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# The Co-Perpetrator Model of Joint Criminal Enterprise

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## Commentary

### 1. Introduction

The doctrine of joint criminal enterprise (JCE) has generated more scholarly analysis than perhaps any other element of the ICTY's jurisprudence. It was not surprising then that the Trial Chamber's decision in *Stakić* made oblique reference to these controversies.<sup>1</sup> What was striking, however, was the Chamber's innovative attempt to redraw the boundaries of the JCE doctrine in light of vigorous and repeated defenses of the doctrine by the Appeals Chamber. The suggestions offered by the Trial Chamber in *Stakić* deserve consideration and elucidation, especially since much of the Trial Chamber's thinking went unrecorded on paper. The *Stakić* decision pointed the way towards a new model of JCE's, though the decision neither explicated it, nor defended it. It is perhaps for this reason that the Appeals Chamber dismissed the Trial Chamber's innovation so quickly and so completely.<sup>2</sup> But the dismissal was hasty and unfortunate. The Trial Chamber's discussion of co-perpetration has merit and, when combined with the current model of JCE, might have significantly advanced the tribunal's jurisprudence of complicity. Unfortunately, the brevity of the Trial Chamber's remarks on the issue made the Appeals Chamber's dismissal that much easier. It shall therefore be the aim of this commentary to give voice to the Trial Chamber's suggestion and reconstruct, in a provocative way, the co-perpetrator model of JCE.

### 2. Joint criminal enterprise

First, though, we must start with the background. JCE has generated significant controversy as a judicially created doctrine, born from the Appeals Chamber's interpretation of the concept of commission found in the ICTY Statute. The framers of the statute, having limited liability to cases where the accused "planned, instigated, ordered, committed or otherwise aided and abetted in the planning, preparation or execution of a crime," would seem to have been explicit in their wishes.<sup>3</sup> But the Appeals Chamber in *Tadić* interpreted the word 'committed' to include participation in joint criminal plans.<sup>4</sup> The Chamber found a history of prosecutions under this mode of liability in the history of war crimes tribunals, arguing that liability for joint criminal plans was now a part of customary international law, which was relevant for interpreting the ICTY Statute's use of the term 'committed'. The Chamber also noted the inherently collective nature of genocide and crimes against humanity, as well as the desire of the Security Council to end impunity for architects of these crimes.<sup>5</sup> Apparently, all of these factors weighed in favor of squeezing joint criminal plans under the rubric of the legal concept of 'commission.' Never mind for the moment that the Security Council explicitly declined to mention either conspiracy or joint criminal plans in its authorizing statute. The *Tadić* decision was immediately adopted as the central mode of liability through which prosecutors charged defendants for participation in atrocity.<sup>6</sup>

The *Tadić* decision generated an intense scholarly dispute, including charges of judicial activism for going beyond the bare language of the ICTY Statute, and possibly, in the minds of some scholars, trampling on the principle of *nulla poena sine lege* in the process.<sup>7</sup> There were also jurisprudential criticisms that we will discuss below. For the time being, suffice it to say that the Trial Chamber was extremely motivated to find a way out of the controversy and point the way towards a new interpretation of joint criminal plans. The doctrine as it stands now is considered to be so prosecution friendly that it is often referred to as the 'darling of prosecutors.'<sup>8</sup>

<sup>1</sup> ICTY, Judgement, *Prosecutor v. Stakić*, Case No. IT-97-24-T, T. Ch., 31 July 2003, ALC-XIV-545, par. 441.

<sup>2</sup> ICTY, Judgement, *Prosecutor v. Stakić*, Case No. IT-97-24-A, A. Ch., 22 March 2006, par. 59.

<sup>3</sup> Article 7, paragraph 1, of the Statute for the International Criminal Tribunal for the former Yugoslavia (ICTY Statute).

<sup>4</sup> See, ICTY, Judgement, *Prosecutor v. Tadić*, Case No. IT-94-1-A, A. Ch., 15 July 1999, Klip/Sluiter, ALC-III-761, par. 186.

<sup>5</sup> ICTY, Judgement, *Prosecutor v. Tadić*, Case No. IT-94-1-A, A. Ch., 15 July 1999, Klip/Sluiter, ALC-III-761, par. 189.

<sup>6</sup> See, e.g., ICTY, Judgement, *Prosecutor v. Krstić*, Case No. IT-98-33-A, T. Ch., 19 April 2004, par. 39 (discussing Trial Chamber finding that Krstić participated in a joint criminal plan to commit genocide); see also ICTY, Decision on Dragoljub Ojdanić's Motion Challenging Jurisdiction-Joint Criminal Enterprise, *Prosecutor v. Milutinović et al.*, Case No. IT-99-37-AR72, 21 May 2003, par. 20 (reiterating arguments against JCE and rejecting them).

<sup>7</sup> See Allison Marston Danner & Jenny Martinez, Guilty Associations: Joint Criminal Enterprise, Command Responsibility, and the Development of International Criminal Law, 93 California Law Review 2005, p. 75 (canvassing the jurisprudential problems of the JCE doctrine).

<sup>8</sup> This phrase, which has recently been applied to JCE, was originally used to describe the permissive use of the conspiracy charge in the common-law system. Although the phrase is often attributed to various sources, the original was Judge Learned Hand, who described conspiracy as 'that darling of the modern prosecutor's nursery.' See United States Supreme Court, *Harrison v. U.S.*, 7 F.2d 259, 263 (2d Cir. 1925).

### 3. The notion of co-perpetration

The Stakić court's innovation centered on the notion of co-perpetration. As the court noted: "For co-perpetration it suffices that there was an explicit agreement or silent consent to reach a common goal by coordinated co-operation and joint control over the criminal conduct. For this kind of co-perpetration it is typical, but not mandatory, that one perpetrator possesses skills or authority which the other perpetrator does not. These can be described as shared acts which when brought together achieve the shared goal based on the same degree of control over the execution of the common acts."<sup>9</sup> The Stakić court cited the jurisprudence and criminal law literature on co-perpetrators, found that it applied to the accusations against Dr. Stakić, and concluded that it would be better to apply co-perpetration as a mode of liability rather than resort to the judicially created doctrine of JCE.

It should be noted first that in this regard the Trial Chamber relied heavily on German criminal law theory. This is notable since the ICTY in general has made a concerted effort to avoid citing legal scholars, preferring instead to cite its own body of jurisprudence and, when necessary, historical precedents going back as far as Nuremberg and Tokyo. The Trial Chamber's decision to cite Roxin and Fletcher<sup>10</sup> is evidence of the Trial Chamber's attempt to look to new sources of law, outside of the tribunals, for a solution to the question of JCE's in the form of co-perpetration.

Co-perpetration is a distinct doctrine from conspiracy, although both are related to complicity, i.e. they are attempts to describe, through the language of criminal law, the participation of multiple individuals in a common criminal endeavor. A co-perpetrator is someone who pursues a criminal endeavor with at least one other confederate, sharing joint control over the operation. Following Roxin, cited by the Trial Chamber in Stakić, we can note the traditional view that co-perpetrators must be essential to the operation in question.<sup>11</sup> In other words, they are necessary but not sufficient conditions to the criminal plan's continued success. A co-perpetrator cannot, by himself, bring the plan to fruition. It is for this reason that he needs fellow perpetrators to act in concert with him. The co-perpetrator's role is also essential; if he refuses to participate, as Roxin notes, the operation is frustrated. He is therefore a necessary – but not sufficient – condition for completing the criminality. This is the essence of co-perpetration: a crime so large that no one individual can accomplish it on his own.

The Trial Chamber found an element of co-perpetration in Dr. Stakić's crimes. Stakić, as mayor of Prijedor Municipality, worked closely with members of the crisis staff and the military and police authorities in a concerted attempt to overthrow the legitimately elected Muslim and Croat officials in the region in a *coup d'état*.<sup>12</sup> Once Serbian control was consolidated in Prijedor Municipality, Stakić participated in a coordinated campaign to drive non-Serbs from the municipality, as one part of a larger plan by Radovan Karadžić to create a homogenous Serbian state. The 'culmination' of this plan, according to the Trial Chamber, was the use of force against non-Serb civilians to create three prison camps – Omarska, Keraterm, and Trnopolje.<sup>13</sup> The Trial Chamber concluded that the civilian authorities, headed by Dr. Stakić, were intimately involved in authorizing the creation of the prison camps, where approximately 3,000 Muslims and Croats were killed.<sup>14</sup> Others were subjected to systematic and repeated sexual attacks.<sup>15</sup> Indeed, the coordination between military and civilian authorities was so close that Stakić eventually wore a military uniform and carried a weapon.

