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Collective Criminality and Individual Responsibility: The Constraints of Interpretation

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ARTICLE

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RESPONSIBILITY: THE CONSTRAINTS OF
INTERPRETATION

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INTRODUCTION

International criminal law as prosecuted in the various international tribunals focuses on mass atrocity crimes: (1) genocide; (2) crimes against humanity; and (3) war crimes.¹ As the Appeals Chamber of the Yugoslavian Tribunal has explained, “most of the time these crimes do not result from the criminal propensity of single individuals but constitute manifestations of collective criminality: the crimes often carried out by groups of individuals acting in pursuit of a common

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1. *See, e.g.*, Rome Statute of the International Criminal Court, July 17, 1998, arts. 6–8, 2187 U.N.T.S. 90 [hereinafter Rome Statute] (note that a definition of the Crime of Aggression has been adopted, but not implemented); Statute of the International Criminal Tribunal for the Prosecution of Persons Responsible for Serious Violations of International Humanitarian Law Committed in the Territory of the Former Yugoslavia since 1991, arts. 2–5, U.N. Doc. S/25704, annex, (May 3, 1993), *adopted by* S.C. Res. 827, U.N. Doc. S/RES/827 (May 25, 1993) [hereinafter ICTY Statute]; Statute of the International Criminal Tribunal for Rwanda, *adopted by* S.C. Res. 955, arts. 2–4, U.N. Doc. S/RES/955, annex (Nov. 8, 1994) [hereinafter ICTR Statute].

criminal design.”² Despite the collective nature of these crimes, international criminal law has adopted a model of individual culpability.³ Some participants in a common criminal design or plan may physically perpetrate a criminal act; others act in ways that are vital to the commission of an offense. The principal task under international criminal law is to assess the culpability of each subgroup. This task requires fact gathering and sorting out the precise acts of individuals in the midst of mass atrocity.⁴

While the definitions of international crimes may vary, the issues raised above also play out across the terrain of forms of participation.⁵ The responses of the international tribunals to these issues have been varied and inconsistent. This Article will consider the reasons why the doctrine regarding forms of participation for collective crimes is incoherent, the precise nature of the incoherence, and whether it is possible to reconcile the various approaches to individual responsibility in the context of collective criminality. It will conclude that while a certain measure of coherence may be attained, full

2. Prosecutor v. Tadić, Case No. IT-94-I-A, Judgment, ¶ 191 (Int’l Criminal Tribunal for the Former Yugoslavia July 15, 1999), <http://www.icty.org/x/cases/tadic/acjug/en/tad-aj990715e.pdf>.

3. See 1 TRIAL OF THE MAJOR WAR CRIMINALS BEFORE THE INTERNATIONAL MILITARY TRIBUNAL: NUREMBERG 14 NOVEMBER 1945 - 1 OCTOBER 1946, at 256 (1947) (stating that decisions must be rendered “in accordance with well-settled legal principles, one of the most important of which is that criminal guilt is personal, and that mass punishments should be avoided.”). For consideration of different models of criminal liability, see Andre Nollkaemper, *Systemic Effects of International Responsibility for International Crimes*, 8 SANTA CLARA J. INT’L L. 313 (2010) [hereinafter Drumbl, *Systemic Effects*]; Mark A. Drumbl, *Accountability for System Criminality*, 8 SANTA CLARA J. INT’L L. 373 (2010) [Drumbl, *Accountability for Systemic Criminality*] (“International criminal law conceptually situates itself upon a fiction namely that wide-sale atrocity is the crime of individuals. Such it may be, but it also is much more.”); Mark A. Drumbl, *Pluralizing International Criminal Justice*, 103 MICH. L. REV. 1295 (2005) [Drumbl, *Pluralizing International Criminal Justice*]; George P. Fletcher, *Collective Guilt and Collective Punishment*, 5 THEORETICAL INQUIRIES L. 163 (2004).

4. See generally MARK OSIEL, *MAKING SENSE OF MASS ATROCITY* (2009).

5. These modes of responsibility are referred to in various ways. Professor Drumbl describes them as “culpability mechanisms” and indicates that “[e]xamples might include joint criminal enterprise, command responsibility, aiding and abetting; and also injecting greater elasticity into juridical understandings of ‘committing,’ ‘instigating,’ ‘ordering,’ and both ‘direct’ and ‘indirect co-perpetration’.” Drumbl, *Accountability for System Criminality*, *supra* note 3, at 378 n.23. In this Article they will, in accordance with the literature, be variously referred to as modes/forms of responsibility, modes of liability, and forms of participation.

reconciliation of the various models will probably continue to elude the international criminal law.

I. *SOURCES OF THE INCOHERENCE*

There are many reasons for the failure of international criminal law to coalesce around one theoretical/doctrinal approach to crimes with multiple participants/perpetrators.

A. *Multiple Decision Making Regimes*

In 1993, the United Nations Security Council, acting in response to the ongoing armed conflict in the former Yugoslavia, created the International Criminal Tribunal for the Former Yugoslavia (“ICTY”).⁶ That ad hoc tribunal was established as a subsidiary organ of the Security Council and charged under its founding statute with “prosecut[ing] . . . persons responsible for serious violations of international humanitarian law committed in the territory of the former Yugoslavia since 1991.”⁷ This was the first international criminal tribunal since Nuremberg post-World War II. The ICTY statute was intended to be largely a codification of customary international law (“CIL”), its process a hybrid of civil and common law traditions. Prosecutors and judges from both traditions staffed the Tribunal.⁸ In 1994, the Security Council created, as a second subsidiary organ, the International Criminal Tribunal for Rwanda (“ICTR”). In addition to these international tribunals, and in response to specific mass atrocities and armed conflicts, the international community established a series of so-called “hybrid” tribunals in Cambodia, Sierra Leone, East Timor, and Lebanon.⁹ Each of these

6. S.C. Res. 808, ¶1, U.N. Doc. S/RES/808 (Feb. 22, 1993); S.C. Res. 827, ¶ 2, U.N. Doc. S/RES/827 (May 25, 1993).

7. ICTY Statute, *supra* note 1, art. 1.

8. See Diane Marie Amann, *Harmonic Convergence? Constitutional Criminal Procedure in an International Context*, 75 *IND. L.J.* 809, 842–43 (2000); Patrick L. Robinson, *Ensuring Fair and Expeditious Trials at the International Criminal Tribunal for the former Yugoslavia*, 11 *EUR. J. INT’L L.* 569, 574–79 (2000).

9. See Laura Dickinson, *The Promise of Hybrid Courts*, 97 *AM. J. INT’L L.* 295 (2003); Etelle R. Higonnet, *Restructuring Hybrid Courts: Local Empowerment and National Criminal Justice Reform*, 23 *ARIZ. J. INT’L & COMP. L.* 347 (2006); Frederic Megret, *In Defense of Hybridity: Towards a Representational Theory of Criminal Justice*, 38 *CORNELL INT’L L.J.* 725 (2005).

international and ad hoc tribunals functioned under its own founding document and while there are many similarities, there are also many differences in these documents.¹⁰ In 1998, a permanent international criminal court was established by treaty and came into being in 2002. The Rome Statute of the International Criminal Court was a carefully negotiated agreement that drew upon civil and common law traditions both in terms of procedure and the substantive definitions of crimes.¹¹ Also, as with the ad hoc tribunals, judges and prosecutors represent both traditions.

Finally, adding to the diffuse nature of decision making regarding international criminal law, domestic (national) courts and tribunals also prosecute international crimes. There is a long history of war crimes prosecutions at the national level. In the United States, for example, violators of the laws of war have long been tried in courts martial *and* military commissions.¹² In recent years states have enacted or broadened the reach of domestic laws allowing prosecution for crimes against humanity and genocide, both in response to specific atrocities and the “complementarity” regime of the Rome Statute, under which the ICC defers to domestic investigations *and* prosecutions of international crimes.¹³ The result is that multiple decision makers in different tribunals with differing charges are interpreting the same or similar international criminal law, including the law regarding forms of responsibility in collective crimes.

10. Compare ICTY Statute, *supra* note 1, art. 5 (defining crimes against humanity), with ICTR Statute, *supra* note 1, art. 3 (defining crimes against humanity); Rome Statute, *supra* note 1, art. 7 (defining crimes against humanity).

11. See THE STATUTE OF THE INTERNATIONAL CRIMINAL COURT: A DOCUMENTARY HISTORY (M. Cherif Bassiouni ed., 1998); M. Cherif Bassiouni, *Negotiating the Treaty of Rome on the Establishment of an International Criminal Court*, 32 CORNELL INT'L L.J. 443 (1999).

12. See, e.g., Scott Silliman, *On Military Commissions*, 36 CASE W. RES. J. INT'L L. 529 (2005).

13. Rome Statute, *supra* note 1, arts. 1, 17; see Katherine L. Doherty & Timothy L.H. McCormack, “Complementarity” as a Catalyst for Comprehensive Domestic Penal Legislation, 5 U.C. DAVIS J. INT'L. L. & POL'Y. 147 (1999); Michael P. Hatchell, *Closing Gaps in United States Law and Implementing the Rome Statute: A Comparative Approach*, 12 ILSA J. INT'L. & COMP. L. 183 (2005).

B. *Nature of International Criminal Law*

1. Strands of Law from which International Criminal Law is Derived

Several factors add to the complexity of international criminal law, and therefore the difficulty in consistently applying it. First, international criminal law is a complex combination of various strands of law.¹⁴ It derives most directly from International Humanitarian Law (“IHL”) or the Law of War, which historically bounded states to conduct armed conflict within certain legal parameters, and defined as war crimes violations of those constraints.¹⁵ The Nuremberg Tribunal found that the extensive history of both treaty and the customary law of war also imposed international criminal responsibility on individuals.¹⁶ In addition to IHL, a second strand of law from which international criminal law derives is International Human Rights Law.¹⁷ The law of Human Rights manifests itself in international criminal law in at least two ways. First, certain substantive crimes are derived from human rights precepts (particularly norms against discrimination). Crimes against humanity and the crime of genocide both fit this model.¹⁸ Second, international human rights law provides a rich source of procedural protections for criminal defendants. Fundamental

14. This idea that various strands or threads of law have contributed to the development of international criminal law is one that has been explored elsewhere. *See, e.g.*, Allison Marston Danner & Jenny S. Martinez, *Guilty Associations: Joint Criminal Enterprise, Command Responsibility, and the Development of International Criminal Law*, 93 CALIF. L. REV. 75, 77 (2005) (discussing “international criminal law as an outgrowth of three legal traditions: domestic criminal law, international human rights law, and transitional justice”).

15. *See, e.g.*, Geneva Convention for the Amelioration of the Condition of the Wounded and Sick in Armed Forces in the Field, Aug. 12, 1949, 6 U.S.T. 3114, 75 U.N.T.S. 31; Geneva Convention for the Amelioration of the Condition of Wounded, Sick and Shipwrecked Members of Armed Forces at Sea, Aug. 12, 1949, 6 U.S.T. 3217, 75 U.N.T.S. 85; Geneva Convention Relative to the Treatment of Prisoners of War, Aug. 12, 1949, 6 U.S.T. 3316, 75 U.N.T.S. 135; Geneva Convention Relative to the Protection of Civilian Persons in Time of War, Aug. 12, 1949, 6 U.S.T. 3516, 75 U.N.T.S. 287 [hereinafter, collectively, Geneva Conventions].

16. *See* Opinion and Judgement, United States, et al. v. Goering, et al., (October 1, 1946), *reprinted in* 41 AM. J. INT’L LAW 172 (1947).

17. For a discussion of the tension between “victim centered” human rights law and the “perpetrator centered” criminal law, see Danner & Martinez, *supra* note 14, at 87.

18. *See, e.g.*, Rome Statute, *supra* note 1, arts. 6, 7.

precepts such as *nullum crimen sine lege* (the presumption of innocence), prohibitions against double jeopardy, and various procedural protections at trial derive from well-established norms of international human rights law.¹⁹ A third strand of law from which international criminal law is derived is that of domestic law.²⁰ In both the development of customary international law and the drafting of treaties, those participating in the formulation of international criminal law necessarily bring to the table their own understanding of criminal law based upon their legal tradition.

