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To What Degree is the Concept of Extended Joint Criminal Enterprise Coherent? A Discussion with Regard to the International Criminal Tribunal of the Former Yugoslavia

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Abstract

Joint Criminal Enterprise (JCE) is a mode of liability designed to capture the individual's relationship to a crime committed by a group, including—in its 'extended form', also known as JCE III—crimes committed by other individuals in that group that were foreseen as *possible*, even if not *likely*. Although the ICTY made no mention of JCE in its statutes, the court introduced JCE and extended JCE in the *Tadić* case (1999). This article examines the use of the concepts and defends them against complaints by various critics. It concludes by supporting their use in the International Criminal Court.

Keywords

Joint Criminal Enterprise, ICTY, Tadić case, contributory negligence

Joint Criminal Enterprise (henceforth JCE) is a mode of liability designed to capture the individual's relationship to a crime committed by a group, including—and most controversially—crimes committed by other individuals in that group. It is fairly common in the common law jurisdictions and in the Netherlands. The International Criminal Tribunal for the former Yugoslavia (henceforth the ICTY) was established on the basis of a Statute[1] which itself makes no mention of JCE. Nevertheless, beginning in the

1. Statutes of the International Criminal Tribunal for the former Yugoslavia, adopted 25 May 1993 by United Nations Resolution 827, available at http://www.icty.org/x/file/Legal%20Library/Statute/statute_sept09_en.pdf (accessed 9 July 2015).

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Tadić case,[2] and then in a number of further cases, the ICTY chose to interpret its Statute as implying JCE, and has chosen to hold a number of people liable explicitly on the basis of JCE. Both the interpretation of the Statute, and the doctrine itself, have been subject to sustained criticism since *Tadić*.

There are in fact three kinds of JCE, often labelled JCE I, II and III. It would be beyond the scope of this paper to examine all three forms, so I shall focus on the most controversial form—JCE III, otherwise known as 'extended JCE'. I will try to determine just how coherent and fair JCE III has been, in the particular application by the ICTY, and at the end I shall briefly examine its possible use at the International Criminal Court.

What is JCE?

Any JCE requires an organised group of two or more people who collectively (and in a co-ordinated fashion) perpetrate a serious crime. Not any group will do, and not any joint activity will do: the *joint* is important, and so is the *already criminal* nature of the enterprise. JCE I takes each individual as equally responsible for that crime, without trying to distinguish between principals and accessories and bystanders—in many joint criminal enterprises there is simply not enough evidence of who might have been a principal and who an accessory, and even if the court had itself witnessed the enterprise being carried out, the fog of war might have obscured who was principal and who was bystander. Having said this, there is some room for discrimination: if the JCE is carried out by a military unit, then the 'group' in question will be those carrying weapons, and not the cook or the medic attached to the unit. But among the weapon-carrying soldiers, the thought is that they were all causally involved in the crime, and all could be imputed sufficient *mens rea* to carry out the crime. (JCE II is a variant of JCE I, and mainly involves the context of a concentration camp.)

Among modern warfare, the Yugoslav wars were distinctive in several ways: the difficulty of distinguishing combatants from civilians, the confusing and smouldering nature of battlefield operations, the lack or concealment of paper trails within command hierarchies, and the confused and incomplete and frightened witness testimonies. For this reason it would have been difficult to hold individuals to account beyond a reasonable doubt for specific individual crimes within the large-scale criminal enterprise, or indeed for specific causal contributions (or omissions) to a group crime. Under such evidential paucity, and under basic principles of legality and the right to a fair trial, it would have been difficult for an international court to achieve any convictions at all. On top of these 'negative' reasons in favour of JCE, many of the Yugoslav crimes we will be discussing are of such a scale and complexity that they could *only* be perpetrated by a co-ordinated group, and so this would be a 'positive' reason in favour of applying JCE.

