

## JOINT INTENTIONS TO COMMIT INTERNATIONAL CRIMES

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

### INTRODUCTION

Collective criminal action has been—and remains—the most contentious area of substantive international criminal law. Three doctrines for imposing individual liability for collective endeavors have obsessively dominated the case law and literature, stretching from Nuremberg to the most current pronouncements of the ICC: conspiracy, Joint Criminal Enterprise (JCE),<sup>1</sup> and co-perpetration. Although the favored doctrines keep changing,

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the central issue always remains: how to hold a defendant responsible for the actions of another. In this Article, I attempt to shift the focus away from the standard debate regarding the relative merits and demerits of these three doctrines. Rather, this Article attempts to cut across the spectrum in a new way and focus instead on the commonalities of these theories in an attempt to elucidate an underlying theory to explain and ground how individual liability can be generated from collective endeavors. In this regard we should be particularly concerned to find a theory that adequately explains vicarious liability for group crimes, i.e. the imposition of liability to all participants for the criminal actions of a colleague.

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

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<sup>1</sup> The three versions of JCE include co-perpetration by individuals who share the intent to commit the act (JCE I); concentration camp cases where the accused has “knowledge of the nature of the system of ill-treatment and intent to further the common design of ill-treatment” (JCE II); and vicarious liability for acts of others that fall outside the scope of the common criminal plan but are nonetheless reasonably foreseeable (JCE III). See Tadić, Appeals Chamber, para. 220. In addition to its application at the ICTY and ICTR, joint enterprise liability is also used at the Special Court for Sierra Leone. See Wayne Jordash & Penelope van Tuyle, *Failure to Carry the Burden of Proof: How Joint Criminal Enterprise Lost its Way at the Special Court for Sierra Leone*, 8 J. INT’L CRIM. JUST. 591 (2010).

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

### I. THE RELATIONSHIP BETWEEN CONSPIRACY AND JCE

There has for some time been a division in the international case law over whether JCE is in fact a version of the conspiracy doctrine. In *Krnojelac*, the ICTY Trial Chamber concluded that the doctrines were related, noting that a “joint criminal enterprise exists where there is an understanding or arrangement amounting to an agreement between two or more persons that they will commit a crime.”<sup>4</sup> This view is not only entirely defensible but doctrinally necessary; the analysis in this Part will explain why. Proponents of JCE reject this definition because they are inclined to distance themselves from a formulation that sounds too much like conspiracy. The received wisdom among international lawyers is that conspiracy is a decidedly common law doctrine that finds insufficient international support to be considered part of international criminal law. Consequently, if JCE amounts to ersatz conspiracy, it will be rejected too. This is the motivation behind the attempt to find a distinction between the two.

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

<sup>3</sup> Bratman's work on joint intentions has been incorporated into the legal literature in several instances, though not in the ICL context. See, e.g., Daniel Markovitz, *Contract and Collaboration*, 113 YALE L.J. 1417, 1451-56 (2004); Scott J. Shapiro, *Laws, Plans, and Practical Reason*, 8 LEGAL THEORY 307 (2002); JULES L. COLEMAN, *THE PRACTICE OF PRINCIPLE* 95-100 (2001); Curtis Bridgeman, *Contracts as Plans*, 2009 U. ILL. L. REV. 341 (2009). See also Claire Finkelstein, *Responsibility for Unintended Consequences*, OHIO ST. J. CRIM. L. 579, 587-92 (2005) (Bratman on intentions generally).

<sup>4</sup> Prosecutor v. Krnojelac, Case No. IT-97-25-T, Trial Chamber Decision (March 15, 2002), para. 80. The sentence is well parsed in Alexander Zahar, *Commentary*, 14 ANNOTATED LEADING CASES OF INTERNATIONAL CRIMINAL TRIBUNALS 841, 842 (2008).

### A. *The Requirement of an Agreement*

The Trial Chamber's view in *Krnjelac* was hastily rejected by the ICTY Appeals Chamber under the pretense that it was not in conformity with the requirements of JCE as originally articulated in *Tadić*.<sup>5</sup> Specifically, the Appeals Chamber rejected the Trial Chamber's formulation because it imposed the extra requirement of requiring proof of an agreement "in relation to each of the crimes committed with a common purpose when it assessed the intent to participate in a systemic form of joint criminal enterprise..."<sup>6</sup> This is curious because it is completely unclear how one can achieve a "common purpose" in the absence of at least some form of criminal agreement. A conspiracy is little more than a criminal agreement in the sense that the agreement is the gravamen of the offense.<sup>7</sup> (Indeed, the very definition of a conspiracy is an agreement between two or more persons to engage in an unlawful act.<sup>8</sup>) The following quotation from the Appeals Chamber puts the problem even more sharply:

Since the Trial Chamber's findings showed that the system in place at the KP Dom sought to subject non-Serb detainees to inhumane living conditions and ill-treatment on discriminatory grounds, the Trial Chamber should have examined whether or not Krnjelac knew of the system *and agreed to it*, without it being necessary to establish that he had entered into an agreement with the guards and soldiers—the principle perpetrators of the crimes committed under the system—to commit those crimes [emphasis added].<sup>9</sup>

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

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<sup>5</sup> Prosecutor v. Krnjelac, Case No. IT-97-25-A, Appeals Chamber Decision (September 17, 2002), para. 97.

<sup>6</sup> *Id.*

<sup>7</sup> See, e.g., *Iannelli v. United States*, 420 U.S. 770, 778 (1975) ("the agreement is the essential evil at which the crime of conspiracy is directed"); *United States v. Beil*, 577 F.2d 1313, 1315 n.2 (5th Cir. 1978) ("The law of conspiracy identifies the agreement to engage in a criminal venture as an event of sufficient threat to social order to permit the imposition of criminal sanctions for the agreement alone, plus an overt act in pursuit of it, regardless of whether the crime agreed upon actually is committed."). For a discussion, see Jens David Ohlin, *Group Think: The Law of Conspiracy and Collective Reason*, 98 J. OF CRIM. L. & CRIMINOLOGY 147, 149 n.8. (2007).

<sup>8</sup> See, e.g., 18 U.S.C. § 371 (West 2007). See also GEORGE P. FLETCHER, *RETHINKING CRIMINAL LAW* 646 (Oxford reprint ed. 2000) (1978); Jens David Ohlin, *Conspiracy*, in *OXFORD COMPANION TO INTERNATIONAL CRIMINAL JUSTICE* (2009).

<sup>9</sup> Prosecutor v. Krnjelac, Appeals Chamber Decision, para. 97, discussed in Zahar, *supra* note 4, at 842-43.

words are the same. Zahar expresses the question nicely when he concludes that there “is a difference, apparently, between ‘agreeing to the system’ and ‘entering into an agreement’ with the principal perpetrators.”<sup>10</sup> The undertone of skepticism is warranted here because there is no doctrinally relevant difference; both are agreements, both are conspiracies.<sup>11</sup> How else can one agree to the system? The view of JCE as a version of the conspiracy doctrine was subsequently also supported by the ICTY Appeals Chamber in *Milutinović*, which concluded that JCE was a version of conspiracy with the added element of “action in furtherance of that agreement.”<sup>12</sup> Although this view was subsequently rejected by the ICTY Appeals Chamber in *Brđanin*, it was, in my view, too hastily discarded.<sup>13</sup>

The *Brđanin* decision also considered the question of whether the prosecution must demonstrate that there was an agreement between the accused in the case and the principal perpetrator of the crime. The Appeals Chamber rejected this requirement because it found no such requirement in the *Tadić* opinion’s rendering of the standard for JCE liability.<sup>14</sup> Furthermore, the court acknowledged that foregoing this additional requirement meant that JCE liability might be imposed for individuals with a mere tenuous connection to the principal perpetrators.<sup>15</sup> The Appeals Chamber reasoned that a common purpose may “materialize extemporaneously.”<sup>16</sup>

This thought was then taken to its logical extreme: the Appeals Chamber in *Brđanin* concluded that the defendants could be vicariously liable for the actions of the physical perpetrators of the crime, even if the physical perpetrators were not part of the JCE.<sup>17</sup> Under this view, the co-defendants conspired with each other and formed a JCE to commit international crimes. These crimes were then carried out by other individuals – the physical perpetrators – but there was no overarching joint enterprise that

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<sup>10</sup> See Zahar, *supra* note 4, at 842.

<sup>11</sup> Indeed, even the *Tadić* court referred to an agreement. See *Tadić*, Appeals Chamber, para. 228.

<sup>12</sup> See *Prosecutor v. Milutinović*, Case No. IT-99-37-A, Appeals Chamber (May 21, 2003), para. 18. It is not clear why the ICTY Appeals Chamber in this case referred to the act requirement as an added element on top of conspiracy, since many jurisdictions require “an overt act in furtherance of the conspiracy” as an essential element of any conspiracy prosecution. This is black letter conspiracy doctrine. See *United States v. Rabinowich*, 238 U.S. 78 (1915). Consequently, the ICTY’s description of JCE in *Milutinović* fits squarely within the definition of a conspiracy.

<sup>13</sup> *Prosecutor v. Brđanin*, Case No. IT-99-36-A, Appeals Chamber (April 3, 2007).

<sup>14</sup> *Id.* at para. 416. Again, this is somewhat strange since even the *Tadić* opinion referred to the “agreed upon” plan.

<sup>15</sup> *Prosecutor v. Brđanin*, Appeals Chamber, para. 418.

<sup>16</sup> *Id.* See also *Tadić*, Appeals Chamber, para. 227.

<sup>17</sup> See *Brđanin*, Appeals Chamber, para. 410.

connected all of them together.<sup>18</sup> This view then leaves a gaping hole in the doctrine: how to link the defendants with the physical perpetrators and vicariously ascribe responsibility to the former for the actions of the latter.<sup>19</sup> This was precisely the doctrinal *raison d'être* for JCE in the first place. Removing the physical perpetrators from the JCE just opens up the original issue again: the need for a linking principle to establish vicarious liability. The Appeals Chamber in *Brđanin* displayed a shocking level of indifference over the lack of such a linking principle, going so far as to admit in a footnote that they would not be providing one in the decision.<sup>20</sup> In dicta, however, the Appeals Chamber suggested that such a linking principle could be established by something like indirect perpetration or perpetration-by-means.<sup>21</sup> In other words, the co-defendants in the JCE used the physical perpetrators as mere instruments to carry out their criminal endeavor. But no such doctrine was flushed out in the decision and subsequent decisions have similarly failed to close this lacuna. This is especially problematic because it is the missing linking principle, not the JCE, that is doing all of the work in the argument by grounding the vicarious liability.<sup>22</sup> In fact, the JCE becomes entirely irrelevant to the case. What is the significance of the JCE to the case if it does not connect the defendants to the perpetrators?

Unfortunately, the Appeals Chamber discussion in *Brđanin* conflates two related but ultimately separate questions. The first is whether a common criminal endeavor must involve some form of agreement. I submit that it must, otherwise one conflates mere crowd behavior with the more directed behavior of a joint criminal *plan* or *enterprise*.<sup>23</sup> However, the fact that a criminal endeavor arises from some kind of agreement is a general question separate from the more specific inquiry of whether a defendant has an agreement with the physical perpetrator of the underlying criminal act. These are two separate questions and the ICTY case law—in particular *Brđanin*—needlessly confused them.

Simply put, it is incorrect to state that conspiracy as a mode of liability requires a direct agreement between the physical perpetrator of the crime and the defendant. True, there must be an agreement at the center of the

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<sup>18</sup> *Id.* at para. 411.

<sup>19</sup> *Id.* at para. 412.

<sup>20</sup> *Id.* at para. 413 n.891.

<sup>21</sup> *Id.* at para. 412.

<sup>22</sup> Even Judge Cassese, the jurist most responsible for the ICTY's adoption of the JCE doctrine, has called the *Brđanin* decision objectionable, excessive, and contrary to the *nullem crimen* principle. See ANTONIO CASSESE, INTERNATIONAL CRIMINAL LAW 195 (2<sup>nd</sup> ed. 2008).

<sup>23</sup> For a discussion of the distinction between crowd behavior and concerted action, see PETER A. FRENCH, COLLECTIVE AND CORPORATE RESPONSIBILITY 68 (1984). See also *infra* Part III.

conspiracy. But the physical perpetrator may have an agreement with a third party, who in turn has an agreement with the defendant. In this sense, the conspiracy doctrine only requires overlapping chains of agreement that link the physical perpetrator to the defendant. But no direct agreement between the two is required. Indeed, it is quite common for the left hand of a conspiracy to be unaware of what the right hand of the conspiracy is doing. Indeed, one hand may even be unaware of the name or identity of the right hand, but this lack of a direct connection does not preclude liability in the U.S. under the doctrine of “chain conspiracies.”<sup>24</sup> In such cases, the lack of a direct agreement between the defendant and the physical perpetrator is no bar to applying the conspiracy doctrine as long as the chain of overlapping agreements connects them. They are all part of the same joint enterprise.

There are other devices for inferring an agreement, such as the well-known doctrine of hub-and-spoke conspiracies. The idea was first broached by the prosecution’s argument in *Kotteakos v. United States* that “separate spokes meeting in a common center” could form a single conspiracy uniting all parts of the wheel.<sup>25</sup> The Supreme Court refused to apply the idea given the facts of *Kotteakos*, but the concept survived and subsequent case law has refined when the hub-and-spokes theory can be applied.<sup>26</sup> The animating

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<sup>24</sup> See, e.g., *United States v. Robinson*, 547 F.3d 632, 641 (6th Cir. 2008); *United States v. Martinez*, 430 F.3d 317, 332-33 (6th Cir. 2005) (“In a drug distribution ‘chain’ conspiracy, it is enough to show that each member of the conspiracy realized that he was participating in a joint venture, even if he did not know the identities of every other member, or was not involved in all the activities in furtherance of the conspiracy.”); *United States v. Leigh*, 62 Fed. Appx. 43, 45 (4th Cir. 2003) (“a chain conspiracy, such as that alleged here, may constitute a single conspiracy”); *United States v. Hines*, 717 F.2d 1481, 1490 (4th Cir. 1983). Compare with *United States v. Tabron*, 437 F.3d 63, 66 (D.C. Cir. 2006) (district courts must make explicit findings regarding scope of defendant’s conspiratorial agreement before holding him responsible for co-conspirator’s reasonably foreseeable acts) and *United States v. Childress*, 58 F.3d 693, 710 (D.C. Cir. 1995) (“Even if, for instance, there exists a core, single chain conspiracy, certain players may have performed activities wholly unrelated to the aims of the conspiracy. In addition, some courts have been reluctant to conclude that the chain conspiracy construct can automatically bind all participants in a drug distribution enterprise into a single agreement . . . when there are no indications of interdependence between the various participants.”).

<sup>25</sup> 328 U.S. 750, 755 (1946). Compare with *United States v. Bruno*, 105 F.2d 921 (2nd Cir. 1939) (allowing liability for narcotics conspiracy where other individuals formed a necessary link in the scheme of distribution, even in the absence of “privity” between the retailers).

<sup>26</sup> See, e.g., *United States v. Carpenter*, 791 F.2d 1024 (2nd Cir. 1986). In *Carpenter*, the Second Circuit indicated that liability might be appropriate in cases where the existence of other parties could be reasonable foreseeable “as a necessary or natural consequence of the unlawful agreement.” See *United States v. Geibel*, 369 F.3d 682 (“Moreover, ‘a single conspiracy is not transformed into multiple conspiracies merely

rationale is typically that a single conspiracy exists when the outer participants had no direct exposure to the other spokes but knew—from logical necessity—that they must have existed. The classic and most common application of the theory is an illicit drug distribution ring, where each retailer is segregated from the others but knows that they must exist; otherwise, each retailer would be selling the entire lot smuggled into the country and not a portion thereof.<sup>27</sup>

The distinction that *Brdanin* should have invoked is between explicit agreements formulated verbally or memorialized in writing, and implicit agreements where some individuals conspire together without ever meeting each other or communicating directly.<sup>28</sup> It is quite common in conspiracies for some members to have *agreed* to a common criminal plan by virtue of their voluntary participation in the plan when they know what the plans entail and decide to participate in it. That *is* an agreement.<sup>29</sup> To suggest otherwise is to fundamentally misunderstand common law conspiracy doctrine; one can agree to a conspiracy without ever uttering a word.<sup>30</sup>

There is also substantial historical support for the idea that common purpose liability and conspiracy liability are one and the same. At Nuremberg, the indictments all referred to a common plan *or* conspiracy as a single atomic concept.<sup>31</sup> The 1996 Draft Code of Crimes against the Peace and Security of Mankind contained the following language: “The principle of indi-

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by virtue of the fact that it may involve two or more phases or spheres of operation, so long as there is sufficient proof of mutual dependence and assistance.”). *See also* United States v. Berger, 224 F.3d 107, 114 -15 (2d Cir. 2000), *quoting* United States v. Maldonado-Rivera, 922 F.2d 934, 963 (2d Cir. 1990). *Compare with* MPC § 5.03 (parenthetical).

<sup>27</sup> *See, e.g.*, United States v. Bruno, 105 F.2d 921 (2<sup>nd</sup> Cir. 1939).

<sup>28</sup> This distinction was helpfully invoked by the Trial Chamber in the very same case, which held that JCE liability required an explicit agreement or understanding between the defendant and the physical perpetrators of the crime. Although the invocation of the concept of “an agreement” strikes me as absolutely correct, I am unsure if the Trial Chamber got it right when it required a direct connection between the defendant and the physical perpetrators, particularly since it is unclear whether an overlapping chain of agreements would satisfy their standard. In any event, the Trial Chamber’s holding was completely rejected by the Appeals Chamber in *Brdanin*.

