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Summary

JCE is a mode of liability that comprises of three categories of case. This thesis focuses on the third category, namely extended JCE.

Extended JCE applies to cases where a group have a common criminal aim, but a crime occurs that was not a part of this common aim. If this crime was a foreseeable consequence of the common aim, and the participants were indifferent to this risk, all are liable for this crime.

The ICTY established extended JCE by finding its existence in customary international law, and thereby implicitly in its Statute. An analysis of the sources of law cited shows that no basis existed to find that extended JCE was a part of customary international law.

By applying extended JCE without a basis in law, the ICTY has violated the principles of legality.

The *actus reus* requirement for extended JCE is substantial participation in a group with a criminal aim. An analysis of the “substantial contribution” needed reveals that it includes a wide range of participation, very vaguely defined.

The *mens rea* requirement of extended JCE is advertent recklessness. This is far lower than the requirements of any other mode of liability, which all require at least knowledge. Even the modes of liability that most closely resemble extended JCE, have a substantially higher criterion for *mens rea*.

Extended JCE does not live up to the *mens rea* requirements established generally for different levels of involvement. The *mens rea* criterion for extended JCE does not fit with the context of international criminal law.

In sum, the level of proof for extended JCE is so vague and low, that it resembles guilt by association.

In modern armed conflicts many crimes may be foreseeable, without being desirable. Extended JCE risks encompassing individuals with very little responsibility for the crimes committed, who simply adhere to their own ethnic groups for survival.

The flexibility of extended JCE creates an extremely potent tool for prosecuting group-based crimes. This flexibility also entails numerous risks to international criminal law, mainly by damaging its legitimacy and making a mockery of the level of proof. There is little to do about the establishment of extended JCE today but actions can be taken to elevate the level of proof, especially in the future case law of the ICC. This is a necessity to uphold respect for international criminal law.

Preface

“The expansion of *mens rea* is an easy but dangerous approach.”¹

¹ *The Prosecutor v. Dario Kordic and Mario Cerkez*, Case no. IT-95-14/2-T, 26 February 2001 (Trial Chamber), para. 219.

Abbreviations

ICC	International Criminal Court
ICTR	International Criminal Tribunal for Rwanda
ICTY	International Criminal Tribunal for the Former Yugoslavia
JCE	Joint Criminal Enterprise
SCSL	Special Court for Sierra Leone
UN	United Nations
UDHR	Universal Declaration of Human Rights
ICCPR	International Covenant on Civil and Political Rights
ECHR	European Convention for the Protection of Human Rights as Amended by Protocol 11.
ECtHR	European Court of Human Rights
The Tribunals	The ICTR and ICTY
ACHPR	African Charter on Human and Peoples' Rights
ICTR Statute	Statute of the International Criminal Tribunal for Rwanda
ICTY Statute	Statute for the International Criminal Tribunal for the Former Yugoslavia
ICC Statute	Statute of the International Court of Justice
SCSL Statute	Statute of the Special Court, annexed to the Agreement between the United Nations and The Government of Sierra Leone on the Establishment of a Special Court for Sierra Leone, Freetown, 16 January 2002

1 Introduction

1.1 Subject and aim

Joint criminal enterprise (JCE) is a mode of liability that has been recognised mainly in common law jurisdictions. In 1999, the International Criminal Tribunal for former Yugoslavia (ICTY) established that it was a part of customary international law and part of the applicable law of the tribunal.

JCE incurs criminal responsibility for all members of a group when they operate with a common criminal purpose. JCE, as the ICTY defined it, comprises of three categories of cases. The first concerns cases where a group of persons act together with a common purpose to commit a crime and when this occurs, all are liable. The second concerns systems of ill-treatment, for example concentration camps, where all that participate in this system are liable.

This thesis will focus on the third category, extended JCE.

Extended JCE covers situations where a group of persons act according to a common purpose, and in the course of this, someone in the group commits a crime that was not a part of the common purpose.

To be liable, it is only necessary that the crime was objectively foreseeable and the accused acted with recklessness regarding that risk.

Extended JCE is a very flexible tool for the prosecutors in international criminal law. It covers groups of any number and territorial distribution and individuals in all levels of involvement. In addition to this, it requires a lower level of *mens rea* than any other mode of liability in international criminal law.

In the context of armed conflict, many crimes are possible and many risks are ignored. Is there a risk that extended JCE applied in a practical context of armed conflict will amount to a “catch all” provision, not only catching the worst perpetrators but also those who are doing what is natural and logical in that context?

As international criminal law breaks new ground in its rapid expansion, it faces criticism concerning its legality. The establishment of the innovative JCE has a particularly loose foundation.

The aim of this thesis is to analyse the risks attached to using extended JCE as a mode of liability in international criminal law.

1.2 Structure and delimitations

This thesis will begin with a detailed analysis of the case in which the ICTY defined extended JCE. This is necessary to understand extended JCE in the subsequent discussions.

The analysis of extended JCE will be divided into two sections.

Firstly, the legal foundation of extended JCE in international criminal law will be scrutinised in the light of the principles of legality. Was the ICTY right in concluding that extended JCE was part of customary international law? Learned scholars have protested, but the case law of the Tribunals has consistently upheld the decision.

It would be highly interesting to analyse whether the ICTY exceeded its limits set out by the Security Council, but this issue had to be excluded due to time and space considerations.

Secondly, the level of proof will be analysed. *Mens rea* and *actus reus* will be considered and put into context. The relationship between level of participation and *mens rea* will be addressed and a comparative approach to other modes of liability will be used. The level of proof will be compared to the requirements of guilt by association.

Each of the two sections of analysis will end with a discussion on the issues addressed. A last chapter will provide conclusions on the risks of extended JCE in international criminal law.

1.3 Method and material

For the most part, case law will be analysed, as this contains the bulk of information regarding extended JCE. The case law will be from various institutions of international criminal law, but the focus will be on the ICTY and to some extent the International Criminal Tribunal for Rwanda (ICTR). Statutes and other international legislation will naturally form a framework supporting the analysis. Writings of legal scholars will aid the analysis.

The information retained regarding extended JCE will be contrasted against international human rights norms, to identify problematic legal issues. These norms will be identified through analysis of international legislation and customary international law.

The focus on the ICTY case law is not intended to be narrow-minded or euro-centric. Rather, it aims to benefit the future of international criminal law worldwide by identifying the problems with the ICTY's definition of extended JCE. This is done with the hope that the new institutions, like the Special Court for Sierra Leone (SCSL) and the International Criminal Court (ICC), will consider these issues and thereafter choose the best path to improve international criminal law.

2 The establishment of JCE in international criminal law

Although some claim JCE has been a part of customary international law since the aftermath of World War II, the ICTY was the first institution to spell out this mode of liability with detailed requisites. This was done by the Appeals Chamber in the *Tadić* case² in 1999.

Subsequent case law at the ICTY and the ICTR has reaffirmed most of the law as determined by the *Tadić* case. As the *Tadić* case is crucial to understanding JCE, we will start by analysing it thoroughly. The legal issues of the *Tadić* case will be with us throughout this thesis, as the analysis will be based on problems arising from the definition of JCE in this case.

In the end of this chapter, we will look at the future of international criminal law, represented by the ICC and the SCSL.

2.1 The *Tadić* case

2.1.1 *The facts*

The facts of the *Tadić* case were never a matter of dispute. The Trial Chamber had found that a group of armed Serb men, including Duško Tadić, had gone to two villages to remove men by force. After the group left the second village, five men were found dead. Four of the dead men had been shot in the head, but there was no evidence of who had committed the killings³.

The Trial Chamber found that it was possible that the killings had been the act of some of the men that entered the village but held that Duško Tadić could not be responsible for such acts.⁴

The Prosecutor appealed, satisfied with the assessment of evidence, but dissatisfied with the application of law when it came to the level of proof needed.⁵

The Appeal Chamber found that there existed a mode of liability called JCE, specifically aimed at group-based violence. This mode of liability was not in the Statute of the Tribunal as the other modes of liability, but formed a part

² *The Prosecutor v. Duško Tadić*, Case no. IT-94-1-A, 15 July 1999 (Appeals Chamber).

³ *Ibid.*, para. 181.

⁴ *The Prosecutor v. Duško Tadić*, Case no. IT-94-1-T, 7 May 1999 (Trial Chamber), para. 373.

⁵ *Tadić, AC*, *supra* note 2, para. 173.

of customary international law. The mode of liability had three subcategories and the third category of JCE was applicable in the *Tadić* case. This third category of JCE was named “extended JCE” as it was more expansive than the first two categories.

Although the Appeals Chamber still had no evidence as to who had committed the killings⁶, they found the only reasonable conclusion to be that the group that Tadić belonged to killed the five men.⁷ Through extended JCE, Tadić could be found guilty of acts committed by others in the group, even though these acts were not a part of the group’s plan.

Extended JCE lowered the *mens rea* and *actus reus* criterion in comparison to the mode of liability of commission considered by the Trial Chamber, and so the Appeals Chamber was now content that the level of proof had been satisfied. Based on the same evidence, but with this rediscovered mode of liability, they found Tadić guilty, beyond reasonable doubt, of the killing of the five men in the village.

2.1.2 The establishment of JCE

The ICTY Appeal Chamber found a need for a mode of liability that better suited the group-based criminality that characterise modern conflict and to facilitate conviction of all those responsible for a crime, and not only the physical perpetrators.⁸

The ICTY Statute does not state JCE as a mode of liability. The Appeals Chamber found JCE established in customary international law through an analysis of post-World War II case law as well as in two international treaties. The Appeal Chamber also examined national legislation, but found no coherent practice among nations. The Appeals Chamber concluded:

“In sum, the Appeals Chamber holds the view that 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 Statute of the International Tribunal.”⁹

The ICTY used a variety of terms to describe JCE in the *Tadić* case, for example “common purpose doctrine”, “common enterprise” and “common design”. Later case law has clarified that all the various terms used in the *Tadić* case refers to one mode of liability, which is preferably referred to as JCE.¹⁰

⁶ *Tadić, AC, supra* note 2, para. 181.

⁷ *Ibid.*, para. 184.

⁸ *Ibid.*, paras. 191, 192.

⁹ *Ibid.*, para. 220.

¹⁰ See *The Prosecutor v. Milan Milutinović, Nikola Šainović & Dragoljub Ojdanić, Decision on Dragoljub Ojdanić’s motion challenging jurisdiction – joint criminal enterprise*, Case no. IT-99-37-AR72, 21 May 2003 (Appeals Chamber), para. 36. Judge

2.1.3 The general requisits for JCE

As the Appeals Chamber had established the existence of JCE, they clarified the requisites. JCE was seen to encompass three categories of cases. These three categories all share the same fundamental *actus reus* and *mens rea* requirements but are adapted to different types of situations. Let us start by looking at these common requisites, before delving into the specific requirements of each category of cases.

The *actus reus* requirements for all categories in the mode of liability of JCE are¹¹:

1. A plurality of persons
2. The existence of a common plan, design or purpose, which amounts to or involves the commission of a crime provided for in the Statute.
3. Participation of the accused in the common design

When it comes to *mens rea* requirements, due to the specific criterions, the three categories end up with very different requirements.¹² Nevertheless, participants in all categories need to possess an intent to participate in, and to further, the criminal aim of the group.¹³

How specific a JCE should be defined has been a matter of different opinions. Some cases have expressed that this can vary from a small group to as broadly defined as the entire Nazi persecution of millions of Jews.¹⁴ Although the later decisions seem to argue that JCE should be kept on a smaller scale¹⁵, indictments had been confirmed that charge participation in very large-scale JCEs¹⁶.

The agreement between the co-perpetrators may be inferred by their acts and the agreement does not have to be explicit.¹⁷

Shahabuddeen, who sat in the court in the *Tadić* case, later regretted the plurality of terms, see *The Prosecutor v. Milan Milutinović, Nikola Šainović & Dragoljub Ojdanić*, Decision on Dragoljub Ojdanić's motion challenging jurisdiction – joint criminal enterprise, Case no. IT-99-37-AR72, 21 May 2003 (Appeals Chamber), Separate opinion of Judge Shahabuddeen, para. 28.

¹¹ *Tadić, AC, supra* note 2, para. 227.

¹² *Ibid.*, para. 228.

¹³ *Ibid.*, para. 228.

¹⁴ *The Prosecutor v. Miroslav Kvočka et al.*, Case no. IT-98-30/1-T, 2 November 2001 (Trial Chamber), para. 310.

¹⁵ *The Prosecutor v. Radoslav Brđanin*, Case no. IT-99-36-T, 1 September 2004 (Trial Chamber), para. 355.

¹⁶ See *The Prosecutor v. Milan Martić*, Second amended indictment, Case no. IT-95-11, 14 July 2003, para. 4 and *The Prosecutor v. Milomir Stakić*, Fourth Amended Indictment, Case no. IT-97-24-PT, 10 April 2002, para. 26.

¹⁷ *The Prosecutor v. Milorad Krnojelac*, Case No. IT-97-25-A, 17 September 2003 (Appeals Chamber), para. 85.

The participation does not need to involve a commission of a specific crime under the Statute, but may take the form of assistance in, or contribution to, the execution of the common plan or purpose.¹⁸ The Tribunals case law has generally laid out that contribution can be made even by omission.¹⁹ There is further no requirement that the accused must have been on the crime site to be liable.²⁰

2.1.4 The three categories of JCE and their specific requisites

The Appeals Chamber found a clear existence of three categories of cases within JCE²¹. The three categories all relate to groups of person with a common purpose to commit a crime, but they apply to three different types of situations.

Here, terminology can become confusing. The first two categories are referred to as “basic” JCE. The second is really a version of the first and is sometimes referred to as “systematic” JCE. The third category is named “extended” JCE.²²

2.1.4.1 Category one and two, basic JCEs

The first category of JCE, “basic” JCE, appears when all co-perpetrators act together according to a common design, all possessing the same criminal intention to commit a crime within the Statute and such a crime is committed.²³ The accused must not physically perpetrate the crime to be liable, he only needs to have voluntarily participated in one aspect of the common design and intend the result.²⁴

The second category of JCE, “basic” or “systematic” JCE, concerns cases where the co-perpetrators have participated in a military or administrative unit functioning as a system of repression, such as the operation of a concentration camp.²⁵

Systematic JCE is not reserved strictly for persons employed within a system of repression, but to anyone that in any way furthered the system.²⁶

The *actus reus* requirement is active participation in this system. The *mens rea* requirement is knowledge of the system of repression and the intent to

¹⁸ *Tadić, AC, supra* note 2, para. 227.

¹⁹ *Brđanin, TC, supra* note 15, para. 263

²⁰ *Krnojelac, AC, supra* note 17, para. 81.

²¹ *Tadić, AC, supra* note 2, para. 195.

²² *The Prosecutor v. Mitar Vasiljević*, Case no IT-98-32-A, 25 February 2004 (Appeals Chamber), paras. 96–98.

²³ *Tadić, AC, supra* note 2, para. 196.

²⁴ *Ibid.*

²⁵ *Ibid.*, para. 202.

²⁶ See *Kvočka et al.*, TC, *supra* note 14, para. 610, where a civilian who entered a camp regularly to beat detained persons was also found to act within the systematic JCE.

further the common design. Both participation and intent may be inferred by position of authority.²⁷

2.1.4.2 Category three, extended JCE

The third category of JCE, extended JCE, is different from the basic versions described above, as it is more flexible and accepts a lower level of proof.

Extended JCE refers to situations where a group of persons act according to a common design, as in category one, and during the course of this, one of the co-perpetrators commits an act that is outside this common design.²⁸ One example would be if a group decided to scare away persons of a different ethnic origin than themselves from a certain region by threats of violence, but in doing so, one of them kills a person instead of merely scaring that person.²⁹ If the killing was a natural and foreseeable consequence of the implementation of the common purpose, *i.e.* to scare people to leave the region, all participants in the group are liable for the killing.

When it came to the *mens rea* requirements for extended JCE, the ICTY was somewhat unclear. They stated the requirements in three different paragraphs in slightly different wording. The criterion can be summarized as follows³⁰:

1. the intention to take part in and further the criminal purpose of a JCE
2. that the crime charged was a natural and foreseeable consequence of the execution of that enterprise, and,
3. that the accused was aware that such a crime was a possible consequence of the execution of that enterprise, and that, with that awareness, he participated in that enterprise.

The accused still needs to possess intent towards the original common criminal purpose, but in relation to the crime actually committed, the *mens rea* requirement is merely advertent recklessness or *dolus eventualis*³¹.

The Appeals Chamber gave a mixed message when discussing the exact degree of *mens rea* for extended JCE. In one paragraph the Appeals Chamber notes that mere indifference of the risk of the crime occurring

²⁷ *Ibid.*

²⁸ *Tadić*, AC, *supra* note 2, para. 204.