It is clear that the Trial Chamber labeled Dr. Stakić a co-perpetrator because of this 'close cooperation' between the military and Dr. Stakić.<sup>16</sup> The nature of the *coup d'état*, and the subsequent ethnic cleansing, required participation from both civilian and military personnel. Military authorities were necessary to di-

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<sup>9</sup> ICTY, Judgement, *Prosecutor v. Stakić*, Case No. IT-97-24-T, T. Ch., 31 July 2003, ALC-XIV-545, par. 440.

<sup>10</sup> Although Fletcher is American, his *Rethinking Criminal Law* (Oxford Univ. Press, New York 2<sup>nd</sup> ed. 2000) is a work of comparative criminal law that relies heavily on German patterns of criminal law theory.

<sup>11</sup> See C. Roxin, *Täterschaft und Tatherrschaft, Perpetration and Control over the Act*, 6th Edition, Berlin, New York, 1994, cited in ICTY, Judgement, *Prosecutor v. Stakić*, Case No. IT-97-24-T, T. Ch., 31 July 2003, ALC-XIV-545, par. 440.

<sup>12</sup> ICTY, Judgement, *Prosecutor v. Stakić*, Case No. IT-97-24-T, T. Ch., 31 July 2003, ALC-XIV-545, par. 490.

<sup>13</sup> ICTY, Judgement, *Prosecutor v. Stakić*, Case No. IT-97-24-T, T. Ch., 31 July 2003, ALC-XIV-545, par. 378.

<sup>14</sup> ICTY, Judgement, *Prosecutor v. Stakić*, Case No. IT-97-24-T, T. Ch., 31 July 2003, ALC-XIV-545, par. 384.

<sup>15</sup> ICTY, Judgement, *Prosecutor v. Stakić*, Case No. IT-97-24-T, T. Ch., 31 July 2003, ALC-XIV-545, par. 228.

<sup>16</sup> ICTY, Judgement, *Prosecutor v. Stakić*, Case No. IT-97-24-T, T. Ch., 31 July 2003, ALC-XIV-545, par. 368.

rect the troops that would instill fear in the local population and use force (or the threat of force) to remove the non-Serb population from the area. The civilian authorities were also essential to the operation for it is they who gave these orders the veneer of authority and allowed the military to proceed under color of law. This was essential to the operation because the perpetrators were pursuing a national objective that they hoped to cloak with democratic legitimacy; they were not simply a band of thugs engaging in isolated acts of violence. It was, to them, a governmental operation, and necessarily so. For all of these reasons, the Trial Chamber was inclined to view Stakić's participation within the contours of the concept of co-perpetration, as a necessary but not sufficient condition for the plan to succeed.

However, the Trial Chamber did not stop there. They added to their analysis of Dr. Stakić's actions the notion of a JCE. He was not simply a co-perpetrator; he was a co-perpetrator who was essential to a large endeavor composed of many individuals. Indeed, the goal of the criminal scheme in question was to turn Prijedor municipality into an exclusively Serbian enclave by ejecting the legitimate government officials, creating a *coup d'état*, intimidating the local population, and setting up prison camps for non-Serb civilians. This could not be accomplished with a mere handful of individuals, but rather was a massive criminal conspiracy, operated at both the highest of government echelons and the lowest of street-level personnel and camp guards. The number of involved individuals was massive and Stakić was an indispensable and necessary part of this huge conspiracy. It is for this reason that the Trial Chamber sought a distinct legal doctrine that would capture the appropriate culpability of Stakić, and in the future, other leaders who stood in comparable positions.

But the true nature of the Trial Chamber's innovation was, I believe, misunderstood by the Appeals Chamber. The Trial Chamber was suggesting, not a replacement for the doctrine of JCE, but an amendment to it, one which avoided the significant jurisprudential pitfalls of the doctrine, while at the same time preserving its core. Had the Chamber sought a true replacement for JCE, the court would have analyzed co-perpetratorship and ignored joint criminal plans. However, the Chamber did nothing of the sort, occasionally lapsing into talk of 'co-perpetrating a JCE,' a phrase favored by the prosecution,<sup>17</sup> as well as other language that mixed the vocabulary of co-perpetration and JCE. Indeed, the Chamber noted that the boundaries between JCE and co-perpetration were unclear.<sup>18</sup> These curious comments suggest that the Chamber was backing in to an amendment of the JCE doctrine, one which would recognize different levels of participation. The rest of this commentary will be devoted to describing this doctrine, and defending it.

#### 4. The co-perpetrator model of joint criminal enterprise

The Stakić innovation was therefore a co-perpetrator model of JCE. The benefit of this model is that it can distinguish between different levels of participation. Dr. Stakić was clearly a major participant in the organizing of the joint criminal plan at the highest levels of local government. Calling him a co-perpetrator distinguishes him from a mere street-level enforcer in someone else's plan. And calling him a 'co-perpetrator of a joint criminal plan' clarifies that he helped organize and direct a widespread conspiracy whose details were carried out by hundreds of others below him.

I shall argue here that this co-perpetrator model of JCE's solves – partially – the most pressing problem of the JCE doctrine. As I have argued elsewhere, the doctrine violates the principle of equal culpability (*nullem crimen sine culpa*), or the idea, specifically, that an individual's criminal liability should match his culpability.<sup>19</sup> It is insufficient for purposes of this maxim that our system require *some* kind of culpability before we attach criminal liability to an individual. This is far too narrow an interpretation of the principle. Rather, the spirit of the principle requires that individuals face only as much liability as is relative to their level of culpability, according to their participation in the criminality. The culpability constraint is, therefore, a rich control of degrees and proportionality, requiring that we analyze the accused's level of participation and insist that his criminal liability match it.

<sup>17</sup> ICTY, Judgement, *Prosecutor v. Stakić*, Case No. IT-97-24-T, T. Ch., 31 July 2003, ALC-XIV-545, par. 504.

<sup>18</sup> ICTY, Judgement, *Prosecutor v. Stakić*, Case No. IT-97-24-T, T. Ch., 31 July 2003, ALC-XIV-545, par. 441.

<sup>19</sup> See, e.g., Jens David Ohlin, Three Conceptual Problems with the Doctrine of Joint Criminal Enterprise, 5 *Journal of International Criminal Justice* 2007, p. 69. See also Kai Ambos, Remarks on the General Part of International Criminal Law, 4 *Journal of International Criminal Justice* 2006, p. 660 (discussing need for increased development of culpability principle in international criminal law generally).

It is this constraint that the doctrine of JCE violates. All participants of joint criminal plans are subject to equal criminal liability according to the doctrine created by the Tadić court, regardless of their level of participation in the plan.<sup>20</sup> Therefore, minor participants are just as guilty as architects, hangers-on just as liable as organizers. No distinctions are allowed, although ad hoc determinations of relative culpability are allowed in the sentencing phase, where the Trial Chamber judges are forced to make these fine distinctions when deciding the length of sentence.<sup>21</sup> But this is hardly sufficient, because a defendant's level of liability is not just a function of punishment; it is also a function of the crime under which he should be convicted.

Perhaps one reason for the development of the JCE doctrine is the difficulty of amassing sufficient evidence to make individual determinations of culpability within a large criminal enterprise. This problem is especially acute in a massive conspiracy to commit crimes against humanity and genocide; determining each participant's level of participation represents a special evidentiary burden on the prosecution. But it is somewhat dangerous to let one's criminal doctrine be so heavily influenced by matters of policy. At Nuremberg, the problem of evidence was solved by labeling the SS and the Gestapo as criminal organizations, which yielded individual criminal liability for mere membership (though mass trials for membership never happened).<sup>22</sup> This decision is now viewed with suspicion by legal scholars committed to the principle of culpability.<sup>23</sup> We cannot justify the lack of individual determinations of culpability implicit in the JCE doctrine by simply claiming that it would be too difficult to do otherwise. Judicial and theoretical honesty demand that we first develop a more nuanced doctrine of joint criminality and then, secondarily, find ways to mitigate any extreme evidentiary burdens that such a doctrine might impose on the prosecution. This commentary performs the first; the second must wait for another day.

#### 4.1 Differentiating levels of participation in criminal plans

The co-perpetrator model of JCE suggests a way out of this deficiency. High-level participants of large conspiracies can be distinguished from low-level participants and can be convicted under a distinct judicial doctrine meant to express their greater degree of culpability. For example, co-perpetrators of a JCE to exterminate civilians would include those who hatched the plan to exterminate the civilians, organized the operation at the political level, and maybe even had operational control over them. These are the decision-makers who acted in concert with each other – hence the notion of co-perpetrator – as well as directed a larger, vertical conspiracy that included hundreds of foot soldiers. The rest of the members of the JCE would include the militia members who carried out their orders. The co-perpetrators of the JCE would be labeled as such – an important jurisprudential achievement – and their liability would be greater than those at the bottom of the conspiratorial ladder.

