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Three Conceptual Problems with the Doctrine of Joint Criminal Enterprise

Jens David Ohlin*

Abstract

This article dissects the Tadić *court's argument for finding the doctrine of joint criminal enterprise in the ICTY Statute. The key arguments are identified and each are found to be either problematic or insufficient to deduce the doctrine from the statute: the object and purpose of the statute to punish major war criminals, the inherently collective nature of war crimes and genocide and the conviction of war criminals for joint enterprises in World War II cases. The author criticizes this over-reliance on international case law and the insufficient attention to the language of criminal statutes when interpreting conspiracy doctrines. The result of these mistakes is a doctrine of joint criminal enterprise that fails to offer a sufficiently nuanced treatment of intentionality, foreseeability and culpability. Specifically, the doctrine in its current form suffers from three conceptual deficiencies: (1) the mistaken attribution of criminal liability for contributors who do not intend to further the criminal purpose of the enterprise, (2) the imposition of criminal liability for the foreseeable acts of one's co-conspirators and (3) the mistaken claim that all members of a joint enterprise are equally culpable for the actions of its members. The author concludes by briefly suggesting amendments to the Rome Statute to rectify these deficiencies.*

1. Introduction

Criminal law is not limited to the actions of isolated individuals. Perpetrators act in concert by developing joint enterprises and pursuing their criminal goals together. They pool information, deliberate in common, coordinate tasks and — distressingly — achieve results. These intra-individual associations are some of the most complicated in criminal law theory. Any time collective action is pursued, the conceptual structure of criminal law theory must be carefully analysed to ensure that criminal liability matches the complex

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relationships and deliberative structures within these collective endeavours. The doctrine of joint criminal enterprise is certainly no exception to this requirement.

The difficulties stem from the simple fact that conspiracies are pursued collectively but are prosecuted individually. When criminal conduct is pursued at the collective level by gangs, militias and criminal organizations, their intention to commit the crime and their culpability resides at the collective level. In some sense, it might be correct to say that the whole group is guilty of wrongdoing. Certainly, this rough sense of justice accords with our folk psychology. We feel gratitude towards a group when they help us, and we resent a group when they do something wrong. And our psychological feelings are not limited to the individuals involved. We express these feelings directly to the group itself. But criminal law must involve the prosecution and punishment of individuals. To do otherwise would be to engage in guilt by association. It is, therefore, the goal of criminal law theory to apportion blame across the various components of a criminal enterprise. But doing so requires a careful analysis of three tricky concepts: intentionality, foreseeability and culpability. The international doctrine of joint criminal enterprise has not always successfully navigated this difficult terrain.

The failure stems in part from the origins of the doctrine. The doctrine has its beginnings in war crimes prosecutions by national and international courts during World War II.[1] Tribunals of several different countries played a part in interpreting this element of the international law of war, and the result has been a doctrine that was developed through a series of ad hoc decisions. There was no attempt to codify the essential concepts of a joint enterprise in any systematic way. This is a classic example of the same kind of development that we see in Anglo-American common law: seemingly systematic and inevitable yet distressingly contingent and contradictory. It is no wonder then that joint criminal enterprises remain under-analysed in the international case law. But the concept is recently witnessing a strong resurgence of scholarly attention. For this reason, Section 1 of this article will be devoted to the *Tadić* decision, the most comprehensive discussion of joint criminal enterprises in pre-Rome Statute case law.

The adoption of the Rome Statute is a first step in the direction of an a priori analysis of joint enterprises. Unfortunately, the Rome Statute in many places restates the international law of war found in the case law instead of building it from scratch. It is perhaps for this reason that the provisions in the statute's Article 25 are so impenetrable, as discussed in the following text. Consequently, the purpose of this article is to address three problems identified

1 See e.g. *Trial of Otto Sandrock and three others*, British Military Court for the Trial of War Criminals; *Trial of Gustav Alfred Jepsen and others*, Proceedings of a British War Crimes Trial held at Luneberg, Germany (13–23 August 1946); *Trial of Franz Schonfeld and others*, British Military Court. For an extensive discussion of the World War II case law, see Judgment, *Tadić* (IT-94-1-A), Appeals Chamber, 15 July 1999, § 195 *passim* (henceforth *Tadić*). See also A. Cassese, *International Criminal Law* (Oxford: OUP, 2003), 183–86.

with the doctrine: (1) an inadequate treatment of intentionality and what level of intentionality is required for a criminal contribution to a conspiracy, (2) a misguided imputation of liability for the 'foreseeable' actions of one's co-conspirators and (3) a violation of the basic principle that individuals should only be criminally liable to the extent of their own culpability. Only when these three conceptual problems are addressed will the notion of joint criminal enterprises flower into a sophisticated doctrine of criminal law.

2. Auspicious Beginnings in *Tadić*

The contemporary doctrine of joint criminal enterprise received its rebirth, and its most complete judicial exegesis, in the Appeals Chamber decision in *Tadić*.[2] The court skilfully analysed the role played by the notion of a 'common design or plan' in war crimes prosecutions going back 50 years. Unfortunately, the framers of the ICTY Statute made no reference to criminal liability for a joint criminal enterprise, a common design or plan, or any notion of conspiracy at all. The Statute's sole reference to conspiracy came in Article 7(1), which required individual criminal responsibility for any person who 'planned, instigated, ordered, committed or otherwise aided and abetted in the planning, preparation or execution of a crime referred to in Articles 2–5 of the present Statute'.

In this section, the author considers the arguments offered by the ICTY Appeals Chamber for an expansive reading of Article 7: the object and purpose of the ICTY Statute to prosecute the architects of war crimes, the collective nature of genocide and war crimes, and the international case law on collective criminal action. As the following analysis will demonstrate, each argument contains deficiencies that cast doubt on the version of the doctrine of joint criminal enterprise constructed by the *Tadić* court. Although the arguments, when combined together, form a substantial case for the court's reading of Article 7, the evidence is insufficient to establish the version of joint criminal enterprise offered by the *Tadić* court. Consequently, this version of the doctrine should not form a substantial precedent when it comes time for the International Criminal Court to interpret the Rome Statute and offer its own analysis of joint criminal enterprise.