Several commentators have addressed the propriety of adopting norms of domestic criminal law either wholesale into international law or extrapolating from domestic law to derive international criminal law.²¹ This is an issue addressed later in this Article in the context of judicial interpretation of the Rome Statute.²² Given the differences in the nature of the crimes generally addressed by international and domestic regimes and the differing political, cultural and legal contexts in which such crimes are prosecuted, there are good arguments against assuming a domestic law approach will work at the international level.²³

19. See, e.g., International Covenant on Civil and Political Rights, art. 14, Dec. 19, 1966, 999 U.N.T.S. 171 (entered into force March 23, 1976).

20. See Danner & Martinez, *supra* note 14, at 83, for this discussion.

21. See, e.g., Robert D. Sloane, *The Expressive Capacity of International Punishment: The Limits of the National Law Analogy and the Potential of International Criminal Law*, 43 STAN. J. INT'L L. 39 (2007) ("But application of the national law analogy proves particularly problematic for ICL because it strives to combine the paradigms of two very different legal fields: (1) classical international law – a profoundly consensual body of law based on broadly shareable norms among nation-states and occupied mainly with their rights and duties inter se; and (2) national criminal law – a profoundly coercive body of law often understood to embody the most fundamental norms and values of a local community, generally that of a single nation-state (or political subdivision).").

22. See *infra* notes 99–103 and accompanying text.

23. In addition to the threads identified above as contributing to the development of international criminal law, an argument has been made by Andre Nollkaemper that the law of state responsibility is "better positioned to address systemic causes of international crimes." See Andre Nollkaemper, *Systemic Effects of International Responsibility for International Crimes*, 8 SANTA CLARA J. INT'L L. 313, 314 (2010). But see Allen S. Weiner, *Working the System: A Comment on André Nollkaemper's System Criminality in International Law*, 8 SANTA CLARA J. INT'L L. 353 (2010); Julian Ku, *How System Criminality Could Exacerbate the Weaknesses of International Criminal Law*, 8 SANTA CLARA J. INT'L L. 365 (2010).

2. Incompatibility of International Criminal Law with the Traditional Emergence of CIL

Traditionally, customary international law norms are formed by states generally and consistently engaging in a uniform practice with the understanding that they are legally obliged to do so. This sense of legal obligation is referred to as *opinio juris*.²⁴ This norm creation can take place over a long period of time or a very short period of time, as in the case of so-called “instant” CIL,²⁵ but the understanding is that at some moment in time the general practice and *opinio juris* will coalesce into a binding norm. This indeterminate and rather vague process contrasts with, or is at least in tension with, accepted tenets of international criminal law, which require clarity and precision in defining crimes, which require that the benefit of any doubt regarding that definition be given to the defendant, and which prohibit ex post facto criminal liability under the *nullum crimen sine lege* rule.²⁶ This tension is most recently apparent in the decision of the Cambodian Tribunal regarding what CIL was established in the 1970s for purposes of prosecutions currently taking place.²⁷

3. Assessing Degree of Culpability

While one may be able to tease out of all major legal systems a general rule that those who are more culpable should be convicted and punished for the most serious crimes, the actual process by which culpability is determined varies greatly

24. See *North Sea Continental Shelf* (Ger./Den. & Ger./Neth.), 1969 I.C.J. 3, 43 (Feb. 20) (“Although the passage of only a short period of time is not necessarily, or of itself, a bar to the formation of a new rule of customary international law on the basis of what was originally a purely conventional rule, an indispensable requirement would be that within the period in question, short though it might be, State practice, including that of States whose interests are specially affected, should have been both extensive and virtually uniform in the sense of the provision invoked;—and should moreover have occurred in such a way as to show a general recognition that a rule of law or legal obligation is involved.”).

25. See generally Michael P. Scharf, *Seizing the “Grotian Moment”: Accelerated Formation of Customary International Law in Times of Fundamental Change*, 43 *CORNELL INT’L L.J.* 439 (2010).

26. See Rome Statute, *supra* note 1, art. 22.

27. See *infra* notes 119–142 and accompanying text.

from system to system.²⁸ This is especially true in assessing individual responsibility for collective crimes, that is, crimes with multiple perpetrators. This determination of culpability turns on the characterization of principals versus accomplices, on the nature of complicity, on aiding and abetting, and on whether one is a co-perpetrator. It also turns on the weight to be accorded the actus reus versus the mens rea of the crime. The international tribunals that have considered these issues have emphasized different factors and hence have differing views of how to assess culpability and ultimately criminal responsibility.

C. *The Process of Interpretation*

Related to the first source of incoherence set out above, but sufficiently different to be discussed separately, is the fact that different tribunals have different ways of deciding upon and interpreting the law of their founding documents, which necessarily shapes the result reached. Even if the substantive definitions of the crimes are essentially the same, interpretation of the text may vary. For example, the ICTY is directed to consider CIL, while the ICC is directed to its own statutory language and only secondarily to CIL, and the Extraordinary Chambers in the Courts of Cambodia (“ECCC”) and other hybrid courts are often directed to apply both international law and domestic law. This has proved to be a particular issue in defining modes of participation, which are often not expressly provided for in the founding documents.²⁹

28. See generally Robert D. Sloane, *The Expressive Capacity of International Punishment: The Limits of the National Law Analogy and the Potential of International Criminal Law*, 43 STAN. J. INT’L L. 39 (2007).

29. And, of course, to the extent that domestic courts are interpreting and applying international criminal law, they are doing so through a prism of national statutory and constitutional law accessed by judges who do not routinely deal with international law. See, e.g., *Rumsfeld v. Hamdan*, 548 U.S. 557, 604–11 (2006) (“Finally, international sources confirm that the crime charged here, is not a recognized violation of the law of war. As observed above . . . none of the major treaties governing the law of war identifies conspiracy as a violation thereof. And the only ‘conspiracy’ crimes that have been recognized by international war crimes tribunals . . . are conspiracy to commit genocide and common plan to wage aggressive war, which is a crime against the peace.”).

II. *WHAT IS THE NATURE OF THE INCOHERENCE?*A. *Nuremberg: Common Plans and Criminal Organizations*

Any discussion of individual criminal responsibility under international law has to begin with Nuremberg.³⁰ The drafters of the Nuremberg Charter sought to deal with the vast nature of Nazi criminality in two principal ways.³¹ First, the Charter on its face sets out conspiracy and common plan liability as forms of participation. In Article 6(a), Crimes Against Peace, the drafters included language that made an individual criminally responsible for “naming, planning, preparation, initiation or waging of a war of aggression, or a war in violation of international treaties, agreements or assurances, or participation in a common plan or conspiracy for the accomplishment of any of the foregoing.”³² In addition, the last paragraph of Article 6, following the definitions of Crimes against Peace, Crimes against Humanity and War Crimes, states: “Leaders, organizers, instigators and accomplices participating in the formulation or execution of a common plan or conspiracy to commit any of the foregoing crimes are responsible for all acts performed by any persons in execution of such plan.”³³ These two excerpts appear to create both a substantive crime of conspiracy, in the former, and a form or mode of participation in the latter.

For reasons well documented elsewhere,³⁴ the Nuremberg Tribunal ruled that it had no jurisdiction to try persons for participating in a common plan or conspiracy to commit crimes

30. Both the trials at Nuremberg and in Tokyo post-World War II applied law agreed to by the Allies and the latter was based upon the design of the former. While the crimes defined were generally the same, see, for example, Zachary D. Kaufman, *The Nuremberg Tribunal v. The Tokyo Tribunal: Designs, Staffs, and Operations*, 43 J. MARSHALL L. REV. 753 (2010) for consideration of some of the differences.

31. The four allied powers—the United States, the United Kingdom, France, and the Soviet Union—established the Nuremberg Tribunal in the so-called London Agreement of August 8, 1945. See Agreement for the Prosecution and Punishment of Major War Criminals of the European Axis, and Establishing the Charter of the International Military Tribunal, Aug. 8, 1951, 82 U.N.T.S. 279 [hereinafter Nuremberg Charter].

32. *Id.* art. 6(a).

33. *Id.* art. 6.

34. See, e.g., TELFORD TAYLOR, *THE ANATOMY OF THE NUREMBERG TRIALS: A PERSONAL MEMOIR* (1992) (providing a first-hand account of the conduct of the trials before the Nuremberg Tribunal).

against humanity or war crimes.³⁵ Only eight of the twenty-two defendants tried at the International Military Tribunal at Nuremberg were convicted of conspiracy counts and only per Article 6(a)—Crimes against Peace.³⁶

The second way in which the Charter drafters sought to deal with the enormity of the Nazi regime's crimes was to allow for the indictment and prosecution of certain organizations under Articles 9 and 10.³⁷ At the trial of the individual defendants, the plan was to have the Tribunal "declare [in connection with any act of which the individual may be convicted] that the group or organization of which the individual was a member was a criminal organization."³⁸ Subsequent to that, proof of individual membership in these organizations would be per se criminal in "national, military, or occupation" courts.³⁹ The prosecution charged six groups or organizations with crimes against the peace, crimes against humanity, war crimes, and criminal conspiracy.⁴⁰ The plan was, as indicated above, to have the Tribunal declare these groups illegal and then members "would be subject to arrest and prosecution before national courts based solely upon their membership."⁴¹ Crucially, the burden of proof would be on the defendant to prove that membership was involuntary or that he did not know of the group's criminal purpose.⁴² Only three of the groups were found by the Tribunal to be criminal organizations.⁴³ Hundreds of trials went forward in occupation courts against members of these groups, but most of the tribunals refused to shift the burden of proof and the prosecution was thus left having to prove voluntariness and

35. See Opinion and Judgement, United States, et al. v. Goering, et al. (October 1, 1946), reprinted in 41 AM. J. INT'L LAW 172 (1947).

36. *Id.* at 331–33.

37. For a more complete discussion of the proposed criminality of organizations under the Nuremberg Charter, see VAN SCHAACK & SLYE, INTERNATIONAL CRIMINAL LAW 784–87 (2d ed. 2011).

38. Nuremberg Charter, *supra* note 31, art. 9.

39. *Id.* art. 10.

40. The groups were: the Reich Cabinet, Leadership Corps of the Nazi Party, General Staff and High Command of the German Armed Forces, the SS, the Gestapo, and the SA (Stormtroopers).

41. VAN SCHAACK & SLYE, *supra* note 37, at 784.

42. *Id.*

43. The groups were: the SS, the Gestapo, and the Leadership Corps of the Nazi Party.

knowledge, which, of course, largely nullified any benefit of the planned process.⁴⁴

B. *Joint Criminal Enterprise Doctrine*⁴⁵

1. Development of the Doctrine

Following prosecutions at the Tribunal in Nuremberg, no international tribunal or court was convened until the ICTY.⁴⁶ The ICTY and the ICTR were established as tribunals in response to the specific contexts of mass violence in the Former Yugoslavia and Rwanda, respectively. Both tribunals were created as subsidiary organs of the Security Council and operate according to statutes adopted by that body.⁴⁷

Neither of the founding Statutes referred to conspiracy or common plan liability, except with regard to conspiracy to commit genocide, which has since 1948 been specifically provided for in the Genocide Convention.⁴⁸ Reference to well-established CIL was to be made under both Statutes in applying and interpreting the crimes.⁴⁹ The Statutes were meant to codify that CIL, in response to the *ex post facto* criticism of the crimes prosecuted at Nuremberg.⁵⁰

44. VAN SCHAACK & SLYE, *supra* note 37, at 786–87.

45. Much has been written about the doctrine of Joint Criminal Enterprise and the case that generated the doctrine, but at least a brief summary is necessary here to frame the larger discussion. *See, e.g.*, Danner & Martinez, *supra* note 14; Scharf, *supra* note 25; Jens David Ohlin, *Joint Intentions to Commit International Crimes*, 11 *CHI. J. INT'L L.* 1 (2011).

46. This is so despite post-World War II intentions to establish such a court as reflected in the Convention for the Prevention and Punishment of the Crime of Genocide, Sept. 12, 1948, 78 U.N.T.S. 277, art. 6 [hereinafter Genocide Convention] (“Persons charged with genocide or any of the other acts enumerated in Article 3 shall be tried by a competent tribunal of the State in the territory of which the act was committed, or by such international penal tribunal as may have jurisdiction with respect to those Contracting Parties which shall have accepted its jurisdiction.”).

