

**BEFORE THE PRE-TRIAL CHAMBER  
EXTRAORDINARY CHAMBERS IN THE COURTS OF CAMBODIA**

**Case No.** : 001/18-07-2007-ECCC/OCIJ (PTC 02)  
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**AMICUS CURIAE BRIEF OF PROFESSOR ANTONIO CASSESE  
AND MEMBERS OF THE *JOURNAL OF INTERNATIONAL CRIMINAL JUSTICE*  
ON JOINT CRIMINAL ENTERPRISE DOCTRINE**

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## INTRODUCTION AND STATEMENT OF INTEREST

1. The Pre-Trial Chamber invited *amicus curiae* Professor Antonio Cassese, editor-in-chief of the *Journal of International Criminal Justice*, together with members of the *Journal*'s Board of Editors and Editorial Committee, to analyze joint criminal enterprise (henceforth "JCE") doctrine pertaining to an appeal of the Closing Order by the Co-Prosecutors in the case of KAING Guek Eav alias "DUCH" (hereinafter DUCH).<sup>1</sup>

2. The Co-Prosecutors seek to amend the Closing Order of the Co-Investigating Judges to indict DUCH for commission of crimes through participation in a JCE.<sup>2</sup> Though the Closing Order noted that DUCH chaired the detention, interrogation and execution camp called S21, and—by DUCH's own admission—was "ultimately responsible for S21", the Closing Order only alleged that DUCH was liable under a commission form of responsibility for instances where he "personally tortured or mistreated detainees at S21".<sup>3</sup>

3. The Pre-Trial Chamber requested *amici curiae* to brief:

- (1) the development of the theory of JCE and the evolution of the definition of this mode of liability, with particular reference to the time period 1975-9;
- (2) whether JCE as a mode of liability can be applied before the ECCC, taking into account the fact that the crimes were committed in the period 1975-9.<sup>4</sup>

4. *Amicus curiae* Professor Cassese was the first President of the International Criminal Tribunal for the Former Yugoslavia ("ICTY"). He is currently Professor of International Law at the University of Florence and Editor-in-Chief of the *Journal of International Criminal Justice*.

5. The *Journal*, published by Oxford University Press, was established by distinguished lawyers and scholars to promote collective reflection on challenges facing international law. The *Journal* is a forum for addressing and analyzing major issues in international criminal

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<sup>1</sup> *Case of Kaing Guek Eav, alias "Duch"* (henceforth '*Kaing Guek Eav*'), Criminal Case File No. 001/18-07-2007-ECCC/OCIJ (PTC 02), Invitation to *Amicus Curiae*, 23 September 2008, § 4. The accused is referred to as "DUCH" in the Closing Order Indicting Kaing Guek Eav alias Duch, Investigation No. 001/18-07-2007-ECCC-OCIJ, Criminal Case File No. 002/14-08-2006, 8 August 2008 (public redacted version). See, e.g., *id.* at §§ 2-5.

<sup>2</sup> *Kaing Guek Eav*, Invitation to *Amicus Curiae*, *supra* note { NOTEREF \_Ref86657952 \h }, § 2; *Kaing Guek Eav*, Criminal Case File No. 001/18-07-2007-ECCC/OCIJ (PTC 02), Co-Prosecutors' Appeal of the Closing Order Against Kaing Guek Eav "Duch" Dated 8 August 2008, 5 September 2008, §§ 2-3, 72.

<sup>3</sup> *Kaing Guek Eav*, Closing Order Indicting Kaing Guek Eav alias Duch, *supra* note { NOTEREF \_Ref86657952 \h }, §§ 22, 153.

<sup>4</sup> *Kaing Guek Eav*, Invitation to *Amicus Curiae*, *supra* note { NOTEREF \_Ref86657952 \h }, § 4.

justice from the vantages of law, jurisprudence, criminology, penal philosophy and the history of international judicial institutions.

6. *Amicus curiae* Professor Cassese is joined by the following members of the *Journal's* Board of Editors or Editorial Committee: professor Mary De Ming Fan, Ms Vanessa Thalmann and professor Salvatore Zappalà.

### SUMMARY OF RELEVANT FACTS

7. The charged person, DUCH, allegedly helped plan and directed the detention and execution site called S21, which was also the headquarters of the Special Branch of the Secret Police under the Democratic Kampuchea regime.<sup>5</sup>

8. S21 became fully operational in October 1975, with DUCH initially serving as deputy in charge of the interrogation unit.<sup>6</sup> DUCH became Chairman and Secretary of S21 in March 1976.<sup>7</sup> Though DUCH appointed a deputy to oversee the day-to-day operation of the office, he “admitted he continued personally to oversee the interrogation of the most important prisoners, and to be ultimately responsible for S21.”<sup>8</sup>

9. One of the central purposes of S21 was to extract confessions exposing further networks of supposed traitors.<sup>9</sup> The vast majority of people interrogated were repeatedly tortured.<sup>10</sup>

10. While some survivors exist, every S21 prisoner was intended for execution.<sup>11</sup> Victims included men, women and children.<sup>12</sup> Many prisoners were deliberately killed; others were subjected to beatings and torture that perpetrators were aware could lead to death.<sup>13</sup> Moreover, the living conditions at S21 “were calculated to bring about the deaths of detainees” through, for example, deprivation of access to adequate food and medical care.<sup>14</sup>

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<sup>5</sup> *Kaing Guek Eav*, Closing Order Indicting Kaing Guek Eav alias Duch, *supra* note { NOTEREF \_Ref86657952 \h }, §§ 1, 20-22, 159.

<sup>6</sup> *Id.*, § 21.

<sup>7</sup> *Id.*, § 22.

<sup>8</sup> *Id.*

<sup>9</sup> *Id.*, § 43.

<sup>10</sup> *Id.*, § 136.

<sup>11</sup> *Id.*, §§ 6, 31, 107, 111.

<sup>12</sup> *Id.*, §§ 50, 127

<sup>13</sup> *Id.*, § 138.

<sup>14</sup> *Id.*, § 139.

11. More than 12,380 detainees died.<sup>15</sup> The last executions occurred on 7 January 1979.<sup>16</sup> Vietnamese forces entering Phnom Penh on 7 January 1979 after the Democratic Kampuchea regime had collapsed and its leadership had fled discovered S21 and a number of recently killed people still chained to iron beds.<sup>17</sup>

### **SUMMARY OF RELEVANT PROCEDURAL HISTORY**

12. In 1999, DUCH was discovered living under another name and arrested by Cambodian military authorities.<sup>18</sup> On 18 July 2007, the Co-Prosecutors of the newly established Extraordinary Chambers in the Courts of Cambodia (ECCC) filed an Introductory Submission summarising allegations against DUCH and four others.<sup>19</sup> During the investigation, DUCH was charged with crimes against humanity and grave breaches of the Geneva Conventions of 1949.<sup>20</sup> On 19 January 2007, the Co-Investigating Judges ordered that the case file on DUCH's responsibility relating to S21 be separated for expedited resolution.<sup>21</sup>

13. On 8 August 2008, the Co-Investigating Judges issued their Closing Order indicting DUCH for crimes against humanity and grave breaches of the Geneva Conventions.<sup>22</sup> The Closing Order recognized that certain acts identified in the judicial investigation also constituted homicide and torture under the 1956 Cambodian Penal Code, but ruled that “these acts must be accorded the highest available legal classification,” and pursued as crimes against humanity or grave breaches of the Geneva Conventions.<sup>23</sup> The Closing Order named six forms of responsibility: commission, ordering, command responsibility, planning, instigation, and aiding and abetting.<sup>24</sup> Under the commission mode of liability, the Closing Order only alleged responsibility where “DUCH personally tortured or mistreated detainees at S21”.<sup>25</sup>

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<sup>15</sup> *Id.*, §§ 107, 140.

<sup>16</sup> *Id.*, § 128.

<sup>17</sup> *Id.*, § 1.

<sup>18</sup> *Id.*, § 3.

<sup>19</sup> *Id.*, § 4.

<sup>20</sup> *Id.*

<sup>21</sup> *Id.*, § 5.

<sup>22</sup> *Id.*, §§ 131-151.

<sup>23</sup> *Id.*, § 152.

<sup>24</sup> *Id.*, §§ 153-161.

<sup>25</sup> *Id.*, § 153.

14. On 21 August 2008, the Co-Prosecutors filed a notice of appeal of the Closing Order.<sup>26</sup> The Co-Prosecutors filed an appeal brief on 5 September 2008 contesting (1) the decision not to indict Duch for homicide and torture under the 1956 Cambodian Penal Code, and (2) the omission of JCE as a mode of commission of the alleged crimes.<sup>27</sup>

15. On 23 September, 2008, the Pre-Trial Chamber invited Professor Cassese, in his capacity as Editor-in-Chief of the *Journal of International Criminal Justice*, together with members of the *Journal's* Board of Editors and Editorial Committee, to submit an *amicus curiae* brief on the development and evolution of JCE theory and whether the mode of liability may be applied at the ECCC in the adjudication of crimes committed between 1975 and 1979.<sup>28</sup> The Pre-Trial Chamber also issued similar invitations to Professor Kai Ambos and McGill University.<sup>29</sup>

16. On 3 October 2008, the charged person in another case, IENG Sary, moved to disqualify *amici* Professor Cassese and editorial members from submitting a brief.<sup>30</sup> IENG purported that the brief of *amici* would be “*result-determinative* [sic]” since Professor Cassese served on the appellate panel of the International Criminal Tribunal for the Former Yugoslavia (ICTY) that rendered a decision in *Prosecutor v. Tadić*,<sup>31</sup> which elucidated JCE as a mode of liability.<sup>32</sup>

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<sup>26</sup> *Kaing Guek Eav*, Investigation No. 001/18-07-2007-ECCC-OCIJ, Criminal Case File No. 002/14-08-2006, Statement of the Co-Prosecutors, 21 August 2008. See also *Kaing Guek Eav*, Invitation to *Amicus Curiae*, *supra* note { NOTEREF\_Ref86657952 \h }, § 1 (characterizing statement as notice of appeal).

<sup>27</sup> *Kaing Guek Eav*, Co-Prosecutors’ Appeal of the Closing Order Against Kaing Guek Eav “Duch” Dated 8 August 2008, *supra* note { NOTEREF\_Ref86663871 \h }, § 2.

<sup>28</sup> *Kaing Guek Eav*, Invitation to *Amicus Curiae*, *supra* note { NOTEREF\_Ref86657952 \h }, at § 4.

<sup>29</sup> The invitations to Professor Ambos and McGill University are referenced in an electronic bulletin dated 23 October 2008 on the ECCC website. The invitations directed to Professor Ambos and McGill University are not yet loaded among the legal documents available through the site.

<sup>30</sup> *Kaing Guek Eav*, Criminal Case File No. 001/18-07-2007-ECCC/OCIJ (PTC 02), Ieng Sary’s Motion to Disqualify Professor Antonio Cassese and Selected Members of the Board of Editors and Editorial Committee of the *Journal of International Criminal Justice* from Submitting a Written *Amicus Curiae* Brief on the Issue of Joint Criminal Enterprise in the Co-Prosecutors’ Appeal of the Closing Order Against KAING Guek Eav “Duch”, 3 October 2008.

<sup>31</sup> *Tadić*, IT-94-1-A, ICTY Appeals Chamber, Judgement, 15 July 1999.

<sup>32</sup> *Kaing Guek Eav*, Ieng Sary’s Motion to Disqualify Professor Antonio Cassese, *supra* note { NOTEREF\_Ref86664553 \h }, pp.1, 3.

17. Before the Pre-Trial Chamber extended its invitation to *amici*, IENG had filed a request on 15 September 2008 to submit arguments on JCE liability in the DUCH case.<sup>33</sup> On 6 October 2008, the Pre-Trial Chamber denied IENG's request, reasoning that the decision in the DUCH case would not be directly applicable to IENG and charged persons do not have a right to intervene in a case to which they are not parties.<sup>34</sup>

18. On 13 October 2008, the Co-Prosecutors opposed IENG's motion to disqualify *amici* Professor Cassese and editorial members of the *Journal of International Criminal Justice*.<sup>35</sup> The Co-Prosecutors argued that IENG is not a party in DUCH's case and therefore "has no standing" to raise the disqualification challenge, as demonstrated by the Pre-Trial Chamber's denial of IENG's motion to intervene and make submissions on JCE liability. On 14 October 2008, the Pre-Trial Chamber denied IENG's motion to disqualify, ruling that he had no standing to bring the motion.<sup>36</sup>

19. On 13 October 2008, the Pre-Trial Chamber decided to determine the Co-Prosecutors' appeal on the basis of written submissions only.<sup>37</sup> The reading of the Pre-Trial Chamber's decision on the Co-Prosecutors' appeal of the Closing Order is scheduled for 5 December 2008.<sup>38</sup>

## SUMMARY OF ANALYSIS

20. JCE is not a crime but a form of criminal liability. This doctrine is a crucial part of international criminal law, ensuring that individual culpability is not obscured in the fog of collective criminality and accountability evaded. The principles of JCE as a mode of criminal

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<sup>33</sup> *Kaing Guek Eav*, Criminal Case File No. 001/18-07-2007-ECCC/OCIJ (PTC 02), Ieng Sary's Expedited Request to Make Submission on the Application of Joint Criminal Enterprise Liability in the Co-Prosecutors' Appeal of the Closing Order Against Kaing Guek Eav "Duch", 15 September 2008.