²⁹ *Ibid.*

³⁰ The Appeals Chamber described the *mens rea* requirements in three different paragraphs in the *Tadić* case, with slightly different wording in each. See *Tadić*, AC, *supra* note 2, paras. 204, 220, 228. Judge Hunt later compared the three different definitions and summarized them as shown in the text. See *Ojdanić et al*, AC, *supra* note 10, separate opinion of Judge Hunt, para. 11.

³¹ *Tadić*, AC, *supra* note 2, para. 220.

would be sufficient.³² In another, the Appeals Chamber states that the accused must have known about the risk, and willingly taken the risk.³³

In the *Tadić* case, the Appeals Chamber found that extended JCE was applicable. The Appeals Chamber found that the group had a common purpose to rid the area of its non-Serb population, but killings were not included in this plan.³⁴ However, it was foreseeable that non-Serbs would be killed in the course of this action. The Appeal Chamber found that Tadić was aware of the likelihood that non-Serbs would be killed and that he yet willingly took the risk.³⁵

This is how the Appeal Chamber could come to a different conclusion using the same facts as the Trial Chamber. The level of proof needed to convict a person who had participated in a group had been substantially lowered.

2.1.5 The development since *Tadić*

Two issues in particular have developed since the *Tadić* case, which have had an effect on the consequences of JCE and are relevant for later discussion.

2.1.5.1 Indictment specificity

Despite its dramatic impact on JCE in international criminal law, the indictment in the *Tadić* case did not plead JCE as a mode of liability³⁶. Since that time, the demand for indictment specificity has been increased dramatically.

Chambers have been more hesitant to consider extended JCE, than basic JCE, when not pleaded in the indictment, perhaps due to extended JCE's flexible nature. When the indictment has used the terms "acting in concert", the Trial Chamber found it could consider basic JCE, but not the extended version.³⁷

In the end, the *Bagambiki* case in 2004 set a very high standard of specificity for JCE in indictments. The Trial Chamber made clear that the Prosecutor must specify in the indictment which form of JCE she argues, the

³² *Ibid.*, para. 204.

³³ *Ibid.*, para. 220.

³⁴ *Ibid.*, para. 231.

³⁵ *Ibid.*, para. 232.

³⁶ *The Prosecutor v. Duško Tadić*, Second Amended Indictment, Case no. IT-94-1-I, 14 December 1995.

³⁷ *The Prosecutor v. Milorad Krnojelac*, Case no. IT-97-25-T, 15 March 2002 (Trial Chamber), paras. 84, 85. Upheld by the Appeals Chamber in *The Prosecutor v. Milorad Krnojelac*, Case No. IT-97-25-A, 17 September 2003 (Appeals Chamber), paras. 116, 142. See also *Vasiljević*, AC, *supra* note 21, paras. 106, 107.

purpose of the enterprise, the identity of the co-perpetrators and how the accused participated in the enterprise.³⁸

2.1.5.2 Separation of principal perpetrators and accomplices

The *Tadić* case discussed JCE as an accomplice liability with co-perpetrators without distinguishing any principal perpetrator or any hierarchy of liability within the enterprise.³⁹

A later trend has been to find whether the accused acted as a principal or an accomplice. A principal is an essential participant who acts with intent⁴⁰, and an accomplice is a participant to a lesser degree.

The *Bagambiki* case clarified that the Prosecutor must even state in the indictment whether she charges the accused as a principal perpetrator in the JCE or not.⁴¹

What purpose this division may have is uncertain. Usually higher level of proof will be needed for principals than for accomplices⁴², and persons who are convicted as physical perpetrators receive a heavier penalty than those who have participated to a lesser degree.⁴³ If this development continues, the categories of JCE may be further specified into sub-categories.

2.2 JCE in the Special Court for Sierra Leone

The Special Court for Sierra Leone (SCSL) is a hybrid court established by agreement between the government of Sierra Leone and the UN in 2002.⁴⁴ The Prosecutor has recently presented a number of indictments and the court has started dealing with decisions and hearings.⁴⁵

³⁸ *The Prosecutor v. André Ntagerura, Emmanuel Bagambiki, Samuel Imanishimwe*, Case no. ICTR-99-46-T, 25 February 2004 (Trial Chamber), para. 34.

³⁹ The only reference to principal perpetrator in *Tadić* case was when discussing German national law in footnote 283.

⁴⁰ *The Prosecutor v. Radislav Krstić*, Case no. IT-98-33-T, 2 August 2001 (Trial Chamber), para. 644, *but see The Prosecutor v. Radislav Krstić*, Case no. IT-98-33-A, 19 April 2004 (Appeals Chamber), paras. 134, 143.

⁴¹ *Bagambiki et al.*, TC, *supra* note 37, para. 34.

⁴² See chapter 4.4.4.

⁴³ *Kvočka et al.*, TC, *supra* note 14, p. 192 *ff.*

⁴⁴ Agreement between the United Nations and The Government of Sierra Leone on the Establishment of a Special Court for Sierra Leone, Freetown, 16 January 2002. See also Security Council resolution 1315 (2000) of 14 August 2000.

⁴⁵ See the website of the SCSL at <http://www.sc-sl.org/index.html>, last visited 23 May 2005.

As in the ICTY and the ICTR, the SCSL Statute makes no reference to JCE as mode of liability.⁴⁶ Still, there are certain indications that JCE will play an important role in the courts decisions. Article 20(3) of the SCSL Statute emphasises that the judges of the SCSL shall be "...guided by the decisions of the Appeals Chamber of the International Tribunals for the former Yugoslavia and Rwanda...". Several of the indictments also plead that the accused are guilty as participants of a JCE.

If the current indictments are accepted by the court, it may result in some changes of extended JCE.

In the *Sesay et al.* case for example, the indictment claims that the purpose or aim of the JCE was to "gain and exercise political power and control over territory of Sierra Leone..."⁴⁷ and that the crimes alleged in the indictment were perpetrated within this JCE or were "a reasonably foreseeable consequence"⁴⁸ of the JCE.

These phrases do allude to JCE as developed in the *Tadić* case, but it illustrates two issues in which the SCSL may further widen the concept of extended JCE.

Firstly, the ICTY stated that the common plan itself must amount to a crime within the Statute. The common plan in the JCE in the *Sesay et al.* indictment, *i.e.* to gain and exercise political power over a territory, is not criminal in itself although the means to accomplish it may be.⁴⁹

If the paragraphs had been phrased slightly different, the indictment would have encompassed the criterion for JCE as established by the ICTY. If the aim had been stated as "to gain and exercise political power and control over territory of Sierra Leone by forcibly removing a certain ethnic group", this would constitute a crime within international criminal law and thereby follow the rule established by the *Tadić* case.

Secondly, the alleged *mens rea* in the indictment would, if proven, not even live up to the ICTY's low standard. In extended JCE, *i.e.* when a crime occurs that was not a part of the common purpose, the ICTY required the standard of proof to be that the crime was a "natural and foreseeable consequence" of the common purpose⁵⁰. The Prosecutor of the SCSL does not claim that the crime was "foreseeable", but "reasonably foreseeable"⁵¹. As above, a simple redraft would have cured the flaw, *i.e.* if the Prosecutor has excluded the word "reasonably". If this legal argument is accepted by the court, it will result in extended JCE having even lower requisites than before.

⁴⁶ See Statute of the Special Court, annexed to the Agreement between the United Nations and The Government of Sierra Leone on the Establishment of a Special Court for Sierra Leone, Freetown, 16 January 2002, Article 6.

⁴⁷ *The Prosecutor v. Issa Hassan Sesay, Morris Kallon and Augustine Gbao*, Amended Consolidated Indictment, Case no. SCSL-2004-15-PT, 13 May 2004, para. 36.

⁴⁸ *Ibid.*, para. 37.

⁴⁹ *Tadić, AC*, *supra* note 2, para. 220.

⁵⁰ *Ibid.*, para. 204, and many ICTY cases has followed this rule.

⁵¹ *Sesay et al.*, Indictment, *supra* note 46, para. 37.

It is unclear whether the text in the indictment is a part of a strategy of some sort or simply an oversight. As the SCSL Chambers may be influenced by the Tribunals' case law, it is likely that they will consider, and follow, the standards set by the consistent case law of the Tribunals regarding JCE. It certainly seems risky for the Prosecutor not to live up to the established requisites of JCE in the indictment.

No obvious benefit stands out to justify a deliberate oversight except if the Prosecutor fears that they will be unable to prove the level of proof set out by the Tribunals' case law and is therefore hoping that the SCSL lower the requisites of proving JCE.

2.3 The development in the ICC

2.3.1 ICC in context

The ICC has recently begun to function as a court, as the Rome Statute⁵² entered into force in June 2002 and the Prosecutor only just decided to investigate its first cases⁵³. The Rome Statute came into existence after a long process of deliberations and compromise, which made its impact on the text.⁵⁴ Although a large number of scholars have analysed the Statute in the light of the deliberations that led up to them, we will have to wait until the first court decisions to see the Chambers' interpretation of the Statute. Nevertheless, by looking at the framework of the Statute coupled with the writings surrounding it, we may achieve a good understanding of the possible path the case law may take.

When it comes to the ICC, it is also important to note that the applicable law is that which is established by treaty, *i.e.* the Rome Statute and other ICC documents⁵⁵. The Rome Statute allows “for principles and rules of international law, including the established principles of the international law of armed conflict” as a secondary source.⁵⁶

When it comes to the power of the ICC legislation and case law on other institutions in international criminal law, it is important to note that only

⁵² Rome Statute, A/CONF.183/9 of 17 July 1998, in force 1 July 2002.

⁵³ See ICC website, ‘The Office of the Prosecutor opens its first investigation’, 23 June 2004, <www.icc-cpi.int/pressrelease_details?id=26&l=en.html>, last visited 24 February 2005, ‘Prosecutor of The International Criminal Court opens an investigation into Northern Uganda’, 20 July 2004, <www.icc-cpi.int/pressrelease_details?id=33&l=en.html>, last visited 23 February 2005.

⁵⁴ R. Cryer, ‘General principles of liability’, in D. McGoldrick, P. Rowe and E. Donnelly (eds.), *The Permanent International Criminal Court, legal and policy issues* (Hart, Portland, 2004), p. 249.

⁵⁵ For example, Elements of Crime, ICC-ASP/1/3 part II –B, adopted 09/09/2002, in force 09/09/2002, The Official Journal of the International Criminal Court, 1st Year

⁵⁶ Rome Statute, *supra* note 51, Article 21(1), see also M. Cherif Bassiouni, *Introduction to international criminal law* (Transnational publishers inc., New York, 2003), p. 269.

state parties are bound by the Statute.⁵⁷ It is not certain that all the provisions in the Rome Statute are part of customary international law.⁵⁸ Although the ICC case law is not strictly binding on others, it will most likely have an impact on the interpretation of international criminal law norms worldwide.

2.3.2 Relevant provisions

The Rome Statute addresses individual criminal responsibility in Article 25⁵⁹. Article 25 does not spell out the term JCE as such, however, strangely enough there are two sections that may cover this principle.

Article 25(3)(a) covers the commission of a crime within the Statute “...jointly with another or through another person...”

Article 25(3)(d) addresses contribution to commission or attempted commission which has not been dealt with through 15(3)(a)-(c) “by a group of persons acting with a common purpose”.

When searching for the future of JCE, the terms used in Article 25 cause confusion. Both the terms “common purpose” in 25(3)(d) and “jointly” in 25(3)(a) seems to allude to JCE⁶⁰. Learned scholars have had different, contrasting ideas on which provision will cover JCE,⁶¹ although most scholars seem to believe that Article 25(3)(d) is the closest provision to encompass JCE.

The most striking difference between the two provisions is the level of involvement, *i.e.* “commission” or “contribution to commission”. Article 25(3)(a) speaks of principals and Article 25(3)(d) of accomplices.

This is interesting considering the development in the Tribunals to separate principal perpetrators from accomplices within JCE⁶². The ICC may chose

⁵⁷ According to the principle of *pacta sunt servanda*, see Vienna Convention on the law of treaties, adopted 23 May 1969, in force 27 January 1980, Article 26

⁵⁸ Bassiouni, 2003, *supra* note 55, p. 262.

⁵⁹ Rome Statute, *supra* note 51, Article 25.

“...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;”

... (d) In any other way contributes to the commission or attempted commission of such a crime by a group of persons acting with a common purpose. Such contribution shall be intentional and shall either:

(i) Be made with the aim of furthering the criminal activity or criminal purpose of the group, where such activity or purpose involves the commission of a crime within the jurisdiction of the Court; or

(ii) Be made in the knowledge of the intention of the group to commit the crime;”

⁶⁰ Especially in light of the plurality of terms used to refer to JCE, see chapter 2.1.2 above and footnote 10.

⁶¹ Cf. R. Cryer, ‘General principles of liability’, in D. McGoldrick, P. Rowe and E.

Donnelly (eds.), *The Permanent International Criminal Court, Legal and Policy Issues*

(Hart, Portland, 2004), p.241 with A. Eser, Individual criminal responsibility, in A.

Cassese, P. Gaeta and J. Jones (eds.) *The Rome Statute of the International Criminal Court: a Commentary* (Oxford University Press, Oxford, 2002), p. 791.

⁶² See chapter 2.1.5.2 above.

to continue this line of reasoning to divide JCE into two modes of liability. If so, it would be very interesting to see how this would affect the level of proof needed.

2.3.2.1 Actus reus

The *actus reus* requirements for co-perpetration in Article 25(3)(a) seem to be:

1. At least two persons working together
2. Both or all committing a crime

The *actus reus* requirements for Article 25(3)(d) seem to be:

1. A group of persons
2. A common purpose within the group
3. The accused contributing to the commission or attempted commission of a crime

The *actus reus* requirements for all categories of JCE in the *Tadić* case⁶³ are: a plurality of persons, a common plan regarding committing a crime in the Statute and participation of the accused in the common design. The degree of participation can vary from physically perpetrating the crime to indirect participation.⁶⁴

It is easy to see that JCE, as established in the ICTY, may have to be split to find its place within the Rome Statute. The principal perpetrators would fit within subparagraph (a) and participants to a lesser degree within subparagraph (d).

2.3.2.2 Mens rea

The *mens rea* requirements for Article 25(3)(a) are not stated in the provision. Article 30 acts as a default for those modes of liability without explicit requirements for *mens rea*.⁶⁵ Article 30 states that, unless otherwise provided, a crime must be committed with intent and knowledge. As Article 25(3)(a) does not have its own, specific *mens rea* criterion, the criterion of Article 30 applies and results in the *mens rea* requisite of intent and knowledge.

⁶³ *Tadić, AC, supra* note 2, para. 227.

⁶⁴ *Ibid.*, para. 227.

⁶⁵ Rome Statute, *supra* note 51, Article 30, Mental element

“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.

2. For the purposes of this article, a person has intent where:

(a) In relation to conduct, that person means to engage in the conduct;

(b) In relation to a consequence, that person means to cause that consequence or is aware that it will occur in the ordinary course of events.

3. For the purposes of this article, "knowledge" means awareness that a circumstance exists or a consequence will occur in the ordinary course of events. "Know" and "knowingly" shall be construed accordingly.”

In 25(3)(d), the *mens rea* requirements are spelled out in the provision itself. According to a normal reading of the ordinary meaning given to the terms in the treaty⁶⁶ they seem to encompass that:

1. the accused's contribution shall be intentional
2. the aim of the contribution shall be to further the groups criminal purpose or activity or,
3. be made in knowledge of the intention of the group.

The *mens rea* requirements of the Rome Statute will most likely introduce a change of the JCE concept.

Basic JCEs were defined by the *Tadić* case as modes of liability for a group of people who have a common criminal aim, or who act within a system of ill-treatment, and possess intent to commit the crime in question.

The ICC has set a slightly higher level of *mens rea* for group based crime. At the ICC, both intent and knowledge is required and in (d) additional factors are introduced.

This does not constitute a dramatic change of the *mens rea* requisites. As in the ICTY⁶⁷, the ICC allows intent to be inferred from relevant facts and circumstances.⁶⁸ When one can infer intent one can often infer knowledge, so in a practical context, similar situations may be dealt with. Basic JCE will probably live on in the ICC context, possibly with slightly higher level of *mens rea*.

