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# Joint Intentions to Commit International Crimes

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# Joint Intentions to Commit International Crimes

Jens David Ohlin\*

## Abstract

*The following article is an attempt to provide a coherent theory that international tribunals may use to ground the imposition of vicarious liability for collective crimes. Currently, the case law and the literature is focused on a debate between the Joint Criminal Enterprise (JCE) doctrine applied by the International Criminal Tribunal for the former Yugoslavia (ICTY) and the co-perpetration doctrine applied by the International Criminal Court (ICC), which defines co-perpetrators as those who have joint control over the collective crime. The latter doctrine, influenced by German criminal law theory, has recently won many converts, both in The Hague and in the Academy, because it allegedly avoids many of the pitfalls and excesses associated with the JCE doctrine, including vicarious liability for actions that fall outside the scope of the criminal plan (JCE III), the most expansive version of the doctrine. The following Article subjects the control theory, the new darling of the professoriate, to renewed scrutiny and questions whether “control” is the most important criterion for collective crimes. This Article defends the claim that the most essential aspect to ground vicarious liability for members of a criminal gang is the mens rea of its individual members. These individuals share with each other a joint intention that the group commits a collective crime, and through a series of hypothetical examples, I argue that this fact ought to be the most central aspect of the doctrine. The original version of JCE doctrine did little to analyze these joint intentions, although it implicitly relied on them, and the co-perpetration theory has sought to sidestep them by emphasizing “control” instead. But this is an overreaction. The proper course is to return mens rea to the center of the debate and develop a nuanced account of joint intentions that avoids the excesses of the JCE doctrine. Instead of replacing JCE with the control theory of perpetration, international courts should reform JCE by eliminating JCE III because it fails to comply with the underlying theory supporting the doctrine.*

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### I. INTRODUCTION

Collective criminal action has been—and remains—the most contentious area of substantive international criminal law. Three doctrines for imposing individual liability for collective endeavors have obsessively dominated the case law and literature, stretching from Nuremberg to the most current pronouncements of the ICC. These doctrines are: (i) conspiracy, (ii) Joint

Criminal Enterprise (JCE),<sup>1</sup> and (iii) co-perpetration. Although the favored doctrines keep changing, the central issue always remains how to hold a defendant responsible for the actions of another. In this Article, I attempt to shift the focus away from the standard debate regarding the relative merits and demerits of these three doctrines. This Article attempts to cut across the spectrum in a new way and focus instead on the commonalities of these theories in an attempt to elucidate an underlying theory to explain and ground how individual liability can be generated from collective endeavors. In this regard, international criminal lawyers should be particularly concerned with finding a theory that adequately explains vicarious liability for group crimes, that is, the imposition of liability to all participants for the criminal actions of a colleague.

In order to accomplish this goal, it is important to first explain the relationship between the three doctrines. Consequently, Section II argues that JCE is just a new variant of the common law conspiracy doctrine, despite repeated protestations to the contrary from the *ad hoc* tribunals. The underlying and essential criterion that unites the two doctrines is the existence of a criminal agreement between the parties. A criminal agreement provides externalized evidence that the parties intend for the crime to be committed. Section III then extends this analysis by briefly examining the two most pressing problems with these doctrines, and in particular conspiracy and JCE: (i) the imposition of vicarious liability for actions that fall outside the scope of the criminal plan, and (ii) the insistence that all members of the JCE are equally culpable, regardless of the scope of their participation in the endeavor. These difficulties crop up when the doctrines show insufficient attention to the question of intention. Section III also explains how these doctrines might be amended to resolve these difficulties. Finally, Section IV explains that the doctrine of co-perpetration, in particular the “control theory” version of the doctrine applied by the ICC, allegedly avoids these two problems. However, Section IV argues that control, by itself, does little to ground the imposition of vicarious liability and that a deeper theory regarding mens rea is required to do the job. Consequently, Section V offers such a theory. Regardless of which doctrine a court applies—conspiracy, JCE, or co-perpetration—some theory must explain the mental state of participants who

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<sup>1</sup> The three versions of JCE include co-perpetration by individuals who share the intent to commit the act (“JCE I”), concentration camp cases where the accused has “knowledge of the nature of the system of ill-treatment and intent to further the common design of ill-treatment” (“JCE II”), and vicarious liability for acts of others that fall outside the scope of the common criminal plan but are nonetheless reasonably foreseeable (“JCE III”). See *Prosecutor v Duško Tadić*, Case No IT-94-1-A, Judgment, ¶ 220 (ICTY App July 15, 1999). In addition to its application at the ICTY and ICTR, joint enterprise liability is also used at the Special Court for Sierra Leone. See Wayne Jordash and Penelope Van Tuyl, *Failure to Carry the Burden of Proof: How Joint Criminal Enterprise Lost its Way at the Special Court for Sierra Leone*, 8 J Intl Crim Just 591, 597–98 (2010) (discussing the “doctrinal confusion and overreaching at the Special Court” regarding JCE application).

join together to pursue collective action. Strangely, although this question is absolutely central to the field, the international criminal law (ICL) literature has all but ignored the need to offer a philosophically sophisticated answer to this question. Section V therefore explores the most plausible answer: individuals form a *joint* or *shared* intention that a group of individuals commits the crime.<sup>2</sup> By appealing to the philosophical literature on shared intentions (which to date has been generally ignored by ICL scholars),<sup>3</sup> this Article offers a theory of collective criminal action that is both theoretically sound and yet also yields a legally workable doctrine for courts to apply. Defendants should only be held liable for each other's actions when each has the intention that they commit the crime together. Although the answer sounds simple at first glance, the theory offers a profound, and much needed, answer that both grounds ascription of vicarious liability, but also explains why the limits (and revisions) described in Section III are absolutely necessary.

## II. THE RELATIONSHIP BETWEEN CONSPIRACY AND JCE

There has for some time been a division in the international case law over whether JCE is in fact a version of the conspiracy doctrine. In *Prosecutor v Milorad Krnojelac*,<sup>4</sup> the ICTY Trial Chamber concluded that the doctrines were related, noting that a “joint criminal enterprise exists where there is an understanding or arrangement amounting to an agreement between two or more persons that they will commit a crime.”<sup>5</sup> This view is not only entirely defensible, but also doctrinally necessary; the analysis in this Section will explain why. Proponents of JCE reject this definition because they are inclined to distance themselves from a formulation that sounds too much like conspiracy. The 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. This is the motivation behind the attempt to find a distinction between the two.

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<sup>2</sup> The terms “joint intention” and “shared intention” will be used interchangeably in this Article.

<sup>3</sup> Bratman's work on joint intentions has been incorporated into the legal literature in several instances, though not in the ICL context. See, for example, Daniel Markovitz, *Contract and Collaboration*, 113 Yale L.J. 1417, 1451–56 (2004); Scott J. Shapiro, *Laws, Plans, and Practical Reason*, 8 Legal Theory 307 (2002); Jules L. Coleman, *The Practice of Principle: In Defence of a Pragmatist Approach to Legal Theory* 95–100 (Oxford 2001); Curtis Bridgeman, *Contracts as Plans*, 2009 U Ill L Rev 341 (2009). See also Claire Finkelstein, *Responsibility for Unintended Consequences*, 2 Ohio St J Crim L 579, 587–92 (2005) (Bratman on intentions generally).

<sup>4</sup> *Prosecutor v Milorad Krnojelac*, Case No IT-97-25-T, Judgment (ICTY T Ch II Mar 15, 2002).

<sup>5</sup> Id ¶ 80. The sentence is well parsed in Alexander Zahar, *Commentary*, in André Klip and Göran Sluiter, eds, 14 *Annotated Leading Cases of International Criminal Tribunals* 841, 842 (Intersentia 2008).

## A. The Requirement of an Agreement

The Trial Chamber's view in *Krnjelac* was hastily rejected by the ICTY Appeals Chamber under the pretense that it was not in conformity with the requirements of JCE as originally articulated in *Prosecutor v Duško Tadić*.<sup>6</sup> Specifically, the Appeals Chamber rejected the Trial Chamber's formulation because "when it assessed the intent to participate in a systemic form of joint criminal enterprise," it imposed the extra requirement of requiring proof of an agreement "in relation to each of the crimes committed with a common purpose."<sup>7</sup> This is curious because it is completely unclear how one can achieve a "common purpose" in the absence of at least some form of criminal agreement. A conspiracy is little more than a criminal agreement in the sense that the agreement is the gravamen of the offense.<sup>8</sup> (Indeed, the very definition of a conspiracy is an agreement between two or more persons to engage in an unlawful act.)<sup>9</sup> The following quotation from the Appeals Chamber puts the problem even more sharply:

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 principle perpetrators of the crimes committed under the system—to commit those crimes.<sup>10</sup>

What is striking about this passage is the dual use of the phrase "agree" in both contexts that the Appeals Chamber seeks to distinguish. How is it possible to "agree to it" if not through an agreement? Indeed, the underlying words are

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<sup>6</sup> *Prosecutor v Krnjelac*, Case No IT-97-25-A, Judgment, ¶ 97 (ICTY App Ch Sept 17, 2003), citing *Tadić*, IT-94-1-A (cited in note 1).

<sup>7</sup> *Id.*

<sup>8</sup> See, for example, *Iannelli v United States*, 420 US 770, 778 n 10 (1975) ("[T]he agreement is the essential evil at which the crime of conspiracy is directed"); *United States v Beil*, 577 F2d 1313, 1315 n 2 (5th Cir 1978), quoting *United States v Feola*, 420 US 671, 694 (1975) ("The law of conspiracy identifies the agreement to engage in a criminal venture as an event of sufficient threat to social order to permit the imposition of criminal sanctions for the agreement alone, plus an overt act in pursuit of it, regardless of whether the crime agreed upon actually is committed."). For a discussion, see Jens David Ohlin, *Group Think: The Law of Conspiracy and Collective Reason*, 98 J Crim L & Criminology 147, 149 n 8 (2007).

<sup>9</sup> See, for example, 18 USC § 371 (West 2007). See also George P. Fletcher, *Rethinking Criminal Law* 646–47 (Oxford 2000) (originally published 1978); Jens David Ohlin, *Conspiracy*, in Antonio Cassese, ed, *Oxford Companion to International Criminal Justice* 279–80 (Oxford 2009) (defining conspiracy as "an agreement by two or more persons to commit an unlawful act").

<sup>10</sup> *Krnjelac*, IT-97-25-A ¶ 97 (emphasis added) (cited in note 6). See also Zahar, *Commentary* at 842–43 (cited in note 4) (discussing the Appeals Chamber's rejection of the agreement requirement).

the same. Alexander Zahar expresses the question nicely when he concludes that there “is a difference, apparently, between ‘agreeing to the system’ and ‘entering into an agreement’ with the principal perpetrators.”<sup>11</sup> The undertone of skepticism is warranted here because there is no doctrinally relevant difference; both are agreements, both are conspiracies.<sup>12</sup> How else can one agree to the system? The view of JCE as a version of the conspiracy doctrine was subsequently also supported by the ICTY Appeals Chamber in *Prosecutor v Milutinović*,<sup>13</sup> which concluded that JCE was a version of conspiracy with the added element of “action in furtherance of that agreement.”<sup>14</sup> Although this view was subsequently rejected by the ICTY Appeals Chamber in *Prosecutor v Brđanin*,<sup>15</sup> it was, in my view, too hastily discarded.<sup>16</sup>

The *Brđanin* decision also considered the question of whether the prosecution must demonstrate that there was an agreement between the accused in the case and the principal perpetrator of the crime. The Appeals Chamber rejected this requirement because it found no such requirement in the *Tadić* opinion’s rendering of the standard for JCE liability.<sup>17</sup> Furthermore, the court acknowledged that foregoing this additional requirement meant that JCE liability might be imposed for individuals with a mere tenuous connection to the principal perpetrators.<sup>18</sup> The Appeals Chamber reasoned that a common purpose may “materialise extemporaneously.”<sup>19</sup>

This thought was then taken to its logical extreme: the Appeals Chamber in *Brđanin* concluded that the defendants could be vicariously liable for the actions of the physical perpetrators of the crime, even if the physical perpetrators were

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<sup>11</sup> See Zahar, *Commentary* at 842 (cited in note 5).

<sup>12</sup> Indeed, even the *Tadić* court referred to an agreement. See *Tadić*, IT-94-1-A ¶ 228 (cited in note 1).

<sup>13</sup> *Prosecutor v Milutinović*, Case No IT-99-37-A, Decision on Dragoljub Ojdanic’s Motion Challenging Jurisdiction – Joint Criminal Enterprise (ICTY App Ch May 21, 2003).

<sup>14</sup> Id ¶¶ 18, 23. It is not clear why the ICTY Appeals Chamber in this case referred to the act requirement as an added element on top of conspiracy, since many jurisdictions require “an overt act in furtherance of the conspiracy” as an essential element of any conspiracy prosecution. This is black letter conspiracy doctrine. See *United States v Rabinovich*, 238 US 78, 86 (1915) (“There must be an overt act; but this need not be of itself a criminal act; still less need it constitute the very crime that is the object of the conspiracy.”). Consequently, the ICTY’s description of JCE in *Milutinović* fits squarely within the definition of a conspiracy.

<sup>15</sup> *Prosecutor v Radoslav Brđanin*, Case No IT-99-36-A, Judgment (ICTY App Ch Apr 3, 2007).

<sup>16</sup> See id ¶¶ 429–31 (outlining the requirements for JCE).

<sup>17</sup> Id ¶ 416. Again, this is somewhat strange since even the *Tadić* opinion referred to the “agreed upon” plan. See *Tadić*, IT-94-1-A ¶ 228 (cited in note 1).

<sup>18</sup> See *Brđanin*, IT-99-36-A ¶ 418 (cited in note 15).

<sup>19</sup> Id ¶ 418. See also *Tadić*, IT-94-1-A ¶ 227 (cited in note 1).

not part of the JCE.<sup>20</sup> Under this view, the co-defendants conspired with each other and formed a JCE to commit international crimes. These crimes were then carried out by other individuals—the physical perpetrators—but there was no overarching joint enterprise that connected all of them together.<sup>21</sup> This view then leaves a gaping hole in the doctrine: how to link the defendants with the physical perpetrators and vicariously ascribe responsibility to the former for the actions of the latter.<sup>22</sup> This was precisely the doctrinal *raison d'être* for JCE in the first place. Removing the physical perpetrators from the JCE just opens up the original issue again: the need for a linking principle to establish vicarious liability. The Appeals Chamber in *Brđanin* displayed a shocking level of indifference over the lack of such a linking principle, going so far as to admit in a footnote that they would not be providing one in the decision.<sup>23</sup> In dicta, however, the Appeals Chamber suggested that such a linking principle could be established by something like indirect perpetration or perpetration-by-means.<sup>24</sup> In other words, the co-defendants in the JCE used the physical perpetrators as mere instruments to carry out their criminal endeavor. But no such doctrine was fleshed out in the judgment and subsequent decisions have similarly failed to close this lacuna. This is especially problematic because it is the missing linking principle, not the JCE, that is doing all of the work in the argument by grounding the vicarious liability.<sup>25</sup> In fact, the JCE becomes entirely irrelevant to the case. What is the significance of the JCE to the case if it does not connect the defendants to the perpetrators?

Unfortunately, the Appeals Chamber discussion in *Brđanin* conflates two related but ultimately separate questions. The first is whether a common criminal endeavor must involve some form of agreement. I submit that it must, otherwise one conflates mere crowd behavior with the more directed behavior of a joint criminal *plan* or *enterprise*.<sup>26</sup> However, the fact that a criminal endeavor arises from some kind of agreement is a general question separate from the more specific inquiry of whether a defendant has an agreement with the physical

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<sup>20</sup> See *Brđanin*, IT-99-36-A ¶ 410 (cited in note 15).

<sup>21</sup> See id ¶ 411.

<sup>22</sup> See id ¶ 412.

<sup>23</sup> See id ¶ 413 n 891.

<sup>24</sup> See *Brđanin*, IT-99-36-A ¶ 412 (cited in note 15).

<sup>25</sup> Even Judge Cassese, the jurist most responsible for the ICTY's adoption of the JCE doctrine, has called the *Brđanin* decision objectionable, excessive, and contrary to the *nullem crimen* principle. See Antonio Cassese, *International Criminal Law* 195 (Oxford 2d ed 2008).

<sup>26</sup> For a general discussion of the distinction between crowd behavior and concerted action, see Peter A. French, *Collective and Corporate Responsibility* 68–75 (Columbia 1984). See also Section IV.



perpetrator of the underlying criminal act. These are two separate questions, and the ICTY case law, in particular *Brđanin*, needlessly confused them.

Simply put, it is incorrect to state that conspiracy as a mode of liability requires a direct agreement between the physical perpetrator of the crime and the defendant. True, there must be an agreement at the center of the conspiracy. But the physical perpetrator may have an agreement with a third party, who in turn has an agreement with the defendant. In this sense, the conspiracy doctrine only requires overlapping chains of agreement that link the physical perpetrator to the defendant. But no direct agreement between the two is required. Indeed, it is quite common for the left hand of a conspiracy to be unaware of what the right hand of the conspiracy is doing. Indeed, one hand may even be unaware of the name or identity of the right hand, but this lack of a direct connection does not preclude liability in the US under the doctrine of “chain conspiracies.”<sup>27</sup> In such cases, the lack of a direct agreement between the defendant and the physical perpetrator is no bar to applying the conspiracy doctrine as long as the chain of overlapping agreements connects them. They are all part of the same joint enterprise.

There are other devices for inferring an agreement, such as the well-known doctrine of hub-and-spoke conspiracies. The idea, first broached by the prosecution’s argument in *Kotteakos v United States*,<sup>28</sup> is that “separate spokes meeting in a common center” could form a single conspiracy uniting all parts of the wheel.<sup>29</sup> The Supreme Court refused to apply this idea to the facts of *Kotteakos*, but the concept survived and subsequent case law has refined when

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<sup>27</sup> See, for example, *United States v Robinson*, 547 F3d 632, 641 (6th Cir 2008); *United States v Martinez*, 430 F3d 317, 332–33 (6th Cir 2005) (“In a drug distribution ‘chain’ conspiracy, it is enough to show that each member of the conspiracy realized that he was participating in a joint venture, even if he did not know the identities of every other member, or was not involved in all the activities in furtherance of the conspiracy.”); *United States v Leigh*, 62 Fed Appx 43, 45 (4th Cir 2003) (“a chain conspiracy, such as that alleged here, may constitute a single conspiracy.”); *United States v Hines*, 717 F2d 1481, 1490 (4th Cir 1983) (“this chain conspiracy is not unlike other multi-leveled drug schemes found to be part of a single conspiracy”). Compare with *United States v Tabron*, 437 F3d 63, 66 (DC Cir 2006) (stating that district courts must “make explicit findings as to the scope of defendant’s conspiratorial agreement before holding him responsible a for co-conspirator’s reasonably foreseeable acts”) and *United States v Childress*, 58 F3d 693, 710 (DC Cir 1995) (“Even if, for instance, there exists a core, single chain conspiracy, ‘certain players may have performed activities wholly unrelated to the aims of the conspiracy.’ In addition, some courts have been reluctant to conclude that the chain conspiracy construct can automatically bind all participants in a drug distribution enterprise into a single agreement . . . when there are no indications of interdependence between the various participants.”) (citations omitted).

<sup>28</sup> 328 US 750 (1946).

<sup>29</sup> Id at 755. Compare with *United States v Bruno*, 105 F2d 921, 923 (2d Cir 1939) (allowing liability for narcotics conspiracy where other individuals formed a necessary link in the scheme of distribution, even in the absence of “privity” between the retailers).

the hub-and-spokes theory can be applied.<sup>30</sup> The animating rationale is typically that a single conspiracy exists when the outer participants had no direct exposure to the other spokes, but knew—from logical necessity—that they must have existed. The classic and most common application of the theory is an illicit drug distribution ring, where each retailer is segregated from the others but knows that they must exist; otherwise, each retailer would be selling the entire lot smuggled into the country and not a portion thereof.<sup>31</sup>

The distinction that *Brdanin* should have invoked is between explicit agreements formulated verbally or memorialized in writing, and implicit agreements where some individuals conspire together without ever meeting each other or communicating directly.<sup>32</sup> It is quite common in conspiracies for some members to have *agreed* to a common criminal plan by virtue of their voluntary participation in the plan when they know what the plan entails and decide to participate in it. That *is* an agreement.<sup>33</sup> To suggest otherwise is to fundamentally misunderstand common law conspiracy doctrine; one can agree to a conspiracy without ever uttering a word.<sup>34</sup>

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<sup>30</sup> See, for example, *United States v Carpenter*, 791 F2d 1024, 1036 (2d Cir 1986). In *Carpenter*, the Second Circuit indicated that liability might be appropriate in cases where the existence of other parties could be reasonably foreseeable “as a necessary or natural consequence of the unlawful agreement[.]” See *id.*, quoting *Pinkerton v United States*, 328 US 640, 648 (1946). See *United States v Berger*, 224 F3d 107, 114–15 (2d Cir 2000), quoting *United States v Maldonado-Rivera*, 922 F2d 934, 963 (2d Cir 1990) (“Moreover, ‘a single conspiracy is not transformed into multiple conspiracies merely by virtue of the fact that it may involve two or more phases or spheres of operation, so long as there is sufficient proof of mutual dependence and assistance.’”). Compare with Model Penal Code § 5.03(2) (ALI 1980) (“If a person guilty of conspiracy . . . knows that a person with whom he conspires to commit a crime has conspired with another person or persons to commit the same crime, he is guilty of conspiring with such other person or persons, whether or not he knows their identity, to commit such crime.”).