The co-perpetrator model of JCE resolves the problem of culpability in better fashion than the alternatives. For example, the other obvious method for distinguishing among participants involves the traditional criminal law categories of principals and accessories. This avenue has the advantage that aiding and abetting is explicitly mentioned in the ICTY Statute and requires less judicial creativity. The distinction between principals and accessories is common to many legal systems and does not raise the comparative controversies that conspiracy does. Unfortunately, the traditional application of these categories raises concerns.<sup>24</sup> Al-

<sup>20</sup> See, e.g., *Prosecutor v. Vasiljević*, Case No. IT-98-32-T, T. Ch. II, 29 November 2002, par. 67 (“If the agreed crime is committed by one or other of the participants in a joint criminal enterprise such as has already been discussed, all of the participants in that enterprise are equally guilty of the crime regardless of the part played by each in its commission”). See also ICTY, *Judgement, Prosecutor v. Tadić*, Case No. IT-94-1-A, A. Ch., 15 July 1999, Klip/Sluiter, ALC-III-761, par. 191 (concluding that “the moral gravity of such participation is often no less—or indeed no different—from that of those actually carrying out the acts in question”); Antonio Cassese, *International Criminal Law*, Oxford Univ. Press, Oxford 2003, p. 181 (“[A]ll participants in a common criminal action are equally responsible if they [...] participate in the action, whatever their position and the extent of their contribution, and... intend to engage in the common criminal action”).

<sup>21</sup> See Cassese, *International Criminal Law*, at 183 (noting that “it would be difficult to distinguish between the degree of criminal liability, except for sentencing purposes”).

<sup>22</sup> See 22 Trial of the Major War Criminals, Proceedings of the International Military Tribunal Sitting at Nuremberg, Germany, 1950, p. 469 (“a criminal organization is analogous to a criminal conspiracy in that the essence of both is cooperation for criminal purposes”).

<sup>23</sup> See, e.g., Justice Stevens' opinion in *Hamdan v. Rumsfeld*, 548 U.S. 557, 759 n.32.

<sup>24</sup> For a discussion, see M. Osiel, *The Banality of Good: Aligning Incentives Against Mass Atrocity*, 105 *Columbia Law Review* 2005, p. 1751; Mark A. Drumbl, *Collective Violence and Individual Punishment: The Criminality of Mass Atrocity*, 99 *Northwestern University Law Review* 2005, p. 539.

though these categories distinguish between different levels of participation, it is unclear if they do so *correctly*, especially in the case of collective crimes such as genocide or crimes against humanity. In the case of a regular murder, some jurisdictions identify the principal as the individual who commits the act himself (e.g. pulls the trigger), and label as accessories those who provide assistance, remain behind the scenes, and are absent from the place of the killing. In some cases this distinction often works well because the higher level of culpability accords with the individual who is holding the gun. The individual who merely induces him to do so may very well exhibit a lower degree of culpability.

In many cases, though, our natural moral intuitions throw this jurisprudence into doubt, because often the individual who *ordered* the murder is most culpable. This is especially true in cases of war crimes: although the soldiers or militiamen are the ones doing the killing, it is no longer correct that we would identify them as being the most culpable members of the conspiracy. Indeed, the fact that an individual soldier pulls the trigger is, perhaps, the most *insignificant* part of the joint enterprise. It is the architect and the organizer, the one who devises the plan and uses his governmental authority to carry it out, who is the most culpable – the truly mass murderer. Some domestic jurisdictions have changed their rules to allow for principal liability for the behind-the-scenes director of the operation. In the next section we will consider the theoretical underpinnings for this doctrinal move.

Unfortunately, though, some jurisdictions retain the traditional definition of principal as the individual who commits the *actus reus* of the crime, so the shooter is defined as the principal perpetrator.<sup>25</sup> This doctrine, already suspect, generates absurd results when imported into international criminal law. If we conclude that the soldiers committing war crimes are principals, this implies two possibilities for the organizers of the campaign of extermination. First, they could be convicted as mere accessories, for the simple reason that they did not pull the trigger. While this avenue preserves the distinction between principals and mere participants, it turns the distinction on its head by radically under-representing the culpability of the organizers. Second, the organizers could be convicted as principals as well under the theory that they committed the act ‘through another’ or a similar notion. The downside of this second possibility is that it fails to make any meaningful distinction between the culpability of the organizers and the soldiers by treating all of them under a single category of perpetration, thereby solving the problem only by eliminating the distinction between principals and accomplices.

Perhaps these difficulties are not surprising. It has been noted that the distinction between principals and accessories was not created with the crime of genocide in mind.<sup>26</sup> Indeed, one might argue that the distinction is concerned solely with the ‘ordinary’ model of one person killing another, for a particular criminal purpose, with the assistance of another. These categories are not appropriate for an organized criminal enterprise (whether domestic or international), and especially not a massive conspiracy to commit crimes against humanity.<sup>27</sup> In these cases, the *actus reus* encompasses the least morally significant element of the endeavor.

<sup>25</sup> In addition to being the rule at common law, other countries, such as Germany, follow this rule. See StGB § 25(1), which defines a principal as someone who ‘commits the offense himself or through another’. The German rule was enacted after the German Supreme Court’s decision in the Stashchynsky case, discussed *infra* at note 28, which held that a KGB agent who performed an assassination on behalf of the government was a mere accessory. For a discussion, see Fletcher, *Liberals and Romantics at War: The Problem of Collective Guilt*, 111 *Yale Law Journal* 2002, p. 1499, 1538; Fletcher, *Rethinking Criminal Law*, at 659 (arguing that the later § 25(1) effectively reversed the German Supreme Court’s holding, because “[i]t is hard to avoid the conclusion that Stashchynsky ‘committed the act himself.’”). The German rule from StGB § 25(1) also suggests the possibility that *both* an assassin like Stashchynsky and his handlers who ordered the killing might be considered principals because the former committed the criminal act ‘himself’ while his superiors arguably committed the act ‘through another.’ It should be noted that under this possible scheme, there is no accessory at all in the crime because everyone is upgraded to the level of principal perpetrators. Also, it is unclear if this result is internally consistent (and consistent with the legislative intent), since the fact that one principal commits the act ‘through another’ implies that the ‘other’ was a mere instrument and thus undeserving of the label of perpetrator. This suggests that the provision identifies the principal as the individual who committed the *actus reus*, except in cases where the principal uses another individual as an instrument to commit the crime, in which case a substitute standard is used to identify the principal (in lieu of the *actus reus* standard).

<sup>26</sup> Cf. M. Osiel, *The Banality of Good: Aligning Incentives Against Mass Atrocity*, 105 *Columbia Law Review* 2005, at 1837 (“current law grapples inadequately with the novel features of mass atrocity”) and 1783-84 (arguing that joint enterprise liability was specifically devised to respond to the evidentiary challenges faced by tribunal prosecutors).

<sup>27</sup> Indeed, it is difficult to overstate the role that collective criminality plays in international criminal justice. What unifies aggression, crimes against humanity, war crimes, and genocide - the crimes that international criminal law concerns itself with - are their inherently collective nature.

#### 4.2 Towards a theory of perpetration

The jurisprudential issue that confronts us is how to define, in the most philosophical sense, the perpetrator of a crime, as opposed to a mere accessory. What is the boundary line, and how should we draw it? The leading commentators on the problem suggest three theories: the objective theory, the subjective theory, and a control theory.<sup>28</sup> The objective theory identifies the perpetrator by looking at whose actions satisfy the elements of the offense. So if the crime in question is murder – the killing of another human being – one looks to the individual who actually performed the physical action of killing. Similarly, for the crime of rape – the use of force to engage in non-consensual intercourse – one would have to look to the individual who actually engaged in sexual intercourse with the victim. Fletcher notes an obvious problem with the theory.<sup>29</sup> Take two individuals who perform a rape, one of whom holds the victim down and the other who engages in the intercourse. Each performs a central aspect of the crime, although neither alone satisfies *both* elements of the offense. Therefore each is to be regarded as a mere accessory, which is absurd. They are clearly both principals, which suggests that the objective theory, while seemingly correct, has gone astray.<sup>30</sup>

The subjective theory looks to the state of mind of the defendant and, in particular, whether the defendant took ownership of his actions, making the crime his own, or, in the alternative, regarding himself as a mere actor in another's plan. Fletcher's example is the Stashchynsky case, where the German Supreme Court concluded that the assassin was acting as a mere instrument of the KGB and did not regard himself as the 'author' of his conduct.<sup>31</sup> This example of the subjective theory is more plausible than the objective theory, in the sense that it generates the correct outcome for cases where the real culprit lingers behind the scenes and the trigger man is a mere instrument. Of course, the notion of being an 'instrument' may be a metaphor, but there is some truth to it nonetheless.