47. *See* ICTY Statute, *supra* note 1; ICTR Statute, *supra* note 1.

48. Genocide Convention, *supra* note 46, art. 3(b).

49. *See* ICTY Statute, *supra* note 1, art. 1 (“The International Tribunal shall have the power to prosecute persons responsible for serious violations of international humanitarian law”); ICTR Statute, *supra* note 1, art. 1 (“The International Tribunal for Rwanda shall have the power to prosecute persons responsible for serious violations of international humanitarian law”).

50. *See* Report of the Secretary-General Pursuant to Paragraph 2 of Security Council Resolution 808, U.N. Doc. S/25704 (May 3, 1993) [hereinafter Report of the Secretary-General]; *see also* discussion *infra* notes 158–160 and accompanying text.

Dusko Tadić was the first defendant tried by the ICTY. He was acquitted by the Trial Chamber of killing five civilians in the village of Jaskići after the military group to which he belonged had passed through the village on an ethnic cleansing mission. In 1999, the Appeals Chamber reversed his acquittal on this crime, finding first that the only reasonable conclusion the Trial Chamber could have drawn is that the armed group to which the Appellant belonged killed the five men in Jaskići.⁵¹ However, the Appeals Chamber did acknowledge that the evidence did not show that Tadić personally killed any of the men and therefore the Chamber was left to decide: (i) whether the acts of one person can give rise to the criminal culpability of another where both participate in the execution of a common criminal plan; and (ii) the degree of mens rea required in such a case.⁵² Although the ICTY statute does not mention common plan or purpose or joint criminal enterprise (“JCE”), the Tribunal found authorization for such a doctrine in Article 7(1) of the statute, which provides: “A person who planned, instigated, ordered, committed or otherwise aided and abetted in the planning, preparation or execution of a crime referred to in Articles 2 to 5 of the present Statute, shall be individually responsible for the crime.”⁵³

The *Tadić* Appeals Chamber read Article 7 broadly, finding that it was meant to reach all forms of individual responsibility, direct and indirect, that are supported by the express language of the Statute (aiding and abetting) and by CIL, and that the “object and purpose”⁵⁴ of the Statute led to the conclusion that “all those who have engaged in serious violations of international humanitarian law, whatever the manner in which they may have perpetrated, or participated in the perpetration of those violations, must be brought to justice.”⁵⁵ The Appeals Chamber then engaged in a detailed examination of post-World War II case law at the Tribunal at Nuremberg, the Tokyo

51. Prosecutor v. Tadić, Case No. IT-94-1-A, Judgement of the Appeals Chamber, para. 183 (Int’l Trib. For the Former Yugoslavia July 15, 1999).

52. *Id.* para. 185.

53. ICTY Statute, *supra* note 1, art. 7 para. 1.

54. Prosecutor v. Tadić, Case No. IT-94-1-A, Judgement of the Appeals Chamber, para. 189 (Int’l Trib. For the Former Yugoslavia July 15, 1999).

55. *Id.* para. 190.

Tribunal and the occupation trials conducted by the Allies.⁵⁶ The Chamber also looked to language in Article 25 of the Draft Rome Statute of the International Criminal Court and to similar language in the International Convention for the Suppression of Terrorist Bombing.⁵⁷ This examination persuaded the Chamber that CIL supports individual criminal responsibility for those who engage in a common plan and the Chamber further distinguished three forms of such common plan or purpose liability.

The basic form of JCE (“JCE I”) attributes individual criminal liability when all co-defendants act pursuant to a common plan or design and possess the same criminal intent, even if each co-perpetrator carries out a different role within the JCE. The mens rea for this form of JCE is the shared intent of all members to commit a certain crime.⁵⁸ The second form of JCE (“JCE II”) is referred to as the “systemic” form and exists where the participants are involved in a criminal plan that is manifested by an institutional framework, such as a concentration camp, involving an organized system of ill treatment.⁵⁹ JCE II is generally viewed as a variation of JCE I. The actus reus of this variant “was the active participation in the enforcement of a system of repression, as it could be inferred from the position of authority and the specific functions held by each accused.”⁶⁰ The mens rea required is personal knowledge of the system of ill treatment and intent to further this concerted system.⁶¹

The third and most controversial form of JCE is the so-called “extended” form (“JCE III”). JCE III ascribes individual criminal liability in situations involving a common design to

56. See discussion *infra* notes 127–143 and accompanying text.

57. Prosecutor v. Tadić, Case No. IT-94-1-A, Judgement of the Appeals Chamber paras. 221–22 (Int’l Trib. For the Former Yugoslavia July 15, 1999).

58. *Id.* para. 196 (“The objective and subjective prerequisites for imputing criminal responsibility to a participant who did not, or cannot be proven to have, effected the killing are as follows: (i) the accused must voluntarily participate in one aspect of the common design (for instance, by inflicting non-fatal violence upon the victim, or by providing material assistance to or facilitating the activities of his co-perpetrators); and (ii) the accused, even if not personally effecting the killing, must nevertheless intend this result.”).

59. See *id.* para. 202.

60. *Id.* para. 203.

61. *Id.*

commit a crime “where one of the perpetrators commits an act which, while outside the common design, was nevertheless a natural and foreseeable consequence of the effecting of that common purpose.”⁶² The mens rea for JCE III combines the shared intent of the perpetrators to achieve the common criminal purpose and the “foreseeability of the possible commission by other members of the group of offences that do not constitute the object of the common criminal purpose.”⁶³ The *Tadić* Appeals Chamber referred to this mens rea as “advertent recklessness”⁶⁴ and it has been analogized to the “felony murder doctrine” in common law jurisprudence,⁶⁵ and to Pinkerton type conspiracy under US law.⁶⁶

In the illustration it offered of a JCE III situation, the Appeals Chamber made clear the result it would reach on the facts of *Tadić*. JCE III would exist, according to the Chamber, where there is:

[A] common, shared intention on the part of a group to forcibly remove members of one ethnicity from their town, village or region . . . with the consequence that, in the course of doing so, one or more of the victims is shot and killed. While murder may not have been explicitly acknowledged to be part of the common design, it was nevertheless foreseeable that the forcible removal of civilians at gunpoint might well result in the deaths of one or more of those civilians.⁶⁷

62. *Id.* para. 204.

63. *Id.* para. 220.

64. *Id.*

65. *See, e.g.*, Scharf, *supra* note 25.

66. *See* Pinkerton v. United States, 328 U.S. 640 (1946); *see also* Ohlin, *supra* note 45, at 703.

67. Prosecutor v. Tadić, Case No. IT-94-I-A, Judgement of the Appeals Chamber paras. 204 (Int'l Trib. For the Former Yugoslavia July 15, 1999).

2. Critique of the JCE Doctrine⁶⁸

The critique of JCE doctrine falls into two broad categories: first, an argument that the *Tadić* interpretation of and reliance upon the post-World War II case law as establishing CIL is incorrect; and, second, a substantive critique of the doctrine itself, particularly JCE III, as too indefinite, lacking clarity, too broad, and inconsistent with basic tenets of criminal law. The former category includes arguments that the ICTY improperly interpreted Article 7(1) of its statute to encompass common plan liability, and that the *Tadić* Appeals Chamber incorrectly interpreted the post-World War II case law to support such a doctrine.⁶⁹ For example, Professor Ohlin argues that “the arguments offered by the ICTY Appeals Chamber for an expansive reading of Article 7[, namely,] the object and purpose of the ICTY Statute to prosecute the architects of war crimes, the collective nature of genocide and war crimes, and the international case law on collective criminal action” each contain “deficiencies that cast doubt on the version of the doctrine of joint criminal enterprise constructed by the *Tadić* court.”⁷⁰ The second category of critique, while often also objecting to the *Tadić* interpretation of the post-World War II cases, focuses instead on the deficiencies of the JCE doctrine itself. For example, Professors Danner and Martinez do not wholly reject the ICTY’s use of JCE, they do, however, object to the scope of the doctrine, the failure of the ICTY Appeals Chamber to narrow the definition of an “enterprise,” and its application to “specific intent” crimes.⁷¹

68. The “extended” form of Joint Criminal Enterprise (“JCE III”) has been a controversial doctrine even within the International Criminal Tribunal of the Former Yugoslavia (“ICTY”) itself. *See, e.g.*, Prosecutor v. Stakić, Case No. IT-97-24-T, Judgement (Int’l Crim. Trib. for the Former Yugoslavia July 31, 2003) (espousing a doctrine of co-perpetration at odds with the JCE doctrine). This decision was overturned on appeal. Prosecutor v. Stakić, Case No. IT-97-24-A (Int’l Crim. Trib. for the Former Yugoslavia Mar. 22, 2006).

69. For a discussion of both of these arguments, see Jens David Ohlin, *Three Conceptual Problems with the Doctrine of Joint Criminal Enterprise*, 5 J. INT’L CRIM. JUST. 69 (2007).

70. *Id.* at 71.

71. Danner & Martinez, *supra* note 14, at 102–51.

3. Other Tribunals and JCE

Following the decision in *Tadić*, the ICTR, applying a statutory provision virtually identical to Article 7 of the ICTY Statute, also applied JCE in all its forms.⁷² In addition, other tribunals have applied forms of JCE, including the Special Court for Sierra Leone (“SCSL”), Special Panels for the Trial of Serious Crimes in East Timor, and most recently the Special Tribunal for Lebanon (“Lebanon Tribunal”).⁷³ Moreover, the Iraqi Tribunal, which was a national court applying international law, found JCE applicable;⁷⁴ the US Supreme Court alluded to the doctrine in a prosecution of a Guantanamo prisoner.⁷⁵

C. Co-Perpetration in the International Criminal Court

1. Background Information on Individual Responsibility and the ICC

Drafting of the Rome Statute, which created the International Criminal Court (“ICC”) was completed before the ICTY had articulated the doctrine of joint criminal enterprise. This treaty was finalized in 1998 and took effect on July 1, 2002, when the requisite 60th State ratified it. Defining the limits of individual responsibility had been carefully considered in drafting the statute. Varying modes of liability were considered and some were explicitly rejected. The Rome Statute contains a detailed provision outlining the requirements for individual criminal responsibility that reflects the compromises made in its negotiations. Article 25 of the Statute provides in relevant part:

72. See, e.g., Prosecutor v. Kayishema, Case No. ICTR-95-1-T, Judgement (Int’l Crim. Trib. for Rwanda May 21, 1999). Note that many if not most of the ICTR prosecutions have been for genocide and thus subject to the crime of “conspiracy to commit genocide.” See also ICTR Statute, *supra* note 1, art. 6.

73. The Lebanon Tribunal interestingly found JCE to be a doctrine generally supported by customary international law (“CIL”), not just under ICTY Article 7(a) language. See Interlocutory Decision on the Applicable Law: Terrorism, Conspiracy, Homicide, Perpetration, Cumulative Charging, Case No. STL-11-01/1 (Special Trib. for Lebanon Feb. 16, 2011). It also noted in passing that the ICC’s alternative co-perpetration based upon the “control theory” was not, unlike JCE, “not recognized in customary international law.” *Id.* para. 18.

74. See Ian M. Ralby, *Joint Criminal Enterprise in the Iraqi High Tribunal*, 28 B.U. INT’L L. J. 281 (2010).

75. *Hamdan v. Rumsfeld*, 58 U.S. 557, 611 n.40 (2006).