Some critics might insist on evidential robustness, and accept a relative lack of convictions. However, we have to remember the strong intuition that led to the establishment of the ICTY in 1993: first, the sheer scale of the atrocities being committed, more serious than anything since the Second World War; second, the relative inaction by Western powers in mounting any serious political or military response. During any debates about JCE, then, the appropriate comparison should not be between the ICTY and the kind of rigorous criminal justice achieved in the sophisticated and well-funded domestic courts of Western countries, but instead between the ICTY and the complete absence of any international judicial intervention at all.

Extended JCE

The third kind of JCE, often called JCE III but also 'extended JCE', is more complicated and controversial, and that is what we will be focusing on. Imagine we have a group who are *already* engaged in committing a JCE I or II. The 'already' is important here, and again for the purposes of this paper, I am assuming that all the members can already be unproblematically held liable for the joint crime. However,

2. *Prosecutor* v *Tadić*, 1999. Case no. IT-94-4-A.

during the commission of the joint crime, a separate *incidental* crime—a more serious crime—is committed. (For clarity and consistency I will henceforth distinguish between the 'joint crime' and the 'incidental crime'.) This incidental crime is not part of the joint crime, not part of the original plans, nor is it necessary for the success of the joint crime. Importantly, there is not enough evidence to prove beyond reasonable doubt that any particular person committed, assisted or even knew about the incidental crime as it was being committed.

So if a court has D in custody, I am assuming they can charge him without difficulty for the joint crime in accordance with JCE I. Where extended JCE comes into play is whether D *knew of the possibility* of the incidental crime being committed, by one of the group members, once the joint crime got underway.

Note that the ICTY usually speaks of the 'possibility' and *not* the 'likelihood'. So this is a weaker *mens rea* than recklessness, which involves freely ignoring a fairly significant risk of what might happen (e.g. the sorts of things that can happen when I drive recklessly); in contrast, this is about the risk of what *other people* might do, something which, under normal circumstances, I would not be responsible for. That is, it has to be shown that D could have foreseen the possibility of the incidental crime, given his understanding of the other members of the group (who might have a track record of violence) and of the nature of the joint crime which his group were currently undertaking (which itself might already involve coercive violence). It also has to be shown that there was a general *culture* of the incidental crime's general *type* being committed in that country by units such as his.

If it can be shown that D knew (or must have known) that the incidental crime was possible, then the question will be whether he did anything to prevent it, such as sabotage the plan, alert the head of the group, or, at the limit, whether he attempted to withdraw from the group. If he did not do any of these things, then he can be held to have, if not acquiesced in the incidental crime, then at least been sufficiently indifferent or callous about its possibility. Importantly, however, this indifference or callousness, even though falling short of the full culpability of intention or even recklessness, is nevertheless taken as the basis for attributing the *same liability* as that which would have been attributed to the particular culprit if he could be determined. In other words, extended JCE is a form of strict liability, and is not a little vulnerable to the problem of moral luck and institutional abuse.[3]

To conclude this section, it is worth briefly distinguishing extended JCE from aiding and abetting (henceforth 'aiding') on the one hand, and from command responsibility on the other, because the ICTY Statute explicitly mentions both these possibilities:

> 7(1). A person who planned, instigated, ordered, committed or otherwise aided and abetted in the planning, preparation or execution of a crime referred to in articles 2 to 5 of the present Statute, shall be individually responsible for the crime.

The important thing about aiding is that the aider need not share the focused intention of the principal, either before, during or after the crime, although he has to be aware that what he is doing is of assistance to the principal. In contrast, (i) the participant in a JCE shares the *mens rea* of the *group*, and (ii) the participant in the JCE shares responsibility for the foreseeable incidental offence by one of the group members even if the participant did not directly aid its commission, and even if—while foreseeing its commission—he did not endorse it.

3. Cassese, a persistent supporter of extended JCE, was optimistic that the structure of the ICTY and its proceedings are such as to prevent abuse: the rights of the accused are fully respected, the accused has full opportunity to explain how he could not possibly have foreseen the possibility; A. Cassese, 'The Proper Limits of Criminal Responsibility Under the Doctrine of Joint Criminal Enterprise' (2007) 5(1) *Journal of International Criminal Justice* 109–33 at 120. Olasolo, on the other hand, is much less optimistic; H. Olasolo, 'Joint Criminal Enterprise and its Extended Form: A Theory of Co-Perpetration Giving Rise to Principal Liability, a Notion of Accessorial Liability, or a Form of Partnership in Crime?' (2009) 20 *Criminal Law Forum* 263–87 at 285.