The problem with the subjective theory is its latent solipsism. What is the relevance of the participant's subjective view of his own place in the operation, especially if his view is not in accord with the objective facts? There are many reasons why a participant may not have an accurate view of his own participation. I am not just thinking of cases of outright delirium or madness, but rather more prosaic cases of self-deception and garden-variety denial.<sup>32</sup> It is quite common for a criminal engaging in horrific conduct to think of himself as a mere instrument of another, rather than take responsibility for his actions, with all this entails. This is certainly easier and it is human nature for individuals to engage in low-level mental gymnastics to prevent themselves from entertaining uncomfortable ideas. And certainly, thinking of oneself as a morally reprehensible individual may be one such intolerable truth that would lead to cases of psychological denial. If this is the case, why should we grant to the defendant the power to transform, through his own perception of himself, his culpable conduct as a perpetrator into that of a mere accomplice? Is it really up to the defendant to decide? Should it be? The more sensible view is that the defendant's place in the operation is independent of his own view of these matters – at least where self-deception is concerned. What matters are the *reasons* for the defendant's actions, which the defendant may or may not wish to fully recognize. Although the defendant may be acting out of, say, anger or hatred, he may not wish to view himself in this uncomfortable light, and may prefer instead to think of himself as acting at the direction of another. But this does not transform a culpable perpetrator into an accomplice. Why give the actor the power to frame the contours of his own criminality? It should be objectively adjudicated.

The third theory looks to who has control and hegemony over the criminal act.<sup>33</sup> This provides a more sophisticated way of looking at the trigger-man and the defendant behind the scenes. What is morally relevant is the degree to which each had control and hegemony over the entire criminal act. If it was the triggerman

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<sup>28</sup> These classifications are borrowed from Fletcher, *Rethinking Criminal Law*, New York, Oxford University Press, 2<sup>nd</sup> ed. 2000, p. 654-55.

<sup>29</sup> See Fletcher, *Rethinking Criminal Law*, New York, Oxford University Press, 2<sup>nd</sup> ed. 2000, p. 655.

<sup>30</sup> Fletcher also largely rejects the subjective theory, calling it 'unworkable in practice'. See Fletcher, *Rethinking Criminal Law*, New York, Oxford University Press, 2<sup>nd</sup> ed. 2000, p. 655.

<sup>31</sup> Stashchynsky, 18 BGHSt. 87 (1962).

<sup>32</sup> For a discussion of self-deception and its relationship to self-knowledge, see Akeel Bilgrami, *Self-Knowledge and Resentment*, Harvard Univ. Press, Cambridge 2006.

<sup>33</sup> The control theory is referred to as *Tatherrschaftslehre* in German, or hegemony-over-the-act, and is discussed in C. Roxin, *Täterschaft und Tatherrschaft, Perpetration and Control over the Act*, 6th Edition, Berlin, New York, 1994, p. 34, and Fletcher, *Rethinking Criminal Law*, New York, Oxford University Press, 2<sup>nd</sup> ed. 2000, p. 656.

who had ‘hegemony’- i.e. the power – over the criminal act, then he is the perpetrator. But if it was the defendant behind the scene who had all of the power, then he is the perpetrator. It depends on the situation. But the question becomes, what *is* the criminal act, and how is it defined? Consider the case of crimes against humanity. If by criminal act one means the individual rape or murder, then it is the foot soldier who has control over the situation, because he can choose to pull the trigger or refrain from doing so (absent a situation of duress à la Erdemović).<sup>34</sup> But if the criminal act in question is the larger conspiracy to commit crimes against humanity or genocide, then the one with the control is clearly the superior officer, the civilian authorities at the top echelon who are directing the activities of the larger group.<sup>35</sup> It is they who are truly in command of the situation and bear ultimate responsibility for the collective crime. Only they have the control necessary to bring the whole plan to fruition.

It is, of course, necessary that we treat the criminal act in question as the larger conspiracy to engage in war crimes or crimes against humanity or genocide, and not the individual act of murder or rape. This goes without saying. First, these are precisely the crimes that the ICTY and the other tribunals adjudicate – individual killings and the like are merely one aspect of the *actus reus* of these crimes. Indeed, the ICTY only gained jurisdiction over the killings, as a matter of international law, because they constitute larger international crimes that threaten international peace and security. And one murder or rape does not threaten to destabilize international relations; the threat comes from the larger pattern of criminal conduct constituting widespread conspiracies to commit ethnic cleansing or crimes against humanity.<sup>36</sup>

While it is true that the civilian superior, like Stakić, has control and hegemony over the larger conspiratorial plan, it is nonetheless the case that the civilian authority often does not have *exclusive* control over the criminal plan. And so it was with Stakić, according to the Trial Chamber’s findings.<sup>37</sup> His hegemony was certainly not exclusive. Rather, he shared control with numerous other individuals, who also exercised control at the top levels of government, the military, and the police. So it would be just as inaccurate to call Stakić a perpetrator simpliciter as it would be to call him an accessory. He is a co-perpetrator, who exercised hegemony and control over the plan, but not the kind of control that is mutually exclusive of others exercising similar control. The control theory not only helps explain why the leaders of group atrocity are to be regarded not as accomplices but as perpetrators, but also why conceptual clarity demands that they must sometimes be regarded as co-perpetrators.

It is now clear why the co-perpetrator model of JCE is beneficial. It resolves many of these jurisprudential difficulties and can be defended by appeal to a control theory of perpetration.<sup>38</sup> The organizers and government officials in charge of the operation are treated as co-perpetrators of the enterprise, while the soldiers are treated – as they should be – as mere participants. In this way, the co-perpetrator model carefully distinguishes between the horizontal and vertical elements of a JCE.<sup>39</sup> The important point to remember is that the criminal doctrine must match our moral theory about the culpability of the defendants and the co-perpetrator model of JCE is successful in this regard.

#### 4.3 The essential characteristics of a joint criminal plan

These situations are, I shall argue, characterized by the following three elements. First, the endeavor is so complex that it must be pursued by a large number of individuals.<sup>40</sup> Second, the endeavor is hierarchical, so that some members play a large organizing role, while others are mere implementers.<sup>41</sup> Third, those who

<sup>34</sup> See Erdemović, Appeal Chamber Judgement, Dissenting Opinion of Judge Cassese, Case No. IT-96-22 (arguing in dissent that duress could be a defense to killing, although difficult to establish in the case of killing innocent civilians).

<sup>35</sup> This depends on whether one focuses on the *chapeau* or the underlying criminal conduct.

<sup>36</sup> Furthermore, victims are entitled to see justice done, not just for the individual crimes to which they have been victimized, but more properly for the larger conspiratorial plans to which their ethnic group has been subjected. It is for these crimes, often world-historical in nature, to which they turn to the international community for some measure of recognition and vindication for their suffering.

<sup>37</sup> ICTY, Judgement, *Prosecutor v. Stakić*, Case No. IT-97-24-T, T. Ch., 31 July 2003, ALC-XIV-545, par. 369.

<sup>38</sup> Indeed, it is clear that the Stakić Trial Chamber, by citing Roxin, was relying on the German version of the control theory.

<sup>39</sup> On the distinction between horizontal and vertical joint criminal enterprises, see ICTY, Judgement, *Prosecutor v. Stakić*, Case No. IT-97-24-T, T. Ch., 31 July 2003, ALC-XIV-545, par. 552.

<sup>40</sup> See Cassese, *International Criminal Law*, at 181 (crimes committed by ‘multitude of persons’); ICTY, Judgement, *Prosecutor v. Tadić*, Case No. IT-94-I-A, A. Ch., 15 July 1999, Klip/Sluiters, ALC-III-761, par. 227.

