

The Proper Limits of Individual Responsibility under the Doctrine of Joint Criminal Enterprise

Antonio Cassese*

Abstract

Joint criminal enterprise (JCE) as a mode of liability in international criminal law is a concept widely upheld by international case law. It has, however, been harshly attacked by commentators, particularly with regard to what has come to be known as the 'third category' of the notion, that of liability based on foreseeability and the voluntary taking of the risk that a crime outside the common plan or enterprise be perpetrated. This author considers that while most criticisms are off the mark, at least two are pertinent: (i) that the International Criminal Tribunal for the former Yugoslavia (ICTY) Appeals Chamber in Tadić (1999) was wrong in indiscriminately using terminology typical of both the civil law and common law tradition, and (ii) that the foreseeability standard, being somewhat loose as a penal law category of culpability and causation, needs some qualification or precision. Generally speaking, the notion of JCE needs some tightening up. For instance, in Kvočka, an ICTY Trial Chamber rightly stressed that the contribution of a participant in a common criminal plan must be 'substantial' (the Appeals Chamber, however, disagreed to some extent in the same case). Furthermore, with specific regard to the third category of JCE, the author, after setting out the social and legal foundations of the foreseeability standard and the motivations behind its acceptance in international criminal law, suggests various ways of qualifying and straightening it out. One of them could lie in assigning to the 'primary offender' (i.e. the person who, in addition to committing the concerted crimes, also perpetrates a crime not part of the common plan or purpose) liability for all the crimes involved, while charging the 'secondary offender' with liability for a lesser crime, whenever this is legally possible. The author then suggests, contrary to a 2004 decision of the ICTY Appeals Chamber in Brđanin, that the third category of JCE may not be admissible when the crime other than that agreed upon requires special intent (this applies to genocide, persecution as a crime against humanity, and aggression). In such cases, the other participants in JCE could only be charged with aiding and abetting the crimes committed by the 'primary offender' if the requisite conditions for aiding and abetting do

* Member of the Board of Editors. [cassesea@tin.it]

exist. The author then suggests that the view propounded in 2004 by an ICTY Trial Chamber in Brđanin is sound, namely that the general notion of JCE may not be resorted to when the physical perpetrators of the crimes charged were not part of the criminal plan or agreement, but rather committed the crimes unaware that a plan or agreement had been entered into by another group of persons. In conclusion, he contends that this qualified notion of JCE, in addition to being provided for in customary international law, does not appear to be inconsistent with a broad interpretation of the provision of the ICC Statute governing individual criminal responsibility, that is, Article 25, in particular 25(3)(d).

1. Introduction

Since *Tadić* (Appeal, 1999), wherein the International Criminal Tribunal for the former Yugoslavia (ICTY) first spelled out the doctrine of joint criminal enterprise (henceforth: JCE) as a modality of criminal liability, this doctrine has been relied upon by the same Tribunal and other international criminal courts to such an extent that it can be regarded as a consolidated (though in some respects still controversial) concept of international criminal law. At the same time it has been looked upon as the ‘darling notion’ by the Prosecution, though legal commentators have looked at it askance.

This notion is crucial more in international criminal law than at the domestic level. In the world community international crimes such as war crimes, crimes against humanity, genocide, torture and terrorism share a common feature: they tend to be expression of collective criminality, in that they are perpetrated by groups of individuals, military details, paramilitary units or government officials acting in unison or in pursuance of a policy. When such crimes are committed, it is extremely difficult to pinpoint the specific contribution made by each individual participant in the collective criminal enterprise, for (i) not all participants acted in the same manner, but rather each of them may have played a different role in planning, organizing, instigating, coordinating, executing or otherwise contributing to the criminal conduct; (ii) the evidence relating to each individual’s conduct may prove difficult if not impossible to find. It would nevertheless be not only immoral, but also contrary to the general purpose of criminal law (to protect the community from the deviant behaviour of its members that causes serious damage to the general interests) to let those actions go unpunished. These considerations *a fortiori* apply to crimes such as murder or aggravated assault committed by a whole crowd; in such cases, it may prove even more difficult to collect evidence about the exact participation of members of the crowd in the crimes. The same considerations also hold true for cases where crimes are institutionally committed within organized and hierarchical units such as concentration or internment camps, where it is difficult to pinpoint the gradations of culpability of the various persons working within and for the organization.

The notion of JCE denotes a mode of criminal liability that appears particularly fit to cover the criminal liability of all participants in a common

criminal plan. At the same time, as I shall try to show, this notion does not run contrary to the general principles of criminal law.

Thus, it is by now widely accepted by international criminal courts that in the case of collective criminality where several persons engage in the pursuit of a common criminal plan or design, all participants in this common plan or design may be held criminally liable for the perpetration of the criminal act, even if they have not materially participated in the commission of said act; in addition, they may also be held responsible, under a number of well-defined conditions, for criminal conduct that, although not originally envisaged in the common criminal design, has been undertaken by one of the participants and may to some extent be regarded as a natural and foreseeable consequence of such a common plan. It is also widely accepted that at the international level this mode of criminal liability can take three different forms.

2. The Three Classes of Liability

The first and more widespread category of liability is responsibility for acts agreed upon when making the common plan or design (I would call it *liability for a common intentional purpose* to emphasize the fact that all participants shared the intent to commit the concerted crime, although only some of them may have physically perpetrated the crime). Here all the participants share the same intent to commit a crime, and all are responsible, whatever their role and position in carrying out of the common criminal plan (even if they simply vote, in an assembly or in a group, in favour of implementing such a plan). In addition to shared intent, *dolus eventualis* (i.e. recklessness or advertent recklessness)¹ may also suffice to hold all participants in the common plan criminally liable. For instance, if a group of servicemen decides to deprive civilians of food and water in order to compel them to build a bridge necessary for military operations or to disclose the names of other civilians who have engaged in unlawful attacks on the military, and then some civilians die, the servicemen should all be accountable not only for a JCE to commit the war crimes of intentionally starving civilians and ‘compelling the nationals of the hostile party to take part in operations of war directed against their own country’;

1 In discussing the *mens rea* element for murder as a war crime, an ICTY Trial Chamber in *Stakić* stated the following with regard to *dolus eventualis*: ‘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*. The Trial Chamber emphasises that the concept of *dolus eventualis* does not include a standard of negligence or gross negligence’ (Judgment, *Stakić* (IT-97-24-T), Trial Chamber, 31 July 2003, § 587). The Appeals Chamber that later sat on the same case held that *dolus eventualis* was equivalent to ‘advertent recklessness’ (Judgment, *Stakić* (IT-97-24-A), Appeals Chamber, 22 March 2006, §§ 99–103), thus taking up the terminology used by the same Appeals Chamber in *Tadić* (Judgment, *Tadić* (IT-94-1-A), Appeals Chamber, 15 July 1999, at § 220).

they should also be held guilty of murder. Indeed, even if the servicemen did not intend to bring about the death of the civilians, the death was the natural and foreseeable consequence of their common criminal plan and the follow-up action.

Society — in our case the world community — must defend itself from this collective criminality by reacting in a repressive manner against all those who, in some form, took part in the criminal enterprise. Society may not indulge in distinctions between the different roles played by each of the participants when trying to uproot or, better, punishing this form of collective criminality. All actors are culpable, even though the differing degrees of guilt may be taken into account at the stage of sentencing.

The second modality of liability is that of responsibility for carrying out a task within a criminal design that is implemented in an institutional framework such as an internment or a concentration camp (I would call this second category *liability for participation in an institutionalized common criminal plan*). Plainly, in an internment camp where inmates are severely ill-treated and even tortured, not only the head of the camp, but also his senior aids and those who physically inflict torture and other inhuman treatment are responsible. Also those who discharge administrative duties indispensable for the achievement of the camp's main goals (for example, to register the incoming inmates, record their death, give them medical treatment or provide them with food) may incur criminal liability. They bear this responsibility so long as they are aware of the serious abuses being perpetrated (knowledge) and willingly take part in the functioning of the institution. That they should be held responsible is only logical and natural; by fulfilling their administrative or other operational tasks, they contribute to the commission of crimes. Without their willing support, crimes could not be perpetrated. Thus, however marginal their role, they constitute an indispensable cog in the murdering machinery. The man who, upon arrival of new trains at Auschwitz, separated the men and the women from the children and the elderly, knowing that this served to establish who should be a forced labourer and who should instead be sent immediately to gas chambers, was instrumental in the perpetration of extermination. Had he intended to shirk criminal responsibility, he should have asked to be relieved of his duties and to discharge other duties elsewhere. This decision was possible and was sometimes made; although, it involved, of course, being sent to combat zones in the Eastern Front. Similarly, the locomotive driver of a train that carried hundreds of detainees to Auschwitz was criminally liable for his participation in extermination, so long as he knew what would happen to the persons he was transporting and did not ask to be exempted from this horrible task.