<sup>29</sup> *See, e.g.*, United States v. Parker, 2009 U.S. App. LEXIS 359, at \*14 (10<sup>th</sup> Cir. January 9, 2009) (“Participation in a conspiracy can be proven by either explicit or implicit agreement by the defendant.”); United States v. McKee, 506 F.3d 225, 238 (3d Cir. 2007) (“the illegal agreement can be, and almost always is, an implicit agreement among the parties to the conspiracy”).

<sup>30</sup> United States v. Price, 13 F.3d 711, 728 (3d Cir. 1994) (drug distribution conspiracies usually implicit); United States v. Zambrano, 776 F.2d 1091, 1095 (2d Cir. 1985) (tacit agreement).

<sup>31</sup> *See* Indictment, International Military Tribunal at Nuremberg, in Trial of War Criminals 25 (1945) (referring in count one to the “common plan or conspiracy”).

vidual criminal responsibility for formulating a plan or participating in a common plan or conspiracy to commit a crime...” and refers to the Nuremberg Charter (article 6), the ICTY Statute, the ICTR Statute, and the Genocide Convention.<sup>32</sup> Furthermore, the 1950 Principles that ratified the outcome of the Nuremberg trials refers to participation in a “common plan or conspiracy.”<sup>33</sup> Consequently, it is clear that even the U.N. and the International Law Commission believe that—at the very least—common purpose liability and conspiracy liability are two sides of the same doctrinal coin.<sup>34</sup>

Further support can be drawn from the ICTR’s jurisprudence on conspiracy to commit genocide, the one crime in the jurisprudence of the ad hoc tribunals where the inchoate offence of conspiracy is allowed.<sup>35</sup> In cashing out the essential elements of conspiracy, including inferring a tacit agreement, the tribunal made reference to joint action: conspiracy is established by “coordinated actions by individuals who have a common purpose and are acting within a unified framework” such as a coalition where “those acting within the coalition are aware of its existence, their participation in it, and its role in furtherance of their common purpose.”<sup>36</sup> Coincidentally, these are essentially the elements of a joint criminal enterprise.

Finally, the fact that JCE III allows for vicarious liability for the acts of co-conspirators, so long as those results are foreseeable, suggests the close connection between the doctrine of conspiracy and JCE.<sup>37</sup> The standard itself for JCE III stems from the *Pinkerton* doctrine, which allows in U.S. federal

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<sup>32</sup> See Draft Code of Crimes against the Peace and Security of Mankind 21 (1996).

<sup>33</sup> See Principles of International Law recognized in the Charter of the Nürnberg Tribunal and in the Judgment of the Tribunal with commentaries.

<sup>34</sup> See also Jens Meierhenrich, *Conspiracy in International Law*, 2 ANNUAL REVIEW OF LAW AND SOCIAL SCIENCE 341 (2006) (arguing for underlying similarities between JCE and conspiracy). See also CIARA DAMGAARD, INDIVIDUAL CRIMINAL RESPONSIBILITY FOR CORE INTERNATIONAL CRIMES 188-189 (2008).

<sup>35</sup> The basis for the asymmetry of allowing the inchoate offence of conspiracy for genocide, but not other international crimes, stems from the fact that conspiracy to commit genocide was explicitly included in the Genocide Convention.

<sup>36</sup> See Nahimana, Appeals Chamber, para. 1047.

<sup>37</sup> See Tadić, Appeals Chamber, para. 224 n. 289 (“Although there is no clearly defined doctrine of common purpose under the United States’ Federal common law, similar principles are promulgated by the *Pinkerton* doctrine. This doctrine imposes criminal liability for acts committed in furtherance of a common criminal purpose, whether the acts are explicitly planned or not, provided that such acts might have been reasonably contemplated as a probable consequence or likely result of the common criminal purpose.”).

courts the imputation of responsibility for the acts of co-conspirators. Indeed, even the language in *Tadić* is borrowed, inter alia, from *Pinkerton*.<sup>38</sup>

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

Historically, it is true that at common law, liability under the common purpose doctrine was a separate mode of liability that was not referred to as “conspiracy.” This suggests, at first glance, that there is a not insignificant distinction between conspiracy and a joint criminal enterprise. But deeper investigation reveals this to not be so. The modern doctrine dates back to *R. v. Swindall and Osborne* in 1846.<sup>39</sup> Two cars were racing in public and one of them struck and killed a pedestrian. Both drivers were convicted of manslaughter.<sup>40</sup> However, the key element of the decision stemmed from the fact that both drivers had agreed to engage in the race and they were doing so negligently.<sup>41</sup> Furthermore, individual liability could not be traced to a single individual because it was unclear which car had killed the pedestrian.

At some point in its historical evolution, U.S. law started to deal with such cases as conspiracies, whereas the common purpose doctrine survived mostly in tort. An early example is *Colegrove v. New York & N. H. R. Co.*, which allowed a plaintiff to maintain an action against two railroads for their negligence.<sup>42</sup> The more modern version of this tort doctrine exists in the form of joint enterprise liability or market share liability, where corporations may be held liable relative to the percentage of their market share in an industry that has caused injury to plaintiffs.<sup>43</sup> Famous examples include birth defects

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<sup>38</sup> See Kai Ambos, *Amicus Brief on Joint Criminal Enterprise*, Extraordinary Chambers of the Courts of Cambodia, at 9 (October 27, 2008) [hereinafter Ambos, JCE Amicus Brief].

<sup>39</sup> Ambos traces the doctrine back even further to the private law concepts of the 14<sup>th</sup> Century. See Kai Ambos, *Joint Criminal Enterprise and Command Responsibility*, 5 J. INT’L CRIM. JUST. 159, 168 n.64 (2007), citing KEITH JOHN MICHAEL SMITH, A MODERN TREATISE ON THE LAW OF CRIMINAL COMPLICITY 209 n.1 (1991). Ambos also notes that the doctrine developed into the common law concept of criminal conspiracy in the 17<sup>th</sup> Century. See *Developments in the Law: Criminal Conspiracy*, 72 HARV. L. REV. 920, 922-23 (1959). This supports the reading offered here that common enterprise liability is of a coin with criminal conspiracy.

<sup>40</sup> See FRANCIS WHARTON, A TREATISE ON CRIMINAL LAW 364 (8<sup>th</sup> ed. 1880).

<sup>41</sup> *Id.*

<sup>42</sup> *Colegrove v. New York & N. H. R. Co.*, 20 N.Y. 492 (1859) (citing and applying the rule from *R. v. Swindall and Osborne*).

<sup>43</sup> See *Sindell v. Abbott Lab.*, 607 P.2d 924 (1988). However, other jurisdictions have rejected enterprise liability in favor of more traditional standards requiring proof of specific causation. See Edward J. Schwartzbauer and Sidney Shindell, *Cancer and the Adjudicative Process: The Interface of Environmental Protection and Toxic Tort Law*, 14 AM. J. L. AND MED. 1, 38 (1988) (arguing that the Supreme Court’s holding regard-

caused by the drug DES, where industry-wide causation is established as a matter of law, but causation to specific defendants is impossible to identify. Disinclined to prevent all recovery in such cases, some courts allowed recovery based on market share liability to be used as a proxy where more finely tuned evaluations of individual causation are impossible. But in the criminal law, the rule of *Swindall* is largely forgotten and has long since been displaced by conspiracy and *Pinkerton's* vicarious liability for the acts of co-conspirators.<sup>44</sup> Although the phrase of joint enterprise liability continues to have some purchase in the criminal law of the United Kingdom,<sup>45</sup> it is clear that these cases involve an agreement, either explicit or tacit, between the individuals, thus demonstrating that the doctrine is a functional analogue to the conspiracy doctrine as a mode of liability.<sup>46</sup>

*Regina v. Powell*, the leading U.K. criminal case on joint enterprise (vicarious) liability, is particularly illustrative. In that case, the various formulations of the doctrine offered by the House of Lords all included the element of an agreement.<sup>47</sup> Indeed, the particular doctrinal puzzle confronted by the Lords was how to properly describe the nature of the vicarious liability: as actions that fall outside the scope of the original criminal agreement

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ing causation in *Celotex Corp. v. Catratt* is arguably inconsistent with the enterprise liability theory).

<sup>44</sup> The doctrine is applied in the United States only in the very limit context of negligent homicide as a result of a car race. *See, e.g.*, *State v. Martin*, 539 So. 2d 1235 (La. 1989); *State v. Melcher*, 487 P.2d 3 (Ariz. Ct. App. 1971); *People v. Kemp*, 310 P.2d 680 (Cal. Ct. App. 1957); *State v. Alterio*, 220 A.2d 451 (Conn. 1966); *State v. McFadden*, 320 N.W.2d 608 (Iowa 1982); *State v. Butler*, 227 N.E.2d 627 (Ohio 1967). It is not a general mode of liability with wider applicability. Joint criminal liability is now established either by *Pinkerton* liability or by aiding and abetting. *See, e.g.*, *United States v. Bowen*, 527 F.3d 1065, 1077-78 (10<sup>th</sup> Cir. 2008); *United States v. Zackery*, 494 F.3d 644, 648 (8<sup>th</sup> Cir. 2007). Only a couple of states retain a joint enterprise liability doctrine that is distinguishable from conspiracy or aiding and abetting. *See, e.g.*, *State v. Jefferson*, 574 N.W.2d 268 (Iowa 1997) (applying Iowa Code section 703.2). *Cf. Commonwealth v. Ortiz*, 679 N.E.2d 1007 (Mass. 1997) (applying joint enterprise liability as a form of aiding and abetting and requiring presence at the scene of the crime, thus distinguishing it from JCE); *Riley v. State*, 878 P.2d 272, 282 (Nev. 1994) (referring to joint criminal liability as a conspiracy theory).

<sup>45</sup> *See, e.g.*, *R. v Powell* (Anthony) and English (1999).

<sup>46</sup> *See R. v. Anderson and Morris* (1966) (tacit agreement and foresight). *See also R. STONE, OFFENCES AGAINST THE PERSON* 45-46 (1999).

<sup>47</sup> *See also Reg. v. Smith* (Wesley) [1963] 1 W.L.R. 1200 (“In the view of this court, that is a wholly unexceptionable direction upon the law except, of course, where the act can be said to be wholly outside the subject-matter of the concerted agreement. The term ‘agreement,’ ‘confederacy,’ ‘acting in concert,’ and ‘conspiracy,’ all pre-suppose an agreement express or by implication to achieve a common purpose, and so long as the act done is within the ambit of that common purpose anyone who takes part in it, if it is an unlawful killing, is guilty of manslaughter.”) (Slade, J.).

but are nonetheless foreseeable, or as actions that are tacitly agreed to by the defendant by virtue of the fact that they were foreseeable and the defendant continued with the enterprise anyway. The particular choice between these two formulations is irrelevant for our purposes here; what matters is that the debate was entirely framed around the nature of the agreement at the heart of the doctrine. British commentators on criminal law similarly recognize the centrality of agreement as an essential aspect of joint enterprise liability.<sup>48</sup>

In conclusion, the best way of understanding domestic liability for joint enterprises is to treat it as conspiracy as a mode of liability. The fact that U.K. law has conspiracy as an inchoate offence but does not have anything called conspiracy liability suggests strongly that what U.S. criminal lawyers call conspiracy liability, British criminal lawyers call joint enterprise liability. Two names; one doctrine.

## II. THE LIMITS OF VICARIOUS LIABILITY

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

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

The current trend in international penal codes is to pull back from JCE III (liability for the foreseeable actions of co-participants beyond the scope of the criminal plan). For example, article 25 of the Rome Statute cov-

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<sup>48</sup> See, e.g., CATHERINE ELLIOTT & FRANCES QUINN, CRIMINAL LAW 220-221 (3d Ed., 2000) (citing the case of *Pettters and Parfitt* for the proposition that “[i]t is not sufficient that they both separately intend the same thing; they must have made it clear to each other, by their actions or words, that they have this common intention, though this might not be communicated until just before or at the point of committing the offence”).

ers some of the same ground as JCE I, but it arguably excludes JCE III.<sup>49</sup> The Rome Statute's Article 25(3)(d), in addition to its requirement that the action must be intentional, also requires that the action meet one of the following two criteria: (i) "be made with the aim of furthering the criminal activity or criminal purpose of the group, where such activity or purpose involves the commission of a crime within the jurisdiction of the Court"; or (ii) "be made in the knowledge of the intention of the group to commit the crime." Certainly, with regard to JCE III, it is unclear which prong would fulfill a JCE III theory. First, JCE III would appear to exclude, by definition, contributions that are made with knowledge of the group's intention to commit the crime. The whole rationale for JCE III is the prosecution of individuals for actions that are foreseeable by an *objective* standard, even if the individual was not consciously deliberating about such possibilities when he or she made the contribution; such contributions are never made *knowingly*. Ambos correctly notes that contributions under JCE III may indeed meet the criteria of acting with the aim of furthering the criminal enterprise,<sup>50</sup> but it can hardly be said that contributions in such instances are "intentional," unless one reduces intentionality to the most innocuous sense of the word to mean actions that are done voluntarily or without compulsion (which cannot be what the term means within the context of the Rome Statute).<sup>51</sup> This strongly suggests that liability for foreseeable actions of co-conspirators that fall outside the scope of the criminal plan are not covered by Article 25(3)(d). This is hardly surprising, since Article 25(3)(d) was enacted in place of a provision penalizing conspiracy as a substantive offence, which has been controversial in international criminal law since Nuremberg, and remains so today.<sup>52</sup> Indeed, even in the U.S., vicarious liability for the acts of co-conspirators falling outside the scope of the criminal plan is widely disfavored.<sup>53</sup> Though the *Pinkerton* doctrine allows such liability in federal court, many state jurisdictions and the Model Penal Code reject the doctrine.<sup>54</sup>

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<sup>49</sup> See Ambos, JCE Amicus Brief, *supra* note 38, at 15.

<sup>50</sup> *Id.* at 14.

<sup>51</sup> See Jens David Ohlin, *Three Conceptual Problems with the Doctrine of Joint Criminal Enterprise*, 5 J. INT'L CRIM. JUST. 69, 78 (2007).

<sup>52</sup> See George P. Fletcher, *Amicus Curiae Brief of Specialists in Conspiracy and International Law in Support of Petitioner*, 2006 WL 53979 (arguing that conspiracy is not a triable offence under the laws of war), *filed in Hamdan v. Rumsfeld*, 548 U.S. 557 (2006).

<sup>53</sup> The drafters of the Model Penal Code declined to codify *Pinkerton* liability and instead chose more traditional categories of complicity such as accomplice liability and aiding and abetting. See MPC Section 2.06. There is also a long history in the scholarly literature of objections to U.S. conspiracy doctrine. See, e.g., Francis B. Sayre, *Criminal Conspiracy*, 35 HARV. L. REV. 393, 393 (1922).

<sup>54</sup> See, e.g., *People v. McGee*, 49 N.Y.2d 48 (N.Y. 1979).

1. *The World War II Case Law.* — Also, the case law foundation for JCE III is shaky. The *Tadić* opinion based its analysis on a series of previously unreported post-World War II military prosecutions.<sup>55</sup> However, the case law for common purpose liability for actions that extend beyond the scope of the plan rested largely on *Essen Lynching* and *Borkum Island*.<sup>56</sup> The first problem with these cases is that neither case produced a written decision from the judges and the written material consists only of submissions from the prosecutor and defense counsel. One is left to infer agreement with the prosecutor's doctrine on the basis of the judges' decision to issue convictions. This is problematic purely as a matter of legal reasoning. Second, and more important, neither case involved a situation where a defendant explicitly agreed to a criminal plan but was convicted for the actions of confederates that extended beyond the scope of the criminal plan. Rather, these were lynchings where the deaths were attributed to the defendants by the judicial system, even though the prosecutors could not prove who had killed whom (by delivering the fatal blows). Indeed, there is not a single *international* case cited in the *Tadić* opinion that includes the language of liability for actions that were reasonably foreseeable. The *Tadić* court cited *Pinkerton* and other domestic cases in a footnote, but conceded that,

reference to national legislation and case law only serves to show that the notion of common purpose upheld in international criminal law has an underpinning in many national systems. By contrast, in the area under discussion, national legislation and case law cannot be relied upon as a source of international principles or rules, under the doctrine of the general principles of law recognised by the nations of the world: for this reliance to be permissible, it would be necessary to show that most, if not all, countries adopt the same notion of common purpose. More specifically, it would be necessary to show that, in any case, the major legal systems of the world take the same approach to this notion. The above brief survey shows that this is not the case.<sup>57</sup>

In terms of more recent case law support for JCE III, the second edition of *International Criminal Law* cites *R. v. Vaillancourt* and *R. v. Martineau*, domestic criminal law cases from Canada in 1987 and 1990 respectively,<sup>58</sup> and *Regina v. Powell and another* and *Regina v. English*, two cases from

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<sup>55</sup> See *Tadić*, Appeals Chamber, para. 195-220.

<sup>56</sup> For a discussion, see Ohlin, Three Conceptual Problems, *supra* note 51, at 76; Amos, JCE Amicus Brief, *supra* note 38, at 28.

<sup>57</sup> *Tadić*, Appeals Chamber, para. 225.

<sup>58</sup> See CASSESE, *supra* note 22, at 200 n.13.

the United Kingdom in 1997. While all four cases support vicarious liability, none applies international law. The treatise also cites *D'Ottavio and Others*, a post-World War II Italian prosecution from 1947, which was also cited in *Tadić*, though that case dealt mostly with the concept of indirect causation and the notion of *causa causae est causa causati*.<sup>59</sup> In *D'Ottavio*, civilians pursued detainees who had escaped from a concentration camp and all were convicted of manslaughter even though only one of them had actually fired a weapon at them (the others arguably pursued them to capture them). The Court of Cassation stated that “[t]his foresight (previsione) necessarily followed from the use of weapons: it being predictable (dovendo prevedersi) that one of the participants might shoot at the fugitives to attain the common purpose (lo scopo comune) of capturing them.”<sup>60</sup> This does indeed sound a lot like *Pinkerton*. However, the Court of Cassation was applying Italian criminal law, not international criminal law, which thus fails to establish that the doctrine can be deduced from customary international law. *Aratano et al.*, also cited in *Tadić*, falls victim to the same problem.<sup>61</sup> The Appeals Chamber in *Brđanin* cited two Control Council Law No. 10 cases (*Justice* and *RuSHA*), though neither specifically refer to a common criminal design and neither involve vicarious liability for acts that fall outside the scope of the criminal plan.<sup>62</sup> It is therefore appropriate to ask if, prior to *Tadić*, there was a single case applying international criminal law or the international law of war that held a defendant vicariously responsible for the foreseeable actions of other members of a common criminal enterprise that nonetheless fell outside the scope of the criminal plan.