<sup>41</sup> See M. Osiel, *The Banality of Good: Aligning Incentives Against Mass Atrocity*, 105 *Columbia Law Review* 2005, 1831-32 (“The superior’s control over an ‘organizational apparatus of hierarchical power,’ as Roxin calls it, enables him to utilize the subordinate ‘as a mere gear in a giant machine’ to produce the criminal result ‘automatically.’ The inferior’s compliance with illegal orders, however, flows neither from coercion nor deception, whether by mistake of fact or law, and so he remains responsible for his actions. This culpability - characteristic of most foot soldiers to mass atrocity - leaves the inferior susceptible to prosecution.”).

pull the trigger are dispensable, while those who organize are indispensable.<sup>42</sup> The first characteristic makes clear why the language of conspiracy would be so tempting – conspiracy is the penal doctrine that was specifically designed to deal with group criminality.<sup>43</sup> The second characteristic makes clear why the distinction between principals and accessories would be tempting – hierarchy demands differentiation.<sup>44</sup> And the third characteristic makes clear why the language of co-perpetration would be tempting – the whole idea of co-perpetration is that the withdrawal of either would frustrate the criminal plan.<sup>45</sup>

However, none of these doctrines is sufficient by itself when one realizes that mass atrocities involve the combination of all three of these elements: a large organization, hierarchically organized, with both dispensable and indispensable members.<sup>46</sup> Each characteristic stands in some tension with the others, in the sense that each provides a rationale for its corresponding mode of liability at the expense of the others. But choosing one mode of liability – and privileging one characteristic – means forgoing another. So the question becomes: which one to choose? What is needed, then, is a new doctrine that is sensitive to not just one but all three of the characteristics of mass atrocity.<sup>47</sup> The co-perpetrator model of JCE does exactly that.

The preceding analysis also makes clear why one cannot simply jettison JCE entirely and rely on more classical categories of participation for principals and accomplices. Indeed, some might look at the problems with JCE discussed in the previous section and argue that the problem stems from the very decision to seek individual criminal liability for collective enterprises.<sup>48</sup> I, however, would not go this far, for the simple reason that the language of JCE does capture something essential about modern criminal behavior, particularly in international criminal law: the pursuit of criminal endeavors through large coordinated networks of perpetrators.<sup>49</sup> One cannot construct an accurate portrait of this criminal behavior using the classical rules of criminal participation. On the other hand, one cannot simply accept an imprecise doctrine of JCE that fails to distinguish between different levels and kinds of participation. The co-perpetrator model of JCE walks the middle path between these two extremes, remaining faithful both to the modern reality of collective criminality and the principle of culpability.<sup>50</sup>

#### 4.4 Consistency with customary international law

Finally, it should be emphasized that the co-perpetrator model of JCE is consistent with the case law of World War II prosecutions detailed by the Appeals Chamber in Tadić.<sup>51</sup> The Appeals Chamber detailed an

<sup>42</sup> ICTY, Judgement, *Prosecutor v. Stakić*, Case No. IT-97-24-T, T. Ch., 31 July 2003, ALC-XIV-545, par. 440 (citing and quoting Roxin for the proposition that “they can only realise their plan insofar as they act together, but each individually can ruin the whole plan if he does not carry out his part”); Fletcher, *Rethinking Criminal Law*, New York, Oxford University Press, 2<sup>nd</sup> ed. 2000, p. 659.

<sup>43</sup> See J.D. Ohlin, *Group Think: The Law of Conspiracy and Collective Reason*, 98 *Journal of Criminal Law & Criminology* 2007, p. 169-70 (“The language of conspiracy, though currently flawed, captures the often collective aspect of modern criminal behavior.”).

<sup>44</sup> See M. Osiel, *The Banality of Good: Aligning Incentives Against Mass Atrocity*, 105 *Columbia Law Review* 2005, p. 1831 (distinguishing superior’s control from subordinates who are essentially ‘fungible’ such that their refusal to execute an order will not compromise the plan’s success).

<sup>45</sup> See C. Roxin, *Täterschaft und Tatherrschaft, Perpetration and Control over the Act*, 6th Edition, Berlin, New York, 1994, p. 278; Fletcher, *Rethinking Criminal Law*, New York, Oxford University Press, 2<sup>nd</sup> ed. 2000, p. 655-57.

<sup>46</sup> Cf. M. Osiel, *The Banality of Good: Aligning Incentives Against Mass Atrocity*, 105 *Columbia Law Review* 2005, p. 1787.

<sup>47</sup> Cf. M. Osiel, *The Banality of Good: Aligning Incentives Against Mass Atrocity*, 105 *Columbia Law Review* 2005, p. 1861 (endorsing, instead of joint enterprise liability, a version of command responsibility doctrine informed by Roxin’s theory of organizational control).

<sup>48</sup> See, e.g., G.P. Fletcher, *Basic Concepts of Criminal Law*, Oxford Univ. Press, New York 1998, p. 192.

<sup>49</sup> See J.D. Ohlin, *Group Think: The Law of Conspiracy and Collective Reason*, 98 *Journal of Criminal Law & Criminology* 2007, p. 170-71 (arguing for collective conception of international crimes).

<sup>50</sup> For a defense of the absolute centrality of the principle of culpability in this discussion, see J.D. Ohlin, *Group Think: The Law of Conspiracy and Collective Reason*, 98 *Journal of Criminal Law & Criminology* 2007, p. 160 (arguing against consequentialist justifications of conspiracy liability that ignore the concept of *nulla poena sine lege*). Compare with M. Osiel, *The Banality of Good: Aligning Incentives Against Mass Atrocity*, 105 *Columbia Law Review* 2005, p. 1768 (citing Fletcher and Drumbl for the proposition that culpability principal may need to be ‘modified or abandoned’ in order for the project of international criminal justice to succeed). While this may be an accurate rendering of Drumbl’s position, see *Pluralizing International Criminal Justice*, 103 *Michigan Law Review* 2005, p. 1309, it does not accurately capture Fletcher’s view. See G.P. Fletcher, *Collective Guilt and Collective Punishment*, 5 *Theoretical Inquiries in Law* 2004, p. 168-69; Fletcher, *Liberals and Romantics at War: The Problem of Collective Guilt*, 111 *Yale Law Journal* 2002, p. 1499. Although Fletcher argues for a distinctively collectivist approach to *guilt*, this does not lessen the import of the culpability principle as an absolute constraint limiting the application of individual liability in a penal system. See also J.D. Ohlin & G.P. Fletcher, *Defending Humanity*, Oxford Univ. Press, New York 2008, p. 210-12 (discussing different senses of the concept of guilt, including moral guilt, criminal guilt, political guilt, and metaphysical guilt); H. Morris, *George Fletcher and Collective Guilt*, 78 *Notre Dame Law Review* 2003, p. 731.

<sup>51</sup> ICTY, Judgement, *Prosecutor v. Tadić*, Case No. IT-94-I-A, A. Ch., 15 July 1999, Klip/Shuiter, ALC-III-761, par. 195.

exhaustive list of military cases in order to demonstrate that, although the doctrine of JCE was absent from the ICTY Statute, it nonetheless remained in customary international law and could be prosecuted on that basis.<sup>52</sup> However, a close reading suggests that many of the cases also relied on the notion of co-perpetration, or at the very least, used ambiguous language that mixed elements of the theory of co-perpetration with the idea of common designs. Consequently, it would be correct to say that a revised doctrine of JCE that includes co-perpetration would be even more faithful to the customary international law cited in *Tadić*.

For example, in *Georg Otto Sandrock et al.*, a British military court convicted three German soldiers for executing a British soldier and a Dutch civilian.<sup>53</sup> Although the judge advocate in that case referred to the German soldiers as being involved in a ‘common enterprise,’ the description of the soldiers makes them sound like co-perpetrators: one fired the shot, another issued the order, and the third served as a lookout.<sup>54</sup> The judge advocate in the case referred to the endeavor as similar to a ‘gangster crime,’ where criminal liability extends to all members of the gang. Indeed, all members of the group were essential to the crime’s commission. The shooters, and those who ordered the shooting, were sentenced to death, while the rest received 15 years in prison.<sup>55</sup> Although the Appeals Chamber cited the case as an example of a conviction for joint criminal plans, the *Tadić* decision also uses the language of co-perpetration to describe the case.<sup>56</sup> This shows the degree to which the two doctrines are often intermingled in the case law.

In *Jepsen and others*, a British court held German soldiers responsible for the killing of 80 concentration camp prisoners who were being transported.<sup>57</sup> Moreover, because *Jepsen* participated in the massacre he could be held responsible, not just for the prisoners he personally shot, but for all of them. The prosecutor noted that, “[i]f *Jepsen* was joining in this voluntary slaughter of eighty or so people, helping the others by doing his share of killing, the whole eighty odd deaths can be laid at his door and at the door of any single man who was in any way assisting in that act.”<sup>58</sup> Again, the Appeals Chamber in *Tadić* described this conduct with the language of co-perpetration.<sup>59</sup>

Finally, the Appeals Chamber also explicitly noted that a great number of World War II cases, especially in Germany and Italy, made no reference to joint criminal plans at all, instead preferring to utilize the concept of co-perpetration to discuss similar fact patterns.<sup>60</sup> It is clear that the post-World War II case law includes support for both joint criminal plans *and* co-perpetration, and that the division between the two doctrines in international criminal law has always been tenuous at best. Therefore, it would be entirely consistent with customary international law to redevelop the concept of joint criminal plans with reference to the concept of co-perpetration – a notion that figured prominently in these historical prosecutions.