Extended JCE was defined by the *Tadić* case to occur in the course of this crime when a group of persons have a common plan to commit a crime, but a different crime that was not a part of the common plan occurs.⁶⁹ All participants are then liable for the crime that was not part of the common plan if the crime was foreseeable and the participants in the group were reckless in regard to this risk. The *mens rea* requirement is only recklessness.⁷⁰

It is difficult to see how extended JCE would live on unchanged in the ICC. The ICTY set the level of *mens rea* in extended JCE to recklessness. The ICC set its minimum acceptable level to intent and knowledge. Nevertheless, we will simply have to wait to see how the ICC will interpret the Rome Statute's *mens rea* requirements. As the ICC may take into account established principles of international armed conflict as a secondary source of law⁷¹, there is a risk that the low level of *mens rea* accepted by the Tribunals may have an impact on the ICC.

⁶⁶ For interpretation, see Vienna Convention on the law of treaties, *supra* note 56, Article 31.

⁶⁷ *Kvočka et al.*, TC, *supra* note 14, para. 610.

⁶⁸ Elements of crime, *supra* note 54, p. 112, para. 3.

⁶⁹ *Tadić, AC*, *supra* note 2, para. 204

⁷⁰ *Ibid.*, para. 220.

⁷¹ See footnote 45.

3 The foundation of extended JCE in the light of the principles of legality

The Appeals Chamber of the ICTY could apply extended JCE in the *Tadić* case only after it had established that JCE was a part of the applicable law of the tribunal. The ICTY needed to prove that JCE existed in customary international law and that customary international law was applicable to the Tribunal.⁷² If this was not proven, the ICTY would violate the principles of legality when using JCE as a mode of liability.

This chapter will start with an analysis of what the principles of legality entail. Secondly, it will continue to analyse customary international law and how it is relevant to the ICTY. Thirdly, it will delve into the ICTY Appeals Chambers establishment of JCE in international criminal law. Lastly, it will conclude by a discussion on how the establishment of extended JCE in international criminal law lives up to the standards set by the principles of legality.

3.1 The principles of legality

The principles of legality comprise of two well-recognised legal principles, *nullum crimen sine lege* (no crime without law) and *nullum poene sine lege* (no punishment without law).⁷³ These are intimately linked through the principle of *nullum crimen sine poena* (no crime without punishment).⁷⁴

The principles of *nullum crimen sine lege* and *nullum poene sine lege* are present in all of the most important international treaties⁷⁵ and form a part of the non-derogable rights⁷⁶. As the principles require crime and punishment to be provided by law, they are vital safeguards in all legal jurisdictions as they protect against potential abuse and arbitrary application of law⁷⁷. Last but not the least, clear legislation is vital for the defence so that it can prepare for trial.⁷⁸

⁷² *Tadić, AC, supra* note 2, para. 220.

⁷³ Bassiouni, 2003, *supra* note 55, p. 218.

⁷⁴ K. Kittichaisaree, *International criminal law* (Oxford University Press, Oxford, 2002), p. 13.

⁷⁵ See UDHR Article 11(2), ICCPR 15(1), ECHR Article 7(1) and ACHPR Article 7(2) almost unanimous provisions, UDHR: “No one shall be held guilty of any penal offence on account of any act or omission which did not constitute an offence, under national or international law, at the time when it was committed”.

⁷⁶ Bassiouni, 2003, *supra* note 55, p. 63.

⁷⁷ Bassiouni, 2003, *supra* note 55p. 218.

⁷⁸ S. Powles, ‘Joint criminal enterprise. Criminal Liability by Prosecutorial Ingenuity and Judicial Creativity?’ 2 *Journal of International Criminal justice* (2004) p. 616.

The ECtHR has extended the principles incorporated in Article 7(1) ECHR to also prohibit the extension of the application of the criminal law, for example by analogy, to the disadvantage of the accused.⁷⁹

When it comes to international criminal law, the application of the principles of legality becomes more complex because the definition of law is wider⁸⁰. The definition of international law includes international conventions, customary international law and general principles of law recognised by civilized nations.⁸¹ The first step obviously needs to be to determine the content of the applicable law, and then to see whether the crime or punishment has a legal basis in international law.

A number of learned scholars have gone as far as concluding that the principles of legality cannot be reproduced at an international level, and if so, only in a reduced scope.⁸² There may be some truth to this in regards to international law in general. In the international criminal law we see today, the international norms increasingly mimic the functions of national law, providing for individual criminal responsibility and a progressively increasing codification of international criminal law. Therefore, there is no reason why international criminal law should be exempt from the safeguards that protect national law.

On the contrary, there should be at least the same level of safety mechanisms in international criminal law as in national law, or even a higher level, as the legitimacy of international criminal law is not as firmly established as national legislation, and because of this vulnerability it should really be protected against being misused.

Misusing international criminal law could lead to the questioning of the entire system of international criminal law. The critics of international criminal law are many and even the *Tadić* case started by the defence challenging the ICTY's jurisdiction.⁸³

The principles of legality were incorporated into the ICTY and ICTR Statutes⁸⁴. As the Secretary-General presented the ICTY Statute, he urged the Tribunal to apply a strict interpretation of international criminal law.

“[T]he application of the principle *nullum crimen sine lege* requires that the international tribunal should apply rules of international humanitarian law which are beyond any doubt part of customary law so that the problem of adherence of some but not all States to specific conventions does not arise.”⁸⁵

⁷⁹ R. Lahti, 'Article 11', in G. Alfredsson and A. Eide (eds.), *The Universal Declaration of Human Rights: A Common Standard of Achievement* (Kluwer, The Hague, 1999), p. 246.

⁸⁰ S. Ratner and J. Abrams, *Accountability for human rights atrocities in international law*, (Oxford University Press, New York, 2001), p. 21.

⁸¹ Statute of the International Court of Justice, Article 38.

⁸² S. Zappalà, *Human rights in international criminal proceedings* (Oxford University Press, Oxford, 2003), pp. 95, 201.

⁸³ *The Prosecutor v. Duško Tadić*, Decision on the Defence Motion on Jurisdiction, Case no. IT-94-1, 10 August 1995 (Trial Chamber).

⁸⁴ ICTY Statute Article 24, ICTR Statute Article 23.

⁸⁵ Report of the Secretary-General pursuant to paragraph 2 of Security Council resolution 808 (1993), 3 May 1993, para. 34.

In the ICC, the principles of legality appear in two provisions of the Rome Statute. Article 22 deals with *nullum crimen sine lege* and Article 23 with *nullum poene sine lege*. Article 22(2) ads,

“The definition of a crime shall be strictly construed and shall not be extended by analogy. In case of ambiguity, the definition shall be interpreted in favour of the person being investigated, prosecuted or convicted.”

It is clear that the legislators of international criminal law wanted the principles of legality to live on in the international contexts and that a strict definition of law should be applied.

3.2 Customary international law and other sources of international law

Customary international law is not explicitly stated as a source of law in the ICTY Statute; rather, the Statute states that the accused shall be prosecuted in accordance with the provisions of the ICTY Statute itself⁸⁶.

The importance of customary international law to the ICTY becomes very clear when looking at the Tribunal’s own legitimacy. The Tribunal was created, not by a treaty among nations as the ICC, but by the Security Council, an executive and not legislative body⁸⁷. The Security Council created the ICTY through Resolution 808/1993, whereby the Security Council determined that the Tribunal should preside over “serious violations of international humanitarian law”⁸⁸.

Such serious violations of humanitarian law had to be well-established principles that all, or at least the majority, of nations could agree upon. To consolidate a set of international crimes and bring them into effect by a tribunal, there could be no uncertainty regarding the existence of these rules. Therefore, these “serious violations of international humanitarian law” had to be a part of customary international law. A Statute was defined that encompassed the pre-existing principles of humanitarian law, which were without doubt well-established principles of customary international law. Because of its origin, and its delicate claim to legitimacy, it is vital the ICTY works within the parameters set for it and that it does not go beyond what was safely determined international humanitarian law at the time of the crime.

⁸⁶ ICTY Statute Article 1.

⁸⁷ P. Sands and P. Klein, *Bowett’s Law of International Institutions* (Thomson, London, 2001), p. 40.

⁸⁸ Security Council resolution 808(1993), 22 February 1993, para. 13.

The ICTY legitimised the principle of extended JCE by stating that it was part of customary international law.⁸⁹ The definition of customary international law is “a general practice accepted as law”.⁹⁰

The elements of customary international law were defined in the ICJ Statute and further clarified by the ICJ in the *Nicaragua* case⁹¹.

The *Nicaragua* case separated the elements of customary international law into two elements, one objective, *i.e.* a general practice, and one subjective *i.e.* accepted as law.⁹² Sources of customary international law include diplomatic correspondence, opinions of official legal advisers, state legislation, and international and national judicial decisions.⁹³ Complete uniformity among these sources is not required, but there must at least be substantial uniformity among states to prove customary international law.⁹⁴

As an interesting thought, no particular duration is needed to establish consistency of a practice in customary international law.⁹⁵ If the SCSL and the ICC continue down the path the ICTY and ICTR has laid out, and nations worldwide accept this, one may argue that a principle of customary international law has emerged, even if it was not a part of customary international law at the time of the *Tadić* case.

3.3 How the ICTY found extended JCE to be established in customary international law

3.3.1 Initial conclusions by the ICTY

We will now return to the beginning, to where the ICTY found that extended JCE was “firmly established in customary international law” and upheld “implicitly, in the Statute of the International Tribunal”⁹⁶. The sources the ICTY used will be analysed to find if there really was sufficient evidence of “a general practice accepted as law”.

Firstly, the ICTY established that collective criminality should be a crime within the Statute through a wide, teleological interpretation of the ICTY Statute. The Chamber argued that the object and purpose of the Statute was that all responsible persons should be tried, regardless if they had carried out the *actus reus* of the crime in the Statute.⁹⁷ This was seen in the light of the

⁸⁹ *Tadić, AC, supra* note 2, para. 220.

⁹⁰ Statute of the International Court of Justice Article 38(1)(b).

⁹¹ *Nicaragua v. USA* (Merits), ICJ Rep. 1986 p. 97.

⁹² P. Malanczuk, *Akehurst's Modern Introduction to International law*, (Routledge, London, 1997), p. 39.

⁹³ I. Brownlie, *Principles of Public International Law*, (Oxford, New York, 2003), p. 6.

⁹⁴ *Ibid.*, p. 7.

⁹⁵ Brownlie, 2003, *supra* note 92, p. 7.

⁹⁶ *Tadić, AC, supra* note 2, para. 220.

⁹⁷ *Ibid.*, para. 189.

fact that crimes in armed conflicts were usually committed by groups of people, all participating in various ways.⁹⁸

The ICTY did not address the critical views against group criminality such as the risk of guilt by association⁹⁹ or the fact that the modes of liability are explicitly stated in the ICTY Statute, and specially restated in the case of genocide.¹⁰⁰

As the ICTY determined this issue set, it only found itself needing support for *actus reus* and *mens rea* requirements. It found these by looking to post-World War II cases, international treaties and national law. I will examine these sources here in the same order that the Appeals Chamber did and focus on the foundation for extended JCE.

3.3.2 Post-World War II cases

The legacy of the post-World War II case law weighs heavily when discussing the legality and origin of international criminal law. The Nuremberg tribunal's case law has been especially regarded as the "archetypes of modern international criminal law implementation"¹⁰¹, but it is important to note that these cases are not perfect examples of international criminal law; they lack the international context to prove current customary international law.

The ICTY found that the post-World War II cases showed "three distinct categories of collective criminality"¹⁰².

For each category of JCE, a number of cases were listed as proof.

Several cases seemed to prove the existence of basic JCE as a part of customary international law. Extended JCE was more difficult to prove. Extended JCE encompass situations where a group has a common purpose, but in carrying out this purpose, a crime is committed that was not a part of the common purpose.

The ICTY emphasized two post-World War II cases when proving extended JCE, the *Essen lynching* case and the *Borkum Island* case.¹⁰³

The *Essen lynching* case was heard by a British court regarding a German captain who placed three British prisoners in the escort of German soldiers

⁹⁸ *Ibid.*

⁹⁹ See discussion in chapter 4.2.

¹⁰⁰ ICTY Statute, Article 4(3).

¹⁰¹ L. S. Sunga, *The Emerging System of International Criminal Law, Developments in Codification and Implementation* (Kluwer Law International, The Hague, 1997) p. 281.

¹⁰² *Tadić, AC, supra* note 2, para. 195.

¹⁰³ Neither have been cited, or even provided with a date of judgment, which make them difficult to find. My attempts only led to other summaries or references to microfilms. Therefore, the information and citations here are from the *Tadić* case itself, limiting my ability to analyze, but as it turns out, there is enough to analyze in the extracts and reasoning in the *Tadić* case itself. Some of the case law referred to by the *Tadić* case were actually handwritten documents, see M. Boot, *Genocide, Crimes against Humanity, War crimes* (Hart Publisher, 2002, Oxford), p. 293.

to take them to a venue for investigation. The captain loudly stated that the prisoners of war ought to be shot and that the soldiers should not interfere if the angry mob molested the prisoners. The angry mob attacked the prisoners and in the end killed them by throwing them off a bridge. The German soldiers did nothing to stop this.¹⁰⁴ The ICTY Chamber noted two statements from the prosecution in the *Essen lynching* case, firstly that the Prosecutor found he did not have to prove intent as it was a question of manslaughter and not murder, and secondly, that the Prosecutor stated that he did not have to prove exactly what each one in the mob had done. The ICTY then assumed that, as the captain was convicted, the judge(s) in the case must have accepted the prosecutions arguments.

I would like to focus on three points of criticism regarding the *Essen lynching* case. Firstly, the Prosecution's argument on intent has nothing to do with the *mens rea* of extended JCE. The argument refers to the *mens rea* in two different crimes, manslaughter and murder, not in the mode of liability. This argument can definitely not be a confirmation that the *mens rea* for genocide, with far more complex *mens rea* requirements than murder or manslaughter, should be lowered when liable through an extended JCE.

Secondly, the Prosecution argued that it did not have to prove what each person actually did. This may very well be true and there are many other cases to prove this point. However, this says nothing about extended JCE. In the *Essen lynching* case, the Prosecution alleged that the group of persons had a common purpose to commit a crime, in this case to fatally harm the prisoners of war. The captain incited the killings from the outset and the result, that the men were killed, was in accordance with the group's common plan. This is the definition of a basic JCE.

The Prosecution does not even insinuate that the murder was an act outside the common purpose, which is the essence of the category of cases labelled "extended JCE". The *Essen lynching* case is clearly about a basic JCE¹⁰⁵ as the crime committed was part of the common purpose, and not outside the common purpose, which the extended version encompasses¹⁰⁶.

Thirdly, almost irrelevant at this point, even if the two arguments from the prosecution could be seen as a basis for extended JCE, there is no proof that the court really depended on them, this is merely the assumption of the ICTY Chamber.

The *Borkum Island* case had similar circumstances, but this time it was a US court presiding upon events taking place in Germany. US prisoners of war

¹⁰⁴ *Tadić*, TC, *supra* note 4, para. 207.

¹⁰⁵ See also M. Sassòli and L. Olson, 'The judgement of the ICTY Appeals Chamber on the merits in the *Tadić* case', 839 *International Review of the Red Cross* (2000) p. 733.

¹⁰⁶ See also A. Marston Danner and J. Martinez, 'Guilty Associations: Joint Criminal Enterprise, Command Responsibility, and the Development of International Criminal Law', Vanderbilt University Law School, Public Law & Legal Theory Working Paper series, Working paper No. 04-09 and Stanford Law School, Public Law & Legal Theory Working Paper Series, Research Paper No. 87, March 2004, <<http://ssrn.com/abstract=526202>> last visited 1 January 2005, p. 38.

had been paraded through a German town, in the course of this severely beaten, and in the end shot by the mayor and some soldiers.

This case, as the *Essen lynching* case, was used to establish extended JCE, but in the case, at best, only a basic JCE appears.

The court found some of the accused guilty of assault and some of murder and assault, which really goes against the idea that they jointly participated in a group with a common purpose and therefore were liable for the crimes the group committed.

The sentence is certainly contrary to the idea of extended JCE, *i.e.* even when something got out of hand and a crime was committed that the group had not agreed upon from the beginning, all should be responsible for the crime, if it was foreseeable. In this case, it should have been foreseeable that the prisoners in the end would be killed, as several actors worked together to abuse them. According to extended JCE, as the ICTY Appeals Chamber defined it, all would be liable for the crime committed in the same way, regardless of their level of involvement. In the *Borkum island* case, the Chambers divided the guilt among the individuals according to their participation. This case does not prove the existence of extended JCE in customary international law, it is more proof against the idea of the existence of extended JCE in customary international law.

