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Bringing the Bosses to International Criminal Trials: The Problems with Joint Criminal Enterprise and the "Control over the Crime" Approach As a Better Alternative

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BRINGING THE BOSSES TO INTERNATIONAL CRIMINAL TRIALS: THE PROBLEMS WITH JOINT CRIMINAL ENTERPRISE AND THE "CONTROL OVER THE CRIME" APPROACH AS A BETTER ALTERNATIVE

Dr. Juan-Pablo Pérez-León-Acevedo[1]*

ABSTRACT

Similar to most international and hybrid criminal tribunals, the International Criminal Tribunal for the former Yugoslavia used the doctrine or theory of Joint Criminal Enterprise (JCE) as a mode of liability when prosecuting and convicting those most responsible, namely, state and non-state political and military leaders, in cases of international crimes. Against such background, the main research questions of this article are whether JCE should be applied in cases of those most responsible for international crimes and whether JCE should be replaced by the "control over the crime" approach. Overall, this article argues and finds two main points. First, JCE presents major issues when applied to cases involving senior leaders. Second, as done by the International Criminal Court, JCE

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should be replaced by the "control over the crime" approach since this approach is an overall more coherent alternative in the above-mentioned types of cases at international and hybrid criminal tribunals. Compared to JCE, the "control over the crime" approach as applied to cases involving senior perpetrators of international crimes: i) allows a clearer differentiation between principals and accessories to the crimes; and, ii) in its manifestation as perpetration through another person using an organized structure of power, is more suitable to appropriately determine criminal liability of those most responsible in large criminal enterprises.

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INTRODUCTION

The International Criminal Tribunal for the former Yugoslavia (ICTY) used the doctrine or theory of Joint Criminal Enterprise (JCE) as a mode of liability when prosecuting and condemning those most responsible, namely, state and non-state political and military leaders, for international crimes.[2] The International Criminal Tribunal for Rwanda (ICTR) did the same. Hybrid criminal courts, such as the Special Court for Sierra Leone (SCSL) and the Extraordinary Chambers in the Courts of Cambodia (ECCC),[3] have followed the same path. However, JCE presents two major problems. First, the distinction between principals and accessories to the crime is based upon the state of mind of the defendant rather than his or her acts. The importance of the contribution of the accused person to the crime is hence undermined. Second, there are important issues regarding individual culpability when JCE is applied. On the one hand, the attribution of criminal liability to political and military leaders is complicated in a large JCE. On the other hand, the attribution of crimes which were not part of the original criminal purpose and were committed by other JCE participants is highly controversial, in particular when it comes to special *mens rea* crimes.

The above-mentioned problems matter for two reasons. First, a legal theory to distinguish those who are truly the most responsible for international crimes from those who have just accessorial participation is necessary. In order to proceed with this distinction, the determination of criminal liability in international criminal courts and tribunals will suit the mandates of these judicial institutions, namely, to focus on senior leaders. Second, in order to avoid impunity for senior

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[2] ANTONIO CASSESE, INTERNATIONAL CRIMINAL LAW 191, 193 (2d. ed. 2008) (noting the specific cases in which the ICTY used JCE as a theory of prosecution).

[3] *Id.* at 330–31 (noting that hybrid courts are those which: i) have a mixed composition, i.e., not only international but are also composed of national judges of the country in which they are set up, such as in Sierra Leone or Cambodia; ii) have jurisdiction not only over international crimes but also over domestic offenses of the host country; and iii) were constituted by an agreement between a state and an international organization such as the United Nations).

leaders but in strict respect for the principle of individual culpability, the adoption of a more consistent approach to criminal liability is necessary.

Against this background, the main research questions posed here are whether JCE should be used in cases of those most responsible for international crimes and whether JCE should be replaced by an alternative approach, such as the "control over the crime."[4] Thus, the present article examines some of the main problems with JCE in order to determine whether JCE should be used to prosecute top military and political leaders at international and hybrid criminal tribunals. As will be examined, the "control over the crime" approach considers that principles to the crime are those who dominate the commission of the crime because they decide whether and how the crime will be committed.[5] It is herein argued that the control over the crime approach constitutes a better alternative than JCE for two reasons. First, this approach takes into consideration that the principals to the crime are not only those who physically carry out the crimes, but also those who control or mastermind the commission of the crimes, regardless of whether the senior leaders are structurally and/or geographically remote from the crime scene when the offence is committed, as they decide whether, when, and how those crimes are perpetrated.[6] This is a "hybrid" approach that combines objective and subjective approaches. Thus, it allows for a clear distinction between principals and accessories when prosecuting leaders for international crimes. Second, "the control over the crime" approach—in its manifestation as perpetration through another person using an organized structure of power—seems to be legally and normatively more coherent when tracking down criminal liability to the senior leaders in large criminal enterprises and is applicable to any international crime.[7] This

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[4] *See infra* Sections I.C, II.B, III.B (discussing what the "control over the crime" approach is and how "principals" to a crime are determined).

[5] *See supra* text accompanying note 4 (discussing what the "control over the crime" approach is and how "principals" to a crime are determined).

[6] *See infra* Section II.A (analyzing the distinction between principles and accessories in criminal liability).

[7] *See infra* Section III.A (noting the difficulties that come with using the doctrine of joint criminal enterprise and why the "control over the crime" approach is a better alternative).

approach better embodies the notion that those higher up are guiltier, which accords with moral sense and political reality.

Accordingly, the present paper has three main sections. The first section provides the general framework—including terminological/conceptual aspects, the importance of an appropriate legal theory of criminal liability in cases of senior leaders, and a presentation of the problems with JCE in these cases. The second section discusses aspects related to the distinction between principals and accessories in collective criminality. This section analyzes issues to reach such differentiation when applying JCE and argues for "the control over the crime" approach as an alternative. Lastly, the third section examines specific individual responsibility issues. In particular, the limits of the application of JCE in certain scenarios, and conversely, the advantages of the "control over the crime" approach are examined.

I. SCOPE AND IMPORTANCE OF THE PROBLEM

The first subsection of this section discusses the terminology and the conceptual framework of those who commit international crimes. Then the second subsection focuses on analyzing the importance of finding a mode or legal theory of criminal liability suitable to the goal of prosecuting and trying senior leaders. Finally, the last subsection discusses why JCE is arguably problematic to achieve the goal of prosecution and trial of senior leaders.

A. Who Commits International Crimes?

A necessary starting point requires a determination of what "direct perpetrator" means in international criminal law. Under this body of law, "direct perpetrator" is understood as an individual who physically carries out the objective elements of a crime with the mental state required by the crime in question.[8]

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[8] *See generally* CASSESE, *supra* note 2, at 188 (noting that whoever physically commits the crime is criminally liable); *see generally* HÉCTOR OLÁSOLO, THE CRIMINAL RESPONSIBILITY OF SENIOR POLITICAL AND MILITARY LEADERS AS PRINCIPALS TO INTERNATIONAL CRIMES 69 (Mohammed Ayat et al. eds., 2009) (stating that "[d]irect perpetration takes place when an individual physically carries out the objective elements of a crime . . . ."); *see generally*

This understanding may be criticized because the one who pulls the trigger would somehow be the direct, more direct, or real perpetrator. Therefore, the attribution of criminal liability to those higher up becomes problematic. Indeed, common law, in particular, American criminal law, does not refer to the category of "direct perpetrator." In common law, what is traditionally called accessory before the fact to a felony is:

> [O]ften the "man higher up" who is more of a social menace than the underlings he employs. There is no sound reason why he should not be called a "principal," and treated as such for all purposes, just as he would be if the crime were treason or misdemeanor. The law in most jurisdictions is now to this effect. In almost all jurisdictions today persons who were accessories or principals at common law, except accessories after the fact, are now classified as principals. The legal distinctions between the classifications are today of little importance. However, the terminology has remained to describe the functions or activities of the actors rather than to distinguish legal culpability.[9]

The difficulty to attribute criminal liability to senior leaders under the notion of "direct perpetrator" in international criminal law is arguably increased by the reluctance of international criminal law to incorporate conspiracy law. Nevertheless, the meaning of "direct perpetrator" needs to be read in context. In international criminal law, the "direct perpetrator" label, that may in principle be understood as the "real" perpetrator, is

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Albin Eser, *Individual Criminal Responsibility*, *in* 1 THE ROME STATUTE OF THE INTERNATIONAL CRIMINAL COURT: A COMMENTARY 767, 789 (Antonio Cassese et al. eds., 2002) (discussing solitary [direct] perpetration as well as the difference between 'principals' and 'co-perpetrators' of a crime); *see generally* Kai Ambos, *Article 25: Individual Criminal Responsibility*, *in* COMMENTARY ON THE ROME STATUTE OF THE INTERNATIONAL CRIMINAL COURT 743, 748 (Otto Triffterer ed., 2d ed. 2008) (discussing perpetration, co-perpetration and perpetration by means); *see generally* GERHARD WERLE, PRINCIPLES OF INTERNATIONAL CRIMINAL LAW 119 (1st ed. 2005) (discussing how to define a "direct perpetrator" in the international law context).

[9] RONALD N. BOYCE ET AL., CRIMINAL LAW AND PROCEDURE: CASES AND MATERIALS 505 (10th ed. 2007); *see also* WAYNE R. LAFAVE, CRIMINAL LAW 664 (4th ed. 2003) (noting that "[t]he distinctions between the other three categories [these three categories are: principal in the first degree, principal in the second degree and accessory before the fact, accessory after the fact is excluded], however, have now been largely abrogated, although some statutes resort to the common law terminology in defining the scope of complicity.").

actually only one denomination within the broader notion of "commission of the crime" which concerns criminal liability as a principal.[10] "Direct" perpetration is thus only a form of "committing a crime."

"Committing a crime" is found in the Statutes of the ICTY,[11] the ICTR[12] and the ICC[13] and involves criminal responsibility as a principal. Articles 7(1) and 6(1) of the Statutes of the ICTY and the ICTR, respectively, read as follows: "[a] person who . . . committed . . . a crime referred to . . . in the present Statute, shall be individually responsible for the crime."[14] When alleged that a senior leader, such as Slobodan Milošević, is a principal to the crime despite no involvement in the physical commission of the crime, the ICTY Prosecutor normally used the following language: "[b]y using the word committed in this indictment the Prosecutor does not intend to suggest that the accused physically committed any of the crimes charged personally. Committing in this indictment refers to participation in a joint criminal enterprise as co-perpetrator."[15] Thus, "committing" was not limited to physical perpetration of the crimes.[16]

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[10] *See generally* Eser, *supra* note 8, at 789–95 (noting the context in which "direct perpetrator" should be understood when determining criminal liability); *see generally* Ambos, *supra* note 8, at 748–55 (discussing perpetration, co-perpetration and perpetration by means); *see generally* OLÁSOLO, *supra* note 8, at 69–70 (discussing direct and indirect perpetration).

[11] Statute of the International Tribunal for the Prosecution of Persons Responsible for Serious Violations of International Humanitarian Law Committed in the Territory of the Former Yugoslavia since 1991, May 25, 1993 [hereinafter ICTY Statute].

[12] Statute of the International Criminal Tribunal for Rwanda, Nov. 8, 1994, 33 I.L.M. 1598 [hereinafter ICTR Statute].

[13] Rome Statute of the International Criminal Court, July 17, 1998, 37 I.L.M. 1002, 2187 U.N.T.S. 90 [hereinafter ICC Statute].

[14] ICTY Statute, *supra* note 11, art. 7(1); ICTR Statute, *supra* note 12, art. 6(1).

[15] Prosecutor v. Slobodan Milošević, Case No. IT-02-54-T, Second Amended Indictment, ¶ 5 (Int'l Crim. Trib. for the Former Yugoslavia July 28, 2004), http://www.icty.org/x/cases/slobodan_milosevic/ind/en/040727.pdf.

[16] Prosecutor v. Slobodan Milosevic, Case No. ICTY-05-87-PT, Decision on Ojdanic's Motion Challenging Jurisdiction: Indirect Co-Perpetration, ¶ 30 (Int'l Crim. Trib. for the Former Yugoslavia Mar. 22, 2006), http://www.icty.org/x/cases/milutinovic/tdec/en/060322.htm (defining "committing" as follows: "that the accused participated, physically *or otherwise directly or indirectly*, in the material elements of the crime charged through positive acts or, based on a duty to act, omissions, whether individually or jointly with others.") (alteration in original); *see also* Prosecutor v. Stakić, Case

The notion of "direct," "immediate," or "physical" perpetrator appears under the wording "as an individual" in Article 25(3)(a) of the ICC 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."[17] This provision thus explicitly considers the "direct perpetrator" notion as a mode of "committing the crime," namely, liability as a principal. This same provision under "[c]ommits . . . through another person" also refers to an "indirect perpetrator."[18] A senior leader that "commits" a crime and becomes a perpetrator or principal thereof does not need to physically carry out the objective elements of the crime because it is sufficient that they are physically carried out by the person that the senior leader uses as a tool to execute the crime.[19] In common law, this would correspond to cases where a perpetrator who is traditionally called "principal" in the first degree uses an innocent or irresponsible agent as an intermediary to commit a crime.[20] However, in international criminal law, this intermediary may also be a responsible agent.[21]

The individual who orders the commission of crimes is generally considered a principal in international criminal law.[22] The ICC has however identified two meanings of "ordering"

No. IT-97-24-T, Judgment, ¶ 439 (Int'l Crim. Trib. for the Former Yugoslavia July 31, 2003) (providing an additional definition of "committing" in joint criminal enterprises).

[17] ICC Statute, *supra* note 13, art. 25(3)(a).

[18] *Id.*

[19] Eser, *supra* note 8, at 793 (expressing that criminal liability extends to a person who commits a crime through another person); *see infra* Section III.B (discussing "direct" and "indirect" perpetrators in detail); *see infra* Section III.B (discussing the "The Control over the Crime" approach to address individual responsibility issues); *see generally* WERLE, *supra* note 8, at 123–24 (noting that committing a crime through another person is a sufficient basis for criminal liability under Article 23(3)(a) of the ICC Statute).

[20] LAFAVE, *supra* note 9, at 664.

[21] *See infra* Section III.B (discussing how Courts have held intermediaries liable for actions ordered by Principals).

[22] Eser, *supra* note 8, at 797; *see generally* Ambos, *supra* note 8, at 755 (noting that a person who orders a crime is not an accomplice to the crime; instead, they are considered perpetrators).

under its Statute. The first meaning is "ordering" as a form of accessorial liability and is used to describe the act of a person in a position of authority and one who uses that position to convince another individual to commit an offence.[23] The second meaning of "ordering" corresponds to the situation of a leader in command of an organization, who commits crimes "through another person" and incurs liability as a principal since "[t]he highest authority does not merely order the commission of a crime, but through his control over the organization, essentially decides whether and how the crime would be committed."[24]

Therefore, the expression "direct perpetrator" is understood here not as the sole "real" perpetrator, but just as the physical or immediate perpetrator. References to senior leaders as "indirect" perpetrators—understood as mediate perpetrators—do not undermine their level of responsibility as principals at all. This is connected to the scope of "the crime scene" in cases of international crimes such as concentration camps where senior leaders are not usually present. This article precisely focuses on those perpetrators and not on low level or middle-ranking individuals.

B. Why a Suitable Mode of Liability when Prosecuting the "Big Fish" Matters?

International crimes prosecuted at international and hybrid criminal tribunals normally involve a large of number of perpetrators who range from senior state or non-state leaders, to low-echelon actors. Due to their dimension, those crimes are usually committed collectively. Nonetheless, their criminal repression has to be conducted on an individual basis in accordance with the principle of individual rather than collective liability and punishment, which is a basic principle of modern criminal law, regardless of how many perpetrators are

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[23] Prosecutor v. Katanga, Case No. ICC-01/04-01/07, Decision on the confirmation of charges, ¶ 517 (Sept. 30, 2008), https://www.icc-cpi.int/CourtRecords/CR2008_05172.PDF; ICC Statute, *supra* note 13, art. 25(3)(b) (stating that a person who "[o]rders, solicits or induces the commission of such a crime which in fact occurs or is attempted" will be held criminally responsible and liable for punishment).