<sup>34</sup> *Kaing Guek Eav*, Criminal Case File No. 001/18-07-2007-ECCC/OCIJ (PTC 02), Decision on Ieng Sary's Request to Make Submissions on the Application of the Theory of Joint Criminal Enterprise in the Co-Prosecutor's [sic] Appeal of the Closing Order Against Kaing Guek Eav "Duch", 6 October 2008, §§ 12-13.

<sup>35</sup> *Kaing Guek Eav*, Criminal Case File No. 001/18-07-2007-ECCC/OCIJ (PTC 02), Co-Prosecutors' Response to Ieng Sary's Motion to Disqualify *Amicus Curiae* in the KAING Guek Eav "Duch" Closing Order Appeal, 13 October 2008, § 3.

<sup>36</sup> *Kaing Guek Eav*, Criminal Case File No. 001/18-07-2007-ECCC/OCIJ (PTC 02), Decision on Ieng Sary's Motion to Disqualify *Amicus Curiae*, 14 October 2008, § 6.

<sup>37</sup> *Kaing Guek Eav*, Criminal Case File No. 001/18-07-2007-ECCC/OCIJ (PTC 02), Decision to Determine the Co-Prosecutors' Appeal of the Closing Order on the Basis of Written Submissions Only, 13 October 2008, § 5.

<sup>38</sup> *Kaing Guek Eav*, Criminal Case File No. 001/18-07-2007-ECCC/OCIJ (PTC 02), Scheduling Order, 25 September 2008, p. 2.

liability crystallized after World War II and were customary rules of international criminal law by 1975. Analysis and systematization of post-World War II cases implementing the principles of the Charter of the International Military Tribunal and Control Council Law No. 10 of 20 December 1945 showed three categories of JCE as a mode of liability: (1) a “basic” form where all participants acted pursuant to a common design and possessed intent to commit the crime, even if each participant carried out a different role and offered varying levels of contribution; (2) a “systemic” form—essentially a variant of the first category applicable to detention and concentration camp cases—and (3) an “extended” form ensuring accountability where another perpetrator commits a crime that, though outside the common design, was a natural and foreseeable consequence of effecting the common purpose.

21. JCE liability may be applied at the Extraordinary Chambers consistently with the principle of *nullum crimen sine lege* because (1) as the ICTY Appeals Chamber has explained, the customary character of the principles of JCE liability, and the steady stream of decisions, instruments, and various national laws upholding JCE principles was reasonable notice making this modality of liability foreseeable, and (2) at any rate, the Cambodian Criminal Code and French law, on which the Cambodian Code is based, would have provided sufficient notice. JCE liability should be applied in appropriate cases at the Extraordinary Chambers to ensure accountability for the full gravity of crimes, where the exact role that each participant in a common purpose may be obscured by the massive scale and complexity of the crime. Recognizing this mode of liability would ensure consistency in the application of law among international and hybrid tribunals that historically have applied JCE liability and that are continuing to apply the doctrine today in contexts as diverse as the former Yugoslavia, Rwanda, Sierra Leone, East Timor, as well as Iraq.<sup>39</sup>

## ANALYSIS

### I. OVERVIEW OF JCE LIABILITY: RATIONALE, SCOPE, LIMITS

22. This section introduces the three forms of JCE liability and their rationale, scope and limits. The next two sections then answer the questions presented to *amicus curiae*, analyzing

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<sup>39</sup> See *infra*, notes { NOTEREF \_Ref212550835 \h \\* MERGEFORMAT }-{ NOTEREF \_Ref212550837 \h \\* MERGEFORMAT } for references to cases from the various international and hybrid tribunals.

the crystallization of customary rules of international criminal law on JCE before 1975 and why JCE doctrine may and should be applied at the Extraordinary Chambers in appropriate cases.

### A. The Three Forms of JCE Liability

23. Three forms of JCE as modes of liability exist in international law.<sup>40</sup> The first and more widespread category is liability for acts agreed upon either when making the common plan or design or when such plan materialized extemporaneously, where all participants shared the intent to commit the concerted crime, regardless of whether the accused was the one who actually physically perpetrated the crime. All are responsible, whatever their role and position in carrying out the common criminal plan. Moreover, the ICTY Appeals Chamber has recently clarified that in all three categories of JCE the person who carried out the *actus reus* of the crime need not have been a member of the JCE so long as the crime committed was part of the common purpose.<sup>41</sup>

24. The second mode of liability—which is essentially a variant of the first—applies to persons carrying out a task within a criminal design implemented in an institutional framework such as an internment or a concentration camp.<sup>42</sup> This “systemic” form of JCE does not require proof of a plan or agreement (whether or not extemporaneous).<sup>43</sup> Plainly, in an internment camp where inmates are severely ill-treated and even tortured, not only the head of the camp, but also senior aides and those who physically inflict torture and other inhuman treatment are responsible. Those who discharge administrative duties indispensable for the achievement of the camp’s main goals—for example, to register the incoming inmates, record

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<sup>40</sup> These three forms are now well-settled and oft-reiterated in international jurisprudence. See, e.g., *Vasiljević*, IT-98-32-A, ICTY, Appeals Chamber, Judgement, 25 February 2004, §§ 96-102; *Tadić*, *supra* note { NOTEREF\_Ref86665274 \h }, §§ 227-228; *Karemera, Ngirumpatse, and Nzirorera*, ICTR-98-44-AR72.5, ICTR-98-44-AR72.6, ICTR Appeals Chamber, Decision on Jurisdictional Appeals: Joint Criminal Enterprise, 12 April 2006, § 13; *Kayishema and Ruzindana*, ICTR-95-1-A, ICTR Appeals Chamber, Judgement (Reasons), 1 June 2001, § 193. See also *Brima, Kamara, and Kanu*, SCSL-2004-116-A, Special Court for Sierra Leone, Appeals Chamber, Judgment, 22 February 2008, § 75 (describing *actus reus* for all forms of JCE).

<sup>41</sup> *Brđanin*, IT-99-36-A, ICTY Appeals Chamber, Judgement, 3 April 2007, § 410. Various circumstances may be bases for inferring that that the crime committed was part of the common purpose, such as knowledge by the person carrying out the *actus reus* about the existence of the JCE—even if the person did not share the intent of the group. *Id.* For an application of these principles to various perpetrators in connection with members of the JCE, see *Martić*, IT-95-11-A, ICTY Appeals Chamber, Judgement, 8 October 2008, §§ 168-212.

<sup>42</sup> See, e.g., *Kvočka*, IT-98-30/1-A, ICTY, Appeals Chamber, Judgement, 28 February 2005, §§ 101-103.

<sup>43</sup> *Id.*, §§ 101-103; *Krnjelac*, IT-97-25-A, ICTY, Appeals Chamber, Judgement, 17 September 2003, § 97.

their death, give them medical treatment, provide them with food or prevent the detainees from leaving—may also incur criminal liability. They bear this responsibility so long as they have knowledge of the serious abuses being perpetrated and willingly take part in the functioning of the institution. Criminal responsibility 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.

25. For this mode of liability, courts can legitimately hold that each participant in the criminal institutional framework was not only cognizant of the crimes in which the institution or its members engage, but also implicitly or expressly shared the criminal intent to commit such crimes.<sup>44</sup> 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 hallways or clean the laundry, for they do not make a significant contribution to implementing the common criminal purpose.

26. The third mode of responsibility concerns those participants who agree to the main goal of the common criminal design, for instance, the forcible expulsion of civilians from an occupied territory, but do not share the intent that one or more members of the group entertain 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. A clear example in domestic criminal law of this mode of liability is that of a bank robbery where three or more people agree to rob the bank carrying guns. They have no intent to kill anyone and do not agree to kill (may even agree not to kill or that the guns are only to threaten). During the robbery one of them fires his weapon and kills a teller. In this scenario, all

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<sup>44</sup> See, e.g., *Mauthausen Concentration Camp* case, General Military Government Court of the U.S. Zone, Dachau, Germany, 29 March – 13 May, 1946, quoted in *Trial of Martin Gottfried Weiss and Thirty-Nine Others (The Dachau Concentration Camp Trial)*, Case No. 60, General Military Government Court of the United States Zone, Dachau, Germany, 15 November-13 December, 1945, in UNITED NATIONS WAR CRIMES COMMISSION, LAW REPORTS OF TRIALS OF WAR CRIMINALS, VOL. XI, at 15 (1947) (ruling that anyone at the concentration camp would have known of its murderous practices and of the plan to kill and that all officials and employees were guilty).

members of the JCE are liable for the killing because it was foreseeable that by carrying guns someone could be killed (despite the absence of intent). The killing was an ‘unintended’ but foreseeable development. Another example 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. Arguably, for criminal liability under the third category of JCE to arise it is necessary for the crime outside the common plan 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.’<sup>45</sup> 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. This mode of incidental criminal liability based on foresight and risk is a mode of liability that is consequential on (and incidental to) a common

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<sup>45</sup> Compare *Mannelli and Others*, Case No. 914, Italian Court of Cassation, Criminal Section I, Judgement of 20 July 1949 (Italian Central Public Record Office, Rome), reprinted in 5 JOURNAL OF INTERNATIONAL CRIMINAL JUSTICE 243-244 (2007) (ruling that a man who hired two people to beat up or cause serious injury to a man was not responsible where the two people also robbed the man because it was out of line with what he expected).

criminal plan, that is, an agreement or plan by a multitude of persons to engage in illegal conduct. The ‘extra crime’ is the outgrowth of the common criminal purpose for which each participant 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. There is a causation link between the agreed-upon crime, the awareness in the secondary offender that an extra offence might be committed, his failure to prevent or stop it, and the occurring of such extra offence. The extra offence is predicated upon the agreed upon crime, and is made possible by the fact that the participant in the JCE who intends to perpetrate a further crime is not stopped by the participant who was cognizant of the likelihood that such further crime would be perpetrated (and did not abandon the primary criminal plan for fear that further crimes be committed). It follows that the conduct of the secondary offender contributed in some significant way to the occurrence of the extra offence.

27. Thus, in addition to shared intent, *dolus eventualis*—a civil-law concept similar to the common-law conception of advertent recklessness—can suffice to hold criminally liable for the extra offence those participants in the common plan who “willingly took the risk”<sup>46</sup>. Suppose for instance, that some members a military unit decide to detain a group of enemy female civilians suspected of having engaged in armed hostilities and they keep them in inhuman and degrading conditions; suppose that one or more members know with certainty that one of his or their colleagues has been sentenced for multiple offences of rape and has consistently affirmed throughout the hostilities that as soon as he would have a chance to rape a few enemy women he would do so; suppose that such a member of the unit actually rapes many of them while detained in unlawful conditions; in this case the other member or members who were fully aware of the likelihood that in creating the appropriate conditions he would have raped some women should be held responsible for both inhuman treatment and rape. The world community must defend itself from this collective criminality by holding those responsible for the full extent and reach of their crimes. The differing degrees of guilt may be taken into account at the stage of sentencing.<sup>47</sup>

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<sup>46</sup> *Brđanin*, *supra* note { NOTEREF\_Ref86666223 \h }, §§. 365, 431.

<sup>47</sup> See, e.g., *Trial of Otto Sandrock and Three Others*, British Military Court for the Trial of War Criminals, held at the Court House, Almelo, Holland, 24-26 November 1945, in UNITED NATIONS WAR CRIMES COMMISSION, LAW REPORTS OF TRIALS OF WAR CRIMINALS, VOL. I, at 41 (1947) (assigning different sentences to German officers who had played different roles in a killing, with the lightest sentence for those who waited by the car).

