

Theorising the Doctrine of Joint Criminal Enterprise in International Criminal Law



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Abstract: Theorising the Doctrine of Joint Criminal Enterprise in International Criminal Law

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This thesis develops a theoretical account of the basis and justification for the doctrine of Joint Criminal Enterprise in international criminal law by examining principles governing the ascription of criminal responsibility in English and German criminal law. The first part consists of a comprehensive review of the development of the JCE doctrine, including its historical antecedents, its initial formulation by the ICTY, its subsequent explication by tribunals and academics, and recent alternative doctrines proposed by the ICC and by commentators. It identifies the main loopholes and contradictions in the construction of these theories, and presents factual scenarios for which these theories, particularly JCE, either have no answers, or problematic ones. The second part examines whether any of the variants of JCE can be justified as principal responsibility. It first identifies elements that distinguish international crimes from their domestic counterparts, and which are pertinent in developing an account of criminal responsibility for international crimes. It also examines the concept of perpetration responsibility in English and German criminal law and theory. It then combines the insights gleaned from these analyses to conclude that only JCE I can be appropriately considered as perpetrator responsibility and proposes a modified version of the doctrine of *Organisationsherrschaft* in German criminal law as a more accurate characterisation of the role and function of high level participants in mass atrocity. The final part focuses on the concept of accomplice responsibility in German and English criminal law and doctrine to address whether JCE II and JCE III can be justified as modes of secondary criminal responsibility. It concludes that JCE II and JCE III can be retained as distinct modes of accomplice liability using expressive and risk justifications, provided their operation is limited in ways that correspond to principles of secondary responsibility in domestic jurisdictions.

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INTRODUCTION

The tension between the individual and the collective is an enduring feature of international criminal law. Hardly any area of the law, ranging from the definitions of crimes to the design and procedural framework of international criminal institutions, remains impervious to its infiltration. However, its greatest challenge, and paradoxically, its most culpable neglect, has been in the demarcation of modes of liability that can truly reflect our normative intuitions about the nature of individual responsibility for crimes that are by their very nature collective.¹ Prosecutors and courts have put forward Joint Criminal Enterprise (JCE) as a mode of responsibility² that ostensibly manages to ascribe and calibrate criminal liability in a manner that adequately captures the collective action at the centre of these crimes while remaining true to criminal law's strict insistence on the principle of individual culpability.³

As first articulated by the Appeals Chamber of the International Criminal Tribunal for the former Yugoslavia (ICTY) in *Prosecutor v Tadić*, JCE liability comprises three categories of cases.⁴ The *actus reus* elements common to all three categories: JCE I, JCE II and JCE III, are:⁵ (a) a plurality of persons; (b) the existence of a common plan, design or purpose which amounts to or involves the commission of a crime provided for in the Statute; and (c) participation of the accused in the common design. The *mens rea* element differs for each category of JCE. For JCE I, the accused

¹ See Elies van Sliedregt, *The Criminal Responsibility of Individuals for Violations of International Humanitarian Law* (CUP Cambridge 2003) 4-5; Gideon Boas, James Bischoff and Natalie Reid, *International Criminal Law Practitioner Library Vol I: Forms of Responsibility in International Criminal Law* (CUP Cambridge 2007) 9.

² While there have been contrary pronouncements by international criminal tribunals on whether JCE is accessorial or principal liability, as will be discussed later, the development and popularity of JCE only makes sense if it is taken to refer to liability as a principal.

³ Mark Osiel, 'The Banality of Good: Aligning Incentives Against Mass Atrocity' (2005) 105 *Colum L Rev* 1751, 1786-1791.

⁴ *Prosecutor v Tadić*, Judgement, Case No IT-94-1, ICTY Appeals Chamber (15 July 1999) para 195.

⁵ *Tadić Appeals judgement* (n 4) para 227.

must have the shared intent to perpetrate a certain crime. For JCE II, the accused must know of the system of ill-treatment and intend to further it. For JCE III, the accused must intend to participate in and further the criminal purpose of the group. In addition, he will be liable for a crime other than the one envisaged in the common plan if the crime was a foreseeable consequence of the common plan and the accused willingly took that risk.⁶

Initially developed by the ICTY based upon a controversial interpretation of ‘commission’ liability in article 7(1) of the ICTY Statute,⁷ JCE has come to occupy pride of place in prosecutions before international and hybrid tribunals around the world.⁸ It has been increasingly resorted to in a plethora of cases by prosecution teams before the ICTY,⁹ the International Criminal Tribunal for Rwanda (ICTR),¹⁰ the Sierra Leone Special Court (SCSL),¹¹ and the Dili Special Panels for Serious Crimes (SPSC).¹² It finds place in the first few applications before the International Criminal

⁶ *Tadić Appeals judgement* (n 4) para 228.

⁷ Statute of the International Tribunal for the Prosecution of Persons Responsible for Serious Violations of International Humanitarian Law Committed in the Territory of the Former Yugoslavia since 1991, U.N. Doc. S/25704 at 36, annex (1993) and S/25704/Add.1 (1993), adopted by Security Council on 25 May 1993, U.N. Doc. S/RES/827 (1993). Art 7(1) stipulates: A person who planned, instigated, ordered, committed or otherwise aided and abetted in the planning, preparation or execution of a crime referred to in articles 2 to 5 of the present Statute, shall be individually responsible for the crime. The ICTY Appeals Chamber held that the term ‘commission’ in Art 7(1) of the ICTY Statute encompassed an individual’s liability for participation in the realisation of a common design or purpose: *Tadić Appeals judgement* (n 4) paras 188-189.

⁸ For an account of the increasing importance and use of JCE, see William Schabas, ‘The ICTY at Ten: A Critical Assessment of the Major Rulings of the International Criminal Tribunal Over the Past Decade: Mens Rea and the International Criminal Tribunal for the Former Yugoslavia’ (2003) 37 *New Eng L Rev* 1032; Nicola Piacente, ‘Importance of the Joint Criminal Enterprise Doctrine for the ICTY Prosecutorial Policy’ (2004) 2 *JICJ* 446; Allison Danner and Jenny Martinez, ‘Guilty Associations: Joint Criminal Enterprise, Command Responsibility, and the Development of International Criminal Law’ (2005) 93 *Cal L Rev* 75, 107.

⁹ For a detailed account of the ICTY cases in which JCE has been pleaded by the prosecution and/or formed the basis for the judgement, see Boas (n 1) 10-124.

¹⁰ Boas (n 1) 28-33.

¹¹ For the indictments in which JCE has been alleged before the SCSL, see Boas (n 1) 128-133.

¹² See *Prosecutor v Francisco Pereira*, Judgment, Case No 34/2003, SPSC (27 April 2005) at 19-20. See also *Prosecutor v Jose Cardoso Ferreira*, Judgment, Case No 04/2001, SPSC (5 April 2003); *Prosecutor v Domingos de Deus*, Judgment, Case No 2a/2004, SPSC (12 April 2005) at 13. See also Boas (n 1) 133-136.

Court (ICC)¹³ and is key to the prosecution case before the Extraordinary Chambers in the Courts of Cambodia (ECCC).¹⁴ It is also mentioned in the Statute of the Special Tribunal for Lebanon, despite the fact that the substantive crimes in the Statute are domestic rather than international crimes.¹⁵ Nevertheless, academics remain sceptical about its possibilities and limitations- ranging from an outright denunciation of JCE as a metaphor for ‘just convict(ing) everyone’¹⁶ to pleas for curtailing its scope and applicability.¹⁷ Recent years have witnessed the first few rumblings of discontent with JCE within the international criminal law community, where courts such as the ICC¹⁸ and prominent academics¹⁹ now propose the doctrines of indirect perpetration and co-perpetration²⁰ as doctrinally richer alternatives to JCE.

These disagreements on the validity of JCE however fail to confront the more pressing problem that international criminal law must resolve. This is the disappointing absence of a conceptual framework in international criminal law for delineating modes of responsibility. In this thesis, I take the first steps towards addressing this lacuna in the law by examining the appropriate basis for distinguishing

¹³ See eg *Situation in the Democratic Republic of the Congo in the Case of Prosecutor v Thomas Lubanga Dyilo*, Decision on the Prosecutor’s Application for a Warrant of Arrest, Article 58, Case No ICC-01/04-01/06, Pre-Trial Chamber I (10 February 2006). The Prosecutor has since abandoned JCE in favour of the doctrines of ‘co-perpetration’ and ‘indirect perpetration’, as we shall see later.

¹⁴ Statement of the Prosecutors on the First Introductory Submission in the Extraordinary Chambers in the Courts of Cambodia filed by the Co-Prosecutors (18 July 2007) 3-4 <<http://www.unakrt-online.org/Docs/Court%20Statements/2007-07-18%20Statement%20of%20Co-Prosecutors-First%20Submission.pdf>> accessed 10 December 2010.

¹⁵ See Marko Milanovic, ‘Domestic Crimes and International Responsibility in the Special Tribunal for Lebanon’ (2007) 5 JICJ 1139.

¹⁶ Mohamed Badar, ‘“Just Convict Everyone!” - Joint Perpetration: From *Tadić* to *Stakić* and Back Again’ (2006) 6 Int’l Crim L Rev 293.

¹⁷ Eg Danner and Martinez (n 8); Boas (n 1).

¹⁸ See *Prosecutor v Lubanga*, Decision on the Confirmation of Charges, Case No. ICC-01/04-01/06, ICC Pre-Trial Chamber I, 29 January 2007; *The Prosecutor v Germain Katanga and Mathieu Ngudjolo Chui*, Decision on the Confirmation of Charges, Case No. ICC-01/04-01/07, 30 September 2008.

¹⁹ See eg Kai Ambos, Kai Ambos, ‘Joint Criminal Enterprise and Command Responsibility’ (2007) 5 JICJ 159; Harmen van der Wilt, ‘Joint Criminal Enterprise: Possibilities and Limitations’ (2007) 5 JICJ 91.

²⁰ I will consider these doctrines in detail in Part II of the thesis.

between parties to an international crime. I do so by considering the theoretical foundations of the distinction between perpetrators and accessories in English and German criminal law, as prominent representatives of the common law and civil law traditions respectively. I assess the points of convergence and difference between these systems and apply this analysis to features that distinguish international crimes from their domestic counterparts in order to develop an account of principal and secondary responsibility for international crimes. In this process, I develop a theoretical account of JCE liability which engages with domestic criminal law principles and theory so as to assess whether it can be justified as a mode of principal or accomplice liability. I also take on the task of considering forms of criminal responsibility that have been put forward as alternatives to JCE and examine whether these are true to the doctrinal bases of responsibility in domestic legal systems and to the nature of international crimes.

The argument developed in this thesis has the following structure. Part I reviews the doctrine of JCE in international criminal law, including its historical antecedents, its initial formulation by the ICTY, and its subsequent explication by tribunals and academics. Part II looks at the concept of a perpetrator in English and German criminal law and theory. It also identifies elements of international crimes that are pertinent in developing a theory of perpetration responsibility. It then uses the doctrinal insights gleaned from the analysis of domestic law and the unique features of international crimes to assess whether JCE and any of the proposed alternative theories of criminal responsibility are appropriate modes of perpetration responsibility for international crimes. Part III is the final part of the thesis which focuses on the concept of accomplice liability in German and English criminal law and doctrine. Based on this assessment, it addresses whether JCE II and JCE III can

be justified as forms of secondary criminal responsibility and whether there is any merit to retaining them as distinct modes of liability for international crimes.

PART I: JCE IN INTERNATIONAL CRIMINAL LAW

A. INTRODUCTION

In the chaotic and under-theorised world of international criminal law, the development of JCE as a mode of individual responsibility for collective crimes represents an extraordinary undertaking. The evolution of JCE has been driven primarily by international tribunals, in particular, the ICTY and the ICTR, which have both contributed substantially to refining the elements of the doctrine. Academics and law makers have played the largely secondary role of critiquing specific aspects of JCE and advocating solutions that address these very particular concerns. This distinct manner in which JCE has matured is perhaps what contributes to the lack of doctrinal sophistication in the debates surrounding the justifications for and legitimacy of the doctrine. Moreover, the sheer nebulousness of the doctrine (the confused nomenclature²¹ is only a trivial reflection of this) also makes it hard to ascertain whether JCE is simply interpreted differently by different tribunals, or whether its contrary explication in various decisions²² is actually a manifestation of deeper disagreements about its fundamental bases. A useful starting point for analysing the

²¹ In *Tadić* alone, the Appeals Chamber used the following terms interchangeably to describe the form of liability: common criminal plan, a common criminal purpose, a common design or purpose, a common criminal design, a common purpose, a common design, and a common concerted design. The common purpose was also described, more generally, as being part of a criminal enterprise, a common enterprise, and a joint criminal enterprise – see Atilla Bogdan, ‘Individual Criminal Responsibility in the Execution of a “Joint Criminal Enterprise” in the Jurisprudence of the *ad hoc* International Tribunal for the Former Yugoslavia’ (2006) 6 Int’l Criminal L Rev 63, 80.

²² This will be considered in detail later in Sections B and C of Part I. For the different formulations of the requirements of JCE by the ICTY for instance, see Boas (n 1) 10-124. For debates on whether and to what extent Art 25(3) of the Rome Statute of the International Criminal Court recognises JCE, see Boas (n 1) 125-128; Vincenzo Militello, ‘The Personal Nature of Individual Criminal Responsibility and the ICC Statute’ (2007) 5 JICJ 941, 949-951; Gerhard Werle, ‘Individual Criminal Responsibility in Article 25 ICC Statute’ (2007) 5 JICJ 953, 958-963; Kai Ambos, ‘Individual Criminal Responsibility’ in O Triffterer (ed), *Commentary on the Rome Statute of the International Criminal Court* (Nomos 1999) 475, 483-486.

appropriateness of JCE for attribution of individual responsibility is a critical look into the elements of JCE, including its historical counterparts and recent alternatives that have been proposed to it. This will be the focus of Part I of the thesis. Once we have managed to clear the air on what JCE and its antecedents seek to achieve and how they set about doing it, we can start to build on and situate them within a theoretical framework for modes of individual participation in international crimes.

Part I is divided into three sections. Section B is an enquiry into JCE's historical antecedents and the tools used by international criminal tribunals confronting the same dilemma between collective criminality and individual responsibility, concluding with the traditional articulation of the JCE doctrine by the ICTY. Section C examines the elements of JCE in detail, exploring differences and variations in the jurisprudence of international tribunals. Section D discusses the doctrines of co-perpetration and indirect perpetration proposed as recent alternatives to JCE.

B. THE ORIGINS OF JOINT CRIMINAL ENTERPRISE

1 Formulating principles of liability at Nuremberg

The Nuremberg trials took place against the backdrop of an increasing recognition in international law that criminal responsibility and guilt should be personal rather than collective in nature. Commentators recognise that historically, international law did not distinguish clearly between civil and criminal liability. Individuals could often be held responsible for their association through nationality, domicile or otherwise, with an enemy or criminal state, in a manner that resembled criminal liability.²³ This position however underwent a gradual change during the nineteenth and twentieth

²³ Quincy Wright, 'International Law and Guilt by Association' (1949) 43 AJIL 746, 749-50. See also Arthur Nussbaum, *A Concise History of the Law of Nations* (Macmillan Co 1947) 34. For a more detailed historical account of criminal responsibility in international law, see Albert Levy, 'Criminal Responsibility of Individuals and International Law' (1945) 12 U Chi L Rev 313.

centuries. For instance, modifications were made in the laws of war acknowledging that apart from liabilities flowing from war, no person should be held responsible for the conduct of another and that subjects should not be punished for the acts of their rulers.²⁴ There was also a spurt in recognition of fundamental human rights at the international level, including the rights of fair trial, presumption of innocence, and an emphasis on non-distinction in rights based on certain group characteristics.²⁵

At the same time, there were almost no recorded cases of individuals being held criminally accountable by an international body (rather than a sovereign state) for conduct that can be loosely termed as acts against the law of nations. Instances of early ‘international prosecutions’ fall into roughly two categories. The first comprise cases where it was unclear whether the trial was truly international²⁶ – that is, whether either the body trying the accused could be deemed properly international, or whether the conduct with which he was charged could be considered an international crime.²⁷ The second consist of trials that never materialised, either due to lack of political will

²⁴ Wright (n 23) citing Grotius, *De Jure Belli as Pacis* (Carnegie Endowment for International Peace 1925) Vol II, Ch xxi, sec xii; Vol III, ch xi; sec ii, 539, 723. See also Gary Komarov, ‘Individual Responsibility under International Law: The Nuremberg Principles in Domestic Legal Systems’ (1980) 29 ICLQ 21, 21-23.

²⁵ Wright (n 23) 752.

²⁶ See for example, the trial and execution of Peter von Hagenbach in Breisach, Austria, in 1474 cited by some international lawyers as the earliest instance of international criminal law being applied to an individual: Georg Schwarzenberger, *International Law as Applied by International Courts and Tribunals vol II* (Stevens & Sons 1968) 462-66; Cherif Bassiouni, ‘The Time Has Come For An International Criminal Court’ (1991) 1 Ind Int’l & Comp L Rev 1. This has been heavily disputed in more recent commentary: Timothy MacCormack, ‘Selective Approach to Atrocity: War Crimes and the Development of International Criminal Law’ (1996-7) 60 Alb L Rev 681, 690-91; Robert Cryer, *Prosecuting International Crimes* (CUP Cambridge 2005) 18.

²⁷ For example, the attempt to prosecute Kaiser Wilhelm II for initiating World War I and offences against ‘international morality and the sanctity of treaties’. For a discussion of this, see James Garner, ‘Punishment of Offenders against the Laws and Customs of War’ (1920) 14 AJIL 70, 91-92; Hans Leonhardt, ‘The Nuremberg Trial: A Legal Analysis’ (1949) 11 Rev Pol 449, 459-60; see also Quincy Wright, ‘The Legal Liability of the Kaiser’ (1919) 13 Am Pol Sci Rev 120.

in pursuing them,²⁸ or due to the proposed punishment having been overridden by amnesty guarantees.²⁹

It was in the context of these developments that the International Military Tribunals at Nuremberg (IMT) and Tokyo (IMTFE) were tasked with establishing accountability for crimes committed by the Axis powers during World War II. The political sentiment surrounding the constitution of the IMTs is vital to understanding the principles of criminal responsibility developed for the prosecutions. The Americans, who were instrumental in formulating the theories of liability finally included in the Charter, were heavily influenced by their perception that the atrocities in World War II had been directed by a highly organised bureaucratic apparatus.³⁰ Their dilemma was to design a theory of liability that would fulfill the popular call for retributive measures against the horrors of Nazism, while at the same time avoiding blanket condemnation of the German people as a whole.³¹ They did so through two ingenious doctrines first developed by Colonel Murray C. Bernays, an inconspicuous young lawyer in the lowly section of Special Projects branch of the US Department of War: conspiracy and liability for membership of criminal organisations.³²

²⁸ German military personnel alleged to have violated the laws and customs of war during World War I were meant to be tried before allied military tribunals, but the Allies finally asked Germany to try a select number before the Supreme Court of Germany in Leipzig: Cherif Bassiouni, 'International Criminal Investigations and Prosecutions: From Versailles to Rwanda' in *International Criminal Law vol III* (Transnational Publishers 1999) 33-34, 37; Remigiusz Bierzanek, 'War Crimes: History and Definition' in *International Criminal Law vol III* (Transnational Publishers) 87, 92-93.

²⁹ The Treaty of Lausanne between the Allies and Turkey signed in 1923 was accompanied by a declaration of amnesty in respect of the attempted extermination of the Armenian people by the Ottoman government and its agents in 1915: Timothy MacCormack, 'From Sun Tzu to the Sixth Committee: The Evolution of an International Criminal Regime' in Timothy MacCormack & G J Simpson (eds), *The Law of War Crimes: National and International Approaches* (Kluwer 1997) 31, 44-5; Cryer (n 26) 33.

³⁰ Memorandum to President Roosevelt from the Secretaries of State and War and the Attorney General, January 22, 1945 in *Report of Robert H. Jackson, United States Representative to the International Conference on Military Trials* (Washington 1949) 4-5.

³¹ Stanislaw Pomorski, 'Conspiracy and Criminal Organisation' in George Ginsburgs and V N Kudriavtsev (eds), *The Nuremberg Trial and International Law* (Martinus Nijhoff 1990) 213, 214.

³² Ann Tusa and John Tusa, *The Nuremberg Trial* (BBC Books 1995) 54. For a detailed account of Bernays' proposal and the American version of the both doctrines, see Tusa and Tusa, 50-67.

Quite unsurprisingly, both doctrines were at the centre of controversy in the negotiations leading up to the drafting of the Nuremberg Charter between the four powers, France, UK, the Soviet Union and the US. Conspiracy especially, as an inchoate crime, was unknown to most of the civil law world.³³ Subsequent French and Russian re-drafts of the Charter conspicuously failed to even mention conspiracy, an omission criticized by a despairing Justice Jackson on the ground that there were no other acceptable means of reaching large numbers of people, especially those against whom evidence of specific unlawful acts was lacking.³⁴ A compromise was finally reached and conspiracy was included in the Charter of the IMT.³⁵ However, not only did the Charter fail to provide for a definition of what constitutes conspiracy, it also criminalised only conspiracy to commit crimes against peace, and not conspiracy to commit war crimes or crimes against humanity.³⁶

The proposal to criminalise membership of certain organisations also met with initial resistance from the Russians on political rather than principled grounds. However, in view of the evidentiary problems confronting prosecutions of suspected

³³ For a slightly surreal and humorous account of the conspiracy debate at the London conference, see Bradley Smith (ed), *The American Road to Nuremberg: The Documentary Record 1944-45* (Hoover Inst Press 1982) 51.

³⁴ Jackson Report (n 30) Doc XXXVII, 300.

³⁵ Nuremberg Rules, in Agreement for the Prosecution and Punishment of the Major War Criminals of the European Axis, 82 UNTS 279, *entered into force* Aug 8, 1945. Article 6 (a) of the Charter of the states: The following acts, or any of them, are crimes coming within the jurisdiction of the Tribunal for which there shall be individual responsibility:

(a) CRIMES AGAINST PEACE: namely, planning, preparation, initiation or waging of a war of aggression, or a war in violation of international treaties, agreements or assurances, or participation in a common plan or conspiracy for the accomplishment of any of the foregoing.

³⁶ Pomorski (n 31) 222-223, 227-228. This nevertheless did not prevent the Americans from charging conspiracy for all three crimes in the indictment. Count 1 of the Indictment labelled 'The Common Plan or Conspiracy' stated, in relevant part: All the defendants, with divers other persons, during a period of years preceding 8 May 1945, participated as leaders, organizers, instigators, or accomplices in the formulation or execution of a common plan or conspiracy to commit, or which involved the commission of, Crimes against Peace, War Crimes, and Crimes against Humanity, as defined in the Charter of this Tribunal, and, in accordance with the provisions of the Charter, are individually responsible for their own acts and for all acts committed by any persons in the execution of such plan or conspiracy.

offenders, the American proposal in this respect also prevailed: the IMT would be asked to make a declaration of criminality concerning the major Nazi organisations which would then be binding against individual members of these organisations being prosecuted in national and occupation courts. Further, there would be a presumption of the accused's voluntariness and knowledge of the criminal purposes of the organisation in these proceedings.³⁷

2 The Prosecutions' grand vision

Despite the IMT prosecutions teams' ostensible championing of the principle of individual criminal responsibility over collective accountability,³⁸ their strategy clearly focussed on establishing the existence of a wide ranging conspiracy, both by the Nazis in Germany,³⁹ and by successive governments in Japan.⁴⁰ Holding particular *individuals* accountable for this conspiracy was of secondary importance⁴¹ and the breadth of the charges ensured that anyone associated with the leadership or in a government position could be considered part of the conspiracy.⁴²

³⁷ Pomorski (n 31) 220. See also Jackson Report (n 30) Doc XXII, 133. For a discussion of the implications of the legal issues left unclear in the final draft, see Carl Haensel, 'Nuremberg Problems' in Wilbourn Burton and Georg Grimm (eds), *Nuremberg: German Views of the War Trials* (Southern Methodist University Press 1955) 146.

³⁸ 2 International Military Tribunal, Trial of the Major War Criminals (1947) 102.

³⁹ See the statement of Robert H Jackson, lead counsel for the American prosecution in Jackson papers, container 191, 'Justice Jackson's story', fns 1046-7 cited in Donald Bloxham, *Genocide on Trial* (OUP 2001) 19.

⁴⁰ *Indictment*, 2 The Tokyo Major War Crimes Trial: The Records of the International Military Tribunal for the Far East (R John Pritchard ed, 1998) 1.

⁴¹ See the opening statement of Robert H Jackson, 2 International Military Tribunal, Trial of the Major War Criminals (1947) 98-99; in the context of the IMTFE, see Allison Danner, 'Beyond the Geneva Conventions: Lessons from the Tokyo Tribunal in Prosecuting War and Terrorism' (2005) 46 Va J Int'l L 30 citing George Blewett, US counsel for General Tōjō Hideki: 'Victor's Injustice: The Tokyo War Crimes Trial' (1950) American Perspective 282, 287-88; Richard Minear, *Victor's Justice: The Tokyo War Crimes Trial* (Princeton University Press 1971) 37 citing Horwitz, 'Tokyo Trial' 498.

⁴² Francis Biddle, 'The Nuernberg Trial' (1947) 33 Va L Rev 679, 691; Richard Wassertrom, 'The Relevance of Nuremberg' (1971) 1 Phil & Pub Aff 22, 37. It has been remarked that in the case of the IMTFE, the indictments served to condemn an entire epoch and a nation: W Seabald, *With MacArthur in Japan* (1965) 152, 159 cited from Elizabeth Kopelman, 'Ideology and International Law: The Dissent of the Indian Justice at the Tokyo War Crimes Trial' (1990-91) 23 NYU J of Int'l L and Pol 373, 395.

The concept of conspiracy in Count 1 of the IMT indictment was less clearly articulated than its traditional understanding in Anglo-Saxon jurisprudence. It charged persons who had participated in the formulation or execution of a ‘common plan *or* conspiracy’ to commit crimes under the Charter.⁴³ The concept of a ‘common plan’ was unknown in any legal system⁴⁴ and undefined in the Charter.

The Nuremberg Charter had also failed to define the concepts of ‘group’ and ‘organisation’ in the provisions outlining the individual responsibility of members of criminal organisations.⁴⁵ The prosecution interpreted ‘group’ to mean a looser and more informal structure or relationship than an ‘organisation’. It assumed that both terms implied an ‘aggregation of persons associated in some identifiable relationship with a collective general purpose.’⁴⁶ The prosecution indicted six separate organisations⁴⁷ while emphasising that all these organisations were interdependent and part of one gigantic apparatus.⁴⁸

In order for an organisation to be declared criminal, the prosecution had to prove the following elements: 1) the organisations’s membership was in general voluntary; 2) it was designed to perform conduct that was criminal under the Charter; 3) due to the character of the organisations’s activities, the members could be presumed to have knowledge of them; and 4) that some defendant tried by the

⁴³ Hans Ehard, ‘The Nuremberg Trial Against the Major War Criminals and International Law’ (1949) 43 AJIL 223, 227.

⁴⁴ Ehard (n 43) 227.

⁴⁵ Harold Leventhal et al., ‘The Nuernberg Verdict’ (1947) 60 Harv L Rev 857, 891.

⁴⁶ *2 Nazi Conspiracy and Aggression* 17 (1946).

⁴⁷ *Indictment*, text published by the International Military Tribunal at Nuremberg as document No 1, Appendix B, 35-38.

⁴⁸ *The Trial of German Major War Criminals – Speeches of the Prosecutors at the Close of the Case against the Indicted Organisations* (HMSO 1946) 61 cited in *History of the United Nations War Crimes Commission and the Development of the Laws of War* (His Majesty’s Stationery Office 1948) 302 (hereinafter UNWCC Report).

Tribunal was a member of the organisation and was guilty of an act on the basis of which the organisation was to be declared criminal.⁴⁹

According to the prosecution, the adjudication by the IMT was of a declaratory nature, which left the question of individual guilt and punishment to the national and local courts trying individuals on the basis of the declaratory judgement. The only effect of it was to create a rebuttable presumption of guilt, thus reversing the burden of proof.⁵⁰ The prosecution was unimpressed by arguments that the mere declaration of criminality of an organisation represented the condemnation of its members, and was therefore already a punishment of one kind.⁵¹

The IMTFE did not choose to indict any of the groups or organisations to which the defendants belonged, though this was within the power conferred on it by Article 5 of the IMFTE Charter.⁵²

3 The IMT Judgements

a. Criminal organisations

Despite its declaration that collective punishment is reprehensible, the IMT was emphatic that it may declare an organisation to be ‘criminal’ if satisfied of its criminal guilt. In this endeavour, it would not be deterred by arguments that group criminality was an innovation.⁵³ The Tribunal was at pains to reconcile this readiness to issue a finding of collective guilt with its profession that all criminal responsibility

⁴⁹ UNWCC Report (n 48) 305.

⁵⁰ UNWCC Report (n 48) 307.

⁵¹ Haensel (n 37) 151. cf Biddle (n 42) 693.

⁵² *Jurisdiction Over Persons and Offenses*. The Tribunal shall have the power to try and punish Far Eastern war criminals who as individuals or as members of organisations are charged with offenses which include Crimes against Peace.

⁵³ See Biddle (n 42) 693.

will be based on the personal guilt of the individual.⁵⁴ The Tribunal may have been conscious of the fact that criminal liability for mere membership of a criminal organisation was controversial in the domestic laws of most nations⁵⁵ and without precedent in international law.⁵⁶ It added various qualifications to the terms of Articles 9 and 10 to achieve this objective.

First, it narrowed the wide net of offenders sought to be prosecuted by blurring the distinct functions performed by the doctrines of organisational criminality and conspiracy in the prosecution case.⁵⁷ The IMT defined a criminal organisation in the following terms: ‘A criminal organisation is analogous to a criminal conspiracy in that the essence of both is co-operation for criminal purposes. There must be a group bound together and organised for a common purpose.’⁵⁸ Second, mere membership in the organisation would not be considered a crime. It would instead have to be established that the individual had knowledge of the criminal purposes of the organisation. In a situation where an individual had been conscripted into the organisation by the State, it would have to be further proved that he was personally implicated in the commission of the criminal conduct.⁵⁹ The accused need not

⁵⁴ See F B Schick, ‘The Nuremberg Trial and the International Law of the Future’ (1947) 41 AJIL 770, 787-88.

⁵⁵ For a survey of domestic legislation that provided for analogous modes of liability, see UNWCC (n 48) Report 318-332.

⁵⁶ Robert Woetzel, *The Nuremberg Trials in International Law* (Stevens and Sons Ltd 1962) 211. See also Hans Leonhardt, ‘The Nuremberg Trial: A Legal Analysis’ (1949) 11 Rev Pol 449, 453-4.

⁵⁷ Compare with Kelsen, ‘Will the Judgment in the Nuremberg Trial Constitute a Precedent in International Law?’ (1947) 1 Intl L Q 153, 165-67.

⁵⁸ 1 *Trial of the Major War Criminals Before the International Military Tribunal* (Washington 1947) 256.

⁵⁹ 1 *Trial of the Major War Criminals Before the International Military Tribunal* (Washington 1947) 256. The Prosecution had already conceded two important qualifications for when an organisation would be considered criminal: (a) its membership must, in general, be voluntary; (b) information about the criminal conduct of the group must be so widespread or easily available that members’ knowledge of the criminal nature could be assumed. See 8 *Trial of the Major War Criminals Before the International Military Tribunal* (Washington 1946) 367-8.

however have known of the specific criminal acts committed pursuant to the criminal purposes of the group or have been directly connected with them.⁶⁰

In adding these requirements of knowledge and voluntary participation in the criminal purposes of a group, the IMT reformulated the original conception of responsibility for membership of a criminal organisation such that it resembled an extended form of conspiracy liability.⁶¹ Individuals who had joined organisations subscribing to their legitimate aims and without knowledge of their unlawful purposes could still be prosecuted if they remained members after discovering these criminal purposes.⁶² Further, in defining a criminal organisation, the tribunal stressed that the organisation could be '*formed* or used' in connection with the commission of conduct denounced under the IMT Charter. The necessary implication of this was that actual commission of crimes by the organisation was not required.⁶³ This was again similar to conspiracy as an inchoate crime.

The judgement went on to considerably limit the kinds of persons who would fall within the net of criminality cast by the organisation. It excluded certain departments and categories of people such as janitors and secretaries who played no direct role in the criminal conduct of the organisation.⁶⁴ A purely pragmatic qualification added was that the small size of a group was a reason for not making a declaration of criminality against it.⁶⁵ This was used to justify the non-issuance of a

⁶⁰ Woetzel (n 56) 203.

⁶¹ Woetzel (n 56) 202 citing Hänsel, *Das Organisationsverbrechen* (Bledenstein Verlag 1947) 54-55.

⁶² Woetzel (n 56) 209-10 citing Rauschenbach, *Der Nürnberger Prozess gegen die Organisationen* (L. Röhrscheid 1954) 132-33.

⁶³ See UNWCC Report (n 48) 312.

⁶⁴ This had been conceded by the prosecution – see UNWCC Report (n 48) 302.

⁶⁵ The Tribunal stated this as an express reason for making no such declaration in the case of the Reich Cabinet, since there would be no strategic advantage or saving of time and resources compared to individually prosecuting the defendants affiliated to the Cabinet. 1 *Trial of the Major War Criminals Before the International Military Tribunal* (Washington 1947) 275-76.

declaration against the General Staff and High Command. Here, the tribunal also added an implicit condition that to be held responsible for membership in a criminal group, the members must actually be *conscious* of forming an ‘organisation’ rather than simply consist of a collection of persons working together.⁶⁶

b. Conspiracy at the IMT and the IMFTE

The IMT at Nuremberg accepted the prosecution theory that the Nazi leadership and its associates had been plotting to wage an aggressive war ever since seizing power. It found it immaterial whether a *single conspiracy* to the extent and over the time alleged in the indictment had been proved.⁶⁷ This omission to determine the exact scope of the conspiracy, or whether there were several conspiracies in existence rather than just one, is astonishing. The kinds of crimes for which an individual can be held guilty by virtue of his participation in the conspiracy or common plan is integrally connected to the scale of the conspiracy and the period over which it is alleged to have been in operation. The broader the definition of the conspiracy, the greater is the potential responsibility of the individual for acts committed by him and others in pursuance of the conspiracy.⁶⁸

After this sweeping pronouncement however, the IMT considerably narrowed the scope of the conspiracy alleged by the prosecution as well as the criteria for participation in it. It began by holding that under Article 6 of the Charter, it had no jurisdiction to try persons for a conspiracy to commit war crimes or crimes against humanity.⁶⁹ Further, the conspiracy ‘must be clearly outlined in its criminal

⁶⁶ See Woetzel (n 56) 199.

⁶⁷ 1 *Trial of the Major War Criminals Before the International Military Tribunal* (Washington 1947) 225.

⁶⁸ For a similar argument, see Pomorski (n 31) 236.

⁶⁹ 1 *Trial of the Major War Criminals Before the International Military Tribunal* (Washington 1947) 226.

purpose... must not be too far removed from the time of decision and action' and must consist of a 'concrete plan to wage war'.⁷⁰ The Tribunal thus avoided the determination that the prosecution case would have had them make – that the entire Nazi government from 1933 onwards was an open conspiracy.⁷¹ It also set a relatively high standard for judging participation in the conspiracy or common plan – whether the defendants, with knowledge of Hitler's aims, gave him their co-operation.⁷² The implication seemed to be that not only must the individual have had knowledge of the aggressive plan, but he must also have been involved personally in the planning with Hitler.⁷³ Only eight of the twenty two defendants were ultimately found guilty of conspiracy.⁷⁴

Following the IMT at Nuremberg's lead, the IMFTE dismissed the conspiracy charges to commit crimes against humanity and war crimes. With respect to conspiracy to commit crimes against peace, the IMFTE regarded the prosecution's vision of conspiracy favourably, only limiting the territorial extent of the planned conspiracy.⁷⁵ As Arthur Comyns Carr, the British prosecutor at the IMFTE later observed with no trace of irony, '[t]he story that unfolded in the judgment is one of a grandiose plot which originated in the late 1920's in the minds of a few officers and

⁷⁰ 1 *Trial of the Major War Criminals Before the International Military Tribunal* (Washington 1947) 225.

⁷¹ Leventhal (n 45) 871.

⁷² 1 *Trial of the Major War Criminals Before the International Military Tribunal* (Washington 1947) 225-26.

⁷³ On this aspect, and the manner in which it is necessarily implied from the convictions and acquittals in the case of individual defendants, see Leventhal (n 45) 873-81

⁷⁴ Biddle (n 42) 690-91.

⁷⁵ Judgment of the Tokyo Tribunal, 101 *The Tokyo Major War Crimes Trial: The Records of the International Military Tribunal For The Far East* (R John Pritchard ed, 1998) 49, 763 (*Tokyo judgment*).

civilians, and grew until it became the dominant purpose... of every successive government of Japan.⁷⁶

In convicting individual defendants of the crime of conspiracy to wage aggressive war, the tribunal deemed it unnecessary that they were either originators of the conspiracy or parties to it till the very end (indeed, this would have been nearly impossible to prove given that the conspiracy spanned more than a decade that saw different cabinets in power).⁷⁷ Instead, ‘all those who at any time were parties to the criminal conspiracy or who at any time with guilty knowledge played a part in its execution’ were declared guilty of the conspiracy to wage aggressive war.⁷⁸ Theoretically, given the geographical and temporal breadth of the alleged conspiracy, and the lack of any qualification as to the extent of participation required in order to be considered a member, the entire population of Japan over a period of more than a decade could be considered part of this conspiracy to wage war, so long as they had some knowledge of it (which considering their country was at war, they could not legitimately claim to not have).

This criticism is echoed in Justice Pal’s dissent in the Tokyo judgement, and his rejection of the absurdity of a theory that presented a series of discrete events marked inevitably by a combination of foresight, accident and surprise, as a linear historical progression with a calculated object and purpose spanning more than a decade. For Pal, the conspiracy edifice erected by the prosecution was tantamount to a judgement on the historical evolution of an entire nation, which was hopelessly simplistic and illegitimate.⁷⁹

⁷⁶ A S Comyns Carr, ‘The Judgment of the International Military Tribunal for the Far East’ (1948) 34 *Trans Grotius Soc* 141, 146.

⁷⁷ Solis Horwitz, ‘The Tokyo Trial’ (1950) 466 *Int’l Conciliation* 473, 507.

⁷⁸ *Tokyo judgment* (n 75) at 49, 770.

⁷⁹ For a detailed account of Pal’s dissent, see Kopelman (n 42).

Pal's criticisms aside, what the indictments and the judgements at Nuremberg and Tokyo highlight are the problems that have plagued international criminal law's attempts to attribute responsibility till the present day: the struggle to produce a historical record and condemnation of crimes that are collective in nature, and cannot be carried out solely by individuals, through holding persons *individually* accountable for these crimes.

4 The apocalyptic moment: Tadić

The doctrine of Joint Criminal Enterprise rose from the ashes of the theories of criminal conspiracy and liability for membership of criminal organisation, though its supporters have been eager to deny any resemblance to its predecessors.⁸⁰ The dominant trend in literature on JCE is to signal the ICTY Appeals Chamber's judgement in *Prosecutor v Tadić* as the first enunciation of the JCE mode of liability in international criminal law.⁸¹ While this statement is not entirely accurate,⁸² *Tadić* was certainly the first case in which an international criminal tribunal clearly established what constitutes JCE: its elements and its status in customary international law. It is therefore important to analyse *Tadić's* exposition of JCE in some depth.

a. Brief factual background

Dusko Tadić was a member of an armed Serbian group that had attacked the village of Jaskici in Bosnia Herzegovina killing five Bosnian Muslim men in the village. He was charged with crimes against humanity under Article 7(1) of the ICTY Statute for

⁸⁰ See van Sliedregt (n 1) 107; Danner and Martinez (n 8) 109, 118-19. Defence counsel before the ICTY have especially emphasised this connection: see Osiel (n 3) 1791. On the conspiracy underpinning of JCE, see Piacente (n 8) 451.

⁸¹ See eg Piacente (n 8) 449.

⁸² It is now acknowledged that the ICTY employed the notion of liability for participation in a common criminal plan or enterprise earlier, in *Prosecutor v Furundžija*, Case No IT-95-17/I-T, Judgment, ICTY Trial Chamber (10 December 1998): see Boas (n 1) 10-14.

the killings and other crimes.⁸³ Although Tadić had been a member of the group and played an active role in the attack by rounding up and assaulting the non-Serb population of the village, the Trial Chamber had failed to be satisfied beyond reasonable doubt that he had participated in the killings of the five men.⁸⁴

The Prosecution appealed against this decision, arguing that Tadić should have been held responsible for the killings in accordance with the doctrine of ‘common purpose’ since the killings were a natural and foreseeable consequence of the attack and occurred in the context of a broader policy to ethnically cleanse the region of Prijedor of non-Serbs.⁸⁵ Since there was no proof that Tadić had personally killed any of the men, the Appeals Chamber had to determine whether he could be held responsible on account of his participation as part of the group that had carried out the killings.⁸⁶

b. Interpretative stance

The Appeals Chamber began its analysis of Tadić’s criminal responsibility by emphasising the inviolability of the principle of personal culpability in criminal law.⁸⁷ It then went on to interpret the term ‘commission’ in Article 7(1) of the ICTY Statute which outlines the modes of individual criminal responsibility (i) by situating it within the object and purpose of the ICTY Statute;⁸⁸ (ii) based on the inherent nature of international crimes.⁸⁹

⁸³ *Prosecutor v Tadić*, IT-94-1-I, Second Amended Indictment (14 December 1995) para 12.

⁸⁴ *Prosecutor v Tadić*, Judgement, Case No. IT-94-1-T, ICTY Trial Chamber (14 July 1997) para 373.

⁸⁵ *Tadić Appeals judgement* (n 4) para 175.

⁸⁶ *Tadić Appeals judgement* (n 4) para 183.

⁸⁷ *Tadić Appeals judgement* (n 4) para 186.

⁸⁸ It relied on other provisions of the ICTY Statute and the report of the Secretary General on the ICTY’s establishment: *Tadić Appeals judgement* (n 4) paras 189-190.

⁸⁹ *Tadić Appeals judgement* (n 4) paras 189-193.

The Chamber opined that the mandate of the ICTY was to bring to justice *all* those who were responsible for serious violations of international humanitarian law committed in former Yugoslavia,⁹⁰ regardless of the manner in which they had participated in the perpetration of these crimes.⁹¹ Thus, persons who contributed to the commission of a crime enumerated under the Statute in pursuance of a common criminal purpose could, in certain circumstances, also be held responsible under the Statute.⁹² The implicit assumption seemed to be that a strict interpretation of ‘commission’ would allow too many perpetrators to escape justice and defeat the purpose of the Statute.

On the face of it, the Chamber’s interpretative stance is consonant with the customary rules of treaty interpretation.⁹³ It however highlights the tension in marrying two very different disciplines of law: international law and criminal law. While the teleological approach to treaty interpretation⁹⁴ supports terms being accorded a fairly broad meaning, interpretation of criminal law statutes tends towards conservatism, and in case of any ambiguity, an interpretation that is favourable to the accused may be adopted.⁹⁵ While the Vienna Convention on the Law of Treaties (VCLT) provides for uniform rules of interpretation irrespective of the nature of the

⁹⁰ See Article 1 of the ICTY Statute: The International Tribunal shall have the power to prosecute persons responsible for serious violations of international humanitarian law committed in the territory of the former Yugoslavia since 1991 in accordance with the provisions of the present Statute.

⁹¹ *Tadić Appeals judgement* (n 4) para 190.

⁹² *Tadić Appeals judgement* (n 4) para 190.

⁹³ Article 31(1) of the Vienna Convention on the Law of Treaties, 1155 UNTS 331, entered into force January 27, 1980 states: A treaty shall be interpreted in good faith in accordance with the ordinary meaning to be given to the terms of the treaty in their context and in the light of its object and purpose.

⁹⁴ For an analysis of the pros and cons of different approaches, see I M Sinclair, ‘The Principles of Treaty Interpretation and their Application by the English Courts’ (1963) 12 ICLQ 508, 509-510 and references therein.

⁹⁵ The application of the principle of strict construction in both the US and the UK has however been far from uniform. See JC Jeffries, ‘Legality, Vagueness and the Construction of Penal Statutes’ (1985) 71 Va L Rev 189; Andrew Ashworth, ‘Interpreting Criminal Statutes: A Crisis of Legality?’ (1991) 107 LQR 419.

treaty,⁹⁶ there is a minority in international law which has questioned the lack of distinction between treaties that may have very different characters.⁹⁷ Treaties establishing international criminal tribunals are quite distinct from traditional treaties that were within the contemplation of the drafters of the VCLT; not only do they impose obligations on individuals rather than States, but the nature of the obligations imposed is a potential severe restriction of the obligor's fundamental liberties.⁹⁸ It is therefore more reasonable to interpret international criminal law treaties in a manner favourable to the accused, as recognised in principles of interpretation pertaining to domestic penal statutes, and as would also be acceptable according to some commentary on the aims of treaty interpretation.⁹⁹

Even if the object of the ICTY Statute to bring to justice perpetrators of atrocities committed during the conflict in Yugoslavia is a legitimate source for understanding the scope of 'commission', the reasoning of the tribunal in using it to impose liability on persons acting in pursuance of a common criminal plan is assailable. To assume

⁹⁶ 'Third Report on the Law of Treaties by Sir Humphrey Waldock, Special Rapporteur' in Yearbook of the International Law Commission 1964, vol. II, 57, New York, 1965 (UN Doc A/CN.4/SER.A/1964/Add.1 (65.V.2)); Schwelb, 'The Law of Treaties and Human Rights' in M Reisman and B Weston (eds), *Towards World Order and Human Dignity: Essays in Honour of Myres S McDougal* (The Free Press 1976) 263, 266-272; P Malanczuk, *Akehurst's Modern Introduction to International Law* (Routledge 1997) 130; Frankowska, 'The Vienna Convention on the Law of Treaties Before United States Courts' (1988) 28 Va J Int'l L 281, 285.

⁹⁷ Wessel, 'Relational Contract Theory and Treaty Interpretation: End-Game Treaties v. Dynamic Obligations' (2004) 60 NYU Ann Survey Am L 149; M Toufayan, 'Human Rights Treaty Interpretation: A Postmodern Account of its Claim to Speciality' (2005) NYU Center for Human Rights and Global Justice Working Paper No 2 <www.chrgj.org/publications/docs/wp/0502%20Toufayan.pdf> accessed 10 December 2010; See also, McNair, 'The Functions and Differing Legal Character of Treaties' (1930) 11 British YB Int'l L 100, 106; Matscher, 'Methods of Interpretation of the Convention' in R St-J Macdonald, F Matscher and H Petzold (eds), *The European System for the Protection of Human Rights* (Martinus Nijhoff 1993) 66.

⁹⁸ Publicists and arbitral tribunals commenting on rules of treaty interpretation prior to the drafting of the VCLT were quite emphatic that 'doubtful stipulations should be interpreted in the least onerous sense for the party obligated' *Sambiaggio case* (Ralston, *Venezuelan Arbitrations of 1903* (1904) 689) quoting publicists including Vattel and Pradier-Fodéré; *Aspinwall Case* (4 Moore, *History and Digest of the International Arbitrations to which the United States has been a Party* 3621ff).

⁹⁹ There are divergent opinions on whether the dominant aim of treaty interpretation is to give effect to the intention of the contracting parties; whether the interpreter should adhere to the plain text of the treaty; or whether a teleological approach that furthers the object and purpose of the treaty should be favoured. For an analysis of the different approaches, see Sinclair (n 94) 509-510 and references therein.

that persons acting in pursuance of a common criminal plan must be guilty for their actions in this capacity is to assume that this is in fact the level of culpability imposed by the ICTY Statute. Support for this proposition cannot be adduced from an expanded construction of the very provisions imposing criminal liability, but must come from some independent source.¹⁰⁰

The *Tadić* Chamber also placed great emphasis on the fact that most international crimes are not the result of the actions of discrete individuals, but rather ‘manifestations of collective criminality’.¹⁰¹ It stated:

Although only some members of the group may physically perpetrate the criminal act... the participation and contribution of the other members of the group is often vital in facilitating the commission of the offence in question. It follows that the *moral gravity of such participation is often no less – or indeed no different –* from that of those actually carrying out the acts in question.¹⁰² (emphasis supplied)

There is an unconscious sleight of hand in the Tribunal’s reasoning here. The tribunal’s stress is on the ‘moral gravity’ of an individual’s participation in the criminal acts; from this it goes on to draw conclusions about his or her ‘criminal responsibility’.¹⁰³ This is to assume a synonymy at two levels – (a) between ‘gravity’ and ‘responsibility’; and (b) between ‘moral’ and ‘criminal’. Neither of these is tenable without further justification.

Even apart from this, the bald statement that the moral gravity of contributing to the commission of an offence is equal to personally perpetrating it surely merited deeper examination. The Chamber clearly had a hierarchy of responsibility in mind when it

¹⁰⁰ Jens Ohlin, ‘Three Conceptual Problems with the Doctrine of Joint Criminal Enterprise’ (2007) 5 JICJ 69, 72.

¹⁰¹ *Tadić Appeals judgement* (n 4) para 191.

¹⁰² *Tadić Appeals judgement* (n 4) para 191.

¹⁰³ ‘Under these circumstances, to hold criminally liable as a perpetrator only the person who materially performs the criminal act would disregard the role as co-perpetrators of all those who in some way made it possible for the perpetrator physically to carry out that criminal act’: *Tadić Appeals judgement* para (n 4)192.

stated that in the case of collective crimes such as international crimes, to hold persons who made it possible for the physical perpetrator to carry out the criminal act liable only as aiders and abettors would be to understate the degree of their criminal responsibility.¹⁰⁴ It is in this context that it distinguished between aiding and abetting and participation in a joint criminal enterprise:¹⁰⁵ (a) unlike the participant in a JCE, the aider/abettor is always an accessory to the crime perpetrated by the principal; (b) conviction for aiding and abetting does not require proof of a common plan which is an essential element of JCE; (c) an aider/abettor must act specifically to assist or encourage the perpetration of a crime and his support must have a substantial effect on its perpetration. In contrast, for JCE liability, it is sufficient that the accused's participation is in some way directed to the furthering of the common design; (d) the aider/abettor must have *knowledge* that his acts assist the commission of a specific crime. This differs from JCE liability, where the accused must have the intent to perpetrate the crime or the intent to further the common design and the *foresight* that crimes beyond this design are likely to be committed.

However, it is difficult to reconcile this prioritisation of JCE (as commission) over accessorial liability when the Chamber actually requires the aider/abettor to do more than the participant in a common criminal enterprise:¹⁰⁶ while the aider/abettor must act specifically to assist the perpetration of a crime and have a substantial effect on its perpetration, the participant in a joint criminal enterprise need only perform acts that are in some way directed to the furthering of the common design. The moral compass being used by the Chamber to calibrate responsibility therefore remains unclear.

¹⁰⁴ *Tadić Appeals judgement* (n 4) paras 191-2.

¹⁰⁵ *Tadić Appeals judgement* (n 4) para 229.

¹⁰⁶ Ambos, 'Joint Criminal Enterprise and Command Responsibility' (n 19) 171.

Possibly aware of these insecure foundations, the Appeals Chamber then claimed support for this ‘category of collective criminality’ from customary international law – mainly cases from domestic courts and international legislation.¹⁰⁷

c. JCE category I

The first category of cases identified by the Chamber is where all the perpetrators, acting pursuant to a common design, possess the same criminal intention. In order to be responsible under this mode of liability, the accused must have voluntarily participated in one aspect of the common design, and must have intended the object of the common design.¹⁰⁸ The Chamber relied on cases decided by the Allied Military courts set up in the aftermath of the Second World War to try persons accused of having committed crimes. It is difficult to analyse comprehensively the Chamber’s reasoning, as several of the cases cited are difficult to obtain.¹⁰⁹ Working within these limitations however, the Chamber’s reliance on these cases is questionable on various grounds.

First, some of the cases¹¹⁰ were decided under the express rules of evidence provided in Regulation 8(ii) of the Royal Warrant of 14th June, 1945 (on which the jurisdiction of the British Military Court was based) as amended by the Royal Warrant of 4th August, 1945, Army Order 127/1945.¹¹¹ Regulation 8(ii) is an evidentiary rule and there is nothing to indicate that it is based on any notion of common design liability. Second, in the cases which do not rely on this provision, the

¹⁰⁷ *Tadić Appeals judgement* (n 4) para 194.

¹⁰⁸ *Tadić Appeals judgement* (n 4) para 196.

¹⁰⁹ For criticism on this note, see Danner and Martinez (n 8) 110, fn 141.

¹¹⁰ *The Trial of Otto Sandrock and other (Almelo Trial)*, British Military Court, Almelo, 24th-26th November, 1945, UNWCC, vol I, 35; *Trial of Franz Schonfeld and others*, British Military Court, Essen, 11th-26th June, 1946, UNWCC, vol XI, 64, 71.

¹¹¹ This Regulation states: Where there is evidence that a war crime has been the result of concerted action upon the part of a unit or group of men, then evidence given upon any charge relating to that crime against any member of such unit or group, may be received as prima facie evidence of the responsibility of each member of that unit or group for that crime.

basis for attribution of liability is extremely unclear. The reasoning in these decisions either does not explicitly state the mode of responsibility being applied by the courts,¹¹² or employs vague terms such as being ‘concerned in the commission of the crime’ which are capable of multiple meanings, including liability for aiding and abetting.¹¹³ Third, quite a few of the cases cited involved a very small group of persons who were familiar with each other and physically present at the time of commission of the offences.¹¹⁴ This is a much narrower category of cases than those at which JCE liability is aimed.

The tribunal concluded its analysis of the first category of JCE on a rather astonishing note. It stated:

It should be noted that in many post-World War II trials held in other countries, courts took the same approach to instances of crimes in which two or more persons participated with a different degree of involvement. However, they did not rely upon the notion of common purpose or common design, preferring to refer instead to the notion of co-perpetration.¹¹⁵

The distinction drawn by the Chamber between ‘common purpose or common design’ and ‘co-perpetration’ is mystifying, given that most of the cases the Chamber

¹¹² See *Schonfeld* (n 110) 68-71; *The United States of America v Otto Ohlenforf et al (Einsatzgruppen)*, Trials of War Criminals before the Nuremberg Military Tribunals under Control Council Law No. 10, United States Government Printing Office, Washington, 1951, vol IV, 3. The *Tadić* Chamber relies on a statement of law that was part of the Prosecution’s closing statement in *Einsatzgruppen* rather than any part of the military court’s judgement: see Closing statement of the prosecution, 13 February 1948, by Brigadier General Telford Taylor, 369-383.

¹¹³ *Trial of Feurstein and others (Ponzano)*, Proceedings of a War Crimes Trial held at Hamburg, Germany (4-24 August, 1948), Judgment of 24 August 1948, 7-8; *Trial of Gustav Alfred Jepsen and others*, Proceedings of a War Crimes Trial held at Luneberg, Germany (13-23 August, 1946), Judgment of 24 August 1946, 241. The paragraph cited by the *Tadić Chamber* in support of common design is ambiguous on whether Jepsen was being held responsible for the acts committed by his agents, under his directions and with this active participation, rather than for being part of the ‘common enterprise’.

¹¹⁴ See Danner and Martinez (n 8) 111.

¹¹⁵ *Tadić Appeals judgement* (n 4) para 201.

cites would indeed be more akin to a notion of ‘co-perpetration’ as first articulated by the ICTY in *Prosecutor v Furundžija*.¹¹⁶

Furundžija, a commander of the Bosnian Croat anti-terrorist police unit, was charged with the war crimes of torture and rape for his interrogation of witnesses A and D, while another member of the police unit, Miroslav Bralo, repeatedly assaulted them and raped witness A before an audience of soldiers.¹¹⁷ Since the prosecution had not specified the precise form of liability in its indictment, it fell to the ICTY Trial Chamber to ascertain the appropriate mode of liability. The Chamber considered several post-Second World War cases dealing with liability for aiding and abetting and distinguished these from cases dealing with ‘co-perpetration’ which involved a group of persons pursuing a common design to commit crimes.¹¹⁸ It relied on two cases – *Dachau Concentration Camp* (discussed later) and *Auschwitz Concentration Camp* for this distinction. It also gleaned support from Article 25(3) of the Rome Statute of the International Criminal Court¹¹⁹ which distinguishes between participation in a common plan or enterprise on the one hand and aiding and abetting

¹¹⁶ *Furundžija* (n 82). ‘Co-perpetration’ liability in the subsequent jurisprudence of the ICTY and the ICC will be discussed later.

¹¹⁷ *Furundžija* (n 82) paras 127-8.

¹¹⁸ *Furundžija* (n 82) paras 191-210.

¹¹⁹ Rome Statute of the International Criminal Court, 2187 UNTS 90, *entered into force* July 1, 2002. Article 25 (3): In accordance with this Statute, a person shall be criminally responsible and liable for punishment for a crime within the jurisdiction of the Court if that person:

- (a) Commits such a crime, whether as an individual, jointly with another or through another person, regardless of whether that other person is criminally responsible;
- (b) Orders, solicits or induces the commission of such a crime which in fact occurs or is attempted;
- (c) For the purpose of facilitating the commission of such a crime, aids, abets or otherwise assists in its commission or its attempted commission, including providing the means for its commission;
- (d) In any other way contributes to the commission or attempted commission of such a crime by a group of persons acting with a common purpose. Such contribution shall be intentional and shall either:
 - (i) Be made with the aim of furthering the criminal activity or criminal purpose of the group, where such activity or purpose involves the commission of a crime within the jurisdiction of the Court; or
 - (ii) Be made in the knowledge of the intention of the group to commit the crime.

on the other.¹²⁰ It went on to conclude that two separate modes of liability had crystallised in international criminal law – ‘co-perpetrators who participate in a joint criminal enterprise’ and aiders and abettors.¹²¹

The *Furundžija* Trial Chamber then defined common design liability as consisting of participation in a joint criminal enterprise (*actus reus*) with the intent to participate (*mens rea*).¹²² It further held that the accused would be held guilty as a co-perpetrator (of torture) if he participated in an integral part of the crime (torture) and partook of the purpose behind the crime (torture).¹²³ While there is no clear distinction made out by the Trial Chamber between ‘co-perpetration’ and ‘joint criminal enterprise liability’, the Chamber in actual fact appeared to have introduced two distinct categories of liability (apart from aiding and abetting) in this instance.¹²⁴ The accused was convicted of torture as a ‘co-perpetrator’ since on all the evidence placed before the Trial Chamber, it was established that he played an integral role in the torture.¹²⁵ Since the accused did not personally rape or participate in an integral part of the crime of rape, his liability on this count was relegated to aiding and abetting.¹²⁶ The concept of joint criminal enterprise was not developed any further.

The cases cited by the *Tadic* Chamber in support of JCE I seem much closer to the concept of ‘co-perpetration’ articulated in *Furundžija*.¹²⁷ In almost all the cases, the accused is relatively close to the scene of the crime and provides active assistance,

¹²⁰ *Furundžija*, (n 82) paras 211-16.

¹²¹ *Furundžija*, (n 82) para 216.

¹²² *Furundžija*, (n 82) para 249.

¹²³ *Furundžija*, (n 82) para 257.

¹²⁴ For this analysis, see Boas (n 1) 13-14.

¹²⁵ *Furundžija*, (n 82) paras 265, 268.

¹²⁶ *Furundžija*, (n 82) para 273. see Boas (n 1) 13.

¹²⁷ See Boas (n 1) 18-19.

rather than being part of a large undefined group whose members he may never have met, but with whom he is presumed to share a common intention.

d. JCE category II

JCE II, labeled as a ‘variant’ of JCE I in the Tribunal’s formulation,¹²⁸ comprises ‘concentration camp cases’ where the alleged offences are committed by members of military or administrative units; i.e., by groups of persons acting pursuant to a concerted plan.¹²⁹ Whereas the *actus reus* elements are common to all forms of JCE, the *mens rea* differs. For JCE II, the accused must know of the system of ill-treatment and intend to further it. In support of this category, the Chamber relied on two cases decided by the US Military court sitting in Germany and the British Military court respectively: *Dachau Concentration Camp*¹³⁰ and *Belsen*.¹³¹ Both cases concerned charges against accused who were in important positions in concentration camps with having acted in pursuance of a common design in having committed various offences against the detainees.¹³²

In *Dachau Concentration Camp*, the crux of the prosecution case was indeed reliance on a ‘common design’ that required proof of: (1) a system to ill-treat the prisoners and commit the crimes, (2) each accused’s awareness of the system, (3) each accused’s encouragement and abetment in enforcing this system.¹³³

The defence challenged this notion of ‘common design’ on several counts, the most notable of which was the vagueness of the term ‘common design’ and its

¹²⁸ *Tadić Appeals judgement* (n 4) para 203.

¹²⁹ *Tadić Appeals judgement* (n 4) para 202.

¹³⁰ *Trial of Martin Gottfried Weiss and thirty-nine others*, General Military Government Court of the United States Zone, Dachau, Germany, 15th November-13th December, 1945, UNWCC, vol XI, 5.

¹³¹ *Trial of Josef Kramer and 44 others*, British Military Court, Luneberg, 17th September-17th November, 1945, UNWCC, vol II, 1.

¹³² *Dachau case* (n 130) 5, 7, *Belsen case* (n 131) 1.

¹³³ *Dachau case* (n 130) 13.

indistinguishability from a charge of conspiracy.¹³⁴ In the course of the trial, relying on Black's Law Dictionary, 'common intention' was defined as a 'community of intention between two or more persons to do an unlawful act'.¹³⁵

The decision of the Military court did not find it necessary to distinguish between 'conspiracy' and 'common design', though from the evidence adduced by the prosecution and the conviction based upon this, it can be surmised that the burden of proof was lower than it would be in a conspiracy charge.¹³⁶ There was no evidence to show that the accused had ever come together to form an agreement to kill and ill-treat the detainees; they did not all know each other; and were not even all at Dachau at the same time.¹³⁷ The conviction instead was based on the fact that there was a general system of cruelty in place in the camp, which was practiced with the active knowledge and participation of the accused. Everyone who took part in this 'common design' was guilty of a war crime, with the differing degrees of participation being reflected in the differential sentences imposed.¹³⁸ It is difficult however to state unreservedly that the Military Court sought to or was even conscious of convicting the accused pursuant to a mode of liability that was distinct from conspiracy.

This is also true of *Belsen*, where the prosecution charged the accused with being 'parties to a general conspiracy' (alternative expressions were "concerted action", "joint action", or "unit") to ill-treat the camp prisoners.¹³⁹ There is no explicit statement in the decision on what mode of responsibility was relied upon to finally convict the accused. Further, in his summing up of the prosecution case, the

¹³⁴ *Dachau case* (n 130) 14.

¹³⁵ *Dachau case* (n 130) 14.

¹³⁶ *Dachau case* (n 130) 14.

¹³⁷ *Dachau case* (n 130) 14.

¹³⁸ *Dachau case* (n 130) 14.

¹³⁹ *Belsen case* (n 131) 108.