The important thing about command responsibility, obviously, is that it can only be applied to someone in command, and not to, for example, a subordinate such as Tadić (see below). However, the lines between extended JCE responsibility and command responsibility were blurred in later ICTY cases involving political leaders such as Brđanin.[4] Here is what the Statute says about command responsibility:

> 7(3). The fact that any of the acts referred to in articles 2 to 5 of the present Statute was committed by a subordinate does not relieve his superior of criminal responsibility if he knew or had reason to know that the subordinate was about to commit such acts or had done so and the superior failed to take the necessary and reasonable measures to prevent such acts or to punish the perpetrators thereof.

What is important to notice here are the expressions 'knew or had reason to know', as well as 'about to commit [. . .] or had done so'. Both these expressions place a much greater burden of proof and of evidence on the prosecution than in the case of extended JCE.[5] This also serves to distinguish the two concepts.

For reasons of space I cannot discuss command responsibility in this essay, and will focus on the extended JCE of subordinates such as Tadić.

The *Tadić* Case

In response to the *Tadić* case, the ICTY Appeal Chamber provided the first and most detailed account of JCE (all three versions) to date. This account has been highly influential, not only on subsequent ICTY cases,[6] but also on other courts, as well as on discussion about the interpretation of the Rome Statute of the International Criminal Court. It has also been very controversial. Below I will be considering some detailed criticisms by J. Ohlin.[7]

The year is 1992, and the Serbs of Bosnia have organised paramilitary units to evict non-Serbs (Muslims and Croats) from the neighbouring villages under a systematic policy of 'ethnic cleansing'. Tadić is a reserve police officer, who then volunteers for one of the new units in the Bosnian area of Prijedor. In this case the JCE (the joint crime) of forced eviction (accompanied by assault and theft) is clearly illegal, and all armed members of the paramilitary group, including Tadić, are to be held liable (he is indicted on a multitude of charges). However, during the joint crime, an incidental crime occurs: five Muslims are killed in the village of Jaskici at precisely the time when Tadić's unit is passing through. There is insufficient evidence or witness testimony to accuse any member of the unit, and so Tadić (already in custody) is held liable for the five murders (in addition to the lesser charges) on the basis of extended JCE. Tadić appeals to various charges, and the prosecution also appeals. I will only be discussing that part of the appeal judgment relating to the extended JCE of the incidental crime.

The Appeal Court asked whether Tadić could be found liable for the deaths of the five Muslims under any of the five kinds of liability explicitly referred to in Article 7(1), that is, planning, instigating, ordering, committing, or aiding and abetting, and the answer was no. Starting at §190, they then famously interpreted 7(1) of the Statute as *implying* the possibility of all three kinds of JCE liability, and supported

4. *Brđanin* was controversial not only because of the blurring with command responsibility, but especially because the defendant's extended JCE liability related to individuals who were *not* members of the joint criminal enterprise; that is, they were not military or bureaucratic subordinates but instead were used by JCE members temporarily as 'tools' in carrying out the joint crime. On this see C. Farhang, 'Point of No Return: Joint Criminal Enterprise in Brđanin' 23(1) *Leiden Journal of International Law* 137–64.
5. For a discussion of command responsibility, see D. Mundis, 'Crimes of a Commander: Superior Responsibility under 7(3) of the ICTY Statute' in G. Boas and W.A. Schabas (eds), *International Criminal Law Development in the Case Law of the ICTY* (Nijhoff Publishers: Leiden, 2013).
6. For example, *Prosecutor* v *Krstić*, 2004. Case no. IT-98-33; *Prosecutor* v *Stakić*, 2006. Case no. IT-97-24; *Prosecutor* v *Martić*, 2008. Case no. IT-95-11; and *Prosecutor* v *Brđanin*, 2007. Case no. IT-99-36-A.
7. D. Ohlin 'Three Conceptual Problems with the Doctrine of Joint Criminal Enterprise' (2007) 5(1) *Journal of International Criminal Justice* 69–90, but also see M. Badar, '"Just Convict Everyone!"—Joint Perpetration from Tadić to Stakić and Back Again' (2006) 6(2) *International Criminal Law Review* 293–302 and Olasolo, above n. 1.