28. JCE liability is distinct from other modes of liability like aiding and abetting. The JCE doctrine serves an important purpose in capturing culpability in the context of collective criminality. There are two main differences between aiding and abetting and JCE liability:

- i. *Actus Reus*. Contributions with substantial effect on the perpetration of the crime are required for aiding and abetting liability; whereas for JCE liability, it suffices if acts are simply directed to the furtherance of the common plan.<sup>48</sup> ICTY now describes the correct level as ‘significant’ (see *Brdanin*, Appeals Chamber, § 427). It is worth noting that the accused does not have to personally perform any part of the *actus reus*.
- ii. Mental state. The requisite *mens rea* for aiding and abetting liability is knowledge that the acts performed assist in the commission of the crime, whereas more is required for JCE liability—either intent to pursue the common purpose or such intent plus foresight that crimes outside the common purpose are likely to be committed.<sup>49</sup>

The ICTY Appeals Chamber has explained that distinguishing between JCE and aiding and abetting liability is important to accurately describing the crime and for purposes of sentencing because aiding and abetting generally is deemed to involve a lesser degree of culpability than commission through a JCE.<sup>50</sup>

29. Since the JCE doctrine is based on the notion of intent, or intent plus foreseeability, and is always premised on a link of causation, it overlaps to a large extent with national law doctrines of liability for collective crime (even where national systems rely upon concepts such as co-perpetration (*coaction* in French) and complicity (*complicité*)).

## **B. The Import of JCE Theory in International Criminal Law**

30. The notion of JCE is more crucial in international criminal law than at the domestic level. In the world community, international crimes such as war crimes, crimes against humanity and genocide share a common feature: they tend to be expressions of collective

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<sup>48</sup> *Kvočka*, *supra* note { NOTEREF \_Ref86666485 \h }, §. 89; *Vasiljević*, *supra* note { NOTEREF \_Ref86666521 \h }, § 102.

<sup>49</sup> *Kvočka*, *supra* note { NOTEREF \_Ref86666485 \h }, § 89; *Vasiljević*, *supra* note { NOTEREF \_Ref86666521 \h }, § 102. See also *Milutinović*, IT-99-37-AR72, ICTY, Appeals Chamber, Decision on Dragoljub Ojdanić’s Motion Challenging Jurisdiction—Joint Criminal Enterprise, 21 May 2003, at § 20 (ruling that a participant in a JCE cannot be regarded as a “mere aider and abettor” because he or she shares the purpose of the joint criminal enterprise rather than merely knows about it).

<sup>50</sup> *Kvočka*, *supra* note { NOTEREF \_Ref86666485 \h }, 28 February 2005, § 92.

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.<sup>51</sup> When such crimes are committed, it is extremely difficult to pinpoint the specific contribution made by each individual participant in the collective criminal enterprise, because (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, and (ii) the evidence relating to each individual's conduct may prove difficult if not impossible to find.

31. 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 exact role of the various persons working within and for the organization.

32. To obscure responsibility in the fog of collective criminality and let the crimes go unpunished would be immoral and contrary to the general purpose of criminal law of protecting the community from deviant behaviour that causes serious damage to the general interest. This damage is often all the more severe in the context of collective criminality. JCE doctrine, as the systematization of principles of customary international law in existence since the post-World War II period, is a vehicle of accountability against such harm.

## **II. THE PRINCIPLES OF JCE LIABILITY CRYSTALLIZED IN CUSTOMARY INTERNATIONAL LAW BEFORE 1975.**

33. The JCE doctrine is based on rules and principles of national law and on international judicial decisions and legal regulations that crystallized as customary international law in the post-World War II period.<sup>52</sup> The customary nature of these international rules formed before

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<sup>51</sup> *Tadić*, *supra* note { NOTEREF \_Ref86665274 \h }, § 191 (reasoning that criminal liability for crimes pursuant to a JCE is “warranted by the very nature of many international crimes” that often “constitute manifestations of collective criminality”).

<sup>52</sup> *Id.*, §§ 195-220, 224-226 (analyzing cases); *Stakić*, IT-97-24-A, ICTY, Appeals Chamber, Judgement, 22 March 2006, § 62 (reaffirming that JCE liability was firmly established in customary international law).

the 1975-1979 period of crimes considered by the ECCC, through case law based on (i) the Charter of the International Military Tribunal (“Nuremberg Charter”), and (ii) Control Council Law No. 10 of 1945. JCE liability is therefore *not* a creation of the International Criminal Tribunal for the Former Yugoslavia (ICTY).<sup>53</sup> Rather, *Prosecutor v. Tadić* elucidated customary international law on liability for collective criminality by synthesizing previously applied rules and principles into a general coherent and systematic framework.<sup>54</sup>

34. The categorization of JCE liability in the 1999 *Tadić* judgement was an attempt to rationalize a vast array of disparate decisions and to set out their rationale. JCE doctrine holds individuals responsible for collectively undertaken offences, even if other members of the group (or persons used by them) physically perpetrated the crimes, because any legal system should deter and redress participation in common criminal purpose. One way to do so is to make any individual participant bear all the consequences of the intentional commission of concerted crimes as well as the foreseeable consequences of joining in a common criminal enterprise.

#### **A. The Development of the Concept of JCE**

35. Customary international law can derive from diverse acts and behaviours, such as State practice, treaties and other international instruments, the practices of international organs, United Nations resolutions, and international and national judicial decisions. In the context of international humanitarian law of armed conflict, the criterion of widespread

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<sup>53</sup> For an apt statement correcting the false premise that JCE was created by the ICTY Appeal Chamber in *Tadić*, see *Gacumbitsi*, ICTR-2001-64-A, ICTR, Appeals Chamber, Separate Opinion of Judge Shahabuddeen, 7 July 2006, § 40:

‘A suggestion that the doctrine of JCE was *created* by *Tadić* is not correct. In *Tadić* the Appeals Chamber was putting forward a judicial construct developed out of its analysis of scattered principles of law gathered together for the purpose of administering international criminal law. The expression “joint criminal enterprise” can be found in those principles; the Appeals Chamber was not proposing any modification of those principles. Courts frequently carry out such an exercise for the better appreciation of what they are doing; especially may this be done where an international criminal court feels called upon to declare the basis on which it is proceeding in a relatively unexplored field of litigation.

Thus, the mission which the Appeals Chamber set itself in *Tadić* was to identify the elements of individual criminal responsibility for a crime collectively perpetrated, as they were to be gathered from existing law; the Chamber was careful to say that “[t]o identify these elements one must turn to customary international law,” several cases being examined, including some from international criminal adjudication. The Appeals Chamber did not see its task as extending to the invention of a new head of liability: it is a misapprehension to suggest otherwise.[...]’

<sup>54</sup> *Tadić*, *supra* note { NOTEREF \_Ref86665274 \h }, §§ 194-228. To conflate elucidation with creation would be akin to likening William Blackstone to the creator of English law, rather than elucidator and compiler.

practice may be eclipsed and *opinio juris* or *necessitatis* separated and elevated as a basis because of the Martens Clause, first inserted into the preamble of the 1899 Hague Convention II and later taken up in several treaties, including the 1949 Geneva Conventions, and numerous judgements of national courts and international tribunals.<sup>55</sup> It can be inferred from the Clause that customary international law does not derive only from widespread and consistent state practice. Rather, the social and moral need for observance of rules, and the expression of legal views by a number of states or international entities about the binding value of the principle or rule, may suffice to establish the principle or customary rule even if there is no widespread or consistent State practice.<sup>56</sup>

36. The principles underlying JCE liability crystallized after World War II, as the international community dealt with the monumental task of adjudicating mass atrocity and collective criminality. In 1945, numerous nations joined an agreement to bring the major war criminals of the Axis powers to justice.<sup>57</sup> Article 6 of the Nuremberg Charter established pursuant to the Agreement conferred on the International Military Tribunal “the power to try and punish persons who, acting in the interests of the European Axis countries, whether as individuals or as members of organizations” committed crimes against peace, war crimes, and crimes against humanity, and provided that:

Leaders, organizers, instigators and accomplices participating in the formulation or execution of a common plan or conspiracy to commit any of the foregoing crimes are responsible for all acts performed by any persons in execution of such plan.<sup>58</sup>

37. This provision clearly envisaged (i) responsibility for participating in a criminal plan, whether or not executed, and (ii) criminal liability for acts committed by any other participant in the execution of the criminal plan.

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<sup>55</sup> As adopted in the 1899 Hague Convention II, the Clause provided:

‘Until a more complete code of the laws of war is issued, the High Contracting Parties think it right to declare that in cases not included in the Regulations adopted by them, populations and belligerents remain under the protection and empire of the principles of international law, as they result from the usages established between civilized nations, from the laws of humanity, and the requirements of the public conscience.’

<sup>56</sup> A. CASSESE, *The Martens Clause: Half a Loaf or Simply Pie in the Sky?*, in 11 EUROPEAN JOURNAL OF INTERNATIONAL LAW (2000), 187-216.

<sup>57</sup> Agreement for the Prosecution and Punishment of the Major War Criminals of the European Axis (Nuremberg Charter), 8 August 1945, 82 U.N.T.S. 280 (1951).

<sup>58</sup> Charter of the International Military Tribunal (“Nuremberg Charter”), Art. 6, appended to Agreement for the Prosecution and Punishment of the Major War Criminals of the European Axis (Nuremberg Charter), Art. 6, 8 August 1945, 82 U.N.T.S. 280 (1951).

38. The Nuremberg Charter has been termed “the birth certificate of international criminal law” and the Nuremberg principles are recognized as customary international law.<sup>59</sup> The principles in the Nuremberg Charter were applied and consolidated in numerous trials at Nuremberg, the International Military Tribunal for the Far East, and in occupied zones.<sup>60</sup> The Charter for the International Military Tribunal for the Far East follows the Nuremberg Charter almost word-for-word—including the provision stating that participants in the formulation of a common plan or conspiracy are responsible for all acts performed by any person in execution of the plan.<sup>61</sup>

39. The Nuremberg Charter appeared to follow a “monistic model” characteristic of some national jurisdictions— which adopt a holistic scheme of perpetratorship viewing contributors to a crime as co-authors of the crime and regarding distinctions in the magnitude of individual contribution to the crime as a matter affecting the sentence, rather than one of guilt or innocence.<sup>62</sup>

40. To give effect to the terms of the Nuremberg Charter and provide for prosecution of other war criminals and offenders, the United States of America, United Kingdom, France and USSR adopted Control Council Law No. 10 on 20 December 1945.<sup>63</sup> Article II(2) of Control Council Law No. 10 also provided for prosecution of crimes against peace, war crimes and crimes against humanity in zones of occupation by the Allied Powers and established the following modes of criminal liability:

Any person without regard to nationality or the capacity in which he acted, is deemed to have committed a crime as defined in paragraph 1 of this Article, if he was (a) a principal or (b) was an accessory to the commission of any such crime or ordered or abetted the same or (c) *took a consenting part therein* or (d) *was connected with plans or enterprises involving its commission* or (e) was a member of any organization or group connected with the commission of any such crime or (f) with reference to paragraph 1 (a) if he held a high

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<sup>59</sup> G. WERLE, *PRINCIPLES OF INTERNATIONAL CRIMINAL LAW* 7 (2005).

<sup>60</sup> *Id.*

<sup>61</sup> Charter of the International Military Tribunal for the Far East, Art. 5, 19 January 1946, T.I.A.S. No. 1589, 4 Bevens 20; amended 26 April 1946, T.I.A.S. No. 1589, 4 Bevens 27.

<sup>62</sup> A. ESER, *Individual Criminal Responsibility*, in *THE ROME STATUTE OF THE INTERNATIONAL CRIMINAL COURT: A COMMENTARY*, Vol. I, at 781, 784 (Antonio Cassese et al., eds. 2002). See, e.g., Art. 110 of the Italian Criminal Code, as interpreted by the Supreme Court in its Judgement n. 6105 of 23 June 1981, according to which “whoever, in any way, is active in the accomplishment of the enterprise” should be deemed responsible.