<sup>31</sup> See, for example, *Bruno*, 105 F2d at 923 (cited in note 29).

<sup>32</sup> This distinction was helpfully invoked by the Trial Chamber in the very same case, which held that JCE liability required an explicit agreement or understanding between the defendant and the physical perpetrators of the crime. Although the invocation of the concept of “an agreement” strikes me as absolutely correct, I am unsure if the Trial Chamber got it right when it required a direct connection between the defendant and the physical perpetrators, particularly since it is unclear whether an overlapping chain of agreements would satisfy their standard. In any event, the Trial Chamber’s holding was completely rejected by the Appeals Chamber in *Brdanin*, IT-99-36-A ¶¶ 415–19 (cited in note 15).

<sup>33</sup> See, for example, *United States v Parker*, 553 F3d 1309, 1317 (10th Cir 2009) (“Participation in a conspiracy can be proven by either explicit or implicit agreement by the defendant.”); *United States v McKee*, 506 F3d 225, 238 (3d Cir 2007) (“[T]he illegal agreement can be, and almost always is, an implicit agreement among the parties to the conspiracy”).

<sup>34</sup> See, for example, *United States v Price*, 13 F3d 711, 728 (3d Cir 1994) (drug distribution conspiracies are usually implicit); *United States v Zambrano*, 776 F2d 1091, 1096 (2d Cir 1985) (from defendant’s activities finder of fact could reasonably infer knowledge, intent and agreement to support conspiracy conviction).

There is also substantial historical support for the idea that common purpose liability and conspiracy liability are one and the same. At Nuremberg, the indictments all referred to a common plan *or* conspiracy as a single atomic concept.<sup>35</sup> The commentary of the 1996 Draft Code of Crimes against the Peace and Security of Mankind contained the following language: “The principle of individual criminal responsibility for formulating a plan or participating in a common plan or conspiracy to commit a crime[.]”<sup>36</sup> It also refers to the Charter of the Nürnberg Tribunal (Article 6), the ICTY Statute (Article 7, paragraph 1), the ICTR Statute (Article 6, paragraph 1), and the Convention on the Prevention and Punishment of the Crime of Genocide (Article III, subparagraph (b)) (Genocide Convention).<sup>37</sup> Furthermore, the 1950 Principles that ratified the outcome of the Nuremberg trials refers to participation in a “common plan or conspiracy.”<sup>38</sup> Consequently, it is clear that even the UN and the International Law Commission believe that—at the very least—common purpose liability and conspiracy liability are two sides of the same doctrinal coin.<sup>39</sup>

Further support can be drawn from the ICTR’s jurisprudence on conspiracy to commit genocide, the one crime in the jurisprudence of the *ad hoc* tribunals where the inchoate offense of conspiracy is allowed.<sup>40</sup> In cashing out the essential elements of conspiracy, including inferring a tacit agreement, the tribunal made reference to joint action; conspiracy is established by “coordinated actions by individuals who have a common purpose and are acting within a unified framework,” such as a coalition where “those acting within the coalition are aware of its existence, their participation in it, and its role in furtherance of

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<sup>35</sup> See International Military Tribunal at Nuremberg, *Indictment*, in 1 *Trial of the Major War Criminals* 29–41 (1947) (referring in count one to the “common plan or conspiracy”).

<sup>36</sup> United Nations, *Draft Code of Crimes Against the Peace and Security of Mankind* (1996), online at [http://untreaty.un.org/ilc/texts/instruments/english/commentaries/7\\_4\\_1996.pdf](http://untreaty.un.org/ilc/texts/instruments/english/commentaries/7_4_1996.pdf) (visited Oct 24, 2010)

<sup>37</sup> See United Nations, *Draft Code of Crimes* (cited in note 36).

<sup>38</sup> See United Nations, *Principles of International Law Recognized in the Charter of the Nürnberg Tribunal and in the Judgment of the Tribunal* (1950), online at [http://untreaty.un.org/ilc/texts/instruments/english/commentaries/7\\_1\\_1950.pdf](http://untreaty.un.org/ilc/texts/instruments/english/commentaries/7_1_1950.pdf) (visited Oct 24, 2010).

<sup>39</sup> See Jens Meierhenrich, *Conspiracy in International Law*, 2 *Ann Rev L & Soc Sci* 341, 351 (2006) (arguing for underlying similarities between JCE and conspiracy); Ciara Damgaard, *Individual Criminal Responsibility for Core International Crimes: Selected Pertinent Issues* 188–93 (Springer 2008).

<sup>40</sup> The basis for the asymmetry of allowing the inchoate offence of conspiracy for genocide, but not other international crimes, stems from the fact that conspiracy to commit genocide was explicitly included in the Genocide Convention.

their common purpose.”<sup>41</sup> Coincidentally, these are essentially the elements of a joint criminal enterprise.

Finally, the fact that JCE III allows for vicarious liability for the acts of co-conspirators, so long as those results are foreseeable, suggests the close connection between the doctrine of conspiracy and JCE.<sup>42</sup> The standard itself for JCE III stems from the *Pinkerton v United States*<sup>43</sup> doctrine, which allows in US federal courts the imputation of responsibility for the acts of co-conspirators.<sup>44</sup> Indeed, even the language in *Tadić* is borrowed, inter alia, from *Pinkerton*.<sup>45</sup>

## B. Common Law Liability for a Joint Criminal Purpose

Historically, it is true that at common law, liability under the common purpose doctrine was a separate mode of liability that was not referred to as “conspiracy.” This suggests, at first glance, that there is a not insignificant distinction between conspiracy and a joint criminal enterprise. But deeper investigation reveals this to not be so. The modern doctrine dates back to *Regina v Swindall and Osborne*<sup>46</sup> in 1846.<sup>47</sup> Two cart drivers were racing in public and one of them struck and killed a pedestrian. Both cart drivers were convicted of manslaughter.<sup>48</sup> However, the key element of the decision stemmed from the fact that both drivers had agreed to engage in the race and they were doing so

<sup>41</sup> *Prosecutor v Ferdinand Nahimana*, Case No ICTR-99-52-T, Judgment and Sentence, ¶ 1047 (Tr Ch I Nov 28, 2007).

<sup>42</sup> See *Tadić*, IT-94-1-A ¶ 224 n 289 (cited in note 1) (“Although there is no clearly defined doctrine of common purpose under the US’s Federal common law, similar principles are promulgated by the Pinkerton doctrine. This doctrine imposes criminal liability for acts committed in furtherance of a common criminal purpose, whether the acts are explicitly planned or not, provided that such acts might have been reasonably contemplated as a probable consequence or likely result of the common criminal purpose.”).

<sup>43</sup> 328 US 640 (1946) (cited in note 30).

<sup>44</sup> See id at 646–48.

<sup>45</sup> See Amicus Curiae Brief of Centre for Human Rights and Legal Pluralism, McGill University, *Kaing Guek Eav (Duch Case)*, Case No 001/18-07-2007-ECCC/OCIJ (PTC 02), ¶ 33 (ECCC filed Oct 27, 2008) (The *Tadić* Court “refers primarily to a doctrine arising from a 1946 U.S. Supreme Court case, *Pinkerton v. U.S.*”).

<sup>46</sup> *Regina v Swindall and Osborne*, [1846] 2 Car & K 230 (UK).

<sup>47</sup> Ambos traces the doctrine back even further to the common purpose theory of the 14th century. See Kai Ambos, *Joint Criminal Enterprise and Command Responsibility*, 5 J Intl Crim Just 159, 168 n 64 (2007), citing Keith John Michael Smith, *A Modern Treatise on the Law of Criminal Complicity* 209 n 1 (Oxford 1991). Ambos also notes that the doctrine developed into the common law concept of criminal conspiracy in the 17th century, citing *Developments in the Law: Criminal Conspiracy*, 72 Harv L Rev 922, 922–23 (1959). This supports the reading offered here that common enterprise liability is of a coin with criminal conspiracy.

<sup>48</sup> See Francis Wharton, 1 *A Treatise on Criminal Law* 364 (Kay and Brother 8th ed 1880).

negligently.<sup>49</sup> Furthermore, individual liability could not be traced to a single individual because it was unclear which cart had killed the pedestrian.

At some point in its historical evolution, US law started to deal with such cases as conspiracies, whereas the common purpose doctrine survived mostly in tort. An early example is *Colegrove v The New York & New Haven Railroad Company and The New York and Harlem Railroad Company*,<sup>50</sup> which allowed a plaintiff to maintain an action against two railroads for their negligence.<sup>51</sup> The more modern version of this tort doctrine exists in the form of joint enterprise liability or market share liability, where corporations may be held liable relative to the percentage of their market share in an industry that has caused injury to plaintiffs.<sup>52</sup> Famous examples include birth defects caused by the drug DES, where industry-wide causation is established as a matter of law, but causation to specific defendants is impossible to identify.<sup>53</sup> Disinclined to prevent all recovery in such cases, some courts allowed recovery based on market share liability to be used as a proxy where more finely tuned evaluations of individual causation are impossible. But in the criminal law, the rule of *Swindall* is largely forgotten and has long since been displaced by conspiracy and *Pinkerton's* vicarious liability for the acts of co-conspirators.<sup>54</sup> Although the phrase of joint enterprise liability

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<sup>49</sup> Id.

<sup>50</sup> 20 NY 492 (1859).

<sup>51</sup> See id at 494. See also Wharton, *A Treatise on Criminal Law* at 364 (cited in note 48) (concluding that the rule also “holds good in respect to all cases where an injury is produced to an innocent third person by a collision between two parties who are both negligent” and citing *Colegrove*).

<sup>52</sup> See *Sindell v Abbott Laboratories*, 607 P2d 924 (Cal 1988); Naomi Shelner, Comment, *DES and a Proposed Theory of Enterprise Liability*, 46 Ford L Rev 963 (1978). However, other jurisdictions have rejected enterprise liability in favor of more traditional standards requiring proof of specific causation. See Edward J. Schwartzbauer and Sidney Shindell, *Cancer and the Adjudicative Process: The Interface of Environmental Protection and Toxic Tort Law*, 14 Am J L & Med 1, 38 (1988) (stating Supreme Court’s holding regarding causation in *Celotex Corporation v Catratt*, 477 US 317 (1986) is arguably inconsistent with the enterprise liability theory since it implicitly rejects the idea that causation is not a part of the plaintiff’s case).

<sup>53</sup> See *Sindell*, 607 P2d at 928 (cited in note 52). See also *Hamilton v Accu-tek*, 935 F Supp 1307 (EDNY 1996) (applying the doctrine to manufacturers of handguns). But see *Skipworth v Lead Industries Ass’n*, 690 A2d 169 (1997) (refusing to apply doctrine to lead pigment manufacturers).

<sup>54</sup> The doctrine is applied in the US only in the very limited context of negligent homicide as a result of a car race. See, for example, *State v Martin*, 539 So 2d 1235, 1239 (La 1989); *State v McFadden*, 320 NW2d 608, 609 (Iowa 1982); *State v Melcher*, 487 P2d 3, 13–14 (Ariz Ct App 1971); *State v Butler*, 227 NE2d 627, 630 (Ohio 1967); *State v Alterio*, 220 A2d 451, 453–56 (Conn 1966); *People v Kemp*, 310 P2d 680, 683 (Cal Ct App 1957). It is not a general mode of liability with wider applicability. Joint criminal liability is now established either by *Pinkerton* liability or by aiding and abetting. See, for example, *United States v Bowen*, 527 F3d 1065, 1077–80 (10th Cir 2008); *United States v Zackery*, 494 F3d 644, 648 (8th Cir 2007). Only a couple of states retain a joint enterprise liability doctrine that is distinguishable from conspiracy or aiding and abetting. See, for example, *State v Jefferson*, 574 NW2d 268, 277–78 (Iowa 1997) (applying Iowa Code section 703.2). But see

continues to have some purchase in the criminal law of the UK,<sup>55</sup> it is clear that these cases involve an agreement, either explicit or tacit, between the individuals, thus demonstrating that the doctrine is a functional analogue to the conspiracy doctrine as a mode of liability.<sup>56</sup>

*Regina v Powell*,<sup>57</sup> the leading UK criminal case on joint enterprise (vicarious) liability, is particularly illustrative. In that case, the various formulations of the doctrine offered by the House of Lords all included the element of an agreement.<sup>58</sup> Indeed, the particular doctrinal puzzle confronted by the Lords was whether to properly describe the nature of the vicarious liability as actions that fall outside the scope of the original criminal agreement, but are nonetheless foreseeable, or as actions that are tacitly agreed to by the defendant by virtue of the fact that they were foreseeable and the defendant continued with the enterprise anyway. The particular choice between these two formulations is irrelevant for our purposes here; what matters is that the debate was entirely framed around the nature of the agreement at the heart of the doctrine. British commentators on criminal law similarly recognize the centrality of agreement as an essential aspect of joint enterprise liability.<sup>59</sup>

In conclusion, the best way to understand domestic liability for joint enterprises is to treat it as a functional analogue to conspiracy as a mode of liability. The fact that UK law has conspiracy as an inchoate offense but does not have anything called conspiracy liability suggests strongly that what US

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*Commonwealth v Ortiz*, 679 NE2d 1007, 1009 (Mass 1997) (applying joint enterprise liability as a form of aiding and abetting and requiring presence at the scene of the crime, knowledge that another intends to commit the crime or intent to commit a crime, and an agreement to be willing and available to help the other if necessary, thus distinguishing it from JCE); *Riley v State*, 878 P2d 272, 282 (Nev 1994) (referring to conspiracy theory as a type of joint criminal liability).

<sup>55</sup> See, for example, *Regina v Powell (Anthony) and English*, 1 AC 1 (HL 1999) (UK).

<sup>56</sup> See *Regina v Anderson and Morris*, [1996] 2 WLR 1195 (UK) (tacit agreement and foresight). See also Richard Stone, *Offences Against the Person* 45–46 (Cavendish 1999).

<sup>57</sup> 1 AC 1 (HL 1999) (UK) (cited in note 55).

<sup>58</sup> See also *Regina v Smith (Wesley)*, [1963] 1 WLR 1200 (UK) (“In the view of this court, that is a wholly unexceptionable direction on the law except, of course, where the act can be said to be wholly outside the subject-matter of the concerted agreement. The terms ‘agreement,’ ‘confederacy,’ ‘acting in concert’ and ‘conspiracy,’ all pre-suppose an agreement express or by implication to achieve a common purpose, and so long as the act done is within the ambit of that common purpose anyone who takes part in it, if it is an unlawful killing, is guilty of manslaughter.”).

<sup>59</sup> See, for example, Catherine Elliott and Frances Quinn, *Criminal Law* 220–21 (Longman 3d ed 2000), citing the case of *Regina v Petters and Parfitt* Crim L Rev 501 (1995) (UK) (“It is not sufficient that they both separately intend the same thing; they must have made it clear to each other, by their actions or words, that they have this common intention, though this might not be communicated until just before or at the point of committing the offence.”).

criminal lawyers call conspiracy liability, British criminal lawyers call joint enterprise liability. Two names, one doctrine.

### III. THE LIMITS OF VICARIOUS LIABILITY

Having linked conspiracy and JCE together as involving a criminal agreement, this Section takes a more critical look at the specifics of the JCE doctrine, its judicial development, and its application. Section III.A examines the World War II precedent for JCE and concludes that there is little support for the ICTY's conclusion that these cases include vicarious liability for actions that fall outside the scope of the criminal plan. To the contrary, Section III.B and Section III.C argue that the World War II cases suggest that the doctrine ought to distinguish between different types of actors in criminal endeavors. The best available distinction is between those individuals who intend for the crime to occur, and those who merely have some advance knowledge of the crime but who themselves do not exhibit an intent for the crime to happen. This crucial distinction will then provide the foundation for a revised theory—based on shared intentions—in Sections IV and V of this Article.

#### A. The Shaky Foundation of JCE III

The current trend in international penal codes is to pull back from JCE III (liability for the foreseeable actions of co-participants beyond the scope of the criminal plan). For example, Article 25 of the Rome Statute covers some of the same ground as JCE I, but it arguably excludes JCE III.<sup>60</sup> The Rome Statute's Article 25(3)(d), in addition to its requirement that the action must be intentional, also requires that the action meet one of the following two criteria: (i) "Be made with the aim of furthering the criminal activity or criminal purpose of the group, where such activity or purpose involves the commission of a crime within the jurisdiction of the Court," or (ii) "Be made in the knowledge of the intention of the group to commit the crime."<sup>61</sup>

Certainly, with regard to JCE III, it is unclear which of those prongs would fulfill a JCE III theory. First, JCE III would appear to exclude, by definition, contributions that are made with knowledge of the group's intention to commit the crime. The whole rationale for JCE III is the prosecution of individuals for actions that are foreseeable by an *objective* standard, even if the individual was not

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<sup>60</sup> See Joint Criminal Enterprise Brief of Amicus Curiae Kai Ambos, *Kaing Guek Eav (Duch Case)*, Case No 001/18-07-2007/ECCC/OCIJ (PTC 02), \*15 (ECCC Oct 27, 2008) ("Ambos Brief"). ("For the future case law of the ICC, this means that the application of JCE II (in the broad sense) and III *on the basis of Art. 25*—and this is the only basis it has—is not possible.")

<sup>61</sup> Rome Statute of the International Criminal Court ("Rome Statute"), July 17, 1998, UN Doc A/CONF.183/9 (1998), reprinted in 37 ILM 999, Art 25.

consciously deliberating about such possibilities when he or she made the contribution; such contributions are never made *knowingly*. Ambos correctly notes that contributions under JCE III may indeed meet the criteria of acting with the aim of furthering the criminal enterprise,<sup>62</sup> but it can hardly be said that contributions in such instances are “intentional,” unless one reduces intentionality to the most innocuous sense of the word to mean actions that are done voluntarily or without compulsion (which cannot be what the term means within the context of the Rome Statute).<sup>63</sup>

This strongly suggests that liability for foreseeable actions of co-conspirators that fall outside the scope of the criminal plan is not covered by Article 25(3)(d). But this is hardly surprising, since Article 25(3)(d) was enacted in place of a provision penalizing conspiracy as a substantive offense, which has been controversial in international criminal law since Nuremberg, and remains so today.<sup>64</sup> Indeed, even in the US, vicarious liability for the acts of co-conspirators falling outside the scope of the criminal plan is widely disfavored.<sup>65</sup> Although the *Pinkerton* doctrine allows such liability in federal court, many state jurisdictions and the Model Penal Code reject the doctrine.<sup>66</sup>

### 1. The World War II case law.

The case law foundation for JCE III is shaky. The *Tadić* opinion based its analysis on a series of previously unreported post-World War II military prosecutions.<sup>67</sup> However, the case law for common purpose liability for actions that extend beyond the scope of the plan rested largely on *Essen Lynching*<sup>68</sup> and

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<sup>62</sup> See Ambos Brief at \*14 (cited in note 60).

<sup>63</sup> See Jens David Ohlin, *Three Conceptual Problems with the Doctrine of Joint Criminal Enterprise*, 5 J Intl Crim Just 69, 78 (2007).

<sup>64</sup> See George P. Fletcher, Amicus Curaie Brief of Specialists in Conspiracy and International Law in Support of Petitioner, *Hamdan v Rumsfeld*, 548 US 557, \*6 (US filed Jan 6, 2006) (“Fletcher Brief”) (arguing that conspiracy is not a triable offence under the laws of war).

<sup>65</sup> The drafters of the Model Penal Code declined to codify *Pinkerton* liability and instead chose more traditional categories of complicity such as accomplice liability and aiding and abetting. See Model Penal Code § 2.06 (ALI 1980). There is also a long history in the scholarly literature of objections to US conspiracy doctrine. See, for example, Francis B. Sayre, *Criminal Conspiracy*, 35 Harv L Rev 393, 393–94 (1922).

<sup>66</sup> See, for example, *People v McGee*, 399 NE2d 1177, 1182 (NY 1979).