### 5. Following in the footsteps of *Kvočka*

It is also important to relate the proposed doctrinal amendment to other cases decided by the tribunal. Although the scope of this Commentary does not allow for an exhaustive analysis of the ICTY jurisprudence in this area,<sup>61</sup> one case in particular demands careful scrutiny. In many ways, the *Stakić* decision followed in the footsteps of the Trial Chamber’s attempt in *Kvočka et al.* to redefine the contours of JCE by introducing

<sup>52</sup> Compare ICTY, Judgement, *Prosecutor v. Tadić*, Case No. IT-94-1-A, A. Ch., 15 July 1999, Klip/Sluiter, ALC-III-761, par. 196-219, with *Kvočka*, Trial Chamber Judgement, par. 291-306.

<sup>53</sup> See Trial of Otto Sandrock and three others, British Military Court for the Trial of War Criminals, Holland 26 November 1945, cited in ICTY, Judgement, *Prosecutor v. Tadić*, Case No. IT-94-1-A, A. Ch., 15 July 1999, Klip/Sluiter, ALC-III-761, par. 197.

<sup>54</sup> ICTY, Judgement, *Prosecutor v. Tadić*, Case No. IT-94-1-A, A. Ch., 15 July 1999, Klip/Sluiter, ALC-III-761, par. 197.

<sup>55</sup> The case is also discussed in Cassese, *International Criminal Law*, at 186 n.6.

<sup>56</sup> ICTY, Judgement, *Prosecutor v. Tadić*, Case No. IT-94-1-A, A. Ch., 15 July 1999, Klip/Sluiter, ALC-III-761, par. 197 (“They therefore were all co-perpetrators of the crime of murder.”).

<sup>57</sup> See Trial of Gustav Alfred Jepsen and others, Proceedings of a War Crimes Trial held at Luneberg, Germany, August 1946, cited in ICTY, Judgement, *Prosecutor v. Tadić*, Case No. IT-94-1-A, A. Ch., 15 July 1999, Klip/Sluiter, ALC-III-761, par. 198. Portions of the *Jepsen* decision have recently been published in 5 *Journal of International Criminal Justice* 2007, p. 228-29.

<sup>58</sup> ICTY, Judgement, *Prosecutor v. Tadić*, Case No. IT-94-1-A, A. Ch., 15 July 1999, Klip/Sluiter, ALC-III-761, par. 198.

<sup>59</sup> ICTY, Judgement, *Prosecutor v. Tadić*, Case No. IT-94-1-A, A. Ch., 15 July 1999, Klip/Sluiter, ALC-III-761, par. 198.

<sup>60</sup> ICTY, Judgement, *Prosecutor v. Tadić*, Case No. IT-94-1-A, A. Ch., 15 July 1999, Klip/Sluiter, ALC-III-761, par. 201.

<sup>61</sup> For a full analysis, see G. Sluiter and A. Zahar, *International Criminal Law*, Oxford Univ. Press, Oxford 2008, p. 221-55 (including assessment of the *Kvočka* Trial Chamber decision).

a hierarchy of participants.<sup>62</sup> In Kvočka, the court applied a distinction between co-perpetrating a JCE and aiding and abetting a JCE. The distinction, the court argued, depended on the *mens rea* of the accused.<sup>63</sup>

### 5.1 Creating a more refined mode of liability

According to the Trial Chamber in Kvočka, individuals who made a substantial contribution with mere knowledge of the group's criminal endeavors are liable for aiding and abetting the JCE.<sup>64</sup> Individuals who share the intent of the JCE are co-perpetrators of the enterprise.<sup>65</sup> In this way, levels of participation in the joint enterprise are distinguished at the level of the offense. Furthermore, there is good reason to insist on this differentiation. There is a categorical moral difference between criminals who knowingly make contributions to a criminal enterprise and those who actually share the criminal purpose of the group.<sup>66</sup> The former simply aid the endeavor, for any number of reasons, including fear or lack of moral fiber required to actively resist the criminality. The latter demonstrate a greater degree of moral depravity, and are especially deserving of penal sanction, because the crime evidences their desire to achieve the aims of the criminal enterprise.<sup>67</sup> This desire is their own; it becomes part of their decision-making process and their psychological makeup.<sup>68</sup> It forms a part of their self, in the fullest sense of the expression. Consequently, the attempt by the Kvočka Trial Chamber to distinguish between these levels of participation was a nuanced attempt to adhere to the principle of culpability.<sup>69</sup> Those who share the intent of the criminal enterprise are clearly more culpable than mere contributors, and their legal liability should increase in proportion to that intent.<sup>70</sup>

One might argue that neither the Stakić nor the Kvočka versions of the JCE doctrine were that different from the Tadić version. Indeed, the Appeals Chamber in Tadić divided cases of joint criminal plans into three categories, with the first being cases of co-perpetration where the accused share the intent to commit the same crime, the second being concentration camp cases, and the third being *dolus eventualis* cases where some members stray from the common design, but all are liable if the actions were foreseeable.<sup>71</sup> Also, the Appeals Chamber concluded that an aider-and-abettor 'carries out acts specifically directed to assist, encourage or lend moral support to the perpetration of a certain specific crime (murder, extermination, rape, torture, wanton destruction of civilian property, etc.), and this support has a substantial effect upon the perpetration of the crime.'<sup>72</sup> However, beneath the surface great differences remain. Although the Tadić doctrine divides JCE cases into three categories, it is important to note that the participants within a criminal

<sup>62</sup> See ICTY, Judgement, Prosecutor v. Kvočka et al., Case No. IT-98-30/1, T. Ch., 2 November 2001, par. 249 ("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>63</sup> ICTY, Judgement, Prosecutor v. Kvočka et al., Case No. IT-98-30/1, T. Ch., 2 November 2001, par. 273 (concluding that "[t]he 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>64</sup> ICTY, Judgement, Prosecutor v. Kvočka et al., Case No. IT-98-30/1, T. Ch., 2 November 2001, par. 282.

<sup>65</sup> ICTY, Judgement, Prosecutor v. Kvočka et al., Case No. IT-98-30/1, T. Ch., 2 November 2001, par. 284 ("a co-perpetrator of a joint criminal enterprise shares the intent to carry out the joint criminal enterprise and performs an act or omission in furtherance of the enterprise")

<sup>66</sup> ICTY, Judgement, Prosecutor v. Kvočka et al., Case No. IT-98-30/1, T. Ch., 2 November 2001, par. 282.

<sup>67</sup> ICTY, Judgement, Prosecutor v. Kvočka et al., Case No. IT-98-30/1, T. Ch., 2 November 2001, par. 285.

<sup>68</sup> See J.D. Ohlin, Group Think: The Law of Conspiracy and Collective Reason, 98 Journal of Criminal Law & Criminology 2007, p. 157 ("once an individual injects himself in the process of collective decision-making, it is not so easy to disentangle from it"); cf. ICTY, Judgement, Prosecutor v. Kvočka et al., Case No. IT-98-30/1, T. Ch., 2 November 2001, par. 284.

<sup>69</sup> ICTY, Judgement, Prosecutor v. Kvočka et al., Case No. IT-98-30/1, T. Ch., 2 November 2001, par. 282 (explicitly discussing moral culpability as applied in *Einsatzgruppen*).

<sup>70</sup> The culpability principle should not be understood as a threshold constraint, but rather as limiting principle that enforces proportionality, not just in sentencing, but also in criminal liability prior to the sentencing phase. For a fuller discussion of this interpretation of the principle, see J.D. Ohlin, Group Think: The Law of Conspiracy and Collective Reason, 98 Journal of Criminal Law & Criminology 2007, p. 160-61 & n.44; J. Hall, General Principles of Criminal Law, New York 1947, p. 129 (explicitly cashing out culpability principle in terms of proportionality).

<sup>71</sup> ICTY, Judgement, *Prosecutor v. Tadić*, Case No. IT-94-I-A, A. Ch., 15 July 1999, Klip/Sluiter, ALC-III-761, par. 220.

<sup>72</sup> ICTY, Judgement, *Prosecutor v. Tadić*, Case No. IT-94-I-A, A. Ch., 15 July 1999, Klip/Sluiter, ALC-III-761, par. 229.

plan are not so divided – all are equally guilty.<sup>73</sup> And although the Tadić version allows for aiders and abettors, it does not recognize the role that they play within a common design. They must either be inside the conspiracy (where they are treated as full members), or they stand outside of it, rendering contributions to ‘a certain specific crime.’<sup>74</sup> But in such a case one loses the intuitive sense that what the defendant is aiding is, in fact, not a single criminal act, but a ‘large criminal enterprise’. This is precisely what is captured by the Trial Chamber’s phrase ‘aiding and abetting a JCE.’ It allows for distinctions *within* the conspiracy.