2. *JCE III and Special Intent*. — In a recent defense of the JCE doctrine, Cassese has proposed a significant restriction on the application of JCE III.<sup>63</sup> In order to remain consistent with the required mental element for international offences, Cassese concedes that JCE III should not be used as a mode of liability for offences that required a showing of special or specific intent.<sup>64</sup> In particular, he argues that this restriction would apply to prosecutions for genocide, persecution, and aggression, since each of these offences require a showing that the defendant had a specific intent that goes beyond the fact that the defendant’s underlying conduct was intentional (so-called

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<sup>59</sup> *Id.* at 204 n.18.

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

<sup>61</sup> *Tadić*, Appeals Chamber, para. 216. See also *Ambos*, JCE Amicus Brief, *supra* note 38, at 29.

<sup>62</sup> *Prosecutor v. Brđanin*, Appeals Chamber, para. 16.

<sup>63</sup> See Antonio Cassese, *The Proper Limits of Individual Responsibility under the Doctrine of Joint Criminal Enterprise*, 5 J. INT’L CRIM. JUST. 109-133 (2007).

<sup>64</sup> *Id.* at 121. The terms specific and special intent (*dolus specialis*) are all used interchangeably here.

general intent).<sup>65</sup> In the case of genocide, the specific intent is the intent to destroy the protected group (in whole or in part),<sup>66</sup> and in the case of persecution, the specific intent is the intent to discriminate against the group by depriving its members of fundamental rights.<sup>67</sup> Applying JCE III in this context would entail convicting a defendant without the requisite specific intent.<sup>68</sup> In essence, the logical extreme of the proposal would entail only using JCE III in cases where the mens rea of the underlying offence can be satisfied by recklessness or *dolus eventualis*, since the mens rea of a defendant in a JCE III case is one of recklessness: he subjectively foresees the resulting crime but willingly participates anyway. The two should match.

Although this proposed contraction of the doctrine is a welcome development, the proposal suffers from some ambiguity regarding the scope of the constraint being proposed. When identifying specific intent crimes in international criminal law, it is important to look for both *chapeau* crimes and underlying offences that require specific intent. For example, genocide is a *chapeau* crime so all instances of genocide, regardless of the underlying offence, will require specific intent.<sup>69</sup> But other international crimes might have specific intent in the underlying offence, and in fact many do. For example, the war crime of willful killing arguably excludes recklessness,<sup>70</sup> as does the war crimes of willfully causing great suffering, or serious injury to

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<sup>65</sup> *Id.*

<sup>66</sup> *See, e.g.*, Rome Statute, article 6.

<sup>67</sup> *See, e.g.*, Rome Statute, article 7(2)(g).

<sup>68</sup> A similar strategy was employed by the Supreme Court of Nevada in *Bolden v. State*, 124 P.3d 191 (Nev. 2005) (upholding Pinkerton liability for general intent crimes but rejecting it for special intent offenses such as burglary and kidnapping). *See also* SANFORD KADISH ET AL. CRIMINAL LAW AND ITS PROCESSES 683 (8<sup>th</sup> ed. 2007) (referring to *Bolden* decision as “Solomonic”).

<sup>69</sup> *See, e.g.*, WILLIAM A. SCHABAS, GENOCIDE IN INTERNATIONAL LAW 214, 221 (2000). *But see* Prosecutor v. Akayesu, ICTR Trial Chamber, Sept. 2, 1998, para. 485 (concluding that special intent was required for aiding and abetting genocide but not for complicity in genocide). For a criticism of this distinction as untenable, see Payam Akhavan, *The Crime of Genocide in the ICTR Jurisprudence*, 3 J. INT’L CRIM. JUST. 989 (2005). The Appeals Chamber subsequently overturned *Akayesu* on this point. *See* Prosecutor v. Ntakirutimana, ICTR Appeals Chamber, Dec. 13, 2004, para. 501 (mens rea of knowledge sufficient for aiding and abetting genocide). For analysis on this point, see Grant Dawson & Rachel Boynton, *Reconciling Complicity in Genocide and Aiding and Abetting Genocide in the Jurisprudence of the United Nations Ad Hoc Tribunals*, 21 HARV. HUM. RTS. J. 241, 261 (2008). The tension between the mens rea for aiding and abetting (knowledge) and the mens rea for genocide as a principal perpetrator (special intent) is not as worrisome, since aiding and abetting represents an inherently lower form of criminal participation. In contrast, the liability on JCE involves full vicarious liability for the actions of another individual.

<sup>70</sup> *See, e.g.*, Rome Statute, article 8(2)(a)(i).

body or health,<sup>71</sup> as well as the war crime of wilfully depriving a prisoner of war of a fair trial.<sup>72</sup> Other examples include, but are not limited to: the war crime of intentional attacks against the civilian population;<sup>73</sup> the war crime of intentional attacks against civilian objects;<sup>74</sup> the war crime of intentional attacks against humanitarian personnel;<sup>75</sup> the war crime of intentional attacks that cause excessive damage to civilian objects;<sup>76</sup> the war crime of intentional attacks against religious and educational facilities.<sup>77</sup> As for crimes against humanity, the list of specific intent crimes includes torture and murder.<sup>78</sup> Murder presents a whole host of problems since many jurisdictions allow recklessness to satisfy some form of depraved heart murder, while others classify such situations as a lower grade of homicide.<sup>79</sup> Furthermore, the whole category of crimes against humanity should be considered a specific intent crime because not only must the underlying conduct be committed as part of a widespread or systematic attack against a civilian population, the perpetrator must also intend or know that the underlying act is part of the widespread or systematic attack. The requirement of intent here would foreclose JCE III under the new Cassese proposal, and the requirement of knowledge would not be satisfied either because in a JCE III case, the defendant may not be aware that the underlying act is being committed, since he is merely being convicted for participating in the enterprise with knowledge that such acts are foreseeable (not actual). This suggests that the proposed contraction of the doctrine is quite sweeping and would, in fact, foreclose JCE III in most situations.

In any event, it is unlikely that the ICTY will adopt the proposed contraction of JCE III, even though it was proposed by the one individual most responsible for the ICTY's adoption of the doctrine in the first place. In 2009, Radovan Karadžić used this exact argument when he filed a *pro se* motion to

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<sup>71</sup> See, e.g., Rome Statute, article 8(2)(a)(iii).

<sup>72</sup> See, e.g., Rome Statute, article 8(2)(a)(vi).

<sup>73</sup> See, e.g., Rome Statute, article 8(2)(b)(i).

<sup>74</sup> See, e.g., Rome Statute, article 8(2)(b)(ii).

<sup>75</sup> See, e.g., Rome Statute, article 8(2)(b)(iii).

<sup>76</sup> See, e.g., Rome Statute, article 8(2)(b)(iv).

<sup>77</sup> See, e.g., Rome Statute, article 8(2)(b)(ix).

<sup>78</sup> See, e.g., Rome Statute, article 7(1)(a) and 7(1)(b). Although U.S. scholars debate whether torture is a specific intent crime under federal law, it is unquestioned that torture is a specific intent crime under international law. See Jens David Ohlin, *The Torture Lawyers*, 51 HARV. INT'L L.J. 193, 207 (2010) (discussing U.S. Senate reservations to ratification of the Convention Against Torture).

<sup>79</sup> Even in jurisdictions that allow recklessness as a mental state for murder, nearly all classify this as a lower grade offence, e.g. second degree murder or depraved heart murder. This is precisely the problem of the JCE doctrine: its failure to ensure a doctrinal grading of culpability.

dismiss all counts relying on JCE III with regard to special intent crimes.<sup>80</sup> The ICTY Trial Chamber denied the motion on the grounds that it was not properly raised as a jurisdictional challenge.<sup>81</sup> If the ICTY were to accept the argument when it finally reaches the merits of the argument (on appeal following conviction), doing so would involve a substantial amendment to the doctrine announced in *Tadić*, which the Appeals Chamber considers well-settled law and has shown little interest in revisiting despite repeated attempts by numerous Trial Chambers.<sup>82</sup>

3. *Conclusion.* The support for JCE III is therefore chimerical. Other than the statutory basis for JCE I in Article 25(3)(d) and customary law, there remains no non-question-begging rationale for JCE III in customary international law. It is perhaps for this reason that other courts have been hesitant to adopt the approach. In addition to the ICC Pre-Trial Chamber's decision in *Lubanga*, the Extraordinary Chambers of the Court of Cambodia recently decided that JCE III did not exist under customary international law at the time when the crimes of the Khmer Rouge were perpetrated in Cambodia.<sup>83</sup> Cassese and the editors of the *Journal of International Criminal Justice* argued in an amicus curiae brief that JCE was not created by the ICTY Appeals Chamber in *Tadić*, but was simply *recognized* by the Chamber on the basis of its analysis of customary international law, including cases that date back to the end of World War II, long before the crimes in Cambodia were committed.<sup>84</sup> It is likely that at least some of these courts will recognize what scholars have increasingly recognized: that JCE III has no basis in either the Rome Statute's Article 25(3)(d), nor customary international law, with the exception of the recent cases adjudicated by the ICTY.<sup>85</sup>

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<sup>80</sup> See *Preliminary Motion to Dismiss JCE III – Special Intent Crimes*, Prosecutor v. Karadžić, March 27, 2009. The motion was filed *pro se* because Karadžić is representing himself before the Tribunal; the motion credits Kevin Jon Heller and Rebecca Mori in a footnote.

<sup>81</sup> See *Decision on Six Preliminary Motions Challenging Jurisdiction*, Prosecutor v. Karadžić, April 28, 2009.

<sup>82</sup> See, e.g., Prosecutor v. Stakić, Appeals Chamber, para. 62.

<sup>83</sup> See *Invitation to Amicus Curiae*, Duch Case, Case No. 001/18-07-2007-ECCC/OCIJ (PTC 02), Extraordinary Chambers in the Courts of Cambodia (Sept. 23, 2008).

<sup>84</sup> See Antonio Cassese et al, *Amicus Curiae Brief of Professor Antonio Cassese and Members of the Journal of International Criminal Justice on Joint Criminal Enterprise Doctrine*, Case No. 001/18-07-2007-ECCC/OCIJ (PTC 02), Extraordinary Chambers in the Courts of Cambodia (Oct. 27, 2008). The amicus brief was signed by Cassese, Mary De Ming Fan, Vanessa Thalmann, and Salvatore Zappala.

<sup>85</sup> It is unclear whether the decisions of the ICTY will be sufficient to establish JCE III as an element of customary international criminal law in the future. Arguably not, since the formation of a norm of customary international law requires state practice and *opinio juris* and the decisions of an international criminal tribunal are not attributable to specific states. See International Law Association, Committee on Forma-

### B. Differentiating Levels of Participation

A revised doctrine of vicarious liability—whatever you call it—should demonstrate the sensitivity to criminal law theory that so many scholars have found wanting in JCE.<sup>86</sup> One obvious place for reform is in the Rome Statute itself. Of course, this will not be easy, since plenty of experienced criminal law scholars were involved as advisors in the original Rome Statute drafting process.<sup>87</sup> Apparently, the lack of coherence in Article 25 generally did not stem from the lack of theoretical expertise in their midst, but rather from the process of collective drafting by committee—a good way to achieve consensus at the cost of coherence.<sup>88</sup>

Of course, the next question is how the Assembly of State Parties could amend the Rome statute. This is an opportunity for great doctrinal advancement. As suggested above, the statute could explicitly reject JCE III and vicarious liability for foreseeable actions falling outside the scope of the agreed criminal plan.<sup>89</sup> This will make clear to courts the intent of the drafters and block an attempt to import JCE III through the backdoor of custo-

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tion of Customary (General) International Law, Statement of Principles Applicable to the Formation of General Customary International Law, at 18 (2000). It is true, however, that state practice may be attributed on the basis of the members of the Security Council that drafted the ICTY Statute. However, since JCE was not directly codified in the ICTY Statute but rather developed by the Tadić court on the basis of their analysis of the term “commission,” it is doubtful that one can seriously attribute state practice or opinion juris based on the adoption of the ICTY Statute by the Security Council.

<sup>86</sup> See, e.g., Albin Eser, *Individual Criminal Responsibility*, in Cassese et al eds., *THE ROME STATUTE OF THE INTERNATIONAL CRIMINAL COURT: A COMMENTARY* 767, 803 (2002); Ambos, *supra* note 39, at 759; George P. Fletcher & Jens David Ohlin, *Reclaiming Fundamental Principles of Law in the Darfur Case*, 3 J. INT’L CRIM. JUST. 539, 551 & passim (2005) (discussing legality deficit).

<sup>87</sup> Nor does there appear to be sufficient will among the Assembly of State Parties to deal with this issue. At the most recent review conference in Kampala, the entire conference was devoted to solving the prickly problem of aggression, and Article 25 was not even identified as a pressing problem.

<sup>88</sup> Cf. Kai Ambos, *Article 25 Individual Criminal Responsibility*, in *COMMENTARY ON THE ROME STATUTE OF THE INTERNATIONAL CRIMINAL COURT* 743, 759 (Otto Triffterer ed., 2<sup>nd</sup> ed. 2008) (1999) (“a provision drafted without regard to basic dogmatic categories will create difficult problems of interpretation for the future ICC”).

<sup>89</sup> For a discussion of the culpability constraints on such prosecutions, see Andrew Ashworth, *A Change of Normative Position: Determining the Contours of Culpability in Criminal Law*, 11 NEW CRIM. L. R. 232 (2008) (rejecting Gardner’s argument for justifying liability for unintended but foreseeable consequences).

mary international law, or one of the other subsections of Article 25(3).<sup>90</sup> Second, the statute should offer a clear statement of the particular kind of “residual accessory liability” that it imposes for cases of group criminality that fall within JCE I. In particular, the new Article 25 should address the major doctrinal problems that still exist with JCE I: the fact that it fails to draw any meaningful distinction between the architects and organizers of a joint criminal enterprise and minor participants who simply contribute to the endeavor or participate as lower-rung offenders. There is a difference, after all, between the proverbial Milošević who, on the one hand, directs the joint enterprise at the highest level, and the foot soldier who, on the other hand, merely participates in the endeavor at the lowest possible level. Their relative culpability demands differentiation.

One possible solution is to codify JCE and split it into two separate modes of liability. The first we might call “co-perpetrating a joint criminal enterprise.”<sup>91</sup> This mode of liability would be limited to individuals who fulfill all three of the following conditions: (1) they participate in a joint criminal endeavor at a high level; (2) they have the intent of furthering the criminal purpose of the group endeavor; and (3) they are indispensable to the success of the joint criminal endeavor. The second mode of liability would be called “aiding and abetting a joint criminal enterprise.”<sup>92</sup> This mode of liability would be appropriate for individuals who do not satisfy one of the three necessary conditions for co-perpetrating a joint criminal enterprise, either because they participated at a lower rung, they did not share the intent of furthering the criminal purpose of the group, or their contributions were not significant enough to warrant vicarious liability.

The rationale for these criteria can be explained quite simply. The first criterion is meant to remedy the fundamental problem that JCE liability, in its current embodiment, makes no attempt to distinguish between princip-

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<sup>90</sup> Increasing a defendant’s inculpation based on customary law is problematic. See Fletcher & Ohlin, *supra* note 86, at 557-58; Ambos, JCE Amicus Brief, *supra* note 38, at 20. See also Rome Statute, article 22 (“definition of a crime shall be strictly construed and shall not be extended by analogy”) and article 23 (*nulla poena sine lege*).

<sup>91</sup> This mode of liability was first discussed in Prosecutor v. Kvočka, Case No. IT-98-30/1, Trial Chamber (Nov. 2, 2001), para. 282-84. For a full analysis of the distinction between aiding and abetting a JCE and co-perpetrating a JCE, see Jens David Ohlin, *Commentary*, 14 ANNOTATED LEADING CASES OF INTERNATIONAL CRIMINAL TRIBUNALS 739, 748-50 (2008).

<sup>92</sup> See Prosecutor v. Kvočka et al., Trial Chamber, 2 November 2001, par. 273 (concluding that “[t]he Trial Chamber believes that the Nuremberg jurisprudence and its progeny allow for ‘aiding and abetting’ in its traditional form to exist in relation to a joint criminal enterprise and in the case of such an aider or abettor, knowledge plus substantial contribution to the enterprise is sufficient to maintain liability. Once the evidence indicates that the participant shares the intent of the criminal enterprise, he graduates to the level of a co-perpetrator of the enterprise.”).

als and accessories.<sup>93</sup> The second criteria is meant to limit the highest form of liability to those who share the criminal purpose of the group, as opposed to those who simply contribute to the group effort with knowledge of the group's efforts.<sup>94</sup> The third criterion is meant to limit liability for co-perpetrating a joint criminal enterprise to those who make a contribution that is not easily substituted by another readily available participant. For example, the political leader who coordinates the military campaign of ethnic cleansing plays an indispensable role because his supervision is necessary to the joint criminal enterprise *in its manifested form*. The same may also be true of the concentration camp commander whose role is essential to the joint criminal enterprise that involves the systematic mistreatment of prisoners. On the other hand, the individual prison guard may not necessarily be indispensable, since there is a long list of other prison guards who might step in to perform the illegal acts if the defendant had refused.