<sup>67</sup> See *Tadić*, IT-94-1-A ¶¶ 195–220 (cited in note 1).

<sup>68</sup> *Trial of Erich Heyer and Six others (“The Essen Lynching Case”)*, British Military Court for the Trial of War Criminals, Essen, 18th–19th and 21st–22d December, 1945, 1 *Law Reports of Trials of War Criminals* 88, 91 (UNWCC 1947) (facts and law that guided the court have to be inferred from the verdicts and sentences imposed and from Counsel’s arguments).



*Borkum Island*.<sup>69</sup> The first problem with these cases is that neither case produced a written decision from the judges, and so the written material consists only of submissions from the prosecutor and defense counsel. One is left to infer agreement with the prosecutor's doctrine on the basis of the judges' decision to issue convictions. This is problematic purely as a matter of legal reasoning. Second, and more importantly, neither case involved a situation where a defendant explicitly agreed to a criminal plan but was convicted for the actions of confederates that extended beyond the scope of the criminal plan. Rather, these were lynchings where the deaths were attributed to the defendants by the judicial system, even though the prosecutors could not prove who had killed whom (by delivering the fatal blows). Indeed, there is not a single *international* case cited in the *Tadić* opinion that includes the language of liability for actions that were reasonably foreseeable. The *Tadić* court cited *Pinkerton* and other domestic cases in a footnote, but conceded 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 systems. By contrast, in the area under discussion, national legislation and case law cannot be relied upon as a source of international principles or rules, under the doctrine of the general principles of law recognised by the nations of the world: for this reliance to be permissible, it would be necessary to show that most, if not all, countries adopt the same notion of common purpose. More specifically, it would be necessary to show that, in any case, the major legal systems of the world take the same approach to this notion. The above brief survey shows that this is not the case.<sup>70</sup>

In terms of more recent case law support for JCE III, the second edition of *International Criminal Law* cites *Regina v Vaillancourt*<sup>71</sup> and *Regina v Martineau*,<sup>72</sup> domestic criminal law cases from Canada in 1987 and 1990 respectively,<sup>73</sup> and *Regina v Powell (Anthony) and Another* and *Regina v English*,<sup>74</sup> two cases from the UK in 1997. While all four cases support vicarious liability, none applies international

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<sup>69</sup> *United States of America v Kurt Goebell et al, (Borkum Island)*, Case No 12-489 (1946), microformed on 1-6 *Records of United States Army War Crimes Trials*, M1103 Rolls 1-7 (National Archives Microfilm Publications 1980), cited in *Tadić*, IT-94-1-A ¶ 210 (cited in note 1). For a discussion, see Ohlin, *Three Conceptual Problems* at 75 n 10, 76 (cited in note 63) (containing discussions of, respectively, *Borkum Island* and *The Essen Lynching Case*); Ambos Brief at \*28 (cited in note 60).

<sup>70</sup> *Tadić*, IT-94-1-A ¶ 225 (cited in note 1).

<sup>71</sup> *Regina v Vaillancourt*, [1987] 2 SCR 636 (Can).

<sup>72</sup> *Regina v Roderick Russell Martineau*, [1990] 2 SCR 633 (1990) (Can).

<sup>73</sup> See Cassese, *International Criminal Law* at 200 n 13 (cited in note 25).

<sup>74</sup> *Regina v Powell (Anthony) and English*, 1 AC 1 (HL 1999) (UK) (cited in note 55).

law. The treatise also cites *D'Ottavio and Others*,<sup>75</sup> a post-World War II Italian prosecution from 1947, which was also cited in *Tadić*, although that case dealt mostly with the concept of indirect causation and the notion of *causa causae est causa causati*.<sup>76</sup> In *D'Ottavio*, civilians pursued detainees who had escaped from a concentration camp and all were convicted of manslaughter even though only one of them had actually fired a weapon at them (the others arguably pursued them to capture them). The Court of Cassation stated that, “[t]his foresight (*previsione*) necessarily followed from the use of weapons: it being predictable (*dovendo prevedersi*) that one of the participants might shoot at the fugitives to attain the common purpose (*lo scopo comune*) of capturing them.”<sup>77</sup> This does indeed sound a lot like *Pinkerton*. However, the Court of Cassation was applying Italian criminal law, not international criminal law, which thus fails to establish that the doctrine can be deduced from customary international law. *Aratano et al.*,<sup>78</sup> also cited in *Tadić*, falls victim to the same problem.<sup>79</sup> The Appeals Chamber in *Brdanin* cited two Control Council Law No 10 cases (*Justice*<sup>80</sup> and *RuSHA*<sup>81</sup>), although neither specifically refers to a common criminal design and neither involves vicarious liability for acts that fall outside the scope of the criminal plan.<sup>82</sup> It is therefore appropriate to ask if, prior to *Tadić*, there was a single case applying international criminal law or the international law of war that held a defendant vicariously responsible for the foreseeable actions of other members of a common criminal enterprise that nonetheless fell outside the scope of the criminal plan.

<sup>75</sup> Cass Pen, 12 Mar 1947, n 270 (Ita), reprinted in *D'Ottavio and Others Case*, 5 J Intl Crim Just 232 (2007).

<sup>76</sup> See Casese, *International Criminal Law* at 204 n 18 (cited in note 25).

<sup>77</sup> *Prosecutor v Tadić (Appeal against Conviction)*, 124 ILR 61, 151 (Intl Crim Trib for the Former Yugoslavia 1999), quoting the judgment in Cass Pen, 12 Mar 1947, n 270 (Ita).

<sup>78</sup> *Aratano and Others*, No 102, Judgment (Ct of Cassation, Feb 21, 1949) (Ita), reprinted in 5 J Intl Crim Just 241 (2007).

<sup>79</sup> See *Tadić*, IT-94-1-A ¶ 216 (cited in note 1). See also Ambos Brief at \*29 (cited in note 47) (“[T]he recognition of JCE III in customary law cannot be deduced from the Italian case law quoted by the Appeals Chamber either, since in this trial—in contrast to the trials before British and U.S. American military tribunals—no international, but exclusively the national law (Art. 116 [1] of the Italian *Codice Penale*) was applied.”).

<sup>80</sup> *United States of America v Josef Altstoetter and Others (Justice)*, United States Military Tribunal III, Judgment of Dec 4, 1947, in 3 *Trials of War Criminals Before the Nuernberg Military Tribunals Under Control Council Law No 10* 954 (US 1951).

<sup>81</sup> *United States of America v Ulrich Greifelt and Others (RuSHA)*, United States Military Tribunal I, Judgment of Mar 10, 1948, in 5 *Trials of War Criminals Before the Nuernberg Military Tribunals Under Control Council Law No 10* 88 (US 1951).

<sup>82</sup> See *Brdanin*, IT-99-36-A § XIII ¶ 16 (cited in note 15) (partial dissent of Judge Shahabuddeen).

## 2. JCE III and special intent.

In a recent defense of the JCE doctrine, Antonio Cassese proposed a significant restriction on the application of JCE III.<sup>83</sup> In order to remain consistent with the required mental element for international offenses, Cassese concedes that JCE III should not be used as a mode of liability for offenses that require a showing of special or specific intent.<sup>84</sup> In particular, he argues that this restriction would apply to prosecutions for genocide, persecution, and aggression, since each of these offenses requires a showing that the defendant had a specific intent that goes beyond the fact that the defendant's underlying conduct was intentional (so-called general intent).<sup>85</sup> In the case of genocide, the specific intent is the intent to destroy the protected group (in whole or in part),<sup>86</sup> and in the case of persecution, the specific intent is the intent to discriminate against the group by depriving its members of fundamental rights.<sup>87</sup> Applying JCE III in this context would entail convicting a defendant without the requisite specific intent.<sup>88</sup> In essence, the logical extreme of the proposal would entail only using JCE III in cases where the mens rea of the underlying offense can be satisfied by recklessness or *dolus eventualis*, since the mens rea of a defendant in a JCE III case is one of recklessness—he subjectively foresees the resulting crime but willingly participates anyway. The two should match.

Although this proposed contraction of the doctrine is a welcome development, the proposal suffers from some ambiguity regarding the scope of the constraint being proposed. When identifying specific intent crimes in international criminal law, it is important to look for both *chapeau* crimes and underlying offenses that require specific intent. For example, genocide is a *chapeau* crime so all instances of genocide, regardless of the underlying offense, will require specific intent.<sup>89</sup> But other international crimes might have specific

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<sup>83</sup> For a general discussion, see Antonio Cassese, The Proper Limits of Individual Responsibility under the Doctrine of Joint Criminal Enterprise, 5 J Intl Crim Just 109 (2007).

<sup>84</sup> See *id.* at 121. The terms specific and special intent (*dolus specialis*) are all used interchangeably here.

<sup>85</sup> *Id.*

<sup>86</sup> See, for example, Rome Statute, Art 6 (cited in note 61).

<sup>87</sup> See, for example, *id.* at Art 7(2)(g).

<sup>88</sup> A similar strategy was employed by the Supreme Court of Nevada in *Bolden v State*, 124 P3d 191, 200 (Nev 2005) (upholding *Pinkerton* liability for general intent crimes but rejecting it for special intent offenses such as burglary and kidnapping). See also Sanford H. Kadish, Stephen J. Schulhofer, and Carol S. Steiker, *Criminal Law and its Processes* 683 (Aspen 8th ed 2007) (referring to *Bolden* decision as “Solomonic”).

<sup>89</sup> See, for example, William A. Schabas, *Genocide in International Law* 214, 221 (Cambridge 2000). But see *Prosecutor v Jean-Paul Akayesu*, Case No ICTR-96-4-T, Judgment, ¶ 485 (Sept 2, 1998) (concluding that special intent was required for aiding and abetting genocide but not for complicity in genocide). For a criticism of this distinction as untenable, see Payam Akhavan, *The*

intent in the underlying offense, and in fact many do. For example, the war crime of willful killing arguably excludes recklessness,<sup>90</sup> as does the war crimes of willfully causing great suffering, or serious injury to body or health,<sup>91</sup> as well as the war crime of willfully depriving a prisoner of war of a fair trial.<sup>92</sup> And there are other examples of specific intent international crimes: the war crime of intentional attacks against the civilian population,<sup>93</sup> the war crime of intentional attacks against civilian objects,<sup>94</sup> the war crime of intentional attacks against humanitarian personnel,<sup>95</sup> the war crime of intentional attacks that cause excessive damage to civilian objects,<sup>96</sup> and the war crime of intentional attacks against religious and educational facilities.<sup>97</sup>

As for crimes against humanity, the list of specific intent crimes includes torture and murder.<sup>98</sup> Murder presents a whole host of problems since many jurisdictions allow recklessness to satisfy some form of depraved heart murder, while others classify such situations as a lower grade of homicide.<sup>99</sup> Furthermore, the whole category of crimes against humanity should be considered a specific intent crime because not only must the underlying conduct be committed as part of a widespread or systematic attack against a civilian population, the perpetrator

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*Crime of Genocide in the ICTR Jurisprudence*, 3 J Intl Crim Just 989, 994 (2005). The Appeals Chamber subsequently overturned *Akayesu* on this point. See *Prosecutor v Ntakirutimana*, Case Nos ICTR-96-10-A and ICTR-96-17-A, Judgment, ¶ 501 (Dec 13, 2004) (*mens rea* of knowledge sufficient for aiding and abetting genocide). For analysis on this point, see Grant Dawson and Rachel Boynton, *Reconciling Complicity in Genocide and Aiding and Abetting Genocide in the Jurisprudence of the United Nations Ad Hoc Tribunals*, 21 Harv Hum Rts J 241, 261 (2008). The tension between the *mens rea* for aiding and abetting (knowledge) and the *mens rea* for genocide as a principal perpetrator (special intent) is not as worrisome, since aiding and abetting represents an inherently lower form of criminal participation. In contrast, the liability on JCE involves full vicarious liability for the actions of another individual.

<sup>90</sup> See, for example, Rome Statute, Art 8(2)(a)(i) (cited in note 61).

<sup>91</sup> See, for example, *id* at Art 8(2)(a)(iii).

<sup>92</sup> See, for example, *id* at Art 8(2)(a)(vi).

<sup>93</sup> See, for example, *id* at Art 8(2)(b)(i).

<sup>94</sup> See, for example, Rome Statute, Art 8(2)(b)(ii) (cited in note 61).

<sup>95</sup> See, for example, *id* at Art 8(2)(b)(iii).

<sup>96</sup> See, for example, *id* at Art 8(2)(b)(iv).

<sup>97</sup> See, for example, *id* at Art 8(2)(b)(ix).

<sup>98</sup> See, for example, Rome Statute, Arts 7(1)(a) and 7(1)(b) (cited in note 61). Although US scholars debate whether torture is a specific intent crime under federal law, it is unquestioned that torture is a specific intent crime under international law. See Jens David Ohlin, *The Torture Lawyers*, 51 Harv Intl L J 193, 207 (2010) (illustrating the US debate on torture as a specific intent crime through discussion of the Bybee torture memo).

<sup>99</sup> Even in jurisdictions that allow recklessness as a mental state for murder, nearly all classify this as a lower grade offence, for example second degree murder or depraved heart murder. This is precisely the problem of the JCE doctrine: its failure to ensure a doctrinal grading of culpability.

must also intend or know that the underlying act is part of the widespread or systematic attack. The requirement of intent here would foreclose JCE III under the new Cassese proposal. The requirement of knowledge would not be satisfied either; in a JCE III case, the defendant may not be aware that the underlying act is being committed, since he is merely being convicted for participating in the enterprise with knowledge that such acts are foreseeable (not actual). This suggests that the proposed contraction of the doctrine is quite sweeping and would, in fact, foreclose JCE III in most situations.

In any event, it is unlikely that the ICTY will adopt the proposed contraction of JCE III, even though it was proposed by the one individual most responsible for the ICTY's adoption of the doctrine in the first place. In 2009, Radovan Karadžić used this exact argument when he filed a pro se motion to dismiss all counts relying on JCE III with regard to special intent crimes.<sup>100</sup> The ICTY Trial Chamber denied the motion on the grounds that it was not properly raised as a jurisdictional challenge.<sup>101</sup> If the ICTY were to accept the argument when it finally reaches the merits of the argument (on appeal following conviction), doing so would involve a substantial amendment to the doctrine announced in *Tadić*, which the Appeals Chamber considers well-settled law and has shown little interest in revisiting despite repeated attempts by numerous Trial Chambers.<sup>102</sup>

### 3. Conclusion.

The support for JCE III is therefore chimerical. Other than the statutory basis for JCE I in Article 25(3)(d) and customary law, there remains no non-question-begging rationale for JCE III in customary international law. It is perhaps for this reason that other courts have been hesitant to adopt the approach. In addition to the ICC Pre-Trial Chamber's decision in *Prosecutor v Thomas Lubanga Dyilo*,<sup>103</sup> the Extraordinary Chambers of the Court of Cambodia recently decided that JCE III did not exist under customary international law at

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<sup>100</sup> See *Prosecutor v Radovan Karadžić, Preliminary Motion to Dismiss JCE III – Special Intent Crimes*, Case No IT-95-05/18-PT, ¶ 1 (ICTY Mar 27, 2009). The motion was filed pro se because Karadžić is representing himself before the Tribunal; the motion credits Kevin Jon Heller and Rebecca Mori in a footnote.

<sup>101</sup> See *Prosecutor v Radovan Karadžić, Decision on Six Preliminary Motions Challenging Jurisdiction*, Case No IT-95-05/18-PT, ¶ 82 (ICTY Apr 28, 2009).

<sup>102</sup> See, for example, *Prosecutor v Milomir Stakić, Judgement*, Case No IT-97-24-A, ¶ 62 (ICTY Mar 22, 2006).

<sup>103</sup> *Prosecutor v Thomas Lubanga Dyilo, Decision on the Confirmation of Charges*, Case No ICC-01/04-01/06, Decision on the Confirmation of Charges (Jan 27, 2007).

the time when the crimes of the Khmer Rouge were perpetrated in Cambodia.<sup>104</sup> Cassese and the editors of the *Journal of International Criminal Justice* argued in an amicus curiae brief that JCE was not created by the ICTY Appeals Chamber in *Tadić*, but was simply *recognized* by the Chamber on the basis of its analysis of customary international law, including cases that date back to the end of World War II, long before the crimes in Cambodia were committed.<sup>105</sup> It is likely that at least some of these courts will recognize what scholars have increasingly recognized: JCE III has no basis in either the Rome Statute's Article 25(3)(d) or customary international law with the exception of the recent cases adjudicated by the ICTY.<sup>106</sup>

## B. Differentiating Levels of Participation

A revised doctrine of vicarious liability—whatever you call it—should demonstrate the sensitivity to criminal law theory that so many scholars have found wanting in JCE.<sup>107</sup> One obvious place for reform is in the Rome Statute itself. Of course, this will not be easy, since plenty of experienced criminal law scholars were involved as advisors in the original Rome Statute drafting

<sup>104</sup> See Kaing Guek Eav (Duch Case), Case No 002/19-09-2007-ECCC/OCIJ (PTC38), Decision on the Appeals Against the Co-Investigative Judges Order on Joint Criminal Enterprise (JCE) (ECCC May 20, 2010) (“JCE Appeals Decision”).

<sup>105</sup> See Amicus Curiae Brief of Professor Antonio Cassese and Members of the Journal of International Criminal Justice on Joint Criminal Enterprise Doctrine, *Kaing Guek Eav (Duch Case)*, Case No 001/18-07-2007-ECCC/OCIJ (PTC 02), ¶¶ 52–59 (Extraordinary Chambers in the Courts of Cambodia filed Oct 27, 2008). The amicus brief was signed by Cassese, Mary De Ming Fan, Vanessa Thalmann, and Salvatore Zappala.

<sup>106</sup> It is unclear whether the decisions of the ICTY will be sufficient to establish JCE III as an element of customary international criminal law in the future. Arguably not, since the formation of a norm of customary international law requires state practice and *opinio juris* and the decisions of an international criminal tribunal are not attributable to specific states. See International Law Association, Committee on Formation of Customary (General) International Law, *Statement of Principles Applicable to the Formation of General Customary International Law*, 18 (2000), online at <http://www.ila-hq.org/download.cfm/docid/A709CDEB-92D6-4CFA-A61C4CA30217F376> (visited Oct 24, 2010). It is true, however, that state practice may be attributed on the basis of the members of the Security Council that drafted the ICTY Statute. However, since JCE was not directly codified in the ICTY Statute but rather developed by the *Tadić* court on the basis of their analysis of the term “commission,” it is doubtful that one can seriously attribute state practice or *opinio juris* based on the adoption of the ICTY Statute by the Security Council.

<sup>107</sup> See, for example, Albin Eser, *Individual Criminal Responsibility*, in Antonio Cassese, Paola Gaeta, and John R.W.D. Jones, eds, 1 *The Rome Statute of The International Criminal Court: A Commentary* 767, 803 (Oxford 2002); Kai Ambos, *Individual Criminal Responsibility, Article 25 Rome Statute*, in Otto Triffterer, ed, *Commentary on the Rome Statute of the International Criminal Court* 743, 759 (Hart 2d ed, special print, 2008) (noting that Article 25(3)(d) was drafted “without regard to basic dogmatic categories,” which will lead to interpretation problems in the future). Consider George P. Fletcher and Jens David Ohlin, *Reclaiming Fundamental Principles of Law in the Darfur Case*, 3 J Intl Crim Just 539, 551 (2005) (discussing legality deficit).

process.<sup>108</sup> Apparently, the lack of coherence in Article 25 generally did not stem from a lack of theoretical expertise among the drafters, but rather from the process of collective drafting by committee—a good way to achieve consensus at the cost of coherence.<sup>109</sup>

Of course, the next question is how the Assembly of State Parties could amend the Rome Statute. This is an opportunity for great doctrinal advancement. As suggested above, the statute could explicitly reject JCE III and vicarious liability for foreseeable actions falling outside the scope of the agreed criminal plan.<sup>110</sup> This will make clear to courts the intent of the drafters and block an attempt to import JCE III through the backdoor of customary international law, or one of the other subsections of Article 25(3).<sup>111</sup> Second, the statute should offer a clear statement of the particular kind of “residual accessory liability” that it imposes in cases of group criminality that fall within JCE I. In particular, the new Article 25 should address the major doctrinal problem that still exists with JCE I: the fact that it fails to draw any meaningful distinction between the architects and organizers of a joint criminal enterprise and minor participants who simply contribute to the endeavor or participate as lower rung offenders. There is a difference, after all, between the proverbial Milošević who, on the one hand, directs the joint enterprise at the highest level, and the foot soldier who, on the other hand, merely participates in the endeavor at the lowest possible level. Their relative culpability demands differentiation.