It can thus be noted that for this mode of liability no previous plan or agreement is required. Nevertheless, one can legitimately hold that each participant in the criminal institutional framework not only is cognizant of the crimes in which the institution or its members engage, but also implicitly or expressly shares the criminal intent to commit such crimes. It cannot be otherwise, because any person discharging *a task of some consequence* in the institution could refrain from participating in its criminal activity by leaving it

(exceptions are made for those who, for example, merely sweep the streets or clean the laundry, for they do not make a considerable contribution to implementing the common criminal purpose).

The third mode of responsibility concerns those participants who agreed to the main goal of the common criminal design (for instance, the forcible expulsion of civilians from an occupied territory) but did not share the intent that one or more members of the group entertained to also commit crimes incidental to the main concerted crime (for instance, killing or wounding some of the civilians in the process of their expulsion). This mode of liability only arises if the participant who did not have the intent to commit the 'incidental' offence, was nevertheless in a position to foresee its commission and willingly took the risk (I would call it *incidental criminal liability based on foresight and voluntary assumption of risk*).

A clear example in domestic criminal law of this mode of liability is that of a gang of thugs who agree to rob a bank without killing anyone, and to this end agree to use fake weapons. In this group, however, one of the members secretly takes real weapons with him to the bank with the intent to kill, if need be. Suppose another participant in the common criminal plan sees this gang member stealthily carrying those weapons. If the armed man then kills a teller or bank officer during the robbery, the one who saw him take the real weapons may be held liable for robbery and murder, like the killer and unlike the other robbers, who will only be liable for armed robbery. Indeed, he was in a position to expect with reasonable certainty that the robber who was armed with real weapons would use them to kill, if something went wrong during the robbery. Although he did not share the *mens rea* of the murderer, he foresaw the event and willingly took the risk that it might come about (plainly, he could have told the other robbers that there was a serious danger of a murder being committed; consequently, he could either have taken the weapons away from the armed robber, or withdrawn from the specific robbing expedition, or even dropped out from the gang). To further clarify the matter, one should perhaps distinguish between an *abstract* and a *concrete* foreseeability of the un-concerted crime. Arguably, for criminal liability under the third category of JCE to arise it is necessary for the un-concerted crime to be abstractly in line with the agreed upon criminal offence; in addition, it is also essential that the 'secondary offender' had a chance of predicting the commission of the un-concerted crime by the 'primary offender.' For instance, if a paramilitary unit occupies a village with the purpose of detaining all the women and enslaving them, a rape perpetrated by one of them would be in line with enslavement, since treating other human beings as objects may easily lead to raping them. It would, however, also be necessary for the 'secondary offender' to have specifically envisaged the possibility of rape (a circumstance that should be proved or at least inferred from the facts of the case) or, at least, to be in a position, under the 'man of reasonable prudence' test, to predict the rape.

As suggested earlier, the notion of JCE that is developed in *Tadić*, however successful in international case law (subject to the exceptions I shall soon mention), has been the object of severe criticisms by commentators. I shall

consider them in some detail, before highlighting the merits and the shortcomings of the notion at issue, and endeavouring to establish whether it is and acceptable.

3. Main Criticisms Levelled Against the Doctrine of JCE

A. *The Doctrine Was Not Delineated in the ICTYSt. and therefore the Appeals Chamber Wrongly Engaged in Judicial Creativity in Referring to It*

It has been argued that the doctrine of JCE was not expressly laid down in the Statute of the ICTY, which in Article 7(1) confined itself to speaking of a few well specified categories (committing, planning, ordering, instigating, aiding and abetting). To add another mode of criminal liability not explicitly provided for in the Statute constituted — so the argument goes — an unwarranted instance of judicial creativity.

This objection ignores that the ICTY Statute, besides outlining the structure of the Tribunal, sets out the offences over which the Tribunal has jurisdiction. However, the definitions of the crimes over which the Tribunal is vested with jurisdiction can only be found in customary international law, as was emphasized *inter alia* by the UN Secretary-General when he submitted the Statute to the Security Council for approval.² Moreover, it is in customary international law that — whenever the Statute is silent — the Tribunal can find the general concepts of criminal law that it must apply on such matters as modes of responsibility, defences, etc. The Appeals Chamber rightly stressed that the word ‘commit’ has a broad purport that can legitimately be identified on the basis of customary international law. The Chamber also rightly stressed that the task of fleshing out that doctrine was dictated by, or at least was consonant with, the purpose of the Statute to prosecute all those responsible for serious crimes in the former Yugoslavia.

Thus, instead of engaging in judicial creativity, the Tribunal fulfilled its proper task of finding and interpreting the law, so as to apply it to the specific case at issue.

B. *The Doctrine Is Inappropriate and Should Be Replaced by That of Co-Perpetration*

These criticisms has been levelled by a Trial Chamber in *Stakić*³ and echoed by Judge Per-Johan Lindholm in his Separate Opinion in another case, *Simić*, where he argued that the doctrine of JCE ‘does not [...] have any substance of

2 See Report of the UN Secretary-General, 3 May 1993 (S/25704), § 34 (‘In the view of the Secretary-General, the application of the principle *nullum crimen sine lege* requires that the International Tribunal should apply rules of international humanitarian law that are beyond any doubt part of customary law so that the problem of adherence of some but not all States to specific conventions does not arise. This would appear to be particularly important in the context of an international tribunal prosecuting persons responsible for serious violations of international humanitarian law’).

3 Judgment, *Stakić* (IT-97-24-T), Trial Chamber, 31 July 2003, §§ 436–438.

its own' and 'is nothing more than a new label affixed to a since long well-known concept or doctrine in many jurisdictions as well as in international criminal law, namely co-perpetration.'⁴

Whatever the merits of the doctrine of co-perpetration (a doctrine embedded in many civil law systems), it is a fact that the ICTY Appeals Chamber dismissed it, holding that the notion of JCE better suits the reality of international criminality. In 2006, the ICTY Appeals Chamber held in *Stakić* that 'co-perpetratorship' as a mode of criminal liability:

does not have support in customary international law or in the settled jurisprudence of the Tribunal, which is binding on the Trial Chambers. By way of contrast, joint criminal enterprise is a mode of liability which is 'firmly established in customary international law' ... and is routinely applied in the Tribunal's jurisprudence.⁵

C. The Doctrine Wrongly Relies both on Civil Law Concepts and Common Law Categories

The objection has also been made that in *Tadić* the Appeals Chamber, after perusing international and national case law to determine whether a customary international rule had evolved on this mode of liability, relied on common law concepts while concomitantly using terms typical of the civil law tradition, such as 'co-perpetrators' and 'accomplice liability'.

This is no doubt true, and it may have contributed to misgivings or misinterpretation. The fact remains, however, that the fundamentals of the doctrine are solid, and the use of slightly misleading language does not detract from the basic soundness of the concept.

D. The Doctrine Fails Properly to Clarify the Difference between JCE and Aiding and Abetting

It has also been pointed out that the concept of JCE does not clearly distinguish between the responsibility of a participant in JCE and that of an aider and abettor; moreover, it even goes so far as to foist a greater weight upon a person responsible for aiding and abetting than on a participant in a JCE. According to Ambos:

In fact, if one takes the objective distinction of the Appeals Chamber [in *Tadić*] literally, an aider and abettor would do more than a co-perpetrator: the aider and abettor carries out

4 Separate and Partly Dissenting Opinion of Judge P.-J. Lindholm, *Simić and others* (IT-95-9-T), Trial Chamber, 17 October 2003, at § 2. The distinguished Judge was referring in particular to concepts enunciated by a leading German criminal lawyer, Carl Roxin. According to Roxin what characterizes co-perpetration is a multiplicity of persons all functionally cooperating in criminal conduct on the strength of a common criminal plan or agreement. See C. Roxin, *Strafrecht – Allgemeiner Teil*, vol. II (München: Beck 2003), 77 *et seq.*, and K. Ambos, 'Joint Criminal Enterprise and Command Responsibility' in this issue.

