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Theories of Co-Perpetration in International Criminal Law

Lachezar Dimitrov Yanev

Theories of Co-Perpetration in International Criminal Law

Proefschrift ter verkrijging van de graad van doctor
aan Tilburg University
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prof. dr. E.H.L. Aarts,
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door het college voor promoties aangewezen commissie
in de aula van de Universiteit

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The Hague

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ABBREVIATIONS

CCL	Control Council Law No. 10
ECCC	Extraordinary Chambers in the Courts of Cambodia
ECtHR	European Court of Human Rights
SPSC	Special Panels for Serious Crimes (East Timor Tribunal)
ICC	International Criminal Court
ICJ	International Court of Justice
ICTR	International Criminal Tribunal for Rwanda
ICTY	International Criminal Tribunal for the former Yugoslavia
IMT	International Military Tribunal
IMTFE	International Military Tribunal for the Far East
JCE	Joint Criminal Enterprise
NMTs	U.S. Nuremberg Military Tribunals
NATO	North Atlantic Treaty Organization
PTC	Pre-Trial Chamber
SCSL	Special Court for Sierra Leone
STL	Special Tribunal for Lebanon
UN	United Nations
UNWCC	United Nations War Crimes Commission

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1.1. Introduction

[I]t is not helpful at all, at this stage of the development of international criminal law, that there now exist two competing concepts of commission as a mode of liability [...] For this mode of liability, there can be only one definition in international criminal law.¹

These words of Wolfgang Schomburg, former judge at the International Criminal Tribunal for the former Yugoslavia (‘ICTY’), are an outcry against one of the most enduring controversies in the modern field of international criminal law: the fragmented definition of co-perpetration responsibility. Nowadays, the international courts and tribunals employ two different theories to formulate the legal framework of this mode of liability. On the one hand, there is the theory of joint criminal enterprise (‘JCE’), often referred to as the common purpose doctrine, which was applied for the first time at the ICTY² and was later also endorsed in the jurisprudence of the International Criminal Tribunal for Rwanda (‘ICTR’),³ the Special Court for Sierra Leone (‘SCSL’),⁴ and the Extraordinary Chambers in the Courts of Cambodia (‘ECCC’).⁵ It was also subsequently recognized in the case law of the Special Tribunal for Lebanon (‘STL’).⁶ On the other hand, however, stands the theory of (joint) control over the crime, that offers a markedly different approach to co-perpetration liability. It was adopted in the emerging jurisprudence of the International

1 *The Prosecutor v. Martić* (IT-95-11-A), Judgment, Appeals Chamber, 8 October 2008, Separate Opinion of Judge Schomburg on the Individual Criminal Responsibility of Milan Martić, para 6. (footnotes omitted)

2 *The Prosecutor v. Tadić* (IT-94-1-A), Judgment, Appeals Chamber, 15 July 1999, paras 185-229; *The Prosecutor v. Vasiljević* (IT-98-32-A), Judgment, Appeals Chamber, 25 February 2004, paras 94-102; *The Prosecutor v. Kvočka et al.* (IT-98-30/1-A), Judgment, Appeals Chamber, 28 February 2005, paras 79-119; *The Prosecutor v. Stakić* (IT-97-24-A), Judgment, Appeals Chamber, 22 March 2006, paras 58-65; *The Prosecutor v. Brđanin* (IT-99-36-A), Judgment, Appeals Chamber, 3 April 2007, paras 357-432; *The Prosecutor v. Krajišnik* (IT-00-39-A), Judgment, Appeals Chamber, 17 March 2009, paras 657-672; *The Prosecutor v. Đorđević* (IT-05-87/1-A), Judgment, Appeals Chamber, 27 January 2014, paras 25-58; *The Prosecutor v. Popović et al.* (IT-05-88-A), Judgment, Appeal Chamber, 30 January 2015, paras 806 *et seq.*; *The Prosecutor v. Stanišić and Simatović* (IT-03-69-A), Judgment, Appeals Chamber, 9 December 2015, para 77.

3 *The Prosecutor v. Kayishema and Ruzindana* (ICTR-95-1-A), Judgment, Appeals Chamber, 1 June 2001, paras 191-193; *The Prosecutor v. Ntakirutimana and Ntakirutimana* (ICTR-96-10-A and ICTR-96-17-A), Judgment, Appeals Chamber, 13 December 2004, paras 461-468; *The Prosecutor v. Simba* (ICTR-01-76-A), Judgment, Appeals Chamber, 27 November 2007, paras 243-255; *The Prosecutor v. Munyakazi* (ICTR-97-36A-A), Judgment, Appeals Chamber, 28 September 2011, paras 156-164; *Nizeyimana v. The Prosecutor* (ICTR-00-55C-A), Judgment, Appeals Chamber, 29 September 2014, paras 321-334; *Karemera and Ndirumpatse v. The Prosecutor* (ICTR-98-44-A), Judgment, Appeals Chamber, 29 September 2014, paras 623-634; *Ngirabatware v. The Prosecutor* (MICT-12-29-A), Judgment, Appeals Chamber, 18 December 2014, paras 242-252.

4 *The Prosecutor v. Brima, Kamara and Kanu* (SCSL-2004-16-A), Judgment, Appeals Chamber, 22 February 2008, paras 72-75; *The Prosecutor v. Sesay, Kallon and Gbao* (SCSL-04-15-A), Judgment, Appeals Chamber, 26 October 2009, paras 474-475; *The Prosecutor v. Taylor* (SCSL-03-01-T), Judgment, Trial Chamber, 18 May 2012, paras 457-468.

5 *The Prosecutor v. Kaing Guek Eav alias Duch* (001/18-07-2007/ECCC/TC), Judgment, Trial Chamber, 26 July 2010, paras 504-517; *The Prosecutor v. Nuon Chea and Khieu Samphan* (002/19-09-2007/ECCC/TC), Case 002/01 Judgment, Trial Chamber, 7 August 2014, paras 690-691.

6 *Interlocutory Decision on the Applicable Law: Terrorism, Conspiracy, Homicide, Perpetration, Cumulative Charging* (STL-11-01/I/AC/R176bis), Decision, Appeals Chamber, 16 February 2011, paras 236-249.

Criminal Court ('ICC'), which expressly rejected the concept of JCE.⁷ Thus, at the expense of coherence and uniformity, international criminal law today hosts the parallel existence of two competing theories of co-perpetration.

The ICC's decision to depart from the established jurisprudence on JCE responsibility came amid sustained criticism against this notion's theoretical framework and calls to replace it with the theory of co-perpetration based on joint control over the crime.⁸ To be sure, despite its wide acceptance in international jurisprudence, JCE proved to be highly controversial from the moment of its endorsement in the *Tadić* case, and it continues to be a divisive issue among scholars and practitioners. Schomburg called it an "artificial concept",⁹ which is "unnecessary and even dangerous".¹⁰ Quite the opposite opinion was professed by Cassese – another former ICTY judge – who praised the doctrine of JCE as a "crucial part of international criminal law, ensuring that individual culpability is not obscured in the fog of collective criminality and accountability evaded".¹¹ There is no one single reason why this construct has proven to be so divisive for so long: rather, it has faced a multitude of critiques ranging from challenges to the legal basis for its application in international criminal law, to debates over the exact scope and meaning of its various legal elements, to disagreements about its nature. Naturally, the advent of the alternative theory of joint control over the crime, as the ICC's preferred approach to co-perpetration liability, additionally exacerbated these disputes and widened the breach between the two

camp: one welcoming the ICC jurisprudence on this issue as a much-needed, positive development, and the other denouncing it as an unnecessary, disruptive effort to re-invent the wheel.

In light of the above, the present thesis seeks to provide an informed position on what has nowadays become a core question in this field: what should be the legal framework of co-perpetration responsibility under international criminal law? To this end, a systematic analysis and critique on the diverging definitions of this mode of liability will be offered, starting from its original formulation in the World War II-era trials – *i.e.* the cradle of international criminal law – to its refinement and fragmentation in the contemporary jurisprudence of the UN *ad hoc* Tribunals and the ICC. The present chapter will first introduce the reader to the concept of co-perpetration in general terms: its meaning, the divergent approaches to it and its relation *vis-à-vis* the other forms of individual responsibility under international criminal law. This will also underscore the importance of this notion for this field of law and the underlying problems that will be examined in the rest of this book. Following this, Chapter 2 will proceed to analyse the Nuremberg-era jurisprudence on the concepts that were used in the aftermath of World War II to assign individual responsibility for collective crimes. This would not only serve to trace the origins of co-perpetration in international criminal law, but it would also build the background against which the principles underlying the modern theories of JCE and joint control could be assessed in the subsequent research, allowing to address some enduring misconceptions about these two theories. The doctrine of JCE will be thoroughly reviewed in Chapters 3 and 4. The former will provide a detailed analysis of the constituent elements of this construct, as defined and refined throughout the jurisprudence of the international tribunals. This is necessary since the exact scope and meaning of some of JCE's legal requirements have long caused confusion and have been subject to conflicting interpretations, both in academia and in practice. Chapter 4 will then analyse two fundamental problems with JCE responsibility that have attracted a lot of criticism from the international commentariat and remain unresolved to present date: i) the customary status and nature of JCE, and particularly the doctrine's third variant (the so-called 'extended' JCE) and ii) the law on JCE with no physical perpetrators ('leadership-level JCE'). The goal behind these two chapters of the book will thus be to clarify the legal elements of the JCE doctrine, resolve its ambiguities and address its often-reported normative inconsistencies and excesses. Subsequently, the next two chapters of this book will focus on the theory of co-perpetration based on joint control over the crime. Chapter 5 will first elaborate on the origins of this notion in the field of international criminal law and examine, much like the analysis on JCE in Chapter 3, the constituent elements of this mode of liability, as defined in the ICC case law. Chapter 6 will then review the purported legal basis for endorsing the joint control theory in ICC proceedings and the merits of applying this construction of co-perpetration, rather than the notion of JCE. On the basis of all the above research, Chapter 7 will conclude this book by proposing what the definitional framework of co-perpetration liability should be in the field of international criminal law.

7 *The Prosecutor v. Lubanga* (ICC-01/04-01/06-803-tEN), Decision on the Confirmation of Charges, Pre-Trial Chamber I, 29 January 2007, paras 338-341; *The Prosecutor v. Katanga and Chui* (ICC-01/04-01/07-717), Decision on the Confirmation of Charges, Pre-Trial Chamber I, 30 September 2008, paras 480-486; *The Prosecutor v. Banda and Jerbo* (ICC-02/05-03/09-121-Corr-Red), Corrigendum of the Decision on the Confirmation of Charges, Pre-Trial Chamber I, 7 March 2011, paras 126-127; *The Prosecutor v. Ntaganda* (ICC-01/04-02/06-309), Decision on the Confirmation of Charges, Pre-Trial Chamber II, 9 June 2014, para 104; *The Prosecutor v. Lubanga* (ICC-01/04-01/06-2842), Judgment, Trial Chamber, 14 March 2012, para 980 *et seq*; *The Prosecutor v. Lubanga* (ICC-01/04-01/06-3121-Red), Judgment, Appeals Chamber, 1 December 2014, paras 469, 473.

8 See *e.g.* *The Prosecutor v. Stakić* (IT-97-24-T), Judgment, Trial Chamber, 31 July 2003, paras 439-442; *The Prosecutor v. Gacumbitsi* (ICTR-2001-64-A), Judgment, Appeals Chamber, 7 July 2006, Separate Opinion of Judge Schomburg on the Criminal Responsibility of the Appellant for Committing Genocide, paras 16-17.

9 *Martić Appeal Judgment*, *supra* n 1, Separate Opinion of Judge Schomburg on the Individual Criminal Responsibility of Milan Martić, para 9.

10 S. Wolfgang, 'Jurisprudence on JCE – Revisiting a Never Ending Story', *Cambodia Tribunal Monitor*, 3 June 2010, at 2, available at http://www.cambodiatribunal.org/assets/pdf/court-filings/ctm_blog_6_1_2010.pdf [accessed 21 July 2016]. Another former ICTY judge, Per-Johan Lindholm, expressed an opinion that JCE "has caused confusion and a waste of time, and is [...] of no benefit to the work of the Tribunal or the development of international criminal law". *The Prosecutor v. Simić et al.* (IT-95-9-T), Judgment, Trial Chamber, 17 October 2003, Separate and Partly Dissenting Opinion of Judge Per-Johan Lindholm, para 5.

11 A. Cassese, 'Amicus Curiae Brief of Professor Antonio Cassese and Members of the Journal of International Criminal Justice on Joint Criminal Enterprise Doctrine', 20 *Criminal Law Forum* (2009), at 294. In this line of thought, Schabas called JCE "the magic bullet" in the prosecution of international crimes. W. Schabas, 'Mens Rea and the International Criminal Tribunal for the Former Yugoslavia', 37 *New England Law Review* (2003), at 1032. See also *e.g.* M. Osiel, 'Modes of Participation in Mass Atrocity', 38 *Cornell International Law Journal* (2005), at 797-798; N. Piacente, 'Importance of the Joint Criminal Enterprise Doctrine for the ICTY Prosecutorial Policy', 2 *Journal of International Criminal Justice* (2004), at 446-454.

1.2. The nature of international crimes: explaining the need for a theory of joint liability

Before presenting the crux of the JCE and the joint control doctrines, it is useful to first offer a brief explanation of the nature of international crimes and clarify why so much time and effort has been spent in crafting the aforementioned two co-perpetration theories. Instead of busying ourselves with devising notoriously complicated notions of multiple liability, why not simply rely on more traditional forms of criminal responsibility that have long been used by national courts to try domestic crimes?

1.2.1. The inherent challenges of assigning liability in a context of mass criminality

International criminal law deals with the prosecution of war crimes, crimes against humanity and genocide: *i.e.* categories of crimes that signal a level of mass-scale, systematic criminality that is profoundly different from the “ordinary” delinquency normally witnessed in a domestic criminal justice context. Indeed, most discussions on the nature of international crimes almost invariably refer to them as being manifestations of “system criminality”.¹² The latter term was first coined by Bert Röling – the Dutch judge at the International Military Tribunal for the Far East – and it has often been used to stress the theoretical and practical difficulties of ascribing responsibility to individuals for international crimes.¹³ Van Sliedregt, for instance, notes that:

[s]ystem criminality very often concerns a plurality of offenders, particularly in carrying out the crimes. It further presupposes an *auctor intellectualis* pulling the strings. This can be one person, but also a group of people gathered together in a political or military structure. The concept of individual criminal responsibility in international criminal law comes with a certain ‘flavour’. System criminality engenders system responsibility. System responsibility borders on collective responsibility. [...] System criminality can put pressure on the principle of individual criminal responsibility and can make it expand beyond the limit of personal culpability.¹⁴

This understanding of international criminal law as a field uniquely concerned with a distinct

form of criminality has been the reason why present-day scholars and practitioners have often submitted that the traditional forms of liability developed in domestic criminal justice systems sometimes fail to properly and effectively attribute responsibility for international crimes.¹⁵ In this vein of thought, the ICC *Lubanga* Trial Chamber also observed that:

both the Romano Germanic and the Common Law legal systems have developed principles about modes of liability. However, at their inception, neither of these systems was intended to deal with the crimes under the jurisdiction of this Court, *i.e.* the most serious crimes of concern to the international community as a whole. The Statute sets out the modes of liability in Articles 25 and 28 and, they should be interpreted in a way that allows properly expressing and addressing the responsibility for these crimes.¹⁶

To be sure, the contention that the special nature of international offences requires re-thinking and revising the methods of ascribing individual responsibility is also not novel: as discussed in detail in Chapter 2, already at the time of the Nuremberg-era trials, the Allies fully realised that it “will never be possible to catch and convict every Axis war criminal [...] under the old concepts and procedures.”¹⁷

The chief predicament is thus the fact that international crimes, more so than domestic ones, are usually the product of the combined efforts of various groups of people, operating in or through complex institutional networks, rather than the acts of a single person.¹⁸ The larger the scale of the said criminal operation, the more the individuals involved in its orchestration, coordination and execution, the more inconspicuous the link becomes between personal acts and resulting crimes. Think, for instance, of a military unit that enters a given town, massacres its civilian population and leaves behind hundreds of dead bodies and no survivors. Due to the nature of this murder enterprise, it may be virtually impossible to determine at trial how many victims the defendant – a soldier in the said unit – personally killed, how many he shot at but were lethally wounded by someone else in his unit and

¹⁵ Weigend, for instance, asserts that “[s]ystemic crime defies the categories of traditional criminal law doctrine. Events such as mass atrocities... may make it necessary to devise new fronts for, and new forms of, criminal responsibility” T. Weigend, ‘Perpetration through an Organization: The Unexpected Career of a German Legal Concept’, 9 *Journal of International Criminal Justice* (2011), at 95. See also *e.g.* H. Olásolo, *The Criminal Responsibility of Senior Political and Military Leaders as Principals to International Crimes* (Oxford: Hart, 2009), at 3; C. Meloni, ‘Fragmentation of the Notion of Co-Perpetration in International Criminal Law’ in L. Van den Herik and C. Stahn (eds), *The Diversification and Fragmentation of International Criminal Law*, Vol 1 (Leiden: Martinus Nijhoff, 2012), at 483-484; T. Weigend, ‘Problems of Attribution in International Criminal Law: A German Perspective’, 12 *Journal of International Criminal Justice* (2014), at 254, 256, 263; R. Cryer, ‘Imputation and Complicity in Common Law States: A (Partial) View from England and Wales’, 12 *Journal of International Criminal Justice* (2014), at 280-281.

¹⁶ *Lubanga* Trial Judgment, *supra* n 7, para 976.

¹⁷ *Subject: Trial of European War Criminals (by Colonel Murray C. Bernays, G-1)*, 15 September 1944, § 7, re-printed in B. Smith, *The American Road to Nuremberg: The Documentary Record, 1944-1945* (Stanford: Hoover Institution, 1982), at 35.

¹⁸ *Tadić* Appeal Judgment, *supra* n 2, para 191.

¹² A. Nollkaemper, ‘Introduction’, in H. Van der Wilt and A. Nollkaemper (eds), *System Criminality in International Law* (Cambridge: Cambridge UP, 2009), at 12-13; A. Smeulers and F. Grünfeld, *International Crimes and Other Gross Human Rights Violations: A Multi- and Interdisciplinary Textbook* (Leiden: Martinus Nijhoff, 2011), at 468; N. Jain, *Perpetrators and Accessories in International Criminal Law: Individual Modes of Responsibility for Collective Crimes* (Oxford: Hart, 2014), at 2-6; H. Vest, ‘Problems of Participation - Unitarian, Differentiated Approach, or Something Else?’, 12 *Journal of International Criminal Justice* (2014), at 302; M. Cupido, *Facts Matter: A Study into the Casuistry of Substantive International Criminal Law* (The Hague: Eleven International, 2015), at 69.

¹³ E. Van Sliedregt, *Individual Criminal Responsibility in International Law* (Oxford: Oxford UP, 2012), at 20-22. See also *Katanga and Chui* Decision on the Confirmation of Charges, *supra* n 7, paras 501-503.

¹⁴ E. Van Sliedregt, ‘System Criminality at the ICTY’, in Van der Wilt and Nollkaemper, *supra* n 12, at 183. (new paragraph omitted)

so on.¹⁹ Should these questions matter if the evidence shows that the defendant killed as many as he could in a co-ordinated and pre-agreed effort to murder everyone in the town? To further complicate the allocation of criminal responsibility, what if the said accused did not physically kill anyone but was instrumental for the success of the mission by *e.g.* coordinating, directing and reorganizing the ground troops?

This last question becomes especially relevant when one tries to determine the liability of military and political leaders involved in mass crimes. Imagine that the murder operation described above was part of several others that took place simultaneously at other towns in the area. This global plan was known only to the commanders of the battalions and to a few other senior state officials, who devised it and promulgated its execution. Could each one of these individuals be held fully responsible for the entire crime, when the evidence shows that none of them physically killed anyone? This is the reality that international criminal law often deals with: those who orchestrate and coordinate war crimes, crimes against humanity and genocide are never their material perpetrators. The intellectual authors of mass atrocities are usually far away from the area where the deplorable acts occurred, leaving their commission to rank-and-file soldiers, paramilitary fighters, contractors, policemen etc. On this point, one of the widely quoted dicta in the field of international criminal law came from the *Eichmann* trial, where the District Court of Jerusalem observed that:

these crimes were committed en masse, not only in regard to the number of the victims, but also in regard to the numbers of those who perpetrated the crime, and the extent to which any one of the many criminals were close to, or remote from, the actual killer of the victim, means nothing as far as the measure of his responsibility is concerned. On the contrary, *in general, the degree of responsibility increases as we draw further away from the man who uses the fatal instrument with his own hands and reach the higher ranks of command*²⁰

Culpability within this context of collective macro-criminality was thus seen to have a reverse proximity rationale to that traditionally assumed in national justice systems, where the person who is most blameworthy is usually the one who physically and directly commits the crime at hand. Therefore, in order to fairly allocate responsibility for international crimes, the tribunals have had to rethink the classical understanding and boundaries of commission and accessorial liability.

¹⁹ On this very point, Cassese elaborates: “When such crimes are committed, it is extremely difficult to pinpoint the specific contribution made by each individual participant in the collective criminal enterprise, because (i) not all participants acted in the same manner, but rather each of them may have played a different role in planning, organizing, instigating, coordinating, executing or otherwise contributing to the criminal conduct, and (ii) the evidence relating to each individual’s conduct may prove difficult if not impossible to find.” See Cassese, *supra* n 11, at 302.

²⁰ *State of Israel v. Eichmann* (Criminal Case No. 40/61), Judgment, District Court of Jerusalem, 11 December 1961, para 197. (*emphasis added*).

1.2.2. *The limits of traditional modes of liability*

The importance of JCE and the theory of co-perpetration based on joint control over the crime for international criminal justice can be best appreciated by looking at the scope and nature of the other, more traditional, modes of criminal liability recognized in the statutes of the various international tribunals. Under ICTY/R law, for instance, an individual can be held responsible for crimes that he plans, instigates, orders, commits or aids and abets.²¹ In addition, command responsibility is provided for cases where a superior fails to prevent or punish the commission of a crime by his subordinates.²² Without examining in detail each of these modes of liability and their definitional elements, it ought to be explained what their nature is and why they may sometimes insufficiently capture the blameworthiness of those who are at the apex of the state and/or military apparatus.

As a point of departure, it bears noting that a criminal law system can adopt one of two general models of participation in a crime, commonly referred to as the ‘unitary/monistic’ and the ‘differentiated’ model.²³ According to the former, which is followed by a small number of states (*e.g.* Austria, Italy), every individual who contributes to a crime with the requisite intent is responsible as a perpetrator (principal) of the crime and his criminal liability is independent from that of any other participant in the said crime.²⁴ Thus, criminal justice systems that abide by this model do not make a strict distinction between principal and accessorial responsibility: *viz.* they do not differentiate between various modes of liability, but regard all participants in a crime – irrespective of the nature and intensity of their contribution to it – as its perpetrators.²⁵ By contrast, the differentiated participation model is “characterized by distinguishing between ‘perpetratorship’ (in a narrower sense)

²¹ Article 7(1), Statute of the International Criminal Tribunal for the former Yugoslavia, (UN Doc. S/RES/827), UN Security Council Resolution 827 (1993), 25 May 1993, as last amended on 7 July 2009 (hereinafter: “ICTY Statute”); Article 6(1), Statute of the International Criminal Tribunal for Rwanda, (UN Doc. S/RES/955), UN Security Council Resolution 955 (1994), 8 November 1994 (hereinafter: “ICTR Statute”). See also Article 6 (1), Statute of the Special Court for Sierra Leone, (2178 UNTS 138), 16 January 2002 (hereinafter: “SCSL Statute”); Article 29, Law on the Establishment of the Extraordinary Chambers in the Courts of Cambodia for the Prosecution of Crimes Committed during the Period of Democratic Kampuchea, 10 August 2001, with inclusion of amendments as promulgated on 27 October 2004, (NS/RKM/1004/006) (hereinafter: “ECCC Law”).

²² ICTY Statute (*Ibid.*), Article 7(3). See also, ICTR Statute (*Ibid.*) Article 6(3), SCSL Statute (*Ibid.*), Article 6(3); ECCC Law (*supra*), Article 29.

²³ J. Vogel, ‘How to Determine Individual Criminal Responsibility in Systemic Contexts: Twelve Models’, *International Society of Social Defence and Humane Criminal Policy* (2002), at 152-153; Van Sliedregt, *supra* n 13, at 65-67; Vest, *supra* n 12, at 305-306; A. Eser, ‘Individual Criminal Responsibility’, in A. Cassese and P. Gaeta (eds), *The Rome Statute of the International Criminal Court: A Commentary*, Vol.1 (Oxford: Oxford UP, 2002), at 781-783.

²⁴ Olásolo, *supra* n 15, at 18-19; Van Sliedregt, *supra* n 13, at 65-66; G. Werle and B. Burghardt, ‘Establishing Degrees of Responsibility: Modes of Participation in Article 25 of the ICC Statute’, in E. Van Sliedregt and S. Vasiliev (eds), *Pluralism in International Criminal Law* (Oxford: Oxford UP, 2014), at 302-303.

²⁵ Eser, *supra* n 23, at 781; Werle and Burghardt, *supra* n 24, at 302-303; Vogel, *supra* n 23, at 152.

and (mere) ‘participation’²⁶ and it typically considers that the perpetrators of a crime are more blameworthy than those who otherwise participate in it.²⁷ The modern international courts and tribunals have come to endorse this approach in their topical jurisprudence,²⁸ which is examined immediately below to further elaborate on the core characteristics of the differentiated participation model and their implications in the context of mass, system criminality.

1.2.2.1. Accessorial modes of liability

[I]f the defendant is charged as an accomplice or accessory, his liability is derivative of the principal’s liability; if the principal is deemed not to have committed a crime, the defendant, too, will go free.²⁹

Planning, instigating, ordering and aiding and abetting are forms of participating in an offence that are premised on the principles of accessorial liability and are, thus, derivative in nature.³⁰ This means that the criminal responsibility of an individual prosecuted under any of them (*i.e.* an accessory) is derived from/dependant on that of the physical perpetrator (*i.e.* the principal). The accessory’s conduct, on its own, is not criminal until it is connected to that of the physical perpetrator of the crime. As Fletcher explained, “there is neither a criminal act, nor accessorial liability without a primary perpetrator of the offence”.³¹ This principle was also affirmed early in the UN *ad hoc* Tribunals’ case law, when the ICTR *Akayesu* Trial Chamber explained that:

26 Eser, *supra* n 23, at 782. See also Olásolo, *supra* n 15, at 15-18; A. Cassese, *Cassese’s International Criminal Law* (3rd edn. Oxford: Oxford UP, 2013), at 162.

27 Eser, *supra* n 23, at 782; Vest, *supra* n 12, at 306; Werle and Burghardt, *supra* n 24, at 303.

28 Werle and Burghardt, *supra* n 24, at 309-310; S. Finnin, *Elements of Accessorial Modes of Liability: Article 25 (3)(b) and (c) of the Rome Statute of the International Criminal Court* (Leiden: Martinus Nijhoff, 2012), at 20, 98; Cassese, *supra* n 26, at 162; M. Cupido, ‘Pluralism in Theories of Liability: Joint Criminal Enterprise versus Joint Perpetration’ in E. Van Sliedregt and S. Vasiliev (eds), *Pluralism in International Criminal Law* (Oxford: Oxford UP, 2014), at 152; Van Sliedregt, *supra* n 13, at 74.

29 D. Luban, J. O’Sullivan and D. Stewart, *International and Transnational Criminal Law* (New York: Aspen, 2010), at 862.

30 *The Prosecutor v. Kordić and Čerkez* (IT-95-14/2-T), Judgment, Trial Chamber, 26 February 2001, para 367; *Simić et al.* Trial Judgment, *supra* n 10, para 135; *Lubanga* Decision on the Confirmation of Charges, *supra* n 7, para 320; *The Prosecutor v. Katanga* (ICC-01/04-01/07-3436-tENG), Judgment, Trial Chamber II, 7 March 2014, paras 1383-1384. See also, Eser, *supra* n 23, at 783; H. Olásolo, ‘Developments in the Distinction between Principal and Accessorial Liability in Light of the First Case Law of the International Criminal Court’ in C. Stahn and G. Sluiter (eds), *The Emerging Practice of the International Criminal Court* (Leiden: Martinus Nijhoff, 2009), at 343; B. Swart, ‘Modes of International Criminal Liability’ in A. Cassese (ed), *The Oxford Companion to International Criminal Justice* (Oxford: Oxford UP, 2009), at 83.

31 G. Fletcher, *Rethinking Criminal Law* (Oxford: Oxford UP, 2000), at 636. See also, Olásolo, *supra* n 15, at 16; F. Giustiniani, ‘The Responsibility of Accomplices in the Case-Law of the Ad Hoc Tribunals’, 20 *Criminal Law Forum* (2009), at 417, 422; C. Farhang, ‘Point of No Return: Joint Criminal Enterprise in Brdanin’, 23 *Leiden Journal of International Law* (2010), at 146.

the physical act which constitutes the act of complicity does not have its own inherent criminality, but rather it borrows the criminality of the act committed by the principal perpetrator of the criminal enterprise.³²

Take for instance ‘instigating’, which the ICTY and ICTR have defined as a mode of liability that applies when a person prompts another to commit an offence,³³ either with direct intent or with awareness of the substantial likelihood that a crime would be committed in the execution of the said instigation.³⁴ Importantly, the Tribunals have stressed that such liability arises only if the instigated person actually proceeds to commit the underlying crime.³⁵ This requirement is equally true for aiding and abetting, planning and ordering: incurring criminal responsibility through any of these constructs depends on the principal’s subsequent acts.³⁶ This perspective is important to keep in mind when reviewing the liability of accessories to a crime: their guilt is derived from the principal’s criminal responsibility, meaning that, on its own, their conduct is not criminal until it is connected to the acts of the principal.³⁷ One practical consequence of this rule is that, in justice systems that strictly adhere to this principle of derivative liability, if the principal is acquitted due to availability of a ground for excluding criminal responsibility, the accessory cannot be convicted for his participation in the crime.³⁸

32 *The Prosecutor v. Akayesu* (ICTR-96-4-T), Judgment, Trial Chamber, 2 September 1998, para 528.

33 *The Prosecutor v. Kordić and Čerkez* (IT-95-14/2-A), Judgment, Appeals Chamber, 17 December 2004, para 27; *Ndindabahizi v. The Prosecutor* (ICTR-01-71-A), Judgment, Appeals Chamber, 16 January 2007, para 117; *Nahimana et al. v. The Prosecutor* (ICTR-99-52-A), Judgment, Appeals Chamber, 28 November 2007, para 480; *The Prosecutor v. Galić* (IT-98-29-T), Judgment, Trial Chamber, 5 December 2003, para 168.

34 *Kordić and Čerkez* Appeal Judgment, *supra* n 33, paras 30, 32; *Nahimana et al.* Appeal Judgment, *supra* n 33, para 480; *The Prosecutor v. Gatete* (ICTR-2000-61-T), Judgment, Trial Chamber, 31 March 2011, para 574. See also G. Boas, N. Reid and J. Bischoff, *International Criminal Law Practitioner Library: Forms of Responsibility in International Criminal Law*, Vol. 1 (Cambridge: Cambridge UP, 2008), at 349-351.

35 Or, at least, attempts the commission of the said crime. *Ndindabahizi* Appeal Judgment, *supra* n 33, para 456; *The Prosecutor v. Mpambara* (ICTR-01-65-T), Judgment, Trial Chamber, 11 September 2006, para 18.

36 *Galić* Trial Judgment, *supra* n 33, para 168; *The Prosecutor v. Aleksovski* (IT-95-14/1-A), Judgment, Appeals Chamber, 24 March 2000, para 165; *Nahimana et al.* Appeal Judgment, *supra* n 33, para 481; *The Prosecutor v. Gotovina et al.* (IT-06-90-T), Judgment Vol.2, Trial Chamber, 15 April 2011, para 1956; *The Prosecutor v. Stanišić and Župljanin* (IT-08-91-T), Judgment Vol.1, Trial Chamber, 27 March 2013, paras 93-98; *Katanga* Trial Judgment, *supra* n 30, para 1385.

37 Finnin, *supra* n 28, at 94. See also, *Akayesu* Trial Judgment, *supra* n 32, para 528.

38 An excellent analysis on this point is offered by Finnin, who distinguishes between ‘non-derivative’ approach (applied in states that adhere to the unitary model of criminal participation), a ‘partially derivative’ approach and a ‘strictly derivative’ approach (followed in states that adopt the differentiated model of criminal participation). Pursuant to the non-derivative approach, a participant in a crime can be found guilty irrespective of whether the perpetrator has a justification or an excuse for committing it, since the liability of the former is independent from that of the latter. The ‘strictly derivative’ approach holds that where the principal has an excuse or a justification for committing a crime, the accessory cannot be found guilty for his participation in it. The ‘partially derivative’ approach affirms this rule, but only with respect to cases where the principal has a justification: *i.e.* an accessory can still be held responsible in cases where the principal has an excuse for the crime he committed. See Finnin, *supra* n 28, at 98-105. See also Eser, *supra* n 23, at 783; I. Haenen, ‘Justifying a Dichotomy in Defences: The Added Value of a Distinction between Justifications and Excuses in International Criminal Law’, 16 *International Criminal Law Review* (2016), at 551-552.

It further bears noting that, under the differentiated model of criminal participation, the accessory to a crime is strictly speaking punished for his *participation relative to* the crime of another individual, the perpetrator: *viz.* only the latter is held responsible for the crime proper, since only his actions are constitutive of the *actus reus* of the crime.³⁹ The crime is, therefore, considered to “belong” to the perpetrator while the accessory’s responsibility is derivative and premised on his participation in the principal’s crime. This feature of the differentiated model can also be distinguished in the UN *ad hoc* Tribunals’ case law. Thus, for instance, they have consistently confirmed that, in contrast to the liability of the perpetrator of a crime, the “aider and abettor is always an accessory to a crime perpetrated by another person, the principal.”⁴⁰ In *Blagojević and Jokić*, the ICTY Appeals Chamber rejected as fundamentally misguided the assertion of one of the accused that an aider and abettor “is convicted *of the crime itself*, in the same way as the principal perpetrator who actually commits the crime”.⁴¹ Rather, it explained that:

Article 7(1) of the Statute deals not only with individual responsibility by way of direct or personal participation in the criminal act but also with individual participation by way of aiding and abetting in the *criminal acts of others*. Aiding and abetting generally involves a lesser degree of directness of participation in the commission of the crime than that required to establish primary liability for an offence.⁴²

In this venue of thought, it is notable that, as Cassese also observed, ‘the judicial practice [of the modern international tribunals] has been to classify every charge and conviction by mode of liability’⁴³ and, indeed, in the disposition part of many of their judgments, the ICTY/R and ICC have specified whether the accused is found guilty as a perpetrator of the crime, or under one of the accessory modes of liability.⁴⁴

One logical inference from the aforesaid principles is that a person who *participates* in an offence by any of the means listed above is often labelled as a ‘secondary’ party to it, while the principal perpetrator is viewed as the ‘main’ wrongdoer. Indeed, the modern international courts and tribunals have at times expressly defined planning, instigating, ordering and aiding and abetting as *secondary* forms of criminal responsibility.⁴⁵ Consequently, it has been argued that they signal a lower degree of blameworthiness than principal liability. In the ICTR *Gatete* case, for instance, Trial Chamber III held that they “reflect merely a fraction” of the culpability of the accused who was found guilty of *committing* genocide.⁴⁶ Indeed, the *ad hoc* Tribunals’ case law is replete with judgments that have contrasted commission responsibility from that of being “*merely* an aider and abettor”, stressing that the latter signals a lesser degree of criminal blameworthiness.⁴⁷ This reasoning has also been adopted in the ICC jurisprudence, where the *Lubanga* Appeals Chamber held more recently that:

This distinction [between principal and accessory liability] is not merely terminological; making this distinction is important because, generally speaking and all other things being equal, a person who is found to commit a crime him- or herself bears more blameworthiness than a person who contributes to the crime of another person or persons. Accordingly, it contributes to a proper labelling of the accused person’s criminal responsibility.⁴⁸

Although the view that principals to a crime are more blameworthy than accessories – *viz.* that the different modes of liability can be arranged in a value-oriented hierarchy with commission liability being at the top – is not uncontested,⁴⁹ it can well be said that

39 Van Sliedregt, *supra* n 13, at 66, 70. In this line of reasoning, Fletcher explained that the accessory to a crime “is held accountable by virtue of his position relative to [it].” Fletcher, *supra* n 31, at 635. See also Finnin, *supra* n 28, at 94. For a contrary view, see J. Stewart, “The End of ‘Modes of Liability’ for International Crimes”, 25 *Leiden Journal of International Law* (2012), at 185-188.

40 *Tadić* Appeal Judgment, *supra* n 2, para 229(i). See also *Vasiljević* Appeal Judgment, *supra* n 2, para 102; *The Prosecutor v. Karadžić* (IT-95-5/18-T), Judgment, Trial Chamber, 24 March 2016, para 560; *The Prosecutor v. Blagojević and Jokić* (IT-02-60-A), Judgment, Appeals Chamber, 9 May 2007, para 192;

41 *Blagojević and Jokić* Appeal Judgment, *supra* n 40, para 192.

42 *Ibid.* (emphasis added). See also *Aleksovski* Appeal Judgment, *supra* n 36, para 170.

43 Cassese, *supra* n 26, at 162. See also Finnin, *supra* n 28, at 20.

44 Thus, for instance, upon overturning Krstić’s trial conviction of committing genocide (through participating in a JCE), the ICTY Appeals Chamber specified in its judgment’s disposition that it finds “Radislav Krstić guilty of aiding and abetting genocide.” *The Prosecutor v. Krstić* (IT-98-33-A), Judgment, Appeals Chamber, 19 April 2004, Section VIII (Disposition). See also *e.g.* *Karemera and Ngirumpatse* Appeal Judgment, *supra* n 3, para 750; *Vasiljević* Appeal Judgment, *supra* n 2, Section VII (Disposition); *The Prosecutor v. Tolimir* (IT-05-88/2-T), Judgment, Trial Chamber, 12 December 2012, para 1239; *The Prosecutor v. Perišić* (IT-04-81-T), Judgment, Trial Chamber, 6 September 2011, para 1838; *The Prosecutor v. Popović et al.* (IT-05-88-T), Judgment, Trial Chamber, 10 June 2010, paras 2104-2110; *The Prosecutor v. Đorđević* (IT-05-87/1-T), Judgment *Vol. I*, Trial Chamber, 23 February 2011, para 2230; *Katanga* Trial Judgment, *supra* n 30, Section XII (Disposition). For an opposite view on this matter, see Stewart, *supra* n 39, at 187 (n 114).

45 The ICC *Lubanga* Trial Chamber, for instance, spoke of “predominance of principal over secondary liability”. *Lubanga* Trial Judgment, *supra* n 7, para 998. See also *The Prosecutor v. Krstić* (IT-98-33-T), Judgment, Trial Chamber, 2 August 2001, para 643; *The Prosecutor v. Ntagerura* (ICTR-99-46-T), Judgment, Trial Chamber, 25 February 2004, para 813; *The Prosecutor v. Fofana and Kondewa* (SCSL-04-14-T-796), Judgment on the Sentencing, Trial Chamber, 9 October 2007, para 34. See also Swart, *supra* n 30, at 87; Olásolo, *supra* n 15, at 3.

46 *Gatete* Trial Judgment, *supra* n 34, paras 592-593. The judges held that the evidence was sufficient to find the accused guilty of planning, ordering, instigating and aiding and abetting genocide. Following this they concluded that: “in the Chamber’s view, Gatete’s participation through a joint criminal enterprise most aptly sums up his criminal conduct. All other modes reflect merely a fraction of his responsibility for the crime.” See also STL Interlocutory Decision on the Applicable Law, *supra* n 6, para 249.

47 *The Prosecutor v. Seromba* (ICTR-2001-66-A), Judgment, Appeals Chamber, 18 March 2008, para 171. See also *e.g.* *Tadić* Appeal Judgment, *supra* n 2, para 192; *Vasiljević* Appeal Judgment, *supra* n 2, para 102; *Kvočka et al.* Appeal Judgment, *supra* n 2, para 92; *The Prosecutor v. Šainović et al.* (IT-05-87-A), Judgment, Appeals Chamber, 23 January 2014, Partially Dissenting Opinion and Declaration of Judge Liu, para 16. See also, Van Sliedregt, *supra* n 13, at 79; Cassese, *supra* n 26, at 162.

48 *Lubanga* Appeal Judgment, *supra* n 7, para 462. For further ICC case law confirming this hierarchy of blameworthiness between principal and accessory liability, see *Lubanga* Trial Judgment, *supra* n 7, para 998; *Katanga and Chui* Decision on the Confirmation of Charges, *supra* n 7, para 471; *The Prosecutor v. Mbarushimana* (ICC-01/04-01/10-465-Red), Decision on the Confirmation of Charges, Pre-Trial Chamber I, 16 December 2011, para 279.

49 *Katanga* Trial Judgment, *supra* n 30, paras 1386-1387; *Lubanga* Trial Judgment, *supra* n 7, Separate Opinion of Judge Adrian Fulford, para 8; *The Prosecutor v. Chui* (ICC-01/04-02/12-3-tENG), Judgment, Trial Chamber, 18 December 2012, Concurring Opinion of Judge Christine Van den Wyngaert, paras 23-26, 29. See also J. Ohlin, E. Van Sliedregt and T. Weigend, ‘Assessing the Control-Theory’, 26 *Leiden Journal of International Law* (2013), at 743-746.

this is the approach that the modern international courts and tribunals have taken on this matter. Notably, when judges have convicted an accused for *committing* a crime, they have repeatedly held that his liability under any of the accessorial modes of liability becomes a moot issue: such a secondary form of responsibility is subsumed under the greater culpability of being liable as a principal.⁵⁰ This raises, naturally, important policy considerations when prosecuting high-ranking military and political accused. While it is often possible to link them to the charged international crimes by means of *e.g.* instigating or ordering liability, international prosecutors have argued that under the above-defined normative approach to principal and accessorial responsibility, “it is wrong to hold those at a leadership level liable on the basis of a secondary mode of liability”.⁵¹ To be sure, if the starting point of analysis is that commission liability signals the highest degree of culpability, then there is indeed merit to the contention that the accessorial modes of liability could not sufficiently capture the guilt of those at the apex of the state and military apparatus, who masterminded the commission of the charged crimes.

Viewing the blameworthiness of accessories to a crime as lower than that of principals not only raises issues of fair labelling, but also inevitably factors in sentencing considerations. In this respect, it is often pointed out that an accessory, and in particular an aider and abettor, deserves a lesser punishment than the principal.⁵² As Van Sliedregt notes, “[f]rom a

normative perspective accessories/participants are less responsible thus less blameworthy; they deserve a mandatory reduction of the penalty’.⁵³ This principle of mitigation for accessorial liability is mostly typical for civil law jurisdictions and has been largely accepted in the modern case law of the international courts.⁵⁴ In Šljivančanin, for instance, the ICTY Appeals Chamber found that:

the fact that an accused did not physically commit a crime is relevant to the determination of the appropriate sentence. Indeed, the determination of the gravity of the crime requires not only a consideration of the particular circumstances of the case, but also of the form and degree of the participation of the accused in the crime. However, while the practice of the International Tribunal indicates that aiding and abetting is a lower form of liability than ordering, committing, or participating in a joint criminal enterprise and may as such attract a lesser sentence, the gravity of the underlying crimes remains an important consideration in order to reflect the totality of the criminal conduct.⁵⁵

The ICTR *Ntagerura* Trial Chamber made an even more sweeping conclusion by holding that “secondary or indirect forms of participation have generally resulted in a lower sentence”.⁵⁶ In the SCSL *Taylor* case, the Trial Chamber convicted the accused of aiding and abetting and of planning various war crimes and crimes against humanity,⁵⁷ following which it sentenced him to 50 years imprisonment.⁵⁸ Noting that the Prosecution had originally requested a sentence of 80 years imprisonment, the trial judges emphasized that the accused had not been found guilty of committing (under the JCE theory) the charged crimes, that “aiding and abetting as a mode of liability generally warrants a lesser sentence than that to be imposed for more direct forms of participation”⁵⁹ and, consequently, that “a sentence of 80 years would be excessive for the modes of liability on which Mr. Taylor has

50 This issue of concurrent convictions was addressed by the *Milutinović et al.* Trial Chamber, which held: “First, where the Prosecution establishes the elements of both commission and another form of responsibility under Article 7(1) in respect of a crime, the Chamber must identify the most appropriate form of liability. If a Chamber opts to convict an accused for the commission of the crime, the Chamber may consider any involvement in the ordering, instigating, or planning of the crime as an aggravating factor in sentencing. However, an accused cannot be convicted for a crime through more than one form of responsibility in relation to the same conduct.” *The Prosecutor v. Milutinović et al.* (IT-05-87-T), Judgment Vol. I, Trial Chamber, 26 February 2009, para 77. See also, *Tolimir* Trial Judgment, *supra* n 44, para 1174; *The Prosecutor v. Brđanin* (IT-99-36-T), Judgment, Trial Chamber, 1 September 2004, para 268; *Stakić* Trial Judgment, *supra* n 8, para 443; *Kordić and Čerkez* Trial Judgment, *supra* n 30, para 386; *Katanga and Chui* Decision on the Confirmation of Charges, *supra* n 7, para 471. See also Boas *et al.*, *supra* n 34, at 356, 361, 366, 392; Werle and Burghardt, *supra* n 24, at 310.

51 *The Prosecutor v. Milutinović et al.* (IT-05-87-PT), Prosecution’s Response to General Ojdanić’s Preliminary Motion Challenging Jurisdiction: Indirect Co-Perpetration, Trial Chamber, 21 October 2005, para 32. On this very point, Olásolo also notes that “the main problem posed by the specific features of international crimes resides on the fact that the application of the traditional modes of liability to such crimes in national criminal law leads to the conclusion that senior political and military leaders... are mere accessories (*as opposed to principals*) to the crimes physically committed by their subordinates. This does not reflect the central role [they] usually play”. See H. Olásolo, *Essays on International Criminal Justice* (Oxford: Hart, 2012), at 123.

52 Ambos, for instance, notes that there exists a “general rule that an accomplice deserves a lower sentence than a co-perpetrator”. K. Ambos, ‘Joint Criminal Enterprise and Command Responsibility’, 5 *Journal of International Criminal Justice* (2007), at 173. Damaška has also noted that a “[large] group of national legal systems require that perpetration be sharply differentiated from complicity, and that the forms of complicity so identified be ranked in terms of their seriousness. Under the widely influential German law, for example, “aiding” (rendering assistance to) a perpetrator is regarded as deserving a categorically milder punishment than “instigating” (or soliciting) the commission of a crime.” M. Damaška, ‘The Shadow Side of Command Responsibility’, 49 *The American Journal of Comparative Law* (2001), at 459. See also Fletcher, *supra* n 31, at 650-651, 659; K. Ambos, ‘Article 25 Individual Criminal Responsibility’ in O. Triffterer (ed), *Commentary on the Rome Statute of the International Criminal Court: Observers’ Notes, Article by Article* (2nd edn, Munich: C.H. Beck/Hart, 2008), at 745; Olásolo, *supra* n 30, at 341; G. Werle, *Principles of International Criminal Law* (2nd edn, The Hague: TMC Asser, 2009), at 169-170; G. Fletcher, ‘Complicity’, 30 *Israel Law Review* (1996), at 141; Werle and Burghardt, *supra* n 24, at 309-310.

53 Van Sliedregt, *supra* n 13, at 72.

54 As Cassese pointed out, ‘although there is no agreed scale of penalties, the general trend [in the international tribunals’ practice] is that perpetration is at the high end of sentencing range and forms of accomplice liability (such as aiding and abetting) are the lower end. Cassese, *supra* n 26, at 162.

55 *The Prosecutor v. Mrkšić and Šljivančanin* (IT-95-13/1-A), Judgment, Appeals Chamber, 5 May 2009, para 407. (*emphasis added*) See also, *The Prosecutor v. Furundžija* (IT-95-17/1-A), Judgment, Appeals Chamber, 21 July 2000, para 249; *Kvočka et al.* Appeal Judgment, *supra* n 2, para 92; *Semanza v. The Prosecutor* (ICTR-97-20-A), Judgment, Appeals Chamber, 20 May 2005, para 388. However, for the view that there is “no automatic correlation between mode of liability and penalty” see *e.g.* *Katanga* Trial Judgment, *supra* n 30, para 1386.

56 *Ntagerura* Trial Judgment, *supra* n 45, para 813. See also S. D’Ascoli, *Sentencing in International Criminal Law: The Approach of the Two Ad Hoc Tribunals and Future Perspectives for the International Criminal Court* (Oxford: Hart, 2011), at 232.

57 *Taylor* Trial Judgment, *supra* n 4, para 6994.

58 *The Prosecutor v. Taylor* (SCSL-03-01-T), Sentencing Judgment, Trial Chamber, 30 May 2012, (Disposition).

59 *Ibid.*, para 21.

been convicted”.⁶⁰ In view of the above sentencing considerations, it is understandable why these accessory types of liability have not had much appeal for the prosecution of military and political masterminds of international crimes.

Finally, aside from the above-said normative concerns, a notable practical shortcoming of the accessory modes of liability is that they often cannot account for the full coordination and cooperation that normally takes place between the various high-ranking actors involved in ‘system criminality’ situations. Hence, reliance on these notions alone can sometimes make it very difficult, if not impossible, to assign to such individuals liability for the *entire* crime. For instance, think of the aforementioned grand plan where a mass murder operation is carried out in several towns – X, Y and Z – respectively by military battalions A, B and C. If prosecuted for *ordering* these crimes, the commander of battalion A may only be held liable in respect to the crimes that his subordinates committed, pursuant to his instructions, in town X. He cannot be connected to the killings in towns Y and Z since they were ordered by the commanders of the other two battalions. In the same time, however, the evidence clearly demonstrates that the murder operations were fully co-ordinated and that each commander gave the order to attack the said town with the knowledge and intent that his troops would form part of the large-scale murder operation. Thus, if the prosecution case is limited to ordering, the military commander will not only be convicted as a secondary party to the crimes committed by others, but he will also not be held liable for the entire crime, even though he desired and closely cooperated for its execution.

Considering all the above, it is understandable why planning, instigating, ordering and aiding and abetting often cannot fully encompass the culpability of criminal masterminds and other ‘higher-ups’. It is an unfair and counterintuitive representation of guilt to conclude that, for instance, Radovan Karadžić was a secondary party (an accessory) to the egregious crimes committed during the war in Bosnia and Herzegovina, while reserving the principal status for the rank-and-file soldiers. Fair labelling, sentencing considerations and the limited potential to fully capture the conduct of criminal masterminds in a system criminality context can explain why these more traditional modes of accessory responsibility are often not the first choice of prosecutorial strategy in international criminal proceedings.

1.2.2.2. Command responsibility

Command responsibility, also called superior responsibility, is a concept premised on the idea that commanders have a legal duty to ensure that their subordinates act in a manner consistent with the dictates of international humanitarian law.⁶¹ Accordingly, under the jurisprudence of the UN *ad hoc* Tribunals, when subordinates commit a crime, their commander could be held responsible if it is established that he: i) had an effective control over the said subordinates, ii) knew or had reasons to know that they were about to, were

in the process of or had committed a crime and iii) failed to take necessary and reasonable measures to prevent the commission of the crime and/or punish the perpetrators thereof.⁶² A question that has given rise to quite some controversy, however, is what exactly is the commander being held responsible for: is he held liable as a *participant* in the crime of his subordinates, or is he rather charged with dereliction of duty as a crime in itself? While it has often been submitted that this concept is as a mode of (accessory) liability, and the UN *ad hoc* Tribunals’ case law on this matter was indeed rather equivocal at first,⁶³ judges have more recently come to define command responsibility as a *sui generis* notion pursuant to which the defendant is convicted *not* for participating in the crimes committed by his subordinates, but for his failure to perform his legal duties as a superior.⁶⁴ In view of this, Olásolo has contended that:

[t]he configuration of the notion of superior responsibility as a crime of pure omission excludes any superiors’ liability for those specific crimes committed by their subordinates. As a result, the author considers that, given the gravity of the crimes within the jurisdiction of the Ad hoc Tribunals, the application of the principle of culpability – which requires the careful determination of the specific

62 Kordić and Čerkez Appeal Judgment, *supra* n 33, paras 827, 840; *The Prosecutor v. Blaškić* (IT-95-14-A), Judgment, Appeals Chamber, 29 July 2004, paras 53-85, 484; *Dordević* Trial Judgment *Vol. I*, *supra* n 44, para 1879; *The Prosecutor v. Nindiliyimana et al.* (ICTR-00-56-T), Judgment, Trial Chamber, 17 May 2011, para 1916; *The Prosecutor v. Prlić et al.* (IT-04-74-T), Judgment *Vol. I*, Trial Chamber, 29 May 2013, para 237. There are some nuances in the legal requirements of command/superior responsibility under ICC law, pertaining to the distinction that Article 28 Rome Statute draws between two main categories of commanders: military and civilian. See Article 28, Rome Statute of the International Criminal Court, (UN Doc. A/CONF.183/9; 2178 UNTS 3), 17 July 1998 [in force on 1 July 2002], as last amended in 2010. For ICC case law on this notion, see *The Prosecutor v. Bemba* (ICC-01/05-01/08-424), Decision on the Confirmation of Charges, Pre-Trial Chamber II, 15 June 2009, paras 404-443. See also Olásolo, *supra* n 15, at 107-108.

63 Bassiouni, for instance, has argued that “[i]mportantly, an accused under the command responsibility doctrine will be held individually liable for participating in war crimes, crimes against humanity, genocide, or for command over individuals who committed such crimes, and not for a lesser offense, such as dereliction of duty.” M. Bassiouni, *Introduction to International Criminal Law: Second Revised Edition* (Leiden: Martinus Nijhoff, 2013), at 361-362. (*emphasis added*) In Cassese’s view, command responsibility could be both a form of criminal participation in subordinates’ crimes and a crime *per se* depending, respectively, on whether the commander failed to *prevent* the subordinate’s crime (in which case there is a link between the commander’s omission and the crime) or failed to *punish* it (in which case the commander cannot be linked as a participant to the already executed crime). Cassese, *supra* n 26, at 191-192. For a review of the initial uncertainty in the ICTY case law on this matter, see C. Meloni, ‘Command Responsibility: Mode of Liability for the Crimes of Subordinates or Separate Offence of the Superior?’, 5 *Journal of International Criminal Justice* (2007), at 625-627; Van Sliedregt, *supra* n 13, at 195-197.

64 In the *Krnjelac* case, the Appeals Chamber stated that “[i]t cannot be overemphasised that, where superior responsibility is concerned, an accused is not charged with the crimes of his subordinates but with his failure to carry out his duty as a superior to exercise control.” *The Prosecutor v. Krnjelac* (IT-97-25-A), Judgment, Appeals Chamber, 17 September 2003, para 171. In the *Popović et al.* case, the Trial Chamber stressed that “[a] superior bears responsibility under Article 7(3) for failing to discharge a duty required by international law, rather than for participating in the crime.” *Popović et al.* Trial Judgment, *supra* n 44, para 1034. See also, *The Prosecutor v. Orić* (IT-03-68-A), Judgment, Appeals Chamber, 3 July 2008, Declaration of Judge Shahabuddeen, paras 18-26; *The Prosecutor v. Orić* (IT-03-68-T), Judgment, Trial Chamber, 30 June 2006, para 293; *Halilović* Trial Judgment, *supra* n 61, para 54. At the ICC, however, the *Bemba* Trial Chamber endorsed the opposite opinion, emphasizing that command/superior responsibility is “a mode of liability, though which superiors may be held criminally responsible for crimes [...] committed by his or her subordinates.” *The Prosecutor v. Bemba* (ICC-01/05-01/08-3343), Judgment, Trial Chamber, 21 March 2016, para 171.

60 The Chamber held that “Mr. Taylor was found not guilty of participation in a joint criminal enterprise, and not guilty of superior responsibility for the crimes committed. A conviction on these principal or significant modes of liability might have justified the sentence of 80 years’ imprisonment proposed by the Prosecution.” *Ibid.*, para 94.

61 *The Prosecutor v. Halilović* (IT-01-48-T), Judgment, Trial Chamber, 16 November 2005, para 39.

wrongdoing and the adjustment of punishment in light of it – should normally result in lower sentences for those superiors who breach their duties to prevent and punish, than for subordinates who commit genocide, crimes against humanity or war crimes.⁶⁵

Indeed, scholars researching the sentencing practice of the ICTY/R have concluded that “[t]he lowest sentences have been given to those convicted on the basis of superior responsibility.”⁶⁶ This is not surprising, given that throughout their case law the UN Tribunals have treated this notion as a lesser form of criminal responsibility by emphasizing that where an accused could be held liable under both command responsibility and any of the other modes of liability listed in the ICTY/R Statute, a conviction should be entered solely on the basis of the latter mode of liability.⁶⁷ As Ambos has explained, this approach is analogous to the rules on concurrence of offences, according to which “the larger crime prevails and ‘absorbs’ the smaller crime”.⁶⁸

Whether viewed as a crime *per se* or as a mode of liability, command responsibility is in either case a notion that focuses on the accused’s omissions. Osiel rightly points out that, as such, it portrays him as someone who is “asleep at the wheel [rather than] driving purposively toward disaster”.⁶⁹ It goes without saying that describing the liability of high-ranking military and political officials, who masterminded and oversaw the mass-scale commission of crimes, in such terms, would be a gross understatement of their role and responsibility. In fact, as long as the international courts and tribunals focus their resources on prosecuting those at the apex of a state or military apparatus, it is likely that superior responsibility will be more often used as an aggravating factor for sentencing purposes, rather than as a sole basis for convictions.⁷⁰

1.2.2.3. Commission liability

‘Committing’ is the mode of criminal liability which the ICTY *Simić* Trial Chamber described as representing “the highest degree of participation in a crime”.⁷¹ The individual who commits (perpetrates) a crime, often called ‘the principal’, is thus considered the most culpable party to

the offence and his liability is independent from that of any other participant in it.⁷² As a point of departure, this has a notable symbolic meaning, especially so in the context of international criminal law where, as Van Sliedregt points out, “stigmatization through the principal status is important bearing in mind the expressive value of prosecuting and punishing international crimes”.⁷³ In the same spirit, the STL Appeals Chamber also distinguished “the stigma of full perpetratorship [from] that of less serious participatory modality.”⁷⁴ Such reasoning raises the issue of fair labelling: *i.e.* the importance of recognizing the masterminds of mass atrocities as the most culpable, main actors in these crimes, and thereafter prosecuting and punishing them accordingly. Also, it has been pointed out that such fair allocation of principal and accessorial liability contributes to building an accurate historic account of what happened, how it came to be and who bears the greatest responsibility.⁷⁵

As already explained above, being an expression of the convicted individual’s criminal responsibility, sentencing is another reason why the principal status is important. In the ICTY *Krstić* case, for example, the Appeals Chamber noted that a downgrade from ‘commission’ to ‘aiding and abetting’ liability requires a reduction in the sentence imposed on the accused:

The Appeals Chamber decides that the sentence must be adjusted due to the fact that it has found Radislav Krstić responsible as an aider and abettor to genocide and to murders... instead of as a coperpetrator, as found by the Trial Chamber. [Accordingly]... the Appeals Chamber proceeds with the adjustment of Krstić’s sentence in light of its findings, and in accordance with the requirements of the Statute and the Rules.⁷⁶

The Chamber reduced Krstić’s sentence from 46 years to 35 years imprisonment.⁷⁷ In the case of the *Prosecutor v Kvočka et al.*, the Appeals Chamber further confirmed this mitigation rule, explaining that “the distinction between these two forms of participation is important... to fix an appropriate sentence. Aiding and abetting generally involves a lesser degree of individual criminal responsibility than co-perpetration”.⁷⁸ That the form of responsibility under which an accused is convicted signals different degrees of blameworthiness – with

⁶⁵ Olásolo, *supra* n 15, at 107.

⁶⁶ B. Holá, A. Smeulders and C. Bijleveld, ‘Is ICTY Sentencing Predictable? An Empirical Analysis of ICTY Sentencing Practice’, 22 *Leiden Journal of International Law* (2009), at 91.

⁶⁷ *Blaškić* Appeal Judgment, *supra* n 62, paras 91-92; *Kvočka et al.* Appeal Judgment, *supra* n 2, para 104; *Popović et al.* Appeal Judgment, *supra* n 2, para 1806; *Milutinović et al.* Trial Judgment Vol.1, *supra* n 50, para 78; *Karadžić* Trial Judgment, *supra* n 40, para 591. *Setako v. The Prosecutor* (ICTR-04-81-A), Judgment, Appeals Chamber, 28 September 2011, para 266. See also, M. Bassiouni, *Crimes against Humanity: Historical Evolution and Contemporary Application* (Cambridge: Cambridge UP, 2011), at 567; K. Ambos, ‘Current Issues in International Criminal Law’, 14 *Criminal Law Forum* (2003), at 250.

⁶⁸ Ambos, ‘Joint Criminal Enterprise’, *supra* n 52, at 163.

⁶⁹ M. Osiel, *Making Sense of Mass Atrocity* (Cambridge: Cambridge UP, 2011), at 56.

⁷⁰ To this end, Osiel quotes Schabas’ contention that in relation to the genocide in Rwanda: “[y]ou would have to look far and wide to find a person in command who did not intend to commit genocide, but who should have known it was being committed and did not take appropriate steps to prevent or punish it.” *Ibid.*

⁷¹ *Simić et al.* Trial Judgment, *supra* n 10, para 137. See also Farhang, *supra* n 31, at 143.

⁷² *Lubanga* Trial Judgment, *supra* n 7, para 998; *Lubanga* Appeal Judgment, *supra* n 7, para 462. Fletcher, *supra* n 31, at 659.

⁷³ Van Sliedregt, *supra* n 13, at 80. See also, Weigend, ‘Problems of Attribution’, *supra* n 15, at 260; Vest, *supra* n 12, at 302.

⁷⁴ STL Interlocutory Decision on the Applicable Law, *supra* n 6, para 249. See also *Tadić* Appeal Judgment, *supra* n 2, para 192.

⁷⁵ Luban, O’Sullivan and Stewart, *supra* n 29, at 862; K. Gustafson, “The Requirement of an ‘Express Agreement’ for Joint Criminal Enterprise Liability: A Critique of Brdanin”, 5 *Journal of International Criminal Justice* (2007), at 139; E. Van Sliedregt, ‘Perpetration and Participation in Article 25(3)’ in C. Stahn (ed), *The Law and Practice of the International Criminal Court* (Oxford: Oxford UP, 2015), at 511.

⁷⁶ *Krstić* Appeal Judgment, *supra* n 44, para 266.

⁷⁷ *Ibid.*, paras 234, 275.

⁷⁸ *Kvočka et al.* Appeal Judgment, *supra* n 2, para 92.

perpetration liability being the most culpable – has also been confirmed in the ICC’s case law,⁷⁹ and Rule 145(1)(c) of the Rules of Procedure and Evidence expressly identifies “the degree of participation of the convicted person” as one of the factors to be considered for sentencing purposes.⁸⁰

It is, thus, not surprising that the prosecutors of the various international tribunals have taken to charging Heads of State and other high-ranking military and political officials with principal liability.⁸¹ However, a problem that the tribunals recognized is that ‘committing’ is a mode of liability which *traditionally* covers first and foremost the physical/direct perpetration of a crime by the offender himself.⁸² This restrictive interpretation of principal liability is not helpful in the context of international criminal law, where, as pointed out above: i) crimes are often the result of the coordinated actions of a group of individuals; and ii) those who bear the greatest responsibility for the commission of the said crimes are geographically removed from the area where they took place. Therefore, the contours of ‘committing’ had to be expanded if principal liability was to be assigned to those persons who did not physically commit the said offence, but “who in some way made it possible for the perpetrator physically to carry out that criminal act”.⁸³ International criminal law was, thus, in need of a mode of liability that would provide a potent tool for addressing the peculiarities of its subject matter: *viz* a legal construct that would enable judges to deal with cases which involve “numerous criminal incidents being committed by a plurality of persons within the highly tangled and confusing context of [an] armed conflict”.⁸⁴ This caused the rise to prominence of the notion of co-perpetration, and the adoption of different theories to define its constituent elements.

1.3. Theories of co-perpetration

1.3.1. Choosing between approaches

Constructing a working definition of co-perpetration is a much more complicated task than it might seem at first glance. If we agree that not only those who physically perpetrate the crime can be qualified as principals, the question arises: what requirements must an individual who otherwise participates in a crime satisfy in order to be elevated to the co-principal status? The answer to this question boils down to providing a reliable criterion for differentiating between co-perpetrators and accessories to group crimes. This task could rightly be called the Gordian knot of modern international criminal law, a difficulty which the ICC and the *ad hoc* tribunals have tried to solve by adopting and applying the theories of joint criminal enterprise and joint control over the crime.

In general, Eser describes the concept of co-perpetration as “the joint commission of a crime by knowingly and voluntarily working together.”⁸⁵ A more elaborate articulation of the *generic* meaning of this mode of liability was offered by ICC Pre-Trial Chamber I, which held that it is:

originally rooted in the idea that when the sum of the co-ordinated individual contributions of a plurality of persons results in the realisation of all the objective elements of a crime, any person making a contribution can be held vicariously responsible for the contributions of all the others and, as a result, can be considered as a principal to the whole crime.⁸⁶

While these definitions do indeed capture the nature of co-perpetration, they do not provide us with a criterion that we can use in order to distinguish between those who were full partners in the group crime (*i.e.* the joint principals) and those others who played a more auxiliary role in its commission (*i.e.* the accessories). Looking at how domestic criminal justice systems have dealt with this problem⁸⁷ shows that three different approaches for making this distinction can be outlined: the formal-objective, the subjective and the material-objective approach.

The formal-objective approach to co-perpetration provides that when a crime is carried out by a plurality of individuals, only those whose acts constitute the objective elements of the crime’s definition can be regarded as joint principals.⁸⁸ Think, for instance, of a criminal plan

⁷⁹ *Lubanga* Trial Judgment, *supra* n 7, para 998; *Lubanga* Appeal Judgment, *supra* n 7, para 462. See *supra* note 48.

⁸⁰ Rule 145(1)(c), International Criminal Court, *Rules of Procedure and Evidence*, ISBN No. 92-9227-278-0. See also, Van Sliedregt, *supra* n 13, at 85; Olásolo, *supra* n 15, at 27; Vest, *supra* n 12, at 300, 303.

⁸¹ See *e.g.* *The Prosecutor v. Karadžić* (IT-95-5/18-PT), Third Amended Indictment, 27 February 2009, paras 6-8; *The Prosecutor v. Mladić* (IT-09-92-PT), Prosecution Submission of the Fourth Amended Indictment and Schedules of Incidents, 16 December 2011, paras 5-7; *The Prosecutor v. Taylor* (SCSL-03-01-T), Prosecution Notification of Filing of Amended Case Summary, 3 August 2007, paras 39, 42-44.

⁸² *Tadić* Appeal Judgment, *supra* n 2, para 188; *Nahimana et al.* Appeal Judgment, *supra* n 33, para 478; *Krstić* Trial Judgment, *supra* n 45, para 601; *Galić* Trial Judgment, *supra* n 33, para 168; *Tolimir* Trial Judgment, *supra* n 44, para 884; *The Prosecutor v. Nyiramasuhuko et al.* (ICTR-98-42-T), Judgment, Trial Chamber, 24 June 2011, para 594.

⁸³ *Tadić* Appeal Judgment, *supra* n 2, para 192.

⁸⁴ V. Haan, ‘The Development of the Concept of Joint Criminal Enterprise at the International Criminal Tribunal for the Former Yugoslavia’, 5 *International Criminal Law Review* (2005), at 173.

⁸⁵ Eser, *supra* n 23, at 791.

⁸⁶ *Lubanga* Decision on the Confirmation of Charges, *supra* n 7, para 326.

⁸⁷ Note that the group of states that follow the ‘monistic’ or ‘unitary’ criminal justice model do not have to deal with this problem as they regard everyone who intervenes in the commission of a crime with the requisite *mens rea* as a perpetrator of the crime. See *supra* text accompanying notes 23-25. See also, Olásolo, *supra* n 30, at 340; Farhang, *supra* n 31, at 140.

⁸⁸ *Lubanga* Decision on the Confirmation of Charges, *supra* n 7, para 328. See also H. Olásolo, *Unlawful Attacks in Combat Situations: From the ICTY’s Case Law to the Rome Statute* (Leiden: Martinus Nijhoff, 2008), at 202; Fletcher, *supra* n 31, at 655; J. Ohlin, ‘Searching for the Hinterman: in Praise of Subjective Theories of Imputation’, 12 *Journal of International Criminal Justice* (2014), at 327; K. Hamdorf, ‘The Concept of a Joint Criminal Enterprise and Domestic Modes of Liability for Parties to a Crime: A Comparison of German and English Law’, 5 *Journal of International Criminal Justice* (2005), at 210;

which A, B and C develop for the purpose of killing victim X. C, who has a car, drives A and B to the victim's house and remains in the car. A and B then enter the house and, brandishing knives, stab X multiple times, both inflicting lethal wounds leading to X's death. Since only A and B objectively participated in the *actus reus* of the crime of murder, *i.e.* their actions alone caused the victim's death, only they may be held liable as co-perpetrators of the crime. C will always be an accessory since his action of driving the car does not fulfil the objective element of the crime of murder. The criminal law of England and Wales has often been referred to as an example of a common law jurisdiction that embraces the formal-objective approach to co-perpetration.⁸⁹ An example of a civil law system which adopts this method of distinguishing between principals and accessories to a group crime is Bulgaria.⁹⁰

The subjective approach to co-perpetration focuses on the *mens rea* of the participants in the collective crime in order to demarcate between primary and secondary parties to it. The underlying rationale of this method is explained by Weigend as follows:

in order to be a perpetrator of any kind, it is necessary [...] to have the mind-set of a perpetrator (*animus auctoris*) or the will to commit the offense oneself. The characteristic of a mere accomplice, by contrast, is that person's will to support another (*animus socii*).⁹¹

Thus, the precise nature of the accused's contribution to the crime is of secondary importance: it is his disposition towards to group crime that serves as a litmus test for determining whether he is a principal or an accessory. This approach expands the traditional borders of commission liability, allowing courts to convict as joint principals individuals who were not present at the crime scene and who did not physically commit the *actus reus* of the crime. When applied to the above-said murder case, this approach to co-perpetration

could allow to also find person C responsible as a co-perpetrator of the crime, which was otherwise committed by A and B. The prosecutor, however, has to prove that the accused C shared the plan and wanted the crime 'as his own': *i.e.* that he closely coordinated his contribution with A and B for the very purpose of murdering the victim. South Africa is one example of a common law-influenced jurisdiction, which endorses such an approach to co-perpetration.⁹² The Netherlands presents one civil law system that follows a subjective approach to co-perpetration (*medeplegen*).⁹³

A third technique that can be distilled from national jurisprudence and legal doctrine is the material-objective approach, in accordance with which principals to a collective crime are those individuals whose participation was *essential* for its commission, meaning that without their contribution the crime would not have taken place.⁹⁴ Analysed through the prism of this method, the co-principal responsibility of the accused A and B, for the murder of victim X, is uncontroversial – the multiple stabbing was a *conditio sine qua non* for X's death. Pursuant to this approach, however, the judges could also find that C is liable as a co-perpetrator provided that his contribution to the murder plan can be characterized as essential for its completion. If, for instance, the evidence demonstrates that only C knew where the victim lived and that only he could take A and B to that location, it can be demonstrated that C was indispensable for the success of the common plan because without his contribution the said concerted crime would not have been committed. C would then also be responsible as a co-perpetrator of X's murder. Such an approach to delineating between principals and accessories to a crime is followed in, for instance, Belgium⁹⁵ and Spain.⁹⁶

1.3.2. JCE: a subjective approach to co-perpetration

Despite some initial confusion on the matter, international criminal courts and commentators have continuously held that joint criminal enterprise is a theory of co-perpetration which

⁸⁹ Hamdorf, *supra* n 88, at 218; A. Ashworth and J. Horder, *Principles of Criminal Law* (7th edn, Oxford: Oxford UP, 2013), at 419-420; Olásolo, *supra* n 15, at 31 (fn 107); Cryer, *supra* n 15, at 272-273.

⁹⁰ Supreme Court of Bulgaria, *Interpretative Judgment No.54 (49/89)*, 16 September 1989, para 5. The judgment states: "It is well-known that our Criminal Code adopts the objective theory in Article 20(2), regarding as a perpetrator only the person who participates in the *actus reus* of the crime. With regards to the theft of private and public property, the *actus reus* consists of the direct appropriation of this property – interrupting the owner's possession of it without his consent and establishing a permanent possession for oneself. When two persons divide their functions in advance, so that one of them takes away the property and establishes material power over it, while the other one is on the lookout for him to protect him from being caught, the former person is a perpetrator and the latter – an accessory. The one who guards while the perpetrator takes away the property is an accessory because he does not objectively participate in the *actus reus* of the theft. No other circumstances can turn a person into a co-perpetrator if he did not participate in the *actus reus* (in this case the appropriation) – neither the preliminary agreement, nor the division of functions, nor the presence at the crime scene." (unofficial translation, case is on file with the author) The position that under Bulgarian law co-perpetrators are individuals who, acting with a common intent, directly and physically carry out one or more of the *actus reus* elements of the crime, has been expressed in subsequent case law from the Supreme Court of Cassation. See, *inter alia*, Supreme Court of Cassation, *Judgment No.478 (347/98)*, 19 November 1998, report by judge rapporteur Savka Stoyanova; Supreme Court of Cassation, *Interpretative Judgment No.2*, 16 July 2009, paras 2.1 and 2.2, available in Bulgarian only at http://www.vks.bg/vks_p10_36.htm [accessed 21 July 2016].

⁹¹ T. Weigend, 'Germany', in K. Heller and M. Dubber (eds), *The Handbook of Comparative Criminal Law* (Stanford, CA: Stanford Law, 2011), at 265. See also, Fletcher, *supra* n 31, at 655; Olásolo, *supra* n 15, at 32-33; Weigend, 'Perpetration through an Organization', *supra* n 15, at 95; Van Sliedregt, *supra* n 13, at 81-82.

⁹² South African courts have long used the common purpose doctrine and acknowledged that participants in a common purpose are principals to the crime. See, *inter alia*, *Thebus and Another v S* (CCT36/02) [2003] ZACC 12; 2003 (6) SA 505 (CC), paras 21(at fn.23) and 44. Burchell explains that: "The existing common-purpose rule in South Africa regards participants in a common purpose as co-perpetrators by a process of imputing or attributing the causal conduct of the actual perpetrator to the others in the common purpose. This form of liability has been found in cases of homicide, treason, public violence, assault, and house breaking." See J. Burchell, 'South Africa', in Heller and Dubber, *supra* n 91, at 467.

⁹³ See Chapter 6, Section 6.2.3.2.i.

⁹⁴ *Lubanga* Decision on the Confirmation of Charges, *supra* n 7, paras 330, 347; Van Sliedregt, *supra* n 13, at 82; Olásolo, *supra* n 15, at 33; Fletcher, *supra* n 31, at 655.

⁹⁵ Article 66 of the Belgian Criminal Code provides that principals to a collective crime are "those who, through any act, provide such help for its execution that the crime or misdemeanour *would not have been committed without their assistance*.", (unofficial translation, *emphasis added*) Article 66, 1867 Criminal Code of Belgium [Strafwetboek], original text in Flemish available at: http://www.ejustice.just.fgov.be/cgi_loi/change_lg.pl?language=nl&la=N&table_name=wet&cn=1867060801 [accessed 21 July 2016]. See also, Van Sliedregt, *supra* n 13, at 95.

⁹⁶ C. Díez and L. Chiesa, 'Spain', in Heller and Dubber, *supra* n 91, at 503-504.

gives rise to principal liability.⁹⁷ This mode of liability has been compartmentalized into three categories, generally labelled the basic (JCE I), the systemic (JCE II) and the extended (JCE III) form.⁹⁸ To convict an individual for participating in any one of them, there are three common *actus reus* requirements that have to be satisfied: i) a plurality of persons, ii) a common plan aiming at or involving the commission of a crime, and iii) the accused's contribution to the common criminal plan.⁹⁹ The difference between the three forms of JCE lies in their *mens rea* element. The 'basic' joint criminal enterprise requires that that the accused shares the common intent to commit the group crime.¹⁰⁰ The 'systemic' JCE – which applies in cases where the common plan is 'institutionalized' (*viz.* it takes place in a system of ill-treatment) – requires that the accused has knowledge of the nature of the said system and intends to further its criminal purpose.¹⁰¹ Lastly, the 'extended' category of JCE allows ascribing co-perpetration liability for crimes that fall outside the scope of the common plan but are a natural and foreseeable consequence of its execution.¹⁰² A JCE participant can be held liable for the additional crime if: "(i) it was *foreseeable* that such a crime might be perpetrated by one or other members of the group and (ii) the accused *willingly took that risk*."¹⁰³ This *mens rea* element of JCE III has been referred to as '*dolus eventualis*' or advertent recklessness.¹⁰⁴

97 *Tadić* Appeal Judgment, *supra* n 2, paras 195, 227-228; *Furundžija* Appeal Judgment, *supra* n 55, paras 115-121; *Kayishema and Ruzindana* Appeal Judgment, *supra* n 3, para 193; *Krnjelac* Appeal Judgment, *supra* n 64, paras 28-32; *Vasiljević* Appeal Judgment, *supra* n 2, paras 94-101; *Ntakirutimana and Ntakirutimana* Appeal Judgment, *supra* n 3, paras 462-468; *Kvočka et al.* Appeal Judgment, *supra* n 2, paras 77-99; *Dordević* Appeal Judgment, *supra* n 2, para 58; *Popović et al.* Appeal Judgment, *supra* n 2, para 1672; *The Prosecutor v. Tolimir* (IT-05-88/2-A), Judgment, Appeals Chamber, 8 April 2015, para 281; *Stanišić and Simatović* Appeal Judgment, *supra* n 2, para 77. See also Haan, *supra* n 84, at 198; H. Olásolo and A. Cepeda, 'The Notion of Control of the Crime and Its Application by the ICTY in the Stakić Case', 4 *International Criminal Law Review* (2004), at 476-477; Gustafson, *supra* n 75, at 137-138; Van Sliedregt, *supra* n 13, at 77-79.

98 *Tadić* Appeal Judgment, *supra* n 2, paras 195-207; *Stakić* Appeal Judgment, *supra* n 2, para 65; *Martić* Appeal Judgment, *supra* n 1, paras 171-172; *Gotovina et al.* Trial Judgment Vol.2, *supra* n 36, paras 1950-1952; *Dordević* Trial Judgment Vol.1, *supra* n 44, paras 1864-1865; *Popović et al.* Trial Judgment, *supra* n 44, para 1021; *Ntakirutimana and Ntakirutimana* Appeal Judgment, *supra* n 3, para 463; *Gacumbitsi* Appeal Judgment, *supra* n 8, para 158; *Simba* Appeal Judgment, *supra* n 3, paras 76-80; *The Prosecutor v. Bizimungu et al.* (ICTR-99-50-T), Judgment, Trial Chamber, 30 September 2011, para 1906; STL Interlocutory Decision on the Applicable Law, *supra* n 6, paras 237-9; *Duch* Trial Judgment, *supra* n 5, para 507.

99 *Tadić* Appeal Judgment, *supra* n 2, para 227; *Brđanin* Appeal Judgment, *supra* n 2, para 430; *Munyakazi* Appeal Judgment, *supra* n 3, para 160; *Brima, Kamara and Kanu* Appeal Judgment, *supra* n 4, para 75; *Duch* Trial Judgment, *supra* n 5, para 508.

100 *Tadić* Appeal Judgment, *supra* n 2, para 228; *Kvočka et al.* Appeal Judgment, *supra* n 2, para 82; *Sesay, Kallon and Gbao* Appeal Judgment, *supra* n 4, para 474; *Duch* Trial Judgment, *supra* n 5, para 509.

101 *Tadić* Appeal Judgment, *supra* n 2, para 228; *Kvočka et al.* Appeal Judgment, *supra* n 2, para 82; *Sesay, Kallon and Gbao* Appeal Judgment, *supra* n 4, para 474.

102 *Tadić* Appeal Judgment, *supra* n 2, para 204; *Kvočka et al.* Appeal Judgment, *supra* n 2, para 83; *Sesay, Kallon and Gbao* Appeal Judgment, *supra* n 4, paras 474-475; *Duch* Trial Judgment, *supra* n 5, para 509.

103 *Tadić* Appeal Judgment, *supra* n 2, para 228; *Kvočka et al.* Appeal Judgment, *supra* n 2, para 83; *Sesay, Kallon and Gbao* Appeal Judgment, *supra* n 4, para 475; *Duch* Trial Judgment, *supra* n 5, para 509; STL Interlocutory Decision on the Applicable Law, *supra* n 6, para 239.

104 *Milutinović et al.* Trial Judgment Vol.1, *supra* n 50, para 96; *Sesay, Kallon and Gbao* Appeal Judgment, *supra* n 4, para 475; STL Interlocutory Decision on the Applicable Law, *supra* n 6, para 248.

Judge Shahabuddeen has explained that the focal point of the JCE/common purpose theory is the will of the accused:

In performing the act, [the JCE members] were of course carrying out their own will, but they were also carrying out [the accused's] will under that understanding. The perspective is important. The focus is not on whether he had power to prevent them from acting as they did; the focus is on whether, even if he could not prevent them from acting as they did, he could have withheld his will and thereby prevented their act from being regarded as having been done pursuant to his own will also.¹⁰⁵

It can thus justly be asserted, as the ICC *Lubanga* Pre-Trial Chamber did,¹⁰⁶ that joint criminal enterprise is a manifestation of the subjective approach to co-perpetration. The participants in the criminal enterprise are held equally responsible for the concerted offence, even when their contributions vary in intensity, since they "intend to achieve the goal of the enterprise together and [...] each of them wants the other participants to contribute to the common goal".¹⁰⁷

An illustration of how this construct is applied in practice could be seen in the ICTY *Vasiljević* case.¹⁰⁸ Vasiljević was a member of a Bosnian Serb paramilitary group. On 7 June 1992, he and a few other members of this group forcefully transported seven Bosnian Muslim men to the bank of a river. There, the men were aligned, facing the river, and summarily shot from behind. Vasiljević did not personally shoot at any of these Muslim men. Nevertheless, he actively participated in their transportation to the river and also made sure that they did not escape.¹⁰⁹ The execution was, thus, carried out as a result of the coordinated efforts of all the paramilitary group's members. Some participated in the capturing of the Muslim men, others in their transportation to the river and yet others in the actual shooting. Each and every one of them performed their task with the shared intent to kill the captured men. In such a case, joint criminal enterprise is used to attach principal liability to any of these persons by attributing to him the actions of the rest of the group. Thus, while Vasiljević did not himself pull the trigger, the Trial Chamber held that "the Accused, by his actions, intended that the seven Muslim men be killed, whether or not he actually carried out any of those killings himself."¹¹⁰ Therefore, he was convicted of co-perpetrating the crime of murder through participating in a joint criminal enterprise.¹¹¹

105 *Vasiljević* Appeal Judgment, *supra* n 2, Separate and Dissenting Opinion of Judge Shahabuddeen, para 32.

106 *Lubanga* Decision on the Confirmation of Charges, *supra* n 7, paras 323, 328-330. See also *Katanga* Trial Judgment, *supra* n 30, para 1392.

107 Haan, *supra* n 84, at 174.

108 *The Prosecutor v. Vasiljević* (IT-98-32-T), Judgment, Trial Chamber, 29 November 2002.

109 *Ibid.*, paras 97-112.

110 *Ibid.*, para 113.

111 *Ibid.*, paras 210-211. On appeal, the judges found that the facts of the case did not show that Vasiljević shared the murderous intent of the other group members, thereby quashing his conviction as a co-perpetrator and instead finding him guilty as an aider and abettor of the murder operation. See *Vasiljević* Appeal Judgment, *supra* n 2, paras 131-132.

While at first glance the notion of joint criminal enterprise may appear to be clearly construed and well-grounded in international criminal law, the UN tribunals' jurisprudence on the precise limits of its constituent elements has proved to be rather inconsistent.¹¹² It would be far from an exaggeration to say that the nature and exact boundaries of the common purpose theory have been contested by both academics and practitioners since its inception in modern international criminal law. Diverging interpretations found in the international tribunals' case law on this construct have prompted criticism of its definitional framework. Van der Wilt, for instance, called JCE responsibility a "shape-shifting concept [...] made to measure depending on the changing facts of each case."¹¹³ Haan has also suggested that "a form of co-perpetration possessing *stricter and more precisely defined elements* should be considered".¹¹⁴ This point of criticism has been further reinforced by the assertion, expressed both in academia and in legal practice, that JCE does not provide an adequate criterion for distinguishing between principals and accessories to a collective crime.¹¹⁵ As a result, the initial enthusiasm and support for this theory waned and the path was opened for the theory of co-perpetration based on joint control over the crime, which Ohlin called "the new darling of the professoriate".¹¹⁶

1.3.3. Joint control over the crime: a material-objective approach to co-perpetration

The first attempt to import the theory of co-perpetration based on joint control over the crime in international criminal proceedings, and thereby replace the doctrine of JCE, was carried out by the ICTY *Stakić* Trial Chamber in 2003.¹¹⁷ The judges found that "joint criminal enterprise is only one of several possible interpretations of the term 'commission' [and] other definitions

of co-perpetration must equally be taken into account".¹¹⁸ Thereafter, the Chamber abandoned the JCE theory and construed a new framework for the concept of co-perpetration, founded on the core premise that co-perpetrators are only those persons who control the group crime: *viz.* they can successfully commit it only if they cooperate with each other, meaning that failure of one of them to do his task would result in the collapse of the entire criminal plan.¹¹⁹ Although this definition of co-perpetration was subsequently rejected by the *Stakić* Appeals Chamber as lacking basis in customary international law and in the established ICTY jurisprudence,¹²⁰ the concept of joint control resurfaced nearly four years later in the very first case brought before the International Criminal Court.¹²¹

In its jurisprudence so far, the ICC has maintained that principals to a crime are those individuals who "control or mastermind its commission because they decide whether and how the offence will be committed".¹²² This rationale lies at the heart of the control over the crime theory, according to which there are three ways in which an individual could dominate/control a crime: i) by physically committing it (direct perpetration); ii) by controlling the will of the person who physically commits it (indirect perpetration); or iii) by having an *essential* task in the joint commission of the crime (*i.e.* joint/co-perpetration).¹²³ The latter manifestation of the control paradigm is what has become known as co-perpetration based on joint control over the crime. This is the approach to co-perpetration responsibility which the ICC *Lubanga* Pre-Trial Chamber first adopted, and which has been followed in ICC criminal proceedings to date. The constituent elements that the *Lubanga* pre-trial judges outlined for this mode of liability are:

- i) 'Existence of an agreement or common plan between two or more persons';¹²⁴
- ii) 'Co-ordinated *essential contribution* made by each co-perpetrator resulting in the realisation of the objective elements of the crime';¹²⁵
- iii) 'The suspect must fulfil the subjective elements of the crime in question';¹²⁶

¹¹² See *infra* Section 1.4.2.

¹¹³ H. Van der Wilt, 'Joint Criminal Enterprise and Functional Perpetration', in Van der Wilt and Nollkaemper, *supra* n 12, at 166.

¹¹⁴ Haan, *supra* n 84, at 201. (*emphasis added*) Provost also observed that "[t]he controversies surrounding the doctrine of joint criminal enterprise have centered on the uncertainty regarding its legal elements". R. Provost, 'Amicus Curiae Brief on Joint Criminal Enterprise in the Matter of the Co-Prosecutors' Appeal of the Closing Order Against Kaing Guek Eav "Duch" Dated 8 August 2008', 20 *Criminal Law Forum* (2009), at 346.

¹¹⁵ See, for instance, D. Guilfoyle, 'Responsibility for Collective Atrocities: Fair Labelling and Approaches to Commission in International Criminal Law', 64 *Current Legal Problems* (2011), at 264-265; S. Manacorda and C. Meloni, 'Indirect Perpetration versus Joint Criminal Enterprise: Concurring Approaches in the Practice of International Criminal Law?' 9 *Journal of International Criminal Justice* (2011), at 164-168. According to Ambos, JCE is a mode of liability under which participants in the common plan can be found guilty either as accessories or as principals to the crime. He contends that it is the German doctrine of functional domination of the act (control over the crime approach) that offers 'the most convincing criteria' for making the principal/accessory distinction. K. Ambos, 'Amicus Curiae Brief in the Matter of the Co-Prosecutors' Appeal of the Closing Order Against Kaing Guek Eav "Duch" Dated 8 August 2008', 20 *Criminal Law Forum* (2009), at 363.

¹¹⁶ J. Ohlin, 'Joint Intentions to Commit International Crimes', 11 *Chicago Journal of International Law* (2011), at 693.

¹¹⁷ *Stakić* Trial Judgment, *supra* n 8.

¹¹⁸ *Ibid.*, para 438.

¹¹⁹ *Ibid.*, paras 440, 490. In building its argumentation, the Chamber relied extensively on the writings of Claus Roxin, who is the original author of the control over the crime theory. For further information on Roxin's theory, see G. Werle and B. Burghardt, 'Claus Roxin on Crimes as Part of Organized Power Structures: Introductory Note', 9 *Journal of International Criminal Justice* (2011), at 191-205.

¹²⁰ *Stakić* Appeal Judgment, *supra* n 2, para 62.

¹²¹ *Lubanga* Decision on the Confirmation of Charges, *supra* n 7, paras 338, 343-367.

¹²² *Lubanga* Decision on the Confirmation of Charges, *supra* n 7, para 330. See also *Katanga and Chui* Decision on the Confirmation of Charges, *supra* n 7, paras 480-486; *Banda and Jerbo* Corrigendum of the Decision on the Confirmation of Charges, *supra* n 7, paras 126-127; *The Prosecutor v. Ruto, Kosgey and Sang* (ICC-01/09-01/11-373), Decision on the Confirmation of Charges, Pre-Trial Chamber II, 23 January 2012, para 291; *The Prosecutor v. Muthaura, Kenyatta and Ali* (ICC-01/09-02/11-382-Red), Decision on the Confirmation of Charges, Pre-Trial Chamber II, 23 January 2012, para 296; *Lubanga* Trial Judgment, *supra* n 7, paras 1003-1006, 1351.

¹²³ *Lubanga* Decision on the Confirmation of Charges, *supra* n 7, para 332.

¹²⁴ *Ibid.*, paras 343-345.

¹²⁵ *Ibid.*, paras 346-348 (*emphasis added*).

¹²⁶ *Ibid.*, paras 349-360.

- iv) ‘The suspect and the other co-perpetrators must all be mutually aware and mutually accept that implementing their common plan may result in the realisation of the objective elements of the crime’,¹²⁷
- v) ‘The suspect is aware of the factual circumstances enabling him or her to jointly control the crime’.¹²⁸

Five years after the Pre-Trial Chamber adopted this definition of co-perpetration, its reasoning was largely affirmed by the Trial Chamber in the Court’s historic first judgment: the *Lubanga* Trial Judgment.¹²⁹ More recently, this approach was also upheld by the ICC Appeals Chamber which found that the ‘essential contribution’ element is the defining feature of co-perpetration and that it is expressed in the accused’s “power to frustrate the commission of the crime”.¹³⁰ It is thus evident that the joint control theory is an expression of the material-objective approach to co-perpetration.

The *Katanga and Ngudjolo Chui* case provides an apposite example of how the theory of co-perpetration based on joint control applies in practice.¹³¹ The accused Germain Katanga and Mathieu Ngudjolo Chui were the commanders of two separate armed rebel forces in Ituri: a district in the north-east of the Democratic Republic of Congo. In 2002, disputes over Ituri’s land and natural resources resulting in armed violence between the different ethnic groups that lived there.¹³² The ICC Prosecutor submitted that on 24 February 2003, Katanga, as the leader of the FRPI militia (*‘Force de Résistance Patriotique en Ituri’*) and Chui, as the leader of the FNI militia (*‘Front des Nationalistes et Intégrationnistes’*), attacked the civilian population of Bogoro in pursuance of a common plan to ‘wipe out’ this village.¹³³ This attack resulted in the commission of various crimes, including murder, pillage, sexual slavery, rape and use of child soldiers, of which both accused were charged as co-perpetrators.¹³⁴ The Document Containing the Charges stated, in particular, that:

The Prosecution submits that KATANGA and NGUDJOLO each committed the war crimes and crimes against humanity listed below jointly with other commanders of the FNI and the FRPI by agreeing to a common plan to “wipe out” Bogoro [...] KATANGA and NGUDJOLO, as military chiefs of all the FRPI and FNI and with the authority conveyed to each of them due to such a position, played an essential role in the implementation of the common plan which led to the commission of the underlying crimes. [...] In contributing to the common plan, KATANGA and NGUDJOLO were aware of their essential role and that such role gave them joint control over

the implementation of the common plan. KATANGA and NGUDJOLO, as well as the other co-perpetrators, were, at a minimum, all mutually aware and accepted that implementing their common plan “to wipe” out Bogoro may result in the commission [of the alleged crimes].¹³⁵

After examining the evidence against the two accused and assessing their exact role and contributions to the common plan, the Pre-Trial Chamber held that they are liable as (indirect) co-perpetrators of the charged crimes.¹³⁶ Faithful to the golden rule of the joint control theory, the judges stressed that these crimes would not have taken place if one of the co-accused had refused to play his role in the plan:

In the view of the Chamber, there is sufficient evidence to establish substantial grounds to believe that FRPI soldiers would obey only orders issued by FRPI commanders and that, similarly, FNI soldiers would obey only orders issued by FNI commanders. Therefore, the fact that Germain Katanga and Mathieu Ngudjolo Chui were the highest commanders of the [FRPI] and [FNI] combatants, respectively, corroborates the finding that without their agreement on the common plan and their participation in its the [sic.] implementation, the crimes would not have been committed as planned.¹³⁷

The ICC *Katanga and Ngudjolo Chui* case and the above-discussed ICTY *Vasiljević* case are illustrative of the diametrically opposite rationales which the theories of joint control and joint criminal enterprise employ in relation to the notion of co-perpetration. For the former, it is the pivotal function of the accused – expressed in his ability to frustrate the implementation of the common plan by withholding his contribution to it – that delineates him as a co-perpetrator of the group crime. For the latter, the gist of co-perpetration liability lies not in the importance of the accused’s co-operation for the success of the plan, but in his attitude towards it: his shared intent to commit the enterprise crimes, his perception of them as ‘his own’ acts.

1.4. Thesis scope and research question

What should be the legal framework of co-perpetration responsibility in international criminal law? This is the central research question of this book and its answer is inextricably connected to assessing the merits of each of the two theories currently used by

¹²⁷ *Ibid.*, paras 361-365.

¹²⁸ *Ibid.*, paras 366-367.

¹²⁹ *Lubanga* Trial Judgment, *supra* n 7, paras 1003-1006; 1351.

¹³⁰ *Lubanga* Appeal Judgment, *supra* n 7, paras 467-469, 473.

¹³¹ *Katanga and Chui* Decision on the Confirmation of Charges, *supra* n 7.

¹³² *Ibid.*, paras 1-4.

¹³³ *Ibid.*, paras 19, 33.

¹³⁴ *Ibid.*, paras 573-582.

¹³⁵ *The Prosecutor v. Katanga and Chui* (ICC-01/04-01/07-649-Anx1A), Amended Document Containing the Charges Pursuant to Article 61(3)(a) of the Statute, Office of the Prosecutor, 26 June 2008, paras 90-93.

¹³⁶ *Katanga and Chui* Decision on the Confirmation of Charges, *supra* n 7, paras 573-582. Due to the fact that the physical perpetration of the charged crimes was committed by subordinate fighters who were not members of the common plan, but rather tools used for its execution, the PTC concluded that the criminal liability of Katanga and Ngudjolo Chui is best described as that of *indirect* co-perpetrators.

¹³⁷ *Ibid.*, para 560.

the international tribunals to construe this mode of liability: *i.e.* joint criminal enterprise and joint control over the crime. The current coexistence of two competing theories of co-perpetration in international criminal law is indeed damaging for this field, because it leads to fragmentation and uncertainty that is vexing for any legal system.¹³⁸ In this respect, it is submitted that a careful perusal and, where necessary, refinement of the legal elements of the above two constructs, followed by a critical assessment of their merits and legal foundations, is much needed to properly understand their strengths and shortcomings, and thereafter propose a framework of co-perpetration that would consolidate the international jurisprudence on this form of individual responsibility. Thus, it is not the goal of this book to suggest some novel, alternative formulation of co-perpetration and thereby further fragment the international criminal law on this issue. Rather, the intention is to systematically review the two existing theories of co-perpetration, identify and address certain ambiguities and deficiencies in their respective legal elements, and, based on the methodology explained further below, determine which one of the thus refined constructs should be used to define co-perpetration responsibility under international criminal law.

1.4.1. Joint principal liability in the wake of international criminal law

Since one of the main objectives of this book is to offer a complete account of co-perpetration under international criminal law, it is quite natural that the starting point of the research would be the Nuremberg-era trials of Nazi war criminals, constituting the birth of this field of law.¹³⁹ To this end, Chapter 2 will include a detailed analysis on the formulation and evolution of the first legal concepts that were used in the post-World War II trials to assign joint responsibility in a context of system criminality: *viz.* conspiracy, membership in a criminal organization and common purpose/design liability. These are not some antiquated notions that have no bearing on our modern understanding of co-perpetration under international criminal law. The debates surrounding their endorsement in Nuremberg law are indicative of the nature of the challenges which the prosecution of international crimes continues to raise to present day, and which has prompted the formulation of complex notions, such as JCE and co-perpetration based on joint control. Moreover, conspiracy, criminal membership and common purpose/design liability are notions that have been incredibly difficult to define and which – due to varying interpretations offered in World War II-era documents and jurisprudence – are nowadays still at the center of controversy

amongst international criminal lawyers.¹⁴⁰ They ought to be reviewed not only for the sake of identifying the historical origins of co-perpetration liability in this field of law, but also because of never-ending debates on how each one of them relates to the modern-day JCE doctrine,¹⁴¹ as well as because of more recent scholarly arguments that the (joint) control over the crime theory could also be discerned in this Nuremberg-era jurisprudence.¹⁴² The research in Chapter 2 will thus serve to introduce the reader to the early debates on the concept of joint responsibility for concerted crimes and will offer a basis that would allow to properly answer some of the normative questions that will be asked in the subsequent chapters.

The goal behind Chapter 2 of this book will thus be to determine whether and how the underlying principles of co-perpetration responsibility were constructed in post-World War II legislation and jurisprudence. For this purpose, it will thoroughly analyse the nature and legal framework of the concepts of conspiracy, membership in a criminal organization and common purpose/design liability: from the moment they were first defined under international criminal law, through the heated debates on their scope and meaning during the drafting of the London Charter of the International Military Tribunal at Nuremberg, to the manner in which they were ultimately applied in the Nazi trials. It will be argued that although the case law from that era sometimes lacked the detail, structure and cohesion of the present-day international tribunals' jurisprudence, a systematic study of the available documents and judgments demonstrates that the common purpose/design notion may rightly be considered to be an embryonic formulation of co-perpetration responsibility under international criminal law.

1.4.2. Co-perpetration based on JCE: legal framework and issues of controversy

Ambiguities in JCE's theoretical framework once prompted a defendant at the ICTY to call it “a monster theory of liability”.¹⁴³ Indeed, the ever-going debates about the exact meaning and scope of each of its constituent elements have given JCE the image of a “fluid

¹³⁸ See *supra* n 1. See also, *e.g.* Van Sliedregt, *supra* n 13, at 12-13; L. Sadat and J. Jolly, ‘Seven Canons of ICC Treaty Interpretation: Making Sense of Article 25's Rorschach Blot’, 27 *Leiden Journal of International Law* (2014), at 781, 785; R. Cryer, ‘Royalism and the King: Article 21 of the Rome Statute and the Politics of Sources’, 12 *New Criminal Law Review* (2009), at 394, 404-405.

¹³⁹ G. Werle and F. Jessberger, *Principles of International Criminal Law* (3rd edn, Oxford: Oxford UP, 2014), at 5; P. Gaeta, ‘Immunity of States and State Officials: A Major Stumbling Block to Judicial Scrutiny?’ in A. Cassese (ed), *Realizing Utopia: The Future of International Law* (Oxford: Oxford UP, 2012), at 236.

¹⁴⁰ Đorđević Appeal Judgment, *supra* n 2, paras 28, 32-34; *The Prosecutor v. Prlić et al.* (IT-04-74-T), Judgment Vol.6, Trial Chamber, 29 May 2013, Separate and Partially Dissenting Opinion of Presiding Judge Jean-Claude Antonetti, at 100 *et seq.*

¹⁴¹ Đorđević Appeal Judgment, *supra* n 2, paras 28, 32-34; *Gatete v. The Prosecutor* (ICTR-00-61-A), Judgment, Appeals Chamber, 9 October 2012, para 263; *Martić Appeal Judgment*, *supra* n 1, Separate Opinion of Judge Schomburg on the Individual Criminal Responsibility of Milan Martić, para 5; *The Prosecutor v. Milutinović et al.* (IT-99-37-AR72), Decision on Dragoljub Ojdanić's Motion Challenging Jurisdiction – Joint Criminal Enterprise, Appeals Chamber, 21 May 2003, para 23. See also K. Ambos, *Treatise on International Criminal Law* (Oxford: Oxford UP, 2013), at 166, 173; Cassese, *supra* n 26, at 163.

¹⁴² R. Clark, ‘Together Again? Customary Law and Control over the Crime’, 26 *Criminal Law Forum* (2015), at 466 *et seq.*; Ambos, ‘Individual Criminal Responsibility’, *supra* n 52, at 751.

¹⁴³ *The Prosecutor v. Milutinović et al.* (IT-99-37-AR72), General Ojdanić's Appeal from Denial of Preliminary Motion to Dismiss for Lack of Jurisdiction: Joint Criminal Enterprise, 28 February 2003, para 9.

concept”:¹⁴⁴ an oft-repeated sentiment that places the doctrine at odds with the legality principle and supports the contention that it should be jettisoned from international criminal law. This problem could not be overlooked. Even the most prominent supporters of JCE have conceded that this notion “needs some tightening up”¹⁴⁵ and that, as a point of departure, the jurisprudential uncertainty that exists about its precise limits should be addressed. For this reason, Chapter 3 of this book will thoroughly examine the various legal elements of the three categories of JCE, explain the exact scope and meaning of each one of them and, where necessary, identify uncertainties and examine further refinements that have been made in post-*Tadić* case law to address them. One major task of this research is, thus, to give a comprehensive and updated account of what JCE liability actually is, before moving on to analyse the specific challenges that have traditionally been raised against it. It will be revealed that many aspects of JCE’s legal framework were not sufficiently elaborated when this doctrine was first adopted by the ICTY and that a lot of fine-tuning, revision and also reshaping of its constituent elements took place in the UN Tribunals’ subsequent case law, including in their more recent topical judgments. Furthermore, Chapter 3 will also scrutinize the purported relationship between JCE liability and the three Nuremberg-era concepts considered in Chapter 2, thus assessing the very conclusion that JCE is a mode of co-perpetration responsibility.

The above research will set the background against which Chapter 4 will address those aspects of the JCE theory that continue to attract strong criticism in the international tribunals’ case law and in academic writings. The research here will be divided in two major parts, each one addressing a broad, complex theme that contains a number of sub-questions. These issues are: i) the disputed customary law status of JCE, and particularly its ‘extended’ variant; and ii) the legal basis and doctrinal problems involved in ascribing JCE responsibility in cases where the physical perpetrators of the group crime are outsiders to the common purpose. Conflicting case law, continuing academic debates and some recent jurisprudential developments on these issues confirm that they remain unsettled.

1.4.2.1. JCE and customary international law

Perhaps the most fundamental and persisting criticism that the JCE concept has faced over the years has been that, contrary to what the international tribunals have consistently asserted, this concept is not part of customary international law. The gravity of this contention could hardly be exaggerated, given that international custom provides the legal basis on which the tribunals have applied this mode of liability. Indeed, there is not a single provision in the statutes of any of the international tribunals that expressly lists JCE responsibility. Rather, the ICTY Appeals Chamber studied a number of Nuremberg-era documents and cases to

confirm that this notion has acquired the status of an international custom and, thus, could be read in the ICTY Statute as a mode of ‘commission’ responsibility under Article 7(1).¹⁴⁶ This finding was subsequently endorsed in the topical jurisprudence of the ICTR,¹⁴⁷ the STL,¹⁴⁸ the SCSL,¹⁴⁹ and, subject to one exception, the ECCC.¹⁵⁰ Critics, however, have often challenged this holding on a number of grounds. As an overarching critique, it has often been argued that the methodology used by the ICTY/R to ascertain JCE’s customary status is flawed because it fails to properly examine the existence of state practice and *opinio juris* on this concept.¹⁵¹ ICTY defendants have often raised this argument, a recent example being the Đorđević case, where the Defence submitted on appeal that “the methodology used in the *Tadić* Appeal Judgment in order to deduce rules of customary international law ‘was fundamentally flaw[ed]’”.¹⁵² Next to questioning whether Nuremberg-era case law may, by itself, evince the formation of state practice and *opinio juris*, criticism has also been levelled at the number of judgments that have been cited to support the customary status of JCE,¹⁵³ as well as against their nature.¹⁵⁴ For this reason, Chapter 4 of this book will first examine what customary international law is and what methods for identifying its formation have been recognized in academia and used by the International Court of Justice, before proceeding to assess the methodology used by the ICTY/R to confirm the status of JCE as an international custom. Thus, in its first part, Chapter 4 will address the aforesaid points of criticism and, by also referring to the preceding research on post-World War II legislation and case law, conclude on the basis of JCE I and JCE II liability in customary international law.

¹⁴⁶ *Tadić* Appeal Judgment, *supra* n 2, para 220; *Milutinović et al.* Appeal Decision on Joint Criminal Enterprise, *supra* n 141, para 20; *Vasiljević* Appeal Judgment, *supra* n 2, para 95; *Brđanin* Appeal Judgment, *supra* n 2, paras 415, 431; *Krajišnik* Appeal Judgment, *supra* n 2, paras 657-658.

¹⁴⁷ *Ntakirutimana and Ntakirutimana* Appeal Judgment, *supra* n 3, para 463; *Karemera et al. v The Prosecutor* (ICTR-98-44-AR72.5, ICTR-98-44-AR72.6), Decision on Jurisdictional Appeals: Joint Criminal Enterprise, Appeals Chamber, 16 April 2006, paras 12, 16.

¹⁴⁸ STL Interlocutory Decision on the Applicable Law, *supra* n 6, para 236.

¹⁴⁹ *Sesay, Kallon and Gbao* Appeal Judgment, *supra* n 4, para 400; *The Prosecutor v. Brima, Kamara and Kanu* (SCSL-04-16-T), Judgment, Trial Chamber, 20 June 2007, para 61; *Taylor* Trial Judgment, *supra* n 4, para 458.

¹⁵⁰ *Duch* Trial Judgment, *supra* n 5, paras 504-510; *Nuon Chea and Khieu Samphan* Trial Judgment, *supra* n 5, paras 690-691.

¹⁵¹ See e.g. M. Karnavas, ‘Joint Criminal Enterprise at the ECCC: A Critical Analysis of the Pre-Trial Chamber’s Decision against the Application of JCE III and Two Divergent Commentaries on the Same’, 21 *Criminal Law Forum* (2010), at 486-487; Boas *et al.*, *supra* n 34, at 21-22. See also *Milutinović et al.* Appeal Decision on Joint Criminal Enterprise, *supra* n 141, para 29.

¹⁵² Đorđević Appeal Judgment, *supra* n 2, para 27.

¹⁵³ A. Bogdan, ‘Individual Criminal Responsibility in the Execution of a “Joint Criminal Enterprise” in the Jurisprudence of the *ad Hoc* International Tribunal for the Former Yugoslavia’, 6 *International Criminal Law Review* (2006), at 109-110; Karnavas, *supra* n 151, at 485-486.

¹⁵⁴ Karnavas, *supra* n 151, at 486-487; C. Steer, ‘Non-State Actors in International Criminal Law’, in J. D’Aspremont (ed), *Participants in the International Legal System: Multiple Perspectives on Non-State Actors in International Law Theoretical Perspectives* (London: Routledge, 2011), at 301-302.

¹⁴⁴ This is how one *amicus curiae* to the Tribunal described JCE in the *Krajišnik* case. See, *Krajišnik* Appeal Judgment, *supra* n 2, para 189. Such concerns that the theoretical framework of JCE liability has not been strictly established but appears to be constantly evolving have also been expressed in academia. See e.g. Haan, *supra* n 84, at 201; H. Van der Wilt, ‘Joint Criminal Enterprise and Functional Perpetration’ in Van der Wilt and Nollkaemper, *supra* n 12, at 166.

¹⁴⁵ A. Cassese, ‘The Proper Limits of Individual Responsibility under the Doctrine of Joint Criminal Enterprise’, 5 *Journal of International Criminal Justice* (2007), at 109.

The customary status of JCE III liability merits a separate consideration due, in part, to certain more recent developments in the international jurisprudence on this concept. Generally speaking, although the legal basis of the ‘basic’ and the ‘systemic’ category of this theory has been subject to some debate,¹⁵⁵ it is JCE’s ‘extended’ variant that has drawn the strongest and most persisting criticism against its treatment as an international custom. There is a large body of scholarly literature stating that the authorities cited in support of JCE III do not sufficiently evince its existence in customary law¹⁵⁶ and, indeed, this issue has been raised time and again by defence lawyers and *amici curiae* at the international tribunals.¹⁵⁷ This criticism reached its peak in May 2010, when the ECCC Pre-Trial Chamber conducted a *de novo* analysis of post-World War II documents and jurisprudence on JCE, and concluded that, unlike JCE I and JCE II responsibility, JCE III had not acquired the status of customary international law during the indicted period.¹⁵⁸ Several months later, the STL Appeals Chamber took notice of this finding and held that the ‘extended’ JCE category *is* customary in nature and that the ECCC Pre-Trial Chamber’s conclusion was based on a limited review of the available legal sources.¹⁵⁹ Adding more fuel to the fire, in September 2011 the ECCC Trial Chamber delivered the “Decision on the Applicability of Joint Criminal Enterprise”, wherein it referred to the aforesaid decision of the STL Appeals Chamber, analysed the additional jurisprudence cited in it to support JCE III liability and still found that this notion was *not* part of customary international law during the Khmer Rouge regime (1975-79).¹⁶⁰ For its own part, the ICTY has so far refused to revisit the findings of the *Tadić* Appeals Chamber on the customary status of JCE III and has maintained that the ECCC’s holdings on this issue were not sufficiently substantiated and, in any case, are not binding on the Tribunal.¹⁶¹ This otherwise stimulating inter-tribunal dispute demonstrates that the customary status of the ‘extended’ form of JCE remains an unresolved issue, which is why Chapter 4 will thoroughly examine the content of the Nuremberg-era legislation and case law that have been cited in support of this notion, as well as look into some

other, unexplored documents from that period. In doing so, it will seek to offer an informed position on whether the idea of ascribing joint principal responsibility for the foreseeable, yet unconcerted, crimes of a common plan was indeed endorsed in post-World War II case law and could be viewed as a rule of customary international criminal law.

Apart from its contested customary status, a second fundamental problem with JCE III is the *nature* of this mode of liability: does it ascribe co-perpetration or accessorial liability for the excess crimes of the common plan? This is a matter that has often been raised in academia and, more recently, has also caused division in the jurisprudence of the international tribunals. The UN *ad hoc* Tribunals have maintained that JCE III is a form of co-perpetration¹⁶² whereas the STL has asserted that, when charged in conjunction with special intent crimes, this notion has to be viewed as a mode of accessorial criminal responsibility.¹⁶³ The latter conclusion was subsequently endorsed in the SCSL’s case law, as well.¹⁶⁴ Many scholars have also expressed the view that that the materially distinct legal framework of the ‘extended’ form of JCE makes its use as a theory of co-perpetration conceptually wrong and contrary to the *nulla poena sine culpa* principle.¹⁶⁵ Chapter 4 of this book will, thus, examine the alleged doctrinal deficiencies of JCE III, study its purported conflict with the principle of individual culpability and propose a solution to the identified legal problems.

1.4.2.2. JCE with no physical perpetrators

The question whether the JCE doctrine can be used to ascribe co-perpetration liability in cases where the concerted crime was committed by non-members of the enterprise – *i.e.* individuals who did not share the group’s common intent but were used as expandable tools for achieving the criminal goal – will be examined in detail in the second part of Chapter 4. The importance of this problem could hardly be overstated, seeing as it directly affects the applicability of this theory in cases where the common plan is designed in the highest levels of the state apparatus: *i.e.* cases against individuals who are the primary target of international criminal prosecutions.

As explained above, the common purpose doctrine is used to attribute to person C the acts of persons A and B so that at the end all members of the plan incur principal liability. The doctrinal basis for this attribution is the common plan that is shared among the participants in the criminal enterprise: it unites their will and governs their subsequent

¹⁵⁵ I. Bantekas, *International Criminal Law* (Oxford: Hart, 2010), at 58; Karnavas, *supra* n 151, at 486.

¹⁵⁶ Ambos, *supra* n 115, at 385-386; A. Danner and J. Martinez, ‘Guilty Associations: Joint Criminal Enterprise, Command Responsibility, and the Development of International Criminal Law’, 93 *California Law Review* (2005), at 110 *et seq*; S. Powles, ‘Joint Criminal Enterprise: Criminal Liability by Prosecutorial Ingenuity and Judicial Creativity?’, 2 *Journal of International Criminal Justice* (2004), at 614-617; R. Clarke, ‘Return to Borkum Island: Extended Joint Criminal Enterprise Responsibility in the Wake of World War II’, 9 *Journal of International Criminal Justice* (2011), at 861; Boas *et al.*, *supra* n 34, at 21-22.

¹⁵⁷ *Milutinović et al.* Appeal on JCE Jurisdiction, *supra* n 143, paras 43-53; *Krajišnik* Appeal Judgment, *supra* n 2, para 189; *Dordević* Appeal Judgment, *supra* n 2, paras 46-47.

¹⁵⁸ *The Prosecutor v. Ieng Sary, Ieng Thirith and Khieu Samphan* (002/19-09-2007-ECCC/OCIJ), Decision on the Appeals against the Co-Investigative Judges Order on Joint Criminal Enterprise (JCE), Pre-Trial Chamber, 20 May 2010, paras 77-83.

¹⁵⁹ STL Interlocutory Decision on the Applicable Law, *supra* n 6, para 239 (at fn 360).

¹⁶⁰ *The Prosecutor v. Nuon Chea, Ieng Sary, Ieng Thirith and Khieu Samphan* (002/19-09-2007-ECCC/TC), Decision on the Applicability of Joint Criminal Enterprise, Trial Chamber, 12 September 2011, paras 32-35.

¹⁶¹ *Dordević* Appeal Judgment, *supra* n 2, paras 50-53.

¹⁶² *Dordević* Appeal Judgment, *supra* n 2, para 77; *Stakić* Appeal Judgment, *supra* n 2, para 87; *The Prosecutor v. Brđanin* (IT-99-36-A), Decision on Interlocutory Appeal, Appeals Chamber, 19 March 2004, paras 5-10.

¹⁶³ STL Interlocutory Decision on the Applicable Law, *supra* n 6, paras 248-249.

¹⁶⁴ *Taylor* Trial Judgment, *supra* n 4, para 468.

¹⁶⁵ H. Olásolo, ‘Joint Criminal Enterprise and Its Extended Form: A Theory of Co-Perpetration Giving Rise to Principal Liability, a Notion of Accessorial Liability, or a Form of Partnership in Crime?’, 20 *Criminal Law Forum* 20 (2009), at 283-284; R. Cryer *et al.*, *An Introduction to International Criminal Law and Procedure* (3rd edn, Cambridge: Cambridge UP, 2014), at 360; Ambos, *supra* n 141, at 105; Jain, *supra* n 12, at 64; *Šainović et al.* Appeal Judgment, *supra* n 47, Partially Dissenting Opinion and Declaration of Judge Liu, paras 18-19.

coordinated actions.¹⁶⁶ This rationale fits well in the above-said *Vasiljević* case, where the accused did not physically kill any of the victims, but this was done by other members of the JCE. The common plan that existed between them and Vasiljević provided the legal basis on which their actions were then imputed on the accused. However, what happens in a factual scenario where persons A, B and C are senior politicians who design a murder enterprise and then use their authority, resources and influence to ensure that rank-and-file soldiers, who are outsiders to this plan, carry out the actual killing? In such a case, the combined acts of the politicians alone do not fulfil the *actus reus* of murder. To this end, the contribution of the trigger pullers, the final jigsaw piece in the murder JCE, must also be added to the said equation, yet this is problematic because the basis for such attribution is the common plan to which the physical perpetrator is an *external* figure.

The question is, thus, whether the direct perpetrator must be a member of the common criminal plan in order for the JCE participants to incur co-perpetration liability for his crimes. The UN *ad hoc* Tribunals' jurisprudence on this point has not been exemplary for consistency and clarity. While in earlier case law the ICTY Appeals Chamber seemed to answer the above question in the positive,¹⁶⁷ in more recent jurisprudence it has consistently held that "[i]t is not required that the principal perpetrators of the crimes which are part of the common purpose be members of the JCE".¹⁶⁸ This purported discrepancy between the ICTY's earlier and late case law on this matter has even prompted some scholars to contend that the notion of 'leadership-level' JCE is a new form of this theory, which deviates from the *Tadić* Appeal Judgment and, more critically, has no basis in customary international law.¹⁶⁹ To this end, Chapter 4 will first thoroughly review the adoption of the concept of JCE at the leadership level in the ICTY case law jurisprudence, thus determining whether the Tribunal indeed impermissibly expanded the original boundaries of the JCE theory, as defined in *Tadić*. This research will help identify the evolutionary gaps in the recent recognition of this notion as a form of co-perpetration liability and help to understand its underlying doctrinal problems.

Accepting that the JCE doctrine does not require the direct perpetrators to be parties to the common criminal plan raises two core questions: i) what exactly must be the nature of the link between members and non-members of the JCE in order to impute the acts of the

latter to the former; and ii) is there a legal basis for adopting this approach. Here again, the case law of the ICTY/R Appeals Chamber has been rather ambiguous. The judges have confirmed that the crimes committed by a non-member of the JCE have to be imputed to (at least one of) the JCE members, yet they have refrained from specifying a particular test for this purpose.¹⁷⁰ Rather, this determination is made on a case-by-case basis and different criteria have been used to this end, such as evidence that the physical perpetrators were 'procured' by one of the members of the JCE,¹⁷¹ or were used as 'tools',¹⁷² or were "requested [...] instigated, ordered, encouraged [by a JCE member] to commit the crime."¹⁷³ This is not a mere quarrel of words: as explained in Chapter 4, these are notably different standards for linking non-members and members of a JCE which, according to established legal doctrine, can change the very nature of 'leadership-level' JCE into a form of *accessorial* responsibility. Olásolo, for instance, has noted that if the physical perpetrator is defined as a 'tool', this means that he is someone who lacks individual autonomy and is fully controlled by the JCE members.¹⁷⁴ If this standard is adopted, then the notion of 'leadership-level' JCE would become a crossbreed between JCE proper and indirect perpetration, thus allowing to brand the JCE members as indirect co-perpetrators of the crimes committed by the non-members of the enterprise. If, however, a standard is accepted whereby it suffices that the JCE participants merely 'requested/ordered/instigated/encouraged' the non-member to commit the said crime, then, as Judge Meron observed, the concept of 'leadership-level' JCE must be considered to ascribe accessorial responsibility.¹⁷⁵

Chapter 4 will distinguish and analyse four approaches that may be used to address the aforesaid jurisprudential uncertainty and solve the doctrinal problems underpinning the use of the JCE notion in cases where the physical perpetrators are outsiders to the common plan. The said techniques include: i) qualifying 'leadership-level' JCE as a mode of accessorial liability; ii) expanding the boundaries of JCE's membership; iii) using a structure of inter-linked JCEs; and iv) combining JCE with the notion of indirect perpetration. The theoretical soundness and practical implications of each of these methods, as well as the legal basis for their possible use in international criminal proceedings, will be carefully examined.

1.4.3. Co-perpetration based on joint control: legal framework and issues of controversy

The theory of co-perpetration based on joint control over the crime will be researched in detail in Chapters 5 and 6 of this book. The former will first analyse each constituent

¹⁶⁶ Ambos, *supra* n 141, at 149, 174; Van Sliedregt, *supra* n 13, at 100, 144; Olásolo, *supra* n 15, at 169, 273-274, 286; A. Gil Gil, 'Mens Rea in Co-perpetration and Indirect Perpetration According to Article 30 of the Rome Statute. Arguments against Punishment for Excesses Committed by the Agent or the Co-perpetrator', 14 *International Criminal Law Review* (2014), at 91. See also *Lubanga* Appeal Judgment, *supra* n 7, para 445.

¹⁶⁷ *Krnjelac* Appeal Judgment, *supra* n 64, paras 83-84. See also *The Prosecutor v. Brđanin and Talić* (IT-99-36-PT), Decision on Form of Further Amended Indictment and Prosecution Application to Amend, Trial Chamber, 26 June 2001, paras 26, 44; *The Prosecutor v. Krnjelac* (IT-97-25-T), Judgment, Trial Chamber, 15 March 2002, para 83; *Brđanin* Trial Judgment, *supra* n 50, paras 264, 347. See further, Olásolo, *supra* n 15, at 184.

¹⁶⁸ *Martić* Appeal Judgment, *supra* n 1, paras 68, 79. See also *Brđanin* Appeal Judgment, *supra* n 2, paras 414-419; *Krajišnik* Appeal Judgment, *supra* n 2, paras 235, 714; *Đorđević* Appeal Judgment, *supra* n 2, paras 56, 165; *Popović et al.* Appeal Judgment, *supra* n 2, para 1050.

¹⁶⁹ Olásolo, *supra* n 15, at 182-184, 202-207, 227; Van Sliedregt, *supra* n 13, at 136, 157 *et seq.*

¹⁷⁰ See *supra* note 168.

¹⁷¹ *Krajišnik* Appeal Judgment, *supra* n 2, paras 235-236; *Gotovina et al.* Trial Judgment Vol.2, *supra* n 36, para 1953.

¹⁷² *Brđanin* Appeal Judgment, *supra* n 2, para 412.

¹⁷³ *Krajišnik* Appeal Judgment, *supra* n 2, para 236.

¹⁷⁴ Olásolo, *supra* n 15, at 227-228. See also *Đorđević* Appeal Judgment, *supra* n 2, paras 63, 169.

¹⁷⁵ *Brđanin* Appeal Judgment, *supra* n 2, Separate Opinion of Judge Meron, para 6.

element of this mode of liability, as defined originally by the ICC Pre-Trial Chamber in the *Lubanga* case and refined in the Court's subsequent case law. It will be shown that, similar to the UN Tribunals' experience with JCE responsibility, the ICC's early jurisprudence on co-perpetration based on joint control was marked by a process of fine-tuning and revising the precise legal framework of this construct. Thus, for instance, its subjective requirement that the accused must be aware of a risk that executing the common plan can result in the commission of the charged crime¹⁷⁶ was initially defined as requiring awareness of a *low* risk that this crime *may* be committed.¹⁷⁷ This finding was, however, revised in later case law and the above element is now interpreted to require that the accused foresaw the commission of the said crime as a *virtual certainty*: *i.e.* he was aware that executing the common plan *will* "in the ordinary course of events" result in the commission of the offence.¹⁷⁸ The other elements of co-perpetration based on joint control have also undergone further elaboration since their first definition in the *Lubanga* Decision on the Confirmation of Charges. Therefore, much like the review of the JCE theory in Chapter 3, Chapter 5 will provide a detailed analysis on the exact scope and meaning of each definitional requirement of the joint control concept, highlighting any ambiguities or inconsistencies in the topical ICC case law and addressing them where possible. Comparisons between the elements of this mode of liability and their counterparts in the doctrine of co-perpetration based on JCE will also be drawn here, which will help to demonstrate that the differences between these two theories of co-perpetration responsibility run deeper than the traditionally reported dichotomy between the 'essential contribution' and the 'shared intent' requirements.¹⁷⁹ Last but not least, Chapter 5 will also review the origins of the doctrine of co-perpetration based on joint control in academic writings and its lineage in domestic and in international jurisprudence: a research that would subsequently also be used to assess the legal basis for the application of this theory in ICC proceedings.

Once the legal framework of co-perpetration based on joint control has been analysed, Chapter 6 will proceed to re-evaluate this theory's: i) legal basis in the ICC Rome Statute; and ii) merits and suitability for the prosecution of international crimes. These are the two general rubrics under which the joint control notion has been criticised, both in academic

writings and in the ICC jurisprudence.¹⁸⁰ The former matter caused controversy already in the Court's very first verdict: *i.e.* the *Lubanga* Trial Judgment.¹⁸¹ The Trial Chamber's Presiding Judge wrote a separate opinion in which he strongly disassociated himself from the theory of co-perpetration based on joint control over the crime and claimed, *inter alia*, that the application of this notion in ICC proceedings is unsupported by the Rome Statute.¹⁸² This finding was later reiterated by another ICC judge – Judge Van den Wyngaert – in her separate opinions to the *Katanga* Trial Judgment¹⁸³ and the *Chui* Trial Judgment.¹⁸⁴ It is now also increasingly submitted in scholarly work that the doctrine of joint control has no legal basis in the applicable sources of law at the ICC and that the Court should revise its construction of co-perpetration liability.¹⁸⁵ In view of this continuing controversy, Chapter 6 will thoroughly review the ICC's findings on this issue and determine whether co-perpetration based on joint control finds support in any of the three sources of law recognized in Article 21 ICC Rome Statute: *i.e.* i) the Court's basic documents; ii) principles and rules of international law; and iii) general principles of law.¹⁸⁶ Article 25(3) ICC Rome Statute – *i.e.* the provision that lists the applicable forms of criminal responsibility – will be assessed using various interpretation techniques, including also a study of its *travaux préparatoires*. This research will also be used to determine whether the JCE theory, as revised in Chapters 3 and 4, can be used to define co-perpetration liability under Article 25(3)(a) ICC Rome Statute. To quote Cassese, "can the ICC rely upon the doctrine of JCE?"¹⁸⁷

Turning to the merits of the doctrine of co-perpetration based on joint control over the crime, its supporters have asserted that it is conceptually better than the theory of JCE because its 'essential contribution' element offers a more reliable, bias-free criterion for distinguishing between joint principals and accessories to a crime.¹⁸⁸ However, in recent years there has also been an increasing number of scholars and practitioners who, having examined the application of the joint control theory in ICC proceedings, have protested that

180 *Lubanga* Trial Judgment, *supra* n 7, Separate Opinion of Judge Adrian Fulford, paras 1-21; *Ngudjolo Chui* Trial Judgment, *supra* n 49, Concurring Opinion of Judge Christine Van den Wyngaert, paras 1-70. See also Ohlin, Van Sliedregt and Weigend, *supra* n 49, at 731-732; Wirth, *supra* n 178, at 978-979.

181 *Lubanga* Trial Judgment, *supra* n 7.

182 *Lubanga* Trial Judgment, *supra* n 7, Separate Opinion of Judge Adrian Fulford, para 16.

183 *Katanga* Trial Judgment, *supra* n 30, Minority Opinion of Judge Christine Van den Wyngaert, para 280.

184 *Chui* Trial Judgment, *supra* n 49, Concurring Opinion of Judge Christine Van den Wyngaert, paras 6, 41-42.

185 J. Ohlin, 'Co-Perpetration: German *Dogmatik* or German Invasion', in C. Stahn (ed), *The Law and Practice of the International Criminal Court* (Oxford: Oxford UP, 2015), at 532-533; Sadat and Jolly, *supra* n 138, at 784.

186 Article 21(1)(a), ICC Rome Statute, *supra* n 62.

187 Cassese, *supra* n 145, at 132.

188 Werle and Burghardt, *supra* n 24, at 316; Ambos, *supra* n 141, at 152; T. Weigend, 'Intent, Mistake of Law, and Co-perpetration in the *Lubanga* Decision on Confirmation of Charges', 6 *Journal of International Criminal Justice* (2008), at 480.

176 See *supra* text accompanying note 127.

177 *Lubanga* Decision on the Confirmation of Charges, *supra* n 7, para 361; *The Prosecutor v. Abu Garda* (ICC-02/05-02/09-243-Red), Decision on the Confirmation of Charges, Pre-Trial Chamber I, 8 February 2010, para 161. See also Olásolo, *supra* n 15, at 283.

178 *Lubanga* Appeal Judgment, *supra* n 7, paras 447-448. See also S. Wirth, 'Co-perpetration in the *Lubanga* Trial Judgment', 10 *Journal of International Criminal Justice* (2012), at 990-991; K. Ambos, 'The First Judgment of the International Criminal Court (Prosecutor v. *Lubanga*): A Comprehensive Analysis of the Legal Issues', 12 *International Criminal Law Review* (2012), at 148-149.

179 See *e.g.* Ohlin, *supra* n 88, at 329-340; Ambos, *supra* n 141, at 152-153; Werle and Burghardt, *supra* n 24, at 316-317; Ohlin, Van Sliedregt and Weigend, *supra* n 49, at 731-734.

“the ICC’s control theory is [...] both vague and indeterminate”.¹⁸⁹ The final part of Chapter 6 will, thus, put forward and assess a number of concerns that arise from the application of this doctrine, particularly in the context of mass, system criminality that is characteristic for the field of international criminal law. The concerns range from the judges being required to conduct a speculative evaluation of how a complex criminal plan would have evolved in an imaginary world where the defendant withdrew his contribution, to engaging in obscure assessments of the power relations between the various participants in the plan. To illustrate the latter point, consider the ICC case against Omar al-Bashir: the incumbent President of Sudan. When issuing a warrant of arrest for him, the Pre-Trial Chamber found that he “was *in full control of all branches* of the ‘apparatus’ of the Republic of the Sudan”,¹⁹⁰ yet also that he “played an essential role in coordinating, with other high-ranking Sudanese political and military leaders, the design and implementation of the... counter-insurgency campaign”.¹⁹¹ Whether al-Bashir had ‘full control’ over the agencies that committed the charged crimes, or in fact shared such control with their respective leaders, is not just a quarrel of words. In fact, the inconsistent language of Al-Bashir’s exact role in the said crimes (*i.e.* was he the lone figure controlling their commission from the apex of the state apparatus, or did he share control with other individuals from the political and military elite of Sudan) prompted Judge Ušacka to file a separate opinion to the Pre-Trial Chamber’s decision to issue an arrest warrant. She pointed out that if the accused was indeed in “full control of all branches” of the Sudanese government, it will be wrong to qualify him as a co-perpetrator and he should be treated as an indirect perpetrator instead.¹⁹² Even though this discussion does not in itself affect al-Bashir’s level of blameworthiness, it influences the evaluation of the liability of the other participants involved in the criminal plan: a matter that, as will be shown in some of the cases discussed in Chapter 6, can lead to jurisprudential inconsistencies and may, in any event, unnecessarily burden the Court’s work.

Considering the above, it seems that one practical effect of the ‘essential contribution’ criterion is that it makes co-perpetration based on joint control applicable only in cases where the confederates are fully equal partners in crime: they are in a strictly horizontal relationship. Should, however, such power relations matter when the evidence clearly shows that, although some of the participants in the common plan were subordinate to others and were replaceable, they all fully supported this plan and shared a common intent

to commit its underlying crime? More generally, did Judge Shahabuddeen rightly note that “a position can be reached in which there could be guilt under JCE but innocence under co-perpetratorship [based on joint control over the crime]”?¹⁹³

These and other questions pertaining to the legal basis and definitional requirements of the joint control theory will be thoroughly addressed in Chapter 6 in order to assess the merits of this notion. This research will ultimately help to establish what should be the framework of co-perpetration responsibility under international criminal law and where should the emphasis be placed when distinguishing between principals and accessories to concerted crimes.

1.5. The assessment framework for co-perpetration responsibility

Since the core research question in this book has a normative character – it seeks to determine how co-perpetration responsibility *should be* defined under international criminal law – there must be an assessment framework at place, establishing criteria that the proposed formulation of co-perpetration must satisfy before it is advanced in the field. The evaluation methodology used in this research presents a set of requirements that, as explained below, are distilled from the principles and considerations which the modern international courts and tribunals adhered to when adopting the JCE and the joint control over the crime theory. This will ensure that the conclusions and recommendations made here are relevant for the practice of these institutions. Thus, it is not the goal of the present book to put forward some formulation of co-perpetration responsibility that is conceptually sound, and maybe is known to function well in one national legal system or another, but is inapplicable at the international criminal courts and tribunals.

Accordingly, the assessment framework that will be used in Chapter 7 to establish how joint principal liability should be defined in international criminal proceedings will have three main requirements. In particular, the proposed construction of co-perpetration liability should: i) have a legal basis under international criminal law; ii) provide an effective mechanism for a fair allocation of principal responsibility in the context of mass criminality; and iii) respect the rights of the accused.

189 Ohlin, *supra* n 88, at 329. See also, Weigend, ‘Perpetration through an Organization’, *supra* n 15, at 100; Van Slieght, *supra* n 13, at 99; H. Vest, ‘Business Leaders and the Modes of Individual Criminal Responsibility under International Law’, 8 *Journal of International Criminal Justice* (2010), at 867; Wirth, *supra* n 178, at 978-979; Ohlin, Van Slieght and Weigend, *supra* n 49, at 731-732; Ohlin, *supra* n 185, at 528-529; Chui Trial Judgment, *supra* n 49, Concurring Opinion of Judge Christine Van den Wyngaert, para 42.

190 *The Prosecutor v. Al Bashir* (ICC-02/05-01/09-94), Second Decision on the Prosecutor’s Application for a Warrant of Arrest, Pre-Trial Chamber I, 12 July 2010, para 42. (*emphasis added*)

191 *Ibid.*

192 *he Prosecutor v. Al Bashir* (ICC-02/05-01/09-3), Decision on the Prosecutor’s Application for a Warrant of Arrest against Omar Hassan Ahmad Al Bashir, Pre-Trial Chamber I, 4 March 2009, Separate and Partly Dissenting Opinion of Judge Anita Ušacka, paras 103-105.

193 *The Prosecutor v. Simić* (IT-95-9-A), Judgment, Appeals Chamber, 28 November 2006, Dissenting Opinion of Judge Schomburg, paras 13-15. In using the term ‘co-perpetratorship’, Judge Shahabuddeen was referring to the control over the crime approach to co-perpetration.

1.5.1. Legal basis under international criminal law

Both the UN *ad hoc* Tribunals and the ICC have based their use of, respectively, the JCE and the joint control theory on the sources of law that apply in their criminal proceedings.¹⁹⁴ To be sure, they are obliged to do so, since they have a strictly defined material jurisdiction and only laws that fall therein could be applied to convict an accused. To do otherwise, would be to use a law which did not exist and apply to the accused at the time he committed the charged act or omission: a situation that will violate the principle of legality (*nullum crimen sine lege*)¹⁹⁵ and is indeed prohibited in the basic documents and jurisprudence of the international tribunals.¹⁹⁶ In general, since international criminal law is a branch of public international law, its sources of law are also defined in Article 38 of the Statute of the International Court of Justice (‘ICJ’), namely: i) treaties; ii) international custom; and iii) general principles of law.¹⁹⁷ Accordingly, when the international courts and tribunals examine the legal basis for using a certain concept, they refer to their respective founding documents, customary international law, and/or general principles of law.¹⁹⁸ As discussed further below, however, there are some palpable differences in the approach that the ICC, on the one hand, and the *ad hoc* Tribunals, on the other, adopt to these sources of law.

As a point of departure, a tribunal’s statute (including any treaties specifically referred to in it),¹⁹⁹ and later its topical jurisprudence,²⁰⁰ present its first line of legal sources. As noted by Cassese:

international criminal courts must first and foremost apply their Statutes, and... this is the case also for those tribunals – such as the ICTY and the ICTR – that were established through ‘secondary legislation’, namely by virtue of a binding decision of the UN Security Council.²⁰¹

Thus, when adopting a certain framework for co-perpetration liability, it must be supported by the relevant statutory provisions establishing the applicable forms of criminal responsibility: a task that involves carefully interpreting the said articles and often also requires consulting the statute’s *travaux préparatoires*.²⁰²

Customary international law – defined under Article 38(1)(b) ICJ Statute as “a general practice accepted as law”²⁰³ – is an important source of law for the international tribunals due to the fact that their statutes do not always provide a legal definition for each notion contained in them, nor do they actually establish an exhaustive list of all the applicable laws.²⁰⁴ The ICC and the UN *ad hoc* Tribunals have thus both referred to international custom in their case law, although there is, for the reasons explained further below, a significant difference in the extent to which they use this source of law and the importance that they attach to it.²⁰⁵ The definition of customary international law and the methods for identifying its formation will be discussed in detail later in this book.²⁰⁶

Finally, where their basic documents and international custom have not been helpful to define the legal framework of a certain concept under international criminal law, the

¹⁹⁴ See, for instance, *Tadić* Appeal Judgment, *supra* n 2, paras 185-225; *Katanga and Chui* Decision on the Confirmation of Charges, *supra* n 7, paras 481-510; *Ieng Sary, Ieng Thirith and Khieu Samphan* Pre-Trial Decision on JCE, *supra* n 158, paras 36-89.

¹⁹⁵ The principle of legality is enshrined in a number a number of international documents, including Article 15 of the International Covenant on Civil and Political Rights, which states that “[n]o one shall be held guilty of any criminal offence on account of any act or omission which did not constitute a criminal offence, under national or international law, at the time when it was committed.” UN General Assembly, *International Covenant on Civil and Political Rights*, 16 December 1966, United Nations, Treaty Series, vol. 999, at 171.

¹⁹⁶ Article 22, ICC Rome Statute, *supra* n 62; United Nations Security Council, *Report of the Secretary-General Pursuant to paragraph 2 of Security Council Resolution 808 (1993)*, (S/25704), 3 May 1993, para 34; *Milutinović et al.* Appeal Decision on Joint Criminal Enterprise, *supra* n 141, para 37; *Ieng Sary, Ieng Thirith and Khieu Samphan* Pre-Trial Decision on JCE, *supra* n 158, para 43; *Katanga* Trial Judgment, *supra* n 30, paras 50-57.

¹⁹⁷ Article 38(1)(d) ICJ Statute further provides that judicial decisions and the writings of eminent scholars may be used as subsidiary means for determining the rules of international law. Article 38(1)(d), Statute of the International Court of Justice, (33 UNTS 993), 26 June 1945. *Cf.* Cryer *et al.*, *supra* n 165, at 8-12; Cassese, *supra* n 26, at 9-18.

¹⁹⁸ Article 21(1), ICC Rome Statute, *supra* n 62. See also *Tadić* Appeal Judgment, *supra* n 2, paras 185-225; *The Prosecutor v. Norman* (SCSL-2004-14-AR72), Decision on Preliminary Motion Based on Lack of Jurisdiction (Child Recruitment), Appeals Chamber, 31 May 2004, paras 8-53; *Ieng Sary, Ieng Thirith and Khieu Samphan* Pre-Trial Decision on JCE, *supra* n 158, paras 36-89; See further, Werle and Jessberger, *supra* n 139, at 56-60; W. Schabas, ‘Customary Law or “Judge-Made” Law: Judicial Creativity at the UN Criminal Tribunals’, in J. Doria, H. P. Gasser and M. Bassiouni (eds), *The Legal Regime of the International Criminal Court: Essays in Honour of Professor Igor Blishchenko* (Leiden: Martinus Nijhoff, 2009), at 79; F. Raimondo, *General Principles of Law in the Decisions of International Criminal Courts and Tribunals* (Leiden: Martinus Nijhoff, 2008), at 119.

¹⁹⁹ Cassese, *supra* n 26, at 12-13.

²⁰⁰ See *e.g.* *Šainović et al.* Appeal Judgment, *supra* n 47, paras 1622-1646; *Muthaura, Kenyatta and Ali* Decision on the Confirmation of Charges, *supra* n 122, paras 296-297.

²⁰¹ Cassese, *supra* n 26, at 11.

²⁰² Thus, for instance, when the *Tadić* Appeals Chamber analysed for the first time the scope and meaning of the international modes of criminal liability at its disposal, its starting point was to look at the provisions listed under Article 7 ICTY Statute and to also consider the UN Secretary General’s report on the drafting of the Statute as an authoritative source for its interpretation. *Tadić* Appeal Judgment, *supra* n 2, paras 186-190. The same was done, for instance, by the ICC Pre-Trial Chamber in *Bemba*, where the judges consulted the *travaux préparatoires* of Article 30 RS in order to determine the precise scope of its content and, in particular, whether it includes the notion of *dolus eventualis*/advertent recklessness in the applicable *mens rea* standards. *Bemba* Decision on the Confirmation of Charges, *supra* n 62, paras 364-369.

²⁰³ Article 38(1)(b) ICJ Statute, *supra* n 197. See *North Sea Continental Shelf (Federal Republic of Germany v. Denmark, Federal Republic of Germany v. The Netherlands)*, Judgment, 20 February 1969, I.C.J. Reports 3, para 77. See also B. Schlütter, *Developments in Customary International Law: Theory and the Practice of the International Court of Justice and the International Ad Hoc Criminal Tribunals for Rwanda and Yugoslavia* (Leiden: Martinus Nijhoff, 2010), at 13-14.

²⁰⁴ Cassese, *supra* n 26, at 12; Werle and Jessberger, *supra* n 139, at 57-59; Cryer *et al.*, *supra* n 165, at 10-11.

²⁰⁵ *Tadić* Appeal Judgment, *supra* n 2, para 194; *The Prosecutor v. Furundžija* (IT-95-17/1-T), Judgment, Trial Chamber, 10 December 1998, paras 168-169; *Šainović et al.* Appeal Judgment, *supra* n 47, paras 1626-1646; *Katanga* Trial Judgment, *supra* n 30, paras 47, 895.

²⁰⁶ See Chapter 4, Section 4.2.1.

tribunals have also referred to the category of general principles of law as a subsidiary source of law.²⁰⁷ These have been defined as “general concepts and legal institutions common to all the major legal systems of the world”,²⁰⁸ and the international tribunals have further specified that while it is not necessary to conduct a survey of every single domestic legal system, it must be shown that the said rule is shared by the common and civil law legal tradition.²⁰⁹ It also bears noting that, outside the context of evincing the existence of a general principle of law, national law is often referred to by the international tribunals not as an applicable source of law but merely as an illustration and assurance of the conceptual cogency of a certain legal notion. This method has been employed by both the ICTY/R and the ICC, the former asserting that:

[I]t should be emphasised that reference to national legislation and case law only serves to show that the notion of common purpose upheld in international criminal law has an underpinning in many national systems²¹⁰

Overall, the jurisdictional rule is that any legal concept applied in criminal proceedings against the accused must be based on, at least one of, the abovementioned three legal sources. Thus, when a particular concept or, for the purposes of this book, a mode of liability, does not have such a basis, it cannot be applied in the practice of the international tribunals irrespective of how academically sound it might be. However, as already noted above, there is a difference in the weight which the ICC, on the one hand, and the *ad hoc* Tribunals, on the other, attach to these sources of law. This difference should be explained here since it has greatly affected the judges’ analyses on co-perpetration and will thus also influence the research conducted in this book and its ultimate recommendations.

To understand how the *ad hoc* Tribunals deal with questions concerning the legal basis for applying a particular concept, one can look no further than the ICTY jurisprudence on the adoption of the JCE doctrine. It was the ICTY Appeals Chamber that first construed this

form of liability and its analysis on the jurisdictional basis for applying it was afterwards adhered to by other *ad hoc* tribunals.²¹¹ In particular, the *Tadić* Appeals Chamber conducted a meticulous review of the relevant provisions from the ICTY Statute, then moved on to analyse customary international law and finally gave illustrative examples from domestic criminal law to support its ultimate conclusion that JCE falls within the Tribunal’s material jurisdiction.²¹² The judges found that the Statute does not explicitly provide for the application of this form of liability,²¹³ but that it can still be applied since it is “firmly established in customary international law.”²¹⁴ In order to grasp this reasoning and the importance that is attached to each of these sources of law, one must first consider the nature of an *ad hoc* tribunal. These institutions are established *after* the commission of the crime over which they are called to exercise jurisdiction, meaning that their constituent documents did not exist at the material time but are applied retroactively: a predicament that, naturally, raises concerns about the *nullum crimen sine lege* principle (“no crime without law”) and the rights of the accused.²¹⁵ In order to deal with this problem, when the ICTY Statute was being drafted, the UN Secretary-General pointed that “the international tribunal should apply rules of international humanitarian law which are beyond any doubt part of customary law”;²¹⁶ *i.e.* apply only rules which had a customary status at the time the events prosecuted took place. In practice, this means that within the *ad hoc* Tribunals’ paradigm, “the golden rule of fidelity to customary international law”, to quote Powderly, reigns supreme.²¹⁷ Their

211 The ICTY’s findings on the legal basis of JCE liability have been adopted by the other international(ized) *ad hoc* tribunals, noting to this effect that their statutory provisions on modes of liability are identical to Article 7(1) ICTY Statute and that they were also set to apply customary international law on the matter. See *supra* notes 3-6, 21.

212 *Tadić* Appeal Judgment, *supra* n 2, paras 185-225. A detailed review of the *Tadić* Appeals Chamber analysis on the legal sources of JCE liability is offered in Chapter 3 of this book.

213 After reviewing the *travaux préparatoires* of the ICTY Statute, the Appeals Chamber concluded that JCE could be seen as being *implicitly* included in the Statute. *Tadić* Appeal Judgment, *supra* n 2, paras 185-193, 220.

214 *Tadić* Appeal Judgment, *supra* n 2, para 220.

215 Cryer *et al.*, *supra* n 165, at 18-21. The ICTY and ICTR were established by the UN Security Council, acting under Chapter VII of the UN Charter. For the ICTY, see UN Security Council Resolution 827, dated 25 May 1993. UN Security Council, *Resolution 827 (1993)*, *Adopted by the Security Council at its 3217th meeting*, (S/RES/827), 25 May 1993. As for the ICTR, it was established on 8 November 1994 with UN Security Council Resolution 955. UN Security Council, *Resolution 955 (1994)*, *Adopted by the Security Council at its 3453rd meeting*, (S/RES/955), 8 Nov 1994. The STL, SCSL and ECCC are also *ad hoc* tribunals which, however, have been set up pursuant to negotiations and agreements between the UN and the governments of respectively Lebanon, Sierra Leone and Cambodia. See Bassiouni, *supra* n 63, at 741-742, 764-765, 771; Olásolo, *supra* n 15, at 38-39.

216 UN Security Council, *Report of the Secretary-General Pursuant to paragraph 2 of Security Council Resolution 808 (1993)*, (S/25704), 3 May 1993, para 34. Subsequently, Judge Shahabuddeen, who was a Vice President of the ICTY, also explained that “the jurisdiction of the ICTY Statute was confined to customary international law and to statutory provisions which had matured into customary international law.” M. Shahabuddeen, *International Criminal Justice at the Yugoslav Tribunal: The Judicial Experience* (Oxford: Oxford UP, 2012), at 67.

217 J. Powderly, ‘Judicial Interpretation at the *Ad Hoc* Tribunals: Method from Chaos’, in J. Powderly and S. Darcy (eds), *Judicial Creativity at the International Criminal Tribunals* (Oxford: Oxford UP, 2010), at 26. The ICTY has explicitly held that the mandate given to it is to apply those rules that are “beyond any doubt part of international law”. See *Milutinović et al.* Appeal Decision on Joint Criminal Enterprise, *supra* n 141, para 9.

207 *Furundžija* Trial Judgment, *supra* n 205, paras 177-178. See also Cryer *et al.*, *supra* n 165, at 11-12.

208 *Furundžija* Trial Judgment, *supra* n 205, para 178. See also *Tadić* Appeal Judgment, *supra* n 2, para 255; *Ieng Sary, Ieng Thirith and Khieu Samphan* Pre-Trial Decision on JCE, *supra* n 158, paras 85-86; *Nuon Chea, Ieng Sary, Ieng Thirith and Khieu Samphan* Trial Decision on JCE Applicability, *supra* n 160, para 37. See further M. Janis, *An Introduction to International Law* (New York: Aspen, 2003), at 56; Werle and Jessberger, *supra* n 139, at 59-60.

209 *The Prosecutor v. Kunarac et al.* (IT-96-23-T), Judgment, Trial Chamber, 22 February 2001, para 439; *The Prosecutor v. Erdemović* (IT-96-22-A), Judgment, Appeals Chamber, 7 October 1997, Joint Separate Opinion of Judge McDonald and Judge Vohrah, para 57; Cassese, *supra* n 26, at 16.

210 *Tadić* Appeal Judgment, *supra* n 2, para 225. See also *Katanga and Chui* Decision on the Confirmation of Charges, *supra* n 7, para 502 (fn 666). More generally, the reference to national law in international proceedings was discussed already in the Nuremberg-era case of *Franz Schonfeld and Nine Others*, where the judges held that “[i]n the present state of vagueness prevailing in many branches of the law of nations... such introduction therein of tested concepts from municipal systems is all to the good, *provided that they are recognized to be in amplification of, and not in substitution for, rules of International Law.*” Trial of Franz Schonfeld and Nine Others, British Military Court, Essen, 11th – 26th June 1946, in UN War Crimes Commission, *Law Reports of Trials of War Criminals*, Vol. XI (London: Published for the United Nations War Crimes Commission by His Majesty’s Stationary Office, 1949), at 72 (*emphasis added*).

statutes constitute a non-exhaustive codification of applicable customary laws which, as the ICTY Appeals Chamber aptly held, “sets out in somewhat general terms the jurisdictional framework within which the Tribunal has been mandated to operate.”²¹⁸ As for the concept of ‘general principles of law’, the Chamber recognized that this is indeed a source of law that the Tribunal can rely on, but concluded that it does not provide support for the JCE theory.²¹⁹ The above explains why the debates on the legal basis and exact definition of this mode of liability are inextricably linked to reviewing and analysing its customary status.

In contrast to the UN *ad hoc* Tribunals, the ICC is a treaty-based court which exercises jurisdiction prospectively: *i.e.* it could adjudicate only on events that have taken place after its founding document, the Rome Statute (‘RS’), entered into force.²²⁰ The practical consequence of this is that the Statute’s content need not be reflective of customary international law: even if one or more of its provisions are not customary in nature, they will still apply to the accused by virtue of the fact that the concerned state had signed and ratified this treaty.²²¹ The sources of applicable law at the International Criminal Court are listed under Article 21(1) RS, which also arranges them in a hierarchical order:

The Court shall apply:

- (a) In the first place, this Statute, Elements of Crimes and its Rules of Procedure and Evidence;
- (b) In the second place, where appropriate, applicable treaties and the principles and rules of international law, including the established principles of the international law of armed conflict;
- (c) Failing that, general principles of law derived by the Court from national laws of legal systems of the world including, as appropriate, the national laws of States that would normally exercise jurisdiction over the crime, provided that those principles are not inconsistent with this Statute and with international law and internationally recognized norms and standards.

That customary international criminal law plays a much less prominent role in the ICC than at the *ad hoc* Tribunals became clear already in the Court’s first decision that adopted the theory of co-perpetration based on joint control over the crime.²²² While the ICTY Appeals Chamber in *Tadić* relied heavily on international custom to adopt the JCE notion, the ICC *Lubanga* Pre-Trial Chamber confined its analysis on the legal basis for using the joint control theory strictly to interpreting the content of the Rome Statute’s provision on modes of liability.²²³ The other sources of law under Article 21 RS, *i.e.* customary law and general principles of law, were not consulted at all. This means that, within the ICC legal

system, customary international law is a secondary source of law relevant only: i) when the ICC founding documents do not provide an answer to the issue at hand; or ii) when it confirms the law provided in the Statute. In cases where a customary rule of international law is contrary to a provision in the Rome Statute, the latter will prevail. This was more recently confirmed in the *Katanga* Trial Judgment, in which the judges held that “it behoves the Chamber to afford precedence to application of the Statute and, in contrast to the [UN] *ad hoc* tribunals, it need not inquire into the existence of a rule of international custom.”²²⁴

Keeping in mind this difference in the UN *ad hoc* Tribunals’ and the ICC’s assessment of the applicable sources of law, the present book will seek to define a theoretical framework of co-perpetration liability that would fit in both paradigms, thus reconciling the jurisprudence of these courts and bringing more uniformity in the field of international criminal law.

1.5.2. Effective legal tool for allocating individual criminal responsibility

As was already explained in Section 1.2 above, international criminal law deals with a distinct form of mass, system criminality, which makes the prosecution of international crimes and the just allocation of individual responsibility exceptionally challenging. The factual complexities that investigators, prosecutors and judges normally have to deal with in international trials are rarely seen in domestic criminal proceedings, which is yet another reason why the mechanical importation of domestic forms of liability in international criminal law can often be unwise. It is this sentiment that has prompted the international tribunals and the commentariat to rethink the traditional borders of criminal responsibility, to construe *sui generis* modes of liability and stress that they “should be interpreted in a way that allows *properly* expressing and addressing the responsibility for [international] crimes”.²²⁵ Accordingly, the second assessment criterion, which the proposed construction of co-perpetration must satisfy, is to provide an *effective* tool for dealing with the predicaments and specificities of prosecuting mass, system criminality.²²⁶ In particular, the said notion should enable the international courts to assign principal liability i) irrespective of the directness/proximity of the accused’s contribution to the concerted crime and ii) notwithstanding the typical factual complexities and evidentiary challenges in this field of law.

The importance of constructing an approach to co-perpetration that is well equipped to deal with the peculiarities of the international criminal law system can hardly be overstated. In an often-quoted dictum, the ICTY Appeals Chamber stressed that the need for a potent mode of joint principal liability is:

²¹⁸ *Milutinović et al.* Appeal Decision on Joint Criminal Enterprise, *supra* n 141, paras 9, 18. See also Schabas, *supra* n 198, at 77.

²¹⁹ *Tadić* Appeal Judgment, *supra* n 2, para 225.

²²⁰ Article 24(1) of the Rome Statute explicitly states that “[n]o person shall be criminally responsible under this Statute for conduct prior to the entry into force of the Statute.” Article 24, ICC Rome Statute, *supra* n 62. See also W. Schabas, *An Introduction to the International Criminal Court* (4th edn, Cambridge: Cambridge UP, 2011), at 70.

²²¹ Cassese, *supra* n 26, at 10; Cryer, *supra* n 138, at 390-405.

²²² *Lubanga* Decision on the Confirmation of Charges, *supra* n 7, paras 338-341.

²²³ *Ibid.*, paras 333-341.

²²⁴ *Katanga* Trial Judgment, *supra* n 30, para 1395. See also *Katanga and Chui* Decision on the Confirmation of Charges, *supra* n 7, para 508; *Ruto, Kosgey and Sang* Decision on the Confirmation of Charges, *supra* n 122, para 289. See also Cryer, *supra* n 138, at 390-405.

²²⁵ *Lubanga* Trial Judgment, *supra* n 7, para 976. (*emphasis added*) See *supra* Section 1.2.1. and Section 1.2.2.

²²⁶ Haan, *supra* n 84, at 175.

warranted by the very nature of many international crimes which are committed most commonly in wartime situations. Most of the time these crimes do not result from the criminal propensity of single individuals but constitute manifestations of collective criminality: the crimes are often carried out by groups of individuals acting in pursuance of a common criminal design. Although only some members of the group may physically perpetrate the criminal act (murder, extermination, wanton destruction of cities, towns or villages, etc.), the participation and contribution of the other members of the group is often vital in facilitating the commission of the offence in question. It follows that the moral gravity of such participation is often no less – or indeed no different – from that of those actually carrying out the acts in question.²²⁷

In this single paragraph, the *Tadić* judges captured one key peculiarity of this field, which was already discussed in the above research,²²⁸ and which has prompted scholars and practitioners to rethink the manner in which criminal responsibility is allocated: *i.e.* international crimes are often the combined product of multiple coordinated contributions, some of which are indirect, yet equally – if not even more – culpable than the direct ones.²²⁹ The challenge in such factual circumstances, which are commonplace in international criminal law, is to assign *perpetration* liability to accused who do not have ‘blood on their hands’, yet for whom it would be patently counterintuitive to conclude that they were mere accessories to the collective crime, given the role they played in it. This problem becomes especially poignant in cases against high-ranking accused, the so-called “intellectual authors” of mass crimes, whose contributions are normally not only indirect, but also structurally remote from the said collective crime. Ascribing (joint) perpetration responsibility to such persons in these circumstances is what Van Sliedregt aptly described as “the Achilles heel of [international criminal law].”²³⁰ Being able to accommodate for this ‘remoteness’ problem is, thus, the first crucial criterion that the proposed theory of co-perpetration must satisfy in order to be an effective tool for trying mass, systemic criminality.

Equally vexing are the practical, evidentiary challenges, which the prosecution of mass criminality presents to the international tribunals. International crimes are often the product of a heterogeneous amalgam of actions, knotted together and made exceedingly difficult to track, due to the nature of such operations and the fact that the authors of these crimes can often rely on the state and military apparatus to conceal their traces. Cassese called this context “the fog of collective criminality”²³¹ and contended that it makes it “extremely difficult to pinpoint the specific contribution made by each individual participant in the collective criminal enterprise,

for (i) not all participants acted in the same manner, but rather each of them may have played a different role [...] (ii) the evidence relating to each individual’s conduct may prove difficult if not impossible to find.”²³² Indeed, as will be shown in Chapter 2, this problem was heavily debated already during the World War II-era trials. Professor Aron Trainin, a Soviet jurist who had struggled to define the criminal responsibility of the Nazi criminal elite, pointed out in his academic work that:

As distinct from common crimes, international crimes are almost always committed not by one person, but by several or many persons - a group, a band, a clique. The accomplices in international crimes are extremely peculiar in their official position and their social composition. These are not some Tom, Dick or Harry of unknown lineage, without hearth or home. These are “titled personages”, upper classes, Ministers, Generals, “leaders”. But the particularly complicated character of responsibility for complicity in international crimes is determined, of course, not by the high ranks and titles of the accomplices. The complexity and exceptional peculiarity of the structure of complicity in international crimes are caused by the extremely complex connections between the individual accomplices in international offences.²³³

and further that:

It is quite obvious that the responsibility of accomplices in international crime is even more complex, because in this case a very extensive network exists, built up out of a whole system of links, with the threads binding together the individual accomplices still more complicated and delicate as a consequence.²³⁴

These are the typical factual complexities of systemic war criminality, in the fog of which “[i]t is often difficult to pinpoint with precision what role a given person played when an international crime is committed in the heat of battle, in a crowded prison camp, or during the course of a chaotic civil war”²³⁵

International criminal law, thus, needs a formulation of co-perpetration liability, which enables courts to effectively deal with the above-said problems of system criminality. To this end, the underlying rationale of both the joint criminal enterprise and the joint control over the crime theories must be assessed against this criterion. Cases from the jurisprudence of the UN *ad hoc* Tribunals and the ICC will also be reviewed that will help to demonstrate the strengths and shortcomings of the “shared intent” and “essential contribution” criteria for differentiating between co-perpetrators and accessories to a collective crime. By comparing them in this way, the effectiveness of these two doctrines of co-perpetration in the context of system criminality could be best evaluated. ‘Effectiveness’ is thus understood here as

227 *Tadić* Appeal Judgment, *supra* n 2, para 191. See also *Kvočka et al.* Appeal Judgment, *supra* n 2, para 80; *The Prosecutor v. Karemera et al.* (ICTR-98-44-T), Decision on the Preliminary Motions by the Defence of Joseph Nzirorera, Édouard Karemera, André Rwamakuba and Mathieu Ndirumapatse Challenging Jurisdiction in relation to Joint Criminal Enterprise, Trial Chamber III, 11 May 2004, para 36.

228 See *supra* Section 1.2.1.

229 See *supra* Section 1.2.1.

230 E. Van Sliedregt, ‘The Curious Case of International Criminal Liability’, 10 *Journal of International Criminal Justice* (2012), at 1174.

231 Cassese, *supra* n 11, at 302.

232 Cassese, *supra* n 145, at 110.

233 A. Trainin, *Hitlerite Responsibility under Criminal Law* (London: Hutchinson & Co, 1945), at 79.

234 *Ibid.*, at 85.

235 Luban, O’Sullivan and Stewart, *supra* n 29, at 858. See also, Cassese, *supra* n 11, at 302; Van Sliedregt, *supra* n 230, at 1173.

a theory's capacity to reach those most blameworthy for the commission of international crimes and assign to them (joint) principal liability, despite the above-stated exigencies of international criminal prosecutions.

1.5.3. *Respect for fundamental principles of criminal justice*

Two fundamental principles of justice are recurrently raised in judicial and academic criticism against the two doctrines of co-perpetration that are currently applied in international criminal proceedings: the principles of culpability (*nulla poena sine culpa*) and legality (*nullum crimen sine lege*), both of which are customary international law and protect the rights of the accused in a criminal process.²³⁶ Indeed, these principles present an important factor for the legitimacy of any legal system.²³⁷ Therefore, a theory of co-perpetration that violates them is unjust and, irrespective of its legal basis and effectiveness, must be jettisoned from international criminal law. As will be shown in Chapter 3, the concept of 'membership in a criminal organization' is one example of a legal construct that has been eschewed in modern international criminal law precisely on such grounds.²³⁸ What then is the exact content of the *nulla poena sine culpa* and *nullum crimen sine lege* doctrines, which the proposed formulation of co-perpetration liability should adhere to?

The principle of *nulla poena sine culpa* literally means "no penalty without fault". This legal canon has been recognized, both by the international courts and in academic writings, as a fundamental principle of international criminal law, pursuant to which "nobody may be held criminally responsible for acts or transactions in which he has not personally engaged or in some other way participated."²³⁹ Indeed, the importance of this principle was stressed already by the International Military Tribunal at Nuremberg.²⁴⁰ Despite the many difficulties that they faced when linking each of the senior Nazi accused to crimes committed in various corners of Europe, the judges rejected the Prosecution's expansive definitions of criminal responsibility. Instead, they asserted that such an adjudication must be made "in accordance with well-settled legal principles, one of the most important of which is that criminal guilt is personal, and that mass punishments should be avoided."²⁴¹ It also bears noting, next to

rejecting punishment for a crime in which the accused did not participate, a second aspect of the principle of culpability is that punishment has to be *proportionate* to the degree of the accused's blameworthiness.²⁴² Thus, the principle of culpability presents an important restraint to the definition of any theory of co-perpetration responsibility: efficiency must be pursued, yet the complexities of systemic criminality cannot be used to justify the imposition of 'collective guilt'/'guilt by association'. The JCE doctrine, and especially its 'extended' variant, has often been criticised for allegedly violating the *nulla poena sine culpa* principle,²⁴³ and certain aspects of the joint control theory have also raised such criticism.²⁴⁴ Thus, upon reviewing and assessing the notions of JCE and joint control, the research must ensure that the proposed construction of co-perpetration under international criminal law respects the principle of culpability.

The principle of *nullum crimen sine lege* is the other fundamental principle of criminal justice that the proposed definition of co-perpetration liability must conform to. It prohibits *ex post facto* application of laws²⁴⁵ and it has been recognised in the case law of the international courts and tribunals, which have confirmed that "a criminal conviction can only be based on a norm which existed at the time the acts or omission with which the accused is charged were committed."²⁴⁶ This consideration is covered by the first criterion of the evaluation framework proposed here.²⁴⁷ As acknowledged in topical case law, however, the principle of legality not only requires that the said law existed and applied to the accused at the material time, but also that it was sufficiently accessible and foreseeable to the accused.²⁴⁸ Concerning the latter, the ICTY *Vasiljević* Trial Judgment observed that the law must have been "defined with *sufficient clarity* for it to have been foreseeable and accessible",²⁴⁹ which the European Court of Human Rights has firmly established to be "satisfied where the individual can know from the wording of the relevant provision and, if need, be with the assistance of the courts' interpretation of it, what acts and omissions will

²⁴² Werle and Burghardt, *supra* n 24, at 304-305; Ohlin, *supra* n 116, at 750.

²⁴³ Ambos, *supra* n 115, at 370; G. Fletcher and J. Ohlin, 'Reclaiming Fundamental Principles of Criminal Law in the Darfur Case' 3 *Journal of International Criminal Justice* (2005), at 54; Danner and Martinez, *supra* n 156, at 137; Boas *et al.*, *supra* n 34, at 419; Ambos, *supra* n 141, at 105.

²⁴⁴ A. Gil Gil and E. Maculan, 'Current Trends in the Definition of 'Perpetrator' by the International Criminal Court: From the Decision on the Confirmation of Charges in the *Lubanga* Case to the *Katanga* Judgment', 28 *Leiden Journal of International Law* (2015), at 360.

²⁴⁵ See *supra* note 195.

²⁴⁶ *Milutinović et al.* Appeal Decision on Joint Criminal Enterprise, *supra* n 141, para 37; *Ieng Sary, Ieng Thirith and Khieu Samphan* Pre-Trial Decision on JCE, *supra* n 158, para 43; *Katanga* Trial Judgment, *supra* n 30, para 50-57.

²⁴⁷ See *supra* Section 1.5.1.

²⁴⁸ *Krnojelac* Appeal Judgment, *supra* n 64, para 220. See also, *Milutinović et al.* Appeal Decision on Joint Criminal Enterprise, *supra* n 141, para 21; *Ieng Sary, Ieng Thirith and Khieu Samphan* Pre-Trial Decision on JCE, *supra* n 158, paras 43-45, 72.

²⁴⁹ *Vasiljević* Trial Judgment, *supra* n 108, para 198. (*emphasis added*)

²³⁶ Werle and Jessberger, *supra* n 139, at 39, 41; Ambos, *supra* n 115, at 369-370; J. Watkins and R. DeFalco, 'Joint Criminal Enterprise and the Jurisdiction of the Extraordinary Chambers in the Courts of Cambodia', 63 *Rutgers Law Review* (2010), at 199-205.

²³⁷ C. Kress, 'Nulla poena nullum crimen sine lege', *The Max Planck Encyclopedia of Public International Law*, Oxford University Press (2010), at para 4.

²³⁸ See Chapter 3, Section 3.2. and Section 3.5.1.

²³⁹ *Tadić* Appeal Judgment, *supra* n 2, para 186; *The Prosecutor v. Taylor* (SCSL-03-01-A), Judgment, Appeals Chamber, 26 September 2013, para 387. See also, A. Cassese, *International Criminal Law* (2nd edn, Oxford: Oxford UP, 2008), at 33; Van Sliedregt, *supra* n 230, at 1171-1173; Werle and Jessberger, *supra* n 139, at 41-42.

²⁴⁰ *France et al. v Göring et al.*, International Military Tribunal, Judgment and Sentence, 1 October 1946, printed in *Trial of the Major War Criminals before the International Military Tribunal, Nuremberg, 14 November 1945-1 October 1946*. Vol. I. Nuremberg, Germany, 1947, at 256.

²⁴¹ *Ibid.*, at 256.

make him criminally liable.”²⁵⁰ Put simply, the legality principle also requires that the legal framework of the said co-perpetration theory has to be ‘sufficiently precise’ (*nullum crimen sine lege certa*),²⁵¹ or as Marsh and Ramsden explained:

whether a crime or mode of liability was foreseeable, the tribunal should assess whether there was ‘specificity’, ‘clarity’, or ‘certainty’ in the elements of liability²⁵²

These requirements affect the legitimacy of both the JCE and the joint control doctrines of co-perpetration. Regarding the latter, for instance, Judge Van den Wyngaert found in her separate opinion to the ICC *Katanga and Chui* Trial Judgment that:

Individuals must have been in a position to know at the time of engaging in certain conduct that the law criminalised it. The Grand Chamber of the European Court of Human Rights has given considerable weight to the elements of “accessibility” and “foreseeability” in its assessment of the legality principle. I doubt whether anyone (inside or outside the [Democratic Republic of Congo]) could have known, prior to the Pre-Trial Chamber’s first interpretations of Article 25(3)(a), that this article contained such an elaborate and peculiar form of criminal responsibility as the theory of “indirect co-perpetration”, much less that it rests upon the “control over the crime” doctrine.²⁵³

As discussed above, the JCE doctrine has also been subject to much criticism that falls in the ambit of the *nullum crimen sine lege certa* principle: *viz.* arguments that this construct’s legal elements are so unclear that it violates the rule of legal certainty.²⁵⁴ It is therefore necessary to examine and refine these problematic aspects in the legal frameworks of the JCE and the joint control theory, before proceedings to discuss which approach to co-perpetration responsibility is better suited for the prosecution of international crimes. To this end, Chapters 3 and 5 of the present book will review at great length the constituent elements of, respectively, JCE and the joint control theory, as defined and further elaborated in the jurisprudence of the international courts and tribunals. In general, any proposed

construction of co-perpetration responsibility in international criminal law must have a clearly defined theoretical framework that conforms to the above-said basic principles of criminal justice.

1.6. Concluding remarks

Judge Schomburg’s words, quoted in the beginning of this chapter, express a concern that has been continuously raised over the past decade: the parallel existence of two competing notions of co-perpetration liability in international criminal law is detrimental for this field. Indeed, as Judge Shahabuddeen observed in his separate opinion to the *Gacumbitsi* Appeals Judgement:

[T]he contribution of an accused to a JCE does not have to be a *sine qua non* of the commission of the crime. Indeed, the contribution does not have to be substantial... By contrast, under the co-perpetratorship theory, since the non-fulfilment by a participant of his promised contribution would “ruin” the accomplishment of the enterprise as visualised, the making of his contribution would appear to be a *sine qua non*. Therefore, though the two theories overlap, they arrive at a point of incompatibility touching guilt or innocence: at that point one theory is wrong, the other right. *This would seem to indicate that only one of the two theories can prevail in the same legal system.*²⁵⁵

This co-existence of two different theories of co-perpetration in international criminal law is a situation that should not be tolerated because it turns this field into a patchwork of conflicting laws and jurisprudence, rather than a coherent body of rules and principles. The very idea that conviction as a principal to a crime may depend on the choice of theory of joint responsibility, *i.e.* on the tribunal that decides the case, shows lack of discipline in the system of international criminal justice and undermines its legitimacy.²⁵⁶ The goal of this thesis is thus to examine in detail the origins, legal framework and merits of the JCE and the joint control theory, in order to propose a construction of what the international law on co-perpetration liability ought to be. For this purpose, it is necessary to carefully revise and compare these two theories and, based on the afore-described assessment framework, determine which approach to co-perpetration is better suited for the purposes of international criminal law.

The establishment of the first permanent international criminal court is without a doubt a culmination of the international community’s efforts to put an end to impunity for those who mastermind the commission of war crimes, crimes against humanity, genocide and the crime of aggression. This being said, the International Criminal Court’s decision to reject *in toto* the theory of joint criminal enterprise and endorse instead the concept of co-perpetration based on joint control over the crime has certainly proven to be one of its most polemical choices.

250 ECtHR (GC) Judgment of 17 May 2010 (Application no. 36376/04), *Kononov v. Latvia*, para 185. It ought to be noted, however, that the Grand Chamber also went on to clarify that: “[a]s regards foreseeability in particular, [...] however clearly drafted a legal provision may be in any system of law including criminal law, there is an inevitable element of judicial interpretation. There will always be a need for elucidation of doubtful points and for adaptation to changing circumstances. Indeed, in certain Convention States, the progressive development of the criminal law through judicial law-making is a well-entrenched and necessary part of legal tradition.” *Ibid.*

251 *Vasiljević* Trial Judgment, *supra* n 108, para 193.

252 L. Marsh and M. Ramsden, ‘Joint Criminal Enterprise: Cambodia’s Reply to *Tadić*’, 11 *International Criminal Law Review* 11 (2011), at 145.

253 *Chui* Trial Judgment, *supra* n 49, Concurring Opinion of Judge Christine Van den Wyngaert, para 20.

254 Cryer has argued that “[f]rom the point of view of fairness to the defendant, the vague, ‘elastic’ nature of the doctrine has led to claims that it is overbroad, thus reliant on prosecutorial discretion rather than law to keep it in check”. See R. Cryer, ‘Prosecuting the Leaders: Promises, Politics and Practicalities’, 1 *Göttingen Journal of International Law* 1 (2009), at 61. See *supra* Section 1.4.2. (text accompanying notes 143-145)

255 *Gacumbitsi* Appeal Judgment, *supra* n 8, Separate Opinion of Judge Shahabuddeen, para 50. (*emphasis added*)

256 Van Sliedregt, *supra* n 13, at 12-13; Sadat and Jolly, *supra* n 138, at 781, 785; Cryer, *supra* n 138, at 394, 404-405.

It led to fragmentation in the field of international criminal law and has raised a number of difficult questions, which continue to cause discord among scholars and practitioners alike. Is the joint control theory, indeed, a panacea to the problems of co-perpetration responsibility reported in the JCE theory and did the ICC have cogent reasons to depart from the long-established ICTY case law? How should international criminal law in general, and the ICC as its future conduit, define the legal elements of this form of individual responsibility? These are some of the most important questions in this field of law, the answers to which remain unsettled and will be the focus of the research in this book.

Back to Nuremberg:
The Genesis of Joint Liability
for International Crimes

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2.1. Introduction

The legal complexities involved in prosecuting top-level state officials for international crimes did not present the contemporary courts and tribunals with a novel problem: rather, they are a predicament, which received its first thorough review over seventy years ago. In the aftermath of World War II, the Governments of the United States of America, the Soviet Union, France and the United Kingdom set on to establish a legal framework for the prosecution of Nazi war criminals. Aware that the crimes at hand were committed *en masse* by a multitude of persons, they sought to construe prosecutorial tools that would effectively deal with the peculiarities of this context of systemic war criminality. The present chapter will examine in detail the content and nature of these legal notions, thus providing the reader with an understanding of how joint responsibility was first ascribed in international criminal law. This will help to understand the subsequent analysis on the modern formulations of co-perpetration liability, as reflected in the joint criminal enterprise (Chapter 3) and the joint control over the crime (Chapter 5) theories.

This research will first review the elusive concepts of ‘conspiracy’ and ‘membership in a criminal organization’: the first two legal tools that were proposed for the prosecution of the Axis leaders before the International Military Tribunal (‘IMT’) and the International Military Tribunal for the Far East (‘IMTFE’). Since the exact meaning of these notions remains unclear and continues to cause controversy, their drafting history and application in post-World War II jurisprudence will be thoroughly examined. It will be demonstrated that their nature was not unequivocal because they were sometimes described as substantive offences and sometimes as modes of liability: a confusion which has persisted to present days and which this chapter will attempt to clarify. Once this analysis has been conducted and the relationship between the two abovementioned notions and the principles of complicity has been reviewed, the attention will be drawn to the third prominent legal concept that was applied in the Nuremberg-era trials: the ‘common purpose/design’ theory. It will be argued that, in its underlying rationale, this notion constituted an early manifestation of co-perpetration liability under international criminal law. This detailed account of World-War II documents and case law on the thorny issue of multiple responsibility will help introduce the reader to those principles of liability which scholars and practitioners continue to struggle with today when defining the framework of co-perpetration.

2.2. ‘Conspiracy’ and ‘Criminal Organizations’: first approach to mass war criminality*

In the field of international criminal law, the legal definition of ‘conspiracy’ and ‘membership in a criminal organization’ has proved to be a contentious issue. While the general consensus in academia and jurisprudence is that they are theories whose international origin can be found

* The research on the concept of conspiracy in Sections 2.2.1. to 2.2.5. was published, with some minor revisions, in L. Yanev, ‘A Janus-Faced Concept: Nuremberg’s Law on Conspiracy vis-à-vis the Notion of Joint Criminal Enterprise’, 26 *Criminal Law Forum* (2015): 419-56.

in the Nuremberg-era trials, their legal nature has been interpreted in two profoundly different manners. Some have treated them strictly as substantive offences¹ and others have argued that these notions were in fact also used as modes of liability:² two standpoints, which, as analyzed in detail in Chapter 3, have greatly influenced our views of the contemporary doctrine of joint criminal enterprise. The following research will thus examine in detail both concepts from the moment of their first formulation in the field of international criminal law to the time of their application in post-World War II case law.

2.2.1. *Introducing the concepts of conspiracy and membership in a criminal organization: Bernays' prosecutorial strategy*

When the International Military Tribunal at Nuremberg started work on 20 October 1945, the task set before it was to try and punish “the major war criminals of the European Axis.”³ Such a venture, however, offered an unprecedented judicial challenge in light of the colossal scope and systemic nature of the committed crimes. This problem was recognized in a memorandum which the US Secretaries of State, War and the Navy sent to President Roosevelt while World War II was still raging:

The attempt to try these crimes on the basis of the separate prosecutions of large numbers of individuals will only make good the Nazi assumption that their crimes would go unpunished if they committed them on a sufficiently grandiose scale. The practical difficulties of proceeding on this basis are almost prohibitive. The crimes to be punished have been committed the world over, and have been participated in by many hundreds of thousands of offenders. Millions of victims and witnesses to these offences have perished.⁴

¹ See e.g. *The Prosecutor v. Milutinović et al.* (IT-99-37-AR72), Decision on Dragoljub Ojdanić's Motion Challenging Jurisdiction – Joint Criminal Enterprise, Appeals Chamber, 21 May 2003, paras 23 and 26. A. Cassese, *Cassese's International Criminal Law* (3rd edn, Oxford: Oxford UP, 2013), at 163; H. Olásolo, *The Criminal Responsibility of Senior Political and Military Leaders as Principals to International Crimes* (Oxford: Hart, 2009), at 34; C. Damgaard, *Individual Criminal Responsibility for Core International Crimes: Selected Pertinent Issues* (Berlin: Springer, 2008), at 188, 191-193; A. Sanders, ‘New Frontiers in the ATS: Conspiracy and Joint Criminal Enterprise Liability after Sosa’, 28 *Berkley Journal of International Law* (2010), at 631-632.

² A. Danner and J. Martinez, ‘Guilty Associations: Joint Criminal Enterprise, Command Responsibility, and the Development of International Criminal Law’, 93 *California Law Review* (2005), at 119; G. Fletcher and J. Ohlin, ‘Reclaiming Fundamental Principles of Criminal Law in the Darfur Case’ 3 *Journal of International Criminal Justice* (2005), at 548-549; H. Van der Wilt, ‘Joint Criminal Enterprise and Functional Perpetration’, in H. Van der Wilt and A. Nollkaemper (eds), *System Criminality in International Law* (Cambridge: Cambridge UP, 2009), at 161, 164; See also *The Prosecutor v. Martić* (IT-95-11-A), Judgment, Appeals Chamber, 8 October 2008, Separate Opinion of Judge Schomburg on the Individual Criminal Responsibility of Milan Martić, para 5.

³ Article 1, Charter of the International Military Tribunal – Annex to the Agreement for the Prosecution and Punishment of the Major War Criminals of the European Axis, (82 UNTS 279), 8 August 1945, reprinted in *Trial of the Major War Criminals before the International Military Tribunal, Nuremberg, 14 November 1945-1 October 1946*. Vol. I (Nuremberg, Germany, 1947), at 10-18.

⁴ *Draft Memorandum for the President from the Secretaries of State, War and Navy, Subject: Trial and Punishment of European War Criminals*, November 11, 1944, re-printed in B. Smith, *The American Road to Nuremberg: The Documentary Record, 1944-1945* (Stanford: Hoover Institution, 1982), at 41.

The fear that the abysmal scale of the Nazi crimes and the sheer number of their perpetrators will form an insurmountable obstacle to prosecution by traditional means was shared by many at the time. It was clear that if mass impunity was to be avoided and judicial action promoted, a prosecution strategy had to be developed: one that could account for the practical difficulties of trying wide-spread and systemic war criminality.

The first such plan to offer legal constructs for trying the Axis war criminals and their subordinates was drafted by Murray Bernays, a lawyer from the U.S. Department of War. In a memorandum dated 15 September 1944, he proposed a two-winged prosecutorial strategy that would eventually leave a visible mark on the IMT and IMTFE Charters.⁵ Bernays recognized the difficulties of applying traditional legal concepts to prosecute the Nazi war criminals and, thus, recommended the adoption of two concepts which were unknown to international law at the time: conspiracy and membership in a criminal organization.⁶ He proposed that the Allies' first step in a judicial process should be to conduct an international mega-trial against the most nefarious organizations of the Third Reich and their respective leaders:

9. The following is therefore recommended for consideration:

- a. The Nazi Government and its Party and State agencies, including the SA, SS, and Gestapo, should be charged before an appropriately constituted international court with *conspiracy to commit murder, terrorism, and the destruction of peaceful populations in violation of the laws of war*.
- b. For the purposes of trial... the prosecuting Nations should bring to the bar only such individual defendants, considered to be representative of the defendant organizations, as they elect.⁷

The idea was, thus, to indict both the Nazi leadership and the organizations which they headed with the charge of conspiracy. For an adjudication of guilt, Bernays argued, the international court “would require no proof that the individuals affected participated in any overt act other than membership in the conspiracy.”⁸ The scope of this notion was additionally expanded in paragraph 10b, which held that “once the conspiracy is established, each act of every member thereof during its continuance and in furtherance of its purposes would be imputable to all other members thereof.”⁹ This framing, as discussed below, altered the classical meaning of conspiracy as an inchoate crime and turned it into an expansive tool for imputing liability: one which the prosecution could use to link each of the major war criminals to virtually the entire spectre of crimes committed by the Nazis during the war. In essence, by proving the existence of an agreement among the accused persons to “commit murder, terrorism, and the destruction of peaceful populations”, they could

⁵ *Subject: Trial of European War Criminals (by Colonel Murray C. Bernays, G-1)*, 15 September 1944, re-printed in Smith, *supra* n 4, at 33-37.

⁶ *Ibid.*, at 35-36.

⁷ *Ibid.*, at 36.

⁸ *Ibid.*, at 36.

⁹ *Ibid.*, at 37.

all be convicted not only of conspiracy as an anticipatory crime, but also of any substantive crimes that subsequently ensued from it. This approach was designed to solve the evidentiary difficulties which the Allies expected to incur when trying to individually link each person at the apex of the Nazi state apparatus to the crimes committed in distant corners of Europe. It provided a very broad prosecutorial net. As for the proposal to also indict the major Hitlerite organizations with this charge of conspiracy, this was necessary for two reasons: i) to reveal and denounce the inherently criminal nature of the Nazi ideology, and ii) to build the doctrinal foundation for the subsequent prosecutions of “minor” Axis war criminals.

Paragraph 9f of Bernays’ plan revealed the second step in his two-pronged strategy, *i.e.* how to try and punish the thousands of soldiers and intermediaries:

f. Thereafter, every member of the mentioned Government and organizations would be subject to arrest, trial and punishment in the national courts of the several United Nations. Proof of membership, without more, would establish guilt of participation in the mentioned conspiracy, and the individual would be punished in the discretion of the court.¹⁰

Thus, after an international judgement on the criminal nature of certain Nazi organizations has been delivered, the Allies could take it to their national courts to try the “small fish” for being members of these structures and, by extension, the conspiracy they represented. This became known as the doctrine of ‘membership in a criminal organization’ which formed the second prosecutorial pillar in Bernays’ plan. In order to secure conviction under it, the prosecutor did not have to prove that the defendant knew of the organization’s criminal activities, or provide evidence of his personal involvement in these acts, or at least demonstrate that he voluntarily joined the criminal structure: it sufficed to merely establish that the accused was a member therein. Factors such as those mentioned above could be taken into account when deciding on the severity of the punishment.¹¹ This approach ensured a time- and cost-efficient system for prosecuting the Nazi mid/low-level war criminals, who at the time were estimated to be more than two million persons.¹²

2.2.2. Reviewing the law on conspiracy and criminal membership

Bernays’ plan was innovative and offered compelling solutions to the practical impossibilities of prosecuting the Axis war criminals, which is why it managed to gain considerable support from other senior US state officials.¹³ Notwithstanding this, however, its doctrinal foundations suffered from legal deficiencies, which were so fundamental that they soon attracted criticism. The highlights of the ensuing legal debates are explored here in order to explain the meaning

and the incoherencies of the notions that Bernays constructed. This will subsequently serve to elucidate how they differed from the modern-day theories of co-perpetration.

2.2.2.1. Conspiracy

Being a US lawyer, it was only natural that Bernays drew heavily from Anglo-American law when drafting his proposal on the Nuremberg prosecutorial strategy. Conspiracy, in particular, is a common law concept, which at the time was unknown in European legal culture.¹⁴ Courts had defined it as an inchoate crime, which is completed when two or more individuals form an agreement to engage in unlawful conduct.¹⁵ Its *actus reus* is thus the very act of agreeing with other individuals to commit a crime and its *mens rea* is the intent to agree and to carry out the agreement’s substantive offence(s).¹⁶ Accordingly, when adjudicating on conspiracy guilt, it is immaterial whether the agreement was ultimately executed, *i.e.* whether the projected offence was committed.¹⁷ If it was, the responsibility of the conspirator for this substantive crime is independent from the conspiracy charge and is determined using the principles of complicity. Following this rationale, an accused may be found guilty both of conspiracy to murder *and* of, for instance, aiding and abetting murder; however, it could also happen that the judges convict him of the conspiracy charge but acquit him of the substantive crime.¹⁸

¹⁴ H. Ehard, ‘The Nuremberg Trial against the Major War Criminals and International Law’, 43 *American Journal of International Law* (1949), at 226-227; S. Pomorski, ‘Conspiracy and Criminal Organization’, in G. Ginsburgs and V. Kudriavtsev (eds), *The Nuremberg Trial and International Law* (Dordrecht: M. Nijhoff, 1990), at 218; G. Fletcher, *Rethinking Criminal Law* (Oxford: Oxford UP, 2000), at 219; E. Van Slieght, *Individual Criminal Responsibility in International Law* (Oxford: Oxford UP, 2012), at 179; Danner and Martinez, *supra* n 2, at 115.

¹⁵ *Mulcahy v. R.* (1868) LR 3 HL 306, at 317; *United States v. Hirsch*, 100 U.S. 33 (1879), at 34; *Pettibone v. United States* 13 S.Ct. 542 (1893), at 545; *United States v. Falcone*, 61 S.Ct. 204 (1940), at 207. The crime of conspiracy had been defined as the “confederation of two or more persons to accomplish by concerted action an *unlawful* purpose, or a lawful purpose by *unlawful* means.” A. Harno, ‘Intent in Criminal Conspiracy’, 89 *University of Pennsylvania Law Review* (1941), at 628. See also Taylor, *supra* n 11, at 36; Fletcher, *supra* n 14, at 218; D. Ormerod, *Smith and Hogan’s Criminal Law* (13th edn, Oxford: Oxford UP, 2011), at 423-424; H. Wechsler, W. Jones and H. Korn, ‘The Treatment of Inchoate Crimes in the Model Penal Code of the American Law Institute: Attempt, Solicitation, and Conspiracy’, 61 *Columbia Law Review* (1961), at 958.

¹⁶ Harno, *supra* n 15, at 628, 631 *et seq*; A. Cassese, *International Criminal Law* (2nd edn, Oxford: Oxford UP, 2008), at 227; Ormerod, *supra* n 15, at 426. As part of the *actus reus* element, there are some jurisdictions that also require an “overt act in furtherance of the criminal agreement”: *i.e.* an act, no matter how insignificant, carried out in furtherance of the conspiracy by one of the co-conspirators. See P. Johnson, ‘The Unnecessary Crime of Conspiracy’, 61 *California Law Review* (1973), at 1142-1143; Wechsler, Jones and Korn, *supra* n 15, at 1003. It has been noted, however, that “overt acts can be entirely innocent ones and are therefore not difficult to make out. Many [US] state and federal statutes, and the common law version of conspiracy, do not even require proof of an overt act.” D. Luban, J. O’Sullivan and D. Stewart, *International and Transnational Criminal Law* (New York: Aspen, 2010), at 879.

¹⁷ As Ormerod explains, “[o]nce the parties have agreed [to commit a crime], the conspiracy is complete, even if they take no further action because, for example, they are arrested.” The conclusion of the agreement marks the commission of the offence, and if one of the parties immediately after that repents and withdraws from the plan, he is still guilty of conspiracy – a point that Ormerod calls “the crucial distinction between inchoate offending and liability as a secondary party.” See D. Ormerod, *Smith and Hogan Criminal Law* (12th edn, Oxford: Oxford UP, 2008), at 400, 402. See also R. Cryer *et al.*, *An Introduction to International Criminal Law and Procedure* (3rd edn, Cambridge: Cambridge UP, 2014), at 356.

¹⁸ Cassese, *supra* n 16, at 227; Wechsler, Jones and Korn, *supra* n 15, at 960; Johnson, *supra* n 16, at 1150-1151; A. Cassese, ‘On the Use of Criminal Law Notions in Determining State Responsibility for Genocide’, 5 *Journal of International Criminal Justice* (2007), at 880; L. Schleicher and D. Stoldt, ‘Federal Criminal Conspiracy’, 30 *American Criminal Law Review* (1992-1993), at 685-686.

¹⁰ *Ibid.*

¹¹ T. Taylor, *The Anatomy of the Nuremberg Trials: A Personal Memoir* (New York: Knopf, 1992), at 36.