[24] *Katanga*, ICC-01/04-01/07, Decision on the confirmation of charges, ¶ 518.

involved.[25] The determination of the theory or mode of liability to be used constitutes one of the most important issues in trials of the most senior political or military leader, such as presidents, highest ranking military officers, and heads of non-state armed groups.[26] The attribution of criminal liability to senior leaders is usually a difficult task due to evidentiary problems since these individuals are geographically remote from the crime scene and have no contact with the direct perpetrators. As a result, criminal liability approaches developed for common offences are not suitable. This explains why international criminal law and, in particular, international and hybrid criminal tribunals have been so concerned to flesh out notions such as JCE or "control over the crime" to appropriately reflect the real dimension of the criminality of senior leaders in conformity with basic criminal law principles. Unfortunately, these objectives have not always been fully met when applying JCE.

At international and hybrid criminal tribunals, the selection and implementation of the most suitable legal theory also matters due to immediate practical consequences. Since the constitutive instruments and/or prosecutorial policies of international and hybrid criminal tribunals are focused on offenders regarded as the most responsible or senior leaders,[27]

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[25] 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, 93 (2005).

[26] *See* WILLIAM A. SCHABAS, AN INTRODUCTION TO THE INTERNATIONAL CRIMINAL COURT 105 (2d ed. 2004) (referencing courts' difficulty in ascertaining leaders' guilt based on what may be circumstantial evidence when there may be a standard of proof of guilt beyond a reasonable doubt).

[27] Luis Moreno-Ocampo, Prosecutor, International Criminal Court, Address at the Nuremberg Conference: "Building a Future on Peace and Justice", (June 24, 25, 2007); However, at the ICTY, the Prosecutor's initial strategy was "pyramidal," i.e., the Prosecutor did first target lower level suspects, and then gradually moved on to go for the "big fish" including military commanders and senior political and military leaders. Only later, the ICTY Rules of Procedure and Evidence were amended so that the ICTY's indictments would concentrate on: "one or more of the most senior leaders suspected of being most responsible for crimes within the jurisdiction of the Tribunal." ICTY Rules of Procedure and Evidence, Rule 28(A). Although the ICC Statute or Rules of Procedure and Evidence contain no similar provision, according to Moreno-Ocampo's Address at the Nuremberg Conference, 2007, the ICC has focused on: "the worst perpetrators, responsible for the worst crimes, those bearing the greatest responsibility, the organizers, the planners, the commanders."

their resources need to be used efficiently to meet their mandates. The selection of the most appropriate legal theory also matters in order to prevent that fairness, or perception of fairness, of the trials is compromised. This is connected with the full respect for the right of the accused to a fair trial and due process guarantees, as well as coherence with basic principles of criminal law as contained in the legal instruments of international and hybrid criminal tribunals.[28]

Ultimately, the use of a legal theory that distorts the role played by senior leaders may lead to a record that does not accurately capture why and how serious international crimes were committed. Prosecutions and trials are arguably the most effective manners to separate collective guilt from individual guilt and contribute to the removal of the stigma of misdeeds from the innocent members of communities collectively blamed for crimes committed on other communities.[29] Prosecutions and trials may also contribute to the truth and acknowledgment in fragile post-conflict societies.[30] Although the judicial approach is not infallible, the judicial truth established as a result of a fair trial has a "tested" quality that makes it persuasive.[31] Therefore, the impact of selecting the most suitable mode of

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[28] ICTY Statute, *supra* note 11, art. 21; ICTR Statute, *supra* note 12, art. 20; Statute of the Special Court of Sierra Leone, Jan. 16, 2002, art. 17 [hereinafter SCSL]; Law on the Establishment of Extraordinary Chambers in the Courts of Cambodia for the Prosecution of Crimes Committed During the Period of Democratic Kampuchea, NS/RKM/1004/006, Oct. 27, 2004, c. 10, arts. 33–35, 37, https://www.eccc.gov.kh/sites/default/files/legal-documents/KR_Law_as_amended_27_Oct_2004_Eng.pdf; *see* ICC Statute, *supra* note 13, arts. 64, 66–67 (discussing the rights of the accused).

[29] Lawrence Weschler, *Inventing Peace*, NEW YORKER, Nov. 20, 1995, at 64 (quoting Richard Goldstone, "[s]pecific individuals bear the major share of the responsibility, and it is they, not the group as a whole, who need to be held to account . . . so that the next time around no one will be able to claim that all Serbs did this, or all Croats or all Hutus . . . ."); Kenneth Roth, *Introduction*, *in* HUMAN RIGHTS WATCH, WORLD REPORT 15 (1995) (discussing how prosecutions lead to individuals taking responsibility for their perpetuation of violence so that their misconduct is not attributed to their people as a whole); *see generally* Juan Mendez, *Accountability for Past Abuses*, 19 HUM. RTS. Q. 255, 277 (1997) (exploring arguments for prosecutions as an effective tool for isolating individual guilt from collective guilt).

[30] *See* Mendez, *supra* note 29, at 278 (discussing advantages of trials in ascertaining truth, asserting that trial verdicts are more difficult to challenge and that the truth is more persuasive because it is "tested").

[31] *Id.*

liability goes beyond the legitimacy of international criminal law and international/hybrid criminal courts. A factor influencing the findings of (international) criminal courts is the legal theory of criminal liability used. Thus, the choice of one legal theory over another may have an impact, at least indirectly, both on the prevention of recurrence of the worst international crimes (often masterminded by top leaders), and on the perception of fairness of the trials of the most responsible.

C. JCE in a (Fading) Spotlight

Since the ICTY Appeals Chamber presided by Judge Shahabuddeen (Guyana) and integrated by Judges Cassese (Italy), Tieya (China), Nieto-Navia (Colombia), and Mwachande Mumba (Zambia) defined JCE in *Tadic* in 1999,[32] both the ICTY and other international and hybrid criminal tribunals have used JCE, especially concerning cases of leaders. The ICTY Prosecutor and Chambers thus relied on JCE in the determination of individual criminal responsibility in *inter alia* cases of Bosnian-Serb and Serb political leaders and high-ranking military officers, including the case against former Serbian President Slobodan Milošević.[33] ICTR cases involved political and military Hutu leaders.[34] The Prosecutors and Chambers of the SCSL and the ECCC have also applied JCE to cases including Liberia's former president Charles Taylor[35] and senior Khmer Rouge leaders.[36] Although the Iraqi High

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[32] Prosecutor v. Tadic, Case No. IT-94-1-A, Judgement, ¶¶ 178–234 (Int'l Crim. Trib. for the Former Yugoslavia July 15, 1999), http://www.icty.org/x/cases/tadic/acjug/en/tad-aj990715e.pdf.

[33] Prosecutor v. Milošević, Case No. IT-02-54-T, Second Amended Indictment, ¶ 5 (Int'l Crim. Trib. for the Former Yugoslavia July 28, 2004), http://www.icty.org/x/cases/slobodan_milosevic/ind/en/040727.pdf.

[34] *Id.*

[35] *See, e.g.*, Prosecutor v. Taylor, Decision on Urgent Defence Motion Regarding a Fatal Defect in the Prosecution's Second Amended Indictment Relating to the Pleading of JCE, Case No. SCSL-03-1-T, ¶ 76 (Special Court for Sierra Leone, Feb. 27, 2009) (finding that the prosecution "adequately fulfilled the pleading requirements of the alleged Joint Criminal Enterprise in the Indictment").

[36] *See, e.g.*, Co-Prosecutors v. Nuon, Case No. 002/19-09-2007/ECCC/TC, Case 002/01 Judgment, ¶¶ 690–96 (Aug. 7, 2014), https://www.eccc.gov.kh/sites/default/files/documents/courtdoc/2014-08-07%2017%3A04/E313_Trial%20Chamber%20Judgement%20Case%20002_01_ENG.pdf (finding JCE I and JCE II applicable).

Tribunal was not strictly a hybrid criminal tribunal, it used JCE in the trial of Saddam Hussein and other Iraqi leaders.[37]

Conspiracy was once called by the American Judge Learned Hand, the "darling of the modern prosecutor's nursery."[38] Similarly, the JCE has been regarded as the "darling notion" by the Prosecution and, to a large extent, by the chambers of international and hybrid criminal tribunals.[39] JCE occupied a central role as the most used mode of liability in the prosecution of high-ranking perpetrators at international and hybrid criminal tribunals. This adoption of JCE should not in principle come as a surprise. JCE presents important qualities to determine individual responsibility in mass criminality contexts. Therefore, JCE links crimes to several offenders, namely principals and accessories, connecting them with distinct crimes. This enables the understanding of the dynamics of interaction and cooperation in a criminal group or organization, which is ever-present in the commission of international crimes.[40]

Nonetheless, JCE was defined in *Prosecutor v. Tadic*, which was a mob violence case involving low-level perpetrators who established a small criminal enterprise. The accused, Dusko Tadic, joined the group whose intention was to evict Bosnian Muslims from their houses, but he had not personally inflicted fatal blows.[41] In this case, JCE was used to sustain Tadic's

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[37] *See* Ian M. Ralby, *Joint Criminal Enterprise Liability in the Iraqi High Tribunal*, 28 B.U. INT'L L.J. 281, 311, 313 (2010) (holding that the Iraq High Tribunal was modeled after the ICC and utilized JCE).

[38] Harrison v. United States, 7 F.2d 259, 263 (2d Cir. 1925). *But cf.* Philip E. Johnson, *The Unnecessary Crime of Conspiracy*, 61 CALIF. L. REV. 1137, 1140 (1973) (noting that sometimes the use of conspiracy law can be a detriment to the prosecution because the "use of a conspiracy charge converts a relatively simple case into a monstrosity of conceptual complexity, giving the defense substantial grounds for an appeal.").

[39] Antonio Cassese, *The Proper Limits of Individual Responsibility Under the Doctrine of Joint Criminal Responsibility*, 5 J. INT'L CRIM. JUST. 109, 110 (2007) (holding that JCE is relied on by international tribunals and by the Prosecution).

[40] Harmen van der Wilt, *Joint Criminal Enterprise: Possibilities and Limitations*, 5 J. INT'L CRIM. JUST. 91, 92 (2007).

[41] Prosecutor v. Tadic, Case No. IT-94-1-T, Opinion and Judgement, ¶ 373 (Int'l Crim. Trib. for the Former Yugoslavia May 7, 1997), http://www.icty.org/x/cases/tadic/tjug/en/tad-tsj70507JT2-e.pdf (finding that

conviction for the killings. The ICTY Appeals Chamber in *Tadic* concluded that the responsibility for crimes ensuing from group criminality would attach to all of the members of the group who shared the common purpose of the group to commit those crimes and actively further the group's aims in some way.[42]

However, when the ICTY from 2000 onwards[43] decided to refocus its mandate from covering a wide range of perpetrators to only prosecuting those perpetrators considered as the most responsible, difficulties and challenges emerged. The application of JCE to cases concerning senior political and military leaders in large criminal organizations faced two important obstacles. First, JCE offered no consistent criterion to distinguish between principals and accessories in large criminal enterprises. This lack of consistent criterion, by definition, is detrimental to the mandates of international and hybrid criminal tribunals. It is detrimental because it is more difficult to analyze the scope of individual guilt of senior perpetrators understood in the collective dimension of international crimes. Second, although the ICTY restricted the scope of JCE trying to avoid the undesired presence of collective

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the accused "was a member of the group of armed men that entered the village of Jaski[c]i, searched it for men, seized them, beat them, and then departed with them and that after their departure the five dead men named in the Indictment were found lying in the village and that these acts were committed in the context of an armed conflict. However, this Trial Chamber cannot, on the evidence before it, be satisfied beyond reasonable doubt that the accused had any part in the killing of the five men or any of them.").

[42] Prosecutor v. Tadic, Case No. IT-94-1-A, Judgement, ¶ 196 (Int'l Crim. Trib. for the Former Yugoslavia July 15, 1999), http://www.icty.org/x/cases/tadic/acjug/en/tad-aj990715e.pdf (finding "[t]he 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 affecting the killing, must nevertheless intend this result.").

[43] *See* S.C. Res. 1534, ¶ 5 (Mar. 26, 2004) (directing tribunals to focus on senior leaders when considering indictments under U.N. Security Council Resolution 1503); *see* S.C. Res. 1503, ¶ 1 (Aug. 28, 2003) ("U*rging* the ICTR to formalize a detailed strategy, modelled on the ICTY Completion Strategy, to transfer cases involving intermediate-and lower-rank accused to competent national jurisdictions . . . . ") (alteration in original).

responsibility,[44] the case law of the ICTY shows that this restriction was insufficient.[45] Moreover, due to the vague contours of a subjective approach, which is quintessential to JCE, the SCSL and the Iraqi High Tribunal applied JCE in such a broad manner that even supporters of JCE had misgivings.[46]

Therefore, international and hybrid criminal courts should reconsider the use of JCE as the primary mode of criminal liability to prosecute high-level offenders. The ICC Chambers have rejected JCE and replaced it with the "control over the crime" approach in the cases of state and non-state senior political and military actors, including Sudan's President Omar Al Bashir.[47]

II. DISTINCTION BETWEEN PRINCIPALS AND ACCESSORIES IN COLLECTIVE CRIMINALITY

The first subsection of this section aims to demonstrate that JCE contains a root problem: JCE provides an inconsistent approach to the distinction between principals and accessories to crimes when collective criminality is present, which is almost always present in international crimes. Therefore, the qualification of senior leaders as principals may become blurred under JCE. The second half of this section seeks to show that

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[44] *See* Prosecutor v. Brđanin, Case No. IT-99-36-T, Judgement, ¶¶ 344–55 (Int'l Crim. Trib. for the Former Yugoslavia Sept. 1, 2004), http://www.icty.org/x/cases/brdanin/tjug/en/brd-tj040901e.pdf (analyzing the facts of the case, the court reasoned that "JCE is not an appropriate mode of liability to describe the individual criminal responsibility of the Accused, given the extraordinarily broad nature of this case, where the Prosecution seeks to include within a JCE a person as structurally remote from the commission of the crimes charged in the Indictment as the Accused.").

[45] *See infra* Section III.A (criticizing the restriction as being insufficient to eliminating collective responsibility and treating all Accused individuals the same).

[46] *See* Ralby, *supra* note 38, at 329–30 (criticizing the broad usage of JCE as a misapplication of the tests required for JCE); *see generally* Wayne Jordash & Penelope Van Tuyl, *Failure to Carry the Burden of Proof: How Joint Criminal Enterprise Lost its Way at the Special Court for Sierra Leone*, 8 J. INT'L CRIM. JUST. 591, 593 (2010) (criticizing broad usage of JCE as overreaching).

[47] Prosecutor v. Al Bashir, ICC-02/05-01/09, Warrant of Arrest for Omar Hassan Ahmad Al Bashir, ¶¶ 7–8 (Mar. 4, 2009), https://www.icc-cpi.int/CourtRecords/CR2009_01514.PDF (ordering Al Bashir arrested for crimes under the theory of control over crime).

the "control over the crime" approach is a better alternative since it leads to a consistent and clear identification of senior leaders as principals.

A. Problems in Clearly Differentiating Principals from Accessories when Applying JCE

According to Fletcher "[t]he central question in any system of complicity is distinguishing between co-perpetrators and accessories. The former are punished as full perpetrators, regardless of the liability of anyone else."[48] Thus, to accurately establish the exact criminal liability of senior leaders, a *sine qua non* question, is to determine what approach to distinguish between principals and accessories to the crime is more suitable. There are three possible approaches as identified by ICC Pre-Trial Chamber I in *Prosecutor v. Lubanga* and ICC Trial Chamber II in *Prosecutor v. Katanga.*[49]

First, under an objective approach to distinguish between principals and accessories, solely those who physically carry out the elements of a crime can be considered principals.[50] This approach has not been used by international and hybrid criminal tribunals in high-profile cases because senior leaders are almost always remote from the crime scene. Applying this approach would result in foot soldiers as the only principals whilst political and military leaders would be held as mere accessories to the crimes. This would be a paradox considering the much more important role of the latter.