Judge Advocate specifically clarified that in assessing responsibility for participation in the administration of the camp, a person's mere presence on the staff would not suffice – there had to be a deliberate commission of a war crime.¹⁴⁰

From these two cases, the Chamber derived the elements of JCE II as consisting of 'active participation in the enforcement of a system of repression, *as it could be inferred from the position of authority* and the specific functions held by each accused.'¹⁴¹ In addition, the accused must have known of the nature of the system and have had the intent to further the common design of ill-treatment.¹⁴² The Chamber was at pains to emphasise that the intent element could be inferred from the position of authority held by the accused, which could on its own indicate an awareness of the common design.¹⁴³

This emphasis is unfortunate for several reasons. First, it seems to go directly against the caveat introduced by the Judge Advocate in *Belsen* (one of the only two cases cited by the Chamber) that the mere position on the staff of a concentration camp would be insufficient to establish criminal responsibility. In the Chamber's formulation, a position of authority serves as inferential evidence for establishing both the *actus reus* and the *mens rea* elements of JCE II. This would give the position of the accused far more weight in establishing responsibility than what a fair reading of *Belsen* would indicate. Second, this takes away from the Chamber's claim that JCE II is merely a variant of JCE I. The very essence of JCE I is that the accused should have intended to perpetrate a certain crime (this being the shared intent on the part of all

¹⁴⁰ *Belsen case* (n 131) 120-21.

¹⁴¹ *Tadić Appeals judgement* (n 4) para 203 (emphasis added).

¹⁴² *Tadić Appeals judgement* (n 4) para 203.

¹⁴³ *Tadić Appeals judgement* (n 4) para 203.

co-perpetrators).¹⁴⁴ If the intent element can be inferred from the position of the accused in the hierarchy, and if this position can make him liable for not only his own conduct but for all crimes that may be part of the running of the concentration camp, and despite his lack of express knowledge of these other crimes, the intent element of JCE I is watered down to an astonishing degree in JCE II. Indeed, it comes to more closely resemble JCE III¹⁴⁵

e. JCE category III

JCE III, also referred to as ‘extended JCE’ in subsequent ICTY jurisprudence,¹⁴⁶ has proved to be the most controversial category of JCE liability developed by *Tadic*. According to *Tadic*, JCE III comprises cases ‘involving a common design to pursue one course of conduct where one of the perpetrators commits an act which, while outside the common design, was nevertheless a natural and foreseeable consequence of the effecting of that common purpose.’¹⁴⁷ As an instance of this, the Chamber formulated a case scenario remarkably similar to the facts in *Tadic*: the responsibility of an accused who shares the common intention of a group to effect ethnic cleansing in a region, in the course of which the victim/s were killed. Since murder is a foreseeable consequence of the forcible removal of civilians at gunpoint, the accused can be held responsible for the murder as well as the ethnic cleansing.¹⁴⁸ This is only if the accused was aware that the actions of the group were most likely to lead to the killing, but still chose to take that risk; in other words, the

¹⁴⁴ *Tadić Appeals judgement* (n 4) para 228.

¹⁴⁵ For a similar argument, see Steven Powles, ‘Joint Criminal Enterprise: Criminal Liability by Prosecutorial Ingenuity and Judicial Creativity?’ (2004) 2 JICJ 606, 609-10.

¹⁴⁶ See for instance, *Prosecutor v Blaskić*, Judgement, Case No. IT-95-14-A, ICTY Appeals Chamber (29 July 2004) para 33.

¹⁴⁷ *Tadić Appeals judgement* (n 4) para 204.

¹⁴⁸ *Tadić Appeals judgement* (n 4) para 204.

mental state is not one of mere negligence, but ‘advertent recklessness’ or *dolus eventualis*.¹⁴⁹

The Chamber traced these elements of JCE III beginning with cases of mob violence, where the common unlawful purpose is carried out by several participants, but the precise role of each perpetrator is uncertain, or it is difficult to determine the exact causal connection between individual perpetrators’ acts and the harm suffered.¹⁵⁰ The first two of these cases cited by the Chamber were *Essen Lynching*¹⁵¹ and *Borkum Island*,¹⁵² decided respectively by the British Military Court and the US Military Court. The facts of the two cases are largely similar – they involve German civilians and soldiers being charged with war crimes for having taken part in the repeated assault on and ultimate death of British and American POWs.

The prosecution in *Essen Lynching* had argued that ‘every person who, following the incitement to the crowd to murder these men, voluntarily took aggressive action against any one of these three airmen *is guilty in that he is concerned in the killing*’¹⁵³ The accused were all held guilty. The *Tadić* Chamber relied on this conviction to infer that though not all the accused intended to kill, they were nevertheless found guilty for being ‘concerned in the killing’. Thus, persons who struck a blow or incited the

¹⁴⁹ *Tadić Appeals judgement* (n 4) para 220. As has been rightly pointed out by some critics, the Chamber uses many different formulations to describe the *mens rea* applicable to JCE III: the consequence not covered in the common plan could be predicted and the accused was indifferent to the risk; *dolus eventualis* (advertent recklessness as described by the Chamber); culpa (negligence); and finally that the crime was foreseeable and the accused willingly took that risk: see Marco Sassoli and Laura Olson, ‘The Judgment of the ICTY Appeals Chamber on the Merits in the *Tadić* Case’ (2000) 839 Int’l Rev Red Cross 733, 747-8. The consequences of these variations will be discussed in detail in Section C of this Part.

¹⁵⁰ *Tadić Appeals judgement* (n 4) para 205.

¹⁵¹ *Trial of Erich Heyer and six others*, British Military Court, Essen, 18th-19th and 21st-22nd December, 1945, UNWCC, vol I, 88.

¹⁵² *United States v Kurt Goebell et al*, Case No 12-489, Report, Survey of the Trials of War Crimes Held at Dachau, Germany (15 Sept. 1948) 2-3.

¹⁵³ *Essen Lynching* (n 151) 89 cited in *Tadić Appeals judgement* (n 4) para 208.

murder were guilty of murder because they could have foreseen that this would result in the killing of the prisoners.¹⁵⁴

Even leaving aside the dubious reliance by the Chamber on a summary of the case which fails to state the legal basis of the verdict¹⁵⁵ it is contestable whether the prosecution actually relied on any theory of common design.¹⁵⁶ On the contrary, the prosecution cited several theories of liability in the course of its argument, including holding the accused responsible as accessories before the fact or as principal parties to the crime.¹⁵⁷ Further, even if the court did rely on some notion of common design, it is difficult to see why JCE I cannot be applied to the case – the common design was evidently to kill the prisoners, and the various accused played different roles in that common design with the intent to accomplish its objective.

The same objection can be raised against *Tadic*'s reliance on the holding in *Borkum Island*. Here, the prosecution had developed a notion of 'common design' which stressed the role of each of the accused as a cog in the wheel of the common design and their responsibility for the prisoners' murders for having participated in the violence that led to the killing. The Chamber itself acknowledged that this conception was closer to JCE I rather than JCE III.¹⁵⁸ Despite this, the Chamber stated that since some of the accused had been found guilty of assault, whereas others had been convicted for murder without any evidence that they had actually killed the prisoners, this must have been on the basis of the latter's ability to predict that the assault would

¹⁵⁴ *Tadić Appeals judgement* (n 4) para 209.

¹⁵⁵ Danner and Martinez (n 8) 110-111.

¹⁵⁶ Danner and Martinez (n 8) 111.

¹⁵⁷ *Essen Lynching* (n 151) 90-91.

¹⁵⁸ *Tadić Appeals judgement* (n 4) paras 210-11. It is also pertinent to note that in one of its final arguments, the prosecution in fact urged that the Anglo-American doctrine of conspiracy was applicable to the case: see Maximilian Koessler, 'Borkum Island Tragedy and Trial' (1956) 47 J Crim L, Criminology and Pol Sci 183, 194.

result in the killings.¹⁵⁹ This conclusion is however quite misleading.¹⁶⁰ If anything, one can argue that if JCE III were being applied to convict some of the accused of murder, it should possibly have been applied to hold everyone in the group guilty of murder rather than assault.

The *Tadic* Chamber then went on to analyse some Italian cases dealing with persons charged with having committed crimes during World War II. The first, and possibly the only good case,¹⁶¹ cited for the proposition that a person may be held criminally responsible for the acts of a group which were not part of the original criminal purpose was *D'Ottavio et al.*¹⁶² In this case, two former Yugoslav prisoners who had escaped from a concentration camp were sought to be captured by four armed civilians, one of whom shot at the prisoners resulting in their death. The trial court's conviction of the accused, not only for illegal restraint, but also for manslaughter, was upheld by the Court of Cassation applying Article 116 of the Italian Criminal Code.¹⁶³

Article 116 provided that where the offence committed was different from the one intended by the participants, the participants would still be responsible if the criminal result was a consequence of their conduct in accordance with the canon that

¹⁵⁹ *Tadić Appeals judgement* (n 4) paras 212-13.

¹⁶⁰ See also Powles (n 145) 616.

¹⁶¹ The relevance of *Aratano et al*, the next case cited by the *Tadić* Chamber, is not quite obvious. The case if anything deals with exculpatory factors for attributing liability to a group of persons acting together, when the crime committed by one of them goes beyond the intended object. It proves nothing in terms of the standard that should be adopted for attribution of criminal responsibility. The same is true of subsequent Italian cases cited by the *Tadić* Chamber for this proposition: *Tadić Appeals judgement* paras (n 4) 216-217.

¹⁶² Italian Court of Cassation, Criminal Section I, Judgment of 12 March 1947, No 270 (trans A Cassese in (2007) 5 JICJ 232 (original pagination retained) See also Powles (n 145) 616-7.

¹⁶³ This article states: whenever the crime committed is different from that willed by one of the participants, also that participant answers for the crime, if the fact is a consequence of his action or omission (*D'Ottavio* (n 162) 3).

the cause of a cause is also the cause of the thing caused.¹⁶⁴ This required an objective causation nexus – in this case, all the participants directly co-operated in illegally detaining the victims which was the indirect cause of the shooting and killing of the victims by one of them. Further, there must have been a psychological causation nexus – all the participants shared the intention to unlawfully detain the prisoners while foreseeing (since they carried weapons) that one of them may shoot the prisoners in order to achieve this common purpose.¹⁶⁵

In addition to the problem that *D'Ottavio*'s holding on the mode of liability is based on an express provision of the Italian Criminal Code, there are other distinctions between the reasoning espoused in *D'Ottavio* and JCE III, which make *Tadic*'s reliance on it less credible. The liability in *D'Ottavio* stems from the principle of concurrence of independent causes¹⁶⁶ instead of the notion of collective responsibility which is at the heart of all variants of JCE. Further, *D'Ottavio* employs the causation nexus of foreseeability within a very small closed group of people who work in concert, which is very different from JCE III liability which can stretch across individuals who were never in contact with each other and were sometimes unaware of each other's exact actions.

f. The Tadic Chamber's concluding remarks on JCE

The *Tadic* Chamber concluded by saying that 'the notion of common design as a form of accomplice liability is firmly established in customary international law'¹⁶⁷ and is implicitly included in the ICTY Statute. It sought to further buttress this

¹⁶⁴ *D'Ottavio* (n 162) 5.

¹⁶⁵ *D'Ottavio* (n 162) 5-6.

¹⁶⁶ See *D'Ottavio* (n 162) 5.

¹⁶⁷ *Tadic Appeals judgement* (n 4) para 220 (emphasis added).

claim by citing two international treaties that adopt the notion of common plan:¹⁶⁸ the International Convention for the Suppression of Terrorist Bombing,¹⁶⁹ and the Rome Statute of the International Criminal Court.

In the case of the former, the Chamber cited Article 2(3)(c)¹⁷⁰ to show that the Convention adopted the concept of liability for acting pursuant to a ‘common criminal purpose’ as distinct from that of aiding and abetting which was included within ‘participating as an accomplice’ in an offence. The Chamber itself acknowledged that the Convention was not yet in force (it has since entered into force) but since it was adopted by consensus in the General Assembly, it could be taken to reflect the legal views of a large number of States.¹⁷¹ There are two interesting points to note here—first, the Chamber distinguishes common design liability from ‘accomplice liability’, a label it used to describe common design in the preceding paragraph of the judgment; second, the Article cited by the Chamber does not in any way endorse the most controversial form of liability propounded by the Chamber – JCE III. The latter objection can also be applied to Article 25 of the Rome Statute cited by the Chamber, for which Article 2(3)(c) of the Terrorist Bombing Convention was a direct inspiration. Moreover, since the wording of the common criminal purpose provision in the Rome Statute was adopted as a consensus alternative to the far more controversial inclusion of conspiracy,¹⁷² it is unclear how far common criminal

¹⁶⁸ *Tadić Appeals judgement* (n 4) paras 221-23.

¹⁶⁹ GA Res 164, UN GAOR, 52nd Sess, Supp No 49, at 389, UN Doc A/52/49 (1998), *entered into force* May 23, 2001.

¹⁷⁰ Any person also commits an offence if that person: (c) In any other way contributes to the commission of one or more offences as set forth in paragraph 1 or 2 of the present article by a group of persons acting with a common purpose; such contribution shall be intentional and either be made with the aim of furthering the general criminal activity or purpose of the group or be made in the knowledge of the intention of the group to commit the offence or offences concerned.

¹⁷¹ *Tadić Appeals judgement* (n 4) para 221.

¹⁷² R Lee, *The International Criminal Court – The Making of the Rome Statute* (Kluwer Law International 1999) 99; Kai Ambos, ‘Article 25’ (n 22) 483.

purpose liability in the Rome Statute extends.¹⁷³ This will be discussed in Section E in greater detail.

The Chamber then briefly made mention of national legislation in support of common criminal purpose liability, only to conclude that it does not establish any coherent practice among States.¹⁷⁴ It differentiated between (a) jurisdictions that provide for liability for crimes envisaged in the common purpose, regardless of the degree of individual participation; and (b) jurisdictions that in addition also impute responsibility for crimes that are a foreseeable consequence of the common plan.¹⁷⁵ Since these jurisdictions embraced differing notions of common purpose, and they were not representative of the major legal systems in the world, the Chamber rejected these as a source of general principles of law in international law.¹⁷⁶

g. The muddled legacy of Tadic

Tadic is an inventive effort to establish JCE as an accepted mode of liability for international crimes. The ICTY's interpretative methodology and its elucidation of the elements of JCE echo the driving spirit behind the Nuremberg prosecutions: devising an acceptable solution to enable the prosecution of individuals for crimes of enormous proportions, where evidence of specific crimes would be almost impossible to procure against these individuals. *Tadic* however goes even beyond the IMT decisions, controversial as they were, in its attempt to prevent impunity for persons who participate in the commission of international crimes. For instance, the IMT verdicts were willing to hold responsible persons who were aware of the object of a

¹⁷³ Powles (n 145) 617.

¹⁷⁴ *Tadić Appeals judgement* (n 4) para 225.

¹⁷⁵ *Tadić Appeals judgement* (n 4) para 224. The Chamber cited Germany and the Netherlands as examples for the former category, and France, Italy, UK, US, Australia, Canada and Zambia for the latter.

¹⁷⁶ *Tadić Appeals judgement* (n 4) para 224.

collective of which they were part, irrespective of their relationship to the specific criminal acts committed pursuant to this object. JCE resembles this formulation in its flexible understanding of what constitutes participation in the criminal activities of an amorphous collective operating over a significant length of time. However, it does not limit the breadth of this formulation in the manner done by the IMT, for instance in its definition of a conspiracy.¹⁷⁷ *Tadic*'s reliance on a handful of cases and treaties, that moreover do not support its deductive reasoning, to establish the elements of JCE is also deeply problematic from the point of view of the sources that may legitimately be used to establish customary international law.¹⁷⁸

Finally, *Tadic*'s conceptual confusion in its concluding observations over JCE as a mode of principal versus accessory liability is unfortunate. The *raison d'être* for its creation as a form of 'commission' liability that adequately reflects the degree of the accused's responsibility¹⁷⁹ as well as the distinction *Tadic* draws between aiding and abetting and JCE on the basis that the former is *accessorial* liability,¹⁸⁰ point unequivocally to JCE having been conceptualised as a form of principal liability. This mistake in characterising JCE as a form of accomplice liability¹⁸¹ has regrettably been repeated in successive decisions, which have either supported JCE as principal liability,¹⁸² or as accessory liability,¹⁸³ or simply considered it as a form of both.¹⁸⁴

¹⁷⁷ See text to notes 69 to 73.

¹⁷⁸ Traditionally, customary international law requires the establishment of two elements: state practice and *opinio juris*. "State practice refers to general and consistent practice by states, while *opinio juris* means that the practice is followed out of a belief of legal obligation." Anthea E Roberts, 'Traditional and Modern Approaches to Customary International Law: A Reconciliation' (2001) 95 AJIL 757 and references therein.

¹⁷⁹ *Tadić Appeals judgement* (n 4) paras 188, 192.

¹⁸⁰ *Tadić Appeals judgement* (n 4) para 229.

¹⁸¹ *Tadić Appeals judgement* (n 4) para 220. For a succinct statement of the contrary pronouncements post *Tadic*, see Ciara Damgaard, *Individual Criminal Responsibility for Core International Crimes* (Springer-Verlag 2008) 193-212.

¹⁸² See for instance *Prosecutor v Milutinovic*, Decision on Dragoljub Odjanic's Motion Challenging Jurisdiction – Joint Criminal Enterprise, Case No. IT-99-37-AR72, ICTY Appeals Chamber (21 May

The far reaching doctrinal implications of this distinction will be considered in detail in Part II.

C. ELEMENTS OF JOINT CRIMINAL ENTERPRISE

Isolating the constituent elements of JCE is not a simple task. On the face of it, the JCE framework established by *Tadić* has served as the template for all subsequent discussions on JCE by the ICTY, other criminal tribunals, as well as academic commentators.¹⁸⁵ Notwithstanding the apparent precision of this framework though, the devil here truly lies in the details. Each element of JCE merits closer scrutiny.

1 Actus Reus

a. Plurality of persons

Since JCE is a mode of establishing individual liability for crimes that are collective in nature, JCE liability cannot exist unless the accused acts along with a number of other persons towards the perpetration of a crime.¹⁸⁶ This does not imply that the accused must physically perpetrate the crime.¹⁸⁷ There is no minimum or maximum number of persons who may constitute this plurality.¹⁸⁸ Neither does it need to be organised in any military or political structure.¹⁸⁹

2003) para 20 and the Separate Opinions of Judge Hunt and Judge Shahabuddeen; *Prosecutor v Krnojelac*, Judgement, Case No. IT-97-25-A, ICTY Appeals Chamber (17 September 2003) paras 73-74.

¹⁸³ *Prosecutor v Brdanin and Talic*, Decision on Motion by Momir Talic for Provisional Release, Case No. IT-99-36/1, ICTY Trial Chamber (28 March 2001) paras 43-44; *Prosecutor v Krnojelac*, Judgement, Case No. IT-97-25-T, ICTY Trial Chamber (15 March 2002) para 77.

¹⁸⁴ See for instance, *Prosecutor v Kvočka*, Judgement, Case No IT-98-30/1-T, ICTY Trial Chamber (2 November 2001) paras 248, 249, 271, 273, 284.

¹⁸⁵ Boas (n 1) 34 and fns therein.

¹⁸⁶ See for instance, *Prosecutor v Ntakirutimana and Ntakirutimana* Judgement, Case Nos. ICTR-96-10-A and ICTR-96-17-A, ICTR Appeals Chamber (13 December 2004) para 466; *Prosecutor v Stakić*, Judgement, Case No. IT-97-24-A, ICTY Appeals Chamber (22 March 2006) para 64.

¹⁸⁷ *Prosecutor v Brdanin*, Judgement, Case No. IT-99-36-A, ICTY Appeals Chamber (03 April 2007) para 410.

¹⁸⁸ Even two persons are sufficient for JCE liability to ensue: *Kvočka Trial Judgement* (n 184) para 307; *Prosecutor v Brdanin*, Judgement, Case No. IT-99-36-T, ICTY Trial Chamber (1 September

It is pertinent to recall that in nearly all the decisions relied on by the *Tadic* Appeals Chamber, the number of persons forming the plurality was relatively small. They were moreover familiar with each other and physically present at the time of commission of the crime.¹⁹⁰ There is no such requirement for the plurality element of JCE to be satisfied.

In fact, the lack of specificity required in pleading and convicting on the basis of JCE is disquieting. The indictment may contain the identities of the individuals constituting the JCE, but if that is not possible, simply stating the category or group to which they belong suffices.¹⁹¹ JCE charges tend to cover a fairly broad range of crimes committed across an extensive territory over a long period of time. For instance, X may be charged for having been part of a JCE that involved the forcible transfer of population in region Y of a country. The plurality element in its current formulation could encompass all the groups that were in some way involved in the transfer - members of the dominant ethnic group, the militia of the country, armed groups, and even civilians. There are no guidelines on what factors decide with which group/groups X is considered to be associated, or whether it is even necessary that all these separate groups must work cohesively to form a plurality. There appear to be no outer boundaries to the size of the group or its time of operation.

2004) para 262; *Prosecutor v Mpambara*, Judgement, Case No. ICTR-01-65-T, ICTR Trial Chamber (11 September 2006) para 13.

¹⁸⁹ See for instance, *Tadic Appeals Judgement* (n 4) para 227; *Stakic Appeals Judgement* (n 188) para 64; *Ntakirutimana Appeals Judgement* (n 186) para 466.

¹⁹⁰ This statement of course does not apply to JCE II, where there is an organised system of repression in place. For JCE I cases cited by *Tadic*, refer to *Almelo trial*; *Hoelzer et al.*

¹⁹¹ See *Prosecutor v Simic et al.*, Judgement, Case No. IT-95-9-T, ICTY Trial Chamber (17 October 2003) para 145; *Prosecutor v Simba*, Judgement, Case No. ICTR-01-76/T, ICTR Trial Chamber (13 December 2005) para 389; *Brdanin Trial Judgement* (n 188) para 346.

b. The existence of a common plan, design or purpose

The second important physical element of JCE is the existence of a common plan, design or purpose, which amounts to or involves the commission of a crime provided for in the Statute (of the criminal tribunal in question).¹⁹²

A ‘common plan’ has been defined as an arrangement or understanding between the accused and one or more persons that a crime will be committed.¹⁹³ This criminality can consist in either the ultimate objective of the plan, or the means used to accomplish it. According to the SCSL Appeals Chamber, ‘the requirement that the common plan, design or purpose of a joint criminal enterprise is inherently criminal means that it must either have as its objective a crime within the Statute, *or contemplate crimes* within the Statute as the means of achieving its objective.’¹⁹⁴ Thus, even though the ultimate objective of the common plan alleged in the Indictment - gaining and exercising political power and control over the territory of Sierra Leone- may not be criminal, the means to achieve this contemplated by the accused, such as unlawful killings, forced labour, and physical and sexual violence should be crimes within the SCSL Statute.¹⁹⁵ The criticism directed against this formulation has been mainly concerned with defective indictments that allege an objective which is not a crime within the court’s jurisdiction without also specifically pleading that the attainment of this objective involves crimes contained in the relevant Statute.¹⁹⁶

¹⁹² *Tadic Appeals Judgement* (n 4) para 227; *Stakic Appeals Judgement* (n 186) para 64.

¹⁹³ *Simic Trial Judgement* (n 191) para 158; *Prosecutor v Blagojevic and Jokic*, Judgement, Case No. IT-02-60-T, ICTY Trial Chamber (17 January 2005) para 699. See further references at Boas (n 1) 37.

¹⁹⁴ *Prosecutor v Brima, Kamara, and Kanu*, Judgment, Case No. SCSL-04-16-T, SCSL Appeals Chamber (22 February 2008) para 80 (emphasis added).

¹⁹⁵ *AFRC Appeals Judgement* (n 194) paras 82-84.

¹⁹⁶ See William Schabas, ‘Special Court for Sierra Leone Rejects Joint Criminal Enterprise’ (*The Trial of Charles Taylor*, 25 June 2007) <<http://charlestaylortrial.org/expert-commentary/professor-william-schabas-on-afrc-decision/>> accessed 13 December 2010.

The ICTY has consistently held that there is no requirement for the common plan or agreement to have been reached at any particular point in time – it could arise extemporaneously¹⁹⁷ and may even materialise after the conduct constituting the crime has already commenced.¹⁹⁸ The dominant jurisprudence suggests that this agreement need not be express, and its existence may be inferred from all the circumstances.¹⁹⁹ For instance, in *Blagojevic and Jokic*, the existence of an understanding to commit murder and persecution at Srebrenica was inferred from the fact that over 7000 male Bosnian Muslims were detained, murdered and buried in a span of five days. This could not have been accomplished without considerable planning and co-ordination amongst JCE members.²⁰⁰

Special considerations apply for establishing the existence of a common plan in the case of JCE II: there is no requirement to have an agreement; instead, the entire system of repression is treated as a common plan or design.²⁰¹ The ICTY has however not been rigorous in construing this condition. It has stated that as long as there is an ‘involvement’ of the accused in the system of ill-treatment, it is ‘less important to prove’ that he had an agreement with other JCE members.²⁰² The applicable standard of liability is whether the accused ‘knew of the system and agreed to it, without it

¹⁹⁷ *Tadic Appeals Judgement* (n 4) para 227; *Stakic Appeals Judgement* (n 186) para 64; *Prosecutor v Vasiljevic*, Judgement, Case No. IT-98-32-A, ICTY Appeals Chamber (25 February 2004) paras 100, 109.

¹⁹⁸ *Krnjelac Trial Judgement* (n 183) para 80.

¹⁹⁹ *Krnjelac Trial Judgement* (n 183) para 80; *Stakic Appeals Judgement* (n 186) para 64; *Vasiljevic Appeals Judgement* (n 197) para 100.

²⁰⁰ *Blagojevic and Jokic* (n 193) para 721.

²⁰¹ *Krnjelac Appeals Judgement* (n 201) para 97; *Prosecutor v Kvočka*, Judgement, Case No. IT-98-30/1-A, ICTY Appeals Chamber (28 February 2005) paras 118-119.

²⁰² *Krnjelac Appeals Judgement* (n 182) para 96.

being necessary to establish that he had entered into an agreement with... the principal perpetrators of the crimes'.²⁰³

These are two quite different criteria for liability. An accused can be 'involved' in a system in various ways – through his indirect assistance in the form of his conduct, express approval by way of words or moral support, or direct physical contribution to the crimes. The extent of this involvement can also vary. For instance, a photographer who was periodically brought into a prison camp to take pictures of certain prisoners could be 'involved' in the system of repression without any exact knowledge of why he is taking the photographs or whether the prisoners are being subjected to ill-treatment (even if he may have his suspicions). Would this be sufficient to hold him liable under JCE II? The second standard - 'agreeing' to the system - is perhaps an even lesser form of involvement. In the Chamber's formulation, it appears to connote mere acquiescence (coupled with knowledge) in the system of repression. Does this imply that if the accused is aware of the system, he has a positive obligation to take action to actively denounce or dissociate himself from the system? If so, does this duty depend on his position in the hierarchy (for instance, he is in a position of authority within the system), or does it apply even to low level members of the system?

The construction of 'common plan' by the ICTY is problematic for several reasons. If there is indeed no requirement for an express arrangement, no ostensible temporal or spatial limit to the common plan, and the spontaneous action of persons resulting in a common criminal result can be used to infer a common design, then persons in far flung locations who may have scarcely ever been in contact could be held responsible for each other's actions. Taken to its extreme, this formulation can be used to charge

²⁰³ *Krnojelac Appeals Judgement* (n 182201) para 97.

persons involved with loosely affiliated terrorist networks around the world with crimes committed by persons working for groups other than their own, even if they had already dissociated themselves from the group, purely on the basis that they had a ‘common plan’ to strike terror in a certain region at a certain point in time. Tempting as this may be from a prosecutorial and evidentiary point of view, this extension of individual responsibility for the acts of persons one hardly knows would be unacceptable.

Some decisions of the ICTY show its discomfort with this broad standard of liability. In *Krajisnik*, the Trial Chamber expressly stated that simply having a common objective was insufficient to transform a group of persons into a plurality. Instead, persons in the criminal enterprise must act jointly, or in concert, to achieve this common objective, in order to be held jointly responsible for the crimes committed thereto.²⁰⁴ The Chamber nevertheless failed to clarify the nature of this ‘joint’ action and on the facts of the case mostly did not concern itself with establishing the exact nature of the relationship between the accused and the other JCE participants or even fully specifying the membership of the JCE.²⁰⁵

The most significant attempt to qualify the extent of ‘common purpose’ is the Trial Chamber’s decision in *Brdanin*, where the accused, who was a high level

²⁰⁴ *Prosecutor v Krajisnik*, Judgement, Case No. IT-00-39-T, ICTY Trial Chamber (27 September 2006) para 884. The Trial Chamber cited some instances of how this acting in concert could be ascertained (paras 1081-82) – “Whether the perpetrator was a member of, or associated with, any organised bodies connected to the JCE; whether the crimes committed were consistent with the pattern of similar crimes by JCE members against similar kinds of victims; whether the perpetrator acted at the same time as members of the JCE, or as persons who were tools or instruments of the JCE; whether the perpetrator’s act advanced the objective of the JCE; whether the perpetrator’s act was ratified implicitly or explicitly by members of the JCE; whether the perpetrator acted in cooperation or conjunction with members of the JCE at any relevant time; whether any meaningful effort was made to punish the act by any member of the JCE in a position to do so; whether similar acts were punished by JCE members in a position to do so; whether members of the JCE or those who were tools of the JCE continued to affiliate with the perpetrators after the act; finally – and this is a non-exhaustive list – whether the acts were performed in the context of a systematic attack, including one of relatively low intensity over a long period.”

²⁰⁵ *Krajisnik Trial Judgement* (n 204) paras 1086-1088; *Boas* (n 1) 102-3.

political figure within the Serbian Democratic Party (SDS) and within the ARK (an area within the planned Bosnian Serb State) was charged with having been a member of a JCE that included the leadership of the SDS, political figures within the ARK, members of the army (VRS) and the Serb paramilitary forces and others. The purpose of the JCE was the permanent forcible removal of Bosnian Muslim and Croat inhabitants from the territory of the planned Bosnian Serb State. The Chamber held that in order to establish JCE liability, there must be an understanding between the accused and the *physical perpetrators* of the crime to commit that particular crime, or a crime that is a natural and foreseeable consequence of the crime agreed upon.²⁰⁶ It would not be enough to simply show an agreement between the accused and the person in control of a military or similar unit committing the crime.²⁰⁷ This mutual understanding or arrangement to commit a crime could be established through direct evidence, or could be inferred from the fact that the accused and the physical perpetrators acted in unison to implement the common plan, only when this was the sole inference possible from the evidence at hand.²⁰⁸ A necessary implication of this definition of an ‘agreement’ is that the physical perpetrator must be a member of the JCE.²⁰⁹ The Chamber concluded its discussion by stating that given the ‘extraordinarily broad nature’ of the case and the structural remoteness of the accused from the commission of the crimes, JCE may not be the appropriate mode of liability to describe the accused’s responsibility.²¹⁰

Brdanin has evoked mixed reactions by international criminal lawyers. Some argue that the requirement of an agreement between the physical perpetrators of the crime

²⁰⁶ *Brdanin Trial Judgement* (n 188) paras 344, 347 (emphasis added).

²⁰⁷ *Brdanin Trial Judgement* (n 188) para 347.

²⁰⁸ *Brdanin Trial Judgement* (n 188) paras 352-353.

²⁰⁹ *Brdanin Appeals Judgement* (n 187) paras 389-391.

²¹⁰ *Brdanin Trial Judgement* (n 188) para 355.

and the accused complements the notion of sharing of the criminal intent by all members of the enterprise which is at the heart of JCE.²¹¹ The contrary view is that this criterion will make it nearly impossible to convict high level individuals who are physically often remote from the commission of the crime.²¹² One suggestion has been to attribute JCE liability to individuals who are structurally remote from the commission by conceptualising the attribution of liability for high level accused through a structure of multiple and overlapping JCEs, rather than through one single massive JCE.²¹³ In this structure, two separate JCEs are envisaged – one between the high level accused (say political or other leaders who plan and put into motion the crimes in question) and the other between the actual physical perpetrators of the crimes (say a military unit). If a non-physical perpetrator who is part of the subsidiary JCE that physically perpetrates the crimes (such as the commander of the military unit) is also a member of the senior JCE in charge of planning the crimes (say in his dual role as the Minister for Security), there is no reason why all the crimes committed by physical perpetrators of the subsidiary JCE could not be attributed to all the members of the senior JCE, as long as the actions of the subsidiary JCE were in pursuance of the plan formulated by the senior JCE. The relevant agreement then is not between the physical perpetrators of the crime and the accused high level offender, but between the accused and a non-physical perpetrator of the subsidiary

²¹¹ Antonio Cassese, 'The Proper Limits of Individual Responsibility under the Doctrine of Joint Criminal Enterprise' (2007) 5 JICJ 109, 126; Elies van Sliedregt, 'Joint Criminal Enterprise as a Pathway to Convicting Individuals for Genocide' (2007) 5 JICJ 184, 200-201.

²¹² Katrina Gustafson, 'The Requirement of an "Express Agreement" for Joint Criminal Enterprise Liability' (2007) 5 JICJ 134, 144-145. See also Allen O'Rourke, 'Joint Criminal Enterprise and Brdanin: Misguided Overcorrection' (2006) 47 Harv Int'l L J 307.

²¹³ Gustafson (n 212). For criticism of Gustafson's position, see Boas (n 1) 89 stating that this is clearly a specious construct for the attribution of liability.

JCE.²¹⁴ Of course, in this situation, the criminal plan of the subsidiary JCE would be subsumed by and narrower than the senior JCE.²¹⁵

Construing JCE in this fashion however turns it into an amalgam of superior responsibility (which is typically a form of omission liability for failing to prevent or punish the criminal conduct of subordinates) and some form of conspiracy liability. The attribution of liability becomes predicated upon a vertically defined command structure (which is quite different from a ‘mutual understanding’ between individuals who may or may not be connected in a hierarchical relationship). The connection between the various members of the criminal plan gets even more attenuated: the other members of the ‘senior’ JCE may have undertaken no further actions pursuant to the ‘policy’ and yet be held responsible for crimes being committed pursuant to the ‘plan’ of the subsidiary JCE, which may be only a far-fetched instantiation of their policy. This formulation scarcely mirrors the notion of JCE as equal liability of individuals sharing the same criminal plan and intention, and acting on it collectively towards its accomplishment.

The concern that limiting JCE liability in this manner may make it difficult to prosecute high level accused is understandable, but cannot be taken as a decisive argument for accepting a mode of liability that appears to stretch its own notion of common plan beyond recognition. The *Brdanin* Appeals Chamber’s acknowledgement that such policy arguments are teleological and inappropriate for determining the validity of a theory of individual criminal responsibility²¹⁶ goes a little too far in completely rejecting the value of teleological considerations in

²¹⁴ Gustafson (n 212) 146-148.

²¹⁵ Gustafson (n 212) 149.

²¹⁶ *Brdanin Appeals Judgement* (n 187) para 421. See also, a similar teleological argument in O’Rourke (n 212) 323.

formulating criminal law and policy. However, it is certainly true that if one chooses to go down the path of using such arguments, then one must also consider competing policy arguments, such as the preservation of individual culpability and fair labeling. The Appeals Chamber nonetheless overturned the Trial Chamber's requirement of an express agreement. It relied heavily on the Separate Opinion of Judge Bonomy in *Prosecutor v Milutinovic*,²¹⁷ on whether responsibility for 'commission' of the crime through participation in a JCE is possible where the physical perpetrator is not a JCE member.²¹⁸ Judge Bonomy considered this question under three headings: previous tribunal jurisprudence, international case law, and general principles of criminal law.

His analysis of ICTY jurisprudence revealed that this issue had not been specifically addressed in any decision by the ICTY. It would moreover not be inconsistent with past jurisprudence to hold a JCE participant liable for commission where the physical perpetrator(s) of the crime is a non-member *but acts as an instrument of the JCE*.²¹⁹ Judge Bonomy introduces a completely new element into the modes by which a person can be held responsible as a JCE member: not only the accused, but no member of the JCE, needs to commit the *actus reus* of the crime in question. Instead, as long as any member of the JCE can be held responsible for using someone outside the JCE to commit the crime (and as the discussion will show further, the physical perpetrator need not share or be aware of the intent behind the crime) all members of the JCE become liable for its commission. He however fails to specify the kind of relationship that must exist between the JCE members and the physical perpetrators of the crime. What must be the level of control exercised by JCE

²¹⁷ *Prosecutor v Milutinovic*, Decision on Ojdanic's Motion Challenging Jurisdiction, Case No. IT-05-87-PT, ICTY Trial Chamber (22 March 2006).

²¹⁸ *Milutinovic* (n 217) Separate Opinion of Judge Bonomy, para 1.

²¹⁹ *Milutinovic* (n 217) Separate Opinion of Judge Bonomy, para 13 (emphasis added).

members over the physical perpetrators - is it complete dominance over their actions, or simply using them in some way to execute the plan, for example through implicit approval of their conduct? Is it sufficient that only one member of the JCE has a connection with different groups of physical perpetrators committing a series of different crimes under the common plan for the rest of the JCE members to be held responsible even if they are unaware of the method of execution of the 'common plan' and do not act to lend it any further support?

In drawing support from international case law for JCE, Justice Bonomy cited two cases decided by the Military Tribunals established under Control Council Law No. 10: the *Justice case*²²⁰ and the *RuSHA case*²²¹ both of which held the accused liable for their connection with the common criminal plan of racial discrimination, even though the *actus reus* was perpetrated by physical perpetrators who simply carried out their orders. The state of mind of the actual physical perpetrators was never in issue.²²² Excessive reliance on these decisions would however be inappropriate given that as discussed earlier, the whole point of JCE is to hold the accused liable as principals rather than accessories, a distinction which was blurred in the judgements of the tribunals acting under Control Council Law No 10. The indictments in these two cases charged the accused as principals as well as accessories and the judgements did not distinguish between various modes of responsibility in their opinions.²²³

²²⁰ *United States v Altstoetter et al.*, U.S. Military Tribunal, Judgement, 3–4 December 1947 in Trials of War Criminals before the Nuernberg Military Tribunals under Control Council Law No. 10 (1951), vol. III.

²²¹ *United States v Greifelt et al.*, U.S. Military Tribunal, Judgement, 10 March 1948, in Trials of War Criminals before the Nuernberg Military Tribunals under Control Council Law No. 10 (1951), vol. V.

²²² *Milutinovic* (n 217) Separate Opinion of Judge Bonomy, paras 18-21, 25.

²²³ See especially *Justice case* (n 220) 1063.

Justice Bonomy also drew support from general principles of criminal law common to most legal systems of the world. He stated that in most common law jurisdictions, the distinction between principals and accessories is nominal, and especially accessories before the fact (persons who order, counsel, or otherwise aid or abet a crime) are as culpable as principal perpetrators.²²⁴ Civil law jurisdictions hold an accused who uses an innocent agent to commit a crime liable as a principal.²²⁵ He thus concluded that most legal systems recognise imposition of liability on an accused who is not the physical perpetrator of the crime, as long as his conduct causes some element of the *actus reus*. The mental state of the actual physical perpetrator is irrelevant.²²⁶

These statements again deserve more nuanced consideration than Judge Bonomy offered them. One of the main reasons why JCE liability has been developed by courts and is charged so frequently by prosecutors is that other modes of accessory liability are considered to only inadequately reflect the true role of the accused in the crime.²²⁷ The accused in a JCE is not simply *liable in the same way* as the principal; *he is the principal*. Even if there is little difference in the punishment of accessories and principals in the common law jurisdictions cited, these are still conceptually distinct categories, and the distinction is certainly relevant for JCE liability in international criminal law.

In addition to the sources and reasoning used in Judge Bonomy's opinion, the *Brdanin Appeals Chamber* also took into account two previous decisions of the

²²⁴ *Milutinovic* (n 217) Separate Opinion of Judge Bonomy, para 29 citing the law in Scotland, England, the US, and Australia.

²²⁵ *Milutinovic* (n 217) Separate Opinion of Judge Bonomy, para 28 citing the law in Germany, France, Poland, Argentina and Colombia.

²²⁶ *Milutinovic* (n 217) Separate Opinion of Judge Bonomy, para 30.

²²⁷ See for instance, *Tadic Appeals Judgement* (n 4) para 192.

ICTY²²⁸ that had held only political and military leaders responsible as JCE members, even though the crimes in question had been carried out by lower level perpetrators who were not members of the JCE.²²⁹ It then concluded that in order to establish JCE liability, it is not important whether the physical perpetrator of the crime is a JCE member, but whether ‘the particular crime in question forms part of the common purpose’. This could be inferred from various circumstances, including whether some member of the JCE closely co-operated with the physical perpetrator to further the common criminal purpose. It is not essential that the latter knows of the existence of the JCE.²³⁰ Neither is an express agreement between the members of the JCE and the physical perpetrator required, irrespective of whether the physical perpetrator is a JCE member.²³¹

The most important factor is the existence of a criminal purpose that is not merely the same, but common to all the persons acting together within the enterprise, and that even if the contribution of the accused to this purpose is not substantial, it should be significant for the crimes for which he is found responsible.²³² This common plan moreover is ‘fluid in its criminal means’; the accused may be held responsible for crimes that were initially not part of the common criminal plan when the leading members of the JCE have information about additional crimes committed because of an expansion of the criminal objective and do not seek to prevent their recurrence.²³³

²²⁸ *Prosecutor v Krstić*, Judgement, Case No. IT-98-33-T, ICTY Trial Chamber (02 August 2001) paras 601, 611, 613, 617-18, 644-45; *Stakić Appeals Judgement* (n) paras 68-70, 75, 81, 84, 95-96, 98.

²²⁹ *Brdanin Appeals Judgement* (n 187) paras 408-9.

²³⁰ *Brdanin Appeals Judgement* (n 187) paras 410.

²³¹ *Brdanin Appeals Judgement* (n 187) paras 415-18.

²³² *Brdanin Appeals Judgement* (n 187) paras 430.

²³³ *Krajisnik Trial Judgement* (n 204) 1098.

These are two potentially irreconcilable criteria. According to the first standard, if the common criminal purpose consists of ethnically cleansing a certain territory, which involves the crimes of forced movement, forced labour and sexual violence, even if the accused's contribution is not significant to ethnic cleansing, it should be significant to say the crime of forced movement for which he is held responsible. The entire point of JCE however, is that the accused is held responsible for *all* the crimes that are a part of the common criminal purpose. Otherwise, he could just be charged for forced movement as a separate offence, and not for crimes committed as a participant in a JCE. The second standard makes an accused liable for all crimes that were not even part of the initial common criminal plan, say illegal detentions and unlawful killings, as long as 'leading members' of the JCE approved of the expansion of the common criminal plan through these additional crimes. In this situation, the accused's contribution towards these additional crimes is not likely to be 'significant', yet he would still be held responsible for these additional crimes, not because of his own conduct, but because of the conduct of 'leading members' of the JCE.

c. The participation of the accused in the common plan

The third physical element of JCE is the participation of the accused in the common design involving the perpetration of one of the substantive crimes contained in the relevant law.²³⁴ The accused need not physically commit any crime in order to fulfil this element.²³⁵ The extent of participation required is in fact lower than that required for aiding and abetting. In the latter case, the accused must perform acts specifically directed to encourage, assist, or lend support to another person in the perpetration of a

²³⁴ *Tadic Appeals Judgement* (n 4) para 227; *Stakic Appeals Judgement* (n 186) para 193.

²³⁵ *Stakic Appeals Judgement* (n 186) para 64; *Kvoicka Appeals Judgement* (n 201) para 99; *Mpambara Trial Judgement* (n 188) para 13.

specific crime.²³⁶ Participation for JCE only requires the accused to have performed some act that is *in some way directed to the furtherance of the common plan or purpose*.²³⁷ As commentators have noted, this turns the traditional distinction between accessory (aiding and abetting) and principal (JCE) liability on its head, by requiring more from the aider/abettor than the perpetrator.²³⁸ This act may even be in the form of an omission that contributes to the common criminal purpose.²³⁹

Skepticism about this low level of participation required has been evident in the decisions of some Trial Chambers. Some have opined that while the accused's contribution need not have been a *sine qua non* of the commission of the crime, it must 'form a link in the chain of causation'.²⁴⁰ The *Kvočka* Trial Chamber held that in order for JCE liability to ensue, the accused's participation must be 'significant',²⁴¹ that is, it should make the enterprise 'efficient or effective' such as a 'participation that enables the system to run more smoothly or without disruption'.²⁴² The Trial Chamber also distinguished between various levels of perpetrators and the kinds of participation that would be required of them to attract JCE liability. An accused's leadership position would militate in favour of his participation being considered significant, and even his approving silence with respect to the crime in question could

²³⁶ *Kvočka Appeals Judgement* (n 201) para 33; *Blaskic Appeals Judgement* (n 146) paras 45, 50; *Vasiljevic Appeals Judgement* (n 197) para 102.

²³⁷ *Tadic Appeals Judgement* (n 4) para 229; *Vasiljevic Appeals Judgement* (n 197) para 102.

²³⁸ Ambos, 'Joint Criminal Enterprise and Command Responsibility' (n 19) 171. See also, Werle (n 22) 962; Verena Haan, 'The Development of the Concept of Criminal Enterprise at the International Criminal Tribunal for the Former Yugoslavia' (2005) 5 Int'l Crim L Rev 167, 201.

²³⁹ *Kvočka Appeals Judgement* (n 201) para 187; *Krajisnik Trial Judgement* (n 204) para 885; *Mpambara Trial Judgement* (n 188) para 24.

²⁴⁰ *Blagojevic and Jokic Trial Judgement* (n 193) para 702; *Brdanin Trial Judgement* (n 188) para 263.

²⁴¹ *Kvočka Trial Judgement* (n 184) para 311. See also *Simic Trial Judgement* (n 191) para 159.

²⁴² *Kvočka Trial Judgement* (n 184) para 309. See Cassese (n 211) 128 holding this as an indispensable requirement for JCE liability, without however stating his reasons.

be considered sufficient.²⁴³ To attract JCE liability, low or middle level perpetrators should not normally be easily replaceable²⁴⁴ and their contribution should be more significant than simply following orders to perform some small function on a single occasion.²⁴⁵ Commentators argue that the requirement that the accused's participation should be significant would not only (favourably) restrict the scope of the JCE that can be charged, but would also ensure that the JCE doctrine is mostly used to charge senior leaders rather than low level offenders.²⁴⁶

The *Kvocka* Trial Chamber's position was however partially overruled by the Appeals Chamber which stated that in general, there is no need for the participation to have been significant. It found the fact that the accused could have been easily replaced and that the criminal purpose could therefore have been achieved without his participation of little relevance.²⁴⁷ It did however acknowledge special cases where proof of a substantial contribution becomes necessary.²⁴⁸ The Appeals Chamber gave the example of 'opportunistic visitors' who are not staff members in a detention camp, but enter the camp and commit crimes. Such persons will only be held liable for participation in a JCE if they make a substantial contribution to the overall effect of the camp.²⁴⁹

Not requiring the accused's participation to have been significant does not sit well with the notion of "equal culpability" that is at the heart of liability for participation in a criminal enterprise. In a JCE, the accused is not only held responsible, but equally

²⁴³ *Kvocka Trial Judgement* (n 184) paras 292, 309.

²⁴⁴ *Kvocka Trial Judgement* (n 184) para 309.

²⁴⁵ *Kvocka Trial Judgement* (n 184) para 311.

²⁴⁶ *Martinez* (n 8) 150. See also *O'Rourke* (n 212) 325.

²⁴⁷ *Kvocka Appeals Judgement* (n 201) paras 193.

²⁴⁸ *Kvocka Appeals Judgement* (n 201) paras 187, 97.

²⁴⁹ *Kvocka Appeals Judgement* (n 201) para 599.

responsible, as the other participants for all acts carried out pursuant to the common criminal plan.²⁵⁰ It is difficult to see how this can be reconciled with only a minor contribution on the part of the accused. The exception carved out for opportunistic visitors only further confuses the issue. On what basis can one distinguish between a low level cook in the detention camp who prepares food for the prisoners and is aware of the activities that are carried out in the detention camp, and an opportunistic visitor who is not a staff member but enters the camp to commit crimes? The Appeal's Chamber's reasoning would make the cook liable regardless of a substantial contribution, since it is not necessary that he was irreplaceable or that the camp's purpose could not be accomplished without his participation. Is it simply because unlike the opportunistic visitor, the cook is a "staff member"? This standard begins to disturbingly resemble guilt by mere association.

2 Mens Rea

The primary distinction between the various categories of JCE lies in their mental rather than physical elements. While the *mens rea* requirements for JCE I are relatively uncontroversial, those required for JCE II and JCE III have invited much comment. These will be discussed below.

a. Mens rea requirements for JCE I

i. Voluntary participation

In order for the accused to incur liability under the first category of JCE, he must voluntarily participate in some aspect of the common criminal plan or design and

²⁵⁰ For an insightful discussion of imposition of equal culpability and the philosophical problems with this, see Ohlin (n 100) 85-88.

intend the criminal result.²⁵¹ There has been a surprising lack of jurisprudence thus far on how the element of ‘voluntariness’ is to be construed.

ii. Shared intent

For JCE I liability to ensue, all participants in the JCE must share the intent to commit the crime that is the object of the common criminal plan, regardless of the extent of their actual physical contribution towards the achievement of the plan.²⁵²

While theoretically, this standard would require the prosecution to prove the state of mind of every single person who is alleged to be a JCE member, in practice, the prosecution has only been required to demonstrate that ‘each of the persons charged and (if not one of those charged) the principal offender or offenders shared the relevant intent required for the crime that is the object of the criminal plan.’²⁵³

It is not clear what ‘sharing’ the intent to commit a crime that is an object of the criminal plan could mean, especially the sharing of an intent with a physical perpetrator of the crime, who as per the jurisprudence of the ICTY discussed above, need not be a JCE member.²⁵⁴ To illustrate the ambiguity of this standard, let us consider a situation where X1 (a high ranking civilian leader), X2 (the head of the national police) and X3 (a military commander), develop a common plan to ethnically cleanse a certain territory by ordering killings, deportations, torture and rape. They implement these plans through unit leaders under their authority, Y1, Y2 and Y3. These unit leaders in turn use low level members of the military and police and

²⁵¹ *Blagojevic and Jokic Trial Judgement* (n 193) para 703; *Tadic Appeals Judgement* (n 4) para 196; *Vasiljevic Appeals Judgement* (n 197) para 119.

²⁵² Cassese (n 211) 111. *Tadic Appeals Judgement* (n 4) para 196; *Stakic Appeals Judgement* (n 186) para 65; *Kvoicka Appeals Judgement* (n 201) para 82.

²⁵³ *Simic Trial Judgement* (n 191) para 160; *Krnjelac Trial Judgement* (n 183) para 83.

²⁵⁴ See above text to notes 228 to 231; See also Boas (n 1) 54, alluding to but not quite following this conundrum to its logical conclusion.

civilians under their control to physically commit the crimes of murder, rape and torture. These low level physical perpetrators are unaware of the full extent of the crimes planned, or the policy behind their commission, and have no contact with X1, X2 and X3.

In this scenario, the only sense in which the physical perpetrators ‘share’ the intent to commit the crimes that are the object of the JCE is that they intend to commit the crimes of murder, torture and rape. They may not however intend, know, or foresee that these crimes are directed towards the larger common plan of ethnic cleansing, which is the only crime that can be prosecuted as an international crime (and not individual killings and acts of rape). Even if they did commit the killings with a view to ethnically cleansing the region, since they were never in contact with the JCE members, it may still be only the ‘same’ intention as the JCE members, rather than a ‘common’ intention. To classify this situation as ‘sharing the intention to commit the crime that is an object of the JCE’ would effectively elide the distinction between the individual crime of murder, and the crime of ethnic cleansing. Indeed, it is difficult to see in what other way a physical perpetrator who is not a JCE member could ever share the intent to commit the crime which is the object of the JCE. The alternative however is to hold that the physical perpetrator must be a JCE member for cases of JCE I liability.

It has been suggested that in addition to shared intent, *dolus eventualis* (advertent recklessness)²⁵⁵ would also be sufficient to hold members of a JCE liable

²⁵⁵ The ICTY Trial Chamber in *Stakic* discussed the requirement of *dolus eventualis* in the following terms: “The technical definition of *dolus eventualis* is the following: if the actor engages in life-endangering behaviour, his killing becomes intentional if he ‘reconciles himself’ or ‘makes peace’ with the likelihood of death. Thus, if the killing is committed with ‘manifest indifference to the value of human life’, even conduct of minimal risk can qualify as intentional homicide. Large scale killings that would be classified as reckless murder in the United States would meet the continental criteria of *dolus eventualis*.” (*Prosecutor v Stakic*, Judgement, Case No. IT-97-24-T, ICTY Trial Chamber (31 July

under the first category.²⁵⁶ The example given is that of a group of servicemen who decide to deprive some civilians of sustenance to force them to build a bridge for military operations. If some of these civilians die, the servicemen would be responsible not only for a JCE to commit the war crime of intentionally starving civilians, but also guilty of murder, since the death was a natural and foreseeable consequence of the common criminal plan.²⁵⁷ This proposition simultaneously employs different standards of *mens rea*. *Dolus eventualis* in civil law systems has no strict equivalent in the common law and requires a volitional element of identification and approval with the ultimate evil result, which common law concepts such as recklessness lack.²⁵⁸ While the additional requirement of ‘advertence’ in ‘recklessness’ could approximate this standard, it is still very different from mere awareness of the natural and foreseeable consequences of one’s act, which the example considers, and which is a much lower standard than *dolus eventualis*.

The example also presupposes a relatively small group of people with comparable knowledge of the scale and extent of the crimes and more or less equivalent participation in carrying out the actions that constitute the crime. In such a situation, it is easier to judge what the natural and foreseeable consequence of the common criminal plan could be. The extent of foreseeability possessed by a minor participant with little awareness of the scope of the common criminal plan is less certain. Does the standard suggested imply that this minor participant would be

2003) para 587). The Appeals Chamber went on to hold that this was equivalent to ‘advertent recklessness’ (*Stakic Appeals Judgement* (n 186) paras 99-103).

²⁵⁶ Cassese (n 211) 109.

²⁵⁷ Cassese (n 211) 111-12.

²⁵⁸ George Fletcher and Jens Ohlin, ‘Reclaiming Fundamental Principles of Criminal Law in the Darfur Case’ 3 JICJ (2005) 539, 554; Michael Bohlander, *Principles of German Criminal Law* (Hart Publishing 2009) 63-65.

responsible only if he, personally, could foresee the additional crime as a natural consequence of his criminal action, or is he responsible as long as the additional crime was a foreseeable and natural consequence of the JCE?

b. Mens rea requirements for JCE II

i. Personal knowledge of the system

ICTY jurisprudence has consistently held that in order for an accused to be held responsible for participation in an institutionalized common criminal plan, he should have personal knowledge of the system of ill-treatment.²⁵⁹ The term ‘system’ has not been defined by either courts or commentators. Given that JCE II has been formulated to cover internment or concentration camp cases,²⁶⁰ one can surmise that it implies a closed hierarchical organisational structure set up for a specific purpose. Some ICTY judgements have formulated the *mens rea* requirement a little differently: the accused must have had knowledge of the ‘criminal nature of the system’.²⁶¹ This has been interpreted to mean that rather than simply requiring the accused to be aware that crimes occurred as part of an institutionalized set up, the accused must have known that the commission of crimes, or of the particular crime that was the object of the JCE, was the reason for the system’s existence.²⁶²

It is difficult to see how this interpretation follows from the difference between requiring ‘knowledge of the system of ill-treatment’ and ‘knowledge of the criminal nature of the system’. A system can be criminal in nature without having been set up expressly for that purpose. Indeed, since the system of ill-treatment stands

²⁵⁹ *Tadic Appeals Judgement* (n 4) para 228; *Vasiljevic Appeals Judgement* (n 197) para 101; *Krnjelac Appeals Judgement* (n 182) para 32.

²⁶⁰ See *Amicus Curiae* Brief of Professor Antonio Cassese and members of the *Journal of International Criminal Justice on Joint Criminal Enterprise Doctrine*, Case File No. 001/18-07-2007-ECCC/OCIJ (PTC 02) (27 October 2008) para 24; Van der Wilt (n 19) 96.

²⁶¹ *Kvocka Appeals Judgement* (n 201) para 198.

²⁶² Boas (n 1) 57 citing *Kvocka Appeals Judgement* (n 201) para 203.

in place of an ‘agreement’ to achieve the common criminal purpose, which in the jurisprudence of the ICTY may materialize even after the conduct constituting the crime has commenced,²⁶³ the former requirement that the accused simply has knowledge that crimes (that are an object of the JCE) occurred in the course of the system’s functioning would appear to be correct.

The accused’s knowledge of the criminal nature of the system can be inferred from the circumstances surrounding his participation in the system, for instance, his position and functions in the system, the amount of time spent by him in the system, and any contact he has with other members of the system.²⁶⁴ Awareness of the crimes committed can also be inferred from the fact that the accused observed the effects of such crimes, or that he was told of the crimes by other people.²⁶⁵ The accused’s position of authority, even a *de facto* one, would be a factor pointing towards the inference that he was aware of the system’s purpose.²⁶⁶

While the circumstances of the accused could justifiably be taken into account to infer his knowledge of the crimes, it is important to strike a note of caution here.²⁶⁷ An institutionalized system of ill treatment on a large scale may very well depend on functional division of labour between various persons involved in the system. For instance, in a large concentration camp, different parts of the camp may be deliberately isolated. X, who drives prisoners to the concentration camp, may be quite isolated from Y, who cooks food for the detainees, from Z who is in charge of

²⁶³ *Krnojelac Trial Judgement* (n 183) para 80.

²⁶⁴ *Kvocka Appeals Judgement* (n 201) paras 201, 203; *Kvocka Trial Judgement* (n 184) para 324.

²⁶⁵ *Kvocka Trial Judgement* (n 184) para 384.

²⁶⁶ *Kvocka Trial Judgement* (n 184) para 324; *Kvocka Appeals Judgement* (n 201) paras 174, 202; *Tadic Appeals Judgement* (n 4) para 228; *Stakic Appeals Judgement* (n 186) para 65.

²⁶⁷ The inference of knowledge on part of the accused from his position of authority within the system of ill-treatment has been particularly criticised as reversing the burden of proof with regard to knowledge and intent. See Haan (n 238) 190; van Sliedregt, ‘Joint Criminal Enterprise as a Pathway to Convicting Individuals for Genocide’ (n 211) 184, 188.

documenting the prisoners who enter the camp. They all may at times hear from other people about the crimes committed in the camp, but their own status rigidly restricts them to the performance of a particular function such that they do not come into contact with other parts of the camp. In this situation, to infer knowledge of the full scale of crimes committed in the camp through continued participation in the camp's activities and hearsay would be stretching the notion of knowledge.

ii. Intent to further the criminal purpose

In order to incur liability under JCE II, it is not necessary that the accused possesses the intent to commit the specific crime with which he is charged (except in the case of crimes that require special intent,²⁶⁸ which shall be discussed below). The only prerequisite is that the accused intends to further the system of ill-treatment.²⁶⁹ This difference in the mental element would serve to distinguish JCE II from JCE I, which requires the accused to share the intent for the crime that is the object of the JCE,²⁷⁰ even though ICTY jurisprudence as well as commentators consistently refer to JCE II as a 'variant of the first category'.²⁷¹ The only situation where the mental elements for JCE I and JCE II are the same is in the case of special intent crimes. The ICTY has held that where the crimes charged pursuant to the JCE require special intent, such as the crime of persecution, the accused must also meet the additional

²⁶⁸ "Special intent of a crime, is the specific intention, required as a constitutive element of the crime, which demands that the perpetrator clearly seeks to produce the act charged" *Prosecutor v Akayesu*, Judgement, Case No. ICTR-96-4-T, ICTR Trial Chamber (2 September 1998) para 498. This has been termed a 'purpose based' interpretation of intent: Claus Kress, 'The Darfur Report and Genocidal Intent' (2005) 3 JICJ 562, 566.

²⁶⁹ Boas (n 1) 59-63 citing and interpreting *Tadic Appeals Judgement* (n 4) para 228; *Krnjelac Appeals Judgement* (n 182) paras 89, 94, 96. *Contra Prosecutor v Brdanin and Talic*, Decision on Form of Further Amended Indictment and Prosecution Application to Amend, Case No. IT-99-36-PT, Pre Trial Decision (26 June 2001) para 27; *Krnjelac Trial Judgement* (n 183) para 78.

²⁷⁰ For this careful analysis, see Boas (n 1) 62-63. For a different source of challenge to JCE II as a variant of JCE I, see Kai Ambos, *Amicus Curiae* concerning Criminal Case File No. 001/18-07-2007-ECCC/OCIJ (PTC 02) (27 October 2008) 13-15.

²⁷¹ *Tadic Appeals Judgement* (n 4) para 203; *Vasiljevic Appeals Judgement* (n 197) para 98; *Kvočka Appeals Judgement* (n 201) para 82. See also *Amicus Curiae* Brief of Antonio Cassese (n 260) para 24.

requirements imposed by the crime, such as the intent to discriminate on political, religious, or racial grounds.²⁷² Thus, in these cases, it would not be sufficient to merely prove intent to further the criminal system. It has been suggested that the fact that the accused possessed the specific intent to commit a special intent crime can support the inference that he also intended to further the system of ill-treatment.²⁷³ However, caution must be exercised against drawing such inferences in all cases. X can intend to commit the crime of persecution without intending to further the crimes of forced labour or sexual violence that may also be part of the system of ill-treatment. Charging him with JCE II liability would make him liable as a perpetrator for all three crimes.

The intention to advance the system of ill-treatment can be inferred from two factors: knowledge of the plan; and participation in its advancement.²⁷⁴ The threshold of participation required is quite low. The accused need not have displayed any enthusiasm or initiative, or derived any personal satisfaction from his participation.²⁷⁵ Even marginal members of the system, such as persons providing medical treatment or food to the detainees in a prison camp, are deemed to constitute indispensable cogs in the criminal system, since without their willing participation in the performance of administrative duties, the system could not be sustained.²⁷⁶

The threshold set for an accused to incur JCE II liability is alarmingly low. If the accused need not possess the intent to commit the particular crime in question, and could incur liability merely by supporting the system of ill-treatment through the performance of administrative duties, it is difficult to see how this mode of liability

²⁷² *Kvovka Trial Judgement* (n 184) para 288; *Kvovka Appeals Judgement* (n 201) paras 110-11.

²⁷³ Boas (n 1) 68.

²⁷⁴ *Kvovka Trial Judgement* (n 184) para 271; *Kvovka Appeals Judgement* (n 201) para 243.

²⁷⁵ *Kvovka Appeals Judgement* (n 201) paras 106, 242; *Krnojelac Appeals Judgement* (n 182) para 100.

²⁷⁶ *Amicus Curiae* Brief of Antonio Cassese (n 260) paras 24-25.

differs from aiding and abetting.²⁷⁷ Indeed, in case of the latter, the contribution would need to be substantial,²⁷⁸ whereas here all that is needed is for the accused to discharge a task of some consequence in the institution.²⁷⁹

The notion that a cook or doctor in a concentration camp can be charged under the same mode of responsibility and be held guilty for the same crimes as someone who personally directed or committed these crimes is also infinitely disturbing. If one is to hold these these two persons equally culpable and take into account the difference in their conduct only at the sentencing stage, a more full blown account of the relationship between ascription of responsibility and sentencing policy would be needed.

c. Mens rea requirements for JCE III

i. Intent to participate in and further criminal purpose

In order to incur liability under JCE III, the accused must possess the intent to participate in the joint criminal enterprise, and to further – individually and jointly – the criminal purpose of the enterprise.²⁸⁰ These two elements overlap with the mental elements of JCE I and JCE II liability. The intent to participate in the JCE is analogous to the requirement of ‘voluntary participation’ in some aspect of the common criminal plan required for JCE I. The intent to further the common criminal purpose is the same as the general intent to further the system of ill-treatment in JCE II.²⁸¹ The only difference in the mental standards is in the case of special intent crimes: while JCE II requires not only the intent to further the common purpose but

²⁷⁷ *Amicus Curiae* Brief of Kai Ambos (n 270) paras 13-14.