¹² H. Wechsler, ‘The Issues of the Nuremberg Trial’, 62 *Political Science Quarterly* (1947), at 21.

¹³ Smith, *supra* n 4, at 52-53.

Bernays' conspiracy was a rather different sort of creature, a controversial amalgam of conspiracy proper and accomplice liability.¹⁹ Pursuant to it, a Nazi leader who agreed with the Hitlerite criminal plan, *without taking any further steps to participate in its realization*, could be found guilty of: i) the crime of conspiracy to commit murder, terrorism, and the destruction of peaceful populations; *and* ii) all the underlying crimes which followed from this conspiracy and could be attributed to at least one of its other members.²⁰ In other words, the only inquiry that had to be made to impute responsibility for the substantive crimes of the conspiracy was whether the accused was a co-conspirator: *i.e.* it was unnecessary to ask any further questions regarding the specific conduct of the accused in relation to the execution of these crimes. This aspect of Bernays' conspiracy notion was particularly troubling because it imputed accomplice liability without upholding the basic requirements for doing so: *viz.* that the accused, through a positive act or omission, participates/assists in the actual perpetration of the projected crime.²¹ The mere act of agreeing to a criminal plan does not satisfy this requirement. Among the first to point at this legal anomaly was Herbert Wechsler, the US Assistant Attorney General at the time. He addressed this matter at length

in a memorandum that he sent to his superior, Francis Biddle, who less than a year later was appointed as the US Judge in the International Military Tribunal.²² Wechsler wrote:

In connection with multiple liability, it should be noted that some confusion may be engendered by the terminology of [Bernays' plan]... I should suppose that what is really to be condemned as criminal is not the inchoate crime of conspiracy but rather the actual execution of a criminal plan. The theory of conspiracy affords a proper basis for reaching a large number of people, no one of whom engaged in all of the criminal conduct, but it is an error to designate as conspiracy the crime itself... The point is rather that *multiple liability for a host of completed crimes is established by mutual participation in the execution of the criminal plan*. The Nazi leaders are accomplices in a completed crime *according to the concepts of accessorial liability* common, I believe, to all civilized legal systems.²³

Wechsler essentially rose two important objections: i) the Nazi elite had to be prosecuted not for some grand anticipatory crime (*i.e.* the Hitlerite conspiracy), but for the actual crimes that ensued from it, and ii) the mere agreement to commit these crimes was not a sufficient legal basis for imputing liability for their commission: it had to be established that the ringleaders mutually participated in the execution of the said criminal plan.

It should be noted that Wechsler's critical analysis on this point was, if not "common... to all civilized legal systems", certainly consistent with how civil law jurisdictions interpreted the notions which Bernays conflated in his memorandum. This was a relevant consideration to take into account when suggesting a novel legal construct for trying German nationals. August von Knieriem, a lawyer and a defendant in one of the subsequent Nazi trials,²⁴ addressed this same issue a few years after his acquittal in a manner akin to Wechsler's reasoning:

Nor does what is called plot or gangsterism constitute participation. A plot is the agreement between several persons to commit a specific crime. Gangsterism is the association of several persons to commit crimes which are as yet indefinite. If the crimes planned are actually committed, they are punished according to the general rules concerning principals or accessories, as the case may be. If six persons have made a plot to commit a murder and two of them then actually commit the murder jointly, these two are punished for murder as co-actors. Whether or not the other four are criminally responsible for the murder depends on whether they are in any way accessories. The agreement itself does not constitute participation, unless it actually constitutes an instigation of the as yet undecided actors. Nor do the acts of some members of a gang result in the punishment of those associates who have not participated in these acts. Insofar as plotting and gangsterism are considered punishable at

19 In the United States, Bernays' expansive variant of the traditional conspiracy rule was soon to become known as the "Pinkerton doctrine/conspiracy". In June 1946, almost two years after Bernays wrote his memorandum, the US Supreme Court adopted this notion in the case of *Pinkerton v. United States*. Walter and Daniel Pinkerton were two brothers indicted with the crime of conspiracy and with ten substantive crimes, which resulted from that conspiracy. The judges recognized that "[t]here is... no evidence to show that Daniel participated directly in the commission of the substantive offenses... although there was evidence to show that these substantive offenses were in fact committed by Walter in furtherance of the unlawful agreement or conspiracy existing between the brothers." The majority decided that this was a sufficient basis to find Daniel guilty not only of conspiracy but also of the substantive crimes committed by his brother. Justice Rutledge wrote a strong dissenting opinion in which he criticized this reasoning and even questioned its constitutionality. He restated that there was no proof "to establish that Daniel participated in [the substantive crimes], aided and abetted Walter in committing them, or knew that he had done so. Daniel in fact was in the penitentiary, under sentence for other crimes, when some of Walter's crimes were done." The only evidence against Daniel was that he had earlier formed an agreement to commit a crime with his brother, leading Justice Rutledge to observe that "because of that agreement without more on his part Daniel became criminally responsible as a principal for everything Walter did thereafter in the nature of a criminal offense of the general sort the agreement contemplated." This, in Justice Rutledge view, was an unacceptable expansion of the traditional limits of the conspiracy doctrine, and he dreaded "[t]he looseness with which the charge may be proved, the almost unlimited scope of vicarious responsibility for others' acts which follows once agreement is shown". In his dissent, Justice Rutledge was also joined by Justice Frankfurter. See *Pinkerton v. United States*, 328 U.S. 640 (1946), 645, 648, 650, 651. The Pinkerton doctrine proved to be extremely controversial and the influential US Model Penal Code entirely rejected it. American Law Institute, *Model Penal Code and Commentaries (Official Draft and Revised Commentaries): With Text of Model Penal Code as Adopted at the 1962 Annual Meeting of the American Law Institute at Washington, D.C., May 24, 1962* (Philadelphia: American Law Institute, 1985), at 307. It has also been denounced by the greater majority of states within the United States of America and has not been accepted in other common law jurisdictions. R. Singer and J. La Fond, *Criminal Law* (4th edn, Austin: Wolters Kluwer Law & Business/Aspen, 2007), at 328-329; Luban, O'Sullivan and Stewart, *supra* n 16, at 880.

20 See *supra* text accompanying notes 8-9. Pomorski, *supra* n 14, at 216.

21 *The Prosecutor v. Akayesu* (ICTR-96-4-T), Judgment, Trial Chamber, 2 September 2008, paras 525-548; *The Prosecutor v. Semanza* (ICTR-97-20-T), Judgment, Trial Chamber, 15 May 2003, paras 393, 395; *Interlocutory Decision on the Applicable Law: Terrorism, Conspiracy, Homicide, Perpetration, Cumulative Charging* (STL-11-01/I/AC/R176bis), Decision, Appeals Chamber, 16 February 2011, paras 218-227. See also F. Giustiniani, 'The Responsibility of Accomplices in the Case-Law of the *Ad Hoc* Tribunals', 20 *Criminal Law Forum* (2009), at 426-427.

22 Memorandum for the Attorney General (Francis Biddle) from the Assistant Attorney General (Herbert Wechsler), 29 December 1944, re-printed in Smith, *supra* n 4, at 84-90.

23 *Ibid.*, at 87. (*emphasis added*)

24 August von Knieriem was one of the 23 defendants in the *Farben* case. See Military Tribunal VI, *United States of America v. Carl Krauch et al.* ("The *Farben* Case"), Case No.6, 27 August 1947-30 July 1948, in *Trials of War Criminals before the Nuernberg Military Tribunals under Control Council Law No. 10, Nuernberg, October 1946-April, 1949*, Vols. VII and VIII (Washington, D.C.: United States Government Printing Office, 1952).

all, they are defined as special crimes. In such cases any member can be punished for plotting and gangsterism as such, but not for the crimes actually committed by others.²⁵

Wechsler's criticism gained momentum and on 22 January 1945 the Attorney General, joined by the Secretaries of State and War, signed and sent to Roosevelt the so-called "Yalta memorandum", which preserved Bernays' vision of a two-staged prosecution but replaced his contentious conspiracy construct with what they called "joint participation in a broad criminal enterprise which included and intended these crimes, or was reasonably calculated to bring them about."²⁶ Seeking to avoid prosecution based on novel and obscure concepts, the authors recommended that the Nazi leaders be tried with the help of this mode of liability, which was in their view:

firmly founded upon the rule of liability, common to all penal systems and included in the general doctrines of the laws of war, that those who participate in the formulation and execution of a criminal plan involving multiple crimes are jointly liable for each of the offenses committed and jointly responsible for the acts of each other.²⁷

Wechsler's rebuttal of the conspiracy-complicity construct obviously struck a chord. What the drafters of the Yalta memorandum recommended was a concept of multiple liability that came very close to the modern-day JCE doctrine. It is more than the analogical labelling, *i.e.* "joint (participation in a broad) criminal enterprise": there is an overlap of the underlying principles. The proposal described a plurality of individuals who *mutually* execute a pre-agreed plan. The plan intends the commission of crimes: an intent, which unites the participants and determines their subsequent cooperation in carrying out that plan. This is the legal basis on which the acts of any one of them can be reciprocally imputed to the others in the group, so that ultimately all participants in the plan are held fully responsible for the entire crime.

The memorandum drafted by the US Attorney General and the Secretaries of State and War was not the last one on this issue. Nevertheless, its definition of the principles of liability to be applied against the Nazi war criminals was reiterated verbatim in the proposal which the United States ultimately presented to its European Allies at a conference held

in San Francisco in April 1945.²⁸ While this seemed to put an end to all talks regarding the conspiracy concept, the truth of the matter, as discussed below, turned out to be quite different.

2.2.2.2. *Membership in a criminal organization*

When Bernays constructed the notion of 'membership in a criminal organization' in paragraph 9f of his memorandum,²⁹ he shaped it as an extension of his conspiracy-complicity notion. As already explained, he proposed that the most prominent Nazi organizations should be charged and convicted of the same grand conspiracy as that alleged against Hitler and his top officials. The idea was that if the international tribunal convicted a Nazi agency on this charge, national courts could subsequently convict all of its members. This construction of the law on criminal membership raised an important question: of what crime exactly was the accused – a member of such an organization – convicted? The analysis provided below shows that there were three possible ways to interpret paragraph 9f of Bernays' original memorandum: i) as defining guilt for criminal membership (*i.e.* an independent crime); ii) as establishing guilt for the aforesaid grand Hitlerite conspiracy (pursuant to paragraph 9a); iii) as a form of accomplice liability that could be used to hold members of the criminal organization responsible for substantive crimes committed by its other agents.

Bernays' prosecutorial strategy did not establish a clear definition of the 'membership in a criminal organization' construct. On the face of it, it seemed that the lesser Nazi criminals were to be convicted precisely of the self-sufficient *crime of membership* (in *e.g.* the Gestapo), which did not entail responsibility for the commission of substantive crimes.³⁰ Participation in a criminal group is an independent offence which at the time also existed in the penal codes of France and the Soviet Union,³¹ and in general has been known in European legal culture.³² A modern-day statement of the objective and subjective elements of the crime of membership in a criminal organization could be found in, for instance, the

²⁸ The San Francisco Conference was convened by the US in an effort to reach a common understanding that the Nazi arch-criminals should be subjected to a judicial process, rather than summary executions. The prosecutorial strategy which the US proposed to the British, Soviet and French delegations eschewed the notion of conspiracy altogether and instead clarified that the trials against the Nazi war criminals will be based on "the rule of liability, common to most penal systems and included in the general doctrine of the laws of war, that those who participate in the formulation and execution of a criminal plan involving multiple crimes are jointly liable for each of the offenses committed and jointly responsible for the acts of each other." It was further explained that the highest ranking German leaders will be charged before an international military tribunal "with complicity in the basic criminal plan", which would require an adjudication on "the nature and purposes of the criminal plan, the identity of the groups and organizations guilty of complicity in it, and the acts committed in its execution." *Memorandum of Proposals for the Prosecution and Punishment of Certain War Criminals and Other Offenders*, 25-30 April 1945, re-printed in Smith, *supra* n 4, at 165-166.

²⁹ See *supra* text accompanying notes 10-11.

³⁰ See *e.g.* Van Slieght, *supra* n 14, at 24; B. Bonafé, *The Relationship between State and Individual Responsibility for International Crimes* (Leiden: Martinus Nijhoff, 2009), at 170-172.

³¹ R. Arens, 'Nuremberg and Group Prosecution', 3 *Washington University Law Quarterly* (1951), at 340-341.

³² Danner and Martinez, *supra* n 2, at 117; E. Wise, 'RICO and Its Analogues: Some Comparative Considerations', 27 *Syracuse Journal of International Law and Commerce* (2000), at 316-317.

²⁵ A. Von Knieriem, *The Nuremberg Trials* (Chicago: H. Regnery, 1959), at 204.

²⁶ *Memorandum for the President, Subject: Trial and Punishment of Nazi War Criminals*, 22 January 1945, re-printed in Smith, *supra* n 4, at 120. The Yalta memorandum, also known as the Crimean proposal, formed an important stepping stone in the formulation of the final prosecution strategy proposal which the United States ultimately presented to its European Allies in San Francisco, short before the London Conference.

²⁷ *Ibid.* (emphasis added)

United Nations Convention against Transnational Organized Crime.³³ In accordance with Article 5(a)(ii), a person is guilty of this crime when:

- with knowledge of either the aim and general criminal activity of an organized criminal group or its intention to commit the crimes in question, takes an active part in:
 - a. Criminal activities of the organized criminal group;
 - b. Other activities of the organized criminal group in the knowledge that his or her participation will contribute to the achievement of the above-described criminal aim

Paragraph 9f of Bernays' plan evidently construed a much more diluted normative framework for the crime of Nazi membership: it proposed that proof of membership alone '*without more*' was sufficient to find the defendant guilty.³⁴ It was neither necessary to show that he intended the organization's criminal goals, nor that he, at the least, knew of them. Moreover, it was not required to establish that the accused voluntarily subscribed to, and actively participated in the agency.³⁵ Thus, the crime that Bernays constructed had one broad *actus reus* requirement (*i.e.* membership in the organization) and lacked a *mens rea* element. In this sense, its legal content was even looser than that of the inchoate crime of conspiracy. In addition to this, the proposal that the criminal nature of the said organization would have been previously established in an international trial, in which the accused was not a party, further highlighted the controversial nature of this 'membership crime'. In practice, Bernays' subsequent trials of 'secondary' Nazi criminals would have had a purely administrative character and not a judicial one, because the only point to be ascertained for a conviction would have been whether the accused was in fact a member of the given Nazi agency or not.

Paragraph 9f of Bernays' plan, however, lent itself to an even broader interpretation. It held that proof of membership alone will be sufficient to "establish guilt of participation in the mentioned conspiracy". This went on to suggest that the accused's membership in a convicted Nazi organization was not so much the crime in itself, but rather the means of establishing his participation in, and thereby guilt for, the alleged grand conspiracy. Bernays line of reasoning seemed to be that when the judges convict a Nazi agency, such as the Gestapo, of "conspiracy to commit murder, terrorism, and the destruction of peaceful populations", they do in practice declare the Gestapo *to be* this criminal conspiracy. Consequently, all of its members could be considered co-conspirators, guilty of this grand Hitlerite conspiracy. Expounding on this very hypothesis, Wechsler argued that Bernays' criminal organizations concept was designed "[f]or those persons who are not physically before the [international tribunal] in the basic conspiracy trial but who are nevertheless to

be charged with participation in the conspiracy."³⁶ By logical inference, this meant that Bernays' plan made guilt for membership in a criminal organization equivalent to conspiracy guilt (*viz.* the Hitlerite conspiracy of which the organization had been convicted). Since the legal requirements for proving membership guilt were even more diluted than those for conspiracy, this caused an important discrepancy. To convict a Nazi ringleader, such as Heinrich Himmler (head of the SS), the prosecution would have had to follow the law on conspiracy and prove the elements of this offence: *i.e.* that there existed a plan to "commit murder, terrorism, and the destruction of peaceful populations" and that Himmler agreed to it and intended to carry it out. To then convict low- and mid-ranking SS officers of participation in this conspiracy, Bernays proposed the doctrine of 'membership in a criminal organization', which in his view only required proving that they were members in the SS, *and nothing more*. Not only was this approach legally incoherent but, as Wechsler pointed out in his document to the US Attorney General, it in fact equated the blameworthiness of the Nazi leaders to that of any rank-and-file member of the said agency.³⁷

If Bernays' concept of criminal membership was indeed akin to conspiracy, then could it perhaps also embrace the rationale of the expansive conspiracy-complicity concept? In other words, was 'membership in a criminal organization' strictly a crime, or was it also conceived as a mode of criminal participation that would allow attributing to the accused the substantive crimes committed by other members of the criminal organization? In his memoirs of the Nazi trials, Telford Taylor indeed described this concept as "a juridical device to eliminate the need to prove complicity of the individual members of the organizations... which were responsible for many if not most of the crimes, by making membership itself sufficient proof of guilt."³⁸ It is showing that subsequent U.S. inter-departmental debates and revisions of Bernays' original plan also followed this interpretation.³⁹ Thus, for instance, the Yalta memorandum held that "[t]hereafter, there would be brought before

36 Memorandum for the Attorney General (Francis Biddle) from the Assistant Attorney General (Herbert Wechsler), 29 December 1944, re-printed in Smith, *supra* n 4, at 88. Wechsler, thus, did not see this construct as substantially different from the main conspiracy charge, but rather as a tool created to "meet the practical difficulty that would be encountered if it were necessary to prove the basic facts of the conspiracy and the participation in it of particular agencies and organizations over and over again". See also Pomorski, *supra* n 14, at 226.

37 Wechsler wrote in his memorandum to the US Attorney General: "I seriously doubt the wisdom of attempting to charge [members of criminal organizations] who are not included in the category of "higher ups" with complicity in the broad charge of criminality to be levelled at the prime leaders. As to such persons – and there will undoubtedly be hundreds, if not thousands – I should favor attempting to reach and punish them only for the particular violations of national laws or the laws and customs of warfare in strictly judicial proceedings... I hold this view largely, because, in my opinion, there is a real danger that the force of the broad criminal charge against the leaders may be seriously weakened in the eyes of the world if too many individuals are included in it." Memorandum for the Attorney General (Francis Biddle) from the Assistant Attorney General (Herbert Wechsler), 29 December 1944, re-printed in Smith, *supra* n 4, at 88-89 (new paragraph omitted).

38 Taylor, who was the Chief US Prosecutor in the subsequent Nazi trials, contended that this was Bernays' vision on organizational liability. Taylor, *supra* n 11, at 41.

39 See e.g. Memorandum for the President, Subject: Trial and Punishment of Nazi War Criminals, 13 January 1945, re-printed in Smith, *supra* n 4, at 101-102; Memorandum for the President, Subject: Trial and Punishment of Nazi War Criminals, 22 January 1945, re-printed in Smith, *supra* n 4, at 120-121.

33 UN General Assembly, *United Nations Convention against Transnational Organized Crime : resolution / adopted by the General Assembly*, 8 January 2001, A/RES/55/25, available at: <http://www.unhcr.org/refworld/docid/3b00f55b0.html> [accessed 17 July 2016].

34 See *supra* text accompanying notes 10-11.

35 *Ibid.*

occupation courts... members of the organizations *who are charged with complicity through such membership*, [but] against whom there is [not sufficient proof] of specific atrocities.”⁴⁰ This meant that the accused’s membership was seen not so much as a crime itself, but as a ground for accomplice liability. The language used in at least one of the subsequent Nazi trials to convict an accused of a membership charge seems to confirm this interpretation. In the trial of *Karl Brandt et al.* (the *Medical* case), the defendants were charged under Count 4 with membership in the SS: a Nazi organization that the IMT had previously declared criminal. For each accused who was eventually convicted pursuant to this charge, the Tribunal concluded that “[a]s a member of the SS *he was criminally implicated in the commission of war crimes and crimes against humanity*, as charged under counts two and three of the indictment.”⁴¹ Thus, their SS membership was viewed once as a substantive crime (under Count 4), and once as a mode of liability that linked the accused to the crimes charged elsewhere in the indictment. Inasmuch as Bernays’ organizational responsibility could be said to mimic the concept of conspiracy-complicity, it is subject to much the same criticism.⁴²

There were plenty of reasons to be critical of Bernays’ formulation of ‘membership in a criminal organization’. He did not clearly define the nature and outer limits of this notion in his original proposal, which made it very vague and highly malleable. Furthermore, its single requirement, namely proof of mere membership, placed it at odds with the basic principle of individual culpability (*nulla poena sine culpa*) which states that no one shall be punished for a crime that he did not commit or in the commission of which he did not participate.⁴³ It may be said thus that Bernays’ organizational liability was a tool ascribing guilt by association. While such criticism would not be amiss, the truth was that, short of accepting mass impunity for the Nazi atrocities, there were no alternatives to Bernays’ proposal. Time was running out and no other US department was ready with a better judicial construct for dealing efficiently with the dismal perspective of prosecuting hundreds of thousands of secondary Nazi criminals. For this reason, the ensuing US inter-departmental debates and revisions of Bernays’ ‘membership in a criminal organization’ concept, focused on addressing its major deficiencies and strengthening its legal framework, rather than replacing it. The final prosecutorial strategy, which the United States proposed to its

European Allies at the San Francisco Conference two months before the London Conference where the IMT Charter was agreed upon, compiled the changes made:

Upon conviction of an organization hereunder, the tribunal shall make written findings and enter written judgment finding and adjudicating the charges against such organization and the representative members on trial. Such findings and judgment shall be given full faith and credit with respect to the criminal purposes and activities of the organization in any subsequent trial hereunder of a person charged with *criminal liability through membership in such organization*. Upon proof of such membership the burden shall be upon the defendant to establish any circumstances relating to his membership or participation therein which are relevant either in defense or in mitigation.⁴⁴

Several important modifications to the notion of ‘membership in a criminal organization’ can be seen in this excerpt from the proposed prosecutorial strategy. To begin with, the document rejects the assumption that membership guilt could be equated to guilt for the grand Hitlerite conspiracy: a problem which, as pointed out above, Wechsler had with Bernays’ original plan. In fact, here the concept is presented not so much as an independent crime, but as a mode of liability, which makes the accused’s membership in a Nazi organization the basis on which he can be found liable for specific crimes. Next to this, the proposal explicitly acknowledges that judges could consider particularities of the person’s membership (*e.g.* involuntariness, limited participation etc.) either in his defence or in mitigation of his sentence. While there is still no explicit mention of any *mens rea* requirement, the last sentence appears to follow the rationale expressed in an earlier draft of this document which stated that “proof [of membership] would place upon the defendant the burden of exculpation, as, for example, by establishing that he joined the organization without knowledge of its criminal purposes.”⁴⁵ The latter view should be emphasized here because, as revealed further below, this was the approach to the *mens rea* element of membership liability which the US, British, Soviet and French delegates ultimately agreed upon at the London Conference.

2.2.3. Drafting the IMT Charter: the London negotiations on conspiracy and membership in a criminal organization

Between 26 June and 9 August 1945 the delegations of the United States of America, France, the United Kingdom and the Soviet Union met at a conference in London to discuss and draft the principles of substantive and procedural criminal law that would eventually

40 The memorandum was drafted by the US Attorney General and the Secretaries of State and War and was sent to President Roosevelt on 22 January 1945. See Yalta memorandum, *supra* note 26, at 120-121. It further went to explain: “In these subsequent trials, therefore, the only necessary proof of guilt of any particular defendant would be his membership in one of these organizations. Proof would also be taken of the nature and extent of the individual’s participation. The punishment of each defendant would be made appropriate to the facts of his particular case.”

41 Military Tribunal I, *United States of America v. Karl Brandt et al.* (“The Medical Case”), Case No. 1, 9 December 1946 – 19 August 1947, in *Trials of War Criminals before the Nuernberg Military Tribunals under Control Council Law No. 10, Nuremberg, October 1946-April, 1949*, Vol. II (Washington, D.C.: United States Government Printing Office, 1949), at 198, 241, 263, 281, 290, 297.

42 For a critical analysis on the conspiracy-complicity concept, see *supra* Section 2.2.2.1.

43 See *e.g.* *The Prosecutor v. Tadić* (IT-94-I-A), Judgment, Appeals Chamber, 15 July 1999, para 186. See also E. Van Sliedregt, ‘The Curious Case of International Criminal Liability’, 10 *Journal of International Criminal Justice* (2013), at 1171-1172.

44 *American Draft of Definitive Proposal, Presented to Foreign Ministers at San Francisco, April 1945*, Document IV, in R. Jackson, *Report of Robert H. Jackson, United States Representative to the International Conference on Military Trials, London, 1945* (Washington, D.C.: Dept. of State, Division of Publications, Office of Public Affairs, 1949), at 25. (*emphasis added*)

45 *Memorandum for the President, Subject: Trial and Punishment of Nazi War Criminals*, 13 January 1945, re-printed in Smith, *supra* n 4, at 101. See also Pomorski, *supra* n 14, at 220.

be enshrined in the Charter of the International Military Tribunal at Nuremberg.⁴⁶ It took no great foresight to predict that the notions of conspiracy and membership in a criminal organization would fall at the epicentre of the legal disputes amongst the Allies.

2.2.3.1. *The travaux préparatoires on conspiracy*

The American delegation at the London Conference was headed by Robert Jackson, the future US Chief Prosecutor at the IMT. Prior to travelling to London, he took charge of a number of revisions of the US prosecutorial strategy, some of which watered down the formulation of the principles of liability proposed to the Allies at the San Francisco Conference.⁴⁷ Then, when he met his colleagues from the Soviet, French and British delegations at the London Conference, he told them that the conspiracy concept lay at “the heart of our proposal.”⁴⁸ The record of the ensuing negotiations could help us understand how the delegates viewed the conspiracy notion and, thus, provide a reliable indicator of the legal meaning that they attributed to it under what ultimately became Article 6 IMT Charter.

The *travaux préparatoires* of the IMT Charter unequivocally show that Robert Jackson was the driving force behind the inclusion of the conspiracy concept in Article 6, yet they also reveal a somewhat confusing account on the precise meaning that he attached to it. On the one hand, he explicitly recognized its nature as a substantive crime,⁴⁹ as did the British delegation, which stated that “the chief crime of which it is alleged that the leaders in Germany are guilty is the common plan or conspiracy to dominate Europe”.⁵⁰ On the other hand, at times Jackson also defined “the principle of conspiracy by which one who joins in a common plan to commit crime becomes responsible for the acts of any other conspirator in executing the plan.”⁵¹ This latter interpretation seemed to bring back the conspiracy-complicity concept that, as originally defined in Bernays’ memorandum, regarded the sole act of agreeing to a criminal design (*viz.* joining it) as a sufficient legal basis to impute liability for the substantive crimes committed in pursuance of the said conspiracy. However, a careful study of Jackson’s statements during this period demonstrates that it is unlikely that he actually sought to implement Bernays’ views on conspiracy into the Charter of the IMT.

It is well known that the civil law allies at the London Conference were determined to exclude any reference to the conspiracy concept from the IMT Charter. Jackson himself stated a couple of years after these negotiations that “there was a significant difference of viewpoint concern[ing] the principles of conspiracy as developed in Anglo-American law, which are not fully followed nor always well regarded by Continental jurists.”⁵² Bradley Smith, who was an eminent historian and commentator of the Nuremberg process, offered a more vivid and often quoted narrative of the French and Soviet disapproval of the conspiracy concept:

During much of the discussion, the Russians and French seemed unable to grasp all the implications of the concept; when they finally did grasp it, they were genuinely shocked. The French viewed it entirely as a barbarous legal mechanism unworthy of modern law, while the Soviets seemed to have shaken their head in wonderment – a reaction, some cynics may believe, prompted by envy. But the main point of the Soviet attack on conspiracy was that it was too vague and so unfamiliar to the French and themselves, as well as to the Germans, that it would lead to endless confusion.⁵³

The French reacted by submitting a counter-proposal that left out the conspiracy notion in its entirety and instead stated that the Tribunal will have jurisdiction to try individuals who “in any capacity whatsoever, directed the perpetration and conduct of” international crimes.⁵⁴ Professor Gros, who headed the French delegation, elaborated on this draft by explaining that the Hitlerite ringleaders “who have planned invasions and atrocities are responsible for all the atrocities which have been committed in execution of that plan. They are the instigators of the crimes.”⁵⁵ Planning and instigating are two distinct forms of liability that seem to be conflated here. Nevertheless, the bottom line of Gros’ argument was evident: the French sought to avoid the ambivalent conspiracy notion in favour of more traditional modes of liability which stress the accused’s active participation in the formulation and direction of international crimes. This rejected the notion of imputing crimes to a person on the mere basis that he had agreed to their commission, as well as the idea that such an agreement could in itself be a crime.

The Soviet Union fully supported this draft and at first abstained from submitting their own proposal, explaining that “[w]e did not submit a text of our own, not only not to provoke a fresh discussion, but in order to be able to come to an agreement quickly.”⁵⁶ This was a quite unfortunate decision because Aron Trainin, the leading legal mind of the Soviet delegation in London, had written an entire book a year earlier on the topic

⁴⁶ A contemporary record of the negotiations and various legal proposals that were made during the conference was prepared by the United States Chief Prosecutor at the Nuremberg Trials, Robert Jackson. See Jackson, *supra* n 44.

⁴⁷ Smith, *supra* n 4, at 141. In particular, in a 19 May 1945 redraft of the American prosecutorial strategy, Jackson and his staff struck out references to “participation in the commission of crimes and in the execution of criminal plans” and instead held that those who participate in the formulation *or* (deliberately striking out “and”) the execution of a criminal plan, are responsible for the acts of each other. *Executive Agreement Relating to the Prosecution of European Axis War Criminals (Drafts 3 and 4)*, 19 May 1945, in Smith, *supra* n 4, at 205-206.

⁴⁸ *Minutes of Conference Session of July 2, 1945*, Document XX, in Jackson, *supra* n 44, at 129.

⁴⁹ *Minutes of Conference Session of July 19, 1945*, Document XXXVII, in Jackson, *supra* n 44, at 87.

⁵⁰ *Amendments Proposed by the United Kingdom, June 28, 1945*, Document XIV, in Jackson, *supra* n 44, at 296.

⁵¹ Jackson, *supra* n 44, at ix (‘Preface’).

⁵² *Ibid.*, at vii.

⁵³ B. Smith, *Reaching Judgement at Nuremberg: The Untold Story of How the Nazi War Criminals Were Judged* (New York: Basic Books, 1977), at 51.

⁵⁴ *Draft Article on Definition of “Crimes”, Submitted by French Delegation*, 19 July 1945, Document XXXV, in Jackson, *supra* n 44, at 293.

⁵⁵ *Minutes of Conference Session of July 19, 1945*, Document XXXVII, in Jackson, *supra* n 44, at 301.

⁵⁶ *Ibid.*, at 298.

of prosecuting the Nazi elite for international crimes.⁵⁷ He, much like Wechsler and the Yalta memorandum, suggested relying on the generally accepted complicity principles and defined them by referring to contemporary Soviet jurisprudence:

To establish complicity, we must establish that there is a common line uniting the accomplices in a given crime, that there is a common criminal design. To establish complicity, it is necessary to establish the existence of a united will, directed toward a single object, common to all the participants in the crime. If, say, a gang of robbers will act in such a way that one part of its members will set fire to houses, violate women, murder and so on, in one place, while another part of the gang will do the same in another place, then even if neither the one nor the other knew of the crimes committed separately by any section of the common gang, they will be held *answerable to the full for the sum total of the crimes*⁵⁸

This explanation of the Soviet perspective on ascribing joint responsibility was never included in any official proposal. Nevertheless, it confirms the above-explained fundamental difference between the conspiracy concept, as developed in Bernays' memorandum, and the principles of complicity to a crime where the emphasis is on the accused person's active participation in the furtherance of the criminal plan, rather than on his mere membership in/agreement to it.⁵⁹

The French proposal paved the way for a series of new drafts. The British, who at first were supportive of the US conspiracy strategy,⁶⁰ also proposed a text that left out this concept and instead built on the French draft. It stated that the future tribunal will exercise jurisdiction over those individuals who "in any capacity whatever directed or participated in the planning, furtherance, or conduct of any or all of the following acts, designs, or attempts" to commit the underlying international crimes.⁶¹ Rising to the occasion, the Soviets also decided to hand in a draft, which avoided conspiracy and instead emphasized

the acts of directing and participating in the preparation and execution of international crimes.⁶²

Jackson, however, was not quite ready to give up and accept the complete exclusion of the conspiracy concept from the IMT Charter. His first reaction to the French proposal, which stated that the Nazi leaders would be held liable as instigators of the crimes committed in the execution of the grand Hitlerite plan, was to say that it actually seemed to be "embodying our concept of conspiracy [but] my difficulty is that that an American judge would not be certain to recognize it in that dress."⁶³ Jackson then expressed the view that the Anglo-American and Continental criminal law systems merely had some "technical differences" on this matter that could be remedied by replacing the term 'conspiracy' with 'common plan'.⁶⁴ It is unlikely that Jackson, having seen the proposals of the French and the British delegation, would have made such a statement if he truly viewed the concept of conspiracy in the same manner Bernays did. There is simply too much of a difference between what the British and the French proposed in their drafts and Bernays' original views on conspiracy, to call it a technical difference. Indeed, Jackson ultimately explained to the other delegates his understanding of conspiracy, he did so in a manner that – contrary to Bernays' memorandum – emphasized the accused's conduct and participation in the criminal plan as an essential ingredient for finding him guilty of the group crime:

The American proposal is that we utilize the conspiracy theory by which a common plan or understanding to accomplish an illegal end by any means, or to accomplish any end by illegal means, renders *everyone who participated* liable for the acts of every other⁶⁵

If taken on their face value, these statements seem to indicate that when Jackson used the term 'conspiracy' to denote a form of criminal participation, he actually viewed it along the lines of the general rules of complicity, as defined in the Yalta and the San Francisco memorandums.⁶⁶ He did not appear to share Bernays' proposal that by virtue of being a co-conspirator – *i.e.* by merely agreeing to the projected crimes – a person could be held liable for the crimes resulting from the execution of the said conspiracy. In this sense, his use of the term 'conspiracy' in this context was misguided and, as explained further below, was meant to achieve another agenda.

The above analysis on Jackson's views on conspiracy can be confirmed by the manner in which he subsequently pled before the IMT the responsibility of the senior Nazi accused for the crimes committed in pursuance of the Hitlerite criminal plan. In particular, in his closing address to the Tribunal, Jackson argued that 'each defendant played a part which

57 A. Trainin, *Hitlerite Responsibility under Criminal Law* (London: Hutchinson & Co., 1945). His work offered a distinct analysis on modes of liability, which, in many respects, is reminiscent of the modern international criminal tribunals' jurisprudence on ascribing responsibility for war crimes. Trainin wrote about perpetrators behind the perpetrators and explained how indirect perpetration under international law is different from its traditional version in national law. He also defined the notion of complicity and clearly distinguished the criminal liability of the perpetrator from that of planners and instigators. The views expressed in this book were ahead of their time because the author sought to do more than build a legal framework for convicting the German arch-criminals. He was taking a step further and arguing that Hitler and his ministers should be prosecuted not as participants (*i.e.* accessories) but as perpetrators (*i.e.* principals) of international crimes. See *Ibid.*, at 79-81.

58 *Ibid.*, at 84, referring to case law of the Military Collegium of the USSR Supreme Court, see *Report of Court Proceedings in the Case of the Anti-Soviet Bloc of Rights and Trotskyites* (Moscow: People's Commissariat of Justice of the U.S.S.R., 1938), at 695. (*emphasis added*)

59 See *supra* Section 2.2.2.1.

60 See, *inter alia*, *Amendments Proposed by the United Kingdom*, 28 June 28 1945, Document XIV, in Jackson, *supra* n 44, at 87.

61 *Proposed Revision of Definition of "Crimes" (Article 6), Submission by the British delegation*, 20 July 1945, Document XXXIX, in Jackson, *supra* n 44, at 312.

62 *Redraft of Definition of "Crimes"*, Submitted by Soviet Delegation, 23 July 1945, Document XLIII, in Jackson, *supra* n 44, at 327.

63 *Minutes of Conference Session of July 19, 1945*, Document XXXVII, in Jackson, *supra* n 44, at 301.

64 *Minutes of Conference Session of July 25, 1945*, Document LI, in Jackson, *supra* n 44, at 387.

65 *Minutes of Conference Session of July 2, 1945*, Document XX, in Jackson, *supra* n 44, at 129. (*emphasis added*)

66 See *supra* text accompanying notes 27-28.

fitted in with every other, and that all advanced the common plan [to wage an aggressive war in Europe]’.⁶⁷ He then described the individual contribution of *each* accused to this plan and concluded that:

The parts played by the other defendants, although less comprehensive and less spectacular than that of [Göring] were nevertheless integral and necessary contributions to the joint undertaking, without any one of which the success of the common enterprise would have been in jeopardy.⁶⁸ as well as that:

Each of these men made a real contribution to the Nazi plan. Every man had a key part. Deprive the Nazi regime of the functions performed by a Schacht, a Sauckel, a von Papen, or a Goering, and you have a different regime... Is there one [among the accused] whose work did not substantially advance the conspiracy along its bloody path towards its bloody goal?⁶⁹

Thus, in contrast to Bernays’ conspiracy, Jackson in fact considered the accused’s coordinated contribution to the advancement of the grand Hitlerite conspiracy as an essential legal element for imputing liability for the resulting crimes. Notably, a few years after the Nuremberg Trial, this time sitting as a US Supreme Court judge in the *Krulewitch* case, he explicitly denounced the underlying rationale of the *Pinkerton* theory (*i.e.* the manifestation of Bernays’ conspiracy in US law):

A recent tendency has appeared in this Court to expand this elastic offense and to facilitate its proof. In *Pinkerton v. United States*, 328 U.S. 640, it sustained a conviction of a substantive crime *where there was no proof of participation* in or knowledge of it, upon the novel and dubious theory that conspiracy is equivalent in law to aiding and abetting.⁷⁰

Although the above statements were made after the London Conference, they present a reliable indicator that Jackson did not endorse Bernays’ vision of conspiracy when advocating for the adoption of this notion in the IMT Charter. Like Bernays, he also saw the Nazi plan to wage an aggressive war as an independent crime (*viz.* the inchoate crime of conspiracy)⁷¹ but his views on the responsibility of the Nazi leaders’ for the substantive offences resulting from that conspiracy were different from Bernays’ and mirrored more closely those expressed in the Yalta memorandum. It is unfortunate that Jackson still used the term ‘conspiracy’ in the latter context but, as explained further below, it is likely that he did this to emphasize that the act of agreeing to a crime is a crime in itself: *i.e.* not in order to include in the IMT Charter Bernays’ idea that such an act alone could be the basis on

which an accused may be held responsible for the substantive crimes committed by others in the execution of the said conspiracy.⁷²

2.2.3.2. *The travaux préparatoires on criminal membership*

The French and the Soviet delegations both affirmed that their criminal justice systems ascribe criminal responsibility for being a member of a criminal group.⁷³ Nonetheless, they were quite perplexed by the ambiguous scope and nature, which the US delegation was proposing for the ‘membership in a criminal organization’ construct.⁷⁴ Trying to alleviate the confusion, Robert Jackson provided a detailed explanation of the precise understanding that he and his team had of this concept and its functioning. He told the other delegates that the idea was to attribute all the crimes of which a Nazi leader is convicted in the major international trial to the respective organization he was heading. This, in turn, will provide the basis to later attribute these crimes to the members of this organization. In Jackson’s words:

We, too, believe in individual responsibility and for that reason could not attribute the acts of the leaders to the members unless we proved that the acts of the leaders were within some common plan or conspiracy. The mere fact that leaders did some particular act, unless within the plan of the conspiracy and within its probable scope, might not bind others to that act. Therefore, we have to tie the acts of individuals to the organization and then the organizational purposes and methods to the individual members... Let us suppose that there is a very active member of the S.S.-active in organizing, active in getting in new members-but he never took a personal part in a single crime. He helped to formulate the general plan; he knew about it; he knew the methods; he knew that their plan was to exterminate minorities, to run concentration camps, to do all these things; but you cannot prove by any witness that he was present when a single offense, standing by itself, was committed. By reason of his membership in this common criminal plan and by reason of his participation in it, we would expect to reach him.⁷⁵

The Soviet delegation then asked Jackson if the international tribunal’s decision in respect to an organization will then have the effect that “punishment can be meted out to all members of that organization” by national courts, or would there still be a necessity to put those members, individually or in groups, to trial.⁷⁶ To this question Jackson responded:

⁷² See *infra* text accompanying notes 100-102.

⁷³ *Minutes of Conference Session of July 2, 1945*, Document XX, in Jackson, *supra* n 44, at 132, 134.

⁷⁴ Indeed, the Russian’s first reaction was to reject it, arguing that an organization cannot be tried in criminal proceedings before an international trial, because an organization is not a physical body. As a juridical person, it may be a party to civil proceedings, but never under criminal law. The Soviet delegation went on to explain that this “does not in the least prevent the conviction of a person for adherence to or membership in a criminal organization, and the Soviet law also provides ... for the trial of an individual for being a member of a criminal organization.” *Ibid.*, at 134, 139.

⁷⁵ *Ibid.*, at 137-8.

⁷⁶ *Ibid.*, at 138.

⁶⁷ Office of United States Chief of Counsel for Prosecution of Axis Criminality, *Nazi Conspiracy and Aggression*, Supplement A (Washington: United States Government Printing Office, 1947), at 25.

⁶⁸ *Ibid.*, at 26.

⁶⁹ *Ibid.*, at 38.

⁷⁰ *Krulewitch v. United States*, 336 U.S. 440 (1949), at 451.

⁷¹ *Nazi Conspiracy and Aggression* (Supplement A), *supra* n 67, at 17.

There would have to be an opportunity given to an individual, before he could be brought under the general plan, to show that there was a mistake in identification, that he was not a member in fact, or to show that he joined because he was forced to join, or some reason why the general finding of guilt should not be applied to him as an individual. He must have a chance to bring forward his individual situation, but he does not have a chance again to question the finding that the organization is guilty of particular plans or designs or offenses. That is settled in the one trial and all that he can thereafter be heard to say concerns his particular connection with the criminal design.⁷⁷

The French delegation embraced the idea and emphasized that it does not see this concept as “punishing equally all members of the organization”.⁷⁸ The Soviet delegation also agreed.⁷⁹

Several notable conclusions can be drawn from Jackson’s more detailed explanation of membership guilt. First, he confirmed that the convicted criminal organization was equated to a common plan and the accused’s membership in the said agency was in turn treated as a form of criminal participation: *i.e.* he was held liable for the organization’s substantive crimes. This clearly means that the notion of membership in a criminal organization functioned as a type of accomplice liability, rather than as a crime in its own right. Although in his example of the SS member Jackson characterized the defendant as someone who actively participates in the day-to-day functioning of this agency, it is debatable whether he regarded such active participation as an additional *actus reus* requirement (*i.e.* other than the membership of the accused) of this concept. Last but not least, the elements of voluntariness and knowledge of the organization’s criminal goals were explicitly recognized as necessary requirements for incurring membership liability, although they were to be assumed proven unless the accused can show otherwise. Put simply, the burden of proof was shifted on the accused to demonstrate that was unaware of the said agency’s criminal goals, or that he was forced to joint it.

While this seemed to clarify the issue, the idea that criminal membership is also a self-sufficient, independent crime did not completely disappear and did emerge in several working papers and drafts of the IMT Charter. For instance, a draft from 11 July 1945 provided that:

⁷⁷ *Ibid.*

⁷⁸ *Ibid.*, at 132. They explained their vision in the following manner: “First, if a special crime is alleged against one of the members, a special trial will be put against him in the local court or in the occupation court. Second, if, on the contrary, certain supposed members can prove that they are not members of the organizations, that they had no knowledge of the purposes of the organizations, that they had been forced into membership, then they could probably be discharged. Third, in the case of other members against whom no special crime can be proved or who cannot prove their innocence, the organization would in a sense be what the British call “outlawed”, and we do not insist upon the kind of punishment that would be applied to them.”

⁷⁹ *Ibid.*, at 140-142. In unison with Jackson’s explanation on membership guilt, the head of the Soviet delegation stated that under Soviet law “once the court had decided in any case, no subsequent trial could raise the question whether [the organization] is criminal or not. It has definitely been pronounced criminal. What [the accused] can do is to produce at the trial evidence that he did not belong to the organization, or took only a minor part in its proceedings, or possibly did not know for what purposes the organization existed, or perhaps that he was forced to join it, but those factors would be considered by the court as providing the basis for his acquittal or reduction in penalty in his individual case.”

¹⁰ In cases where a group or organization is declared criminal by the Tribunal, the competent national authorities of any Signatory have the right to bring individuals to trial for membership therein before national, military or occupation courts. In any such case the criminal nature of the group or organization is considered proved and shall not be questioned.

¹¹ Any person may be charged before a national, military or occupation court, referred to in Article 11, *with a crime other than of membership in a criminal group or organization* and such court may, after convicting him, impose upon him punishment independent of and additional to the punishment imposed by the Tribunal for participation in the criminal activities of such group or organization.⁸⁰

Jackson, who had already clearly defined criminal membership as a mode of liability, went on to explain that since “a person cannot twice be placed in jeopardy *for the same offense* ... [the Charter must] make clear that conviction of membership in the organization does not preclude subsequent punishment for other offenses.”⁸¹ In other words, Jackson stressed that the double jeopardy rule is not violated if a person is convicted once of membership in a criminal group, and once of another substantive offence because the two are different crimes. This same point was also made by the British delegation, when Sir David Maxwell Fyfe said that the above-cited draft Article 12 IMT Charter is “intended to cover any minor criminal, and the only point in it is that he may be charged with *other crimes in addition to membership* in the organization and punishment would be imposed accordingly.”⁸² The French and Soviet delegations did not disagree with this interpretation. Thus, the *travaux préparatoires* of the IMT Charter militate a conclusion that the concept of ‘membership in a criminal organization’ was also viewed as an independent crime, of which the accused could be found guilty.

The conclusion to be drawn from the research above remains a matter of dispute. The preparatory works on the IMT Charter clearly demonstrate that the drafters discussed criminal membership sometimes as an independent crime and sometimes as a proof of participation in the Nazi organization’s crimes. On the one hand, this could suggest that they envisioned it as a bifurcated concept. On the other hand, however, it may also be that they were at times simply mixing different legal concepts without necessarily having the intent to establish a dual nature for ‘membership in a criminal organization’. This confusion, as pointed out below, resurfaced during the subsequent trials of Nazi war criminals.

2.2.4. Reaching a compromise and the final text of the IMT Charter

Defining the general principles of law to be included within the IMT Charter proved to be the most laborious, time-consuming and controversial part of the London Conference.

⁸⁰ *Draft of Agreement and Charter, Reported by Drafting Subcommittee, July 11, 1945*, Document XXV, in Jackson, *supra* n 44, at 198. (*emphasis added*)

⁸¹ *Minutes of Conference Session of July 16, 1945*, Document XXX, in Jackson, *supra* n 44, at 248. (*emphasis added*)

⁸² *Ibid.*, at 247. (*emphasis added*)

After some initial confusion, the Allies managed to reach an agreement on the legal notion to be used for the subsequent prosecution of the numerous ‘secondary’ Nazi criminals: the ‘membership in a criminal organization’ notion. The US conspiracy proposal, however, which was meant for the prosecution of the Nazi leaders, divided the Allies until the very end.

2.2.4.1. Article 6 IMT Charter: the law on conspiracy

Time was pressing the Allies at the London Conference and they appeared to have reached an impasse on the conspiracy issue. Jackson continued to insist that “nothing except the common plan or conspiracy theory will reach” certain top level Nazi war criminals,⁸³ while the head of the Soviet Delegation, General Nikitchenko, openly disagreed and stated that more traditional provisions on organizing and instigating war crimes could serve to convict just as well.⁸⁴ The frustration from going back and forth to such debates and never reaching an agreement was on the rise, a testimony of which is Nikitchenko’s remark: “[i]f we start discussion on that again, I am afraid the war criminals will die of old age”.⁸⁵ The compromise which Sir Maxwell Fyfe, chairman of the conference, proposed and eventually got accepted was to merge the proposals of the civil law Allies with the American conspiracy text.⁸⁶ It was either that or a failure of the entire venture.

By the end of the London Conference, the Allies had thus agreed on the following text of Article 6 of the IMT Charter, defining the Tribunals’ jurisdiction:

The Tribunal established by the Agreement referred to in Article 1 hereof for the trial and punishment of the major war criminals of the European Axis countries shall have the power to try and punish persons who, acting in the interests of the European Axis countries, whether as individuals or as members of organizations, committed any of the following crimes.

The following acts, or any of them, are crimes coming within the jurisdiction of the Tribunal for which there shall be individual responsibility:

- (a) CRIMES AGAINST PEACE: namely, planning, preparation, initiation or waging of a war of aggression, or a war in violation of international treaties, agreements or assurances, or participation in a common plan or conspiracy for the accomplishment of any of the foregoing;
- (b) WAR CRIMES: namely; violations of the laws or customs of war. Such violations shall include, but not be limited to, murder, ill-treatment or deportation to slave labor or for any other purpose of civilian population of or in occupied territory, murder or ill-treatment of prisoners of war or persons on the seas, killing of hostages, plunder of public or private property, wanton destruction of cities, towns or villages, or devastation not justified by military necessity;
- (c) CRIMES AGAINST HUMANITY: namely, murder, extermination, enslavement, deportation, and other inhumane acts committed against any civilian population, before or during the war; or

⁸³ *Ibid.*, at 254.

⁸⁴ *Ibid.*

⁸⁵ *Minutes of Conference Session of July 25, 1945*, Document LI, in Jackson, *supra* n 44, at 389.

⁸⁶ *Ibid.*, at 379.

persecutions on political, racial or religious grounds in execution of or in connection with any crime within the jurisdiction of the Tribunal, whether or not in violation of the domestic law of the country where perpetrated.

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.

One could easily spot the patchwork of compromises, which shape this article. To begin with, conspiracy as an *inchoate crime* is recognised only under sub-paragraph a), *i.e.* only when the underlying criminal agreement is aimed at the commission of crimes against peace. However, if the accused persons formed an agreement to commit war crimes or crimes against humanity under sub-paragraphs b) or c), the IMT Charter did not provide a basis to charge and convict them for conspiracy, as an anticipatory crime. On this point, Pomorski argued that there is no legal or practical reason for this discrepancy, maintaining that “[o]ne is at a loss to understand why conspiracy to prepare an aggressive war should be a crime per se while conspiracy to set up a death camp should not be.”⁸⁷ It would appear that this narrow adoption of conspiracy as a substantive crime (only in relation to crimes against peace) was a midway between not using it at all and using it for all three categories of international crimes listed in the Charter.

The very last sentence of Article 6 IMT Charter contained further reference to the term “conspiracy” but this time in the context of the rules of liability applicable to the crimes listed under sub-paragraphs a) to c). In the spirit of compromise, it was merged with the notions that the Soviet and French delegations proposed at the London Conference for ascribing liability to the Nazi leadership.⁸⁸ Due to the lack of a clear definition, however, it remained unclear what the exact limits and constituent elements of conspiracy liability were in this provision. At first look, the phrase “accomplices participating in the formulation or execution of a common plan or conspiracy” could be interpreted as a codification of Bernays’ conspiracy-complicity notion (*Pinkerton* liability). Indeed, this view has often been expressed in academia.⁸⁹ In this author’s opinion, however, neither the ordinary text nor the preparatory works of Article 6 IMT Charter support such a conclusion. First of all, if the said last sentence indeed codified the expansive, bifurcated construction of conspiracy from Bernays’ original memorandum, it makes no sense that Article 6(a) would then separately and in contrast to sub-paragraphs b) and c) provide that participating in a conspiracy to wage aggressive wars is a crime: *i.e.* this text would simply be redundant under the suggested meaning of the said last sentence. More importantly, the above research has revealed that none of the delegates at the London Conference, not even Jackson,

⁸⁷ Pomorski, *supra* n 14, at 222.

⁸⁸ See *supra* text accompanying notes 54-62.

⁸⁹ Danner and Martinez, *supra* n 2, at 114-115; G. Fletcher, *Amicus Curiae Brief of Specialists in Conspiracy and International Law in Support of Petitioner [Conspiracy - Not a Triable Offense]*, at 14, filed in *Hamdan v. Rumsfeld*, 548 U.S. 557 (2006); Pomorski, *supra* n 14, at 223-224; H. Van der Wilt, ‘Joint Criminal Enterprise: Possibilities and Limitations’, 5 *Journal of International Criminal Justice* (2007), at 93-94.

ever asserted that liability for substantive crimes may be imputed on the sole basis of agreeing to a common plan to commit them: *i.e.* this defining feature of Bernays' version of conspiracy was not envisioned for the IMT Charter.⁹⁰ To be sure, Jackson did use the term 'conspiracy' to also denote a form of criminal participation, but he did so in a way consistent with the general rules of complicity, which require that the accused actively participated in the criminal design. Therefore, this author submits that the better interpretation of the last sentence of Article 6 is that it referred to the word 'conspiracy' merely as a synonym of 'common plan' – *i.e.* not as a distinct legal construct with its own specific meaning – and, thus, that this provision codified the universally accepted rule of joint liability, as defined in the Yalta and in the San Francisco memorandums.⁹¹ In this vein of thought, Jackson asserted in his closing arguments in the IMT that:

The Charter forestalls resort to... parochial and narrow concepts of conspiracy taken from local law by using the additional and non-technical term, "common plan". Omitting entirely the alternative term of "conspiracy" the Charter reads that "leaders, organizers, instigators and accomplices participating in the formulation or execution of a common plan to commit" any of the described crimes "are responsible for all acts performed by any persons in execution of such plan."⁹²

The last mystery that remains to be solved here is why Jackson was so eager to include the term 'conspiracy' in a sentence that he himself clearly understood as describing the classic rules of complicity responsibility. The answer could be inferred from the manner in which he subsequently drafted the conspiracy charges in the IMT Indictment and it had little to do with law. In particular, Jackson saw the adoption of the conspiracy language in the last sentence of Article 6 as an opportunity to charge all the accused before the IMT with the inchoate crime of conspiracy to commit each one of the crimes listed under Article 6 a) to c) of the Statute.⁹³

2.2.4.2. Articles 9 – 11 IMT Charter: the law on criminal membership

The four delegations at the London Conference ultimately agreed on the following text for the IMT Charter provisions governing the concept of criminal membership:

Article 9. At the trial of any individual member of any group or organization the Tribunal may declare (in connection with any act of which the individual may be convicted) that the group or organization of which the individual was a member was a criminal organization.

After receipt of the Indictment the Tribunal shall give such notice as it thinks fit that the prosecution intends to ask the Tribunal to make such declaration and any member of the organization

will be entitled to apply to the Tribunal for leave to be heard by the Tribunal upon the question of the criminal character of the organization. The Tribunal shall have power to allow or reject the application. If the application is allowed, the Tribunal may direct in what manner the applicants shall be represented and heard.

Article 10. In cases where a group or organization is declared criminal by the Tribunal, the competent national authority of any Signatory shall have the right to bring individuals to trial for membership therein before national, military or occupation courts. In any such case the criminal nature of the group or organization is considered proved and shall not be questioned.

Article 11. Any person convicted by the Tribunal may be charged before a national, military or occupation court, referred to in Article 10 of this Charter, with a crime other than of membership in a criminal group or organization and such court may, after convicting him, impose upon him punishment independent of and additional to the punishment imposed by the Tribunal for participation in the criminal activities of such group or organization.

The plain text of these articles unequivocally defines 'membership in a criminal organization' as an independent crime of which an accused could be convicted before domestic courts. In particular, Article 11 IMT Charter recognizes the possibility of prosecuting persons for crimes *other than* criminal membership. As the drafting history of these provisions shows, however, this notion was also discussed as a mode of criminal responsibility,⁹⁴ and was actually applied as such in some of the subsequent Nazi trials.⁹⁵ Next to this, it bears noting that, unlike earlier drafts, the final text of the IMT Charter does not expressly establish any of the legal elements of membership responsibility. Nevertheless, the *travaux préparatoires* show that the delegates considered proof of the accused's membership in a convicted Nazi organization to be the only requirement for establishing his guilt under this concept. Knowledge of the agency's criminal purpose was discussed as a relevant legal element but it was to be assumed, unless the accused could prove otherwise.⁹⁶

2.2.5. The IMT Judgement: judicial definition of conspiracy and membership in a criminal organization

The Nuremberg Trial before the International Military Tribunal commenced on 20 November 1945 and the Prosecution had indicted 24 military and political leaders of Nazi Germany,⁹⁷

⁹⁴ See *supra* Section 2.2.3.2.

⁹⁵ See *infra* text accompanying notes 153-156 and 235-239.

⁹⁶ See *supra* text accompanying notes 75-79.

⁹⁷ Two of the accused, however, were eventually not prosecuted: Robert Ley (committed suicide a few days after being indicted) and Gustav Krupp (his health condition rendered him unfit to stand trial). Therefore, in total 22 accused stood trial, one of whom, Martin Bormann, was tried *in absentia*. *Trial of the Major War Criminals before the International Military Tribunal, Nuremberg, 14 November 1945-1 October 1946*, Vol. I, Nuremberg, Germany, 1947, at 27.

⁹⁰ See *supra* Section 2.2.3.1.

⁹¹ See *supra* text accompanying notes 27-28.

⁹² Nazi Conspiracy and Aggression (Supplement A), *supra* n 67, at 30.

⁹³ See *infra* text accompanying notes 100-102.

as well as the six most notorious Nazi organizations.⁹⁸ The charges were grouped in four counts which roughly followed the structure of Article 6 IMT Charter: crimes against peace (Count Two), war crimes (Count Three), crimes against humanity (Count Four) and grand conspiracy to commit all the above (Count One).⁹⁹

2.2.5.1. Conspiracy

Pursuant to the agreed division of tasks amongst the Allies, the Americans were put in charge of drafting Count One of the Indictment.¹⁰⁰ This meant that the allegations of conspiracy guilt were to be formulated by none other than Robert Jackson, who had already been appointed as Chief U.S. Prosecutor at the International Military Tribunal. In doing so, Jackson and his team endorsed a wide interpretation of the relevant text of Article 6 IMT Charter. Notably, Count One alleged that the defendants were guilty of “conspiracy for the accomplishment of Crimes against Peace; of a conspiracy to commit Crimes against Humanity [...] and of a conspiracy to commit War Crimes.”¹⁰¹ Thus, the accused were practically charged with three distinct counts of conspiracy as an inchoate crime, which strongly suggests that the reason why Jackson was so determined during the London Conference to have this term in the last sentence of Article 6 IMT Charter was because he saw its inclusion there as a statutory basis for charging the Nazi defendants with the inchoate crime of conspiracy to commit each and every category of crimes listed under the Charter.¹⁰² Aside from this, Count One of the Indictment also alleged that, having participated in the formulation or execution of the conspiracy to commit crimes against peace, war crimes and crimes against humanity, the defendants were “individually responsible for their own acts and for all acts committed by any persons in the execution of such plan or conspiracy.”¹⁰³ While one may be tempted to conclude that this presents Bernays’ concept of conspiracy-complicity, such an assertion would be incorrect because Count One did not allege that the accused must automatically incur liability for the substantive crimes of the conspiracy on the sole basis of being its members. Rather, it specifically listed the personal contributions of each accused to the execution of the charged common plan or conspiracy,¹⁰⁴ detailing them in a separate appendix to the Indictment.¹⁰⁵ Moreover, as already noted above, when Jackson addressed the IMT in his closing arguments, he once again described the role of each accused defendant and emphasized that they all made “integral and necessary contributions to the joint undertaking, without any of which the success of the common enterprise would have been in

jeopardy.”¹⁰⁶ It is, thus, rather evident that Bernays’ idea to hold the members of a conspiracy liable for its substantive crimes solely by virtue of having agreed to it, was not given effect in the IMT Indictment. As for the exact definitional framework of conspiracy, the Indictment did not explicitly distinguish and elaborate on the legal elements of this concept: rather, it broadly alleged that certain principles of the Nazi part program were an evidence of and constituted a criminal agreement, and that “each defendant became a member of the Nazi Party and of the conspiracy, with knowledge of [its] aims and purposes”.¹⁰⁷

Jackson’s formulation of the conspiracy charge, and particularly the decision to charge the accused with the inchoate crime of conspiracy to commit all the crimes listed in Article 6 IMT Charter, faced an onslaught during the judicial deliberations on Count One. The French judge, Donnedieu de Vabres, raised several objections to its application in the case and called for its dismissal.¹⁰⁸ The American judge, Francis Biddle, who was in fact critical of Bernays’ conspiracy notion already during the earlier US debates on it,¹⁰⁹ shared his French colleague’s opinion on this matter.¹¹⁰ The British judge, Lawrence, and the Soviet judge, Nikitchenko, on the other hand, favoured this conspiracy charge: a surprising turn of events when it is recalled that Nikitchenko fiercely opposed this concept throughout the entire London Conference.¹¹¹ In this deadlock situation, the solution the judges designed was to keep the conspiracy charge but limit as much as possible its scope and impact on the case. Thus, the part on conspiracy in the final IMT Judgement, titled “The Law as to the Common Plan or Conspiracy”, is barely three pages long and was used to convict only eight of the 24 accused.¹¹²

The four judges made several important findings on conspiracy law. First of all, they explicitly held that the IMT Charter recognises as a separate crime only conspiracy to commit crimes against peace, thus rejecting *in toto* the Prosecution’s charges on conspiracy to commit war crimes and conspiracy to commit crimes against humanity.¹¹³ Put simply, the Nuremberg Judgement confirmed that agreeing with others to wage an aggressive war is an international crime, while agreeing with others to commit war crimes or crimes against humanity is not an act that in itself gives rise to criminal guilt. As for the definitional elements of this conspiracy crime, the Judgment, much like the IMT Charter, remained silent. Instead of trying to provide

106 Nazi Conspiracy and Aggression (Supplement A), *supra* n 67, at 26.

107 Nazi Conspiracy and Aggression, *supra* note 101, at 16. See also B. Smith, *Reaching Judgment at Nuremberg* (New York: Basic, 1977), at 122.

108 Smith, *supra* n 107, at 121-123. Several years after the IMT Judgement was delivered, Judge Donnedieu de Vabres argued in a lecture that “[s]uch a charge implies the danger of paving the way for arbitrariness. To charge with ‘conspiracy’ is a favourite weapon of tyranny.” Von Knieriem, *supra* n 25, at 216.

109 See *supra* text accompanying notes 26-27.

110 Pomorski, *supra* n 14, at 230.

111 *Ibid.*, at 229-230. See also *supra* Section 2.2.3.1.

112 *France et al. v Göring et al.*, International Military Tribunal, Judgment and Sentence, 1 October 1946, printed in *Trial of the Major War Criminals before the International Military Tribunal, Nuremberg, 14 November 1945-1 October 1946*, Vol. I, Nuremberg, Germany, 1947, at 224-226. The defendants who were found guilty under Count One were: Goering, Hess, Ribbentrop, Keitel, Rosenberg, Raeder, Jodl and Neurath. *Ibid.*, at 279-336.

113 *Ibid.*, at 226.

98 *Ibid.* The six indicted organizations were: the Reich Cabinet, the Leadership Corps of the Nazi Party, the SS, the Gestapo, the SA, and the General Staff and High Command of the German Armed Forces.

99 *Ibid.*, at 29-68.

100 Pomorski, *supra* n 14, at 227; H. Leventhal *et al.* ‘The Nuernberg Verdict’, 60 *Harvard Law Review* (1947), at 859.

101 Office of United States Chief of Counsel for Prosecution of Axis Criminality, *Nazi Conspiracy and Aggression*, Vol. 1 (Washington: United States Government Printing Office, 1946), at 29.

102 *Cf.* Fletcher, *supra* n 89, at 15.

103 Nazi Conspiracy and Aggression, *supra* note 101, at 15.

104 *Ibid.*, at 29.

105 *Ibid.*, at 57-68.

a distinct doctrinal framework for conspiracy, the judges only went so far as to set limitations on the Prosecution's expansive pleading of this notion:

The Prosecution says, in effect, that any significant participation in the affairs of the Nazi Party or Government is evidence of a participation in a conspiracy that is in itself criminal. Conspiracy is not defined in the Charter. But in the opinion of the Tribunal the conspiracy must be clearly outlined in its criminal purpose. It must not be too far removed from the time of decision and of action. The planning, to be criminal, must not rest merely on the declarations of a party program, such as are found in the 25 points of the Nazi Party, announced in 1920, or the political affirmations expressed in *Mein Kampf* in later years. The Tribunal must examine whether a concrete plan to wage war existed, and determine the participants in that concrete plan.¹¹⁴

Several important conclusions can be drawn from this dictum. To begin with, the four judges rejected the Prosecution's wide-sweeping formulation of the criminal agreement (*viz.* the Nazi Party political platform) and instead held that conspiracy guilt requires proof of a plan, which is "concrete" and "clearly outlined in its criminal purpose". This conclusion reflects Judge de Vabres' earlier objection that, far from what the Prosecution pled, evidence on conspiracy has to prove "that a group of people had, *at a specific time and place*, agreed on *definite criminal objectives* and the criminal methods they intended to use to attain them."¹¹⁵ In addition to this requirement of specificity, the Judgement also mentions one of proximity: the criminal plan or agreement "must not be too far removed from the time of decision and of action". As a result, the judges used evidence of specific meetings between Hitler and his closest associates, such as the Berlin meeting of 5 November 1937, to establish the existence of an agreement to wage an aggressive war.¹¹⁶ Conspiracy guilt was, thus, limited to those accused who attended these meetings and who "with knowledge of [Hitler's] aims, gave him their co-operation".¹¹⁷ Thus, Smith rightly pointed out that "the record of these conferences were central in establishing the existence of such plans and in identifying those who were parties to them."¹¹⁸

It is plain obvious that the IMT Judgement treated (aggressive war) conspiracy as an

independent crime. However, did the judges also embrace the idea that agreeing to a criminal plan makes one liable for "all acts committed by any persons in the execution of such plan or conspiracy": *i.e.* was Bernays' conspiracy-complicity ('*Pinkerton* conspiracy')¹¹⁹ also upheld? When interpreting the closing sentence of Article 6 IMT Charter,¹²⁰ the Tribunal held that the reference to conspiracy in it "[does] not add a new and separate crime to those already listed... [but is] designed to establish the responsibility of persons participating in a common plan."¹²¹ Thus, while Jackson thought that the reference to conspiracy in the closing sentence of Article 6 IMT Charter would serve as an inchoate crime in relation to all the above provisions, *as well as* reflect the universally accepted rule of complicity (as stated in the Yalta and San Francisco memorandums),¹²² the judges accepted only the latter proposition. Notably, this finding can be considered the first international judicial recognition of joint criminal enterprise responsibility seeing as it was later cited in the subsequent Nazi trials to reject the concept of conspiracy and confirm as a separate mode of liability a person's participation in the furtherance of a common plan/design/purpose.¹²³ The precise meaning of the latter construct and how it differs from the conspiracy crime will be discussed further below: at this point, it suffices to note the summary analysis that the United Nations War Crimes Commission provided on this matter:

In conclusion it may be repeated that the difference between a charge of conspiracy and one of acting in pursuance of a common design is that the first would claim that an agreement to commit offences had been made, while the second would allege not only the making of an agreement but the performance of acts pursuant to it.¹²⁴

It is showing that none of the defendants found guilty of agreeing to the aggressive war conspiracy was also *automatically* found responsible for substantive crimes that ensued from the execution of the conspiracy. For a conviction under Counts Two to Four of the Indictment, the judges always adduced evidence of the accused person's active participation in the alleged substantive crime. It is true that the IMT decided to discuss Count One (conspiracy to wage an aggressive war) and Count Two (planning and waging an aggressive war) together since "they are in substance the same", but the judges also made it clear that

¹¹⁴ *Ibid.*, at 225.

¹¹⁵ Smith, *supra* n 107, at 122.

¹¹⁶ The 5 November 1937 meeting in Berlin was attended by Hitler's Supreme Commanders and discussed the invasion of Austria and Czechoslovakia – plans which materialized just a few months later. IMT Judgment, *supra* n 112, at 188-192. See also, Leventhal, *supra* n 100, at 865-867.

¹¹⁷ IMT Judgment, *supra* n 112, at 226. As Pomorski points out, the judges applied Count One strictly to Hitler's "inner ring"; to those defendants before the IMT who had direct contact with him in the discussions on the plans to wage an aggressive war. See Pomorski, *supra* n 14, at 233.

¹¹⁸ Smith, *supra* n 107, at 138-139. See also *e.g.* the *High Command* case, where the Military Tribunal refused to convict the thirteen defendants on the charge of conspiracy to wage an aggressive war because "[n]o matter what their rank or status, it was clear from the evidence that they had been outside the policy-making circle close to Hitler and had had no power to shape or influence the policy of the German State." *Trial of Wilhelm von Leeb and Thirteen Others* ('*The German High Command Trial*'), United States Military Tribunal, Nuremberg, 30th December 1947 – 28th October 1946, in UN War Crimes Commission, *Law Reports of Trials of War Criminals*, Vol. XII (London: Published for the United Nations War Crimes Commission by His Majesty's Stationary Office, 1949), at 12.

¹¹⁹ See *supra* text accompanying notes 7-9 and 19-23.

¹²⁰ Namely the part that reads: "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." See *supra* Section 2.2.4.1.

¹²¹ IMT Judgment, *supra* n 112, at 226.

¹²² See *supra* text accompanying notes 27-28 and 63-71.

¹²³ See *infra* Section 2.3.3.3.i.

¹²⁴ UN War Crimes Commission, *Law Reports of Trials of War Criminals*, Vol. XV (London: Published for the United Nations War Crimes Commission by His Majesty's Stationary Office, 1949), at 97-98.

“the defendant’s guilt under each Count must be determined”.¹²⁵ An illustrative example is the conviction of Rudolf Hess, who was charged under all four Counts in the Indictment. The Tribunal found that Hess “was the top man in the Nazi Party” and that, as the Deputy Führer, he was privy to Hitler’s plans to wage an aggressive war.¹²⁶ His knowing acceptance of these schemes made him guilty of the conspiracy charge under Count One. Hess was also convicted under Count Two for waging a war of aggression after the judges outlined a number of instances showing his participation in the actual execution of Hitler’s plans.¹²⁷ However, Hess was found not guilty of Counts Three and Four because the judges “[did] not find that the evidence sufficiently connects Hess with these crimes to sustain a finding of guilt”.¹²⁸ It can, therefore, be concluded that the IMT did not embrace the rationale behind the *Pinkerton* doctrine, according to which mere agreement with other persons to commit a crime (*i.e.* joining a conspiracy) can be the sole basis on which an accused may be found liable for the crimes committed in the execution of that conspiracy.

2.2.5.2. Criminal membership

The six indicted Nazi organizations were all charged with responsibility for the crimes listed under Counts One to Four of the IMT Indictment.¹²⁹ During the trial hearings, the Prosecution outlined what it considered the legal requirements for declaring an organization criminal.¹³⁰ In particular, proof was to be adduced that: i) the given agency was “generally voluntary”, which meant that, although there might have been instances of conscription, it was an agency which “on the whole... persons were free to join or stay out of”; ii) its criminal nature and methods were clearly “of such a character that its membership in general may properly be charged with knowledge of them”; iii) the agency’s aims were criminal “in that it was designed to perform acts denounced as crimes in Article 6 of the Charter”.¹³¹ When an indicted Nazi agency was found to satisfy these requirements, it could

be declared a criminal organization. The first two criteria were included to serve as the legal basis on which the Tribunal would make a general finding on the existence of knowledge and voluntariness among the organizations’ members. This finding would be binding on national courts for subsequent proceedings, making proof of membership in the convicted organization the sole requirement for convicting an accused. The burden of proof was thereby shifted onto him to show that he did not know the criminal goals of the agency, or that he did not voluntarily join it.¹³² This construct was explicitly pled as an independent crime, with Jackson explaining that “[a]ny member guilty of direct participation in [the organization’s crimes]... can be tried on the charge of having committed the specific crimes *in addition to the general charge of membership in a criminal organization*.”¹³³

The notion of ‘membership in a criminal organization’ did not fare any better than that of conspiracy during the judicial deliberations in the Nuremberg Trial.¹³⁴ As one commentator pointed out, “[t]he Tribunal did not reach final agreement on it until just four days before the Judgment and verdicts were read out in open court.”¹³⁵ The judge who was the most persistent opponent of the membership charge was Francis Biddle who observed that “[t]his group crime [is] a shocking thing” and called for its complete repudiation from the case.¹³⁶ It, thus, became clear that the senior US Judge at Nuremberg was in fact against both pillars of the original US prosecution strategy: conspiracy and criminal organizations. Judge Donnedieu de Vabres was also critical of this notion but he thought that it should be refurbished, rather than abandoned. He acknowledged that his half-hearted support for the organizational guilt construct was quite inconsistent with his fierce objections against the conspiracy charge and explained his stance on the issue with a policy consideration: the French people, who had suffered tremendously at the hands of the Gestapo and SS, would never understand and accept a failure to declare these organizations criminal.¹³⁷ Since both Judge Lawrence and Judge Nikitchenko were in favour of applying the notion of ‘membership in a criminal organization’, a decision was taken again to follow the middle way: keep the concept but curb its application. As a result, of the accused six Nazi organizations, the Judgment acquitted three and declared only the Leadership Corps of

¹²⁵ IMT Judgment, *supra* n 112, at 224. See also M. Scharf, “Seizing the ‘Grotian Moment’: Accelerated Formation of Customary International Law in Times of Fundamental Change”, 43 *Cornell International Law Journal* (2010), at 459.

¹²⁶ The evidence did not directly establish that Hess attended the several conferences where Hitler discussed with his closest henchmen the plans to wage an aggressive war, but the Tribunal held: “Hess was Hitler’s closest personal confidant. Their relationship was such that Hess must have been informed of Hitler’s aggressive plans when they came into existence”. IMT Judgment, *supra* n 112, at 284.

¹²⁷ To mention a few examples of Hess’s participation in the execution of the aggressive war plan, the judges stated that he “signed a decree setting up the government of Sudetenland as an integral part of the Reich”, or that he “arranged with Keitel to carry out the instructions if Hitler to make the machinery of the Nazi Party available for a secret mobilization” etc. *Ibid.*, at 283.

¹²⁸ *Ibid.*, at 284.

¹²⁹ *Trial of the Major War Criminals before the International Military Tribunal, Nuremberg, 14 November 1945-1 October 1946*, Vol. I, Nuremberg, Germany, 1947, at 80-84.

¹³⁰ *Trial of the Major War Criminals before the International Military Tribunal, Nuremberg, 14 November 1945-1 October 1946*, Vol. VIII, Nuremberg, Germany, 1947, at 367-368.

¹³¹ *Ibid.* The Prosecution repeated its submission that “[o]f course, it is not incumbent on the Prosecution to establish the individual knowledge of every member of the organization or to rebut the possibility that some may have joined in ignorance of its true character.” An organization was defined as any “aggregation of persons associated in identifiable relationship with a collective, general purpose.”

¹³² *Ibid.*, at 368-369. See also Pomorski, *supra* n 14, at 239-240.

¹³³ *Trial of the Major War Criminals before the International Military Tribunal, Nuremberg, 14 November 1945-1 October 1946*, Vol. VIII, Nuremberg, Germany, 1947, at 368 (*emphasis added*)

¹³⁴ According to Smith, “[t]he conspiracy controversy had been [the judges’] most fundamental challenge... but the problem that never seemed to leave them alone was that of criminal organizations.” Smith, *supra* n 107, at 156.

¹³⁵ *Ibid.*

¹³⁶ *Ibid.*, at 161.

¹³⁷ *Ibid.*, at 162-3.

the Nazi Party, the SS, and the Gestapo and S.D. to be criminal.¹³⁸ Further restrictions were made to the effect that particular sub-units of the three convicted organizations were excluded from the declaration of criminality¹³⁹ and that persons who ceased to be members prior to the commencement of the war on 1 September 1939 could not be held responsible.

The IMT Judgement went beyond limiting the application of the criminal membership concept as it also narrowed substantially the normative framework which the Prosecution pled for it. Mindful of the fact that this construct borders, to say the least, on prescribing collective guilt, the judges emphasized that adjudication on the criminality of an organization “should be exercised in accordance with well-settled legal principles, one of the most important of which is that criminal guilt is personal, and that mass punishments should be avoided.”¹⁴⁰ It was also acknowledged that the proposed application of the membership crime would introduce “a far reaching and novel procedure. Its application, unless properly safeguarded, may produce great injustice.”¹⁴¹ In order to make sure that innocent persons are not punished, the IMT designed a stricter framework for this crime:

A criminal organization is analogous to a criminal conspiracy in that the essence of both is cooperation for criminal purposes. There must be a group bound together and organized for a common purpose. The group must be formed or used in connection with the commission of crimes denounced by the Charter. Since the declaration with respect to the organizations and groups will, as has been pointed out, fix the criminality of its members, that definition should *exclude persons who had no knowledge of the criminal purposes or acts of the organization and those who were drafted by the State for membership, unless they were personally implicated in the commission of acts declared criminal by Article 6 of the Charter as members of the organization*. Membership alone is not enough to come within the scope of these declarations.¹⁴²

This dictum of the IMT Judgement clearly declares knowledge and voluntariness to be two of the constituent elements of the notion of membership in a criminal organization. As such, they had to be established by the prosecution in each individual case since membership

alone was not enough. Pomorski was, therefore, correct to point out that “[i]n effect, the burden of proof regarding these elements was put on the prosecution, consistently with the classical doctrine of presumption of innocence”.¹⁴³ This finding had a profound practical effect because it put an end to the initial vision of having streamlined national trials that would allow swift processing and convictions of hundreds of thousands of defendants.¹⁴⁴ Moreover, just like the concept of conspiracy, ‘membership in a criminal organization’ was acutely defined as a crime: a finding which seemed to put to rest the London Conference debates that it was also a mode of liability implicating the accused in the actual crimes committed by the organization.¹⁴⁵ The *actus reus* of this crime was, thus, a *voluntary membership* in an organization whose aims were criminal, while its *mens rea* consisted of *knowledge* of the organization’s criminal purposes. Indeed, the judges even recommended that the military tribunals prescribe a standardized penalty for it in the subsequent trials of Nazi war criminals, with “fixed limits appropriate to the nature of the crime”.¹⁴⁶

The IMT’s restrictive formulation of the nature and limits of the criminal membership concept had a profound effect on its use in the subsequent trials of ‘lesser’ Nazi war criminals. As Cohen wrote, “it had in actuality lost any practical significance as an independent category of criminality and was simply subsumed within the general purge of denazification that would have, in any event, taken the significance of such membership into account.”¹⁴⁷ Nevertheless, where this notion was pled in criminal proceedings, the Allies’ military tribunals in Germany did follow the IMT’s construction of it as a

143 Pomorski, *supra* n 14, at 239-240. Thus, for instance, in the *Pohl* case, which was tried before the US Military Tribunal in Nuremberg, the judges found that the Prosecution had proven beyond reasonable doubt that the accused Rudolf Scheide was a member of the SS, but that there was not sufficient evidence to prove that he had personal knowledge of the criminal activities of the SS. Scheide was thus acquitted on the charge of membership in a criminal organization. Military Tribunal II, *United States of America v. Oswald Pohl et al.* (“The Pohl Case”), Case No. 4, 8 April 1947 – 3 November 1947, in *Trials of War Criminals before the Nuernberg Military Tribunals under Control Council Law No. 10, Nuremberg, October 1946 – April, 1949*, Vol. V, (Washington, D.C.: United States Government Printing Office, 1950), at 1018.

144 As Smith explained, the IMT’s Judgement practically “[buried] the whole system of criminal organization prosecution. As the judges surely realized, none of the occupation authorities was going to proceed very far with the task of prosecuting two million to three million cases, in each of which they would have to prove that the defendant was a voluntary and knowledgeable member of a criminal organization”. Smith, *supra* n 107, at 164.

145 See *supra* Section 2.2.3.2.

146 In particular, the IMT observed that under Law No.10 of the Allied Control Council, members of a criminal organization can be punished with the death penalty, while under the De-Nazification Law of 5 March, which was in force in the United States Zone in Germany, the maximum penalty for this offence did not exceed 10 years imprisonment. The IMT Judgement, thus, recommended to the Allied Control Council “that Law No. 10 be amended to prescribe limitations on the punishment which may be imposed for membership in a criminal group or organization so that such punishment shall not exceed the punishment prescribed by the De-Nazification Law.” IMT Judgment, *supra* n 112, at 256-257.

147 D. Cohen, ‘Transitional Justice in Divided Germany After 1945’, in J. Elster (ed), *Retribution and Reparation in the Transition to Democracy* (Cambridge: Cambridge UP, 2006), at 72. The US Chief Prosecutor for the subsequent Nazi trials also acknowledged that a decision was made that “the so-called “membership cases” would, for the most part, be handled as a part of the denazification program. The punishment of membership in these organizations (within the limits of the IMT declaration) was, therefore, only an incidental purpose of the Nuernberg trials.” See T. Taylor, *Final Report to the Secretary of the Army on the Nuernberg War Crimes Trials under Control Council Law No. 10* (Washington D.C., 15 August 1949), at 70.

138 IMT Judgment, *supra* n 112, at 255-279. There were different reasons why the other three organizations were acquitted. The SA lost its prominence after the 1934 Blood Purge and did not play any important role in the events after that, which in practice left it out of the temporal framework of the crimes that the IMT adjudicated on. The Tribunal further found that the High Command and General Staff was in fact not an organization within the meaning of Article 9 IMT Charter, but an aggregation of military men who at given points of time happened to hold high military ranks. Since it was not a tangible group or an organization, the judges found that the High Command and General Staff could not be declared a *criminal* organization. As for the Reich Cabinet, the IMT held that “no declaration of criminality should be made with respect to the Reich Cabinet for two reasons: (1) because it is not shown that after 1937 it ever really acted as a group or organization; (2) because the group of persons here charged is so small that members could be conveniently tried in proper cases without resort to a declaration that the Cabinet of which they were members was criminal.” *Ibid.*, at 273-278.

139 In other words, the three convicted Nazi organizations were not declared criminal in their entirety: some of their sub-divisions were excluded from this declaration. For instance, the IMT held that the Secret Field Police or the Border and Customs Protection, branches of the Gestapo, were not criminal in nature. *Ibid.*, at 267-268.

140 *Ibid.*, at 256.

141 *Ibid.*

142 *Ibid.* (*emphasis added*)

substantive crime and convictions under it brought relatively low sentences.¹⁴⁸ The most famous and well-documented of these subsequent trials were 12 cases tried before the US Military Tribunals in Nuremberg between October 1946 and April 1949.¹⁴⁹ The concept of criminal membership played a role in eight of them,¹⁵⁰ and the judges overwhelmingly construed it as a substantive offence. Thus, for instance, in the trial of *Josef Altstötter et al.*, the accused Altstötter was “found not guilty of committing war crimes and crimes against humanity but guilty of membership of a criminal organisation”, which was why he received the relatively short sentence of five years imprisonment.¹⁵¹ Another trial in which some of the accused were convicted only of the crime of membership is that of *Ulrich Greifelt et al.* where five of the accused – Meyer-Retling, Schwarzenberger, Sollmann, Ebner and Tesch – were each sentenced to terms of imprisonment of less than 3 years: sentences that were significantly lower than those of the other defendants who were also found guilty of war crimes and crimes against humanity.¹⁵²

It should be pointed out, however, that there were also instances where the language used by the judges blurred the line between criminal membership as a substantive crime and the notion of complicity. In the *Karl Brandt et al* case, for instance, ten of the accused persons were charged under Count 4 with membership in a criminal organization, namely the SS.¹⁵³ In respect to each accused who was eventually convicted under this charge, the judgement

stated that “[a]s a member of the SS *he was criminally implicated in the commission of war crimes and crimes against humanity*, as charged under counts two and three of the indictment.”¹⁵⁴ It appeared, thus, that their membership was treated not only as a self-sufficient crime pursuant to Count 4, but also as a mode of liability which linked them to the crimes charged elsewhere in the indictment. In the *Friedrich Flick et al.* case, the judges addressed the responsibility of two defendants, Flick and Steinbrinck, with regards to their membership in the SS as follows:

An organization which on a large scale is responsible for such crimes can be nothing else than criminal. One who knowingly by his influence and money contributes to the support thereof must, under settled legal principles, be deemed to be, if not a principal, certainly an accessory to such crimes. So there can be no force in the argument that when, from 1939 on, these two defendants were associated with Himmler and through him with the SS they could not be liable because there had been no statute nor judgment declaring the SS a criminal organization and incriminating those who were members or in other manner contributed to its support.¹⁵⁵

The merging between membership in a criminal organization and the principles of complicity to a crime is evident in this dictum. It is further notable that Telford Taylor, who served as the Chief US Prosecutor in the subsequent Nazi trials, also seemed to be ill at ease when defining the nature of this notion. In his report to the Secretary of the Army, he argued that pursuant to the IMT Judgement, “membership was not really made a distinct and self-sufficient crime, but rather was one of the ways by which an individual might be proved guilty of complicity in one or more of the four substantive categories of crimes just described”.¹⁵⁶ Notwithstanding these statements, the analysis presented further above shows that the overwhelming approach of the Allies’ military tribunals in the subsequent Nazi trials was to follow the reasoning of the IMT judges and treat the concept of membership in a criminal organization strictly as a crime in its own right.

2.2.6. *The IMTFE Judgment: controversy and an adherent approach to conspiracy*

Having examined how the notions of multiple criminal liability evolved in the debates leading to the delivery of the IMT Judgment, it is apposite to also review their treatment in the IMTFE Judgment. On 19 January 1946, two months after the commencement of the Nuremberg Trial, the ‘Charter of the International Military Tribunal for the Far East’ was promulgated, Article 1 of which declared the creation of an international tribunal with

¹⁴⁸ Cohen has explained that the British military tribunals were the only ones that “pursued a systematic policy of criminal proceedings for membership in a criminal organization. By October 1949, these tribunals had tried 24, 154 members of the leadership corps (*Fuehrerkorps*) of the Nazi Party (NSDAP), the Gestapo and SD, and the SS... Of these 15, 724 were convicted. 5614 received a penalty of imprisonment, the rest were fined... The vast majority of those sentenced to a prison term were eligible for immediate release because their internment time counted against their relatively shorter sentences. Only nine hundred had to spend any additional time in custody and most of these were released after a few months. In July 1950, only forty-three remained in custody in the British camp at Esterwegen.” Cohen, *supra* n 147, at 71-72.

¹⁴⁹ These were the “Medical case” (Case No. 1), the “Milch case” (Case No. 2), the “Justice case” (Case No. 3), the “Pohl case” (Case No. 4), the “Flick case” (Case No. 5), the “Farben case” (Case No. 6), the “Hostage case” (Case No. 7), the “RuSHA case” (Case No. 8), the “Einsatz case” (Case No. 9), the “Krupp case” (Case No. 10), the “Ministries case” (Case No. 11) and the “High Command case” (Case No. 12). A total of 177 defendants were tried under these twelve cases, of whom 142 were convicted. Taylor, *supra* n 147, at 69 and 91. It should be noted that the 12 cases before the Military Tribunals in Nuremberg have been largely recognized as international trials. As Koessler explained, these cases against other major Nazi war criminals were intended as a continuation of the IMT Trial but without participation from the Soviet Union. See, M. Koessler, ‘American War Crimes Trials in Europe’, 39 *The Georgetown Law Journal* (1950), at 25, 36. See also *The Prosecutor v. Erdemović* (IT-96-22-A), Judgment, Appeals Chamber, 7 October 1997, Separate and Dissenting Opinion of Judge Cassese, para 27.

¹⁵⁰ Taylor, *supra* n 147, at 70.

¹⁵¹ *Trial of Josef Altstötter and Others* (‘The Justice Trial’), United States Military Tribunal, Nuremberg, 17th February – 4th December 1947, in UN War Crimes Commission, *Law Reports of Trials of War Criminals*, Vol. VI (London: Published for the United Nations War Crimes Commission by His Majesty’s Stationary Office, 1948), at 86.

¹⁵² The prison sentences of the other 8 accused in this case ranged from 10 years imprisonment to a life sentence. *Trial of Ulrich Greifelt and Others*, United States Military Tribunal, Nuremberg, 10th October 1947 – 10th March 1948, in UN War Crimes Commission, *Law Reports of Trials of War Criminals*, Vol. XIII (London: Published for the United Nations War Crimes Commission by His Majesty’s Stationary Office, 1949), at 36. For a further overview of criminal membership cases and sentences, see Taylor, *supra* n 147, at 93.

¹⁵³ The *Medical Case*, *supra* n 41, Vol. I, at 17.

¹⁵⁴ *Ibid.*, at 198, 241, 263, 281, 290, 297.

¹⁵⁵ Military Tribunal IV, *United States of America v. Friedrich Flick et al.* (‘The Flick Case’), Case No. 5, 19 April 1947 – 22 December 1947, in *Trials of War Criminals before the Nuernberg Military Tribunals under Control Council Law No. 10, Nuremberg, October 1946-April, 1949*, Vol. VI (Washington, D.C.: United States Government Printing Office, 1952), at 1216-1217.

¹⁵⁶ Taylor, *supra* n 147, at 70.

a permanent seat in Tokyo “for the just and prompt trial and punishment of the major war criminals in the Far East.”¹⁵⁷ At the outset, the Tokyo Tribunal was thus viewed as a continuation of the IMT: a sister tribunal that will try the military and political leaders of imperial Japan, while the “the major war criminals of the European Axis” were prosecuted in Nuremberg.¹⁵⁸ In practice, however, these tribunals differed from each other in a number of important respects and, before examining the parts of the IMTFE Judgment that are relevant to this research, it is helpful to first note several aspects of the Tokyo Tribunal that have quite negatively affected its jurisprudential legacy, prompting the view that it is a less authoritative source of international criminal law.

2.2.6.1. Differentiating the IMTFE from the IMT: the American connection

The IMTFE Judgment has been largely neglected both in academia and in the jurisprudence of the modern international courts which have traditionally focused on examining the Nuremberg Trial and the subsequent Nazi trials in Allied-occupied Germany.¹⁵⁹ Part of the reason for this has been the highly controversial nature of the Tokyo Tribunal and its proceedings against the accused. Already in the first years after the end of the trial, Schwarzenberger noted that:

The legal standards – or their absence – of the Tokyo Trial were such as to make lawyers wish to forget all about it at the earliest possible moment. Such criticism cannot be levelled at the judges of Nuremberg.¹⁶⁰

While this observation may contain some exaggeration, it is undoubtedly true that there were a few aspects of the establishment, conduct and transparency of the Tokyo Trial that sharply set it apart from its Nuremberg counterpart and have attracted much criticism. First and foremost, it is important to bear in mind that unlike the IMT – which was established by an international agreement concluded among the Allies – the IMTFE was set up by an executive decree issued by US General Douglas MacArthur, the Supreme Commander for

the Allied Powers.¹⁶¹ Next, while the IMT Charter was the product of negotiations between the governments of the United Kingdom, France, the Soviet Union and the United States, the IMTFE Charter was “drafted by the Americans only, essentially by Joseph B. Keenan, Chief Prosecutor at the Tokyo Trial, and the Allies were only consulted after its issuance.”¹⁶² As a result, even though certain parts of it were directly adopted from and modelled after the Nuremberg Charter, the Tokyo Charter was moulded by the US to fit its policies for that trial. One very clear example of this was Article 5 IMTFE Charter, sub-paragraph (c) of which restated almost verbatim the definition of ‘crimes against humanity’ contained in Article 6(c) IMT Charter,¹⁶³ yet with one important exception: it struck out the requirement that a crime against humanity can only be committed “against the civilian population”.¹⁶⁴ Bernard Röling, who was the Dutch judge at the IMTFE, recalled that this amendment was proposed by the Chief Prosecutor Keenan several days before the start of the trial so that the Tribunal could also convict the defendants for the killing of US soldiers.¹⁶⁵ a suggestion that would have qualified as a crime against humanity the attack on Pearl Harbor, which was foremost on General MacArthur’s mind when establishing the IMTFE.¹⁶⁶

Such issues of substantive law aside, it was the procedure that most clearly showed the American control over the Tokyo Trial. Firstly, unlike the IMT judges who were appointed by the respective governments of the Four Allies, pursuant to Article 2 IMTFE Charter the judges in the Tokyo Tribunal were all appointed by General MacArthur from a list that was submitted to him by the states involved in the war in Asia.¹⁶⁷ He also nominated the IMTFE President.¹⁶⁸ Furthermore, while the Nuremberg Tribunal had four Chief Prosecutors selected by the Allies, the IMTFE had one Chief Prosecutor appointed by General MacArthur – the American Joseph Keenan – and ten associate prosecutors appointed by the other states that

¹⁶¹ Special Proclamation - Establishment of an International Military Tribunal for the Far East (19 January 1946), re-printed in Boister and Cryer, *supra* n 157, at 5-6. See also S. Williams, *Hybrid and Internationalised Criminal Tribunals: Selected Jurisdictional Issues* (Oxford: Hart, 2012), at 137; K. Ambos, *Treatise on International Criminal Law* (Oxford: Oxford UP, 2013), at 6; Boister and Cryer, *supra* n 159, at 25-26; Hisakazu, *supra* n 159, at 6.

¹⁶² Röling and Cassese, *supra* n 159, at 2. See also Boister and Cryer, *supra* n 159, at 26-27.

¹⁶³ For an overview and analysis of the text of Article 6 IMT Charter, see *supra* Section 2.2.4.1.

¹⁶⁴ Article 5 IMTFE Charter, *supra* n 157.

¹⁶⁵ In short, Keenan’s prosecutorial strategy was to allege that Japan had started an ‘unjust war’ against the USA, and that within such a war every murder of a US soldier amounted to an unlawful killing and, consequently, to a crime against humanity if committed on a mass scale. Quite rightly, the IMTFE rejected this, as Röling called it, “silly suggestion”. Röling and Cassese, *supra* n 159, at 3, 56-57; *United States et al. v. Araki et al.*, International Military Tribunal for the Far East, Judgment and Sentence, 4 November 1948, re-printed in B.V.A. Röling and C. F. Rüter, *The Tokyo Judgment: The International Military Tribunal for the Far East (I.M.T.F.E.)*, 29 April 1946-12 November 1948, Vol. 1 (Amsterdam: APA-U Amsterdam, 1977), at 32-33.

¹⁶⁶ Röling and Cassese, *supra* n 159, at 78-80.

¹⁶⁷ In particular, the said states were those signatories to the Japanese “Instrument of Surrender” (namely, the USA, the UK, France, the Soviet Union, Canada, China, Australia, the Netherlands and New Zealand), as well as India and the Philippines. The IMTFE had thus a grand total of 11 judges. Article 2 IMTFE Charter, *supra* n 157. See also *e.g.* Boister and Cryer, *supra* n 159, at 23, 26.

¹⁶⁸ Röling and Cassese, *supra* n 159, at 30; Hisakazu, *supra* n 159, at 7.

¹⁵⁷ Article 1, Charter of the International Military Tribunal for the Far East, 19 January 1946 (amended 26 April 1946), re-printed in N. Boister and R. Cryer, *Documents on the Tokyo International Military Tribunal: Charter, Indictment and Judgments* (Oxford: Oxford UP, 2008), at 7-11.

¹⁵⁸ Article 1 IMT Charter, *supra* n 3.

¹⁵⁹ See *e.g.* N. Boister and R. Cryer, *The Tokyo International Military Tribunal: A Reappraisal* (Oxford: Oxford UP, 2008), at 1; M. Bassiouni, *Crimes against Humanity in International Criminal Law* (2nd edn, The Hague: Kluwer Law International, 1999), at 530 (fn. 97); F. Hisakazu, ‘The Tokyo Trial: Humanity’s Justice v Victors’ Justice’, in T. Tanaka, T. McCormack and G. Simpson (eds), *Beyond Victor’s Justice?: The Tokyo War Crimes Trial Revisited* (Leiden: Martinus Nijhoff, 2011), at 17; B. V. A. Röling and A. Cassese, *The Tokyo Trial and Beyond: Reflections of a Peacemaker* (Cambridge: Polity Press, 1993), at 81.

¹⁶⁰ G. Schwarzenberger, ‘The Problem of an International Criminal Law’, 3 *Current Legal Problems* (1950), at 289-290, re-printed in G. Simpson (ed), *War Crimes Law* (Aldershot: Ashgate/Dartmouth, 2004), at 5-38.

had been in war with Japan.¹⁶⁹ It also bears pointing out that in accordance with Article 17 IMTFE Charter, General MacArthur was entitled to “reduce or otherwise alter the [IMTFE] sentence except to increase its severity”:¹⁷⁰ a provision that had an analogue in the IMT Charter where, however, this kind of authority lied with the Allied Control Council in Germany.¹⁷¹ These and other such aspects of the Tokyo Trial have cast a shadow on its legitimacy, prompting some scholars to challenge the authority of its jurisprudence and describe it as “essentially an American undertaking.”¹⁷²

The actual conduct of the IMTFE proceedings – which resulted in a majority judgment that found all defendants guilty¹⁷³ – has also been subject to much criticism. Röling, who was one of the dissenting judges, opined in his memoirs of the Tokyo Trial that “the Tribunal was inconsistent and often favoured the prosecution”¹⁷⁴ and openly stated that the Soviet, Chinese and Filipino judges were in favour of delivering most severe verdicts from the very start of the trial.¹⁷⁵ Challenges of bias were also raised against the IMTFE President, the Australian Judge Webb, for whom Minear noted:

Early in the trial President Webb interrupted the prosecution to question a Japanese witness himself. His question was this: “Then, was the purpose of the Imperial Rule Assistance Association [Japan’s wartime political party] to prepare the people for an inhumane and illegal war against Great Britain and America, a war which should not have been begun and a war which cannot be defended?” Prejudgment of the issue at stake in the trial could hardly be more blatant.¹⁷⁶

Such prejudice could indeed be discerned in the Majority’s findings on the conspiracy charge, for which Cryer and Boister have noted that parts of them were “basically cut-and-pasted from the prosecution submissions”, while ignoring crucial and reliable submissions that were raised

by the defence:¹⁷⁷ a point that is reviewed further below. Speaking of the Majority’s judgment, the French Judge Bernard revealed in his dissenting opinion,¹⁷⁸ and this was subsequently also confirmed by Judge Röling,¹⁷⁹ that the IMTFE Judgment was not the product of deliberations between all 11 judges, but was in fact drafted by seven of them and the other four judges were basically presented the final product as a done deal. Indeed, this was one of the reasons which Judge Bernard put forward for concluding that the verdict against all the accused is invalid on account of being procedurally defective, and he more generally observed that:

Essential principles, violations of which would result in most civilized nations in the nullity of the entire procedure, and the right of the Tribunal to dismiss the case against the Accused, were not respected.¹⁸⁰

To this end, it is also quite showing that whereas the IMT Judgment and the official records of the Nuremberg Trial were promptly published in a 42-volume series,¹⁸¹ the IMTFE Judgment remained unpublished for nearly 30 years after the completion of the trial,¹⁸² and it took a few more years before the transcripts of the proceedings were also made widely available.¹⁸³ When asked for his opinion on the reasons for this peculiarity, Röling’s response was reminiscent of Schwarzenberger above-cited criticism:

I think the Americans felt uncomfortable about the whole Tokyo Trial. [...] I suppose that they were perhaps a bit ashamed of what happened there, with the resignation of the American judge, with the appointment of two judges after the trial had already started, with all the other awkward events. I suspect they didn’t want the Tokyo Trial to become very well known.¹⁸⁴

¹⁶⁹ Article 8 IMTFE Charter, *supra* n 157.

¹⁷⁰ Article 17 IMTFE Charter, *supra* n 157.

¹⁷¹ Article 29 IMT Charter, *supra* n 3.

¹⁷² M. Karnavas, ‘Joint Criminal Enterprise at the ECCC: a Critical Analysis of the Pre-Trial Chamber’s Decision against the Application of JCE III and Two Divergent Commentaries on the Same’, 21 *Criminal Law Forum* (2010), at 457. See also, M. Futamura, *War Crimes Tribunals and Transitional Justice: The Tokyo Trial and the Nuremberg Legacy* (London: Routledge, 2008), at 62; G. Robertson, *Crimes against Humanity: The Struggle for Global Justice* (3rd edn, London: Penguin, 2006), at 257. Indeed, in his reflections on the Tokyo Trial, Röling stated that “the Chief Prosecutor was an American, Keenan. In fact the Americans were in control of most aspects of the trial. The trial was very much an American performance, except that the tribunal was international and also Keenan was assisted by prosecutors from most of the countries then sitting in judgment.” Röling and Cassese, *supra* n 159, at 31.

¹⁷³ IMTFE Judgment, *supra* n 165, at 464-465.

¹⁷⁴ Röling and Cassese, *supra* n 159, at 51.

¹⁷⁵ *Ibid.*, at 29. The appointment of the Filipino Judge Jaranilla was especially alarming, considering the fact that he was a victim of the Bataan Death march, which had formed part of the charges against the accused. See Cryer *et al.*, *supra* n 17, at 123.

¹⁷⁶ R. Minear, *Victors’ Justice: The Tokyo War Crimes Trial* (Princeton: Princeton UP, 1971), at 85. (reference to court transcript omitted)

¹⁷⁷ Boister and Cryer, *supra* n 159, at 217.

¹⁷⁸ IMTFE Judgment, *supra* n 165, at 494-495.

¹⁷⁹ Röling and Cassese, *supra* n 159, at 62-63.

¹⁸⁰ IMTFE Judgment, *supra* n 165, at 494.

¹⁸¹ Known as “The Blue Series”, the official records of the Nuremberg Trial were published in the years 1947-1949. *Trial of the Major War Criminals before the International Military Tribunal, Nuremberg, 14 November 1945-1 October 1946*. Vols. I-XLII. Nuremberg, Germany, 1947-1949.

¹⁸² The IMTFE Judgment and the separate opinions attached to it were first published in 1977, in two volumes edited by Röling and Prof. Rüter. See B.V.A. Röling and C. F. Rüter, *The Tokyo Judgment: The International Military Tribunal for the Far East (I.M.T.F.E.), 29 April 1946-12 November 1948*, Vols. 1-2 (Amsterdam: APA-U Amsterdam, 1977). See also Röling and Cassese, *supra* n 159, at 6; Boister and Cryer, *supra* n 157, at lxxxiii; Minear, *supra* n 176, at 213.

¹⁸³ The official transcripts of the IMTFE Trial were first published by Pritchard and Zaide in 1981. R. Pritchard and S. Zaide (eds), *The Tokyo War Crimes Trial: Complete Transcript of the Proceedings* (New York: Garland, 1981). See also Boister and Cryer, *supra* n 157, at lxxxiii.

¹⁸⁴ Röling and Cassese, *supra* n 159, at 81.

It is beyond the scope of this chapter to highlight all the irregularities which marred the Tokyo Trial.¹⁸⁵ Rather, the above cursory overview of some of the best-known deficiencies of the IMTFE has sought to provide a general sense of the troubled legacy of this Tribunal and to help understand why present-day international criminal lawyers have largely shunned its work, arguing that:

the proceedings at Tokyo left much to be desired in terms of fairness, whereas the Nuremberg proceedings, as noted, were substantially fair. Additionally, the judgment at Nuremberg was, with few exceptions, substantially fair; whereas the Tokyo judgment was substantially unfair to a number of defendants.¹⁸⁶

Indeed, although the Nuremberg Trial has also attracted some criticism,¹⁸⁷ and despite the fact that there were certainly praiseworthy aspects to the Tokyo Trial,¹⁸⁸ there is a stark difference in fairness and legitimacy of these two international tribunals. It is, therefore, hardly surprising that nowadays the IMTFE Judgment is often viewed as a generally less authoritative precedent than the IMT Judgment.¹⁸⁹

2.2.6.2. Conspiracy in Tokyo

It bears noting from the outset that the construct of membership in a criminal organization did not figure in the IMTFE Charter. Indeed, Japanese agencies were not indicted in Tokyo, so the Tribunal did not have to examine this notion.¹⁹⁰ Quite the opposite was true for the concept of conspiracy, which was codified in Article 5 IMTFE Charter that largely mirrored the language of Article 6 IMT Charter:¹⁹¹

The Tribunal shall have the power to try and punish Far Eastern war criminals who as individuals or as members of organizations are charged with offences which include Crimes against Peace. The following acts, or any of them, are crimes coming within the jurisdiction of the Tribunal for which there shall be individual responsibility:

- (a) Crimes against Peace: Namely, the planning, preparation, initiation or waging of a declared or undeclared war of aggression, or a war in violation of international law, treaties, agreements or assurances, or participation in a common plan or conspiracy for the accomplishment of any of the foregoing;
- (b) Conventional War Crimes: Namely, violations of the laws or customs of war;
- (c) Crimes against Humanity: Namely, murder, extermination, enslavement, deportation, and other inhumane acts committed against any civilian population, before or during the war, or persecutions on political or racial grounds in execution of or in connection with any crime within the jurisdiction of the Tribunal, whether or not in violation of the domestic law of the country where perpetrated. 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 person in execution of such plan.¹⁹²

Regarding the conspiracy notion, the only difference between the text of this provision and its Nuremberg counterpart lies in the last four lines: here, they were included as part of the text of sub-paragraph (c), while in the IMT Charter they were separated in an independent paragraph. Although this structural alteration did lead the French judge to conclude that – unlike the IMT Charter – the IMTFE Charter also recognizes conspiracy to commit war crimes and conspiracy to commit crimes against humanity as separate, inchoate offences,¹⁹³ the Majority viewed this difference for what it most likely was: a drafting error that was not meant to define a different scope and meaning for conspiracy than that established in the IMT Charter.¹⁹⁴

Similarly to the IMT Prosecution, the IMTFE Prosecution sought to found its case on a charge of an overarching conspiracy that was alleged to have existed between the military and political leaders of Japan. In particular, Count 1 of the IMTFE Indictment stated that:

[a]ll the Defendants together with divers other persons, between the 1st January, 1928, and the 2nd September, 1945, participated as leaders, organizers, instigators, or accomplices in the formulation or execution of a common plan or conspiracy and are responsible for all acts performed by themselves or by any person in execution of such plan.¹⁹⁵

It was further stated that the goal of the conspiracy was “that Japan should secure the military, naval, political and economic domination of East Asia and of the Pacific and

¹⁸⁵ For the leading, most informative academic work on this point, see Minear, *supra* n 176. See also Röling and Cassese, *supra* n 159.

¹⁸⁶ Bassiouni, *supra* n 159, at 531. In a more general vein, Minear submitted that “[t]he Tokyo trial is a bad precedent, bad enough, I suggest, to cast doubt on the Nuremberg precedent as well.” Minear, *supra* n 176, at xi.

¹⁸⁷ Robertson, *supra* n 172, at 253-255; V. Morris, and M. Scharf, *An Insider’s Guide to the International Criminal Tribunal for the Former Yugoslavia: A Documentary History and Analysis* (Irvington-on-Hudson, NY: Transnational, 1995), at 9.

¹⁸⁸ Röling and Cassese, *supra* n 159, at 86, 90; Cryer *et al.*, *supra* n 17, at 123-124; B.V.A. Röling and C. F. Rüter, *The Tokyo Judgment: The International Military Tribunal for the Far East (I.M.T.F.E.), 29 April 1946-12 November 1948*, Vol. 1 (Amsterdam: APA-U Amsterdam, 1977), at xvi.

¹⁸⁹ Morris and Scharf, *supra* n 187, at 8 (fn. 42); Karnavas, *supra* n 172, at 457; I. Bantekas and S. Nash, *International Criminal Law* (3rd edn, London: Routledge-Cavendish, 2007), at 509; Futamura, *supra* n 172, at 144-147.

¹⁹⁰ Röling and Cassese, *supra* n 159, at 3; Bassiouni, *supra* n 159, at 531.

¹⁹¹ The most notable difference between the text of Article 5 IMTFE Charter and Article 6 IMT Charter and was the above-discussed altered definition of ‘crimes against humanity’. See *supra* text accompanying notes 163-166.

¹⁹² Article 5 IMTFE Charter, *supra* n 157. Compare to Article 6 IMT Charter, discussed *supra* Section 2.2.4.1.

¹⁹³ *United States et al. v. Araki et al.*, International Military Tribunal for the Far East, Judgment and Sentence, 4 November 1948, Dissenting Judgment of the Member from France, re-printed in Röling, B.V.A., and C. F. Rüter, *The Tokyo Judgment: The International Military Tribunal for the Far East (I.M.T.F.E.), 29 April 1946-12 November 1948*, Vol. 1 (Amsterdam: APA-U Amsterdam, 1977), at 494.

¹⁹⁴ As explained below, the IMTFE Judgment thus fully adopted the IMT’s findings on the law of conspiracy. See *infra* text accompanying notes 202-207. For a detailed analysis on the meaning of conspiracy within the text of Article 6 IMT Charter, see *supra* Section 2.2.4.1.

¹⁹⁵ *United States et al. v. Araki et al.*, International Military Tribunal for the Far East, Indictment, re-printed in Boister and Cryer, *supra* n 157, at 18.

Indian Oceans, and of all countries and islands therein and bordering thereon”, which goal was to be achieved through waging an aggressive war against any opposing country.¹⁹⁶ Looking at the wording of Count 1, it is quite clear that the Prosecution defined the concept of conspiracy in the broadest possible way. On the one hand, it was an independent crime – *i.e.* conspiracy to wage a war of aggression (commit crimes against peace) under Article 6(a) IMTFE Charter – which allowed to scoop in this wide network all 28 accused, who held various military and political positions during different, intermittent periods of time.¹⁹⁷ On the other hand, it was seemingly also pled as a mode of liability, considering that Count 1 also held that each conspirator was responsible for all acts committed in the execution of this overarching conspiracy. Cryer and Boister, thus, described Count 1 IMTFE Indictment as “all-embracing”,¹⁹⁸ seeing as all the other crimes that were charged in the case were performed in the execution of the grand conspiracy. On a *prima facie* consideration, this construction is practically identical to Bernays’ original memorandum and his concept of conspiracy-complicity. It would be recalled that according to the underlying rationale of this notion, the mere act of agreeing to a conspiracy, *without more*, suffices to find the conspirator responsible for the inchoate crime of conspiracy *and* for the substantive crimes committed in the execution of the said conspiracy.¹⁹⁹ While the above research has shown that the US Chief Prosecutor at the IMT did not adopt this reasoning when pleading the conspiracy charge,²⁰⁰ the IMTFE Prosecutor appears to have done so. In particular, analysis of the official transcripts of the Tokyo Trial has led scholars to conclude that the Prosecution:

asserted that an accused would be guilty of a substantive crime against peace *in the absence of participation* if the event occurred and the conduct continued after the individual had become party to the conspiracy, and there was no evidence of objection by the accused or even if there was some evidence of disagreement.²⁰¹

As shown immediately below, this interpretation of the law on conspiracy was rejected by the IMTFE.

While the IMTFE Prosecutor was still pleading his case-in-chief, the IMT delivered its Judgment, which gave all the participants in the Tokyo Trial ample opportunity to study it

and consider the IMT judges’ restrictive interpretation of the law on conspiracy.²⁰² Thus, when the IMTFE Judgment was handed down on 4 November 1948, the judges made clear that they had paid close attention to the Nuremberg precedent from two years ago. In particular, early in the Judgment, they held that:

In view of the fact that in all material respects the Charters of this Tribunal and the Nuremberg Tribunal are identical, this Tribunal prefers to express its unqualified adherence to the relevant opinions of the Nuremberg Tribunal rather than by reasoning the matters anew in somewhat different language to open the door to controversy by way of conflicting interpretations of the two statements of opinions.²⁰³

Regarding specifically the law on conspiracy under the IMTFE Charter, and the Prosecution’s expansive use of this concept, the judges reasoned that “[o]n this topic the Tribunal concurs in the view of the Nuremberg Tribunal.”²⁰⁴ Thus, just like the IMT, the Tokyo Tribunal accepted that conspiracy to commit crimes against peace (*i.e.* to wage a war of aggression) is a separate, independent crime but rejected the view that forming an agreement to commit any of the other crimes listed under the IMTFE Charter is also a crime in and of itself.²⁰⁵ As for what the exact meaning of this crime is, the judges found that “[a] conspiracy to wage aggressive or unlawful war arises when two or more persons enter into an agreement to commit that crime.”²⁰⁶ Thus, forming an agreement to wage a war of aggression was the *actus reus* of this crime. The *mens rea* element was stated implicitly when the judges reasoned that a newcomer to the conspiracy becomes a conspirator if he “adopt[s] the purpose of the conspiracy”: *i.e.* purpose/direct intent to carry out the concerted crime was required.²⁰⁷

The Prosecution’s submission that a member of a conspiracy can also be held liable for the resulting substantive crimes, even if he did not actually participate in their execution – *i.e.* Bernays’/Pinkerton conspiracy – was rejected by the IMTFE. Specifically, in their findings on the Indictment, the judges first clearly separated the crime of conspiracy to wage an aggressive war from the actual waging of an aggressive war by finding that:

²⁰² The IMT Judgment was delivered on 1 October 1946, nearly 4 months before the IMTFE Prosecution finished pleading its case-in-main (24 January 1947) and about a year and a half before the Prosecution and the Defence submitted their closing arguments (respectively on 11 February 1948 and 16 April 1948). See Boister and Cryer, *supra* n 157, at lix.

²⁰³ IMTFE Judgment, *supra* n 165, at 28.

²⁰⁴ *Ibid.*, at 32. For an analysis of the IMT judges’ interpretation of the concept of conspiracy, see *supra* Section 2.2.5.1.

²⁰⁵ Specifically, the judges concluded that “Crimes against Peace is the only category in which ‘common plan or conspiracy’ is stated to be a crime. It has no application to Conventional War Crimes and Crimes against Humanity as conspiracies to commit such crimes are not made criminal by the Charter of the Tribunal”. *Ibid.* at 31-32. The Tribunal thus summarily dismissed all the charges of ‘sub-conspiracies’ to commit murder as a war crime and as a crime against humanity, contained in Counts 37, 38, 44, and 53 of the Indictment. *United States et al. v. Araki et al.*, International Military Tribunal for the Far East, Indictment, re-printed in Boister and Cryer, *supra* n 157, at 27, 29-30 and 32.

²⁰⁶ IMTFE Judgment, *supra* n 165, at 31.

²⁰⁷ *Ibid.*

¹⁹⁶ *Ibid.*

¹⁹⁷ The Prosecutor Keenan argued before the IMTFE that conspiracy is “a combination of two or more persons, by concerted action, to accomplish a criminal or unlawful purpose, or some purpose not in itself criminal or unlawful, by criminal or unlawful means... The purpose of the conspiracy may be continuous, that is, it may contemplate commission of several offences, or overt acts.”, cited in D. Crowe, *War Crimes, Genocide, and Justice: A Global History* (New York: Palgrave Macmillan, 2014), at 229.

¹⁹⁸ Boister and Cryer, *supra* n 159, at 207.

¹⁹⁹ See *supra* Section 2.2.1. and Section 2.2.2.1. (text accompanying notes 19-25)

²⁰⁰ See *supra* Section 2.2.3.1. (text accompanying notes 67-72) and Section 2.2.5.1. (text accompanying notes 100-107)

²⁰¹ Boister and Cryer, *supra* n 159, at 221-222. (*emphasis added*)

No more grave crimes can be conceived of than a conspiracy to wage a war of aggression *or* the waging of a war of aggression. The probable result of such a conspiracy and the inevitable result of its execution is that death and suffering will be inflicted on countless human beings.²⁰⁸

The manner in which the judges then examined the accused's liability for the grand conspiracy crime (Count 1), on the one hand, and for the substantive crimes of waging wars of aggression against the various allied nations (Counts 27-36), on the other, reveals the restrictive approach they took on the concept of conspiracy. For instance, in the verdict against the accused Araki, the Tribunal held that he was "one of the leaders of the conspiracy set out in Count 1" and was thus guilty under Count 1 of the Indictment.²⁰⁹ Notably, however, Araki was then acquitted of nearly all the charges of waging the aggressive wars that resulted from this conspiracy because the judges concluded that there was "no evidence that he took *active part* in the wars referred to in Counts 29, 31, 32, 33, 35 and 36".²¹⁰ The accused was also found not guilty of Counts 54 and 55 – charging responsibility for war crimes and crimes against humanity – because of lack of evidence that he participated in/contributed to their commission.²¹¹ The verdict against the accused Minami is nearly identical: he was held guilty of the grand conspiracy charge but was acquitted of the substantive crimes of waging wars of aggression.²¹² It is, thus, evident that the IMTFE did not endorse the proposition that the sole act of agreeing to a common plan to wage an aggressive war suffices to hold the defendant guilty not only of the crime of conspiracy, but also of the substantive crimes resulting from the said conspiracy. In fact, where the judges did find the accused guilty of waging a war of aggression, or of charges of war crimes and crimes against humanity, they always cited evidence showing that the particular accused "contributed largely",²¹³ "contributed substantially",²¹⁴ took "active"/"important"/"prominent"/"principal" etc. part in²¹⁵ the execution of the substantive crime.

Considering all the above, it is clear that the IMTFE Judgment adopted the Nuremberg Tribunal's restrictive interpretation of the scope and meaning of the conspiracy notion. In fact, scholars have more generally observed that regarding questions of law:

²⁰⁸ *Ibid.*, at 441. (*emphasis added*)

²⁰⁹ *Ibid.*, at 443.

²¹⁰ By contrast, Araki was held guilty of waging an aggressive war against the Republic of China (Count 27) after the Tribunal cited evidence that he "took a prominent part in the development and the carrying out of the military and political policies pursued in Manchuria and Jehol", thereby concluding that he actively "participated in the waging of that war." *Ibid.*

²¹¹ *Ibid.*

²¹² *Ibid.*, at 454-455. It also bears noting that another accused, Oshima, was found guilty only of the conspiracy crime under Count 1 and was acquitted of all the other charges against him. *Ibid.*, at 456.

²¹³ *Ibid.*, at 445

²¹⁴ *Ibid.*

²¹⁵ *Ibid.*, at 449-450, 452, 458-459.

the Tokyo Trial served as little more than a 'follow-on' from the Nuremberg Trial in that the judges limited their contribution on jurisprudential matters to offering their 'unqualified adherence' to the Nuremberg Judgment.²¹⁶

In this respect, although the Tokyo Tribunal's factual findings on the grand conspiracy charge have attracted much criticism,²¹⁷ its findings on the law of conspiracy were a reiteration of the Nuremberg precedent.

2.2.7. Preliminary conclusions

If the Nuremberg-era international legislation and jurisprudence on the concepts of conspiracy and membership in a criminal organization is to be described in several words, 'controversial', 'complex' and 'confusing' would most likely top the list. One conclusion that could be drawn from the above research is that at different times, different actors had different views about the meaning and nature of these legal constructs. The consequence of having this chaotic legacy is that if a present-day scholar or practitioner contends that conspiracy/criminal membership is a substantive crime, he would certainly find post-World War II documents that affirm this view. However, the same holds true for those seeking support for the argument that the two concepts were also construed as forms of participation

²¹⁶ Y. Totani, 'The Case against the Accused', in Tanaka, McCormack and Simpson, *supra* n 159, at 160-161. In the same venue of thought, Cryer pointed out that the IMT Judgment "followed the Nuremberg IMT's opinion on practically all aspects of law. [...] Perhaps the only major difference was that, unlike the Nuremberg IMT, which did not find it necessary to deal with command responsibility, the Tokyo IMT discussed that principle in some detail, and applied it both to military and civilian defendants." Cryer *et al.*, *supra* n 17, at 121-122.

²¹⁷ Whereas the IMT required evidence of specific meetings, taking place on concrete dates on which the accused met and formulated a common plan that had a well-defined goal and was not too far-removed in time from its execution (*supra* text accompanying notes 114-118), the Tokyo Tribunal took a much looser approach to confirm the existence of a conspiracy. The IMTFE judges practically recited the Prosecution's case when finding that the grand conspiracy in Count 1 came into being between 1927 and 1929 when "a party of military men, with Okawa and other civilian supporters, was advocating [the policy] that Japan should expand by the use of force." This conspiracy, with its vaguely defined goal and quite ambiguous starting point, was found to have "lasted until Japan's defeat in 1945." With the exception of Matsui and Shigemitsu, all the accused – who at different points of time during this nearly two-decade period held various political/military positions in Japan – were found to have joined the grand conspiracy. No evidence of an express agreement, reached at a particular meeting, between them was ever considered. Rather, the judges inferred the existence of a conspiracy from circumstantial evidence showing the raise of militarism in Japan. In turn, proof that a defendant was part of Japan's military or political leadership during this period and that he, in one form or another, voiced an opinion favouring the war sufficed to find that the said accused was a member of the conspiracy. IMTFE Judgment, *supra* n 165, at 439-442. In fact, even accused for whom the evidence showed that they opposed Japan's going to war, yet continued to hold an important political position – e.g. the defendant Shigemitsu – were found guilty under Count 1. To this end, Röling critically explained that "[f]rom the decision of the Tribunal's majority it follows that it is forbidden to accept important government posts, even if one does so to prevent or end a war." Röling and Cassese, *supra* n 159, at 58-59. More generally, Judge Bernard lamented in his dissenting opinion that "[n]o direct proof was furnished concerning the formation among individuals known, on a known date, at a specific point, of a plot the object of which was to assure to Japan the domination unaccepted by its inhabitants of some part of the world. The only thing proven is the existence among certain influential classes of the Japanese nation of the desire to seat at all costs the domination of Japan upon other parts of East Asia." IMTFE Judgment, Dissent of Member from France, *supra* n 193, at 495-496. For a critical analysis on the IMTFE findings under Count 1 of the Indictment, see also Boister and Cryer, *supra* n 159, at 217-220.

in a crime. Therefore, it could be quite difficult to convincingly compare them to the legal notions that the modern international tribunals have used to try war criminals: a matter addressed in Chapter 3, where the contemporary debates on the relationship between conspiracy/criminal membership and JCE liability will be studied.²¹⁸

Notwithstanding the above, this author is of the opinion that an evolutionary transition could be discerned in the identified three development stages of the notions of conspiracy and membership in a criminal organization: *viz.* i) Bernays' original memorandum and the ensuing US inter-departmental debates on it; ii) the London Conference; and iii) the IMT (and IMTFE) Judgment. Both conspiracy and membership in a criminal organization were first defined in an excessively broad manner by Bernays. The former concept was treated both as an independent crime of which Hitler and his associates could be convicted and as a mode of liability through which they could also be linked to all the substantive crimes committed on the field. The latter notion was defined even more obscurely in Bernays' plan and it seemed to have three possible functions. In particular, membership in a Nazi criminal agency, "without more", could be seen as: i) an independent crime; ii) a diluted equivalent to the grand Hitlerite conspiracy; and iii) a mode of liability to convict organization's members for substantive crimes attributed to it.²¹⁹

Bernays' legal notions were subsequently refined in the ensuing US inter-departmental talks and then further trimmed and reworked during the heated discussions between the Allies at the London Conference, culminating in the adoption of the IMT Charter. In accordance with Article 6, conspiracy was recognized as an independent offence but solely in relation to crimes against peace, thus leaving war crimes and crimes against humanity out of its scope. The term then also appeared in the last sentence of this provision – containing the forms of participation in a crime – but, contrary to what has often been claimed, the *travaux préparatoires* of Article 6 IMT Charter show that this specific text did not incorporate Bernays' conspiracy-complicity notion. While it is true that Jackson sometimes discussed conspiracy as a mode of liability, he actually defined its legal framework in a manner consistent with the generally accepted rule on complicity. In particular, he always highlighted the accused's active participation in furthering the common criminal plan, which confirms that Jackson did not view the mere act of agreeing to a plan as a legal basis for imputing responsibility for the substantive offences resulting from the execution of this plan. Neither was such an idea endorsed by any of the other delegates in London: if anything, the debates on responsibility arising from participation in a common plan resonated more closely with the rule on joint enterprise liability, as stated in the Yalta and San Francisco memorandums. As for the concept of membership in a criminal organization, it was dealt with under Articles 9-11 IMT Charter, where it was established solely as an independent crime, even though the preparatory works reveal that this notion was also construed as a mode of liability. This significantly limited the original formulation that was found in Bernays' plan. Furthermore, the drafting history of the criminal membership

provisions also demonstrate that the Allies additionally refined its meaning by confirming that it requires that the accused must have knowledge of the organization's criminal goal: *i.e.* "proof of membership *without more*" was *not* deemed enough for a conviction. However, the delegates agreed that such knowledge was to be assumed and that the burden was on the accused to prove otherwise.²²⁰

By the time the conspiracy/criminal membership concepts reached the IMT judges, the two had substantially evolved from their original formulations. Nevertheless, there remained a few uncertainties, mostly concerning the concept of conspiracy and its meaning under Article 6 IMT Charter. The Tribunal put an end to the confusion when it clearly held that conspiracy is a substantive crime which, under the IMT Charter, is applicable only when it is aimed at the commission of crimes against peace. This, the judges explained, had to be distinguished from liability for 'participating in a common plan', which is what they defined to be the meaning of the final sentence of Article 6 IMT Charter. The latter concept was, thus, considered to require active *participation* in the execution of a common plan and was clearly construed as a form of individual criminal responsibility for substantive crimes resulting from the furtherance of such a plan. Bernays' notion of conspiracy-complicity (presently known under US law as *Pinkerton* liability) – which sought to ascribe responsibility to a conspirator for all the crimes committed by his confederates in the execution of an agreement merely on the basis that he agreed to this plan – was thus never applied by the IMT. This put an end to the idea that conspiracy can also be a mode of liability and established the concept of participating in a common plan/design: a materially distinct type of criminal responsibility that was further elaborated in the subsequent trials of 'minor' Nazi criminals before the Allies' tribunals in occupied Germany.²²¹ As for the criminal membership concept, the IMT established that it is strictly an independent crime (and not a mode of liability) that requires the prosecution to prove that the accused was a voluntary member of an organization that had criminal goals, and that he had knowledge of them.²²² The IMTFE, in turn, did not deal with the notion of criminal membership in its Judgment and fully endorsed the Nuremberg Tribunal's narrow construction of the law on conspiracy.

The above summation of the conducted research helps to explain why the Nuremberg-era notions of conspiracy and membership in a criminal organization should be viewed strictly as independent crimes in the context of international criminal law. Although it is certainly true that they were originally construed also as forms of criminal participation, they were gradually refined as ultimately recognized by the Nuremberg and Tokyo Tribunals solely as substantive crimes. In this respect, they do not constitute an early form of co-perpetration responsibility in international criminal law, irrespective of what specific definitions they might be given in one domestic jurisdiction or another.

²²⁰ See *supra* Section 2.2.3. and Section 2.2.4.

²²¹ See *infra* Section 2.3.3.

²²² See *supra* Section 2.2.5.2.

²¹⁸ See Chapter 3, Section 3.5.1.

²¹⁹ See *supra* Section 2.2.1. and Section 2.2.2.

2.3. The notion of ‘common design/purpose’

With the Nuremberg Trial of Major War Criminals underway, the governments of France, the United Kingdom, the Soviet Union and the USA convened to also formulate a common policy for trying the ‘lesser’ Nazi war criminals. This led to the promulgation of the Control Council Law No. 10 (‘CCL’) on 20 December 1945, the purpose of which was “to establish a uniform legal basis in Germany for the prosecution of war criminals and other similar offenders, other than those dealt with by the International Military Tribunal”.²²³ Pursuant to Article III CCL, Germany was divided into four Occupation Zones, wherein the Allied Powers could establish military tribunals and prosecute suspected Nazi war criminals.²²⁴ Thus, when the trials started, the Occupying Powers conducted them “either under the framework they had set up in Control Council Law No. 10 or in conjunction with their own national enabling legislation.”²²⁵ Chief among this category of cases were those tried before the US Military Tribunals in Nuremberg (‘the NMTs’).²²⁶ Within their subject-matter, as defined in Article II(1) CCL, fell four groups of crimes: crimes against peace, war crimes, crimes against humanity and “membership in... a criminal group or organization declared criminal by the International Military Tribunal.”²²⁷ It was also stated in Article I CCL that the IMT Charter formed an “integral part of this Law”.²²⁸ Notwithstanding this spirit of continuity, Control Council Law No.10 differed from the IMT Charter in at least one important aspect: its elaboration on the applicable modes of liability.

2.3.1. Article II(2) CCL - refining the modes of criminal liability

Article II(2) of Control Council Law No. 10 provided the following definition of the modes of liability applicable before the military tribunals at the Occupation Zones in Germany:

Any person without regard to nationality or the capacity in which he acted, is deemed to have committed a crime as defined in paragraph 1 of this Article, if he was (a) a principal or (b) was

an accessory to the commission of any such crime or ordered or abetted the same or (c) took a consenting part therein or (d) was connected with plans or enterprises involving its commission or (e) was a member of any organization or group connected with the commission of any such crime or (f) with reference to paragraph 1 (a) if he held a high political, civil or military (including General Staff) position in Germany or in one of its Allies, co-belligerents or satellites or held high position in the financial, industrial or economic life of any such country.

Several preliminary observations can be made when reading this text. First of all, Article II(2) CCL outlined six different modes of liability in a much more structured manner than that seen in the text of Article 6 IMT Charter.²²⁹ In fact, the latter nearly eviscerated the border between crimes and forms of participation in them, which, as extensively discussed above, led to quite some confusion during the Nuremberg Trial. Next to this, Article II(2) CCL distinguished, for the first time in international criminal law, between principals and accessories to a crime. This constituted a significant development from the law contained in Article 6 IMT Charter, which followed a unitary/monistic approach to criminal participation.²³⁰ A thorough analysis on this point is provided further below. Another eminent feature of Article II(2) CCL was the absence of any reference to the concept of conspiracy among the applicable modes of liability. Instead, Article II(2)(d) addressed the responsibility of individuals who were “connected with plans or enterprises involving” the commission of any crime listed under this law. The only mention of conspiracy was seen in Article II(1)(a) CCL, which made partaking in a conspiracy to commit crimes against peace a substantive offence.²³¹ All of these *prima facie* observations stem from the plain text of Article II(2) CCL. By examining the jurisprudence of the subsequent military tribunals in Germany, one can attest their validity and obtain an authoritative interpretation of the exact scope and meaning of the relevant provisions contained therein.

Before delving into those aspects of Article II(2) CCL which are most pertinent for the purposes of this chapter, several parts of its legal content should be summarily addressed here to avoid any confusion or gaps in the analysis. To begin with, sub-paragraph f) of

²²⁹ See *supra* Section 2.2.4.1.

²³⁰ The unitary model of criminal liability does not distinguish between the different classes of participation in a crime: it states that every person who contributes to a crime with the requisite *mens rea* is liable as a perpetrator (*i.e.* principal). The significance of his contribution matters only for sentencing purposes. See *e.g.* Ambos, *supra* n 161, at 105; H. Olásolo, ‘Joint Criminal Enterprise and Its Extended Form: A Theory of Co-Perpetration Giving Rise To Principal Liability, a Notion of Accessorial Liability, or a Form of Partnership In Crime?’, 20 *Criminal Law Forum* (2009), at 272; J. Vogel, ‘How to Determine Individual Criminal Responsibility in Systemic Contexts: Twelve Models’, *International Society of Social Defence and Humane Criminal Policy* (2002), at 152; A. Cassese, ‘Amicus Curiae Brief of Professor Antonio Cassese and Members of the Journal of International Criminal Justice on Joint Criminal Enterprise Doctrine’, 20 *Criminal Law Forum* (2009), at 304; J. Stewart, ‘The End of ‘Modes of Liability’ for International Crimes’, 25 *Leiden Journal of International Law* (2012), at 169-170.

²³¹ The text of Article II(2)(a) CCL almost mirrored that of Article 6(a) IMT Charter and defined crimes against peace as the “[i]nitiation of invasions of other countries and wars of aggression in violation of international laws and treaties, including but not limited to planning, preparation, initiation or waging a war of aggression, or a war of violation of international treaties, agreements or assurances, or participation in a common plan or conspiracy for the accomplishment of any of the foregoing.” (*emphasis added*) Article II(2)(a), Control Council Law No. 10, *supra* note 223, at 250.

²²³ Control Council Law No. 10, Punishment of Persons Guilty of War Crimes, Crimes Against Peace and Against Humanity, December 20, 1945, Official Gazette Control Council for Germany 50-55 (1946), re-printed in Taylor, *supra* n 147, at 250-253 (Appendix D).

²²⁴ *Ibid.*, Article III.

²²⁵ Cohen, *supra* n 147, at 63. Cohen further summarized the jurisprudence of the military tribunals in the four Occupation Zones, stating that: “[t]hese trials began in 1945 and, in the case of the French, went on well into the 1950’s. American military tribunals convicted 1814 German War Criminals (450 received death sentences), British tribunals 1085 (240 death sentences), French 2107 (104 death sentences) [...] On some accounts, the Soviet Union tried and convicted as many as 45,000 Germans of war crimes, though some other figures are lower and caution is required”. *Ibid.*

²²⁶ See *supra* note 149. For an explanation on the nature of these trials, their authoritative value and a comparison with the series of other trials, which took place in the US Occupation Zone in Germany, see Chapter 4, Section 4.2.2.3 and Section 4.2.3.2.ii.

²²⁷ Article II(1), Control Council Law No. 10, *supra* note 223, at 250.

²²⁸ *Ibid.*

Article II(2) CCL sought to ascribe criminal liability to individuals on the mere basis that they “held a high political, civil or military” position in the Axis Powers, or “held high position in the financial, industrial or economic life of any such country.” The only limitation of this provision was that it could be used solely “with reference to paragraph 1(a)”: *i.e.* only in conjunction with crimes against peace. Telford Taylor – the Chief Prosecutor in the cases brought before the Military Tribunals in Nuremberg – disapproved of this concept and explained that “[f]or reasons of law and policy... no defendant was ever charged with the commission of crime under the wording of clause (f) of that paragraph”.²³² The NMTs also rejected this provision²³³ and in the *Farben* case Judge Herbert noted that it practically imposed strict liability for crimes against peace:

Literally construed, Control Council Law No. 10, paragraph 2 (f), which is applicable only to crimes against peace, might be held to mean that the holders of high political, civil or military positions in Germany, or holders of high positions in the financial or economic life of Germany, are deemed, *ipso facto*, to have committed crimes against peace... No such literal interpretation could be permitted. Paragraph 2 (f) merely requires that the fact that a person held such a high position to be taken into consideration with all of the other evidence in determining the extent of individual knowledge and participation in crimes against peace.²³⁴

Another part of Article II(2) CCL that should also be addressed here is sub-paragraph e), which introduced the membership in a criminal organization concept *as a mode of liability*: *i.e.* the idea that an individual can be held responsible for the substantive crimes of an agency on the sole basis that he was a member therein.²³⁵ It would be recalled that this interpretation was rejected by the Nuremberg Tribunal when it framed this notion strictly as an independent crime.²³⁶ In truth, there is no real conflict of law here because the Control Council Law No. 10 was promulgated almost one year prior to the delivery of the IMT Judgement. Rather, the text of Article II(2)(e) CCL demonstrates, when viewed together with the inconsistent definitions of this notion provided at the London Conference,²³⁷ that the Allies truly had a very bifurcated understanding of the nature of the criminal membership notion. As a result, the CCL treated it once as a substantive crime (Article II(1)(d)) and

once as a mode of criminal liability (Article II(2)(e)).²³⁸ This dualistic definition did not materialize in the subsequent jurisprudence of the Allies’ military tribunals in Germany as they adhered to the IMT’s authoritative interpretation on this issue, thus, applying the concept of membership in a criminal organization strictly as a substantive crime.²³⁹

Finally, a few words also ought to be said about the mode of liability established under Article II(2)(c) CCL: *i.e.* ‘*taking consenting part in*’ the commission of crimes. This provision is notable because it established a form of criminal participation which, at least at first glance, was difficult to distinguish from the one listed in Article II(2)(d) CCL. The latter, as discussed below, outlined the liability of individuals ‘*connected with plans or enterprises involving*’ the commission of crimes: a provision which the contemporary international tribunals have often referred to when analysing the legislative roots of the theory of JCE.²⁴⁰ Despite this seemingly analogous language, however, sub-paragraph (c) had a materially different legal meaning from sub-paragraph (d), and from all the other provisions under Article II(2) CCL. Draft documents exchanged among the Allies prior to the promulgation of Control Council Law No. 10 reveal that they regarded the concept of ‘taking consenting part in [international crimes]’ as a distinct form of omission liability:

- b. As used in this directive, the term “war criminals” includes all persons... who have committed war crimes. The term specifically includes *persons who have taken a consenting part in war crimes, as, for example, a superior officer who has failed to take action to prevent a war crime when he had knowledge of its contemplated commission and was in a position to prevent it.*²⁴¹

As Heller has explained, ‘taking consenting part in’ the commission of crimes was, thus, seen as akin to the concept of command responsibility.²⁴² This reasoning also found support in the jurisprudence of the military tribunals in occupied Germany, which construed Article II(2)(c) CCL as a mode of liability applicable when a person in position of authority fails to object

²³⁸ Taylor, *supra* n 147, at 7 (fn 34).

²³⁹ See *supra* Section 2.2.5.2.

²⁴⁰ See, for instance, *The Prosecutor v. Brđanin* (IT-99-36-A), Judgment, Appeals Chamber, 3 April 2007, para 395; *Rwamakuba v. The Prosecutor* (ICTR-98-44-AR72.4), Decision on Interlocutory Appeal Regarding Application of Joint Criminal Enterprise to the Crime of Genocide, Appeals Chamber, 22 October 2004, paras 18-20; *The Prosecutor v. Ieng Sary, Ieng Thirith and Khieu Samphan* (002/19-09-2007-ECCC/OCIJ), Decision on the Appeals against the Co-Investigative Judges Order on Joint Criminal Enterprise (JCE), Pre-Trial Chamber, 20 May 2010, para 57. See also J. Watkins, and R. DeFalco, ‘Joint Criminal Enterprise and the Jurisdiction of the Extraordinary Chambers in the Courts of Cambodia’, 63 *Rutgers Law Review* (2010), at 208, 210-211; L. Marsh, and M. Ramsden, ‘Joint Criminal Enterprise: Cambodia’s Reply to *Tadić*’, 11 *International Criminal Law Review* (2011), at 146;

²⁴¹ Draft Directive to the US (UK) (USSR) Commander in Chief, *Apprehension and Detention of War Criminals*, 21 October 1944, Article 3(b), re-printed in Taylor, *supra* n 147, at 247. (*emphasis added*)

²⁴² K. Heller, *The Nuremberg Military Tribunals and the Origins of International Criminal Law* (Oxford: Oxford UP, 2011), at 259.

²³² Taylor, *supra* n 147, at 72. Taylor went on to say: “I believed, this clause was included in order to make it clear that the position held by a defendant should be given full consideration in determining the extent of his knowledge of, and participation in, the making and execution of policies, political, military, or economic as the case might be. Accordingly, the language of clause (f) of paragraph 2 was utilized in the indictments in the “Farben,” “Krupp,” “Ministries,” and “High Command” cases (these being the only four cases in which crimes against peace were charged) only as descriptive of the status of the defendants, and not as part of the “charging language.”

²³³ Von Knieriem, *supra* n 25, at 206.

²³⁴ The *Farben* Case, *supra* n 24, Vol. VIII, at 1299.

²³⁵ See *supra* Section 2.2.2.2 and Section 2.2.3.2.

²³⁶ See *supra* Section 2.2.5.2.

²³⁷ See *supra* Section 2.2.3.2.

to a crime he knew had been, or was going to be, committed.²⁴³ Thus, ‘taking consenting part in’ was a mode of liability whose nature was materially distinct from any notion used to describe the responsibility of an accused who acted in pursuance of a common criminal plan.

2.3.2. *The principal-accessory distinction in post-Nuremberg jurisprudence*

The military tribunals’ case law on Article II(2) CCL could serve to answer two questions that are essential for tracing the origins of co-perpetration liability in international criminal law: i) what was the legal meaning of enterprise liability in sub-paragraph d); and ii) was it defined as a mode of joint principal liability or as a form of accessory liability. For this purpose, it must first be established whether the tribunals differentiated between principals and accessories to a crime.

The distinction which Article II(2) CCL made between those who commit a crime (*i.e.* principals) and those who assist in it (*i.e.* accessories) is remarkable but also dubious. Looking at the plain wording of this provision, it is difficult to say with certainty whether it established some kind of a hierarchy between the modes of liability listed in it and what the exact relation between them was. At first look, it appeared that sub-paragraph a) was the ambit of principal liability, while sub-paragraphs b) to f) contained the ‘lesser’ forms of secondary liability. Such an interpretation, however, is contradicted by the part which states that a person is “deemed to have committed a crime” when he acted in any of the ways listed under subparagraphs a) to f) of this Article.²⁴⁴ Thus, for instance, a person who is ‘connected with plans or enterprises’ that involved the commission of a crime (Article II(2)(d) CCL), or a person who ‘took consenting part in’ it (Article II(2)(c) CCL) is considered to have committed that crime: *i.e.* he is regarded not as an accessory, but as a principal to the crime. Pursuant to this reading, Article II(2) CCL seems to follow more closely a unitary approach to criminal liability than a differentiated one: it treats everyone who contributed to a crime as its perpetrator.²⁴⁵ Researching the case law of the Allies’ military tribunals in occupied Germany could help to shed more light on this issue.

2.3.2.1. *Case law confirming unitary approach*

Many scholars have subscribed to the view that in spite of the explicit reference to principals and accessories in Article II(2) CCL, such a differentiation between the various participants in a group crime never truly materialized in the tribunal’s jurisprudence.²⁴⁶ This view is certainly not without merit, considering that there were many occasions where the judges addressed in a very broad manner the link between the accused and the crime he was charged with. In some cases, for instance, the accused was found guilty without any mention of the modes of liability under Article II(2) CCL. A very good example is the *Einsatz* case in which the 22 defendants were persons who held command positions in the infamous Einsatzgruppen: four paramilitary squads that operated on the territory of invaded Eastern European countries for the purpose of liquidating groups undesirable to National Socialism, including “Jews, gypsies, insane people, Asiatic inferiors, Communist functionaries and asocials.”²⁴⁷ The overall approach followed by the judges to reach a conviction was to demonstrate that the said defendant had knowledge of the programme and mass executions and then refer to evidence proving that he had some form of involvement in or contribution to the programme of mass executions. If these criteria were satisfied, the judges concluded in a standard language that “[t]he Tribunal finds the defendant guilty under counts one and two of the indictment”,²⁴⁸ without basing these findings on any of the specific modes of liability established under Article II(2) CCL. No analysis was offered to differentiate between principals and accessories to the mass murder operations. The defendant Paul Blobel, for instance, who was in command of Sonderkommando group 4a (a sub-unit of Einsatzgruppe C), was held responsible for the murder of 60,000 people. The two-and-a-half page judgement against him found that his unit “took an active part in... [the] mass killing”, as well as that “[i]n one operation his Kommando killed so many people that it could collect 137 trucks full of clothes.”²⁴⁹ Nowhere did the judgement specifically discuss the precise nature of Blobel’s involvement in these executions and, thus, if he was held liable for ordering (Article II(2)(b)) them, or for taking a consenting part in them (Article II(2)(c)), or whether he actually incurred enterprise liability (Article II(2)(d)) pursuant to the CCL. His command position over the units which committed the said crimes served to establish both his knowledge thereof and, rather cryptically, his contribution to them. It was, thus, considered irrelevant which mode of liability could be applied to convict the accused: no distinction was made between the various sub-headings of Article II(2) CCL. This approach follows a unitary model of criminal liability, which has Ambos described as “fairly unsophisticated”.²⁵⁰

²⁴³ Heller has provided a detailed analysis on the US military tribunals’ case law on Article II(2)(c) CCL. After looking at the *Einsatz*, the *Farben* and the *Ministries* cases, he concluded that the legal elements of ‘taking consenting part in’ a crime require that the defendant 1) knew that a crime had been or was about to be committed 2) was in a position of authority and 3) failed to object to the crimes commission. Heller points out that while very similar to the modern day concept of command responsibility, ‘taking consenting part’ in a crime was still materially different because it did not require proof of “effective control”: *i.e.* that the person in position of authority had the material power to prevent or punish to commission of crimes. See Heller, *supra* n 242, at 259-261.

²⁴⁴ Article II(2) CCL states that: “Any person... is deemed to have committed a crime... if he was [sub-paragraphs a) to f)]. Article II(2), Control Council Law No. 10, *supra* note 223, at 250.

²⁴⁵ A. Cassese *et al.*, *International Criminal Law: Cases and Commentary* (Oxford: Oxford UP, 2011), at 324. See *supra* note 230.

²⁴⁶ See *e.g.* Ambos, *supra* n 161, at 106; Olásolo, *supra* n 230, at 272; Heller, *supra* n 242, at 252.

²⁴⁷ Military Tribunal II, *United States of America v. Otto Ohlendorf et al.* (“The *Einsatzgruppen* Case”), Case No.9, 29 September 1947 – 9 April 1948, in *Trials of War Criminals before the Nuernberg Military Tribunals under Control Council Law No. 10, Nuremberg, October 1946-April, 1949*, Vol. IV (Washington, D.C.: United States Government Printing Office, 1950), at 411-589, 416.

²⁴⁸ *Ibid.*, at 512, 515, 518, 521. Under Count One and Count Two of the Indictment, the accused were charged respectively with crimes against humanity and war crimes.

²⁴⁹ *Ibid.*, at 527-528.

²⁵⁰ Ambos, *supra* n 161, at 105.

The above analysis is illustrative of those cases in which the tribunals did not elaborate at all on the concrete modes of liability used to convict the accused.²⁵¹ This indifference to the principal/accessory distinction, however, could also be seen in other instances where the exact opposite was done: *i.e.* the judges quoted the entire text of Article II(2) CCL when finding the accused guilty. A showing example of this is the *Milch* case in which the defendant was held responsible for, amongst other crimes, deporting to Germany millions of foreign civilians and prisoners of war to be used as forced labourers.²⁵² Erhard Milch was a member of the Central Planning Board,²⁵³ which was regularly provided with reports on the procurement of “foreign slave labor and prisoners of war” who were forced to work in the German military industry, as well as with information on the “cruel and barbarous methods used in forcing civilians... into the Reich for war work.”²⁵⁴ The judges further cited evidence proving that:

the defendant not only listened to stories of enforced labor from eastern civilians and other prisoners of war and thereby became aware of the methods used in procuring such labor, but... he himself urged more stringent and coercive means to supplement the dwindling supply of labor in the Luftwaffe.²⁵⁵

Although Milch had no direct command authority over the procurement of forced labour,²⁵⁶ it was evident that he was involved in the commission of the said crimes, at the least, by reason of encouraging the said programme (*i.e.* abetting the crimes). The manner in which the judges addressed the legal nature of this involvement, however, revealed their approach towards the applicable modes of liability under Article II(2) CCL:

The Tribunal therefore finds the defendant [Milch] guilty of the war crimes charged in count one of the indictment, to wit, that *he was a principal in, accessory to, ordered, abetted, took a consenting part in and was connected with, plans and enterprises involving* slave labor and deportation to slave labor of the civilian populations of countries and territories occupied by the German armed forces, and in the enslavement, deportation, ill-treatment and terrorization of such persons; and further that *the defendant was a principal in, accessory to, ordered, abetted, took a consenting part in, and was*

connected with, plans and enterprises involving the use of prisoners of war in war operations and work having a direct relation to war operations.²⁵⁷

Under the above circumstances, the legal effect of quoting the entire text of Article II(2) CCL when convicting an accused is practically the same as that of not referring to this provision at all. The focus was on proving knowledgeable contribution to the charged crime, which in turn sufficed to (generally) establish individual liability: *i.e.* qualifiers such as ‘principal’, ‘abettor’ or any of the other statutory alternatives under Article II(2) CCL were quite irrelevant. As Von Knieriem, a lawyer by profession and one of the defendants in the *Farben* case, wrote several years after his acquittal:

most of the Nuremberg Tribunals did not even take the trouble to state clearly on which of the alternatives enumerated in Art.2, Par.2, of CCL No.10 their sentences were based in a particular case. Frequently it is impossible to ascertain whether a sentence is based on the fact that somebody was a principal or an accessory, or whether he was regarded as having participated in the crime only by consenting. The term “participation”... does not at all mean [accessoryship] in the technical sense, as distinguished from principalship, but rather a taking part in a crime in a broader sense of the word and therefore comprehends all forms of acting. In most of the cases where more than one person acted, the opinions say no more than that a certain defendant “took part in the act.” It is then left to the reader to ponder which of the various alternatives of CCL No. 10 may have been applicable.²⁵⁸

2.3.2.2. Case law confirming differentiated approach

All of the above-examined cases were adjudicated by the US Military Tribunals in Nuremberg (‘NMTs’). As seen time and again in the research so far, however, post-World War II case law and documents often offer equivocal answers to legal questions. There is much jurisprudence from the Allies’ tribunals, including from the NMTs, which could help us see a quite different picture from that presented above. Some notable examples will be presented here because they can help to better understand the principal/accessory discourse in the Nuremberg-era trials.

The judgement in the *Pohl et al.* case, for instance, contains a number of legal findings which clearly demonstrate that, when interpreting Article II(2) CCL, the NMTs *did* follow the differentiated model to criminal participation.²⁵⁹ This case dealt with 18 defendants who held leadership positions in the Economic and Administrative Main Office (‘WVHA’): one of the twelve main departments of the SS. The WVHA was in charge of the administrative needs of the SS (*e.g.* transportation, provision of supplies etc.) but it also administered Nazi Germany’s entire concentration camps system.²⁶⁰ In his closing arguments, one of the Defence Counsels examined at length, both from common and civil law perspective, the

²⁵¹ As Von Knieriem observed, “the tribunals have hardly ever touched upon the question of exactly what form of participation occurred in a concrete case. It is, therefore, hard to say how far the elastic wording of Art. II, Par. 2, was applied to particular cases.” Von Knieriem, *supra* n 25, at 210.

²⁵² Military Tribunal II, *United States of America v. Erhard Milch* (“The *Milch* Case”), Case No.2, 2 January 1947-16 April 1947, in *Trials of War Criminals before the Nuernberg Military Tribunals under Control Council Law No. 10, Nuremberg, October 1946-April, 1949*, Vol. II (Washington, D.C.: United States Government Printing Office: 1950, at 353-896.

²⁵³ The Central Planning Board (“Mitglied der Zentralen Planung”) was Nazi Germany’s supreme authority that oversaw and controlled the production and allocation of raw materials used in German’s war industry.

²⁵⁴ *Ibid.*, at 785.

²⁵⁵ *Ibid.*, at 787.

²⁵⁶ The complete authority over the acquisition of manpower rested in Sauckel, who was answerable directly to Goering. *Ibid.*, at 781.

²⁵⁷ *Ibid.*, at 790. (*emphasis added*)

²⁵⁸ Von Knieriem, *supra* n 25, at 211.

²⁵⁹ The *Pohl* Case, *supra* n 143.

²⁶⁰ The WVHA’s task of administrating the camps did not involve any of the processes relating to the sending of people to, or their release from, concentration camps. *Ibid.*, at 966.

modes of liability under Article II(2) CCL, stressing also the distinction between principal and accessory liability.²⁶¹ He argued that a person who did not physically commit a crime could not be held responsible as a principal pursuant to Article II(2)(a) CCL because this would be contrary both to Anglo-Saxon and to Continental-European legal culture.²⁶² Regardless of how much merit there is to this argument, it succeeded in one notable aspect: it attracted the judge's attention to the issue of distinguishing more clearly between the modes of liability under the CCL. As a result, the *Pohl et al.* Judgment contained language that specified, albeit rather inconsistently, the modes of liability which best characterized the role of the accused in the commission of the indicted crimes.²⁶³ Thus, for instance, when adjudicating the guilt of the defendant Volk,²⁶⁴ the judges observed:

It has been argued in Volk's behalf that he cannot be convicted of war crimes or crimes against humanity because the prosecution has not established that he personally ever killed, maltreated or robbed a concentration camp inmate. The prosecution never attempted to prove that Volk directly and physically abused a human being. It has been further argued that in order to convict Volk of any crime it must be shown that, if he knew of maltreatment of concentration camp inmates, he had to have the power to prevent the maltreatment in order to be convicted of crime. The law does not require that the proof go so far. It is enough if the accused took a *consenting part* in the commission of a crime against humanity to be convicted under Control Council Law No. 10.²⁶⁵

The Tribunal, thus, indirectly recognized that if the Prosecution had charged the accused with commission liability, it would have had to adduce evidence showing that he personally killed, maltreated or robbed the said victims. Since there was no such evidence, however, Volk's role in this crime appeared to be that of a *participant* in it, and more specifically of one who *took a consenting part* in it. A very similar language was used in the judgement against Josef Vogt, who was chief auditor in the WVHA:

there is no claim that Vogt was either a principal in, or an accessory to the actual mistreatment or enslavement of the concentration camp inmates. The most that is claimed is that because of his position he must have known about them and therefore took a consenting part in and was connected with them.²⁶⁶

²⁶¹ *Ibid.*, at 905-913.

²⁶² *Ibid.*, at 906.

²⁶³ Some of the defendants were found guilty of 'taking consenting part in' the crimes charged under Count Two (War Crimes) and Count Three (Crimes against Humanity) of the Indictment, amongst which were plunder of public and private property, murder, extermination, enslavement, deportation, unlawful imprisonment, torture and persecutions on political, racial and religious grounds. *Ibid.*, at 964, 997, 1001, 1010. Another defendant, Erwin Tschentscher, was acquitted on the charge of bearing command responsibility for crimes committed by his subordinates, because the judges found that the elements of this mode of liability were not satisfied by the facts of the case. *Ibid.*, at 1011.

²⁶⁴ Volk was described by the Tribunal as "a vital figure in [WVHA] Amstgruppe W charged with the handling of vast SS enterprises employing unnumbered concentration camp inmates." *Ibid.*, at 1048.

²⁶⁵ *Ibid.*

²⁶⁶ *Ibid.*, at 1002.

These examples illustrate that the judges not only distinguished between perpetrating a crime (*i.e.* principal liability) and participating in it (*i.e.* accessory liability), but that they also seemed to introduce a hierarchy between them. The latter point was then explicitly confirmed in a subsequent paragraph of this judgement, where the Tribunal held:

The provisions of Article II, paragraph 2, of Control Council Law No. 10, are clear and unambiguous. It enumerates, *in a descending scale of culpability*, the persons who are deemed to have committed crimes:

- (1) Principals.
- (2) Accessories or abettors.
- (3) Persons taking a consenting part.
- (4) Persons connected with plans or enterprises involving its commission.
- (5) Members of certain organizations or groups.
- (6) Holders of high political, civil, or military positions.²⁶⁷

This statement of the CCL law on modes of liability, read in conjunction with the above-cited dicta from the *Pohl et al.* judgement, presents an explicit and unequivocal confirmation of the differentiated model to criminal participation. It was also restated in a slightly softer language in the later *Ministries* case, where the judges held that "all those who were either principals or accessories before or after the fact, are criminally responsible, *although the degree of criminal responsibility may vary in accordance with the nature of his acts.*"²⁶⁸ Another finding of law from the *Farben* case further demonstrates that the judges did not follow a unitary approach to the modes of liability under Article II(2) CCL, but drew a line between primary and secondary parties to a crime:

The prosecution does not contend that Farben instituted a slave labor program of its own. On the contrary, it is the theory of the prosecution that the defendants, through the instrumentality of Farben and otherwise, embraced, adopted, and executed the forced labor policies of the Third Reich, thereby becoming accessories to and taking a consenting part in the commission of war crimes and crimes against humanity in violation of Article II of Control Council Law No. 10.²⁶⁹

²⁶⁷ *Ibid.*, at 1180. (*emphasis added*)

²⁶⁸ Military Tribunal IV, *United States of America v. Ernst Von Weizsaecker et al.* ("The Ministries Case"), Case No.11, 6 January 1948 – 13 April 1949, in *Trials of War Criminals before the Nuernberg Military Tribunals under Control Council Law No. 10, Nuremberg, October 1946-April, 1949*, Vol. XIV (Washington, D.C.: United States Government Printing Office, 1953), at 337. (*emphasis added*) That the tribunal did not follow a unitary approach in this case but indeed distinguished between primary and secondary parties to a crime is evident from its finding on the law of accessories after the fact: "In the realm of the ordinary criminal law, one who conceals the fact that a crime has been committed or gives false testimony as to the facts *for the purpose of giving some advantage to the perpetrator...* is an accessory after the fact." *Ibid.* (*emphasis added*)

²⁶⁹ The *Farben* Case, *supra* n 24, Vol. VIII, at 1172. All the defendants in this case were officials of the 'I.G. Farben': Germany's largest industrial concern at the time, which Hitler utilized in his war plans.

If the judges at the US Military Tribunals in Nuremberg had opted for treating any person who contributed to a crime as its perpetrator (*viz.* the unitary model of criminal participation), there would have been no reason at all to discuss which mode of liability under the Control Council Law No. 10 is charged. It would have been unnecessary to specify that the accused individual was not prosecuted as a principal, but as an accessory to the indicted crime. Instead, this was a difference that was emphasized in the *Flick et al.* case, too, where the judges held that “[o]ne who knowingly by his influence and money contributes to [group crimes] must, under settled legal principles, be deemed to be, *if not a principal, certainly an accessory* to such crimes.”²⁷⁰ Such language is typical for the differentiated model of criminal participation.

Next to the Nazi trials which took place in the US Occupation Zone in Germany, there were also those prosecuted by the other Allied Powers in their respective zones. Some of them were documented by the United Nations War Crimes Commission and they further reveal that the principal/accessory distinction was made in the zonal trials.²⁷¹ Relevant examples of cases decided by the British military tribunals in Germany include, for instance, the *Zyklon B* case²⁷² and the *Franz Schonfeld and Nine Others* case.²⁷³ In the latter, the Advocate General analyzed the applicable approach to liability for criminal participation in the following way:

If the accessory orders or advises one crime and the principal intentionally commits another; that is to say that the principal offender is ordered to burn a house and instead commits a larceny, a theft, the accessory before the fact will not be answerable in law for the theft. If, however, the principal commits the offence of murder upon A - and you may think that this is important - when he has been ordered to commit it upon B, and he does that by mistake, the accessory will be liable in respect of the murder upon A.

...

There must be some active proceeding on the part of the accessory, that is, he must procure, incite or in some other way encourage the act done by the principal.

²⁷⁰ The *Flick* Case, *supra* n 155, at 1216-1217.

²⁷¹ UN War Crimes Commission, *Law Reports of Trials of War Criminals*, Vols. I-XV (London: Published for the United Nations War Crimes Commission by His Majesty's Stationary Office, 1947-1949).

²⁷² The *Zyklon B* case is nowadays cited by international tribunals as Nuremberg-era jurisprudence on aiding and abetting liability. The accused were charged with supplying poisonous gas to the Nazi concentration camps that was used for the murder of interned civilians. The Prosecution alleged that the three accused “were war criminals for putting the means to commit the crime into the hands of those who actually carried it out”, as well as that “by supplying gas, knowing that it was to be used for murder, the three accused had *made themselves accessories before the fact to that murder*.” Thus, a clear distinction was made between liability for actually committing the crime (principal liability) and liability for knowingly assisting its commission (accessorial liability). *Trial of Bruno Tesch and Two Others* (“The *Zyklon B* Case”), British Military Court, Hamburg, 1st – 8th March 1946, in UN War Crimes Commission, *Law Reports of Trials of War Criminals*, Vol. I (London: Published for the United Nations War Crimes Commission by His Majesty's Stationary Office, 1947), at 94, 101.

²⁷³ *Trial of Franz Schonfeld and Nine Others*, British Military Court, Essen, 11th – 26th June 1946, in UN War Crimes Commission, *Law Reports of Trials of War Criminals*, Vol. XI (London: Published for the United Nations War Crimes Commission by His Majesty's Stationary Office, 1949) at 64-73.

...

A principal in the first degree, of whom you have already heard mention in this case, is one who is the actor, or actual perpetrator of the fact.²⁷⁴

Thus, the form of criminal participation was differentiated and not everyone who had a causal contribution to the crime was called a perpetrator. Already at the stage of attributing criminal liability, the court clearly set apart the role of an accessory to a crime from that of a principal. This is atypical for the unitary approach which treats all parties to a crime as principals and, as Eser has explained, does not employ the notion of accessorial liability.²⁷⁵ Even more revealing is the Judge Advocate's observation in this case that if the principal was to be found not guilty of the indicted crime, then all the other parties to crime could also not be held liable.²⁷⁶ This is a confirmation of the principle of derivative liability which lies at the core of the differentiated approach and distinguishes it from the unitary model that treats the liability of each participant to a group crime as independent from that of the others.²⁷⁷

The French military tribunals also differentiated between perpetrators and participants, and they even attached a different degree of culpability to the different modes of participating in a crime.²⁷⁸ Pursuant to Article 4 of the French Ordinance of 28th August, 1944, concerning the Suppression of War Crimes:

Where a subordinate is prosecuted as the actual perpetrator of a war crime, and his superiors cannot be indicted as being equally responsible, they shall be considered as accomplices in so far as they have organised or tolerated the criminal acts of their subordinates.²⁷⁹

²⁷⁴ *Ibid.*, at 69-70.

²⁷⁵ A. Eser, ‘Individual Criminal Responsibility’, in A. Cassese and P. Gaeta (eds), *The Rome Statute of the International Criminal Court: A Commentary*, Vol. I (Oxford: Oxford UP, 2002), at 781. See also S. Finnin, *Elements of Accessorial Modes of Liability: Article 25 (3)(b) and (c) of the Rome Statute of the International Criminal Court* (Leiden: Martinus Nijhoff, 2012), at 12-13, 93, 98.

²⁷⁶ In particular, the Judge Advocate said: “Rotschopf [the person who physically committed the charged crime], of course, is the axle upon which the wheel of this case turns. If Rotschopf is to be expunged from this case altogether on the basis that he has committed no crime then automatically it must follow that the other accused are equally not guilty.” *Schonfeld and Nine Others* Case, *supra* n 273, at 70.

²⁷⁷ Van Slidregt, *supra* n 14, at 66.

²⁷⁸ The UN War Crimes Commission explained that the Nazi trials that were adjudicated by the French Military Government Tribunals in Germany were relatively few in number and that the great majority of the cases were actually prosecuted before the Permanent Military Tribunals in Metz, Strasbourg, Lyon and a few other French cities. These two types of tribunals differed in their jurisdictional basis. The Government Tribunals in the French Zone of Germany explicitly recognized that their jurisdiction is derived from the Control Council Law No. 10, while the legal basis for the establishment of the Permanent Military Tribunals in various French cities was the French Ordinance of 28 August 1944, Concerning the Suppression of War Crimes. UN War Crimes Commission, *Law Reports of Trials of War Criminals*, Vol. III, Annex II (London: Published for the United Nations War Crimes Commission by His Majesty's Stationary Office, 1948), at 93-102.

²⁷⁹ *Ibid.*, at 94.

This provision is revealing in several important aspects. First, according to this law, modes of accessorial liability which describe acts of organizing and tolerating crimes were to be applied where the commander could not be held as liable as the actual perpetrator. This unequivocally confirms that, according to the French authorities, accessorial liability signaled a lower degree of culpability than principal liability. Second, this article also states somewhat cryptically that, under unspecified circumstances, a commander may also be held liable as a perpetrator of the crimes committed by his subordinates. According to Ambos, this is an implicit recognition of the notion of indirect perpetration.²⁸⁰ Third, it is evident that in accordance with this provision the tribunals had to make a distinction between principals and accessories already at the stage of attributing criminal liability. A germane example of a case which illustrates this point is the *Franz Holstein et al.* case in which the 24 accused were charged with destruction of property, killing of civilians, pillage and ill-treatment of civilians.²⁸¹ The tribunal went through lengths to define the mode of participation in these crimes for each of the accused, eventually finding some of them guilty as perpetrators, others as instigators and yet others as accomplices.²⁸²

2.3.2.3. Conclusions

Without purporting to provide an exhaustive analysis on the entire body of jurisprudence from the Nuremberg-era military tribunals, the present research has presented sufficient evidence to draw a few important conclusions. For one, the claim that the Control Council Law No.10 and the subsequent trials of Nazi war criminals did not make the principal-accessory distinction is incorrect. There were certainly cases where the tribunals failed to properly define the mode of liability used to convict the accused and, thus, exhibited an indifference for the various forms of criminal participation typical for the unitary approach. These instances, however, should be seen more as lapses in an emerging field of law rather than as a judicial pronouncement on the model to be followed. In fact, in those cases where such a pronouncement was explicitly made – e.g. the US *Pohl et al.* case,²⁸³ the UK *Franz Schonfeld et al.* case,²⁸⁴ and the French *Franz Holstein et al.* case²⁸⁵ – the judges defined the law on criminal participation by making a clear distinction between principals and accessories to a crime. Furthermore, some indications were also given that, at least in theory, a different degree of culpability was attached to the primary and secondary parties in group crimes. This latter point, however, does not seem to have had a practical effect on the sentencing

practices of the tribunals, meaning that accessorial guilt did not provide for a mandatory sentence mitigation. As stated in the notes on the *Franz Holstein et al.* case:

It is a universally recognised principle of modern penal law that accomplices during or after the fact are responsible in the same manner as actual perpetrators or as instigators, who belong to the category of accomplices before the fact. That is a principle recognised equally in the field of war crimes.²⁸⁶

On the basis of these findings and the preceding legal analysis, the present research subscribes to Van Sliedregt's contention that, rather than genuinely unitary, "the better view, is to regard criminal participation in the post-Nuremberg proceedings as a model that is differentiated in recognizing the principal-accessory distinction yet unitary in sentencing."²⁸⁷ Article II(2) CCL lends itself to this interpretation because it clearly distinguishes between the modes of liability under sub-paragraphs a) to f) and yet it also states that a person who participates in a crime by any of these methods is "deemed to have committed a crime". In other words, a distinction is made at the attribution stage and a person with a causal contribution to the crime is sometimes a principal and sometimes an accessory. This distinction, however, becomes immaterial at the sentencing stage where the accessory could be punished as the principal, *i.e.* he is treated *as if* he committed the crime.²⁸⁸

2.3.3. Liability for acting in pursuance of a common criminal design

Having concluded that the post-Nuremberg proceedings distinguished between principals and accessories to a crime, it is now time to inquire into the meaning and nature of the concept of 'common purpose/design'. The analysis contained below will demonstrate that this notion was applied by the post-World War II tribunals to hold the participants in a criminal plan *fully* and *equally* responsible for the commission of a concerted crime, and, as such, constitutes an early theory of co-perpetration liability in international criminal law.

2.3.3.1. Legal basis for applying the 'common purpose/design' notion

As already explained above, the IMT judges' restrictive interpretation of the legal meaning of conspiracy and membership in a criminal organization marked the end of their prominence in Nuremberg-era jurisprudence. In many of the subsequent Nazi trials, the defendants were thus

²⁸⁰ Ambos, *supra* n 161, at 107.

²⁸¹ *Trial of Franz Holstein and Twenty-Three Others*, Permanent Military Tribunal at Dijon, 3 February 1947, in UN War Crimes Commission, *Law Reports of Trials of War Criminals*, Vol. VIII (London: Published for the United Nations War Crimes Commission by His Majesty's Stationary Office, 1949), at 26-31.

²⁸² *Ibid.*, at 26, 31-33.

²⁸³ See *supra* text accompanying notes 259-267.

²⁸⁴ See *supra* text accompanying notes 273-277.

²⁸⁵ See *supra* text accompanying notes 281-282.

²⁸⁶ *Franz Holstein and Twenty-Three Others Case*, *supra* n 281, at 32.

²⁸⁷ Van Sliedregt, *supra* n 14, at 37.

²⁸⁸ Fletcher has extensively analysed this approach to criminal participation, noting that both the Anglo-American and the French criminal justice systems strictly distinguish between perpetrators, co-perpetrators and accessories to a crime without, however, officially recognizing a principle of mitigation for the punishment of lesser forms of participation in a crime. In Fletcher's words "Anglo-American and French law are committed to the principle that accessories and perpetrators should be punished alike... In view of this principle of uniform punishment, one wonders why the French and Anglo-American systems ever recognized the distinction among perpetrators, joint perpetrators and accomplices. The reason in both systems appears to have been an initial commitment to the theory of derivative liability. The accessory could be punished only if the perpetrator was guilty." See Fletcher, *supra* n 14, at 651 *et seq.*

charged with liability for “acting in pursuance of a common design” to commit crimes.²⁸⁹ The statutory basis for this concept was not explicitly stated and although etymological similarities suggest that it was Article II(2)(d) CCL – *i.e.* being ‘connected with plans or enterprises’ – the topical case law did not expressly confirm this.

The notion of “acting in pursuance of a common design” was used in three of the first cases brought before the US Military Tribunals in Nuremberg.²⁹⁰ In particular, Count One of the indictments in the *Medical*, *Justice* and *Pohl* cases stated in a standard language that:

All of the defendants herein, acting in concert with each other and with others, unlawfully, wilfully, and knowingly participated... in the formulation and execution of the said common design, conspiracy, plans and enterprises to commit, and which involved the commission of war crimes and crimes against humanity and accordingly are individually responsible for their own acts and for all acts performed by any person or persons in execution of the said common design, conspiracy, plans, and enterprises.²⁹¹

None of the indictments noted which sub-paragraph of Article II(2) CCL offered the statutory basis for applying the notion of ‘common design’. Rather, a general reference was made to the article in its entirety, leaving the reader to guess which of its alternatives contained this mode of responsibility. Nevertheless, it is rather revealing that the label ‘common design’ was used interchangeably with ‘plans and enterprises’, thus, mirroring the text of Article II(2)(d) CCL. Furthermore, this sub-paragraph is precisely what the Defence in the *Justice* case understood to be the statutory basis for the Count One charge,²⁹² as did Judge Blair who wrote a separate opinion on this point.²⁹³ Therefore, even though none of the judgments in the said three cases explicitly identified Article II(2)(d) CCL as the legal basis for ‘common design’ responsibility, such an inference is not without merit.²⁹⁴

²⁸⁹ UNWCC Law Reports, Vol. XV, *supra* n 124, at 94-95.

²⁹⁰ “Acting in pursuance of a common design” first appeared under Count One of the indictments in the *Medical*, *Justice* and *Pohl et al.* cases. See, respectively, The *Medical Case*, *supra* n 41, Vol. I, at 10; Military Tribunal III, *United States of America v. Josef Altstötter et al.* (“The *Justice Case*”), Case No. 3, 5 March 1947 – 4 December 1947, in *Trials of War Criminals before the Nuernberg Military Tribunals under Control Council Law No. 10, Nuremberg, October 1946-April, 1949*, Vol. III (Washington, D.C.: United States Government Printing Office: 1951), at 17; The *Pohl Case*, *supra* n 143, at 201.

²⁹¹ The *Pohl Case*, *supra* n 143, at 204; The *Justice Case*, *supra* n 290, at 17; The *Medical Case*, *supra* n 41, Vol. I, at 10.

²⁹² In particular, the Defence stated that the Prosecution’s use of the conspiracy notion in Count One was contrary to the CCL because “Article II, 2 (d) of Law No. 10(2) could not be taken to admit charges of conspiracy to commit war crimes and crimes against humanity since the system of Law No. 10 makes it clear beyond doubt that the facts of crimes are exhaustively defined in sub-paragraph 1, whereas in sub-paragraph 2 only the forms of complicity in these crimes are defined.” See The *Justice Trial*, *supra* n 151, at 105.

²⁹³ The *Justice Case*, *supra* n 290, at 1195-1197.

²⁹⁴ Support for this conclusion could also be found in the ICTR *Rwamakuba* JCE Decision, in which the Appeals Chamber pointed at Article II(2)(d) of Control Council Law No.10 as the statutory basis for the application of the predecessor of the JCE theory, *i.e.* the ‘common purpose/design’ notion. *Rwamakuba* Decision on Joint Criminal Enterprise, *supra* n 240, para 18. See also *Brdanin* Appeal Judgment, *supra* n 240, para 395; R. Clarke, ‘Return to Borkum Island: Extended Joint Criminal Enterprise Responsibility in the Wake of World War II’, 9 *Journal of International Criminal Justice* (2011), at 847.

Looking beyond the *Medical*, *Justice* and *Pohl* cases and into the totality of ‘common design/purpose’ jurisprudence coming from the Allies’ tribunals in occupied Germany, it must be conceded that these judgments largely failed to discuss the precise statutory provision that warranted the application of this construct. Therefore, while a case can be made that this was Article II(2)(d) CCL, the answer to this question inevitably involves a dose of speculation.

2.3.3.2. Normative framework and case law

Liability for acting in pursuance of a common design played a central role in the proceedings before the US Military Tribunals and, as discussed further below, was also defined in the case law and legislation of the other Allied Powers which prosecuted ‘minor’ Nazi war criminals in occupied Germany. This jurisprudence is analyzed here in order to distil the legal elements of this mode of liability.

i) The United States military tribunals

The notion of ‘common design’ liability played a central role in a number of cases that were decided by the US Military Tribunals in Nuremberg. This type of responsibility was used in, for instance, the *RuSHA* case,²⁹⁵ the *Medical* case²⁹⁶ and in the *Pohl* case.²⁹⁷ For reasons of brevity, and in order to avoid repetition,²⁹⁸ these cases will not be discussed here. The present research will only examine the trial of *Josef Altstötter et al.* (“the *Justice Case*”) as an apposite example of NMT jurisprudence adopting the ‘common design’ notion.²⁹⁹ The sixteen accused in this case were former judges, prosecutors or officials in Nazi Germany’s Ministry of Justice who were alleged to have participated in the governmental ‘racial purity’ plan to eliminate the Jews and other people who were undesirable to the regime. The Indictment, thus, stated that:

The German criminal laws, through a series of additions, expansions, and perversions by the defendants became a powerful weapon for the subjugation of the German people and for the extermination of certain nationals of the occupied countries. This program resulted in the murder,

²⁹⁵ Military Tribunal I, *United States of America v. Ulrich Greifelt et al.* (“The *RuSHA Case*”), Case No. 8, 20 October 1947 – 10 March 1948, in *Trials of War Criminals before the Nuernberg Military Tribunals under Control Council Law No. 10, Nuremberg, October 1946-April, 1949*. Vols. IV and V (Washington, D.C.: United States Government Printing Office, 1950). The analysis of the *RuSHA* Judgment and its use of common design liability is provided in Chapter 4, Section 4.2.3.3.ii.

²⁹⁶ The *Medical Case*, *supra* n 41, Vols. I-II. The analysis of the *Medical* Judgment and its use of common design liability is provided in Chapter 4, Section 4.2.3.3.ii.

²⁹⁷ The *Pohl Case*, *supra* n 143, at 998, 1173. For a review of the *Pohl* Judgment and its use of common design liability, see *e.g.* Heller, *supra* n 242, at 281-282; K. Ambos, ‘Amicus Curiae Brief in the Matter of the Co-Prosecutors’ Appeal of the Closing Order Against Kaing Guek Eav “Duch” Dated 8 August 2008’, 20 *Criminal Law Forum* (2009), at 380.

²⁹⁸ Due to their relevance to one of the central research questions in this book, the *Medical* and the *RuSHA* cases will be examined in detail in Chapter 4. See Chapter 4, Section 4.2.3.3.ii.

²⁹⁹ The *Justice Case*, *supra* n 290.

torture, illegal imprisonment, and ill-treatment of thousands of Germans and nationals of occupied countries.³⁰⁰

On this basis, the Prosecution charged all the defendants with “special responsibility for and participation in these crimes.”³⁰¹ As the UN War Crimes Commission subsequently explained, it was precisely the concept of ‘common design’ that was applied in this case, even though the Indictment did not explicitly articulate it.³⁰² Indeed, the manner in which the judges construed the defendants’ liability for the charged crimes confirms this:

The defendants are not now charged with conspiracy as a separate and substantive offense, but it is alleged that they participated in carrying out a governmental plan and program for the persecution and extermination of Jews and Poles, a plan which transcended territorial boundaries as well as the bounds of human decency. Some of the defendants took part in the enactment of laws and decrees the purpose of which was the extermination of Poles and Jews in Germany and throughout Europe. Others, in executive positions, actively participated in the enforcement of those laws and in atrocities, illegal even under German law, in furtherance of the declared national purpose. Others, as judges, distorted and then applied the laws and decrees against Poles and Jews as such in disregard of every principle of judicial behavior. The overt acts of the several defendants must be seen and understood as *deliberate contributions toward the effectuation of the policy* of the Party and State.³⁰³

In this dictum, the bench clearly outlined the contours of a mode of criminal participation that i) is to be distinguished from conspiracy and ii) applies in scenarios where a group of persons, acting in pursuance of a common criminal plan, carry out different functions and contribute in varying manners to the execution of that plan. Pursuant to this mode of liability, the acts of all participants in the shared plan can be cumulatively attributed to each one of them individually. The judges further explained that in order to convict an accused under this type of liability, the Prosecution has to establish the following material facts:

(1) the fact of the great pattern or plan of racial persecution and extermination; and (2) specific conduct of the individual defendant in furtherance of the plan.³⁰⁴

Read together, the two above-cited paragraphs establish the following objective/material and subjective/mental elements of ‘common design’ liability: i) existence of a criminal plan which is shared by a plurality of persons; ii) specific contribution of the accused to the furtherance of the plan; and iii) the contribution must be made ‘deliberately’. The

last element constitutes the *mens rea* standard of ‘common design’ responsibility. The word ‘deliberate’, in its form as an adjective, is defined in *Black’s Law Dictionary* – with reference to common law jurisprudence – to mean “formed, arrived at, or determined upon as a result of careful thought and weighing of considerations, as a deliberate judgment or plan [...] especially according to a preconceived design.”³⁰⁵ Requiring that the accused ‘*deliberately*’ contributes to the common purpose, thus, means that his contribution to the criminal plan must be made “willfully; with premeditation; intentionally; purposely”.³⁰⁶ This implies that the mental element of ‘common design’ liability is more than knowledge that the contribution assists the commission of a crime: it is required that the accused directly intends the commission of the concerted crime(s). In confirmation of this, it is showing how the judges defined the contours of this type of liability when discussing the charges against the accused Rothaug:

The individual cases in which Rothaug applied the cruel and discriminatory law against Poles and Jews cannot be considered in isolation. It is of the essence of the charges against him that he participated in the national program of racial persecution. It is of the essence of the proof *that he identified himself with this national program and gave himself utterly to its accomplishment*.³⁰⁷

Parallel to the proceedings before the Military Tribunals in Nuremberg, the US also set up military government courts in other cities in its Occupation Zone in Germany. Hundreds of trials were conducted in these courts, the nature and constitution of which will be addressed in more detail in Chapter 4. It suffices to say at this point that many of them present Nuremberg-era jurisprudence that applied ‘common design’ liability to convict the accused.³⁰⁸ A pertinent example of a case falling within this group of trials is the *Dachau Concentration Camp Case*, in which the ‘common design’ notion played a pivotal role in the charges against the accused. In particular, the Prosecution submitted that the 40 defendants, who held various positions of authority in the Dachau system of ill-treatment, had all:

participated in a common plan to run these camps in a manner so that the great numbers of prisoners would die or suffer severe injury and that... each individual accused took a vigorous and active part in the execution of this plan.³⁰⁹

305 H. Black, *Black’s Law Dictionary: Definitions of the Terms and Phrases of American and English Jurisprudence, Ancient and Modern* (4th edn, St. Paul, MN: West Pub., 1968), at 513.

306 *Ibid.*, at 514.

307 The *Justice Case*, *supra* n 290, at 1156. (*emphasis added*)

308 Chapter 4, Section 4.2.3.3.i.

309 *Trial of Martin Gottfried Weiss and Thirty-Nine Others* (‘The Dachau Concentration Camp Trial’), General Military Government Court of the United States Zone, Dachau, 15 November 1945 – 13 December 1945, in UN War Crimes Commission, *Law Reports of Trials of War Criminals*, Vol. XI (London: Published for the United Nations War Crimes Commission by His Majesty’s Stationary Office, 1949), at 7.

300 *Ibid.*, at 23-24.

301 *Ibid.*, at 24.

302 UNWCC Law Reports, Vol. XV, *supra* n 124, at 95.

303 The *Justice Case*, *supra* n 290, at 1063. (*emphasis added*)

304 *Ibid.*

A remarkable feature of this case is that it was rested entirely on this allegation: a point which was also made by the Prosecution when it openly conceded that “[i]f there is no such common design, then every man in this dock should walk free because that is the essential allegation in the particulars that the court is trying.”³¹⁰ To explain the law on ‘common design’ liability, the Prosecution quoted scholarly work which defined the general principle of law that:

No matter how wide may be the separation of the confederates, if they are all engaged in a common plan for the execution of the felony and all take their part in the furtherance of the common design, all are liable as principals.³¹¹

In response to the Defence’s argument that the ‘common design’ notion was a crime identical to ‘conspiracy’, the Prosecution explained that the former was in fact a mode of participating in substantive crimes and referred to *Black’s Law Dictionary* to define it as “a community of intention between two or more persons to do an unlawful act.”³¹² The court eventually found all the accused guilty of the charged crimes and sentenced thirty-six of them to death, one to hard labour for life and three to hard labour for 10 years,³¹³ thus upholding the Prosecution’s contention that a common criminal design can provide the basis for a reciprocal attribution of the acts of the participants therein. To establish the guilt of each of the accused, the prosecutor was required to prove “(1) that there was in force at Dachau a system to ill-treat the prisoners and commit the crimes listed in the charges, (2) that each accused was aware of the system (3) that each accused, by his conduct “encouraged, aided and abetted or participated” in enforcing the system.”³¹⁴

ii) The British military tribunals

As already stated above, ‘common design’ liability played a prominent role not only in the US military tribunals’ case law, but also in that of the other occupying powers. Some of the best known cases decided by the British military tribunals, for instance, include the *Franz Schonfeld et al.* case, the *Otto Sandrock et al.* case (the *Almelo* case) and the *Max*

Wielen et al. case (the *Stalag Luft III* case). In the first of these cases, Schonfeld and nine other defendants were charged with the murder of three Allied airmen in the Dutch city of Tilburg.³¹⁵ Evidence was introduced that the killings were carried out by Rotschopf, one of the defendants, alone: a fact that was not challenged by this accused.³¹⁶ The Prosecution submitted that the other nine defendants participated in various other ways in the crime: three of them entered together with Rotschopf the house where the airmen were hiding, while others waited outside, or drove the cars to the said location, or gave instructions. The backbone of the Prosecution’s case was that “this was a concerted action to murder... three people who were known to be British pilots and that they, having surrendered to the accused Rotschopf, were in fact murdered in accordance with the plan.”³¹⁷ Six of the defendants were acquitted because the evidence against them was insufficient to establish their guilt. Rotschopf and the three defendants who entered the house where the killings took place were found guilty and all sentenced to death.³¹⁸ The notes on the case state:

The Military Court did not of course state its reasons for deciding as it did. It may be safely said, however, that, in finding Roesener, Schwanz and Cremer guilty in addition to Rotschopf, the Court was following one of three possible courses:

- (i) The Court may have found that the three accused were principals in the second degree in the murders committed by Rotschopf as principal in the first degree, in that they, for instance, prevented the escape of the victims ;
- (ii) The Court may have found that the three accused were acting in pursuance of a common plan to commit murder, and were therefore liable for the offence even though the actual killing was committed by Rotschopf ; or
- (iii) [Regulation 8 (ii) of the Royal Warrant].³¹⁹

Several important conclusions can be drawn from this explanation. First of all, ‘common plan’ liability (, which was used interchangeably with the ‘common design’ label)³²⁰

³¹⁰ *Ibid.*, at 12.

³¹¹ *Ibid.*, at 13. More specifically, the Prosecution quoted scholarly analysis which stated that the person who is “outside of an enclosure watching to prevent surprise or for the purpose of keeping guard while his confederates inside are committing a felony, such constructive presence is sufficient to make him a principal in the second degree”. For an explanation of the common law distinction between principals in the first/second degree, see *infra* note 321.

³¹² *Ibid.*, at 14. (*emphasis added*) See also T. Jardim, *The Mauthausen Trial: American Military Justice in Germany* (Cambridge, MA: Harvard UP, 2012), at 119. In the *Flossenburg* Trial, the Prosecution restated its position on the difference between conspiracy and ‘common design’ responsibility, explaining that “the offence with which the accused stand charges is *not* a conspiracy... [Instead] it is submitted that each of the accused was capable of and *did* entertain a common intent or design to subject inmates of Flossenburg [concentration camp] to beatings, killings, tortures, starvation, and other indignities.” See *United States of America v. Friedrich Becker et al.*, United States Military Court, Dachau, 14 May 1946 – 22 January 1947, in UNWCC Law Reports, Vol. XV, *supra* n 124, at 95 (fn 1).

³¹³ The sentences of some of the accused were later commuted by the reviewing authorities. See *e.g.* The *Dachau Concentration Camp* Trial, *supra* n 309, at 8.

³¹⁴ *Ibid.*, at 13.

³¹⁵ *Schonfeld and Nine Others* Case, *supra* n 273, at 64-73.

³¹⁶ *Ibid.*, at 65, 68.

³¹⁷ *Ibid.*, at 67.

³¹⁸ *Ibid.*

³¹⁹ *Ibid.*, at 71. The Royal Warrant of 14 June 1945 was the British enabling legislation of the CCL, under which British Military Courts held trials in the British Zone of Occupation. Regulation 8 (ii) of this law was categorised by the UN War Crimes Commission as “a provision relating to evidence and not as one of substantive law”. The text of this regulation stated: Where there is evidence that a war crime has been the result of concerted action upon the part of a formation, unit, body, or group of persons, evidence given upon any charge relating to that crime against any member of such a formation, unit, body, or group may be received as *prima facie* evidence of the responsibility of each member of that formation, unit, body, or group for that crime ; in any such case all or any members of any such formation, unit, body, or group may be charged and tried jointly in respect of any such war crime and no application by any of them to be tried separately shall be allowed by the court. See UNWCC Law Reports, Vol. XV, *supra* n 124, at 92

³²⁰ *Schonfeld and Nine Others* Case, *supra* n 273, at 69, 70, 72.

appeared to be distinguished from the principals in the first degree/principals in the second degree dichotomy under Anglo-American law.³²¹ Here, the ‘common design’ notion was described as a mode of liability in which all those who acted in pursuance of the common plan were held responsible for the actual crime, *i.e.* as co-perpetrators with Rotschopf, and not for being participants in it. This principle received a more definite formulation in the *Almelo* trial, in which three accused persons were charged with the murder of a British pilot: one of them drove the car to the place where the execution happened and prevented people from interfering, another carried out the execution and the third accused, who was in command of the group, dug the victim’s grave.³²² The Judge Advocate explained that, in light of the pre-agreed plan to commit the indicted war crime of murder, the three accused may incur ‘common purpose’ liability, defining the law on this notion as follows:

[T]here was no dispute that [the victim] was taken and killed by a shot in the back of the neck, that the shot was fired by the accused Ludwig Schweinberger, and that with him taking part in the execution, were the accused Sandrock and Hegemann. There was no dispute that all three knew what they were doing and had gone there for the very purpose of having this officer killed. If people were all present together at the same time *taking part in a common enterprise which was unlawful, each one in his own way assisting the common purpose of all, they were all equally guilty in law.*³²³

The same legal elements of ‘common design/purpose’ liability which were outlined by the US Tribunal in the *Justice* case can thus be discerned in this statement before the British Tribunal in the *Almelo* trial: i) a criminal plan shared by a plurality of persons; ii) they coordinated their contributions in the execution of the plan; iii) each one of them shared the common purpose of all (*i.e.* shared the direct intent to commit the group crime). Furthermore, despite their varying contributions, all participants in the criminal enterprise were regarded as equally guilty in law, meaning that not only Schweinberger but also Sandrock and Hegemann were in fact convicted as perpetrators of the said murder: *i.e.* they were all co-perpetrators.

The two above-cited cases dealt with criminal enterprises which had a limited scope as they concerned the killings of several persons which took place in one confined location. The British military tribunals’ jurisprudence, however, confirms that the ‘common purpose’

notion can also be applied in cases where the criminal design had a nationwide character. The *Stalag Luft III* case provides an apposite example.³²⁴ It dealt with the murder of Allied soldiers who, after escaping the Stalag Luft III war camp, had gone in different directions, hoping to escape the borders of Germany and its occupied territories. When news of this escape reached Hitler, he consulted with Goering, Keitel and Himmler, and issued an order that more than half of the 80 escapees must be executed upon recapture.³²⁵ This order beseeched secrecy and provided a *modus operandi* of how the executions were to be carried out. An important point of this case was that, out of the 18 accused, Max Wielen was the only person who was called to Berlin in order to be personally shown Hitler’s order.³²⁶ The others were all Gestapo members stationed at the regional headquarters in the cities where the escapees were recaptured and subsequently executed, including Munich, Karlsruhe, Strasbourg, Zlin and few others. They were not made privy to Hitler’s original order that put in motion the network of executions, but were instead instructed by their immediate superiors to kill in secrecy one or more Allied soldiers who had been detained by local police units.³²⁷ Each such order was then carried out by a group acting with the common purpose to kill and each of the abovementioned 17 accused (apart from Max Wielen) participated in one way or another in these murder squads.³²⁸ The case, thus, offered a more complicated setting in which there was one larger criminal enterprise to kill half of the 80 Allied escapees and a number of smaller enterprises which occurred in the various Gestapo headquarters and each resulted in the deaths of several of these escapees. This peculiarity was recognised by the Prosecution, as a result of which the Indictment’s first two charges accused the 18 defendants with joint participation in the killing of all 50 Allied officers while the other seven charges were divided per city and accused only certain defendants (those who operated in the given city) with liability for the murder of specifically named soldiers.³²⁹ The Tribunal, however, found only Max Wielen guilty of the murder of all 50 escapees, since he alone took part in and contributed to the execution of Hitler’s order with the knowledge of the plan in its entirety. The notes on the case stated:

[I]t seems that the court found that though there was evidence that the members of every group of accused were together concerned in the killing of the officers handed over to them, and were therefore guilty of one of the charges (iii)-(ix), there was not enough evidence beyond that to show that they knew what had been planned in Berlin or what was happening outside their region and therefore,

321 Under common law, when a number of people participate in the commission of a crime, those who physically commit the crime are called principals in the first degree and those who are at the crime scene and actively assist the perpetrator are called principals in the second degree. The latter’s liability is still derived from that of the first degree principal and they are distinguished from accessories before the fact who assist, encourage, instigate the crime without being present at the crime scene. See Van Sliedregt, *supra* n 14, at 179; Fletcher, *supra* n 14, at 645; J. Ohlin, ‘Organizational Criminality’, in E. Van Sliedregt and S. Vasiliev (eds), *Pluralism in International Criminal Law* (Oxford: Oxford UP, 2014), at 110.