The second approach is subjective because it considers the "state of mind in which the contribution to the crime was made"[51] to differentiate principals from accessories to the crime.

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[48] GEORGE P. FLETCHER, RETHINKING CRIMINAL LAW 659 (2d. ed. 2002).

[49] Prosecutor v. Katanga, ICC-01/04-01/07, Judgment pursuant to Article 74 of the Statute, ¶¶ 1390–94 (Mar. 7, 2014), https://www.icc-cpi.int/CourtRecords/CR2015_04025.PDF; Prosecutor v. Lubanga, ICC-01/04-01/06, Judgment pursuant to Article 74 of the Statute, ¶¶ 328–30 (Mar. 14, 2012), https://www.icc-cpi.int/CourtRecords/CR2012_03942.PDF.

[50] *Katanga*, ICC-01/04-01/07, Judgment pursuant to Article 74 of the Statute, ¶ 1391.

[51] *Lubanga*, ICC-01/04-01/06, Judgment pursuant to Article 74 of the Statute, ¶ 921.

Therefore, it does not consider the level of contribution to the commission of a crime. Under this approach, principals are only those who "make their contribution to the crime with the shared intent to commit the offence . . . regardless of the level of their contribution to its commission."[52] JCE is grounded in this approach. As remarked by the ICTY, the situation of an individual as a principal to a crime lies in the shared intent by all the participants in the enterprise to make their contributions with the aim of furthering the common criminal purpose.[53] The level of contribution of JCE participants is thus secondary.[54]

By fleshing out this subjective approach, the ICTY in *Prosecutor v. Tadic* identified three variants of JCE. The first category (JCE-I) corresponds to cases where all the co-accused act in pursuance of a common design and possess the same criminal intention.[55] The second category (JCE-II) relates to the so-called "concentration camp" cases. This category is similar to the first one, but it is applied to cases where the alleged offences have been committed by members of military or administrative units.[56] In these two categories, the defendant must actually have the intent to commit the crime.[57] The third category (JCE-III) is also referred to as the "extended form" of JCE.[58] JCE-III shares the same objective elements (*actus reus*) of the other two varieties of JCE: i) the presence of a plurality of persons; ii) the

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[52] *Id.*

[53] Prosecutor v. Tadic, Case No. IT-94-1-A, Judgement, ¶ 228 (Int'l Crim. Trib. for the Former Yugoslavia July 15, 1999), http://www.icty.org/x/cases/tadic/acjug/en/tad-aj990715e.pdf; Prosecutor v. Milutinović, Case No. IT-99-37-AR72, Decision on Dragoljub Ojdanić's Motion Challenging Jurisdiction–Joint Criminal Enterprise, ¶ 20 (Int'l Crim. Trib. for the Former Yugoslavia May 21, 2003), https://cld.irmct.org/assets/Uploads/full-text-dec/2003/03-05-21%20Milutinovic%20et%20al%20Decision%20on%20Ojdanic%20JCE%20Jxn%20Challenge.pdf.

[54] Tadic, IT-94-1-A, Judgement, ¶¶ 227, 229.

[55] *Id.* ¶196.

[56] *Id.* ¶ 202.

[57] *See id.* ¶ 228 (discussing JCE-II, the accused's personal knowledge of the system of ill-treatment must be additionally proved).

[58] *See* WILLIAM A. SCHABAS, THE UN INTERNATIONAL CRIMINAL TRIBUNALS: THE FORMER YUGOSLAVIA, RWANDA AND SIERRA LEONE 310 (2006) (noting the difference that first two categories focus on intent, but the third category describes an objective standard relating to the foreseeability of the consequences of the action).

existence of a common plan, design or purpose which amounts to or involves the commission of a crime under the statute of the respective tribunal; and iii) the participation of the accused in the common design involving the perpetration of one or more crimes under the jurisdiction of the tribunal.[59]

However, JCE-III differs from the other two types of JCE. It is different because, in addition to crime(s) agreed upon in the common plan, other crimes under JCE-III may be attributed if "(i) it was *foreseeable* that such a crime might be perpetrated by one or other members of the group and (ii) the accused *willingly took that risk*."[60] This foreseeability element, especially as to specific intent crimes, has made JCE-III highly controversial.[61] Via JCE-III, the ICTY indeed adopted *mutatis mutandis,* the so-called *Pinkerton* doctrine from American conspiracy law.[62] In *Pinkerton v. United States*, the US Supreme Court ratified the principle that co-conspirators are essentially accomplices to any crime actually committed by other persons involved in the conspiracy in furtherance of the common purpose of the agreement.[63] However, Justice Jackson strongly objected the *Pinkerton* doctrine in *Krulewitch v. United States* at the US Supreme Court.[64] The full application of the *Pinkerton* doctrine has been criticized as an "overly expansive application of liability"[65] and the drafters of the US Model Penal Code have rejected it.[66]

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[59] *Tadic*, IT-94-1-A, Judgement, ¶ 227.

[60] *Id.* ¶ 228 (alteration in original).

[61] *See infra* Section III.A (explaining the difficulties of prosecuting "foreseeable" crimes).

[62] Pinkerton v. United States, 328 U.S 640, 646–48 (1946).

[63] *Id.* at 645–47.

[64] Krulewitch v. United States, 336 U.S. 440, 445–51 (1949) (Jackson, J., concurring) (stating that "a conviction of a substantive crime where there was no proof of participation in or knowledge of it, upon the novel and dubious theory that conspiracy is equivalent in law to aiding and abetting.").

[65] BETH VAN SCHAACK & RONALD C. SLYE, INTERNATIONAL CRIMINAL LAW AND ITS ENFORCEMENT 868 (Robert C. Clark et al., 2d ed. 2010).

[66] *See* MODEL PENAL CODE § 2.06 (1985) (noting that "law would lose all sense of just proportion if simply because of the conspiracy itself each [co-conspirator] were accountable for thousands of additional offenses of which he was completely unaware and which he did not influence at all."); *see also id.* (stating that individuals may be held liable for all crimes that are a natural and foreseeable consequence of acting according to the common purpose, but natural and foreseeable is difficult to define).

There is some overlap between conspiracy and JCE. The Charter of the International Military Tribunal at Nuremberg (IMT) extended conspiracy generally to all crimes under the jurisdiction of this Tribunal,[67] besides its inclusion in Article 6(a) (conspiracy to commit crimes against peace). However, the IMT only accepted conspiracy to commit crimes against peace as discussed later.[68] The Statutes of the ICTY and the ICTR only included conspiracy to commit genocide,[69] following verbatim, the 1948 Genocide Convention (Article 3(b)). Conspiracy was not included in the ICC Statute due to the insistence of civil law lawyers since conspiracy is generally not included in their criminal codes.[70] However, liability for "contributing to a common purpose" (Article 25(3)(d)) was adopted as a surrogate for conspiracy.[71] JCE may be considered another name for conspiracy due to their similarities.[72] Nevertheless, JCE is a mode of liability to commit crimes, but it is not a crime in itself. This is different than conspiracy under common law as the US

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[67] *See* Agreement for the Prosecution and Punishment of the Major War Criminals of the European Axis, art. 6 Aug. 8, 1945, 58 Stat. 1544, 82 U.N.T.S. 280 [hereinafter Prosecution and Punishment] (stating that "[l]eaders, organizers, instigators and accomplices participating in the formulation or execution of a common plan or conspiracy to commit any of the foregoing crimes [crimes against peace, war crimes and crimes against humanity] are responsible for all acts performed by any persons in execution of such plan.").

[68] *See infra* Section III.A (discussing whether the application of the doctrine of JCE can be extrapolated from small criminal enterprises to larger ones).

[69] *See* ICTY Statute, *supra* note 11, art. 4(3)(b) (discussing what constitutes a punishable act); *see* ICTR Statute, *supra* note 12, art. 2(3)(b) (discussing what constitutes a punishable act).

[70] *See* Per Saland, *International Criminal Law Principles*, *in* THE INTERNATIONAL CRIMINAL COURT: THE MAKING OF THE ROME STATUTE ISSUES, NEGOTIATIONS, RESULTS 189, 198–99 (Roy S. Lee ed., 1999) (discussing the legislative history of general principles of criminal law in Part 3 of the Rome Statute and Article 21 on Applicable Law).

[71] WERLE, *supra* note 8, at 167; *see* Eser, *supra* note 8, at 802 (discussing the history of "conspiracy" and how the definition of the conspiracy has changed over time); *see generally* Ambos, *supra* note 8, at 760, 761 (discussing facilitation and contribution).

[72] *See* 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, 119 (2005) (discussing the formal distinction between JCE and conspiracy, and the weight such a distinction carries).

Supreme Court importantly identified in *Hamdan v. Rumsfeld*.[73] However, conspiracy is a mode of criminal responsibility under the US Model Penal Code.[74]

Furthermore, the ICTY Appeals Chamber in *Prosecutor v. Milutinović*, which was integrated by a majority of common law judges,[75] identified a difference between conspiracy and JCE: "while mere agreement is sufficient in the case of conspiracy, the liability of a member of a joint criminal enterprise will depend on the commission of criminal acts in furtherance of that enterprise."[76]

Even though under JCE senior leaders can be principals to the crime regardless of their remoteness from the crime scene, such as concentration camps, JCE distinguishes between principals and accessories to the crimes based exclusively on the will of the defendant. In other words, minor contributions that may eventually include preparation of the actual commission of the crimes may be sufficient provided that the common criminal purpose is shared.[77] Conversely, major contributions with knowledge of the common criminal purpose, but without necessarily sharing it, do not trigger criminal liability as a principal under JCE. This was explicitly acknowledged by the ICTY as JCE provides with no formal distinction between JCE members "who make overwhelmingly large contributions and

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[73] *See* Hamdan v. Rumsfeld, 548 U.S. 557 n.40 (2006) (noting that "[the ICTY] has adopted a 'joint criminal enterprise' theory of liability, but that is a species of liability for the substantive offence . . . not a crime on its own.").

[74] *See generally* MODEL PENAL CODE § 5.03(1) (1985) (describing inchoate crimes, including the definition of conspiracy); *see also* VAN SCHAACK & SLYE, *supra* note 65, at 866 (noting that "[t]he Model Penal Code treats conspiracy as a form of responsibility at § 5.03(1)").

[75] Prosecutor v. Milutinović, Case No. IT-99-37-AR72, Decision on Dragoljub Ojdanić's Motion Challenging Jurisdiction–Joint Criminal Enterprise, ¶ 25 (Int'l Crim. Trib. of the Former Yugoslavia May 21, 2003), https://cld.irmct.org/assets/Uploads/full-text-dec/2003/03-05-21%20Milutinovic%20et%20al%20Decision%20on%20Ojdanic%20JCE%20Jxn%20Challenge.pdf (Presiding by Judge Shahabudeen (Guyana) and integrated by Judges Hunt (Australia), Gunawardana (Pakistan), Pocar (Italy), and Jorda (France)).

[76] *Id.* ¶ 23.

[77] Katrina Gustafson, *The Requirements of an 'Express Agreement' for Joint Criminal Enterprise Liability: A Critique of Brdjanin*, 5 J. INT'L CRIM. JUST. 134, 141 (2007).

JCE members whose contributions, though significant, are not as great."[78]

The above-analyzed point reveals a fundamental problem affecting JCE: its imposition of equal culpability to all members of the same JCE. Whilst some ICTY judgments tried to incorporate the role and function of the accused in the criminal enterprise,[79] the predominant tendency was to regard all participants as equals in regards to criminal liability attribution.[80] This may even be associated to a unitary concept of perpetration, namely, no distinction between principals and accessories, which is still present in few domestic systems.[81] The absence of a distinction between principals and accessories in the Charters of the IMT and the International Military Tribunal for the Far East[82] was due to the fact that these tribunals by definition truly focused only on the most responsible senior offenders.[83] However, the distinction between principals and

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[78] Prosecutor v. Brđanin, Case No. IT-99-36-A, Judgement, ¶ 432 (Int'l Crim. Trib. of the Former Yugoslavia Apr. 3, 2007), http://www.icty.org/x/cases/brdanin/acjug/en/brd-aj070403-e.pdf (noting that the Court does not differentiate based on the degree of contribution to the purpose of the crime).

[79] *See* Prosecutor v. Kvočka, Case No. IT-98-30/1-T, Judgement, ¶¶ 306, 309–10, 312 (Int'l Crim. Trib. of the Former Yugoslavia Nov. 2, 2001), http://www.icty.org/x/cases/kvocka/tjug/en/kvo-tj011002e.pdf (stating that to be held liable as a participant in a JCE, the extent of the participation must be "significant"); *see* Prosecutor v. Kvocka, Case No. IT-98-30/1-A, Judgement, ¶¶ 97, 104 (Int'l Crim. Trib. of the Former Yugoslavia Feb. 28, 2005), http://www.icty.org/x/cases/kvocka/acjug/en/kvo-aj050228e.pdf (overruling the Trial Chamber's consideration about an additional requirement of significant/substantial contribution of a JCE participant and added that this may only be relevant to prove the *mens rea* of shared intent).

[80] *See* Prosecutor v. Vasiljević, Case No. IT-98-32-A, Judgement, ¶ 111 (Int'l Crim. Trib. for the Former Yugoslavia Feb. 25, 2004), http://www.icty.org/x/cases/vasiljevic/acjug/en/val-aj040225e.pdf (providing that participation in a JCE is regarded as a form of commission and all participants of the joint enterprise to be equally guilty regardless of the role they played).

[81] *See* Straffelov. Lov 126 of April 15, 1930. Consolidated text in Lovbekendtgorelse 1156 of Sept 20, 2018, Codice Penale art. 110 (It.).

[82] *See* Eser, *supra* note 8, at 784 (stating that the tribunal does not distinguish between principals and accessories).

[83] International Military Tribunal for the Far East Charter, art. 1, Jan. 19, 1946 (stating "[t]he International Military Tribunal for the Far East is hereby established for the just and prompt trial and punishment of the major war criminals in the Far East."); *see* Prosecution and Punishment, *supra* note 687, art. 1 (stating that "there shall be established an International Military

accessories has at the international level existed since Control Council Law No. 10,[84] which was adopted by the Allied Control Council in Germany for the punishment of persons—other than the accused at the IMT—guilty of international crimes.[85]

The special nature of international crimes leads to the need to distinguish between principals and accessories in order to identify the most responsible and to determine how and why they unleashed large scale violence. Certain wording used by the ICTY Appeals Chamber in *Tadic* caused some uncertainty concerning interpretation of JCE as a theory originating principal liability in conformity with customary international law.[86] This corresponded to the fact that the ICTY, by interpreting the heading "committed" in Article 7(1) of its Statute (which is equivalent to Article 6(1) of the ICTR Statute), concluded that:

> [I]t does not exclude those modes of participating in the commission of crimes which occur where several persons having a common purpose embark on criminal activity that is then carried out either jointly or by some members of this plurality of persons . . . . The notion of common design as a form of accomplice liability is firmly established in customary international law and in addition is upheld, albeit implicitly [in the ICTY Statute].[87]

The ICTY Appeals Chamber in *Prosecutor v. Milutinović* in May 2003, clarified that JCE or the common purpose doctrine constitutes a theory of co-perpetration that gives rise to principal

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Tribunal . . . for the just and prompt trial and punishment of the major war criminals of the European Axis.").

[84] Punishment of Persons Guilty of War Crimes, Crimes against Peace and Against Humanity, Control Council Law No. 10, art. II(2) (stating that "[a]ny person . . . is deemed to have committed a crime . . . if he was (a) principal or (b) was an accessory to the commission of any such crime . . . .").

[85] *See id.* (discussing the enactment of this statute in Germany as a means "to give effect to the terms of the Moscow Declaration of 30 October 1943 and the London Agreement of 8 August 1945 . . . .").