<sup>63</sup> Control Council Law No. 10, Punishment of Persons Guilty of War Crimes, Crimes Against Peace and Against Humanity, § 1, 20 December 1945, in T. Taylor, Final Report to the Secretary of the Army on the Nuernberg War Crimes Trials Under Control Council Law No. 10, at Appendix D, 15 August 1949.

political, civil or military (including General Staff) position in Germany or in one of its Allies, co-belligerents or satellites or held high position in the financial, industrial or economic life of any such country.”<sup>64</sup>

This provision clearly envisaged criminal liability for participation in a criminal enterprise through either (i) consenting participation in such an enterprise or (ii) connection with criminal plans of a group or a criminal enterprise of a multitude of persons. Both the principal perpetrator and any person “connected with plans or enterprises involving” the commission of a crime were deemed to have “committed” the crime.<sup>65</sup>

41. These international legal instruments, and the jurisprudence based on the provisions, are important to understanding how the principles of JCE liability crystallized in international criminal law. As the ICTY Trial Chamber explained in *Kupreškić*:

It cannot be gainsaid that great value ought to be attached to decisions of such international criminal courts as the international tribunals of Nuremberg or Tokyo, or to national courts operating by virtue, and on the strength, of Control Council Law No. 10, a legislative act jointly passed in 1945 by the four Occupying Powers and thus reflecting international agreement among the Great Powers on the law applicable to international crimes and the jurisdiction of the courts called upon to rule on those crimes. These courts operated under international instruments laying down provisions that were either declaratory of existing law or which had been gradually transformed into customary international law.<sup>66</sup>

42. The International Military Tribunal Judgement (“Nuremberg Judgement”) issued under the auspices of the Nuremberg Charter held that Article 6’s reference to criminal responsibility for acts performed in execution of a common plan or conspiracy did not add a new and separate crime to those already listed; rather the text was “designed to establish the responsibility of persons participating in a common plan.”<sup>67</sup> In the course of analyzing common planning to prepare and wage war, and holding that the Charter only defined conspiracy to commit acts of aggressive war as a separate crime, the International Military Tribunal stated:

‘The argument that such common planning cannot exist where there is complete dictatorship is unsound. A plan in the execution of which a number of persons participate is still a plan, even though conceived by only one of them; and those who execute the plan do not avoid

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<sup>64</sup> *Id.*, Art. II(1)(a),(b),(c), (2) (emphasis added).

<sup>65</sup> *Brđanin*, *supra* note { NOTEREF\_Ref86666223 \h }, § 395.

<sup>66</sup> *Kupreškić et al.*, IT-95-16-A, ICTY Trial Chamber, Judgement, 14 January 2000, § 541.

<sup>67</sup> International Military Tribunal Judgement, in TRIAL OF THE MAJOR WAR CRIMINALS BEFORE THE INTERNATIONAL MILITARY TRIBUNAL, NUREMBERG, VOL. I, at 226 (1947).

responsibility by showing that they acted under the direction of the man who conceived it. Hitler could not make aggressive war by himself. He had to have the co-operation of statesmen, military leaders, diplomats, and business men. *When they, with knowledge of his aims, gave him their co-operation, they made themselves parties to the plan he had initiated.* They are not to be deemed innocent because Hitler made use of them, if they knew what they were doing. That they were assigned to their tasks by a dictator does not absolve them from responsibility for their acts. The relation of leader and follower does not preclude responsibility here any more than it does in the comparable tyranny of organised domestic crime.<sup>68</sup>

Subsequent case law dealing with war crimes restated or developed the principles tersely laid down in the two foundational instruments detailed above and in the Nuremberg judgment.

### 1. “Basic” Form JCE Category 1: Case Law

43. Cases exemplifying the “basic form” JCE category 1 dealt with circumstances where all the members of the JCE shared the same criminal intent and played varying roles. For example, in the case of *Georg Otto Sandrock et al.* (“*Almelo* Trial”), German non-commissioned officers were tried for the executions without trial of a British pilot and a Dutch civilian.<sup>69</sup> In each execution, the Germans drove with the condemned person to the execution site; one man stood by the car; one man shot the airman; and the third man, who had also conveyed the execution orders to the other two, dug the grave.<sup>70</sup> The Judge Advocate, summing up the case concerning the killing of the pilot, stated:

‘There was no dispute that all three [accused] knew what they were doing and had gone there for the very purpose of having this officer killed. If people were all present together at the same time taking part in a common enterprise which was unlawful, each one in his own way assisting the common purpose of all, they were all equally guilty in law.’<sup>71</sup>

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<sup>68</sup> *Id.* (emphasis added).

<sup>69</sup> *Trial of Otto Sandrock and Three Others*, *supra* note { NOTEREF \_Ref86668651 \h }, at 35.

<sup>70</sup> *Id.*, at 35-37, 40-41. The Prosecutor analogized the case to “that of a gangster crime, every member of the gang being equally responsible with the man who fired the actual shot.” *Id.*, at 37. Four men were tried because the German officer who stood at the car during the execution of the pilot was replaced by another officer during the execution of the civilian. *Id.*, at 36.

<sup>71</sup> *Id.*, at 40. *Cf. Kr. Case*, 30 May 1950, ENTSCHEIDUNGEN, VOL. 3, at p. 65 (explaining that it generally suffices for a conviction for a crime against humanity under Art. II(1)(c) if the defendant consented to the commission of the crime physically carried out by another person, but this consent must be present at the time of the commission, otherwise, no furthering of the crime (which can also be a mere intellectual furthering) can be assumed. Compare *Case of Sch. and others*, 20 April 1949, ENTSCHEIDUNGEN, VOL. 2, at p. 11.

All the accused were found guilty for the killings in which they had played a part.<sup>72</sup> The differentiation of roles was accounted for at sentencing, with the man who fired the shot and the man who gave the order sentenced to death and the men who stood at the car sentenced to 15 years' imprisonment.<sup>73</sup>

44. Similarly, the Judge Advocate in the *Hölzer et al.* case of Germans charged with killing a Canadian prisoner of war without trial summed up: "If the Court find[s] that . . . [the accused] knew the purpose was to kill this airman, then, as the Court is well aware, persons together taking part in a common enterprise which is unlawful, each in their own way assisting the common purpose of all, then they are all equally guilty in point of law."<sup>74</sup> The Judge Advocate in the *Franz Schonfeld and Nine Others* Case drew from a rule of English substantive law, that "if several persons combine for an unlawful purpose or for a lawful purpose to be effected by unlawful means, and one of them, in carrying out the purpose, kills a man, it is murder in all who are present, whether they actually aid or abet or not, provided that the death was caused by a member of the party in the course of his endeavours to effect the common object of the assembly."<sup>75</sup>

45. In the *Feurstein and Others (Ponzano case)*, the Judge Advocate of a British Military Court explained that "to be concerned in the commission" of a killing meant more than just being the direct cause of death, by inflicting the fatal injury: "it also means an indirect degree of participation."<sup>76</sup> The Judge Advocate elaborated:

'[A] person can be concerned in the commission of a criminal offence, who, without being present at the place where the offence was committed, took such a part in the preparation for

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<sup>72</sup> *Trial of Otto Sandrock and Three Others*, *supra* note { NOTEREF \_Ref86668651 \h }, at 41.

<sup>73</sup> *Id.*

<sup>74</sup> *Hoelzer et al.* Canadian Military Court, Aurich, Germany, Record of Proceedings, 25 March-6 April 1946, vol. I, at 341, 347, 349 (RCAF Binder 181.009 (D2474) (copy obtained from the ICTY's Library on file with *amicus curiae*). See also *K. and others (Synagogue case)*, 10 August 1948, ENTSCHIEDUNGEN VOL. 1, at pp. 53-56: In this case the German Court (LG Arnsberg) convicted K. under Section 305 of the German Penal Code and for crimes against humanity under Art. II(1)(c) of Control Council Law No. 10 for demolition of a synagogue as a co-perpetrator in a group of six to eight other members. The Court held that although it could not be proven that the accused actively, i.e. physically, took part in the destruction, as a person of authority, he intellectually contributed to the crime through his presence as an approving spectator. Since he also wanted the crime as his own, he was personally liable as co-perpetrator for the destruction according to the subjective theory of perpetratorship under German law and also for crimes against humanity.

<sup>75</sup> *Trial of Franz Schonfeld and Others*, British Military Court, Essen, 11-26 June 1946, in UNITED NATIONS WAR CRIMES COMMISSION, LAW REPORTS OF TRIALS OF WAR CRIMINALS, VOL. XI, at 64, 68 (1949).

<sup>76</sup> *Feurstein and Others (Ponzano Case)*, British Military Court Sitting at Hamburg, Germany, Judgment of 24 August 1948 (on file in the Public Record Office, Kew Gardens, London, file WO 235/525), reproduced in 5 JOURNAL OF INTERNATIONAL CRIMINAL JUSTICE 238, 239 (2007).

this offence as to further its object; in other words, he must be the cog in the wheel of events leading up to the result which in fact occurred. He can further that object not only by giving orders for a criminal offence to be committed, but he can further that object by a variety of other means [. . .].<sup>77</sup>

The Judge Advocate also rejected the contention that accused could evade liability by claiming the offence could have occurred even without their participation, explaining that the accused could still be guilty without being vital links in the chain of causation, so long as the accused were “concerned in the commission” of the criminal offence and had “guilty knowledge” of the intended purpose of the crime.<sup>78</sup>

46. In the *Einsatzgruppen* case, the Prosecution argued to a United States Tribunal that lower-level accused Radetzky and Schubert, among others, were guilty of war crimes and crimes against humanity because they were members of *Einsatz* units with an express mission, well-known to members, to carry out a large-scale program of murder and members who

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<sup>77</sup> *Id.* Compare *Case of Dr. P and Others*, 5 March 1949, ENTSCHIEDUNGEN, VOL. 1, at p. 321 (convicting doctor for aiding and abetting murder under German law and for crimes against humanity because his acts contributed to the overall planning of the killing of mentally disabled people when he officially examined the victims and foresaw the possibility that they might get killed; holding that the degree of involvement is totally irrelevant for a conviction under Art II(1),(2) of Control Council Law No. 10); *Case of M. and Others*, 21 March 1950, ENTSCHIEDUNGEN, VOL. 2, at p. 375 (holding that accused who made a list of persons who were to be transported to Auschwitz where most of them were killed sufficiently contributed to a crime against humanity). See also *Case of W.*, 21 December 1948, ENTSCHIEDUNGEN, VOL. 2, at p. 203: The accused, who sat in the kitchen watching two other SS men beat 16 members of a Jewish family with a leather belt, was convicted as co-perpetrator of aggravated assault and for a crime against humanity. Since the German courts of lower instance generally applied both German criminal law and Control Council Law No. 10, they subsumed the contribution of the defendants under the differentiated provisions on participation in German criminal law for purposes of conviction under German criminal law. The Court explained that whenever the objective and subjective requirements of the German provisions were fulfilled, or the requisites for co-perpetration according to the German subjective theory on participation or aiding and abetting were met, the defendant was also criminally liable for crimes against humanity under Control Council Law No. 10, since the provision on participation in Article (II)(2) was much broader. Moreover, since the Oberster Gerichtshof für der Britische Zone did not divide “crimes against humanity” into single criminal acts as sub-categories of crimes against humanity (e.g. murder, etc), instead applying a very holistic approach, there was no need for attribution of single acts to the different defendants: whoever as part of a group with his acts somehow contributed to a crime against humanity was liable as perpetrator of a crime against humanity. Whoever with his acts contributed to the whole system of National Socialism—one comprehensive mass crime against humanity—committed a crime against humanity. But see *L. and others*, 18 December 1949, ENTSCHIEDUNGEN, VOL. 2, at pp. 313, 319 (stating that mere membership generally is not sufficient for a conviction for a crime against humanity concerning the commission of a specific crime by other members of the group, since the conviction requires some kind of causation by the defendant to the specific criminal act, but noting that mere membership can suffice as an objective element, if, in a specific case, this membership encourages the other members of the group to commit the crimes and if the mental element is present).

<sup>78</sup> *Feurstein and Others (Ponzano Case)*, *supra* note { NOTEREF \_Ref86669783 \h }, 239-240.

assisted in the functioning of the units were guilty of crimes committed by the unit.<sup>79</sup> The Prosecution argued that Article II(2) of Control Council Law No. 10 was “[i]n line with recognized principles common to all civilized legal systems” and signified that those who take a consenting part in the commission of the crime, or who “are connected with plans or enterprises” involved in the commission of crime, or who belong to an organization or group engaged in the commission of crime, were guilty together with the “principals”.<sup>80</sup> The Opinion and Judgement of the Tribunal found Radetzky and Schubert guilty of war crimes and crimes against humanity because Radetzky took “a consenting part” in the crimes and because of Schubert’s “general participation in the venture of the *Einsatzgruppe D*”.<sup>81</sup>

## 2. “Systemic” JCE Category 2: Case Law

47. The second category, a variant of the first category in the context of units operating concentration camps—a special case of groups acting pursuant to a concerted plan—is exemplified by the *Dachau Concentration Camp*,<sup>82</sup> *Mauthausen Concentration Camp*<sup>83</sup> and *Belsen*<sup>84</sup> cases.