One possible solution is to codify JCE and split it into two separate modes of liability. The first we might call “co-perpetrat[ing] a joint criminal enterprise.”<sup>112</sup> This mode of liability would be limited to individuals who fulfill

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<sup>108</sup> Nor does there appear to be sufficient will among the Assembly of State Parties to deal with this issue. At the most recent review conference in Kampala, the entire conference was devoted to solving the prickly problem of aggression, and Article 25 was not even identified as a pressing problem.

<sup>109</sup> But see Ambos, *Individual Criminal Responsibility* at 759 (cited in note 107) (“[A] provision drafted without regard to basic dogmatic categories will create difficult problems of interpretation for the future ICC.”).

<sup>110</sup> For a general discussion of the culpability constraints on such prosecutions, see Andrew Ashworth, *A Change of Normative Position: Determining the Contours of Culpability in Criminal Law*, 11 *New Crim L Rev* 232 (2008) (rejecting John Gardner’s argument for justifying liability for unintended but foreseeable consequences).

<sup>111</sup> Increasing a defendant’s inculpation based on customary law is problematic. See Fletcher and Ohlin, 3 *J Intl Crim Just* at 557–58 (cited in note 107); Ambos Brief at \*20–21 (cited in note 60). See also Rome Statute, Art 22 (“definition of a crime shall be strictly construed and shall not be extended by analogy”) and Art 23 (“A person convicted by the Court may be punished only in accordance with this Statute.”) (cited in note 61).

<sup>112</sup> This mode of liability was first discussed in *Prosecutor v Miroslav Kvočka, Judgement*, Case No IT-98-30/1-T, ¶¶ 282–84 (ICTY Nov 2, 2001). For a full analysis of the distinction between aiding and

all three of the following conditions: (1) they participate in a joint criminal endeavor at a high level, (2) they have the intent of furthering the criminal purpose of the group endeavor, and (3) they are indispensable to the success of the joint criminal endeavor. The second mode of liability would be called “aiding and abetting a joint criminal enterprise.”<sup>113</sup> This mode of liability would be appropriate for individuals who do not satisfy one of the three necessary conditions for co-perpetrating a joint criminal enterprise, either because they participated at a lower rung, they did not share the intent of furthering the criminal purpose of the group, or their contributions were not significant enough to warrant vicarious liability.

The rationale for these criteria can be explained quite simply. The first criterion is meant to remedy the fundamental problem that JCE liability, in its current embodiment, makes no attempt to distinguish between principals and accessories.<sup>114</sup> The second criterion is meant to limit the highest form of liability to those who share the criminal purpose of the group, as opposed to those who simply contribute to the group effort with knowledge of the group’s efforts.<sup>115</sup> The third criterion is meant to limit liability for co-perpetrating a joint criminal enterprise to those who make a contribution that is not easily substituted by another readily available participant. For example, the political leader who coordinates the military campaign of ethnic cleansing plays an indispensable role because his supervision is necessary to the joint criminal enterprise *in its manifested form*. The same may also be true of the concentration camp commander whose role is essential to the joint criminal enterprise that involves the systematic mistreatment of prisoners. On the other hand, the individual prison guard may not necessarily be indispensable, since there is a long list of

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abetting a JCE and co-perpetrating a JCE, see Jens David Ohlin, *Commentary*, in André Klip and Göran Sluiter, eds, 14 *Annotated Leading Cases* 739, 748–50 (Intersentia 2008).

<sup>113</sup> See *Kvočka*, IT-98-30/1-T ¶ 273 (cited in note 112):

The Trial Chamber believes that the Nuremberg jurisprudence and its progeny allow for ‘aiding and abetting’ in its traditional form to exist in relation to a joint criminal enterprise and in the case of such an aider or abettor, knowledge plus substantial contribution to the enterprise is sufficient to maintain liability. Once the evidence indicates that the participant shares the intent of the criminal enterprise, he graduates to the level of a co-perpetrator of the enterprise[.]

<sup>114</sup> See, for example, *Prosecutor v Radislav Krstić*, Case No IT-98-33-T, Judgment, ¶ 642 (ICTY Aug 2, 2001) (guilty for co-perpetrating a joint criminal enterprise for “participation . . . of an extremely significant nature and at the leadership level”).

<sup>115</sup> See *Kvočka*, IT-98-30/1-T ¶ 311 (cited in note 112) (“The Trial Chamber finds that during periods of war or mass violence, the threshold required to impute criminal responsibility to a mid or low level participant in a joint criminal enterprise as an aider and abettor or co-perpetrator of such an enterprise normally requires a more substantial level of participation than simply following orders to perform some low level function in the criminal endeavor on a single occasion.”).



other prison guards who might step in to perform the illegal acts if the defendant had refused.

The Appeals Chamber of the ICTY already considered and rejected a version of this proposal put forth by an ICTY Trial Chamber. The Appeals Chamber objected that one could not combine the concept of joint criminal enterprise with the concepts of co-perpetration or aiding and abetting, since all three are modes of liability.<sup>116</sup> According to the Appeals Chamber, the only permissible combination is one substantive offense and one mode of liability, combined together in a coherent sentence to accurately describe the criminality of the defendant.<sup>117</sup> As if appealing to the universal grammar of the criminal law, the Appeals Chamber rejected such ad hoc combination of modes of liability as syntactically nonsensical.<sup>118</sup> But this objection misunderstands the nature of the proposal. The idea is not to compose a sentence of criminal law out of two modes of liability and a substantive offence. Rather, the idea is to break up one inexact mode of liability—joint criminal enterprise liability—in favor of two more specific and accurate modes of liability: (1) co-perpetrating a JCE, and (2) aiding and abetting a JCE. The result is nothing less than the destruction of JCE as it is currently known and its replacement by a far more subtle pair of modes of liability that adequately capture the gradations of culpability most commonly found in international criminal law.

There is already some support for this proposal to discard the current JCE in the ICTY case law. The Trial Chamber in *Stakić* arguably suggested a similar approach, as did the Trial Chamber in *Kvočka*.<sup>119</sup> The Appeals Chamber's rejection of the approach boiled down to nothing more powerful than the demands of *stare decisis* and the fact that the doctrinal amendments represented too far a departure from the *Tadić* decision that first announced the JCE doctrine.

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<sup>116</sup> See *Prosecutor v Kvočka, Judgment*, Case No IT-98-30/1-A, ¶¶ 79–92 (ICTY App Ch Feb 28, 2005). For a critical analysis of the Appeals Chamber's decision, see Alexander Zahar and Göran Sluiter, *International Criminal Law: A Critical Introduction* 238–42 (Oxford 2008).

<sup>117</sup> See *Kvočka*, IT-98-30/1-A ¶¶ 91–92 (cited in note 116) (noting that aiding and abetting involves a lesser degree of individual criminal responsibility than co-perpetration in a joint criminal enterprise).

<sup>118</sup> See *id.*

<sup>119</sup> *Prosecutor v Milomir Stakić, Judgment*, Case No IT-97-24-T, ¶ 440 (ICTY T Ch II July 31, 2003) (describing co-perpetration as “an explicit agreement or silent consent to reach a common goal by coordinated co-operation and joint control over the criminal conduct”). The ICTY Trial Chamber in *Prosecutor v Anto Furundžija, Judgment*, Case No IT-95-17/1-T, ¶ 216 (ICTY T Ch Dec 10, 1998), also referred to “co-perpetrators who participate in a joint criminal enterprise,” thus suggesting the same distinction. But see *Kvočka*, IT-98-30/1-T ¶¶ 466–67 (cited in note 112).

### C. Historical Support for JCE Differentiation

Furthermore, there are historical precedents for the notion of aiding and abetting a joint criminal enterprise.<sup>120</sup> As noted by the *Kvočka* Trial Chamber, several International Military Tribunal at Nuremberg (IMT) and Control Council Law No 10 cases convicted individuals for aiding and abetting a common criminal plan.<sup>121</sup> For example, the *Dachau Concentration Camp*<sup>122</sup> case involved the prosecution of guards whose participation in the common design varied—participation that the prosecution described as “aiding and abetting in the execution of the common design.”<sup>123</sup> Also, the *Einsatzgruppen*<sup>124</sup> case established clear standards for making distinctions between levels of participation in a common criminal endeavor, thus belaying the suggestion in *Tadić* that common enterprise liability will admit no such distinctions of relative culpability.<sup>125</sup> The distinctions were based on significant participation and the holding of a high position of responsibility or command.<sup>126</sup> Consequently, “[t]his analysis gives support to the proposition that persons who assist or facilitate a criminal endeavor, particularly when lower down on the hierarchical ladder of the enterprise, act as aiders or abettors of the joint criminal enterprise.”<sup>127</sup>

Although the *Kvočka* case argues that the *Stalag Luft III*<sup>128</sup> case (before a British military court) supports its analysis, this is doubtful.<sup>129</sup> As acknowledged by *Kvočka* in a footnote, all participants were convicted of the same charge regardless of their degree of participation in the criminal endeavor; their various

<sup>120</sup> The historical support for this distinction is also explored by Kevin Heller in his forthcoming Oxford University Press book regarding the twelve cases of the US military tribunal at Nuremberg (on file with author) (explaining how the tribunals distinguished between co-perpetrating and abetting a criminal enterprise).

<sup>121</sup> See *Kvočka*, IT-98-30/1-T ¶ 269 (cited in note 112).

<sup>122</sup> *Trial of Martin Gottfried Weiss and Thirty-Nine Others (Dachau Concentration Camp)*, General Military Government Court of the United States Zone, Dachau, Germany, 15th Nov–13th Dec, 1945, 11 *Law Reports of Trials of War Criminals*, 5 (UNWCC 1947).

<sup>123</sup> See *id.* at 13.

<sup>124</sup> *The United States of America v Otto Ohlendorf and others (Einsatzgruppen)*, United States Military Tribunal II, 4 *Trials of War Criminals Before the Nuernberg Military Tribunals Under Control Council Law No 10* 3 (US 1951).

<sup>125</sup> Compare *Tadić*, IT-94-1-A ¶ 191 (cited in note 1) with *Einsatzgruppen* at 373 (cited in note 124) (commanders over operations have a “deeper responsibility for the crimes of the men under their command”).

<sup>126</sup> See *Kvočka*, IT-98-30/1-T ¶¶ 281–82 (cited in note 112).

<sup>127</sup> *Id.* ¶ 291.

<sup>128</sup> *Trial of Max Wielen and 17 Others (“Stalag Luft III”)*, British Military Court, Hamburg, Germany, 1st July–3d Sept, 1947, 11 *Law Reports of Trials of War Criminals* 31–53 (UNWCC 1947).

<sup>129</sup> See *id.*, cited and discussed in *Kvočka*, IT-98-30/1-T ¶ 295 (cited in note 112).

levels of culpability were distinguished only in the sentences, which ranged from death sentences for the commanders to ten year prison terms for the drivers.<sup>130</sup> This suggests precisely the opposite approach to the one being advanced in this Article: the need to establish more subtle modes of liability that make gradations of culpability before the sentencing phase. *Almelo*<sup>131</sup> is more promising.<sup>132</sup> That case involved the deliberate killing of a British prisoner of war, which resulted in the following conclusion: “If people were all present together at the same time, taking part in a common enterprise which was unlawful, each one in their own way assisting the common purpose of all, they were all equally guilty in law.”<sup>133</sup> Similarly, the *Kiel Gestapo*<sup>134</sup> case arguably involved aiding and abetting a joint endeavor, because the two drivers who were convicted in a killing performed by the Gestapo were convicted for their role in the joint operation. In the words of the prosecutor:

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 offence, though their individual responsibility with regard to punishment may vary.<sup>135</sup>

Interpreting the *Hadamar*<sup>136</sup> case is somewhat more complicated. In that case, the defendants were charged with “acting jointly and in pursuance of a common intent and acting for and on behalf of the then German Reich . . . [as they did] willfully [sic], deliberately and wrongfully, aid, abet, and participate in the killing of human beings of Polish and Russian nationality.”<sup>137</sup> In one sense, this supports our view of the new mode of liability due to its reference to aiding and abetting a common project. On the other hand, the charge seems to imply that the defendants shared the criminal purpose of the group, which under the *Kvočka* formulation would make them liable for co-perpetrating a joint criminal

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<sup>130</sup> See *Kvočka*, IT-98-30/1-T ¶ 296 n 488 (cited in note 112).

<sup>131</sup> *Trial of Otto Sandrock and Three Others (“Almelo”)*, British Military Court for the Trial of War Criminals, Held at the Court House, Almelo, Holland, 24th–26th Nov, 1945, 1 *Law Reports of Trials of War Criminals* 35, 43 (UNWCC 1947).

<sup>132</sup> See *Kvočka*, IT-98-30/1-T ¶ 297 (cited in note 112).

<sup>133</sup> *Almelo* at 43 (cited in note 131). However, the precedent is problematic because it also stands for the proposition of equal culpability regardless of the level of participation.

<sup>134</sup> *The Kiel Gestapo Case*, 11 *Law Reports of Trials of War Criminals* 42–44 (UNWCC 1947), part of *Stalag Luft III* (cited in note 128).

<sup>135</sup> *Id.* at 43–44.

<sup>136</sup> *Trial of Alfons Klein and Six Others (Hadamar)*, United States Military Commission Appointed by the Commanding General Western Military District, Wiesbaden, Germany, 8th–15th Oct, 1945, 1 *Law Reports of Trials of War Criminals* 46–54 (UNWCC 1947).

<sup>137</sup> *Id.* at 47.

enterprise. It is unclear from *Hadamar* whether the charge is meant to distinguish between high level co-perpetrators and low level accomplices. The *Kvočka* Trial Chamber distilled, on the basis of the factual allegations, that no intent to further the criminal purpose was involved in the case, because the psychiatrists administered injections, sometimes under duress, and there was no “indication that the accused shared a criminal intent to murder the Polish and Soviet nationals,” although their presence at the facility suggested that “by showing up for work daily and performing the tasks assigned to them, they substantially assisted and facilitated the killings.”<sup>138</sup>

#### D. Objections to Differentiation

One obvious objection must be considered at this point. If the principle of culpability demands that we draw distinctions between the highest and lowest offenders, why not simply eliminate JCE entirely and replace it with the more traditional categories of principals and accessories? Judicious application of Ockham’s razor would counsel in favor of the simplest, most economical categories to make these distinctions. Indeed, the *Stakić* Trial Chamber seemed motivated to reject JCE in favor of less controversial, more time-tested modes of liability that might accomplish the task more effectively. And certainly, international criminal law is not unfamiliar with individualized conduct; it is indeed possible for an individual to be a co-perpetrator, or to aid and abet a more discrete, isolated individual crime. For example, two soldiers might commit a war crime together as co-perpetrators, where the war crime in question is discrete in time and place and unconnected to a larger collective endeavor that justifies the label of a joint criminal enterprise. Although such individuals would rarely be tried before an ICC plagued by insufficient resources and inclined to use its prosecutorial discretion to deal with the “most serious crimes of concern to the international community,”<sup>139</sup> other tribunals, either ad hoc or hybrid, may indeed prosecute such individuals. Some critics of JCE focus their attention on this model of pure individual criminal conduct and therefore conclude that JCE, or its domestic analogues, should be entirely excised from the criminal law,<sup>140</sup> rather than simply amended as I have argued here.

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<sup>138</sup> *Kvočka*, IT-98-30/1-T ¶ 304 (cited in note 112).

<sup>139</sup> Rome Statute, Preamble (cited in note 61).

<sup>140</sup> See, for example, George P. Fletcher, *Rethinking Criminal Law* at 649 (stating that “the availability of conspiratorial and vicarious liability has inhibited the refinement of the common-law criteria of complicity”) and 660 (concluding that if Anglo-American law “were ever to admit of a more refined classification of actors as accessories and perpetrators, the system would have to abandon the doctrine of conspiratorial complicity”) (cited in note 9); Phillip Johnson, *The Unnecessary Crime of Conspiracy*, 61 Cal L Rev 1137, 1139 (1973).

This conclusion would be too hasty. There is value to branding a defendant a co-perpetrator of a joint criminal enterprise rather than a co-perpetrator *simpliciter*. The former correctly tracks the reality of the situation: that the defendant presided as a co-perpetrator not over, say, a two person collaboration, but over a potentially massive joint criminal enterprise that involved hundreds or perhaps even thousands of criminals. Such enterprises are, in a sense, the heart of international criminal law, since genocide and crimes against humanity are rarely carried out by isolated individuals acting alone.<sup>141</sup> The typical pattern is group criminality. Indeed, recognition of this fact is precisely why the *Tadić* court was so motivated to develop the joint criminal enterprise doctrine in the first instance.<sup>142</sup> The motivation is correct.

The question is how to develop a sophisticated doctrine that navigates between the collective nature of international criminality and the individualized determinations of criminal law. Nuremberg arguably swung too far in the other direction by declaring certain organizations criminal and penalizing membership in them.<sup>143</sup> But the opposite is no solution either. Eliminating joint enterprise liability and every version of the conspiracy doctrine would fashion a legal doctrine that fails to mirror the structure of the very criminal conduct that it seeks to capture in its doctrinal categories, because the conduct of individuals during war time involves collective or group effort. The solution is to develop a doctrine that models group criminal behavior but only imposes liability relative to the contributions of the specific defendant. The result would be a doctrine that is both accurate to the realities on the ground and consistent with the principle of culpability. In the common law, the conspiracy doctrine (correctly conceived) fulfills this mandate. In German theory, the concepts of *Organisationsherrschaft* and *Zurechnungsprinzip Gesamttat* do similar work.<sup>144</sup> My

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<sup>141</sup> But see Ambos, 5 J Intl Crim Just at 183 (cited in note 47) (arguing for the “criminal enterprise as the starting point of attribution in international criminal law”). The suggestion stems from the German doctrine of *Organisationsherrschaft* and a resulting “mixed system of individual-collective responsibility” (presumably constrained by the principle of individual culpability). Id.

<sup>142</sup> See *Tadić*, IT-94-1-A ¶ 191 (cited in note 1) (“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.”).

<sup>143</sup> See *Charter of the International Military Tribunal*, Art 9, 59 Stat 1546, 82 UNTS 284 (Aug 8, 1945). However, the membership offense only applied to individuals who had culpable knowledge of the criminal purposes or acts of the organization, and the IMT interpreted the doctrine through the lens of conspiracy. See International Military Tribunal, 22 *Trial of the Major War Criminals: Proceedings of the International Military Tribunal Sitting at Nuremberg, Germany 14 Nov 1945–1 Oct 1946* 500 (1948) (“A criminal organization is analogous to a criminal conspiracy in that the essence of both is co-operation for criminal purposes.”).

<sup>144</sup> See Ambos, 5 J Intl Crim Just at 181–83, citing Claus Roxin, *Täterschaft und Tatherrschaft* (de Gruyter 8th ed 2006) (cited in note 47) (*Organisationsherrschaft* is “the theory of control of the act

preferred solution, the theory of joint or shared intentions, is developed in Section IV. All are attempts to dress the original Nuremberg move—the concept of criminal organizations—in modern clothing. They are correct insofar as they take the criminal group as the starting point of the analysis.

#### IV. THE LIMITS OF THE CONTROL THEORY

Having carefully diagnosed the problems with both conspiracy and JCE, we should now turn our attention to co-perpetration. In this Section, I argue that while co-perpetration avoids many of the problems associated with JCE, the doctrine as applied by the ICC exaggerates the importance of “control” as a defining characteristic of joint endeavors, while at the same time undervaluing the centrality of the distinctive mental states of the participants in joint criminal endeavors. By analyzing a series of hypothetical examples, the following Section concludes that intentionality—rather than control—must be the center of any doctrine of group criminality.

##### A. Co-Perpetration at the ICC

The ICC Pre-Trial Chamber offered its own analysis of the Rome Statute’s Article 25 in its *The Prosecutor v Thomas Lubanga Dyilo*<sup>145</sup> decision.<sup>146</sup> The Chief Prosecutor declined to plead JCE and instead charged Lubanga under a theory of co-perpetration.<sup>147</sup> This in itself represented a substantial jurisprudential decision on the part of the Office of the Prosecutor. Although the ICTY Trial Chamber on a few occasions attempted to push a theory of co-perpetration in favor of JCE,<sup>148</sup> the Office of the Prosecutor at the ICTY never once pushed for co-perpetration as a mode of liability in place of joint criminal enterprise.<sup>149</sup> The ICC Pre-trial Chamber concluded that the notion of co-perpetration in Article 25(3)(a) best described the allegations against Lubanga because,

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by virtue of a hierarchical organisation”) and Friedrich Dencker, *Kausalität und Gesamttat* (Duncker 1996) (*Zurechnungsprinzip Gesamttat* is “a principle or theory of attribution according to which the ‘global act’ (the criminal enterprise) constitutes the central object of attribution”).

<sup>145</sup> *Lubanga*, ICC-01/04-01/06 (cited in note 103).

<sup>146</sup> See id ¶ 337.