The Appeals Chamber of the ICTY already considered and rejected a version of this proposal put forth by an ICTY Trial Chamber. The Appeals Chamber objected that one could not combine the concept of joint criminal enterprise with the concepts of co-perpetration or aiding and abetting, since all three are modes of liability.<sup>95</sup> According to the Appeals Chamber, the only permissible combination is one substantive offence and one mode of liability, combined together in a coherent sentence to accurately describe the criminality of the defendant.<sup>96</sup> As if appealing to the universal grammar of the criminal law, the Appeals Chamber rejected such ad hoc combination of modes of liability as syntactically nonsensical.<sup>97</sup> But this objection totally misunderstands the nature of the proposal. The idea is not to compose a sentence of criminal law out of two modes of liability and a substantive offence. Rather, the idea is to break up one inexact mode of liability—joint criminal enterprise liability—in favor of two more specific and accurate modes of liability: co-perpetrating a JCE and aiding and abetting a JCE. The result is nothing less than the destruction of JCE as it is currently known and its replacement by a

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<sup>93</sup> See, e.g., Prosecutor v. Krstic, Case No. IT-98-33, Trial Chamber, para. 642 (August 2, 2001) (guilty for co-perpetrating a joint criminal enterprise for “participation... of an extremely significant nature and at the leadership level.”)

<sup>94</sup> See Kvočka, Trial Chamber, para. 311 (“The Trial Chamber finds that during periods of war or mass violence, the threshold required to impute criminal responsibility to a mid or low level participant in a joint criminal enterprise as an aider and abettor or co-perpetrator of such an enterprise normally requires a more substantial level of participation than simply following orders to perform some low level function in the criminal endeavor on a single occasion.”).

<sup>95</sup> See Kvočka, Appeals Chamber, para. 80. For a critical analysis of the Appeals Chamber's decision, see GÖRAN SLUITER & ALEXANDER ZAHAR, INTERNATIONAL CRIMINAL LAW: A CRITICAL INTRODUCTION 241 (2008).

<sup>96</sup> Kvočka, Appeals Chamber, para. 91.

<sup>97</sup> *Id.*

far more subtle pair of modes of liability that adequately capture the gradations of culpability most commonly found in international criminal law.

There is already some support for this proposal in the ICTY case law. The Trial Chamber in *Stakić* arguably suggested a similar approach, as did the Trial Chamber in *Kvočka*.<sup>98</sup> The Appeals Chamber's rejection of the approach boiled down to nothing more powerful than the demands of *stare decisis* and the fact that the doctrinal amendments represented too far a departure from the *Tadić* decision that first announced the JCE doctrine.

### C. Historical Support for JCE Differentiation

Furthermore, there are historical precedents for the notion of aiding and abetting a joint criminal enterprise.<sup>99</sup> As noted by the *Kvočka* Trial Chamber, several IMT and Control Council Law No. 10 cases convicted individuals for aiding and abetting a common criminal plan.<sup>100</sup> For example, the *Dachau Concentration Camp* case involved the prosecution of guards whose participation in the common design varied—participation that the prosecution described as “aiding and abetting in the execution of the common design.”<sup>101</sup> Also, the *Einsatzgruppen* case established clear standards for making distinctions between levels of participation in a common criminal endeavor, thus belaying the suggestion in *Tadić* that common enterprise liability will admit no such distinctions of relative culpability.<sup>102</sup> The distinctions were based on significant participation and the holding of a high position of responsibility or command.<sup>103</sup> Consequently, “[t]his analysis gives support to the proposition that persons who assist or facilitate a criminal endeavor, particularly when lower down on the hierarchical ladder of the enterprise, act as aiders or abettors of the joint criminal enterprise.”<sup>104</sup>

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<sup>98</sup> *Stakić*, Trial Chamber, para. 440. The ICTY Trial Chamber in *Prosecutor v. Furundžija*, Case No. IT-95-17, para. 216 (Dec. 10, 1998), also referred to “co-perpetrators who participate in a JCE,” thus suggesting the same distinction. *Cf.* *Kvočka*, Trial Chamber, para. 435.

<sup>99</sup> The historical support for this distinction is also explored by Kevin Heller in his forthcoming OUP book regarding the 12 cases of the U.S. military tribunal at Nuremberg.

<sup>100</sup> *Kvočka*, Trial Chamber, para. 269.

<sup>101</sup> *See* *U.S. vs. Martin Gottfried Weiss, et al.*

<sup>102</sup> *Compare* *Tadić*, Appeals Chamber, para. 191 *with* *The United States of America v. Otto Ohlenforf et al.*, 4 *Trials of War Criminals before the Nuremberg Military Tribunals under Control Council Law No. 10*, at 373.

<sup>103</sup> *Kvočka*, Trial Chamber, para. 281-82.

<sup>104</sup> *Id.* at para. 291.

Although the *Kvočka* case argues that the *Stalag Luft III* case (before a British military court) supports its analysis, this is doubtful.<sup>105</sup> As acknowledged by *Kvočka* in a footnote, all participants were convicted of the same charge regardless of their degree of participation in the criminal endeavor; their various levels of culpability were distinguished only in the sentences, which ranged from death sentences for the commanders to 10-year prison terms for the drivers. This suggests precisely the opposite approach to the one being advanced in this Article: the need to establish more subtle modes of liability that make gradations of culpability before the sentencing phase. *Almelo* is more promising.<sup>106</sup> That case involved the deliberate killing of a British POW, which resulted in the following conclusion: “If people were all present together at the same time, taking part in a common enterprise which was unlawful, each one in their own way assisting the common purpose of all, they were all equally guilty in law.”<sup>107</sup> Similarly, the *Kiel Gestapo* case arguably involved aiding and abetting a joint endeavor, because the two drivers who were convicted in a killing performed by the Gestapo were convicted for their role in the joint operation. In the words of the prosecutor:

If people are all present, aiding and abetting one another to carry out a crime they knew was going to be committed, they are taking their respective parts in carrying it out, whether it be to shoot or whether it is to keep off other people or act as an escort whilst these people were shot, they are all in law equally guilty of committing that offence, though their individual responsibility with regard to punishment may vary.<sup>108</sup>

Interpreting the *Hadamar* case is somewhat more complicated. In that case, the defendants were charged with “acting jointly and in pursuance of a common intent and acting for and on behalf of the then German Reich . . . [as they did] wilfully, deliberately and wrongfully, aid, abet, and participate in the killing of human beings of Polish and Russian nationality.”<sup>109</sup> In one

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<sup>105</sup> Trial of Max Wielen and 17 others, British Military Court (July 1 – Sept. 3, 1947) 11 U.N.W.C.C. at 31-53 (1947), cited and discussed in *Kvočka*, Trial Chamber, para. 295.

<sup>106</sup> *Id.* at para. 297.

<sup>107</sup> Trial of Otto Sandrock and Three Others, British Military Court for the Trial of War Criminals (Nov. 24-26, 1945), 1 U.N.W.C.C. at 35, 43 (1947). However, the precedent is problematic because it also stands for the proposition of equal culpability regardless of the level of participation.

<sup>108</sup> *Kiel Gestapo Case*, 11 UNWCC 43-44 (1947), cited and discussed in *Kvočka*, Trial Chamber, para. 298.

<sup>109</sup> Trial of Alfons Klein and Six Others, U.S. Military Commission Appointed by the Commanding General Western Military District (Oct. 8-15, 1945), 1 UNWCC 46-54 (1947).

sense, this supports our view of the new mode of liability due to its reference to aiding and abetting a common project. On the other hand, the charge seems to imply that the defendants shared the criminal purpose of the group, which under the *Kvočka* formulation would make them liable for co-perpetrating a joint criminal enterprise. It is unclear from *Hadamer* whether the charge is meant to distinguish between high-level co-perpetrators or low-level accomplices. The *Kvočka* Trial Chamber distilled, on the basis of the factual allegations, that no intent to further the criminal purpose was involved in the case, because the psychiatrists administered injections, sometimes under duress, and there was no “indication that the accused shared a criminal intent to murder the Polish and Soviet nationals,” though their presence at the facility suggested that “by showing up for work daily and performing the tasks assigned to them, they substantially assisted and facilitated the killings.”<sup>110</sup>

#### D. Objections to Differentiation

One obvious objection must be considered at this point. If the principle of culpability demands that we draw distinctions between the highest and lowest offenders, why not simply eliminate JCE entirely and replace it with the more traditional categories of principals and accessories? Judicious application of Ockham’s Razor would counsel in favor of the simplest, most economical, categories to make these distinctions. Indeed, the *Stakić* Trial Chamber seemed motivated to reject JCE in favor of less-controversial, more time-tested modes of liability that might accomplish the task more effectively. And certainly, international criminal law is not unfamiliar with individualized conduct; it is indeed possible for an individual to be a co-perpetrator or to aid and abet a more discrete, isolated individual crime. For example, two soldiers might commit a war crime together as co-perpetrators, where the war crime in question is discrete in time and place and unconnected to a larger collective endeavor that justifies the label of a joint criminal enterprise. Although such individuals would rarely be tried before an ICC plagued by insufficient resources and inclined to use its prosecutorial discretion to deal with crimes of the “greatest concern to the international community,” other tribunals, either ad hoc or hybrid, may indeed prosecute such individuals. Some critics of JCE focus their attention on this model of pure individual criminal conduct and therefore conclude that JCE, or its domestic analogs, should be entirely excised from the criminal law,<sup>111</sup> rather than simply amended as I have argued here.

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<sup>110</sup> *Kvočka*, Trial Chamber, para. 304.

<sup>111</sup> See, e.g., GEORGE P. FLETCHER, BASIC CONCEPTS IN CRIMINAL LAW 192 (1998); Phillip Johnson, *The Unnecessary Crime of Conspiracy*, 61 CAL. L. REV. 1137 (1973). Cf. Tho-

This conclusion would be too hasty. There is a value to branding a defendant a co-perpetrator of a joint criminal enterprise rather than a co-perpetrator *simpliciter*. The former correctly tracks the reality of the situation: that the defendant presided as a co-perpetrator not over, say, a two-person collaboration, but over a potentially massive joint criminal enterprise that involved hundreds or perhaps even thousands of criminals. Such enterprises are, in a sense, the heart of international criminal law, since genocide and crimes against humanity are rarely carried out by isolated individuals acting alone.<sup>112</sup> The more typical pattern is group criminality. Indeed, recognition of this fact is precisely why the *Tadić* court was so motivated to develop the joint criminal enterprise doctrine in the first instance.<sup>113</sup> The motivation is correct.

The question is how to develop a sophisticated doctrine that navigates between the collective nature of international criminality and the individualized determinations of the criminal law. Nuremberg arguably swung too far in the other direction by declaring certain organizations criminal and penalizing membership in them.<sup>114</sup> But the opposite is no solution either. Eliminating joint enterprise liability and every version of the conspiracy doctrine would fashion a legal doctrine that fails to mirror the structure of the very criminal conduct that it seeks to capture in its doctrinal categories, because the conduct of individuals during war time involves collective or group effort. The solution is to develop a doctrine that models group criminal behavior but only imposes liability relative to the contributions of the specific defendant. The result would be a doctrine that is both accurate to the realities on the ground and consistent with the principle of culpability. In the common law, the conspiracy doctrine (correctly conceived) fulfills this mandate. In Germa-

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mas Weigend, *Intent, Mistake of Law, and Co-perpetration in the Lubanga Decision on Confirmation of Charges*, 6 J. INT'L CRIM. JUST. 471 (2008).

<sup>112</sup> Cf. Ambos, *supra* note 39, at 183 (arguing for the “criminal enterprise as the starting point of attribution in international criminal law”). The suggestion stems from the German doctrine of *Organisationsherrschaft* and a resulting “mixed system of individual-collective responsibility” (presumably constrained by the principle of individual culpability). *Id.*

<sup>113</sup> *Tadić*, Appeals Chamber, para. 191 (“Most of the time these crimes do not result from the criminal propensity of single individuals but constitute manifestations of collective criminality: the crimes are often carried out by groups of individuals acting in pursuance of a common criminal design.”).

<sup>114</sup> See Charter of the International Military Tribunal, 59 Stat. 1546, 82 U.N.T.S. 284 (Aug. 8, 1945), article 9. However, the membership offense only applied to individuals who had culpable knowledge of the criminal purposes or acts of the organization, and the IMT interpreted the doctrine through the lens of conspiracy. See 22 Trial of the Major War Criminals, Proceedings of the International Military Tribunal Sitting at Nuremberg, Germany 469 (1950) (“a criminal organization is analogous to a criminal conspiracy in that the essence of both is cooperation for criminal purposes”).

ny theory, the concepts of *Organisationsherrschaft* and *Zurechnungsprinzip Gesamttat* do similar work.<sup>115</sup> My preferred solution, the theory of joint or shared intentions, will be developed in Part III. All are attempts to dress the original Nuremberg move—the concept of criminal organizations—in modern clothing. They are correct insofar as they take the criminal group as the starting point of the analysis.

### III. THE LIMITS OF THE CONTROL THEORY

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

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

The ICC Pre-Trial Chamber offered its own analysis of the Rome Statute’s Article 25 in its *Lubanga* decision.<sup>116</sup> The Chief Prosecutor declined to plead JCE and instead charged Lubanga under a theory of co-perpetration.<sup>117</sup> This in itself represented a substantial jurisprudential decision on the part of the Office of the Prosecutor. Although the ICTY Trial Chamber on a few occasions attempted to push a theory of co-perpetration in favor of JCE,<sup>118</sup> the Office of the Prosecutor at the ICTY never once pushed for co-perpetration as a mode of liability in place of joint criminal enterprise.<sup>119</sup> The ICC Pre-trial

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<sup>115</sup> See Ambos, *supra* note 39, at 181-83, citing CLAUS ROXIN, *TÄTERSCHAFT UND TÄTHERRSCHAFT* (2006) (*Organisationsherrschaft*) and F. DENCKER, *KAUSALITÄT UND GESAMTTAT* (1996) (*Zurechnungsprinzip Gesamttat*).

<sup>116</sup> See *Lubanga*, para. 337 & *passim*.

<sup>117</sup> However, the Legal Representative of Victims argued to the court that Article 25(3)(a) codified joint criminal enterprise. See *Lubanga*, para. 325.

<sup>118</sup> The most notable example was *Prosecutor v. Stakić*, Trial Chamber Decision, Case No. IT-97-24-T (July 31, 2003). For a discussion of this case and its subsequent reversal by the Appeals Chamber, see Jens David Ohlin, *Commentary*, 14 ANNOTATED LEADING CASES OF INTERNATIONAL CRIMINAL TRIBUNALS 739 (2008). See also Héctor Olásolo, *Reflections on the Treatment of the Notions of Control of the Crime and Joint Criminal Enterprise in the Stakić Appeal Judgement*, 7 INT’L CRIM. L. REV. 143 (2007).

<sup>119</sup> The Office of the Prosecutor did allege on several occasions that defendants were responsible for co-perpetrating a joint criminal enterprise. See *Prosecutor v. Stakić*, Trial Chamber Decision, para. 504.

Chamber concluded that the notion of co-perpetration in Article 25(3)(a) best described the allegations against Lubanga because “the concept of co-perpetration is originally rooted in the idea that when the sum of the coordinated individual contributions of a plurality of persons results in the realization of all the objective elements of a crime, any person making a contribution can be held vicariously responsible for the contributions of all the others and, as a result, can be considered as a principal to the whole crime.”<sup>120</sup>

The Pre-Trial Chamber started its analysis by considering the various doctrines that can be used to distinguish between perpetrators and accomplices.<sup>121</sup> The traditional common-law rule, which the Chamber termed the “objective” approach, defined perpetrators as those who committed the *actus reus* of the crime, while supporters behind the scenes were branded as mere accomplices.<sup>122</sup> This is a counter-intuitive result when the person behind the scenes orders the murder and the triggerman is a mere employee.<sup>123</sup> The alternative is a “subjective” approach, which defines the perpetrator by virtue of their subjective mental state, i.e. their intent to commit the crime.<sup>124</sup> In the case of a collective crime, what defines the perpetrators is their shared intent to commit the crime, regardless of their level of objective contribution (small or large). The Chamber identified the subject approach with the JCE doctrine applied by the ICTY in *Tadić*.<sup>125</sup>

The Pre-Trial Chamber swept both of these approaches to the side, preferring to chart a third way—co-perpetration—that combined subjective and objective elements in a different way. The Chamber based its understanding of co-perpetration in the Rome Statute on Roxin’s control theory of perpetration.<sup>126</sup> This view is popular in German criminal law theory and has gained renewed currency in international circles as a result of the *Lubanga*

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<sup>120</sup> See *Lubanga*, para. 326.

<sup>121</sup> *Id.*, para. 328-30.

<sup>122</sup> *Lubanga*, para. 328. By using this terminology, the Pre-Trial Chamber was following the classification offered by George Fletcher. See FLETCHER, *RETHINKING*, *supra* note 8, at 654-55.

<sup>123</sup> For a discussion of the problems with the objective approach, see Jens David Ohlin, *Commentary*, *supra* note 91, at 744. See also FLETCHER, *RETHINKING*, *supra* note 8, at 655.

<sup>124</sup> *Lubanga*, para. 329; FLETCHER, *RETHINKING*, *supra* note 8, at 655, *citing* Stashchynsky, 18 BGHSt. 87 (1962) (German court holding that KGB agent was not a principal because he was a mere instrument of his superiors).

<sup>125</sup> *Lubanga*, para. 329.