48. In the *Belsen* case, the Judge Advocate summed up the case for the Prosecution based on (1) knowledge by the Auschwitz staff “that a system and a course of conduct was in force” to brutalize detainees, and (2) participation by the staff in the course of conduct, in furtherance of the common agreement to run the camp brutally.<sup>85</sup> In the *Dachau Concentration Camp* case, the U.S. Military Government Court held that camp staff members who actively participated in the camp where they knew murders and cruelties were inflicted were “acting in pursuance of a common design to violate the laws and usages of war” and were guilty of a war crime though

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<sup>79</sup> *The United States of America v. Otto Ohlendorf et al. (The Einsatzgruppen Case)*, Case No. 9, Military Tribunal II, Judgement, 10 April 1948, in TRIALS OF WAR CRIMINALS BEFORE THE NUERNBERG MILITARY TRIBUNALS UNDER CONTROL COUNCIL LAW NO. 10, VOL. IV, at 369, 373.

<sup>80</sup> *Id.*, at 369, 372.

<sup>81</sup> *Id.*, at 411, 578, 584.

<sup>82</sup> *Trial of Martin Gottfried Weiss and Thirty-Nine Others (The Dachau Concentration Camp Trial)*, *supra* note { NOTEREF \_Ref86671075 \h }, at 5 (1947).

<sup>83</sup> See *supra* note { NOTEREF \_Ref86671075 \h }, at 15.

<sup>84</sup> *Trial of Josef Kramer and 44 Others (The Belsen Trial)*, Case No. 10, British Military Court, Luneberg, 17th September-17th November 1945, in UNITED NATIONS WAR CRIMES COMMISSION, LAW REPORTS OF TRIALS OF WAR CRIMINALS, VOL. II, at 1 (1947).

<sup>85</sup> *Id.*, at 120-121.

the extent and nature of their participation varied.<sup>86</sup> The varying degrees of participation of the accused were taken into account in sentences that ranged from 5 years of hard labour to death.<sup>87</sup> In the *Mauthausen Concentration Camp* case, a U.S. Military Government Court similarly found all 61 accused guilty, reasoning that anyone at the concentration camp would have known of its rampant and murderous criminal practices and of the plan by Reich officials to kill.<sup>88</sup> The Court ruled that every official or employee “in any way in control of or stationed at or engaged in the operation” of the camp “in any manner whatsoever” was guilty.<sup>89</sup>

### 3. “Extended” Form JCE Category 3: Case Law

49. The principles of the third category of JCE liability for foreseeable crimes outside the common design are illustrated by numerous cases. The *Essen Lynching*<sup>90</sup> case is an illustrative example arising from the context of mob violence. The seven accused Germans in the case—an army captain, a private, and five civilian inhabitants of Essen—were charged with committing a war crime in that, together with others, they were “concerned in the killing” of three British airmen who were prisoners of war.<sup>91</sup> The Captain had ordered two men, including the private, to escort the airmen to the nearest Luftwaffe unit for interrogation, allegedly saying loudly, so the crowd could hear, that the escort was not to interfere with the crowd if it molested the prisoners.<sup>92</sup> As the prisoners were marched through the Essen main streets, the crowd grew and started hitting the prisoners and throwing sticks and stones at them.<sup>93</sup> An unknown German corporal shot and wounded one of the airmen in the head.<sup>94</sup> When the airmen reached a bridge, they were eventually thrown over the parapet; one airmen died from the fall and the others died from shots from the bridge and beatings by crowd members.<sup>95</sup>

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<sup>86</sup> *Trial of Martin Gottfried Weiss and Thirty-Nine Others (The Dachau Concentration Camp Trial)*, *supra* note { NOTEREF \_Ref86671075 \h }, at 14.

<sup>87</sup> *Id.*

<sup>88</sup> *Mauthausen Concentration Camp* case, *supra* note { NOTEREF \_Ref86671075 \h }, at 15.

<sup>89</sup> *Id.*, at 15.

<sup>90</sup> *Trial of Erich Heyer and Six Others*, Case No. 8, British Military Court for the Trial of War Criminals, Essen, 18-19 and 21-22 December 1945, in UNITED NATIONS WAR CRIMES COMMISSION, LAW REPORTS OF TRIALS OF WAR CRIMINALS, VOL. I, at 88 (1947).

<sup>91</sup> *Id.*, at 88-89.

<sup>92</sup> *Id.*

<sup>93</sup> *Id.*

<sup>94</sup> *Id.*

<sup>95</sup> *Id.*

50. The Prosecution argued that no intent to kill must be proven to convict for unlawful killing, which could be manslaughter rather than murder.<sup>96</sup> The Prosecution argued that every person who “voluntarily took aggressive action against any one of these three airmen” was “guilty in that he is concerned in the killing;” reasoning that every member of the crowd knew the airmen were doomed and “every person in that crowd who struck a blow is both morally and criminally responsible for the deaths”.<sup>97</sup>

51. No Judge Advocate was appointed in the case and there was therefore no summing up in court.<sup>98</sup> Inferences may be drawn, however, about to the Court’s reasoning from the verdict and the evidence summarized by counsel.<sup>99</sup> The Captain was convicted and sentenced to death by hanging while the private ordered not to intervene was sentenced to imprisonment for five years.<sup>100</sup> Three of the five civilians were found guilty.<sup>101</sup> A civilian who struck the airmen on the bridge and then went under the bridge to throw an airman who still appeared to be alive into the stream, was sentenced to death by hanging.<sup>102</sup> Another civilian who witnesses saw beating the airmen and trying to grab a rifle to shoot the airmen under the bridge while yelling that the airmen should be killed was sentenced to imprisonment for life.<sup>103</sup> The third civilian, who admitted to joining the crowd in striking the airmen, was convicted and sentenced to imprisonment for ten years.<sup>104</sup>

52. The ICTY Appeals Chamber reasoned in *Prosecutor v. Tadić*, that it can be inferred from the verdicts in the *Essen Lynching* case that that the accused were found guilty though they took part to different degrees in the killing and not all of them intended to kill; rather the

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<sup>96</sup> Transcript of Prosecution’s Argument, at 65, *id.* (Public Record Office, London, WO 235/58) (copy obtained from ICTY Library).

<sup>97</sup> *Id.*, at 66.

<sup>98</sup> *Trial of Erich Heyer and Six Others*, *supra* note { NOTEREF \_Ref86671862 \h }, at 91.

<sup>99</sup> *Id.* See also *Tadić*, *supra* note { NOTEREF \_Ref86665274 \h }, §§ 208-209 (drawing inferences).

<sup>100</sup> *Trial of Erich Heyer and Six Others*, *supra* note { NOTEREF \_Ref86671862 \h },, at 90.

<sup>101</sup> *Id.*, at 90-91.

<sup>102</sup> Compare Transcript of Prosecution’s Argument, *supra* note { NOTEREF \_Ref86672871 \h }, at 68 (Prosecution’s summary of evidence against Johann Braschoss) with *Trial of Erich Heyer and Six Others*, *supra* note { NOTEREF \_Ref86671862 \h }, at 91 (sentence for Johann Braschoss).

<sup>103</sup> Compare Transcript of Prosecution’s Argument, *supra* note { NOTEREF \_Ref86672871 \h }, at 67-68, (Prosecution’s summary of evidence against Karl Kaufer) with *Trial of Erich Heyer and Six Others*, *supra* note { NOTEREF \_Ref86671862 \h }, at 91 (sentence for Karl Kaufer).

<sup>104</sup> Compare Transcript of Prosecution’s Argument, *supra* note { NOTEREF \_Ref86672871 \h }, at 67 (Prosecution’s summary of Boddenberg’s admissions and case against Boddenberg based on his striking the blows with a belt), with *Trial of Erich Heyer and Six Others*, *supra* note { NOTEREF \_Ref86671862 \h }, at 91 (sentence for Hugo Boddenberg).

intent of some was ill-treatment of the prisoners.<sup>105</sup> The Appeals Chamber drew a similar inference from the outcome of the *Borkum Island* case, another prisoner-of-war lynching case detailed at length in *Prosecutor v. Tadić*.<sup>106</sup>

53. Further illustrative are several cases decided by Italian courts after World War II concerning crimes committed against prisoners of war, Italian partisans, or members of the Italian Army fighting against the Germans and the *Repubblica Sociale Italiana* (RSI), the *de facto* government under German control established by Fascist leaders. The Italian cases are illuminating because Italy is a prominent example of a system following a holistic “unitary perpetrator” model that also appears to be the approach of the Nuremberg Charter.<sup>107</sup>

54. In *D’Ottavio and Others*, the Italian Court of Cassation considered the case of four local villagers who surrounded two escaped war prisoners at the village fountain, during the course of which a villager shot an escapee, Vusović, who later died.<sup>108</sup> In convicting the three villagers who had not fired the shot, the Teramo Court of Assize applied Article 116 of the Italian Criminal Code, which provided: “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.”<sup>109</sup>

55. The three villagers who had not fired the shot appealed, arguing they only intended to capture Vusović and therefore could only be held accountable for an attempt to illegally detain.<sup>110</sup> The Court of Cassation affirmed the lower court’s imposition of liability, explaining that for a participant to be held liable for crimes other than the one intended, there had to be a “causation nexus—which is not only objective but also psychological—between the fact committed and willed by all participants and the different fact committed by one of the

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<sup>105</sup> *Tadić*, *supra* note { NOTEREF\_Ref86665274 \h }, § 209.

<sup>106</sup> *Id.*, §§ 210-213. See also M. KOESSLER, *Borkum Island Tragedy and Trial*, 47 JOURNAL OF CRIMINAL LAW, CRIMINOLOGY, AND POLICE SCIENCE 183 (1956).

<sup>107</sup> A. ESER, *supra* note { NOTEREF\_Ref212504649 \h \\* MERGEFORMAT }, at 781, 784. See also discussion *supra* note { NOTEREF\_Ref212504649 \h \\* MERGEFORMAT }.

<sup>108</sup> *D’Ottavio and Others Case*, No. 270, Italian Court of Cassation, Criminal Section I, Judgement of 12 March 1947 (Central Public Record Office, Rome), reprinted in 5 JOURNAL OF INTERNATIONAL CRIMINAL JUSTICE 232 (2007).

<sup>109</sup> *Id.*, 232-233. Art. 116 provides that if the crime committed is more serious than the one willed, the penalty is decreased and indeed, the Teramo Court of Assize sentenced those who had not fired the shot to less years of imprisonment. *Id.*

<sup>110</sup> *Id.*

participants.”<sup>111</sup> The ensuing liability was premised on “the fundamental principle of concurrence of interdependent causes” under which “participants answer for a crime both when they are the direct cause of the crime and when 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.]”<sup>112</sup>

56. The Court of Cassation reasoned that objective causation was based on the fact that all the participants directly cooperated in the crime of attempted illegal detention, which was the indirect cause of the subsequent connected event of the shooting.<sup>113</sup> “[P]sychological causation” was based on the shared conscious will to engage in an attempt to unlawfully detain while foreseeing a possibly different crime in the course of the common purpose of capture, as could be inferred by the use of weapons.<sup>114</sup>

57. In contrast, in the context of determining whether people were disqualified from amnesty because they had committed voluntary murder, the Italian Court of Cassation repeatedly ruled that participants in a round-up of partisans in which people were killed were not responsible for murder.<sup>115</sup> In cases like *Aratano and Others* and *Berardi*, the rationale

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<sup>111</sup> *Id.*

<sup>112</sup> *Id.*

<sup>113</sup> *Id.*, 234.