<sup>147</sup> However, the Legal Representative of Victims argued to the court that Article 25(3)(a) codified joint criminal enterprise. See id ¶ 325.

<sup>148</sup> The most notable example was *Prosecutor v Stakić*, Case No IT-97-24-T (cited in note 119). For a discussion of this case and its subsequent reversal by the Appeals Chamber, see Ohlin, *Commentary* at 739–41 (cited in note 112). See also Héctor Olásolo, *Reflections on the Treatment of the Notions of Control of the Crime and Joint Criminal Enterprise in the Stakić Appeal Judgement*, 7 Intl Crim L Rev 143, 143 (2007).

<sup>149</sup> The Office of the Prosecutor did allege on several occasions that defendants were responsible for co-perpetrating a joint criminal enterprise. See *Stakić*, IT-97-24-T ¶ 504 (cited in note 119).

the concept of co-perpetration 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.<sup>150</sup>

The Pre-Trial Chamber started its analysis by considering the various doctrines that can be used to distinguish between perpetrators and accomplices.<sup>151</sup> The traditional common law rule, which the Chamber termed the “objective” approach, defined perpetrators as those who committed the *actus reus* of the crime, while supporters behind the scenes were branded as mere accomplices.<sup>152</sup> This is a counter-intuitive result when the person behind the scenes orders the murder and the triggerman is a mere employee.<sup>153</sup> The alternative is a “subjective” approach, which defines the perpetrator by virtue of his or her subjective mental state, that is, his or her intent to commit the crime.<sup>154</sup> In the case of a collective crime, what defines the perpetrators is their shared intent to commit the crime, regardless of their level of objective contribution (small or large). The Chamber identified the subjective approach with the JCE doctrine applied by the ICTY.<sup>155</sup>

The Pre-Trial Chamber swept both of these approaches to the side, preferring to chart a third way, co-perpetration, which combined subjective and objective elements in a different way. The Chamber based its understanding of co-perpetration in the Rome Statute on Roxin’s control theory of perpetration.<sup>156</sup> This view is popular in German criminal law theory and has gained renewed currency in international circles as a result of the *Lubanga* decision.<sup>157</sup> The control theory of perpetration distinguishes between principals and accessories by asking

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<sup>150</sup> See *Lubanga*, ICC-01/04-01/06 at ¶ 326 (cited in note 103).

<sup>151</sup> See *id.* at ¶¶ 327–32.

<sup>152</sup> See *id.* at ¶ 328. See also Fletcher, *Rethinking Criminal Law* at 654–55 (cited in note 9) (classifying theories to distinguish between principal perpetrators and accessories).

<sup>153</sup> For a discussion of the problems with the objective approach, see Ohlin, *Commentary* at 744 (cited in note 112). See also Fletcher, *Rethinking Criminal Law* at 655 (cited in note 9).

<sup>154</sup> See *Lubanga*, ICC-01/04-01/06 at ¶ 329 (cited in note 103); Fletcher, *Rethinking Criminal Law* at 657, citing *Staschynsky*, 18 BGHSt 87 (1962) (Ger) (cited in note 9) (German court holding that KGB agent was not a principal because he was a mere instrument of his superiors).

<sup>155</sup> See *Lubanga*, ICC-01/04-01/06 at ¶ 329 (cited in note 103).

<sup>156</sup> Consider Claus Roxin, *Täterschaft und Tatherrschaft* 34 (de Gruyter 6th ed 1994); Fletcher, *Rethinking* at 655–56 (cited in note 9); *Stakić*, IT-97-24-T at ¶ 440 n 945 (cited in note 119); *Lubanga*, ICC-01/04-01/06 at ¶¶ 324 n 414, 348 n 425 (cited in note 103).

<sup>157</sup> For a complete discussion, see Thomas Weigend, *Intent, Mistake of Law, and Co-perpetration in the Lubanga Decision on Confirmation of Charges*, 6 J Intl Crim Just 471, 478–79 (2008). See also Gerhard Werle, *Principles of International Criminal Law* 123 ¶ 354 (TMC Asser 2005).

who has control over the crime in question. If a defendant was in control of the criminal act, perhaps by virtue of ordering or soliciting a murder, then the defendant is an indirect perpetrator, even if he is not the *physical* perpetrator of the crime in question (that is, he did not pull the trigger).<sup>158</sup> The indirect perpetrator is indispensable because he controls the endeavor. If the individual with the gun is directed to conduct the crime by a military superior, then he has no direct control over the crime and is largely dispensable to the endeavor; he can be replaced by another soldier who can be ordered to commit the crime. If the indirect perpetrator works in tandem at the leadership level with others, then the leaders are classified as co-perpetrators because they share joint control over the crime. Control over the crime may be exercised through a hierarchical organizational structure (for example, *Organisationsherrschaft*), though there are other avenues for exercising control.

According to the ICC, the objective requirements for co-perpetration are the existence of a common plan among the participants and an essential contribution to the plan by the defendant.<sup>159</sup> The requirement that the contribution be essential means that the defendant could have frustrated the plan by withdrawing from it, thus establishing his joint control over the endeavor. The required mental state for an indirect perpetrator is *awareness* of his or her control over the crime.<sup>160</sup> For co-perpetrators, the required mental state is awareness of their *joint* control over a common plan and awareness of their essential contribution to it. Since both Lubanga and others had joint control over the crime, his participation was best viewed through the lens of co-perpetration, according to the Pre-Trial Chamber.<sup>161</sup> In addition to awareness of their control and essential contribution, co-perpetrators must also have the intent that the physical perpetrators commit the crime.<sup>162</sup> However, the ICC completely watered down the intent requirement to the absolute minimum.<sup>163</sup> For purposes of this doctrine, co-perpetrators “intend” the crime if they are aware of the risk that the physical perpetrators will commit the offense and the co-perpetrators reconcile themselves to this risk or consent to it.<sup>164</sup>

Criminal lawyers from common law jurisdictions would hardly describe this mental requirement as anything close to intentional or purposeful. At most,

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<sup>158</sup> See Fletcher, *Rethinking Criminal Law* at 655–59 (cited in note 9).

<sup>159</sup> See *Lubanga*, ICC-01/04-01/06 ¶ 343 (cited in note 103).

<sup>160</sup> See id ¶ 331.

<sup>161</sup> See id ¶ 341.

<sup>162</sup> See Gerhard Werle, *Principles of International Criminal Law* 178 (TMC Asser 2d ed 2009).

<sup>163</sup> See Weigend, 6 J Intl Crim Just at 481 (cited in note 157).

<sup>164</sup> See id at 481–82.



it is a form of advertent recklessness.<sup>165</sup> Criminal lawyers from civil law jurisdictions will often refer to this mental requirement as *dolus eventualis* and consider it uncontroversial, but the ICC's use of the concept here bears scrutiny. It is especially problematic because the ICC uses the same concept to conclude that the goal of the common plan need not be criminal at all: it is enough for the defendant to subjectively reconcile themselves to the risk that their pursuit of the (lawful) common plan will entail the perpetration of various crimes by other actors.<sup>166</sup> The Rome Statute defines acting with "intent" (in relation to a consequence) as meaning to "cause [a] consequence" or to be aware that the consequence will happen "in the ordinary course of events."<sup>167</sup> The ICC put a gloss on this standard by concluding that a defendant's subjective awareness of a substantial risk of the consequence happening was sufficient to meet this standard.<sup>168</sup> Although this accords with the civil law doctrine of *dolus eventualis*, it is not at all clear that it accords with the meaning of the Rome Statute's requirement of "in the ordinary course of events," which suggests a higher standard than *dolus eventualis*. The result of the ICC's control theory approach is the combination of *awareness* of joint control over the crime with an intentionality requirement that is so watered down that the control requirement appears to be doing all of the heavy lifting in the doctrine. In the case of indirect co-perpetrators, what "links" the defendants to each other is the common plan or agreement among them; but what links these defendants to the physical perpetrators is not the existence of a common plan but rather the defendants' joint control over the perpetrators, either as instruments or through an organizational hierarchy. However, the whole point of vicarious liability is the doctrinal need to provide a linking principle between the physical perpetrators of the crime and the defendants, and in the case of indirect co-perpetrators, the control criterion allegedly provides that link.

The second problem with the doctrine of co-perpetration is that it seems to imply a model of cooperation among a small number of individuals; the paradigmatic version of co-perpetration is cooperation between two individuals to complete a crime.<sup>169</sup> The Rome Statute's formulation of liability for crimes "commit[ted] . . . jointly with another" suggests a crime committed by two

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<sup>165</sup> See Cassese, *International Criminal Law* at 200–01 (cited in note 25) ("the test is . . . whether a man of reasonable prudence would have forecast that conduct, under the circumstances prevailing at the time").

<sup>166</sup> See Weigend, 6 J Intl Crim Just at 482 (cited in note 157).

<sup>167</sup> See Rome Statute, Art 30(2)(b) (cited in note 61).

<sup>168</sup> See *Lubanga*, ICC-01/04-01/06 ¶ 352 (cited in note 103). See also Weigend, 6 J Intl Crim Just at 481 (cited in note 157).

<sup>169</sup> See Fletcher, *Rethinking Criminal Law* at 638 (cited in note 9).

persons;<sup>170</sup> the provision does not say “committed jointly with others.” International crimes, by contrast, are often committed by a great plurality of persons committed to a joint cause, and it is unclear whether describing such large-scale conspiracies as examples of co-perpetration is an accurate reflection of the facts on the ground. That being said, Roxin’s theory of indirect perpetration through an organizational hierarchy nicely captures the relationship between a discrete number of leaders in a vast conspiracy, but it is unclear if the framers of the Rome Statute had this picture in mind when they crafted Article 25(3)(a) and its reference to “jointly with another.” Such large-scale organizational criminality seems more suited to Article 25(3)(d)—contributions to a group endeavor—which the ICC has so far declined to utilize.

## B. A New Geography of Collective Action

Replacing JCE with the control theory of perpetration requires further scrutiny. We should conduct an independent and first order analysis of the criminality of group actors and decide what type of theory would best describe their culpability. A reactionary acceptance of the control theory would be just as unwise as blind acceptance of JCE. My own sense is that the control theory’s attempt to move away from the subjective mental state of the perpetrators—and the idea of joint or shared intentions—is not ideal. Individuals often combine their efforts in order to achieve collective goals and, in so doing, demonstrate a particular intentional state that demonstrates their individual commitment to a joint activity.<sup>171</sup> Replacing this mental state with “awareness” of the circumstances of joint control and a watered-down intent requirement may have unintended consequences, which this Section will now explore. Although it is clear from Section III that the doctrine of JCE was deeply problematic, it is unclear whether the control theory, by sidestepping shared intentions, accurately responds to the particular problems in the doctrine. Ironically, it may be the case that the implicit idea of joint intentions was the one part of the JCE doctrine that ought to be retained.

In order to understand fully the mental states of individuals involved in group criminality, as well as their legal significance for criminal culpability, it would be best to consider a series of hypotheticals involving group action. Consider the following:

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<sup>170</sup> See Rome Statute, Art 25(3)(a) (cited in note 61).

<sup>171</sup> See Section V.

### 1. The Love Parade.

A large techno music festival is being held outdoors in an industrial city in Germany.<sup>172</sup> The crowd (hundreds of thousands of individuals) quickly exceeds the capacity of the outdoor location where the music festival is being held. The main entrance to the festival is a small pedestrian tunnel that creates a bottleneck situation.<sup>173</sup> People continue to stream into the tunnel to get to the concert, but there is no room on the other side for them. At the same time, individuals inside the concert start to use the tunnel as an exit. People start to panic as they realize that there is not enough room in the tunnel to accommodate everyone. With people continuing to push from both sides of the narrow tunnel, those inside the tunnel become trapped with nowhere to move. More than twenty concertgoers are crushed to death by the surging crowd.<sup>174</sup>

### 2. Essen Lynching.

Three British pilots are captured in the German town of Essen during World War II.<sup>175</sup> A German officer orders a subordinate to transport the British POWs to a Luftwaffe post where they can be interrogated.<sup>176</sup> However, at the time of departure, the German officer issues the following additional order: the escort should not interfere with any civilians who might attack the prisoners.<sup>177</sup> The command was issued in public so that it could be heard not just by the escort but also by a crowd that had gathered in the vicinity.<sup>178</sup> As the POWs were marched down the streets of Essen, they were beaten by a growing crowd and eventually thrown over a bridge. One of the POWs died instantly after the fall from the bridge and the other two POWs were finished off by shots fired from the crowd and a final round of beatings.<sup>179</sup>

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<sup>172</sup> The example is based on the stampede that recently occurred in Duisburg, Germany. See Judy Dempsey, *Stampede at German Music Festival Kills 18*, NY Times (July 24, 2010).

<sup>173</sup> See *id.*

<sup>174</sup> See Judy Dempsey, *Deadly German Stampede Gets Its Villain*, NY Times (July 30, 2010).

<sup>175</sup> The example is based on the *Essen Lynching Case* at 91 (cited in note 68). See also *Tadić*, IT-94-1-A ¶¶ 207–09 (cited in note 1) (citing *Essen Lynching Case*).

<sup>176</sup> See *Tadić*, IT-94-1-A ¶ 207 (cited in note 1).

<sup>177</sup> *Id.*

<sup>178</sup> *Id.*

<sup>179</sup> *Id.*

### 3. The Concentration Camp.

Three military officers are all working as guards in a Concentration Camp in the former Yugoslavia.<sup>180</sup> The detention camp is specifically designed to serve as a system of mistreatment against the civilians who are detained there. Crimes, including murder, torture, and rape, are being systematically committed against the civilians who live in the camp. The officers are all aware of the illegal nature of the camp and the officers all have the general intent to support the systemic mistreatment of the civilians in the camp by working as guards there.<sup>181</sup> One of the officers engages in the torture and rape of one of the civilian detainees. The other two officers do not directly help commit this particular act, nor are they aware of this particular crime when it occurs.

### 4. The Deportation.

A unit of soldiers is engaged in a campaign of ethnic cleansing in an attempt to remove all members of an ethnic minority from the region.<sup>182</sup> The soldiers forcibly remove fifty civilians from their homes simply because of their ethnicity and do not allow them to take any of their possessions with them. The soldiers agree amongst themselves that they will drive the civilians to a local train station, where a freight train is waiting to deport them, like cattle, to another region. The result will be an ethnically homogenous homeland (or at least progress towards that goal). However, when the detainees arrive at the train station, one of the soldiers decides that he prefers to kill the civilians instead of simply deporting them. He shoots all of them.

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<sup>180</sup> The classic concentration camp precedent is *Dachau Concentration Camp*, 11 *Law Reports of Trials of War Criminals* 5 (UNWCC 1947). The most significant concentration camp case to come out of the ICTY is the *Čelebići Camp Case*. See *Prosecutor v Delalić, Mucić, Delić, Landžo (Čelebići Camp Case)*, Case No IT-96-21-T, Judgment, ¶¶ 195–96 (ICTY T Ch Nov 16, 1998).

<sup>181</sup> See, for example, *Čelebići Camp Case*, IT-96-21-T ¶¶ 325–26 (cited in note 180) (*mens rea* required for individual criminal responsibility for degrees of involvement in a crime is “awareness of the act of participation coupled with a conscious decision to participate by planning, instigating, ordering, committing, or otherwise aiding and abetting the commission of a crime.”); *Tadić*, IT-94-1-A ¶ 202 (cited in note 1). See also *Trial of Josef Kramer and 44 Others (Belsen)*, British Military Court, Luneberg, Germany, 17 Sept–17 Nov, 1945, 2 *Law Reports of Trials of War Criminals* 1 (UNWCC 1947) (forty-five staff of Belsen or Auschwitz concentration camps and others in positions of authority accused of committing murders individually and of having knowingly participated in a common plan to operate a system of ill-treatment and murder in these camps).

<sup>182</sup> See *Stakić*, IT-97-24-A ¶ 278 (cited in note 102) (Appeals Chamber’s view of the *actus reus* and *mens rea* of the offence of deportation). For a full discussion of deportation as a crime against humanity, see Robert Cryer, et al, *An Introduction to International Criminal Law and Procedure* 249–50 (Cambridge 2d ed 2010) (specifically discussing ICTY case law regarding deportation in the context of ethnic cleansing).

## 5. Attack Against Civilians.

A unit of twelve soldiers is ordered to seize a town that is located along a strategic roadway. By seizing the town, including its tall buildings, the soldiers will be able to locate and fire upon any enemy soldiers who drive down the roadway. There are many civilians living in the town. Instead of evacuating and detaining the unarmed civilians, the soldiers decide to simply kill all of them. The soldiers agree that, in order to achieve this result, each of them will go into a building and kill any occupants that they find there.

What is the common factor among each of these hypotheticals? All of them involve collective action, although the degree of integration, the level of agreement, and the mental state of the participants are different in each case. To start, consider the easiest case, the Attack Against Civilians. In that case, the soldiers agree to commit the crime together. What is distinctive about the scenario is that the outcome would be impossible—or perhaps difficult—for each individual to achieve on his or her own. Consequently, the individuals agree on a collective course of action. So each individual not only has the intention to pursue his own particular course of action, but each individual understands and *intends* for the other individuals to fulfill their part of the program as well. One can infer this intentional state—intending to commit one's own act and intending that others do similarly—on the basis of their shared commitment to the overall outcome, and the fact that the outcome is not achievable without this level of collective coordination. Arguably, this is the easiest case to justify vicarious liability for the actions of co-participants, because each individual has the mental state (intention) that grounds not only his own action but also the actions of his co-participants.

Contrast that situation with the most difficult hypothetical—the Love Parade example. In that case, the individuals at each end of the tunnel have a rather simple intention: to use the tunnel as a means of egress. When panic begins to set in and the individuals involved realize that there is a danger, each simply has an intention to escape the chaos in order to survive.<sup>183</sup> Taken together, the consequence of so many individuals acting on their individual intentions produces a deadly collective result: the crowd itself becomes a surging mass that ends up killing twenty individuals. However, the crucial distinguishing factor of the Love Parade crush, and others like it, is the attitude of each individual about the actions of the others. Although each individual intends to get through the tunnel, he or she does not intend for the others to do the same. This distinguishes the Love Parade crowd from the Attack Against the Civilians. In fact, each individual concertgoer would probably prefer that the others refrain

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<sup>183</sup> See Dempsey, *Stampede* at 1 (cited in note 172).

from going through the tunnel in order to make it easier for him or her to pass through. Also, none of the concertgoers wants anyone to die. So what produces the deadly result is the confluence of so many concertgoers with individual intentions that result in a completely uncoordinated result. This notion of an *uncoordinated* result is significant, because a stampede is really just a collective action problem like the Prisoners' Dilemma.<sup>184</sup> If the concertgoers could have coordinated their behavior properly, they could have exited the concert grounds in a safe and orderly fashion. But once the crowd started to panic, each individual was concerned that he or she might get trapped by the surging crowd, so each individual decided to push to get out in order to save himself or herself. Of course, if each individual knew for certain that the other concertgoers would forgo pushing, there would be no need for him or her to push as well in an attempt to escape. But since there was no way of enforcing this norm, each individual had to engage in egoistic self-preservation and try to push his or her way out of the crowd, even if this helped create the very collective problem that caused the stampede. The problem of norm enforcement in such situations is particularly acute because even police officers screaming at people to stop will do nothing to change the people's self-interested behavior if they risk death or injury when the rest of the crowd ignores the police officers' commands. And, given that the rest of the crowd is in the exact same situation, this guarantees that no one will listen to the police officers. The result is a Prisoners' Dilemma where everyone defects.<sup>185</sup>

This can be distinguished from the more *coordinated* result of the crowd behavior in the Essen Lynching example. In that scenario, the members of the crowd hear the order of German officer suggesting that it might be a good idea if the POWs were to meet a violent end.<sup>186</sup> The crowd then responds by beating

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<sup>184</sup> But see Jeff Wise, *When Crowds Panic*, NY Times Blog (Aug 3, 2010), online at <http://freakonomics.blogs.nytimes.com/2010/08/03/when-crowds-panic/> (visited Oct 24, 2010) (“[T]he most perplexing form of tragedy: one that unfolds entirely as a result of the normal psychology of healthy human beings. When crowds reach a critical density, they automatically become vulnerable to a contagion of blind fear that overwhelms any attempt at rational behavior[.]”).

<sup>185</sup> See Roger Brown, *Social Psychology* 738–44 (The Free Press 1965) (stampede as *n*-person Prisoner's Dilemma); Mark Granovetter, *Economic Action and Social Structure: The Problem of Embeddedness*, 91 *Am J Soc* 481, 490 (1985) (citing Roger Brown's *n*-person Prisoners' Dilemma).