In accordance with this Statute, a person shall be criminally responsible and liable for punishment for a crime within the jurisdiction of the Court if that person:

- (a) Commits such a crime, whether as an individual, jointly with another or through another person, regardless of whether that other person is criminally responsible;
- (b) Orders, solicits or induces the commission of such a crime which in fact occurs or is attempted;
- (c) For the purpose of facilitating the commission of such a crime, aids, abets or otherwise assists in its commission or its attempted commission, including providing the means for its commission;
- (d) In any other way contributes to the commission or attempted commission of such a crime by a group of persons acting with a common purpose. Such contribution shall be intentional and shall either:
 - (i) Be made with the aim of furthering the criminal activity or criminal purpose of the group, where such activity or purpose involves the commission of a crime within the jurisdiction of the Court; or
 - (ii) Be made in the knowledge of the intention of the group to commit the crime⁷⁶

2. The ICC Weighs In

Many scholars, including some who participated in the drafting of the Rome Statute, anticipated that the ICC would use the language of Article 25 to implement a form of JCE in the new court.⁷⁷ The first opportunity for the Court to address this

76. Rome Statute, *supra* note 1, art. 25(3). Article 25 also makes provision for the crime of incitement to commit genocide and attempt:

- (e) In respect of the crime of genocide, directly and publicly incites others to commit genocide;
- (f) Attempts to commit such a crime by taking action that commences its execution by means of a substantial step, but the crime does not occur because of circumstances independent of the person's intentions. However, a person who abandons the effort to commit the crime or otherwise prevents the completion of the crime shall not be liable for punishment under this Statute for the attempt to commit that crime if that person completely and voluntarily gave the criminal purpose.

Id.

77. *See, e.g.*, William Schabas, AN INTRODUCTION TO THE INTERNATIONAL CRIMINAL COURT 103–04 (2d ed. 2004) (“Inspired by this provision in the Rome

issue came in the Pre-Trial Chamber's Decision on the Confirmation of Charges in the *Lubanga* case.⁷⁸ The Prosecutor charged Lubanga "with criminal responsibility under Article 25(3)(a) of this Statute, which covers the notions of direct perpetration (commission of a crime in person), co-perpetration (commission of a crime jointly with another person) and indirect perpetration (commission through another person, regardless of whether that other person is criminally responsible)." ⁷⁹ The Prosecution also referred to Article 25(3)(d) of the Rome Statute in submitting that, in addition to Article 25(3)(a) liability, Lubanga was potentially subject to Article 25(3)(d). The prosecutor "believe[d] that 'common purpose' in terms of Article (3)(d) could properly be considered as a "third applicable mode of criminal liability," and therefore, "request[ed] that the Pre-Trial Chamber make findings that the legal requirements of these three modes of liability are either satisfied or not satisfied."⁸⁰ The Prosecution made this request in light of the possibility that any one of these theories might not prevail. In that case, it would "promote efficiency" if the Prosecution could rely on a previous finding that charges might be based on an alternative theory.⁸¹ The Prosecution does, however, assert that "co-perpetration" pursuant to Article 25(3)(a) "best represents the criminal

Statute, the judges of the ICTY have developed what has come to be known as 'joint criminal enterprise' theory of liability, and it would seem plausible that ICC judges will be strongly influenced by this case law in their application of Article 25."); Danner & Martinez, *supra* note 14, at 154 ("The Rome Statute of the International Criminal Court (ICC) states that an individual is criminally responsible for a crime if he commits, orders, or aids and abets the crime, or '[i]n any other way contributes to the commission of such a crime by a group of persons acting with a common purpose.' Thus, JCE, under one of its alternative names (common purpose doctrine) falls within the ambit of the ICC Statute."); Ohlin, *supra* note 69, at 77 ("It is perhaps laudable that the Rome Statute includes a more detailed provision on joint criminal enterprise in Article 25.").

78. Prosecutor v. Lubanga Dyilo, Case No. ICC-01/04-01/06, Decision on the Confirmation of Charges (Jan. 29, 2007), <http://www.icc-cpi.int/iccdocs/doc/doc266175.pdf>.

79. *Id.* para. 318 (citing Prosecutor v. Lubanga Dyilo, Case No. ICC-01/04-01/06-356-Conf-Anx1, Documents Containing the Charges para. 27 (Aug. 28, 2006)).

80. Prosecutor v. Lubanga Dyilo, Case No. ICC-01/04-01/06, Document Containing the Charges para. 12(ii) (Aug. 28, 2006), <http://www.icc-cpi.int/iccdocs/doc/doc192552.pdf>.

81. *Id.*

responsibility for crimes with which Thomas Lubanga Dyilo is charged.”⁸²

The Pre-Trial Chamber (“PTC”) made two early determinations that influenced its final decision. First, it decided that if it finds that there is criminal responsibility for defendant Lubanga as a co-perpetrator under Article 25(3)(a), “the question as to whether it may also consider the other forms of accessory liability provided for in Articles 25(3)(b) to (d) of the Statute or the alleged superior responsibility of Thomas Dyilo Lubanga under Article 28 [would] become[] moot.”⁸³ Note that in making this determination, the PTC foreshadowed its later conclusion that Article 25(3)(d) provides for a form of accessory liability only and rendered its discussion of 25(3)(d) dicta. Second, in focusing on the concept of co-perpetration as set out in Article 25(3)(a) and finding it:

[R]ooted in the idea that when the sum of co-ordinated individual contributions of a plurality of persons results in the realisation 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.⁸⁴

The PTC concluded that “the definitional criterion of the concept of co-perpetration is linked to the distinguishing criterion between principals and accessories to a crime where a criminal offence is committed by a plurality of persons.”⁸⁵

What the Chamber seems to mean here is that the criterion that they will adopt as key to co-perpetration will distinguish that form of joint liability from accessory liability (i.e., if you meet this criterion then principal liability will attach under Article 25(3)(a)). This does not, on its face, seem to preclude asserting principal liability under another provision, Article 25(3)(d) being the most likely, though that is where the PTC seems to end up.

82. Prosecutor v. Lubanga Dyilo, Case No. ICC-01/04-01/06, Document Addressing Matters that Were Discussed at the Confirmation Hearing para. 27 (Dec. 4, 2006), <http://www.icc-cpi.int/iccdocs/doc/doc243643.pdf>.

83. Prosecutor v. Lubanga Dyilo, Case No. ICC-01/04-01/06, Decision on the Confirmation of Charges para. 321 (Jan. 29, 2007).

84. *Id.* para. 326.

85. *Id.* para. 327.

The PTC then considered three possible approaches to the distinction between principal and accessory liability upon which the Article 25(3)(a) category of co-perpetration will depend. The first is the objective approach, which focuses on the completion of objective elements of the crime (i.e., the *actus reus*), so that “only those who physically carry out one or more of the objective elements of the offence can be considered principals to the crime.”⁸⁶ The second is the “subjective approach,” which the PTC identifies with the ICTY and its JCE jurisprudence. This approach “moves the focus from the level of contribution to the commission of the offence as the distinguishing criterion between principals and accessories, and places it instead on the state of mind in which the contribution to the crime was made.”⁸⁷ The PTC concludes that only those with the “shared intent” to commit the crime “can be considered principals to the crime, regardless of the level of their contribution to the commission.”⁸⁸ The third approach, and the one adopted by the Chamber, is what the opinion characterizes as the “concept of control.”⁸⁹ This approach, which the Chamber contends is applied in numerous legal systems but which is largely based upon German law,⁹⁰ maintains that principals to a crime include not only those who physically perpetrate the objective elements of a crime, but “also . . . 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.”⁹¹ Note that in explaining these approaches and their relevance to drawing a line between principal and accessorial liability, the PTC glosses

86. *Id.* para. 328.

87. *Id.* para. 329.

88. *Id.* This conclusion by the Pre-Trial Chamber (“PTC”) does not seem adequately to recognize the required *actus reus* for JCE in its various forms and thus presents an overly simplified view of that doctrine. It is not all clear that the application of JCE precludes a finding of accessorial liability in a given case.

89. *Id.* para. 330.

90. The Chamber essentially cites German law and literature, or cases citing German law, in support of its decision. *See, e.g., id.* paras. 346–48 and accompanying footnotes.

91. *Id.*

over the conflict that exists regarding them in the German domestic law and commentary upon which it relies.⁹²

The PTC spends a great deal of time defining the “concept of control,” noting that it has both an objective and a subjective element: the former “consisting of the appropriate factual circumstances for exercising control over the crime” and the latter “consisting of the awareness of such circumstances.”⁹³ The PTC concludes that this approach characterizes as principals only those who have “control over the commission of the offense—and are aware of having such control.”⁹⁴

The PTC further distinguishes Article 25(3)(a) from (3)(d), “which is closely akin to the concept of joint criminal enterprise or common purpose doctrine adopted by the jurisprudence of the ICTY,” by concluding that Article 25(3)(d) applies only to accessorial liability and a “residual form of accessory liability” applicable only if 25(3)(b) or (c) does not apply.⁹⁵ This conclusion is not self-evident from the language of the statute, nor widely shared. An argument could certainly be made that Article 25(3)(d) could provide for another form of principal liability, particularly in a large-scale crime based upon a common plan versus the type of co-perpetration provided for in *Lubanga*.⁹⁶ Once the PTC had decided to embrace the notion

92. For a comprehensive and excellent exploration of the control theory of perpetration, see Neha Jain, *The Control Theory of Perpetration in International Law*, 12 CHI. J. INT'L L. 159 (2011).

93. Prosecutor v. Lubanga Dyilo, Case No. ICC-01/04-01/06, Decision on the Confirmation of Charges para. 331 (Jan. 29, 2007).

94. *Id.* para. 332. This is so “because: i. they physically carry out the objective elements of the offence (commission of the crime in person or direct perpetration); ii. they control the will of those who carry out the objective elements of the offence (commission of the crime through another person, or indirect perpetration; or iii. They have along with others, control over the offence by reason of the essential tasks assigned to them (commission of the crime jointly with others, or co-perpetration).” *Id.*

95. *Id.* paras. 335–37.

96. That section could also be read as providing an alternative and not subsidiary form of liability: “Indeed in *Furundzija*, the ICTY held that these provisions confirm that international (criminal) law recognizes a distinction between aiding and abetting a crime and participation in a common criminal plan as ‘two separate categories of liability for criminal participation . . . – co-perpetrators who participate in a joint criminal enterprise, on the one hand, and aiders and abettors, on the other.’” Kai Ambos, *Article 25: Individual Criminal Responsibility*, in COMMENTARY ON THE ROME STATUTE OF THE INTERNATIONAL CRIMINAL COURT 475, 484 (Otto Triffterer ed., 2d ed. 2008). Indeed, the Appeals Chamber in *Tadić* went to great lengths to distinguish the JCE doctrine it was announcing from aiding and abetting under the ICTY Statute:

of the concept of control as a distinguishing feature of principal versus accessory liability, the PTC “considers that the concept of co-perpetration embodied in Article 25(3)(a) of the Statute coincides with that of joint control over the crime by reason of the essential nature of the various contributions to the commission of the crime.”⁹⁷ Key to the application of this model to joint or co-perpetration by two or more persons is the idea that no one perpetrator need exercise overall control over the offense, but that they share control in the sense that each of them “could frustrate the commission of the crime by not carrying out his or her task.”⁹⁸

Following the decision in *Lubanga* concerning the control theory of co-perpetration, the ICC PTC in the *Katanga & Chui* case extended this doctrine to encompass joint indirect perpetration, a much more controversial version of the control theory.⁹⁹ As Professor Jain notes, the “heavy reliance of the

In light of the preceding propositions it is now appropriate to distinguish between acting in pursuance of a common purpose or design to commit a crime, and aiding and abetting.

(i) The aider and abettor is always an accessory to a crime perpetrated by another person, the principal.

(ii) In the case of aiding and abetting no proof is required of the existence of a common concerted plan, let alone of the pre-existence of such a plan. No plan or agreement is required: indeed, the principal may not even know about the accomplice’s contribution.

(iii) The aider and abettor carries out acts specifically directed to assist, encourage or lend moral support to the perpetration of a certain specific crime (murder, extermination, rape, torture, wanton destruction of civilian property, etc.) and this support has a substantial effect upon the perpetration of the crime. By contrast, in the case of acting in pursuance of a common purpose or design, it is sufficient for the participant to perform acts that in some way are directed to the furthering of the common plan or purpose.

(iv) In the case of aiding and abetting, the requisite mental element is knowledge that the acts performed by the aider and abettor assist the commission of a specific crime by the principal. By contrast, in the case of common purpose or design more is required (i.e., either intent to perpetrate the crime or intent to pursue the common criminal design plus foresight that those crimes outside the criminal common purpose were likely to be committed) as stated above.

Prosecutor v. Tadić, Case No. IT-94-1-A, Judgment, para. 229 (Int’l Crim. Trib. for the Former Yugoslavia July 15, 1999).