[86] Prosecutor v. Tadic, Case No. IT-94-1-A, Judgement, ¶¶ 192–96 (Int'l Crim. Trib. for the Former Yugoslavia July 15, 1999), http://www.icty.org/x/cases/tadic/acjug/en/tad-aj990715e.pdf.

[87] Prosecutor v. Tadic, Case No. IT-94-1-A, Judgement, ¶¶ 190, 220 (Int'l Crim. Trib. for the Former Yugoslavia July 15, 1999), http://www.icty.org/x/cases/tadic/acjug/en/tad-aj990715e.pdf.

liability (as opposed to accessorial liability), and thus falls under the heading "committed" in Article 7(1) of the ICTY Statute.[88] However, judgments of the ICTY Trial Chambers from 1999 to 2003 were quite erratic. Some judgments explicitly qualified JCE as a theory of accomplice liability, affirming that the distinction between principals and accessories was alien to the ICTY Statute.[89] This may relate to the standard common law logics of principals and agents.[90] Other judgments considered JCE as accessorial liability together with the notion of aiding and abetting,[91] and as a form of accomplice liability not covered by the expression "committed" in Article 7(1) of the ICTY Statute.[92] Finally, other judgments of ICTY Trial Chambers were imprecise by determining that participants in a JCE can be either principals to a crime (co-perpetrators) or accessories to the crime (aiders or abettors) depending on their level of contribution,[93] or the state of mind with which they contributed

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[88] Prosecutor v. Milutinović, Case No. IT-99-37-AR72, Decision on Dragoljub Ojdanić's Motion Challenging Jurisdiction–Joint Criminal Enterprise, ¶¶ 20, 31 (Int'l Crim. Trib. for the Former Yugoslavia May 21, 2003), https://cld.irmct.org/assets/Uploads/full-text-dec/2003/03-05-21%20Milutinovic%20et%20al%20Decision%20on%20Ojdanic%20JCE%20Jxn%20Challenge.pdf.

[89] *See* Prosecutor v. Krnojelac, Case No. IT-97-25-T, Judgment, ¶¶ 74–77 (Int'l Crim. Trib. for the Former Yugoslavia Mar. 15, 2002), http://www.icty.org/x/cases/krnojelac/tjug/en/krn-tj020315e.pdf (stating that the distinction between a "participant" and the "principal offender" is unnecessary and irrelevant for sentencing purposes).

[90] *See* BOYCE ET. AL., *supra* note 9, at 494–95, 505, 519–21 (outlining common law and Model Penal Code theories of liability); *see* LAFAVE, *supra* note 9, at 664 (discussing the differences between principals and accomplices/accessories); *see also supra* Section I.A (defining a "direct perpetrator").

[91] *See* Prosecutor v. Kordić, Case No. IT-95-14/2-T, Judgement, ¶ 399 (Int'l Crim. Trib. for the Former Yugoslavia Feb. 26, 2001), http://www.icty.org/x/cases/kordic_cerkez/tjug/en/kor-tj010226e.pdf (comparing "the forms of responsibility based on participation in a common purpose with aiding and abetting . . . .").

[92] *See* Prosecutor v. Brđanin, Case No. IT-99-36, Decision on Motion by Momir Talic for Provisional Release, ¶¶ 40–45 (Int'l Crim. Trib. for the Former Yugoslavia Mar. 28, 2001), http://www.icty.org/x/cases/brdanin/tdec/en/10328PR215226.htm (recognizing "common design" or "common purpose" as a "form of accomplice liability" that doesn't align with the definition of 'committed' which is proposed to comprehend "physical perpetration of a crime by the offender himself . . . .").

[93] *See* Prosecutor v. Krstic, Case No. IT-98-33-T, Judgement, ¶¶ 642–43 (Int'l Crim. Trib. for the Former Yugoslavia Aug. 2, 2001), http://www.icty.org/x/cases/krstic/tjug/en/krs-tj010802e.pdf (denoting that

to the crime.[94] Moreover, the ICTY recognized that the introduction of a criterion of "special contribution" may lead to some disparities.[95] The background problem is that no formal distinction exists between JCE members who make overwhelmingly large contributions to the criminal enterprise, and those whose contributions are less significant.[96]

This uncertainty may also affect the accused. The accused is already aware of the mode of liability charged with. However, the accused might be adversely affected with a surprising sentence that arises out of this uncertainty if he/she is switched from an accessory in the charges to a principal in the conviction. Although JCE was not explicitly included in the Statutes of the ICTY and the ICTR, the status of JCE as part of customary international law—which is a legal source applied by these tribunals—holds importance relating to the principle of legality.[97] Such principle goes to the heart of the defendant's rights since it includes the *nullum crime sine lege* principle and the prohibition of non-retroactivity.[98] Accordingly, some scholars cast doubts on how consistent JCE, as applied by the

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"accomplice liability" is an ancillary form of participation compared to "direct or principal perpetrators").

[94] *See* Prosecutor v. Kvocka, Case No. IT-98-30/1-T, Judgement, ¶¶ 249, 273 (Int'l Crim. Trib. for the Former Yugoslavia Nov. 2, 2001), http://www.icty.org/x/cases/kvocka/tjug/en/kvo-tj011002e.pdf (concluding that actors making contributions knowing but not sharing the common criminal purpose are accessories).

[95] *See* Prosecutor v. Brđanin, Case No. IT-99-36-A, Judgement, ¶ 432 (Int'l Crim. Trib. for the Former Yugoslavia Apr. 3, 2007), http://www.icty.org/x/cases/brdanin/acjug/en/brd-aj070403-e.pdf (holding that "[t]he Appeals Chamber recognizes that, in practice, this approach may lead to some disparities, in that it offers no formal distinction between JCE members who make overwhelmingly large contributions and JCE members whose contributions, though significant, are not as great.").

[96] *See id.* (holding that there are disparities because "any [disparities are] adequately dealt with at the sentencing stage.").

[97] *See* U.N. Secretary-General, *Report of the Secretary-General Pursuant to Paragraph 2 of Security Council Resolution 808* (1993), ¶ 34, U.N. Doc. S/25704 (May 3, 1993) (stating "[i]n the view of the Secretary General, the application of the principle nullum crimen sine lege requires that the international tribunal should apply rules of international humanitarian law that are beyond any doubt part of customary law . . . .") (alteration in original).

[98] CASSESE, *supra* note 2, at 30–52 (holding that the *nullum crime sine lege* principal and the prohibition against nonretroactivity are important parts of international criminal law).

ICTY and the ICTR, is with the principle of legality.[99] Despite these doubts, the ICTY considered that the question of JCE as part of customary international law and, in accordance with the principle of legality, had already been settled.[100]

Therefore, JCE presents some important problems in clearly identifying senior leaders as principals to the crime to ensure they do not dilute or trivialize their liability. Some scholars recognize this limitation and criticize JCE for that problem.[101] However, they agree with some jurisprudence[102] that, as far as the difference between principals and accessories is introduced during sentencing via attenuating or aggravating circumstances, concerns as to the problem should not be excessive.[103]

The problems associated with identifying senior leaders as principals to the crime to ensure they do not escape liability is criticized. First, although judges may partially distinguish minor contributors (accessories) from principals at sentencing via mitigating and aggravating factors, criminal responsibility is not simply a function of sentencing. This difference has to be reflected not only during the sentencing, but also in the indictment and trial, which holds importance for the legitimacy of international and hybrid criminal tribunals. Individual criminal responsibility is not exclusively subsumed by serving an appropriate time in prison, but instead, it reaches the core of the criminal offence and leads to the stigma of having been

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[99] *See, e.g.*, OLÁSOLO, *supra* note 8, at 52 (finding that "this conclusion is not necessarily consistent with those general principles on criminal responsibility laid down both in the ICTYS and in general international criminal law.").

[100] Brđanin, Case No. IT-99-36-A, Judgement, ¶ 431 (explaining that JCE is customary international law); *see* Prosecutor v. Stakić, Case No. IT-97-24-A, Judgement, ¶ 62 (Int'l Crim. Trib. for the Former Yugoslavia Mar. 22, 2006), http://www.icty.org/x/cases/stakic/acjug/en/sta-aj060322e.pdf (finding that JCE is customary international law).

[101] Kai Ambos, *Joint Criminal Enterprise and Command Responsibility*, 5 J. INT'L CRIM. JUST. 159, 167–72 (2007).

[102] *See* Brđanin, Case No. IT-99-36-A, Judgement, ¶ 432 (recognizing that although JCE leads to disparities between those accused who had a large impact and those that had a small impact, these disparities are "adequately dealt with at the sentencing stage.").

[103] Ambos, *supra* note 101, at 173.

convicted as a principal. The determination of the guilt of the accused is therefore a "central truth that the current version of joint criminal enterprise obscures."[104] Second, not all parts of a criminal organization are equal regardless of the difficulties to scrutinize its internal deliberative structure. Leaders, mid-level perpetrators, and executioners perform different functions at different levels in the commission of international crimes. Hence, the attribution of equal criminal responsibility to offenders who did not have the same role is unacceptable due not only to legal, but moral considerations.[105]

The problems with the application of JCE become clearer in the ICTY's findings on the difference between JCE in cases of co-perpetration (principals) and aiding and abetting (accessories). The ICTY repeatedly concluded that the support of the aider and abettor has to have "a substantial effect upon the perpetration of the crime. By contrast, it is sufficient for a participant in a joint criminal enterprise to perform acts that in some way are directed to the furtherance of the common design."[106] The paradox here is that the level of contribution required for aiding and abetting (accessorial liability) is higher than for participating in a JCE (principal liability as a co-perpetrator). Such a distinction may be understood as JCE is grounded in a subjective approach to distinguish between principals and accessories and, hence, the distinction is based on the state of

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[104] Jens David Ohlin, *Three Conceptual Problems with the Doctrine of Joint Criminal Enterprise*, 5 J. INT'L CRIM. JUST. 69, 88 (2007) (discussing relative culpability of minor participants).

[105] *See id*. at 86–88 (discussing the problem of equal culpability).

[106] Prosecutor v. Vasiljević, Case No. IT-98-32-A, Judgement, ¶ 102 (Int'l Crim. Trib. for the Former Yugoslavia Feb. 25, 2004), http://www.icty.org/x/cases/vasiljevic/acjug/en/val-aj040225e.pdf; *see also* Prosecutor v. Milutinović, Case No. IT-99-37-AR72, Decision on Dragoljub Ojdanić's Motion Challenging Jurisdiction–Joint Criminal Enterprise, ¶ 20 (Int'l Crim. Trib. for the Former Yugoslavia May 21, 2003), https://cld.irmct.org/assets/Uploads/full-text-dec/2003/03-05-21%20Milutinovic%20et%20al%20Decision%20on%20Ojdanic%20JCE%20Jxn%20Challenge.pdf (explaining that merely knowing about a JCE is not enough to be regarded as an aider and abettor); *see also* Prosecutor v. Krajišnik, Case No. IT-00-39-A, Judgment, ¶¶ 655, 662, 674, 694 (Int'l Crim. Trib. for the Former Yugoslavia Mar. 17, 2000), http://www.icty.org/x/cases/krajisnik/acjug/en/090317.pdf (discussing the *actus reus* and its requirements, such as assisting, encouraging, and lending moral support).

mind under which the contribution to the crime was made.

Accordingly, the lower level of contribution required by co-perpetration founded in JCE is "compensated" by a higher threshold subjective element while only "knowledge" is required in aiding and abetting.[107] Co-perpetration based on JCE requires aiming at the achievement of the common criminal plan or purpose, namely, *dolus directus* in the first degree.[108] The unintended but improper consequence of the application of JCE is that central players in the commission of offences may be qualified simply as accessories and, in turn, those who have a minor role—such as foot soldiers—can be found guilty as the sole principals. A related problem is that the ICTY rejected the possibility of finding an accused guilty because of aiding and abetting a JCE; although, in theory, this is feasible as an aider or abettor to a single crime within a JCE still holds such status unless that crime is totally unrelated to that JCE.[109]

In any event, the combination of a stringent subjective element with a low level of contribution does not exist in JCE-III because the ICTY ruled that criminal responsibility for a crime may be imposed on an actor even if "he only knew that the perpetration of such a crime was merely a possible

[107] Prosecutor v. Tadic, Case No. IT-94-1-A, Judgement, ¶ 229(iv) (Int'l Crim. Trib. for the Former Yugoslavia July 15, 1999), http://www.icty.org/x/cases/tadic/acjug/en/tad-aj990715e.pdf; Prosecutor v. Krnojelac, Case No. IT-97-25-A, Judgement, ¶ 33(iv) (Int'l Crim. Trib. for the Former Yugoslavia Sept. 17, 2003), https://www.eccc.gov.kh/sites/default/files/documents/courtdoc/00207024-00207060.pdf.

[108] Prosecutor v. Ntakirutimana, Case Nos. ICTR-96-10 and ICTR-96-17-A, Judgement, ¶ 467 (Dec. 13, 2004); *see* OLÁSOLO, *supra* note 8, at 260 (discussing the JCE requirements of co-perpetration); *see* Prosecutor v. Brđanin, In Trial Chamber II, Decision on Motion by Momir Talic for Provisional Release, ¶ 365 (Int'l Crim. Trib. for the Former Yugoslavia Mar. 28, 2001), http://www.icty.org/x/cases/brdanin/tdec/en/10328PR215226.htm (discussing the foreseeability of a crime in the first degree).

[109] Ambos, *supra* note 101, at 169–70; *see* Prosecutor v. Kvočka Case No. IT-98-30/1-A, Judgment, ¶ 273 (Int'l Crim. Trib. for the Former Yugoslavia Feb. 28, 2005), http://www.icty.org/x/cases/kvocka/acjug/en/kvo-aj050228e.pdf (discussing the liability to be incurred by the presence of a participant in a joint criminal enterprise); s*ee generally* DAVID ORMEROD & KARL LAIRD, SMITH AND HOGAN'S TEXT, CASES, AND MATERIALS ON CRIMINAL LAW 264–65 (11th ed. 2005) (discussing the liability of an aider or abettor in relation to their efforts for the JCE).

consequence . . . ."[110] This leads to another paradox whereby JCE-III leads to principal liability as opposed to aiding and abetting even though the objective and subjective elements of aiding and abetting are more demanding. The ICTY Appeals Chamber tried to justify this by saying that in a JCE-III "the actor already possesses the intent to participate and further the common criminal purpose of a group."[111] Such explanation is unsatisfactory. A person cannot be found responsible as a principal unless he/she holds the *mens rea* required by the respective crime; should one fall short of meeting the subjective elements of the crime contained in the respective crime definition, then he/she can eventually be considered as an accessory.[112] Thus, JCE-III may, at least, and to an important extent, amount to a form of aiding and abetting despite the case law of the ICTY and the ICTR considered it as raising principal liability.[113]

Overall, the identification of senior leaders as principals under JCE is problematic. On the one hand, the ICTY sometimes considered JCE participants as mere accessories to the crimes; while on the other hand, JCE as a subjective approach may lead to finding a central player who substantially contributes to a crime as an accessory.

B. The "Control over the Crime" Approach as an Alternative

The "control over the crime" approach to distinguish principals and accessories was applied in *Prosecutor v. Stakić* by an ICTY Trial Chamber,[114] which was constituted by civil law

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[110] Prosecutor v. Blaškić, Case No. IT-95-14-A, Judgement, ¶ 33 (Int'l Crim. Trib. for the Former Yugoslavia July 29, 2004), http://www.icty.org/x/cases/blaskic/acjug/en/bla-aj040729e.pdf.

[111] *Id.*

[112] *See* Ambos, *supra* note 101, at 168–71 (describing the elements required to be considered an aider and abettor, a co-perpetrator, or an accessory).

[113] *See* Prosecutor v. Tadic, Case No. IT-94-1-A, Judgement, ¶¶ 192, 229 (Int'l Crim. Trib. for the Former Yugoslavia July 15, 1999), http://www.icty.org/x/cases/tadic/acjug/en/tad-aj990715e.pdf (explaining the differences between acting toward a common purpose and aiding and abetting); *see also* Ntakirutimana, Case Nos. ICTR-96-10 and ICTR-96-17-A, Judgement, ¶¶ 462–67 (noting the *mens rea* and extreme result of expanding the liability).