5 Judgment, *Stakić* (IT-97-24-A), Appeals Chamber, 22 March 2006, § 62.

substantial acts 'specifically directed' to assist in the perpetration of the (main) crime, while the co-perpetrator must only perform acts (of any kind) that 'in some way' are directed to the furthering of the common plan or purpose. This turns the traditional distinction between co-perpetration and aiding and abetting (the distinction as to the weight of the contribution, which must be more substantial in the case of co-perpetration) on its head.⁶

Admittedly, a major difference between the two categories of persons does exist. It lies in their respective *mens rea* (as for *actus reus*, in both cases a 'substantial' contribution is required, as I shall point out *infra* at 4.B. and 6, with regard to JCE). The participant in a JCE (i) shares from the outset a common criminal plan or purpose and a common intent to perpetrate a crime (murder, forced expulsion, persecution and so on); or (ii) by willingly and knowingly participating in an institutional criminal framework, expressly or implicitly evinces his sharing the criminal conduct in which that institutional framework engages; or else (iii) in addition to adhering to a criminal plan and sharing the intent to commit a crime, willingly runs the risk that another participant may perpetrate a further crime that the former had foreseen.

In contrast, he who aides and abets does not share, either at the outset or later, the criminal intent of the perpetrator; he only intends to assist the perpetrator in the commission of a crime. Although he is cognizant that the perpetrator intends to commit the crime, he does not share the *mens rea*. This is why, in principle, the criminal liability of the aider and abettor is more tenuous (or less weighty) than that of the participant in a common criminal enterprise.

E. The Foreseeability Standard Is neither Precise nor Reliable

With regard to the form of liability that has most lent itself to criticism, namely, *incidental criminal liability based on foresight and risk*, it has also been noted that the foreseeability standard is unreliable,⁷ so much so that through such a standard — it has been claimed — the doctrine introduces a 'form of strict liability'.⁸

Admittedly it is not an easy task for a court to determine whether the criminal conduct of a person participating in a JCE, which lies outside the common plan or agreement, was foreseeable by another participant, and whether that other participant willingly took the risk that the conduct be performed. It will be for the prosecution to prove that the participant had knowledge of a *specific* fact or circumstance evincing the likelihood that the other participant might commit an un-concerted crime (to revert

6 Ambos, *supra* note 4.

7 See, for instance, Ambos, *supra* note 4, and E. van Sliedregt, 'Joint Criminal Enterprise as a Pathway to Convicting Individuals for Genocide' in this issue.

8 Ambos, *supra* note 4.

to the example given earlier, whether he had seen the other robber replacing fake weapons with real ones). It will also be for the prosecution to prove whether the *general* circumstances of the commission of the agreed crime were such as to make it extremely likely, hence foreseeable, that other 'incidental' crimes be committed. For example, in the case of a common plan for the expulsion of an ethnic group from a multi-ethnic village not involving murder or other violent attacks on life and limb, it will be for the prosecution to prove that (i) among the members of the military unit charged with the forcible eviction there were violent characters that in the past had engaged in murder and rape of civilians and (ii) the accused knew this circumstance. It is also for the prosecution to prove that, in addition to knowledge, the participant at issue knowingly took the risk that the foreseeable situation might occur. This, again, could be inferred from a whole range of factual circumstances.

Clearly, if the prosecution fails to prove all this, the charge must be dismissed. It would be contrary to the principles of a fair trial to shift the burden of proof and require the defence to prove that the accused did not know the relevant facts, nor foresaw the crime and willingly took the risk that it be committed.

It could, however, be objected that the problem with this category of JCE does not arise in the sphere of evidence. Rather, it hinges on two fundamental notions of criminal law: *culpability* and *causation*. It has been contended that this category of criminal enterprise disregards the necessity that a person be held guilty only if his culpability has been proven; or in other words, that the causal link between his conduct and *mens rea* on the one side, and the crime, on the other, is proved. Based on that doctrine, one would find a person guilty of, say, murder, even if that person lacked the requisite subjective element (intent or *dolus*) proper to the crime and only entertained a lesser form of *mens rea* (foreseeability plus willingly taking the risk that the crime be perpetrated, that is *dolus eventualis*). It would follow that the causal link between the *mens rea* and conduct on the one side and the event or crime, on the other, would be lacking. Thus — so the objection would continue — under certain conditions, one would place on a par the person who deliberately brought about the death of the victim and an individual who instead did not *intend* to cause such effect.

This objection is indisputably important, and can be met by advancing three arguments.

First, the foundation of this mode of responsibility is to be found in *considerations of public policy*, that is the need to protect society against persons who (i) band together to take part in criminal enterprises and (ii) whilst not sharing the criminal intent of those participants who intend to commit more serious crimes outside the common enterprise, nevertheless are aware that such crimes may be committed and (iii) do not oppose or prevent them. These policy considerations were aptly spelled out by the House of Lords in 1997, in *Regina v. Powell and another* and *Regina*

v. *English*,⁹ albeit with regard to crimes committed at the domestic level. The speeches of Lords Steyn¹⁰ and Lord Sutton¹¹ are particularly enlightening in this respect.

The second argument is more germane to strictly legal considerations. Generally speaking, one should not neglect an important factor: *incidental criminal liability based on foresight and risk* is a mode of liability that is consequential on (and incidental to) a common criminal plan, that is, an agreement or plan by a multitude of persons to engage in illegal conduct. The ‘extra crime’

9 In the first case, P, D., and a third man went to the home of the deceased, a dealer in cannabis. As soon as he opened the door, one member of the group shot him and he died shortly afterwards. The defendants were charged with murder on the basis of joint enterprise. At the trial P gave evidence and claimed that he was present at the scene only to buy cannabis. D. did not give evidence, but it was submitted on his behalf that he was unaware of the presence of the gun until it was used and that P. was responsible for the shooting. Both defendants were convicted of murder. The Court of Appeal (Criminal Division) dismissed both defendants’ appeals.

In the second case, the defendant, E., who was aged 15 at the time of the offence, and W. were convicted of the murder of a police sergeant on the basis of joint enterprise. Both the defendant and W. attacked the deceased with wooden posts. At the trial it was the Crown’s case that the defendant was present when W. produced the knife with which the fatal injuries were inflicted. It was maintained on the defendant’s behalf that there was evidence that he had fled the scene before W. produced the knife. The Court of Appeal (Criminal Division) dismissed E.’s appeal.

10 His Lordship stated the following:

At first glance there is substance in the third argument [of counsel for the Appellants] that it is anomalous that a lesser form of culpability is required in the case of a secondary party, viz. foresight of the possible commission of the greater offence, whereas in the case of the primary offender the law insists on proof of the specific intention which is an ingredient of the offence. This general argument leads, in the present case, to the particular argument that it is anomalous that the secondary party can be guilty of murder if he foresees the possibility of such a crime being committed while the primary can only be guilty if he has an intent to kill or cause really serious injury. Recklessness may suffice in the case of the secondary party but it does not in the case of the primary offender. The answer to this supposed anomaly, and other similar cases across the spectrum of criminal law, is to be found in practical and policy considerations. If the law required proof of the specific intention on the part of a secondary party, the utility of the accessory principle would be gravely undermined. It is just that a secondary party who foresees that the primary offender might kill with the intent sufficient for murder, and assists and encourages the primary offender in the criminal enterprise on this basis, should be guilty of murder. He ought to be criminally liable for harm that he foresaw and that in fact resulted from the crime he assisted and encouraged. But it would in practice almost invariably be impossible for a jury to say that the secondary party wanted death to be caused or that he regarded it as virtually certain. In the real world proof of an intention sufficient for murder would be well nigh impossible in the vast majority of joint enterprise cases. Moreover, the proposed change in the law must be put in context. The criminal justice system exists to control crime. A prime function of that system must be to deal justly but effectively with those who join with others in criminal enterprises. Experience has shown that joint criminal enterprises only too readily escalate into the commission of greater offences. In order to deal with this important social problem, the accessory principle is needed and cannot be abolished or relaxed. For these reasons, I would reject the arguments advanced in favour of the revision of the accessory principle (at 8).

11 My Lords, I recognise that as a matter of logic there is force in the argument advanced on behalf of the appellants, and that on one view it is anomalous that if foreseeability of death or really serious harm is not sufficient to constitute *mens rea* for murder in the party who actually

we are discussing is the *outgrowth* of previously agreed or planned criminal conduct for which each participant in the common plan is already responsible. This 'extra crime' is rendered possible by the prior joint planning to commit the agreed crime(s) other than the one 'incidentally' or 'additionally' perpetrated. We are not discussing the responsibility arising when members of a group (for instance, a military unit) engage in lawful action (for example, overpowering by military force an enemy fortification) and in the course of combat one of the combatants kills a civilian or rapes a woman — a crime for which of course he alone must bear criminal responsibility. Our discussion here, rather, turns on cases where a plurality of persons agrees to perpetrate one or more crimes for which they all bear responsibility and *in addition* one of them commits a further crime. Here, it is plain, the additional crime is premised on the existence of a concerted criminal purpose. In other words, there exists a causal link between the concerted crime and the 'incidental' crime: the former constitutes the preliminary *sine qua non* condition and the basis of the latter (although, with regard to the latter, only the participant that evinced knowledge and risk shares the liability of the other participant that perpetrated the 'additional' offence). To further clarify the nexus between the two categories of crimes at issue, it could, perhaps, prove useful to insist on the distinction between *abstract* and *concrete* (or specific) foreseeability, suggested above (at § 2).