After analyzing the two cases with an “international approach” above at length, the ICTY Chamber looked at some Italian cases, which dealt with what occurred in Italy during World War II. The only clear proof of extended JCE in these Italian cases is *D’Ottavia et al.*, where a group of Italians had the common purpose to capture prisoners of war who had escaped from a concentration camp and in the course of this, a pursuer shot one of the fugitives. The Italian court found that the group had a shared intent to capture the fugitives, and should have foreseen the killing; thereby all were liable for the killing. This is a clear-cut example of extended JCE as defined by the *Tadić* case. Astonishing enough, it is the only example of extended JCE in international criminal law the ICTY found.

In one of the other Italian cases, *Arratano et al.*, the courts decision was contrary to establishing extended JCE. The court of cassation referred to a Supreme Court decision that established that even in a group everyone must have intent of murder to be found guilty of this crime.¹⁰⁷ Extended JCE allows for recklessness for *mens rea*, a far lower criterion than intent.

After examining the cases above, the ICTY Appeals Chamber found that the three categories of JCE were firmly established in customary international law. Although the two basic forms of JCE may have been established by this analysis, there was no proof of extended JCE in the “international” cases and only one case showed extended JCE in the domestic Italian case.

¹⁰⁷ *Tadić, AC, supra* note 2, para. 216.

On the contrary, several cases seem to oppose the existence of extended JCE in international criminal law.

Additionally, it is important to note that the case law cited above all comes from jurisdiction that include extended JCE in their domestic legislation, namely the UK, the US and Italy. Germany, for example, does not acknowledge extended JCE in their national jurisdiction.¹⁰⁸ If the case law cited was simple expressions of domestic legislation, it is even more astonishing that the ICTY found proof of extended JCE through case law, as it could not find such proof in its later analysis of national legislation¹⁰⁹.

In recent times, both the ICTY and the ICTR have referred to national legislation in former Yugoslavia and Rwanda to substantiate their claims.¹¹⁰ The increasing awareness of this issue may be a consequence of international criminal law moving from resembling victors' justice to proclaiming to be a truly global international criminal law.¹¹¹

In conclusion, the ICTY found this far-reaching, innovative mode of liability established in international criminal law by case law through one case in a domestic jurisdiction. The firm legal foundation of extended JCE in international criminal law that the ICTY found in post-World War II cases does not exist.

3.3.3 International treaties

After inexplicably concluding that extended JCE was established through post-World War II case law, the Chamber still continued to investigate to what extent international treaties and national law show the existence of extended JCE.

The ICTY emphasized two international treaties, which in their view supported all three categories of JCE, including extended JCE.

The first example was the International Convention for the Suppression of Terrorist Bombing¹¹² from 1997.

Article 2(3)(c) of the convention states as a mode of liability:

“[an act committed by]...a group of persons acting with a common purpose; such contribution shall be intentional and either be made with the aim of furthering the general criminal activity or purpose of the group or be made in the knowledge of the intention of the group to commit the offence or offences concerned.”

¹⁰⁸ *Ibid.*, para. 224.

¹⁰⁹ *Tadić, AC*, *supra* note 2, para. 225

¹¹⁰ *See for example, The Prosecutor v. Jean Paul Akayesu*, Case no ICTR-96-4-T, 2 September 1998 (Trial Chamber), para. 467.

¹¹¹ Danner and Martinez, 2004, *supra* note 105, p. 2.

¹¹² International Convention for the Suppression of Terrorist Bombing, adopted by consensus by the United Nations General Assembly through resolution A/RES/52/164 of 15 December 1997 and opened for signature on 9 January 1998.

There are three very potent arguments against holding the Terrorist Bombing Conventions as a source of law regarding extended JCE.

Firstly, the convention does not include any version of extended JCE. Article 2(3)(c) is in fact a version of conspiracy, created through tough, but successful, negotiations between common law and civil law nations.¹¹³ In common law jurisdictions, the theory of conspiracy is widely accepted, whereas in civil law countries it is almost unheard of.¹¹⁴ As these legal traditions meet to agree on international treaties, conspiracy has been one of the most difficult issues to reach agreement upon. In the end, an extradition treaty of the European Union was used to find common ground and reach a definition that all could agree upon.¹¹⁵ It was hard enough to reach agreement on conspiracy, and we can safely assume that the more extensive theory of extended JCE would never have been agreed upon by the stern diplomats at that time.

Secondly, and most obviously, the requisites in Article 25(3)(c) are much higher than the ICTY allowed for extended JCE. The version of conspiracy in Article 2(3)(c), demands the accused to possess intent to commit the crime, or knowledge of the principal perpetrators intent. Extended JCE requires the accused to possess intent towards the general criminal aim of the group, but regarding the crime committed outside of that aim, the accused only needs to be reckless regarding a foreseeable risk. The low criterion of *mens rea* established for extended JCE would never be acceptable for conviction under Article 2(3)(c). Once again, the Terrorist Bombing Convention may prove some issues regarding the basic JCE's, but it provides no proof of the extended version.

Thirdly, it is unwise to automatically transfer legal principles from the terrorism context to the area of international criminal law. It is possible, and has been well-argued¹¹⁶, that large-scale terrorist attacks can be regarded as crimes against humanity or genocide. Terrorist networks could easily be described in terms of JCE's. Nevertheless, the nature of large-scale terrorist attacks is vastly different from the subject matter that the ICTY and ICTR have dealt with.¹¹⁷ The different contexts do interact and may merge, but call for caution before transferring a principle from the one area of law to the other.

The ICTY takes a second example of an international treaty establishing JCE by looking at the Rome Statute of the ICC. The Rome Statute is,

¹¹³ P. Saland, 'International Criminal Law Principles', in R. S. Lee (ed.) *The International Criminal Court: The Making of the Rome Statute* (Kluwer, The Hague, 1999), p. 199.

¹¹⁴ *Ibid.*, 199

¹¹⁵ R. P. Barrett and L. E. Little, 'Lessons of Yugoslav Rape Trials: A Role for Conspiracy Law in International tribunals, 88 Minnesota Law Review Nov 2003, 30, p. 14.

¹¹⁶ See for example J. D. Fry, 'Terrorism as a Crime Against Humanity and Genocide: The backdoor to Universal Jurisdiction, 7 UCLA Journal of International Law and Foreign Affairs 169 (2002)

¹¹⁷ Danner and Martinez, 2004, *supra* note 105, p. 36.

unlike the Statutes of the Tribunals, an international treaty created and signed by member states and therefore is a good indication what issues the countries of the world are able to agree upon and on what issues they cannot agree on.

The Appeals Chamber concluded that JCE is a mode of liability in Article 25(3)(d) of the Rome Statute¹¹⁸ and considered this evidence of a common *opinion juris* of the world to acknowledge JCE.¹¹⁹

When examining the text of Article 25(3)(d) we find that, apart from dealing with collective criminality, it is very different from the definitions of extended JCE. Instead, it bears great resemblance to another text we recently discussed.

In fact, when the Preparatory Committee sat down to discuss individual criminal liability in the Rome Statute, the sensitive issue of conspiracy was once again the hottest issue.¹²⁰

Common law countries pushed hard to include conspiracy and civil law countries worked hard to exclude it. An ingenious solution was found, a solution that had been used before.

Instead of spending valuable time debating, the preparatory committee chose to rely on a definition already negotiated successfully by the parties in the International Convention for the Suppression of Terrorist Bombing. The mode of liability in Article 25(3)(d) of the Rome Statute was copied almost verbatim from Article 2(3)(c) of the Terrorist Bombing Convention.¹²¹

Obviously, many of the arguments put forward from the author against the attempt to justify extended JCE via the Terrorist bombing convention can be applied to the attempt to use the Rome Statute to justify extended JCE. The version of conspiracy in the Rome Statute requires intent or knowledge of the principal's intent, as discussed in chapter 2.3. Extended JCE, allowing for recklessness as its *mens rea* requirement, is far from close to the definition in the Rome Statute.

Although the Tribunals' case law has given a broad interpretation of JCE to the extent that it is similar to that of conspiracy¹²², they are still two different crimes, even in the Tribunal's Statutes. It is strange of the ICTY to use two definitions of conspiracy, a crime already in the Tribunal's Statutes, as a reason to expand their Statutes and create a new mode of liability. This is even stranger as the ICC and Terrorist Bombing Conventions version of conspiracy cannot be used as a foundation for extended JCE.

¹¹⁸ *But see* the discussion in chapter 2.3.2. regarding the possibility that JCE may also fit within Article 25(3)(a) of the Rome Statute.

¹¹⁹ *Tadić, AC, supra* note 2, para. 222.

¹²⁰ *See for example* Barrett and Little, 2003, *supra* note 113, p. 14, and Saland, 1999, *supra* note 111, p. 198.

¹²¹ Saland, 1999, *supra* note 111, p. 1999, M. Arsanjani, The Rome Statute of the International Criminal Court, 93 *American Journal of International Law* 22 36-37 (1999), p. 36 and Barrett and Little, 2003, *supra* note 113. p. 8.

¹²² Barrett and Little, 2003, *supra* note 113, p. 8.

In conclusion, none of the two treaties the ICTY found to support JCE, allows for extended JCE.

3.3.4 National legislation

As a final source of customary international law, the ICTY Appeals Chamber looked at national legislation to see whether there was a coherent legal practice.

Although international criminal law is moving from the early years where most principles could be derived from either common law or civil law jurisprudence, and plunging forward towards a legal personality of its own¹²³, the importance of national law still remains as a means of interpretation.

If it could be proven that a majority of nations in the world accepted a certain practice, the first step to proving this practice in customary international law would have been taken.¹²⁴ Although the ICTY claimed to have established extended JCE already by case law and international treaties¹²⁵, this analysis has failed to see this proof. The analysis of national law seems to be the last resort to legitimize the existence of extended JCE in customary international law.

The ICTY found that several national jurisdictions accepted JCE as a mode of liability, but in various ways. Two categories of states could be distinguished, each accepting JCE in different degrees.

Firstly, some countries accepted that when a group worked together towards a common criminal aim, all participants in the group were liable for the crimes committed, as long as they were in line with what had been the aim of the group. Crimes committed outside of the common purpose would be the sole responsibility of the person who physically perpetrated them. When comparing this form of liability with JCE in international criminal law, these countries would criminalize the type of crimes that occur in a basic JCE, *i.e.* when all work together in a group with intent and all are liable for the crimes within the common purpose.

In situations where a crime is committed outside the common purpose, which is the subject matter of extended JCE, these national jurisdictions only find the principal perpetrator liable. In extended JCE, as established by the ICTY, all would be responsible as long as the crime was foreseeable. In sum, this category of countries accepts basic JCE, but not extended JCE. These countries include Germany and the Netherlands.¹²⁶

¹²³ Danner and Martinez, 2004, *supra* note 105, p. 2.

¹²⁴ For discussion of customary international law, *see* in chapter 3.2.

¹²⁵ *Tadić, AC, supra* note 2, para. 220.

¹²⁶ *Tadić, AC, supra* note 2, para. 225

Secondly, there is a larger group of countries that consider both the crimes committed as a part of the common purpose and those committed outside of the common purpose to be the responsibility of the whole group, regardless of the level of involvement. These countries therefore have a corresponding view to the ICTY as the countries criminalize situations identical to both basic and extended JCE. In these countries jurisdictions we find a well-established basis for the criteria of extended JCE. These countries include civil law countries like France and Italy and common law countries as England and Wales, Canada, the United States, Australia and Zambia.¹²⁷

In sum, the ICTY concluded that there was no coherent legal practice around the world that could help establish extended JCE as a principle of customary international law.¹²⁸ The Appeals Chamber felt confident that the post-World War II case law combined with the international treaties was sufficient to establish extended JCE in customary international law.

There is reason to believe that the ICTY did not disregard from this source of law as they claimed to, and should have, and we will therefore continue analyzing a few aspects of the national legislation.

It is interesting to note that in all the case law the ICTY found to support extended JCE, we can only find one case that actually concerned extended JCE. That case was *D'Ottavio et al.*, where an Italian court, judged upon acts committed by Italians, on Italian ground, under Italian national law. As Italy is one of the countries in the second category of countries which accepts extended JCE in their national legislation, it is obvious that the ruling in the case will be positive towards the principle of extended JCE. The *D'Ottavio et al.* case should have been analysed under the heading of national law as that is what it deals with. Instead, it was described under the auspices of post-World War II cases, which implied an international aspect to the law, that in reality was lacking.

It seems like extended JCE in international criminal law is strikingly similar to the corresponding concept in the national legislations in the second category of countries. In these national jurisdictions, as in international criminal law, all in the group are liable for crimes committed outside of the common purpose, if they were foreseeable. The requisite of foreseeability was not apparent in the post-World War II case law, except for the Italian case, or in the international treaties. It can only have been inferred though accepting requisites from certain national jurisdictions.

Where the ICTY found extended JCE well established by case law, we have found no such thing. In examining case law and international treaties, we have merely found the Italian case to prove the existence of extended JCE. Nevertheless, the ICTY established detailed criteria for extended JCE, including *mens rea* and *actus reus*. The ICTY claimed to base these

¹²⁷ *Ibid.*, para. 224.

¹²⁸ *Tadić, AC*, *supra* note 2, para. 225.

conclusions on case law, but these detailed criteria were not visible in that source of law. Instead, the second group of national jurisdictions shows an abundance of detailed criteria for extended JCE. This principle has its specific place in these jurisdictions and naturally comes with a detailed set of criterion established by a long line of national case law. This is the most likely source of the *mens rea* and *actus reus* criterion for extended JCE that the ICTY established. This is the only place these criteria could have been found.

It is also interesting to note that the group of nations that do accept extended JCE in their national jurisdictions may be limited as to their number, but not as to their influence in world politics.

The United States, the United Kingdom and Italy accept extended JCE in their national jurisdictions and were also the main actors in post-World War II cases including the Nuremberg trials.¹²⁹

At least two of the five judges in the Appeals Chamber came from jurisdictions specifically mentioned to support extended JCE.¹³⁰ This does not mean to suggest that they were biased in any way, but a person raised and perhaps legally trained in a certain legal context would naturally take on these ideas easier.

It seems that national legislation has played a greater role in the establishment of JCE in international criminal law than the ICTY would like to recognise. As those national jurisdictions are not part of a coherent legal practice, it was legally incorrect of the Tribunal to have been influenced by them when determining the criterion of extended JCE.

3.4 Discussion

As the Security Council established the ICTY, it left the new Tribunal with the guideline to interpret international criminal law strictly. The law applied should without any doubt form part of what all nations accepted as international criminal law, so that there would be no doubts as to its legality.

Many years into its work, the ICTY took a different direction. The strict interpretation was substituted by a wide, teleological interpretation, not of what existed beyond any reasonable doubt in international criminal law, but of what should exist. The ICTY determined that there was a need for a mode of liability for group-based criminality, and took action.¹³¹

The ICTY claim that the sources above establish that all three categories of JCE are a part of customary international law. The reality is very different. The sources do establish the basic forms of JCE, where a crime occurs

¹²⁹ See for example Boot, 2002, *supra* note 102, p. 185.

¹³⁰ Judge Antonio Cassese from Italy and Judge Florence Ndepele Mwachande Mumba from Zambia.

¹³¹ *Tadić, AC*, *supra* note 2,, para. 189.

within the purpose of the group, but certainly not the extended version, where a crime is committed outside of this purpose.

To prove something exists in customary international law, one must prove that there is a general practice among states and that the states regard this practice as law. A convincing number of situations must be provided before arguing this successfully.

The ICTY claim that extended JCE was established by post-World War II case law. An analysis of the case law cited as support show that only one domestic Italian case clearly refers to extended JCE. This case is more of an expression of national Italian law, and not international criminal law. Several cases cited as support for extended JCE, actually provide evidence to the contrary. In conclusion, this is far from enough to prove customary international law. Several other scholars have come to this conclusion.¹³²

The ICTY then claim that extended JCE is supported by international treaties. Two articles are seen as proof, but in reality, one is a copy of the other. None of them allow for the low *mens rea* criterion of extended JCE.

Finally, the ICTY states that national legislation cannot support extended JCE in international criminal law, as there is no coherent practice among nations. An analysis shows that this is true, but that the ICTY most likely used the national legislations to establish extended JCE. There is simply no other source of customary international law that contains the specific criterion of extended JCE like the legislation in these national jurisdictions does.

The ICTY Appeals Chamber was wrong. Extended JCE was not a part of customary international law by the time of the crimes of the *Tadić* case.

Could any other source of international law be used to establish extended JCE in international criminal law? Article 38 of the ICJ Statute, which is widely accepted as a definition of the general sources of international law¹³³ also provides “general principle of law recognised by civilized nations”¹³⁴ and learned writings¹³⁵ as sources. Extended JCE is not a general principle of law, as many nations do not accept it in their national jurisdictions and learned scholars are consistent in criticizing extended JCE. It seems clear that no source of international law can help us establish extended JCE as part of international criminal law.