[114] Prosecutor v. Stakić, Case No. IT-97-24-T, Judgement, ¶ 440 (Int'l

judges.[115] However, the trial judgment was overruled by the ICTY Appeals Chamber, constituted by both civil law and common law Judges,[116] which employed JCE instead.[117] Nevertheless, the "control over the crime" approach has been successfully applied at the ICC. ICC Pre-Trial Chamber I, which mainly consisted of civil law judges,[118] considered in *Prosecutor v. Lubanga* that:

> [P]rincipals to a crime are not limited to those who physically carry out the objective elements of the offence. Rather, principals also include those individuals who, in spite of their absence from the scene of the crime, control or mastermind its commission because they decide whether and . . . how the offence will be committed.[119]

The German scholar Claus Roxin developed the modern guise of this approach, which is an open concept and presents three main variants.[120] First, the "control over the action" in direct or immediate perpetration, is such that an individual or a group of individuals physically commit(s) murder.[121] This first variant is illustrated by criminal codes of civil law countries, such as Columbia.[122] Under this first variant, the perpetrator is

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Crim. Trib. for the Former Yugoslavia July 31, 2003), http://www.icty.org/x/cases/stakic/tjug/en/stak-tj030731e.pdf.

[115] *See id.* (presiding by Judge Schomburg (Germany), Judge Vassylenko (Ukraine) and Judge Argibay (Argentina)).

[116] *See id.* (presiding by Judge Pocar (Italy) and integrated by Judge Shahabuddeen (Guyana), Judge Guney (Turkey), Judge Vaz (Senegal), and Judge Meron (United States)).

[117] *Id.* ¶¶ 59–63.

[118] *See generally* Prosecutor v. Lubanga, Case No. ICC-01/04-01/06, Decision on the confirmation of charges (Jan. 29, 2007), https://www.icc-cpi.int/CourtRecords/CR2007_02360.PDF (presiding by Judge Jorda (France) and integrated by Judge Kuenyehia (Ghana) and Judge Steiner (Brazil)).

[119] Prosecutor v. Lubanga, Case No. ICC-01/04-01/06, Judgment pursuant to Article 74 of the Statute, ¶ 920 (Mar. 14, 2012), https://www.icc-cpi.int/CourtRecords/CR2012_03942.PDF.

[120] CLAUS ROXIN, Autoria y Dominio del Hecho en Derecho Penal 149 (2000) § 17 [hereinafter Roxin 1]; *see generally* Claus Roxin, *Crimes as Part of Organized Power Structures*, 9 J. INT'L CRIM. JUST. 193, 193–205 (2011) (noting that the concept of "perpetrator" is one that is more open-ended and varies depending on specific facts) [hereinafter Roxin 2].

[121] *See generally* Roxin 2, *supra* note 120, at 195–202 (discussing the murder in the context of "control over the action" through the Stashynsky case).

[122] Criminal Code of (1988), Section 25(2); *see generally* CÓDIGO PENAL [C.

a person who carries out the elements of the crime and has control over the crime, insofar as he/she physically carries those elements.[123] This mode does not seem to be relevant for the attribution of criminal liability to senior leaders since they usually are neither the trigger-pullers, nor are they present at the crime scene.

Second, the "control over the will" in indirect perpetration, e.g., when an individual uses an innocent agent (a minor or an insane) to commit murder, or when the physical (direct) perpetrator is coerced or mistaken.[124] Criminal courts of both civil law and common law countries have applied this second variant.[125] Such a variant may be of practical importance when the physical perpetrators are innocent agents, such as child soldiers who have been used in several recent armed conflicts,[126] or when there is enough evidence that the physical perpetrators were coerced.

Third, an example of "functional control over the will" in indirect perpetration would be when a soldier who himself/herself is a perpetrator (neither under coercion, mistake, nor an innocent agent) commits murder by implementing orders within an organized structure of power controlled by a senior

PEN.] [CRIMINAL CODE] art. 29, (Colom.) (discussing the differences between those who perform the criminal conduct and those who contribute to the criminal conduct).

[123] *See* Roxin 1, *supra* note 120, § 18 (discussing that the person who performs the necessary elements of a crime is the author of the crime); *see also* Prosecutor v. Lubanga, Case No. ICC-01/04-01/06, Decision on the confirmation of charges, ¶ 332 (Jan. 29, 2007), https://www.icc-cpi.int/CourtRecords/CR2007_02360.PDF (discussing when a person can become a perpetrator of a crime); *see also* Prosecutor v. Katanga, Case No. ICC-01/04-01/07, Decision on the confirmation of charges, ¶ 488(a) (Sept. 30, 2008), https://www.icc-cpi.int/CourtRecords/CR2008_05172.PDF (noting that "a principal is one who . . . physically carries out all elements of the offence . . . .").

[124] Roxin 1, *supra* note 120, at 259–69; Roxin 2, *supra* note 120, at 197.

[125] *See generally* OLÁSOLO, *supra* note 8, at 61–62 nn.271, 273–76 & 279 (noting cases that have applied this approach). Courts of common-law countries have also applied the notion of the "control over the crime" to convict, as a perpetrator, the person who uses an innocent agent as a tool to commit a crime.

[126] Armed conflicts in the Democratic Republic of Congo, Sierra Leone, Rwanda, Colombia and Peru.

political or military leader, or a group of senior leaders (indirect perpetrators or masterminds).[127] Courts of civil law countries have embraced this third variant in cases involving individuals such as former Latin-American Presidents.[128] This variant has a broader scope of practical application than the second one. In cases where there is one individual mastermind, who does not physically commit a crime, the individual can still be found liable for indirect commission because the individual uses a "direct" perpetrator as an "instrument" who is functionally controlled by the former's dominant will. The indirect perpetrator's control over the crime is thus derived from the functional power of an individual's dominant will.[129] Where there is a plurality of masterminds, the functional control is based on the contribution of several offenders to the commission of a crime, which amounts to co-performance. This is grounded in the principle of distribution of tasks. The key position of each co-perpetrator lies on their shared control over the crime, hence, their power to ruin the implementation of the common plan by withholding his/her contribution to the crime.[130]

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[127] *See* Roxin 1, *supra* note 120, at 269–80 (discussing actors different involvements in criminal activity in organized power structures); *see also* Roxin 2, *supra* note 120, at 197–202 (discussing control based on organized power structures, the Eichmann case, and perpetration and participation with organizational power structure).

[128] *See infra* Section III.B (discussing specific cases involving "functional control over the will").

[129] *See* Roxin 1, *supra* note 120, § 20 (discussing the possible justifications for actors who did not execute the act alone); *see also* Prosecutor v. Lubanga, Case No. ICC-01/04-01/06, Decision on the confirmation of charges, ¶ 332(ii) (Jan. 29, 2007), https://www.icc-cpi.int/CourtRecords/CR2007_02360.PDF (discussing that individuals control the will of those who carry out the objective elements of the offence through both direct and indirect perpetration); *see also* Prosecutor v. Katanga, Case No. ICC-01/04-01/07, Decision on the confirmation of charges, ¶ 488(c) (Sept. 30, 2008), https://www.icc-cpi.int/CourtRecords/CR2008_05172.PDF (defining principal as a person who "has control over the will of those who carry out the objective elements of the offence . . . .").

[130] *See* Roxin 1, *supra* note 120, § 27 (discussing co-authorship and the dominion of fact); *see also Lubanga*, ICC-01/04-01/06, Decision on the confirmation of charges, ¶ 332(iii) (explaining that principals have control over the offense based on the essential tasks assigned to them); *see also Katanga*, Case No. ICC-01/04-01/07, Decision on the confirmation of charges, ¶ 488(b) (providing a definition of a principal perpetrator which considers the level of control the principal perpetrator had over the crime, measured by "the essential tasks assigned to him . . . .").

Bearing in mind the previous doctrinal framework, it is argued here that the "control over the crime" approach is a sounder option than JCE to distinguish principals and accessories. Thus, it more accurately captures the real dimensions of the criminal liability of political and military leaders based on three arguments.

First, the "control over the crime" approach offers more coherent parameters to clearly qualify the most senior leaders as principals and not just as mere accessories to the crime. It is argued here that the "control over the crime" is a more reliable approach. Due to its hybrid nature, this approach merges the best of the subjective and objective approaches leading to a result legally and logically more consistent. On the other hand, the objective component is given by the factual circumstances leading to the control over the crime, and the subjective component is represented by the awareness of the factual circumstances that lead to such control.[131] In the light of the jurisprudence of the ICC, the "control over the crime" approach reconciles two contrary positions and makes them move forward.[132] This clearly contrasts with JCE where, as analyzed,[133] minor defendants may be found as the only principals and senior leaders may be convicted only as mere accessories. Therefore, it can be argued that the "control over the crime" approach is more realistic than JCE because the former is better suited than the latter to reflect the dynamics of grave criminality as it happens in the real world. In other words, it is considered here that it is fair and logical to hold senior leaders guilty as principals and not as mere accessories in cases where they were aware of the crime that they intentionally masterminded and kept under their control.

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[131] *See* OLÁSOLO, *supra* note 8, at 36 (analyzing the subjective and objective components of the control of the crime theory).

[132] *See Katanga*, Case No. ICC-01/04-01/07, Decision on the confirmation of charges, ¶ 484 (citing Claus Roxin, Strafrecht Allgemeiner Teil II § 25/30 (2003), noting that "the doctrine of control over the crime corresponds to an evolution of subjective and objective approaches, such that it effectively represents a synthesis of previously opposed views and doubtless owes its broad acceptance to this reconciliation of contrary positions.").

[133] *See supra* Section II.A (discussing potential issues that occur when differentiating principals from accessories).

Second, the "control over the crime" approach is a clearer standard to distinguish between principals and accessories. This is illustrated by how the ICC Statute frames the modes of liability. Article 25(3)(a) of the ICC Statute deals with the three basic modes of liability relating to commission by a principal "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." In turn, modes of accessorial liability are listed in subsequent paragraphs under the same article: ordering, soliciting and inducing (Article 25(3)(b)); aiding, abetting and otherwise assisting in the perpetration of the crime (Article 25(3)(c)); and a residual form of accessory liability (Article 25(3)(d)),[134] which was cited by the ICTY Appeals Chamber in *Prosecutor v. Tadic* to give content to its then novel JCE.[135] Accordingly, unlike the ICTY, which had to provide content to its Statute about how to distinguish between principals and accessories, the ICC Statute already contains a clear distinction between principals and accessories to the crime. By relying on Article 25(3)(a) of the ICC Statute, ICC Trial Chamber II in *Prosecutor v. Katanga* and ICC Pre-Trial Chamber I in *Prosecutor v. Lubanga* concluded that the ICC Statute does not embrace the objective approach as the commission by another person cannot be reconciled with the consideration of physical perpetrators as the only possible principals to the crime.[136]

Third, the ICC, based on its Statute, has also concluded that Article 25(3)(a) cannot be grounded in a subjective approach.[137]

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[134] *See* ICC Statute, *supra* note 13 art. 25(3)(d) (imposing responsibility where the offender "[i]n any other way contributes to the commission or attempted commission of such a crime by a group of persons acting with a common purpose.").

[135] Prosecutor v. Tadic, Case No. IT-94-1-A, Judgement, ¶ 222 (Int'l Crim. Trib. for the Former Yugoslavia July 15, 1999), http://www.icty.org/x/cases/tadic/acjug/en/tad-aj990715e.pdf.

[136] Prosecutor v. Katanga, Case No. ICC-01/04-01/07, Judgment pursuant to Article 74 of the Statute ¶ 1392 (Trial Chamber II Mar. 7, 2014), https://www.icc-cpi.int/CourtRecords/CR2015_04025.PDF; Prosecutor v. Lubanga, Case No. ICC-01/04-01/06, Decision on the confirmation of charges, ¶ 332(ii) (Pre-Trial Chamber I Jan. 29, 2007), https://www.icc-cpi.int/CourtRecords/CR2007_02360.PDF.

[137] *See Lubanga*, ICC-01/04-01/06, Decision on the confirmation of charges, ¶¶ 333–37 (discussing individuals who have control over the

The ICC found that Article 25(3)(d) incorporates a mode of liability akin to JCE and, as under the ICC Statute this provision raises accessorial liability,[138] the approach endorsed by the ICC Statute to identify the principals is not subjective unlike that adopted by the ICTY and the ICTR.[139] Therefore, the ICC by interpreting its Statute has considered JCE or, in general, modes of liability based on a subjective approach as residual or accessorial. By considering JCE as a theory under customary international law to distinguish principals from accessories, the ICTY Appeals Chamber in *Prosecutor v. Tadic* cited Article 25(3)(d).[140] However, as mentioned, ICC Pre-Trial Chambers in *Prosecutor v. Lubanga* and *Prosecutor v. Katanga* rejected the use of a subjective approach. Some authors, based on a critical analysis of the ICTY's jurisprudence, have casted doubts on both how coherent the use of JCE was to distinguish between principals and accessories and whether participation in a JCE gives rise to liability as a principal to the crime in the first place.[141]

In any event, the real scope of criminal liability of political and military leaders is expected to be accurately and clearly portrayed by limiting it to one or more of the three modes of

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commission of the offence as well as the subjective criteria for distinguishing between principals and accessories under Article 25(3)(a) and 25(3)(d) of the ICC Statute); The ICC also added that Article 25(3)(d) would have been the basis of the concept of co-perpetration under Article 25(3)(a) of the ICC Statute, had the drafters of the ICC Statute opted for a subjective approach to distinguish between principals and accessories.

[138] *See id.* ¶¶ 334–37 (discussing the close relation between Article 25(3)(d) and the concept of joint criminal liability).

[139] *See generally* George P. Fletcher & Jens David Ohlin, *Reclaiming Fundamental Principles of Criminal Law in the Darfur Case*, 3 J. INT'L CRIM. JUST. 539, 549 (2005) (illustrating that although Article 25(3)(d) was considered akin to JCE by the ICC, there is actually an important difference because in the former, either intention to aim the criminal plan or even knowledge would suffice, whereas knowledge is not enough in JCE).

[140] *See* Prosecutor v. Tadic, Case No. IT-94-1-A, Judgement, ¶¶ 222–23 (Int'l Crim. Trib. for the Former Yugoslavia July 15, 1999), http://www.icty.org/x/cases/tadic/acjug/en/tad-aj990715e.pdf (noting that Article 25 of the ICC Statute was not only adopted by a Diplomatic Conference in Rome but was also adopted by a majority of States, and was endorsed by the Sixth Committee of the UN General Assembly).

[141] *See* OLÁSOLO, *supra* note 8, at 53–54 (discussing incongruent notions of international and regional conventions in differentiating principals and accessories).

principal criminal liability contained in the ICC Statute read in the light of the "control over the crime" approach.[142] Indeed, the ICC has so far used those modes of liability concerning state and non-state civilian and military leaders, including warlords of Uganda, Democratic Republic of Congo and Sudan's President Al Bashir. As JCE is contained in the ICC Statute as a residual mode of liability, it will likely be used exceptionally. The ICC primarily applied the "control over the crime" approach rather than JCE.[143] Indeed, the ICC Appeals Chamber in *Prosecutor v. Lubanga* confirmed that the "control over the crime" theory is "a convincing and adequate approach."[144] Among other legal scholars, Ambos has also concluded that "this theory is indeed now the guiding principle to distinguish between perpetration and accessorial responsibility (secondary participation) in the Court's case law."[145]

III. INDIVIDUAL RESPONSIBILITY ISSUES

The first subsection of this section aims to demonstrate that the application of JCE in cases of senior leaders may lead to inconsistencies with the principle of individual criminal liability. On the one hand, JCE presents limitations in large criminal enterprises. While on the other hand, the attribution of crimes not originally agreed on in a JCE but supposedly "foreseeable" is highly controversial. The second subsection seeks to demonstrate that the "control over the crime" approach does not present those problems. In particular, the mode of indirect perpetration controlling an organized structure of power better reflects the liability of senior leaders in strict respect for the principle of individual criminal liability.