<sup>126</sup> See generally C. ROXIN, *TÄTERSCHAFT AND TÄTHERSCHAFT* [Perpetration and Control over the Act] 34 (6<sup>th</sup> ed. 1994); FLETCHER, *RETHINKING*, *supra* note 8, at 656; Stakić, Trial Chamber, para. 440 and n.945; *Lubanga*, Pre-Trial Chamber, para. 324 n. 414, 348 n.425. See also GERHARD WERLE, *PRINCIPLES OF INTERNATIONAL CRIMINAL LAW* margin note 354 (2005).

decision.<sup>127</sup> The control theory of perpetration distinguishes between principals and accessories by asking who has control over the crime in question. If a defendant was in control of the criminal act, perhaps by virtue of ordering or soliciting a murder, then the defendant is an indirect perpetrator, even if he is not the *physical* perpetrator of the crime in question (i.e. he did not pull the trigger).<sup>128</sup> The indirect perpetrator is indispensable because he controls the endeavor. If the individual with the gun is directed to conduct the crime by a military superior, then he has no direct control over the crime and is largely dispensable to the endeavor; he can be replaced by another soldier who can be ordered to commit the crime. If the indirect perpetrator works in tandem at the leadership level with others, then the leaders are classified as co-perpetrators because they share joint control over the crime. Control over the crime may be exercised through a hierarchical organizational structure (e.g. *Organisationsherrschaft*), though there are other avenues for exercising control.

According to the ICC, the objective requirements for co-perpetration are the existence of a common plan among the participants and an essential contribution to the plan by the defendant.<sup>129</sup> The requirement that the contribution be essential means that the defendant could have frustrated the plan by withdrawing from it, thus establishing his joint control over the endeavor. The required mental state for an indirect perpetrator is *awareness* of his or her control over the crime.<sup>130</sup> For co-perpetrators, the required mental state is awareness of their *joint* control over a common plan and awareness of their essential contribution to it. Since both Lubanga and others had joint control over the crime, his participation was best viewed through the lens of co-perpetration, according to the Pre-Trial Chamber.<sup>131</sup> In addition to awareness of their control and essential contribution, co-perpetrators must also have the intent that the physical perpetrators commit the crime.<sup>132</sup> However, the ICC completely watered down the intent requirement to the absolute minimum.<sup>133</sup> For purposes of this doctrine, co-perpetrators “intend” the crime if they are aware of the risk that the physical perpetrators will commit the offence and the co-perpetrators reconcile themselves to this risk or consent to it.<sup>134</sup>

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<sup>127</sup> Lubanga, Pre-Trial Chamber, para. 348. For a complete discussion, see Thomas Weigend, *Intent, Mistake of Law, and Co-perpetration in the Lubanga Decision on Confirmation of Charges*, 6 J. INT'L CRIM. JUST. 471, 478-79 (2008).

<sup>128</sup> See FLETCHER, RETHINKING, *supra* note 8, at 655-59.

<sup>129</sup> See Lubanga, para. 343.

<sup>130</sup> *Id.* at para. 331.

<sup>131</sup> *Id.* at para. 368.

<sup>132</sup> See G. WERLE, PRINCIPLES OF INTERNATIONAL CRIMINAL LAW 178 (2<sup>nd</sup> ed. 2009).

<sup>133</sup> See Weigend, *supra* note 111, at 481.

<sup>134</sup> *Id.* at 481-82.

Criminal lawyers from common law jurisdictions would hardly describe this mental requirement as anything close to intentional or purposeful. At most, it is a form of advertent recklessness.<sup>135</sup> Criminal lawyers from civil law jurisdictions will often refer to this mental requirement as *dolus eventualis* and consider it uncontroversial, but the ICC's use of the concept here bears scrutiny. It is especially problematic because the ICC uses the same concept to conclude that the goal of the common plan need not be criminal at all: it is enough for the defendant to subjectively reconcile themselves to the risk that their pursuit of the (lawful) common plan will entail the perpetration of various crimes by other actors.<sup>136</sup> The Rome Statute defines acting with "intent" as meaning to "cause a consequence" or awareness that the consequence will happen "in the ordinary course of events."<sup>137</sup> The ICC put a gloss on this standard by concluding that a defendant's subjective awareness of a substantial risk of the consequence happening was sufficient to meet this standard.<sup>138</sup> Although this accords with the civil law doctrine of *dolus eventualis*, it is not at all clear that it accords with the meaning of the Rome Statute's requirement of "in the ordinary course of events," which suggests a higher standard than *dolus eventualis*. The result of the ICC's control theory approach is the combination of *awareness* of joint control over the crime with an intentionality requirement that is so watered down that the control requirement appears to be doing all of the heavy lifting in the doctrine. In the case of indirect co-perpetrators, what "links" the defendants to each other is the common plan or agreement among them, but what links these defendants to the physical perpetrators is not the existence of a common plan but rather the defendants' joint control over the perpetrators, either as instruments or through an organizational hierarchy. However, the whole point of vicarious liability is the doctrinal need to provide a linking principle between the physical perpetrators of the crime and the defendants, and in the case of indirect co-perpetrators, the control criterion allegedly provides that link.

The second problem with the doctrine of co-perpetration is that it seems to imply a model of cooperation among a small number of individuals; the paradigmatic version of co-perpetration is cooperation among two individuals to complete a crime.<sup>139</sup> The Rome Statute's formulation of liability for crimes "committed jointly with another" suggests a crime committed by two persons;<sup>140</sup> the provision does not say "committed jointly with others." International crimes, by contrast, are often committed by a great plurality of persons committed to a joint cause, and it is unclear whether describing such

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<sup>135</sup> See CASSESE, *supra* note 22, at 200-01.

<sup>136</sup> See Weigend, *supra* note 111, at 482.

<sup>137</sup> See Rome Statute, article 30(1).

<sup>138</sup> See Lubanga, para. 352; *see also* Weigend, *supra* note 111, at 481.

<sup>139</sup> See FLETCHER, *RETHINKING*, *supra* note 8, at 655-59.

<sup>140</sup> See Rome Statute, article 25(3)(a).

large-scale conspiracies as examples of co-perpetration is an accurate reflection of the facts on the ground. That being said, Roxin's theory of indirect perpetration through an organizational hierarchy nicely captures the relationship between a discrete number of leaders in a vast conspiracy, but it is unclear if the framers of the Rome Statute had this picture in mind when they crafted Article 25(3)(a) and its reference to "jointly with another." Such large-scale organizational criminality seems more suited to Article 25(3)(d) – contributions to a group endeavor – which the ICC has so far declined to utilize.

### B. A New Geography of Collective Action

Replacing JCE with the control theory of perpetration requires further scrutiny. We should conduct an independent and first-order analysis of the criminality of group actors and decide what type of theory would best describe their culpability. A reactionary acceptance of the control theory would be just as unwise as blind acceptance of JCE. My own sense is that the control theory's attempt to get away from the subjective mental state of the perpetrators—and the idea of joint or shared intentions—is not ideal. Individuals often combine their efforts in order to achieve collective goals and, in so doing, demonstrate a particular intentional state that demonstrates their individual commitment to a joint activity.<sup>141</sup> Replacing this mental state with "awareness" of the circumstances of joint control and a watered-down intent requirement may have unintended consequences, which this Section will now explore. Although it is clear from Part II that the doctrine of JCE was deeply problematic, it is unclear whether the control theory, by sidestepping shared intentions, accurately responds to the particular problems in the doctrine. Ironically, it may be the case that the implicit idea of joint intentions was the one part of the JCE doctrine that ought to be retained.

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

1. *The Love Parade*. A large techno-music festival is being held outdoors in an industrial city in Germany.<sup>142</sup> The crowd (hundreds of thousands of individuals) quickly exceeds the capacity of the outdoor location where the music festival is being held. The main entrance to the festival is a small pe-

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<sup>141</sup> See *infra* Part IV.

<sup>142</sup> The example is based on the stampede that recently occurred in Duisburg, Germany. See Judy Dempsey, *Stampede at German Music Festival Kills 18*, N.Y. TIMES (July 24, 2010).

destrian tunnel that creates a bottleneck situation.<sup>143</sup> People continue to stream into the tunnel to get to the concert, but there is no room on the other side for them. At the same time, individuals inside the concert start to use the tunnel as an exit. People start to panic as they realize that there is not enough room in the tunnel to accommodate everyone. With people continuing to push from both sides of the narrow tunnel, those inside the tunnel become trapped with nowhere to move. More than 20 concertgoers are crushed to death by the surging crowd.<sup>144</sup>

2. *Essen Lynching*. Three British pilots are captured in the German town of Essen during World War II.<sup>145</sup> A German officer orders a subordinate to transport the British POWs to a Luftwaffe post where they can be interrogated.<sup>146</sup> However, at the time of departure, the German officer issues the following additional order: the escort should not interfere with any civilians who might attack the prisoners, who were slated for eventual execution.<sup>147</sup> The command was issued in public so that it could be heard not just by the escort but by a crowd that had gathered in the vicinity.<sup>148</sup> As the POWs were marched down the streets of Essen, they were beaten by a growing crowd and eventually thrown over a bridge. One of the POWs died instantly after the fall from the bridge and the other two POWs were finished off by shots fired from the crowd and a final round of beatings.<sup>149</sup>

3. *The Concentration Camp*. Three military officers are all working as guards in a Concentration Camp in the former Yugoslavia.<sup>150</sup> The detention camp is specifically designed to serve as a system of mistreatment against the civilians who are detained there. Crimes are being systematically committed against the civilians who live in the camp, including murder, torture, and rape. The officers are all aware of the illegal nature of the camp and the officers all have the general intent to support the systemic mistreat-

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<sup>143</sup> See Dempsey, *supra* note 142.

<sup>144</sup> See Judy Dempsey, *Deadly German Stampede Gets Its Villain*, N.Y. TIMES (July 30, 2010).

<sup>145</sup> The example is based on Trial of Erich Heyer and six others [*Essen Lynching*], British Military Court for the Trial of War Criminals, Essen, Germany, Dec. 18-22, 1945, 1 U.N.W.C.C. 88, 91 (year). The case is cited in *Tadić*, para. 207-09.

<sup>146</sup> See *Tadić*, para. 207.

<sup>147</sup> *Id.*

<sup>148</sup> *Id.*

<sup>149</sup> *Id.*

<sup>150</sup> The classic concentration camp precedent is *Martin Gottfried Weiss and Thirty-Nine Others [The Dachau Concentration Camp Trial]*, General Military Government Court of the United States Zone, in XI Law Reports of Trials of War Criminals 5, 14 (1947). The most significant concentration camp case to come out of the ICTY is the Čelebići Camp Case. See *Prosecutor v. Delalić, Mucić, Delić, Landžo [Čelebići Camp Case]*, Case No. IT-96-21-T, para. 195 (November 16, 1998).

ment of the civilians in the camp by working as guards there.<sup>151</sup> One of the officers engages in the torture and rape of one of the civilian detainees. The other two officers do not directly help commit this particular act, nor are they aware of this particular crime when it occurs.

4. *The Deportation.* A unit of soldiers is engaged in a campaign of ethnic cleansing in an attempt to remove all members of an ethnic minority from the region.<sup>152</sup> The soldiers forcibly remove 50 civilians from their homes simply because of their ethnicity and do not allow them to take any of their possessions with them. The soldiers agree amongst themselves that they will drive the civilians to a local train station, where a freight train is waiting to deport them, like cattle, to another region. The result will be an ethnically homogenous homeland (or at least progress towards that goal). However, when the detainees arrive at the train station, one of the soldiers decides that he prefers to kill the civilians instead of simply deporting them. He shoots all of them.

5. *Attack Against Civilians.* A unit of 12 soldiers is ordered to seize a town that is located along a strategic roadway. By seizing the town, including its tall buildings, the soldiers will be able to locate and fire upon any enemy soldiers who drive down the roadway. There are many civilians living in the town. Instead of evacuating and detaining the unarmed civilians, the soldiers decide to simply kill all of them. The soldiers agree that, in order to achieve this result, each of them will go into a building and kill any occupants that they find there.

What is the common factor among each of these hypotheticals? All of them involve collective action, although the degree of integration, the level of agreement, and the mental state of the participants is different in each case. To start, consider the easiest case, the Attack Against Civilians. In that case, the soldiers agree to commit the crime together. What is distinctive about the scenario is that the outcome would be impossible—or perhaps difficult—for each individual to achieve on his or her own. Consequently, the individuals agree on a collective course of action. So each individual not only has the intention to pursue his own particular course of action, but each individual understands and *intends* for the other individuals to fulfill their part of the program as well. One can infer this intentional state—intending to commit one’s own act and intending that others do similarly—on the basis of their

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<sup>151</sup> See, e.g., *Čelebići*, para. x; Tadić, Appeals Chamber, para. 202. See also *Trial of Josef Kramer and 44 others [Belsen Concentration Camp]*, British Military Court in Luneberg, Germany, Sept 17-Nov. 17, 1945, 11 U.N.W.C.C. 1 (1947).

<sup>152</sup> Cf. *Prosecutor v. Stakić*, Appeals Chamber (March 22, 2006), para. 278. For a full discussion of deportation as a crime against humanity, see ROBERT CRYER ET AL, AN INTRODUCTION TO INTERNATIONAL CRIMINAL LAW AND PROCEDURE 249-50 (2<sup>nd</sup> ed. 2010) (specifically discussing ICTY case law regarding deportation in the context of ethnic cleansing).

shared commitment to the overall outcome, and the fact that the outcome is not achievable without this level of collective coordination. Arguably, this is the easiest case to justify vicarious liability for the actions of co-participants, because each individual has the mental state (intention) that grounds not only their own action but also the actions of their co-participants.

Contrast that situation with the most difficult hypothetical, the Love Parade example. In that case, the individuals at each end of the tunnel have a rather simple intention: to use the tunnel as a means of egress. When panic begins to set in and the individuals involved realize that there is a danger, each simply has an intention to escape the chaos and survive.<sup>153</sup> Taken together, the consequence of so many individuals acting on their individual intention produces a deadly collective result: the crowd itself becomes a surging mass that ends up killing 20 individuals. However, the crucial distinguishing factor of the Love Parade crush, and others like it, is the attitude of each individual about the actions of the others. Although each individual intends to get through the tunnel, they do not intend for the others to do the same. This distinguishes the Love Parade crowd from the Attack Against the Civilians. In fact, each individual concertgoer would probably prefer that the others refrain from going through the tunnel, in order to make it easier for them to pass through. Also, none of the concertgoers want anyone to die. So what produces the deadly result is the confluence of so many concertgoers with individual intentions that result in a completely uncoordinated result. This notion of an *uncoordinated* result is significant, because a stampede is really just a collective action problem like the Prisoner's Dilemma.<sup>154</sup> If the concertgoers could have coordinated their behavior properly, they could have exited the concert grounds in a safe and orderly fashion. But once the crowd started to panic, each individual was concerned that they might get trapped by the surging crowd, so each individual decided to push to get out in order to save themselves. Of course, if each individual knew for certain that the other concertgoers would forgo pushing, there would be no need for them to push as well in an attempt to escape. But since there was no way of enforcing this norm, each individual had to engage in egoistic self-preservation and try to push their way out of the crowd, even if this helped create the very collective problem that caused the stampede. The problem of norm-enforcement in such situations is particularly acute because even police officers screaming at people to stop will do nothing to change the self-interested behavior if they

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<sup>153</sup> See Dempsey, *supra* note 142.

<sup>154</sup> Cf. Jeff Wise, *When Crowds Panic*, Freakonomics, Nytimes.com (Aug. 3, 2010), available at <http://freakonomics.blogs.nytimes.com/2010/08/03/when-crowds-panic/> ("the most perplexing form of tragedy: one that unfolds entirely as a result of the normal psychology of healthy human beings. When crowds reach a critical density, they automatically become vulnerable to a contagion of blind fear that overwhelms any attempt at rational behavior.").

risk death or injury when the rest of the crowd ignores the police officers' commands.<sup>155</sup> And given that the rest of the crowd is in the exact same situation, this guarantees that no one will listen to the police officers. The result is an unsolved Prisoner's Dilemma where everyone defects.<sup>156</sup>

This can be distinguished from the more *coordinated* result of the crowd behavior in the Essen Lynching example. In that scenario, the members of the crowd hear the order of German officer suggesting that it might be a good idea if the POWs were to meet a violent end.<sup>157</sup> The crowd then responds by beating the POWs. Each individual clearly has the intention to administer each individual blow.<sup>158</sup> But what is the attitude of each individual regarding the activities of the rest of the crowd? Although no advance coordination or deliberate planning sessions are conducted, it is possible to infer that each member of the mob intended for the rest of the mob to engage in the beating as well.<sup>159</sup> Unlike the Love Parade example where the collective violence is the unfortunate result of uncoordinated behavior, the collective violence in Essen Lynching is the deliberate result of coordinated behavior. Each member of the crowd intends to hit the POWs and similarly intends for the rest of the crowd to do the same, with full knowledge that together they might achieve a result that individually would be impossible to achieve: killing the captives.<sup>160</sup> Such is the psychology of lynching.<sup>161</sup> It is

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<sup>155</sup> Cf. Dempsey, *supra* note 142.

<sup>156</sup> See ROGER BROWN, SOCIAL PSYCHOLOGY (1965) (stampede as *n*-person Prisoner's Dilemma); Mark Granovetter, *Economic Action and Social Structure: The Problem of Embeddedness*, 91 AM. J. OF SOC. 481, 490 (1985).

<sup>157</sup> Compare with Tadić, para. 209, concluding that "not all of them intended to kill but all intended to participate in the unlawful ill-treatment of the prisoner's of war." It is not clear whether this is a legitimate inference from the *Essen Lynching* case. The court appeared to hold all of the individuals vicariously liable regardless of whether they had fired a shot or delivered one of the fatal blows, though this does not entail the conclusion that defendants were convicted in the absence of an intent to kill. See especially Tadić, para. 209 n. 259 (discussing civilians, including Boddenberg, who were convicted in light of the fact that the motives of the crowd against the airmen "were deadly").