97. *Id.* para. 341.

98. *Id.* para. 342.

99. See Prosecutor v. Katanga & Chui, Case No. ICC-01/04-01//07, Decision on the Confirmation of Charges paras. 495–99 (Sept. 30, 2008), <http://www.icc-cpi.int/iccdocs/doc/doc571253.pdf>.

Katanga and Chui Pre-Trial Chamber on theory of *Organisationsherrschaft* is controversial, given that this theory does not enjoy wide support in domestic legal systems, with the exception of Germany and a few Latin American states that are heavily influenced by German legal doctrine.”¹⁰⁰ It is noteworthy that “the Chamber cites Claus Roxin almost exclusively in its elucidation of the elements of the doctrine.”¹⁰¹

3. Critiques of the ICC’s Control Theory of Perpetration

Professor Jain’s article has many interesting things to say about the control theory of perpetration and its potential to provide a nuanced approach to the complex questions surrounding modes of liability in international criminal law. She does, however, have several concerns with the ICC Pre-Trial Chamber’s embrace of this theory. Among them, she notes that the “sparseness of the elements outlined by *Lubanga* makes it difficult to assess how they would be applied to concrete cases before the court.”¹⁰² In addition, she points out that over reliance on one theory of control, Roxin’s, which has wide support in the scholarly community but has not been adopted by the German courts, is problematic, as is the *Katanga* PTC’s reliance on indirect co-perpetration, when “there is considerable debate even in German academic circles about the viability of the doctrine” since “[t]he individual elements of the doctrine . . . have been subjected to considerable criticism, and prominent academics in Germany reject the application of the doctrine altogether in favor of co-perpetration and even secondary responsibility for instigation.”¹⁰³

Regarding the issue Professor Jain characterizes as the “substantive issue of whether these are theoretically sound modes of liability that the ICC can legitimately adopt for international crimes,” several concerns have been raised by scholars.¹⁰⁴ Yet, there is also a procedural objection to the ICC’s

100. Jain, *supra* note 92, at 184.

101. *Id.*

102. *Id.* at 183.

103. *Id.* at 186.

104. See, e.g., Ohlin, *supra* note 45 (rejecting control as the basis for liability under Article 25 and arguing that a theory of “Joint Intentions” would restore mens rea to a central role in developing a doctrine to govern individual liability for collective crimes). But see Jain, *supra* note 92, at 186 (extensively critiquing Ohlin’s critique); see also

interpretation of Article 25. The PTCs have seemingly ignored the direction given to the Court in Article 21 regarding which law is to be applied in the Court. In the name of applying the language of “this Statute,” the PTC actually applies, without adequate explanation, a narrow doctrine not widely accepted, nor supported explicitly or implicitly by the *travaux préparatoires* or international law more generally.¹⁰⁵ This issue will be explored more fully in Part IV of this Article.

D. *The Cambodian Tribunal’s Decision Regarding JCE*

The last piece of incoherence in the doctrine derives from the decision in May 2010, by the Extraordinary Chambers in the Courts of Cambodia (“ECCC”), a hybrid court charged with trying “those most responsible” for crimes of the Khmer Rouge, thirty-five years after the fact.¹⁰⁶ That court decided that the CIL between 1975 and 1979 supported the application of JCE I and JCE II, but not that of JCE III. The context of this decision was an appeal of the Co-Investigative Judges Order on JCE concerning the:

[O]ngoing judicial investigation against NUON Chea, IENG Sary, IENG Thirith, KHIEU Samphan and KAING Guek Eav alias “Duch” relating to charges of crimes against humanity and grave breaches of the Geneva Conventions dated 12 August 1949, offences defined and punishable under Articles 5, 6, 29 (new) of the law on the Establishment of the Extraordinary Chambers in the Courts of Cambodia, dated 27 October 2004 (“ECCC Law”).¹⁰⁷

OSIEL, *supra* note 4, at 33–65 (critiquing the indirect perpetration model relied on in *Katanga*).

105. See Rome Statute, *supra* note 1, art. 21.

106. See Law on the Establishment of the Extraordinary Chambers in the Courts of Cambodia for the Prosecution of Crimes Committed During the Period of Democratic Kampuchea, Royal Decree No. NS/RKM/0801/12, art. 1 (Aug. 10, 2001) (Cambodia):

The purpose of this law is to bring to trial senior leaders of Democratic Kampuchea and those who were most responsible for the crimes and serious violations of Cambodian penal law, international humanitarian law and custom, and international conventions recognized by Cambodia, that were committed during the period from 17 April 1975 to 6 January 1979.

107. Case No. 002/19-09-2007-ECCC/OCIJ(PTC38), Public Decision on the Appeals Against the Co-Investigative Judges Order on Joint Criminal Enterprise, para. 1 (May 20, 2010) (Cambodia).

This appeal sought to quash the order of the Co-Investigating Judges that the doctrine of Joint Criminal Enterprise was applicable law in the ECCC.¹⁰⁸ The defendants argued that JCE should be inapplicable because:

such application would violate the principle of legality because JCE was not acknowledged as customary international law before or during the period of 1975-1979, nor is it presently recognized as such and 2) JCE is not specified in the ECCC Establishment Law, nor is it a part of Cambodian law or recognized by any international convention enforceable before the ECCC.¹⁰⁹

After resolving various procedural matters, the PTC reached the merits of the defendants' appeal.

The PTC first cited the *Tadić* decision, its three categories of JCE and its understanding of the common actus reus for all three types of JCE, "namely: (i) a common plan . . . ; (ii) involving a plurality of persons[;] and (iii) an individual contribution by the charged person or accused to the execution of the common plan"¹¹⁰ The Chamber also sets out the variations in *mens rea* established earlier, which attach to each form of JCE and characterizes the "concept of JCE as a form of criminal responsibility in international law" as a "unique" one, which "combines features from different legal traditions and has been applied and shaped by actors from varying legal backgrounds."¹¹¹ The Chamber makes reference to prosecutors and judges at the post-World War II commissions and tribunals who:

applied the concepts on responsibility established in the Nuremberg Charter and Control Council No. 10 not only to impose responsibility on those perpetrators who physically committed acts for their violations of humanitarian law, but also on those individuals who, pursuing a common design with others, participated in the commission of such crimes(s).¹¹²

108. *Id.* para. 2.

109. *Id.*

110. *Id.* para. 38.

111. *Id.* paras 39–40.

112. *Id.* para. 40.

Some of those crimes, the Chamber noted, involved mob violence against Allied military and resistance forces in which the crimes were physically committed by individuals who shared a common intent with the accused, who was not remote from the perpetration of the crime. The tribunal also identified crimes “perpetrated on a broader scale and involving state agents, the persons convicted were usually remote from the physical perpetration of the crimes and no consideration was given to the criminal responsibility or even state of mind of the perpetrators.”¹¹³

The Chamber acknowledged that the relevant Cambodian law of the 1970s, which was based upon the civil law, did recognize a form of “co-perpetration,” which resembles JCE I and II in that it treats as co-perpetrators “not only those who physically perform the *actus reus* of the crime, but also those who possess the *mens rea* for the crime and participate or contribute to its commission.”¹¹⁴ However, these two doctrines, JCE and co-perpetration, are not co-extensive, since JCE would appear to embrace situations in which the accused is “more remote from ‘actual perpetration of the’ crime than the direct perpetration required under domestic law.”¹¹⁵

In establishing the framework for its decision, the Tribunal makes reference to Article 33 (2) (new) of the ECCC Law, which requires that the “ECCC shall exercise its jurisdiction in accordance with international standards of justice, fairness and due process of law, as set out in Articles 14 and 15 of the International Covenant on Civil and Political Rights (“ICCPR”).”¹¹⁶ The PTC referred specifically to the principle of *nullum crimen sine lege* found in Article 15(1).¹¹⁷ The Chamber set out four pre-conditions that therefore must be satisfied in order for a particular form of criminal responsibility to fall within the ECCC’s jurisdiction:

113. *Id.*

114. *Id.* para. 41.

115. *Id.*

116. *Id.* para. 43.

117. *Id.*; see International Covenant for Civil and Political Rights art. 15(1), Dec. 16, 1966, 999 U.N.T.S. 171 (“No one shall be held guilty of any criminal offense on account of any act or omission which did not constitute a criminal offense, under national or international law, at the time when it was committed.”).

- (i) it must be provided for in the [ECCC Law], explicitly or implicitly;
- (ii) it must have existed under customary international law at the relevant time;
- (iii) the law providing for that form of liability must have been sufficiently accessible at the relevant time to anyone who acted in such a way;
- (iv) such person must have been able to foresee that he could be held criminally liable for his actions if apprehended.¹¹⁸

In applying these pre-conditions, the Chamber first rejected arguments by the defense that the OCIJ erred in finding that the ECCC could apply customary international law. The defense based this argument on the fact that the ECCC is in essence a domestic Cambodian court in a country adhering to a dualist system, without “specific directives in the Constitution, legislation or national jurisprudence incorporating customary law into domestic law.”¹¹⁹ The Chamber concluded that Article 2 of the ECCC Law provided jurisdiction to apply forms of responsibility recognized by customary international law at the relevant time.¹²⁰ Having found that the ECCC had jurisdiction both to prosecute these defendants for violations of IHL, and to apply CIL, the Chamber then turned to what it characterized as the “core of the Appeals, that is whether there was in 1975–1979 a customary law basis for JCE and, in the alternative, its systematic and extended forms, and if so, whether these form(sic) of responsibility were sufficiently accessible and foreseeable to the Charged Persons.”¹²¹

118. Case No. 002/19-09-2007-ECCC/OCIJ(PTC38), Public Decision on the Appeals Against the Co-Investigative Judges Order on Joint Criminal Enterprise, para. 43 (May 20, 2010) (Cambodia).

119. *Id.* para. 48.

120. *Id.*

121. *Id.* para. 50.

1. Was JCE a Recognized Form of Criminal Responsibility under CIL Prior to 1975?

Despite some initial confusing language with regard to determining when CIL exists,¹²² the Chamber cites the Statute of the International Court of Justice for language regarding the legitimacy of CIL as a source of international law, which requires the court to apply “international custom, as evidence of a general practice accepted as law.”¹²³ The Chamber finds that, in terms of state practice, “not only must the acts concerned amount to a settled practice, but they must be such, or be carried out in such a way, as to be evidence of a belief that this practice is rendered obligatory by the existence of a rule of law requiring it.”¹²⁴ The Chamber then engaged in a full consideration of the *Tadić* Appeals Judgment. It noted that the Order appealed in this case “logically refers to the above ICTY seminal decision on JCE as persuasive authority for its conclusion that, ‘[c]onsidering the international aspects of the ECCC and the fact that the jurisprudence relied upon in articulating JCE pre-existed the events under investigation at the ECCC, there is a basis under international law for applying JCE before the ECCC.’”¹²⁵

The PTC then proceeded to differentiate JCE I and II from JCE III. As to the former, which the Chamber characterized as “basic and systemic forms of JCE,” the Chamber refused to limit its assessment of “whether *Tadić* incorrectly” found JCE liability to a consideration of the authorities relied upon by the Appeals Chamber in that case.¹²⁶ Instead, the ECCC Pre-Trial Chamber found the *Tadić* opinion:

122. *See, e.g., id.* para. 53 (“When determining the state of customary international law in relation to the existence of a crime or form of individual responsibility, a court shall assess existence of ‘common, consistent and concordant’ state practice or *opinio juris* . . .”).

123. Statute of the International Court of Justice, art. 38, para. 1, June 26, 1945, 59 Stat. 1055, 33 U.N.T.S. 993 (annexed to U.N. Charter).

124. Case No. 002/19-09-2007-ECCC/OCIJ(PTC38), Public Decision on the Appeals Against the Co-Investigative Judges Order on Joint Criminal Enterprise, para. 53 (May 20, 2010) (quoting *North Sea Continental Shelf (Ger./Den. & Ger./Neth.)*, 1969 I.C.J. 3, 77 (Feb. 20)) (Cambodia).

125. *Id.* para. 54.

126. *Id.* para. 57.