this with references to customary international law (and especially some WWII cases tried just after the war),[8] to other international statutory instruments,[9] and to the national laws of common law countries[10] as well as of Germany and the Netherlands. With regard to the extended JCE, The Appeal Chamber writes:

> 204. The third category [of JCE] concerns cases involving a common design to pursue one course of conduct where one of the perpetrators commits an act which, while outside the common design, was nevertheless a natural and foreseeable consequence of the effecting of that common purpose. [...] While murder may not have been explicitly acknowledged to be part of the common design, it was nevertheless foreseeable that the forcible removal of civilians at gunpoint might well result in the deaths of one or more of those civilians. Criminal responsibility may be imputed to all participants within the common enterprise where the risk of death occurring was both a predictable consequence of the execution of the common design and the accused was either reckless or indifferent to that risk.

The Court had stated (at 192) that to hold someone 'liable only as [merely] aiders and abettors might understate the degree of their criminal responsibility'—this seems to be an implied acknowledgement of the moral outrage underlying the efforts of the court. The thought was that the defendant had been caught up in genuine engaged malice beyond the bounds of detached assistance.

Now in the above quotation the key question is whether the unplanned act was or was not a 'natural and foreseeable consequence' (or 'predictable consequence'). Note the 'objective' formulation behind the term 'foreseeable', entailing a reference to what a reasonable person could have predicted or foreseen in the circumstances—in preference to the 'subjective' formulation which would have directed the court to enquire into what Tadić himself actually did or did not foresee. It draws inspiration from the joint enterprise doctrine in English law, and from the famously liberal version of the conspiracy doctrine in US law.[11]

In the special circumstances where the JCE comprises planned, intentional genocide, all members of the group would share JCE I liability, regardless of their specific contributions to the action, since *any* subsequent harmful action to target ethnicity members could be described as part of the original plan. Any reference to foreseeability is therefore unnecessary, unless perhaps one member impulsively chooses a new target—a member of a different, previously untargeted ethnic group—along the way. But

8. The key cases were the *Essen Lynching* case (Trial of Erich Heyer and six others, British Military Court for the Trial of War Criminals, Essen, December 1945, UNWCC, Vol. I) and the *Borkum Island* case (Case. no. 12-489, United States v Kurt Goebell et al., Report, Survey of the Trials of War Crimes Held at Dachau, Germany, 2–3 (15 September 1948). Both cases concerned a mob of German civilians, during the war, attacking Allied prisoners of war, with informal encouragement by nearby officials. In each case the attacks resulted in the deaths of the POW with no way to identify the specific culprit. The officials were thereby held responsible for the deaths, even though their intention may not have been for anyone to get killed by the attacks. Engvall is sceptical about the amount of support these two cases provide to the doctrine of extended JCE; L. Engvall 'The Future of Extended Joint Criminal Enterprise—Will the ICTY's Innovation Meet the Standards of the ICC?' (2007) 76 *Nordic Journal of International Law* 241–63 at 245. See also C. Clarke, 'Extended Joint Criminal Enterprise Responsibility in the Wake of World War II' (2011) 9(4) *Journal of International Criminal Justice* 839–62.
9. For example, the UN International Convention for the Suppression of Terrorist Bombing (1997), adopted by the UN General Assembly through resolution 52/164 of 15 December 1997, cited in the *Tadić* appeal judgment, available at http://www.icty.org/x/cases/tadic/acjug/en/tad-aj990715e.pdf (accessed 9 July 2015) at 221. However, as Engvall notes (above n. 7 at 246), the version of conspiracy cited in Art. 2(3)(c) of this UN Convention demands that the accused possess the *intent* to commit the crime, or the *knowledge* of the principal perpetrator's intent. This is a much higher requirement than the foreseeability criterion of extended JCE.
10. The classic case in English law is *Powell and English* [1999] 1 AC 1 (HL). Here the House of Lords confirmed that the defendant need only have been able to 'contemplate' the incidental crime as 'possible'.
11. The 'felony-murder' rule allows all members of a conspiracy to be charged with foreseeable murder when a member carries out a murder that was not part of the original conspiracy. See for example the case of *State* v *Tison* 129 Ariz. 526, 633 P.2d 335 (1981). Two brothers helped their father to break out of jail, but the brothers were charged with murder since their father had committed a murder during the getaway. (The murder was held to be foreseeable because the brothers had given the father a gun after breaking him out.)