<sup>158</sup> This issue is discussed in Steven Powles, *Joint Criminal Enterprise: Criminal Liability by Prosecutorial Ingenuity and Judicial Creativity?*, 2 J. INT'L CRIM. JUST. 606 (2004).

<sup>159</sup> See Powles, *supra* note 158, at 615-16 ("The prosecution in Essen Lynching, as the Appeals Chamber noted [in *Tadić*], specifically stated that if the accused had the intent to kill, then they would be guilty of murder; if they had no such intent, then they could still be convicted of manslaughter. The accused were convicted of murder, implying that the court concluded that they all indeed intended the airmen to die.").

<sup>160</sup> For another example of individual intent for the group to commit the act, see Rod Nordland, *Afghan Couple Stoned to Death on Taliban Orders*, N.Y. TIMES, Aug 16, 2010 (execution where 200 villagers participated by throwing stones and were described as "festive" and "cheering").

important to realize that in such situations, the intention of each individual regarding the actions of the crowd arises somewhat spontaneously, without prior deliberation, but this does not mean that there is no intention or coordination at all. Spontaneous and intentional coordination should not be confused with no coordination at all. That is the difference between the Love Parade Example and Essen Lynching.

Consider now the Concentration Camp Example. This hypothetical sits in the middle between the Love Parade Example and the Attack Against the Civilians. Each individual has the intention to work as a guard at the camp and in so doing has the intention to further the system of mistreatment that the camp represents. But each guard's attitude about the work of the others is a little more complicated. Each guard intends that the other guards also work to keep the system of mistreatment functioning, since each knows that it would be impossible to run such a system without the collective coordination of many guards who were similarly inclined. It would be literally impossible for a single individual to operate such a facility alone. However, it is probably not the case that the two guards intend for the third guard to commit that *particular* act of torture and rape.<sup>162</sup> This places the intentions of the guard in a liminal position between the two other hypotheticals. It is perhaps for this reason that the ICTY in *Tadić* designated an entirely separate doctrinal category—JCE II—for these cases.<sup>163</sup> Under the rule announced in *Tadić*, a concentration camp guard is vicariously liable for the actions of other guards if the defendant has the “intent to further the common concerted design to ill-treat inmates.”<sup>164</sup> The defendant need not have the intent for the specific underlying criminal act charged in the indictment. So in the case of the Concentration Camp example, the two prison guards would be convicted of war crimes for the torture and rape committed by the third guard. The *Tadić* court justified this rule by appeal to World War II precedent, and in particular the *Dachau Concentration Camp* case, though the ruling is a bit thin on a doctrinal theory to explain the result.<sup>165</sup>

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<sup>161</sup> Cf. HADLEY CANTRIL & ALBERT H. CANTRIL, *THE PSYCHOLOGY OF SOCIAL MOVEMENTS* 93-94 (2002).

<sup>162</sup> See, e.g., Kvočka, Appeals Chamber, para. 184 (“The Trial Chamber found that Kvočka had actively contributed to the everyday functioning and maintenance of the camp and, through his participation, enabled the camp to continue unabated its insidious policies and practices, 396 and is thus criminally responsible for the crimes committed as part of the joint criminal enterprise.”). Judgment, Krajišnik (IT-00-39/40), Trial Chamber, 27 September 2006, para. 884 (mens rea requirements for JCE II).

<sup>163</sup> *Tadić*, Appeals Chamber, para. 202.

<sup>164</sup> *Tadić*, Appeals Chamber, para. 202.

<sup>165</sup> *Tadić*, Appeals Chamber, para. 203 n.250.

The most tenuous example is the Deportation hypothetical. In that case, the soldiers all have the individual intent to cooperate on the deportation. And each individual soldier intends for the other soldiers to complete their part in the plan as well. So we have a mutually reinforcing network of reciprocal intentions. However, the rogue soldier also has an intention that the others do not share: the intent to murder the civilians. The attitude of the other soldiers regarding this action might run the gamut from regret to a form of passive acquiescence.<sup>166</sup> In any event, they clearly do not intend for the rogue soldier to take this action. The most that can be said is that they were negligent or reckless for participating in a joint criminal endeavor with a member whose capacity for rogue behavior and straying from the criminal plan was reasonably foreseeable. Under both common-law conspiracy doctrine and JCE doctrine, this recklessness provides the justification for vicarious liability for actions that fall outside the scope of the original criminal plan.<sup>167</sup>

The co-perpetration theory applied by the ICC tends to analyze all of the following hypotheticals under the rubric of control.<sup>168</sup> According to the Pre-Trial Chamber's analysis, "the notion underpinning this third approach is that principals to a crime are not limited to those who physically carry out the objective elements of the offence, but also include those who, in spite of being removed from the scene of the crime, control or mastermind its commission because they decide whether and how the offence will be committed."<sup>169</sup> Fair enough. However, the required elements applied by the ICC to co-perpetrators provide confusing guidance. The objective elements include a common plan and an essential contribution to it. The subjective elements include intent (read *dolus eventualis*) that the crime be committed and awareness of their joint control over the crime.<sup>170</sup> So the control theory would provide the following answers to the hypotheticals. In the case of the Attack Against the Civilians, the soldiers are all guilty as co-perpetrators of

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<sup>166</sup> At the most extreme end of the spectrum, one might describe the attitude of the soldiers as that of *dolus eventualis*. See FLETCHER, RETHINKING, *supra* note 8, at 445–49. *But see* Fletcher & Ohlin, *supra* note 86, at 554 ("If the purpose of an armed band is to rid an area of potential military opponents and they know that some people will die as a result, their attitude is not necessarily *dolus eventualis*. Their killing is *dolus* only if they realize that specific people will die, approve and desire this result in their hearts, and decide to continue with their action").

<sup>167</sup> Allison Marston Danner & Jenny S. Martinez, *Guilty Associations: Joint Criminal Enterprise, Command Responsibility, and the Development of International Criminal Law*, 93 CAL. L. REV. 75, 164 (2005); Mark Osiel, *The Banality of Good: Aligning Incentives Against Mass Atrocities*, 105 COLUM. L. REV. 1751, 1785 (2005).

<sup>168</sup> See, e.g., Pre-Trial Decision on Confirmation of Charges, Prosecutor v. Lubanga, Case No. 01/04-01/06 (Jan. 29, 2007), para. 322 & *passim*.

<sup>169</sup> *Lubanga*, para. 330.

<sup>170</sup> *Lubanga*, para. 331.

the entire war crime because each one played an essential role in the crime and exercised joint control over the operation. In the case of the Love Parade stampede, it is difficult to determine whether there is a common plan and whether their contributions are to be considered essential. First, the ICC's control theory does not require a common *criminal* goal; it allows prosecution for a non-criminal goal that creates a substantial risk of criminal consequences. As for judging the "essentiality" of the contribution, the doctrine devolves into counterfactual analysis.<sup>171</sup> On the one hand, each individual's role was non-essential because "but for" their conduct, the stampede would surely still have occurred in almost exactly the same way. On the other hand, this produces a paradoxical answer: the same thing could be answered about each defendant at which point the stampede would certainly *not* have happened. As for the criteria of joint control and awareness of control, the answer is complicated. In one sense, each concertgoer exercised joint control over the result by virtue of their actions that caused the result; had the concertgoers done otherwise, the stampede would not have occurred, thus implying a level of mutual control. On the other hand, the collective result was completely *uncoordinated*, thus suggesting a complete lack of meaningful control over the result. But herein lays the difficulty: The lack of coordination stems from the lack of a common criminal plan. However, the ICC's control theory does not require that the common plan have a criminal goal, but only that the co-perpetrators realize the substantial risk of criminal consequences.

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

The Concentration Camp and the Deportation examples are also difficult to resolve. Under the control theory, the camp guards might be considered as jointly in control because they exercise coordinated authority over the inmates. Moreover they are clearly aware of the circumstances of their coordinated contributions and their joint control over the prison. On the oth-

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<sup>171</sup> See Weigend, *supra* note 111, at 480..

er hand, they are in the middle of the organizational hierarchy and perhaps ultimate control rests with the commandant of the prison, as in the Essen Lynching Example.<sup>172</sup> The commandant presumably has the authority to relieve a camp guard of his duty and replace him with another soldier. Is this enough to conclude that the guard is not in joint control over the crime?<sup>173</sup> The Deportation case is the one example where a strict version of the control theory could offer a simple and elegant answer: none of the soldiers has control over the rogue soldier who strays from the pre-arranged criminal plan. Although each is guilty of co-perpetrating the war crime of deportation (and possibly a crime against humanity for persecution), the only soldier guilty of murder as a war crime is the rogue soldier. However, the ICC's expansive version of the control theory left the door open for vicarious liability provided that the other soldiers were aware "of the substantial likelihood that his or her actions or omissions would result in the realization of the objective elements of the crime... [and decided] to carry out his or her actions or omissions despite such awareness."<sup>174</sup> Applied to the current facts, this liability based on *dolus eventualis* would attach if the other soldiers understood that there was a substantial likelihood that the plan would result in the killing of the deportees by the rogue soldier and continued with the plan nevertheless.<sup>175</sup> This use of *dolus eventualis* simply rehashes the JCE III standard of "reasonably foreseeable."<sup>176</sup>

The ICC control theory cobbles together a patchwork of requirements but never achieves a convincing account of group criminality. Although control is relevant for culpability, it is not the central element. By defining the mental element of the co-perpetrator as awareness of joint control combined with a watered down intent requirement, the doctrine effectively moves the

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<sup>172</sup> For example, the commandant of the notorious Tuol Sleng prison was one of the first to be indicted and then stand trial at the ECCC. See Kaing Guek Eav [Duch Case], ECCC Trial Chamber, File/Dossier No. 001/18-07-2007/ECCC/TC, Judgement, 26 July 2010 (sentence of 35 years minus 10 years for time served and 5 years for illegal detention).

<sup>173</sup> Weigend helpfully suggests that control should be cashed out relative to the "viewpoint of the concrete criminal plan," so that the relevant question is not whether the crime would have happened at all but rather whether the crime would have still happened in the same way as agreed to by the participants. See Weigend, *supra* note 111, at 480. Of course, this requires an account of the level of specificity in the plan. The same plan might be described in different ways: a thick version that includes many specific details, a thin version that simply traces the broad outlines of the plan and excludes details, and finally, versions of varying degrees of specificity along the spectrum between the thin and thick versions.

<sup>174</sup> *Lubanga*, para. 353.

<sup>175</sup> *Lubanga*, para. 352.

<sup>176</sup> See Fletcher & Ohlin, *supra* note 86, at 554 (arguing that *dolus eventualis* represents a higher degree of culpability than common law recklessness).

mental element to the background in favor of the objective element.<sup>177</sup> Control becomes the *sine qua non* of the doctrine. True, this result is consistent with the PTC's motivation in adopting the control theory in the first place—avoiding the subjective approach embodied by JCE—but one wonders whether the result adequately captures the culpable mental state of the participants of collective crimes.

What is deemphasized and undervalued in the ICC's control theory is the joint intention of the participants—no adequate theory of vicarious liability in international criminal law can be complete without a thorough understanding of the mental attitude of each participant to the participation of his colleagues. The basic structure of that answer must involve an appropriate mapping, at the philosophical level, of an individual's intentional commitment to the group endeavor. By drawing on the philosophical literature on shared intentions, the following section is devoted to briefly explaining that account and demonstrating its centrality in resolving these questions. Although a theory of shared intentions does not resolve every question of culpability raised by the hypotheticals in the previous section, the following section will demonstrate that a satisfactory ICL doctrine of collective participation cannot be constructed without one. It is a necessary but not a sufficient condition.

#### IV. A THEORY OF JOINT INTENTIONS

This section draws heavily on the work of Michael Bratman, who has offered the most philosophically convincing treatment of the matter of shared intentions.<sup>178</sup> John Searle and Raimo Tuomola have also pursued similar accounts, which they called collective intentions and we-intentions.<sup>179</sup> For the most part, the philosophical differences between these theories will be of only partial concern to our analysis. True, it is important to get the theoretical details correct. But before we do that, we must demonstrate that the very idea of group intentionality is the relevant subject to discuss. Whether you call it a shared or joint intention, a collective intention, or a we-intention does not matter yet. We start with the definition offered by Bratman not because

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<sup>177</sup> *Lubanga*, para. 329 (describing JCE as a “subjective” approach which requires shared intent). Clearly, the PTC was referring to JCE I, not JCE III. Also, it can be inferred from this paragraph that the PTC favored the doctrine of co-perpetration over JCE because the latter was allegedly too organized around the mental states of the participants). For a further discussion of the subjective approach, see FLETCHER, *RETHINKING*, *supra* note 8, 654-56.

<sup>178</sup> See, e.g., MICHAEL E. BRATMAN, *FACES OF INTENTION* 93-129 (1999).

<sup>179</sup> See John R. Searle, *Collective Intentions and Actions*, in Philip R. Cohen et al., *INTENTIONS IN COMMUNICATION* 401 (1990); Raimo Tuomela & Kaarlo Miller, *We-Intentions*, 53 *PHIL. STUDIES* 367 (1988).

I am committed to its correctness, but rather because it offers the most concise and elegant formulation from which to start the analysis.<sup>180</sup>

#### A. *The Shared Intention Thesis*

In numerous essays, Bratman defends what he calls the Shared Intention Thesis (SI thesis).<sup>181</sup> It consists of the following propositions.

We intent to *J* if and only if:

- (1) (a) I intend that we *J* and (b) you intend that we *J*.
- (2) I intend that we *J* in accordance with and because of (1)(a), (1)(b), and meshing subplans of (1)(A) and (1)(b); you intend that we *J* in accordance with and because of (1)(a), (1)(b), and meshing subplans of (1)(a) and (1)(b).
- (3) (1) and (2) are common knowledge between us.<sup>182</sup>

Although the Shared Intention Thesis sounds technical, it can be parsed rather simply. Step 1 codifies the requirement that a shared intention is simply a collection of two (or more) individual intentions that are related in the right way. The required relationship is then explained in Step 2 and Step 3. The individual intentions referred to in Step 1 are a very specific kind of intention, which is the intention that you and I both engage in an activity *together*.<sup>183</sup>

The relationship between the intentions that is codified in Step 2 involves the reciprocal and coordinated nature of the intentions.<sup>184</sup> In other words, the individuals do not simply intend for the cooperation to happen and then blindly hope that it comes to pass.<sup>185</sup> Rather, each individual desires that the group commit the action in full knowledge that the other individual so desires as well.<sup>186</sup> That is the first half of Step 2. The second half of Step 2 involves the meshing of subplans, or the coordination for how the activity will be conducted.<sup>187</sup> This does not necessarily mean that all possible subplans will be coordinated, but simply that each individual has an expectation

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<sup>180</sup> Bratman's theory is arguably the most influential theory of joint intentions and has been widely cited in the legal field (although not in international criminal law). See, e.g., JULES L. COLEMAN, *THE PRACTICE OF PRINCIPLE: IN DEFENCE OF A PRAGMATIST APPROACH TO LEGAL THEORY* (2001).

<sup>181</sup> See BRATMAN, *supra* note 178, at 131.

<sup>182</sup> *Id.* at 121.

<sup>183</sup> *Id.* at 122.

<sup>184</sup> *Id.* at 124.

<sup>185</sup> *Id.* at 118.

<sup>186</sup> *Id.* at 119.

<sup>187</sup> *Id.* at 125.

that they will plan with the others how to carry out the activity, and it is within the context of this expectation that each individual has the intention that the group will conduct the activity.<sup>188</sup> Finally, Step 3 simply states that each member will be aware of the reciprocal nature of the intentions.<sup>189</sup>

Bratman's preferred example is the painting of a house by two individuals.<sup>190</sup> Suppose an individual wants to paint a house and starts in the front. As it happens, a second individual also wants to paint the house and starts from the back. Since neither is aware of the other, we could not conclude that they have a shared intention to paint the house.<sup>191</sup> Any coordination here is completely accidental. Suppose then that the individual in the front of the house is aware of the activity of the second individual, but not vice versa. This would also not constitute a joint intention to paint the house. Third, consider a situation where both are aware of the existence of the other painter, but neither is doing the painting in accordance with—and because of—the other painter. (Such an indifference might be strange, but not impossible). This leaves us with the possibility that each one is aware of the other painter and in fact does the painting in full expectation that the other painter is doing the same from the opposite end. This, in fact, is quite easy to imagine where two individuals are committed to pursuing a project efficiently. However, what if the painter in the front starts painting in blue and the painter in back starts painting in red, and each one was painting the house with the intention that it be *fully* painted in the color that they were painting? In this situation, there would not be a joint intention either. A joint intention arises where there is some minimal planning activity such that each individual intends that the group commit the action because they have coordinated subplans that dictate how the action is going to be carried out.<sup>192</sup> Then and only then can we conclude that two individuals exhibit a shared intention to commit a particular action.

Several immediate observations can be drawn from this account. First, this account is highly individualistic. The basic building blocks of the account are individuals and their individual intentions, and the particular relationship between those intentions. There is nothing overly metaphysical or mystical about the concepts being deployed here.<sup>193</sup> There is no reference to corporate entities or group minds.<sup>194</sup> Indeed, if there is any fault here, it

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<sup>188</sup> *Id.* at 119.

<sup>189</sup> *Id.*

<sup>190</sup> *Id.* at 93.

<sup>191</sup> *Id.* at 94.

<sup>192</sup> *Id.* at 98 (meshing sub-plans).

<sup>193</sup> *Cf.* Searle, *supra* note 179, at 404 (discussion of group minds and collective unconscious "at best mysterious and at worst incoherent").