The fact that the incidental crime may be based on a nexus with the concerted crime was clearly emphasized by various courts. Suffice it to mention here the decision of the Italian Court of Cassation in *D'Ottavio and others*.¹²

carries out the killing, it is sufficient to constitute *mens rea* in a secondary party. But the rules of the common law are not based solely on logic but relate to practical concerns and, in relation to crimes committed in the course of joint enterprises, to the need to give effective protection to the public against criminals operating in gangs. As Lord Salmon stated in *Reg. v. Majewski* [1977] A.C. 443, 482e, in rejecting criticism based on strict logic of a rule of the common law, 'this is the view that has been adopted by the common law of England, which is founded on common sense and experience rather than strict logic'. In my opinion there are practical considerations of weight and importance related to considerations of public policy which justify the principle stated in *Chan Wing-Siu v. The Queen* [1985] A.C. 168 and that prevail over considerations of strict logic (at 15).

¹² Decision of 12 March 1947. Two former Yugoslav war prisoners, who escaped from a concentration camp, were suddenly surrounded by four local individuals near an Italian village. While one of them managed to flee, the other man was hit by two gunshots fired by D'Ottavio with his hunting rifle. The four aggressors then immediately left the scene. The injured man later died. The Teramo Court of Assize held that the accused had not intended to kill. With regard to the defendants other than D'Ottavio, it had applied Art. 116 of the Italian Criminal Code, providing that 'Where 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. If the crime committed is more serious than that willed, the penalty is decreased for the participant who willed the less serious offence.' On appeal, the Court of Cassation held that:

The complaint concerning the application of Art. 116 is also without merit. By virtue of this provision, where the crime committed is other than the one willed by one of the participants, also that participant is accountable for the crime if the criminal result is a consequence of his action or omission. In order for a criminal event to be held to constitute the consequence

The participant in the JCE to commit a specific crime or set of crimes is put in the position to foresee the further, un-concerted crime, on account of his joining the criminal enterprise to commit the agreed upon crime. Although he did not share the intent of the participant that engaged in the further criminal conduct, he had predicted that conduct and willingly taken the risk that it might occur. There lies his *culpability*. He could have prevented the further crime, or disassociated himself from its likely commission. His failure to do so entails that he too must be held guilty.

Admittedly, in a mature legal system it should be possible to take account of the lesser degree of culpability of the participant at issue by qualifying his culpability through a charge lesser than that against the 'primary offender'. If the latter has engaged in *murder* while conducting a concerted unlawful deportation of civilians, the lesser offender could be accused of *manslaughter*. This different charge would take into account the lesser degree of culpability of the 'secondary offender'. However, international criminal law is a rudimentary body of law, which allows for such sophisticated distinctions or gradations *only to a very limited extent*. In short, one cannot charge a lesser offender with an offence belonging to a different category of international crimes; for instance, one cannot charge the 'primary offender' with murder as a crime against humanity and the 'secondary offender' with murder as a war crime. This would indeed be erroneous, for the two categories show different features; the offences at issue belong either to one category (for instance, crimes against

of the participant's action, it is necessary that there be a causation nexus — which is not only objective but also psychological — between the fact committed and willed by all the participants and the different fact committed by one of the participants. This is so because the participant's responsibility envisaged in Art. 116 is grounded not in the notion of collective responsibility... but in the fundamental principle of concurrence of interdependent causes, upheld and specified in Arts 40 and 41 of the Criminal Code. By virtue of the latter principle, all the participants answer for a crime both where they are the direct cause of the crime and where they are the indirect cause, in accordance with the canon *causa causae est causa causati* [the cause of a cause is also the cause of the thing caused; i.e. whoever voluntarily creates a situation bringing to, or resulting in, criminal conduct is accountable for that conduct whether or not he willed the crime].

It is this concurrence of causes that also in this particular case of participation re-establishes the requirement of legal identity of the fact that is the precondition of the cooperation 'in the commission of same crime'. This identity is at least generic if not specific in that all the defendants have effectively contributed to the first crime that was the cause of the second. Here lies the nexus of objective causation: all participants have directly cooperated in the crime of attempted illegal detention of persons (provided for in Art. 605 of the Criminal Code) by surrounding and chasing two fugitive prisoners of war, armed with a gun and a musket for the purpose of unlawfully capturing them. This crime was the indirect cause of the subsequent and connected event consisting of the rifle shot that D'Ottavio alone fired at one of the fugitives, a rifle shot that caused a wound followed by death [see Art. 584 on manslaughter (*omicidio preterintenzionale*)]. There also exists a psychological causation in that all the participants shared the conscious will to engage in an attempt to unlawfully detain a person while foreseeing a possible different crime, as can be inferred from the use of weapons: it was to anticipate that one of them might have shot at the fugitives with a view to achieving the common purpose of capturing them. For the English translation of the decision see *infra*, 232. See also the decision in *Mannelli and others*, 20 July 1949, *infra*, 243.

humanity) if the requisite conditions are met (chiefly, the existence of a context of widespread or systematic practice), or to the other. Furthermore, laying different charges within the same category of international crime is logically possible only with regard to *some classes of underlying offences*. As classes of offences where a gradation is possible one can mention: murder and manslaughter (as a war crime, or a crime against humanity); or wilful killing (as a grave breach) and unlawful killing (as a war crime in an international armed conflict);¹³ or rape and sexual violence (as a war crime or a crime against humanity); or torture and inhuman or degrading treatment (as a war crime or a crime against humanity). For other underlying offences it would seem difficult to apply such gradations of culpability and hence of charging.

The objection at issue may also be met by adding an important qualification to the application of the third class of JCE under discussion. Resorting to such class would be intrinsically ill-founded when the crime committed by the 'primary offender' requires a special or specific intent (*dolus specialis*), that is, the crime charged is one of genocide, persecution or aggression (it is common knowledge that for genocide the intent to destroy a 'protected group' in whole or in part is required; persecution presupposes the intent to discriminate on one of the requisite grounds; aggression, at least in the opinion of some commentators,¹⁴ is grounded in the intent to appropriate a foreign territory or to obtain economic advantages, or to interfere with the internal affairs of the victim state). In these cases the 'secondary offender' may not share — by definition — that special intent (otherwise one would fall under the first and second class of JCE), even though entertaining such intent is a *sine qua non* condition for being charged with the crime. He may, therefore, not be accused of such crime under the doctrine at issue. This proposition is based on two grounds. First, on a logical impossibility: one may not be held responsible for committing a crime that requires special intent (in addition to the intent needed for the underlying crime) unless that special intent can be proved, whatever mode of responsibility for the commission of crimes is relied upon (this leaves out aiding and abetting, where it suffices to prove that the offender has made a substantial contribution to the commission of the crime by others, had knowledge of the crime and intentionally provided assistance to its perpetration). Second, admittedly whoever is liable under the third category of JCE has a distinct *mens rea* from that of the 'primary offender'; nevertheless, as the 'secondary offender' bears *responsibility for the same crime* as the 'primary offender', the 'distance' between the subjective element of the two offenders must not be so dramatic as in the case of crimes requiring special intent.

13 This proposition is based on the assumption that grave breaches may only be committed in international armed conflicts, a position taken in 1995 by the ICTY Appeals Chamber in *Tadić* (Decision on the Defence Motion for Interlocutory Appeal, *Tadić* (IT-94-1-A), Appeals Chamber, 2 October 1995) but probably no longer valid under current international customary law.

14 S. Glaser, 'Quelques remarques sur la définition de l'agression en droit international pénal' in *Festschrift für Th. Rittler* (Aalen: Verlag Scientia, 1957), at 388–393; Idem, 'Culpabilité en droit international pénal', in 99 *Hague Recueil* (1960- I), at 504–505.

Otherwise, the crucial notions of ‘personal culpability’ and ‘causation’ would be torn to shreds.¹⁵ For such crimes the ‘secondary offender’ could only be charged — it is submitted — with *aiding and abetting* the main crime (needless to say, subject to the condition that the requirements of aiding or abetting the commission of one of the three classes of aforementioned crimes are met).