322 *Trial of Otto Sandrock and Three Others* (‘The *Almelo* Trial’), British Military Court, Almelo, Holland, 24 – 26 November 1945 in UN War Crimes Commission, *Law Reports of Trials of War Criminals*, Vol. I (London: Published for the United Nations War Crimes Commission by His Majesty’s Stationary Office, 1947), at 36-38.

323 *Ibid.*, at 40. (*emphasis added*)

324 *Trial of Max Wielen and 17 Others* (‘The *Stalag Luft III* Case’), British Military Court, Hamburg, Germany, 1 July – 3 September 1947, in UN War Crimes Commission, *Law Reports of Trials of War Criminals*, Vol. XI (London: Published for the United Nations War Crimes Commission by His Majesty’s Stationary Office, 1949).

325 *Ibid.*, at 33.

326 *Ibid.*, at 35.

327 *Ibid.*, at 40-44.

328 *Ibid.*, at 34.

329 *Ibid.*, at 31-32.

a fortiori, not enough evidence that they were together concerned in the killing of 50 out of the 80 escaped officers.

In the case of Max Wielen, unlike that of the other 17 accused, there was evidence of his participation both in the preparation and in the concealment of the crime. It seems that, basing its conclusions on this additional evidence which was not available against the other accused, the court found him guilty of being concerned... in the killing of the 50 officers.³³⁰

Regarding such instances of joint liability for the commission of a crime, the Judge Advocate then affirmed that:

If people are all present, aiding and abetting one another to carry out a crime they knew was going to be committed, they are taking their respective parts in carrying it out, whether it be to shoot or whether it is to keep off other people or act as an escort whilst these people were shot, they are all in law equally guilty of committing that offence³³¹

Read also in light of the facts of the case, this is a confirmation of the principle that a common criminal design can provide the basis for a reciprocal attribution of individual contributions to the desired crime, thus, making all participants in it equally guilty of it.

iii) The French military tribunals

The US and British military tribunals' jurisprudence on the 'common design/purpose' construct confirmed one basic principle of criminal law, described by the United Nations War Crimes Commission ('UNWCC') as "the rule which exists in many systems of law that those who take part in a common design to commit an offence which is carried out by one of them *are all fully responsible* for that offence in the eyes of criminal law."³³² Civil law jurisdictions refer to this principle as the notion of co-perpetration,³³³ which did in fact make an appearance in the Nazi trials before the French tribunals. Regrettably, the UNWCC reports on such cases where the accused were charged with joint principal liability do not offer enough information to define with certainty the legal framework of this concept. Instead, they mostly provide brief summaries of the parties' arguments and judicial findings, without detailed quotations thereof.

³³⁰ *Ibid.*, at 45.

³³¹ *Ibid.*, at 43-44.

³³² UNWCC Law Reports, Vol. XV, *supra* n 124, at 96. (*emphasis added*)

³³³ *The Prosecutor v. Lubanga* (ICC-01/04-01/06-803-tEN), Decision on the Confirmation of Charges, Pre-Trial Chamber I, 29 January 2007, para 326. The ICC Pre-Trial Chamber defined co-perpetration as a legal concept that is "originally rooted in the idea that when the sum of the co-ordinated individual contributions of a plurality of persons results in the realisation of all the objective elements of a crime, any person making a contribution can be held vicariously responsible for the contributions of all the others and, as a result, can be considered as a principal to the whole crime."

One good example of this is the *Carl Bauer et al.* case, in which three German officers were found guilty of the murder of three French prisoners of war.³³⁴ The evidence showed that the latter were captured and taken to the accused Bauer, who was the commanding officer. He ordered the accused Schrameck to take them away for execution, and the latter delivered them thus to the accused Falten, whose squad then carried out the said killings.³³⁵ The judges found all three accused guilty of the charged crime and sentenced Bauer to death, whereas Falten and Schrameck were each given a sentence of five years imprisonment.³³⁶ The criminal liability of the accused in this case was described by the UNWCC in the following terms:

Bauer's personal liability in this case lay in that he originated the crime by giving orders to his subordinates in pursuance of Hitler's instructions. Such responsibility is covered by Article 6, last paragraph, of the Nuremberg Charter:

"Leaders, organisers, instigators, and accomplices participating in the formulation or execution of a common plan or conspiracy to commit any ... crimes are responsible for all acts performed by any persons in execution of such plan."

In French law, it is covered by Article 4 of the Ordinance of 28th August, 1944, concerning the Suppression of War Crimes:

"Where a subordinate is prosecuted as principal perpetrator of a war crime, and his hierarchical superiors cannot be charged as joint perpetrators, the latter are regarded as accomplices to the extent to which they had organised or tolerated criminal acts of their subordinates."

From this it follows that, if a superior is prosecuted because of orders issued to subordinates, *he is held responsible as principal or joint perpetrator*, as the case may be.³³⁷

This case resembles the British military tribunals' trials which dealt with the killings of Allied officers, several of which were discussed above. However, without the actual judgement, or at least direct references to the relevant dicta in it, it is impossible to state with certainty what the precise finding on the accused persons' liability was. On the one hand, it could be argued that Bauer, Falten and Schrameck shared a common purpose to murder the French prisoners of war and that, by contributing in his own way to the crime, each accused became a joint perpetrator of the three killings. As the UNWCC noted, this finding would have found support in the text of Article 4 of the French Ordinance of 28 August 1944, read in conjunction with the very last paragraph of Article 6 IMT Charter.

While there is no rule, which requires judges to punish equally the joint perpetrators of a crime, the palpable difference between Bauer's sentence (death penalty) and that of the other two accused (5 years imprisonment each) suggests that the French tribunal may have

³³⁴ *Trial of Carl Bauer, Ernst Schrameck and Herbert Falten*, Permanent Military Tribunal, Dijon, France, 18 October 1945, in UN War Crimes Commission *Law, Reports of Trials of War Criminals*, Vol. VIII (London: Published for the United Nations War Crimes Commission by His Majesty's Stationary Office, 1949), at 15.

³³⁵ *Ibid.*

³³⁶ *Ibid.*, at 16.

³³⁷ *Ibid.*, at 21. (*emphasis added*)

followed another line of reasoning. Notably, both Falten and Schrameck submitted that they acted upon immediate orders, which forced them to participate in the crime, and the evidence showed that Schrameck in fact delayed the execution and went back to Falten to ask him if he should carry it out.³³⁸ The judges accepted these extenuating circumstances, which depicted Schrameck and Falten more as (unwilling) tools in Bauer's hands, rather than as his partners in crime, sharing with him a common purpose to kill. Thus, when the UNWCC asserted that a commander, who orders his subordinates to commit a crime, can be held liable as "principal or joint perpetrator, *as the case may be*", it seemed to hint at an alternative interpretation: *i.e.* that Bauer was guilty as an indirect perpetrator:

In our case it would appear that Bauer was found guilty as principal perpetrator, and therefore convicted to death. This resulted from the findings regarding the part played by his two subordinates. By admitting their respective pleas, the Tribunal in fact decided that both were instrumental in the killing of the three F.F.I. prisoners, but bore lesser responsibility.³³⁹

One conclusion that can be drawn from this finding is that the French court in this case did not endorse an objective approach to distinguishing between principals and accessories to a crime, seeing as Bauer was apparently held responsible *as a principal perpetrator* even though he did not physically commit the *actus reus* of the said offence. It is also unlikely that this conviction was premised on the control over the crime concept since: i) the available records do not show any discussion that is characteristic for the use of this particular approach and ii) this case pre-dates by nearly two decades the first discussion of the control theory (in academic writings).³⁴⁰ Thus, one could plausibly argue that, although the records of the *Carl Bauer et al.* case do not clearly state whether this case of *joint* perpetration responsibility or not, Bauer's conviction as a perpetrator endorsed a subjective approach to assigning principal responsibility: an approach that also underlines the 'common purpose' doctrine.³⁴¹

Overall, the rather limited records of the few French cases reported in the Law Reports of the United Nations War Crimes Commission do not provide sufficient information to draw general conclusions on how these tribunals construed the relevant modes of liability. The few other French cases on joint perpetration that can be cited here³⁴² also do not offer any analysis that can help to understand the approach, which the judges followed when finding defendants liable as co-principals to the crime.

³³⁸ *Ibid.*, at 16.

³³⁹ *Ibid.*, at 21.

³⁴⁰ See Chapter 5, Section 5.2.1. and Chapter 4, Section 4.3.3.2.iv (text accompanying notes 510-516).

³⁴¹ See Chapter 1, Section 1.3.1. (text accompanying notes 91-93) and Chapter 5, Section 5.2.1.

³⁴² See, for instance, the trial of *Gustav Becker et al.* where the prosecutor charged Becker, Weber and Schultz as joint principals of the crimes of unlawful arrest and ill-treatment, while 17 other accused persons were charged *in absentia* as accomplices. *Trial of Gustav Becker, Wilhelm Weber and 18 Others*, Permanent Military Tribunal, Lyon, 17 July 1947, in UN War Crimes Commission, *Law Reports of Trials of War Criminals*, Vol VII (London: Published for the United Nations War Crimes Commission by His Majesty's Stationary Office, 1948), at 67.

Taken in its totality, the Nuremberg-era case law on 'common purpose/design' liability reveals that this is a doctrine, which was used by the US/British military tribunals in occupied Germany to hold the participants in a criminal plan guilty of the resulting crime. Several legal requirements had to be met in order for an accused to incur this form of liability: objectively, the prosecution must establish: i) the existence of a criminal plan that is common to a plurality of persons and ii) that the accused, with his specific conduct, contributed to the effectuation of this plan. Subjectively, it had to be proved that iii) the accused shared the common purpose in that his contribution was done 'deliberately' and 'for the purpose' of committing the crime.³⁴³ If these three requirements were satisfied, all participants in the common purpose were found to be equally guilty and fully responsible of the concerted crime that only one or some of them physically executed.

2.3.3.3. Legal nature of 'common design/purpose' liability

i) Relation to the concept of conspiracy

When the theory of "acting in pursuance of a common design" was pled by Prosecutor Taylor for the first time before the Military Tribunals in Nuremberg, he did so in a way which effectively equated this notion to the conspiracy concept, as it appeared in the last sentence of Article 6 IMT Charter (*i.e.* 'participating in the formulation or execution of a common plan or conspiracy'). In particular, under Count One of the *Medical, Justice* and *Pohl* indictments – titled "The Common Design or Conspiracy" – the Prosecutor stated that:

[A]ll of the defendants herein, acting pursuant to a common design, unlawfully, willfully, and knowingly did conspire and agree together and with each other and with diverse other persons, to commit war crimes and crimes against humanity, as defined in Control Council Law No. 10, Article II.³⁴⁴

It appears that, as far as the Prosecution was concerned, the concepts of 'common design' and 'conspiracy' were synonymous, and Taylor, contrary to the IMT Judgement, was charging the accused with conspiracy to commit war crimes and crimes against humanity. He explained in his final report several years after these trials that he did so because he was not convinced by the reasoning of the IMT judges on this legal issue and thought that "the language of Control Council Law No. 10 differed in certain respects from that of the London Charter".³⁴⁵ This was a decision which ran into trouble with the judges who, after reading the content of Count One, refused to accept the formulations contained therein:

It is the ruling of this Tribunal that neither the Charter of the International Military Tribunal nor Control Council Law No. 10 has defined conspiracy to commit a war crime or crime against

³⁴³ See *supra* text accompanying notes 299-331.

³⁴⁴ The *Medical* Case, *supra* n 41, Vol. I, at 10; The *Justice* Case, *supra* n 290, at 17; The *Pohl* Case, *supra* n 143, at 201.

³⁴⁵ Taylor, *supra* n 147, at 70-71.

humanity as a separate substantive crime; therefore, this Tribunal has no jurisdiction to try any defendant upon a charge of conspiracy considered as a separate substantive offense.

Count I of the indictment, *in addition to the separate charge of conspiracy*, also alleges unlawful participation in the formulation and execution of plans to commit war crimes and crimes against humanity which actually involved the commission of such crimes. We, therefore, cannot properly strike the whole of Count I from the indictment, but insofar as Count I charges the commission of the alleged crime of conspiracy as a separate substantive offense, distinct from any war crime or crime against humanity, the Tribunal will disregard that charge.³⁴⁶

This ruling in the *Medical* case clearly proves that the judges did not accept the Prosecution's reasoning and instead unequivocally held that common design liability – *i.e.* “participation in the formulation and execution of plans” – is a mode of liability to be distinguished from the substantive crime of conspiracy. It will be recalled that this distinction was already addressed in the IMT Judgment³⁴⁷ so its affirmation here served to add a further emphasis on it. This line of reasoning was also echoed in legal scholarship in the years following the Nuremberg trials. Thus, for instance, Maximilian Koessler, who was also an attorney from the U.S. Department of the Army in the war crimes trials in occupied Germany, wrote:

Concerning forms of participation in a crime, charges in the Dachau trials were at least on their face based upon the general principles regarding kinds of complicity recognized among all civilized nations rather than on anything which is particular to the Anglo-American systems of law, as for instance, charged based merely on an agreement to commit a crime, without any materialization thereof, at least in the form of an attempt (conspiracy). No exception from this general approach were the so-called common design charges which must not be confused with a conspiracy charge even though they were often loosely referred to by the last mentioned term.³⁴⁸

This quote is also a reminder that the Allied military tribunals that operated in Germany under the authority of Control Council Law No.10 did not apply domestic law when trying the Nazi defendants but aspired to apply rules of international criminal law, as also defined in the IMT Charter and Judgment.³⁴⁹

ii) A mode of accessory liability or a theory of co-perpetration?

That the post-World War II trials established the ‘common design/purpose’ notion as a mode of liability, distinct from the substantive crime of conspiracy, is a point which the above research has also confirmed.³⁵⁰ The question that now remains to be answered is

exactly what kind of responsibility it prescribes: is ‘common purpose/design’ a form of accomplice liability which defines the confederates in a joint plan as accessories to the collective crime (principals being only those who physically carry out the *actus reus* of the crime), or does it ascribe joint principal liability to all the partners in the crime and should therefore be regarded as an early formulation of co-perpetration under international criminal law? The answer could be distilled from some of the dicta quoted in the preceding section, where examples of ‘common design’ jurisprudence were discussed. It will be recalled, for instance, that in the US *Dachau* case, the Prosecution relied on the view that when a group of individuals “are all engaged in a common plan for the execution of the felony and all take their part in the furtherance of the common design, *all are liable as principals*.”³⁵¹ Quite the same interpretation was offered by the Judge Advocate in the British *Stalag Luft III* case, when he held that people who assist each other in the execution of a common criminal purpose “are all in law *equally guilty of committing* that offence”.³⁵² Overall, the ‘common purpose’ concept was used to reciprocally attribute to each participant in a joint criminal plan the contributions of his/her confederates, the ultimate result being that the combined acts of all of them were considered in law to be done individually by each one of them. To a person trained in civil (Romano-Germanic) law, this description of the nature of ‘common design’ liability can only mean that it is a mode of co-perpetration, giving rise to joint principal responsibility to all the participants who share in the criminal plan. First, the notion treats all the parties to the crime as *equally guilty* (*i.e.* the blameworthiness of those who actively contribute to the desired crime is equated to that of those who physically commit it) and, second, all of them are convicted *of the crime itself*: *i.e.* not of participating in one way or another in it, which is what accessory liability entails.³⁵³ The very idea that the *acts* of the others are imputed to the accused (and vice versa), meaning that he is treated as if the group's collective acts are his own act, goes to say that he is considered, in law, to have committed the group crime. While this is certainly a sound interpretation, it is not the only one available: the above-cited dicta on ‘common purpose’ responsibility can be analysed quite differently from a common (Anglo-American) law perspective.

In the Anglo-American legal tradition, while a distinction is made between principals and accessories to a group crime, the latter are considered to be as culpable as the former. Put simply, an accessory to a crime is treated as being equally liable to the principal.³⁵⁴ In addition to this, under common law, the accessory is convicted *of the crime* and not of *participating* in it. Thus, while in Germany the aider and abettor is punished for assisting

³⁵¹ The *Dachau Concentration Camp Trial*, *supra* n 309, at 13.

³⁵² The *Stalag Luft III Case*, *supra* n 324, at 43-44.

³⁵³ Van Slidregt, *supra* n 14, at 70.

³⁵⁴ Section 8 of the United Kingdom's Accessories and Abettors Act 1861 states that “[w]hosoever shall aid, abet, counsel or procure the commission of any indictable offence whether the same be an offence at common law or by virtue of any act passed or to be passed, shall be liable to be tried, indicted and punished as a principal offender”. Section 8, Accessories and Abettors Act 1861, (24 & 25 Vict. c.94). See also J. Smith and B. Hogan, *Criminal Law* (London: Butterworths, 1996), at 127-129; Fletcher, *supra* n 14, at 636, 651; A. Ashworth and J. Horder, *Principles of Criminal Law* (7th edn, Oxford: Oxford UP, 2013), at 420.

³⁴⁶ The *Medical Case*, *supra* n 41, Vol. II, at 122. (*emphasis added*)

³⁴⁷ See *supra* text accompanying notes 121-124.

³⁴⁸ Koessler, *supra* n 149, at 82.

³⁴⁹ See also Chapter 4, Section 4.2.2.3. (text accompanying notes 89-103)

³⁵⁰ See *supra* Section 2.3.3.2.

the commission of a particular offence, in the United Kingdom this person is convicted of the crime itself.³⁵⁵ When the finding that the executioners of a common criminal plan are “equally guilty of committing that offence”³⁵⁶ is assessed against this normative framework, it becomes less certain whether the concept of ‘common purpose/design’ was indeed applied in the Nuremberg-era case law as a form of joint principal liability. Since it was exactly the British and the US military tribunals that relied on it, this concern is not without merit. What is more, the ‘common purpose’ theory is often said to originate from English criminal law,³⁵⁷ where courts have affirmed long before the post-World War II trials that:

it is a principle of law, that if several persons act together in pursuance of a common intent, *every act done in furtherance of such intent by each of them is, in law, done by all*. The act, however, must be in pursuance of the common intent. Thus, if several were to intend and agree together to frighten a constable, and one were to shoot him through the head, such an act would affect the individual only by whom it was done.³⁵⁸

The point that causes discord in common law jurisprudence and academia, however, is precisely the question of what kind of liability is incurred pursuant to the concept of ‘common purpose’. Under English law, where it is usually labeled as ‘joint enterprise’ responsibility, the dominant view is that this is a theory of complicity which gives rise to accessorial (secondary) liability to the participants in a common purpose, thus reserving principal liability only for the person(s) who physically carried out the *actus reus* elements of the agreed crime.³⁵⁹ However, the opinion has also been expressed in UK case law that the joint enterprise notion is a special form of liability, which defines as joint principals all those who share the common purpose.³⁶⁰ A case that could serve to illustrate the controversy

³⁵⁵ Van Sliedregt, *supra* n 14, at 70-71; Ormerod, *supra* n 15, at 185-186; Ashworth and Horder, *supra* n 354, at 420-421.

³⁵⁶ The *Stalag Luft III* Case, *supra* n 324, at 43-44.

³⁵⁷ E. Van Sliedregt, ‘Joint Criminal Enterprise as a Pathway to Convicting Individuals for Genocide’, 5 *Journal of International Criminal Justice* (2007), at 185; Ambos, *supra* n 297, at 361; M. Rabie, ‘The Doctrine of Common Purpose in Criminal Law’, 88 *South African Law Journal* (1971), at 227; J. Ohlin, ‘Joint Intentions to Commit International Crimes’, 11 *Chicago Journal of International Law* (2011), at 703.

³⁵⁸ *Macklin and others* [1838] 2 Lewin CC 225, at 226 (*emphasis added*); *R v. Thompson* (1869) 11 Cox CC 362, at 364. The principle was further reiterated by British courts at the time World War II was in its peak, see *e.g.* *R v. Appleby* [1943] 28 Cr. App. R. 1, at 7. See also Rabie, *supra* n 357, at 227-228.

³⁵⁹ Ormerod, *supra* n 15, at 190, 213-215; Olásolo, *supra* 1, at 55-56; Ashworth and Horder, *supra* n 354, at 436-438; R. Cryer, ‘Imputation and Complicity in Common Law States: A (Partial) View from England and Wales’, 12 *Journal of International Criminal Justice* (2014), at 272-273, 275-278.

³⁶⁰ Lord Justice Hobhouse held in a Court of Appeal judgement that: “persons who participate in a criminal joint enterprise are, through the attribution to them of the *actus reus*, *in reality joint principals with the primary actor*. However since the primary actor has himself committed a criminal offence, there is a tendency to treat him alone as the principal and all the others as mere accessories. This in turn gives rise to a strongly held academic view, supported by doctrinal arguments probably derived from the concept of complicity, that their liability can only be based upon ‘aiding and abetting’.” *Credit Lyonnais Bank Nederland NV v Export Credits Guarantee Department* [1999] C.L.C. 823, at 851. (*emphasis added*) See also *R v. Stewart and Schofield* [1995] 1 Cr. App. R. 441, at 447.

surrounding this theory is the more recent UK Supreme Court judgement in *R v. Gnango*.³⁶¹ The case concerned two persons (A and B) who engaged in an unlawful gunfight, each one aiming to kill the other, in the course of which a passerby (C) was accidentally killed by a bullet shot by A. The majority found that B was an accessory to C’s murder, deciding in the process to quash B’s earlier conviction on common purpose/joint enterprise liability and rely instead on the notion of aiding and abetting.³⁶² Lord Brown and Lord Clarke, however, disagreed with this line of reasoning and united around the view that B is liable as a principal, not an accessory, under the joint enterprise doctrine. Lord Clarke wrote:

I entirely agree with my Lord Brown’s conclusions... Like him, I am not disposed to analyse the respondent’s liability for murder in accessory terms but as a principal to a joint enterprise (that is an agreement) to engage in unlawful violence specifically designed to cause death or serious injury, where death occurs as a result. I would be inclined to describe this as a form of principal and not secondary liability³⁶³

Thus, for Lord Brown and Lord Clarke, B and A shared a common purpose to engage in lethal violence, in the execution of which C was killed. This, they opined, elevated B’s liability for C’s murder to that of “a principal to a joint enterprise”, even though it was only A who caused the *actus reus* of the crime (it was A’s bullet that hit and killed C). Lord Kerr, having read the judgments of Lords Brown and Clarke, disagreed and held that “[a] clear distinction has to be drawn between the concepts of joint principal liability and joint enterprise.”³⁶⁴ He viewed the latter as “a species of secondary liability”³⁶⁵ and pointed out that under English law principals are only those individuals who cause the *actus reus* of the crime.³⁶⁶ Noting this divergence of opinions, the majority held:

We have considered the judgments of Lord Brown and Lord Clarke. They essentially agree with our conclusions. Each, however, considers that the defendant was liable as a principal to the agreed joint activity of shooting with intent to kill or cause serious injury, rather than as an accessory to

³⁶¹ *R v. Gnango* [2011] UKSC 59.

³⁶² *Ibid.*, paras 42-46; 55-62. “The majority” in this case stands for the judgement of Lord Phillips, Lord Judge and Lord Wilson – three of the seven justices in the UK Supreme Court. The other justices in the case were Lord Brown and Lord Clarke (who found the defendant guilty as a principal in a joint enterprise), Lord Dyson (who agreed with the conclusion of the majority but found that the defendant could also be found guilty as a principal to the crime) and Lord Kerr (who wrote a dissenting opinion, holding that the defendant could not be held liable for the murder of C).

³⁶³ *Ibid.*, para 81.

³⁶⁴ *Ibid.*, para 127.

³⁶⁵ *Ibid.*, para 128.

³⁶⁶ Lord Kerr wrote: “The *actus reus* in this case was the killing of [C]. To be guilty of that offence as a joint principal, it would have to be shown that [B] caused or contributed to a cause of her death. With great respect to the views of Lord Brown and Lord Clarke, it is not sufficient that he be shown to be engaged by agreement in violence designed to cause death or serious injury. The crucial question is whether he caused or contributed to the death of the victim. This is not an issue which was put to the jury and a conclusion as to whether [B]’s actions caused or contributed to [C]’s death cannot be inferred from their verdict.” *Ibid.*, para 129.

the act of firing the shot. This is not a difference of substance. It may well be that, in terms of the common law, [A] was a principal in the first degree and the respondent was a principal in the second degree [...]. Whether the respondent is correctly described as a principal or an accessory is irrelevant to his guilt.³⁶⁷

The above discussion on the nature of common purpose/joint enterprise responsibility is quite showing of the ambiguous status of the doctrine under English criminal law. The view that joint principals and accessories are equally liable parties to a crime makes it by and large irrelevant whether one adopts the view that the concept is a form of co-perpetration liability or a mode of secondary responsibility. In Romano-Germanic legal systems, where the perpetrator (principal) status signifies a higher degree of culpability, efforts have been spent to expand the scope of this type of liability beyond its natural meaning so that it could also be applicable to a person who did not physically commit the *actus reus* of the offence but is seen as being just as culpable. In a system where the law puts a sign of equality between principals and accessories, there is no need for such elaborations. This having been said, however, it bears noting that in other common law states – namely in Australia³⁶⁸ and South Africa³⁶⁹ – courts have held that the ‘common purpose’ theory gives rise to *co-principal* liability. As for the United States legal system, there the term ‘common purpose/design’ does not have a separate legal meaning but is used in the context of conspiracy

liability,³⁷⁰ which courts have long defined as ascribing joint principal responsibility for the commission of the concerted crime.³⁷¹

If the domestic approach of common law jurisdictions to the ‘common purpose’ notion can be any sort of indicator of how the British and US military tribunals in occupied Germany interpreted this concept in the context of international war crimes trials, then one could build a case for either view: that it is a form of accessorial (secondary) liability, or that it is a theory of joint principalship. In this author’s view, the more reasonable interpretation is the latter. When the ‘common purpose’ principle was originally formulated in the 19th century *Macklin* case, it stated that “if several persons act together in pursuance of a common intent, *every act done in furtherance of such intent by each of them is, in law, done by all*”.³⁷² The US/UK tribunals in occupied Germany invoked the same rationale when relying on the ‘common purpose/design’ theory.³⁷³ The only logical inference of stating that the act of the physical perpetrator is the act of each participant in the group crime is that the *actus reus* of the crime is, metaphysically and for the purposes of the law, carried out by all the participants in the common purpose: *i.e.* that each one of them is a co-perpetrator of the concerted crime. The author therefore subscribes to the view adopted in some of the abovementioned common law jurisdictions and expressed by civil law scholars/practitioners that the ‘common purpose’ doctrine is “a kind of subjective co-perpetration.”³⁷⁴

2.4. Conclusions

The post-World War II trials were without doubt a defining moment for international criminal law, a major undertaking that laid the foundations of this legal discipline. The rejection of the classic proposition that government officials enjoy functional immunities from prosecution for international crimes, the categorization and delineation between crimes against humanity and war crimes: these and other fundamental principles of international criminal law received their first elaboration in the Nuremberg-era legislation

³⁶⁷ *Ibid.*, para 62. The judgement further stated that “[w]hether, on strict analysis, that made the respondent guilty as a principal to [A’s] actus reus of firing the fatal shot, or guilty as one who had “aided, abetted, counselled or procured” his firing of that shot creates no practical difficulty on the facts of this case and does not affect the result.” *Ibid.*, para 64.

³⁶⁸ The High Court of Australia has acknowledged that two or more individuals can be held liable as principals in the first degree (i.e. co-perpetrators) when they “act in concert” for the commission of a group crime, even when it was only one of them who physically caused the *actus reus* of the agreed crime. An elaboration of this principle was provided by Justice McHugh in *Osland*, where he held that “where the parties are acting as the result of an arrangement or understanding, there is nothing contrary to the objects of the criminal law in making the parties liable for each other’s acts and the case for doing so is even stronger when they are at the scene together. If any of those acting in concert but not being the actual perpetrator has the relevant *mens rea*, it does not seem wrong in principle or as a matter of policy to hold that person liable as a principal in the first degree. Once the parties have agreed to do the acts which constitute the *actus reus* of the offence and are present acting in concert when the acts are committed, the criminal liability of each should depend upon the existence or non-existence of *mens rea* or upon their having a lawful justification for the acts, not upon the criminal liability of the actual perpetrator.” See *Osland v. R*, 10 December 1998, High Court of Australia (HCA 75; 197 CLR 316), paras 72-73, 93. See also J. Smith, ‘Joint Enterprise and Secondary Liability’, 50 *Northern Ireland Legal Quarterly* (1999), at 154-155; Olásolo, *supra* 1, at 56.

³⁶⁹ In South Africa (which is best described as a mixed common law/civil law system), courts have long used the common purpose doctrine and acknowledged that participants in a common purpose are principals to the crime. See *e.g. Thebus and Another v. S* (CCT36/02) [2003] ZACC 12; 2003 (6) SA 505 (CC), paras 21(at fn. 23) and 44. Burchell explains that: “The existing common-purpose rule in South Africa regards participants in a common purpose as co-perpetrators by a process of imputing or attributing the causal conduct of the actual perpetrator to the others in the common purpose. This form of liability has been found in cases of homicide, treason, public violence, assault, and house breaking.” See J. Burchell, ‘South Africa’, in K. Heller and M. Dubber (eds), *The Handbook of Comparative Criminal Law* (Stanford, CA: Stanford Law, 2011), at 467.

³⁷⁰ See *e.g. Salinas v. U.S.* [1997] 522 U.S. 52, at 64, where the US Supreme Court reiterated “the common-law principle that, so long as they share a common purpose, conspirators are liable for the acts of their co-conspirators.” In *American Tobacco Co. v. U.S.*, the Supreme Court further held that “[w]here the circumstances are such as to warrant a jury in finding that the conspirators had a unity of purpose or a common design and understanding, or a meeting of minds in an unlawful arrangement, the conclusion that a conspiracy is established is justified.” *American Tobacco Co. v. U.S.* [1946] 328 U.S. 781, at 810. See also *Bourjaily v. U.S.* [1987] 483 U.S. 171, at 188; *Pinkerton v. U.S.* [1946] 328 U.S. 640; *Hicks v. U.S.* [1893] 150 U.S. 442, at 450.

³⁷¹ Fletcher explains that “it is well established in American law that membership in a conspiracy serves as a criterion for liability as a co-perpetrator of substantive crimes committed by other conspirators.”, as well as that “the doctrine of conspiratorial complicity collapses the distinction between accessories and perpetrators [and] the effect of finding membership in the conspiracy is to make the defendant a co-perpetrator of substantive offenses committed in furtherance of the conspiracy.” Fletcher, *supra* n 14, at 659-660; 674.

³⁷² See *supra* note 358.

³⁷³ See *supra* Section 2.3.3.2.

³⁷⁴ Ambos, *supra* n 297, at 361. See also *e.g. Cassese, supra* n 230, at 323-324.

and jurisprudence.³⁷⁵ The task of pioneering this field of law in a very dynamic context and within a limited timeframe, naturally, brought along the danger that some of its substance might not be construed in as structured and refined manner as it would normally be in a mature legal system. The above research has revealed that this was the case with the law on modes of liability, which the IMT and the Allies' tribunals in occupied Germany often brushed over or addressed only superficially in their case law. Rather than including a separate section in which each of the applicable forms of responsibility would be explained, their judgments mostly offered sporadic analysis, scattered throughout the legal findings on the charges against an accused. For this reason, a microscopic research of relevant fragments from this jurisprudence was needed to extract the legal requirements of the notions of joint liability used in the post-World War II prosecutions and clarify their legal nature.

The research carried out in this chapter has led to one fundamental conclusion: within the international criminal law discourse, the Nuremberg-era 'common purpose/design' notion constitutes an embryonic formulation of co-perpetration liability. Judges distinguished it from the 'conspiracy' and 'membership in a criminal organization' notions which, although broadly defined in early documents, were eventually constructed strictly as crimes in the jurisprudence of the IMT/FE and the Allies' tribunals. In particular, the former was used to convict Hitler's closest associates for agreeing to his plan to wage an aggressive war, while the latter was used to convict 'lesser' Nazi criminals for being knowing members of a specific Nazi organization. These two concepts had no other use. By contrast, the 'common purpose' theory was regarded as a mode of liability which, when its legal elements were satisfied, allowed for the reciprocal attribution of all acts of participants in the criminal plan, to the effect that in the end they were all considered to be fully and equally guilty of the executed offence. Overall, while this theory was articulated somewhat crudely, its underlying principles clearly position it in the ambit of co-perpetration liability. Refinement of its definitional framework was a task left for the future generations of international criminal lawyers.

375 A. Cassese, *Cassese's International Criminal Law* (3rd edn, Oxford: Oxford UP, 2013), at 247.

3

The Pitfalls of Joint Criminal Joint Criminal Enterprise: Doctrinal Framework and Nature

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3.1. Introduction

It is well known that the joint criminal enterprise theory was construed by the ICTY Appeals Chamber in the very first case adjudicated by it: the *Prosecutor v Tadić*.¹ Being the doctrine's *locus classicus* in modern international criminal law, this judgment and the analysis contained in it was subsequently relied upon by other contemporary courts and tribunals when endorsing this mode of liability.² The *Tadić* case will thus form a focal point of the analysis contained in this chapter, which will start by providing a brief overview of the drafting of the ICTY Statute and its provisions on individual criminal responsibility. This would not only serve as a bridge with the previous chapter on the post-World War II notions of liability, but it would also offer useful information concerning the statutory basis and legal nature of JCE responsibility. After the drafting of Article 7 ICTY Statute has been reviewed, the research will move on to explain how its text, as adopted by the UN Security Council, was eventually applied in the *Tadić* case. For this purpose, a brief summary of the case facts will first be offered, followed by a detailed analysis on the judicial findings on JCE's theoretical framework. The doctrine's three variants will be delineated and their *actus reus* and *mens rea* requirements will be separately analysed. While the *Tadić* Appeals Judgement will provide the research basis, subsequent case law that has further refined JCE's constituent elements will also be carefully studied. This will build a comprehensive account of the joint criminal enterprise doctrine, paramount for understanding how it functions in practice and where its conceptual problems lie.

The second part of this chapter is dedicated to researching the nature of the JCE theory and how it relates to the notions of 'conspiracy', 'membership in a criminal organization' and 'common design', as elaborated in the post-World War II trials. This is necessary because the definition of JCE as a theory of co-perpetration continues to be challenged, both in academia and legal practice, by claims that it is in fact a concept equivalent to criminal membership and conspiracy. As already explained, the latter two constructs were subjected to much criticism at Nuremberg and have been eschewed in international criminal law ever since.³ Thus, two basic questions will be addressed here: i) what, if any, is the relation of conspiracy and membership in a criminal organization to JCE and ii) given that the *ad hoc* Tribunals regard it as analogous to the 'common design' notion, is JCE correctly identified as a theory of co-perpetration or is it inherently a mode of accessory liability? To answer these questions, the research will refer to the analysis and conclusions drawn in Chapter 2, as well as examine the reasoning offered by the ICTY Appeals Chamber in *Tadić* and several other cases.

¹ *The Prosecutor v. Tadić* (IT-94-1-A), Judgment, Appeals Chamber, 15 July 1999, paras 185-229.

² *The Prosecutor v. Ntakirutimana and Ntakirutimana* (ICTR-96-10-A and ICTR-96-17-A), Judgment, Appeals Chamber, 13 December 2004, paras 461-468; *The Prosecutor v. Brima, Kamara and Kanu* (SCSL-2004-16-A), Judgment, Appeals Chamber, 22 February 2008, paras 72-76; *Interlocutory Decision on the Applicable Law: Terrorism, Conspiracy, Homicide, Perpetration, Cumulative Charging* (STL-11-01/I/AC/R176bis), Decision, Appeals Chamber, 16 February 2011, paras 236-249; *The Prosecutor v. Ieng Sary, Ieng Thirith and Khieu Samphan* (002/19-09-2007-ECCC/OCIJ), Decision on the Appeals against the Co-Investigative Judges Order on Joint Criminal Enterprise (JCE), Pre-Trial Chamber, 20 May 2010, paras 54 *et seq.*

³ See Chapter 2, Section 2.2. See also *infra* Section 3.5.1.

3.2. Drafting modes of liability into the ICTY Statute: from Nuremberg to The Hague

There is an echo in this Chamber today. The Nuremberg Principles have been reaffirmed. We have preserved the long-neglected compact made by the community of civilized nations 48 years ago in San Francisco to create the United Nations and enforce the Nuremberg Principles.⁴

With these words, Madeleine Albright - at the time the permanent representative of the United States of America to the United Nations - celebrated Security Council Resolution 808, passed on 22 February 1993.⁵ It stated that an international tribunal will be established where persons responsible for the mass violence in the dissolving Yugoslav Federation could be prosecuted.⁶ For this purpose, it tasked the UN Secretary-General with preparing a draft statute that would be proposed for discussion and adoption by the Security Council.⁷ This was a pivotal moment for the development of international criminal law which, until then, was in a hibernation state. The eruption of the Cold War soon after the end of the Nuremberg process made sure that any international trials for war crimes, crimes against humanity and genocide became unattainable for the next nearly fifty years. Thus, when the Secretary-General started working on the report concerning a novel tribunal for Yugoslavia, the primary source of legal authority that he could consult were the Nuremberg-era documents and jurisprudence. It is important to briefly sketch out the debates on the content of what eventually became Article 7 ICTY Statute, seeing as its text, listing the applicable forms of liability, was later also imported in the statutes of the other *ad hoc* international and hybrid tribunals: *i.e.* it became accepted as a contemporary statement of the forms of criminal responsibility applicable under customary international criminal law.⁸ Moreover, the *Tadić* Appeals Chamber found that this provision *implicitly* establishes the JCE concept:⁹ a finding that will be reviewed further down in this chapter.

4 UN Security Council, *Provisional Verbatim Record of the Three Thousand One Hundred and Seventy-Fifth Meeting* (S/PV.3175), 22 February 1993, at 11.

5 UN Security Council, *Resolution 808 (1993), Adopted by the Security Council at its 3175th meeting* (S/RES/808), 22 February 1993, para 1.

6 *Ibid.*, para 1

7 *Ibid.*, para 2

8 Article 7(1), Statute of the International Criminal Tribunal for the former Yugoslavia, (UN Doc. S/RES/827), UN Security Council Resolution 827 (1993), 25 May 1993, as last amended on 7 July 2009 (hereinafter: "ICTY Statute"); Article 6(1), Statute of the International Criminal Tribunal for Rwanda, (UN Doc. S/RES/955), UN Security Council Resolution 955 (1994), 8 November 1994 (hereinafter: "ICTR Statute"). See also Article 6 (1), Statute of the Special Court for Sierra Leone, (2178 UNTS 138), 16 January 2002 (hereinafter: "SCSL Statute"); Article 29, Law on the Establishment of the Extraordinary Chambers in the Courts of Cambodia for the Prosecution of Crimes Committed during the Period of Democratic Kampuchea, 10 August 2001, with inclusion of amendments as promulgated on 27 October 2004, (NS/RKM/1004/006) (hereinafter: "ECCC Law").

9 *Tadić* Appeal Judgment, *supra* n 1, para 220.

More than thirty states assisted the Secretary-General in the difficult task of preparing a draft proposal for an ICTY Statute. They put forward to him, either formally or informally, suggestions regarding the Tribunal's applicable law, including the law on individual criminal responsibility.¹⁰ France, for instance, submitted a report prepared by the Committee of French Jurists, which heavily drew from the notions applied at Nuremberg.¹¹ It distinguished between three levels of criminal culpability and then argued that "[t]he highest level is occupied by the policy makers, those who turned the violation of basic human rights and the laws of war into a permanent system of attaining political objectives."¹² After recognizing the practical difficulty of prosecuting such persons,¹³ the French proposed that they should be charged with the crime of conspiracy, as defined in the Nuremberg trials:

86. It would be another matter if, as in the case of the Nuremberg trials, "formulation or execution of a common plan or conspiracy to commit any of the...crimes" coming within the jurisdiction of the Tribunal (crime of "conspiracy"), were to be treated as a separate offence. This is the solution to be adopted.¹⁴

Next to the crime of conspiracy, the French also proposed applying the notion of 'membership in a criminal organization', once again mirroring the structure envisioned in the IMT/IMTFE Charters:

92. In addition, membership in a de jure or de facto group whose primary or subordinate goal is to commit crimes coming within the jurisdiction of the Tribunal would constitute a specific offence.

93. That was the solution adopted in article 9 and 10 of the Charter of the Nuremberg Tribunal, and it can be related to well-known concepts in penal-law, such as criminal association or conspiracy.

94. Two precautions should, however, be taken so as to avoid any shift towards an unacceptable form of collective responsibility. The first would be to confer on the Tribunal competence to declare a group to be criminal in a separate decision. The second would be to allow as a

10 UN Security Council, *Report of the Secretary-General Pursuant to paragraph 2 of Security Council Resolution 808 (1993)* (S/25704), 3 May 1993, para 13.

11 UN Security Council, *Letter Dated 10 February 1993 from the Permanent Representative of France to the United Nations addressed to the Secretary General* (S/25266), 10 February 1993.

12 *Ibid.*, para 84.

13 *Ibid.*, para 85. In particular, the French proposal stated that "the traditional concepts of incitement to commit offences and of criminal intent... do not allow for effective action. On the basis of those concepts, the specific criminal role of leaders would be identified only when those who actually committed the offences are being tried and in most cases it would be very difficult to show the link between each offence and general directives from afar. Such a criminal role would thus remain unpunished."

14 *Ibid.*, para 86.

defence – respectively, if need be – any spontaneous withdrawal by an individual from such a group.¹⁵

Whether the French had in mind to ensure some sort of continuity between the Nuremberg-era jurisprudence and the work of the Yugoslav Tribunal by proposing this bifurcated conspiracy-criminal membership strategy is a matter of debate. It is notable, however, that the conspiracy concept also figured, in one form or another, in the proposals of other states, including Italy,¹⁶ the United States of America¹⁷ and Canada.¹⁸ Nevertheless, there were also countries, such as the Netherlands¹⁹ and Russia,²⁰ which suggested texts that entirely excluded any references to the notions of conspiracy and organizational liability. Moreover,

in their recommendations to the Secretary General, Amnesty International and the Lawyers Committee for Human Rights strongly advocated against the adoption of the membership in a criminal organization concept, arguing that:

The imposition of collective punishment has no place in criminal trials which must define individual criminal responsibility:

1) No one should be deemed to have committed specific criminal acts merely by being a member of an organization that had as its object the commission of these crimes.²¹

Canada mirrored this opinion in its comments on the Tribunal's Statute, declaring that "[g]uilt by association, or the creation of offences based purely on membership in a *de jure* or *de facto* group whose primary or subordinate goal is to commit crimes coming within the jurisdiction of the tribunal is not acceptable."²²

After reviewing the proposals and recommendations put forward to him, the Secretary-General completed his report to the Security Council.²³ It contained a draft of the statute with the substantive laws to be included in it, as well as explanatory notes for each of the proposed articles. Regarding the principles of individual criminal responsibility, the Secretary-General advised against the adoption of the notion of membership in a criminal organization:

The question arises, however, whether a juridical person, such as an association or organization, may be considered criminal as such and thus its members, for that reason alone, be made subject to the jurisdiction of the International Tribunal. The Secretary-General believes that this concept should not be retained in regard to the International Tribunal. The criminal acts set out in this statute are carried out by natural persons; such persons would be subject to the jurisdiction of the International Tribunal irrespective of membership in groups.²⁴

Considering the controversial jurisprudential history of this notion²⁵ and the recommendations not to include it in the proposed statute, it is understandable why the Secretary-General

¹⁵ *Ibid.*, paras 92-94.

¹⁶ Article 6 of the proposal drafted by the Commission of Italian jurists provided that "[t]he fact of instigating the commission of any of the crimes referred to article 4, or of being an accomplice thereto *or of agreeing to the commission of the crime*, shall be punished according to the provisions of article 7." UN Security Council, *Letter Dated 16 February 1993 from the Permanent Representative of Italy to the United Nations addressed to the Secretary General* (S/25300), 17 February 1993, at 4. In the explanatory notes on this article, the commission stated that "[a]ll international criminal law texts explicitly refer to the penalties for certain forms of complicity in committing the crime. As a result, the draft statute includes a provision punishing complicity, instigation and conspiracy to commit the crime." *Ibid.*, at 12.

¹⁷ Article 11(d) of the US proposal on applicable modes of liability stated that "[t]hose who conspired to commit or who were accomplice to any of the violations in article 10 are individually responsible for such violations." US Security Council, *Letter Dated 5 April 1993 from the Permanent Representative of the United States of America to the United Nations addressed to the Secretary-General* (S/25575), 12 April 1993, at 7.

¹⁸ The relevant part of Article 12 of the Canadian proposal stated that "[p]rinciples of liability and forms of complicity, instigation and conspiracy to commit a crime within the jurisdiction of the tribunal must be specifically and clearly defined." UN Security Council, *Letter Dated 13 April 1993 from the Permanent Representative of Canada to the United Nations addressed to the Secretary-General* (S/25594), 14 April 1993, at 4.

¹⁹ The Netherlands agreed with France that three different levels of criminal responsibility could be distinguished in the context of mass war criminality and that the highest of these levels is occupied by the orchestrators of the crimes. However, rather than suggesting the concepts of conspiracy and membership in a criminal organization, the Dutch proposal held that "the fact that prosecution should, in the opinion of the Netherlands, focus on major war criminals does not mean that no action should be taken to investigate offences committed by subordinate personnel. On the contrary, such offences have to have been established, after all, before efforts can be made to determine where the responsibility of these crimes lay. It is advisable, however, to consider from the outset, while investigating individual crimes, whether and to what extent such crimes were committed *within a systemic pattern of action or other context which could indicate that responsibility was shared by persons in senior positions*. In short, it would be advisable to try to establish from the outset *whether the offence was an initiative of the offender (and possibly a number of co-perpetrators) or whether his superiors (leaders) may be considered to have been guilty of complicity in or procuring the commission of the crime*." UN Security Council, *Note Verbale Dated 30 April 1993 from the Permanent Representative of the Netherlands to the United Nations addressed to the Secretary-General* (S/25716), 4 May 1993, at 4-5. (*emphasis added*)

²⁰ The Russian draft statute of the Yugoslav Tribunal addressed the applicable modes of liability in Article 14(1) which stated: "The crimes specified in article 12 of this Statute shall be deemed to have been committed by any individual who:

- a) Committed such a crime directly; and/or
- b) Organized or directed the commission of such a crime; and/or
- c) Attempted to commit such a crime or was associated in some way with the commission of such a crime, or incited others to commit such a crime, or deliberately assisted others in the commission of such a crime."

UN Security Council, *Letter Dated 5 April 1993 from the Permanent Representative of the Russian Federation to the United Nations addressed to the Secretary-General* (S/25537), 6 April 1993, at 6.

²¹ Amnesty International, *Memorandum to the United Nations: the Question of Justice and Fairness in the International War Crimes Tribunal for the Former Yugoslavia* (AI Index: EUR 48/02/93), April 1993, at 4-5. A similar position was expressed by the Lawyers Committee for Human Rights in the letter sent to the Secretary-General on 19 April 1993. The letter has been re-printed in V. Morris and M. Scharf, *An Insider's Guide to the International Criminal Tribunal for the Former Yugoslavia: A Documentary History and Analysis*, Vol. 2 (Irvington-on-Hudson, NY: Transnational, 1995), at 463-468.

²² UN Security Council, *Letter Dated 13 April 1993 from the Permanent Representative of Canada to the United Nations addressed to the Secretary-General* (S/25594), 14 April 1993, at 4.

²³ UN Security Council, *Report of the Secretary-General Pursuant to paragraph 2 of Security Council Resolution 808 (1993)* (S/25704), 3 May 1993.

²⁴ *Ibid.*, para 51.

²⁵ See Chapter 2, Section 2.2.2.2.; Section 2.2.3.2.; Section 2.2.4.2.; and Section 2.2.5.2.

chose to explicitly reject it. The other Nuremberg-era concept, which was put forward in some of the proposals – *i.e.* conspiracy – was also denounced, albeit not as categorically and directly. The Secretary-General's report established 'conspiracy to commit genocide' as a separate crime,²⁶ but for the rest it entirely omitted the use of this notion anywhere else in the statute. As for the list of applicable modes of liability, the following ones were proposed to the Security Council:

54. The Secretary-General believes that all persons who participate in the planning, preparation or execution of serious violations of international humanitarian law in the former Yugoslavia contribute to the commission of the violation and are, therefore, individually responsible.

...

59. The corresponding article of the statute would read:

Article 7

Individual criminal responsibility

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.

...

The fact that any of the acts referred to in articles 2 to 5 of the present Statute was committed by a subordinate does not relieve his superior of criminal responsibility 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.²⁷

Thus, neither the notion of conspiracy, nor that of membership in a criminal organization, fell in the ambit of the Secretary-General's proposed text on the modes of liability to be applied at the Yugoslav Tribunal. Instead, the latter was rejected *in toto* and the former was formulated as a crime only and strictly with reference to genocide.

On 25 May 1993, the Security Council passed Resolution 827, wherein it unanimously approved the Secretary-General's report and officially declared the establishment of the ICTY under Chapter VII of the UN Charter.²⁸ The proposed text on the applicable modes of liability was adopted without any changes and was enshrined in Article 7 ICTY Statute.²⁹

²⁶ UN Security Council, *Report of the Secretary-General Pursuant to paragraph 2 of Security Council Resolution 808 (1993)*, (S/25704), 3 May 1993, Article 4(3)(b).

²⁷ *Ibid.*, paras 57, 59.

²⁸ UN Security Council, *Resolution 827 (1993)*, *Adopted by the Security Council at its 3217th meeting* (S/RES/827), 25 May 1993.

²⁹ See *supra* note 8.

3.3. Introducing the common purpose doctrine in the ICTY jurisprudence

The Nuremberg trials taught us important lessons, one being that the effective prosecution of international crimes requires, due to their very nature, a potent tool for ascribing joint liability. The Allies spent months at the end of World War II arguing over such notions, the IMT went through great lengths to address this problem in its judgement against the Nazi leaders and the post-Nuremberg trials developed further the international case law on it.³⁰ Thus, when in 1993 the UN Security Council approved the Secretary-General's proposal to eschew conspiracy and organizational liability from the ICTY Statute, an alternative legal construct should have been provided to define the liability of individuals who join efforts to execute a criminal plan. This was not done, which seemed to create a *non liquet* situation that the ICTY judges had to deal with already in the first cases brought before them: *Tadić* and *Furundžija*.

3.3.1. The Tadić Trial Judgement (7 May 1997): case facts and findings

The first defendant to be prosecuted before the International Criminal Tribunal for the former Yugoslavia – Duško Tadić – was a low-ranking Bosnian Serb who committed crimes against non-Serbs in the Prijedor Municipality, north-eastern Bosnia. He was charged with 34 counts of war crimes and crimes against humanity, the last five of which concerned events that took place in a small village called Jaskići.³¹ In particular, the Indictment alleged that the Accused was a member of an armed Serb group which, on 14 June 1992, went from house to house in the said village, forced their Muslim residents out and separated the men from the women and children. The men were then severely beaten and five of them were subsequently killed.³² The exact role of the accused in these particular events was not further specified in the charges and his liability for it became a major point of debate during the trial and appeal proceedings.

Having examined the evidence presented by the Prosecution, the Trial Chamber found that the Accused was a member of armed Serb forces that, between May and December 1992, sought to rid the Prijedor region from its non-Serb civilian population by committing violent acts against it.³³ One of the attacks within this context took place on 14 June 1992 when Tadić and a relatively small group of armed men entered Jaskići, searched its 11 houses and ordered the Muslim men to go and lay down on the road outside. They were then severely beaten and marched off to a collection point, where they were loaded on

³⁰ See Chapter 2, Section 2.2. and Section 2.3.

³¹ *The Prosecutor v. Tadić* (IT-94-1-I), Indictment (Amended), 14 December 1995.

³² *Ibid.*, para 12.

³³ *The Prosecutor v. Tadić* (IT-94-1-T), Judgment, Trial Chamber, 7 May 1997, para 660. See also *Tadić* Appeal Judgment, *supra* n 1, para 175.

buses and transferred away to an unknown location.³⁴ During this operation, five of the mistreated Muslim men were killed but the Prosecutor's evidence did not show by whom and in what circumstances.³⁵ The testimony of eyewitnesses was sufficient to establish beyond reasonable doubt that the Accused actively assisted "in the calling-out of residents and the separation of men from women and children", and that he also participated in the beating of four of the Muslim men.³⁶ However, none of the witnesses saw Tadić or any other member of the armed group kill the five victims. It was only after the armed group left that they could go on the street again and see five dead bodies, four of whom were shot in the head.³⁷ The Trial Chamber found Tadić guilty of the crimes of cruel treatment and other inhumane acts but acquitted him of the murder charges.³⁸ The judges did not specify under which of the modes of liability under Article 7 ICTY Statute they convicted the Accused for the Jaskići crimes: rather, it was held in a broad language that he *participated* in these crimes and is, therefore, responsible pursuant to Article 7(1) of the Statute.

The *Tadić* Trial Chamber was notably the first ICTY chamber that analyzed the scope of *participation* as a basis for criminal liability. It reserved the concept of 'committing' for the cases where an accused "directly engaged" in the alleged crimes.³⁹ The other forms of liability under Article 7(1) ICTY Statute (aiding and abetting, ordering, planning and instigating) were then grouped together as forms of criminal participation and the judges proceeded to analyze the requirements for convicting an accused on such basis.⁴⁰ For this purpose, they examined a number of post-World War II cases and it was within this context that they mentioned, for the very first time in ICTY jurisprudence, the 'common purpose/design' concept.⁴¹ However, the Chamber did not interpret it as a notion with a distinct legal meaning: rather, it alluded to it in its overall analysis on criminal participation that ultimately led to a legal finding on the *actus reus* and *mens rea* elements of aiding and abetting liability.⁴² Thus, the judges viewed the act of directly and substantially assisting to a common design as a way of aiding and abetting the commission of a crime, reserving principal liability solely for those who physically committed the crime. This is confirmed

in the legal findings which the bench made in relation to another set of charges regarding the role of the Accused in the beating of Muslim men in the Omarska death camp:⁴³

The Trial Chamber further finds that the accused in some instances was himself the perpetrator and in others intentionally assisted directly and substantially in the common purpose of inflicting physical suffering upon them and thereby aided and abetted in the commission of the crimes and is therefore individually responsible for each of them as provided by Article 7, paragraph 1, of the Statute.⁴⁴

This analysis and the findings on the Accused's guilt for the crimes in Jaskići became a major point of discussion when the case went on appeal. Prior to this, however, the common purpose concept made one more appearance in the ICTY trial jurisprudence and the chamber that used it made findings about its nature that largely contradicted those drawn in the *Tadić* trial.

3.3.2. *The Furundžija Trial Judgement (10 December 1998): a new reading of common purpose liability*

One and a half year after the *Tadić* Trial Judgement, a chamber composed of Judges Florence Mumba, Richard May and Antonio Cassese delivered the *Furundžija* Trial Judgement.⁴⁵ Anto Furundžija was a Bosnian Croat who commanded a unit of soldiers, known as the "Jokers", in the Vitez Municipality, central Bosnia and Herzegovina. He stood accused of rape and torture committed against two individuals on 15 May 1993 at the Jokers Headquarters.⁴⁶ The victims were a Muslim woman (Witness A) and a Croatian soldier (Witness D). The judges found that on or about 18 or 19 May 1993, Witness A was arrested and taken to the Jokers Headquarters where she was interrogated by the Accused. During the interrogation, she was stripped naked by a soldier who then proceeded to rape her and subject her to cruel, inhuman and degrading treatment. The purpose of this abuse was to extract information from Witness A regarding her family and alleged connection with the enemy.⁴⁷ Witness D, who was also interrogated by the Accused and subjected to severe physical assaults by the soldier, was made to watch Witness A, a woman he knew, being raped. This was done in order to force Witness D to admit all the allegations made against Witness A.⁴⁸ The Trial Chamber concluded that:

⁴³ For the charges concerning the crimes in the Omarska camp, see *Tadić* Indictment, *supra* n 31, para 6.

⁴⁴ *Tadić* Trial Judgment, *supra* n 33, para 726. See also *ibid.*, paras 730, 735, 738.

⁴⁵ *The Prosecutor v. Furundžija* (IT-95-17/1-T), Judgment, Trial Chamber, 10 December 1998.

⁴⁶ *The Prosecutor v. Furundžija* (IT-95-17/1-PT), Amended Indictment, 2 June 1998, paras 25-26.

⁴⁷ *Furundžija* Trial Judgment, *supra* n 45, paras 124, 127.

⁴⁸ *Ibid.*, para 127.

³⁴ *Tadić* Trial Judgment, *supra* n 33, paras 346-348, 373.

³⁵ While the Trial Chamber agreed that the said five Muslim men were found murdered after Tadić and his group left the city, it held that it was not proven beyond reasonable doubt that these men were in fact killed during the operation in which the Accused participated. The judges concluded that there is a "distinct possibility that [these killings] may have been the act of a quite distinct group of armed men". *Ibid.*, para 373. The Appeals Chamber subsequently overturned this finding and held that the evidence clearly demonstrated that the five Muslim men were in fact killed by the armed group to which the Accused belonged. *Tadić* Appeal Judgment, *supra* n 1, paras 182-184.

³⁶ *Tadić* Trial Judgment, *supra* n 33, para 369.

³⁷ *Ibid.*, para 370.

³⁸ *Ibid.*, paras 759-765.

³⁹ *Ibid.*, para 673.

⁴⁰ *Ibid.*, paras 675-692.

⁴¹ *Ibid.*, paras 676, 685.

⁴² *Ibid.*, para 692.

There is no doubt that the accused and [the soldier], as commanders, divided the process of interrogation by performing different functions. The role of the accused was to question, while [the soldier's] role was to assault and threaten in order to elicit the required information from Witness A and Witness D.⁴⁹

Furundžija's responsibility for the above crimes could *prima facie* be defined as aiding and abetting their commission, so the judges went on to define the constituent elements of this notion.⁵⁰ After conducting their own analysis on Nuremberg-era case law, they made the same findings on the *actus reus* and *mens rea* of this mode of liability as the *Tadić* Trial Chamber.⁵¹ However, they provided a very different definition of 'common purpose' responsibility in this process. Rather than as a form of aiding and abetting a crime,⁵² the *Furundžija* Trial Chamber construed it as a notion of co-perpetration liability. In particular, the judges held that:

Mention should also be made of several [post-World War II] cases which enable us to distinguish aiding and abetting from the case of co-perpetration involving a group of persons pursuing a common design to commit crimes.⁵³

Several Nazi concentration camp cases, discussed previously in Chapter 2 of this book,⁵⁴ and the Rome Statute of the International Criminal Court were used as legal authorities supporting the conclusion that:

two separate categories of liability for criminal participation appear to have crystallised in international criminal law - co-perpetrators who participate in a joint criminal enterprise, on the one hand, and aiders and abettors, on the other.⁵⁵

Setting aside arguments about the limited jurisprudence used to make this finding, or the merit of the Chamber's analysis of the Rome Statute,⁵⁶ it is evident that the *Furundžija* judges were united around the view that the 'common purpose' concept is a form of co-perpetration that is distinct from aiding and abetting liability. They explained that the latter requires a substantial assistance, encouragement or support for a crime, coupled with *knowledge* that this act assists the commission of the crime. This makes it distinct from common purpose liability "where the *actus reus* consist of participation in a joint criminal enterprise and the *mens rea* required is *intent* to participate."⁵⁷ To explain how this difference translates into practice, the trial judges considered a situation in which torture is committed by a multitude of persons⁵⁸ and held that:

To determine whether an individual is a perpetrator or co-perpetrator of torture or must instead be regarded as an aider and abettor, or is even not to be regarded as criminally liable, it is crucial to ascertain whether the individual who takes part in the torture process *also partakes of the purpose behind torture* (that is, acts with the intention of obtaining information or a confession, of punishing, intimidating, humiliating or coercing the victim or a third person, or of discriminating, on any ground, against the victim or a third person). If he does not, but gives some sort of assistance and support with the knowledge however that torture is being practised, then the individual may be found guilty of aiding and abetting in the perpetration of torture. Arguably, if the person attending the torture process neither shares in the purpose behind torture nor in any way assists in its perpetration, then he or she should not be regarded as criminally liable (think for example of the soldier whom a superior has ordered to attend a torture session in order to determine whether that soldier can stomach the sight of torture and thus be trained as a torturer).⁵⁹

The conclusion was thus made that "all those who in some degree participate in the crime and in particular take part in the pursuance of one of its underlying purposes, are equally liable."⁶⁰ The above analysis reveals that the Trial Chamber used a subjective test to

⁴⁹ *Ibid.*, para 130.

⁵⁰ *Ibid.*, paras 187 *et seq.*

⁵¹ In particular, the Chamber held "the legal ingredients of aiding and abetting in international criminal law to be the following: the *actus reus* consists of practical assistance, encouragement, or moral support which has a substantial effect on the perpetration of the crime. The *mens rea* required is the knowledge that these acts assist in the commission of the offence." *Ibid.*, para 249.

⁵² See *supra* Section 3.3.1.

⁵³ *Furundžija* Trial Judgment, *supra* n 45, para 210.

⁵⁴ See Chapter 2, Section 2.3.3.2.

⁵⁵ *Furundžija* Trial Judgment, *supra* n 45, paras 216.

⁵⁶ In their analysis on the distinction made in the Rome Statute between aiding and abetting and co-perpetration liability, the judges juxtaposed Article 25(3)(d) RS with Article 25(3)(c) RS: Article 25 of the Rome Statute distinguishes between, on the one hand, a person who "contributes to the commission or attempted commission of [...] a crime by a group of persons acting with a common purpose" where the contribution is intentional and done with the purpose of furthering the criminal activity or criminal purpose of the group or in the knowledge of the intention of the group to commit the crime", from, on the other hand, a person 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. See *ibid.* (footnotes omitted). This analysis is problematic because co-perpetration liability in the Rome Statute is in fact listed under Article 25(3)(a) RS, whereas Article 25(3)(d) RS that the judges referred to describes another, residual form of criminal participation. See Chapter 4, Section 4.2.2.1.

⁵⁷ *Furundžija* Trial Judgment, *supra* n 45, paras 249.

⁵⁸ The bench presented a fictional case where "one person orders that torture be carried out, another organises the whole process at the administrative level, another asks questions while the detainee is being tortured, a fourth one provides or prepares the tools for executing torture, another physically inflicts torture or causes mental suffering, another furnishes medical assistance so as to prevent the detainee from dying as a consequence of torture or from subsequently showing physical traces of the sufferings he has undergone, another processes the results of interrogation known to be obtained under torture, and another procures the information gained as a result of the torture in exchange for granting the torturer immunity from prosecution." *Ibid.*, para 253.

⁵⁹ *Ibid.*, para 252. (*emphasis added*)

⁶⁰ *Ibid.*, para 254.

demarcate between principal and accessorial liability in a collective crime, seeing support for this approach in the Nuremberg-era common purpose theory.

On the basis of this formulation of the law, the Chamber found Furundžija guilty as a co-perpetrator of the torture inflicted upon Witness A and Witness D,⁶¹ and guilty as an aider and abettor of the rape against Witness A.⁶² It has been pointed out in academia, that this is a legal finding which is difficult to reconcile with the Chamber's otherwise clear formulation on the law of common purpose liability.⁶³ If this theory allows to hold liable as a co-perpetrator a person who in some way participates in a joint criminal enterprise, provided that he shared its underlying criminal purpose, then why was Furundžija found guilty as a co-principal only of torture? The rape of Witness A formed part of the torture enterprise, the Accused witnessed it and nevertheless continued interrogating the victim thus contributing to the ongoing rape. One possible answer, as indicated by Boas, is that when the Chamber found Furundžija guilty as a co-perpetrator of torture, it did so stating that he took "an integral part" in the crime by means of interrogating the victim.⁶⁴ The argument then is that he did not play such an integral part in the rape of Witness A. This explanation, however, is not a convincing one because when the judges defined the elements of co-perpetration based on the common purpose theory, they did not establish any such requirement. Having "an integral part" in the crime is an element which suggests that accused has to carry out one of the *actus reus* requirements of the crime in order to qualify as a co-perpetrator. This, as discussed in Chapter 1 of this book, is characteristic for the formal-objective approach to co-perpetration,⁶⁵ which has not been adopted by the modern international criminal tribunals. It might be that the judges thought that the rape of Witness A was not part of the original torture plan between the Accused and the soldier, but was rather an accidental one for which no shared intent existed between Furundžija and the perpetrator. This reasoning, however, is difficult to reconcile with the Chamber's factual findings.

Whichever the case, the *Furundžija* Trial Chamber's statement on the law on common purpose liability is significant because it put this notion for the first time on a separate footing, as distinct from the other modes of liability explicitly provided under Article 7 ICTY Statute, and clearly differentiated it from aiding and abetting. The further refinement of its constituent elements and overall doctrinal framework was the next step to be taken and this was done by the Appeals Chamber six months after the *Furundžija* Trial Chamber rendered its judgement.

⁶¹ *Ibid.*, paras 264-268.

⁶² The judges explained that the Accused "did not personally rape Witness A, nor can he be considered, under the circumstances of this case, to be a co-perpetrator." *Ibid.*, para 273-275.

⁶³ See e.g. G. Boas, N. Reid and J. Bischoff, *International Criminal Law Practitioner Library: Forms of Responsibility in International Criminal Law*, Vol. 1 (Cambridge: Cambridge UP, 2008), at 12-15.

⁶⁴ *Furundžija* Trial Judgment, *supra* n 45, para 267. Boas *et al.*, *supra* n 63, at 13-14.

⁶⁵ See Chapter 1, Section 1.3.1. The objective approach to co-perpetration, *i.e.* that co-perpetrators are only those persons who physically commit part of the *actus reus* of the crime, has been rejected in the ICTY jurisprudence. See *Tadić* Appeal Judgment, *supra* n 1, para 191; *The Prosecutor v. Kvočka et al.* (IT-98-30/1-A), Judgment, Appeals Chamber, 28 February 2005, para 99. It was also rejected in the case law of the ICC. See Chapter 5, Section 5.3.2.

3.3.3. *The Tadić Appeal Judgement (15 July 1999): systemizing common purpose liability*

The above research shows that by the time the *Tadić* case went on appeal, the common design theory had already entered the Tribunal's case law: it was for the Appeals Chamber to decide whether and what role it was going to play henceforth. It is notable that two of the judges who sat in the *Furundžija* Trial Chamber - Judges Mumba and Cassese - were now in the Appeals Chamber that had to decide on the Prosecution's submission that the *Tadić* Trial Chamber did not construe correctly the common purpose concept and thereby "erred when it decided that it could not, on the evidence before it, be satisfied beyond reasonable doubt that the accused had any part of the killing of the five men... from the village of Jaskići."⁶⁶ It is worth noting at this point that Judge Antonio Cassese was the one who authored the text on common purpose/JCE liability in the *Tadić* Appeals Judgment.⁶⁷

The Appeals Chamber started its analysis on the contested common purpose notion by first looking at the five modes of liability explicitly provided under Article 7(1) ICTY Statute and inquiring "whether criminal responsibility for participating in a common criminal purpose falls within the ambit of [this provision]".⁶⁸ It then engaged in a teleological interpretation of the Statute and used the UN Secretary-General's Report on the establishment of the ICTY to emphasize that the object and purpose of the Statute is to provide a legal basis for prosecuting "all those who have engaged in serious violations of international humanitarian law, *whatever the manner in which they may have perpetrated, or participated in the perpetration* of those violations".⁶⁹ On this basis, the Chamber concluded that even though Article 7 ICTY Statute does not explicitly establish the notion of common purpose liability it "does not exclude those modes of participating in the commission of crimes which occur where several persons having a common purpose embark on criminal activity that is then carried out either jointly or by some members of this plurality of persons."⁷⁰ The judges further stated that this interpretation:

is not only dictated by the object and purpose of the Statute but is also warranted by the very nature of many international crimes which are committed most commonly in wartime situations. Most of the time these crimes do not result from the criminal propensity of single individuals but constitute manifestations of collective criminality: the crimes are often carried out by groups of individuals acting in pursuance of a common criminal design. Although only some members of the group may

⁶⁶ *Tadić* Appeal Judgment, *supra* n 1, para 172.

⁶⁷ M. Shahabuddeen, 'Judicial Creativity and Joint Criminal Enterprise' in S. Darcy and J. Powderly (eds), *Judicial Creativity at the International Criminal Tribunals* (Oxford: Oxford UP, 2010), at 201 (fn 89).

⁶⁸ *Tadić* Appeal Judgment, *supra* n 1, para 187.

⁶⁹ *Ibid.*, para 190.

⁷⁰ *Ibid.*, para 190. Indeed, in subsequent JCE decisions the judges have maintained this conclusion, claiming that "[t]he Statute of the ICTY is not and does not purport to be... a meticulously detailed code providing explicitly for every possible scenario and every solution thereto." See *The Prosecutor v. Milutinović et al.* (IT-99-37-AR72), Decision on Dragoljub Ojdanić's Motion Challenging Jurisdiction – Joint Criminal Enterprise, Appeals Chamber, 21 May 2003, para 18.

physically perpetrate the criminal act (murder, extermination, wanton destruction of cities, towns or villages, etc.), the participation and contribution of the other members of the group is often vital in facilitating the commission of the offence in question. It follows that the moral gravity of such participation is often no less – or indeed no different – from that of those actually carrying out the acts in question.

Under these circumstances, *to hold criminally liable as a perpetrator only the person who materially performs the criminal act would disregard the role as co-perpetrators of all those who in some way made it possible for the perpetrator physically to carry out that criminal act.* At the same time, depending upon the circumstances, to hold the latter liable only as aiders and abettors might understate the degree of their criminal responsibility.⁷¹

These efforts to read the common purpose concept into the ICTY Statute illustrate the point raised earlier in this chapter: when, during the preparatory works, the decision was made to abandon the notions of conspiracy and membership in a criminal organization, Article 7(1) should have been equipped with a mode of liability that would account for this special nature of international crimes. Since the Secretary-General drafted his Report with the aim that those rules contained in it shall be reflective of customary international law,⁷² the explicit inclusion of the common purpose notion in it, and its adoption by the Security Council thereafter, would have precluded much of the subsequent debates in the tribunals' JCE jurisprudence.

Having concluded that the ICTY Statute (implicitly) provides for the application of the common purpose doctrine, the Appeals Chamber conducted a *de novo* analysis of post-World War II case law in order to construe its legal framework. The cases which the judges analyzed to reach their conclusions need not be presented and examined anew here. Many of them were reviewed in the previous chapter of this book⁷³ and those which concern the problematic third category are thoroughly scrutinized in Chapter 4. What should be pointed out here is that the *Tadić* Appeals Chamber looked at the Nuremberg-era jurisprudence on the notion of common purpose/design and then refined and systemized it in a manner that

gave the theory a modern look and filled in the perceived gap in Article 7(1) ICTY Statute. The judges held that:

Many post-World War II cases concerning war crimes proceeded upon the principle that when two or more persons act together to further a common criminal purpose, offences perpetrated by any of them may entail the criminal liability of all the members of the group. Close scrutiny of the relevant case law shows that broadly speaking, the notion of common purpose encompasses three distinct categories of collective criminality.⁷⁴

These three types of collective criminality are addressed by what the judges categorised as the three variants of the common purpose doctrine. The first one is applied in cases where “all co-defendants, acting pursuant to a common design, possess the same criminal intention”.⁷⁵ It is nowadays known as the ‘basic’ category of joint criminal enterprise liability, or JCE I. As an example of the instances covered by JCE I, the Chamber pointed at “the formulation of a plan among the co-perpetrators to kill, where, in effecting this common design (and even if each co-perpetrator carries out a different role within it), they nevertheless all possess the intent to kill.”⁷⁶ In such a case, JCE I allows “imputing criminal responsibility to a participant who did not, or cannot be proven to have, effected the killing.”⁷⁷ The second type of post-Nuremberg cases which the *Tadić* Appeals Chamber discerned as using the common purpose notion were those concerning “instances where the offences charged were alleged to have been committed by members of military or administrative units such as those running concentration camps: i.e. by groups of persons acting pursuant to a concerted plan.”⁷⁸ This type of collective criminality is addressed by what came to be known in modern international criminal law as the ‘systemic’ form of JCE liability, or JCE II. The judges acknowledged that JCE II is in practice “really a variant of the first category”,⁷⁹ used by the Nuremberg-era courts to qualify as co-perpetrators defendants who had an objective position of authority within the system of ill-treatment and failed to protect the lives of inmates. Put simply, what distinguishes JCE II from JCE I is that the common design in the former is institutionalized: *i.e.* it takes place in a detention centre, a prison, a concentration camp etc. Finally, the third type of collective criminality cases that the *Tadić* Appeals Chamber was able to discern were ones “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

⁷¹ *Tadić* Appeal Judgment, *supra* n 1, paras 191-192. (*emphasis added*)

⁷² The Report containing the proposed statute of the ICTY stated that “[i]n the view of the Secretary-General, the application of the principle *nullum crimen sine lege* requires that the international tribunal should apply rules of international humanitarian law which are beyond any doubt part of customary law”. UN Security Council, *Report of the Secretary-General Pursuant to paragraph 2 of Security Council Resolution 808 (1993)*, (S/25704), 3 May 1993, para 34. In his work as an academic, Judge Shahabuddeen has also confirmed that “the jurisdiction of the ICTY Statute was confined to customary international law and to statutory provisions which had mature into customary international law.” M. Shahabuddeen, *International Criminal Justice at the Yugoslav Tribunal: The Judicial Experience* (Oxford: Oxford UP, 2012), at 67.

⁷³ The Appeals Chamber reviewed six Nuremberg-era in relation to the ‘basic’ form of JCE (the *Almelo* case, the *Hoelzer et al.* case, the *Jepsen and others* case, the *Schonfeld and others* case, the *Einsatzgruppen* case and the *Ponzano* case), two concentration camp cases for the ‘systemic’ form of JCE (the *Dachau Concentration Camp* case and the *Belsen* case) and two cases for the ‘extended’ form of JCE (the *Borkum Island* case and the *Essen Lynching* case). Most of these cases are discussed in more detailed in Chapter 2, Section 2.3.3.2. and Chapter 4, Section 4.2.3.

⁷⁴ *Tadić* Appeal Judgment, *supra* n 1, para 195.

⁷⁵ *Ibid.*, para 196.

⁷⁶ *Ibid.*

⁷⁷ *Ibid.*

⁷⁸ *Ibid.*, para 202.

⁷⁹ *Ibid.*, para 203.

of the effecting of that common purpose.”⁸⁰ This is the paradigm covered by the so-called ‘extended’ category of joint criminal enterprise liability, or JCE III.

The Appeals Chamber applied the third JCE variant to the facts of the case and found Tadić liable for the five killings in the village of Jaskići.⁸¹ It conceded that the evidence did not show that the Accused directly intended the murder of these Muslim men, nor that he was the one who personally executed them. However, these killings were a natural and foreseeable consequence of the common plan to forcibly remove the Muslims from Jaskići: a plan that the Accused shared and in which he actively participated by severely beating some of the Jaskići men. The following section will thoroughly examine the legal elements of the doctrine of joint criminal enterprise in all its variants: as identified by the *Tadić* Appeals Chamber and further elaborated in the UN *ad hoc* Tribunals’ subsequent case law.

3.4. Joint criminal enterprise: theoretical framework

Since the modes of liability listed under Article 7 ICTY Statute were not defined anywhere in this document, it was left for the judges to determine their material and mental requirements. Thus, as already noted above, they dedicated a lot of effort in the Tribunal’s first judgements to distil these elements from post-World War II jurisprudence, which they saw as “indicative of principles of customary international law at the time.”⁸² This is also how JCE’s theoretical framework was construed. The *Tadić* Appeals Chamber analysed the Nuremberg-era case law on common purpose/design liability, discerned in it the objective and subjective prerequisites for ascribing this type of responsibility and then further refined and organized them to shape the three variants of the present-day joint criminal enterprise doctrine.⁸³

3.4.1. The objective (material) elements

The “basic”, “systemic” and “extended” JCE liability have the same objective requirements: i) a plurality of persons; ii) a common plan, design or purpose, which amounts to or involves

the commission of crimes; and iii) the accused person’s contribution to the plan.⁸⁴ This is how the *Tadić* Appeals Chamber first outlined them and how they have been stated in the case law of the ICTY, ICTR, SCSL and ECCC ever since.

3.4.1.1. A plurality of persons

In order for an accused to incur JCE liability, the prosecution first has to prove that he or she acted as part of a group of individuals. When the *Tadić* Appeals Chamber first elaborated this objective element, it stated that these persons “need not be organised in a military, political or administrative structure”.⁸⁵ This makes the theory applicable also to cases where the accused was part of a heterogeneous, disorganized group, *e.g.* mob violence cases. In their subsequent case law, the international tribunals have consistently confirmed this finding.⁸⁶ In addition to this, they have also further specified the minimum number of individuals that a JCE group has to consist of: *viz.* the criminal purpose must be shared between “two or more people”.⁸⁷ In the *Milutinović et al.* case, the ICTY Trial Chamber was even more specific:

For joint criminal enterprise liability to arise, the accused must act with at least one other person, but the two or more persons that make up a joint criminal enterprise need not be organised into any sort of military, political, or administrative structure... There is no upper limit on the size or scope of the joint criminal enterprise.⁸⁸

⁸⁴ *Tadić* Appeal Judgment, *supra* n 1, para 227; *The Prosecutor v. Vasiljević* (IT-98-32-A), Judgment, Appeals Chamber, 25 February 2004, para 100; *Ntakirutimana and Ntakirutimana* Appeal Judgment, *supra* n 2, para 466; *Kvočka et al.* Appeal Judgment, *supra* n 65, para 96; *The Prosecutor v. Brđanin* (IT-99-36-A), Judgment, Appeals Chamber, 3 April 2007, para 364; *The Prosecutor v. Munyakazi* (ICTR-97-36A-A), Judgment, Appeals Chamber, 28 September 2011, para 160; *Gatete v. The Prosecutor* (ICTR-00-61-A), Judgment, Appeals Chamber, 9 October 2012, para 239; *The Prosecutor v. Gotovina and Markač* (IT-06-90-A), Judgment, Appeals Chamber, 16 November 2012, para 89; *Ndahimana v. The Prosecutor* (ICTR-01-68-A), Judgment, Appeals Chamber, 16 December 2013, para 198; *Karemera and Ngirumpatse v. The Prosecutor* (ICTR-98-44-A), Judgment, Appeals Chamber, 29 September 2014, para 145; *The Prosecutor v. Stanišić and Simatović* (IT-03-69-A), Judgment, Appeals Chamber, 9 December 2015, para 77.

⁸⁵ *Tadić* Appeal Judgment, *supra* n 1, para 227.

⁸⁶ See *e.g.* *Vasiljević* Appeal Judgment, *supra* n 84, para 100; *The Prosecutor v. Stakić* (IT-97-24-A), Judgment, Appeals Chamber, 22 March 2006, para 64; *The Prosecutor v. Haradinaj et al.* (IT-04-84bis-T), Judgment, Trial Chamber, 29 November 2012, para 617; *The Prosecutor v. Tolimir* (IT-05-88/2-T), Judgment, Trial Chamber, 12 December 2012, para 889; *The Prosecutor v. Stanišić and Simatović* (IT-03-69-T), Judgment *Vol. 2*, Trial Chamber, 30 May 2013, para 1258; *The Prosecutor v. Karadžić* (IT-95-5/18-T), Judgment, Trial Chamber, 24 March 2016, para 562; *Ntakirutimana and Ntakirutimana* Appeal Judgment, *supra* n 2, para 466; *The Prosecutor v. Karemera and Ngirumpatse* (ICTR-98-44-T), Judgment, Trial Chamber, 2 February 2012, para 1436; *The Prosecutor v. Kaing Guek Eav alias Duch* (001/18-07-2007/ECCC/TC), Judgment, Trial Chamber, 26 July 2010, para 508; *The Prosecutor v. Brima, Kamara and Kanu* (SCSL-2004-16-T), Judgment, Trial Chamber, 20 June 2007, para 63; *The Prosecutor v. Taylor* (SCSL-03-01-T), Judgment, Trial Chamber, 18 May 2012, para 459.

⁸⁷ *The Prosecutor v. Kvočka et al.* (IT-98-30/1-T), Judgment, Trial Chamber, 2 November 2001, para 307. See also *The Prosecutor v. Stakić* (IT-97-24-T), Judgment, Trial Chamber, 31 July 2003, para 66; *The Prosecutor v. Brđanin* (IT-99-36-T), Judgment, Trial Chamber, 1 September 2004, para 262; *The Prosecutor v. Milutinović et al.* (IT-05-87-T), Judgment *Vol. I*, Trial Chamber, 26 February 2009, para 98; *The Prosecutor v. Mpambara* (ICTR-01-65-T), Judgment, Trial Chamber, 11 September 2006, para 13; *Brima, Kamara and Kanu* Trial Judgment, *supra* n 86, para 69.

⁸⁸ *Milutinović et al.* Trial Judgment *Vol. I*, *supra* n 87, para 98.

⁸⁰ *Ibid.*, para 204.

⁸¹ *Ibid.*, paras 232-234.

⁸² *Rwamakuba v. The Prosecutor* (ICTR-98-44-AR72.4), Decision on Interlocutory Appeal Regarding Application of Joint Criminal Enterprise to the Crime of Genocide, Appeals Chamber, 22 October 2004, para 14. See also *Tadić* Appeal Judgment, *supra* n 1, para 194; *Furundžija* Trial Judgment, *supra* n 45, paras 193-197; *The Prosecutor v. Kupreškić et al.* (IT-95-16-T), Judgment, Trial Chamber, 14 January 2000, para 541.

⁸³ In his subsequent academic work, Cassese stated that the construction of JCE’s theoretical framework was “an attempt to rationalize a vast array of disparate [Nuremberg-era] decisions and set out their rationale.” A. Cassese, ‘Amicus Curiae Brief of Professor Antonio Cassese and Members of the Journal of International Criminal Justice on Joint Criminal Enterprise Doctrine’, 20 *Criminal Law Forum* (2009), at 302.

Thus, it is accepted that the plurality of persons requirement can be satisfied even when there are only two JCE members.⁸⁹ At first glance, this finding might appear somewhat superfluous because the nature of international crimes suggests that in most cases such enterprises will be formed by a large group of individuals. Nevertheless, the abovementioned *Furundžija* case, in which the common plan to torture was shared and executed by two persons,⁹⁰ shows that this is not always the case.

It has also been clarified that while it is not necessary to name each one of the persons with whom the accused formed a JCE, the Prosecution must at the very least identify them by reference to the categories or groups to which they belonged.⁹¹ The *Karadžić* Indictment, for instance, lists the names of some of the people with whom the accused participated in a shared criminal plan (e.g. Slobodan Milošević, Ratko Mladić etc.) and identifies others as leaders of specific military and political units (e.g. the Serbian Ministry of Internal Affairs, the Yugoslav Army etc.).⁹² This, the tribunals have concluded, is necessary in order to prevent vagueness or ambiguity in the charges against the accused and put him on notice of the composition of the alleged JCE against him. Failing to identify the JCE members by name or group introduces a material defect in the indictment and, as Boas has explained, “[a] chamber will likely refuse to consider allegations of an enterprise between an accused and individuals labelled... as ‘other known and unknown participants’ or ‘others’”.⁹³

3.4.1.2. A common plan, design or purpose

The *Tadić* Appeals Chamber’s review of Nuremberg-era jurisprudence led it to the conclusion that the second objective element of JCE liability is “[t]he existence of a common plan, design or purpose which amounts to or involves the commission of a crime.”⁹⁴ The terms

‘purpose’, ‘design’, and ‘plan’ do not differ in their legal meaning: rather, as the *Brđanin and Talić* Trial Chamber explained, they are synonymous and can be used interchangeably.⁹⁵ They have been interpreted to mean that the accused and the other participant(s) in the said group of persons formed “an arrangement or understanding amounting to an agreement... that a particular crime will be committed.”⁹⁶ Cassese also defined the common purpose element as “an agreement or plan by a multitude of persons to engage in illegal conduct.”⁹⁷ It ought to be noted, however, that this definition is far from universally accepted. In particular, some have argued that there is a notable difference between a ‘common plan, design, or purpose’ and ‘an understanding or an agreement’ in that the latter term is “connotationally more specific and more personal and more suggestive of a point in time when there was a meeting of minds than [...] the alternative expressions.”⁹⁸ This issue erupted in the ICTY *Brđanin* case, where the Prosecution appealed the Trial Chamber’s finding that JCE liability “necessitates a direct agreement between each JCE member regarding the commission of the crimes”⁹⁹ and further submitted that the judges erred when they required “proof of an ‘understanding or agreement’ in addition to proving the existence of a common purpose”.¹⁰⁰ Addressing this matter, the Appeals Chamber pointed out that the trial judges did not introduce a new JCE requirement but simply equated the element of ‘common purpose’ to an ‘agreement or understanding’.¹⁰¹ It then appeared to disagree with this equation and made the following, quite bizarre, finding:

⁹⁵ The judges noted that the *Tadić* Appeals Chamber “labelled [JCE] variously, and apparently interchangeably, as a common criminal plan, a common criminal purpose, a common design or purpose, a common criminal design, a common purpose, a common design, and a common concreted design.” *The Prosecutor v. Brđanin and Talić* (IT-99-36-PT), Decision on Form of Further Amended Indictment and Prosecution Application to Amend, Trial Chamber, 26 June 2001, para 24. See also *Vasiljević* Appeal Judgment, *supra* n 84, para 100 (at fn. 175); *The Prosecutor v. Taylor* (SCSL-2003-1-T), “Decision on Defence Notice of Appeal and Submissions Regarding the Majority Decision Concerning the Pleading of JCE in the Second Amended Indictment”, Appeals Chamber, 1 May 2009, para 19. See also Boas *et al.*, *supra* n 63, at 37; R. O’Keefe, *International Criminal Law* (Oxford: Oxford UP, 2015), at 170 (fn 21); Shahabuddeen, *supra* n 72, at 216-217.

⁹⁶ *The Prosecutor v. Vasiljević* (IT-98-32-T), Judgment, Trial Chamber, 29 November 2002, para 66. See also *Stakić* Trial Judgment, *supra* n 87, para 435; *Brđanin* Trial Judgment, *supra* n 87, para 341; *Brima, Kamara and Kanu* Trial Judgment, *supra* n 86, para 69. For other judgments that have used the term ‘agreement’ to define the element of common plan, design or purpose, see also e.g. *Stanišić and Župljanin* Trial Judgment *Vol. I*, *supra* n 91, para 102; STL Interlocutory Decision on the Applicable Law, *supra* n 2, paras 237-239. See also V. Haan, ‘The Development of the Concept of Joint Criminal Enterprise at the International Criminal Tribunal for the Former Yugoslavia’, 5 *International Criminal Law Review* (2005), at 180; Olásolo, *supra* n 93, at 158.

⁹⁷ A. Cassese, ‘The Proper Limits of Individual Responsibility under the Doctrine of Joint Criminal Enterprise’, 5 *Journal of International Criminal Justice* (2007), at 118.

⁹⁸ A. Zahar, ‘Commentary on the Judgment of the ICTY Appeals Chamber in the Case of Prosecutor v. Milorad Krnojelac’ in A. Klip and G. Sluiter (eds), *Annotated Leading Cases of International Tribunals: The International Criminal Tribunal for the Former Yugoslavia 2003*, Vol. 14 (Antwerp: Intersentia, 2008), at 842.

⁹⁹ *Brđanin* Appeal Judgment, *supra* n 84, para 358.

¹⁰⁰ The Prosecution further submitted that “what is required under *Tadić* is proof of a common plan, design, or purpose to commit a crime and that this requirement is met by the members of the JCE espousing the *same* common plan, design, or agreement, without the need to separate “one-to-one” agreements.” *Ibid.*, para 380.

¹⁰¹ *Ibid.*, para 389.

⁸⁹ For reasons of comprehensiveness, it should be noted here that in the *Ntakirutimana and Ntakirutimana* case, the ICTR Appeals Chamber seemed to have provided a different answer when it held, in passing, that “[f]or joint criminal enterprise liability to arise an accused must act with a number of other persons.” See *Ntakirutimana and Ntakirutimana* Appeal Judgment, *supra* n 2, para 466. (*emphasis added*) Considering the totality of the *ad hoc* Tribunals’ jurisprudence on the matter (and keeping in mind that the ICTY and ICTR share a common Appeals Chamber), this finding in the *Ntakirutimana and Ntakirutimana* Appeal Judgment should be seen as a drafting error, rather than an intended reformulation of the plurality of persons requirement. On this point, see also Boas *et al.*, *supra* n 63, at 35.

⁹⁰ See *supra* Section 3.3.2.

⁹¹ *The Prosecutor v. Krajišnik* (IT-00-39-A), Judgment, Appeals Chamber, 17 March 2009, para 156; *Brđanin* Appeal Judgment, *supra* n 84, para 430; *The Prosecutor v. Đorđević* (IT-05-87/1-A), Judgment, Appeals Chamber, 27 January 2014, para 141; *Tolimir* Trial Judgment, *supra* n 86, para 889; *Karadžić* Trial Judgment, *supra* n 86, para 562; *The Prosecutor v. Stanišić and Župljanin* (IT-08-91-T), Judgment *Vol. I*, Trial Chamber, 27 March 2013, para 101; *The Prosecutor v. Simba* (ICTR-1-76-A), Judgment, Appeals Chamber, 27 November 2007, paras 63, 69-75; *Munyakazi* Appeal Judgment, *supra* n 84, para 161; *The Prosecutor v. Nuon Chea and Khieu Samphan* (002/19-09-2007/ECCC/TC), Case 002/01 Judgment, Trial Chamber, 7 August 2014, para 692.

⁹² *The Prosecutor v. Karadžić* (IT-95-5/18-PT), Third Amended Indictment, 27 February 2009, paras 11-12.

⁹³ Boas *et al.*, *supra* n 63, at 36. For an overview of ICTY/ICTR cases in which failure to properly plead JCE has resulted in the judges declaring the indictment defect, see H. Olásolo, *The Criminal Responsibility of Senior Political and Military Leaders as Principals to International Crimes* (Oxford: Hart, 2009), at 237-251.

⁹⁴ *Tadić* Appeal Judgment, *supra* n 1, para 227. See also *Đorđević* Appeal Judgment, *supra* n 91, paras 116, 120; *The Prosecutor v. Šainović et al.* (IT-05-87-A), Judgment, Appeals Chamber, 23 January 2014, para 609; *Munyakazi* Appeal Judgment, *supra* n 84, para 160; *Taylor* Trial Judgment, *supra* n 86, para 457.

The Trial Chamber's definition of the notion of common plan is also relevant to the interpretation of the disputed finding. The Trial Chamber initially recalled the finding in the *Tadić* Appeal Judgement that the common plan, design, or purpose "amounts to or involves the commission of a crime provided for in the Statute". However, its further findings are that the common plan pursuant to the first category of JCE "would amount to, or involve, an understanding or an agreement between the members of the JCE to commit a crime" and "necessarily has to amount to, or involve, an understanding or an agreement between two or more persons that *they will commit a crime* within the Statute". The Appeals Chamber notes that the Trial Chamber cites no support to this rather significant departure from the definition of the common plan enunciated in *Tadić*. Neither is there any reason to depart from *Tadić*.¹⁰²

In the author's view, this finding is contrary to both the Tribunal's earlier jurisprudence and to common sense. To begin with, concluding that the *Tadić* Appeals Chamber did not define the 'common plan, design or purpose' element as an agreement is incorrect. It is, indeed, true that the *Tadić* judges did not specifically use the word 'agreement' when identifying the objective legal elements of JCE liability: they spoke of a "common plan", "common design", "common purpose", "common enterprise", or some combination of these, without referring whatsoever to the term 'agreement'.¹⁰³ Nonetheless, when the Appeals Chamber concluded its analysis on JCE's legal framework and proceeded to differentiate it from aiding and abetting, it held that:

In the case of aiding and abetting no proof is required of the existence of a common concerted plan, let alone of the pre-existence of such a plan. *No plan or agreement* is required: indeed, the principal may not even know about the accomplice's contribution.¹⁰⁴

The *Tadić* Appeals Chamber thus *did* recognize that a plan *or agreement* is a basic component of JCE responsibility. The lack of the word 'agreement' in the dicta fleshing out this doctrine was incidental, rather than a deliberate omission intended to establish that a common purpose does not require an agreement between the JCE members. This could

¹⁰² *Ibid.*, para 390. It must be emphasized that this finding was separate and distinct from the other, related matter that the *Brđanin* Appeals Chamber addressed in its judgment, namely whether the law on JCE requires that there exists an agreement between the JCE members, on the one hand, *and* the persons they used to physically commit the concerted crimes, on the other: *i.e.* the issue of the so-called 'leadership-level' JCEs. See Chapter 4, Section 4.3.2.2.

¹⁰³ *Tadić* Appeal Judgment, *supra* n 1, paras 185, 187-188, 190-191, 193, 196-197, 199-206, 227.

¹⁰⁴ *Ibid.*, para 229. (*emphasis added*) Also, when explaining the legal elements of JCE II liability, the Appeals Chamber cited as legal authority in a footnote the Nuremberg-era *Belsen* case, in which the Judge Advocate had stated that: "all the accused employed on the staff at Auschwitz knew that a system and a course of conduct was in force, and that, in one way or another in furtherance of a common agreement to run the camp in a brutal way, all those people were taking part in that course of conduct. [...] [I]f the Court were satisfied that they were doing so, then they must, each and every one of them, assume responsibility for what happened." *Ibid.*, para 202 (at fn.251), referring to *Trial of Josef Kramer and 44 Others*, British Military Court, Luneburg, 17 September – 17 November 1945, in UN War Crimes Commission *Law Reports of Trials of War Criminals*, Vol. II (London: Published for the United Nations War Crimes Commission by His Majesty's Stationary Office, 1947), at 120.

be further confirmed by looking at the cornerstone *Ojdanić* Decision on JCE where the Appeals Chamber held that:

Joint criminal enterprise and "conspiracy" are two different forms of liability. Whilst conspiracy requires showing that several individuals have agreed to commit a certain crime or set of crimes, a joint criminal enterprise requires, *in addition to such a showing, that the parties to that agreement took action in furtherance of that agreement*. In other words, while mere agreement is sufficient in the case of conspiracy, the liability of a member of a joint criminal enterprise will depend on the commission of criminal acts in furtherance of that enterprise.¹⁰⁵

In light of the above, it is apposite to conclude that the 'common plan/design/purpose' element of the JCE doctrine requires proof of an agreement between the JCE participants. As Judge Shahabuddeen has explained, the word 'agreement' here is used in a broad sense, not as a technical legal term establishing some contractual relationship between the JCE members.¹⁰⁶ It is only logical that a common plan comes into being as a result of some form of an (explicit or implicit) agreement between two or more individuals: *i.e.* absent an underlying agreement, any collective behaviour could only be qualified as uncoordinated and random. In this respect, Ohlin rightly poses that "it is completely unclear how one can achieve a 'common purpose' in the absence of at least some form of criminal agreement."¹⁰⁷ To be sure, eminent scholars who have extensively analysed JCE liability have regularly described it as applicable in cases where a group of persons share a "common plan or agreement" to commit a specific crime.¹⁰⁸ As for the above-cited argument that the term 'agreement' somehow requires more detailed evidence than the phraseology 'common plan/design/purpose', the present author is of the view that this contention lacks in merit. Specifically, irrespective of what expression is used to label the said objective requirement, the *ad hoc* Tribunals have established that when pleading JCE liability, the Prosecution

¹⁰⁵ *Milutinović et al.* Decision on Joint Criminal Enterprise, *supra* n 70, para 23. The confusion on this matter stems from the *Krnjelac* Appeal Judgment which, while specifically analyzing the "systemic" category of JCE, stated that "with regard to the crimes considered within a systemic form of joint criminal enterprise, the intent of the participants other than the principal offenders presupposes personal knowledge of the system of ill-treatment ... and the intent to further the concerted system of ill-treatment. Using these criteria, it is less important to prove that there was a more or less formal agreement between all the participants than to prove their involvement in the system." *The Prosecutor v. Krnjelac* (IT-97-25-A), Judgment, Appeals Chamber, 17 September 2003, para 96. Far from rejecting the 'agreement' requirement for the entire JCE theory, this dictum actually affirms it and only states that, as explained in more detail below, in the specific JCE II-context, the system of ill-treatment presents an institutionalized common plan, so the agreement between the JCE participants in it is in fact inherent to their acceptance of the system and its methods. This is the reason why the Judgment states that it is "*less important*" (*viz.* less important than in JCE I and JCE III scenarios) to prove the existence of an agreement when looking at "systemic" JCEs. See *infra* text accompanying notes 124-129. See also Olásolo, *supra* n 93, at 173-174.

¹⁰⁶ *Brđanin* Appeal Judgment, *supra* n 84, Partly Dissenting Opinion of Judge Shahabuddeen, paras 6-7.

¹⁰⁷ J. Ohlin, 'Joint Intentions to Commit International Crimes' 11 *Chicago Journal of International Law* (2011), at 697, 699.

¹⁰⁸ See *e.g.* Olásolo, *supra* n 93, at 158; E. Van Sliedregt, *Individual Criminal Responsibility in International Law* (Oxford: Oxford UP, 2012), at 131, 138; Cassese, *supra* 97, at 110, 116, 118, 126; K. Ambos, *Treatise on International Criminal Law* (Oxford: Oxford UP, 2013), at 161, 174.

must conform to a high standard of specificity: namely, the Prosecution has to plead, and respectively prove, “the nature and purpose of the enterprise, the period over which the enterprise is said to have existed, the identity of the participants in the enterprise, and the nature of the accused’s participation in the enterprise.”¹⁰⁹

The finding that the common purpose has to *either* aim at *or* involve the commission of crimes ensures that JCE liability can also be applied to situations where the shared plan has a non-criminal goal which, however, is to be achieved by criminal means. For example, in the *Šainović et al.* Indictment, the ICTY Prosecution alleged that the accused persons participated in a JCE that did not have a strictly criminal goal: *viz.* the JCE sought “the modification of the ethnic balance in Kosovo in order to ensure continued Serbian control over the province.”¹¹⁰ It was also explicitly pled, however, that the said non-criminal objective was set “to be achieved by criminal means [...] that included deportations, murders, forcible transfers and persecutions directed at the Kosovo Albanian population.”¹¹¹ Here lies a crucial point: in this kind of cases, where the common purpose is said to have a non-criminal goal, the law on JCE responsibility requires that the common design *necessarily* involved the commission of crimes as the means agreed amongst the JCE participants to achieve that goal.¹¹² In essence, the difference is, thus, rather technical: a group of persons may form a common design to forcibly displace members of a specific ethnic group (*i.e.* a JCE with a criminal objective) or the said plan could have the broader objective of establishing control over a certain region (*i.e.* a non-criminal goal) that is set to be achieved by means of deporting the targeted group of people.¹¹³ Whichever the case,

the crucial underlying finding must be that the JCE participants agreed to commit the crime of unlawful deportation, which characterises their common purpose as criminal. A common plan that is not specifically directed at the commission of a crime – either as the end goal, or as the necessary means to achieve a non-criminal goal – cannot form the basis of JCE liability.

The *Tadić* Appeals Chamber also held that “[t]here is no necessity for this plan, design or purpose to have been previously arranged or formulated. The common plan or purpose may materialise extemporaneously and be inferred from the fact that a plurality of persons acts in unison to put into effect a joint criminal enterprise.”¹¹⁴ There are two aspects to this finding. It first confirms that JCE liability is not dependent on the existence of a preparatory planning or a formal agreement, concluded prior to the execution of the crime. A common criminal design may in fact develop spontaneously, without there being an explicit understanding between its participants, as seen, for instance, in the Nuremberg-era *Essen Lynching* case, where a crowd of civilians gradually gathered around three British war prisoners, who were marched through the city of Essen, and started hitting and kicking them to death.¹¹⁵ Boas has, thus, pointed out that the members of a JCE “may formulate the enterprise at the scene of the crime, either just before one or more of them begins to physically perform the conduct envisioned, or perhaps even after such performance has begun.”¹¹⁶ The second part of the above-cited *Tadić* Appeals Chamber’s finding raises an evidentiary matter: the existence of a common design need not be proved by direct evidence of an agreement between the JCE members, such as an eye-witness testimony or a written document, but could be inferred from “the totality of the circumstances surrounding the commission of a crime or underlying offence.”¹¹⁷ An often quoted example of such inference can be seen in the already discussed *Furundžija* case,¹¹⁸ where the judges held on appeal:

There was no need for evidence proving the existence of a prior agreement between the Appellant and [the soldier] to divide the interrogation into the questioning by the Appellant and physical abuse by [the soldier]. The way the events in this case developed precludes any reasonable doubt that the Appellant and [the soldier] knew what they were doing to Witness A and for what purpose they were treating her in that manner; that they had a common purpose may be readily inferred from all the

109 *Ngirabatware v. The Prosecutor* (MICT-12-29-A), Judgment, Appeals Chamber, 18 December 2014, para 248. See also *Mugenzi and Mugiraneza v. The Prosecutor* (ICTR-99-50-A), Judgment, Appeals Chamber, 4 February 2013, para 116; *Šainović et al.* Appeal Judgment, *supra* n 94, para 214; *The Prosecutor v. Simić et al.* (IT-95-9-A), Judgment, Appeals Chamber, 28 November 2006, para 22. See also, Olásolo, *supra* n 93, at 234-237.

110 *The Prosecutor v. Šainović et al.* (IT-05-87-PT), (Redacted) Third Amended Indictment, 21 June 2006, para 19.

111 *Ibid.*

112 *Krajišnik* Appeal Judgment, *supra* n 91, para 188; *The Prosecutor v. Milutinović et al.* (IT-05-87-T), Judgment *Vol. 3*, Trial Chamber, 26 February 2009, paras 95-96. See also Olásolo, *supra* n 93, at 274-275; M. Milanović, ‘An Odd Couple: Domestic Crimes and International Responsibility in the Special Tribunal for Lebanon’, 5 *Journal of International Criminal Justice* (2007), at 1146; W. Jordash, and P. Van Tuyl, ‘Failure to Carry the Burden of Proof: How Joint Criminal Enterprise Lost Its Way at the Special Court for Sierra Leone’, 8 *Journal of International Criminal Justice* (2010), at 600; S. Meisenberg, ‘Joint Criminal Enterprise at the Special Court for Sierra Leone’, in C. Jalloh (ed), *The Sierra Leone Special Court and its Legacy: the Impact for Africa and International Criminal Law* (Cambridge: Cambridge UP, 2014), at 85; S. Wirth, ‘Co-perpetration in the Lubanga Trial Judgment’, 10 *Journal of International Criminal Justice* (2012), at 975. Note that this aspect of the JCE theory has been misinterpreted in the jurisprudence of the SCSL, which has been extensively criticized for using JCE liability to convict accused persons in cases where the common purpose had a non-criminal goal that did not necessarily involve the commission of crimes but merely *contemplated* that such crimes may be committed, under certain circumstances, in the execution of the common purpose. This is a much broader and erroneous formulation of JCE liability, which does not state that the accused agreed to commit the specific crimes as the necessary means for achieving their objective, but rather states that they foresaw a possibility that the non-criminal common purpose might trigger the commission of crimes. See N. Jain, *Perpetrators and Accessories in International Criminal Law: Individual Modes of Responsibility for Collective Crimes* (Oxford: Hart Pub, 2014), at 66-67, 70; Meisenberg, *Ibid.*, at 80-90.

113 See *e.g.* *Milutinović et al.* Trial Judgment *Vol. 3*, *supra* n 112, para 95.

114 *Tadić* Appeal Judgment, *supra* n 1, para 227. See also *Brđanin* Appeal Judgment, *supra* n 84, para 418; *Gatete* Appeal Judgment, *supra* n 84, para 241; *Šainović et al.* Appeal Judgment, *supra* n 94, para 609; *Đorđević* Appeal Judgment, *supra* n 91, para 138; *Nizeyimana v. The Prosecutor* (ICTR-00-55C-A), Judgment, Appeals Chamber, 29 September 2014, para 327.

115 *Trial of Erich Heyer and Six Others* (‘The *Essen Lynching* Case’), British Military Court, Essen, 18-19 and 21-22 December 1945, in UN War Crimes Commission, *Law Reports of Trials of War Criminals*, Vol. I (London: Published for the United Nations War Crimes Commission by His Majesty’s Stationary Office, 1947), at 89.

116 Boas *et al.*, *supra* n 63, at 39.

117 *Milutinović et al.* Trial Judgment *Vol. 1*, *supra* n 87, para 102. See also *The Prosecutor v. Đorđević* (IT-05-87/1-T), Judgment *Vol. 1*, Trial Chamber, 23 February 2011, para 1862; *The Prosecutor v. Simić et al.* (IT-95-9-T), Judgment, Trial Chamber, 17 October 2003, para 158.

118 See *supra* Section 3.3.2.

circumstances, including (1) the interrogation of Witness A by the Appellant in both the Large Room while she was in a state of nudity, and the Pantry where she was sexually assaulted in the Appellant's presence; and (2) the acts of sexual assault committed by [the soldier] on Witness A in both rooms... *Where the act of one accused contributes to the purpose of the other, and both acted simultaneously, in the same place and within full view of each other, over a prolonged period of time, the argument that there was no common purpose is plainly unsustainable.*¹¹⁹

Inferring the existence of a common criminal design from circumstantial evidence is, thus, an important method for dealing with cases where the evidence of an explicit agreement has been destroyed, concealed or is otherwise unavailable, as well as with cases in which the agreement between the JCE members was unwritten and non-verbalised.

The scope which a common plan, design or purpose may have is unlimited. The ICTY *Kvočka* Trial Chamber held that it “can range anywhere along a continuum from two persons conspiring to rob a bank to the systemic slaughter of millions during a vast criminal regime comprising thousands of participants.”¹²⁰ The ICTR *Rwamakuba* Appeals Chamber confirmed that “liability for participation in a criminal plan is as wide as the plan itself, even if the plan amounts to a ‘nation wide government-organized system of cruelty and injustice’.”¹²¹ Thus, it is well accepted that the common purpose leading to JCE liability can be both small-scale and nationwide. Moreover, it has also been pointed out that within a larger common design (e.g. a governmental plan to physically destroy a particular ethnic group within a state), smaller and distinct enterprises (e.g. a common design shared by members of a concentration camp to kill inmates from this ethnic group) can take place.¹²² Analysed in this manner, it seems that a real danger exists, especially in cases of nationwide JCEs, that the prosecution could formulate the underlying common purpose in an overly expansive manner and use this mode of liability as a catch-all net to convict a high-ranking accused for all the crimes which took place in the field. To prevent any such practice, the tribunals have explicitly held that the contours of a common plan have to be “properly defined”, viz. that the Prosecution “specif[ies] the common criminal purpose in terms of both the criminal goal intended and its scope (for example, the temporal and geographic limits of this goal, and the general identities of the intended victims)”.¹²³

Finally, it should be noted that the common design element is treated rather differently in the context of “systemic” JCE liability. As Van Sliedregt correctly noted, “[a] system of

ill-treatment (a detention camp) is considered itself the common plan, design or purpose.”¹²⁴ This means that a concentration camp which has been established, for instance, for the purpose of persecuting a given ethnic group by subjecting inmates belonging to it to torture, inhuman and degrading treatment is in essence the physical manifestation of a common design to persecute: its walls mark the outer boundaries of this JCE, its period of existence is the JCE's timeframe etc. The practical effect of this particularity is that the Prosecution does not have to prove the existence of an agreement between the participants in a “systemic” JCE, i.e. the concentration camp members.¹²⁵ If the evidence demonstrates that the accused held a position of authority in this camp, knew of its criminal goal and intended to further it, he is *eo ipso* considered to have joined with the other staff members in the agreement that characterizes the common criminal purpose. The ICTY *Krnjelac* Appeals Chamber explained it as follows:

The Appeals Chamber notes that, with regard to the crimes considered within a systemic form of joint criminal enterprise... it is less important to prove that there was a more or less formal agreement between all the participants than to prove their involvement in the system.

...

The Appeals Chamber considers that, by requiring proof of an agreement in relation to each of the crimes committed with a common purpose, when it assessed the intent to participate in a systemic form of joint criminal enterprise, the Trial Chamber went beyond the criterion set by the Appeals Chamber in the *Tadić* case. Since the Trial Chamber's findings showed that the system in place at the KP Dom sought to subject non-Serb detainees to inhumane living conditions and ill-treatment on discriminatory grounds, the Trial Chamber should have examined whether or not Krnjelac knew of the system and agreed to it, without it being necessary to establish that he had entered into an agreement with the guards and soldiers - the principal perpetrators of the crimes committed under the system - to commit those crimes.¹²⁶

It is important to emphasize, however, that the ‘systemic’ form of JCE responsibility is not an all-encompassing prosecutorial tool for ascribing guilt for each and every crime, which occurs on the premises of a concentration camp. The judges have made it clear that the definition of the common purpose which constitutes the system of ill-treatment has to be strictly limited to “the commission of those crimes which, given the context and evidence adduced, could be considered as common to all the offenders beyond reasonable doubt.”¹²⁷

¹¹⁹ *The Prosecutor v. Furundžija* (IT-95-17/1-A), Judgment, Appeals Chamber, 21 July 2000, para 120. (*emphasis added*)

¹²⁰ *Kvočka et al.* Trial Judgment, *supra* n 87, para 307.

¹²¹ *Rwamakuba* Decision on Application of JCE to Genocide, *supra* n 82, para 25. (*emphasis added*) See also *Brđanin* Appeal Judgment, *supra* n 84, paras 423-424.

¹²² These have been referred to as subsidiary joint criminal enterprises. See *Kvočka et al.* Trial Judgment, *supra* n 87, para 307. See also J. Ohlin, ‘Second-Order Linking Principles: Combining Vertical and Horizontal Modes of Liability’, 25 *Leiden Journal of International Law* (2012), at 775.

¹²³ *Brđanin* Appeal Judgment, *supra* n 84, paras 423, 430; *Haradinaj et al.* Trial Judgment, *supra* n 86, para 618; *Stanišić and Župljanin* Trial Judgment Vol.1, *supra* n 91, para 102.

¹²⁴ Van Sliedregt, *supra* n 108, at 137. See also Boas *et al.*, *supra* n 63, at 38; Olásolo, *supra* n 93, at 161; Haan, *supra* n 96, at 180.

¹²⁵ Cassese also explained that “unlike the first category, JCE II does not require proof of an express or implied agreement to commit a crime. Instead, proof of the accused's participation in the system of ill-treatment serves the same legal function as an agreement.” A. Cassese, *Cassese's International Criminal Law* (3rd edn, Oxford: Oxford UP, 2013), at 163. See also M. Bassiouni, *Introduction to International Criminal Law: Second Revised Edition* (Leiden: Martinus Nijhoff, 2013), at 378.

¹²⁶ *Krnjelac* Appeal Judgment, *supra* n 105, paras 96-97. See also *Kvočka et al.* Appeal Judgment, *supra* n 65, paras 188-119. See further Cassese, *supra* 97, at 112.

¹²⁷ *Krnjelac* Appeal Judgment, *supra* n 105, para 120.

These crimes were in turn labelled as the ‘common denominator’ of the enterprise and it is only for them that JCE II liability applies.¹²⁸ Take, for instance, the abovementioned concentration camp established for the purpose of persecuting by means of subjecting inmates to torture, inhuman and degrading treatment. If a group of guards decide to rape some of the prisoners, this additional crime will fall outside the ‘common denominator’ of crimes defining the ‘systemic’ JCE. In such a case, the other participants in the overall persecutorial JCE, *e.g.* the camp commander, could not be held liable under JCE II for the crime of rape. The *Krnjelac* Appeals Chamber held that there are two possible outcomes in such a scenario:

For alleged crimes... which albeit committed at the [system of ill-treatment] clearly go beyond the system’s common purpose, liability may be imputed to a person participating in the system for crimes of this kind committed by another participant if it was foreseeable that a crime of this sort was likely to be committed by that other participant and the former willingly took the risk (or was indifferent to it).

For alleged crimes which, whilst implicating several co-perpetrators at the [system of ill-treatment], do not appear beyond all reasonable doubt to constitute a purpose common to all the participants in the system, they should be considered as coming under a first category joint criminal enterprise without reference to the concept of system.¹²⁹

Thus, if the prosecution can prove that the rape of inmates was a natural and foreseeable result of effecting the common purpose to subject them to torture, inhuman and degrading treatment, the JCE participants could be held liable as co-perpetrators for this excess crime of rape under JCE III (*see below*). If, however, these acts of rape were an incidental occurrence, unforeseen and unknown to the other members of the JCE, then only the guards who separately agreed to commit rape could be held liable as its co-perpetrators (under JCE I). The latter situation is an example of a small, subsidiary JCE that takes place within the context of a large joint criminal enterprise: *i.e.* a common purpose within a common purpose.

A separate, normative question, which relates to both the first and the second objective elements of JCE liability, is whether the physical perpetrator of the JCE crimes must share the underlying common plan, design or purpose: *i.e.* whether the person who directly commits the JCE crimes has to be a member of the said JCE, or he could also be an ‘outsider’ who the JCE participants procured and used to achieve their criminal objective. This is a critical juncture in the JCE’s conceptual framework, a matter that continues to attract doctrinal criticism and will be separately addressed in Chapter 4.¹³⁰

¹²⁸ *Ibid.*, paras 118, 120.

¹²⁹ *Ibid.*, paras 121, 122.

¹³⁰ See *e.g.* Ohlin, *supra* n 122, at 771-797. See Chapter 4, Section 4.3.

3.4.1.3. *The accused’s contribution to the common purpose*

To incur any of the three types of JCE liability, an accused must not only be part of a group of individuals who share a common purpose to commit a crime: he must also actively contribute to/participate in it. This is the third objective element of the theory of joint criminal enterprise and the *Tadić* Appeals Chamber construed it somewhat broadly, stating that:

This participation need not involve the commission of a specific crime... but may take the form of assistance in, or contribution to, the execution of the common plan or purpose.¹³¹

The judges further shed some light on this matter when they compared how liability for aiding and abetting a crime differs from JCE liability *vis-a-vis* the element of contribution:

The aider and abettor carries out acts specifically directed to assist, encourage or lend moral support to the perpetration of a certain specific crime (murder, extermination, rape, torture, wanton destruction of civilian property, etc.), and this support has a substantial effect upon the perpetration of the crime. By contrast, in the case of acting in pursuance of a common purpose or design, it is sufficient for the participant to perform acts that in some way are directed to the furthering of the common plan or purpose.¹³²

Two substantive findings could be discerned in the above paragraphs. The first one pertains to the *nature* of the requisite contribution: the Chamber established that, other than by physically committing one or more of the concerted crimes, the JCE accused can contribute by providing any other type of assistance that is directed to the furtherance of the criminal enterprise. It was thus determined, and subsequently confirmed throughout the ICTY/R case law, that, under the JCE theory, an accused’s contribution may, taken on its own, have an ostensibly non-criminal nature, such as setting up political structures (that are instrumental for the success of the said plan),¹³³ offering false information to media and international authorities (in order to cover up the commission of JCE offences),¹³⁴ or providing weapons and other military equipment (that is later used to commit the concerted offences).¹³⁵ The UN *ad hoc* Tribunals have consistently affirmed this finding when defining the law on JCE

¹³¹ *Tadić* Appeal Judgment, *supra* n 1, para 227.

¹³² *Ibid.*, para 229.

¹³³ *Krajišnik* Appeal Judgment, *supra* n 91, para 218. See N. Farrell, ‘Attributing Criminal Liability to Corporate Actors: Some Lessons from the International Tribunals’, 8 *Journal of International Criminal Justice* (2010), at 878-879; Van Sliedregt, *supra* n 108, at 100.

¹³⁴ *The Prosecutor v Popović et al.* (IT-05-88-T), Judgment, Trial Chamber, 10 June 2010, paras 1815, 1820. See also M. Kearney, ‘Any Other Contribution? Ascribing Liability for Cover-Ups of International Crimes’, 24 *Criminal Law Forum* (2013), at 340-343.

¹³⁵ *The Prosecutor v. Ngirabatware* (ICTR-99-54-T), Judgment, Trial Chamber, 20 December 2012, para 1306.

liability¹³⁶ and, indeed, with the advent of cases against mid- and high-ranking accused, judges have quite often considered non-criminal contributions to alleged JCEs. To this end, the post-*Tadić* JCE jurisprudence has also clarified that the “accused does not have to be present at the time and place of perpetration of the crime in order to be held responsible for it.”¹³⁷

The second substantive finding that could be detected in the above-cited dicta from the *Tadić* Appeal Judgment is rather implicit and concerns the requisite *intensity* of the accused’s contribution. In particular, when contrasting JCE from aiding and abetting liability, the judges stressed that the latter notion requires the accused’s contribution to have a “substantial effect” on the commission of the crime, yet did not establish any such qualifier for the theory of JCE. They merely held that the accused’s participation/contribution must “in some way” further the joint criminal enterprise: a formulation that clearly signals a lower contribution threshold than the one defined for aiding and abetting,¹³⁸ but is still rather ambivalent as to the exact level of intensity required. This prompted some scholars to contend that, pursuant to the *Tadić* Appeal Judgment’s statement of the applicable law on JCE, “*minor* contributions may be sufficient to hold [the accused] liable as co-perpetrators for their participation in a joint criminal enterprise as long as they share the common criminal purpose.”¹³⁹ The early post-*Tadić* jurisprudence on JCE responsibility did not pay attention to this matter and kept reciting the above findings on the contribution requirement, thus furthering the impression that there is no lower threshold to the effect that the accused’s contribution is required to have on the implementation of the said JCE.¹⁴⁰ The *Kvočka et al.* Trial Chamber was the first to challenge this proposition in its Trial Judgment from November 2001, wherein it engaged in an extensive analysis to establish what the necessary level of participation is in order to incur JCE liability.¹⁴¹

¹³⁶ *Ntakirutimana and Ntakirutimana* Appeal Judgment, *supra* n 2, para 466; *Kvočka et al.* Appeal Judgment, *supra* n 65, para 99; *The Prosecutor v. Babić* (IT-03-72-A), Judgment on Sentencing Appeal, Appeals Chamber, 18 July 2005, para 38; *Krajišnik* Appeal Judgment, *supra* n 91, para 215; *Ngirabatware* Trial Judgment, *supra* n 135, para 1300; *The Prosecutor v. Gotovina et al.* (IT-06-90-T), Judgment Vol. 2, Trial Chamber, 15 April 2011, para 1953; *Haradinaj et al.* Trial Judgment, *supra* n 86, para 619; *Tolimir* Trial Judgment, *supra* n 86, para 893; *Stanišić and Simatović* Trial Judgment Vol.2, *supra* n 86, para 1258.

¹³⁷ *Stanišić and Župljanin* Trial Judgment Vol.1, *supra* n 91, para 103. See also *Krnojelac* Appeal Judgment, *supra* n 105, paras 81; *Kvočka et al.* Appeal Judgment, *supra* n 65, para 112; *Simba* Appeal Judgment, *supra* n 91, para 296; *Tolimir* Trial Judgment, *supra* n 86, para 893.

¹³⁸ Haan, *supra* n 96, at 201; Jain, *supra* n 112, at 55.

¹³⁹ Olásolo, *supra* n 93, at 277. In the same venue of thought, A. Danner and J. Martinez, ‘Guilty Associations: Joint Criminal Enterprise, Command Responsibility, and the Development of International Criminal Law’, 93 *California Law Review* (2005), at 150-151; T. Liefänder, ‘The Lubanga Judgment of the ICC: More Than Just the First Step?’, 1 *Cambridge Journal of International and Comparative Law* (2012), at 203; M. Osiel, *Making Sense of Mass Atrocity* (Cambridge: Cambridge UP, 2011), at 59;

¹⁴⁰ *Kupreškić et al.* Trial Judgment, *supra* n 82, para 772; *The Prosecutor v. Kordić and Čerkez* (IT-95-14/2-T), Judgment, Trial Chamber, 26 February 2001, paras 397-399; *The Prosecutor v. Krstić* (IT-98-33-T), Judgment, Trial Chamber, 2 August 2001, para 611; *The Prosecutor v. Krnojelac* (IT-97-25-T), Judgment, Trial Chamber, 15 March 2002, paras 79-82, 88; *Vasiljević* Trial Judgment, *supra* n 96, para 67; *Krnojelac* Appeal Judgment, *supra* n 105, paras 31, 33; *Vasiljević* Appeal Judgment, *supra* n 84, paras 100, 102.

¹⁴¹ *Kvočka et al.* Trial Judgment, *supra* n 87, paras 265-312.

The *Kvočka et al.* case dealt *inter alia* with crimes committed in the Omarska camp: a detention camp that was set up in May 1992 in the Prijedor region (north-west Bosnia) for the purpose of “interrogat[ing], discriminat[ing] against, and otherwise abus[ing] non-Serbs from Prijedor and which functioned as a means to rid the territory of or subjugate non-Serbs.”¹⁴² It is one of the two ICTY cases that have been decided on the basis of the ‘systemic’ category of JCE.¹⁴³ The Trial Chamber started its analysis on the common contribution requirement for all three variants of the doctrine by recognizing that:

[t]he precise threshold of participation in joint criminal enterprise has not been settled, but the participation must be “in some way ... directed to the furthering of the common plan or purpose”.¹⁴⁴

Thus, the judges clearly viewed the relevant finding of the *Tadić* Appeals Chamber as leaving open the question about the requisite level of participation, rather than as establishing that any contribution, even a minimal one, suffices to qualify the accused as a co-perpetrator under the JCE doctrine. The Chamber pointed out that in *Tadić* the accused was expressly found to have *actively* participated in the enterprise by personally rounding and severely beating some of the victims, and noted that “[i]n the Tribunal jurisprudence, the contribution of persons convicted of participation in a joint criminal enterprise has to date been direct and significant”,¹⁴⁵ even if this has not been expressly stated as a legal requirement. The judges then proceeded to review a number of post-World War II cases, including the *Dachau Concentration Camp* case,¹⁴⁶ the *Einsatzgruppen* case,¹⁴⁷ the *Stalag Luft III* case,¹⁴⁸ the *Almelo* case¹⁴⁹ and a few others,¹⁵⁰ and ultimately concluded that:

These cases make clear that when a detention facility is operated in a manner which makes the discriminatory and persecutory intent of the operation patently clear, anyone who knowingly *participates in any significant way* in the operation of the facility or assists or facilitates its activity, incurs individual criminal responsibility for participation in the criminal enterprise¹⁵¹

¹⁴² *Ibid.*, para 323.

¹⁴³ The other one being the *Krnojelac* case. *Krnojelac* Trial Judgment, *supra* n 140; *Krnojelac* Appeal Judgment, *supra* n 105.

¹⁴⁴ *Kvočka et al.* Trial Judgment, *supra* n 87, para 289.

¹⁴⁵ *Ibid.*, para 323.

¹⁴⁶ *Ibid.*, paras 276-278. A discussion on this case and its use of the notion of ‘common design/purpose’ is included in Chapter 2, Section 2.3.3.2.i) and in Chapter 4, Section 4.2.3.3.i).

¹⁴⁷ *Ibid.*, paras 279-283. The facts of this case are generally noted in Chapter 2, Section 2.3.2.1.

¹⁴⁸ *Ibid.*, paras 295-296. For a detailed discussion of this case, see Chapter 2, Section 2.3.3.2.ii) and Chapter 4, Section 4.3.3.2.iii)

¹⁴⁹ *Ibid.*, para 297. The case is discussed in Chapter 2, Section 2.3.3.2.ii).

¹⁵⁰ These were the *Kiel Gestapo* case, the *Jaluit Atoll* case, the *Velpke Children’s Home* case and the *Hadamar* case. *Ibid.*, paras 298-304.

¹⁵¹ *Ibid.*, para 306.

On the basis of the above case law analysis, the *Kvočka et al.* Trial Chamber established that a JCE suspect “must have carried out acts that *substantially assisted or significantly effected* the furtherance of the goals of the enterprise”,¹⁵² that his “acts or omissions *significantly assist or facilitate* the commission of the crimes”,¹⁵³ and further that he “would not be someone readily replaceable, such that any “body” could fill his place.”¹⁵⁴ Some confusion may be engendered by the Chamber’s simultaneous use of the ‘substantial’ and the ‘significant’ qualifier,¹⁵⁵ but in view of its overall analysis, it is evident that the judges established a ‘significant’ contribution as the requisite threshold of participation under the JCE doctrine,¹⁵⁶ and this is how academics who reviewed the *Kvočka* Trial Judgment have understood these findings.¹⁵⁷

Before the *Kvočka et al.* case reached appeal, the Trial Chamber’s finding that the JCE doctrine requires the accused to *significantly* contribute to the furtherance of the common plan was confirmed in the October 2003 *Simić et al.* Trial Judgment,¹⁵⁸ but ignored in the February 2004 *Vasiljević* Appeal Judgment¹⁵⁹ and the September 2004 *Brđanin* Trial Judgment.¹⁶⁰ This matter did not thus receive a proper appellate review until February 2005, when the *Kvočka et al.* Appeal Chamber was directly confronted with the question “[w]hat level of contribution is required to show participation in a joint criminal enterprise?”¹⁶¹ The judges took notice of the Trial Chamber’s conclusions on this point and, somewhat abruptly, held that:

Contrary to the holding of the Trial Chamber, the Tribunal’s case-law does not require participation as co-perpetrator in a joint criminal enterprise to have been significant, unless otherwise stated. *A fortiori*, contrary to Kvočka’s submissions, such participation need not be “direct or significant”. Kvočka’s arguments are thus rejected on this point.¹⁶²

The Appeals Chamber reiterated in several other paragraphs its finding that, as a general rule, the accused’s contribution to the JCE does not have to be substantial or significant¹⁶³ and even found that the significance of the said contribution would only be relevant for “demonstrating that the accused shared the intent to pursue the common purpose.”¹⁶⁴ Notably, this rejection of the Trial Chamber’s respective findings was not premised on any substantive counter analysis and, indeed, the judges paid no heed to the Nuremberg-era jurisprudence that was reviewed in the Trial Judgment: rather, they made some perfunctory references to the relevant conclusions contained in the *Tadić* and *Vasiljević* Appeal Judgments. While this seemed to settle the issue, the truth of the matter turned out to be very different. In a rather surprising turn of events, the Appeals Chamber reasoned in one of its first post-*Kvočka et al.* JCE judgments – the *Brđanin* Appeal Judgment – that under the established law on joint criminal enterprise liability:

[the Chamber must] characterize the contribution of the accused in this common plan. On this last point, 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*.¹⁶⁵

Interestingly, in making this finding, the judges cited as a source of authority the *Kvočka et al.* Appeal Judgment which, as pointed out above, stated exactly the opposite and only confirmed that the significance of an accused’s contribution to the said JCE could be a relevant factor for determining whether he shared the underlying common intent of the criminal enterprise.¹⁶⁶ To this end, Olásolo argued at the time that the *Brđanin* Appeals Chamber’s above holding ought to be seen as an affirmation of the said evidentiary technique described in *Kvočka et al.*, rather than as a statement of the legal requirements of the JCE doctrine.¹⁶⁷ This is not, however, how the ICTY/R post-*Brđanin* jurisprudence has

¹⁵² *Ibid.*, para 312.

¹⁵³ *Ibid.*, para 308.

¹⁵⁴ *Ibid.*, para 309.

¹⁵⁵ Indeed, in another paragraphs, the judges also found that “a participant in the criminal enterprise must make a *substantial* contribution to the enterprise’s functioning or endeavors before he or she may be held criminally liable.” *Ibid.*, para 310. Some authors have suggested that the *Kvočka et al.* Trial Chamber used these different standards because it sought to distinguish between the level of contribution required from high-level participants in a JCE and that required from mid- and low-level ones. Boas *et al.*, *supra* n 63, at 48-49. A more plausible interpretation, however, is that the Chamber used the ‘significant’ and ‘substantial’ qualifiers interchangeably, as synonyms, without considering that one signals a higher threshold of participation than the other. *The Prosecutor v. Mbarushimana* (ICC-01/04-01/10-465-Red), Decision on the Confirmation of Charges, Pre-Trial Chamber I, 16 December 2011, para 280 (fn. 662).

¹⁵⁶ For an analysis on what constitutes a “significant contribution”, see *infra* text accompanying notes 176-190.

¹⁵⁷ Cassese, *supra* 97, at 127; Olásolo, *supra* n 93, at 163-164.

¹⁵⁸ *Simić et al.* Trial Judgment, *supra* n 117, para 159.

¹⁵⁹ The *Vasiljević* Appeals Chamber made no reference to the said analysis in the *Kvočka et al.* Trial Judgment, but simply recited the earlier findings on JCE law from the *Tadić* Appeal Judgment. *Vasiljević* Appeal Judgment, *supra* n 84, paras 100, 102.

¹⁶⁰ The *Brđanin* Trial Chamber only held that the accused’s contribution to the said JCE “must form a link in the chain of causation [but] it is not necessary that the participation be a *conditio sine qua non*, or that the offence would not have occurred but for the accused’s participation.” *Brđanin* Trial Judgment, *supra* n 87, para 263.

¹⁶¹ *Kvočka et al.* Appeal Judgment, *supra* n 65, para 93-94.

¹⁶² *Ibid.*, para 187.

¹⁶³ *Ibid.*, paras 97, 104.

¹⁶⁴ *Ibid.*, paras 97. The Appeals Chamber only conceded that “there may be specific cases which require, as an exception to the general rule, a substantial contribution of the accused to determine whether he participated in the joint criminal enterprise”, giving as an example cases of ‘opportunistic visitors’ who visit detention camps to commit crimes. *Ibid.* (at footnote 212).

¹⁶⁵ *Brđanin* Appeal Judgment, *supra* n 84, para 430. (*emphasis added*)

¹⁶⁶ *Ibid.* (fn 427).

¹⁶⁷ That is, as an affirmation that the intensity of the accused’s contribution is relevant inasmuch as it can be used as evidence to infer that he/she shared the common criminal purpose. Olásolo, *supra* n 93, at 165-166.

approached this matter and by now it has become a standard finding, consistently affirmed throughout trial and appeal judgments, that the:

contribution of an accused person to the JCE need not be, as a matter of law, necessary or substantial, but it should at least be a significant contribution to the crimes for which the accused is found responsible.¹⁶⁸

In the author's view, the UN *ad hoc* Tribunal's acceptance of the 'significant' standard as the requisite threshold of participation in a JCE is a welcome refinement in the case law on this mode of responsibility: it tightens up its legal framework and, more importantly, brings it in better conformity with its doctrinal ancestor: the Nuremberg-era 'common purpose/design' construct. The *Kvočka et al.* Trial Chamber's review of post-World War II cases convincingly showed that convictions based on participation in a criminal enterprise required more than just any minimal contribution,¹⁶⁹ and some additional cases could be cited to this effect, including the *Ulrich and Merkle* case,¹⁷⁰ the *Hans Wuelfert et al.* case¹⁷¹ and the many other, subsidiary *Dachau Concentration Camp* cases¹⁷² that required showing that the accused participated "to a substantial degree" in the common design.¹⁷³ The UN War Crimes Commission notes on the *Stalag Luft III* case explained that the concept of 'common purpose' required showing that the accused carried out "some performance which

went on directly to achieve the [alleged crime], that *it had some real bearing* on the [crime], would not have been so effective or been done so expeditiously if that person had not contributed his willing aid."¹⁷⁴ It further bears noting that, as explained in Chapter 2, when the IMT Chief US Prosecutor pled that all the accused were liable for participating in a common plan to wage an aggressive war in Europe, he emphasized that every one of them made "a real contribution to the Nazi plan", "played indispensable and reciprocal parts in this tragedy" and "substantially advance[d]" it.¹⁷⁵ Thus, from a Nuremberg-era perspective, there is certainly a lot of merit to the proposition that the modern-day doctrine of JCE requires, at the very least, a 'significant' contribution to the common purpose, possibly even a higher/more intense lever of participation.

Having established that the ICTY/R jurisprudence requires the accused's participation in a JCE to be *significant* at the minimum, it should now be explained what legal meaning has been given to this qualifier. To begin with, the Tribunals' above-cited finding that the level of the accused's contribution to the joint enterprise need not be 'necessary', or 'substantial', as it suffices that it is 'significant',¹⁷⁶ clearly construes the latter standard as a lower threshold than the former two. Indeed, the *Gotovina and Markač* Appeals Chamber explicitly affirmed that:

the threshold for finding a "significant contribution" to a JCE is lower than the "substantial contribution" required to enter a conviction for aiding and abetting.¹⁷⁷

The *ad hoc* Tribunals have not defined a specific meaning for the qualifier 'substantial',¹⁷⁸ so the above finding could only provide some general understanding of the intensity entailed in a 'significant' contribution. A more precise and meaningful definition was given by the *Kvočka et al.* Trial Chamber when it held that, although the significance of the accused's participation has to be assessed on a case by case basis, a contribution is considered to be 'significant' if it:

¹⁶⁸ *Stanišić and Simatović* Trial Judgment *Vol.2*, *supra* n 86, para 1258. See also *Gotovina and Markač* Appeal Judgment, *supra* n 84, paras 89, 149; *Stanišić and Simatović* Appeal Judgment, *supra* n 84, paras 45, 83; *The Prosecutor v. Popović et al.* (IT-05-88-A), Judgment, Appeal Chamber, 30 January 2015, para 1378; *Krajišnik* Appeal Judgment, *supra* n 91, paras 215, 662, 675, 695-696; *The Prosecutor v. Martić* (IT-95-11-A), Judgment, Appeals Chamber, 8 October 2008, paras 68, 79, 84; *Gatete* Appeal Judgment, *supra* n 84, para 96; *Nizeyimana* Appeal Judgment, *supra* n 114, para 325; *Ndahimana* Appeal Judgment, *supra* n 84, para 198; *Karadžić* Trial Judgment, *supra* n 86, para 564; *Haradinaj et al.* Trial Judgment, *supra* n 86, para 619; *Stanišić and Župljanin* Trial Judgment *Vol.1*, *supra* n 91, para 103; *Ngirabatware* Trial Judgment, *supra* n 135, para 1300; *Gotovina et al.* Trial Judgment *Vol. 2*, *supra* n 136, para 1953; Đorđević Trial Judgment *Vol.1*, *supra* n 117, para 1863.

¹⁶⁹ *Kvočka et al.* Trial Judgment, *supra* n 87, paras 276-282, 291-306.

¹⁷⁰ Deputy Judge Advocate's Office (War Crimes Group European Command), *Review and Recommendations: United States of America v. Hans Ulrich and Otto Merkle* (Case No. 000-50-2-17), General Military Government Court of the United States at Dachau, Germany, 12-22 November 1946, [Date of Case Review: 12 June 1947], at 10-11. Web <<http://www.jewishvirtuallibrary.org/jsource/Holocaust/dachautrial/d19.pdf>> [accessed 1 July 2016]. Case is briefly discussed in Chapter 4, Section 4.2.3.3.i. (text accompanying notes 195-197)

¹⁷¹ Deputy Judge Advocate's Office (War Crimes Group European Command), *Review and Recommendations: United States of America v. Hans Wuelfert et al.*, (Case No. 000-50-2-72), General Military Government Court of the United States at Dachau, Germany, 12-17 March 1947, [Date of Case Review: 19 Sept 1947], at 2, 12. Web <<http://www.jewishvirtuallibrary.org/jsource/Holocaust/dachautrial/d73.pdf>> [accessed 21 July 2016].

¹⁷² For an explanation of the relationship between the *Dachau Concentration Camp Case* as a 'parent case' to the series of affiliated smaller cases against low-level Dachau staff held before the US military tribunals in Occupied Germany, see Chapter 4, Section 4.2.3.3.i.

¹⁷³ For the Judge Advocates' reviews of the other affiliated *Dachau Concentration Camp* cases, and the use of the "substantial degree" of participation language, see "The Dachau Trials: Dachau Cases (1945 - 1947)." *The Jewish Virtual Library*. American-Israeli Cooperative Enterprise, Web. <<http://www.jewishvirtuallibrary.org/jsource/Holocaust/WarCrime13.html>> [accessed 21 July 2016].

¹⁷⁴ *Trial of Max Wielen and 17 Others* ('The *Stalag Luft III* Case'), British Military Court, Hamburg, Germany, 1 July – 3 September 1947, in UN War Crimes Commission, *Law Reports of Trials of War Criminals*, Vol. XI (London: Published for the United Nations War Crimes Commission by His Majesty's Stationary Office, 1949), at 46. (*emphasis added*) For a more detailed discussion on the case, see Chapter 4, Section 4.3.3.2.iii.

¹⁷⁵ Office of United States Chief of Counsel for Prosecution of Axis Criminality, *Nazi Conspiracy and Aggression*, Supplement A (Washington: United States Government Printing Office, 1947), at 25, 37-38. See Chapter 2, Section 2.2.3.1. (text accompanying notes 67-72) and Chapter 2, Section 2.2.5.1. (text accompanying notes 101-107) Admittedly, however, this pleading by the IMT Chief Prosecutor of the accused's contribution to the common plan was construed as an evidentiary argument – *i.e.* a submission on what their contributions can be described as based on the available evidence – rather than as a general statement of the law and the level of contribution required to find the accused liable for their alleged participation in the execution of the said common plan.

¹⁷⁶ See *supra* note 168.

¹⁷⁷ *Gotovina and Markač* Appeal Judgment, *supra* n 84, para 149.

¹⁷⁸ G. Werle and F. Jessberger, *Principles of International Criminal Law* (3rd edn, Oxford: OUP, 2014), at 202 (fn 209); R. Cryer *et al.*, *An Introduction to International Criminal Law and Procedure* (3rd edn, Cambridge: Cambridge UP, 2014), at 358 (fn 46).

makes an enterprise *efficient or effective*; e.g. a participation that enables the system to run more smoothly or without disruption.¹⁷⁹

The judges further explained that:

whether th[e] participation is deemed significant will depend on a variety of factors, including the size of the criminal enterprise, the functions performed, the position of the accused, the amount of time spent participating after acquiring knowledge of the criminality of the system, efforts made to prevent criminal activity or to impede the efficient functioning of the system, the seriousness and scope of the crimes committed and the efficiency, zealotry or gratuitous cruelty exhibited in performing the actor's function.¹⁸⁰

These factors for determining whether the accused's contribution has reached the 'significant' threshold of the JCE theory were repeated in the 2009 *Milutinović et al.* Trial Judgment,¹⁸¹ the 2012 *Tolimir* Trial Judgment,¹⁸² and the 2016 *Karadžić* Trial Judgment,¹⁸³ yet it bears noting that, to date, the ICTY/R Appeals Chamber has not expressly endorsed this definition and test for the 'significant' contribution requirement. Rather, the Appeals Chamber has only held that this inquiry requires an assessment on a case-by-case basis,¹⁸⁴ while making sure to stress that "not every type of conduct would amount to a significant enough contribution to the crime for this to create criminal liability for the accused regarding the crime in question."¹⁸⁵ Concerning the latter point, it is worth pointing out that there have been a few notable instances where the ICTY acquitted accused charged with JCE liability after holding that they did not sufficiently contribute to the alleged criminal enterprise: e.g. Žigić in the *Kvočka et al.* case,¹⁸⁶ Pandurević

in the *Popović et al.* case¹⁸⁷ and Čermak in the *Gotovina et al.* case.¹⁸⁸ Be that as it may, there is merit to the argument that the ICTY/R (appellate) jurisprudence would benefit from a more focused discussion on the exact meaning of the 'significant' contribution requirement of JCE liability, and its distinction from the 'substantial' standard. Some guidance on this matter may also be sought from the relevant ICC case law where it has been argued that a "contribution is 'substantial' where the crime might still have occurred absent the contribution of the Accused, but not without great difficulty",¹⁸⁹ while the 'significant' contribution has been contrasted as lesser than that and assessable through factors such as:

- (i) the sustained nature of the [accused's] participation after acquiring knowledge of the criminality of the group's common purpose, (ii) any efforts made to prevent criminal activity or to impede the efficient functioning of the group's crimes, (iii) whether the person creates or merely executes the criminal plan, (iv) the position of the suspect in the group or relative to the group and (v) perhaps most importantly, the role the suspect played vis-à-vis the seriousness and scope of the crimes committed.¹⁹⁰

187 Vinko Pandurević was the Commander of the Zvornik Brigade (Drina Corps) in the Bosnian Serb Army. The Trial Chamber found that during his absence from Zvornik between 4 and 15 July 1995, units from the Zvornik Brigade were mobilized to participate in the murder operations that took place in and around Srebrenica (a JCE to murder), of which Pandurević was not informed until his return. Upon his return, he was "informed obliquely of some involvement on the part of the Zvornik Brigade" and by the time Pandurević acquired actual knowledge of the murder operation – on 16 July – the Zvornik Brigade was "no longer engaged in activities connected to the detention and execution of the prisoners in the area of Zvornik." Later on, however, on 23 July, another accused, Vujadin Popović, entered the Zvornik Brigade clinic where ten wounded Bosnian Muslim prisoners were held, took them away and had them executed. The Trial Chamber reasoned that this incident gave rise to Pandurević's liability for aiding and abetting by omission the murder of the ten men but held that, on its own, this occurrence and Pandurević's omission did not present a sufficient contribution to hold him liable under the larger count of JCE to murder. The judgment thus states that: "[t]he Trial Chamber has found Pandurević responsible due to his failure to take measures to prevent Popović from taking the prisoners away with the knowledge that Popović was involved in the murder operation and that the prisoners would thus probably be killed. The Trial Chamber, however, does not consider Pandurević's omission in this respect to amount to a significant contribution by him to the common purpose of the JCE." *Popović et al.* Trial Judgment, *supra* n 134, paras 1972-1973, 1976.

188 Ivan Čermak was a representative of the Croatian Government, dealing with international agencies and media on questions concerning an infamous military operation carried out by the Croatian army in 1995, and he was the Commander of the Knin Garrison that operated in the Krajina region between August 1995 and November 1995. Trial Chamber found that he issued misleading assurances to the international community that action to stop the crimes committed during the said operation was being taken, and that he denied and concealed the commission of crimes in the village of Grubori, Knin municipality. After examining whether this participation amounted to a significant contribution to the established JCE to permanently remove the Serb civilian population from Krajina, the judges concluded that it did not an acquitted Čermak of the JCE charge. In particular, the Trial Chamber held that "Čermak's misleading assurances were not of a magnitude and nature to constitute contributions to the JCE. With regard to Čermak's denial and concealment of the crimes committed in Grubori, the Trial Chamber finds, considering the finding on the JCE objective and the nature of Čermak's acts, that they did not constitute a significant contribution to the JCE." *Gotovina et al.* Trial Judgment *Vol. 2*, *supra* n 136, para 2548.

189 *The Prosecutor v. Lubanga* (ICC-01/04-01/06-2748-Red), Prosecution's Closing Brief, 1 June 2011, para 65. See also *The Prosecutor v. Katanga and Chui* (ICC-01/04-01/07-1541), Prosecution's Pre-Trial Brief on the Interpretation of Article 25(3)(a), 19 October 2009, para 15.

190 *Mbarushimana* Decision on the Confirmation of Charges, *supra* n 155, para 284.

179 *Kvočka et al.* Trial Judgment, *supra* n 87, para 309. Cf. *Simić et al.* Trial Judgment, *supra* n 117, para 159.

180 *Kvočka et al.* Trial Judgment, *supra* n 87, para 311.

181 *Milutinović et al.* Trial Judgment *Vol. I*, *supra* n 87, para 105.

182 *Tolimir* Trial Judgment, *supra* n 86, para 893.

183 *Karadžić* Trial Judgment, *supra* n 86, para 565.

184 *Krajišnik* Appeal Judgment, *supra* n 91, para 696.

185 *Brđanin* Appeal Judgment, *supra* n 84, para 427. Cf. *Đorđević* Trial Judgment *Vol. I*, *supra* n 117, para 1863; *Tolimir* Trial Judgment, *supra* n 86, para 893.

186 The Appeals Chamber found that Zoran Žigić – a taxi driver who on several occasions entered the Omarska detention camp to severely beat some of its Bosnian-Muslim detainees – was improperly convicted on trial under the JCE theory for the crimes committed in the camp generally. In particular the appellate judges concluded that the instances where Žigić entered the camp to commit crimes "formed only mosaic stones in the general picture of violence and oppression" and, respectively, that "no reasonable trier of fact could conclude from the evidence before the Trial Chamber that Žigić participated in a significant way in the functioning of Omarska camp. He cannot be held responsible as a participant in this joint criminal enterprise; his conviction for the crimes committed in this camp "in general" has to be overturned." *Kvočka et al.* Appeal Judgment, *supra* n 65, para 599.

Finally, there are two additional features of JCE's contribution element that have been elaborated in post-*Tadić* case law and that ought to be briefly highlighted here. First, although the *Tadić* Appeal Judgment did not expressly state this, the subsequent ICTY/R jurisprudence has consistently confirmed that the JCE accused is not required to participate in the enterprise through a positive act, but he could also contribute to it through an omission.¹⁹¹ The *Kvočka et al.* Appeal Judgment is commonly cited as a source of authority to this effect and particularly the Chamber's finding that JCE liability requires "the accused to have committed an act *or an omission* which contributes to the common criminal purpose."¹⁹² Importantly, not all failures to act can satisfy this requirement: the accused's omission could entail his JCE liability only if he/she was under "a legal duty to act" when failing to do so.¹⁹³ It bears noting that, to date, no ICTY/R accused has been convicted under the JCE concept *solely* on the basis of an omission: in cases where an accused has been found to have contributed to the enterprise by means of an omission, the judges have always combined this with a finding of positive acts through which he significantly participated in the alleged JCE.¹⁹⁴

Another notable aspect of JCE's contribution element pertains to the question whether the accused's contribution must be made at the *execution* stage of the common plan, or it may also be limited to the *preparatory* stage of the enterprise: an issue that has raised much debate in the commentariat on the theory of co-perpetration based on joint control¹⁹⁵ but has attracted only sparse attention in the JCE jurisprudence and scholarship. Originally, the *Tadić* Appeals Chamber held that an accused's participation in the said JCE "may take the form of assistance in, or contribution to, *the execution of the common plan or purpose*."¹⁹⁶

This wording became standard language in the ICTY/R post-*Tadić* jurisprudence,¹⁹⁷ and although it could be read as establishing that the accused must provide his contribution at the execution stage of the JCE – *i.e.* that participation restricted to the preparatory stage cannot attract JCE responsibility – this legal holding is, as explained below, also susceptible to a broader interpretation. Contributions made at its planning and preparatory phase of a common purpose have often been considered in the UN *ad hoc* Tribunals' case law, yet invariably in combination with contributions which the said accused also made at the execution stage,¹⁹⁸ which explains why the question whether the former alone can suffice for a conviction did not merit much consideration for a long time. It was not until the November 2010 ICTR *Kanyarukiga* Trial Judgment¹⁹⁹ that a chamber was called to adjudicate on the JCE liability of an accused whose contribution to the said common design was limited to its planning phase. The case concerned an attack that took place in mid-April 1996, during which thousands of armed Hutus killed approximately 2000 Tutsi women, children and men hiding in the Nyange Parish Church.²⁰⁰ Noting the above-cited law on JCE, the Trial Chamber held that it is:

not convinced that the Prosecution has proven beyond reasonable doubt that the Accused participated in a joint criminal enterprise, as alleged. The Chamber recalls that, in order for an accused to be convicted of "committing" pursuant to a theory of JCE, it must be established that he or she participated in the *execution* of the common plan or purpose of the enterprise. While the Trial Chamber has found that Kanyarukiga participated in the planning of the destruction of the Nyange Church (discussed further below), it does not find any credible evidence to suggest that the Accused ordered, instigated, encouraged or provided material assistance to the attackers in this case. Thus, the Chamber finds that the evidence is insufficient to establish that the Accused significantly contributed to the execution or commission of the crimes charged. Moreover, the Trial Chamber recalls that an accused cannot be convicted of planning and committing the same offence. Having considered both JCE, which is a form of commission, and planning as possible modes of liability, the Chamber finds that, in view of the factual findings in this case, planning more aptly captures the alleged criminal conduct of the accused than JCE.²⁰¹

Thus, the judges clearly interpreted the existing jurisprudence on JCE liability to require proof of the accused's participation in/contribution to the *execution* stage of the criminal enterprise.

191 *Karadžić* Trial Judgment, *supra* n 86, para 566; *Tolimir* Trial Judgment, *supra* n 86, para 894; *Haradinaj et al.* Trial Judgment, *supra* n 86, para 619; *Kvočka et al.* Trial Judgment, *supra* n 87, para 309; *The Prosecutor v. Bizimungu et al.* (ICTR-99-50-T), Judgment, Trial Chamber, 30 September 2011, para 1948; *The Prosecutor v. Ndahimana* (ICTR-01-68-T), Judgment, Trial Chamber, 30 December 2011, para 810; *Đorđević* Trial Judgment *Vol. I*, *supra* n 117, para 1863; *Milutinović et al.* Trial Judgment *Vol. I*, *supra* n 87, para 103; *Mpambara* Trial Judgment, *supra* n 87, para 24; See also Werle and Jessberger, *supra* n 178, at 202; Cassese, *supra* n 125, at 165, 182; A. Cassese (ed), *The Oxford Companion to International Criminal Justice* (Oxford: Oxford UP, 2009), at 394-395.

192 *Kvočka et al.* Appeal Judgment, *supra* n 65, paras 187, 421. (*emphasis added*)

193 *The Prosecutor v. Galić* (IT-98-29-A), Judgment, Appeals Chamber, 30 November 2006, para 175; *The Prosecutor v. Ntagerura et al.* (ICTR-99-46-A), Judgment, Appeals Chamber, 7 July 2006, para 334; *Milutinović et al.* Trial Judgment *Vol. I*, *supra* n 87, para 103; *Đorđević* Trial Judgment *Vol. I*, *supra* n 117, para 1863; *Haradinaj et al.* Trial Judgment, *supra* n 86, para 619; *Tolimir* Trial Judgment, *supra* n 86, para 894.

194 *The Prosecutor v. Tolimir* (IT-05-88/2-A), Judgment, Appeals Chamber, 8 April 2015, para 437; *Gotovina et al.* Trial Judgment *Vol. 2*, *supra* n 136, para 2370; *Kvočka et al.* Appeal Judgment, *supra* n 65, para 195; *Ndahimana* Trial Judgment, *supra* n 191, para 811

195 See Chapter 5, Section 5.4.1.2.

196 *Tadić* Appeal Judgment, *supra* n 1, para 227. (*emphasis added*)

197 *Ntakirutimana and Ntakirutimana* Appeal Judgment, *supra* n 2, para 466; *Vasiljević* Appeal Judgment, *supra* n 84, para 100; *Kvočka et al.* Appeal Judgment, *supra* n 65, para 96; *Krajišnik* Appeal Judgment, *supra* n 91, para 695; *Gatete* Appeal Judgment, *supra* n 84, para 96; *Šainović et al.* Appeal Judgment, *supra* n 94, para 987; *Karemera and Ndirumpatse* Appeal Judgment, *supra* n 84, para 567; *Popović et al.* Appeal Judgment, *supra* n 168, para 1378.

198 For case law where the accused has been found to have significantly participated in a JCE through providing contributions both at the preparatory/planning and the execution stage of the common plan, see *e.g.* *Stakić* Appeal Judgment, *supra* n 86, paras 74-78; *Krajišnik* Appeal Judgment, *supra* n 91, paras 216-218; *Gotovina et al.* Trial Judgment *Vol. 2*, *supra* n 136, para 2370.

199 *The Prosecutor v. Kanyarukiga* (ICTR-02-78-T), Judgment and Sentence, Trial Chamber, 1 November 2010.

200 *Ibid.*, para 640.

201 *Ibid.*, para 643. (footnotes omitted)

On appeal, the Prosecution did not seek an invalidation of the Trial Judgment, but it requested the Appeals Chamber to clarify the law on this particular matter, arguing that it is “an issue of general importance to the development of the Tribunal’s case law.”²⁰² The judges took notice of this and while they acknowledged that in exceptional circumstances they have discretion to hear such appeals, they, quite disappointingly, refused to make a finding on the matter.²⁰³ This implicitly confirms that by the time the *Kanyarukiga* Appeal Judgment was delivered in May 2012, the ICTY/R Appeals Chamber did not have an available answer, discussed and adopted in previous case law, to the question whether JCE liability strictly requires that the accused’s contribution be made at the execution stage of the JCE. Indeed, writing in a Separate Opinion, Judge Pocar rightly noted that “the jurisprudence does not specify what form the participation of an accused in the common purpose of a joint criminal enterprise must take.”²⁰⁴

It remains to be seen whether and how the UN *ad hoc* Tribunals will resolve the matter of planning/preparatory-stage contributions as forms of significant participation in a JCE. The above-cited finding of the *Kanyarukiga* Trial Chamber certainly raises a valid point. It would be inappropriate to hold an accused liable under the JCE doctrine for actions that squarely fall in the ambit of planning liability: *viz.* all he did was “design the criminal conduct constituting one or more statutory crimes that are later perpetrated”,²⁰⁵ without being involved in any other way in the furtherance of the said plan. Doing so would largely eviscerate the border between JCE and planning liability, and make the latter notion quite superfluous.²⁰⁶ On the other hand, however, it is also true that actions performed in the preparatory stage of a common plan (*e.g.* setting up and organizing the necessary military or administrative structures, securing funding and military equipment in advance of a criminal operation) may clearly have, at the very least, a significant effect on the subsequent execution of the said plan and should, when all the other legal elements are met, entail JCE liability for the accused. Indeed, the Tribunal’s holding that the JCE accused must provide “assistance in, or contribution to, the execution of the common plan or purpose”²⁰⁷ does not necessarily state that the said contribution must be provided “at” the execution stage: rather, it seems to state in more general terms that the contribution has to further the execution of the common purpose. The above-mentioned examples of conduct that might technically

fall at the preparatory stage of the enterprise could, under this interpretation, rightly be considered as contributing to the execution of the plan. Considering also that it will often be problematic to draw a rigorous line between the preparatory and execution stages of a complex JCE, the author agrees with Olásolo’s conclusion that, in principle:

from the perspective of the diversity of the criminal phenomenon, there is conduct that, despite the fact that it is not directly executive, is directly and immediately linked to the execution of the objective elements of the crime and the consequent harm on the societal value protected by international criminal law. Therefore, it should be considered an integral part of the commission of the crime.²⁰⁸

To this end, the alternative wording which the UN *ad hoc* Tribunals have occasionally used to state the requisite JCE contribution requirement – *i.e.* that “the accused must have participated in furthering the common purpose at the core of the joint criminal enterprise”²⁰⁹ – is perhaps a preferable, more stage-neutral one.

3.4.2. The subjective (mental) elements

Throughout their case law, the international tribunals have generally held that “[w]ith respect to the *mens rea*, the requirements of the three categories of JCE differ.”²¹⁰ The *Tadić* Appeals Chamber first summarized them as follows:

With regard to the first category, what is required is the intent to perpetrate a certain crime (this being the shared intent on the part of all co-perpetrators). With regard to the second category (which, as noted above, is really a variant of the first), personal knowledge of the system of ill-treatment is required (whether proved by express testimony or a matter of reasonable inference from the accused’s position of authority), as well as the intent to further this common concerted system of ill-treatment. With regard to the third category, what is required is the *intention* to participate in and further the criminal activity or the criminal purpose of a group and to contribute to the joint criminal enterprise or in any event to the commission of a crime by the group. In addition, responsibility for a crime other than the one agreed upon in the common plan arises only if, under the circumstances of the case, (i) it was *foreseeable* that such a crime might be perpetrated by one or other members of the group and (ii) the accused *willingly took that risk*.²¹¹

²⁰² *Kanyarukiga v. The Prosecutor* (ICTR-02-78-A), Judgment, Appeals Chamber, 8 May 2012, para 267.

²⁰³ *Ibid.*

²⁰⁴ *Ibid.*, Separate Opinion of Judge Pocar, para 4.

²⁰⁵ This is how “planning” liability has been defined by the ICTY/R. See *The Prosecutor v. Kordić and Čerkez* (IT-95-14/2-A), Judgment, Appeals Chamber, 17 December 2004, para 26; *Nahimana et al. v The Prosecutor* (ICTR-99-52-A), Judgment, Appeals Chamber, 28 November 2007, para 479.

²⁰⁶ There are, of course, other notable differences between these two types of liability: unlike JCE, planning does not strictly require a plurality of persons, nor does it require that the accused shares a direct intent to commit the planned crimes. *Nahimana et al.* Appeal Judgment, *supra* n 205, para 479. In a similar vein of thought, Olásolo notes that “some authors see the notion of co-perpetration as a kind of conspiracy which is put in practice. Hence, they distinguish co-perpetration from conspiracy in that co-perpetration requires, besides the meeting of minds, a subsequent contribution at the execution stage.” Olásolo, *supra* n 93, at 167.

²⁰⁷ See *supra* notes 196-197.

²⁰⁸ Olásolo, *supra* n 93, at 279.

²⁰⁹ *Stanišić and Župljanin Trial Judgment Vol.1*, *supra* n 91, para 103; *Brđanin Appeal Judgment*, *supra* n 84, para 427; *Karemera and Ngirumpatse Appeal Judgment*, *supra* n 84, para 421.

²¹⁰ *Haradinaj et al.* Trial Judgment, *supra* n 86, para 620. See also *Tadić Appeal Judgment*, *supra* n 1, para 228; *Vasiljević Appeal Judgment*, *supra* n 84, para 101; *Ntakirutimana and Ntakirutimana Appeal Judgment*, *supra* n 2, para 467; *Ndahimana Trial Judgment*, *supra* n 191, para 722; *Duch Trial Judgment*, *supra* n 86, para 509; *The Prosecutor v. Sesay, Kallon and Gbao* (SCSL-04-15-T), Judgment, Trial Chamber, 2 March 2009, para 264.

²¹¹ *Tadić Appeal Judgment*, *supra* n 1, para 228.

The following section thoroughly examines the subjective elements of the three forms of JCE liability and reveals that the difference between them is, in fact, not as profound as the above-quoted paragraph suggests on first read.

3.4.2.1. The mental element of the ‘basic’ joint criminal enterprise

To incur JCE I liability, the accused must *share a common intent* with the other participants in the joint enterprise to commit the concerted crime.²¹² The *Tadić* Appeals Chamber explained that, on the subjective plane, this is how one can distinguish between JCE participants, on the one hand, and aiders and abettors, on the other: *i.e.* the latter merely have knowledge that their acts contribute to the commission of a specific crime, while the former intend this crime.²¹³ In its subsequent jurisprudence, the ICTY clarified that this heightened *mens rea* requirement is the reason why the participants in a JCE are qualified as principals to the crime, rather than as accessories to it.²¹⁴ The ‘shared intent’ requirement is, thus, the cornerstone of JCE I liability. The question arises: what does it exactly mean?

Taken on its own, the *Tadić* Appeals Chamber’s finding that a JCE participant has to *intend* the commission of a crime can mean different things to lawyers from different criminal justice systems simply because ‘intent’ is a concept that could be broken down to various sub-categories, the definitions of which vary per legal system.²¹⁵ The ICTY *Blaškić* Trial Chamber generally summarised these *mens rea* variations as follows:

[There may be] direct malicious intent (“... the agent seeks to commit the sanctioned act which is either his objective or at least the method of achieving his objective”). There may also be indirect malicious intent (the agent did not deliberately seek the outcome but knew that it would be the result) or recklessness, (“the outcome is foreseen by the perpetrator as only a probable or possible consequence”). In other words... the conduct “of a person taking a deliberate risk in the hope that the risk does not cause injury”.²¹⁶

When the *Tadić* Appeals Chamber’s analysis on the basic form of JCE liability is considered in its entirety, it becomes clear that the judges construed its subjective element to be precisely what the *Blaškić* Trial Chamber called ‘direct malicious intent’. In particular, the

Tadić judges clarified that a member in a JCE to kill must “(i)... *voluntarily participate* in one aspect of the common design (for instance, by inflicting non-fatal violence upon the victim, or by providing material assistance to or facilitating the activities of his co-perpetrators); and (ii) ... even if not personally effecting the killing must nevertheless *intend this result*.”²¹⁷ The second part of this finding confirms what the label ‘common purpose’ itself suggests: the JCE participant pursues the *purpose* that defines the enterprise, *i.e.* he knows that his acts go towards the commission of a crime and he *desires* this crime to be committed. This is the highest, most-culpable, *mens rea* standard, which is known in criminal justice systems belonging to the Romano-Germanic legal family as ‘*dolus directus* in the first degree’ and Anglo-American jurisdictions refer to it as ‘purpose’ or ‘direct intent’.²¹⁸ In this respect, Olásolo rightly observed that:

any participant in a basic form of joint criminal enterprise must specifically intend to cause the objective elements of the core crimes of the enterprise (*dolus directus* in the first degree) insofar as they are the ultimate goal of the enterprise or the means through which the goal of the enterprise is to be achieved.²¹⁹

and further that:

the notion of joint criminal enterprise requires that all participants in the enterprise share a *dolus directus* in the first degree with regard to the core crimes of the enterprise, regardless of whether the crimes in question require, in principle, a less stringent subjective element.²²⁰

If JCE I responsibility requires that the accused intended the core crime, meaning that he wanted/desired its commission, then the *Tadić* Appeals Chamber’s additional finding that his participation in the enterprise must also be *voluntary* seems to be somewhat redundant. In truth, as Jain has also observed, the ICTY has largely ignored this component of JCE liability and “has not clarified how this element of voluntariness is to be construed.”²²¹ One may argue that it requires the accused’s participation in the enterprise to be voluntary, in the

²¹² *Tadić* Appeal Judgment, *supra* n 1, paras 220, 228; *Vasiljević* Appeal Judgment, *supra* n 84, para 101; *Krajišnik* Appeal Judgment, *supra* n 91, para 707; *Đorđević* Appeal Judgment, *supra* n 91, para 468; *Šainović et al.* Appeal Judgment, *supra* n 94, paras 1014-1015; *Stanišić and Simatović* Appeal Judgment, *supra* n 84, para 77; *Popović et al.* Appeal Judgment, *supra* n 168, para 1369; *Ntakirutimana and Ntakirutimana* Appeal Judgment, *supra* n 2, para 467; *Karemera and Ngirumpatse* Appeal Judgment, *supra* n 84, para 145; *Nizeyimana* Appeal Judgment, *supra* n 114, para 325.

²¹³ *Tadić* Appeal Judgment, *supra* n 1, para 229.

²¹⁴ *Milutinović et al.* Decision on Joint Criminal Enterprise, *supra* n 70, para 21; *Kvočka et al.* Appeal Judgment, *supra* n 65, paras 87-92. See also Cassese, *supra* n 125, at 163.

²¹⁵ It has, thus, been observed that “in the German system, there are three discrete categories of intention, rather than, as in the United States, one word with many meanings depending on the context”. D. Luban, J. O’Sullivan and D. Stewart, *International and Transnational Criminal Law* (New York: Aspen, 2010), at 867.

²¹⁶ *The Prosecutor v. Blaškić* (IT-95-14-T), Judgment, Trial Chamber, 3 March 2000, para 254.

²¹⁷ *Tadić* Appeal Judgment, *supra* n 1, para 196. (*emphasis added*)

²¹⁸ Van Sliedregt, *supra* n 108, at 40-45; Luban, O’Sullivan and Stewart, *supra* n 215, at 866-867; S. Finnin, *Elements of Accessorial Modes of Liability: Article 25 (3)(b) and (c) of the Rome Statute of the International Criminal Court*. (Leiden: Martinus Nijhoff, 2012), at 154; A. Eser, ‘Mental Elements - Mistake of Fact and Mistake of Law’, in A. Cassese and P. Gaeta (eds), *The Rome Statute of the International Criminal Court: A Commentary*, Vol.1 (Oxford: Oxford UP, 2002), at 914.

²¹⁹ Olásolo, *supra* n 93, at 167. Wirth confirmed this, stating that “JCE has a high [*mens rea*] requirement, in that only intent in the sense of purpose suffices (that is *dolus directus* of the first degree)”. Wirth, *supra* n 112, at 974.

²²⁰ Olásolo, *supra* n 93, at 283.

²²¹ Jain, *supra* n 112, at 57.

sense that it is not “the result of any threat or inducement”.²²² In practice, however, where the Prosecution proves that the accused shared a *dolus directus* in the first degree to commit the group crime, this will already militate a finding that his participation in the enterprise was not coerced, but voluntary. This point was made by the ICTY Trial Chamber in the *Brđanin and Talić* case:

If a person does something “knowingly and wilfully”, *it may ordinarily be assumed that he did it voluntarily*. [...] If Talić wishes to raise an issue as to the voluntary nature of his participation in the joint criminal enterprise pleaded, and if that is a relevant issue in the case, he must at the trial point to or elicit evidence from which it could be inferred that there is at least a reasonable possibility that his participation was not voluntary. Only then does the prosecution bear the onus of establishing that his action was indeed voluntary.²²³

In the author’s opinion, when the evidence shows that the accused was compelled by another to participate in a criminal enterprise, the rational inference from his involuntariness would be that he did not desire the crime and thus did not genuinely share the purpose.²²⁴ The accused’s intent in such a situation would be that of an individual who knows that a crime would almost certainly result from his actions and, even though he does not want this consequence or might even detest its occurrence, proceeds to act. This *mens rea* standard is known as ‘*dolus directus* in the second degree’, or ‘indirect intent/oblique intent’,²²⁵ which is a category of intent lower than what is required to incur JCE I responsibility.²²⁶ It is difficult to imagine a case where the accused is coerced to participate in a JCE and yet shares a *dolus*

directus in the first degree to commit the core crime. Therefore, if ‘voluntary participation’ is understood as meaning ‘done of free will and without threat or coercion’, this element is redundant when read together with the central requirement that the members in a ‘basic’ JCE must specifically intend its criminal purpose: *viz.* intend to commit the concerted crime.

A more cogent interpretation of the ‘voluntary’ element is that it requires *stricto sensu* that the accused’s act or omission contributing to the said JCE was not involuntary, such as an act that is carried out in a state of automatism,²²⁷ but was the product of a conscious decision to act in this particular way. The accused could then be said to have meant to participate in the enterprise. Eser described this as a restrictive approach to defining an individual’s intention in relation to his or her conduct:

Therefore, though it may appear as a matter of course, ‘meaning to engage in the conduct’ does not mean more than the perpetrator’s will to act at all, in voluntarily doing or omitting the physical movement (as distinct from involuntary moving or staying unmoved) and to behave in this and not in another way. In this respect ... [it] is indeed *no more than the requirement of voluntary conduct without regard to its purpose or result*.²²⁸

Thus, the ‘voluntary participation’ element simply tells us that the accused consciously acted the way he did, which is a separate and distinct question from what his intention in relation to the consequence of his action was. Having said all this, it bears noting the jurisprudence of the modern international tribunals does not offer an example of a case in which the defendant was found to have participated in a basic JCE, sharing the intent to commit its core crime, but was nonetheless acquitted under this mode of liability due to a finding that his participation in the enterprise was not voluntary. It is also showing that even though there are judgements that list the ‘voluntary participation’ requirement as part of JCE I’s subjective element,²²⁹ many more of them do not mention it at all and uphold solely the core requirement of sharing the intent to commit the crime(s) comprising the ‘basic’ joint criminal enterprise.²³⁰

²²² This definition of the term “voluntary”, considered in the context of voluntary guilty pleas, was provided by Judges McDonald and Vohrah in their Joint Separate Opinion to the *Erdemović* Appeals Judgement. *The Prosecutor v. Erdemović* (IT-96-22-A), Judgment, Appeals Chamber, 7 October 1997, Joint Separate Opinion of Judge McDonald and Judge Vohrah, para 10. Black’s Law Dictionary defines ‘voluntary’ as “[u]nconstrained by interference; unimpelled by another’s influence; spontaneous; acting of oneself.” H. Black, *Black’s Law Dictionary: Definitions of the Terms and Phrases of American and English Jurisprudence, Ancient and Modern* (4th edn, St. Paul, MN: West Pub., 1968), at 1746.

²²³ *Brđanin and Talić* Decision on Amended Indictment, *supra* n 95, para 48. (*emphasis added*)

²²⁴ The question of what, if any, effect acts of duress against a person can have on the *mens rea* of the person to commit a crime has been subject to much debate and disagreement. In common law, for instance, it is generally accepted that duress is an excuse that does not negate the accused’s *mens rea* (Director of Public Prosecutions for Northern Ireland v. Lynch, [1975] A.C. 653). However, it has also been upheld that, apart from an excuse, in certain circumstances, namely for crimes requiring specific/direct intent, duress can also signal that the accused did not possess the necessary *mens rea* to commit a crime. Thus, for instance, in *Paquette v. The Queen*, [1977] 2 S.C.R. 189, the Supreme Court of Canada held that “[a] person whose actions have been dictated by fear of death or of grievous bodily injury cannot be said to have formed a genuine common intention to carry out an unlawful purpose with the person who has threatened him.” For a nuanced discussion on whether excuses can be a factor negating the accused’s *mens rea*, see also G. Fletcher, *Basic Concepts of Criminal Law* (New York: Oxford UP, 1998), at 84-85.

²²⁵ Eser, *supra* n 218, at 914-915; Van Sliedregt, *supra* n 108, at 41; Finnin, *supra* n 218, at 155.

²²⁶ See *supra* text accompanying notes 217-220. As Olásolo explains, “[b]y requiring this stringent subjective element [i.e. *dolus directus* in the first degree], the notion of joint criminal enterprise ‘compensates’ for the low level of contribution that is required from a senior political or military leader to become a participant in the enterprise (and thus a principal to the crimes). Olásolo, *supra* n 93, at 283.

²²⁷ Eser, *supra* n 218, at 913 K. Heller, ‘The Rome Statute of the International Criminal Court’ in K. Heller and M. Dubber (eds), *The Handbook of Comparative Criminal Law* (Stanford, CA: Stanford Law, 2011), at 602.

²²⁸ Eser, *supra* n 218, at 913 (*emphasis added*).

²²⁹ *Vasiljević* Appeal Judgment, *supra* n 84, para 119; *Brđanin* Appeal Judgment, *supra* n 84, para 365; *Munyakazi* Appeal Judgment, *supra* n 84, para 160; *Stanišić and Župljanin* Trial Judgment Vol.1, *supra* n 91, para 105; *Milutinović et al.* Trial Judgment Vol.1, *supra* n 87, para 108; *The Prosecutor v. Sesay, Kallon and Gbao* (SCSL-04-15-A), Judgment, Appeals Chamber, 26 October 2009, para 475; *Brima, Kamara and Kanu* Trial Judgment, *supra* n 86, para 61. For academic literature treating “voluntary participation” as a separate and distinct mental element of the basic form of JCE liability, see e.g. Boas *et al.*, *supra* n 63, at 51.

²³⁰ *Stakić* Appeal Judgment, *supra* n 86, para 65; *Krajišnik* Appeal Judgment, *supra* n 91, para 200; *Stanišić and Simatović* Appeal Judgment, *supra* n 84, para 77; *Popović et al.* Trial Judgment, *supra* n 134, para 1021; *Gotovina et al.* Trial Judgment Vol. 2, *supra* n 136, para 1953; *Haradinaj et al.* Trial Judgment, *supra* n 86, para 620; *Tolimir* Trial Judgment, *supra* n 86, para 895; *Ntakirutimana and Ntakirutimana* Appeal Judgment, *supra* n 2, para 467; *The Prosecutor v. Gacumbitsi* (ICTR-2001-64-A), Judgment, Appeals Chamber, 7 July 2006, para 158; *Simba* Appeal Judgment, *supra* n 91, paras 77-78; *The Prosecutor v. Nizeyimana* (ICTR-2000-55C-T), Judgment, Trial Chamber, 19 June 2012, para 1455; STL Interlocutory Decision on the Applicable Law, *supra* n 2, para 237; *Taylor* Trial Judgment, *supra* n 86, para 465. For academic literature that omits the “voluntary participation” element when analyzing the *mens rea* of the basic form of JCE liability, see e.g. Olásolo, *supra* n 93, at 166-170.

Therefore, rather than as an autonomous and materially distinct component of the doctrine's *mens rea* requirement, the element of voluntariness can be seen either as a reference to the condition that the accused directly/specifically intended the criminal result, or simply as a statement that his participation was a conscious one "as is essential for a human act anyway".²³¹

It has been further clarified in the tribunals' case law that when the criminal enterprise seeks the commission of a special intent (*dolus specialis*) crime - e.g. genocide, persecution or torture - the basic category of JCE liability requires that the participants share the intent of the underlying offence *and* that they share the *dolus specialis* of the said crime.²³² For instance, in a JCE to commit genocide by killing members of a particular ethnic group, an accused may be convicted under JCE I liability if the Prosecution proves that he:

- i) shared the general intent to commit the underlying act of genocide (*i.e.* he had the intent to, in this example, kill the members of that group); and
- ii) shared the *dolus specialis* for genocide (*i.e.* he intended to "destroy in whole or in part... [the said] ethnic group").²³³

The *Vasiljević* case, which was discussed in more detail in Chapter 1,²³⁴ illustrates how this is applied in practice. In relation to the killing of seven Muslim men at the Drina River, the Trial Chamber first found that the accused participated in the common purpose to murder and held that "the Accused [...] intended that the seven Muslim men be killed".²³⁵ Vasiljević was, thus, convicted as a co-perpetrator in a JCE to murder.²³⁶ The judges then proceeded to consider the Accused's guilt under the charge of persecution in relation to the same incident.²³⁷ In doing so they analyzed whether, in addition to intending the murder of the Muslim men, Vasiljević and the other JCE members executed the victims on religious or political discriminatory grounds:

²³¹ Eser, *supra* n 218, at 913.

²³² *Kvočka et al.* Appeal Judgment, *supra* n 65, para 110; *Popović et al.* Appeal Judgment, *supra* n 168, para 711; Đorđević Appeal Judgment, *supra* n 91, para 470; *Stanišić and Župljanin* Trial Judgment Vol. I, *supra* n 91, para 105; *Bizimungu et al.* Trial Judgment, *supra* n 191, para 1908; *Nizeyimana* Trial Judgment, *supra* n 230, para 1455.

²³³ For an example of such JCE I application in a genocide case, see *Popović et al.* Trial Judgment, *supra* n 134, paras 1175-1181.

²³⁴ See Chapter 1, Section 1.3.2. Vasiljević was a member of a Bosnian Serb paramilitary group. On 7 June 1992, he and a few other members of this group forcefully transported seven Bosnian Muslim men to the bank of the Drina river, where the men were aligned, facing the river, and summarily shot. Vasiljević did not personally shoot at any of the Muslim men but he actively participated in their transportation to the river and also made sure that they did not escape. See *Vasiljević* Trial Judgment, *supra* n 96, paras 97-112.

²³⁵ *Ibid.*, para 113.

²³⁶ *Ibid.*, paras 210-211.

²³⁷ Persecution is a special intent crime which consists of an act or omission which: "1. discriminates in fact and which denies or infringes upon a fundamental right laid down in international customary or treaty law (the *actus reus*); and 2. was carried out deliberately *with the intention to discriminate on one of the listed grounds, specifically race, religion or politics (the mens rea)*." *Kvočka et al.* Appeal Judgment, *supra* n 65, para 320. (*emphasis added*)

The Trial Chamber has already found that the Accused has individual criminal responsibility for murder punishable under Article 5 of the Statute in relation to five victims, pursuant to a joint criminal enterprise to kill the seven Bosnian Muslim men on the banks of the Drina River. The Trial Chamber is satisfied that the only reasonable inference available on the evidence is that these seven Muslim men were singled out for religious or political reasons, and that the killing of five of them were acts carried out on discriminatory grounds, namely, religious or political. The Trial Chamber is also satisfied that the acts of the Accused were in fact discriminatory, in that the men were killed only because they were Muslims. Accordingly, the Accused incurs individual criminal responsibility for the crime of persecution on the basis of the underlying crime of murder of five of the Bosnian Muslim civilians.²³⁸

The crime of murder was 'upgraded' to the additional crime of persecution by murder because it was carried out with a discriminatory intent and Vasiljević was in turn found to be guilty of this separate crime because the judges concluded that he shared the *dolus specialis*. However, if the evidence was to show that, while he intended the murder, he had no clue that the victims were singled out on religious or political grounds, he would have incurred basic JCE liability only for the crime of murder and not for the crime of persecution.

Having examined the kind of intent that is required by the basic form of JCE liability, there remain several other aspects to this element that should be mentioned here. First of all, it must be born in mind that when assessing the intent of a JCE participant, it is immaterial what his motives to commit the said crime were. This was emphasized by the ICTY *Jelisić* Appeals Chamber where the judges held:

The Appeals Chamber further recalls the necessity to distinguish specific intent from motive. The personal motive of the perpetrator of the crime of genocide may be, for example, to obtain personal economic benefits, or political advantage or some form of power. The existence of a personal motive does not preclude the perpetrator from also having the specific intent to commit genocide.²³⁹

More generally, the *Tadić* Appeals Chamber confirmed the irrelevance and "inscrutability of motives in criminal law" for any reason other than as factors "in mitigation or aggravation of the sentence" imposed on an accused.²⁴⁰ A JCE member can thus share a *dolus directus* in the first degree to commit the agreed crimes irrespective of what his motive is or, indeed, even if he has no particular motive: it has been noted in the ICTY jurisprudence that "shared criminal intent does not require the co-perpetrator's personal satisfaction or enthusiasm or his personal

²³⁸ *Vasiljević* Trial Judgment, *supra* n 96, para 254.

²³⁹ *The Prosecutor v. Jelisić* (IT-95-10-A), Judgment, Appeals Chamber, 5 July 2001, para 49. See also *Krnjelac* Appeal Judgment, *supra* n 105, para 102; *Kvočka et al.* Appeal Judgment, *supra* n 65, para 106.

²⁴⁰ *Tadić* Appeal Judgment, *supra* n 1, paras 268-269.

initiative in contributing to the joint enterprise.”²⁴¹ Furthermore, the tribunals have confirmed that in the absence of direct evidence, the intent of a JCE participant may be inferred from the circumstances, including from his “knowledge combined with continuing participation” in the enterprise.²⁴² However, such an inference “must be the only reasonable inference available on the evidence” and any benefit of the doubt must be given to the accused.²⁴³

Finally, the requirement that the intent in a basic type of joint criminal enterprise must be ‘shared’ means that it must be common to all the JCE members: *i.e.* all of them possess the *same* intent to commit the crime together.²⁴⁴ It also signals that, as Cassese observed, “it is not sufficient for the participants to each have formulated an independent, yet identical, intent.”²⁴⁵ Hence, if two soldiers, separately and without any coordination between each other, happen to plunder the same civilian house, their intent may be practically the same but it is not shared in that it lacks reciprocity: the soldiers do not intend to assist each other in the commission of the said crime.²⁴⁶ There is an obvious overlap here between the mental element of ‘shared intent’ and the material element of ‘a common plan, design or purpose’. If the soldiers had previously agreed to plunder the house or if they became aware of each other’s actions at the crime scene and started coordinating them (thus forming a common plan extemporaneously), then this will militate a finding that their intent to plunder the house was *shared*, rather than independent. In this respect, Olásolo correctly points out that:

The subjective requirement that all participants in a basic form of joint criminal enterprise must share the intent to commit the core crimes of the enterprise is closely related to the objective requirement of a common plan, design or purpose which aims at the commission of the core crimes of the enterprise (or which considers their commission as the means to achieve its ultimate goal), and that comes into being as a result of an arrangement, or an understanding amounting to an agreement, between the participants in the enterprise. In the view of the author these elements are the cornerstone of the notion of co-perpetration based on joint criminal enterprise because

²⁴¹ Thus, for instance, a JCE member may get no personal satisfaction *per se* from subjecting prisoners of war to forced labour by making them dig trenches: he may do it purely in order to obtain some military advantage. This finding will by no means preclude a conclusion that the accused specifically intended the said crime by wanting its commission. *Krnjelac* Appeal Judgment, *supra* n 105, para 100; *Kvočka et al.* Appeal Judgment, *supra* n 65, para 106. See also Olásolo, *supra* n 93, at 168; Boas *et al.*, *supra* n 63, at 65; Cassese, *supra* n 125, at 164.

²⁴² *Haradinaj et al.* Trial Judgment, *supra* n 86, para 620. See also *Stanišić and Simatović* Appeal Judgment, *supra* n 84, para 81; *Popović et al.* Appeal Judgment, *supra* n 168, para 1369; *Krajišnik* Appeal Judgment, *supra* n 91, para 697; *Tolimir* Trial Judgment, *supra* n 86, para 895; *Simba* Appeal Judgment, *supra* n 91, paras 264-266. See also *e.g.* Boas *et al.*, *supra* n 63, at 54.

²⁴³ *The Prosecutor v. Krstić* (IT-98-33-A), Judgment, Appeals Chamber, 19 April 2004, para 41; *Kvočka et al.* Appeal Judgment, *supra* n 65, para 237; *Popović et al.* Appeal Judgment, *supra* n 168, para 1369; *Nizeyimana* Appeal Judgment, *supra* n 114, para 330.

²⁴⁴ Olásolo, *supra* n 93, at 170.

²⁴⁵ Cassese, *supra* n 125, at 164.

²⁴⁶ Ohlin, *supra* n 107, at 736, 753. See also *Gotovina and Markač* Appeal Judgment, *supra* n 84, paras 89; *Nizeyimana* Appeal Judgment, *supra* n 114, para 325.

one can only attribute the contributions made by one participant in the joint criminal enterprise to the other participants in the enterprise if everyone acts in furtherance of a common plan, design or purpose with the intent to implement it.²⁴⁷

3.4.2.2. The mental element of the ‘systemic’ joint criminal enterprise

Since *Tadić* was not a JCE II case, the Appeal Chamber’s analysis on the precise substance of the subjective requirement of this variant of the doctrine was rather scarce. The judges simply held that in a number of Nuremberg-era cases defendants “were found guilty of the war crime of ill-treatment”²⁴⁸ if the evidence proved that they participated in a system of repression with “(i) knowledge of the nature of the system and (ii) the intent to further the common concerted design to ill-treat inmates.”²⁴⁹ Formulated in this manner, it is not very clear what exactly the accused has to intend: the specific crimes that are being committed in the particular system of repression or, more broadly, the furtherance of its overall criminal objective. On the one hand, the Chamber seemed to establish that the accused must have knowledge of the concrete crime which characterizes the systemic JCE, in this case “the war crime of ill-treatment”, and intend its commission. On the other hand, however, it could also be argued that the judges used ‘ill-treatment’ as a generic term which may encompass different types of underlying crimes: *i.e.* a ‘system of ill-treatment’ may be one in which the inmates are tortured, or a system where they are murdered, or subjected to forced labour, or any combination of these or other separate and distinct crimes. Then, following the *Tadić* Appeals Chamber’s formulation of JCE II law, one may argue that the administrator in a concentration camp can be held liable as a co-perpetrator of all these crimes without proving that he specifically intended any one of them: it suffices to show that he knew they were being committed and intended to further the general purpose to ill-treat the inmates. While there are scholars who subscribe to this latter view and argue that a JCE II defendant “[need] not share the intent to commit the crime charged”,²⁵⁰ this author, for reasons explained below, is of the opinion that under the systemic form of JCE responsibility, the defendant must share a *dolus directus* in the first degree to commit the crimes charged as inherent to the said system of ill-treatment.

The correct approach to the above dilemma was elaborated by the ICTY years after the *Tadić* case, in the first JCE II cases brought before the Tribunal - the *Prosecutor v. Krnjelac* and the *Prosecutor v. Kvočka*. The lead on thoroughly examining JCE II *mens rea* requirement was taken by the *Krnjelac* Trial Chamber which started its analysis by comparing the ‘basic’ and the ‘systemic’ forms of JCE liability:

²⁴⁷ Olásolo, *supra* n 93, at 169.

²⁴⁸ *Tadić* Appeal Judgment, *supra* n 1, para 203.

²⁴⁹ *Ibid.* The Chamber thereby concluded that the systemic form of JCE liability requires proof of the accused’s “personal knowledge of the system of ill-treatment... as well as the intent to further this common concerted system of ill-treatment.” *Ibid.* para 228.

²⁵⁰ Boas *et al.*, *supra* n 63, at 65-66. Boas extensively argues that “[t]he overall approach to the mental elements of the second category taken by the [ICTY]... makes it clear that, to incur liability, the accused need not have the general intent to commit the crime with which he is charged; rather, he need merely have the intent to further the criminal purpose of the system of ill-treatment” *Ibid.*, at 59 *et seq.* See also Jain, *supra* n 112, at 149; Cryer *et al.*, *supra* n 178, at 359.

The first category is where all the participants in the joint criminal enterprise share the same criminal intent. The second category is similar but relates to the concentration camp cases... The Trial Chamber is satisfied that the only basis for the distinction between these two categories made by the *Tadić* Appeals Chamber is the subject matter with which those cases dealt, namely concentration camps during World War II... The Trial Chamber is in any event satisfied that both the first and the second categories discussed by the *Tadić* Appeals Chamber *require proof that the accused shared the intent of the crime committed by the joint criminal enterprise*.²⁵¹

The judges thus considered that the only difference between JCE I and JCE II responsibility is an objective one: in the latter, the common plan, design or purpose is materialized in the form of a concentration camp, a detention facility etc. On the subjective plane, however, these two variants of the doctrine were regarded to be the same. Indeed, this finding resonates with the *Tadić* Appeals Chamber's conclusion that the 'systemic' type of JCE is "really a variant of the first category".²⁵² If the doctrine's first two categories are defined as akin to each other, then it is only logical that the 'shared intent' element, fundamental for JCE I liability, is also inherent to JCE II liability. This line of reasoning was upheld by the ICTY Appeals Chamber when the *Krnojelac* case went on appeal. The judges first explained that:

apart from the specific case of the extended form of joint criminal enterprise, the very concept of joint criminal enterprise presupposes that its participants, other than the principal perpetrator(s), share the perpetrators' joint criminal intent.²⁵³

The Appeals Chamber further held:

In view of the Trial Chamber's findings of fact and the criterion to be applied to determine whether a participant in a system whose common purpose was the persecution (based on imprisonment and inhumane acts) and cruel treatment (based on living conditions) of the [inmates] had the required

intent, the Appeals Chamber will now examine whether no trier of fact could reasonably have concluded that *Krnojelac* *shared the intent of the co-perpetrators of those crimes*.²⁵⁴

Thus, even though in other parts of the judgement the *Krnojelac* Appeals Chamber did use the more general formulation of the JCE II subjective requirement – *i.e.* that the accused intended to further the system of ill-treatment²⁵⁵ – it is clear that the meaning it gave to this phrase was that of a requirement that the accused must share the intent to commit the specific crimes that represent the system of repression. Otherwise, if he was simply required to have knowledge of these crimes and intend in some general way to further the system's functioning, there would be no practical difference between JCE II and aiding and abetting liability. Such a difference, however, clearly exists and the ICTY *Kvočka* Trial Chamber explained it with an example:

For instance, an accountant hired to work for a film company that produces child pornography may initially manage accounts without awareness of the criminal nature of the company. Eventually, however, he comes to know that the company produces child pornography, which he knows to be illegal. If the accountant continues to work for the company despite this knowledge, he could be said to aid or abet the criminal enterprise. Even if it was also shown that the accountant detested child pornography, criminal liability would still attach.