“[R]einforced by the use made of the doctrine of common plan or enterprise in”: 1) Article 6 of the London Charter of the International Military Tribunal (“London Charter” or the “Nuremberg Charter”), providing that persons “participating in the formulation or execution of a Common Plan or Conspiracy to commit crimes against peace, war crimes, or crimes against humanity are responsible for all acts performed by any persons in execution of such plan”; and 2) the Control Council Law No. 10, which was a legislative act jointly passed in 1945 by the four Occupying Powers, reflecting international agreement among the Great Powers on the law applicable to international crimes and the jurisdiction of the military courts called upon to rule on such crimes, providing that both the principal perpetrator and a person “connected with plans or enterprises involving” the commission of a crime were considered to have ‘committed’ that crime.¹²⁷

The PTC concluded that these instruments show an intention to find criminal liability for one who does not physically perpetrate a crime, but intentionally participates in the formulation or execution of a common plan. Therefore, “[t]his constitutes undeniable support of the basic and systemic forms (JCE I and II) of JCE liability.”¹²⁸

Regarding the preliminary question of whether judicial decisions should form the basis for determining customary international law, the PTC found such case law to be “an authoritative interpretation of their constitutive instruments” and that it “can be relied upon to determine the state of customary international law with respect to the existence of JCE as a form of criminal responsibility” at the time relevant for this case.¹²⁹ The chamber then considered the eight cases relied upon by *Tadić* in support of JCE I and II.¹³⁰ It also accepted the

127. *Id.*

128. *Id.* para. 58.

129. *Id.* para. 60.

130. *Id.* paras. 62–63 (citing *The Trial of Otto Sandrock and Three Others, British Military Court for the Trial of War Criminals, Held at the Court House, Almelo, Holland on 24-26 November, 1945, reprinted in* 1 UNITED NATIONS WAR CRIMES COMM’N, LAW REPORTS OF TRIALS OF WAR CRIMINALS 35 (1947); *Hoelzer et al.*, 1 CANADIAN MILITARY COURT AURICH GERMANY, RECORD OF PROCEEDINGS 25 MARCH-6 APRIL, 1946, at 341, 347, 349 (RCAF Binder 181.009) (D2474); *Trial of Gustav Alfred Jepsen and Others, reprinted in* PROCEEDINGS OF A WAR CRIMES TRIAL HELD AT LUNEBERG, GERMANY (13-23 AUGUST, 1946), Judgement of 24 August 1946 (original transcripts in Public Record Office, Kew,

representation of the OCP that there are “more relevant post-World War II international military cases than the ones cited by *Tadić* and considered two of those to be particularly relevant.”¹³¹

Ultimately, the PTC concluded that, “[i]n the light of the London Charter, Control Council Law No. 10, international cases and authoritative pronouncements” there is “no doubt that JCE I and JCE II were recognized forms of responsibility in customary international law at the time relevant for Case 002.”¹³² Moreover, because these forms of responsibility were recognized in CIL, and were forms the Chamber held to “have an underpinning in the Cambodian law concept of co-authorship applicable at the time,” such liability was “sufficiently accessible and foreseeable to the defendants.”¹³³

The PTC finally addressed the “more controversial form of JCE”¹³⁴—JCE III. The defendants here argued that JCE III was not supported by customary international law and that its application would therefore violate the principle of legality. Support for the JCE III doctrine was lacking, the Appellants argued, because in the World War II cases cited, “the military courts only issued a simple guilty verdict and made no extensive

Richmond); *Trial of Franz Schonfeld and Others*, in *British Military Court, Essen, June 11-26, 1946*, reprinted in 11 LAW REPORTS OF TRIALS OF WAR CRIMINALS, *supra*, at 68; *Trial of Feurstein and Others*, reprinted in PROCEEDINGS OF A WAR CRIMES TRIAL HELD AT HAMBURG, GERMANY (4-24 AUGUST, 1948), Judgement of 24 August 1948 (original records in Public Record Office, Kew, Richmond); *United States v. Ohlenforf et al.*, reprinted in 4 TRIALS OF WAR CRIMINALS BEFORE THE NUREMBERG MILITARY TRIBUNALS UNDER CONTROL COUNCIL LAW NO. 10, at 3 (1951); *Trial of Martin Gottfried Weiss and Thirty-nine Others*, *General Military Government Court of the United States Zone, Dachau, Germany, 15 November-13 December, 1945*, reprinted in 11 LAW REPORTS OF TRIALS OF WAR CRIMINALS, *supra*, at 5; *Trial of Josef Kramer and 44 others*, *British Military Court, Lüneberg, 17 September-17 November, 1945*, reprinted in 2 LAW REPORTS OF TRIALS OF WAR CRIMINALS, *supra*, at 1 (1945)).

131. *Id.* para. 65 (“The Pre-Trial Chamber finds two of the Control Council law No. 10 cases, the *Justice* and *RuSHA* cases, to be particularly apposite to determining whether the basic and systemic forms of JCE (JCE I & II) formed part of customary international law at the time relevant for Case 002. These cases have been discussed extensively by the ICTR Appeals Chamber, who *inter alia* relied on these sources to conclude that, as of 1992, customary international law permitted the imposition of criminal liability on a participant in a common plan to commit genocide.”).

132. *Id.* para. 69.

133. *Id.* para. 72.

134. *Id.* para. 74.

legal finding on the issue of common criminal plan.”¹³⁵ The Appellants also argued that *Tadić*:

‘relied in large part on unpublished cases, mostly from Italy [. . .] which has adopted a unitary system whereby any person who intervenes in the commission of a crime is liable as a perpetrator, whereas most national criminal law systems have adopted an approach that makes a distinction between perpetrators or principals to the crime and accessories to the crime or secondary parties. . . .’¹³⁶

The OCP countered that the Appellants’ arguments ignore substantial evidence supporting the *Tadić* finding of JCE III and argued that “many advanced jurisdictions recognized modes of co-perpetration similar to JCE III, [including] conspiracy, the felony murder doctrine, the concept of *association de malfaiteurs* and numerous other doctrines of co-perpetration.”¹³⁷

The PTC agreed with the Appellants that the authorities relied upon by *Tadić* “do not provide sufficient evidence of consistent state practice or *opinio juris* at the time relevant to” the Cambodian prosecution.¹³⁸ The Chamber “concludes that JCE III was not recognized as a form of responsibility applicable to violations of international humanitarian law” for several reasons.¹³⁹ First, neither the Nuremberg Charter nor Control Council Law No. 10 specifically provide for JCE III.¹⁴⁰ Second, the Chamber discounted the *Tadić* reliance on post-World War II cases,¹⁴¹ finding that while the facts in those cases might be consistent with a finding of JCE III, “in the absence of a reasoned judgement in these cases, one cannot be certain of the basis of liability actually retained by the military courts.”¹⁴²

135. *Id.* para. 75.

136. *Id.* (citing Ieng Sary Appeal, para. 40) (alterations in original).

137. *Id.* para. 76.

138. *Id.* para. 77.

139. *Id.*

140. Case No. 002/19-09-2007-ECCC/OCIJ(PTC38), Public Decision on the Appeals Against the Co-Investigative Judges Order on Joint Criminal Enterprise, para. 78 (May 20, 2010) (Cambodia) (finding the two other international instruments relied upon by *Tadić* were not relevant since they were not in existence in the relevant time period of 1975–1979).

141. See, e.g., *Trial of Erich Heyer and Six Others (Essen Lynching Case)*, *British Military Court for the Trial of War Criminals, Essen, dec. 18-19 and 21-22 1945*, reprinted in 1 LAW REPORTS OF TRIALS OF WAR CRIMINALS, *supra* note 130, at 1.

142. *Id.* para. 79.

Third, the Chamber found that the Italian war crimes cases relied upon by the ICTY were not appropriate precedents for establishing CIL because they took place in domestic courts and applied domestic law and do not, therefore constitute international case law.¹⁴³

The PTC also went on to consider whether general principles of criminal law supported the *Tadić* tribunal's finding of JCE III, finding "a number of ICTY Appeals decisions state or imply that it is acceptable to have recourse to such principles in defining not only the elements of an international crime, but also the scope of a form of responsibility for an international crime."¹⁴⁴ The PTC made clear its understanding that *Tadić* itself:

only referred to national legislation and case law to show that the notion of common purpose upheld in international law has an underpinning in many national systems. . . . [T]hese domestic sources could not be relied upon as irrefutable evidence of international principles or rules under the doctrine that general principles of law are recognized by the nations of the world; for this reliance to be permissible, most, if not all, countries must have adopted the same notion of common purpose. In *Tadić*, the court concluded that this was not the case.¹⁴⁵

Therefore, the Chamber finds JCE III is not applicable before the ECCC.¹⁴⁶

III. ANALYSIS: CAN THE INCOHERENCE BE MADE COHERENT AND WHY DOES THAT MATTER?

To take the second question first, it matters for several reasons. First, coherent and clear definitions of crimes, including forms of responsibility/modes of participation in

143. *Id.* para. 82.

144. *Id.* para. 84 (citing Prosecutor v. Furundzija, Case No. IT-95/1-T, Trial Judgement, para. 177 (Int'l Crim. Trib. for the Former Yugoslavia Dec. 10, 1998) (holding that "to arrive at an accurate definition of rape based on the criminal law of specificity . . ., it is necessary to look for principles of criminal law common to the major legal systems. These principles may be derived, with all due caution, from national laws,"); Prosecutor v. Blaskić, Case No. IT-95-14-A, Appeal Judgement, paras. 34-42 (Int'l Crim. Trib. for the Former Yugoslavia July 29, 2004)).

145. *Id.* para. 85.

146. *Id.* para. 88.

crimes, go to the question of the credibility of international criminal law and the international criminal justice system. Having the same behavior charged and punished differently depending upon the tribunal in which the case is heard makes it difficult to argue that ICL and the international justice system are a mature regime. Moreover, the *nullum crimen sine lege* rule requires that there be a clear, definite statement of the law before a defendant can be charged with a crime.¹⁴⁷ And yet, the current disarray in the doctrine shows no signs of being resolved any time soon.

A. *Does Co-Perpetration per the ICC “Win”?*

The PTCs of the ICC have now definitively rejected joint criminal enterprise as the framework for charging those who commit a crime collectively. The PTCs have instead elected to adopt a form of co-perpetration based upon “control” as the only form under which perpetrators may be charged as principals. The PTC, at least in *Lubanga*, has expressly rejected JCE III—the extended form—but its rationale seems also to be inconsistent with JCE I and II, at least as forms of principal liability. Those latter two forms have quite broad acceptance, pre- and post-*Lubanga*, not just in the ICTY and the ICTR, but also in the various hybrid courts, even those, such as the ECCC, which reject JCE III. This is perhaps so because these forms, particularly JCE I (and JCE II if it is viewed as a subset or variation of JCE I), find broad support in the domestic law of states and, arguably, in CIL.

Although the Rome Statute does create a permanent international criminal court with, perhaps, the goal of having such a court be the ultimate arbiter of international criminal law doctrine, such an outcome seems unlikely in the short term—or even the near long term. This is so for the following reasons.

147. See, e.g., Rome Statute, *supra* note 1, art. 22(2) (“The definition of a crime shall be strictly construed and shall not be extended by analogy. In case of ambiguity, the definition shall be interpreted in favor of the person being investigated, prosecuted or convicted.”).

1. Complementarity

Key to the regime created by the Rome Statute is the principle of complementarity. This principle is expressed in Article I of the Statute, establishing the international criminal court and making it “complementary to national criminal jurisdictions.”¹⁴⁸ Article 17 of the Statute sets out the details of the “complementarity” principle. It provides that the Court shall not take jurisdiction over a case where:

(a) The case is being investigated or prosecuted by a State which has jurisdiction over it, unless the State is unwilling or unable genuinely to carry out the investigation or prosecution;

(b) The case has been investigated by a State which has jurisdiction over it and the State has decided not to prosecute the person concerned, unless the decision resulted from the unwillingness or inability of the State genuinely to prosecute.¹⁴⁹

Article 17 further identifies “unwillingness” to investigate or prosecute as involving situations in which “proceedings were or are being undertaken . . . for the purpose of shielding the person concerned from criminal responsibility for crimes within the jurisdiction of the Court”; [t]here has been an unjustified delay”; or “the proceedings were not or are not being conducted independently or impartially and they were or are being conducted in a manner which, in the circumstances, is inconsistent with an intent to bring the person concerned to justice.”¹⁵⁰ In ascertaining “inability” to investigate or prosecute, Article 17(3) directs that the “Court shall consider whether, due to a total or substantial collapse or unavailability of its national judicial system, the State is unable to obtain the accused or the necessary evidence and testimony or otherwise unable to carry out its proceedings.”¹⁵¹

The consequence of these provisions is that the Court must defer to States which seek to investigate and prosecute international crimes. This is key to the scheme of the ICC, which

148. *Id.* art. 1.