A. The Object and Purpose of the ICTY Statute

The ICTY Appeals Chamber was faced with a difficult choice. They could adhere to the strict language of the ICTY Statute and limit their notion of conspiracy to aiding and abetting, a limited conspiracy doctrine that was explicitly mentioned in the Statute, or they could infer a more expansive

2 *Tadić*, § 189 *passim*.

doctrine of conspiracy than the plain language offered.[3] The court chose the latter alternative, and constructed a reading of the ICTY Statute that found a doctrine of joint criminal enterprise in the 'object and purpose' of the Statute to extend jurisdiction of the tribunal to perpetrators responsible for 'serious violations of international humanitarian law', as stated by Article 1 of the Statute.[4] This clever argument suggested that Article 1 of the Statute could be used to offer an expansive reading of Article 7, under the theory that a strict reading of Article 7, limited to aiding and abetting, would allow too many perpetrators to escape the reach of international criminal justice. And it was certainly the intent of the Security Council, in framing the ICTY Statute, to extend jurisdiction to these perpetrators, and so the only reasonable reading of Article 7 must include a sufficiently liberal doctrine of conspiracy that will allow prosecution for these offenders.[5]

This argument is clever but regrettable. The structure of the argument suggests that we can work backwards from the proposition that the defendants must be punished. Since the defendants must be punished, the statute must be read in such a way that it will yield the desired result. Of course, the argument is circular. We cannot help ourselves to the proposition that the defendants are guilty until the argument is concluded and we have determined, on some other basis, the level of culpability imposed by the ICTY Statute. It is true that the ICTY Statute was directed at the most egregious offenders. No one doubts that those who are charged and brought before international tribunals have fought in wars and engaged in dreadful conduct. But their level of legal liability for collective criminal conduct is precisely what is at issue. Are they guilty for the actions of their co-conspirators or merely guilty for their own actions? The fact that the framers of the ICTY Statute sought to end impunity for war crimes does not help us answer this fundamental question of criminal law theory. Although it is clear that the framers of the Statute intended to impose criminal liability for perpetrators, this fact alone tells us little about which theory of liability they wanted them prosecuted for and under what factual circumstances. A proper reading of Article 7(1) of the ICTY Statute must be offered first and then it must be applied in individual cases to determine culpability. This means that the basic elements of criminal law theory must be introduced at the beginning of the inquiry. But we cannot do the opposite: assume culpability in order to offer an interpretation of the statute. This turns the process of interpreting a penal statute on its head.

B. The Collective Nature of Genocide and War Crimes

Of course, the *Tadić* court's interpretation of Article 7(1) did not rely exclusively on the argument from the object and purpose of the ICTY Statute.

3 For a discussion of aiding and abetting and its difference from the doctrine of joint criminal enterprise, see A. Cassese, *supra* note 1, 188.

4 *Tadić*, § 189.

5 *Ibid.*, and *passim*.

The interpretation was more complex and multi-layered. The doctrine of joint criminal enterprise was also 'warranted by the very nature of many international crimes which are committed most commonly in wartime situations'.[6] War crimes, genocide and crimes against humanity are frequently collective endeavours, pursued by gangs, militias and armies. In the case of genocide, the endeavour is necessarily collective insofar as genocide is the attempt by one ethnic group to eliminate another.[7] This argument suggests that the collective aspect of these crimes is essential to their proper analysis. To exclude the doctrine of joint criminal enterprise from the ICTY Statute is to miss the point of the collective and conspiratorial nature of these horrendous crimes.

Genocide is indeed a collective crime, and it is that very collective nature that poses such a problem for international criminal law. Furthermore, the problem is most apparent in the doctrine of joint criminal enterprise. I have argued elsewhere that genocide is the attempt by one ethnic group to wipe out another.[8] It has been suggested in some circles that one individual, or a small group of individuals, can carry out genocide. Indeed, the Rome Statute's treatment of the crime seems to allow for this possibility. However, it is quite clear from an analysis of the historical evidence that genocide occurs when an entire ethnic group declares existential war with another and seeks its destruction. Consequently, it is the ethnic group as a whole that carries the intention to carry out the crime. It is not simply one individual engaged in a murderous rampage.

This poses certain problems for the program of international criminal justice. After all, it is the responsibility of criminal tribunals to prosecute and punish *individuals* for their actions. They cannot attribute criminal intentions to an entire ethnicity nor can they exact punishment for them. Even if it is really true that the German people, as a whole, desired the destruction of the Jews, as has been argued in the historical literature, it was impossible to adjudicate this fact before criminal tribunals. The question of this true collective guilt must be judged by the world stage, by the conscience of the German people and ultimately by their maker, if there is one. Criminal tribunals, in contrast, were left to deal with the guilt of discrete individuals.

This poses the difficult question of how individual criminal prosecution is possible for a crime, such as genocide, that has such a vague collective aspect.

6 See *Tadić*, at § 191.

7 For a discussion of genocide, see R. Lemkin, 'Genocide as a Crime under International Law', 41 *American Journal of International Law* (1947) 145–151. I have argued elsewhere that genocide is necessarily collective: it is the attempt by one ethnic group to destroy another. While a single individual may commit a murder with the intent to destroy another ethnic group, it should not fall under the category of genocide until there is some desire by the ethnic group as a whole to wipe out their victims. See G.P. Fletcher and J.D. Ohlin, 'Reclaiming Fundamental Principles of Criminal Law in the Darfur Case', 3 *Journal of International Criminal Justice* (2005), at 546. However, this view departs significantly from the Rome Statute's treatment of the crime of genocide, which does not require this collective aspect.

8 See Fletcher and Ohlin, *supra* note 7, at 546 (discussing the collective nature of genocidal intent).

One answer is to concentrate on the collective nature of the crime at a more local level: the conspiracy of the military leadership, the militia, the gang and the mob. These collective entities are the closest we can come to the collective nature of these crimes and still remain faithful to the basic foundation of criminal law and its commitment to holding *individuals* responsible for their actions.

This suggests that the *Tadić* court was entirely correct when it emphasized the irreducibly collective nature of international crimes such as genocide. But, just because these crimes are necessarily collective, it does not mean that we can play fast and loose with the theory that we develop to attribute liability to these smaller collectivities, such as gangs and militias. The collective moral guilt suggested by these crimes cannot be used as a justification to blindly impose criminal liability to all members of a conspiracy, regardless of their level of participation. Although all members of the aggressor ethnicity may face the collective guilt and shame imposed by the actions of their fellow countrymen, they must only face *criminal* liability before international tribunals if they participated in a meaningful way in the horrors of genocide.

So while it is certainly true that genocide and war crimes are collective in nature, this is a far cry from establishing that the doctrine of joint criminal enterprise can be deduced from the nature of the criminal activity. Indeed, the operative question is not whether there is a collective aspect to these crimes — no serious scholar would deny this — but rather what is the nature of this collective aspect and what is its scope. Furthermore, the ICTY Statute makes explicit reference to planning, instigating, and aiding and abetting — collective modes of liability all.[9] It is therefore entirely consistent with the collective aspect of war crimes and genocide to argue that the ICTY Statute should be construed by its terms only and conspirators limited to criminal liability for aiding and abetting. But there is no warrant for extending liability to a joint criminal enterprise simply because the very nature of these crimes is collective. The question is not whether it is collective or not but what kind of collective action is criminal under the ICTY Statute.