Tadić denied the intention to commit anything more than the ethnic cleansing, and so the question of foreseeability and vicarious liability opens up.

It is important to see that not just *any* consequence will do, however. Obviously lots of nasty things are merely 'possible' when a person has a gun. But as the judgment states, *given* the violence already involved in evicting people from their homes at gunpoint (the joint crime), in an area of long-standing ethnic tension, it is not implausible to claim that the death of a non-Serb would be natural and foreseeable. Similarly, the foreseeability only applies to persons already participating in the JCE, and already in a position to carry out the original harmful plans that comprise the JCE: so again, the unarmed paramilitary cook could not be charged with extended JCE liability no matter how much he foresaw the incidental crime. Importantly, it did not have to be shown that Tadić had in any way agreed with the incidental crime, or accepted it or endorsed it: it is enough that he could be taken as understanding the possibility of its occurrence while nevertheless continuing to participate in the joint crime once underway.

However, later in the judgment, the court actually raised the threshold from 'natural and foreseeable' to 'most likely':

> 220. [...] It should be noted that more than negligence is required. What is required is a state of mind in which a person, although he did not intend to bring about a certain result, was aware that the actions of the group were most likely to lead to that result but nevertheless willingly took that risk. In other words, the so-called *dolus eventualis* is required (also called 'advertent recklessness' in some national legal systems).

This looks like it might generate an important ambiguity. Raising the threshold from 'foreseeable' to 'most likely' would increase the evidentiary burden on the prosecution, and this might make eventual convictions more difficult, but also perhaps more fair. In fact, it does not seem that this 'most likely' threshold was used in subsequent cases, and that mere 'possibility' remained sufficient—hence the controversy, to which I now turn.[12]

The problem of culpability

Jens David Ohlin sees three 'conceptual' problems with extended JCE, as exemplified in the ICTY judgments. One of the problems concerns the culpability resulting from the presumed foreseeability.[13] Ohlin agrees with (i) the imposition of full liability for JCE participants with regard to the JCE itself, and he also agrees with (ii) additional vicarious liability on JCE participants for foreseeable incidental crimes by other JCE participants. However, he argues against equating this additional liability between two parties who are not equally culpable, namely the vicariously liable Tadić and the unknown murderer(s) of the five Muslims. Instead, Ohlin suggests that Tadić be charged with (something like) contributory negligence in tort law—which reflects a culpability less than murder—for his voluntary assumption of a known risk.[14]

Cassese, a supporter of extended JCE, responds to this criticism,[15] by suggesting that the distinctions and gradations can be reflected not at the *charge* stage but at the *sentencing* stage. We should not forget,