At some point, moreover, if the accountant continues to work at the company long enough and performs his job in a competent and efficient manner with only an occasional protest regarding the despicable goals of the company, it would be reasonable to infer that *he shares the criminal intent of the enterprise and thus becomes a co-perpetrator*. The man who merely cleans the office afterhours, however, and who sees the child photos and knows that the company is participating in criminal activity and who continues to clean the office, would not be considered a participant in the enterprise because his role is not deemed to be sufficiently significant in the enterprise.²⁵⁶

Whether it is a business company or a concentration camp, the reasoning stands the same: the one who contributes to a criminal institution only with knowledge of its crimes is an aider and abettor of these crimes, while the one who shares the intent to commit them graduates to a co-perpetrator. This reasoning was subsequently upheld by the appeals judges who, very much in line with their previous findings in the *Krnojelac* case, confirmed that "participants in a basic or systemic form of joint criminal enterprise *must be shown to share the required intent of the principal perpetrators*."²⁵⁷ This author thus subscribes to the view,

²⁵¹ *Krnojelac* Trial Judgment, *supra* n 140, para 78. In much the same spirit, a few months later the *Vasiljević* Trial Chamber held that "[t]he first and second categories are basic forms of a joint criminal enterprise. Both require that the accused shared the intent of the principal offenders of the crime. The distinction drawn between the two categories relates to subject matter only, the second category being associated with the concentration camp cases or alike situations." *Vasiljević* Trial Judgment, *supra* n 96, para 64. Furthermore, in his separate opinion to the *Ojdanić* JCE Appeal Decision, Judge Hunt also stressed that ICTY case law establishes the same *mens rea* standard for JCE I and JCE II liability, explaining that "[t]he position of the accused in the second category is exactly the same as the accused in the first category [...] Both of them must intend that the crime charged is to take place. To accept anything less as sufficient would deny the existence of a 'common purpose'." *Milutinović et al.* Decision on Joint Criminal Enterprise, *supra* n 70, Separate Opinion of Judge David Hunt on Challenge by Ojdanić to Jurisdiction *Joint Criminal Enterprise*, para 8. See also *Nuon Chea and Khieu Samphan* Trial Judgment, *supra* n 91, para 694.

²⁵² *Tadić* Appeal Judgment, *supra* n 1, para 203. This finding has been consistently reiterated in the subsequent jurisprudence of the tribunals. See *e.g.* *Vasiljević* Appeal Judgment, *supra* n 84, para 98; *Kvočka et al.* Appeal Judgment, *supra* n 65, para 82; *Krnojelac* Appeal Judgment, *supra* n 105, para 32; *Ntakirutimana and Ntakirutimana* Appeal Judgment, *supra* n 2, para 464; STL Interlocutory Decision on the Applicable Law, *supra* n 2, para 238; *Duch* Trial Judgment, *supra* n 86, para 507; *Sesay, Kallon and Gbao* Appeal Judgment, *supra* n 229, para 474.

²⁵³ *Krnojelac* Appeal Judgment, *supra* n 105, para 84.

²⁵⁴ *Ibid.*, para 109. (*emphasis added*)

²⁵⁵ *Ibid.*, paras 89, 111.

²⁵⁶ *Kvočka et al.* Trial Judgment, *supra* n 87, paras 285-286. (*emphasis added*)

²⁵⁷ *Kvočka et al.* Appeal Judgment, *supra* n 65, para 110. (*emphasis added*)

expressed also by others in academia,²⁵⁸ that the *mens rea* element of the ‘systemic’ variant of JCE liability is the same as that of JCE I: the participants in the common purpose must share a *dolus directus* in the first degree to commit the enterprise’s crimes. It should also be noted that, just like JCE I liability, in cases where the accused is charged with a special/ulterior intent crime, such as persecution or genocide, JCE II responsibility requires that he must also possess the *dolus specialis* for the crime in question.²⁵⁹

It is not for nothing that the international tribunals have consistently affirmed that the “second modality of JCE... essentially amounts to a different articulation of the first”.²⁶⁰ If the first two variants of joint criminal enterprise have the same subjective element, however, why did the *Tadić* Appeals Chamber find that it is “the *mens rea* element [that] differs according to the category of common design under consideration.”?²⁶¹ Part of the answer to this question is to be found in the following explanation provided by the judges:

It is important to note that, in these [JCE II] cases, the requisite intent could also be inferred from the position of authority held by the camp personnel. Indeed, it was scarcely necessary to prove intent where the individual’s high rank or authority would have, in and of itself, indicated an awareness of the common design and an intent to participate therein.²⁶²

As noted above, in JCE I cases, intent could be inferred from the totality of circumstances and when this is done a high standard has to be met: such an inference of shared intent must be the “only reasonable inference available on the evidence”.²⁶³ The defendant is to benefit from any doubt on this matter. In JCE II cases, however, this inference could be almost automatic once it is established that the accused held a position of authority within the system of ill-treatment. Haan is, therefore, right to conclude that:

²⁵⁸ Olásolo, for instance, commented that “there is no difference between the basic and the systemic forms of joint criminal enterprise in relation to the requirement that the defendant must have the intent (*dolus directus* in the first degree) to commit the crimes that are the ultimate goal (or the means to achieve such goal) of the common criminal plan, design or purpose. In the case of a systemic form of joint criminal enterprise, where the common purpose is implemented through a system of ill treatment, this requirement is often encapsulated in the expression ‘intent to further the system of ill-treatment’.” Olásolo, *supra* n 93, at 171; See also e.g. A. Cassese, *International Criminal Law* (2nd edn, Oxford: Oxford UP, 2008), at 196; E. Van Sliedregt, ‘Joint Criminal Enterprise as a Pathway to Convicting Individuals for Genocide’, *5 Journal of International Criminal Justice* (2007), at 186; A. Cassese (ed), *The Oxford Companion to International Criminal Justice* (Oxford: Oxford UP, 2009), at 395; H. Olásolo, ‘Joint Criminal Enterprise and Its Extended Form: A Theory of Co-Perpetration Giving Rise To Principal Liability, a Notion of Accessorial Liability, or a Form of Partnership In Crime?’, *20 Criminal Law Forum* (2009), at 278-279; J. Stewart, ‘The End of ‘Modes of Liability’ for International Crimes’, *25 Leiden Journal of International Law* (2012), at 172.

²⁵⁹ *Kvočka et al.* Appeal Judgment, *supra* n 65, para 110; *Krnojelac* Appeal Judgment, *supra* n 105, para 111.

²⁶⁰ STL Interlocutory Decision on the Applicable Law, *supra* n 2, para 238. See *supra* note 251.

²⁶¹ *Tadić* Appeal Judgment, *supra* n 1, para 228. This finding has also been consistently repeated in the case law of the ICTY/R. See e.g. *Vasiljević* Appeal Judgment, *supra* n 84, para 101; *Stakić* Appeal Judgment, *supra* n 86, para 65; *Brđanin* Appeal Judgment, *supra* n 84, para 365; *Simba* Appeal Judgment, *supra* n 91, para 77.

²⁶² *Tadić* Appeal Judgment, *supra* n 1, para 203.

²⁶³ *Krstić* Appeal Judgment, *supra* n 243, para 41; *Kvočka et al.* Appeal Judgment, *supra* n 65, para 237.

on first view, the subjective requirement [of JCE II] seems to be identical to that of the basic category of JCE. But there is one main difference between the two variants of JCE concerning the inference of the intent from the circumstances of the case... [I]n the case of the second category of JCE, the accused’s intent does not need to be established on a case by case basis but may be automatically inferred: The systemic character of the enterprise seems to justify a general assumption that a person who met the objective requirements of the JCE, i.e. who contributed significantly to the establishment or maintenance of the prison camp, also acted with knowledge of the criminal character of the institution and also *intended all crimes* that have been committed within the institution during the time he worked there.²⁶⁴

Thus, one major point of difference between the subjective requirements of the ‘basic’ and the ‘systemic’ category of JCE liability is an evidentiary one: the rules governing the inference of intent in the latter variant are much less strict than in the former.

There is, however, yet another aspect in which the *mens rea* of JCE II differs from that of the ‘basic’ category of joint criminal enterprise. It was already explained that JCE I liability requires that the intent of the participants in the enterprise is ‘shared’, meaning that they agree between each other to commit the desired crimes, rather than independently formulate such an identical intent.²⁶⁵ There is, thus, an element of reciprocity in their intent in that they mean to assist one another in the commission of the crime. This feature is practically absent in the JCE II cases, where the participants need not be shown to have formulated an agreement between themselves to commit a crime: rather, they must only be shown to have intended the crimes of the system of repression they worked at.²⁶⁶ Thus, while JCE I participants share between each other a common criminal intent, the JCE II participant is best described as sharing the purpose of the system of ill-treatment. This difference might appear rather technical but it was stressed by the Appeals Chamber in the *Krnojelac* case where the Prosecution had charged the accused – a camp commander – with JCE liability by claiming that he entered into a common purpose with the guards to commit each of the indicted crimes, instead of grouping the crimes together as the ultimate goal of the system of repression and charging the accused for sharing that goal and contributing to it. The judges held:

The Appeals Chamber notes that the Trial Chamber clearly followed the approach taken in the Indictment since, for each aspect of the common purpose pleaded by the Prosecution, it sought to determine whether Krnojelac shared the intent of the principal offenders. The Appeals Chamber finds that such an approach corresponds more closely to the first category of joint criminal enterprise than to the second. However, given that the Prosecution did not provide a more suitable definition of common purpose when referring to the systemic form of joint criminal enterprise, this approach does not amount to an error of law.²⁶⁷

²⁶⁴ Haan, *supra* n 96, at 189. (*emphasis added*) See also Olásolo, *supra* n 93, at 173.

²⁶⁵ See *supra* text accompanying notes 244-247.

²⁶⁶ See *supra* text accompanying notes 251-259.

²⁶⁷ *Krnojelac* Appeal Judgment, *supra* n 105, para 94.

The judges concluded that the better approach is to define the crimes committed in the system and examine whether the accused “knew of the system and agreed to it”,²⁶⁸ rather than break down these crimes and ask if he entered into an agreement with the guards to commit each of them. In this respect, it could be concluded that while both JCE I and JCE II require that the defendant specifically intends the crimes that define the common purpose, it is the content of the ‘shared’ element that has a different nuance in these two types of joint criminal enterprise.

3.4.2.3. *The mental element of the ‘extended’ joint criminal enterprise*

Hardly any academic discussion on the ‘extended’ type of JCE goes without stating that this is the theory’s most controversial variant. In part, this sustained criticism is due to the normative framework of JCE III liability which, for reasons discussed in the next chapter of this book, is often considered to be at odds with certain fundamental principles of criminal law. As a point of departure, however, the very definitional elements of the ‘extended’ JCE have proven to be confusing and have caused much disagreement amongst scholars and practitioners in the field.

When the *Tadić* Appeals Chamber first elaborated the *mens rea* of the ‘extended’ JCE, it held that:

With regard to the third category of cases, it is appropriate to apply the notion of “common purpose” only where the following requirements concerning the *mens rea* are fulfilled: (i) the intention to take part in a joint criminal enterprise and to further – individually and jointly – the criminal purposes of that enterprise; and (ii) the foreseeability of the possible commission by other members of the group of offences that do not constitute the object of the common criminal purpose. Hence, the participants must have had in mind the intent, for instance, to ill-treat prisoners of war... and one or some members of the group must have actually killed them.²⁶⁹

Further down the judgement the judges reiterated this point stating that JCE III responsibility requires:

the *intention* to participate in and further the criminal activity or the criminal purpose of a group and to contribute to the joint criminal enterprise or in any event to the commission of a crime by the group. In addition, responsibility for a crime other than the one agreed upon in the common plan arises only if, under the circumstances of the case, (i) it was *foreseeable* that such a crime might be perpetrated by one or other members of the group and (ii) the accused *willingly took that risk*.²⁷⁰

²⁶⁸ *Ibid.*, para 97.

²⁶⁹ *Tadić* Appeal Judgment, *supra* n 1, para 220.

²⁷⁰ *Ibid.*, para 228.

The first thing that becomes clear from this finding of law is that JCE III liability is premised on the existence of a ‘basic’ (or a ‘systemic’) form of joint criminal enterprise.²⁷¹ After all, the crimes dealt with under the JCE III rubric are called ‘extended’ precisely because they are an outgrowth of an already agreed upon particular set of crimes: *i.e.* ‘core’ crimes. In accordance with the Appeals Chamber’s reasoning, in order to be found guilty of the incidental crimes the defendant must first be shown to have intended the enterprise’s core crimes.²⁷² Thus, it can be concluded that the requirement of ‘shared intent’, inherent to JCE I and JCE II responsibility, also comes into play in JCE III cases.²⁷³ As Cassese pointed out, these are not cases where the accused is tried for participating in a lawful enterprise that incidentally led to the commission of a crime he could have foreseen: on the contrary, these are cases where he shared a common purpose to commit crimes A and B, but in the course of executing this plan one or more of his confederates additionally committed crime C.²⁷⁴ To illustrate this with an example, in the case of the *Prosecutor v Karemera and Ngirumpatse*, the ICTR Trial Chamber III held that the two defendants participated in a joint criminal enterprise which was aimed at the destruction of the Tutsi population in Rwanda. The bench found that both of them shared the genocidal intent of the common purpose, thus concluding that they are responsible under the ‘basic’ type of joint criminal enterprise for the crime of genocide based on killing.²⁷⁵ The evidence, however, also revealed that in the execution of the genocidal JCE the crimes of sexual assault and rape were committed against Tutsi women. The judges reasoned that these additional crimes were in fact a natural and foreseeable consequence of the ‘basic’ genocidal JCE, and that Ngirumpatse and Karemera

²⁷¹ Cassese, *supra* n 125, at 170; Olásolo, *supra* n 258, at 279; Boas *et al.*, *supra* n 63, at 68-70.

²⁷² *Ntakirutimana and Ntakirutimana* Appeal Judgment, *supra* n 2, para 467; *Vasiljević* Appeal Judgment, *supra* n 84, para 101; *Brđanin* Appeal Judgment, *supra* n 84, para 411; *Stanišić and Simatović* Appeal Judgment, *supra* n 84, para 77; *Karemera and Ngirumpatse* Trial Judgment, *supra* n 86, paras 1462-1464; STL Interlocutory Decision on the Applicable Law, *supra* n 2, para 239. The ICTY *Brđanin* Appeals Chamber stressed this point by giving the following example: For example, an accused who enters into a joint criminal enterprise to commit the crime of forcible transfer shares the intent of the direct perpetrators to commit that crime. However, if the prosecution can establish that the direct perpetrator in fact committed a different crime, and that the accused was aware that the different crime was a natural and foreseeable consequence of the agreement to forcibly transfer, then the accused can be convicted of that different offence. *The Prosecutor v. Brđanin* (IT-99-36-A), Decision on Interlocutory Appeal, Appeals Chamber, 19 March 2004, para 5. This very point was also stressed by Judge Fisher in her separate opinion to the SCSL *Sesay et al.* Appeal Judgement where she stated that: “before arriving at the question of whether the accused may incur JCE liability for reasonably foreseeable crimes committed *beyond* the scope of the common criminal purpose, a trier of fact must be satisfied beyond reasonable doubt that the accused shared the intent to commit the crimes *within* the common criminal purpose.” See *Sesay, Kallon and Gbao* Appeal Judgment, *supra* n 229, Partially Dissenting and Concurring Opinion of Justice Shireen Avis Fisher, para 8.

²⁷³ Confirming this, the ICTY *Gotovina* Trial Chamber held that “[i]n addition to the intent of the first form, the third form requires proof that the accused person took the risk that another statutory crime, not forming part of the common criminal objective, but nevertheless being a natural and foreseeable consequence of the JCE, would be committed.” *Gotovina et al.* Trial Judgment Vol. 2, *supra* n 136, para 1953. (*emphasis added*) For the same elaboration on the application of JCE III liability to cases of ‘systemic’ JCE, see *Kvočka et al.* Appeal Judgment, *supra* n 65, para 86. See also Cassese, *supra* n 83, at 299.

²⁷⁴ Cassese, *supra* n 125, at 170.

²⁷⁵ *Karemera and Ngirumpatse* Trial Judgment, *supra* n 86, paras 1451-1458.

were beyond reasonable doubt “aware that widespread rapes and sexual assaults on Tutsi women were at least a possible consequence of the JCE to pursue the destruction of the Tutsi population in Rwanda.”²⁷⁶ Thus, only after the accused were found to have pursued the basic JCE to commit genocide, were they also convicted, under the ‘extended’ JCE theory, of the incidental crimes of rape and sexual assault. Put simply, JCE III liability can be best seen as an add-on to the ‘basic’ and ‘systemic’ variants of the doctrine. Affirming this, in the more recent ICTR *Ngirabatware* case, the ICTR Appeals Chamber held that the accused’s acquittal on the charge of participating in a ‘basic’ JCE to commit extermination meant that he also had to be acquitted of the crime of rape, which he was charged under the ‘extended’ JCE category as a natural and foreseeable consequence of the original plan. The judges explained that:

Ngirabatware’s contribution to the common purpose to exterminate the Tutsi civilian population was essential for establishing his responsibility for crimes committed beyond the common purpose, but which are nevertheless a natural and foreseeable consequence thereof. Since the Prosecution failed to prove Ngirabatware’s contribution to the common purpose of exterminating the Tutsi civilian population pleaded under Count 5 of the Indictment, Ngirabatware’s conviction for rape entered via the extended form of joint criminal enterprise under Count 6 of the Indictment cannot be sustained.²⁷⁷

i) Determining the standard of foreseeability

Having said this, the question which arises is: what is the precise *mens rea* required by the ‘extended’ variant of joint criminal enterprise in order to find the accused guilty of a crime committed outside the common purpose? The *Tadić* Appeals Chamber established a two-fold requirement, namely that “(i) it was *foreseeable* that such a crime might be perpetrated by one or other members of the group and (ii) the accused *willingly took that risk*.”²⁷⁸ The bench held that this *mens rea* standard is known as *dolus eventualis* or advertent recklessness²⁷⁹ and then also elaborated, in a language that became standard in subsequent JCE jurisprudence, that the extra crime has to be “a natural and foreseeable consequence of the effecting of th[e] common purpose.”²⁸⁰ What this formulation failed to specify, however, is whether this crime had to be foreseeable to the accused in particular (*i.e.* subjective foreseeability), or whether it must have been foreseeable to any reasonable person (*i.e.*

objective foreseeability).²⁸¹ In the *Prosecutor v Kvočka*, the Appeals Chamber answered this question as follows:

the Appeals Chamber wishes to affirm that an accused may be responsible for crimes committed beyond the common purpose of the systemic joint criminal enterprise, if they were a natural and foreseeable consequence thereof. However, it is to be emphasized that this question must be assessed in relation to *the knowledge of a particular accused*. [...] *What is natural and foreseeable to one person participating in a systemic joint criminal enterprise, might not be natural and foreseeable to another, depending on the information available to them.* [...] A participant may be responsible for such crimes only if the Prosecution proves that *the accused had sufficient knowledge such that the additional crimes were a natural and foreseeable consequence to him*.²⁸²

This finding of the *Kvočka* Appeals Chamber has been occasionally repeated in the Tribunal’s subsequent trial jurisprudence.²⁸³ It treats the first requirement of JCE III responsibility – that the crime was a “natural and foreseeable consequence” of the common purpose – as creating a subjective foreseeability test. If that is indeed the case, then what is the meaning of the second *mens rea* requirement of the ‘extended’ category of JCE: *i.e.* that “the accused willingly took th[e] risk”? In its post-*Tadić* case law, the Appeals Chamber explicitly defined this element as meaning that “the accused, with the awareness that such a crime was a *possible consequence* of the implementation of that enterprise, decided to participate in that enterprise.”²⁸⁴ When the two JCE III requirements are read together, some confusion may arise. Both of them discuss a subjective standard of foreseeability but each one sets a different level of risk-assessment: one requires that the accused was aware that the unconcerted crime was a *natural and foreseeable* consequence of the common design and the other requires that the accused was aware that this crime was a *possible* consequence. Obviously, it makes little sense to say that the *mens rea* of JCE III liability requires that the accused once foresaw a very high risk of the commission of the extra crime (*i.e.* he recognized it as a *natural* consequence of the common plan)

281 On the one hand the Appeals Chamber held that what JCE III liability requires is “a state of mind in which a person, although he did not intend to bring about a certain result, was aware that the actions of the group were most likely to lead to that result but nevertheless willingly took that risk” and also that “everyone in the group must have been able to predict this result” *Ibid.*, para 220. In this paragraph, the judges seemed to establish an objective foreseeability standard. On the other hand, however, when applying JCE III liability to the facts of the case they also held that “[t]he Appellant was aware that the actions of the group of which he was a member were likely to lead to such killings, but he nevertheless willingly took that risk.” *Ibid.*, para 232. Boas has, therefore, argued that the *Tadić* Appeal Judgment established both an objective and a subjective foreseeability requirement. Boas *et al.*, *supra* n 63, at 73.

282 *Kvočka et al.* Appeal Judgment, *supra* n 65, para 86. (*emphasis added*) See also *Karemera and Ngirumpatse* Appeal Judgment, *supra* n 84, para 627.

283 See *e.g.* Đorđević Trial Judgment *Vol.1*, *supra* n 117, para 1865; *Haradinaj et al.* Trial Judgment, *supra* n 86, para 621; *Tolimir* Trial Judgment, *supra* n 86, para 897.

284 *Brđanin* Appeal Judgment, *supra* n 84, para 411. (*emphasis added*) See also *Vasiljević* Appeal Judgment, *supra* n 84, para 101; *Ntakirutimana and Ntakirutimana* Appeal Judgment, *supra* n 2, para 467; Đorđević Appeal Judgment, *supra* n 91, para 906; *Popović et al.* Trial Judgment, *supra* n 134, para 1030; *Stanišić and Župljanin* Trial Judgment *Vol.1*, *supra* n 91, para 106.

276 *Ibid.*, paras 1477, 1483.

277 *Ngirabatware* Appeal Judgment, *supra* n 109, para 251.

278 *Tadić* Appeal Judgment, *supra* n 1, para 228.

279 *Ibid.*, para 220.

280 *Ibid.*, para 204. See also *Vasiljević* Appeal Judgment, *supra* n 84, para 99; *Ntakirutimana and Ntakirutimana* Appeal Judgment, *supra* n 2, para 465; *Martić* Appeal Judgment, *supra* n 168, para 171; *Haradinaj et al.* Trial Judgment, *supra* n 86, para 621; *Stanišić and Simatović* Trial Judgment *Vol.2*, *supra* n 86, para 1257; *Karemera and Ngirumpatse* Appeal Judgment, *supra* n 84, para 627; *Tolimir* Appeal Judgment, *supra* n 194, para 514.

and then additionally mention a seemingly lower standard of such risk-assessment (*i.e.* that the accused recognizes the incidental crime as a *possible* consequence of the plan). This discrepancy could be resolved if one takes the view that “a natural and foreseeable consequence” and “a possible consequence” are in fact synonymous: *viz.* they establish the same standard for how high must be the foreseen risk of the commission of the extra crime. In this case, all that the second JCE III *mens rea* requirement does is refer to the level of risk-assessment already established in the first one and then simply require proof to the effect that the accused voluntarily continued his participation in the common plan.²⁸⁵ Put simply, pursuant to this interpretation, the ‘extended’ type of JCE is applicable when i) the accused knew that the additional crime was a natural and foreseeable/possible consequence of the original criminal design and ii) nevertheless took that risk by joining the plan and continuing his participation in it. While this is surely a reasonable interpretation, it would appear that a different one has in fact come to dominate the ICTY case law.

In the *Stakić* case, the ICTY Appeals Chamber constructed the elements of JCE III in a manner that differed from its findings in *Kvočka*, yet is more consistent with the language that was originally used in the *Tadić* Appeals Judgment:

for the application of third category joint criminal enterprise liability, it is necessary that: (a) crimes outside the Common Purpose have occurred; (b) these crimes were a natural and foreseeable consequence of effecting the Common Purpose and (c) the participant in the joint criminal enterprise was aware that the crimes were a possible consequence of the execution of the Common Purpose, and in that awareness, he nevertheless acted in furtherance of the Common Purpose.²⁸⁶

This formulation clearly separates the requirement that the extra crime must be “a natural and foreseeable consequence” of the common plan from the subsequent inquiry into the accused’s state of mind in relation to it. Whether the unconcerted offence was a “natural and foreseeable consequence” appears to be an objective inquiry that has to be made independently from what the accused believed at the material time. Importantly, the latter continues to be a core JCE III legal requirement, but it is considered as a separate matter. Thus, as Boas has also pointed out, this means that both an objective and a subjective standard of foreseeability exist for incurring responsibility under the ‘extended’ JCE.²⁸⁷ A significant body of post-*Tadić* jurisprudence has explicitly defined JCE III’s constituent elements in this very manner. Thus, for instance, in the *Stanišić & Simatović* case, the ICTY Trial Chamber explained that:

The third form of JCE is characterized by a common criminal design to pursue a course of conduct where one or more of the co-perpetrators commit an act which, while outside the common design, is a natural and foreseeable consequence of the implementation. There are two additional requirements for this form, one objective, the other subjective. The objective element does not depend upon the accused’s state of mind. This is the requirement that the resulting crime was a natural and foreseeable consequence of the JCE’s execution. It is to be distinguished from the subjective state of mind, namely that the accused was aware that the resulting crime was a possible consequence of the execution of the JCE, and participated with that awareness.²⁸⁸

This approach was most recently affirmed by the ICTY Appeals Chamber in the *Tolimir* case, when it held that:

The Appeals Chamber is not persuaded that the Trial Chamber erred in its application of [the JCE III *mens rea*] test. The Trial Chamber first determined that persecutory acts and opportunistic killings were natural and foreseeable consequences of the two JCEs. It then specifically analysed whether Tolimir knew that these crimes might be perpetrated by a member of the JCEs and willingly accepted the risk that such crimes would be committed by assessing his knowledge of the events on the ground and continued participation in the JCEs. Such an approach is consistent with the accepted JCE III *mens rea* test.²⁸⁹

A number of things become clear from this formulation of the elements of JCE III. For a start, the requirement that the additional crime has to be “a natural and foreseeable consequence” of the common purpose is confirmed as an objective element, independent of the accused’s *mens rea*. A standard of objective foreseeability is, thus, introduced which is then supplemented by a subjective one, requiring that the accused himself was aware of the possibility that the extra crime might be committed by one of his confederates. This interpretation is not in dissonance with the original *Tadić* Appeal Judgment on JCE III liability, which in Boas’ opinion contains language that “would suggest that both types of foreseeability are required.”²⁹⁰ In this respect it is notable that Cassese also took this view when explaining the elements of JCE III liability:

For criminal liability under the third category of JCE to arise, it is necessary for the unconcerted crime to be *abstractly in line* with the agreed-upon criminal offence; in addition, it is also essential that the ‘secondary offender’ had a chance of predicting the commission of the unconcerted crime

²⁸⁵ In accordance with this interpretation, Boas has argued that the ‘willingly took that risk’ requirement “would seem to add nothing in practical terms to what the prosecution must prove to secure a conviction under the third category.” Boas *et al.*, *supra* n 63, at 73.

²⁸⁶ *Stakić* Appeal Judgment, *supra* n 86, para 87.

²⁸⁷ Boas *et al.*, *supra* n 63, at 80-81. See also *e.g.* S. Powles, ‘Joint Criminal Enterprise: Criminal Liability by Prosecutorial Ingenuity and Judicial Creativity?’, 2 *Journal of International Criminal Justice* (2004), at 609.

²⁸⁸ *Stanišić and Simatović* Trial Judgment Vol. 2, *supra* n 86, para 1257. For ICTY jurisprudence confirming this interpretation, see *e.g.* *Brđanin and Talić* Decision on Amended Indictment, *supra* n 95, paras 28-30; *Gotovina et al.* Trial Judgment Vol. 2, *supra* n 136, para 1952; *The Prosecutor v. Krajišnik* (IT-00-39-T), Judgment, Trial Chamber, 27 September 2006, para 882; *The Prosecutor v. Haradinaj et al.* (IT-04-84-T), Judgment, Trial Chamber, 8 April 2008, para 137; *Tolimir* Appeal Judgment, *supra* n 194, para 514. See also, STL Interlocutory Decision on the Applicable Law, *supra* n 2, para 241.

²⁸⁹ *Tolimir* Appeal Judgment, *supra* n 194, para 514.

²⁹⁰ Boas *et al.*, *supra* n 63, at 73. See also K. Ambos, ‘Joint Criminal Enterprise and Command Responsibility’, 5 *Journal of International Criminal Justice* (2007), at 175; Jain, *supra* n 112, at 61-62.

by the ‘primary offender’. For instance, if a paramilitary unit occupies a village with the purpose of detaining all the women and enslaving them, a rape perpetrated by one of them would be in line with enslavement, since treating other human beings as objects may easily lead to raping them. It would, however, also be necessary for the ‘secondary offender’ to have specifically envisaged the possibility of rape (a circumstance that should be proved or at least inferred from the facts of the case), or at least to have been in position to predict the rape.²⁹¹

It is important to note that this interpretation of the JCE III theoretical framework does not necessarily contradict the one described in the previous paragraph. In particular, the test of subjective foreseeability is still dominant when establishing JCE III liability, seeing that there could be no conviction without proving that the accused himself was aware of the risk that the deviatory crime may occur. What is different in this construction is that it also adds a standard of objective foreseeability which in essence requires that the additional crime was “abstractly in line”²⁹² with the core crimes of the enterprise. This narrows the scope of the doctrine’s third variant by limiting its applicability to “those crimes that, while they deviate from the common plan, do not deviate too far from it.”²⁹³ Therefore, pursuant to this formulation, a participant in a JCE to commit crime A would not be held responsible for the incidental crime B if the latter radically departed from the original plan. This will be the case even if it can be proved that the said JCE participant personally knew there was a risk that crime B might occur. For example, think of a group of soldiers who share the intent to enter a certain town’s city hall and take as hostages its civilian leadership (a war crime under Article 2(h) and Article 3 ICTY Statute). In the process of executing this plan, one of the soldiers (soldier X), unknowingly to the others, derogates from the original agreement and plants explosives in the nearby mosque, which he thereafter detonates (destruction of religious property as a war crime under Article 3(d) ICTY Statute). In the circumstances, even if another soldier from the said group (soldier Y) foresaw the commission of the additional crime as a possible consequence – because, for instance, he had prior knowledge that soldier X had previously engaged in such conduct and saw him take explosives when preparing for the hostage mission – he will likely not be found guilty under the ‘extended’ variant of JCE. This is so because, following the above construction of JCE III liability, the element of objective foreseeability would not be satisfied since the destruction of religious property in this case cannot be regarded as a natural and foreseeable consequence of the original plan.²⁹⁴

291 A. Cassese, *International Criminal Law* (2nd edn, Oxford: Oxford UP, 2008), at 200. (*emphasis added*) Note, however, that Cassese also stated that for policy considerations the standard of foreseeability required by JCE III liability at the international level should be an objective one: *i.e.* that “a man of reasonable prudence would have forecast... [the additional crime], under the circumstances prevailing at the time. *Ibid.*, at 200-201.

292 *Ibid.* See also the STL Appeals Chamber confirming that the additional crimes must be “generally in line with the agreed upon criminal offence.” STL Interlocutory Decision on the Applicable Law, *supra* n 2, para 241.

293 Boas *et al.*, *supra* n 63, at 81.

294 This does not mean that soldier Y cannot be held liable under another mode of liability for the destruction of the said mosque/church. Depending on the facts of the case, and in particular his own actions, he may be held liable for aiding and abetting the additional crime.

ii) Determining the requisite degree of foresight

A question that was alluded to several times in the above analysis and has proved to be a major point of uncertainty in the case law on the JCE III theoretical framework concerns the precise *degree* of foresight required from the accused to incur this form of liability. The *Tadić* Appeals Chamber offered different formulations, once stating that the accused must be “aware that the actions of the group *were most likely to lead to* [the deviatory crime]”,²⁹⁵ then holding that it has to be “foreseeable that such a crime *might be perpetrated*”²⁹⁶ in the execution of the common design. Indeed, as recently as 2009, the ICTY *Milutinović* Trial Chamber confirmed that the jurisprudence on this point continued to be ambiguous:

Trial and Appeal Judgements have variously held that the accused must be aware that such a crime or underlying offence (a) was a “natural and foreseeable consequence” of the common purpose, (b) was a probable consequence of the joint criminal enterprise, (c) would “most likely” occur, or (d) was merely a possible consequence, rather than substantially likely to occur. The Chamber will adopt the formulation of the Appeals Chamber that it has to be *reasonably foreseeable* on the basis of the information available to the accused that the crime or underlying offence would be committed.²⁹⁷

Thus, while it is certainly true that JCE III liability has an element of subjective foreseeability which requires that the accused is aware of the risk of the additional crime being committed, it is less clear what the level of this risk has to be. The ‘extended’ form of JCE is definitely not a mode of strict liability which can be used to convict an accused for every incidental crime that results from the execution of the common purpose. So how likely must the occurrence of the additional crime have been to the particular accused when he decided to participate in the JCE at the material time? This question was more recently settled by the ICTY Appeals Chamber in a decision delivered in the *Karadžić* case.²⁹⁸ In an interlocutory appeal from a ruling of the Trial Chamber, the Prosecution submitted that the judges erred in law when they held that the *mens rea* element of JCE III responsibility requires that the additional crimes must have been “reasonably foreseeable consequences” of the common plan.²⁹⁹ The trial judges equated this to a “foresight by the accused that the deviatory crimes *would probably* be committed”.³⁰⁰ The Prosecution argued, however, that rather than this ‘probability’ standard the ICTY case law in fact embraced a lower ‘possibility’ standard as the JCE III requisite degree of foresight.

295 *Tadić* Appeal Judgment, *supra* n 1, para 220.

296 *Ibid.*, para 228.

297 *Milutinović et al.* Trial Judgment *Vol. I*, *supra* n 87, para 111. (*emphasis added*)

298 *The Prosecutor v. Karadžić* (IT-95-5/18-AR72.4), Decision on Prosecution’s Motion Appealing Trial Chamber’s Decision on JCE III Foreseeability, Appeals Chamber, 25 June 2009.

299 *Ibid.*, paras 4, 7.

300 *Ibid.*, paras 4.

The Appeals Chamber started its analysis by conceding that:

the *Tadić* Appeal Judgement deploys a range of diverse formulations in setting out the *mens rea* element of JCE III. These include several formulations that tend more towards a possibility than a probability standard [...] The variable formulations present in the *Tadić* Appeal Judgement at minimum suggest that it did not definitively set a probability standard as the *mens rea* requirement for JCE III.³⁰¹

and also that:

the *Tadić* Appeal Judgement does not settle the issue of what likelihood of deviatory crimes an actor must be aware of to allow conviction under JCE III³⁰²

Having said this, however, the judges stated that, despite certain lapses, “a significant number of Appeals Judgements have adopted formulations suggestive of a possibility standard rather than a probability one.”³⁰³ The meaning of the “possibility” standard appears to be captured in the phrase “foreseeable that such a crime *might* be committed”. In explaining where this level of risk-assessment stands in a continuum of foresight, the judges held:

It is, however, worth noting that the term “possibility standard” is not satisfied by implausibly remote scenarios. Plotted on a spectrum of likelihood, the JCE III *mens rea* standard does not require an understanding that a deviatory crime would *probably* be committed; it does, however, require that the possibility a crime could be committed is sufficiently substantial as to be foreseeable to an accused.³⁰⁴

This paragraph from the *Karadžić* Appeals Chamber Decision on JCE III liability should put to rest the debates on the degree of foresight required by the *mens rea* of the doctrine’s third category.³⁰⁵ This mode of liability does not require that the additional crimes were foreseen by the accused as an inevitable/virtually certain consequence of the common design.³⁰⁶

³⁰¹ *Ibid.*, para 14.

³⁰² *Ibid.*, para 15.

³⁰³ *Ibid.* The Chamber did acknowledge that in the *Krstić* Appeals Judgement, a language was used that could be again indicative both of the possibility and the probability standard. In that judgement, the Chamber held that JCE III *mens rea* requires “probability that other crimes *may* result”. *Ibid.*, para 16.

³⁰⁴ *Ibid.*, para 18.

³⁰⁵ For an excellent overview of the Tribunal’s inconsistent jurisprudence on this issue and the academic take on it, see Boas *et al.*, *supra* n 63, at 73-82.

³⁰⁶ This appears to be the standard applied by the ICTY Trial Chamber in the *Krstić* case, where the judges held that “given the circumstances at the time the plan was formed, General Krstić must have been aware that an outbreak of these crimes *would be inevitable* given the lack of shelter, the density of the crowds, the vulnerable condition of the refugees, the presence of many regular and irregular military and paramilitary units in the area and the sheer lack of sufficient numbers of UN soldiers to provide protection.” *Krstić* Trial Judgment, *supra* n 140, para 616.

Neither is it necessary to prove that he was aware that these crimes were a “probable” consequence – *i.e.* there was a high likelihood that they would occur – of the JCE. It suffices to show that he had the knowledge that these crimes were a “possible” consequence of the enterprise: a degree of foresight which is lower than the above two and yet, according to the *Karadžić* appeal judges, requires more than awareness of a *de minimis* risk. This is how one could best understand the Appeals Chamber’s finding that the risk has to be “sufficiently substantial”. It should be noted that the ICTY Appeals Chamber’s upheld this finding in the subsequent Šainović *et al.* Appeal Judgment of 2014, where it held that:

[T]he Trial Chamber erred in law in concluding that for JCE III liability to arise, it must be foreseeable to the accused that the crime “would be committed”. The Appeals Chamber recalls that [...] JCE III liability arises even if the JCE member knows that the commission of the crime is only a “possible consequence” of the execution of the common purpose. It is necessary “that the possibility a crime could be committed is sufficiently substantial as to be foreseeable to the accused.”³⁰⁷

To summarize the above analysis on the elements of the ‘extended’ form of JCE, there are three requirements which have to be satisfied in order to find an accused guilty under this mode of liability. Firstly, it must be established that he specifically intended the core/original crimes of the common purpose before proceeding to analyse his guilt for the deviatory crimes. This means that the accused must first be shown to satisfy the *mens rea* element of the ‘basic’ or ‘systemic’ JCE to which the said incidental crimes are an outgrowth. Secondly, it has to be established that these unintended crimes were in fact a natural and foreseeable consequence of the original JCE. This assessment is an objective one in that it is independent from the state of mind of the accused: *i.e.* it requires that the additional crime would be natural and foreseeable to a person of reasonable prudence. Thirdly, JCE III liability requires that the accused himself knew that the excess crime was a *possible* consequence of the common purpose (*i.e.* that there was a “sufficiently substantial” risk that it *may* be committed) and, in spite of this knowledge, continued to participate in the common purpose.

3.5. Joint criminal enterprise *vis-a-vis* the Nuremberg-era notions on joint liability

3.5.1. JCE and the notions of conspiracy and membership in a criminal organization*

Combined with the research conducted in Chapter 2, the above analysis on the JCE theoretical framework can help provide an answer to one critical question about

³⁰⁷ Šainović *et al.* Appeal Judgment, *supra* n 94, para 1557. See also Popović *et al.* Appeal Judgment, *supra* n 168, para 1432.

the origin and nature of the joint criminal enterprise doctrine: what is its relationship with the Nuremberg-era notions of conspiracy and membership in a criminal organization? As already noted in the first part of this chapter, during the drafting of the ICTY Statute, both of these concepts were deliberately excluded from Article 7 on account of their controversial nature. One of the most sustained lines of criticisms against the doctrine of JCE has thus been that it is akin to these two notions and, therefore, should be subjected to the same rejection under international criminal law.³⁰⁸

It was during the ICTY *Ojdanić* case that the parallels between JCE, on the hand, and conspiracy and membership in a criminal organization, on the other, were first brought up in a pronounced attempt to undermine the doctrine's credibility and basis in international criminal law. In particular, the Defence argued that JCE is "a euphemism for conspiracy",³⁰⁹ as well as that it constitutes a form of organizational guilt that "exposes General Ojdanić to liability for being a member of an organization, other members of which are alleged to have committed crimes".³¹⁰ Pointing at the fact that both conspiracy and criminal membership were repudiated from the ICTY Statute, the Defence submitted that the JCE theory has also been excluded by the drafters.³¹¹ The Appeals Chamber rejected these assertions by the Defence. To begin with, the judges nuanced JCE's different nature from conspiracy by holding:

Whilst conspiracy requires a showing that several individuals agreed to commit a certain crime or set of crimes, a joint criminal enterprise requires, in addition to such a showing, that the parties to that agreement took action in furtherance of that agreement. In other words, while mere agreement is sufficient in the case of conspiracy, the liability of a member of a joint criminal enterprise will depend on the commission of criminal acts in furtherance of that enterprise. Thus, even if it were conceded that conspiracy was excluded from the realm of the Tribunal's Statute, that would have no impact on the presence of joint criminal enterprise as a form of "commission" pursuant to Article 7(1) of the Statute.³¹²

* This section, with some changes in its text, was published in L. Yanev, 'A Janus-Faced Concept: Nuremberg's Law on Conspiracy vis-à-vis the Notion of Joint Criminal Enterprise', 26 *Criminal Law Forum* (2015): 419-56.

308 Ambos, for instance, has argued that "conceiving JCE as a form of collective responsibility modelled after the law on conspiracy and similar to the membership or organizational liability as applied in Nuremberg, its inclusion in [ICC law] will go against the will of the drafters of the Rome Statute". Ambos, *supra* n 108, at 173. In this venue of thought, Ohlin has also observed that "[t]he received wisdom among international lawyers is that conspiracy is a decidedly common law doctrine that finds insufficient international support to be considered part of international criminal law. Consequently, if JCE amounts to ersatz conspiracy, it will be rejected too." Ohlin, *supra* n 107, at 696.

309 *The Prosecutor v. Šainović and Ojdanić* (IT-99-37-PT), General Dragoljub Ojdanić's Preliminary Motion to Dismiss for Lack of Jurisdiction: Joint Criminal Enterprise, Trial Chamber, 29 November 2002, para 6.

310 *The Prosecutor v. Milutinović et al.* (IT-99-37-AR72), General Ojdanić's Appeal from Denial of Preliminary Motion to Dismiss for Lack of Jurisdiction: Joint Criminal Enterprise, Appeals Chamber, 28 February 2003, para 65.

311 *Ibid.*, para 20; *Milutinović et al.* Decision on Joint Criminal Enterprise, *supra* n 70, para 23.

312 *Milutinović et al.* Decision on Joint Criminal Enterprise, *supra* n 70, para 23.

Next to this, the bench also disagreed with the contention that JCE is identical to the notion of membership in a criminal organization, explaining that "[c]riminal liability pursuant to a joint criminal enterprise is not a 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."³¹³

The *Ojdanić* Appeals Chamber's reasoning on this point has been cited with approval in academia³¹⁴ and has also been affirmed in the subsequent case law of the ICTR, SCSL and STL.³¹⁵ Yet the matter was never put to rest, seeing that at present there remain many scholars who argue that JCE is akin to both conspiracy and organizational liability.³¹⁶ This contention even received support from within the UN *ad hoc* Tribunals when Judge Schomburg wrote in a separate opinion to the ICTY *Martić* Appeals Judgment that:

While the Appeals Chamber has in the past explicitly stated that "criminal liability pursuant to a joint criminal enterprise is not liability for mere membership or for conspiring to commit crimes," the constant expansion of the concept of JCE in the jurisprudence of the International Tribunal suggests the contrary.³¹⁷

Indeed, as recently as January 2014, the ICTY Appeals Chamber was seized with this specific issue in the Đorđević case, where the Defence had submitted in its appeal brief that, with one particular exception, the conspiracy concept was rejected in the IMT Judgment

313 *Ibid.*, para 26. (*emphasis added*) See also *Tolimir* Appeal Judgment, *supra* n 194, para 590; Đorđević Appeal Judgment, *supra* n 91, para 32; *Brđanin* Trial Judgment, *supra* n 87, para 263; *Simić et al.* Trial Judgment, *supra* n 117, para 158.

314 See, for instance, Cassese, *supra* n 125, at 163; Olásolo, *supra* n 93, at 34; C. Damgaard, *Individual Criminal Responsibility for Core International Crimes: Selected Pertinent Issues* (Berlin: Springer, 2008), at 188, 191-193; A. Sanders, 'New Frontiers in the ATS: Conspiracy and Joint Criminal Enterprise Liability after Sosa', 28 *Berkley Journal of International Law* (2010), at 631-632.

315 The STL Appeals Chamber confirmed that "the notions of conspiracy... and joint criminal enterprise are distinct: the former is a substantive crime, the latter is a mode of criminal responsibility." STL Interlocutory Decision on the Applicable Law, *supra* n 2, para 203. A nearly identical finding was made by the SCSL Appeals Chamber when it held that "conspiracy and JCE are legally distinct concepts. Most obviously, conspiracy is an inchoate offence whereas JCE is a mode of liability." *Sesay, Kallon and Gbao* Appeal Judgment, *supra* n 229, para 397. For ICTR jurisprudence on this matter, see *e.g.* *Mpambara* Trial Judgment, *supra* n 87, para 13; *Gatete* Appeal Judgment, *supra* n 84, para 263.

316 Danner and Martinez, for instance, have contended that "contrary to the Appeals Chamber's assertions, joint criminal enterprise is historically and conceptually related both to conspiracy and to the prosecution of criminal organizations." Danner and Martinez, *supra* n 139, at 110. See also Ambos, *supra* n 108, at 173; A. Chouliaras, 'Discourses on International Criminality' in A. Smeulers (ed), *Collective Violence and International Criminal Justice: An Interdisciplinary Approach* (Antwerp: Intersentia, 2010), at 84; N. Boister, 'The Application of Collective and Comprehensive Criminal Responsibility for Aggression at the Tokyo International Military Tribunal: The Measure of the Crime of Aggression?', 8 *Journal of International Criminal Justice* (2010), at 436-437; H. Van der Wilt, 'Joint Criminal Enterprise and Functional Perpetration', in H. Van der Wilt and A. Nollkaemper (eds), *System Criminality in International Law* (Cambridge: Cambridge UP, 2009), at 164; G. Fletcher and J. Ohlin, 'Reclaiming Fundamental Principles of Criminal Law in the Darfur Case', 3 *Journal of International Criminal Justice* (2005), at 544, 548-549.

317 *Martić* Appeal Judgment, *supra* n 168, Separate Opinion of Judge Schomburg on the Individual Criminal Responsibility of Milan Martić, para 5. Similarly, see *Popović et al.* Appeal Judgment, *supra* n 168, Separate and Dissenting Opinions of Judge Mandiaye Niang, para 31.

and, therefore, the ICTY/R should also cease to apply the JCE doctrine:

In other words, when rejecting conspiracy as applied to crimes against humanity and war crimes, the IMT rejected common plan liability as well. [...] Therefore, the IMT explicitly declined to rely on JCE or anything similar in order to convict accused of war crimes or crimes against humanity. It eschewed imposing such sweeping liability. [...] There is, therefore, nothing in the London Charter or IMT Judgement that supports JCE as applied by the Appeals Chamber. The most authoritative WWII tribunal declined to utilise JCE or anything similar.³¹⁸

Thus, while one camp in this debate has tenaciously rejected the drawing of parallels between JCE and conspiracy/criminal membership, the other has maintained that JCE does incorporate the rationale of these two Nuremberg-era notions and is, thereby, subject to the same criticism and rejection under international criminal law.

This divergence of opinions can be largely explained by the fact that, within the post-World War II legal framework, neither the notion of conspiracy, nor that of membership in a criminal organization had a consistent, single legal definition. As explored in detail in Chapter 2 of this book, their content was interpreted in various manners from the moment of their first formulation in Bernays' original proposal to the point of their application in the IMT Trial and the subsequent prosecutions.³¹⁹ Being such multifaceted notions, it could be quite difficult to compare them to the JCE doctrine and when the ICTY *Ojdanić* Appeals Chamber first did so, its analysis turned out to be somewhat cursory and incomplete. To be sure, the judges did not err when they emphasized that JCE is a mode of liability and that, as such, it differs from the concepts of criminal membership and conspiracy, both of which they regarded as substantive crimes. Indeed, in its Judgement, the Nuremberg Tribunal did define them strictly as crimes³²⁰ and this interpretation was then endorsed in the subsequent trials of lesser Nazi war criminals, held under Control Council Law No. 10.³²¹ This finding, however, leads us to the point where the controversy between the ICTY and JCE critics originates. Proponents of the claim that the JCE theory is merely a different label for conspiracy do not refer to conspiracy proper (*i.e.* the inchoate crime) when asserting this contention: rather, what they actually have in mind is the conspiracy-complicity notion that was first elaborated in Bernays' memorandum and was later endorsed in US criminal law under the name *Pinkerton* liability.³²² The essential question that the UN *ad hoc* Tribunals have, indeed, so far failed to address is: if the IMT Judgment applied

the conspiracy concept solely as a substantive (inchoate) crime, and thereby rejected Bernays' expansive use of conspiracy as a form of liability, what bearing does this have on the basis for applying JCE in modern international criminal proceedings? This is where the analysis of the *Ojdanić* Appeals Chamber comes short and where the ongoing controversy on this topic stems from. If a sign of equality could, indeed, be put between these two notions, then it would truly be logical to argue, as the Đorđević Defence most recently did, that the IMT's rejection of the sweeping concept known as Bernays'/*Pinkerton* conspiracy should be viewed as an *ipso facto* rejection of the modern-day JCE doctrine.³²³

In the author's opinion, the IMT's (implicit) refusal to apply the concept of conspiracy in the manner envisioned in Bernays' memorandum can have no bearing on the application of the JCE theory in modern international criminal proceedings since, contrary to what has often been argued in academia, Bernays'/*Pinkerton* conspiracy and JCE are two materially distinct notions. As already explained in Chapter 2, pursuant to the former concept, an individual who agreed with others to commit a crime could be held liable for the crime of conspiracy *and* for the product crimes of the agreement, irrespective of whether he participated in their execution or not.³²⁴ This feature of Bernays' conspiracy was distinguished and criticized already by his contemporaries³²⁵ and has, indeed, also been highlighted in the US *Pinkerton* doctrine. To cite Fichtelberg on this point:

[T]he dramatic legal consequences of conspiracy become highlighted even further in light of the *Pinkerton* rule, that asserts that an individual may be prosecuted for a crime that he or she played no role in carrying out, provided that it can be shown that the criminal act was part of the actual conspiracy... This means that an individual who is part of a conspiracy may be charged with all of the crimes that comprise the conspiratorial enterprise without actually proving that the accused had anything to do with the carrying out of the actual crime itself.³²⁶

Thus, under Bernays'/*Pinkerton* conspiracy concept, the sole act of intentionally agreeing to a criminal plan is the alpha and omega of what is required to find the conspirator guilty of "each act of every member thereof during its continuance and in furtherance of its purposes".³²⁷ This aspect marks the first crucial difference with the JCE doctrine, which *always* requires that the accused either directly participated in the commission of the

318 *The Prosecutor v. Đorđević* (IT-05-87/1-A), Vlastimir Đorđević's Appeal Brief, 15 August 2011, paras 41, 43, 45; Đorđević Appeal Judgment, *supra* n 91, paras 32-34.

319 See Chapter 2, Section 2.2.

320 See Chapter 2, Section 2.2.5.

321 See Chapter 2, Section 2.2.5.2. (text accompanying notes 147-156) and Section 2.3.3.3

322 See Chapter 2, Section 2.2.1. and Section 2.2.2.1. See *e.g.* H. Van der Wilt, *supra* n 316, at 164; Ohlin, *supra* n 107, at 702-703; H. Van der Wilt, 'Joint Criminal Enterprise: Possibilities and Limitations', 5 *Journal of International Criminal Justice* (2007), at 96. Danner and Martinez have, thus, argued that "international judges fail to acknowledge that conspiracy is not only a substantive crime but also constitutes a liability theory in its own right." Danner and Martinez, *supra* n 139, at 119.

323 Đorđević's Appeal Brief, *supra* n 318, paras 34-43.

324 See Chapter 2, Section 2.2.1. and Section 2.2.2.1.

325 See Chapter 2, Section 2.2.2.1.

326 A. Fichtelberg, 'Conspiracy and International Criminal Justice', 17 *Criminal Law Forum* (2006), at 156. See also Van Sliedregt, *supra* n 108, at 132. This same observation was also made by Justice Jackson in his separate opinion to the *Krilewitch* case, decided by the US Supreme Court. *Krilewitch v. United States*, 336 U.S. 440 (1949), 451.

327 *Subject: Trial of European War Criminals (by Colonel Murray C. Bernays, G-1)*, 15 September 1944, re-printed in B. Smith, *The American Road to Nuremberg: The Documentary Record, 1944-1945* (Stanford: Hoover Institution, 1982), at 37. See Chapter 2, Section 2.2.2.

group crime, or that he otherwise contributed to the execution of the common purpose.³²⁸ The ICTY/R has further emphasized that although the accused's contribution need not be *sine qua non* for the successful execution of the JCE, "it should at least be a significant contribution to the crimes for which the accused is to be found responsible."³²⁹ Even the most far-reaching category of the doctrine, *i.e.* JCE III liability, still requires proof that the accused *significantly* contributed to the original common design before he could be held guilty of the deviatory crimes.³³⁰ A JCE member who agrees to the common plan but subsequently does nothing to contribute to it could not, under any of the doctrine's categories, be held liable for the crimes that resulted from the execution of the plan. In fact, he cannot be held liable even if it could be established that he provided some *minimal* assistance to the furtherance of the common plan. Bernays'/*Pinkerton* conspiracy on the other hand, introduces only one objective inquiry for imputing liability for the substantive crimes of a conspiracy: *viz.* it only asks whether the accused was a co-conspirator/agreed to the criminal plan.³³¹ The question whether he actually contributed to/participated in the furtherance of the conspiracy is entirely irrelevant. This material distinction between the two concepts could not be overemphasized: it marks a crucial difference between them, and a major point of doctrinal criticism against Bernays'/*Pinkerton* conspiracy.

A second fundamental difference between Bernays' sweeping vision of conspiracy and the JCE doctrine lies in the fact that the former is still, in part, an inchoate crime: *i.e.* pursuant to it, an individual who joins a criminal agreement is held guilty of the very act of agreeing to commit a crime.³³² As explained in Chapter 2, this concept thus has a clearly bifurcated nature because it may be used to hold a person who joins a criminal agreement: i) guilty of the crime of agreeing to commit a crime (an idea that is largely foreign to Continental European law)³³³ and ii) liable for the subsequent commission of any substantive crimes by his confederates in pursuance of that agreement. The concept of JCE, on the other hand, lacks the entire first limb of Bernays'/*Pinkerton* conspiracy: *i.e.* one

who solely agrees to a JCE aiming at, or involving, the commission of crimes is not guilty of anything.³³⁴ Put simply, joining/becoming a member of a JCE is not an act that this theory defines as a crime in its own right. In view of the above differences, it is quite evident that if Bernays' conspiracy and the JCE doctrine could be said to share any feature, it is that both constructs are premised on the existence of a common plan, or agreement between two or more individuals: a similarity that, on its own, makes Bernays' conspiracy (*Pinkerton* liability) as akin to JCE, as it is to any other theory of co-perpetration. This author is, thus, convinced that the two core differences discussed above sufficiently show that JCE is materially different from Bernays'/*Pinkerton* conspiracy. Therefore, the argument that the latter notion was ultimately denounced by the IMT cannot be used to detract from the accepted legal basis for applying JCE liability in modern international criminal proceedings.

The same conclusion can be drawn regarding the alleged analogy between JCE and the concept of membership in a criminal organization. Despite the several possible ways in which one could interpret the nature of organizational guilt in Bernays' plan,³³⁵ and the subsequent confusion that arose during the London Conference on this point,³³⁶ the Nuremberg Tribunal recognised it strictly as a substantive crime.³³⁷ As a result, persons convicted under this notion were punished precisely for their membership and *not* for the criminal organization's specific crimes. The rationale behind the JCE doctrine is exactly the opposite. A participant in a joint criminal enterprise is held liable for the actual offenses committed in the execution of the said common plan, not for being a member of the institution/body of persons which carries out this plan.³³⁸ Therefore, the *Ojdanić* Appeals Chamber correctly stated that, unlike the Nuremberg-era concept of criminal membership, JCE is not a crime, but a means of committing one. Even if one was to assume *arguendo* that the criminal membership construct also allowed ascribing liability to the accused for the substantive crimes of the said agency, this notion still cannot be equated to JCE because its definitional elements are materially distinct. To begin with, as was already analysed in detail above, the international tribunals have consistently affirmed that the JCE participants "need not be organised in a military, political, or administrative structure".³³⁹ This marks a key difference with the concept of membership in a criminal organization which is fundamentally premised on the existence of such a structure: an institution which the judges could declare criminal and thereafter use as the cornerstone for imputing individual guilt to

³²⁸ See *supra* Section 3.4.1.3.

³²⁹ *Brđanin* Appeal Judgment, *supra* n 84, para 430; *Martić* Appeal Judgment, *supra* n 168, para 172; *Gatete* Appeal Judgment, *supra* n 84, para 96; *Ndahimana* Appeal Judgment, *supra* n 84, para 199 (fn 526). See also, Cassese, *supra* n 125, at 163.

³³⁰ *Ngirabatware* Appeal Judgment, *supra* n 109, para 251. As explained above, the *actus reus* of the three JCE variants is the same: *i.e.* they all require that the accused contributes to the common purpose. See *supra* Section 3.4.1. and Section 3.4.1.3.

³³¹ See Chapter 2, Section 2.2.1. and Section 2.2.2.1.

³³² *Ibid.*

³³³ See *e.g.* G. Fletcher, *Amicus Curiae Brief of Specialists in Conspiracy and International Law in Support of Petitioner [Conspiracy - Not a Triable Offense]*, at 12, filed in *Hamdan v. Rumsfeld*, 548 U.S. 557 (2006); Van Sliedregt, *supra* n 108, at 179; S. Pomorski, 'Conspiracy and Criminal Organization', in G. Ginsburgs and V. Kudriavtsev (eds), *The Nuremberg Trial and International Law* (Dordrecht: Martinus Nijhoff Publishers, 1990), at 218; G. Fletcher, *Rethinking Criminal Law* (Oxford: Oxford UP, 2000), at 219. It should be noted, however, that civil law jurisdictions have gradually also come to adopt in their legislation concepts that, in some aspects, resemble the common law notion of conspiracy. For a detailed research on German, French, Spanish and Italian legislation and case law on such similar constructs, see J. Okoth, *The Crime of Conspiracy in International Criminal Law* (Dordrecht: Springer, 2014), at 46-73.

³³⁴ Such a person becomes responsible *only* when the JCE is executed and *only* provided that he contributed to its furtherance. *Milutinović et al.* Decision on Joint Criminal Enterprise, *supra* n 70, para 23.

³³⁵ See Chapter 2, Section 2.2.2.2.

³³⁶ See Chapter 2, Section 2.2.3.2.

³³⁷ See Chapter 2, Section 2.2.5.2.

³³⁸ As the ICTY *Simić et al.* Trial Chamber explained, "[j]oint criminal enterprise is not a liability for mere membership of a criminal enterprise as it is concerned with the *participation* in the commission of a crime as part of a joint criminal enterprise." *Simić et al.* Trial Judgment, *supra* n 117, para 158.

³³⁹ *Tadić* Appeal Judgment, *supra* n 1, para 227. See *supra* Section 3.4.1.1

all its members.³⁴⁰ Second, for organizational liability to arise it suffices to show that the accused had “*knowledge of the criminal purposes or acts of the organization*”,³⁴¹ while the core *mens rea* element for JCE liability, present in all three categories of the doctrine, is that the accused must *share a dolus directus in the first degree* to commit the core crimes of the enterprise.³⁴² Last but not least, JCE liability applies when there is proof that the accused contributed to the execution of the common plan, unlike organizational liability where “[p]roof of membership, without more”³⁴³ was the only objective element of this notion.³⁴⁴

3.5.2. JCE and the Nuremberg-era common purpose theory

Lastly, a few words should also be said about the kinship between the notion of joint criminal enterprise and the Nuremberg-era common purpose notion, as well as how they relate to what is nowadays called co-perpetration liability. This issue was thoroughly addressed by the *Tadić* Appeals Chamber and yet certain findings in its judgement appeared to be rather confusing.

In the process of construing the theoretical framework of the JCE doctrine, the *Tadić* Appeals Chamber made two important conclusions. The first one, as already explained above, was that this doctrine originates from post-World War II jurisprudence where defendants were found guilty under what was back then called ‘common purpose/design’ liability.³⁴⁵ Indeed, it was from such cases that the judges extracted dicta that allowed them to define the *actus reus* and *mens rea* elements of what ultimately became the three-headed JCE doctrine. At the same time, however, it is evident that the Chamber did not simply take a concept that was used over seventy years ago and directly transplant it into the ICTY jurisprudence: it further elaborated, refined and structured its legal requirements, thus adhering it to our modern understanding of international criminal law. Thus, looking at the research contained in Chapter 2 and Chapter 3 of this book, could it be confirmed that the doctrine of joint criminal enterprise is, indeed, the contemporary analogue of the Nuremberg-era ‘common purpose’ liability? The analysis in the present chapter has demonstrated that the ‘basic’ and the ‘systemic’ forms of JCE are virtually identical, the core difference being a contextual one. Objectively, they both require a plurality of persons who act in furtherance of a common plan, design or purpose (under the second

JCE variant the plan is ‘institutionalized’) and that the particular accused contributed to the plan.³⁴⁶ Subjectively, it was shown that the *mens rea* of both JCE I and JCE II liability requires proof that the accused shared the group’s intent to commit the enterprise crimes.³⁴⁷ Comparing these to the constituent elements of the Nuremberg-era ‘common purpose’ notion affirms the *Tadić* Appeals Chamber’s conclusion that they are equivalent. In particular, the research in Chapter 2, which inquired into how the Allies’ tribunals interpreted the ‘common design’ concept both in regular and in concentration camp cases, revealed that the legal requirements for incurring this type of liability were: i) the existence of a criminal plan which is common to a plurality of individuals; ii) the accused’s specific conduct that contributed to the effectuation of this plan; and iii) the accused shares the common purpose in that his contribution is done “deliberately” and “for the purpose” of committing the said crime.³⁴⁸ While the post-World War II tribunals did not elaborate as expansively on the precise scope of each of these elements as the modern UN *ad hoc* tribunals have done, it is evident that the core requirements of the modern JCE I/II theory and the historical ‘common purpose’ concept are essentially the same. What remains to be analysed is thus how, if at all, the ‘extended’ form of JCE liability (with its additional legal requirements)³⁴⁹ fits in this Nuremberg-era framework of ‘common purpose’ liability: an issue that will be separately discussed in Chapter 4 as it forms one of the core research questions of this book.

The second conclusion which the *Tadić* Appeals Chamber drew when formulating the JCE theory concerned the *nature* of this mode of liability. While the judges were unequivocal about what they considered to be its jurisprudential origin, they appeared to be rather dubious when determining what kind of criminal responsibility JCE confers upon the accused. In most paragraphs of the judgement, the Appeals Chamber referred to the JCE participants as “co-perpetrators”³⁵⁰ and indeed described the need for this doctrine by stating that in certain cases of group criminality:

to hold criminally liable as a perpetrator only the person who materially performs the criminal act would disregard the role *as co-perpetrators* of all those who in some way made it possible for the perpetrator physically to carry out that criminal act. At the same time, depending upon the circumstances, to hold the latter liable only as aiders and abettors might understate the degree of their criminal responsibility.³⁵¹

³⁴⁰ See Chapter 2, Section 2.2.2.2. and Section 2.2.5.2.

³⁴¹ *France et al. v Göring et al.*, International Military Tribunal, Judgment and Sentence, 1 October 1946, printed in *Trial of the Major War Criminals before the International Military Tribunal, Nuremberg, 14 November 1945-1 October 1946*, Vol. I, Nuremberg, Germany, 1947, at 256, see Chapter 2, Section 2.2.5.2.

³⁴² See *supra* Section 3.4.2

³⁴³ *Subject: Trial of European War Criminals (by Colonel Murray C. Bernays, G-1)*, 15 September 1944, re-printed in Smith, *supra* n 327, at 37. See Chapter 2, Section 2.2.1.

³⁴⁴ See discussion on The *Medical Case* in Chapter 2, Section 2.2.2.2. (text accompanying notes 41-42)

³⁴⁵ *Tadić* Appeal Judgment, *supra* n 1, para 195. See also *Brđanin* Appeal Judgment, *supra* n 84, paras 393-404; *Jeng Sary, Ieng Thirith and Khieu Samphan* Pre-Decision on JCE, *supra* n 2, paras 57-69.

³⁴⁶ See *supra* Section 3.4.1

³⁴⁷ See *supra* Section 3.4.2.1. The *mens rea* element of the ‘systemic’ form of JCE and the conclusion that, while differently formulated, it essentially boils down to the same intent standard required by the ‘basic’ JCE category is discussed in Section 3.4.2.2.

³⁴⁸ See Chapter 2, Section 2.3.3.2. (text accompanying note 343)

³⁴⁹ See *supra* Section 3.4.2.3. For a thorough analysis on the nature of JCE III, see Chapter 4, Section 4.2.5.

³⁵⁰ *Tadić* Appeal Judgment, *supra* n 1, paras 196-198, 203, 220, 228,

³⁵¹ *Ibid.*, para 192. (*emphasis added*)

On the other hand, however, when summing up its review on the post-World War II ‘common purpose’ jurisprudence, the Appeals Chamber concluded that JCE is firmly established under customary international law “as a form of *accomplice* liability”.³⁵² These inconsistent findings of the judges created some initial confusion both in academia and in the Tribunal’s practice.³⁵³ Either JCE was construed as a theory of co-perpetration, giving rise to principal liability to all the participants, or it was a form of accomplice liability, ascribing accessorial liability to those participants in the enterprise who did not physically commit the concerted crime. Considering the Appeals Chamber’s analysis in its totality, it seemed more likely that it established JCE as a form of co-perpetration and yet the judges did not explicitly state under which sub-heading of Article 7 ICTY Statute they considered the theory to fall: an omission that only contributed to the general uncertainty.

It was four years after the *Tadić* Judgement that the matter was settled definitively and the Appeals Chamber gave an unequivocal answer on what the nature of JCE liability is. It did so in the *Ojdanić* case: in the same decision where it rejected the Defence’s argument that this doctrine is equivalent to the conspiracy and membership in a criminal organization notions.³⁵⁴ The judges observed:

Leaving aside the appropriateness of the use of the expression “co-perpetration” in such a context, it would seem therefore that the Prosecution charges co-perpetration in a joint criminal enterprise as a form of “commission” pursuant to Article 7(l) of the Statute, rather than as a form of accomplice liability. The Prosecution’s approach is correct to the extent that, insofar as a participant shares the purpose of the joint criminal enterprise (as he or she must do) as opposed to merely knowing about it, he or she cannot be regarded as a mere aider and abettor to the crime which is contemplated. *Thus, the Appeals Chamber views participation in a joint criminal enterprise as a form of “commission” under Article 7(1) of the Statute.*³⁵⁵

Further down this decision, the judges once again stressed that “joint criminal enterprise is to be regarded, *not as a form of accomplice liability*, but as a form of ‘commission’”.³⁵⁶ This is a finding which has, ever since, been consistently repeated in the jurisprudence of

the ICTY and the other international criminal tribunals,³⁵⁷ and also found wide support in academia.³⁵⁸ Also, it is worth noting that several months after its *Ojdanić* JCE Decision, the Appeals Chamber in the *Krnjelac* case explained the reason why the *Tadić* Appeal Judgement states that JCE is “a form of *accomplice* liability”. The judges held that this phrasing was a drafting error and not a statement of law, and pointed at the French version of the *Tadić* Judgement where, indeed, the problematic phrase was drafted otherwise:

[T]he *Tadić* Appeals Judgement concludes in paragraph 220 that: “[...] the notion of common design as a *form of accomplice liability* is firmly established in customary international law [...]” This sentence was correctly translated in the French version of the Appeals Judgement as: “[...] la notion de dessein commun en tant que *forme de responsabilité au titre de coauteur* est fermement établie en droit international coutumier [...]”. In fact, given the context of the passage, the Appeals Chamber is clearly referring to this notion in the sense of co-perpetrator.³⁵⁹

While English is the original language in which the *Tadić* Appeal Judgment was drafted, it is remarkable that precisely the phrase that is at odds with the rest of the judgment, *viz.* that JCE is “a form of *accomplice* liability”, is differently translated in the judgment’s French version: the other official language of the ICTY. The latter, as seen above, states that JCE is a “forme de responsabilité au titre de coauteur”: *i.e.* a form of co-perpetrator responsibility, rather than a ‘responsabilité du complice’. Furthermore, it will be recalled that Antonio Cassese – the judge who authored the section on JCE liability³⁶⁰ – also sat in the *Furundžija* Trial Chamber, which had unequivocally declared a few months earlier that the ‘common purpose’ notion is a mode of co-perpetration liability.³⁶¹ In view of the above, it can be plausibly concluded that the part in the *Tadić* Appeal Judgement that described JCE a mode accomplice of liability was merely a drafting error that does not reflect the Appeal Chamber’s view on the nature of JCE liability.

To conclude on this point, it is quite clear that the *Tadić* Appeals Chamber established the JCE doctrine as the modern successor of the Nuremberg-era notion of ‘common purpose’,

³⁵² *Ibid.*, para 220. (*emphasis added*)

³⁵³ Thus, for instance, the *Brđanin and Talić* Trial Chamber held that “[a] ‘form of accomplice liability’ cannot be the same as the liability for the physical perpetration of the crime by the accused himself... Common purpose as a ‘form of accomplice liability’ is more naturally comprehended within the words ‘otherwise aided and abetted in the planning, preparation or execution’ in Article 7.1.” *The Prosecutor v Brđanin and Talić* (IT-99-36-PT), Decision on Motion by Momir Talić for Provisional Release, Trial Chamber, 28 March 2001, para 43. See also Damgaard, *supra* n 314, at 202-203; Van Sliedregt, *supra* n 258, at 189-190; Olásolo, *supra* n 258, at 272-273.

³⁵⁴ See *supra* Section 3.5.1. *Milutinović et al.* Decision on Joint Criminal Enterprise, *supra* n 70.

³⁵⁵ *Ibid.*, para 20. (*emphasis added*)

³⁵⁶ *Ibid.*, para 31. (*emphasis added*)

³⁵⁷ Kvočka *et al.* Appeal Judgment, *supra* n 65, para 80; Ntagerura *et al.* Appeal Judgment, *supra* n 193, para 24; Nahimana *et al.* Appeal Judgment, *supra* n 205, para 478; Krajišnik Appeal Judgment, *supra* n 91, paras 662-666; Munyakazi Appeal Judgment, *supra* n 84, para 163; Gatete Appeal Judgment, *supra* n 84, para 263; Đorđević Appeal Judgment, *supra* n 91, para 56; Popović *et al.* Appeal Judgment, *supra* n 168, para 1672; Tolimir Appeal Judgment, *supra* n 194, para 281.

³⁵⁸ K. Ambos, ‘Amicus Curiae Brief in the Matter of the Co-Prosecutors’ Appeal of the Closing Order Against Kaing Guek Eav “Duch” Dated 8 August 2008’, 20 *Criminal Law Forum* (2009), at 361, 364, 366-367; L. Marsh and M. Ramsden, ‘Joint Criminal Enterprise: Cambodia’s Reply to *Tadić*’, 11 *International Criminal Law Review* (2011), at 148; Cassese, *supra* n 83, at 323-324; H. Olásolo and A. Cepeda, ‘The Notion of Control of the Crime and Its Application by the ICTY in the Stakić Case’, 4 *International Criminal Law Review* (2004), at 476-477; Werle and Jessberger, *supra* n 178, at 199-204; O’Keefe, *supra* n 95, at 170.

³⁵⁹ *Krnjelac* Appeal Judgment, *supra* n 105, para 70 (at fn 101, *emphasis added*)

³⁶⁰ Shahabuddeen, *supra* n 67, at 201 (fn 89).

³⁶¹ See *supra* Section 3.3.2.

which in turn it regarded as a mode of co-perpetration. The analysis contained in the previous Chapter 2 of this book supports this finding, inasmuch as it confirms that the Allies' military tribunals did, indeed, use the 'common purpose/design' notion to ascribe *equal liability* to the participants in a shared plan on the basis of *reciprocal attribution of their contributions* to the group crime. These persons were thus convicted *for the actual crime* - i.e. not for participating in it, based on the principles of derivative liability - which is why Chapter 2 concluded that in essence the 'common design' notion, as applied in the post-World War II trials, can be rightly seen as the primordial formulation of co-perpetration liability in international criminal law.³⁶² As the successor of this notion, it is only natural that JCE (at least in its 'basic' and 'systemic' category) is nowadays widely regarded as a theory of co-perpetration both in academia and in practice.³⁶³ It is, just as the ICC *Lubanga* Pre-Trial Chamber concluded, a manifestation of the subjective approach to co-perpetration, according to which co-principals to a group crime are those persons who *share the intent* to commit this crime.³⁶⁴

3.6. Conclusion

Scholars have often referred to the joint criminal enterprise doctrine as "the most complex and conceptually challenging liability theory in international criminal law".³⁶⁵ The above research can only confirm this statement. When the ICTY *Tadić* Appeals Chamber first construed JCE, it rooted it in the Nuremberg-era 'common purpose/design' concept, attempting in the process to bring more structure and clarity to the otherwise ample case law on this mode of liability. It was a daunting task, considering that in those days the judges did not specifically identify the legal requirements of this notion in a separate section discussing the law on 'common design' responsibility.³⁶⁶ Rather, these findings were scattered throughout the judgments, which is the reason why sixty years later the ICTY *Tadić* Appeals Chamber had to go through the process of distilling, refining and systemizing them in a coherent framework. The post-World War II 'common purpose' notion thus 'evolved' in the *Tadić* Appeals Judgment into the JCE theory, which in turn has been further clarified and elaborated in the subsequent jurisprudence of the international tribunals. In the present chapter, the definitional elements of the doctrine of joint criminal

enterprise were thoroughly examined to give the reader a complete understanding of this form of criminal responsibility. Ambiguities about the exact scope and meaning of certain requirements of JCE liability were also addressed. The next chapter of this book will now turn to present and review two fundamental (normative) problems of the JCE theory, which remain unresolved to present day.

³⁶² See Chapter 2, Section 2.3.3.3.

³⁶³ Ambos, for instance, notes that "[i]n fact, the JCE doctrine can be traced back to the English *common purpose theory*, i.e., a kind of subjective co-perpetration." Ambos, *supra* n 358, at 361, 364, 366-367. See also Marsh and Ramsden, *supra* n 358, at 148; Cassese, *supra* n 83, at 323-324; Olásolo and Cepeda, *supra* n 358, at 476-477.

³⁶⁴ *The Prosecutor v. Lubanga* (ICC-01/04-01/06-803-tEN), Decision on the Confirmation of Charges, Pre-Trial Chamber I, 29 January 2007, para 329. See also Chapter 1, Section 1.3.1. and Section 1.3.2.

³⁶⁵ Danner and Martinez, *supra* n 139, at 103. See also e.g. E. Van Sliedregt and D. Stoitchkova, 'International Criminal Law', in S. Joseph and A. McBeth (eds), *Research Handbook on International Human Rights Law* (Cheltenham, UK: Edward Elgar Pub., 2010), at 262.

³⁶⁶ See Chapter 2, Section 2.3.3.2.

4

The Pitfalls of Joint Criminal Enterprise Liability

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4.1. Introduction

Having sketched out and explained the conceptual framework of joint criminal enterprise, it is now time to examine the theory’s most pertinent problems. As already noted in Chapter 1, this book will look at two major controversies over JCE liability that continue to divide the minds of scholars and practitioners, prompting some of them to dispute the merits of this notion and advocate for its rejection in international criminal law: i) the customary law status of JCE, and in particular the doctrine’s ‘extended’ category, and ii) the controversial law on incurring JCE liability for crimes committed by non-members of the enterprise.¹ The significance of each of these issues will be explained to help the reader understand how they affect the application of this theory in international criminal proceedings. The goal here is to review the jurisprudential confusion on these two problems and propose a course of action on how to deal with them.

The disputed legal basis for the ‘extended’ type of JCE will be thoroughly examined in the first part of this chapter. A two-pronged analysis will be carried out in order to determine whether this mode of liability is, indeed, established under customary international law. First, the methodology that the UN *ad hoc* Tribunals have used to assert this will be evaluated. This is necessary because, as shown below, one of the most criticised aspects of the *Tadić* Appeal Judgment is precisely the approach which the judges followed to ascertain the formation of an international custom on JCE liability. Therefore, before analysing the substance of the sources that were cited regarding the theory’s third variant, it should first be determined whether such sources could at all serve as evidence of the formation of customary international law. For this purpose, the current research will present the legal meaning of this concept and examine how the International Court of Justice has come to identify rules of customary international law. It is against this practice that the validity of the *Tadić* methodology could be most meaningfully appraised. Following this, the content of the sources that the international tribunals have cited to affirm the customary status of the ‘extended’ variant of JCE will be examined in the second part of the research. A number of Nuremberg-era judgments will be reviewed in detail: cases that can help determine whether the underlying principles of JCE III were, indeed, recognized in this jurisprudence. Moreover, it will also be examined whether this variant of the doctrine, given its different rationale, is correctly defined as a form of principal, rather than accessory, liability. These are questions which the previous chapters of this book addressed in relation to the ‘basic’ and ‘systemic’ category of joint criminal enterprise and which, with respect to JCE III liability, merit a separate consideration here.

The second part of this chapter will deal with the doctrinal problems involved in using JCE responsibility in cases where the common purpose is shared by a plurality of persons who rely on outsiders – e.g. subordinates, mercenaries – to physically commit the concerted crime. This modality of the JCE theory is often referred to as ‘JCE with no physical perpetrators’, or ‘leadership-level JCE’. Several critical legal questions should be convincingly addressed here. First, have the UN tribunals accepted that JCE liability is applicable in such situations

¹ See Chapter 1, Section 1.4.1.

and, if so, does customary international law support this construct? It will be shown that the approach that the ICTY/R have taken to the question of JCEs with no physical perpetrators has been far from consistent and that there are notable doctrinal gaps in the evolution of this concept in the Tribunals' case law. Second, if the Nuremberg-era jurisprudence does provide a precedent for applying the notion of JCE to leadership-level cases, what must be the exact nature of the link between the members of the enterprise and the non-members who directly commit the crimes? This link must be properly defined in order to qualify the former persons as co-perpetrators in accordance with the basic principles of criminal law. To this end, the research will explain the doctrinal problems of ascribing liability to JCE members for crimes committed by outsiders of the enterprise, review various approaches that may be used to solve this issue and examine the (customary) legal basis for their application in international proceedings. The answers to these questions will largely determine whether the JCE theory can be an effective prosecutorial tool in cases against high-profile defendants.

Almost ten years after the *Tadić* Appeal Judgment was delivered, Cassese conceded in academic work that “[g]enerally speaking, the notion of JCE needs some tightening up.”² Part of this arduous task was undertaken in Chapter 3, when reviewing JCE's legal framework and addressing the jurisprudential ambiguities on the precise meaning and limits of its definitional elements. The present chapter will continue this undertaking by providing research that would help refine those aspects of the JCE doctrine that have remained controversial to present day.

4.2. The customary status and nature of JCE III liability*

So far, the ‘extended’ variant of the JCE theory has been largely left out of the research in this book. Chapter 2 examined the Nuremberg-era ‘common purpose/design’ concept and distilled its constituent elements,³ which in turn helped to confirm in Chapter 3 that these elements are nowadays contained in the ‘basic’ and ‘systemic’ forms of the JCE doctrine.⁴ No mention was made, however, of post-World War II cases where the ‘common purpose/design’ concept was used to ascribe liability for unintended, deviatory crimes of the enterprise: *i.e.* no research was offered on the jurisprudential origins of the ‘extended’ form of JCE liability. Moreover, while Chapter 3 concluded that the first two JCE categories are properly characterized as modes of co-perpetration/joint principal liability, it did not make any finding on the kind of liability that the accused incurs under the ‘extended’ type of JCE.⁵

* Substantive parts of Sections 4.2.2. to 4.2.4. of this chapter were published (with minor changes in the text) in L. Yanev, ‘The Theory of Joint Criminal Enterprise at the ECCC: A Difficult Relationship’ in S. Meisenberg and I. Stegmüller (eds), *The Extraordinary Chambers in the Courts of Cambodia: Assessing Their Contribution to International Criminal Law* (The Hague: T.M.C. Asser Press, 2016): 203-254.

2 A. Cassese, ‘The Proper Limits of Individual Responsibility under the Doctrine of Joint Criminal Enterprise’, 5 *Journal of International Criminal Justice* (2007), at 109.

3 See Chapter 2, Section 2.3.3.2. (text accompanying footnote 343)

4 See Chapter 3, Section 3.5.2.

5 *Ibid.*, see text accompanying footnotes 361-363.

These questions will be duly addressed in the present section.

4.2.1. Defining customary international law: theories of formation

As already explained in the previous chapters, customary international law plays a crucial role in the modern discourse on JCE liability because it provides the legal basis for the application of this theory in international criminal proceedings.⁶ If the customary status of JCE is refuted, the international *ad hoc* Tribunals will be barred from relying on this form of liability. For this reason, before delving into the controversy surrounding the ‘extended’ form of JCE, it is first necessary to explain what customary international law actually is. In fact, the vague nature of this concept is part of the reason why the debates over the customary basis for JCE III are still ongoing.

Custom is one of the sources of international law established under Article 38(1) of the Statute of the International Court of Justice (‘ICJ’). It is contained in sub-paragraph (b), which defines it as “evidence of a general practice accepted as law.”⁷ One of the leading cases where the Court elaborated on the meaning of this concept is the *North Sea Continental Shelf Cases*, in which the judges explained that an international custom is “a settled [state] practice [that is] carried out in such a way, as to be evidence of a belief that this practice is rendered obligatory by the existence of a rule of law requiring it.”⁸ Thus, two elements have been distinguished as forming the constituent parts of customary international law: i) the (objective) element of state practice (*usus*) and ii) the (subjective) element of a belief that the said practice is dictated by a legal obligation (*opinio juris sive necessitates*). It is often difficult to differentiate between the two requirements, which is why the International Committee of the Red Cross has pointed out that “[m]ore often than not, one and the same act reflects practice and legal conviction.”⁹ As a matter of general guideline, however, Schabas has aptly pointed out that “[s]tate practice may be drawn from such sources as national legislation, military manuals and treaties, [and] *opinio juris* is often derived from judgments or, perhaps, official pronouncements.”¹⁰ Notably, this is not

6 See Chapter 1, Section 1.4.1.1. and Section 1.5.1. See also Chapter 3, Section 3.2. and Section 3.3.

7 Article 38(1)(b), Statute of the International Court of Justice, (33 UNTS 993), 26 June 1945.

8 *North Sea Continental Shelf Cases (Federal Republic of Germany v. Denmark; Federal Republic of Germany v. Netherlands)*, Judgment, 20 February 1969, ICJ Reports 1969: 3, para 77. See also *e.g.* G. Werle and F. Jessberger, *Principles of International Criminal Law* (3rd edn, Oxford: OUP, 2014), at 57-59; R. Cryer *et al.*, *An Introduction to International Criminal Law and Procedure* (3rd edn, Cambridge: Cambridge UP, 2014), at 10-11; G. Boas *et al.*, *International Criminal Law Practitioner Library: International Criminal Procedure*, Vol. 3 (Cambridge: Cambridge UP, 2011), at 3.

9 L. Doswald-Beck and J-M. Henckaerts, *Customary International Humanitarian Law: Volume I, Rules* (New York: Cambridge UP, 2005), at xl. See also A. Roberts, ‘Traditional and Modern Approaches to Customary International Law: A Reconciliation’, 95 *American Journal of International Law* (2001), at 758.

10 W. Schabas, ‘Customary Law or “Judge-Made” Law: Judicial Creativity at the UN Criminal Tribunals’, in J. Doria, H. P. Gasser and M. Bassiouni (eds), *The Legal Regime of the International Criminal Court: Essays in Honour of Professor Igor Blishchenko* (Leiden: Martinus Nijhoff, 2009), at 80.

a strict and unequivocal classification because, as shown further below, in many cases the ICJ has referred to international treaties as evidence of *opinio juris*, and to court judgments as evidence of state practice:¹¹ a matter that, in itself, may create some confusion when assessing the methodology used by judges to identify custom. More importantly, however, even though customary international law is traditionally defined by reference to this two-pronged structure, the ICJ jurisprudence on the importance and interplay between the *usus* and the *opinio juris* requirements is far from consistent, which has prompted scholars to differentiate between two distinct theories on the formation of international custom.¹² The current research will briefly present these two approaches which, in turn, will help to review the methodology used by the ICTY/R to establish the customary status of JCE responsibility.

4.2.1.1. The traditional method

The aforesaid two techniques for identifying customary international law have generally been labelled as the traditional and the modern one.¹³ The former, also referred to as the ‘classic’ or ‘textbook’ approach, was articulated by the ICJ in the abovementioned *North Sea Continental Shelf Cases*.¹⁴ While it affirms that the formation of international custom has to be evidenced both by *usus* and *opinio juris*, this method places the emphasis on the former requirement as it focuses on the collection and analysis of extensive examples of state practice. The element of *opinio juris* is treated as a secondary, auxiliary factor.¹⁵ In this respect, the classic method is said to employ an inductive process for identifying customary international law. What matters above all is the empirical proof of virtually uniform, “common, consistent and concordant”¹⁶ state practice. Once this is established, the inquiry into the subjective reasons for this practice may be carried out as a subsidiary matter. The ICJ has used this approach in most of its earlier case law, including the well-

known *S.S. Lotus Case*,¹⁷ the *Fisheries Case*¹⁸ and the *Nottebohm Case*.¹⁹ Although this method resonates with legal positivist thought,²⁰ it has been extensively criticised on account of how practical and effective it really is. Thus, for instance, Meron has warned of the “difficulties involved in presenting large bodies of evidence on state practice to a bench of ... judges governed by formal procedures and evidentiary rules”,²¹ and has further expressed concern that the classic method’s rigorous emphasis on the element of uniform state practice:

might make it impossible to identify many norms of customary international law, for there is virtually no norm that every nation consistently obeys; in any event, to reduce customary law to a mere description of completely universal practices would be to strip it of its force as law.²²

An example that is often given to illustrate this line of criticism is the prohibition of torture: a rule that is recognized as international custom even though the corresponding state practice is far from common and consistent.²³

4.2.1.2. The modern method

The modern approach to identifying customary international law downplays the importance of state practice and instead emphasises the subjective, *opinio juris* element. Baxter explained its underlying rationale particularly well:

The process of establishing the state of customary international law is one of demonstrating what States *consider to be* the measure of their obligations. The actual conduct of States in their relations with other nations is only a subsidiary means whereby the rules which guide the conduct of States are ascertained. The firm statement by the State of what it considers to be the rule is far better evidence of its position than what can be pieced together from the actions of that country at different times and in a variety of contexts.²⁴

¹¹ See *infra* text accompanying notes 25-33 and 74-79.

¹² B. Schlütter, *Developments in Customary International Law: Theory and the Practice of the International Court of Justice and the International Ad Hoc Criminal Tribunals for Rwanda and Yugoslavia* (Leiden: Martinus Nijhoff, 2010), at 168; T. Meron, ‘Revival of Customary Humanitarian Law’, 99 *American Journal of International Law* (2005), at 819.

¹³ Y. Kirakosyan, ‘Finding Custom: The ICJ and the International Criminal Courts and Tribunals Compared’, in L. Van den Herik and C. Stahn (eds), *The Diversification and Fragmentation of International Criminal Law*, Vol 1 (Leiden: Martinus Nijhoff, 2012), at 151; Meron, *supra* n 12, at 819; Roberts, *supra* n 9, at 757-758; A. Alvarez-Jiménez, ‘Methods For The Identification Of Customary International Law In The International Court Of Justice’s Jurisprudence: 2000–2009’, 60 *International and Comparative Law Quarterly* (2011), at 686-687.

¹⁴ *North Sea Continental Shelf Cases*, *supra* n 8, paras 75-78. See also Meron, *supra* n 12, at 819; Alvarez-Jiménez, *supra* n 13, at 686.

¹⁵ Roberts, *supra* n 9, at 758; N. Petersen, ‘Customary Law Without Custom? Rules, Principles and the Role of State Practice in International Norm Creation’, 23 *American University International Law Review* (2007), at 278; F. Martin *et al.*, *International Human Rights and Humanitarian Law: Treaties, Cases and Analysis* (New York: Cambridge UP, 2006), at 30.

¹⁶ *Fisheries Jurisdiction (United Kingdom v. Iceland)*, Merits, Judgment, 25 July 1974, ICJ Reports 1974: 3, Joint Separate Opinion of Judges Forster, Bengzon, Jimenez de Arechaga, Nagendra Singh and Ruda, para 16.

¹⁷ *The Case of the S.S. Lotus (France v. Turkey)*, Judgment, 7 September 1927, PCIJ (Series A – No.10), at 18, 29. See also Roberts, *supra* n 9, at 758.

¹⁸ *Fisheries Case (United Kingdom v. Norway)*, Judgment, 18 December 1951, ICJ Reports 1951: 116, at 131. See also Schlütter, *supra* n 12, at 128-129.

¹⁹ *Nottebohm Case /second phase/ (Liechtenstein v. Guatemala)*, Judgment, 6 April 1955, ICJ Reports 1955: 4, at 22. See also Schlütter, *supra* n 12, at 129.

²⁰ Schlütter, *supra* n 12, at 17, 26.

²¹ Meron, *supra* n 12, at 819.

²² *Ibid.*, at 820.

²³ B. Leppard, *Customary International Law: A New Theory with Practical Applications* (Cambridge: Cambridge UP, 2010), at 332; J. Goldsmith and E. Posner, ‘A Theory of Customary International Law’, 66 *The University of Chicago Law Review* (1999), at 1117; Petersen, *supra* n 15, at 279-280.

²⁴ R. Baxter, ‘Multilateral Treaties as Evidence of Customary International Law’, 41 *British Yearbook of International Law* (1965-1966), at 300. (*emphasis added*) See also Roberts, *supra* n 9, at 758; Schlütter, *supra* n 12, at 140 *et seq.*

The *Nicaragua Case* is considered the leading example of a case in which the ICJ applied this method.²⁵ One of the legal questions that the Court had to address was the customary status of the rule prohibiting the use of force in international relations. Though the judges affirmed the two-pronged structure of international custom,²⁶ their subsequent analysis focused entirely on tracing and confirming the existence of *opinio juris* by exploring the attitude of states towards a number of UN General Assembly resolutions, international treaties and conferences dealing with the prohibition of the use of force.²⁷ The Court did not provide any substantial review on the corresponding practice of these states. A further manifestation of this modern approach in the *Nicaragua Case* could be seen in the manner in which the customary law status of Article 3 common to the four Geneva Conventions was affirmed. The judges reasoned that the text of this provision has acquired the status of international custom without adducing any particular evidence of state practice or *opinio juris* supporting this finding.²⁸ Rather, they premised their conclusion on the finding that the principles provided in Article 3 of the Geneva Conventions “reflect ... ‘elementary considerations of humanity’.”²⁹ The underlying rationale here appears to be that the more basic and fundamental the said humanitarian principle is, the more likely it is to treat it as reflected in the *opinio juris* of states. On this point, Meron draws a parallel with the post-World War II tribunals’ case law on identifying international custom in the context of humanitarian law and observes that there exists:

a tendency to ignore, for the most part, the availability of evidence of state practice (scant as it may have been) and to assume that noble humanitarian principles that deserve recognition as the positive law of the international community have in fact been recognized as such by states. [...] The teleological desire to solidify the humanizing content of the humanitarian norms clearly affects the judicial attitudes underlying the “legislative” character of the judicial process. Given the scarcity of actual practice, it may well be that, in reality, tribunals have been guided, and are likely to continue to be guided, by the degree of offensiveness of certain acts to human dignity; the more heinous the act, the more the tribunal will assume that it violates not only a moral principle of humanity but also a positive norm of customary law.³⁰

25 *Military and Paramilitary Activities in and against Nicaragua (Nicaragua v. United States of America)*, Merits, Judgment, 27 June 1986, ICJ Reports 1986: 14.

26 *Ibid.*, paras 183-184.

27 *Ibid.*, paras 188-193. See also e.g. T. Meron, ‘The Geneva Conventions as Customary Law’, 81 *The American Journal of International Law* (1987), at 362; Schlütter, *supra* n 12, at 152-154; Kirakosyan, *supra* n 13, at 151; Petersen, *supra* n 15, at 280.

28 The *Military and Paramilitary Activities in and against Nicaragua Case*, *supra* n 25, paras 218-220. See also J. Powderly, ‘Judicial Interpretation at the *Ad Hoc* Tribunals: Method from Chaos’, in J. Powderly and S. Darcy (eds), *Judicial Creativity at the International Criminal Tribunals* (Oxford: Oxford UP, 2010), at 27; Meron, *supra* n 27, at 357.

29 The *Military and Paramilitary Activities in and against Nicaragua Case*, *supra* n 25, para 218.

30 Meron, *supra* n 27, at 361.

Notably, the relaxed, deductive approach to customary international law has been used by the ICJ in various other cases dealing with issues of international humanitarian law, including the *Arrest Warrant Case*,³¹ the *Reservations to the Convention on Genocide Advisory Opinion*³² and the *Advisory Opinion on the Wall in the Occupied Palestinian Territory*.³³ In this respect, one could find merit in the view that the modern method of identifying custom is better suited for the context of certain branches of international law, such as international humanitarian law and international criminal law.³⁴ The use of the traditional approach, as Schabas has observed, makes more sense in the field of “public international law in the classic sense, for example in determining the limits of fishing zones, or the scope of diplomatic immunities, or other issues involving reciprocal rights of states in which the distinct elements of practice and *opinio juris* usually manifest themselves rather clearly.”³⁵ By contrast, international criminal law does not really function in such a state-to-state environment: it lives and breathes in the courtrooms of international courts and tribunals which states have vested with the authority to apply the laws that they have agreed upon.

Custom has often been described as the most ambiguous source of international law.³⁶ The existence of different methods for identifying its formation, coupled with the difficulties of distinguishing between its two constituent elements in practice, has often ensured that ICJ decisions on the customary status of a given rule are accepted by some and criticised by other scholars and practitioners. In this respect, the specific field of international criminal law is no exception.

4.2.2. *The ICTY/R methodology affirming the customary status of the JCE doctrine: an appraisal*

The above analysis can help us put in a normative framework the discussion on the customary status of the JCE theory. A general line of criticism against this mode of liability has been that the methodology which the *Tadić* Appeals Chamber used to confirm its

31 *Arrest Warrant of 11 April 2000 (Democratic Republic of the Congo v. Belgium)*, Judgment, 11 February 2002, ICJ Reports 2002: 3, para 58. See Schlütter, *supra* n 12, at 161-162; Meron, *supra* n 12, at 820.

32 *Reservations to the Convention on Genocide*, Advisory Opinion, 28 May 1951, ICJ Reports 1951: 15, at 23. See Schlütter, *supra* n 12, at 142-143.

33 *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory*, Advisory Opinion, 9 July 2004, ICJ Reports 2004: 136, paras 87, 154-158. See Schlütter, *supra* n 12, at 165-166; Alvarez-Jiménez, *supra* n 13, at 690.

34 Schlütter, *supra* n 12, at 35-36; A. Cassese, ‘Amicus Curiae Brief of Professor Antonio Cassese and Members of the Journal of International Criminal Justice on Joint Criminal Enterprise Doctrine’, 20 *Criminal Law Forum* (2009), at 303.

35 Schabas, *supra* n 10, at 100.

36 Schlütter, *supra* n 12, at 13; S. Lamb, ‘Nullum Crimen, Nulla Poena Sine Lege in International Criminal Law’ in A. Cassese and P. Gaeta (eds), *The Rome Statute of the International Criminal Court: A Commentary*, Vol. 1 (Oxford: Oxford UP, 2002), at 743; I. Jaspović, ‘The ICTY’s Approach to Customary Law: A Case Study of the Mens Rea of Imputed Command Responsibility’, in T. Krueßmann (ed), *ICTY: Towards a Fair Trial?* (Wien: Neuer Wissenschaftlicher Verlag, 2008), at 89.

basis in international custom failed to properly examine the existence of state practice and *opinio juris*.³⁷ Indeed, as recently as 2014, the ICTY Đorđević Appeals Chamber was seized with this very matter, after the Defence had submitted that “the methodology used in the *Tadić* Appeal Judgment in order to deduce rules of customary international law ‘was fundamentally flaw[ed]’”.³⁸ Thus, before proceeding to analyse the substance of the finding that JCE III liability is customary law, the following section will conceptualize and evaluate the method which the *ad hoc* Tribunals used to reach this finding.

While the ICTY/R have on many occasions further elaborated the constituent elements of JCE responsibility, the substantive analysis that the *Tadić* Appeals Chamber carried out to confirm its customary status was never reviewed in the Tribunals’ subsequent jurisprudence. Rather, whenever defendants have challenged the legal basis for the application of this theory, judges have dealt with the matter by making perfunctory references to the relevant findings in the *Tadić* Appeal Judgment.³⁹ In this sense, Olásolo correctly observes that “the ICTY Appeal Judgment in the *Tadić* case is still, today, the cornerstone of the ICTY and ICTR case law on the notion of joint criminal enterprise”.⁴⁰ The method, in particular, that the *Tadić* judges used to conclude that JCE liability is customary law can be regarded as representative of the *ad hoc* Tribunals’ jurisprudence on this matter.

When the *Tadić* Appeals Chamber started constructing the legal framework of JCE, it held that:

the Tribunal’s Statute does not specify (either expressly or by implication) the objective and subjective elements (*actus reus* and *mens rea*) of this category of collective criminality. To identify these elements one must turn to customary international law. Customary rules on this matter are discernible on the basis of various elements: chiefly case law and a few instances of international legislation.⁴¹

37 G. Boas, N. Reid and J. Bischoff, *International Criminal Law Practitioner Library: Forms of Responsibility in International Criminal Law*, Vol. 1 (Cambridge: Cambridge UP, 2008), at 21-22; M. Karnavas, ‘Joint Criminal Enterprise at the ECCC: A Critical Analysis of the Pre-Trial Chamber’s Decision against the Application of JCE III and Two Divergent Commentaries on the Same’, 21 *Criminal Law Forum* (2010), at 486-487; A. Bogdan, ‘Individual Criminal Responsibility in the Execution of a “Joint Criminal Enterprise” in the Jurisprudence of the *ad Hoc* International Tribunal for the Former Yugoslavia’, 6 *International Criminal Law Review* (2006), at 110-111. See also *The Prosecutor v. Milutinović et al.* (IT-99-37-AR72), Decision on Dragoljub Ojdanić’s Motion Challenging Jurisdiction – Joint Criminal Enterprise, Appeals Chamber, 21 May 2003, para 29.

38 *The Prosecutor v. Đorđević* (IT-05-87/1-A), Judgment, Appeals Chamber, 27 January 2014, para 27.

39 See e.g. *The Prosecutor v. Krajišnik* (IT-00-39-A), Judgment, Appeals Chamber, 17 March 2009, para 659; *The Prosecutor v. Martić* (IT-95-11-A), Judgment, Appeals Chamber, 8 October 2008, para 80; *Milutinović et al.* Decision on Joint Criminal Enterprise, *supra* n 37, para 29. In fact, it was a decade after the *Tadić* Appeal Judgment, in a case brought before the ECCC, that the legal basis for JCE liability was for the first time analysed *de novo* by an international(ized) tribunal: a matter that is discussed later in this chapter. See *The Prosecutor v. Ieng Sary, Ieng Thirith and Khieu Samphan* (002/19-09-2007-ECCC/OCIJ), Decision on the Appeals against the Co-Investigative Judges Order on Joint Criminal Enterprise (JCE), Pre-Trial Chamber, 20 May 2010, paras 79-81; *The Prosecutor v. Nuon Chea, Ieng Sary, Ieng Thirith and Khieu Samphan* (002/19-09-2007-ECCC/TC), Decision on the Applicability of Joint Criminal Enterprise, Trial Chamber, 12 September 2011, paras 30-31.

40 H. Olásolo, *The Criminal Responsibility of Senior Political and Military Leaders as Principals to International Crimes* (Oxford: Hart, 2009), at 49.

41 *The Prosecutor v. Tadić* (IT-94-1-A), Judgment, Appeals Chamber, 15 July 1999, para 194. (*emphasis added*)

In the ensuing analysis, the judges referred to a number of World War II-era judgments which established responsibility based on the ‘common purpose/design’ concept,⁴² as well as to two international treaties that contain references to this mode of liability: the Rome Statute of the International Criminal Court and the International Convention for the Suppression of Terrorist Bombings.⁴³ Many of the judgments that the *Tadić* Appeals Chamber referred to were already reviewed in Chapter 2 of this book, which affirmed that the Nuremberg-era case law endorsed the construct of ‘common purpose/design’ and used it to ascribe joint principal liability.⁴⁴ The question that will be addressed here is whether, according to the above-discussed theories on customary law formation, these sources can actually serve as evidence of the establishment of an international custom.

4.2.2.1. Use of international treaties

Both the Terrorist Bombings Convention and the Rome Statute of the ICC contain provisions that, in nearly identical terms, establish liability for persons who contribute to the commission of a crime by “a group of persons acting with a common purpose”.⁴⁵ In *Tadić*, the judges held that these two international treaties have been adopted by a large majority of states and, thus, “may be taken to express the legal position i.e. *opinio iuris* of those States.”⁴⁶ This warranted the inference that the ‘common purpose’ notion itself is a widely recognized mode of liability. The judges did not offer any analysis on the state practice stemming from the cited provisions. In fact, such practice could not have been identified because, at the material time, both treaties had still not entered into force.⁴⁷ Taken on its own, this part of the Chamber’s analysis on the customary status of JCE liability is

42 *Ibid.*, paras 195-219.

43 *Ibid.*, paras 221-222.

44 The Appeals Chamber reviewed six Nuremberg-era cases in relation to the ‘basic’ variant of JCE (the *Almelo* case, the *Hoelzer et al.* case, the *Jepsen and others* case, the *Schonfeld and others* case, the *Einsatzgruppen* case and the *Ponzano* case), two concentration camp cases for the ‘systemic’ form of JCE (the *Dachau Concentration Camp* case and the *Belsen* case) and two cases for the ‘extended’ form of JCE (the *Borkum Island* case and the *Essen Lynching* case). See Chapter 2, Section 2.3.3. See also *infra* Section 4.2.3.

45 Article 2(3)(c) of the Terrorist Bombings Convention states that: “Any person also commits an offence if that person [...] c) In any other way contributes to the commission of one or more offences as set forth in paragraphs 1 or 2 of the present article by a group of persons acting with a common purpose; such contribution shall be intentional and either be made with the aim of furthering the general criminal activity or purpose of the group or be made in the knowledge of the intention of the group to commit the offence or offences concerned.” See Article 2(3)(c), International Convention for the Suppression of Terrorist Bombings, (UN Doc. A/RES/52/164), 15 December 1997. Article 2(3)(c) of the Terrorist Bombings Convention was subsequently used for the drafting of Article 25(3)(d) of the Rome Statute of the International Criminal Court, as a result of which the text of the latter closely resembles that of the former. See Article 25(3)(d), Rome Statute of the International Criminal Court, (UN Doc. A/CONF.183/9, 2178 UNTS 3), 17 July 1998 [in force on 1 July 2002], as last amended in 2010. See also E. Van Sliedregt, ‘Modes of Participation’, in L. Sadat (ed), *Forging a Convention for Crimes against Humanity* (Cambridge: Cambridge UP, 2011), at 251-252; A. Eser, ‘Individual Criminal Responsibility’, in A. Cassese and P. Gaeta (eds), *The Rome Statute of the International Criminal Court: A Commentary*, Vol.1 (Oxford: Oxford UP, 2002), at 802.

46 *Tadić* Appeal Judgment, *supra* n 41, paras 221, 223.

47 *Ibid.*

exemplary of the modern method of identifying customary international law. As pointed out above, this technique of deducing the element of *opinio juris* from widely accepted UN treaties and neglecting the corresponding state practice was applied by the ICJ in a number of its best-known cases.⁴⁸ In fact, if there is a problem with the judges' reliance on the Terrorist Bombings Convention and the ICC Rome Statute it is admittedly one of substance. In particular, Article 25(3) of the Rome Statute 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; [...]
 - (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; [...]⁴⁹

Although Article 25(3)(d) RS indeed refers to 'common purpose' liability, the problem is that it does it in a manner that does not correspond to JCE's legal framework, as established in the ICTY jurisprudence.⁵⁰ Moreover, scholars have noted that the 'common purpose' concept that is contained in this provision is in fact defined as a mode of *accessorial* liability since (joint-) principal liability is strictly confined to the ambit of Article 25(3)(a) RS.⁵¹ Thus, the argument goes, the *Tadić* Appeals Chamber erroneously relied on Article 25(3)(d) RS to find an *opinio juris* to the effect that its construction of JCE is recognized as a form of *co-perpetration* under customary international law.⁵² The merit of this criticism will be analysed in Chapter 6, which will examine the interplay between the relevant provisions on criminal liability within the ICC Rome Statute.⁵³ At this point, it suffices to

say that Article 25(3)(d) RS is not a codification of JCE liability: rather, as Cassese also explained, it establishes a distinct variation of aiding and abetting responsibility, namely aiding and abetting a common purpose.⁵⁴ Thus, this provision and its twin counterpart from the Terrorist Bombings Convention do not offer evidence to the effect that the 'common purpose' theory, as constructed by the *Tadić* judges, had been widely accepted by states as a form of joint principal liability. At best, these articles could be seen as containing a general reference to the concept of 'common purpose', mentioned in the specific context of a notably different mode of liability.⁵⁵ This is not really a potent evidence of states' acceptance of the 'common purpose' doctrine as a form of co-perpetration under international criminal law. Such evidence can be found elsewhere and the Tribunals did identify it in their post-*Tadić* jurisprudence.

In its subsequent case law, the ICTY/R Appeals Chamber additionally cited provisions from the Charter of the International Military Tribunal at Nuremberg and the Control Council Law No.10 as evidence of international recognition of the 'common purpose' theory.⁵⁶ These documents and their respective articles on individual liability, indeed, offer strong support for the *Tadić* Appeals Chamber's analysis since, as already explained in Chapter 2 of this book,⁵⁷ they provided the statutory basis on which the Nuremberg-era tribunals subsequently applied the 'common purpose/design' notion. The question is, thus, whether these instruments and the principles of liability listed in them can be considered as indicative of customary international law. To this effect, it would be recalled that the IMT Charter was signed by the United States of America, the United Kingdom, the Soviet Union and France, and was then also acceded to by 19 other states.⁵⁸ Afterwards, it was also ingrained as "an integral part" of Control Council Law No.10: a legislative act which was jointly passed by the former four states⁵⁹ and has been regarded by the modern *ad hoc* tribunals as "reflecting

54 Cassese further compared this form of liability to a notion used in Italian criminal law: "external participation in mafia crimes" (*concorso esterno in associazione mafiosa*) A. Cassese, *International Criminal Law* (2nd edn, Oxford: Oxford UP, 2008), at 213. For the argument that Article 25(3)(d) establishes a variant of aiding and abetting that is distinct from aiding and abetting proper merely in the sense that it contains a "group factor", see also Eser, *supra* n 45, at 803.

55 A. Cassese, *Cassese's International Criminal Law* (3rd edn, Oxford: Oxford UP, 2013), at 175. See also, Đorđević Appeal Judgment, *supra* n 38, paras 37-38.

56 *Rwamakuba v. The Prosecutor* (ICTR-98-44-AR72.4), Decision on Interlocutory Appeal Regarding Application of Joint Criminal Enterprise to the Crime of Genocide, Appeals Chamber, 22 October 2004, paras 18, 23; *The Prosecutor v. Brdanin* (IT-99-36-A), Judgment, Appeals Chamber, 3 April 2007, paras 393-395; Đorđević Appeal Judgment, *supra* n 38, paras 42-43.

57 Chapter 2, Section 2.2.4.1, Section 2.2.5.1 (text accompanying footnotes 120-123) and Section 2.3.3.1.

58 These were Australia, Belgium, Czechoslovakia, Denmark, Ethiopia, Greece, Haiti, Honduras, India, Luxembourg, the Netherlands, New Zealand, Norway, Panama, Paraguay, Poland, Uruguay, Venezuela, and Yugoslavia. See R. Jackson, *Report of Robert H. Jackson, United States Representative to the International Conference on Military Trials, London, 1945* (Washington, D.C.: Dept. of State, Division of Publications, Office of Public Affairs, 1949), at viii (Preface).

59 Control Council Law No. 10, Punishment of Persons Guilty of War Crimes, Crimes Against Peace and Against Humanity, December 20, 1945, Official Gazette Control Council for Germany 50-55 (1946), re-printed in T. Taylor, *Final Report to the Secretary of the Army on the Nuernberg War Crimes Trials under Control Council Law No. 10* (Washington D.C., 15 August 1949), at 250-253 (Appendix D). Pursuant to Article I of Control Council Law No.10, the IMT Charter was made "an integral part" of this agreement. See Chapter 2, Section 2.3.

48 See *supra* text accompanying notes 25-33.

49 Article 25(3) ICC Rome Statute, *supra* n 45. For the substantially identical text of Article 2(3)(c) Terrorist Bombings Convention, see *supra* note 45.

50 There are notable differences in, amongst other elements, the *mens rea* requirement of the concept established under article 25(3)(d) RS and the *mens rea* of the JCE doctrine. On this point, see Chapter 6, Section 6.2.1.2. See also *The Prosecutor v. Mbarushimana* (ICC-01/04-01/10-465-Red), Decision on the Confirmation of Charges, Pre-Trial Chamber I, 16 December 2011, para 282; *The Prosecutor v. Katanga* (ICC-01/04-01/07-3436-tENG), Judgment, Trial Chamber II, 7 March 2014, para 1619; C. Stahn, 'Justice Delivered or Justice Denied?: The Legacy of the Katanga Judgment', 12 *Journal of International Criminal Justice* (2014), at 825-826.

51 See, for instance, Olásolo, *supra* n 40, at 52-55; R. O'Keefe, *International Criminal Law* (Oxford: Oxford UP, 2015), at 193. See also Đorđević Appeal Judgment, *supra* n 38, paras 29, 35-36.

52 Olásolo, *supra* n 40, at 53-54.

53 See Chapter 6, Section 6.2.1.2.

an international agreement among the Great Powers on the law applicable to international crimes”.⁶⁰ The rules contained in the IMT Charter, including those on individual liability, were then unanimously recognized by the UN General Assembly under Resolution 95(I) of 11 December 1946.⁶¹ Commenting on the nature of this resolution, Scharf explained that it:

had all the attributes of a resolution entitled to great weight as a declaration of customary international law: it was labelled an “affirmation” of legal principles; it dealt with inherently legal questions; it was passed by a unanimous vote; and none of the members expressed the position that it was merely a political statement. [...] The International Court of Justice, the International Criminal Tribunal for the Former Yugoslavia, the European Court of Human Rights, and several domestic courts have cited the General Assembly resolution affirming the principles of the Nuremberg Charter and judgments as an authoritative declaration of customary international law.⁶²

There is thus substantial merit to the argument that “the Nuremberg Charter [...] subsequently obtained recognition as custom”⁶³ and, respectively, so did its Article 6 provision on common plan responsibility. As explained in Chapter 2 of this book, this type of liability was expressly distinguished by the IMT from the concept of conspiracy and it was then further refined in the subsequent Nazi trials into what became known as “common purpose/design” responsibility.⁶⁴ In this respect, it also bears noting that pursuant to UN Resolution 95(I), the International Law Commission was instructed to “treat as a matter of primary importance”⁶⁵ the formulation and codification of the principles established in the IMT Charter and Judgment. A few years later, in 1950, the Commission published the so-called seven Nuremberg principles,⁶⁶ Principle VII of which provides that “[c]omplicity in the commission of a crime against peace, a war crime, or a crime against humanity [...] is a

crime under international law.”⁶⁷ The explanatory notes to it held that this includes the rule of liability for persons participating in a common criminal plan, as recognized in the IMT Judgment and distinguished from the concept of conspiracy.⁶⁸

The Nuremberg-era documents identified above militate the finding that the concept of ‘common design/purpose’ – *i.e.* the predecessor of JCE – was widely recognized by states as a mode of liability applicable in international criminal law. Therefore, they evince the existence of *opinio juris*, if not the formation of international custom altogether. However, on their own, they do not define the exact legal framework (constituent elements) and nature (accessorial or principal liability) of this notion. For this purpose, one should examine the manner in which it was applied in practice by the tribunals operating under the authority of these instruments.

4.2.2.2. Use of post-World War II judgments

The bulk of the *Tadić* Appeals Chamber’s analysis on the customary law status of JCE and its three categories focused on reviewing how Nuremberg-era judgments defined the concept of ‘common purpose/design’. In particular, the judges referred to a total of 10 cases adjudicated by the Allied military tribunals in occupied Germany: six cases in support of the ‘basic’ type of JCE,⁶⁹ two Nazi concentration camp cases for the doctrine’s ‘systemic’ form⁷⁰ and another two cases to support its ‘extended’ variant.⁷¹ The substance of (some of) the cases cited by the Chamber to confirm the customary basis of the first two types of JCE was already reviewed in the previous chapters of this book and need not be addressed anew here.⁷² It suffices to recall that in its authoritative and widely publicised analysis of Nuremberg-era case law, the United Nations War Crimes Commission (‘UNWCC’) affirmed that many cases were decided under:

the rule which exists in many systems of law that those who take part in a common design to commit an offence which is carried out by one of them are all *fully responsible* for that offence in the eyes of the criminal law.⁷³

60 *The Prosecutor v. Kupreškić et al.* (IT-95-16-T), Judgment, Trial Chamber, 14 January 2000, para 541; *Ieng Sary, Ieng Thirith and Khieu Samphan* Pre-Trial Decision on JCE, *supra* n 39, para 57.

61 See UN General Assembly, *Affirmation of the Principles of International Law Recognized by the Charter of the Nuremberg Tribunal*, G.A. Res. 95 (I), U.N. GAOR, 1st Sess., pt. 2, at 1144, U.N. Doc. A/236, 11 December 1946, available at: <<http://www.un.org/documents/ga/res/1/ares1.htm>> [accessed 1 July 2016]. See also Jackson, *supra* n 58, at viii (Preface).

62 M. Scharf, *Customary International Law in times of Fundamental Change: Recognizing Grotian Moments* (Cambridge: Cambridge UP, 2013), at 64-66. For further support that UN General Assembly Resolution 95(I) is widely accepted as declarative of customary international law, see M. Bassiouni, *Introduction to International Criminal Law: Second Revised Edition* (Leiden: Martinus Nijhoff, 2013), at 76.

63 *The Prosecutor v. Erdemović* (IT-96-22-A), Judgment, Appeals Chamber, 7 October 1997, Joint Separate Opinion of Judge McDonald and Judge Vohrah, para 51. See also Cassese, *supra* n 34, at 304.

64 See Chapter 2, Section 2.2.4.1. and Section 2.2.5.1.

65 See UN General Assembly Resolution 95(I), *supra* n 61.

66 UN International Law Commission, ‘Report of the International Law Commission Covering Its Second Session, 5 June - 29 July 1950’ (Doc. A/1316), 2 *Yearbook of the International Law Commission* (1950), at 374-378 (paras 95-127), available at <http://legal.un.org/ilc/publications/yearbooks/1950.htm> [accessed 21 July 2016].

67 *Ibid.*, at 377. It should be noted that traditionally the term ‘complicity’ was understood as a generic notion that covers both co-perpetration and accessory liability. K. Ambos, *Treatise on International Criminal Law* (Oxford: Oxford UP, 2013), at 149; G. Fletcher, *Rethinking Criminal Law* (Oxford: Oxford UP, 2000), at 637; S. Eldar, ‘Exploring International Criminal Law’s Reluctance to Resort to Modalities of Group Responsibility: Five Challenges to International Prosecutions and Their Impact on Broader Forms of Responsibility’, 11 *Journal of International Criminal Justice* (2013), at 341. See also *The Prosecutor v. Krnojelac* (IT-97-25-A), Judgment, Appeals Chamber, 17 September 2003, para 70.

68 *Ibid.*, at 377-378 (paras 125-126).

69 *Tadić* Appeal Judgment, *supra* n 41, paras 196-201.

70 *Ibid.*, paras 202-203.

71 *Ibid.*, paras 204-213.

72 The substance of some of the cases cited by the *Tadić* Appeals Chamber to affirm the customary status of JCE I and JCE II, and that of others, was already reviewed in Chapter 2, Section 2.3.3. The substantive analysis of the case law used to confirm the ‘extended’ type of JCE liability is provided below. See *infra* Section 4.2.3.

73 UN War Crimes Commission, *Law Reports of Trials of War Criminals*, Vol. XV (London: Published for the United Nations War Crimes Commission by His Majesty’s Stationary Office, 1949), at 96. (*emphasis added*)

Chapter 2 concluded that the ‘common purpose/design’ concept, as applied by the post-World War II tribunals, constitutes a primordial formulation of co-perpetration liability in the field of international criminal law, and Chapter 3 affirmed that its constituent requirements are indeed engrained in the modern legal framework of JCE I/II liability. The question that remains to be answered is thus a methodological one: could this jurisprudence, coupled with the afore-stated international treaties, evince the formation of international custom regarding JCE liability?

To begin with, it should be pointed out that the consultation of judicial precedents for the identification of a rule of international custom has long been accepted as a valid technique by the International Court of Justice.⁷⁴ In the *S.S. Lotus Case*, both parties referred to national judgments as evidence of state practice and, respectively, of the formation of customary law.⁷⁵ The judges then duly reviewed the cited domestic cases and noted that:

So far as the Court is aware there are no decisions of international tribunals in this matter; but some decisions of municipal courts have been cited. Without pausing to consider the value to be attributed to the judgments of municipal courts in connection with the establishment of the existence of a rule of international law, it will suffice to observe that the decisions quoted sometimes support one view and sometimes the other.⁷⁶

Two important observations could be drawn from this dictum. First, it implicitly confirms that judicial precedents may serve to indicate states’ practice with regards to a particular rule. This conclusion had been previously reached in the *German Interests in Polish Upper Silesia Case*, where the Court explained that judgments may be treated as “facts which express the will and constitute the activities of States”.⁷⁷ Second, it seems to indicate that *international* judgments present a stronger, more reliable evidence of the establishment of a given rule of international law. In his academic work, Sir Hersch Lauterpacht even stated that judgments of international courts and tribunals are not so much evidence of state practice and *opinio juris* as they are, in fact, a declaration of what international law is and, thus, are “to a substantial degree identical with the sources of law enumerated in the first three paragraphs of Article 38 [ICJ Statute].”⁷⁸ The ICTY *Kupreškić* Trial Chamber echoed this line of reasoning when it explained that:

⁷⁴ The *S.S. Lotus Case*, *supra* n 17, at 28-30. Schlütter notes that “there are also a large number of cases which centred on international evidence when the formation of new customary law, like international conventions or international court judgments, was being assessed. The invocation of such evidence affirms that the ICJ does not shut its eyes to a more modern understanding of customary international law-making”. Schlütter, *supra* n 12, at 169.

⁷⁵ *Ibid.*

⁷⁶ *Ibid.*, at 28.

⁷⁷ *Case Concerning Certain German Interests in Polish Upper Silesia (German v. Poland)*, Judgment, 25 May 1926, PCIJ (Series A – No.7), at 19. In this sense, Cassese explained that “customary international rules may normally be drawn or inferred from judicial decisions, which to a very large extent have been handed down, chiefly in the past, by *national* criminal courts (whereas by now there exists a conspicuous number of judgments delivered by international criminal courts)”. Cassese, *supra* n 55, at 13.

⁷⁸ H. Lauterpacht, *The Development of International Law by the International Court* (London: Stevens, 1958), at 20-22.

Being international in nature and applying international law *principaliter*, the Tribunal cannot but rely upon the well-established sources of international law and, within this framework, upon judicial decisions. What value should be given to such decisions? [...] [T]he authority of precedents (*auctoritas rerum similiter judicatarum*) can only consist in evincing the possible existence of an international rule. More specifically, precedents may constitute evidence of a customary rule in that they are indicative of the existence of *opinio iuris sive necessitatis* and international practice on a certain matter [...] Here again attention should however be drawn to the need to distinguish between various categories of decisions and consequently to the weight they may be given for the purpose of finding an international rule or principle. It cannot be gainsaid that great value ought to be attached to decisions of such international criminal courts as the international tribunals of Nuremberg or Tokyo, or to national courts operating by virtue, and on the strength, of Control Council Law no. 10 [...] These courts operated under international instruments laying down provisions that were either declaratory of existing law or which had been gradually transformed into customary international law. [...] In sum, international criminal courts such as the International Tribunal must always carefully appraise decisions of other courts before relying on their persuasive authority as to existing law. Moreover, they should apply a stricter level of scrutiny to national decisions than to international judgements, as the latter are at least based on the same corpus of law as that applied by international courts, whereas the former tend to apply national law, or primarily that law, or else interpret international rules through the prism of national legislation.⁷⁹

The point which the Trial Chamber made is clear and could be easily related to the problem of allocating responsibility for international crimes. As already explained in Chapter 1, the field of international criminal law is a field that deals with a very different kind of criminality than national criminal law and this, in turn, affects how we allocate responsibility between various parties to the crime. Therefore, a judgment which applies national law to construe the liability of a few persons engaged in stealing a car cannot have the same value for identifying a rule of customary international law as a judgment which relies on internationally agreed provisions to assign liability to senior politicians, military commanders and rank-and-file soldiers who were implicated in the execution of a nationwide genocidal plan.

Considering all the above, it is safe to conclude that the *Tadić* judges’ reliance on post-World War II jurisprudence to affirm the customary basis of JCE liability is methodologically valid. The judgments of the Nuremberg Tribunal and the Allied military tribunals in Germany offer an authoritative interpretation of the principles that were established in the IMT Charter and were subsequently unanimously adopted in UN General Assembly Resolution 95(I).⁸⁰ As such, they reflect state practice corresponding to the *opinio juris* on ‘common purpose/design’ liability and, therefore, support a conclusion that JCE is part of

⁷⁹ *Kupreškić et al.* Trial Judgment, *supra* n 60, paras 540-542. For a similar line of reasoning, see also Đorđević Appeal Judgment, *supra* n 38, paras 42-43; *The Prosecutor v. Milutinović et al.* (IT-05-87-PT), Decision on Ojdanić’s Motion Challenging Jurisdiction: Indirect Co-perpetration, Trial Chamber, 22 March 2006, para 39; *Ieng Sary, Ieng Thirith and Khieu Samphan* Pre-Trial Decision on JCE, *supra* n 39, paras 65, 82.

⁸⁰ See *supra* note 61

customary international law.⁸¹ Also, given the manner in which the Allied military tribunals applied the concept of ‘common purpose/design’,⁸² the finding that JCE is a mode of *co-perpetration* liability under customary international law is plausible.

4.2.2.3. Criticism of the judgments cited by the Tadić Appeals Chamber

Finally, two specific criticisms of the sources used in *Tadić* to affirm JCE’s customary status ought to be briefly addressed here. First, scholars have often argued that the Appeals Chamber relied on “too few cases to support the existence of [common, consistent and concordant] state practice”.⁸³ This quantitative argument is unconvincing for several reasons. To begin with, the number of Nuremberg-era judgments that applied the ‘common purpose/design’ notion is not limited to those explicitly cited in *Tadić*.⁸⁴ The use of this mode of liability was extensive, not sporadic, a testimony of which is the fact that this construct was distinguished and separately analyzed in the United Nations War Crimes Commission case law digest.⁸⁵ More importantly, however, such criticism that emphasizes the state practice element and calls for vast empirical evidence of it goes amiss in the field of international criminal law where, prior to the 1990s, prosecutions of international crimes had been generally scarce. In this line of thought, Cassese also explained that:

In the context of international humanitarian law of armed conflict, the criterion of widespread practice may be eclipsed and *opinio juris* or *necessitates* separated and elevated as a basis... [T]he social and moral need for observance of rules, and the expression of legal views by a number of states or international entities about the binding value of the principle or rule, may suffice to establish the principle or customary rule even if there is no widespread or consistent State practice.⁸⁶

The Nuremberg-era jurisprudence, limited as it may be, constituted the most substantial body of such practice at the time of the *Tadić* Appeal Judgment. Given that its basic principles were unanimously adopted by the United Nations,⁸⁷ and keeping in mind the ICJ modern method of identifying international custom,⁸⁸ the above criticism cannot detract from the conclusion that the concept of ‘common purpose/design’ is recognized under customary international criminal law.

The second line of criticism focuses on the *nature* of the judgments cited by the *Tadić* Appeals Chamber. In particular, it has been argued that since the cases upon which the judges relied were all decided by American, British and Canadian military tribunals, they could only serve as evidence that the concept of ‘common purpose/design’ is recognized in common law, but not that it has been established as part of customary international criminal law.⁸⁹ Civil law jurisdictions such as Germany and Spain, the argument goes, did not adopt this concept and in fact have come to apply a quite different approach to co-principal liability.⁹⁰ These arguments are lacking in merit because they fail to appreciate that the Allied military tribunals operating in occupied Germany did not apply domestic law when trying the Nazi accused. Rather, under the authority of Control Council Law No.10, they applied international law and, as Scharf has also explained, “followed the Charter and jurisprudence of the Nuremberg Tribunal.”⁹¹ It need only be recalled that the US Military Tribunals at Nuremberg referred to the IMT Judgment to conclude that the notion of conspiracy, as interpreted under US law, is not applicable in cases brought before them.⁹² Instead, they applied the concept of ‘common purpose/design’, which they considered to have been recognized by the International Military Tribunal in its analysis on Article 6 IMT Charter.⁹³ In this respect, Koessler, who was an attorney in some of the US trials in Germany, observed:

⁸¹ Ohlin submits that a judgment by an international court “is not an example of state practice, since the decision of particular judges at international tribunals cannot be attributed to specific states.” J. Ohlin, ‘Co-Perpetration: German *Dogmatik* or German Invasion’, in C. Stahn (ed), *The Law and Practice of the International Criminal Court* (Oxford: Oxford UP, 2015), at 525. The present author respectfully disagrees with this assertion. Just as national judgments have been considered acts of the said state, so could international judgments present a form of collective state practice of those states that have enshrined their *opinio juris* in the basic document of the said international tribunal and invested in it the authority to apply these legal principles they had agreed upon.

⁸² See Chapter 2, Section 2.3.3.2. and Section 2.3.3.3.; Chapter 3, Section 3.5.2.

⁸³ Karnavas, *supra* n 37, at 485-486. See also Bogdan, *supra* n 37, at 109-110.

⁸⁴ The United Nations War Crimes Commission in fact pointed out that “[i]n a large number of trials held before United States Military Government Courts the charges made were charges that accused ‘acted in pursuance of a common design to commit’ certain stated offences”. UNWCC Law Reports, Vol. XV, *supra* n 73, at 94. (*emphasis added*) In its *de novo* analysis on the customary status of the JCE doctrine, the ECCC Pre-Trial Chamber also noted that “there are more relevant post-World War II international military cases than the ones cited by *Tadić*.” In particular, the judges referred to 16 additional cases published in the UNWCC digest and another 10 cases decided by German Courts on the basis of Control Council Law No.10. *Ieng Sary, Ieng Thirith and Khieu Samphan* Pre-Trial Decision on JCE, *supra* n 39, para 65 (fn 191).

⁸⁵ UNWCC Law Reports, Vol. XV, *supra* n 73, at 94-98.

⁸⁶ Cassese, *supra* n 34, at 303.

⁸⁷ See *supra* text accompanying notes 61-68.

⁸⁸ As noted above, the ICJ has applied the more relaxed, modern approach to identifying customary international law especially in cases dealing with issues of international humanitarian law and international criminal law. See *supra* text accompanying notes 25-35. On this point, Schabas has pointed out that this approach “may also trouble public international lawyers, who find the methodology imprecise or inconsistent. It might be better if it was simply acknowledged that customary international law in the context of international criminal law means something different than customary international law in the context of traditional public international law.” Schabas, *supra* n 10, at 100-101.

⁸⁹ Karnavas, *supra* n 37, at 486-487; C. Steer, ‘Non-State Actors in International Criminal Law’, in J. D’Aspremont (ed), *Participants in the International Legal System: Multiple Perspectives on Non-State Actors in International Law Theoretical Perspectives* (London: Routledge, 2011), at 301-302.

⁹⁰ Olásolo, *supra* n 40, at 59-60.

⁹¹ Scharf, *supra* n 62, at 74-75. See also, M. Bassiouni, *Crimes against Humanity: Historical Evolution and Contemporary Application* (Cambridge: Cambridge UP, 2011), at 157.

⁹² Military Tribunal I, *United States of America v. Karl Brandt et al.* (“The Medical Case”), Case No. 1, 9 December 1946-19 August 1947, in *Trials of War Criminals before the Nuernberg Military Tribunals under Control Council Law No. 10, Nuremberg, October 1946-April, 1949*, Vol. II (Washington, D.C.: United States Government Printing Office: 1949, at 122. See Chapter 2, Section 2.3.3.3.

⁹³ See Chapter 2, Section 2.2.5.1 and Section 2.2.6.

Concerning forms of participation in a crime, charges in the Dachau trials were at least on their face based upon the general principles regarding kinds of complicity recognized among all civilized nations rather than on anything which is particular to the Anglo-American systems of law [...] No exception from this general approach were the so-called common design charges⁹⁴

Thus, rather than arising specifically from US domestic law, this notion was defined and used in accordance with what the Yalta memorandum, discussed in Chapter 2, called:

the rule of liability, common to all penal systems and included in the general doctrines of the laws of war, that those who participate in the formulation and execution of a criminal plan involving multiple crimes are jointly liable for each of the offenses committed and jointly responsible for the acts of each other.⁹⁵

The British tribunals also emphasized in a case brought before them that it was “not a trial under English Law”⁹⁶ and the UN War Crimes Commission noted that while members of the court often made references to domestic law notions, they were “using the words almost in inverted commas”⁹⁷ and merely “as providing analogies on which the Court might act.”⁹⁸ It is, therefore, misguided to claim that the US and British military tribunals in occupied Germany applied Anglo-American law when trying the Nazi defendants. The ‘common purpose/design’ concept, in particular, made its entrance in the field of international criminal law as a result of negotiations and compromise among the Allies on the content of Article 6 IMT Charter,⁹⁹ and the ensuing recognition by the International Military Tribunal of “the responsibility of persons participating in a common plan.”¹⁰⁰ It was not mechanically imported from the domestic law of any particular state and its doctrinal basis was certainly not alien to civil law jurisdictions. In fact, it ought to be noted that the underlying rationale of the ‘common purpose/design’ notion was in practice also applied by German courts that, under the authority of the Control Council Law No.10, tried Nazi war criminals in the Allied occupied zones. In many of these cases, the decision whether the accused was responsible as a co-perpetrator (*Mittäter*) or as an accessory (*Gehilfe*) to a group crime depended on

whether the evidence could show that he “wanted the offence as his own”: *i.e.* on whether he shared the group’s intent to commit the crime or not.¹⁰¹ Also, although there are no readily accessible records to show how the Soviet tribunals in Germany construed joint principal responsibility, it bears noting that the approach followed in Soviet domestic jurisprudence at that time mirrored the underlying rationale of the Nuremberg-era ‘common purpose/design’ theory:

To establish complicity, we must establish that... there is a common criminal design. To establish complicity, it is necessary to establish the existence of a *united will directed toward a single object common to all* the participants in the crime. If, say, a gang of robbers will act in such a way that one part of its members will set fire to houses, violate women, murder and so on, in one place, while another part of the gang will do the same in another place, then... they will be held *answerable to the full* for the sum total of the crimes¹⁰²

It is thus quite natural that present-day academics have often described JCE – the successor of the ‘common purpose/design’ construct – as a mixture of the common and civil law tradition, and a genuine mode of individual responsibility under international criminal law.¹⁰³

94 M. Koessler, ‘American War Crimes Trials in Europe’, 39 *The Georgetown Law Journal* (1950), at 82.

95 *Memorandum for the President, Subject: Trial and Punishment of Nazi War Criminals*, 22 January 1945, re-printed in B. Smith, *The American Road to Nuremberg: The Documentary Record, 1944-1945* (Stanford: Hoover Institution, 1982), at 120. See Chapter 2, Section 2.2.2.1.

96 *Trial of Erich Heyer and Six Others* (‘The Essen Lynching Case’), British Military Court, Essen, 18-19 and 21-22 December 1945, in UN War Crimes Commission, *Law Reports of Trials of War Criminals*, Vol. I (London: Published for the United Nations War Crimes Commission by His Majesty’s Stationary Office, 1947), at 91.

97 UNWCC Law Reports, Vol. XV, *supra* n 73, at 9.

98 *Ibid.*, at 49.

99 See Chapter 2, Section 2.2.4.1 and Section 2.2.5.1. See also Scharf, *supra* n 62, at 74-75.

100 *France et al. v Göring et al.*, International Military Tribunal, Judgment and Sentence, 1 October 1946, printed in *Trial of the Major War Criminals before the International Military Tribunal, Nuremberg, 14 November 1945-1 October 1946*, Vol. I, Nuremberg, Germany, 1947, at 226.

101 For instance, in the *K. and others case* (‘*Synagogue Case*’) the German Supreme Court in the British Occupied Zone convicted one of the accused as a co-perpetrator of the destruction of a synagogue, which was defined as a crime against humanity under Article II of Control Council Law No.10. The evidence showed that this accused did not physically participate in the attack on the building. However, the Court found that he contributed to the crime with his presence at the crime scene which, due to his prominent militant position as an “*alter Kämpfer*”, further exhilarated the rest of the group members to destroy the synagogue. The accused was found guilty as a co-perpetrator of the said crime against humanity because it was established that “he also wanted the crime as his own”. The case is discussed in *The Prosecutor v. Furundžija* (IT-95-17/1-T), Judgment, Trial Chamber, 10 December 1998, paras 205-207. See also Cassese, *supra* n 34, at 308 (fn 74). Another suitable example is the *R. Mulka et al. case* (‘*Auschwitz Concentration Camp Case*’) in which the defendants were found guilty as aiders and abettors to the charged crimes because “if it could not be proved that the accused actually identified himself with the aims of the Nazi regime, then the court would treat him as an aider and abettor because he lacked the specific intent to ‘want the offence as his own’”. *Tadić* Appeal Judgment, *supra* n 41, para 203 (fn 254). In a similar vein, in the *Hechingen and Haigerloch* case from 1947, a German tribunal found that the main accused, a senior civil official who had passed on and supervised orders received from Gestapo to deport the Jews of two small German towns to Auschwitz, “acted neither as perpetrator (*Täter*) nor co-perpetrator (*Mittäter*) but as accessory (*Gehilfe*) since his participation was confined to executing the orders of the Gestapo in his capacity as *Landrat* of *Kreis* Hechingen... *without departing from these orders on the basis of decisions of his own.*” An English translation of this judgment is available in ‘Modes of Participation in Crimes Against Humanity: The Hechingen and Haigerloch Case’, 7 *Journal of International Criminal Justice* (2009): 131-154 (quoted dictum is on page 138, *emphasis added*).

102 *Report of Court Proceedings in the Case of the Anti-Soviet Bloc of Rights and Trotskyites* (Moscow: People’s Commissariat of Justice of the U.S.S.R., 1938), at 695. (*emphasis added*) This formulation was cited by Trainin, the leading legal mind of the Soviet delegation in London, as reflecting the Soviet jurisprudence on the matter. A. Trainin, *Hitlerite Responsibility under Criminal Law* (London: Hutchinson & Co., 1945), at 84.

103 Van Sliedregt has explained that “JCE is a merger of common law and civil law. JCE in international law is a unique (*sui generis*) concept in that it combines and mixes two legal cultures/systems.” E. Van Sliedregt, ‘Joint Criminal Enterprise as a Pathway to Convicting Individuals for Genocide’, 5 *Journal of International Criminal Justice* (2007), at 199. See also K. Ambos, ‘Amicus Curiae Brief in the Matter of the Co-Prosecutors’ Appeal of the Closing Order Against Kaing Guek Eav “Duch” Dated 8 August 2008’, 20 *Criminal Law Forum* (2009), at 364-365.

4.2.3. JCE III and customary international criminal law

The ‘basic’ and ‘systemic’ forms of JCE are both premised on the principle that a person who contributes to a common plan with a shared intent to commit its projected crime is fully liable for the commission of the crime:¹⁰⁴ a principle that has a discernible lineage in Nuremberg-era law¹⁰⁵ and, as explained above, is therefore rightly considered part of customary international criminal law. JCE III liability, however, is materially distinct from the first two variants of the doctrine because it ascribes liability to the accused for crimes that were not part of the original plan and that he did not specifically intend.¹⁰⁶ To demonstrate the customary basis of this type of liability, the *Tadić* Appeals Chamber relied on several sources, the chief of which were two post-World War II cases: the *Essen Lynching* case¹⁰⁷ and the *Borkum Island* case.¹⁰⁸ There are a few peculiarities of these judgments, however, which have long casted doubt on the validity of the Chamber’s analysis and led to the more recent rejection of JCE III liability in the case law of the Extraordinary Chambers in the Courts of Cambodia.¹⁰⁹ The following section will conduct a renewed analysis on these judgments and other relevant Nuremberg-era documents that can help determine whether the ‘common purpose/design’ notion was, indeed, developed and applied in a manner that also supports the modern law on the ‘extended’ category of JCE.

4.2.3.1. Early traces of liability for the foreseeable crimes of a common criminal plan

As discussed in Chapter 2, the first construct that was proposed to deal with multiple liability in the context of international criminal law was Bernays’ conspiracy-complicity notion, which immediately attracted criticism for its doctrinal inconsistencies and was ultimately rejected by the Nuremberg Tribunal.¹¹⁰ It was also explained that this concept, which in US domestic law is known as *Pinkerton* liability, was materially distinct from the doctrine of JCE in all its three categories.¹¹¹ Thus, it would be erroneous to refer to the *Pinkerton*/Bernays’ conspiracy when reviewing the origins of the ‘extended’ form of

JCE liability. Rather, the earliest formulation of the underlying rationale of JCE III should be sought in the World War II-era document that first outlined the JCE liability principle: the Yalta memorandum from 22 January 1945. It will be recalled that its content was drafted by the future US judge at the IMT and two other senior government officials.¹¹² They eschewed Bernays’ conspiracy and advised President Roosevelt to propose to the European Allies that the Nazi war criminals be prosecuted under the rule of liability that was seen as common to all penal systems: “joint participation in a broad criminal enterprise which included and intended these crimes, *or was reasonably calculated to bring them about*.”¹¹³ The memorandum thus suggested that those who participate in the furtherance of a common criminal design could be held liable not only for the specifically intended crimes of this enterprise but also for those that, although unintended, were “reasonably calculated” to occur. The parallels with the contemporary JCE III doctrine, which assigns liability for crimes that were “a natural and foreseeable consequence” of the original plan,¹¹⁴ are evident. In fact, when this provision was subsequently included in the memorandum that the US Government proposed to the UK, French and Soviet Governments at the San Francisco conference of April 1945, it bore even closer semblance to the language of JCE III and stated that the international tribunal will:

determine both the guilt of the individual leaders and the extent of the participation of each of these organizations and its members in the great Nazi criminal enterprise, of which the crimes and atrocities which have shocked the world were an integral part *or at least the natural and probable consequence*.¹¹⁵

Moving on to the London conference, where the four Allies prepared the IMT Charter, it is notable that the idea of imputing responsibility for the “reasonably calculated” crimes of a joint enterprise also appeared in several draft texts on individual liability.¹¹⁶ Nevertheless, the records of these negotiations do not contain any substantial elaborations

¹⁰⁴ See Chapter 3, Section 3.5.2.

¹⁰⁵ See Chapter 2, Section 2.3.3.

¹⁰⁶ As explained in Chapter 3, under the ‘extended’ type of JCE, the accused can be found liable for crimes which were a natural and foreseeable consequence to the original plan, provided that he foresaw the risk of their occurrence and nevertheless continued to participate in the plan. See Chapter 3, Section 3.4.2.3.

¹⁰⁷ The *Essen Lynching* Case, *supra* n 96, at 91.

¹⁰⁸ *The United States of America v. Kurt Goebell et al.* (Case No. 12-489), General Military Government Court in Ludwigsburg, Germany, 6 February – 22 March 1946.

¹⁰⁹ *Ieng Sary, Ieng Thirith and Khieu Samphan* Pre-Trial Decision on JCE, *supra* n 39, paras 77-83; *Nuon Chea, Ieng Sary, Ieng Thirith and Khieu Samphan* Trial Decision on JCE Applicability, *supra* n 39, paras 29-35. For more information on the debate amongst scholars and practitioners on the customary status of JCE III liability, see Chapter 1, Section 1.4.1.1.

¹¹⁰ See Chapter 2, Section 2.2.

¹¹¹ See Chapter 3, Section 3.5.1.

¹¹² See Chapter 2, Section 2.2.2.1.

¹¹³ *Memorandum for the President, Subject: Trial and Punishment of Nazi War Criminals*, 22 January 1945, re-printed in Smith, *supra* n 95, at 120. (*emphasis added*) The document defined this theory as “firmly founded upon the rule of liability, common to all penal systems and included in the general doctrines of the laws of war, that those who participate in the formulation and execution of a criminal plan involving multiple crimes are jointly liable for each of the offenses committed and jointly responsible for the acts of each other.” See Chapter 2, Section 2.2.2.1.

¹¹⁴ See Chapter 3, Section 3.4.2.3.

¹¹⁵ *Memorandum of Proposals for the Prosecution and Punishment of Certain War Criminals and Other Offenders*, 25-30 April 1945, re-printed in Smith, *supra* n 95, at 165-166. (*emphasis added*).

¹¹⁶ *Planning Memorandum Distributed to Delegations at Beginning of London Conference, June 1945*, Document XI, in Jackson, *supra* n 58, at 65; *Draft of Agreement and Charter, Reported by Drafting Subcommittee, July 11, 1945*, Document XXV, in Jackson, *supra* n 58, at 197; *Redraft of Charter, Submitted by British Delegation, July 23, 1945*, Document XLV, in Jackson, *supra* n 58, at 352.

or discussions on this notion and in fact many subsequent proposals omitted it entirely.¹¹⁷ Overall, it can be said that references to liability for the incidental but foreseeable crimes of a common design were quite sporadic and isolated, rather than an expression of a well-pronounced effort to establish such a law. The Allies evidently thought little of it and when they ultimately agreed on the final text of Article 6 IMT Charter, no reference was made to this type of responsibility. This disinterest could possibly be explained by the manner in which they viewed the crimes committed by the Nazis. In particular, as confirmed by the IMT Indictment and Jackson's closing address to the Tribunal, the charged war crimes and crimes against humanity were seen not as incidental or ancillary to the Hitlerite plan to wage a war of aggression in Europe, but as an integral part of this plan.¹¹⁸ More specifically, the Prosecution argued that "the central crime in this pattern of crime, the kingpin which holds them all together, is the plot for aggressive war"¹¹⁹ and that:

the war crimes against Allied forces and the crimes against humanity committed in occupied territories are incontestably part of the program of making the war because, in the German calculations, they were indispensable to its hope of success.¹²⁰

Indeed, if one takes the view that the slave labour programmes, the extermination of Jews and the other crimes charged were regarded as an intrinsic part of the Nazi criminal plan to wage a war of aggression, it seems understandable why the London delegations felt no pressing need to define and establish the limits of liability for incidental crimes in the context of collective criminality.

Since the IMT Prosecution did not clearly rely on this type of responsibility to build its case, the issue was not discussed by the judges and, as Clarke has also pointed out, "the IMT did not touch on [liability for] unintended offences".¹²¹ Thus, it could be concluded that as far as the Nuremberg Judgment and the time period preceding its delivery is concerned, there is little material to suggest that the underlying rationale of JCE III responsibility was established under international criminal law.

¹¹⁷ See e.g. *Revised Definition of "Crimes"*, Prepared by British Delegation to Meet Views of Soviet Delegation, July 28, 1945, Document LIII, in Jackson, *supra* n 58, at 392; *Revision of Definition of "Crimes"*, Submitted by American Delegation, July 31, 1945, Document LVI, in Jackson, *supra* n 58, at 395.

¹¹⁸ Office of United States Chief of Counsel for Prosecution of Axis Criminality, *Nazi Conspiracy and Aggression*, Supplement A (Washington: United States Government Printing Office, 1947), at 16-24. See also Office of United States Chief of Counsel for Prosecution of Axis Criminality, *Nazi Conspiracy and Aggression*, Vol. 1 (Washington: United States Government Printing Office, 1946), at 15-16.

¹¹⁹ *Nazi Conspiracy and Aggression* (Supplement A), *supra* n 118, at 17.

¹²⁰ *Ibid.*, at 24.

¹²¹ R. Clarke, 'Return to Borkum Island: Extended Joint Criminal Enterprise Responsibility in the Wake of World War II', 9 *Journal of International Criminal Justice* (2011), at 844.

4.2.3.2. JCE III in the subsequent trials of Nazi war criminals: the sources cited in *Tadić*

i) The *Essen Lynching* case reviewed

The first case which the *Tadić* Appeals Chamber cited to confirm the customary status of JCE III liability was the *Essen Lynching* case, adjudicated by the British Military Tribunal in Essen in December 1945.¹²² The seven accused in this case were all charged with the commission of a war crime, viz. for being "concerned in the killing of three unidentified British airmen."¹²³ It was alleged that the accused, Erich Heyer, while standing before a crowd of civilians, ordered another accused, Peter Koenen, to escort the three British airmen to the nearest Luftwaffe unit and, adding in a loud voice so that everyone could hear, to not interfere if the gathered crowd would start molesting the prisoners. In the ensuing march throughout the streets of Essen, the British soldiers were severely beaten by civilians, five of whom were the other accused in this case, until they were eventually thrown over a bridge and shot dead. The Prosecutor submitted that:

every person who, following the incitement to the crowd to murder these men, voluntarily took aggressive action against any of these three airmen, was guilty in that he was concerned in the killing. It was impossible to separate any one of these acts from another; they all made up what is known as a lynching. From the moment they left those barracks, the men were doomed and the crowd knew they were doomed and every person in that crowd who struck a blow was both morally and criminally responsible for the deaths of the three men.¹²⁴

In its summary of the case, the UNWCC explained that the five accused civilians:

were found guilty because every one of them had in one form or another taken part in the ill-treatment which eventually led to the death of the victims, though against none of the accused had it been exactly proved that they had individually shot or given the blows which caused the death.¹²⁵

The *Tadić* Appeals Chamber used this information to make a seemingly plausible inference. It held that, based on the parties' arguments and the verdict, it could be concluded that this case concerned a common plan to subject the three British airmen to ill-treatment and the resulting murder was an excess crime to this plan. According to the *Tadić* judges, "not all [defendants] intended to kill but all intended to participate in the unlawful ill-treatment of

¹²² The *Essen Lynching* Case, *supra* n 96, at 88-92.

¹²³ *Ibid.* at 88.

¹²⁴ *Ibid.*, at 89.

¹²⁵ *Ibid.*, at 91.

the prisoners of war”, which suggested that their subsequent convictions for murder must have been based on a JCE III liability rationale.¹²⁶

There are several noticeable problems with this interpretation of the law applied in the *Essen Lynching* case: problems which render the *Tadić* Appeal Chamber’s analysis tenuous at best. To begin with, the Prosecution explicitly argued that the case against the seven accused was based on “a charge of murder and of nothing other than murder.”¹²⁷ This goes to say that there were no charges of ill-treatment on top of which some defendants were also found guilty of murder as a war crime. Rather, if the *Essen Lynching* case could be used as an example of a ‘common purpose’ judgment, there is more merit in treating it as a support for the ‘basic’ JCE category: viz. as a case concerning an enterprise aimed at committing murder. Furthermore, as Clarke has also noted, the Prosecution did not submit that the death of the three British airmen was a *foreseeable* consequence, but that the accused “*knew* they were doomed”;¹²⁸ i.e. rather than JCE III’s *dolus eventualis*, the *mens rea* standard pled here appeared to be knowledge of a certain result, combined with a voluntary participation in the execution of the plan. Last but not least, it must be noted that no Judge Advocate was appointed in the *Essen Lynching* case, which is why the UNWCC explained that “the considerations as to the facts and as to the law which guided the Court” were not clear and it was only possible to infer them.¹²⁹ This makes the *Tadić* Appeals Chamber’s reliance on this case quite problematic, especially in light of the fact that it cited only one other case to support the conclusion that the ‘extended’ form of JCE is firmly established under customary international criminal law.

ii) The *Borkum Island* case reviewed

The second case on which the *Tadić* judges relied regarding JCE III responsibility was the *Borkum Island* case.¹³⁰ Before examining its content, there are some general aspects of the nature of this trial that ought to be explained because they can affect the assessment of the law applied in it. To begin with, it is important to note that this case was decided by a US Military Government Court at Ludwigsburg, and as such falls within the group of trials that have often been referred to as the “Dachau Trials”.¹³¹ An important feature of these cases is that, unlike the trials before the Nuremberg Military Tribunals, they did not result in reasoned judgments, which contained the findings on law and fact. Rather, the judges

simply delivered a guilty/not guilty verdict at the end of the trial.¹³² Therefore, it is usually a matter of speculation what law they applied to convict the accused. It also bears noting in this respect that the judges in these military courts were not civilians but American officers and although in theory at least one of them had to have legal training, in practice this rule was not so strictly followed.¹³³ To ensure the fairness of the courts’ verdicts, a review process was established in accordance with which a conviction would become final only after it had been approved by the army commander who appointed the court. For this purpose, a judge advocate was assigned to examine the case file, comment on whether the verdict is legally just and provide a recommendation on its approval. As Koessler explained, it is on the basis of these detailed written reviews that the commander ultimately decided whether to approve a conviction or not.¹³⁴ Nowadays, they offer the most authoritative insight into the “Dachau Trials” as they contain a summary of the parties’ main arguments and a commentary on the nature of the charges and the final verdict.

Moving on to the merits of the *Borkum Island* trial, the facts of this case are very much similar to those in the *Essen Lynching* case. The Prosecution alleged that the 15 accused were guilty of participating in the assault (charge two) and murder (charge one) of seven US airmen who, on 4 August 1944, had crash-landed on the German island of Borkum.¹³⁵ In particular, it was alleged that following this accident, the victims were taken by several German officers to the nearest military compound. There the accused Goebell, who was the commander of all the naval units in Borkum, ordered that they be marched through the city and to the airport where, in accordance with set procedure, they were to be flown to mainland Germany. Evidence was introduced to the effect that Goebell called the accused Rommel, who was Chief of Police in Borkum, and after informing him of the march of the seven American airmen, referred him to the decree of Reich Minister Goebbels, according to which “if fliers were taken prisoners and the civilians started to attack them the police was not to interfere”.¹³⁶ Goebell also called the accused Akkermann, who was the mayor of Borkum, and told him the same thing. Following this, a unit of seven soldiers was assigned to escort the prisoners to the airport and orders were given to the effect that the guards “were not to protect the fliers in the event of attacks by the civilian population.”¹³⁷ In the ensuing march through the city, the seven victims were severely beaten by the civilian crowd until they were eventually shot dead by a soldier called Langer, a few hundred meters away from the airport. Each of the 15 accused played a role in this group crime: some

¹²⁶ *Tadić* Appeal Judgment, *supra* n 41, para 209.

¹²⁷ The *Essen Lynching* Case, *supra* n 96, at 91.

¹²⁸ See *supra* text accompanying note 124. Clarke, *supra* n 121, at 851.

¹²⁹ The *Essen Lynching* Case, *supra* n 96, at 91.

¹³⁰ *The United States of America v. Kurt Goebell et al.* (Case No. 12-489), General Military Government Court in Ludwigsburg, Germany, 6 February – 22 March 1946.

¹³¹ As Koessler explained, parallel to the cases brought before the Nuremberg Military Tribunals, the US also set up military government courts in its occupation zone in Germany. The majority of cases adjudicated before these courts were held at a US military compound in Dachau, at the site of the former concentration camp. This is why they are collectively labeled the “Dachau Trials” even though some of them – such as the *Borkum Island* case – were in fact adjudicated in other German cities. Koessler, *supra* n 94, at 25

¹³² *Ibid.*, at 29.

¹³³ *Ibid.*, at 28, 56

¹³⁴ *Ibid.*, at 67.

¹³⁵ Deputy Judge Advocate’s Office (War Crimes Group European Command), *Review and Recommendations: The United States v. Kurt Goebell et al.* (Case No. 12-489), General Military Government Court in Ludwigsburg, Germany, 6 February – 22 March 1946, [Date of Case Review: 1 August 1947], at 1. Web <<http://www.jewishvirtuallibrary.org/jsource/Holocaust/dachautrial/fs43.pdf>> [accessed 21 July 2016].

¹³⁶ *Ibid.*, at 4, 37.

¹³⁷ *Ibid.* at 4.

of them publicly incited the civilians to “beat the dogs, beat the murderers... beat them dead”,¹³⁸ some physically beat the victims,¹³⁹ some ensured that the police would turn a blind eye to the lynch¹⁴⁰ and some devised this whole plan and ordered the non-interference of the prisoners’ guards.¹⁴¹ The Prosecution thus submitted that all the accused were “cogs in the wheel of common design, all equally important, each cog doing the part assigned to it. And the wheel of wholesale murder could not turn without all the cogs”.¹⁴² It further argued that on this basis “each and every one of the accused [was] guilty of murder”.¹⁴³

While it is perfectly clear that the Prosecution relied on the ‘common purpose’ theory to define the liability of each accused, the lack of a reasoned judgment still creates uncertainty as to whether this was ultimately the approach followed by the judges in the case. However, it seems apposite to conclude that this was so, seeing that the review of the case prepared by the Judge Advocate’s Office explicitly defined the responsibility of several of the accused as that of persons “who join as participants in a plan to commit an unlawful act”.¹⁴⁴ The question that is more difficult to answer is whether the underlying principles of the ‘extended’ form of JCE were indeed defined and applied in this case. On the one hand, it may be argued that, just like in the *Essen Lynching* case, the Prosecutor in *Borkum Island* trial charged the defendants with participation in a common design to commit murder, which would mean that this case is more representative of the ‘basic’ form of JCE. Indeed, the *Tadić* Appeals Chamber itself conceded that this is a reasonable interpretation.¹⁴⁵ On the other hand, however, there is a very notable difference between the two cases: while *Essen*

Lynching was founded on “a charge of murder and of nothing other than murder”,¹⁴⁶ in *Borkum Island* there were two charges: of assault and of murder.¹⁴⁷ Aside from one accused who was acquitted under both charges, all the accused were found guilty of the assault charge and of them six were also convicted under the murder charge.¹⁴⁸ These six were Goebell, Akkermann, Seiler, Krolikowski, Wentzel and Schmitz but it was only against Schmitz that the Prosecution introduced evidence of direct participation in the shooting of the victims.¹⁴⁹ Thus, one could argue that the common design shared by all the accused was to assault (lynch) the US airmen and that their eventual murder was an additional crime to this enterprise, which was foreseen and accepted by the abovementioned six accused. This is certainly how the *Tadić* Appeals Chamber interpreted these verdicts when it concluded that the convictions under the charge of murder were entered:

Presumably... on the basis that the [six] accused, whether by virtue of their status, role or conduct, were in a position to have predicted that the assault would lead to the killing of the victims by some of those participating in the assault.¹⁵⁰

The Chamber’s inference on this point is not without merit and additional research shows that it is supported by the conclusions contained in the Judge Advocate’s subsequent review of the case. In particular, after examining the evidence against the accused Seiler,¹⁵¹ the reviewing authority recommended to the army commander that the verdict against this accused, for both the assault and the murder charges, should be approved in accordance with the law that:

All who join as participants in a plan to commit an unlawful act, *the natural and probable consequence of the execution of which involved the contingency of taking human life*, are legally responsible *as principals* for a homicide committed by any of them in pursuance of or in furtherance of this plan. The accused very actively furthered and contributed to the plan which resulted in several illegal killings. The evidence indicates that he was at least comparatively willing participant. While he is legally responsible as a principal for the illegal killings, the extent of his culpability is not too clear

138 The accused Akkermann shouted these words to the civilian crowd as the airmen were marched nearby the City Hall. *Ibid.*, at 35-36. Evidence was also introduced that the accused Weber, a soldier who was assigned to guard the prisoners, also shouted to the crowd: “there the pigs are coming, beat them to death. *Ibid.*, at 22.

139 The accused Mammenga and Heinemann are two of the defendants against whom evidence was introduced to the effect that they had personally punched and beaten the fliers with their fists. *Ibid.*, at 38 and 41.

140 Rommel, the Chief of Borkum Police, after being telephoned both by Akkermann and Goebell and informed of the prisoners’ march and reminded of the Reich Minister’ decree to not interfere in cases of civilian lynch, went to the house of the leader of the Emergency Service and agreed that “neither the Emergency Service nor the police should have anything to do with the affair.” *Ibid.*, at 8.

141 The accused Goebell and Seiler - both of whom never left the military base where the seven fliers were first interrogated - were instrumental to the planning and coordination of the march. *Ibid.*, at 12-13 and 24-25.

142 The Prosecutor further argued that “[I]t is important, as I see it, to determine the guilt of each of these accused in the light of the particular role that each one played. *They did not all participate in exactly the same manner.* Members of mobs seldom do. One will undertake one special or particular action and another will perform another particular action. It is the composite of the actions of all that results in the commission of the crime. Now, all legal authorities agree that where a common design of a mob exists and the mob has carried out its purpose, then no distinction can be drawn between the finger man and the trigger man (*sic*). *No distinction is drawn between the one who, by his acts, caused the victims to be subjected to the pleasure of the mob or the one who incited the mob, or the ones who dealt the fatal blows.*” This text from the Prosecution’s Charge Sheet is cited in *Tadić* Appeal Judgment, *supra* n 41, para 210.

143 *Ibid.*

144 The *Borkum Island* Case, Judge Advocate’s Review, *supra* n 135, at 21, 23, 25.

145 *Tadić* Appeal Judgment, *supra* n 41, para 211.

146 The *Essen Lynching* Case, *supra* n 96, at 91.

147 See *supra* text accompanying note 135.

148 The *Borkum Island* Case, Judge Advocate’s Review, *supra* n 135, at 1.

149 *Ibid.*, at 1 and 26.

150 *Tadić* Appeal Judgment, *supra* n 41, para 213.

151 Seiler was the commanding officer of the military compound where the US airmen were first taken after they crash-landed on the Borkum Island. Joined by his superior Goebell, he questioned the prisoners and assigned the units that were to march the airmen through Borkum. In accordance with Goebell’s instructions, he ordered the units to refrain from interfering if the civilians attacked the prisoners, to make sure that the prisoners walk with their hands above their heads, to beat the prisoners with the rifle butts if the fliers did not do this and to shoot dead any flier who tried to escape. According to the testimony of one witness, Seiler even offered a bottle of whiskey to the first guard who would shoot such a flier. Following these instructions, Seiler remained back in the compound while the prisoners were marched through Borkum city. The *Borkum Island* Case, Judge Advocate’s Review, *supra* n 135, at 24.

in that the orders he issued and the steps he took were apparently at the direction of his superior officer [Goebell] and there is no showing as to acts in furtherance of the plan following the time that the fliers started on the march. The extent of his culpability is not sufficient to warrant the death penalty.¹⁵²

There could be no doubt that the Judge Advocate's summation of the law in respect to Seiler's criminal liability outlines the underlying principles of the modern JCE III theory although, as will be explained below, with one notable difference regarding the standard of foreseeability. This formulation of the law on liability for the foreseeable crimes of a common criminal plan was restated verbatim in the sections dealing with the liability of the other accused, as well.¹⁵³ While one cannot state with absolute certainty what the judges' reasoning behind the verdicts was, the review of the Judge Advocate's Office strongly militates in favour of the conclusion that the *Borkum Island* case was decided upon the rule that those who jointly participate in the formulation and execution of a common plan to commit a crime (e.g. assault) can also be held liable for the natural and probable consequences of furthering this plan (e.g. murder). It is also clear from the above elaboration on the law that such individuals are qualified as principals to the said crimes.

The question that arises is what value should be attached to this judgment when trying to determine the customary law status of the 'extended' form of JCE. First of all, it should be pointed out that unlike the US Military Tribunals at Nuremberg, which were established under the authority of the Allied Control Council Law No.10 and have been judicially recognized as international tribunals applying international law,¹⁵⁴ the US military government courts which adjudicated the "Dachau trials" were national tribunals operating solely under US authority.¹⁵⁵ It was already discussed above that domestic judgments have been regarded as less indicative of the formation of customary international law because, to cite the ICTY Trial Chamber, they are not "based on the same corpus of law as that applied by international courts... [but] tend to apply national law, or primarily that law, or else interpret international rules through the prism of national legislation."¹⁵⁶ At the same time, however, it bears noting that, despite their origin, the US military government courts in Germany were not set to conduct proceedings under US domestic criminal law. Rather,

their jurisdiction was limited to applying the international law of war crimes, defined by the Headquarters of the United States Forces, European Theater of Operation, as:

violations... of the laws and usages of war of general application and acceptance, including the acts in contravention of treaties and conventions dealing with the conduct of war, as well as other offenses against persons or property which outrage common justice or involve moral turpitude, committed in connection with military operations, with or without orders or the sanction of commanders.¹⁵⁷

Koessler, who was a civilian attorney employed by the US Department of the Army to review "Dachau trials" verdicts, thus explained that although these courts derived their authority from a domestic directive:¹⁵⁸

this does not mean that the substantive law applied by those commissions was American law. It was the international law of war crimes. Consequently, in determining the guilt of a defendant, only internationally recognized principles of criminal law could properly be applied, thus not the described conspiracy doctrine which is generally not part of the criminal law in civil law countries, as for instance France and Germany.¹⁵⁹

Regarding the 'common design' notion and the imputation of liability for natural and probable consequence of the execution of a common criminal plan, Koessler viewed it as "a universally recognized principle of criminal law".¹⁶⁰ Inasmuch as the *Borkum Island* judgment could truly be seen as international case law, furthering the Nuremberg-era jurisprudence on the notion of 'common design/purpose', it presents potent evidence of the customary law status of JCE III liability.

¹⁵² *Ibid.*, at 25. (*emphasis added*)

¹⁵³ *Ibid.*, at 21, 23, 27, 29, 31, 32, 34, 36, 38, 40, 41-42.

¹⁵⁴ Military Tribunal III, *United States of America v. Josef Altstötter et al.* ("The Justice Case"), Case No.3, 5 March 1947-4 December 1947, in *Trials of War Criminals before the Nuernberg Military Tribunals under Control Council Law No. 10, Nuremberg, October 1946-April, 1949*, Vol. III (Washington, D.C.: United States Government Printing Office, 1951), at 984; Military Tribunal IV, *United States of America v. Ernst Von Weizsaecker et al.* ("The Ministries Case"), Case No.11, 6 January 1948 – 13 April 1949, in *Trials of War Criminals before the Nuernberg Military Tribunals under Control Council Law No. 10, Nuremberg, October 1946-April, 1949*, Vol. XIV (Washington, D.C.: United States Government Printing Office, 1953), at 325; See also, Koessler, *supra* n 94, at 25, 36; *Erdemović Appeal Judgment*, *supra* n 63, Separate and Dissenting Opinion of Judge Cassese, para 27; *Kupreškić et al.* Trial Judgment, *supra* n 60, paras 540-542.

¹⁵⁵ M. Koessler, 'Borkum Island Tragedy and Trial', 47 *Journal of Criminal Law and Criminology* (1956), at 194-195.

¹⁵⁶ *Kupreškić et al.* Trial Judgment, *supra* n 60, para 542. See *supra* text accompanying notes 74-79.

¹⁵⁷ Headquarters, U.S. Forces, European Theater, *Investigation of War Crimes*, (Circ. 132), 2 October 1945, re-printed in *Report of the Deputy Judge Advocate for War Crimes, European Command*, June 1944 - July 1948, at 111. (*emphasis added*) Web. <http://www.loc.gov/tr/frd/Military_Law/pdf/report-deputy-JA-war-crimes.pdf> [accessed 1 July 2016].

¹⁵⁸ The jurisdictional basis of the US military government courts that conducted the US zonal trials in occupied Germany was the Joint Chiefs of Staff, Directive on the Identification and Apprehension of Persons Suspected of War Crimes or Other Offenses and Trial of Certain Offenders (J.C.S. 1023/10), 8 July 1946, reprinted in T. Taylor, *Final Report to the Secretary of the Army on the Nuernberg War Crimes Trials under Control Council Law No. 10*, Appendix C, (Washington D.C., 15 August 1949). See K. Heller, *The Nuremberg Military Tribunals and the Origins of International Criminal Law* (Oxford: Oxford UP, 2011), at 9-17; R. Alija-Fernández, 'Justice for No-Land's Men? The United States Military Trials against Spanish Kapos in Mauthausen and Universal Jurisdiction', in K. Heller and G. Simpson (eds), *The Hidden Histories of War Crimes Trials* (Oxford: Oxford UP, 2013), at 105-106.

¹⁵⁹ Koessler, *supra* n 155, at 195. See also T. Jardim, *The Mauthausen Trial: American Military Justice in Germany* (Cambridge, MA: Harvard UP, 2012), at 31.

¹⁶⁰ In his view, "[i]t is a universally recognized principle of criminal law, governing the determination of guilt of an accomplice, that one who knowingly and willingly participates in a criminal design or undertaking is equally with the direct perpetrator or perpetrators responsible for any act in pursuance of that design or undertaking, or which is a natural or probable consequence of it". *Ibid.*, at 194. See also Koessler, *supra* n 94, at 82.

iii) Other sources cited in *Tadić* and preliminary conclusions

Aside from the *Borkum Island* and *Essen Lynching* trials, the *Tadić* Appeals Chamber also cited a few post-World War II cases decided by Italian courts, where the judges found the defendants liable for the unintended but foreseeable crimes of a common plan.¹⁶¹ Their nature, however, makes reliance on them problematic and is the reason why this section will address them only summarily.

The group of Italian cases referred to by the *Tadić* judges were 11 in total and they all dealt with war crimes committed by the armed forces of the “*Repubblica Sociale Italiana*”, or by civilians, in the period 1943-1945. They were adjudicated by the Italian Court of Cassation during the late 1940s and, according to the ICTY Appeals Chamber, all of them “indisputably applied the notion that a person may be held criminally responsible for a crime committed by another member of a group and not envisaged in the criminal plan.”¹⁶² One feature which sets these trials apart from the rest of the Nuremberg-era jurisprudence cited in the *Tadić* Appeal Judgment is that they were purely domestic in nature: *i.e.* they were brought before a national court which applied exclusively national law.¹⁶³ Therefore, while they are certainly indicative of the Italian approach to assigning criminal liability, they do not constitute international case law elaborating on the Nuremberg principles regarding common plan responsibility. As noted above, both the ICJ and the *ad hoc* Tribunals have limited the value to be attached to domestic judgments when determining the formation of international custom.¹⁶⁴ For this reason, it is not surprising that when the ECCC Pre-Trial Chamber carried out the first thorough review of the sources cited in *Tadić* to confirm the customary status of JCE III, it held that since the Italian cases represented domestic law, they “do not amount to... proper precedents for the purpose of determining the status of customary law in this area.”¹⁶⁵ The author agrees with this finding and submits that whatever the content of these judgments is, they could at the most be used to illustrate the soundness of the JCE III underlying rationale, as well as its acceptance in Italian national law, but not as proof that this mode of liability has been established under customary international law.

When the ICTY was established, its material jurisdiction was limited to applying rules which are “beyond any doubt part of customary international law”.¹⁶⁶ Considering the totality of sources which the *Tadić* Appeals Chamber cited to confirm the customary status of JCE III liability, one could understand why many scholars and practitioners have criticised the judges’ findings on the applicability of this concept. The *Essen Lynching* case can arguably be viewed as Nuremberg-era jurisprudence on the ‘basic’ form of JCE, but it is evident from the charges raised against the seven accused that this case was not dealing

with a dichotomy between core and incidental crimes of a common criminal plan: *i.e.* it could not have applied the underlying principles of the modern JCE III theory.¹⁶⁷ The group of Italian cases, where domestic courts applied domestic criminal law, can be considered as evidence of Italy’s practice on this matter but on their own they have very little to say about the formation of an international custom on liability for the incidental crimes of a common design. These judgments must be distinguished from post-World War II jurisprudence which elaborated the rules of international criminal law enshrined in the IMT Charter and the Allied Control Council Law No.10, and thus constitutes potent evidence of the creation of customary international law. The only authority cited in the *Tadić* Appeal Judgment that could be genuinely said to support the Chamber’s finding on the customary law status of JCE III is, thus, the *Borkum Island* trial. As explained above, despite the lack of a written judgment, the Judge Advocate’s review of this case militates in favour of concluding that some of the accused were found responsible for the incidental but foreseeable crimes of a common criminal plan.¹⁶⁸ Nevertheless, this case alone is not sufficient to evince beyond reasonable doubt the formation of international custom on JCE III liability. Moreover, it ought to be noted that while most of the cases cited by the *Tadić* judges in relation to JCE I and JCE II liability have been widely publicised and are easily accessible,¹⁶⁹ the records of the *Borkum Island* case were never published and are nowadays still difficult to access.¹⁷⁰ This is problematic because, as the ICTY Appeals Chamber has pointed out, in order to apply JCE in accordance with the principle of *nullum crimen sine lege*, “the law providing for such liability must be sufficiently accessible at the relevant time”.¹⁷¹

In light of all the above, it is reasonable to conclude that the sources cited in the *Tadić* Appeal Judgment to affirm the customary basis of JCE III liability do not sufficiently support such a finding.

4.2.3.3. JCE III in the subsequent trials of Nazi war criminals: other sources

When the ECCC judges rejected the customary status of JCE III liability they held that

¹⁶⁷ See *supra* text accompanying notes 122-129.

¹⁶⁸ See *supra* text accompanying notes 151-153.

¹⁶⁹ With several exceptions, the jurisprudence cited in the *Tadić* Appeal Judgment (and the other cases identified in this book) to confirm the customary basis of the ‘basic’ and the ‘systemic’ types of JCE has been published in the widely disseminated law reports of the UN War Crimes Commission, as well as in the well-known and easily accessible 15 volumes of “Trials of War Criminals before the Nuremberg Military Tribunals”. UN War Crimes Commission, *Law Reports of Trials of War Criminals*, Vols. I-XV (London: Published for the United Nations War Crimes Commission by His Majesty’s Stationary Office, 1947-1949); *Trials of War Criminals before the Nuernberg Military Tribunals under Control Council Law No. 10, Nuremberg, October 1946-April, 1949*, Vols. I-XV (Washington, D.C.: United States Government Printing Office, 1946-1949).

¹⁷⁰ The records of the “Dachau trials” are kept on microfilms, stored in the US National Archives and Records Administration, which can be inspected personally upon visit to National Archives Building in Washington D.C. Digital photocopies of some of these documents are available online at the Jewish Virtual Library. See ‘Nazi War Crimes Trials: The Dachau Cases (1945 - 1948)’, *The Jewish Virtual Library*, American-Israeli Cooperative Enterprise, Web. <<http://www.jewishvirtuallibrary.org/jsource/Holocaust/Dachautrialtoc.html>> [accessed 9 July 2016]

¹⁷¹ *Milutinović et al.* Decision on Joint Criminal Enterprise, *supra* n 37, para 37.

¹⁶¹ *Tadić* Appeal Judgment, *supra* n 41, paras 214-219.

¹⁶² *Ibid.*, para 218.

¹⁶³ Ambos, *supra* n 103, at 386.

¹⁶⁴ See *supra* text accompanying notes 74-79.

¹⁶⁵ *Ieng Sary, Ieng Thirith and Khieu Samphan* Pre-Trial Decision on JCE, *supra* n 39, para 82.

¹⁶⁶ UN Security Council, *Report of the Secretary-General Pursuant to paragraph 2 of Security Council Resolution 808 (1993) (S/25704)*, 3 May 1993, para 34.

neither the *Borkum Island*, nor the *Essen Lynching* case clearly adopted the underlying principles of this form of responsibility.¹⁷² This development did not trigger any substantial response in the ICTY/R subsequent jurisprudence and neither Tribunal revised the *Tadić* Appeals Chamber's findings on the 'extended' form of JCE. Notice of the said ECCC decision was taken only by the Appeals Chamber of the Special Tribunal for Lebanon which, after briefly listing several additional examples of seemingly relevant post-World War II cases, concluded that JCE III is firmly established under customary international criminal law.¹⁷³ These and a few other cases will be examined here.

i) Additional Dachau cases

To affirm the customary status of JCE III, the STL Appeals Chamber referred to three cases that fall in the abovementioned group of "Dachau trials":¹⁷⁴ the *United States v. Martin Gottfried Weiss et al.*,¹⁷⁵ the *United States v. Hans Ulrich and Otto Merkle*,¹⁷⁶ and the *United States v. Hans Wuelfert et al.*¹⁷⁷ The first of these three cases was already reviewed in Chapter 2 and has often been referred to as the *Dachau Concentration Camp Case*.¹⁷⁸ It dealt with the most senior staff members of the Dachau concentration camp and was tried as a "parent case" for a series of subsequent cases against other individuals involved in the camp's operation. As the UNWCC explained, this meant that judges in these affiliated follow-up trials had to:

take judicial notice of the decision rendered in the parent case including the finding of the court that the [Dachau] mass atrocity operation was criminal in nature and that the participants there acting in pursuance to a common design did subject the persons to [crimes] and no examination of the record of such parent case need to be made for the purpose.¹⁷⁹

¹⁷² *Ieng Sary, Ieng Thirith and Khieu Samphan* Pre-Trial Decision on JCE, *supra* n 39, paras 79-81; *Nuon Chea, Ieng Sary, Ieng Thirith and Khieu Samphan* Trial Decision on JCE Applicability, *supra* n 39, paras 30-31.

¹⁷³ *Interlocutory Decision on the Applicable Law: Terrorism, Conspiracy, Homicide, Perpetration, Cumulative Charging* (STL-11-01/I/AC/R176bis), Decision, Appeals Chamber, 16 February 2011, paras 237 (fn 355) and 239 (fn 360).

¹⁷⁴ See *supra* note 131.

¹⁷⁵ *Trial of Martin Gottfried Weiss and Thirty-Nine Others* ('The Dachau Concentration Camp Trial'), General Military Government Court of the United States Zone, Dachau, 15 November 1945 – 13 December 1945, in UN War Crimes Commission, *Law Reports of Trials of War Criminals*, Vol. XI (London: Published for the United Nations War Crimes Commission by His Majesty's Stationary Office, 1949), at 5-17.

¹⁷⁶ *United States of America v. Hans Ulrich and Otto Merkle* (Case No. 000-50-2-17), General Military Government Court of the United States, Dachau, Germany, 12-22 November 1946.

¹⁷⁷ *United States of America v. Hans Wuelfert et al.*, (Case No. 000-50-2-72), General Military Government Court of the United States, Dachau, Germany, 12-17 March 1947.

¹⁷⁸ See Chapter 2, Section 2.3.3.2.i

¹⁷⁹ The *Dachau Concentration Camp Trial*, *supra* n 175, at 16. Koessler observed that the idea was that "findings of fact in a parent case concerning a particular concentration camp [were made] to a specified extent binding upon the tribunals in subsequent trials related to the same concentration camp. [...] It would have been a waste of time, efforts and costs to repeat the evidence concerning certain general features of a particular concentration camp, introduced in the parent case, in each of the numerous affiliated proceedings." Koessler, *supra* n 94, at 32-33.

Thus, the 'common purpose/design' charge, which as explained in Chapter 2 formed the basis of the *Dachau Concentration Camp Case*, was subsequently also used in many 'smaller' trials against other participants in this system of ill-treatment.¹⁸⁰ They adopted the findings made in the "parent case" regarding the nature of the Dachau operation and the crimes committed in it, applied the law on 'common purpose/design' and sought to determine whether the defendant sufficiently participated in this system of ill-treatment in order to be convicted of its crimes.¹⁸¹ In fact, both the *Ulrich and Merkle* and the *Hans Wuelfert et al.* case, which the STL listed as evidence of the customary status of JCE III, belong to this category of trials.¹⁸² Therefore, it is important to first find out if the Dachau "parent case" truly assigned liability for the incidental crimes of a common criminal plan, and as such constitutes evidence of the customary status of JCE III.

The *Dachau Concentration Camp Case* was summarily examined in a report prepared and published by the United Nations War Crimes Commission.¹⁸³ Although this report clearly states that this case was founded on the 'common design' charge,¹⁸⁴ there is nothing in it that even remotely suggests that this notion was also used in the case to ascribe liability for crimes that were un-concerted and incidental to the Dachau criminal operation. In fact, the section of the UNWCC report that explained the law on this mode of liability states that "the prosecution adduced evidence that Dachau Concentration Camp was run according to a system which *inevitably produced*" the crimes charged in the indictment.¹⁸⁵ There is, thus, no discussion and distinction made between core and incidental crimes of the Dachau 'common design': rather, the crimes charged in the indictment were all viewed as inherent to this system of ill-treatment and falling within its criminal purpose. The UNWCC further cited the Prosecution's reliance on the principle of law that:

[n]o matter how wide may be the separation of confederates, if they are all engaged in a common plan for the execution of the felony and all take their part in the furtherance of the common plan, all are liable as principals.¹⁸⁶

The law defined here clearly confirms the underlying principles of the 'basic'/'systemic' type of joint criminal enterprise but it does not propound the rationale of the 'extended' category of JCE.

¹⁸⁰ Digital copies of the Judge Advocates' reviews of many of these cases can be accessed online at the Jewish Virtual Library. See *supra* note 170.

¹⁸¹ UNWCC Law Reports, Vol. XV, *supra* n 73, at 93.

¹⁸² STL Interlocutory Decision on the Applicable Law, *supra* n 173, para 237 (fn 355).

¹⁸³ The *Dachau Concentration Camp Trial*, *supra* n 175, at 5-17.

¹⁸⁴ *Ibid.*, at 7, 12.

¹⁸⁵ *Ibid.*, at 12. (*emphasis added*) For information on the specific crimes charged in this case, see *infra* note 190.

¹⁸⁶ *Ibid.*, at 13.

In light of the above, it is difficult to understand the STL Appeals Chamber's decision to list the *Dachau Concentration Camp Case* as evidence of the customary foundations of the 'extended' type of JCE. Regrettably, the judges did not deem it necessary to explain why they thought this case provides support for this mode of liability.¹⁸⁷ Some merit to this contention, however, may be seen in the Judge Advocate's original review of the case. In particular, when elaborating on the applicable law, the reviewing authority stated:

It is a well-settled principle of law that where two or more persons combine to perform a criminal act, each may be held liable criminally for all of his acts and of his confederates, done in furtherance of the common design, and where the design is actually carried out, then the liability of each person who participated therein is determined by the nature and extent of his participation. Furthermore, all who join in such common design to commit an unlawful act must take *responsibility for all the consequences of the execution of that act if done in furtherance of the plan although not specifically contemplated by the parties*, or even forbidden by the defendant, or although the actual perpetrator is not identified.¹⁸⁸

This statement of the law was not quoted in the UNWCC report on the *Dachau Concentration Camp Case*. It defined the limits of 'common design' liability in a very broad way by holding that the participants in a shared criminal plan could be held liable not only for the specifically agreed upon crimes, but also for *all* other consequences that resulted from the execution of the plan. At first sight, it seems that the underlying rationale of the JCE III notion, which imputes liability for additional offences that are *a natural and foreseeable* consequence of the original criminal enterprise, is included in the above formulation of the law. However, the truth is that the Judge Advocate's definition of 'common design' liability was much broader than that and, as formulated, it in fact bordered on establishing strict liability for any offence, foreseeable or not, committed in furtherance of this plan. Unlike the Judge Advocate's review in the *Borkum Island* case,¹⁸⁹ the review of the *Dachau Concentration Camp Case* did not clearly outline the elements of what is nowadays called the 'extended' form of JCE. This is not surprising, given that the charges in the latter trial were not at all structured in a manner that suggested that the Prosecution differentiated between core and

incidental crimes of the Dachau enterprise.¹⁹⁰ To be sure, the Prosecution's case was that the crimes charged in the indictment were an integral part of the Dachau system¹⁹¹ and the Judge Advocate's review stated unequivocally that "very little could have been hit-or-miss in such a kaleidoscopic pattern of human exploitation."¹⁹² In other words, the defendants did not face charges of some incidental, un-concerted crimes that fell outside the original criminal scope of the Dachau system. Therefore, one cannot conclude with any certainty that the *Dachau Concentration Camp Case* employed the principles of JCE III responsibility to convict the accused. Despite the lack of a written judgment, it is plausible to infer that the concept of 'common purpose/design' indeed formed the *ratio decidendi* of the verdicts in this case, but not that this form of liability was applied beyond its original scope.

As noted above, the *Dachau Concentration Camp Case* was a "parent case" to a series of affiliated "smaller" trials which dealt with the guilt of other persons involved in this system of ill-treatment. It bears noting that in some of these trials the defendants were acquitted of the charges because the evidence demonstrated that the nature and extent of their participation in the common design was insufficient for a conviction.¹⁹³ In other cases, such as the *Ulrich and Merkle* case and the *Hans Wuelfert et al.* case cited by the STL Appeals Chamber, the accused were shown to have "participated to a substantial degree" in the Dachau criminal enterprise so they were found guilty of the charged crimes: *i.e.* of the crimes that characterised this system of ill-treatment, as first defined in the "parent case".¹⁹⁴ Contrary to what the STL

¹⁹⁰ The indictment in the *Dachau Concentration Camp Case* contained two charges of war crimes. Under Charge 1, all the accused were held liable for "acting in pursuance of a common design to... [subject] civilian nationals of nations then at war with the then German Reich to cruelties and mistreatment, including killings, beatings, tortures, starvation, abuses and indignities". Charge 2 held the accused were responsible for "acting in pursuance of a common design to... [subject] members of the armed forces of nations then at war with the then German Reich... to cruelties and mistreatment, including killings, beatings, tortures, starvation, abuses and indignities" The *Dachau Concentration Camp* Trial, Judge Advocate's Review, *supra* n 188, at 1-2.

¹⁹¹ The *Dachau Concentration Camp* Trial, *supra* n 175, at 12.

¹⁹² The *Dachau Concentration Camp* Trial, Judge Advocate's Review, *supra* n 188, at 143.

¹⁹³ See, for instance, Deputy Judge Advocate's Office (War Crimes Group European Command), *Review and Recommendations: The United States v. Stefan Koch et al.* (Case No. 000-50-2-55), Intermediate Military Government Court, Dachau, Germany, 20-21 January 1947, [Date of Case Review: 29 July 1947], at 2-3. Web <<http://www.jewishvirtuallibrary.org/jsource/Holocaust/dachautrial/d56.pdf>> [accessed 1 May 2016]; Deputy Judge Advocate's Office (War Crimes Group European Command), *Review and Recommendations: The United States v. Karl Adami et al.* (Case No. 000-50-2-1), Intermediate Military Government Court, Dachau, Germany, 11-14 October 1946, [Date of Case Review: 24 Mar 1947], at 10 (regarding the liability of Anton Schermaul). Web <<http://www.jewishvirtuallibrary.org/jsource/Holocaust/dachautrial/d4.pdf>> [accessed on 1 May 2016].

¹⁹⁴ Deputy Judge Advocate's Office (War Crimes Group European Command), *Review and Recommendations: United States of America v. Hans Wuelfert et al.* (Case No. 000-50-2-72), General Military Government Court of the United States, Dachau, Germany, 12-17 March 1947, [Date of Case Review: 19 September 1947], at 2, 12. Web <<http://www.jewishvirtuallibrary.org/jsource/Holocaust/dachautrial/d73.pdf>> [accessed 7 May 2016]; Deputy Judge Advocate's Office (War Crimes Group European Command), *Review and Recommendations: United States of America v. Hans Ulrich and Otto Merkle* (Case No. 000-50-2-17), General Military Government Court of the United States, Dachau, Germany, 12-22 November 1946, [Date of Case Review: 12 June 1947], at 11. Web <<http://www.jewishvirtuallibrary.org/jsource/Holocaust/dachautrial/d19.pdf>> [accessed 7 May 2016]. For a list of the crimes charged in the *Dachau Concentration Camp Case*, and respectively in the follow-up smaller trials, see *supra* note 190.

¹⁸⁷ They only refer to a page from the case typescript, the content of which is unknown since this document is not published anywhere but is kept on file with the STL. STL Interlocutory Decision on the Applicable Law, *supra* n 173, para 237 (fn 355).

¹⁸⁸ Office of Judge Advocate (Headquarters, Third US Army and Eastern Military District), *Review of the Proceedings of General Military Court in the Case of United States vs. Martin Gottfried Weiss et al.*, 15 Nov – 13 Dec 1945, [Date of Case Review: March-April 1946], at 141 (*emphasis added*, references omitted). Web. <<http://www.jewishvirtuallibrary.org/jsource/Holocaust/dachautrial/d3.pdf>> [accessed 27 July 2016].

¹⁸⁹ See *supra* text accompanying note 152.

judges have suggested by listing these two cases as evidence of the customary status of JCE III, nothing in them actually implies that the accused were found guilty on the basis of liability for incidental crimes of a common criminal design. The *Ulrich and Merkle* case dealt with two accused who were members of the SS at the Dachau Camp and ran the DAW (*Deutsche Ausrüstungswerke*) workshops there. Thousands of Dachau prisoners were forced to work in this factory and were severely mistreated either directly by or upon instructions from the two accused. Both accused were found guilty of the charges against them and the reviewing authority recommended that the verdict be upheld, stating that:

The Court was required to take cognizance of the decision rendered in the Parent Case, including the findings of the Court therein, that the [Dachau] mass atrocity operation was criminal in nature and that the participants therein, acting in pursuance of a common design, subjected persons to killings, beatings, tortures, etc., and was warranted in inferring that those shown to have participated knew of the criminal nature thereof. Both of the accused were shown to have participated in the mass atrocity and the Court was warranted by the evidence adduced that, either in the Parent case or in this subsequent proceeding, in concluding as to them that they not only participated to a substantial degree, but the nature and extent of their participation was such as to warrant the sentence imposed.¹⁹⁵

The same conclusion was also drawn *mutatis mutandis* in the Judge Advocate's review of the *Hans Wuelfert et al.* case¹⁹⁶ and, in fact, this was the standard language used by the reviewing authorities to confirm guilty verdicts in the subsequent Dachau Camp trials.¹⁹⁷ It is abundantly clear that this construction of the law on 'common design' responsibility does not contain the underlying rationale of JCE III liability. Therefore, seeing that these reviews best indicate the legal basis on which the cases were decided, it is right to conclude that neither the *Ulrich and Merkle* case, nor the *Hans Wuelfert et al.* case, nor any of the other smaller trials affiliated to the Dachau "parent case", constitute strong evidence that the 'extended' form of JCE has been firmly established under customary international law.

ii) The Nuremberg Military Tribunals case law

To confirm the customary status of JCE III, the STL Appeals Chamber also referred to the case of the *United States of America v. Ulrich Greifelt et al.* ("The *RuSHA* Case"), decided by Nuremberg Military Tribunal I.¹⁹⁸ The defendants in this case were 14 Nazi

officials who held senior positions in four SS organizations that had one fundamental purpose: "to proclaim and safeguard the supposed superiority of "Nordic" blood, and to exterminate and suppress all sources which might "dilute" or "taint" it."¹⁹⁹ Under Count One of the indictment, which dealt with crimes against humanity, the Prosecution alleged that the defendants acted in furtherance of:

a systematic program of genocide, aimed at the destruction of foreign nations and ethnic groups, in part by murderous extermination, and in part by elimination and suppression of national characteristics. The object of this program was to strengthen the German nation and the so-called "Aryan" race at the expense of such other nations and groups by imposing Nazi and German characteristics upon individuals selected therefrom... and by the extermination of "undesirable" racial elements.²⁰⁰

and also that:

In carrying out the plans and enterprises constituting a vast integrated scheme to commit genocide and thereby to strengthen Germany, the defendants herein participated in criminal activities, including but not limited to those set forth hereinafter in paragraphs 11 to 21, inclusive, of th[e] indictment.²⁰¹

The said criminal activities included forced abortions, punishment for sexual intercourse with Germans, persecution and extermination of Jews, abducting "racially valuable" alien children etc. Although it is evident that the Prosecution construed the liability of the accused along the lines of what is nowadays known as the theory of joint criminal enterprise, the indictment did not contain any language propounding the underlying principles of the theory's third category. It described the charged crimes as an inherent part of the genocidal program, rather than as an incidental yet foreseeable consequence of the execution of that scheme.

The same could also be said for the actual judgment which the STL Appeals Chamber listed, without providing any elaboration on the matter, as evidence of the customary status of JCE III liability.²⁰² The judges in the *RuSHA* case indeed found that the accused Hofmann and Hildebrandt, who were appointed successively as chiefs of the SS Race and Settlement Main Office ("*SS Rasse und Siedlungshauptamt*"), actively participated in the Nazi 'Germanization' plan which had as its primary purpose: "[t]he two-fold objective of weakening and eventually destroying other nations while at the same time strengthening

¹⁹⁵ The *Ulrich and Merkle* Case, Judge Advocate's Review, *supra* n 194, at 10-11.

¹⁹⁶ The *Hans Wuelfert et al.* Case, Judge Advocate's Review, *supra* n 194, at 11-12.

¹⁹⁷ Digital copies of the Judge Advocate's reviews of many of the subsequent Dachau Concentration Camp cases can be accessed online via the database of the Jewish Law Library. See 'The Dachau Trials: Dachau Cases (1945 - 1947)', *The Jewish Virtual Library*, American-Israeli Cooperative Enterprise, Web. <<http://www.jewishvirtuallibrary.org/jsource/Holocaust/WarCrime13.html>> [accessed 27 July 2016].