Extended JCE was not a part of international law at all, at the time of the crime.

¹³² M. Sassòli and L. Olson, 2000, *supra* note 104, and Danner and Martinez, 2004, *supra* note 105

¹³³ Brownlie, 2003, *supra* note 92, p. 5.

¹³⁴ ICJ Statute Article 38(1)(c).

¹³⁵ ICJ Statute Article 28(1)(d).

Apart from noting that the ICTY made an error of law, a more challenging issue arises.

The ICTY and the ICTR has convicted several individuals as responsible through extended JCEs. The Tribunals have convicted and issued punishment without any basis in its applicable law.

In doing so, they have violated the principles of legality. The principles of legality, which are some of the most fundamental rules in criminal law and non-derogable rights. This has not been done once, or twice, but repeatedly. The ICTY and the ICTR have consistently upheld the rule established in the *Tadić* case and, at least the SCSL, seems to continue in their footsteps.

The critics of international criminal law can point to this case as an example of internationally established institutions violating the most fundamental norms of criminal law to achieve a politically correct purpose, *i.e.* to seem efficient in convicting war criminals.

The odd thing is, that when analysing the status of customary international law in the year of 2005, it may be concluded that extended JCE does form part of customary international law. The case law of the ICTY and the ICTR has been consistent and SCSL seems to follow the case law too. Apart from legal scholars, there has been no loud protest against the establishment of extended JCE. No particular duration is needed to establish consistency of a practice in customary international law¹³⁶ and so extended JCE may have emerged into international criminal law.

The ICTY has moved a long way from its original purpose of applying only the most well established law, to the point where it may have actually created law. This raises serious issues regarding the competence of the ICTY, the control function of the Security Council and the legality of international criminal law.

4 Level of proof

4.1 Introduction

Extended JCE is one of the most highly criticised modes of liability in international criminal law, and is often alleged to contain a low or unspecific level of proof. The *mens rea* requirements of recklessness are of course an obvious issue of concern, but many other issues are worth discussion.

In this second part of analysis, this thesis will move into an examination of the level of proof for extended JCE.

¹³⁶ Brownlie, 2003, *supra* note 92, p. 7.

Some critics go as far as claiming that extended JCE is a form of guilt by association. The analysis will be seen in the light of this risk to determine the accuracy of this harsh criticism.

In the light of the examination above, we must note that it is difficult to analyse the criterion for level of proof without a clearly identified origin of the principle. As extended JCE has no obvious location in the intricate web of international criminal law, this analysis will start with finding that position. This will be done by a detailed analysis of the *Brđanin* case and during this, other issues will be identified that will facilitate the discussion, such as the interrelation between the two sets of modes of liability in the Statutes of the ICTY and the ICTR.

With this in place, a more detailed analysis of the risk of extended JCE can begin. Firstly, the seemingly clearly established *actus reus* requirements will be scrutinised. The *actus reus* requirement of extended JCE is participation in a group with a common criminal purpose. This chapter will focus on the degree of participation, but later also address issues relating to how the group is defined. Secondly, the much criticised *mens rea* requirements will get its turn.

The *mens rea* requirements will be analysed in various ways to understand it properly. The criterion for extended JCE will be established, and then a comparative approach between all the modes of liability will be commenced. The most similar modes of liability will receive closer attention. Later, the *mens rea* requirements will be analysed in the light of the level of involvement.

Through these various analyses, a clear picture of the *mens rea* requirements should appear.

As the level of proof has been established, it will be put into context. Armed conflict has changed in the effect of globalisation. The level of proof of extended JCE must be put into context to make potential risks visible.

A discussion will conclude the arguments put forward and present the findings on what risk the level of proof in extended JCE entail.

4.2 Guilt by association

Since the time the Nuremberg tribunal first judged upon individual criminal responsibility for crimes committed in groups, there has been a debate on how to separate this liability from guilt by association.¹³⁷

Guilt by association entails that a member of a criminal association or organisation is liable for a crime by the mere fact of membership¹³⁸.

¹³⁷ See for example Boot, 2002, *supra* note 102, p. 297.

Individual criminal responsibility for group crimes needs to establish that every co-perpetrator fulfils the criterion to be individually responsible¹³⁹, and is and not automatically labelled guilty because of the nature of the group.

Guilt by association has been strongly condemned. The Nuremberg Tribunal faced a great deal of controversy when it dealt with participation in criminal organisations.¹⁴⁰ It concluded “in accordance with well-settled legal principles, one of the most important of which is that criminal guilt is personal, and that mass punishments should be avoided.”¹⁴¹ It was clear by the Nuremberg Tribunal’s case law that more than mere membership in an organization was needed.¹⁴²

The US Supreme court has likewise condemned guilt by association, stating that it is a “thoroughly discredited doctrine”.¹⁴³

When it came to establishing the ICTY, the Secretary-General of the UN made a clear statement rejecting guilt by association:

“The criminal acts set out in this statute are carried out by natural persons; such persons would be subject to the jurisdiction of the International Tribunal irrespective of membership in groups.”¹⁴⁴

The first annual report of the ICTY also made an appealing argument against guilt by association as it argued that collective responsibility would result in a further antagonism among religious and ethnic groups in former Yugoslavia, continuing the tragic history of the region. When incurring liability on individuals, and not groups, specific perpetrators will be regarded as guilty instead of ethnic or religious entities.¹⁴⁵

Several scholars have expressed concern that extended JCE will allow for guilt by association.¹⁴⁶ If extended JCE is defined too broadly, it might resemble guilt by association. Without detailed criterion on how to identify

¹³⁸ W. Schabas, ‘Mens Rea and the International Criminal Tribunal for the Former Yugoslavia’, 37 *New England Law Review* (2003) 1015, p. 1017

¹³⁹ A. Eser, ‘Individual criminal responsibility’, in A. Cassese, P. Gaeta and J. Jones (eds.) *The Rome Statute of the international criminal court: a commentary* (Oxford University Press, Oxford, 2002) p. 780.

¹⁴⁰ Boot, 2002, *supra* note 102, p. 300.

¹⁴¹ International Military Tribunal, Judgment, in *Trial of the Major War Criminals Before the International Military Tribunal: Nuremberg*, 14 November 1945-1 October 1946, 256 (1947)

¹⁴² Danner and Martinez, 2004, *supra* note 105, p. 5

¹⁴³ *Uphaus v. Wyman*, 360 U.S. 72, 79 (1959)

¹⁴⁴ Report of the Secretary-General pursuant to paragraph 2 of Security Council resolution 808 (1993), 3 May 1993, para. 56. *See also* para. 34.

¹⁴⁵ Report of the International Tribunal for the Prosecution of Persons Responsible for Serious Violations of International Humanitarian Law Committed in the Territory of former Yugoslavia since 1991, A/49/342, S/1994/1007, 29 August 1994, para. 16.

¹⁴⁶ *See for example* Boot, 2002, *supra* note 102, p. 288, A. Marston Danner, ‘Joint Criminal Enterprise and Contemporary International Criminal Law’ 98 *American Society of International Law Proceedings* (2004)186, p. 188,

the individual participation, the only criterion remaining is that of membership in a group with a criminal purpose.

In the US context, the closest mode of liability to extended JCE is the Pinkerton conspiracy liability. The Pinkerton conspiracy liability allows for liability for foreseen crimes outside of the common purpose, just like extended JCE.¹⁴⁷ It has also been subject to criticism on the basis that it might include guilt by association as it compromises the criterion for individual responsibility.¹⁴⁸

There is concern that when international criminal law will be applied in national courts, the human rights norms may be further marginalized. Although the UN Tribunals may consider individual responsibility, if they establish the criterion to vaguely, other courts may use the vague criterion to justify applying guilt by association.

Lately, guilt by association has been a hot topic when discussing anti-terrorism legislation. The United States Military Commission issued two indictments in 2004 alleging terrorist crimes committed through a version of JCE.¹⁴⁹

The difficulty at hand is to balance the liability for group-based criminality with specific criterion for the individual guilt.

In this chapter, the level of proof needed in extended JCE will be assessed and put into context to facilitate an analysis on how specific the level of proof really is, and how close it comes to guilt by association.

4.3 Degree of participation

Not everyone who is working in a group with a criminal purpose is liable under the JCE doctrine. A certain minimum degree of participation is required.

The ICTY Trial Chambers defined the degree of participation in JCE through the *Kvočka* case and this definition was later upheld by the *Simić et al. case*.¹⁵⁰ Both these cases concerned basic JCEs, but there are no indications that this is exclusively a criterion for this version of JCE.

¹⁴⁷ Danner and Martinez, 2004, *supra* note 105, fn 139.

¹⁴⁸ *Ibid.*

¹⁴⁹ Danner, 2004, *supra* note 142, p. 189.

¹⁵⁰ *Kvočka et al.*, TC, *supra* note 14, para. 309, 310, *The Prosecutor v. Blagoje Simić, Miroslav Tadić, Simo Zarić*, Case no: IT-95-9-T, 17 October 2003 (Trial Chamber), para. 159. *The Prosecutor v. Miroslav Kvočka et al.*, Case no. IT-98-30/1-A, 28 February 2005 (Appeals Chamber), did not deal with the specific issue, *but see Kvočka*, AC, para. 682 for a discussion of what facts in a concentration-camp case could be relevant.

The ICTY Trial Chambers defined the degree of participation to be that of “substantial contribution to the enterprise’s functioning”.¹⁵¹ The substantial contribution can be in the form of an act or an omission, which contribute to making the enterprise effective.¹⁵²

The contribution must also be aimed at furthering the JCE’s criminal plan.¹⁵³ The involvement must form a link in the chain of causation of the enactment of the criminal purpose, although it does not have to be a *conditio sine qua non*.¹⁵⁴

In extended JCE, it is important to note that the criminal purpose only refers to what the group had determined to do together, and not what subsequently occurred outside of this purpose. The accused only has to substantially contribute to the agreed plan and there are no indications whatsoever that the accused in any way is required to actively contribute to the act that went outside the common purpose. The only requirement is a form of passive contribution in the way that the crime was foreseeable and the accused still continued with the participation in the common purpose.

Naturally, such a contribution must be considered on a case-by-case basis to establish how the specific circumstances of that individual match the criterion.¹⁵⁵

While the direct physical perpetration of a crime by a member of the enterprise may be easy to place within the category “substantial contribution”, many other situations may be more problematic. The participation must not amount to a crime in itself, only to contribute to the criminal purpose. Contribution in a group can take many expressions. To supply weapons may easily be considered a substantial contribution, but what if the person supplies food or shelter? To forcefully incite the group may be considered substantial contribution, but how about the person who omits to condemn the heinous acts?

The *Kvočka* case did not provide much discussion to define the exact degree of participation, but from what we can find several factors weigh in. Two factors can be identified that need to be analysed together to come to the right conclusion on degree of participation.

Firstly, we have the actual act or omission that the accused committed. The nature of this can vary. It includes acts and omissions, direct participation and indirect participation, and anything from direct commission to assistance.¹⁵⁶

¹⁵¹ *Kvočka et al.*, TC, *supra* note 14, para. 309, 310, *Simić et al.*, TC, *supra* note 146, para. 159.

¹⁵² *Kvočka et al.*, TC, *supra* note 14, para. 309.

¹⁵³ *Ibid.*

¹⁵⁴ *Ibid.*

¹⁵⁵ See *Kvočka*, AC, *supra* note 146, para. 682.

¹⁵⁶ *Brđanin*, TC, *supra* note 15, para. 263.

Secondly, we have the status of the accused, which determines the impact of the act or omission. An act of a person in a position of authority may have a very different impact on persons around him or her than the same act committed by a low rank official. The high rank official's act or omission may indicate to the community an official standpoint or simply the opinion of the person in power and this will affect the community in their personal decision-making.

A person in a high position of authority will need to commit a less serious act or omission to be seen as substantially contributing to the criminal aim. On the other hand, a person in a low position of authority will be required to commit an act or omission of higher significance to fulfil the criterion of substantially contributing.

In the light of the above, it takes more evidence, or evidence of a higher calibre to find a low rank official without reasonable doubt liable in a JCE. It seems logical that most cases of JCE would relate to high rank officials, as this would simply be easier to prove.

Still, the ICTY has itself pointed out that most of the post-World War II case law does not find high officials liable in JCE's, but often low-rank soldiers like drivers or guards who have participated in isolated offences.¹⁵⁷

Also, in modern day international criminal law, there are several cases where low rank officials or even civilians¹⁵⁸ are found liable in a JCE.

The degree of participation needed for liability of a JCE is a complex matter that includes a wide range of action and inaction. JCE permits criminal liability for crimes committed very remotely from the accused¹⁵⁹, and clarity of the requisites is lacking. In the sensitive balance between the various parameters, there is a risk of a sliding scale towards a degree of participation that is insufficient to meet the needs of clear, concise and predictable law.

Although the criterion "substantially contribute" may seem very tangible and definitive, there is a lack of guidelines from the courts on how to interpret this phrase. The *actus reus* criterion of extended JCE is not as firm as desired, considering its extreme flexibility and potential to secure convictions.

¹⁵⁷ See for example the *Borkum Island* case.

¹⁵⁸ See for example *Kvočka et al.*, TC, *supra* note 14, para. 610.

¹⁵⁹ D. Mundis, 'Crimes of a commander: Superior responsibility under 7(3) of the ICTY Statute', in G. Boas and W. Schabas (eds.), *International Criminal Law Developments in the Case Law of the ICTY* (Martinus Nijhoff Publishers, Leiden, 2003), p. 273.

4.4 *Mens rea* in extended JCE

4.4.1 Introduction

Mens rea is one of the most difficult components to define and prove in criminal law. It may be relatively easy to see the objective requirements, but to claim a fact relating to a subjective requirement is very difficult. How can one possibly prove what went on within another persons mind?

This work becomes even more difficult when that mind is operating in the context of armed conflict. In this chaos, a person's mind may behave very differently than it otherwise would. To assess what is "natural" or "foreseeable" in this context may differ widely from what observers may understand from experience of their own peaceful lives.

To prove what a person thought at a specific time, we need to rely on statements or documents surrounding this person to infer his or her mental state. The chaos of armed conflict also effects this aspect. Fewer written documents may have been issued during states of emergencies and even less found after the conflict ends.¹⁶⁰ It has proven difficult to find witnesses willing to testify to the Tribunals generally¹⁶¹ and this would also effect the aspect of proving *mens rea*.

To prove *mens rea* in this context may be the most difficult task for the prosecution in international criminal law, and some flexible interpretation is necessary.¹⁶² Lowering the *mens rea* requirements to facilitate convictions may be an easy way to go, but it is also a dangerous road to take.¹⁶³ The level of *mens rea* is crucial in defining the crimes of international criminal law and lowering these requisites will have a large impact on the concept of international criminal law.

Extended JCE is the only category of JCE that does not require intent regarding the crime committed. The *mens rea* requirement of extended JCE is instead advertent recklessness, which is uncommon in international criminal law.

The *Tadić* case established the requirements of advertent recklessness in extended JCE. It stated that when an act is committed outside the common purpose, the accused is liable if this act was a "natural and foreseeable consequence of the execution of that enterprise" and the accused "was aware that such a crime was a possible consequence of the execution of that

¹⁶⁰ M. Mennecke and E. Merkusen 'The International Criminal Tribunal for the Former Yugoslavia and the Crime of Genocide' in S. Jensen (ed.), *Genocide: Cases, Comparisons and Contemporary Debates*, (The Danish Center for Holocaust Studies, Copenhagen, 2003), p. 299.

¹⁶¹ See for example V. Morris and M. Scharf, *An Insider's Guide to the International Criminal Tribunal for the Former Yugoslavia* (Transnational publ., New York, 1995), p. 242.

¹⁶² Mennecke and Merkusen, 2003, *supra* note 156.

¹⁶³ *Kordic and Cerkez*, *supra* note 1, para. 219.

enterprise, and that, with that awareness, he participated in that enterprise”¹⁶⁴.

As we have established in previous chapters that the principle of extended JCE has no basis in customary international law, it is difficult to discuss the origin of these requirements to interpret them properly.

We will look at the issues that surround the *mens rea* requirement of international criminal law, to put the *mens rea* requirement of extended JCE in context.

The *Brđanin* case’s 98 *bis* decisions established where JCE had its rightful place within the Statutes of the ICTY and ICTR and how that affected its *mens rea* requirements. The analysis will start with this case to clarify JCE’s place within the complex structure of the Statutes and while doing that also explaining the modes of liability and *mens rea* for genocide, which will help us in later discussion.