²⁷⁸ *Tadic Appeals Judgement* (n 4) para 229.

²⁷⁹ *Amicus Curiae* Brief of Antonio Cassese (n 260) para 25.

²⁸⁰ *Tadic Appeals Judgement* (n 4) paras 220 and 228; *Kvočka Appeals Judgement* (n 201) para 83; *Stakic Appeals Judgement* (n 186) para 65.

²⁸¹ Boas (n 1) 69.

also the specific intent to commit the crime charged in these cases, for JCE III liability, it is enough to demonstrate that the accused possessed the general intent to further the common criminal purpose.²⁸²

ii. The accused's foresight and voluntary assumption of risk

JCE III liability arises where one or more members of the JCE commit crimes that go beyond the common purpose. The accused can be held responsible for these additional crimes only if they were a natural and foreseeable consequence of the realisation of the plan and the accused willingly took this risk.²⁸³ International courts have struggled to articulate the correct contours of this element and several inconsistent definitions have been employed. To illustrate these with the help of an example, consider a slightly modified version of the example used in JCE I.²⁸⁴ X1 (the high ranking civilian leader), X2 (the head of the national police) and X3 (the military commander), develop a common plan to forcibly expel civilians from a certain occupied region. They implement these plans through unit leaders under their authority, Y1, Y2 and Y3. These unit leaders in turn use low level members of the military (A1 to A3) and police (B1 to B3) and civilians (C1 to C3) to physically deport civilians using force. In the course of these deportations, A1 to A3 commit rapes and murders. When could C1 to C3 be held responsible for the rapes and murders under JCE III?

According to the standard articulated in *Tadic*, two conditions would need to be fulfilled for this liability. First, the rapes and murders should have been objectively

²⁸² Boas (n 1) 70 citing *Prosecutor v Brdanin*, Decision on Interlocutory Appeal, Case No. IT-99-36-A, ICTY Appeals Chamber (19 March 2004) para 7. *Contra Mpambara Trial Judgement* (n 188) para 14.

²⁸³ Ambos, 'Joint Criminal Enterprise and Command Responsibility' (n 19) 160-61.

²⁸⁴ See text following note 254.

as well as subjectively foreseeable,²⁸⁵ that is, not only should C1 to C3 been able to predict that rapes and murders could be committed in the course of the forcible expulsion, but the same should also have been foreseeable to a reasonable person in place of C1 to C3.²⁸⁶

Second, for subjective foreseeability, the crime must have been foreseen to be likely, whereas, for objective foreseeability, the crime must have merely been possible.²⁸⁷ That is, C1 to C3 should have been aware that the actions of the group were *likely* to result in rapes and murders, and it should have been objectively foreseeable that rapes and murders *might* be committed by one or more members of the group.²⁸⁸ Subsequent ICTY Chambers however, have not been consistent in applying this standard. For instance, in *Brdanin*, the subjective foreseeability standard was lowered²⁸⁹ such that C1 to C3 need only have been aware that the rapes and murders were a ‘possible’ rather than a ‘predictable’ consequence of the common plan. The *Krstic* Trial Chamber, on the facts of the case, held the accused liable under JCE III for crimes that he should have foreseen as an ‘inevitable’ outcome of the common plan,²⁹⁰ though both the Trial Chamber and the Appeals Chamber quoted *Brdanin*’s standard of the crime being merely “possible” as the correct law.²⁹¹ Both

²⁸⁵ *Contra* Cassese who supports a standard of mere objective foreseeability on the ground that participants in large scale atrocities can be expected to be particularly alert to the consequences of their actions; the gravity of the crimes makes the maximum penalty within the bounds of legality desirable; and the level of culpability of the accused can be taken into account at the sentencing stage: Cassese (n 211) 123. One can conversely argue that it is the very scale of atrocities committed in armed conflict situations that makes foreseeability of another person’s conduct exceptionally difficult.

²⁸⁶ *Tadic Appeals Judgement* (n 4) paras 220, 228. See Boas (n 1) 72.

²⁸⁷ *Tadic Appeals Judgement* (n 4) paras 220, 232. See Boas (n 1) 73-74.

²⁸⁸ *Tadic Appeals Judgement* (n 5) paras 220, 232. See Boas (n 1) 73-74.

²⁸⁹ *Brdanin and Talic* (n 269) para 31. See Shane Darcy, ‘Imputed Criminal Liability and the Goals of International Justice’ (2007) 20 *Leiden J Int’l L* 377, 383.

²⁹⁰ *Krstic Trial Judgement* (n 228) para 616.

²⁹¹ *Krstic Trial Judgement* (n 228) para 613; *Prosecutor v Krstić*, Judgement, Case No. IT-98-33-A, ICTY Appeals Chamber (19 April 2004) para 149.

Brdanin and *Krstic* also failed to specify the degree of probability of the crime being committed for objective foreseeability.²⁹² Yet another standard of foreseeability was introduced by the *Kvočka* Appeals Chamber, which held that the prosecution must prove ‘that the accused had sufficient knowledge such that the additional crimes were a natural and foreseeable consequence to him’.²⁹³ This would imply not only that the crimes must be objectively foreseeable, but that the accused knew that these additional crimes normally occur in the given enterprise.²⁹⁴ The contrary standards on foreseeability applied by tribunals make the conviction ironically unforeseeable.²⁹⁵

The ICTY has also grappled with the mental element required in the case of special intent crimes such as genocide. Prior to 2004, the ICTY had held that the notion of genocide as a ‘natural and foreseeable consequence’ of an enterprise that did not have genocide as its aim was not compatible with the *dolus specialis* element for genocide.²⁹⁶ However, current jurisprudence has rejected this standard as having confused the *mens rea* element for the crime of genocide with the mental requirement for the mode of liability by which the accused is held criminally responsible.²⁹⁷ Hence, the prosecution need only demonstrate that it was reasonably foreseeable to

²⁹² *Krstic Trial Judgement* (n 228) para 613; *Brdanin and Talic* (n 269) para 31. Other ICTY cases have also quoted the correct standard as the one in *Brdanin*. See for instance, *Vasiljevic Appeals Judgement* (n 197) para 101; *Ntakirutimana Appeals Judgement* (n 186) para 467.

²⁹³ *Kvočka Appeals Judgement* (n 201) para 86. See also *Prosecutor v Limaj*, Judgement, Case No. IT-03-66-T, ICTY Trial Chamber (30 November 2005) para 512; *Krajisnik Trial Judgement* (n 204) para 882.

²⁹⁴ Ambos, ‘Joint Criminal Enterprise and Command Responsibility’ (n 19) 175.

²⁹⁵ Ambos, ‘Joint Criminal Enterprise and Command Responsibility’ (n 19) 174; see also Fletcher and Ohlin (n 258) 550.

²⁹⁶ *Stakic Trial Judgement* (n 255) para 530; *Prosecutor v Brdanin*, Decision on Motion for Acquittal Pursuant to Rule 98 bis, Case No. IT-99-36-T, ICTY Trial Chamber (28 November 2003) paras 30, 57. On the requirement of *dolus eventualis*, see David L Neressian, *Genocide and Political Groups* (OUP 2010) 36-38.

²⁹⁷ *Brdanin Interlocutory Decision* (n 282) para 6.

the accused that an act amounting to genocide would be committed and that it would be committed with genocidal intent.²⁹⁸

Several disquieting conclusions arise from the JCE III standard employed by the ICTY. In holding a JCE member responsible for the crimes of other participants that were not agreed upon but simply foreseeable, JCE III liability essentially seems to be predicated on mere membership in the group pursuing the JCE.²⁹⁹ Under the mental requirements outlined, it is possible to hold C1 to C3 liable for the crimes of A1 to A3 regardless of whether C1 to C3 knew of the mental states of A1 to A3 or their intention to commit murders and rapes.³⁰⁰ This is actually a lower mental standard than what would have to be proved were C1 to C3 held liable for aiding and abetting: they must have known that their actions aid the specific commission of rapes and murders by A1 to A3 and have been aware of the intent with which A1 to A3 committed these crimes.³⁰¹ Even more astonishingly, even if A1 to A3 themselves lacked the necessary *mens rea* for the crimes, say if they were unaware that these crimes amounted to extermination due to their scale and extent, C1 to C3 could still be held responsible.³⁰²

The only exception is for specific intent crimes like genocide,³⁰³ where it would have been necessary to prove that C1 to C3 knew that the crimes would be committed with genocidal intent, though again they may not know by whom specifically the crimes would be committed. The problem in the case of JCE III liability for specific intent crimes however arises because JCE III is a form of

²⁹⁸ *Brdanin Interlocutory Decision* (n 282) para 10.

²⁹⁹ See Ambos, 'Joint Criminal Enterprise and Command Responsibility' (n 19) 168.

³⁰⁰ See Darcy (n 289) 383.

³⁰¹ See *Tadic Appeals Judgement* (n 4) para 229; *Krnjelac Trial Judgement* (n 183) para 75; Badar (n 16) 301.

³⁰² Badar (n 16) 301.

³⁰³ Badar's criticism on this ground seems therefore misplaced: see Badar (n 16) 301.

principal rather than accomplice liability, yet by using JCE liability C1 to C3 would be convicted as perpetrators, to the same degree as A1 to A3 who have committed the rapes and murders with genocidal intent, despite the fact that they did not act with the *mens rea* required for a conviction for genocide.³⁰⁴ Although this problem has captured the attention of critics more starkly in specific intent crimes, the lowering of *mens rea* for commission liability by using JCE III is no less true for general intent crimes, where the foreseeability standard would place on par individuals who deliberately committed the crime with the intent proper to it, and those who only entertained the lesser *mens rea* of foreseeability.³⁰⁵

Cassese puts forth several arguments to counter these objections. While acknowledging the concerns mentioned above, he opines that considerations of public policy that society should be protected against criminals who band together in illegal enterprises would necessitate the application of JCE III.³⁰⁶ He relies on these justifications outlined in English law for convictions in cases of joint enterprises, where the accused is held criminally liable for the harm he foresees resulting from the crime he encouraged, but where it would be impossible to prove the specific intention required for the crime.³⁰⁷ However, considerations of public policy would also dictate an insistence on adherence to the principle of personal culpability for the imposition of criminal liability, and Cassese provides no scale with which to rank these principles. Moreover, since JCE III is a mode of principal liability, his reliance on

³⁰⁴ On this point, see Haan (n 238) 200.

³⁰⁵ Powles (n 145) 606, 612; Ambos, 'Joint Criminal Enterprise and Command Responsibility' (n 19) 168-169. Cassese acknowledges this concern but argues that there are factors that counter or outweigh it: Cassese (n 211) 117-123.

³⁰⁶ Cassese (n 211) 117-118.

³⁰⁷ *R v Powell; R v English*, [1999] 1 AC 1.

English law which specifically talks about accessory liability,³⁰⁸ and which is moreover the subject of much controversy among scholars,³⁰⁹ is misplaced.

Cassese's next argument also meets with the same problem. He relies on the intuitive notion that since the common criminal plan is a *sine qua non* for the 'extra crime', the culpability of the accused in JCE III lies in his having been in a position to foresee the extra crime (because of his participation in the initial plan) and having failed to prevent or dissociate himself from it.³¹⁰ While a sophisticated legal system would be able to calibrate the different degrees of responsibility of the accused and the principal offender (for example, holding the accused liable for manslaughter rather than murder), international criminal law lacks the maturity to make these gradations in the case of most offences (exceptions include rape and sexual violence; murder and manslaughter etc). Instead, the difference in levels of culpability may appropriately be taken into account at the sentencing stage.³¹¹ Cassese's position misses the *raison d'être* for the introduction of JCE liability: that it matters not only what we hold someone responsible for, but also *how* we hold them responsible. The accused in the JCE III position is clearly culpable to some extent; the entire point of delineating modes of liability is to reflect the differences in the degrees of culpability between different categories of accused. The solution to international criminal law's immaturity as a discipline cannot lie in running roughshod over these distinctions at the level of imposition of responsibility.³¹²

D. ALTERNATIVES TO JCE

³⁰⁸ Powell (n 307).

³⁰⁹ This will be considered in detail in Part III of the thesis.

³¹⁰ Cassese (n 211) 119-120.

³¹¹ Cassese (n 211) 120-122.

³¹² On this point, see Fletcher and Ohlin (n 258) 539, 550. Fletcher and Ohlin go so far as to state that JCE III liability is equivalent to strict liability, which is slightly overstating the case.

While JCE may still be the most popular tool in the hands of international prosecutors, there have been recent developments suggesting a shift away from JCE towards new doctrines of criminal liability which are closely connected with modes of criminal responsibility in continental legal systems (and those influenced by them): ‘co-perpetration’ and ‘indirect perpetration’.

1 Co-perpetration and indirect perpetration at the ICTY

The doctrines of co-perpetration and indirect perpetration have had a troubled history in the jurisprudence of the ICTY, having been conspicuously championed by judges influenced by the continental legal system, particularly the criminal law of Germany.

The first ICTY judgement to employ the theory of co-perpetration was the *Stakic* Trial Chamber, which held that before resorting to JCE, it would give preference to ‘a more direct reference to “commission” responsibility, such as co-perpetration’.³¹³ It set out the physical elements of co-perpetration as follows: (1) there was an explicit agreement or tacit understanding to reach (2) a common goal through (3) co-operation and (4) joint control over the criminal conduct.³¹⁴ Relying on Claus Roxin’s influential work, *Täterschaft und Tatherrschaft*, it defined the key factor as the joint control of the perpetrators over the act such that the perpetrators can realise their plans only insofar as they work together towards its accomplishment, whereas each can individually ruin the plan if he fails to carry out his part.³¹⁵

It set out the mental elements of co-perpetration to consist of (1) the accused’s awareness of the substantial likelihood that crimes would result from co-operation

³¹³ *Stakic Trial Judgement* (n 255) para 438.

³¹⁴ *Stakic Trial Judgement* (n 255) para 440.

³¹⁵ *Stakic Trial Judgement* (n 255) para 440.

ensuing from the same degree of control over the common acts; (2) the accused's awareness that his role is essential for the common goal's fulfilment.³¹⁶

The *Stakic* Trial Chamber acknowledged that even though its concept of perpetration overlapped in part with the definition of JCE, it was closer to what most legal systems recognised as 'commission', and that it avoided introducing modes of liability such as membership of a criminal organisation that were not contemplated in the ICTY Statute.³¹⁷

The *Stakic* definition of co-perpetration was used by the Prosecution in its amended indictment in *Milutinovic*, where the Prosecution argued that under the concept of 'indirect co-perpetration' in *Stakic*, an accused will be liable 'if he has an agreement with others, plays a key role in the agreement and one or more participants used others to carry out crimes'.³¹⁸ The *Milutinovic* Trial Chamber rejected this mode of responsibility, holding that the source cited by the *Stakic* Trial Chamber (Roxin) did not support its definition of the physical elements and it could not find any evidence for these elements in customary international law.³¹⁹ Further, neither Roxin nor *Stakic* makes mention of participants to the agreement using persons outside the agreement to commit the crimes.³²⁰ On the same day, the *Stakic* Appeals Chamber set aside the portions of the *Stakic* Trial Chamber's decision dealing with the co-perpetration on the ground that this mode of liability did not have support either in customary international law or in the settled jurisprudence of the ICTY.³²¹

³¹⁶ *Stakic Trial Judgement* (n 255) para 442.

³¹⁷ *Stakic Trial Judgement* (n 255) para 441 and fn 950.

³¹⁸ *Milutinovic* (n 217) para 7.

³¹⁹ On this point, see also *Prosecutor v Gacumbitsi*, Judgement, Case No. ICTR-2001-64-A, ICTR Appeals Chamber (7 July 2006) Separate Opinion of Judge Shahabuddeen, para 51.

³²⁰ *Milutinovic* (n 217) para 37, 39, 40-42.

³²¹ *Stakic Appeals Judgement* (n 186) paras 62-63.

The most detailed elucidation of co-perpetration as well as indirect perpetration can be found in the Separate Opinion of Judge Schomburg in the *Gacumbitsi Appeals Judgement*. Judge Schomburg endorsed the core physical elements of co-perpetration as set out in *Stakic*, and cited Roxin, as well as the penal codes of Colombia, Paraguay, and Finland in support of these elements.³²² In addition, he pointed to indirect perpetration or ‘perpetration by means’ as a well established doctrine in several legal systems around the world.³²³ In order to be liable for indirect perpetration, the accused must have used the direct or physical perpetrator of the crime as a mere instrument for the commission of the crime. The attribution of criminal liability is based on the control exercised by the accused over the conduct and the will of the physical perpetrator.³²⁴

Judge Schomburg cited the jurisprudence of Argentinean courts³²⁵ as well as the German Federal Supreme Court (*Bundesgerichtshof*) which had entered convictions for high ranking accused applying the doctrine of indirect perpetration. He relied on Roxin and the judgement of the *Bundesgerichtshof* in the *Politbüro* case³²⁶ to hold that modern criminal law recognised liability for indirect perpetration irrespective of whether the physical perpetrators were also criminally responsible. This was especially true of crimes committed by virtue of an organised structure of power

³²² *Gacumbitsi Appeals Judgement* (n 319) Separate Opinion of Judge Schomburg, para 17 and fn 29.

³²³ *Gacumbitsi Appeals Judgement* (n 319) Separate Opinion of Judge Schomburg, fn 30 and paras 18-21.

³²⁴ *Gacumbitsi Appeals Judgement* (n 319) Separate Opinion of Judge Schomburg, para 18 citing Roxin, *Täterschaft und Tatherrschaft* (2000) 142-274 and Kai Ambos, ‘Article 25’ (n 22) marginal no. 9.

³²⁵ *Gacumbitsi Appeals Judgement* (n 319) Separate Opinion of Judge Schomburg, para 19 and fn 34 citing the Argentinean National Appeals Court, Judgement on Human Rights Violations by Former Military Leaders of 9 December 1985 (report and translation of crucial parts at 26 ILM (1987) 317-372). The Argentinean National Appeals Court found the notion of indirect perpetration to be included in Art. 514 of the Argentinean Code of Military Justice and in Art. 45 of the Argentinean Penal Code. The Argentinean Supreme Court upheld this judgement on 30 December 1986.

³²⁶ German Federal Supreme Court (*Bundesgerichtshof*), Judgement of 26 July 1994, *BGHSt* 40, 218-240.

where the physical perpetrator's identity was irrelevant, and the control and consequently the primary responsibility for the crimes shifted to the person behind the scenes who occupied a leadership position in the hierarchical structure.³²⁷ He did not elaborate on what factors needed to be proved in order to establish that the accused occupied a leadership position, but from the context of his statements, they would appear to relate to proving control over the conduct and will of persons comprising the organised structure.

Judge Schomburg concluded with the observation that indirect perpetration was particularly apposite as a theory of international criminal responsibility, as it served to bridge the physical distance between the crime and persons who should be considered the main perpetrators due to their involvement and control over the crimes committed.³²⁸ This had also been recognised in Article 25(3)(a) of the Rome Statute establishing the International Criminal Court which provided for liability through co-perpetration as well as indirect perpetration.³²⁹ He acknowledged that these modes of liability overlapped to a great extent with JCE, the main difference consisting in the key element of attribution: while JCE is based primarily on the common state of mind of the perpetrators (subjective criterion), co-perpetration and indirect perpetration also depend on whether the perpetrator exercises control over the criminal act (objective criterion).³³⁰ He suggested that these doctrines should be harmonised in the

³²⁷ *Gacumbitsi Appeals Judgement* (n 319) Separate Opinion of Judge Schomburg, paras 19-20 citing the *Politbüro* case at 236 and Roxin, *Täterschaft und Tatherrschaft* (2000) 242-252.

³²⁸ *Gacumbitsi Appeals Judgement* (n 319) Separate Opinion of Judge Schomburg, para 21.

³²⁹ For this, he also cited the observations of the ICC Pre Trial Chamber I interpreting Article 25(3): *Prosecutor v Thomas Lubanga Dyilo*, Decision Concerning Pre-Trial Chamber I's Decision of 10 February 2006 and the Incorporation of Documents into the Record of the Case against Mr. Thomas Lubanga Dyilo, ICC-01/04-01/06, 24 February 2006, Annex I: Decision on the Prosecutor's Application for a Warrant of Arrest, Article 58, para. 96.

³³⁰ *Gacumbitsi Appeals Judgement* (n 319) Separate Opinion of Judge Schomburg, para 22 and fn 41.

jurisprudence of the ad hoc tribunals to better reflect the notion of ‘commission’ in different national legal systems.³³¹

In yet another Separate Opinion in the ICTY Appeals Chamber’s judgement in *Milan Martić*,³³² Judge Schomburg pushed for the acceptance of co-perpetration as a mode of responsibility for international crimes arguing that this reflects the accused’s true position as a high ranking principal perpetrator. In contrast, JCE actually trivialises his guilt by holding him guilty as a mere member of a criminal group.³³³ Further, in deducing individual criminal liability from membership in an association or group, the ever expanding notion of JCE is *ultra vires* and counterproductive to the ICTY’s mandate of achieving peace and reconciliation.³³⁴

According to Judge Schomburg, JCE doctrine could not identify the individual criminal contribution to the crime, which was necessary for appropriate sentencing. JCE III especially lacked specificity and any objective criteria such as control over the crime for imposition of criminal responsibility.³³⁵ Given these circumstances, it was particularly disturbing that the ICTY has discarded internationally recognised modes of responsibility such as co-perpetration and perpetration by means, which moreover had been recently endorsed by the ICC.³³⁶

The introduction of co-perpetration and indirect perpetration as alternatives to JCE certainly give international criminal law theorists food for thought. The problem though, at least in the ICTY’s jurisprudence on these theories so far, is that the

³³¹ *Gacumbitsi Appeals Judgement* (n 319) Separate Opinion of Judge Schomburg, paras 22, 24.

³³² *Prosecutor v Milan Martić*, Judgement, Case No. IT-95-11-A, ICTY Appeals Chamber (8 October 2008).

³³³ *Martić Appeals Judgement* (n 332) Separate Opinion of Judge Schomburg, para 2.

³³⁴ *Martić Appeals Judgement* (n 332) Separate Opinion of Judge Schomburg, para 5.

³³⁵ *Martić Appeals Judgement* (n 332) Separate Opinion of Judge Schomburg, paras 3, 7 and 9.

³³⁶ *Martić Appeals Judgement* (n 332) Separate Opinion of Judge Schomburg, para 6 citing *Katanga and Chui* (n 18) para 510; *Lubanga* (n 18) para 338.

contours of these modes of liability are quite indeterminate. While there is some detail on the physical elements that must be present to constitute these modes of liability, the mental elements are relatively ambiguous. For instance, the *Stakic* Trial Chamber's holding that the accused must be aware of the substantial likelihood that crimes will occur is scarcely sufficient to establish responsibility for special intent crimes such as genocide. It is also unclear whether all the accused charged as co-perpetrators should share the relevant mental state, or whether only the accused's state of mind is in question.³³⁷ Neither is the relationship between JCE and co-perpetration clear. While JCE I has been likened to co-perpetration, both by the ICTY as well as in academic literature,³³⁸ it seems to require less than what co-perpetration would suggest: rather than control or domination over the act, all that seems to be required for JCE I is that the accused performs *some acts* that are directed towards the furtherance of the common plan.

Further, the claim that these modes of liability are particularly appropriate in establishing responsibility for international crimes merits closer examination. The attractiveness (and danger) of JCE liability is to a large extent contingent upon the fact that it reflects and shows the relevance of multifarious relationships, ranging from those based on domination/subordination to those resulting from spontaneous mutual connivance, for the imposition of criminal liability.³³⁹ The notion of control, in contrast, can at best be applied as a fictional construct to impose liability on the basis of a hierarchical structure. This can perhaps never capture the unpredictable and varied causes and consequences of mass atrocity crimes that are difficult to attribute

³³⁷ For a similar point, see Badar (n 16) 297.

³³⁸ Ambos, 'Joint Criminal Enterprise and Command Responsibility' (n 19) 170; *Tadic Appeals Judgement* (n 4) paras 198, 201; *Prosecutor v Babic*, Judgement on Sentencing Appeals, Case No. IT-03-72, ICTY Appeals Chamber (18 July 2005) para 38.

³³⁹ Mark J Osiel, 'Modes of Participation in Mass Atrocity' 38 *Cornell Int'l L J* (2005) 793, 797.

to the actions and intentions of a single person or even a small tightly knit set of people, no matter what position they may occupy in the hierarchy.³⁴⁰

2 The ICC's rejection of JCE

Unlike the Statutes of the ad hoc tribunals, the Rome Statute of the International Criminal Court provides a fairly sophisticated structure delineating modes of criminal responsibility. Article 25 (3) of the Rome Statute, in relevant part, states:

3. In accordance with this Statute, a person shall be criminally responsible and liable for punishment for a crime within the jurisdiction of the Court if that person:
- (a) Commits such a crime, whether as an individual, jointly with another or through another person, regardless of whether that other person is criminally responsible;
 - (b) Orders, solicits or induces the commission of such a crime which in fact occurs or is attempted;
 - (c) For the purpose of facilitating the commission of such a crime, aids, abets or otherwise assists in its commission or its attempted commission, including providing the means for its commission;
 - (d) In any other way contributes to the commission or attempted commission of such a crime by a group of persons acting with a common purpose. Such contribution shall be intentional and shall either:
 - (i) Be made with the aim of furthering the criminal activity or criminal purpose of the group, where such activity or purpose involves the commission of a crime within the jurisdiction of the Court; or
 - (ii) Be made in the knowledge of the intention of the group to commit the crime

Given that the Rome Statute represents the first instance of indirect perpetration being explicitly recognised in an international criminal law instrument, it is surprising that there was little debate preceding its inclusion,³⁴¹ precluding reliance on the *travaux préparatoires* as a guide to interpretation of 25(3). What is clear though from the express wording of 25(3)(a), is that it recognises criminal responsibility for the acts of an agent, irrespective of whether the agent himself is culpable or innocent (for example, when he is a minor).³⁴²

³⁴⁰ Osiel (n 3) 1770. This concern is acknowledged by Ambos, 'Joint Criminal Enterprise and Command Responsibility' (n 19) 182 who nevertheless argues that too naturalistic a perspective distorts the normative foundations of this theory.

³⁴¹ Florian Jessberger and Julia Geneuss, 'On the Application of a Theory of Indirect Perpetration in *Al Bashir*: German Doctrine at the Hague?' (2008) 6 JICJ 853, 857.

³⁴² See Jessberger and Geneuss (n 341) 857.

The first decision of the ICC Pre-Trial Chamber on modes of liability³⁴³ came in the wake of intense speculation of whether, in its interpretation of Art. 25(3), the ICC would endorse JCE as a form of commission liability. The *Lubanga* Pre Trial Chamber began by distinguishing between commission liability (through direct perpetration, co-perpetration and indirect perpetration) as concretised in Art. 25(3)(a) and accessory liability provided for in Arts. 25(3)(b) – (d) (including liability for contribution to a common purpose), stating that if it found reasonable grounds to believe that the accused was responsible as a co-perpetrator under Art. 25(3)(a) for the purpose of confirmation of charges, then the question of accessory liability would be irrelevant.³⁴⁴

The Pre Trial Chamber then proceeded to define ‘co-perpetration’ in Art. 25(3)(a) by first noting different kinds of approaches that are used to distinguish between principals and accessories in crimes committed by a plurality of persons.³⁴⁵ The ‘objective approach’ held that only a person who physically contributes to one of the objective elements of the crime is a principal. Since Art. 25(3)(a) recognised the responsibility for the acts of an innocent agent, this was clearly not the approach endorsed by the provision.³⁴⁶ The ‘subjective approach’ focussed on the mental state of the perpetrator, where only persons who shared the common intent to commit the crime could be considered principals, regardless of the extent of contribution to the crime. This approach, employed by the ad hoc tribunals in their definition of JCE, was akin to the mode of accessory liability recognised in Art. 25(3)(d) and was a residual form of *accessory* liability which would not be otherwise covered under concepts

³⁴³ *Lubanga* (n 18).

³⁴⁴ *Lubanga* (n 18) paras 318, 320-321.

³⁴⁵ *Lubanga* (n 18) paras 326-327.

³⁴⁶ *Lubanga* (n 18) paras 328, 333.

such as ordering, soliciting, aiding and abetting. It could not therefore be the correct interpretation of principal liability under Art. 25(3)(a).³⁴⁷

The Pre-Trial Chamber noted that the third approach of ‘control’ over the crime was expressly included in the provision of liability for indirect perpetration in Art. 25(3)(a), and that the notion of ‘co-perpetration’ in the same Article must therefore cohere with the choice of control as the criterion for distinguishing between principals and accessories.³⁴⁸ Thus, only persons who have control over the crime by virtue of the essential tasks assigned to them for the commission of the crime and are aware of having such control can be considered joint or co-perpetrators.³⁴⁹

The three approaches to distinguishing between parties to a crime are an interesting starting point for a debate on what is the appropriate model for international criminal law. Given that these approaches are almost entirely based on German criminal law theory however,³⁵⁰ their transposition to international criminal law requires a more sophisticated analysis than the *Lubanga* decision. Theories of participation already developed at the international criminal law level moreover may not so easily fit within this framework. For instance, *Lubanga* does not really do justice to the complexity of the JCE doctrine by characterising it as the ‘subjective approach’³⁵¹ – JCE, or at the very least JCE I and JCE II, clearly demands an active contribution for liability to be imposed.³⁵² Since the notion or concept of ‘control’ is

³⁴⁷ *Lubanga* (n 18) paras 329, 334-338.

³⁴⁸ *Lubanga* (n 18) paras 331-332, 349-350.

³⁴⁹ *Lubanga* (n 18) paras 330-332, 341.

³⁵⁰ See Part II of the thesis, text to notes 517 to 535 below.

³⁵¹ This characterisation is also endorsed by Héctor Olásolo, ‘Reflections of the Treatment of the Notions of Control of the Crime and Joint Criminal Enterprise in the Stakić Appeal Judgement’ (2007) 7 Int’l Crim L Rev 143, 147.

³⁵² See Thomas Weigend, ‘Intent, Mistake of Law, and Co-perpetration in the *Lubanga* Decision on Confirmation of Charges’ (2008) 6 JICJ 471, 478. Weigend also states that JCE does not even purport to distinguish between principals and accessories to a crime. This observation is not wholly accurate,

at the heart of the *Lubanga* Chamber's adoption of co-perpetration, it would have been helpful for the Chamber to have expanded on what exactly control, especially 'joint control', would encompass. One could for instance argue that joint control over the act presupposes equal participation or contribution by the co-perpetrators, whereas different kinds of degrees or contributions would lead to distinctions in the categorisation of different parties to the crime.³⁵³

The *Lubanga* Chamber then specified the objective and subjective elements of co-perpetration. The objective elements consist of (i) an agreement or a common plan between two or more persons. This plan can be implicit and should include an element of criminality, even though it need not be directed specifically at the commission of a crime.³⁵⁴ (ii) co-ordinated essential contribution by each perpetrator resulting in the realisation of the objective elements of the crime. This contribution may be at any stage of the crime.³⁵⁵

The subjective elements include (i) the accused must fulfil all subjective elements of the crime with which he is charged, including specific intent for crimes such as genocide. For most crimes under the jurisdiction of the ICC, this would mean meeting the 'intent' and 'knowledge' requirements in Art. 30(1) of the Rome Statute.³⁵⁶ (ii) All co-perpetrators must be mutually aware of and accept that the execution of the common plan may result in the realisation of the objective elements of the crime. If there is a substantial likelihood that the objective elements of the

given that the reason for the development of JCE liability is that holding senior leaders of crimes responsible only as accessories is as an understatement of their position and role in complex crimes.

³⁵³ See Militello (n 22) 946-7.

³⁵⁴ *Lubanga* (n 18) paras 343-345; *Katanga and Chui* (n 18) paras 522-523.

³⁵⁵ *Lubanga* (n 18) paras 346-348; *Katanga and Chui* (n 18) paras 524-526 which cited examples of essential contribution as activating mechanisms by leaders which lead to automatic compliance with their orders, designing an attack, supplying ammunition and co-ordinating the activities of troops.

³⁵⁶ *Lubanga* (n 18) paras 349-360; *Katanga and Chui* (n 18) paras 527-532.

crime would occur, this mutual acceptance can be inferred from the co-perpetrators' awareness of this likelihood and their decision to implement the plan despite such awareness. If on the other hand the risk is low, the co-perpetrators must have expressly accepted that implementing the plan would result in the realisation of the objective elements of the crime.³⁵⁷ (iii) The accused's awareness of the factual circumstances enabling him to jointly control the crime, i.e., that his role is essential in the implementation of the common plan and that he can frustrate its realisation by failing to perform his function.³⁵⁸

The sparseness of the elements outlined by *Lubanga* makes it difficult to assess how they would be applied to concrete cases before the court, and some of the interpretation in *Lubanga* also gives rise to concern. For instance, in the absence of any direct evidence that Lubanga was involved in the recruitment of child soldiers, the Trial Chamber based his responsibility for this crime on his 'essential role' in the common plan between him and some leaders of the FPLC (the military wing of a political group in Congo called the UPC, of which Lubanga was the founder and leader) to broaden the base of their army.³⁵⁹ The Chamber held that the implementation of this plan, which targeted young recruits, entailed the objective risk that children under 15 years of age would be recruited.³⁶⁰ Given Lubanga's key role of overall co-ordination of the FPLC, the Chamber held him to have joint control as a co-perpetrator over the implementation of the plan.³⁶¹ This part of the decision has been criticised on the basis that Lubanga's key role in the leadership of the FPLC and its activities does not support the inference that his contribution was essential for the

³⁵⁷ *Lubanga* (n 18) paras 361-365; *Katanga and Chui* (n 18) paras 533-537.

³⁵⁸ *Lubanga* (n 18) paras 366-367; *Katanga and Chui* (n 18) paras 538-539.

³⁵⁹ *Lubanga* (n 18) para 377.

³⁶⁰ *Lubanga* (n 18) para 377.

³⁶¹ *Lubanga* (n 18) paras 383, 398.

specific crime of the recruitment of child soldiers.³⁶² The criticism is certainly valid and stems from the Chamber's failure to clarify what it deems as the object of essential contribution: the specific crime, or the common plan.

Another instance of the potential divergence between the outlined element and its application is in inferring mutual acceptance that the execution of the plan may result in the realisation of the objective elements of the crime in low risk cases from the co-perpetrators' express acceptance of this result. As an example of this express acceptance, the Chamber points to when 'killing is committed with manifest indifference to human life'; on the other hand, intent is absent when the actor perceives a non-substantial risk but believes that his expertise will prevent the realisation of the offence.³⁶³ However, it is difficult to see how 'manifest indifference' in the first case can imply 'acceptance' of the victim's death, apart from treating this as an acceptance of the risk of death (which in the Chamber's formulation is not sufficient to prove intent in low risk cases). In the second case, in contrast, one could say that the actor 'accepts the risk' and is simply mistaken about his ability to prevent the risk and/or the level of his expertise.³⁶⁴

In the decision of confirmation of charges in *Katanga and Chui*, the Pre Trial Chamber endorsed³⁶⁵ and expanded upon the notion of control and liability under Art. 25(3)(a) developed in *Lubanga*. In *Katanga and Chui* however, the Chamber focussed on the elements of liability for joint perpetration through another person. The Chamber saw no merit in the Defence's argument that the phrase 'jointly with another or through another person' can include either 'co-perpetration' or 'indirect

³⁶² Weigend (n 352) 486-487.

³⁶³ *Lubanga* (n 18) paras 354 fn 436.

³⁶⁴ See Weigend (n 352) 483.

³⁶⁵ *Katanga and Chui* (n 18) paras 480-486.

perpetration’, but not ‘indirect co-perpetration’.³⁶⁶ It then set out the objective elements for perpetration by means, concentrating on the cases which it considered most relevant to international criminal law: where the perpetrator in the background commits the crime through another, who is also criminally responsible, by means of a ‘control over an organisation’ (*Organisationsherrschaft*)³⁶⁷ (a more accurate understanding would be control of the *act* by virtue of a hierarchical organisation).³⁶⁸

The first element consists in the perpetrator’s control over the organisation. The Chamber opined that since Art. 25(3)(a) expressly provided for the commission of a crime through another culpable person, it would also comprise cases involving the principal’s control over an organisation.³⁶⁹ Several national jurisdictions employed this concept to hold leaders of organisations responsible as perpetrators rather than accessories³⁷⁰ on the basis that in some cases of complex crimes, a person’s degree of blameworthiness increases in tandem with his rise in hierarchy within an organisational structure.³⁷¹ The concept had also been recognised in the jurisprudence of international tribunals.³⁷²

The second element is the existence of an organised and hierarchical apparatus of power. The organisation must be composed of superiors and sufficient subordinates that are fungible, hence ensuring manifest compliance with orders. The leader must exercise authority through means such as his power to hire, train, discipline, and

³⁶⁶ *Katanga and Chui* (n 18) paras 490-493.

³⁶⁷ *Katanga and Chui* (n 18) paras 495-499.

³⁶⁸ Ambos, ‘Joint Criminal Enterprise and Command Responsibility’ (n 19) 181.

³⁶⁹ *Katanga and Chui* (n 18) paras 501, 510.

³⁷⁰ *Katanga and Chui* (n 18) paras 502-505 citing the courts of Germany, Argentina, Peru, Spain and Chile.

³⁷¹ *Katanga and Chui* (n 18) para 503 citing *Attorney General v Eichmann*, Judgement, Case No. 40/61, Jerusalem District Court, 36 ILR 5-14, 18-276, 12 December 1961, para 197.

³⁷² *Katanga and Chui* (n 18) paras 506-509 citing the jurisprudence of the ICTY discussed above, Nuremberg jurisprudence and a previous decision by Pre Trial Chamber III of the ICC.

provide resources to his subordinate. This control should be mobilised to secure compliance with orders that include the commission of crimes within the Court's jurisdiction.³⁷³

The third element is execution of the crimes through 'automatic' compliance with orders. The organisational apparatus must be designed such that subordinates are mere cogs in the wheel and are easily replaceable. Thus, any single person's failure to follow orders cannot compromise the plan. In this fashion, the organisation develops a life of its own which enables it to function independent of the identity of any single executor. This automatic compliance, which is at the heart of the leader's liability as a principal, may also be achieved through intensive and violent training regimens for subordinates.³⁷⁴

The Chamber went on to hold that a co-perpetrator could be held liable for the crimes committed by the culpable subordinates of his co-perpetrator on the basis of mutual attribution by combining the doctrines of *Organisationsherrschaft* and co-perpetration.³⁷⁵ It repeated the objective and subjective elements required for co-perpetration in *Lubanga* and added an additional subjective element in the case of co-perpetration of a crime through another person: the accused's awareness of the factual circumstances enabling him to exercise control over the crime through another person, i.e., the character of the organisation, his position of authority within the organisation, and factual circumstances enabling automatic compliance with orders.³⁷⁶

³⁷³ *Katanga and Chui* (n 18) paras 511-514 citing Roxin, *Taterschaft und Tatherrschaft*, 8th ed., Berlin, De Gruyter, 2006, 245 and BGHSt 40, 218 at p. 236 (*Politbüro* case).

³⁷⁴ *Katanga and Chui* (n 18) paras 515-518 citing Roxin, *Taterschaft und Tatherrschaft*, 8th ed., Berlin, De Gruyter, 2006, p. 245, *The Juntas Trial*, Case No. 13/84, The Federal Appeals Chamber of Argentina, chap. 7/6 and German academic commentaries.

³⁷⁵ *Katanga and Chui* (n 18) paras 519-520.

³⁷⁶ *Katanga and Chui* (n 18) paras 533-537.

The heavy reliance of the *Katanga and Chui* Pre-Trial Chamber on the theory of *Organisationsherrschaft* is controversial given that this theory does not enjoy wide support in domestic legal systems,³⁷⁷ with the exception of Germany and a few Latin American states which are heavily influenced by German legal doctrine (indeed the Chamber cites Claus Roxin almost exclusively in its elucidation of the elements of the doctrine).³⁷⁸ Moreover, given the tight degree of control it requires,³⁷⁹ *Organisationsherrschaft* may not be the most appropriate interpretation of perpetration by means for purposes of Art. 25(3)(a). In its vision of a gigantic machine like apparatus made up of hundreds of individuals controlled by a few persons at the top, the doctrine employs even more of a fictional construct to order the chaotic reality of international crimes, than does JCE with its illusion of an agreement between scores of thousands of members.

Regardless of the merits of the doctrines however, the initial practice of the ICC indicates that the ICC is very much prepared to go its own way in interpreting and establishing modes of criminal responsibility based on the express provisions of the Statute, rather than on JCE. This is also reflected in the prosecutorial strategy being adopted at the ICC. For instance, the Prosecutor's application for an arrest warrant against Sudanese President Al Bashir characterises his responsibility as a perpetrator purely on the basis of indirect perpetration under Art. 25(3)(a).³⁸⁰

³⁷⁷ Jessberger and Geneuss (n 341) 868; Compare with Werle (n 22) 963-4, who states that while perpetration by means is recognised in major legal systems, it had not been regulated by international criminal law instruments or courts prior to the Rome Statute.

³⁷⁸ On Roxin's version of *Organisationsherrschaft*, refer to Part II of the thesis, text to notes 596 to 604.

³⁷⁹ See Kai Ambos, 'Article 25' (n 22) 475, 480.

³⁸⁰ Public Redacted Version of Prosecutor's Application under Art. 58 filed on 14 July 2008, *Situation in Darfur, Sudan* (ICC-02/05-157) (12 September 2008). For a detailed analysis, see Jessberger and Geneuss (n 341) 853.

The relationship between Art. 25(3) and JCE however remains far from clear. Differences between JCE (as a whole) and the concept of co-perpetration have been alluded to not only by the ICC, but also by commentators, who focus mostly on the objective elements of the two modes of liability: any contribution to the criminal purpose versus an essential contribution, and the requirement of a specific intent to commit the crime in the case of special intent crimes for liability for co-perpetration.³⁸¹ While the ICC does not seem prepared to accept JCE as a form of principal liability under Art. 25(3)(a), it may be willing to interpret accessory liability under Art. 25(3)(d) as a ‘little cousin’ of JCE.³⁸² However, it is difficult to map the elements of JCE directly onto the wording of Art. 25(3)(d) – the latter does not require that the members of the group have the *shared intent* for the achievement of the common purpose, which is the crux of JCE liability.³⁸³ Art. 25(3)(d)(ii) liability moreover seems difficult to justify even as accessory liability. Under this provision, it appears sufficient that the accused makes some contribution to the criminal enterprise, for instance, by supplying food or other provisions to the members of the enterprise, as long as he knows of its goals.³⁸⁴ On the face of it, this would cover almost everyone living under a criminal regime such as Nazi Germany or the Khmer Rouge

³⁸¹ Werle (n 22) 962-3.

³⁸² Jessberger and Geneuss (n 341) 865. See also Linda Engvall, ‘The Future of Extended Joint Criminal Enterprise – Will the ICTY’s innovation meet the standards of the ICC?’ (2007) 76 *Nordic J Int’l L* 241, 258. Several commentators have previously grappled with fitting JCE into the structure of Art. 25. See for instance, See Militello (n 22) 949-51.

³⁸³ See Boas (n 1) 127-8.

³⁸⁴ See Ohlin (n 100) 78-80. Ohlin however does not seem to consider Art. 25(3)(d) as an instance of only accessory liability since he goes on to argue that this provision makes equally liable the person who makes the greatest contribution as well as the person who makes the smallest contribution to the criminal enterprise. Arguably, the first category of persons would be charged under Art. 25(3)(a) rather than Art. 25(3)(d). Clark argues that despite the difference in the literal drafting of the two mental states in Art. 25(3)(d), the drafters perhaps did not really intend different results, or else these offences may be of different gravity: Roger S Clark, ‘Drafting a General Part to a Penal Code: Some Thoughts Inspired by the Negotiations on the Rome Statute of the International Criminal Court and by the Court’s First Substantive Law Discussion in the *Lubanga Dyilo* Confirmation Proceedings’ (2008) 19 *Crim L F* 519, 548.

in Cambodia. Unlike aiding and abetting, which requires the contribution to at least be substantial,³⁸⁵ there is no such limiting clause in Art. 25(3)(d).

It is also hard to predict whether the ICC would interpret Art. 25(3)(d) to include situations meant to be covered by JCE III where a crime that was not intended, but was merely foreseeable is committed by members of the group other than the accused.³⁸⁶ There is some academic support for 25(3)(d) being accorded an expansive interpretation to include JCE III situations.³⁸⁷ However, there is significantly greater merit in the view that JCE III and some forms of JCE II are too close to conspiracy (as a mode of liability rather than an independent crime) to fall within the meaning of 25(3)(d), particularly since the drafters of the Rome Statute expressly rejected the inclusion of conspiracy liability. Also, the ‘foreseeability’ standard for JCE III liability would considerably water down the ‘knowledge’ requirement of 25(3)(d).³⁸⁸ The suggestion that ‘knowledge’ could cover ‘foresight’ and ‘voluntary taking of risk’ of a criminal action by members of the criminal group³⁸⁹ blurs the carefully crafted distinctions that legal systems make between ‘knowledge’, ‘recklessness’ and ‘criminal negligence’ in domestic law.

The ICC’s interpretation would invariably influence the interpretation of the almost identical provision in the Statute of the Special Tribunal for Lebanon which provides for JCE responsibility for the *domestic* crime of terrorism.³⁹⁰ The only

³⁸⁵ *Tadic Appeals Judgement* (n 4) para 229.

³⁸⁶ Boas (n 1) 128; Powles (n 145) 606, 617-618. See also Fletcher and Ohlin (n 258) 549; Linda Engvall (n 382) 259-260.

³⁸⁷ Milanovic (n 15) fn 21; Cassese (n 211) 132. Ohlin suggests that it is plausible to argue that if the accused makes a contribution with the aim of furthering the *criminal purpose* of the group, it is certainly possible that he was unaware of the conduct with which he is charged but could have foreseen its possibility: Ohlin (n 100) 85.

³⁸⁸ Ambos, ‘Joint Criminal Enterprise and Command Responsibility’ (n 19) 172-173.

³⁸⁹ Cassese (n 211) 132.

³⁹⁰ Article 3(1)(b) STL Statute. See Milanovic (n 15) 1144.

significant difference between Article 25(3)(d) of the Rome Statute and Article 3(1)(b) of the STL Statute is that the latter omits the requirement that the common criminal activity which the accused intends to further must involve the commission of a crime within the Court's jurisdiction. This may result in a situation where the indictment may charge the accused with the intent to further a criminal purpose that is not within the SCSL Statute, purely so that this common criminal purpose could then be used to impose individual liability for specific crimes that are provided for in the Statute, and for which the accused could not directly be held responsible except under an expanded notion of *mens rea* as in JCE III.³⁹¹

E. CONCLUSION

For more than a decade of the operation of international criminal tribunals, JCE in all its chameleon like glory has been the darling of prosecutors and the favoured mode of liability for convictions compared to its counterparts such as aiding and abetting, or command responsibility. The past few years reflect the first warning signs that it could be dethroned from this position by the introduction of two new doctrines of liability: 'co-perpetration' and 'indirect perpetration'.

The aim of this chapter has been rather modest: it has simply attempted to show the loopholes and contradictions in the construction of these theories by international criminal tribunals and also by academics, and also presented factual scenarios for which these theories, particularly JCE, either have no answers thus far, or problematic ones. Underlying these superficial (though vital, especially from the point of view of the accused who is charged under these modes of liability) problems however, is the lack of a conceptual framework in international criminal law for delineating modes of responsibility. This theoretical poverty has sought to be

³⁹¹ Along similar lines, see Milanovic (n 15) 1145-1148.

explained as resulting from an under theorised shift in principles of responsibility from public international law (which traditionally focused on States and collectives) to criminal law (which takes the individual as the central unit of attribution of responsibility).³⁹² To add to this deficit, the initial practice of international criminal law has been disproportionately driven by international lawyers working in human rights and humanitarian law, rather than criminal law.³⁹³

The ensuing discussion will therefore seek to create a tentative theoretical framework for international criminal law's modes of responsibility, through focussing on JCE, and the alternative of indirect co-perpetration and its analogues. While the principles and conceptual apparatus of domestic criminal law cannot be transposed, without more, to the international level, they can serve as an excellent starting point to ground and illuminate our understanding of the principles underpinning allocation of responsibility between parties to a crime. It is this terrain that we shall next explore.

³⁹² Fletcher and Ohlin (n 258) 541.

³⁹³ Darryl Robinson, 'The Identity Crisis of International Criminal Law' (2008) 21 *Leiden J Int'l L* 925, 928; Wessel, 'Judicial Policy-Making at the International Criminal Court: An Institutional Guide to Analyzing International Adjudication' (2006) 44 *Colum J Transnat'l L* 377, 449; Damaska, 'The Shadow Side of Command Responsibility' (2001) 49 *Am J Comp L* 455, 495.

PART II: THE PRINCIPAL IN INTERNATIONAL CRIMINAL LAW

A. INTRODUCTION

In the previous Part, I showed how the invention and development of JCE has clearly been motivated by a desire to be able to hold persons in positions of authority who are often quite far removed from the actual commission of the crime responsible as principals. The focus on these categories of persons is a natural (though hardly inevitable) consequence of the jurisdiction of most international tribunals being limited to senior leaders and those deemed ‘most responsible’ for the crimes in question.³⁹⁴ It is also a necessary consequence of attributing individuals with responsibility for crimes that are international in nature. Given the scale and scope of these crimes, and the mens rea required for them,³⁹⁵ it would be very difficult to charge the physical perpetrator of the crime who is usually a low level subordinate following orders, or an ordinary civilian caught up in the chaos of armed conflict, with a mass crime such as genocide; he would be more appropriately charged for the individual crime of murder, which is not an international crime.

This combination of the personal and material (subject matter) jurisdiction of international criminal tribunals gives rise to unique problems in attribution of liability for international crimes that are distinct from those found in domestic criminal systems: (1) The non physical perpetrator is sought to be held responsible not only for

³⁹⁴ See for instance Article 1 of the ECCC law (Law on the Establishment of the Extraordinary Chambers in the Courts of Cambodia for the Prosecution of Crimes Committed During the Period of Democratic Kampuchea (2001) (Cambodia), as amended by NS/RKM/1004/006 (27 October, 2004) which limits the Court’s jurisdiction to senior leaders of Democratic Kampuchea and those most responsible for the atrocities committed during the Khmer Rouge, and Article 1 of the SCSL Statute (Statute of the Special Court for Sierra Leone, SC Res 1315, January 16, 2002, 2178 UNTS 138, 145) which similarly limits the competence of the Court to try those bearing the greatest responsibility for serious violations of international humanitarian law and Sierra Leonean law.

³⁹⁵ This is especially true of the crime of genocide which requires a ‘specific intent’: *Akayesu* (n 268) para 498.

the crime of one physical perpetrator such as murder (the classic situation in domestic criminal law), but for the actions of several physical perpetrators taken as a whole (for example several murders that amount to the international crime of genocide) (2) This greater crime is not only different quantitatively, but also qualitatively - it is an entirely different crime and not simply different degrees of the same crime (such as murder and manslaughter) (3) Unlike in domestic criminal law where the role played by the non-physical perpetrator in bringing about the crime is usually lesser than that of the physical perpetrator, in international crimes, the former's role is almost always greater.

These special characteristics of international crimes warrant a distinctive approach to allocating responsibility between principals and accessories in international criminal law. In this and the following Parts of the thesis, I seek to develop a tentative structural framework for the attribution of individual criminal responsibility in international criminal law. There is at present no academic literature on the theoretical basis for distinguishing between parties to an international crime. The last section of Part I discussing the case law of the ICC touched briefly upon the notion of control adapted from German criminal law as a basis for this distinction. Apart from this rather scant pronouncement, international criminal law, which has largely been case law driven thus far, has not considered this matter. Part II will therefore consider what concept of principalship is apposite for international criminal law. Section B will start by identifying the need for a distinctive approach to perpetration responsibility for international crimes. It will then go on to develop a conceptual account of this mode of responsibility by critically looking at the theoretical basis on which the fault lines between principals and accessories are drawn in English criminal law (Section C) and German criminal law (Section D). Finally, Section E will examine whether one can

build a case for a more capacious concept of principalship in international criminal law by drawing on German and English criminal law theory. I will also analyse whether any of the variants of JCE can be accommodated within this concept.

B. THE NEED FOR A DISTINCTIVE APPROACH TO PERPETRATION IN INTERNATIONAL CRIMINAL LAW

In academic writing on rules of responsibility, it is widely acknowledged that there is no “*a priori* unitary approach to theorising criminal responsibility”;³⁹⁶ indeed, different concepts of responsibility may have particular conditions of existence which could relate to a host of socio-cultural, economic, political and other factors.³⁹⁷ One of the central functions of criminal responsibility is to censure the conduct of the accused. This expression however is not confined to evaluating simply whether the accused is innocent or guilty, but also what exactly he is guilty of.³⁹⁸ The rules of criminal responsibility would fulfill this essential communicative function only if they accurately express³⁹⁹ the nature of the censure, its appropriate target, and the conditions under which it is deserved.⁴⁰⁰ A theory of attribution of responsibility for international crimes must therefore be capable of representing, as accurately as possible, both the nature of the crime in question as well as how exactly the accused is connected to its commission.

This communicative function of criminal responsibility is perhaps even more important in international criminal trials than it is for domestic crimes. Apart from the

³⁹⁶ Nicola Lacey, ‘In Search of the Responsible Subject: History, Philosophy and Social Sciences in Criminal Law Theory’ (2001) 64 MLR 350, 351.

³⁹⁷ Mark J. Osiel, *Making Sense of Mass Atrocity* (CUP 2009) 126.

³⁹⁸ Victor Tadros, *Criminal Responsibility* (OUP 2005) 80.

³⁹⁹ Gardner holds that rules of responsibility are ascriptive rather than normative. They are therefore directed towards making our judgments on whether and how we should count what people have done more accurate, rather than more desirable or valuable. See John Gardner, ‘Criminal Law and the Uses of Theory: A Reply to Laing’ (1994) 14 OJLS 217, 220.

⁴⁰⁰ Tadros (n 398) 3.

more standard aims of criminal justice - retribution,⁴⁰¹ deterrence,⁴⁰² incapacitation and rehabilitation - proponents of trials for international crimes have come to see the process as embracing increasingly more ambitious goals. International criminal trials are now touted as venues for giving voice to victims of mass violence, expected to create a historical record of wrongdoing, and even to contribute to prevention of conflict.⁴⁰³ There is also emphasis on the potential didactic function of these trials – creating a public sense of accountability for severe violations of human rights through exposure, stigmatization, and internalization of norms and values that respect human rights.⁴⁰⁴ Champions of these trials assert that it is only through justice – establishing accountability for abuses, creating an accurate historical record, and providing some relief for victims – that a conflict society can transition to a peaceful and stable one based on the rule of law.⁴⁰⁵ There is dispute among commentators on whether these are all legitimate aims of the international criminal trial, whether they are capable of being operationalised, and how they should be prioritised. However, if the truth and history telling and didactic functions of international criminal trials are to be realised,

⁴⁰¹ See eg Judith N Shklar, *Legalism: Law, Morals, and Political Trials* (Harvard UP 1964) 158; Claude Jorda, 'The International Criminal Tribunal for the Former Yugoslavia: Its Functioning and Future Prospects' (1999) 3 Hofstra L & Pol'y Symp 167, 201; Richard J Goldstone, 'Justice as a Tool for Peace-making: Truth Commissions and International Criminal Tribunals' (1996) 28 NYU J Int'l L & Pol 485, 491.

⁴⁰² See eg David Wippman, 'Atrocities, Deterrence and the Limits of International Justice' (1999) 23 Fordham Int'l L J 473; Leyla Nadya Sadat, *The International Criminal Court and the Transformation of International Law* (Transnational 2002) 73-75.

⁴⁰³ 'Developments in International Law – International Criminal Law' (2001) 114 Harv L Rev 1943, 1961; Minna Schrag, 'Lessons Learnt from ICTY Experience' (2004) 2 JICJ 427, 428; Mirjan Damaska, 'What is the Point of International Criminal Justice?' (2008) 83 Chi-Kent L Rev 329, 331.

⁴⁰⁴ Damaska (n 403) 345-47; Payam Akhavan, 'Justice in the Hague, Peace in the Former Yugoslavia? A Commentary on the United Nations War Crimes Tribunal' (1998) 20 Hum Rts Q 737, 741-42, 746-51.

⁴⁰⁵ Juan E Méndez, 'In Defence of Transitional Justice' in A. James MacAdams (ed), *Transitional Justice and the Rule of Law in New Democracies* (University of Notre Dame Press 1997) 1, 7; Jose E Alvarez, 'Rush to Closure: Lessons of the Tadic Judgement' (1998) 96 Mich L Rev 2031, 2031-32; Ruti G Teitel, *Transitional Justice* (OUP 2001) 28; Alexander K.A. Greenawalt, 'Justice without Politics: Prosecutorial Discretion and the International Criminal Court' (2007) 39 NYU J Int'l L & Pol 583, 602.

it is essential not only that they reflect, quite precisely, the position of the accused in the context of mass atrocity, but also situate him within the political and cultural climate that made this violence possible. The principles of allocation of criminal responsibility in the context of mass atrocities must therefore be true to the nature of the international crime as well as the position of the accused in its commission.

In order to formulate an appropriate concept of perpetration in international criminal law, it is thus important to note the most important markers of an international crime, the climate in which it is committed, and the major participants in its commission.

The most telling feature of an international crime as contrasted with its domestic counterpart is that it is inherently collective in nature, for the perpetrator as well as the victim.⁴⁰⁶ While the perpetrator of a crime such as ethnic cleansing or waging aggressive war is individually culpable, he invariably commits this crime on behalf of or in furtherance of a collective criminal project, be it that of a state or other authority.⁴⁰⁷ The hypothetical figure of the lone *génocidaire* hardly ever exists in practice: the perpetrator is part of and acts within a social structure that influences his conduct and in conjunction with other people.⁴⁰⁸ Similarly, the victims of international crimes are also mostly chosen not based on their individual characteristics, but because of their actual or perceived membership of a collective.⁴⁰⁹ This is reflected in the provisions of the law as well as in practice. Genocide for instance, is defined as

⁴⁰⁶ Akhavan, *Justice in the Hague* (n 404) 781; George P Fletcher, 'The Storrs Lectures: Liberals and Romantics at War: The Problem of Collective Guilt' (2002) 111 *Yale L J* 1499, 151; Laurel E Fletcher & Harvey M Weinstein, 'Violence and Social Repair: Rethinking the Contribution of Justice to Reconciliation' (2002) 24 *Hum Rts Q* 573, 605.

⁴⁰⁷ Robert D Sloane, 'The Expressive Capacity of International Punishment: The Limits of the National Law Analogy and the Potential of International Criminal Law' (2007) 43 *Stan J Int'l L* 39, 56.

⁴⁰⁸ Sloane (n 407) 56.

⁴⁰⁹ Mark A. Drumbl, 'Collective Violence and Individual Punishment: The Criminality of Mass Atrocity' 99 *Northwest U L Rev* (2005) 539, 571.

performing certain acts such as killing or causing serious harm “with the intent to destroy, in whole or in part, a national, ethnical, racial or religious group, as such”.⁴¹⁰ International crimes are also collective in the sense that they are committed with the consciousness on the part of the individual perpetrator that he is part of a common project. While it would be too far fetched to say that there is a “corporate mens rea”⁴¹¹ at work in all international crimes, what can hardly be disputed is that crimes such as crimes against humanity that are committed as a systematic and widespread attack against a civilian population cannot be understood solely in terms of the mental state of each perpetrator. Rather, one must address the social structures and group solidarity that renders them possible- whether that is based on fear of violence, ethnic hatred or religious intolerance.⁴¹²

The second distinctive aspect of international crimes is that the individual crimes do not deviate from, but conform to the prevailing social norm.⁴¹³ In this sense, they are indeed the ‘crimes of obedience’ coined by Kelman: they are acts carried out under explicit instructions from the authorities or makers of official policy, or at least in an environment in which they are sponsored, expected or tolerated by them, and which are considered illegal or immoral by the larger community⁴¹⁴ (Drumbl uses the terminology of jus cogens norms and basic conceptions of human decency when speaking of this larger community.⁴¹⁵ For international crimes, this larger community would consist of the international community of States, especially those that are

⁴¹⁰ Article 2, Convention on the Prevention and Punishment of the Crime of Genocide, 1948, 78 UNTS 277.

⁴¹¹ Sloane (n 407) 58.

⁴¹² Osiel, *Mass Atrocity* (n 397) 187-188.

⁴¹³ Andre Nollkaemper, ‘Introduction’ in Andre Nollkaemper & Harmen van der Wilt (eds), *System Criminality in International Law* (CUP 2009) 1, 6; Immi Tallgren, ‘The Sensibility and Sense of International Criminal Law’ (2002) 13 EJIL 561, 575; Fletcher, Storrs Lecture (n 406) 1541.

⁴¹⁴ H. C. Kelman, ‘The Policy Context of International Crimes’ in *System Criminality* (n 413) 26, 27.

⁴¹⁵ Drumbl, *Collective Violence* (n 409) 567.

signatories to instruments such as the Rome Statute of the ICC). This is regardless of whether the crimes are also committed for personal motives or with zeal.⁴¹⁶ The perpetrator of an international crime acts within a moral and cultural universe where his actions correspond to the values of the group to which he belongs. He may conceive of himself as being in the right and working to prevent injustice or even in self defence.⁴¹⁷ The victims are transformed into the guilty party and the group dynamic is reinforced by a myth of ethnic, religious, racial or national superiority that is under threat from the victims.⁴¹⁸ Such experiences have been documented by scholars and journalists studying genocide and ethnic cleansing in cases such as Rwanda and Yugoslavia.⁴¹⁹ As Drumbl writes of Rwanda, the “pre-existing normative structure was suspended and replaced with the normalisation of ethnic elimination. Killing became a civic duty: neighbours killed neighbours they had known since childhood and with whom they previously had lived in harmony”.⁴²⁰ Some authors go so far as to assert that in such a climate, it is paradoxically those who refuse to commit the crimes that act in deviance to the social norm. Criminal law in these circumstances appears to be something that can only be adhered to by exceptional individuals.⁴²¹

⁴¹⁶ Kelman (n 414) 27.

⁴¹⁷ See José E Alvarez, ‘Crimes of State/ Crimes of Hate: Lessons from Rwanda’ (1999) 24 *Yale J Int’l L* 365, 396-97; Mark A Drumbl, ‘Punishment, Postgenocide: From Guilt to Shame to Civis in Rwanda’ (2000) 75 *NYU L Rev* 1221, 1243, 1245.

⁴¹⁸ Drumbl, *Collective Violence* (n 409) 567-568, Alvarez, *Rwanda* (n 417) 396-97; Tallgren (n 413) 574.

⁴¹⁹ See for instance, on Rwanda, Alison Des Forges, *“Leave None to Tell the Story”: Genocide in Rwanda* (Human Rights Watch 1999).

⁴²⁰ Drumbl, *Collective Violence* (n 409) 570.

⁴²¹ Drumbl, *Collective Violence* (n 409) 568; Tallgren (n 413) 573.