The Appeals Chamber in Kvočka, like in Stakić, would have no part of this judicial innovation.<sup>75</sup> The distinction between co-perpetrating and aiding and abetting a JCE was struck down, although the court’s reasoning was unconvincing.<sup>76</sup> The Appeals Chamber concluded that a defendant is liable for aiding and abetting a crime if he believes that he is helping a single individual. If, on the other hand, he realizes that his assistance is helping *a plurality of persons*, then the defendant is guilty of co-perpetrating a JCE.<sup>77</sup> The Appeals Chamber’s words here are beside the point. The Chamber concluded that, “[w]here, however, the accused knows that his assistance is supporting the crimes of a group of persons involved in a JCE and shares that intent, then he may be found criminally responsible for the crimes committed in furtherance of that common purpose as a co-perpetrator.”<sup>78</sup> The whole point of the Trial Chamber’s innovation was that aiders and abettors *who do not share the intent* of the overall conspiracy should only be guilty of aiding and abetting the JCE. In a slight-of-hand move, the Appeals Chamber makes no reference at all to this category of participant. But this was precisely the participant that the scheme developed by the Trial Chamber was meant to address.<sup>79</sup>

The Appeals Chamber’s global objection to the move seemed to be based on the grammar of criminal law. The Appeals Chamber argued that there could be no such thing as an aider-and-abettor of a JCE for the simple reason that JCE is a mode of liability – not a criminal offense itself – and it could not be qualified by another mode of liability such as aiding and abetting.<sup>80</sup> In constructing a grammatically correct sentence of criminal participation one may include only one criminal offense and one mode of liability. But one cannot combine one mode of liability with another mode of liability. This is what the philosophers refer to as a category mistake.<sup>81</sup> This objection goes to the very heart of the dilemma about joint criminal enterprise and its roots in the conspiracy doctrine. A conspiracy, in its most basic definition, is an agreement between two or more persons to commit an unlawful act.<sup>82</sup> This agreement can be used by the legal system in one of two ways. Either the agreement can be penalized as a substantive offense itself, as it is in the United States,<sup>83</sup> or it can be used as a rationale to hold one member of the group legally responsible for the actions of another, as is the rule in many jurisdictions.<sup>84</sup> The former is conspiracy as a substantive offense and the latter is conspiracy as a mode of liability. It is clear that conspiracy as a substantive offense has no place in the IC-

<sup>73</sup> ICTY, Judgement, *Prosecutor v. Tadić*, Case No. IT-94-1-A, A. Ch., 15 July 1999, Klip/Sluiter, ALC-III-761, par. 224.

<sup>74</sup> ICTY, Judgement, *Prosecutor v. Tadić*, Case No. IT-94-1-A, A. Ch., 15 July 1999, Klip/Sluiter, ALC-III-761, par. 229.

<sup>75</sup> ICTY, Judgement, *Prosecutor v. Kvočka*, Case No. IT-98-30/1, A. Ch., 28 February 2005, par. 91.

<sup>76</sup> ICTY, Judgement, *Prosecutor v. Kvočka*, Case No. IT-98-30/1, A. Ch., 28 February 2005, par. 92.

<sup>77</sup> ICTY, Judgement, *Prosecutor v. Kvočka*, Case No. IT-98-30/1, A. Ch., 28 February 2005, par. 90.

<sup>78</sup> ICTY, Judgement, *Prosecutor v. Kvočka*, Case No. IT-98-30/1, A. Ch., 28 February 2005, par. 90.

<sup>79</sup> ICTY, Judgement, *Prosecutor v. Kvočka et al.*, Case No. IT-98-30/1, T. Ch., 2 November 2001, par. 283 (“despite acknowledging the possibility that one could aid and abet a criminal enterprise, it [the Tadić Appeals Chamber] did not explain how”).

<sup>80</sup> ICTY, Judgement, *Prosecutor v. Kvočka*, Case No. IT-98-30/1, A. Ch., 28 February 2005, par. 91 (“The Appeals Chamber emphasizes that joint criminal enterprise is simply a means of committing a crime; it is not a crime in itself. Therefore, it would be inaccurate to refer to aiding and abetting a joint criminal enterprise. The aider and abettor assists the principal perpetrator or perpetrators in committing the crime.”).

<sup>81</sup> See G. Ryle, *The Concept of the Mind*, 1949; Sluiter and Zahar, *International Criminal Law*, at 241.

<sup>82</sup> The modern common-law definition of conspiracy in the U.S. dates back at least as far as *Commonwealth v. Hunt*, 45 Mass. 111, 121-22 (1842) (“The general rule of the common law is, that it is a criminal and indictable offence, for two or more to confederate and combine together, by concerted means, to do that which is unlawful or criminal, to the injury of the public, or portions or classes of the community, or even to the rights of an individual.”)

<sup>83</sup> Conspiracy is illegal in the United States even if the plan results in no criminal action, as long as at least one member of the conspiracy takes an affirmative step in furtherance of the conspiracy. This *ex ante* version of the conspiracy doctrine is designed to allow early intervention by the judicial system into developing criminal plans.

<sup>84</sup> This is the so-called Pinkerton liability, named for *Pinkerton v. United States*, 328 U.S. 640 (1946) (upholding criminal liability for the actions of co-conspirators in ‘furtherance of the unlawful project,’ as long as the actions are foreseeable).

TY's JCE jurisprudence, nor in the international law of war as such.<sup>85</sup> Precedents for this point of law go back at least as far as Nuremberg and the tribunal's decision to reject the broader American model of conspiracy in favor of the narrower Continental one.<sup>86</sup>

So the question becomes, did this unique addition of the terms co-perpetration and aiding and abetting to the notion of JCE somehow transform JCE from a mode of liability into a substantive offense? The Appeals Chamber's fears in this regard are misplaced and overly burdened by an impoverished and simplistic understanding of criminal syntax.<sup>87</sup> Simply put, the concept of 'aiding and abetting a JCE' was not meant to attach a mode of liability to a substantive offense. Rather, it was meant to create two entirely new modes of liability – one for aiding and abetting a JCE and a second for co-perpetrating a JCE – fashioned from the existing, yet imprecise, mode of liability of JCE. These would *replace* the existing mode and in any case would have to be attached to a specific criminal offense. Consequently, a given defendant could be charged with aiding and abetting a JCE to commit crimes against humanity (by, for example, working in some marginal capacity at a prison camp without the intent to further the enterprise). Similarly, a defendant could be charged with co-perpetrating a JCE to commit war crimes (for ordering a massacre), with clear intent to share the criminal purpose of the group.

In this way, the notion of aiding and abetting a JCE represented, albeit in a nascent form, the greatest jurisprudential innovation in the JCE doctrine since it was created in *Tadić*. The new doctrine refined the existing categories in such a way that it increased the likelihood that the jurisprudence would remain faithful to the principle of culpability. Greater distinctions could be maintained between the culpability of defendants, rather than simply catching all of them in one big net.<sup>88</sup>

## **5.2 The control theory and its importance for JCE**

Of course, we must be clear that the Kvočka distinction (between those who share the intent of the plan and those who simply know of it) is somewhat different from the distinction between principals and accessories that we constructed using the German control theory of perpetration. Not only are these two sets of distinctions different, they might even stand in some tension with each other. In essence, the Kvočka innovation was simply a dyadic distinction between two levels of participation; it would not have solved all of the problems considered above. The control theory distinction between low-level participants and organizers would remain to some degree. For example, it is possible that a mere foot soldier could be categorized as a co-perpetrator under the Kvočka theory if he shared the criminal purpose of the group, but categorized as a mere accessory under the control theory because he did not exercise any hegemony over the conspiracy. However, the reverse does not seem to be possible. Consider the foot soldier who simply knows of the criminal plan, and makes his contribution knowing of the plan, but does not share the criminal purpose of the group. It is possible for this foot soldier to be categorized as a mere aider and abettor under the Kvočka scheme, because he simply knew of the criminal plans, but if that were the case he would have to be considered an aider and abettor under the control theory as well, because it is highly unlikely – indeed impossible – for someone who does not share the criminal purpose of the group to nonetheless exercise hegemony over it. It is implicit within the notion of hegemony that one shares the criminal purpose of the group.

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<sup>85</sup> The U.S. Supreme Court recognized as much in Justice Stevens' opinion in *Hamdan v. Rumsfeld*, 126 S. Ct. 2749, 2779-80 (2006) (section on conspiracy and the law of war garnering four votes, concluding that conspiracy is not part of the international law of war).