<sup>114</sup> *Id.*

<sup>115</sup> *E.g.*, *Aratano and Others* Case, No. 102, Italian Court of Cassation, Criminal Section II, Judgement of 21 February 1949 (Central Public Record Office, Rome), reprinted in 5 JOURNAL OF INTERNATIONAL CRIMINAL JUSTICE 241-242 (2007) (holding that participants in a shootout intended to frighten partisans into surrendering lacked intent to kill and therefore were not guilty of voluntary murder disqualifying them from amnesty); *Berardi* Case, No. 996, Italian Court of Cassation, Criminal Section II, Judgement of 27 August 1947 (Central Public Record Office, Rome), reprinted in 5 JOURNAL OF INTERNATIONAL CRIMINAL JUSTICE 235-237 (2007) (ruling that “the mere fact of having taken part in a round-up, in which a person was killed, does not of itself for a finding that the participant wanted to cooperate in the specific action that was the cause of the death of that person” and that someone who “confined himself to participating in the round-up voluntarily” could not be said to have effectively cooperated in the crime of murder and was therefore not disqualified from amnesty); *Tossani* Case, Case No. 1446, Italian Court of Cassation, Criminal Section II, Judgement of 17 September 1946 (Italian Central Public Record Office, Rome), reprinted in 5 JOURNAL OF INTERNATIONAL CRIMINAL JUSTICE 230-231 (2007) (ruling that an unarmed person who had “a passive role” in a police mop-up operation in which a person was killed during the “exceptional and unforeseen” circumstance of the victim trying to avoid arrest by escaping through the roof, was not responsible for the death, which could not be a ground for excluding amnesty). But see *Bonati et al.*, Italian Court of Cassation, Judgement of 5 July 1946, at 19 (Italian Central Public Record Office, Rome) (described in *Tadić*, *supra* note { NOTEREF \_Ref86665274 \h }, § 217) (holding appellant guilty of murder perpetrated by another member of the group reasoning that though the crime was more grave than intended by some of the participants it “was in any case a consequence, albeit indirect, of his participation”).

was predicated on lack of intent necessary for voluntary murder,<sup>116</sup> while the rationale in the *Tossani* case was lack of foreseeability that a death would ensue from the “exceptional and unforeseen” circumstance of the victim trying to avoid arrest by escaping through a roof.<sup>117</sup>

58. The cases thus generally contemplated liability for foreseeable crimes committed by another member of the group not envisaged in the criminal plan though in some cases, the requisite *mens rea* for responsibility was not altogether clear or consistent.<sup>118</sup> Another judgement of the Italian Court of Cassation in the same period, concerning a regular criminal offence rather than a war crime, is helpful in explaining the required causal nexus: the foreseeable crime beyond the common plan must be a “logical and foreseeable development” of the intended offence rather than an altogether “new fact, having its own causal autonomy, linked to the fact willed by the commissioning person by an accidental nexus.”<sup>119</sup> The Italian Court of Cassation explained in the *Mannelli and Others* case that “a cause, whether immediate or not, direct or indirect, simultaneous or subsequent, should never be confused with the mere occasion.”<sup>120</sup>

59. Thus, the principles behind JCE liability—and safeguards against overreaching—were founded on jurisprudence well before 1975. This jurisprudence was determined by the ICTY Appeals Chamber to “firmly establish in customary international law” the concepts behind JCE liability.<sup>121</sup>

60. It bears adding that some cases brought before German courts after World War II pursuant to Control Council Law No. 10 seem to confirm the approach taken in the cases mentioned above, although generally speaking those courts applied Control Council Law No. 10 with regard to the definition of crimes, whereas for the mode of responsibility they preferred to apply the general notions of German criminal law of co-perpetration

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<sup>116</sup> *Aratano and Others*, *supra* note { NOTEREF \_Ref86679821 \h }, 241-242; *Berardi Case*, *supra* note { NOTEREF \_Ref86679821 \h }, 235-237.

<sup>117</sup> *Tossani Case*, *supra* note { NOTEREF \_Ref86679821 \h }, 230-231.

<sup>118</sup> See *Tadić*, *supra* note { NOTEREF \_Ref86665274 \h }, § 218 (“Admittedly, in some of the cases the *mens rea* required for a member of the group to be held responsible . . . was not clearly spelled out.”).

<sup>119</sup> *Mannelli and Others Case*, *supra* note { NOTEREF \_Ref86680120 \h }, 243-244.

<sup>120</sup> *Id.*, 243. The Court of Cassation ruled that a man who hired two people to beat up or cause serious injury to a man named Orsi, who he resented, was not responsible where the two people also robbed Orsi. *Id.* at 243-244.

<sup>121</sup> *Tadić*, *supra* note { NOTEREF \_Ref86665274 \h }, § 220.

(*Mittäterschaft*) and aiding and abetting (*Beihilfe*). The *Sch. and others* case is illustrative of this tendency.<sup>122</sup>

61. In the night of 9 November 1938 the defendant and others (SS men) went for N. at his place, searched his house, took him to the police station, from there to a burning synagogue where he was brutally mistreated (by others). From there the defendant brought N. back to the police station; on the way N. was shot by a non-identified third person. While lying on the floor he was kicked by several persons in a crowd (there was no proof that the defendant also kicked N. himself). Later on N. died. The Court (*Oberlandesgericht*, or court of appeal) held that this whole incident amounted to a crime against humanity and since the defendant contributed to the crime with his own acts, he was criminally responsible for the crime. Concerning the first mistreatment of N. in front of the synagogue the Court stated that if the defendant knew or expected that by taking N. to the synagogue, N. was in danger of being mistreated by the crowd, the defendant was criminally responsible for the acts carried out against N. As for the kicking of N. by the crowd, the Court stated that the defendant wanted the mistreatment of N. and as a person of authority was an approving spectator; he therefore also actively contributed to the crime against humanity.

62. It would thus seem that the Court in fact applied the principles of JCE 3 category for the first episode (ill-treatment in front of the synagogue), while it embraced the principles of JCE 1 for the second episode (kicking by the crowd).

## **B. The Roots of the Principles of JCE Liability in Major National Systems**

63. The international customary rules that gradually evolved in the 1940s and 1950s were also based on, and to a large extent resulted from or were borrowed from, similar national legal provisions or national case law. Generally speaking, national legislation and case law reflected the principles of JCE categories 1 and 3. JCE category 2—relevant to concentration, detention, or internment camps—normally does not explicitly arise in national legal systems.<sup>123</sup>

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<sup>122</sup> See *supra*, note { NOTEREF \_Ref86680269 \h }.

<sup>123</sup> National legislation is reviewed in the decision in *Tadić* and will not be surveyed here because of space constraints, and because the reference to national legislation and case law only serves to highlight that the principles of JCE have roots in many national systems and not to make any claims about general consistency of

64. To summarize, doctrines in common-law countries such as the United Kingdom uphold the doctrine of “joint unlawful enterprise”, and “joint enterprise liability”, which to a large extent covers JCE categories 1 and 3.<sup>124</sup> In the United States, the doctrines of “complicity” and conspiracy tend to cover JCE category 1 and some cases other than the widely criticised *Pinkerton* case<sup>125</sup> cover JCE 3.<sup>126</sup> Other common-law countries upholding principles of JCE liability, whatever the name or formal definition given to the doctrine, include Canada, Australia and Zambia.<sup>127</sup>

65. A number of civil-law countries, for example France, Italy, Korea, Switzerland, and the former Socialist Federal Republic of Yugoslavia, uphold principles that match or at any rate overlap with the doctrine. These countries tend to use the heading of “criminal association” or “complicity:” *association de malfaiteurs* and *complicité* in France; *associazione per delinquere*, or *concorso in attività criminose*, in Italy; *responsabilité des coauteurs*, *responsabilité des complices* in other countries such as Belgium, Switzerland and Germany. These modes of liability cover JCE category 1 and 3 situations.<sup>128</sup>

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state practice. See *Tadić*, *supra* note { NOTEREF\_Ref86665274 \h }, §§ 224 & nn. 283-291, 225 (“[N]ational legislation and case law cannot be relief upon as a source of international principles or rules, under the doctrine of the general principles of law recognised by the nations of the world: for this reliance to be permissible, it would be necessary to show that most, if not all, countries adopt the same notion of common purpose. More specifically, it would be necessary to show that, in any case, the major legal systems of the world take the same approach to this notion. The above brief survey shows this is not the case.”).

<sup>124</sup> See, e.g., A.P. SIMESTER AND G.R. SULLIVAN, CRIMINAL LAW – THEORY AND DOCTRINE 210-219 (2002) (citing cases); D. ORMEROD, SMITH & HOGAN CRIMINAL LAW 141-148 (9th ed., 1999) (citing cases).

<sup>125</sup> From the U.S. Supreme Court decision in *Pinkerton v. United States*, 328 U.S. 640, 646-647 (1946).

<sup>126</sup> See A.H. LOEWY, CRIMINAL LAW 245-278 (2004) (collecting cases). Cf. *Tison v. Arizona*, 481 U.S. 137, 157 (1987) (holding that the U.S. Constitutional protection against cruel and unusual punishment does not prohibit the death penalty as disproportionate in the case of a defendant who played a major part in committing, with reckless indifference, a felony that resulted in murder, reasoning that “some non-intentional murderers may be among the most dangerous and inhumane of all”).

<sup>127</sup> *Tadić*, *supra* note { NOTEREF\_Ref86665274 \h }, § 224 & nn.287-291 (explaining doctrine in these national jurisdictions).

<sup>128</sup> See, e.g., for France: F. DESPORTES AND F. LE GUNEHÉC, LE NOUVEAU DROIT PÉNAL – IDROIT PÉNAL GÉNÉRAL 417-438 (3rd ed. 1996); for Belgium: C. HENNAU AND J. VERHAEGEN, DROIT PÉNAL GÉNÉRAL 277-286 (2003); for Switzerland, J. HURTADO POZO, DROIT PENAL – PARTIE GÉNÉRALE 352-379 (2008); for the former Socialist Federal Republic of Yugoslavia: *Milutinović*, *supra* note { NOTEREF\_Ref86682336 \h }, at § 40; for South Korea: 제30조 (공동정범) 2인 이상이 공동하여 죄를 범한 때에는 각자를 그 죄의 정범으로 처벌한다 [Article 30 of the Korean Criminal Law] (unofficial translation: “When two or more people have committed a crime in a collaborative manner, each of them will be punished for that crime as a principal.”); 대법원 1972.4.20. 선고 71도2277 판결 【폭력행위등처벌에관한법을위반,특수폭행치사】 [South Korean Supreme Court, 1972.4.20. Verdict 71 Do128 2277 Judgment128 [Violation of the Punishment of Violence, Death by the Particular Violence] ] (소위 공모공동정범에 있어서는 범죄행위를 공모한 이상 그후

66. While some civil-law jurisdictions, such as Germany, do not provide for liability akin to JCE category 3 principles,<sup>129</sup> other countries have doctrines akin in operation to JCE category 3 that provide for liability based on *dolus eventualis*.<sup>130</sup> Particularly enlightening are some judgments delivered by the French *Cour de cassation*<sup>131</sup> as well as the Swiss *Tribunal Fédéral* emphasizing that an accomplice can be responsible for the criminal offence of the principal perpetrator also when he entertained simple *dolus eventualis*.<sup>132</sup>

67. It may be worth clarifying that the notion of JCE in international criminal law serves the specific purpose of capturing the reality of complex collective crimes without adopting one national model or the other. It is not necessarily the case that in all criminal law systems persons are punished by resorting to the notion of JCE or similar notions. What matters (and what the JCE doctrine tries to accomplish) is to do what in many national systems is done in different ways: to make each single individual participant in a common criminal plan accountable for all the offences which he contributed to carry out. This entails that an individual should be responsible for all those crimes which, although not explicitly spelled out in any agreement or common purpose among the participants, are the clear product of the implementation of the common criminal purpose. This phenomenon may be labelled in different ways in different systems; however, the *underlying rationale* seems to a large extent similar. Moreover, even if JCE or something similar does not exist in all domestic systems, this may be justified by the *general character of national criminal systems*. Obviously, they do not deal *exclusively* with extremely serious collective crimes: they deal with all kinds of

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그 실행행위에 직접 가담하지 아니하더라도 다른 특별한 사정이 없는 한 다른 공모자의 분담 실행한 행위에 대하여 공동정범의 죄책을 면할 수 없다고 함이 본원의 종래 판례이다( 1948.1.2선고, 4281형상4판결)) (unofficial translation: “So called, a principal criminal based on collaboration and complicity within the joint criminal enterprise would not be absolved from the liability even though that person did not carry out the crime on his own when he or she took partial charge of the crime according to the 1948.1.2 Verdict.”) (citing 1948.1.2. Verdict 4281 Hyunsang 4 Judgment).

<sup>129</sup> See *Gacumbitsi*, Separate Opinion of Judge Shahabuddeen, *supra* note { NOTEREF \_Ref86682883 \h }, § 40 (explaining that Germany would not recognize category 3 JCE).

<sup>130</sup> See, e.g., for France: DESPORTES AND F. LE GUNEHÉC, *supra* note { NOTEREF \_REF86681487 \h }, 424-25; for the Netherlands: Netherlands, Supreme Court, 20 January 1998 (in *Nederlandse Jurisprudentie*, 1998, no. 426, cited by E. VAN SLIEDREGT, *Joint Criminal Enterprise as a Pathway to Convicting Individuals for Genocide*, in 5 JOURNAL OF INTERNATIONAL CRIMINAL JUSTICE 184, 199 (2007)).

<sup>131</sup> See *infra*, § 78.