<sup>194</sup> For a discussion of the history of corporate entities as it relates to legal discourse, see Ohlin, *Group Think*, *supra* note 7, at 163-69.

may be that the account is overly individualistic. Given that the account is so entirely individualistic, how does it manage to yield an account of a *collective* intention? The answer lays in the heavy use and deployment of the concept of planning.<sup>195</sup> Although many agents (including some animals) may have the capacity to form some kind of mental intention, only planning agents are capable of interacting with each other in a way that can yield a collective intention.<sup>196</sup> This is based on the full-blown reciprocal nature of how planning agents interact with each other. Planning agents recognize each other as being uniquely capable of engaging in cooperative behavior, through the process of deliberation regarding means, in a way that results in either the full or partial meshing of subplans.<sup>197</sup> Taken together, this yields a shared intention.

It does not matter (or it should not matter), what you call it. The label is unimportant. But one could offer a theory of shared intentions that is far less individualistic and far more collectivist. Searle, for example, argues that collective intentions of the type explained by Bratman are irreducible to their individual components.<sup>198</sup> By this he means that collective intentionality is not *wholly* reducible to individual intentions. His argument for the irreducibility of collective intentions stems from a simple intuition.<sup>199</sup> A thoroughgoing individualistic account of collective intentions is only possible because it makes reference to cooperation.<sup>200</sup> This much is undeniable. The house painters only exhibit a collective intention to paint the house when there is some indication that they believe and intend that they will cooperate in the house-painting project. Without this level of cooperation, one simply has two people individually painting a house with two separate individual intentions to paint the house. The reference to cooperation, though, may be problematic. How ought we to understand the concept of cooperation? Presumably it involves at least two individuals who work together to achieve a particular outcome. The “working together” is a process that is not accidental, but rather is intentionally desired by the individuals who are cooperating together. This is the very definition of cooperation. If this is the right understanding of cooperation, the appeal to cooperation is indeed problematic because it renders the entire account viciously circular.<sup>201</sup> The account of joint intentions is only rendered intelligible as an *individualistic* account because of its implicit appeal to the concept of cooperation. But cooperation already

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<sup>195</sup> See BRATMAN, *supra* note 178, at 96.

<sup>196</sup> See MICHAEL BRATMAN, INTENTION, PLANS, AND PRACTICAL REASON 14-27 (1987).

<sup>197</sup> See BRATMAN, *supra* note 178, at 36. Compare with CAROL ROVANE, THE BOUNDS OF AGENCY (1998).

<sup>198</sup> Searle, *supra* note 179, at 404.

<sup>199</sup> See *id.* at 405.

<sup>200</sup> *Id.* at 406.

<sup>201</sup> See Searle, *supra* note 179, at 406.

has the notion of a collective intention imbedded within it.<sup>202</sup> So we are left with an uncomfortable dilemma. Either one includes cooperation in the formula and risks circularity, or one excludes cooperation from the formula and in the process leave the account hopelessly underbroad. Neither alternative is particularly attractive. It suggests that collective intentions may not be easily reducible to individual intentions. As Searle puts it, they are a “primitive phenomenon.”<sup>203</sup>

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

#### *B. Planning, Cooperation, and Deliberation.*

Before continuing, it is necessary to cash out what we mean by planning and cooperation. What does this entail? On these two issues, my account departs from the specifics of Bratman’s theory. Bratman is correct that all human agents are planning agents, in the sense that human agents naturally engage in long-term planning that requires thinking about how to complete complex projects and how the sub-units of those projects intermingle with each other.<sup>204</sup> This kind of planning implies rational deliberation, or the process of thinking about which projects to prioritize and which avenues to pursue as a means of achieving them. This process of planning and deliberation can be done individually (in the case of individual action) or collectively, in the case of cooperative projects.

Coordination often involves *deliberation* about how the group will commit the crime. International crimes often exhibit this type of behavior where a group of individuals engage in collective deliberation in pursuit of a common criminal endeavor. It is this participation in the collective endeavor that is sufficient to generate individual culpability (on the basis of the shared intention of the group to commit the crime). One sees this, for example, in what a prosecutor at the ICTY might refer to as a horizontal JCE to commit

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<sup>202</sup> *Id.*

<sup>203</sup> *Id.*

<sup>204</sup> See BRATMAN, *supra* note 196, at 130-32.

war crimes or crimes against humanity.<sup>205</sup> In such cases a small cadre of military or political leaders—or both—conspire together to pursue a joint criminal plan. Their shared intention to commit the crime suggests a doctrinal avenue for grounding vicarious liability for the actions of other members of the group who do not commit the actus reus but nonetheless identify with the result by virtue of their desire to see it succeed.

Planning and deliberation in the context of cooperative behavior have very particular characteristics. Two characteristics that I have previously identified are particularly relevant: pooling information and shared decision-making.<sup>206</sup> In the case of pooling information, individuals who make up the ground floor of the operation share relevant information with the decision-makers. This is a frequent occurrence in the military context where information is sent up the chain of command. Such groups are often vertically organized with decision-making concentrated at the top and information gathering concentrated at the bottom by the rank and file.<sup>207</sup> Furthermore, such groups are often loosely-knit conspiracies with imperfect or infrequent coordination of behavior.<sup>208</sup>

Cases involving shared decision making are slightly different. In such situations, individuals engage in reason-giving and reason-taking behavior that results in a collective decision. In some cases, the organizational structure of the group concentrates decision-making power in a limited group of individuals or even in a single leader; in rare cases, the organizational structure contemplates democratic decision-making. But regardless of the procedure adopted for making *final* decisions, the group employs shared rationality for engaging in collective deliberation. Not only does the group consider appropriate goals, but it considers how to achieve them with a plan. When their plans develop contradictions or inconsistencies that frustrate their goals, they seek to resolve them.<sup>209</sup>

There is a clear link between deliberation and joint intentions. Consider each individual's personal attitude regarding the group's endeavor. By engaging in some form of collective deliberation about how to go about achieving a group goal, the individuals in the group must—by logical necessity—have a shared intention that the crime be committed. Otherwise the collective deliberation fails to get off the ground. Bratman puts the point in terms of “meshing” of subplans, so that two individuals painting a house make some

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<sup>205</sup> See Ambos, *JCE and Command Responsibility*, *supra* note 39, at 180.

<sup>206</sup> See Ohlin, *supra* note 194, at 190.

<sup>207</sup> *Id.* at 190-91.

<sup>208</sup> *Id.* at 192.

<sup>209</sup> It does not matter whether they actually resolve the contradictions. All that matters is that they are committed to resolving them. See Ohlin, *Group Think*, *supra* note 7, at 191. See also ROVANE, *THE BOUNDS OF AGENCY* 130 (1998) (commitment to overall rational unity).

allowance for how and with what color they will do the painting. He describes this process using the language of coordination, although as Searle rightly points out, the content of the concept of coordination remains a bit elusive.<sup>210</sup>

In previous articles I have explored the collective rationality that emerges from such group deliberations.<sup>211</sup> In particular, I argued that shared decision making can generate collective rationality that overlaps with individual rationality.<sup>212</sup> In these cases, the rationality of the group is not wholly reducible to the rationality of the individual. As the recent literature on the Doctrinal Paradox makes clear, group behavior must be analyzed at the group level in order to make sense of it.<sup>213</sup> The process of collective deliberation encourages participants in the group to seek overall rational unity among the entire group; indeed, the individuals are each committed to achieving this rational unity among the group. Contradictions in the group's plan are viewed as problems that demand resolution. Whether the group is able to resolve such contradictions is an entirely different matter; it is undeniable that the group views conflicting courses of action as contradictions that ought to be resolved if possible.

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

The question is whether it is correct to say that the participants in Essen Lynching have a joint intention for the group to lynch the airmen, even though there is insufficient opportunity for deliberation. One possibility is to take the lack of deliberation as evidence for lack of cooperation and therefore a lack of a joint intention. Under the joint intentions theory, this would counsel against applying vicarious liability to the participants. A second possibility is to conclude that deliberation has little to do with cooperative beha-

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<sup>210</sup> See Searle, *supra* note 179, at 406.

<sup>211</sup> See Ohlin, *supra* note 194, at 176.

<sup>212</sup> *Id.* at 178-83. See also ROVANE, *supra* note 197, at 193.

<sup>213</sup> See, e.g., Lewis A. Kornhauser & Lawrence G. Sager, *The One and the Many: Adjudication in Collegial Courts*, 81 CAL. L. REV. 1, 10-13 (1993); Philip Pettit, *Collective Persons and Powers*, 8 LEGAL THEORY 443 (2002).

viator, since cooperative behavior is possible in its absence. If this is correct, then our account of cooperation and planning stands in need of revision.

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

This suggests that cooperation can vary by degree. In cases involving instantaneous cooperation to commit a simple task (such as a lynching), no deliberation is required. As the complexity of the task increases, the rational relationship between members of the group may change as well. Cooperation may take the form of deliberation, which imposes a unique rational structure to the group. The demand for overall rational unity will cause the group to pool information and stick to a particular decision making structure. This is a form of collective reason.

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

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

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

If we reexamine the Love Parade stampede, the notion of joint intentions explains why vicarious liability should be unthinkable in such a case.

The concertgoers in the tunnel engaged in no cooperation; nor did they reflexively make decisions in light of, and because of, the actions of the other concertgoers. Indeed, their interests were antagonistic. One might object that antagonism and joint intentions are not mutually exclusive, *viz.* two participants in a game competing against each other and with mutually incompatible interests, though they still cooperate with each other *by playing the game*.<sup>214</sup> However, the Love Parade example can be distinguished from antagonistic game-playing cooperation because game-playing involves a joint intention to follow the rules of the game in order to mutually achieve the satisfaction of game-playing. The Love Parade example is devoid of either actual rule-following or a shared commitment to rule-following in order to engage in game playing.

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

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<sup>214</sup> Situations involving cooperative activity at one level, and antagonism at another level, have long confounded judges in the case law. *See, e.g.,* *People v. Russell*, 91 N.Y.2d 280 (N.Y. 1998) (participants in gun battle were all convicted for intentionally aiding the shooter, even though they were shooting at each other). The court noted that “unlike an unanticipated ambush or spontaneous attack that might have taken defendants by surprise, the gunfight in this case only began after defendants acknowledged and accepted each other’s challenge to engage in a deadly battle on a public concourse”). *Id.* *See also* *People v. Abbott*, 445 N.Y.S.2d 344 (N.Y. 1981) (applying similar rule in drag racing context). The rule has been frequently criticized. *See* Daniel B. Yeager, *Dangerous Games and the Criminal Law*, 16 CRIM. JUST. ETHICS 3 (1997). Bratman is more sympathetic to the general idea and acknowledges that competitive game playing involves cooperative activity. *See* BRATMAN, *supra* note 178, at 107 (playing chess involves cooperation to play the game, though one’s opponent does not, and cannot, cooperate in his opponent’s plan to check-mate him). Game playing therefore involves meshing of sub-plans among the players, although not all the way down.

The Concentration Camp Case and the Attack Against Civilians examples are also easy to resolve. The soldiers in the Attack Against Civilians not only share a commitment to a particular goal, but they also mesh sub-plans and each one is aware of their particular role in the overall endeavor. Indeed, the attack would not be possible (each soldier clearing a different building) without the coordination that results from their joint intention to commit the crime. This joint intention makes clear why vicarious liability is consistent with the principle of culpability. Although the physical actions are committed by several individuals, each one intends for the other to commit the action. By so doing, he or she makes it his own. To explain this argument, it might be helpful to consider other situations where an actor might be legally responsible for the actions of another because they “make it their own.”<sup>215</sup> In a case where a mob boss procures a subordinate to commit a murder, the mob boss makes the action his own because he wants the crime to be committed and uses his subordinate as an instrument to make it happen.<sup>216</sup> The Attack Against Civilians exists on a spectrum with the mob boss, although this time each soldier makes the collective action his own, not because each uses the other soldiers as an instrument, but simply because each soldier intends for the group to commit the crime and intends to do his part to bring the collective plan into fruition. It is the mental state—not the *actus reus*—that provides the justification for the vicarious liability.

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

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<sup>215</sup> See, e.g., *Nye & Nissen v. United States*, 336 U.S. 613, 619 (1949) (aider and abettor “in some sort associate[s] himself with the venture, that he participate[s] in it as in something that he wishes to bring about, that he seek[s] by his action to make it succeed”); *State v. Gladstone*, 474 P.2d 274 (Wash. 1970).

<sup>216</sup> This is best described as an example of indirect perpetration. The ICC case against al-Bashir is based on this doctrine. See Florian Jessberger, *On the Application of a Theory of Indirect Perpetration in Al Bashir: German Doctrine at The Hague?*, 6 J. INT’L CRIM. JUST. 853 (2008).

that some crimes might happen (least culpable).<sup>217</sup> What is the moral and legal significance of their having a joint intention to operate a system of mistreatment, and what is the moral and legal significance of the *lack* of any joint intention with regard to that *particular* criminal act? My point here is not to defend a particular moral conclusion for how we should treat the two guards in the Concentration Camp example. Rather, my point is to emphasize that a theory of joint intentions gets to the heart of the nuanced culpability of the guards in this example.

One might object that the control theory was invoked by the ICC as a method of distinguishing between co-perpetrators and accomplices—i.e. distinguishing between levels of participation in a criminal endeavor—and not grounding vicarious liability.<sup>218</sup> And certainly the ICC’s use of the control theory suggests that they also implicitly considered some notion of a shared or joint intention as a relevant consideration, since the ICC requires a finding of an agreement or common plan among the co-perpetrators.<sup>219</sup> The question is whether control is the right barometer with which to distinguish between co-perpetrators and accomplices. According to the ICC, accomplices contribute to the endeavor but have no control over the outcome, i.e. they are not in a position to determine whether the crime actually happens or not. Although this is one plausible avenue for distinguishing between principals and their accomplices, one might also invoke the concept of joint intentions to do the job. Under this proposal, those who jointly intend to commit the crime with each other would be liable as co-perpetrators (or some other designation), whereas those who simply assist the group with *mere knowledge* that their assistance will help complete the crime are then labeled as accomplices. If the joint intentions theory is capable of making this distinction (and doing so better), it is unclear what is left for control as a criterion to do.

This is arguably what the ICTY Trial Chambers in *Kvočka* and *Stakić* were getting at.<sup>220</sup> The trial chambers in both cases insisted that JCE could

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<sup>217</sup> Compare Lubanga, para. 350 (“aware that it will occur in the ordinary course of events”) with *id.* at para. 352 (“accepts such an outcome by reconciling himself or herself with it or consenting to it (also known as *dolus eventualis*)”).

<sup>218</sup> See Lubanga, para. 327.

<sup>219</sup> See Lubanga, para. 344. The agreement can either be to commit a crime within the jurisdiction of the statute, or a common plan towards a non-criminal goal that will nonetheless result in a crime as a necessary outcome. See *id.* at para. 352 (describing this level of culpability as *dolus directus*).

<sup>220</sup> See Prosecutor v. Stakić, Trial Chamber, 31 July 2003, par. 441; Prosecutor v. Kvočka et al., Trial Chamber, 2 November 2001, par. 249 (“The Trial Chamber also considers that it is possible to co-perpetrate and aid or abet a joint criminal enterprise, depending primarily on whether the level of participation rises to that of sharing the intent of the criminal enterprise. An aider or abettor of a joint criminal enterprise, whose acts originally assist or otherwise facilitate the criminal endeavor, may become

be revised so that it distinguishes between those who co-perpetrated a JCE and those who aided and abetted the JCE.<sup>221</sup> And the distinction between the two categories was not based on control, but rather co-perpetrators were those who intended to commit the crime while the accomplices merely assisted with knowledge that they were helping the group to commit the crime.<sup>222</sup> Although both are concerned in the criminality, their mode of participation—and their mental state—is fundamentally different. The one problem with the doctrinal innovation of the Trial Chamber is that the court failed to give the necessary theoretical analysis to explain why the distinction was both fruitful and necessary. Indeed, both decisions were rather skeletal on theory. I submit that if the court had laid a proper foundation for its doctrinal distinction, by developing an explicit theory of joint intentions, the rationale for their decision would have been far clearer—and ultimately more influential.<sup>223</sup>

The same issue plagues the Rome Statute. Article 25(3)(d) of the Statute penalizes individuals involved in group criminality when they make a contribution with the *intent* to aid the group in committing the crime or with *knowledge* of the group's intent to commit the crime.<sup>224</sup> The intuitive problem with this provision is that its two subsections appear to inculcate two completely different classes of criminals—principals and accomplices—and group them under the same umbrella. This repeats the same conceptual error of JCE. On its face, individual responsibility for both classes is unproblematic and controversial; their grouping *together* in Article 25(3)(d), though, suggests a moral equivalency that belies our intuitions regarding their different levels of culpability. And I believe this Article has clearly articulated the foundation for their differing culpability: principals of group crimes share an intention for the group to commit the crime, while accomplices do not.

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so involved in its operations that he may graduate to the status of a co-perpetrator of that enterprise.”)

<sup>221</sup> Kvočka, Trial Chamber, para. 282.

<sup>222</sup> Kvočka, Trial Chamber, para. 284.

<sup>223</sup> The Trial Chamber's attempt to split JCE into two separate categories—aiding and abetting a JCE and co-perpetrating a JCE—was immediately rejected by the Appeals Chamber. See *Prosecutor v. Kvočka*, Appeals Chamber, Feb. 28, 2005, par. 90-92. The Appeals Chamber engaged in a similar rebuke of the Trial Chamber in *Stakić*. See *Prosecutor v. Stakić*, Appeals Chamber, March 22, 2006, par. 59.

<sup>224</sup> For a full analysis of Article 25(3)(d), see Jens David Ohlin, *Joint Criminal Confusion*, 12 NEW CRIM. L. REV. 406 (2009).