149. *Id.* art. 17.

150. *Id.*

151. *Id.*

thus encourages States to enact domestic law under which they may prosecute international crimes committed on their territory and/or by their own citizens.¹⁵² Some States will, of course, assert jurisdiction more broadly under so-called “universal jurisdiction” statutes, which permit them, to the extent allowed by international law,¹⁵³ to prosecute even those without nationality or territoriality links to the forum.¹⁵⁴ This means, of course, that as States prosecute crimes against humanity, war crimes and genocide in domestic courts, those courts will find it necessary to interpret the various precepts of ICL, including the substantive crimes themselves and forms of participation. Nothing would bind such a domestic court to the interpretations of the ICC, for example to choosing co-perpetration based on a control model. In fact, history would suggest instead that States would make reference to CIL in defining these terms.

2. The Infrequency of Decision Making by the ICC

Given its limited resources, political constraints, and its charge to “exercise its jurisdiction over persons for the most serious crimes of international concern,”¹⁵⁵ the decisions of the Court will be few and far between. The record of the Court thus far is very sparse.¹⁵⁶ Even preliminary decisions by the PTCs are few.¹⁵⁷ It will take decades for the Court to establish even the most basic of interpretations of the Rome Statute. While having a permanent court is meant to address both the logistical difficulties of establishing ad hoc tribunals to deal with mass atrocities after the fact and thereby to deter future crimes and

152. See generally Doherty & McCormack, *supra* note 13.

153. See Arrest Warrant of 11 April 2000 (Dem. Rep. Congo v. Belg.) 2002 I.C.J. 3, 24 (Feb. 14) (holding that sitting foreign ministers are immune from prosecution under another State’s universal jurisdiction statute).

154. Though States with the broadest statutes have in recent years yielded to international political pressure and have narrowed the reach of their universal jurisdiction statutes. See generally Steven Ratner, *Belgium’s War Crimes Statute: A Postmortem*, 97 AM. J. INT’L L. 888 (2003).

155. Rome Statute, *supra* note 1, art. 1.

156. As of February, 2014 only eighteen cases in eight situations have been brought before the Court.

157. For the most recent summary of the current status of cases, see *Situations and Cases*, INT’L CRIM. CT., http://www.icc-cpi.int/en_menus/icc/situations_and_cases/Pages/situations_and_cases.aspx (last visited Feb. 17, 2014).

criminals by establishing a forum to provide swift and certain justice, the reality of such a scheme seems far off.

3. Ad Hoc/Hybrid Tribunals Will Continue to Play a Role

One of the consequences of the Court's limitations will probably be continued use of ad hoc tribunals. Even as the tribunals in the former Yugoslavia and Rwanda wind down and prepare to turn their prosecutions over to national courts under their completion strategies, more use is being made of hybrid tribunals.¹⁵⁸ These hybrid tribunals have continued to be created even after establishment of the ICC.¹⁵⁹ Along with domestic courts, these hybrid courts supplement, and complement, the work of the ICC. They have the advantage of being tailored for a specific situation, taking into account the cultural, and local political aspects of the conflict involved. They also may be viewed as more legitimate by citizens of the State involved, as opposed to a tribunal far away.¹⁶⁰ Judges for the State involved also may add to the credibility of the decision making in the eyes of the populace. There may be disadvantages to such tribunals as well, hence the determination of the international community to create a permanent court. And, as with domestic courts, these courts have not been and may not be bound by any interpretations of ICL set forth by the ICC.¹⁶¹

B. *The Role of Interpretation in Making the Incoherent Coherent*

Related to, but somewhat different from the preceding section, which addressed the fact that different tribunals apply different law in different contexts, is the issue that each of the tribunals has interpreted its constitutive document as having dictated the methodology for interpretation and application of law to the alleged crimes. There are several models in the ad

158. See S.C. Res. 1503, U.N. Doc. S/RES/1503 (Aug. 28, 2003); S.C. Res. 1534, U.N. Doc. S/RES/1534 (Mar. 26, 2004).

159. For example, the Lebanon Tribunal was created in 2007 to prosecute those responsible for the 2005 assassination of Rafiq Hariri and twenty-two others. See *Special Tribunal for Lebanon*, UNITED NATIONS, <http://www.un.org/apps/news/infocus/lebanon/tribunal/timeline.shtml> (last visited Feb. 17, 2014).

160. See Dickinson, *supra* note 9.

161. See, e.g., Prosecutor v. Sesay, Kallon and Gbao, Case No. SCSL-04-15-T, Judgment (Special Court for Sierra Leone, Trial Chamber Mar. 2, 2009) (embracing JCE in all forms).

hoc and permanent tribunals. These have been alluded to earlier, but deserve a more complete consideration since they are key to the particular issue of forms of participation. First, the ICTY and the ICTR are charged by their founding documents with applying the stated crimes consistently with customary international law.¹⁶² The report of the Secretary-General on the establishment of the ICTY clearly intends that the statute of new court be viewed as having codified existing CIL and thus as answering any *nullum crimen sine lege* concerns.¹⁶³ Interpreting the crimes set out in the Statute with a reference to CIL is certainly consistent with that concern and leads directly to the *Tadić* decision's embrace of JCE as established by post-World War II CIL.

Similarly, the hybrid courts have embraced methodologies that ultimately have led them to the application of CIL and the acceptance of at least some forms of JCE. This is true whether the courts are charged with application of domestic and international law in the form of CIL, e.g., ECCC in Cambodia; application of domestic and defined international crimes modeled on the ICTY/ICTR Statutes, which are then interpreted under CIL, e.g., Sierra Leone, East Timor; or application of domestic law, which is found to allow or require the application of international law, including CIL, as a part of domestic law, e.g., Lebanon).

Finally there is the methodology of interpretation set out in the Rome Statute of the ICC. Article 21 of that Statute provides that:

The Court shall apply:

162. ICTY Statute, *supra* note 1, art. 1 (charging the Tribunal with “prosecut[ing] persons responsible for serious violations of international humanitarian law”); ICTR Statute, *supra* note 1, art. 1 (charging the Tribunals with “[p]rosecut[ing] . . . Persons Responsible for Genocide and Other Serious Violations of International Humanitarian Law”).

163 . Report of the Secretary-General, *supra* note 50 (“[International humanitarian law] exists in the form of both conventional and customary law. While there is international customary law which is not laid down in conventions, some of the major conventional humanitarian law has become part of customary international law In the view of the Secretary General, the application of the principle *nullum crimen sine lege* requires that the international tribunal shall apply rules of international humanitarian law which are beyond any doubt part of customary law so that the problem of adherence of some but not all States to specific conventions does not arise.”).

- (a) In the first place, this Statute, Elements of Crimes and its Rules of Procedure and Evidence;
- (b) In the second place, where appropriate, applicable treaties and the principles and rules of international law, including the established principles of the international law of armed conflict;
- (c) Failing that, general principles of law derived by the Court from national laws of legal systems of the world, including, as appropriate, the national laws of states that would normally exercise jurisdiction over the crime, provided that those principles are not inconsistent with this Statute and with international law and international norms and standards.¹⁶⁴

IV. A PATHWAY TOWARD A COHERENT FRAMEWORK

A. *The Merits Decision in Lubanga*¹⁶⁵

The judgment in the *Lubanga* case essentially affirms the PTC's Decision on the Confirmation of Charges, discussed above, with what the Separate Opinion refers to as "minor modifications to ensure compliance with the Statute."¹⁶⁶ Those modifications do suggest a movement away from the most severe aspects of the "control theory" of co-perpetration, but it is the Separate Opinion by Judge Adrian Fulford which is the most promising in terms of a possible new approach to modes of liability in the ICC.

Judge Fulford of the United Kingdom agreed that the control theory of co-perpetration, as modified by the Court's opinion is the test that should be applied to this case "as a matter of fairness,"¹⁶⁷ since this test represents the principles of law on which the trial was prosecuted and defended. However, he made his view quite clear at the outset of his opinion "that the test laid down by the Pre-Trial Chamber is unsupported by

164. Rome Statute, *supra* note 1, art. 21.

165. Prosecutor v. Lubanga Dyilo, Case No. ICC-01/04-01/06, Judgement (March 14, 2012).

166. *Id.* (separate opinion of Judge Fulford); see Thomas Lieflander, *The Lubanga Judgment of the ICC: More than Just the First Step?*, 1 CAMBRIDGE J. INT'L & COMP. L. 191 (discussing how the Trial Chamber modifies the mens rea requirement of the PTC).

167. Lubanga, Case No. ICC-01/04-01/06, para. 2 (separate opinion of Judge Fulford).

the text of the Statute and it imposes an unnecessary and unfair burden on the prosecution.”¹⁶⁸ The Separate Opinion reviewed the PTC’s holding that under Article 25(3)(a), “liability for committing a crime ‘jointly with another’ attaches only to individuals who can be said to have control over the crime.”¹⁶⁹ The PTC’s five part test for establishing such co-perpetrator liability is “directed at those who have ‘control over the commission of the offence.’” The five elements as summarized by Judge Fulford are:

- i. The “existence of an agreement or common plan between two or more persons;
- ii. The “coordinated essential contribution made by each co-perpetrator resulting in the realisation of the objective elements of the crime;”
- iii. “[T]he suspect [must] fulfill the subjective elements of the crime with which he or she is charged”;
- iv. “[T]he suspect and the other co-perpetrators (a) must all be mutually aware of the risk that implementing their common plan may result in the realisation of the objective elements of the crime, and (b) must all mutually accept such a result by reconciling themselves with it or consenting to it;” and
- v. “[T]he suspect [must be aware] of the factual circumstances enabling him or her to jointly control the crime.”¹⁷⁰

1. Distinguishing Between Principals and Accessories

Judge Fulford addressed the reasons provided by the PTC for adopting the control of the crime approach and found them both wanting and unsupported by the text of the Statute. First, the PTC founded its adoption of the control theory on the “perceived necessity to establish a clear dividing line between the various forms of liability under Article 25(3)(a)-(d) of the Statute and, in particular, to distinguish between the liability of ‘accessories’ under Article 25(3)(b) and that of ‘principals’

168. *Id.* para. 3.

169. *Id.* para. 4 (citing PTC decision, paras. 326–38).

170. *Id.*

under Article 25(3)(a).¹⁷¹ In response, he argued that the plain text of Article 25(3) “defeats the argument that subsections (a)-(d) . . . must be interpreted so as to avoid creating an overlap between them.”¹⁷² In his view, the various provisions of Articles 25(3)(a) (committing a crime through another), and 25(3)(b) (ordering, soliciting and inducing the commission of a crime), “will often be indistinguishable in their application vis-à-vis a particular situation.”¹⁷³ He thus concluded that, “in [his] judgment the plain language of Article 25(3) demonstrates that the possible modes of commission under Article 25(3)(a)-(d) of the Statute were not intended to be mutually exclusive.”¹⁷⁴ In support of this view he noted that “the *ad hoc* tribunals have held that the various modes of liability available under their statutes are not mutually exclusive.”¹⁷⁵

The Separate Opinion also rejected the notion of distinguishing the various forms of liability by establishing a “hierarchy of seriousness that is dependent on creating rigorous distinctions between the modes of liability within Article 25(3).”¹⁷⁶ While Judge Fulford acknowledged that such a ranking might be useful if sentencing was strictly determined by the particular statutory provision on which defendant’s conviction is based, he noted that such is not the case. The Rome Statute provisions governing how sentences are to be imposed (Article 78 and Rule 145 of the Rules of Procedure and Evidence) require reference to “all the relevant factors, . . . including the gravity of the crime and the individual circumstances of the convicted persons.”¹⁷⁷ Although “degree of participation” is one of the factors to be considered, “these provisions overall do not narrowly determine the sentencing range by reference to the mode of liability under which the accused is convicted, and instead this is simply one of a number of relevant factors.”¹⁷⁸

171. *Id.* para. 6.