This line of argument has overtones of a philosophical determinism that would make the attribution of responsibility difficult,⁴²² and it is not my place to pursue it too closely here as it would involve a deviation into the very possibility of responsibility in these settings. Moreover the discipline of international criminal law already forecloses that debate by providing for criminal responsibility in these circumstances. George Fletcher offers a slightly different account of this dimension of international crimes in terms of the denial of the perpetrator's opportunity for self-correction. The moral climate of hate does not cause the crime to be committed, but rather deprives people of their second order capacity for self restraint (from criminal conduct). The perpetrator is subject to the phenomenal world of the senses but always has the capacity to choose the noumenal world of reason and let his conduct be governed by the moral law. However, the circumstances in which he operates can make this exercise of choosing the moral order far more demanding.⁴²³ It is for this reason that the dramatically different background, which Carlos Nino terms "radical evil",⁴²⁴ in which international crimes are committed as compared to isolated acts of murder or rape must be paid serious attention to in any theory of responsibility for an international crime.

Finally, a theory of perpetration for international crimes has to be sensitive to the number and motivations of the participants in the crime. It must be able to accommodate the fact that these participants will be spatially and temporally dispersed and that for this reason, unlike in domestic crimes, a theory of responsibility cannot afford to focus solely on the time and place where each individual offence

⁴²² Sloane (n 407) 61-62 discussing and ultimately dismissing philosophical determinism in these circumstances.

⁴²³ Fletcher, Storrs Lecture (n 406) 1541-1543.

⁴²⁴ Carlos Santiago Nino, *Radical Evil on Trial* (Yale UP 1996) vii.

(such as rape) constituting the overall crime (war crime) occurred. It should also be cautious of simplifying the social, cultural and structural forces that make mass atrocity possible and resist the temptation to make all cases of mass violence fit into a preconceived mould. International crimes can take place in diverse organizational settings – they can be highly organized and rigidly hierarchical ones, or deliberately encourage arbitrariness and spontaneity.⁴²⁵ The crimes may rely on anonymity and functional specialization to facilitate their commission. For instance, they may be committed through the use of a bureaucratic apparatus so as to increase the emotional and physical distance between the perpetrators and the victims (Nazi Germany is often cited as a prime example of this organisational matrix).⁴²⁶ Conversely, they may thrive on proximity between the perpetrators and the victims where neighbours, friends and family are motivated to kill, hurt and rape people they previously had close ties with in a ritual cleansing affirming the division of religion, race or ethnicity (as in Rwanda).⁴²⁷

International crimes also typically involve perpetrators working at different levels – policy (leaders such as Hitler and Pol Pot who were involved with planning, ordering and instigation), mid level administration (who operationalise these plans but have little influence at the overarching policy level) and actual physical perpetrators (who are more often than not quite unaware of the larger political agendas and use the opportunities to sometimes settle private differences).⁴²⁸ Though these categories are necessarily simplifications, it is worth noting that the leadership level is most closely

⁴²⁵ Mark J Osiel, 'Constructing Subversion in Argentina's Dirty War' (2001) 75 *Representations* 119, 127.

⁴²⁶ See Sloane (n 407) 64. Contra Osiel, *Mass Atrocity* (n 397) 99.

⁴²⁷ Arne Johan Vetlesen, *Evil and Human Agency: Understanding Collective Evildoing* (CUP 2005) 32; Drumbl, *Collective Violence* (n 409) 569.

⁴²⁸ See Michael Mann, *The Dark Side of Democracy* (CUP 2006) 9; Tallgren (n 413) 572; Osiel, *Mass Atrocity* (n 397) 67.

connected to the “collective aspect” of the crime, such as intending the killings as part of a widespread or systematic attack against part of the civilian population. The rank and file perpetrator has usually little to do with these features that make the crime a truly international one. Conversely, the leadership level participant is rarely if ever involved in the physical commission of the individual offence which constitutes an essential part, but not the whole, of the actus reus of the international crime.⁴²⁹ Thus, unlike the typical domestic crime, the persons involved in the commission of an international crime are attached to different aspects of the crime – both categories have an essential role to play, but there is little overlap in these roles, and their motivations for acting can be entirely different. While cases of organized crime in domestic criminal law may also involve the same categories of participants, the sheer scale and proportion of the crimes and the number of people involved in mass atrocity far exceeds those in organized crime situations. For instance, it is estimated that more than a million people participated in some capacity in the Rwandan genocide which was characterized by broad based involvement and support.⁴³⁰

It is also important to keep in mind that the image of the participant as a soulless bureaucrat who is only ‘doing his job’ as part of the enterprise of mass atrocity⁴³¹ presents only part of the truth about the reality of mass atrocity. This image is of significance and has proved quite influential in the development of a theory of perpetration. As we shall discuss later,⁴³² Roxin’s picture of the fungible intermediary as a human automaton clearly relies on this conception of the physical perpetrator in order to shift control onto the *Hintermann*. However, as academics have noted in their

⁴²⁹ See Tallgren (n 413) 572.

⁴³⁰ Philip Gourevitch, *We Wish to Inform You That Tomorrow We Will Be Killed with Our Families: Stories from Rwanda* (Picador 1998) 244, 279; Des Forges (n 419) 485, 770.

⁴³¹ See Sloane (n 407) 64.

⁴³² See text to notes 627 to 631.

studies of the phenomenon of mass atrocity, more often than not, there is a “communal engagement with violence”.⁴³³ Atrocity cannot be perpetrated on such a widespread basis unless it is accompanied by vigorous participation by a very large number of ordinary people.⁴³⁴ Some authors even question whether crimes on such an epidemic scale can be committed by people simply acting under the instructions of authority figures unless they have internalized the ideology behind the instructions and actually wish to assist in its operationalisation.⁴³⁵ People can only be motivated to commit such acts when the ideology resonates with their own psychological dispositions.⁴³⁶

While the calculating bureaucrat and the crazed ideological killer represent two extremes perhaps of the kinds of actors in international crimes, most perpetrators will display some or a combination of various kinds of motives.⁴³⁷ Mann even classifies perpetrators according to their motives: ideological killers, bigoted killers, fearful killers, careerist killers, materialist killers, disciplined killers, comradesly killers and bureaucratic killers.⁴³⁸ In fact, no case of mass atrocity will have only one type of perpetrator. This is true even of cases such as Nazi Germany where it is now acknowledged that while the personnel in concentration camps were part of an oppressive organizational matrix, they still had considerable freedom to act and perpetrate violence as they wished without fear of retribution.⁴³⁹ Commentators on mass conflict note that in quite a number of these scenarios, subordinates enjoy

⁴³³ Fletcher & Weinstein (n 406) 605.

⁴³⁴ Drumbl, *Collective Violence* (n 409) 569; Laurel E Fletcher, ‘From Indifference to Engagement: Bystanders and International Criminal Justice’ (2005) 26 *Mich J Int’l L* 1013, 1026.

⁴³⁵ Vetlesen (n 427) 25-26.

⁴³⁶ Vetlesen (n 427) 50.

⁴³⁷ On Rwanda, see Drumbl, *Rwanda* (n 417) 1246-1251.

⁴³⁸ Mann (n 428) 27-29.

⁴³⁹ Vetlesen (n 427) 36 quoting Sofsky.

considerable autonomy in the interpretation and execution of the policy directives of leaders and sometimes this control over the fate of their victims is appropriated rather than granted voluntarily.⁴⁴⁰ For example, during Argentina's Dirty War, junior officers who acted at the lower levels exercised a fair amount of discretion over how to treat their victims after interrogation.⁴⁴¹

These distinctive features of international crimes – their collective nature, conformity to the prevailing social norms, and widespread participation in their commission by different levels of participants acting on different motives – must be kept in mind while evaluating the possibility of using domestic criminal law principles to construct a theory of perpetration responsibility for international crimes. We can now turn to this analysis by first considering principal responsibility in English criminal law.

C. THE PRINCIPAL IN ENGLISH CRIMINAL LAW THEORY

1 Causation and the Concept of the Principal

English criminal law provides a seemingly straightforward definition of the principal party to a crime – it is the person who most directly and immediately fulfils the definitional elements of the offence.⁴⁴² There can be more than one principal party to an offence, for instance where P1 and P2 both separately meet all elements of the relevant offence, or where P1 and P2 are joint principals such that both have the requisite mens rea and their actions, in combination, fulfil the actus reus required for

⁴⁴⁰ Osiel, *Mass Atrocity* (n 397) 22-23, 26.

⁴⁴¹ Osiel, *Mass Atrocity* (n 397) 102.

⁴⁴² KJM Smith, *A Modern Treatise on the Law of Criminal Complicity* (Clarendon Press 1991) 27-28.

the offence.⁴⁴³ In this situation P1 will personally not commit at least some part of the actus reus for the offence.⁴⁴⁴

The distinction between the principal and other parties to a crime is based on the notion of immediacy of the causal connection between the conduct of the offender and its consequences.⁴⁴⁵ Generally speaking, the principal P's volitional actions are considered the cause of an act or omission if they constitute the ultimate human conduct before the result.⁴⁴⁶ Thus, the voluntary intervention by a third party D is regarded as having broken the chain of causation, resulting in D being held liable as the principal and P only being considered as an accessory to the offence, provided he meets the relevant actus reus and mens rea requirements.⁴⁴⁷ This view of what constitutes causation is grounded in Hart and Honoré's influential work distinguishing between occurrences in the realm of nature and those in the field of human relationships, based on the autonomy and agency of human actions. Thus, while it may be logical to talk about events in the natural world as having been 'caused' by other events or by a human agent, the conduct of a voluntary human actor cannot be said to be 'caused' by any other human being – the latter can at best give 'reasons for action' for the former.⁴⁴⁸ This is because every human being, in Kadish's inimitable style, is ultimately a 'wild card' who is, in the final analysis, free to make any decision he likes or to change his mind.⁴⁴⁹

⁴⁴³ AP Simester and GR Sullivan, *Criminal Law: Theory and Doctrine* (Hart Publishing 2010) 207.

⁴⁴⁴ Smith, *Criminal Complicity* (n 442) 28.

⁴⁴⁵ Smith, *Criminal Complicity* (n 442) 80.

⁴⁴⁶ Andrew Ashworth, *Principles of Criminal Law* (OUP 2009) 105.

⁴⁴⁷ Ashworth (n 446) 106-111, discussing in detail the exceptions to this principle.

⁴⁴⁸ HLA Hart and AM Honoré, *Causation in the Law* (Clarendon Press 1959) 48-54. For a critical look at this thesis, see JH Mansfield, 'Causation in the Law – A Comment' (1963) 17 Van L Rev 487, 510-514.

⁴⁴⁹ Sanford H Kadish, 'Complicity, Cause and Blame: A Study in the Interpretation of Doctrine' (1985) 73 Cal L Rev 323, 360.

The only exception that Hart and Honoré recognise to this view of human actions is when the conduct of the primary actor P is involuntary or not wholly voluntary. They cite instances of when an accused D intends P to perform a particular action and P's action is not fully voluntary in that it is induced by coercion, deceit or the exercise of authority. In these situations, D may still be considered the principal party.⁴⁵⁰ The exact scope of 'not fully voluntary actions' in their thesis is unclear. They suggest that these are not limited to cases where P would be exempt from criminal liability.⁴⁵¹ Thus, the scope of non voluntary actions appears broader than situations where P would either be excused or justified in his conduct. At another place, they also list a number of non exhaustive factors that may take away from the voluntariness of P's conduct, including lack of muscular control or consciousness, duress, and predicaments created by D for P where P cannot be said to have a 'fair choice'.⁴⁵² They do not however elaborate further on these circumstances or on the limits of their operation. As we shall later explore, resolving this ambiguity is crucial to building on an appropriate concept of principalship.

The traditional formulation of the accessory's liability in English law conceives of it as derivative in nature, that is, it arises from and is dependent upon D's contribution to or participation in the offence committed by the primary party P.⁴⁵³ As we shall see later in Part III on accessorial liability, this is now a matter of considerable dispute and prominent commentators consider other theories that attach more importance to D's independent conduct to have gained precedence. This is particularly true after the introduction of Part II of the Serious Crime Act 2007 which introduces a new range of

⁴⁵⁰ Hart and Honoré (n 448) 323-4.

⁴⁵¹ Hart and Honoré (n 448) 340.

⁴⁵² Hart and Honoré (n 448) 70.

⁴⁵³ Kadish (n 449) 337.

offences of ‘encouraging or assisting crime’ which are auxiliary offences of complicity.⁴⁵⁴ Nonetheless, the debates surrounding the derivative doctrine are important for understanding the limits of principal responsibility in English law. For instance, does D’s liability result from his participation in the *crime* perpetrated by P, or does it flow from his participation in the *wrongful act* carried out by P?⁴⁵⁵ If the latter is the case, D could possibly incur criminal responsibility even when P is excused (for example on grounds of duress), but not when P is justified in committing the act.⁴⁵⁶ Second, must the nature of D’s participation be ‘causal’ in some way, that is, should it have made a difference to the outcome of the ultimate offence by P?⁴⁵⁷ Alternatively, is it sufficient that D intentionally contributed to P’s conduct while possessing the mens rea required for the offence committed by P and intending that P perform the actions that ultimately resulted in P’s liability?⁴⁵⁸ As we shall see in the following sections, these questions have a bearing on our notion of principalship.

2 The Problem of the Accessory’s Greater Liability

Since on the traditional account, the accessory’s liability is derivative in nature, the orthodox view was that the accessory D’s liability cannot exceed that of the principal

⁴⁵⁴ See Ashworth (n 446) 426-427.

⁴⁵⁵ On the implications of this distinction, see George P Fletcher, *Rethinking Criminal Law* (OUP, 2000) 641-45. Several commentators have advocated basing the responsibility of the accessory on the wrongful act of the principal, rather than on the offence. See Kadish (n 449) 379-82; Peter Alldrige, ‘The Doctrine of Innocent Agency’ (1990) 2 Crim L F 45, 46-47.

⁴⁵⁶ Fletcher, *Rethinking* (n 455) 6421-43.

⁴⁵⁷ Smith, *Criminal Complicity* (n 442) 7, 246.

⁴⁵⁸ Kadish (n 449) 346-350. English law seems to have followed Kadish in not requiring that the accessory’s contribution have any causal potency. See Glanville Williams, ‘Complicity, Purpose and the Draft Code – I’ [1990] Crim LR 4, 6; CMV Clarkson, HM Keating and SR Cunningham, *Clarkson and Keating’s Criminal Law: Text and Materials* (Sweet & Maxwell 2007) 548-49. Dennis remarks that the accessory’s causal connection with the offence may be immaterial – IH Dennis, ‘The Mental Element for Accessories’ in Peter Smith (ed), *Criminal Law: Essays in Honour of JC Smith* (Butterworths 1987) 40, 41.

P. In the frequently cited case of *R v Richards*,⁴⁵⁹ the defendant hired two men with the intention that they grievously hurt her husband, but the men instead inflicted only minor injuries. The issue was whether the defendant can be charged as an accessory for the more serious offence of unlawful and malicious wounding with an intent to do grievous bodily harm, when the principals were only convicted of unlawfully and maliciously wounding another person. The court answered the question in the negative, holding that since only one offence had been committed, and that this offence was one of unlawful wounding, it was not possible to hold any accessory liable for an offence greater than the one that had actually been committed. This position was overturned by the decision of the House of Lords in *Howe*,⁴⁶⁰ where the court affirmed that a secondary party can be convicted of murder, despite the principal having been convicted only of manslaughter. However, the court's reasoning for this proposition was quite cursory, and it did not address the theoretical underpinnings or implications of taking this position.⁴⁶¹ Lord Mackay simply stated that where D intends the offence that has in fact occurred, the fact that P may only be convicted of a lesser offence *for some reason special to him*, would not necessarily work to reduce the offence for which D is held responsible.⁴⁶² The ambiguity in this statement is disappointing, for it could encompass an entire range of excuses as well as justifications. If P were indeed convicted of a lesser offence on the ground that his conduct is justified, it is difficult to see how D could ever be convicted of the higher offence on a theory of derivative accessorial liability. Indeed, the decision in *Howe* has been interpreted by some commentators to constitute a partial abandonment of the

⁴⁵⁹ [1974] QB 776. The case has been the subject of much debate. See Fletcher, *Rethinking* (n 455) 672-673; Clarkson and Keating (n 458) 578-79.

⁴⁶⁰ *R v Howe*, [1987] 1 AC 417.

⁴⁶¹ Smith, *Criminal Complicity* (n 442) 130; Clarkson and Keating (n 458) 578-79.

⁴⁶² *Howe* (n 460) 458 (emphasis supplied).

derivative theory, since D's liability can hardly be said to derive from the more serious offence of murder which was never committed. It is instead based on his own personal culpability stemming from what he intended or contemplated.⁴⁶³

The problem of accessorial liability that potentially exceeds that of the principal may perhaps be dismissed as a minor anomaly in the theory of derivative liability. Most situations that we encounter in our lives, and those that come before courts, would involve principals that our moral intuitions would consider more culpable than their accessorial counterparts. However, examples abound of situations where convicting the 'secondary party' D of a lesser offence would seem to understate the degree of his culpability versus the 'primary party' P. Commentators frequently take inspiration from *Othello* in signalling how even though Othello the principal is clearly guilty in murdering Desdemona, the greater culpability lies with Iago, who masterminds and engineers the ultimate killing by exploiting Othello's weaknesses of character and manipulating everyone else into falling in line with his wishes.⁴⁶⁴ Prosecutions for international crimes are in fact rarely concerned with the Othellos as perpetrators. An international crime such as genocide may be the result of a highly organised bureaucratic apparatus with clearly identified chains of responsibility and 'leaders' as in Nazi Germany, or it could be consequent upon a more diffused and seemingly spontaneous outbreak of mass atrocities targeting particular groups. In either event, the actual physical perpetrator of an offence is usually too minor a participant in the mass crime composed of thousands of similar offences to be subject to the jurisdiction of an international tribunal. This is quite apart from the fact that in the majority of

⁴⁶³ Ashworth (n 446) 427; Simester and Sullivan dispute this interpretation by arguing that murder and manslaughter should not be considered as independent offences since the core of the wrong is identical in both cases: Simester and Sullivan (n 443) 249-50.

⁴⁶⁴ See for instance the discussion by Kadish (n 449) 385-88.

cases it would be quite fanciful to attribute the mens rea of the mass crime to the physical perpetrator.

English criminal law theory has devised three main ways in which greater liability can be attributed to the ‘secondary’ party in the crime.⁴⁶⁵ The first relies on a broader conceptualisation of the derivative nature of accessorial liability, whereas the other two depend on an expansion of the concept of principalship. While the latter two hold greater interest for our purpose, the first merits a brief examination here.

3 A Broader Conception of Derivative Liability

The broader conception of accessorial liability rests the liability of the accessory D not on the crime committed by the principal P, but on the objectively harmful wrong perpetrated by P.⁴⁶⁶ It has been recommended as a sound basis for derivative accessorial liability by academics drawing upon German criminal law theory,⁴⁶⁷ and has also been proposed by the Law Commission’s Report on ‘Participating in Crime’.⁴⁶⁸ The argument is that while wrongfulness is a feature of the act objectively considered, culpability is always personal in nature.⁴⁶⁹ P’s culpability cannot therefore be imputed to D and instead must be judged in terms of D’s own mental state with respect to the objectively wrongful act.⁴⁷⁰

⁴⁶⁵ I will not discuss the introduction of the offences of ‘encouraging or assisting crime’ here, which introduce a wholly new category of parties to a crime by holding persons responsible for the inchoate offences of encouragement or assistance under Sections 44 to 46 of the Serious Crime Act 2007.

⁴⁶⁶ Smith, *Criminal Complicity* (n 442) 130.

⁴⁶⁷ Kadish (n 449) 390; Fletcher, *Rethinking* (n 455) 641-644.

⁴⁶⁸ Law Commission, *Participating in Crime* (Law Com No 305 Cm 7084, 2007) paras 4.14, 4.15.

⁴⁶⁹ Fletcher defines culpability as a form of accountability, which is distinct from it in that it is limited to wrongful acts (and not those that are justified) and that it is linked to the degree of wrongdoing: Fletcher, *Rethinking* (n 455) 459.

⁴⁷⁰ Fletcher, *Rethinking* (n 455) 642.

At first glance, the theory appears especially promising for attributing liability for international crimes.⁴⁷¹ As we saw earlier, imputation of liability for international crimes is a very different enterprise from that for domestic crimes. Thus, while in factual scenarios like *Richards* and *Howe*, it is possible (though not ideal) for the court to be able to simply reduce P's liability on a vague basis such as 'some reason special to him', this reasoning would not carry any weight in international crimes. Unlike a reduction of liability from murder to manslaughter that P may incur due to some excuse, in a prosecution for an international crime such as genocide, P is culpable for an entirely different crime such as murder. P's 'objectively wrongful act' appears a much stronger basis for assessing D's liability. So long as D possesses the requisite mental state for the crime of genocide while intending P to commit the single crime of murder, D's liability would still be derivative of P's act. This would of course only be a partial explanation of D's liability, as one murder by itself does not constitute an international crime. D's liability would ultimately be derivative of thousands of wrongful acts carried out by principals such as P, with D possessing the mens rea for genocide, and regardless of whether P and the other physical perpetrators conceived of their actions as amounting to genocide. It is pertinent to note that if one accepts the opinion of commentators who argue that the derivative theory has been partially eclipsed by doctrines of accomplice liability that view the accomplice's culpability separately from that of the principal and based on what the accomplice intended or contemplated will happen,⁴⁷² this objection loses much of its force.

⁴⁷¹ Ashworth's objection to the *Howe* holding on the ground that the higher crime for which the accessory is convicted never took place would be inapplicable in this context. See Ashworth (n 446) 427.

⁴⁷² See Ashworth (n 446) 426-27.

Whichever doctrine of accomplice liability one chooses to follow, the problem still persists that holding D responsible only as an accessory misstates his actual role and participation in the offence. While language can possibly bear the strain of an accessory being held liable for murder while the principal is convicted only of manslaughter, it is more difficult to assign the label of an ‘accessory’ to a genocidaire where the principal is guilty only of murder or rape, as the case may be. It also goes against the notion of the principal as the ‘dominant party’ in the chain of events leading up to the wrongful act.⁴⁷³ Is it possible then to conceive of D as the principal while remaining true of English law’s theory of complicity and participation in crime? This is what we will next examine.

4 Innocent and Semi Innocent Agency

The principal as a party to the crime is not particularly widely discussed in English criminal law. English legal practice as well as theory lavishes most of its attention on the accessory and the mens rea and actus reus requirements for accessorial liability. This is in contrast to legal systems such as Germany, where the principal is the primary focus of discussion and the accessory is defined negatively by first identifying the potential scope of principal conduct.⁴⁷⁴

This problem becomes apparent when one considers situations in which English criminal law departs from its basic premise that P’s voluntary conduct is the cause of an offence if it is the final human conduct before the result, and expands the scope of principals to include parties whose conduct in relation to an offence is interrupted by

⁴⁷³ On the principal as the actor who occupies centre stage in a criminal scheme, see Fletcher, *Rethinking* (n 455) 656.

⁴⁷⁴ Smith, *Criminal Complicity* (n 442) 80-81.

the act of an intervening third party.⁴⁷⁵ The most striking instance of this is found in the doctrine of ‘innocent agency’ where the ‘innocent agent’ is a person whose actions are not deemed free, informed and voluntary due to some personal factors such as insanity, ignorance or minority, and for this reason can be regarded as having been ‘caused’ by the words or conduct of another person (for instance through coercion or deception).⁴⁷⁶ Some of the more controversial applications of the innocent agency doctrine by English courts have been in situations where the agent was acting under duress or out of necessity. In *Pagett*,⁴⁷⁷ the defendant fired shots at the police pursuing him while using his girlfriend as a shield. The girlfriend was killed by the police firing back at the defendant. The court convicted the defendant of manslaughter on the ground that the police officer’s shooting back at the defendant was an involuntary action that arose out of the necessity of self preservation, and was in the course of his duty to prevent crime and arrest the defendant. As Ashworth suggests, a better rationale for the decision would perhaps have been a test of ‘alternative danger’ where when D places a person in a situation of having to choose between the possibility of harming oneself or harming another, the causal connection is better traced through D who compels this choice, rather than the person forced to make it.⁴⁷⁸ This test echoes Hart and Honoré’s examples of circumstances where P’s actions would not be considered wholly voluntary if they are induced by an emergency engineered by D, thus robbing P of a fair choice.⁴⁷⁹

⁴⁷⁵ Ashworth (n 446) 106-111. Ashworth mentions three such situations - non voluntary conduct of third parties; conduct of doctors; and conduct of the victim.

⁴⁷⁶ Glanville Williams, ‘Innocent Agency and Causation’ (1992) 3 Crim L F 289, 294.

⁴⁷⁷ (1983) 76 Cr App R 279.

⁴⁷⁸ Ashworth (n 446) 107.

⁴⁷⁹ Hart and Honoré (n 448) 70.

The typical case in international criminal law merits a slightly different approach. This is because the range of actions that would be considered excused or justified in domestic crimes, and therefore labelled ‘involuntary’ is far broader than similar conduct in international crimes. International criminal law permits the defences of duress and having acted under superior orders to the physical perpetrator of the crime only in very limited circumstances.⁴⁸⁰ Moreover, there is something intuitively false in speaking of the actions of a person who is caught up in the climate of mass atrocity and persuaded to commit a murder or a rape as ‘innocent’.

The better approach is to consider his responsibility under the doctrine of ‘semi-innocent’ agency. As described by the Law Commission, the notion of ‘semi-innocent’ agency applies when the perpetrator P satisfies the fault element of a less serious offence, but is innocent because he lacks the fault element for the more serious offence intended by the ‘secondary party’ D, and which shares the same actus reus.⁴⁸¹ The basis for D’s liability in such cases is not the derivative doctrine of complicity, but the doctrine of causation. P’s actions are considered less than fully voluntary, but not to such an extent so as to fully absolve him of any criminal responsibility.⁴⁸² They can be characterised as having been ‘caused’ to the extent that he does not possess complete knowledge with respect to the nature or circumstances of his conduct.⁴⁸³ This certainly seems a logical extension of the doctrine of innocent agency. As Williams puts it, if D can act through a completely innocent agent P1, there is no reason why he cannot do so through a semi-innocent agent P2. It would be

⁴⁸⁰ See as an example, Articles 31 and 33 of the ICC Statute.

⁴⁸¹ Law Commission Report (n 468) [4.14], [4.15]; Smith, *Criminal Complicity* (n 442) 130.

⁴⁸² Kadish (n 449) 388 citing Hart and Honoré (n 448) 296-304.

⁴⁸³ Smith, *Criminal Complicity* (n 442) 130.

unreasonable for the partial guilt of P2 to operate as a defence against D.⁴⁸⁴ P2 would be treated as an innocent agent in respect of ‘part of the responsibility’ of D.⁴⁸⁵

This doctrine would perhaps capture the relationship and consequent liability between a senior leader or a person in a position of authority who intends to commit genocide and the individual physical perpetrator of an offence such as murder quite well. Two issues that would need to be fleshed out in greater detail would be to what extent the actus reus of the two offences can be considered ‘shared’ given that the actus reus of murder (by P2) will usually form a tiny part of the actus reus of genocide (by D), and whether there are conceptual problems with aggregating the actus reus of several offences in order to form that of the larger offence perpetrated by D. The second is the extent to which P2 can strictly be called an ‘agent’ of D in a situation of mass conflict, where P2 and D may not form part of a vertical chain of command and where P2 may in fact be unaware of D’s existence and machinations. I will address these in Section E when building upon the doctrine of semi-innocent agency as a viable tool for international criminal law.

Before we move on to the third alternative for attribution of liability to the secondary party in English criminal law theory, it would be useful to pause and consider whether the traditional limits to the doctrine of innocent agency recognised in English law would make the doctrine inapplicable in the context of international crimes. There is a strong case for the proposition that the doctrine of innocent agency cannot be used to hold the secondary party liable as a principal in at least two cases:⁴⁸⁶ the first is where the offence cannot be committed except through the agency of a

⁴⁸⁴ Glanville Williams, *Textbook of Criminal Law* (Stevens & Sons 1983) 374.

⁴⁸⁵ Glanville Williams, *Criminal Law: The General Part* (Stevens & Sons 1961) 391.

⁴⁸⁶ Williams, *Criminal Law: The General Part* (n 485) 350-1. However, as Simester and Sullivan note, the proposals in the Law Commission’s Report on *Participating in Crime* would serve to eliminate both these limitations: Simester and Sullivan (n 443) 209 referring to the Law Commission Report (n 468) [4.9].

defined class of persons, and the second is where the nature or definition of the offence renders anything except personal physical perpetration conceptually impossible.⁴⁸⁷ Gardner, following Kadish,⁴⁸⁸ calls the latter offences ‘nonproxyable’⁴⁸⁹ and asserts that where nonproxyable actions are wrongs by themselves, or necessary ingredients of more complex wrongs, a secondary party cannot be a principal to these wrongs by making a causal contribution through another person. Kadish rests this distinction on linguistic considerations that guide our understanding of certain actions such as being drunk or being married, or having sexual intercourse, as conduct that can only be performed through one’s own person.⁴⁹⁰ Gardner’s reason for differentiating between nonproxyable wrongs and other wrongs is embedded in the structure of rational agency: human beings have a different relationship to their own actions as compared to their relationships with the actions of others. While they are directly responsible for the former, their responsibility for the latter arises only to the extent they contribute to them.⁴⁹¹

One of the most controversial applications of the innocent agency in English law that has invited much criticism precisely for ignoring the ‘nonproxyable’ nature of the crime of rape has been in the case of *Cogan and Leak*.⁴⁹² This case involved Leak having forced his wife to have sexual intercourse with Cogan, who believed that she had consented. Cogan was acquitted on the ground of his mistaken belief in her consent (which then operated as a defence), while Leak was convicted as a principal

⁴⁸⁷ Williams, *Textbook of Criminal Law* (n 484) 369-372; Kadish (n 449) 374.

⁴⁸⁸ Kadish (n 449) 373.

⁴⁸⁹ Gardner has a wider definition of these wrongs than Kadish. While Kadish would limit these wrongs to those that do not consist in making a causal contribution to anything, such as drinking or having sex, Gardner would include actions that require a causal contribution of a refined sort, such as in killing or coercing or lying. John Gardner, ‘Complicity and Causality’ (2007) 1 *Crim L & Phil* 127, 135-6.

⁴⁹⁰ Kadish (n 449) 373-74.

⁴⁹¹ Gardner (n 489) 135-36.

⁴⁹² [1975] 3 *WLR* 316 (Crim App).

to the crime of rape on the basis that he used Cogan simply as a ‘means to procure a criminal purpose’.⁴⁹³ The decision has been criticised for convicting D as a principal by way of acting through an innocent agent, when conviction would have been impossible had he physically perpetrated the rape (a husband could not be held guilty of raping his wife). If the logic of the decision is taken to its extreme, even a woman could be held guilty as a principal for the crime of rape, even though the offence is defined such that it can only be committed by a man.⁴⁹⁴

Several responses can be made to these claims. As Moore argues, if killing is considered a nonproxyable wrong, and the difference between someone who kills and another person who causes the killing is simply a linguistic one, the solution to the problem of a limited class of principals is simply to redefine the offence using non-causative verbs (homicide as ‘causing death’ rather than ‘killing’ for instance).⁴⁹⁵ On the other hand, if the difference between causing death and killing is moral in nature (as Gardner would argue), then the moral difference turns on the degree of causal contribution rather than on the semantic nature of certain verbs in a language.⁴⁹⁶ There are of course still certain actions that would be considered nonproxyable, depending on the evil sought to be prohibited by the criminal provision. For instance, if the evil of rape consists in the violation of a person’s body, rather than its violation by the perpetrator’s own body, situations like *Cogan* could easily be accommodated within its definition. This may not however be true of offences such as bigamy, because it is

⁴⁹³ *Cogan* (n 492) 318.

⁴⁹⁴ Williams, *Textbook of Criminal Law* (n 484) 371; Kadish (n 449) 377.

⁴⁹⁵ Michael S Moore, ‘Causing, Aiding, and the Superfluity of Accomplice Liability’ (2007-08) 156 U Pa L Rev 395, 416. Ashworth would agree that the problems with definition are primarily linguistic, rather than embedded in moral or social distinctions. Ashworth (n 446) 430.

⁴⁹⁶ Moore (n 495) 417-418. Simester and Sullivan put forward a third alternative: the gist of the crime relates to the particular behaviour or *conduct* of the individual, and not to the bringing about of some *consequence*. They however acknowledge that it is not always clear what type of conduct requires P’s direct involvement: Simester and Sullivan (n 443) 443

not an offence to cause someone else to get married while being married, but only to cause oneself to do so.⁴⁹⁷

Regardless of the merits of the arguments surrounding the limitation of innocent agency to offences that are not nonproxyable in nature, they should not pose a serious barrier in the case of attribution of liability for international crimes. On the contrary, they would only support the secondary party D who acts through the semi innocent physical perpetrator P2 being held responsible as the principal. International crimes would certainly fall within the range of wrongs that Gardner identifies as complex wrongs that could (not always, but in certain cases) contain certain nonproxyable wrongs. For instance, crimes against humanity as defined in the Rome Statute of the International Criminal Court comprise a number of acts that warrant this label when “committed as part of a widespread or systematic attack directed against any civilian population, with knowledge of the attack”. These acts include murder, enslavement, forcible transfer of population, torture, rape and other forms of sexual violence.⁴⁹⁸ The Elements of Crimes⁴⁹⁹ that assist the ICC in interpreting and applying the Statute further specify the elements of different offences. The first element in the definition of murder as a crime against humanity is that the perpetrator killed one or more persons.⁵⁰⁰ Killed is further defined as interchangeable with the term “caused death”. This definition applies to all elements which use either of these concepts.⁵⁰¹ The Elements of Crimes have similar provisions in respect of several other crimes.⁵⁰²

⁴⁹⁷ Moore (n 495) 419-420.

⁴⁹⁸ Article 7, ICC Statute.

⁴⁹⁹ International Criminal Court, Elements of Crimes, U.N. Doc. PCNICC/2000/1/Add.2 (2000).

⁵⁰⁰ Elements of Crimes (n 499) Article 7(1)(a) 1.

⁵⁰¹ Elements of Crimes (n 499) Footnote 7.

⁵⁰² See eg Elements of Crimes (n 499) Footnote 17, which recognises that given the complexity of the crime of sexual slavery, its commission could involve several perpetrators.

Therefore, the requirement of personal perpetration through the body of the perpetrator does not seem to feature very strongly in the understanding of these crimes. Moreover, it would perhaps be linguistically inappropriate to describe the actual physical perpetrator P2 as belonging to the class of persons who can legitimately be considered to commit a crime against humanity. Given the definitional element of a widespread attack directed against civilian population, with knowledge of the attack, it would be a highly unusual situation in which P2 can personally perpetrate enough acts with the requisite knowledge to qualify as the principal of such a crime. The logical principal for meeting these qualifications is D who either plans or masterminds the attacks, or is in a position of authority to order the individual attacks that make up the crime against humanity.

5 Outcome responsibility and principalship

The final alternative that has been put forward by Sullivan for attributing liability to D as a principal rather than an accessory, in a situation where D is not the direct physical perpetrator of the offence, is where D by his own conduct bears “outcome responsibility” for the wrong perpetrated and possesses the mens rea commensurate with the gravity of the crime.⁵⁰³ This doctrine rests on the premise that P’s conduct can be characterised as having been caused by D in a *de minimis* sense in certain circumstances even if it does not take the form of deception or coercion.⁵⁰⁴ Sullivan argues that the proposition that we can cause persons to do things while still considering their actions in general to be freely chosen is deeply embedded in social life. Indeed, it would be difficult to maintain social order unless there were some

⁵⁰³ Robert Sullivan, ‘Principals and Accomplices – a Necessary and Useful Division’ in Antony Duff and Christoffer Wong (eds), *Foundational Issues in the Philosophy of Criminal Law*, Special Workshop at the 23rd IVR Congress, 1-6 August 2007, Kraków, Poland 151, 158, 163 <http://cracow.nordstraff.net/omnes_02.pdf> accessed 12 December 2010.

⁵⁰⁴ Sullivan (n 503) 158-161.

degree of certainty that should D perform x, it is more likely than not that P would perform y.⁵⁰⁵

Sullivan borrows the phrase ‘outcome responsibility’ from Honoré, who uses it in the sense of unmediated causal responsibility for an outcome.⁵⁰⁶ Sullivan extends the concept however to include situations where there is some material or in the world relationship between the act or omission of the agent and the instantiation of the wrong.⁵⁰⁷ Thus, D could be held responsible as a principal in the event that his conduct has more than a minor causal impact on the instantiation of the wrong perpetrated by P, or if he has agreed with P that the wrong be committed, even if the actual actus reus of the wrong is carried out by P.⁵⁰⁸ In the latter case, D would have outcome responsibility, regardless of whether the agreement between P and D has a causal effect, and on the basis that he is party to the agreement which renders P’s actions assignable to him.⁵⁰⁹

It is difficult to accept the extension of principal liability to D who may not perform any part of the actus reus to the extent advocated by Sullivan. Attributing principal liability on the mere fact of an agreement would make D liable for an offence based on his status (as a party to the agreement) rather than his conduct towards the offence. It is not clear that simple identification with a plan to commit an offence can do enough work to take the place of a requirement of a causal contribution for liability as

⁵⁰⁵ Sullivan (n 503) 160. Sullivan suggests the English courts have in fact indirectly recognised this proposition in cases such as *Environment Agency v Empress Car Co (Abertillery)*, [1999] 1 AC 1 where the House of Lords held that the company had caused riverine pollution by storing oil close to the river despite the fact that the immediate cause of pollution was the voluntary trespass of a third party. For criticism of this decision, see Ashworth (n 446) 107.

⁵⁰⁶ Tony Honoré, *Responsibility and Fault* (Hart Publishing 1999) 7-40.

⁵⁰⁷ Sullivan (n 503) 155, fn 24. See also, Robert Sullivan, ‘First Degree Murder and Complicity – Conditions for Parity of Culpability between Principal and Accomplice’ (2007) 1 Crim L & Phil 271, 276.

⁵⁰⁸ Sullivan (n 503) 165-66.

⁵⁰⁹ Sullivan (n 503) 165.

a principal. Unless this is coupled with the condition that D makes some material difference through his participation in the offence (which would reintroduce causation into the picture), this would be an unacceptable expansion of the class of potential principals to an offence.

It is in any event not a particularly useful theoretical basis for attributing liability for international crimes. If D is to be held liable as a principal on the basis of his status as a party to an agreement which he has reached with P and other physical and non physical perpetrators of the offence, and in the absence of any causal contribution, fairness in labelling would demand that the agreement be fairly concrete, between a defined class of individuals, and proof of it be readily forthcoming. This would be quite impossible in a situation of armed conflict where there is no easily discernable chain of command between D who is in a position of authority and P the ordinary civilian simply imitating his compatriots in the commission of offences.

6 Conclusion

As the analysis in the preceding sections shows, some of the concerns with using modes of principal liability recognised in English criminal law to attribute responsibility for international crimes stem from the 'group' nature of these crimes involving several hundreds of people in their commission. Part of the reason why the English law on principals does not appear to account for this dimension is that it has instead considered this issue in some detail as a matter of accomplice liability. The doctrine of joint enterprise which we shall discuss in Part III forms a central part of English law and provides for the possibility of secondary individual liability for crimes that are committed as part of a collective. Despite this paucity, there is some potential for adapting the existing conceptual basis for principal liability in English criminal law to the case of responsibility for international crimes. While this would

certainly involve an important reconceptualisation of the concept of causation in English legal doctrine, it would not constitute too radical a departure from the notion of innocent agency already widely recognised in English law. Before we explore the feasibility of this option in greater detail, it is pertinent to explore what a very different and equally influential legal system has to say about the concept of principalship in criminal law- the German system.

D. THE PRINCIPAL IN GERMAN CRIMINAL LAW THEORY

1 Forms of participation in German criminal law

German criminal law presents a complicated and minutely theorised account of the principal party to a crime, especially as compared to English criminal law. This is partly on account of the fact that a party to a crime can only be classified as an accessory once it has been established that he cannot be considered a principal.⁵¹⁰ The German Criminal Code (StGB)⁵¹¹ regulates the following categories of participation in a crime:

Section 25 Principals

(1) Any person who commits the offence himself or through another shall be liable as a principal.

(2) If more than one person commit the offence jointly, each shall be liable as a principal (joint principals).

Section 26 Instigation

Any person who intentionally induces another to intentionally commit an unlawful act (abettor) shall be liable to be sentenced as if he were a principal.

Section 27 Aiding

⁵¹⁰ Smith, *Criminal Complicity* (n 442) 80-81.

⁵¹¹ Criminal Code (Strafgesetzbuch, StGB) promulgated on 13 November 1998 (Federal Law Gazette I, p.345, p.3322). I have relied on the English translation by Michael Bohlander authorised by the Federal Ministry of Justice, available at http://www.gesetze-im-internet.de/englisch_stgb/index.html. The only variation I have introduced is in the translation of the term *Anstiftung* as 'Instigation' rather than the original 'Abetting' as I believe it more appropriately reflects the understanding of the term in English law.

(1) Any person who intentionally assists another in the intentional commission of an unlawful act shall be convicted and sentenced as an aider.

(2) The sentence for the aider shall be based on the penalty for a principal. It shall be mitigated pursuant to section 49 (1).

Thus, a principal or perpetrator is one who commits the offence himself (*unmittelbare Täter* or direct perpetrator); or through another person (*mittelbare Täter* or indirect perpetrator); or jointly with another principal (*Mittäter* or co-perpetrator). In addition, commentators recognise the category of *Nebentäterschaft*, or independent multiple principals acting alongside each other towards the commission of an offence.⁵¹² An accessory is one who intentionally induces another person to intentionally commit an unlawful act (*Anstifter*, or abettor or instigator); or who intentionally renders aid to another in the latter's intentional commission of an unlawful act (*Beihilfe*, or aider).⁵¹³

The basis for the distinction between principals and accessories consists in that perpetration is direct, indirect or joint *personal* commission of an offence, whereas accessorial responsibility arises from specific kinds of contribution to the *act of another*.⁵¹⁴ This basic differentiation permits an assessment of the weight and quality of one's contribution to an act (constituting an offence). If A's contribution is of such weight and quality that the act can be described as his own, then A is liable as a principal. He can thus be attributed with the act of a joint principal (in the context of co-perpetration) or the act of a secondary party used by him as a tool (in the context of indirect perpetration). In both instances, this attribution depends solely on the contribution of A and is independent of the criminal liability of the other parties to the crime. If on the other hand, A's contribution to the act is only of such secondary weight that it can be described as a contribution to the act of another, then A is liable

⁵¹² Johannes Wessels & Werner Beulke, *Strafrecht, allgemeiner Teil: Die Straftat und ihr Aufbau (Schwerpunkte)* (CF Müller Verlag 2008) 179; Bohlander (n 258) 153.

⁵¹³ *Schwerpunkte* (n 512) 179; Bohlander (n 258) 153.

⁵¹⁴ *Schwerpunkte* (n 512) 179.

as an accessory. In this case, A's criminal responsibility is derivative in nature, that is, it exists only when the act of the main perpetrator can be described as an unlawful main offence.⁵¹⁵

Different theories have been put forward on how exactly this dividing line between principals and accessories is to be concretised. Before an overview of these theories however, it would be helpful to have a brief note on the concept of an offence in German criminal law. Each offence is subject to three stages of examination within the tripartite structure of German criminal law: the elements of an offence or offence description (*Tatbestand*); unlawfulness (*Rechtswidrigkeit*); and culpability or guilt (*Schuld*). The *Tatbestand* delineates the typical wrong in an act. It consists of the objective characteristics (similar to *actus reus*), which are mostly present in the respective offence definitions, and the subjective characteristics (similar to *mens rea*) such as intent. 'Unlawfulness' considers to what extent an act that is criminal under normal circumstances is justified in the concrete and special circumstances of the individual case. The criterion of culpability finally examines whether the personal responsibility of the participant for the concrete criminal act is absent due to the presence of excusatory defences.⁵¹⁶

2 Theories on parties to a crime

The StGB is silent on the criterion for demarcation between principals and accessories, and the Federal Court of Justice (*Bundesgerichtshof* or BGH) and criminal law commentators have propounded numerous theories on the appropriate dividing line. Amongst the most prominent of these are the following:

⁵¹⁵ Ulrich Sieber & Marc Engelhart, *Strafbare Mitwirkung von Führungspersonen in Straftätergruppen und Netzwerken in Deutschland* (Max-Planck-Institut für ausländisches und internationales Strafrecht unpublished report 2009) 12-13 (hereinafter MPICC report).

⁵¹⁶ Bohlander (n 258) 16-17; MPICC report (n 515) 9.

a. Objective theories

The most notable of the objective theories is the Formal-Objective theory, which was dominant in scientific writings till around 1930. According to this theory, the perpetrator is the person who realises the elements of an offence, either in full or in part, himself; all other contributors to the offence are accessories. This theory is now acknowledged as too narrow – it cannot for example account for the StGB's category of indirect perpetration – and is seldom advanced today. Other examples of objective theories are the Necessity theory, according to which a perpetrator is a person who contributes to an essential part of the act, without which the offence could not have been accomplished, and the Contemporaneity theory, under which all the parties working jointly during the realization of the offence are perpetrators.⁵¹⁷

b. Subjective theories

Subjective theories were developed in the jurisprudence of the BGH as an autonomous approach to the problem of differentiating between principals and accessories, tied to the will and inner attitude of the participant.⁵¹⁸ They were developed in two main forms: the *Dolus* theory and the Interest theory. While both determine the status of a party to a crime depending on whether he possessed the will of a perpetrator or that of an accessory, they use different criteria to determine this will. For the *Dolus* theory, a person who subordinates his will to another, who leaves the decision of whether an act is committed to the will of another, is an accessory. In contrast, the principal is one who does not recognise the controlling will of another. The Interest theory makes the degree of one's interest in the result of the (criminal)

⁵¹⁷ Heinrich Wilhelm Laufhütte et al. (Hrsg.), *Strafgesetzbuch Leipziger Kommentar (Großkommentar): Band 1* (de Gruyter Recht 2006) 1848; MPICC report (n 515) 16.

⁵¹⁸ MPICC report (n 515) 16; *Schwerpunkte* (n 512) 182.

act the main criterion for the demarcation. The accessory is one who has no or very little personal interest in the result of the act; the perpetrator in contrast brings about the result on the basis of his personal interest.⁵¹⁹

The development of the subjective theories in the jurisprudence of the courts has been uneven. The pendulum swings between decisions that have completely rejected its application, to those that have held a person responsible as an accessory even when he personally fulfilled all the elements of an offence⁵²⁰ (this is unlikely to be possible any longer given the definition of perpetration in Section 25 of the StGB). For instance, in the *Badewannenfall* (Bath tub case) the sister of the mother of an illegitimate new born child had drowned the baby in a bathtub on the mother's urging. The court convicted the mother as the principal and the sister only as an accessory on the ground that she had acted without the will of a perpetrator and solely in the interests of the mother.⁵²¹ This approach was rejected by the BGH in the *Kameradenmordfall* (Case of the murder of the fellow soldier) where it stated that a person who kills another with his own hands would be considered the principal notwithstanding his having acted in the presence, under the influence, or for the sake of another person.⁵²² However, the court again reversed this stance in the *Staschynskij* case where the accused was a KGB assassin who had murdered two persons on the direct orders of the head of the KGB. He was however convicted only as an aider while the head of the KGB was considered the principal on the ground that Staschynskij had acted without the will of a perpetrator.⁵²³

⁵¹⁹ *Leipziger Kommentar* (n 517) 1846-1847.

⁵²⁰ See Bohlander (n 258) 162-163.

⁵²¹ RGSt 74, S. 84.

⁵²² BGHSt 8, 393.

⁵²³ BGHSt 18, 87.

The subjective theories command few supporters in scientific literature which criticises them as too unclear and arbitrary. It is argued that the assessment of whether a person has the will of the perpetrator has little to do with psychological reality. This results in unjustified judicial discretion which militates against the principle of legal certainty.⁵²⁴ The extreme version of the subjective theories also ignores the objective contribution of the participant in the realisation of the elements of an offence. This leads to an improper isolation of the will of the perpetrator from its relationship with the elements of the offence that form the basis of the codified concept of perpetration.⁵²⁵ While the later jurisprudence of the BGH continues to adhere to a subjectively oriented demarcation criterion, it is overlaid by considerable objective elements in its assessment of this subjective criterion. The will of the participant is determined through the use of objective criteria. The factors for the evaluation of the will of the party to the crime are the extent of the contribution and control over the act, as well as the will to control the act and the degree of personal interest in the result of the act.⁵²⁶

c. Act domination or control theory (Tatherrschaftslehre)

The theory most widely endorsed in current scientific literature is the theory of ‘act domination’ or control (*Tatherrschaftslehre*), which represents a synthesis of the objective and subjective theories. On this account, the decisive criterion for establishing the boundary between principals and accessories is control over the act: the perpetrator dominates or controls the commission of the act, and the accessory participates in its occurrence without domination. To have control over the act means

⁵²⁴ *Leipziger Kommentar* (n 517) 1859.

⁵²⁵ *Schwerpunkte* (n 512) 183.

⁵²⁶ *Schwerpunkte* (n 512) 182; MPICC report (n 515) 17.

to hold in one's hands the elements constituting the offence (with the requisite intent).⁵²⁷ This control can take different forms: direct domination over the act in the case of direct perpetration (*Handlungsherrschaft*); control over the will of the direct perpetrator or domination arising out of the superior knowledge of the indirect perpetrator in the case of indirect perpetration (*Willensherrschaft*); functional domination of the participating joint actor in the case of co-perpetration (*funktionale Tatherrschaft*).⁵²⁸ The perpetrator is the person who as the key figure (*Zentralgestalt*) in the events exercises this control through his ability to strategically mastermind the commission of the act (in indirect perpetration) or through his joint hegemony over the act (in co-perpetration). He can thereby execute or obstruct the commission of the offence according to his will. The accessory in contrast is the marginal figure in the course of events who merely aids or otherwise advances the commission of the criminal act.⁵²⁹

The control theory is more multi faceted as well as more persuasive than the objective and subjective theories, both theoretically as well as pragmatically. It brings together several modes of conduct (act domination, will domination, functional domination) under the umbrella term of 'control' and thus provides the possibility of a more nuanced concept of perpetration. Unlike the subjective theories, it recognises that the perpetrator is the subject of the offence and his conviction is tied to the unlawfulness of the elements of the offence, rather than the blameworthiness of his internal attitude.⁵³⁰ It also transcends the narrowness of the objective theories in dispensing with the requirement of personal fulfilment of all the elements of the

⁵²⁷ *Schwerpunkte* (n 512) 181; MPICC report (n 515) 17.

⁵²⁸ *Schwerpunkte* (n 512) 181.

⁵²⁹ *Schwerpunkte* (n 512) 181-82; MPICC report (n 515) 17.

⁵³⁰ *Leipziger Kommentar* (n 517) 1860.

offence and acknowledging that they can be realised with the help of a coerced human instrument or in co-operation with another person.⁵³¹

The control theory was first systematised by Claus Roxin, and is now endorsed by the majority of commentators, though in varying forms. Further, even though the courts have not adopted the control theory as such, as mentioned earlier, the current jurisprudence comes quite close to it in its use of objective criteria for the identification of the will of the perpetrator.⁵³² For instance, in the *Katzenkönigfall* (Cat King Case),⁵³³ H and P induced R, a psychologically dependent man, into believing in a demon called the Cat King as the supreme power in the universe. H wanted to get rid of N and together with P, convinced R that if he did not kill N as a human sacrifice, Cat King would instead massacre a million people. R was persuaded to act on this belief and stabbed N three times. H, P and R were all convicted of attempted murder. One of the main questions considered by the court was whether H and P should be held liable as perpetrators or only as accessories to the attempted murder. The court stated that the issue of whether H and P can be classified as indirect perpetrators will depend on their objective control measured by the criterion of the will of the perpetrator. The indirect perpetrator is the person who induces and manipulates the conduct he intends through deliberately causing a mistake of law such that the person labouring under the mistake can still be regarded as his (culpable) tool. H and P deluded R and then consciously manipulated him into carrying out the act of murder intended by them. They also determined substantially the mode of its execution – for example, P handed him the murder weapon and instructed him how to use it. R was in a dependant relationship with H and P, which they used to control

⁵³¹ *Leipziger Kommentar* (n 517) 1860.

⁵³² *Leipziger Kommentar* (n 517) 1848, 1856-57.

⁵³³ BHGSt 35, 347. For a summary of the case, see *Leipziger Kommentar* (n 517) 1895-96.

him, and from which he could extricate himself only with great difficulty. Thus, H and P could induce R to commit the crime and control the act execution through the strength of their influence and their superior knowledge of the circumstances of the case.

Given its predominant position in German criminal law, the following section will briefly catalogue the various categories of perpetration based on the control theory. This part is mainly descriptive. The bulk of the analysis is reserved for the ensuing part of this Chapter which concerns the two forms of perpetration most relevant for international crimes: control over the act by virtue of a hierarchical organisation (*Organisationsherrschaft*) and its relationship to co-perpetration.

3 Categories of perpetration

a. Direct perpetration (Die unmittelbare Täterschaft)

The category of direct perpetration is relatively uncontroversial in German criminal law. According to Section 25 of the StGB, anyone who personally commits the criminal act, that is, fulfils or realizes the constituent elements of the offence himself, is the direct perpetrator. This commission can be by way of an act or an omission, though culpability for the latter presupposes that the omission arises from a specific duty, the successful performance of which is obligated (Section 13 StGB).⁵³⁴

The dominant view is that Section 25 no longer permits a person who fulfils all the elements of the offence himself to be held liable as an accessory on account of his lacking the will of a perpetrator.⁵³⁵ As Roxin states, direct act domination is the prototype of perpetration: it is not possible for a person to control an act more

⁵³⁴ MPICC report (n 515) 18.

⁵³⁵ MPICC report (n 515) 18; *Leipziger Kommentar* (n 517) 1874-75.

definitively than by doing it himself.⁵³⁶ This is the case even when he acts under a situation of duress (Section 35 StGB) – he would still be a perpetrator, albeit an excused one.⁵³⁷ This is based on the reasoning that the ‘perpetrator’ of an offence is not the same as the person who is ‘most responsible’ for the criminal act in a moral or criminological sense. The person who ordered the act can for instance merit greater punishment. Instead, the perpetrator is one who occupies the central position in the course of events by personally carrying out the execution of the elements of the offence.⁵³⁸

b. Indirect perpetration (Die mittelbare Täterschaft)

Indirect perpetration is one of the more complicated categories of perpetration in German criminal law, and it would occupy a disproportionate part of this Section to do justice to the various shades of opinion on this category. I will therefore only outline the main contours of indirect perpetration, highlighting the issues that will be essential to later understand the concept of *Organisationsherrschaft*, which is one of its sub-categories.

Section 25 states that a person who perpetrates or commits a crime *through* another is an indirect perpetrator. The word ‘through’ signifies that the indirect perpetrator (*Hintermann*) controls the direct perpetrator (*Frontmann*) of the criminal act in such a manner that he uses or manipulates him as a human tool or instrument. Due to this ‘tool’ function, the *Frontmann* normally possesses some deficit (for instance, he lacks the requisite intent for the offence), which the *Hintermann* exploits in order to control or dominate him.⁵³⁹ Thus, while the *Frontmann* still possesses

⁵³⁶ Claus Roxin, *Täterschaft und Tatherrschaft* (de Gruyter Recht 2006) 127 (hereinafter Roxin, TT)

⁵³⁷ *Leipziger Kommentar* (n 517) 1876.

⁵³⁸ Roxin, TT (n 536) 127-128.

⁵³⁹ MPICC report (n 515) 19; *Schwerpunkte* (n 512) 190.

Handlungsherrschaft (act hegemony), this is overlaid by the *Willensherrschaft* or domination over the will of the *Frontmann* by the *Hintermann*.⁵⁴⁰ Two main groups of indirect perpetration are recognised: a) the first is the normal case of indirect perpetration where the hegemony of the *Hintermann* is based on his dominance over the *Frontmann* due to some factual or legal grounds. This results in the latter's exemption from criminal responsibility; b) the second group is the exception where the *Frontmann* is held liable alongside the *Hintermann* despite the latter's hegemony. The *Hintermann* is in this case, the 'perpetrator behind the perpetrator'.⁵⁴¹

The objective and subjective requirements for indirect perpetration are quite straightforward: indirect perpetration calls for the *Hintermann's* domination over the act, which as a rule is based upon a lack of such domination by the *Frontmann*. In the case of the perpetrator behind the perpetrator, the *Frontmann* himself is also criminally responsible. This hegemony of the *Hintermann* presupposes an active contribution on his part, though the majority opinion in the literature recognises that the domination may also arise by virtue of an omission.⁵⁴² The *Hintermann* must be shown to possess a 'double intent' – he must have intent with respect to the elements of the offence, as well as intent in relation to the elements that constitute the act of indirect perpetration (for instance the circumstances that establish his indirect perpetration). In both cases, intent to the degree of *dolus eventualis* is sufficient – that is, he must be aware of the possibility of the result of the act and accept it.⁵⁴³

Roxin grounds the hegemony of the *Hintermann* in these cases on the fact that the *Hintermann* occupies the central position in the course of events and controls the

⁵⁴⁰ Roxin, TT (n 536) 143.

⁵⁴¹ MPICC report (n 515) 20.

⁵⁴² MPICC report (n 515) 26.

⁵⁴³ MPICC report (n 515) 27.

Frontmann due to his ability to make the last and final decision about the occurrence.⁵⁴⁴ Whether he has this ability does not depend on an evaluation of the *Frontmann's* psychological state, but on whether the law absolves him of responsibility and transfers it on the *Hintermann* instead. For if the law relieves the *Frontmann* of responsibility and lets him go unpunished, this can only mean that it perceives the *Hintermann* as controlling the course of events and thus as the key figure in the operational sequence constituting the elements of the offence.⁵⁴⁵ This formulation is referred to as the 'responsibility principle' (*Verantwortungsprinzip*). In its uncompromising version, the principle implies that the *Frontmann* can only be a tool of the *Hintermann* if he is not held criminally responsible on the ground that he either did not fulfil the subjective or objective elements of the offence, or did not act unlawfully or with culpability. This results in the responsibility being shifted onto the *Hintermann*.⁵⁴⁶ The principle is however heavily disputed in German commentary and is certainly inconsistent with recognising the concept of the 'perpetrator behind the perpetrator', which is one of the two main classes of indirect perpetration.⁵⁴⁷

Roxin formulates three main ways of establishing control leading to indirect perpetration: coercion; utilisation of a mistake on the part of the *Frontmann* or on the basis of the *Hintermann's* superior knowledge; and hegemony through control over an organisational apparatus.⁵⁴⁸ These divisions do not strictly map onto the distinction between the two categories of indirect perpetration, and I will use this categorisation to illustrate some of the instances of hegemony examined by Roxin.

⁵⁴⁴ Roxin, TT (n 536) 143-144.

⁵⁴⁵ Roxin, TT (n 536) 146-147.

⁵⁴⁶ *Leipziger Kommentar* (n 517) 1880.

⁵⁴⁷ *Leipziger Kommentar* (n 517) 1880, 1881-1882 and references therein.

⁵⁴⁸ Roxin, TT (n 536) 242.

i. Indirect perpetration where the Frontmann is not criminally responsible

The first category of indirect perpetration resembles the doctrine of innocent agency in English law referred to above. The rationale for holding the *Hintermann* responsible as a principal however is control instead of causation. This control is based on the *Hintermann*'s exploitation of a human tool who acts without culpability or who is excused.⁵⁴⁹ Similar to cases of innocent agency, indirect perpetration exists if the *Frontmann* acts under duress as provided under Section 35 of the StGB.⁵⁵⁰ The *Frontmann* fulfils the elements of the offence, and thereby holds the execution of the act in his hand, or possesses the act domination. This is however overlaid by the will domination of the *Hintermann* who indirectly controls the act by directly controlling the *Frontmann* on the basis of duress. The *Frontmann* is therefore still a perpetrator – but an excused one – and the responsibility lies with the *Hintermann*.⁵⁵¹

Indirect perpetration can also exist by virtue of the superior knowledge of the *Hintermann*. For instance, he may know the background to the criminal act, while the *Frontmann* may be unaware of the circumstances of his conduct or judge the facts wrongly. The *Frontmann* then acts without intention or with the intention for a lesser offence (the case of the unintentionally acting tool) and is therefore either not culpable or liable only for the lesser crime.⁵⁵² The *Hintermann* may also, unlike the

⁵⁴⁹ MPICC report (n 515) 21.

⁵⁵⁰ **Section 35. Duress** (1) A person who, faced with an imminent danger to life, limb or freedom which cannot otherwise be averted, commits an unlawful act to avert the danger from himself, a relative or person close to him, acts without guilt. This shall not apply if and to the extent that the offender could be expected under the circumstances to accept the danger, in particular, because he himself had caused the danger, or was under a special legal obligation to do so; the sentence may be mitigated pursuant to section 49 (1) unless the offender was required to accept the danger because of a special legal obligation to do so.

(2) If at the time of the commission of the act a person mistakenly assumes that circumstances exist which would excuse him under subsection (1) above, he will only be liable if the mistake was avoidable. The sentence shall be mitigated pursuant to section 49 (1).

⁵⁵¹ *Leipziger Kommentar* (n 517) 1885.

⁵⁵² MPICC report (n 515) 20.

Frontmann, know that that the latter is acting in the absence of legal grounds for justification (case of the lawfully acting tool). This is for example the case when a policeman takes an innocent person into custody on the basis of false information supplied by the *Hintermann*. Here the conduct of the policeman is justified due to his right to arrest. The *Hintermann* exploits the situation so that the *Frontmann* behaves as the *Hintermann* intends him to, and thereby makes the illegal arrest.⁵⁵³

The majority opinion also endorses indirect perpetration in cases where the *Hintermann* possesses an essential qualification that the *Frontmann* lacks, for example, he fulfils the criminal intent requirement essential for the offence (case of the tool acting without criminal intent as an instance of the tool lacking qualification) In this configuration, the *Frontmann* lacks the stipulated (in the offence) special attribute of the perpetrator. For instance, under Section 348 of the StGB (making false entries in public records), a public official who is in charge of making entries in the register of land holdings and who induces a non-officer to make false entries will be liable as an indirect perpetrator rather than an instigator, since the non-officer cannot be a perpetrator as defined in the offence.⁵⁵⁴ This recognition stems primarily from a desire to prevent gaps in criminalisation, since in these cases the penalisation of the *Hintermann* as an instigator is not possible due to the lack of an intentional act of the *Frontmann*.⁵⁵⁵ Indirect perpetration is also accepted where the *Hintermann* causes the *Frontmann* to harm or kill himself due to mistake or coercion. Here, an objective characteristic of the elements of the offence is missing (suicide for instance is not criminalised since the crime of killing calls for the act of another person) and the

⁵⁵³ MPICC report (n 515) 21.

⁵⁵⁴ *Leipziger Kommentar* (n 517) 1918.

⁵⁵⁵ MPICC report (n 515) 20.