<sup>132</sup> See, e.g., Judgment of 13 October 1982 (108 IB 301, at legal ground 3, in German); Judgement of 5 October 1983 (109 IV 147, legal ground 4; in German); Judgement of 4 December 2005 (132 IV 49, legal ground 1.1, in French).

criminal offence and in most cases criminal law has to be applied to the less serious offences. However, granted that there may be reasons at the national level for limiting responsibility to the agreed-on crimes, such reasons do not seem to be equally appropriate in international criminal law. When one turns to this field of law, one has to take account of a fact: the risk that a multitude of persons decide to engage in some atrocities (and not others), cannot allow them simply to turn a blind eye to all the perverse effects their common criminal purpose may entail. The JCE doctrine serves to make those who determine the ‘avalanches’ accountable for the entirety of their acts, to the fullest extent. In addition, this legal regulation should have a preventive effect against engaging in criminal conduct: the very creation of a situation of risk that leads to the perpetration of further offences calls for punishment. There is no reason to consider that the participants who deliberately agreed to engage in criminal conduct of very serious nature should not be required to pay attention to the potential perpetration of further atrocities by some members of the group.

68. To conclude on this point, the principles of JCE liability, rendered necessary by the very nature of international crimes, are founded on the convergence of (i) national legislation and case law of the major legal systems of the world, and (ii) international judicial decisions and instruments.

### **III. THE EXTRAORDINARY CHAMBERS MAY AND SHOULD APPLY JCE DOCTRINE IN APPROPRIATE CASES.**

69. Article 29 of the Law on the Establishment of the ECCC, stating forms of responsibility, was modelled on Article 7 of the ICTY Statute.<sup>133</sup> Similar to the Statutes of the ICTY, the ICTR, and the Special Court for Sierra Leone (“SCSCL”), Article 29 of the ECCC law, defines criminal responsibility for those “who planned, instigated, ordered, aided and abetted, or committed” the crimes punishable by the Court.<sup>134</sup> Just as the ICTY, ICTR and

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<sup>133</sup> E.E. MEIJER, *The Extraordinary Chambers in the Courts of Cambodia for Prosecuting Crimes Committed by the Khmer Rouge: Jurisdiction, Organization, and Procedure of an Internationalized National Tribunal*, in INTERNATIONALIZED CRIMINAL COURTS AND TRIBUNALS: SIERRA LEONE, EAST TIMOR, KOSOVO, AND CAMBODIA 216 (C.P.R. Romano, A. Nollkaemper, & J.K. Kleffner, eds., 2004).

<sup>134</sup> Law on the Establishment of Extraordinary Chambers in the Courts of Cambodia for the Prosecution of Crimes Committed During the Period of Democratic Kampuchea, with Inclusion of Amendments as Promulgated on 27 October 2004, Art. 29, NS/RKM/1004/006. Compare ICTY Statute, Art. 7(3) (defining individual criminal responsibility for persons who “planned, instigated, ordered, committed, or otherwise aided

SCSL have interpreted “committed” to include participation in a JCE, the Extraordinary Chambers may also read “committed” to include liability for commission through a JCE.<sup>135</sup>

70. As discussed below, the ECCC may apply JCE doctrine consistently with the principle of *nullum crimen sine lege*. Moreover application of JCE liability would greatly serve three important interests (1) accurately accounting for the full gravity of crimes, (2) vertical consistency of interpretation of international criminal law across time, in light of the post-World War II precedents discussed, and (3) horizontal consistency across the array of contemporary international and hybridized tribunals that apply JCE liability—from the ICTY, to the ICTR, to the SCSL, to the Special Panel for Serious Crimes of East Timor<sup>136</sup> as well as to the Iraqi High Tribunal<sup>137</sup> (the only exception is the ICC, which however is treaty-based and whose judges so far have decided to give little weight to customary law).

**A. JCE Liability Is Consistent with the Principle of *Nullum Crimen Sine Lege*.**

71. The principle *nullum crimen sine lege* requires as a matter of justice that a criminal conviction be based on violation of a norm in existence at the time of the accused’s alleged

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and abetted in the planning, preparation or execution of a crime”); ICTY Statute, Art. 6(1) (same); SCSL Statute, Art. 6(1) (same).

<sup>135</sup> Compare, e.g., *Milutinović*, *supra* note { NOTEREF \_Ref86682336 \h }, at §. 20; *Tadić*, *supra* note { NOTEREF \_Ref86665274 \h }, §§ 188-193; *Ntakirutimana and Ntakirutimana*, ICTR-96-10-A and ICTR-96-17-A, ICTR, Appeals Chamber, Judgement, 13 December 2004, at §§ 462, 468. See also *Brima, Kamara, and Kanu*, *supra* note { NOTEREF \_Ref86666521 \h }, §§ 72-75 (applying ICTY jurisprudence on JCE doctrine and noting that Art. 6(1) of the SCSL Statute “is in the same terms as Article 7(1) of the ICTY Statute”).

<sup>136</sup> *Cardoso*, 04/2001, Special Panel for the Trial of Serious Crimes in the District Court of Dili, East Timor, Judgment, 5 April 2003, §§ 367-376 (finding the accused guilty under JCE theory, applying *Tadić* and other ICTY judgements in interpreting UNTAET Regulation 2000/15); *De Deus*, 2a/2004, Special Panel for the Trial of Serious Crimes in the District Court of Dili, East Timor, Judgment, 12 April 2005, at p. 13 (holding that though the accused did not personally beat the victim, he was guilty “as part of a joint criminal enterprise” because he was part of an organized force intent on killing and contributed by carrying a gun, uttering scolds and threats, and intimidating unarmed people, thereby strengthening the resolve of the group). Compare *Perreira*, 34/2003, Special Panel for the Trial of Serious Crimes in the District Court of Dili, East Timor, Judgment, 27 April 2005, at pp. 19-20 (ruling that coordination between actors is required for JCE liability and that two wills to kill, arising independently, do not suffice for JCE liability).

<sup>137</sup> See, e.g., *Dujail Trial Judgement*, 1/9 1st/2005, Supreme Iraqi Criminal Tribunal, 22 November 2006, at Part III, pp. 22-23, 25 (English translation), available at [http://law.case.edu/saddamtrial/documents/dujail\\_opinion\\_pt3.pdf](http://law.case.edu/saddamtrial/documents/dujail_opinion_pt3.pdf) (citing the *Tadić* and *Krnojelac* Appeal Judgements of the ICTY in adjudicating Saddam Hussein’s culpability for crimes against humanity related to the killings of Dujail residents).

acts or omissions.<sup>138</sup> The principle prevents a court from creating new law or interpreting existing law beyond reasonable limits of acceptable clarification—but does not preclude progressive development of the law or interpretation and clarification of the elements of a particular crime by courts.<sup>139</sup> Moreover, Article 15 of the International Covenant on Civil and Political Rights, prescribing standards adopted by Article 33 (new) of the Law on the Establishment of the Extraordinary Chambers, expressly qualifies its *nullum crimen sine lege* principle by providing: “Nothing in this article shall prejudice the trial and punishment of any person for any act or omission which, at the time when it was committed, was criminal according to the general principles of law recognized by the community of nations.”

72. Considering a challenge predicated on the principle of *nullum crimen sine lege* to the application of the JCE liability, the ICTY Appeals Chamber explained that the Tribunal must “be satisfied that the crime or the form of liability with which an accused is charged was sufficiently *foreseeable* and that the law providing for such liability must be sufficiently *accessible* at the relevant time, taking into account the specificity of international law when making that assessment.<sup>140</sup>” The Appeals Chamber noted that Article 26 of the Criminal Code of the Socialist Federal Republic of Yugoslavia defined a strikingly similar form of liability to JCE liability and this helped provide notice.<sup>141</sup>

73. Importantly, however, the Appeals Chamber also held that *even if the domestic provision had not existed*, the decisions and legal instruments identified in *Prosecutor v. Tadić* establishing the principles of JCE liability in customary international law would have sufficed as reasonable notice.<sup>142</sup> The Appeals Chamber explained that customary law may provide sufficient guidance and there was “a long and consistent stream of judicial decisions, international instruments and domestic legislation [from various national systems] which

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<sup>138</sup> International Military Tribunal Judgement, *supra* note { NOTEREF \_Ref86684543 \h \\* MERGEFORMAT }, at 219; *Milutinović*, *supra* note { NOTEREF \_Ref86682336 \h }, at § 37. See also Law on the Establishment of Extraordinary Chambers in the Courts of Cambodia *supra* note { NOTEREF \_Ref86684633 \h }, Art. 33 new, NS/RKM/1004/006 (providing that the Extraordinary Chambers will exercise jurisdiction in accord with international standards as set out in Arts 14 and 15 of the 1966 International Covenant on Civil and Political Rights); International Covenant on Civil and Political Rights, Art. 15 (“No one shall be held guilty of any criminal offence on account of any act or omission which did not constitute a criminal offence, under national or international law, at the time when it was committed.”).

<sup>139</sup> *Milutinović*, *supra* note { NOTEREF \_Ref86682336 \h }, at § 38.

<sup>140</sup> *Id.*, § 38 (emphasis added).

<sup>141</sup> *Id.*, §§ 40-41.

<sup>142</sup> *Id.*, § 41.

would have permitted any individual to regulate his conduct accordingly and would have given him reasonable notice”.<sup>143</sup> Hence, *regardless* of whether the specific national jurisdiction had law on point, the customary character of principles of JCE liability, borne out in a stream of decisions and legal instruments, would have sufficed.

74. Thus, regardless of the content of Cambodian law, application of JCE liability would not violate the principle of *nullum crimen sine lege*. Moreover, at any rate, in Cambodia, between 1975 and 1979, the Criminal Code of 1956 was applicable and envisaged responsibility for both co-perpetratorship (*coaction*) and complicity (*complicité*), pursuant to Articles 82 and 83.<sup>144</sup>

75. Complicity was articulated into various forms pursuant to Articles 83 to 87 of the Cambodian Criminal Code: instigation, advising, ordering, giving instructions, explanation, provision of means, or aiding and abetting.<sup>145</sup> Apparently adopting the unitary model, the Cambodian Code envisaged the same penalty for all participants in the crime providing: “Any person, who wilfully participates in the commission of any crimes or offences, either directly or indirectly, shall be punished with the same punishment applicable to the principal perpetrator.”<sup>146</sup>

76. Based on the French approach to criminal law, the Cambodian law thus apparently differentiated between two categories:

- (i) *Coaction*, embracing (a) collective crimes committed without prior agreement (mob crimes), (b) crimes based on a prior agreement (criminal association, plot, etc.), and (c) crimes committed during a momentary agreement aimed at committing a specific crime (complicity).
- (ii) *Complicité*, encompassing instigation, ordering, providing means, aiding and abetting.

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<sup>143</sup> *Id.*, § 41.

<sup>144</sup> CAMBODIAN CRIMINAL CODE OF 1956, Art. 82 (unofficial English translation) (“Any person, who wilfully participates in the commission of any crimes or offences, either directly or indirectly, shall be punished with the same punishment applicable to the principal perpetrator. If it is a direct participation, he/she shall be deemed as a co-perpetrator. If an indirect participation, he/she shall be considered an accomplice.”); *id.* at Art. 83 (“The participation either indirectly or by complicity may be punishable only if the underlying acts are the results of instigation, explanation, provision of means, or aiding or abetting.”).

<sup>145</sup> *Id.* at Art. 83.

<sup>146</sup> *Id.* at Art. 82.

77. The authors of this Brief are not familiar with Cambodian case law relating to the application of the above provisions in the period up to 1979.<sup>147</sup> As the Cambodian legal system was largely based on the French criminal system, however, an examination of French case law on the matter seems warranted.

78. Various cases brought before French courts would neatly fit into the various categories of JCE. *Coaction* seems clearly to cover JCE 1 and 2. JCE 3 would be matched in French case law by some applications of the notion of “*complicité*”, as shown by the following cases:

(i) *Cour de cassation, Chambre criminelle, 31 December 1947*<sup>148</sup>: In this case, the accused was convicted of complicity in theft for instigating the theft and waiting in the car while other individuals stole gold and other jewellery from a woman, with the aggravating circumstance of falsely pretending to be policemen. The accused did not pretend to be a policeman but was nevertheless convicted of aggravated theft. The *Cour de cassation* applied Article 59 of the French Penal Code, which stated that the accomplice is liable to the same sanctions as the author of the offence<sup>149</sup>; and ruled that the accused was responsible for all the aggravating circumstances committed by the principal perpetrators, even if he was not aware of them. It was sufficient that the accomplice knew the facts that led to or encouraged the offence; it was not necessary that he be aware of the aggravating circumstances that accompanied them.