#### D. Restrictions on Vicarious Liability

It should now be clear why vicarious liability for actions falling outside the scope of the criminal plan is so controversial.<sup>225</sup> Insofar as the action falls outside the scope of the collective plan, there was no shared intention to commit the wayward crime. Since the joint action was based on an initial agreement to commit the crime, the defendant's intention is predicated on that initial agreement. Nor does it change matters if the wayward action was a reasonably foreseeable consequence of the criminal plan.<sup>226</sup> These individual wayward actions cannot be attributed back to the defendant; the shared intention was entirely different. The problem with the JCE doctrine was never its "subjective" approach but rather its insistence on vicarious liability for acts that fall outside the scope of the original criminal agreement (JCE III). Indeed, JCE III should never have been developed in the first place, because as demonstrated in this Article, it is inconsistent with the very theory that animates the JCE doctrine.<sup>227</sup> Defendants in a JCE III case do not have a shared intention to commit the crime in question, and therefore they do not have the requisite mental state to place them in the same category as the principal perpetrator who committed the act. In addition to its deficiencies at the level of criminal law theory, JCE III is unsupported by either the current Rome Statute or the international case law; future international courts ought to reject it.<sup>228</sup> The ICC's control theory suffers from similar deficiencies: the use of *dolus eventualis* as a permissible mental state effectively guts the objective requirement of a common criminal plan.

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<sup>225</sup> See, e.g., Danner & Martinez, *supra* note 167, at 137 (JCE as the nuclear bomb of the ICTY's arsenal); Powles, *supra* note 158, at 619 (criticizing JCE III); Ambos, JCE Amicus Brief, *supra* note 38, *passim* (rejecting JCE III as incompatible with fundamental principles of criminal law theory); Ohlin, *Three Conceptual Problems*, *supra* note 51, at 81 ("The more subtle avenue would have distinguished between actions taken with mere knowledge of the conspiracy and those taken to intentionally advance the conspiracy. The former should yield the lightest liability while the latter should yield the heaviest. But the actions of a joint criminal enterprise cannot be attributed to both equally.").

<sup>226</sup> Compare with Tadić, Appeals Chamber, para. 224.

<sup>227</sup> For an example of this tension, see *D'Ottavio and others* (March 12, 1947), cited in Cassese, *Proper Limits*, *supra* note 63, at 119-120 n.12 ("There also exists a psychological causation in that all the participants shared the conscious will to engage in an attempt to unlawfully detain a person while foreseeing a possible different crime, as can be inferred from the use of weapons: it was to anticipate that one of them might have shot at the fugitives with a view to achieving the common purpose of capturing them."). The Italian Court of Cassation seems unbothered by the fact that the "shared conscious will" of the participants did not include the crime for which they were convicted.

<sup>228</sup> See *supra* Part IIA.

A theory of joint intentions nicely explains why the restrictions outlined in Part II of this article are absolutely necessary. The two restrictions—now conceptually linked—include eliminating vicarious liability for actions that fall outside the scope of the original agreement and differentiating levels of participation in the group endeavor. The former restriction is required by the theory because, for those actions that fall outside the scope of the original plan, there is no joint intention with regard to that criminal action. And if the joint intention grounds vicarious liability in the first instance, the absence of a joint intention with regard to that one criminal act requires rejection of the application of vicarious liability to all other members of the group. The latter restriction is required because those who carry the joint intention for the group to commit the crime are categorically different from those who merely assist the endeavor with knowledge that their assistance will facilitate the group's efforts. What justifies this categorical distinction? Simply put, those who carry the joint intention are guilty of an *intentional* act, while those without the joint intention are, at most, guilty of a crime of knowing facilitation or complicity. If at some point an accomplice changes their attitude about the group's endeavor, and intends for the group to commit the crime, then the accomplice graduates to the status of co-perpetrator where greater liability is appropriate.<sup>229</sup>

In the end, the appropriate course of action is not to replace JCE with the control theory of perpetration, but rather reform JCE and eliminate JCE III because it fails to comply with the underlying theory supporting the doctrine. The latest developments in the case law may support this prescription. In May, the Extraordinary Chambers in the Courts of Cambodia (ECCC) issued a decision rejecting JCE III.<sup>230</sup> In a well-crafted and tightly argued opinion that bodes well for the young tribunal, the Pre-Trial Chamber examined all of the historical precedents in the post-World War II era and went well beyond the cases cited by the ICTY in *Tadić*.<sup>231</sup> The Pre-Trial Chamber con-

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<sup>229</sup> One might object that this joint intentions theory could potentially label thousands of minor participants as co-perpetrators, simply based on their joint intention. Are factory workers making munitions guilty as co-perpetrators if they exhibit a joint intention to use the weapons as part of a criminal plan? The answer is simple: such cases should not be resolved by changing the required mental state for the doctrine, but rather by further examination of the level of contribution required to the plan as part of the objective element. If one adopts the differentiated version of JCE discussed in Part IIB, the level of contribution could be used to distinguish between co-perpetrating a JCE and aiding and abetting a JCE. A full analysis of the required level of contribution (de minimus, substantial, or indispensable) for vicarious liability is outside the scope of the present Article.

<sup>230</sup> See Decision on the Appeals Against the Co-investigating Judges Order on Joint Criminal Enterprise (JCE), *Kaing Guek Eav [Duch Case]*, ECCC Pre-Trial Chamber, May 20, 2010.

<sup>231</sup> Duch Case, JCE Decision, para. 65 (discussing *Justice* and *RuSHA* cases).

cluded that, although some form of joint enterprise liability was already part of customary international law in the 1970s when the Khmer Rouge atrocities were committed, there was insufficient evidence of a similar norm regarding vicarious liability for criminal acts outside the scope of the criminal plan.<sup>232</sup> Prosecutions before the ECCC will now proceed with joint enterprise liability but without the darling of the prosecutor's nursery, JCE III.

Even more than the result, the Pre-Trial Chamber's *reasoning* was striking.<sup>233</sup> International tribunals applying JCE usually just cite *Tadić*, under the assumption that even if JCE was not a part of customary law after World War II, there is ample evidence today that JCE is an indelible part of modern ICL.<sup>234</sup> But the substance of the ECCC's decision suggests that *Tadić*—as a precedent—is more problematic than that. The ICTY in *Tadić* argued that JCE was supportable as judicial interpretation of Article 7 of the ICTY Statute because, inter alia, JCE was a part of customary international law dating back to the World War II cases, and that one should read the inclusion of the term “commission” in Article 7 of the ICTY Statute against this background.<sup>235</sup> If a subsequent court demonstrates, convincingly, that this historical interpretation of customary international law is incorrect, then the very underpinnings of *Tadić* start to evaporate. Future courts might be forced to conclude that *Tadić* was wrongly decided.

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<sup>232</sup> Duch Case, JCE Decision, para. 87.

<sup>233</sup> For a criticism of the PTC Decision regarding JCE III, see David Scheffer & Anthony Dinh, *The Pre-Trial Chamber's Significant Decision on Joint Criminal Enterprise for Individual Responsibility*, in CAMBODIA TRIBUNAL MONITOR, June 3, 2010 (arguing inter alia that the decision was inconsistent with the Court's goal of prosecuting senior leaders responsible for the atrocities). This argument has a long pedigree. See, e.g., Prosecutor v. Tadić, Appeals Chamber, para. 189; Cassese, *Proper Limits*, supra note 63, at 117. For criticism of *Tadić* on this point, see Ohlin, *Three Conceptual Problems*, supra note 51, at 72 (circular argument); Héctor Olásolo, *Joint Criminal Enterprise and its Extended Form: A Theory of Co-Perpetration Giving Rise to Principal Liability, A Notion of Accessorial Liability, or a Form of Partnership in Crime?*, 20 CRIM. L. F. 285 (2009) (failure to address principle of legality); Weigend, supra note 111, at 477 (political mission of JCE). For a rebuttal of the Scheffer & Dinh article by a member of the defense team, see Michael G. Karnavas, *Joint Criminal Enterprise at the ECCC*, available at [http://www.dccam.org/Tribunal/Analysis/pdf/JCE\\_at\\_the\\_ECCC.pdf](http://www.dccam.org/Tribunal/Analysis/pdf/JCE_at_the_ECCC.pdf), at 18-20 (noting that neither the Cambodian enabling legislation creating the court, nor the bilateral agreement with the United Nations, mentions JCE).

<sup>234</sup> See, e.g., Stakić, Appeals Chamber, para. 59 (suggesting that JCE is well-settled law and binding precedent at the ICTY).

<sup>235</sup> Tadić, Appeals Chamber, para. 194 (“the Tribunal's Statutes does not specify (either expressly or by implication) the objective and subjective elements (*actus reus* and *mens rea*) of this category of collective criminality. To identify these elements one must turn to customary international law.”).

The ECCC Pre-Trial Chamber concluded that some concept of joint enterprise liability was included in the London Charter and Control Council Law No. 10 (liability for a common plan or conspiracy), thus providing evidence of *opinio juris* regarding an emerging customary norm for these prosecutions.<sup>236</sup> However, although there was substantial case law support for JCE I and even JCE II, the ICTY's support for JCE III rested largely on *Borkum Island* and *Essen Lynching*, neither of which involved "extensive legal finding[s] on the issue of common criminal plan or mob beatings."<sup>237</sup> Furthermore, the court also questioned in a footnote the categorization of *Essen Lynching* and *Borkum Island* as JCE III cases and questioned whether any defendant who did not have the intent to kill was found guilty in the cases.<sup>238</sup> Under this reading of the cases, none of the convictions was based on the theory that participation in the violence without the intent to kill could generate liability for murder.<sup>239</sup> Italian cases after World War II purporting to support JCE III were rejected because the court in that case was not applying international law.<sup>240</sup>

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

I have argued in the past that the principle of culpability implicitly includes a proportionality component, such that defendants should only be held criminally responsible according to the *level* of their culpability.<sup>241</sup> If the constraint applies to punishment only (i.e. prison terms should be proportional to individual culpability), then arguably the inclusion of JCE III defendants within the same group as JCE I and JCE II defendants is unproblematic, as long as they receive different prison sentences by whatever tribunal sentences them.<sup>242</sup> If this view is correct, then even violating the joint inten-

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<sup>236</sup> Duch Case, JCE Decision, para. 57.

<sup>237</sup> Duch Case, JCE Decision, para. 75.

<sup>238</sup> Duch Case, JCE Decision, n. 223, citing Powles, *supra* note 158, at 615-16, and Ohlin, *Three Conceptual Problems*, *supra* note 51, at 75 n.10.

<sup>239</sup> Duch Case, JCE Decision, para. 80.

<sup>240</sup> Duch Case, JCE Decision, para. 75, 82 (citing *D'Ottavio et al.*).

<sup>241</sup> See Ohlin, *Group Think*, *supra* note 7, at 160

<sup>242</sup> Compare Cassese, *JCE Amicus Brief*, *supra* note 84, at 37 (arguing that distinctions regarding culpability may be adequately assessed at sentencing in conformance

tions doctrine is not enough to demand revision of JCE III or any other extended version of joint liability doctrine. One could simply concede the point that JCE III is unsupported by a joint intention but then shift strategy and point out that JCE III is not based on intentionality *at all*, but rather on lower mental states that are nonetheless still culpable.<sup>243</sup> Although the joint intentions theory presented in this Article supports vicarious liability, it was not meant to supplant all forms of criminal responsibility entirely, including crimes of recklessness.

However, it seems intuitively correct that the culpability principle is about more than just punishment.<sup>244</sup> The criminal law engages in many functions above and beyond the mechanics of punishment, and the codification of culpability in the form of criminal law offences, and the forms of responsibility that accompany them, are crucial to the other basic functions of international criminal justice, including (among other things) the expressive role of properly declaring the international community's precise condemnation of the criminal activity, and the role of vindicating the rule of law.<sup>245</sup> While there are many other ways of expressing these additional roles over and above punishment (vindication, retribution, strengthening human rights norms, etc.), it seems intuitively the case that proper identification of the level of culpability is absolutely central. But why? One possible answer is that it is simply an *a priori* goal to have criminal law doctrine properly codify different levels of culpability.

In recent writings, Frédéric Mégret, drawing in part on previous writings of mine about JCE, has argued that this goal could also be expressed as a question of "fair labeling."<sup>246</sup> Under this view, criminal defendants—in both domestic and international courts—have a basic human right to fair labeling of their criminal conduct. The criminal process owes an obligation to criminal defendants to properly label their criminal conduct, and this obligation is more basic and foundational than the obligation to limit punishment

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with *nulla poena sine culpa*), with Ohlin, *Three Conceptual Problems*, *supra* note 51, at 87 (requiring doctrinal distinctions to codify culpability gradations).

<sup>243</sup> See Tadić, Appeals Chamber, para. 220 (advertent recklessness or *dolus eventualis*).

<sup>244</sup> See, e.g., Kai Ambos, *Remarks on the General Part of International Criminal Law*, 4 J. INT'L CRIM. JUST. 660 (2006); Paul H. Robinson, *Four Predictions for the Criminal Law of 2043*, 19 RUTGERS L.J. 897, 903 (1988).

<sup>245</sup> See, e.g., Robert D. Sloane, *The Expressive Capacity of International Punishment*, 43 STAN. J. INT'L L. 39 (2007).

<sup>246</sup> See Frédéric Mégret, *Prospects for "Constitutional" Human Rights Scrutiny of Substantive International Criminal Law by the ICC, with Special Emphasis on the General Part*, paper presented at Washington University School of Law, Whitney R. Harris World Law Institute, International Legal Scholars Workshop, Roundtable in Public International Law and Theory (Saint Louis, Feb. 4-6, 2010) (on file with the author).

to the level of their culpability. Indeed, one might even *generate* the constraint against punishment as initially deriving from the constraint against labeling.

According to Mégret, the need for fair labeling stems from a human rights theory of the criminal law.<sup>247</sup> Fairness (as a human rights procedural norm), demands precise fidelity to appropriate labels for criminal offences.<sup>248</sup> This basic human rights norm then generates a whole battery of constraints that limit everything from pre-detention, the rules of evidence, the structure of the trial, and the final outcome of punishment. This much is well-known and obvious. But the human rights norm also constrains criminal law doctrine itself, in the sense that an over-extended doctrine that inflates criminal responsibility violates the human rights of the defendant to the fair labeling of their conduct.<sup>249</sup> This is a new way of thinking of the point, by invoking the language of human rights which previously was restricted to the domain of criminal procedure (as opposed to substantive criminal law).<sup>250</sup> Most scholars in the past, myself included, have been inclined to view the matter as simply a matter internal to criminal law theory, *viz.* the normative goal of getting things right, where the consequence of failing to get it right means violating the principle of culpability.<sup>251</sup> Regardless of the language one uses, however, the consequences for failing to get it right are clear. The culpability of lower participants is inflated and implicitly, the culpability of higher participants is deflated, simply by virtue of their inclusion in the same category as those at the bottom of the culpability ladder. In addition to being theoretically unsatisfying, this result also frustrates the consequentialist goals of a criminal justice system (including deterrence).

#### CONCLUSION

Despite the intense scrutiny regarding JCE, conspiracy, and co-perpetration, international judges and lawyers have demonstrated insufficient interest in developing a deeper theory of criminal responsibility for

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<sup>247</sup> See Mégret, *supra* note 246, at 35. See also Andrew Ashworth, *The Elasticity of Mens Rea*, in C.F.H. Tapper, ed., *CRIME, PROOF, AND PUNISHMENT: ESSAYS IN HONOUR OF SIR ROBERT CROSS* (1981).

<sup>248</sup> See Mégret, *supra* note 246, at 38.

<sup>249</sup> *Id.*

<sup>250</sup> As evidence of the procedural assumption regarding the rights of criminal defendants, consider article 14 of the International Covenant on Civil and Political Rights, which codifies, *inter alia*, equality before the law, presumption of innocence, right to a fair trial, and the right of appeal, but makes no reference to the content of substantive criminal law.

<sup>251</sup> See Ohlin, *Three Conceptual Problems*, *supra* note 51, at 88 (identifying as an inherent goal of the criminal law the codification of moral distinctions based on culpability).

group endeavors.<sup>252</sup> The case law of the tribunals is focused almost exclusively on choosing the appropriate doctrine that is consistent with statutory provisions and customary international law. Occasionally, judges consider compliance and fidelity to deeper principles of criminal law, though usually under the guise of discussing “general principles of law” as the term is understood by public international lawyers. Even more rarely do they broach the question of criminal law theory and they hardly ever hazard a foray into the philosophical landmines of collective action and the intentionality that generates it. Perhaps this is not surprising. The autonomy of law in general, and international criminal law in particular, has supposedly liberated lawyers from engagement with the allegedly indeterminate and unanswerable pre-legal questions of philosophy, psychology, and morality. But in nascent fields, such as international criminal law, there is more conceptual space (and need) for consideration of first-order moral and philosophical theories that ground the legal doctrines that courts are often in the position, not just of applying, but of announcing. International tribunals have a greater responsibility to ensure that their rules and doctrines are defensible.

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

This process is especially difficult when the question is individual responsibility for collective criminal action. This Article has concluded that international courts ought to be developing their doctrine around the concept of joint or shared intentions. In particular, we have been unconcerned with the specifics of JCE, co-perpetration, and conspiracy, and more concerned with grounding these doctrines in a philosophically nuanced theory that posits vicarious liability when a group of individuals each intend for their group to complete a crime and each individual acts according to the reciprocal nature of this joint intention. This phenomenon of joint intentions both justifies

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<sup>252</sup> The confusion surrounding Article 25 of the Rome Statute is just one example of this phenomenon. *See, e.g.,* Albin Eser, *Individual Criminal Responsibility*, in Cassese et al eds., *THE ROME STATUTE OF THE INTERNATIONAL CRIMINAL COURT: A COMMENTARY* 767, 803 (2002) (“employment of obviously different mental concepts in this provision can hardly hide the lack of expertise in criminal theory when this provision was developed”).

the application of vicarious liability imposed by international tribunals and also explains why it is so important to distinguish between criminal defendants who merely exhibit recklessness (under the current JCE III) from those who directly intend the consequences of their criminal participation. This is the doctrinal payoff of the joint intentions theory.