Of course, the court does not rely on any single argument presented in the preceding text, but combines them to demonstrate that joint criminal enterprise was included in the ICTY Statute: the object and purpose of the statute, the collective nature of war crimes and the long history of conspiracy in international case law. However, none of this changes the fact that neither joint criminal enterprise, nor any of its predecessors, is mentioned in the ICTY Statute. While it is true that the ICTY Statute is a limited document that purposely left the details of many judicial doctrines to judges of the tribunal to complete, it is undeniable that Article 7(1) included aiding and abetting and made no mention of joint criminal enterprise.

9 See Art. 7(1) ICTYSt.

C. The Tadić *Version of Joint Criminal Enterprise*

The *Tadić* court used these arguments to construct a very specific formulation of joint criminal enterprise. In its view, joint criminal enterprise included three distinct scenarios, each of which could form the basis for criminal liability under the ICTY Statute. The first scenario involves a conspiracy where all members carry the intent to commit the crime, although the criminal action is only executed by one member of the conspiracy. The second scenario involves concentration camps, where all members have knowledge of the system of mistreatment in the camp and carry the intention to further that system of ill reatment. In that case, each participant in the common design is criminally liable for all acts of mistreatment by other members of the concentration camp, even if the defendant has no knowledge or intent with regard to the specific crime or action. The third scenario involves cases where the participant is committed to the goals of a joint criminal enterprise and becomes liable for the foreseeable criminal acts of other participants, even if the criminal acts in question were not part of the agreement. Under this third scenario, according to the court, liability attaches as long as the defendant could reasonably *foresee* that other participants in the common plan might engage in these criminal activities.

These three variants of joint criminal enterprise were distilled from the international cases, some of which are of dubious precedential value.[10] The exhaustive list of cases presented by the court make it unmistakably clear that tribunals, both international and national, have often made use of an

10 For example, the *Tadić* court relies on cases such as *Kurt Goebell et al.* (*The Borkum Island Case*), a 1944 US military court decision. See *Tadić*, § 210–212. In that case, a US Flying Fortress aircraft was shot down over German territory and its crew was subjected to a death march. The airmen were escorted by German soldiers who encouraged civilians to beat the prisoners who were eventually shot and killed. The US prosecutor argued for a guilty verdict based on a broad theory of common criminal purpose. Although the facts of the case are directly relevant to a discussion of joint criminal enterprise, the military court issued only a simple guilty verdict and made no extensive legal findings on the issue of common criminal plans or mob beatings. Consequently, the *Tadić* court is left to quote the words of the US military prosecutor and *infer* that the judges adopted the prosecutor's reasoning. These types of cases are of negligible value for precisely this reason. Indeed, the prosecutor's discussion of the issue is internally contradictory. At one point he argues that 'it 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'. This is a subtle point and one that I will emphasize in later sections of this article. But a sentence later the prosecutor drops this idea without explanation and contradicts himself by suggesting that '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. 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 directly contradicts his earlier proclamation about the importance of individual guilt, even in the face of mob violence. It is unclear how these statements can be reconciled.

expansive notion of conspiracy in their convictions of war criminals.[11] For example, in *Essen Lynching*, cited in *Tadić*, soldiers escorting a prisoner were held responsible for his lynching by a mob. The court in *Essen Lynching* seemed to adopt the prosecution's argument that all members of the mob were guilty of the murder regardless of their degree of participation, because they were 'concerned in the killing'.[12] However, it is somewhat distressing for the court in *Tadić* to rely on case law — what it characterizes as customary international law — to establish an argument for joint criminal enterprise. It may be true that past war crimes tribunals, some exercising jurisdiction without a written penal statute, have interpreted conspiracy with a wide brush.[13] But what relevance does this have when the level of criminal liability in the ICTY is governed solely by the Statute's Article 7, a provision which did not exist when the World War II tribunals in Germany and Italy began their work?

Consequently, the three variants retain significant conceptual shortcomings. Most regrettable is the third variant of the doctrine that extends criminal liability for the foreseeable actions of co-conspirators, even if the actions extend beyond the agreed upon scope of the common criminal plan. As shall be argued in subsequent sections of this article, extending the doctrine of conspiracy to these situations violates basic principles of criminal law. Although the *Tadić* court constructed a novel argument for finding a doctrine of joint criminal enterprise in the ICTY Statute, the court had little reason to find this third variant in the statute. To suggest that defendants should be liable for the criminal acts of their co-conspirators, even when these actions fall outside the scope of the original criminal agreement, is a strong and unwarranted conclusion, especially when the statute governing the ICTY restricted liability to planning, instigating, and aiding and abetting.

The analysis in the *Tadić* decision also includes the regrettable proposition that all members of a common criminal plan may be equally culpable. For example, the court says that '[a]lthough only some members of the group may physically perpetrate the criminal act (murder, extermination,

11 For example, in the *Ponzano* case, which involved the killing of British prisoners of war, the judge noted that liability attaches in situations where the accused is 'the cog in the wheel of events leading up to the result' and that the participation need not be so extensive that the crime would not have happened without his participation. In *Ponzano*, the judge concluded that liability for a common criminal plan required knowledge of the group's plan. Implicitly this suggests that the intention to further the common criminal plan is not required for liability. This case is cited and quoted with approval in *Tadić*, § 199.

12 *Trial of Erich Heyer and six others*, British Military Court for the Trial of War Criminals, Essen, 18–22 Dec 1945, UNWCC, vol. I, at 91, cited in *Tadić*, § 207.

13 The cases heard by the IMT were governed by the Nuremberg Charter, which included only a minimalist definition of substantive offences. Subsequent prosecutions were also held under the auspices of Control Council Law No. 10, which governed the administration of Germany after the war before the return of sovereignty. However, these prosecutions rarely involved the interpretation of a sophisticated penal statute that defined war crimes or conspiracy in an explicit fashion.

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'.[14] This is a philosophical problem because there are many crimes involving facilitation by minor actors, and the moral gravity of this facilitation is much less than the principal action. To suggest that all members of a conspiracy are equally culpable ignores the internal structure of the conspiracy and treats it as if it were some kind of group person whose internal structure was morally irrelevant. As Section 5 will demonstrate, this is untrue. The internal structure of a common criminal plan is morally and legally significant, especially where the crime in question is genocide or crimes against humanity. Unfortunately, these problems with the doctrine of joint criminal enterprise are not limited to *Tadić* and continue to the present day. Now that we have traced the genesis of the doctrine of joint criminal enterprise in the international case law and how it was applied by the judges of the ad hoc tribunals, we can now turn to the future of the doctrine as it will be applied (and should be applied) at the International Criminal Court.