The third response to the objections under discussion is directed to emphasize that the basic proposition suggested here on the basis of existing case law (that any participant in a JCE is also *guilty* for acts by another participant, under the conditions set out in the case law) is accompanied by the proposition that *at the sentencing stage* one must, however, take into account the different degrees of culpability of the participants. The lesser form of *mens rea* of the ‘secondary offender’ shall be taken into account by meting out a lighter sentence than that inflicted on the participant who materially perpetrated the offence not envisaged in the criminal plan. Both participants are guilty, but the one that did not materially perpetrate the further crime must get a less heavy sentence on account of his lesser culpability.

Finally, to further clarify the scope of this class of JCE we should ask ourselves whether the *mens rea* requirement for this JCE is the secondary offender’s *subjective foresight* of the likelihood of the crime being committed by the primary offender (i.e. the secondary offender actually foresaw that likelihood), or instead *objective foreseeability* of that likelihood (i.e. he ought to have foreseen that the crime was likely to be perpetrated). As the Supreme Court of Canada rightly pointed out in two celebrated decisions concerning ‘constructive murder’ (i.e. murder imputed to a person by law from his course of actions, though his deeds taken severally do not amount to voluntary murder), *R. v. Vaillancourt*

15 In 2004, the ICTY Appeals Chamber took a contrary view in *Brđanin* (IT-99-36), with regard to genocide. In its Decision on Interlocutory Appeal of 19 March 2004, it held that ‘provided that the standard applicable to that head of liability [the third category of JCE], i.e. ‘reasonably foreseeable and natural consequences’ is established, criminal liability can attach to an accused for any crime that falls outside of an agreed upon joint criminal enterprise’ (§ 9). It went on to say that ‘The Trial Chamber erred by conflating the *mens rea* requirement of the crime of genocide with the mental requirement of the mode of liability by which criminal responsibility is alleged to attach to the accused.’ (§ 10). The Appeals Chamber thus reversed a prior decision of the Trial Chamber (Decision for Acquittal Pursuant to Rule 98bis, *Brđanin* (IT-99-36-T), 28 November 2003), which had held (correctly, in my opinion) that the specific intent required for genocide ‘cannot be reconciled with the *mens rea* required for a conviction pursuant to the third category of JCE. The latter consists of the Accused’s awareness of the risk that genocide would be committed by other members of the JCE. This is a different *mens rea* and falls short of the threshold needed to satisfy the specific intent required for a conviction for genocide under Art. 4(3)(a) [of the ICTY Statute]’ (§ 57). In 2005, in *Kvočka and others* (IT-98-30/1), the same Appeals Chamber limited the need for sharing the special intent to the first category of JCE. It ‘affirmed’ the Trial Chamber’s conclusion that participants in a basic or systemic form of JCE must be shown to share the required intent of the principal perpetrators. Thus, for crimes of persecution, the Prosecution must demonstrate that the accused shared the common discriminatory intent of the JCE. If the accused does not share the discriminatory intent, then he may still be liable as an aider and abettor if he knowingly makes a substantial contribution to the crime.’ (§ 110). This proposition was also taken up by an ICTR Trial Chamber (Judgment, *Simba* (ICTR-01-76-T), Trial Chamber, 13 December 2005, at § 388).

(1987) and *R. v. Martineau* (1990), objective foreseeability constitutes a lower threshold.¹⁶ This threshold the Court in *Vaillancourt* considered admissible in cases of 'constructive murder' whereas in *Martineau* the same Court held the subjective test to be more consonant with principles of fundamental justice. Probably the later ruling was also dictated by the fact that under Canadian legislation a finding of murder entails a mandatory sentence of life imprisonment; it was therefore felt necessary to raise the threshold of culpability for any such finding. Be that as it may, it would seem that at the international level the lower requirement of objective foreseeability is upheld by case law, as proved by the cases (*Tadić*, *Krstić* and *Stakić*) that I will consider *infra*, at 4(C). In other words, at the international level what is required is not that the secondary offender actually foresaw the criminal conduct likely to be taken by the primary offender; the test is rather whether a man of reasonable prudence would have foreseen that conduct under the circumstances prevailing at the time. Three reasons seem to warrant the acceptance of a lower threshold at the international level. First, the crimes at issue are massive and of extreme gravity; moreover they are normally perpetrated under exceptional circumstances of armed violence. Under these circumstances one can legitimately expect that combatants and other persons participating in armed hostilities or involved in large scale atrocities be particularly alert to the possible consequences of their actions. Secondly, the gravity of the crimes at issue makes it necessary for the world community to prevent and punish serious misconduct to the maximum extent allowed by the principle of legality. Thirdly, in international criminal law there is no fixed scale of penalties; courts are therefore free duly to appraise the level of culpability of the accused and accordingly impose a congruous sentence.

4. A Survey of Recent International Case Law

It may prove useful to briefly dwell on the various cases where the notion at issue was recently relied upon by international courts, to see how these courts have applied it under the specific circumstances of each case.

16 See *R. v. Vaillancourt*, judgment of 3 December 1987, [1987] 2 S.C.R 636 (online: www.scc.lexum.umontreal.ca/1987/1987rcs2-636, at 24-29 visited on 4 January 2007) and *R. v. Martineau*, judgment of 13 September 1990, [1990] 2. S.C.R 633 (online, www.scc.lexum.umontreal.ca/1990/199rcs2-633, at 16-20, visited on 4 January 2007).

The facts in *Vaillancourt* are interesting. During an armed robbery, appellant's accomplice shot and killed a client. He then escaped but appellant was arrested and convicted of second degree murder (i.e. unlawful taking of human life with malice but without deliberation or premeditation) as a party to the offence. However, the two had previously agreed to commit the robbery armed only with knives; when on the night of the robbery the accomplice arrived with a gun, appellant insisted that it be unloaded; the accomplice removed three bullets from the gun and gave them to the appellant, whose glove containing the three bullets was later recovered by the police at the scene of the crime. The Court upheld the appeal against conviction and ordered a new trial. As Judge L'Heureux-Dubé later noted in his dissenting opinion in *Martineau*, 'The facts themselves in *Vaillancourt* negated *mens rea* Given these facts, it seems unlikely that *Vaillancourt*, or any reasonable person in his position, had reason to foresee that anyone would be killed in the course of the robbery' (at 29).

First of all, let us see how courts applied the first category of JCE.

A. *Liability for a Common Intentional Purpose*

In 2001, in *Krstić*, an ICTY Trial Chamber held that the defendant had participated in a JCE to commit genocide. The Court explained at length that initially Krstić had only taken part in a common plan to forcibly expel Muslims from the area of Srebrenica; however, later on, when it became apparent that the various military leaders in fact were planning the killing of thousands of military-aged men, the defendant showed, through his various acts and behaviour, that he shared the ‘genocidal intent to kill the men.’ The Chamber, therefore, found Krstić guilty of genocide and sentenced him to 46 years in prison.¹⁷ The Appeals Chamber held instead that Krstić was only guilty of complicity in genocide, for he had not shared the genocidal intent but simply aided and abetted genocide. It reduced his sentence to 35 years’ imprisonment.

In 2003, in *Simić and others*, an ICTY Trial Chamber held that the three accused, Bosnian Serbs operating in the municipalities of Bosanski Samac and Odzak in Bosnia Herzegovina, committed various crimes there. The main defendant, Simić (who, at the time of the conflict, was the President of the Municipal Assembly and of the Crisis Staff, later renamed ‘the War Presidency’), participated in a basic form of JCE. He shared with others the intent to execute a common plan of persecution of non-Serb civilians in the Bosanski Samac municipality. According to the Trial Chamber, Simić, as the highest-ranking civilian in

¹⁷ Judgment, *Krstić* (IT-98-33-T), Trial Chamber, 2 August 2001, §§ 621–645. The Chamber concluded that: ‘In the present case, General Krstić participated in a joint criminal enterprise to kill the military-aged Bosnian Muslim men of Srebrenica with the awareness that such killings would lead to the annihilation of the entire Bosnian Muslim community at Srebrenica. His intent to kill the men thus amounts to a genocidal intent to destroy the group in part. General Krstić did not conceive the plan to kill the men, nor did he kill them personally. However, he fulfilled a key coordinating role in the implementation of the killing campaign. In particular, at a stage when his participation was clearly indispensable, General Krstić exerted his authority as Drina Corps Commander and arranged for men under his command to commit killings. He thus was an essential participant in the genocidal killings in the aftermath of the fall of Srebrenica. In sum, in view of both his *mens rea* and *actus reus*, General Krstić must be considered a principal perpetrator of these crimes’ (§ 644).