Frontmann cannot therefore be held responsible (case of the tool where an element of the offence is missing).⁵⁵⁶

ii. Perpetrator behind the perpetrator

The second category of indirect perpetration where the *Hintermann* and *Frontmann* can both be held responsible constitutes an exception to the general concept of indirect perpetration and forms the subject of a lively dispute between commentators. The BGH first elaborated on the rationale behind the acceptance of a perpetrator behind a fully responsible perpetrator in the *Katzenkönigfall* (Cat King case)⁵⁵⁷ referred to earlier. Here, the court held H and P responsible as indirect perpetrators despite R being held liable (although his sentence was mitigated on the ground that he was acting under an avoidable mistake of law as per Section 17 of the StGB). According to the court, H and P's hegemony over the act lay in the intensity of their effect on R and in their inducement and exploitation of his mistake of law about the permissibility of killing one person in order to save a million other lives.⁵⁵⁸

In the literature, other cases of this type of indirect perpetration are discussed. These relate to the mistake of the *Frontmann* concerning the concrete meaning of his action. Here, the *Frontmann*'s conduct fulfils the elements of the offence, and is unlawful and culpable. Nevertheless, his mistake masks the material legal and factual circumstances decisive for the evaluation of the act, the knowledge of which shifts the control to the *Hintermann*.⁵⁵⁹ This is for instance the case in a manipulated *error in persona*, where A wants to shoot B, but B who knows of this plan deliberately sends C to the scene of the crime where A confuses him for B and shoots him. For A, there

⁵⁵⁶ MPICC report (n 515) 22.

⁵⁵⁷ See (n 533).

⁵⁵⁸ MPICC report (n 515) 22.

⁵⁵⁹ *Leipziger Kommentar* (n 517) 1898.

exists only an *error in persona* and he is fully responsible for the crime. One strand of the scientific literature considers B an indirect perpetrator, since he manipulated A and thus controlled the occurrence.⁵⁶⁰

The manipulation can also relate to deception over the quantifiable measure of the unlawfulness or guilt. For instance, A dupes B into destroying the valuable painting belonging to C by feigning that it is worthless. B is the perpetrator of the harm and fully responsible, but the measure of unlawfulness and guilt covered by his intent is small. Some commentators would therefore consider A the indirect perpetrator to whom the more extensive part of the harm can be attributed.⁵⁶¹ This situation is comparable to the concept of a semi innocent agent in England. Here, the agent P's actions are said to be 'caused' by D due to P's incomplete knowledge relating to the circumstances of his conduct resulting in an absence of the fault element for the more serious offence intended by D. Both D and P are thus responsible as perpetrators.⁵⁶² Just like in the first category of indirect perpetration in German criminal law however, the basis for D's liability is control rather than causation.

One of the highly controversial applications of the 'perpetrator behind the perpetrator' is in the form of *Organisationsherrschaft*. This category was first formulated by Roxin⁵⁶³ and was recognised by the BGH (though in a slightly different variant) in 1994 where the court held the members of the National Defence Council of the former GDR responsible as indirect perpetrators for the killings of fugitives at the

⁵⁶⁰ MPICC report (n 515) 25; *Leipziger Kommentar* (n 517) 1900-01.

⁵⁶¹ MPICC report (n 515) 25; *Leipziger Kommentar* (n 517) 1898.

⁵⁶² Refer text to notes 481 to 485.

⁵⁶³ Claus Roxin, 'Straftaten im Rahmen organisatorischer Machtapparate' (1963) *Goltdammer's Archiv für Strafrecht* 193 (hereinafter Roxin 1963).

border between East and West Germany.⁵⁶⁴ In its simplified form, the doctrine of *Organisationsherrschaft* posits that the *Hintermann* can control the acts of intermediaries within the framework of an organised apparatus of power. The intermediary is similar to a virtually replaceable wheel in a gearbox. The *Hintermann's* hegemony over the act is exercised through instructions which, due to the organisational structure, result in an almost automatic realisation of the offence he intends.⁵⁶⁵ Since this theory is the most relevant form of indirect perpetration in the context of international crimes, I will discuss it in detail in the next Section.

c. Co-perpetration (Mittäterschaft)

Co-perpetration is the joint commission of a criminal act⁵⁶⁶ through a knowing and willing working together of the individual participants.⁵⁶⁷ In contrast to act hegemony and domination through will, co-perpetration is based on the functional act domination of each co-perpetrator, which arises from the principle of division of labour and functional role allocation.⁵⁶⁸ This allocation ensures that the success of the criminal act is possible only through the co-operation of all co-perpetrators, so that the plan succeeds or fails depending on the functional contribution of each perpetrator. The act domination of the co-perpetrator is based on the fact that through his part of the act, he simultaneously controls the total act; his failure to perform his part of the act also results in a failure of the entire plan for all the other participants.⁵⁶⁹ For instance, two bank robbers A and B rob a bank together where A threatens the employees with a gun while B removes the cash from the tills. Every participant here

⁵⁶⁴ See (n 326).

⁵⁶⁵ MPICC report (n 515) 23.

⁵⁶⁶ Section 25, StGB.

⁵⁶⁷ MPICC report (n 515) 29; *Schwerpunkte* (n 512) 186.

⁵⁶⁸ *Leipziger Kommentar* (n 517) 1931.

⁵⁶⁹ *Leipziger Kommentar* (n 517) 1931-32.

acts an equal partner – he participates in a common agreement or plan and a joint commission of the criminal act. The act contributions complement each other in such a manner that they collectively make the criminal act a joint venture and the joint result is fully attributable to each co-worker.⁵⁷⁰

There are mainly two requirements for co-perpetration: an objective requirement of collective act execution for the realisation of the elements of the offence and a subjective requirement of a common act plan.⁵⁷¹

i. Collective act execution

The co-perpetrators must work together jointly based on a division of labour towards the attainment of the result of the elements of the offence. The act contribution of each co-perpetrator must therefore be of sufficient weight and importance such that it grounds the necessary co-domination over the act; this is indeed the primary difference between co-perpetration and aiding, where the contribution of the participant merely amounts to helping the act of another.⁵⁷² As a rule, the contribution must consist of an act by the perpetrator, though the jurisprudence of the courts and part of the literature endorses co-perpetration through omissions.⁵⁷³ Thus, if A and B, two prison officers agree to make the escape of a prisoner possible such that A hands him the prison key (act) while B leaves the outer prison gates unlocked in violation of his duty (omission), they will still be co-perpetrators of the offence of facilitating the escape of prisoners (Section 120, StGB).⁵⁷⁴ If the conditions for co-perpetration are present, the objective act contributions of the participants are mutually attributed as if

⁵⁷⁰ MPICC report (n 515) 29; *Leipziger Kommentar* (n 517) 1931-32.

⁵⁷¹ MPICC report (n 515) 29.

⁵⁷² MPICC report (n 515) 30.

⁵⁷³ MPICC report (n 515) 29.

⁵⁷⁴ *Leipziger Kommentar* (n 517) 1935.

they had realized all the elements themselves. An attribution is however not possible when the elements of the offence have special requirements for the perpetrator and call for personal commission by the perpetrator. Also, it is not possible to attribute subjective characteristics such as special intent requirements.⁵⁷⁵

There is a good deal of controversy over whether this act contribution must be at the stage of execution of the elements of the offence, or whether contributions in the preparation stage can also be sufficient. According to the established jurisprudence of the BGH, even a small co-operation in the preparation stage may lead to liability as a co-perpetrator if it is carried out with the will of a perpetrator⁵⁷⁶ (which reflects the continuing influence of the subjective theory in the BGH's jurisprudence).⁵⁷⁷ This includes ferrying the perpetrator to the scene of the crime, participation in the planning of a murder, and even advice given to the co-perpetrator which strengthens his resolution to commit the crime.⁵⁷⁸ Commentators disagree on whether such preparatory acts can ground co-perpetration. The typical example given is that of a gang leader who conceives of the criminal scheme and decides on its mode of commission, but leaves its execution entirely to the other gang members.⁵⁷⁹ One strand of opinion would reject liability as a co-perpetrator of the gang leader and hold him responsible only as an accessory, unless he took part in some manner in the execution of the crime - for instance he remained in contact with the gang through telephone or radio and thus conducted their deployment.⁵⁸⁰ Others contest this characterisation on the basis that the gang leader is not participating in the act of

⁵⁷⁵ MPICC report (n 515) 32; *Schwerpunkte* (n 512) 188.

⁵⁷⁶ *Leipziger Kommentar* (n 517) 1942 and cases cited therein.

⁵⁷⁷ Refer text to notes 521 to 526 discussing the BGH and its adherence to the subjective theory for demarcating parties to a crime.

⁵⁷⁸ *Leipziger Kommentar* (n 517) 1942.

⁵⁷⁹ *Schwerpunkte* (n 512) 187; Roxin, TT (n 536) 298-300.

⁵⁸⁰ Roxin, TT (n 536) 298-300.

another, but that the result of the act is consequent on a willing collective participation in a joint act. Also, given the role of the gang leader, it would be inappropriate to consider him a marginal figure in the course of events and thus an accessory.⁵⁸¹

There is however merit in the argument that since perpetration is tied to the realisation of the elements of the offence, co-perpetration must consist of joint domination of the implementation of these elements, and thus exist during the execution stage. A person who merely participates in the preparation stage can certainly influence the course of events, but can scarcely be said to control it. If the executor of the act plan acts freely and with responsibility, the realisation of the plan would always be dependent on the initiative, resolutions and decisions of the direct executor.⁵⁸² Thus, only co-operation in the execution stage would justify responsibility as a co-perpetrator. This execution stage is however not limited to the core elements of the offence, but encompasses the entire phase between the beginning of the attempt and the formal completion of the act and covers actions that would form an inseparable part of the complex action chain.⁵⁸³ I will analyse the significance of this debate in the Section on *Organisationsherrschaft* where some commentators suggest co-perpetration as a viable alternative to this form of indirect perpetration.

Another situation which represents an ambiguity in the objective requirements for co-perpetration, and which would be important for later clarifying the boundaries of perpetration in international criminal law, is the fact scenario of ‘successive co-perpetration’. Here the question is whether a contribution subsequent to the commencement of the execution stage can also be punished as co-perpetration, for instance, a person who joins an act of resistance which has already begun and takes

⁵⁸¹ *Schwerpunkte* (n 512) 190.

⁵⁸² *Leipziger Kommentar* (n 517) 1943.

⁵⁸³ *Leipziger Kommentar* (n 517) 1943-44.

part in further attacks against the enforcement agency. The jurisprudence affirms co-perpetration during the entire execution stage as long as the subsequent participation is based on a mutual understanding and not unilateral in nature.⁵⁸⁴ There is controversy over whether aggravating factors that were already completed before the participation of the subsequently joining co-perpetrator can also be attributed to him. While the courts favour this attribution, the majority of the literature rejects it on the basis that this undermines the functional act domination at the heart of co-perpetration.⁵⁸⁵

ii. Common act plan

As the functional act domination based on co-operation in accordance with a division of labour presupposes an overall plan, co-perpetration requires that the contributors to the criminal act reach an agreement to commit the act as equal partners.⁵⁸⁶ A jointly developed and decided upon plan is not essential. The acceptance or approval of an already formed plan of another which then forms the basis of the further joint action is sufficient. What is essential is mutual consent over the joint realisation of the act at the time or even before the beginning of the act; this agreement may not take place explicitly, but can also take place by implication. This would exclude situations where a joint accord is missing, such as a coincidental simultaneous exploitation of a situation by persons working side by side, but without a mutual understanding.⁵⁸⁷ Co-perpetration is also possible if the individual participations do not know each other, as long as each person is conscious that there are other participants who are likewise

⁵⁸⁴ *Leipziger Kommentar* (n 517) 1950.

⁵⁸⁵ *Leipziger Kommentar* (n 517) 1951-53.

⁵⁸⁶ MPICC report (n 515) 31; *Leipziger Kommentar* (n 517) 1938.

⁵⁸⁷ MPICC report (n 515) 31; *Leipziger Kommentar* (n 517) 1938.

working towards a common goal, and these other participants have the same knowledge.⁵⁸⁸

From the necessity for a common act plan it follows that the act of one of the contributors that goes beyond the plan, the so called ‘excess’, cannot be attributed to the others.⁵⁸⁹ This is because the other contributors do not have hegemony over the act or the requisite intention regarding the deviation.⁵⁹⁰ Thus, if several persons plan a robbery and one of them gets carried away and commits a murder during the robbery, he alone will be responsible for the killing.⁵⁹¹ There are some exceptions to this rule, as it is not necessary that the common plan covers each and every detail of the execution; each perpetrator may be given some leeway to act as the situation demands as long as this helps accomplish the common goal. Therefore, deviations from the common plan which are within the range of the relevant acts with which one must normally reckon do not count as an excess. The main test is the foreseeability of the deviant course of action.⁵⁹² A deviation from the original plan during the joint executing action can also be introduced into the agreement by a mutual understanding, which again negates excess.⁵⁹³ Similar situations of liability for deviations from the common plan are dealt with under the doctrine of joint enterprise as a form of accomplice liability in English law.⁵⁹⁴ The test is one of subjective foresight of a significant possibility that the crime will be committed in the course of

⁵⁸⁸ MPICC report (n 515) 31; *Leipziger Kommentar* (n 517) 1939.

⁵⁸⁹ MPICC report (n 515) 32; *Leipziger Kommentar* (n 517) 1940.

⁵⁹⁰ MPICC report (n 515) 32.

⁵⁹¹ RGSt 44, 321, 324; BGH NJW 1973 377.

⁵⁹² MPICC report (n 515) 32; *Leipziger Kommentar* (n 517) 1940.

⁵⁹³ *Schwerpunkte* (n 512) 189.

⁵⁹⁴ Ashworth (n 446) 420-21 discussing English case law on the topic. As Ashworth notes, the exact status of joint enterprise liability is contested in English law, that is, commentators are divided on whether it is a distinct form of secondary responsibility.

the joint enterprise.⁵⁹⁵ We will discuss this in more detail in Part III of the thesis dealing with accessorial liability in English law.

4 Organisationsherrschaft

a. Roxin's formulation of Organisationsherrschaft

In 1963, Claus Roxin added an independent category of indirect perpetration to the already recognised groups of hegemony through coercion and hegemony through utilisation of mistake: domination by will on the basis of an organizational power apparatuses or *Organisationsherrschaft*.⁵⁹⁶ This category refers to cases where the *Hintermann* has an organised power apparatus at his disposal through which he can accomplish the offences he aims at, without having to leave their realisation contingent on an independent decision by the *Frontmann*. English law does not have any mode of assigning responsibility which corresponds to *Organisationsherrschaft*.

Unlike the other two forms of domination by will, *Organisationsherrschaft* transfers control over the course of events to the *Hintermann* despite a fully criminally responsible intermediary.⁵⁹⁷ Roxin differentiates these cases from the other two forms of domination by will by referring to real life examples. He relies on the cases of Eichmann and Staschynskij.⁵⁹⁸ Eichmann was a member of the SS in the Nazi regime and was charged with the task of facilitating and managing the mass deportation of Jews to extermination camps in Eastern Europe. Staschynskij was a KGB agent who assassinated two exiled politicians on behalf of the secret service. Roxin argued that in such cases, it would be difficult to argue that either person was excused due to domination of will through coercion or mistake. For instance,

⁵⁹⁵ Ashworth (n 446) 422.

⁵⁹⁶ Roxin 1963 (n 563) 200.

⁵⁹⁷ Roxin TT (n 536) 242-243.

⁵⁹⁸ Roxin 1963 (n 563) 201-03.

documentary material on the Nazi regime showed that no one would have been shot or even threatened with a death sentence on account of refusal to follow orders to kill. Similarly, while it was not impossible that the killer of a defenceless human being did not see the material injustice of his act under the grip of an ideological infatuation, the more convincing explanation was that the offender simply suppressed the voice of his conscience by thinking of the greater responsibility of the instruction giver. Thus, these cases would not excuse the direct perpetrator on account of coercion or mistake.⁵⁹⁹

However, as Roxin argues, no one could fail to realise that the head of the secret service or a highly placed official responsible for the organisation of mass deportation of the Jews controls the commission of the offences in a way that is different from the normal accessory.⁶⁰⁰ The special position of the *Hintermann* in these cases results from the specific mode of action within the framework of the organisational apparatus. Such an organisation develops a life which is independent of the changing existence of its members and of the decisions of the individual act executors; it functions as it were automatically. To use a figure of speech, the *Hintermann* sits at the operational centre of the organisational structure and if he presses a button to order a killing, he can expect it to be fulfilled without him even knowing who executes the action.⁶⁰¹ This expectation of fulfilment does not arise from any deception or duress on the part of the *Hintermann*. Instead, it is based on the fungibility of the executing organs, such that if one organ refuses to participate, another immediately steps into its place and the execution of the total plan continues unhindered. Each executing organ is therefore an anonymous and arbitrarily

⁵⁹⁹ Roxin 1963 (n 563) 199; Roxin TT (n 536) 243-44.

⁶⁰⁰ Roxin 1963 (n 563) 200; Roxin TT (n 536) 244-45.

⁶⁰¹ Roxin 1963 (n 563) 200; Roxin TT (n 536) 245.

exchangeable figure, much like a simple cog in the machine like organisation, which places the *Hintermann* in the central position of the occurrence and lends him domination over the act.⁶⁰²

It is irrelevant for *Organisationsherrschaft* whether the *Hintermann* acts on his own initiative or on the instructions of more highly placed superiors. All that is required is that he can direct or steer the part of the organisation which is subordinate to him, without having to rely on the resolution of his subordinates for the commission of the offence.⁶⁰³ An action that does not independently work to steer the organisation further would only qualify as accessorial in nature. For instance, A who simply outlines the plan of destruction without possessing any authority, or B who stands outside the apparatus as an informer, can only be accessories because of their lack of steering power. This does not imply that their conduct is less despicable than that of the perpetrator, but it is the element of control and not the degree of culpability that is decisive for the demarcation of the forms of perpetration.⁶⁰⁴

b. Other forms of indirect perpetration that relate to Organisationsherrschaft

i. Schroeder's theory of the perpetrator behind the perpetrator

A different account of the concept of a perpetrator behind a fully responsible perpetrator, which was later borrowed by the BHG in its formulation of *Organisationsherrschaft*, was outlined by Schroeder in 1965.⁶⁰⁵ Instead of the fungibility of the act intermediaries, Schroeder grounded the responsibility of the *Hintermann* on his use of a *Frontmann* who is already determined to carry out the

⁶⁰² Roxin 1963 (n 563) 200-01; Roxin TT (n 536) 245. The criterion of fungibility has invited much criticism, as we shall later examine, on doctrinal and empirical grounds.

⁶⁰³ Roxin 1963 (n 563) 203; Roxin TT (n 536) 248.

⁶⁰⁴ Roxin 1963 (n 563) 204; Roxin TT (n 536) 249.

⁶⁰⁵ F.C. Schroeder, *Der Täter hinter dem Täter: Ein Beitrag zur Lehre von der mittelbaren Täterschaft* (Duncker & Humblot 1965).

criminal act. In this case too, the *Hintermann* may rely on the almost automatic regular implementation of his criminal goal, not based on the replaceability of the intermediary, but on his already complete, though conditional, readiness to commit the offence.⁶⁰⁶ By ‘conditional’ Schroeder only meant that the act resolution of the intermediary was still pending activation.⁶⁰⁷ The culpability of the *Hintermann* arises from the fact that he consciously provides the igniting spark for the known explosive material and avails himself of a pliable tool for a criminal result in his own direct interest.⁶⁰⁸

Schroeder argues that the criterion of replaceability used by Roxin cannot be decisive for criminal responsibility because in organisations that rely on functional specialisation, persons such as poisonous gas specialists are not easily substitutable. However, their irreplaceability would in any event not impact the responsibility of the other participants. What is crucial is that the executor who is already resolved to commit the criminal act stands prepared for the *Hintermann’s* instruction at any time.⁶⁰⁹ This situation is different from that of instigation, where the instigator cannot be sure of the certainty of the criminal result because the *Frontmann* may still be susceptible to counter-acting reasons, whereas here he acts in knowledge of the *Frontmann’s* certain act resolution.⁶¹⁰

Schroeder’s position has been effectively criticised in literature. Even if, as Schroeder argues, there is a high degree of certainty attached to the crime result due to the already determined executor, this still does not mean that the *Hintermann* has

⁶⁰⁶ Thomas Rotsch, ‘Tatherrschaft kraft Organisationsherrschaft?’ (2001) 112 *Zeitschrift für die gesamte Strafrechtswissenschaft* 518, 524.

⁶⁰⁷ F.C. Schroeder, ‘Der Sprung des Täters hinter dem Täter aus der Theorie in die Praxis’ (1995) *Juristische Rundschau* 177, 179.

⁶⁰⁸ Schroeder *Täter* (n 605) S. 158.

⁶⁰⁹ Schroeder JR (n 607) 178.

⁶¹⁰ Schroeder JR (n 607) 178.

control over the occurrence;⁶¹¹ the *Frontmann* can still, if he suddenly develops scruples, refrain from the criminal act – this situation is hardly different from instigation.⁶¹² On the other hand, if the *Frontmann* is really so determined to commit the act that the result is practically guaranteed, then it is difficult to understand why the provocation by the *Hintermann*, which moreover occurred before the time of the act commission, would grant him sufficient control over the act so as to justify his punishment as an indirect author.⁶¹³ Further, Schroeder's fact situation does not correspond to reality in the majority of cases – the absolute readiness of the *Frontmann* to commit the criminal act is the exception rather than the rule. Cases such as those of the German guards at the wall show that many of the act executors actually tried to withdraw themselves from the criminal tasks or only performed them to avoid a substantial personal disadvantage.⁶¹⁴

ii. The BGH's adoption of Organisationsherrschaft

The BGH, as previously mentioned, first adopted the doctrine of *Organisationsherrschaft* in its decision on the German border guards case in 1994. The BGH however did not follow only Roxin's version of *Organisationsherrschaft* in its formulation, but combined it with Schroeder's criterion of the intermediary's (absolute) readiness to realise the criminal act. It held that a *Hintermann* has domination over an act, despite a fully responsible *Frontmann*, if he uses the basic framework conditions of an organisational structure within which his act contribution gives rise to a regular operational sequence. Such framework conditions may exist in

⁶¹¹ Harro Otto, 'Täterschaft kraft organisatorischen Machtapparates' (2001) *Jura* 753, 757-58.

⁶¹² Rotsch, *Tatherrschaft* (n 606) 525.

⁶¹³ Rotsch, *Tatherrschaft* (n 606) 525.

⁶¹⁴ Claus Roxin, 'Anmerkung', (1995) *Juristen-Zeitung* 49, 51; Kai Ambos, 'Tatherrschaft durch Willensherrschaft kraft organisatorischer Machtapparate' (1998) *Goltdammer's Archiv für Strafrecht* 226, 230.

command hierarchies as well as in state, business or business like organisational structures. If the *Hintermann* acts in the knowledge of these circumstances, if he in particular uses the absolute readiness of the executing organ to fulfil the elements of the offence, and if he wants his action to culminate in the result of the element of the offence, then he will be the indirect perpetrator.⁶¹⁵

The BGH however went beyond Roxin in introducing the possibility of using *Organisationsherrschaft* in the case of economic and business like enterprises.⁶¹⁶ Roxin limits the application of his theory to those organisations that are completely detached from the legal order. This is because as long as the administration and execution organs keep themselves bound in principle to an independent legal order, the instructions to commit criminal acts cannot ground act domination. The laws of this order will have a higher ranking vis-à-vis the illegal instructions and will thus exclude the domination by will of the *Hintermann*.⁶¹⁷ Roxin confined *Organisationsherrschaft* to mainly two cases: crimes committed by the state authorities, and crimes committed by organisations such as underground movements, secret organizations, criminal organizations and similar unions that function as a ‘state within the state’.⁶¹⁸

In later decisions, the BGH has expanded the range of application of the doctrine even further to include organisations such as hospitals. It also uses different criteria for holding the *Hintermann* responsible: his conscious creation and use of the basic framework conditions of the organisational structure in order to implement the

⁶¹⁵ See (n 326).

⁶¹⁶ On this extension of *Organisationsherrschaft*, see MPICC Report (n 515) 23-24.

⁶¹⁷ Roxin 1963 (n 563) 204; Roxin TT (n 536) 249.

⁶¹⁸ Roxin 1963 (n 563) 205; Roxin TT (n 536) 250.

elements of the offence.⁶¹⁹ There is no mention of the element of fungibility which is fundamental to Roxin's explication.⁶²⁰ To assess the merit of these different approaches, it is now important to consider each of the criteria for *Organisationsherrschaft* put forward by Roxin.

c. Elements of Organisationsherrschaft

There are three main elements in Roxin's theory of *Organisationsherrschaft*: (1) the existence of a vertically hierarchically arranged organization (power apparatus), (2) the unlimited exchangeability of the direct author within the power apparatus (fungibility) and (3) the working of the apparatus outside of the legal order (detachedness from the law).⁶²¹

i. Taut hierarchical organisational structure

Roxin's elucidation of *Organisationsherrschaft* requires an organisational structure which functions such that the instructions of the *Hintermann* lead to an automatic implementation of the elements of the offence. Roxin also talks of an organisation that is independent of its individual members who act as a functional part of a larger machine like structure; this is the basis on which he excludes a group of asocial elements who unite to commit common criminal offences and elect one of them as their leader.⁶²² This presupposes a fairly tightly organised hierarchical structure.⁶²³

Roxin ties this structure to the existence of a large number of fungible act intermediaries. However, it is a little difficult to reconcile these two elements in

⁶¹⁹ Vgl. BGHSt 48, S. 77 (90 f.); S. 331 (342); BGH Urt. v. 3.7.2003 – 1 StR 453/02, S. 30 f. MPICC report (n 515) 25.

⁶²⁰ Thomas Rotsch, 'Neues zur Organisationsherrschaft' (2005) *Neue Zeitschrift für Strafrecht* 13, 17.

⁶²¹ Henning Radtke, 'Mittelbare Täterschaft kraft Organisationsherrschaft im nationalen und internationalen Strafrecht' (2006) *Goltdammer's Archiv für Strafrecht* 350, 354.

⁶²² Roxin 1963 (n 563) 206; Roxin TT (n 536) 251.

⁶²³ Ambos (n 614) 240-41.

practice. The larger the number of act intermediaries, the more difficult it would be to control the system so that the *Hintermann*'s instructions are implemented smoothly.⁶²⁴ This is all the more so if these intermediaries are arbitrarily replaceable. Roxin could be taken as referring to a functionally differentiated and decentralised large enterprise, where the actors often do not know of each other's exact functions and perform their tasks more or less independently. It is however more difficult to ensure a 'regular operational sequence' within such a structure⁶²⁵ and the arbitrary replaceability of the intermediaries also becomes far more limited in such circumstances.

Moreover as far as international crimes are concerned, Roxin's organisational structure, though conceded by him to be an 'ideal type',⁶²⁶ does not reflect the reality of the majority of situations of mass conflict. Crimes committed by the direct perpetrators in these situations are often spontaneous, or crimes of opportunity, or individual responses to a climate of permissibility. The direct executor can hardly be said to be part of any power structure, and even less a tightly organised and controlled one, especially given that the crimes are spatially and temporally widespread and can encompass entire geographical regions. Perhaps Roxin would circumvent this objection by limiting the requirement of a taut hierarchical structure with regular operational sequences to the leadership level of the organisation. Thus, top and maybe even mid level officials must be part of this vertical hierarchical structure which unleashes the chain of events leading to the commission of mass crimes. However,

⁶²⁴ Rotsch, Tatherrschaft (n 606) 557.

⁶²⁵ Rolf D. Herzberg, 'Mittelbare Täterschaft und Anstiftung in formalen Organisationen' in Knut Amelung (Hrsg.), *Individuelle Verantwortung und Beteiligungsverhältnisse bei Straftaten in bürokratischen Organisationen des Staates, der Wirtschaft und der Gesellschaft* (Pro Universitate Verlag 2000) 33, 36.

⁶²⁶ Roxin 1963 (n 563) 207; Roxin TT (n 536) 252.

this would be contrary to his criterion of the fungible direct executor as *part* of the organisational chain structure.

ii. Fungibility of the act intermediaries

For Roxin, fungibility of the act intermediaries forms a central part of his theory of *Organisationsherrschaft*, for it is only due to a large number of replaceable act executors that the refusal of any one of them to commit a criminal act cannot adversely affect the execution of the criminal plan. This criterion has been heavily disputed by commentators.

One set of arguments focuses on the view of act intermediaries as instrumental cogs in a machine. It is argued that the expectation of automatic implementation of the elements of the offence by these intermediaries contradicts holding them criminally responsible as direct perpetrators.⁶²⁷ The assumption of soulless humans is also contested – even in the most strict and tightly controlled organisational structure, the fundamental unpredictability of freely acting humans (and *Organisationsherrschaft* assumes this freedom) cannot be done away with. *Organisationsherrschaft* presents us with a crooked picture of humans who are merged into an organisational structure and become one with the machine. However, just because some or all of the individuals are replaceable does not make the enterprise any less a union of human beings, or lessen the imponderability of the result that follows from this basis. If the picture of the soulless power apparatus is genuinely taken seriously, it is hard to see why this does not at the same time justify relieving the act executors from criminal responsibility.⁶²⁸

⁶²⁷ Otto (n 611) 755.

⁶²⁸ Uwe Murmann, 'Tatherrschaft durch Weisungsmacht' (1996) *Goltdammer's Archiv für Strafrecht* 269, 273-74.

These internal contradictions of a criminally responsible yet machine like direct executor can be partially resolved if one distinguishes more clearly between individual unlawfulness and collective unlawfulness – that is, unlawfulness that arises in organisational settings.⁶²⁹ Unlike in the normal case of indirect perpetration where the responsibility of the *Hintermann* is based on his direct control over the direct perpetrator, in cases of macro-criminality, the *Hintermann* controls the intermediary only indirectly through the mechanism of the organisational apparatus.⁶³⁰ The direct perpetrator is on the one hand responsible for his own criminal acts; on the other hand, his actions are part of the acts of the organisation as a whole. This organisational aspect does not relieve him as an individual for the individual unlawfulness. However, the only person who can be held responsible for this organisational unlawfulness is the person who has control over the organisation – the *Hintermann*.⁶³¹ This response is particularly relevant in the context of international crimes. It signals that principles of attribution may be different in cases of individual and collective criminality. Thus, individual direct perpetrators can be criminally responsible for only the individual acts of rapes and murders that constitute genocide; but the *Hintermann* alone will be responsible for the macro-crime of genocide comprised of these individual acts. The response nevertheless fails to address the troubling aspect of viewing the direct perpetrator as a soulless tool of the *Hintermann*.

This objection is connected to the second set of arguments against fungibility: in the context of the concrete act, there is usually only a limited number of act intermediaries who can commit it. One cannot therefore refer to an unlimited number

⁶²⁹ Ambos (n 614) 234.

⁶³⁰ Ambos (n 614) 234.

⁶³¹ Rene Bloy, 'Grenzen der Täterschaft bei fremdhändiger Tatausführung' (1996) *Goldammer's Archiv für Strafrecht* 424, 441.

of exchangeable act executors. For instance, in the case of the guards posted at the border between East and West Germany, in the context of the temporally and spatially limited concrete act of preventing the escape of refugees, only a few soldiers were present.⁶³² At best then, the soldiers were not instantly but only successively replaceable. This would not differ in any material way from any other form of indirect perpetration or guarantee automatic implementation of the elements of the offence for the concrete individual offence.⁶³³

Roxin seems to distinguish though between immediate substitutability in the context of the concrete act, and the abstract substitutability as a whole within the structure of the power apparatus. He himself states that in the concrete situation, as in the Staschinskij case, only a few persons need be involved.⁶³⁴ This however separates the criterion of fungibility from the concrete act and appears to ground domination over the concrete act on a different criterion: the *conception* of the direct executor that if he were to refuse, another person would perform the criminal act in his stead, hence leading to his implementing the elements of the offence. This would however make the *Hintermann's* domination over the act contingent on his awareness of the belief of the direct executor, which is suspiciously close to a subjective rather than objective basis for act domination. It would also contradict Roxin's own repudiation of the subjective theory.⁶³⁵ Even leaving aside this potential inconsistency, the direct executor's mere belief that he is exchangeable will not necessarily make him perform the criminal act. Even if he is convinced of the inevitability of the criminal result, he

⁶³² Murmann (n 628) 273.

⁶³³ Ambos (n 614) 232.

⁶³⁴ Roxin 1963 (n 563) 202-03; Roxin TT (n 536) 247-48.

⁶³⁵ Rotsch, Tatherrschaft (n 606) 527.

may still be revolted by the thought of being personally implicated in it and refrain from participation.

Roxin's argument could perhaps still be saved if one considers that having domination or control over the act simply has a different meaning in the context of *Organisationsherrschaft* when compared to other cases of indirect perpetration. In the usual case of indirect perpetration, the 'act' (over which the *Hintermann* must have control) represents the direct criminal act committed by the *Frontmann*. In *Organisationsherrschaft*, the 'act' may be taken to refer to the entire expiration of events leading to the fulfilment of the result of the elements of the offence. The *Hintermann* would thus have the central position if he controls the sequence of events till the implementation of the crime.⁶³⁶ However, this would result in a decoupling of the domination over the act from the elements of the offence. If Roxin were to accept this solution, it would contradict his stance that the perpetrator must have the key position in the execution action constituting the elements of the offence.⁶³⁷

This objection may not however apply with the same strength in the case of international crimes. This is because international offences have an inbuilt collective element in their definition – a crime against humanity is not an individual act of murder or rape; such individual acts reach the level of an international crime only if they are part of a widespread or systematic practice. The *Hintermann* can thus only be someone who occupies the central position in, or has control over, this entire sequence of events, including the collective element of the crime. To decouple his involvement from each individual micro crime that comprises this group crime would still not result in a complete detachment from the elements of the offence. Indeed, it

⁶³⁶ Rotsch NStZ (n 620) 15-16.

⁶³⁷ Rotsch NStZ (n 620) 15-16.

would be difficult to argue that the same individual can have control over both the individual and collective elements of the international crime at the same time.

iii. Detachedness from the legal order

Roxin limits the operation of *Organisationsherrschaft* to organisations that are detached from the legal order, for it is only in these organisations that the administration and execution organs of the power apparatus are not bound to laws that have a higher ranking. The latter would normally exclude the automatic implementation of the *Hintermann's* illegal instructions. This criterion is challenged primarily by Ambos who states that while detachedness from the law may exist in these organisations, it is not a necessary condition. In fact, if the organisation forms part of the legal order, the *Hintermann's* domination over the act is greater.⁶³⁸ He argues that in the case of non-State power apparatuses which have a symbiotic relationship with the State, such as the Sicilian mafia or Colombian drug cartels, the organisation is not detached from the law, but operates as a “para State”, that is, it is integrated into the law in order to achieve a common interest. This does not however change anything in the effective domination of the top management of the apparatus over the act and direct executors.⁶³⁹ Ambos is however guilty of eliding the distinction between the *government* and the ‘State’ – while there may indeed be a symbiotic relationship between the former and the organisation, one cannot equate this to an integration of the organisation within the *positive legal order* which may still be committed to fighting the criminal acts of the organisation.

Ambos is more careful of this distinction when discussing state organised power apparatuses where he admits the existence of two parallel legal orders. The first

⁶³⁸ Ambos (n 614) 242.

⁶³⁹ Ambos (n 614) 242-243.

is the 'normal' State legal order which is obligated to fight crime. The second is the 'perverted' legal order based on a secret plan of the government aimed at criminal ends which forms the basis of the clandestinely operating national power apparatus.⁶⁴⁰ The situation is however different if the legal order forms the basis of state sanctioned crime, such as in the military dictatorships of Argentina and Chile, where crimes are perpetrated in the name of the law by the authority of the executive and through the instrumentality of the courts. Here there is no element of detachedness from the law; instead, with the concentration of unlawfulness and the authority of the law in the hands of the same national power apparatus, the automatic implementation of the illegal instruction by the act intermediary is even more assured than in a case of law detachedness.⁶⁴¹

Ambos admits that 'law' in Roxin's sense can also refer to natural rather than positive law; the state apparatus which acts in contradiction to the *lex naturalis* thus detaches itself from the order of the natural law even if it is in conformity with the positive law. However he rejects this interpretation on the ground that it is too abstract and that such unwritten supra legal principles do not lend themselves to clear or immediate understanding for the act intermediary. Thus, they cannot form a normative barrier to the execution of the *Hintermann's* orders.⁶⁴²

Ambos's criticism on law detachedness is convincing in the context of a state apparatus if Roxin indeed takes law to mean positive law. However, he intuitively seems to have in mind natural rather than positive law – his reference to a 'higher ranking' of this law⁶⁴³ and to the rarity of such an organisation existing in a

⁶⁴⁰ Ambos (n 614) 243.

⁶⁴¹ Ambos (n 614) 244.

⁶⁴² Ambos (n 614) 244-45.

⁶⁴³ Roxin 1963 (n 563) 204; Roxin TT (n 536) 249.

constitutionally stable legal order⁶⁴⁴ point in this direction. This may in fact be one of the major strengths rather than weaknesses of Roxin's theory when applied to international crimes. It is exactly because such unwritten higher laws cannot be immediately comprehended by the act intermediary that they do not present a barrier to him for executing the contravening illegal instruction of the *Hintermann*. This lack of comprehension would result from the intermediary's unawareness of the material unlawfulness of the instructions due to the ideological glare that surrounds situations of mass atrocity – as we noted, the direct executor of the international crime often acts in a social climate of moral permissiveness for the criminal act. Roxin's criterion of law detachedness would then perform two very important functions in clarifying the basis for international criminal responsibility: it would capture the social context in which mass crimes are committed and the 'banality of evil'⁶⁴⁵ documented by historians and sociologists in these situations; at the same time, it would provide a moral compass for the behaviour expected of the act intermediary when surrounded by a climate that sanctions horrific acts of brutality and provide a normative justification for his criminal responsibility.

5 Alternatives to Organisationsherrschaft

a. Instigation

Several commentators argue that the *Hintermann* in the context of *Organisationsherrschaft* should not be held responsible as an indirect perpetrator, but only as an instigator. The first set of arguments bases this on the fully criminal responsible direct perpetrator. As Herzberg summarises, Hitler, Himmler and Honecker committed the killings which they instructed not as perpetrators but only as

⁶⁴⁴ Roxin 1963 (n 563) 207; Roxin TT (n 536) 252.

⁶⁴⁵ See the discussion at Mark J Osiel, *Mass Atrocity, Ordinary Evil, and Hannah Arendt: Criminal Consciousness in Argentina's Dirty War* (Yale University Press 2001) 25-31.

instigators, because of the intervention of a deliberate and personally criminally responsible third person between the instructions and the criminal result.⁶⁴⁶ We have already considered this objection in the context of our discussion that the attribution of responsibility in cases of macro-criminality may be based on different principles than those applicable to normal crimes.

The second objection holds that there is little difference between instigation and *Organisationsherrschaft* with respect to the uncertainty of the criminal result. Murmann gives the example of a professional thief who is instigated by X to procure a certain article for him for a reasonable price – in this case X can be as certain of achieving his criminal result as the *Hintermann* in Roxin's example.⁶⁴⁷ This example is however not an apt comparison, since *Organisationsherrschaft* by its very nature is not meant to regulate the relationship between two determinate individuals. A more relevant example is put forward by Rotsch of a politician P who promises in a demonstration comprised of 500 fanatical supporters to reward with a million US dollars anyone who kills his unpopular competitor X. Rotsch argues that P can be as sure or unsure that the criminal result he wants will be carried out as the *Hintermann* in Roxin's case, even though Roxin would accept only instigation here due to lack of an organisational structure. This is because there are diverse reasons capable of motivating a large number of humans to commit a criminal offence.⁶⁴⁸ Rotsch is undoubtedly correct in his conclusion, but his objection misses the main point of *Organisationsherrschaft* – the element of control exercised by the *Hintermann* by virtue of the organisational structure as compared to an instigator. In Rotsch's example, while there is a very high empirical probability of P's criminal desires being

⁶⁴⁶ Herzberg (n 625) 48.

⁶⁴⁷ Murmann (n 628) 74.

⁶⁴⁸ Rotsch NStZ (n 620) 14.

carried out, his instigation of his motley crowd of supporters still does not give him any control over their actions – whether or not they decide to kill X for a monetary reward depends entirely on their own motivations and wishes.

The third objection relates to Roxin's argument that the acceptance of instigation in situations such as the German border guards case severely underestimates the extent of contribution of the accused. It disguises the fact that they were the true decision makers in the illegal enterprise by relegating them to marginal figures in the occurrence.⁶⁴⁹ Herzberg responds that this is untrue, since both instigation and perpetration differ neither in the kind nor in the weight of the injury caused to the protected legal interest; the demarcation between the forms of participation does not depend on the degree of unlawfulness (which is a matter for sentencing) but only on whether the crime is committed personally or by a criminally responsible third person.⁶⁵⁰ He also refutes Roxin's assertion that persons in the position of Hitler and Himmler cannot be equated with normal instigators since they possess a destructive and law violative potential that is simply not comparable to the everyday instigator.⁶⁵¹ Herzberg argues that glaring differences can always be found between different instigators, but they become relevant for the assignment of a different category of participation only if they relate to the criteria for the demarcation of participation forms. For instance, even the head of a mafia who extorts funds in the name of protection or a KGB functionary who occasionally gives instructions for a killing would be considered perpetrators under *Organisationsherrschaft* even though their destruction potential cannot be compared with that of Hitler.⁶⁵²

⁶⁴⁹ Roxin, Anmerkung (n 614) 49.

⁶⁵⁰ Herzberg (n 625) 49.

⁶⁵¹ Claus Roxin, 'Anmerkungen zum Vortrag von Prof. Dr. Herzberg' in Amelung (n 625) 55, 56.

⁶⁵² Rolf D Herzberg, 'Antwort auf die Anmerkungen von Prof. Dr. Roxin' in Amelung (n 625) 57.

These are certainly powerful arguments, but they are somewhat misleading. *Organisationsherrschaft* does not demand that there is a certain degree of destructive potential that must be reached before X can be labelled a perpetrator. Different perpetrators within *Organisationsherrschaft* may enjoy different degrees of power and authority and operate at different levels within the organisational structure. This is acknowledged by Roxin himself when he uses Eichmann's example to state that Eichmann would be a perpetrator even if he was working under the instructions of the Nazi regime as a whole.⁶⁵³ To say that a KGB agent is not as dangerous as Hitler and therefore not a perpetrator is a fairly meaningless comparison. Moreover, all these objections outlined above still miss some crucial points of difference between instigation and (indirect) perpetration. To label Hitler or Himmler as instigators who would have left the decision on whether their criminal aims are implemented to the discretion of their subordinates does not sit very well with historical and social reality; the criminal acts committed were not the acts of a strange third person, but very much intended as their own plan and work.⁶⁵⁴ The relationship of the *Hintermann* and the act intermediary is also very different from that of the instigator and the direct executor – the instigator must normally establish contact with the act executor, convince or persuade him to carry out the criminal act and overcome his scruples. None of this applies to the *Hintermann* in *Organisationsherrschaft* who can ensure the implementation of his order on account of his control over the power apparatus.⁶⁵⁵

⁶⁵³ Roxin 1963 (n 563) 202, 203; Ambos (n 614) 234.

⁶⁵⁴ *Leipziger Kommentar* (n 517) 1915.

⁶⁵⁵ Roxin in Amelung (n 651) 55.

b. Co-perpetration

Some commentators argue against *Organisationsherrschaft* as a form of indirect perpetration and put forward co-perpetration as a more convincing alternative for the situations it addresses. They suggest that the implementation of the elements of the offence does not have to be limited to the execution stage. All that is required is that these contributions are sufficiently important so that the lack of act immediacy is compensated for by the weight of the contribution and the position of the contributor within the organisation. The direct act execution then appears only as a part of the realised criminal act. Thus, even though the *Hintermann's* contributions in an organisation may be limited to the planning and preparation stage, because of their importance and his position within the apparatus, he can be a co-perpetrator.⁶⁵⁶ The debate between commentators who limit co-perpetration to contributions in the execution stage and those who recognise co-perpetration also in the case of preparatory acts was referred to earlier.⁶⁵⁷ In the context of *Organisationsherrschaft*, it appears more logical to include preparatory acts within the common act execution. The *Hintermann* here clearly does occupy a 'key position' within the course of events as required by Roxin. Moreover, the objection that someone only involved in the preparatory stage has only influence but no control over the criminal result does not apply in *Organisationsherrschaft*. The control of the *Hintermann* arises from his position within the power apparatus and its specific mode of functioning that ensures the implementation of his instructions regardless of the will of the direct actors.

It is also argued that a common act plan or resolution exists in cases of *Organisationsherrschaft*. The common resolution is engendered through a common

⁶⁵⁶ Otto (n 611) 759.

⁶⁵⁷ See text to notes 576 to 583.

consciousness between the instruction givers and the act executors that certain criminal acts are to be committed in accordance with the instructions of the leadership level. Whether the direct executors have any say in this division of labour is quite irrelevant – indeed this negotiation is rare in even normal large scale enterprises. It suffices that the act execution is done in consciousness of this common resolution.⁶⁵⁸ Some commentators go even further and argue that the common knowledge of the criminal acts is tied to the participant's readiness to become a member of the organisation. The act executor, through his organisational affiliation, implies that he wants to execute the illegal instructions. The joint resolution of the executors arises from the identification with the common organisational objective.⁶⁵⁹

This understanding of a common plan however transforms the collective act resolution into mere acquiescence in an already formed plan.⁶⁶⁰ It loses sight of the element of mutuality that is the foundation of a common resolution. It can hardly be argued that the direct executors in the context of mass crimes had any voice, or in most cases even interest, in the formulation of the plan or that they had any power to mould or influence it. One of the main criteria for co-perpetration thus seems missing in *Organisationsherrschaft*.

Finally, a hierarchically structured power apparatus presupposes a vertical structure that is characteristic of indirect perpetration (a top to bottom operational sequence flowing from the instruction giver to the direct executor) rather than the horizontal structure typical of co-perpetration (a mutual co-operation based on

⁶⁵⁸ G. Jakobs, 'Mittelbare Täterschaft der Mitglieder des Nationalen Verteidigungsrats' (1995) *Neue Zeitschrift für Strafrecht* 26, 27.

⁶⁵⁹ Otto (n 611) 758-59.

⁶⁶⁰ *Leipziger Kommentar* (n 517) 1915; Georg Küpper, 'Zur Abgrenzung der Täterschaftsformen' (1998) *Goltdammer's Archiv für Strafrecht* 519, 524.

division of labour).⁶⁶¹ It is contended that since the direct executor is held fully criminally responsible in *Organisationsherrschaft*, legally, the *Hintermann* does not have a superior position in relation to the *Frontmann* – both are liable as perpetrators.⁶⁶² This analysis however ignores the structurally subordinate relationship of the *Frontmann* in the power apparatus – while each executor may refuse to perform his part of the plan, there are always other executors that can replace him (the criterion of fungibility). Hence, the *Frontmann* does not possess the ability to block the implementation of the criminal plan.⁶⁶³ Moreover, the fact that both the *Frontmann* and the *Hintermann* are criminally responsible does not make them equal partners as the basis of their responsibility differs – as noted earlier, the former is responsible for the individual act of unlawfulness whereas the latter is responsible for the organisational unlawfulness.

6 Conclusion

The preceding analysis reveals that Roxin's theory of *Organisationsherrschaft* represents a potential model for a theory of perpetration for international crimes. This is especially true of his criterion of detachedness from the law which captures the social climate in which international crimes take place, while being able to isolate the attribution of responsibility to individuals rather than collectives. It also highlights some of the challenges in adapting the theory in the context of international criminal law, prominent amongst which is the requirement of a tightly organised power apparatus. Now that we have examined some of the promising aspects of English and German criminal law theories of perpetration as concerns their application to

⁶⁶¹ *Leipziger Kommentar* (n 517) 1915; Bloy (n 631) 440; Küpper (n 660) 524.

⁶⁶² Jakobs (n 658) 27; Otto (n 611) 759.

⁶⁶³ *Leipziger Kommentar* (n 517) 1915-1916.

international criminal law, the task of the next section would be to examine the points of commonality between the two and how they can be moulded to address problems peculiar to international crimes. We will also examine whether JCE can have any role to play in this scheme of forms of perpetration.

E. TOWARDS A THEORY OF PERPETRATION FOR INTERNATIONAL CRIMES

1 Analogies and lessons from domestic criminal law and theory

While our analysis of English and German criminal law makes clear that both legal systems have distinct ways of conceptualising perpetration, it also reveals a significant point of commonality: the rules governing allocation of responsibility (with the exception of *Organisationsherrschaft* in German criminal law) presuppose a rather small number of persons as parties to a crime. Further, the standard cases and examples around which these rules are based are not spatially or temporally very dispersed. There is also a marked reluctance to hold that two persons may be simultaneously responsible as perpetrators in different capacities and to different degrees in respect of conduct constituting a crime, in any manner other than joint commission through personal fulfilment of all or some of the elements constituting an offence. These predispositions of domestic criminal law systems that underlie their understanding of principal responsibility are conspicuously challenged in the typical scenario of an international crime such as genocide or a crime against humanity.

At first glance, English criminal law does not appear to offer much scope for an expansive concept of principalship that would encompass the liability of several perpetrators for a collective crime. The basic assumption for perpetrator liability is that the perpetrator directly and immediately fulfils the definitional elements of the

offence⁶⁶⁴ and as outlined in the previous sections, it is not easy to establish this condition for international crimes.⁶⁶⁵ English law also makes it difficult to trace the chain of causation from the immediate physical perpetrator to the mastermind behind the crime such that the latter can be held responsible as a principal despite and in addition to the criminal responsibility of the former.⁶⁶⁶ However, it does recognise exceptions to these fundamental premises in limited circumstances which include situations where the conduct of the physical perpetrator is not wholly free, informed and voluntary.⁶⁶⁷

While the law as such only acknowledges this in the form of the doctrine of innocent agency, literature and recent recommendations by the Law Commission also refer to the concept of a ‘semi-innocent agent’ where the primary party’s actions cannot be considered fully voluntary, but still do not result in complete absolution from criminal responsibility.⁶⁶⁸ In this case, his actions are regarded as having been ‘caused’ by the secondary party since he does not possess complete knowledge with respect to the nature or circumstances of his conduct.⁶⁶⁹ The notion of semi-innocent agency then provides for the possibility of two parties being held liable as principals for the same conduct to different degrees (for example murder and manslaughter) on the basis that the actions of the immediate perpetrator can be said to be ‘caused’ by the secondary party. It however does not address a situation of mass criminality where there may be several thousand or even more immediate perpetrators and tracing liability back to the leader or policy level perpetrator using a simple one to one

⁶⁶⁴ See text to notes 442 to 444.

⁶⁶⁵ See text following note 502 .

⁶⁶⁶ See text to notes 444 to 449.

⁶⁶⁷ See text to notes 450 to 452.

⁶⁶⁸ See text to notes 475 to 485.

⁶⁶⁹ See text to notes 481 to 483.

causation analysis (leader D ‘caused’ the actions of immediate perpetrators A, B, C, D,...) will be very difficult. Moreover, it does not appear to contemplate a situation where this high level perpetrator may not know of the exact identity of his so called ‘agent’ and indeed have no contact with him. Neither does it capture the distinctive aspects of mass criminality: its collective nature and the climate of moral permissiveness that encourages or endorses this conduct. As mentioned earlier, this paucity may very well be explained by the treatment of individual liability for crimes committed as part of a collective under the category of accomplice liability in English law.

German criminal law theory on perpetration on the other hand attempts to accommodate these aspects of international crimes. The emphasis on the concept of ‘control’ rather than causation and the perpetrator as the *Zentralgestalt* based either on his functional control over the act (co-perpetration) or his control over the will of the direct perpetrator (indirect perpetration)⁶⁷⁰ opens up the possibility of holding several people simultaneously responsible as principals. While English law also recognises the concept of joint principals, because of its exacting conditions for causation and the requirement that the perpetrator must personally fulfil at least some part of the *actus reus*,⁶⁷¹ the scope for perpetrator responsibility is much narrower. German law’s differentiation between the principal and the accessory based on the weight and quality of the party’s contribution to the act is also an appealing starting point for the construction of a concept of perpetration for international crimes. If someone is a marginal figure in the occurrence of the criminal act and his contribution to it is secondary in nature such that he would be considered as contributing to the *act of*

⁶⁷⁰ See text to notes 527 to 529.

⁶⁷¹ See text to notes 442 to 444.

another,⁶⁷² he should be classified as an accessory rather than a principal. This is certainly a more accurate characterisation of the role of the immediate physical perpetrator of a murder that is part of a genocidal policy of which he is ignorant.

While a strict adherence to the *Verantwortungsprinzip* in German criminal law would make it difficult to hold the secondary party responsible as a perpetrator unless the primary party is not considered culpable, the law recognises several exceptions to this principle in the case of the ‘perpetrator behind the perpetrator’.⁶⁷³ This is partly due to control, rather than causation, as the fundamental requirement for attribution of criminal responsibility: parties can be simultaneously responsible for ‘control’ over the act on different bases – hegemony over the act, hegemony over the will and functional hegemony. Several applications of the perpetrator behind the perpetrator are found in the law and theory, which could be pertinent for international crimes. For instance, in the Cat King case, the *Hintermann’s* domination over the act was grounded on the intensity of his effect on the *Frontmann* and in his inducement and exploitation of the latter’s mistake of law.⁶⁷⁴ This could *prima facie* apply to the relationship between the high level and immediate physical participants in mass atrocity – the person at the leadership level can be said to have induced and exploited the physical perpetrators’ belief that the crime is necessary and permissible. There is still a missing link here that would need to be supplied which relates to how exactly this influence and effect came about given that, unlike the Cat King scenario, the parties were never in contact.

Related, though heavily disputed, cases of liability as an indirect perpetrator occur when the physical perpetrator is labouring under a mistake as concerns the

⁶⁷² See text to notes 514 to 515.

⁶⁷³ See text to notes 557 to 565.

⁶⁷⁴ MPICC report (n 515) 22.

concrete meaning of his conduct, of which the *Hintermann* is aware and which gives him control over the occurrence. The *Hintermann*'s superior knowledge of the circumstances of the conduct and his manipulation of the immediate perpetrator make him the *Zentralgestalt* in the course of events.⁶⁷⁵ Again, this would be true of the policy level participant in a genocide who masterminds the genocidal scheme and induces or takes advantage of an atmosphere of hatred to persuade ordinary people to commit crimes. The physical perpetrator may often be unaware that his individual act of rape or killing is part of this larger scheme. As in the Cat King case, the factors or position that enable this manipulation and control have to be made more concrete.

Even more significant than these situations however is the category of *Organisationsherrschaft* as a form of indirect perpetration in German criminal law which applies specifically in the case of collective crimes. This concept recognises that persons in leadership positions can be held responsible as perpetrators of crimes on a mass scale that are committed by a very large number of physical perpetrators who they may have never come into contact with and whose exact identity is irrelevant.⁶⁷⁶ Roxin's criterion of detachedness from the law is also sensitive to the perversion of norms which makes these crimes possible.⁶⁷⁷ Where the theory fails is in its recognition of the third distinctive feature of international crimes, that is, in its treatment of the character of the physical perpetrator as an automaton and his motivations as banal. It also oversimplifies to the point of caricature, the conditions under which mass atrocity occurs. A vertical tautly structured hierarchical organisation that gives rise to an automatic implementation of commands is simply non-existent in most cases of international crimes. Further, as we discussed in Part D,

⁶⁷⁵ See text to notes 559 to 561.

⁶⁷⁶ See text to notes 601 to 602.

⁶⁷⁷ See text to notes 643 to 645.

the criterion of control over the act which Roxin considers vital for domination is only plausible if one accepts that the meaning of this control in collective crimes is quite different from that in usual cases of indirect perpetration. Instead of the direct concrete act committed by the *Frontmann*, the *Hintermann* can only have control over the entire sequence of events (the widespread commission of individual acts of killings and torture) leading to the fulfilment of the result of the elements of the offence (the collective component of the international crime).⁶⁷⁸

Despite these reservations, *Organisationsherrschaft* in its different variants provides a promising template around which one can construct a theory of perpetration for international crimes. It addresses several of our intuitions about mass atrocity, which can be modified and developed into a coherent account of principalship. This is for instance true of Schroeder's observation that the *Hintermann* should be liable as a perpetrator because he deliberately inflames the dormant passions of the intermediary so as to use him as a tool to achieve the criminal result he desires.⁶⁷⁹ This is certainly one part of the reality of how high level perpetrators can harness ordinary people to physically commit the crimes which they have planned and set in motion. The same emphasis on the carefully planned actions of the *Hintermann* which enable him to manipulate circumstances such that he can ensure the fulfilment of the elements of the offence he intends is apparent in the BGH's version of *Organisationsherrschaft*. The *Hintermann's* liability hinges on his conscious creation and utilisation of the basic framework conditions of an organisational structure that result in the realisation of an offence.⁶⁸⁰ In both cases, the focus is, as Roxin states (though not quite for the same argument), on the *Hintermann's* ability to unleash destruction on a scale that simply

⁶⁷⁸ See text to notes 636 to 637 and text following note 637.

⁶⁷⁹ See text to notes 606 to 608.

⁶⁸⁰ See text to notes 615, and 619 to 620.

cannot be equated with an ordinary instigator.⁶⁸¹ Though the language of the law can scarcely accommodate an element as vague as ‘destructive potential’ in its lexicon, it is an important insight to be borne in mind while constructing our theory of perpetration.

The other important contribution of *Organisationsherrschaft* to a theory of attribution of criminal responsibility lies in its differentiation of individual unlawfulness and collective unlawfulness. *Organisationsherrschaft* provides a foundation for a claim that principles of criminal responsibility and attribution may differ for cases of individual and collective criminality.⁶⁸² The *Hintermann*’s criminal responsibility in the latter case is derived from organisational (collective) unlawfulness rather than the act of any single individual perpetrator.⁶⁸³ This obviates the problem of having to trace the chain of causation from each physical perpetrator’s individual act of murder or rape to the overall genocidal enterprise in which the *Hintermann* occupies a leadership position. It also circumvents the contradiction in holding the *Hintermann* liable despite a criminally responsible intermediary. It offers the closest analogue in domestic criminal law theories on perpetration to the uniquely collective dimension of the elements of an international crime.

As we noted earlier in Part I, the ICC has already attempted to combine *Organisationsherrschaft* with the concept of co-perpetration for attributing responsibility to high and mid level perpetrators. It would be useful to consider whether some promising aspects of *Organisationsherrschaft* can indeed be taken together with certain aspects of co-perpetration in German criminal law in developing a doctrine of perpetration for situations of mass atrocity. This would be especially

⁶⁸¹ Roxin, in Amelung (n 625) 55, 56.

⁶⁸² See text to notes 629 to 631.

⁶⁸³ See text to notes 629 to 631.

pertinent in situations where the high level perpetrators act as part of a tacit agreement to carry out criminal policy objectives, but have distinct chains of command operating under them. Mutual attribution of the crimes of the immediate perpetrators could then only be based on division of labour and functional domination by each of the high level perpetrators over the act such that the act is possible only with the co-operation of each co-perpetrator.

2 A Theory of Perpetration for International Crimes

a. Distinguishing between levels of perpetrators

In order to be faithful to the nature and structure of mass criminality, attribution of criminal responsibility must distinguish between roughly three broad categories of participants – (i) immediate participants, who directly perpetrate the conduct constituting the crime in question. These would include ordinary people acting with different motives ranging from the banal to zealous; (ii) mid level participants who are rarely and only remotely involved in the policy making or planning level but are aware of the policy objectives and operationalise them through the immediate perpetrators. This would for instance apply to commanders of a military unit; (iii) high level participants who mastermind the criminal plan and are at the highest level of policy and decision making but do not personally involve themselves with the details of its implementation or physically perpetrate any of the offences constituting the macro crime. Hitler, Pol Pot and Milosevic, to name a few individuals, would fall within this class of participants.

Similar to German criminal law, where different conceptions of ‘control’ are employed to hold individuals criminally responsible, the attribution of criminal liability to these classes of participants can, and indeed must of necessity, rest on different bases. This is because the responsibility of high level participants must flow

from the collective aspect of the acts perpetrated and their unlawfulness. The actus reus element of this collective aspect is supplied by an aggregation of each individual micro-crime committed by the immediate physical perpetrators. On the other hand, the responsibility of the direct and immediate participant is tied to the individual micro crime that forms part of the war crime or crime against humanity. This low level participant himself may or may not ultimately be held responsible in each case (the ICC for instance provides for a defence on grounds of duress.⁶⁸⁴ This is however available in very limited cases and is not the position in other international criminal tribunals). This would depend to a great degree on the circumstances of his conduct and his reasons for action. However, his responsibility cannot be said to relate to the macro aspect of the international crime because he will almost in all cases lack the necessary *mens rea*. I will not pursue the issue of the criminal responsibility of this class of participants any further here, since it is not the focus of my thesis. Prosecutions in international criminal courts do not seek to target this level of offenders; sometimes they are even prohibited by their jurisdictional requirements from doing so. I will instead focus on the leadership level and the second category of mid level perpetrators. The criminal responsibility of the mid level perpetrator may be likened to either the first or the third category depending on his exact role and contribution to the offence and his mental state. We will discuss this in the next Section.

b. Responsibility based on the concept of control

i. Rationale and framework

Roxin's statement of the perpetrator of a crime as the *Zentralgestalt* in the course of events constituting the offence is a powerful starting point for a theory of perpetrator

⁶⁸⁴ Article 31, Rome Statute.

responsibility in international criminal law. It accords with our moral intuitions to assign perpetrator responsibility in the commission of an offence to a person whose contribution to its occurrence is of the weight and quality that pushes him in the very centre of the offence. Similar to Roxin's doctrinal analysis however, we must then go on to fill this concept of the *Zentralgestalt* with content to discover what conditions would qualify for holding someone responsible as a perpetrator.

In order to ascertain these conditions, one must look at the roles played by the participants in an international crime, which of these are most important, and the reasons for their significance. International crimes are necessarily the product of a collective endeavour and the categories of participants we mentioned earlier play different roles in bringing them about. The immediate physical participant plays a significant role in the commission of the individual crime which constitutes an essential part of the collective offence. Indeed, it is difficult to imagine a person more in the centre of an act than someone who physically commits it.⁶⁸⁵ However, this only applies to the individual offence such as torture or killing, which may by itself form a miniscule portion of the widespread and systematic planned attacks that characterise international crimes. It is the person who occupies the central position in this collective part of the offence who is most of interest to us, rather than the one who controls the individual micro offence.

Mass atrocity however, as we noted, cannot strictly speaking be 'controlled' by any one individual in Roxin's sense where one person has the last and final decision over whether the offence will occur. The spontaneity, initiative and arbitrariness displayed by mid and low level participants, some of which is deliberately harnessed by the

⁶⁸⁵ Roxin, TT (n 536) 127.

policy level participant, is characteristic of mass atrocity⁶⁸⁶ and precludes a scenario where any one individual or even set of individuals has the last and final say on whether the international crime will occur. Instead, we must shift the focus to control over what is truly dangerous and central to the occurrence of international crimes – control over the unleashing of a destructive potential that can lead to the commission of mass atrocity and is intended or foreseen to do so. Osiel’s metaphor of the culpable village watchmaker who constructs a clock, attaches a bomb to it, and then walks away so that detonation occurs much later,⁶⁸⁷ is over simplified, but nonetheless instructive here in identifying some important features of where the crux of the action lies in mass atrocity. As Osiel notes, in this situation, assuming the non-intervention of a third party, by assembling and winding up the clock, the watchmaker sets into motion a process which results in the explosion and the harm arising from it. He will thus be responsible for it, even if he does not know the exact identity of the potential victims or the manner in which they would be harmed.⁶⁸⁸ This approach transfers the temporal focus from the scene of the crime to the place and time of the construction and winding up of the clock. He likens this to the Argentinean courts’ account of the military juntas where the juntas established an elaborate administrative system to carry out political repression at the very beginning of the military rule. After that, individual members of the juntas did not need to directly intervene in the functioning of this system to achieve the crimes they intended.⁶⁸⁹

For cases of mass atrocity, Osiel’s metaphor helps us look for the central figure in their occurrence away from the time and place of the concrete crime, and to the scene

⁶⁸⁶ Osiel, *Mass Atrocity* (n 397) 98-104.