From this point, the analysis will continue to compare extended JCE with the other modes of liability and thereby place extended JCE into a well-established framework created by the Statutes and the judges of the Tribunals. The analysis will then continue to contrast the *mens rea* requirement in extended JCE to the level of involvement. By doing so, the author hopes to clarify whether extended JCE is similar to these well-established principles or, if not, to what degree it is atypical. To summarise the thoughts regarding *mens rea*, this subchapter will end with a discussion.

4.4.2 The Brđanin case

4.4.2.1 The Trial Chambers conclusion

The definition of *mens rea* of extended JCE, first stated in the *Tadić* case, was repeated unanimously in ICTY and ICTR case law in years to follow, without regard to its lack of legitimacy.¹⁶⁵

Four years after the *Tadić* case, Trial Chamber II of the ICTY was brave enough to object to this conclusion. Trial Chamber II found that extended JCE did not live up to the level of *mens rea* required for genocide. This occurred in response to the defence motion to dismiss the *Brđanin* case¹⁶⁶, where category one and three of JCE were alleged.

The decisions that followed are illustrative of the issues surrounding the level of *mens rea* in extended JCE, and will therefore be used as the basis for the discussion.

¹⁶⁴ See p. 3.

¹⁶⁵ See chapter 4.3. above.

¹⁶⁶ *The Prosecutor v. Radoslav Brđanin*, Decision on motion for acquittal pursuant to rule 98 *bis*, Case no. IT-99-36-T, 28 November 2003 (Trial Chamber).

The Trial Chamber decided not to allow count one of the indictment¹⁶⁷, where extended JCE was alleged, as they found it did not live up to the *mens rea* standard of committing genocide.

4.4.2.2 Mens rea of genocide

The *mens rea* requirement of genocide is that of “specific intent”. The act does not only have to be committed intentionally, but with a certain kind of intent, *i.e.* “...with intent to destroy, in whole or in part, a national, ethnical or religious group...”¹⁶⁸.

The crime of genocide is unique among the crimes in the Statutes to demand such a specific intent. The definition of genocide in the ICTR, ICTY and ICC Statutes are exact copies of the definition in the Genocide Convention¹⁶⁹, where this specific intent originated.

The three remaining crimes in the ICTR and ICTY Statutes have a different history as they instead originate from the Geneva conventions.¹⁷⁰ Although covering a related matter, genocide does not appear in any of the four Geneva conventions. Genocide was not even expressed in the Charter of the Nuremberg Tribunal¹⁷¹, although it was mentioned by the prosecution and was seen as a category of crimes against humanity.¹⁷²

The crime of genocide acquired its distinct status through the Genocide convention, due to the strong desire of the international community to act after uncovering the horrors of the Holocaust¹⁷³. The concept of genocide is part of *jus cogens* today¹⁷⁴. It may be fair to say that the international community considers genocide as more severe than the other crimes in international criminal law, and have therefore set, and maintained, this especially high level of *mens rea* to condemn only the worst offenders.

4.4.2.3 Modes of liability for genocide

Genocide is also the only crime in the ICTY Statute to have its own list of modes of liability, found in Article 4(3) of the ICTY Statute and Article 2(3)

¹⁶⁷ *The Prosecutor v. Radoslav Brđanin*, case No. IT-99-36-T, Sixth Amended Indictment, 9 December 2003.

¹⁶⁸ ICTY Statute Article 4.

¹⁶⁹ Convention on the Prevention and Punishment of the Crime of Genocide, approved by resolution 260 A (III), 9 December 1948, entry into force 12 January 1951. *See* arts. 2, 3.

¹⁷⁰ For example, “crimes against humanity” is historically an outgrowth of “war crimes”, *see* M. Cherif Bassiouni *Crimes against Humanity in International Criminal Law* (Kluwer Academic publishers, Dordrecht, 1992), p. 165, and “grave breaches of Geneva conventions of 1949” obviously refer to the Geneva conventions.

¹⁷¹ *See* Boot, 2002, *supra* note 102, p. 12.

¹⁷² *See* Boot, 2002, *supra* note 102, p. 13, A. Cassese, ‘Genocide’, in A. Cassese, P. Gaeta and J. Jones (eds.), *The Rome Statute of the International Criminal Tribunal* (Oxford University Press, Oxford, 2002), p. 355.

¹⁷³ Boot, 2002, *supra* note 102, p. 12.

¹⁷⁴ Cassese, 2002, *supra* note 168, p. 338.

in the ICTR Statute. To make this discussion easier, only reference to the ICTY Statute will be made.

The other crimes in the Tribunals' Statutes share a general list of modes of liability, while genocide is covered by the general list and the list specific to genocide. The reason for this distinction is once again that the Article relating to genocide was copied verbatim from the Genocide Convention¹⁷⁵.

The specific set of modes of liability for genocide results in, for example, that a person can be liable for attempt to commit genocide, but not attempt to commit crimes against humanity. The modes of liability in Article 4(3) are:

- (a) genocide;
- (b) conspiracy to commit genocide;
- (c) direct and public incitement to commit genocide;
- (d) attempt to commit genocide;
- (e) complicity in genocide.

Now, this provision may cause confusion when compared to the general list of modes of liability in Article 7(1) in the ICTY Statute¹⁷⁶, which covers modes of liability for all crimes of the Statute and is slightly different:

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.

Evidently, Article 7(1) has a few modes of liability that are not in Article 4(3), such as planning, instigating and aiding and abetting. As the provision explicitly states that these general modes of liability are applicable to Articles 2 to 5, they apply to genocide too. Genocide has therefore two sets of modes of liability, giving a wide spectrum of somewhat overlapping modes to choose from.

When reviewing all case law at the ICTR and ICTY it seems as if the courts still prefer to use the modes of liability specific for genocide when convicting an accused for a crime related to genocide. In fact, only one case was found where a general mode of liability had been used in connection to genocide.¹⁷⁷

In the *Tadić* case, JCE was found to implicitly be a part of the Statute but as *Tadić* was convicted of all crimes in the ICTY Statute except for genocide, only 7(1) was discussed. The modes of liability in 4(3) were not mentioned once and so the issue over which of the provisions JCE would be attached to never arose.

¹⁷⁵ See Genocide convention, *supra* note 165, Article 3.

¹⁷⁶ Identical to Article 6(1) in the ICTR Statute.

¹⁷⁷ Elizaphan Ntakirutimana was found liable for aiding and abetting genocide in *The Prosecutor v. Elizaphan and Gérard Ntakirutimana*, Cases no. ICTR-96-10 and ICTR-96-17-T, 21 February 2003 (Trial Chamber), para. 790.

4.4.2.4 The Appeals Chamber

The Trial Chamber pointed out that, as the accused was allegedly liable under Article 4(3)(a) for committing genocide, the *mens rea* requirements of extended JCE were not enough.

The Trial Chamber suggested that the *mens rea* requirements for other modes of liability, such as complicity or aiding and abetting genocide did not have to live up to the high standards of 4(3)(a) since they had their own specific requisites.¹⁷⁸ The Trial Chamber interpreted liability through extended JCE to be a form of commission of genocide in 4(3)(a) and therefore extended JCE had to live up to these strict demands. An analysis of the *mens rea* requirements of the other modes of liability will be presented below, to see how extended JCE compares.

The Trial Chambers decision was appealed, and the Appeals Chamber once again reaffirmed the principle of JCE by reversing the Trial Chambers decision to strike count 1.¹⁷⁹

The Appeals Chamber's main argument was that, as a separate mode of liability, JCE was not different from other modes of liability, like aiding and abetting and complicity, that lower the *mens rea* requirement in comparison to 4(3)(a)¹⁸⁰.

The difference in view between the two Chambers was that the Trial Chamber saw JCE as a way of finding the accused liable for genocide in 4(3)(a). The Appeals Chamber seems to argue that JCE is not a form of 4(3)(a), but rather an additional general mode of liability, to be added to the list in 7(1), which applies to all crimes within the Statute including genocide. Extended JCE, as a mode of liability in its own right, is not dictated by the requirements of any other mode.

As we now know exactly where the ICTY has placed this principle within the complex system of its statute, *i.e.* as an additional mode of liability in Article 7(1), we can continue to compare extended JCE to other elements of the Statute.

4.4.3 Mens rea in different modes of liability – a comparative aspect

The table below has been created for easy viewing of the *mens rea* requirements of all the other modes of liability in the Tribunals Statutes. It is a general presentation, as there is no room here to delve deeper into an analysis of each mode of liability.

¹⁷⁸ *Brđanin*, TC, *supra* note 15, paras. 37, 57.

¹⁷⁹ *The Prosecutor v. Radoslav Brđanin*, Decision on interlocutory appeal, Case no. IT-99-36-A, 19 March 2004, Appeals Chamber.

¹⁸⁰ *Ibid.*, para. 7.

In analysing this table, we can more clearly see the structure of the well-established modes of liability and how they compliment each other. By selecting some modes of liability that lie closer to extended JCE, to see how they are similar or different, the position of extended JCE will come forward even clearer.

Mode	Article¹⁸¹	Mens rea requirement¹⁸²
Planning	7(1)/6(1)	Direct or indirect intent that the crime would be committed ¹⁸³ . “Planning” means that one or more persons design the commission of a crime at both the preparatory and execution phases. ¹⁸⁴
Instigation	7(1)/6(1)	Direct intent to provoke the commission of the crime. ¹⁸⁵ The accused must have “intended to provoke or induce the commission of the crime, or was aware of the substantial likelihood that the commission of a crime would be a probable consequence of his acts.” ¹⁸⁶
Ordering	7(1)/6(1)	Direct or indirect intent that the crime would be committed ¹⁸⁷ .
Committing	7(1)/6(1)	Direct or indirect intent that the crime would be committed ¹⁸⁸ . The accused must have acted “in the awareness of the substantial likelihood that a criminal act or omission would occur as a consequence of his conduct.” ¹⁸⁹
Aiding and abetting	7(1)/6(1)	The accused must intend to assist or facilitate, or at least accept that such assistance would be a “foreseeable consequence of his conduct” ¹⁹⁰ . The accused must not intent to facilitate a specific crime. If he is aware of several possible crimes to be committed, and one is committed, he has intended to facilitate this crime. ¹⁹¹ The accused must have known the principals intent, but needs not to have shared it. ¹⁹² The accused must have known that his acts assisted the crime. ¹⁹³ When the crime committed is a special intent crime, as persecution, the accused must know that the crimes are committed with this special intent to be liable for aiding and abetting such a crime. ¹⁹⁴

¹⁸¹ In ICTY/ICTR Statute.

¹⁸² In this presentation, I have had great help of the HRW report: ‘Genocide, War Crimes and Crimes against humanity: Topical digest of the case law of the International Criminal Tribunal for Rwanda and the International Criminal Tribunal for former Yugoslavia’ Human Rights Watch, 2001, found at <http://hrw.org/reports/2004/ij/>, last visited 24 May 2005.

¹⁸³ *The Prosecutor v. Tihomir Blaskic*, Case no. IT-95-14-T, 3 March 2000, (Trial Chamber), para. 278, *Kordic and Cerkez*, TC, *supra* note 1, para. 386.

¹⁸⁴ *Krstić*, TC, *supra* note 39, para. 601

¹⁸⁵ *Kordic and Cerkez*, TC, *supra* note 1, para. 387.

¹⁸⁶ *The Prosecutor v. Mladen Naletilic and Vinko Martinovic*, Case no IT-98-34-T, 31 March 2003 (Trial Chamber), para. 60.

¹⁸⁷ *Blaskic*, TC, *supra* note 179, para. 278, *Kordic and Cerkez*, TC, *supra* note 1, para. 386.

¹⁸⁸ *Blaskic*, TC, *supra* note 179, para. 278, *Kordic and Cerkez*, TC, *supra* note 1, para. 386.

¹⁸⁹ *The Kvočka et al.*, TC, *supra* note 14, para. 251.

¹⁹⁰ *Blaskic*, TC, *supra* note 179, para. 286.

Command responsibility	7(3)	The commander must have known or had reason to know that the subordinate had, or was about to, commit a crime. ¹⁹⁵ Level of proof will be lighter on commanders in a well-established chain of command, and higher on a commander in an informal position. ¹⁹⁶ The more distant the commander was from the accused, the higher the level of proof of his knowledge. ¹⁹⁷ The commander “should have known” if general information was available to the commander which should have made him suspect possible crimes by subordinates. ¹⁹⁸
Genocide	4(3)(a)/ 2(3)(a)	See committing. In addition, the specific intent of genocide must be fulfilled.
Conspiracy to commit genocide	4(3)(b)/ 2(3)(b)	The group, which has formed an agreement to commit genocide, must have a joint intent to commit genocide, <i>i.e.</i> the specific intent. ¹⁹⁹
Incitement to commit genocide	4(3)(c)/ 2(3)(c)	The accused must intend to provoke another to commit genocide, by his actions creating a state of mind in another necessary to commit genocide. The accused must also himself have the specific intent to commit genocide. ²⁰⁰
Attempt to commit genocide	4(3)(d)/ 2(3)(d)	See genocide. The genocidal intent must be formed before the genocidal act was committed. ²⁰¹
Complicity in genocide	4(3)(e)/ 2(3)(e)	At the moment he acted, the accused must have known that he was providing assistance to the commission of the principal offence and that the principal had a genocidal intent. ²⁰²

Studying the table, we clearly see that planning, instigation, ordering, committing, genocide, conspiracy to genocide, incitement to genocide and attempt to commit genocide all require intent or even specific intent.

¹⁹¹ *The Prosecutor v. Anto Furundzija*, case no. IT-95-17/1-T, 10 December 1998 (Trial Chamber), para. 246.

¹⁹² *The Prosecutor v. Zlatko Aleksovski*, Case no. IT-95-14/1-AR77, 30 May 2001, (Appeals Chamber), para. 162. Here lies and important distinction between aiding and abetting and participating in a JCE. In a JCE all must possess the same intent to further a crime, see *The Prosecutor v. Mitar Vasiljević*, Case no. IT-98-32-T, 29 November 2002 (Trial Chamber), para. 71.

¹⁹³ *Vasiljević*, TC, *supra* note 188, para. 71.

¹⁹⁴ *Kvočka et al.*, TC, *supra* note 14, para. 262.

¹⁹⁵ See wording in Article 7(3), ICTY Statute.

¹⁹⁶ *Kordic and Cerkez*, TC, *supra* note 1, para. 428

¹⁹⁷ *Naletilic and Martinovic*, TC, *supra* note 182, para. 72.

¹⁹⁸ See Mucic in *The Prosecutor v. Zejnic Delalic, Zdravko Mucic, Hazim Delic and Esad Landzo* (The *Celebici* case), Case No. IT-96-21-A, 20 February 2001, (Appeals Chamber), para. 222.

¹⁹⁹ *The Prosecutor v. Alfred Musema*, Case no. ICTR-96-13-A, 27 January 2000 (Trial Chamber), para. 192.

²⁰⁰ *Akayesu*, TC, *supra* note 108, para. 560.

²⁰¹ *The Prosecutor v. Clement Kayishema and Obed Ruzindana*, Case no. ICTR-95-1-T, 21 May 1999 (Trial Chamber), para. 91.

²⁰² *Akayesu*, TC, *supra* note 108, paras. 538–539.

Aiding and abetting, and complicity settle for knowledge as the requirement for *mens rea*, while command responsibility does not even require full knowledge.

Recklessness is not an adequate level of *mens rea* in any of the modes of liability above.

In international criminal law, only two modes of liability require less than full knowledge or intent. These are command responsibility, which demands the superior to have had reason to know, and extended JCE with its recklessness criteria. The superior in command responsibility is an accomplice to the subordinate principal.²⁰³

Command responsibility and extended JCE also both allow for a solely objective standard of *mens rea*. In extended JCE, the crime needs to be “natural and foreseeable”, and in command responsibility, the superior ought to have known about the crime. In both, there is no requirement for subjective criteria, such as that the accused actually did foresee the crime or that the superior really possessed the knowledge of a crime being committed.²⁰⁴ The *mens rea* of command responsibility is perhaps the one that closest resembles that of extended JCE. Still, command responsibility has a substantially higher criterion for *mens rea* than extended JCE.

The mode of liability, which has the most similar *actus reus* criterion to extended JCE, would be aiding and abetting and conspiracy to commit genocide. These modes of liability may all play a vital role when prosecuting participants in group based violence. Aiding and abetting encompass cases where an accessory assists or facilitates the commission of a crime by a principal.²⁰⁵ The requirements for conspiracy are very similar to those of JCE, as it covers agreements between persons to commit genocide.²⁰⁶ Conspiracy is specific to genocide²⁰⁷ and may encompass inchoate crimes²⁰⁸.

Conspiracy to commit genocide has a higher level of *mens rea* than extended JCE. Because this mode of liability is limited to the crime of genocide, all participants must possess specific intent.