¹⁹⁸ Military Tribunal I, *United States of America v. Ulrich Greifelt et al.* ("The *RuSHA* Case"), Case No. 8, 20 October 1947 – 10 March 1948, in *Trials of War Criminals before the Nuernberg Military Tribunals under Control Council Law No. 10, Nuremberg, October 1946-April, 1949*. Vols. IV and V (Washington, D.C.: United States Government Printing Office, 1950).

¹⁹⁹ The *RuSHA* Case, *supra* n 198, Vol. IV, at 613.

²⁰⁰ *Ibid.* at 609-610.

²⁰¹ *Ibid.* at 613.

²⁰² STL Interlocutory Decision on the Applicable Law, *supra* n 173, para (fn 355).

Germany, both territorially and biologically, at the expense of conquered nations.”²⁰³ The judges further held that *RuSHA* was the SS agency that was principally tasked with conducting racial examinations: a function that placed it at the heart of the crimes committed as part of the ‘Germanization’ program because its decisions on the racial value of the victim determined the questions of sterilization, forced abortion, abduction of children etc.²⁰⁴ The evidence showed that the defendant Hofmann was “fully conversant of the atrocious program”²⁰⁵ and so was Hildebrandt for whom it was shown to have “emphatically issued instructions”²⁰⁶ to his *RuSHA* subordinates, stating:

I want to point out once more the grave responsibility which has been assigned to the SS Leaders for Race and Resettlement matter by this new order, that is, to especially further all valuable racial strains for the strengthening of our people and to accomplish a complete elimination of everything racially inferior.²⁰⁷

The judges ultimately found that both accused “actively participated in the measures adopted and carried out in furtherance of the Germanization program”²⁰⁸ and were therefore criminally responsible for the crimes of this enterprise, namely:

the kidnaping of alien children; forcible abortions on Eastern workers; taking away infants of Eastern workers; the illegal and unjust punishment of foreign nationals for sexual intercourse with Germans; hampering the reproduction of enemy nationals; the forced evacuation and resettlement of foreign populations; the forced Germanization of enemy nationals; and the utilization of enemy nationals as slave labor.²⁰⁹

As the modern international tribunals have also noted, the *RuSHA* Judgment did define the liability of Hofmann and Hildebrandt in a manner that is analogous to the ‘basic’ category of JCE.²¹⁰ However, there is nothing in it to suggest that the accused were held responsible for crimes that were ancillary to the ‘Germanization program’, but were regarded as a natural and foreseeable consequence of its execution. In fact, the judges found that “*in the very beginning* the Germanization program envisioned certain drastic and oppressive measures, *among them*: Deportation of Poles and Jews; the separation of family groups

and the kidnapping of children [...] and the hampering of the reproduction of the Polish population.”²¹¹ Therefore, it is highly unlikely that the *RuSHA* case applied the rationale of JCE III liability and, contrary to the STL Appeals Chamber’s assertions, it cannot be treated as cogent evidence of the customary status of the doctrine’s third variant.

Another case from the Nuremberg Military Tribunals which is particularly relevant for the purpose of the present research is the *United States of America v. Karl Brandt et al.* (“The Medical Case”).²¹² It dealt with 23 accused – most of whom were medical doctors – who were involved in organizing and conducting human experiments on inmates in concentration camps throughout Nazi Germany, including high-altitude experiments, freezing experiments, poison experiments etc. The Indictment stated in a sweeping language that the accused were:

principals in, accessories to, ordered, abetted, took a consenting part in, and *were connected with plans and enterprises involving medical experiments without the subjects’ consent*... in the course of which experiments the defendants committed murder, brutalities, cruelties, tortures, atrocities, and other inhuman acts.²¹³

Of interest to the present study are the verdicts against three of the defendants – Ruff, Romberg and Weltz – who, the Prosecution alleged, subjected inmates at the Dachau camp to high-altitude experiments in order to “investigate the limits of human endurance and existence at extremely high altitudes.”²¹⁴ In particular, the case for the Prosecution was that these three accused and Dr. Sigmund Rascher formed an agreement to carry out the said experiments and divided the tasks among each other. Weltz was the person who brought all the parties together and coordinated the execution of the plan. Rascher, who was killed before the end of the war, was subordinate to Weltz and personally conducted the high-altitude experiments at Dachau. Ruff provided his expertise in the field of aviation medicine and he further supplied a mobile low-pressure chamber needed for these tests. Romberg was the principal assistant of Ruff and he was sent to Dachau to work together with Rascher on the experiments, seeing that the latter was not an expert in this particular area.²¹⁵ According to the Prosecution, the four accused met several times to agree on the details of their criminal plan, following which “the experimental program started to move as a mutual undertaking.”²¹⁶ The Prosecutor argued at trial that:

²¹¹ The *RuSHA* Case, *supra* n 198, Vol. V, at 96.

²¹² Military Tribunal I, *United States of America v. Karl Brandt et al.* (“The Medical Case”), Case No. 1, 9 December 1946–19 August 1947, in *Trials of War Criminals before the Nuernberg Military Tribunals under Control Council Law No. 10, Nuremberg, October 1946-April, 1949*, Vols. I and II (Washington, D.C.: United States Government Printing Office, 1949).

²¹³ The *Medical Case*, *supra* n 212, Vol. I, at 11. (*emphasis added*)

²¹⁴ These experiments at the Dachau concentration camp took place between March and August 1942. *Ibid.*

²¹⁵ The *Medical Case*, *supra* n 212, Vol. II, at 273-274.

²¹⁶ The *Medical Case*, *supra* n 212, Vol. I, at 95.

²⁰³ The *RuSHA* Case, *supra* n 198, Vol. V, at 90.

²⁰⁴ *Ibid.*, at 106, 110, 113-114, 117-118, 124, 129-130, 136.

²⁰⁵ *Ibid.*, at 115.

²⁰⁶ *Ibid.*

²⁰⁷ *Ibid.*, at 116.

²⁰⁸ *Ibid.*, at 160-161.

²⁰⁹ *Ibid.*

²¹⁰ *Rwamakuba* Decision on Application of JCE to Genocide, *supra* n 56, para 15; *Brđanin* Appeal Judgment, *supra* n 56, paras 393, 399-404; *Ieng Sary, Ieng Thirith and Khieu Samphan* Pre-Trial Decision on JCE, *supra* n 39, para 68.

[T]he high-altitude crimes committed in Dachau... was a criminal undertaking from its inception. It was known to all concerned that the proposed experiments were certain to result in deaths and that they were to be performed on nonvolunteers... Weltz supported the ambition of his subordinate, Rascher, to perform the experiments on behalf of the Weltz Institute. He secured the collaboration of Ruff and Romberg... He took care of the technical arrangements and participated in conferences with Ruff, Romberg, and Rascher which decided on the experiments to be performed... The deaths which occurred in these experiments were foreseeable from the beginning.²¹⁷

On the one hand, one might interpret the last sentence of the above-cited text as a reference to the underlying rationale of JCE III responsibility. It could be inferred that the accused agreed to subject the Dachau concentration camp inmates, through the said high-altitude experiments, to acts of inhuman treatment – this being the core concerted crime of the enterprise – and that the execution of this design led to the death of a large number of the test subjects: *i.e.* murder being the incidental but foreseeable crime of the enterprise. However, this line of reasoning is too tenuous to base a conclusive finding on. In fact, just a few lines above the sentence where the deaths of inmates were described as foreseeable, the Prosecution explicitly argued that the three defendants *knew* that the high-altitude experiments were *certain* to result in deaths. The *mens rea* standard described here is indirect intent, or *dolus directus* in the second degree. It is a higher degree of intent than the one required for incurring JCE III liability: *dolus eventualis*, or advertent recklessness.²¹⁸ In other words, rather than describing Ruff, Romberg and Weltz as persons who foresaw a risk that the deaths of inmates may result from the execution of the high-altitude experiments, the Prosecution contended that they had actual knowledge that the death of many inmates will certainly result from these tests. Moreover, these deaths were not described as incidental, additional crimes to the common plan: rather, in its closing brief, the Prosecution clearly argued that they “were expected from the very beginning and were a part of the experimental plan.”²¹⁹ Therefore, while there could be no doubt that the charges against the three defendants were based on the concept of common design/enterprise responsibility,²²⁰ the Prosecution did not expand its scope beyond that discussed in Chapter 2 of this book,²²¹ or at least not to an extent matching the legal framework of JCE III liability.

The Prosecution’s case against Ruff, Romberg and Weltz did not fare well before the Tribunal. After examining all the evidence, the judges found that two different series of

high-altitude experiments were conducted at the Dachau concentration camp. The first kind, just as the Prosecution had alleged, tested the limits of human endurance at extremely high altitudes. Around 200 inmates were forced to participate in these experiments that resulted in the deaths of nearly 80 of them. The second series of experiments, however, investigated the problems of rescue of aviators at high altitudes. Between 10 to 15 German nationals who were prisoners at Dachau participated in these human experiments and none of them died or was injured.²²² The Defence had submitted that Ruff, Romberg and Weltz agreed to carry out only this latter kind of tests and solely on volunteers, while the forced deadly experiments that examined the limits of human endurance at extremely high altitudes were conducted independently by Dr. Rascher who had gone rogue and had stopped following orders from Weltz.²²³ This argument seems to have convinced the judges because they found Weltz not guilty of the charges against him and explained that:

[w]hile the evidence is convincingly plain that Weltz participated in the initial arrangements for the experiments and brought all parties together, it is not so clear that *illegal experiments* were planned or carried out while Rascher was under Weltz command, or that he knew that experiments which Rascher might conduct in the future would be illegal and criminal.²²⁴

Indeed, the Tribunal found that the research assignment that Weltz pursued was to investigate the problems of rescue of aviators at high altitudes,²²⁵ which led him to contact Romberg and Ruff, and set up the experiment at Dachau. Although it was not clearly stated in the judgment, it appears that in itself this specific venture was considered by the judges to be a “permissible medical experiment”.²²⁶ This is confirmed by the fact that Romberg and Ruff – both of whom admitted to having conducted the experiments on rescue at high altitudes – were acquitted of all the charges against them.²²⁷ This means that solely the experiments on the limits of human endurance were regarded as illegal and entailed criminal responsibility for those implicated in them. The judges held that Rascher was “the prime mover in the[se] experiments”²²⁸ and also accepted the evidence that from the first day of his work in Dachau, Rascher refused to report to Weltz on the progress of the experiments, as a result of which the latter transferred him out of his command and the experiments were stopped.²²⁹

Is the *Medical* case a Nuremberg-era JCE III jurisprudence? At first glance, the answer might appear to be yes. Ruff, Romberg, Weltz and Rascher had formed an agreement to

²¹⁷ *Ibid.*, at 96.

²¹⁸ See Chapter 3, Section 3.4.2.3.

²¹⁹ Further in the Prosecution’s closing brief, it was re-stated that “deaths were expected from the very beginning and were a part of the experimental plan.” *The Medical Case*, *supra* n 212, Vol. I, at 103.

²²⁰ In the closing brief, when concluding on the liability of the three defendants, the Prosecutor argued that “it is clear that Weltz must be held responsible for the numerous murders which resulted during the high-altitude experiments in Dachau. Not only did he participate in plans and enterprises involving the commission of these experiments, but he was also the direct superior of Rascher who, together with Russ and Romberg, actually executed the experiments.” *Ibid.*, at 99-100.

²²¹ See Chapter 2, Section 2.3.3.2.

²²² *The Medical Case*, *supra* n 212, Vol. II, at 275.

²²³ *The Medical Case*, *supra* n 212, Vol. I, at 100-102.

²²⁴ *The Medical Case*, *supra* n 212, Vol. II, at 274-275. (*emphasis added*)

²²⁵ *Ibid.*, at 273.

²²⁶ *Ibid.*, at 181.

²²⁷ *Ibid.*, at 275-276.

²²⁸ *Ibid.*, at 273.

²²⁹ *Ibid.*, at 274.

carry out a series of human experiments which had one aim, yet Rascher deviated from this plan by independently conducting a second, unauthorized string of experiments, which resulted in the deaths of many subjects. It is instructive that, according to the judges, Weltz could not be held responsible for these additional, un-concerted crimes because there was not enough evidence to prove “that he knew that experiments which Rascher *might conduct in the future would be illegal and criminal*.”²³⁰ This could be interpreted as an implicit recognition of the rationale of JCE III liability: if Weltz had been aware of the risk that these additional deadly experiments might be conducted in the execution of the original plan, he would have been found guilty of the resulting crimes. There are, however, several notable problems with this line of reasoning. To begin with, as explained in Chapter 3, the ‘extended’ type of JCE only applies in situations where the excess crime is a by-product of a common criminal purpose that is shared by all the accused: *i.e.* the modern international tribunals have determined that JCE III liability does not concern cases where a non-criminal plan accidentally results in the commission of a crime.²³¹ Considering the acquittals of Ruff, Romberg and Weltz, it can be concluded that the Tribunal did not find that the original plan, to which they all contributed, was aimed at the commission of crimes. Thus, contrary to the Prosecution’s allegation that their agreement was a “criminal undertaking from its inception”,²³² there was actually no JCE at all between the three accused and Rascher. This means that this part of the *Medical* Judgment could not serve as evidence of the customary status of any of the theory’s variants. Moreover, even if these accused had been found to have shared a criminal design, a much more detailed and pronounced elaboration on when they may be held liable for Rascher’s additional crimes must be offered in the judgment before it could be cited as a Nuremberg-era JCE III jurisprudence.

4.2.4. Evaluating the customary status of JCE III

Is the ‘extended’ variant of the JCE doctrine firmly established under customary international criminal law? The above research has shown that this is a many-sided question that cannot be answered with a simple ‘yes’ or ‘no’. As a point of departure, it is the method of recognizing international custom that causes division on this matter. Legal positivists who insist on seeing large bodies of evidence of common and consistent state practice would probably never agree that JCE, in any of its three categories, is a customary mode of liability. However, for the field of international criminal law, which was born in the context of the World War II-era trials and then entered into a vacuum during the Cold War decades only to be brought back to life in the 1990s, such demands for vast state practice are counterproductive. Indeed, they could be used to challenge the customary status of practically every rule of international criminal law. To be sure, the methodology that the ICTY *Tadić* Appeals Chamber used to confirm the customary basis for JCE responsibility

corresponds to what has become known as the ‘modern’ approach to customary international law: a method which has been followed on many occasions by the International Court of Justice, especially in cases regarding rules of international humanitarian law. The UN *ad hoc* Tribunals’ approach was, thus, neither novel, nor invalid and the present research has further explained why the specific sources they relied on to affirm the customary status of the Nuremberg-era ‘common purpose’ concept – and its present-day manifestation in JCE I and JCE II liability – do, indeed, support this conclusion.

The second conclusion that could be drawn from the above research is that the *current* legal framework of JCE III liability finds no basis in customary international criminal law. As explained in Chapter 3, after years of jurisprudential uncertainty, the ICTY Appeals Chamber eventually established that the standard of foreseeability required by the ‘extended’ variant of JCE is that that the accused must be aware that the additional crime could be a *possible*, rather than a *probable*, consequence of the execution of the plan:

Plotted on a spectrum of likelihood, the JCE III *mens rea* standard does not require an understanding that a deviatory crime would *probably* be committed; it does, however, require that the possibility a crime could be committed is sufficiently substantial as to be foreseeable to an accused.²³³

and further that:

JCE III liability arises even if the JCE member knows that the commission of the crime is only a “possible consequence” of the execution of the common purpose. It is necessary “that the possibility a crime could be committed is sufficiently substantial as to be foreseeable to the accused.”²³⁴

This research has identified several early traces of JCE III responsibility in post-World War II documents and jurisprudence, yet none of them support the degree of foresight that the ICTY Appeals Chambers has established for this type of responsibility. The memorandum which the Allies endorsed at the San Francisco conference explicitly stated that Hitler and his associates would be held liable for crimes that were “an integral part or at least the *natural and probable* consequence” of the execution of the Nazi criminal enterprise.”²³⁵ This was an elaboration of the earlier formulation made in the Yalta memorandum, which stated that the participants in a criminal design will be held responsible for the intended crimes of their enterprise and also for those that it “was *reasonably calculated* to bring them about”.²³⁶ a statement of the law which also appeared sporadically

²³³ *The Prosecutor v. Karadžić* (IT-95-5/18-AR72.4), Decision on Prosecution’s Motion Appealing Trial Chamber’s Decision on JCE III Foreseeability, Appeals Chamber, 25 June 2009, para 18. See Chapter 3, Section 3.4.2.3.ii.

²³⁴ *The Prosecutor v. Šainović et al.* (IT-05-87-A), Judgment, Appeals Chamber, 23 January 2014, para 1557.

²³⁵ *Memorandum of Proposals for the Prosecution and Punishment of Certain War Criminals and Other Offenders*, 25-30 April 1945, re-printed in Smith, *supra* n 95, at 165-166. (*emphasis added*). See *supra* Section 4.2.3.i.

²³⁶ *Memorandum for the President, Subject: Trial and Punishment of Nazi War Criminals*, 22 January 1945, re-printed in Smith, *supra* n 95, at 120. (*emphasis added*)

²³⁰ *Ibid.*, at 274-275. (*emphasis added*)

²³¹ See Chapter 3, Section 3.4.2.3.

²³² The *Medical* Case, *supra* n 212, Vol. I, at 96.

in a few earlier drafts of the IMT Charter.²³⁷ Furthermore, the one case in which the underlying principles of JCE III liability were most clearly elaborated by the Judge Advocate – *i.e.* the *Borkum Island* case – also defined the rule as imposing liability for deviatory offences, which are “the *natural and probable* consequence of the execution” of the original criminal plan.²³⁸ As already noted in Chapter 3, the difference between a ‘possibility’ and a ‘probability’ standard is in the degree of foresight that the accused must have: the latter one is stricter than the former. Therefore, it can be concluded that the ICTY Appeals Chamber impermissibly broadened the scope of JCE III liability when it upheld the possibility standard and, thus, rejected the test that was first entertained in the Nuremberg-era body of law.

Finally, it remains to be answered whether, if the necessary adjustments to the JCE III legal framework are made, the sources stated in this research allow a conclusion that this form of liability is a rule of customary international law. There is a good reason why the answer to this question continues to cause controversy among scholars and practitioners in this field. On the one hand, there are, indeed, some Nuremberg-era documents and judgments which contain language that propounds the underlying rationale of JCE liability. The Yalta memorandum,²³⁹ the San Francisco memorandum,²⁴⁰ several draft texts of the IMT Charter,²⁴¹ and most notably the *Borkum Island* case²⁴² did discuss the issue of liability for incidental crimes of a common criminal plan. On the other hand, however, the above research has shown that the other cases which modern international tribunals have cited as evidence of the customary status of JCE III do not truly support such a finding. In fact, let us take as a starting point the argument that the ICTY has made about the need to distinguish between various categories of decisions and the value they have for identifying rules of customary international law.²⁴³ The IMT Judgment, as one delivered by an internationally constituted tribunal that applied international law, is on the top of this hierarchy. While the IMT recognized “the responsibility of persons participating in a common plan”²⁴⁴ – *i.e.* ‘common purpose/design’ liability – this research has explained that the Tribunal remained silent on the question of liability for the incidental crimes of a common criminal design.²⁴⁵ Next come the judgments of the Nuremberg Military Tribunals: courts that were judicially

recognized as international in nature, applied international law as enshrined in the Control Council Law No.10 and only differed from the IMT in their composition: *viz.* they were comprised solely of US judges and prosecutors.²⁴⁶ The *RuSHA* judgment is the only one that has been cited in modern international criminal case law to evince the customary status of JCE III liability and the above review of it found that this claim is without merit.²⁴⁷ Additional research of the NMT judgments has shown that only the *Medical* case seems to have touched upon the issue of liability for the incidental crimes of a common criminal plan but, for reasons explained above, it was concluded that this judgment also did not employ the rationale behind the ‘extended’ form of JCE.²⁴⁸ Moving down this value-oriented hierarchy of decisions, there are all the other judgments of the Allies’ military tribunals in occupied Germany which, given their nature,²⁴⁹ should arguably be given less weight when tracing the formation of customary international criminal law, than those of the IMT and the NMTs. From this particular category of decisions, the *Borkum Island* case stands out as the only one in which the notion of liability for incidental crimes of a common criminal plan was clearly entertained. Apart from this case, however, the above research has demonstrated that none of the other “Dachau trials” cited by the STL, nor the *Essen Lynching* case discussed in the ICTY *Tadić* Appeal Judgment, actually established the principles underlying JCE III liability.²⁵⁰ Lastly, the “least valuable” category of judgments are those delivered by domestic courts, which applied national criminal law. The group of Italian cases cited by the ICTY *Tadić* Appeals Chamber fall within this category and, as the ECCC also pointed out, their value for identifying the status of customary international criminal law is lesser.²⁵¹

The above résumé does not support a finding that JCE III liability has a firm footing in post-World War II law and jurisprudence, and that as such it has crystalized into a principle of customary international criminal law. While the ‘common purpose/design’ construct could be easily identified in judgments belonging to each of the above-described four categories, and is codified in a number of legal texts from that period,²⁵² the extension of this form

²⁴⁶ See *supra* note 154.

²⁴⁷ See *supra* text accompanying notes 198-211.

²⁴⁸ See *supra* text accompanying notes 212-232.

²⁴⁹ On the nature of the US military government courts which conducted the so-called “Dachau trials” see *supra* text accompanying notes 154-159. Although in theory it was the Control Council Law No.10 that established the authority of these Tribunals to conduct trials in occupied Germany, the US, British and French governments all enacted national legislative acts that set up and govern the work of these courts. Thus, unlike the NMTs, they did not strictly apply the law specifically established under the Control Council Law No.10 and they were domestic courts. D. Cohen, ‘Transitional Justice in Divided Germany After 1945’, in J. Elster (ed), *Retribution and Reparation in the Transition to Democracy* (Cambridge: Cambridge UP, 2006), at 63; Koessler, *supra* n 155, at 194-195. Nevertheless, as pointed out above, they did not apply national law when trying the accused but sought to apply the generally accepted principles of international law. See *supra* text accompanying notes 89-98 and 154-160.

²⁵⁰ See *supra* Section 4.2.3.2.i and Section 4.2.3.3.i.

²⁵¹ *Ieng Sary, Ieng Thirith and Khieu Samphan* Pre-Trial Decision on JCE, *supra* n 39, para 82. See *supra* Section 4.2.3.2.iii.

²⁵² See *supra* Section 4.2.2.1 and Section 4.2.2.2. See also Chapter 2, Section 2.2.2.1. (text accompanying notes 23-28), Section 2.2.4.1. and Section 2.3.3.1.

²³⁷ See *supra* note 116.

²³⁸ See *supra* text accompanying note 152.

²³⁹ *Memorandum for the President, Subject: Trial and Punishment of Nazi War Criminals*, 22 January 1945, re-printed in Smith, *supra* n 95, at 120.

²⁴⁰ *Memorandum of Proposals for the Prosecution and Punishment of Certain War Criminals and Other Offenders*, 25-30 April 1945, re-printed in Smith, *supra* n 95, at 165-166.

²⁴¹ See *supra* note 116.

²⁴² See *supra* text accompanying notes 144-160.

²⁴³ *Kupreškić et al.* Trial Judgment, *supra* n 60, paras 540-542. See *supra* note 79.

²⁴⁴ IMT Judgment, *supra* n 100, at 226. See Chapter 2, Section 2.2.5.1.

²⁴⁵ See *supra* text accompanying notes 116-121.

of liability to *incidental* crimes of the enterprise is a principle that was mentioned only sporadically in early draft documents leading to the promulgation of the IMT Charter and was not applied in any of the major trials of Nazi war criminals. The modern international tribunals have sought support for JCE III responsibility mostly in the smaller, zonal trials held by the US and British courts in occupied Germany, records of which are quite often unavailable or less accessible. Even if, next to the *Borkum Island* trial, one could unearth several more such cases that recognized the concept of liability for incidental crimes of a common criminal plan, it would still be doubtful whether, on their own, a couple of decisions belonging exclusively to this particular category can evince that JCE III liability has been firmly established as an international custom. On the basis of the above, it is concluded that, considering all sources which the modern international tribunals have explicitly cited so far, the ‘extended’ category of joint criminal enterprise is not a mode of liability that has a basis in customary international criminal law.

4.2.5. The nature of JCE III liability

As explained earlier in this book, the UN *ad hoc* Tribunals have consistently found that JCE is a theory of co-perpetration responsibility.²⁵³ Notably, this finding has been made in relation to all three variants of the doctrine, including the ‘extended’ form of joint criminal enterprise.²⁵⁴ The research conducted in Chapter 3 assessed the merits of this assertion and concluded that it is valid in relation to the ‘basic’ and ‘systemic’ category of JCE, because they both rely on the existence of: i) a common plan to commit the concerted crime, and ii) a shared direct intent to commit the said crime, as an accepted doctrinal basis for reciprocal attribution of acts between the participants in a criminal enterprise.²⁵⁵ These two requirements ensure that the principle of individual culpability is respected when (joint) principal liability is imputed to a JCE I or JCE II participant who did not physically and directly commit the said concerted crime. Chapter 3, however, left open the question whether this conclusion also holds true for JCE III liability: a matter that, for the reasons explained below, merits a separate consideration here.

²⁵³ See Chapter 1, Section 1.3.2. and Chapter 2, Section 3.5.2.

²⁵⁴ Đorđević Appeal Judgment, *supra* n 38, para 58; *The Prosecutor v. Popović et al.* (IT-05-88-A), Judgment, Appeal Chamber, 30 January 2015, para 1672; *The Prosecutor v. Tolimir* (IT-05-88/2-A), Judgment, Appeals Chamber, 8 April 2015, para 281; *Krajišnik* Appeal Judgment, *supra* n 39, para 662; H. Olásolo, ‘Joint Criminal Enterprise and its Extended Form: A Theory of Co-Perpetration Giving Rise To Principal Liability, a Notion of Accessorial Liability, or a Form of Partnership In Crime?’, 20 *Criminal Law Forum* (2009), at 283.

²⁵⁵ See Chapter 2, Section 3.5.2. Indeed, scholars and practitioners have widely recognized that, in legal doctrine, the common plan/design/agreement between the participants in a concerted crime is the element which allows to impute the actions of each member of the said common plan to its other members. See e.g. *The Prosecutor v. Lubanga* (ICC-01/04-01/06-3121-Red), Judgment, Appeals Chamber, 1 December 2014, para 445. See also e.g. Olásolo, *supra* n 40, at 286; E. Van Sliedregt, *Individual Criminal Responsibility in International Law* (Oxford: Oxford UP, 2012), at 100, 144; Ambos, *supra* n 67, at 149; A. Gil Gil, ‘Mens Rea in Co-perpetration and Indirect Perpetration According to Article 30 of the Rome Statute. Arguments against Punishment for Excesses Committed by the Agent or the Co-perpetrator’, 14 *International Criminal Law Review* (2014), at 91.

4.2.5.1. Co-perpetration based on JCE III: doctrinal deficiencies and the principle of individual culpability

Aside from its disputed basis under customary international criminal law, a second existential criticism that has long plagued the ‘extended’ form of JCE has been the challenge to its nature as a mode of co-perpetration liability. In particular, it has often been argued that, in view of its materially distinct legal structure, this variant of the doctrine differs in nature from JCE I/JCE II responsibility and may not be used to ascribe *principal* liability for the additional, incidental crimes of the said enterprise: viz. a JCE participant who foresees a risk that one or more of his confederates may commit an extra crime cannot be held responsible as a co-perpetrator of that crime.²⁵⁶ There is certainly much force in this submission, considering that – in relation to the excess crimes – JCE III actually lacks both of the abovementioned prerequisites that make the reciprocal attribution of acts in the enterprise doctrinally possible. Specifically, while it is true that the ‘extended’ category of JCE always requires the existence of a common criminal plan, this plan pertains solely to the ‘core’ crimes of the enterprise.²⁵⁷ The excess crimes, which are the focus of JCE III responsibility, fall *outside* the scope of this plan: they are not agreed upon by the members of the enterprise and there is no common intent to commit them. The fact that an incidental crime was foreseen as a possible consequence of the original plan does not bring it *within* the scope of the authentic agreement between the JCE members. Thus, when persons A, B and C agree to commit the crime Y, and C additionally commits the foreseeable crime Z, there is neither a common plan/agreement to commit Z, nor a shared *dolus directus* in the first degree to this end, and yet under the ‘extended’ category of JCE all three accused may be held liable as co-perpetrators of the crime Z (in addition to crime Y). This evident lack of doctrinal basis on which C’s acts in relation to the crime Z are imputed to A and B has prompted many to argue that JCE III ascribes guilt by association and thus violates the *nulla poena sine culpa* principle.²⁵⁸ As Ambos has aptly pointed out:

As to the *principle of culpability*, the conflict with JCE III is even more evident. [...] [I]f, according to this doctrine, *all* members of a criminal enterprise incur criminal responsibility even for criminal acts performed by only *some* members and which have not been agreed upon by all members

²⁵⁶ Olásolo, *supra* n 254, at 283-284; Cryer *et al.*, *supra* n 8, at 360; Cassese, *supra* n 34, at 323-324; N. Jain, *Perpetrators and Accessories in International Criminal Law: Individual Modes of Responsibility for Collective Crimes* (Oxford: Hart, 2014), at 64; Šainović *et al.* Appeal Judgment, *supra* n 234, Partially Dissenting Opinion and Declaration of Judge Liu, paras 18-19.

²⁵⁷ As explained in Chapter 3, there can be no JCE III liability without first establishing the existence of a ‘basic’ or ‘system’ form of JCE. See Chapter 3, Section 3.4.2.3.

²⁵⁸ Šainović *et al.* Appeal Judgment, *supra* n 234, Partially Dissenting Opinion and Declaration of Judge Liu, para 18; A. Danner and J. Martinez, ‘Guilty Associations: Joint Criminal Enterprise, Command Responsibility, and the Development of International Criminal Law’, 93 *California Law Review* (2005), at 108-109, 137; K. Ambos, ‘Joint Criminal Enterprise and Command Responsibility’, 5 *Journal of International Criminal Justice* (2007), at 207; M. Badar, “‘Just Convict Everyone!’ – Joint Perpetration: From Tadić to Stakić and Back Again”, 6 *International Criminal Law Review* (2006), at 301; G. Fletcher and J. Ohlin, ‘Reclaiming Fundamental Principles of Criminal Law in the Darfur Case’, 3 *Journal of International Criminal Justice* (2005), at 548. S. Powles, ‘Joint Criminal Enterprise: Criminal Liability by Prosecutorial Ingenuity and Judicial Creativity?’, 2 *Journal of International Criminal Justice* (2004), at 611; S. Wolfgang, ‘Jurisprudence on JCE – Revisiting a Never Ending Story’, *Cambodia Tribunal Monitor*, 3 June 2010, at 3-4.

before the actual commission but are, nonetheless, attributed to all of them on the basis of mere foreseeability, the previous *agreement* or *plan* of the participants as the only legitimate basis of reciprocal attribution has been *given up*. On what basis can a member of the original JCE who behaved in full compliance with the original plan then be blamed for the excess crimes?²⁵⁹

As discussed further below, while the fact that the JCE participant *foresees* the commission of the extra crime and still continues to participate in the enterprise surely entails some degree of culpability in relation to it, this foresight alone does not provide a doctrinal basis on which the unconcerted offence can be imputed to him, so that he could be held *fully responsible as a co-perpetrator*.

Next to the lack of an agreement, there is also the related problem of a lack of a shared intent in relation to the incidental JCE crime, which creates an additional legal anomaly in the application of the ‘extended’ JCE form. In particular, it creates two classes of co-perpetrators: JCE member(s) who directly intend the commission of the unconcerted offence (the ‘primary’ perpetrator) and JCE member(s) who only foresaw the risk of its commission (the ‘secondary’ perpetrator). This division could then be used to circumvent the subjective element of a crime that a *perpetrator*, and respectively, a co-perpetrator must, otherwise, always fulfil.²⁶⁰ Relying on JCE III to assign responsibility for special intent crimes, such as genocide and persecution, reveals the most dramatic manifestation of this problem. If A, B and C form an agreement to forcibly remove the population of a certain city (JCE I to forcibly transfer), in the execution of which C commits acts of genocide that A and B foresaw as a possible result of executing their original plan, JCE III allows holding A and B responsible as (joint-) *perpetrators* of genocide, despite the fact that they lacked the requisite *dolus specialis* for this crime²⁶¹ and merely had a *dolus eventualis* in relation to it.²⁶² This

anomaly has been much criticized in academia²⁶³ and even Cassese, one of the staunchest supporters of JCE III liability, conceded that:

whoever is liable under the third category of JCE has a distinct mens rea from that of the ‘primary offender’; nevertheless, as the ‘secondary offender’ bears responsibility for the same crime as the ‘primary offender’, the ‘distance’ between the subjective element of the two offenders must not be so dramatic as in the case of crimes requiring special intent. Otherwise, the crucial notions of ‘personal culpability’ and ‘causation’ would be torn to shreds.²⁶⁴

In this author’s view, Cassese aptly highlighted the nature of the problem at hand and, in fact, his conclusion – though restricted to the matter of JCE III and *dolus specialis* crimes – hints at a broader consideration. In particular, a logical extension of this reasoning is that JCE III may also not be applied to crimes that specifically require any *mens rea* standard higher than *dolus eventualis*: viz. *dolus directus* in the first degree or *dolus directus* in the second degree.²⁶⁵ For example, some ICTY judgments have established that the war crime of destroying or willfully damaging cultural property, listed in Article 3(d) ICTY Statute,²⁶⁶ requires that the perpetrator acted with direct intent in relation to the proscribed consequence:

As for the *mens rea* element for this crime, the Chamber is guided by the previous jurisprudence of the Tribunal that a perpetrator must act with a direct intent to damage or destroy the property in question. There is reason to question whether indirect intent ought also to be an acceptable form of *mens rea* for this crime, but that is an issue not directly raised by the circumstances of this case.²⁶⁷

²⁵⁹ Ambos, *supra* n 67, at 174.

²⁶⁰ As the ICTY Appeals Chamber aptly explained in the *Brđanin* case, to qualify as a *perpetrator* of a crime the accused must always fulfil its definitional elements, which is different for *participants* other than the perpetrator (*e.g.* aiders and abettors) who could incur criminal liability even though their *mens rea* was different (lesser) than that required in the crime’s definition. *The Prosecutor v. Brđanin* (IT-99-36-A), Decision on Interlocutory Appeal, Appeals Chamber, 19 March 2004, para 5. The requirement that the perpetrator must fulfil both the *actus reus* and the *mens rea* of the crime is, by logical extension, also valid for the co-perpetrator. Since in cases of co-perpetration the *actus reus* of the crime is usually carried out only by *some* of the confederates, the various theories of co-perpetration – including the JCE doctrine – have relied on the element of common plan or agreement to reciprocally attribute the *actus reus* of the crime to all the participants in the plan, which is how at each one of them is considered, for the purposes of law, to have personally carried out the objective requirements of the crime. Crucially, however, the crime’s *mens rea* element is not subject to such attribution and it has to be proven that the co-perpetrator actually possessed it: a requirement that the JCE doctrine automatically fulfils by requiring that the JCE members must share the highest level of intent – purpose/*dolus directus* in the first degree – even when the crime’s definition could be satisfied with a lower for of intent. See Chapter 3, Section 3.4.2.1. See also *Šainović et al.* Appeal Judgment, *supra* n 234, Partially Dissenting Opinion and Declaration of Judge Liu, para 17.

²⁶¹ Aside from intent to commit the underlying act, the crime of genocide further requires the specific intent to “destroy in whole or in part, a national, ethnical, racial, or religious group, as such.” Article 4(2), Statute of the International Criminal Tribunal for the former Yugoslavia, (UN Doc. S/RES/827), UN Security Council Resolution 827 (1993), 25 May 1993, as last amended on 7 July 2009. See also *Popović et al.* Appeal Judgment, *supra* n 254, para 415; *The Prosecutor v. Krstić* (IT-98-33-A), Judgment, Appeals Chamber, 19 April 2004, paras 20, 220.

²⁶² See Chapter 3, Section 3.4.2.3.

²⁶³ Van Sliedregt, *supra* n 103, at 205-206

²⁶⁴ Cassese, *supra* n 2, at 121-122.

²⁶⁵ Olásolo, *supra* n 254, at 282. As far as the *ad hoc* Tribunals are concerned, this problem would arise in very limited scenarios because, as Olásolo has noted, for *most* crimes falling within their jurisdiction, the ICTY/R have adopted a general *mens rea* standard of “awareness of the substantial likelihood” that the said crime would result from the actions of the perpetrator and acceptance of that risk. This standard seems to generally put the crimes’ *mens rea* on a par level with the subjective elements of JCE III, thus avoiding the above-discussed problem. Olásolo, *supra* n 40, at 77-82; For a discussion on the various forms of *mens rea* see Chapter 5, Section 5.4.2.1. and Chapter 3, Section 3.4.2.1.

²⁶⁶ Article 3(d) ICTY Statute defines as a violation of the laws and customs of war the “seizure of, destruction or wilful damage done to institutions dedicated to religion, charity and education, the arts and sciences, historic monuments and works of art and science”.

²⁶⁷ *The Prosecutor v. Strugar* (IT-01-42-T), Judgment, Trial Chamber, 31 January 2005, para 311. The *Brđanin* Trial Chamber also held that “[w]ith respect to the *mens rea* requisite of destruction or devastation of property under Article 3 (d), the jurisprudence of this Tribunal is consistent by stating that the mens rea requirement is intent (*dolus directus*).” *The Prosecutor v. Brđanin* (IT-99-36-T), Judgment, Trial Chamber, 1 September 2004, para 599. See also *The Prosecutor v. Naletilić & Martinović* (IT-98-34-T), Judgment, Trial Chamber, 31 March 2003, para 605; *The Prosecutor v. Blaškić* (IT-95-14-T), Judgment, Trial Chamber, 3 March 2000, para 185. It bears noting, however, that in subsequent jurisprudence that ICTY Appeals Chamber has actually broadened the scope of the *mens rea* requirement for this crime, holding that, other than with direct intent, a person can also commit it recklessly. See *The Prosecutor v. Strugar* (IT-01-42-A), Judgment, Appeals Chamber, 17 July 2008, paras 277-278; *The Prosecutor v. Milutinović et al.* (IT-05-87-T), Judgment *Vol. I*, Trial Chamber, 26 February 2009, paras 206, 210. For a critique of this broad definition of the *mens rea* element for the crimes of targeting civilians and civilian objects, see J. Ohlin, ‘Targeting and the Concept of Intent’, 35 *Michigan Journal of International Law* (2013), at 92-99; H. Olásolo, *Unlawful Attacks in Combat Situations: From the ICTY’s Case Law to the Rome Statute* (Leiden: Martinus Nijhoff, 2008), at 218-223.

Similarly, the *mens rea* requirement for rape – both as a crime against humanity and as a war crime – has been consistently defined as “the intention to effect prohibited sexual penetration, and the knowledge that it occurs without the consent of the victim”,²⁶⁸ which clearly indicates that rape is construed as a direct intent crime within the ICTY/R case law.²⁶⁹ Using JCE III to assign co-perpetration responsibility for such *dolus directus* crimes could also be problematic. True, the gap between the *mens rea* of the ‘secondary’ offender (*i.e. dolus eventualis*) and the ‘primary’ offender (*dolus directus* in the first/second degree) is not as dramatic as in the cases of *dolus specialis* crimes, yet it is still distressing that the ‘secondary’ offender could be found liable as a principal for a crime, the subjective elements of which he did not satisfy.²⁷⁰ This is where the tension between JCE III and the *nulla poena sine culpa* principle lies. As Werle and Burghardt have explained, the latter notion has two core aspects, namely that: i) a person shall not be punished for a crime he did not commit or otherwise participate in; and ii) punishment shall be *proportionate* to the degree of the accused’s culpability.²⁷¹ It is specifically the latter aspect of the principle of individual culpability that JCE III tampers with when assigning *joint principal* liability to the ‘secondary’ JCE offender for the unconcerted and unintended crimes, committed by the ‘primary’ JCE offender.

4.2.5.2. *Tribunals divided: resolving the tension between JCE III and the nulla poena sine culpa principle*

Despite the fact that over the years various defendants at the ICTY have raised one or more of the above doctrinal considerations to challenge the use of JCE III liability in the cases against them,²⁷² the ICTY Appeals Chamber has maintained that the ‘extended’ form

of joint criminal enterprise is a mode of co-perpetration liability that applies to all crimes within the Tribunal’s jurisdiction, including *dolus specialis* crimes.²⁷³ To this date, JCE III convictions have been upheld on appeal in seven cases at the ICTY – namely *Tadić*,²⁷⁴ *Krstić*,²⁷⁵ *Stakić*,²⁷⁶ *Martić*,²⁷⁷ Šainović et al.,²⁷⁸ *Popović et al.*,²⁷⁹ and *Tolimir et al.*²⁸⁰ – and in only one case at the Rwandan Tribunal: *Karemera and Ngirumpatse*.²⁸¹ Of these, the last four mentioned ICTY appeals also involved the application of JCE III to a special intent crime. While one may be inclined to say that this is a relatively sparing use of this variant of the doctrine, it is quite notable that half of these 8 appeal verdicts were in fact delivered in the last two years, thus presenting a rise in the Tribunals’ reliance on the ‘extended’ type of JCE. This is a worrying observation, considering the above-identified doctrinal deficiencies of this mode of liability, and the vitriol it has faced from the international commentariat over the years. Still, recent jurisprudential developments have also started to show some cracks in the judicial support for JCE III and have brought the search for solutions to the above-stated doctrinal problems closer to the ICTY/R chambers.

Just as the ECCC’s decision to reject JCE III’s customary status formed a milestone in the international jurisprudence on this type of liability,²⁸² an interlocutory decision of the STL Appeals Chamber from February 2011 presented another seismic moment in JCE III case law: this time concerning the nature of this construct and its relationship with the principle of *nulla poena sine culpa*.²⁸³ The Chamber, which notably was presided by Judge Cassese, offered the following observation that is worth quoting at length here:

One final remark is in order. JCE III is predicated, as discussed above, on the foreseeability of crimes, and on the acceptance of such foreseeable crimes by the ‘secondary offender’. This is why when other tribunals have discussed it, they have often referred to the notion of *dolus eventualis*. However, this notion does not easily tally with special intent crimes, such as terrorism. Under international law, when a crime requires special intent (*dolus specialis*), its constitutive elements can only be met, and the accused consequently be found guilty, if it is shown beyond reasonable doubt that he specifically intended to reach the result in question, that is, he entertained the required special intent. A problem

268 *The Prosecutor v. Karemera and Ngirumpatse* (ICTR-98-44-T), Judgment, Trial Chamber, 2 February 2012, para 1677. See also, *The Prosecutor v. Prlić et al.* (IT-04-74-T), Judgment Vol. I, Trial Chamber, 29 May 2013, para 69; *The Prosecutor v. Gacumbitsi* (ICTR-2001-64-A), Judgment, Appeals Chamber, 7 July 2006, para 151; *The Prosecutor v. Kunarac et al.* (IT-96-23 & IT-96-23/1-A), Judgment, Appeals Chamber, 12 June 2002, paras 127-129.

269 M. Badar, *The Concept of Mens Rea in International Criminal Law: The Case for a Unified Approach* (Oxford: Hart, 2013), at 303-304; M. Gillett, and M. Schuster, ‘Fast-track Justice: The Special Tribunal for Lebanon Defines Terrorism’, 9 *Journal of International Criminal Justice* (2011), at 1016-1017.

270 In this venue of thought, scholars have also noted that JCE III liability is excluded from ICC law by virtue of the fact that Article 30 RS establishes *dolus directus* in the first/second degree as a general *mens rea* element for the crimes in the Court’s jurisdiction, thus rejecting the notion of *dolus eventualis* and, respectively, the prospect of using JCE III in the ICC proceedings. See Chapter 5, Section 5.4.2.1. See also Van Sliedregt, *supra* n 255, at 146; Cassese, *supra* n 55, at 175; Ambos, *supra* n 67, at 172-173; M. Summers, ‘The Problem of Risk in International Criminal Law’, 13 *Washington University Global Studies Law Review* (2014), at 671.

271 G. Werle and B. Burghardt, ‘Establishing Degrees of Responsibility: Modes of Participation in Article 25 of the ICC Statute’, in E. Van Sliedregt and S. Vasiliev (eds), *Pluralism in International Criminal Law* (Oxford: Oxford UP, 2014), at 304-5. See also J. Ohlin, ‘Joint Intentions to Commit International Crimes’ 11 *Chicago Journal of International Law* (2011), at 750.

272 *Tolimir* Appeal Judgment, *supra* n 254, para 275; Đorđević Appeal Judgment, *supra* n 38, paras 73-74; *The Prosecutor v. Stakić* (IT-97-24-A), Judgment, Appeals Chamber, 22 March 2006, para 99; *The Prosecutor v. Karadžić* (IT-95-5/18-PT), Motion for Leave to Reply and Reply Brief: Preliminary Motion to Dismiss JCE III - Special Intent Crimes, Trial Chamber, 20 April 2009, paras 9-12.

273 *Popović et al.* Appeal Judgment, *supra* n 254, paras 1440, 1672; Đorđević Appeal Judgment, *supra* n 38, paras 58, 77; *Brđanin* Decision on Interlocutory Appeal, *supra* n 260, paras 5-10.

274 *Tadić* Appeal Judgment, *supra* n 41, paras 230-234.

275 *Krstić* Appeal Judgment, *supra* n 261, paras 150-151.

276 *Stakić* Appeal Judgment, *supra* n 272, para 98.

277 *Martić* Appeal Judgment, *supra* n 39, paras 183-187, 194-195, 202-205.

278 *Šainović et al.* Appeal Judgment, *supra* n 234, paras 1083, 1092, 1283, 1541, 1548-1549, 1582, 1592.

279 *Popović et al.* Appeal Judgment, *supra* n 254, paras 1435, 1443, 1709, 1717.

280 *Tolimir* Appeal Judgment, *supra* n 254, para 514.

281 *Karemera and Ngirumpatse v. The Prosecutor* (ICTR-98-44-A), Judgment, Appeals Chamber, 29 September 2014, paras 633, 635.

282 *Ieng Sary, Ieng Thirith and Khieu Samphan* Pre-Trial Decision on JCE, *supra* n 39, paras 77-83. See *supra* Section 4.2.3.

283 STL Interlocutory Decision on the Applicable Law, *supra* n 173.

arises from the fact that for a conviction under JCE III, the accused need not share the intent of the primary offender. This leads to a serious legal anomaly: if JCE III liability were to apply, a person could be convicted as a (co)perpetrator for a *dolus specialis* crime without possessing the requisite *dolus specialis*.

Thus, while the case law of the ICTY allows for convictions under JCE III for genocide and persecution as a crime against humanity even though those crimes require special intent, and contrary to what the Prosecution pleads, the better approach under international criminal law is not to allow convictions under JCE III for special intent crimes like terrorism. In other words, it would be insufficient for a finding of guilt for an accused charged as a participant in a JCE (directed, for instance, to the commission of robbery or murder) to have foreseen the possibility that the crimes within the common purpose would eventually give rise to a terrorist act by another participant in the criminal enterprise. He must have the required special intent for terrorism he must specifically intend to cause panic or to coerce a national or international authority. In such a case, the ‘secondary offender’ should not be charged with the commission of terrorism, but at the utmost only with a form of accomplice liability, in that he foresaw the possibility that another participant in the criminal enterprise might commit a terrorist act, willingly accepted that risk and did not drop out of the enterprise or prevent the perpetration of the terrorist offence. This person’s attitude should therefore be assessed as a form of *assistance* to the terrorist act, not as a form of *perpetration* – and provided of course that all other necessary conditions are met. The difference between the two classifications of the mode of responsibility should be clear. JCE III makes the ‘secondary offender’ a perpetrator, while aiding and abetting is evidently a lower mode of liability: one can be liable for less than direct intent because the system does not intend to pin on him the stigma of full perpetratorship, but rather that of a less serious participatory modality.²⁸⁴

The Appeals Chamber’s conclusion was significant not because the ideas contained in it were particularly novel: both the explanation of the doctrinal problem and the proposed solution to assign accessorial liability to the ‘secondary’ JCE III participant for the excess *dolus specialis* crimes had already been debated in scholarship.²⁸⁵ Rather, it was the deliberate departure from the established ICTY/R jurisprudence, coupled with the authority that this decision carried by virtue of being endorsed by the very judge who authored the JCE text in *Tadić*,²⁸⁶ that made it a powerful precedent for the limits of this theory. Indeed, the STL’s interlocutory decision did attract much attention in academia, where it has been praised as a positive development in the jurisprudence on JCE III liability.²⁸⁷ More notably, however, this decision managed to finally put this problem high on the agenda of the judges from the other international tribunals. At the SCSL, the *Taylor* Trial Chamber took notice of the reasoning provided by the STL judges and concurred that an accused could not be

held responsible under the ‘extended’ form of JCE for *dolus specialis* crimes.²⁸⁸ The ECCC has not addressed this matter yet, probably in light of the fact that it rejected altogether the application of JCE III responsibility in its proceedings, but it has generally emphasized that the accused must possess the requisite special intent in order to be convicted of a *dolus specialis* crime under the doctrine of JCE.²⁸⁹ Quite predictably, ICTY accused also started citing the STL’s interlocutory decision to contend that JCE III may not be used to enter convictions for such crimes.²⁹⁰ So far, the Tribunal’s response has been to reject the STL’s conclusions as “not binding on the [ICTY]”²⁹¹ and stress that its own jurisprudence on the ‘extended’ form of JCE is “not to be lightly dismissed by the Appeals Chamber simply because another tribunal has decided the matter differently”,²⁹² without offering any particular counter-arguments to address the doctrinal concerns over JCE III. Nevertheless, several ICTY judges have more recently concurred with the afore-cited dicta from the STL’s decision²⁹³ and concluded that the use of JCE III to hold an accused responsible as a co-perpetrator of a *dolus specialis* crime that he only foresaw and accepted the risk of its commission “contravenes the fundamental principle of individual culpability.”²⁹⁴ It thus transpired that the conceptual limits and legal incoherencies of the ‘extended’ variant of JCE have also become a matter of internal division within the Yugoslav Tribunal.

The solution offered by the STL – *i.e.* to treat the ‘secondary’ JCE offender as an aider and abettor (accessory) of the foreseeable *dolus specialis* crime – is, for the reasons explained further below, persuasive, yet it only partially resolves the strong tension between JCE III and the *nulla poena sine culpa* principle. In particular, the Appeals Chamber limited its conclusion solely to the question of special intent offences and generally upheld the use of the ‘extended’ form of the doctrine for all other international crimes. It held that the latter application of JCE III is legitimate because: i) the accused, even though lacking direct intent to commit the extra crime, was still able to foresee it and rendered its commission possible through continuing his participation in the enterprise; ii) public policy considerations (*i.e.* protecting society from this kind of dangerous group behavior) justify the use of this form of liability; and iii) the possibly lower culpability of the ‘secondary’ offender *vis-à-vis* the additional crime could be taken into account at the sentencing stage by lowering

²⁸⁸ *The Prosecutor v. Taylor* (SCSL-03-01-T), Judgment, Trial Chamber, 18 May 2012, para 468.

²⁸⁹ *Nuon Chea, Ieng Sary, Ieng Thirith and Khieu Samphan* Trial Decision on JCE Applicability, *supra* n 39, para 13.

²⁹⁰ *The Prosecutor v. Karadžić* (IT-95-5/18-T), Decision on Accused’s Motion to Strike JCE III Allegations as to Specific Intent Crimes, Trial Chamber, 8 April 2011, para 3; Đorđević Appeal Judgment, *supra* n 38, paras 74-76; Popović *et al.* Appeal Judgment, *supra* n 254, para 1704.

²⁹¹ Đorđević Appeal Judgment, *supra* n 38, para 83.

²⁹² *Ibid.*, See also Popović *et al.* Appeal Judgment, *supra* n 254, para 1708.

²⁹³ Šainović *et al.* Appeal Judgment, *supra* n 234, Partially Dissenting Opinion and Declaration of Judge Liu, paras 11-20; Tolimir Appeal Judgment, *supra* n 254, Opinions Séparée et Partiellement Dissidente du Juge Jean-Claude Antonetti, at 95-101; *The Prosecutor v. Prlić et al.* (IT-04-74-T), Judgment Vol. 6, Trial Chamber, 29 May 2013, Separate and Partially Dissenting Opinion of Presiding Judge Jean-Claude Antonetti, at 106-107, 152.

²⁹⁴ Šainović *et al.* Appeal Judgment, *supra* n 234, Partially Dissenting Opinion and Declaration of Judge Liu, para 18.

²⁸⁴ *Ibid.*, paras 248-249.

²⁸⁵ Van Sliedregt, *supra* n 103, at 205-206; Cassese, *supra* n 2, at 121-122; Olásolo, *supra* n 254, at 284.

²⁸⁶ M. Shahabuddeen, ‘Judicial Creativity and Joint Criminal Enterprise’ in S. Darcy and J. Powderly (eds), *Judicial Creativity at the International Criminal Tribunals* (Oxford: Oxford UP, 2010), at 201 (n.89).

²⁸⁷ See *e.g.* Ambos, *supra* n 67, at 174; Cassese, *supra* n 55, at 172-173; Jain, *supra* n 256, at 73-74.

the sentence of the accused.²⁹⁵ The present author is of the opinion that none of these points settles the afore-stated conceptual problems of using JCE III as a mode of co-perpetration responsibility. The existence of a causal link between the original common criminal plan and the unconcerted crime is, as Ambos also pointed out, not a doctrinal basis that allows for the (reciprocal) attribution of the excess acts.²⁹⁶ To accept that a causal connection between a person's act and a crime is enough to assign *principal* liability, is to collapse the differentiated model of criminal participation into a unitary one.²⁹⁷ Similarly, it may well be that JCE III accommodates for important and valid policy considerations, yet this does not resolve the underlying doctrinal crisis that this type of liability faces: *i.e.* its lack of a common plan/agreement element *vis-à-vis* the additional crime. At best, these policy concerns could be a reason to overlook the lack of doctrinal basis for imputing the unconcerted crime to the 'secondary' JCE offender and hold him liable as a co-perpetrator. Lastly, the assertion that the 'secondary' JCE offender may be given a lower sentence for the commission of the excess crime is a step in the right direction in that it might assuage the troubled proportionality aspect of the principle of individual culpability.²⁹⁸ However, it is unclear why this person should still be labelled as a 'co-perpetrator' (while being punished less harshly than the 'real' perpetrator) and, again, what the legal basis for the imputation of the excess acts of the 'primary' offender to the 'secondary' offender is. In this respect, Judge Liu submitted recently that the nature of JCE III liability is "a *tertium genus* between principal and accessory liability."²⁹⁹

What then can be the solution to the problem at hand? Writing in a separate opinion to the *Krajišnik* Appeal Judgment, Judge Shahabuddeen put forward two propositions to address the nature of JCE III liability.³⁰⁰ His first idea was premised on a rather obfuscated suggestion that foresight of the possible commission of a crime could be equated to intent to commit that crime,³⁰¹ so that the *Tadić* definition of JCE III could be read to say that when the 'secondary' offender foresees and *willingly accepts* the risk of the commission of the additional crime, he actually also *agreed* and formed *direct intent* in relation to that additional crime.³⁰² While this conclusion would, in theory, solve the doctrinal problems of JCE III liability, it is undesirable

because: i) as Judge Shahabuddeen conceded, it practically eliminates the distinction between intent and foresight;³⁰³ and ii) it makes JCE III an obsolete notion because it completely fuses it within the scope of JCE I/II liability: a result that is hardly consistent with the *Tadić* Appeal Judgment and the subsequent ICTY/R case law on this mode of liability. The second proposal that Judge Shahabuddeen put forward essentially mirrors the STL Appeals Chamber's finding but expands it for JCE III liability in its entirety: *viz.* conclude that this variant of the theory is founded on the principles of *accessorial* liability for all crimes (*i.e.* not only for special intent crimes).³⁰⁴ In the present author's view, this is the most viable and doctrinally sound solution to the above-discussed problems of the 'extended' variant of JCE. By holding the 'secondary' offender liable as an accessory to the unintended but foreseeable crimes of the enterprise, both sources of tension between JCE III and the *nulla poena sine culpa* principle are dealt with. As an accessory, the accused (who only had a *dolus eventualis* in relation to the additional crime) would correctly not be required to satisfy the possibly more stringent *mens rea* element of the crime that the perpetrator must fulfil, be it *dolus specialis*, or *dolus directus* in the first/second degree.³⁰⁵ Next, the problem with the lack of a common plan or agreement as a doctrinal basis for the reciprocal attribution of the unconcerted crime(s) would also cease to exist because, by being an accessory, the 'secondary' offender would only be held liable for his participation in relation to that crime: *i.e.* the unconcerted acts of the 'primary' offender are not *imputed* to the 'secondary' offender anymore.

To conclude, it is quite notable that when the *Brđanin* Appeals Chamber – the original protagonist of the proposition that the 'extended' variant of JCE also applies to *dolus specialis* crimes – first held that a conviction for genocide may be based on JCE III liability, the judges explained that the accused is not required to have genocidal intent because:

The elements of a crime are those facts which the Prosecution must prove to establish that the conduct of the perpetrator constituted the crime alleged. However, participants other than the direct perpetrator of the criminal act may also incur liability for a crime, and in many cases different *mens rea* standards may apply to direct perpetrators and other persons. The third category of joint criminal enterprise liability is, *as with other forms of criminal liability, such as command responsibility or aiding and abetting*, not an element of a particular crime. It is a mode of liability through which an accused may be individually criminally responsible despite not being the direct perpetrator of the offence.³⁰⁶

A fundamental aspect of this holding was that the judges expressly distinguished JCE III from commission liability and compared it to a mode of accessorial liability, before concluding that there is no doctrinal problem in using this notion to convict the accused of

²⁹⁵ STL Interlocutory Decision on the Applicable Law, *supra* n 173, para 245.

²⁹⁶ Ambos, *supra* n 67, at 174.

²⁹⁷ As explained earlier in this book, a unitary model of criminal liability does not distinguish between categories of responsibility but considers every individual who has a causal contribution to the commission of a crime (and has the requisite *mens rea* for it) as a principal perpetrator of that crime, whose liability is independent from that of all other persons who contributed to the crime: *i.e.* no distinction is made between principal and accessorial liability. J. Vogel, 'How to Determine Individual Criminal Responsibility in Systemic Contexts: Twelve Models' *International Society of Social Defence and Humane Criminal Policy* (2002), at 152; J. Stewart, "The End of 'Modes of Liability' for International Crimes", 25 *Leiden Journal of International Law* (2012), at 169-170. See Chapter 2, Section 2.3.1. and Section 2.3.2.

²⁹⁸ See *supra* text accompanying note 271.

²⁹⁹ Šainović *et al.* Appeal Judgment, *supra* n 234, Partially Dissenting Opinion and Declaration of Judge Liu, para 18.

³⁰⁰ *Krajišnik* Appeal Judgment, *supra* n 39, Separate Opinion of Judge Shahabuddeen, para 32.

³⁰¹ *Ibid.*, para 34, citing as support of this idea the English cases of *R v. Hancock* [1986] A.C. 455; *R v. Moloney* [1985] A.C. 905 and *R v. Smith (Wesley)* [1963] 1 WLR 1200.

³⁰² *Ibid.*, paras 36-37, 41-42.

³⁰³ *Ibid.*, paras 34, 43.

³⁰⁴ *Ibid.*, paras 43-52.

³⁰⁵ *Brđanin* Decision on Interlocutory Appeal, *supra* n 260, para 5; *Krajišnik* Appeal Judgment, *supra* n 39, Separate Opinion of Judge Shahabuddeen, para 47. See also, Jain, *supra* n 256, at 161-165, 193-194.

³⁰⁶ *Brđanin* Decision on Interlocutory Appeal, *supra* n 260, para 5. (*emphasis added*)

genocide: a finding that has been utterly ignored in the subsequent ICTY/R case law that has confirmed the use of JCE III *as a form of co-perpetration* responsibility, also for special intent crimes.³⁰⁷ In view of the lack of a doctrinal basis on which the additional crimes may be imputed to the ‘secondary’ JCE offender, and the problematic gap that arises between his *mens rea* (*dolus eventualis*) and that of *dolus specialis* and *dolus directus* in the first/second degree crimes, it is submitted that JCE III should generally be characterized as a form of accessorial liability.

4.3. The law on JCE with no physical perpetrators

The second fundamental problem that is addressed in this chapter raises important normative concerns about the scope of application of JCE liability and affects the doctrine in its entirety: the issue of using this notion to ascribe co-perpetration responsibility in cases where the direct (physical) perpetrators of the crime are not members of the JCE. As explained in the previous chapters, the ICTY/R Appeals Chamber has construed this theory as an expression of the legal principle that where two or more individuals coordinate efforts to execute a common criminal plan, the acts of each one of them can be reciprocally attributed to the other participants in the plan.³⁰⁸ The doctrinal basis on which this attribution is made possible is the agreement or plan that exists between all the participants in the concerted crime.³⁰⁹ This is the vehicle that unites their individual contributions into a whole and allows treating the so combined group conduct as if it was, metaphysically and for the purpose of the law, the personal act of each member of the criminal enterprise. This legal fiction expands the classic boundaries of principal liability and enables tribunals to define as co-perpetrators persons who did not physically carry out the *actus reus* elements of the concerted crimes. The specific angle which the JCE theory takes to this paradigm is that by uniting his will with that of the other participants in the common plan (*viz.* sharing the JCE purpose), the accused accepts the actions of his confederates as his own, which is why they should be treated as such in law.³¹⁰

This line of reasoning could be neatly applied in the earliest case law of the UN *ad hoc* Tribunals, where the judges dealt with rather small-scale cases in which the accused and a few other persons had formed a common purpose to commit a given crime and then the

crime was physically committed by one or more of the said individuals.³¹¹ A problem arises, however, in scenarios where the concerted crimes are in fact committed by a non-member of the JCE who is used by the JCE participants to further their common purpose. In such a case, the combined acts of all JCE members do not constitute the commission of the group crime because there is one piece in the puzzle that is missing: the acts of the physical perpetrator(s). If the agreement or common design between the JCE members is the legal basis for the reciprocal attribution of their contributions to the group crime, how can the final act of an outsider be attributed to the JCE members, so that they could all still be held liable as co-perpetrators? This is the question which the ICTY struggled with when it started dealing with its first cases against high-ranking military and political officials who used a host of foot soldiers, mercenaries, civil servants etc. to execute their criminal enterprises.³¹² Moreover, as shown below, this is a problem that has not been convincingly addressed to this date. Its importance is underlined by the fact that the modern international tribunals have moved past the stage of trying low-level accused and are nowadays focusing their resources on the prosecution of those at the apex of state power: *i.e.* the kind of cases in which the notion of JCE with no physical perpetrators comes into play.

4.3.1. A dubious start: early ICTY case law on JCE with no physical perpetrators

While the *Tadić* Appeals Chamber has often been praised for, among other things, pioneering the construction of what became “the most important mode of liability in modern international criminal law”,³¹³ it is also true that the judges defined several aspects of JCE’s framework in a rather ambiguous manner. As discussed in Chapter 3, this caused some intense debates on the precise scope of the doctrine’s legal elements in the ICTY’s subsequent jurisprudence.³¹⁴ The question whether the physical perpetrators of JCE crimes have to be amongst the parties to the criminal plan, *i.e.* whether the objective requirement of common plan or agreement must exist between the JCE members *and* those who physically commit the group crimes, did not escape this ambiguity. The present section will present a detailed review of how the problem of JCE with no physical perpetrators was addressed in *Tadić* and post-*Tadić* case law, which will not only answer the question of whether and how the *ad hoc* Tribunals have adopted this concept, but will also introduce the reader to all the legal and practical difficulties involved in applying the JCE doctrine to cases against senior political and military accused.

³⁰⁷ *Popović et al.* Appeal Judgment, *supra* n 254, paras 1440, 1672; *Đorđević* Appeal Judgment, *supra* n 38, paras 58, 77; *Stakić* Appeal Judgment, *supra* n 272, para 87.

³⁰⁸ See Chapter 1, Section 1.4.2.2 and Chapter 3, Section 3.5.2.

³⁰⁹ *Ambos*, *supra* n 103, at 370, 381; *Van Slidregt*, *supra* n 255, at 100, 144; *Olásolo*, *supra* n 40, at 169, 273-274, 286; *Ambos*, *supra* n 67, at 149, 174; *Gil Gil*, *supra* n 255, at 91. See also *Lubanga* Appeal Judgment, *supra* n 255, para 445.

³¹⁰ *The Prosecutor v. Vasiljević* (IT-98-32-A), Judgment, Appeals Chamber, 25 February 2004, Separate and Dissenting Opinion of Judge Shahabuddeen, para 32; *Furundžija* Trial Judgment, *supra* n 101, para 229.

³¹¹ *Furundžija* Trial Judgment, *supra* n 101, paras 124-130; *Tadić* Appeal Judgment, *supra* n 41, paras 178-184; *The Prosecutor v. Vasiljević* (IT-98-32-T), Judgment, Trial Chamber, 29 November 2002, paras 96-111.

³¹² See *infra* Section 4.3.1.3. and Section 4.3.2.

³¹³ J. Ohlin, ‘Joint Criminal Confusion’ 12 *New Criminal Law Review* (2009), at 407. See also *Van Slidregt*, *supra* n 103, at 187; A. O’Rourke, ‘Joint Criminal Enterprise and Brđanin: Misguided Overcorrection’, 47 *Harvard International Law Journal* (2006), at 307; N. Piacente, ‘Importance of the Joint Criminal Enterprise Doctrine for the ICTY Prosecutorial Policy’, 2 *Journal of International Criminal Justice* (2004), at 446-454.

³¹⁴ See Chapter 3, Section 3.4.

4.3.1.1. The Tadić Appeal Judgment

The *Tadić* Appeal Judgment contains several paragraphs which specifically discuss the law on JCE responsibility in all its three categories and summarize the content of each legal element of the theory. In some of these paragraphs, the physical perpetrators are described as members of the criminal plan who share its underlying common intent, while in others they are entirely omitted from the analysis, as if their precise position in the enterprise is legally irrelevant. It is worth having a closer look into this inconsistency.

The *Tadić* Appeals Chamber first mentioned the JCE doctrine in a dictum where, after noting the modes of liability explicitly provided in Article 7(1) ICTY Statute, it found that the Statute:

does not exclude those modes of participating in the commission of crimes which occur where several persons having a common purpose embark on criminal activity that is then carried out *either jointly or by some members* of this plurality of persons.³¹⁵

Here, JCE liability is clearly presented as applicable in cases where the direct perpetrators are members of the common purpose. The judges spoke of the JCE crimes as committed either by all members of the enterprise, or by some of them and did not entertain a third possibility: that the JCE members use third parties/outside to commit the concerted crimes. This formulation could suggest that the JCE doctrine is not applicable to wider factual scenarios where the JCE crimes are committed by non-members of the common purpose. However, when the Chamber then proceeded to review post-World War II case law and establish the legal requirements for ascribing the ‘basic’ form of JCE liability, it held that:

the objective and subjective prerequisites for imputing criminal responsibility to a participant who did not, or cannot be proven to have, effected the killing are as follows: (i) the accused must voluntarily participate in one aspect of the common design (for instance, by inflicting non-fatal violence upon the victim, or by providing material assistance to or facilitating the activities of his co-perpetrators); and (ii) the accused, even if not personally effecting the killing, must nevertheless intend this result.³¹⁶

This dictum contains no mention of a requirement that the group crime must be committed by one of the JCE members: it simply states that the accused must contribute to the common plan with a shared intent to commit its crimes. This has prompted some to argue that *Tadić* left the door open for applying the JCE doctrine also to factual scenarios where the participants in the common purpose contribute to various aspects of its furtherance but in the end use an outsider to physically commit the projected JCE crimes.³¹⁷

³¹⁵ *Tadić* Appeal Judgment, *supra* n 41, para 190. (*emphasis added*)

³¹⁶ *Ibid.*, para. 196.

³¹⁷ *Milutinović et al.* Decision on Indirect Co-perpetration, *supra* n 79, Separate Opinion of Judge Iain Bonomy, para 6; *Brđanin* Appeal Judgment, *supra* n 56, para 406; See also Olásolo, *supra* n 40, at 205.

The above statement of the legal elements of JCE I liability coincides with the Appeals Chamber’s subsequent articulation of JCE II liability³¹⁸ but can be contrasted with the manner in which the judges then defined the requirements for ascribing JCE III liability:

The third category 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. [...] [An] example is that of a common plan to forcibly evict civilians belonging to a particular ethnic group by burning their houses; *if some of the participants in the plan*, in carrying out this plan, *kill civilians by setting their houses on fire, all the other participants in the plan are criminally responsible for the killing* if these deaths were predictable.³¹⁹

In this dictum, the person who physically commits the additional JCE crime is unequivocally described as a member of the common plan, which suggests that this is, indeed, a requirement for attaching JCE liability to the other participants in the enterprise. In fact, further down the Judgment, when summing up its analysis of Nuremberg-era jurisprudence, the Chamber stated that the ‘basic’ form of JCE applies in “cases of co-perpetration, where all participants in the common design possess the same criminal intent to commit a crime (*and one or more of them* actually perpetrate the crime, with intent).”³²⁰

There is, thus, a notable discrepancy in the Chamber’s analysis on this matter: in some dicta the judges spoke of the JCE crime being committed by at least one of the JCE members, while in others they omitted any reference to the triggermen when defining the theory’s legal elements. This ambivalence could also be seen in the Chamber’s conclusion on the objective and subjective requirements of JCE liability.³²¹ What really complicates the picture, however, is the fact that the judges were not confronted with a factual scenario that specifically required them to make an *explicit* finding on whether the physical perpetrators’ membership in the JCE is a *conditio sine qua non* for ascribing JCE responsibility. Indeed, the *Tadić* case concerned a small-scale JCE that was physically executed by some of the members of the enterprise,³²² so it has been argued that the Chamber’s sporadic references

³¹⁸ When listing the legal elements of the systemic variant of JCE, the Chamber held its *actus reus* requires “the active participation [of the accused] in the enforcement of a system of repression”, while the *mens rea* element is “(i) knowledge of the nature of the system and (ii) the intent to further the common concerted design to ill-treat inmates. No mention was made of a requirement that the direct perpetrators have to be members of the JCE. See *Tadić* Appeal Judgment, *supra* n 41, para 203.

³¹⁹ *Ibid.*, para 204. (*emphasis added*)

³²⁰ *Ibid.*, para 220. (*emphasis added*)

³²¹ *Ibid.*, paras 227-228. When listing the objective elements common to the three categories of JCE, the judges did not specify that the physical perpetrator must be part of the plurality of persons that shares a common plan to commit a crime (para 227). However, when the Chamber moved to distinguish the different subjective elements of the three JCE types, it held that for JCE III liability to arise “the participants must have had in mind the intent, for instance to ill-treat prisoners of war... and *some member of the group must have actually killed them.*” (para 228, *emphasis added*)

³²² For an overview of the relevant facts of the case, see Chapter 3, Section 3.3.1.

to the physical perpetrators as JCE members were merely context-specific and were not meant to establish a general limitation on the theory's scope of application.³²³ There is some merit to this line of reasoning. If the judges had specifically and for the purpose of clarifying the contours of JCE liability also considered an alternative factual scenario in which the triggermen of the JCE crimes were outsiders to the common purpose, their respective findings would have categorically concluded the matter.

In the author's view, the *Tadić* Appeal Judgment construed the JCE doctrine as a form of liability in which the common purpose/design requirement provides a linking principle that allows for a reciprocal attribution of acts among the JCE members. The question that initiated the Chamber's analysis on this notion was "whether the acts of one person can give rise to the criminal culpability of another *where both participate* in the execution of a common criminal plan".³²⁴ This was the starting point of the entire discussion on JCE liability and, considering also the factual background of the *Tadić* case, there should be no doubt that the judges viewed the physical perpetrators as members of the common purpose when constructing this doctrine. Notwithstanding this, it remains questionable whether the Appeals Chamber actually meant to restrict JCE's scope of application strictly to cases of *Tadić*'s calibre: *viz.* to small enterprises, in which those who committed the concerted offence were parties to the criminal plan, sharing the underlying common intent. Given the Chamber's equivocal language on this point and the lack of an express consideration of a wider factual scenario, where the JCE crimes are carried out by outsiders used by the JCE members, it could still be concluded that this matter was left open for debate.

4.3.1.2. Subsequent cases against low-profile accused

The *Tadić* Appeals Chamber's ambivalent language on this point was cited nearly verbatim in a number of subsequent ICTY/R judgments which, just as the *Tadić* case, dealt with relatively low-level accused who were involved in small-scale enterprises.³²⁵ The problem of ascribing JCE liability for crimes committed by 'outsiders' to the criminal purpose did not arise in these cases and was not specifically addressed by the judges, so there is no need to examine them in any detail here. There is, however, one notable exception: an ICTY trial in which, despite not required by the specific factual matrix of the case, the chambers made an explicit adjudication on the question whether JCE liability is applicable in instances where the physical perpetrator of the concerted crimes is not a member of the JCE.

In the *Krnjelac* case, the Prosecutor charged the accused, who was the commander of a detention camp situated near the city of Sarajevo, with participation in a common purpose

to persecute the Muslim and other non-Serb detainees in the said camp.³²⁶ In its statement of the law on JCE liability, the Trial Chamber held that:

To prove the basic form of joint criminal enterprise, the Prosecution must demonstrate that each of the persons charged and (if not one of those charged) the principal offender or offenders had a common state of mind, that which is required for that crime.³²⁷

This legal finding, as Olásolo has also observed, meant that the judges defined JCE liability as requiring that the direct perpetrators of the group crime must be members to the enterprise.³²⁸ It is through membership in the common criminal purpose that the physical perpetrators could be said to share "a common state of mind" with the other JCE participants. A logical inference of the Chamber's conclusion was that if the principal offenders did not share such a common state of mind with the accused, then the JCE doctrine became inapplicable.

The Prosecution appealed this holding of the *Krnjelac* Trial Chamber, submitting that it constitutes an error of law and that the *Tadić* Appeal Judgment did not establish such a legal requirement.³²⁹ This objection was not raised out of concerns for the present case: after all, as stated in the Indictment, the Prosecution itself argued that Krnjelac participated in a common purpose "together with the... guards and soldiers" of the said detention camp:³³⁰ *i.e.* together with the physical perpetrators of the indicted crimes. It was for strategic reasons going beyond the *Krnjelac* case that the Prosecution sought to have this finding of the trial judges reversed. In particular, it argued that if the Chamber's approach was upheld and the law on JCE liability was set to require proof that the triggermen were also parties to the common plan, this "could render the notion of joint criminal enterprise redundant in the context of State criminality."³³¹ The Prosecution gave a fictional example of a criminal design that is shared by senior political and military officials who, while geographically removed from the crime scene, use unaware soldiers to physically execute this design, and argued that in these cases "the Trial Chamber's criterion would make it impossible to implement the concept of joint enterprise."³³² The issue of JCE with no physical perpetrators

³²⁶ *The Prosecutor v. Krnjelac* (IT-97-25-I), Third Amended Indictment, 25 June 2001, paras 5.1 *et seq.*

³²⁷ *The Prosecutor v. Krnjelac* (IT-97-25-T), Judgment, Trial Chamber, 15 March 2002, para 83. The *Krnjelac* case was, as explained in Chapter 3, a JCE II case because it concerned common purpose crimes committed in a system of ill-treatment. The sole reason why the Trial Chamber referred to the 'basic' form of JCE is because it held that the elements of JCE I and JCE II liability are essentially the same and decided that "[i]t is appropriate to treat both as basic forms of the joint criminal enterprise." *Ibid.*, para 78. See also, Chapter 3, Section 3.4.2.2.

³²⁸ Olásolo, *supra* n 40, at 184.

³²⁹ *Krnjelac* Appeal Judgment, *supra* n 67, para 83.

³³⁰ *Krnjelac* Indictment, *supra* n 326, para 5.1.

³³¹ *Krnjelac* Appeal Judgment, *supra* n 67, para 83.

³³² More specifically, the Prosecution's example referred to "high-level political and military leaders who, from a distant location, plan the widespread destruction of civilian buildings (hospitals and schools) in a particular area in order to demoralise the enemy without the soldiers responsible for carrying out the attacks sharing the objective in question or even knowing the nature of the relevant targets." *Ibid.*

³²³ *Milutinović et al.* Decision on Indirect Co-perpetration, *supra* n 79, Separate Opinion of Judge Iain Bonomy, paras 6-7; *Brđanin* Appeal Judgment, *supra* n 56, para 406.

³²⁴ *Tadić* Appeal Judgment, *supra* n 41, para 185.

³²⁵ *Kupreškić et al.* Trial Judgment, *supra* n 60, paras 772 *et seq.*; *The Prosecutor v. Kayishema and Ruzindana* (ICTR-95-1-A), Judgment, Appeals Chamber, 1 June 2001, paras 192-193; *The Prosecutor v. Ntakirutimana and Ntakirutimana* (ICTR-96-10-A and ICTR-96-17-A), Judgment, Appeals Chamber, 13 December 2004, paras 463-467; *Vasiljević* Appeal Judgment, *supra* n 310, para 101; *The Prosecutor v. Kvočka et al.* (IT-98-30/1-A), Judgment, Appeals Chamber, 28 February 2005, para 99.

was, thus, squarely formulated and the Appeals Chamber was put on the spot to make an explicit determination on it. The appeal judges took notice of the Prosecution's submission and, without providing any substantial legal analysis, upheld the Trial Chamber's contested finding by concluding that:

apart from the specific case of the extended form of joint criminal enterprise, the very concept of joint criminal enterprise presupposes that its participants, other than the principal perpetrator(s) of the crimes committed, share the perpetrators' joint criminal intent. The Appeals Chamber notes that the Prosecution does not put forward any contrary arguments and does not show how this requirement contravenes the *Tadić* Appeals Judgement, as it alleges. The Appeals Chamber also notes that the example given by the Prosecution in support of its argument on this point appears more relevant to the planning of a crime under Article 7(1) of the Statute than to a joint criminal enterprise.³³³

This was the first and the only time in which the ICTY/R Appeals Chamber, having explicitly considered a factual matrix where the criminal design is shared only by individuals who are at the apex of the state apparatus, affirmed that the physical perpetrators of the concerted crimes have to be members of the JCE, sharing its common intent with the other JCE participants.³³⁴ The judges clearly held that this notion is not a suitable mode of liability for the kind of State-level cases described by the Prosecution, in which the triggermen are outsiders who cannot be said to have shared a criminal purpose with their high-ranking superiors. This legal finding of the appeal judges is notable also in view of the fact that by the time it was made in September 2003, the ICTY had already started dealing with some of its first cases concerning broad-scale enterprises and these had signalled the problems arising from the application of this restrictive approach to JCE liability.

4.3.1.3. The advent of cases against mid- and high-ranking accused

i) The *Brđanin and Talić* case

It was a pre-trial decision delivered by ICTY Trial Chamber II in June 2001, in the *Prosecutor v Brđanin and Talić* case, that first brought to the forefront the issue of applying JCE liability to a factual scenario involving a nation-wide criminal purpose.³³⁵

³³³ *Ibid.*, para 84.

³³⁴ K. Gustafson, 'The Requirement of an 'Express Agreement' for Joint Criminal Enterprise Liability: A Critique of Brđanin', 5 *Journal of International Criminal Justice* (2007), at 141-142. It must be noted that this finding was later quoted with approval by the ICTY Appeals Chamber in a footnote in the *Vasiljević* Appeal Judgment. See *Vasiljević* Appeal Judgment, *supra* n 310, para 97 (fn 171). However, it is doubtful whether, given the sparse reference to the finding of the *Krnjelac* Appeals Chamber and the lack of any nuanced, substantial discussion on the matter, the *Vasiljević* Appeal Judgment can properly be considered an ICTY/R appellate jurisprudence confirming the requirement that the physical perpetrators must be members of the JCE.

³³⁵ *The Prosecutor v. Brđanin and Talić* (IT-99-36-PT), Decision on Form of Further Amended Indictment and Prosecution Application to Amend, Trial Chamber, 26 June 2001, para 26. Boas also notes that "*Brđanin* was the first case in the *ad hoc* Tribunals pleading JCE as a form of liability against a relatively high-level accused for a substantial number of crimes with a broad temporal and geographical scope". Boas *et al.*, *supra* n 37, at 93.

The Prosecution alleged that Radoslav Brđanin, President of the Crisis Staff of the self-proclaimed Autonomous Region of Krajina, and Momir Talić, the commander of the 1st Krajina Corps of the Bosnian Serb Army, "each participated in a criminal enterprise... the common purpose of which was the permanent removal of the majority of Bosnian Muslim and Bosnia Croat inhabitants from the territory of the planned Serbian State".³³⁶ Brđanin and Talić were thus, respectively, the highest political and military authority in the said seceding region that comprised more than 16 municipalities, in some of which the Serb population was a minority.³³⁷ This Autonomous Region of Krajina had to form part of a planned separate Serbian entity within Bosnia and Herzegovina, and the Indictment specified that the two accused participated in this vast enterprise with a number of other high-ranking state officials, including:

other members of the [Autonomous Region of Krajina] Crisis Staff, the leadership of the Serbian republic, including Radovan Karadžić, Momčilo Krajišnik and Biljana Plavšić, and the [Serb Democratic Party], members of the Assembly of the Autonomous Region of Krajina and the Assembly's Executive Committee, the Serb Crisis staffs of the ARK municipalities, the army of the Republika Srpska, Serb paramilitary forces and others.³³⁸

Before the trial commenced, Talić's Defence filed a motion in which it alleged that the form of the Indictment was defective since the Prosecution had failed to plead with sufficient clarity the material facts concerning the accused's guilt under the common purpose theory.³³⁹ In their subsequent decision, the trial judges made a number of findings on the legal elements of this mode of liability which limited its scope of application and raised the question whether JCE could be used in cases of such magnitude. The Chamber first held that:

It is clear from the *Tadić* Conviction Appeal Judgment that, in relation to both the first and the second categories [of JCE], the prosecution must demonstrate that all of the persons charged *and all of the persons who personally perpetrated the crime* charged had a common state of mind – that the crime charged should be carried out, and the state of mind required for that crime.³⁴⁰

and, further again, that:

it is necessary for the prosecution to prove that, between the person who personally perpetrated the further crime charged and the person charged with that crime, there was an agreement (or a common purpose) to commit at least a particular crime, so that it can then be determined whether the further

³³⁶ *The Prosecutor v. Brđanin and Talić* (IT-99-36-I), Further Amended Indictment, 9 March 2001, paras 14-15, 27.

³³⁷ *Ibid.*, para 4.

³³⁸ *Ibid.*, para 25.

³³⁹ *Brđanin and Talić* Decision on Form of Indictment, *supra* n 335, paras 1, 3.

³⁴⁰ *Ibid.*, para 26. (*emphasis added*)

crime charged was a natural and foreseeable consequence of executing *that* agreed crime. Without such proof, it cannot be held that the accused was a member of a joint criminal enterprise together with the person who committed that further crime charged.³⁴¹

These two dicta boil down to one core finding: the JCE doctrine applies only when there is an agreement/common purpose between the accused and the direct perpetrator, shaping a shared intent among them to commit the concerted crime. Naturally, this restrictive interpretation led the trial judges to the inevitable conclusion that the Prosecution in the present case would face a “real difficulty [...] in identifying the agreed criminal object of the enterprise in which *these* accused were members *together with the persons who committed the crimes charged* [given] the extraordinarily wide nature of the case”.³⁴² The evident problem is that one cannot expect to find evidence that the military and political leaders of a certain state reached an agreement with thousands of foot soldiers to commit crimes that were subsequently executed throughout the entire state. Most of the time soldiers do not even know what grand plan they are directed to play a role in. A rank-and-file soldier may very well intend to deport the Muslims in city X but if he is just a “tool” in the hands of those above him and not a party to the underlying plan or agreement between the said high-ranking state officials, he could not be said to *share* with them a *common intent* to forcibly displace the Muslims in city X (, as well as Y and Z).³⁴³

The *Brđanin and Talić* judges did not to strike the charges of JCE from the Indictment because they concluded that the above problem would have to be settled at trial but they made it abundantly clear that, in their view, the *Tadić* Appeals Chamber did not envision this theory to be applicable to criminal enterprises of such a large scale.³⁴⁴

ii) Misapplying the *Brđanin and Talić* Decision: the early cases against mid- and high-ranking accused

As noted further above, it is far from clear that this line of reasoning, requiring that the physical perpetrators have to be members of the JCE, was in fact adopted in the *Tadić* Appeal Judgment.³⁴⁵ Nevertheless, this interpretation of the *Brđanin and Talić* judges started a string of trial jurisprudence at the ICTY which quoted the above dicta with approval and upheld that JCE liability requires proof of agreement/common plan between the direct perpetrators of the concerted offences and the JCE accused.³⁴⁶ Several of these judgments dealt with

broad-scale criminal enterprises and it is remarkable that while the judges defined the law on JCE liability in the above restrictive way, they did not apply the notion accordingly to the facts of the case. The *Krstić* Trial Judgment from August 2001 illustrates this point.³⁴⁷ The Prosecution charged the accused General Radislav Krstić, the commander of the Drina Corps of the Bosnian Serb Army (VRS), with *inter alia* participating in a common design to forcibly remove the Bosnian Muslims from Srebrenica.³⁴⁸ Even though the indicted crimes were committed in a relatively small area, they were the result of a criminal plan that was devised and shared between senior military and political officials. In particular, the Trial Chamber found that “the political and/or military leadership of the VRS formulated a plan to permanently remove the Bosnian Muslim population from Srebrenica”³⁴⁹ and that the defendant was amongst the key participants in this plan. More specifically, the judges identified General Ratko Mladić and other officials of the Bosnian Serb Army’s Main Staff and the Drina Corps as the JCE members.³⁵⁰ Significantly, the actual physical perpetrators of the JCE crimes, *i.e.* the rank-and-file soldiers in the various brigades and battalions that were deployed to Srebrenica to execute this plan, were left out of the Trial Chamber’s analysis. Thereafter, when the judges proceeded to explain the *mens rea* requirement of JCE, they cited the *Brđanin and Talić* Decision from June 2001, including the part stating that the accused and the physical perpetrators of the JCE crimes must all share the underlying common criminal purpose.³⁵¹ Nonetheless, when the Chamber proceeded to apply the law to the established facts of the case, it did not enter any findings on the *mens rea* of the physical perpetrators *vis-à-vis* the common purpose: it only inquired into whether the accused shared the JCE intent.³⁵²

There is an evident discrepancy between the formulation and the application of the law on JCE responsibility here. The fact that the foot soldiers in Srebrenica executed the JCE does not necessarily mean that they shared its underlying criminal purpose with the JCE members that the Chamber identified. Hypothetically, the soldiers could have been unaware of the real criminal nature of the operation they were ordered to carry out (*e.g.* they were led to believe that they were evacuating the local population in order to protect it from some threat), or they could have acted with a lesser form of intent than that required by JCE (*i.e.* direct intent/*dolus directus* in the first degree),³⁵³ or they could have intended to commit one crime while the true underlying purpose of the JCE had actually been another. To illustrate the latter point, the trial judges found that the forcible transfer of the Srebrenica Muslims was carried out as part of an attack that was launched against them on discriminatory

³⁴¹ *Ibid.*, para 44. (*emphasis in original*)

³⁴² *Ibid.* (*emphasis added*)

³⁴³ In this case, the direct perpetrators’ intent to commit the crime of forcible transfer is independent from that of the JCE members. See Chapter 3, Section 3.4.2.1. On this point, see also Cassese, *supra* n 55, at 164.

³⁴⁴ *Brđanin and Talić* Decision on Form of Indictment, *supra* n 335, para 45.

³⁴⁵ See *supra* Section 4.3.1.1.

³⁴⁶ *The Prosecutor v. Krstić* (IT-98-33-T), Judgment, Trial Chamber, 2 August 2001, para 613; *Krnjelac* Trial Judgment, *supra* n 327, paras 75, 83; *Vasiljević* Trial Judgment, *supra* n 311, para 64; *The Prosecutor v. Simić et al.* (IT-95-9-T), Judgment, Trial Chamber, 17 October 2003, para 160.

³⁴⁷ *Krstić* Trial Judgment, *supra* n 346.

³⁴⁸ *Ibid.*, para 602. See also *The Prosecutor v. Krstić* (IT-98-33-I), Amended Indictment, 27 October 1999, paras 12, 30-33.

³⁴⁹ *Krstić* Trial Judgment, *supra* n 346, para 612.

³⁵⁰ *Ibid.*, paras 610, 612.

³⁵¹ *Ibid.*, para.613.

³⁵² *Ibid.*, paras 614-615.

³⁵³ See Chapter 3, Section 3.4.2.1.

grounds and therefore constituted the crime of persecution.³⁵⁴ Then, when concluding on Krstić's JCE liability, the Chamber found that he also shared this intent to persecute and found him guilty of this crime, too.³⁵⁵ No such finding was explicitly made for the physical perpetrators of the enterprise. This is problematic because it could have been that "the political and/or military leadership of the VRS",³⁵⁶ Krstić included, shared a common intent to commit persecution through acts of forcible transfer but the foot soldiers "only" had a direct intent to commit the latter offence (*i.e.* they did not share the discriminatory intent). More generally, even if the Srebrenica JCE was solely aimed at the crime of forcible transfer and the direct perpetrators did directly intend to commit this crime, without proof of an agreement between them and the high-ranking JCE members, how could they be said to have *shared a common intent* to commit the JCE crimes?³⁵⁷ The judges did not show an interest in any such considerations and they found Krstić liable under the JCE theory without making a single finding on the intent of the physical perpetrators. It can, therefore, be concluded that although the Trial Chamber cited with approval the *Brđanin and Talić* finding that the notion of JCE requires proof that "the accused shared with the person who personally perpetrated the crime the state of mind required for that crime",³⁵⁸ the judges did not actually apply this law to the facts of the case.

This half-hearted support for the requirement that the physical perpetrators have to be members of the JCE – *i.e.* affirming it in theory but disregarding it in practice – could also be observed in another early ICTY case brought against relatively senior accused: the *Simić et al.* Trial Judgment.³⁵⁹ Parallel to this, in several other judgments dealing with wide-scale criminal enterprises, the chambers defined JCE liability without making any reference to the restrictive findings of the *Brđanin and Talić* Decision from June 2001 and convicted the accused despite the lack of evidence of an agreement between them and the physical perpetrators of the JCE crimes.³⁶⁰ A trend could thus be observed in the early post-*Brđanin and Talić* case law against senior accused: judges applied the JCE doctrine to factual

matrices involving large enterprises with hundreds/thousands of physical perpetrators by simply ignoring the problems identified in the June 2001 Decision.

iii) Rejecting the *Brđanin and Talić* Decision: the further cases against senior accused

The legal challenges involved in ascribing JCE liability when the physical perpetrators are outsiders to the common design were becoming increasingly evident and the way in which the ICTY was handling this issue was, to say the least, perplexing. On the one hand, both the *Brđanin and Talić* Trial Chamber and the *Krnojelac* Appeals Chamber categorically held that the physical perpetrators of the JCE crimes must share a common intent with the accused: *viz.* that they all must be members of the common purpose/agreement underlining the JCE.³⁶¹ On the other hand, a series of judgments against mid-/high-ranking military and political officials clearly disregarded this requirement when relying on the JCE theory to convict the accused.³⁶² Therefore, it is hardly a surprise that on 22 March 2006, the *Milutinović et al.* Trial Chamber was seized of a pre-trial Defence motion which raised the very same question that the *Brđanin and Talić* Trial Chamber had to address nearly 5 years earlier:

[Could an accused] be held responsible for his participation in a joint criminal enterprise [...] where one or more of the JCE participants use persons outside the JCE to physically perpetrate the crime or crimes which constitute the JCE's common criminal purpose.³⁶³

The ambivalent ICTY case law on this matter provided both the Prosecution and the Defence with judgments they could cite to support their opposing submissions. The Defence submitted that under the Tribunal's case law, JCE liability cannot be applied where the direct perpetrator is not himself a member of the JCE,³⁶⁴ while the Prosecution referred to the abovementioned *Krstić* Trial Judgment to argue the opposite³⁶⁵ and further contended that it:

would be [an] "absurd result" if the Trial Chamber were to limit JCE liability to instances in which the physical perpetrator is a participant in the JCE: [this would mean that] where X and Y come to an agreement to kill all the inhabitants of a village, and Y uses a weapon of mass destruction to destroy the village, then X would bear responsibility, but where Y orders troops under his command to do the killings, then X "can at the most be an aider and abettor".³⁶⁶

The Prosecution thus highlighted the importance of using the concept of JCE to convict

³⁵⁴ *Krstić* Trial Judgment, *supra* n 346, paras 533-538.

³⁵⁵ In the Chamber's findings, they were the members of the JCE. *Ibid.*, para 612.

³⁵⁶ *Ibid.*, para 618.

³⁵⁷ See *supra* text accompanying note 343.

³⁵⁸ *Krstić* Trial Judgment, *supra* n 346, para 613, quoting *Brđanin and Talić* Decision on Form of Indictment, *supra* n 335, para 31.

³⁵⁹ *Simić et al.* Trial Judgment, *supra* n 346., paras 160, 983-993. For a critical analysis of how the JCE doctrine was applied in this case, see Olásolo, *supra* n 40, at 190-193. For another case against a high-ranking accused, in which the judges confirmed that JCE liability requires the physical perpetrators to be members of the enterprise but never actually attempted to apply this requirement to the facts of the case, see *The Prosecutor v. Stakić* (IT-97-24-T), Judgment, Trial Chamber, 31 July 2003, para 435.

³⁶⁰ See *e.g.* *Stakić* Appeal Judgment, *supra* n 272, paras 68-98. For a detailed discussion on why the *Stakić* case presents jurisprudence in which the JCE theory was applied to crimes committed by persons who were outsiders to the criminal purpose – *i.e.* they were non-members of the JCE – see H. Olásolo, 'Reflections on the Treatment of the Notions of Control of the Crime and Joint Criminal Enterprise in the *Stakić* Appeal Judgement', 7 *International Criminal Law Review* (2007), at 156-161.

³⁶¹ See *supra* Section 4.3.1.2. and Section 4.3.1.3.i.

³⁶² See *supra* Section 4.3.1.3.ii.

³⁶³ *Milutinović et al.* Decision on Indirect Co-perpetration, *supra* n 79, para 3.

³⁶⁴ *Ibid.*, para 18.

³⁶⁵ *Ibid.*, para 19.

³⁶⁶ *Ibid.*, para 21.

senior military and political accused because this defined them as co-perpetrators of the crimes and it would be “wrong to hold those at a leadership level liable on the basis of a secondary mode of liability.”³⁶⁷

Unlike the *Brđanin and Talić* Trial Chamber, the *Milutinović et al.* trial judges did not make any findings on the substance of the matter at hand. They noted that the challenge raised by the Defence presented:

a claim that the concept of JCE does not extend to circumstances in which the commission of a crime is said to have been effected through the hands of others whose *mens rea* is not explored and determined, and who are not shown to be participants in the JCE.³⁶⁸

According to the judges, this claim raised objections pertaining to the legal framework of JCE liability and as such was a matter to be analysed at trial, not in pre-trial proceedings regarding the form of the Indictment.³⁶⁹ Nevertheless, the substance of the Defence’s submission on the JCE scope of application was thoroughly examined in a separate opinion drafted by one of the judges in the case: Judge Iain Bonomy. He reviewed the *Tadić* Appeal Judgment, considered how the legal elements of JCE were defined in a few relevant post-*Tadić* cases and concluded that these decisions “do not give decisive guidance as to whether the Tribunal’s jurisprudence requires that the physical perpetrator be a participant in the JCE.”³⁷⁰ Judge Bonomy then went on to say that “considerations of both justice and common sense” make such a requirement for applying JCE liability superfluous.³⁷¹ He concluded that:

it is not inconsistent with the jurisprudence of the Tribunal for a participant in a JCE to be found guilty of commission where the crime is perpetrated by a person or persons who simply act as an instrument of the JCE, and who are not shown to be participants in the JCE. There is certainly no binding decision of the Appeals Chamber that would prevent the Trial Chamber from finding an accused guilty on that basis.³⁷²

³⁶⁷ *The Prosecutor v. Milutinović et al.* (IT-05-87-PT), Prosecution’s Response to General Ojdanić’s Preliminary Motion Challenging Jurisdiction: Indirect Co-Perpetration, Trial Chamber, 21 October 2005, para 32.

³⁶⁸ *Milutinović et al.* Decision on Indirect Co-perpetration, *supra* n 79, para 23.

³⁶⁹ *Ibid.*

³⁷⁰ *Milutinović et al.* Decision on Indirect Co-perpetration, *supra* n 79, Separate Opinion of Judge Iain Bonomy, para 8. Aside from the *Tadić* Appeals Judgment, the additional judgments that Judge Bonomy referred to were all listed in one single footnote which simply referred to the paragraphs where the legal elements of the JCE doctrine had been stated: *i.e.* there was no analysis on the actual application of the notion in these post-*Tadić* cases. The judgments that were cited in this footnote were the *Vasiljević* Appeal Judgment, the *Krnjelac* Appeal Judgment, the *Stakić* Trial Judgment, the *Kordić and Čerkez* Trial Judgment and the *Kvočka et al.* Appeal Judgment. See *Ibid.*, para 8 (fn 12).

³⁷¹ *Ibid.*

³⁷² *Ibid.*, para 13. Judge Bonomy then proceeded to examine Nuremberg-era jurisprudence that supports the use of JCE liability in factual scenarios where the physical perpetrators were not members of the common plan, as well as national criminal law to this effect. (*Ibid.*, paras 14-30) This discussion is addressed in the next sections of the present research. See *infra* Section 4.3.3.3.

Two main points of criticism can be levelled at Judge Bonomy’s analysis. First, aside from his analysis of the *Tadić* Appeal Judgment, his review of the Tribunal’s subsequent case law was rather cursory³⁷³ and failed to identify and consider the findings made in the *Brđanin and Talić* Decision from June 2001 and the *Krnjelac* Appeal Judgment. As discussed above, in both of these cases the Chambers concluded, having explicitly considered a wide-scale JCE scenario, that JCE liability requires that both the accused and the physical perpetrators have to be parties to the criminal purpose/agreement, sharing a common intent to commit its projected offences. Second, even if it were true that the existing ICTY jurisprudence at the time had not established such a requirement, it is regrettable that Judge Bonomy adopted this view without then offering an explanation on what doctrinal basis the *acts* of the physical perpetrator (non-member of the JCE) can be attributed to the JCE members, so the latter could be treated as co-perpetrators of the said crimes.³⁷⁴ Be that as it may, Judge Bonomy’s separate opinion marked a notable point in the ICTY jurisprudence: this was the first time that a judge pointedly stated that the JCE doctrine does not require the direct perpetrators of the JCE crime to be members of the underlying common purpose/agreement. This separate opinion by a single judge would soon become extensively cited in the ICTY’s first judgments embracing the law on JCE with no physical perpetrators.

4.3.2. Adopting the notion of leadership-level JCE

4.3.2.1. The Krajišnik Trial Judgment

Six months after the *Milutinović et al.* Trial Chamber delivered its jurisdictional decision, the matter of ascribing JCE responsibility to an individual who was at the apex of state power had to be addressed in the *Krajišnik* Trial Judgment.³⁷⁵ The accused, Momčilo Krajišnik, was the President of the Assembly of the Bosnian-Serb Republic (“Republika Srpska”) and was one of the five members of the Bosnian-Serb Presidency.³⁷⁶ The Indictment charged him with being a co-perpetrator in a joint criminal enterprise that was aimed at:

the permanent removal, by force or other means, of Bosnian Muslim, Bosnian Croat or other non-Serb inhabitants from large areas of Bosnia and Herzegovina through the commission of crimes which are punishable under Articles 3, 4, and 5 of the Statute of the Tribunal.³⁷⁷

³⁷³ See *supra* note 370.

³⁷⁴ For a brief summary of the problem, see *supra* notes 308-312. Judge Bonomy himself conceded that it would not be proper to apply the doctrine in cases where the link between the JCE members and the direct perpetrators (non-members) of the JCE crimes is “too attenuated” but, other than vaguely stating that this link should be of a “direct or close” nature, he did not further discuss the doctrinal problems involved in applying JCE as a mode of co-perpetration liability when the direct perpetrators are not amongst the JCE members. *Milutinović et al.* Decision on Indirect Co-perpetration, *supra* n 79, Separate Opinion of Judge Iain Bonomy, para 10.

³⁷⁵ *The Prosecutor v. Krajišnik* (IT-00-39-T), Judgment, Trial Chamber, 27 September 2006.

³⁷⁶ *Ibid.*, paras 129-135, 181.

³⁷⁷ *The Prosecutor v. Krajišnik and Plavšić* (IT-00-39&40-PT), Amended Consolidated Indictment, 7 March 2002, para 4.

The Prosecution, thus, alleged the existence of a nation-wide criminal enterprise that involved the commission of numerous crimes, including genocide, persecution and extermination.³⁷⁸ A quite peculiar account of the participants in this JCE was provided. The Indictment stated that, apart from the accused, the other JCE members were Slobodan Milošević, Radovan Karadžić, Ratko Mladić etc. (*i.e.* high-ranking military and political leaders), as well as other, unnamed, individuals who were broadly referred to as members of the Bosnian Serb Army, paramilitary and voluntary units, the police etc.³⁷⁹ Clearly, the controversies surrounding the matter of JCE with no physical perpetrators made the Prosecution wary and it sought to characterize both the leadership-level accused and the rank-and-file triggermen of this nation-wide JCE as members of the common purpose. The end result, however, was an unrealistic picture that, as explained further below, dissolved the borders of individual liability and led to collective responsibility. The Prosecution must have been aware of the evidentiary challenges involved in pleading that Krajišnik and the foot soldiers who executed the JCE crimes were all parties to an agreement because it subsequently submitted that:

[s]hould the Trial Chamber find that the members of the JCE consisted only of a core group (such as Krajišnik, Karadžić, Plavšić, Koljević, Mladić, Mićo Stanišić and Mandić), liability still attaches to Krajišnik for participation in that JCE, as the physical perpetrators of the crimes were acting as instruments of that JCE. Similarly, insofar as any crimes were committed by local Bosnian Serbs who were not members of the JCE, those Serbs were acting as instruments under the direction of participants in the JCE.³⁸⁰

At trial, the Defence argued that the JCE doctrine was inapplicable to the case because this concept could only be used to ascribe liability for “low-level, small scale criminal activity [...] committed by small groups of [...] soldiers or civilians.”³⁸¹ Specifically, it submitted that “liability under JCE requires proof that the Accused had entered into an agreement with the individuals who were the principal perpetrators of the underlying crimes”.³⁸² The Prosecution responded by citing several ICTR Appeals Chamber’s

decisions which concluded that there is no geographical limitation on the JCE size³⁸³ and, more to the point, it submitted that the law on JCE liability does not require the direct perpetrators to be members of the enterprise.³⁸⁴

The Trial Chamber rejected the Defence’s argument and, referring to Judge Bonomy’s separate opinion in the *Milutinović et al.* Decision, held that:

a JCE may exist even if none or only some of the principal perpetrators are part of it, because, for example, they are not aware of the JCE or its objective and are procured by members of the JCE to commit crimes which further that objective.³⁸⁵

No other authority was cited to support this finding and, as far as the ICTY/R jurisprudence at the time was concerned, there were no previous judgments where JCE law had been explicitly defined in this way. After all, when Judge Bonomy held that JCE liability does not require the physical perpetrators to be members of the common purpose, he did so not because there were previous cases in which such a finding was positively made but because he contended that this interpretation of the JCE law was “not inconsistent with the jurisprudence of the Tribunal”.³⁸⁶ Thus, the *Krajišnik* Trial Judgment constitutes the first instance in which the concept of JCE with no direct perpetrators was *explicitly* adopted in the ICTY jurisprudence.³⁸⁷ However, just like Judge Bonomy’s separate opinion, it did not explain in much detail how the crimes of the non-members of the JCE could be doctrinally attributed to the JCE accused: *i.e.* what must be the nature of the link between the direct perpetrators and the leadership-level accused in order to qualify the latter as *co-perpetrators* of the crimes? The Trial Chamber simply held that the JCE participants must be “sufficiently connected”³⁸⁸ with those who committed the concerted

383 *Ibid.* para 874. More specifically, the Prosecution referred to two decisions of the ICTR Appeals Chamber: the *Rwamakuba* JCE Decision from October 2004 and the *Karemera et al.* JCE Decision from April 2006. These two decisions are not separately examined in detail here because they did not specifically address the question whether the JCE theory requires proof of an agreement between the accused and the physical perpetrators of the JCE crimes: *viz.* whether they all need to have shared a common intent to commit the JCE crimes. Rather, these decisions dealt with the related but distinct question of whether customary international law permits applying the JCE theory to “vast scope” criminal enterprises. See *Karemera et al. v. The Prosecutor* (ICTR-98-44-AR72.5, ICTR-98-44-AR72.6), Decision on Jurisdictional Appeals: Joint Criminal Enterprise, Appeals Chamber, 12 April 2006, paras 11-18; *Rwamakuba* Decision on Application of JCE to Genocide, *supra* n 56, para 25. There is a notable distinction between these two questions: one concerns the contours of JCE’s legal framework and the other challenges the *legal basis* for applying this doctrine to nation-wide criminality. This difference can be seen in the substance of the Defence’s appeal in *Karemera et al.*, where the Appeals Chamber noted that “the crucial question raised by the [Defence] is whether customary international law permits imposition of third category JCE liability on an accused for crimes committed by fellow participants in a JCE of ‘vast scope’.” Thus, the Defence was not challenging whether JCE responsibility can be imposed for crimes committed by non-members of the JCE, which is what the present research seeks to address. *Karemera et al.* Decision on Joint Criminal Enterprise, *Ibid.*, paras 12, 17. (*emphasis added*)

384 *Krajišnik* Trial Judgment, *supra* n 375, para 875.

385 *Ibid.*, para 883.

386 *Milutinović et al.* Decision on Indirect Co-perpetration, *supra* n 79, Separate Opinion of Judge Iain Bonomy, para 13.

387 Van Sliedregt, *supra* n 255, at 66, 70; Olásolo, *supra* n 40, at 226.

388 *Krajišnik* Trial Judgment, *supra* n 375, para 1086.

378 *Ibid.*, para 15-27.

379 *Ibid.*, para 7.

380 *Krajišnik* Trial Judgment, *supra* n 375, para 1080.

381 *Ibid.*, para 871.

382 *Ibid.*, para 873.

crimes and that proof of “interaction or cooperation among [them] – their joint action”³⁸⁹ will establish the link necessary to apply JCE liability. It is not at all clear how these requirements present a solution to the doctrinal problems of the law on JCE with no physical perpetrators. If the top ten military and political leaders of a state meet to devise a nation-wide criminal plan to commit genocide and then, through orders passed down the different levels of the political and military apparatus, have the various stages of the plan executed by numerous individuals, can Soldier X, who was told by his immediate field commander to kill several people in some village, ever be regarded as “sufficiently connected” and “acting jointly” with the ten leaders who devised the nation-wide genocidal JCE? More importantly, on what legal basis precisely are the *acts* of Soldier X imputed to the leaders (so they could be qualified as *co-perpetrators*) if he neither shared with them a common plan/agreement, nor in fact even knew that there was an ongoing murder operation throughout the entire state that his acts were part of? If the order to kill the said village men can be traced back to one of the leaders, is it not more logical and doctrinally coherent that this connection would make the leader liable for *ordering* the crimes committed by Soldier X, rather than for (co-)perpetrating them? The *Krajišnik* Trial Chamber did not duly address these questions, which has prompted some scholars to argue that when it embraced the law on JCE without physical perpetrators, it practically did so by “overlook[ing] the requirements of the common criminal plan and shared intent among all participants in the enterprise”.³⁹⁰

4.3.2.2. *The Brđanin case: a decisive point in the jurisprudence on ‘leadership-level’ JCE*

The *Krajišnik* Trial Judgment explicitly adopted the view that the JCE theory does not require the direct perpetrators to be members of the enterprise, but without an appellate jurisprudence to confirm or reject this, the matter remained unresolved. An end to this debate was put in the very case that first put the issue at the forefront of judicial scrutiny: the *Prosecutor v Brđanin and Talić*.³⁹¹ It will be recalled that in its pre-trial Decision from June 2001, Trial Chamber II warned the Prosecution that its JCE charges against the two accused would require proof of an agreement between them and the physical perpetrators of the indicted crimes.³⁹² The Chamber thus rejected the possibility of applying the JCE doctrine to cases where a common purpose is shared between senior accused who use outsiders as instruments to physically commit the JCE crimes. The same Trial Chamber, albeit in a different composition, subsequently delivered the actual trial judgment in this case.

³⁸⁹ *Ibid.*, para 884.

³⁹⁰ Olásolo, *supra* n 40, at 227. For similar criticism, see also M. Ventura, ‘The Application of Joint Criminal Enterprise to Complex Top Political Leadership Cases Upheld: The Krajišnik Appeal Judgment’, in A. Klip and S. Freeland (eds), *Annotated Leading Cases of International Criminal Tribunals: International Criminal Tribunal for the former Yugoslavia*, Vol. 48 (Cambridge/Antwerp/Portland: Intersentia, 2016), (forthcoming), available at SSRN: <http://ssrn.com/abstract=2694433>, at 8-11 [accessed 1 July 2016]; M. Cupido, ‘Pluralism in Theories of Liability: Joint Criminal Enterprise versus Joint Perpetration’ in Van Sliedregt and Vasiliev, *supra* n 271, at 136-137.

³⁹¹ See *supra* Section 4.3.1.3.i.

³⁹² See *supra* text accompanying note 340-341.

i) The *Brđanin* Trial Judgment

Early at the trial stage of the case, the accused Talić was provisionally released due to his deteriorating health and his case was separated from that against his co-accused,³⁹³ which is why Trial Chamber II eventually had to try only Radislav Brđanin for the crimes charged in the Indictment.³⁹⁴ The *Brđanin* Trial Judgment was delivered on 1 September 2004 and, rather unsurprisingly, it entirely upheld the interpretation of JCE responsibility contained in its June 2001 Decision. To begin with, when defining the concept’s legal framework, the judges stated that:

it is necessary for the Prosecution to prove that, *between the member of the JCE physically committing the material crime charged and the person held responsible under the JCE for that crime*, there was a common plan to commit at least that particular crime.³⁹⁵

This finding marked the collapse of the Prosecution’s JCE case. In particular, when the judges proceeded to apply the theory to the established facts of the case they noted that, according to the Indictment, Brđanin participated in a JCE to create a separate, mono-ethnic Bosnian Serb state with:

great many individuals [...] including Momir Talić, other members of the ARK Crisis Staff, the leadership of [Republika Srpska], including Radovan Karadžić, Momčilo Krajišnik, Biljana Plavšić, members of the Assembly of the Autonomous Region of Krajina and the Assembly’s Executive Committee, the Serb Crisis Staffs of the ARK municipalities, the army of the Republika Srpska, Bosnian Serb paramilitary forces and others.³⁹⁶

The Chamber then held that the *actus reus* of the JCE crimes was committed “by members of the army, the Bosnian Serb police, Serb paramilitary groups, Bosnian Serb armed civilians or unidentified individuals (“Physical Perpetrators”).”³⁹⁷ Naturally, the judges could identify the physical perpetrators by name in only a few instances and for the rest they were referred to by the specific unit to which they belonged.³⁹⁸ The Chamber proceeded to explain that in order to find Brđanin liable under the JCE doctrine:

³⁹³ The trial against these two accused commenced in January 2002, but in September the same year Talić was provisionally released for health reasons. The proceedings against him were terminated in June 2003, following his death. See ICTY Case Information Sheet, “*Krajina*” (IT-99-36/1) - *Momir Talić*, at 4-5, available at: http://www.icty.org/x/cases/talic/cis/en/cis_talic_en.pdf [accessed 11 July 2016].

³⁹⁴ See *supra* text accompanying notes 336-338.

³⁹⁵ *Brđanin* Trial Judgment, *supra* n 267, para 264. (*emphasis added*) The only authority that the Chamber cited to support this finding was its own pre-trial Decision from June 2001.

³⁹⁶ *Ibid.*, para 343.

³⁹⁷ *Ibid.*, para 345.

³⁹⁸ *Ibid.*

it is not sufficient to prove an understanding or an agreement to commit a crime between the Accused and a person in charge or in control of a military or paramilitary unit committing a crime. The Accused can only be held criminally responsible under the mode of liability of JCE if the Prosecution establishes beyond reasonable doubt that he had an understanding or entered into an agreement with the Relevant Physical Perpetrators to commit the particular crime eventually perpetrated³⁹⁹

One can hardly overstate the limiting effect that this finding had on the scope of application of the JCE theory. Requiring evidence that the accused had reached an agreement/common plan *directly* with the rank-and-file soldiers made this notion practically inapplicable to large-scale cases involving senior military and political accused. The bigger the scope of the alleged JCE, the more the persons involved in its execution, the less likely it is to prove the existence of an agreement/common plan shared between all of them. It has often been argued that the judges adopted this restrictive approach to JCE liability as a response to growing concerns at the time that this doctrine is prone to expansive use that could exceed the limits of personal culpability and lead to guilt by association.⁴⁰⁰ However, as explained in detail below, short form crippling the theory as it did, there were other ways in which the Chamber could have prevented such a pervasive application of the JCE concept and solved the problem of imputing the acts of non-members to members of the JCE.⁴⁰¹

After examining all the evidence, the judges found that both Brđanin and many of the physical perpetrators of the JCE crimes “espoused” the common plan (the “Strategic Plan”) to deport and forcibly transfer the non-Serb population from the region of Krajina: *i.e.* both sides intended the commission of these crimes.⁴⁰² However, the judges found that without proof of an agreement/common plan between them to unite their will, they could not be considered to have formed a *shared* intent:

[T]he mere espousal of the Strategic Plan by the Accused on the one hand and many of the Relevant Physical Perpetrators on the other hand is not equivalent to an arrangement between them to commit a concrete crime. Indeed, the Accused and the Relevant Physical Perpetrators could espouse the Strategic Plan and form a criminal intent to commit crimes with the aim of implementing the Strategic Plan *independently from each other* and without having an understanding or entering into any agreement between them to commit a crime.

Moreover, the fact that the acts and conduct of an accused facilitated or contributed to the commission of a crime by another person and/or assisted in the formation of that person’s criminal intent is not

sufficient to establish beyond reasonable doubt that there was an understanding or an agreement between the two to commit that particular crime. An agreement between two persons to commit a crime requires a mutual understanding or arrangement with each other to commit a crime.⁴⁰³

As explained previously in this book,⁴⁰⁴ the shared intent requirement is the cornerstone of the JCE theory and, together with the common plan/agreement element, forms the basis on which the reciprocal attribution of the personal acts of the JCE participants is possible. In fact, these two requirements could be viewed as the two sides of the same medal. Two people cannot be said to share the same intent, if they have not – explicitly or tacitly – formed an agreement to commit the projected crime.⁴⁰⁵ The *Brđanin* Trial Chamber was rightly concerned that if these requirements are ignored *vis-à-vis* the physical perpetrators of the JCE crimes, a gap would be formed that will prevent the attribution of the triggermen’s acts to the members of the JCE. In spite of the fact that the judges properly identified the nature of the problem, their response to it was unnecessarily rigid: the necessary link for such imputation could have been established in several different ways, other than requiring that the physical perpetrators must be members of the JCE, sharing its underlying agreement/common criminal plan with the leadership-level accused.⁴⁰⁶

In the end, the Trial Chamber did not find any direct evidence of the existence of such a mutual agreement, nor could it infer it from the facts of the case, so it decided that Brđanin could not be held liable under the JCE doctrine⁴⁰⁷ and instead found him guilty as an aider and abettor of the indicted crimes.⁴⁰⁸ Overall, the judges concluded that JCE is not an appropriate form of liability in cases of such “extraordinarily broad nature” where the accused is someone who is structurally/hierarchically remote from the perpetrators of the concerted crimes.⁴⁰⁹

The *Brđanin* Trial Judgment immediately stirred strong reactions both in legal practice and in academia. Some scholars agreed with its findings on the scope of application of JCE,⁴¹⁰ while others criticised the judges for unnecessarily narrowing the theory⁴¹¹ and

403 *Ibid.*, paras 351-352.

404 Chapter 3, Section 3.4.2.1 (text accompanying notes 244-247). Olásolo, *supra* n 40, at 169.

405 Ohlin, *supra* n 271, at 697, 736-737.

406 See *infra* Section 4.3.3.2.iii and iv.

407 *Brđanin* Trial Judgment, *supra* n 267, paras 353-354, 356.

408 *Ibid.*, paras 1054, 1061, 1067, 1071, 1075.

409 *Ibid.*, para 355.

410 Cassese, for instance, at first contended that “the view propounded in 2004 by [the *Brđanin* Trial Chamber] is sound, namely that the general notion of JCE may not be resorted to when the physical perpetrators of the crimes charged were not part of the criminal plan or agreement, but rather committed the crimes unaware that a plan or agreement had been entered into by another group of persons.” Cassese, *supra* n 2, at 110. See also Van Sliedregt, *supra* n 103, at 200-201. However, in his later academic work, Cassese appeared to have embraced the law on JCE with no physical perpetrators and recommended solutions to the legal problems it raised. See Cassese, *supra* n 55, at 174-175.

411 Gustafson, *supra* n 334, at 145; O’Rourke, *supra* n 313, at 321-325.

399 *Ibid.*, para 347.

400 Danner and Martinez, *supra* n 258, at 135-136; Gustafson, *supra* n 334, at 140, 145; O’Rourke, *supra* n 313, at 324; H. Van der Wilt, ‘Joint Criminal Enterprise and Functional Perpetration’, in H. Van der Wilt and A. Nollkaemper (eds), *System Criminality in International Law* (Cambridge: Cambridge UP, 2009), at 166; E. Van Sliedregt, ‘The Curious Case of International Criminal Liability’, 10 *Journal of International Criminal Justice* (2012), at 1180.

401 See *infra* Section 4.3.3.2.

402 *Brđanin* Trial Judgment, *supra* n 267, para 350.

argued that “a conviction under ‘joint criminal enterprise’, which is a form of committing, would have been more appropriate to characterize Brđanin’s role as a co-ordinator of ethnic cleansing, rather than finding that he acted as an aider and abetter.”⁴¹² At the ICTY, Judge Bonomy opined that the *Brđanin* trial judges made their restrictive findings on JCE liability merely as a reaction to the specific circumstances of the case and emphasized that, in any event, the matter was yet to be addressed by the Appeals Chamber.⁴¹³ The *Krajišnik* Trial Chamber also openly disagreed with the interpretation of the JCE doctrine contained in the *Brđanin* Trial Judgment.⁴¹⁴ It was, thus, left for the Appeals Chamber to put an end to these disputes and clarify the law on JCE with no physical perpetrators.

ii) The *Brđanin* Appeal Judgment

The Appeals Chamber delivered its Judgment in the *Brđanin* case on 3 April 2007 and it analysed in detail the contested scope of application of the JCE theory. The Prosecution had raised, *inter alia*, two grounds of appeal against the Trial Judgment, in which it argued that:

the Trial Chamber erred by: (1) requiring that the principal perpetrator of a crime be a member of the JCE (“Ground 1”), and (2) holding that the mode of liability of JCE is limited to small cases and necessitates a direct agreement between each JCE member regarding the commission of the crimes (“Ground 2”).⁴¹⁵

In essence, the Prosecution submitted that these findings lacked a proper legal basis and cited Nuremberg-era and ICTY/R case law purportedly supporting the opposite conclusions.⁴¹⁶ The Defence challenged the Prosecution’s interpretation of the said judgments and argued that an expansive approach to JCE liability, such as that pled by the Prosecution, “has the potential to lapse [the doctrine] into guilt by association.”⁴¹⁷

The Appeals Chamber started its analysis on the issue at hand by emphasizing that it is “of considerable significance to the Tribunal’s jurisprudence”⁴¹⁸ and stating that the question whether the physical perpetrators have to be members of the JCE presents a problem that “has not yet been explicitly addressed by the Appeals Chamber.”⁴¹⁹ The latter is certainly not true. As the judges explained, being a member of a JCE means sharing the common

purpose of that JCE.⁴²⁰ It will be recalled that in the *Krnojelac* case, the Appeals Chamber explicitly affirmed that the JCE participants and the principal perpetrators must all share a joint criminal intent:⁴²¹ a finding that unequivocally confirms that the triggermen must also be JCE members. Be that as it may, the *Brđanin* Appeals Chamber would not have necessarily been bound to follow its reasoning in the *Krnojelac* case because, in accordance with the Tribunal’s settled practice, it could have invoked cogent reasons to “depart from a previous decision after the most careful consideration has been given to it, both as to the law, including the authorities cited, and the facts.”⁴²²

Turning to the substance of the Prosecution’s appeal, the judges carefully reviewed the relevant Nuremberg-era jurisprudence cited by the parties, examined the Tribunal’s own case law on the matter and, after heavily quoting the analysis and findings of Judge Bonomy in his separate opinion in the *Milutinović et al.* case,⁴²³ concluded that:

what matters in a first category JCE is not whether the person who carried out the *actus reus* of a particular crime is a member of the JCE, but whether the crime in question forms part of the common purpose. In cases where the principal perpetrator of a particular crime is not a member of the JCE, this essential requirement may be inferred from various circumstances, including the fact that the accused or any other member of the JCE closely cooperated with the principal perpetrator in order to further the common criminal purpose. In this respect, when a member of the JCE uses a person outside the JCE to carry out the *actus reus* of a crime, the fact that the person in question knows of the existence of the JCE – without it being established that he or she shares the *mens rea* necessary to become a member of the JCE – may be a factor to be taken into account when determining whether the crime forms part of the common criminal purpose. However, this is not a *sine qua non* for imputing liability for the crime to that member of the JCE.⁴²⁴

Thus, for the *Brđanin* Appeals Chamber, it was irrelevant whether the physical perpetrators of JCE crimes share the JCE common intent: *i.e.* whether they are members of the JCE, together with the (leadership-level) accused. It sufficed to establish that the triggermen’s crimes can be objectively considered as part of the JCE: a finding to be made on a case-by-case basis, taking into account various factors, such as a “close cooperation” between the direct perpetrators and at least one JCE member, or the former’s knowledge of the JCE, etc. The judges, thus, upheld the law on JCE with no physical perpetrators and confirmed that if two or more persons form a common criminal purpose and then use an outsider to

⁴¹² T. Blumenstock, ‘The Judgment of the International Criminal Tribunal for the Former Yugoslavia in the Brđanin Case’, 18 *Leiden Journal of International Law* (2005), at 73.

⁴¹³ *Milutinović et al.* Decision on Indirect Co-perpetration, *supra* n 79, Separate Opinion of Judge Iain Bonomy, para 10.

⁴¹⁴ *Krajišnik* Trial Judgment, *supra* n 375, paras 882, 884.

⁴¹⁵ *Brđanin* Appeal Judgment, *supra* n 56, para 358.

⁴¹⁶ *Ibid.*, paras 368-370, 379-382, 387. The content of these and other relevant post-World War II judgments is separately examined further below. See *infra* Section 4.3.3.3.

⁴¹⁷ *Brđanin* Appeal Judgment, *supra* n 56, paras 371, 383.

⁴¹⁸ *Ibid.*, para 361.

⁴¹⁹ *Ibid.*, para 366.

⁴²⁰ This is seen in the dictum where the judges found that “[i]n cases where the principal perpetrator shares that common criminal purpose of the JCE or, in other words, is a member of the JCE [...] it is superfluous to require an additional agreement between that person and the accused to commit that particular crime”. *Ibid.*, para 418. (*emphasis added*)

⁴²¹ *Krnojelac* Appeal Judgment, *supra* n 67, para 84. See *supra* Section 4.3.1.2.

⁴²² *The Prosecutor v. Aleksovski* (IT-95-14/1-A), Judgment, Appeals Chamber, 24 March 2000, para 109; *The Prosecutor v. Perišić* (IT-04-81-A), Judgment, Appeals Chamber, 28 February 2013, para 34.

⁴²³ *Brđanin* Appeal Judgment, *supra* n 56, para 393-409.

⁴²⁴ *Ibid.*, para 410.

physically commit its projected crime, they can all be held vicariously liable for the acts of the physical perpetrators.

The above finding put an end to the debates whether the JCE triggermen have to share the joint criminal intent/be members of the JCE/be parties to the common agreement.⁴²⁵ It was a conclusion that is nowadays seen as a defining point in the Tribunals' JCE jurisprudence.⁴²⁶ However, when the *Brđanin* Appeals Chamber rejected the existence of such a requirement, it failed to critically address the one question which instantly arises from this finding: what then must be the nature of the link between the member and the non-member of the JCE so that the acts of the latter can be imputed on the former? The very reason for adopting the JCE doctrine on the first place was a need to establish a link between the accused and the direct perpetrators that would allow treating them all as equally liable for the commission of the said crime.⁴²⁷ As Ohlin has also pointed out, "[r]emoving the physical perpetrators from the JCE just opens up the original issue again: the need for a linking principle to establish vicarious liability."⁴²⁸ The *Tadić* Appeal Judgment, as argued above and noted by the *Brđanin* Appeals Chamber, did not conclusively restrict the JCE doctrine solely to cases where the triggermen are members of the common purpose,⁴²⁹ but this certainly does not mean that this concept could simply be applied *without establishing any link* between the JCE members and the executioners of the crimes.

To be sure, the Appeals Chamber was aware of the problem of attribution which arose when removing the direct perpetrators from the common purpose. In particular, the judges did acknowledge that "for it to be possible to hold an accused responsible for the criminal conduct of another person there must be a link between the accused and the crime as legal basis for the imputation of criminal liability."⁴³⁰ However, no detailed legal analysis was provided on what the exact nature of this link must be in the context of JCE with no physical perpetrators. It was simply held, in a broad and rather vague manner, that:

to hold a member of a JCE responsible for crimes committed by non-members of the enterprise, it has to be shown that the crime can be imputed to one member of the joint criminal enterprise, and that this member – when using a principal perpetrator – acted in accordance with the common plan. The existence of this link is a matter to be assessed on a case-by-case basis.⁴³¹

Put simply, the judges recognized that when one excludes the direct perpetrators from the JCE a need arises to establish some link of imputation between them and the members of the JCE, but their analysis went no further than that. This prompted some academics to contend that the Chamber "displayed a shocking level of indifference" towards this fundamental problem.⁴³² It is a matter that could potentially change the nature of JCE liability. In particular, as explained in detail below, if the said link is of an accessory nature – i.e. the JCE participants instigated, ordered etc. the triggermen to commit the JCE crime – then, in accordance with the principles of derivative liability, it will not be possible to impute the crime to the JCE members: i.e. they could not be held liable for committing that crime.⁴³³ The *Brđanin* Appeals Chamber was not oblivious to this problem, as is evident from a footnote it included in the above-cited dictum:

The jurisprudence of the Tribunal traditionally equates a conviction for JCE with the mode of liability of "committing" under Article 7(1). The Appeals Chamber declines at this time to address whether this equating is still appropriate where the accused is convicted via JCE for crimes committed by a principal perpetrator who was not part of the JCE, but was used by a member of the JCE.⁴³⁴

The reason why the judges refused to make a finding on this issue at the time was not because they considered it an insignificant problem. Rather, the fact that three of them drafted separate opinions on this matter, offering different interpretations on how to deal with it, suggests that they were most likely not ready to make such a determination.⁴³⁵ All in all, one cannot escape the conclusion that when it adopted the law on JCE with no physical perpetrators, the *Brđanin* Appeals Chamber settled one matter that had long caused jurisprudential uncertainty only to open up another point of controversy which has remained unsettled to present day.

4.3.2.3. *Final observations and post-Brđanin endorsement of 'leadership-level' JCE*

It would not be an exaggeration to say that the question whether the JCE doctrine requires the physical perpetrators to be members of the common purpose created a jurisprudential chaos in the ICTY's first decade of trial and appeal judgments. This body of case law has

⁴²⁵ Following the *Brđanin* Appeals Judgment, the ICTY/R jurisprudence, as well as that of the SCSL, ECCC and STL, has consistently confirmed that JCE members can be held liable for crimes committed by non-members of the JCE. See *infra* notes 438-441.

⁴²⁶ Van Sliedregt, *supra* n 255, at 157, 163.

⁴²⁷ This link being the 'common plan/design/purpose' they all share. *Tadić* Appeal Judgment, *supra* n 41, paras 191-192.

⁴²⁸ Ohlin, *supra* n 271, at 699.

⁴²⁹ *Brđanin* Appeal Judgment, *supra* n 56, para 406. See *supra* Section 4.3.1.1.

⁴³⁰ *Brđanin* Appeal Judgment, *supra* n 56, para 412.

⁴³¹ *Ibid.*, para 413.

⁴³² Ohlin, *supra* n 271, at 699. For other scholars who have shared the opinion that the *Brđanin* Appeal Judgment did not answer the question what kind of link has to be established between the JCE members and the non-member, physical perpetrators of the JCE crimes, see e.g. Cassese, *supra* n 55, at 174; Van Sliedregt, *supra* n 255, at 164; J. Ohlin, 'Second-Order Linking Principles: Combining Vertical and Horizontal Modes of Liability' 25 *Leiden Journal of International Law* (2012), at 774; A. Cassese (ed), *The Oxford Companion to International Criminal Justice* (Oxford: Oxford UP, 2009), at 395; C. Farhang, 'Point of No Return: Joint Criminal Enterprise in *Brđanin*', 23 *Leiden Journal of International Law* (2010), at 151-152.

⁴³³ See *infra* Section 4.3.3.1 and Section 4.3.3.2.i. For an explanation on the principles of derivative liability, see Chapter 1, Section 1.2.2.1.

⁴³⁴ *Brđanin* Appeal Judgment, *supra* n 56, para 413 (fn 891).

⁴³⁵ An analysis on the Separate Opinions of Judge Van Den Wyngaert, Judge Meron and Judge Shahabuddeen is provided in *infra* Section 4.3.3.1.

been viewed in two different ways. Some have argued that the *Tadić* Appeal Judgment and the subsequent early jurisprudence of the UN *ad hoc* Tribunals did not conclusively settle this question, so in this sense the *Brđanin* Appeals Chamber dealt with a *non liquet* situation when it held that the JCE theory can also be applied in cases where the triggermen are not members of the common purpose.⁴³⁶ Others have contended that the initial ICTY JCE case law did in fact construe this mode of liability strictly as applying in cases where the accused *and* the direct perpetrators are all participants in the enterprise. They have called this the ‘traditional’ JCE doctrine and have thus submitted that the *Brđanin* Appeals Chamber essentially created a new and separate JCE notion: the ‘leadership-level’ JCE.⁴³⁷ In practice, it matters little which angle one takes on this issue: in both cases the ultimate conclusion – that must be assessed for its doctrinal soundness and basis in customary law – is that the *Brđanin* Appeal Judgment adopted the view that JCE liability does not require the physical perpetrators of the concerted crime to be members of the common purpose, provided that this crime could (somehow) be imputed to, at least one of, the JCE members. This finding has been continuously confirmed in the ICTY’s post-*Brđanin* case law,⁴³⁸ and it has been further upheld in the jurisprudence of the ICTR,⁴³⁹ the SCSL⁴⁴⁰ and the STL.⁴⁴¹ It is, thus, apposite to conclude that the law on JCE with no physical perpetrators has become firmly established in modern international criminal law.

The question which the *Brđanin* Appeals Chamber did not carefully address – *i.e.* how the crimes committed by non-members of the JCE could be imputed to the JCE members and, respectively, can JCE still be considered a theory of co-perpetration – has remained unsettled. If anything, since the *Krajišnik* Appeal Judgment from 17 March 2009, the matter has become even more complicated because in this case the Appeals Chamber held, without providing *any* legal reasoning to this effect, that JCE is a form of ‘commission’ responsibility irrespective of whether the physical perpetrators of the JCE crimes were

members of the common purpose or not.⁴⁴² More recently, this conclusion was confirmed in the *Đorđević* case, where the Appeals Chamber was again confronted with a Defence submission challenging the nature of JCE with no physical perpetrators.⁴⁴³ The judges found that:

The Appeals Chamber has repeatedly held that participation in any category of joint criminal enterprise is a form of commission. As explained in the *Krajišnik* Appeal Judgement, a conviction pursuant to joint criminal enterprise liability for crimes committed through physical perpetrators who were not part of the joint criminal enterprise also properly falls under Article 7(1) of the Statute.⁴⁴⁴

The latest ICTY case law thus seems to define the notion of JCE with no physical perpetrators as a mode of co-perpetration liability, while at the same time it continues to use imprecise and vague language to characterise the link between the JCE accused and the non-members of the criminal enterprise. The judges have generally asserted that in such factual scenarios it will be established on a case-by-case basis whether the underlying offences can be imputed to at least one JCE member, who does not need to be the accused himself.⁴⁴⁵ No particular test has been established in order to make such a determination. Relevant factors that have been announced in various judgments include whether the physical perpetrators were “procured” by one of the JCE members,⁴⁴⁶ whether the crimes of the non-JCE members “formed part of [the] common criminal purpose”,⁴⁴⁷ or whether “the JCE member explicitly or implicitly requested the non-JCE member to commit such a crime, or instigated, ordered, encouraged or otherwise availed himself of the non-JCE member to commit the crime.”⁴⁴⁸ The next section of this chapter will explain the problem behind these sweeping formulations of the link between the JCE accused

⁴³⁶ *Milutinović et al.* Decision on Indirect Co-perpetration, *supra* n 79, Separate Opinion of Judge Iain Bonomy, paras 6-8; *Brđanin* Appeal Judgment, *supra* n 56, paras 406-409; *Milutinović et al.* Prosecution’s Response on Indirect Co-Perpetration, *supra* n 367, paras 19-25.

⁴³⁷ Olásolo, *supra* n 40, at 182-184, 202-207, 227; Van Sliedregt, *supra* n 255, at 136, 157 *et seq.*

⁴³⁸ *Martić* Appeal Judgment, *supra* n 39, para 171; *Krajišnik* Appeal Judgment, *supra* n 39, paras 235, 714; *The Prosecutor v. Gotovina and Markač* (IT-06-90-A), Judgment, Appeals Chamber, 16 November 2012, para 89; *Šainović et al.* Appeal Judgment, *supra* n 234, para 1256; *Đorđević* Appeal Judgment, *supra* n 38, paras 56, 165; *Popović et al.* Appeal Judgment, *supra* n 254, para 1050.

⁴³⁹ *Karemera and Ndirumpatse* Trial Judgment, *supra* n 268, para 1440; *The Prosecutor v. Nizeyimana* (ICTR-2000-55C-T), Judgment, Trial Chamber, 19 June 2012, para 1456; *Nizeyimana v. The Prosecutor* (ICTR-00-55C-A), Judgment, Appeals Chamber, 29 September 2014, para 325.

⁴⁴⁰ *The Prosecutor v. Sesay, Kallon and Gbao* (SCSL-04-15-A), Judgment, Appeals Chamber, 26 October 2009, para 414.

⁴⁴¹ STL Interlocutory Decision on the Applicable Law, *supra* n 173, para 237 (fn 357).

⁴⁴² *Krajišnik* Appeal Judgment, *supra* n 39, paras 663-666. The Defence submitted in its appeal brief that “the *Brđanin* Appeal Judgement implicitly recognised the impropriety of locating JCE within “commission” [liability] in cases of high-level actors such as *Krajišnik*, and where the principal perpetrators of the crimes are not JCE members”. (*Ibid.*, para 660) The Prosecution replied by arguing that “JCE is “committing” regardless of whether the principal perpetrators are part of the JCE [and] that a group with a common purpose amounting to or involving the commission of crimes under the Statute poses a greater danger than individual perpetrators and merits a serious for of liability in the form of “commission”.” (*Ibid.*, para 661) The Appeals Chamber noted these arguments, recognized that the *Brđanin* Appeal Judgment left open the question whether JCE with no physical perpetrators can still be qualified as ‘commission’ liability, and then without an explanation dismissed the “attempt by JCE counsel to distance *Krajišnik* from the crimes and thereby show the inappropriateness of qualifying his liability as “commission”.” (*Ibid.*, para 666)

⁴⁴³ *Đorđević* Appeal Judgment, *supra* n 38, para 54.

⁴⁴⁴ *Ibid.*, para 56.

⁴⁴⁵ *Krajišnik* Appeal Judgment, *supra* n 39, paras 226, 235; *The Prosecutor v. Tolimir* (IT-05-88/2-T), Judgment, Trial Chamber, 12 December 2012, para 890; *Đorđević* Appeal Judgment, *supra* n 38, paras 70, 165; *The Prosecutor v. Stanišić & Zupljanin* (IT-08-91-T), Judgment *Vol. I*, Trial Chamber, 27 March 2013, para 104.

⁴⁴⁶ *Krajišnik* Appeal Judgment, *supra* n 39, paras 235-236; *The Prosecutor v. Gotovina et al.* (IT-06-90-T), Judgment *Vol. 2*, Trial Chamber, 15 April 2011, para 1953.

⁴⁴⁷ *Martić* Appeal Judgment, *supra* n 39, para 171; *Đorđević* Appeal Judgment, *supra* n 38, para 70.

⁴⁴⁸ *Krajišnik* Appeal Judgment, *supra* n 39, para 236.

and the physical perpetrators of the concerted crimes, examine the possible solutions that have been proposed in practice and academia, and recommend a course of action.

4.3.3. Linking the physical perpetrators to the ‘leadership-level’ JCE

4.3.3.1. Legal doctrine and the problem of JCEs with no physical perpetrators

Why is it doctrinally unsound to conclude that the JCE participants can be held responsible as co-perpetrators for crimes committed by outsiders who were “procured” to commit the crimes of the enterprise? Let us take as a point of departure the Prosecution’s appellate submission in the *Milutinović et al.* case, where it stated that it would be an “absurd result” if JCE liability is limited:

to instances in which the physical perpetrator is a participant in the JCE: [this would mean that] where X and Y come to an agreement to kill all the inhabitants of a village, and Y uses a weapon of mass destruction to destroy the village, then X would bear [JCE] responsibility, but where Y orders troops under his command to do the killings, then X “can at the most be an aider and abettor”.⁴⁴⁹

The first notable legal problem with this statement is that it plainly disregards one of the basic principles of criminal law: the principle of individual autonomy, which states that individuals shall be intrinsically “treated as agents capable of choosing their acts and omissions, and that without recognizing [them as such] they could hardly be regarded as moral persons.”⁴⁵⁰ While a weapon of mass destruction does not possess individual autonomy and the crimes which are committed through its use are rightly attributed to the person who wields it, the crimes that are committed by fully autonomous individuals are theirs only. The above Prosecution’s example neglects this principle as it axiomatically equates the direct perpetrators (subordinate soldiers) of the JCE to inanimate tools that lack individual autonomy or free will. To be sure, there are certain limitations to this principle, pursuant to which some groups of persons, such as minors or mentally challenged persons, are considered to not possess (full) individual autonomy.⁴⁵¹ It is, however, wrong to generally assume that a case in which a JCE member uses a weapon of mass destruction to commit the said crimes is legally equivalent to a case where he “procures” fully responsible persons for this purpose, and then on this basis argue that the JCE doctrine is equally applicable to both scenarios.

⁴⁴⁹ *Milutinović et al.* Decision on Indirect Co-perpetration, *supra* n 79, para 21.

⁴⁵⁰ A. Ashworth and J. Horder, *Principles of Criminal Law* (7th edn, Oxford: Oxford UP, 2013), at 24. See also, T. Weigend, ‘Perpetration through an Organization: The Unexpected Career of a German Legal Concept’, 9 *Journal of International Criminal Justice* (2011), at 96, 104. In *R v. Wholesale Travel Group Inc.*, [1991] 3 S.C.R. 154, at 228, Justice Cory from the Supreme Court of Canada pointed out that “[c]riminal law is rooted in the concepts of individual autonomy and free will and the corollary that each individual is responsible for his or her conduct. It assumes that all persons are free actors, at liberty to choose how to regulate their own actions in relation to others.”

⁴⁵¹ Cassese, *supra* n 55, at 227; A. Cassese (ed), *The Oxford Companion to International Criminal Justice* (Oxford: Oxford UP, 2009), at 415.

The second legal problem with the Prosecution’s example is closely related to the first one and has to do with the principles of derivative liability. As already noted in Chapter 1,⁴⁵² the international criminal courts have adopted a differentiated model to criminal participation, which distinguishes between “commission” and various other modes of (accessorial) liability. In this model, the responsibility of those who plan, instigate, order, aid and abet, or otherwise *participate* in the commission of a crime, is derivative of the liability of the actual perpetrator of the crime.⁴⁵³ One basic feature of this approach is, as Van Sliedregt has also explained, that it considers only the perpetrator responsible for the crime itself, while the accessory is, strictly speaking, punished for his contribution to/effect on the perpetrator’s conduct.⁴⁵⁴ For instance, a person who aids and abets another to commit murder is held liable for *his assistance* in the commission of murder, not for the crime of murder itself. Only the perpetrator is punished for the crime proper because only his conduct constitutes the crime’s *actus reus*. Indeed, this was also affirmed in the ICTY *Blagojević and Jokić* case, where the Appeals Chamber rejected the accused’s argument that the aider and abettor “is convicted of *the crime itself*, in the same way as the principal perpetrator who actually commits the crime”⁴⁵⁵ and stressed, instead, that:

“Article 7(1) of the Statute deals not only with individual responsibility by way of direct or personal participation in the criminal act but also with individual participation by way of aiding and abetting in *the criminal acts of others*. Aiding and abetting generally involves a lesser degree of directness of participation in the commission of the crime than that required to establish primary liability for an offence.”⁴⁵⁶

⁴⁵² See Chapter 1, Section 1.2.1. Cassese, *supra* n 55, at 162.

⁴⁵³ D. Luban, J. O’Sullivan and D. Stewart, *International and Transnational Criminal Law* (New York: Aspen, 2010), at 862; Fletcher, *supra* n 67, at 636, 640-641; Olásolo, *supra* n 40, at 15-16.

⁴⁵⁴ Van Sliedregt, *supra* n 255, at 66, 70. See also Chapter 1, Section 1.2.2.1. However, note that although they distinguish between principals and accessories to a crime, Anglo-American criminal justice systems, do in fact treat the accessories as principals to the crime: *i.e.* they punish the accessories of *the crime* they participated in. *Ibid.*, at 70. See also Fletcher, *supra* n 67, at 652-653.

⁴⁵⁵ *The Prosecutor v. Blagojević and Jokić* (IT-02-60-A), Judgment, Appeals Chamber, 9 May 2007, para 192.

⁴⁵⁶ *Ibid.*, (*emphasis added*). See also *Aleksovski* Appeal Judgment, *supra* n 422, para 170.

Thus, the crime itself – being the act of another (*i.e.* the perpetrator) – “belongs” solely to that person, and the accessory’s responsibility is premised on his participation *relative to* the said crime.⁴⁵⁷ As long as the physical perpetrator is a fully responsible, autonomous individual, his actions are his own and they cannot be imputed to another person.⁴⁵⁸ The logical continuation of this paradigm can be observed in the widely-accepted “innocent agent” theory, which states that when the physical perpetrator *lacks* individual autonomy, and is therefore *not* criminally responsible, the person who directed him to commit the crime is liable as its perpetrator.⁴⁵⁹ In this way, it is possible to treat the crime committed by the innocent agent as if it has been the personal act of the indirect perpetrator. Such imputation, however, is foreclosed when dealing with fully responsible subordinate soldiers.

Considering all the above, it is not difficult to spot the gaping hole in the Prosecution’s example and, more generally, in the theory of JCE with no direct perpetrators: if JCE member Y instructs soldiers under his command to commit crimes he had previously agreed upon with X, Y could be punished for *ordering* the commission of the said crimes but not for *committing* them. Since the JCE doctrine is used to reciprocally impute the acts of the JCE participants, X could then also be held liable for *ordering* the JCE crimes.⁴⁶⁰ However, the acts of the soldiers (*i.e.* the actual crimes) remain outside the JCE circle of attribution, so they cannot be imputed to either X or Y. This “downgrades” JCE liability from a theory of co-perpetration to a theory of accessoryship, which defeats the very reason why the Prosecution has insisted on using this notion to convict senior state officials.⁴⁶¹ At the same time, to ignore the above principles and state that the JCE doctrine allows holding X and Y liable as co-perpetrators if one of them had “procured” or “requested” the soldiers to commit the JCE crimes, is to practically collapse the differentiated approach to

criminal participation into a unitary one in which every person who causally contributes to the commission of a crime is its perpetrator.⁴⁶² The question which has to be answered is thus: short from proving that the direct perpetrators are members of the JCE, what other legal techniques could be employed to impute their actions to (at least one of) the JCE participants so the latter can still be qualified as co-perpetrators of the concerted crimes.

4.3.3.2. Choosing between various approaches

As already noted above, three of the judges in the *Brđanin* Appeals Chamber drafted separate opinions that examined in further detail the above problem and offered solutions for it. These and several other possible approaches to dealing with the doctrinal shortcomings of the theory of JCE with no physical perpetrators will be reviewed here with an eye to recommend a viable course of action.

i) Transforming JCE into a mode of accessory liability: Judge Meron’s approach

Judge Meron’s Separate Opinion to the *Brđanin* Appeal Judgment largely confirms the points already raised in the above research. He started his analysis by endorsing the view that the JCE doctrine can also be applied in cases where the physical perpetrators are not members of the enterprise, but then emphasized that this raises one fundamental question: “how should we characterize such convictions under the modes of liability identified in Article 7(1) in the Statute?”⁴⁶³ Judge Meron agreed that it is reasonable to treat JCE as a form of “commission” in those cases where one of the JCE members physically commits the said crime.⁴⁶⁴ However, he could not accept that this conclusion remains valid in cases where the physical perpetrators of the JCE crimes are outsiders to the common criminal purpose:

In my view, where a JCE member uses a non-JCE member to carry out a crime in furtherance of the common purpose, then all other JCE members should be liable via the JCE under the same mode of liability that attaches to this JCE member. Thus, where A and B belong to a JCE and A orders non-member X to commit a crime in furtherance of the JCE, then B’s conviction for this crime via the JCE should be treated as a form of “ordering” for purposes of Article 7(1) rather than as a form of “committing”. Since B’s liability for this crime is essentially derivative of A’s, he should not be convicted of a higher mode of liability than that which attaches to A’s conduct.⁴⁶⁵

Judge Meron’s answer to the question that initiated his analysis is illustrative of the principles of derivative liability characteristic for the differentiated approach to criminal participation. If the JCE concept serves to reciprocally attribute the acts of the JCE participants, then the

⁴⁵⁷ This is why in their dispositions ICTY/R and ICC judgments have often specified whether the accused is held liable as a perpetrator, or as an *e.g.* aider and abettor of the charged crime(s). See *e.g.* *Tolimir* Trial Judgment, *supra* n 445, para 1239; *The Prosecutor v. Perišić* (IT-04-81-T), Judgment, Trial Chamber, 6 September 2011, para 1838; *The Prosecutor v. Đorđević* (IT-05-87/1-T), Judgment *Vol. I*, Trial Chamber, 23 February 2011, para 2230; *The Prosecutor v. Popović et al.* (IT-05-88-T), Judgment, Trial Chamber, 10 June 2010, paras 2104-2110; *Krstić* Appeal Judgment, *supra* n 261, Section VIII (Disposition); *Vasiljević* Appeal Judgment, *supra* n 310, Section VII (Disposition); *Karemera and Ngirumpatse* Appeal Judgment, *supra* n 281, para 750; *Katanga* Trial Judgment, *supra* n 50, Section XII (Disposition). See also S. Finnin, *Elements of Accessorial Modes of Liability: Article 25 (3)(b) and (c) of the Rome Statute of the International Criminal Court* (Leiden: M. Nijhoff, 2012), at 20. However, it should be noted that in most cases the UN *ad hoc* Tribunals do not deem it necessary to repeat such information in the disposition and instead hold, in a more general language, that they find the accused guilty under Article 7(1)/Article 6(1) ICTY/R Statute of the counts charged in the indictment. Stewart has argued, in this author’s view mistakenly for the reasons already explained above, that this more general language indicates that the Tribunals have concluded that an accessory to a crime is convicted of the crime itself, just as the principal is. Stewart, *supra* n 297, at 187 (fn 114).

⁴⁵⁸ Weigend, *supra* n 450, at 96, 103-104.

⁴⁵⁹ M. Bohlander, *Principles of German Criminal Law* (Oxford: Hart, 2009), at 156-158; D. Ormerod, *Smith and Hogan’s Criminal Law* (13th edn, Oxford: Oxford UP, 2011), at 188-189; Van Sliedregt, *supra* n 255, at 90. As noted by Fletcher, these are cases of indirect perpetration (perpetration-by-means) and “[p]aradigmatic instances are using a child or an insane person to implement a criminal plan of which the latter is totally unaware.” Fletcher, *supra* n 67, at 639. See also STL Interlocutory Decision on the Applicable Law, *supra* n 173, para 254.

⁴⁶⁰ This particular line of reasoning was endorsed by Judge Meron, see *infra* text accompanying notes 465-467.

⁴⁶¹ *Milutinović et al.* Prosecution’s Response on Indirect Co-Perpetration, *supra* n 367, paras 32-33.

⁴⁶² Olásolo, *supra* n 254, at 272; Van Sliedregt, *supra* n 255, at 65-70; Ambos, *supra* n 67, at 105; Vogel, *supra* n 297, at 152; Finnin, *supra* n 457, at 12-13, 93, 98; Cassese, *supra* n 34, at 304; Stewart, *supra* n 297, at 169-170.

⁴⁶³ *Brđanin* Appeal Judgment, *supra* n 56, Separate Opinion of Judge Meron, para 4.

⁴⁶⁴ *Ibid.*, para 5.

⁴⁶⁵ *Ibid.*, para 6.

act of “committing” the concerted crimes remains outside this circle of attribution by virtue of being carried out by an outsider to the common criminal purpose. Judge Meron thus concluded that:

Where a crime in furtherance of the common purpose has not been directly “committed” by a JCE member, then the “committing” of this crime cannot fairly be imputed to the other JCE members via the JCE. Instead, these other JCE members can only be held responsible for a crime that furthers the common purpose to the same extent that another JCE member is responsible for this crime.⁴⁶⁶

and further again that:

I consider that where a JCE member uses a non-member to carry out a crime within the common criminal purpose, the other members of the JCE have responsibility for this crime that is derivative of their relationship to this JCE member. I thus would equate their convictions for JCE with regard to that crime with whatever mode of liability reflects the responsibility of the JCE member who used the non-member.⁴⁶⁷

In the author’s opinion, Judge Meron’s analysis is theoretically sound, yet its practical consequences are strategically vexing. Most certainly, without a link of imputation that would bring the perpetrator’s *actus reus* into the JCE circle, it is doctrinally wrong – particularly in a system that distinguishes between various forms of criminal participation – to hold all the JCE members liable as co-perpetrators of the said crime. However, stopping here and concluding that the theory of ‘leadership-level’ JCE is a mode of accessorial liability practically deprives the *ad hoc* Tribunals of the power to hold the *intellectual authors* of international crimes (*i.e.* high-ranking military and political officials) liable as their principal perpetrators: a result that, for the reasons pointed out in Chapter 1, is undesirable.⁴⁶⁸ Therefore, Judge Meron’s Separate Opinion provides a valuable doctrinal explanation of the problem at hand but it does not offer a pragmatic solution to it.

ii) Broadening JCE’s membership: Judge Shahabuddeen’s approach

In his Separate Opinion to the *Brđanin* Appeal Judgment, Judge Shahabuddeen offered an approach to JCE that would allow using the doctrine to ascribe co-perpetration liability in a leadership-level scenario.⁴⁶⁹ He first emphasized that “the governing principle of international humanitarian law is that an accused is punishable only for his own criminal

conduct”⁴⁷⁰ and in general agreed with the above views expressed by Judge Meron.⁴⁷¹ In fact, the only deficiency he saw in Meron’s proposal concerned an evidentiary difficulty. In particular, he reasoned that his colleague’s approach – pursuant to which, if one JCE participant orders the commission of the said crimes, then all JCE participants could incur ‘ordering’ liability – would require proof that the members of the JCE had actually agreed amongst each other that they will ‘order’ the non-member perpetrators to commit the agreed crimes: *i.e.* that “the JCE itself gave authority to members to issue such orders”.⁴⁷² Judge Shahabuddeen was hesitant to accept this aspect of Meron’s proposal since he believed that “[i]t would be an exceptional case in which there was evidence of such authority being given.”⁴⁷³ Whatever the merit of this interpretation might be, eventually he did not accept that approach and proposed a different solution to the problem at hand: one based on what he called the “extended membership formula” of JCE liability.⁴⁷⁴

Judge Shahabuddeen took a very different angle to the ‘leadership-level’ JCE scenario. Rather than construing some novel link of imputation between the JCE members and the non-member physical perpetrators, he sought to stretch the boundaries of the JCE membership: *i.e.* find a way to count the triggermen as members of the JCE, so that their acts could be imputed to the JCE leaders. He wrote:

I am of opinion that a physical perpetrator, who acquiesces in the JCE and perpetrates a crime within its common purpose, thereby becomes a member of the JCE, if he is not already a member. His acts (including his acquiescence) have of course to be proved beyond reasonable doubt, but there is no need to exaggerate this requirement: from the circumstances, inferences may be drawn compatibly with that standard.⁴⁷⁵

In other words, Judge Shahabuddeen’s view is that if *e.g.* the leader of a state and his cabinet ministers formulate a genocidal common plan and then use institutions under their control and authority to execute the plan, any ground-level individual who “acquiesces” to it and commits a crime within its scope becomes a member of the said JCE. At this point, it would be right to ask how much knowledge the physical perpetrator must have of the said genocidal plan before he can be considered to have acquiesced to it (, obviously a person could not possibly agree to a plan, the existence of which he does not even know of). According to Judge Shahabuddeen:

⁴⁷⁰ *Ibid.*, para 3.

⁴⁷¹ *Ibid.*, paras 10-11.

⁴⁷² *Ibid.*, para 11.

⁴⁷³ *Ibid.*, para.11.

⁴⁷⁴ *Ibid.*, para 5.

⁴⁷⁵ *Ibid.*, para 4.

⁴⁶⁶ *Ibid.*, para 7.

⁴⁶⁷ *Ibid.*, para 8.

⁴⁶⁸ See Chapter 1, Section 1.2.1.

⁴⁶⁹ *Brđanin* Appeal Judgment, *supra* n 56, Partly Dissenting Opinion of Judge Shahabuddeen, paras 1-20.

the details of a criminal scheme as settled by its originators need not be known to the newcomer; it is sufficient that he is aware of the general intendment.⁴⁷⁶

Thus, Judge Shahabuddeen opined that a foot soldier could become a member of a state-level JCE even if he does not know all its details, provided that he is generally aware of its overall criminal purpose. To support this conclusion, he quoted a finding of the International Military Tribunal at Nuremberg which held that:

A plan in the execution of which a number of persons participate is still a plan, even though conceived by only one of them. ... Hitler could not make aggressive war by himself. He had to have the co-operation of statesmen, military leaders, diplomats, and business men. When they, with knowledge of his aims, gave him their cooperation, they made themselves parties to the plan he had initiated.⁴⁷⁷

There are several flaws in Judge Shahabuddeen's interpretation of this dictum. First of all, the IMT reached the above finding in the specific context of rejecting "[t]he argument that [a] common planning cannot exist where there is complete dictatorship".⁴⁷⁸ *i.e.* the dictum had nothing to do with the question whether a person can be a member of a criminal plan when he only knows *e.g.* half of it, but addressed the very distinct issue of whether at all there could be a common plan/agreement between a tyrant and his closest aides. Second, it would be recalled that when assessing the liability of the accused for participating in Hitler's plan to wage a war of aggression in Europe, the IMT required much more than some peripheral knowledge of the "general intendment" of Hitler's plan. For instance, Bormann was acquitted of the aggressive war charges because the judges found that:

The evidence does not show that Bormann knew of Hitler's plans to prepare, initiate, or wage aggressive wars. He attended none of the important conferences when Hitler revealed piece by piece these plans for aggression. Nor can knowledge be conclusively inferred from the positions he held.⁴⁷⁹

In general, the IMT judges held that the only members of the grand Hitlerite conspiracy were those who were part of Hitler's innermost circle and attended the specific meetings where he revealed his aggressive war plans,⁴⁸⁰ which eventually led the Tribunal to conclude

that only 8 of the accused were members of this conspiracy.⁴⁸¹ Had the IMT used Judge Shahabuddeen's "extended membership formula" on how one joins a criminal design, the imminent conclusion would have been that all the defendants – each of them a senior Nazi official – were members of the aggressive war conspiracy. If the judges were unwilling to accept that Karl Dönitz, the Commander-in-Chief of the German Navy, was a member of Hitler's conspiracy because "he was not present at the important conferences where plans for aggressive war were announced, and there is no evidence he was informed about the decisions reached there",⁴⁸² then it is quite evident that the IMT Judgment does not support Judge Shahabuddeen's interpretation on how a foot soldier can become a member of a leadership-level common purpose.

Another troubling aspect of Shahabuddeen's proposal is that it largely dilutes the most fundamental element of the JCE doctrine: the shared intent requirement. As already explained above, the members of a JCE are those persons who share its common purpose: *i.e.* share the same intent to commit the enterprise's crimes.⁴⁸³ Under the "extended membership formula" that the honorable judge proposed, however, it is possible to qualify as a member of the JCE a person who is aware of just a few aspects of the criminal plan, as long as he has knowledge of its "general intendment".⁴⁸⁴ An evident question arises: how could an individual who has only limited knowledge of the scope of a criminal plan ever be said to share a common intent with the masterminds of that plan? Surely, if the political leaders of some state secretly form a JCE to forcibly remove all Christians from the cities X, Y and Z, a soldier who is only aware of the part of the plan pertaining to the city X could not be considered to share a common intent with the JCE leaders to remove all Christians from X, Y and Z: *i.e.* he should not be regarded as a member of the vast JCE. Judge Shahabuddeen's "extended membership formula" could serve to circumvent this conclusion. It would allow judges to qualify the said soldier as a member of the JCE on the mere basis that he was aware of "the general intendment" to deport Christians. Upholding this reasoning would change the very essence of JCE from a mode of liability that applies to people who share the same intent to commit all JCE crimes, to a concept that can be used to group together loosely related persons with partially overlapping criminal intentions.

Related to the above, there is also a practical reason to question the wisdom of seeking to qualify rank-and-file perpetrators as members of a 'leadership-level' JCE. In particular, the UN ad hoc Tribunals' jurisprudence has established that all the participants in a joint criminal enterprise are equally liable for the commission of the JCE crimes.⁴⁸⁵ Pursuant to this holding, a soldier who becomes a member of a 'leadership-level' JCE by "acquiescing" to it incurs the same degree of responsibility for all the JCE offences as the political and

⁴⁷⁶ *Ibid.*, para 8.

⁴⁷⁷ *Ibid.*, para 8, quoting IMT Judgment, *supra* n 100, at 226.

⁴⁷⁸ IMT Judgment, *supra* n 100, at 226.

⁴⁷⁹ *Ibid.*, at 339. Similarly, the accused Schacht, who the IMT saw as a "central figure in Germany's rearmament program" was acquitted of the aggressive war charges against him because the judges found that he "was clearly not one of the inner circle around Hitler which was most closely involved with this common plan." *Ibid.*, at 310.

⁴⁸⁰ *Ibid.*, at 226. S. Pomorski, 'Conspiracy and Criminal Organization', in G. Ginsburgs and V. Kudriavtsev (eds), *The Nuremberg Trial and International Law* (Dordrecht: M. Nijhoff, 1990), at 233.

⁴⁸¹ See also Chapter 2, Section 2.2.5.1.

⁴⁸² IMT Judgment, *supra* n 100, at 310.

⁴⁸³ See *supra* note 420.

⁴⁸⁴ See *supra* text accompanying note 476.

⁴⁸⁵ *Tadić* Appeal Judgment, *supra* n 41, paras 191-192; *Furundžija* Trial Judgment, *supra* n 101, para 254; *Stakić* Trial Judgment, *supra* n 359, para 435. See also Boas *et al.*, *supra* n 37, at 17.

military leaders who designed and implemented this enterprise. The JCE doctrine works on the basis of reciprocal attribution of acts, so when the foot soldier is counted among the members of the JCE (i.e. the state leaders) their acts become just as imputable on him as his acts are on them. Not only is it unrealistic to say that the masterminds of a nation-wide JCE and the thousands of soldiers who executed it all shared between each other a common purpose, it would also be contrary to the fundamental principle of culpability to hold a soldier who knew of and contributed to only some aspects of the JCE responsible for the full specter of JCE crimes. To illustrate this point by means of an example, consider the Nazi plan to exterminate the European Jews. According to Judge Shahabuddeen's "extended membership formula", the person who pulls the levers of the gas chambers in Auschwitz could be qualified as a member of this Hitlerite plan, provided that: i) he is aware of the general intendment to exterminate Jews and ii) his crimes fall in the scope of this common plan.⁴⁸⁶ It would be irrelevant if he lacks knowledge of the existence of a whole network of concentration camps which is set up for this purpose across Europe and is secretly murdering Jews en masse. By qualifying this person as a member of this vast JCE, all details of which are known only to Hitler and his closest aides, his acts of murdering all Jews in Auschwitz indeed become attributable to the Nazi leadership. However, being a member of this broad JCE, he would now also incur principal liability for the thousands of acts of murder committed in pursuance of this JCE in all other concentration camps, even though he was not even aware of their existence. Unless one introduces some novel distinction between different classes of members in one JCE, which would completely mutilate the theory's structure, there is no way in which persons X, Y and Z could all be members of the same JCE and yet each be held liable for different 'portions' of the concerted JCE crimes: i.e. it is not possible to convict only X and Y (leaders) of all the JCE core crimes, while Z (foot soldier) of just a part of them. In this respect, Judge Van Den Wyngaert rightly pointed out in her separate declaration to the Brđanin Appeal Judgment that Judge Shahabuddeen's approach "would have an overly broad 'downward' effect."⁴⁸⁷

iii) Inter-linked JCEs

In an academic article that was published a few years after the Brđanin Trial Judgment came out, Gustafson proposed a theoretically coherent and practically sound method in which the JCE doctrine could be used to ascribe co-perpetration liability in leadership-level cases.⁴⁸⁸ In particular, she advocated the model of "separate and inter-linked JCEs" as a solution to the abovementioned challenges of imputing the acts of low-level perpetrators to the members of a state-level JCE.⁴⁸⁹ Gustafson's idea was that if a member of the leadership-level JCE (JCE α) can be found to have formulated a separate JCE with the rank-and-file

executioners (JCE β) to commit (at least some) of the concerted crimes, that member would become a conduit through which the crimes committed by the participants in JCE β can be attributed to the high-ranking participants in JCE α . This structure could be illustrated as follows:

Pursuant to this method, D could be held liable as a co-perpetrator of the crimes committed by each rank-and-file executioner (X) since they were all members in JCE β . Once D's liability is so established, step two will be to attribute his commission liability for the given crimes to his confederates A, B and C by virtue of their mutual participation in the higher level JCE α . This approach allows keeping the low-level executioners out of the leadership-level JCE and it thus avoids the notable problems with Judge Shahabuddeen's proposal. Applying the "inter-linked JCEs" method to the above example of the Nazi plan to exterminate the European Jews would help to illustrate this point.

Let us suppose that D is the commander of the Auschwitz concentration camp and that A, B and C are, respectively, Heinrich Himmler (in charge of the concentration camps in Nazi Germany), the commander of the Dachau camp and the commander of the Belsen camp. A, B, C and D secretly meet and agree on using the said camps to detain and murder as many Jews as possible, thus formulating the common purpose underlying JCE α . With this knowledge, D then returns to Auschwitz, gathers its staff members and gives them guidance and instructions on what to do with the Jewish detainees in the camp. In this factual scenario, if the Auschwitz operation is construed as a JCE, D can be held liable as a co-perpetrator of inter alia the mass murder of Jews at Auschwitz. Moreover, if the same findings are also drawn mutatis mutandis for the Dachau and Belsen operations, then the mass murder of Jews in these two camps could also be imputed to D because he was a member, together with B and C, in the high-level JCE α . The end result is thus that A

⁴⁸⁶ See *supra* text accompanying notes 475-476.

⁴⁸⁷ Brđanin Appeal Judgment, *supra* n 56, Declaration of Judge Van Den Wyngaert, para 5.

⁴⁸⁸ Gustafson, *supra* n 334.

⁴⁸⁹ *Ibid.*, at 147.

(Himmler), B, C and D can all be held liable as co-perpetrators of the extermination of the Jews at the Dachau, Belsen and Auschwitz camps even though the said four persons did not physically kill a single Jew. At the same time, since the rank-and-file are excluded from the high-level JCE, the excessively broad downward effect that Judge Van Den Wyngaert saw in Judge Shahabuddeen’s “extended membership formula” is avoided. It is not possible to hold the person who pulled the levers of the gas chambers in Auschwitz liable for all the crimes of the higher-level JCE because he was an outsider to it: he did not share its criminal purpose, for he was not even aware of its existence and parameters. At the most, he may be held liable as a co-perpetrator in a JCE to kill the Jews in Auschwitz. This approach to applying JCE in leadership-level cases not only offers a more equitable distribution of liability but, as Gustafson has also noted, is more representative of reality.⁴⁹⁰

It ought to be emphasized that two or more JCEs do not become inter-linked simply by virtue of having a common member. Naturally, it is possible that one and the same individual may simultaneously be a member in two entirely independent JCEs, in which case the acts of the participants in either group would bear no relevance to the liability of those in the other. In order to be inter-linked, it has to be shown that the crimes committed by the participants in the low-level JCE were carried out “pursuant to the high-level group’s agreed upon plan”.⁴⁹¹ For the purpose of the above Nazi example, for instance, the prosecution would have to prove that D’s instructions and administration of Auschwitz were based on and sought to further the plan that he agreed to with A, B and C.

In further support of Gustafson’s model of “inter-linked JCEs”, it could be argued that this application of the common purpose theory has precedent in Nuremberg-era jurisprudence. In particular, the Stalag Luft III Case, which was previously considered in Chapter 2,⁴⁹² seems to have applied a notably similar structure of overlapping JCEs to convict the accused. It will be recalled that the case was brought before a British military court in Occupied Germany and dealt with the participation of 18 accused in a nationwide murder operation that resulted in the deaths of 50 Allied soldiers. The victims, who had escaped the Stalag Luft III prisoners of war camp, were hunted down by agents of the KriPo (Criminal Police) and were then handed over to the Gestapo, whose agents subsequently executed the prisoners while pretending to transfer them back to the camp. The entire operation was planned at the highest level in a meeting that was held on 26 March 1944 at Berchtesgarden between Hitler, Himmler, Göring and Keitel.⁴⁹³ Himmler then issued an order which was conveyed through the Central Security Office, under Kaltenbrunner’s command, and reached the various Gestapo and KriPo regional headquarters, informing their commanding officers that detained escapees must be executed. As a result, the

Gestapo regional headquarters in Saarbrücken, Strasbourg, Karlsruhe, Munich, Kiel and Zlin all organized small groups of agents who, in separate instances but in much the same pattern, shot the Allied officers handed over to them by the KriPo.⁴⁹⁴ It is important to note that 17 of the accused were members of the said six Gestapo regional headquarters and participated in the killing of at least one of the victims. Only one of the accused, Max Wielen, had a different position and role in this operation, in that he did not participate in any of the specific incidents of murder identified by the Prosecution: rather, he was the commanding officer of the KriPo regional headquarters in Berslau, which delivered 27 of the captured prisoners to the Gestapo. Crucially, of all the defendants, Wielen was the only one who was personally called to Berlin and was shown Hitler’s order, signed by Kaltenbrunner and calling for the secret execution of more than half of the 80 Allied escapees.⁴⁹⁵

Irrespective of this notable difference in the positions of Max Wielen and the other 17 accused, the Prosecution sought to present them all as members of the overall design to kill all 50 prisoners. The UNWCC’s summary of the case cites the Prosecution as alleging:

“that these 18 accused were concerned with their masters in Berlin... and with other persons known and unknown – and, of course, that includes Hitler, Himmler and Kaltenbrunner – in the killing of prisoners of war who had escaped from Stalag Luft III” and that they were acting for a common purpose.

[...]

There was, in the prosecution’s submission, perfect co-operation between the Gestapo and the KriPo on the top level at the RSHA [Central Security Office], *i.e.* between General Müller and General Nebe, and it was an irresistible inference that unless there had also been such co-operation on the next lower level between regional headquarters of the Gestapo and KriPo, the smooth execution of the Hitler order would have been impossible.⁴⁹⁶

However, the judges did not accept this broad definition of the members of the said enterprise. Aside from Max Wielen, none of the other 17 accused was found guilty of the grand charge of being concerned, together with General Müller (chief of Gestapo) and General Nebe (Chief of the KriPo) in the killing of the 50 soldiers. Rather, each one of them was convicted only of the killing(s) committed by the particular regional Gestapo group that they were members of. The UNWCC’s case notes explain that:

[i]t seems that the court found that though there was evidence that the members of every group of accused were together concerned in the killing of the officers handed over to them ... there was not enough evidence beyond that to show that they knew what had been planned in Berlin or what was happening outside their region and therefore, *a fortiori*, not enough evidence that they were together concerned in the killing of 50 out of the 80 escaped officers.⁴⁹⁷

⁴⁹⁰ *Ibid.*

⁴⁹¹ *Ibid.*, at 148.

⁴⁹² See Chapter 2, Section 2.3.3.2.ii. *Trial of Max Wielen and 17 Others* (‘The Stalag Luft III Case’), British Military Court, Hamburg, Germany, 1 July – 3 September 1947, in UN War Crimes Commission, *Law Reports of Trials of War Criminals*, Vol. XI (London: Published for the United Nations War Crimes Commission by His Majesty’s Stationary Office, 1949).

⁴⁹³ The *Stalag Luft III* Case, *supra* n 492, at 33-34.

⁴⁹⁴ *Ibid.*, at 34.

⁴⁹⁵ *Ibid.*, at 35.

⁴⁹⁶ *Ibid.*, at 34-35, 36.

⁴⁹⁷ *Ibid.*, at 45.

Wielen, on the other hand, against whom evidence was introduced of going to Berlin, meeting General Nebe and being told of the precise content of Hitler's order, was clearly regarded as a member of the higher-level group of individuals and therefore incurred liability for the murder of all 50 Allied officers.⁴⁹⁸ It is thus apposite to argue that liability in the Stalag Luft III Case was assigned by establishing a number of low-level enterprises, each one of which was linked to a higher-level common purpose that was shared only by a small circle of persons. Members of the low-level (regional) JCEs were convicted only of the crimes of their "small" enterprise, while the higher-ups in Berlin, who had full knowledge of the common purpose in its entirety, were held liable for all 50 killings committed in its pursuance. Admittedly, the records of this case do not present a perfect blueprint of Gustafson's model as no explicit findings were made on the existence of a person who was a common member of both the low-level regional JCEs and the higher-level JCE: i.e. a person who was the conduit of co-perpetration liability linking the Berlin group to each of the identified six regional Gestapo groups. In fact, even though the charge of being concerned in/acting for a common purpose was distinguished from aiding and abetting responsibility,⁴⁹⁹ the court did not delve into the kind of theoretical legal analysis that has dominated the present-day debates on the nature of 'leadership-level' JCEs. Nevertheless, it could still be argued that the Stalag Luft III Case, with its evident structure of different-level overlapping criminal enterprises, bears close resemblance to the "inter-linked JCEs" construct proposed by Gustafson and could, therefore, be cited here as a legal precedent.

In theory, Gustafson's model of "inter-linked JCEs" can be applied to connect those at the very apex of the state apparatus to those on the field by establishing a chain of overlapping JCEs that runs from state-level, through mid-level, to low-level circles of persons. Clearly, the more structurally removed the senior accused is from the physical perpetrators, the longer this chain of JCEs will have to be. This is where one could identify the sole practical weakness in Gustafson's proposal: using the inter-linked JCEs method in trials against the highest-ranking political/military leaders of states would require proving the legal elements of each and every JCE that forms a link in the chain connecting the said leader to the rank-and-file.⁵⁰⁰ This could turn such a trial into an evidentiary nightmare and may significantly protract the proceedings. To this end, Olásolo gives as an example the trial of Slobodan Milošević which, in his view, if adjudicated on the basis of this approach, it would have involved:

at the very least, four levels of interlinked joint criminal enterprises: i) the first between the physical perpetrators and the heads of the units; ii) the second, between the members of the [regional political structure] and the heads of the units to which the physical perpetrators belong; iii) the third between [the head of the regional political structure] and the political and military leadership of the Srpska Republic; and iv) the fourth between a core group of the Bosnian Serb political and military leadership in Pale (Radovan Karadzic, Momcilo Krajisnik and Biljana Plavsic) and key members of the government of Serbia and of the Federation of Serbia and Montenegro, including its former president Slobodan Milosevic.⁵⁰¹

Olásolo rightly notes that Gustafson's method would not only require proving the existence of four distinct JCEs but, since crimes were committed in different regions in Bosnia, each time the Prosecution seeks to establish Milošević as a co-perpetrator of crimes committed in one of those regions, the first two levels of the above chain will change and new JCEs will have to be proven: i.e. moving across various regions changes the groups involved in the first and second link of this chain of JCEs.⁵⁰² Thus, while the "inter-linked JCEs" model provides an approach to leadership-level cases that is conceptually sound and in line with the ICTY/R jurisprudence on this mode of liability, it could potentially make the trials of political/military leaders rather ineffective by imposing a colossal evidentiary burden on the prosecution.

iv) Combining JCE and indirect perpetration

None of the above three proposals found ground in the ICTY/R's jurisprudence. Judge Shahabuddeen's "extended membership formula" was rejected already in the Brđanin Appeal Judgment which, as explained above, explicitly held that the JCE doctrine does not require the physical perpetrators to be members of the common purpose. Judge Meron's idea of accepting the notion of JCE at the leadership-level as a mode of accessorial liability was also rejected in the ICTY's post-Brđanin appellate case law, which has established that JCE is a theory of co-perpetration responsibility irrespective of whether the direct perpetrators were members of the common purpose or not.⁵⁰³ Despite its merits, Gustafson's proposal of "inter-linked JCEs" has also not prospered at the ad hoc Tribunals, seeing that to present day it has not been expressly endorsed in any of their judgments. Instead, certain terminology that was used by the Brđanin Appeals Chamber and in subsequent ICTY case law has led some prominent scholars to argue that the Tribunals have tacitly adopted another approach to this matter: one that combines JCE with the separate mode of liability known as indirect perpetration.⁵⁰⁴

⁴⁹⁸ *Ibid.*, at 40, 45.

⁴⁹⁹ *Ibid.*, at 31 (see charges (i) and (ii)). The notion of being "concerned in" a crime (e.g. killing) was defined by the Judge Advocate as being "part of a machine doing some duty, carrying out some performance which went on directly to achieve the killing, that it had some real bearing on the killing, would not have been so effective or been done so expeditiously if that person had not contributed his willing aid." *Ibid.* at 46. The UNWCC report on this case seemed to equate it to the notion of "acting for a common purpose" (*Ibid.*, at 35) and, indeed, this case has often been referred to in analyses on JCE responsibility. See *The Prosecutor v. Kvočka et al.* (IT-98-30/1-T), Judgment, Trial Chamber, 2 November 2001, paras 295-296; Van Sliedregt, *supra* n 255, at 34.

⁵⁰⁰ Olásolo, *supra* n 40, at 199.

⁵⁰¹ *Ibid.*

⁵⁰² *Ibid.*

⁵⁰³ *Krajišnik* Appeal Judgment, *supra* n 39, paras 663-666; *Dorđević* Appeal Judgment, *supra* n 38, para 56.

⁵⁰⁴ Cassese, *supra* n 55, at 179; Olásolo, *supra* n 40, at 227-213.

Indirect perpetration, often referred to as perpetration-by-means, is a concept rooted in the idea that a person who uses another human being ‘as a tool’ to commit a crime has, in law, himself perpetrated the actus reus of that crime. The traditional manifestation of this notion is known in common law jurisdictions as “the innocent agent” theory and applies in cases where the direct (physical) perpetrator of the crime is not a criminally responsible individual because he/she *e.g.* is a child, or suffers from a mental defect, or acted under coercion.⁵⁰⁵ As explained above, in such cases the criminal acts of the innocent agent could be imputed to the individual who utilized him/her for this purpose without prejudice to the principles of personal autonomy and derivative liability.⁵⁰⁶ The underlying reasoning is that by dominating the will of the agent and using him to commit a crime, the indirect perpetrator essentially acts “in the same way as if he had used an inanimate instrument to accomplish his will”.⁵⁰⁷ It has been pointed out that this type of liability is recognized in virtually all legal systems in the world,⁵⁰⁸ which is why it may also be qualified as a general principle of law. In theory, if this concept is combined with the JCE doctrine, the resulting hybrid construct could serve to ascribe principal responsibility in leadership-level cases. The Prosecution would have to establish that one or more of the JCE members used ‘as a tool’ irresponsible persons to commit the concerted crimes and were thus liable as (indirect) perpetrators: a finding that would bring the *actus reus* of the crime into the JCE circle of attribution and would thereby allow to hold all leadership-level accused liable as (indirect) co-perpetrators of the crimes. In practice, however, such a fusion between these two modes of liability would be useless because in the international criminal law context the direct perpetrators of crimes are rarely innocent agents: *i.e.* the rank-and-file are often knowing and willing executioners of crimes.⁵⁰⁹

Indirect perpetration has, however, been expanded in legal theory to also cover certain cases where the physical perpetrator is a fully responsible individual. German scholarship and jurisprudence recognizing the concept of perpetrator behind the perpetrator (‘*Täter hinter dem Täter*’) have been at the forefront in the debates on this alternative use of indirect

perpetration and have already left a notable trace in modern international criminal law.⁵¹⁰ In particular, the theory of ‘*Organisationsherrschaft*’ (‘Control Based on Organized Power Structures’), which was developed in the early 1960s by the prominent German lawyer Claus Roxin, has provided a powerful doctrinal basis for holding an individual responsible as an indirect perpetrator even when the crime was committed by a fully responsible agent.⁵¹¹ This theory is premised on the existence of an organized power apparatus which the person behind the scenes (‘*hintermann*’) controls and which, Roxin stated, gives him virtual certainty that his will shall be executed by the lower ranks of that organization, ultimately leading to the commission of the crime by the direct perpetrator (‘*vordermann*’).⁵¹² In Roxin’s view:

Such an organization develops a life independent of its changing membership. Its functioning does not depend on the individual personality of the executors; it is, so to speak, ‘automatic’. One need only keep in mind the not at all artificial case in which, in a dictatorial regime, the government builds an apparatus to eliminate unpopular persons or groups of people. If, in such a situation – speaking figuratively – the behind-the-scenes actor at the nerve centre of the organizational structure presses a button and issues an order to kill, he can expect to be obeyed, without needing to know those who carry it out. Nor is it necessary that he have recourse to the tools of coercion or deception. After all, he knows that if one of the numerous organs participating in the commission of the offence shirks its task, another will immediately take its place without affecting the accomplishment of the overall plan.⁵¹³

Roxin further explained that within such an organization:

the direct author of the crime is still a free and responsible agent, who is punishable as the perpetrator with personal responsibility. But this circumstance is irrelevant in relation to the control exercised by the intellectual author, since from his viewpoint, the perpetrator does not represent a free and responsible individual, but an anonymous, interchangeable figure. While his power of control over his own actions is unquestionable, the perpetrator is nonetheless, at the same time, a mere gear in the wheel of the machinery of power who can be replaced at any time, and this dual perspective places the intellectual author alongside the perpetrator at the heart of events.⁵¹⁴

⁵⁰⁵ STL Interlocutory Decision on the Applicable Law, *supra* n 173, para 254; *Katanga* Trial Judgment, *supra* n 50, para 1402; G. Werle, *Principles of International Criminal Law* (2nd edn, The Hague: TMC Asser, 2009), at 178; Fletcher, *supra* n 67, at 639; Ambos, *supra* n 67, at 154-155; Cryer *et al.*, *supra* n 8, at 367; T. Weigend, ‘Problems of Attribution in International Criminal Law: A German Perspective’, 12 *Journal of International Criminal Justice* (2014), at 259; F. Jessberger and J. Geneuss, ‘On the Application of a Theory of Indirect Perpetration in Al Bashir: German Doctrine at The Hague?’, 6 *Journal of International Criminal Justice* (2008), at 857.

⁵⁰⁶ See *supra* Section 4.3.3.1.

⁵⁰⁷ *Brđanin* Appeal Judgment, *supra* n 56, Partly Dissenting Opinion of Judge Shahabuddeen, para 13; Werle, *supra* n 505, at 178.

⁵⁰⁸ Fletcher, *supra* n 67, at 639; STL Interlocutory Decision on the Applicable Law, *supra* n 173, para 254; *The Prosecutor v. Katanga and Chui* (ICC-01/04-01/07-717), Decision on the Confirmation of Charges, Pre-Trial Chamber I, 30 September 2008, para 495.

⁵⁰⁹ K. Ambos, ‘The Fujimori Judgment: A President’s Responsibility for Crimes against Humanity as Indirect Perpetrator by Virtue of an Organized Power Apparatus’, 9 *Journal of International Criminal Justice* (2011), at 147; Ambos, *supra* n 67, at 155;

⁵¹⁰ *Katanga and Chui* Decision on the Confirmation of Charges, *supra* n 508, paras 496 *et seq.*; *The Prosecutor v. Ruto, Kosgey and Sang* (ICC-01/09-01/11-373), Decision on the Confirmation of Charges, Pre-Trial Chamber II, 23 January 2012, paras 292, 301-349; *Stakić* Trial Judgment, *supra* n 359, para 439. See also Olásolo, *supra* n 40, at 302-306; Van Sliedregt, *supra* n 255, at 158, 165-170; Ambos, *supra* n 67, at 154-160.

⁵¹¹ C. Roxin, ‘Straftaten Im Rahmen Organisatorischer Machtapparate’, *Goltdammer’s Archiv Für Strafrecht* (1963), at 193-207. For an English translation of Roxin’s original work, see G. Werle and B. Burghardt, ‘Claus Roxin on Crimes as Part of Organized Power Structures: Introductory Note’, 9 *Journal of International Criminal Justice* (2011): 191-205.

⁵¹² Roxin, *supra* n 511, at 200. See also Jessberger and Geneuss, *supra* n 505, at 860; Jain, *supra* n 256, at 125-126; M. Osiel, ‘The Banality of Good: Aligning Incentives against Mass Atrocity’, 105 *Columbia Law Review* (2005), at 1831-1833. See also *Katanga and Chui* Decision on the Confirmation of Charges, *supra* n 508, paras 511-518.

⁵¹³ Werle and Burghardt, *supra* n 511, at 198 (original German text in Roxin, *supra* n 511, at 200).

⁵¹⁴ Translation provided in *Katanga and Chui* Decision on the Confirmation of Charges, *supra* n 508, para 515. For the original German text, see C. Roxin, *Täterschaft Und Tatherrschaft* (1st edn, Hamburg: Cram, De Gruyter & Co, 1963), at 245.

It is clear that the position of the indirect perpetrator in the ‘*Organisationsherrschaft*’ doctrine is fundamentally different from that in the ‘innocent agent’ doctrine. Roxin’s *hintermann* does not control the will of the physical perpetrator – which is why the latter continues to be a fully autonomous person, liable as perpetrator of the crime – but, instead, he controls the organized power apparatus which ensures the automatic execution of his will by relying on “anonymous, interchangeable [direct perpetrators who] can be replaced at any time.”⁵¹⁵ If one *vordermann*, being an autonomous person with free will, refuses to commit the crime in question, he would be immediately replaced with another *vordermann* who will: a core feature that guarantees the automatic execution of the *hintermann*’s orders and thus elevates him to the role of an indirect perpetrator. Roxin’s theory of indirect perpetration has, thus, three distinct legal elements:

- i) the existence of an organized power structure (‘*Machtapparat*’) that is premised on a strict superior-subordinate hierarchy;
- ii) fungible/interchangeable nature of the individual executioners of the criminal acts, ensuring automatic compliance with superior orders;
- iii) the organization functions outside the legal order.⁵¹⁶

A person who exercises effective control over such a power apparatus and, with the necessary intent, orders the commission of a crime, could be held liable as an indirect perpetrator of that crime, irrespective of the culpability of the physical perpetrator.

Neither the *Brđanin* Appeal Judgment, nor the subsequent jurisprudence of the ad hoc Tribunals has expressly identified and endorsed the theory of ‘*Organisationsherrschaft*’ as the linking principle that is used to impute the acts of non-members of a JCE to the participants in the criminal enterprise. Nonetheless, the reasoning applied by judges in some leadership-level cases does suggest that they have implicitly relied on the concept of a perpetrator-behind-the-perpetrator, and used it in combination with the JCE theory. In *Brđanin*, the Appeals Chamber approvingly referred to the Prosecution’s argument that when the physical perpetrators are not members of the JCE, the link of imputation “is to be found in the fact that the members of the joint criminal enterprise use the principal perpetrators as “tools” to carry out the crime.”⁵¹⁷ In the *Martić* case – where the defendant

was the Minister of Interior of the Serbian Autonomous Region of Krajina and later on the President of the Republic of Serbian Krajina – the Appeals Chamber found Martić liable under the JCE theory for crimes committed by non-members of the enterprise, after observing that:

the crimes [were] perpetrated by the JNA [Yugoslav People’s Army], TO [Territorial Defence] and *Milicija Krajine*. In this regard, the Appeals Chamber recalls [...] Martić’s position as Minister of the Interior and his absolute authority over the MUP, his control over the armed forces, the TO and *Milicija Krajine*, the cooperation between the TO, the JNA, the *Milicija Krajine* and the armed forces of the SAO Krajina, and the control over the JNA and the TO exercised by other members of the JCE as well as its findings regarding Martić’s conduct and *mens rea*.⁵¹⁸

Similar language emphasizing the absolute authority and control which the accused, or one of his JCE confederates, exercised over an organized power structure was also used in the *Stakić* case⁵¹⁹ and in the *Krajišnik* case⁵²⁰ to impute the criminal acts committed by the rank-and-file members of these power structures to the ‘leadership-level’ JCE. More recently, the Đorđević Appeals Chamber affirmed that “the link between the physical perpetrator and a joint criminal enterprise member need not be direct but may be indirect, i.e. established based on the hierarchical structure of the forces involved in the perpetration of the crimes.”⁵²¹ In a footnote to this holding, the judges also outlined the elements of such indirect liability by summarizing the relevant findings made by the Trial Chamber in the earlier *Martić* case:

a link between Martić and the physical perpetrators was established mainly on the basis of: (i) the hierarchical structure within the JNA, the police and other Serb forces active on the territory of the SAO Krajina and the Republic of Serbian Krajina; (ii) Martić’s general role as the Minister of Interior, his absolute authority over the MUP and his control over the armed forces of the SAO Krajina; (iii) the cooperation between the TO, the JNA, the *Milicija Krajine* and the armed forces of the SAO; (iv) the control over the JNA and the TO by other members of the JCE; and (v) Martić’s conduct and *mens rea*.⁵²²

Based on the above case law, one could indeed convincingly argue that the ICTY has come to apply (a variation of) the ‘*Organisationsherrschaft*’ theory and combined it with JCE liability to address the challenges of ascribing co-perpetration responsibility in leadership-level cases.

Using indirect perpetration – *in its perpetrator behind the perpetrator form* – to define the link between the non-member physical perpetrators and the leadership-level JCE members

⁵¹⁵ Werle and Burghardt, *supra* n 511, at 199 (original German text in Roxin, *supra* n 511, at 201). See also, Ambos, ‘The Fujimori Judgment’, *supra* n 509, at 148, 154-155.

⁵¹⁶ Jain, *supra* n 256, at 129-133; Weigend, *supra* n 450, at 97. Roxin formulated the last requirement (*i.e.* detachment from legal order) in view of considerations that only such organizations can muster unquestionable obedience to illegal orders. He held that in an organization that operates *inside* the legal order “an order to carry out criminal action cannot form the basis for control, because law ranks higher and, in normal cases, rules out the execution of illegal orders, and thus the control [*Willensmacht*] of the person behind the scenes.” Werle and Burghardt, *supra* n 511, at 202-203 (original German text in Roxin, *supra* n 511, at 204).

⁵¹⁷ *Brđanin* Appeal Judgment, *supra* n 56, para 412. The JCE doctrine was not applied on appeal to the facts of the case because the Prosecution had not sought a reversal of Brđanin’s trial conviction (as an aider and abettor) but only a clarification on the law on JCE. Thus, aside from the Appeals Chamber’s theoretical findings on the scope of application of JCE responsibility, the ICTY *Brđanin* Appeal Judgment does not contain any analysis on how/whether the specific criminal acts of the physical perpetrators in this case could be imputed to the Accused via the JCE doctrine.

⁵¹⁸ *Martić* Appeal Judgment, *supra* n 39, para 187.

⁵¹⁹ *Stakić* Appeal Judgment, *supra* n 272, paras 68-70. See also Cassese, *supra* n 55, at 179; Olásolo, *supra* n 40, at 222.

⁵²⁰ *Krajišnik* Appeal Judgment, *supra* n 39, paras 239-241, 262.

⁵²¹ Đorđević Appeal Judgment, *supra* n 38, para 169.