It is perhaps laudable that the Rome Statute includes a more detailed provision on joint criminal enterprise in Article 25. As a document, the Rome Statute leaves less room for judicial creativity and purposively worked out more judicial doctrine so state parties had a greater awareness of the court's function and the criminal liability it would impose. This is certainly a noteworthy development that is consistent with the principle of *nullum crimen sine lege* referenced in the preceding text. But if the Rome Statute includes a more specific provision on joint criminal enterprise, why are the above criticisms of *Tadić* relevant? The criticisms are important because they highlight the unique circumstances of the *Tadić* case: the cryptic language of Article 7 of the ICTY Statute and the court's attempt to reason from the object and purpose of the court's jurisdiction. These unique circumstances make it clear that the *Tadić* case cannot be used, in turn, as a precedent to help interpret the Rome Statute's provisions on joint criminal enterprise. The interpretation of the Rome Statute must remain an issue of first impression for the International Criminal Court when it begins its deliberations. The reasoning of the *Tadić* decision, whether one likes it or not, interpreted Article 7 of the ICTY Statute on the basis of international case law, the nature of collective crimes and the object and purpose of the ICTY Statute. But the Rome Statute and its Article 25 provisions were born from an entirely different process and its provisions must be interpreted within that context. Although *Tadić* is a brilliantly written decision, it cannot stand as a meaningful precedent for prosecutions of joint criminal enterprise before the International Criminal Court.

14 See *Tadić*, § 191.

It is therefore important to engage in a critical examination of the conceptual shortcomings of the doctrine of joint criminal enterprise. In the following sections, this article will examine the concepts of intentionality, foreseeability and culpability as they relate to the doctrine of joint criminal enterprise. This article will argue that any good theory of criminal complicity must remain faithful to these core principles. Unfortunately, the doctrine of joint criminal enterprise in its current form is not always consistent with these fundamental concepts. Amendments to the Rome Statute should be considered to achieve this compliance.

3. The Problem of Intentionality

The first conceptual problem with the doctrine of joint criminal enterprise is an insufficient treatment of the concept of intentionality. The Rome Statute's Article 25 requires that a contribution to the commission or attempted commission of an offence must be 'intentional' — although the exact meaning of this language is far from clear. If the provision is to be taken literally, the provision simply requires that the basic underlying action must be intentional, not negligent. For example, if a merchant is charged with selling goods that are instrumental for the commission of a crime to a member of a criminal group, the act of selling must be intentional, as opposed to merely accidental. The provision does not appear to require what one might think it would require, i.e. that the contribution be intentional in the sense of intending the ultimate goal of the criminal conspiracy. That is not what is meant by the word 'intentional' here because this further element is codified in the next subsection of the Rome Statute. In addition to the requirement that the contribution be 'intentional', there is a second prong in Article 25(3)(d) that must be fulfilled: the contribution must either be made 'with the aim 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'. The crucial point here is that the second prong is disjunctive. Either one of the aforementioned elements in the second prong is sufficient to meet the Article 25(3)(d) standard for criminal liability.

The conceptual difficulty stems from this obscure analysis of intentionality. Of course it seems natural to penalize a contribution that is intentional in the basic sense and is made with the aim of furthering the criminal purpose of the group. The real question is how one justifies criminal liability for an intentional contribution that is *not* made with the aim of furthering the criminal purpose of the group, but is simply made with 'knowledge of the intention of the group to commit the crime'. First, the English language version of this provision is so syntactically obtuse that it is barely grammatical. A more fluid and faithful translation might require liability for an intentional contribution that is made 'knowing of the group's intention to commit a crime'. But regardless of the clunky syntax, this provision imposes such severe criminal liability that it demands deeper analysis. When a gang engages in its

criminal activities, many individuals are aware of these activities even though they neither condone nor support them in a meaningful way. Consider, for example, an organized criminal gang — the Mafia, say — that is engaged in planned criminal behaviour. Other members of the community are all aware of this conspiracy, its members and its objectives. Their criminal enterprise is not secretive but is openly pursued with impunity. The fact that the goal of their conspiracy is publicly known should not be legally significant for those who do not share its goals.

Many members of the community may provide contributions to a criminal organization despite the fact that they disapprove of the group's criminality.[15] Merchants sell food, water and clothing to criminals; they sell cars and gasoline and repair their vehicles; they rent them office space, apartments and houses.[16] These services are no doubt contributions to criminal organizations, since, without them, a conspiracy could not continue. Furthermore, these services may well be performed knowing of a gang's criminal goals. However, these contributions are best viewed as commodities because they are readily available on the open market. (Of course, the sale of firearms or explosives is another story.) But if one merchant does not sell the gasoline, another merchant will. However, because this contribution is 'intentional' in the basic sense and is made 'knowing of the group's intention to commit the crime', the merchant is criminally liable for the whole conspiracy under the Rome Statute. This application of the doctrine of joint criminal enterprise is a significant example of legislative over-reaching.[17] Whether this was the intent of the Rome Statute's framers is unclear. What is certain is that this is the effect of the provision.

This mistake stems from a failure to understand the philosophical significance of knowledge and intentionality in criminal law theory. Knowledge of criminal activity, by itself, is rarely morally significant. Many individuals may be aware of criminal activity but they are not complicit in the conspiracy just because they receive advance knowledge of it. Indeed, when the crime in question is a crime against humanity or a war crime, the whole community may be aware of the activity. In wartime, criminal conspirators, by virtue of

15 This issue is central to the case of Salim Ahmed Hamdan. The US government claims that Hamdan, apart from being bin Laden's driver, was also his bodyguard and a combatant, although Hamdan's lawyers dispute this. See *Hamdan v. Rumsfeld*, 126 S. Ct. 2749 (2006). For a discussion of the criminal liability of background contributors, see G.P. Fletcher, Amicus Curiae Brief of Specialists in Conspiracy and International Law in Support of Petitioner, *Hamdan v. Rumsfeld* 26–28 (2006).

16 See e.g. G.P. Fletcher, *Rethinking Criminal Law* (Boston: Little, Brown, 1978), at 676 (discussing the criminal liability of merchants and suppliers).

17 Cases at the ICTY since *Tadić* have recognized and corrected this oversight. See Judgment, *Kvočka et al.* (IT-98-38/1), Trial Chamber, 2 November 2001, § 309 (requiring a substantial contribution for liability under joint criminal enterprise). See also A.M. Danner and J.S. Martinez, 'Guilty Associations: Joint Criminal Enterprise, Command Responsibility, and the Development of International Criminal Law,' 93 *California Law Review* (2005), at 150 (arguing for a more limited version of JCE that requires a substantial contribution).

their military control over a territory, may exercise their plans with virtual impunity and may not feel compelled to disguise their behaviour. Their joint criminal enterprise might be available for all to see. In many cases this is precisely the point, because the public nature of the war crime terrorizes and demoralizes the enemy. Consequently, mere knowledge of criminal activity, with no significant contribution with the intention of furthering the common enterprise, should yield the lowest level of liability.