Aiding and abetting on the other hand, also has a similar *mens rea* requirement to extended JCE. It would therefore be useful to compare the *mens rea* requirements of aiding and abetting to extended JCE to see how

²⁰³ W. Schabas, ‘Mens rea and the International Criminal Tribunal for the Former Yugoslavia’, 37 New England Law Review 1015 (2003), p. 6.

²⁰⁴ *Ibid.*, p. 9.

²⁰⁵ See *The Prosecutor v. Dragoljub Kunarac, Radomir Kovac and Zoran Vukovic*, Case no. IT-96-23T& IT-96-23/1-T, 22 February 2001, (Trial Chamber), para. 392, *Kvočka et al.*, TC, *supra* note 14, para. 254.

²⁰⁶ *Musema*, TC, *supra* note 195, para. 191.

²⁰⁷ See Article 4(3) ICTY Statute.

²⁰⁸ *The Prosecutor v. Ferdinand Nahimana, Jean-Bosco Barayagwiza and Hassan Ngeze*, Case no. ICTR-99-52-T, 3 December 2003, (Trial Chamber), para. 1044.

they differ. Numerous cases have distinguished the various requirements of aiding and abetting and of extended JCE.²⁰⁹

Aiding and abetting has an interesting link to extended JCE from the establishment in the *Tadić* case. The Chambers stated that to rely on aiding and abetting as a mode of liability for accomplices within a JCE would be to “understate the degree of their criminal responsibility”²¹⁰. The Appeals Chamber found the ICTY Statute insufficient and therefore created a new, very potent mode of liability, specifically aimed to capture the co-perpetrators of group-based violence.

The ICTY Appeals Chambers distinguished aiding and abetting and JCE in general as such²¹¹:

- a. The aidor and abettor is always an accessory to a crime committed by the principal.
- b. Aiding and abetting does not require proof of a common plan, the principal may not even know about the aidor or abettors contribution
- c. An aidor and abettor must assist a specific crime and the support must be substantial effect on the specific crime. The participant in the JCE only needs to, in some way, further the criminal aim of the group.
- d. The *mens rea* requirement in aiding and abetting is knowledge that the acts assist the principal. “By contrast, in the case of common purpose or design more is required (*i.e.*, either intent to perpetrate the crime or intent to pursue the common criminal design plus foresight that those crimes outside the criminal common purpose were likely to be committed).”

The first three issues are related to *actus reus*. Aiding and abetting is only applicable for accomplices. The Appeals Chamber does not spell out the criterion for JCE, but should *e contrario* be that in JCE, not all are accomplices.

While aiding and abetting does not require a plan, the plan is a fundamental element of JCE. Aiding and abetting requires a high degree of specificity regarding the crime, whereas JCE does not. As long as the common plan of the JCE is identified, various crimes inside and outside this plan are the responsibility of the group, through basic and extended JCE. In addition, JCE may encompass principals, whereas aiding and abetting may not. It seems as if the requirements for *actus reus* is not noticeably higher in any of the modes of liability, but aims for different situations.

An example of the closeness of the two modes of liability is that the ICTY stated that an accused may start out as an aidor or abettor to a principal, but as the crime progress, the accused may graduate to be liable as a co-perpetrator in a JCE. This would occur if the participation lasts for a longer

²⁰⁹ See for example, *Tadić, AC, supra* note 2, para. 229, *Blaskic, TC, supra* note 179, para. 288, *Furundzija, TC, supra* note 187, para. 249.

²¹⁰ *Tadić, AC, supra* note 2, para. 192.

²¹¹ *Tadić, AC, supra* note 2, para. 229.

time and the accused becomes more involved in the functioning of the enterprise, even without physically perpetrating the crime.²¹²

Regarding the difference in *mens rea*, we must take a closer look at the definitions of *mens rea* in the two modes of liability. In the list of differences above, the ICTY Appeals Chambers seemed to be of the opinion that JCE has a higher level of *mens rea* than aiding and abetting. It should be noted that the Appeal Chamber discussed the entire principle of JCE, whereas we only focus on extended JCE, which has a different requirement of *mens rea* than the basic forms of JCE.

Extended JCE does require the accused to willingly participate in a JCE, with an intent to participate in the common purpose. Extended JCE is distinguished by relating to cases where a common purpose exists, but a crime occurs that was not part of that common purpose. The intent must be present in relation to the common purpose, not in relation to the act that subsequently occurs outside of this purpose and constitute the crime. Regarding the crime, which actually occurs outside of the original purpose, only advertent recklessness is necessary²¹³. The *mens rea* requirement the accused must fulfil in relation to the crime is therefore advertent recklessness, and not intent.

In aiding and abetting, the terminology regarding *mens rea* is somewhat blurred between the concepts of intent and knowledge. The five references in the table above display both of these terms.

For example, in the reference to the *Furundzija* case, the Trial Chamber stated that if the accused was aware that one of several crimes would probably be committed, and one of these crimes is committed, he intended to facilitate the commission of that crime.²¹⁴ Yet, intent is not a requisite. Other cases lessen the level of *mens rea*. In the *Blaškić* case, antedating the *Furundzija* case, the Trial Chamber held that the accused must only have to accept that his assistance would be a foreseeable consequence of his conduct.²¹⁵ The *Vasiljević* case, an even later case, stated very clearly that the *mens rea* requirement of aiding and abetting was that the accused knew that his acts assisted the principal in the commission of a crime.²¹⁶ Other cases cited in the table above adhere to this reasoning. In the end, the *mens rea* requirements of aiding and abetting are knowledge that the accused's acts assisted the commission of the crime.

As we have clarified that extended JCE demands advertent recklessness, and aiding and abetting demand knowledge, it is also clear that when comparing the two, aiding and abetting has the higher level of *mens rea*. This is peculiar considering that the Appeals Chamber in the *Tadić* case strived to create a mode of liability for those perpetrators who incur greater criminal

²¹² *Kvočka et al.*, TC, *supra* note 14, para. 284.

²¹³ *Tadić*, AC, *supra* note 2, para. 220.

²¹⁴ *Furundzija*, TC, *supra* note 187, para. 246.

²¹⁵ *Blaskic*, TC, *supra* note 179, para. 278.

²¹⁶ *Vasiljević*, TC, *supra* note 188, para. 71.

liability. The degree of criminal liability is often matched by a higher level of proof in both *mens rea* and *actus reus*. Such is not the case here.

It seems that the Appeals Chamber instead created a mode of liability with lower standards, which more easily could lead to convictions of a wider range of potential perpetrators. Despite its deceptive language, the Appeals Chamber did not intend to create a higher degree of liability, merely an easier way of liability.

The result of the comparative approach is that it is easy to see that the level of *mens rea* in extended JCE is atypical in comparison to other modes of liability and especially those similar to extended JCE.

In the context of all the modes of liability, we clearly see that extended JCE has the very lowest level of *mens rea* among all the modes of liability. No other mode of liability comes close to the recklessness-criterion. Even when comparing extended JCE to the modes of liability that are closest to extended JCE *actus reus* and *mens rea*, a large disparity appears.

In the background of the lack of legality when creating the principle, we can only speculate on why such a low degree of *mens rea* was chosen for this principle.

The next subchapter is dedicated to the relationship between the degree of involvement and the *mens rea* requirement in various modes of liability.

4.4.4 How the separation of principals and accomplices affect mens rea

4.4.4.1 General analysis

The level of proof required in a mode of liability generally corresponds to the degree of criminal involvement.

The modes of liability that only encompass principals, *i.e.* committing and genocide, all require intent or specific intent for *mens rea* and specific, high degrees of *actus reus*. The modes of liability that only encompass accomplices, as aiding and abetting, settle for knowledge as a *mens rea* requirement. It is therefore strange that a mode of liability agreed upon to cover a higher degree of criminal responsibility than aiding and abetting, require less proof for *mens rea*.

Let us look at the division between principals and accomplices to analyze how the level of involvement effects the *mens rea* requirements and to see if there is any logic to the low level of *mens rea* in extended JCE.

In the common law jurisdictions, a principal in criminal law is defined as “one who is present at or participates in the crime charged or procures an innocent agent to commit the crime”.²¹⁷ The principal is usually the one who

²¹⁷ J. R. Nolan and J. M. Nolan-Haley *Black’s Law Dictionary* (West publisher, St. Paul, 1990), p. 1192.

originates the idea of committing the crime and/or directly carries it out.²¹⁸ An accomplice, or accessory, would be a person who assists the principal.

Within international criminal law, several cases have upheld a distinction between principals and accomplices. In two cases, the ICTY has established that Article 7(1) of its Statute encompass both principals and accomplices.²¹⁹ The *Celebici* case further stated that a principal should be characterized as having intent, whereas the accomplice should at least know about the principal's intent.²²⁰

Some scholars believe that the two Tribunals have been unclear on the distinction between principals and accomplices²²¹, and it certainly seems this way. In clarifying the requisites for the degrees of involvement, the requisites for *mens rea* and *actus reus* would also be clarified.

It has also been argued that the division between principals and accomplices is inadequate in the context of group-based crime, where actors participate in a more complex manner than in other criminality.²²² Be that as it may, as seen above, there is certainly an aspiration among the tribunals to activate the terms to further specify the modes of liability. Therefore, regardless of the fact that the Tribunals may be unclear in their jurisprudence, there must be a meaningful aim in the specification of the level of involvement.

4.4.4.2 Level of involvement and extended JCE

The debate here really refers us back to Chapter 2.1.5.2, where we found that the ICTY had specified the principle of JCE into principal perpetrators and accomplices. The level of involvement was also required to be addressed clearly from the beginning of the case by being explicitly stated in the indictment. This topic is also interesting as the ICC may deal with the future of JCE by incorporating it into two different provisions, one dealing with principals and one with accomplices.²²³

Most modes of liability are defined in a way that make all perpetrators within those categories either principals or accomplices. Within JCE, declaring the level of involvement using one label is not so easy. An individual's possible involvement in group-base criminality offers both larger variety and complexity.

²¹⁸ See definition at www.law.com, last visited 24 May 2005.

²¹⁹ *Celebici*, AC, *supra* note 194, para. 338, *Kordiz and Cerkez*, TC, *supra* note 1, para. 373.

²²⁰ *Celebici*, AC, *supra* note 194, para. 326.

²²¹ C. Möller, 'Kai Ambos, Der allgemeine Teil des Völkerstrafrechts. Ansätze Einer Dogmatisierung [The General Part of International Criminal law. First Steps Toward a Theoretical approach](Berlin, Duncker & Humbot, 2002)' 1 *Journal of International Criminal Justice* (2003), 737, p. 738, and P. Murphy, 'Elies van Sliedregt, The Criminal Responsibility of individuals for violations of international humanitarian law(The Hague, TMC Asser Press, 2003)' 2 *Journal of International Criminal Justice* (2004) 932, p. 932.

²²² Murphy, 2004, *supra* note 217, p. 1.

²²³ See chapter 2.3.2.

When the principle of JCE was first established by the ICTY in the *Tadić* case, it referred to JCE as an accomplice liability.²²⁴

A later judgment changed this definition. The Trial Chamber in the *Krstić* case found that this statement had not been a part of the Appeals Chambers *ratio decidendi* and thereby found itself free to reverse this conclusion. The Trial Chamber in the *Krstić* case decided there should be a division within JCE of principals and accomplices.²²⁵

The Trial Chamber of the ICTY found General *Krstić* liable as a principal within a basic JCE because of his *mens rea* and *actus reus*.²²⁶ *Krstić* was found to have genocidal intent and he had been an “essential participant” in the crimes. An accomplice was defined as a secondary form of participation.²²⁷

The Appeals Chamber made a different assessment on the facts of the case. It found that *Krstić* did not possess genocidal intent and because of this he could not be considered a principal perpetrator of genocide.²²⁸ In fact, since basic JCE requires intent for all participants, he was found liable under aiding and abetting instead.

Although the Appeals Chamber made a different assessment of the facts, it upheld the Trial Chamber’s reasoning that JCE was not exclusively an accomplice liability, but rather may encompass a mix of principals and accomplices and that those categories require different *mens rea*. It also upheld the conclusion that to be a principal perpetrator in a JCE, intent is required.

This conclusion will have an effect on all categories of JCE, although less of an impact on the basic forms of JCE. The basic forms of JCE may potentially encompass a group consisting of only principals and at least generally encompass a larger number of principals, as the crime is committed closer to the group.

The relevance of the *Krstić* case’s conclusion is certainly clear when it comes to extended JCE. Extended JCE, includes a mixture of various degrees of involvement. The person who commits a crime outside the common purpose is a principal, whereas persons who act only within the agreed common purpose and do not participate in the commission of the crime outside the common purpose, are seen as accomplices to the crime outside the common purpose if it was foreseeable.

This division seems to make sense on the face of it, but let us look at the consequences of this specification.

²²⁴ *Tadić*, AC, *supra* note 2, paras. 220, 223.

²²⁵ *Krstić*, TC, *supra* note 39, para. 642.

²²⁶ *Ibid.*, para. 644.

²²⁷ *Ibid.*, para. 643.

²²⁸ *Krstić*, AC, *supra* note 39, para. 134

According to the statement from the *Celebici* case above, principals are defined by having intent to commit the crime and accomplices should have knowledge of the principles intent.

About a year after the *Celebici* case, the *Bagambiki* case laid down a rule saying that the level of involvement must be clearly stated in the indictments. The indictment must spell out whether the accused was charged as a principal or an accomplice in a JCE.

The consequence of laying out such a rule of indictment specificity upon a pre-existing rule of *mens rea* for these levels of involvement must be that the *mens rea* requirement attached to the level of involvement must be proven to win a conviction.

Therefore, it should be true that, if the prosecution claims in the indictment that the accused was a principal in the JCE, they must prove intent, and if the prosecution claims in the indictment that the accused is an accomplice in a JCE, they must prove that the accused knew of the principal's intent.

Yet, this logical conclusion has not expressed itself in case law. It is true that the ICTY decided *Krstić* was not guilty as a principal in JCE as he did not possess the requisite intent, but it is hard to say if that was because he was charged as a principal or within a basic JCE.

Most importantly, the logical conclusion of the *mens rea* requirements of principals and accomplices would be that extended JCE should require at least knowledge of the principal's intent as a *mens rea* requirement for accomplices in an extended JCE. Strangely, there are no indications in case law that the Tribunals consider requiring knowledge for an accomplice in extended JCE. On the contrary, the Tribunals persist in upholding recklessness as a requirement in extended JCE. In doing this the Tribunals violates the rule set out for accomplices and creates an atypical, illogical praxis even in the aspect of level of involvement.

Time will tell if this omission is due to confusion between the two tribunals case law. Perhaps the authors of the *Bagambiki* judgement did not even reflect on the possible consequences of the judgement. Perhaps future case law may consider the law differently and elevate the *mens rea* requirement in extended JCE, or simply lower the *mens rea* requirement of accomplices to a level corresponding to that of extended JCE. In the year that has passed since the *Bagambiki* judgement, no such reflections have been evident.

4.5 Additional aspects of flexibility in extended JCE

As we have taken a closer look into the requisites for extended JCE, we have found that this principle can be flexed to various degrees depending on how strict the requisites are interpreted.

The unspecific *mens rea* and *actus reus* requisites certainly give extended JCE an exceptional flexibility.

The definition of JCE itself also adds to this flexibility. The amount of persons potentially liable in an extended JCE is determined very much by how the Prosecutor defines the group participating in the JCE in the first place, which is a result of the common purpose the Prosecutor alleges the group has had.

As we have seen before²²⁹ the definitions of the width of a JCE has varied. In the *Kvočka* case, the Trial Chamber stated that a JCE could vary from two person's participation in a common criminal manoeuvre to the wide notion of the entire Nazi persecution of millions of Jews during World War II²³⁰. The *Kvočka* case also suggested that within one general JCE there might be other, smaller or more specific JCEs.²³¹

In the *Brđanin* case, the Trial Chamber found that the Appeals Chambers intention in the *Tadić* case was that JCE should not cover large JCEs but rather smaller ones that contained structural closeness within the group.²³²

In the *Brđanin* case, the Trial Chamber specifically narrowed down the JCE to persons who had carried out the *actus reus* of the crimes alleged.²³³ Within the actors that remained, the structural remoteness was too great to find an agreement between the alleged perpetrators²³⁴ and the accused was convicted of aiding and abetting instead.²³⁵

The preferred size of the JCE started out as infinite and was later restrained by strict guidelines. Yet, the indictments of cases waiting to be decided at the ICTY still allege JCEs of enormous proportions.