⁵²² *Ibid.*, (fn 504).

is undoubtedly and elegant solution to the problem at hand. It avoids the evidentiary pitfalls of the ‘inter-linked’ JCE model, allows qualifying the high-ranking JCE participants as (indirect) co-perpetrators of the concerted crimes and corresponds to reality in that military and political leaders do normally use hierarchical organizations to ensure the execution of their will. Could this be the answer to the legal dilemma posed by the *Brđanin* Appeal Judgment? Setting aside the various points of normative/theoretical criticism that scholars and practitioners have raised against the ‘*Organisationsherrschaft*’ doctrine,⁵²³ there is one notable problem with endorsing this approach in international criminal proceedings: the lack of legal basis for doing so. While indirect perpetration in its ‘innocent agency’ variant has been widely recognized by the major legal systems in the world and could nowadays be viewed as a general principle of law,⁵²⁴ the same cannot be said about its broader perpetrator behind the perpetrator variant. Regarding, in particular, Roxin’s original theory, Weigend has submitted that “[t]here is certainly nothing to even remotely suggest that the concept of ‘perpetration through an organization’ is a form of criminal liability recognized as customary international law.”⁵²⁵ Indeed, given that this theory was elaborated in 1963, it is quite understandable that it does not figure in the Nuremberg-era documents and jurisprudence.⁵²⁶ This, and the fact that this form of liability is not provided in the statute of any of the modern international *ad hoc* tribunals, puts reliance on it at odds with the *nullum crimen sine lege* principle. The only exception here is the ICC Rome Statute which contains the first international codification of the notion of perpetrator behind the perpetrator: Article 25(3) (a) states that a person could *commit* a crime “through another person, *regardless of whether that other person is criminally responsible*”.⁵²⁷ Roxin’s ‘*Organisationsherrschaft*’ doctrine

can be used to construe the framework of indirect perpetration under this provision⁵²⁸ and then, had the ICC not opted for a different approach to co-perpetration, be combined with the JCE theory to assign principal liability in leadership-level cases. At the ICTY/R, however, the applicable sources of law – *i.e.* statute, custom, general principles of law – do not provide a firm legal basis for adopting such an approach. In this respect, it is quite showing that in the *Stakić* case, the Appeals Chamber explicitly rejected the Trial Chamber’s reliance on Roxin’s control theory for the construction of co-perpetration liability: it held that the legal framework which the trial judges endorsed for this mode of liability “does not have support in customary international law or in the settled jurisprudence of this Tribunal”.⁵²⁹ While Cassese considered that this rejection of Roxin’s control theory concerned only its formulation of co-perpetration liability – and *not* its construction of indirect perpetration (*viz.* the ‘*Organisationsherrschaft*’ concept)⁵³⁰ – it is evident that the latter notion suffers from much the same lack of legal basis.

In view of the above, one could understand the ICTY’s reluctance to explicitly identify the ‘*Organisationsherrschaft*’ theory as the link of imputation between the direct perpetrators and the members of a leadership-level JCE. In fact, despite the above-cited jurisprudence that points at the Tribunal relying on the concept of indirect perpetration in such cases, it would be wrong to conclude that this is, in fact, the approach that the *ad hoc* Tribunals have endorsed in their post-*Brđanin* case law. Rather, it would appear that that they have only accepted indirect perpetration as *one of* the possible ways to impute the crimes of the “outsiders” to members of the JCE. This was most recently confirmed by the Đorđević Appeals Chamber which held that JCE liability:

does not require that the use of the physical perpetrator by the joint criminal enterprise member be equivalent to that of a “tool”. In order to impute liability to an accused – as a member of a joint criminal enterprise – for a crime physically carried out by a non-member of the joint criminal enterprise, the Appeals Chamber requires the existence of a link between the accused and the crime, which is to be assessed on a case-by-case basis.⁵³¹

Indeed, the judges acknowledged that in some cases the link between the JCE member and the physical perpetrators “may be indirect, *i.e.* established based on the hierarchical structure of the forces involved in the perpetration of the crimes”,⁵³² but they ultimately found that under the Tribunal’s jurisprudence:

⁵²⁸ As the ICC Pre-Trial Chamber first did in *Katanga and Chui* Decision on the Confirmation of Charges, *supra* n 508, paras 495-518.

⁵²⁹ *Stakić* Appeal Judgment, *supra* n 272, para 62. For a review of the manner in which the *Stakić* Trial Chamber used Roxin’s control theory to construct a legal framework for co-perpetration liability (as an alternative to the JCE doctrine) see Chapter 5, Section 5.2.2.

⁵³⁰ Cassese, *supra* n 55, at 179.

⁵³¹ Đorđević Appeal Judgment, *supra* n 38, para 63. (*emphasis added*)

⁵³² *Ibid.*, para 169.

⁵²³ For an excellent overview of the conceptual problems that have identified in Roxin’s doctrine, see Weigend, *supra* n 450, at 99-101, 103-105. See also Ambos, ‘The Fujimori Judgment’, *supra* n 509, at 150-157.

⁵²⁴ See *supra* note 508.

⁵²⁵ Weigend, *supra* n 450, at 106. See also G. Werle and B. Burghardt, ‘Indirect Perpetration: A Perfect Fit for International Prosecution of Armchair Killers? (Foreword)’, 9 *Journal of International Criminal Justice* (2011), at 85-86; L. Sadat and J. Jolly, ‘Seven Canons of ICC Treaty Interpretation: Making Sense of Article 25’s Rorschach Blot’, 27 *Leiden Journal of International Law* (2014), at 784.

⁵²⁶ Nevertheless, it bears noting that, since the 1980s, Roxin’s ‘*Organisationsherrschaft*’ theory has been applied by the domestic courts of some European and Latin American jurisdictions in cases dealing with the commission of international crimes. It was applied for the first time in 1985, in Argentina, by the Buenos Aires Federal Court of Appeals in the well-known *Juntas* case: the trial against the commanders of the military juntas that ruled over Argentina between 1976 and 1983. Most famously, however, this theory was applied by the German Federal Supreme Court in the early 1990s in the so-called *Border Guard* Cases that dealt with the criminal responsibility of three senior members of the National Defence Council of the German Democratic Republic for the killings of people who tried to cross the border from East to West Germany. See H. Olásolo and A. Cepeda, ‘The Notion of Control of the Crime and Its Application by the ICTY in the *Stakić* Case’, 4 *International Criminal Law Review* (2004), at 493-596; F. Muñoz-Conde and H. Olásolo, ‘The Application of the Notion of Indirect Perpetration through Organized Structures of Power in Latin America and Spain’, 9 *Journal of International Criminal Justice* (2011): 113-135. More recently, the ‘*Organisationsherrschaft*’ doctrine was applied by the Peruvian Supreme Court in the case against the former President Alberto Fujimori for crimes against humanity committed between 1991 and 1992, during his presidency. Ambos, ‘The Fujimori Judgment’, *supra* n 509.

⁵²⁷ Article 25(3)(a) ICC Rome Statute, *supra* n 45.

the essential requirement to impute responsibility to a joint criminal enterprise member for crimes committed by non-members is that “the crime in question forms part of the common criminal purpose”.⁵³³

The latter finding takes us back to the starting point of this analysis: that under the principles of individual autonomy and derivative liability, the JCE members cannot be held liable as *co-perpetrators* of crimes committed by a non-member of the JCE merely on the basis that these crimes, in a holistic sense and without the physical perpetrators being aware of it, were part of the said ‘leadership-level’ common purpose.

4.3.3.3. *International custom and JCE with no physical perpetrators*

Having outlined the above approaches, it is now time to consider one question which has been intentionally left out of the analysis so far: what legal basis is there for endorsing the notion of ‘leadership-level’ JCE? More specifically, did the Nuremberg-era tribunals use the doctrine of ‘common purpose/design’ to ascribe liability to senior accused for crimes committed by non-members of the enterprise and, if yes, what technique did they adopt to deal with the problems identified above?

When Judge Iain Bonomy first endorsed the view that the JCE theory does not require those who directly commit the concerted crime(s) to be members of the enterprise, he pointed at two Control Council Law No.10 cases to this effect: the *Justice* and the *RuSHA* case.⁵³⁴ His analysis on these judgments was subsequently cited by the *Brđanin* Appeals Chamber when it adopted the concept of ‘leadership-level’ JCE⁵³⁵ and has also been upheld in the ICTY’s post-*Brđanin* jurisprudence.⁵³⁶ Both of these cases were already discussed previously in this book, so they need not be introduced anew here.⁵³⁷ It suffices to recall that in both of them a number of the high-ranking defendants were convicted of crimes on the basis of having participated in nationwide criminal enterprises that aimed at their commission.⁵³⁸ There can be no doubt, and indeed it has never been contested in legal practice or academia, that the physical perpetrators of the crimes in these two cases were not regarded as members of the said enterprises. Neither

the *RuSHA*, nor the *Justice* judgment examined the *mens rea* of the rank-and-file executioners of the crimes, or sought to determine whether these persons knew that the crimes formed part of a grand common design.⁵³⁹ The physical perpetrators were, thus, entirely omitted from the Nuremberg Military Tribunals’ analysis on the common design liability of the senior accused, as if their culpability and position *vis-à-vis* the accused and the criminal enterprise was wholly irrelevant. Therefore, there is merit to the UN *ad hoc* Tribunals’ assertion that the Nuremberg-era *Justice* and *RuSHA* trials offer support for the concept of ‘leadership-level’ JCE.

Two lines of criticism regarding the relevance of the above two cases should be briefly addressed here. First, some authors have argued that the mode of liability applied in them was not identical to the JCE doctrine and, therefore, that they do not constitute precedents for JCE to begin with. Consequently, the argument goes, neither the *Justice*, nor the *RuSHA* judgment could possibly offer any support for the concept of JCE with no physical perpetrators: *i.e.* they are both irrelevant to this subject matter.⁵⁴⁰ The reasoning behind this contention has been that there are several paragraphs in both judgments which appear to construe enterprise liability as applicable even when the accused only had *knowledge* of the concerted crimes and was *aware* that he was connected with their commission. It has been stressed that this analysis is contrary to the JCE theory, which strictly requires that the accused shared a direct intent to commit the concerted crimes.⁵⁴¹ In the author’s view, this contention lacks in merit. It is certainly true that when discussing enterprise responsibility, the judges in the *RuSHA* and the *Justice* cases were not always consistent in their analysis of the accused’s *mens rea*: sometimes they construed it as direct intent to commit the concerted crimes⁵⁴² while in other instances they more generally referred to the accused’s knowledge of these crimes and his continued participation in the said enterprise as sufficient for conviction.⁵⁴³ Notwithstanding these discrepancies and considering the review of these two cases that was carried out earlier in this book,⁵⁴⁴ the author subscribes to the conclusion reached by the modern international tribunals that:

the legal elements applied by the Military Tribunal [in the *Justice* and *RuSHA* cases] to determine the liability of the accused are sufficiently similar to those of JCE ... and constitute a valid illustration of the state of customary international law with respect to the basic form and systemic form of JCE (JCE I & JCE II).⁵⁴⁵

⁵³³ *Ibid.*, para 70.

⁵³⁴ *Milutinović et al.* Decision on Indirect Co-perpetration, *supra* n 79, Separate Opinion of Judge Iain Bonomy, paras 15-26.

⁵³⁵ *Brđanin* Appeal Judgment, *supra* n 56, paras 393-404.

⁵³⁶ Đorđević Appeal Judgment, *supra* n 38, para 42.

⁵³⁷ The *Justice* case was reviewed in more detail in Chapter 2, Section 2.3.3.2.i. For an analysis on the relevant parts of the *RuSHA* case, see *supra* Section 4.2.3.3.ii.

⁵³⁸ As discussed above, in the *RuSHA* case, the accused Hofmann and Hildebrandt were both found to have taken active part in the Nazi ‘Germanization’ plan, which had “[t]he two-fold objective of weakening and eventually destroying other nations while at the same time strengthening Germany, both territorially and biologically, at the expense of conquered nations.” See *supra* text accompanying notes 203-211. In the *Justice* case, the defendant Rothaug (Chief Justice of the Special Court in Nuremberg) was clearly held liable for having “participated in the national program of racial persecution” and so was the defendant Lautz (Chief Public Prosecutor of the People’s Court) who the judges found guilty of having “participat[ed] in the national program of racial extermination of Poles by means of the perversion of the law of high treason”. The *Justice* Case, *supra* n 154, at 1123, 1128, 1156.

⁵³⁹ *Milutinović et al.* Decision on Indirect Co-perpetration, *supra* n 79, Separate Opinion of Judge Iain Bonomy, paras 20, 23; *Brđanin* Appeal Judgment, *supra* n 56, paras 398, 400-401. See also Jain, *supra* n 256, at 53.

⁵⁴⁰ Olásolo, *supra* n 40, at 210-211; Farhang, *supra* n 432, at 151.

⁵⁴¹ *Ibid.*

⁵⁴² The *Justice* Case, *supra* n 154, at 985, 988, 1156; The *RuSHA* Case, *supra* n 198, Vol. V, at 115.

⁵⁴³ The *Justice* Case, *supra* n 154, at 1081; The *RuSHA* Case, *supra* n 198, Vol. V, at 106.

⁵⁴⁴ See Chapter 2, Section 2.3.3.2.i and *supra* Section 4.2.3.3.ii.

⁵⁴⁵ *Ieng Sary, Ieng Thirith and Khieu Samphan* Pre-Trial Decision on JCE, *supra* n 39, para 65. See also *Rwamakuba* Decision on Application of JCE to Genocide, *supra* n 56, paras 15, 24; *Milutinović et al.* Decision on Indirect Co-perpetration, *supra* n 79, Separate Opinion of Judge Iain Bonomy, para 26; *Brđanin* Appeal Judgment, *supra* n 56, paras 393, 399-404; Đorđević Appeal Judgment, *supra* n 38, para 34. For academic support of this view, see Heller, *supra* n 158, at 389-391.

As a more general remark, it should be noted that examining post-World War II jurisprudence under a microscope to determine if it perfectly fits each aspect of the theoretical framework of JCE (or, for that matter, of any other legal concept used in this field) is neither reasonable, nor desirable. Nuremberg was the “birth certificate” of international criminal law, and so the rules and norms applied by the tribunals back then were in their infancy,⁵⁴⁶ undergoing a turbulent process of refinement and sometimes lacking the well-crystallized and uniform structure that they would normally have developed in a mature legal system. To rigorously demand that the normative framework of laws identified as custom nowadays must have a perfectly matching and ever uniformly applied blueprint in Nuremberg-era documents and case law is to smother international criminal law in its early development. It is, thus, rather understandable that some evolutionary steps were taken when the *Tadić* Appeals Chamber first distilled and systemized from this body of laws the modern legal framework of JCE liability.

The second line of criticism has been that the *Justice* and the *RuSHA* judgments alone are insufficient to provide a customary basis for the concept of ‘leadership-level’ JCE.⁵⁴⁷ First of all, it should be noted that these two trials are not the only ones that may be cited to support the application of JCE responsibility in cases where the physical perpetrators are not members of the enterprise. From the Nuremberg-era jurisprudence examined in this book so far, it will be recalled that in the above-discussed *Stalag Luft III* case, the accused Max Wielen was held responsible for the murder of all 50 Allied soldiers based on his participation in the high-level common purpose that was shared solely by senior Nazi officials in Berlin.⁵⁴⁸ The court clearly explained that each low-level executioner could be held liable only for the respective killings he directly participated in, as none of them was a member of the Berlin-level common design: *i.e.* the latter could rightly be defined as a JCE with no physical perpetrators. Next to this case, one may also consider the *Borkum Island* trial in support of the contention that JCE liability does not require the physical perpetrators to be members of the common design.⁵⁴⁹ As already explained above, the seven victims of the death march in this case were killed by a mysterious soldier named Langer, who was not among the accused and whose responsibility and position *vis-à-vis* the common purpose was not analyzed by the tribunal. In the same line of reasoning, Judge Bonomy has argued that in fact the members of the civilian crowd who beat and kicked the victims “were obviously not participants in any common plan devised by the accused.”⁵⁵⁰

Second, it bears noting that the *Brđanin* Appeals Chamber did not expressly assert that the *Justice* and the *RuSHA* judgments alone evince the formation of a custom on the notion of ‘leadership-level’ JCE: rather, as Van Sliedregt has also pointed out, it referred to them

solely as “a valid source for *the ascertainment of the contours* of joint criminal enterprise liability in customary international law”.⁵⁵¹ In other words, these two cases were only used to affirm that ‘common purpose/design’ liability was applied by the World War II-era tribunals also in trials where those who committed the *actus reus* of the crimes were not members of the enterprise. Beyond that, however, the judges did not deem it necessary to specifically determine whether *Justice* and *RuSHA* alone provide a sufficient customary basis for the concept of ‘leadership-level’ JCE. The line of reasoning here seems to be that the issue at hand does not concern the establishment of some novel legal notion but merely seeks to clarify the concrete limits of one of the legal elements of JCE responsibility: *i.e.* of a theory that has already been found to have a veritable pedigree in World War II-era jurisprudence. As such, it was apparently regarded as a narrower question that can be sufficiently addressed by reviewing several relevant decisions on this doctrine.

Whether the Appeals Chamber’s approach at this point is sound and its reliance on just two judgments to adopt ‘leadership-level’ JCE liability is sufficient, could be a matter of some debate. Nonetheless, this author is of the opinion that in light of the great value that should be attached to Control Council Law No. 10 decisions for evincing the formation of international customary rules,⁵⁵² and considering also the two additional cases that were identified above – *Stalag Luft III* and *Borkum Island* – there is ample evidence to warrant the conclusion that the “common purpose/design” concept was recognized as applicable also in cases where the *actus reus* of the concerted crime was committed by non-members of the enterprise. However, there still remains one crucial question about the normative framework of this notion and its further application in modern international criminal proceedings. In particular, none of the above-said four cases explicitly established a rational criterion for imputing the acts of the (non-member) physical perpetrator of the crimes to the members of the said enterprise: a shortcoming that, as thoroughly explained above, constitutes a doctrinal defect, especially if the participants in the enterprise are defined as *co-perpetrators* of the crime.⁵⁵³ Therefore, these cases are inherently inconclusive about the very essence of the problem analyzed in this chapter and do not present a customary law solution to it that is compatible with (modern) legal theory. They completely neglect the requisite link of imputation between the physical perpetrators of the crime and the enterprise members: *i.e.* the link that the *Brđanin* Appeals Chamber itself defined as a crucial component for the proper use of JCE liability in such paradigms.⁵⁵⁴

An effective solution to this problem can still be found in some of the above-described approaches to the JCE with no physical perpetrators concept. For instance, in the “inter-linked JCEs” model, the requisite link of imputation between the perpetrators and the JCE

⁵⁴⁶ Werle and Jessberger, *supra* n 8, at 5.

⁵⁴⁷ Van Sliedregt, *supra* n 255, at 163; Jain, *supra* n 256, at 52 (fn 43).

⁵⁴⁸ See *supra* Section 4.3.3.2.iii, text accompanying footnotes 492–499.

⁵⁴⁹ See *supra* Section 4.2.3.2.ii, text accompanying footnotes 135–153.

⁵⁵⁰ *Milutinović et al.* Decision on Indirect Co-perpetration, *supra* n 79, Separate Opinion of Judge Iain Bonomy, para 7 (fn 11).

⁵⁵¹ *Brđanin* Appeal Judgment, *supra* n 56, para 415. (emphasis added) See also *Milutinović et al.* Decision on Indirect Co-perpetration, *supra* n 79, Separate Opinion of Judge Iain Bonomy, para 26. See further Van Sliedregt, *supra* n 255, at 163.

⁵⁵² *Kupreškić et al.* Trial Judgment, *supra* n 60, para 541.

⁵⁵³ See *supra* Section 4.3.3.1. The only exception here might be the *Stalag Luft III* trial which, as already argued above, could be interpreted as endorsing an inter-linked JCEs model. See *supra* Section 4.3.3.2.iii.

⁵⁵⁴ See *supra* Section 4.3.2.2.ii, text accompanying footnotes 430–434.

leadership is established by using one or more “intermediary” JCEs: viz. by using a notion that is defined as customary law. This is an important perspective: “inter-linked JCEs” is not some new form of liability. Rather, it is simply a combination of overlapping JCEs and, therefore, its structure conforms to international custom. As Weigend has noted, there is also no doctrinal obstacle to combining two recognized types of liability and charging the accused under such an amalgam, provided that the legal elements of both its constituent parts are then proven.⁵⁵⁵ After all, there is an endless number of ways in which a JCE member can contribute to the commission of the concerted crime and if he did so by forming a separate JCE with its physical perpetrators, then there is no reason why he, and through him his confederates in the higher-level JCE, could not be held responsible as co-perpetrators of these crimes. Similarly, combining JCE with indirect perpetration – in its perpetrator behind the perpetrator from – is also theoretically possible, but there is a fundamental problem here: the latter form of liability is not recognized as customary international law⁵⁵⁶ and, therefore, this combination would lack the necessary legal basis to be applied at the UN *ad hoc* Tribunals. Nevertheless, this is a venue that could be pursued at the International Criminal Court, considering that the Rome Statute explicitly recognizes the idea of indirect perpetration through a fully responsible agent and that the ICC judges have already endorsed and applied Roxin’s ‘*Organisationsherrschaft*’ doctrine.⁵⁵⁷ This is, of course, only a hypothetical possibility, since the ICC has so far refused to accept the JCE theory as the basis for its construction of co-perpetration responsibility.

4.3.4. Concluding remarks

‘Leadership-level’ JCE (JCE with no physical perpetrators) is without a doubt one of the most controversial and doctrinally complicated notions adopted by the ICTY/R. It has proven to be an important prosecutorial tool in trials against high-ranking military and political leaders, and yet it continues to be plagued by various concerns ranging from the disputed legal basis for its application in modern international criminal proceedings to its questionable adherence to core principles of criminal liability. In fact, the very endorsement of this concept by the UN *ad hoc* Tribunals came after years of jurisprudential flux and contradictory decisions. When the *Tadić* Appeals Chamber first constructed the limits of JCE liability, it left open the question whether those who commit the *actus reus* of the crimes must invariably be members of the enterprise, *i.e.* whether they must also share the common purpose. In the subsequent six years preceding the Appeal Judgment in the *Brđanin* case, this question was answered in the positive by some chambers,⁵⁵⁸ in the negative by others,⁵⁵⁹

and there were also a few instances where the judges simply turned a blind eye to this issue when ascribing JCE responsibility to (relatively) senior accused.⁵⁶⁰

The matter was settled by the *Brđanin* Appeals Chamber when it ultimately upheld the view that the doctrine of joint criminal enterprise can also be applied in cases where the direct perpetrators of the JCE crimes were not members of the common purpose. This is the position that has been accepted at the ICTY/R to present day.⁵⁶¹ The Chamber’s answer, however, only gave rise to further questions, some of which the judges themselves were not able to address unanimously and have, in fact, remained unsettled to this date.⁵⁶² The chief difficulty has been to define what the link of imputation between the (non-member) physical perpetrators and the JCE members should be and, respectively, what kind of liability would then the participants in a ‘leadership-level’ JCE incur. The UN *ad hoc* Tribunals’ post-*Brđanin* jurisprudence on this topic has taken the position that JCE at the leadership level is still a theory of co-perpetration liability and that the said link of imputation would be established on a case-to-case basis, with the goal of proving that the crimes committed by the non-members of the JCE “formed part of [the] common criminal purpose”.⁵⁶³ This nebulous definition and loose approach to the matter at hand are problematic because, as this chapter has explained, they collapse JCE liability into a doctrine that is at odds with the principles of autonomy and derivative liability.⁵⁶⁴ Therefore, the law on ‘leadership-level’ JCE as it stands today is a law that, in this author’s view, should be refined.

The search for a solution to the identified doctrinal defects of the concept of JCE with no physical perpetrators has been a quest for establishing a linking principle that: i) enables us to impute the acts of non-members of a JCE to the members of the enterprise (so the latter can be held responsible *as co-perpetrators*); and ii) has a legal basis in international criminal law, ensuring that the said construction of JCE respects the *nullum crimen sine lege* principle. Four approaches were identified and discussed in this research as possible answers to this dilemma, and of them two were rejected for various reasons. Judge Shahabuddeen’s proposal to expand the JCE membership formula (so as to allow including the rank-and-file executioner of crimes amongst the members of the ‘leadership-level’ enterprise) does not present a viable solution to the problem at hand because it would practically equate the liability of low-ranking and senior accused, and also because it dilutes the legal framework of JCE to an extent that lacks support in Nuremberg-era case law.⁵⁶⁵ Judge Meron’s proposal to turn the legal nature of ‘leadership-level’ JCE into whatever mode of accessorial liability

⁵⁶⁰ See *supra* Section 4.3.1.3.ii.

⁵⁶¹ See *supra* Section 4.3.2.2.ii and Section 4.3.2.3.

⁵⁶² See *supra* Section 4.3.3.2.

⁵⁶³ *Brđanin* Appeal Judgment, *supra* n 56, para 413; *Martić* Appeal Judgment, *supra* n 39, para 171; *Đorđević* Appeal Judgment, *supra* n 38, para 70.

⁵⁶⁴ See *supra* Section 4.3.3.1.

⁵⁶⁵ See *supra* Section 4.3.3.2.ii.

⁵⁵⁵ Weigend, *supra* n 450, at 110-111.

⁵⁵⁶ See *supra* Section 4.3.3.2.iv, text accompanying footnotes 523-530.

⁵⁵⁷ Article 25(3)(a) ICC Rome Statute, *supra* n 45; *Katanga and Chui* Decision on the Confirmation of Charges, *supra* n 508, paras 495-518.

⁵⁵⁸ See *supra* Section 4.3.1.2, Section 4.3.1.3.i and Section 4.3.2.2.i.

⁵⁵⁹ See *supra* Section 4.3.1.3.iii and Section 4.3.2.1.

(*i.e.* ordering, instigating etc.) is used to link the JCE members to the non-member physical perpetrators of the concerted crime, is both conceptually sound and faithful to the *nullum crimen sine lege* principle, but it fails to deliver the result pursued by the ICTY/R: *i.e.* it does not construe ‘leadership-level’ JCE as a mode of co-perpetration liability but downgrades it into a theory of accessory responsibility.⁵⁶⁶ There remain, thus, two approaches which the present research has identified as possible solutions to be explored: the ‘inter-linked JCEs’ model and the combination of JCE responsibility with the concept of perpetrator-behind-the-perpetrator (indirect perpetration). Both methods establish a doctrinally sound linking principle, based on which the crimes committed by non-members of the enterprise can be imputed to the (high-ranking) JCE participants, *i.e.* they both warrant the use of ‘leadership-level’ JCE as a form of co-perpetration liability.⁵⁶⁷ The “inter-linked JCEs” technique is attractive because the link of imputation it relies upon – *viz.* the use of additional, overlapping JCEs – to connect (at least one of) the members of the high-level enterprise to the physical perpetrators makes it consistent with customary international law. This model is thus a viable option for the UN *ad hoc* Tribunals, although one must be mindful of its one notable drawback: the evidentiary challenges involved in proving the existence of multiple JCEs.⁵⁶⁸ In this respect, the alternative method of combining JCE with the notion of indirect perpetration through hierarchical organizations (*‘Organisationsherrschaft’*) offers a more efficient manner of linking those at the very apex of a state or military apparatus (the ‘leadership-level’ JCE) to the rank-and-file executioners of the concerted crimes. At the same time, however, this theory is not recognized under customary international law, which makes its application in the ICTY or the ICTR problematic *vis-à-vis* the *nullum crimen sine lege* principle. Still, this is a solution that, as pointed out above, could in principle be endorsed at the ICC because the Rome Statute provides the requisite legal basis to do so.⁵⁶⁹

JCE with no physical perpetrators is not a novel concept that the ICTY/R made up and that has no analogue in post-World War II jurisprudence. The present research has shown that in a number of cases from that body of law, ‘common purpose/design’ liability was applied to factual circumstances in which those who committed the *actus reus* of the crimes were clearly not members of the said enterprise.⁵⁷⁰ Unfortunately, these cases did not clearly and explicitly address the nature of the link that must be established between the participants in the common purpose and the (non-member) physical perpetrators, and in this sense they could even be said to support the imprecise legal framework that the ICTY *Brđanin* Appeals Chamber eventually construed for ‘leadership-level’ JCE. Be that as it may, the position that has been taken in this research is that this particular aspect of the law on ‘common purpose/design’ responsibility, as applied in those Nuremberg-era cases, is doctrinally immature and

ought to be refined in order to meet the basic principles of criminal liability recognized by the modern international courts and tribunals, rather than to be directly imported in their criminal proceedings. The method of “inter-linked JCEs”, or the alternative combination of JCE with indirect perpetration, provide viable venues for such refinement of the concept of ‘leadership-level’ JCE.

4.4. Conclusion

Although ambiguities about the precise scope and meaning of one or another legal element of the JCE theory have certainly caused some academic vexation over the years, the international commentariat’s vitriol against this doctrine has mostly focused on its ‘extended’ category and, in more recent years, the notion of JCE with no physical perpetrators. The problems that these two manifestations of JCE responsibility raise are, in fact, quite similar. Doctrinally, they both jettison the ‘common plan/agreement’ requirement as the legal basis for reciprocal attribution of criminal acts: *viz.* JCE III ascribes co-perpetration liability for crimes which fall *outside* the common plan, and ‘leadership-level’ JCE ascribes co-perpetration liability for crimes that are committed by *outsiders* to the common plan. In both cases, a crucial link of imputation is lost: a link on which the difference between principal and accessory responsibility hinges. Next to this common conceptual problem – and all the concerns about fair labelling and the individual culpability principle that spring from it – both JCE III and the notion of ‘leadership-level’ JCE have been criticized for lacking legal basis in customary international law and, thus, breaching the *nullum crimen sine lege* principle, too. Thus far, the ICTY/R’s response to these concerns, and especially to the doctrinal criticism against these two constructs, has been rather detached and reserved. It is quite reminiscent of Judge Shahabuddeen’s observation that, in law:

[t]he common sense of a practical solution overbears preoccupation with dried and parched categories of erudite discussions: these might lead to an elegant new model which however fails to deliver what is needed by the criminal law as a system of social control. “The life of the law is not logic, but experience”, said Holmes. That well-known aphorism does not mean that logic has no place in the law [...] What the statement means is that logic has to be applied to the fruits of experience.⁵⁷¹

The research contained in the present chapter has taken the opposite view of law as its starting point: the view that policy considerations, legitimate as they might be, should not result in the adoption of “practical solutions” that defy the logic contained in basic principles of law. It has thus sought to engage in such “dried and parched categories of erudite discussions” in order to determine whether a doctrinally coherent solution exists that could still be used to support the

⁵⁶⁶ See *supra* Section 4.3.3.2.i.

⁵⁶⁷ See *supra* Section 4.3.3.2.iii and Section 4.3.3.2.iv.

⁵⁶⁸ See *supra* Section 4.3.3.2.iii, text accompanying notes 500-502.

⁵⁶⁹ See *supra* Section 4.3.3.2.iv text accompanying notes 527-530.

⁵⁷⁰ See *supra* Section 4.3.3.3.

⁵⁷¹ *Krajišnik* Appeal Judgment, *supra* n 39, Separate Opinion of Judge Shahabuddeen, para 51. See also R. Cryer, ‘Imputation and Complicity in Common Law States: A (Partial) View from England and Wales’, 12 *Journal of International Criminal Justice* (2014), at 269.

practical outcome that the UN *ad hoc* Tribunals have pursued through the concepts of JCE III and JCE with no physical perpetrators. Where this has not been possible, the research has duly concluded so, rather than invoked policy concerns to compensate for doctrinal deficiencies.

Regarding the disputed customary status and nature of JCE III, the present chapter first proceeded to define what customary international law is, review the established techniques for identifying the formation of custom and ultimately assess the methodology that the ICTY has used to confirm the customary basis of the JCE doctrine. In this process, it also explained why the finding that the ‘basic’ and ‘systemic’ variant of JCE amount to an international custom is persuasive. The same conclusion could not be reached, however, for the doctrine’s ‘extended’ category. The renewed analysis of the post-World War II cases that were cited in *Tadić* to this end, coupled with a broader review of additional, under-researched Nuremberg-era documents and jurisprudence, has led to the finding that there is very limited and sporadic support for the idea of ascribing common design responsibility for incidental crimes. Moreover, in those few documents (the Yalta memorandum from January 1945 and the San Francisco memorandum from April 1945) and judgments (the *Borkum Island* case) where the underlying rationale of JCE III liability was indeed contemplated, its legal framework contained an important difference from that which the UN *ad hoc* Tribunals have given to it. Thus, considering also the argument that due to their nature these sources should be given a lesser evidentiary value for determining the formation of an international custom, the present research concluded that the ‘extended’ form of JCE lacks a basis in customary international law. As for the nature of this mode of liability, this chapter has also explained that the lack of a common plan/agreement *vis-à-vis* the excess crimes of the enterprise and the legal gap that arises between the intent of the JCE III accused (*dolus eventualis*) and crimes that have a more stringent *mens rea* requirement, makes the use of JCE III as a type of co-perpetration liability conceptually problematic and inconsistent with the *nulla poena sine culpa* principle. The only viable solution that this author could see to this problem is to construe the ‘extended’ variant of JCE as a form of accessory liability and thus overcome its lack of a doctrinal basis for a reciprocal imputation of the unconcerted crimes of the enterprise, as well as the fact that the accused may not satisfy the requisite *mens rea* of the said crime. While the above findings constitute a drastic theoretical limitation to the theory of JCE and its third variant, their practical implication for the use of this doctrine in international criminal proceedings might not be, for the reasons elaborated in Chapter 7, all that significant.

As for the notion of JCE with no physical perpetrators, the present research has shown that its adoption by the ICTY/R has not been exemplary of jurisprudential consistency. *Tadić* did not actually address this matter and in several of the earlier post-*Tadić* cases the chambers did in fact assert that for JCE liability to arise, the physical perpetrators of the concerted crime *have to* be members of the enterprise, sharing the common criminal purpose. The subsequent advent of the ICTY’s first cases against relatively senior accused saw some chambers patently ignore this finding (the *Krstić* trial) and others expressly denounce it (the *Krajišnik* trial). The matter was finally put to rest by the *Brđanin* Appeals Chamber that upheld the concept of JCE at the leadership level but, critically, declined to make a finding

on whether this manifestation of the JCE doctrine could still be considered a theory of co-perpetration. This part, however, was later ignored by the Appeals Chamber in *Krajišnik* and all the more recent ICTY cases, in which it has come to establish – without providing any explanation to this effect – that JCE at the leadership level is a mode of co-perpetration liability. The present research has argued that this is doctrinally inappropriate because when the JCE crimes are committed by an outsider to the common criminal plan or agreement, his acts naturally fall outside the circle of reciprocal imputation that this plan or agreement constitutes, thereby making it impossible to declare the JCE participants responsible as co-perpetrators. Four potential solutions to this dilemma were examined in the above research, of which it found two to be viable methods for ensuring that the notion of JCE with no physical perpetrators is rightly defined as a form of co-perpetration: the “inter-linked JCEs” model and the combination of JCE liability with the notion of indirect perpetration. It was further explained that the use of the former technique would be consonant with customary international law – and, thus, a plausible solution for *ad hoc* tribunals – while the latter option lacks such a customary basis, but is a venue that could be pursued at the ICC.

5

Co-Perpetration based on Joint Control over the Crime: Doctrinal Framework

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5.1. Introduction

Whatever the merits and shortcomings of the doctrine of joint criminal enterprise may be, this mode of liability has failed to gain currency in the emerging jurisprudence of the International Criminal Court. The ICC has, for reasons that will be scrutinized in greater detail later in this book, adopted a very different legal framework for the concept of co-perpetration, basing it on the theory of (joint) control over the crime.¹ The goal of this chapter is to present and examine how the legal elements of this formulation of co-perpetration have been defined in the Court's case law. The focal point of research will be the relevant findings that ICC Pre-Trial Chamber I made in the *Lubanga* Decision on the Confirmation of Charges, which presents the first ICC document to substantively elaborate and endorse the control over the crime notion.² Indeed, it can be argued that this decision is for the theory of co-perpetration based on joint control what the ICTY *Tadić* Appeal Judgment is for the JCE concept: its bedrock jurisprudence in modern international criminal law. Furthermore, the research will assess how the subsequent ICC case law has additionally refined the precise scope and meaning of each element of co-perpetration under the control theory. The present chapter will, thus, be modelled to match the structure of Chapter 3's analysis of the legal framework of JCE, albeit the volume of cases reviewed here will be markedly lower, seeing as the jurisprudence of the International Criminal Court is still in its nascence.³ Where appropriate, parallels will also be drawn with the findings made earlier on the legal elements of the JCE doctrine, which will serve to underline and better understand the differences and similarities between these two competing approaches to joint perpetration responsibility.

This chapter will first briefly trace the origins of the notion of co-perpetration based on joint control over the crime and present the earliest (failed) attempt to adopt it in international criminal proceedings: *i.e.* the ICTY *Stakić* case. This will provide the reader with a necessary background information on the legal sources that the International Criminal Court later drew inspiration from when adopting the joint control doctrine. Following this, the main part of the research will then examine: i) the early submissions of the parties to the *Lubanga* case on how to construct the notion of co-perpetration under Article 25(3)(a) Rome Statute; ii) the *Lubanga* Pre-Trial Chamber's ultimate findings on the conceptual framework of co-perpetration based on joint control over the crime; and iii) the evolution of this form of liability in the subsequent ICC jurisprudence. A thorough and up-to-date account of the constituent elements of the joint control doctrine under ICC law will thus be provided, which will then be used in Chapter 6 to review the merits and legal basis for its application in the Court's criminal proceedings.

¹ Chapter 6, Section 6.2.

² *The Prosecutor v. Lubanga* (ICC-01/04-01/06-803-tEN), Decision on the Confirmation of Charges, Pre-Trial Chamber I, 29 January 2007, paras 338-341.

³ At the time of writing this chapter, the ICC has delivered four trial judgments (the *Lubanga*, *Katanga*, *Chui* and *Bemba* trial judgments) and two appeal judgments (in the *Lubanga* and the *Chui* cases), which is why the larger part of the case law analysed in this chapter consists of ICC Pre-Trial Chambers' decisions on the confirmation of charges.

5.2. Doctrinal and jurisprudential origins of the theory of co-perpetration based on joint control over the crime

5.2.1. Back to 1963: Roxin's "Täterschaft Und Tatherrschaft"

The 'control over the crime' theory, known in German legal doctrine as '*Tatherrschaftslehre*', has its roots in the postdoctoral work of the prominent German scholar Prof. Claus Roxin.⁴ In his research, which he carried out in the early 1960s, he sought to construe a legal criterion for distinguishing between principals and accessories to a crime that would be a viable alternative to the one used at the time by the Federal Supreme Court of Germany. In particular, the Court applied a subjective approach pursuant to which the defendant's *mens rea* served as the litmus test for classifying his criminal responsibility: *viz.* a person was considered to be the principal if he wanted the crime 'as his own' (*animus auctoris*) and an accessory if he merely wanted to support the act of another (*animus socii*).⁵ Roxin was critical of this approach and highlighted its deficiencies by examining a recent judgment that the Federal Supreme Court had delivered in the *Stashynsky* case, where the accused – a KGB agent who in 1957 assassinated in Munich two Ukrainian opponents of the Soviet regime – was held liable as an aider to the two murders because the judges concluded that he followed strict orders from his KGB superiors and acted under fear that he would likely be executed if he disobeyed these orders.⁶ Thus, in the Court's assessment, Stashynsky did not view the killing of the two victims "as his own acts, but as the instrument or assistant in the act of another."⁷ Consequently, the accused was convicted as an accessory to the crimes that he, otherwise, physically perpetrated. This extreme application of the subjective approach to making the principal/accessory distinction attracted much criticism in German academia for being irrational and for empowering judges with too much discretion when evaluating the facts of a case.⁸ Roxin also shared these views in his work and he thereby advocated the control over the crime criterion, arguing that:

A person is a perpetrator if he controls the course of events; one who, in contrast, merely stimulates in someone else the decision to act or helps him to do so, but leaves the execution to the attributable act of the other person, is an instigator or abettor.⁹

Thus, Roxin reasoned that a principal to a crime is the person who *dominates* its commission in that ultimately he decides whether the crime will be committed or not, while those who just have a marginal influence on the crime's execution could only be accessories. The criterion of control/domination was considered to offer an objective approach to drawing the line between principal and accessory liability: a method that is much less prone to abuse and bias.

Having endorsed the control approach, Roxin proceeded to systematize and elaborate on its manifestation in the three distinct modalities of committing a crime: directly, through an agent, and jointly with another person. The best-known expression of the control doctrine, and the one for which Roxin has been widely praised as its author, is the theory of 'Control Based on Organized Power Structures' ('*Organisationsherrschaftslehre*').¹⁰ As explained in Chapter 4, this legal concept is a variant of indirect perpetration, which allows holding *both* the person behind the scenes (*e.g.* the Chairman of the KGB) *and* the direct perpetrator of the crime (*e.g.* Stashynsky) liable as principals by establishing the existence of a hierarchical power structure or apparatus (*e.g.* the KGB) that the former controls and uses to impose his will on the latter.¹¹ Naturally, the traditional form of indirect perpetration – *viz.* "the innocent agent" theory – can also be viewed through the control paradigm since in such cases the person-behind-the-scenes is said to control/dominate the will of the innocent agent (*e.g.* a mentally ill person) and, thus, use him as a "tool/instrument" to commit a crime.¹² Next, the theory of control over the crime also finds an expression in cases of direct perpetration, for which Roxin explained that:

He who, voluntarily and without being dependent on others any more than is socially conventional, realizes all the constituent elements [of a crime] is the principal perpetrator. He has in every conceivable way control over the act. This is the prototype of perpetration, the most obvious expression of the central figure [in the crime] ... One cannot control an act more unequivocally than by doing it himself; one cannot have a tighter control than through self-reliance.¹³

4 C. Roxin, *Täterschaft Und Tatherrschaft* (1st edn, Hamburg: Cram, De Gruyter & Co, 1963). It should be noted that the concept of control over the act ('*Tatherrschaft*') was not, in itself, authored by Roxin, but was in fact put forward in 1939 by another German jurist, Hans Welzel. Roxin, however, was the first to systematize and further develop this concept into the comprehensive legal doctrine that we know today. See H. Olásolo, *The Criminal Responsibility of Senior Political and Military Leaders as Principals to International Crimes* (Oxford: Hart, 2009), at 36; N. Jain, *Perpetrators and Accessories in International Criminal Law: Individual Modes of Responsibility for Collective Crimes* (Oxford: Hart, 2014), at 120; K. Ambos, *Treatise on International Criminal Law* (Oxford: Oxford UP, 2013), at 150 (fn 404).

5 M. Bohlander, *Principles of German Criminal Law* (Oxford: Hart, 2009), at 162. See Chapter 1, Section 1.3.1.

6 *Stashynsky Case*, Judgment, 19 October 1962, 18 BGHSt 87. For a more detailed discussion on the *Stashynsky* Judgment, see G. Fletcher, *Rethinking Criminal Law* (Oxford: Oxford UP, 2000), at 657-659; Bohlander, *supra* n 5, at 162. See further C. Roxin, 'Straftaten Im Rahmen Organisatorischer Machtapparate', *Goltdammer's Archiv Für Strafrecht* (1963), at 193-198. (English translation available in G. Werle and B. Burghardt, 'Claus Roxin on Crimes as Part of Organized Power Structures: Introductory Note', 9 *Journal of International Criminal Justice* (2011): 191-205.)

7 Translated text from original judgment in Fletcher, *supra* n 6, at 657.

8 T. Weigend, 'Perpetration through an Organization: The Unexpected Career of a German Legal Concept', 9 *Journal of International Criminal Justice* (2011), at 95.

9 Werle and Burghardt, *supra* n 6, at 196 (original German text in Roxin, *supra* n 6, at 198-199).

10 Roxin, *supra* n 6, at 193-207.

11 For an explanation of the doctrinal underpinnings of this theory, see Chapter 4, Section 4.3.3.2.iv)

12 *Ibid.* See also H. Olásolo and A. Cepeda, 'The Notion of Control of the Crime and Its Application by the ICTY in the Stakić Case', 4 *International Criminal Law Review* (2004), at 489.

13 Roxin, *supra* n 4, at 127. (*unofficial translation*) Original German text: "Wer ungenötigt und ohne von einem anderen in mehr als sozialüblicher Weise abhängig zu sein alle Tatbestandsmerkmale eigenhändig verwirklicht, ist Täter. Er hat in jedem denkbaren Falle die Tatherrschaft. Es handelt sich hier um den Prototyp der Täterschaft, um die sinnfälligste Ausprägung der Zentralgestalt, um eine Konstellation bei der die „natürliche Auffassung des Lebens“ und die Wertung des Gesetzgebers sich fraglos decken. Man kann eine Tat nicht deutlicher beherrschen, als indem man sie selber tut; man kann nichts fester in der Hand haben als durch die Eigenhändigkeit."

Thus, while cases of indirect perpetration are viewed as situations of ‘control over the will’ of the physical perpetrator, cases of direct perpetration fall within the rubric of ‘control over the act’.¹⁴ Finally, the third manifestation of the control theory, and the one that is the focus of the present research, is the concept of co-perpetration based on ‘joint (functional) control over the crime’, which espouses the coordinated execution of *essential* tasks/functions as the hallmark of co-perpetration. Thus, the underlying rationale here is that when an offence is committed as a result of the coordinated acts of a plurality of individuals acting in furtherance of a common plan, co-perpetrators are only those persons who were key figures for the execution of the said crime, in that without their acts the crime would not have been committed. In Roxin’s words:

The co-perpetrator can achieve nothing on his own... The plan only ‘works’ if the [co-perpetrator] works with the other person... they can only realise their plan insofar as they act together, but each individually can ruin the whole plan if he does not carry out his part. To this extent he is in control of the act ... [t]his type of ‘key position’ of each co-perpetrator describes precisely the structure of joint control over the act.”¹⁵

Put simply, Roxin argued that the distinguishing feature of the co-perpetrator of a group crime is that he has the power to frustrate the commission of the concerted crime by withdrawing his contribution to it. Scholars have argued that, pursuant to this interpretation, the co-perpetrator in fact exerts a “negative control” over the crime because his power is limited to the ability to *interrupt* the commission of the crime:¹⁶ *i.e.* none of the co-perpetrators is capable of ensuring on his own the successful execution of the said criminal plan as they are all dependent on each other’s cooperation. Roxin provided the following example to this effect:

If two people govern a country together – are joint rulers in the literal sense of the word – the usual consequence is that the acts of each depend on the co-perpetration of the other. The reverse side of this is, inevitably, the fact that by refusing to participate, each person can frustrate the action.¹⁷

By contrast, a person who contributes to a collective crime in a less dramatic/essential fashion – *i.e.* the criminal plan could still be executed absent his participation in it – is, at the most, an accessory to the concerted crime, irrespective of whether he wanted the crime “as his own” or not.

It must be heavily emphasized at this point that it is by no means the aim of the present chapter to provide a detailed account of Roxin’s original views on the ‘control over the crime’ theory, or to in any way engage in the discussions that have long captivated German jurists on its exact scope and meaning. Rather, the above cursory summary is merely meant to introduce the reader to the origins and underlying rationale of this concept, before proceeding to analyze how the International Criminal Court has interpreted and applied it when construing the legal elements of co-perpetration responsibility under Article 25(3) (a) Rome Statute. It bears noting that Roxin expressly defined the control over the crime doctrine as an “open-ended concept”¹⁸ and that its aforesaid manifestations have been subjected to varying interpretations in German academia and jurisprudence,¹⁹ as well as in the (limited) case law on this notion of a few Latin American states.²⁰ Regarding the ICC’s reliance on the control doctrine, the Appeals Chamber more recently suggested that the Court’s construction of co-perpetration liability is based on a *sui generis* reading of the control approach that is in truth inspired from, yet is not necessarily a faithful re-statement or direct application of, Roxin’s original legal doctrine:

As regards the argument that this approach was first developed in domestic legal doctrine, which is, as such, not applicable at the Court, the Appeals Chamber would like to clarify that it is not proposing to apply a particular legal doctrine or theory as a source of law. Rather, it is interpreting and applying article 25 (3) (a) of the Statute. In so doing, the Appeals Chamber considers it appropriate to seek guidance from approaches developed in other jurisdictions in order to reach a coherent and persuasive interpretation of the Court’s legal texts. This Court is not administering justice in a vacuum, but, in applying the law, needs to be aware of and can relate to concepts and ideas found in domestic jurisdictions.²¹

¹⁸ Werle and Burghardt, *supra* n 6, at 205 (original German text in Roxin, *supra* n 6, at 206).

¹⁹ T. Weigend, ‘Intent, Mistake of Law, and Co-perpetration in the Lubanga Decision on Confirmation of Charges’, 6 *Journal of International Criminal Justice* (2008), at 479-480; K. Ambos, ‘The Fujimori Judgment: A President’s Responsibility for Crimes against Humanity as Indirect Perpetrator by Virtue of an Organized Power Apparatus’, 9 *Journal of International Criminal Justice* (2011), at 154. Regarding German case law, it has been noted that German courts in fact still apply a predominantly subjective approach to distinguishing between principals and accessories to a crime, and that in those few cases in which they have applied Roxin’s doctrine of ‘*Organisationsherrschaft*’, they have altered some aspects/elements of its legal framework. Weigend, *supra* n 8, at 94-95, 98-99; G. Werle and B. Burghardt, ‘The German Federal Supreme Court (*Bundesgerichtshof, BGH*) on Indirect Perpetration: Introductory Note’, 9 *Journal of International Criminal Justice* (2011), at 209-210; Jain, *supra* n 4, at 120; K. Hamdorf, ‘The Concept of a Joint Criminal Enterprise and Domestic Modes of Liability for Parties to a Crime: A Comparison of German and English Law’, 5 *Journal of International Criminal Justice* (2005), at 210-211.

²⁰ F. Muñoz-Conde and H. Olásolo, ‘The Application of the Notion of Indirect Perpetration through Organized Structures of Power in Latin America and Spain’, 9 *Journal of International Criminal Justice* (2011), at 113-135; Ambos, *supra* n 19, at 157.

²¹ *The Prosecutor v. Lubanga* (ICC-01/04-01/06-3121-Red), Judgment, Appeals Chamber, 1 December 2014, para 470.

¹⁴ Olásolo and Cepeda, *supra* n 12, at 488.

¹⁵ English translation of Roxin’s analysis in *The Prosecutor v. Stakić* (IT-97-24-T), Judgment, Trial Chamber, 31 July 2003, para 440 (original German text in Roxin, *supra* n 4, at 278).

¹⁶ Olásolo, *supra* n 4, at 277; J. Ohlin, E. Van Sliedregt and T. Weigend, ‘Assessing the Control-Theory’, 26 *Leiden Journal of International Law* (2013), at 727; A. Gil Gil and E. Maculan, ‘Current Trends in the Definition of ‘Perpetrator’ by the International Criminal Court: From the Decision on the Confirmation of Charges in the *Lubanga* Case to the *Katanga* Judgment’, 28 *Leiden Journal of International Law* (2015), at 357.

¹⁷ English translation of Roxin’s analysis found in *Stakić* Trial Judgment, *supra* n 15, para 440 (original German text in Roxin, *supra* n 4, at 279).

Thus, when examining and commenting on the legal elements of the notion of co-perpetration based on joint control over the crime, this research will focus strictly on the ICC's topical case law as being determinative of the content of this concept *under international criminal law*.

5.2.2. The ICTY Stakić Trial Judgment: a debut for the joint control theory in international criminal proceedings

As already noted above, the control over the crime doctrine – and in particular Roxin's theory of indirect perpetration through organized structures of power – was subsequently applied in a number of national jurisdictions: most famously, by the Argentinian Federal Court of Appeals in the 1985 *Juntas* Trial²² and by the Federal Supreme Court of Germany in the 1994 *Border Guard* Trial.²³ However, it was not until the ICTY delivered its *Stakić* Trial Judgment in 2003 that the control over the crime doctrine received its first treatment by an international tribunal, thus making an entrance in international jurisprudence.²⁴

The *Stakić* case concerned events that took place in Bosnia's Prijedor Municipality in the course of 1992. The Prosecution alleged *inter alia* that the Accused, who at that time was the President of the Prijedor Municipal Crisis Staff (and, thus, the highest civilian authority in the region), participated in a joint criminal enterprise, the purpose of which was:

“the permanent forcible removal of Bosnian Muslim and Bosnian Croat inhabitants from the territory of the planned Serbian state, including a campaign of persecutions through the commission of the crimes alleged in Counts 1 to 8 of the Indictment.”²⁵

22 For an English translation of the key excerpts of the *Juntas* Judgment, see E. Dahl and A. Garro (transl), ‘Argentina: National Appeals Court (Criminal Division) Judgment on Human Rights Violations by Former Military Leaders’, 26 *International Legal Materials* (1987): 317-72 (the analysis on indirect perpetration through a hierarchical power apparatus is at 360 *et seq.*) For a detailed review of the *Juntas* Judgment's treatment of the notion of indirect perpetration, see Olásolo and Cepeda, *supra* n 12, at 494 (fn 64); Muñoz-Conde and Olásolo, *supra* n 20, at 116-118.

23 For an English translation of the key excerpts of the *Border Guard* Judgment, see G. Werle and B. Burghardt, ‘Introductory Note: Judgment of 26 July 1994 Against Former Minister of National Defence Keßler and Others’, 9 *Journal of International Criminal Justice* (2011): 207-26. For a review of the *Border Guard* Judgment and its treatment of the notion of indirect perpetration, see Olásolo and Cepeda, *supra* n 12, at 496 (fn 65).

24 It has been suggested, most notably by Ambos, that the control over the act theory may in fact be distinguished in the World War II-era *Justice* Judgment, delivered by Nuremberg Military Tribunal III. In this respect, Ambos points at certain phrases contained in that judgment (*e.g.* “conscious participation in a nationwide government-organized system of cruelty and injustice”) that he views as reminiscent of the *Organisationsherrschaft* doctrine. K. Ambos, “Command Responsibility and *Organisationsherrschaft*: Ways of Attributing International Crimes to Those ‘Most Responsible’”, in H. Van der Wilt and A. Nollkaemper (eds), *System Criminality in International Law* (Cambridge: Cambridge UP, 2009), at 143 (fn 84). Aside from its noticeable anachronism, the problem with this assertion is that it is based on allusions to sporadic lexical similarities between parts of the text of the *Justice* Judgment and Roxin's theory of ‘Control Based on Organized Power Structures’. It is implausible to infer solely from the use of words such as “organized system”, “hierarchy” etc. that the control doctrine “may be identified in the Nuremberg *Justice* case.” *Ibid.* Rather, as examined in Chapter 2, the guilt of the accused in this case was determined based on the ‘common design/purpose’ theory. See Chapter 2, Section 2.3.3.2.i. See also, Chapter 6, Section 6.2.2. (text accompanying footnotes 117-128)

25 *The Prosecutor v. Stakić* (IT-97-24-PT), Fourth Amended Indictment, 10 April 2002, para 26.

Upon examining the evidence, the Trial Chamber found that in 1992 there were three distinct political and military structures in Prijedor that closely co-operated in pursuance of a common goal to “consolidat[e] Serbian control in Prijedor Municipality”:²⁶ i) the Crisis Staff, presided over by the Accused and constituting Prijedor's governing body, ii) the police, headed by the Chief of Police Simo Drljača; and iii) the military forces stationed in Prijedor, commanded by Colonel Vladimir Arsić.²⁷ The judges further held that in the execution of this shared plan, the crimes of persecution (through various acts, including murder, torture, physical violence, rape and sexual assaults),²⁸ extermination²⁹ and murder, as a violation of the laws and customs of war,³⁰ were committed by members of the police and military units. It was established that the Accused actively participated in the furtherance of the plan in that he “facilitated coordination by the police and military with each other and with the civilian authorities”³¹ and provided the necessary logistical (fuel, technical equipment etc.) and financial support.³²

When the Trial Chamber proceeded to describe Stakić's criminal responsibility for the established crimes, it refused to follow the Tribunal's settled jurisprudence on JCE and took a sharp turn in redefining its law on co-perpetration liability. In particular, the judges held that:

Joint criminal enterprise is *only one of several possible interpretations* of the term “commission” under Article 7(1) of the Statute and that other definitions of co-perpetration must equally be taken into account.³³

In the ensuing analysis on a new definitional framework of co-perpetration, the Trial Chamber drew heavily from the postdoctoral work of Roxin and directly quoted excerpts from it.³⁴ The judges held that this form of liability requires “an explicit agreement or silent consent to reach a common goal by coordinated co-operation *and joint control over the criminal conduct*.”³⁵ In their view, the latter requirement is typically satisfied when the accused individual “possesses skills or authority which the other perpetrator does not” and is therefore capable of ruining the entire criminal venture by refusing to play his part in it.³⁶

26 *Stakić* Trial Judgment, *supra* n 15, para 470.

27 *Ibid.*, paras 469, 479-481, 488.

28 *Ibid.*, para 818.

29 *Ibid.*, para 655.

30 *Ibid.*, para 590, 616.

31 *Ibid.*, para 482.

32 *Ibid.*, paras 482-488.

33 *Ibid.*, para 438. (*emphasis added*)

34 *Ibid.*, para 440.

35 *Ibid.* (*emphasis added*)

36 *Ibid.*

The Chamber expressly spoke of the role of the co-perpetrators as being “*essential* for the achievement of the common goal”³⁷ and stressed that they must all have “the same degree of control over the execution of the common acts.”³⁸ This interpretation of co-perpetration clearly departed from the settled law on JCE and gave international currency to Roxin’s doctrine of joint (functional) control over a crime. The resulting new construction of co-perpetration responsibility was set to have six objective legal elements:

- i) “Co-perpetrators”;
- ii) “Common goal”;
- iii) “Agreement or silent consent”;
- iv) “Coordinated co-operation”;
- v) “Joint control over criminal conduct”;
- vi) “[The accused’s] authority”³⁹

and three *mens rea* elements:

- i) “*Mens rea* for the specific crime charged”;
- ii) “Mutual awareness of substantial likelihood that crimes would occur”;
- iii) “[The accused’s] awareness of the importance of his own role”.⁴⁰

These were the definitional elements of the form of liability that the judges ultimately labelled “co-perpetratorship”.⁴¹

The Trial Chamber did not offer much explanation on the theoretical meaning of these legal requirements but, rather, directly proceeded to apply them to the facts of the case. Thus, for instance, it did not explain whether the “co-perpetrators” objective element – which can be seen as the counterpart of the “plurality of persons” element under the JCE doctrine – requires that these individuals be organized in some formal structure, whether there exist any specific limits to the number of co-perpetrators etc. The judges only identified the names and positions of the Accused’s co-perpetrators.⁴² Similarly, no analysis was offered on the legal meaning of the “common goal” and “agreement or silent consent” requirements, or why they had to be set apart as two separate and distinct objective elements. The Chamber found that the former was satisfied since the evidence demonstrated that the co-perpetrators shared a goal to consolidate

Serbian control in the Prijedor Municipality,⁴³ while for the latter element the judges referred to proof of specific agreements that were concluded between the co-perpetrators in pursuance of the said objective (, including agreements to use armed force against non-Serb civilians and to establish detention camps in order to force them to flee Prijedor).⁴⁴ The difference between the two elements seemed to be thus, as Olásolo also asserted, that “common goal” refers to the co-perpetrator’s objective in broader terms, whereas the “agreement or silent consent” element was seen to require proof of a concrete (explicit or tacit) criminal agreement to implement the said common goal.⁴⁵ In the same spirit, the judges also differentiated, somewhat redundantly, between “co-ordinated contribution” and “joint control over criminal conduct” as two separate objective elements, although in essence both reflect the requirement for essential contribution to the concerted crime. The Trial Chamber first addressed in detail the synchronized activities and coordinated co-operation between the Crisis Staff, the army and the police in the Prijedor Municipality,⁴⁶ following which it held that:

The common goal could not be achieved without joint control over the final outcome and it is this element of interdependency that characterises the criminal conduct. No participant could achieve the common goal on his own, although each could individually have frustrated the plan by refusing to play his part or by reporting crimes. If, for example, the political authorities led by Dr. Stakić had not participated, the common plan would have been frustrated.⁴⁷

Thus, the Trial Chamber made it abundantly clear that it regarded the Accused’s joint control over the group crimes, expressed in his ability to frustrate the execution of the common plan by withdrawing his participation in it, as the key criterion that defined him as a co-perpetrator of these crimes. Finally, under the last objective legal element of “co-perpetratorship” listed in the *Stakić* Trial Judgment – *i.e.* “[the accused’s] authority” – the judges cited evidence to the effect that Stakić was the top politician in Prijedor, who was in charge of the Crisis Staff and “had special responsibility for events in Prijedor and also the power to change their course.”⁴⁸ Some have suggested that this element was cited by the Trial Chamber not as a requirement of co-perpetration responsibility *per se*, but rather because the judges in fact implicitly combined co-perpetration with indirect perpetration liability: *i.e.* that the said element is part of the latter notion and signals that Stakić had control over the physical perpetrators of the crimes through the institutions placed under his authority.⁴⁹

³⁷ *Ibid.*, para 442. (*emphasis added*)

³⁸ *Ibid.*, para 440.

³⁹ *Ibid.*, paras 469-470, 472, 478, 490, 492.

⁴⁰ *Ibid.*, paras 495-497.

⁴¹ *Ibid.*, paras 468.

⁴² The individuals who the judges identified as the Accused’s co-perpetrators were “the Chief of Police, Simo Drljača, prominent members of the military such as Colonel Vladimir Arsić and Major Radmilo Zeljaja, the president of the Executive Committee of Prijedor Municipality, Dr. Milan Kovačević, and the Commander both of the Municipal Territorial Defence Staff and the Trnopolje camp, Slobodan Kuruzović. *Ibid.*, para 469.

⁴³ *Ibid.*, para 470.

⁴⁴ *Ibid.*, paras 472-477.

⁴⁵ Olásolo, *supra* n 4, at 310-311.

⁴⁶ *Stakić* Trial Judgment, *supra* n 15, paras 478-489.

⁴⁷ *Ibid.*, para 490.

⁴⁸ *Ibid.*, para 494.

⁴⁹ V. Haan, ‘The Development of the Concept of Joint Criminal Enterprise at the International Criminal Tribunal for the Former Yugoslavia’, 5 *International Criminal Law Review* (2005), at 197; Olásolo, *supra* n 4, at 313-314.

As for the subjective elements of “co-perpetratorship”, the *Stakić* Trial Chamber found that the first one – *i.e.* “*mens rea* for the specific crime charged” – requires that the defendant satisfied the specific *mens rea* standard for each of the concerted offences, varying from *dolus eventualis* to *dolus specialis* as the case may be.⁵⁰ Thus, for instance, Stakić was held liable as a co-perpetrator of the crime of extermination since he “acted with the requisite intent, at least *dolus eventualis*, to exterminate the non-Serb population of Prijedor municipality”⁵¹ and then also of the crime of persecution after finding that he possessed the requisite specific intent for it.⁵² With regards to the “mutual awareness of substantial likelihood that crimes would occur” element, the Chamber held that it requires that the accused “acted in the awareness that crimes would occur as a direct consequence of their pursuit of the common goal.”⁵³ In this respect, it referred to evidence proving that Stakić and his co-perpetrators aimed to remove the Muslims from Prijedor by whatever means necessary and thereby “either accepted the consequence that crimes would occur or actively participated in their commission.”⁵⁴ Lastly, without expressly elaborating on the theoretical meaning and significance of the third subjective requirement of “co-perpetratorship” – *i.e.* “[the accused’s] awareness of the importance of his own role” – the judges concluded that, being the most senior political figure in Prijedor, Stakić knew that he was essential for the success of the plan and that he could thwart it at any point by refusing to play his part in it and using his powers to protect the non-Serb civilians.⁵⁵

The theoretical framework that the *Stakić* Trial Chamber construed for co-perpetration responsibility, crude as it was, presented a significant development: it elevated Roxin’s views on commission liability to the international level and gave his concept of (joint) control over a crime its first interpretation and application in the field of law. It did not, however, succeed in starting a revolution in the ICTY/R jurisprudence because, when the case went on appeal, the Appeals Chamber rejected the novel concept of “co-perpetratorship” liability for lacking basis in customary international law and reinstated JCE as the co-perpetration theory that is binding on the Trial Chambers.⁵⁶ As a result, no chamber at the *ad hoc* Tribunals ever applied the joint control over the crime doctrine again. Nevertheless, the *Stakić* Trial Judgment’s legal findings on co-perpetration were soon to find realization and further development in the emerging case law of the International Criminal Court.

5.3. Introducing the joint control theory in the ICC case law*

With the exception of superior responsibility, the applicable modes of liability under ICC law are listed under Article 25(3) Rome Statute,⁵⁷ the structure and content of which significantly differs from that of Article 7 ICTY Statute and its analogues in the founding documents of the other international and hybrid courts.⁵⁸ Specifically, Article 25(3) RS states in its relevant part that:

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;
 - (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

Markedly, unlike the ICTY Statute, the Rome Statute explicitly listed co-perpetration liability under sub-paragraph a), recognizing that the commission of a crime can be carried out “*jointly with another*”. However, this provision did not specifically indicate what the legal framework of co-perpetration is under the Statute: a fundamental question which the ICC had to deal with already in the very first case brought before it.

⁵⁰ *Stakić* Trial Judgment, *supra* n 15, para 495.

⁵¹ *Ibid.*, para 661.

⁵² Namely, the Trial Chamber found that “the Accused had the intent to discriminate against non-Serbs or those affiliated or sympathising with them because of their political or religious affiliations in the Prijedor municipality during the relevant time in 1992.” *Ibid.*, para 826.

⁵³ *Ibid.*, para 496.

⁵⁴ *Ibid.*

⁵⁵ *Ibid.* para 498.

⁵⁶ *The Prosecutor v. Stakić* (IT-97-24-A), Judgment, Appeals Chamber, 22 March 2006, para 62.

* Parts of the research contained in this section was published in L. Yanev and T. Kooijmans, ‘Divided Minds in the Lubanga Trial Judgment: a Case against the Joint Control Theory’, 13 *International Criminal Law Review* (2013): 789-828.

⁵⁷ Superior/command responsibility is contained under Article 28 RS. See Article 25 and Article 28, Rome Statute of the International Criminal Court, (UN Doc. A/CONF.183/9, 2178 UNTS 3), 17 July 1998 [in force on 1 July 2002], as last amended in 2010.

⁵⁸ See Chapter 3, Section 3.2.

5.3.1. *The Prosecutor v Lubanga: case facts and early submissions on co-perpetration*

The first person brought to trial before the International Criminal Court was Thomas Lubanga Dyilo: a former Congolese warlord who was charged with crimes committed during the armed conflict that occurred in the District of Ituri, the Democratic Republic of Congo, between July 2002 and December 2003. In particular, the Office of the Prosecutor alleged that the Accused, acting as President of the “*Union des Patriotes Congolais*” (‘UPC’) party and Commander-in-Chief of its military wing, the “*Force Patriotique pour la Libération du Congo*” (‘FPLC’):

committed the crimes of enlisting and conscripting children under the age of fifteen years and using them to participate actively in hostilities as co-perpetrator, jointly with other FPLC officers and UPC members and supporters, including, *inter alia*, the FPLC officers named below.⁵⁹

The Prosecution submitted that these crimes were committed by UPC/FPLC members/fighters in pursuance of a goal to establish Hema control and dominance in Ituri through waging a war against the Lendu and other non-Hema ethnic groups and their militias.⁶⁰ Notably, the charges stated that the Accused *committed* the said crimes *jointly with others*, thus making it clear that he was considered liable as a co-perpetrator under Article 25(3)(a) RS.

The Prosecution’s construction of the notion of co-perpetration was rather ambivalent. On the one hand, already in its application for an arrest warrant against Lubanga, it informed Pre-Trial Chamber I that “co-perpetration *based on joint control of the crime*” best defined the criminal responsibility of the Accused.⁶¹ Such language clearly suggested an endorsement of the ‘*Tatherrschaft*’ theory and Roxin’s views on joint functional control over the act: a theory that the then ICC Prosecutor, Luis Moreno-Ocampo, was well familiar with, seeing as he was one of the prosecutors at the Argentinian 1985 *Juntas* Trial.⁶² On the other hand, however, the actual legal framework that the Prosecution pled for this mode of liability did not follow at all the underlying rationale of the control doctrine. To begin with, the Document Containing the Charges stated that:

Based on the intent shared by Thomas LUBANGA DYILO and the other joint perpetrators to enlist and conscript children under the age of fifteen years and to use them in hostilities, he, in *pursuing the common goal*, coordinated their efforts, and controlled the execution of the common plan.⁶³

At the time this document was drafted, the terms ‘shared intent’ and ‘common goal’ were the hallmark constituent elements of the joint criminal enterprise theory, as elaborated in the case law of the ICTY/R.⁶⁴ If anything, this wording of the co-perpetration charges in the *Lubanga* Document Containing the Charges, was more comparable to JCE jurisprudence than it was to, for instance, the above-discussed *Stakić* Trial Judgment. To illustrate this, in the ICTY *Simić et al.* case, the Trial Chamber held Blagoje Simić liable as a co-perpetrator in a joint criminal enterprise to persecute, emphasizing that he “and the other participants acted with the shared intent to pursue their common goal.”⁶⁵ Even more significantly, however, during the pre-trial proceedings in *Lubanga*, the Prosecution filed a further submission, wherein it contended that co-perpetration liability does not require a *conditio sine qua non* contribution to the concerted crime:

In the Prosecution’s view, the contribution of a co-perpetrator is “*essential*” when it amounts to a significant contribution in the realization of the common plan. Co-perpetration, however, does not require that the contribution of each co-perpetrator is a *conditio sine qua non* for the execution of the common plan. It is sufficient that the co-perpetrator’s contribution is more than marginal or merely accidental.⁶⁶

In sum, the Prosecution argued that an accused is responsible as a co-perpetrator when he was part of a group of persons who shared the same intent to commit a certain crime and, acting in furtherance of their common goal, he contributed to the criminal plan in a way that was “*more than marginal or merely accidental*”. This formulation of the notion of co-perpetration put the main focus on the accused’s *mens rea* and downplayed the contribution requirement. It is thus quite clear that what the Prosecution in the *Lubanga* case labelled as co-perpetration based on joint control over the crime, was in substance an articulation of the underlying rationale of the common purpose/JCE theory.

This equivocal pleading of the Accused’s criminal responsibility as a co-perpetrator of the charged crimes confused the Defence and it complained that the Prosecution was in effect conflating different theories.⁶⁷ Meanwhile, the Legal Representatives of Victims argued that it is precisely the joint criminal enterprise concept that constitutes co-perpetration liability under Article 25(3)(a) RS and that ought to be followed in the case against Lubanga.⁶⁸ In this flurry of contested submissions, it was clear that one of the major challenges that Pre-

⁶⁴ See Chapter 3, Section 3.3.3. and Section 3.4.2.1.

⁶⁵ *The Prosecutor v. Simić et al.* (IT-95-9-T), Judgment, Trial Chamber, 17 October 2003, paras 138, 992.

⁶⁶ *The Prosecutor v. Lubanga* (ICC-01/04-01/06-749), Prosecution’s Document Addressing Matters that were Discussed at the Confirmation Hearing, 4 December 2006, para 41.

⁶⁷ *The Prosecutor v. Lubanga* (ICC-01/04-01/06-T-44-EN), Transcript, Pre-Trial Chamber, 24 November 2006, at 37.

⁶⁸ *The Prosecutor v. Lubanga* (ICC-01/04-01/06-745-tEN), Written Submissions of the Legal Representative of Victim a/0105/06, Legal Representatives of Victims, 1 December 2006, para 16; *The Prosecutor v. Lubanga* (ICC-01/04-01/06-750-tEN), Observations Made During the Confirmation Hearing on Behalf of Victims a/0001/06, a/0002/06 and a/0003/06, Legal Representatives of Victims, 4 December 2006, para 39.

⁵⁹ *The Prosecutor v. Lubanga* (ICC-01/04-01/06-356-Anx2), Document Containing the Charges, Article 61(3)(a), Office of the Prosecutor, 28 August 2006, para 20.

⁶⁰ *Ibid.*, paras 12-13.

⁶¹ *The Prosecutor v. Lubanga* (ICC-01/04-01/06-8-US-Corr), Decision on the Prosecutor’s Application for a Warrant of Arrest, Article 58, Pre-Trial Chamber I, 10 February 2006, para 96. (*emphasis added*)

⁶² L. Moreno-Ocampo, ‘The International Criminal Court: Seeking Global Justice’, 40 *Case Western Reserve Journal of International Law* (2008), at 215.

⁶³ *Lubanga* Document Containing the Charges, *supra* n 59, para 21. (*emphasis added*)

Trial Chamber I was going to deal with was the construction of the definitional framework of co-perpetration responsibility under ICC law.

5.3.2. *The Lubanga Decision on the Confirmation of Charges*

In view of the parties' submissions on Lubanga's criminal liability as a co-perpetrator and the imposing backdrop of the ICTY/R jurisprudence on the doctrine of JCE, it is hardly surprising that a big part of the International Criminal Court's very first decision on the confirmation of charges was dedicated to examining the scope and meaning of the notion of joint commission of a crime under Article 25(3)(a) RS. The *Lubanga* Pre-Trial Chamber started its analysis by taking notice of the parties' disagreement on the interpretation of co-perpetration liability and explaining in general terms that:

the concept of co-perpetration is originally rooted in the idea that when the sum of co-ordinated individual contributions of a plurality of persons results in the realisation of all the objective elements of a crime, any person making a contribution can be held vicariously responsible for the contributions of all the others and, as a result, can be considered as a principal to the whole crime.⁶⁹

The judges then found that there exist three approaches to co-perpetration, which differ in that each of them establishes a distinct criterion for differentiating between (joint) perpetrators and accessories to a concerted crime: i) the objective approach; ii) the subjective approach and iii) the control over the crime approach.⁷⁰ The underlying rationale of each of them was discussed in Chapter 1 of the present book and need not be addressed anew here.⁷¹ It suffices to say that the Chamber recognized the JCE doctrine as a manifestation of the subjective approach to co-perpetration⁷² and, therefore, as one of the concepts that, *in theory*, could be used to define the legal framework of this mode of liability under Article 25(3)(a) RS.

Faced with the abovementioned three possible approaches to co-perpetration liability, the *Lubanga* Pre-Trial Chamber offered a contextual reading of Article 25(3) RS to determine which one is endorsed in the Rome Statute. The judges first renounced the objective approach because, in their view, the idea that principals to a crime are only those who physically carry out its *actus reus* elements is irreconcilable with Article 25(3)(a), in the part reading 'commits ... through another person'.⁷³ In other words, the Chamber reasoned that the recognition of the concept of indirect perpetration, pursuant to which a person can be a principal to a crime even if it is physically committed by another individual (an agent), presents an *ipso facto* rejection of the objective approach to joint principal liability. The judges then also refused to

follow the subjective approach, and respectively the theory of JCE, because they found that the common purpose concept is expressly contained in Article 25(3)(d), wherein it is defined as a mode of *accessorial* liability.⁷⁴ Naturally, they pointed out, it could not be that the Rome Statute refers to the same construct under two materially distinct provisions on criminal responsibility. This line of reasoning is more critically reviewed in the next chapter of this book. Importantly, it is this systematic interpretation of Article 25(3) RS that ultimately led the Pre-Trial Chamber to conclude that "not having accepted the objective and subjective approaches for distinguishing between principals and accessories ... the Statute embraces the third approach, which is based on the concept of control over the crime."⁷⁵

Having adopted the control theory as the remaining available approach to constructing the modes of liability under Article 25(3) RS, the judges proceeded to explain that the concept of co-perpetration *based on joint control over the crime*:

is rooted in the principle of the division of essential tasks for the purpose of committing a crime between two or more persons acting in a concerted manner. Hence, although none of the participants has overall control over the offence because they all depend on one another for its commission, they all share control because each of them could frustrate the commission of the crime by not carrying out his or her task.⁷⁶

As a source of authority for making this finding, the Pre-Trial Chamber cited the ICTY *Stakić* Trial Judgment: the only international judgment at the time to have endorsed Roxin's doctrine of control over an act. Indeed, when defining the objective and subjective requirements of this mode of liability, the judges kept referring to the corresponding conclusions of the *Stakić* Trial Chamber, although they did also slightly revise them. The concept of co-perpetration based on joint control over the crime was ultimately held to consist of the following five legal elements:

- i) "Existence of an agreement or common plan between two or more persons";⁷⁷
- ii) "Co-ordinated essential contribution made by each co-perpetrator resulting in the realisation of the objective elements of the crime";⁷⁸
- iii) "The suspect must fulfil the subjective elements of the crime in question";⁷⁹
- iv) "The suspect and the other co-perpetrators must all be mutually aware and mutually accept that implementing their common plan may result in the realisation of the objective elements of the crime";⁸⁰

⁷⁴ *Ibid.*, paras 334-337.

⁷⁵ *Ibid.*, para 338.

⁷⁶ *Ibid.*, para 342.

⁷⁷ *Ibid.*, paras 343-345.

⁷⁸ *Ibid.*, paras 346-348.

⁷⁹ *Ibid.*, paras 349-360.

⁸⁰ *Ibid.*, paras 361-365.

⁶⁹ *Lubanga* Decision on the Confirmation of Charges, *supra* n 2, para 326.

⁷⁰ *Ibid.*, paras 327-330.

⁷¹ See Chapter 1, Section 1.3.1.

⁷² *Lubanga* Decision on the Confirmation of Charges, *supra* n 2, para 329.

⁷³ *Ibid.*, para 333.

- v) “The suspect is aware of the factual circumstances enabling him or her to jointly control the crime”.⁸¹

Interestingly, although clearly adopting the ‘*Tatherrschaft*’ doctrine in its interpretation of co-perpetration responsibility, the *Lubanga* Pre-Trial Chamber did not expressly refer to Roxin’s work. In fact, the only time his postdoctoral thesis is specifically mentioned in this part of the Decision is, as examined further below, when the judges rejected Roxin’s original contention that only contributions made at the *execution* stage of the common plan could be essential.⁸² It can, thus, be said that when endorsing the control theory and using it to define co-perpetration liability, the Pre-Trial Chamber did not mechanically import any specific reading of it but did, in fact, give this theory its own spin. Following the *Lubanga* Decision on the Confirmation of Charges, the concept of ‘control’ has been affirmed and applied as the distinguishing criterion between (joint) principal and accessorial liability in all the ICC’s judgments and confirmation of charges decisions to present date.⁸³ The next section of this chapter will thoroughly analyze the meaning that the Court’s jurisprudence has established for each of the aforementioned five legal elements of the theory of co-perpetration based on joint control over the crime.

5.4. Joint Control over the Crime: Theoretical Framework

The ICC jurisprudence on the concept of co-perpetration based on joint control over the crime is not yet as voluminous as the UN *ad hoc* Tribunals’ case law on JCE responsibility but it has proven to be just as vibrant and evolving. Since the *Lubanga* Decision on the Confirmation of Charges, the control doctrine and its manifestations under Article 25(3) (a) RS – mainly in the notion of (indirect) co-perpetration – have been pled and discussed in nearly all ICC cases that have reached the confirmation of charges stage.⁸⁴ Similarly to

what happened at the ICTY, the *Lubanga* Pre-Trial Chamber’s findings on the definitional framework of co-perpetration based on joint control were adopted and further refined in the Court’s subsequent jurisprudence.

5.4.1. The objective (material) elements

The *Lubanga* Decision on the Confirmation of Charges established two objective elements for the concept of co-perpetration based on joint control over the crime: i) existence of a common plan or agreement between two or more persons; and ii) coordinated essential contributions by each co-perpetrator.

5.4.1.1. A common plan or agreement between two or more persons

When formulating the legal elements of co-perpetration based on joint control over the crime, the *Lubanga* Pre-Trial Chamber held that “the first objective requirement [...] is the existence of an agreement or common plan between two or more persons.”⁸⁵ The judges noted that this requirement was actually divided into two sub-criteria in the ICTY *Stakić* Trial Judgment – i) a common goal and ii) a silent consent or an agreement – but they clearly did not see a cogent reason to adopt this partitioning.⁸⁶ In fact, unlike the jurisprudence on JCE, the judges also did not consider the existence of a ‘common plan/agreement’ and a ‘group of persons’ as *separate* objective elements of this type of criminal liability but instead combined them into one overall legal requirement. In itself, this is simply a matter of presentation and it is the substance of the said first objective element, in all its distinct parts, that shall be examined here.

i) “Two or more persons”

Regarding the existence of a plurality of individuals, inherent to the very notion of co-perpetration, the *Lubanga* Pre-Trial Chamber clearly held that under the joint control over the crime doctrine there have to be, at the minimum, *two* persons who coordinate efforts to further the said common plan. This finding has been consistently confirmed in the Court’s subsequent judgments/decisions, although some of them have phrased it in a slightly different manner and instead of using the “two or more persons” phrase have found that “the suspect must be part of a common plan or agreement *with one or more persons*”.⁸⁷ While this clarifies the lower limit, the ICC has not yet expressly addressed the question whether there exists some upper limit to the number of persons who could be co-perpetrators under this theory. This matter is far from purely academic. Considering the inherent rationale of

⁸¹ *Ibid.*, paras 366-367.

⁸² *Ibid.*, para 348 (fn 425). See *infra* Section 5.4.1.2. (text accompanying notes 155-162)

⁸³ *The Prosecutor v. Lubanga* (ICC-01/04-01/06-2842), Judgment, Trial Chamber, 14 March 2012, para 994; *The Prosecutor v. Katanga* (ICC-01/04-01/07-3436-tENG), Judgment, Trial Chamber II, 7 March 2014, para 1396; *Lubanga* Appeal Judgment, *supra* n 21, paras 469, 473; *The Prosecutor v. Katanga and Chui* (ICC-01/04-01/07-717), Decision on the Confirmation of Charges, Pre-Trial Chamber I, 30 September 2008, para 486; *The Prosecutor v. Bemba* (ICC-01/05-01/08-424), Decision on the Confirmation of Charges, Pre-Trial Chamber II, 15 June 2009, para 348; *The Prosecutor v. Abu Garda* (ICC-02/05-02/09-243-Red), Decision on the Confirmation of Charges, Pre-Trial Chamber I, 8 February 2010, para 152; *The Prosecutor v. Banda and Jerbo* (ICC-02/05-03/09-121-Corr-Red), Corrigendum of the Decision on the Confirmation of Charges, Pre-Trial Chamber I, 7 March 2011, para 126; *The Prosecutor v. Ruto, Kosgey and Sang* (ICC-01/09-01/11-373), Decision on the Confirmation of Charges, Pre-Trial Chamber II, 23 January 2012, para 291; *The Prosecutor v. Muthaura, Kenyatta and Ali* (ICC-01/09-02/11-382-Red), Decision on the Confirmation of Charges, Pre-Trial Chamber II, 23 January 2012, para 296; *The Prosecutor v. Ntaganda* (ICC-01/04-02/06-309), Decision on the Confirmation of Charges, Pre-Trial Chamber II, 9 June 2014, para 104.

⁸⁴ The *Mbarushimana* case is the one notable exception where the charges against the accused were not based on Article 25(3)(a) RS, so the judges did not engage in lengthy deliberations on the modes of liability listed therein and their parameters under the control over the crime theory. See *The Prosecutor v. Mbarushimana* (ICC-01/04-01/10-465-Red), Decision on the Confirmation of Charges, Pre-Trial Chamber I, 16 December 2011, para 8.

⁸⁵ *Lubanga* Decision on the Confirmation of Charges, *supra* n 2, para 343.

⁸⁶ *Ibid.*, para 343 (fn 423). See *supra* Section 5.2.2.

⁸⁷ *Bemba* Decision on the Confirmation of Charges, *supra* n 83, para 350 (*emphasis added*); *Ntaganda* Decision on the Confirmation of Charges, *supra* n 83, para 104; *Ruto, Kosgey and Sang* Decision on the Confirmation of Charges, *supra* n 83, para 292; *Banda and Jerbo* Decision on the Confirmation of Charges, *supra* n 83, para 128; *Muthaura, Kenyatta and Ali* Decision on the Confirmation of Charges, *supra* n 83, para 297.

co-perpetration based on joint control over the crime, it may be rather implausible to submit – as the UN *ad hoc* Tribunals have done for JCE – that there is no theoretical maximum to the number of co-perpetrators in a common plan/agreement.⁸⁸ In particular, when the core definitional criterion for a co-perpetrator is that he is somebody who plays an *essential* role in the common plan (*i.e.* has the power to frustrate the commission of the concerted crime), it is difficult to imagine a common plan that contains a vast multitude of such persons. Indeed, the larger the number of individuals alleged to be co-perpetrators under the joint control doctrine, the more unrealistic it becomes to argue that each of these persons was a key figure in the common plan, capable of halting its execution. There are certainly some practical implications to this consideration. Thus, for instance, the *Lubanga* Defence argued during the pre-trial proceedings that if the joint control theory is truly adhered to, then the document containing the charges should be found defective in the part referring to the Accused's alleged co-perpetrators broadly as “other FPLC officers and UPC members and supporters”;⁸⁹ rather, the Defence submitted, the Prosecution must be required to specifically state the names of each co-perpetrator in the said plan, as there could not possibly be so many of them who actually had joint control over its execution.⁹⁰ The requisite degree of specificity when pleading the plurality of persons who are part of an alleged common plan is an issue that has not yet been properly addressed in the ICC jurisprudence. In fact, different chambers have specified to varying degrees the identity of the individuals with whom the accused was held to have jointly perpetrated the concerted crimes. In the *Gbagbo* Decision on the Confirmation of Charges, for instance, Pre-Trial Chamber I held that Laurent Gbagbo, the former President of Ivory Coast, committed the charged crimes “jointly with members of his inner circle”.⁹¹ It was explained in detail that the said ‘inner circle’ consisted of Simone Gbagbo, Charles Blé Goudé and “a limited number of close associates” from this country's political and military elite, who were identified in witness testimonies.⁹² The judges were thus very concrete about the identity of the co-perpetrators in the alleged common plan and supported the idea that there was a very limited number of them. By contrast, in the *Ntaganda* case, Pre-Trial Chamber II held that the Accused, who was the Deputy Chief of Staff of the UPC/FPLC,⁹³ “was part of a common plan amongst members of the UPC/FPLC to assume military and political control over Ituri”,⁹⁴ but did not specify at all who these ‘members of the UPC/FPLC’ actually were. Certainly, it could

not have been *all* UPC/FPLC members since this would mean that there were thousands of co-perpetrators who had essential functions and each of them could frustrate the execution of the common plan.⁹⁵ In any event, from the accused's perspective, it is vital that he be informed as specifically as possible of the identity of his alleged co-perpetrators so he could properly build his defense and dispute the links in the chain of causation that qualify him as a co-perpetrator of the crimes committed by others. In the author's view, there is merit to the argument that the legal framework of co-perpetration based on joint control presupposes a more limited number of persons who can be said to control/dominate a common plan and, therefore, the application of this theory should require a high degree of specificity when identifying the co-perpetrators, possibly even higher than the one that has been accepted under JCE law.⁹⁶

It also bears noting that although in the *Lubanga* case the individuals who formed the common plan were all UPC/FPLC members,⁹⁷ the ICC jurisprudence on co-perpetration based on joint control does not require the “two or more persons” to be organized within any formal political or military structure: *viz.* they may also be a disparate collection of individuals. Thus, for instance, in the *Muthaura et al.* case, Pre-Trial Chamber II held that during the 2007-2008 post-election violence in Kenya, a common plan to commit crimes against civilians who were supporting the opposition party was agreed upon between two of the accused – Muthaura and Kenyatta – and a person called Maina Njenga.⁹⁸ At the relevant time, they were, respectively, the Chairman of the National Security Committee, a high-profile politician who supported one of the presidential candidates, and the leader of an underground criminal organization known as the Mungiki.⁹⁹ *i.e.* three persons who did not belong to a single institutional framework and had a quite heterogeneous background.

ii) “Common plan or agreement”

Turning to the ‘common plan or agreement’ part of the first objective legal element of co-perpetration based on joint control, the *Lubanga* Pre-Trial Chamber did not differentiate in any way the notions ‘common plan’ and ‘agreement’ but, rather, used them interchangeably as synonyms.¹⁰⁰ Indeed, subsequent ICC jurisprudence, has routinely referred to these

⁸⁸ See Chapter 3, Section 3.4.1.1.

⁸⁹ *Lubanga* Document Containing the Charges, *supra* n 59, para 20. However, it bears noting that the Prosecution did name *some* of the alleged co-perpetrators, namely Bosco Ntaganda, Tchaligonza and Chief Kahwa. *Ibid.*, para 23.

⁹⁰ *The Prosecutor v. Lubanga* (ICC-01/04-01/06-T-44-EN), Transcript, Pre-Trial Chamber, 24 November 2006, at 47-48; *The Prosecutor v. Lubanga* (ICC-01/04-01/06-T-43-EN), Transcript, Pre-Trial Chamber, 23 November 2006, at 34.

⁹¹ *The Prosecutor v. Laurent Gbagbo* (ICC-02/11-01/11-656-Red), Decision on the Confirmation of Charges, Pre-Trial Chamber I, 12 June 2014, para 230.

⁹² *Ibid.*, para 86.

⁹³ See *supra* Section 5.3.1.

⁹⁴ *Ntaganda* Decision on the Confirmation of Charges, *supra* n 83, para 105.

⁹⁵ Indeed, nothing of this sort is suggested by the *Ntaganda* Pre-Trial Chamber, seeing as it expressly stated that the Accused was liable as an *indirect* co-perpetrator since he committed the charged crimes jointly with members of the UPC/FPLC but through using other persons “namely [other] UPC/FPLC members and/or Hema civilians”. *Ibid.*, para 102. In other words, *some* UPC/FPLC members were (indirect) co-perpetrators with Ntaganda, while others were used as tools by the former to commit the said crimes. The *Ntaganda* Decision on the Confirmation of Charges did not deem it necessary to clearly specify who exactly were the persons in the said former group.

⁹⁶ See Chapter 3, Section 3.4.1.1.

⁹⁷ *The Prosecutor v. Lubanga* (ICC-01/04-01/06-2748), Prosecution's Closing Brief, Trial Chamber, 1 June 2011, para 77; *Lubanga* Decision on the Confirmation of Charges, *supra* n 2, paras 377-378.

⁹⁸ *Muthaura, Kenyatta and Ali* Decision on the Confirmation of Charges, *supra* n 83, para 297.

⁹⁹ *Ibid.*, paras 186, 190, 381, 405-406.

¹⁰⁰ *Lubanga* Decision on the Confirmation of Charges, *supra* n 2, paras 343-345.

two terms together,¹⁰¹ and the *Mbarushimana* Decision on the Confirmation of Charges further held that the ‘agreement or common plan’ concept is “functionally identical” to the “common purpose” term, as found in Article 25(3)(d) RS.¹⁰² Their centrality for co-perpetration responsibility was stressed by the *Lubanga* pre-trial judges, who pointed out that this form of liability could only arise when a group of persons *coordinate* their actions towards the commission of crimes and, naturally, such coordination requires some form of an agreement that each one of them would act in a particular way in order to achieve the common goal.¹⁰³ As the Appeals Chamber noted recently, “[i]t is this very agreement ... that ties the co-perpetrators together and that justifies the reciprocal imputation of their respective acts.”¹⁰⁴ A person who contributes to a collective crime without having agreed to do so with its perpetrators could not be held vicariously liable for the latter’s acts and, at the most, may be an accessory to the crimes they committed.

The *Lubanga* Pre-Trial Chamber explained that the common plan between the accused and the other co-perpetrators “need not be explicit and that its existence can be inferred from the subsequent concerted action of the co-perpetrators.”¹⁰⁵ This finding has also been affirmed throughout the Court’s case law¹⁰⁶ and was recently further expanded by the *Lubanga* Appeals Chamber, which held that the agreement need not be previously arranged, but may materialize extemporaneously.¹⁰⁷ Notably, when making the latter finding, the Appeals Chamber cited the ICTY *Tadić* Appeal Judgment and its adoption in the subsequent ICTY/R jurisprudence.¹⁰⁸ To this end, it could be argued that the conclusions reached on this point in the Chapter 3 analysis on JCE liability are also applicable here.¹⁰⁹ Thus, the ICC law on co-perpetration has accepted that the common plan/agreement: i) could be formed implicitly and spontaneously at the crime scene, and ii) could, as an evidentiary matter, be inferred from circumstantial evidence, where there is lack of direct proof. Illustrative

of the latter point is the *Abu Garda* case, in which the Accused – a rebel commander in Darfur – was charged with crimes that resulted from a joint attack carried out by combined rebel forces against the African Union Mission in Sudan: *viz.* a peacekeeping mission stationed at the Military Group Site Haskanita (‘MGS Haskanita’).¹¹⁰ In the Prosecution’s view, the Accused was liable as a co-perpetrator of the alleged crimes in that he formed a common plan with the other senior commanders of the said rebel forces to attack the MGS Haskanita and exercised joint control with them over the execution of the crimes.¹¹¹ Proving the existence of this common plan was the turning point in this case. The Prosecution first relied on witness testimonies stating that several meetings were held between Abu Garda and the said other co-perpetrators, during which the agreement was reached to attack the MGS Haskanita. This direct evidence of a common plan was rejected by the ICC Pre-Trial Chamber as “scant and unreliable”.¹¹² The judges then moved to examine whether the alleged actions of the Accused *during the attack* on MGS Haskanita could be used to infer the existence of such a plan and held that, in principle, “the existence of a common plan might be inferred from Mr. Abu Garda’s issuance of orders to the combined forces, and/or from his participation in the attack, *if proven with the requisite threshold*.”¹¹³ The Pre-Trial Chamber ultimately found that the Prosecution’s evidence relating to the Accused’s conduct was insufficient to make such an inference and thereby declined to confirm the charges against him.¹¹⁴ However, it is clear that if this circumstantial evidence had been stronger, the judges would have inferred the existence of a common plan between the Accused and the other commanders to attack the peacekeeping mission in Sudan.

So far, the analysis on the first objective requirement of co-perpetration based on joint control has not differed substantively from Chapter 3’s corresponding findings on the first two material elements of JCE liability.¹¹⁵ However, the *Lubanga* Pre-Trial Chamber’s definition of the *nature* of the required ‘common plan or agreement’ requirement is where this changes and the first main difference between these two theories can be identified. In particular, the judges found that under the theory of joint control the common plan “does not need to be specifically directed at the commission of a crime”: it suffices that, at the minimum, the said plan involved “an element of criminality”.¹¹⁶ They explained that to this end it has to be established:

- i) that the co-perpetrators have agreed (a) to start the implementation of the common plan to achieve a non-criminal goal, and (b) to only commit the crime if certain conditions are met; or

¹¹⁰ *Abu Garda* Decision on the Confirmation of Charges, *supra* n 83, paras 21-22.

¹¹¹ *Ibid.*, para 22.

¹¹² *Ibid.*, para 179.

¹¹³ *Ibid.*, para 186. (*emphasis added*)

¹¹⁴ *Ibid.*, paras 215-216, 231, 236.

¹¹⁵ See Chapter 3, Section 3.4.1.1. and Section 3.4.1.2.

¹¹⁶ *Lubanga* Decision on the Confirmation of Charges, *supra* n 2, para 344.

¹⁰¹ *bu Garda* Decision on the Confirmation of Charges, *supra* n 83, para 160; *Katanga and Chui* Decision on the Confirmation of Charges, *supra* n 83, para 522; *Muthaura, Kenyatta and Ali* Decision on the Confirmation of Charges, *supra* n 83, para 297; *Lubanga* Trial Judgment, *supra* n 83, para 981; *The Prosecutor v. Blé Goudé* (ICC-02/11-02/11-186), Decision on the Confirmation of Charges, Pre-Trial Chamber I, 11 December 2014, para 137.

¹⁰² *Mbarushimana* Decision on the Confirmation of Charges, *supra* n 84, para 271.

¹⁰³ *Lubanga* Decision on the Confirmation of Charges, *supra* n 2, para 343.

¹⁰⁴ *Lubanga* Appeal Judgment, *supra* n 21, para 445. See also *The Prosecutor v. Ongwen* (ICC-02/04-01/15-422-Red), Decision on the Confirmation of Charges, Pre-Trial Chamber II, 23 March 2016, para 38; *Blé Goudé* Decision on the Confirmation of Charges, *supra* n 101, para 134. See further Olásolo, *supra* n 4, at 276; Ambos, *supra* n 4, at 149.

¹⁰⁵ *Lubanga* Decision on the Confirmation of Charges, *supra* n 2, para 345.

¹⁰⁶ *Lubanga* Trial Judgment, *supra* n 83, para 988; *Katanga and Chui* Decision on the Confirmation of Charges, *supra* n 83, para 523; *Banda and Jerbo* Decision on the Confirmation of Charges, *supra* n 83, para 129; *Abu Garda* Decision on the Confirmation of Charges, *supra* n 83, para 180; *Ruto, Kosgey and Sang* Decision on the Confirmation of Charges, *supra* n 83, para 301.

¹⁰⁷ *Lubanga* Appeal Judgment, *supra* n 21, para 445. See also *Ongwen* Decision on the Confirmation of Charges, *supra* n 104, para 38.

¹⁰⁸ *Lubanga* Appeal Judgment, *supra* n 21, para 445 (fn 819).

¹⁰⁹ See Chapter 3, Section 3.4.1.2. (text accompanying notes 114-119)

- ii) that the co-perpetrators (a) are aware of the risk that implementing the common plan (which is specifically directed at the achievement of a non-criminal goal) will result in the commission of the crime, and (b) accept such an outcome.¹¹⁷

This finding has caused quite some controversy both in academia and in subsequent ICC case law. It will be recalled that under JCE law, the common plan/design/purpose has to either aim at the commission of the crime or, where the plan has a non-criminal goal, *necessarily involve* the commission of a crime.¹¹⁸ In either case, the underlying conclusion is that the participants in the JCE have reached an agreement that is specifically aimed at the commission of a crime, whether that crime be the end goal of their enterprise or the agreed means to achieve that goal. This is radically different from the above definition of the nature of the common plan element under the doctrine of co-perpetration based on joint control. Put simply, the *Lubanga* pre-trial judges found that a person can be held liable as a co-perpetrator for participating in a common plan, which neither had a crime as its objective, nor involved the commission of a crime as the agreed means to achieve a non-criminal goal, but merely entailed a risk that the charged crime might be committed in the execution of the said plan.¹¹⁹ Thus, for instance, in *Lubanga*, where it was found that the common plan was “to build an effective army to ensure the UPC/FPLC’s domination of Ituri”¹²⁰ (*i.e.* a non-criminal goal), the Trial Chamber observed that:

[t]his plan resulted in the conscription, enlistment and use of children under the age of 15 to participate actively in hostilities, *a consequence which occurred in the ordinary course of events*. This conclusion satisfies the common-plan requirement under Article 25(3)(a).¹²¹

In other words, as the *Lubanga* Pre-Trial Chamber had also previously stated, even though the common plan did not specifically aim to commit the crime of conscripting, enlisting and using children under the age of 15 in hostilities, the Accused could be held liable as a co-perpetrator of that crime because “in the normal course of events, [the plan’s]

implementation entailed the *objective risk* that it would involve [targeting] children under the age of fifteen years”¹²²

This definition of the ‘common plan or agreement’, as requiring at least “an element of criminality”, has been upheld in a number of subsequent ICC decisions on the confirmation of charges,¹²³ although some of them actually construed it in rather different terms. For instance, the *Katanga and Chui* Pre-Trial Chamber established that “the common plan *must include* the commission of a crime”¹²⁴ and the *Gbagbo* Pre-Trial Chamber held that while the crime need not be the ultimate objective of the said agreement, it has to be “a criminal element *inherent to* the common plan”.¹²⁵ The latter language is more reminiscent of the definition of a ‘common plan/design/purpose’ under the JCE theory because it does not describe the crime as a possible objective risk of executing the plan but, rather, as an integral part of plan that had been agreed on. The ambiguity on this point now seems to have been resolved in the more recent *Lubanga* Trial and Appeal Judgments, both of which thoroughly addressed the matter, after the Defence submitted that co-perpetration liability requires a common plan that is “intrinsically criminal”, rather than one that is “merely capable of creating conditions conducive to the commission of criminal acts”.¹²⁶ Thus, in the Defence’s view, the Prosecution had to prove that Lubanga and his co-perpetrators pursued a common plan, which was specifically directed at committing the charged crimes. The Trial Chamber rejected this reasoning and held that for co-perpetration:

it is necessary, as a minimum, for the prosecution to establish [that] the common plan included *a critical element of criminality*, namely that, its implementation embodied a *sufficient risk* that, if events follow the ordinary course, a crime *will be* committed.¹²⁷

To determine what counts as a “sufficient risk”, the Trial Chamber read Article 25(3)(a) RS in conjunction with Article 30 RS – establishing the applicable mental elements under ICC law – and concluded that it has to be proved that the implementation of the common plan “embodies a sufficient risk that, *in the ordinary course of events*, a crime *will be* committed.”¹²⁸ Thus, the judges rejected the idea that a *low* risk of the sort associated with the *dolus eventualis* concept is sufficient to define the common plan as involving a “critical element of criminality”.¹²⁹ The Appeals Chamber further built on this reasoning by stating that the commission of the charged

¹¹⁷ *Ibid.*

¹¹⁸ See Chapter 3, Section 3.4.1.2. (text accompanying notes 110-113) See also Olásolo, *supra* n 4, at 274-275; M. Milanović, ‘An Odd Couple: Domestic Crimes and International Responsibility in the Special Tribunal for Lebanon’, 5 *Journal of International Criminal Justice* (2007), at 1146; S. Meisenberg, ‘Joint Criminal Enterprise at the Special Court for Sierra Leone’, in C. Jalloh (ed), *The Sierra Leone Special Court and its Legacy: the Impact for Africa and International Criminal Law* (Cambridge: Cambridge UP, 2014), at 85; S. Wirth, ‘Co-Perpetration in the Lubanga Trial Judgment’, 10 *Journal of International Criminal Justice* (2012), at 975; W. Jordash and P. Van Tuyl, ‘Failure to Carry the Burden of Proof: How Joint Criminal Enterprise Lost Its Way at the Special Court for Sierra Leone’, 8 *Journal of International Criminal Justice* (2010), at 600-601.

¹¹⁹ Ambos, *supra* n 4, at 152; Wirth, *supra* n 118, at 974-975; J. Ohlin, ‘Searching for the Hinterman: In Praise of Subjective Theories of Imputation’, 12 *Journal of International Criminal Justice* (2014), at 331-332; Gil Gil and Maculan, *supra* n 16, at 359-362; Olásolo, *supra* n 4, at 274.

¹²⁰ *Lubanga* Trial Judgment, *supra* n 83, para 1134.

¹²¹ *Ibid.*, para 1136. (*emphasis added*)

¹²² *Lubanga* Decision on the Confirmation of Charges, *supra* n 2, para 377. (*emphasis added*)

¹²³ *Banda and Jerbo* Decision on the Confirmation of Charges, *supra* n 83, para 129; *Muthaura, Kenyatta and Ali* Decision on the Confirmation of Charges, *supra* n 83, para 399; *Ruto, Kosgey and Sang* Decision on the Confirmation of Charges, *supra* n 83, para 301.

¹²⁴ *Katanga and Chui* Decision on the Confirmation of Charges, *supra* n 83, para 523. (*emphasis added*)

¹²⁵ *Gbagbo* Decision on the Confirmation of Charges, *supra* n 91, para 231.

¹²⁶ *Lubanga* Trial Judgment, *supra* n 83, para 983.

¹²⁷ *Ibid.*, para 985. (*emphasis added*)

¹²⁸ *Ibid.*, para 986.

¹²⁹ *Ibid.*, paras 984, 1012.

crimes has to be “a virtual certainty” of the execution of the alleged common plan in order for the said “element of criminality” to be satisfied.¹³⁰ In fact, the appeal judges also held that the Trial Chamber’s use of the word ‘risk’ in this particular context is not appropriate because this term is usually associated with the *dolus eventualis* concept and considerations of ‘possibility’ and ‘probability’ of a crime occurring, which is not what the “critical element of criminality” stands for.¹³¹ Thus, the position that has now crystalized in the ICC’s jurisprudence appears to be that, in order to incur co-perpetration liability based on the joint control theory, the accused must participate in a common plan that is either specifically directed at the commission of one or more crimes, or contains “an element of criminality” in that there is a ‘virtual certainty’ that crimes will be committed in the execution of the plan (*i.e.* that crimes will be committed in the ordinary course of events).

The above treatment of the ‘common plan or agreement’ requirement is liable to cause confusion and has, indeed, attracted criticism both from within and from outside the ICC.¹³² In particular, one notable problem is that it conflates the objective notion of a criminal agreement or plan with subjective considerations inherent to assessing *risks* of the commission of crimes, and *the accused’s awareness* thereof. The fact that both the Trial and the Appeals Chamber in *Lubanga* defined the parameters of the ‘common plan or agreement’ element by analyzing the *mens rea* standards under Article 30 RS is quite showing of this peculiarity.¹³³ Oddly enough, the Trial Chamber even noted that “*the mental requirement* that the common plan included the commission of a crime will be satisfied if the co-perpetrators knew that, in the ordinary course of events, implementing the plan will lead to that result.”¹³⁴ It is, thus, hardly surprising that in her separate Concurring Opinion to the *Chui* Trial Judgment, Judge Van Den Wyngaert stated that, although the ICC jurisprudence has consistently described it as an objective requirement, in her view “the common plan pertains to the subjective rather than to the objective element of joint perpetration.”¹³⁵ In this author’s opinion, however, a more viable interpretation would be to regard the problematic “element of criminality” feature of the ‘common plan or agreement’

simply as requiring a finding of an *objective* risk that the plan was virtually certain to result in the charged crime: *i.e.* a finding to be made on the basis of the facts of the case, independently from the subsequent inquiry about the accused’s *mens rea* toward the crime. The latter finding will thus be made solely in the analysis on the subjective elements of co-perpetration based on joint control over the crime. In other words, whether *the accused* foresaw the charged crime as an inevitable/probable/possible consequence of executing the common plan is a determination that is separate and distinct from the inquiry on whether this plan entailed an objective risk of resulting in the commission of the said crime.¹³⁶ This approach would untangle the perplexing objective-subjective structure that the ICC case law has given to the ‘common plan’ element.

Finally, and perhaps most fundamentally, some scholars have generally disagreed with the idea that a ‘common plan or agreement’ need only possess “an element of criminality” and does not have to necessarily incorporate the commission of a certain crime. Thus, for instance, Ambos has submitted that:

I am not even convinced that a mere ‘critical element of criminality’ suffices for a plan of co-perpetrators. After all, we are not dealing here with any plan (for example to pay a visit to London next weekend) but with a plan which forms the basis of a joint commission of a crime and, as a consequence, of the mutual attribution of the respective contributions of the co-perpetrators. Such a plan cannot be predominantly non-criminal but must at least – that would be my ‘minimum’ – contain a more or less concrete crime to be committed, otherwise there is nothing (agreed) that could be mutually attributed.¹³⁷

The concerns that the ICC’s definition of the ‘common plan or agreement’ element can cast an overly broad net for attributing co-perpetration responsibility are surely not without merit. If a common plan has a non-criminal objective (*e.g.* to gain control over a certain territory), which the confederates agree to achieve through neutral means (*e.g.* using armed force), the question arises whether these persons could be considered to have *agreed to* the commission of a crime that was a reasonably foreseeable consequence of the execution of the plan. In other words, do persons who agree to pursue a non-criminal goal, through non-criminal means, *ipso facto* also agree to the potential commission of any objectively foreseeable crime, which results from the execution of this plan, thus bringing the said crime *within* the scope of their common plan and making it mutually attributable to all of them? This question is especially poignant in the field of international criminal law, seeing as it regularly deals with factual scenarios where persons agree on fighting wars and, as one SCSL chamber observed, “[h]istory has shown that serious violations of international humanitarian law by certain members of the armed forces or groups during armed conflict are a foreseeable consequence of such an engagement in conflict”.¹³⁸ In this respect, it would clearly be excessive to hold an individual, who agreed to and furthered a

¹³⁰ *Lubanga* Appeal Judgment, *supra* n 21, paras 447, 451.

¹³¹ *Ibid.*, para 449.

¹³² Ambos, *supra* n 4, at 152; M. Cupido, ‘Pluralism in Theories of Liability: Joint Criminal Enterprise versus Joint Perpetration’ in E. Van Sliedregt and S. Vasiliev (eds), *Pluralism in International Criminal Law* (Oxford: Oxford UP, 2014), at 144-145; Gil Gil and Maculan, *supra* n 16, at 359-362; Ohlin, *supra* n 119, at 332, 338; K. Ambos, ‘Article 25 Individual Criminal Responsibility’ in O. Triffterer and K. Ambos (eds), *The Rome Statute of the International Criminal Court: A Commentary* (3rd ed, Munich: C.H. Beck, 2016), at 993-994. See also *The Prosecutor v. Ngudjolo Chui* (ICC-01/04-02/12-3-tENG), Judgment, Trial Chamber, 18 December 2012, Concurring Opinion of Judge Christine Van den Wyngaert, paras 31-39.

¹³³ *Lubanga* Trial Judgment, *supra* n 83, paras 984-988; *Lubanga* Appeal Judgment, *supra* n 21, paras 442-450.

¹³⁴ *Lubanga* Trial Judgment, *supra* n 83, para 986. (*emphasis added*)

¹³⁵ *Chui* Trial Judgment, *supra* n 132, Concurring Opinion of Judge Christine Van den Wyngaert, para 32. Ambos also noted that the definition of the ‘common plan or agreement’ element adopted in the ICC case law creates a “mixed objective-subjective structure” for this requirement under the theory of co-perpetration based on joint control. K. Ambos, ‘The First Judgment of the International Criminal Court (Prosecutor v. Lubanga): A Comprehensive Analysis of the Legal Issues’, 12 *International Criminal Law Review* (2012), at 140. See also N. Jain, ‘Individual Responsibility for Mass Atrocity: In Search of a Concept of Perpetration’, 61 *American Journal of Comparative Law* (2013), at 859-860.

¹³⁶ For a discussion on the respective subjective element of co-perpetration based on joint control over the crime, see *infra* Section 5.4.2.1.

¹³⁷ Ambos, *supra* 135, at 140. See also Gil Gil and Maculan, *supra* n 16, at 359-362; Jain, *supra* n 135, at 859.

¹³⁸ *The Prosecutor v. Brima, Kamara and Kanu* (SCSL-04-16-T), Judgment, Trial Chamber, 20 June 2007, para 72. See also Meisenberg, *supra* n 118, at 89.

common plan to wage a war, responsible as a co-perpetrator for all crimes that are regarded as a possible consequence of effecting this plan.¹³⁹ The *Lubanga* Appeals Chamber’s decision to narrow the scope of the ‘common plan’ element so that it could only consist of crimes that are either specifically agreed upon, or that can be objectively defined as a ‘virtually certain’ result of the plan’s execution should, therefore, be welcomed. Nonetheless, one must still be mindful of the criticism that the joint control theory’s broader definition of the ‘common plan’ element blurs the link between the crime and the accused’s contribution to it: *viz.* an essential, yet non-criminal contribution (*e.g.* providing the necessary military equipment) to a non-criminal plan (*e.g.* gain control over Ituri) is considered to connect the accused to a crime that is qualified as a virtually certain consequence of the effecting of this plan (*e.g.* conscripting children into the armed forces). As Judge Van Den Wyngaert also explained, while this problem does not arise when the common plan is specifically directed at the commission of a crime, one consequence of the ICC’s more expansive construction of the ‘common plan’ element is that:

the focus of attention has shifted away from how the conduct of the accused is related to the commission of a *crime* to what role he/she played in the execution of the common *plan*. Indeed, under the Pre-Trial Chamber’s interpretation, it suffices for an accused to make a contribution to the realisation of the common *plan*, even if this contribution has no direct impact on the coming into being of the material elements of a *crime*.¹⁴⁰

5.4.1.2. Co-ordinated essential contribution

The ‘*essential*’ contribution requirement is undoubtedly the hallmark feature of the doctrine of co-perpetration based on joint control over the crime, distinguishing it fundamentally from the JCE theory.¹⁴¹ As already elaborated above, pursuant to this objective legal element, a person can be qualified as a co-perpetrator of a group crime only when it could be established that his role in its commission was so indispensable, that if he had withdrawn his participation from it, the common plan would have collapsed and the crime would not have been committed.¹⁴² The *Lubanga* Pre-Trial Chamber unequivocally endorsed this criterion for distinguishing between co-perpetrators and accessories, and asserted that a person’s contribution to a common plan is considered ‘essential’ when he had “the power to frustrate the commission of the crime by not performing [his] tasks”.¹⁴³ Echoing the interpretation offered in the *Stakić* Trial Judgment, the judges found that under the joint

control theory, all the co-perpetrators are mutually dependent on each other in that none of them has overall control over the crime – *viz.* none of them can, on his own, ensure its commission – yet each one of them has the material ability to thwart the successful execution of the common plan.¹⁴⁴ For this reason, it has often been pointed out that the co-perpetrator actually exercises “negative control” over the commission of the crime.¹⁴⁵

With two notable exceptions that will be reviewed in detail further below, the *Lubanga* Pre-Trial Chamber’s above interpretation of the ‘essential contribution’ requirement has been consistently upheld in the subsequent ICC case law.¹⁴⁶ Its finding that the qualifier ‘essential’ means that the accused’s contribution must be a *condition sine qua non* for the commission of the concerted crimes is consistent with Roxin’s original thoughts on the theory of joint control and is shared by many in the commentariat.¹⁴⁷ To further explain the adoption of this standard, the *Lubanga* Trial Chamber observed more recently – and its reasoning on this point was later upheld by the Appeals Chamber – that the contribution of a co-perpetrator, who is held liable for *committing* a charged crime, must “necessarily [be] of greater significance” than that of an individual who participates in the commission of the crime via any of the other means listed in Article 25(3)(b) to (d) RS.¹⁴⁸ Both chambers pointed at the *ad hoc* Tribunals’ jurisprudence on aiding and abetting, planning, instigating and ordering responsibility, observed that it requires that such accessories to a crime must have *substantially* contribute to its commission, and thus concluded that, logically then, a co-perpetrator’s contribution to a crime has to be *essential*.¹⁴⁹ The underlying assumption here is that, as the appeal judges expressly stated in *Lubanga*, “the blameworthiness of the person is directly dependent on the extent to which the person actually contributed to the crime in question”¹⁵⁰ The merits of this line of reasoning will be analyzed in the next chapter of this book. For the time being, it bears noting that while some scholars have

¹⁴⁴ *Ibid.*, para 342 (fn.422). See *supra* Section 5.2.2.

¹⁴⁵ Olásolo and Cepeda, *supra* n 12, at 502; Ohlin, Van Sliedregt and Weigend, *supra* n 16, at 727; Gil Gil and Maculan, *supra* n 16, at 357.

¹⁴⁶ *Katanga and Chui* Decision on the Confirmation of Charges, *supra* n 83, paras 524-525; *Bemba* Decision on the Confirmation of Charges, *supra* n 83, para 350; *Banda and Jerbo* Decision on the Confirmation of Charges, *supra* n 83, para 136; *Abu Garda* Decision on the Confirmation of Charges, *supra* n 83, para 153; *Ruto, Kosgey and Sang* Decision on the Confirmation of Charges, *supra* n 83, para 292; *Muthaura, Kenyatta and Ali* Decision on the Confirmation of Charges, *supra* n 83, para 297; *Ntaganda* Decision on the Confirmation of Charges, *supra* n 83, para 104; *Lubanga* Trial Judgment, *supra* n 83, para 999; *Lubanga* Appeal Judgment, *supra* n 21, para 469; *Ongwen* Decision on the Confirmation of Charges, *supra* n 104, para 38.

¹⁴⁷ See *e.g.* G. Werle, *Principles of International Criminal Law* (2nd edn, The Hague: TMC Asser, 2009), at 176; Jain, *supra* n 4, at 123; Weigend, ‘Co-perpetration in *Lubanga*’, *supra* n 19, at 479; Olásolo, *supra* n 4, at 266; A. Cassese, *Cassese’s International Criminal Law* (3rd edn, Oxford: Oxford UP, 2013), at 176; R. Cryer *et al.*, *An Introduction to International Criminal Law and Procedure* (3rd edn, Cambridge: Cambridge UP, 2014), at 356.

¹⁴⁸ *Lubanga* Trial Judgment, *supra* n 83, paras 996-997; *Lubanga* Appeal Judgment, *supra* n 21, paras 467-469.

¹⁴⁹ *Ibid.*

¹⁵⁰ *Lubanga* Appeal Judgment, *supra* n 21, para 468.

¹³⁹ For a detailed discussion on the need to distinguish between common plans to wage war and concerted actions being taken towards the commission of a crime, see the scholarly literature criticising the expansive definition of the ‘common plan’ element that the SCSL adopted in its application of the JCE doctrine. See *e.g.* Meisenberg, *supra* n 118, at 69-95; Jordash and Van Tuyt, *supra* n 118, at 591-613.

¹⁴⁰ *Chui* Trial Judgment, *supra* n 132, Concurring Opinion of Judge Christine Van den Wyngaert, paras 34-35. (*emphasis in original*)

¹⁴¹ See Chapter 3, Section 3.4.1.3.

¹⁴² See *supra* Section 5.2.1. and Section 5.2.2.

¹⁴³ *Lubanga* Decision on the Confirmation of Charges, *supra* n 2, para 347.

regarded the use of the ‘*essential* contribution’ criterion as “a more principled justification”¹⁵¹ for ascribing co-perpetration liability and one that is “also superior to an approach that focuses predominantly on subjective criteria”,¹⁵² others completely reject this logic and submit that the blameworthiness of an individual is in fact directly linked to his *mens rea* vis-à-vis the crime, so it is the mental element that has to be the guiding point in distinguishing between principals and accessories to a crime.¹⁵³ Be that as it may, the requirement that an accused’s contribution to the common plan has to be ‘essential’, and the above-cited meaning of this qualifier, seems to be firmly settled in the ICC case law as the guiding definitional criterion for co-perpetration liability. Interestingly, although this sets a very strict and high threshold of participation in the said common plan, the *Lubanga* Trial Chamber found that the question whether the accused’s contribution was ‘essential’ or not requires an “assessment [that] involves a *flexible approach*, undertaken in the context of a broad inquiry into the overall circumstances of a case.”¹⁵⁴ There is a lot to be said about the practical implications of adopting such a strict standard in the field of international criminal law, so this matter will be discussed separately in the next chapter of this book, when assessing the merits of the joint control theory.

Another significant finding that the *Lubanga* Pre-Trial Chamber made on the ‘essential contribution’ requirement is that the accused’s contribution to the common plan does *not* have to be made at the *execution* stage of the concerted crime: *i.e.* contributing during the planning or preparatory stage may also suffice to ascribe co-perpetration liability to an accused, as long as his contribution was essential for the furtherance of the common plan.¹⁵⁵ Quite notably, the judges recognized that this conclusion is contrary to Roxin’s classical views on this matter but clearly did not consider themselves bound to follow this aspect of his theory.¹⁵⁶ Indeed, Roxin originally restricted the ‘essential contribution’ element solely to tasks performed at the stage of executing the crime because he argued that when the role of a person is limited to providing assistance in the planning or preparatory stage, he will lose all control over the commission of the concerted crime the moment he provides his assistance.¹⁵⁷ For instance, an individual who agrees to a common plan to rob a bank and whose role in this plan is restricted to *e.g.* finding the blueprints of the said bank, obtaining information about its security details and sharing this with his confederates, could not be a central figure in the commission of the

crime because the moment he fulfils this function, he no longer has the power to frustrate the commission of the crime. From that point onwards, the actual commission of the crime is entirely in the hands of his partners and he can no longer stop it if he wished to do so. Thus, the argument put forward in favor of this restriction is, to cite Jain on this point, that:

since perpetration is tied to the realization of the elements of the offence, co-perpetration must consist of joint domination *of these elements*. Thus, only co-operation in the execution stage would justify responsibility as a co-perpetrator.¹⁵⁸

As noted above, this interpretation is not endorsed by the *Lubanga* Pre-Trial Chamber and the subsequent ICC case law has invariably affirmed that the doctrine of co-perpetration based on joint control over the crime does not require the essential contribution to be performed during the execution stage.¹⁵⁹ In *Katanga and Chui*, for instance, the Pre-Trial Chamber held that:

[d]esigning 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 of the crime).¹⁶⁰

The *Lubanga* Appeals Chamber also confirmed that:

The essential contribution can be made not only at the execution stage of the crime, but also, depending on the circumstances, at its planning or preparation stage, including when the common plan is conceived. At the core of this approach is the assumption that a co-perpetrator may compensate for his or her lack of contribution at the execution stage of the crime if, by virtue of his or her essential contribution, the person nevertheless had control over the crime.¹⁶¹

One evident benefit of this approach is that it avoids the difficulties of determining the precise point at which the planning/preparatory stage of a common plan ends and the execution phase begins, and then allocating the accused’s acts to one stage or the other: a matter that, in and of itself, has caused much controversy among scholars examining Roxin’s ‘*Tatherrschaft*’ theory and that, considering the vast criminal plans and convoluted facts that are usually dealt with in international criminal proceedings, would have additionally strained the ICC jurisprudence on

¹⁵¹ Ambos, *supra* n 4, at 152.

¹⁵² G. Werle and B. Burghardt, ‘Establishing Degrees of Responsibility: Modes of Participation in Article 25 of the ICC Statute’, in Van Sliedregt and S. Vasiliev, *supra* n 132, at 316. Similarly, Manacorda and Meloni have contended that “[t]he ‘control over the crime’ approach undoubtedly represents a significant improvement [to the JCE doctrine].” S. Manacorda and C. Meloni, ‘Indirect Perpetration versus Joint Criminal Enterprise: Concurring Approaches in the Practice of International Criminal Law?’, 9 *Journal of International Criminal Justice* (2011), at 171.

¹⁵³ Ohlin, *supra* n 119, at 336.

¹⁵⁴ *Lubanga* Trial Judgment, *supra* n 83, para 1003. (*emphasis added*)

¹⁵⁵ *Lubanga* Decision on the Confirmation of Charges, *supra* n 2, para 348.

¹⁵⁶ *Ibid.*, (fn 425).

¹⁵⁷ *Katanga and Chui* Decision on the Confirmation of Charges, *supra* n 83, para 526 (fn 689). See also Olásolo, *supra* n 4, at 277-278; Jain, *supra* n 4, at 124; Ohlin, Van Sliedregt and Weigend, *supra* n 16, at 733.

¹⁵⁸ Jain, *supra* n 4, at 124. See also Gil Gil and Maculan, *supra* n 16, at 358.

¹⁵⁹ *Lubanga* Trial Judgment, *supra* n 83, paras 1004-1005; *Blé Goudé* Decision on the Confirmation of Charges, *supra* n 101, para 134; *Katanga and Chui* Decision on the Confirmation of Charges, *supra* n 83, para 526; *Muthaura, Kenyatta and Ali* Decision on the Confirmation of Charges, *supra* n 83, para 402; *Ruto, Kosgey and Sang* Decision on the Confirmation of Charges, *supra* n 83, para 306. See also Ambos, ‘Article 25’, *supra* n 132, at 992.

¹⁶⁰ *Katanga and Chui* Decision on the Confirmation of Charges, *supra* n 83, para 526.

¹⁶¹ *Lubanga* Appeal Judgment, *supra* n 21, para 469.

this mode of liability.¹⁶² In the author's opinion, from a normative point of view, there is merit to the finding that contributions made at the preparatory stage of a common plan could also be 'essential' in nature and give their author the material ability to frustrate the crime. The person who delivers the vital blueprints for the concerted bank robbery may lose his power to control the *subsequent* execution of the plan but so does his confederate who put the group together in the first place and then contributes to the execution stage by *e.g.* driving the group members to the bank and giving them the necessary weapons/equipment for the job. Both persons lose the ability to frustrate the commission of the crime once they deliver their contributions yet, when viewed in its entirety, it is evident that absent their participation, the common plan would have collapsed and the said crime would not have been committed. It seems excessively formalistic to distinguish between parties who had control over the said crime *up to a certain moment* and parties who retained control until the very end/the completion of the offence. Having said this, the judges should nevertheless make sure to avoid endorsing an overly expansive approach to dealing with contributions made solely in the planning/preparatory stage as they would run the risk of rendering other types of liability, such as soliciting and aiding and abetting, obsolete.¹⁶³

The ICC jurisprudence has further established that the 'essential contribution' element does not require the accused to have directly and physically contributed to the commission of the concerted crime. Indeed, to incur co-perpetration liability under the theory of joint control, he "does not need to be present at the scene of the crime, so long as he exercised, jointly with others, control over the crime."¹⁶⁴ This allows ascribing co-perpetration liability also to senior military and political leaders, who are often geographically removed from the crime scene and whose contributions to the charged crimes are of an indirect nature. Importantly, however, the *Lubanga* Pre-Trial Chamber expressly held, and it has been consistently confirmed in the case law of the Court, that when combined, the "essential contribution made by *each* co-perpetrator [*must result*] in the realization of the objective elements of the crime".¹⁶⁵ This means that even though the contribution of the accused need not be directly and physically linked to the crime, it is still required that

the physical commission of the crime is carried out by at least one of the accused's co-perpetrators. Otherwise, if the *actus reus* of the crime is committed by somebody outside the common plan, it would be, *prima facie*, impossible to conclude that the combined essential contributions of all the co-perpetrators resulted in the objective elements of the said crime. To this end, Olásolo has rightly pointed out that "joint control, as any other form of co-perpetration, requires those who physically carried out the objective elements of the crime be among the co-perpetrators."¹⁶⁶ This is, indeed, a sound statement of the law since, as analyzed in detail in Chapter 4 and recently confirmed by the *Lubanga* Appeals Chamber, the 'common plan/agreement' provides the legal basis for reciprocal attribution of acts, so when the crime is committed by a non-party to the plan, this legal basis cannot be used to impute that final act of commission to the members of the plan: *i.e.* the latter cannot be defined as co-perpetrators.¹⁶⁷

The above analysis naturally brings up the previously discussed doctrinal dilemmas of common plans agreed upon between high-ranking accused but physically perpetrated by rank-and-file outsiders to this agreement. The *Katanga and Chui* Pre-Trial Chamber first addressed this matter by elaborating on the findings drawn in the *Lubanga* Decision on the Confirmation of Charges and establishing that "the essential task(s) can be carried out by the co-perpetrators physically *or they may be executed through another person*."¹⁶⁸ The judges then reasoned that in the latter scenarios the co-perpetrator's "essential contribution may consist of activating the mechanisms which lead to the automatic [...] commission of the crimes."¹⁶⁹ Thus, the solution was to combine the notion of co-perpetration based on joint control with the notion of indirect perpetration based on, what the judges called, "control over the organization".¹⁷⁰ To define the latter notion, the judges heavily relied on Roxin's work on the liability of a perpetrator behind the perpetrator ('*Täter hinter dem Täter*') and, thereby, the theory of *Organisationsherrschaft*. The legal framework of this construct and how its merger with co-perpetration liability (based on JCE) can be used to ascribe joint principal responsibility in leadership cases was discussed previously in this book and need not be addressed anew here.¹⁷¹ For the purpose of the present research, it suffices to note that the above finding of the *Katanga and Chui* Pre-Trial Chamber officially introduced in the ICC's jurisprudence the distinction between "direct" and "indirect" co-perpetration: the former requires that the physical commission of the concerted crimes was carried out by at least one of the purported co-perpetrators, while the latter dispenses with this requirement by holding that the physical perpetrators can also be outsiders, provided that they are controlled by at least one of the

¹⁶² Regarding the complex task of distinguishing between the preparatory and the execution stages of a common plan, Olásolo has noted that: "Roxin states that a rigid distinction between the preparatory and execution stages is not possible. In his view, such a distinction should be undertaken on the basis of a set of guidelines (not fixed criteria) that need to take into consideration the facts of the case. These guidelines should be based on the notion of the 'unitary sense of the action'. As a result, events which are necessary for, directly linked to, or immediately before the carrying out of the objective elements of the crime, are part of the execution phase." Olásolo, *supra* n 4, at 278-279. Jain argues a fairly different definition, stating that the "execution stage is not limited to the core elements of the offence but encompasses the entire phase between the beginning of the attempt and the formal completion of the act, and covers action that would form an inseparable part of the complex action chain". Jain, *supra* n 4, at 124.

¹⁶³ Ohlin, Weigend and Van Sliedregt have rightly noted in this respect that "if all [...] contributions, which can be quite remote in time and place from the commission of the offence, are deemed 'essential' and thus sufficient to establish perpetration, then one must ask what remains for mere accessory liability as an instigator or an aider and abettor." Ohlin, Van Sliedregt and Weigend, *supra* n 16, at 732.

¹⁶⁴ *Lubanga* Trial Judgment, *supra* n 83, paras 1004-1005. See also *Lubanga* Appeal Judgment, *supra* n 21, para 466.

¹⁶⁵ *Lubanga* Decision on the Confirmation of Charges, *supra* n 2, para 346. See also *Katanga and Chui* Decision on the Confirmation of Charges, *supra* n 83, para 523; *Banda and Jerbo* Decision on the Confirmation of Charges, *supra* n 83, para 128; *Ntaganda* Decision on the Confirmation of Charges, *supra* n 83, para 105.

¹⁶⁶ Olásolo, *supra* n 4, at 294-295.

¹⁶⁷ *Lubanga* Appeal Judgment, *supra* n 21, para 445. See Chapter 4, Section 4.2.5.1. and Section 4.3.3.1.

¹⁶⁸ *Katanga and Chui* Decision on the Confirmation of Charges, *supra* n 83, para 521.

¹⁶⁹ *Ibid.*, para 525.

¹⁷⁰ *Ibid.*, paras 500 *et seq.*

¹⁷¹ The same doctrinal reasoning on the imputation of acts by the rank-and-file physical perpetrator to the indirect perpetrator first and then to his co-perpetrators applies here, too. See Chapter 4, Section 4.3.3.1. and Section 4.3.3.2.iv. See also *supra* Section 5.2.1.

co-perpetrators, by means of an organized and hierarchical power apparatus.¹⁷² In *Garda*, the Pre-Trial Chamber explained that the objective elements of ‘an agreement or common plan’ and ‘coordinated essential contribution’ are “common to both co-perpetration (or ‘direct’ co-perpetration) and indirect co-perpetration”¹⁷³ and then specified that:

the objective requirements of indirect co-perpetration also include (i) the existence of an organized and hierarchical apparatus of power; (ii) the perpetrator’s control over such an organization; and (iii) the execution of the crimes by the physical perpetrators by almost automatic compliance with orders of senior commanders.¹⁷⁴

Indirect co-perpetration could, thus, be seen as a sub-variant of co-perpetration that introduces the above additional three objective requirements to doctrinally accommodate for situations in which the contributions of *all* members of the common plan were indirect and the crimes were physically/directly committed by outsiders.¹⁷⁵

Finally, it bears noting that although the Pre-Trial, Trial and Appeals Chambers of the ICC have continuously held that co-perpetration based on joint control requires the accused’s contribution to be ‘essential’,¹⁷⁶ this conclusion has not gone unchallenged within the Court’s jurisprudence, and two of the latest confirmation of charges decisions have palpably departed from this interpretation of the law on co-perpetration. As explained above, when the Office of the Prosecution first pled the law on co-perpetration before the *Lubanga* Pre-Trial Chamber, it referred to the (joint) control over the crime theory, yet emphatically argued that the accused’s contribution to the concerted crime only has to be “more than

marginal or merely accidental”: *i.e.* that the contribution need not be *a sine qua non* for the commission of the crime.¹⁷⁷ Then, even after the *Lubanga* Decision on the Confirmation of Charges was issued, the Prosecution continued arguing throughout its submissions in various ICC cases that co-perpetration based on joint control does not require an ‘essential’ contribution but rather “that the accused made a substantial contribution to the commission of the crimes.”¹⁷⁸ For this purpose, the Prosecution has submitted that a contribution is ‘substantial’ “where the crime might have been committed without it, but its completion would have been significantly more difficult.”¹⁷⁹ Aside from two ICC judges who wrote vigorous separate opinions criticizing the control theory as a whole and its ‘essential contribution’ element in particular,¹⁸⁰ the ICC chambers have steadily refused to adopt the Prosecution’s above interpretation of co-perpetration responsibility. However, there are two quite notable deviations from the ICC’s consistent jurisprudence on this matter. In the recent *Gbagbo* Decision on the Confirmation of Charges, the judges found the Accused liable as an (indirect) co-perpetrator of the charged crimes after observing *inter alia* that:

(i) Laurent Gbagbo was part of a common plan to use force against civilians with members of his inner circle, who all shared the intent to commit the crimes; (ii) Laurent Gbagbo and his inner circle, acting in a coordinated manner, used the pro-Gbagbo forces to carry out the material elements of the crimes, and that *without Laurent Gbagbo’s actions, the crimes would not have been committed or would have been committed in a significantly different way*;¹⁸¹

This finding was more recently also affirmed in the *Blé Goudé* case, where Pre-Trial Chamber I held that:

The decisive consideration is whether the individual contribution of each co-perpetrator within the framework of the agreement is such that without it the crime would not be committed *or would be committed in a significantly different way*.¹⁸²

¹⁷² *Banda and Jerbo* Decision on the Confirmation of Charges, *supra* n 83, paras 125, 134-135, 138; *Ntaganda* Decision on the Confirmation of Charges, *supra* n 83, para 102; *Abu Garda* Decision on the Confirmation of Charges, *supra* n 83, paras 159-162. The definitional elements of indirect co-perpetration are thus a mix of the legal elements of co-perpetration based on joint control and indirect perpetration based on control over an organised system of power. They were more recently restated by the *Ruto et al.* Pre-Trial Chamber as: “(i) the suspect must be part of a common plan or an agreement with one or more persons; (ii) the suspect and the other co-perpetrator(s) must carry out essential contributions in a coordinated manner which result in the fulfilment of the material elements of the crime; (iii) the suspect must have control over the organization; (iv) the organization must consist of an organised and hierarchical apparatus of power; (v) the execution of the crimes must be secured by almost automatic compliance with the orders issued by the suspect; (vi) the suspect must satisfy the subjective elements of the crimes; (vii) the suspect and the other co-perpetrators must be mutually aware and accept that implementing the common plan will result in the fulfilment of the material elements of the crimes; and (viii) the suspect must be aware of the factual circumstances enabling him to exercise joint control over the commission of the crime through another person(s).” *Ruto, Kosgey and Sang* Decision on the Confirmation of Charges, *supra* n 83, para 292.

¹⁷³ *Abu Garda* Decision on the Confirmation of Charges, *supra* n 83, para 160.

¹⁷⁴ *Ibid.*, (fn 246).

¹⁷⁵ In this respect, the *Ongwen* Pre-Trial Chamber found that indirect co-perpetration is “a particular form of co-perpetration”. *Ongwen* Decision on the Confirmation of Charges, *supra* n 104, paras 38-39. Weigend also noted that “in German understanding, indirect co-perpetration is not a novel creation but simply a sub-category of joint perpetration.” T. Weigend, ‘Problems of Attribution in International Criminal Law: A German Perspective’, 12 *Journal of International Criminal Justice* (2014), at 260.

¹⁷⁶ See *supra* note 146.

¹⁷⁷ See *supra* note 66.

¹⁷⁸ *The Prosecutor v. Katanga and Chui* (ICC-01/04-01/07-1541), Prosecution’s Pre-Trial Brief on the Interpretation of Article 25(3)(a), 19 October 2009, para 12. See also *Lubanga* Prosecution’s Closing Brief, *supra* n 97, para 65; *The Prosecutor v. Muthaura and Kenyatta* (ICC-01/09-02/11-444), Prosecution’s Submissions on the Law of Indirect Co-Perpetration under Article 25(3)(a) of the Statute and Application for Notice to be Given under Regulation 55(2) with Respect to the Accuseds’ Individual Criminal Responsibility, 3 July 2012, para 12.

¹⁷⁹ *Katanga and Chui* Prosecution’s Interpretation of Article 25(3)(a), *supra* n 178, para 15. Similarly, in the *Lubanga* Closing Brief, the Prosecution argued that a “contribution is “substantial” where the crime might still have occurred absent the contribution of the Accused, but not without great difficulty.” *Lubanga* Prosecution’s Closing Brief, *supra* n 97, para 65.

¹⁸⁰ The separate opinions of Judge Fulford and of Judge Van den Wyngaert in, respectively, the *Lubanga* Trial Judgment and in the *Katanga* and the *Chui* Trial Judgments are analysed in more detail in Chapter 7. See Chapter 7, Section 7.2.

¹⁸¹ *Gbagbo* Decision on the Confirmation of Charges, *supra* n 91, para 230. (*emphasis added*)

¹⁸² *Blé Goudé* Decision on the Confirmation of Charges, *supra* n 101, para 135. (*emphasis added*)

These are the first, and thus far the only, instances in the practice of the International Criminal Court, where the chambers have expressly concluded that co-perpetration responsibility under Article 25(3)(a) RS could arise even if the accused's contribution was *not* of such a magnitude that its withdrawal would have frustrated the commission of the group crime: *viz.* the standard definition of the 'essential contribution' element.¹⁸³ Instead, both in *Gbagbo* and in *Blé Goudé* the pre-trial judges accepted that it suffices to show that absent the accused's contribution, the concerted crime could still have been committed albeit "in a significantly different way". This was further reiterated in the actual legal findings on Gbagbo's and Blé Goudé's responsibility, thus confirming the Pre-Trial Chambers' intention to expand the definition of the contribution requirement beyond the original limits that were described for in the *Lubanga* Decision on the Confirmation of Charges.¹⁸⁴ The judges' characterization of these two accuseds' contributions to the alleged common plans are in fact quite reminiscent of the above-cited definition that the Office of the Prosecutor has pled for this element of co-perpetration.¹⁸⁵ Therefore, this author submits that the *Gbagbo* and *Blé Goudé* Pre-Trial Chambers effectively rejected the "essential contribution" standard for the concept of co-perpetration under ICC law and replaced it with a requirement that can be best characterized as a 'substantial contribution'. It remains to be seen whether these two decisions will prove to be an outlier in the ICC case law on co-perpetration, or whether they would initiate a revision in the Court's approach to this form of responsibility: an approach that, as the Appeals Chamber has affirmed, requires the Prosecution to prove that "the accused had control over the crime, by virtue of his or her essential contribution to it *and the resulting power to frustrate its commission*".¹⁸⁶

5.4.2. The subjective (mental) elements

The *Lubanga* Pre-Trial Chamber identified three subjective requirements for the notion of co-perpetration based on joint control over the crime: i) the accused possesses the requisite *mens rea* for the crime in question; ii) the accused and the other co-perpetrators are mutually aware and mutually accept that implementing the common plan may result in the commission of the crime; and iii) the accused is aware of the circumstances that enable him to jointly control the crime.

5.4.2.1. The accused fulfils the subjective elements of the charged crimes

Starting its legal analysis on the subjective elements of co-perpetration based on joint control over the crime, the *Lubanga* Pre-Trial Chamber held that this form of liability "requires above all that the suspect 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."¹⁸⁷ To this end, the judges referred to Article 30 RS, which establishes the general subjective element for all the crimes falling within the ICC jurisdiction in the following terms:

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.¹⁸⁸

In its ensuing interpretation of this provision, the Pre-Trial Chamber referred to the concept of *dolus*, distilled its three categories – *viz.* *dolus directus* in the first degree, *dolus directus* in the second degree and *dolus eventualis* – and found that all of them are included in the above text. Specifically, the judges first held that Article 30 RS encompasses situations where the accused i) knows that his actions or omissions will bring about the objective elements of the crime and ii) performs this conduct "with the concrete intent to bring about the objective elements of the crime".¹⁸⁹ The Chamber recognized this as *dolus directus* in the first degree: the form of intent that is known in common law jurisdictions as "direct intent".¹⁹⁰ Indeed, a combined reading of the Article 30(3) – establishing the requisite knowledge in relation to a consequence – and the first part of Article 30(2)(b) – requiring that the accused "*means to cause that consequence*" is indicative of the inclusion of this form of *dolus* in the Rome Statute. Next, the judges referred to the second part of Article 30(2)(b) – establishing that a person has an intent in relation to a consequence when he "is aware that it will occur in the ordinary course of events" – to declare that the Rome Statute also endorses the concept of *dolus directus* in the second degree, which they construed as applicable in situation where:

¹⁸⁷ *Lubanga* Decision on the Confirmation of Charges, *supra* n 2, para 349.

¹⁸⁸ As affirmed also by the *Bemba* Pre-Trial Chamber, this provision "is meant to function as a default rule for all crimes within the jurisdiction of the Court". This finding is also supported by the General Introduction to the ICC Elements of the Crimes, paragraph 2 of which establishes that "[w]here no reference is made in the Elements of Crimes to a mental element for any particular conduct, consequence or circumstance listed, it is understood that the relevant mental element, i.e., intent, knowledge or both, set out in article 30 [RS] applies." *Bemba* Decision on the Confirmation of Charges, *supra* n 83, para 353.

¹⁸⁹ *Lubanga* Decision on the Confirmation of Charges, *supra* n 2, para 351.

¹⁹⁰ *Bemba* Decision on the Confirmation of Charges, *supra* n 83, para 357. See also M. Badar, 'The Mental Element in The Rome Statute of the International Criminal Court: A Commentary from a Comparative Criminal Law Perspective', 19 *Criminal Law Forum* (2008), at 482; S. Finnin, 'Mental Elements Under Article 30 Of The Rome Statute Of The International Criminal Court: A Comparative Analysis', 61 *International and Comparative Law Quarterly* (2012), at 341; E. Van Sliedregt, *Individual Criminal Responsibility in International Law* (Oxford: Oxford UP, 2012), at 45.

¹⁸³ See *supra* text accompanying notes 141-154.

¹⁸⁴ *Gbagbo* Decision on the Confirmation of Charges, *supra* n 91, para 232; *Blé Goudé* Decision on the Confirmation of Charges, *supra* n 101, para 143.

¹⁸⁵ See *supra* text accompanying notes 177-179.

¹⁸⁶ *Lubanga* Appeal Judgment, *supra* n 21, para 473. (*emphasis added*)

the suspect, *without having the concrete intent* to bring about the objective elements of the crime, is aware that such elements *will be the necessary outcome* of his or her actions or omissions¹⁹¹

Finally, the *Lubanga* Pre-Trial Chamber also concluded that Article 30 RS encompasses *dolus eventualis*, which is the form of *mens rea* that applies in situations where:

the suspect (a) is aware of *the risk* that the objective elements of the crime *may* result from his or her actions or omissions, and (b) accepts such an outcome by reconciling himself or herself with it or consenting to it.¹⁹²

Here, the judges explained that when the risk of the commission of the crime is “substantial”, *i.e.* there was a high likelihood that the crime “will occur in the ordinary course of events”, the accused’s acceptance of this risk could be *inferred* from his decision to carry out his actions in spite of being aware of this high risk.¹⁹³ However, if this risk is low, the Chamber held that the accused must be shown to have “*expressly* accepted the idea that [the crime] *may result* from his or her actions or omissions.”¹⁹⁴

Put simply, the *Lubanga* Decision on the Confirmation of Charges established that the theory of co-perpetration based on joint control over the crime requires that the accused must, at the very least, possess *dolus eventualis* with respect to the concerted crimes, since this is the lowest form of intent which Article 30 RS sets as a general mental element of all crimes listed in Articles 6 to 8 RS.¹⁹⁵ Importantly, the judges noted that Article 30 RS starts with the phrase “unless otherwise provided”, which is why they held that if the definition of a certain crime in the Rome Statute expressly requires a different mental element – such as the prescribed *dolus specialis* for the crime of genocide – the accused must fulfil that element, too.¹⁹⁶ It ought to be noted that this also holds true if the definition of the said crime requires a lesser form of *mens rea* than *dolus eventualis*. Thus, for instance, the *Lubanga* Pre-Trial Chamber pointed out that the ICC Elements of Crimes specifically provide that the war crimes of conscripting, enlisting and using children under the age of fifteen years in hostilities require that the defendant “knew *or should have known* that such person or persons were under the age of 15 years”: a category of intent that the judges rightly equated

to negligence.¹⁹⁷ Although negligence is a lesser form of *mens rea* than *dolus eventualis*, and despite its legal finding that a “state of mind [that] falls short of accepting that the objective elements of the crime may result from [the suspect’s] acts or omission ... would not meet the “intent and knowledge” requirement embodied in article 30 of the Statute,”¹⁹⁸ the Chamber reasoned that the ‘should have known’ requirement will apply in relation to the victim’s age because it constitutes a valid exception to the general subjective elements established in Article 30 RS.¹⁹⁹

While the subsequent ICC jurisprudence has consistently affirmed that the first mental element of co-perpetration based on joint control is that the accused must “fulfil the subjective elements of the crimes charged”,²⁰⁰ certain aspects of the *Lubanga* Pre-Trial Chamber’s actual findings on what these subjective elements are under Article 30 RS proved to be controversial and were revised in later case law. In particular, the above conclusions on the *dolus eventualis* concept and its alleged inclusion in Article 30 RS were met with a lot of criticism. First of all, the *Lubanga* judges’ very definition of this form of *mens rea* was deeply problematic because they construed the level of risk inherent to it by referring to the second part of Article 30(2)(b) RS: *i.e.* the concept of *dolus eventualis* was defined as involving liability for individuals who are “aware that [the crime] *will occur in the ordinary course of events*”.²⁰¹ This interpretation, however, is contrary to the common understanding that this form of *mens rea* in fact applies in situations where the accused foresees the crime as a *possible* consequence (*i.e.* a low risk that the crime ‘may’ occur), rather than as an *inevitable* one (*i.e.* what the phrase “will occur in the ordinary course of events” actually suggests).²⁰² More importantly, this construction of *dolus eventualis*

197 *Ibid.*, paras 357-358. More specifically, the ‘should have known’ requirement here pertains to a circumstance – *i.e.* that the victim was under the age of 15 years – and this creates a conflict with Article 30(3) RS, which stipulates that the accused must be shown to have had actual knowledge in relation to the said circumstance. Naturally, if the accused did not have such knowledge (but merely should have known about this circumstance), then this also creates a problem with the Article 30(2) RS volitional element in relation to consequences. If the accused did not know that the said victims were under the age of 15 years, then it could not be established that he either “meant to” conscript, enlist and use these children under the age of 15 to participate actively in hostilities, or that he was aware that this consequence “will occur in the ordinary course of events”. More on the issue of ICC crimes that require lesser forms of *mens rea* than the general mental element established under Article 30 RS, see G. Werle and F. Jessberger, *Principles of International Criminal Law* (3rd edn, Oxford: Oxford UP, 2014), at 187-188.

198 *Lubanga* Decision on the Confirmation of Charges, *supra* n 2, para 355.

199 *Ibid.*, para 359.

200 *Bemba* Decision on the Confirmation of Charges, *supra* n 83, para 351; *Banda and Jerbo* Decision on the Confirmation of Charges, *supra* n 83, paras 150-151; *Abu Garda* Decision on the Confirmation of Charges, *supra* n 83, para 161; *Gbagbo* Decision on the Confirmation of Charges, *supra* n 91, paras 230, 236; *Lubanga* Trial Judgment, *supra* n 83, paras 1013, 1018.

201 *Lubanga* Decision on the Confirmation of Charges, *supra* n 2, para 353. (*emphasis added*)

202 S. Finnin, *Elements of Accessorial Modes of Liability: Article 25 (3)(b) and (c) of the Rome Statute of the International Criminal Court* (Leiden: Martinus Nijhoff, 2012), at 157-158; Bohlander, *supra* n 5, at 64; Werle and Jessberger, *supra* n 197, at 180-181; K. Ambos, ‘General Principles of Criminal Law in the Rome Statute’, 10 *Criminal Law Forum* (1999), at 21-22. B. Goy, ‘Individual Criminal Responsibility before the International Criminal Court’, 12 *International Criminal Law Review* (2012), at 16; Ohlin, Van Slidregt and Weigend, *supra* n 16, at 738; Ohlin, *supra* n 119, at 332.

191 *Lubanga* Decision on the Confirmation of Charges, *supra* n 2, para 352. (*emphasis added*) Common law systems have labelled this form of *mens rea* as “oblique intent”. See *Bemba* Decision on the Confirmation of Charges, *supra* n 83, para 357 (fn 447).

192 *Lubanga* Decision on the Confirmation of Charges, *supra* n 2, para 352. (*emphasis added*)

193 *Ibid.*, para 353.

194 *Ibid.*, para 354.

195 Olásolo, *supra* n 4, at 281; J. Ohlin, ‘Co-Perpetration: German *Dogmatik* or German Invasion’, in C. Stanh (ed), *Law and Practice of the International Criminal Court* (Oxford: Oxford UP, 2015), at 533-534.

196 *Lubanga* Decision on the Confirmation of Charges, *supra* n 2, paras 349, 356.

as applicable in situations where the accused foresees and accepts the crime merely as a possible/probable consequence of his actions is the reason why many scholars had argued already at the time that this form of *dolus* is actually excluded from the Rome Statute.²⁰³ Thus, it is hardly a surprise that the *Lubanga* Pre-Trial Chamber's findings on this point led to much debate and revision in the Court's subsequent judgments and decisions.

The question whether Article 30 RS encompasses *dolus eventualis* – and, respectively, whether this form of intent suffices for the first subjective element of co-perpetration based on joint control – erupted already in the first post-*Lubanga* jurisprudence: the *Katanga and Chui* Decision on the Confirmation of Charges.²⁰⁴ The Defence submitted that this form of *dolus* is excluded from the Rome Statute and requested the Pre-Trial Chamber to reject the reliance on this notion for the construction of co-perpetration liability.²⁰⁵ The issue divided the judges and although the Majority upheld the disputed findings reached in *Lubanga*, it did not substantiate its decision to do so, arguing that this was unnecessary in the present case since the concept of *dolus eventualis* was not used to decide on the charges against the two accused.²⁰⁶ No signs of such evasiveness were shown in the Court's next-in-turn *Bemba* Decision on the Confirmation of Charges,²⁰⁷ where Pre-Trial Chamber II directly set on the review Article 30 RS in order to determine the exact scope of the first mental element of co-perpetration based on joint control. The judges first clarified that the notion of *dolus* requires the existence of both a cognitive and a volitional element and that, depending on the strength of the latter *vis-à-vis* the former, three distinct forms of *dolus* are generally recognized in legal theory: *dolus directus* in the first and in the second degree, and *dolus eventualis*.²⁰⁸ The Chamber further affirmed that the first two variants are indeed embraced in Article 30(2) and (3) RS. It explained that the chief difference between them is that in *dolus directus* in the first degree “the volitional element is prevalent as the suspect

purposefully wills or desires to attain the prohibited result”,²⁰⁹ while for the notion of *dolus directus* in the second degree the opposite is true in that the accused does not desire – he may even despise – the criminal consequence, yet acts with the knowledge that the crime in question “will be the *almost inevitable* outcome of his acts or omissions”.²¹⁰ Notably, the Pre-Trial Chamber expressly found that this latter form of intent is embraced in the second part of Article 30(2)(b) RS via its reference to the suspect's awareness that a consequence ‘will occur in the ordinary course of events’. It reasoned that this phrase establishes a standard of “virtual certainty”/“practical certainty” that the said consequence will occur,²¹¹ and held that this is the lowest standard of foreseeability that Article 30 RS accommodates for.²¹²

The latter findings led the *Bemba* judges to conclude that the *dolus eventualis* concept is excluded from ICC law. They held that this form of intent is based on the lower standard of “foreseeing the occurrence of the undesired consequence as a *mere likelihood or possibility*” and observed that if the drafters of Article 30 RS wanted to endorse it, they would have:

used the words “may occur” or “might occur in the ordinary course of events” to convey mere eventuality or possibility, rather than near inevitability or virtual certainty.²¹³

To further support this conclusion, the judges also researched the *travaux préparatoires* of the Rome Statute and pointed out that *dolus eventualis* was proposed in early drafts of Article 30, but was then abandoned in the later stages of negotiations, thus indicating that the drafters did not mean to include this form of *mens rea* in the ICC law.²¹⁴ On the basis of all the above, the *Bemba* Pre-Trial Chamber confirmed that the first subjective element of co-perpetration based on joint control over the crime requires that the accused must “fulfil the subjective elements of the crimes charged”,²¹⁵ but revised the relevant findings made in *Lubanga* and concluded that, as a general rule, this requirement is satisfied when the accused “was at least aware that, in the ordinary course of events, the occurrence of such crimes was a virtually certain consequence of the implementation of the common plan.”²¹⁶

²⁰³ Ambos, *supra* n 202, at 21-22; G. Werle and F. Jessberger, “Unless Otherwise Provided’: Article 30 of the ICC Statute and the Mental Element of Crimes under International Criminal Law”, 3 *Journal of International Criminal Justice* (2005), at 53; O. Triffterer, ‘The New International Criminal Law: Its General Principles Establishing Individual Criminal Responsibility’ in K. Koufa (ed), *The New International Criminal Law* (Athens: Sakkoulas, 2003), at 706.

²⁰⁴ *Katanga and Chui* Decision on the Confirmation of Charges, *supra* n 83.

²⁰⁵ *Ibid.*, para 476.

²⁰⁶ *Ibid.*, para 251 (fn 329). The *Katanga and Chui* Decision on the Confirmation of Charges states that “[t]he definition of the concept of *dolus directus* of the first and second degrees, and of *dolus eventualis*, can be found in [the *Lubanga* Decision on the Confirmation of Charges, para. 351]. In the *Lubanga* Decision, the Chamber found that article 30(1) of the Statute encompasses also *dolus eventualis*. The majority of the Chamber endorses this previous finding. For the purpose of the present charges in the present Decision, it is not necessary to determine whether situations of *dolus eventualis* could also be covered by this offence, since, as shown later, there are substantial grounds to believe that the crimes were committed with *dolus directus*. Judge Anita Ušacka disagrees with the position of the majority with respect to the application of *dolus eventualis*. Judge Anita Ušacka finds that, at this time, it is unnecessary for her to provide reasons, since the issue of whether article 30 of the Statute also encompasses cases of *dolus eventualis* is not addressed in the present Decision.”

²⁰⁷ *Bemba* Decision on the Confirmation of Charges, *supra* n 83.

²⁰⁸ *Ibid.*, para 357.

²⁰⁹ *Ibid.*, para 358. (*emphasis added*)

²¹⁰ *Ibid.*, para 359. (*emphasis added*)

²¹¹ *Ibid.*, para 362.

²¹² *Ibid.*, para 360.

²¹³ *Ibid.*, para 363.

²¹⁴ *Ibid.*, paras 365-368.

²¹⁵ *Ibid.*, para 351.

²¹⁶ *Ibid.*, para 369. The judges still clarified that if the definition of a crime in the Rome Statute or the Elements of Crimes expressly establishes a higher (*e.g. dolus specialis*) or lower (*e.g. negligence*) form of intent, then this becomes the applicable mental element that the accused must fulfil under the first subjective requirement of co-perpetration based on joint control. *Ibid.*, para 354.

The *Bemba* Pre-Trial Chamber's analysis of Article 30 RS has been met with approval by many in the commentariat²¹⁷ and its merits need not be reviewed here. For the purposes of the present chapter, what matters is that the above rejection of concept of *dolus eventualis* and the respective revision of the first subjective element of co-perpetration based on joint control was endorsed in the subsequent ICC practice.²¹⁸ Thus, to sum up all the above-said, it is now a settled matter in the Court's case law that the first subjective element of co-perpetration based on joint control – *i.e.* that “the accused fulfils the subjective elements of the charged crimes” – is satisfied if the accused:

- i) knows that his/her participation in the common plan/agreement will cause the charged crime and consciously carries out this conduct with the purposeful intent to bring about the commission of the charged crime; *or*
- ii) consciously participates in the common plan without the concrete intent to commit the said crime but with awareness that this consequence will occur in the ordinary course of events.

In the latter case, it has to be shown that the crime was a ‘virtually certain’/‘almost inevitable’ consequence of the implementation of the common plan and the accused was aware of this.²¹⁹ There is no talk of ‘risk’, or of ‘possibility/probability’, that the crime ‘may’ occur. This point was recently made by the *Lubanga* Appeals Chamber when noting an error made by the Trial Chamber to this end. Specifically, the problem was that although the trial judges held that “the notion of *dolus eventualis*, along with the concept of recklessness, was deliberately excluded from the framework of the [Rome] Statute”,²²⁰ they also held that the phrase ‘will occur in the ordinary course of events’ demands a “prognosis [that] involves consideration of the concepts of ‘possibility’ and ‘probability’, which are inherent to the notions of ‘risk’ and ‘danger’.”²²¹ The Appeals Chamber reasoned that the Trial Chamber's language here

217 K. ‘Critical Issues in the *Bemba* Confirmation Decision.’, 22 *Leiden Journal of International Law* (2009), at 718; W. Schabas, *The International Criminal Court: A Commentary on the Rome Statute* (Oxford: Oxford UP), 2010, at 467; Werle and Jessberger, *supra* n 197, at 182 (agreeing with the *Bemba* Pre-Trial Chamber's analysis of the plain language of Article 30 RS and criticizing that of the *Lubanga* Pre-Trial Chamber, yet ultimately stating that a different interpretation ought to be adopted that would still allow the ICC to rely on the concept of *dolus eventualis*); Ambos, *supra* 135, at 149; Van Sliedregt, *supra* n 190, at 47-48; Cryer *et al.*, *supra* n 147, at 383. However, for a view challenging the soundness of the conclusions on *dolus eventualis* reached by the *Bemba* Pre-Trial Chamber, see Wirth, *supra* n 118, at 990.

218 *Lubanga* Trial Judgment, *supra* n 83, para 1011; *Katanga* Trial Judgment, *supra* n 83, paras 774-776; *Lubanga* Appeal Judgment, *supra* n 21, paras 447-449; *Banda and Jerbo* Decision on the Confirmation of Charges, *supra* n 83, para 153; *Muthaura, Kenyatta and Ali* Decision on the Confirmation of Charges, *supra* n 83, para 411; *Ruto, Kosgey and Sang* Decision on the Confirmation of Charges, *supra* n 83, paras 335-336; *Ntaganda* Decision on the Confirmation of Charges, *supra* n 83, paras 123-126; *Gbagbo* Decision on the Confirmation of Charges, *supra* n 91, paras 235-236.

219 *Muthaura, Kenyatta and Ali* Decision on the Confirmation of Charges, *supra* n 83, para 411; *Ntaganda* Decision on the Confirmation of Charges, *supra* n 83, para 124.

220 *Lubanga* Trial Judgment, *supra* n 83, para 1011.

221 *Ibid.*, para 1012. In view of this language, Ohlin has contended that the *Lubanga* Trial Chamber rejected *dolus eventualis* “in name only”, but in fact “smuggled *dolus eventualis* through the back door, by strangely concluding that elements of risk, danger, probability, and possibility were all inherent in the phrase ‘in the ordinary course of events’ from Article 30.” Ohlin, *supra* n 119, at 332. Judge Van Den Wyngaert offered a similar argument in her Concurring Opinion to the *Chui* Trial Judgment. See *Chui* Trial Judgment, *supra* n 132, Concurring Opinion of Judge Christine Van den Wyngaert, para 37.

was confusing since it still seemed to refer to the *dolus eventualis* concept,²²² and therefore strongly asserted that the second parts of Article 30(2)(b) and Article 30(3) RS:

do not refer to the notion of “risk”, but employ the term of occurrence of a consequence “in the ordinary course of events”. The Appeals Chamber considers that the words “[a consequence] will occur” refer to future events. The verb ‘occur’ is used with the modal verb ‘will’, and not with ‘may’ or ‘could’. Therefore, this phrase conveys, as does the French version, certainty about the future occurrence. However, absolute certainty about a future occurrence can never exist; therefore the Appeals Chamber considers that the standard for the foreseeability of events is *virtual* certainty.²²³

Having affirmed *dolus directus* in the first and second degree as the general mental element of all crimes in the Rome Statute, the ICC Chambers have also consistently relied on the “unless otherwise provided” clause in Article 30(1) RS to require a higher (*dolus specialis*) or a lower (*e.g.* negligence) form of *mens rea* for co-perpetration liability in cases where the definition of the charged crime(s) expressly requires such a standard.²²⁴

5.4.2.2. *Mutual awareness and acceptance that the charged crimes will result from the implementation of the common plan*

The ‘mutual awareness and acceptance’ element has aptly been described in academia as “the ‘subjective counterpart’ of the common plan-element” of the doctrine of co-perpetration based on joint control.²²⁵ As was explained earlier in the research on JCE liability, there could be no talk of co-perpetration, whichever theory is used to construe this notion, in cases where two or more persons – independently and without any kind of co-ordination among each other – form an otherwise identical intent to commit a particular crime: there always has to be some sort of unity and reciprocity in their intentions in order to speak of joint perpetration.²²⁶ The *Lubanga* Pre-Trial Chamber was clearly mindful of this when it held that:

it is precisely the co-perpetrators’ mutual awareness and acceptance of [the criminal] result which justifies (a) that the contributions made by the others may be attributed to each of them, including the suspect, and (b) that they be held criminally responsible as principals to the whole crime.²²⁷

222 *Lubanga* Appeal Judgment, *supra* n 21, para 448.

223 *Ibid.*, para 447.

224 For case law where the judges applied *dolus specialis* in the context of (indirect) co-perpetration liability, see *Ruto, Kosgey and Sang* Decision on the Confirmation of Charges, *supra* n 83, para 347; *Ntaganda* Decision on the Confirmation of Charges, *supra* n 83, para 126; *Gbagbo* Decision on the Confirmation of Charges, *supra* n 91, para 236. For case law where the ICC judges have used ‘should have known’/negligence standard to ascribe co-perpetration liability to the accused, see *Ntaganda* Decision on the Confirmation of Charges, *supra* n 83, para 133.

225 M. Cupido, *Facts Matter: A Study into the Casuistry of Substantive International Criminal Law* (Den Haag: Eleven International, 2015), at 85.

226 See Chapter 3, Section 3.4.2.1. (text accompanying notes 244-247)

227 *Lubanga* Decision on the Confirmation of Charges, *supra* n 2, para 362.

The centrality of this element to the theory of co-perpetration based on joint control was, thus, squarely stated by the judges, yet their actual elaboration on its substance suffered from much the same flaws as those witnessed in their analysis of the theory's first subjective requirement. In particular, the Chamber found that the 'mutual awareness and acceptance' element requires that:

[t]he suspect and the other co-perpetrators (a) must all be mutually aware of the risk that implementing the common plan *may result* in the realization of the objective elements of the crime, and (b) must all mutually accept such a result by reconciling themselves with it or consenting to it.²²⁸

In a language that mirrored their analysis on the first subjective element, the judges explained how the co-perpetrators' mutual acceptance of causing the commission of the charged crime is established differently, depending on whether they were aware that the risk of the commission of the crime was high (*viz.* a "substantial risk"),²²⁹ or low.²³⁰

The *Lubanga* Pre-Trial Chamber's findings on the 'mutual awareness and acceptance' element thus incorporated the controversial *dolus eventualis* concept as the basic standard also for the second subjective element of co-perpetration based on joint control. Indeed, the judges used the expression "may result" to define the level of awareness that the co-perpetrators must have of the likelihood that the common plan could result in the commission of crimes. Olásolo observed to this end that, pursuant to these findings of the *Lubanga* judges, the concept of co-perpetration based on joint control was effectively construed to require that the co-perpetrators have to "share a *dolus eventualis* with regard to the realization of the objective elements of the crimes as a result of implementing the common plan."²³¹ Although this is certainly an apposite reading of how the *Lubanga* Decision on the Confirmation of Charges viewed the law on joint perpetration, it has to be emphasized that this is *not* how co-perpetration based on joint control ultimately came to be defined in the successive ICC jurisprudence. In particular, following the *Bemba* Trial Chamber's analysis of Article 30 RS and the ensuing revision of the theory's first subjective element,²³² the 'mutual awareness and acceptance' requirement was amended, too, and has ever since been consistently formulated to state that:

the suspect and the other co-perpetrators must be mutually aware and mutually accept that implementing the common plan *will result* in the fulfilment of the objective elements of the crimes.²³³

228 *Ibid.*, para 361. (*emphasis added*)

229 *Ibid.*, para 363. See *supra* Section 5.4.2.1. (text accompanying note 193)

230 *Ibid.*, para 364. See *supra* Section 5.4.2.1. (text accompanying note 194)

231 Olásolo, *supra* n 4, at 283.

232 See *supra* Section 5.4.2.1. (text accompanying notes 207-224)

233 *Banda and Jerbo* Decision on the Confirmation of Charges, *supra* n 83, paras 150, 159. (*emphasis added*) See also *Ruto, Kosgey and Sang* Decision on the Confirmation of Charges, *supra* n 83, para 292; *Muthaura, Kenyatta and Ali* Decision on the Confirmation of Charges, *supra* n 83, para 297; *Ntaganda* Decision on the Confirmation of Charges, *supra* n 83, para 121; *Gbagbo* Decision on the Confirmation of Charges, *supra* n 91, para 238.

The only post-*Bemba* jurisprudence in which the 'may result', rather than the 'will result', test appeared in the wording of the 'mutual awareness and acceptance' element is the *Abu Garda* Decision on the Confirmation of Charges, which is more likely a drafting error, rather than an attempt to reinstate the *dolus eventualis* notion.²³⁴ Thus, it now seems to be firmly established in the ICC's case law that the second mental element of co-perpetration based on joint control requires, as a general rule, that the co-perpetrators share a *dolus directus* in the second degree in relation to objective elements of the crime resulting from the execution of the common plan between them. Naturally, this formulation also covers situations where the accused and his co-perpetrators in fact share a direct intent (*i.e.* *dolus directus* in the first degree) to commit these crimes. To this end, a more thorough elaboration of this element – expressly recognizing these two possible scenarios – was offered both in *Bemba* and in *Katanga and Chui*, where the Pre-Trial Chambers held that the element of 'mutual awareness and acceptance' requires:

the (1) co-perpetrators' mutual awareness that implementing the common plan will result in the fulfillment of the material elements of the crimes; and yet (2) they carry out their actions with the purposeful will (intent) to bring about the material elements of the crimes, or are aware that in the ordinary course of events, the fulfillment of the material elements will be a virtually certain consequence of their actions.²³⁵

Given that the first subjective element of co-perpetration based on joint control over the crime – *viz.* the suspect 'fulfils the subjective elements of the charged crimes' – has been affirmed to generally require, at the minimum, a *dolus directus* in the second degree, it is only logical that this form of *dolus* is then also reflected in the second subjective element. After all, in essence, the latter simply requires that the accused's *mens rea* stated under the first mental requirement was mutual/common/shared with the other co-perpetrators in the common plan.

Although the *Lubanga* Pre-Trial Chamber did not make an express finding on whether the above contours of the 'mutual awareness and acceptance' element become stricter in cases concerning a *dolus specialis* crime, it seems logical that the findings made on this point in the analysis of the first mental element of co-perpetration also apply *mutatis mutandis* here.²³⁶ Put simply, if the common plan resulted in the crime of *e.g.* genocide,

234 *Abu Garda* Decision on the Confirmation of Charges, *supra* n 83, para 161. The Pre-Trial Chamber never actually applied the subjective elements of co-perpetration in this case. It found this to be unnecessary due to the fact that the objective 'common plan or agreement' element was not satisfied and the charges against the accused were not confirmed. *Ibid.*, paras 234, 236. Notably, however, when stating the law on the subjective elements of co-perpetration, the judges cited as authorities the *Lubanga*, the *Katanga and Chui* and the *Bemba* confirmation of charges decisions, the latter two of which clearly eschewed the 'may result' standard and used the 'will result' one when wording the 'mutual awareness and acceptance' requirement. *Ibid.*, para 161 (fn 248).

235 *Bemba* Decision on the Confirmation of Charges, *supra* n 83, para 370. See also *Katanga and Chui* Decision on the Confirmation of Charges, *supra* n 83, para 533.

236 See *supra* Section 5.4.2.1. (text accompanying notes 196-197)

the Prosecution will have to prove that the accused and the other co-perpetrators mutually possessed the required genocidal intent, rather than that they were merely mutually aware that the execution of their plan would result in the commission of genocide. This reasoning is, however, contradicted by one specific finding that the *Lubanga* Pre-Trial Chamber made when discussing the ‘mutual awareness and acceptance’ requirement. In particular, the judges found, in contrast to their earlier conclusion on the first subjective element, that:

although, in principle, the war crime of enlisting or conscripting children under the age of fifteen years or using them to participate actively in hostilities requires only a showing that the suspect “should have known” that the victims were under the age of fifteen years, the Chamber considers that this subjective element *is not applicable in the instant case*. Indeed, the theory of co-perpetration based on joint control over the crime requires that all the co-perpetrators, including the suspect, be mutually aware of, and mutually accept, the likelihood that implementing the common plan would result in the realization of the objective elements of the crime.²³⁷

In the author’s view, this conclusion makes little sense when viewed in light of the Chamber’s preceding analysis of the “unless otherwise provided” phrase in Article 30 RS and the finding that, in the present case, the ‘should have known’ standard *could be* (exceptionally) applied to satisfy the first mental requirement of co-perpetration based on joint control.²³⁸ Accepting that a negligence standard may, depending on the charged crime, fulfil the first subjective element of co-perpetration – but not the second one – is tantamount to saying that an accused who was negligent in relation to this crime could *never* be its co-perpetrator: *i.e.* irrespective of whether the crime’s definition endorsed such a low *mens rea* standard. It will be a *non sequitur* to first find that an accused acted negligently towards such a crime, thus satisfying the first subjective element of co-perpetration, and then assert that the accused and the other co-perpetrators were mutually aware and accepted that the crime will be committed in the execution of the common plan. Either both mental elements should be able to adopt a lower *mens rea* standard stated in the crime’s definition, or none of them should. Post-*Lubanga* jurisprudence on co-perpetration liability has not expressly addressed this issue yet. Most decisions on confirmation of charges have confined their findings on the ‘mutual awareness and acceptance’ requirement to a single paragraph that, in a rather cursory language, simply refers to the preceding conclusions on the accused’s *mens*

rea under the first subjective element.²³⁹ This approach shows the overlap and congruence that exists between the first two mental elements of co-perpetration based on joint control, but it also makes proving the *mutuality* of the accused’s and the other co-perpetrators’ intentions a rather superfluous task.²⁴⁰

Having examined the scope of the first two subjective requirements of co-perpetration based on joint control, it can now be shown that they create another capital point of distinction between this theory and the JCE concept. It will be recalled that in order to incur JCE liability, the accused must always possess a direct intent/*dolus directus* in the first degree to commit the core crimes of the common plan, design or purpose: an intent that he shares with the other co-perpetrator(s) in the enterprise.²⁴¹ This is the case even if the legal definition of the said crime contains a lower *mens rea* standard such as recklessness: the doctrine of JCE still requires that the accused specifically intended to commit the crime that is the aim of the common design.²⁴² This strong emphasis on the accused’s purposeful will/desire to realize the objective elements of the concerted crime is what the JCE doctrine brings to the fore to rationalize the attribution of co-perpetration responsibility to an accused who otherwise did not physically perpetrate the crimes in question. By contrast, under the theory of co-perpetration based on joint control, the accused does not have to want/mean the commission of the delict: in truth, he may even detest its occurrence. It suffices to demonstrate that he was aware that the crime was virtually certain to result from the execution of the common plan and accepted this (undesired) consequence: a *dolus* that he must share with the other co-perpetrators in that plan.²⁴³ The difference becomes even more pronounced when the suspect is charged under the joint control theory with a crime that requires a lesser category of *means rea* than this generally prescribed *dolus directus* in the second degree. Then the theory is adapted to endorse this lower standard of *e.g.* negligence or recklessness, while the JCE concept would still require a direct intent to qualify the accused as a co-perpetrator of this core crime of the common plan.

²³⁹ *Ruto, Kosgey and Sang* Decision on the Confirmation of Charges, *supra* n 83, para 348; *Muthaura, Kenyatta and Ali* Decision on the Confirmation of Charges, *supra* n 83, para 418; *Ntaganda* Decision on the Confirmation of Charges, *supra* n 83, para 104; *Banda and Jerbo* Decision on the Confirmation of Charges, *supra* n 83, para 159.

²⁴⁰ In fact, in *Lubanga*, Trial Chamber I did not even treat the ‘mutual awareness and acceptance’ requirement as separate from the ‘accused fulfils the subjective elements of the charged crime’ element: rather, it merged them into one requirement, stating that the Prosecution must prove that “the accused and at least one other perpetrator meant to conscript, enlist or use children under the age of 15 to participate actively in hostilities or they were aware that in implementing their common plan this consequence ‘will occur in the ordinary course of events’”. *Lubanga* Trial Judgment, *supra* n 83, para 1013 (and para 1018). Cupido has rightly observed that this conflation of the first two subjective elements of co-perpetration based on joint control practically neglects the requirement of *mutual* awareness and establishes that the accused’s awareness alone is sufficient to this end. Cupido, *supra* 132, at 144.

²⁴¹ See Chapter 3, Section 3.4.2.1. See also A. Cassese (ed), *The Oxford Companion to International Criminal Justice* (Oxford: Oxford UP, 2009), at 395; M. Drumbl, ‘The Curious Criminality of Mass Atrocity: Diverse Actors, Multiple Truths, and Plural Responses’, in Van Sliedregt and S. Vasiliev, *supra* n 132, at 87.

²⁴² Olásolo, *supra* n 4, at 283.

²⁴³ See *supra* text accompanying notes 207-223, 232-235.

²³⁷ *Lubanga* Decision on the Confirmation of Charges, *supra* n 2, para 365. (*emphasis added*)

²³⁸ *Ibid.*, para 359. See *supra* Section 5.4.2.1. (text accompanying notes 196-199) Note that although the judges stated the applicable law on co-perpetration in these terms, they did not actually apply this negligence standard to convict the Accused but held that *Lubanga* was “at the very least, aware that, in the ordinary course of events, the implementation of the common plan would involve” the commission of the war crimes of enlisting, conscripting and using children under the age of 15 in hostilities. *Ibid.*, para. 404.

The above comparative analysis and the conclusion that the concept of JCE establishes a more demanding subjective requirement than co-perpetration based on joint control does not take into account the mental element of the ‘extended’ JCE form: *viz.* the *dolus eventualis* that this theory requires for ascribing liability for ‘incidental’ crimes of the common purpose.²⁴⁴ In other words, the above analysis compares the mental element that the doctrine of JCE requires in relation to the ‘core’ crimes of the enterprise,²⁴⁵ *vis-à-vis* the subjective requirements of the notion of co-perpetration based on joint control. Since the latter has come to generally require a *dolus directus* in the second degree for all crimes of the common plan or agreement, without distinguishing between core and incidental ones, some scholars have pointed out that it in fact imposes a stricter mental requirement than the *dolus eventualis* standard adopted in JCE III.²⁴⁶ This is certainly a valid point: when the JCE doctrine is considered in its totality – *i.e.* together with the expansive, third variant – it is true that this construct allows casting a wider net of co-perpetration liability by allowing to also impute to the accused responsibility for crimes which he merely foresaw as a *possible* consequence of the implementation of the common plan:²⁴⁷ a situation that, following the above-described revision of the original *Lubanga* Decision on the Confirmation of Charges, is rejected under the theory of co-perpetration based on joint control over the crime.²⁴⁸ This notwithstanding, it must be kept in mind that even when applying JCE III liability, the accused is still required to share a *dolus directus* in the first degree in relation to the core crimes of the enterprise: a stringent requirement that surpasses the mental elements of co-perpetration based on joint control. Moreover, it ought to be recalled that the standard of *dolus directus* in the second degree which the latter theory has come to adopt for its subjective requirements is applicable as a general rule that can be deviated from when the charged crime of the common plan specifically establishes a lower *mens rea* element: a dependency, which is unknown to the JCE framework and which could, for certain such crimes, make the subjective elements of co-perpetration based on joint control even more relaxed than the *dolus eventualis* standard used in JCE III liability.

5.4.2.3. *The accused is aware of the factual circumstances enabling him to jointly control the crime*

Finally, the *Lubanga* Pre-Trial Chamber held that the last, third subjective requirement of the theory of co-perpetration based on joint control requires the accused to be aware of the factual circumstances which enable him to exercise joint control over the crime.²⁴⁹ Just

as the ‘mutual awareness and acceptance’ element has been portrayed as the “subjective counterpart” of the ‘common plan/agreement’ element,²⁵⁰ so could one argue that this ‘awareness of joint control’ requirement constitutes the subjective analogue of the ‘essential contribution’ element. This is quite evident from the judges’ explanation that it is satisfied when the accused is:

aware (i) that his or her role is essential to the implementation of the common plan, and hence in the commission of the crime, and (ii) that he or she can – by reason of the essential nature of his or her task – frustrate the implementation of the common plan, and hence the commission of the crime, by refusing to perform the task assigned to him or her.²⁵¹

Thus, the concept of co-perpetration based on joint control over the crime requires not only an objective finding that the accused possessed the power to frustrate the commission of the said crime, but also that he was subjectively aware that he possessed such power.²⁵² The reasoning here seems to be that an accused who understands that he is indispensable for the commission of the crime, knows that he has the material ability to prevent it and still offers his support for its execution, possesses the moral blameworthiness of a (joint) principal to that crime.

This third mental element of co-perpetration based on joint control has been uniformly affirmed in the ICC jurisprudence.²⁵³ It is, however, quite remarkable how the chambers have applied this element in practice. In particular, the approach that they have generally developed when addressing this requirement of the theory has been to highlight – usually within a single paragraph that makes perfunctory references to previous findings – i) the leadership/dominant position of the accused, and ii) his essential contribution to the alleged common plan, in order to infer that he was aware of the factual circumstances enabling him to jointly control the said crime.²⁵⁴ Thus, for instance, in *Banda and Jerbo*, the Pre-Trial Chamber offered the following analysis to find that this third subjective element of co-perpetration based on joint control was satisfied:

²⁵⁰ Cupido, *supra* n 225, at 85.

²⁵¹ *Lubanga* Decision on the Confirmation of Charges, *supra* n 2, para 367.

²⁵² Jain, *supra* n 4, at 145.

²⁵³ *Katanga* Trial Judgment, *supra* n 83, para 1396; *Lubanga* Trial Judgment, *supra* n 83, paras 1013, 1018; *Bemba* Decision on the Confirmation of Charges, *supra* n 83, para 371; *Katanga and Chui* Decision on the Confirmation of Charges, *supra* n 83, paras 538-539; *Abu Garda* Decision on the Confirmation of Charges, *supra* n 83, para 161; *Banda and Jerbo* Decision on the Confirmation of Charges, *supra* n 83, para 160; *Ruto, Kosgey and Sang* Decision on the Confirmation of Charges, *supra* n 83, para 292; *Muthaura, Kenyatta and Ali* Decision on the Confirmation of Charges, *supra* n 83, paras 297, 410; *Ntaganda* Decision on the Confirmation of Charges, *supra* n 83, para 121; *Gbagbo* Decision on the Confirmation of Charges, *supra* n 91, para 230.

²⁵⁴ *Banda and Jerbo* Decision on the Confirmation of Charges, *supra* n 83, para 161; *Ntaganda* Decision on the Confirmation of Charges, *supra* n 83, para 135; *Lubanga* Decision on the Confirmation of Charges, *supra* n 2, para 409; *Ruto, Kosgey and Sang* Decision on the Confirmation of Charges, *supra* n 83, para 348; *Muthaura, Kenyatta and Ali* Decision on the Confirmation of Charges, *supra* n 83, para 419.

²⁴⁴ See Chapter 3, Section 3.4.2.3.

²⁴⁵ See Chapter 3, Section 3.4.2.1. and Section 3.4.2.2.

²⁴⁶ Meisenberg, *supra* n 118, at 87; K. Heller, ‘JCE III, the Rome Statute, and Bashir’, Web Blog post: *Opinio Juris*, 11 February 2009, <http://opiniojuris.org/2009/02/11/jce-iii-and-the-rome-statute/> [accessed 5 March 2016]; Werle and Jessberger, *supra* n 197, at 206-207; Ambos, *supra* n 4, at 172-173.

²⁴⁷ See Chapter 3, Section 3.4.2.3.

²⁴⁸ See *supra* Section 5.4.2.1. and Section 5.4.2.2.

²⁴⁹ *Lubanga* Decision on the Confirmation of Charges, *supra* n 2, para 366.

The Chamber recalls its findings regarding the suspects' positions as leaders of the troops involved in the attack on the MGS Haskanita, the suspects' essential contributions to the plan and execution of the attack and their personal participation in the attack. Having regard to their prominent role in the attack, the Chamber finds that there is sufficient evidence to establish substantial grounds to believe that Abdallah Banda and Saleh Jerbo were aware both that their role in the commission of the crimes charged was essential, and that any of them could frustrate the implementation of the common plan, in the way the crime was committed, by refusing to perform the tasks assigned to them in the attack on the MGS Haskanita.²⁵⁵

No new factual findings are made in these particular sections and it seems rather unlikely that, having once found that the defendant was a key figure to the said common plan, who provided an indispensable contribution to its implementation, the judges will ever conclude that he was unaware of his ability to jointly control/frustrate the commission of the said crimes. Indeed, in the ICC jurisprudence thus far, the drafting of the paragraph(s) containing the analysis on this last subjective requirement of co-perpetration based on joint control has been quite formalistic and has never raised substantive discussion or litigation. Therefore, it is perhaps unsurprising that even though it expressly confirmed the third mental element in its statement of the law on co-perpetration based on joint control over the crime,²⁵⁶ the *Lubanga* Trial Chamber actually omitted to apply it to the facts of the case when convicting the Accused pursuant to this mode of liability.²⁵⁷ The Court would do well to further explain in its future case law the importance of the 'awareness of joint control' requirement and its interplay with the other elements of co-perpetration based on joint control.

5.5. Conclusion

The international jurisprudential lineage of the theory of co-perpetration based on joint control over the crime might not be as venerable as that of the JCE doctrine but it has certainly proven to be just as dynamic and fast-evolving. What started as a scholarly work in German academia in the 1960s was, nearly half a century later, endorsed by the International Criminal Court and cultivated into a new, alternative approach to distinguishing between principal and accessory liability. Importantly, while Roxin's '*Tatherrschaftslehre*' provided the Court with a blueprint for its construction of the modes of liability listed under Article 25(3)(a) RS, the *Lubanga* Pre-Trial Chamber and the later ICC Pre-Trial, Trial and Appeals Chambers have given their own, unique interpretation of the 'control over the act' concept, at times even consciously departing from the original views of the theory's

prominent author.²⁵⁸ It is for this reason that academics have presently come to distinguish between "Roxin's Control Theory" and "the ICC's Control Theory".²⁵⁹

The International Criminal Court's case law on the notion of co-perpetration based on joint control is still in its nascence and it is expected that the precise legal contours of this type of criminal responsibility will undergo a further process of refinement and revision that might very well outdate some of the analysis contained in this chapter. After all, as was shown in the above research, the original legal framework that was construed for this notion in the *Lubanga* Decision on the Confirmation of Charges has already been overhauled in several aspects, most notably in the established subjective requirements of this theory.²⁶⁰ In other areas, the findings of the *Lubanga* Pre-Trial Chamber have been additionally adjusted,²⁶¹ or have generated little subsequent debate and are yet to be fully explored.²⁶² In view of these developments that have taken place in the nearly ten years of post-*Lubanga* ICC jurisprudence, the present chapter has attempted to provide an exhaustive and up-to-date account of all the constituent (objective and subjective) elements of co-perpetration based on joint control over the crime. In analyzing the scope of each one of them and illustrating their application in case law, it has also drawn some important parallels and comparisons with the joint criminal enterprise theory, which can help us to better understand the core differences between these two theories of co-perpetration. It is now left for the next chapter of this book to review the purported legal basis and merits for the use of the notion of co-perpetration based on joint control over the crime in ICC proceedings.

²⁵⁸ See *supra* Section 5.4.1.2. (text accompanying notes 155-163)

²⁵⁹ Ohlin, *supra* n 119, at 326-328.

²⁶⁰ For the rejection of the *dolus eventualis* notion in the *Bemba* Decision on the Confirmation of Charges and the corresponding revision of the first and second subjective requirements of co-perpetration based on joint control over the crime in the subsequent ICC case law, see *supra* Section 5.4.2.1. and Section 5.4.2.2.

²⁶¹ See, for instance, the further elaboration on the nature of the essential contribution requirement provided by the *Katanga and Chui* Pre-Trial Chamber and the insertion of indirect contributions in the legal framework of co-perpetration, *supra* Section 5.4.1.2. (text accompanying notes 164-175)

²⁶² See, for instance, the discussion on the third subjective requirement of co-perpetration based on joint control, *supra* Section 5.4.2.3.

²⁵⁵ *Banda and Jerbo* Decision on the Confirmation of Charges, *supra* n 83, para 161.

²⁵⁶ *Lubanga* Trial Judgment, *supra* n 83, paras 1013, 1018.

²⁵⁷ *Ibid.*, paras 1346-1351. See also Ambos, *supra* 135, at 148.

Rethinking the Theory of Co-Perpetration Based on Joint Control over the Crime

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6.1. Introduction*

The theory of co-perpetration based on joint control over the crime has had a remarkably prolific career at the International Criminal Court following its endorsement in the *Lubanga* Decision on the Confirmation of Charges, yet its use has certainly not gone unchallenged by the international commentariat and, perhaps more surprisingly, by some of the Court's judges. The first "internal" rejection of the joint control theory came from Judge Adrian Fulford, who presided over the Trial Chamber that delivered the historic ICC's first verdict: the *Lubanga* Trial Judgment. Writing in a separate opinion, he raised several strong objections to the application of the control construction of co-perpetration responsibility in ICC proceedings and decided to distance himself from it.¹ He was soon after joined in this dissent by Judge Christine Van den Wyngaert, who wrote a separate opinion in the *Chui* Trial Judgment – the Court's second verdict – wherein she also called for the abandonment of the control over the crime approach to the modes of principal liability contained in Article 25(3)(a) RS.² She subsequently reiterated this position in another separate opinion that she submitted in the *Katanga* Trial Judgment.³ Thus, it transpired that the continuing controversy among scholars and practitioners about the proper definition of co-perpetration has also gained a foothold in the practice of the International Criminal Court.

The criticism of the (joint) control theory that has been raised both in academia and in the aforesaid separate opinions of Judge Fulford and Judge Van den Wyngaert may be categorized in two general rubrics: i) questioning the legal basis for applying the control over the crime doctrine in ICC proceedings, and ii) disputing the merits of the Court's definition of co-perpetration under this approach. The present chapter is structured accordingly: it consists of two main sections, one for each of these generic objections to the joint control doctrine, wherein the relevant conflicting arguments are first sketched out and then thoroughly assessed. The goal is thus to systematize the said criticism, offer additional research that further elaborates on it and highlights several other related concerns, and ultimately review the validity of the identified objections to the concept of co-perpetration based on joint control. The chapter will first examine the professed legal basis in ICC law for adopting this theory. To this end, it will focus on the sources of applicable law listed under Article 21(1) RS and analyse whether the control approach to criminal responsibility finds support in: i) the founding documents of the ICC, ii) customary international law, and iii) general principles of law derived from the laws and jurisprudence of domestic legal

* Large parts of the research contained in this chapter was published in L. Yanev and T. Kooijmans, 'Divided Minds in the Lubanga Trial Judgment: A Case against the Joint Control Theory', 13 *International Criminal Law Review* (2013): 789-828.

1 *The Prosecutor v. Lubanga* (ICC-01/04-01/06-2842), Judgment, Trial Chamber, 14 March 2012, Separate Opinion of Judge Adrian Fulford, paras 1-21.

2 *The Prosecutor v. Ngudjolo Chui* (ICC-01/04-02/12-3-tENG), Judgment, Trial Chamber, 18 December 2012, Concurring Opinion of Judge Christine Van den Wyngaert, paras 1-70.

3 *The Prosecutor v. Katanga* (ICC-01/04-01/07-3436-tENG), Judgment, Trial Chamber II, 7 March 2014, Minority Opinion of Judge Christine Van den Wyngaert, paras 277 *et seq.*

systems. It will be shown that misuse of legal terminology has caused much confusion in this field: a confusion that can be clarified by looking beyond mere legislative labels – e.g. ‘co-perpetration’, ‘joint liability’ or ‘joint commission’ – and assessing the actual underlying meaning given to such constructs, as witnessed in, for instance, judicial practice on their application. Following this, the second major section in this chapter will address the criticism that the ICC’s control theory is, contrary to what its proponents have contended, vague and impractical. The application of this doctrine in the ICC jurisprudence will be scrutinized to determine whether it, indeed, suffers from certain conceptual deficiencies that could cast doubt on the merits of its use. More generally, the extent to which the Court has actually remained true to the doctrinal underpinnings of the (joint) control theory when applying it would also be considered.