The concept of intentionality, in contrast, is acutely significant. A criminal defendant's actions become increasingly blameworthy if he intentionally produces the desired result of a criminal enterprise. For example, in most domestic systems of criminal law intentional murder is punished more severely than homicide as a result of negligence or what the Model Penal Code calls recklessness.[18] The rationale for this legal distinction is clear. Intentional murder is a more significant moral violation and those who intentionally commit murder demonstrate a more malignant heart than those who kill someone as a result of their negligence. While the result may be the same in both cases — a death, say — the mental states are entirely different. The desire to kill another human being is especially heinous. Although the scope of this article does not allow for a full-blown account, such a theory would trace how the mental *desires* of a clearly intentional crime are more closely associated with the criminal's self because they form part of his rational decision-making structure. They represent, as if were, a *commitment* to a criminal outcome and the steps necessary to achieve it (means-end reasoning). In any case, knowledge and intentionality are distinct concepts, each carrying their own moral significance.

Unfortunately, it is precisely this distinction that is obliterated by the Rome Statute's Article 25 provision on joint criminal enterprise. Because the Article 25(3)(d) requirement is disjunctive, an intentional contribution made knowing of the group's objectives yields the exact same criminal liability as an intentional contribution made with the aim of furthering the criminal objectives of the conspiracy. Both types of intentional contribution make the contributor liable for the acts of the entire conspiracy. Furthermore, both contributors are *equally* liable in the sense that for both the entire conspiracy becomes their own, legally speaking. But this penal equality does not match the moral distinctions between the two conspirators. The intentional contributor who has the aim of furthering the goals of the criminal conspiracy — who wants, as it were, to achieve the objectives of the criminal enterprise — is far more culpable than the intentional contributor who merely provides some background service with knowledge of the group's activities.

Part of this difficulty stems from the fact that the Statute makes no mention of 'membership' in the joint criminal enterprise. Perhaps this is a laudable conceptual objective. Citizens of the free world are rightly sensitive to

18 See Model Penal Code § 210.4 (defining negligent homicide and classifying it as a third-degree felony, lower than both murder and manslaughter).

the prospect of criminalizing mere membership in any group, regardless of how nefarious the group's criminality may be.[19] Individuals must be prosecuted for their actions, not for their associations; to do otherwise is to engage in guilt by association.[20] So it is right that the Rome Statute attempts to separate the guilty from the innocent without reference to membership. But the Statute's proxy for membership falters because it equates the background contributor with no intentional desire to further the aim of the conspiracy with the architect of the conspiracy whose every action is conducted with the goal of completing the conspiracy's criminal plan. In an attempt to replace the concept of membership with the concept of individual action, the Rome Statute has made the mistake of equating all actions together under the banner of a joint criminal enterprise. The more subtle avenue would have distinguished between actions taken with mere knowledge of the conspiracy and those taken to intentionally advance the conspiracy. The former should yield the lightest liability while the latter should yield the heaviest. But the actions of a joint criminal enterprise cannot be attributed to both equally.

4. The Problem of Foreseeability

The second conceptual deficiency of the doctrine of joint criminal enterprise is an inadequate treatment of foreseeability. As noted in Section 1, the Appeals Chamber in *Tadić* concluded that members of a joint criminal enterprise are criminally responsible for the actions of their co-conspirators, even if these actions were not agreed in advance. The sole constraint on this vicarious liability is that the actions of the co-conspirators must be foreseeable to the defendant.[21] In other words, if it is objectively foreseeable that other members of the enterprise might extend their actions beyond the agreement, then all members of the conspiratorial group can be charged with the crime. I shall argue in this section that equal criminal liability should be restricted to acts that were part of the criminal plan *as it was formulated*. For non-agreed foreseeable acts, a lower level of liability is warranted.

It is only in certain factual circumstances that this conceptual problem becomes apparent. Consider criminal plans to kill an entire ethnic group, to commit genocidal acts or to terrorize a civilian population with crimes against humanity. In these situations the conspiracy has few limits — the

19 One noticeable exception to this rule was the labelling, at the Nuremberg trials, of the entire SS and Gestapo, as criminal organizations. See *Göring and others*, International Military Tribunal, Nuremberg, Germany (1946).

20 US citizens are justifiably sensitive about criminalizing membership in any organization. In the 1950s, being a member of the Communist Party was illegal in most US jurisdictions and Communist party members were subject to professional sanctions and prison time. It was not necessary to prove that Communist party members engaged in additional seditious acts or plotted a revolution against the US government. Membership alone was considered sufficiently seditious to warrant criminal prosecution.

21 See *Tadić*, § 204.

plan is simply to kill as many people as possible — so the resort to the concept of foreseeability is unnecessary. For any defendant who is charged as part of the criminal enterprise, it is likely that the attacks formed part of the agreement since the plan was so extensive and severe. There were no limits. But many prosecutions for joint criminal plans involve a subtler and more troubling scenario: the conspirators plan an attack on a specific objective but some of the soldiers engage in criminal conduct that far exceeds the original plan.[22] This usually happens in one of two ways. Either the soldiers use tactics that were not part of the plan, such as torture or rape, or the soldiers widen the scope of the attack by choosing new targets on their own initiative, such as a different village or building. In these situations, the version of joint criminal enterprise announced in *Tadić* allows for all members of the plan to face equal punishment for the foreseeable crime.

This result is not unique to international criminal law. The same problem appears in US law and its famously liberal version of the conspiracy doctrine. The US case law is filled with examples of burglaries and bank robberies, where one assailant goes beyond the agreement and uses deadly force on, say, a security guard or bystander. Under the theory that this activity is 'foreseeable', even if not assented to, all members of the conspiracy can be charged with murder under the felony-murder rule. (In many cases the defendant is not even aware that his co-conspirator is carrying a gun, but the murder is ruled 'foreseeable' anyway.) In one famous case, two sons who helped their father escape from prison were sentenced to death for a murder committed by their father in the course of the getaway.[23] The sons had walked in a different direction and did not see the shooting. The US Supreme Court upheld the death sentence in the case.[24] The resulting murder was allegedly foreseeable because the defendants had agreed to participate in a violent felony — the jailbreak.

But we ought to carefully examine the justification for this doctrinal move, whether in the US version of conspiracy or its international counterpart. What is the significance of the concept of foreseeability? It is not, of course, always relevant. For example, a parent may foresee that his child might turn out to be a criminal, but this does not make the parent guilty of the child's crime. One might object that the parent is not a participant in the child's criminal plan, so the foreseeability here is sufficiently distinct from a joint criminal enterprise where the co-conspirator must anticipate the foreseeable actions of his co-conspirators. This is an important distinction and it points the way towards a deeper understanding of this conceptual problem.