12. In the case of *Prosecutor* v *Karadžić*, Case no. IT-95-5/18 at 18, the Appeals Chamber specified that the 'possibility' in question has to be a 'sufficiently substantial' one.
13. Above n. 6 at 7 ff. The page references for the Ohlin article refers to the PDF version available online, which runs from pp. 1–15. The printed pagination runs from pp. 69–90.
14. As Olasolo (above n. 1 at 281) explains, this suggestion would go against the ICTY's consistent rejection of negligence as setting too low a standard. Recall the *Tadić* judgment, above n. 1 at §220. See also *Stakic*, above n. 5 at §587.
15. Above n. 2 at 122. For completeness, he makes two further points in response. First, he refers to the strong public policy considerations supporting a robust response to such grave crimes (at 117). But I think that Ohlin would argue that a scheme of 'contributory negligence', backed up with lengthy sentences, would still send a clear enough message. Second, Cassese claims that the ICTY does not have as many conceptual resources to draw such distinctions as a 'mature legal system': 'International criminal law is a rudimentary body of law, which allows for such sophisticated distinctions or gradations *only to a very limited extent*' (at 120, original italics).

says Cassese, that Tadić was already guilty of the serious offence of 'ethnic cleansing', a JCE that naturally and foreseeably led to the egregious murder (by someone) of the five Muslims. Such is the egregiousness, such is the complexity of the case and the court's lack of evidence-gathering powers, that it would be better to hold Tadić equally liable but then to reflect differences in culpability by handing out more or less harsh sentences accordingly. A lenient sentence could also better accommodate the counter-example of the 'pressured patriot'. That is, it might be argued that room should be made for people joining the Bosnian paramilitary for morally neutral or even admirable reasons—out of Serbian patriotism and a genuine desire to defend Serb interests from a sincerely perceived threat—and once the nasty work begins, then it becomes impossible to protest or withdraw, and one's participation is effectively under duress.[16]

Ohlin anticipates this response,[17] and argues against it by means of the following *reductio ad absurdum*: if culpability were unimportant at the charging stage, then we might as well have a single generic crime ('Felony' with a capital 'F'), and leave *all* distinctions to the sentencing stage. But this will not do, continues Ohlin: it is very much part of the criminal process for the accusation to track perceived culpability, especially within the context of an adversarial system involving a prosecution and defence, and especially when so much of the public stigma is attached to the charge.

In terms of sentencing, Ohlin actually acknowledges the opposite worry:[18] that in downgrading Tadić's liability to that of contributory negligence, as Ohlin is suggesting, this will too readily lead to unacceptably lenient sentences and even acquittals. However, this would not necessarily be the case, says Ohlin, since it would shift the prosecutorial efforts to determining the exact nature of the agreement—explicit *and* implicit—among the JCE participants, something the prosecution does not need to investigate if they have extended JCE at their disposal, as they do at present. Too often the so-called 'agreement' that grounds any JCE is something of a legal fiction, designed to conceal highly heterogeneous recruitment, retention and organisational procedures and pressures, all of which should be relevant to any determination of culpability.[19]

However, I would have to reject Ohlin's claim in this regard. This comes down to a disagreement about whether to impute implicit agreement or implicit knowledge on Tadić. The end result might well be the same for Tadić: but given the circumstances of war, I think it would be more difficult to plausibly impute a specific implicit agreement than to impute implicit individual knowledge (and subsequent advertent recklessness). To put the point inversely: it would be easier for Tadić to deny an implicit agreement than to deny implicit knowledge, and this—I argue—would go too far to allowing too many suspects to get off *given* the difficulty, in a warzone, of gathering the quantity and quality of evidence that would normally be required in a domestic trial. Yes, we have to assume that Tadić was a fairly ordinary person to begin with, and not a bloodthirsty criminal. We have to assume that he would have a natural reluctance to agree to any plan involving murder, but less reluctance to participate in an ethnic cleansing plan that might involve some vaguely foreseeable excesses carried out by other participants against 'national enemies'. As the plan advanced, his knowledge about his colleagues' intentions would grow more certain, but it would still fall short of anything like an agreement or endorsement: to a certain extent he would be carried along by events, and by the spirit of events, without pausing sufficiently to imprint them with his willing approval.