⁶⁸⁷ Osiel, *Mass Atrocity* (n 397) 104.

⁶⁸⁸ Osiel, *Mass Atrocity* (n 397) 104.

⁶⁸⁹ Osiel, *Mass Atrocity* (n 397) 104.

where they were orchestrated and the machinery for their operationalisation was set up. The *Zentralgestalt* in an international crime is the person who sets this entire machinery in motion and utilises it in order to achieve the criminal results he intends, or knows will occur, or at least foresees as a probable consequence of his actions and accepts it. The significance of this position has been acknowledged, albeit in a different context, by most analysts of genocide and ethnic cleansing⁶⁹⁰ and lies at the heart of what commentators such as Schroeder and Roxin are concerned about: the potential for destruction possessed by the *Hintermann*.⁶⁹¹ This potential can exist by virtue of his leadership position, charisma, or de facto authority over a large number of biddable individuals, and his conscious creation and manipulation of a situation⁶⁹² that results in tremendous harm. It also echoes the BHG's recognition of the rationale behind the responsibility of the 'perpetrator behind the perpetrator': the *Hintermann's* superior knowledge of the circumstances of the conduct as compared to the *Frontmann* and his deliberate inducement or exploitation of this fact to manipulate the latter.⁶⁹³ This position also provides a rational basis for Iago's greater liability as compared to Othello, a scenario which is frequently mentioned by common law commentators struggling to assign greater responsibility to the 'secondary party'. Iago's central position in the killing of Desdemona lies in his control by virtue of his having engineered the killing through his exploitation of Othello's jealousy and his manipulation of all the other characters in the play into adhering to his plan.⁶⁹⁴

⁶⁹⁰ See eg Osiel (n 397) 104.

⁶⁹¹ See eg Mark A Drumbl, *Atrocity, Punishment, and International Law* (CUP 2007) 25-26 and references therein.

⁶⁹² See text to notes 608 and 619.

⁶⁹³ See text to notes 557 to 558.

⁶⁹⁴ See the discussion on Iago by Kadish (n 449) 385-88.

ii. Objective/actus reus elements

Article 25(3)(a) of the Rome Statute of the ICC contains an apt definition of perpetrator responsibility for an international crime: it is the person who “commits such a crime, whether as an individual, jointly with another or through another person, regardless of whether that other person is criminally responsible”.

The objective elements for perpetration responsibility under this formulation which I outline here can be readily accommodated within this definition. They borrow heavily from the concept of *Organisationsherrschaft* but with substantial modifications to suit the specific circumstances of mass atrocity. As we discussed above, the *Zentralgestalt* in an international crime is the person who creates and sets into motion or utilises the process which results in the commission of mass atrocity. Following this rationale, I identify the first objective element as the perpetrator’s ‘control over the act’ by virtue of his conscious creation, operationalisation or utilisation of the framework conditions of the process that results in the realisation of the international crime.⁶⁹⁵ Thus, the *actus reus* consists of the accused’s creation or manipulation of the apparatus that results in the realisation of the elements of a crime within the jurisdiction of the court. This may encompass a series of activities ranging from formulating a plan, deciding on the mode of its execution, setting up a framework to achieve the intended outcome, and ordering subordinates to ensure its implementation.

Several clarifications are in order here. First, instead of the direct individual criminal act committed by the physical perpetrator, hegemony over the ‘act’ here must be taken to mean control over the sequence of events leading to the result of the elements of the offence. The perpetrator would thus have the central position if he controls the

⁶⁹⁵ This is a modified version of the BGH’s definition of the elements of *Organisationsherrschaft*. See text to notes 615 to 620.

sequence of events till the implementation of the international crime.⁶⁹⁶ Second, this ‘control’ of the perpetrator is not based on the law’s absolution of the physical perpetrator from criminal liability. Neither does it reflect that he has the ‘last and final say’ over whether the crime will occur. Instead, we must shift the focus of the control from the moment immediately before the conduct constituting the crime is committed to the time where the conduct which results in the events leading to the mass crime is committed.

The ‘control’ is based on the perpetrator’s creation or manipulation of the apparatus that results in mass atrocity. This does not imply that the apparatus he sets up or exploits must and can only result in the commission of an international crime. Rather, there must be a high degree of certainty, greater than that present in ordinary cases of instigation, that the crime intended will occur.⁶⁹⁷ The perpetrator may not be in a position to have the decisive voice over whether the offence will occur – indeed it would be absurd to suggest that individuals such as Osama bin Laden for instance can now prevent all cases of fundamentalist terrorism simply by asking individual Al – Qaida members to desist from their criminal activities. His control instead stems from the intensity of the effect of his conduct⁶⁹⁸ over the destructive machinery of violence. Quite often, this will be based on his occupying a position of some authority within the apparatus that initiates or fuels mass atrocity which enables him to order his subordinates to commit the crimes he intends and supply them with the resources to do so.⁶⁹⁹

⁶⁹⁶ See text to notes 636 to 637 and text following note 637.

⁶⁹⁷ See text to notes 647 to 648 and text following note 648.

⁶⁹⁸ See text to notes 603 to 604.

⁶⁹⁹ This is similar to the criterion used in by the ICC Pre-Trial Chamber in *Katanga and Chui* (n 18) paras 511-514.

Second, there must exist an operational framework or apparatus which the perpetrator either establishes or uses, through which the perpetrator can set in motion the chain of events that results in the commission of the crime. The perpetrator must occupy a position within or in relation to this apparatus which enables him to harness its potential to achieve the criminal result. This apparatus need not however be vertically structured or rigidly hierarchical. Informal networks of power with weak links may sometimes be more useful for the commission of international crimes than tautly structured apparatuses.⁷⁰⁰ Neither is it necessary that each individual physical perpetrator is part of the apparatus. The individual micro crimes committed by the direct perpetrators which comprise the international crime however must be related, in more than a *de minimis* way, to the activities of this operational framework. For instance consider a situation where X belonging to ethnic group A kills his neighbour Y who is a member of ethnic group B because he covets his property. This crime is however committed within a context where the public radio owned by the government comprised of members of A exhorts all members of A to eliminate all members of B. Militia members supported by the government distribute weapons in X's village, print pamphlets with incendiary messages targeting group B and make public lists of all the residents of the village belonging to B. X is also conscious that members of B are being routinely killed with the approval of or at least without fear of sanction by the government. In this situation, the operational framework or apparatus will consist of the network of militia, media, and governmental entities that members of A utilise to encourage and perpetrate violence against members of B. The killing of Y will be related in more than a *de minimis* sense to the network of militia and state policy that sanctions the elimination of group Y.

⁷⁰⁰ Osiel, *Mass Atrocity* (n 397) 115.

The third objective element is the existence of circumstances such that the individual crime conforms to the prevailing social norm. This element admittedly goes beyond a simple assessment of the responsibility of the individual defendant before the court and involves the court in ascertaining the veracity of complicated historical, social and political facts. However, it is this element that makes international crimes distinct from their domestic counterpart. Moreover, it is this perversion of norms that lends the high level perpetrator his destructive potential. It makes the commission of the individual crimes by ordinary people far more likely than in a situation where these acts are condemned by the moral and social climate and the individual must overcome his scruples in acting against them. This does not mean that the positive legal order in the state where these crimes are committed must endorse them. There can be a formal commitment to fighting crime in a state despite the crimes being encouraged, ordered, or tolerated by the government in practice. Neither does it imply that the sanction for the crimes must come only from the government or the state. There can be a 'para-state' or a state within a state that is based on achieving these criminal aims. This could even be constituted by rebel groups that enjoy a great deal of authority or power over significant portions of the population in the state where these crimes are committed. In this situation, even though there may be the possibility of individuals who engage in these crimes being punished by the government, the probability of this is remote either because the government is in a state of collapse or because the rebel group enjoys sufficient popular support to put it outside the bounds of the government's ability to sanction individuals.

iii. Subjective/mens rea elements

The subjective elements for perpetrator liability are quite close to those required for indirect perpetration in German criminal law and elaborated by the ICC in its

adoption of *Organisationsherrschaft*.⁷⁰¹ The perpetrator must have a ‘double intent’ – that is, he must have intent with respect to the elements of the offence in question as well as in relation to the elements that enable him to establish his control over the ‘act’. Thus, he must fulfil the *mens rea* elements for each individual crime with which he is charged. This includes the specific intent required for the crime of genocide. This part of the mental element could be included within the definition of the crime (as is the case with the definition of genocide in all international instruments) or it may be included within a separate provision that applies to all the crimes which fall within the jurisdiction of the international tribunal in question (as in Article 30 of the Rome Statute of the ICC). In addition, he must be aware of the circumstances that enable him to create and utilise the framework conditions within an organisational apparatus which result in the commission of the crimes with which he is charged. For instance, he must have knowledge of his position or authority that allows him to harness this apparatus for the ends he desires, and the atmosphere of moral permissibility for the crimes he wants. Here, intent to the degree of *dolus eventualis* would be sufficient – he must be aware of the possibility of the result of the act and accept it.⁷⁰²

c. Organisationsherrschaft distinguished from instigation responsibility

Unlike the model of the perpetrator of an international crime outlined above, the instigator is not the *Zentralgestalt* in the course of events constituting the crime. The quality and weight of his contribution to this sequence of events is sufficient only to make him a marginal figure in its occurrence, and his conduct is in the form of a contribution to the act of another, rather than his own act.

⁷⁰¹ See text to notes to 356 to 358 and 376.

⁷⁰² See text to note 543.

In terms of the objective and subjective elements for responsibility, the instigator lacks 'control' over the apparatus - he does not possess the authority or capacity to create and manipulate its operational framework to achieve the criminal result he desires. To illustrate with an example, A is one of the leaders of a militia aimed at cleansing a region of all members of ethnic group X. Together with the other leaders, he devises an elaborate plan to achieve this purpose. Under this plan, the militia is organised into smaller units which patrol the region holding rallies inciting hatred against X, threatening members of X, and distributing weapons amongst the local population in order to attack them. On a day set by the leaders of the militia, members of the units start directly attacking members of X. In the ensuing violence, ordinary people not belonging to X are caught up in the climate of atrocity and also commit killings, acts of torture and rape against members of X. A month later, almost all members of X have either been killed, grievously injured, or fled to neighbouring parts. A has not directly committed any of these acts. Nor has he involved himself with the operation of ethnic cleansing after the elaboration of the scheme and the setting up of the machinery to achieve this. Nonetheless, he will be responsible as a perpetrator under our theory of control provided he acts – that is, he devises the plan and organises the militia in which he holds a leadership position in order to accomplish the aims of the plan - with the requisite *mens rea*. In the same fact scenario, imagine B, a journalist who whole heartedly supports the plan laid out by A and his cohorts and writes incendiary articles in newspapers and pens down fiery speeches echoing the leadership policy of ethnic cleansing that are used by the militia to exhort people to violence. B will certainly qualify as an instigator if he acts with the *mens rea* for the crime of ethnic cleansing. However, his liability cannot be extended to perpetration if he does not possess any authority over the administrative

and military framework such that he can use it to achieve the goal of ethnic cleansing. While B may have influence over the course of events, this cannot be equated with the control exercised by A.

The second major difference lies in the subjective element for liability. In contrast with the perpetrator, the instigator does not need to fulfil the *mens rea* required for each individual crime, especially the special intent for the crime of genocide. We will discuss this difference in *mens rea* in greater detail in Part III of the thesis dealing with accessorial responsibility in international criminal law.

d. Organisationsherrschaft combined with co-perpetration

As the example above illustrates, A may act with several other people in order to achieve the criminal results he desires. This will in fact be the more usual case in the orchestration of international crimes which often require extensive planning and preparation. There could be several ways in which A is related to the other participants at the leadership/policy level. They could all be part of a centralised committee which decides collectively on each aspect of the policy and its mode of implementation (for instance, the Khmer Rouge party leadership in Cambodia was organised along these lines),⁷⁰³ or there could be distinct areas of policy and operational control at the leadership level (the Argentinian juntas are a good example of this).⁷⁰⁴ In both cases however, the issue of whether the conduct of A and the other high level perpetrators can be mutually attributed in a manner so that they are all equally and jointly responsible for all the crimes committed by each one of them becomes relevant. The ICC recognises this possibility by combining the doctrine of

⁷⁰³ Kaing Guek Eav *alias* Duch, Judgement, Case File No. 001/18-07-2007-ECCC/TC, Trial Chamber (26 July 2010) paras 84-91.

⁷⁰⁴ On the general structure and functioning of the juntas, see Osiel (n 645).

co-perpetration with the doctrine of *Organisationsherrschaft* in order to achieve this mutual attribution.⁷⁰⁵ Our version of *Organisationsherrschaft* can also be employed alongside the doctrine of co-perpetration to come to the same result. The elements of this co-perpetration must be however spelt out in greater detail than the ICC was prepared to divulge in the *Lubanga* decision.⁷⁰⁶

As we discussed, co-perpetration liability is based on functional domination of each co-perpetrator over the act based on role allocation and a division of labour which ensures that the act can be realised only through the co-operation and willing working together of all co-perpetrators. The ICC outlined the objective and subjective elements for co-perpetration liability as follows:

The objective elements consist of (i) a common plan between two or more persons. This plan can be implicit and should include an element of criminality, even though it need not be directed specifically at the commission of a crime.⁷⁰⁷ (ii) co-ordinated essential contribution by each perpetrator resulting in the realisation of the objective elements of the crime. This contribution may be at any stage of the crime.⁷⁰⁸ We can flesh some aspects of these elements out in greater detail by relying on the analysis of German criminal law theory.

The element of a common plan requires mutual consent over the joint realisation of the act, including acceptance or approval of an already formed plan. The co-perpetrators must work together jointly based on a division of labour towards the realisation of the elements of the offence. It is not necessary that the individual

⁷⁰⁵ *Katanga and Chui* (n 18) paras 519-520.

⁷⁰⁶ See text to notes 354 to 358.

⁷⁰⁷ *Lubanga* (n 18) paras 343-345; *Katanga and Chui* (n 18) paras 522-523.

⁷⁰⁸ *Lubanga* (n 18) paras 346-348; *Katanga and Chui* (n 18) paras 524-526 which cited examples of essential contribution as activating mechanisms by leaders which lead to automatic compliance with their orders, designing an attack, supplying ammunition and co-ordinating the activities of troops.

participants know each other, as long they are aware that there are other participants who are likewise working towards a common goal, and these other participants have the same knowledge.⁷⁰⁹

The act contribution of each co-perpetrator must be of sufficient weight and importance such that it grounds the necessary co-domination over the act. This essential contribution must then exist for each individual international crime with which the accused is charged (the crime of recruitment of child soldiers in the *Lubanga* decision) rather than simply to the common plan (broadening the base of the army). The only exception would be where the common plan itself gives each perpetrator discretion to act as the situation requires as long as this helps accomplish the common goal. If the deviation from the plan then falls within what is foreseeable and with which one must normally reckon, it can still be mutually attributed to each co-perpetrator. Thus, if Lubanga's contribution was essential to the plan of broadening of the army (including through the commission of crimes), and it was foreseeable that this would involve the recruitment of child soldiers, he can still be held responsible for the crime. Similar to the ICC's position, this contribution can even be at the preparation stage. What is essential is that it is of sufficient importance so that the lack of act immediacy is compensated for by the weight of the contribution and the importance of the position of the co-perpetrator within the criminal plan such that he can ensure its success or failure. Further, as affirmed in German jurisprudence,⁷¹⁰ it is not necessary that the accused had been part of the criminal plan from its very inception. Even if he participates in the execution of the plan after it has already begun based on a mutual understanding and with the necessary act domination through his essential functional contribution, he will be responsible as a co-

⁷⁰⁹ MPICC report (n 515) 31; *Leipziger Kommentar* (n 517) 1939.

⁷¹⁰ See text to note 584.

perpetrator. This is particularly relevant in the context of international crimes which may be spread over several years and involve several changes in personnel, including at the very top levels of policy making and co-ordination.

The subjective elements for co-perpetration liability outlined in *Lubanga* are sufficiently clear and need no modification. To reiterate: (i) the accused must fulfil all subjective elements of the crime with which he is charged⁷¹¹ (ii) all co-perpetrators must be mutually aware of and accept that the execution of the common plan may result in the realisation of the objective elements of the crime.⁷¹² (iii) the accused must be aware of the factual circumstances enabling him to jointly control the crime, i.e., that his role is essential in the implementation of the common plan and that he can frustrate its realisation by failing to perform his function.⁷¹³

3 Application of the theory to *Katanga and Chui*

We are now in a position to consider whether the highly modified version of *Organisationsherrschaft* presented above is capable of being applied to assess the liability of individuals in the kinds of cases that come before the ICC and other international tribunals. The obvious case for this analysis is the ICC's decision in *Katanga*, since it is the only decision by an international criminal tribunal to have outlined in detail the conditions for *Organisationsherrschaft* and to have applied them to the concrete facts of the case. Since the case however only related to the confirmation of charges against the accused, the facts are not described in great detail and one can only rely on the rather terse connections between the statements of law

⁷¹¹ *Lubanga* (n 18) paras 349-360; *Katanga and Chui* (n 18) paras 527-532.

⁷¹² *Lubanga* (n 18) paras 361-365; *Katanga and Chui* (n 18) paras 533-537.

⁷¹³ *Lubanga* (n 18) paras 366-367; *Katanga and Chui* (n 18) paras 538-539.

made by the Pre-Trial Chamber and their application to the facts to see whether they can also support our version of *Organisationsherrschaft*.

Briefly, the two accused, Germain Katanga and Matthieu Ngudjolo Chui have been charged with war crimes and crimes against humanity committed in the village of Bogoro in the Ituri district of the eastern part of the Democratic Republic of Congo (DRC) from January to March 2003. The specific charges relate to murder or wilful killing, inhumane acts, sexual slavery, rape, cruel or inhuman treatment, using children to participate actively in hostilities, outrages upon personal dignity, intentional attack against the civilian population, pillage and destruction of property.⁷¹⁴ Katanga was a military leader of an ethnic (predominantly Nigati) combatant group called the *Force de Résistance Patriotique en Ituri* (FRPI).⁷¹⁵ Chui was a military leader of another ethnic (the Lendu) combatant group known as the *Front des Nationalistes et Intégrationnistes* (FNI).⁷¹⁶ Members of both groups were allegedly responsible for the crimes committed in Bogoro during the relevant period.⁷¹⁷ The Pre-Trial Chamber held both Katanga and Chui responsible under various counts of war crimes and crimes against humanity on the basis of *Organisationsherrschaft* and co-perpetration. For responsibility under *Organisationsherrschaft*, the Chamber considered the following conditions:

1. Katanga and Chui had control over the organisation. Katanga was the de jure commander of the FRPI and had de facto control over the commanders of the FRPI who sought his orders for the procurement and distribution of weapons and reported to him. Chui was the de jure commander of the FNI and had de facto control over FNI

⁷¹⁴ *Katanga and Chui* (n 18) paras 12-32.

⁷¹⁵ *Katanga and Chui* (n 18) para 6.

⁷¹⁶ *Katanga and Chui* (n 18) para 9.

⁷¹⁷ *Katanga and Chui* (n 18) paras 13-14.

commanders on the same basis as Katanga. Both commanders signed official documents including peace treaties and amnesties on behalf of their fighters.⁷¹⁸

2. Both the organisations – the FRPI and the FNI - were hierarchically organised. The FRPI was organised into camps each of which had a commander. Katanga was the commander of the Aveba camp which served as the FRPI headquarters. The FRPI had a military structure of sectors, battalion and companies. Katanga gave his instructions and his commanders communicated through radios. Katanga had the authority to punish his subordinates. The FNI had a similar military organised structure and Chui was the commander of one of its central camps.⁷¹⁹

3. Compliance with Katanga and Chui's orders was ensured. Both the FRPI and FNI were large organisations with an extensive supply of interchangeable low level soldiers. Further, the soldiers were young, subjected to brutal military training and owed allegiance to the military leaders of their ethnic groups, hence ensuring almost automatic compliance with orders.⁷²⁰

If the conception of *Organisationsherrschaft* developed in this Section is used, Katanga and Chui could still be held responsible as indirect perpetrators of the war crimes and crimes against humanity committed by the FRPI and FNI troops. The focus of the analysis would however change. It would be based on:

1. Katanga and Chui's 'control' over the crimes by virtue of their conscious creation and/manipulation of the basic framework conditions of the FRPI and FNI respectively in order to achieve the criminal results they desire. The Trial Chamber's preliminary analysis of the facts suggests there is sufficient evidence for this claim. Katanga and

⁷¹⁸ *Katanga and Chui* (n 18) paras 540-542.

⁷¹⁹ *Katanga and Chui* (n 18) paras 543-544.

⁷²⁰ *Katanga and Chui* (n 18) paras 545- 547.

Chui occupied leadership positions in the FRPI and the FNI. They met in early 2003 and planned the attack against Bogoro and distributed this plan to the commanders of the two organisations.⁷²¹ They also had direct responsibility for its implementation through the giving of instructions and distribution of weapons.⁷²² They both played an overall co-ordinating role in the plan's implementation through their continuous contacts with the other participants in the plan and their encouragement of the soldiers in carrying them out.⁷²³

2. The existence of an operational framework through the organisation of the FRPI and the FNI by which Katanga and Chui could set in motion the chain of events leading to the crimes committed during the attack on Bogoro. Katanga and Chui occupied leadership positions within this framework which they could harness to achieve their criminal plan. The details of this organisational structure have already been mentioned above.

3. The conformity of the individual crimes of rape, murder, torture and pillage to the prevailing social norm. There existed a protracted armed conflict in Ituri involving several armed groups. Combatants had organised themselves into ethnic groups called the FRPI and FNI to fight against the Hema ethnic groups which was organised into the UPC and the FPLC.⁷²⁴ The FRPI and the FNI were encouraged and instigated to commit crimes against the Hema, including through the recruitment of child soldiers who were conditioned into committing atrocities,⁷²⁵ the procurement and distribution

⁷²¹ *Katanga and Chui* (n 18) para 548.

⁷²² *Katanga and Chui* (n 18) para 555.

⁷²³ *Katanga and Chui* (n 18) paras 555.

⁷²⁴ *Katanga and Chui* (n 18) paras 13-14.

⁷²⁵ *Katanga and Chui* (n 18) para 547.

of weapons⁷²⁶ and military parades during which songs with hate filled lyrics were sung.⁷²⁷

The analysis of the subjective elements would remain the same as undertaken by the Trial Chamber. The main shift in analysis would involve the lack of any necessity to prove that the FRPI and FNI were rigidly organised with fungible soldiers who automatically complied with the orders given by Katanga and Chui. It would also require a more detailed account of the role of the two accused in the planning and bringing about of the crimes, rather than simply concentrating on their position as leaders of their respective organisations. The third element would highlight the context in which the crimes took place and correctly situate the position of Katanga and Chui as well as the masses of unnamed low level perpetrators within the historical and social reality of mass atrocity.

4 Scope for the application of JCE

At first glance, there seems to be little in common between JCE and the conception of *Organisationsherrschaft* outlined above for the attribution of responsibility to high and mid level parties to an international crime. In the Section on German criminal law discussing the viability of co-perpetration as an alternative to *Organisationsherrschaft*, we addressed how co-perpetration presupposes a horizontal structure with mutual co-operation between equal participants based on the division of labour. This is very different from the structural subordination of the *Frontmann* in *Organisationsherrschaft* which relies on a top to bottom operational sequence flowing from the authority figure to the immediate perpetrator of the offence.⁷²⁸

⁷²⁶ *Katanga and Chui* (n 18) para 555.

⁷²⁷ *Katanga and Chui* (n 18) para 555.

⁷²⁸ See text to notes 601 to 602.

A structural difference also characterizes the relationship between JCE and the modified version of *Organisationsherrschaft*. While strictly speaking, JCE does not presume any particular structural framework in its application- its adaptability to the particular circumstances of the case is indeed counted as one of its strengths – the requirement of a common plan or agreement lies at the very heart the doctrine. This implies at least a minimum degree of mutual understanding and acting in concert with common objectives. On the other hand, the modified account of *Organisationsherrshcaft* requires no such mutual understanding or agreement between all the participants in the international crime. The operational framework created and utilized by the perpetrator in order to achieve his criminal ends may be rigid or flexible, horizontal or vertical, tightly organized or loosely structured. The physical perpetrator may be conscious of the macro crime to which he is contributing or simply settling private grudges cloaked by an atmosphere of permissiveness towards the commission of grave harms. This captures, far better than JCE, the relationship between the contributors to mass atrocity, their different motivations and the operational framework which makes crime on such an endemic scale possible. Since the focus is on the person who is the *Zentralgestalt* in the course of events leading up to the crimes and his liability is derived from his use of the framework conditions of an organizational structure, it becomes unnecessary to ascertain the exact identity of all the participants, including the immediate perpetrators of the crime. Instead, it is far more important to correctly understand and articulate the operational framework.

The second major difference lies in the extent of contribution required by the accused. JCE only requires the accused to have performed some act that is *in some*

way directed to the furtherance of the common plan or purpose,⁷²⁹ a standard that is lower than that required for accessorial liability for international crimes. A ‘substantial’ contribution is required only of opportunistic visitors who are not members of the system of ill-treatment in the case of JCE II.⁷³⁰ Even if the requirement of a substantial or significant contribution is extended to all categories of JCE, this would imply that the only distinction between an aider/abettor (whose contribution must also have a significant impact on the common criminal plan) and a perpetrator lies in their mental state. Unlike the accessory, the perpetrator must intend to commit the crime or at least to further the common design and foresee that crimes beyond this design are likely to be committed.⁷³¹ In contrast, the modified account of *Organisationsherrschaft* based on the criterion of control uses both objective and subjective criteria to distinguish between parties to a crime. Using these criteria, an accused who does not occupy the central position in the course of events (and thus has a major impact on its final occurrence) will not qualify as a perpetrator, irrespective of his mental state. The attribution of perpetrator responsibility results from his setting into motion the chain of events that leads to the commission of the international crime and the intensity of his effect on this sequence (combined with his having the requisite mental state). This is a far more convincing basis for holding him liable as a perpetrator than simply his intention or foreseeability with respect to the offence.

Finally, the mental element for liability under *Organisationsherrschaft* is different from the *mens rea* required for responsibility under the various categories of JCE. For *Organisationsherrschaft*, the perpetrator must fulfil the *mens rea* requirements for each individual offence with which he is charged, including the specific intent for the

⁷²⁹ *Tadić Appeals Judgement* (n 4) para 229; *Vasiljević Appeals Judgement* (n 197) para 102.

⁷³⁰ *Kvočka Appeals Judgement* (n 201) para 599.

⁷³¹ *Tadić Appeals judgement* (n 4) para 229.

crime of genocide. In addition he must have intent to the extent of *dolus eventualis* (he must foresee the result of the act and accept it) with respect to the elements that constitute the act of *Organisationsherrschaft*, that is the circumstances that enable him to create and utilise the framework conditions within an organisational apparatus which result in the commission of the crimes with which he is charged. JCE also requires the perpetrator to possess the intent to commit the crime. He must however 'share' this intent with other JCE participants. As we discussed earlier, it is unclear in what sense this intent can be shared over a large number of spatially and temporally dispersed persons who are deemed part of the common plan. For *Organisationsherrschaft* liability, the focus is on the mental state of the accused himself rather than whether he shares this mental state with other people. The *mens rea* required for JCE II and JCE III liability is even lower. As noted, for JCE II, the accused does not need to possess the intent to commit the specific crime with which he is charged (except for crimes that require special intent), but only the intent to further the system of ill-treatment.⁷³² We have already discussed how this would elide the distinction between liability for aiding/abetting and liability for commission of an offence.⁷³³ The *mens rea* for JCE III lowers this standard even further by holding a JCE member responsible for the crimes of other participants that were not agreed upon, but simply foreseeable, which makes perpetration responsibility possible by mere membership in the group pursuing the JCE.⁷³⁴ This is not possible under our account of *Organisationsherrschaft* which demands that the accused fulfill the mental elements for the specific crime with which he is charged in each case.

⁷³² Boas (n 1) 59-63 citing and interpreting *Tadic Appeals Judgement* (n 4) para 228; *Krnjelac Appeals Judgement* (n 182) paras 89, 94, 96. *Contra Brdanin and Talic* (n 269) para 27; *Krnjelac Trial Judgement* (n 183) para 78.

⁷³³ See text to notes 277 to 279.

⁷³⁴ See text to notes 299 to 302.

There is nonetheless some place for the application of JCE I in combination with the modified version of *Organisationsherrschaft*, insofar as it approximates the elements of co-perpetration stated above. The objective elements for both forms of liability overlap to some extent. There is the requirement of a plurality of persons and a common plan based on mutual understanding in both cases. However, unlike in JCE I, the contribution of the co-perpetrator needs to be of sufficient weight and importance such that it grounds the necessary co-domination over the act.⁷³⁵ Further, this essential contribution must exist for each individual international crime with which the accused is charged except in cases of excess mentioned above.

Co-perpetration and JCE I also have similar subjective requirements. In each case, the accused must possess the *mens rea* required for the specific offence in question. The ‘sharing’ of this intent in JCE I can be likened to *Lubanga*’s criterion that the co-perpetrators must be mutually aware of and accept that the execution of the common plan may result in the realisation of the objective elements of the crime. In addition, the accused must also be aware of the circumstances that enable him to co-dominate the crime.⁷³⁶

F. CONCLUSION

The modified version of *Organisationherrschaft* that we have constructed here is an attempt to restructure and combine divergent theoretical perspectives on perpetration responsibility in order to develop a suitable account of the criminal responsibility of senior and mid level participants in mass atrocity. This mode of responsibility engages with domestic criminal law principles and theory while simultaneously capturing the unique features of international crimes. Though the

⁷³⁵ See Héctor Olásolo, *The Criminal Responsibility of Senior Political and Military Leaders as Principals to International Crimes* (Hart Publishing 2009) 277.

⁷³⁶ As Olásolo notes, JCE liability does not have this element. Olásolo (n 735) 284.

specific elements of this form of *Organisationsherrschaft* undoubtedly constitute a departure from settled principles of perpetration responsibility in both German and English criminal law (and by extension criminal law doctrine in other countries that are based on these systems), they remain true to the fundamental concerns that guide the allocation of criminal responsibility in both jurisdictions. In addition, they also highlight the distinctive features of international crimes as compared to their domestic counterparts – their inherently collective nature, the climate of moral permissiveness which characterises their occurrence, and the nature and motivations of the various participants in their commission. When combined with JCE I (to the extent it corresponds to co-perpetration as outlined above), this version of *Organisationsherrschaft* presents an accurate picture of the role and function of high level participants in international crimes and situates them in the political context of mass atrocity perpetuated through the acts of several thousands of anonymous individuals. It is also capable of adoption as a theory of responsibility under Article 25(3)(a) of the Rome Statute of the ICC to hold an accused responsible for the commission of an international crime “whether as an individual, jointly with another or through another person, regardless of whether that other person is criminally responsible”.

This account of *Organisationsherrschaft* however clearly rules out the possibility of employing JCE II and JCE III as modes of commission responsibility. The next part of the thesis will turn to examining whether either of these forms of responsibility can be accommodated within accessorial responsibility for international crimes. As with perpetration responsibility, the analysis will be based on theories of accessorial responsibility in English and German criminal law adapted to the unique circumstances of mass atrocity.

PART III: JCE AS A DISTINCT CATEGORY OF ACCESSORIAL RESPONSIBILITY FOR INTERNATIONAL CRIMES

A. INTRODUCTION

The construction of principal responsibility in Part II of the thesis revealed that criminal responsibility under JCE II and JCE III cannot be accommodated within the concept of perpetration. This does not however imply that JCE II and JCE III have no independent value as modes of responsibility for international crimes. Their worth may indeed lie in their status as distinct categories of accessorial responsibility⁷³⁷ that represent the relationship between the accused and the crime more accurately than would be possible under traditional modes of secondary responsibility such as aiding and abetting. To assess this claim, we would need to consider whether the elements of JCE II and JCE III are supported by principles of secondary liability in domestic criminal law. If this is indeed the case, we would have to go further and examine whether there is any merit to retaining them as separate categories of accessorial responsibility – in other words, whether their recognition adds anything to the terrain covered by the traditional modes of secondary liability.

Part III will therefore focus on whether JCE II and JCE III can be justified as separate modes of secondary liability for international crimes. Section B will start by critically looking at principles of accessorial responsibility in English criminal law (with a special focus on the concept of joint enterprise responsibility). Section C will employ the same analysis for German criminal law. Section D will distil the results of these Sections and combine them with lessons gleaned from the analysis of JCE (in

⁷³⁷ I will use the terms accessorial, secondary and accomplice interchangeably in the course of this Part.

Part I) and the nature of international criminal law (in Part II) to assess the viability of JCE as a mode of secondary responsibility for international crimes.

B. THE ACCESSORY IN ENGLISH CRIMINAL LAW THEORY

1 Participation in crime, complicity and causality

After the recent changes to English criminal law introduced by the Serious Crime Act 2007, a person may become a party to a crime in one of three ways: (i) as a principal (who most directly and immediately fulfils the definitional elements of the offence); (ii) as a secondary party (who aids, abets, counsels, or procures, or who is liable as a participant in a joint unlawful enterprise); and (iii) as someone who incurs responsibility for the inchoate offences of encouragement or assistance under Sections 44 to 46 of the Serious Crime Act 2007.⁷³⁸

We have already dealt at length with the first mentioned category in Part II of the thesis. While there is some area of overlap between (ii) and (iii), our concern here is mainly with the secondary party. Accomplice liability in English law is governed by Section 8 of the Accessories and Abettors Act 1861: “whosoever shall aid, abet, counsel or procure the commission of any indictable offence ... shall be liable to be tried, indicted and punished as a principal offender.” Section 8 does not create any substantive offence or provide a definition of accomplice liability as such; it was intended mainly as a procedural rule specifying that accessories could be convicted and sentenced as principals.⁷³⁹ However, in 1975, the Court of Appeal held that the four words should be given their ordinary meaning.⁷⁴⁰ It is now widely conceded that

⁷³⁸ Ashworth (n 446) 404; Simester and Sullivan (n 443) 205-6.

⁷³⁹ Ashworth (n 446) 407; David Ormerod, *Smith and Hogan's Criminal Law* (OUP 2009) 179.

⁷⁴⁰ *Attorney-General's Reference (No. 1 of 1975)* [1975] QB 773, 779.

there is no real critical distinction to be drawn between the terms and that all four can be used as a catch all phrase in an indictment.⁷⁴¹

Although the principal and the accomplice are treated identically for the purposes of punishment in that they are both guilty of the full offence, the distinction between the two still has some limited significance. Most importantly, the status of an accomplice is in part contingent upon the existence of a principal who commits an offence.⁷⁴² There are also practical differences. In contrast with the principal, strict liability offences require *mens rea* on the part of the accessory. There is also no vicarious liability for the act of an accomplice. Further, the definitions of certain offences allow for the possibility of their commission (as a principal) only by a defined class of persons.⁷⁴³

The conventional account of secondary responsibility rests on the doctrine of derivative liability: the liability of the accomplice D arises from and is dependent upon D's participation in the offence committed by the primary party P.⁷⁴⁴ However, as we noted in Part II, commentators have challenged whether this doctrinal basis is truly representative of current English law and argued that there is a shift towards viewing the culpability of the accomplice separately from that of the principal and based on what the accomplice intended or contemplated will happen.⁷⁴⁵ Nonetheless, the traditional importance of derivative liability as a fundamental principle underlying secondary responsibility has given rise to a spirited debate concerning the nature of the link between the accessory's conduct and that of the harm brought about by the

⁷⁴¹ Clarkson and Keating (n 458) 547; Simester and Sullivan (n 443) 210.

⁷⁴² Simester and Sullivan (n 443) 206; Smith and Hogan (n 739) 179-180.

⁷⁴³ Simester and Sullivan (n 443) 206; Smith and Hogan (n 739) 180.

⁷⁴⁴ Sanford H Kadish, 'Complicity, Cause and Blame: A Study in the Interpretation of Doctrine' (1985) 73 Cal L Rev 323, 337.

⁷⁴⁵ See Ashworth (n 446) 426-27.

principal.⁷⁴⁶ This link has been explained using one of three rationales: causal, agency and risk.⁷⁴⁷

The causal explanation has some prominent supporters in English law. For instance, K.J.M. Smith and John Gardner argue that both the principal and the accessory make a causal contribution to the offence; the difference lies in the nature of their contribution. As Smith notes, ‘it has always been implied in the concept of complicity that an accessory’s involvement... did make some difference to the outcome’.⁷⁴⁸ The difference between the causal contribution of the principal and that of the accomplice is based on the immediacy or directness of the cause - while the principal’s act is the most immediate cause of the *actus reus*, the accessory’s causal contribution is through the perpetrator by either encouragement or assistance.⁷⁴⁹ Gardner echoes this statement in his observation that both categories of participants in the crime make a difference or change the world. The distinction between them lies in that the accessory makes the difference through the principal, or ‘by making a difference to the difference principals make’.⁷⁵⁰ Kadish suggests a diluted form of “potential causation” where the accomplice’s liability is based on the fact that the accomplice’s assistance could potentially have made a difference to whether the offence was committed, that is, it is unclear whether the offence could have been committed in its absence.⁷⁵¹

⁷⁴⁶ Smith, *Criminal Complicity* (n 442) 73-74.

⁷⁴⁷ Smith, *Criminal Complicity* (n 442) 73-79.

⁷⁴⁸ Smith, *Criminal Complicity* (n 442) 246.

⁷⁴⁹ Smith, *Criminal Complicity* (n 442) 80.

⁷⁵⁰ Gardner (n 489)128. Compare with Simester and Sullivan who argue that though causation need not be present, accomplice liability presupposes that there is a sufficient degree of connection between D’s conduct and P’s commission of the offence: Simester and Sullivan (n 443) 214-215.

⁷⁵¹ Sanford Kadish, *Blame and Punishment* (Macmillan 1987) 162.

English law has nonetheless chosen to follow the orthodox formulation of causation put forward by Hart and Honoré, which treats the voluntary and willed actions of a human agent (the principal) as breaking the causal chain.⁷⁵² No causal link is required to be proved for accomplice liability. For instance, in *Giannetto*, the court opined that the mere utterance of ‘oh goody’ by a husband to a plan already in existence to kill his wife would suffice for secondary liability.⁷⁵³ An exception is made in the case of procuring, which has been defined to mean to produce by endeavour and thus requires a causal link between the conduct of the accessory and the commission of the offence.⁷⁵⁴ The non essential nature of the causal link combined with the partial abandonment of derivative liability signals a shift in focus in the basis for secondary responsibility. The liability of the accessory no longer flows from his contribution to the offence committed by the primary party but is instead contingent on his own conduct towards the offence he intended or contemplated. This would suggest a move towards a risk or endangerment rationale for accessorial responsibility. It is not possible however to reconcile all the case law with this approach. For instance, liability based on ‘encouragement’ requires both encouragement in fact as well as an intention to encourage on the part of the accessory, which is closer to a causal explanation.⁷⁵⁵

The third rationale based on notions of ratification or agency also commands limited support in both doctrine and decisions. This approach relies on consensus to ground responsibility: the principal assents to the agent’s actions and the agent

⁷⁵² See text to notes 448 to 452, Part II of the thesis.

⁷⁵³ [1997] 1 Cr.App.R. 1.

⁷⁵⁴ *Attorney-General’s Reference* (n 740).

⁷⁵⁵ *Clarkson and Keating* (n 458) 351-52.

consents to be the agent of the principal.⁷⁵⁶ In so acting, the agent identifies herself with the actions of the principal and forfeits her right to be treated as an individual. The principal's actions may thus be imputed to her to hold her responsible.⁷⁵⁷ Robert Sullivan's concept of the 'outcome responsibility' of the accessory based on the agreement to commit a crime which turns the crime into a project held in common mirrors this position to some extent.⁷⁵⁸ The agency rationale has also been alluded to in earlier English cases concerning joint enterprise. In *Anderson and Morris*, Lord Parker CJ concluded for the court that the unauthorised actions of a co-adventurer in breach of what had been tacitly agreed to as part of the common purpose would not incriminate his fellow adventurers.⁷⁵⁹ In the subsequent Privy Council case of *Chan Wing-Sui*, Sir Robin Cooke stated that the case depends

on the wider principle whereby a secondary party is criminally liable for acts by the primary offender of a type which the former foresees but does not necessarily intend. That there is such a principle is not in doubt. It turns on contemplation or putting the same idea in other words, *authorisation*, which may be express but is more usually implied. It meets the case of a crime foreseen as a possible incident of the common unlawful enterprise. The criminal culpability lies in participating in the venture with that foresight⁷⁶⁰ (emphasis added)

While Sir Robin Cooke's confused interchangeable use of the concepts of contemplation (which is more akin to the risk rationale) and authorisation (agency) is unfortunate,⁷⁶¹ his statement nevertheless relies on agency as an underlying principle justifying accessorial responsibility. Subsequent English case law however, as we shall see later, has abandoned this basis and now relies on (subjective) foresight

⁷⁵⁶ Smith, *Criminal Complicity* (n 442) 74, discussing and ultimately rejecting this approach..

⁷⁵⁷ Joshua Dressler, 'Reassessing the Theoretical Underpinnings of Accomplice Liability: New Solutions to an Old Problem' (1985-86) 37 *Hastings LJ* 91, 111.

⁷⁵⁸ Sullivan (n 503) 165.

⁷⁵⁹ [1966] 2 *QB* 110, 118-19.

⁷⁶⁰ [1985] *AC* 168, 175.

⁷⁶¹ See Smith, *Criminal Complicity* (n 442) 220.

alone.⁷⁶² Moreover, the structure of agency responsibility differs significantly from accomplice liability in criminal law. While the agent's liability is derived from the principal's initial acts of authorisation, this situation is reversed in criminal complicity. Also, unlike in criminal law, agency responsibility mainly focuses on the inactive party in the relationship.⁷⁶³

Different aspects of secondary responsibility in English law thus appear to be based on different rationales and there is no apparent attempt to find a single coherent justification. As we will go on to discuss however, agency occupies a limited place in the current law of accomplice liability – mainly in the case of encouragement. The risk/endangerment rationale on the other hand seems more influential in the law, especially in the retention of liability arising from participation in a joint unlawful enterprise and in the creation of auxiliary offences of complicity under the Serious Crime Act.

2 A brief account of the distinct modes of secondary liability

The main forms of secondary liability are aiding, abetting, counselling and procuring. Participation in a joint enterprise also gives rise to accomplice liability, but it has a somewhat unique status in English criminal law and we will examine it separately in the subsequent sections.

Aiding: A secondary party D aids a primary party P through any form of assistance, for example supplying a weapon or acting as a lookout, before or at the time of the offence.⁷⁶⁴ While there must be *actual* assistance, it need not be substantial.⁷⁶⁵ For instance if D supplies a weapon to P for use during a bank robbery which P ultimately

⁷⁶² See text to notes 814 to 819 and notes 829 to 830.

⁷⁶³ Smith, *Criminal Complicity* (n 442) 75.

⁷⁶⁴ Smith and Hogan (n 739) 186; Ashworth (n 446) 407.

⁷⁶⁵ Simester and Sullivan (n 443) 210-11.

does not use, he would still be liable as an aider. D's act is important because it helped or might have helped P in some way in the commission of the offence, even if it was not a cause of the offence.⁷⁶⁶ There is some controversy over whether P must be aware of the fact of assistance if she is in fact assisted. In the American case of *State v Tally*, Judge Tally, who knew that his brothers-in-law intended to kill V, prevented a third party from warning V and V was ultimately killed. Tally was held guilty as an aider and abettor, notwithstanding that his brothers-in-law were not aware of his assistance.⁷⁶⁷ While some commentators endorse this conclusion by arguing that aiding does not require any consensus between D and P,⁷⁶⁸ others doubt it on the ground that there is no meeting of minds in this situation.⁷⁶⁹ While accepting this position would certainly extend the boundaries of complicity liability, it may be justified on the basis that the diluted form of causation (D's conduct might have helped P) combined with the *mens rea* required of S still serve to limit its operation.

Abetting and counselling: The natural meaning of abet is to 'incite, instigate, or encourage' and abetting is typically identified in terms of some form of encouragement of the principal to commit the offence.⁷⁷⁰ This encouragement may be by way of words or conduct. Even mere presence (for instance at the scene of an illegal prize fight)⁷⁷¹ may constitute abetment if the presence in fact encourages P to commit the offence and is intended to do so.⁷⁷² The requirement of an encouragement in fact necessitates that D's encouragement must be communicated to P, that is, P

⁷⁶⁶ Ashworth (n 446) 407.

⁷⁶⁷ 102 Ala 25, 15 So 772 (1894).

⁷⁶⁸ Smith and Hogan (n 739) 186; see also Simester and Sullivan (n 443) 211 who do not however put forward any justification for this conclusion.

⁷⁶⁹ Ashworth (n 446) 408.

⁷⁷⁰ Smith and Hogan (n 739) 186; Simester and Sullivan (n 443) 212.

⁷⁷¹ *Coney*, (1882) 8 QBD 534.

⁷⁷² *R v Clarkson*, [1971] 3 AllER 344; Simester and Sullivan (n 443) 212.

must be aware of the encouragement even if he is ultimately not influenced by it.⁷⁷³ Counselling covers conduct such as advising on an offence or supplying the information required for its commission.⁷⁷⁴ In *A-G's Reference (No 1 of 1975)*, it was suggested that both abetting and counselling might require a meeting of minds between D and P.⁷⁷⁵ This would certainly accord with the position that there must be encouragement in fact to constitute abetment.⁷⁷⁶

Procuring: In contrast with aiding, abetting and counselling, procuring requires a much stronger connection between the secondary party and the offence: D must deliberately induce or influence P to commit the offence⁷⁷⁷ and there must be a causal connection between D's conduct and the commission of the offence even if it does not form a sine qua non for the commission.⁷⁷⁸ Procuring does not require a meeting of minds between D and P and P may be quite ignorant of D's persuasion or inducement.⁷⁷⁹ In *A-G's Reference (No 1 of 1975)*,⁷⁸⁰ D added alcohol to P's drink without his knowledge and an unaware P subsequently drove home. D was convicted of procuring P's strict liability offence of drunken driving since he knew that P was intending to drive and that the natural result of the added alcohol would be to bring his blood concentration above the prescribed limit.⁷⁸¹

⁷⁷³ Smith and Hogan (n 739) 187; Simester and Sullivan (n 443) 213.

⁷⁷⁴ Ashworth (n 446) 414.

⁷⁷⁵ See (n 740).

⁷⁷⁶ Smith and Hogan (n 739) 188.

⁷⁷⁷ Simester and Sullivan (n 443) 214.

⁷⁷⁸ Smith and Hogan (n 739) 188; Simester and Sullivan (n 443) 214.

⁷⁷⁹ Simester and Sullivan (n 443) 214; Smith and Hogan (n 739) 189.

⁷⁸⁰ See (n 740).

⁷⁸¹ Smith and Hogan (n 739) 188; Ashworth (n 446) 414.

3 The mental element for complicity

The *mens rea* for secondary participation is twofold: the accessory D must possess the necessary fault elements with respect to his own acts, as well as with respect to the acts of the principal P:⁷⁸²

- 1) D must intend his own acts of contribution (i.e. to aid, abet, counsel, or procure P) and be aware of their ability to assist or encourage P.
- 2) D must appreciate the nature of P's actions: D must know or foresee the 'essential matters' relating to P's actions which make these actions an offence. These 'essential matters' would appear to include the facts, circumstances and other matters which constitute the *actus reus* of the offence.⁷⁸³

a. Requirement of purpose

The first prong of the fault element for accessorial liability requires a voluntary act performed by D with the awareness that it would assist or encourage P in the commission of an offence. There is however some controversy over whether D must possess a mental attitude with respect to the offence going beyond mere awareness and actually intend the offence to occur. In other words, is it sufficient that D acts in a manner which he knows will facilitate the offence intended by P or should he act *in order* to assist its commission, even if he ultimately did not desire that the offence be committed?⁷⁸⁴

The bulk of English case law and authorities support the conclusion that D's knowledge that his act will assist is sufficient.⁷⁸⁵ The main decision in this respect is

⁷⁸² Clarkson and Keating (n 458) 559; Ashworth (n 446) 415.

⁷⁸³ Ashworth (n 446) 415-16; Smith and Hogan (n 739) 192; Simester and Sullivan (n 443) 220.

⁷⁸⁴ See Smith, *Criminal Complicity* (n 442) 141; R A Duff, "Can I Help You?" Accessorial Liability and the Intention to Assist' (1990) 10 LS 165, 165-66.

⁷⁸⁵ An exception is carved out for procurement which requires a causal contribution by D that induces P to commit the offence. This implies that D must intend to facilitate the commission of the crime by P, and not merely to intend the act of facilitation: Simester and Sullivan (n 443) 220 fn 107, 221.

NCB v Gamble, where a weighbridge operator issued a ticket to a lorry driver certifying the lorry's weight, thus allowing him to take his overweight lorry onto a public road. The operator was convicted of aiding and abetting the offence on the basis that it was sufficient that he was aware that the lorry was overweight and that it was about to be driven on a public road. It was irrelevant that he may have been indifferent to its commission.⁷⁸⁶ Indeed, in *DPP for Northern Ireland v Lynch* it was held that an accessory acting with knowledge in pursuance of a murderous plan would be liable even if he was horrified by it.⁷⁸⁷ The only clear contradictory authority which requires the accessory to have a purposive attitude is the decision in *Fretwell*, where D, who had reluctantly given an abortifacient to a woman who used it and died, was not held liable as an accomplice because he had been unwilling for the woman to take it.⁷⁸⁸ The case of *Gillick* is also adduced as evidence of the requirement of a purposive intention.⁷⁸⁹ Here, a doctor who supplied contraceptive advice and treatment for girls under 16 was not held guilty as an accomplice to the offence of unlawful sexual intercourse since he intended only to act in the best interests of the girl by protecting her from the risk of pregnancy or disease.⁷⁹⁰ However, since their Lordships based their opinions on differing considerations and did not fully examine the earlier authorities in reaching their decisions, *Gillick* is not conclusive of the matter.⁷⁹¹ Indeed, some authors argue that *Gillick* and even *Fretwell* are better regarded as being implicitly based on the defences of duress or necessity on the part

⁷⁸⁶ [1959] 1 QB 11. See Ashworth (n 446) 417.

⁷⁸⁷ [1975] AC 653, 678.

⁷⁸⁸ (1862) Le & Ca 161.

⁷⁸⁹ See IH Dennis, 'Intent, Purpose and Complicity: A Reply' [1988] Crim LR 649, 655.

⁷⁹⁰ *Gillick v West Norfolk and Wisbech Area Health Authority*, [1984] QB 581.

⁷⁹¹ Smith, *Criminal Complicity* (n 442) 147-149; Ashworth (n 446) 417.

of the accessory.⁷⁹² In both cases, while D may have hoped that P would not commit the offence, it would be incorrect to say that he did not intend the act of facilitation, regardless of whether he undertook the act for benevolent purposes or with reluctance.⁷⁹³ Another approach is to view *Fretwell* as evidence for the proposition that clear disapproval of, or non consent to, the principal's criminal act may negative the mental element required for accomplice liability.⁷⁹⁴

The purposive intent requirement is advocated by commentators who favour a narrower reach of complicity responsibility by excluding cases of D's peripheral involvement in the conduct of P where D and P lack any community of purpose.⁷⁹⁵ They also reject penalising D when he is simply going about his ordinary course of business such as selling certain commodities with the awareness that they may assist the commission of an offence by P.⁷⁹⁶ This approach favours free trade and individual freedom⁷⁹⁷ and shifts the emphasis from the actual conduct of D, from what he actually did, to his mental attitude for acting thus.⁷⁹⁸ It is consonant with the philosophy that men should not, in general, act as their brothers' keepers.⁷⁹⁹

However, the intent based on simple knowledge approach is not really as grave an intrusion into personal liberty as the purposive stance would have us think. On this account, D's liability is based on a voluntary and knowing association with P's criminal behaviour.⁸⁰⁰ D does not have to supervise P's actions, enquire after her

⁷⁹² Smith and Hogan (n 739) 196; Simester and Sullivan (n 443) 221-222.

⁷⁹³ Simester and Sullivan (n 443) 221.

⁷⁹⁴ Dennis, 'The Mental Element for Accessories' (n 458) 52; Smith, *Criminal Complicity* (n 442) 149.

⁷⁹⁵ G R Sullivan, 'Intent, Purpose and Complicity' [1988] Crim LR 641.

⁷⁹⁶ Smith, *Criminal Complicity* (n 442) 150-51.

⁷⁹⁷ Ashworth (n 446) 412; Smith, *Criminal Complicity* (n 442) 153.

⁷⁹⁸ Sullivan, 'Intent, Purpose and Complicity' (n 795) 641.

⁷⁹⁹ Ashworth (n 446) 412; Smith, *Criminal Complicity* (n 442) 153; Duff (n 784) 180.

⁸⁰⁰ Duff (n 784) 171 setting out the position.

purpose, or take any steps to prevent P from acting. D must simply desist from voluntarily assisting P when he is aware that P intends to commit an offence.⁸⁰¹ The intrusion into D's freedom, insofar as it exists, is justifiable in the interests of protecting the rights of victims not to be attacked, burgled or subject to any other criminal activities.⁸⁰²

Nonetheless, there is perhaps good reason to incorporate a purpose requirement into the fault element for secondary liability. Doing so would ensure that the link between D's conduct and the offence committed by P is not so attenuated as to make the parity of culpability between S and P a mockery. At the same time, concerns that this requirement would unduly restrict the scope of the criminal law in protecting rights of potential victims should to some extent be alleviated by the recent introduction of Section 45 of the Serious Crime Act 2007 which provides for the offence of encouraging or assisting an offence believing that it will be committed.⁸⁰³ While D would not be accountable as an accessory in the same manner and to the same extent under the newly enacted law, it would still provide for the possibility of his culpability in a situation where he acts with the knowledge that his conduct will assist the commission of an offence by P.

b. Knowledge/foresight of essential matters

The classic statement on the accomplice's mental state with respect to the offence committed by the principal is found in the decision of *Johnson v Youden*: the

⁸⁰¹ Simester and Sullivan (n 443) 225.

⁸⁰² Simester and Sullivan (n 443) 225.

⁸⁰³ See Ashworth (n 446) 412-13.

accessory must know the essential matters that constitute the offence.⁸⁰⁴ This implies.⁸⁰⁵

- 1) D must know the conduct element of P's offence
- 2) D must know the consequences and circumstances of P's conduct
- 3) D must know the fact of P's *mens rea*.

Questions arise as to the degree of specificity of knowledge required on the part of D: must D have actual knowledge or is it sufficient that he was reckless? What constitutes the 'essential matters' of the offence?

On the latter question, two main principles have evolved. D must either know (i) the type of offence intended (and eventually committed) by P; or (ii) that P would commit any one of a number of offences (and P eventually commits one of them).⁸⁰⁶ The former test was adopted by the Court of Criminal Appeal in *Bainbridge* where the court held that D must not merely suspect but actually know that P intends to commit a crime of the *type* actually committed.⁸⁰⁷ The content of the term 'type' was left unresolved.⁸⁰⁸ The latter test was propounded by the House of Lords in *DPP for Northern Ireland v Maxwell*, where Maxwell drove a group of terrorists to a public house knowing that it would form the target of an attack of violence, but being unaware of what exactly was planned. He was held liable as an accessory on the basis that even though he did not know the particular crime intended, he knew or contemplated the crime eventually committed as having been on the principal's

⁸⁰⁴ [1950] 1 KB 544, 546.

⁸⁰⁵ Smith and Hogan (n 739) 201-202; Smith, *Criminal Complicity* (n 442) 178, 180.

⁸⁰⁶ Smith and Hogan (n 739) 202 (Smith and Hogan also mention a third test concerning joint enterprise cases which we will consider in the next sections); Dennis, 'The Mental Element for Accessories' (n 458) 45; Simester and Sullivan (n 443) 230.

⁸⁰⁷ [1960] 1 QB 129.

⁸⁰⁸ Smith, *Criminal Complicity* (n 442) 164; Smith and Hogan (n 739) 203.

‘shopping list’ of offences.⁸⁰⁹ In other words, it was sufficient that the crime committed by P was within the range of possible offences contemplated by D.⁸¹⁰ The relationship between the *Bainbridge* and *Maxwell* tests is not quite clear.⁸¹¹ For instance, under *Maxwell*, D may not be liable for a crime which was not within the range of offences he contemplated P might commit, even if it is of the same type as one of these offences.⁸¹² In any event, Section 46 of the Serious Crime Act brings within its ambit the situation represented by *Maxwell* by providing for the offence of encouraging or assisting offences believing that one or more will be committed.⁸¹³

The principle in *Maxwell* also highlights the issue of the requirement of the accomplice’s knowledge of the offence as contrasted with simple foresight. The earlier position was that mere recklessness or a belief that an offence is likely to be committed would not be enough; there must be actual knowledge.⁸¹⁴ However, the current law supports a test of recklessness as sufficient.⁸¹⁵ *Maxwell* itself points to that conclusion, for if it is only required that D must know that one of a certain range of offences will be committed, then with respect to the particular offence which is eventually committed, D can only believe that it is likely to be committed.⁸¹⁶ Other decisions have also clearly articulated the test of foresight.⁸¹⁷ For instance, in *Carter v Richardson*, D was convicted as an accessory for the offence of drunken driving since he was aware that P had consumed so much alcohol that it was ‘probable that his

⁸⁰⁹ [1978] 3 AllER 1140; see Dennis, ‘The Mental Element for Accessories’ (n 458) 45.

⁸¹⁰ Dennis, ‘The Mental Element for Accessories’ (n 458) 45.

⁸¹¹ Smith, *Criminal Complicity* (n 442) 166.

⁸¹² Smith and Hogan (n 739) 203.

⁸¹³ See Ashworth (n 446) 420.

⁸¹⁴ AP Simester, ‘The Mental Element in Complicity’ (2006) 122 LQR 578, 583; Simester and Sullivan (n 443) 226-27.

⁸¹⁵ Simester and Sullivan (n 443) 227, 228 and references therein.

⁸¹⁶ Ashworth (n 446) 419; See also Smith, *Criminal Complicity* (n 442) 169.

⁸¹⁷ See eg. *Rook*, [1993] 1 WLR 1005; *Reardon*, [1999] Crim LR 392.

blood alcohol content was over the limit'.⁸¹⁸ Similarly, in *Bryce*, the court considered it sufficient that at the time D aided P (by transporting him to the scene of the crime), he contemplated a 'real possibility' that P would commit the type of offence he eventually did.⁸¹⁹

Simester challenges this dilution of the knowledge standard and states that the holdings in the cases supporting this standard are either obiter, or are guilty of eliding the distinction between the fault element for aiding and abetting and that of joint enterprise liability.⁸²⁰ He also argues against the lowering of the *mens rea* standard on the basis that any less stringent requirement would not sufficiently involve D in P's conduct so as to justify her conviction as an accessory.⁸²¹ It is only when D acts either with the purpose or the awareness of facilitating P's crime that her otherwise lawful conduct becomes a wrong and establishes a link between her culpability and the ultimate harm.⁸²² The knowledge standard also entails fewer sacrifices on the part of the citizen and is more conducive to individual freedom.⁸²³ Simester's arguments are persuasive, particularly after the enactment of the provisions of Serious Crime Act which would still operate to cover situations such as *Maxwell* and prevent the net of criminal liability from being cast too narrowly. However, they are difficult to accept in light of the weight of the case law which supports the test of recklessness, unless one could make a convincing case that joint enterprise liability (which most of the cases upholding this standard were concerned with) is quite a distinct species of

⁸¹⁸ [1974] R.T.R. 314. For criticism of the reasoning in *Carter*, see Simester and Sullivan (n 443) 227.

⁸¹⁹ [2004] EWCA Crim 1231.

⁸²⁰ Simester, *Mental Element* (n 814) 585.

⁸²¹ Simester, *Mental Element* (n 814) 589.

⁸²² Simester, *Mental Element* (n 814) 589-90.

⁸²³ Simester, *Mental Element* (n 814) 592; Simester and Sullivan (n 443) 228.

accessorial responsibility from aiding and abetting. It is this question which we will next consider.

4 Liability based on participation in a joint unlawful enterprise

a. Elements and structure of joint enterprise liability

Under current English law, secondary responsibility also includes the concept of joint venture, though as we shall see later, the precise elements required for its establishment are quite controversial.⁸²⁴ Joint enterprise liability can take one of two forms. The first or ‘basic’ form is when D and P agree or act in concert to commit crime X (say burglary). D will be party to the joint venture if he intended that the burglary be committed or if he foresaw that P or any other party to the agreement might commit the burglary.⁸²⁵ The second and more controversial form, which Smith labels ‘parasitic accessory liability’,⁸²⁶ arises when in the course of committing crime X, P goes on to commit a further crime Y (say murder). In this situation, D will be liable on the basis of joint enterprise liability if:⁸²⁷

- 1) D and P embark on a joint venture for the commission of crime X
- 2) D had foreseen that in the course the committing crime X, there was a real risk that P might commit a further crime
- 3) Crime Y committed by P occurred as an incident of the joint enterprise and did not fundamentally differ from the crime anticipated by D.

The leading case on joint enterprise liability is the Privy Council decision in *Chan Wing Sui*, where in the course of a joint enterprise to commit a robbery, one of the

⁸²⁴ Ashworth (n 446) 420; Smith and Hogan (n 739) 182 who state that unlike in Australian law, participants in a joint criminal enterprise are not principals, but secondary parties.

⁸²⁵ JC Smith, ‘Criminal Liability of Accessories: Law and Law Reform’ (1997) 113 LQR 453, 454; Sullivan, ‘First Degree Murder and Complicity’ (n 507) 274.

⁸²⁶ Smith, ‘Criminal Liability of Accessories: Law and Law Reform’ (n 825) 454-55.

⁸²⁷ Smith, ‘Criminal Liability of Accessories: Law and Law Reform’ (n 825) 455; Sullivan, ‘First Degree Murder and Complicity’ (n 507) 275; Ashworth (n 446) 420; Smith and Hogan (n 739) 209.

parties to the venture killed one of the victims with a knife. The defendants argued that the knives they carried were only meant to frighten the victims and not to cause any injury. In upholding the conviction of the defendants for the killing, Sir Robin Cooke used the language of ‘contemplation or putting the same idea in other words, authorisation, which may be express but is more usually implied. It meets the case of a crime foreseen as a possible incident of the common unlawful enterprise. The criminal culpability lies in participating in the venture with that foresight’.⁸²⁸ As we noted earlier however, the rationale of authorisation or agreement has now given way to the test of subjective foresight of a substantial risk that the collateral crime might be committed.⁸²⁹ Thus, D, who foresees that P may possibly use force while committing the robbery they jointly embark upon, will be held liable for the harm resulting from the contingent use of force by P, regardless of whether he intended the harm to occur and even if he dreaded its possibility.⁸³⁰ We will assess next what exactly this foresight must encompass – the conduct element of P’s offence, its consequences, or the manner of its commission.

b. Scope of the common purpose and fundamentally different act

The issue of the accessory’s foresight or contemplation is central to the determination of responsibility arising out of participation in a joint criminal venture. The very scope of the joint enterprise depends on ‘what was contemplated by parties sharing that purpose’.⁸³¹ Thus, D will not be liable for a crime Y committed by P in the course

⁸²⁸ [1985] AC 168, 175.