Although, generally speaking the Chamber’s reasoning is convincing, some points may give rise to misgivings. For instance, in § 635, the Chamber seems to assume that in some respects the defendant also participated in a third-category JCE, a proposition that seems questionable (the Chamber stated the following: ‘The Trial Chamber has further determined that the ordeal inflicted on the men who survived the massacres may appropriately be characterised as a genocidal act causing serious bodily and mental harm to members of the group pursuant to Article 4(2)(b). While the agreed objective of the joint criminal enterprise in which General Krstić participated was the actual killing of the military aged Bosnian Muslim men of Srebrenica, the terrible bodily and mental suffering of the few survivors clearly was a natural and foreseeable consequence of the enterprise. General Krstić must have been aware of this possibility and he, therefore, incurs responsibility for these crimes as well.’). Causing suffering to the survivors would seem to be part and parcel of the crime of genocide, not of a distinct conduct.

the municipality, acted in unison with others to execute a plan that included: the forcible takeover of the town of Bosanski Samac, and the persecutions of non-Serb civilians in the area, which took the form of unlawful arrests and detention, cruel and inhumane treatment including beatings, torture, forced labour assignments and confinement under inhumane conditions, deportations and forcible transfers. The Chamber held that he was a participant in the JCE, while no evidence permitted the conclusion that the other two defendants were also participants. According to the Chamber, Miroslav Tadić (a retired school teacher who acted as assistant commander for logistics and was a member of the Crisis staff), did not even aid and abet the JCE. Tadić had knowledge of the discriminatory intent of the JCE through his position as a member of a particular body (the Exchange Commission); nevertheless his actions could not be considered to have had a 'substantial effect' on unlawful arrests and detentions. In the view of the Chamber, Miroslav Tadić did not share and was unaware of Simić's intent and that of the other participants in the JCE to subject Bosnian Muslims and Croats to dangerous or humiliating work, even though Tadić was aware of the existence of a forced labour programme. He, however, 'substantially contributed' to the deportation of non-Serb civilians as an aider and abettor. As for Zarić (an assistant commander for intelligence, reconnaissance, morale and information and a chief of national security in the municipality), in the view of the Chamber he was guilty of persecution, in particular cruel and inhumane treatment including beatings, torture and confinement under inhumane conditions. Simić was sentenced to 17 years' imprisonment, Miroslav Tadić to 8 and Zarić to 6.¹⁸

The ICTY took an important stand in *Brđanin* in 2004. In the indictment, the Prosecution had alternatively pleaded the defendant's criminal responsibility pursuant to the first and third categories of JCE. With respect to the first category, the Prosecution alleged in the various counts that '[t]he purpose of the joint criminal enterprise was the permanent forcible removal of Bosnian Muslim and Bosnian Croat inhabitants from the territory of the planned Serbian state by the commission of the crimes alleged.' The alternative pleading of the third category specified that '[the defendant] [was] individually responsible for the crimes enumerated in [various counts] on the basis that these crimes were natural and foreseeable consequences of the acts' of deportation and forcible transfer of civilians. The Chamber noted that for both categories of JCE to materialize it was required to prove not only the existence of a common criminal plan, but also that the crimes had been perpetrated by one or more participants in such common plan. However, in the case at issue the crimes had been committed by members of the army, police and paramilitary groups that had not participated in the criminal plan or enterprise.¹⁹ The Chamber,

18 Judgment, *Simić and others* (IT-95-9), Trial Chamber, 17 October 2003, §§ 144–160, 983–1055.

19 'The evidence does not show that any of the crimes charged in the Indictment were physically perpetrated by Momir Talic, other members of the ARK Crisis Staff, the leadership of the SerBiH and the SDS (including Radovan Karadzic, Momcilo Krajsnik and Biljana Plavsic), members of the ARK Assembly and the Assembly's Executive Committee and the Serb Crisis Staffs of the ARK municipalities [all participants in the common plan]. As it has not been established

therefore, dismissed the applicability of the notion of JCE to the crimes at issue.²⁰ Although the Chamber did not provide detailed reasons for its conclusion, it would seem to be correct. To extend criminal liability to instances where there was no agreement or common plan between the perpetrators and those who participated in the common plan would seem to excessively broaden the notion, which is always premised on the *sharing of a criminal intent by all* those who take part in the common enterprise (and this premise is the *sine qua non* condition for the possible additional liability arising in the third category of JCE, where the ‘primary offender’ commits a further crime, not envisaged in the common plan).²¹

The International Criminal Tribunal for Rwanda (ICTR) too has upheld the notion of JCE. In *Rwamakuba* (Decision on Interlocutory Appeal), the Appeals Chamber held that the Tribunal had jurisdiction to try the appellant on a charge of genocide through the mode of liability of JCE.²² In *Ntakirutimana and Ntakirutimana*, the Appeals Chamber relied upon the first category of JCE, but found that the Trial Chamber had been correct in not applying the doctrine to the case at issue.²³ In *Simba*, in 2005, an ICTR Trial Chamber held that the accused was guilty of JCE to commit genocide and extermination.²⁴ In another case where the Prosecution had similarly charged a person with JCE to commit

that these persons carried out the *actus reus* of any of the crimes charged in the Indictment, the Trial Chamber will not examine the existence of a JCE between the Accused and these individuals. The *actus reus* of the crimes charged in the Indictment that have been established beyond reasonable doubt was perpetrated by members of the army, the Bosnian Serb police, Serb paramilitary groups, Bosnian Serb armed civilians or unidentified individuals (‘Physical Perpetrators’). While the names of the perpetrators have been established in a relatively small number of cases, in most cases the Physical Perpetrators have only been identified by the group they belonged to.’ (Judgment, *Brđanin* (IT-99-36-T), Trial Chamber II, 1 September 2004, § 345.)

20 ‘The Trial Chamber is of the view that the mere espousal of the Strategic Plan by the Accused on the one hand and many of the Relevant Physical Perpetrators on the other hand is not equivalent to an arrangement between them to commit a concrete crime. Indeed, the Accused and the Relevant Physical Perpetrators could espouse the Strategic Plan and form a criminal intent to commit crimes with the aim of implementing the Strategic Plan *independently from each other* and without having an understanding or entering into any agreement between them to commit a crime’ (§ 351). ‘The Trial Chamber is of the view that JCE is not an appropriate mode of liability to describe the individual criminal responsibility of the Accused, given the extraordinarily broad nature of this case, where the Prosecution seeks to include within a JCE a person as structurally remote from the commission of the crimes charged in the Indictment as the Accused. Although JCE is applicable in relation to cases involving ethnic cleansing, as the *Tadic* Appeal Judgement recognises, it appears that, in providing for a definition of JCE, the Appeals Chamber had in mind a somewhat smaller enterprise than the one that is invoked in the present case.’ (*Ibid.*, § 355).

21 For a well argued contrary view, see K. Gustafson, ‘The Requirement of an ‘Express Agreement’ for Joint Criminal Enterprise Liability’, in this issue.

22 Decision on Interlocutory Appeal, *Rwamakuba* (ICTR-98–44C), Appeals Chamber, 22 October 2004, §§ 9–30.

23 ICTR Judgment, *Ntakirutimana and Ntakirutimana* (ICTR-96-10; ICTR-96-17), Appeals Chamber, 13 December 2004, §§ 462, 466, 468–484.

24 Judgment, *Simba* (ICTR-01-76), Trial Chamber, 13 December 2005, at §§ 386–396, 411–419, 420–426.

genocide and extermination (*Mpambara*), an ICTR Trial Chamber held instead that no proof beyond a reasonable doubt had been tendered that the accused possessed the intent to be part of a JCE. It consequently acquitted him on all counts of the indictment.²⁵

B. Liability for Institutional Participation in a Common Criminal Plan

An ICTY Trial Chamber relied upon this notion in 2001 in *Kvočka and others*. The Chamber found that the five defendants had occupied positions or roles in the operation of a detention camp at Omarska, where various crimes were committed (persecution, murder and torture). Kvočka had been the camp commander's right hand; Kos was a guard shift commander; Radić was a shift commander. Zigić, who was a taxi driver in the Prijedor area during the period of 26 May to 30 August 1992, used to enter Omarska as well as other two camps for the purpose of abusing, beating, torturing and killing prisoners. Lastly, Prcac was de facto a deputy camp commander. According to the Chamber the Omarska camp 'was a JCE, a facility used to interrogate, discriminate against, and otherwise abuse non-Serbs from Prijedor and which functioned as a means to rid the territory of or subjugate non-Serbs' (§ 323). The Chamber held that the continuous perpetration of crimes in the camp was common knowledge to anybody living there.²⁶ It held that all the accused formed part of a JCE to commit the crimes ascribed to them, and sentenced all of them to varying sentences. The Appeals Chamber confirmed the convictions and sentences.