6.2. Reviewing the legal basis for the joint control theory

As already explained in Chapter 5, when the *Lubanga* Pre-Trial Chamber first adopted the theory of control over the crime – and the corresponding construction of co-perpetration responsibility – the judges engaged in a contextual reading of Article 25(3) RS to support their findings.⁴ In sum, they concluded that the Rome Statute rejects both the objective and the subjective approaches to co-perpetration under Article 25(3)(a) RS because both were seen as incompatible with the forms of criminal responsibility contained in other parts of the article. This finding led to the seemingly plausible conclusion that the Statute must then adopt the remaining control approach to liability.⁵ Importantly, the Rome Statute was the central, and in essence also the only, legal source that the Chamber used to endorse this doctrine. It did not proceed to analyze its status under international customary law, nor did it expressly attempt to confirm it is a general principle of law. To be sure, this was not strictly necessary, seeing as Article 21 RS identifies the latter two sources of law as subsidiary and tasks the Court to apply “[i]n the first place, this Statute, Elements of Crimes and its Rules of Procedure and Evidence”.⁶ When reviewing the legal basis for adopting the theory of co-perpetration based on joint control, the present section will, therefore, first focus on assessing the content of Article 25(3) Rome Statute and only then, if needed, proceed to

look into the other two sources of law identified above. For this reason, it is worth recalling here the relevant text of this provision:

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;
 - (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;⁷

6.2.1. Alleged basis in Article 25(3) RS

6.2.1.1. The ‘plain text’ of Article 25(3) RS: a textualist interpretation

In his separate opinion to the *Lubanga* Trial Judgment, Judge Fulford rejected the contention that the Rome Statute adopts the joint control doctrine after observing that, for a determination on co-perpetration liability “the plain text of Article 25(3) does not require proof that the crime would *not* have been committed absent the accused’s contribution (*viz.* that his role was essential).”⁸ On this basis, he submitted that the phrase ‘commits [...] jointly with another’ solely requires that the accused, following a joint understanding between him and at least one other person, contributed in a coordinated manner to the commission of a crime.⁹ According to Judge Fulford, once this is established, co-perpetration liability should then require placing an “appropriate emphasis on the accused’s state of mind”.¹⁰ He thus arrived at the conclusion that:

⁷ Article 25, ICC Rome Statute, *supra* n 6.

⁸ *Lubanga* Trial Judgment, *supra* n 1, Separate Opinion of Judge Adrian Fulford, para 15.

⁹ *Ibid.*, para 16.

¹⁰ *Ibid.*, para 17.

⁴ See Chapter 5, Section 5.3.2. (text accompanying notes 73-75)

⁵ *The Prosecutor v. Lubanga* (ICC-01/04-01/06-803-tEN), Decision on the Confirmation of Charges, Pre-Trial Chamber I, 29 January 2007, paras 333-338.

⁶ Article 21(1)(a), UN General Assembly, *Rome Statute of the International Criminal Court (last amended 2010)*, 17 July 1998, ISBN No. 92-9227-227-6, available at <<http://www.refworld.org/docid/3ae6b3a84.html>> [accessed 1 June 2016]. See Chapter 1, Section 1.5.1. (text accompanying notes 220-224) The ICC Chambers have consistently held that “it behoves the Chamber to afford precedence to application of the Statute and, in contrast to the ad hoc tribunals, it need not inquire into the existence of a rule of international custom.” *Katanga* Trial Judgment, *supra* n 3, para 1395. See also *The Prosecutor v. Katanga and Chui* (ICC-01/04-01/07-717), Decision on the Confirmation of Charges, Pre-Trial Chamber I, 30 September 2008, para 508; *The Prosecutor v. Ruto, Kosgey and Sang* (ICC-01/09-01/11-373), Decision on the Confirmation of Charges, Pre-Trial Chamber II, 23 January 2012, para 289.

[A] plain text reading of Article 25(3)(a) establishes the following elements for co-perpetration:

- a The involvement of at least two individuals.
- b Coordination between those who commit the offence, which may take the form of an agreement, common plan or joint understanding, express or implied, to commit a crime or to undertake action that, in the ordinary course of events, will lead to the commission of the crime.
- c A contribution to the crime, which may be direct or indirect, provided either way there is a causal link between the individual's contribution and the crime.
- d Intent and knowledge, as defined in Article 30 of the Statute, or as “otherwise provided” elsewhere in the Court's legal framework.¹¹

As Ohlin also explained, this construction of co-perpetration effectively deflates the contribution element, while raising the importance of the mental requirement.¹² Whatever the merits of Judge Fulford's definition of co-perpetration liability may be,¹³ his opinion that the plain text of Article 25(3) RS does not adopt the joint control doctrine – and, respectively, its “essential contribution” element – has been reiterated in academia¹⁴ and was also expressed by Judge Van den Wyngaert in her separate opinions to the *Chui* Trial Judgment¹⁵ and the *Katanga* Trial Judgment.¹⁶ She also asserted that since the control theory is not expressly contained in the text of Article 25(3) RS, its importation as an interpretative tool for constructing the modes of criminal liability listed therein amounts to ‘judicial creativity’ that may infringe on the legality principle:

I doubt whether anyone (inside or outside the [Democratic Republic of Congo]) could have known, prior to the Pre-Trial Chamber's first interpretations of Article 25(3)(a), that this article contained such an elaborate and peculiar form of criminal responsibility as the theory of “indirect co-perpetration”, much less that it rests upon the “control over the crime” doctrine.¹⁷

Judge Van den Wyngaert thus submitted that under a plain reading of Article 25(3)(a) RS, and its “commits [...] jointly with another” provision, “[o]nly those individuals whose acts made a *direct contribution* to bringing about the material elements can thus be said to have

jointly perpetrated the crime.”¹⁸ Thus, she argued, a person who supplied the murder weapon could not be qualified as a co-perpetrator under Article 25(3)(a) RS because regardless of whether his contribution was ‘essential’, “[o]nly the actual shooting of the victim with the weapon is killing [and] the material elements of the crime do not include obtaining the means for its commission”.¹⁹ A contribution is thus considered to be ‘direct’ when it has “an immediate impact on the way in which the material elements of the crimes are realised”.²⁰ The soundness of this definition of co-perpetration will be addressed later in this book:²¹ it only bears noting at this point that Judge Van den Wyngaert also considered the plain text of Article 25(3)(a) RS to exclude the control doctrine but, interestingly, her reading of this provision produced a rather different formulation of co-perpetration compared to that offered by Judge Fulford. The “plain text” of the article was still interpreted differently by these two ICC judges: a fact that, as pointed out below, raises doubts about the conclusiveness of this method of interpretation in the concrete situation.

The textualist approach to statutory interpretation that both Judge Fulford and Judge Van den Wyngaert insisted on is, indeed, supported by Article 31(1) of the Vienna Convention on the Law of Treaties, which establishes that “[a] treaty shall be interpreted in good faith in accordance with the ordinary meaning to be given to the terms of the treaty”.²² In this respect, looking at the plain text of Article 25(3)(a) RS and interpreting its provisions in view of their ordinary meaning is *prima facie* a valid technique for construing its modes of liability. In fact, such a literal reading of the phrase “commits [...] jointly with another” finds precedent in the jurisprudence of the East Timor Tribunal, which is relevant because Section 14 of the Tribunal's Statute – establishing the applicable modes of liability – is identical to Article 25 of the Rome Statute.²³ The group crimes cases prosecuted in this hybrid court dealt mostly with mid/low-level militants, who participated in the killing of civilians. The judges focused on the ordinary meaning of the provision ‘commits [...] jointly with another’ and did not prescribe any particular contribution threshold for incurring co-perpetration responsibility.²⁴ Proving that the accused and at least one other individual closely coordinated efforts to commit the charged crime, with the required intent for its commission, was often sufficient to find him liable as a co-perpetrator. In the *João Sarmento* case, for instance,

¹⁸ *Ibid.*, para 44.

¹⁹ *Ibid.*, para 45.

²⁰ *Ibid.*, para 46.

²¹ See Chapter 7, Section 7.2.2.

²² Article 31(1), *Vienna Convention on the Law of Treaties*, 23 May 1969, United Nations, Treaty Series, vol. 1155, p. 331, available at <<http://www.refworld.org/docid/3ae6b3a10.html>> [accessed 15 July 2016].

²³ Section 14, UN Transitional Administration in East Timor, *On the Establishment of Panels with Exclusive Jurisdiction over Serious Criminal Offences*, Regulation No. 2000/15 (UNTAET/REG/2000/15), 6 June 2000, <www.un.org/en/peacekeeping/missions/past/etimor/untaetR/Reg0015E.pdf> [accessed 30 July 2016].

²⁴ See e.g. *The Prosecutor v. João Sarmento* (SPSC-18A/2001), Judgment, 12 August 2003, paras 81-82; *The Prosecutor v. Domingos Mendonca* (SPSC-18b/2001), Judgment, 13 October 2003, paras 110-112; *The Prosecutor v. Lino de Carvalho* (SPSC-10/2001), Judgment, 18 March 2004, para 61.

¹¹ *Ibid.*, para 16.

¹² J. Ohlin, ‘Co-Perpetration: German *Dogmatik* or German Invasion’, in C. Stahn (ed), *The Law and Practice of the International Criminal Court* (Oxford: Oxford UP, 2015), at 532-533.

¹³ See Chapter 7, Section 7.2.1.

¹⁴ L. Sadat and J. Jolly, ‘Seven Canons of ICC Treaty Interpretation: Making Sense of Article 25's Rorschach Blot’, 27 *Leiden Journal of International Law* (2014), at 784; Ohlin, *supra* n 12, at 527-528; M. Aksenova, ‘The Modes of Liability at the ICC: The Labels That Don't Always Stick’, 15 *International Criminal Law Review* (2015), at 643, 654.

¹⁵ *Chui* Trial Judgment, *supra* n 2, Concurring Opinion of Judge Christine Van den Wyngaert, paras 6, 41-42.

¹⁶ *Katanga* Trial Judgment, *supra* n 3, Minority Opinion of Judge Christine Van den Wyngaert, para 280.

¹⁷ *Chui* Trial Judgment, *supra* n 2, Concurring Opinion of Judge Christine Van den Wyngaert, para 20.

the accused was part of a militia group that attacked a village because its inhabitants were supporters of independence for East Timor.²⁵ Sarmento, together with several other militia members, kicked and beat with sticks a civilian boy. The victim was eventually stabbed to death by an unidentified member of the group.²⁶ Although the evidence did not demonstrate that Sarmento himself fatally stabbed the victim, the judges still found that he was liable as a co-perpetrator of murder because he “together with others took part in the beating and killing”.²⁷ It was the co-ordinated result and the accused’s purposeful contribution to it that warranted his co-perpetrator liability. The precise magnitude of his contribution, and in particular whether it was *essential* to the commission of the concerted crime, was not a factor that regulated liability under Section 14(3)(a) of the Tribunals’ Statute. This approach to co-perpetration seems to be in line with Judge Fulford’s construction of this mode of liability under Article 25(3)(a) RS. More generally, the *João Sarmento* case offers a suitable example for the often heard criticism that in such factual circumstances, the joint control construct is ambivalent and impractical because it requires from the judges to determine whether “each individual punch from a member of the crowd is considered an essential activity”.²⁸ It may be plausibly argued that if Sarmento, who clearly intended the murder of the civilian boy, was to withdraw his contribution, the crime would still have taken place: viz. that he lacked the power to frustrate its commission. Should this mean that he ought to be labelled as an accessory to the said crime? The plain text of the provision ‘commits [...] jointly with another’ does not support such a restrictive interpretation.

Notwithstanding the above, it is questionable whether a purely textualist interpretation of Article 25(3)(a) RS does, in fact, bolster one concrete formulation of co-perpetration liability and exclude the other alternatives. The modes of liability listed in the Rome Statute have rightly been described as “open-textured concepts” that are not specifically construed in the said article,²⁹ and focusing exclusively on the ordinary meaning of the words ‘commits [...] jointly with another’ is hardly an approach that could help us distill all the legal elements of co-perpetration liability. For instance, this text does not say anything about the existence of a common plan or agreement, as a key legal element of co-perpetration liability, let alone define its exact scope.³⁰ Furthermore, it is true that the plain wording of Article 25(3)(a) RS does not say anything about joint perpetration liability

requiring an ‘*essential* contribution’ to the concerted crime but, following this reasoning, one may argue that it also does not expressly support Judge Van den Wyngaert’s submission that the accused’s contribution has to be ‘direct’.³¹ Indeed, it is telling that Judge Fulford’s textualist interpretation of Article 25(3)(a) RS and his proposed legal framework of co-perpetration did not contain such a qualifier for the nature of the contribution requirement: in fact, he explicitly stated that the accused’s contribution could also be ‘indirect’, as long as it can be causally linked to the crime.³² These conflicting interpretations of the plain text of Article 25(3)(a) RS demonstrate that the proposed positivist approach to statutory construction cannot offer a definitive answer to the question whether the Rome Statute commands a specific formulation of co-perpetration liability. In this respect, this author agrees with Werle and Burghardt, who have argued that looking at the ordinary meaning of Article 25(3) is only the first step to dealing with the issue at hand, meaning that one should also consider “the context as well as the object and purpose of Article 25(3)”.³³

6.2.1.2. A contextual interpretation of Article 25(3) RS

As already noted above, the *Lubanga* Pre-Trial Chamber adopted the (joint) control theory on the basis of a contextual interpretation of the Rome Statute. Its reasoning swiftly managed to muster support in academic circles. Werle and Jessberger, for instance, have shared the opinion that “the ICC Statute’s structure permits conclusions that are incompatible with the Yugoslavia Tribunal’s doctrine of joint criminal enterprise”³⁴ and have thus submitted that co-perpetration under Article 25(3)(a) RS ought to be based on the control over the crime theory.³⁵ Quite similarly, Manacorda and Meloni have contended that “[m]oving away from the mere adoption of the JCE doctrine [...] the Rome Statute clearly shows the path to be followed.”³⁶ The present author submits, however, that there are several aspects in the *Lubanga* Pre-Trial Chamber’s contextual interpretation of the rather nebulous Article 25(3) RS that render the adoption of the control theory unconvincing.

When the pre-trial judges in *Lubanga* interpreted the provision ‘commits [...] jointly with another’ by its association with the other modes of liability contained in Article 25(3)(a) RS, they only examined how the objective and the subjective approach to co-perpetration fit in the overall structure of this article, before concluding that neither of the two is compatible with it.³⁷ Notably, the judges then adopted the remaining control approach *not* because

²⁵ *João Sarmento* Judgment, *supra* n 24, para 65.

²⁶ *Ibid.*, paras 67-69.

²⁷ *Ibid.*, paras 82.

²⁸ J. Ohlin, ‘Joint Intentions to Commit International Crimes’, 11 *Chicago Journal of International Law* (2011), at 733.

²⁹ *Chui* Trial Judgment, *supra* n 2, Concurring Opinion of Judge Christine Van den Wyngaert, para 12.

³⁰ Interestingly, Judge Van den Wyngaert uses this argument to conclude that co-perpetration under Article 25(3)(a) RS does not require the existence of a “common plan” as an independent objective element of this mode of liability. *Ibid.*, paras 31, 33. In this author’s view, however, it is impossible to talk of co-perpetration liability where there is no common plan/agreement between the accused and his confederates: indeed, the very idea of having a *coordinated* commission of a crime is inextricably linked to the existence of some form of a common plan, whether pre-arranged or arising extemporaneously, explicit or implicit, between the co-perpetrators. See Chapter 3, Section 3.4.1.2.

³¹ See *supra* text accompanying notes 18-20.

³² See *supra* text accompanying note 11.

³³ G. Werle and B. Burghardt, ‘Establishing Degrees of Responsibility: Modes of Participation in Article 25 of the ICC Statute’, in E. Van Sliedregt and S. Vasiliev (eds), *Pluralism in International Criminal Law* (Oxford: Oxford UP, 2014), at 315.

³⁴ G. Werle and F. Jessberger, *Principles of International Criminal Law* (3rd edn, Oxford: Oxford UP, 2014), at 205.

³⁵ *Ibid.*, at 206.

³⁶ S. Manacorda and C. Meloni, ‘Indirect Perpetration versus Joint Criminal Enterprise: Concurring Approaches in the Practice of International Criminal Law?’ 9 *Journal of International Criminal Justice* (2011), at 168.

³⁷ *Lubanga* Decision on the Confirmation of Charges, *supra* n 5, paras 333-338. See Chapter 5, Section 5.3.2.

it was shown to be in perfect harmony with the other parts of Article 25(3) RS, but just because the other two approaches were already rejected. This reasoning suffers from several deficiencies. First of all, if the Chamber had actually also examined through such contextual interpretation, and with equal tenacity, the use of the control approach to joint perpetration responsibility, it would have seen that this method also does not fit neatly in the structure of Article 25(3) RS, and the other modes of liability listed in it. In particular, if the RS indeed adopted the control criterion for distinguishing between principals and accessories, then as Ambos³⁸ and Eser³⁹ have also explained, ‘ordering’ would not have been listed as an accessory mode of liability in Article 25(3)(b), but as a form of indirect perpetration under Article 25(3)(a) RS. After all, armies are *per se* hierarchical organizations of power, where those in position of authority have control over the rank-and-file, using them as ‘tools’ to achieve a particular goal. The subordinate soldier is the epitome of Roxin’s “anonymous, interchangeable figure, a cog in the machine of the power structure that can be replaced at any time”.⁴⁰ Ensuring that orders are strictly followed is the only way an army can properly function, and an arsenal of techniques is used to achieve this goal – intense military training, fungibility of subordinates and so forth. If the Rome Statute endorses the control paradigm for differentiating between principals and accessories, then how is indirect perpetration materially different from ordering? Seeking to distinguish these two forms of liability in a manner consistent with the control theory’s rationale, the *Katanga and Chui* Pre-Trial Chamber rather unconvincingly held that the degree of control in an ordinary army (*i.e.* the context in which ordering liability is usually applied) is not necessarily of the same intensity as that required for indirect perpetration under the theory of control over the crime.⁴¹ The judges essentially envisioned a Nazi-like automatized hierarchical power apparatus, where the level of control exercised by those in position of authority is absolute and greater

than the degree of control observed in a regular army. Only when a military commander’s (, or a civil leader’s) control over the said subordinates is elevated to such a heightened level⁴² can his orders be more than “mere orders” and qualify him as an indirect perpetrator under the control doctrine. Other than being artificially exaggerated,⁴³ this definition of the control that indirect perpetrators must have over the commission of the crime (*via* the organized power apparatus at their disposal) has hardly been applied in the ICC practice,⁴⁴ where leaders of rather loosely-knit organizations have still been held liable as principals (indirect perpetrators) for ordering crimes.⁴⁵ This not only renders “mere” ordering liability practically superfluous, but it compels the conclusion that if the control approach was truly incorporated in the Rome Statute, then ordering would not have been contained as a mode of accessory liability under Article 25(3)(b) RS.⁴⁶ Thus, in the same way it held that the subjective and objective approaches to co-perpetration are irreconcilable with some of the other legal notions in Article 25(3) RS, so could the *Lubanga* Pre-Trial Chamber also have found that the adoption of the control approach is precluded by the inclusion of ‘ordering’ among the secondary, accessory modes of liability.

Naturally, the above critique of the Pre-Trial Chamber’s findings on the difference, under the control theory, between indirect perpetration and ordering liability may be a matter of debate, and further arguments can be raised in support of either proposition. It is, however, quite obvious that the judges took pains to draw some distinction between two modes of liability which, at least on their face value, converge under the control theory and, therefore, could discredit its adoption in ICC case law. Such a courtesy was not extended to

38 K. Ambos, ‘Article 25 Individual Criminal Responsibility’ in O. Triffterer (ed), *Commentary on the Rome Statute of the International Criminal Court: Observers’ Notes, Article by Article* (2nd edn, Munich: C.H. Beck/Hart, 2008), at 765.

39 A. Eser, ‘Individual Criminal Responsibility’, in A. Cassese and P. Gaeta (eds), *The Rome Statute of the International Criminal Court: A Commentary*, Vol.1 (Oxford: Oxford UP, 2002), at 797.

40 C. Roxin, ‘Straftaten Im Rahmen Organisatorischer Machtapparate’, *Goltdammer’s Archiv Für Strafrecht* (1963), at 202 (for English translation, see G. Werle and B. Burghardt, ‘Claus Roxin on Crimes as Part of Organized Power Structures: Introductory Note’, 9 *Journal of International Criminal Justice* (2011), at 199). For an overview of the doctrine of indirect perpetration based on control over organized structures of power, see Chapter 4, Section 4.3.3.2.iv) and Chapter 5, Section 5.2.1.

41 *Katanga and Chui* Decision on the Confirmation of Charges, *supra* n 6, paras 515-518. The judges explained that an indirect perpetrator, unlike a person who is liable for *ordering* a crime, does not “merely order the commission of the crime, but through his control over the organization, essentially decides whether and how the crime will be committed”. By extension, such reasoning implies that as far as ‘mere’ ordering in a regular army is concerned, it is not the military commander who controls whether and how the crime will be committed, but: i) either his subordinate soldiers (*i.e.* the physical perpetrators), or ii) his superiors. The former contention rings hollow as it is contrary to a common understanding of how a traditional army functions. The latter contention basically suggests that ordering is a form of liability reserved for mid-level commanders, who receive and issue orders, since they do not have the same level of (ultimate) control as the person who is at the very top of the military hierarchy. Such interpretation is rejected by Roxin himself who viewed Adolf Eichmann (a mid-ranking SS bureaucrat) as the “paradigmatic example of an indirect perpetrator by means of control over an organized power structure”. See Werle and Burghardt, *Introductory Note*, *supra* note 40, at 192.

42 It should be noted that ‘ordering’ has been customarily defined by the *ad hoc* Tribunals as requiring proof that the accused was in position of authority that granted him the power to “compel another to commit a crime in following the accused’s order”. See *e.g. Semanza v. The Prosecutor* (ICTR-97-20-A), Judgment, Appeals Chamber, 20 May 2005, para 361; *The Prosecutor v. Boškoski and Tarčulovski* (IT-04-82-A), Judgment, Appeals Chamber, 19 May 2010, para 164; *The Prosecutor v. Tolimir* (IT-05-88/2-T), Judgment, Trial Chamber, 12 December 2012, para 905.

43 As Jain explains, in Germany, the motherland of the control theory, perpetration through an organization has been applied to include also organizations such as hospitals and business-like structures. See N. Jain, ‘The Control Theory of Perpetration in International Criminal Law’, 12 *Chicago Journal of International Law* (2011), at 171; N. Jain, *Perpetrators and Accessories in International Criminal Law: Individual Modes of Responsibility for Collective Crimes* (Oxford: Hart Pub., 2014), at 128.

44 Indeed, scholars have often sceptically observed that the ICC Chambers have found this strict and absolute control that they formally require for indirect perpetration liability in the African context of “largely disorganized militias or rebel armies, where the authority of a leader may be accepted only as long as he is successful in providing material goods and military success.” T. Weigend, ‘Indirect Perpetration’, in Stahn, *supra* n 12, at 553. See also E. Van Sliedregt, *Individual Criminal Responsibility in International Law* (Oxford: Oxford UP, 2012), at 87.

45 See *infra* Section 6.3.2.

46 In this respect, it also bears noting that even scholars who favor the control over the crime approach to making the principal/accessory distinction, have explained that the notable difference between ordering and indirect perpetration lies not on the objective, but on the subjective plane. Werle, for instance, contends that “on the one hand [the person who orders a crime] has authority within a hierarchical structure, and thus incurs a higher level of responsibility as a mere abettor. On the other hand, ordering constitutes a form of accessory liability that entails a lower degree of responsibility than commission. This is warranted by a lesser standard of *mens rea* compared to a perpetrator-by-means, as the person giving the order need not possess the specific intent that may be required by the crime.” Werle and Jessberger, *supra* n 34, at 215.

the subjective approach to co-perpetration, which the *Lubanga* Pre-Trial Chamber rightly recognized as inherent to the JCE theory, but then hastened to equate it to the *accessorial* form of liability in Article 25(3)(d) RS.⁴⁷ This contention raises the second main objection to the judge's contextual interpretation: *i.e.* the notion contained in Article 25(3)(d) is materially distinct from JCE liability and, thus, cannot be used to assert that the Rome Statute rejects the subjective approach to co-perpetration. It would be recalled the JCE liability requires that the accused shares the intent of the other co-perpetrators to commit the said crime:⁴⁸ a subjective requirement that naturally flows from the objective one that the accused and the other co-perpetrators have to form between each other a 'common plan, design or purpose' to commit a crime.⁴⁹ The mode of liability listed in Article 25(3)(d) RS differs from JCE in both of these aspects. Liability for an accused under this provision may arise even when he contributes to the execution of a common purpose merely with "the *knowledge* of the intention of the group to commit the crime."⁵⁰ In other words, unlike the doctrine of JCE, in any of its three variants,⁵¹ the mode of criminal responsibility contained in Article 25(3)(d) RS does *not* require the accused to share a *dolus directus* in the first degree to commit the *core* crimes of the said common purpose. Stemming from this, it is also evident that Article 25(3)(d) RS does not strictly require proof that the accused was a party to the common purpose: *i.e.* incurring liability under this provision is not conditional on objectively establishing that a common criminal purpose was formed between *the accused* and the other participants in the common purpose. After all, it is counterintuitive to state that a person who does not intend, but merely knows, the crimes of a common purpose is a party to it.⁵² This author, thus, agrees with Cassese who has also noted that:

the gist of Article 25(3)(d) is the regulation not of JCE but rather of a different mode of responsibility [consisting] in the fact that a person *outside* the criminal group committing (or attempting to commit) a crime *contributes* to the perpetration of such crime without being a member of the criminal group.⁵³

47 The *Lubanga* Pre-Trial Chamber argued that Article 25(3)(d) provides a residual form of *accessory* liability which is "closely akin" to the joint criminal enterprise theory. Therefore, the judges concluded that the subjective approach to co-perpetration (embodied in the JCE theory) is not adopted by the Rome Statute for construing principal liability under Article 25(3)(a). *Lubanga* Decision on the Confirmation of Charges, *supra* n 5, paras 334-337.

48 See Chapter 3, Section 3.4.2.

49 See Chapter 3, Section 3.4.1.2.

50 See *supra* note 7.

51 As explained previously, the UN *ad hoc* Tribunals have consistently held that even the 'extended' category of JCE an accused must first be shown to have shared the intent to commit the 'core' crimes of the enterprise before he may be held liable for the natural and foreseeable 'incidental' crimes of the enterprise. See Chapter 3, Section 3.4.2.3.

52 As the ICTY *Brđanin* Appeals Chamber also held, the question whether a certain person is a member of a JCE is a question whether he shares the common purpose of the JCE: *viz.* whether he shares the common intent to commit the concerted crime. *The Prosecutor v. Brđanin* (IT-99-36-A), Judgment, Appeals Chamber, 3 April 2007, para 418. See Chapter 4, Section 4.3.2.2.ii.

53 A. Cassese, *International Criminal Law* (2nd edn, Oxford: Oxford UP, 2008), at 213. See also J. Ohlin, 'Searching for the Hinterman: in Praise of Subjective Theories of Imputation', 12 *Journal of International Criminal Justice* (2014), at 338; Eser, *supra* n 39, at 803; Jain, 'Perpetrators and Accessories', *supra* n 43, at 85.

To further support this conclusion, Cassese also pointed out that the blueprint of Article 25(3)(d) RS, *i.e.* Article 2(3) of the International Convention for the Suppression of Terrorist Bombings,⁵⁴ was intended to cover "forms of 'external assistance'" to terrorist criminality.⁵⁵ Thus, the form of liability contained in this provision of the Rome Statute could aptly be described as responsibility for aiding and abetting a common purpose.⁵⁶ In this respect, Ambos also asserted that aiding and abetting liability under Article 25(3)(c) RS, and the mode of liability listed in Article 25(3)(d) RS are akin to each other, the sole objective difference between them being that the former describes aiding and abetting an individual crime, while the latter refers to aiding and abetting a collective, group crime.⁵⁷

To illustrate the above-said difference between JCE and the notion of aiding and abetting a crime committed by persons acting with a common purpose (*i.e.* Article 25(3)(d) RS), consider the following example given by the ICTY *Kvočka* Trial Chamber:

For instance, an accountant hired to work for a film company that produces child pornography may initially manage accounts without awareness of the criminal nature of the company. Eventually, however, he comes to know that the company produces child pornography, which he knows to be illegal. *If the accountant continues to work for the company despite this knowledge, he could be said to aid or abet the criminal enterprise.* Even if it was also shown that the accountant detested child pornography, criminal liability would still attach.

At some point, moreover, if the accountant continues to work at the company long enough and performs his job in a competent and efficient manner with only an occasional protest regarding the despicable goals of the company, it would be reasonable to infer that he shares the criminal intent of the enterprise and thus becomes a co-perpetrator. The man who merely cleans the office afterhours, however, and who sees the child photos and knows that the company is participating in criminal activity and who continues to clean the office, would not be considered a participant in the enterprise because his role is not deemed to be sufficiently significant in the enterprise.⁵⁸

In these factual circumstances, Article 25(3)(d) RS becomes applicable at the stage when the said accountant gains knowledge of the company's criminal purpose and still continues

54 For more information on the 1997 Terrorist Bombings Convention, the text of its provision on "a group of persons acting with a common purpose" and its relation to Article 25(3)(d) RS, see Chapter 4, Section 4.2.2.1.

55 Cassese, *supra* n 53, at 213.

56 This term "aiding and abetting a common purpose" was in fact used by the ICTY Prosecution in the Tribunal's earlier case law, but was rejected by the Appeals Chamber for lacking doctrinal coherency. A common purpose/JCE, the judges have explained, is not a crime as such but a manner of committing one. Therefore, saying that a person is liable for aiding and abetting a common purpose is inaccurate. See *The Prosecutor v. Prlić et al.* (IT-04-74-AR72.3), Decision on Petković's Appeal on Jurisdiction, Appeals Chamber, 23 April 2008, para 21. (citing *The Prosecutor v. Kvočka et al.* (IT-98-30/1-A), Judgment, Appeals Chamber, 28 February 2005, para 91)

57 Ambos, *supra* n 38, at 766. Ambos continues by explaining that "the significant difference between subparagraphs (c) and (d) lies, *if at all*, on the subjective level". (*emphasis added*)

58 *The Prosecutor v. Kvočka et al.* (IT-98-30/1-T), Judgment, Trial Chamber, 2 November 2001, paras 285-286. (*emphasis added*)

to provide his contribution to its execution. At this moment, even though he is an employee of the company, he is not, for the purposes of law, a member of the criminal enterprise because he does not share the common purpose. He is an aider and abettor who knowingly assists in the commission of a crime by a group of persons acting with a common purpose. The moment he starts sharing this purpose, an intent that could be inferred from his continued contribution to the said enterprise, he becomes a member of the JCE and thus graduates to a co-perpetrator of the concerted crimes: this is where the difference between Article 25(3)(d) RS and JCE responsibility lies. The hallmarks of this line of reasoning can also be distinguished in, for instance, the ICTY *Krstić* case, the relevant facts of which were already explained earlier in this book.⁵⁹ The Trial Chamber found the accused guilty as a co-perpetrator in a joint criminal enterprise to kill the Bosnian Muslim men of Srebrenica:⁶⁰ a common purpose which the judges found to have been formulated by the military and political leadership of the Bosnian Serb Army⁶¹ and then expressly noted that, even though Krstić was not one of those leaders who conceived the plan, he had an indispensable role in its execution.⁶² The Appeals Chamber disagreed with this reasoning. Upon reconsidering the Trial Chamber's factual findings, it held that "the Main Staff of the VRS [were] the principal participants in the genocidal enterprise [and] Radislav Krstić was aware of *their* genocidal intent"⁶³ but he did not support this plan and did not share its genocidal intent.⁶⁴ The Appeals Chamber, therefore, concluded that his liability is better defined as that of an aider and abettor of genocide, committed by the said group of people who shared the genocidal common purpose.⁶⁵ In this author's view, Krstić's liability is illustrative of the nature of the concept contained in Article 25(3)(d) RS - it is not a new, distinct mode of liability, but rather a variance of aiding and abetting responsibility.

In more recent jurisprudence, the ICC judges have in fact acknowledged that JCE liability and the mode of criminal responsibility listed in Article 25(3)(d) RS are, actually, two materially distinct notions, thus rejecting the initial assertion of the *Lubanga* Pre-Trial Chamber.⁶⁶ Thus, for instance, in the *Katanga* Trial Judgment, ICC Trial Chamber II stressed that one major difference between these two forms of liability is that, unlike JCE liability, under Article 25(3)(d) RS:

the accused will not be considered responsible for all of the crimes which form part of the common purpose, but only for those to whose commission he or she contributed. Accordingly, a person who stands charged pursuant to article 25(3)(d) will not incur individual criminal responsibility for those crimes which form part of the common purpose but to which he or she did not contribute.⁶⁷

The judges, thus, clearly defined this provision as establishing "a species of accessoryship"⁶⁸ that can be used to hold an accused responsible only for those crimes of the common purpose that his contribution can be causally linked to. Moreover, the Trial Chamber went on to explain, this type of responsibility only requires proof that the accused had *knowledge* of the specific crimes of the criminal purpose that he contributed to and is held liable for.⁶⁹ The judges, thus, expressly found that "[i]t need not be proven, therefore, that the accused shared the group's intention to commit the crime."⁷⁰ The Chamber also accepted the view that an accused under Article 25(3)(d) RS can be an outsider to the common purpose, although it also found that this need not necessarily be the case since this provision does not explicitly establish such a requirement.⁷¹

To be sure, Article 25(3)(d) RS is susceptible to varying definitions, which has prompted some academics to strongly argue that "it is impossible to construct a coherent and nonredundant interpretation of Article 25(3)(d)", thereby submitting that it is a hopelessly ambiguous provision that should be altogether revised by the legislator.⁷² Be that as it may, the finding of the *Lubanga* Pre-Trial Chamber that this article is equivalent to the theory of JCE is highly unconvincing and presents a hasty decision to rule out the use

⁶⁷ *Katanga* Trial Judgment, *supra* n 3, para 1619.

⁶⁸ *Ibid.*

⁶⁹ *Ibid.*, para 1642.

⁷⁰ *Ibid.*, paras 1638, 1642.

⁷¹ *Ibid.*, para 1631. It bears noting that in the *Mbarushimana* Decision on the Confirmation of Charges, the Pre-Trial Chamber also viewed JCE and Article 25(3)(d) liability as distinct modes of liability, but rejected the argument that the latter is only applicable in cases where the accused contributes from outside the group of individuals acting with a common purpose. The judges found that "to adopt an essential contribution test for liability under article 25(3)(a) of the Statute, as this Chamber has done, and accept the Defence argument that 25(3)(d) liability is limited only to non-group members would restrict criminal responsibility for group members making non-essential contributions." *Mbarushimana* Decision on the Confirmation of Charges, *supra* n 66, para 273. The problem with this reasoning is that it takes as a point of departure the assumption that Article 25(3)(a) RS must adopt the control theory and its essential contribution standard. If, instead, the ICC was to adopt the subjective approach to co-perpetration liability, group members who make a non-essential contribution to the common purpose would still qualify as co-perpetrators under Article 25(3)(a) RS, while Article 25(3)(d) will be reserved for situations where a person who does not share the criminal purpose, but has knowledge of it, assists the joint principals in the commission of the crime.

⁷² J. Ohlin, 'Joint Criminal Confusion' 12 *New Criminal Law Review* (2009), at 406, 410. See also F. Mantovani, 'The General Principles of International Criminal Law: The Viewpoint of a National Criminal Lawyer', 1 *Journal of International Criminal Justice* (2003), at 35.

⁵⁹ See Chapter 4, Section 4.3.1.3.ii.

⁶⁰ *The Prosecutor v. Krstić* (IT-98-33-T), Judgment, Trial Chamber, 2 August 2001, paras 620, 633, 636.

⁶¹ *Ibid.*, para 612.

⁶² *Ibid.*, para 644.

⁶³ *The Prosecutor v. Krstić* (IT-98-33-A), Judgment, Appeals Chamber, 19 April 2004, paras 143-144.

⁶⁴ *Ibid.*, para 137.

⁶⁵ *Ibid.*, paras 137, 143-144.

⁶⁶ *The Prosecutor v. Mbarushimana* (ICC-01/04-01/10-465-Red), Decision on the Confirmation of Charges, Pre-Trial Chamber I, 16 December 2011, para 282; *Katanga* Trial Judgment, *supra* n 3, para 1619. See also C. Stahn, 'Justice Delivered or Justice Denied?: The Legacy of the Katanga Judgment', 12 *Journal of International Criminal Justice* (2014), at 825-826.

of the subjective approach to co-perpetration liability under Article 25(3)(a) RS.⁷³ More generally, it can be argued that a contextual reading of Article 25(3) RS is a futile exercise that seeks to find uniformity and harmony in a place where none can be found: *viz.* in the sub-paragraphs of an article that is a patchwork of compromises between the divergent views on criminal responsibility held by the drafters of the Rome Statute.⁷⁴ Indeed, it is for this very reason that Article 25 RS was more recently aptly described by Sadat and Jolly as “a legal Rorschach blot taking on a different meaning depending upon the underlying legal training, tradition, and even policy-orientation of those seeking to interpret it.”⁷⁵ In view of all the above, the conclusion that a contextual interpretation of Article 25(3) RS does not decidedly support one particular approach to distinguishing between principal and accessory liability is meritorious.

6.2.1.3. *The travaux préparatoires of Article 25(3) RS*

The search for the proper contours of co-perpetration under Article 25(3)(a) RS has not triggered much research on the preparatory works of this provision. Indeed, when examining the *Lubanga* Decision on the Confirmation of Charges, one cannot help but notice that

the judges deduced the approach that the Statute purportedly adopts without consulting at all the earlier draft versions of Article 25(3) RS and the various proposals made by the state delegations involved in its drafting. Given that the plain text of this provision does not expressly adopt any particular construction of joint perpetration liability, the reasonable course of action would have been to further explore the principles of treaty interpretation found in the Vienna Convention on the Law of Treaties, Article 32 of which establishes that when the ordinary meaning of a provision is ambiguous or obscure,

[r]ecourse may be had to supplementary means of interpretation, including the preparatory work of the treaty and the circumstances of its conclusion⁷⁶

The technique of looking at the *travaux préparatoires* of a treaty when interpreting its provisions has often been used by the International Court of Justice, either to further confirm the meaning it had given to a certain provision after reviewing its ordinary text,⁷⁷ or to construe a meaning for a provision the plain text of which is wholly unclear.⁷⁸ Indeed, as already pointed out in Chapter 5, the *Bemba* Pre-Trial Chamber reviewed the drafting history of the Rome Statute to conclude that, contrary to the findings drawn in the *Lubanga* Decision on the Confirmation of Charges, Article 30 RS does *not* include the notion of *dolus eventualis*.⁷⁹ The same ought to be done when reading the requirement of *essential* contribution in the line ‘commits [...] jointly with another’: *i.e.* when adopting the control over the crime approach for the analysis of Article 25(3) RS.

⁷⁶ Article 32, Vienna Convention on the Law of Treaties, *supra* n 22.

⁷⁷ See *e.g. Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Croatia v. Serbia)*, Judgment, International Court of Justice, 3 February 2015, paras 95-97. One of the questions that the Court was asked to address in this case was whether provisions of the Genocide Convention could be applied retroactively. The judges first held that, unlike several other international treaties that contain provisions that expressly impose on states obligations to also punish acts that took place before the treaty came into force for that State, the plain text of the Genocide Convention does not contain such language. Instead of concluding here, the judges then also examined the preparatory works of the Genocide Convention and demonstrated that the intention of its drafters was to apply its provisions for those who commit genocide “in the future” and no delegation expressed the view that the Convention is intended to impose obligations to prosecute and punish genocidal acts committed in the past.

⁷⁸ See *e.g. Rights of Nationals of the United States of America in Morocco (France v. United States of America)*, Judgment, International Court of Justice, 27 August 1952, at 209-212. The case concerned a dispute between France and the United States of America on the meaning of Article 95 of the General Acts of Algéciras of 1906, specifically how this provision defines the value for customs purposes of imported goods. Different interpretations were offered by the two parties to the case, and the ICJ held that “[i]t can not be said that the provisions of Article 95 alone, or of Chapter V of the [General Act of Algéciras of 1906] considered as a whole, afford decisive evidence in support of either of the interpretations contended for by the Parties respectively.” The judges, therefore, proceeded to examine the preparatory works of this multilateral treaty and the concrete proposals of the various delegations leading to the adoption of the disputed Article 95, in order to ultimately construe its meaning. For more on the reliance on *travaux préparatoires* in treaty interpretation by the ICJ, see *e.g.* M. Ris, ‘Treaty Interpretation and ICJ Recourse to Travaux Préparatoires: Towards a Proposed Amendment of Articles 31 and 32 of the Vienna Convention on the Law of Treaties’, 14 *Boston College International and Comparative Law Review* (1991), at 118 *et seq.*

⁷⁹ See Chapter 5, Section 5.4.2.1. *The Prosecutor v. Bemba* (ICC-01/05-01/08-424), Decision on the Confirmation of Charges, Pre-Trial Chamber II, 15 June 2009, paras 361-369.

⁷³ More recently, the *Katanga* Trial Chamber put forward another, broader argument against adopting the subjective approach to distinguishing between principals and accessories to a group crime, this time focusing on the interaction between Articles 25(3) and 30 RS. In particular, the judges rejected this approach because they held that “the mental element defined in article 30 of the Statute applies both to perpetrators, for the purposes of article 25(3)(a), and to certain forms of accessoryship, particularly those enfolded by article 25(3)(b), since the text of the article leaves the volitional element unspecified.” *Katanga* Trial Judgment, *supra* n 3, para 1392. The present author is of the view that this argument is unconvincing. In particular, the fact that the Rome Statute contains a provision, which defines the various applicable degrees of intent, does not preclude the possibility that some modes of liability may strictly require *dolus directus* in the first degree, while others may adopt a lower degree of intent (*e.g.* knowledge or *dolus directus* in the second degree) that is also recognized under Article 30 RS. As Badar also observed, the difference between the two degrees of intent (in relation to consequence) that are contained in Article 30(2)(b) RS – *i.e.* the accused “means to cause that consequence”, or “is aware that it will occur in the ordinary course of events” – is precisely “the presence or absence of a positive desire or purpose to cause that consequence”: *i.e.* the very criterion that the subjective approach uses to distinguish between principals and accessories to a collective crime. M. Badar, *The Concept of Mens Rea in International Criminal Law: The Case for a Unified Approach* (Oxford: Hart, 2013), at 393. Thus, while it is true that Article 30 provides a default *mens rea* standard for crimes, this need not necessarily mean that the above-said two forms of intent must automatically constitute the common mental element for each and every form of liability in Article 25(3) RS. Rather, it is plausible to submit that the subjective element of any mode of liability must simply fit within the said default framework, and so the expressly recognized distinction between purposeful intent and knowledge can be used to distinguish between joint perpetrators (wanting the criminal consequence) and accessories (having only knowledge/awareness, but not sharing the purpose) to a collective crime.

⁷⁴ Saland, who was the chairman of the Working Group that was set up to draft Article 25 of the ICC Rome Statute, recalled that “This central article on individual criminal responsibility originally posed great difficulties to negotiate in a number of ways. One problem was that experts from different legal systems took strongly held positions, based on their national laws, as to the exact content of the various concepts involved. They seemed to find it hard to understand that another legal system might approach the issue in another way: *e.g.*, have a different concept, or give the same name to a concept but with a slightly different content.” P. Saland, ‘International Criminal Law Principles’, in R. Lee (ed), *The International Criminal Court: The Making of the Rome Statute—Issues, Negotiations, Results* (The Hague: Kluwer Law International, 1999), at 198. Sadat and Jolly have thus noted that, “Article 25(3) is likely a consensus provision that lacks a strong and logically cohesive theoretical underpinning of the kind that can be found in domestic jurisdictions.” Sadat and Jolly, *supra* n 14, at 775. See also W. Schabas, *The International Criminal Court: A Commentary on the Rome Statute* (Oxford: Oxford UP, 2010), at 431.

⁷⁵ Sadat and Jolly, *supra* n 14, at 756.

The preparatory works on Article 25(3) RS show that the drafters of the Rome Statute did seek to differentiate between forms of principal and accessory liability.⁸⁰ However, it was never proposed, nor even discussed, that this distinction has to be based on the joint control theory. The Preparatory Committee on the Establishment of an International Criminal Court ('the PrepCom') held its first two sessions at the UN headquarters in New York between March and August 1996, during which the state delegations submitted proposals on, *inter alia*, the principles of individual criminal responsibility to be included in the ICC Statute.⁸¹ In September that year, the PrepCom submitted to the UN General Assembly its report on the work and negotiations carried out during the said two sessions, which contained two very detailed articles on liability: one titled "Criminal responsibility of principals", and the other one: "Responsibility of other persons in the completed crimes of principals".⁸² The former included separate sub-paragraphs on direct, indirect and joint perpetration:

- 1) A person is criminally responsible as a principal and is liable for punishment for a crime under the Statute if the person, with the mental element required for the crime:
 - a) Commits the conduct specified in the description (definition) of the crime;
 - b) Causes the consequences, if any, specified in the description (definition); and
 - c) Does so in the circumstances, if any, specified in that description (definition).
- 2) Where two or more persons jointly commit a crime under this Statute with a common intent to commit such a crime, each person shall be criminally responsible and liable to be punished as a principal.
- 3) [A person shall be deemed to be a principal where that person commits the crime through an innocent agent who is not aware of the criminal nature of the act committed, such as a minor, a person of defective mental capacity or a person acting under mistake of fact or otherwise acting without *mens rea*.]⁸³

This early draft of Article 25(3)(a) RS strongly suggests that the PrepCom did not intend to adopt the joint control theory as the approach for distinguishing between principals and accessories. In particular, paragraph 2 focuses on the co-perpetrators' *common intent* as the element determining their principal liability, rather than on a joint control of the commission of the crime. The drafters expressly defined the elements of co-perpetration

and no requirement of an essential contribution was included among them. There is also no record of discussions to this effect: if there was such a proposal raised by some of the parties, it would have been reflected in the content of paragraph 2 by means of adding an alternative text to it in square brackets.⁸⁴ Thus, although the delegates at the PrepCom indeed disagreed on several issues concerning criminal responsibility,⁸⁵ there was a consolidated approach to the notion of co-perpetration: one emphasizing the 'common intent' of the perpetrators as the definitional criterion for their principal liability.

Some delegations did, however, question the necessity of specifying the core elements of the various modes of liability to be included in the ICC Statute.⁸⁶ Indeed, as explained above, the PrepCom's 1996 report contained two separate provisions on individual criminal responsibility – one on perpetrators and one on accessories – both of which were rather voluminous because they defined in quite some detail each mode of liability. The contention that such specificity should be avoided gained momentum and during the third session of the PrepCom, held in February 1997, a working paper was submitted by the delegations of Germany, the Netherlands, Canada and the United Kingdom, which consolidated in a single article the modes of liability listed in the earlier, 1996 draft and left out their definitions.⁸⁷ It bears noting at this point that of these four countries, Roxin's control doctrine was known only in Germany and, even there, more so in academia, than in the established court practice.⁸⁸ The paragraph on principal responsibility proposed in the said working paper now read:

A person is criminally responsible and liable for punishment for a crime defined [in Article 20] [in this Statute] if that person:
Commits such a crime, whether as an individual, jointly with another, or through a person who is not criminally responsible;⁸⁹

⁸⁰ Preparatory Committee on the Establishment of an International Criminal Court, *Applicable Law and General Principles of Criminal Law* (A/AC.249/L.4), 6 August 1996, at 7-8, 11. To this end, the author disagrees with Judge Fulford's contention that the Statute does not seek to draw strict lines between principal and accessory liability. See *Lubanga Trial Judgment*, *supra* n 1, Separate Opinion of Judge Adrian Fulford, paras 6-7. Further on this point, see S. Wirth, 'Co-perpetration in the Lubanga Trial Judgment' 10 *Journal of International Criminal Justice* (2012), at 978-979. For the opposite view, however, see e.g. Sadat and Jolly, *supra* n 14, at 774-775.

⁸¹ C. Hall, 'The First Two Sessions of the UN Preparatory Committee on the Establishment of an International Criminal Court', 91 *The American Journal of International Law* (1997), at 177-187.

⁸² Report of the Preparatory Committee on the Establishment of an International Criminal Court, Vol. II (Compilation of Proposals), *General Assembly Official Records, Fifty-first Session, Supplement 22(A)* (A/51/22), 13 September 1996, at 81-83. <http://www.legal-tools.org/uploads/tx_ltpdb/doc21329.pdf> [accessed on 3 July 2016].

⁸³ *Ibid.*, at 81-82.

⁸⁴ Preparatory Committee on the Establishment of an International Criminal Court, *Applicable Law and General Principles of Criminal Law* (A/AC.249/L.4), 6 August 1996, at 3.

⁸⁵ Preparatory Committee on the Establishment of an International Criminal Court (Working Group on General Principles of Criminal Law and Penalties), *Chairman's Text, Article B* (A/AC.249/1997/WG.2/CRP.2), 13 February 1997, at 2. <www.iccnw.org/documents/WrkGrp2IndividualRespFeb97.pdf> [accessed 29 January 2016]. See also Saland, *supra* n 74, at 199.

⁸⁶ M. Bassiouni, *The Legislative History of the International Criminal Court*, Vol. 2 (Ardsley, NY: Transnational, 2005), at 201; Preparatory Committee on the Establishment of an International Criminal Court (25 March – 12 April 1996), *Summary of the Proceedings of the Preparatory Committee during the Period 25 March – 12 April 1996* (A/AC.249/1), 7 May 1996, paras 79, 88.

⁸⁷ Preparatory Committee on the Establishment of an International Criminal Court (Working Group on General Principles of Criminal Law and Penalties), *Working Paper Submitted by Canada, Germany, Netherlands and the United Kingdom* (A/AC.249/1997/WG.2/DP.1), 14 February 1997. <<http://www.iccnw.org/documents/WorkGrp2Paper.pdf>> [accessed 29 January 2016].

⁸⁸ For an analysis on how the Netherlands, Germany and common law jurisdictions define joint perpetration liability see *infra* Section 6.2.3.2.

⁸⁹ Working Paper Submitted by Canada, Germany, Netherlands and the United Kingdom, *supra* n 87.

This text clearly offers a concise, yet identical in substance, wording of the expansive 1996 draft article on principal responsibility: it reiterates the same three forms of perpetration, while leaving out any references to specific legal elements. No records exist to show that apart from shortening the text, the drafters also intended to alter the meaning of these variants of principal liability. The definition of indirect perpetration, most notably, remained the same, being exclusively limited to the theory of innocent agency.⁹⁰ Thus, although re-structured, nothing suggests that the meaning of the provision on joint perpetration was changed: rather, it was a continuation of the April 1996 draft article on principal liability. Thus, it is reasonable to conclude that the phrase “commits [...] jointly with another” kept the original understanding that joint principals in a collective crime are those persons who shared a ‘common intent’ to commit it.⁹¹

The working paper that the delegations of the Netherlands, Canada, the United Kingdom and Germany submitted gained the overwhelming support of the other delegates at the Working Group on General Principals of Criminal Law and Penalties, and it was largely restated in the 19 February 1997 Chairman’s text on individual criminal responsibility.⁹² The only change that was made to the paragraph on principal liability concerned the concept of indirect perpetration, which was re-drafted to state that an individual can commit a crime through another person “*regardless of whether that person is criminally responsible*”.⁹³ Although this alteration expands the classical scope of indirect perpetration – *i.e.* the innocent agent doctrine – and creates room for employing various theories that can fill in the gap,⁹⁴ it has no relation to the spirit of the provision “commits [...] jointly with another”. As explained further below, states that have adopted such autonomous concepts

of indirect perpetration still apply a subjective approach to co-perpetration, maintaining that joint principals to a crime are those individuals who share a common intent to commit it and thereby coordinate their contributions to commit the concerted crime.

The above-said 19 February 1997 draft by the Chairman of the PrepCom Working Group on General Principals of Criminal Law and Penalties marks the last phase in the negotiations and preparatory works on *commission* responsibility, seeing as the language of its sub-paragraph a) is recited nearly verbatim in the final text of Article 25(3)(a) RS.

“(a) commits such a crime, whether as an individual, jointly with another, or through another person regardless of whether that person is criminally responsible;”⁹⁵

Indeed, as Schabas has also pointed out, this draft was ultimately adopted with no much debate at the Rome Conference in 1998.⁹⁶ The first conclusion that may be drawn from the above research is that, as other scholars have also stated,⁹⁷ not a single document in the *travaux préparatoires* of the Rome Statute suggests that the drafters of Article 25(3) intended it to incorporate the doctrine of control over the crime. Defining the elements of the modes of liability contained in this article based on the control paradigm is, therefore, a choice that is premised neither on the ordinary text of this provision, nor on the intentions of its drafters. If anything, a more plausible case could be built for the proposition that the preparatory works on joint perpetration liability under the Rome Statute put forward the element of ‘common intent’ as the litmus test for construing this mode of liability.

6.2.2. A basis under Article 21(1)(b) RS: ‘principles and rules of international law’?

As noted above, Article 21(1)(a) RS establishes that the ICC must apply “[i]n the first place, this Statute, Elements of Crimes and its Rules of Procedure and Evidence”,⁹⁸ which has led the Court to conclude that the other sources of law listed in Article 21(1)(b) and (c) are subsidiary and may be considered “only when the statutory material fails to prescribe a legal solution”.⁹⁹ Taking into account the above research and its conclusion that neither a literal, nor a contextual, nor indeed a teleological interpretation of Article 25(3)(a) expressly and unequivocally supports one particular construction of co-perpetration liability – least

⁹⁰ For a discussion on this doctrine, see Chapter 4, Section 4.3.3.1. and Section 4.3.3.2. See also Van Sliedregt, *supra* n 44, at 90; H. Olásolo, *The Criminal Responsibility of Senior Political and Military Leaders as Principals to International Crimes* (Oxford: Hart, 2009), at 109-110.

⁹¹ See *supra* text accompanying note 83.

⁹² Preparatory Committee on the Establishment of an International Criminal Court (Working Group on General Principles of Criminal Law and Penalties), *Chairman’s Text, Article B b., c. and d. Individual criminal responsibility* (A/AC.249/1997/WG.2/CRP.2/Add.2), 19 February 1997, at 1-2. <https://www.legal-tools.org/uploads/tx_ltpdb/doc19258.pdf> [accessed 29 January 2016].

⁹³ *Ibid.*, (*emphasis added*). In particular, the sub-paragraph on principal liability in the 19 February 1997 Chairman’s text now read: “(a) commits such a crime, whether as an individual, jointly with another, or through another person regardless of whether that person is criminally responsible;”

⁹⁴ The idea that an individual could qualify as an indirect perpetrator even when the person who physically commits the crime is also responsible for his/her acts, has been expressed in various autonomous theories of liability, such as “functional perpetration” (“*functioneel daderschap*”) in the Netherlands, perpetration through “control based on organized power structures” (“*Organisationsherrschaft*”) in Germany, subjective approaches of indirect perpetration as used in *e.g.* the earlier jurisprudence of the Federal Supreme Court of Germany etc. For a discussion on these, see Chapter IV, Section 4.3.3.2. and Chapter V, Section 5.2.1. See also Jain, ‘Perpetrators and Accessories’, *supra* n 43, at 118-119; Van Sliedregt, *supra* n 44, at 91; K. Ambos, ‘Command Responsibility and Organisationsherrschaft: Ways of Attributing International Crimes to the ‘Most Responsible’’, in H. Van der Wilt and A. Nollkaemper (eds), *System Criminality in International Law* (Cambridge: Cambridge UP, 2009), at 127-157; H. Van der Wilt, ‘On Functional Perpetration in Dutch Criminal Law: Some Reflections Sparked off by the Case against the Former Peruvian President Alberto Fujimori’, 11 *Zeitschrift Für Internationale Strafrechtsdogmatik* (2009), at 615-621.

⁹⁵ Chairman’s Text, *supra* n 92, at 1. The sole difference between sub-paragraph a) of this draft version and the final text of Article 25(3)(a) RS is that the latter, for entirely grammatical reasons, includes the word “other” in the text on indirect perpetration, so at to now read: “regardless of whether that *other* person is criminally responsible”. See *supra* text accompanying note 7.

⁹⁶ Schabas, *supra* n 74, at 423-424.

⁹⁷ Van Sliedregt, *supra* n 44, at 86; Sadat and Jolly, *supra* n 14, at 781; Ohlin, *supra* n 12, at 524; Aksanova, *supra* n 14, at 655.

⁹⁸ Article 21(1)(a), ICC Rome Statute, *supra* n 6. (*emphasis added*)

⁹⁹ *Katanga and Chui* Decision on the Confirmation of Charges, *supra* n 6, para 508. See also *Ruto, Kosgey and Sang* Decision on the Confirmation of Charges, *supra* n 6, para 289; *Katanga* Trial Judgment, *supra* n 3, para 1395; *The Prosecutor v. Bemba* (ICC-01/05-01/08-3343), Judgment, Trial Chamber, 21 March 2016, paras 66, 69.

of all the control theory – it is apposite to turn our attention to Article 21(1)(b). It provides that the ICC shall apply:

In the second place, where appropriate, applicable treaties and the principles and rules of international law, including the established principles of the international law of armed conflict;¹⁰⁰

The reference to ‘principles and rules of international law’ has been widely regarded as including customary international law among the applicable sources of law under the Rome Statute.¹⁰¹

Unsurprisingly, having maintained that the theory of control over the crime is (implicitly) incorporated in Article 25(3) RS, the ICC judges have never seriously contemplated the question whether this doctrine is recognized as an international custom. In fact, one might even argue that the *Katanga and Chui* Pre-Trial Chamber tacitly conceded that it is not when, in dealing with the Defence’s submission that the ICTY *Stakić* Appeals Chamber rejected the theory of joint control for lacking legal basis in customary law, the judges simply held that:

The [Stakić] Appeals Chamber rejected this mode of liability by stating that it did not form part of customary international law. However, under article 21(l)(a) of the Statute, the first source of applicable law is the Statute. Principles and rules of international law constitute a secondary source applicable only when the statutory material fails to prescribe a legal solution. Therefore, and since the Rome Statute expressly provides for this specific mode of liability, the question as to whether customary law admits or discards the ‘joint commission through another person’ is not relevant for this Court. This is a good example of the need not to transfer the *ad hoc* tribunals’ case law mechanically to the system of the Court.¹⁰²

Had the *Katanga and Chui* Pre-Trial Chamber actually proceeded to address the substance of the question put before it, it would have had to: i) conduct a *Tadić*-style lengthy analysis on case law and legislation evincing the formation of an international custom on the joint control doctrine;¹⁰³ and ii) reject the *ad hoc* Tribunals’ long-standing conclusion that co-perpetration based on JCE is recognized under customary law, seeing as it could not be that this source of law simultaneously supports two competing theories of co-perpetration liability. Considering the research presented earlier in this book, the present author submits

¹⁰⁰ Article 21(1)(b), ICC Rome Statute, *supra* n 6.

¹⁰¹ *Bemba* Trial Judgment, *supra* n 99, para 71. See also Schabas, *supra* n 74, at 391; Sadat and Jolly, *supra* n 14, at 761; R. O’Keefe, *International Criminal Law* (Oxford: Oxford UP, 2015), at 552; J. Powderly, ‘The Rome Statute and the Attempted Corseting of the Interpretative Judicial Function: Reflections on Sources of Law and Interpretative Technique’ in Stahn, *supra* n 12, at 478.

¹⁰² *Katanga and Chui* Decision on the Confirmation of Charges, *supra* n 6, para 508.

¹⁰³ For a discussion on the definition of customary international law, the theories on its formation, the methods used in international criminal proceedings to confirm the customary status of a certain rule, and the UN *ad hoc* Tribunals’ analysis on the customary basis of the JCE doctrine, see Chapter 4, Section 4.2.

that such an undertaking would not have rendered favourable results for the control doctrine.

It has been overwhelmingly affirmed, both in academic research¹⁰⁴ and in the case law of the modern international and hybrid tribunals,¹⁰⁵ that the control over the crime doctrine does not have a basis in customary international law. Indeed, the review of Nuremberg-era legislation and jurisprudence on criminal responsibility carried out in Chapter 2,¹⁰⁶ clearly shows that neither the architects of the IMT/IMTFE Charter, nor the Nuremberg and the Tokyo Tribunals, nor the well-known subsequent trials of Nazi officials in Occupied Germany ever endorsed a mode of liability for which the accused’s control/hegemony over the alleged crime was an essential legal element. In fact, for the larger part, the debates on the constructs to be used for ascribing liability revolved around construing expansive prosecutorial tools, rather than concepts which, at least at first look, seek to shrink the circle of individuals who could incur (principal) liability.¹⁰⁷ It is, thus, hardly a surprise that when the *Lubanga* Pre-Trial Chamber first endorsed the control theory, no reference was made to any World War II-era legislation or jurisprudence. Indeed, the international support that the judges cited for the notion of co-perpetration based on joint control was limited, as Judge Fulford also critically stressed,¹⁰⁸ to the overturned ICTY *Stakić* Trial Judgment and the separate opinion of Judge Schomburg in the ICTR *Gacumbitsi* Appeal Judgment.¹⁰⁹ To further expand on these sources, one may also refer to Judge Schomburg’s separate opinions in the *Limaj et al.*, the *Martić*, and the *Simić* appeal judgments, although only the latter one was actually available to the *Lubanga* Pre-Trial Chamber at the relevant time.¹¹⁰ Be that as it may, the truth is that outside the ICC, no international tribunal has ever endorsed the control approach in cases of co-perpetration. The ICTY *Stakić* Trial

¹⁰⁴ T. Weigend, ‘Perpetration through an Organization: The Unexpected Career of a German Legal Concept’, 9 *Journal of International Criminal Justice* (2011), at 106; Sadat and Jolly, *supra* n 14, at 777, 784; Aksenova, *supra* n 14, at 644; Ohlin, *supra* n 12, at 532-533; E. Van Sliedregt, ‘Perpetration and Participation in Article 25(3)’, in Stahn, *supra* n 12, at 507; F. Jessberger and J. Geneuss, ‘On the Application of a Theory of Indirect Perpetration in Al Bashir: German Doctrine at The Hague?’ 6 *Journal of International Criminal Justice* (2008), at 868; G. Werle, ‘Individual Criminal Responsibility in Article 25 ICC Statute’ 5 *Journal of International Criminal Justice* (2007), at 964; R. Cryer *et al.*, *An Introduction to International Criminal Law and Procedure* (3rd edn, Cambridge: Cambridge UP, 2014), at 363-364; G. Werle and B. Burghardt, ‘Indirect Perpetration: A Perfect Fit for International Prosecution of Armchair Killers? (Foreword)’, 9 *Journal of International Criminal Justice* (2011), at 85-86.

¹⁰⁵ *The Prosecutor v. Stakić* (IT-97-24-A), Judgment, Appeals Chamber, 22 March 2006, para 62; *The Prosecutor v. Milutinović et al.* (IT-05-87-PT), Decision on Ojdanić’s Motion Challenging Jurisdiction: Indirect Co-perpetration, Trial Chamber, 22 March 2006, paras 39-40; *Interlocutory Decision on the Applicable Law: Terrorism, Conspiracy, Homicide, Perpetration, Cumulative Charging* (STL-11-01/I/AC/R176bis), Decision, Appeals Chamber, 16 February 2011, para 256.

¹⁰⁶ See Chapter 2, Section 2.2. and Section 2.3.

¹⁰⁷ See Chapter 2, Section 2.2.

¹⁰⁸ *Lubanga* Trial Judgment, *supra* n 1, Separate Opinion of Judge Adrian Fulford, para 10.

¹⁰⁹ *Lubanga* Decision on the Confirmation of Charges, *supra* n 5, paras 330 (fn 418) and 342 (fn 422).

¹¹⁰ *The Prosecutor v. Simić* (IT-95-9-A), Judgment, Appeals Chamber, 28 November 2006, Dissenting Opinion of Judge Schomburg, paras 13-17; *The Prosecutor v. Limaj, Bala and Musliu* (IT-03-66-A), Judgment, Appeals Chamber, 27 September 2007, Partially Dissenting and Separate Opinion and Declaration of Judge Schomburg, paras 10-13; *The Prosecutor v. Martić* (IT-95-11-A), Judgment, Appeals Chamber, 8 October 2008, Separate Opinion of Judge Schomburg on the Individual Criminal Responsibility of Milan Martić.

Chamber, which was notably presided by Judge Schomburg, did so but its reasoning was explicitly rejected by the Appeals Chamber for lacking basis in customary law.¹¹¹ It was striking that, other than academic work, no (international) case law or legislation was cited by the *Stakić* trial judges to support this departure from the settled ICTY/R law on JCE.¹¹² Judge Schomburg later tried to present a wider support for the joint control concept by quoting national laws that mirror the terminology used in the *Stakić* Trial Judgment.¹¹³ In doing so, however, he failed to make one critical distinction: the existence of domestic (or international) legislation that specifically uses the generic terms ‘joint perpetration’, ‘co-perpetration’, or ‘co-principals’ is, on its own, no indicator of the concrete approach that a said legal system uses to construct this mode of liability.¹¹⁴ To find out whether a certain state relies on the control paradigm – out of the three approaches identified in the *Lubanga* Decision on the Confirmation of Charges – for defining the legal framework of co-perpetration, one ought to look beyond mere legislative labels and into the manner in which this notion is *applied* in court practice. Furthermore, the nature of the cases that are reviewed when evaluating whether a particular theory of co-perpetration has crystallized in an international custom must also be kept in mind. As already noted in Chapter 4 and pointed out by the ICTY *Kupreškić* Trial Chamber, the rules that a domestic court applies to ascribe liability for *domestic* crimes are, in general, less indicative of the formation of an international custom on co-perpetration responsibility for *international* crimes.¹¹⁵ The latter kind of delinquency, which is so often linked to the notion of ‘system criminality’, raises a number of unique considerations when allocating liability: considerations that are largely alien to domestic criminal proceedings.¹¹⁶

There are some authors who have sought to find a pedigree for the control theory in post-World War II case law by drawing analogies between certain words used in judgments from that era and the underlying rationale of Roxin’s control doctrine, ultimately concluding that a number of trials applied “a test of whether the accused had a “decisive”, “integral” or “essential” role in a plan or enterprise.”¹¹⁷ Clark, for instance, has emphasized that in the *RuSHA* case, the defendants were charged for participating in a common criminal plan, to

which they all contributed in a way that was “vital to the success of the whole enormous

operation”.¹¹⁸ Similarly, Ambos has argued that:

the judgment in the *Justice Trial* was *implicitly* based on [the theory of “*Organisationsherrschaft*”] since the accused were held responsible because of their “conscious participation in a nationwide government-organized system of cruelty and injustice”, *i.e.* because of their commission of crimes by way of a hierarchical organizational structure.¹¹⁹

The reasoning behind the above assertions is unconvincing for a number of reasons. First of all, a finding that a certain accused had a ‘vital’/‘essential’/‘necessary’ etc. function in the furtherance of an enterprise – and, indeed, there are many Nuremberg-era trials where the prosecution and/or judges characterized the accused’s contribution to the crime in such terms¹²⁰ – is by no means a statement of the law on this mode of liability: *viz.* a case-specific, *factual* finding on the intensity of an accused’s participation in the alleged enterprise does not necessarily present a general legal finding on the constituent element of the said form of liability. The *Justice* and the *RuSHA* cases, both of which were discussed previously in this book,¹²¹ do not contain a single passage in which either the prosecution, or the judges construed the law on ‘common design’ liability, or any other mode of liability, as requiring a *sine qua non* contribution to the concerted crime. In this respect, it should be noted that there are many ICTY/R judgments in which the judges would first affirm that JCE law requires a ‘significant’ contribution to the alleged JCE and then, after assessing the evidence, conclude that the accused’s contribution was “substantial”, or even “essential”.¹²² This does not mean

118 Clark, *supra* n 117, at 478, referring to Military Tribunal I, *United States of America v. Ullrich Greifelt et al.* (“The *RuSHA* Case”), Case No. 8, 20 October 1947 – 10 March 1948, in *Trials of War Criminals before the Nuernberg Military Tribunals under Control Council Law No. 10, Nuremberg, October 1946-April, 1949*, Vol. IV (Washington, D.C.: United States Government Printing Office, 1950), at 60. This case was discussed in Chapter 4, Section 4.2.3.3.ii.

119 Ambos, *supra* n 38, at 751, referring to Military Tribunal III, *United States of America v. Josef Altstötter et al.* (“The *Justice* Case”), Case No. 3, 5 March 1947 – 4 December 1947, in *Trials of War Criminals before the Nuernberg Military Tribunals under Control Council Law No. 10, Nuremberg, October 1946-April, 1949*, Vol. III (Washington, D.C.: United States Government Printing Office, 1951), at 985. This case was discussed in Chapter 2, Section 2.3.3.2.i.

120 In the IMT Trial, for instance, the Chief US Prosecutor Robert Jackson pled that “[t]he parts played by the other defendants, although less comprehensive and less spectacular than that of [Göring], were nevertheless *integral and necessary contributions* to the joint undertaking, *without any one of which the success of the common enterprise would have been in jeopardy*.” Office of United States Chief of Counsel for Prosecution of Axis Criminality, *Nazi Conspiracy and Aggression*, Supplement A (Washington: United States Government Printing Office, 1947), at 25. (*emphasis added*) It is clear, however, that Jackson did not seek to establish a standard of “necessary” contribution, seeing as in this closing address to the Tribunal, he also described the contribution of the accused as “substantial”, or “real” or sometimes without even using any qualifiers. See *Ibid.*, at 38.

121 See Chapter 2, Section 2.3.3.2.i and Chapter 4, Section 4.2.3.3.ii.

122 See *e.g.* *Tolimir* Trial Judgment, *supra* n 42, paras 893, 1093, 1227; *The Prosecutor v. Popović et al.* (IT-05-88-T), Judgment, Trial Chamber, 10 June 2010, paras 1027, 1820; *Krstić* Trial Judgment, *supra* n 60, paras 611, 644; *The Prosecutor v. Karemera and Ngirumpatse* (ICTR-98-44-T), Judgment, Trial Chamber, 2 February 2012, paras 1436, 1457-1458.

111 *Stakić* Appeal Judgment, *supra* n 105, para 62. See Chapter 5, Section 5.2.2.

112 *The Prosecutor v. Stakić* (IT-97-24-T), Judgment, Trial Chamber, 31 July 2003, paras 439-442.

113 *Simić* Appeal Judgment, *supra* n 110, Dissenting Opinion of Judge Schomburg, paras 13-15.

114 See *infra* Section 6.2.3.1.

115 See Chapter 4, Section 4.2.2.2. See *The Prosecutor v. Kupreškić et al.* (IT-95-16-T), Judgment, Trial Chamber, 14 January 2000, paras 540-542; *The Prosecutor v. Ieng Sary, Ieng Thirith and Khieu Samphan* (002/19-09-2007-ECCC/OCIJ), Decision on the Appeals against the Co-Investigative Judges Order on Joint Criminal Enterprise (JCE), Pre-Trial Chamber, 20 May 2010, para 82.

116 See Chapter 1, Section 1.2.1.

117 R. Clark, ‘Together Again? Customary Law and Control over the Crime’, 26 *Criminal Law Forum* (2015), at 466. See also Ambos, *supra* n 38, at 751; Olásolo, *supra* n 90, at 63.

that those judgments provide support for the (joint) control doctrine.¹²³ Secondly, stressing the use of terms such as “vital”, “integral” and “essential” in the *RuSHA* and the *Justice* judgments to demonstrate customary support for the control theory is also problematic because it overlooks the many passages in these two cases where the contribution of the accused was stated in lesser terms, such as *e.g.* ‘substantial’,¹²⁴ or was not defined with any specific qualifier.¹²⁵ The crux of the analysis on these, and any other, Nuremberg-era judgments should, therefore, fall on tracing and analyzing instances where the judges defined the applicable law in general terms, and if no such express discussion took place: consider what basic principles of (joint) liability may be unequivocally distilled from the *totality* of the factual findings used to convict the accused. In the author’s view, while the *RuSHA* and the *Justice* judgments could plausibly be interpreted to have employed a mode of liability akin to the present-day JCE liability,¹²⁶ they do not provide support for the control approach to criminal responsibility. In fact, post-World War II jurisprudence can be identified which explicitly confirms that liability based on participation in a common criminal plan does not require a *sine qua non* contribution to the concerted crime(s),¹²⁷ and that it suffices that the accused’s contribution had “some real bearing” on the furtherance of that plan.¹²⁸

123 Similarly, the fact that a particular Nuremberg-era trial dealt with accused who functioned in a given Nazi agency and, thus, the judgment contains terms such as ‘organization’, ‘apparatus’, or ‘system’ does not automatically imply reliance on the underlying rationale of what, decades later, became known as the ‘*Organisationsherrschaft*’ theory.

124 The judges in the *RuSHA* case concluded that: “in the case of the general and systematic commission of crimes in concentration camps all of the defendants are guilty. All of the defendants had *substantial connections with the concentration camps*, the very existence and operation of which necessarily involved murder, atrocities, torture, enslavement, and other inhumane acts.” (*emphasis added*) The *RuSHA* Case, *supra* n 118, at 261.

125 For instance, in relation to the accused Schlegelberger, the judges in the *Justice* case held: “in the earlier portions of this opinion we have repeatedly referred to the actions of the defendant Schlegelberger. Repetition would serve no good purpose. By way of summary we may say that Schlegelberger supported the pretension of Hitler in his assumption of power to deal with life and death in disregard of even the pretense of judicial process. By his exhortations and directives, Schlegelberger contributed to the destruction of judicial independence. It was his signature on the decree of 7 February 1942 which imposed upon the Ministry of Justice and the courts the burden of the prosecution, trial, and disposal of the victims of Hitler’s Night and Fog. For this he must be charged with primary responsibility.” The *Justice* Case, *supra* n 119, at 1083.

126 See the analysis contained in Chapter 2, Section 2.3.3.2.i and Chapter 4, Section 4.2.3.3.ii.

127 That the defendant’s contribution to a common plan does not have to be a *sine qua non* for the execution of the plan was also explicitly stated in *Feurstein and others* (Ponzano Case):

Therefore, whether you think that any of these accused were vital links in this event or whether they were not, whether you think that this execution or these executions might have taken place even in their absence, that of course does not free them from guilt if you think they can be said to have been concerned in these executions at Ponzano and the Cisa Pass. ‘Feurstein and others (Ponzano Case), British Military Court Sitting at Hamburg, Germany * Judgment of 24 August 1948’, 5 *Journal of International Criminal Justice* (2007), at 240. See also *The Prosecutor v. Tadić* (IT-94-1-A), Judgment, Appeals Chamber, 15 July 1999, para 199.

128 In the *Stalag Luft III* case, the British Military Court in Hamburg reasoned that “the persons concerned must have been part of the machine doing some duty, carrying out *some performance which went on directly to achieve the killing*, that it *had some real bearing on the killing*, would not have been so effective or been done so expeditiously if that person had not contributed his willing aid.” *Trial of Max Wielen and 17 Others* (“The *Stalag Luft III* Case”), British Military Court, Hamburg, Germany, 1 July – 3 September 1947, in UN War Crimes Commission, *Law Reports of Trials of War Criminals*, Vol. XI (London: Published for the United Nations War Crimes Commission by His Majesty’s Stationary Office, 1949), at 46. (*emphasis added*) For a review of the facts of the case and its reliance on ‘common purpose/design’ liability, see Chapter 2, Section 2.3.3.2.ii and Chapter 4, Section 4.3.3.2.iii.

Putting aside Nuremberg-era legislation and case law, it has also been pointed out that the control theory has more recently come to be applied in a number of domestic legal systems:¹²⁹ an observation that may, indeed, be pertinent for determining the customary status of the concept of co-perpetration based on joint control over the crime. As a point of departure, one should keep in mind that, as discussed earlier in this book, domestic judgments – and particularly those applying *national* criminal law to *ordinary*, “garden-variety” crimes¹³⁰ – generally have a lower probative value for evincing the formation of a customary rule of international criminal law.¹³¹ To this end, it is more appropriate to consider such purely domestic case law when determining the existence of a general principle of law, rather than the crystallization of an international custom.¹³² Having said this, it is certainly true that the control doctrine has also been applied by municipal courts in cases dealing with the sort of system criminality that is characteristic for international crimes: *i.e.* cases which, although not founded on the corpus of law that the international tribunals apply, are still relevant because of the analogous factual circumstances they dealt with. The most prominent examples of this type of domestic precedents include the Argentinian *Juntas* Trial,¹³³ the German *Border*

129 *Lubanga* Decision on the Confirmation of Charges, *supra* n 5, para 330; *Katanga and Chui* Decision on the Confirmation of Charges, *supra* n 6, para 485.

130 Ohlin, *supra* n 12, at 520.

131 Chapter 4, Section 4.2.2.2. and Section 4.2.4. See also *Kupreškić et al.* Trial Judgment, *supra* n 115, paras 540-542; *Sary, Thirith and Samphan* Pre-Trial Decision on JCE, *supra* n 115, para 82. See *infra* note 132.

132 In this venue of thought, the ICTY *Milutinović et al.* Trial Chamber clearly pointed out that: “[t]he Trial Chamber acknowledges the possibility that some species of co-perpetration and indirect perpetration [based on the control over the crime theory] can be found in various legal systems throughout the world. Nevertheless [...] the task before the Trial Chamber is not to determine whether co-perpetration or indirect perpetration are general principles of law, but instead to determine whether the[se] forms of responsibility [...] existed in customary international law at the relevant time. Consequently, even if Roxin or other authorities did provide clear evidence that the very specific definition of co-perpetration in [the *Stakić* Trial Judgment] exists in German or other national law, such evidence would not support a conclusion that there is state practice and *opinio juris* demonstrating the existence of the *Stakić* definition in customary international law.” *Milutinović et al.* Decision on Indirect Co-perpetration, *supra* n 105, para 39. (*emphasis added*). For further support of the argument that strictly domestic jurisprudence is not proper evidence of the formation of an international custom but is relevant for determining the existence of a general principle of law see *Sary, Thirith and Samphan* Pre-Trial Decision on JCE, *supra* n 115, paras 65, 86; *The Prosecutor v. Nuon Chea, Ieng Sary, Ieng Thirith and Khieu Samphan* (002/19-09-2007-ECCC/TC), Decision on the Applicability of Joint Criminal Enterprise, Trial Chamber, 12 September 2011, para 37; *Tadić* Appeal Judgment, *supra* n 127, para 225. See also B. Schlütter, *Developments in Customary International Law: Theory and the Practice of the International Court of Justice and the International Ad Hoc Criminal Tribunals for Rwanda and Yugoslavia* (Leiden: Martinus Nijhoff, 2010), at 75; B. Lepard, *Customary International Law: A New Theory with Practical Applications* (Cambridge: Cambridge UP, 2010), at 164-165.

133 It was the Argentinian Federal Court of Appeals that, in 1985, applied the theory of indirect perpetration based on control over an organized structure of power to the *Juntas* Trial. An English translation of the key excerpts of the *Juntas* Judgment was published several years later in E. Dahl and A. Garro (transl.), ‘Argentina: National Appeals Court (Criminal Division) Judgment on Human Rights Violations by Former Military Leaders’, 26 *International Legal Materials* (1987): 317-72 (the analysis on indirect perpetration through a hierarchical power apparatus starts at 360 *et seq.*). For a review of the *Juntas* Trial and its use of the indirect perpetration notion, see H. Olásolo and A. Cepeda, ‘The Notion of Control of the Crime and Its Application by the ICTY in the *Stakić* Case’, 4 *International Criminal Law Review* (2004), at 494 (fn 64); F. Muñoz-Conde and H. Olásolo, ‘The Application of the Notion of Indirect Perpetration through Organized Structures of Power in Latin America and Spain’, 9 *Journal of International Criminal Justice* (2011), at 116-118.

Guard Trial,¹³⁴ and a few more cases from Latin American jurisdictions, including Chile, Peru and Colombia.¹³⁵ There are several things that should be highlighted about these trials. First of all, as already pointed out in Chapter 5, they are precedents of the application of *one* particular manifestation of the control doctrine: namely, the theory of indirect perpetration based on control over an organized structure of power (“*Organisationsherrschaft*”).¹³⁶ The use of this autonomous form of liability in the said jurisdictions is by no means declarative of the approach that they take to co-perpetration liability. Thus, for instance, even though the Colombian Supreme Court relied on *Organisationsherrschaft* liability in the 2010 *Garcia Romero* case,¹³⁷ Olásolo has pointed out that under Colombian law:

the notion of co-perpetration requires that a plurality of persons, acting in a concerted manner, implement a common criminal plan in accordance with the principle of division of tasks. [...] In this scenario, as long as it can be shown that a person made a contribution during the stage of the execution of the crimes, that person becomes automatically a co-perpetrator, regardless of the relevance of his contribution; there is no need for such contribution to be of an essential nature.¹³⁸

Similarly, although the German Federal Supreme Court has indeed applied the theory of indirect perpetration based on control over an organized power apparatus in its case law, German law on co-perpetration responsibility is not premised on the control concept.¹³⁹ Thus, whatever value the above-said domestic judgments might have for determining the status of customary international criminal law, their relevance is limited to defining the contours of indirect perpetration liability: *i.e.* they do not constitute evidence of acceptance of the concept of co-perpetration based on joint control. Secondly, even in relation to the theory of indirect perpetration based on control over an organized power apparatus, it would be wrong to conclude that these domestic precedents evince its crystallization into a customary norm of international law. Other than the fact that, outside the ICC context, no international document

and/or jurisprudence has ever endorsed this concept,¹⁴⁰ it has also been pointed out that the abovementioned domestic judgments come from Germany and a handful of other, German-influenced national legal systems:¹⁴¹ hardly a basis on which one can conclude that the doctrine of indirect perpetration based on control over an organized structure of power has become a customary rule of international criminal law.¹⁴²

The approach to joint perpetration responsibility that has been widely recognized, both in legal practice and in academia, as a customary norm of international criminal law is embodied in the JCE doctrine.¹⁴³ The research contained in the present book has confirmed this conclusion,¹⁴⁴ albeit not for the ‘extended’ category of this concept.¹⁴⁵ It was shown that JCE liability has been adopted and continuously applied by the contemporary international and hybrid tribunals,¹⁴⁶ and, more significantly, that the underlying rationale of this construct does have a long pedigree in the Nuremberg-era legislation and case law.¹⁴⁷ To avoid any unnecessary repetition, it would only be recalled that already during the early negotiations among the Allies, leading to the establishment of the IMT, the notion of “joint participation in a broad criminal enterprise”¹⁴⁸ was recognized as grounded in:

the rule of liability, common to all penal systems and included in the general doctrines of the laws of war, that those who participate in the formulation and execution of a criminal plan involving

¹⁴⁰ Jessberger and Geneuss, *supra* n 104, at 868.

¹⁴¹ Van Sliedregt, *supra* n 44, at 87; Jain, ‘The Control Theory’, *supra* n 43, at 184; Ohlin, *supra* n 12, at 523-524. It should also be pointed out here that the Argentinian Federal Court of Appeals’ adoption of *Organisationsherrschaft* liability in the *Juntas* Trial was subsequently rejected by the Supreme Court. See *Katanga and Chui* Decision on the Confirmation of Charges, *supra* n 6, para 504.

¹⁴² Weigend, *supra* n 104, at 106; Werle and Burghardt, *supra* n 104, at 85-86; Sadat and Jolly, *supra* n 14, at 784.

¹⁴³ *Tadić* Appeal Judgment, *supra* n 127, paras 188, 195-226; *The Prosecutor v. Krajišnik* (IT-00-39-A), Judgment, Appeals Chamber, 17 March 2009, paras 657-666; *The Prosecutor v. Đorđević* (IT-05-87/1-A), Judgment, Appeals Chamber, 27 January 2014, paras 32-53; *The Prosecutor v. Tolimir* (IT-05-88/2-A), Judgment, Appeals Chamber, 8 April 2015, para 281; STL Interlocutory Decision on the Applicable Law, *supra* n 105, paras 236-249; *The Prosecutor v. Sesay, Kallon and Gbao* (SCSL-04-15-A), Judgment, Appeals Chamber, 26 October 2009, paras 397-400; *The Prosecutor v. Kaing Guek Eav alias Duch* (001/18-07-2007/ECCC/TC), Judgment, Trial Chamber, 26 July 2010, paras 504-510; *The Prosecutor v. Nuon Chea and Khieu Samphan* (002/19-09-2007/ECCC/TC), Case 002/01 Judgment, Trial Chamber, 7 August 2014, paras 690-691. See also E. Van Sliedregt, ‘Modes of Participation’ in L. Sadat (ed), *Forging a Convention for Crimes against Humanity* (Cambridge: Cambridge UP, 2011), at 250; A. Cassese, *Cassese’s International Criminal Law* (3rd edn, Oxford: Oxford UP, 2013), at 164; M. Scharf, *Customary International Law in times of Fundamental Change: Recognizing Grotian Moments* (New York: Cambridge UP, 2013), at 75-85; Jessberger and Geneuss, *supra* n 104, at 856, 866.

¹⁴⁴ See Chapter 2, Section 2.3.; Chapter 4, Section 4.2.2.

¹⁴⁵ See Chapter 4, Section 4.2.3. and Section 4.2.4.

¹⁴⁶ See Chapter 1, Section 1.1.

¹⁴⁷ See Chapter 2, Section 2.3.; Chapter 4, Section 4.2.2.

¹⁴⁸ This mode of criminal responsibility was included both in the January 1945 Yalta memorandum and in the April 1945 San Francisco memorandum. See Chapter 2, Section 2.2.2.1., text accompanying notes 26-28.

¹³⁴ The German Federal Supreme Court used the concept of indirect perpetration based on control over an organized structure of power in the 1994 *Border Guard* Trial. An English translation of the key excerpts of the *Border Guard* Judgment is available at G. Werle and B. Burghardt, ‘Introductory Note: Judgment of 26 July 1994 Against Former Minister of National Defence Keßler and Others’, 9 *Journal of International Criminal Justice* (2011): 207-26. For an analysis of the *Border Guard* Judgment and its treatment of the concept of indirect perpetration, see Olásolo and Cepeda, *supra* n 133, at 496 (fn 65).

¹³⁵ Muñoz-Conde and Olásolo, *supra* n 133, at 113-135; K. Ambos, ‘The Fujimori Judgment: A President’s Responsibility for Crimes against Humanity as Indirect Perpetrator by Virtue of an Organized Power Apparatus’, 9 *Journal of International Criminal Justice* (2011), at 137-158.

¹³⁶ See Chapter 5, Section 5.2.2 and *supra* notes 133-135. See also, *Katanga and Chui* Decision on the Confirmation of Charges, *supra* n 6, paras 502 (fn 666), 504-505.

¹³⁷ Olásolo explains that the accused in this case was a Colombian senator and a co-founder of a paramilitary group that carried out, *inter alia*, the ‘Macayepo massacre’ of October 2000: a crime for which the Supreme Court held the accused liable as an indirect perpetrator, based on his control over the said paramilitary group. For a more detailed analysis of the case, see Muñoz-Conde and Olásolo, *supra* n 133, at 124-127.

¹³⁸ *Ibid.*, at 123.

¹³⁹ See *infra* Section 6.2.3.2.iii.

multiple crimes are jointly liable for each of the offenses committed and jointly responsible for the acts of each other.¹⁴⁹

This rule on “common plan” liability was later included, albeit in a regrettably opaque language, in the very last sentence of Article 6 IMT Charter:¹⁵⁰ a provision which the International Military Tribunal found to establish the “responsibility of persons participating in a common plan”.¹⁵¹ In turn, this holding of the IMT was then endorsed and further developed in the subsequent trials of Nazi war criminals in Occupied Germany. They first coined the label “common purpose/design” for this form of liability, and used it to ascribe *full responsibility* to the participants in a common plan who, sharing the purpose to commit its underlying crime, coordinate efforts to execute it.¹⁵² The emphasis fell on the accused’s state of mind – his intention to jointly commit the concerted crime with his confederates – and the precise intensity of his contribution was a secondary factor that mattered only for sentencing purposes.¹⁵³ Half a century after these Nuremberg-era trials, the ICTY adopted this rationale, and further specified and refined it into a modern legal theory that it initially described as “co-perpetration involving a group of persons pursuing a common design to commit crimes”,¹⁵⁴ but eventually came to be known simply as ‘joint criminal enterprise’. This is the spirit of continuity and uniformity of international criminal law that the modern international courts and tribunals should strive to preserve.

The manner in which the International Criminal Court has handled the construction of co-perpetration liability is representative of what Van Sliedregt described as “the ICC’s institutional culture [...] to pursue *Alleingang*”: *i.e.* the Court’s propensity to act as a self-contained system of law that will shun and depart from legal principles defined by the ICTY/R, even where the Rome Statute does not strictly require it to do so.¹⁵⁵ The silence in

the plain text of Article 25(3)(a) RS on how to approach the notion of co-perpetration could have been cited by the judges as a reason to consult the sources of law listed in Article 21(1)(b) RS and adopt – with the necessary revision and refinement – the customary law on JCE responsibility that they were very much aware of:¹⁵⁶ a decision that would have consolidated the ICTY/R and the ICC case law and, as argued above, could have been supported with the Rome Statute’s preparatory works.¹⁵⁷ Instead, the *Lubanga* Pre-Trial Chamber adopted the control approach to co-perpetration after engaging in a contextual reading of Article 25 RS that was unconvincing¹⁵⁸ and unsupported by the *travaux préparatoires* of this provision,¹⁵⁹ prompting some to criticize the Court for effectively *choosing* to depart from the UN *ad hoc* Tribunals’ case law and fragmenting international criminal law.¹⁶⁰ In this respect, the present author fully agrees with the sentiment expressed in academia that, instead of pursuing a culture of *Alleingang*:

the ICC should see itself as the permanent embodiment of the customary international law principles established in and by the *ad hoc* international tribunals except insofar as the Statute clearly directs it in a different direction.¹⁶¹

In view of the above research, it can be concluded that, when considered together, the sources of law listed under Article 21(1)(a) and (b) RS do not provide a legal basis for endorsing the control approach to co-perpetration responsibility under ICC law. Rather, they militate a finding that the legal framework of this form of liability must be based on the underlying principles of the notion of common purpose/JCE.

6.2.3. A basis under Article 21(1)(c) RS: ‘general principles of law’?

Considering the above analysis and the hierarchy which Article 21(1) RS establishes between the sources of law applicable at the ICC, it may be argued that it is irrelevant whether the doctrine of control over the crime – and, in particular, the concept of co-perpetration based on joint control – has a legal basis in ICC law as a ‘general principle of law’ under Article 21(1)(c) RS. After all, it is only when the Court’s constituent documents (Article 21(1)(a) RS), or the principles and rules of international law (Article 21(1)(b) RS), do not offer a legal solution to the matter at hand, that the ICC judges are entitled to look at:

¹⁵⁶ *Lubanga* Decision on the Confirmation of Charges, *supra* n 5, paras 323, 328-330; *Katanga and Chui* Decision on the Confirmation of Charges, *supra* n 6, paras 478, 506; *Katanga* Trial Judgment, *supra* n 3, para 1392.

¹⁵⁷ See *supra* Section 6.2.1.3.

¹⁵⁸ See *supra* Section 6.2.1.2.

¹⁵⁹ See *supra* Section 6.2.1.3.

¹⁶⁰ Sadat and Jolly, *supra* n 14, at 781, 785.

¹⁶¹ *Ibid.*, at 770. See also Cryer, *supra* n 155, at 404-405.

¹⁴⁹ *Memorandum for the President, Subject: Trial and Punishment of Nazi War Criminals*, 22 January 1945, re-printed in B. Smith, *The American Road to Nuremberg: The Documentary Record, 1944-1945* (Stanford: Hoover Institution, 1982), at 120; *Memorandum of Proposals for the Prosecution and Punishment of Certain War Criminals and Other Offenders*, 25-30 April 1945, re-printed in Smith, *Ibid.*, at 165-166. See Chapter 2, Section 2.2.2.1.

¹⁵⁰ The last paragraph of Article 6 IMT Charter read: “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.” Article 6, *Charter of the International Military Tribunal - Annex to the Agreement for the prosecution and punishment of the major war criminals of the European Axis* (“London Agreement”), United Nations, 8 August 1945, available at: <http://www.unhcr.org/refworld/docid/3ae6b39614.html> [accessed 21 July 2016]. For an analysis on the meaning of this provision, see Chapter 2, Section 2.2.4.1.

¹⁵¹ A mode of liability that the IMT judges expressly distinguished from the notion of conspiracy. *France et al. v Göring et al.*, International Military Tribunal, Judgment and Sentence, 1 October 1946, printed in *Trial of the Major War Criminals before the International Military Tribunal, Nuremberg, 14 November 1945-1 October 1946*, Vol. I, Nuremberg, Germany, 1947, at 226. See Chapter 2, Section 2.2.5.1.

¹⁵² See Chapter 2, Section 2.3.3.2.

¹⁵³ Van Sliedregt, *supra* n 44, at 34-35.

¹⁵⁴ *The Prosecutor v. Furundžija* (IT-95-17/1-T), Judgment, Trial Chamber, 10 December 1998, para 210.

¹⁵⁵ E. Van Sliedregt and S. Vasiliev, ‘Pluralism: A New Framework for International Criminal Justice’, in Van Sliedregt and Vasiliev, *supra* n 33, at 5; E. Van Sliedregt, ‘Pluralism in International Criminal Law’, 25 *Leiden Journal of International Law* (2012), at 849. See also R. Cryer, ‘Royalism and the King: Article 21 of the Rome Statute and the Politics of Sources’, 12 *New Criminal Law Review* (2009), at 394.

general principles of law derived by the Court from national laws of legal systems of the world including, as appropriate, the national laws of States that would normally exercise jurisdiction over the crime, provided that those principles are not inconsistent with this Statute and with international law and internationally recognized norms and standards.¹⁶²

Thus, even if one assumed *arguendo* that the joint control theory has become a general principle law, its importation in ICC law would be barred as inconsistent, at the very least, with customary international law,¹⁶³ and arguably with the Rome Statute itself.¹⁶⁴ Nevertheless, in the interest of comprehensiveness and in order to address some important misconceptions, it is still apposite to analyse whether the theory of co-perpetration based on joint control is a general principle of law.

When the *Lubanga* Pre-Trial Chamber adopted the control approach to co-perpetration, it held that “the concept of control over the crime [...] is applied in numerous legal systems”.¹⁶⁵ In much the same spirit, Judge Schomburg – on whose work the Pre-Trial Chamber heavily relied – had also submitted in several dissenting opinions, after citing the penal codes of various national criminal jurisdictions, that “co-perpetratorship in general requires ‘joint functional control over a crime’”.¹⁶⁶ These arguments, if taken at face value, may suggest that the joint control theory is so common to the national justice systems of the world and so entrenched in their case law on group criminality, that it is nowadays a general principle of law. The modern international tribunals and the international commentariat have often described this source of law as consisting of principles that are so fundamental that they will be found in “most, if not all,” legal systems of the world.¹⁶⁷ The ICTY Chambers have clarified that a determination of whether a certain concept is a general principle of law does not require a thorough survey of each and every national jurisdiction in the world, but it has to be shown that it is accepted by the world’s major legal systems, both of civil and common law tradition.¹⁶⁸ How does the joint control theory measure against this standard?

6.2.3.1. Preliminary comments on the domestic jurisdictions cited by the ICC Chambers

The *Lubanga* Pre-Trial Chamber’s finding that ‘numerous’ jurisdictions apply the control theory was not premised on any independent review of legislation and jurisprudence from such national legal systems. Rather, the judges simply referred in the accompanying footnote to the dissenting opinion of Judge Schomburg in the *Gacumbitsi* case.¹⁶⁹ In it, he quoted various national criminal codes that contain articles on ‘indirect perpetration’ and ‘joint/co-perpetration’ liability.¹⁷⁰ In the subsequent ICTY *Simić* case, Judge Schomburg provided an extended list of state legislation that recognizes these modes of liability.¹⁷¹ He thus used the reference to the term ‘co-perpetration’ in all these criminal codes as evidence of a wide acceptance of his construction of this concept: *i.e.* as support for the theory of co-perpetration based on joint control.¹⁷² It is beyond the scope of the present chapter to critically review all the national jurisdictions Judge Schomburg referred to, but even a cursory analysis of these sources reveals several defects in the above line of reasoning. To begin with, as the Pre-Trial Chamber itself explained, co-perpetration is a generic term that could be approached in three different ways, of which the joint control paradigm is but one. Therefore, it is both erroneous and misleading to refer to the presence of the phraseology ‘joint perpetration’ – or ‘co-perpetration’, ‘joint commission’ etc. – in the penal code of a certain state as evidence of its adoption of the joint control theory. To give an example, Judge Schomburg’s reference to the penal codes of *e.g.* the Netherlands, Japan, Colombia, Germany to show the alleged wide support for the joint control theory¹⁷³ is flawed because research into the jurisprudence of these states has revealed that their courts have actually adopted a predominantly subjective approach to assigning co-perpetration liability: *i.e.* they have placed the onus of joint principal liability on the accused’s shared intent to commit the concerted crime, rather than on the significance of his contribution to the said common plan.¹⁷⁴ Similarly, Finnish and US legislation on indirect perpetration could not possibly be cited in support of the control approach to criminal liability, because in both of these

¹⁶² Article 21(1)(c), ICC Rome Statute, *supra* n 6.

¹⁶³ See *supra* Section 6.2.2.

¹⁶⁴ See *supra* Section 6.2.1.

¹⁶⁵ *Lubanga* Decision on the Confirmation of Charges, *supra* n 5, para 330; *Katanga and Chui* Decision on the Confirmation of Charges, *supra* n 6, para 485.

¹⁶⁶ *Simić* Appeal Judgment, *supra* n 110, Dissenting Opinion of Judge Schomburg, paras 13-15. See also *The Prosecutor v. Gacumbitsi* (ICTR-2001-64-A), Judgment, Appeals Chamber, 7 July 2006, Separate Opinion of Judge Schomburg on the Criminal Responsibility of the Appellant for Committing Genocide, para 16.

¹⁶⁷ *Tadić* Appeal Judgment, *supra* n 127, para 225; *Sary, Thirith and Samphan* Pre-Trial Decision on JCE, *supra* n 115, paras 85-86; *Chea, Sary, Thirith and Samphan* Trial Decision on the Applicability of JCE, *supra* n 132, para 37. See also Werle and Jessberger, *supra* n 34, at 59-60; M. Janis, *An Introduction to International Law* (New York: Aspen, 2003), at 56.

¹⁶⁸ *Furundžija* Trial Judgment, *supra* n 154, para 178; *The Prosecutor v. Kunarac et al.* (IT-96-23-T), Judgment, Trial Chamber, 22 February 2001, para 439; *The Prosecutor v. Erdemović* (IT-96-22-A), Judgment, Appeals Chamber, 7 October 1997, Joint Separate Opinion of Judge McDonald and Judge Vohrah, para 57.

¹⁶⁹ *Lubanga* Decision on the Confirmation of Charges, *supra* n 5, para 330 (fn 418).

¹⁷⁰ The cited penal codes were those of Colombia, Paraguay, Germany, Spain and Finland. *Gacumbitsi* Appeal Judgment, *supra* n 166, Separate Opinion of Judge Schomburg on the Criminal Responsibility of the Appellant for Committing Genocide, para 16 (fn 29-30).

¹⁷¹ More specifically, Judge Schomburg cited the criminal codes of Bosnia and Herzegovina, the Former Yugoslav Republic of Macedonia, Croatia, Serbia, Montenegro, Slovenia, the Former Yugoslavia, Germany, Cameroon, Chile, the Czech Republic, Greece, Hungary, Israel, Japan, Mexico, the Netherlands, Poland, Portugal, Republic of Korea, Spain, Colombia, Finland and Paraguay. *Simić* Appeal Judgment, *supra* n 110, Dissenting Opinion of Judge Schomburg, paras 13-15.

¹⁷² *Ibid.*, paras 15-16.

¹⁷³ *Ibid.*, para 14.

¹⁷⁴ For an analysis on Japanese, Dutch and German case law on co-perpetration, see *infra* Section 6.2.3.2. A review of the subjective approach to co-perpetration adopted in Colombia was done by Olásolo and Muñoz-Conde in Muñoz-Conde and Olásolo, *supra* n 133, at 122-123. See *supra* text accompanying notes 137-138.

countries this mode of liability is limited to the ‘innocent agent’ doctrine:¹⁷⁵ *i.e.* the said laws are in no way indicative of acceptance of the notion of indirect perpetration based on control over an organized power apparatus or, more generally, of the control approach to distinguishing between principals and accessories to a crime.¹⁷⁶ For this reason, citing national legislation that resembles the text of Article 25(3)(a) RS and uses terms such as ‘commits jointly’, ‘co-perpetration’ etc., is far from conclusive: it is the very manner in which domestic courts have interpreted and applied joint perpetration responsibility that must be analysed in order to claim support for one particular approach to this notion.

The second noticeable problem with the *Lubanga* Pre-Trial Chamber’s cursory reference to Judge Schomburg’s dissenting opinion in *Gacumbitsi* pertains to the diversity of the municipal laws listed in it. In particular, aside from the above-said citation of the ‘innocent agent’ theory in US and Finnish law, it cited a limited number of rather uniform civil law jurisdictions (*i.e.* Spain, Germany, Colombia and Paraguay).¹⁷⁷ Indeed, in much the same spirit, in *Katanga and Chui*, the Pre-Trial Chamber again claimed wide domestic support for the control over the crime doctrine – and in particular the concept of indirect perpetration based on control over an organized structure of power – by referring to case law from just five criminal justice systems: Germany, Argentina, Spain, Peru and Chile.¹⁷⁸ This scarcity of resources has been criticized by the commentariat, and Van Sliedregt has pointed out that:

given that the Spanish approach is German-influenced, this essentially means that one legal system lies at the basis of the ‘control of the crime’ approach at the ICC ... In essence, ‘control of the crime’ is a German legal concept, elevated to the level of international law.¹⁷⁹

¹⁷⁵ To support its finding that “[t]he concept of control over the crime constitutes a third approach for distinguishing between principals and accessories which ... is applied in numerous legal systems”, the *Lubanga* Pre-Trial Chamber referred to paragraph 16, footnote 30 of Judge Schomburg’s dissenting opinion in *Gacumbitsi*, where he cited, *inter alia*, the law on indirect perpetration contained in the US Model Penal Code and the Criminal Code of Finland. The relevant legal provisions in these documents state: “Model Penal Code (American Law Institute 1985), Sec. 2.06 (2): “A person is legally accountable for the conduct of another person when: (a) [...] he causes an innocent or irresponsible person to engage in such conduct [...]” (emphasis added); [...] *Rikoslaki/Strafflag* (Finland), Sec. 4 (unofficial translation): “Whoever intentionally commits a crime by employing another person, that cannot be held criminally responsible due to mental incapacity, lack of *mens rea* or any other reason concerning the establishment of individual criminal responsibility, as an instrument, shall be punished as a perpetrator.”” *Gacumbitsi* Appeal Judgment, *supra* n 166, Separate Opinion of Judge Schomburg on the Criminal Responsibility of the Appellant for Committing Genocide, para 16 (fn 30), referred to in *Lubanga* Decision on the Confirmation of Charges, *supra* n 5, para 330 (fn 418).

¹⁷⁶ For a discussion on the ‘innocent agent’ theory and ‘*Organisationsherrschaft*’ liability as two different paradigms of indirect perpetration, see Chapter 4, Section 4.3.3.2.iv.

¹⁷⁷ *Gacumbitsi* Appeal Judgment, *supra* n 166, Separate Opinion of Judge Schomburg on the Criminal Responsibility of the Appellant for Committing Genocide, para 16 (fn 30).

¹⁷⁸ *Katanga and Chui* Decision on the Confirmation of Charges, *supra* n 6, para 502 (fn 666).

¹⁷⁹ Van Sliedregt, *supra* n 44, at 87; Van Sliedregt, *supra* n 104, at 507. Jain has also shared this view: “The heavy reliance of the *Katanga and Chui* Pre-Trial Chamber on the theory of *Organisationsherrschaft* is controversial, given that this theory does not enjoy wide support in domestic legal systems, with the exception of Germany and a few Latin American states that are heavily influenced by German legal doctrine.” Jain, ‘The Control Theory’, *supra* n 43, at 184. See also Weigend, *supra* n 104, at 105; Ohlin, *supra* n 12, at 523-524; *Chui* Trial Judgment, *supra* n 2, Concurring Opinion of Judge Christine Van den Wyngaert, para 17.

Put plainly, it would seem that the broad support which ICC Pre-Trial Chamber I has claimed for incorporating the control doctrine in Article 25(3) RS is primarily based on: i) German academia; ii) several dissenting opinions of the German Judge Schomburg; and iii) German case law. While Ambos is right to submit that the validity of any legal theory is not dependent on its geographical origin,¹⁸⁰ the application of Roxin’s control theory in ICC law cannot be justified merely with its persuasiveness: it must first be based on the applicable sources of law under Article 21(1) RS. To this end, concluding that the control approach to criminal liability has become a general principle of law under Article 21(1)(c) RS would require, as stated above, demonstrating that this concept has been adopted in the world’s major legal systems, both of civil and common of law tradition.

6.2.3.2. A review of domestic approaches to co-perpetration liability

This section will examine in more detail a few of the national jurisdictions that Judge Schomburg cited in his dissenting opinions in *Gacumbitsi* and in *Simić*,¹⁸¹ in order to determine whether they indeed evince domestic support for the doctrine of co-perpetration based on joint control. Next to this, a few additional legal systems, including common law ones, would also be reviewed, which will help to conclude if the joint control theory has become a general principle of law.

i) The Netherlands

In Dutch criminal law, co-perpetration responsibility (‘*medeplegen*’) is established under Article 47(1) Penal Code (‘*Wetboek van Strafrecht*’), which states:

“As perpetrators of a criminal offence will be punished: Those who commit a criminal offence, who cause a criminal offence to be committed or who *jointly commit a criminal offence*.”¹⁸²

Seeing as this provision does not prescribe any particular construction of co-perpetration liability – it only generically recognizes that a person can “jointly commit” a crime – the precise contours of this mode of criminal responsibility have been crystalized in topical jurisprudence. One of the early and still leading cases on co-perpetration liability is the *Wormerveer Arson* case, where two persons (O. and L.), acting in accordance with a pre-agreed plan, set a barn on fire.¹⁸³ O. held the ladder, which L. used to climb to the barn’s attic. It then transpired that the hay there was wet, so L. told O. to hand him some dry straw from the ground, which the latter did. Before the Supreme Court (‘*Hoge Raad*’), O. argued that his role in the charged crime

¹⁸⁰ K. Ambos, ‘The First Judgment of the International Criminal Court (Prosecutor v. Lubanga): A Comprehensive Analysis of the Legal Issues’, 12 *International Criminal Law Review* (2012), at 143.

¹⁸¹ See *supra* notes 170-171.

¹⁸² English translation in *Simić* Appeal Judgment, *supra* n 110, Dissenting Opinion of Judge Schomburg, para 14. (*emphasis added*) Original text in Dutch: “1. Als daders van een strafbaar feit worden gestraft: 1°. zij die het feit plegen, doen plegen of medeplegen,” See Boek 1, Titel V, Artikel 47(1), *Wetboek van Strafrecht* 1881,

¹⁸³ Hoge Raad, 29 Oktober 1934, NJ 1934, 1673.

was marginal and, thus, that he ought to be convicted as an accessory to the crime committed by L. The judges clearly disagreed with this argument and found the appellant liable as a co-perpetration. They held that:

setting the hay on fire was done by L. (the co-perpetrator), but this need not mean that only L. should be guilty of arson and the appellant could be accused of no more than accessoryship; that in accordance with the agreement to jointly start the fire, the cooperation between the two persons was so complete and close that at the end it was more or less accidental that it was L. who brought the burning match to the hay; that thus the acts of the appellant do not bear the character of assistance but of a joint and completed in unity arson.¹⁸⁴

For the Supreme Court it was, thus, unimportant whether the appellant's role in this crime was as great as that of the other person, or whether without O.'s contribution L. would have been able to light the barn on fire: in other words, it was not required that both individuals shared control over the crime by performing 'essential' tasks. Rather, their co-perpetration liability was warranted by the fact that they fully and closely cooperated with each other for the very purpose of committing the concerted crime. This rationale has been followed in subsequent Dutch jurisprudence on joint perpetration.¹⁸⁵ More recently, in 2011 the Supreme Court found two sisters guilty of murder in a case where the evidence showed that the contribution of one of them (the accused) was limited to being present in the victim's house and passively watching how her older sister (the co-accused) was slowly killing the victim.¹⁸⁶ The Court held that the accused was liable as co-perpetrator and emphasized her intent and close cooperation with the co-accused to commit the charged crime:

¹⁸⁴ *Ibid.* (unofficial translation) Original Dutch text: "dat het aansteken van hooi door L. (de mededader) is geschied, doch dit er niet toe behoeft te leiden, dat alleen L. zich aan brandstichting zou hebben schuldig en aan requirant niet meer dan medeplichtigheid zou kunnen worden verweten; dat toch ook in verband met de gemaakte afspraak om te zamen den brand te stichten, de samenwerking tusschen de beide personen zo volledig en zoo nauw is geweest, dat het ten slotte min of meer toevallig was, dat L. de brandende lucifer bij het hooi heeft gebracht; dat dan ook de handelingen van requirant niet het karakter van hulpverlening dragen maar van een te zamen en in vereniging voltooide brandstichting."

¹⁸⁵ See *e.g.*, HR 17 November 1981, NJ 1983, 84 m.nt. ThWwV ('Containerdiefstal' case); HR 8 May 2001, NJ 2001, 480 ('Bacchus' case); HR 28 May 2002, NJ 2003, 142.

¹⁸⁶ HR, 22 November 2011, NJB 2011/2269. The facts of the case, accepted by the Court, are as follows; on the night between 6 July and 7 July 2007, a 21-year-old woman (the accused) and her older sister (the co-accused) went to the house of the victim for the purpose of settling a problem between the latter two. Prior to this, the co-accused had made it clear that she will beat the victim and had also told her younger sister that they should both dress in black. When they arrived at the victim's house, the co-accused, in the presence of the accused, forced the victim to write a farewell letter and then drink pills and bleach. After some time, the victim told the two sisters that she cannot feel anything, following which the co-accused went to the kitchen, took a rope and then brought the victim to the bathroom, where she strangled the victim to death. The accused was present at all time and on one occasion was also left alone with the victim for about ten minutes because the co-accused left the house to go to the car. After they were convinced that the victim was dead, the two sisters left the house. Before doing so, the co-accused, in an effort to hide their traces, took with them the can of Coke and the ashtray which the accused used in the house.

Before the accused and the co-accused went to the victim's house, the reason for visiting the victim was clear to the accused. Moreover, the accused knew of the co-accused's intention to beat the victim ... The accused did not make a single effort to dissuade the co-accused from her intentions or to stop her. She did not distance herself from the actions of the co-accused in any other way ... especially when at some point it became clear to her that an act of murder was taking place ... Based on the above, the court of appeal is thus of the opinion that there was such a *deliberate and close cooperation between the accused and the co-accused*, that we speak of *co-perpetration* by the accused of the primary charge. The described conduct leads to the conclusion that the intent of the accused and co-accused was purposefully aimed at the execution of the plan developed during the evening at the victim's house to rob the victim of her life.¹⁸⁷

The Advocate General pointed out in his conclusion to the said case that "the accused cooperated with the co-accused so deliberately and closely, and with an eye to kill the victim, that there was a co-perpetration of murder."¹⁸⁸

The definitional criterion of co-perpetration liability under Dutch criminal law is thus the subjective element of a 'deliberate and close cooperation' ('*bewuste en nauwe samenwerking*'). For the contribution requirement, Schalken notes that "the act of the co-perpetrator does not have to be a *conditio sine qua non* for the occurrence of the criminal consequence".¹⁸⁹ Indeed, this was also established by the Supreme Court in a landmark decision from 2014, where the judges found that a co-perpetrator has to provide "an intellectual and/or material contribution" to the concerted crime that has "a substantial effect" on its commission, thus confirming that the said contribution need not be a *conditio sine qua non*.¹⁹⁰ Thus, while the accused's contribution to the said crime is an important constituent element of co-perpetration responsibility, the Court explained that "[t]he

¹⁸⁷ *Ibid.*, para 2.2.2. (*emphasis added*, unofficial translation) Original text in Dutch: "Voordat de verdachte en haar medeverdachte naar de woning van [slachtoffer] gingen, was de reden van hun bezoek aan [slachtoffer] ook voor de verdachte duidelijk. De verdachte wist bovendien van het voornemen van de medeverdachte om [slachtoffer] te slaan. ... De verdachte heeft geen enkele poging gedaan om de medeverdachte van haar voornemen af te brengen of haar daarvan te weerhouden. Zij heeft zich ook niet op enige ander wijze gedistantieerd van het handelen van de medeverdachte ... temeer daar het voor haar op enig moment duidelijk was dat die dodingshandelingen gaande waren. Op grond van het bovenstaande is mitsdien naar het oordeel van het hof sprake van een *zodanige bewuste en nauwe samenwerking tussen de verdachte en de medeverdachte*, dat sprake is van het *medeplegen* van het de verdachte onder 1 primair tenlastegelegde feit. De omschreven gang van zaken leidt tot de conclusie dat het opzet van de verdachte en haar medeverdachte doelbewust gericht is geweest op de uitvoering van het minst genomen gedurende de avond in de woning van [slachtoffer] ontstane voornemen om [slachtoffer] van het leven te beroven." (*emphasis added*)

¹⁸⁸ *Ibid.*, Conclusie Vellinga, para 23. Original text in Dutch: "kan uit de gebezigde bewijsmiddelen worden afgeleid dat de verdachte zo bewust en nauw met de medeverdachte heeft samengewerkt met het oog op het vermoorden van het slachtoffer dat van medeplegen van moord kan worden besproken."

¹⁸⁹ Original text in Dutch: "De handeling van de medepleger hoeft geen *conditio sine qua non* te zijn voor het intreden van het strafrechtelijke gevolg". See T. Schalken, annotatie bij: HR 28 May 2002, NJ 2003/142, para 3. Hartmann has also observed that the Dutch courts' approach to co-perpetration has been to put most of the weight on the subjective criterion of "deliberate and close cooperation", whereas the objective elements have remained at the background of the courts' analyses. A. Hartmann, 'Medeplegen: Back to Basics', 5 *Delikt En Delinkwent* (2012), at 457.

¹⁹⁰ In the original text in Dutch, the Court referred to an "intellectuele en/of materiële bijdrage aan het delict", which must have had "een wezenlijke bijdrage" on the commission of the offence. HR, 2 December 2014, NJB 2014/2278, paras 3.2.1. and 3.2.2.

emphasis is on the [deliberate and close] cooperation, and less on the question of who performed which factual acts.”¹⁹¹

ii) Japan

Japan is another civil law system where a subjective approach to co-perpetration has been traditionally followed. Pursuant to Article 60 of the Japanese Penal Code, “[t]wo or more persons who commit a crime in joint action are all principals.”¹⁹² An elaboration on this type of liability was provided by the Supreme Court in its early case law, where it found that “the essence of co-principal status in general is acts to commit certain designated crimes, perpetrated jointly with criminal intent on the part of each of two or more persons forming a *single body with a single mind based on a mutual enterprise*”,¹⁹³ and also that “the rationale for punishing persons in collusion as co-principals is because they have become a *single body with a single purpose*, and each makes use of the acts of the others in achieving his or her own purpose”.¹⁹⁴ A thorough review of the topical Japanese jurisprudence is provided by Dandō, who has observed that courts have traditionally employed a subjective approach to co-perpetration – *viz.* that joint principals to a crime are those who view the concerted crime as their own¹⁹⁵ – and has pointed at the Supreme Court’s reasoning in the *Nerima* case:

For collusional co-principal criminality to arise, two or more persons, for the purpose of perpetrating specified crimes, must utilise the acts of some among the group sharing common objectives for the purpose of achieving the objective constituting the content of collusion. Those acts then become the facts of perpetration of the crime. Consequently, because the fact of participating in collusion is based on the relationship described above, even persons who did not participate directly in the acts of perpetration can be viewed as having perpetrated a crime when they made the acts of others their own means of perpetration; there is no reason to distinguish them from the rest in that case.¹⁹⁶

191 Original text in Dutch: “Het accent ligt daarbij op de samenwerking en minder op de vraag wie welke feitelijke handelingen heeft verricht.”. *Ibid.*, para 3.1. The judges further went on to point out that it is impossible to define in the abstract what qualifies as a ‘close and deliberate cooperation’ as this assessment must be made on a case-by-case basis. To this end, they noted that relevant criteria can be, *inter alia*, the “intensity of the cooperation, the underlying division of tasks, the role of the accused in the preparation, execution and aftermath of the crime and its importance, his presence at important moments, and that he did not withdraw his participation at any moment.” *Ibid.*, para 3.2.2.

192 Article 60, 1907 Penal Code of Japan [[刑法 *Keihō*], (Act No.45 of 1907), official English translation available at <http://www.cas.go.jp/jp/seisaku/hourei/data/PC.pdf> [accessed 20 August 2016].

193 15 Keishu 715 (Gr. Ct. Cass., Nov 5, 1936), quoted in S. Dandō, *The Criminal Law of Japan: The General Part* (Littleton: F.B. Rothman, 1997), at 237 (fn 69). Regarding the *actus reus* requirement, the Court found that “in some cases all the persons concerned join in the perpetration personally; in others, they collude together and have some among them perform what has been agreed to. Despite the diversity of modes of realizing the criminal purpose, however, the essence is the same in that in both types of cases the realization of the criminal intent is achieved through mutual cooperation in both mind and actions.” It is thus evident that the joint control theory, and its requirement for an *essential* contribution, is not followed by Japanese courts.

194 2 Keishu 478 (S. Ct. Second P.B., May 8, 1948); 5 Keishu 1987 (S. Ct. Second P.B. Sept. 28, 1951), cited in Dandō, *supra* n 193, at 238 (fn 70).

195 Dandō, *supra* n 193, at 235 (fn 62) and 238 (fn 71).

196 33 Keishu (S. Ct. G.B., May 28, 1958) *Nerima* case, quoted Dandō, *supra* n 193, at 238-239 (fn 71).

Haley, who has provided one of the most recent reviews on Japanese criminal law, also confirms that courts have adopted an intent-based approach to co-perpetration liability.¹⁹⁷ Having analysed Japanese case law on this form of criminal responsibility, he concludes that:

the first requirement is concurrence of intent or collusion to act together to commit a criminal act. Common purpose and tacit understandings suffice. The second requirement is joint acts of perpetration. For this purpose *evidence of sequential acts* is sufficient.¹⁹⁸

It is thus evident that, under Japanese law, the distinction between principals and accessories to a group crime is based not on the theory of control and its ‘essential contribution’ test, but on what Hyoichiro Kusano called “the theory of a body having a common intent”.¹⁹⁹

iii) Germany

Germany offers a particularly interesting case because it contradicts the expectations that it would be an archetypical example of a legal system that has adopted the control over the crime approach. Co-perpetration liability is established in Section 25(2) of the Penal Code, which states that:

If more than one person commit the offence jointly, each shall be liable as a principal (joint principals).²⁰⁰

Clearly, the plain text of this provision does not establish a particular construction for this type of responsibility, which is why Jain has also explained that the German Penal Code is “silent on the criterion for demarcation between principals and accessories”.²⁰¹ In this respect, it has often been observed in academia that several approaches have been discussed in Germany on how to define co-perpetration liability and that this has led to the formation of two camps: German scholarship, which largely supports the control theory, and German courts, which “still mainly classify parties on the basis of a rather subjective approach”, seeing the accused’s scope of participation, interest in the crime and control over it simply as

197 J. Haley, ‘Japan’, in K. Heller and M. Dubber (eds), *The Handbook of Comparative Criminal Law* (Stanford: Stanford UP, 2011), at 402.

198 *Ibid.*

199 Dandō, *supra* n 193, at 238.

200 Section 25(2), 1998 Criminal Code of Germany [*Strafgesetzbuch*], (BGBl. I S. 3322), official English translation available at “http://www.gesetze-im-internet.de/englisch_stgb/index.html” www.gesetze-im-internet.de/englisch_stgb/index.html [accessed 20 August 2016].

201 Jain, ‘The Control Theory’, *supra* n 43, at 162.

possible indicators of his *mens rea*.²⁰² This antagonism between academia and judicial practice in Germany has also been described by Bohlander,²⁰³ and Weigend has affirmed that courts nowadays largely adhere to the subjective approach, albeit also mixing it with an objective test:

The courts have long relied on subjective factors to draw those distinctions: in order to be a perpetrator of any kind, it is necessary, according to long-standing jurisprudence, to have the mind-set of a perpetrator (*animus auctoris*) or the will to commit the offense oneself. The characteristic of a mere accomplice, by contrast, is that person's will to support another (*animus socii*). In recent years the courts have moved away from this strictly subjective approach toward a holistic one, evaluating all objective and subjective elements of the situation.²⁰⁴

Weigend explains that, in its more recent jurisprudence, the German Supreme Court has departed from a purely subjective approach and endorsed one based on “‘evaluative overall consideration’ (*wertende Gesamtbetrachtung*)” of all objective and subjective factors in the case.²⁰⁵

Concerning specifically co-perpetration liability, it has to be emphasized that this ‘overall evaluation’ test does not present an endorsement of the joint control theory. Commentators have explained that under this revised approach, the Federal Supreme Court (‘*Bundesgerichtshof*’) has still found that even small amounts of cooperation at the preparatory stage could still lead to joint perpetration liability if the accused acted with the will of a perpetrator.²⁰⁶ Therefore, although the German courts have indeed applied in a number of cases the theory of indirect perpetration based on control over an organized structure of power,²⁰⁷ it is not true that they define the notion of co-perpetration responsibility on the basis of the joint control theory, nor that the control criterion is the guiding tool that German courts generally use to make the principal/accessory distinction.

202 K. Hamdorf, ‘The Concept of a Joint Criminal Enterprise and Domestic Modes of Liability for Parties to a Crime: A Comparison of German and English Law’ 5 *Journal of International Criminal Justice* (2005), at 210-211. See also G. Fletcher, *Rethinking Criminal Law* (Oxford: Oxford UP, 2000), at 655, 660-662.

203 M. Bohlander, *Principles of German Criminal Law* (Oxford: Hart Pub., 2009), at 161-163.

204 T. Weigend, ‘Germany’, in Heller and Dubber, *supra* n 197, at 265. See also T. Weigend, ‘Problems of Attribution in International Criminal Law: A German Perspective’, 12 *Journal of International Criminal Justice* (2014), at 257-258; Weigend, *supra* n 104, at 95. This view is also shared by Bohlander who states that: “[t]he courts, and mainly the BGH, traditionally have adhered to the so-called subjective theory, ie the distinction made mainly on the basis of the offender’s *mens rea*, that is, based on whether D wants the offence ‘as his own’ (*animus auctoris*) or merely wants to support someone else’s actions (*animus socii*) [...] In more recent years, the BGH has come around to an approach which combines paying lip service to the subjective theory approach with a more objective evidential test: the court will now base its decisions as to whether or not the accused had the *animus auctoris* on the scope of the accused’s objective influence and control over the offence as shown by the evidence”. Bohlander, *supra* n 203, at 162-163.

205 Weigend, ‘Problems of Attribution’, *supra* n 204, at 258.

206 Jain, ‘The Control Theory’, *supra* n 43, at 166 (referring to case law research at fn 38); Weigend, ‘Problems of Attribution’, *supra* n 204, at 258.

207 Jain, ‘Perpetrators and Accessories’, *supra* n 43, at 128. See *supra* note 134; G. Werle and B. Burghardt, ‘The German Federal Supreme Court (Bundesgerichtshof, BGH) on Indirect Perpetration: Introductory Note’, 9 *Journal of International Criminal Justice* (2011), at 209-210, 224.

iv) Other domestic jurisdictions and conclusion on general principles of law

Conducting a detailed survey of the laws and jurisprudence on co-perpetration liability in a large number of domestic jurisdictions is neither feasible, nor necessary for the purposes of the present research. As explained above, international tribunals have held that:

it is generally accepted that the distillation of a “general principle of law recognised by civilised nations” does not require the comprehensive survey of all legal systems of the world as this would involve a practical impossibility and has never been the practice of the International Court of Justice or other international tribunals which have had recourse to Article 38(1)(c) of the ICJ Statute.²⁰⁸

Rather, what is required to determine whether a particular concept is a general principle of law is to find out whether this notion can be considered a “common denominator” for a broad spectrum of national jurisdictions belonging to the major legal families of the world.²⁰⁹ With respect to the notion of co-perpetration liability, a brief overview of a few more legal systems, both of common and of civil law tradition, could sufficiently demonstrate that there is simply too much variation – both within and between the world’s major legal families – to find that a general principle of law exists on how to distinguish between (joint) principals and accessories to a collective crime.

While the above study of German, Japanese and Dutch criminal law has shown that these three jurisdictions apply a predominantly subjective approach to co-perpetration responsibility, it would be plainly wrong to generalize these findings as representative for the Romano-Germanic legal family. To be sure, the other two approaches identified by the *Lubanga* Pre-Trial Chamber can also be distinguished in various domestic jurisdictions

208 *Erdemović* Appeal Judgment, *supra* n 168, Joint Separate Opinion of Judge McDonald and Judge Vohrah, para 57. See also Sary, *Thirith and Samphan* Pre-Trial Decision on JCE, *supra* n 115, para 86.

209 *Furundžija* Trial Judgment, *supra* n 154, para 178; *Kunarac et al.* Trial Judgment, *supra* n 168, para 439; *Milutinović et al.* Decision on Indirect Co-perpetration, *supra* n 105, Separate Opinion of Judge Iain Bonomy, para 27; Sary, *Thirith and Samphan* Pre-Trial Decision on JCE, *supra* n 115, para 86.

belonging to the civil law tradition.²¹⁰ Thus, for instance, Bulgaria²¹¹ and France²¹² present examples of legal systems that traditionally follow the objective approach to co-perpetration: viz. their courts have established that principals to a collective crime are only those individuals whose contribution constitutes one or more of the *actus reus* elements of the crime. Spain,²¹³

210 *Lubanga* Decision on the Confirmation of Charges, *supra* n 5, paras 328-330. See Chapter 1, Section 1.3.1.

211 The Bulgarian Supreme Court has held that: “It is well-known that our Criminal Code adopts the objective theory in Article 20(2), regarding as a perpetrator only the person who participates in the *actus reus* of the crime. With regards to the theft of private and public property, the *actus reus* consists of the direct appropriation of this property: interrupting the owner’s possession of it without his consent and establishing a permanent possession for oneself. When two persons divide their functions in advance, so that one of them takes away the property and establishes material power over it, while the other one is on the lookout for him to protect him from being caught, the former person is a perpetrator and the latter – an accessory. The one who guards while the perpetrator takes away the property is an accessory because he does not objectively participate in the *actus reus* of the theft. No other circumstances can turn a person into a co-perpetrator if he did not participate in the *actus reus* (in this case the appropriation) – neither the preliminary agreement, nor the division of functions, nor the presence at the crime scene.” Supreme Court of Bulgaria, *Interpretative Judgment No.54 (49/89)*, 16 September 1989, para 5. (unofficial translation, case is on file with the author). More recently, this objective approach to co-perpetration was confirmed by the Supreme Court of Cassation, which held that “article 20(2) Penal Code defines as a co-perpetrator the person who participates in the *actus reus* of the crime. With regard to ‘theft’, the *actus reus* consists of taking away another person’s property without his consent (appropriation of property) and the establishment of permanent possession of it. To be a co-perpetrator of the crime, it is not necessary that the person participates in the two phases of the *actus reus*, which is why the one who plays a lookout while his accomplice directly takes away the property, but after that together with him escapes the crime scene with the aim to establish a permanent material hold, is a co-perpetrator and not an accessory. This is so because he objectively participated in the second phase of the *actus reus* – in the permanent establishment of material power over the property in this crime.” See Supreme Court of Cassation, *Judgment No.478 (347/98)*, 18 November 1998, report by judge rapporteur S. Stoyanova (unofficial translation, case is on file with the author). See also Supreme Court of Cassation, *Interpretative Judgment No.2*, 16 July 2009, paras 2.1-2.2, available at http://www.vks.bg/vks_p10_36.htm [accessed 17 July 2016, Bulgarian only].

212 Bell explains that under French law: “[c]o-principals are distinguished from accomplices in that they are liable in their own right. It is not necessary to establish the criminal liability of the other person involved. The key difference is that the co-principal has performed the actions which constitute the offence, where the accomplice has done ancillary acts with a view to assisting the offence.” J. Bell, S. Boyron and S. Whittaker, *Principles of French Law* (2nd edn, Oxford: Oxford UP, 2008), at 233; See also Van Slidregt, *supra* n 44, at 96.

213 The Spanish Supreme Court has explained that: “our precedents have consistently affirmed that perpetration or participation liability does not depend on an alleged, respectively, *animus auctoris* or *animus socii*, but [on] whether the contribution is objectively decisive or not to control the act.” (unofficial translation). Supreme Court of Spain, Judicial Chamber for Criminal Cases, Judgment of 4 September 1994, available at <http://supremo.vlex.es/vid/-202702499> [accessed 29 July 2016]. (original text in Spanish: “Nuestros precedentes han sostenido reiteradamente que la autoría o la participación no dependen de un supuesto animus auctoris o animus socii respectivamente, sino de si la aportación es objetivamente determinante o no del dominio del hecho.”) Indeed, Díez and Chiesa affirm that Spanish courts distinguish between principals and accessories to a crime on the basis of “the so-called control-over-the-event theory (*teoría del dominio del hecho*). Pursuant to this theory, only those who have control or dominion over the criminal conduct can be considered perpetrators. An actor has control or dominion over the criminal conduct in three circumstances: 1. *Direct perpetration* – when he or she produces the result by way of his or her own acts or omissions; 2. *Perpetration by means* – when the actor has control over an innocent person who is used by him or her as an instrument for the commission of the offense (e.g., ordering a hypnotized person to commit an offense); 3. *Joint perpetration or coperpetration* – when he or she has joint control over the criminal conduct.” C. Díez and L. Chiesa, ‘Spain’, in Heller and Dubber, *supra* n 197, at 503-504. See also Olásolo and Cepeda, *supra* n 133, at 485-487 (fn 32).

Belgium²¹⁴ and Paraguay,²¹⁵ on the other hand, can be cited as examples of civil law systems that have either expressly endorsed Roxin’s control theory in their jurisprudence, or have generally drafted their legislation on co-perpetration to state that a co-perpetrator must provide an ‘essential contribution to’/‘share control over’ the group crime. It can, thus, plausibly be concluded that there is a radical fragmentation in the approaches that civil law jurisdictions have adopted to construct the notion of co-perpetration responsibility.

Common law jurisdictions are less divided in the techniques they have used to distinguish between principals and accessories to a crime. Academics have overwhelmingly reported that the common law approach to complicity is an objective one, pursuant to which (joint) principals to a crime have traditionally been defined as those persons whose acts are the immediate cause of the *actus reus* elements of the crime.²¹⁶ Those who assisted the commission of the crime in any other way are thereby qualified as accessories, irrespective of how important their contribution was, or whether they wanted the crime as their own or not. This approach has generally been recognized and endorsed in US law,²¹⁷ and in the law of England and Wales,²¹⁸ although it bears noting that these two jurisdictions have both abrogated, at least in terms of blameworthiness, the distinction between principals and

214 Article 66 of the Belgian Criminal Code, explicitly adopts the underlying rationale of the joint control theory by stating that principals to a collective crime are “those who, through any act, provide such help for its execution that *the crime or misdemeanour would not have been committed without their assistance*.”; (*emphasis added*, unofficial translation). Article 66, 1867 Criminal Code of Belgium [*Strafwetboek*], original text in Flemish: “Als daders van een misdaad of een wanbedrijf worden gestraft: [...] Zij die door enige daad tot de uitvoering zodanige hulp hebben verleend dat *de misdaad of het wanbedrijf zonder hun bijstand niet had kunnen worden gepleegd*.”).

215 Article 29(2) of the Paraguayan Penal Code specifically defines co-perpetration liability as requiring shared, joint control over the group crime. In particular, it states that “Also punishable as a principal is he who acts in agreement with another in such a way that, through his contribution to the fact, he *shares with the other person control over the realization of the fact*.” (*emphasis added*, unofficial translation). Article 29(2), 1997 Criminal Code of Paraguay [Código Penal], (Ley N° 1.160/97), original text: “También será castigado como autor el que obrara de acuerdo con otro de manera tal que, mediante su aporte al hecho, comparta con el otro el dominio sobre su realización.”

216 D. Ormerod, *Smith and Hogan’s Criminal Law* (13th edn, Oxford: Oxford UP, 2011), at 190, 213-215; A. Ashworth and J. Horder, *Principles of Criminal Law* (7th edn, Oxford: Oxford UP, 2013), at 436-438; Van Slidregt, *supra* n 44, at 71-72; R. Cryer, ‘Imputation and Complicity in Common Law States: A (Partial) View from England and Wales’, 12 *Journal of International Criminal Justice* (2014), at 272-273; Hamdorf, *supra* n 202, at 218-219.

217 *U.S. v. Bell*, 812 F.2d 188 (1987), at 194 (confirming that: “It is hornbook law that ‘[t]here can be more than one principal in the first degree. This occurs when more than one actor participates in the actual commission of the offense. Thus, when one man beats a victim and another shoots him, both may be principals in first degree to murder. And when two persons forge separate parts of the same instrument, they are both principals in the first degree to the forgery.’”). See also *Standefer v. U.S.*, 447 U.S. 10 (1949), at 15-16; *State v. Burney*, 191 Or. App. 227 (2003), at 232-233. See further W. LaFave and A. Scott, *Substantive Criminal Law* (2nd edn, St. Paul, MN: West Pub., 2003), at 326-333; Ohlin, *supra* n 12, at 519; D. Broyles, *Criminal Law in the USA* (Alphen aan den Rijn, The Netherlands: Wolters Kluwer Law & Business, 2011), at 92.

218 *R. v Stringer (Ian Bryan)* [2011] EWCA Crim 1396, para 43 (recognizing that: “a principal in the first degree was ordinarily the person who actually carried out the conduct element of the offence (in murder the killing) with the necessary mental element. (There might be more than one principal in the first degree if two or more persons each carried out part of the conduct element with the necessary mental element.)”). See also *R. v Gnanango* [2011] UKSC 59, para 127. Cf. Ormerod, *supra* n 216, at 190, 213-215; Ashworth and Horder, *supra* n 216, at 436-438.

accessories to a crime, thus making it more nominal than of substance.²¹⁹ This objective approach to joint principal liability is also adopted in Canada.²²⁰ Having said this, it is important to note that not all common law jurisdictions uniformly subscribe to the afore-said method of distinguishing between principals and accessories to a group crime. Thus, for instance, Australia has come to endorse a subjective approach to joint principal liability, pursuant to which a person who “acts in concert” with another to commit a crime may be held liable as a principal, even if he/she did not physically carry out one or more of the *actus reus* elements of the crime.²²¹ South Africa, which is a mixed common and civil law jurisdiction, has long used the subjective, ‘common purpose’ approach to ascribing co-perpetration responsibility.²²² Moreover, it would be recalled that, notwithstanding the

219 The United Kingdom’s Accessories and Abettors Act 1861 states that “[w]hosoever shall aid, abet, counsel or procure the commission of any indictable offence [...] shall be liable to be tried, indicted and punished as a principal offender”. Section 8, Accessories and Abettors Act 1861, (24 & 25 Vict. c.94). Similarly, in US criminal law, it has been established that “[w]hoever commits an offense against the United States or aids, abets, counsels, commands, induces or procures its commission, is punishable as a principal.” Title 18, U.S. Code, § 2(a). See e.g. *Gonzales v. Duenas-Alvarez*, 549 U.S. 183 (2007), at 189-190; *R. v Ngango* [2011] UKSC 59, paras 62, 64; *Milutinović et al.* Decision on Indirect Co-perpetration, *supra* n 105, Separate Opinion of Judge Iain Bonomy, para 29. See further, J. Smith and B. Hogan, *Criminal Law* (London: Butterworths, 1996), at 127-129; Fletcher, *supra* n 202, at 636, 651; Ashworth and Horder, *supra* n 216, at 420.

220 The Canadian Supreme Court has affirmed that “Generally speaking, there are two forms of liability for Criminal Code offences, primary or principal liability (actually or personally committing the offence), and secondary liability (also known as party liability), both codified in s. 21 of the Criminal Code. [...] Thus, under s. 21(1)(a), every person who commits all of the elements of an offence will face criminal liability as a co-principal along with any others who also committed all elements of that offence. [...] Co-principal liability can also arise for offences other than murder, as s. 21 applies to all offences set out in the Criminal Code. Indeed, many other offences without causal requirements would lend themselves more clearly to a “co-principal” type situation, as they are offences which are often committed by more than one person, such as robbery, kidnapping, or breaking and entering. In those cases, the *actus reus* or acts that make up the offence can extend over minutes or hours or days, and different elements or portions of the offence can be completed by different persons (if one person breaks the window of a premises, and both persons enter it, they are both still actually committing the same break and enter). In this way, co-principal liability can arise whether the acts of each accused are committed sequentially (one acts first, the other acts second, and the *actus reus* of the offence is only complete after the second act), or whether the acts are concurrent (both accused persons act at the same time, each committing the entire *actus reus*).” *R. v. Pickton*, 2010 SCC 32, [2010] 2 S.C.R. 198, paras 51, 53, 65.

221 The High Court of Australia has acknowledged that two or more individuals can be held liable as principals in the first degree (*i.e.* co-perpetrators) when they “act in concert” for the commission of a group crime. An elaboration on this principle was provided by McHugh J who held that “where the parties are acting as the result of an arrangement or understanding, there is nothing contrary to the objects of the criminal law in making the parties liable for each other’s acts and the case for doing so is even stronger when they are at the scene together. If any of those acting in concert but not being the actual perpetrator has the relevant *mens rea*, it does not seem wrong in principle or as a matter of policy to hold that person liable as a principal in the first degree. Once the parties have agreed to do the acts which constitute the *actus reus* of the offence and are present acting in concert when the acts are committed, the criminal liability of each should depend upon the existence or non-existence of *mens rea* or upon their having a lawful justification for the acts, not upon the criminal liability of the actual perpetrator.” *Osland v R.*, 10 December 1998, High Court of Australia (HCA 75; 197 CLR 316), paras 72-73, 93. *Cf.* Ormerod, *supra* n 216, at 190.

222 South African courts have established that participants in a common purpose are principals to the crime. See e.g., *Thebus and Another v S* (CCT36/02) [2003] ZACC 12; 2003 (6) SA 505 (CC), paras 21 (fn 23) and 44. Burchell explains that: “The existing common-purpose rule in South Africa regards participants in a common purpose as co-perpetrators by a process of imputing or attributing the causal conduct of the actual perpetrator to the others in the common purpose. This form of liability has been found in cases of homicide, treason, public violence, assault, and house breaking.” J. Burchell, ‘South Africa’, in Heller and Dubber, *supra* n 197, at 467.

above findings, both US and English law have actually defined certain special forms of liability that stress the subjective element of a unity of purpose to ascribe joint (principal) responsibility for the commission of concerted crimes.²²³ Overall, there is ample authority to the effect that both objective and subjective approaches to co-perpetration have been endorsed across the common law world, yet no evidence could be found of a jurisdiction that has adopted, let alone routinely applied, the view that joint principals to a group crime are only those individuals who control its execution by virtue of having an essential function in it (*viz.* the crime could not take place without their contribution to it).

Even though the above research has elaborated on just a handful of national jurisdictions, several important conclusions could be drawn from it. To begin with, unless it explicitly contains a reference to ‘joint control’/‘essential contribution’ in its definition, municipal legislation on co-perpetration liability cannot be automatically regarded as endorsement of the joint control theory. Researching past legislative labels and into topical case law is what is often necessary in order to properly understand the approach which a particular domestic legal system follows to distinguish between (joint) principals and accessories to a crime. The second important conclusion that could be drawn from the above research is that there is no one theory of joint perpetration which is “so fundamental that it will be found in virtually every legal system”²²⁴ and can therefore be seen as a general principle of law, within the meaning of Article 21(1)(c) RS. The joint control theory, in particular, has been endorsed in some but eschewed in other civil law jurisdictions, and is also alien to the common law world. Thus, national legal systems that have adopted this doctrine may be cited as support for its conceptual soundness, or as an illustration of its application in practice, but certainly not as proof that it has become a general principle of law. Similarly, the JCE theory also cannot be regarded as a universally accepted approach to co-perpetration responsibility. This is the reason why, even though they have confirmed its status as customary international law, the international tribunals have rejected the view that JCE liability is a general principle of law.²²⁵

6.3. Rethinking the merits of the theory of co-perpetration based on joint control

Given that the notion of co-perpetration based on joint control over the crime is neither

223 In US law, this is the concept of ‘Pinkerton liability’/‘Pinkerton conspiracy’. See Chapter 2, Section 2.2.2.1. (at n 19) and Section 2.3.3.3.ii (at n 370-371). English law has adopted the notion of ‘joint enterprise’ liability, which has overwhelmingly been viewed as a form of accomplice liability, although it has also been argued in case law that this notion defines the participants in the enterprise as joint principals to the crime. See the analysis contained in Chapter 2, Section 2.3.3.3.ii (text accompanying footnotes 354-367)

224 Janis, *supra* n 167, at 56. See *supra* note 167.

225 *Tadić* Appeal Judgment, *supra* n 127, para 225; *Chea, Sary, Thirith and Samphan* Trial Decision on the Applicability of JCE, *supra* n 132, paras 37-38.

a general principle of law, nor an international custom, and noting that the plain text of Article 25(3)(a) RS simply uses the generic phrase ‘commits [...] jointly with another’, the interpretative gymnastics, which the *Lubanga* Pre-Trial Chamber went through in order to still adopt this particular doctrine are confounding. Indeed, the judges could have just as easily ‘read in’ the subjective approach to this provision,²²⁶ which would have better resonated with the *travaux préparatoires* of the Rome Statute.²²⁷ The decision to set aside the venerable international case law on common purpose/JCE responsibility and construct a new, alternative formulation of the notion of co-perpetration could have been triggered by one of two reasons. Either the Chamber was pursuing the aforementioned *Alleingang* policy, seeking to set the ICC on a different course of forging its own path in the field of international criminal law,²²⁸ or – amidst all the criticism that the JCE theory had accumulated at the time – it was genuinely convinced that the control approach provides a better, conceptually sound and more principled way to distinguish between principals and accessories to international crimes. The latter idea will be addressed in this section in order to review the perceived merits of the theory of co-perpetration based on joint control over the crime.

6.3.1. The ‘joint control’ criterion: a theoretical critique

When Roxin first construed his control over the act theory (*Tatherrschaftslehre*), he largely did so in reaction to the subjective approach to perpetration, which he criticized as “lead[ing] to legal uncertainty and irrational jurisprudence of emotion, entirely at the discretion of judges”.²²⁹ There is an undeniable appeal in this criticism, seeing as it has been recurrently raised in academia ever since, where proponents of the control theory have continued to stress that the subjective method, and thereby the JCE theory, “lacks a rational criterion for distinguishing between joint principals and accessories, leaving everything to the court’s assessment of the defendant’s attitude”.²³⁰ The alternative provided by the (joint) control approach is, in turn, hailed as a viable solution because it reportedly establishes a clear and principled demarcation criterion that leaves courts with “less room for manipulation than any subjective test.”²³¹ The following section would challenge these assertions and demonstrate that the perceived strictness and transparency of the control paradigm are largely overstated, both in theory and in practice.

²²⁶ See *supra* Section 6.2.1.2.

²²⁷ See *supra* Section 6.2.1.3.

²²⁸ See *supra* text accompanying notes 155-161.

²²⁹ Werle and Burghardt, *supra* n 40, at 195. See Chapter 5, Section 5.2.1.

²³⁰ Weigend, *supra* n 104, at 95. See also Fletcher, *supra* n 202, at 658; A. Chouliaras, ‘From ‘Conspiracy’ to ‘Joint Criminal Enterprise’: In Search of the Organizational Parameter’, in C. Stahn and L. Van den Herik (eds), *Future Perspectives on International Criminal Justice* (The Hague: T.M.C. Asser, 2010), at 577; Van Sliedregt, *supra* n 44, at 82.

²³¹ T. Weigend, ‘Intent, Mistake of Law, and Co-perpetration in the *Lubanga* Decision on Confirmation of Charges’, 6 *Journal of International Criminal Justice* (2008), at 480. See also K. Ambos, *Treatise on International Criminal Law* (Oxford: Oxford UP, 2013), at 152; Ohlin, *supra* n 12, at 528; Werle and Burghardt, *supra* n 33, at 316.

On a theoretical level, the control approach to co-perpetration responsibility has sustained much criticism for requiring the fact-finder to engage in a counter-factual analysis about whether the crime would have still taken place in a fictional world where the accused had not contributed to it. Judge Fulford was the first at the ICC to voice such an objection when he observed that:

an *ex post facto* assessment as to whether an individual made an essential contribution to war crimes, crimes against humanity or genocide will often be unrealistic and artificial. These crimes frequently involve a large number of perpetrators, including those who have controlling roles. It will be a matter of guesswork as to the real consequence for the particular crime if the accused is (hypothetically) removed from the equation, and most particularly it will not be easy to determine whether the offence would have been committed in any event.²³²

This criticism was subsequently also shared by Judge Van den Wyngaert, who pointed out in her separate opinion to the *Chui* Trial Judgment that:

the “essential contribution” requirement [...] compels Chambers to engage in artificial, speculative exercises about whether a crime would still have been committed if one of the accused had not made exactly the same contribution.²³³

There is a salient point in this criticism, which directly challenges the proposition that the control criterion ensures objectivism and clarity when differentiating between principals and accessories to a crime. Indeed, how could a test requiring judges to analyze events in an alternative universe, wherein the accused did not contribute to the concerted crime(s), be any more objective – or less subjective – than a test stressing the assessment of an accused’s *mens rea* vis-à-vis the collective crime? Evaluating the intent of an accused, and whether he shared an alleged common purpose to commit crimes, could certainly be an arduous task, but it is far from the obscure and manipulable operation that critics of the subjective approach to co-perpetration would claim it is. True, judges often do not have direct evidence of the accused’s *mens rea* and are forced to make inferences to this effect. Nevertheless, such inferences are not drawn from thin air, but are still based on actual evidence of the accused’s conduct – e.g. public speeches, orders he gave, the tenacity with which he performed his tasks etc. – and, needless to say, the rule is that such an inference “must be the only reasonable inference available on the evidence”.²³⁴ By contrast, a judge applying the theory of joint control has no access to evidence in the alternative world where the accused withheld his contribution to the concerted crime. His task thus becomes one of

²³² *Lubanga* Trial Judgment, *supra* n 1, Separate Opinion of Judge Adrian Fulford, para 17.

²³³ *Chui* Trial Judgment, *supra* n 2, Concurring Opinion of Judge Christine Van den Wyngaert, para 42.

²³⁴ *Krstić* Appeal Judgment, *supra* n 63, para 41; *Kvočka et al.* Appeal Judgment, *supra* n 56, para 237; *The Prosecutor v. Šainović et al.* (IT-05-87-A), Judgment, Appeals Chamber, 23 January 2014, para 995; *The Prosecutor v. Popović et al.* (IT-05-88-A), Judgment, Appeal Chamber, 30 January 2015, para 1369.

considering the evidence in the case at hand and, as Van Sliedregt, Weigend and Ohlin aptly note, “hypothetical[ly] guessing”²³⁵ how events would have unfolded absent the accused’s participation in the crime. Therefore, even though it is true that the subjective approach to co-perpetration may leave some room for judicial bias, this is equally, if not even more, true for the joint control paradigm. It is for this reason that, in more recent years, the international commentariat has increasingly started protesting that “the ICC’s control theory is [...] both vague and indeterminate”:²³⁶ *i.e.* a criticism that largely mirrors the objections that have been put forward against the subjective approach to co-perpetration.

To illustrate the above point, consider a case in which a senior political official from state A (the accused) and the leaders of a rebel group in the neighbouring state B form a common plan to wage a military campaign of terror in the latter state in order to destabilize its government and, ultimately, seize power.²³⁷ Pursuant to this agreement, the accused supplies the rebel army with a large shipment of arms and ammunition, which they later use for the agreed purpose and manage to gain control over large territories in state B. The evidence, however, shows that the rebels also had access to other sources of military equipment, including arms depots that they captured from the government, limited weapons trade with other, third parties etc. A judge applying the concept of co-perpetration based on joint control to the facts of the case would have to determine whether the contribution of the accused was ‘essential’ for the success of the common plan: *viz.* whether a withdrawal of his arms supply would have frustrated the concerted terror campaign.²³⁸ This is an inquiry that raises at least two questions, the answer to which would inevitably involve a notable dose of speculation and subjectivism. Namely, absent the accused’s weapons: i) would the rebels have been able to further their terror campaign with the other, limited sources of military arsenal, which they had at the time; and ii) would the rebels have been able to continue their campaign by replacing the accused’s contribution with another source of arms and ammunition? An answer to the latter question would be largely speculative, yet patently relevant for determining whether the contribution of the accused was indeed essential, or not. Perhaps the rebels would have expanded their weapons trade with the other, third parties, or they could have found an altogether different, alternative supplier.²³⁹ The former question may be a matter of guesswork too, but, more notably, it can potentially raise an important normative concern: what if the conclusion is reached that the rebels would have been able to continue their campaign, even if relying only on the other sources of weapons they had at the

time, although this would have significantly impaired their efficiency, possibly limiting the scope of their military operations? Should this finding, which would qualify the accused’s contribution as non-essential, but maybe ‘substantial’,²⁴⁰ justify the conclusion that he is an accessory, if it could be proven that he provided these weapons sharing a common intent with the rebel leaders to carry out the terror campaign in state B? More importantly, could it truly be said that this often fine, blurred line between ‘non-essential’ (*e.g.* ‘substantial’) and ‘essential’ contributions – lying at the heart of the concept of joint control – is a matter of a purely objective assessment that leaves less discretion to judges than an assessment of whether the accused shared the common purpose to commit the concerted offence or not? In this author’s view, the answer to these questions is negative, and the control approach to co-perpetration responsibility can be just as permeable to judicial discretion as the intent-based approach. In the above case, for instance, it is not difficult to imagine how a judge could overstate the centrality of the accused’s contribution and downplay the importance of the rebels’ alternative sources of arms – or vice versa – in order to reach the conclusion that he considers to be just. As discussed below, such instances where the facts of a case are straightjacketed to fit the legal doctrine can possibly be discerned in the ICC’s topical jurisprudence, as well.

Lastly, it has also been pointed out that the control criterion can be vague and impractical because it introduces problems of relativism when assessing the accused’s responsibility.²⁴¹ This issue has been stressed mostly with regards to the notion of indirect perpetration based on control over an organized structure of power, which Roxin used in his original work to submit that Adolf Eichmann could be held criminally responsible as an indirect perpetrator of the killing of Jews in concentration camps.²⁴² A number of scholars, however, have pointed out that, being a mid-level SS bureaucrat, Eichmann did not actually have *absolute* control over these crimes, since only the leader at the very top of the apparatus had “power and authority [that] can neither be blocked nor disturbed in any way from above.”²⁴³ In this respect, Weigend has concluded that:

to make the distinction between perpetratorship and accessory liability depend on the issue of factual ‘domination’ of the criminal act leads to unpredictable results depending on the existence of other actors and the relative degree of their ‘domination’.²⁴⁴

A similar problem arises when one considers the application of the control criterion to the notion of co-perpetration. If persons A, B and C form a common plan to commit a crime and then divide among each other three tasks that are absolutely essential for its completion,

²³⁵ J. Ohlin, E. Van Sliedregt and T. Weigend, ‘Assessing the Control-Theory’, 26 *Leiden Journal of International Law* (2013), at 731.

²³⁶ Ohlin, *supra* n 53, at 329. See also H. Vest, ‘Business Leaders and the Modes of Individual Criminal Responsibility under International Law’, 8 *Journal of International Criminal Justice* (2010), at 867; Weigend, *supra* n 104, at 100; Wirth, *supra* n 80, at 978-979; Ohlin, Van Sliedregt and Weigend, *supra* n 235, at 731-732; Van Sliedregt, *supra* n 44, at 99; Ohlin, *supra* n 12, at 528-529.

²³⁷ This example is loosely based on the factual circumstances in the SCSL *Taylor* case. *The Prosecutor v. Taylor* (SCSL-03-01-T), Judgment, Trial Chamber, 18 May 2012.

²³⁸ See Chapter 5, Section 5.4.1.2.

²³⁹ Ohlin, Van Sliedregt and Weigend, *supra* n 235, at 732; Wirth, *supra* n 80, at 979.

²⁴⁰ See Chapter 5, Section 5.4.1.2. (text accompanying notes 176-185)

²⁴¹ Weigend, *supra* n 104, at 100.

²⁴² Roxin, *supra* n 40, at 193, 201-203 (for English translation, see Werle and Burghardt, *supra* n 40, at 199-202).

²⁴³ Ambos, *supra* n 135, at 151. See also Weigend, *supra* n 104, at 100.

²⁴⁴ Weigend, *supra* n 104, at 100.

could C be regarded as a co-perpetrator if the evidence shows that he was in fact a subordinate of A and the latter was ready to replace him with another person if C refused to perform his task? While the contribution that has been assigned to C is ‘essential’, his relationship *vis-à-vis* the other co-perpetrators does suggest that he does not in fact have the material power to frustrate the commission of the crime. Accordingly, even if C was an enthusiastic party to the common plan, who did everything within his power to further its execution, he would still qualify as an accessory to the crime.²⁴⁵ Indeed, it will be recalled that when Roxin defined his concept of co-perpetration based on joint control, he stressed that each co-perpetrator has a “key position” (*‘schlüsselstellung’*)²⁴⁶ in the common plan and that without his co-operation the other is “equally helpless” (*‘ebenso hilflos’*)²⁴⁷ in executing the plan. There is, thus, a sense of mutual dependence, as seen in the example which Roxin gave:

If two people govern a country together - are joint rulers in the literal sense of the word - the usual consequence is that the acts of each depend on the co-perpetration of the other. The reverse side of this is, inevitably, the fact that by refusing to participate, each person individually can frustrate the action.²⁴⁸

The *Stakić* Trial Chamber called this aspect of the doctrine the “element of interdependency”.²⁴⁹ The difficulty here is that common criminal plans, especially in the field of international criminal law, are often formed by persons who, at least formally, are in asymmetrical power relationships. This means, as observed in the below review of topical ICC jurisprudence, that the application of the control approach to co-perpetration may lead to confusing and impractical assessments of the power and authority of each co-perpetrator relative to that of the others.

The appeal of the control over the crime theory stems from a naturalistic observation that, generally speaking, human conduct is more tangible, more perceptible to our senses, than human thoughts and intentions, so therefore an analysis of the former is bound to be more principled and less prone to subjectivism than an assessment of the latter. Accordingly, the definitional criterion for co-perpetration liability should emphasize the acts of the co-perpetrator, rather than his *mens rea*, as the litmus test for categorizing his responsibility. In this author’s view, however, although the basic intuitiveness of this argument makes it quite persuasive on the surface, a more thorough consideration of its actual implementation in the doctrinal framework of co-perpetration based on joint control reveals a number of chronic flaws. In particular, the adoption of this approach to co-perpetration requires judges to: i) engage in a speculative, counter-factual analysis of the case; ii) draw artificial and

often highly subjective lines between ‘essential’ and ‘less-than-essential’ (e.g. ‘substantial’) contributions; and iii) conduct rather impractical reviews of the power relationships between the different participants in the common plan to establish their actual, material ability to frustrate its execution. The more complicated the factual circumstances of the charged crime, the more pronounced the above problems become, the less talk there is of limited judicial discretion. In fact, as argued in the next section, some of these setbacks may already be identified in the ICC case law on the control over the crime doctrine.

6.3.2. The joint control criterion in practice: much ado for nothing?

Contrary to the claim that the control method for demarcating between principals and accessories is more principled, precise and immune to judicial subjectivism, the first judgments delivered by the ICC have already drawn much scholarly criticism that the Court is applying this criterion in a quite relaxed and expansive manner.²⁵⁰ Indeed, it may be said that while the Chambers have been very stringent when defining, in accordance with the control doctrine, the theoretical frameworks of the modes of liability under Article 25(3) (a) RS, they have been noticeably less rigorous when actually applying these notions to the facts of cases. The present section will analyse topical ICC jurisprudence and highlight a few decisions that illustrate the aforementioned flaws of the control criterion and raise doubts about its asserted limiting effect on judicial discretion and subjectivism when ascribing criminal responsibility.

One clear example of the problem at hand is the ICC’s practice on the concept of indirect perpetration based on control over an organized structure of power. As already elaborated above, when the *Katanga and Chui* Pre-Trial Chamber first construed the legal elements of this mode of liability, it stressed that it differs from ‘ordering’ responsibility in that the organizational control typical for the latter notion is of a lesser degree and nature than that required for the former.²⁵¹ In particular, the judges explained that for indirect perpetration:

[t]he main attribute of this kind of organisation is a mechanism that enables its highest authorities to ensure automatic compliance with their orders. Thus, “[s]uch Organisation develops namely a life that is independent of the changing composition of its members. It functions, without depending on the individual identity of the executant, as if it were automatic.” An authority who issues an order within such an organisation therefore assumes a different kind of responsibility than in ordinary cases of criminal ordering. In the latter cases, article 25(3)(b) of the Statute provides that a leader or commander who orders the commission of a crime may be regarded as an accessory. [...] The leader’s ability to secure this automatic compliance with his orders is the basis for his principal — rather than accessorial — liability. The highest authority does not merely order the commission of a

²⁴⁵ Provided, of course, that he did not physically commit the concerted crime, in which case he would qualify as a direct perpetrator.

²⁴⁶ C. Roxin, *Täterschaft Und Tatherrschaft* (1st edn, Hamburg: Cram, De Gruyter & Co., 1963), at 279.

²⁴⁷ *Ibid.*, at 278.

²⁴⁸ English translation found in *Stakić* Trial Judgment, *supra* n 112, para 440. Original German text in Roxin, *supra* n 246, at 279.

²⁴⁹ *Stakić* Trial Judgment, *supra* n 112, para 490.

²⁵⁰ Ohlin, Van Sliedregt and Weigend, *supra* n 235, at 731-732; A. Gil Gil, and E. Maculan. ‘Current Trends in the Definition of ‘Perpetrator’ by the International Criminal Court: From the Decision on the Confirmation of Charges in the *Lubanga* Case to the *Katanga* Judgment’, 28 *Leiden Journal of International Law* (2015), at 357; M. Cupido, *Facts Matter: A Study into the Casuistry of Substantive International Criminal Law* (Den Haag: Eleven International Pub., 2015), at 71.

²⁵¹ See *supra* Section 6.2.1.2.

crime, but through his control over the organisation, essentially decides whether and how the crime would be committed.²⁵²

Thus, the Chamber described a perfectly automatized, Weberian-like organization, where orders are guaranteed to be unconditionally executed, as a fundamental element of indirect perpetration based on control over an organized structure of power. Keeping this in mind, it is striking to find out how the ICC Pre-Trial Chamber found the existence of such an organization in the *Ruto et al.* case.²⁵³ The accused Ruto was held liable as an indirect co-perpetrator of the charged crimes that he committed through an organization called ‘The Network’.²⁵⁴ As the Chamber itself explained, this association was “comprised of eminent ODM political representatives, representatives of the media, former members of the Kenyan police and army, Kalenjin elders and local leaders”, who first met on 30 December 2006 in Ruto’s house where they planned to attack particular segments of the Kenyan civilian population due to their political affiliations.²⁵⁵ Following this meeting, the members of ‘The Network’ met a few more times at various locations including a trading centre, a milk plant, and the houses of other individuals, to further discuss their criminal plans, establish a hierarchy among each other and divide their responsibilities.²⁵⁶ The Chamber found that Ruto, who was at the apex of ‘The Network’, ensured the automatic compliance with his orders within this organization by putting into place “a two-fold strategy: (1) a payment mechanism; and (2) a punishment mechanism”.²⁵⁷ The former consisted of giving motivational stipends and rewards to rank-and-file members of ‘The Network’ who followed orders²⁵⁸ and the latter included beatings, seizure of assets and death threats for those who refused to carry out the tasks they were given.²⁵⁹ On this basis, the *Ruto et al.* Pre-Trial Chamber reasoned that ‘The Network’ became the kind of organization that warrants the use of the concept of indirect perpetration based on control over an organized structure of power.

In the author’s view, the above finding is not convincing and demonstrates much of what is wrong with the ICC’s rhetoric about the control doctrine. The fact that ‘The Network’ – a quite amorphous group of persons, who relied on most rudimentary tactics to compel compliance with orders – was found to be an organized power apparatus within the meaning of Roxin’s concept of indirect perpetration, affirms several of the theoretical criticisms presented in the above research. First, the distinction which the *Katanga and*

Chui Pre-Trial Chamber drew between ordering and indirect perpetration liability, and the holding that the latter concept applies to rigid, hierarchical structures of power that are more automatized in their functioning than a regular army,²⁶⁰ is only dust in the eyes. It seeks to conjure some formal barrier between the said modes of liability under Articles 25(3)(a) and (b) RS that will be consonant with the endorsement of the control approach to distinguishing between principal and accessory liability but that, as practice shows, is clearly immaterial. Put simply, if even ‘The Network’ can fit the *Katanga and Chui* definition of the sort of organization required for using indirect perpetration liability, then the scope of application for ‘ordering’ is entirely decimated. Against this standard, virtually every modern army will qualify as an organized power apparatus within the meaning of the *Organisationsherrschaft* doctrine and so commanders who order the commission of a crime will be indirect perpetrators per definition. Secondly, the assertion that the control approach curtails judicial discretion and provides for less subjectivism in the assessment of the accused’s responsibility also rings hollow. It is quite visible that when addressing the core issue of ‘automatic compliance’ with orders, the *Ruto et al.* judges brushed over the evidence of non-compliance with orders from ‘The Network’ leadership,²⁶¹ and instead emphasized the role of the punishment mechanisms used to ensure such compliance. One showing example is the Chamber’s finding that:

Witness 2 reports an alternative method of sanctioning those who did not comply and did not join the violence against the PNU supporters. According to the said witness, when the violence started on 30 December 2007, those who refused to join were punished by being obligated to “donate something to help feed [...] the youths participating in the looting”. Additionally, Witness 4 reports that at least one person was spared from beatings by giving a bull as appeasement.²⁶²

On the basis of this evidence, the judges could have just as plausibly highlighted the instances of non-compliance with orders and found that ‘The Network’ was not the kind of draconian, highly automated structure of power that the *Katanga and Chui* Pre-Trial Chamber first described when construing the legal elements of indirect perpetration under Article 25(3)(a) RS. Determining the degree of compliance with orders within a given organization – e.g. whether this was sufficiently automatic to qualify Ruto as an indirect perpetrator, or lesser so he would incur ordering liability – would often be far from a matter that lends itself to a single, objective interpretation.

The *Ruto et al.* case and its analysis of ‘The Network’ is perhaps one of the more extreme examples of a relaxed application of the control doctrine (in its ‘perpetrator behind a perpetrator’ manifestation), but it is hardly exceptional. Scholars have generally criticized the ICC’s tendency to apply the notion of indirect perpetration based on control over an organized structure of power to “largely disorganized militias or rebel armies, where the authority of

²⁵² *Katanga and Chui* Decision on the Confirmation of Charges, *supra* n 6, paras 517-518.

²⁵³ *Ruto, Kosgey and Sang* Decision on the Confirmation of Charges, *supra* n 6.

²⁵⁴ *Ibid.*, paras 316, 349.

²⁵⁵ *Ibid.*, paras 182, 186-187.

²⁵⁶ *Ibid.*, paras 188, 191-196.

²⁵⁷ *Ibid.*, para 317.

²⁵⁸ *Ibid.*, paras 320-323.

²⁵⁹ *Ibid.*, paras 324-326.

²⁶⁰ See *supra* text accompanying notes 251-252 and Section 6.2.1.2.

²⁶¹ *Ruto, Kosgey and Sang* Decision on the Confirmation of Charges, *supra* n 6, paras 324, 326.

²⁶² *Ibid.*, para 326.

a leader may be accepted only as long as he is successful in providing material goods and military success.”²⁶³ This pliable use of the control theory in cases of indirect perpetration is indicative of the overall approach that the ICC has adopted in its application of the control criterion, seeing as it has also been discerned in cases of co-perpetration. Ohlin, Van Sliedregt and Weigend, for instance, have argued that the *Lubanga* Trial Chamber’s application of co-perpetration liability to the facts of the case:

may not define perpetration too narrowly but too broadly. The way the Trial Chamber applies the test to the facts of *Lubanga* gives an indication of how far the net of perpetration is cast under the seemingly narrow ‘essentiality’ test. A joint perpetrator, the *Lubanga* majority holds, does not have to be present at the scene of the crime, and there need not even exist a direct or physical link between his contribution and the commission of the crime; it is sufficient for a perpetrator to assist in formulating the relevant strategy or plan, to become involved in directing or controlling other participants’ or to determine the roles of those involved in the offence. If all these contributions, which can be quite remote in time and place from the commission of the offence, are deemed ‘essential’ and thus sufficient to establish perpetration, then one must ask what remains for mere accessorial liability as an instigator or an aider and abettor.²⁶⁴

The *Lubanga* Trial Chamber is not the only one to have pointed at an accused’s position of leadership and his overall coordinating role in the common plan to affirm that his contribution to the plan was ‘essential’.²⁶⁵ Other than the said danger of expansiveness, this approach is liable to introducing automatism in the actual application of the ‘essentiality’ test. Depending on the facts of the case, it may well be that an accused’s high rank and involvement in the preparation and/or coordination of a common plan were a *conditio sine qua non* for the commission of the crime but it would be erroneous to accept this as universally true and not offer a proper analysis to this end. In the *Ntaganda* case, for example, the Pre-Trial Chamber considered the liability of the accused, who was one of the chief commanders in Lubanga’s rebel army (the ‘UPC/FPLC’), for *inter alia* various crimes committed during a February 2003 attack by UPC/FPLC forces on a few villages, dubbed “the Second Attack”.²⁶⁶ This operation was part of the common plan to gain control over the Ituri region, which the Chamber found to have existed between Lubanga, Ntaganda and other co-perpetrators.²⁶⁷ The judges held that, in relation to the “Second Attack”, Ntaganda contributed essentially to its execution because

he “assumed a coordinating role before the execution stage of the crimes”²⁶⁸ and then, while away from the crime scene, he:

(i) was in contact with the troops through a manpack and a Motorola; (ii) received updates on the situation in the field; and (iii) issued operational orders concerning the fighting.²⁶⁹

Whether the crimes charged in relation to the said “Second Attack” would have been committed by the UPC/FPLC ground troops absent Ntaganda’s above-stated contributions could be a matter of some debate. What is rather alarming, however, is that the Pre-Trial Chamber did not explain in a single sentence *why* it considered these acts to have been *essential* for the commission of the crimes. Listing a range of contributions in one paragraph and then swiftly finding in the next one that they were essential, without in-between properly motivating this determination, is hardly the line of reasoning that demonstrates that the control approach to co-perpetration leaves less room for judicial discretion and is more objective/principled than the theory of JCE. Rather, it signals a malleable determination of the intensity of contributions provided by high-ranking accused.

Assuming that the UPC/FPLC troops’ ability to stay in radio contact with Ntaganda, give him updates on the combat situation and receive operational orders from him was, indeed, crucial for the execution of the “Second Attack” and the commission of crimes, it can still be questioned whether he had the material ability to frustrate the commission of the said crimes by withdrawing his participation in the common plan. Given that Lubanga, the UPC/FPCL Commander-in-Chief, was found to have been “the ultimate authority in that political-military structure” and the person who had “ultimate control, including as regards military matters”,²⁷⁰ it is doubtful to what extent Ntaganda could be said to have shared a joint control over the execution of the common plan: *i.e.* to have been that key figure in the common plan on whom the other joint perpetrators (mutually) depended. This raises the aforesaid problem of assessing power relations,²⁷¹ which the *Ntaganda* Pre-Trial Chamber did not explicitly address, but has otherwise already stirred controversy in the ICC case law. Thus, for instance, in the *Al-Bashir* Arrest Warrant Decision, the judges found that the accused, acting as President of Sudan, and other high-ranking Sudanese military and political officials designed and executed a common plan to attack in Darfur civilians who were associated with rebel groups.²⁷² While the Majority reasoned that Al-Bashir’s liability could be described as an indirect co-perpetrator,²⁷³ Judge Ušacka disagreed with this finding

²⁶³ Weigend, *supra* n 44, at 553. See also *e.g.* Van Sliedregt, *supra* n 44, at 87; Manacorda and Meloni, *supra* n 36, at 171.

²⁶⁴ Ohlin, Van Sliedregt and Weigend, *supra* n 235, at 731-732. See also Gil Gil and Maculan, *supra* n 250, at 357; Wirth, *supra* n 80, at 979.

²⁶⁵ *The Prosecutor v. Laurent Gbagbo* (ICC-02/11-01/11-656-Red), Decision on the Confirmation of Charges, Pre-Trial Chamber I, 12 June 2014, para 232; *The Prosecutor v. Ntaganda* (ICC-01/04-02/06-309), Decision on the Confirmation of Charges, Pre-Trial Chamber II, 9 June 2014, paras 108-117.

²⁶⁶ *Ntaganda* Decision on the Confirmation of Charges, *supra* n 265, para 29.

²⁶⁷ *Ibid.*, paras 105-106.

²⁶⁸ *Ibid.*, para 113.

²⁶⁹ *Ibid.*, para 114.

²⁷⁰ *Lubanga* Trial Judgment, *supra* n 1, para 1169.

²⁷¹ See *supra* text accompanying notes 241-249.

²⁷² *The Prosecutor v. Al Bashir* (ICC-02/05-01/09-3), Decision on the Prosecutor’s Application for a Warrant of Arrest against Omar Hassan Ahmad Al Bashir, Pre-Trial Chamber I, 4 March 2009, paras 214-215.

²⁷³ *Ibid.*, paras 216, 223.

and submitted that, under the control doctrine, one cannot speak of co-perpetration when the common plan was in fact fully dominated by one of its participants:

I also agree that it can be inferred that, as members of the highest level of the [Government of Sudan], these persons played an essential role in the commission of the crime. However, I do not find any evidence which addresses *the issue of the locus of control*; it is unclear whether such control indeed rested fully with Omar Al-Bashir, or whether it was shared by others such that each person had the power to frustrate the commission of the crime. For this reason, I would decline to find [...] that Omar Al Bashir was responsible through co-perpetration and instead issue an arrest warrant based only on [...] indirect perpetration.²⁷⁴

In the author's view, there is much logic in this dissent. What Judge Ušacka defined as “the issue of the locus of control”, is what Roxin called the “key position” (*‘schlüsselstellung’*)²⁷⁵ of the co-perpetrator and the *Stakić* Trial Chamber described as the “element of interdependency”.²⁷⁶ The fact that a person is assigned/delegated an essential task for the execution of a common plan does not mean *per se* that he has the material power to frustrate the execution of that plan. It is also his position vis-à-vis the other joint perpetrators that makes him their partner in crime: someone who they mutually *depend on* for its execution and, thus, share ‘the locus of control’ with, rather than someone they use as a dispensable tool. In practice, such assessments of the authority and power relations between the participants in a common plan would often be particularly indeterminate in the field of international criminal law. In *Katanga and Chui*, for instance, the Pre-Trial Chamber concluded that Germain Katanga was the supreme commander of the FRPI armed group, who had “ultimate control over FRPI commanders”,²⁷⁷ and Mathieu Chui was the supreme commander of the FNI armed group, who had “ultimate control over FNI commanders”.²⁷⁸ Therefore, although subordinate commanders were also involved in the common plan to attack the village of Bogoro, the judges held that:

Germain Katanga and Mathieu Ngudjolo Chui implemented the common plan in a coordinated manner and that Germain Katanga and Mathieu Ngudjolo Chui had joint control over the implementation of the plan, insofar as their essential overall coordinating roles gave to them, *and only to them*, the power to frustrate the implementation of the plan.²⁷⁹

Compare this finding to the *Ntaganda* case where, despite being a subordinate commander in the FPLC – an armed group that was judicially recognized to have been under the “ultimate control” of Lubanga²⁸⁰ – the accused was held liable as an indirect co-perpetrator who shared control over the execution of the said common plan.²⁸¹ Of course, these are different armed groups but, unless Katanga and Chui's control over, respectively, the FRPI and FNI was somehow more “ultimate” than that of Lubanga over the FPLC, it is unclear why in the former case indirect co-perpetration liability could be assigned to the said two supreme commanders “*and only to them*”,²⁸² and in the latter scenario subordinate commanders were ‘permitted’ in this circle of indirect co-perpetrators. This is the very problem that Judge Ušacka saw in the *Al-Bashir* case and the level of control that the Accused had over the state/military apparatus. It shows that there is much room for relativism and discretion when applying the control criterion in cases of such nature and complexity.

The above-stated practical deficiencies of the control approach to principal responsibility present a challenge not only for the Chambers but also for the Prosecution. Indeed, Judge Fulford submitted in his separate opinion in *Lubanga* that this theory “imposes an unnecessary and unfair burden on the prosecution”.²⁸³ To this end, one last case that bears noting to further highlight the practical problems with the application of this approach to joint perpetration is *Muthaura et al.*²⁸⁴ Looking at the Document Containing the Charges, one could see how the Prosecutor struggled to define the guilt of Mohammed Ali: one of the three co-accused.²⁸⁵ Muthaura and Kenyatta were both charged as indirect co-perpetrators of a common plan to conduct widespread and systematic attacks against supporters of the government's opposition. According to the Prosecution, the plan was twofold: i) recruit forces that will attack such civilians; and ii) secure the non-intervention of the Kenyan Police before, during and after the said attacks.²⁸⁶ Ali, who was the Commissioner of Police, exercised *de jure* and *de facto* control over its forces and, the Prosecution alleged, joined and shared this common plan, although it was originally devised by the other two accused.²⁸⁷ He allegedly instructed his subordinates and the other security units not to obstruct the forces

²⁸⁰ *Lubanga* Trial Judgment, *supra* n 1, para 1169.

²⁸¹ *Ntaganda* Decision on the Confirmation of Charges, *supra* n 265, paras 102, 105, 108.

²⁸² By explicitly holding that the control over the common plan to “wipe out” Bogoro belonged to Katanga and Chui, “and only to them”, the Pre-Trial Chamber excluded from this ambit of indirect co-perpetration responsibility other, subordinate commanders who were involved in the common plan, such as Commander Boba Boba and Commander Kute. Indeed, nowhere in its decision does the Pre-Trial Chamber mention any other, named or unnamed, indirect co-perpetrators in the said common plan. *Katanga and Chui* Decision on the Confirmation of Charges, *supra* n 6, paras 548, 557, 561.

²⁸³ *Lubanga* Trial Judgment, *supra* n 1, Separate Opinion of Judge Adrian Fulford, para 3.

²⁸⁴ *The Prosecutor v. Muthaura, Kenyatta and Ali* (ICC-01/09-02/11-382-Red), Decision on the Confirmation of Charges, Pre-Trial Chamber II, 23 January 2012.

²⁸⁵ *The Prosecutor v. Muthaura, Kenyatta and Ali* (ICC-01/09-02/11-257-AnxA), Document Containing the Charges, Office of the Prosecutor, 19 August 2011.

²⁸⁶ *Ibid.*, paras 76-79.

²⁸⁷ *Ibid.*, paras 43, 77-78.

²⁷⁴ *Ibid.*, Separate and Partly Dissenting Opinion of Judge Anita Ušacka, para 104. (*emphasis added*)

²⁷⁵ Roxin, *supra* n 246, at 279. See *supra* text accompanying notes 244-248.

²⁷⁶ *Stakić* Trial Judgment, *supra* n 112, para 490.

²⁷⁷ *Katanga and Chui* Decision on the Confirmation of Charges, *supra* n 6, para 540.

²⁷⁸ *Ibid.*, para 541.

²⁷⁹ *Ibid.*, para 561. (*emphasis added*)

sent to attack the opposition supporters and he later refrained from arresting or initiating the prosecution of any of the main perpetrators of the said attacks.²⁸⁸ The Prosecution dubbed this the “abstention element” of the common plan and described it as central to the plan, yet it ultimately charged Ali with accessorial liability under Article 23(3)(d) RS.²⁸⁹ It was clear, however, that the Prosecution was oscillating between different forms of liability while drafting the charges. In what appears to be a missed redaction from an earlier draft, it argued that “Muthaura, Kenyatta and Ali are aware of the factual circumstances *enabling them to exercise joint control over the crime*”.²⁹⁰ Indeed, it is quite showing that, throughout the entire document containing the charges, mention is made of the close cooperation between Kenyatta and Ali, their key roles and top hierarchical positions, as well as general references to other co-perpetrators in the common plan, aside from Muthaura and Kenyatta.²⁹¹ In light of this, it is surprising that the Prosecution ultimately chose to charge Ali as an accessory to the group crime. One plausible explanation could be that Muthaura and Kenyatta, having devised the plan, solicited support for it, recruited the physical perpetrators and provided all the necessary funding, watered down Ali’s contribution and made it seem less than essential: a finding that, under the control doctrine, would explain the Prosecution’s final decision to plead for Ali’s accessorial, rather than principal liability. This, however, would also show the fallibility of untangling ‘essential’ and ‘non-essential’ tasks in complex criminality and, in any event, does not make much sense, seeing that the Prosecution expressly described the “abstention element” – *i.e.* Ali’s contribution – as an essential part of the common plan. Alternatively, it may be that the Prosecution downgraded Ali’s responsibility to an accessory because of his subordinate position relative to the other accused: namely, he was subordinate to Muthaura, who was the Chairman of the Kenyan National Security Committee.²⁹² Indeed, in view of the Prosecution’s submission that Muthaura had direct authority over Ali, it could be counterintuitive to find that Ali controlled the execution of the common plan, jointly with Muthaura and Kenyatta. Whichever the case may be, the use of the control criterion is clearly not a panacea that provides for a clear-cut, objective and uncontroversial distinction between principals and accessories to collective crimes.

Critics of the subjective approach to allocating criminal responsibility have argued that it is manipulable in that a judge can easily adjust the case facts to it in order to reach the conclusion that he considers to be fair and equitable.²⁹³ The theory of control, the argument goes, takes away this discretion from the hands of the judges and ensures that their relevant findings are principled and objective. One may question the wisdom of seeking to curtail judicial discretion when trying infamously convoluted and ever-more challenging cases of

mass, systemic criminality. Be that as it may, the present research has sought to show that this perceived strictness and objectiveness of the control criterion is overly exaggerated in theory, and has hardly had such an effect in the ICC practice. The cases that were examined above demonstrate that, when faced with facts that do not quite fit the ostensibly rigid legal matrix of co-perpetration or indirect perpetration liability under the control theory, ICC Chambers have not had much difficulty straightjacketing the case facts to the legal framework of the form of principal liability that they considered to best capture the guilt of the accused. In this sense, the Court’s adoption of the control over the crime approach, and the resulting fragmentation in the field of international criminal law, not only lacked a legal basis,²⁹⁴ but it did not present a conceptually better, less prone to subjectivism, criterion for distinguishing between principals and accessories to a collective crime.

6.4. Conclusion

When the ICC *Lubanga* Pre-Trial Chamber endorsed the theory of co-perpetration based on joint control in January 2007, it marked a defining moment for the field of international criminal law, much like the *Tadić* Appeals Chamber did in 1999. In fact, one thing that the *Lubanga* Decision on the Confirmation of Charges and the *Tadić* Appeal Judgment have in common is that both of them formed an important jurisprudential juncture in the development of this legal system. *Tadić* was the first appeal judgment of the ICTY: a tribunal that many people saw as a symbolic bridge between the birth of international criminal law in Nuremberg and its journey to early adolescence in The Hague.²⁹⁵ *Lubanga* was the first confirmation decision of the ICC: a court that marked the next evolutionary step of moving past the scattered *ad-hockery* and into a single, permanent basis for development. The attitude to this process, however, has been profoundly different. While the *Tadić* judges sought continuity, by tracing World War II-era jurisprudence on joint responsibility and refining it into a contemporary legal doctrine, the judges in *Lubanga* opted for severance and fragmentation, by setting aside the international case law on ‘common purpose’/JCE liability and endorsing the theory of joint control. To justify this rupture, the Pre-Trial Chamber and the many proponents of the new, alternative formulation of co-perpetration liability submitted that this was necessary because: i) the ICC Rome Statute requires the adoption of the control theory and is not compatible with the subjective approach to making the principal/accessory distinction; and ii) the joint control theory is more objective and principled than the JCE theory, which had already been subjected to much criticism by the international commentariat at the time.

²⁸⁸ *Ibid.*, para 99.

²⁸⁹ *Ibid.*, paras 45-46, 94.

²⁹⁰ *Ibid.*, para 93. (title of subsection, *emphasis added*)

²⁹¹ *Ibid.*, paras 84, 86, 90.

²⁹² *Ibid.*, para 38.

²⁹³ Weigend, ‘Problems of Attribution’, *supra* n 204, at 257.

²⁹⁴ See *supra* Section 6.2.

²⁹⁵ See Chapter 3, Section 3.2. It is perhaps more accurate to say that *Tadić* was the first *conviction* judgment handed down by the ICTY Appeals Chamber, seeing as its very first judgment was actually delivered in the *Erdemović* case and addressed issues arising from the accused’s guilty plea and trial sentencing judgment. *Erdemović* Appeal Judgment, *supra* n 168.

The present chapter has challenged both of these propositions. It has reviewed the alleged legal basis for applying the doctrine of control in ICC proceedings and explained that neither the plain text of Article 25(3) RS, nor a contextual interpretation of this provision provide an express and conclusive answer on how to define the legal elements of co-perpetration responsibility. The contextual reading that the *Lubanga* Pre-Trial Chamber used to endorse the control criterion was premised on a finding that was later expressly refuted in the ICC case law: *i.e.* the assertion that the subjective approach to co-perpetration, expressed in the JCE doctrine, is rejected because this construct is contained in Article 25(3)(d) RS as a mode of accessorial liability.²⁹⁶ Furthermore, it was also pointed out that, under the same contextual method of interpreting Article 25(3) RS, the adoption of the control theory fails to explain what is the difference between indirect perpetration under subparagraph (a) and ordering under subparagraph (b) of this provision: a problem that has materialized in the ICC practice.²⁹⁷ The additional research that was carried out into the *travaux préparatoires* of the Rome Statute, customary international law and the general principles of law showed that neither of them supports the theory of co-perpetration based on joint control over the crime.²⁹⁸ At the same time, however, the former two sources provide ample legal basis for using the underlying rationale of the JCE concept – *i.e.* the ‘shared intent’ formula – to define the legal framework of co-perpetration under Article 25(3)(a) RS. Doing so would align the ICC case law with the jurisprudence of all the other modern international tribunals and with the Nuremberg-era precedents, thus reducing the fragmentation and enhancing the legitimacy of this field of law.

As for the argument that the control approach is preferable to the theory of JCE because it allows us to distinguish between principals and accessories to a group crime in a more objective and principled manner, the above research has concluded that this assertion is unconvincing both in theory and in practice. The joint control doctrine and its hallmark element that the contribution of the co-perpetrator must be ‘essential’ is deeply problematic because it compels judges to carry out a highly hypothetical and speculative assessment of whether the concerted crime would have been committed if the accused had not contributed to it. While the intent of an accused could be convincingly inferred from evidence of his objective conduct, evidence of the course of events in an alternative world where the accused did not participate in the concerted crime is unattainable, which is why there will inevitably be a dose of guesswork in a judge’s assessment of whether the contribution of the accused was a *sine qua non* for the commission of the crime. Furthermore, the very classification of a criminal contribution as ‘essential’ or ‘less-than-essential’ would often be an abstract and intuitive task that would give judges much of the discretion that opponents of the subjective approach to co-perpetration detest. Finally, it was also explained that the joint control theory would require the fact finder to engage in highly impractical and often very indeterminate assessments of the power relations between the various participants in the common plan, in order to establish whether the accused had the material ability to

frustrate the commission of the crime. These problems are especially acute in the context of international criminal law where crimes are usually the product of multiple, varying in time and location, contributions that are provided by a wide group of military and political actors, whose power relations are often elusive and changing over time. Indeed, this chapter has argued that some of these issues could already be identified in the nascent jurisprudence of the ICC.

In light of the above, this author is of the view that when the *Lubanga* Pre-Trial Chamber first constructed the notion of co-perpetration under Article 25(3)(a) RS it should have done what the *Tadić* Appeals Chamber had done earlier: take over the existing precedent under international criminal law, revise and refine it where necessary to also fit the framework of the Rome Statute, and ultimately carry this legacy forward in its own jurisprudence. The JCE doctrine certainly had its own known problems and excesses at the time, but the more constructive and legally justified decision would have been to address those issues and trim the said excesses, rather than jettison the entire notion and introduce a whole new theory of co-perpetration. The next, final chapter of this book will propose how this could have been – and, indeed, still could be – done.

²⁹⁶ See *supra* Section 6.2.1.2.

²⁹⁷ *Ibid.* and *supra* Section 6.3.2.

²⁹⁸ See *supra* Section 6.2.1.3., Section 6.2.2. and Section 6.2.3.

Co-Perpetration Responsibility
in International Criminal Law:
Forging a Path Forward

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7.1. Introduction

What should be the legal framework of co-perpetration responsibility in international criminal law? This is the central question that was posed at the very beginning of this book and each of the preceding chapters contains an important piece of the answer that will be asserted here. As a point of departure, one finding that can be drawn from the research conducted so far is that – as they are currently formulated by the international courts and tribunals – neither the doctrine of JCE, nor the joint control over the crime concept provide an impeccable construction of co-perpetration liability. In fact, as this chapter will duly summarize, both doctrines have aspects that place them at odds with one or more of the basic assessment criteria that were endorsed in Chapter 1 to determine how joint commission responsibility should be defined in international criminal proceedings.¹ Therefore, advocating the use of either JCE, or the joint control theory, *talis qualis*, for the future prosecution of international crimes would be unmeritorious. Rather, the way forward is to consider the identified deficiencies of these notions and thereby propose a refined and re-tailored construction of co-perpetration that would fit the aforesaid evaluation framework and, ideally, be applicable at both the ICC and the *ad hoc* Tribunals. This author is of the view that such a definition is possible and its adoption would bring some much-needed uniformity in the international criminal law on this form of criminal responsibility.

This chapter would first briefly appraise the formulations of co-perpetration that Judge Fulford and Judge Van den Wyngaert proposed in their separate opinions to, respectively, the *Lubanga* Trial Judgment² and the *Chui* Trial Judgment.³ Their interpretations of Article 25(3) RS, and in particular the nebulous “commits [...] jointly with another” clause in subparagraph a), were already sketched out in Chapter 6,⁴ yet the actual assessment of these novel proposals was purposely left for the present research. Arguments will be raised to dispute the conceptual prowess of the two materially different legal frameworks that the honourable judges proposed for co-perpetration liability, as well as the merits for their adoption at the ICC. Following this, the main part of this chapter will be set out, in which pertinent findings from the research that was conducted in Chapters 2 to 6 will be systematized and used to determine how JCE and the joint control over the crime doctrine measure against the three core requirements – legal basis, efficiency and fairness – of the evaluation framework that was adopted in Chapter 1. The goal here is thus to bring together and conceptualize the problems and excesses that were identified in the preceding research on these two theories, trim and revise the said troubling aspects, and in the end distil a refined, single legal framework for co-perpetration that meets the said three criteria. It will be asserted that

1 See Chapter 1, Section 1.5.
2 *The Prosecutor v. Lubanga* (ICC-01/04-01/06-2842), Judgment, Trial Chamber, 14 March 2012, Separate Opinion of Judge Adrian Fulford, paras 1-21.
3 *The Prosecutor v. Ngudjolo Chui* (ICC-01/04-02/12-3-tENG), Judgment, Trial Chamber, 18 December 2012, Concurring Opinion of Judge Christine Van den Wyngaert, paras 1-70.
4 See Chapter 6, Section 6.2.1.1.

the often-noted disparity between the sources of law that apply at the ICC and the *ad hoc* Tribunals is neither absolute, nor antithetical to designing a uniform construction of co-perpetration that may be used in both contexts. A duly redacted, narrowed-down definition of the JCE doctrine, as the research in this chapter will show, provides such a solution that could ameliorate “the unfortunate, inconsistent, and fissiparous state in which the general principles of liability in international criminal law currently find themselves”.⁵

7.2. Searching for the right formula: the alternative views of two ICC Judges

The debates on the proper limits of co-perpetration responsibility in international criminal law have traditionally focused on comparing the JCE and the joint control concept, assessing their strengths and deficiencies, and advocating the adoption of one or the other concept as offering a conceptually better definition of joint commission.⁶ In this respect, Judge Fulford and Judge Van den Wyngaert’s proposals on how to construct this mode of liability are remarkable since they set aside the above dichotomy and provided a renewed look on the matter at hand.⁷ Their ideas should thus be carefully scrutinized here before proceeding to recommend a formulation of co-perpetration that could be applied in both the ICC and the *ad hoc* tribunals’ context.