<sup>186</sup> Compare with *Tadić*, IT-94-1-A ¶ 209 (cited in note 1) (concluding that “not all of them intended to kill but all intended to participate in the unlawful ill-treatment of the prisoners of war”). It is not clear whether this is a legitimate inference from the *Essen Lynching* case. The court appeared to hold all of the individuals vicariously liable regardless of whether they had fired a shot or delivered one of the fatal blows, though this does not entail the conclusion that defendants were convicted in the absence of an intent to kill. See especially *id.* ¶ 209 n 259 (discussing civilians, including Boddenberg, who were convicted in light of the fact that the motives of the crowd against the airmen “were deadly”).

the POWs. Each individual clearly has the intention to administer each individual blow.<sup>187</sup> But what is the attitude of each individual regarding the activities of the rest of the crowd? Although no advance coordination or deliberate planning sessions are conducted, it is possible to infer that each member of the mob intended for the rest of the mob to engage in the beating as well.<sup>188</sup> Unlike the Love Parade example where the collective violence is the unfortunate result of uncoordinated behavior, the collective violence in Essen Lynching is the deliberate result of coordinated behavior. Each member of the crowd intends to hit the POWs and similarly intends for the rest of the crowd to do the same, with full knowledge that together they might achieve a result that individually would be impossible to achieve: killing the captives.<sup>189</sup> It is important to realize that in such situations, the intention of each individual regarding the actions of the crowd arises somewhat spontaneously, without prior deliberation, but this does not mean that there is no intention or coordination at all. Spontaneous and intentional coordination should not be confused with no coordination at all. That is the difference between the Love Parade example and Essen Lynching.

Consider now the Concentration Camp example. This hypothetical sits in the middle between the Love Parade example and the Attack Against the Civilians. Each individual has the intention to work as a guard at the camp and in so doing has the intention to further the system of mistreatment that the camp represents. But each guard's attitude about the work of the others is a little more complicated. Each guard intends that the other guards also work to keep the system of mistreatment functioning, since each knows that it would be impossible to run such a system without the collective coordination of many guards who were similarly inclined. It would be literally impossible for a single individual to operate such a facility alone. However, it is probably not the case that the two guards intend for the third guard to commit that *particular* act of torture and rape.<sup>190</sup> This places the intentions of the guard in a liminal position

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<sup>187</sup> This issue is discussed in Steven Powles, *Joint Criminal Enterprise: Criminal Liability by Prosecutorial Ingenuity and Judicial Creativity?*, 2 J Intl Crim Just 606, 616 (2004).

<sup>188</sup> See *id.* (“The prosecution in Essen Lynching, as the Appeals Chamber noted [in *Tadić*], specifically stated that if the accused had the *intent* to kill, then they would be guilty of murder; if they had no such intent, then they could still be convicted of manslaughter. The accused were convicted of murder, implying that the court concluded that they all indeed intended the airmen to die.”).

<sup>189</sup> For another example of individual intent for the group to commit the act, see Rod Nordland, *In Bold Display, Taliban Order Stoning Deaths*, NY Times (Aug 16, 2010) (execution where 200 villagers participated by throwing stones and were described as “festive” and “cheering”).

<sup>190</sup> See, for example, *Kvočka*, IT-98-30/1-A ¶ 184 (cited in note 116) (“The Trial Chamber found that Kvočka had actively contributed to the everyday functioning and maintenance of the camp and, through his participation, enabled the camp to continue unabated its insidious policies and practices, and is thus criminally responsible for the crimes committed as part of the joint criminal

between the two other hypotheticals. It is perhaps for this reason that the ICTY in *Tadić* designated an entirely separate doctrinal category, JCE II, for these cases.<sup>191</sup> Under the rule announced in *Tadić*, a concentration camp guard is vicariously liable for the actions of other guards if the defendant has the “intent to further the common concerted design to ill-treat inmates.”<sup>192</sup> The defendant need not have the intent for the specific underlying criminal act charged in the indictment. So, in the case of the Concentration Camp example, the two prison guards would be convicted of war crimes for the torture and rape committed by the third guard. The *Tadić* court justified this rule by appeal to World War II precedent, and in particular the *Dachau Concentration Camp* case, although the ruling is a bit thin on a doctrinal theory to explain the result.<sup>193</sup>

The most tenuous example is the Deportation hypothetical. In that case, the soldiers all have the individual intent to cooperate on the deportation. And each individual soldier intends for the other soldiers to complete their part in the plan as well. So there is a mutually reinforcing network of reciprocal intentions. However, the rogue soldier also has an intention that the others do not share: the intent to murder the civilians. The attitude of the other soldiers regarding this action might run the gamut from regret to a form of passive acquiescence.<sup>194</sup> In any event, they clearly do not intend for the rogue soldier to take this action. The most that can be said is that they were negligent or reckless for participating in a joint criminal endeavor with a member whose capacity for rogue behavior and straying from the criminal plan was arguably reasonably foreseeable. Under both common law conspiracy doctrine and JCE doctrine, this recklessness provides the justification for vicarious liability for actions that fall outside the scope of the original criminal plan.<sup>195</sup>

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enterprise.”); *Prosecutor v Momčilo Krajišnik*, Case No IT-00-39/40, Judgment, ¶ 884 (ICTY T Ch I Sept 27, 2006) (“[P]ersons in a criminal enterprise must be shown to act together, or in concert with each other, in the implementation of a common objective, if they are to share responsibility for the crimes committed through the JCE[.]”).

<sup>191</sup> See *Tadić*, IT-94-1-A ¶ 202 (cited in note 1).

<sup>192</sup> See id ¶ 203.

<sup>193</sup> See id ¶ 203 n 250.

<sup>194</sup> At the most extreme end of the spectrum, one might describe the attitude of the soldiers as that of *dolus eventualis*. See Fletcher, *Rethinking Criminal Law* at 445–49 (cited in note 9). But see Fletcher and Ohlin, 3 J Intl Crim Just at 554 (cited in note 107) (“If the purpose of an armed band is to rid an area of potential military opponents and they know that some people will die as a result, their attitude is not necessarily *dolus eventualis*. Their killing is *dolus* only if they realize that specific people will die, approve and desire this result in their hearts, and decide to continue with their action.”).

<sup>195</sup> See Allison Marston Danner and Jenny S. Martinez, *Guilty Associations: Joint Criminal Enterprise, Command Responsibility, and the Development of International Criminal Law*, 93 Cal L Rev 75, 164 (2005) (discussing mixed US circuit court reactions to charges under statute for providing material support or resources to an organization designated as a “foreign terrorist organization” without a



The co-perpetration theory applied by the ICC tends to analyze all of the following hypotheticals under the rubric of control.<sup>196</sup> According to the Pre-Trial Chamber's analysis,

[t]he notion underpinning this third approach is that principals to a crime are not limited to those who physically carry out the objective elements of the offence, but also include those who, in spite of being removed from the scene of the crime, control or mastermind its commission because they decide whether and how the offence will be committed.<sup>197</sup>

Fair enough. However, the required elements applied by the ICC to co-perpetrators provide confusing guidance. The objective elements include a common plan and an essential contribution to it.<sup>198</sup> The subjective elements include intent (*dolus eventualis*) that the crime be committed and awareness of their joint control over the crime.<sup>199</sup> So the control theory would provide the following answers to the hypotheticals. In the case of the Attack Against the Civilians, the soldiers are all guilty as co-perpetrators of the entire war crime because each one played an essential role in the crime and exercised joint control over the operation. In the case of the Love Parade stampede, it is difficult to determine whether there is a common plan and whether each individual's contribution is to be considered essential. First, the ICC's control theory does not require a common *criminal* goal; it allows prosecution for a non-criminal goal that creates a substantial risk of criminal consequences. As for judging the "essentiality" of the contribution, the doctrine devolves into counterfactual analysis.<sup>200</sup> On the one hand, each individual's role was non-essential because "but for" his or her conduct, the stampede would surely still have occurred in almost exactly the same way. On the other hand, this produces a paradoxical answer: the same thing could be answered about each defendant at which point the stampede would certainly *not* have happened. As for the criterion of joint control and awareness of control, the answer is complicated. In one sense, each concertgoer exercised joint control over the result by virtue of his or her actions that caused the result; had the concertgoers done otherwise, the stampede would not have occurred, thus implying a level of mutual control. On the other hand, the collective result was completely *uncoordinated*, thus suggesting a complete lack of meaningful control over the result. Herein lies the difficulty: the lack of

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scienter requirement); Mark Osiel, *The Banality of Good: Aligning Incentives Against Mass Atrocities*, 105 Colum L Rev 1751, 1785–86 (2005) (discussing the resemblance between JCE III and *Pinkerton* and felony murder).

<sup>196</sup> See, for example, *Lubanga*, ICC-01/04-01/06 ¶ 322 (cited in note 103).

<sup>197</sup> *Id.* ¶ 330.

<sup>198</sup> See *id.* ¶¶ 343, 346.

<sup>199</sup> See *id.* ¶¶ 331, 366.

<sup>200</sup> See Weigend, 6 J Intl Crim Just at 480 (cited in note 157).

coordination stems from the lack of a common criminal plan. However, the ICC's control theory does not require that the common plan have a criminal goal, but only that the co-perpetrators realize the substantial risk of criminal consequences.

Consider now the Essen Lynching example. Although there is joint activity in this case (including a spontaneous plan to lynch the airmen), we again run into the same ambiguity over whether each individual punch from a member of the crowd is considered essential activity. In one sense the actions of the crowd appear to be coordinated because each realizes that he or she is participating in a lynching, but the issue of control again appears elusive. One might resolve the anxiety here by declaring that the German officer who suggested to the crowd that they should lynch the airmen is the real perpetrator of the crime; he retained control over the crime because he could have refrained from issuing the order in the first place—and could have intervened and dispersed the crowd when it started. While *his* culpability is clear under the control theory, in situations where the top level actor is missing (The Love Parade example), the question of control is confusing.

The Concentration Camp and the Deportation examples are also difficult to resolve. Under the control theory, the camp guards might be considered as jointly in control because they exercise coordinated authority over the inmates. Moreover they are clearly aware of the circumstances of their coordinated contributions and their joint control over the prison. On the other hand, they are in the middle of the organizational hierarchy, and perhaps ultimate control rests with the commandant of the prison, as in the Essen Lynching example.<sup>201</sup> The Commandant presumably has the authority to relieve a camp guard of his duty and replace him with another soldier. Is this enough to conclude that the guard is not in joint control over the crime?<sup>202</sup> The Deportation case is the one example where a strict version of the control theory could offer a simple and elegant answer: none of the soldiers has control over the rogue soldier who strays from the pre-arranged criminal plan. Although each is guilty of co-

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<sup>201</sup> For example, the commandant of the notorious Tuol Sleng prison was one of the first to be indicted and then stand trial at the ECCC. See *Kaing Guek Eav (Duch Case)*, Case No 001/18-07-2007/ECCC/TC, Judgment, ¶¶ 679–81 (ECCC T Ch July 26, 2010) (sentence of thirty-five years minus ten years for time served and five years for illegal detention).

<sup>202</sup> Weigend helpfully suggests that control should be cashed out relative to the “viewpoint of the concrete criminal plan,” so that the relevant question is not whether the crime would have happened at all but rather whether the crime would have still happened in the same way as agreed to by the participants. See Weigend, 6 *J Intl Crim Just* at 480 (cited in note 157). Of course, this requires an account of the level of specificity in the plan. The same plan might be described in different ways—a thick version that includes many specific details, a thin version that simply traces the broad outlines of the plan and excludes details, and finally, versions of varying degrees of specificity along the spectrum between the thin and thick versions.

perpetrating the war crime of deportation (and possibly a crime against humanity for persecution), the only soldier guilty of murder as a war crime is the rogue soldier. However, the ICC's expansive version of the control theory left the door open for vicarious liability provided that the other soldiers were aware "of the substantial likelihood that his or her actions or omissions would result in the realization of the objective elements of the crime . . . [and decided] to carry out his or her actions or omissions despite such awareness."<sup>203</sup> Applied to the current facts, this liability based on *dolus eventualis* would attach if the other soldiers understood that there was a substantial likelihood that the plan would result in the killing of the deportees by the rogue soldier and continued with the plan nevertheless.<sup>204</sup> This use of *dolus eventualis* simply rehashes the JCE III standard of "reasonably foreseeable."<sup>205</sup>

The control theory cobbles together a patchwork of requirements but never achieves a convincing account of group criminality. Although control is relevant for culpability, it is not the central element. By defining the mental element of the co-perpetrator as awareness joint control combined with a watered down intent requirement, the doctrine effectively moves the mental element to the background in favor of the objective element.<sup>206</sup> Control becomes the *sine qua non* of the doctrine. True, this result is consistent with the PTC's motivation in adopting the control theory in the first place—avoiding the subjective approach embodied by JCE—but one wonders whether the result adequately captures the culpable mental state of the participants of collective crimes.

The ICC's control theory deemphasizes and undervalues the joint intention of the participants—no adequate theory of vicarious liability in international criminal law can be complete without a thorough understanding of the mental attitude of each participant to the participation of his colleagues. The basic structure of that answer must involve an appropriate mapping, at the philosophical level, of an individual's intentional commitment to the group endeavor. By drawing on the philosophical literature on shared intentions, the following section is devoted to briefly explaining that account and

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<sup>203</sup> *Lubanga*, ICC-01/04-01/06 ¶ 353 (cited in note 103).

<sup>204</sup> See *id.* ¶ 352.

<sup>205</sup> See Fletcher and Ohlin, 3 *J Intl Crim Just* at 554 (cited in note 107) (arguing that *dolus eventualis* represents a higher degree of culpability than common law recklessness).

<sup>206</sup> See *Lubanga*, ICC-01/04-01/06 ¶ 329 (cited in note 103) (describing JCE as a "subjective" approach which requires shared intent). Clearly, the Pre-Trial Chamber (PTC) was referring to JCE I, not JCE III. Also, it can be inferred from this paragraph that the PTC favored the doctrine of co-perpetration over JCE because the latter was allegedly too organized around the mental states of the participants. For a further discussion of the subjective approach, see Fletcher, *Rethinking Criminal Law* at 655 (cited in note 9).

demonstrating its centrality in resolving these questions. Although a theory of shared intentions does not resolve every question of culpability raised by the hypotheticals in the previous section, the following section will demonstrate that a satisfactory ICL doctrine of collective participation cannot be constructed without one. It is a necessary but not a sufficient condition.

## V. A THEORY OF JOINT INTENTIONS

This section draws heavily on the work of Michael Bratman, who has offered the most philosophically convincing treatment of the matter of shared intentions.<sup>207</sup> John Searle and Raimo Tuomola have also pursued similar accounts, which they called collective intentions and we-intentions.<sup>208</sup> For the most part, the philosophical differences between these theories will be of only partial concern to our analysis. True, it is important to get the theoretical details correct. But before we do that, we must demonstrate that the very idea of group intentionality is the relevant subject to discuss. Whether you call it a shared or joint intention, a collective intention, or a we-intention does not matter yet. We start with the definition offered by Bratman not because I am committed to its correctness, but rather because it offers the most concise and elegant formulation from which to start the analysis.<sup>209</sup>

### A. The Shared Intention Thesis

In numerous essays, Bratman defends what he calls the Shared Intention Thesis (SI thesis).<sup>210</sup> It consists of the following propositions:

We intend to *J* [joint activity] if and only if:

- (1) (a) I intend that we *J* and (b) you intend that we *J*.
- (2) I intend that we *J* in accordance with and because of (1)(a), (1)(b), and meshing subplans of (1)(a) and (1)(b); you intend that we *J* in accordance with and because of (1)(a), (1)(b), and meshing subplans of (1)(a) and (1)(b).
- (3) (1) and (2) are common knowledge between us.<sup>211</sup>

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<sup>207</sup> See, for example, Michael E. Bratman, *Faces of Intention: Selected Essays on Intention and Agency* 93–129 (Cambridge 1999).

<sup>208</sup> For a general discussion, see John R. Searle, *Collective Intentions and Actions*, in Philip R. Cohen, Jerry Morgan, and Martha E. Pollack, eds, *Intentions in Communication* 401 (MIT 1990); Raimo Tuomola and Kaarlo Miller, *We-Intentions*, 53 *Phil Studies* 367 (1988).

<sup>209</sup> Bratman's theory is arguably the most influential theory of joint intentions and has been widely cited in the legal field (although not in international criminal law). See, for example, Coleman, *The Practice of Principle* at 96–99 (cited in note 3).

<sup>210</sup> See Bratman, *Faces* at 131 (cited in note 207).

<sup>211</sup> *Id.*

Although the SI thesis sounds technical, it can be parsed rather simply. Step 1 codifies the requirement that a shared intention is simply a collection of two (or more) individual intentions that are related in the right way. The required relationship is then explained in Steps 2 and 3. The individual intentions referred to in Step 1 are a very specific kind of intention, which is the intention that you and I both engage in an activity *together*.<sup>212</sup>

The relationship between the intentions that is codified in Step 2 involves the reciprocal and coordinated nature of the intentions.<sup>213</sup> In other words, the individuals do not simply intend for the cooperation to happen and then blindly hope that it comes to pass.<sup>214</sup> Rather, each individual desires that the group commit the action in full knowledge that the other individual so desires as well.<sup>215</sup> That is the first half of Step 2. The second half of Step 2 involves the meshing of subplans, or the coordination for how the activity will be conducted.<sup>216</sup> This does not necessarily mean that all possible subplans will be coordinated, but simply that each individual has an expectation that they will plan with the others how to carry out the activity, and it is within the context of this expectation that each individual has the intention that the group will conduct the activity.<sup>217</sup> Finally, Step 3 simply states that each member will be aware of the reciprocal nature of the intentions.<sup>218</sup>

Bratman's preferred example is the painting of a house by two individuals.<sup>219</sup> Suppose an individual wants to paint a house and starts in the front. As it happens, a second individual also wants to paint the house and starts from the back. Since neither is aware of the other, we could not conclude that they have a shared intention to paint the house.<sup>220</sup> Any coordination here is completely accidental. Suppose then that the individual in the front of the house is aware of the activity of the second individual, but not vice versa. This would also not constitute a joint intention to paint the house. Third, consider a situation where both are aware of the existence of the other painter, but neither is doing the painting in accordance with—and because of—the other painter. (Such indifference might be strange, but not impossible). This leaves us with the possibility that each one is aware of the other painter and in fact does the

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<sup>212</sup> See *id* at 115.

<sup>213</sup> See *id* at 124.

<sup>214</sup> See Bratman, *Faces* at 118 (cited in note 207).

<sup>215</sup> See *id* at 119.

<sup>216</sup> See *id* at 125.

<sup>217</sup> See *id* at 119–21.

<sup>218</sup> See Bratman, *Faces* at 119 (cited in note 207).

<sup>219</sup> See *id* at 93–94, 98, 112, 120, 153–56.

<sup>220</sup> See *id* at 94.

painting in full expectation that the other painter is doing the same from the opposite end. This, in fact, is quite easy to imagine where two individuals are committed to pursuing a project efficiently. However, what if the painter in the front starts painting in blue and the painter in back starts painting in red, and each one is painting the house with the intention that it be *fully* painted in the color that they were painting? In this situation, there would not be a joint intention either. A joint intention arises where there is some minimal planning activity such that each individual intends that the group commit the action because they have coordinated subplans that dictate how the action is going to be carried out.<sup>221</sup> Then and only then can we conclude that two individuals exhibit a shared intention to commit a particular action.

Several immediate observations can be drawn from this account. First, this account is highly individualistic. The basic building blocks of the account are individuals and their individual intentions, and the particular relationship between those intentions. There is nothing overly metaphysical or mystical about the concepts being deployed here.<sup>222</sup> There is no reference to corporate entities or group minds.<sup>223</sup> Indeed, if there is any fault here, it may be that the account is overly individualistic. Given that the account is so entirely individualistic, how does it manage to yield an account of a *collective* intention? The answer lays in the heavy use and deployment of the concept of planning.<sup>224</sup> Although many agents (including some animals) may have the capacity to form some kind of mental intention, only planning agents are capable of interacting with each other in a way that can yield a collective intention.<sup>225</sup> This is based on the full blown reciprocal nature of how planning agents interact with each other. Planning agents recognize each other as being uniquely capable of engaging in cooperative behavior, through the process of deliberation regarding means, in a way that results in either the full or partial meshing of subplans.<sup>226</sup> Taken together, this yields a shared intention.

It does not matter (or it should not matter) what you call it. But one could offer a theory of shared intentions that is far less individualistic and far more

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<sup>221</sup> See id at 95–98.

<sup>222</sup> See also Searle, *Collective Intentions* at 404 (cited in note 208) (discussion of group minds and collective unconscious “at best mysterious and at worst incoherent”).

<sup>223</sup> For a discussion of the history of corporate entities as it relates to legal discourse, see Ohlin, 98 J Crim L & Criminol at 163–69 (cited in note 8).