⁸²⁹ Smith, ‘Criminal Liability of Accessories: Law and Law Reform’ (n 825) 457; Ashworth (n 446) 422.

⁸³⁰ See Simester and Sullivan (n 443) 234.

⁸³¹ *Powell* (n 307) citing with approval *McAuliffe v R*, (1995) 130 ALR 26, 30 and *Hui Chi-ming v R*, [1992] 1 AC 34. See Clarkson and Keating (n 458) 557.

of committing crime X if the act done by P was ‘fundamentally different’ from what S contemplated.⁸³²

This issue of the correct scope of the joint venture becomes controversial in cases of spontaneous violence that are alleged to be in pursuance of a joint enterprise. For instance, *O’Flaherty*⁸³³ and *Mitchell*⁸³⁴ both concerned cases of spontaneous violence where the idea of a prior ‘plan’ or ‘agreement’ to commit certain acts could not be applied to the conduct of the defendants. In both instances, the issue was whether the ultimate offence with which D had been charged was committed in the course of an evolving joint enterprise of which D had continued to be a part, or whether there were two discrete joint enterprises, and D had only been involved in one of them and had withdrawn from the other which led to the crime. In *O’Flaherty*, R and T had participated in the initial attack on V at place A, but then refrained from accompanying the group to place B where V was further assaulted, suffered stab wounds and a head injury and died. F did follow the attackers to B, armed with a cricket bat, and was present when the attack at B occurred, though he did not participate in it. The court held that in such cases of spontaneous violence, the scope of the joint enterprise must be inferred “from the knowledge and actions of individual participants”. Since there was no evidence to support that the pursuit was part of a joint enterprise by R and T, their appeals against the murder conviction were permitted. On the other hand, since F had continued in the pursuit armed with a weapon, he was still within the joint enterprise and could be considered to have provided encouragement, or at least be ready to lend support to the attackers. His appeal was therefore dismissed. The distinction made by the court between R, T and F

⁸³² Smith and Hogan (n 739) 210.

⁸³³ *R v. O’Flaherty (Errol Carlton)*, [2004] EWCA Crim 526; [2004] Cr. App. R. 20 (CA (Crim Div)).

⁸³⁴ *R v. Mitchell (Laura)*, [2008] EWCA Crim 2552; [2009] 1 Cr. App. R. 31 (CA (Crim Div)).

thus does not seem to depend so much on what each party had contemplated – indeed, all three may very well have foreseen that V may be killed in the violence. However, through their *actions*, R and T could have been considered to have withdrawn from the enterprise. This was not true of F, whose conduct still potentially contributed (through his act of encouragement) to the commission of the fatal offence. The distinction between R and T on the one hand and F on the other thus appears to be based on the causal contribution by the accessory in a joint enterprise to the principal's conduct.

The question of what makes P's act 'fundamentally different' from that contemplated by D has also caused some confusion, that is, whether it relates to the difference in weapons used by P, his actions or intentions, or the consequences of his acts.⁸³⁵ For instance in *English*, during an attack by D and P using wooden stakes, P killed the victim with a knife. Lord Hutton held that the use of the knife in this case was fundamentally different from that of a wooden post and thus fell outside the scope of the enterprise as contemplated by S.⁸³⁶ This principle was reiterated by the House of Lords in *Rahman* where D along with a group of people armed with a variety of blunt instruments engaged in a gang fight during the course of which the victim was stabbed, resulting in his death. D argued that he did not know that any of the members possessed a knife or that they would act with the intent to kill. The House of Lords held that P's intent to kill was not fundamentally different from the real risk of death or grievous bodily harm being caused intentionally that had been

⁸³⁵ Smith and Hogan (n 739) 213.

⁸³⁶ [1997] 4 All ER 545, 564; Simester and Sullivan (n 443) 237.

foreseen by D.⁸³⁷ The test of fundamental difference applied to the nature of P's acts or his actual conduct rather than to his intent.⁸³⁸

Simester and Sullivan interpret the concept of fundamental difference in *English* and *Rahman* to be most closely related to the degree of dangerousness, that is, if the weapon used by P was different from, but equally dangerous as, the weapon which D contemplated he may use, D will still be liable under joint enterprise liability.⁸³⁹ The degree of dangerousness is however not evaluated solely according to the weapon used, but also by taking into account the context and other evidence.⁸⁴⁰ This test of dangerousness appears to be endorsed by the Court of Appeal's recent decision in *R v Mendez*.⁸⁴¹ In this case, V was chased and attacked by a group of partygoers resulting in injuries that were not particularly serious. However, he died as a result of three stabs that were inflicted on his chest. The defendants were both convicted of murder as secondary parties. One of the issues before the court was whether the first defendant was guilty of murder since it had not been suggested that he knew that anyone in the group possessed a knife. The court held that it would be unjust for D to be held guilty of V's murder by P, if its direct cause was a deliberate act by P which was of a different kind and significantly more life threatening than the kinds of acts D intended or foresaw.⁸⁴²

⁸³⁷ [2008] UKHL 45. See Ashworth (n 446) 423, 425.

⁸³⁸ Ashworth (n 446) 425; Simester and Sullivan (n 443) 238. As has been recently emphasised, this holding does not imply that D need not foresee that P might act with intent. P must foresee not only that D may commit the *actus reus* of crime Y, but that he may do so with the requisite *mens rea* for crime Y: *R. v A*, [2010] EWCA Crim 1622; [2010] 2 Cr. Ap. R. 32 (CA (Crim Div)); David Ormerod, 'Case Comment: R. v A' [2011] Crim LR 61, 63-4.

⁸³⁹ Simester and Sullivan (n 443) 238-39. They also cite the decision of the Court of Appeal in *Uddin*, [1999] QB 431, 441 (CA) as supporting this reasoning.

⁸⁴⁰ Simester and Sullivan (n 443) 239.

⁸⁴¹ [2010] EWCA Crim 516; [2010] 3 All ER 231 (CA (Crim Div)).

⁸⁴² *Mendez* (n 841) [47]; see Matthew Dyson, 'More Appealing Joint Enterprise' (2010) 69 CLJ 425-28.

The court however also appeared to reintroduce the notion of causation into the test of fundamental difference by framing it thus:⁸⁴³ “Conduct by P which involves a total and substantial variation from that encouraged by D could not properly be regarded as the ‘fruit’ of D’s encouragement, nor with propriety be said to have been committed under D’s influence.”⁸⁴⁴ This is an unfortunate statement of the test. As Ormerod notes, joint enterprise liability does not rest on whether D’s act is causally connected to the eventual crime committed by P, but on whether D contemplated that P may commit it with the requisite *mens rea*.⁸⁴⁵

In any event, the interpretation of fundamental difference as based on dangerousness seems too narrow as it concerns primarily cases of differences in weapons and does not yield a broader principle that would apply to other deviations. A more useful approach is to look at whether P acted so as to bring about the consequence which D contemplated. Whether P chooses to use a knife or a gun, the victim is equally dead in either case. The method by which he accomplished this result should be irrelevant.⁸⁴⁶ Conversely, even if D knew that P had a knife, if he contemplated only that P would use it to frighten the victim, he should not be held responsible if P stabbed the victim instead causing his death.⁸⁴⁷ The test of foresight or contemplation thus seems mostly closely related to the expected outcome of P’s conduct.⁸⁴⁸ Smith’s example of D and P who jointly act to administer drug X to the victim where P knows that X will kill the victim whereas D believes that it will only make him ill, illustrates this point. The administration of a fatal drug is fundamentally

⁸⁴³ See David Ormerod, ‘Case Comment: R. v. Mendez (Reece)’ [2010] Crim LR 874, 877.

⁸⁴⁴ *Mendez* (n 841) [20].

⁸⁴⁵ Ormerod (n 843) 877.

⁸⁴⁶ JC Smith, ‘Case and Comment: R. v. Powell and Daniels’ [1998] Crim LR 48, 50; Ashworth (n 446) 425; Smith and Hogan (n 739) 214; Clarkson and Keating (n 458) 563.

⁸⁴⁷ Smith, ‘Case and Comment: R. v. Powell and Daniels’ (n 846) 51.

⁸⁴⁸ See Ashworth (n 446) 425.

different from one which only causes a minor illness. D can legitimately claim that he would not have been part of the joint venture had he known the true nature of the drug.⁸⁴⁹ This statement of the test of fundamental difference must however be qualified to deal with the kinds of situations discussed below, where D will not be responsible for the offence committed by P, but may nonetheless be liable for a lesser offence arising out of the same act done by P.⁸⁵⁰

c. Conviction for a different offence

A further refinement of the contemplation or foresight requirement is introduced in the case where D only foresees that P might resort to violence in the course of the joint enterprise, but does not foresee his murderous state of mind. In this situation, can D be convicted of the lesser offence of manslaughter while P is held guilty of murder, or must D be acquitted completely? English courts have not been uniform in their decisions on this matter and there are authorities both supporting D's conviction for the lesser offence,⁸⁵¹ as well as authorities that would acquit him altogether.⁸⁵² The difference turns essentially on what the accessory's foresight determines – his level of culpability or the scope of the joint venture as such. For instance, in *Smith*, Lord Parker CJ in effect considered the fact of the accessory's liability as stemming from the scope of the joint venture, and his foresight as determinative only of his level of culpability.⁸⁵³ A similar rationale was propounded in *Gilmour*⁸⁵⁴ and *Day*⁸⁵⁵ which

⁸⁴⁹ JC Smith, 'Commentary: R. v. Day (M) and others' [2001] Crim LR 984, 985; Smith and Hogan (n 739) 215.

⁸⁵⁰ Smith and Hogan (n 739) 216.

⁸⁵¹ *Betty*, (1963) 48 Cr. App. Re. 72; *Reid*, (1976) 62 Cr. App. Rep. 109; *Stewart and Scholfield*, [1995] 1 Cr. App. R. 441.

⁸⁵² *Dunbar*, [1998] Crim LR 693; *Uddin* (n 839); *Powell* (n 307).

⁸⁵³ [1963] 1 WLR 1200. See Smith, *Criminal Complicity* (n 442) 226-27.

⁸⁵⁴ [2002] 2 Cr. App. Rep. 407 (Court of Appeal of Northern Ireland).

⁸⁵⁵ [2001] Crim LR 984.

support accessory liability for the lesser offence in cases where the principal may have ‘larger intentions’ on the basis of the accessory’s personal state of mind.⁸⁵⁶ The cases which reject secondary liability for manslaughter on the other hand rely on the fact that violence which is of a gravity which D did not foresee takes P’s conduct out of the scope of the joint venture.⁸⁵⁷

The former approach would approximate more closely the general shift from assessing D’s culpability on the basis of the ‘derivative’ theory of responsibility to one which evaluates his conduct independently.⁸⁵⁸ On this theory, D could indeed be convicted of manslaughter based on what he foresaw, and P’s deviation from that would not result in his acquittal. This conclusion is also supported in the latest jurisprudence.⁸⁵⁹ In *Yemoh*,⁸⁶⁰ during an attack on V by D and others, V was stabbed and died. D had foreseen that P may use a knife to inflict harm, but may not have foreseen P’s intention to kill. The Court of Appeal, relying on the reasoning in *Rahman*, upheld D’s conviction for manslaughter as D had foreseen the essential elements of manslaughter and P’s having acted with intent to kill was not fundamentally different from what he had contemplated.⁸⁶¹ In any event, under Part 2 of the Serious Crime Act, 2007, D can be convicted of encouraging and assisting the crime he contemplated, regardless of P’s subsequent conduct.⁸⁶²

⁸⁵⁶ Clarkson and Keating (n 458) 562 citing commentary to *Day* [2001] Crim LR 984, 985.

⁸⁵⁷ GR Sullivan, ‘Participating in Crime: Law Com No. 305 – Joint Criminal Ventures’ [2008] Crim LR 19, 24.

⁸⁵⁸ See Ashworth (n 446) 426.

⁸⁵⁹ See Simester and Sullivan (n 443) 241-242.

⁸⁶⁰ [2009] EWCA Crim 930, [2009] Crim LR 888.

⁸⁶¹ See Simester and Sullivan (n 443) 241-242.

⁸⁶² See Ashworth (n 446) 426.

d. Joint enterprise as a distinct mode of accomplice liability

The status of joint enterprise liability as a form of secondary responsibility is uncontroversial in English law.⁸⁶³ What is less certain is whether joint enterprise is simply a variant of other forms of secondary liability or whether it forms a distinct category of accessorial responsibility. The Law Commission's Consultation Paper No 131⁸⁶⁴ appears to support the latter position, as does the decision in *Stewart and Schofield* where Hobhouse LJ distinguished joint enterprise from aiding, abetting etc stating that 'when the allegation is joint enterprise, the allegation is that one defendant participated in the criminal act of another'.⁸⁶⁵

Simester and Sullivan argue strongly in favour of this position on the ground that joint enterprise is distinct from liability as an aider and abettor, both normatively and structurally.⁸⁶⁶ Structurally, liability for aiding and abetting involves only a single offence which is aided or encouraged by D and eventually committed by P. Joint enterprise doctrine has nothing special to say about this scenario; it comes into its own in the cases that Smith labels 'parasitic' secondary liability that consist of two offences: the joint venture to commit offence X by D and P and the further offence Y which P commits alone. D does not contribute to offence Y; his connection to offence Y operates through the joint venture and his liability consists in having foreseen its commission as a possible consequence of the venture.⁸⁶⁷ Simester also states that if joint enterprise were merely a sub species of assistance and encouragement, one could dispense with the requirement of crime X altogether and then apply the same criteria

⁸⁶³ In contrast, parties to an unlawful joint enterprise are considered co-principals in South African law: see eg, Jonathan Burchell, 'Joint Enterprise and Common Purpose: Perspectives in English and South African Law' (1997) 10 SACJ 125, 139.

⁸⁶⁴ Law Commission, *Assisting and Encouraging Crime* (Consultation Paper No. 131 1993).

⁸⁶⁵ [1995] Cr. App. R. 441.

⁸⁶⁶ Simester, 'The Mental Element in Complicity' (n 814) 593; Simester and Sullivan (n 443) 243.

⁸⁶⁷ Simester, 'The Mental Element in Complicity' (n 814) 593; Simester and Sullivan (n 443) 243-44.

for secondary liability for crime Y as would exist for the other forms of secondary liability. This is however not the case: at the very least, the conduct element differs widely. In contrast with other forms of secondary liability, D need not directly assist or encourage crime Y. Instead, he must participate in the joint venture and it is his commitment to the common purpose that makes him liable for crime Y. Such a showing of common purpose is not required for standard cases of accomplice liability.⁸⁶⁸

According to Simester and Sullivan, it is the element of an unlawful agreement or concert that distinguishes joint enterprise liability from standard cases of aiding and abetting.⁸⁶⁹ In the latter case, it is D's intentional or knowing association with P's unlawful conduct that makes his conduct a wrong. In joint enterprise on the other hand, D's wrong consists in her deliberate participation in a common endeavour to commit a crime.⁸⁷⁰ It is D's voluntary affiliation with a shared criminal purpose (to commit crime A) which justifies his assumption of responsibility for crime B which he only foresees and which exempts him from the more demanding requirements of having actually encouraged or helped crime B as would be the case in standard forms of complicity.⁸⁷¹

The majority of the commentators however consider joint enterprise simply as a species of liability for assistance and encouragement. This is partly based on the law's shift from the requirement of tacit agreement to one based on the accomplice's contemplation to ground liability for the collateral offence. This test of (subjective) foresight of the further offence is similar to the basis for holding D liable under other

⁸⁶⁸ Simester, 'The Mental Element in Complicity' (n 814) 593, 595, 598.

⁸⁶⁹ Simester, 'The Mental Element in Complicity' (n 814) 598; Simester and Sullivan (n 443) 243.

⁸⁷⁰ Simester and Sullivan (n 443) 243; Simester, 'The Mental Element in Complicity' (n 814) 598-99.

⁸⁷¹ Simester and Sullivan (n 443) 243; Simester, 'The Mental Element in Complicity' (n 814) 598-99.

modes of secondary responsibility.⁸⁷² Smith also argues against the proposition that one can simply drop crime X (the basic offence) out of the picture and assess D's liability directly in relation to crime Y: since D's liability for crime Y is 'parasitic' on the joint venture to commit crime X, logically, it cannot exist without the basic liability for crime X.⁸⁷³ This also makes the distinction in the *actus reus* elements of other forms of accomplice liability and joint enterprise cases pointed out by Simester and Sullivan less stark. D can only participate in the acts of P through assistance or encouragement in either case; the only difference is that in joint enterprise cases, the aiding or abetting takes the form of a joint venture to commit crime X and there is no need to prove any further acts of facilitation in respect of crime Y.⁸⁷⁴

This crucial element of the joint venture which results in the commission of additional wrongs for which D can be held liable however deserves to be taken as seriously as Simester and Sullivan would like. The common purpose results in a shared bond of affiliation between D and P and other members of the joint venture which the mere aider or abettor, who need not have a purposive attitude towards P and his acts, lacks. The normative position of the voluntarily committed gang member D1 is thus very different from the independent aider and abettor D2.⁸⁷⁵ It is moreover this shared purpose that broadens the liability of D for the collateral offence Y which he does not contribute to in any manner. Thus, while the conduct element for standard forms of accessorial responsibility must exist in relation to crime X which is ultimately committed, the conduct element for joint enterprise responsibility need

⁸⁷² Graham Virgo, 'Clarifying Accessorial Liability' (1998) 57 CLJ 13, 15; Dennis, 'The Mental Element for Accessories' (n 458) 43.

⁸⁷³ Smith, 'Criminal Liability of Accessories: Law and Law Reform' (n 825) 462.

⁸⁷⁴ Smith, 'Criminal Liability of Accessories: Law and Law Reform' (n 825) 463; Smith and Hogan (n 739) 207.

⁸⁷⁵ Simester and Sullivan (n 443) 244; Simester, 'The Mental Element in Complicity' (n 814) 598-99.

only exist in relation to X and not for crime Y which P eventually commits. Moreover, joint enterprise liability has a representational value that distinguishes it from liability for aiding and abetting: it is a more accurate account of the roles played by different members in a criminal enterprise committed to the commission of certain offences during the course of which one or more members go on to commit collateral offences.⁸⁷⁶

e. Justification for joint enterprise responsibility

At first glance, liability arising out of participation in a joint criminal venture, particularly D's liability for the collateral offence committed by P, appears to unduly extend the scope of D's liability for offences to which he has made no direct contribution. Several arguments, both normative and pragmatic, have been adduced to support this extension. One set of arguments focuses on the conduct of the secondary party and is grounded in his voluntary association with a criminal venture. The element of collusion not only constitutes a manifestation of D's criminal proclivities⁸⁷⁷ but also makes his conduct an independent wrong.⁸⁷⁸ D's participation in the unlawful enterprise represents his affiliation with a segment of society that has set itself against the rule of law.⁸⁷⁹ Even if D does not make any direct contribution to the collateral offence, he is indirectly causally connected to it as he helps create or contribute to the situation in which it occurs.⁸⁸⁰ In more close knit ventures, D may also be in a position of authority to exercise supervision over the other members and

⁸⁷⁶ See Dennis, 'The Mental Element for Accessories' (n 458) 43.

⁸⁷⁷ Smith, *Criminal Complicity* (n 442) 6.

⁸⁷⁸ Simester and Sullivan (n 443) 244, fn 260; Simester, 'The Mental Element in Complicity' (n 814) 600-01.

⁸⁷⁹ Simester and Sullivan (n 443) 244; Simester, 'The Mental Element in Complicity' (n 814) 600.

⁸⁸⁰ See Paul H Robinson, 'Imputed Criminal Liability' (1984) 93 Yale LJ 609, 633.

restrain their conduct.⁸⁸¹ This reasoning which appears to base D's conviction on his 'criminal proclivities' is not particularly persuasive. Apart from being circular, the argument does not have anything to say about how the same logic should not then apply to D's liability for aiding and abetting. D's purported affiliation with anti-rule-of law sentiments as a basis for his extended liability is also unconvincing. Arguably, anyone who commits or facilitates the commission of an offence in any manner exhibits the same characteristics.

A second set of justifications for joint enterprise liability stems from a risk/endangerment rationale similar to that used for inchoate offences. Through his association in a criminal enterprise, D increases the likelihood that the collateral offence will occur.⁸⁸² Criminal enterprises also represent a greater threat to public safety than individuals acting alone, as the members of the enterprise tend to mutually reinforce individual criminal tendencies, discouraging withdrawal and often resulting in an escalation of crime.⁸⁸³ Moreover, liability based on participation in the joint enterprise deters people from associating with criminal ventures and thus makes the offences less likely to occur.⁸⁸⁴ These are empirical claims that have some merit, but perhaps need to be supported by fairly comprehensive studies in other areas of the social sciences. The argument on deterrence especially does not seem very plausible. At least in cases of joint enterprise that involve spontaneous outbreaks of violence such as street fights, it is unlikely that the potential for punishment would feature very strongly in the decision making calculus of a party to the enterprise. Neither is it entirely clear that even if one or more persons are deterred from participating in the

⁸⁸¹ See Smith, *Criminal Complicity* (n 442) 233.

⁸⁸² Smith, *Criminal Complicity* (n 442) 6.

⁸⁸³ Simester, 'The Mental Element in Complicity' (n 814) 600-01; Simester and Sullivan (n 443) 244; Ashworth (n 446) 403.

⁸⁸⁴ Smith, *Criminal Complicity* (n 442) 233; see also Ashworth (n 446) 404.

joint venture, this would necessarily mean that an offence is less likely to be committed. Offences that are committed pursuant to joint ventures which involve a relatively large number of persons, or in which individual actors are more or less dispensable, would be just as likely to occur.

We will consider these arguments in more detail when we turn to the justification of joint enterprise liability for international crimes in Section D of this Part. It is however also important to note here that this endangerment rationale combined with a focus on the accessory's own mental attitude towards the offence he contemplated plays a more prominent role even in the traditional modes of secondary responsibility as discussed earlier, and is also evidenced by the creation of the auxiliary offences of complicity under the Serious Crime Act. The disparity between the rationale for standard forms of accomplice liability and joint enterprise responsibility is therefore less acute under the current law than one would initially imagine. In addition, in international crimes, joint ventures with a shared criminal purpose are far closer to the ground reality and may reflect the role of the participants in the crime much better than the standard forms of complicity.

5 Conclusion

As the analysis in this section reveals, the English law on secondary liability is not quite straightforward or coherent. While causal, agency and endangerment explanations ground various aspects of accessorial responsibility, no single policy rationale serves to tie together the different ways and means by which D is held accountable as a secondary party to the crime. Nevertheless, the emphasis on the fault element of subjective foresight for all forms of accomplice liability when seen together with the creation of the new auxiliary offences of complicity under the Serious Crime Act points towards a focus on the mental attitude and conduct of the

accessory, assessed independently from the principal, for the assignment of responsibility. This is true not only for the standard forms of complicity, but also for joint enterprise responsibility. Before we examine whether the doctrinal bases for secondary responsibility in English law can support JCE liability in international criminal law, we will embark on a similar exercise as we conducted in Part II of the thesis and compare the position of an accomplice in English law with that in German law.

C. THE ACCESSORY IN GERMAN CRIMINAL LAW THEORY

1 The structure and basis of secondary responsibility

The StGB (German Criminal Code) recognises two categories of accomplice liability: aiding and abetting.

Section 26 Instigation

Any person who intentionally induces another to intentionally commit an unlawful act (abettor) shall be liable to be sentenced as if he were a principal.

Section 27 Aiding

(1) Any person who intentionally assists another in the intentional commission of an unlawful act shall be convicted and sentenced as an aider.

(2) The sentence for the aider shall be based on the penalty for a principal. It shall be mitigated pursuant to section 49(1).

German criminal law conceives of the accessory as the marginal figure in the course of events which constitutes an offence. The accessory merely facilitates the course of events, without controlling it.⁸⁸⁵ His participation is of such secondary weight that it is evaluated as a contribution to the unlawful act of a third party.⁸⁸⁶ His act represents a different degree of attack against the legal interest protected by the elements of the offence (as compared to the perpetrator)⁸⁸⁷ and his criminal responsibility is

⁸⁸⁵ MPICC Report (n 515) 13.

⁸⁸⁶ MPICC Report (n 515) 13.

⁸⁸⁷ MPICC Report (n 515) 13.

contingent on the existence of an unlawful act intentionally committed by the perpetrator.⁸⁸⁸ This difference is also reflected in the operative provisions of judgments where the verdict specifically mentions either abetment or assistance to denote participation in the act of another.⁸⁸⁹

The distinction between principals and accessories also has significant practical consequences.⁸⁹⁰ For instance, the rules for attempts under Sections 22 to 24 of the StGB only regulate the conduct of perpetrators whereas accessorial attempts are regulated under Section 30. Only attempted instigation is criminalised and there is an obligatory mitigation of punishment under Section 49(1); attempted aid remains unpunished.⁸⁹¹ As Section 27(2) makes clear, there is also an obligatory mitigation of punishment for the aider as compared to the perpetrator. This is based on the reasoning that the aider merely renders help to an actor who is already committed to carrying out an unlawful act.⁸⁹²

The basis of accessorial responsibility in German criminal law mirrors the conventional account of accomplice liability in English criminal law – the accessory's liability derives from the main act of the perpetrator. However, unlike the traditional requirement in English law of an 'offence' by principal P which forms the basis of accessory D's criminal liability, German law is based on the doctrine of 'limitierte Akzessorietät' which signals the limited dependence of accessorial liability on the main offence. Thus, D's liability derives from the unlawful act of P⁸⁹³ and his

⁸⁸⁸ MPICC Report (n 515) 13.

⁸⁸⁹ MPICC Report (n 515) 14.

⁸⁹⁰ MPICC Report (n 515) 15.

⁸⁹¹ MPICC Report (n 515) 11.

⁸⁹² MPICC Report (n 515) 11.

⁸⁹³ Bohlander (n 258) 168; *Leipziger Kommentar* (n 517) 1977.

culpability is assessed separately from that of P under Section 29 of the StGB.⁸⁹⁴ Consequently, if the main act by P is not intentional, or is justified, or does not fulfil the elements of the offence, D will not be liable. Conversely, if P only lacks culpability and is excused, D can still be subject to criminal responsibility.⁸⁹⁵

The principle of ‘limitierte Akzessorietät’ does not however explain fully the rationale behind the criminal responsibility of accessories which has been the subject of fierce debate amongst German commentators. Five main theories have been put forward, three of which endorse a complete independence of the accessorial conduct from that of the perpetrator: the doctrine of participation in guilt, the doctrine of solidarity with wrongfulness, and the pure causation theory. The fourth, accessory-oriented-causation theory, considers the accessory to have caused the perpetrator’s behaviour, which makes him criminally responsible. The fifth is the doctrine of ‘accessorial attack on the legally protected interest’, and it combines elements of both these approaches. I will deal with each of these in turn.

Under the doctrine of participation in guilt or culpability, the accessory’s criminal responsibility stems from the fact that he corrupts the perpetrator and entangles him in culpable conduct.⁸⁹⁶ The pure version of this theory is clearly rejected by the positive law which does not require the existence of a culpable main act for accessorial liability.⁸⁹⁷ A modified guilt participation doctrine has been proposed by Trechsel who views the reason for the accessory’s liability in his having involved the perpetrator in wrongful acts. This does not mean the perpetrator is culpable – as in the case of causing a not recognizably insane person to commit an offence – but the

⁸⁹⁴ **Section 29, StGB.** Every participant shall be punished according to his own guilt irrespective of the guilt of the other. *Schwerpunkte* (n 512) 197.

⁸⁹⁵ *Schwerpunkte* (n 512) 197; MPICC Report (n 515) 34-35; *Leipziger Kommentar* (n 517) 1977.

⁸⁹⁶ *Leipziger Kommentar* (n 517) 1973; Roxin, TT (n 536) 133.

⁸⁹⁷ *Leipziger Kommentar* (n 517) 1973; Roxin, TT (n 536) 133.

accessory's actions still lead to the perpetrator being subjected to a criminal investigation and in some cases, to the imposition of sanctions.⁸⁹⁸ This modified theory does not however account for the standard case of aiding, where the perpetrator is already resolved to commit an unlawful act.⁸⁹⁹ It also severely understates the role of the perpetrator in the commission of an offence – the perpetrator is not a victim but an independent person responsible for his own acts and decisions; he cannot make the accessory a scapegoat for his conduct.⁹⁰⁰ Quite similar to the agency rationale for accessorial liability in English law, the guilt participation theory risks reversing the relationship between the perpetrator and the accomplice such that the accomplice becomes the central figure in the commission of the crime.

Another theory that emphasises the independent wrongfulness of the accessorial act is the doctrine of showing solidarity with the wrongfulness of a third party. According to Schumann, the accessory's culpability lies in his solidarity as manifested by his intentional contribution to the unlawful act of a third party; the accessory thus makes common cause with the unlawful act of the perpetrator.⁹⁰¹ The solidarity theory avoids some of the pitfalls of the guilt participation theory. It emphasises that the measure of wrongfulness of the solidarity depends on the object of reference of the act of solidarity, hence tying the punishment frame of the accessorial act to that of the main act.⁹⁰² It is also able to tackle the problem of over expansion of punishability – situations like neutral everyday actions (like the sale of a screwdriver to a person who

⁸⁹⁸ *Leipziger Kommentar* (n 517) 1973; Roxin, TT (n 536) 133.

⁸⁹⁹ *Leipziger Kommentar* (n 517) 1973; Roxin, TT (n 536) 133.

⁹⁰⁰ Roxin, TT (n 536) 134.

⁹⁰¹ *Leipziger Kommentar* (n 517) 1976; Roxin, TT (n 536) 134.

⁹⁰² Roxin, TT (n 536) 135.

uses it to commit theft) would not be punishable as aid for lack of solidarity with the perpetrator.⁹⁰³

Nonetheless, this theory does not adequately explain the rationale for the accessory's punishment as it lacks reference to the role played by the accessory in the fulfilment of the elements of an offence.⁹⁰⁴ If D instigates P to commit a murder, his criminal responsibility stems from the death of the victim, and not merely from his solidarity with P.⁹⁰⁵ It also does not describe accurately the relation between D and P in many cases. Even if D exclusively pursues his own interests in instigating P, he should still be liable as an instigator. Similarly, the fact that D aids P in exchange for a small fee and is quite indifferent to or even disapproving of the main act carried out by P does not affect his liability as an aider.⁹⁰⁶

Yet another representative of the independence of the accessorial wrongfulness doctrines is the pure causation theory under which the accessory is responsible, independent of the perpetrator's act, for the result of the elements of the offence intentionally caused by him.⁹⁰⁷ In its most radical form represented by Lüderssen, accessorial responsibility is dependent on whether the legal interest protected by the elements of the offence is protected against injury by the accessory. If that is the case, the accessory will be liable despite the lack of an appropriate main act by the perpetrator.⁹⁰⁸ Thus, for example, secondary participation in suicide will be punishable since the life of the victim is protected against all third parties, even if the victim cannot realise the elements of the offence (of suicide, which is not

⁹⁰³ *Leipziger Kommentar* (n 517) 1976; Roxin, TT (n 536) 135.

⁹⁰⁴ *Leipziger Kommentar* (n 517) 1976; Roxin, TT (n 536) 135.

⁹⁰⁵ Roxin, TT (n 536) 135.

⁹⁰⁶ Roxin, TT (n 536) 135.

⁹⁰⁷ Roxin, TT (n 536) 131.

⁹⁰⁸ *Leipziger Kommentar* (n 517) 1974; Roxin, TT (n 536) 131.

criminalised) in his own person.⁹⁰⁹ It is difficult to see why the pure causation theory has any purchase amongst commentators, given its irreconcilability with Sections 26 and 27 of the StGB which incorporate the principle of limitierte Akzessorietät.⁹¹⁰ It also leads to an unjustified expansion of the range of punishability by its relinquishment of the connection between the wrongfulness of the main act and the wrongful conduct of the accessory.⁹¹¹

The theory which corresponds to the current majority opinion and also finds approval by the BGH is the doctrine of accessory-oriented-causation which bases D's punishability on his causation of P's intentional and unlawful conduct.⁹¹² For Jescheck, the wrongfulness of D's act consists in his participation in the injury to a norm brought about by P. The wrongfulness of D's act is thus dependent on the reason and measure of the wrongfulness of the main act.⁹¹³ The doctrine therefore rejects all theories that proceed from the independence of the wrongfulness of the accessorial conduct.⁹¹⁴ Lackner/Kühl summarise the predominant view thus: the instigator and aider facilitate and/or co-cause the unlawful act committed by the perpetrator.⁹¹⁵ The accessory-oriented-causation theory, which resembles the doctrine of causation and derivative liability in English law, certainly accords with the principle of limitierte Akzessorietät in Sections 26 and 27.⁹¹⁶ It cannot however explain certain aspects of the positive law, such as the impunity of the agent

⁹⁰⁹ *Leipziger Kommentar* (n 517) 1974.

⁹¹⁰ *Leipziger Kommentar* (n 517) 1974-75; Roxin, TT (n 536) 131.

⁹¹¹ *Leipziger Kommentar* (n 517) 1975; Roxin, TT (n 536) 131.

⁹¹² *Leipziger Kommentar* (n 517) 1975; Roxin, TT (n 536) 136.

⁹¹³ *Leipziger Kommentar* (n 517) 1975; Roxin, TT (n 536) 136.

⁹¹⁴ Roxin, TT (n 536) 136.

⁹¹⁵ *Leipziger Kommentar* (n 517) 1975; Roxin, TT (n 536) 136.

⁹¹⁶ *Leipziger Kommentar* (n 517) 1975; Roxin, TT (n 536) 136.

provocateur⁹¹⁷ or the non criminalisation of neutral actions (as aid) even though such cases represent the causing of a punishable main act in an accessorial manner.⁹¹⁸

It is for this reason that Roxin states that the accessory-oriented-causation theory represents a necessary but not sufficient condition for the reason for secondary responsibility.⁹¹⁹ He develops the doctrine of secondary participation as an accessorial attack on the legally protected interest which proceeds partly from the independence of the accessorial wrong and partly from its connection to the wrongfulness of the main act.⁹²⁰ It is derivative in that the intentional wrong committed by the perpetrator is attributed to the accessory. It is however also independent to the extent that this attribution is only possible when the accessory's conduct also represents an independent attack on the protected legal interest.⁹²¹ Thus, D who requests P to kill him but survives cannot be punished as an instigator because his life is not protected against attack by his own person (suicide is not criminalised).⁹²² This also justifies the impunity of the agent provocateur recognised in the law, since his action is not aimed at the fulfilment of the elements of the offence and thus not directed towards the injury of a protected legal interest.⁹²³ The doctrine overcomes some of the problems associated with all the above mentioned theories. It limits the range of criminal responsibility based on causal contribution by requiring an independent attack on the legal interest protected by the elements of the offence.⁹²⁴ At the same time, it emphasises the accessorial nature of accomplice liability and its nature as a secondary

⁹¹⁷ *Leipziger Kommentar* (n 517) 1976; Roxin, TT (n 536) 137.

⁹¹⁸ *Leipziger Kommentar* (n 517) 1976; Roxin, TT (n 536) 136, 137.

⁹¹⁹ Roxin, TT (n 536) 136.

⁹²⁰ Roxin, TT (n 536) 130-131; *Leipziger Kommentar* (n 517) 1972.

⁹²¹ Roxin, TT (n 536) 131; *Leipziger Kommentar* (n 517) 1971-72.

⁹²² *Leipziger Kommentar* (n 517) 1970.

⁹²³ *Leipziger Kommentar* (n 517) 1971.

⁹²⁴ *Leipziger Kommentar* (n 517) 1971.

concept to perpetration by deriving its unlawfulness from the wrong committed by the perpetrator.⁹²⁵

2 Instigation

According to Section 26 of the StGB, the instigator is someone who intentionally induces another person to commit an intentional and unlawful act. In this respect, instigation resembles assistance which also calls for an intentional and unlawful main act. However, in contrast with assistance, instigation is a more serious form of participation as the instigator is responsible for provoking the unlawful act resolution of the perpetrator whereas the aider merely assists a person who is already decided on committing an offence.⁹²⁶ The instigator is thus jointly responsible (along with the perpetrator) for the causing of the act resolution, which justifies a higher punishment than that of the aider.⁹²⁷ Instigation has the following objective and subjective elements:

a. The instigator must 'induce' the perpetrator to commit an unlawful act

Consensus exists over the requirement that the instigation by the abettor D must be causal or at least co-causal for the perpetrator P's decision to commit the unlawful act.⁹²⁸ The question then is whether any inducement that is causal for P's act resolution would qualify as instigation or must D influence P's will in some fashion?⁹²⁹ This issue has proved most controversial in cases where D's conduct merely leads to a situation that could provoke an unlawful act by P. For instance, can a thief who leaves money or jewellery on his trail to slow down his pursuers be guilty

⁹²⁵ *Leipziger Kommentar* (n 517) 1971-72.

⁹²⁶ MPICC Report (n 515) 36-37.

⁹²⁷ *Leipziger Kommentar* (n 517) 1986-87; see Schönke/Schröder, *Strafgesetzbuch: Kommentar* (27 Aufl, C.H. Beck 2006) 543 (hereinafter *Sch/Sch*).

⁹²⁸ *Leipziger Kommentar* (n 517) 1991 and references therein.

⁹²⁹ *Sch/Sch* (n 927) 543-44.

of instigating theft? Similarly, can a man who tells a bad tempered husband that his wife is having an affair and supplies him with the name and address of the paramour be liable for abetting bodily injury?⁹³⁰ The situation also came up in a case before the BGH⁹³¹ (which unfortunately did not address this particular issue) where D raped V and then asked P who had been standing there and had not decided on also having sexual intercourse with V, 'do you want, too?'. P proceeded to also rape V. The BGH held D guilty of abetting the rape on the basis that he had a conditional intent to instigate. As commentators have pointed out, the BGH should first have considered whether a mere question, in the absence of factors such as peer pressure on P to prove his manhood, could suffice for instigation.⁹³²

Some authors would hold D liable as an instigator in such situations lest more refined and subtle ways of inducement that still have some influence on P go unpunished.⁹³³ This interpretation however stretches the range of conduct covered by instigation a little too far. Unlike a concrete act of inducement, the mere creation of an act provoking situation is in some ways too close to everyday life situations that may potentially tempt a person into committing an offence.⁹³⁴ It also belies the rationale for secondary responsibility as an independent attack on the legally protected interest by the accessory. This would more readily be present in more direct cases of inducement by the accessory where there is a concrete communicative influence by D on P.⁹³⁵ Moreover, it makes the link between the conduct of the accessory and the

⁹³⁰ See *Leipziger Kommentar* (n 517) 1987; Roxin, TT (n 536) 153.

⁹³¹ BGH GA 1980, 183.

⁹³² Bohlander (n 258) 169; *Leipziger Kommentar* (n 517) 2002; Roxin, TT (n 536) 155.

⁹³³ *Leipziger Kommentar* (n 517) 1987.

⁹³⁴ *Leipziger Kommentar* (n 517) 1987-88; Roxin, TT (n 536) 153.

⁹³⁵ *Leipziger Kommentar* (n 517) 1988; *Sch/Sch* (n 927) 544.

unlawful act ultimately committed too tenuous to justify the equal punishment meted out to the perpetrator and the instigator.

On the other end of the spectrum, some authors demand that the communicative influence should reach the level of a collusive agreement between the instigator and the perpetrator.⁹³⁶ Puppe calls this a ‘wrongfulness pact’ whereby P enters into an agreement with D who extracts a promise or obligation from P that he will commit the unlawful act. This agreement is not legally binding, but is factually so.⁹³⁷ Thus, instigation exists if in the event that D had withdrawn from the common wrongful pact, P would have also renounced the act.⁹³⁸ This doctrine however hardly accords with the wording of Section 26. ‘Obligating’ P is different from ‘inducing him’ to commit an act: causing someone to reach the decision to commit an unlawful act through skilful persuasion is inducement and hence instigation – it still does not reach the level of an obligation.⁹³⁹ On the other hand, if D gives P some money to beat up V who P had already decided to injure for personal reasons, this may count as an obligation, though not, as we shall see in the following sub-section, incitement (as P is already resolved to commit the act).⁹⁴⁰ Further, similar to the guilt participation doctrines, the requirement of an obligation transforms the relationship between P and D and turns D into the dominant party in the relationship by making P’s conduct contingent on his actions.⁹⁴¹ This cannot be reconciled with the notion of the perpetrator as the central character in the course of events constituting the offence. It is also not borne out in practice: the instigator may simply set in course a chain of

⁹³⁶ *Leipziger Kommentar* (n 517) 1989.

⁹³⁷ *Leipziger Kommentar* (n 517) 1989.

⁹³⁸ *Leipziger Kommentar* (n 517) 1989.

⁹³⁹ See *Leipziger Kommentar* (n 517) 1990; Roxin, TT (n 536) 152.

⁹⁴⁰ Roxin, TT (n 536) 152.

⁹⁴¹ For a somewhat similar argument, see *Leipziger Kommentar* (n 517) 1990; Roxin, TT (n 536) 157.

events over which he may later have no influence⁹⁴² – after the initial spark, P's actions may therefore be entirely independent of D's wishes and not based on any sense of an obligation or agreement.

A more promising middle course is charted by the dominant doctrine of intellectual or mental contact which requires that the instigator must influence the will of the perpetrator through overt intellectual or mental contact.⁹⁴³ This would involve inciting P to commit the main act such that it opens the possibility that P makes the incitement (in addition to his other motives and reasons) a basis for his act resolution.⁹⁴⁴ In addition however, D's statement that mentally influences P must have an objectively inciting character.⁹⁴⁵ For instance, if D simply reports to P about similar unlawful acts committed by others, this would not qualify as instigation even if he took into account the possibility that P may be incited by his description.⁹⁴⁶ Appropriate means of influencing P's will may include express statements in the form of commissioning, persuasion, or promises of rewards or gifts, or more subtle ones such as suggestions or questions.⁹⁴⁷

b. The perpetrator must be able to be induced

Since the instigation must be causal for the perpetrator's act resolution, one cannot instigate a perpetrator who is already resolved on committing the unlawful act (the so called *omnimodo facturus*). In such cases, only psychological aid or attempted instigation (Section 30, StGB) comes into question.⁹⁴⁸ This boundary between

⁹⁴² *Leipziger Kommentar* (n 517) 1990; Roxin, TT (n 536) 158.

⁹⁴³ *Schwerpunkte* (n 512) 203; *Leipziger Kommentar* (n 517) 1987.

⁹⁴⁴ *Schwerpunkte* (n 512) 203.

⁹⁴⁵ *Leipziger Kommentar* (n 517) 1988; Roxin, TT (n 536) 155.

⁹⁴⁶ *Leipziger Kommentar* (n 517) 1988; Roxin, TT (n 536) 155.

⁹⁴⁷ *Schwerpunkte* (n 512) 203; *Leipziger Kommentar* (n 517) 2002; *Sch/Sch* (n 927) 544.

⁹⁴⁸ *Schwerpunkte* (n 512) 203; *Leipziger Kommentar* (n 517) 1992.

psychological aid and instigation however requires further clarification since one cannot insist on P's absolute certainty that he will commit the act – the provision for withdrawal (Section 24, StGB) clearly accounts for the perpetrator changing his mind.⁹⁴⁹ Commentators have therefore suggested that when the reasons and motives pushing towards the commission of a crime have attained a clear predominance in P's psyche, he cannot be further instigated.⁹⁵⁰ Thus, if P is still in two minds about the commission of the act or has serious misgivings about embarking on it, D who persuades him to carry it out can still be held liable as an instigator.⁹⁵¹ However, if P is more or less resolved to commit the act and only has last minute doubts, D will in all likelihood be liable only as an aider.⁹⁵² Given the obligatory mitigation of punishment for aid as compared to instigation, this guideline, while helpful, is not as precise as one would wish.

Problems arise in situations where D instigates P to commit an act other than the one he is resolved to commit. Three categories of cases come up most frequently: *The Umstiftung*. This category refers to cases where D induces P to commit a different act from the one he planned. The controversial issue here is whether this change represents the causing of a new act resolution and hence instigation or whether the change constitutes only a modification of the existing act plan and thereby aid.⁹⁵³ The change can concern the perpetrator, the elements of the offence, the object of the act, the motive for the act, or the means for carrying out the act.⁹⁵⁴

⁹⁴⁹ *Leipziger Kommentar* (n 517) 1992; Roxin, TT (n 536) 150.

⁹⁵⁰ *Leipziger Kommentar* (n 517) 1992; Roxin, TT (n 536) 150.

⁹⁵¹ *Leipziger Kommentar* (n 517) 1992; *Sch/Sch* (n 927) 544-45.

⁹⁵² *Leipziger Kommentar* (n 517) 1992; Roxin, TT (n 536) 150.

⁹⁵³ *Leipziger Kommentar* (n 517) 1993.

⁹⁵⁴ Roxin, TT (n 536) 158.

Commentators are unanimous that causing a change of the perpetrator qualifies as instigation rather than aid on the basis that changing the concrete perpetrator always changes the act. Thus, if D persuades A instead of B to commit the same terrorist attack on an airplane, he would be responsible not as an aider, but as an instigator.⁹⁵⁵ For the same reason, a change in the elements of the offence also represents instigation rather than aid- if D persuades P who wants to cause bodily injury to V to instead destroy V's car, he is liable as an instigator for damage to the property. This applies even if the elements of the offence protect the same legal interest (for instance, in the case of extortion and fraud).⁹⁵⁶

In cases of causing a change in the object of the act, the criterion of 'plan domination' proposed by Schulz has been quite widely accepted – if D charts a new plan through changing the act object targeted by P, then he qualifies as an instigator; if his conduct merely inserts itself into or improves P's existing plan, he is an aider.⁹⁵⁷ In a case situation widely cited in German criminal law textbooks, if P wants to steal whisky to entertain his guest, and D induces him to steal vodka instead since that is more to the guest's taste, D is only an aider. On the other hand, if D induces P to steal the vodka and sell it for his own profit and meanwhile entertain the guest with beer, then he is liable as an instigator to the theft since he promotes an entirely new plan.⁹⁵⁸ However, as Roxin states, the evaluation of what counts as a new plan and what can be considered as a mere insertion into an existing plan can be fairly subjective.⁹⁵⁹ Also, Schulz's criterion of plan domination is not quite an accurate description of the

⁹⁵⁵ *Leipziger Kommentar* (n 517) 1993; Roxin, TT (n 536) 159.

⁹⁵⁶ *Leipziger Kommentar* (n 517) 1993; Roxin, TT (n 536) 159.

⁹⁵⁷ *Leipziger Kommentar* (n 517) 1993; Roxin, TT (n 536) 159.

⁹⁵⁸ *Leipziger Kommentar* (n 517) 1993; Roxin, TT (n 536) 160.

⁹⁵⁹ Roxin, TT (n 536) 160.

instigator's role here –D merely induces the changed plan and does not have control over it; what P ultimately does is his own decision.

Causing a bare change of motive or mode of commission (for the same act) are classified as aiding rather than abetting. So for instance if D persuades P to steal the whisky in the above example for the purpose of selling it rather than entertaining his guests as originally planned, he will only be an aider, since the concrete act of theft as such remains the same.⁹⁶⁰ Similarly, if D gives a master key to P who intends to break into a house with a screwdriver, he will be liable for assistance.⁹⁶¹

The Abstiftung. If D induces P to commit a less grave crime than he intended (for instance, theft (Section 242, StBG) instead of theft with weapons (Section 244, StBG))⁹⁶² then he is not liable for instigating the less serious offence. This is because the act resolution for the basic offence is encompassed within P's resolution for the more serious offence.⁹⁶³ This is also the case when D persuades P to inflict a smaller injury within the same elements of the offence – for instance, steal a hundred Euros instead of the planned thousand.⁹⁶⁴ In such cases, D may not be liable even as an aider since he actually causes a reduction of the risk in relation to the protected legal interest and hence cannot be attributed with the result of the elements of the offence.⁹⁶⁵ D would still be responsible on account of assistance if he only wanted to make the commission of the offence easier through the choice of a less dangerous form of commission (for example a blunt and silent instrument for robbery rather than

⁹⁶⁰ *Leipziger Kommentar* (n 517) 1994; Roxin, TT (n 536) 161.

⁹⁶¹ *Leipziger Kommentar* (n 517) 1994; see Roxin, TT (n 536) 161.

⁹⁶² *Leipziger Kommentar* (n 517) 1994.

⁹⁶³ *Leipziger Kommentar* (n 517) 1994; Roxin, TT (n 536) 151.

⁹⁶⁴ *Leipziger Kommentar* (n 517) 1994; Roxin, TT (n 536) 151.

⁹⁶⁵ *Leipziger Kommentar* (n 517) 1994; Roxin, TT (n 536) 151.

noisy firearms) because in this case, while the risk of harm is reduced, the risk of successful commission is increased.⁹⁶⁶

The Übersteigerung or Aufstiftung. The most controversial cases concern situations where D persuades P to commit a more serious offence than the one he intends – for instance beating V black and blue instead of simply administering a slap.⁹⁶⁷ The BGH addressed this issue in a case⁹⁶⁸ where P who had decided to commit a robbery was induced by D to carry along a club with which he struck the victim unconscious, resulting in aggravated robbery (under Section 250, StGB) instead of simple robbery (Section 249, StGB). The BGH held P liable as an instigator on the basis that due to the use of a club, the measure of wrongfulness of the main act had been considerably increased as compared to the planned one.⁹⁶⁹ One trend in the jurisprudence rejects this analysis using the ‘analytical separation principle’ whereby instigation can only exist in relation to that part of the elements of the offence in relation to which P was not already resolved.⁹⁷⁰ Thus, if in the above case, P had already decided to commit injury (through his bodily strength) then the persuasion to carry a club would only be aid since the qualifying circumstance is not independently punishable as a separate offence.⁹⁷¹ If, on the other hand, P only intended to use threats to commit the robbery, then D would be guilty as an instigator to the injury and only as an aider to the robbery.⁹⁷² If D induces P who wants to commit a theft to instead commit a robbery (with force), then he will be guilty of instigation to the use

⁹⁶⁶ *Leipziger Kommentar* (n 517) 1995; Roxin, TT (n 536) 151.

⁹⁶⁷ *Leipziger Kommentar* (n 517) 1995.

⁹⁶⁸ BGHSt 19, 339.

⁹⁶⁹ *Leipziger Kommentar* (n 517) 1995; Roxin, TT (n 536) 162.

⁹⁷⁰ *Leipziger Kommentar* (n 517) 1996; Roxin, TT (n 536) 162.

⁹⁷¹ *Leipziger Kommentar* (n 517) 1996; Roxin, TT (n 536) 162.

⁹⁷² *Leipziger Kommentar* (n 517) 1996; Roxin, TT (n 536) 162.

of force and aid to the robbery.⁹⁷³ The analytic separation principle is however difficult to accept because it ignores the insight that the whole is more than simply the sum of its parts – robbery is more than simply theft plus use of force or theft plus injury. To hold the instigator responsible only for an independent part of this offence understates his role in the offence ultimately committed.⁹⁷⁴

c. The intent of the instigator and requirement of determinateness

Similar to English law, the intent of the instigator has two aspects: it must exist in relation to his own act of instigation as well as with respect to the commission of the main act by the perpetrator.⁹⁷⁵ Intent to the extent of *dolus eventualis* is sufficient in both cases – D must consider as possible and accept the fact that his conduct will give rise to P's act resolution.⁹⁷⁶ In addition, he must possess *dolus eventualis* with respect to all essential objective and subjective elements of the offence as well as the circumstances that justify the punishment of the main act – that is, that the main act is unlawful and intentionally committed by P.⁹⁷⁷ According to the majority opinion, D's intent must be directed to the actual completion of the main act by P.⁹⁷⁸ Hence, D who instigates P to commit a theft and informs the police so that P is arrested in the attempt is not liable as an instigator.⁹⁷⁹

The instigator must intend to instigate a concrete perpetrator towards a concrete criminal act. To what extent the person of the perpetrator and the act need to be determinate is heavily disputed. For instance, the generic prompting to commit some

⁹⁷³ *Leipziger Kommentar* (n 517) 1996; Roxin, TT (n 536) 162.

⁹⁷⁴ *Leipziger Kommentar* (n 517) 1996; Roxin, TT (n 536) 162-63.

⁹⁷⁵ MPICC Report (n 515) 39; *Schwerpunkte* (n 512) 204.

⁹⁷⁶ MPICC Report (n 515) 39; *Leipziger Kommentar* (n 517) 2004.

⁹⁷⁷ MPICC Report (n 515) 39; *Leipziger Kommentar* (n 517) 2005.

⁹⁷⁸ MPICC Report (n 515) 41; *Schwerpunkte* (n 512) 205.

⁹⁷⁹ *Schwerpunkte* (n 512) 205; *Leipziger Kommentar* (n 517) 2012.

general criminal act cannot be classified as instigation, because the connection between the offence ultimately committed and the prompter is too attenuated to justify punishment equal to that of the perpetrator.⁹⁸⁰ The element of steering or inducement that proves causal for the perpetrator's act requires that the instigator must have a more exact conception of the offence in question.⁹⁸¹ An early decision of the Reichsgericht (RGSt 1,110 f) confirms this: D had remarked to P who was a domestic helper that it is stupid of one to not use such an opportunity to secretly make money. The RG absolved D of liability for instigation for misappropriation as it was unclear to which elements of the offence the instigation was directed. Thus, the instigation must be with reference to specific offence elements.⁹⁸²

On the other hand, the instigator need not know precisely all the circumstances of the act, such as the time, place or method of execution.⁹⁸³ If D incites P to rob a supermarket, it hardly matters whether P does so on Monday or Tuesday and whether D knows the date and time. The BGH⁹⁸⁴ had occasion to address this issue in a case where P needed money in order to flee abroad. D had initially advised him to do so by selling some things, and when this proved impractical, remarked, 'then you would have to rob a bank or a gas station'. P made no reply to this, but committed a bank robbery worth 40,000 DM two days later. The BGH rejected D's liability for instigation on the ground that the act picture was indefinite due to the lack of any individualising circumstances (object, place, time and other circumstances of the act execution). This was despite the fact that the elements of the offence (robbery) and the objects of the act (bank or gas station) had been specified. It held that while the

⁹⁸⁰ See *Schwerpunkte* (n 512) 204; Roxin, TT (n 536) 173.

⁹⁸¹ *Sch/Sch* (n 927) 547.

⁹⁸² Roxin, TT (n 536) 165, 173.

⁹⁸³ *Schwerpunkte* (n 512) 204; *Sch/Sch* (n 927) 547.

⁹⁸⁴ BGHSt 34 63.

instigator does not need to know every detail of the offence committed, he must be aware of the circumstances that make the act recognisable as a concrete particularised happening. What exactly those circumstances must be depends on the individual case and cannot be outlined in the abstract.⁹⁸⁵

An alternative to the BGH's determinacy criterion has been proposed by commentators who argue that liability for instigation would arise if the intent of the instigator is directed towards certain elements of the offence and encompasses the 'essential dimensions' of the wrongfulness of the main act.⁹⁸⁶ These essential dimensions include the approximate degree of the harm and the type and manner of injury on the planned object of the act.⁹⁸⁷ Thus in the case above, D had intent with respect to all three – the elements of the offence (robbery), the extent of injury (he knew how much money the perpetrator needed), and the manner and type of attack (an attack on a savings bank or gas station).⁹⁸⁸ The BGH rejects this approach on the ground that a focus on a generally abstract 'wrongfulness dimension' weakens the ties between the act of instigation and the main act. This makes it difficult to justify the culpability of the instigator and his identification with the act of the perpetrator.⁹⁸⁹ This criticism however ignores the fact that this wrongfulness dimension must exist in the context of concrete elements of the offence.⁹⁹⁰

In fact, it is not the criterion of 'essential dimensions of wrongfulness', but the BGH's own approach that falls victim to the charge of abstraction. Leaving the decision of which individualising elements suffice to demarcate the concrete act to the

⁹⁸⁵ See *Leipziger Kommentar* (n 517) 1997-78; Roxin, TT (n 536) 173.

⁹⁸⁶ *Leipziger Kommentar* (n 517) 1998; Roxin, TT (n 536) 174.

⁹⁸⁷ Roxin, TT (n 536) 174.

⁹⁸⁸ Roxin, TT (n 536) 174. The instigation would still fail on the ground that the statement did not have an objectively inciting character: *Leipziger Kommentar* (n 517) 1999.

⁹⁸⁹ *Leipziger Kommentar* (n 517) 1998; Roxin, TT (n 536) 175.

⁹⁹⁰ *Leipziger Kommentar* (n 517) 1998; Roxin, TT (n 536) 175.

discretion of the judges is open to attack for lack of legal certainty.⁹⁹¹ Some of the individualising features mentioned by the BGH also seem quite irrelevant to the determination of culpability – whether P robs branch X or Y of a bank, or whether he commits the robbery today or tomorrow, should have no bearing of the liability of D as an instigator to the bank robbery.⁹⁹² Neither does the BGH’s doctrine fit the reality of organised crime – the leader of a terrorist group who instructs its members to rob a bank to procure funds for the group should not escape liability merely because he left it to his minions to decide which bank they would target and when.⁹⁹³

Commentators agree that prompting an indeterminate and undefined group of people to commit a crime will not suffice for instigation.⁹⁹⁴ Agreement also exists over the fact that it is not necessary to induce a determinate individual as long as one person in a determinate group is incited. For instance, if D tells a group of 5 people ‘whoever amongst you beats X will receive 500 Euros from me’, he will be liable as an instigator if one of them commits the act.⁹⁹⁵ Between these two extremes, what level of determinateness is required of the addressee is heavily disputed. A convincing guideline has been put forward by Rogall and partly accepted in the literature – as long as D can determine the perpetrator without excessive difficulty and potentially induce him to commit the unlawful act, he will be liable for instigation.⁹⁹⁶ This standard is based on the steering potential exercisable by D⁹⁹⁷ and accords with the rationale for instigation liability in German criminal law.

⁹⁹¹ See *Leipziger Kommentar* (n 517) 1999; Roxin, TT (n 536) 175-76.

⁹⁹² *Leipziger Kommentar* (n 517) 1998; Roxin, TT (n 536) 175.

⁹⁹³ See *Leipziger Kommentar* (n 517) 1998; Roxin, TT (n 536) 175.

⁹⁹⁴ MPICC Report (n 515) 39; *Leipziger Kommentar* (n 517) 2000; *Sch/Sch* (n 927) 547.

⁹⁹⁵ MPICC Report (n 515) 39; *Leipziger Kommentar* (n 517) 2000; *Sch/Sch* (n 927) 547.

⁹⁹⁶ *Leipziger Kommentar* (n 517) 2001; Roxin, TT (n 536) 179.

⁹⁹⁷ *Leipziger Kommentar* (n 517) 2001.

d. The Equivalence of the Instigator's Intent and the Perpetrator's Act

D's intent determines the extent of his responsibility for the unlawful main act of the perpetrator. If P goes beyond the act intended by D, D cannot normally be attributed with this excess of P. Thus, if D instigates P to cause injury to V and P kills V instead, D can only be liable for the injury that is realised as part of the murder.⁹⁹⁸ Disputes arise in cases where P commits a different act from that intended by D. The majority opinion endorses a standard of foreseeability akin to English criminal law in these cases: if D had taken into account the possibility of the deviation, he would be responsible for it.⁹⁹⁹ The jurisprudence however goes further and holds D responsible if he should have foreseen the deviation given the circumstances of case.¹⁰⁰⁰ This test of objective foreseeability is similar to the old English test in cases of joint enterprise liability and is wider than the prevalent test of subjective foresight in English law. The justification appears to be that the intent requirement for instigation is far less rigid than that for co-perpetration or indirect perpetration since in the typical case of instigation, the instigator leaves the details of the act execution in the hands of the perpetrator.¹⁰⁰¹ The scope of the liability is limited however in important ways, in that the instigator is not responsible for deviations that are significant, such as deviations in the elements of offence.

As compared to English law, there is also a surprising lack of debate on what would count as a significant deviation. Roxin refers quite briefly to cases of deviation that would be relevant to instigation liability. Similar to English law, deviations in the details of the act execution, such as a change in the modality of execution (a theft is

⁹⁹⁸ *Sch/Sch* (n 927) 549.

⁹⁹⁹ MPICC Report (n 515) 40.

¹⁰⁰⁰ MPICC Report (n 515) 40.

¹⁰⁰¹ *Schwerpunkte* (n 512) 205.

committed by means of a truck instead of a van) or the motive for the act (robbing a bank for private gain instead of supporting a terrorist organisation) have no bearing on the responsibility of the instigator. Such specific conditions are often not strictly planned or left open or make no significant difference to the ultimate outcome.¹⁰⁰² On the other hand, deviations in the object of the act (P beats X instead of Y as intended by D) or the elements of the offence (D instigates P to commit theft but P commits fraud) cannot be attributed to the instigator. This is because in the first case, P realises a wholly different plan from that instigated by D, while in the second, D's intent has reference to different elements of the offence.¹⁰⁰³ Roxin uses the dimension of wrongfulness to distinguish cases of excess that concern the type and quantity of wrongfulness within the same elements of the offence. If P's act falls within the measure and type of injury to the protected legal interest intended by D, he can be attributed with responsibility for it.¹⁰⁰⁴ If D incites P to clear out the window display of a jewellery shop and P plunders the entire shop instead, D is liable for instigation as P's act falls within the wrongfulness dimension of the act instigated by D. The 'lesser' intent of D and P's 'excess' is taken into account during the sentencing stage.¹⁰⁰⁵

The discussion on excess in German criminal law has centred on cases of *error in persona vel obiecto* by P and how this would affect D's liability. The question was first considered by the Prussian Upper Tribunal in the Rose-Rosahl case¹⁰⁰⁶ where the trader Rosahl instigated his employee to shoot his creditor Schliebe. Rose lay in wait for Schliebe but in the faint light of dawn, mistakenly took the victim for

¹⁰⁰² *Leipziger Kommentar* (n 517) 2015; Roxin, TT (n 536) 164-165.

¹⁰⁰³ Roxin, TT (n 536) 165.

¹⁰⁰⁴ *Leipziger Kommentar* (n 517) 2015-16; Roxin, TT (n 536) 166.

¹⁰⁰⁵ Roxin, TT (n 536) 166.

¹⁰⁰⁶ GA 1859 322. For a summary of the case, see *Leipziger Kommentar* (n 517) 2017.

Schliebe, and shot him dead. The court held that the *error in persona* was irrelevant for Rose and held him liable for murder. It also considered the mistake irrelevant in the case of Rosahl and held him responsible as an instigator. This dictum was affirmed by BGHSt 37, 214 (*Case of heir to the farm*)¹⁰⁰⁷ in a similar fact situation. The accused had instigated S to kill his son M by promising him a monetary reward. S, who was given a description of M and also shown a photograph, confused K for M in the dark and erroneously shot K. The BGH affirmed that this error was irrelevant for instigation liability unless the error was outside the boundaries of what was foreseeable as a matter of general life experience.