22 In these situations, commanders may also be criminally responsible under a theory of command responsibility, codified in Article 28 of the Rome Statute. This is also known in US legal circles as the *Yamashita* principle. Although both command responsibility and joint criminal enterprise might yield the same result for a commander — a guilty verdict — they are distinct legal doctrines. They are related insofar as both doctrines allow vicarious liability for the acts of others.

23 See *State v. Tison*, 129 Ariz. 526, 633 P.2d 335 (1981).

24 See *Tison v. Arizona*, 481 U.S. 137 (1986). The outcome of the case was criticized by Prof. Dershowitz, who represented the defendants.

The critical factor for the conspirator is that his participation in a criminal plan brings additional responsibilities — one of which is to anticipate that co-conspirators may act in extreme ways. This is the very nature of violent criminal plans, which do not always hew closely to their written script. The criminal assumes responsibility for this misbehaviour and it is appropriate to burden him with vicarious liability. American lawyers refer to this general phenomenon in tort law as 'assumption of risk'.[25] The militia member who joins a joint enterprise to engage in an unlawful attack assumes the risk that other members of the militia may attack other targets and use extreme measures — such as torture — that were not part of the original plan. The militia member is responsible for the consequences.

While this is no doubt true, what level of responsibility has the militia member assumed? The responsibility is best understood as a species of negligence. The militia member has not directly engaged in the torture, nor did he have the intent to do so. But his crime is one of negligence, in the sense that he did not take the appropriate measures to ensure that other members of the enterprise would stick to the plan.[26] However, negligent homicide is always punished at a lower level than intentional murder. It is crucial that criminal law maintain the distinction between those who kill with malice aforethought and those who's negligence or recklessness results in death. The former is the result of the most extreme moral depravity because the criminal desires the result and this commitment forms a core aspect of his rational self. His rational commitments — his beliefs and desires — make him who he is.

This is precisely the problem with the concept of foreseeability in joint criminal enterprise. All members of the conspiracy are treated equally, and the militia member who assumed the risk of joining the enterprise is charged with the same crime as the militia member who decided on his own to torture civilians. The distinction between the two participants is obliterated. The doctrine of foreseeability should result in a conviction for a crime of negligence, and as a result the militia member who was negligently responsible for the war crime should be charged with a lesser crime in accord with his lower degree of culpability.

Some might bristle at this suggestion, fearing that it will lead to lower prison sentences and even acquittals for many war criminals who face trial before international tribunals. These fears are unwarranted, however. The issue of which elements were agreed to at the beginning is a factual dispute separate from the legal issues discussed here. In many cases, the actions of other militia members will simply be imputed to the other members of the conspiracy on the theory that their actions were part of the agreement, either

25 The doctrine stems from US tort law and holds that an individual who willingly takes on certain risks cannot himself maintain an action for damages suffered during an accident. The doctrine has now been largely replaced by contributory negligence, which simply lowers the amount of recovery based on the degree of the plaintiff's fault for the accident.

26 E.g. New York Penal Law refers to this crime as 'reckless disregard for human life', and it is prosecuted as second-degree murder, one step below first-degree murder.

implicitly or explicitly.[27] For example, a prosecutor might change his strategy and argue that torture was an implicit — albeit unspoken — part of the plan from the beginning. Prosecutors have been weary of proving such allegations in the past because they did not have to; the doctrine of foreseeability rendered this proof unnecessary. They were content to demonstrate that the conduct occurred and then have judges attach vicarious liability to all participants of the criminal enterprise. But this situation has led to the doctrinal shortcomings identified in this section. Once prosecutors are acquainted with a new understanding of foreseeability, they will attempt to construct their cases in the appropriate way. The change will not result in a flood of acquittals. It will simply ensure that prosecutors gather the necessary proof, if they have it, or reduce the criminal liability of co-conspirators to the appropriate level. But at least prosecutors will now have to prove culpable conduct instead of merely associating the defendant with it vicariously.

Some might also fear that this change in doctrine will yield lower sentences for secondary participants of wartime atrocities. Their argument is as follows: there is good reason to provide equal culpability for all members of a criminal conspiracy during wartime. When the crime in question is so vulgar, all perpetrators should receive substantial jail time. While the architects of a slaughter deserve lengthy prison sentences, low-level participants in a massacre also deserve stiff sentences, and the fact that there are more culpable parties should not be used as an excuse to lower the sentences of the lower-level participants. Their actions, after all, are horrendous enough to warrant lengthy punishment, notwithstanding the fact that even more culpable defendants may be on the horizon. So there is no practical consequence to this problem of equal culpability. All participants will receive lengthy sentences, just as they should. What matters if the doctrine obliterates these moral distinctions when they may not even show up in the punishment?

The answer to this objection is obvious. Conceding for the moment the point that even low-level participants in a massacre may deserve lengthy punishment, and that punishment may in a practical sense end up being similar to the punishment of the architects, it is wrong to assume that we do not have to be careful with our legal doctrine. Just because the criminal justice system 'runs out' of appropriate punishments to give the architects of genocide and war crimes (because of the constraints we place on our own institutions of punishment), it does not mean that our doctrine should be insensitive to the distinctions between perpetrators. We ought to insist that our legal doctrine is sophisticated enough to distinguish between different levels of participation in war crimes, if only out of our commitment to conceptual clarity. If, at the end of the day, both the low-level participant and the architect receive life in prison, we will have at least arrived at this result in an intellectually honest fashion.

27 For a discussion of the issue of explicit and implicit agreements, see K. Gustafson, 'The Requirement of an "Express Agreement" for Joint Criminal Enterprise Liability,' in this Symposium.

Although *Tadić* offered a clear statement in favour of the doctrine of foreseeability, it is totally unclear where the Rome Statute stands on the issue. Article 25 of the Statute makes no mention of the concept at all. It is therefore unknown how the International Criminal Court will analyse the issue. On the one hand, Article 25(3)(d)(ii) requires that a criminal contribution be made 'in the knowledge of the intention of the group to commit the crime'. This would suggest that the doctrine of foreseeability does not apply because the defendant must know about the intent — not simply foresee its hypothetical possibility. On the other hand, however, the alternate possibility for contribution liability under Article 25(3)(d)(i) states that the contribution must be made 'with the aim of furthering the criminal activity or criminal purpose of the group'. This provision's application to the doctrine of foreseeability is uncertain. It would seem as if foreseeability is irrelevant if you are furthering the criminal activity of the group, if 'criminal activity' refers to the conduct that is the basis for the charge. But if the defendant is furthering the criminal *purpose* of the group, it is certainly possible that he is unaware of the conduct that has been charged but could have foreseen its possibility. The International Criminal Court will be called upon to decide these questions during their first cases dealing with joint criminal enterprise. It is therefore important that the court develop a sophisticated account of the concept of foreseeability and understand its relationship to crimes of negligence.