(ii) *Cour de cassation, Chambre criminelle, 28 May 1980*<sup>150</sup>: Here, the accused, a member of the board of directors of a company, was convicted of complicity in the misuse of corporate funds (*abus de biens sociaux*) committed by a co-accused (the President of the board of directors of the company). His complicity was established because he knowingly accepted the misuse of the funds for several years on the basis of a tacit agreement. According to the *Cour de cassation*, the accused allowed the principal perpetrator to commit the offence and this act could be qualified as “positive”. Although complicity by aiding and abetting cannot be deduced from a simple lack of action (*inaction*) or non-participation, it was blatant where the plaintiff, as a member of the board of directors, was aware of the misuse of corporate funds being committed by the President, and let him commit it, although he had legal means to oppose it.

(iii) *Cour de cassation, Chambre criminelle, 19 June 1984* (in *Bulletin criminel N° 231*): In this case five co-accused were charged with the murder of five people, while two others were charged with complicity in murder. The initial plan of the seven co-accused was to kidnap a man named Messie in order to question him, and possibly execute him, and thereby obtain compromising documents. When the five co-accused went to his house, however, Messie was absent and they killed five other witnesses who were present in the house. The petitioner, who played a role in the planning and gave instructions but did not participate in the killings,

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<sup>147</sup> *Amici curiae* are not proposing to be experts on Cambodian domestic jurisprudence and leave this area to national experts.

<sup>148</sup> *Bulletin criminel* N° 270.

<sup>149</sup> Current Article 121-6 of the French Penal Code states that « *Sera puni comme auteur le complice de l'infraction, au sens de l'article 121-7* ». Unofficial English translation: “*The accomplice to the offence, in the meaning of article 121-7, is punishable as a perpetrator.*”

<sup>150</sup> J. PRADEL, LES GRANDS ARRETS DU DROIT PENAL GENERAL 408 (2001).

alleged a violation of Article 60 of the Criminal Code (on complicity)<sup>151</sup>. He argued he could not be convicted of complicity in acts that were not predictable at the moment of the planning of the offence. The *Cour de cassation* held that the object of each of the five murders was either to prepare, facilitate and execute the theft ordered by the plaintiff or to assist the escape or ensure the impunity of the perpetrators and accomplices. The Court reaffirmed the principle that the accomplice bears responsibility for all the aggravating circumstances, even if he did not know them; it also ruled that in the case, the link (*la relation*) between the instructions given by the plaintiff and the murder of the five persons, required by Article 60 of the Penal Code, did exist.

79. Thus, the potential for liability under JCE principles was (1) reasonably foreseeable even absent the domestic legislation and relevant French case law, and (2) all the more foreseeable because domestic law, and French cases relevant to interpreting Cambodian law modelled after French law, provided for liability under domestic doctrines akin to JCE 1 and 3 liability principles.

80. Finally it is worth stressing that, depending on domestic Cambodian case-law, JCE might be applied even if called by a different name, such as something akin to the French *complicité* in Khmer. What is important is that the concept can be applied according to international law, whatever its name.

**B. Concerns About Potentially Overbroad Liability are Alleviated at the International Level and Outweighed by Important Interests.**

81. Some commentators have expressed misgivings about liability for foreseeable crimes outside the common purpose under JCE category 3, fearing this mode of liability may breach the principle of culpability (*nullum crimen sine culpa*). The concern is that the culpability of the secondary offender who joined the criminal plan or agreement and foresaw the offence outside the plan is wrongly equated with that of the primary offender who committed the agreed-upon crime plus another offence. Under such a theory, it is argued, a secondary

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<sup>152</sup> This Art. 60 (on complicity) was replaced by current Article 121-7 of the French Penal Code : “*Est complice d'un crime ou d'un délit la personne qui sciemment, par aide ou assistance, en a facilité la préparation ou la consommation. Est également complice la personne qui par don, promesse, menace, ordre, abus d'autorité ou de pouvoir aura provoqué à une infraction ou donné des instructions pour la commettre.* » Unofficial English translation: “*The accomplice to a felony or a misdemeanour is the person who knowingly, by aiding and abetting, facilitates its preparation or commission. Any person who, by means of a gift, promise, threat, order, or an abuse of authority or powers, provokes the commission of an offence or gives instructions to commit it, is also an accomplice.*”

offender could be found guilty of murder without the intent to kill, which was instead harboured by the primary offender, who perpetrated the murder.

82. These objections can be met by noting the following:

(i) With regard to degree of culpability, though the secondary offender did not have the intention (*dolus directus*) to commit the un-concerted crime, he was party to a criminal enterprise to commit an agreed-upon crime, and the extra crime was rendered possible both by his participation in the criminal enterprise and by his failure to drop out, or stop the crime, once he was able to foresee the extra crime. Thus there was a causal link between the concerted crime, the secondary offender's mental attitude and conduct, and the extra crime perpetrated by the primary offender.

It is the JCE 1 that normally creates the platform from which the principal perpetrators are able to commit the JCE 3 crimes. Particularly when one deals with government/officially sanctioned criminality at the JCE1 level, this official support for the first set of crimes can 'open the door' to the next type of crime. Officially sanctioned illegal detention or deportation can lead to other mistreatment. This risk is heightened when one is faced with massive JCE's involving many people sharing a broad common purpose and implementing such common purpose by using the institutions under their control to commit the crimes (sometimes using the principal perpetrators).

Since the crimes that we are dealing with are committed on such a large scale and often over a broad time period, JCE 1 and 3 are closely linked and JCE 3 often morphs into JCE 1 through 'notice'. In the ethnic cleansing situation the original common purpose may have been to deport. During deportations, killings, rapes, destruction are regularly used to achieve the purpose. At first, these crimes may be a JCE 3 foreseeable consequence of the common purpose of deportation. As the JCE members learn of these additional crimes and continue to pursue the common purpose, it is possible to establish JCE 1 common intention to commit these (formerly JCE 3) crimes.

Generally speaking, there must be a deterrent and accountability mechanism to address those who foresee a further crime but continue to contribute to the criminal enterprise and fail to prevent or stop the extra crime or to drop out of the criminal enterprise to avoid being a participant in the extra crime.

(ii) Moreover, the lesser culpability and blameworthiness of the secondary offender (assuming that this is the case) can be accounted for at sentencing—and indeed, in several of the JCE cases analyzed in the preceding section, sentences were reduced for those with lesser roles or culpability convicted for the same offence.<sup>152</sup>

(iii) As to the foundation and very *raison d'être* of JCE 3, it bears noting that this mode of responsibility is founded in considerations of public policy—the need to protect society against persons who band together to engage in criminal enterprises and who persist in their criminal conduct though they foresee that more serious crimes outside the common enterprise may be committed. These policy considerations were aptly spelled out by the U.S. Supreme Court in *Tison v. Arizona* in 1987<sup>153</sup> and by members of the House of Lords in 1997, in *Regina v. Powell and Daniels*<sup>154</sup> and *Regina v. Powell (Anthony)*,<sup>155</sup> in the context of crimes committed at the domestic level.<sup>156</sup>

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<sup>152</sup> E.g., *Trial of Otto Sandrock and Three Others*, *supra* note { NOTEREF \_Ref86668651 \h }, at 41; *Trial of Erich Heyer and Six Others*, *supra* note { NOTEREF \_Ref86671862 \h }, at 91.

<sup>153</sup> See *supra* note { NOTEREF \_Ref86686982 \h }. The Supreme Court in *Tison* held that the U.S. Constitutional protection against cruel and unusual punishment does not prohibit the death penalty as disproportionate in the case of a defendant who played a major part in committing, with reckless indifference, a felony that resulted in murder, reasoning:

‘[S]ome nonintentional murderers may be among the most dangerous and inhumane of all—the person who tortures another not caring whether the victim lives or dies, or the robber who shoots someone in the course of the robbery, utterly indifferent to the fact that the desire to rob may have the unintended consequence of killing the victim as well as taking the victim's property. This reckless indifference to the value of human life may be every bit as shocking to the moral sense as an “intent to kill.” Indeed it is for this very reason that the common law and modern criminal codes alike have classified behaviour such as occurred in this case along with intentional murders. See, e.g., G. Fletcher, *Rethinking Criminal Law* § 6.5, pp. 447-448 (1978) (“[I]n the common law, intentional killing is not the only basis for establishing the most egregious form of criminal homicide.... For example, the Model Penal Code treats reckless killing, ‘manifesting extreme indifference to the value of human life,’ as equivalent to purposeful and knowing killing”). . . . [W]e hold that the reckless disregard for human life implicit in knowingly engaging in criminal activities known to carry a grave risk of death represents a highly culpable mental state, a mental state that may be taken into account in making a capital sentencing judgment when that conduct causes its natural, though also not inevitable, lethal result.’ *Id.*

<sup>154</sup> *Regina v. Powell and Daniels*, [1998] 1 Cr. App. R. 261 (House of Lords February 17, 18, 19, July 17, October 30, 1997).

<sup>155</sup> *Regina v. Powell (Anthony) and Another Appellant*, [1999] 1 A.C. 1 (House of Lords, 1997 Feb. 17, 18, 19; July 17; Oct. 30).

<sup>156</sup> The speech of Lords Steyn in the two cases before the House of Lords was very illuminating. His Lordship stated:

‘The established principle is that a secondary party to a criminal enterprise may be criminally liable for a greater criminal offence committed by the primary offender of a type which the former foresaw but did not necessarily intend. The criminal culpability lies in participating in the criminal enterprise with that foresight. Foresight and intention are not synonymous terms. But foresight is a necessary and sufficient ground of the liability of accessories. . . . 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

83. Finally, any fear of abuse in applying JCE liability is mitigated at the international level because (i) international trials are predicated on full respect for the rights of the accused; this entails that the defendant may bring elements to show that he could not possibly foresee the extra crime (and he would thus not be culpable for it); (ii) in international and hybrid tribunals, professional judges, capable of exercising care and prudence, determine whether the culpability of the offender is proved beyond a reasonable doubt. Furthermore, it must be stressed once again that the specificity of international crimes is linked to their collective character and to the fact that they often occur when people engage in criminal conduct on a large scale.

84. That the notion of JCE proves useful to criminal justice if it is used with prudence and full respect for the fundamental principles of fair trial is demonstrated by a recent war crime case brought before a British General Court Martial sitting in Colchester: *R. v. Evans and others* (3 November 2005). The case arose as a result of incidents in Iraq in 2003. Seven

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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.’ *Regina v. Powell and Daniels*, *supra* note { NOTEREF \_Ref86687209 \h \\* MERGEFORMAT }, 266-69; *Regina v. Powell (Anthony) and Another Appellant*, *supra* note { NOTEREF \_Ref86687284 \h }, 12-14.

Similarly, Lord Hutton said:


‘. . . I recognise that as a matter of logic . . . 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 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.’ *Regina v. Powell and Daniels*, *supra* note { NOTEREF \_Ref86687209 \h \\* MERGEFORMAT }, 280-81; *Regina v. Powell (Anthony) and Another Appellant*, *supra* note { NOTEREF \_Ref86687284 \h }, 25.

defendants were accused of murder and violent disorder caused during stop and search operations in which they attacked several Iraqi civilians and killed one. The Prosecution could not pinpoint which defendant materially killed the victim, but argued that the soldiers were involved in a JCE to commit murder. The Judge Advocate stated that ‘if one or more of the soldiers at the start of the incident used reasonable or proportionate force to facilitate a lawful search, but then subsequently used disproportionate – and therefore unlawful force—those members of the patrol who were carrying out their lawful duties such as [...] securing and protecting the area [...] could only be guilty if it could be proved that they joined in or encouraged the unlawful force and at the time could foresee that the actions of the soldiers using unlawful force would kill or cause serious harm to the victim’. However, since there was *insufficient evidence* to direct a properly directed Court Martial Board to come to this conclusion, the Judge Advocate directed the Board to find the defendants not guilty.<sup>157</sup> Thus, the Judge Advocate, while generally upholding the JCE doctrine based on foreseeability, found *in casu* that lack of evidence made it inapplicable.

## CONCLUSION

85. In the period 1975-1979, there existed customary rules in international criminal law providing for three distinct modes of JCE liability. These rules were applicable to Cambodia. JCE doctrine may be applied by the Extraordinary Chambers in keeping with the principle *nullum crimen sine lege* and should be applied where appropriate to accurately reflect the full gravity of crimes and ensure consistency in uses of modes of liability in international criminal law.

Respectfully submitted,

27 Oct. 2008	Professor Antonio Cassese for <i>Amici Curiae</i>	Florence Italy	
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<sup>157</sup> Case cited in C. BYRON, *British Prosecutions Arising out of the War in Iraq*, in A. Cassese (ed.), OXFORD COMPANION TO INTERNATIONAL CRIMINAL JUSTICE (forthcoming), at p. 624.

Date	Name	Place	Signature
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