The view of the BGH is convincing in cases where D merely describes the intended victim V, and P desirous of following his instructions kills Y who has the misfortune of fitting the description. Here, the mental picture of the instigator corresponds in its substantial outlines to the perpetrator's act, as the instigator assumes that the perpetrator will kill the person who fits the given description.¹⁰⁰⁸ Difficulties arise in the hypothetical case put forward by commentators where P kills Y, realises his mistake and then lies in wait for V and shoots him as intended by D. In this scenario, somewhat dramatically referred to as the blood bath argument, the BGH would hold D responsible for both killings even though he committed only one act of instigation directed to the latter killing.¹⁰⁰⁹ Thus, some commentators suggest that D should be held liable either for attempted instigation (of the act intended by him) on the basis of normal rules of *aberratio ictus* or for instigating an attempt.¹⁰¹⁰ These opinions are however unpersuasive for pragmatic as well as doctrinal reasons. Since attempted

¹⁰⁰⁷ See discussion at Roxin, TT (n 536) 167, 169.

¹⁰⁰⁸ *Schwerpunkte* (n 512) 207; *Leipziger Kommentar* (n 517) 2019: *Sch/Sch* (n 927) 550.

¹⁰⁰⁹ *Schwerpunkte* (n 512) 206; *Leipziger Kommentar* (n 517) 2019.

¹⁰¹⁰ See references at *Leipziger Kommentar* (n 517) 2020.

instigation is punishable only in the case of crimes and not misdemeanours, this solution causes potential gaps in punishment. Likewise, an actual attack on the incorrect victim cannot simultaneously be evaluated as an attempted attack on the (absent) intended victim.¹⁰¹¹

3 Aid

Aid is intentional assistance to the intentionally committed unlawful act of another. Aiding is distinguished from co-perpetration on the basis that the aider lacks hegemony over the act and is a marginal figure who merely advances the unlawful act of another.¹⁰¹²

a. Causality and aid

In contrast with instigation which undisputedly requires a causal connection between the act of the instigator and the result of the offence, the causation requirement in the case of aiding is highly disputed.¹⁰¹³ If for instance D gives P a knife to kill V but P poisons him instead, can D be punished as an aider? In the leading decision on this issue in RGSt 58, 113ff (114/115), the Reichsgericht adopted the view that aiding does not require the causal promotion or facilitation of the *result of the elements of the offence*. Even if the aid has no influence on the result, D's conduct would still be considered aid if it actually promotes or facilitates the *act* of the perpetrator. The BGH has affirmed this holding.¹⁰¹⁴ This standard avoids difficulties in proof that arise with a causation requirement, especially in cases of psychological aid and aid through omissions.¹⁰¹⁵ It has however been convincingly criticised in the majority opinion in the literature. Since the act of the perpetrator is directed towards the realisation of the

¹⁰¹¹ *Schwerpunkte* (n 512) 206; *Leipziger Kommentar* (n 517) 2020.

¹⁰¹² MPICC Report (n 515) 41; *Schwerpunkte* (n 512) 208.

¹⁰¹³ See eg Roxin, TT (n 536) 192-97.

¹⁰¹⁴ BGH MDR (D) 1972, 16.

¹⁰¹⁵ *Sch/Sch* (n 927) 551 and references therein.

elements of the offence, it is difficult to see how D's assistance could promote P's act in the concrete circumstances of the case without having a causal effect on the result of the elements of the offence.¹⁰¹⁶

Indeed the BGH has mostly used it in cases where actual causality exists.¹⁰¹⁷ Thus the BGH¹⁰¹⁸ convicted the driver of a car as an aider because he continued to drive as instructed by two robbers in the car while they robbed a co-passenger such that the victim's screams could not be heard and there was no opportunity for a third party to intervene. The BGH evaluated the accused's continuing to drive as having 'facilitated' the commission of the act. However, the decision could as easily have been rendered using a causation analysis since the act of driving was clearly causal for the commission of the robbery.¹⁰¹⁹

The reluctance of the BGH to adopt a causation standard which is endorsed by the bulk of the academic commentary may arise from its understanding of the causation requirement in terms of a sine qua non condition for the result of the elements of the offence.¹⁰²⁰ This is not however the way the majority opinion treats causation. The standard is instead that the act contribution of the aider makes possible, facilitates, intensifies or secures the commission of the main act.¹⁰²¹ Thus, causation exists not only if without the assistance, the result would not have come about but also includes situations of 'modification causality' where the assistance (along with the act of the perpetrator) only affects the commission of the offence in some manner. This could for instance consist in handing a burglar a pair of gloves so

¹⁰¹⁶ *Leipziger Kommentar* (n 517) 2044; Roxin, TT (n 536) 194.

¹⁰¹⁷ *Leipziger Kommentar* (n 517) 2045; Roxin, TT (n 536) 194.

¹⁰¹⁸ BGH (DAR 1981, 226).

¹⁰¹⁹ *Leipziger Kommentar* (n 517) 2045.

¹⁰²⁰ See references at *Leipziger Kommentar* (n 517) 2030.

¹⁰²¹ MPICC Report (n 515) 42; *Leipziger Kommentar* (n 517) 2030.

that he can prise open a window more easily without leaving fingerprints. The deciding factor is whether the course of events was transformed through the act of assistance.¹⁰²² It is for this reason that the effect of the aid must be considered in the concrete circumstances of the case and no hypothetical situations may be taken into account.¹⁰²³ Thus, in the oft quoted example of D who carries a ladder to the scene of the crime for the burglar P, liability on account on assistance cannot be ruled out simply because P may well have carried the ladder himself. Any contrary holding would also make essential help rendered by D, such as supplying a master key to P, non punishable, if P could have procured it through other means.¹⁰²⁴

For the same reason, contributions that later prove to be superfluous would still be considered aid. Thus, D who acts as a lookout during a robbery would still be punished as an aider even if there was ultimately no occasion for him to sound an alarm. This is because the fact of his presence served *ex ante* to increase the chances of the result of the elements of the offence occurring and reduced the element of risk undertaken by the perpetrator.¹⁰²⁵ However, the effect of the aiding contribution must, at the very least, extend till the stage of attempt by the perpetrator - if while carrying the ladder to the house P plans to burgle, D sees a window in the house open from a distance and simply abandons the ladder, he will not be responsible for aiding P's burglary.¹⁰²⁶

A minority viewpoint in the literature also rejects the causality requirement and understands aid as an endangerment offence where D is liable as an aider if his contribution poses an abstract or concrete danger to the legal interest protected by the

¹⁰²² *Leipziger Kommentar* (n 517) 2030; Roxin, TT (n 536) 193.

¹⁰²³ *Leipziger Kommentar* (n 517) 2032; Roxin, TT (n 536) 193.

¹⁰²⁴ *Leipziger Kommentar* (n 517) 2032; *Sch/Sch* (n 927) 552.

¹⁰²⁵ *Leipziger Kommentar* (n 517) 2033; *Sch/Sch* (n 927) 552.

¹⁰²⁶ *Leipziger Kommentar* (n 517) 2032; *Sch/Sch* (n 927) 552.

elements of the offence.¹⁰²⁷ This doctrine is not very persuasive as it blurs the distinction between aid and non-punishable attempted aid.¹⁰²⁸ The nature of the abstract danger that would suffice for aid is also unclear: for instance, if D hands P a drink thus ensuring that P carries out a theft in a better frame of mind, would that count as an abstract dangerous contribution and thus aid?¹⁰²⁹ Moreover, treating aid as an independent endangerment offence uncouples the aider's conduct from the elements of the offence injured by the perpetrator. This cannot be reconciled with the general structure and reasoning behind secondary responsibility in German criminal law as an accessorial attack on the legally protected interest.¹⁰³⁰

b. The requirements of a causal risk-increase and psychological connection

According to the majority opinion, co-causation of the realisation of the elements of the offence is a necessary, but not sufficient, condition for responsibility as an aider.¹⁰³¹ Even contributions that P does not use at all can modify the manner and type of the act execution and hence be deemed co-causal – for instance, D gives the thief P a master key which P never even intended to use because he knew that the door was unlocked. A causal act contribution will only be punished as aid if it increases the risk for the victim and/or the chances of the result of the elements of the offence occurring.¹⁰³²

Thus, in the oft quoted example of whether D who gives P a drink can be adjudged an aider, the distinction turns on whether D's conduct represents an independent indirect attack on the legally protected interest through an intentional

¹⁰²⁷ See references at *Leipziger Kommentar* (n 517) 2045-46.

¹⁰²⁸ *Leipziger Kommentar* (n 517) 2030; *Sch/Sch* (n 927) 552.

¹⁰²⁹ *Leipziger Kommentar* (n 517) 2046; Roxin, TT (n 536) 196.

¹⁰³⁰ See *Sch/Sch* (n 927) 552.

¹⁰³¹ *Leipziger Kommentar* (n 517) 2030; Roxin, TT (n 536) 203.

¹⁰³² *Leipziger Kommentar* (n 517) 2031; Roxin, TT (n 536) 203.

increase in the chances that the legally impermissible result will occur. If D hands a beer to burglar P who is fatigued by his efforts to drill a hole through a bank vault so as to revive his strength, he increases the chances of the successful execution of the burglary and may be punished as an aider. On the other hand, if a sympathiser D passes on a glass of champagne to an illegal squatter P to celebrate his occupation of the house, this cannot be considered assistance to the squatting as this does not facilitate P's continuing to do so.¹⁰³³

Apart from co-causation and risk increase, an additional precondition for assistance liability is that either P is aware of D's act of assistance or that D's act is objectively recognizable as increasing the chances of success of P's act.¹⁰³⁴ D would be an aider if he prevents a policeman from approaching a house which P is burgling, even if P does not notice his aid.¹⁰³⁵ On the other hand, D's mere readiness to help P should the occasion arise would not be punished as aid, as this would amount to criminalising his attitude rather than his behaviour. Thus, if D, a colleague of pickpocket P, stands near the scene of the prospective theft without P's knowledge, and with the aim of creating a diversion to assist P if needed, he will not be punished as an aider despite the fact that his conduct increases the chance that P's act will be successful.¹⁰³⁶

c. Means of aid and psychological aid

Commentators and the jurisprudence recognise two main categories of aid: physical and intellectual. Physical aid consists of act contributions such as provision of a weapon or a tool used in the commission of the crime.¹⁰³⁷ Intellectual aid comprises contributions that influence the psyche of the perpetrator and the extent to which it is

¹⁰³³ *Leipziger Kommentar* (n 517) 2032; Roxin, TT (n 536) 203.

¹⁰³⁴ *Leipziger Kommentar* (n 517) 2034; Roxin, TT (n 536) 205.

¹⁰³⁵ *Leipziger Kommentar* (n 517) 2034; Roxin, TT (n 536) 205.

¹⁰³⁶ *Leipziger Kommentar* (n 517) 2034; Roxin, TT (n 536) 205.

¹⁰³⁷ MPICC Report (n 515) 42; Roxin, TT (n 536) 198.

punishable is heavily disputed.¹⁰³⁸ Relatively uncontroversial cases of intellectual aid are situations of ‘technical advice’ where D gives P advice that facilitates the act or makes it possible, for instance, detailed descriptions of the place where the crime is to be committed, or guidance on the best way to crack open a safe door.¹⁰³⁹ Cases of previous assistance that are directed towards making the potential subsequent prosecution of the perpetrator more difficult are also widely accepted as aid. Thus, D who hands P a face mask so that he would be unrecognizable during a robbery would be liable as an aider.¹⁰⁴⁰

Cases where D’s assistance merely reinforces or confirms P’s act resolution represent problematic cases of intellectual aid.¹⁰⁴¹ The opinions range from jurisprudence which accepts a fairly wide range of punishability on account of its renunciation of a causality requirement to authors who reject these cases as intellectual aid.¹⁰⁴² A persuasive middle ground is taken by commentators who argue that instances where the act resolution of the perpetrator is stabilised, intensified, or strengthened through provision of additional motivating factors would be punishable as aid. Bare expressions of solidarity with the perpetrator or approval of his actions would remain unpunished. In the former case, D’s actions are in fact co-causal for P’s final act resolution and thus also for the result of the elements of the offence.¹⁰⁴³ Thus, if P decides to carry out an abortion and D in addition gives her money to secure the execution of the act,¹⁰⁴⁴ he supplies her with an additional motive for its commission

¹⁰³⁸ *Leipziger Kommentar* (n 517) 2034; Roxin, TT (n 536) 198.

¹⁰³⁹ *Leipziger Kommentar* (n 517) 2034; *Sch/Sch* (n 927) 554.

¹⁰⁴⁰ *Leipziger Kommentar* (n 517) 2035; *Sch/Sch* (n 927) 555.

¹⁰⁴¹ MPICC Report (n 515) 42; Roxin, TT (n 536) 198.

¹⁰⁴² See references at *Leipziger Kommentar* (n 517) 2035-36.

¹⁰⁴³ *Leipziger Kommentar* (n 517) 2035; *Sch/Sch* (n 927) 555; Roxin, TT (n 536) 198-89, 200.

¹⁰⁴⁴ (RG HRR 1939, Nr.1275)

and reinforces the chances of the result occurring. The same holds true for D who cheers on P to hit the victim more violently than he had planned.¹⁰⁴⁵ The BGH has however gone further and held expressions of sympathy to constitute aid, for example, judging expressions of solidarity with illegal squatters as assistance to the injuries on policemen inflicted by them.¹⁰⁴⁶ In OLG Stuttgart NJW 1950,118 the court even held that the continuation of an illicit relationship with a married lover strengthens his decision to murder his wife and is therefore punishable as aid. It is difficult to see how these situations could possibly represent a causal indirect attack on the legally protected interest.¹⁰⁴⁷

The BGH's jurisprudence on aid through inactive presence or omissions has been inconsistent.¹⁰⁴⁸ In BGH StV 1982, 516, in the course of a return trip from Holland to Germany the accused had realised that the co-defendants in the car wanted to import heroin into Germany. He made protestations, but when the co-defendants outlined a plan to fool the border police, simply remained quiet. The 2nd senate of the BGH rejected liability for aiding on the ground that the possible strengthening of the act resolution of the co-defendants existed in the omission by the accused to voice an objection. This omission could not be punished in the absence of a specific duty to intervene. The 3rd senate however reached a different conclusion in a very similar scenario (BGH StV 1982, 517) where the accused who was a lawyer sat quietly while his two lawyer colleagues and three others planned an act of extortion while having a meal at a restaurant. The BGH held him liable as an aider as his silent presence constituted a promotion of the extortion, even though he could only have registered

¹⁰⁴⁵ *Leipziger Kommentar* (n 517) 2035; *Sch/Sch* (n 927) 555.

¹⁰⁴⁶ BGHZ 63,124, 130; Roxin, TT (n 536) 200.

¹⁰⁴⁷ See *Leipziger Kommentar* (n 517) 2052.

¹⁰⁴⁸ See discussion at *Leipziger Kommentar* (n 517) 2036; Roxin, TT (n 536) 200-01.

his disapproval by walking away or confronting his colleagues. The omission to do so should however have been punishable only if there was a positive duty on the part of the accused to leave or to protest.¹⁰⁴⁹

d. The intent of the aider and excess

The mens rea requirements for liability as an aider closely mirror those for abetment responsibility, with some important variations. Similar to the intent of the abettor, the aider's intent has a twofold component: it must be directed towards his own act of assistance to an intentional unlawful act of the perpetrator, and on the injury (by the perpetrator) to the legal interest protected by the elements of the offence.¹⁰⁵⁰ Since aid must be rendered intentionally, negligent aid does not suffice for liability. Conversely, *dolus directus* is not required and mere *dolus eventualis* would ground assistant liability.¹⁰⁵¹

Similar to English law, it is not necessary that D approves of or endorses P's act; if he is aware that his contribution will facilitate the main act, his personal misgivings or disapproval do not affect his liability.¹⁰⁵² If on the other hand the contribution is not suited to promoting P's act and D knows this, he will not incur responsibility.¹⁰⁵³ Since the aider's intent must be directed towards an actual injury to the protected legal interest by the perpetrator, he will not be liable if he intends that the act only reaches the stage of attempt. Thus, if D knows that P will not succeed in his act of theft because he has already informed the police about it, he is not an aider.¹⁰⁵⁴

¹⁰⁴⁹ *Leipziger Kommentar* (n 517) 2036; Roxin, TT (n 536) 201.

¹⁰⁵⁰ *Leipziger Kommentar* (n 517) 2054; *Sch/Sch* (n 927) 556.

¹⁰⁵¹ *Leipziger Kommentar* (n 517) 2054; *Sch/Sch* (n 927) 556.

¹⁰⁵² *Leipziger Kommentar* (n 517) 2054; *Sch/Sch* (n 927) 556.

¹⁰⁵³ *Leipziger Kommentar* (n 517) 2054; *Sch/Sch* (n 927) 556.

¹⁰⁵⁴ *Schwerpunkte* (n 512) 210.

While English law does not specifically distinguish between the determinateness requirements for the aider's intent as compared to the instigator's intent, German criminal law theory places less stringent requirements on the former. This is based on the rationale that the instigator is responsible for giving the initial impetus to the perpetrator's acts or provoking an act resolution, and must therefore be aware of the intended act, at least in its rough outlines. The aider in contrast only facilitates the already planned act stemming from the act resolution of the perpetrator.¹⁰⁵⁵ The majority opinion in the literature endorses a standard where the aider must be aware of the wrongfulness dimension and the direction of attack on the legally protected interest intended by the perpetrator. He may not however have any knowledge of the extent of harm, or the type and manner of the attack on the legal interest protected by the elements of the offence.¹⁰⁵⁶ If D lends P a gun for 'a robbery' and has no further information on the details of the proposed robbery, he can still be punished on account of aiding.¹⁰⁵⁷ D may also be unaware of P's identity – for instance X persuades D to lend him a van so that X can help P carry out a kidnapping.¹⁰⁵⁸

The BGH also relaxes the requirements for determinateness in the case of the aider, but its pronouncements yield a far less clear or uniform standard.¹⁰⁵⁹ In a case decided by the BGH,¹⁰⁶⁰ D had sold members of a 'revolutionary cell' an alarm that was used by them to delay the detonation of a bomb attack in the Lufthansa premises in Cologne. D was punished as an aider to the offence of 'inducing an explosion' even though he had only known that the alarm would be used for a bomb attack on some

¹⁰⁵⁵ Bohlander (n 258) 173; *Leipziger Kommentar* (n 517) 2055.

¹⁰⁵⁶ *Leipziger Kommentar* (n 517) 2055; *Sch/Sch* (n 927) 556.

¹⁰⁵⁷ Roxin, TT (n 536) 225.

¹⁰⁵⁸ See *Leipziger Kommentar* (n 517) 2056.

¹⁰⁵⁹ *Leipziger Kommentar* (n 517) 2056-57; Roxin, TT (n 536) 226-229.

¹⁰⁶⁰ BGHR, StGB § 27 Abs. 1, Vorsatz 6.

political opponents of the cell. The BGH adopted the standard for abettor intent proposed by Roxin and convicted D because D's mental picture encompassed the essential wrongfulness dimension and the direction of the attack on the protected legal interest, which sufficed for the concretisation of his intent.¹⁰⁶¹ The analysis and conclusion in this case resemble the *Bainbridge* test where the aider must know that the perpetrator intends to commit a crime of the *type* eventually committed.

A later decision of the BGH¹⁰⁶² however seems closer to the *Maxwell* 'shopping list' test, though the BGH's reasoning is not very consistent. This case concerned D, a jewellery expert, who wrongly certified the value of some jewels as 300,000 DM, despite taking into account the fact that due to his valuation, they may be sold for a higher price or serve as security. P then used them to obtain a credit of 270,000 DM from the bank which he could not later repay and the bank was unable to sell the stones. P was convicted for fraud and D for aiding the fraud. The BGH reiterated its reasoning that D's abstract conception of the elements of the offence (of fraud) and his having foreseen P's act sufficed for his conviction as an aider.¹⁰⁶³ It added that an aider is someone who gives the perpetrator a decisive means in hand for the commission of the act, thereby increasing the risk of commission of the main act. However, less 'decisive' means of act commission can also ground assistance responsibility.¹⁰⁶⁴ At another place, the BGH also contradicted its own position that the aider need not be aware of the time, place or manner of commission of the offence by stating that one seriously foresees the commission of an offence only if he knows the essential details of the act plan. This includes knowledge of circumstances which

¹⁰⁶¹ Roxin, TT (n 536) 226.

¹⁰⁶² BGHSt 42, 135.

¹⁰⁶³ Roxin, TT (n 536) 227.

¹⁰⁶⁴ Roxin, TT (n 536) 228.

make the commission of the main act sufficiently probable. However, the jewellery valuation expert did not only not know the ‘essential’ details of the act plan, but no details at all, and yet was held liable by the BGH because he had a conception of the essential wrongfulness and direction of the attack on the protected legal interest.¹⁰⁶⁵

As in the case of the instigator, the aider is liable only within the framework of his intent; the rules for ‘excess’ in instigation are also applicable to assistance.¹⁰⁶⁶ If D supplies P with tools for house-breaking, and P then kills X who surprises him in the act, D will not be liable for aiding the killing. Similar to instigation, he can however be responsible if he had foreseen the deviation from the original plan and according to the jurisprudence, if in the ordinary course of things, he should have foreseen such a deviation.¹⁰⁶⁷ One can also aid in co-perpetration as well as in indirect perpetration. In either case, the conditions of co-perpetration or indirect perpetration must be fulfilled by the direct perpetrators.¹⁰⁶⁸

e. Neutral actions

The problem of aid to ‘neutral actions’ has come into prominence only fairly recently and since become somewhat of a fashionable theme amongst commentators.¹⁰⁶⁹ These are everyday transactions that the potential aider would carry out quite irrespective of whether they were being ultimately used for criminal purposes, for example selling knives in a household goods shop, which the members of a violent gang buy to commit crimes.¹⁰⁷⁰ Some commentators argue that such conduct should not be subject to criminal sanctions, while others support criminalising neutral actions based on

¹⁰⁶⁵ Roxin, TT (n 536) 228.

¹⁰⁶⁶ MPICC Report (n 515) 45; *Sch/Sch* (n 927) 557.

¹⁰⁶⁷ MPICC Report (n 515) 45; *Sch/Sch* (n 927) 557.

¹⁰⁶⁸ MPICC Report (n 515) 43.

¹⁰⁶⁹ See references at *Leipziger Kommentar* (n 517) 2037.

¹⁰⁷⁰ *Schwerpunkte* (n 512) 209.

criteria that differ from ordinary cases of aid.¹⁰⁷¹ There is further dispute on whether the distinction between neutral and other actions falls within subjective or the objective part of the elements of the offence.¹⁰⁷² Commentators favouring the latter option for instance classify normal commercial transactions as conduct that is socially appropriate and hence not unlawful. Alternatively, they reject the attribution of responsibility to the aider under the rubric of a permitted degree of risk in everyday life.¹⁰⁷³

The jurisprudence however, following commentators such as Roxin, uses a combination of objective and subjective criteria with particular emphasis on the aider's state of mind. If D knew, rather than simply accepted as a possibility, that his actions would support the unlawful act of P and that the act of P served an exclusively criminal purpose, he will be liable as an aider.¹⁰⁷⁴ The first element of this test requires that aid in the case of neutral actions requires the higher level of *dolus directus* instead of *dolus eventualis*. The second element of the test was applied by the BGH¹⁰⁷⁵ in a case where D was charged with aiding in the organisation of landmines along the former GDR's internal German border on the basis that he assisted in the drafting of standing orders for the general organisation of the border regime. The BGH acquitted D on the ground that this general organisation of the border regime was a useful and legal act for the perpetrators even in the absence of the minefields issue.¹⁰⁷⁶ The only exception to this two pronged standard is in cases where D foresees that his actions may be used by P for committing an offence and where the

¹⁰⁷¹ See references at *Leipziger Kommentar* (n 517) 2041-42.

¹⁰⁷² *Schwerpunkte* (n 512) 209; *Sch/Sch* (n 927) 553.

¹⁰⁷³ *Schwerpunkte* (n 512) 209; *Sch/Sch* (n 927) 553.

¹⁰⁷⁴ Bohlander (n 258) 173; *Schwerpunkte* (n 512) 209-10; Roxin, TT (n 536) 207-08.

¹⁰⁷⁵ BGH NJW 2001, 2410.

¹⁰⁷⁶ See Bohlander (n 258) 173.

risk of the punishable behaviour is acknowledged by him to be so high that he lets himself support an actor recognizably determined to carry out the act.¹⁰⁷⁷

The requirement for *dolus directus* and the exception to it in the case of neutral actions is explained by German commentators using the ‘trust’ principle, that is, people must normally be able to act on the assumption that other people around them are not rushing to commit criminal acts. Without such trust, everyday commercial activities such the sale of lighters, knives, etc, which are indispensable for modern life, would become impossible.¹⁰⁷⁸ This is similar to the pragmatic approach advocated by commentators in English law who argue for a ‘purposive’ requirement in the case of neutral aiding actions. However, German criminal law theory goes further than them in advocating that this trust is displaced when the aider recognises the high risk that a crime will be committed by someone who is clearly determined to do so.¹⁰⁷⁹ Roxin illustrates this principle with the help of two cases. In the first one, a salesman D thinks that customer P looks dodgy but nevertheless sells him a screwdriver. P uses the screwdriver for breaking into a house. D will not be an aider because his subjective impression of P’s ‘suspicious appearance’ must be reinforced by a concrete criterion that establishes P’s inclination to commit an unlawful act.¹⁰⁸⁰ This will exist in the second case scenario, where P and other members of his gang are engaged in a gang fight on the street and P goes to a shop in the vicinity from which the fight is visible to procure additional knives. If salesperson D sells him the

¹⁰⁷⁷ *Leipziger Kommentar* (n 517) 2039.

¹⁰⁷⁸ *Leipziger Kommentar* (n 517) 2039; Roxin, TT (n 536) 214-16.

¹⁰⁷⁹ *Leipziger Kommentar* (n 517) 2039; Roxin, TT (n 536) 214-16.

¹⁰⁸⁰ Roxin, TT (n 536) 214-15.

knives and foresees that these will be used to inflict injuries during the course of the fight, he will be liable as an aider to these injuries.¹⁰⁸¹

It is worth noting here that the second element of the two pronged test - D must know that P's act served an exclusively criminal purpose – resolves the problem that English law encountered in the case of *Gillick*. Since the doctor's contraceptive advice and treatment would remain meaningful and useful even in the absence of P engaging in unlawful sexual intercourse, he would not be liable as an aider.

4 Conclusion

As the discussion above reveals, the major issues in German criminal law on accessories resemble those that we encounter in English criminal law theory and jurisprudence. The doctrinal basis of accessorial responsibility, causality requirements, the extent to which the intent of the accessory must be determinate, the treatment of neutral actions, and cases of excess by the perpetrator all feature prominently in both systems and are much disputed. One of the most striking differences between the two systems however lies in the very subject we are most interested in – the absence of any special mode of responsibility such as joint enterprise in the case of German criminal law. The reason for this may well be that German criminal law treats cases of parasitic joint enterprise liability under excess configurations in aiding and abetting. Also, the 'group' aspect of joint enterprise liability may be dealt with by combining the principles of excess and aider liability for co-perpetration and/or indirect perpetration. The next section will consider the similarities and differences in the treatment of accessories in German and English criminal law and theory to assess whether liability under JCE II and JCE III could be justified under the principles of secondary responsibility in both legal systems.

¹⁰⁸¹ *Leipziger Kommentar* (n 517) 2039; Roxin, TT (n 536) 215.

D. JOINT CRIMINAL ENTERPRISE LIABILITY FOR INTERNATIONAL CRIMES

1 Analogies and Lessons from Domestic Criminal Law and Theory

English and German criminal law and theory distinguish clearly between parties to a crime, both in terms of the rationale for attribution of criminal responsibility (as principals or accessories), and as a matter of certain practical consequences that follow from this classification.¹⁰⁸² This is despite the fact that under English law, an accessory can be punished to the same extent as a perpetrator. There is some overlap in the different doctrinal justifications for holding the accessory criminally responsible in the two legal systems, though there is a marked divergence in the weight accorded to them. This is particularly true of the causal basis for accessorial responsibility. Following the orthodox formulation of causation put forward by Hart and Honoré, English criminal law in general rejects the requirement of a causal link for accomplice liability. However, causation features to some extent in the case of specific modes of secondary responsibility such as ‘procuring’ and ‘encouragement’.¹⁰⁸³ In addition, influential commentators on English criminal law argue that the attribution of secondary responsibility assumes that the accessory makes a causal contribution to the offence, albeit one that is mediated through the perpetrator.¹⁰⁸⁴ This view is similar to the dominant justification for accomplice liability in the German criminal law system: the accessory-oriented-causation doctrine articulated by the BGH according to which the accomplice must facilitate and/or co-causes the principal’s unlawful act.¹⁰⁸⁵

¹⁰⁸² See text to notes 742 to 743 and notes 885 to 892.

¹⁰⁸³ See text to notes 752 to 755.

¹⁰⁸⁴ See text to notes 748 to 751.

¹⁰⁸⁵ See text to notes 912 to 915.

The risk or endangerment rationale that features prominently in recent developments in the English law of complicity¹⁰⁸⁶ does not have a strict counterpart in German criminal law. The reason for this may be due to the centrality of the principle of *limitierete Akzessorietät* in Sections 26 and 27 of the StGB, whereby the accessory D's liability derives from the unlawful act of principal P and his punishment must correspond to the punishment framework of P's act.¹⁰⁸⁷ D's conduct must also result in an injury to the legal interest protected by the elements of the offence.¹⁰⁸⁸ This is indeed the reason why the causal account favoured by Roxin and some other influential commentators on German criminal law adds a further stipulation to the BGH standard: the accessory's act must represent an independent attack on the legally protected interest.¹⁰⁸⁹ This connection between harm caused to the legal interest protected by the elements of the offence and the conduct of the accessory is modified in cases of inchoate offences of complicity under the Serious Crime Act based on an endangerment rationale – here, D can be convicted simply for doing an act that is capable of encouraging or assisting the commission of an offence in the belief that it will be committed. Thus, the offence that P ultimately commits may differ from the one D's act is aimed at encouraging. D can be punished as an accessory despite the fact that the injury to the legal interest protected by the offence elements at which his conduct is aimed never came to pass.

Despite the dominance of the accessory-oriented-causation theory in German criminal law literature, the differences in English and German law may appear less stark when one considers the application of the causal link requirement to concrete

¹⁰⁸⁶ See text to notes 752 to 755 and 882 to 884.

¹⁰⁸⁷ See text to notes 913 to 916.

¹⁰⁸⁸ See text to notes 920 to 923.

¹⁰⁸⁹ See text to notes 920 to 923.

modes of liability – aiding and abetting – in both jurisdictions. For instance, there is consensus that liability for instigation in German criminal law requires that the instigation by D is causal or at least co-causal for P's decision to commit an unlawful act.¹⁰⁹⁰ Causality however is also important if D is to be convicted as an abettor/instigator under English law – D must intend to encourage P and in fact must encourage P in the commission of an offence.¹⁰⁹¹ Instigation in both systems requires a meeting of minds between P and D.¹⁰⁹² The difference in the causation requirements in English and German criminal law may then be one of degree – while English law only requires that D's encouragement is communicated to P, even if he is not ultimately influenced by it,¹⁰⁹³ German criminal law poses a higher standard that D must influence P's will through overt intellectual contact.¹⁰⁹⁴

A similar picture emerges when one considers the necessity of a causal link for liability in case of aiding. Both systems reject a causation nexus if 'causation' is taken to mean that D's actions must constitute a sine qua non for the commission of the offence.¹⁰⁹⁵ A diluted causation requirement can however be found lurking in English criminal law which recognises D's liability for aiding if his conduct in fact helped or could potentially have helped P in the commission of an offence.¹⁰⁹⁶ D's assistance need not however be substantial.¹⁰⁹⁷ This is remarkably similar to the standard employed by the BGH and German criminal law commentators. According to the BHG, D would be liable as an aider if his conduct promotes the act of P. As we

¹⁰⁹⁰ See text to note 928.

¹⁰⁹¹ See text to notes 771 to 773.

¹⁰⁹² See text to notes 775 to 776 and notes 943 to 944.

¹⁰⁹³ See text to note 773.

¹⁰⁹⁴ See text to notes 943 to 944.

¹⁰⁹⁵ See text to notes 778 and 1020.

¹⁰⁹⁶ See text to note 766.

¹⁰⁹⁷ See text to note 765.

discussed, it is unlikely that D's conduct can facilitate P's act (which is directed towards the realisation of the elements of the offence) without also being causal for the commission of the offence.¹⁰⁹⁸ The majority view in the literature holds that D's conduct would be causal if it makes possible, facilitates, intensifies or secures the commission of P's (unlawful) act. Again, this facilitation need not be substantial; it must however increase the risk for the victim and/or the likelihood that the result of the elements of the offence will occur.¹⁰⁹⁹

Thus, notwithstanding the seeming divergence in English and German criminal law on the necessity of a causal link for accessorial responsibility, one can reasonably argue that a diluted form of causation (where causation is defined to exclude a *sine qua non* condition) underlies the primary modes of secondary responsibility in both legal systems. Exceptions to this general common standard can be found in each case – responsibility for instigation in German criminal law requires a greater causation nexus than that in English law, and inchoate offences of complicity in English criminal law abjure the requirement of a causal link.

The second major area of difference in the attribution of secondary responsibility in the two systems consists in the *mens rea* or subjective elements. The requirement of “double intent” for accomplice liability is common to the two systems: D's intent must exist in relation to his own conduct as well as the commission of the main act by P.¹¹⁰⁰ However, the level of intent differs between the two countries. In order to convict D as an accessory under German law, *dolus eventualis* with respect to both aspects is sufficient: D must consider as possible and accept that his conduct will result in P's act as well possess *dolus eventualis* with respect to all essential objective

¹⁰⁹⁸ See text to notes 1014 to 1016.

¹⁰⁹⁹ See text to notes 1021 to 1022 and 1032.

¹¹⁰⁰ See text to notes 782, 975 and 1050.

and subjective elements of the offence.¹¹⁰¹ In English criminal law on the other hand, the first prong of the *mens rea* element requires D to know that his conduct will facilitate the commission of the offence intended by P whereas the second prong is satisfied as long as D foresees the essential matters relating to P's conduct which makes it an offence.¹¹⁰² The knowledge standard is higher than that required in German law whereas recklessness/foresight is lower than the German law requirement of *dolus eventualis*. German and English criminal law also treat the question of specificity of knowledge/foresight required of D with respect to the elements of the offence somewhat differently. According to English law, D must know the 'essential elements of the offence' which has been interpreted in case law to mean that D must either know the type of offence intended (and ultimately committed) by P (*Bainbridge*) or that P would commit any one of a 'shopping list' of offences (one of which P commits) (*Maxwell*).¹¹⁰³ This is different from the two dominant tests found in German criminal law and theory for instigation. The BHG's requirement that D is aware of the circumstances that makes the (unlawful) act recognisable as a concrete particularised happening¹¹⁰⁴ is stricter than either of the two tests in English law, neither of which would be concerned with D's knowledge of individualising conditions such as the time, place or site of the offence. The majority opinion in the commentary on the other hand holds that D's intent must be directed towards certain elements of the offence and the 'essential dimensions' of the wrongfulness of the main act. The latter comprise the degree of harm and the manner and type of attack on

¹¹⁰¹ See text to notes 976 to 977 and 1051.

¹¹⁰² See text to note 783.

¹¹⁰³ See text to notes 807 to 810.

¹¹⁰⁴ See text to notes 984 to 985.

the legally protected interested.¹¹⁰⁵ While the second prong of this test could be likened to the *Maxwell* standard, it is more rigid in its reference to certain elements of the offence. The specificity requirements are lowered in the case of liability for aiding under German criminal law, and as already mentioned, the tests adopted by the BGH can be arguably construed as resembling the *Bainbridge* and *Maxwell* standards.¹¹⁰⁶

While both English and German law consider neutral actions to present certain challenges to the traditional *actus reus* and *mens rea* requirements for general accessory responsibility, their resolution of the problem posed by neutral actions takes different forms. The majority position in English case law and legal commentary holds that D's knowledge that his act will assist the offence intended by P will suffice for accomplice liability; the minority would have D act in order to assist its commission.¹¹⁰⁷ Instead of looking to purpose, German criminal law adds another element to the requirement that D must be aware that his actions would support P's unlawful act – P's act must also serve an exclusively criminal purpose. German criminal law dilutes the knowledge requirement in cases where D takes into account the possibility that his actions will facilitate P's commission of an offence and that there is such a high risk that P will commit an offence that his (D's) actions can be construed as having supported a person who is clearly determined to carry out the crime.¹¹⁰⁸

Joint enterprise as a distinct form of secondary liability in English criminal law has no obvious German counterpart; cases of 'parasitic accessory liability' under joint enterprise in English law would be dealt with under principles of 'excess' in German

¹¹⁰⁵ See text to notes 986 to 987.

¹¹⁰⁶ See text to notes 1055 to 1063.

¹¹⁰⁷ See text to notes 784 to 799.

¹¹⁰⁸ See text to notes 1074 to 1079.

law. D is liable for the acts of P on the basis of joint enterprise liability if three conditions are met: (a) D and P act in concert to commit crime X; (b) D had foreseen that in the course of committing X, there was a real risk that P would also commit crime Y; and (c) Y occurred as an incident of the joint venture and did not fundamentally differ from the crime foreseen by D.¹¹⁰⁹ In contrast, German cases of ‘excess’ concern liability for aiding or instigation in cases where P commits an act that deviates from that intended by D.¹¹¹⁰ There is thus no requirement of an ‘agreement’ or ‘joint venture’ to commit a crime as in English law. German law however also applies a test of foreseeability to hold D liable: if D had taken into account the possibility of the deviation in P’s conduct, or even should have taken it into account given the circumstances of the case, he will be liable for P’s act.¹¹¹¹ Both these factors – the lack of a joint venture and the lower test of objective foreseeability – cast the net of liability farther than that in English criminal law.

There are some overlaps between the English law requirement that Y should not be fundamentally different from the act foreseen by D, and the German law standard that P’s conduct should not constitute a ‘significant deviation’ from that intended by D. Deviations in the modality of the act execution or the motive for the act are irrelevant in both systems.¹¹¹² The test of foresight in English law seems most closely connected to the expected consequences of P’s conduct.¹¹¹³ This standard seem to correspond to some of the specific instances of deviation identified in German criminal law: changes in the object of the act or the elements of the offence would count as significant deviations. If there are changes in the measure and type of

¹¹⁰⁹ See text to notes 824 to 827.

¹¹¹⁰ See text to notes 998 to 999 and 1066.

¹¹¹¹ See text to notes 1000 to 1001 and 1067.

¹¹¹² See text to notes 835 to 846 and 1002.

¹¹¹³ See text to notes 848 to 849.

injury to the protected legal interest from that foreseen by D, he would not be liable.¹¹¹⁴

2 Support for JCE II and JCE III in Domestic Criminal Law

Now that we have addressed some of the commonalities and points of difference in the treatment of secondary responsibility in English and German criminal law, we can go on to assess whether the *actus reus* and *mens rea* elements of JCE II and JCE III find any support in these domestic systems.

The *actus reus* elements common to JCE II and JCE III are: (1) a plurality of persons; (2) the existence of a common plan or design; (3) the participation of the accused in the common plan.¹¹¹⁵ In order to satisfy the first element, the accused must act along with a number of persons to commit the crime. There is no requirement of a maximum or minimum number, or of any kind of organisational structure, for the plurality.¹¹¹⁶ This is true of joint enterprise liability in England and also of liability for aiding and instigation in Germany.

The second element is the existence of a common plan which involves the commission of a crime. The plan can arise extemporaneously and need not be explicit.¹¹¹⁷ This position also accords with joint enterprise liability in the UK.¹¹¹⁸ Liability for aiding or instigation in German criminal law does not require a common plan. However, it is possible for instance, to have instigation in the form of ‘*Mitanstiftung*’, i.e. instigation in co-perpetration where several persons act in concert

¹¹¹⁴ See text to notes 1003 to 1005.

¹¹¹⁵ *Tadić Appeals judgement* (n 4) para 227.

¹¹¹⁶ See text to notes 188 to 189.

¹¹¹⁷ See text to notes 197 to 199.

¹¹¹⁸ See text following notes 833 and 834.

to instigate the perpetrator to commit the act. In this situation, the elements for co-perpetration must be present, including the existence of a common plan.¹¹¹⁹

Tribunal jurisprudence has interpreted the common plan requirement differently in cases of JCE II which concern concentration camp scenarios. Here no agreement is needed and instead, the entire system of repression in place in the concentration camp is treated as a common plan.¹¹²⁰ The ICTY has put forward two potentially inconsistent criteria in interpreting this condition: first, that if the accused is ‘involved’ in the system of repression, it is less important to prove the fact of an agreement, and second, that the accused knew of the system and agreed to it, without it being necessary that he entered into an ‘agreement’ with the principal perpetrators. The second test, as discussed, seems to interpret ‘agree’ to mean ‘acquiesce’.¹¹²¹ Mere acquiescence would not however be sufficient for establishing the elements of co-perpetration (for *Mitanzstiftung*) in German criminal law which presupposes a mutual understanding or consent between the co-perpetrators which forms the basis of the further joint action.¹¹²² If one agrees with commentators such as Simester, one can make the same argument for common purpose in English criminal law: the distinction between the aider/abettor and the party to a joint enterprise lies in the fact that the latter and the perpetrator have a shared bond of affiliation resulting from the common purpose. The accessory’s voluntary and purposive affiliation with the act of the perpetrator distinguishes his normative position from the aider/abettor.¹¹²³ If this reading of common purpose is correct, simple acquiescence will not satisfy the test of a common plan or purpose in English criminal law as well.

¹¹¹⁹ *Leipziger Kommentar* (n 517) 2023.

¹¹²⁰ See text to notes 201 to 203.

¹¹²¹ See text following note 203.

¹¹²² See text to notes 586 to 587.

¹¹²³ See text to notes 870 to 871.

The *Brdanin* Trial Chamber's opinion that the common plan or agreement must exist between the accused and the physical perpetrators of the crime¹¹²⁴ seems to be borne out by the cases discussed under joint enterprise in English law – there does not appear to be any situation where the accused had no contact or understanding with the physical perpetrator of the crime. The *Brdanin* Appeal Chamber has however rejected this criterion to hold that the physical perpetrator does not need to be a member of the JCE. The most important factor is that the criminal plan is not only the same, but common to all persons acting within the enterprise and that even if the accused's contribution to this common purpose is insubstantial, it should be significant for the crimes for which he is found responsible.¹¹²⁵ This latter test however defeats the purpose of parasitic joint enterprise liability in English law as well as cases of excess in German law. The very purpose behind these forms of liability is that the accused should be able to be held liable for crimes towards which he did not make a significant contribution. As we will discuss later, the best justification for this appears to be a risk/endangerment rationale stemming from D's membership in the joint unlawful enterprise which leads to the commission of these crimes.¹¹²⁶ If one looks at the elements of a 'common plan' in the German theory of co-perpetration, there is no requirement for the participants in the common plan or agreement to have met or known each other. It is sufficient that each party to the plan acts in the mutual knowledge that there are other participants who are also working towards a common goal.¹¹²⁷

¹¹²⁴ See text to notes 206 to 209.

¹¹²⁵ See text to notes 230 to 232.

¹¹²⁶ See text to notes 1145 to 1149.

¹¹²⁷ See text to note 588.

The third *actus reus* element for JCE II and JCE III is that the accused must perform some act that is in some way directed towards the furtherance of the common purpose. Commentators have argued that the participation of the accused in the common purpose should be ‘significant’ for him to attract liability.¹¹²⁸ The ICTY has rejected this formulation except in the case of opportunistic visitors who enter a concentration camp to commit crimes, and who are not staff members – they must be proved as having made a substantial contribution to the overall effect of the camp.¹¹²⁹ This criterion tracks the debates on the requirement of a causal link for secondary responsibility in domestic law. As seen previously, neither English nor German criminal law requires the D’s contribution to the unlawful act of P to have been substantial. However, both systems would require a minimal causal link between D’s conduct and the crime committed by P in order to attribute liability. This does not however mean that D’s conduct must constitute a *sine qua non* for the commission of the crime.

Thus, the three elements of the *actus reus* requirement in JCE II and JCE III do find some support in domestic criminal law principles, although with some modifications that would be required to their interpretation by tribunals. The criterion of an ‘agreement’ in the case of a common plan should mean exactly that: a mutual understanding or consent to commit the crimes in question. The accused and the physical perpetrators should be members of the common plan. This does not mean that they should have met each other; it only implies that they should act with the awareness that there are other participants in the plan all working towards the same common goal. The accused must causally contribute to the commission of the crimes

¹¹²⁸ See text to note 246.

¹¹²⁹ See text to notes 247 to 249.

that are a result of the common plan, although his contribution need not be a sine qua non for their commission.

The mens rea requirements for JCE II and JCE III differ. In order to be held liable under JCE II, the accused must have personal knowledge of the criminal nature of the system in place in a concentration camp as well as the intent to further the criminal purpose. The latter intent can be inferred from two factors: knowledge of the criminal plan and participation in its advancement.¹¹³⁰ As we noted in Part I, this gives rise to an unjustified expansion of liability in the case of neutral actions, such as the performance of duties as a cook in a concentration camp. In this case, the cook may well have some knowledge of the purpose for which the camp has been set up and be participating in the camp through his activities as a cook. It is however difficult to use this function to convict him to the same level as a perpetrator for crimes such as genocide which may fall within the camp's mandate.¹¹³¹ The problem posed by neutral actions to a *mens rea* requirement grounded in knowledge, rather than purpose, is also found in domestic law systems. As noted above, English law has struggled to come up with a principled solution to this issue, with some commentators advocating that an exception should be carved out for neutral actions which warrant a more rigid standard of purpose. The bulk of the law however supports only a knowledge standard, with academics considering the defences of duress and necessity as potential safeguards to the expansion of liability.¹¹³² The defences of duress and necessity are however permitted under extremely limited circumstances in international criminal law and it is by no means clear that someone accused of having participated in a joint criminal enterprise that involves heinous actions such as murder could benefit from

¹¹³⁰ See text to notes 259 to 266.

¹¹³¹ See text following note 267.

¹¹³² See text to notes 785 to 794.

defences that need proof of proportionality of conduct. The German criminal law option of adding an additional element – the conduct of the perpetrator must serve an exclusively criminal purpose¹¹³³ – also does not seem particularly helpful in the concentration camp context; a concentration camp by its very nature serves an entirely criminal purpose.

There may still be some justification for permitting neutral actions to be subjected to the same knowledge standard as other conduct that would incur liability under JCE II. First, the objection that this equates the conduct of a cook with that of a physical perpetrator of a crime such as murder loses some of its bite once JCE II is acknowledged as a mode of accessorial rather than perpetrator responsibility. Second, the treatment of D's conduct as deserving of criminal sanctions is not as harsh as it may initially appear. As discussed earlier in the context of English law,¹¹³⁴ D's liability is ultimately based on his knowing association with the camp's criminal purpose. The knowledge as intent standard does not require D to take any steps that would involve going out of her way to fathom the camp's activities or prevent the perpetrators in a camp from performing criminal acts. She must only desist from voluntarily facilitating the camp's endeavours when she knows that it is engaged in heinous acts. If the only reason for D engaging in such conduct is out of an imminent and real threat to her life, she may yet be granted some limited protection under the defences of duress and necessity.

The most controversial *mens rea* requirements are found in the case of JCE III. There is some overlap between the *mens rea* elements in JCE I and JCE II and those required for JCE III: the accused must intend to participate in the joint enterprise (JCE I) and also intend to further the criminal purpose of the enterprise (JCE II). The

¹¹³³ See text to notes 1074 to 1076.

¹¹³⁴ See text to notes 800 to 802.

problematic aspect of JCE III *mens rea* exists in the third prong: the participant in a JCE, D, can be held liable for the crimes committed by another JCE member P, even if the crime goes beyond the common purpose, as long as it was a natural and foreseeable consequence of the common plan and D willingly took this risk.¹¹³⁵ D should have foreseen that P was likely to commit the additional crimes (subjective foreseeability) and it should have been objectively foreseeable that the additional crimes might be committed by P. The foreseeability standards have not however been applied consistently by ICTY tribunals.¹¹³⁶ In our discussion of English and German law, it emerged that German criminal law has no strict equivalent to cases of JCE III, which would instead be governed by principles of ‘excess’ in liability for aiding and instigation. D would thus be liable under ‘excess’ principles as long as it was objectively foreseeable (a lower standard than what JCE III demands) that P would commit the crimes he did. However, there is an additional qualifying condition – P’s conduct should not significantly deviate from that contemplated by D.¹¹³⁷ This is an extremely significant factor for limiting D’s liability as a secondary party, and is present in a different variant in the English doctrine of joint enterprise, where the additional crime committed by P must not fundamentally differ from the crime foreseen by D. This test of fundamental difference is connected, to some extent in both jurisdictions, to the expected consequence of P’s conduct.¹¹³⁸ Thus, under German criminal law, if D’s intent had reference to different elements of the offence – torture instead of murder – this would count as a significant deviation.¹¹³⁹ In English criminal law, if D had contemplated that P would beat V, but P killed V instead, D

¹¹³⁵ See text to notes 280 to 283.

¹¹³⁶ See text to notes 285 to 294.

¹¹³⁷ See text to notes 999 to 1001.

¹¹³⁸ See text to notes 848 to 849 and 1002 to 1005.

¹¹³⁹ See text to notes 1003 to 1004.

would not be liable, or under some of the case law, would be liable only for the lesser offence which he did contemplate.¹¹⁴⁰

If one transposes this requirement to JCE III, some of the more pressing concerns with this form of liability seem to be addressed. For instance, even for crimes that do not require special intent, D would only be liable on account of JCE III if he contemplated that one or more members of the JCE would act so as to fulfil the elements of the offence, which would include the intent requirement for the offence. It is important to note that he would be liable as an accessory, rather than to the same extent as the perpetrators of the crime. Further, since JCE III would be a form of secondary responsibility instead of principal liability, D's liability would derive from the unlawful conduct of the members of the JCE who would need to satisfy the *actus reus* and *mens rea* elements of the contemplated crime in the first place. The case scenario mentioned in Part I, whereby D is held responsible under JCE III for a crime which he contemplated may be committed by P, but for which P himself lacked the necessary *mens rea*, would thus not be possible under this scenario.

3 Justification for JCE as a Distinct Mode of Accessorial Responsibility

If one limits the operation of JCE II and JCE III in the manner suggested above, the next question that must be answered is whether there is any merit to retaining JCE II and JCE III as modes of accessorial liability that are distinct from aiding and abetting. As the above discussion would have already made obvious, systems such as the German criminal legal system do not have any equivalent mode of liability and would simply treat JCE cases under traditional modes of secondary responsibility combined with principles of 'excess'. The status of joint enterprise liability is also disputed in English criminal law, where prominent commentators

¹¹⁴⁰ See text to notes 850 to 861.

simply consider it a variant of liability for aiding and abetting. Nonetheless, as we highlighted in our analysis of English law, there are important differences between liability for aiding and abetting and liability arising from participation in a joint venture. The crux of joint enterprise liability lies in the existence of a common purpose between the members of the joint venture, where the accessory has a purposive attitude towards the commission of crimes by the perpetrator; the indifferent aider/abettor lacks any such community of purpose. It is this shared bond or affiliation between the accessory and the members of the enterprise that broadens his liability to cover cases that would traditionally not fall within the domain of liability for aiding and abetting.¹¹⁴¹ While in standard cases of accomplice liability, D's *actus reus* must exist in relation to crime X which is eventually committed, in joint venture liability, it exists only in relation to crime X and not for crime Y which is eventually committed. Thus, in joint enterprise cases, the contributory link between D's conduct and the collateral crime for which he is held liable is more indirect, and mediated through the joint venture, as compared to the standard cases of the accessory's contribution to the principal offence.¹¹⁴²

We touched on the possible justifications for this extension of responsibility in the section on English joint venture liability. These need to be considered here in greater depth and in light of the nature of international crimes. The first set of explanations is grounded in D's voluntary association with a criminal venture. This conduct not only signals D's criminal proclivities, but his affiliation with an enterprise committed to criminal purposes helps contribute to the situation in which the additional crime occurs.¹¹⁴³ This argument is not particularly convincing. The fact that

¹¹⁴¹ See text to notes 869 to 871.

¹¹⁴² See text to notes 867 to 868.

¹¹⁴³ See text to notes 877 to 880.

D has criminal proclivities cannot by itself justify a broader imposition of liability on him in the absence of concrete conduct that offends against the law. If this conduct consists in his signing up to a criminal enterprise, then the argument simply proves itself, and no more. Moreover, the mere fact of conduct helping contribute to a situation in which a crime occurs cannot, by itself, justify criminalising it. There can be plenty of situations in everyday life which contribute to the circumstances in which a crime occurs. This is indeed the reason why the majority opinion in German criminal law rejects the punishment (as instigation) of the mere creation of a situation that may tempt or provide additional incentives to the perpetrator to commit the criminal act.¹¹⁴⁴ Even if one considers such actions as conduct that should be criminalised on account of the mental influence it has on the perpetrator, it is difficult to see why this is any different from liability for aiding/abetting.

Another line of reasoning follows a risk/endangerment rationale, with two different explanations for D's liability: the first is a normative justification which holds D liable on the reasoning that he assumes the risks that flow from his subscription to the common criminal purpose; the second is empirical in nature and bases his liability on the fact that through his association with the criminal enterprise, he increases the risk that the collateral crime will occur.¹¹⁴⁵ Both these arguments will have some currency in the context of international crimes. The assumption of risk rationale holds that in signing up as a member of an enterprise committed to criminal purposes, D implicitly accepts the risk that he will be responsible for wrongs which are perpetrated by the enterprise in the course of realising those purposes, and over which he may have no control. This analysis has been persuasively criticised on the basis that it equates the cognitive element of foresight (of risk) with the volitional element of its conscious or

¹¹⁴⁴ See *Leipziger Kommentar* (n 517) 1987.

¹¹⁴⁵ Beatrice Krebs, 'Joint Criminal Enterprise' (2010) 73 *MLR* 578, 594-56.

deliberate acceptance. It is however acknowledged that some risks may be so closely attendant to the fulfilment of the criminal purpose, that in foreseeing the possibility of their occurrence, D can also be said to have accepted this possibility.¹¹⁴⁶ This latter condition applies quite strongly in cases of mass atrocity, where the criminal purposes of the enterprise will usually be defined in fairly broad terms and often have multiple means of execution. Thus, if D becomes a member of a joint venture with the aim of ethnically cleansing a certain region in a country, torture and rape are likely tools of accomplishing this objective. It would then not be far-fetched to claim that he assumed the risk that in addition to forcible transfer (the crux of ethnic cleansing), members of the JCE would also commit the additional offences of rape and torture.

The enhancement of risk approach is perhaps even more pertinent in the context in which international crimes occur. The argument is that the constitution of the criminal enterprise exacerbates the likelihood that the collateral crime will occur. Members of a group (committed to crime) will behave quite differently from individuals acting alone, due to the members mutually reinforcing each other's resolve to commit crimes, discouraging withdrawal and often resulting in an escalation of atrocities. Thus, in voluntarily associating himself with the unlawful venture, D increases the risk that the collateral crime will be perpetrated by its members.¹¹⁴⁷ This phenomenon is considered to have some explanatory force in trying to understand the behaviour of 'ordinary' perpetrators in mass atrocities, whereby the average individual becomes capable of committing heinous crimes in group settings.¹¹⁴⁸ It has also been put forward by international law commentators in discussing the rationale for JCE III

¹¹⁴⁶ Krebs (n 1145) 594-95.

¹¹⁴⁷ See text to notes 882 to 884.

¹¹⁴⁸ See eg the discussion and references in O. Sara Liwerant, 'Mass Murder: Discussing Criminological Perspectives' (2007) 5 JICJ 917.

liability.¹¹⁴⁹ However, substantiating this claim requires greater engagement with empirical research in other fields of the social sciences dealing with mass atrocity.

Yet another set of justifications flows from the representational value of joint enterprise liability, and that it is a more accurate account of the role of members in group crimes, than that offered by traditional modes of secondary responsibility. In Part II, we noted the need for a distinctive approach to responsibility for international crimes starting from the premise that the communicative function of criminal responsibility is achieved only if it is capable of accurately representing both the nature of the crime as well as the role played the accused in its commission.¹¹⁵⁰ We identified three distinctive aspects of international crimes: their collective nature, conformity to the prevailing social norms, and widespread participation in their commission by different levels of participants acting on different motives.¹¹⁵¹ The first and third of these features would support using JCE as a distinct mode of accessory responsibility. While there is no theoretical limit to the number of parties that can be liable as aiders and abettors, typical cases of aiding and abetting do not involve group or collective criminality. This is particularly true of large groups dispersed over location and time. JCE on the other hand, emphasises the peculiarly collective aspects of mass atrocity: the fact that the perpetrator usually commits an international crime in furtherance of a collective criminal project, and with the consciousness that he is part of a larger common project. Arguably, this consciousness is stronger in the leadership and administration level organs, rather than the rank and file perpetrator. It nevertheless explains far better the attitudes and conduct displayed

¹¹⁴⁹ See Cassese (n 211) 117-118.

¹¹⁵⁰ See text to notes 398 to 400.

¹¹⁵¹ See text to notes 406 to 441.

by different participants in mass atrocity cases, than traditional modes of secondary responsibility.

4 Conclusion

In this Part of the thesis, we set out to examine two main issues: whether JCE II and JCE III find any support in principles of criminal responsibility in domestic criminal law systems and if yes, whether there is any merit to retaining them as distinct modes of liability for international crimes. The above analysis answers both these questions in the affirmative, with some important qualifications. The *actus reus* and *mens rea* elements for JCE II and JCE III would need to be modified to some extent so that they accord with principles of accomplice liability in German and English criminal law. For the *actus reus* elements common to both forms of JCE, the following limitations would need to feature prominently in their interpretation: the common plan or agreement means a mutual understanding or consent to commit the crimes in question; this does not include mere acquiescence. The accused and the physical perpetrators should be parties to the agreement. This only means that they should act in the knowledge that there are other participants in the plan all working towards the common criminal goal. There must be a causal link, not necessarily amounting to a *sine qua non* condition, between the conduct of the accused and the commission of crimes that are a result of the common plan.

Several of the concerns with respect to the *mens rea* elements of JCE II and III take on a slightly different form once one acknowledges that they are forms of secondary rather than principal liability, though here again, certain conditions must be met to prevent an unjustified expansion of liability. The problem of neutral actions being subject to a knowledge standard in JCE II is addressed to some extent by considering the rationale for similar standards in domestic law and also by the availability of the

defences of duress and necessity to the accessory. In the case of JCE III, the domestic law requirement that the collateral crime does not fundamentally deviate from the crime contemplated by the accused needs to be made more explicit. This would mean that the accused must have foreseen that a JCE member would act as so to fulfil the elements of the offence (eventually committed), including the intent requirement for the offence. The accused's liability would also be derivative of the perpetrator's unlawful conduct, ensuring that the perpetrator himself satisfies the necessary *actus reus* and *mens rea* elements for the crime.

Limiting the operation of JCE II and JCE III in this fashion does result in them more closely resembling traditional modes of accomplice liability, with one significant caveat: while in the latter cases, the accused's contribution must exist in relation to crime X which is ultimately committed, in JCE, his contribution is in relation to crime X and not to collateral crime Y which is eventually committed. Retaining JCE II and III as distinct modes of responsibility is nevertheless justified in light of the operation of the risk and expressive rationales in international criminal law.

CONCLUSION

This thesis began with the rather modest ambition of examining whether any justification for the doctrine of Joint Criminal Enterprise can be found in principles of criminal responsibility that are recognised in domestic criminal law systems. This project assumes that principles of criminal responsibility developed in the domestic criminal law context are salient in conceptualising forms of responsibility for international crimes. In this sense, there is no attempt to, as it were, reinvent the wheel, that is, I take the set of doctrinal justifications that have guided the ascription of responsibility in these systems for granted and make no claims to developing any alternative account of the theoretical foundations of criminal responsibility. At the same time, I proceed to engage fully with these divergent justifications and assess their merit in relation to the unique features of international crimes.

This methodological posture led to the project developing a life of its own where I have been compelled to analyse in detail the different approaches that the English and German criminal law systems take to fundamental questions of responsibility, causation, and the structure of parties to a crime. In considering the problems with JCE and the alternatives to it, I realised that while a project that simply critiques the existing theories is a valuable intervention in the current literature on individual accountability for international crimes, it must go further and make a more positive contribution by proposing doctrinally coherent forms of responsibility that would be appropriate for international crimes. In order to do this, it is not enough to rely purely on legal literature and analyses. One must instead draw on accounts of mass atrocity by political scientists, sociologists and other scholars working in the broader field of social sciences to isolate elements that serve to distinguish international crimes from

domestic ones. It is only by combining the two sets of issues which these different analyses divulge that a promising account of responsibility can be developed.

Using these tools, I come to the following conclusions. A true engagement with principles of responsibility in prominent domestic legal systems and with the nature of international crimes reveals that only JCE I can qualify as perpetrator responsibility. JCE II and JCE III are more properly regarded as forms of secondary liability. These statements need to be further qualified. JCE I is only defensible as a form of principal responsibility to the extent it corresponds to the elements of co-perpetration as identified in Part II of the thesis. Taken on its own, it is nonetheless not the most appropriate basis for holding senior and mid level participants in mass atrocity responsible as principal perpetrators. I put forward a modified version of *Organisationsherrschaft* as a more accurate characterisation of the role and function of high level participants in mass atrocity, which simultaneously situates them in the political and social climate which renders these crimes possible. I also support the retention of JCE II and JCE III as distinct modes of accomplice liability, using expressive and risk justifications. This is however only permissible if they are limited in ways that correspond to principles of secondary responsibility in domestic jurisdictions and which were identified in Part III of the thesis.

While my project is confined to evaluating forms of individual accountability for international crimes, it reveals methodological and conceptual problems that persist in varied areas of international criminal law. There are at least two pressing challenges that international criminal law academics and courts have been remiss in addressing and which are central to the doctrinal confusion surrounding JCE: the first, they have usually not bothered conducting an in-depth assessment and comparison of domestic law and principles; the second, they have not adequately

considered how international crimes may differ from domestic crimes in significant ways that have a bearing not only on modes of responsibility, but on a host of other contested issues such as defences and sentencing. The first failing invites a little more sympathy. International and comparative criminal law are fairly new areas of research. Unlike traditional fields of public international law on the one hand, and pure domestic criminal law on the other, international criminal law practitioners and academics are rarely trained in the methods and doctrines of international criminal law as “career” academics or practitioners. It is perhaps not so surprising then that they transpose their own training and experience in domestic criminal law systems or in pure public international law doctrine to issues they confront in international criminal law. This problem is only compounded by the fact that even someone who sincerely wants to understand and analyse the different theories, debates and controversies in diverse domestic criminal law systems will not find this an easy challenge to undertake. The primary problem is one of language and translation. For instance, it is difficult to find a single textbook that explains the main principles of German criminal law in detail in English.¹¹⁵² The international criminal lawyer must then of necessity be multi-lingual, or at least prepared to devote considerable time and effort to learning how to read and understand legal literature in different languages.

The second omission is a little more surprising, given that the entire discipline of international criminal law at least *prima facie* assumes that there is something different about certain crimes that are labelled international, which justifies taking them out of the purview of the exclusive jurisdiction of national courts and legitimises their investigation and prosecution by the international community. It is this task that

¹¹⁵² Bohlander’s work (Bohlander (n 258)) is an excellent introduction to the basic principles of German criminal law in English, but is unfortunately not particularly helpful if one wants to understand in depth and critique these principles. Admittedly, this is also not the purpose of his project, which only purports to give an overview of the law and theory.

international criminal lawyers must take up, not in isolation, but in conversation with other disciplines that seek to understand the processes that lead to mass atrocity.

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