<sup>224</sup> For a general discussion, see Michael E. Bratman, *Intention, Plans, and Practical Reason* 14–27 (Harvard 1987).

<sup>225</sup> See Carol Rovane, *The Bounds of Agency: An Essay in Revisionary Metaphysics* 144–45 (Princeton 1998). See also Bratman, *Faces* at 95–98 (cited in note 207).

<sup>226</sup> See Michael E. Bratman, *Intention* at 36 (cited in note 224). Compare id with Rovane, *Bounds* at 144–45 (cited in note 225).

collectivist. Searle, for example, argues that collective intentions of the type explained by Bratman are irreducible to their individual components.<sup>227</sup> By this he means that collective intentionality is not *wholly* reducible to individual intentions. His argument for the irreducibility of collective intentions stems from a simple intuition. A thoroughly individualistic account of collective intentions is only possible because it makes reference to cooperation.<sup>228</sup> This much is undeniable. The house painters only exhibit a collective intention to paint the house when there is some indication that they believe and intend that they will cooperate in the house-painting project. Without this level of cooperation, one simply has two people individually painting a house with two separate individual intentions to paint the house. The reference to cooperation, though, may be problematic. How ought one understand the concept of cooperation? Presumably it involves at least two individuals who work together to achieve a particular outcome. The “working together” is a process that is not accidental, but rather is intentionally desired by the individuals who are cooperating together. This is the very definition of cooperation. If this is the right understanding of cooperation, the appeal to cooperation is indeed problematic because it renders the entire account viciously circular.<sup>229</sup> The account of joint intentions is only rendered intelligible as an *individualistic* account because of its implicit appeal to the concept of cooperation.

But cooperation already has the notion of a collective intention imbedded within it.<sup>230</sup> So we are left with an uncomfortable dilemma. Either one includes cooperation in the formula and risks circularity, or one excludes cooperation from the formula and in the process leaves the account hopelessly underbroad. Neither alternative is particularly attractive. It suggests that collective intentions may not be easily reducible to individual intentions. As Searle puts it, they are a “primitive phenomenon.”<sup>231</sup>

We need not resolve the problem here. Although I’m inclined to favor the irreducibility thesis, we are not absolutely required to resolve the philosophical debate in order to insist that some coherent theory of joint or shared intentions is necessary to ground an ICL doctrine for vicarious liability. I will rest content if I can demonstrate that a theory of joint intentions is required to ground the doctrine, without necessarily flushing out every last detail of the theory. Nor does this incompleteness render the theory suspect. It simply represents a promissory note that some less doctrinal aspects of the theory require future

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<sup>227</sup> Searle, *Collective Intentions* at 404 (cited in note 208).

<sup>228</sup> See *id.* at 406.

<sup>229</sup> See *id.* at 405.

<sup>230</sup> See Searle, *Collective Intentions* at 405 (cited in note 208).

<sup>231</sup> *Id.* (defining these intentions as “primitive phenomenon” in the sense that they are irreducible).

resolution. To confront them directly at this stage of the argument would risk entropy.

## B. Planning, Cooperation, and Deliberation

Before continuing, it is necessary to cash out what we mean by planning and cooperation. What does this entail? On these two issues, my account departs from the specifics of Bratman's theory. Bratman is correct that all human agents are planning agents in the sense that human agents naturally engage in long term planning that requires thinking about how to complete complex projects and how the sub-units of those projects intermingle with each other.<sup>232</sup> This kind of planning implies rational deliberation, or the process of thinking about which projects to prioritize and which avenues to pursue as a means of achieving them. This process of planning and deliberation can be done individually, in the case of individual action, or collectively, in the case of cooperative projects.

Coordination often involves *deliberation* about how the group will commit the crime. International crimes often exhibit this type of behavior where a group of individuals engage in collective deliberation in pursuit of a common criminal endeavor. It is this participation in the collective endeavor that is sufficient to generate individual culpability (on the basis of the shared intention of the group to commit the crime). One sees this, for example, in what prosecutors at the ICTY used to refer to as a horizontal JCE to commit war crimes or crimes against humanity.<sup>233</sup> In such cases a small cadre of military or political leaders, or both, conspire together to pursue a joint criminal plan. Their shared intention to commit the crime suggests a doctrinal avenue for grounding vicarious liability for the actions of other members of the group who do not commit the *actus reus* but nonetheless identify with the result by virtue of their desire to see it succeed.

Planning and deliberation in the context of cooperative behavior have very particular characteristics. Two characteristics that I have previously identified are particularly relevant: pooling information and shared decision-making.<sup>234</sup> In the case of pooling information, individuals who make up the ground floor of the operation share relevant information with the decision-makers. This is a frequent occurrence in the military context where information is sent up the chain of command. Such groups are often vertically organized with decision-making concentrated at the top and information gathering concentrated at the

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<sup>232</sup> See Bratman, *Faces* at 35–37 (cited in note 207).

<sup>233</sup> See Ambos, 5 J Intl Crim Just at 180 (cited in note 47) (describing relationship between members of JCE I as being on the same hierarchical level and operating in a “coordinated, horizontal way”).

<sup>234</sup> See Ohlin, 98 J Crim L & Criminol at 190–95 (cited in note 8).



bottom by the rank and file.<sup>235</sup> Furthermore, such groups are often loosely knit conspiracies with imperfect or infrequent coordination of behavior.<sup>236</sup>

Cases involving shared decision-making are slightly different. In such situations, individuals engage in reason-giving and reason-taking behavior that results in a collective decision. In some cases, the organizational structure of the group concentrates decision-making power in a limited group of individuals or even in a single leader; in rare cases, the organizational structure contemplates democratic decision-making. But regardless of the procedure adopted for making *final* decisions, the group employs shared rationality for engaging in collective deliberation. Not only does the group consider appropriate goals, it considers how to achieve them with a plan. When its plan develops contradictions or inconsistencies that frustrate its goals, it seeks to resolve them.<sup>237</sup>

There is a clear link between deliberation and joint intentions. Consider each individual's personal attitude regarding the group's endeavor. By engaging in some form of collective deliberation about how to go about achieving a group goal, the individuals in the group must, by logical necessity, have a shared intention that the crime be committed. Otherwise the collective deliberation fails to get off the ground. Bratman puts the point in terms of "meshing" of subplans, so that two individuals painting a house make some allowance for how and with what color they will do the painting.<sup>238</sup> He describes this process using the language of cooperation, although as Searle rightly points out, the content of the concept of cooperation remains a bit elusive.<sup>239</sup>

In previous articles I have explored the collective rationality that emerges from such group deliberations.<sup>240</sup> In particular, I argued that shared decision-making can generate collective rationality that overlaps with individual rationality.<sup>241</sup> In these cases, the rationality of the group is not wholly reducible

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<sup>235</sup> See *id.* at 190–91.

<sup>236</sup> See *id.* at 192.

<sup>237</sup> It does not matter whether they actually resolve the contradictions. All that matters is that they are committed to resolving them. See Ohlin, 98 *J. Crim. L. & Criminol.* at 183 (cited in note 8). See also Rovane, *Bounds* at 137–41 (cited in note 225) (describing the rational activities carried out by groups in order to achieve a common end).

<sup>238</sup> See Bratman, *Faces* at 98 (cited in note 207).

<sup>239</sup> See Searle, *Collective Intentions* at 406 (cited in note 208).

<sup>240</sup> See Ohlin, 98 *J. Crim. L. & Criminol.* at 176–78 (cited in note 8).

<sup>241</sup> See *id.* at 178–83 (discussing "overlapping agents" who participate in a collective endeavor embodied in a group's rational point of view but who reserve a portion of their deliberation for themselves in order to retain their existence as individual agents at the same time). See also Rovane, *Bounds* at 137–41 (cited in note 225); Carol Rovane, *What is an Agent?*, 140 *Synthese* 181 (2004).

to the rationality of the individual. As the recent literature on the Doctrinal Paradox makes clear, group behavior must be analyzed at the group level in order to make sense of it.<sup>242</sup> The process of collective deliberation encourages participants in the group to seek overall rational unity among the entire group; indeed, the individuals are each committed to achieving this rational unity among the group. Contradictions in the group's plan are viewed as problems that demand resolution. Whether the group is able to resolve such contradictions is an entirely different matter; it is undeniable that the group views conflicting courses of action as contradictions that ought to be resolved if possible.

But what of the Essen Lynching example? In that case, the group of civilians attacks the British airmen with little or no time to engage in the process of collective decision-making. The group's actions are spontaneous. However, this is not to say that its actions are uncoordinated. The process of lynching creates an instantaneous coordination, where each individual plays his part in the overall endeavor. But when the endeavor is lynching, each individual in the mob plays the exact same role: hitting the victims. So the collective action is parsed into smaller component parts, although each part is the same. There are no differentiated subplans. A public stoning happens in the exact same way. Everybody just picks up a stone and throws it.

The question is whether it is correct to say that the participants in Essen Lynching have a joint intention for the group to lynch the airmen, even though there is insufficient opportunity for deliberation. One possibility is to take the lack of deliberation as evidence for lack of cooperation and therefore a lack of a joint intention. Under the joint intentions theory, this would counsel against applying vicarious liability to the participants. A second possibility is to conclude that deliberation has little to do with cooperative behavior, since cooperative behavior is possible in its absence. If this is correct, then our account of cooperation and planning stands in need of revision.

The participants in the Essen Lynching example are not just acting individually without regard for each other. There is a difference, after all, between the Essen Lynching and the Love Parade. The success of the endeavor would be impossible without the simultaneous and coordinated activity of the crowd. So cooperative activity is possible without deliberation.

This suggests that cooperation can vary by degree. In cases involving instantaneous cooperation to commit a simple task (such as a lynching), no

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<sup>242</sup> See, for example, Lewis A. Kornhauser and Lawrence G. Sager, *The One and the Many: Adjudication in Collegial Courts*, 81 Cal L Rev 1, 10–13 (1993) (illustrating the doctrinal paradox judges sometimes face in collective adjudicative efforts). For a general discussion, see Philip Pettit, *Collective Persons and Powers*, 8 Legal Theory 443 (2002).

deliberation is required. As the complexity of the task increases, the rational relationship between members of the group may change as well. Cooperation may take the form of deliberation, which imposes a unique rational structure to the group. The demand for overall rational unity will cause the group to pool information and stick to a particular decision-making structure. This is a form of collective reason.

The important point is that not all cases of joint intentions will produce collective reason. The Essen Lynching is the perfect example; the participants jointly intend for the group to kill the airmen, but the group fails to engage in rational deliberation. The question is whether vicarious liability for acts within the scope of the criminal plan should attach to these cases of group criminality that take place in the absence of sustained rational deliberation. Although this is a multilayered question, this much is certain: despite the lack of deliberation, the participants still jointly intend to commit the crime, so the imposition of vicarious liability of the group's overall activity would hardly violate the principle of culpability.

### C. Applying the Shared Intentions Theory to International Criminal Law

The appropriate course of action is to take the theory and apply it to the five hypotheticals presented at the beginning of the section and then compare the results it yields to the results that we achieved with the ICC's control theory of co-perpetration. If I am correct, a theory of joint intentions provides better answers to the hypotheticals than the control theory. This does not mean that control as a criterion is irrelevant, but simply that its centrality has been exaggerated. Just as the case law and scholarly literature in 1997 revealed an unreflective acceptance of JCE, we are rapidly and worrisomely coming to a current situation where blind and unreflective acceptance of JCE is being replaced with a hagiographic approach to the control theory of co-perpetration. Neither is particularly helpful; healthy skepticism should rule the day.

If we reexamine the Love Parade stampede, the notion of joint intentions explains why vicarious liability should be unthinkable in such a case. The concertgoers in the tunnel engaged in no cooperation; nor did they reflexively make decisions in light of, and because of, the actions of the other concertgoers. Indeed, their interests were antagonistic. One might object that antagonism and joint intentions are not mutually exclusive. Consider two participants in a game competing against each other and with mutually incompatible interests; they still

cooperate with each other *by playing the game*.<sup>243</sup> However, the Love Parade example can be distinguished from antagonistic game-playing cooperation because game-playing involves a joint intention to follow the rules of the game in order to mutually achieve the satisfaction of game-playing. The Love Parade example is devoid of either actual rule following or a shared commitment to rule following in order to engage in game playing.

Compare this with Essen Lynching. Although the cooperation is rather spontaneous, it is clear that the members of the crowd share an intention to commit a collective act: the lynching of the airmen. Not only does each member of the crowd want to lynch the soldier, but each member of the crowd knows that the other members of the crowd are similarly inclined and that each will play his part in the gruesome deed by throwing a punch or kicking them. The aggregation of the individual acts does more than produce an accidental collective result like the Love Parade; it produces a planned action that each member desires. It should be noted that not all cases of mob behavior will be exactly the same; they can cover the entire spectrum between Love Parade and Essen Lynching. Some brawls might be more haphazard and less coordinated than Essen Lynching, but still more organized than Love Parade, like a barroom brawl. The key to distinguishing them is the intentionality of the participants and their interrelation.

The Concentration Camp Case and the Attack Against Civilians example are also easy to resolve. The soldiers in the Attack Against Civilians not only share a commitment to a particular goal, but they also mesh subplans and each one is aware of his particular role in the overall endeavor. Indeed, the attack would not be possible (each soldier clearing a different building) without the coordination that results from their joint intention to commit the crime. This joint intention makes clear why vicarious liability is consistent with the principle of culpability. Although the physical actions are committed by several

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<sup>243</sup> Situations involving cooperative activity at one level, and antagonism at another level, have long confounded judges in the case law. See, for example, *People v Russell*, 693 NE2d 193, 194 (NY 1998) (participants in gun battle were all convicted for intentionally aiding the shooter, even though they were shooting at each other). The court noted that “unlike an unanticipated ambush or spontaneous attack that might have taken defendants by surprise, the gunfight in this case only began after defendants acknowledged and accepted each others’ challenge to engage in a deadly battle on a public concourse.” *Id.* at 195. See also *People v Abbott*, 445 NYS2d 344, 347 (NY App Div 1981) (applying similar rule in drag racing context). The rule has been frequently criticized. For a general discussion, see Daniel B. Yeager, *Dangerous Games and the Criminal Law*, 16 *Crim Just Ethics* 3 (1997). Bratman is more sympathetic to the general idea and acknowledges that competitive game playing involves cooperative activity. See Bratman, *Faces* at 107 (cited in note 207) (playing chess involves cooperation to play the game, though one’s opponent does not, and cannot, cooperate in his opponent’s plan to checkmate him). Game playing therefore involves meshing of subplans among the players, although not all the way down.

individuals, each one intends for the other to commit the action. By so doing, he or she makes it his own. To explain this argument, it might be helpful to consider other situations where actors might be legally responsible for the actions of another because they “make it their own.”<sup>244</sup> In a case where a mob boss procures a subordinate to commit a murder, the mob boss makes the action his own because he wants the crime to be committed and uses his subordinate as an instrument to make it happen.<sup>245</sup> The Attack Against Civilians exists on a spectrum with the mob boss, although this time each soldier makes the collective action his own, not because each uses the other soldiers as an instrument, but simply because each soldier intends for the group to commit the crime and intends to do his part to bring the collective plan into fruition. It is the mental state—not the *actus reus*—that provides the justification for the vicarious liability.

The Concentration Camp case is a little more difficult, but the existence of joint intentionality arguably captures the ambiguity of the situation. The two camp guards both share a joint intention to operate a system of ill treatment of civilians and each knows that the other is working with them on a coordinated plan to achieve that result. However, the two guards clearly do not share an intention with the third guard to commit that particular criminal act, that is, the torture and rape of the civilian. The torture and rape are at best a natural outgrowth of the system of mistreatment that the guards have the intention of promoting by working at the camp. Their culpability appears to remain in a liminal space between a hypothetical defendant who has a joint intention to commit a particular crime (most culpable) and a hypothetical defendant who merely recklessly participates in a criminal gang knowing that some crimes might happen (least culpable).<sup>246</sup> What is the moral and legal significance of their having a joint intention to operate a system of mistreatment, and what is the

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<sup>244</sup> See, for example, *Nye & Nissen v United States*, 336 US 613, 619 (1949), quoting *United States v Peoni*, 100 F2d 401, 402 (2d Cir 1938) (aider and abettor “in some sort associate[s] himself with the venture, that he participate[s] in it as in something that he wishes to bring about, that he seek[s] by his action to make it succeed”); *State v Gladstone*, 474 P2d 274, 278 (Wash 1970) (defendant who directed an agent of the police to someone who might be willing to sell marijuana not guilty of aiding and abetting because no evidence that defendant did something in association or connection with the seller to accomplish the crime).

<sup>245</sup> This is best described as an example of indirect perpetration. The ICC case against al-Bashir is based on this doctrine. For a general discussion, see Florian Jessberger and Julia Geneuss, *On the Application of a Theory of Indirect Perpetration in Al Bashir: German Doctrine at The Hague?*, 6 J Intl Crim Just 853 (2008).

<sup>246</sup> Compare *Lubanga*, ICC-01/04-01/06 ¶ 350 (cited in note 103) (“[aware] that a circumstance exists or a consequence will occur in the ordinary course of events”), with id ¶ 352 (“accepts such an outcome by reconciling himself or herself with it or consenting to it (also known as *dolus eventualis*)”).

moral and legal significance of the *lack* of any joint intention with regard to that *particular* criminal act? My point here is not to defend a particular moral conclusion for how we should treat the two guards in the Concentration Camp example. Rather, my point is to emphasize that a theory of joint intentions gets to the heart of the nuanced culpability of the guards in this example.

One might object that the control theory was invoked by the ICC as a method of distinguishing between co-perpetrators and accomplices—that is, distinguishing between levels of participation in a criminal endeavor—and not grounding vicarious liability.<sup>247</sup> And certainly the ICC’s use of the control theory suggests that they also implicitly considered some notion of a shared or joint intention as a relevant consideration, since the ICC requires a finding of an agreement or common plan among the co-perpetrators.<sup>248</sup> The question is whether control is the right barometer with which to distinguish between co-perpetrators and accomplices. According to the ICC, accomplices contribute to the endeavor but have no control over the outcome. They are not in a position to determine whether the crime actually happens or not. Although this is one plausible avenue for distinguishing between principals and their accomplices, one might also invoke the concept of joint intentions to do the job. Under this proposal, those who jointly intend to commit the crime with each other would be liable as co-perpetrators (or some other designation), whereas those who simply assist the group with *mere knowledge* that their assistance will help complete the crime are then labeled as accomplices. If the joint intentions theory is capable of making this distinction (and doing it better), it is unclear what is left for control as a criterion to do.

This is arguably what the ICTY Trial Chambers in *Kvočka* and *Stakić* were getting at.<sup>249</sup> The trial chambers in both cases insisted that JCE could be revised so that it distinguishes between those who co-perpetrated a JCE and those who aided and abetted the JCE.<sup>250</sup> And the distinction between the two categories was not based on control, but rather co-perpetrators were those who intended to commit the crime while the accomplices merely assisted with knowledge that

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<sup>247</sup> See id ¶ 327.

<sup>248</sup> See id ¶ 344. The agreement can either be to commit a crime within the jurisdiction of the statute, or a common plan towards a non-criminal goal that will nonetheless result in a crime as a necessary outcome. See id ¶ 352 (describing this level of culpability as *dolus directus*).

<sup>249</sup> See *Stakić*, IT-97-24-T ¶ 441 (cited in note 119); *Kvočka*, IT-98-30/1-T ¶ 249 (cited in note 112) (“The Trial Chamber also considers that it is possible to co-perpetrate and aid or abet a joint criminal enterprise, depending primarily on whether the level of participation rises to that of sharing the intent of the criminal enterprise. An aider or abettor of a joint criminal enterprise, whose acts originally assist or otherwise facilitate the criminal endeavor, may become so involved in its operations that he may graduate to the status of a co-perpetrator of that enterprise.”).

<sup>250</sup> See *Kvočka*, IT-98-30/1-T ¶ 284 (cited in note 112).

they were helping the group commit the crime.<sup>251</sup> Although both are concerned in the criminality, their modes of participation—and their mental states—are fundamentally different. The one problem with the doctrinal innovation of the Trial Chamber is that the court failed to give the necessary theoretical analysis to explain why the distinction was both fruitful and necessary. Indeed, both decisions were rather skeletal on theory. I submit that if the court had laid a proper foundation for its doctrinal distinction, by developing an explicit theory of joint intentions, the rationale for its decision would have been far clearer—and ultimately more influential.<sup>252</sup>

The same issue plagues the Rome Statute. Article 25(3)(d) of the Statute penalizes individuals involved in group criminality when they make a contribution with the *intent* to aid the group in committing the crime or with *knowledge* of the group's intent to commit the crime.<sup>253</sup> The intuitive problem with this provision is that its two subsections appear to inculcate two completely different classes of criminals—principals and accomplices—and group them under the same umbrella. This repeats the same conceptual error of JCE. On its face, individual responsibility for both classes is unproblematic and controversial; their grouping *together* in Article 25(3)(d), though, suggests a moral equivalency that belies our intuitions regarding their different levels of culpability. And I believe this Article has clearly articulated the foundation for their differing culpability: principals of group crimes share an intention for the group to commit the crime, while accomplices do not.