172. *Id.* para. 7.

173. *Id.*

174. *Id.*

175. *Id.* para. 8 n.13 (citing both ICTY and ICTR cases in support).

176. *Id.* para. 9.

177. *Id.* (citing Rome Statute, *supra* note 1, art. 78(1)).

178. *Id.*

Judge Fulford noted the source of the “control theory” of co-perpetration, as considered earlier in this Article, characterizing it as an “approach . . . imported directly from the German legal system.”¹⁷⁹ While acknowledging that “Article 21(1)(c) of the Statute permits the Court to draw upon ‘general principles of law’ derived from national legal systems,” he argued that before doing so, “a Chamber should undertake a careful assessment as to whether the policy considerations underlying the domestic legal doctrine are applicable at this Court, and it should investigate the doctrine’s compatibility with the Rome Statute framework.”¹⁸⁰

The PTC here was apparently led astray by its failure to consider these matters. In adopting the German doctrine, the PTC failed to take notice of the fact that under the German legal system a defendant’s sentencing range is determined by reference to the mode of liability under which he is convicted. Therefore, precise distinctions between these various modes take on heightened importance. In the ICC, however, such considerations are inapplicable.

2. Establishing Principal Liability for Those Who Participate Remotely

Judge Fulford also rejected this second justification for adopting the “control theory,” because “a plain reading of Article 25(3)(a) establishes the criminal liability of co-perpetrators who contribute to the commission of the crime notwithstanding their absence from the scene, and it is unnecessary to invoke the control of the crime theory in order to secure this result.”¹⁸¹

In reaching this result, the opinion cited the Vienna Convention on the Law of Treaties, Article 31(1), which provides that a treaty’s provisions (here those of the Rome

179. *Id.* para. 10. He does, however, devote some time to detailing the ways in which the Pre-Trial Chamber’s embrace of the control theory differs from the theory as described by Professor Roxin. *Id.*

180. *Id.* (“This applies regardless of whether the domestic and the ICC provisions mirror each other in their formulation. It would be dangerous to apply a national statutory interpretation simply because of similarities of language, given the overall context is likely to be significantly different.”).

181. *Id.* para. 12.

Statute) are to be interpreted “in good faith in accordance with the[ir] ordinary meaning [. . .] in their context and in light of [the Statute’s] object and purpose.”¹⁸² In applying this language, it concludes that the plain meaning “establishes the following elements for co-perpetration”:

- a. The involvement of at least two individuals.
- b. Coordination between those who commit the offence, which may take the form of an agreement, common plan or joint understanding, express or implied to commit a crime or to undertake action that in the ordinary course of events, will lead to the commission of the crime.
- c. A contribution to the crime, which may be direct or indirect, provided either way there is a causal link between the individual’s contribution and the crime.
- d. Intent and knowledge, as defined in Article 30 of the Statute, or as “otherwise provided” elsewhere in the Court’s legal framework”¹⁸³

What the “plain text” of the Statute does not require, in the view of Judge Fulford, is whether the requirement of awareness by the accused “that a crime will be committed ‘in the ordinary course of events’ is to be equated with a ‘possibility’, a ‘probability’, a ‘risk’ or a ‘danger’ (see paragraph 1012 of the Judgment).”¹⁸⁴ Also, he noted that the Statute’s requirement that the accused “commits” the crime requires “a contribution to the commission of the crime.”¹⁸⁵ However, “[n]othing in the Statute requires that the contribution must involve direct, physical participation at the execution stage of the crime, and, instead, an absent perpetrator may be involved.”¹⁸⁶ In any event, “the word ‘commits’ simply requires an operative link between the individual’s contribution and the commission of the crime.” Finally, a plain reading of Article 25(3) “does not require proof that the crime would not have been committed absent the accused’s involvement (*viz* that his role was essential).”¹⁸⁷

182. *Id.* para. 13 (citing Vienna Convention on the Law of Treaties art. 31(1), May 23, 1969, 1155 U.N.T.S. 18232) (alteration in original).

183. *Id.* para. 16.

184. *Id.* para. 15.

185. *Id.*

186. *Id.*

187. *Id.* (emphasis omitted).

B. *The Pathway Forward*

1. Building on Judge Fulford's Opinion

While much of what Judge Fulford says is certainly correct, his ultimate conclusion that the “plain meaning” of Article 25 (3)(a) provides a clear test is not. He is correct in noting that “the test laid down by the Pre-Trial Chamber is unsupported by the text of the Statute.”¹⁸⁸ Nothing in the text of that section, nor in the *travaux préparatoires*, supports the control theory of co-perpetration set out by the majority, with its requirement of “essential contribution” and its consequent “hypothetical investigation as to how events might have unfolded without the accused’s involvement.”¹⁸⁹ Nor, as Judge Fulford amply explains, does that language require each of the possible modes of participation to be mutually exclusive.

The text of Article 25(3) does not provide a clear test for determining individual responsibility for collective crimes. Although it represents a carefully negotiated compromise, that compromise (as compromises often do) obscures the detail necessary for a realistically applicable test.¹⁹⁰ I do not agree with those who, prior to the *Lubanga* decision¹⁹¹ or following that decision,¹⁹² would find in Article 25(3)(a)–(d) a hierarchy of culpability. Rather, I agree with Judge Fulford that the self-evident overlap of several parts of Article 25(3) suggests that there was no intention by the drafters to establish such a

188. *Id.* para. 3

189. *Id.* para. 17 (“It seems to me to be important to stress that an *ex post facto* assessment as to whether an individual made an essential contribution to war crimes, crimes against humanity or genocide will often be unrealistic and artificial. These crimes frequently involve a large number of perpetrators, including those who have controlling roles. It will largely be a matter of guesswork as to the real consequence for the particular crime if the accused is (hypothetically) removed from the equation, and most particularly it will not be easy to determine whether the offence would have been committed in any event.”).

190. *See, e.g.*, Kevin Jon Heller, *Lubanga Decision Roundtable: More on Co-Perpetration*, OPINIO JURIS, <http://www.opiniojuris.org/2012/03/16/lubanga-decision-roundtable-more-on-co-perpetration/> (“At the outset it should be noted that Article 25(3)(a) is maddeningly vague.”).

191. *See, e.g.*, Gerhard Werle, *Individual Criminal Responsibility in Article 25 ICC Statute*, 5 J. INT’L CRIM. JUST. 953, 957 (2007) (“Article 25(3)(a)-(d) establishes a value oriented hierarchy of participation in a crime under international law.”).

192. *See e.g.*, Heller, *supra* note 190.

hierarchy.¹⁹³ Nor should we ignore the heinous nature of crimes (and the consequent high degree of culpability for those acting in concert in pursuit of a common plan (as envisioned by 25(3)(d))).¹⁹⁴

2. Constraints of Interpretation

The way out of this confusing legal landscape lies in the rules of interpretation set out in Article 21 of the Rome Statute, introduced earlier in this article.¹⁹⁵ All of the opinions in *Lubanga*, Pre-Trial Chamber and Trial Chamber, purport to rely upon the first rule of interpretation in Article 21(a) requiring that the Court shall apply “this Statute, Elements of Crimes, and its Rules of Procedure and Evidence.” In the Decision on the Merits, both the majority and Judge Fulford’s Separate Opinion read the “plain meaning” of this text as definitive and yet, their readings are diametrically opposed.¹⁹⁶ Judge Fulford’s unease with the majority opinion is clearly warranted, but his proposed solution is not.

Instead, because of the inherent ambiguity of Article 21(a), the Court should rely upon the second part of Article 21, which directs the Court to apply “[i]n the second place, where appropriate applicable treaties and the principles and rules of international law, including the established principles of the international law of armed conflict.”¹⁹⁷ Those “established principles” arguably include forms of participation as applied in international, hybrid, and domestic courts since World War II. Reference should be made to the jurisprudence of the ad hoc

193. Prosecutor v. Lubanga Dyilo, Case No. ICC-01/04-01/06, para. 8 (separate opinion of Judge Fulford) (March 14, 2012) (“[T]here is no proper basis for concluding that ordering, soliciting or inducing a crime (Article 25(3)(b)) is a less serious form of commission than committing it ‘through another person’ (Article 25(3)(a)), and these two concepts self-evidently overlap.”).

194. I also think that Professor Heller is incorrect in concluding that “Article 25(3)(d) is limited to contributions to a group crime that are made by individuals who are *not* members of the group.” Heller, *supra* note 190. This is certainly not self-evident from the language of the text, nor from contemporaneous interpretations of its drafting and is at minimum contradicted by the ICTY’s reliance on this very language in *Tadić* to find principal liability for one who was a member of the group.

195. See *supra* note 164 and accompanying text.

196. Lubanga, Case No. ICC-01/04-01/06, para. 7 (separate opinion of Judge Fulford).

197. Rome Statute, *supra* note 1, art. 21(b).

tribunals (ICTY, ICTR, and the various hybrid tribunals discussed earlier) and consideration given to the widespread acceptance in those courts of the concept of JCE, at least in its basic and systemic forms (JCE I and II). The ICC is the outlier here in terms of defining individual responsibility in the context of a mass crime.

The current approach by the ICC is problematic on two levels, as a matter of procedure and on the substance of the question. First, as stated above, the Court seems to have ignored the Article 21 methodology of interpretation in failing under 21(b) to consider “principles and rules of international law, including the established principles of the international law of armed conflict.”¹⁹⁸ While it might be argued that the latter phrase refers to the substantive law defining crimes under international humanitarian law, nothing in the language of Article 21(b) so limits it. Moreover, previous tribunals considering this issue have found that customary international law of armed conflict includes determinations of proper modes of responsibility.¹⁹⁹ Application of 21(b) would have at least required the ICC to struggle with whether customary international law requires application of joint criminal enterprise in some form, and to explain why it was rejecting that framework.

If the Court had found that “applicable treaties and the principles of international law” did not provide a framework for individual liability for collective crimes, then the 21(c) provision directs the Court to apply “general principles from national laws of legal systems of the world.”²⁰⁰ One would expect that such an application might have considered both civil and common law doctrines concerning individual responsibility for crimes with multiple perpetrators. So not only the principally German “control theory,” but conspiracy and other common plan or purpose liability as reflected in the national laws of other civil law and common law systems would have been taken into consideration. No such exploration takes place in these cases, where the Chambers settle upon a theory, not only limited to one such national legal system, but in a form almost wholly

198. *Id.*

199. *See, e.g., supra* notes 127–130 and accompanying text.

200. Rome Statute, *supra* note 1.

dependent on one scholar's view. This is a theory not only so limited, but also, in some of its details, controversial within that one legal system. Thus, a good argument could be made that the Chambers erred both procedurally and substantively in their adoption of the control theory, in failing to consider customary international law and in failing to justify the adoption of that theory in the face of alternative, more broadly accepted bases for liability.

CONCLUSION

In conclusion, the ICC has to some extent tied its hands in terms of moving toward forms of participation more in line with CIL and the decisions of other international courts. In *Lubanga*, the Trial Chamber feels itself bound to accept the "control theory" basis for co-perpetration, because that is the "law of the case" under which Lubanga was charged and prosecuted. Even Judge Fulford, who would have the court reject the control theory, accepts that the Trial Chamber should apply this standard to the case before it because of the accused's right to be informed "in detail of the nature, cause and content of the charge[s]"²⁰¹ against him. This, Judge Fulford concludes, requires that the accused "needs to be aware of the basic outline of the legal framework against which [the] facts will be determined. This ensures that the accused knows at all stages of the proceeding, what he is expected to meet."²⁰² Because the test he proposes using would have made it easier to convict Lubanga, the control of the crime theory should, he asserts, be applied. Progress toward a coherent concept of individual responsibility that encompasses the modes of participation discussed in this article, will require the Appeals Chamber to reconsider this position. It is clear it must do so.

201. *Lubanga*, Case No. ICC-01/04-01/06, para. 20 (separate opinion of Judge Fulford).

202. *Id.*