5. The Problem of Equal Culpability

The preceding analysis underscores the most basic problem with the doctrine of joint criminal enterprise: its imposition of equal culpability for all members of a joint enterprise.[28] This is wrong on a philosophical level. Culpability must be relative to the contribution involved. A defendant who makes a small contribution is not as guilty as someone who makes a large contribution. To hold otherwise is to violate the principle of individual moral responsibility, a principle that both *Tadić* and the Rome Statute claim to uphold.[29] Did Eichmann have the same level of culpability as the prison guard? Obviously not — he was more culpable. The whole project of criminal law is to make these difficult distinctions; the current doctrine of joint criminal enterprise obfuscates them.

One suspects that there are both practical and philosophical reasons for this false imposition of equal culpability. The first is practical. Penal statutes all over the world are written by governments concerned with punishing criminal defendants, not acquitting them. For example, one suspects that

28 See e.g. *Vasiljević* (IT-98-32-T), Trial Chamber II, 29 November 2002, § 67 ('If the agreed crime is committed by one or other of the participants in a joint criminal enterprise such as has already been discussed, all of the participants in that enterprise are equally guilty of the crime regardless of the part played by each in its commission').

29 See Art. 25(2) of the Rome Statute on individual responsibility.

the rebirth of the conspiracy doctrine in the US coincides with a movement to impose stricter criminal penalties to deal with the growing social problem of rampant crime.[30] Prosecutors sought greater legislative tools to make criminal prosecutions easier.[31] Statutes criminalizing conspiracy were one method in that general trend. Some jurisdictions criminalized conspiratorial agreements, even in the absence of criminal fruition. Others extended equal criminal liability to all members of the conspiracy. This proved beneficial in cases where prosecutors wanted to charge a defendant with murder but did not have the proof to directly connect him to it.

One suspects a similar development in the international arena. The early examples of joint criminal enterprise from *Tadić* stem from the World War II era. Prosecutors and judges from the Allied countries were concerned with penalizing war criminals they felt were obviously guilty, but requiring a high standard of proof was unrealistic given the chaotic nature of the time.[32] It was therefore a practical necessity that all members of a conspiracy be charged with the same degree of culpability. Also, many of the prosecutors and judges made reference to the use of conspiracy doctrine in the US to justify imposing equal culpability for participants in a criminal enterprise.[33] The practical necessity of punishing war criminals in the aftermath of a world war was no doubt influential in how the doctrine of conspiracy proliferated in the coming decades.

There is a second, more philosophical, reason which might explain the false imposition of equal culpability. Scholars are sometimes tempted to view the criminal conspiracy as a joint endeavour whose actions are the result of a group agent. In some more metaphysical circles the criminal conspiracy may even be labelled with the unfortunate term 'group person'.[34] There are some serious temptations to go this route. Treating the group as a single,

30 For a discussion of the US doctrine of conspiracy, see Fletcher, *Rethinking Criminal Law*, *supra* note 16, at 646. See also G.E. Lynch, 'Revising the Model Penal Code: Keeping It Real,' 1 *Ohio State Criminal Law Review* (2003), at 231 (describing the crime wave of the 1970s and 1980s and the political pressure that sparked ad hoc changes to American penal statutes).

31 Indeed, one innovation of US common law was to criminalize conspiracy even in the absence of any action on the part of the conspiracy's participants, although some statutes now require an overt act. The mere act of making an agreement a crime of conspiracy was thus making it easier on prosecutors to secure convictions even in the absence of proving the individual acts of the criminal plan. This notion of conspiracy per se as a conspiratorial agreement is to be distinguished from the notion of conspiracy as liability for the actions of one's co-conspirators. For a discussion of this distinction, see Fletcher, Amicus Brief, *supra* note 15, at 6–7.

32 For a description of the US war crimes prosecutions that took place after the conclusion of the International Military Tribunal, see P. Maguire, *Law and War* (New York: Columbia University. Press, 2002).

33 See e.g. *Alfons Klein and others (Hadamer Trial)*, US Military Commission, Wiesbaden, Germany. The prosecutor in the case noted that under US law 'all distinctions between accomplices, between accessories before the fact and accessories after the fact, have been completely eliminated'. For an extensive discussion of the case, see Cassese, *supra* note 1, at 183–84.

34 This label attributes legal personality to the entity and makes it the subject of both rights and responsibilities. For a discussion of the concept of the group person, see J.D. Ohlin, 'Is the Concept of the Person Necessary For Human Rights?' 105 *Columbia Law Review* (2005), at 209.

unified collective accords with our psychological attitudes. Using the concept of the group agent to analyse its behaviour allows us to attribute mental intentions to the group entity and any actions taken on its behalf. For example, we are grateful to the group when it engages in praiseworthy conduct, and we resent the group *as a whole* when it engages in wrongdoing. Although we understand in an abstract and intellectual sense that the group is merely composed of isolated individuals, our reactive attitudes are basic and only capable of so much revision.[35] Indeed, we cannot help but resent the group. Furthermore, we are inclined to hold the whole group responsible for its actions and we might seek retribution from the group at the collective level. We would be pleased, at an emotional level, to see punishment imposed on the whole group. And these emotions are not entirely off the mark. The logical conclusion of this mode of reasoning is to impose equal culpability for all individuals who form part of the group agent. Regardless of whether these concepts are explicitly discussed in the literature, they are nonetheless lurking in the background.

One might object that differences in culpability are found at the level of sentencing. Judges make individual determinations of relative culpability during the sentencing phase of each criminal trial, and it is in this arena that minor contributors are distinguished from a conspiracy's prime movers. In one sense it may be logical to make culpability determinations at this level. After all, the prison terms available for war crimes and crimes against humanity are all the same; the trial chamber can impose life in prison or anything less, depending on the severity of the crime. Indeed, this may be taken as a distinguishing feature of international criminal law over its municipal counterparts. The crimes are all so heinous that any of them — in theory — can be deserving of life in prison.

This argument proves too much. If culpability were simply a function of sentencing we could dispense with much of the substantive elements of international crimes. One might, for example, dispense with the classification of international crimes into distinct categories and simply replace them with a single offence — one might call it felony with a capital 'F' — that would encompass all violations of the laws of war. A judge could then take into account the severity of each violation and craft an appropriate sentence based on individual factual findings. Relative culpability could be maintained in this fashion. This would replicate the kind of rough battlefield justice that was once imposed before the law of war was codified and institutionalized as international criminal law.