It is worth stressing that the Trial Chamber rightly emphasized the need for the participation of a person in an institutionalized JCE to be 'significant'; that is, through 'an act or omission that makes an enterprise efficient or effective;

25 Judgment, *Mpambara* (ICTR-01-65), Trial Chamber, 11 September 2006, §§ 13–14, 38–40, 76, 113, 164.

26 'The Trial Chamber has also emphasized that anyone regularly working in or visiting Omarska camp would have had to know that crimes were widespread throughout the camp. Knowledge of the joint criminal enterprise can be inferred from such indicia as the position held by the accused, the amount of time spent in the camp, the function he performs, his movement throughout the camp, and any contact he has with detainees, staff personnel, or outsiders visiting the camp. Knowledge of the abuses could also be gained through ordinary senses. Even if the accused were not eye-witnesses to crimes committed in Omarska camp, evidence of abuses could be seen by observing the bloodied, bruised, and injured bodies of detainees, by observing heaps of dead bodies lying in piles around the camp, and noticing the emaciated and poor condition of detainees, as well as by observing the cramped facilities or the blood-stained walls. Evidence of abuses could be heard from the screams of pain and cries of suffering, from the sounds of the detainees begging for food and water and beseeching their tormentors not to beat or kill them, and from the gunshots heard everywhere in the camp. Evidence of the abusive conditions in the camp could also be smelled as a result of the deteriorating corpses, the urine and feces soiling the detainees clothes, the broken and overflowing toilets, the dysentery afflicting the detainees, and the inability of detainees to wash or bathe for weeks or months.' (Judgment, *Kvočka and others* (IT-98-30/1), Trial Chamber, 2 November 2001, § 324.)

e.g. a participation that enables the system to run more smoothly or without disruption' (§ 309). It then wisely went on to note that the significance of the contribution is to be determined on a case by case basis, taking into account a variety of factors (§ 311). On this point the Appeals Chamber took a slightly different stand, and held that:

in general, there is no specific legal requirement that the accused make a substantial contribution to the JCE. However, there may be specific cases which require, as an exception to the general rule, a substantial contribution of the accused to determine whether he participated in the JCE. In practice, the significance of the accused's contribution will be relevant to demonstrating that the accused shared the intent to pursue the common purpose. (§ 97)²⁷

It should be noted that in other cases the Tribunal has stressed the need for the contribution of each participant in a JCE to be 'substantial'.²⁸ For instance, in *Limaj and others*, an ICTY Trial Chamber found that the Prosecution had not proved that the three accused persons (members of the Kosovo Liberation Army) were liable for a JCE to commit in 1998 such crimes as torture, ill-treatment and murder in a prison camp in Kosovo.²⁹

It bears noting that the requirement that the contribution of a participant in a JCE should be 'substantial' had not been envisaged by the ICTY Appeals Chamber in *Tadić* (1999).³⁰ This requirement seems to the present writer to be indispensable.

C. Incidental Criminal Liability Based on Foresight and Acceptance of Risk

The question facing the Appeals Chamber in *Tadić* was raised by the Prosecution. According to its ground of cross-appeal, the Trial Chamber had erred in finding that the accused could not be charged with the killing of five men in the village of Jaskiči, when he participated in the attack on that village and the village of Sivci on 14 June 1992, because there was no evidence showing that he had killed or taken part in the killing of those five men. According

27 However, the Chamber subsequently held that in some exceptional cases the 'substantial' character of a participant's contribution is needed: 'The Appeals Chamber is of the opinion that a person need not have any official function in the camp or belong to the camp personnel to be held responsible as a participant in the joint criminal enterprise. It might be argued that the possibility of "opportunistic visitors" entering the camp and maltreating the detainees at random added to the atmosphere of oppression and fear pervading the camp. In the view of the Appeals Chamber, it would not be appropriate to hold every visitor to the camp who committed a crime there responsible as a participant in the joint criminal enterprise. The Appeals Chamber maintains the general rule that a substantial contribution to the joint criminal enterprise is not required, but finds that, in the present case of 'opportunistic visitors', a substantial contribution to the overall effect of the camp is necessary to establish responsibility under the joint criminal enterprise doctrine'. (Judgment, *Kvočka and others* (IT-98-30/1-A), Appeals Chamber, § 599.)

28 *Ibid.*, § 667.

29 Judgment, *Limaj and others* (IT-03-66-T), Trial Chamber II, 30 November 2005, §§ 665–670.

30 *Tadić* (1999), *supra* note 1, § 227.

to the Prosecution 'the only conclusion reasonably open from all the evidence is that the killing of five victims was entirely predictable as part of the natural and probable consequences of the attack on the villages of Sivci and Jaskići on 14 June 1992' (§ 175). The Defence argued instead that the Trial Chamber correctly found that 'it was a possibility that the five victims in Jaskići were killed by another, distinct group of armed men, especially as nothing [was] known as to who shot the victims or in what circumstances' (§ 176). As for the Prosecution's common purpose submission, the Defence contended that 'it would have to be shown that the common purpose in which the Appellant allegedly took part included killing as opposed to ethnic cleansing by other means' (§ 177).

The Appeals Chamber upheld the Prosecution's submissions after engaging in an elaborate outline of the notion of common purpose or JCE in international criminal law.³¹ Based on this notion, the Appeals Chamber found that in the case at issue the defendant had taken part in a common plan to commit inhumane acts against the non-Serb civilian population in the Prijedor region in 1992. He was an armed member of the armed group that took part in the attack, and committed several crimes. He must have been aware 'that the actions of the group of which he was a member were likely to lead to . . . killings, but he nevertheless willingly took that risk' (§ 232). The Appeals Chamber, therefore, found the defendant guilty. Subsequently the Trial Chamber, to which the case had been remitted for sentencing purposes, held that for the murder of the five Muslims, Tadić was simultaneously guilty of a grave breach, a war crime and a crime against humanity. It sentenced him to 24 years' imprisonment for the grave breach and the war crime and 25 years for the crime against humanity, with the sentences to be served concurrently³² (in its previous judgment, where the murder of the five Muslims had not been imputed to Tadić, the Trial Chamber had sentenced him to 20 years' imprisonment).³³ On 26 January 2000, the Appeals Chamber reduced the sentence to 20 years' imprisonment, both because it held the previous sentence to be excessive with regard to the relatively minor position of the accused, and

31 'With regard to the first category, what is required is the intent to perpetrate a certain crime (this being the shared intent on the part of all co-perpetrators). With regard to the second category . . . , personal knowledge of the system of the treatment is required (whether proved by express testimony for a matter of reasonable in view inference from the accused's position of authority), as well as the intent to further this common concerted system of ill-treatment. With regard to the third category, what is required is the intention to participate in and further the criminal activity or the criminal purpose of a group and to contribute to the joint criminal enterprise or in any event to the commission of a crime by the group. In addition, responsibility for a crime other than the one agreed upon in the common plan arises only if, under the circumstances of the case, (i) it was *foreseeable* that such a crime might be perpetrated by one or are the members of the group and (ii) the accused *willingly took that risk*' (*Ibid.*, § 228).

32 Sentencing Judgment, *Tadić* (IT-94-1-T), Trial Chamber II, 11 November 1999, §§ 15–18, 27–29 and 32 E and G.

33 Sentencing Judgment, *Tadić* (IT-94-1-T), Trial Chamber II, 14 July 1997.

because in its view ‘there is in law no distinction between the seriousness of a crime against humanity and that of a war crime’. It was consequently wrong to consider the same offence as more grave if regarded as a crime against humanity than as a war crime.³⁴

The question of this category of criminal liability arose again in *Krstić*, although only tangentially, before the Trial Chamber. As pointed out earlier, the Chamber held that the defendant had participated in a JCE to commit genocide. Nevertheless, the Chamber relied upon the third category of criminal enterprise with regard to some crimes committed against the persons who had escaped the massacre. It held that it was not proved that various crimes committed against Muslims fleeing Srebrenica had been agreed upon in the criminal plan. They were nevertheless to be imputed to the defendant — so held the Chamber — because they were the foreseeable consequence of the policy of forcible expulsions that was part of the criminal plan.³⁵

In *Stakić*, the Appeals Chamber, after reversing the Trial Chamber’s ruling based on the notion of ‘co-perpetratorship’, held that the accused, in holding important positions such as President of the Crisis Staff, had participated in a JCE to commit crimes of persecution, forced displacement and ill-treatment in detention camps against Muslims in the Prijedor area in Bosnia-Herzegovina. It then held that the accused bore criminal liability under the third category of JCE for crimes not agreed upon, namely killings in detention camps, transportation to camps of the non-Serb civilian population and killings by the Serb armed military and police forces. The Appeals Chamber concluded that the accused was responsible under the third head of JCE for the crimes of murder (as a war crime and a crime against humanity) and extermination as a crime against humanity. It is notable that the Chamber insisted on the requirement of *dolus eventualis* and held, based on the findings of the Trial Chamber, that this form of *mens rea* did exist in the case at issue.³⁶