<sup>86</sup> After the French judge noted that conspiracy per se was antithetical to civil law, the IMT rejected the prosecution's conspiracy argument and convicted the defendants of conspiracy in only one instance - conspiracy to commit aggression - on the theory that aggression is inherently collective. See J.A. Bush, 'The Supreme [...] Crime' and Its Origins: The Lost Legislative History of the Crime of Aggressive War, 102 *Columbia Law Review* 2002, p. 2373; B.F. Smith, *Reaching Judgment at Nuremberg*, 1977, p. 134-37.

<sup>87</sup> The Appeals Chamber's only citation for this point of law was ICTY, Judgement, *Prosecutor v. Milutinovic et al.*, Case No.: IT-99-37-AR72, Decision on Dragoljub Ojdanic's Motion Challenging Jurisdiction-Joint Criminal Enterprise, 21 May 2003, par. 20. In this paragraph, the Appeals Chamber interprets the phrase 'co-perpetrator of a joint criminal enterprise' (the phrase used by the Office of the Prosecutor in its charge) to mean 'commission' in the form of a joint criminal enterprise. The Appeals Chamber also suggests that the expression 'co-perpetration' is inappropriate in this context—essentially dismissing the relevance of it and ignoring it.

<sup>88</sup> The pithy phrase "Just Convict Everybody" best captures this insight. See G. Sluiter, *Guilt by Association: Joint Criminal Enterprise on Trial*, 5 *Journal of International Criminal Justice* 2007, p. 67.

Not all of these theoretical difficulties need be resolved here. Suffice it to say that the control theory is advantageous because it labels, as the most culpable, those individuals who have the opportunity and control necessary to bring about the great crimes that the tribunal is concerned with. On the other hand, the Kvočka approach has the advantage of recognizing that the power and hegemony to influence world events is not always a function of the defendant's choices, but is rather an accident of birth, prestige, class, and education. Philosophers sometimes refer to this as moral luck.<sup>89</sup> What is morally relevant is not one's station in life, or one's opportunity to exercise power, but whether one shared the goals of the criminal conspiracy and moved it forward in whatever way one could. Why should we treat the organizer as more culpable than the soldier, just because the organizer was born into the ranks of the bourgeoisie rather than the working class? Here we can see the return of the subjective theory and its continuing relevance to the discussion at hand.<sup>90</sup> If the soldier, in sharing the intent to further the criminal purpose of the group, commits a war crime, has he not somehow adopted these actions as his own? Although the soldier has not climbed the conspiratorial ladder, he has nonetheless adopted the full weight of the conspiracy by identifying with it and working towards its conclusion.

Perhaps the best way of summarizing the proposal is that the co-perpetrator of the JCE should be defined as someone who had control over the larger conspiracy, although not exclusive control, and who shared the criminal purpose of the group. (This is the category where Stakić belongs.) The aider-and-abettor of the JCE is to be defined as someone who had no control over the larger conspiracy, and merely made a contribution with knowledge of the group's intentions. Still to be determined is how we should classify the defendant who shared the criminal purpose, but was too far down the ladder to exercise meaningful hegemony over the larger conspiracy. Should he get the benefit of his own moral luck?

As I said, we need not resolve the distinction here between the two competing approaches that I have outlined: the Kvočka approach and the control theory approach. Rather, it is important simply to recognize that JCE, as a mode of liability, is a doctrine in great need of further development and subdivision. What exactly the subdivision should look like remains to be seen, but it is clearly a live issue for both legal scholars and the Appeals Chamber. Further development is not just warranted, but required.

### 5.3 The trial Chamber's intention in Stakić

It is my contention that it is precisely these theoretical issues that the Stakić Trial Chamber was pointing to when it discussed Dr. Stakić's role as a co-perpetrator in a JCE. Although the Trial Chamber did not fully explicate its reasoning, the broad outlines can be inferred. The Chamber was attempting to distinguish Stakić from mere contributors who did not share the criminal purpose of the group, or those who shared the criminal purpose but were minor players.<sup>91</sup> He did, indeed, participate in a meaningful way in the conspiracy and shared the intent of the group, presiding over the Crisis Staff that was in control over Prijedor municipality.<sup>92</sup> While the Trial Chamber ruled that he did not share this intent where genocide was concerned (having found insufficient evidence of genocidal intent "of alleged perpetrators acting on a higher level in the political structure" in Prijedor in 1992),<sup>93</sup> the Trial Chamber nonetheless ruled that he did share the intent to commit crimes against humanity and war crimes.<sup>94</sup> Indeed, before sentencing him to life in prison, the Chamber concluded that "[s]uch a wide-scale, complex and brutal persecutory campaign could never have been achieved without the essential contribution of leading politicians such as Dr. Stakić."<sup>95</sup>

The Trial Court in Stakić was right to note the major benefit to discussing co-perpetration. Judicial minimalism cautions against resorting to a judicially created doctrine that has aroused controversy.<sup>96</sup> This is the best reason to adopt some version of the distinction between aiding and abetting a JCE and co-perpetrating

<sup>89</sup> See Bernard Williams, *Moral Luck*, Cambridge University Press, Cambridge 1982, p. 20-39.

<sup>90</sup> Interestingly, the Trial Chamber in Stakić went out of its way to note Stakić's subjective awareness of his own role in the plan. See ICTY, Judgement, *Prosecutor v. Stakić*, Case No. IT-97-24-T, T. Ch., 31 July 2003, ALC-XIV-545, par. 497-98.

<sup>91</sup> ICTY, Judgement, *Prosecutor v. Stakić*, Case No. IT-97-24-T, T. Ch., 31 July 2003, ALC-XIV-545, par. 352.

<sup>92</sup> ICTY, Judgement, *Prosecutor v. Stakić*, Case No. IT-97-24-T, T. Ch., 31 July 2003, ALC-XIV-545, par. 348-49.

<sup>93</sup> ICTY, Judgement, *Prosecutor v. Stakić*, Case No. IT-97-24-T, T. Ch., 31 July 2003, ALC-XIV-545, par. 547.

<sup>94</sup> ICTY, Judgement, *Prosecutor v. Stakić*, Case No. IT-97-24-T, T. Ch., 31 July 2003, ALC-XIV-545, par. 712, 826.

<sup>95</sup> ICTY, Judgement, *Prosecutor v. Stakić*, Case No. IT-97-24-T, T. Ch., 31 July 2003, ALC-XIV-545, par. 906.

<sup>96</sup> ICTY, Judgement, *Prosecutor v. Stakić*, Case No. IT-97-24-T, T. Ch., 31 July 2003, ALC-XIV-545, par. 438 ("a more direct reference to 'commission' in its traditional sense should be given priority before considering responsibility under the judicial term 'joint criminal enterprise'").

a JCE. Doing so links the judicially created doctrine to categories more universally applied in criminal law and explicitly mentioned in the ICTY Statute.<sup>97</sup> However, this does not replace JCE with these categories. It simply combines them with JCE, creating a new hybrid mode of liability that, it should be emphasized, improves the argument that this mode of liability can be inferred from the meaning and structure of Article 7(1) of the statute. It is far easier to conclude that aiding and abetting a JCE and co-perpetrating a JCE can be inferred from the statute than it is to conclude that JCE ‘simpliciter’ can be inferred from the statute, for the simple reason that the more refined categories that we have discussed remain more faithful to the language of the statute.

## **6. Conclusion**

To summarize, we have argued that the doctrine of JCE is in need of further development. Specifically, the doctrine starts as an interpretation of what it means to ‘commit’ a crime, in the language of article 7(1) of the ICTY Statute. Therefore, it is imperative that the doctrine be developed with reference to the basic principles of perpetration. What does it mean to perpetrate a crime, and what does it mean to be an accessory? The two accounts outlined in this commentary include two ways that JCE might be developed to properly take account of these core principles, and might be combined with each other as we have suggested. Or there might be other accounts that offer even more refined differentiation between levels of participation.

It has been my contention here that any basic theory of perpetration must rely on notions of hegemony and control, on the one hand, and indispensability on the other. The doctrine should also take into account the degree to which mass atrocities are collective crimes, conspiratorial in nature, and hierarchical. The key is to properly allocate blame among the various individuals who find themselves in the fault lines between these concepts, exhibiting one characteristic but not the other. This is the key to Stakić—a man indispensable to a widespread crime, who shared its criminal purpose, and was near the top of the hierarchy, but was not in exclusive control of it. This is the co-perpetrator of a JCE.

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<sup>97</sup> Indeed, even the Tadić Appeals Chamber recognized the validity of this factor. See ICTY, Judgement, *Prosecutor v. Tadić*, Case No. IT-94-I-A, A. Ch., 15 July 1999, Klip/Sluiter, ALC-III-761, par. 224.