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[142] Briony McKenzie, The Principal Liability of Political and Military Leaders for International Crimes: Joint Criminal Enterprise *versus* Indirect Co-Perpetration 28–32 (Oct. 2014) (unpublished LLB (Hons) dissertation, University of Otago) (on file with University of Otago).

[143] *See generally id.* (discussing the application of the control over the crime approach in the context of the ICC).

[144] Prosecutor v. Lubanga, Case No. ICC-01/04-01/06 A 5, Judgment on the appeal of Mr Thomas Lubanaga Dyilo against his conviction, ¶¶ 469–70, 473 (Dec. 1, 2014), https://www.icc-cpi.int/CourtRecords/CR2014_09844.PDF.

[145] Ambos, *supra* note 8, at 979, 997–98.

A. Difficult Application of JCE to Large Criminal Enterprises and the Problem of "Foreseeable" Crimes

Individual responsibility issues, a first problem that the original doctrine of JCE (as shaped by the ICTY in *Prosecutor v. Tadic)*, face issues in their application when determining whether its application can be extrapolated from small criminal enterprises to large ones. As mentioned, JCE was first framed at the ICTY to address individual criminal liability out of a mob violence case involving low-level perpetrators in pursuance of a small criminal enterprise.[146] However, the real challenge came later when the ICTY started prosecuting and trying political and military leaders for specific crimes committed by a multitude of lower level offenders in a context of structural and geographical remoteness between the former and the latter. The problem then became clear as voiced by the former ICTY/ICTR Prosecutor Del Ponte: "criminal liability of high ranking leaders who share the intent to commit a crime and jointly act to achieve it through various means, cannot be dependent on whether one of them actually physically commits the crime."[147]

In any event, the failure of JCE, as understood by the ICTY and the ICTR to live up to that challenge, may be explained by two complementary reasons.[148] First, in systematic or large scale criminality, the higher the position of a military or political leader, the broader the criminal activities in which he/she has participated in are.[149] As a result, the number of members of a JCE, in which the leader has supposedly been involved, often becomes much higher.[150] Second, the theory of JCE requires including, within a JCE, political and military leaders as well as mid-level and low-ranking followers who physically execute the crimes.[151] In scenarios characterized by large numbers of

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[146] *See supra* Section I.C (discussing specific courts that have applied the joint criminal enterprise theory).

[147] Carla Del Ponte, *Investigation and Prosecution of Large-Scale Crimes at the International Level: The Experience of the ICTY*, 4 J. INT'L CRIM. JUST. 539, 550–51 (2006).

[148] *See* OLÁSOLO, *supra* note 8, at 189–90 (discussing difficulty in applying traditional JCE notions to perpetrators who are remote).

[149] *Id.* at 190.

[150] *Id.*

[151] *Id.*

individuals and remoteness, the application of the original notion of JCE becomes a sort of legal fiction that does not meet real circumstances. JCE requires that all members of the criminal enterprise act in pursuance of a single common criminal plan. They additionally need to share both the intent to commit the core crimes of the criminal enterprise and any additional intent (*dolus specialis*) that may be required by such crimes. For example, this contrasts with the situation of the Nazi SS. Although the IMT, after a fair hearing declared the SS to be a criminal organization, did not suggest that all of the SS members shared the same common purpose of the SS.[152]

The common purpose doctrine assumes, as an element, that JCE members in entering a prior agreement prove to be psychologically capable and prepared to commit the crimes in question and, therefore, prevents them from "recoil and . . . have to blame themselves for their predicament."[153] The pivotal importance of a prior and explicit agreement is grounded in its condition as the only link that binds the members of the group together. Nonetheless, in the contexts of large organizations that contain several hierarchical layers, these explicit agreements and mutual understandings are normally absent. Because of these absent explicit agreements, the use of JCE in charging high-ranking offenders is almost fatally compromised. Several authors, including Antonio Cassese, have stood up for JCE, concluding that the only solution in cases of vast criminal enterprises to attribute criminal responsibility to senior political and military leaders is simply not to rely on any JCE doctrine.[154]

The application of JCE to large criminal enterprises seems to come dangerously closer to a variety of collective criminal liability[155] and risks violating the principle of individual

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[152] IMT, Judgment of 1 October 1946, *in* 22 Trial of German Major War Criminals, Proceedings of the International Military Tribunal Sitting at Nuremberg, Germany 501–23 (1946) (declaring the Nazi Leadership Corps, Gestapo and SD, and SS to be criminal organizations but not doing so as for SA, Reich Cabinet, and the General Staff and High Command).

[153] van der Wilt, *supra* note 40, at 107.

[154] *See* Cassese, *supra* note 39, at 126, 133 (giving support to JCE).

[155] *See* Mohamed Elewa Badar, *"Just Convict Everyone!"–Joint Perpetration: From Tadić to Stakić and Back Again*, 6 INT'L CRIM. L. REV. 293, 302 (2006) (finding that "[i]f, one day, the Prosecution succeeds in granting a

criminal responsibility.[156] This theory is illustrated in *Prosecutor v. Brđanin* when the prosecution alleged a broad JCE spanning from the President of the *Republika Srpska* to members of the Army of the *Republika Srpska* (VRS) and Serb paramilitary members.[157] The ICTY Trial Chamber in *Prosecutor v. Brđanin*, which was later overruled by the ICTY Appeals Chamber on this point, had found that JCE should only apply to relatively small-scale cases and not in this case due to its extraordinarily broad nature.[158] This example, to some extent, is similar to the notion of considering membership in a criminal organization as being a crime, something not seen since the IMT Statute.[159] Yet, when applying its Statute, the IMT recommended that future trials for criminal membership should

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conviction for one of the 'specific purpose crimes' under the third category of joint criminal enterprise, this will alter the JCE doctrine to become an umbrella to 'just convict everyone'."); *see* Ambos, *supra* note 101, at 167–69 (finding that JCE III makes a non-actor responsible for the conduct of an actor, which is a form of vicarious liability, and should only be considered as an aider or abettor to the crime).

[156] *See* CASSESE, *supra* note 2, at 33–34 (stating that the principle of individual criminal responsibility "lays down two notions. First, nobody may be held accountable for criminal offences perpetrated by other persons . . . . Secondly, a person may only be held criminally liable if he is somehow culpable for any breach of criminal rules.").

[157] Alberto Nardelli et. al., *Bosnia and Herzegovina: The World's Most Complicated System of Government?*, THE GUARDIAN (Oct. 8, 2014, 7:58 AM), https://www.theguardian.com/news/datablog/2014/oct/08/bosnia-herzegovina-elections-the-worlds-most-complicated-system-of-government (showing that the Republika Srpska is one of two main political entities of Bosnia and Herzegovina, the other being the Federation of Bosnia Herzegovina); *see generally* Prosecutor v. Brđanin, Case No. IT-99-36-T, Judgement, ¶ 10 (Int'l Crim. Trib. for the Former Yugoslavia Sept. 1, 2004), http://www.icty.org/x/cases/brdanin/tjug/en/brd-tj040901e.pdf (discussing the effects of the JCE on both the president and army members of the Republika Srpska).

[158] *See Brđanin*, IT-99-36-T, Judgement, ¶¶ 355–56 (finding that the appeals chamber intended a small enterprise for JCE); *see also* Prosecutor v. Brđanin, Case No. IT-99-36-A, Judgement, ¶ 422 (Int'l Crim. Trib. of the Former Yugoslavia Apr. 3, 2007), http://www.icty.org/x/cases/brdanin/acjug/en/brd-aj070403-e.pdf (noting that the Appeals Chamber contemplated applying JCE to larger criminal cases such as Tadic).

[159] *See* Prosecution and Punishment, *supra* note 67, art. 10 (stating that "where a group or organi[z]ation is declared criminal by the Tribunal, the competent national authority of any Signatory shall have the right to bring individuals to trial for membership therein before national, military or occupation courts . . . the criminal nature of the group or organi[z]ation is considered proved and shall not be questioned.").

include firm due process guarantees and only involve true members of the convicted entities, namely: the SS, the SD and the Gestapo, and the leadership corps of the Nazi Party.[160]

Although the ICTY and the ICTR kept their position of applying JCE to attribute criminal liability to high and middle ranking perpetrators, those tribunals were mindful of the problems just underlined. The ICTY and the ICTR actually tried to adapt their original small criminal enterprise JCE theory to make it applicable to large criminal enterprises.[161] In *Prosecutor v. Brđanin*, which followed the decision of the ICTR in *Rwamakuba v. Prosecutor*,[162] the ICTY Appeals Chamber held that the application of JCE is not circumscribed to small cases.[163] This Chamber reached such a conclusion by considering that what matters in a basic form of JCE is not whether the person who physically carried out the objective elements of a specific crime is a JCE participant, but rather whether that crime belongs to the common criminal plan or purpose.[164] The Chamber was presided by US Judge Meron,[165] and in a conclusion similar to the *Pinkerton* Doctrine,[166] the Court

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[160] *See* IMT, Judgment of 1 October 1946, *in* 22 The Trial of German Major War Criminals, Proceedings of the International Military Tribunal Sitting at Nuremberg, Germany 449 (1948) (finding the need to safeguard convicting only certain individuals because of the possibility of a death sentence); *see also* Jonathan A. Bush, *The Prehistory of Corporations and Conspiracy in International Law: What Nuremberg Really Said*, 109 COLUM. L. REV. 1094, 1161 (2009) (stating that as to the Nuremberg trials in the zonal governments that "the implication was that membership charges would not be a shortcut to conviction and would certainly not be available against average complicitous Germans, who would be handled through denazification or not at all.").

[161] *See* Neha Jain, *The Control Theory of Perpetration in Criminal Law*, 12 CHICAGO J. INT'L L. 159, 162 (2011) (discussing the ICTY and ICTR adopting JCE).

[162] Rwamakuba v. Prosecutor, Case No. ICTR-98-44-AR72.4, Decision on Interlocutory Appeal Regarding Application of Joint Criminal Enterprise to the Crime of Genocide, ¶ 25 (Oct. 22, 2004), http://www.worldcourts.com/ictr/eng/decisions/2004.10.22_Prosecutor_v_Rwamakuba.pdf.

[163] *Brđanin*, IT-99-36-A, Judgement, ¶ 423.

[164] *Id.* ¶ 410.

[165] *See generally id.* (the Chamber was also integrated by Judges Shahabuddeen (Guyana), Güney (Turkey), Vaz (Senegal), and Van Den Wyngaert (Belgium)).

[166] *See supra* Section II.A (discussing the application of liability as concluded in the Pinkerton Doctrine).

established that:

> In cases where the principal perpetrator shares that common criminal purpose of the JCE, or in other words, is a member of the JCE, and commits a crime in furtherance of the JCE, it is superfluous to require an additional agreement between that person and the accused to commit that particular crime. In cases where the person who carried out the *actus reus* of the crime is not a member of the JCE, the key issue remains that of ascertaining whether the crime in question forms part of the common criminal purpose. This is a matter of evidence.[167]

By limiting the JCE participants to political and military leaders who design the common criminal plan and direct their subordinates to implement such plan, the ICTY Appeals Chamber accordingly tried to address the problems stemming from the original JCE in cases of vast criminal enterprises committed in a broad territory over an extended period of time. Thus, all the JCE participants belong to political and military leadership and their relationship is more horizontal than vertical. Some scholars have referred to this adaptation of the original JCE as "[JCE] at the leadership level."[168] Moreover, the ICTY in *Prosecutor v. Martić* implicitly endorsed this notion by even introducing some elements of indirect perpetration which, as explained, is grounded in the "control over the crime" approach: "[i]t is not required that the principal perpetrators of the crimes which are part of the common purpose be members of a JCE. An accused or another member of a JCE may use the principal perpetrators to carry out the *actus reus* of a crime."[169]

Despite these efforts, it is argued here that such endeavors are not enough. First, JCE as applied to leadership combines two competing approaches to distinguish between principals and accessories, namely, a subjective approach which is intrinsic to JCE, and a hybrid, or functional approach, that underlies the

[167] *Brđanin*, IT-99-36-A, Judgement, ¶ 418.

[168] *See* OLÁSOLO, *supra* note 8, at 206 (discussing how rank and position determines your use and duties for the commission of crimes).

[169] Prosecutor v. Martić, Case No. IT-95-11-T, Judgement, ¶ 438 (Int'l Crim. Trib. for the Former Yugoslavia June 12, 2007), http://www.icty.org/x/cases/martic/tjug/en/070612.pdf (alteration in original).

mode of indirect perpetration using an organized structure of power. The result in this adapted JCE is that the controlling criterion to attribute criminal liability to senior leaders as principals is left uncertain. Accordingly, the identification of the ultimate approach to determine criminal responsibility of senior leaders was left unclear. Since JCE at the leadership level departs from the subjective approach, but without completely adopting the "control over the crime" approach, such an ultimate criterion may be the shared intent to implement the common criminal plan with the other high-ranking officers, that the defendant shares control over the crime with the other JCE leaders, or even both of them. Such an outcome seems to just replace previous obscurity in applying the original JCE with other problems in applying an adapted JCE version at the leadership level.

Second, the inconvenience of this exercise also stems from the contents of the case law invoked by the ICTY and the ICTR to shape the notion of co-perpetration based on JCE at the leadership level. The jurisprudence invoked by the ICTY and the ICTR consisted in few post-World War II cases which applied forms of accessorial liability that have little to do with a doctrine relating to JCE/principal liability. Due to a terminological confusion, the ICTR in *Rwamakuba v. Prosecutor*[170] and the ICTY in *Prosecutor v. Brđanin*[171] inaccurately concluded the existence of JCE at the leadership level based on the *Justice* case and the *RuSHA* case,[172] both decided by the US Military Tribunal established in Germany after World War II. In the *Justice* case, the US Military Tribunal concluded that the criminal liability of the defendant arises when, among others, the following conditions are met: "knowledge of an offense

170 Rwamakuba v. Prosecutor, Case No. ICTR-98-44-AR72.4, Decision on Interlocutory Appeal Regarding Application of Joint Criminal Enterprise to the Crime of Genocide, ¶¶ 15–25 (Oct. 22, 2004), http://www.worldcourts.com/ictr/eng/decisions/2004.10.22_Prosecutor_v_Rwamakuba.pdf.

171 *Brđanin*, Case No. IT-99-36-A, Judgement, ¶¶ 395–404.

172 IMT, Judgement of 3–4 December 1947 (*ex. rel.* Justice Case), *in* 3 Trials of Major War Criminals, Proceedings of the International Military Tribunal Sitting at Nuremberg, Germany (1947) [hereinafter Justice Case]; IMT, Judgement 10 March 1948 (*ex. rel.* RuSHA Case), *in* 5 Trials of Major War Criminals Proceedings of the International Military Tribunal Sitting at Nuremberg, Germany (1948).

charged in the indictment and established by the evidence . . ." and "consciously participated in the plan or took a consenting part therein."[173] Despite the fact that there was some reference to plans or enterprises, the "knowledge" requirement used in the *Justice* case is a lower threshold than the one underlying JCE, namely, intent or *dolus*.[174] Additionally, the conspiracy charge was dismissed in the *Justice* case as the US Military Tribunal decided to adopt a finding of the IMT, which consisted in that conspiracy only extended to conspiracy to commit crimes against peace but not to conspiracy to commit war crimes or crimes against humanity.[175]

Another inaccuracy of the ICTR in *Rwamakuba v. Prosecutor* was to find that the language used in Article 6(a) of the IMT Charter is very similar to the language employed in *Prosecutor v. Tadic*.[176] With regard to the language, neither the IMT Charter nor the IMTFE Charter were relatively close to co-perpetration based on JCE.[177] The Charters of the IMT and the IMTFE contain no distinction between principals and

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[173] Justice Case, *supra* note 172, at 1081, 1093.

[174] *See generally id.* at 1093–96 (discussing the knowledge requirement in the *Justice* case—a non JCE circumstance).