34 Judgment in Sentencing Appeal, *Tadić* (IT-94-1-T), Appeals Chamber, 26 January 2000, §§ 55–58, 69 and 76(3).

35 ‘The Trial Chamber is not, however, convinced beyond reasonable doubt that the murders, rapes, beatings and abuses committed against the refugees at Potocari were also an agreed upon objective among the members of the joint criminal enterprise. However, there is no doubt that these crimes were natural and foreseeable consequences of the ethnic cleansing campaign. Furthermore, given the circumstances at the time the plan was formed, General Krstić must have been aware that an outbreak of these crimes would be inevitable given the lack of shelter, the density of the crowds, the vulnerable condition of the refugees, the presence of many regular and irregular military and paramilitary units in the area and the sheer lack of sufficient numbers of UN soldiers to provide protection. In fact, on 12 July, the VRS organised and implemented the transportation of the women, children and elderly outside the enclave; General Krstić was himself on the scene and exposed to firsthand knowledge that the refugees were being mistreated by VRS or other armed forces.’ (*Krstić* Trial Judgment, *supra* note 2, § 616.)

36 The Appeals Chamber stated the following: ‘Regarding the camp killings, the Trial Chamber concluded that it ‘is satisfied beyond reasonable doubt that Dr. Stakić, as President of the Crisis Staff in Prijedor, actively participated in and threw the full support of the civilian authorities behind the decision to establish the infamous Keraterm, Omarska and Trnopolje

Finally, it should be mentioned that the ICTY Appeals Chamber has placed a broad interpretation on the category of JCE under discussion. In 2004 in *Brđanin*, it held that this category of JCE can also apply when acts of genocide are committed by the 'primary offender'.³⁷ In 2006, in *Karemera and others*, the ICTR Appeals Chamber held that this category of criminal liability can also cover crimes committed by fellow participants 'in a vast joint criminal enterprise', where crimes committed by the fellow participants are 'structurally or geographically remote from the accused'.³⁸

camps'. The Appellant 'was one of the co-perpetrators in a plan to consolidate Serb power in the municipality at any cost, including the cost of the lives of innocent non-Serb civilians in the camps', and he 'simply accepted that non-Serbs would and did die in those camps'. Furthermore, the Trial Chamber found that the Appellant was 'fully aware that large numbers of killings were being committed in the camps', and that he was aware of the pervasive atmosphere of impunity for wrongdoing that prevailed in the camps, and that was likely to result in the death of the detainees.

'As to the convoy killings, the Trial Chamber found that many killings occurred during the transportation to camps of the non-Serb civilian population. The Trial Chamber found that the primary perpetrators of these crimes were members of the Prijedor 'Intervention Platoon' established by the Crisis Staff presided over by the Appellant. As this platoon was comprised of individuals with criminal records and people recently released from jail, the Trial Chamber found that '[t]o entrust the escort of a convoy of unprotected civilians to such groups of men, as Dr. Stakić along with his co-perpetrators on several occasions did in order to complete the plan for a purely Serb municipality, is to reconcile oneself to the reasonable likelihood that those travelling on the convoy will come to grave harm and even death'. Thus the Trial Chamber concluded that the Appellant 'took an active role in the organisation of the massive displacement of the non-Serb population out of Prijedor municipality', and that, along with his co-perpetrators, the Appellant reconciled himself to the reasonable likelihood that those travelling on convoys would come to grave harm and even death.

'Concerning the municipality killings, . . . the Trial Chamber found that 'The Trial Chamber does not believe that the conscious object of Dr. Stakić's participation in the creation and maintenance of this environment of impunity was to kill the non-Serb citizens of Prijedor municipality. However, it is satisfied that Dr. Stakić, in his various positions, acted in the knowledge that the existence of such an environment would in all likelihood result in killings, and that he reconciled himself to and made peace with this probable outcome.

'In relation to the crime of extermination, the Trial Chamber . . . concluded that the Appellant ' . . . because of his political position and role in the implementation of the plan to create a purely Serb municipality, was familiar with the details and the progress of the campaign of annihilation directed against the non-Serb population. [The Appellant] was aware of the killings of non-Serbs and of their occurrence on a massive scale. The Trial Chamber is therefore convinced that [the Appellant] acted with the requisite intent, at least *dolus eventualis*, to exterminate the non-Serb population of Prijedor municipality in 1992 and finds [the Appellant] guilty of this crime, punishable under Article 5(b) of the Statute. In finding that the Appellant acted at least with *dolus eventualis* to commit extermination, the Trial Chamber concluded that the commission of extermination was likely, the Appellant was aware of this, and he had reconciled himself to that likelihood. This finding fulfils the requisite elements required for third category joint criminal enterprise liability: the crime of extermination was a natural and foreseeable consequence of carrying out the Common Purpose of the joint criminal enterprise, and the Appellant reconciled himself to that outcome.' (*Stakić Appeals Judgment, supra* note 1, §§ 93–97.)

37 Decision on Interlocutory Appeal, *Brđanin*, *supra* note 15, at §§ 9–10.

38 Decision on Jurisdictional Appeals: Joint Criminal Enterprise, *Karemera and others* (ICTR-98-44), Appeals Chamber, 12 April 2006, §§ 11–18.

5. Can the ICC Rely upon the Doctrine of JCE?

It has been rightly noted that the Statute of the International Criminal Court, while embracing the notion of joint participation in a criminal enterprise in Article 25(3)(d), always requires *intent* as the necessary subjective element necessary for a finding of criminal liability.³⁹ It follows that the ICC, while generally authorized to rely upon the doctrine under discussion, would be barred from applying the third category of JCE.

It would, however, seem that a broad interpretation of the expression ‘intentional participation’ could prove warranted. By requiring that the contribution of an individual to crimes ‘by a group of persons acting with a common purpose’ be intentional, the provision at issue may be construed as requiring that the intent be referred to the common criminal plan, and, as such, may also embrace acts performed by one of the participants outside that criminal plan, provided that another participant had a certain degree of awareness and foresight of the commission of such acts. This interpretation could be supported by the fact that the provision under discussion requires that the contribution to the common criminal purpose be intentional and made, among other things, ‘in the knowledge of the intention of the group to commit the crime’. The notion of ‘knowledge’ could well cover that of ‘foresight’ and ‘voluntary taking of the risk’ of a criminal action by one or several members of the group.

This expansive interpretation of Article 25(3)(d) would be justified by the need to punish criminal conduct that otherwise would not be regarded as culpable. In addition, it would not be contrary to the principle of personal culpability, for in any case the person at issue (i) would be guilty of intentionally participating in a criminal purpose or plan, (ii) his *mens rea* concerning the additional, not previously concerted crime, would have to be proved by the Prosecution and (iii) his lesser culpability would have to be taken into account at the sentencing stage.

³⁹ This provision stipulates that:

‘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:

- (i) Commits such a crime, whether as an individual, jointly with another or through another person, regardless of whether that other person is criminally responsible;
- (ii) Orders, solicits or induces the commission of such a crime that in fact occurs or is attempted;
- (iii) 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;
- (iv) *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;* (emphasis added).

6. The Notion at Issue Has Passed the Test of Judicial Scrutiny

By and large, all the dangers of abuse and misapprehension of the doctrine by international courts, feared by a number of commentators, have not materialized. Courts have tended to apply the notion in a wise and well-balanced manner, insisting, among other things, on the need that the contribution of participants in a JCE be 'substantial' for criminal liability to arise. However, the most recent tendency of the ICTY Appeals Chamber seems to broaden the third category of JCE by extending it to crimes of genocide committed by the 'primary offenders' (a view that has been respectfully criticized above), as well as to 'vast criminal enterprises' where the fellow participants may be 'structurally or geographically remote from the accused'.

I have suggested above some ways of qualifying and straightening out the third category of JCE. More generally, I submit that the latitude that the notion leaves to judges should induce them to proceed gingerly and with utmost prudence when appraising the evidence and establishing the existence of both *actus reus* and *mens rea*. In case of doubt, they should arguably opt for a not-guilty determination. Furthermore, should prosecutors intend to charge persons with criminal liability for crimes committed under the third category of JCE, they could envisage, where appropriate, the possibility of charging the 'secondary defendants' with a lesser crime than that with which the 'primary defendant' stands accused.