#### D. Restrictions on Vicarious Liability

It should now be clear why vicarious liability for actions falling outside the scope of the criminal plan is so controversial.<sup>254</sup> Insofar as the action falls

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<sup>251</sup> Id.

<sup>252</sup> The Trial Chamber's attempt to split JCE into two separate categories—aiding and abetting a JCE and co-perpetrating a JCE—was immediately rejected by the Appeals Chamber. See *Kvočka*, IT-98-30/1-A ¶¶ 90–92 (cited in note 116). The Appeals Chamber engaged in a similar rebuke of the Trial Chamber in *Stakić*. See *Stakić*, IT-97-24-A ¶¶ 59–62 (cited in note 102).

<sup>253</sup> For a full analysis of Article 25(3)(d), see Jens David Ohlin, *Joint Criminal Confusion*, 12 New Crim L Rev 406 (2009).

<sup>254</sup> See, for example, Danner and Martinez, 93 Cal L Rev at 137 (cited in note 195) (JCE as the nuclear bomb of the international prosecutor's arsenal); Powles, 2 J Intl Crim Just at 619 (cited in note 187) (broad nature of JCE could lead to “unfortunate miscarriage of justice” if Trial Chambers are not vigilant in ensuring sufficient evidence in support of allegations and rigorous scrutiny of the evidence); Ambos Brief at \*1, 13, 15–19, (cited in note 60) (rejecting JCE III as incompatible with fundamental principles of criminal law theory); Ohlin, 5 J Intl Crim Just at 81 (cited in note 63) (“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

outside the scope of the collective plan, there was no shared intention to commit the wayward crime. Since the joint action was based on an initial agreement to commit the crime, the defendant's intention is predicated on that initial agreement. Nor does it matter whether the wayward action was a reasonably foreseeable consequence of the criminal plan.<sup>255</sup> These individual wayward actions cannot be attributed back to the defendant; the shared intention was entirely different. The problem with the JCE doctrine was never its "subjective" approach, but rather its insistence on vicarious liability for acts that fall outside the scope of the original criminal agreement (JCE III). Indeed, JCE III should never have been developed in the first place because, as demonstrated in this Article, it is inconsistent with the very theory that animates the JCE doctrine.<sup>256</sup> Defendants in a JCE III case do not have a shared intention to commit the crime in question, and therefore they do not have the requisite mental state to place them in the same category as the principal perpetrator who committed the act. In addition to its deficiencies at the level of criminal law theory, JCE III is unsupported by either the current Rome Statute or the international case law; future international courts ought to reject it.<sup>257</sup> The ICC's control theory suffers from similar deficiencies: the use of *dolus eventualis* as a permissible mental state effectively guts the objective requirement of a common criminal plan.

A theory of joint intentions nicely explains why the restrictions outlined in Part II of this article are absolutely necessary. The two restrictions, now conceptually linked, include eliminating vicarious liability for actions that fall outside the scope of the original agreement, and differentiating levels of participation in the group endeavor. The former restriction is required by the theory because, for those actions that fall outside the scope of the original plan, there is no joint intention with regard to that criminal action. And if the joint intention grounds vicarious liability in the first instance, the absence of a joint intention with regard to that one criminal act requires rejection of the application of vicarious liability to all other members of the group. The latter restriction is required because those who carry the joint intention for the group

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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.").

<sup>255</sup> Compare with *Tadić*, IT-94-1-A ¶ 224 (cited in note 1).

<sup>256</sup> For an example of this tension, see *D'Ottavio* (cited in note 75), cited in Cassese, 5 J Intl Crim Just at 119–20 n 12 (cited in note 83) ("There also exists a psychological causation in that all the participants shared the conscious will to engage in an attempt to unlawfully detain a person while foreseeing a possible different crime, as can be inferred from the use of weapons: it was to anticipate that one of them might have shot at the fugitives with a view to achieving the common purpose of capturing them."). The Italian Court of Cassation seems unbothered by the fact that the "shared conscious will" of the participants did not include the crime for which they were convicted.

<sup>257</sup> See Section III.A.



to commit the crime are categorically different from those who merely assist the endeavor with knowledge that their assistance will facilitate the group's efforts. What justifies this categorical distinction? Simply put, those who carry the joint intention are guilty of an *intentional* act, while those without the joint intention are, at most, guilty of a crime of knowing facilitation or complicity. If at some point an accomplice changes his or her attitude about the group's endeavor, and intends for the group to commit the crime, then the accomplice graduates to the status of co-perpetrator where greater liability is appropriate.<sup>258</sup>

In the end, the appropriate course of action is not to replace JCE with the control theory of perpetration, but rather reform JCE and eliminate JCE III because it fails to comply with the underlying theory supporting the doctrine. The latest developments in the case law may support this prescription. In May, the Extraordinary Chambers in the Courts of Cambodia (ECCC) issued a decision rejecting JCE III.<sup>259</sup> In a well-crafted and tightly argued opinion that bodes well for the young tribunal, the Pre-Trial Chamber examined all of the historical precedents in the post-World War II era and went well beyond the cases cited by the ICTY in *Tadić*.<sup>260</sup> The Pre-Trial Chamber concluded that, although some form of joint enterprise liability was already part of customary international law in the 1970s when the Khmer Rouge atrocities were committed, there was insufficient evidence of a similar norm regarding vicarious liability for criminal acts outside the scope of the criminal plan.<sup>261</sup> Prosecutions before the ECCC will now proceed with joint enterprise liability but without the darling of the prosecutor's nursery: JCE III.

Even more than the result, the Pre-Trial Chamber's *reasoning* was striking.<sup>262</sup> International tribunals applying JCE usually just cite *Tadić*, under the assumption

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<sup>258</sup> One might object that this joint intentions theory could potentially label thousands of minor participants as co-perpetrators, simply based on their joint intention. Are factory workers making munitions guilty as co-perpetrators if they exhibit a joint intention to use the weapons as part of a criminal plan? The answer is simple: such cases should not be resolved by changing the required mental state for the doctrine, but rather by further examination of the level of contribution required to the plan as part of the objective element. If one adopts the differentiated version of JCE discussed in Section III.B, the level of contribution could be used to distinguish between co-perpetrating a JCE and aiding and abetting a JCE. A full analysis of the required level of contribution (de minimus, substantial, or indispensable) for vicarious liability is outside the scope of the present Article.

<sup>259</sup> See JCE Appeals Decision (cited in note 104).

<sup>260</sup> See id ¶ 65 (discussing *Justiće* and *RuSHA* cases).

<sup>261</sup> See id ¶ 87.

<sup>262</sup> For a criticism of the PTC decision regarding JCE III, see David Scheffer and Anthony Dinh, *The Pre-Trial Chamber's Significant Decision on Joint Criminal Enterprise for Individual Responsibility*, Cambodia Tribunal Monitor (June 3, 2010), online at [http://www.cambodiatribunal.org/images/CTM/ctm\\_scheffer\\_dinh\\_jce\\_commentary\\_3\\_june\\_2010.pdf](http://www.cambodiatribunal.org/images/CTM/ctm_scheffer_dinh_jce_commentary_3_june_2010.pdf) (visited Oct 24, 2010) (arguing inter alia that the

that even if JCE was not a part of customary law after World War II, there is ample evidence today that JCE is an indelible part of modern ICL.<sup>263</sup> But the substance of the ECCC's decision suggests that *Tadić*, as a precedent, is more problematic than that. The ICTY argued that JCE was supportable as judicial interpretation of Article 7 of the ICTY Statute because, inter alia, JCE was a part of customary international law dating back to the World War II cases, and that one should read the inclusion of the concept of "commission" in Article 7 of the ICTY Statute against this background.<sup>264</sup> If a subsequent court demonstrates, convincingly, that this historical interpretation of customary international law is incorrect, then the very underpinnings of *Tadić* start to evaporate. Future courts might be forced to conclude that *Tadić* was wrongly decided.

The ECCC Pre-Trial Chamber concluded that some concept of joint enterprise liability was included in the London Charter and Control Council Law No 10 (liability for a common plan or conspiracy), thus providing evidence of *opinio juris* regarding an emerging customary norm for these prosecutions.<sup>265</sup> However, although there was substantial case law support for JCE I and even JCE II, the ICTY's support for JCE III rested largely on *Borkum Island* and *Essen Lynching*, neither of which involved "extensive legal finding[s] on the issue of common criminal plan or mob beatings."<sup>266</sup> Furthermore, the court also questioned in a footnote the categorization of *Essen Lynching* and *Borkum Island* as JCE III cases and also questioned whether any defendant who did not have the

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decision was inconsistent with the Court's goal of prosecuting senior leaders responsible for the atrocities). This argument has a long pedigree. See, for example, *Tadić*, IT-94-1-A ¶ 189 (cited in note 1); Cassese, 5 J Intl Crim Just 109 at 117 (cited in note 83). For criticism of *Tadić* on this point, see Ohlin, 5 J Intl Crim Just at 72 (cited in note 63) (circular argument); Héctor 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 Crim L F 263, 285 (2009) (failure to address principle of legality); Weigend, 6 J Intl Crim Just at 477 (cited in note 157) (political mission of JCE). For a rebuttal of the Scheffer and Dinh article by a member of the defense team, see Michael G. Karnavas, *Joint Criminal Enterprise at the ECCC: A Critical Analysis of Two Divergent Commentaries on the Pre-Trial Chamber's Decision Against the Application of JCE*, 18–20, online at [http://www.dccam.org/Tribunal/Analysis/pdf/JCE\\_at\\_the\\_ECCC.pdf](http://www.dccam.org/Tribunal/Analysis/pdf/JCE_at_the_ECCC.pdf) (visited Oct 24, 2010) (noting that neither the Cambodian enabling legislation creating the court, nor the bilateral agreement with the United Nations, mentions JCE).

<sup>263</sup> See, for example, *Stakić*, IT-97-24-A ¶ 62 (cited in note 102) (suggesting that JCE is well settled law and binding precedent at the ICTY).

<sup>264</sup> See *Prosecutor v. Milan Milutinović, Nikola Šainović & Dragoljub Ojdanić, Decision on Dragoljub Ojdanić's Motion Challenging Jurisdiction - Joint Criminal Enterprise*, Case No. IT-99-37-AR72, ¶ 20 (ICTY A Ch May 23, 2003) ("The Appeals Chamber therefore regards joint criminal enterprise as a form of 'commission' pursuant to Article 7(1) of the Statute.").

<sup>265</sup> See JCE Appeals Decision ¶ 57 (cited in note 104).

<sup>266</sup> *Id.* ¶ 75.

intent to kill was found guilty in the cases.<sup>267</sup> Under this reading of the cases, none of the convictions was based on the theory that participation in the violence without the intent to kill could generate liability for murder.<sup>268</sup> Italian cases after World War II purporting to support JCE III were rejected because the court in that case was not applying international law.<sup>269</sup>

One might question the importance of JCE differentiation and limiting vicarious liability by noting that in each case, all members who provide assistance display a culpable mental state, regardless of whether they have a joint intention for the group to commit the crime. Individuals accused under JCE III display a form of recklessness or *dolus eventualis*, while members who assist a group enterprise without sharing the joint intention are still culpable insofar as they knowingly provide assistance of facilitation. Since these individuals are still culpable, it is hard to see how this represents a violation of the principle of *nulla poena sine culpa*.

I have argued in the past that the principle of culpability implicitly includes a proportionality component, such that defendants should only be held criminally responsible according to the *level* of their culpability.<sup>270</sup> If the constraint applies to punishment only (that is, prison terms should be proportional to individual culpability), then arguably the inclusion of JCE III defendants within the same group as JCE I and JCE II defendants is unproblematic, as long as they receive different prison sentences by whatever tribunal sentences them.<sup>271</sup> If this view is correct, then even violating the joint intentions doctrine is not enough to demand revision of JCE III or any other extended version of joint liability doctrine. One could simply concede the point that JCE III is unsupported by a joint intention but then shift strategy and point out that JCE III is not based on intentionality *at all*, but rather on lower mental states that are nonetheless still culpable.<sup>272</sup> Although the joint intentions theory presented in this Article supports vicarious liability, it was not meant to supplant all forms of criminal responsibility entirely, including crimes of recklessness.

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<sup>267</sup> Id ¶ 75 n 223, citing Powles, 2 J Intl Crim Just at 615–16 (cited in note 187), and Ohlin, 5 J Intl Crim Just at 75 n 10 (cited in note 63).

<sup>268</sup> See JCE Appeals Decision ¶ 80 (cited in note 104).

<sup>269</sup> Id ¶¶ 75, 82, citing *D'Ottavio* (cited in note 75).

<sup>270</sup> See Ohlin, 98 J Crim L & Criminol at 160–61 (cited in note 8).

<sup>271</sup> Compare Cassese, *Amicus Brief* ¶ 82(ii) (cited in note 105) (arguing that distinctions regarding culpability may be adequately assessed at sentencing in conformance with *nulla poena sine culpa*), with Ohlin, 5 J Intl Crim Just at 87–88 (cited in note 63) (requiring doctrinal distinctions to codify culpability gradations).

<sup>272</sup> See *Tadić*, IT-94-1-A ¶ 220 (cited in note 1) (requiring advertent recklessness or *dolus eventualis*).

However, it seems intuitively correct that the culpability principle is about more than just punishment.<sup>273</sup> The criminal law engages in many functions above and beyond the mechanics of punishment, and the codification of culpability in the form of criminal law offenses, and the forms of responsibility that accompany them, is crucial to the other basic functions of international criminal justice, including (among other things) the expressive role of properly declaring the international community's precise condemnation of the criminal activity, and the role of vindicating the rule of law.<sup>274</sup> While there are many other ways of expressing these additional roles over and above punishment (vindication, retribution, strengthening human rights norms, etc), it seems intuitively the case that proper identification of the level of culpability is absolutely central. But why? One possible answer is that it is simply an *a priori* goal to have criminal law doctrine properly codify different levels of culpability.

In recent writings, Frédéric Mégret, drawing in part on previous writings of mine about JCE, has argued that this goal could also be expressed as a question of "fair labeling."<sup>275</sup> Under this view, criminal defendants—in both domestic and international courts—have a basic human right to fair labeling of their criminal conduct. The criminal process owes an obligation to criminal defendants to properly label their criminal conduct, and this obligation is more basic and foundational than the obligation to limit punishment to the level of their culpability. Indeed, one might even *generate* the constraint against punishment as initially deriving from the constraint against labeling.

According to Mégret, the need for fair labeling stems from a human rights theory of the criminal law.<sup>276</sup> Fairness (as a human rights norm) demands precise

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<sup>273</sup> See, for example, Kai Ambos, *Remarks on the General Part of International Criminal Law*, 4 J Intl Crim Just 660, 665–68 (2006) ("*culpa* is no longer (only) the intent to cause a certain result, but the blameworthiness of the perpetrator's conduct"); Paul H. Robinson, *Four Predictions for the Criminal Law of 2043*, 19 Rutgers L J 897, 903–06 (1988) (predicting continued refinement in the public's conception of blameworthiness and refinement of doctrines designed to address these judgments).

<sup>274</sup> For a general discussion, see, for example, Robert D. Sloane, *The Expressive Capacity of International Punishment: The Limits of the National Law Analogy and the Potential of International Criminal Law*, 43 Stan J Intl L 39 (2007).

<sup>275</sup> Frédéric Mégret, *Prospects for "Constitutional" Human Rights Scrutiny of Substantive International Criminal Law by the ICC, with Special Emphasis on the General Part* \*38 (paper presented at Washington University School of Law, Whitney R. Harris World Law Institute, International Legal Scholars Workshop, Roundtable in Public International Law and Theory, Feb 4–6, 2010) (on file with the author).

<sup>276</sup> See *id.* at \*36. For a general discussion, see also Andrew Ashworth, *The Elasticity of Mens Rea*, in C.F.H. Tapper, ed, *Crime, Proof, and Punishment: Essays in Memory of Sir Rupert Cross* 45 (Butterworths 1981).

fidelity to appropriate labels for criminal offenses.<sup>277</sup> Traditionally, this basic human rights norm generates a whole battery of procedural constraints that limit everything from pre-detention, the rules of evidence, the structure of the trial, and the final outcome of punishment. This much is well known and obvious. But the human rights norm also constrains criminal law doctrine itself in the sense that an over-extended doctrine that inflates criminal responsibility violates the human rights of the defendant to the fair labeling of their conduct.<sup>278</sup> This is a new way of thinking of the point, by invoking the language of human rights, which previously was restricted to the domain of criminal procedure (as opposed to substantive criminal law).<sup>279</sup> Most scholars in the past, myself included, have been inclined to view the matter as simply a matter internal to criminal law theory, namely, the normative goal of getting things right, where the consequence of failing to get it right means violating the principle of culpability.<sup>280</sup> Regardless of the language one uses, however, the consequences for failing to get it right are clear. The culpability of lower participants is inflated and implicitly, the culpability of higher participants is deflated simply by virtue of their inclusion in the same category as those at the bottom of the culpability ladder. In addition to being theoretically unsatisfying, this result also frustrates the consequentialist goals of a criminal justice system (including deterrence).

## VI. CONCLUSION

Despite the intense scrutiny regarding JCE, conspiracy, and co-perpetration, international judges and lawyers have demonstrated insufficient interest in developing a deeper theory of criminal responsibility for group endeavors.<sup>281</sup> The case law of the tribunals is focused almost exclusively on choosing the appropriate doctrine that is consistent with statutory provisions and customary international law. Occasionally, judges consider compliance and fidelity to deeper principles of criminal law, although usually under the guise of

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<sup>277</sup> See Mégret, *Prospects* at 37 (cited in note 275).

<sup>278</sup> See *id.*

<sup>279</sup> As evidence of the procedural assumption regarding the rights of criminal defendants, consider Art 14 of the UN International Covenant on Civil and Political Rights (1966), General Assembly Res No 2200A (XXI), UN Doc A/6316, 999 UN Treaty Ser 171 (Mar 23, 1976), which codifies, *inter alia*, equality before the law, presumption of innocence, right to a fair trial, and the right of appeal, but makes no reference to the content of substantive criminal law.

<sup>280</sup> See Ohlin, 5 J Intl Crim Just at 88 (cited in note 63) (identifying as an inherent goal of the criminal law the codification of moral distinctions based on culpability).

<sup>281</sup> The confusion surrounding Article 25 of the Rome Statute is just one example of this phenomenon. See, for example, Eser, *Individual Criminal Responsibility* at 803 (cited in note 107) (“employment of obviously different mental concepts in this provision can hardly hide the lack of expertise in criminal theory when this provision was developed”).

discussing “general principles of law” as the term is understood by public international lawyers. While some judges consider the issue from the perspective of criminal law theory, others simply ignore it, and none hazards a foray into the philosophical landmines of collective action and the intentionality that generates it. Perhaps this is not surprising. The autonomy of law in general, and international criminal law in particular, has supposedly liberated lawyers from engagement with the allegedly indeterminate and unanswerable pre-legal questions of philosophy, psychology, and morality. But in nascent fields, such as international criminal law, there is more conceptual space (and need) for consideration of first-order moral and philosophical theories that ground the legal doctrines. Courts are often in the position of not just applying, but also of announcing such theories. International tribunals have a greater responsibility to ensure that their rules and doctrines are defensible.

This is not to suggest that international courts ought to be ignoring the law when morality or philosophy counsels an alternate course. Nothing could be further from the truth. Rather, the point is simply that international lawyers are often in the position of applying modes of liability based on skeletal statutory language—namely, the word “committed” in Article 7 of the ICTY Statute—that leaves great discretion to the court in terms of which criminal law doctrines ought to be applied. It is precisely in such situations that an international tribunal ought to be concerned with ascertaining the exact contours of individual criminal responsibility. And such an inquiry demands a broad examination of the foundation of that responsibility.

This process is especially difficult when the question is individual responsibility for collective criminal action. This Article concludes that international courts ought to be developing their doctrine around the concept of joint or shared intentions—a philosophically nuanced theory that posits vicarious liability when groups of individuals each intend for their group to complete a crime and each individual acts according to the reciprocal nature of this joint intention. This phenomenon of joint intentions both justifies the application of vicarious liability imposed by international tribunals and also explains why it is so important to distinguish between criminal defendants who merely exhibit recklessness (under the current JCE III) from those who directly intend the consequences of their criminal participation. This is the doctrinal payoff of the joint intentions theory.