[175] IMT, Judgement of 1 October 1946 (*ex. rel.* Göering Case), *in* Trial of the Major War Criminals, Proceedings of the International Military Tribunal Sitting at Nuremberg, Germany 226 (1947) (noting that "the Charter does not define as a separate crime any conspiracy except the one to commit acts of aggressive war."); *see also* Bush, *supra* note 160, at 1164 (noting that "Control Council Law No. 10 contained different language about complicity, conspiracy, and accessorial liability, meaning that that there was a stronger argument that conspiracy liability, even for conspiracy to commit war crimes and crimes against humanity, was within Law No. 10.").

[176] *See* Prosecutor v. Rwamakuba, Case No. ICTR-98-44-AR72.4, Decision on the Interlocutory Appeal Regarding Application of Joint Criminal Enterprise to the Crime of Genocide ¶ 24 (Oct. 22, 2004), https://cld.irmct.org/assets/filings/ICTR-98-44-1602-GOVERNMENT-I-KAREMERA-DECISION-ON-INTERLOCUTORY-APPEAL-REGARDING-APPLICATION-OF-JOINT-CRIMINAL-ENTERPRISE-TO-THE-CRIME-OF-GENOCIDE2.pdf (noting that "[t]he language used in the Charter of the International Military Tribunal, the indictment submitted to that tribunal, Control Council Law No. 10, and the indictment and judgement in the *Justice Case* have much in common with the language used in the *Tadić* Appeals Judgement to describe the elements of a joint criminal enterprise.") (alteration in original); *see also* Prosecutor v. Tadic, Case No. IT-94-1-A, Judgement ¶¶ 242, 260 (Int'l Crim. Trib. for the Former Yugoslavia July 15, 1999) (discussing further the Control Council Law No. 10).

[177] Justice Case, *supra* note 172, at 1081, 1093.

accessories, and these instruments additionally distinguish up to four categories on participants in a common plan or conspiracy[178] unlike JCE under which all the offenders are equally liable as principals (co-perpetrators) to the crimes.[179]

The Iraqi High Tribunal, when applying JCE-II to large scale criminal enterprises, arguably erred in affirming that Saddam Hussein participated in a JCE to further the criminal objectives of the Iraqi government and had the necessary *mens rea* to be held guilty due to his title as the leader of the Iraqi regime.[180] Thus, the Iraqi High Tribunal based its findings not on the defendant's individual intent but on his position and even family relationships.[181]

In addition to the problematic application of JCE to large scale criminal enterprises, another major issue on individual liability when applying JCE and, in particular JCE-III, is the problem of foreseeability of crimes not agreed upon by the JCE participants, either early or late-joiners. This is especially controversial in cases of *dolus specialis* crimes such as genocide, crimes against humanity of persecution, and aggression. Under JCE-III, all the members of a group are held accountable for the criminal conduct of some members merely because of the foreseeability of the crimes that are additional to the crimes originally agreed on.[182] This explains why there is consensus to

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[178] *See* Prosecution and Punishment, *supra* note 67, art.6(c) (stating there "shall be individual responsibility" for the listed crimes); *see also* Charter of the Int'l Mil. Trib. for the Far East, sec. II, art. (5)(c) (listing "[l]eaders, organizers, instigators and accomplices . . . [as] responsible for all acts performed by any person in execution of such plan.").

[179] *See* Prosecutor v. Furundžija, Case No. IT-95-17/1-A, Judgement ¶¶ 117–19 (Int'l Crim. Trib. for the Former Yugoslavia July 21, 2000), http://www.icty.org/x/cases/furundzija/acjug/en/fur-aj000721e.pdf (noting the previous Appeals Chamber decision that, "the common plan or purpose may materiali[z]e extemporaneously and be inferred from the fact that a plurality of persons acts in unison to put into effect a joint criminal enterprise.").

[180] Iraqi High Tribunal [First Criminal Court], 1/E First/2005 of November 5, 2006, p. 99 (Iraq).

[181] *Id.*

[182] *See* Prosecutor v. Martić, Case No. IT-95-11A, Judgement, ¶¶ 83–84 (Int'l Crim. Trib. for the Former Yugoslavia Oct. 8, 2006), http://www.icty.org/x/cases/martic/acjug/en/mar-aj081008e.pdf (discussing the lowered mens rea requirement of the foreseeability standard in JCE III).

qualify such standard as neither precise nor reliable,[183] and even regard JCE-III as the introduction of a form of strict liability.[184] The foreseeability standard paradoxically makes the sanction of the accused unforeseeable. JCE-II thus presupposes that the participant in a JCE must know that the crimes in question normally take place in the respective enterprise. However, this does not work in cases where the defendant credibly pleads a lack of knowledge with regard to foreseeability.

It is argued here that the problems with foreseeability in JCE-III are that all members of the conspiracy need to be treated equally, the distinction among participants is destroyed, and JCE-III artificially forces a conviction that would instead have to be a conviction based on negligence. This is illustrated in *Prosecutor v. Krstic*. Krstic was a commander of the *Republik Sprska* Drina Corps. The ICTY Trial Chamber concluded that "[Krstic] must be considered a principal perpetrator of these crimes."[185] In application of JCE-III for the genocide in Srebrenica.[186] Nevertheless, the contacts and meetings of Krstic with higher officers of the *Republik Sprska* army such as General Mladic and the foreseeability of the Srebrenica massacre, which led to the conviction of Krstc under JCE-III, were considered insufficient by the Appeals Chamber that instead found Krstc as an aider and abettor.[187] The imposition

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[183] *See* Fletcher & Ohlin, *supra* note 139, at 550 (discussing the criminal prosecution of an individual based on a theory of liability not found in the Article 25 Rome Statute but found in case law of the ICTY Statute); *see also* Ambos, *supra* note 101, at 174 (describing that adding a knowledge element to the foreseeability element is not precise or reliable); *see also* van der Wilt, *supra* note 40, at 99 (noting the scope of the Joint Criminal Enterprises are unclear); *see also* Cassese, *supra* note 39, at 122 (arguing whether the mens rea requirement should be the "subjective foresight" or the "objective foreseeability").

[184] GUÉNAËL METTRAUX, INTERNATIONAL CRIMES AND THE *AD HOC* TRIBUNALS 292–93 (2005); E. VAN SLIEDREGT, THE CRIMINAL RESPONSIBILITY OF INDIVIDUALS FOR VIOLATION OF INTERNATIONAL HUMANITARIAN LAW 106–09, 356–60 (2003).

[185] Prosecutor v. Krstic, Case No. IT-98-33-T, Judgement, ¶ 644 (Int'l Crim. Trib. for the Former Yugoslavia Aug. 2, 2001), http://www.icty.org/x/cases/krstic/tjug/en/krs-tj010802e.pdf.

[186] *Id.* ¶¶ 486–89 (noting that between July 12 and 15, 1995, members of the Bosnian Serb Army killed approximately 8,000 Bosnian Muslim men and boys).

[187] Prosecutor v. Krstic, Case No. IT-98-33-A, Judgement, ¶¶ 135–44 (Int'l Crim. Trib. for the Former Yugoslavia Apr. 19, 2004),

of a harsh sentence does not solve the problem because the difference between principal and accessories and the exact determination of criminal liability scope are at stake.[188]

This situation becomes even more problematic when the foreseeability standard, imbedded in JCE-III, is expanded to *dolus specialis* crimes. The ICTY Appeals Chamber in *Prosecutor v. Brđanin* downgraded the specific genocidal intent requirement,[189] which quintessentially defines genocide, in order to circumvent notorious evidentiary problems. This was followed by the ICTY decision in *Prosecutor v. Milosevic*. In the latter case, an ICTY Pre-Trial Chamber concluded that a participant in a JCE III to commit genocide is not required to have the specific genocidal intent because it is sufficient that the commission of this crime was "reasonably foreseeable" to him.[190] Therefore, this Chamber distinguished between JCE-I and JCE-III concerning the need of a specific intent shared by all the JCE participants in JCE-I as opposed to mere foreseeability for participants who were not directly perpetrating the genocide under JCE-III. The main argument of the ICTY and the ICTR about the application of JCE-III to specific *mens rea* crimes corresponds to the nature of JCE as another mode of liability and not as a crime itself.[191]

In principle, it may be claimed that one thing is the *mens rea* of a mode of liability (JCE-III) and another thing is the *mens rea* of the crime (genocide).[192] However, there is some contradiction because an accused may not be held responsible

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http://www.icty.org/x/cases/krstic/acjug/en/krs-aj040419e.pdf.

[188] *See* Ohlin, *supra* note 104, at 82–83 (discussing the concept of foreseeability in criminal law).

[189] Prosecutor v. Brđanin, Case No. IT-99-36-A, Decision on Interlocutory Appeal, ¶ 10 (Int'l Crim. Trib. for the Former Yugoslavia Mar. 19, 2004), http://www.icty.org/x/cases/brdanin/tdec/en/040319-2.htm.

[190] Prosecutor v. Milosevic, Case No. IT-02-54-T, Decision on Motion for Judgement of Acquittal, ¶¶ 291–92 (Int'l Crim. Trib. for the Former Yugoslavia June 16, 2004), http://www.icty.org/x/cases/slobodan_milosevic/tdec/en/040616.htm.

[191] *Brdjanin*, Case No. IT-99-36-A, Decision on Interlocutory Appeal, ¶ 5.

[192] *See* Elies van Sliedregt, *Joint Criminal Enterprise as a Pathway to Convicting Individuals*, 5 J. INT'L CRIM. JUST. 184, 207 (2007) (discussing the advantages of developing indirect perpetration as a mode of criminal liability).

for committing a crime that requires special *mens rea* unless this can be proved regardless of what mode of liability is employed. Additionally, the distance between the *mens rea* of the offender who committed the specific intent crime and the *mens rea* of the other(s) cannot be too large because "the crucial notions of 'personal culpability' and 'causation' would be torn to shreds."[193]

The ECCC has, however, excluded the application of JCE-III from cases concerning genocide charges because, among other reasons, it considered JCE-III not to be part of customary international law at the moment of the Khmer Rouge crimes.[194] Nonetheless, the diffuse contours of the notion of "foreseeable" crimes led the SCSL to reach even more questionable results. The SCSL lowered the *mens rea* requirement for JCE membership since the SCSL Appeals Chamber considered it sufficient that JCE members share a lawful common objective and each one separately "contemplates" the possibility that crimes might be committed in pursuance of such objective.[195] This arguably constituted a violation of the principle of individual responsibility, and was even qualified as a nonexistent fourth form of JCE.[196]

B. "The Control over the Crime" Approach as an Alternative

Modes of liability grounded in the "control over the crime" approach, in particular indirect perpetration using an organized structure of power either applied alone or in combination with co-perpetration, constitutes a better option than JCE to address individual responsibility issues previously raised.

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[193] Cassese, *supra* note 39, at 122.

[194] Prosecutor v. Chea, Case No. 002/19-09-2007-ECCC/OCIJ (PTC38), Decision on the Appeals Against the Co-Investigative Judges Order on Joint Criminal Enterprise (JCE), ¶¶ 77–83 (May 20, 2010).

[195] Prosecutor v. Brima, Case No. SCSL-2004-16-A, Judgment ¶ 80 (Feb. 22, 2008); *see also* Prosecutor v. Taylor, Case No. SCSL-2003-01-T, Decision on "Defence Notice of Appeal and Submissions Regarding the Majority Decision Concerning the Pleading of JCE in the Second Amended Indictment", ¶ 21 (May 1, 2009) (discussing what Members of the Revolutionary United Front were being charged with and the requisite liability for the crimes).

[196] *See* Jordash & Van Tuyl, *supra* note 46, at 604 (discussing the notion of "common criminal purpose construction," and how it has been applied inaccurately in some cases).

Indirect perpetration, namely, perpetration through another person, uses an organized structure of power and exhibits a solid theoretical structure to capture criminal liability of high-level perpetrators in contexts of the commission of large scale and/or systematic international crimes.[197] The hallmark of this mode is the perpetrator's domination of the human "tool" who directly executes the crime.[198] Nevertheless, this necessary lack of autonomy of the direct perpetrator would result in that only non-criminally responsible actors such as a minor, an insane individual, or a person under duress can be direct perpetrators, which would make this theory unsuitable for international crimes because these are almost always perpetrated by criminally responsible direct offenders.[199] To address this point, the theory of the German Professor Roxin, which was elaborated with a view to the trial of Eichmann,[200] is of particular importance. Roxin introduced a consistent exception via the notion of the organized structure of power that guarantees the "domination" of the commission of the crime even when the direct perpetrator is criminally responsible, which is incorporated in Article 25(3)(a) of the ICC Statute. Indirect perpetration using an organized structure of power is applicable provided that two requirements are met: there is a tight hierarchical structure, and the members of the organization must be easily replaceable.[201]

When closer attention is paid to the dynamics underlying mass criminality, it could be that crimes masterminded by the "perpetrator behind the perpetrator" or "the man behind the man" almost always involve a complex apparatus of power at which normally the direct perpetrators are "fungible", namely, any foot soldier unwilling or unable to carry out the crime can almost be immediately replaced by another one and so forth.

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197 *See* Jain, *supra* note 161, at 184–85 (discussing the elements of a perpetrator's control over the organization).

198 Roxin 1, *supra* note 120, at 269–80.

199 *See* Thomas Weigend, *Perpetration Through an Organization: The Unexpected Career of a German Legal Concept*, 9 J. INT'L CRIM. JUST. 91, 96 (2011) (discussing the actions of indirect perpetration, including the perpetrator's "domination of the human 'instrument' . . . .").

200 Roxin 1, *supra* note 120, at 273.

201 *Id.* at 272–73; s*ee also* Roxin 2, *supra* note 120, at 199–201 (noting that there are two components of indirect perpetration).

Therefore, the will of the indirect perpetrator, normally senior leaders, will be guaranteed and implemented precisely due to the use of an organized structure. As to the Nazi structure of power, used by Roxin as an example, some historians and specialists in holocaust studies such as Raul Hilberg have concluded that the German bureaucracy, especially during the last stages of the holocaust, worked without being ordered or pressured as everybody knew what to do and the objectives.[202]

Be that as it may, indirect perpetration using an organized apparatus of power made its debut at an international criminal tribunal in *Prosecutor v. Katanga* when the ICC found that the "control over the crime" amounted to "control over the organi[z]ation."[203] The ICC determined that the requirements of indirect perpetration now includes the existence of an apparatus of power, within which the direct perpetrator and indirect perpetrator operate and which, in turn, enables the indirect perpetrator to secure the commission of the crimes.[204] By quoting Roxin, the ICC established that:

> While his power of control over his own actions is unquestionable, the [direct] perpetrator is nonetheless, at the same time, a mere gear in the wheel of the machinery of power who can be replaced at any time, and this dual perspective places the intellectual author alongside the perpetrator at the heart of events.[205]

Also, ICC Trial Chamber II in *Prosecutor v. Katanga* referred to and explained in detail the theory of "control over the organi[z]ation" (*Organisationsherrschaft*), in which the "perpetrator behind the perpetrator" liability is applicable as a theory to interpret Article 25(3)(a) of the ICC Statute:

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[202] *See* Christopher R. Browning, *Spanning a Career: Three Editions of Raul Hilberg's Destruction of the European Jews*, *in* 8 LESSON AND LEGACIES 191, 194 (Doris L. Bergen ed., 2008) (noting that "Hilberg asserts that this bureaucracy 'had no master plan, no fundamental blueprint, no clear-cut view of its actions.' Yet . . . the German administration knew what it was doing.").

[203] Prosecutor v. Katanga, Case No. ICC-01/04-01/07, Decision on the confirmation of charges, ¶ 500 (Sept. 30, 2008), https://www.icc-cpi.int/CourtRecords/CR2008_05172.PDF.

[204] *Id.* ¶¶ 515–18.

[205] *Id.* ¶ 515 (quoting Claus Roxin, Täterschaft und Tatherrschaft 245 (8th ed. 2006)).