Of course, we would never impose such a penal scheme because it violates a firmly held intuition that guilt and innocence must be determined relative to the elements of each offence. For example, both the objective and subjective elements required to prove the underlying crime of murder are not the same

35 P.F. Strawson, 'Freedom and Resentment,' in G. Watson (ed.), *Free Will* (Oxford: OUP, 1982) 59–80.

as the underlying crime of rape. Relative culpability is not simply a matter of serving the appropriate time in a penal facility. It goes deeper to the very heart of the criminal offence. The minor participant and the chief conspirator are not simply deserving of different *sentences*. Their *guilt* is different and it is this central truth that the current version of joint criminal enterprise obscures. One cannot solve the conceptual problem by giving the minor participant a reduction in prison time during the sentencing phase. First, the stigma of a criminal conviction is itself significant, independent of the punishment, and requires that correct determinations of relative culpability be expressed at the level of offences. Second, trial judges wield a greater degree of discretion during the sentencing phase than when they make decisions about guilt or innocence, which can be reviewed when the legal standards are incorrectly applied to the facts. Although it is true that sentencing appeals have occasionally been successful at the tribunals, they are undoubtedly more difficult to adjudicate because sentences, by their nature, stem from the gut-level moral determinations of the judges. The whole point of constructing a sophisticated penal statute such as the Rome Statute is to increase the determinations of guilt that can be made at the level of the criminal offence, where the accused receives the appropriate procedural protections so that international criminal law becomes more than just individual sentencing judges making those gut-level decisions about the severity of each atrocity. The doctrine of joint criminal enterprise flies in the face of this trend.

In the end, the problem with imposing equal culpability is that it ignores the internal structure of the group agent. There is a temptation to view the group agent as a single entity whose internal deliberative structure is either inscrutable or irrelevant. The only alternative is therefore to impose liability at the group level and administer punishment equally to its parts.[36] But just because it is possible to model the group dynamics of the criminal conspiracy at the collective level does not mean that the internal structure is irrelevant. Not all parts of the group agent are equal. Indeed, the internal deliberative structure of the conspiracy is not just morally discernible, it is crucial to the proper allocation of criminal blame. The architect, the executioner, and the background supplier all perform distinct functions within the conspiracy and they should be held responsible relative to the importance of their personal conduct. It is possible to prove who joined the group first, who directed and planned its activities and who carried out its orders. While these activities are all undoubtedly criminal, they are not equally criminal. Any legal doctrine that equates them does a disservice to the project of codifying difficult moral distinctions into a legal system.

36 For a discussion of the philosophical implications of collective action and responsibility, see C. Kutz, *Complicity: Ethics and Law for a Collective Age* (Cambridge: CUP, 2000).

6. Reforming Joint Criminal Enterprise

The three conceptual problems with joint criminal enterprise identified in this article do not implicate the essential core of the doctrine. The problems only arise when the doctrine is codified and developed. Consequently, it should be possible to reform the doctrine to deal adequately with the problems of intentionality, foreseeability and culpability. Since the Rome Statute represents the future of international criminal justice, it is appropriate to formulate revisions to the doctrine of joint criminal enterprise within the context of the Rome Statute's Article 25. Although amendments are unlikely and difficult, there is a structure in place for states parties to make alterations to the Rome Statute, just as any multilateral treaty-based commitment can be altered. Furthermore, the fact that amendments are difficult to obtain is no excuse when the stakes are so high. To refrain from this analysis would be to surrender to the status quo.

The first needed reform is an amendment to the obscure Article 25 of the Rome Statute that responds to the problems of intentionality identified in Section 2 of this essay. The reader will recall that Article 25(3)(d) was problematic because it equated the responsibility of the defendant who intended to further the aim of the criminal enterprise with the defendant who was merely aware of the group's intention to commit the crime. These avenues of liability should be separated into distinct categories. The first category should include those whose intention is to further the criminal enterprise, i.e. those who now fall under Article 25(3)(d)(i). These individuals are rightly considered to be members of the conspiracy and should receive the harshest sentences in accordance with their individual culpability. The second category should include those defendants who do not intend to further the goals of the criminal enterprise but are simply aware of its existence. This subdivision of the statute should be rewritten so that these defendants are liable for a lower criminal provision. For example, they might be liable under a new provision creating an affirmative duty to make reasonable efforts to stop a criminal plan in progress. In the alternative, Article 25(3)(d) should be rewritten so that it is clear that a substantial and indispensable contribution is required before criminal liability is invoked.[37] In other words, the statute should be clear that merchants providing mere background services should not be charged with the crimes of their customers.

The second needed reform is an amendment that addresses the problem of foreseeability. As discussed earlier, the Rome Statute makes no reference to the concept and it is unclear how Article 25 will be interpreted in this regard. It is important that prosecutions before the International Criminal Court be

37 See *Kvočka et al.*, *supra* note 17. Of course, it is possible that judges at the ICC may read the 'substantial contribution' requirement into the Rome Statute on the basis of the reasoning in *Kvočka*. But revisions to the doctrine are preferable at the legislative — rather than judicial — level.

governed by the principle that the foreseeable crimes of one's co-conspirators will carry a lower criminal penalty than crimes that were explicitly or implicitly part of the criminal plan. This principle would mirror the distinction between intentional murder and negligent or reckless homicide. The best way of ensuring this moral hierarchy is to add a new subsection to Article 25 explicitly codifying this interpretation of the concept of foreseeability and its appropriate level of culpability.

The third needed reform is an amendment to Article 25 that explicitly states that all members of a conspiracy will be judged according to their individual participation and importance in the overall criminal scheme. This may be implicit in Article 25(2) but it is too uncertain to tell for sure. More appropriate would be an explicit discussion of culpability. This is especially important given the tendency of international judges to look to the case law to interpret these doctrines. Since so many prosecutions in the past have applied the version of joint criminal enterprise that attributes criminal conduct to all members of the conspiracy, the statute must be explicitly amended in order to displace these precedents. In formulating this new amendment it would not be necessary to list a detailed hierarchy of mastermind, architect, coordinator, soldier, minor contributor and service provider. It would be sufficient to simply state that prosecutions under Article 25 must be relative to an individual's role in the overall criminal organization and that minor players are less culpable than masterminds. Judges at the International Criminal Court could then apply this standard at trial after engaging in the appropriate fact finding.

Now is the time to improve the Rome Statute. Prosecutions at the International Criminal Court are only now beginning. While any potential amendment would only be prospective in nature and could not be applied retroactively, these amendments would go a long way to ensuring that the Rome Statute's version of joint criminal enterprise is as free from conceptual confusion as possible. The fact that amendments are difficult to achieve does not diminish their importance. The concepts of intentionality, foreseeability, and culpability are so central to criminal law that any penal statute must demonstrate a serious commitment to them.