7.2.1. Judge Fulford’s notion of co-perpetration and ‘operative links’

In his separate opinion to the *Lubanga* Trial Judgment, Judge Fulford proposed that instead of engaging into “unrealistic and artificial” evaluations of whether an accused’s contribution was ‘essential’ or not,⁸ the proper framework of co-perpetration responsibility “simply requires an *operative link* between the individual’s contribution and the commission of the crime.”⁹ Based on a literal interpretation of the phrase “commits [...] jointly with another” in Article 25(3)(a) RS, he argued that this mode of liability should contain the following objective and subjective legal elements:

- a) The involvement of at least two individuals.
- b) Coordination between those who commit the offence, which may take the form of an agreement, common plan or joint understanding, expressed or implied, to commit a crime or to undertake action that, in the ordinary course of events, will lead to the commission of the crime.
- c) A contribution to the crime, which may be direct or indirect, provided either way there is a causal link between the individual’s contribution and the crime.
- d) Intent and knowledge, as defined in Article 30 of the Statute, or as “otherwise provided” elsewhere in the Court’s legal framework.¹⁰

The line of reasoning that Judge Fulford offered to distil these four constituent elements of co-perpetration from the plain text of the phrase “commits [...] jointly with another” is persuasive at first look. The part ‘with another’ was used to establish the requirement for a plurality of (at least two) individuals, whereas the adverb ‘jointly’ was considered to express the requirement for coordination among these persons, which “self-evidently necessitates [the existence of] an agreement, common plan or joint understanding.”¹¹ Judge Fulford further pointed out that the requirement that the accused must ‘contribute’ to the commission of the crime flows from the verb ‘commit’, and then deduced from Article 30 RS the mental element of co-perpetration to require that “the joint perpetrators must, at a minimum, be aware that executing the agreement or plan will lead to the commission of a crime [...] ‘in the ordinary course of events.’”¹²

Judge Fulford’s proposal, appealing as it may seem because of its professed adherence to the ordinary text of Article 25(3)(a) RS, is conceptually troubling. One major problem with it is that it construes the contribution element simply as requiring some ‘operative/causal link’ between the accused’s conduct and the commission of the crime, without further analysing the precise meaning of this test. In particular, while it is clear that Judge Fulford thought that less-than-essential contributions could suffice to establish an ‘operative/causal link’ between a co-perpetrator and the group crime, he did not specify how relaxed this causal connection can be: *i.e.* there is no lower limit to the requisite intensity of the accused’s contribution and its effect on the said crime. The resulting definition of co-perpetration is, thus, vague and overly broad. This aspect of Judge Fulford’s proposal was later criticized by Judge Van den Wyngaert, who observed that:

I am, however, reluctant to accept that it is sufficient for there to be simply a causal link between an individual’s contribution and a crime. Causality is an elastic notion, the outer contours of which are notoriously difficult to define. Depending on which conception of causality one adopts, it is possible to characterise contributions that are very far removed from the actual crime as causal.¹³

5 R. Cryer, ‘Imputation and Complicity in Common Law States: A (Partial) View from England and Wales’, 12 *Journal of International Criminal Justice* (2014), at 281.

6 G. Werle and B. Burghardt, ‘Establishing Degrees of Responsibility: Modes of Participation in Article 25 of the ICC Statute’, in E. Van Sliedregt and S. Vasiliev (eds), *Pluralism in International Criminal Law* (Oxford: Oxford UP, 2014), at 316-317; H. Olásolo, *The Criminal Responsibility of Senior Political and Military Leaders as Principals to International Crimes* (Oxford: Hart, 2009), at 229-231; S. Manacorda and C. Meloni, ‘Indirect Perpetration versus Joint Criminal Enterprise: Concurring Approaches in the Practice of International Criminal Law?’ 9 *Journal of International Criminal Justice* (2011), at 159-178.

7 *Lubanga* Trial Judgment, *supra* n 2, Separate Opinion of Judge Adrian Fulford, paras 15-16; *Chui* Trial Judgment, *supra* n 3, Concurring Opinion of Judge Christine Van den Wyngaert, paras 40-48.

8 *Lubanga* Trial Judgment, *supra* n 2, Separate Opinion of Judge Adrian Fulford, para 17.

9 *Ibid.*, para 15. (*emphasis added*)

10 *Ibid.*, para 16.

11 *Ibid.*, para 15.

12 *Ibid.*

13 *Chui* Trial Judgment, *supra* n 3, Concurring Opinion of Judge Christine Van den Wyngaert, para 43.

This criticism raises a valid concern. To be sure, the notion of causation is not anchored to the ‘but for’/*sine qua non* rule and it has long been accepted, both in domestic and in international criminal law doctrine, that non-essential contributions could also form a ‘causal link’ between the accused and the offence for the purpose of ascribing criminal responsibility.¹⁴ However, it would be contrary to the principle of individual culpability, and its proportionality aspect,¹⁵ to assert that *any* contribution – even the most insignificant and marginal one – could establish a sufficient ‘causal link’ to hold an accused liable *as a co-perpetrator* of a concerted crime.¹⁶ It would clearly be excessive to conclude that, for instance, a concentration camp engineer, who was one of the technicians responsible for the general maintenance of camp facilities and was called in on one occasion to repair a malfunctioning gas chamber, is a joint perpetrator of the extermination of hundreds of thousands of inmates, because his contribution had an ‘operative link’ to the crime’s commission.¹⁷

Even if we accept that the engineer’s contribution in the above example had more than a trivial effect on the murder operation and, therefore, should warrant *some* responsibility, it is counterintuitive to conclude that he is a joint perpetrator of the said crime: *viz.* at the most, the accused can be an accessory. However, adopting the broad, unqualified ‘operative/causal link’ test obscures the border between principal and accessory liability, especially when one also considers the subjective element of Judge Fulford’s notion of co-perpetration. It would be recalled that while the JCE doctrine also adopts a less stringent causal connection between the accused and the said crime – *viz.* the *significant* contribution element – true to the philosophy of the subjective approach to criminal responsibility, it compensates for this with a strict *mens rea* requirement: the accused must share a direct intent to commit the said crime.¹⁸ In contrast, Judge Fulford’s definition of co-perpetration solely requires awareness

that a crime will result from the execution of the common plan.¹⁹ Consequently, the accused could be found liable as a co-perpetrator of a crime, in the commission of which he did not physically participate,²⁰ did not essentially contribute to and did not directly intend/want as his own. Thus, it would appear that the framework of co-perpetration endorsed by Judge Fulford discards all three approaches to differentiating between principals and accessories to collective criminality,²¹ which makes it unclear on what criterion, if any, this distinction is to be made. The unqualified ‘causal link’ test cannot be such a criterion for the simple reason that accessory modes of liability, such as ordering, instigating and aiding and abetting, also require a causal link between the conduct of the accused and the crime.²² In this respect, Ohlin *et al.* have rightly concluded that:

[t]he test of perpetratorship which [Judge Fulford] suggests therefore remains vague and leaves the judges very much to their own intuition rather than providing them with standards by which to make the difficult distinction between perpetration and mere accessory liability.²³

Judge Fulford’s flexible definition of co-perpetration responsibility is a corollary to his conclusion that Article 25(3) RS does not call for a strict differentiation between principal and accessory liability, nor does it arrange its modes of individual responsibility in a

19 Lubanga Trial Judgment, *supra* n 2, Separate Opinion of Judge Adrian Fulford, para 15.

20 Judge Fulford explained that the Rome Statute does *not* require “that the [accused’s] contribution must involve direct, physical participation at the execution stage of the crime, and, instead an absent perpetrator may [also] be involved.” *Ibid.*

21 See Chapter 1, Section 1.3.1. See also *The Prosecutor v. Lubanga* (ICC-01/04-01/06-803-tEN), Decision on the Confirmation of Charges, Pre-Trial Chamber I, 29 January 2007, paras 328-330; Olásolo, *supra* n 6, at 4-5.

22 Regarding ‘instigation’ liability, the ICTR *Gacumbitsi* Appeals Chamber held that “[a]s the *Kordic and Cerkez* Appeal Judgement established, ‘it is not necessary to prove that the crime would not have been perpetrated without the involvement of the accused’; rather, ‘it is sufficient to demonstrate that the instigation was a *factor substantially contributing* to the conduct of another person committing the crime.’ Thus, the Prosecution has correctly stated the *causation requirement* for instigation.” *The Prosecutor v. Gacumbitsi* (ICTR-2001-64-A), Judgment, Appeals Chamber, 7 July 2006, para 129. (*emphasis added*) See also *The Prosecutor v. Kordić and Čerkez* (IT-95-14/2-A), Judgment, Appeals Chamber, 17 December 2004, para 27; *The Prosecutor v. Blaškić* (IT-95-14-T), Judgment, Trial Chamber, 3 March 2000, paras 278, 280; *The Prosecutor v. Brđanin* (IT-99-36-T), Judgment, Trial Chamber, 1 September 2004, para 359; *The Prosecutor v. Kordić and Čerkez* (IT-95-14/2-T), Judgment, Trial Chamber, 26 February 2001, para 387. The same “substantial contribution” test for determining the existence of a causal link between the accused’s actions and the resulting crime has also been established in the jurisprudence on the other forms of accessory responsibility, such as ‘ordering’ and ‘aiding and abetting’. See *e.g.* *The Prosecutor v. Karadžić* (IT-95-5/18-T), Judgment, Trial Chamber, 24 March 2016, paras 571-572; *The Prosecutor v. Boškoski and Tarčulovski* (IT-04-82-A), Judgment, Appeals Chamber, 19 May 2010, paras 158-160; *The Prosecutor v. Mrkšić and Šljivančanin* (IT-95-13/1-A), Judgment, Appeals Chamber, 5 May 2009, para 49; *The Prosecutor v. Nchamihigo* (ICTR-2001-63-T), Judgment, Trial Chamber, 21 November 2008, paras 352, 368; *The Prosecutor v. Strugar* (IT-01-42-T), Judgment, Trial Chamber, 31 January 2005, para 332. Concerning aiding and abetting liability, Badar thus observed that “[a] causal link between the act of assistance and the conduct of the principal perpetrator need not be such as to show that the offence would not have been committed in the absence of such assistance, but ‘it must have had a substantial effect on the commission of the crime by the principal offender’.” M. Badar, *The Concept of Mens Rea in International Criminal Law: the Case for a Unified Approach* (Oxford: Hart, 2013), at 337. See also Olásolo, *supra* n 6, at 100 (fn 112).

23 Ohlin, Van Slieght and Weigend, *supra* n 16, at 729. See also Ambos, *supra* n 16, at 147.

14 Common and civil law jurisdictions, as well as the international tribunals, have extended the scope of causality by holding that when the accused’s contribution has a ‘substantial’ or ‘significant’ effect on the commission of a crime, this suffices to establish the ‘causal link’ necessary for ascribing criminal responsibility (principal and/or accessory) for the said accused. See A. Ashworth and J. Horder, *Principles of Criminal Law* (7th edn, Oxford: Oxford UP, 2013), at 105-108; M. Bohlander, *Principles of German Criminal Law* (Oxford: Hart Pub., 2009), at 45-48; G. Fletcher, *Basic Concepts of Criminal Law* (New York: Oxford UP, 1998), at 62-72; Olásolo, *supra* n 6, at 138, 145-146.

15 Werle and Burghardt, *supra* n 6, at 304-305. See also J. Ohlin, ‘Joint Intentions to Commit International Crimes’ 11 *Chicago Journal of International Law* (2011), at 750.

16 J. Ohlin, E. Van Slieght and T. Weigend, ‘Assessing the Control-Theory’, 26 *Leiden Journal of International Law* (2013), at 728-729; K. Ambos, ‘The First Judgment of the International Criminal Court (Prosecutor v. Lubanga): A Comprehensive Analysis of the Legal Issues’, 12 *International Criminal Law Review* (2012), at 147.

17 Indeed, it will be recalled that some accused at the Dachau trials, including camp guards and contractors, were altogether acquitted because the tribunals considered that their “participation in the mass atrocity was *too remote* to form a proper basis” for a conviction, and they were “not shown to have participated to a *substantial degree*” in the commission of the crime. Deputy Judge Advocate’s Office (War Crimes Group European Command), *Review and Recommendations: The United States v. Karl Adami et al.*, (Case No. 000-50-2-1), Intermediate Military Government Court in Dachau, Germany, 11-14 October 1946, [Date of Case Review: 24 Mar 1947], at 10 (*emphasis added*) Web <<http://www.jewishvirtuallibrary.org/jsource/Holocaust/dachautrial/d4.pdf>> [accessed 31 July 2016]. See further Chapter 4, Section 4.2.3.3.i)

18 See Chapter 3, Section 3.4.1.3 and Section 3.4.2.1. See also Olásolo, *supra* n 6, at 260, 283.

hierarchy of blameworthiness.²⁴ For the reasons stated in the preceding chapter,²⁵ and further elaborated by others in the commentariat,²⁶ the present author does not accept this view and submits that the drafting history and the plain text of Article 25(3) RS clearly adopt the differentiated model of criminal participation, the most basic purpose of which is to separate (at least at the attribution stage) principal from accessory liability.²⁷ Having said this, it is important to emphasize that, contrary to what some scholars have suggested, the adoption of this model does not inevitably lead to the conclusion that the perpetrator's contribution to a said crime "must be *greater* than a contribution of a secondary participant pursuant to subparagraphs (b) to (d) [RS]":²⁸ viz. the control criterion does not present the only key to understanding the differentiated, hierarchical structure of Article 25(3) RS. In principle, this normative distinction between perpetrators and accessories to a crime could also be based on a subjective criterion,²⁹ as evinced by the UN *ad hoc* Tribunals' jurisprudence.³⁰

7.2.2. Judge Van den Wyngaert's notion of co-perpetration and 'direct contributions'

In her separate opinion to the *Chui* Trial Judgment, Judge Van den Wyngaert largely endorsed Judge Fulford's analysis on co-perpetration responsibility,³¹ with one important

exception: as already pointed out above, she disagreed with his finding that the accused's contribution need only form a 'causal link' to the commission of the concerted crime.³² Having also rejected the 'essential contribution' standard,³³ Judge Van den Wyngaert stated:

[F]or joint perpetration, there must, in my view, be a *direct contribution* to the realisation of the material elements of the crime. This follows from the very concept of joint perpetration. [...] The essence of committing a crime is bringing about its material elements. *Only those individuals whose acts made a direct contribution to bringing about the material elements can thus be said to have jointly perpetrated the crime.*³⁴

To explain the exact meaning of a 'direct contribution', she then gave the following example:

the acquisition of a weapon by a murderer acting individually is not part of the crime of killing. Only the actual shooting of the victim with the weapon is the killing. This is because the material elements of that crime do not include obtaining the means for its commission, regardless of whether acquiring the means of commission of the killing could be classified as an "essential contribution". There is no reason why this reasoning should change according to whether persons act individually or jointly. When persons act jointly, the material elements of the crime remain exactly the same, they just bring them about together. For this reason, only those persons who are directly involved in the realisation of the material elements of a crime can be said to have jointly perpetrated it.³⁵

This example perfectly demonstrates the difference between the definitions of co-perpetration proposed in Judge Fulford and Judge Van den Wyngaert's separate opinions. According to the former, the accused who provided the murder weapon *can be* held liable as a co-perpetrator of murder if, all other elements of co-perpetration being satisfied,³⁶ it is confirmed that there was an 'operative/causal link' between the supply of the said weapon and the killing of the victim. According to Judge Van den Wyngaert, on the other hand, the confederate who participates in a common plan to murder by furnishing the necessary weapon could never be a co-perpetrator because his conduct does not constitute the material elements of murder, as found in the legal definition of this crime: *i.e.* he will always be an accessory/aider and abettor. This deep-seated difference between the two proposed frameworks of co-perpetration liability is striking, given that both judges contended that their respective definition is based on a literal interpretation of the plain text of Article 25(3)(a) RS.³⁷ In this respect, it is doubtful how much merit there is to

²⁴ *Lubanga* Trial Judgment, *supra* n 2, Separate Opinion of Judge Adrian Fulford, paras 6-8.

²⁵ See Chapter 6, Section 6.2.1.3. (text accompanying notes 80-91)

²⁶ S. Wirth, 'Co-perpetration in the *Lubanga* Trial Judgment', 10 *Journal of International Criminal Justice* (2012), at 979; Ambos, *supra* n 16, at 144-145. For a scholarly view supporting Judge Fulford's contention, see L. Sadat and J. Jolly, 'Seven Canons of ICC Treaty Interpretation: Making Sense of Article 25's Rorschach Blot', 27 *Leiden Journal of International Law* (2014), at 774-775.

²⁷ H. Vest, 'Problems of Participation - Unitarian, Differentiated Approach, or Something Else?', 12 *Journal of International Criminal Justice* (2014), at 303, 306-308; K. Ambos, 'Article 25 Individual Criminal Responsibility', in O. Triffterer (ed), *Commentary on the Rome Statute of the International Criminal Court: Observers' Notes, Article by Article* (2nd edn, Munich: C.H. Beck/Hart, 2008), at 745.

²⁸ K. Ambos, *Treatise on International Criminal Law* (Oxford: Oxford UP, 2013), at 152-153. As was explained in Chapter 5, the *Lubanga* Trial Chamber held that since the modes of liability in Article 25(3) RS are arranged in a value-oriented hierarchy, and accessories to a crime (e.g. instigators, aiders and abettors etc.) must be shown to have *substantially* contributed to crime, then the higher blameworthiness of the perpetrator would require that his contribution to the crime was *essential*. *Lubanga* Trial Judgment, *supra* n 2, paras 996-997; *The Prosecutor v. Lubanga* (ICC-01/04-01/06-3121-Red), Judgment, Appeals Chamber, 1 December 2014, paras 467-469. See Chapter 5, Section 5.4.1.2.

²⁹ Chapter 1, Section 1.3.1. and Chapter 5, Section 5.2.1.

³⁰ Under the ICTY/R jurisprudence, an accused found liable as a co-perpetrator in a JCE is more culpable than an aider and abettor, even though the latter notion requires a higher (*substantial*) contribution from the accused than the former (*significant*). This is so because the normative criterion used to grade the culpability of the accused in these two modes of liability is a subjective one: viz. the accused's disposition towards the crime. *The Prosecutor v. Tadić* (IT-94-1-A), Judgment, Appeals Chamber, 15 July 1999, para 229; *The Prosecutor v. Furundžija* (IT-95-17/1-T), Judgment, Trial Chamber, 10 December 1998, para 252; *The Prosecutor v. Vasiljević* (IT-98-32-A), Judgment, Appeals Chamber, 25 February 2004, Separate and Dissenting Opinion of Judge Shahabuddeen, para 32; *The Prosecutor v. Kvočka et al.* (IT-98-30/1-T), Judgment, Trial Chamber, 2 November 2001, paras 285-286; *The Prosecutor v. Krstić* (IT-98-33-A), Judgment, Appeals Chamber, 19 April 2004, para 266; *The Prosecutor v. Kvočka et al.* (IT-98-30/1-A), Judgment, Appeals Chamber, 28 February 2005, para 92. See also Ohlin, Van Slidregt and Weigend, *supra* n 16, at 741.

³¹ *Chui* Trial Judgment, *supra* n 3, Concurring Opinion of Judge Christine Van den Wyngaert, paras 32, 42.

³² *Ibid.*, para 43.

³³ *Ibid.*, para 42.

³⁴ *Ibid.*, para 44.

³⁵ *Ibid.*, para 45.

³⁶ See *supra* text accompanying note 10.

³⁷ *Chui* Trial Judgment, *supra* n 3, Concurring Opinion of Judge Christine Van den Wyngaert, paras 11, 39; *Lubanga* Trial Judgment, *supra* n 2, Separate Opinion of Judge Adrian Fulford, para 17. See *supra* Section 7.2.

the assertion that a strictly positivist reading of the phrase “commits [...] jointly with another” can inform us of the proper construction of co-perpetration at the ICC.

Judge Van den Wyngaert’s formulation of co-perpetration clearly endorses the formal-objective approach for distinguishing between principals and accessories to a crime.³⁸ Indeed, her definition of a ‘direct contribution’ – *i.e.* a contribution that has “an immediate impact” on the realization of the crime’s material elements³⁹ – mirrors the “most immediate cause” test in the criminal law of England and Wales, which is traditionally cited as a paradigmatic example of a system using this approach to the principal/accessory dichotomy.⁴⁰ In this respect, unlike Judge Fulford’s proposal, Judge Van den Wyngaert’s notion of co-perpetration does provide a concrete criterion that would allow judges to differentiate between joint perpetrators and mere accessories to a collective crime. However, it is precisely the nature of this criterion that raises the chief problem with this formulation of co-perpetration: it brings back the original dilemma highlighted by the *Tadić* Appeals Chamber, and further discussed in Chapter 1 of this book,⁴¹ that in the context of system criminality:

[a]lthough only some members of the group may physically perpetrate the criminal act (murder, extermination, wanton destruction of cities, towns or villages, etc.), the participation and contribution of the other members of the group is often vital in facilitating the commission of the offence in question. It follows that the moral gravity of such participation is often no less – or indeed no different – from that of those actually carrying out the acts in question.

Under these circumstances, to hold criminally liable as a perpetrator only the person who materially performs the criminal act would disregard the role as co-perpetrators of all those who in some way made it possible for the perpetrator physically to carry out that criminal act. At the same time, depending upon the circumstances, to hold the latter liable only as aiders and abettors might understate the degree of their criminal responsibility.⁴²

Adopting the requirement of ‘direct/immediate contribution’ as a definitional criterion for co-perpetration would preclude the possibility of holding high-ranking political/military leaders – who mastermind criminal plans and coordinate efforts to ensure their execution – responsible as (joint) *principals* to the resulting crimes, thus raising objections about fair labelling and just allocation of guilt in international criminal law.⁴³ It would practically mean that only the rank-and-file soldiers who, *e.g.* physically kill one or more civilians in

an extermination campaign, can be held responsible as co-perpetrators of the entire crime, whereas those at the apex of the state and military apparatus would be mere accessories.⁴⁴ a vexing conclusion, considering the expressive value of international prosecutions and the general jurisprudential tendency to treat commission responsibility as the most culpable mode of participation in a crime, warranting a more severe punishment than aiding and abetting.⁴⁵ Moreover, endorsing the formal-objective approach to the principal/accessory distinction is generally problematic under ICC law since it clashes with the concept of indirect perpetration through a responsible agent, as established in Article 25(3)(a) RS.⁴⁶

It should be noted that, much like Judge Fulford, Judge Van den Wyngaert rejected the assertion that the modes of liability in Article 25(3) RS are necessarily arranged in a hierarchy of blameworthiness, affecting also sentencing considerations, and called for the renouncement of this normative reasoning in the ICC’s case law.⁴⁷ At the same time, however, she conceded that “[t]here is an understandable intuitive tendency to consider [the ‘masterminds/intellectual authors’ of international crimes] as somehow most blameworthy for large-scale criminality”,⁴⁸ and, more generally, expressed an affinity for the notion of fair labelling.⁴⁹ It would seem that the aforesaid concerns weighed on Judge Van den Wyngaert’s mind, seeing as, in the very last paragraph of her substantive analysis on co-perpetration liability, she left an open door for the possibility of holding high-ranking military and political accused responsible as principals. In particular, she introduced some flexibility to her initial definition of a ‘direct contribution’, by holding that in some factual scenarios acts of planning or coordination by an accused who was geographically removed from the crime scene may also qualify as a ‘direct contribution’ since “some crimes cannot reasonably be committed without planning and coordination”.⁵⁰ She was of the view that:

44 Ohlin, Van Sliedregt and Weigend have generally submitted that such a construction of co-perpetration would also be superfluous because a person who qualifies as a co-perpetrator under it will already satisfy the criteria for being convicted as an individual perpetrator. Ohlin, Van Sliedregt and Weigend, *supra* n 16, at 730. This author respectfully disagrees with the said contention. In the above extermination example, for instance, while a rank-and-file soldier can be held individually liable for the civilian(s) he physically killed, it is only through the notion of co-perpetration (even as Judge Van den Wyngaert defined it) that he may be held (jointly) responsible for *the entire* crime: *i.e.* also for the killings of civilians by his confederates. Furthermore, there are complex crimes, the legal definition of which contains more than one *actus reus* element, and when a group of persons divide the tasks between each other so that each one of them performs one aspect of the crime’s *actus reus*, it could be that neither of them individually committed the said crime in its entirety and only by combining the acts of each of them could the crime’s legal definition be fulfilled.

45 See Chapter 1, Section 1.2.2.1 and Section 1.2.2.3.

46 *Lubanga* Decision on the Confirmation of Charges, *supra* n 21, para 333; *The Prosecutor v. Katanga* (ICC-01/04-01/07-3436-tENG), Judgment, Trial Chamber II, 7 March 2014, para 1391. See also N. Jain, *Perpetrators and Accessories in International Criminal Law: Individual Modes of Responsibility for Collective Crimes* (Oxford: Hart, 2014), at 82.

47 *Chui* Trial Judgment, *supra* n 3, Concurring Opinion of Judge Christine Van den Wyngaert, paras 23-26, 29.

48 *Ibid.*, para 29.

49 *Ibid.*, para 28.

50 *Ibid.*, para 46.

38 Chapter 1, Section 1.3.1.

39 *Chui* Trial Judgment, *supra* n 3, Concurring Opinion of Judge Christine Van den Wyngaert, para 46.

40 D. Ormerod, *Smith and Hogan’s Criminal Law* (13th edn, Oxford: Oxford UP, 2011), at 215; E. Van Sliedregt, *Individual Criminal Responsibility in International Law* (Oxford: Oxford UP, 2012), at 90; J. Keiler, ‘Towards a European Concept of Participation in a Crime’, in A. Klip (ed), *Substantive Criminal Law of the European Union* (Antwerpen: Maklu, 2011), at 183.

41 Chapter 1, Section 1.2.1.

42 *Tadić* Appeal Judgment, *supra* n 30, paras 191-192. (*emphasis added*)

43 Olásolo, *supra* n 6, at 31. See Chapter 1, Section 1.2.2. (text accompanying notes 45-51, 71-75)

sometimes the means used to commit the material elements of a crime inherently require planning and coordination (e.g. an air raid by a bomber squadron). In all those cases the distinctive feature of what constitutes a direct contribution is that it is an intrinsic part of the actual execution of the crime.⁵¹

Put simply, this critical dictum establishes that a contribution which does not constitute one or more of the material elements of the concerted crime – *i.e.* Judge van den Wyngaert’s original definition of a ‘direct/immediate contribution’ – may still be qualified as ‘direct’, if it was “an intrinsic part” of the execution of the crime. Some academics have rightly pointed out that this introduction of the ‘intrinsic part’ test clouds the difference between ‘direct’ contributions and ‘indirect’ ones, thus creating the kind of ambiguity that Judge Van den Wyngaert identified in Judge Fulford’s construction of co-perpetration.⁵² Indeed, whether the accused’s contribution was ‘intrinsic’ for the commission for a crime, and whether it formed a ‘causal/operative link’ between him and the crime, are both elastic questions that could leave much space for judicial discretion. Mass, systemic war criminality is almost by definition the product of some form of planning and coordination between a group of persons, so one may well wonder whether such participation in the preparatory stage is to be generally considered as an ‘intrinsic part’ of, and thus a ‘direct’ contribution to, the actual commission of the crime, or not. If this determination is to be made on a case-by-case basis, then what is the yardstick by which we can assess if the accused participation in the planning of an *e.g.* indiscriminate air-bombing campaign qualifies as a ‘direct’ contribution (co-perpetration), or not (accessoryship)? The rather cursory analysis that Judge Van den Wyngaert offered on the ‘intrinsic part’ exception to her otherwise clearly formal-objective approach to co-perpetration responsibility does not answer the question. This dubious standard could, thus, also result in relative and subjective assessments, of the kind that the JCE and joint control over the crime doctrines have often been accused.⁵³

7.3. Testing the theories of JCE and joint control over the crime

“For this mode of liability, there can be only one definition in international criminal law”: this outcry of Judge Schomburg was cited at the beginning of this book, not just as an introduction to its subject matter but as an allusion to the general sentiment that has underscored the never-ending debates on the proper construction of co-perpetration liability

in international criminal law.⁵⁴ Indeed, many in the commentariat nowadays share the view that the international courts and tribunals should endorse a single, uniform framework for this form of responsibility, since its fragmentation in two competing, coexisting definitions damages the stature and legitimacy of this field of law.⁵⁵ It is disturbing that a person may be convicted as a co-perpetrator in one international tribunal but not in another, depending on whether he is tried under the JCE or the joint control over the crime theory: *i.e.* depending solely on whether his case is brought before a specially established *ad hoc* tribunal, or the ICC.⁵⁶

This disparity is not an overstatement: as the previous chapters have shown, there are a number of intrinsic differences between these two theories of co-perpetration. To briefly recap the core ones here, the accused’s contribution to the common plan must be ‘significant’ under the JCE doctrine,⁵⁷ but ‘essential’ under the joint control theory.⁵⁸ Next, JCE requires that the said common plan must *necessarily* involve (*i.e.* be specifically directed at) the commission of a crime,⁵⁹ whereas for co-perpetration based on joint control it suffices if the plan contains ‘an element of criminality’: *i.e.* the plan need not be specifically directed at the commission of the charged crime, but its implementation has to entail an objective risk that the offence would be committed in the ordinary course of events.⁶⁰ Finally, on the subjective side, the JCE doctrine requires that the accused shared a direct intent/*dolus directus* in the first degree to commit the core crime(s),⁶¹ whereas the joint control concept requires, *inter alia*, that the accused and the other co-perpetrators are mutually aware and mutually accept that executing the common plan would result in the commission of the charged offence: *i.e.* the accused shares a *dolus directus* in the second degree in relation to the objective elements of the crime.⁶² In this respect, Judge Shahabuddeen aptly observed that:

⁵⁴ *The Prosecutor v. Martić* (IT-95-11-A), Judgment, Appeals Chamber, 8 October 2008, Separate Opinion of Judge Schomburg on the Individual Criminal Responsibility of Milan Martić, para 6.

⁵⁵ Sadat and Jolly, *supra* n 26, at 770, 781, 786; E. Van Sliedregt, ‘Pluralism in International Criminal Law’, 25 *Leiden Journal of International Law* (2012), at 849, 852.

⁵⁶ Although the ICC, the UN *ad hoc* Tribunals and the internationalized hybrid courts (like the SCSL and ECCC) are separate legal regimes, independent from each other and governed by their own constituent documents, they are also an integral part of the system of international criminal justice. As such, instead of viewing themselves as ‘self-contained’ legal regimes, they should strive to achieve harmony and coherence in their definitions of core notions of substantive international criminal law, including international crimes, forms of criminal responsibility etc. If international criminal law is to be viewed as anything more than a disparate collection of tribunal-specific rules and conflicting jurisprudence, such extrovert approach is essential. R. Cryer, ‘Royalism and the King: Article 21 of the Rome Statute and the Politics of Sources’, 12 *New Criminal Law Review* (2009), at 395; Van Sliedregt, *supra* n 55, at 848-852.

⁵⁷ See Chapter 3, Section 3.4.1.3. (text accompanying notes 138-175)

⁵⁸ See Chapter 5, Section 5.4.1.2. (text accompanying notes 141-154)

⁵⁹ See Chapter 3, Section 3.4.1.2. (text accompanying notes 110-113).

⁶⁰ See Chapter 5, Section 5.4.1.1. (text accompanying notes 115-131, 137-140)

⁶¹ See Chapter 3, Section 3.4.2.1. (text accompanying notes 212-220)

⁶² See Chapter 5, Section 5.4.2.2. (text accompanying notes 233-235, 241-243)

⁵¹ *Ibid.*

⁵² Ohlin, Van Sliedregt and Weigend, *supra* n 16, at 730.

⁵³ See Chapter 6, Section 6.3.1. A. Chouliaras, ‘From ‘Conspiracy’ to ‘Joint Criminal Enterprise’: In Search of the Organizational Parameter’, in C. Stahn and L. Van den Herik (eds), *Future Perspectives on International Criminal Justice* (The Hague: T.M.C. Asser, 2010), at 577; J. Ohlin, ‘Searching for the Hinterman: In Praise of Subjective Theories of Imputation’, 12 *Journal of International Criminal Justice* (2014), at 329; Ohlin, Van Sliedregt and Weigend, *supra* n 16, at 731-732.

though the two theories overlap, they arrive at a point of incompatibility touching guilt or innocence: at that point one theory is wrong, the other right. This would seem to indicate that only one of the two theories can prevail in the same legal system.⁶³

In order to evaluate the legal framework of the JCE and the joint control doctrines, and thereafter propose a revised, uniform definition of co-perpetration responsibility that could be applied in both an *ad hoc* context and the ICC Rome Statute regime, Chapter 1 endorsed three evaluation criteria:

- i) legal basis (under international criminal law)
- ii) effectiveness (when allocating principal liability in the context of mass, system criminality); and
- iii) fairness (to the rights of the accused).⁶⁴

The next sub-sections will streamline the research conducted in Chapters 2 to 6 of this book to determine how JCE and the joint control theory measure against each of these criteria, and on the basis of the observations and conclusions drawn, distil the refined definitional elements of co-perpetration responsibility.

7.3.1. Legal basis

7.3.1.1. The contrived gap between international custom and the Rome Statute

Before recounting this book's findings on the legal basis for applying the concepts of JCE and joint control over the crime in international criminal proceedings, there is a general matter that should be addressed here first. International criminal law is nowadays divided in two streams, two models of criminal justice that often seem to function in a very disjointed manner: *viz.* the *ad hoc* model, embodied in tribunals such as the ICTY, ICTR, SCSL etc., and the treaty-based permanent regime of the ICC. One fundamental difference between these two camps concerns the jurisdictional nature of the said courts and tribunals – *i.e.* retroactive versus prospective – which, as already explained in Chapter 1, has affected their approach to the applicable sources of international criminal law.⁶⁵ In particular, the *ad hoc* model inevitably brings to the fore the importance of customary international criminal law, since those tribunals are generally set up to try persons for crimes that had been committed *prior to* the promulgation of their founding documents.⁶⁶ Reading their statutes as a non-exhaustive codification of international custom,⁶⁷

and using custom as an interpretative lens when construing the legal elements of each concept contained therein,⁶⁸ is therefore the necessary method that the *ad hoc* tribunals adopt to secure compliance with the *nullum crimen sine lege* principle. Milanović has thus rightly pointed out that the statutes of the ICTY/R, STL and the other *ad hoc* tribunals are purely jurisdictional in nature: *viz.* they do *not* establish new penal laws that are binding on individuals, but only give the respective tribunal jurisdiction to try already existing crimes, which is why such a “Statute could never go beyond customary law”.⁶⁹ At the ICC, on the other hand, custom need not be a primary legal source since the Court has a treaty-based jurisdiction that is prospective: indeed, Article 21 RS creates a hierarchy in the applicable sources of law, according to which custom is considered secondary to the ICC's founding documents.⁷⁰ Moreover, Article 10 RS has also been included as a provision that is “obviously [meant] to divorce the Statute from customary law”.⁷¹ This difference in their primary sources of law has been emphasized by the ICC when departing from the ICTY/R's customary definitions of a number of laws, of which the concept of co-perpetration is but one,⁷² prompting Van den Herik to suggest that the advent of the ICC has marked the decline of international custom as a source of international criminal law.⁷³

As the analysis contained further below will demonstrate, irrespective of the status that customary law is given at the ICC, the concept of co-perpetration responsibility can indeed be constructed in a way that could be uniformly applied both in the *ad hoc* model and at the ICC. As a general point, however, this author would like to stress that the reported marginalization of the role of customary law at the ICC, and in future international criminal law as a whole, is exaggerated and misconceived. To begin with, there are several eventualities under which the

68 *The Prosecutor v. Milutinović et al.* (IT-99-37-AR72), Decision on Dragoljub Ojdanić's Motion Challenging Jurisdiction – Joint Criminal Enterprise, Appeals Chamber, 21 May 2003, para 9. See also J. Powderly, ‘Judicial Interpretation at the *Ad Hoc* Tribunals: Method from Chaos’, in J. Powderly and S. Darcy (eds), *Judicial Creativity at the International Criminal Tribunals* (Oxford: Oxford UP, 2010), at 26.

69 Milanović, ‘Is the Rome Statute Binding on Individuals? (And Why We Should Care)’, 9 *Journal of International Criminal Justice* (2010), at 26-27. See also Olásolo, *supra* n 6, at 38-39.

70 See Chapter 1, Section 1.5.1. (text accompanying notes 220-224) and Chapter 6, Section 6.2.2.

71 Milanović, *supra* n 69, at 30. Article 10 RS states that “[n]othing in this Part shall be interpreted as limiting or prejudicing in any way existing or developing rules of international law for purposes other than this Statute.” See also L. Van den Herik, ‘The Decline of Customary International Law as a Source of International Criminal Law’ in C. Bradley (ed), *Custom's Future: International Law in a Changing World* (New York: Cambridge UP, 2016), at 230; A. Heinze, ‘Article 10’ in O. Triffterer and K. Ambos (eds), *The Rome Statute of the International Criminal Court: A Commentary* (3rd ed, Munich: C.H. Beck, 2016), at 649, 651.

72 Examples of other areas where the ICC law and jurisprudence has departed from customary law, as defined by the ICTY/R, include the definition of the crime of genocide, command/superior responsibility, forms of intent (in particular *dolus eventualis*) and other. See A. Cassese, *Cassese's International Criminal Law* (3rd edn, Oxford: Oxford UP, 2013), at 105-108, 129; Cryer, *supra* n 56, at 395-397; E. Van Sliedregt, and S. Vasiliev, ‘Pluralism: A New Framework for International Criminal Justice’ in Van Sliedregt and Vasiliev, *supra* n 6, at 4-5; Ambos, *supra* n 28, at 276-278; R. Cryer, ‘The Boundaries of Liability in International Criminal Law, or ‘Selectivity by Stealth’’, 6 *Journal of Conflict and Security Law* (2001), at 27-29; C. Meloni, ‘Fragmentation of the Notion of Co-perpetration in International Criminal Law’ in L. Van Den Herik and C. Stahn (eds), *The Diversification and Fragmentation of International Criminal Law* (Leiden: Martinus Nijhoff, 2012), at 498-499.

73 Van den Herik, *supra* n 71, at 230.

63 *Gacumbitsi* Appeal Judgment, *supra* n 22, Separate Opinion of Judge Shahabuddeen, para 50.

64 See Chapter 1, Section 1.5.

65 See Chapter 1, Section 1.5.1.

66 Olásolo, *supra* n 6, at 38-39; M. Bassiouni, *Introduction to International Criminal Law: Second Revised Edition* (Leiden: Martinus Nijhoff, 2013), at 741-742, 764-765, 771.

67 UN Security Council, *Report of the Secretary-General Pursuant to paragraph 2 of Security Council Resolution 808 (1993) (S/25704)*, 3 May 1993, para 34; M. Shahabuddeen, *International Criminal Justice at the Yugoslav Tribunal: The Judicial Experience* (Oxford: Oxford UP, 2012), at 67.

ICC will be required to apply the Rome Statute consistently with customary international law. As Sadat and Jolly have also observed, one of them concerns instances where the UN Security Council refers a non-party State to the ICC, whereby the Court can then start conducting trials against accused, whose state had not ratified the Rome Statute.⁷⁴ In such cases, the ICC would actually be applying the Rome Statute in relation to conduct that took place *before* the Statute became applicable to the said state (and, thereby, to its nationals). To be sure, the UN Security Council does have the authority, when acting under Chapter VII of the UN Charter, to bring a state within the jurisdiction of an international tribunal and demand its cooperation, much like it did with the countries from the former Yugoslavia (ICTY) and Rwanda (ICTR).⁷⁵ However, this does not mean – as the experience from the UN *ad hoc* Tribunals has confirmed – that the legality principle may be trampled and laws retroactively applied to convict accused from that state.⁷⁶ In this respect, where a non-party State is referred to the ICC, the same considerations about the *nullum crimen sine lege* principle and customary international law arise, as when the Security Council decides to establish a special *ad hoc* tribunal for that state.⁷⁷ In the same line of reasoning, Milanović has also pointed out that international custom would also play a focal part in ICC proceedings against individuals, who are nationals of a non-party State that lodges a declaration under Article 12(3) RS, requesting the Court to apply retroactive jurisdiction for crimes that took place on its territory.⁷⁸

That international custom will likely continue to play an important role in international criminal law is further evidenced by the fact that the ICC's establishment has not inhibited the proliferation of new *ad hoc* (hybrid) tribunals,⁷⁹ nor has it prevented talks about creating ones

in the future.⁸⁰ If these courts continue to apply international custom, as they would inevitably be required to do (due to their inherently retroactive jurisdiction), and the ICC keeps departing from custom as defined in ICTY/R case law – even where the Court is not strictly required by the Rome Statute to do so⁸¹ – the field of international criminal law will be shred to pieces. To avoid this, it has rightly been argued that these courts and tribunals should engage in judicial dialogue, rather than in “judicial turf wars”⁸² over definitions of crimes, modes of liability and other core concepts of substantive international criminal law.⁸³ These institutions should work in a spirit of continuity, whereby the legacy of the Nuremberg-era trials finds its reaffirmation and refinement in the jurisprudence of the first post-Cold War *ad hoc* tribunals and the latter's case law is, in turn, regarded as a basis to build on by the world's first permanent international criminal court. This would ensure coherence and consistency in the still developing system of international criminal law, the sort of uniformity that Philippe Kirsch, the first President of the ICC, envisioned when he characterized the Court as “the natural continuation of Nuremberg's legacy.”⁸⁴ The framework of co-perpetration liability that will be constructed in this chapter is a step towards this vision of continuation and uniformity.

7.3.1.2. *The Rome Statute and the theory of joint control over the crime*

A critic of the above said aspirations can rightly say that, irrespective of how noble or enticing they might be, such endeavors to reduce fragmentation in international criminal law cannot be invoked to prompt ICC judges to simply ignore the text of the Rome Statute, when it conflicts with customary international law as defined in the *ad hoc* tribunals' jurisprudence. To be sure, there may very well be instances where a certain provision in

⁷⁴ Sadat and Jolly, *supra* n 26, at 786. See also Milanović, *supra* n 69, at 25, 27, 37-38.

⁷⁵ R. Cryer *et al.*, *An Introduction to International Criminal Law and Procedure* (3rd edn, Cambridge: Cambridge UP, 2014), at 556-557, 559-561.

⁷⁶ See *supra* notes 67-69.

⁷⁷ In this venue of thought, applying the notion of co-perpetration based on joint control over the crime would be highly problematic in a case against an accused from a non-party State, which was referred to the ICC by the UN Security Council. An objection that this concept is not grounded in customary international law could then not be dealt with by holding, as the ICC judges have done in a number of cases so far, that this form of liability does not have to be a custom because it is established in the Rome Statute. See *The Prosecutor v. Ruto, Kosgey and Sang* (ICC-01/09-01/11-373), Decision on the Confirmation of Charges, Pre-Trial Chamber II, 23 January 2012, paras 288-289; *The Prosecutor v. Katanga and Chui* (ICC-01/04-01/07-717), Decision on the Confirmation of Charges, Pre-Trial Chamber I, 30 September 2008, para 508. See also Milanović, *supra* n 69, at 38.

⁷⁸ Milanović, *supra* n 69, at 25, 27, 36-37.

⁷⁹ The creation of the Special Tribunal for Lebanon in 2007 by UN Security Council Resolution 1757, being one such example. See UNSC Res. 1757, 30 May 2007. See also Bassiouni, *supra* n 66, at 769-778. The most recent example of an *ad hoc* tribunal, which is tasked with applying *inter alia* customary international law for trying war crimes and crimes against humanity is the Kosovo Relocated Specialist Judicial Institution in the Hague. See Assembly of the Republic of Kosovo, *Law on Specialist Chambers and Specialist Prosecutor's Office* (Law No. 05/L-053), 3 August 2015; ‘Kosovo Court to be Established in The Hague’, *Government of the Netherlands*, 15 January 2016, available at: <<https://www.government.nl/latest/news/2016/01/15/kosovo-court-to-be-established-in-the-hague>> [accessed 27 February 2016]; L. Yanev, ‘Co-Perpetration Responsibility in the Kosovo Specialist Chambers: Staying on the Beaten Path?’, 14 *Journal of International Criminal Justice* (2016): 101-121.

⁸⁰ Most recent examples of such talks include proposals for the establishment of a special war crimes tribunal for international crimes committed during the currently ongoing civil war in Syria. See P. Wall, ‘US House of Representatives Overwhelmingly Calls for War Crimes Tribunal for Syria (with Jurisdiction to Try Americans, Apparently)’, Web blogpost, *Opinio Juris*, 22 March 2016, available at <<http://opiniojuris.org/2016/03/22/us-house-of-representatives-overwhelmingly-calls-for-war-crimes-tribunal-for-syria-with-jurisdiction-to-try-americans-apparently/>>. [accessed 31 July 2016]; D. Tolbert, ‘Introduction: A Very Special Tribunal’, in A. Alamuddin, N. Jurdi and D. Tolbert (eds), *The Special Tribunal for Lebanon: Law and Practice* (Oxford: Oxford UP, 2014), at 3. Another example was the failed proposal at the UN Security Council for the establishment of an international tribunal “for the purpose of prosecuting persons responsible for crimes connected with the downing of Malaysia Airlines flight MH17 on 17 July 2014 in Donetsk Oblast, Ukraine”. See UN Security Council, ‘Security Council Fails to Adopt Resolution on Tribunal for Malaysia Airlines Crash in Ukraine, Amid Calls for Accountability, Justice for Victims | Meetings Coverage and Press Releases’, *United Nations News Centre*, 29 July 2015. <<http://www.un.org/press/en/2015/sc11990.doc.htm>>. [accessed 31 July 2016].

⁸¹ See *infra* text accompanying notes 85-86. Van Sliedregt called this the ICC's policy of ‘*Alleingang*’. See Van Sliedregt, *supra* n 55, at 849. See also Cryer, *supra* n 56, at 394.

⁸² R. Higgins, ‘A Babel of Judicial Voices? Ruminations from the Bench’, 55 *International and Comparative Law Quarterly* (2006), at 792.

⁸³ Sadat and Jolly, *supra* n 26, at 770; Cryer, *supra* n 56, at 395; Van Sliedregt, *supra* n 55, at 850-852.

⁸⁴ P. Kirsch, ‘Applying the Principles of Nuremberg in the International Criminal Court’, 6 *Washington University Global Studies Law Review* (2007), at 508. Indeed, Kirsch considered the role of the ICC as that of a permanent embodiment of customary international criminal law. Having been heavily involved in the drafting of the Rome Statute, he explained that the delegates at the Rome Conference reached a “general agreement that the definitions of crimes in the ICC Statute were to reflect customary international law, and not create new law.” P. Kirsch, ‘Foreword’ in K. Dörmann, *Elements of War Crimes under the Rome Statute of the International Criminal Court: Sources and Commentary* (Cambridge: Cambridge UP, 2003), at xiii., cited in Milanović, *supra* n 69, at 32.

the Statute departs from custom so expressly and unequivocally⁸⁵ that, considering the hierarchy that Article 21 establishes for the applicable sources of law, the ICC Chambers would be bound to set aside the international customary definition of the notion in question. However, this need not always be the case and, as the research conducted in the previous chapters of this book has shown, the ICC's adoption of the joint control doctrine presents one clear example of the Court eschewing customary law even though the Rome Statute did *not* strictly require this.⁸⁶ In fact, the joint control definition of co-perpetration liability is actually not supported by any of the sources of law applicable at the ICC.

The International Criminal Court has so far been resolute that the text of Article 25 RS provides the legal basis for adopting the theory of joint control.⁸⁷ Indeed, it has to, because if this is not true – *i.e.* if this provision either does not establish any particular definition of joint commission responsibility, or it actually endorses an alternative one – then the concept of co-perpetration based on joint control over the crime should be immediately jettisoned from ICC proceedings. This is so because, as was determined earlier in Chapter 6, none of the other two (subsidiary) sources of law that apply at the ICC, *viz.* customary international law and general principles of law, provide support for this concept.⁸⁸ The quest for assessing the legal basis of the joint control doctrine is thus, by-and-large, an exercise of reviewing Article 25(3) RS. The approach that the ICC Chambers have taken on this matter so far shows a regrettable tendency to purposely seek departure from, rather than cohesion with, the settled international case law, from Nuremberg to the Hague. There are several key points that lead the present author to this conclusion and, more importantly, to the finding that the ICC's basic documents do not in fact provide a legal basis for adopting the theory of co-perpetration based on joint control.

Article 25(3) RS is one of the most enigmatic provisions in the Rome Statute and there is clearly nothing in its plain text that even remotely suggests that joint perpetrators of a group crime are only those individuals who share control over its commission by having an essential role in it.⁸⁹ The ordinary text of sub-paragraph a) of this article merely states that

a person can commit a crime “jointly with another”⁹⁰ which, by itself, is not particularly helpful as it leaves the door open for adopting various criteria to make the co-perpetrator/accessory distinction. In general, a literal interpretation of the plain text of Article 25(3) (a) RS – which would usually be a judge's foremost interpretative technique⁹¹ – does not really yield a conclusive answer to the issue at hand, seeing as Judge Fulford and Judge Van den Wyngaert both applied a strictly textualist reading of the phrase “commits [...] jointly with another” and yet they proposed two materially different definitions of co-perpetration responsibility.⁹² A contextual interpretation of Article 25(3) RS, which is what the *Lubanga* Pre-Trial Chamber used to adopt the theory of joint control, is perhaps the most dubious one, since it assumes the existence of a conceptually coherent interplay between the provisions of an article that was actually drafted as a merger of views from various legal traditions, and is thus regarded as a “consensus provision that lacks a strong and logically cohesive theoretical underpinning”.⁹³ More importantly, as the analysis in Chapter 6 has shown, a contextual reading of Article 25(3) RS could also be used to reject the joint control approach to co-perpetration,⁹⁴ and it does not conclusively exclude the subjective approach to distinguishing between joint perpetrators and accessories to a group crime.⁹⁵ Last but not least, research into the *travaux préparatoires* of Article 25(3) RS – as a supplementary method of treaty interpretation, recognized in the Vienna Convention on the Law of Treaties⁹⁶ – has revealed that none of the delegations at the Preparatory Committee on the Establishment of an International Criminal Court ever proposed the joint control approach to co-perpetration. If anything, there is evidence indicating that the drafters of the ominous “commits [...] jointly with another” provision discussed a subjective approach to this form of responsibility, putting the emphasis on the element of ‘common intent’.⁹⁷

⁸⁵ For instance, this appears to be the case with the Rome Statute's definition of crimes against humanity, which – contrary to the customary international law – establishes one additional contextual element for this category of international crimes: *viz.* the existence of a ‘State or organizational policy’ condoning the said attack against the civilian population. See Cassese, *supra* n 72, at 107; G. Werle and B. Burghardt, ‘Do Crimes Against Humanity Require the Participation of a State or a ‘State-like’ Organization?’, 10 *Journal of International Criminal Justice* (2012), at 1165-1166; C. Stahn, ‘Justice Delivered or Justice Denied?: The Legacy of the Katanga Judgment’, 12 *Journal of International Criminal Justice* (2014), at 816-818.

⁸⁶ Cf. Van Sliedregt, *supra* n 55, at 849. See Chapter 6, Section 6.2.

⁸⁷ *Lubanga* Decision on the Confirmation of Charges, *supra* n 21, paras 333-338; *Katanga* Trial Judgment, *supra* n 46, paras 1391-1394.

⁸⁸ See Chapter 6, Section 6.2.2. and Section 6.2.3.

⁸⁹ *Lubanga* Trial Judgment, *supra* n 2, Separate Opinion of Judge Adrian Fulford, para 15; *Chui* Trial Judgment, *supra* n 3, Concurring Opinion of Judge Christine Van den Wyngaert, paras 6, 41-42; Sadat and Jolly, *supra* n 26, at 784; M. Aksenova, ‘The Modes of Liability at the ICC: The Labels That Don't Always Stick’, 15 *International Criminal Law Review* (2015), at 643-644, 654; J. Ohlin, ‘Co-Perpetration: German *Dogmatik* or German Invasion’, in C. Stahn (ed), *The Law and Practice of the International Criminal Court*. Oxford: Oxford UP, 2015, at 527-528. See also Chapter 6, Section 6.2.1.1.

⁹⁰ Article 25(3)(a), Rome Statute of the International Criminal Court, (UN Doc. A/CONF.183/9, 2178 UNTS 3), 17 July 1998 [in force on 1 July 2002], as last amended in 2010.

⁹¹ Vienna Convention on the Law of Treaties, (1155 UNTS 331), 23 May 1969. As the International Law Commission noted, the process of treaty interpretation is generally one where “the interpreter must first consider the plain meaning of the words in a treaty, if any, proceeding therefrom to the context and to considerations relating to object and purpose, subsequent practice and, eventually, *travaux préparatoires*.” Study Group of the International Law Commission, *Fragmentation of International Law: Difficulties arising from the Diversification and Expansion of International Law (report finalized by Martti Koskenniemi)* (A/CN.4/L.682), UN General Assembly, 2006, para 464. See also *Chui* Trial Judgment, *supra* n 3, Concurring Opinion of Judge Christine Van den Wyngaert, para 11.

⁹² See *supra* Section 7.2. See also, Chapter 6, Section 6.2.1.1.

⁹³ Sadat and Jolly, *supra* n 26, at 775. See also W. Schabas, *The International Criminal Court: A Commentary on the Rome Statute* (Oxford: Oxford UP, 2010), at 431; P. Saland, ‘International Criminal Law Principles’, in R. Lee (ed), *The International Criminal Court: The Making of the Rome Statute--Issues, Negotiations, Results* (The Hague: Kluwer Law International, 1999), at 198.

⁹⁴ See Chapter 6, Section 6.2.1.2. (text accompanying notes 37-47)

⁹⁵ See Chapter 6, Section 6.2.1.2. (text accompanying notes 47-71)

⁹⁶ Article 32 VCLT, *supra* n 91. See also Chapter 6, Section 6.2.1.3. (text accompanying notes 76-79)

⁹⁷ Report of the Preparatory Committee on the Establishment of an International Criminal Court, Vol. II (Compilation of Proposals), *General Assembly Official Records, Fifty-first Session, Supplement 22(A)* (A/51/22), 13 September 1996, at 81-82. <http://www.legal-tools.org/uploads/tx_ltpdb/doc21329.pdf> [accessed 31 July 2016]. See Chapter 6, Section 6.2.1.3.

In view of the above, it is evident that the ICC's adoption of the joint control approach to co-perpetration liability was a matter of choice and not a decision that is strictly required by the text of Article 25(3) RS. This provision does not categorically establish any concrete legal framework for co-perpetration responsibility and the various interpretative techniques that can be used to resolve the matter are also inconclusive. In such circumstances, Article 21(1)(b) RS provides for customary international law to be used to deal with the said lacuna in the Court's basic documents.⁹⁸ Furthermore, these are precisely the instances which, as a matter of policy, the ICC judges should use as an opportunity to align the Court's jurisprudence with the settled case law of the modern international tribunals and the Nuremberg-era precedents, rather than emphatically avert them by providing recondite interpretations of the Rome Statute that create "a situation where international criminal law is becoming fragmented between customary law and the Rome Statute".⁹⁹ In this vein of thought, Cryer has convincingly argued that where the Rome Statute does not clearly and unequivocally define the legal meaning of a certain notion, as is the case with the concept of co-perpetration responsibility, international custom could be relied on not only as a subsidiary source of law under Article 21(1)(b) RS, but possibly also as a means of statutory interpretation recognized in Article 31(3)(c) of the Vienna Convention on the Law of Treaties.¹⁰⁰ The meaning of the latter provision was elaborated on in a widely cited report, prepared in 2006 by the International Law Commission, which indeed concluded that:

Customary international law and general principles of law are of particular relevance to the interpretation of a treaty under article 31 (3) (c) [VCLT] especially where:

- (a) The treaty rule is unclear or open-textured;
- (b) The terms used in the treaty have a recognized meaning in customary international law or under general principles of law;
- (c) The treaty is silent on the applicable law and it is necessary for the interpreter [...] to look for rules developed in another part of international law to resolve the point.¹⁰¹

As Judge Van den Wyngaert rightly explained, "the terms used by Article 25(3)(a) [RS] refer to open-textured concepts"¹⁰² and, considering all the above-said findings, this author

is of the view that co-perpetration liability at the ICC should be defined in accordance with customary international law. By doing so, a uniform definition of co-perpetration liability can be crafted, which would bridge the topical jurisprudence of the abovementioned two camps in the field of international criminal law: the *ad hoc* tribunals and the ICC.

7.3.1.3. Customary international law and the theory of JCE

Ascertaining the contours of co-perpetration under customary international law is a task that is bound to attract criticism due, in large part, to the elusive nature of custom as a source of law. In essence, while the general consensus is that international custom is formed by the existence of two components, *i.e.* state practice and *opinio juris*, there is confusion and disagreement on practically all aspects concerning the identification of customary law: *viz.* what acts constitute evidence of state practice and legal conviction, and how much of either is necessary to evince the formation of a customary rule of international law?¹⁰³ For this reason, an important part of this research has been to analyse this notion, assess the methods for identifying customary law that have been used by the ICJ and recognized in academia, and then review the methodology that the UN *ad hoc* Tribunals employed to establish the customary status of the doctrine of co-perpetration based on JCE. Several important findings were made here, the chief one of which is that relying on Nuremberg-era legislation (*e.g.* the IMT/FE Charter and the Control Council Law No. 10) and jurisprudence (of the IMT/FE and the Allies' military tribunals in Occupied Germany and beyond) is a methodologically sound approach for identifying the existence of a customary norm of international criminal law.¹⁰⁴ Furthermore, it was submitted that, given the specific nature of international crimes and the challenges they pose to prosecuting them,¹⁰⁵ the modern *ad hoc* tribunals have rightly asserted that the case law of *international* tribunals, such as the IMT/FE and the Nuremberg Military Tribunals, has higher probative value for evincing the existence of a customary form of responsibility in international criminal law, than the case law of national courts adjudicating on 'garden-variety', domestic offences.¹⁰⁶ In this sense, the latter is more relevant for determining whether a certain form of liability qualifies as a general principle of law, rather than for probing its status in customary international criminal law.¹⁰⁷

i) The customary status of JCE I (and JCE II) liability

The process of assessing the customary status of JCE has thus proven to be an arduous exercise of studying post-World War II documents and case law on concepts of joint criminal responsibility, carefully tracing and examining their meaning and legal nature,

⁹⁸ *Katanga* Trial Judgment, *supra* n 46, para 39.

⁹⁹ Cryer, *supra* n 56, at 399.

¹⁰⁰ *Ibid.*, at 398-399. In particular, Article 31(3) states that, when interpreting a treaty, "[t]here shall be taken into account, together with the context [...] (c) any relevant rules of international law applicable in the relations between the parties." Article 31(3)(c) VCLT, *supra* n 91. On the issue of using custom as an interpretative lens for defining the concepts contained in the Rome Statute, see also *The Prosecutor v. Bemba* (ICC-01/05-01/08-3343), Judgment, Trial Chamber, 21 March 2016, paras 78-79; *Katanga* Trial Judgment, *supra* n 46, para 47.

¹⁰¹ International Law Commission, *Report of the International Law Commission (Fifty-eighth Session, 1 May-9 June and 3 July-11 August 2006)* (A/61/10), UN General Assembly, 2006, at 414. See also International Law Commission, 'Fragmentation Report', *supra* n 91, para 467; P. Sands, and J. Commission, 'Treaty, Custom and Time: Interpretation/Application?' in M. Fitzmaurice, O. Elias and P. Merkouris (eds), *Treaty Interpretation and the Vienna Convention on the Law of Treaties: 30 Years On* (Leiden: Martinus Nijhoff, 2010), at 56-58.

¹⁰² *Chui* Trial Judgment, *supra* n 3, Concurring Opinion of Judge Christine Van den Wyngaert, para 12.

¹⁰³ See Chapter 4, Section 4.2.1.

¹⁰⁴ See Chapter 4, Section 4.2.2.1 and Section 4.2.2.2.

¹⁰⁵ See Chapter 1, Section 1.2.

¹⁰⁶ See Chapter 4, Section 4.2.2.2. and 4.2.4. (text accompanying notes 243-251) and Chapter 6, Section 6.2.2.

¹⁰⁷ See Chapter 6, Section 6.2.2. (text accompanying notes 129-132)

and ultimately analysing how they relate to the contemporary JCE doctrine, in all its three variants. Based on the research conducted in Chapters 2 to 4 of this book, two core conclusions on the legal basis for using the JCE doctrine in international criminal proceedings can be streamlined here. First, the ‘basic’ variant JCE is rightly treated as a customary form of co-perpetration responsibility, since its underlying rationale – *viz.* that individuals who share a common purpose to commit a crime and coordinate efforts to this end are mutually responsible for each other’s acts, and can all be held fully responsible for the commission of the crime – is rooted in the Nuremberg-era ‘common purpose/design’ concept. As such, JCE I responsibility can indeed be said to have a venerable, well-established pedigree in international legislation and case law.¹⁰⁸ In particular, some of its earliest constructions can be traced in the Yalta and San Francisco memorandums, which defined the notion of “joint participation in a broad criminal enterprise” as being:

firmly founded on the rule of liability, common to all penal systems and included in the general doctrines of the laws of war, that those who participate in the formulation and execution of a criminal plan involving multiple crimes are jointly liable for each of the offenses committed and jointly responsible for the acts of each other.¹⁰⁹

Subsequent discussions between the Allies at the London Conference resulted in the inclusion of ‘common plan’ liability in the last sentence of Article 6 IMT Charter¹¹⁰ (later also mirrored in Article 5 IMTFE Charter),¹¹¹ the exact meaning of which has caused some confusion¹¹² but was rightly constructed by the International Military Tribunal as a “[form of] responsibility of persons participating in a common plan” that is different from the crime of conspiracy.¹¹³ This finding of law was then also adopted by the International Military Tribunal for the Far East,¹¹⁴ and as Chapter 2 explained, it could be viewed as the first international judicial recognition of the modern JCE doctrine’s underlying rationale.¹¹⁵ Moreover, following the completion of the IMT Trial, ‘participating in a common plan’ responsibility was recognized as part of the legal principles that were unanimously reaffirmed by the UN General Assembly

in Resolution 95(I) and the corresponding report of the International Law Commission.¹¹⁶

The IMT’s findings on the concept of ‘participating in a common plan’ were then cited and further developed by the Military Tribunals in Nuremberg (‘NMTs’) into what came to be known as the ‘common design’ notion: a form of liability that, in line with the IMT Judgment, was viewed as applicable to all international crimes.¹¹⁷ These tribunals, which were judicially recognized as international courts that apply international law,¹¹⁸ operated under the authority of the Allied Control Council Law No. 10, Article II(2)(d) of which established responsibility for those “connected with plans or enterprise involving [a crime’s] commission”: a clause that can rightly be seen as another primordial codification of JCE liability in international criminal law.¹¹⁹ The NMT’s judges applied enterprise responsibility/the ‘common design’ concept in a number of cases, including the *Justice*,¹²⁰ *RuSHA*,¹²¹ *Medical*¹²² and *Pohl*¹²³

¹¹⁶ See Chapter 4, Section 4.2.2.1. (text accompanying notes 61-68)

¹¹⁷ See Chapter 2, Section 2.3.3.3.

¹¹⁸ Military Tribunal III, *United States of America v. Josef Altstötter et al.* (“The *Justice* Case”), Case No. 3, 5 March 1947 – 4 December 1947, in *Trials of War Criminals before the Nuernberg Military Tribunals under Control Council Law No. 10, Nuremberg, October 1946-April, 1949*, Vol. III (Washington, D.C.: United States Government Printing Office, 1951), at 984; Military Tribunal IV, *United States of America v. Ernst Von Weizsaecker et al.* (“The *Ministries* Case”), Case No.11, 6 January 1948 – 13 April 1949, in *Trials of War Criminals before the Nuernberg Military Tribunals under Control Council Law No. 10, Nuremberg, October 1946-April, 1949*, Vol. XIV (Washington, D.C.: United States Government Printing Office, 1953), at 325; See also M. Koessler, ‘American War Crimes Trials in Europe’, 39 *The Georgetown Law Journal* (1950), at 25, 36; *The Prosecutor v. Erdemović* (IT-96-22-A), Judgment, Appeals Chamber, 7 October 1997, Separate and Dissenting Opinion of Judge Cassese, para 27; *The Prosecutor v. Kupreškić et al.* (IT-95-16-T), Judgment, Trial Chamber, 14 January 2000, paras 540-542.

¹¹⁹ Article II(2)(d), Control Council Law No. 10, Punishment of Persons Guilty of War Crimes, Crimes Against Peace and Against Humanity, December 20 1945, 50-55 *Official Gazette Control Council for Germany* (1946), re-printed in T. Taylor, *Final Report to the Secretary of the Army on the Nuernberg War Crimes Trials under Control Council Law No. 10* (Washington D.C., 15 August 1949), at 250-253 (Appendix D). See Chapter 2, Section 2.3.3.1. See further *The Prosecutor v. Brđanin* (IT-99-36-A), Judgment, Appeals Chamber, 3 April 2007, para 395; *Rwamakuba v. The Prosecutor* (ICTR-98-44-AR72.4), Decision on Interlocutory Appeal Regarding Application of Joint Criminal Enterprise to the Crime of Genocide, Appeals Chamber, 22 October 2004, para 18; R. Clarke, ‘Return to Borkum Island: Extended Joint Criminal Enterprise Responsibility in the Wake of World War II’, 9 *Journal of International Criminal Justice* (2011), at 847.

¹²⁰ The *Justice* Case, *supra* n 118. For an analysis of this case, see Chapter 2, Section 2.3.3.2.i.

¹²¹ Military Tribunal I, *United States of America v. Ulrich Greifelt et al.* (“The *RuSHA* Case”), Case No. 8, 20 October 1947 – 10 March 1948, in *Trials of War Criminals before the Nuernberg Military Tribunals under Control Council Law No. 10, Nuremberg, October 1946-April, 1949*, Vols. IV and V (Washington, D.C.: United States Government Printing Office, 1950). For an analysis of this case, see Chapter 4, Section 4.2.3.3.ii.

¹²² Military Tribunal I, *United States of America v. Karl Brandt et al.* (“The *Medical* Case”), Case No. 1, 9 December 1946 – 19 August 1947, in *Trials of War Criminals before the Nuernberg Military Tribunals under Control Council Law No. 10, Nuremberg, October 1946-April, 1949*, Vols. I and II (Washington, D.C.: United States Government Printing Office, 1949). For an analysis of this case, see Chapter 4, Section 4.2.3.3.ii. (text accompanying notes 212-232)

¹²³ Military Tribunal II, *United States of America v. Oswald Pohl et al.* (“The *Pohl* Case”), Case No. 4, 8 April 1947 – 3 November 1947, in *Trials of War Criminals before the Nuernberg Military Tribunals under Control Council Law No. 10, Nuremberg, October 1946 – April, 1949*, Vol. V, (Washington, D.C.: United States Government Printing Office, 1950), at 998, 1173. For an analysis of this case and its use of common design liability, see K. Ambos, ‘Amicus Curiae Brief in the Matter of the Co-Prosecutors’ Appeal of the Closing Order Against Kaing Guek Eav “Duch” Dated 8 August 2008’, 20 *Criminal Law Forum* (2009), at 380; K. Heller, *The Nuremberg Military Tribunals and the Origins of International Criminal Law* (Oxford: Oxford UP, 2011), at 281.

¹⁰⁸ See Chapter 2, Section 2.3.3., Chapter 3, Section 3.5.2. and Chapter 4, Section 4.2.2.

¹⁰⁹ *Memorandum for the President, Subject: Trial and Punishment of Nazi War Criminals*, 22 January 1945, re-printed in B. Smith, *The American Road to Nuremberg: The Documentary Record, 1944-1945* (Stanford: Hoover Institution, 1982), at 120; *Memorandum of Proposals for the Prosecution and Punishment of Certain War Criminals and Other Offenders*, 25-30 April 1945, re-printed in Smith, *Ibid.*, at 165-166. See Chapter 2, Section 2.2.2.1.

¹¹⁰ See Chapter 2, Section 2.2.4.1.

¹¹¹ See Chapter 2, Section 2.2.6.1.

¹¹² See Chapter 2, Section 2.2.4.1. (text accompanying notes 88-92)

¹¹³ *France et al. v Göring et al.*, International Military Tribunal, Judgment and Sentence, 1 October 1946, printed in *Trial of the Major War Criminals before the International Military Tribunal, Nuremberg, 14 November 1945-1 October 1946*, Vol. I, Nuremberg, Germany, 1947, at 226. Chapter 2, Section 2.2.5.1 (text accompanying notes 119-124).

¹¹⁴ See Chapter 2, Section 2.2.6.2. (text accompanying notes 203, 208-217)

¹¹⁵ See Chapter 2, Section 2.2.5.1. (text accompanying notes 119-124)

trials. Moreover, this mode of criminal liability also played an important role in many of the so-called ‘Dachau trials’, which were conducted before US military government courts in occupied Germany,¹²⁴ chief of which was the *Dachau Concentration Camp Case*.¹²⁵ This jurisprudence was noted in the report of the United Nations War Crimes Commission, which explained that the ‘common design’ concept was based on:

the rule which exists in many systems of law that those who take part in a common design to commit an offence which is carried out by one of them are all *fully responsible* for that offence in the eyes of the criminal law.¹²⁶

Similarly, ‘common design’ responsibility – which was interchangeably used with labels such as ‘common purpose’, ‘enterprise liability’ etc. – was also relied on in the jurisprudence of the British military tribunals in occupied Germany, examples of which were the *Stalag Luft III*,¹²⁷ *Franz Schonfeld et al.*¹²⁸ and *Almelo*¹²⁹ trials. Those cases confirmed the principle that:

If people were all present together at the same time taking part in a common enterprise which was unlawful, each one in his own way assisting the common purpose of all, they were all equally guilty in law.¹³⁰

¹²⁴ or an explanation of this category of cases and an analysis of the application of the ‘common design’ notion in several of them, see Chapter 4, Section 4.2.3.2.ii. and 4.2.3.3.i.

¹²⁵ *United States of America v. Martin Gottfried Weiss et al.*, General Military Government Court of the United States, Dachau, Germany, 15 November 1945 – 13 December 1945. For an analysis of this case, see Chapter 2, Section 2.3.3.2.i. (text accompanying notes 309-314) and Chapter 4, Section 4.2.3.3.i. (text accompanying notes 183-192)

¹²⁶ UN War Crimes Commission, *Law Reports of Trials of War Criminals*, Vol. XV (London: Published for the United Nations War Crimes Commission by His Majesty’s Stationary Office, 1949), at 96. (*emphasis added*) Similarly, one of the attorneys in the ‘Dachau trials’ explained that, rather than being anything specific to Anglo-American law, the ‘common design’ notion was applied as “a universally recognized principle of criminal law.” Koessler, *supra* n 118, at 82.

¹²⁷ *Trial of Max Wielen and 17 Others* (‘The *Stalag Luft III* Case’), British Military Court, Hamburg, Germany, 1 July – 3 September 1947, in UN War Crimes Commission, *Law Reports of Trials of War Criminals*, Vol. XI (London: Published for the United Nations War Crimes Commission by His Majesty’s Stationary Office, 1949). For an analysis of this case, see Chapter 4, Section 4.3.3.2.iii. (text accompanying notes 492-499) and Chapter 2, Section 2.3.3.2.ii. (text accompanying notes 324-331)

¹²⁸ *Trial of Franz Schonfeld and Nine Others*, British Military Court, Essen, 11th – 26th June 1946, in UN War Crimes Commission, *Law Reports of Trials of War Criminals*, Vol. XI (London: Published for the United Nations War Crimes Commission by His Majesty’s Stationary Office, 1949) at 64-73. For an analysis of this case, see Chapter 2, Section 2.3.3.2.ii. (text accompanying notes 315-321)

¹²⁹ *Trial of Otto Sandrock and Three Others* (‘The *Almelo* Trial’), British Military Court, Almelo, Holland, 24 – 26 November 1945 in UN War Crimes Commission, *Law Reports of Trials of War Criminals*, Vol. I (London: Published for the United Nations War Crimes Commission by His Majesty’s Stationary Office, 1947), at 35-45. For an analysis of this case, see Chapter 2, Section 2.3.3.2.ii. (text accompanying notes 322-323)

¹³⁰ The *Almelo* Trial, *supra* n 129, at 40.

In addition, although there are no accessible records of the trials held in the Soviet Occupation Zone in Germany, it bears noting that the USSR national jurisprudence on joint responsibility followed an approach that was akin to the concept of ‘common design’ applied at Nuremberg. Aron Trainin, the legal expert of the Soviet delegation at the London conference, summarized it in his scholarly work on trying Hitler and his aides by citing jurisprudence from the Military Collegium of the USSR Supreme Court:

To establish complicity, we must establish that there is a common line uniting the accomplices in a given crime, that there is a common criminal design. To establish complicity, it is necessary to establish the existence of a united will directed toward a single object common to all the participants in the crime. If, say, a gang of robbers will act in such a way that one part of its members will set fire to houses, violate women, murder and so on, in one place, while another part of the gang will do the same in another place, then even if neither the one nor the other knew of the crimes committed separately by any section of the common gang, they will be held answerable to the full for the sum total of the crimes.¹³¹

As for the French¹³² and German¹³³ tribunals that conducted trials under Control Council Law No. 10, the records of these proceedings, under-reported and difficult to access as they are, do not show that the French and German courts applied the ‘common design’ concept, as such, to assign co-perpetration responsibility. Notably, however, they appear to have adopted a visibly subjective approach to distinguishing between (joint) principals and accessories to a collective crime, which was akin to the underlying rationale of the ‘common purpose/design’ notion.¹³⁴

The Nuremberg-era ‘common purpose/design’ notion can, for the reasons explained in Chapter 2 of this book, be regarded as the embryonic version of co-perpetration responsibility in international criminal law.¹³⁵ The courts used it to mutually attribute to each participant in a common criminal plan the acts of his confederates in it, so that they could all be held fully and equally responsible for the group crime, even though only some of them physically committed it. Neither the IMT/FE, nor the Allied military tribunals that subsequently tried Nazi criminals in occupied Germany, nor any of the laws (and negotiations thereto) establishing these courts, ever espoused the idea that joint perpetrators of a crime are only those persons who controlled its commission by means of having an ‘essential’ role in the effecting of the common plan. To the contrary, in Nuremberg-era cases where the requisite

¹³¹ A. Trainin, *Hitlerite Responsibility under Criminal Law* (London: Hutchinson & Co., 1945), at 84, referring to case law of the Military Collegium of the USSR Supreme Court, see *Report of Court Proceedings in the Case of the Anti-Soviet Bloc of Rights and Trotskyites* (Moscow: People’s Commissariat of Justice of the U.S.S.R., 1938), at 695. See further Chapter 2, Section 2.2.3.1. (text accompanying notes 56-59)

¹³² See Chapter 2, Section 2.3.3.2.iii.

¹³³ See Chapter 4, Section 4.2.2.3. (text accompanying notes 99-101)

¹³⁴ See Chapter 2, Section 2.3.3.2.iii and Chapter 4, Section 4.2.2.3. (at note 101)

¹³⁵ See Chapter 2, Section 2.3.3.3.ii.

gravity of the accused's contribution to a criminal enterprise was expressly discussed, it was affirmed that the level of participation need not be a *conditio sine qua non* for the execution of the common plan,¹³⁶ but rather that it suffices that the accused's contribution had "some real bearing"¹³⁷ on the effecting of the plan by advancing it "to a substantial degree".¹³⁸ The emphasis, thus, fell on the accused's intent to commit the concerted crime, on him sharing the common purpose to achieve the said criminal goal. Accordingly, the legal elements of the 'common purpose/design' doctrine that Chapter 2 distilled from the examined post-World War II jurisprudence were:

- i) the existence of a criminal plan that is common to a plurality of persons;
- ii) the accused, with his specific conduct, contributed to the effecting of this plan;
- iii) the accused shared the common purpose to commit the concerted crime, in that he contributed 'deliberately' and 'for the purpose' of committing the crime.¹³⁹

This framework of the 'common purpose/design' concept could nowadays be easily discerned in the 'basic' category of JCE.¹⁴⁰ To be sure, certain evolutionary steps, prompted by doctrinal refinement and modern interpretation, were taken, which does not detract from the conclusion that JCE I is essentially a faithful restatement of the Nuremberg-era 'common purpose/design' theory.¹⁴¹ The same holds true for the 'systemic' category of

JCE, seeing as it is substantively "a different articulation"¹⁴² of the 'basic' form, which – despite the seemingly different formal wording of its subjective element – also requires that the accused shared the common intent to commit the core crimes that define the institutionalized enterprise.¹⁴³ Therefore, as Chapter 4 demonstrated, the 'basic' (and by extension the 'systemic') form of JCE is rightly regarded by the modern international tribunals as a customary form of co-perpetration responsibility.¹⁴⁴

ii) Refuting the customary status of JCE III liability

The second major finding that this book has made on the legal basis of JCE liability in customary international law concerns the 'extended' variant of this doctrine. In particular, the detailed review of all the sources that the *Tadić* Appeals Chamber and the other contemporary international tribunals have cited to establish the customary status of JCE III responsibility,¹⁴⁵ as well as additional research of unexamined Nuremberg-era documents and jurisprudence,¹⁴⁶ has led to the conclusion that the concept of co-perpetration responsibility for unconcerted but foreseeable crimes of a common plan lacks basis in customary international criminal law.

Chapter 4 showed that the idea of assigning criminal responsibility for the "reasonably foreseeable"/"natural and foreseeable" crimes of a common plan was indeed discussed among the Allies in some of the earlier documents leading to the London conference and the adoption of the IMT Charter.¹⁴⁷ However, these references were sporadic and the notion was altogether discarded in the later stages of the drafting of the Charter, possibly due to the limited practical use that the Allies attached to it: *i.e.* they viewed the numerous Nazi war crimes as an integral, indispensable part of Hitler's plan to wage an aggressive war, rather than as an accidental, yet foreseeable, result of its execution.¹⁴⁸ In any event, the final text of Article 6 IMT Charter did not contain any reference to individual responsibility for "reasonably foreseeable" crimes of a common plan,¹⁴⁹ nor was this concept used in the

¹³⁶ 'Feurstein and Others (*Ponzano Case*): British Military Court Sitting at Hamburg, Germany * Judgment of 24 August 1948', 5 *Journal of International Criminal Justice* (2007), at 240; *Tadić* Appeal Judgment, *supra* n 30, para 199. See Chapter 6, Section 6.2.2. (text accompanying notes 117-128)

¹³⁷ The *Stalag Luft III* Case, *supra* n 127, at 46. (*emphasis added*)

¹³⁸ Deputy Judge Advocate's Office (War Crimes Group European Command), *Review and Recommendations: United States of America v. Hans Ulrich and Otto Merkle* (Case No. 000-50-2-17), General Military Government Court of the United States, Dachau, Germany, 12-22 November 1946, [Date of Case Review: 12 June 1947], at 10-11. Web <<http://www.jewishvirtuallibrary.org/jsource/Holocaust/dachautrial/d19.pdf>> [accessed 27 February 2016]; Deputy Judge Advocate's Office (War Crimes Group European Command), *Review and Recommendations: United States of America v. Hans Wuelfert et al.* (Case No. 000-50-2-72), General Military Government Court of the United States, Dachau, Germany, 12-17 March 1947, [Date of Case Review: 19 Sept 1947], at 2, 12. Web <<http://www.jewishvirtuallibrary.org/jsource/Holocaust/dachautrial/d73.pdf>> [accessed 31 July 2016]. See Chapter 3, Section 3.4.1.3. (text accompanying notes 169-175)

¹³⁹ See Chapter 2, Section 2.3.3.2.iii. (text accompanying note 343)

¹⁴⁰ See Chapter 3, Section 3.5.2.

¹⁴¹ *Ibid.* In this respect, it ought to be noted that the Grand Chamber of the European Court of Human Rights has affirmed that such refinement does not stand in the way of the legality principle, stating that "[t]here will always be a need for elucidation of doubtful points [in a said law] and for adaptation to changing circumstances. Indeed, in certain Convention States, the progressive development of the criminal law through judicial law-making is a well-entrenched and necessary part of legal tradition." ECtHR (GC) Judgment of 17 May 2010 (Application no. 36376/04), *Kononov v. Latvia*, para 185. See also ECtHR Judgment of 22 November 1995 (Application no. 20166/92), *S.W. v. the United Kingdom*, para 36. See further E. Bleichrodt, 'Freedom from Retrospective Effect of Penal Legislation (Article 7)' in P. Van Dijk, F. Van Hoof, A. Van Rijn and L. Zwaak (eds), *Theory and Practice of the European Convention on Human Rights* (4th edn, Antwerpen: Intersentia, 2006), at 654-655.

¹⁴² *Interlocutory Decision on the Applicable Law: Terrorism, Conspiracy, Homicide, Perpetration, Cumulative Charging* (STL-11-01/I/AC/R176bis), Decision, Appeals Chamber, 16 February 2011, para 238.

¹⁴³ See Chapter 3, Section 3.4.2.2. (text accompanying notes 251-259) and Section 3.5.2.

¹⁴⁴ See Chapter 4, Section 4.2.2. and Section 4.2.4.

¹⁴⁵ Chapter 4, Section 4.2.3.2.

¹⁴⁶ Chapter 4, Section 4.2.3.1. and Section 4.2.3.3.

¹⁴⁷ Chapter 4, Section 4.2.3.1. (text accompanying notes 112-116)

¹⁴⁸ *Ibid.* (text accompanying notes 117-120)

¹⁴⁹ Theoretically, one could argue that since the last sentence of Article 6 IMT Charter stated that the participants in a common plan "are responsible for all acts performed by any persons in execution of such plan", this may be interpreted as an implicit recognition of liability for crimes that are a 'natural and foreseeable' consequence of a common plan. Clarke, *supra* n 119, at 841-842. This, however, is not a convincing reasoning because: i) the phrase "for all acts" can just as reasonably be interpreted to mean all acts falling within the scope of the said common plan; and ii) even if this phrase is considered to include unconcerted, incidental crimes of the common plan, it clearly defines such liability in a much broader way than the qualifier of 'natural and foreseeable' crimes. For a more detailed explanation on this point, see Chapter 4, Section 4.2.3.3.i. (text accompanying notes 188-190)

actual IMT Judgment.¹⁵⁰ In addition to this, research into the subsequent trials of Nazi war criminals before the NMTs also did not present evidence of the judges ascribing liability for unconcerted but foreseeable crimes of a common plan.¹⁵¹ Of these twelve cases, only the *RuSHA* trial has been cited by the present international tribunals as evidence of the customary status of the ‘extended’ JCE variant,¹⁵² and the analysis conducted in Chapter 4 found that this assertion lacks in merit.¹⁵³ Further research of the other NMT trials showed that the *Medical* case contains dicta that can be seen as relevant to JCE III liability, but this proposition was also rejected upon a closer review of that case.¹⁵⁴

As for the two post-World War II trials that the *Tadić* Appeals Chamber used to affirm the customary status of the ‘extended’ form of JCE – viz. the *Essen Lynching* and the *Borkum Island* cases – the lack of reasoned judgments in them makes it very difficult to ascertain their relevance for this doctrine’s third variant. Nevertheless, after closely scrutinizing the reported facts of the *Essen Lynching* trial, Chapter 4 asserted that this case could not have been decided on the basis of JCE III responsibility since: i) the accused were charged with a single count of murder and so there was no dichotomy between inside/outside crimes to the common purpose; and ii) the Prosecution’s pleading of the defendant’s *mens rea* in relation to the charged crime was not reflective of the subjective element of JCE III liability.¹⁵⁵ The *Borkum Island* case, on the other hand, proved to be a different story. The Judge Advocate’s review of the case, which was not examined by the *Tadić* Appeals Chamber,¹⁵⁶ contains a most detailed statement of the facts and the two charges in it (assault and murder), and it affirms that the reviewing authority indeed defined the liability of some of the accused by reference to the legal principle that:

All who join as participants in a plan to commit an unlawful act, *the natural and probable consequence of the execution of which involved the contingency of taking human life*, are legally responsible *as principals* for a homicide committed by any of them in pursuance of or in furtherance of this plan.¹⁵⁷

It was thus concluded that the judges in *Tadić* correctly identified the *Borkum Island* case as a post-World War II case law supporting the underlying rationale of JCE III liability.

The question thus arises whether the limited mention of responsibility for “reasonably foreseeable” crimes of a common plan in several early Nuremberg-era documents and the use of this notion in the *Borkum Island* case sufficiently evinces the customary status of JCE III. It is submitted that it does not for several reasons. First of all, the current legal framework of the ‘extended’ category of JCE adopts a degree of foresight that is lower than the one discussed in the identified several post-World War II documents: *i.e.* for JCE III it suffices that the accused foresaw the accidental crime as a *possible* consequence of effecting the common plan¹⁵⁸ while at Nuremberg the argument was about *probable* consequences of the said plan.¹⁵⁹ Second, and more importantly, the quantity and quality of the said sources does not sufficiently support the *Tadić* Appeals Chamber’s conclusion on the customary status of JCE III. *Borkum Island* is but one case, belonging moreover to a category of trials, which – due to the domestic nature of the tribunals that adjudicated them¹⁶⁰ – have been viewed as somewhat less authoritative than the IMT and the NMTs jurisprudence.¹⁶¹ The additional cases that were cited by the STL Appeals Chamber to support the customary status of JCE III, namely the *Dachau Concentration Camp Case* and two of the affiliated ‘follow-up’ trials, could also not be shown to have relied on the notion of liability for the reasonably foreseeable crimes of a common criminal plan to convict the accused.¹⁶² Considering this scarcity of case law, and more crucially the general silence on this concept in the *international* legislation and jurisprudence from that era, Chapter 4 reached the conclusion that the ‘extended’ form of JCE was wrongly categorized by the *Tadić* Appeals Chamber as customary international law.¹⁶³

7.3.1.4. Concluding remarks

The construction of co-perpetration that can harmonize the topical jurisprudence of the *ad hoc* tribunals and the ICC, thereby providing a uniform framework for this mode of liability under international criminal law, is grounded in custom. It endorses the element of ‘shared intent’ as the litmus test for distinguishing between joint principals and accessories to a collective crime thus regarding as co-perpetrators those individuals who share the common criminal purpose to commit it: viz. who want the commission of the concerted crime, and coordinate efforts to this end. This is the most rudimentary element, the nucleus of joint perpetration responsibility that could be distilled from the post-World War II international and domestic prosecutions of Nazi war criminals, and from the laws that the Allies

¹⁵⁰ Chapter 4, Section 4.2.3.1. (text accompanying note 121)

¹⁵¹ Chapter 4, Section 4.2.3.3.ii.

¹⁵² STL Interlocutory Decision on the Applicable Law, *supra* n 142, para 237 (fn 355).

¹⁵³ Chapter 4, Section 4.2.3.3.ii. (text accompanying notes 198-211)

¹⁵⁴ *Ibid.* (text accompanying notes 212-232)

¹⁵⁵ See Chapter 4, Section 4.2.3.2.i.

¹⁵⁶ In fact, the judges in *Tadić* mistakenly asserted that no Judge Advocate was assigned to the *Borkum Island* case. *Tadić* Appeal Judgment, *supra* n 30, para 212.

¹⁵⁷ Deputy Judge Advocate’s Office (War Crimes Group European Command), *Review and Recommendations: The United States v. Kurt Goebell et al.* (Case No. 12-489), General Military Government Court in Ludwigsburg, Germany, 6 February - 22 March 1946, [Date of Case Review: 1 August 1947], at 25. (*emphasis added*) Web <<http://www.jewishvirtuallibrary.org/jsource/Holocaust/dachautrial/fs43.pdf>> [accessed 29 February 2016]. See Chapter 4, Section 4.2.3.2.ii.

¹⁵⁸ See Chapter 3, Section 3.4.2.3.ii.

¹⁵⁹ See Chapter 4, Section 4.2.4. (text accompanying notes 233-238)

¹⁶⁰ For a discussion of the ‘Dachau trials’ and their nature of domestic courts applying international criminal law, see Chapter 4, Section 4.2.3.2.ii. (text accompanying notes 154-160)

¹⁶¹ See Chapter 4, Section 4.2.2.2. and Section 4.2.4. (text accompanying notes 243-251)

¹⁶² See Chapter 4, Section 4.2.3.3.i.

¹⁶³ See Chapter 4, Section 4.2.4.

negotiated to enable these trials.¹⁶⁴ The *Tadić* Appeals Chamber correctly identified this rationale in its study of the Nuremberg-era case law and properly embedded it in the modern legal framework of the JCE theory, although it did go a step too far in this process when it also asserted that, under customary international law, this form of responsibility also applies to unintended but foreseeable crimes of a common criminal purpose.¹⁶⁵

In view of all the above, the present author submits that a narrowed down construction of the JCE doctrine – excluding its ‘extended’ form – satisfies the first criterion (‘legal basis’) of the evaluation framework for co-perpetration responsibility in international criminal law. It matters little what we decide to call this revised construct: *i.e.* whether we keep the JCE label, pivot back to the Nuremberg-era ‘common purpose/design’ terminology, or give it some new, neutral name to signal its divorce from JCE III responsibility.¹⁶⁶ What is important is that this attuned formulation of the JCE theory, consisting essentially of the constituent elements of the ‘basic’ form of JCE, is: i) a faithful statement of the customary definition of co-perpetration in international criminal law and ii) can thus be applied both in the *ad hoc* model of international criminal justice and the ICC context, to construct the open-textured “commits [...] jointly with another” clause in Article 25(3)(a) RS.¹⁶⁷

Whether and how the rejection of the customary status of JCE III responsibility affects this theory’s overall effectiveness and its fairness towards the rights of the accused, are issues that will be addressed in the subsequent sections of this chapter. One final matter that ought to be highlighted here is that narrowing the definition of JCE liability to the notion’s ‘basic’ (and ‘systemic’) variant will bring it in better conformity with the ICC Rome Statute. In particular, as was already explained in Chapter 5, the ICC has concluded that Article 30 RS excludes the concept of *dolus eventualis*,¹⁶⁸ which has prompted many in the commentariat to contend that JCE III responsibility cannot be reconciled with the text of

the Rome Statute.¹⁶⁹ This problem is rendered moot by the rejection of the customary status of the ‘extended’ JCE variant and its consequent removal from the doctrine’s overall legal framework.

7.3.2. Effectiveness

The sentiment that, in view of their mass scale and systemic nature, international crimes could not be effectively tried using traditional forms of individual responsibility, is practically as old as the field of international criminal law. Indeed, it prompted the Allies to construe some truly elaborate, system criminality-adapted notions of joint liability for trying Nazi war criminals in the aftermath of World War II.¹⁷⁰ It is why the UN Tribunals adopted the JCE doctrine,¹⁷¹ and the ICC concocted intricate constructs like indirect co-perpetration based on joint control over organized structures of power.¹⁷² From Nuremberg to the Hague, these notions have struggled to balance between two intrinsically conflicting goals: on the one hand, the need to effectively allocate individual responsibility in the context of mass, systemic criminality and, on the other hand, to respect the fundamental tenets of criminal justice, including the principles of legality and personal culpability.¹⁷³ Thus, next to having a legal basis in international criminal law, the construction of co-perpetration responsibility that this book will propose must also fulfil these criteria of ‘effectiveness’ and ‘fairness’.¹⁷⁴

As was explained in Chapter 1, the effectiveness criterion focuses on two fundamental exigencies of international prosecutions: i) they deal with crimes that are normally the product of manifold, notoriously convoluted interactions between a multitude of people, the individual contributions of whom are usually rather difficult to discern (*viz.* what Cassese called “the fog of collective criminality”)¹⁷⁵ and ii) they often involve an element of remoteness, whereby the most culpable participants in a mass crime are usually geographically removed from the crime

¹⁶⁴ See *supra* Section 7.3.1.3.i.

¹⁶⁵ See *supra* Section 7.3.1.3.ii.

¹⁶⁶ In an article published in 2014, Ohlin proposed that the ICC should use a notion he called the ‘Joint Intentions Theory’ to construct co-perpetration responsibility under the Rome Statute. Ohlin’s proposal, which he described as a subjective approach to co-perpetration, is to accept the element of “shared intention producing coordination” as the definitional criterion for distinguishing between co-perpetrators and accessories to a crime. Accordingly, co-perpetrators of a collective crime will be “only those individuals who desire that the group commit the crime and who participate in the group-level deliberation that resulted in that joint intention and coordinated elements of the plan.” In the present author’s view, this is not a novel theory since it essentially amounts, as Ohlin himself conceded, to a restatement of the UN *ad hoc* Tribunals’ JCE doctrine, minus its problematic ‘extended’ category. Ohlin, ‘Searching for the Hinterman’, *supra* n 53, at 337-340.

¹⁶⁷ See *supra* Section 7.3.1.1. and Section 7.3.1.2. Confirming that JCE I fits the framework of Article 25(3)(a) RS, see also *e.g.* K. Ambos, ‘Joint Criminal Enterprise and Command Responsibility’, 5 *Journal of International Criminal Justice* (2007), at 170-171; Cassese, *supra* n 72, at 175.

¹⁶⁸ *The Prosecutor v. Bemba* (ICC-01/05-01/08-424), Decision on the Confirmation of Charges, Pre-Trial Chamber II, 15 June 2009, paras 363-369; *Katanga* Trial Judgment, *supra* n 46, paras 774-776; *Lubanga* Trial Judgment, *supra* n 2, para 1011; *Lubanga* Appeal Judgment, *supra* n 28, paras 447-449. See Chapter 5, Section 5.4.2.1. (text accompanying notes 204-223)

¹⁶⁹ See *e.g.* Jain, *supra* n 46, at 85; Van Sliedregt, *supra* n 40, at 146; H. Van der Wilt, ‘Joint Criminal Enterprise and Functional Perpetration’, in H. Van der Wilt and A. Nollkaemper (eds), *System Criminality in International Law* (Cambridge: Cambridge UP, 2009), at 159.

¹⁷⁰ See Chapter 2, Section 2.2.1.

¹⁷¹ See Chapter 3, Section 3.3.

¹⁷² See Chapter 5, Section 5.3.2. and Section 5.4.1.2. (text accompanying notes 168-175)

¹⁷³ E. Van Sliedregt, ‘The Curious Case of International Criminal Liability’, 10 *Journal of International Criminal Justice* (2012): 1171-1188.

¹⁷⁴ See Chapter 1, Section 1.5.2. and Section 1.5.3.

¹⁷⁵ A. Cassese, ‘Amicus Curiae Brief of Professor Antonio Cassese and Members of the Journal of International Criminal Justice on Joint Criminal Enterprise Doctrine’, 20 *Criminal Law Forum* (2009), at 302. See also D. Luban, J. O’Sullivan and D. Stewart, *International and Transnational Criminal Law* (New York: Aspen, 2010), at 858; A. Cassese, ‘The Proper Limits of Individual Responsibility under the Doctrine of Joint Criminal Enterprise’, 5 *Journal of International Criminal Justice* (2007), at 110.

scene.¹⁷⁶ A construction of co-perpetration that accommodates for the aforesaid predicaments, thus enabling the tribunals to deal with the problems of macro-criminality and assign principal responsibility to those most blameworthy of the commission of international crimes, could be seen as an effective tool for the prosecution of international crimes. In this sense, for instance, Judge Van den Wyngaert's concept of co-perpetration¹⁷⁷ (doubts over its legal basis put aside) would visibly struggle with both aspects of the efficiency criterion. If applied to a case such as *Tadić*, in which the evidence does not exactly establish which member of the identified armed group physically and directly murdered the victims¹⁷⁸ – viz. the 'fog of collective criminality' problem – a chamber would never be able to allocate co-perpetration responsibility in the said factual circumstances. This is so because the judges would simply not know which participant in this armed group that acted in pursuance of a common plan provided a 'direct contribution' by 'most immediately' causing the material elements of the concerted offence: *i.e.* the central definitional criterion in Judge Van den Wyngaert's construct of co-perpetration fails to deliver in such commonplace scenarios.¹⁷⁹ Furthermore, the second, 'remoteness' predicament is also left unresolved because, as already noted above, endorsing the 'direct/immediate contribution' criterion would mean that senior political and military accused will generally escape *principal* responsibility due to the lack of 'blood on their hands'.¹⁸⁰

7.3.2.1. Co-perpetration based on joint control

Before examining how the abovementioned narrowed-down construction of the JCE theory¹⁸¹ measures against the 'effectiveness' criterion, it is appropriate to first reflect on how effective of a prosecutorial tool the joint control approach to co-perpetration liability is, even though its legal basis in international criminal law was already rejected in this book.¹⁸² To start with, it is important to explain that, as far as the problem of remote contributions to international crimes is concerned, the notion of co-perpetration based on joint control over the crime allows the net of principal liability to be cast wide enough so that individuals who were away from the crime scene could still be held liable as perpetrators. This is so because, as the ICC has asserted, the theory's core definitional criterion – viz. the *essential* contribution element – does not require direct and physical participation in the execution of the material elements of the crime: remote contributions to the crime may also be a *conditio*

sine qua non for its commission.¹⁸³ Thus, as long as one of the parties to the said common plan physically commits the concerted crime, all confederates who had an essential role in the furtherance of the plan, including ones who were hundreds or thousands of kilometres away from the crime scene, may also be held responsible as co-perpetrators of that crime. As for those cases where the crime is committed by *outsiders* to the common plan, the concept of co-perpetration based on joint control has been effectively combined with the concept of indirect perpetration based on control over organized structures of power, in order to allow holding the participants in the common plan liable as (indirect) co-perpetrators of the charged crimes.¹⁸⁴

Having said this, a number of objections to the perceived merits of the doctrine of joint control were raised in Chapter 6,¹⁸⁵ some of which indeed cause doubts about how effectively this approach to co-perpetration liability can deal with the problems of macro-criminality. For one, it was explained that the use of this construct requires courts to engage in counterfactual and artificial analyses, which raise additional, unnecessary evidentiary challenges.¹⁸⁶ To refer again to the *Tadić* case as an example, the lack of evidence confirming the exact role that each member of the armed group had in this murder operation would make it devilishly difficult to establish whether the participation of the accused, one member in the criminal enterprise, was essential or not.¹⁸⁷ After all, to determine whether a contribution was *essential*, one must view it in the overall context of the said crime, and evaluate it in relation to the roles of all the other participants who were involved in it, which is precisely what the available evidence would not allow in such a case.¹⁸⁸ Also, even when the roles of the parties to the crime can be pinpointed for the most part, the joint control test would still raise difficulties in a case involving multiple sufficient causes to the crime's commission, as was shown in the review of the *João Sarmento* trial.¹⁸⁹ It is important to stress that these are not isolated, case-specific problems: rather, they are structural shortcomings of the control approach to co-perpetration that will inevitably arise in such factual scenarios, which are highly common for the field of international criminal law. The larger the scale of the charged international crime, the more convoluted the links between the individual contributions to its commission are, the less feasible it becomes for a fact-finder to untangle

183 *Lubanga* Trial Judgment, *supra* n 2, paras 1004-1005. See also *Lubanga* Appeal Judgment, *supra* n 28, para 466. See Chapter 5, Section 5.4.1.2.

184 Chapter 5, Section 5.4.1.2. (text accompanying notes 168-175)

185 Chapter 6, Section 6.3.

186 Chapter 6, Section 6.3.1.

187 See *supra* note 178.

188 The evidence in *Tadić* showed that the accused actively participated in the separation of victims, but it did not show how exactly many people were involved in this operation (it could only be found that the said armed group was 'relatively small'), nor who killed the five Muslim men, nor in what circumstances: all issues that will affect the proper determination on whether the crimes would have taken place absent *Tadić's* contribution. See Chapter 3, Section 3.3.1.

189 *The Prosecutor v. João Sarmento* (SPSC-18A/2001), Judgment, 12 August 2003. See Chapter 6, Section 6.2.1.1. (text accompanying notes 25-28)

176 See Chapter 1, Section 1.5.2 and Section 1.2.1. Van Sliedregt pointed out that this structural remoteness of the 'intellectual authors' of international crimes introduces a "two-tier liability scheme [that] is the Achilles heel of [international criminal law]". Van Sliedregt, *supra* n 173, at 1174.

177 See *supra* Section 7.2.2.

178 For a discussion of the factual circumstances in the *Tadić* case and the difficulties involved in its prosecution, see Chapter 3, Section 3.3.1.

179 See *supra* Section 7.2.2. (text accompanying notes 34-46)

180 *Ibid.* (text accompanying notes 43-46)

181 See *supra* Section 7.3.1.4.

182 See *supra* Section 7.3.1.2.

non-essential from essential contributions, and plausibly determine if the common plan to commit the said crime would have collapsed without the accused's contribution. It can largely be a matter of conjecture to confirm whether, for instance, the amount of weapons that an accused provides in a common plan to terrorize a civilian population is 'essential', when he is not the only source of arms and ammunition, or he could be replaced by another supplier, or the plan could perhaps still be executed without the accused's participation, albeit in a limited or a materially different manner.¹⁹⁰

These issues raise evidentiary challenges which, especially in the field of international criminal law, can be said to impose "an unnecessary and unfair burden on the prosecution".¹⁹¹ What is more, they also strain the work of judges by requiring them to: i) conduct speculative, counter-factual assessments of the available evidence; ii) draw quite artificial borders between 'essential' and 'less-than-essential' contributions; and iii) carry out impractical evaluations of the accused's position in the alleged plan, relative to the other parties to it, in order to confirm his material ability to frustrate the plan's execution.¹⁹² Considering all this, one could question how effective the joint control doctrine truly is when used to assign co-perpetration liability in cases shrouded by the 'fog of collective war criminality'. Such an approach may function well in a domestic delinquency context, where the link between an accused's action and a resulting crime is usually much clearer and easy to identify/assess (due to the mostly confined nature of these crimes), but it falters in international criminal prosecutions, where building a meticulous account of the entire chain, or rather a web, of causation is often simply impossible. It is, thus, hardly surprising that the control doctrine has at times been applied rather loosely by the ICC chambers, some of which visibly struggled to fit the established facts in the cases before them to the rigid theoretical framework of (indirect) co-perpetration responsibility they were tasked to apply.¹⁹³ Indeed, in more recent years, the above-noted problems have also triggered strong criticism from the commentariat, with ever more academics contending that the application of the control theory in ICC proceedings has led to:

decrease in efficiency, the imposition of additional burdens on the prosecution, fragmented international criminal law [and] created extraordinarily complex and esoteric understanding of Article 25(3) [RS] that renders international criminal law obscure and difficult to understand.¹⁹⁴

7.3.2.2. Co-perpetration based on JCE

Like the joint control theory, the doctrine of JCE also allows international tribunals to

capture in the net of co-perpetration responsibility persons who provide indirect, remote contributions to the commission of international crimes.¹⁹⁵ Indeed, when introducing this construct in ICTY case law, the Appeals Chamber first observed that:

to hold criminally liable as a perpetrator only the person who materially performs the criminal act would disregard the role as co-perpetrators of all those who in some way made it possible for the perpetrator physically to carry out that criminal act. At the same time, depending upon the circumstances, to hold the latter liable only as aiders and abettors might understate the degree of their criminal responsibility.¹⁹⁶

The specific angle that the JCE theory takes to this matter is to hold that when a person shares a common purpose with others to commit a crime, he may be held liable as a co-perpetrator of the concerted crime even when his participation in the plan "[did] not involve the commission of a specific crime [but took] the form of assistance in, or contribution to, the execution of the common plan or purpose."¹⁹⁷ Thus, as pointed out in Chapter 3, in JCE cases against mid- and high-ranking accused, the ICTY/R have stated that the "accused does not have to be present at the time and place of perpetration of the crime in order to be held responsible for it", provided that he shared the common criminal purpose and his contribution to the JCE crime was, at the least, significant.¹⁹⁸ The doctrinal soundness of this approach was verified in Chapter 4,¹⁹⁹ and while the analysis identified a conceptual problem in cases where the said JCE consists *solely* of remote contributors – *i.e.* the so-called 'leadership-level' JCE – solutions were put forward, which for the reasons explained further below reaffirm this doctrine's potency to deal with the said 'remoteness' problem.²⁰⁰

Placing the emphasis on the accused's shared direct intent to commit the group crimes, and then downscaling the requisite magnitude of his contribution to the said common purpose, is the formula that has made JCE a potent tool for assigning co-perpetration liability in the fog of mass, systemic criminality: a legal notion, which the commentariat has often viewed

¹⁹⁵ Thus satisfying the 'effectiveness' criterion discussed above, see *supra* text accompanying notes 175-176.

¹⁹⁶ *Tadić* Appeal Judgment, *supra* n 30, para 192.

¹⁹⁷ *Ibid.*, para 227. See also *The Prosecutor v. Krajišnik* (IT-00-39-A), Judgment, Appeals Chamber, 17 March 2009, para 215; *Brđanin* Appeal Judgment, *supra* n 119, para 427. This was recently confirmed in the *Karadžić* case, where the Trial Chamber explained that the accused "need not have performed any part of the *actus reus* of the crime charged" in order to incur JCE liability. *Karadžić* Trial Judgment, *supra* n 22, para 564.

¹⁹⁸ *The Prosecutor v. Stanišić and Župljanin* (IT-08-91-T), Judgment *Vol. I*, Trial Chamber, 27 March 2013, para 103. See also *The Prosecutor v. Krnojelac* (IT-97-25-A), Judgment, Appeals Chamber, 17 September 2003, para 81; *Kvočka et al.* Appeal Judgment, *supra* n 30, para 112; *The Prosecutor v. Simba* (ICTR-01-76-A), Judgment, Appeals Chamber, 27 November 2007, para 296; *The Prosecutor v. Tolimir* (IT-05-88/2-T), Judgment, Trial Chamber, 12 December 2012, para 893; *Karadžić* Trial Judgment, *supra* n 22, para 564. See Chapter 3, Section 3.4.1.3.

¹⁹⁹ See Chapter 4, Section 4.3.

²⁰⁰ See *infra* Section 7.3.3. (text accompanying notes 242-256) and Chapter 4, Section 4.3.3.2.iii and iv.

¹⁹⁰ For a detailed discussion on these points, see Chapter 6, Section 6.3.1. (text accompanying notes 237-241)

¹⁹¹ *Lubanga* Trial Judgment, *supra* n 2, Separate Opinion of Judge Adrian Fulford, para 3. See also Sadat and Jolly, *supra* n 26, at 784.

¹⁹² See Chapter 6, Section 6.3.1.

¹⁹³ See Chapter 6, Section 6.3.2.

¹⁹⁴ Sadat and Jolly, *supra* n 26, at 781-782. See also Ohlin, Van Sliedregt and Weigend, *supra* n 16, at 731-732; Ohlin, *supra* n 89, at 527-531.

as the prosecution’s “magic bullet”.²⁰¹ Indeed, its application is not at all contingent on the nature of the (hierarchical) power relations between the different parties to the common purpose,²⁰² and – by setting the requisite degree of the accused’s contribution to ‘significant’ – the framework of the JCE doctrine gives judges more latitude to manage the practical, evidentiary challenges of this field of law: *i.e.* the challenges that hinder the use of the joint control theory.²⁰³ In fact, if anything, the concept of co-perpetration based on JCE has been criticised for being ‘overly- effective’ because it casts the net of principal responsibility so widely, that it stretches thin the personal culpability principle, and borders on assigning guilt by association.²⁰⁴ In other words, the concerns over the theory of JCE have been that it is unbalanced in the reverse sense to the joint control concept: *i.e.* in the sense that it tips the scales too much in favour of prosecutorial effectiveness and at the expense of fairness to the rights of the accused. The merits of this line of criticism will be separately discussed below, in the part dedicated to the ‘fairness’ criterion. At this point, it is important to highlight that, as was explained in Chapter 4, the cause for this vitriol against the doctrine of JCE has been the underlying rationale of its ‘extended’ variant, several aspects of which were, indeed, found to breach the *nulla poena sine culpa* principle.²⁰⁵ Together with the rejection of the customary status of JCE III responsibility, this is the reason why the present chapter calls for contracting the JCE doctrine to a framework that excludes its current third category and, thereby, establishes a much more balanced approach to the above-described dichotomy between the ‘effectiveness’ and ‘fairness’ criteria. This course of action, however, naturally raises an important question that must be addressed here: would a rejection of its ‘extended’ variant render the JCE theory ineffective?

Cutting out JCE III responsibility would surely affect the doctrine’s overall potency, in that it will reduce the spectre of mutual attribution only to crimes that were specifically agreed upon by the co-perpetrators. However, there are several reasons to argue that this

limitation is rather theoretical and its practical significance would have a more limited nature, especially in cases against senior accused. To begin with, one should keep in mind the rather porous border between ‘internal’ and ‘external’ crimes to common plans that are executed over long periods of time. Take, for instance, the ICTY’s jurisprudence, where – due to the nature of the conflict and the available evidence – it became an established practice of the Prosecution to charge the (senior) accused with JCE I liability for the crimes of deportation and/or forcible transfer, and then rely on JCE III for all other (natural and foreseeable) crimes that were committed during the effecting of this plan but the evidence could not establish that they were also a specifically agreed part of it.²⁰⁶ Importantly, however, the ICTY/R Appeals Chamber has established that a “JCE can evolve over time” so that crimes that were not originally agreed upon amongst the co-perpetrators (‘external’, JCE III crimes) could become *part of* the common plan (‘internal’, JCE I crimes) provided that they were continuously committed with the knowledge of the JCE participants.²⁰⁷ As the STL Appeals Chamber observed:

While, originally, the participants in a common enterprise may agree on only a few, ‘core’ crimes, what were foreseeable crimes in the early stages of a JCE may well become accepted criminal objectives of an increasing number of JCE members. [...] One of the main differences between JCE I and JCE III, while theoretically important, may not thus be so pivotal when it comes to actual evidence and allowed inferences: often, when a participant in a JCE foresees an additional crime he originally had not subscribed to and nevertheless agrees to continue providing his significant contribution to the JCE, the only reasonable inference might be that he has come to agree to that additional crime, therefore bringing his liability back into the fold of JCE I.²⁰⁸

In other words, in cases involving protracted executions of common plans, the JCE members’ knowledge of the commission of additional crimes, coupled with their continued participation in the plan, could be used to infer that – at some point – they implicitly agreed to *also* commit the said excess crimes thus bringing them *within* the scope of JCE I responsibility and making JCE III unnecessary. What is required from the judges in such factual scenarios, the *Krajišnik* Appeals Chamber explained, is to find:

(1) whether [the JCE accused] were informed of the [unconcerted] crimes, (2) whether they did nothing to prevent their recurrence and persisted in the implementation of this expansion of the common objective, and (3) *when* the expanded crimes became incorporated into the common objective.²⁰⁹

²⁰⁶ Boas *et al.*, *supra* n 201, at 42-43.

²⁰⁷ *Krajišnik* Appeal Judgment, *supra* n 197, paras 162-163, 170-177. See also *The Prosecutor v. Đorđević* (IT-05-87/1-T), Judgment *Vol. I*, Trial Chamber, 23 February 2011, para 1862; *Tolimir* Trial Judgment, *supra* n 198, para 892; *Stanišić and Župljanin* Trial Judgment *Vol. I*, *supra* n 198, para 102; *Karadžić* Trial Judgment, *supra* n 22, para 563. See also Cassese, *supra* n 72, at 172.

²⁰⁸ STL Interlocutory Decision on the Applicable Law, *supra* n 142, para 246.

²⁰⁹ *Krajišnik* Appeal Judgment, *supra* n 197, para 171.

²⁰¹ W. Schabas, ‘Mens Rea and the International Criminal Tribunal for the Former Yugoslavia’, 37 *New England Law Review* (2003), at 1032. See also G. Boas, N. Reid and J. Bischoff, *International Criminal Law Practitioner Library: Forms of Responsibility in International Criminal Law*, Vol. 1 (Cambridge: Cambridge UP, 2008), at 420; Ambos, *supra* n 167, at 159.

²⁰² For a discussion on the “locus of control” issue, or what Roxin called the “*schlüsselstellung*” element, in the joint control approach to co-perpetration, and the practical difficulties it raises, see Chapter 6, Section 6.3.1. (text accompanying notes 244-249) and Section 6.3.2. (text accompanying notes 274-282)

²⁰³ See Chapter 6, Section 6.3.1.

²⁰⁴ A. Danner and J. Martinez, ‘Guilty Associations: Joint Criminal Enterprise, Command Responsibility, and the Development of International Criminal Law’, 93 *California Law Review* (2005), at 108-109; M. Badar, “‘Just Convict Everyone!’ – Joint Perpetration: From Tadić to Stakić and Back Again”, 6 *International Criminal Law Review* (2006), at 301; C. Damgaard, *Individual Criminal Responsibility for Core International Crimes: Selected Pertinent Issues* (Berlin: Springer, 2008), at 236-238; S. Powles, ‘Joint Criminal Enterprise: Criminal Liability by Prosecutorial Ingenuity and Judicial Creativity?’, 2 *Journal of International Criminal Justice* (2004), at 611; G. Fletcher and J. Ohlin, ‘Reclaiming Fundamental Principles of Criminal Law in the Darfur Case’, 3 *Journal of International Criminal Justice* (2005), at 548; S. Wolfgang, ‘Jurisprudence on JCE – Revisiting a Never Ending Story’, *Cambodia Tribunal Monitor*, 3 June 2010, at 3-4; Ambos, *supra* n 167, at 207.

²⁰⁵ See Chapter 4, Section 4.2.5. In this respect, Ohlin has also noted the tendency to “impugn an entire approach simply because one application of it, namely JCE III, was discredited.” Ohlin, ‘Searching for the Hinterman’, *supra* n 53, at 334.

In cases against high-ranking military/political officials, which are the ones that often concern common criminal plans being effected over lengthy periods of time, the practical relevance of JCE III liability is thus limited to those excess, unconcerted crimes that were committed in the early stages of the plan's execution *before* they were incorporated in it through the above-said means.²¹⁰ These initial surplus crimes are the ones that the narrowed-down construction of the JCE theory, excluding its current 'extended' category, would not be able to reach and ascribe co-perpetration responsibility for.

More generally, it should be kept in mind that although rejecting JCE III could make it more difficult, and sometimes indeed impossible,²¹¹ to ascribe co-perpetration liability for the unconcerted but foreseeable crimes of a common plan, this does not mean that the participants in such a plan would incur no responsibility for the said excess crimes. Depending on the facts of the case, they could still be held liable as accessories to these additional offences.²¹² This is the decrease in 'effectiveness' that bringing the JCE doctrine in conformity with the principles of *nullum crimen sine lege* and *nulla poena sine culpa* comes at the cost of.

7.3.3. Fairness

The Nuremberg-era notions of conspiracy and membership in a criminal organization offer an apt example of how two theories of joint criminal responsibility that were originally construed with an eye on enhancing the effectiveness of trying mass criminality,²¹³ have been eschewed from international criminal law ever since on account of their questionable performance *vis-à-vis* basic principles of criminal justice.²¹⁴ Indeed, 'effectiveness' concerns being recognized, it is just as important that the legal framework of the theory of co-perpetration that international courts apply lives up to the *nullum crimen sine lege* and *nulla poena sine culpa* principles, and thus respects the rights of the accused as explained in Chapter 1.²¹⁵

²¹⁰ Admittedly, however, in a small scale enterprise, where the JCE members agree to commit one limited crime (*e.g.* torture a person), and one of the participants performs a one-off deviation from the said plan (*e.g.* shoots the victim dead), the above reasoning of transforming 'extended' crimes into 'internal' ones could not be applied. In such cases, the judges would not be able to ascribe co-perpetration responsibility for the unconcerted crime using the narrowed-down, JCE III-excluded, construction of the JCE doctrine. Next to this, it should also be noted that even in cases involving the prolonged execution of large-scale common criminal plans, there could still be a one-time commission of an unconcerted crime that is not continuously repeated, meaning that only JCE III liability could be used to ascribe co-perpetration liability for the said excess crime.

²¹¹ *Krajišnik* Appeal Judgment, *supra* n 197, para 171.

²¹² For a discussion on the idea of ascribing accessory liability for the foreseeable crimes of a common plan, see Chapter 4, Section 4.2.5.2. (text accompanying notes 304-307)

²¹³ See Chapter 2, Section 2.2.1.

²¹⁴ See Chapter 2, Section 2.2.2. and Section 2.2.5.; Chapter 3, Section 3.2. and Section 3.5.1.

²¹⁵ See Chapter 1, Section 1.5.3.

7.3.3.1. Co-perpetration based on joint control

Several problems with the application of the doctrine of co-perpetration based on joint control over the crime were identified earlier in this book, which can be compiled here to question the received wisdom that this construct safeguards the rights of the accused person better than the theory of JCE.²¹⁶ Foremost of these problems is, of course, the highly questionable legal basis for adopting the control approach to joint perpetration in ICC jurisprudence: a matter that was already summarily discussed above and need not be addressed anew here.²¹⁷ For the purposes of the present section, it suffices to note that this raises concerns over the theory's conformity with the principle of legality: *i.e.* it prompts criticism that the concept of co-perpetration based on joint control is a novel creation of the ICC judges that is not based on any of the applicable sources of law listed in the Article 21 RS and, therefore, using it to obtain convictions violates the principle of *nullum crimen sine lege*. Indeed, not only was this doctrine 'read in' the Rome Statute through an inconclusive contextual interpretation of Article 25 – which is contradicted by virtually all other interpretation techniques that could have been used to construe the forms of liability in this provision²¹⁸ – but, as Judge Van den Wyngaert has noted, it is also doubtful how 'accessible' and 'foreseeable' this novel international construction of co-perpetration was to any person accused of committing international crimes before the ICC Pre-Trial Chamber I delivered its seminal *Lubanga* Decision on the Confirmation of Charges.²¹⁹ The control theory originates from a German postdoctoral work,²²⁰ which has not been translated in any language other than Spanish, and which – until its refuted acceptance in the *Stakić* Trial Judgment – had found sporadic realization only in domestic case law from Germany and a few other German-influenced national legal systems.²²¹ This is hardly the kind of authority that could have given an accused from any jurisdiction other than the said few adequate notice of the meaning of the clause "commits [...] jointly with another" under Article 25(3) (a) RS.

Another problem with the doctrine of co-perpetration based on joint control that merits a consideration here concerns the scope of the 'common plan' requirement. As was explained in Chapter 5, the ICC has established that under the joint control concept, the plan that the co-perpetrators must share does not have to be specifically directed at the commission of

²¹⁶ See Chapter 6, Section 6.3.1. (text accompanying notes 229-231)

²¹⁷ See *supra* Section 7.3.1.2.

²¹⁸ *Ibid.* (text accompanying notes 89-102)

²¹⁹ *Chui* Trial Judgment, *supra* n 3, Concurring Opinion of Judge Christine Van den Wyngaert, para 20. In this respect, it bears noting that the 'accessibility' and 'foreseeability' of the JCE theory has been confirmed through reference to its customary status. See *Milutinović et al.* Decision on Joint Criminal Enterprise, *supra* n 68, para 41; Cassese, 'Amicus Curiae', *supra* n 175, at 295.

²²⁰ C. Roxin, *Täterschaft Und Tatherrschaft* (1st edn, Hamburg: Cram, De Gruyter & Co, 1963). See Chapter 5, Section 5.2.1.

²²¹ an Slidregt, *supra* n 40, at 87; Ohlin, *supra* n 89, at 523-524. N. Jain, 'The Control Theory of Perpetration in International Criminal Law', 12 *Chicago Journal of International Law* (2011), at 184; See Chapter 6, Section 6.2.2. (text accompanying notes 129-142) and Chapter 5, Section 5.2.2.

a crime. Rather, it suffices if the plan contained “an element of criminality”, meaning that its execution entailed an objective risk that the charged crime would be committed in the ordinary course of events.²²² The doctrinal problems that this definition of the ‘common plan’ requirement raises were discussed in Chapter 5, which observed that it allows holding individuals mutually liable for crimes that were neither an ultimate objective of their common plan, nor the agreed means to achieve a non-criminal goal, but are essentially the unconcerted by-product of effecting this non-criminal plan.²²³ Such crimes, even if they are an objectively foreseeable consequence of the plan, are still *not an agreed part* of it,²²⁴ which is why ascribing joint perpetration liability for them raises much the same *nulla poena sine culpa* objections that the ‘extended’ variant of JCE does.²²⁵ As Gil Gil and Maculan have aptly pointed out:

Such a broad understanding of the ‘element of criminality’ is hardly compatible with the rule of strict interpretation, because, if the plan does not envisage the commission of a concrete crime, ‘there is nothing (agreed) what (*sic*) could be mutually attributed’. Furthermore, this interpretation infringes on the principle of individual criminal responsibility in so far as it implies the possibility of charging the defendant with crimes that are committed in excess of the common plan. When one of the parties commits a crime not initially included, even implicitly, in the common plan, the adopted broad understanding of the common plan allows the extension of responsibility for that excess to all those who agreed to the plan, provided that they foresaw the (excess) crime as a possible occurrence in the ordinary course of events.²²⁶

Since the ‘common plan’ provides the doctrinal basis for the mutual attribution of acts among the confederates,²²⁷ unconcerted offences that were not an agreed part of the plan – whether as its ultimate goal, or as the necessary means to achieve it – cannot be reciprocally attributed to each participant in the plan on the mere basis that they were a reasonably foreseeable result of effecting it. Therefore, holding each participant in such a plan liable *as a co-perpetrator* of the

excess crime that only one of them committed breaches the principle of personal culpability: a truth that is as valid for JCE III, as it is for the joint control theory, and for any other theory of co-perpetration liability.²²⁸

More generally, the danger of widening the scope of the ‘common plan’ requirement is that it makes it increasingly difficult to differentiate between participation in common plans to wage wars, and participation in common plans to commit crimes: a distinction that, if not duly made, could easily result in excessive and unfair convictions.²²⁹ By not requiring that the plan contains a specifically agreed upon crime, the ICC’s joint control theory leaves the door open for treating legitimate plans (*e.g.* to establish control over a particular territory by using armed force), to which the accused provided a neutral contribution (*e.g.* supplied arms/financing), as the basis for reciprocal attribution of crimes that were an objectively foreseeable consequence of executing the plan. This paradigm is troubling for at least two reasons: i) it is susceptible to excessive use in that, historically speaking, common plans to wage wars always entertain risks that crimes could be committed;²³⁰ and ii) it, as Judge Van de Wyngaert explained, shifts “the focus of attention away from how the conduct of the accused is related to the commission of a *crime* to what role he/she played in the execution of the common *plan*.”²³¹ In other words, the core inquiry becomes whether the accused’s contribution (*e.g.* providing the needed financing and information to capture a besieged city) was essential for the success of the plan, instead of whether and how it was causally linked to the commission of an objectively foreseeable crime of the plan (*e.g.* destruction of cultural property): a difficulty that does not arise when the plan is inherently criminal in that it is specifically directed/necessarily involves the commission of a crime.²³²

²²⁸ For an analogous, more detailed analysis explaining which aspects of the principle of *nullum crimen sine lege* are breached by the ‘extended’ variant of JCE when ascribing co-perpetration responsibility for unconcerted but reasonably foreseeable crimes of a common plan, see Chapter 4, Section 4.2.5.1.

²²⁹ See Chapter 5, Section 5.4.1.1.ii. (text accompanying notes 137-140)

²³⁰ Which, in turn, could mean that the only way in which an accused can avoid individual criminal responsibility for such possible excess crimes is by not entering common plans to wage wars: a conclusion that is incompatible with the current framework of laws governing the initiation and conduct of armed conflicts. *The Prosecutor v. Brima, Kamara and Kanu* (SCSL-04-16-T), Judgment, Trial Chamber, 20 June 2007, para 72. See also S. Meisenberg, ‘Joint Criminal Enterprise at the Special Court for Sierra Leone’, in C. Jalloh (ed), *The Sierra Leone Special Court and its Legacy: the Impact for Africa and International Criminal Law* Cambridge: Cambridge UP, 2014, at 89. Using the joint control theory’s ‘element of criminality’ definition of the ‘common plan’ element could, for instance, mean that political leaders of France, the United Kingdom and the other NATO states that jointly effected the humanitarian intervention in Libya in 2001 may be held liable as (indirect) co-perpetrators of crimes that were allegedly committed during the NATO air strikes, pending a finding that their common plan, legitimate as it may have been, entailed an objective risk of the commission of these crimes. It is, of course, not argued here that the leaders of Western states could not bear criminal responsibility for international crimes: the point is, rather, that an overly broad definition of the ‘common plan’ element does, indeed, turn the very decision to go to war – and, thereby, create a historically crime-conducive environment – into a basis for assigning co-perpetration liability for the possible/probable/virtually certain product crimes of the said war. See F. Abrahams and S. Kwiram, *Unacknowledged Deaths: Civilian Casualties in NATO’s Air Campaign in Libya* (New York, NY: Human Rights Watch, 2012): 1-75; UN Human Rights Council, *Report of the International Commission of Inquiry on Libya* (A/HRC/19/68), 2 March 2012, paras 122, 617-655; C. Stahn, ‘Libya, the International Criminal Court and Complementarity: A Test for ‘Shared Responsibility’’, 10 *Journal of International Criminal Justice* (2012), at 326, 332.

²³¹ *Chui* Trial Judgment, *supra* n 3, Concurring Opinion of Judge Christine Van den Wyngaert, para 34.

²³² *Ibid.*, para 35.

²²² *Lubanga* Decision on the Confirmation of Charges, *supra* n 21, para 344; *The Prosecutor v. Banda and Jerbo* (ICC-02/05-03/09-121-Corr-Red), Corrigendum of the Decision on the Confirmation of Charges, Pre-Trial Chamber I, 7 March 2011, para 129; *The Prosecutor v. Muthaura, Kenyatta and Ali* (ICC-01/09-02/11-382-Red), Decision on the Confirmation of Charges, Pre-Trial Chamber II, 23 January 2012, para 399; *Ruto, Kosgey and Sang* Decision on the Confirmation of Charges, *supra* n 77, para 301. See Chapter 5, Section 5.4.1.1. (text accompanying notes 116-131)

²²³ Chapter 5, Section 5.4.1.1. (text accompanying notes 116-140)

²²⁴ In this vein of thought, Ambos has also rejected the idea “that a mere ‘critical element of criminality’ suffices for a plan of co-perpetrators” and has asserted that [s]uch a plan cannot be predominantly non-criminal but must at least [...] contain a more or less concrete crime to be committed, otherwise there is nothing (agreed) that could be mutually attributed.” Ambos, *supra* n 16, at 140. See also N. Jain, ‘Individual Responsibility for Mass Atrocity: In Search of a Concept of Perpetration’, 61 *American Journal of Comparative Law* (2013), at 859.

²²⁵ See Chapter 4, Section 4.2.5.1.

²²⁶ A. Gil Gil and E. Maculan, ‘Current Trends in the Definition of ‘Perpetrator’ by the International Criminal Court: From the Decision on the Confirmation of Charges in the *Lubanga* Case to the *Katanga* Judgment’, 28 *Leiden Journal of International Law* (2015), at 360.

²²⁷ *Lubanga* Appeal Judgment, *supra* n 28, para 445; Ambos, *supra* n 28, at 149, 174; Van Sliedregt, *supra* n 40, at 100, 144; Olásolo, *supra* n 6, at 276. See Chapter 4, Section 4.3.

7.3.3.2. Co-perpetration based on JCE

Of the two theories of co-perpetration currently applied in international criminal law, the JCE doctrine has certainly been the one that has faced the lion's share of criticism pertaining to the principles of legality and culpability. Most recurrent have been the challenges to this theory's basis in international custom,²³³ raising legitimate concerns that its application in international criminal proceedings violates the *nullum crimen sine lege* principle. This question was already addressed above, in the section that confirmed the customary status of JCE I/II liability,²³⁴ yet rejected that of JCE III, recommending that the latter concept be jettisoned from the doctrine's legal framework.²³⁵ It can thus be concluded here that the *current* definition of co-perpetration based on joint criminal enterprise that is applied by the UN Tribunals does, indeed, violate the legality principle, inasmuch as the doctrine's 'extended' variant lacks legal basis in customary international law. Moreover, it should also be noted that the few World War II-era documents that may be identified as entertaining the underlying rationale of JCE III have not – unlike the legislation and jurisprudence supporting JCE I/II – been widely published and are, even today, extremely difficult to access,²³⁶ raising questions about how foreseeable and accessible²³⁷ this third variant of the doctrine was prior to its construction in the ICTY *Tadić* Appeal Judgment. Therefore, it is submitted that respect for the principle of legality requires narrowing down the legal definition of JCE, so as to exclude the doctrine's third limb that ascribes co-perpetration responsibility for unconcerted but foreseeable crimes of a common criminal purpose.

Regarding the *nulla poena sine culpa* principle, two critical aspects of the JCE concept were analysed in Chapter 4, which place the theory at odds with this fundamental principle of criminal justice. First of all, it was explained that the 'extended' variant of JCE impermissibly assigns joint perpetration responsibility for offences that fall *outside* the scope of the common criminal plan, because it lacks a doctrinal basis on which such excess crimes may be mutually attributed to all participants in the said plan.²³⁸ The 'common plan' is the legal element, which enables such reciprocal attribution of acts among the confederates, but this is possible for acts that are carried out *within the agreed scope* of the said criminal plan, not for unconcerted acts

that fall *outside* of it.²³⁹ In addition to this, the low *mens rea* requirement of JCE III liability – *viz.* the *dolus eventualis* test – creates a further doctrinal incongruity when the legal definition of the excess crime requires a higher *mens rea* standard, like *dolus specialis*, or *dolus directus* in the *first/second* degree. In such cases, the doctrine allows ascribing co-perpetration liability for a crime that the accused neither agreed on, nor participated in, nor had the requisite intent (as stated in the crime's definition) to commit.²⁴⁰ Considering the above, Chapter 4 concluded that while the 'extended' category of JCE could plausibly be defined as a mode of accessorial liability, its present use to ascribe co-perpetration responsibility for excess crimes violates the principle of *nulla poena sine culpa*, and in particular the requirement that punishment must be proportionate to the degree of the accused's culpability.²⁴¹ Thus, both the principle of legality and the principle of culpability command that the 'extended' form of JCE be rejected from the overall legal framework of this doctrine.

The second aspect of the joint criminal enterprise theory that was thoroughly analysed in Chapter 4 and can be said to infringe on the principle of individual culpability concerns the current formulation and use of the notion of 'leadership-level JCE': *viz.* JCE with no physical perpetrators.²⁴² The doctrinal problem that this formation raises is rather similar to that of JCE III in the sense that it also seeks to ascribe co-perpetration liability for acts that fall outside the circle of mutual attribution that is the common plan, albeit in a different manner. In particular, the acts committed by non-parties to a JCE, although specifically intended by the 'leadership-level' JCE members, are acts committed by *outsiders* to the common plan and, therefore, they cannot be reciprocally imputed to the JCE members.²⁴³ The principles of individual autonomy and derivative liability provide that the 'leadership-level' JCE accused who procure rank-and-file physical perpetrators to commit a crime could be held responsible for ordering, instigating or otherwise *participating* in the commission of the said offence, but – absent a common plan between the JCE accused and the direct perpetrators – the acts of the latter cannot be mutually attributed to the former so they can be held liable as *co-perpetrators* of the crime.²⁴⁴ The post-*Brđanin* ICTY/R jurisprudence, however, has neglected these doctrinal considerations and has accepted that a 'leadership-level JCE' is still a mode of co-perpetration responsibility, without properly addressing the nature of the critical link between JCE members and the non-member

233 I. Bantekas, *International Criminal Law* (Oxford: Hart, 2010), at 58; M. Karnavas, 'Joint Criminal Enterprise at the ECCC: A Critical Analysis of the Pre-Trial Chamber's Decision against the Application of JCE III and Two Divergent Commentaries on the Same', 21 *Criminal Law Forum* (2010), at 486; Ambos, *supra* n 123, at 385-386; Danner and Martinez, *supra* n 204, at 110 *et seq*; Powles, *supra* n 204, at 614-617; Clarke, *supra* n 119, at 861; Boas, Bischoff and Reid, *supra* n 201, at 21-22. See Chapter 1, Section 1.4.2.1. (text accompanying notes 151-161)

234 See *supra* Section 7.3.1.3.i.

235 See *supra* Section 7.3.1.3.ii and Section 7.3.1.4.

236 On the notable difference in the accessibility of the Nuremberg-era legislation and case law supporting JCE I and JCE II liability, on the one hand, and JCE III responsibility, on the other see Chapter 4, Section 4.2.3.2. (text accompanying notes 169-171)

237 See Chapter 1, Section 1.5.3. (text accompanying notes 248-254) *Milutinović et al.* Decision on Joint Criminal Enterprise, *supra* n 68, para 37.

238 See Chapter 4, Section 4.2.5.1 (text accompanying notes 253-259)

239 Ambos, *supra* n 28, at 174; Cryer *et al.*, *supra* n 75, at 360; Cassese, 'Amicus Curiae', *supra* n 175, at 323-324; H. Olásolo, 'Joint Criminal Enterprise and Its Extended Form: A Theory of Co-Perpetration Giving Rise to Principal Liability, a Notion of Accessorial Liability, or a Form of Partnership In Crime?', 20 *Criminal Law Forum* (2009), at 283-284; Jain, *supra* n 46, at 64; *The Prosecutor v. Šainović et al.* (IT-05-87-A), Judgment, Appeals Chamber, 23 January 2014, Partially Dissenting Opinion and Declaration of Judge Liu, paras 18-19.

240 See Chapter 4, Section 4.2.5.1. (text accompanying notes 260-270)

241 See Chapter 4, Section 4.2.5.2.

242 See Chapter 4, Section 4.3.

243 See Chapter 4, Section 4.3.3.1.

244 *Ibid.* (text accompanying notes 450-462) *Brđanin* Appeal Judgment, *supra* n 119, Separate Opinion of Judge Meron, paras 4-6.

physical perpetrators of the concerted crime.²⁴⁵ It is this unresolved feature of the ‘leadership-level JCE’ concept that could make its use as a form of co-perpetration responsibility contrary to the principle of culpability. To this end, Chapter 4 reviewed four possible solutions that can be endorsed to resolve this matter and bring the notion of JCE with no physical perpetrators in conformity with the culpability principle,²⁴⁶ two of which are reiterated immediately below.

It should be stressed that the above-said doctrinal problem that ‘external’ contributions to a common plan raise is by no means unique to the JCE doctrine. Indeed, since the doctrinal basis for the reciprocal imputation of acts – *viz.* the common plan – is the same for any theory of co-perpetration, Olásolo stressed that “any [...] form of co-perpetration requires, those who physically carried out the objective elements of the crime be among the co-perpetrators.”²⁴⁷ It was explained in Chapter 5 that the theory of co-perpetration based on joint control has solved this problem by merging with the notion of indirect perpetration based on organised structures of power, thus allowing the senior accused to be held responsible as (indirect) co-perpetrators of the concerted crime committed by the outsiders to the common plan.²⁴⁸ Indeed, as Weigend also observed, a confederate could contribute to a common criminal plan in a myriad of ways, one of which is by controlling the direct perpetrator through a hierarchical power apparatus: a paradigm that, if agreed upon by the ‘leadership-level’ accused as part of their plan, allows us to impute the acts of the physical perpetrators to the high-ranking accused who controlled the said hierarchical organization, and then – because of the common plan they shared – to all the other senior confederates.²⁴⁹ Chapter 4 explained that the same solution could also be adopted in the legal framework of a ‘leadership-level JCE’ and even noted a few judgments where this approach appears to have been implicitly used by the ICTY,²⁵⁰ yet it also stressed that the lack of customary basis for the construct of indirect perpetration through an organized structure of power makes this method problematic.²⁵¹ Adopting the narrowed definition of co-perpetration based on JCE and merging it with this concept of indirect perpetration in cases of leadership-level enterprises would be possible at the ICC, because the Rome Statute expressly recognizes the responsibility of a ‘perpetrator-behind-the-perpetrator’.²⁵² However, in view of the legality principle, this approach to ‘leadership-level’ JCEs could

not be applied in an *ad hoc* tribunal’s context:²⁵³ or, at least, not until a point of time, when it can be established that the recognition of the concept of perpetration through a fully responsible person in the Rome Statute, coupled with its consistent application in the ICC’s jurisprudence, has signalled the formation of a new customary rule of international criminal law. It is from that point onwards that a future *ad hoc* tribunal would be able to properly use this concept to link the ‘leadership level’ JCE to crimes committed by non-members of the common criminal plan. Until then, the most viable solution that was scrutinized in Chapter 4 is that of ‘inter-linked JCEs’:²⁵⁴ a construction that complies with both the legality and the culpability principles,²⁵⁵ although admittedly it is a less efficient method of linking the direct perpetrators to the ‘leadership level’ JCE members,²⁵⁶ so that the latter can be held liable as co-perpetrators of the former’s acts.

As a more general criticism that touches upon the issue of fairness, some scholars have argued that a subjective approach for differentiating between perpetrators and accessories to a crime, like the one embodied in the JCE doctrine, is irrational and leaving too much space for judicial discretion.²⁵⁷ Whatever the wisdom of suppressing the margin of judicial appreciation in the notoriously complex international trials may be, Ohlin has rightly pointed out that, from a normative perspective, the subjective approach to making the principal/accessory distinction provides more intuitive results in that:

[m]ental elements – especially volitional ones – represent the defendant’s desire to bring about a state of affairs in the world. As such, these volitional elements represent a moral choice, a decision for which agents will be called to account by their social communities and the criminal law. Volitional elements are the hallmarks of our rational agency and, by extension, responsibility and desert. As human agents in the world, there is much beyond our control, but our decisions are one unassailable exemplar of moral responsibility.²⁵⁸

Also, considering the analysis provided in Chapter 6, it is vastly exaggerated how abstract and susceptible to judicial bias the process of determining the accused’s intent is, compared to the analysis of whether his or her contribution to a crime was essential or not.²⁵⁹ A person’s intent may not always be directly stated, yet it can be inferred from his or her objective conduct – an assessment that we constantly perform in every-day life²⁶⁰ and is

²⁴⁵ See Chapter 4, Section 4.3.2.3. Ohlin, *supra* n 15, at 699; Cassese, *supra* n 72, at 174; Van Sliedregt, *supra* n 40, at 164.

²⁴⁶ See Chapter 4, Section 4.3.3.2.

²⁴⁷ Olásolo, *supra* n 6, at 294-295.

²⁴⁸ See Chapter 5, Section 5.4.1.2. (text accompanying notes 164-175)

²⁴⁹ T. Weigend, ‘Perpetration through an Organization: The Unexpected Career of a German Legal Concept’, 9 *Journal of International Criminal Justice* (2011), at 110-111.

²⁵⁰ *The Prosecutor v. Đorđević* (IT-05-87/1-A), Judgment, Appeals Chamber, 27 January 2014, para 169 (fn 504); *The Prosecutor v. Stakić* (IT-97-24-A), Judgment, Appeals Chamber, 22 March 2006, paras 68-70. See also Cassese, *supra* n 72, at 179; Olásolo, *supra* n 6, at 222.

²⁵¹ See Chapter 4, Section 4.3.3.2.iv.

²⁵² Article 25(3)(a), ICC Rome Statute, *supra* n 90; *Katanga and Chui* Decision on the Confirmation of Charges, *supra* n 77, paras 495-518.

²⁵³ See Chapter 4, Section 4.3.3.3.

²⁵⁴ See Chapter 4, Section 4.3.3.2.iii.

²⁵⁵ *Ibid.* (text accompanying notes 489-499) and Section 4.3.4. (text accompanying notes 567-569)

²⁵⁶ See Chapter 4, Section 4.3.3.2.iii. (text accompanying notes 500-502) Olásolo, *supra* n 6, at 199.

²⁵⁷ Chouliaras, *supra* n 53, at 577; Fletcher, G. P. *Rethinking Criminal Law*. Oxford: Oxford UP, 2000, at 658.

²⁵⁸ Ohlin, ‘Searching for the Hinterman’, *supra* n 53, at 336. In the same venue of thought, see also *Vasiljević* Appeal Judgment, *supra* n 30, Separate and Dissenting Opinion of Judge Shahabuddeen, para 32.

²⁵⁹ See Chapter 6, Section 6.3.

²⁶⁰ Ohlin, ‘Searching for the Hinterman’, *supra* n 53, at 335.

known in law as the doctrine of *dolus ex re*²⁶¹ – whereas the evaluation of how events would have unfolded in an imaginary world where one of many contributions to a crime does not take place would often be a highly speculative task.²⁶²

7.4. Co-perpetration responsibility in international criminal law: a single legal framework

When the line is drawn, and all the above findings of the assessment framework are taken into account, the conclusion that can be distilled here is that a revised, narrowed formulation of the JCE theory, which excludes its ‘extended’ variant, constitutes the approach to co-perpetration that: i) has a legal basis in international criminal law, capable of consolidating the case law of the ICC and the *ad hoc* tribunals; ii) is an effective legal tool for ascribing principal liability in the problematic context of mass, systemic criminality; and iii) conforms to the *nullum crimen sine lege* and *nulla poena sine culpa* principles, thus respecting the accused’s rights. The core rationale of this approach, its doctrinal nucleus, is expressed in the understanding that when a plurality of persons form a common plan to commit a crime and coordinate their contributions to this end, those who shared the group’s intent to commit the said crime are responsible as its co-perpetrators, irrespective of which one of them physically committed the group crime.²⁶³ It is, as scholars and practitioners have often explained, a subjective approach to co-perpetration responsibility, which focuses on the accused’s intent to differentiate between (joint) principals and accessories to a collective crime: *viz.* those who share the common intent to commit it and thus want this crime as their own are co-perpetrators, whereas those who only had knowledge of the plan and did not desire the commission of the concerted crime are accessories.²⁶⁴

Given that the ‘systemic’ type of JCE was found to be substantively akin to the ‘basic’ JCE form – in that they both have the same objective elements²⁶⁵ and, on the subjective plane, both require that the accused shares the common intent to commit the ‘core’ crimes

of the said criminal enterprise²⁶⁶ – it is unnecessary for the purposes of the present section to include this dichotomy here.²⁶⁷ For this reason, the theoretical framework of co-perpetration responsibility that is proposed here is in essence a faithful restatement of the ‘basic’ variant of JCE. Each of its constituent elements was defined and further examined in much detail in Chapter 3, so they will be summarily stated here.²⁶⁸ In particular, the definition of co-perpetration that should be commonly used in international criminal law requires the following, objective and subjective, legal elements:

- i) A plurality of two or more persons;
- ii) A common plan that aims at or involves the commission of a crime;
- iii) A coordinated, significant contribution by the accused to the effectuation of the common plan; and
- iv) The accused shares the common, direct intent to commit the concerted crime.

The core definitional criterion of this construction of co-perpetration responsibility is thus the requirement that the accused must share *the same purposeful intent* to commit the group crime as his confederate(s) in the said plan.²⁶⁹ It is a requirement that presupposes the existence of a close solidarity amongst the co-perpetrators, meaning that they must have a virtually identical understanding of the content of the criminal plan and the steps each one of them has to take in order to ensure its successful execution. Working in close cooperation to this end, each one of them wants to commit the agreed crime in concert with the other participant(s) in the criminal enterprise. It is, as Ohlin has aptly noted, a situation where there is, in fact, a single intent that is “exhibited by different agents”:²⁷⁰ this is what the phrase ‘sharing a common purpose’ truly means.²⁷¹ Naturally, where the concerted crime requires a *dolus specialis*, such as the crime of genocide, the subjective element of co-perpetration liability will require that the confederates: i) share a direct intent/*dolus directus*

261 C.-F. Stuckenberg, ‘Problems of ‘Subjective Imputation’ in Domestic and International Criminal Law’, 12 *Journal of International Criminal Justice* (2014), at 314.

262 See Chapter 6, Section 6.3.1.

263 See Chapter 3, Section 3.5.2. and Chapter 2, Section 2.3.3.3.ii.

264 *Tadić* Appeal Judgment, *supra* n 30, paras 191, 229; *Furundžija* Trial Judgment, *supra* n 30, para 252; *Vasiljević* Appeal Judgment, *supra* n 30, Separate and Dissenting Opinion of Judge Shahabuddeen, para 32; *The Prosecutor v. Popović et al.* (IT-05-88-A), Judgment, Appeal Chamber, 30 January 2015, para 1369; *Lubanga* Decision on the Confirmation of Charges, *supra* n 21, paras 323, 328-330.

265 See Chapter 3, Section 3.4.1. *Tadić* Appeal Judgment, *supra* n 30, para 227; *The Prosecutor v. Stanišić and Simatović* (IT-03-69-A), Judgment, Appeals Chamber, 9 December 2015, para 77.

266 See Chapter 3, Section 3.4.2.1. and Section 3.4.2.2. See also *Milutinović et al.* Decision on Joint Criminal Enterprise, *supra* n 68, Separate Opinion of Judge David Hunt on Challenge by Ojdanić to Jurisdiction *Joint Criminal Enterprise*, para 8; *The Prosecutor v. Nuon Chea and Khieu Samphan* (002/19-09-2007/ECCC/TC), Case 002/01 Judgment, Trial Chamber, 7 August 2014, para 694; *The Prosecutor v. Krnojelac* (IT-97-25-T), Judgment, Trial Chamber, 15 March 2002, para 78; *Krnojelac* Appeal Judgment, *supra* n 198, paras 84, 109; *Kvočka et al.* Trial Judgment, *supra* n 30, paras 285-286; *Kvočka et al.* Appeal Judgment, *supra* n 30, para 110. See also Olásolo, *supra* n 6, at 171, 173; A. Cassese, *International Criminal Law* (2nd edn, Oxford: Oxford UP, 2008), at 196.

267 Indeed, as was explained in Chapter 3, the only material difference between the ‘basic’ and ‘systemic’ variant of JCE pertains to the factual circumstances in which they are applied, which does introduce certain variations in the manner in which the parameters of the common plan are defined and inferences about the accused’s shared intent can be made: *i.e.* evidentiary issues, which do not present differences in the theoretical framework of these two variants of the JCE doctrine. See Chapter 3, Section 3.4.2.2. (text accompanying notes 261-268)

268 See Chapter 3, Section 3.4.1. and Section 3.4.2.1.

269 See Chapter 3, Section 3.4.2.1.

270 Ohlin, ‘Searching for the Hinterman’, *supra* n 53, at 337.

271 See Chapter 3, Section 3.4.2.1. (text accompanying notes 244-247)

in the first degree to perpetrate the underlying genocidal act (*e.g.* murder); and ii) also share the special genocidal intent required for the commission of that crime.²⁷²

On the objective side, the legal elements of this approach to co-perpetration are just as demanding. The ‘common plan’ element requires that the confederates form a plan/agreement that is inherently criminal in that it is specifically directed at the commission of a crime, either as its final objective, or as the agreed means to achieve an otherwise legitimate goal.²⁷³ This is a narrow definition that flows naturally from the stringent subjective element of the proposed construction of co-perpetration, and it ensures that this form of individual responsibility is not excessively applied to persons who participate in non-criminal plans that simply entail risks of the commission of crimes.²⁷⁴ This notwithstanding, it should be noted that a common plan can materialise extemporaneously and it may also grow to include criminal means which were not initially intended by the confederates.²⁷⁵ Turning to the ‘plurality of persons’ requirement, co-perpetration responsibility requires that the accused forms the said common plan with at least one other person, and it is not necessary that they be organized in any military, administrative, or political structure.²⁷⁶ Crucially, however, the physical perpetrator of the concerted crime(s) must be among the said ‘group of persons’, *i.e.* the co-perpetrators: if he or she is not, then the principles of derivative liability and individual autonomy require that a link of imputation has to be established through one of the above-stated techniques, in order to hold the confederates responsible as co-perpetrators of the crimes committed by the outsider to the common plan.²⁷⁷ Finally, regarding the ‘participation’ element, to qualify as a joint perpetrator of the collective crime, the accused’s contribution to the said common plan need not constitute any of the *actus reus* element of its agreed crime, but may take any other (indirect) form.²⁷⁸ It can be a positive act or an omission,²⁷⁹ and it may take place both at the preparatory or at the execution stage of the common plan.²⁸⁰ Importantly, the said contribution does not have to be a *sine qua non* for the effecting of the common plan but, at

the very least, it must have a significant effect on the commission of the concerted crime.²⁸¹ There is no exact formula regulating what constitutes a ‘significant’ contribution: it is less than ‘essential’ and more than ‘*de minimis*’, but ultimately this determination must be made on a case-by-case basis, taking into account various relevant variables.²⁸²

Adopting the above construction of co-perpetration responsibility would fit squarely in the overall framework of modes of liability applicable in an *ad hoc* tribunal’s model, seeing as it essentially amounts to a contraction and revision of the ICTY/R’s account of the customary law on JCE. Admittedly, however, its implementation in the ICC Rome Statute can raise some additional considerations, noting especially the definition of aiding and abetting responsibility in Article 25(3)(c) RS. In particular, the problem with this provision is that it defines the aider and abettor as a person who “for the purpose of facilitating the commission of a crime” assists in its commission: a *mens rea* standard that has not yet been interpreted in the topical case law of the ICC and that has caused much disagreement in the commentariat. Indeed, scholars have widely explained that there are several reasonable interpretations of this clause,²⁸³ namely that it either: i) requires that the aider and abettor purposefully wills the commission of the offence by the physical perpetrator,²⁸⁴ or ii) requires only that the aider and abettor *intends to assist* in the crime of another person, meaning that – in relation to the criminal consequence – it would suffice if he merely has *knowledge* of the said crime but does not share the perpetrator’s intent to commit it.²⁸⁵ The latter interpretation would by and large align Article 25(3)(c) RS with the customary definition of aiding and abetting adopted in the ICTY/R’s jurisprudence, which has also affirmed that the aider and abettor must “have intended the facilitation of the commission of [the] crime”,²⁸⁶ but has consistently affirmed

²⁷² *Ibid.*, (text accompanying notes 232-238)

²⁷³ See Chapter 3, Section 3.4.1.2. (text accompanying notes 110-113)

²⁷⁴ For a discussion of this problem in the framework of the theory of co-perpetration based on joint control, see Chapter 5, Section 5.4.1.1.ii. (text accompanying notes 137-140) and *supra* Section 7.3.3.1.

²⁷⁵ See Chapter 3, Section 3.4.1.2. (text accompanying notes 114-119) and *supra* Section 7.3.2.2. (text accompanying notes 206-210)

²⁷⁶ See Chapter 3, Section 3.4.1.1.

²⁷⁷ See *supra* Section 7.3.3.2. (text accompanying notes 242-256), and Chapter 4, Section 4.3.3.1. and Section 4.3.3.2.iii and iv.

²⁷⁸ See Chapter 3, Section 3.4.1.3.

²⁷⁹ *Ibid.* (text accompanying notes 191-194)

²⁸⁰ *Ibid.* (text accompanying notes 195-209)

²⁸¹ *Karadžić* Trial Judgment, *supra* n 22, para 565; *Popović et al.* Appeal Judgment, *supra* n 264, para 1378; *Stanišić and Simatović* Appeal Judgment, *supra* n 265, paras 45, 83; *Krajišnik* Appeal Judgment, *supra* n 197, paras 215, 662, 675, 695-696; *Nizeyimana v The Prosecutor* (ICTR-00-55C-A), Judgment, Appeals Chamber, 29 September 2014, para 325; *Ndahimana v. The Prosecutor* (ICTR-01-68-A), Judgment, Appeals Chamber, 16 December 2013, para 198. Chapter 3, Section 3.4.1.3. (text accompanying notes 165-175)

²⁸² Chapter 3, Section 3.4.1.3. (text accompanying notes 176-190)

²⁸³ See *e.g.* H. Olásolo and E. Rojo, ‘Forms of Accessorial Liability under Article 25(3)(b) and (c)’, in C. Stahn (ed), *The Law and Practice of the International Criminal Court* (Oxford: Oxford UP, 2015), at 584-585; N. Farrell, ‘Attributing Criminal Liability to Corporate Actors: Some Lessons from the International Tribunals’, 8 *Journal of International Criminal Justice* (2010), at 882; D. Scheffer, ‘Brief of David J. Scheffer, Director of the Center for International Human Rights, as Amicus Curiae in Support of the Issuance of a Writ of Certiorari, (19 May 2010)’ filed in *Presbyterian Church of Sudan et al. v. Talisman Energy Inc.*, Supreme Court of the United States, at 14-15.

²⁸⁴ Olásolo and Rojo, *supra* n 283, at 584; Cassese, *supra* n 72, at 195; Ambos, *supra* n 28, at 152.

²⁸⁵ Scheffer, *supra* n 283, at 4-5, 19, 22; D. Piragoff and D. Robinson, ‘Article 30 Mental Element’, in Triffterer, *supra* n 27, at 855. See also *The Prosecutor v. Taylor* (SCSL-03-01-A), Judgment, Appeals Chamber, 26 September 2013, paras 449, 451.

²⁸⁶ *Karadžić* Trial Judgment, *supra* n 22, para 577. See also *The Prosecutor v. Simić* (IT-95-9-A), Judgment, Appeals Chamber, 28 November 2006, para 86; *Popović et al.* Appeal Judgment, *supra* n 1732; *The Prosecutor v. Blaškić* (IT-95-14-A), Judgment, Appeals Chamber, 29 July 2004, para 50; *Mrkšić and Šljivančanin* Appeal Judgment, *supra* n 22, para 159.

that the accused need only have knowledge in relation to the said crime.²⁸⁷ Put simply, the accused is required to intend that his contribution serves to facilitate the commission of a crime, though he need only have knowledge/be aware of its essential elements and does not have to purposefully will its commission. Endorsing the herewith proposed construction of co-perpetration responsibility in the ICC's case law, would require the Court to define aiding and abetting liability under Article 25(3)(c) RS by using this second, knowledge-based interpretation framed above. Accordingly, co-perpetrators are those participants who share the common purpose to commit a crime, whereas accessories are those, whose purpose is to *facilitate* the commission of a crime they only have *knowledge* of (but do not share the direct intent to commit). Otherwise, if a direct intent standard is used for Article 25(3)(c) RS responsibility, it would become impossible to distinguish between co-perpetrators and accessories to a collective crime under the definition of co-perpetration proposed here.

7.5. Conclusion

Beyond researching statutory provisions, venerable jurisprudence and legal doctrine, the quest for formulating a framework of co-perpetration responsibility under international criminal law is also an expression of how we view this field of law and what our aspirations for it truly are. Is 'international criminal law' merely a catch-all phrase used to describe a disparate collection of, at times brazenly conflicting, laws and jurisprudence from the various international courts and tribunals, or is it a distinct legal order that is gradually developing its own, coherent body of substantive laws? For those who subscribe to the latter proposition, as this author does, the urge to resist the ongoing fragmentation of substantive international criminal law, and plea for coherence and continuity in the bipolar model of *ad hoc* and ICC-based justice is only natural. The parallel existence of two conflicting theories of, for the present purposes, co-perpetration responsibility thus becomes unacceptable and the search for a uniform definition of this mode of liability: imperative. This is not to say that such efforts to promote uniformity should make us blind to evident differences that certainly do exist in the applicable laws of these courts and tribunals. Rather, the motion here is that in those instances where the law leaves enough space for interpretation, that space should be used to reconcile, and not segregate, the practice of the ICC and the *ad hoc* tribunals. The law on co-perpetration liability provides an example where the perceived fissure between the Rome Statute and international custom could be closed, and harmony between the two may indeed be achieved.

The difficulty with defining generic, open-textured legal notions – like co-perpetration responsibility – under international criminal law, is that they often have a different meaning to scholars and practitioners from different legal systems, which is why constructing a definition to be used at the international tribunals may sometimes feel like building the Tower of Babel.

²⁸⁷ *Tadić* Appeal Judgment, *supra* n 30, para 229; *Šainović et al.* Appeal Judgment, *supra* n 239, para 1649; *Mrkšić and Šljivančanin* Appeal Judgment, *supra* n 22, paras 49, 159; *The Prosecutor v. Lukić and Lukić* (IT-98-32/1-A), Judgment, Appeals Chamber, 4 December 2012, para 428.

It is important that we restrain the natural propensity to define such notions through the prism of our own national legal training and recognize the specificities of international prosecutions. International criminal law is a distinct legal order dealing with mass, systemic criminality that is rarely observed in a national context, and that raises some unique challenges, which cannot be dealt with by simply importing domestic views on individual criminal responsibility in this field. In this sense, Cryer rightly points out that international criminal law needs *international* criminal lawyers, who:

seek to develop their own understanding of attributability that takes into account the specific nature of the standard case of international [...] crimes, that of their systemic commission, but is emancipated from domestic approaches that have not been developed from the start to include large scale crimes rather than being built upon to encompass them.²⁸⁸

Thus, as a general point of departure, the concept of individual responsibility for international crimes ought to be viewed in a manner that is sensitive to the peculiarities of this field of law, even if it is alien to the particular practice followed in our own domestic justice system.

The path forward for co-perpetration responsibility in international criminal law, is the path of judicial dialogue (not “judicial turf wars”),²⁸⁹ of pursuing continuity and cohesion (not disruption and fragmentation), of weighing the challenges of international prosecutions, while setting aside affinities to specific domestic approaches to liability. The legal framework of co-perpetration, which the current book has put forward, endeavours to follow this path. It finds a legal basis in both the ICC and the *ad hoc* model of criminal justice, provides an effective tool for ascribing principal responsibility in the context of mass criminality, and respects the rights of the accused under the legality and culpability principles. It presents a *sui generis* definition of co-perpetration that maintains a spirit of continuity – combined, naturally, with refinement – between the various stages in the development of international criminal law: from nascence (the Nuremberg-era trials), to adolescence (the UN Tribunals and early ICC jurisprudence), to its future maturity into full adulthood.

²⁸⁸ Cryer, *supra* n 5, at 280.

²⁸⁹ Higgins, *supra* n 82, at 792.

THEORIES OF CO-PERPETRATION IN INTERNATIONAL CRIMINAL LAW

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Summary

The proper construction of co-perpetration responsibility in international criminal law has become one of the most enduring and divisive controversies in this field. It has caused a split in the modern international courts and tribunals' case law, with the UN *ad hoc* Tribunals endorsing the notion of joint criminal enterprise ('JCE') and the International Criminal Court adopting the alternative joint control over the crime ('joint control') concept to define the legal elements of this mode of liability. As a result, at the expense of coherence and uniformity, international criminal law nowadays hosts the parallel existence of two competing and materially distinct theories of co-perpetration.

This book seeks to reconcile the topical jurisprudence of the ICTY/R and the ICC by providing a definition of joint commission liability that can be uniformly applied in the two justice models that these institutions represent: the *ad hoc*- and the treaty-based (Rome Statute) model. Thus, the main research question here is: what should be the legal framework of co-perpetration responsibility in international criminal law? To provide an answer, an assessment framework is adopted (discussed further below), pursuant to which this study carries out a comprehensive analysis and appraisal of the various constructs that the international courts and tribunals have used to define the liability of persons who commit a crime jointly with others: from its early formulations in the post-World War II trials of Nazi war criminals, to its refinement and fragmentation in the modern jurisprudence of the ICTY/R and the ICC. Regarding specifically the JCE and joint control doctrines, it is submitted that a careful perusal and, where necessary, refinement of their constitutive elements, followed by a critical assessment of their merits and legal foundations, is required to understand their strengths and deficiencies, and thereafter propose a framework of co-perpetration that would consolidate the international jurisprudence on co-perpetration responsibility. Thus, rather than seeking to suggest some novel construction of co-perpetration that would further fragment the international criminal law on this issue, the goal of this book is to systematically review JCE and the joint control theory, identify and address ambiguities and deficiencies in their respective legal elements, and, based on the adopted methodology, determine which one of the thus refined notions should be used to define co-perpetration responsibility under international criminal law.

Chapter 1 introduces the difficulties involved in ascribing criminal responsibility in the context of mass criminality and provides a first look at the two theories that the modern international courts and tribunals have developed to distinguish between (joint) principals and accessories to collective crime(s): *viz.* the theory of co-perpetration based on joint criminal enterprise and the theory of co-perpetration based on joint control over the crime. The chief predicament of trying international crimes is that they usually result from the

combined actions of a vast multitude of individuals, who function within and through complex networks of military and political organizations. The larger the scale of the charged crime, the more the persons involved in its orchestration, coordination and execution, the more elusive the link becomes between individual acts and the resulting crime. To complicate the matter further, in such a context, those who we instinctively consider to be the most culpable for the commission of mass international crimes are usually not the physical perpetrators, but senior state officials who were far away from the crime scene. This sort of criminality – which is rarely seen in domestic criminal law proceedings but is the norm in international criminal law – raises many practical and doctrinal considerations that cannot be easily addressed using traditional notions of individual criminal responsibility. Indeed, the sentiment that, in view of their mass scale and systemic nature, international crimes could not be effectively tried using traditional modes of liability is as old as the field of international criminal law and has prompted the international courts and tribunals, from Nuremberg to The Hague, to construct some novel, special concepts of criminal responsibility that are better equipped to deal with the said predicaments of prosecuting mass war criminality.

The JCE and the joint control doctrine are two such concepts. Applied, respectively, by the UN *ad hoc* Tribunals and the ICC, they constitute two materially different approaches to holding a person liable as a (joint) perpetrator for crimes, in the commission of which he did not directly participate. This Chapter offers a brief overview of the legal frameworks and underlying rationale of these two theories, following which it sketches out the controversial aspects concerning their merits and basis in international criminal law that are studied subsequently in the book. JCE is defined as a form of co-perpetration that applies when a plurality of individuals share a common criminal purpose and act in a coordinated manner to commit its underlying crime. It is a manifestation of the subjective approach to co-perpetration because it puts the emphasis on the *mens rea* of the participants in the collective crime to demarcate between joint perpetrators and accessories to it: *viz.* those who share the common intent to commit the concerted crime are co-perpetrators in a JCE, whereas those who merely have knowledge of the plan are accessories (aiders and abettors) to the crime. By contrast, the theory of co-perpetration based on joint control is viewed as a material-objective approach to co-perpetration liability that relies on the intensity of the accused's contribution to the group crime as the litmus tests for distinguishing between (joint) principals and accessories: *viz.* principals are only those individuals who provide an 'essential' contribution to the effecting of the plan, without which the plan would fail and the crime would not be committed.

Both JCE and the joint control doctrine have been subjected to various kinds of criticism, ranging from disputes over the precise scope and meaning of some of their legal elements, to challenges to the legal basis and overall merits of these two doctrines. This chapter provides a brief first look at these issues that will be thoroughly discussed throughout the rest of the book and sets out the order in which the analysis will take place. This

comprehensive review and appraisal of the JCE and the joint control doctrine, combined with a research on the jurisprudential origins of the notion of joint principal liability in World War II-era documents and case law, will provide the necessary research to propose a refined legal framework of co-perpetration responsibility under international criminal law. For this purpose, an assessment framework is put forward, establishing three criteria that the proposed formulation of co-perpetration has to satisfy: it must i) have a legal basis in international criminal law; ii) provide an effective mechanism for a fair allocation of principal responsibility in the context of mass criminality; and iii) respect the rights of the accused. These requirements are derived from the legal principles and considerations that the international courts and tribunals have adhered to when adopting the JCE and the joint control theories, thus ensuring that the conclusions and recommendations made here are relevant for the practice of these institutions. Specifically, the ‘legal basis’ criterion requires that the proposed formulation of co-perpetration is supported by the sources of law applicable at the *ad hoc* Tribunals and at the ICC, taking into account the divergent approaches that these courts have developed to the said legal sources. The ‘effectiveness’ criterion requires that the proposed definition of co-perpetration responsibility enables courts to effectively deal with the aforesaid exigencies of international prosecutions: *i.e.* that they are usually concerned with crimes that are the product of manifold, convoluted interactions by a multitude of individuals, the personal contributions of whom can be extremely difficult to discern (what Cassese called ‘the fog of collective criminality’),¹ as well as that they traditionally involve an element of remoteness, whereby the most culpable participants in a mass crime are geographically removed from the crime scene. The ‘fairness’ criterion requires that the proposed construction of co-perpetration must, next to being an effective tool for allocating individual responsibility in the context of mass criminality, respect the basic tenets of criminal justice, including the principles of legality (*nullum crimen sine lege*) and personal culpability (*nulla poena sine culpa*).

Chapter 2 thoroughly examines the formulation and evolution of the first legal concepts that were devised in the aftermath of World War II to ascribe responsibility for the crimes of the Nazi regime: *i.e.* conspiracy, membership in a criminal organization and common purpose/design liability. They have been incredibly difficult to define and – due to varying interpretations in the Nuremberg-era documents and case law – continue to cause controversy amongst international criminal lawyers. Far from being antiquated concepts that have no bearing on the present-day debates on individual responsibility for joint perpetration, these constructs could help us determine whether and how the underlying principles of co-perpetration liability were defined in the post-World War II legislation and jurisprudence. The debates surrounding their adoption in case law from that period expose the challenges that the prosecution of international crimes involves and that have prompted the modern international tribunals to formulate complex forms of criminal responsibility,

such as the JCE and joint control doctrines. They ought to be reviewed not only for the sake of identifying the historical origins of co-perpetration liability in this field of law, but also because of never-ending debates on how each one of them relates to the contemporary JCE doctrine, as well as because of more recent arguments that the (joint) control over the crime theory could also be discerned in this Nuremberg-era jurisprudence.

Reviewing the Nuremberg-era documents and case law reveals that an evolutionary pattern can be discerned in the three stages of development that the conspiracy and criminal membership concepts went through: *i.e.* i) their original formulation in Bernays’ memorandum and the ensuing US inter-departmental debates, ii) the preparatory works on their inclusion in the Charter of the International Military Tribunal in Nuremberg and iii) the Nuremberg (and the Tokyo) Tribunal’s judgment. Both conspiracy and membership in a criminal organization were originally defined in an excessively broad manner that proposed their use both as crimes in their own right, and as modes of liability. The legal frameworks that Bernays initially proposed for these two constructs in his memorandum were so loose and discordant with the basic principles of complicity and personal culpability, that they quickly drew strong criticism, both from within the US administration and from the European Allies. They underwent a process of gradual refinement that started with the US inter-departmental reviews of Bernays’ memorandum, continued through the heated debates among the Allies at the London Conference (leading to their adoption in the IMT Charter), and their ultimate interpretation and application by the International Military Tribunal in Nuremberg. At the end of this process of refinement, the conspiracy notion was recognized strictly as an inchoate crime and only in relation to the commission of crimes against peace, thus putting an end to the original idea that forming an agreement to commit a crime can, by itself, also be used as a mode of liability for ascribing criminal responsibility for the actual crimes resulting from the execution of the said agreement. As for the criminal membership notion, the IMT confirmed its nature as a substantive crime – and not a mode of liability – and emphasized that it requires proof that the accused was a voluntary member of an organization that had criminal goals, as well as that he had knowledge of them. Neither conspiracy, nor the concept of membership in a criminal organization could thus be said to constitute an early formulation of co-perpetration liability under international criminal law.

This chapter also reviews in detail the notion of common purpose/design responsibility, which can be traced to some of the earliest memorandums that were exchanged among the Allies towards the end of World War II. The Yalta and San Francisco memorandums expressly distinguished it from the crime of conspiracy and explained that responsibility for ‘joint participation in a broad criminal enterprise’ is premised upon ‘the rule of liability [...] that those who participate in the formulation and execution of a criminal plan involving multiple crimes are jointly liable for each of the offenses committed and jointly responsible

¹ A. Cassese, “Amicus Curiae Brief of Professor Antonio Cassese and Members of the Journal of International Criminal Justice on Joint Criminal Enterprise Doctrine,” *Criminal Law Forum* 20.2-3 (2009), at 302.

for the acts of each other.’² Subsequent discussions between the Allies at the London Conference led to the inclusion of ‘common plan’ liability in the last sentence of Article 6 IMT Charter (later also mirrored in Article 5 IMTFE Charter), the precise meaning of which was stated by the International Military Tribunal, which defined it as a form of responsibility of individuals participating in the execution of common plan and distinguished it from the crime of conspiracy. This finding of law was then also adopted by the International Military Tribunal for the Far East and was cited and further developed by the Military Tribunals in Nuremberg (‘NMTs’) into what came to be known as the notion of ‘common design’. It was defined as a mode of liability that, in line with the IMT Judgment, was applicable to all international crimes and was considered to be premised on the principle that ‘those who take part in a common design to commit an offence which is carried out by one of them are all fully responsible for that offence in the eyes of the criminal law.’³ This mode of liability was also applied in many of the smaller zonal trials that were conducted by the Allies’ courts in occupied Germany, operating under the authority of the Allied Control Council Law No. 10, Article II(2)(d) of which listed criminal responsibility for individuals ‘connected with plans or enterprises involving [a crime’s] commission’.

Although the jurisprudence from that turbulent era often lacked the detail, structure and coherence of the modern international tribunals’ case law, a systematic study of the available documents and judgments reveals that the underlying rationale of the common purpose/design concept places it in the ambit of co-perpetration liability. The courts used it to mutually attribute to each participant in a common criminal plan the acts of his confederates in it, so they could all be held *fully and equally* liable for the group crime, even though only some of them physically perpetrated it. In this sense, the Nuremberg-era ‘common purpose/design’ concept constitutes an embryonic formulation of co-perpetration responsibility in international criminal law. The emphasis fell on the accused’s intent to commit the concerted crime: on him sharing the common purpose to achieve the criminal goal. The legal elements of this mode of liability that could be distilled from the examined jurisprudence are: i) the existence of a criminal plan, which is common to a plurality of individual; ii) the accused, with his specific conduct, contributed to the effecting of the said plan; and iii) the accused shared the common purpose to commit the concerted crime, in that he contributed to it ‘deliberately’ and ‘for the purpose’ of committing the crime.

Chapter 3 offers a renewed look at the theoretical framework of the modern JCE theory, focusing on the most problematic and unresolved aspects of its objective and subjective legal elements. The ICTY *Tadić* Appeal Judgment, which presents the theory’s *locus*

classicus in modern international criminal law, forms a starting point of the analysis here and serves to introduce the legal basis and nature of the JCE doctrine, as well as the reasons behind its adoption in the ICTY’s early case law. To this end, the *travaux préparatoires* of Article 7 ICTY Statute and the often-overlooked ICTY *Furundžija* Trial Judgement – which preceded the *Tadić* Appeal Judgment, but is actually the first ICTY judgment to elaborate JCE’s underlying rationale – are also reviewed to provide a necessary context against which *Tadić*’s findings on the scope and nature of JCE responsibility can be better appreciated.

The *Tadić* Appeals Chamber’s core findings on JCE’s doctrinal framework – *viz.* its separation in three distinct categories and the general statement of their objective and subjective elements – have been consistently affirmed in the ICTY and ICTR’s subsequent case law. There are three categories of JCE, commonly known as the ‘basic’ (JCE I), the ‘systemic’ (JCE II) and the ‘extended’ (JCE III) category, that have the same objective legal elements: i) a plurality of individuals; ii) a common plan, design or purpose that amounts to or involves the commission of crimes; and iii) the accused person’s contribution to the said plan. As for their subjective legal elements, JCE I requires that the accused shares a common intent with the other JCE participants to commit the concerted crime, while JCE II – which applies in cases where the common criminal purpose is ‘institutionalized’ in that it takes place in a system of ill-treatment (e.g. a concentration camp) – requires knowledge of the nature of the system and intent to further its criminal purpose. As for JCE III, it allows ascribing co-perpetration responsibility for crimes that fall outside the scope of the common purpose but are a natural and foreseeable consequence of its execution. A JCE participant could be held responsible for such an excess crime if it was *foreseeable* that such a crime may be perpetrated in the execution of the said common plan and he *willingly took that risk* by continuing his participation in the plan.

Notwithstanding the consistency in the UN *ad hoc* Tribunals’ jurisprudence on the above statement of the JCE theory, there are many aspects of the exact scope of each of JCE’s constitutive elements that were left unaddressed in the *Tadić* Appeal Judgment and were subjected to further elaborations in the Tribunals’ post-*Tadić* jurisprudence, with some issues remaining unresolved to present date. Thus, although *Tadić* provides the basis of the research contained in this chapter, its main objective is to thoroughly examine how each element of JCE responsibility has been refined in the ICTY/R’s jurisprudence, identify ambiguities and inconsistencies in it, and seek to resolve them. The goal is, thus, to build a most comprehensive and up-to-date account JCE’s constituent elements, paramount to understanding how this theory functions in practice and where its conceptual problems lie. Some areas where the *ad hoc* Tribunals’ JCE case law has been incoherent or ambiguous, thus prompting criticism and varying interpretations in the commentariat, include the requisite intensity of the JCE accused’s contribution and the stage at which it has to be provided, the standard of foreseeability established under JCE III liability, the precise meaning of JCE II’s subjective element and whether it requires the accused to directly intend the crimes of the system of ill-treatment. These and other such unresolved (or inconsistently defined) aspects of JCE’s framework are addressed in detail in this part.

² Memorandum for the President, Subject: Trial and Punishment of Nazi War Criminals, 22 January 1945, re-printed in B. Smith, *The American Road to Nuremberg: The Documentary Record, 1944-1945* (Stanford: Hoover Institution, 1982), at 120. See also *Memorandum of Proposals for the Prosecution and Punishment of Certain War Criminals and Other Offenders*, 25-30 April 1945, re-printed in *Ibid.*, at 165-166.

³ UN War Crimes Commission, *Law Reports of Trials of War Criminals*, Vol. XV (London: Published for the United Nations War Crimes Commission by His Majesty’s Stationary Office, 1949), at 96.

The second part of this chapter is dedicated to appraising the nature of JCE responsibility and how it relates to the Nuremberg-era concepts of conspiracy, membership in a criminal organization and common design responsibility. The definition of JCE as a form of co-perpetration continues to be challenged, both in academia and in the UN Tribunals' practice, by claims that it is in fact a concept equivalent to conspiracy and criminal membership, which is why it should suffer the same fate of rejection from modern international criminal law. The two basic questions that are addressed here are thus: i) what, if any, is the relation of conspiracy and membership in a criminal organization to JCE; and ii) given that the *ad hoc* Tribunals regard it as analogous to the 'common design' notion, is JCE correctly identified as a theory of co-perpetration, or is it inherently a mode of accessory liability? Regarding the first question, it is submitted that even when JCE is compared to the most expansive (Bernays') definition of conspiracy and criminal membership (that viewed these notions also as modes of liability), there are a number of important differences in their legal frameworks that make them materially distinct from one another. As for the second question addressed in this part, it is shown that the legal framework of the Nuremberg-era 'common purpose/design' concept can nowadays indeed be easily discerned in the 'basic' and 'systemic' JCE forms. To be sure, some evolutionary steps, prompted by doctrinal refinement and modern interpretation, were taken, yet this does not detract from the conclusion that JCE I/JCE II responsibility is, in its essence, a faithful restatement of the notion of 'common purpose/design'. Considering that the analysis in Chapter 2 concluded that the latter concept constitutes a primordial definition of co-perpetration liability in international criminal law, it is only natural that, as its successor, JCE (in its 'basic' and 'systemic' variant) is constructed as a form of joint commission. The 'extended' form of JCE, however, merits a separate analysis on this point, conducted in the next chapter of this book.

Chapter 4 addresses two major controversies over the JCE theory that continue to divide the minds of scholars and practitioners, prompting some to challenge the merits of this notion and call for its rejection in international criminal law: *i.e.* i) the customary law status of JCE, and in particular the doctrine's 'extended' variant; and ii) the law on incurring JCE responsibility for crimes committed by non-members of the enterprise.

The disputed legal basis of JCE III, as well as the nature of this mode of liability, are examined in the first part of this chapter. A two-pronged analysis is carried out, the first step in which examines the notion of customary international law, reviews the two techniques for identifying the formation of custom applied by the International Court of Justice and, thereafter, appraises the methodology that the UN *ad hoc* Tribunals have used to affirm the customary basis of the JCE theory. Based on this research, and the earlier analysis conducted in Chapter 2, it is concluded that the 'basic' and 'systemic' forms of JCE are established in customary international law. This conclusion, however, cannot be reached for the theory's 'extended' category. After conducting a renewed analysis of the Nuremberg-era cases that were cited in *Tadić* to support JCE III responsibility, supplemented by an additional

appraisal of unexamined post-World War II documents and case law, it is concluded that there is very limited and sporadic support for the idea of ascribing 'common purpose/design' liability for incidental crimes. Moreover, in the few documents that did contemplate such a notion, its legal framework differed in one important aspect from the modern JCE III theory, as elaborated by the *ad hoc* Tribunals. Thus, considering also the argument that due to their nature these sources should be given a lesser evidentiary value for determining the formation of an international custom, it is concluded that the 'extended' JCE variant lacks a basis in customary international law. As for the nature of this form of liability, this study asserts that the lack of a common plan/agreement *vis-à-vis* the additional crimes of the enterprise and the legal gap that arises between the intent of the JCE III accused (*dolus eventualis*) and crimes that have a more stringent *mens rea* element, makes the use of JCE III as a form of co-perpetration liability conceptually problematic and inconsistent with the *nulla poena sine culpa* principle. The only viable solution to this problem is to define JCE III as a mode of *accessorial* liability. Doing so allows to adequately deal with the lack of a doctrinal basis for reciprocal imputation of the unconcerted crimes of the enterprise, as well as with the fact that the accused may not satisfy the requisite *mens rea* of these crimes.

The second part of this chapter reviews the Tribunals' controversial law on ascribing JCE liability for crimes committed by persons who are not members of the said JCE: *viz.* the notion of JCE with no physical perpetrators ('leadership level JCE'). It is demonstrated that its adoption by the UN *ad hoc* Tribunals has come amidst a jurisprudential chaos on this point. The *Tadić* Appeals Chamber did not actually address this matter and in several of the earliest post-*Tadić* cases the chambers did in fact hold that for JCE liability to arise, the physical perpetrators of the concerted crime *have to be* members of the enterprise, sharing its common criminal purpose. The subsequent advent of the ICTY's first cases against relatively senior accused saw some chambers simply ignore this finding (the *Krstić* trial) and others expressly rejected it (the *Krajišnik* trial). The matter was put to rest by the *Brđanin* Appeals Chamber, which upheld the notion of JCE with no physical perpetrators but, critically, declined to enter a finding on whether this manifestation of the JCE doctrine can still be qualified as a form of co-perpetration liability. This part was later ignored by the Appeals Chamber in *Krajišnik* and all the most recent ICTY cases, which have come to establish – without providing any reasoning or doctrinal elaboration to this end – that JCE at the leadership level is a form of co-perpetration. This study has asserted that this conclusion is doctrinally inappropriate because when the JCE crimes are committed by an outsider to the common criminal plan or agreement, his acts fall outside the circle of reciprocal imputation that this plan/agreement constitutes, thereby making it impossible to declare the JCE participants liable *as co-perpetrators*. Four potential solutions to this dilemma are examined, two of which are ultimately considered to present viable methods for ensuring that the concept of JCE with no physical perpetrators is properly defined as a form of co-perpetration: *viz.* i) a model of "inter-linked JCEs"; and ii) a combination of JCE with a form of perpetration-by-means (indirect perpetration), such as Roxin's 'Organisationsherrschaft' theory.

Chapter 5 provides an extensive analysis on the origins and doctrinal framework of co-perpetration based on joint control over the crime under international criminal law. It starts by tracing the roots of the ‘control over the crime’ doctrine in German scholarship – more specifically the postdoctoral work of Professor Claus Roxin – and then elaborating in detail on its first international recognition and application in the ICTY *Stakić* Trial Judgment. This overview is subsequently used to appraise the introduction of the joint control theory in the early case law of the International Criminal Court, highlighting the discrepant views that the parties to the *Lubanga* case initially held on it, and offer a better understanding of the legal sources that the Pre-Trial Chamber consulted when constructing for the first time the concept of co-perpetration based on joint control. This study uses the *Lubanga* Decision on the Confirmation of Charges – *i.e.* the first ICC document to endorse and substantively elaborate the legal framework of the joint control doctrine – as a starting point of the research and then examines how the subsequent ICC jurisprudence has additionally refined the precise scope of each element of co-perpetration based on joint control. Thus, just like Chapter 3’s analysis on JCE liability, this chapter systematically reviews and appraises the definitional requirements of the joint control theory, thus developing a complete and up-to-date account of this mode of liability’s legal framework under ICC law.

Although the international jurisprudence on the theory of co-perpetration based on joint control is still not as voluminous as that on the JCE theory, it has certainly proven to be just as dynamic and fast evolving. The ICC *Lubanga* Pre-Trial Chamber originally established that the legal elements of this type of responsibility require: i) the existence of an agreement or common plan between the accused and at least one other person; ii) the accused provides a coordinated essential contribution to the common plan, resulting in the commission of the crime; iii) the accused fulfills the subjective elements of the crime; iv) the accused and the other co-perpetrators are mutually aware and accept that executing the common plan may result in the commission of the crime; and iv) the accused is aware of the factual circumstances that enable him to jointly control the crime. Although the ICC’s subsequent case law has, by and large, consistently restated this formulation of the legal framework of co-perpetration based on joint control, some aspects of the theory’s legal elements have already been revised in the Court’s topical jurisprudence, others have been further elaborated and there are also some questions that have not yet been properly addressed. Perhaps most notably, the *Lubanga* Pre-Trial Chamber’s adoption of a *dolus eventualis* standard for the *mens rea* elements of the joint control theory has been renounced and replaced by a *dolus directus* in the second degree standard. Further refinements have been introduced regarding the scope of the ‘common plan’ element (the definition of which has been criticized both within the ICC and by the commentariat), the position of the physical perpetrators in relation to the plurality of persons sharing a common plan and, most recently, the definition of the ‘essential’ contribution element. These and other aspects of the joint control theory’s legal framework are comprehensively analyzed and duly critiqued in this chapter, drawing also parallels and comparisons with the counterpart legal elements of the JCE theory.

Chapter 6 provides a critique of the theory of co-perpetration based on joint control over the crime. It is divided in two main sections, dealing with two categories of objections that can be levelled at this notion: i) questioning the legal basis for applying the joint control doctrine in ICC proceedings; and ii) disputing the merits of the Court’s definition of co-perpetration under the control approach. The study thus systematizes the conflicting arguments surrounding the adoption of this concept in ICC case law, further researches and elaborates on the identified points of criticism and, ultimately, reviews the validity of the said objections to the concept of co-perpetration based on joint control.

The professed legal basis for endorsing the joint control doctrine at the ICC is appraised in the first part of this study. It focuses on the sources of applicable law listed under Article 21(1) of the ICC Rome Statute and systematically examines whether the control approach to criminal responsibility finds support in: i) the ICC’s founding documents; ii) customary international law; and iii) general principles of law derived from the laws and jurisprudence of domestic legal systems. Regarding a legal basis in the Rome Statute, it is argued that neither a literal, nor a contextual interpretation of Article 25(3) RS expressly and unequivocally supports a particular construction of co-perpetration responsibility. A purely textualist reading of the phrase “commits [...] jointly with another” does not yield a conclusive answer, seeing also as two ICC judges who adopted such an approach ended up providing two materially distinct frameworks of co-perpetration. A contextual interpretation of Article 25(3) RS, which is what the *Lubanga* Pre-Trial Chamber used to endorse the theory of joint control, is equally inconclusive because it could just as plausibly be used to reject the joint control approach to co-perpetration responsibility and, in any event, it does not unequivocally exclude the subjective approach to distinguishing between joint perpetrators and accessories to a group crime. More generally, the problem with a contextual interpretation of Article 25(3) RS is that it assumes the existence of a conceptually coherent interplay between the various provisions of an article that was actually drafted as a consensus, merging the different views of various legal traditions. Further research into the *travaux préparatoires* of Article 25(3) RS – as a supplementary method of treaty interpretation, recognized in the Vienna Convention on the Law of Treaties – reveals that none of the delegations in the ICC Preparatory Committee ever proposed the joint control approach to the concept of co-perpetration. If anything, there is evidence that the drafters of the ominous ‘commits [...] jointly with another’ provision in Article 25(3) (a) RS entertained a subjective approach to this mode of liability, putting the emphasis on the element of ‘common intent’. As for a legal basis in customary international law and the general principles of law, the research into these two sources of law shows that neither of them supports the co-perpetration based on joint control over the crime theory. It is argued that misuse of legal terminology has caused much confusion in this field, which can be clarified by looking beyond mere legislative labels – *e.g.* ‘co-perpetration’, ‘joint liability’, ‘joint commission’ – and assessing the actual underlying meaning given to such constructs, as seen in the judicial practice on their application.

The second main section in this study appraises the doctrinal merits of the ICC's control approach to co-perpetration responsibility, elaborating on the criticism that – contrary to what its proponents have contended – this notion is both vague and impractical. Based on a review of the ICC's topical case law, it is submitted that the joint control doctrine and its hallmark element that the contribution of the co-perpetrator must be 'essential' is problematic since it compels judges to carry out a highly hypothetical and speculative assessment of whether the group crime would have been committed absent the accused's contribution. Whereas the intent of an accused could be convincingly inferred from his objective conduct, evidence of how events would have unfolded in an alternative reality where the accused did not participate in the concerted crime is unattainable. In this sense, a judge's evaluation of whether the contribution of an accused was a *sine qua non* for the commission of the group crime inevitably involves a dose of guesswork. In addition to this, the very classification of a criminal contribution as 'essential' or 'less-than-essential' is often an abstract and intuitive task, which gives judges much of the discretion that critics of the subjective approach to co-perpetration responsibility detest. Finally, it is also argued that the joint control doctrine requires the fact finder to engage in highly impractical and often indeterminate assessments of the power relations among the various participants in a common plan, in order to establish whether the particular accused had the material ability to frustrate the commission of the crime. These problems are especially acute in the field of international criminal law, where crimes are usually the product of multiple, varying in time and location, contributions provided by a wide group of military and political actors, whose power relations are often elusive and changing over time. A review of the Court's topical case law is provided to demonstrate that the above-identified shortcomings of the joint control theory could already be identified in the nascent jurisprudence of the ICC.

Chapter 7 concludes this book by summarizing the findings of the research conducted thus far and systemizing them into the proposed assessment framework for defining the proper construction of co-perpetration responsibility in international criminal law. It starts by briefly appraising the legal formulations of this form of liability that Judge Fulford and Judge Van den Wyngaert proposed in their separate opinions to, respectively, the *Lubanga* Trial Judgment and the *Chui* Trial Judgment. These are two novel definitions of co-perpetration that are separately appraised here because they deviate from the established JCE/joint control dichotomy examined in the previous chapters and purport to stem from the plain text of Article 25(3) RS. Thus, they ought to be carefully considered before proceeding to recommend a formulation of co-perpetration that could be applied in both the ICC and an *ad hoc* tribunal's context. It is submitted that Judge Fulford's definition, which focuses on the existence of an 'operative link' between the co-perpetrator's contribution and the concerted crime is conceptually troubling because it introduces a vague causality test that makes it practically impossible to distinguish between principals and accessories to a crime. It effectively discards all known approaches to making this distinction. Regarding Judge Van den Wyngaert's definition of co-perpetration, which relies on an element of 'direct contribution' that has 'an immediate impact' on the commission of the group crime, it is

argued that this definition opens the original problems of ascribing principal responsibility to those senior military/political accused who are instinctively viewed as most responsible but who did not themselves directly and physically perpetrate the *actus reus* elements of the crime.

The main part of this chapter recaps pertinent findings from the research conducted in Chapters 2 to 6 and systematizes them to determine how the JCE and the joint control over the crime doctrines measure against the three requirements – *viz.* legal basis, efficiency and fairness – of the evaluation framework that was adopted in Chapter 1. The goal here is thus to bring together and conceptualize the problems and excesses that were identified in the preceding research on these two notions, trim and revise the said troubling aspects, and in the end distil a refined, single legal framework for co-perpetration that meets the said three criteria. As a point of departure, it is asserted that the often-quoted disparity between the sources of law applicable at the ICC and the UN *ad hoc* Tribunals is neither absolute, nor antithetical to designing a uniform construction of co-perpetration that could be used in both contexts. Despite being a secondary source of law at the ICC, it is argued that there are several scenarios in which international custom will play a leading role in ICC proceedings, as well as that, in general, its continued importance for this field of law is evinced in the establishment of new *ad hoc* (hybrid) tribunals, which are intrinsically obliged to apply international custom. For this reason, unless we accept shredding international criminal law in two pieces – *i.e.* ICC and *ad hoc* tribunals' law – these institutions ought to engage in judicial dialogue and, whenever possible, seek continuity and uniformity in defining crimes, forms of criminal responsibility and other core concepts of substantive international criminal law. Based on the analysis conducted in this chapter, and a review of how JCE and the joint control theory measure against each of the three criteria in the proposed assessment framework, it is concluded that a narrowed down construction of JCE – which excludes the doctrine's 'extended' variant – constitutes the approach to co-perpetration that: i) has a legal basis in international criminal law, capable of consolidating the topical jurisprudence of the ICC and the *ad hoc* tribunals; ii) is an effective legal tool for ascribing principal liability in the problematic context of mass, systemic criminality; and iii) conforms to the *nullum crimen sine lege* and *nulla poena sine culpa* principles, thus respecting the accused's rights. The core rationale of this approach, its doctrinal nucleus, is expressed in the idea that when a plurality of individuals form a common plan to commit a certain crime and coordinate their contributions to this end, those who shared the group's intent to commit this crime are responsible as co-perpetrators, irrespective of which one of them physically committed the group crime. The legal elements of this definition of co-perpetration liability are thus:

- i) A plurality of two or more persons;
- ii) A common plan that aims at or involves the commission of a crime;
- iii) A coordinated, significant contribution by the accused to the effecting of the common plan; and
- iv) The accused shares the common, direct intent to commit the concerted crime.

It matters little what we decide to call this revised construction of co-perpetration: *i.e.* whether we keep the ‘joint criminal enterprise’ label, go back to the Nuremberg-era ‘common purpose/design’ terminology, or give it some new, neutral name to signal its divorce from JCE III responsibility.

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