Ohlin rephrases his position in a different way: 'mere knowledge of criminal activity, with no significant contribution and with the intention of furthering the common enterprise, should yield the lowest

16. Cassese cites the Special Tribunal for Lebanon as formally accepting this differential sentencing principle; A. Cassese et al., *Cassese's International Criminal Law*, 3 rd edn, (OUP: Oxford, 2013) 169.
17. Above n. 6 at 11.
18. Ibid. at 9.
19. On this, see A. Osiel, 'Modes of Participation in Mass Atrocity' (2005) 38(3) *Cornell International Law Journal* 793–822 at 797.

level of liability.'[20] This thought draws on a widely-shared reluctance within common law systems to hold people liable for their knowledgeable omissions. After all, continues Ohlin, merchants routinely sell food, water, and clothing to known criminals.

> Indeed, when the crime in question is a crime against humanity or a war crime, the whole community may be aware of the activity. In wartime, criminal conspirators, by virtue of their military control over a territory, may exercise their plans with virtual impunity and may not feel compelled to disguise their behaviour. Their joint criminal enterprise might be available for all to see. In many cases this is precisely the point, because the public nature of the war crime terrorizes and demoralizes the enemy.[21]

Again I would disagree with Ohlin here. There might be a case for the common-law reluctance to hold knowledgeable omission liable—in the stable peacetime situations that characterise most common law jurisdictions today. But a society such as Yugoslavia being torn apart by civil war is a very different context, and knowledge takes on much greater moral significance. We can still draw some distinctions. First, the merchant is selling materials and services that are not *directly* related to the JCE in question: he is not selling weapons (as Ohlin himself acknowledges). Second, the merchant has to make a living, and may be under duress from criminal elements. Third, there is usually a clear difference between a participant and a non-participant. (Although again there will be awkward borderline situations of drivers, map-suppliers, etc.) Tadić had a gun in his hand; the merchant did not, and this would impose a natural limit on the scope of the court's potential targets.

Fourth, just because everyone knows does not mean that a participant such as Tadić cannot be deemed liable for his knowledge, precisely because, as a JCE participant, he was in a much better position to prevent or express his opposition to the incidental crime, and if necessary to reconsider his participation in the entire JCE of ethnic cleansing, precisely because he knew it now carried a risk with it. This knowledge is of direct moral significance: he knows what could happen, and his knowledge makes him, morally, part of it. His knowledge generates more than contributory negligence—as Ohlin proposed—precisely because of his physical *and moral* proximity to the contemplated action.

A paradigm case of contributory negligence would be the jay-walking pedestrian. Her negligence makes her partly responsible for her ensuing injuries when the car hits her (assuming the driver himself is non-negligent). But here the consequences of her more or less known assumption of risk is to be suffered by her person alone. When *other people*—namely the five Muslims—suffer partly as a result of Tadić's specific omission (and the symbolic and practical support that his continuing presence offered to his collegial perpetrators), then his knowledge takes on deeper moral significance. Knowledge of the possibility of the incidental crime is still not the same as the intentional commission of the crime, of course. But it is close enough in the particularly messy circumstances of civil war that they can be taken as effectively equal, and the nuances left to the sentencing stage, as Cassese suggests.

Finally, Ohlin argues that extended JCE comes too close to 'guilt by association',[22] and reminds us of the excesses of the House Un-American Activities Committee in the 1950s in condemning US citizens for mere membership of the Communist Party.[23] However, this is not the most relevant example since

20. Above n. 6 at 7.
21. Ibid.
22. Ibid. Engvall, above n. 7 at 252, makes the same point:

> There is certainly a need for a mode of liability adapted to group criminality, but such a mode of liability must uphold the fundamental principles of criminal law. Extended JCE bears a striking similarity to guilt by association, where a member of a criminal group is liable for a crime by the mere fact of membership in that group. Guilt by association is strongly condemned in national and international criminal law.

23. Above n. 6 at 14, note 20.

there was woefully insufficient evidence that the Communist Party was engaged in any seditious or treasonous activity. More relevant would be the Nuremburg International Military Tribunal's determination of the SS and Gestapo as essentially criminal organisations, guided by clear criminal principles that would have been sufficiently known to all members such that mere membership could be taken as culpable. This type of guilt by association has rarely been challenged, and would seem more appropriate as an analogy to the Serb paramilitaries on a rampage of unimpeded ethnic cleansing.