> This theory is the work of Claus Roxin and appears to be invoked mostly in scenarios where a crime was committed through persons bearing criminal responsibility . . . . [T]he theory is consonant with the foregoing constituent elements of indirect commission, since exertion of control over an apparatus of power allows control over the crimes committed by its members; a perpetrator behind the perpetrator may, therefore, be at work . . . . [T]he Pre-Trial Chamber held that where a crime is committed by members of an "organi[z]ed and hierarchical apparatus of power", "[t]he highest authority does not merely order the commission of a crime, but through his control over the organi[z]ation, essentially decides whether and how the crime would be committed."
>
> . . . . This key feature of the organi[z]ation, discerned in such functional automatism, secures the superior's control over the crime, irrespective of the members' identity.[206]

As ICC Trial Chamber II in *Prosecutor v. Katanga* recognized, the apparatus of power autonomously works and its existence and survival cannot depend on any personal relationship between its members since the existence of a "power structure" (*Matchapparat*) is necessary.[207] Importantly, the Chamber concluded that Roxin's theory cannot be reduced exclusively to bureaucracies similar to those of the Third Reich.[208] Therefore, a senior leader that commits a crime and becomes a perpetrator or a principal does not need to physically carry out the objective elements of that crime because it is sufficient that these elements are physically carried out by a person who the senior leader uses as a tool to execute the crime.[209] An additional example of the ICC's practice can be seen in the arrest warrant against the Sudanese President Al Bashir which stated that indirect perpetration was present using an organized structure of power and thus establishing liability.[210]

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[206] Prosecutor v. Katanga, Case No. ICC-01/04-01/07, Judgment pursuant to Article 74 of the Statute, ¶¶ 1404–05, 1409 (Mar. 7, 2014), https://www.icc-cpi.int/CourtRecords/CR2015_04025.PDF.

[207] *Id.* ¶ 1409.

[208] *Id.*

[209] Eser, *supra* note 8, at 709.

[210] *See* Prosecutor v. Al Bashir, Case No. ICC-02/05-01/09, Decision on the Prosecution's Application for a Warrant of Arrest against Omar Hassan Ahmad Al Bashir, ¶¶ 209–23 (Mar. 4, 2009), https://www.icc-cpi.int/CourtRecords/CR2009_01517.PDF (finding that Al Bashir is alleged to be "criminally responsible under article 25(3)(a) of the Statute for committing

In addition, indirect perpetration using an organized structure of power is flexible enough to be combined to better reflect the reality of criminality at large scale. For example, in *Prosecutor v. Katanga*, the ICC employed jointly indirect perpetration using an organized structure of power and co-perpetration giving way to "indirect co-perpetration"[211] as the only feasible manner to accurately depict the real scope of the criminal liability of the two defendants as principals. The ICC used this combination since even though Katanga and Ngudjolo Chui acted with a common plan (co-perpetration), each co-defendant led his own organization, and some of the individuals within each structure of power only accepted orders from the leader of their own ethnic group who could be described as:

> An individual who has no control over the person through whom the crime would be committed cannot be said to commit the crime by means of that other person. However, if he acts jointly with another individual—one who controls the person used as an instrument—these crimes can be attributed to him on the basis of mutual attribution.[212]

Other factual scenarios may be better examined via the so-called "joint indirect-perpetratorship."[213] Unlike "indirect co-perpetration", which involves more than one criminal organization, joint indirect perpetration involves "only one (criminal) organization led and dominated by (various) co-

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genocide, crimes against humanity and war crimes through the 'apparatus' of the State of Sudan . . . .").

[211] Prosecutor v. Katanga, Case No. ICC-01/04-01/07, Decision on the confirmation of charges, ¶ 490 (Sept. 30, 2008), https://www.icc-cpi.int/CourtRecords/CR2008_05172.PDF; *see* OLÁSOLO, *supra* note 8, at 302–30 (describing how indirect co-perpetration has developed in cases including the Katanga case); *see also* Prosecutor v. Milutinovic, Case No. IT-05-87-PT, Decision on Ojdanic's Motion Challenging Jurisdiction: Indirect Co-Perpetration, ¶ 25 (Int'l Crim. Trib. for the Former Yugoslavia Mar. 22, 2006), http://www.icty.org/x/cases/milutinovic/tdec/en/060322.htm (finding that "in order to come within the Tribunal's jurisdiction, any form of responsibility 'must be provided for in the Statute, explicitly or implicitly', and 'must have existed under customary international law at the relevant time.'").

[212] Prosecutor v. Katanga, Case No. ICC-01/04-01/07, Decision on the confirmation of charges, ¶ 493.

[213] *See* Ambos, *supra* note 8, at 997–98 (discussing the applicability of assessing a scenario under a joint indirect-perpetration theory).

perpetrators acting with a common purpose."[214] In the practice of the ICC, the Ivorian politician leader Blé Goudé was charged with the perpetration of the alleged crimes jointly with both the former Ivorian President Laurent Gbagbo and Gbagbo's inner circle.[215] This means that Goude was accused of having "exercised control, jointly with the other co-perpetrators, over the pro-Gbagbo forces, which were organi[z]ed and hierarchical in nature and through which the crimes charged were committed."[216]

At the domestic level, the *Junta Trial* case in Argentina and the *German Border* case illustrate this type of situation related to "joint indirect-perpetratorship." In the *Junta Trial* case, the Federal Court of Appeals of Argentina found that members of the military dictatorship known as "Junta," who ruled Argentina from 1976 to 1984, controlled and commanded a machinery of power whereby members of armed and security forces tortured, murdered, and disappeared civilians who were considered subversives.[217] In the *German Border* case, the German Federal Supreme Court found the leaders of the German Democratic Republic responsible for homicide as indirect perpetrators by using an organized structure of power that involved border guards who shot citizens that tried to flee to West Germany.[218] The application of indirect perpetration using an organized power structure controlled by several individuals has also been used in the prosecution of senior leaders of non-state armed groups. For example, the Peruvian Supreme Court in *Abimael Guzman* found the leaders of the Maoist Shining Path Movement-Peruvian Communist Party to be guilty as indirect perpetrators of widespread and systematic murders and

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[214] *Id.* at 998.

[215] Prosecutor v. Blé Goudé, Case No. ICC-02/11-02/11, Decision on the confirmation of charges against Charles Blé Goudé, ¶ 137 (Dec. 11, 2014), https://www.icc-cpi.int/CourtRecords/CR2015_05444.PDF.

[216] *Id.* ¶ 149; *see also* Ambos, *supra* note 8, at 998 (discussing further the elements of a joint indirect-perpetratorship theory).

[217] Cámara Federal de Apelaciones [CFed.] [federal court of appeals], 09/12/1985, "Prosecutor v. Jorge Rafael Videla," (1985) (Arg.).

[218] Bundesgerichtshof [BGH] [Federal Court of Justice] Nov. 3, 1992, ENTSCHEIDUNGEN DES BUNDESGERICHTSHOFES IN STRAFSACHEN BGHSt 39, 1 (Ger.) translated in Raymond Youngs, Sourcebook on German Law (Cavendish, 1994).

terrorist acts committed during the Peruvian armed conflict.[219]

Although ICC Pre-Trial Chamber I in *Prosecutor v. Al-Bashir* implied that there were indirect co-perpetrators,[220] this may be questioned.[221] In any event, the Chamber in *Prosecutor v. Al-Bashir* employed indirect perpetration using a structure of power as a mode of attribution of criminal liability. This makes sense because there was only one criminal organization led by Al-Bashir who was a standalone figure in full control of the alleged structure of power organized to supposedly commit crimes in Darfur.[222] This approach was also employed by the Peruvian Supreme Court in the 2009 judgment in the case against former Peruvian President Alberto Fujimori.[223] Fujimori was convicted of acts categorized as crimes against humanity due to his role as an indirect perpetrator controlling an organized structure of power that involved the use of a paramilitary group that murdered and tortured civilians considered subversives or terrorists.[224] In 1998, Justice Baltazar Garzón (National Audience of Spain) invoked similar reasoning by issuing a committal for trial decision against the ex-Chilean President Augusto Pinochet, who ruled Chile from 1973 to 1990; Pinochet allegedly controlled an apparatus of power to commit systematic and widespread torture, murder, and enforced disappearance of political and ideological opponents.[225]

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[219] Att'y Gen. v. Guzman, R.N. No. 5385-2006, Judgment, § 4.5.8–5.2 (Crim. Chamber II of the Sup. Ct. Nov. 26, 2007), https://www.asser.nl/upload/documents/DomCLIC/Docs/NLP/Peru/GuzmanReinoso_CorteSuprema_Sentencia_13-10-2006.pdf.

[220] Prosecutor v. Al Bashir, Case No. ICC-02/05-01/09, Decision on the Prosecution's Application for a Warrant of Arrest against Omar Hassan Ahmad Al Bashir, ¶ 216 (Mar. 4, 2009), https://www.icc-cpi.int/CourtRecords/CR2009_01517.PDF.

[221] Ambos, *supra* note 8, at 998.

[222] *Al Bashir*, ICC-02/05-01/09-3, Decision on the Prosecution's Application for a Warrant of Arrest against Omar Hassan Ahmad Al Bashir, ¶ 222.

[223] Att'y Gen. v. Fujimori, Exp. No. A.V. 19-2001Barrios Altos, Case No. AV 19-2001, Judgement, La Cantuta and Army Intelligence Service Basement Cases, ¶¶ 718–48 (Sup. Ct. of Peru Apr. 7, 2009), https://www.asser.nl/upload/documents/DomCLIC/Docs/NLP/Peru/Fujimori_Sentencia_7-4-2009.pdf translated in Aimee Sullivan, The Judgement Against Fujimori for Human Rights Violations, 25 Am. U. L. Rev. 834, 834-42 (2010).

[224] *Id.*

[225] Augusto Pinochet Ugarte, [1999] 38 I.L.M. 68 (Q.B. Div'l Ct. 1998); R

Accordingly, indirect perpetration grounded in the "control over the crime" approach is sufficiently flexible to accurately capture the criminal liability of leaders. As discussed, possible scenarios include: i) cases of a single senior leader; ii) cases where there are several senior leaders acting as co-perpetrators but each one controlling his/her own structure of power; and iii) cases in which the structure of power of one criminal organization is jointly controlled by two or more high-ranking perpetrators.

The combination of indirect perpetration using an organized structure of power and co-perpetration is flexible and coherent as the modes of liability employed follow the same approach, namely, "control over the crime" unlike attempts by the ICTY to complement JCE with some elements from the "control over the crime" approach. This proved to be unconvincing as it merged two competing approaches. As analyzed, the "control over the crime" approach thus applied portrays the complex dynamics in large criminal enterprises both at a horizontal level (co-perpetration) and at a vertical hierarchical level (indirect perpetration). The reality of modern bureaucracies, which engage in mass criminality and rely on the functional division of labor, is therefore appropriately reflected.[226]

Third, indirect perpetration either applied alone or in combination better guarantees the respect for the principles of legality and individual criminal responsibility. Some case law of the ICTY invoked the vague concept of "substantial" contribution in order to decrease the uncertainty related to the subjective approach employed by the ICTY.[227] Conversely, the

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v. Bow Street Metropolitan Stipendiary Magistrate, *ex parte* Pinochet Ugarte, 3 W.L.R. 1456 (H.L. 1998) *annulled by* R v. Bow Street Metropolitan Stipendiary Magistrate, *ex parte* Pinochet Ugarte (No.2), 2 W.L.R. 272 (H.L. 1999); R v. Bow Street Metropolitan Stipendiary Magistrate, *ex parte* Pinochet Ugarte, 2 W.L.R. 827 (H.L. 1999); *see also* Michael Byers, *The Law and Politics of the Pinochet Case*, 10 DUKE J. COMP. & INT'L L. 415, 416–23 (2000) (discussing Pinochet's accusations in Spain and background of legal proceedings).

[226] *See* ZYGMUNT BAUMAN, MODERNITY AND THE HOLOCAUST 98 (1989) (noting when the means are dissociated from the moral ends of using violence).

[227] *See* Prosecutor v. Kvocka, Case No. IT-98-30/1-T, Judgement, ¶¶ 95–97 (Int'l Crim. Trib. of the Former Yugoslavia Nov. 2, 2001), http://www.icty.org/x/cases/kvocka/tjug/en/kvo-tj011002e.pdf (discussing the

ICC has applied a higher threshold because one of the objective elements of co-perpetration based on joint control over the crime is that the contribution to the crime be "essential."[228] Under Article 30 of the ICC Statute, the subjective element of the crimes requires the intent to commit the crime and relevant knowledge. This high threshold guarantees the afore-mentioned principle, which holds importance since the commission of a crime as a principal entails the highest degree of individual criminal responsibility and must be construed narrowly.[229] Concerning criminal responsibility of senior leaders, modes of liability grounded in the "control over the crime" approach presupposes a sort of "(normative) control over the acts imputed to them and a mental state linking them to these acts, thereby complying with the principle of culpability."[230]

CONCLUDING REMARKS

Overall, "the control over the crime" as reflected in the practice and law of the ICC is a better approach than a subjective approach underlying JCE. Nevertheless, as Fletcher has noted, this is neither the beginning nor the end of the story.[231] Certain concerns may be raised about how a theory originally framed for a very rigid state apparatus with a high level of hierarchical control (Nazi Germany) can work in contexts such as non-international armed conflicts in Africa with non-state actors where such "mechanization" seems to be weaker and the structures of power are more informal. However, the ICC has been aware of those limitations and has applied the indirect co-perpetration in those contexts.[232] Concerning some obstacles

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massacre of Muslims from Hambarine).

[228] Prosecutor v. Katanga, Case No. ICC-01/04-01/07, Decision on the confirmation of charges, ¶¶ 522–26 (Sept. 30, 2008), https://www.icc-cpi.int/CourtRecords/CR2008_05172.PDF; s*ee also* Prosecutor v. Lubanga, ICC-01/04-01/06, Judgment pursuant to Article 74 of the Statute, ¶¶ 343–48 (Mar. 14, 2012), https://www.icc-cpi.int/CourtRecords/CR2012_03942.PDF (providing an example where court demonstrates higher threshold).

[229] WERLE, *supra* note 8, at 170.

[230] Ambos, *supra* note 101, at 183.

[231] George P. Fletcher, *New Court, Old Dogmatik*, 9 J. INT'L CRIM. JUST. 179, 190 (2011).

[232] *Katanga*, ICC-01/04-01/07, Decision on the confirmation of charges, ¶ 519; s*ee also* Stefano Manacorda & Chantal Meloni, *Indirect Perpetration Versus Joint Criminal Enterprise: Concurring Approaches in the Practice of*

related to evidence of the requirement of "interchangeability" of direct perpetrators in the African context, the ICC suggested that an alternative means to secure automatic compliance with the orders of the leaders may be through "intensive, strict, and violent training regimes. For example, by abducting minors and subjecting them to punishing training regimes in which they are taught to shoot, pillage, rape, and kill . . . ."[233] Another concern is the vagueness of the "domination" notion and whether this is a factual or a normative concept.[234]

Be that as it may, the "control over the crime" approach should be used by future international and hybrid criminal tribunals when trying the most responsible, namely, senior leaders, in contexts of large-scale crimes. In conclusion, this approach, and in particular the indirect perpetration controlling an organized structure of power, is more advanced than JCE. This conclusion is formulated despite the fact that the said approach has some imperfections that judicial institutions such as the ICC must correct as much as possible. This is important because there is a need to adopt a more consistent legal approach. Even more importantly, this is necessary because there is a need to accurately reflect the real dimensions of the roles of the highest level offenders as principals in scenarios of massive commission of the worst international crimes, and in strict respect for the rights of the accused, the principle of legality, and the principle of individual criminal responsibility.

International Criminal Law?, 9 J. INT'L. CRIM. JUST. 159, 171–72 (2011) (discussing the ways in which the "control over the crime" approach is superior to JCE).

[233] OLÁSOLO, *supra* note 8, at 124.

[234] *See* Weigend, *supra* note 199, at 104–05 (discussing the murky difference between influencing and dominating others).