In the later case of *Brđanin*, the Appeals Chamber explicitly emphasised that 'JCE is not an open-ended concept that permits convictions based on guilt by association.'[24] They continue:

> 429. To begin with, as explained above, the accused must possess the requisite intent [to join the JCE]. Moreover, a Chamber can only find that the accused has the requisite intent if this is the only reasonable inference on the evidence.

This would seem to eliminate the 'bystander' problem—clearly the relevant intent here is the common purpose for which the group came together. The thought is that the individual had already forgone the 'sympathy of the law' (and thereby 'changed his normative position') by joining and remaining in the joint criminal enterprise of ethnic cleansing which he can be assumed to have known was very much illegal and very morally wrong. And once moral scruple has been set aside for this joint enterprise, the chances are very high that the violence will only escalate. As Cassese puts it:

> Under these circumstances society can legitimately expect the participants in an existing JCE to be particularly alert to the possible consequences of their concerted criminal actions and hold them criminally accountable if additional crimes are committed in execution of the common purpose.[25]

In contrast, a group of soldiers carrying out a lawful military action on a legitimate enemy target would not be responsible under JCE if one of them shot a civilian in cold blood.

Extended JCE at the ICC

By way of conclusion, it is worth briefly examining the International Criminal Court (ICC) to see whether and how they have invoked the concept of extended JCE, or whether they might do so in the future. The ICC was established by the 1998 Rome Statute.[26] Article 25 seems to permit general JCE I liability:

> 3. In accordance with this Statute, a person shall be criminally responsible and liable for punishment for a crime within the jurisdiction of the Court if that person:
>
> (a) Commits such a crime, whether as an individual, jointly with another or through another person, regardless of whether that other person is criminally responsible;

However, Article 30 then states:

> 1. Unless otherwise provided, a person shall be criminally responsible and liable for punishment for a crime within the jurisdiction of the Court only if the material elements are committed with intent and knowledge.

24. Above n. 4 at 428.
25. Above n. 15 at 169.
26. Rome Statute of the International Criminal Court, document A/CONF.183/9 of 17 July 1998 and corrected by process-verbaux of 10 November 1998, 12 July 1999, 30 November 1999, 8 May 2000, 17 January 2001 and 16 January 2002. The Statute entered into force on 1 July 2002. Available at http://www.icc-cpi.int/nr/rdonlyres/ea9aeff7-5752-4f84-be94-0a655eb30e16/0/rome_statute_english.pdf (accessed 9 July 2015).

The explicit reference to 'intent and knowledge' (carefully defined in the immediately subsequent provisions) would seem to rule out extended JCE. This is the first time in international criminal law that *mens rea* has been codified as a general condition for individual criminal responsibility. However, it is not yet clear what 'unless otherwise provided' could be taken to mean in years to come. In one of the few cases to date, that of *Bemba*, the court rejected the 'advertent recklessness' characteristic of extended JCE in *Tadić* and explained that 'intent' required that the suspect 'was at least aware that, in the ordinary course of events, the occurrence of such crimes was a virtually certain consequence of the implementation of the common plan'.[27] Again, the 'virtually certain consequence' is a far cry from the mere foreseeable 'possibility' of the *Tadić* judgment. It will be interesting to see how this changes in the future.

In conclusion, then, we may say that the doctrine of extended joint criminal enterprise reached a relatively coherent use over several cases at the ICTY, but that this has not been sufficient to silence its critics, both within academic circles and within the ICC.

Declaration of Conflicting Interests

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27. Situation in the Central African Republic in the case of *The Prosecutor* v *Jean-Pierre Bemba Gongo*; Decision Pursuant to Art. 61 (7)(a) and (b) of the Rome Statute, dated 15 June 2009 at §369, available at http://www.icc-cpi.int/iccdocs/doc/doc699541.pdf (accessed 9 July 2015).