The *Martić* indictment alleges that the purpose of the JCE was the forcible removal of the non-Serb population from one-third of the territory of Croatia.²³⁶ The *Stakić* indictment alleges the aim of the JCE to be “the

²²⁹ See p. 5.

²³⁰ *Kvočka et al.*, TC, *supra* note 14, paras. 207, 310.

²³¹ *Ibid.*, para. 307.

²³² *Brđanin*, TC, *supra* note 15, para. 355.

²³³ *Ibid.*, para. 345.

²³⁴ *Ibid.*, para. 355.

²³⁵ *Ibid.*, para. 1055.

²³⁶ *The Prosecutor v. Milan Martić*, Second Amended Indictment, Case no. IT-95-11, 14 July 2003, para. 4.

permanent forcible removal of a majority of Bosnian Muslims and Bosnian Croats from the territory of the planned Serbian state²³⁷.

In the Rwandan context, when following the *Kvočka* definition, the Hutu persecution of the Tutsi during 1994 would fit into one large JCE.²³⁸ Imagine the consequences in this small country²³⁹ with tightly knit communities, as everyone contributing to the Hutu joint goal, perhaps by providing petrol or medical care, being liable for genocide either through a basic or extended JCE. This would really include almost every individual of Hutu ethnicity.

Today, the majority of cases in international criminal law are dealt with by two, very tightly-knit, UN organs, i.e. the ICTY and the ICTR. The future will certainly bring a larger spectrum of courts, all with their interpretation of international criminal law. If the criteria of extended JCE are established too loosely by the UN Tribunals, there is no telling where it will end when courts, without the human rights values of the UN, deal with the matter.

Regarding the aim of the JCE, it should be noted that the Prosecution of the SCSL has already alleged a substantial decrease of the level of proof. The *Tadić* case set as a standard that the common aim should include a crime within international criminal law. In the SCSL indictments, no crime is alleged. If Chambers of the SCSL accept this, an even wider definition of JCE will have been accepted.²⁴⁰

A definition this wide is just too large to handle.

4.6 Extended JCE in the context of armed conflict

4.6.1 The specific circumstances regarding group violence in modern armed conflict

The reality of armed conflict is a changing concept, and is dependant on the actors involved and the possibilities and lack of such in the modern world. Conflict pre-dating World War II, were often signified by strong states or

²³⁷ *The Prosecutor v. Milomir Stakic*, Fourth Amended Indictment, Case no. IT-97-24-PT, 10 April 2002, para. 26.

²³⁸ Danner and Martinez, 2004, *supra* note 105, pp. 58–59.

²³⁹ Rwanda has a land area of 24 948 sq. km, less than half of the land area of Bosnia-Herzegovina today, CIA World Factbook, www.indexmundi.com, last visited 16 May 2005.

²⁴⁰ See the discussion in chapter 2.2.

blocks of states fighting each other with regular armies²⁴¹. With the impact of globalisation, many recent conflicts have lacked the typical elements of inter-state war and involve smaller, more flexible groups. To understand this impact of extended JCE in international criminal law, the reality of the context of armed conflict must be examined.

Mary Kaldor has described these recent conflicts as “new wars” contrasting against “old wars”.²⁴² These new wars include a new type of organised violence, the boundaries between war, organised crime and systematic violations of human rights have become blurred.

Although these conflicts can be described as non-international armed conflicts according to the Geneva conventions, they have a myriad of transnational connections, especially regarding funding and weapons supplies. In particular, the war in Bosnia-Herzegovina and the recent African wars have been seen as examples of “new wars”.²⁴³

The main point of the new wars is the idea that the legitimacy of the state structure disintegrated during the war. The state may initially have had a regular army legitimizing the use of force by democratic ideals and funded it by taxpayers. Especially where ethnic conflicts tear a territory apart, the legitimacy of the state begins to disintegrate. In Bosnia-Herzegovina, the regular army disintegrated into regular and irregular armies, supported by felons, volunteers and mercenaries²⁴⁴. The irregular armies consisted of paramilitary organisations and local police forces.²⁴⁵ Irregular armies often blend in with civilians, thereby blurring the definitions and endangering the civilian population.²⁴⁶ Militias are often based on ethnic nationalism²⁴⁷, but although in theory, Serbs, Croats and Muslims fought each other, these various groups made, and changed, liaisons with each other as the war went along and as it favoured their strategy.²⁴⁸

The reason for the disintegration of the regular army might be the failing states lack of central leadership. Another aspect is that without a solid state, there is no one to pay the wages of the regular armies, as local industries may stop and taxation may be impossible.²⁴⁹ When a nation disintegrates, the funding must come from other sources than taxation. In new wars, the fighting is intimately linked to organised crime, which sponsors the combatants.²⁵⁰ The combatant may either have to work for local warlords

²⁴¹ M. Kaldor, *Nya och gamla krig: organiserat våld under globaliseringens era* [New and Old Wars, Organised Violence in the era of Globalisation] (Daidalos, Uddevalla, 1999), p. 26.

²⁴² *Ibid.*, p. 1.

²⁴³ *Ibid.*, p. 41

²⁴⁴ *Ibid.*, p. 56

²⁴⁵ *Ibid.*, p. 58

²⁴⁶ E. Allison and R. Goldman, ‘Irregulars’ in R. Gutman and D. Reiff (eds.) *Crimes of war: What the public should know*, (Norton and Company inc, New York, 1999), p. 216

²⁴⁷ E. Staub, *The roots of evil* (Cambridge University press, Cambridge, 2002), p. 154

²⁴⁸ Kaldor, 1999, *supra* note 237, p. 56.

²⁴⁹ *Ibid.*, p. 105

²⁵⁰ *Ibid.*, p. 116

with connections within this organised crime and/or depend on plundering during the fighting. The result is the privatisation of violence.²⁵¹

The new wars are also described as network warfare and have striking similarities to gang warfare in our large cities.²⁵² The new war is clearly made up by groups, varying in size and structure with great flexibility.

People act differently in a group than they would otherwise act as individuals. The persons own self and that of the group are interdependently perceived, inseparable although one identification may be emphasised more than the other depending on the circumstances.²⁵³

People may defuse, or give up, the concept of themselves as individuals and emphasise shared values.²⁵⁴ The group has more power to enable the interests of its members and has less moral constraints.²⁵⁵

In every society, the young are urged to more or less adopt the values of the society they live in through socialisation.

Certain cultures may possess a higher potential for group-based violence.²⁵⁶ When problems arise, the shared values and group-mentality will spur group-based violence.

In the 1920's the Balkans were described in a novel as a region filled by ethnic hatred and this picture has stuck to the region.²⁵⁷ A popular opinion of the international community, especially in Europe, at the outbreak of the war was that it was pointless to try to stop the killings, as the Serbs, Croats and Muslims were so intent on killing each other.²⁵⁸

In the regions defence, it must be said that it also has been a functioning multi-ethnic community for a long period of time²⁵⁹. Still, the ethnic tension was deeply embedded in the community and when the conditions were right (or rather, wrong) it flourished.

Ervin Staub suggests that when powerful emotions are expressed in a group, it becomes difficult for the individual to deviate from the group perception. Even when these perceptions change, it may be impossible for the individual not to follow the group.²⁶⁰ The power of group dynamics may force actors to perpetrate heinous crimes, and in its course sweep with it individuals who would never commit the acts alone.²⁶¹

²⁵¹ *Ibid.*, p. 107.

²⁵² M. Kaldor, *Global civil society, an answer to war* (Blackwell publ., Cambridge, 2004), pp. 119, 121.

²⁵³ D. Abrams and M. Hogg 'Collective Identity: Group Membership and Self-conception' in M. Hogg and R. Scott Tindale (eds.), *Psychology Blackwell Handbook of Social: Groups Processes* (Blackwell publ., Oxford, 2001), p. 431.

²⁵⁴ Staub, 2002, *supra* note 243, p. 77.

²⁵⁵ *Ibid.*, p. 28.

²⁵⁶ *Ibid.*, p. 18

²⁵⁷ R. Hardin, *One for All* (Princeton University Press, 1995, New Jersey), p. 147 *ff.*

²⁵⁸ M. Albright, *Madam Secretary, A memoir* (Macmillan, 2003, Oxford), p. 179.

²⁵⁹ Hardin (1995), p. 148.

²⁶⁰ Staub, 2002, *supra* note 243, p. 78

²⁶¹ *Kvočka et al.*, TC, *supra* note 14, para. 310.

As we have seen, modern day warfare is changing into a more flexible network of a variety of groups, interchanging during the conflict. These groups are often based on ethnic division, and socialisation makes it natural for individuals to stick with the group, especially in difficult times, and will most likely remain in the group although the aim of the group changes.

Regular and irregular troops are mixed into this network, classic humanitarian law may have a problem defining the victim and perpetrators, as the line between civilian, and combatant becomes more than blurred.

All this adds up to a specific context in which we must now examine the principle of extended JCE.

4.6.2 The level of proof in extended JCE in this context

As various constellations of groups become the main actors in armed conflict, JCE, and especially extended JCE, are potent tools that can effectively secure conviction when looking to punish group crimes.

The degree of participation of individuals in militias, police forces and local bands will vary. In all groups, there are a spectrum of leaders, facilitators and the footmen. All actors may make substantial contributions to the group's aim, but in various ways.

In the context of "new wars", this substantial contribution may be expressed differently in the ICTY and ICTR cases than what we have seen in the post-World War II cases, depending on the difference in the group's composition.

In the post-World War II cases, the groups were always regular armies or at least led by military personnel, although with ample support of civilians.

In the ICTY and ICTR cases, the groups can of course consist of regular armies, but more often consist of paramilitary or irregular groups. In a conflict based on ethnic division, ethnic groups will stick together, forming groups. It will seem logical to support one's own group, for personal survival and because the individual most likely shares the group's values, which are often the issues of the war. The groups will have an ethnic civilian base rather than a strictly military one. When looking at an informal group, rather than a well-known military hierarchy with persons trained to execute specific duties, the exact degree of participation becomes more difficult to determine.

Another problem of the definition of furthering the JCE's criminal plan is that the accused's main aim may not be to further a criminal plan, but to save themselves, and they do this by joining a certain group. It is likely that accused persons are driven by the fear that the opposite ethnic group may

destroy their own ethnic group unless their own ethnic group does the same first²⁶² or that they are starving and have to survive by plundering other groups²⁶³. To “contribute” to the criminal aim, may therefore be an unfortunate side effect, and not the intended result. To make the JCE efficient and effective will be natural under the circumstances and may not even require a conscious decision.

In the context of ethnic conflict, it would not take much to prove that leaders made a substantial contribution.²⁶⁴

For example, in the ICTR, *bourgmestres* are the frequent subjects in case law²⁶⁵. *Bourgmestres* were the ultimate authority of the *commune*, the essential building blocks of the administration.²⁶⁶ They were responsible for keeping the order in the commune as well as supervising weapons supplies and military training²⁶⁷. This, in addition to the fact that *bourgmestres* were politically appointed by the Hutu regime that prepared the genocide²⁶⁸, led to the fact that many, but not all, *bourgmestres* actively contributed to the genocide in terrible ways. Occasionally the *bourgmestres* stood up and tried to prevent the coming genocide, and when this occurred, they risked their lives.²⁶⁹ Some *bourgmestres* merely remained passive, allowing the militia Interahamwe to operate in their communes with impunity.

In extended JCE, there is no requirement of active participation. Thereby, when a *bourgmestre*, as an administrative leader of the commune, participated in meetings prior to the genocide of 1994 to discuss the political situation, and later failed to take action to stop the genocide, they will be seen as participating and substantially contributing to the JCE. This argument does not intend to depict the *bourgmestres* of Rwanda as innocent persons, as this is certainly not true. It simply shows how easy it is to include individuals within the description of extended JCE if one is at the wrong place at the wrong time.

The genocide in Rwanda was well prepared and organised. The Hutu people had been incited for some time through radio and newspapers. Interahamwe

²⁶² This was the situation in Rwanda, where much of the public incitement to genocide through media claimed that the RPF and their accomplices (in reality, all Tutsi and moderate Hutu) aimed to claim power and once again terrorise the Hutu population. The incitement often claimed that the only way to stop this was to eliminate all the accomplices. See Human Rights watch, *Leave none to tell the story*, at <http://www.hrw.org/reports/1999/rwanda/index.htm#TopOfPage>, last visited 16 May 2005, Chapter *The genocide, popular participation*.

²⁶³ Kaldor, 1999, *supra* note 237, p. 107

²⁶⁴ See also discussion in Chapter 4.3.

²⁶⁵ For example, *The Prosecutor v. Jean Paul Akayesu*, Case no. ICTR-96-4-A, 1 June 2001 (Appeals Chamber).

²⁶⁶ *Leave none to tell the story*, *supra* note 258, chapter: *History, the single-party state*.

²⁶⁷ See for example *The Prosecutor v. Clement Kayishema, Ignace Baglishema, Charles Sikubwabo, Aloys Ndimbaty, Vincent Rutaganira, Mika Muhimana, Ryandikayo, Obed Ruzindana*, First amended indictment, Case no. ICTR-95-1-I, para. 9.

²⁶⁸ See for example *ibid.*, para. 8

²⁶⁹ For example the *bourgmestres* of Gitarama. *Leave none to tell the Story*, *supra* note 258, Chapter *Extending the genocide, destroying opposition in Gitarama*

were mobilised, trained and armed and there was little one person could do, even if he was in a position of authority. Obviously, the noble thing to do would be to oppose the violence and try to stop it. Such action would most likely lead to the death of the dissident, especially since the genocidaires especially targeted Tutsi intellectuals and Hutu moderates in the start of the genocide to quiet any call for reason and opposition against the strong incitement to eliminate the Tutsi. Surely, we would all wish that we could stand up for what is right, regardless of the circumstances, but when actually being put in that position, together with parents, spouses and children to protect, what would one actually do? Probably nothing.

Regarding the *mens rea* in extended JCE, it is frightfully easy for a person belonging to one ethnic group to fulfil these criteria. In difficult times, a person usually has the intent of pursuing the success of his or her own ethnic groups and poverty and fear only add to this general conception.

A group, under pressure, may even feel justified to act aggressively. As Staub commented earlier, it is very difficult for a person who is a participant of a strongly emotional group under pressure, to not follow that group, even when its course changes. This thought gives us extra reason to be careful with the low level of *mens rea* in extended JCE, as the initial participants may have a natural urge to stick with the group, even when the group starts committing heinous acts. A person attracted to such a group may not mind the risk that the group may commit a crime, as long as the person is safe within the community. That the person is reckless regarding the risk is not the same as wanting that risk to realise. There is a massive difference in the two notions, where the lower degree of *mens rea* allows persons very detached from the crime, to be held liable for it. We also must consider that the individual may participate, reckless of the consequences, out of fear for his or her own safety.²⁷⁰

When it is psychologically reasonable that an initial participant in a group remains, even when that group's values shifts, should the level of what should be criminal not be set higher?

The issue of foreseeability also deserves to be mentioned. In the chaos of armed conflict, many more crimes will be foreseeable than during peace. It is foreseeable that crimes are committed by groups and it is foreseeable that persons form groups, so that the risk that a person joins a group, which will later commit some form of crime, must be imminent.

What is an adequate level of proof when it comes to foreseeability of group crimes in armed conflict? When a person is participating in a group of the same ethnic group generally responsible for these actions, in an area where genocide is occurring, most things may be foreseeable, regardless of that individuals *mens rea* or *actus reus*. In such a situation, there is little that an individual can do to avoid responsibility other than to leave the group. Leaving the group is often not a choice in a state of war, where the group provides protection and identification.

²⁷⁰ M. Sassòli and L. Olson, 2000, *supra* note 104, p. 7.

As a more practical question, after the chaos of armed conflict it will be difficult to collect evidence. Most likely, ethnic tension continues adding to this problem. JCE provides the possibility to secure conviction even when evidence of exactly who did what is lacking.²⁷¹ See for example the *Tadić* case, where neither the Trial Chamber nor the Appeals Chamber could find any evidence that *Tadić* had personally, or in the group, committed any act related to the killings, and was still convicted.²⁷²

The flexibility of JCE matches the development of “new wars” perfectly. Where constellations of groups in new wars range from nation wide troops in thousands to local groups of three, JCE covers them. Whether groups vary from elite military forces to peasants doing the dirty work, JCE covers them too. When the groups diverge and change goals or sides even, JCE is there to provide means of convicting the members.

In the context of the Balkan war, which had more diversity of actors than in Rwanda, JCE would fit the description of all groups from the regular forces, to the civilians that took matters into their own hands. In Rwanda, JCE will cover the common aim of the Hutu led MRND party and its “Youth wing” and militia Interahamwe both in a nation wide sense and locally.

This flexibility is not a bad thing in itself. We just have to realise what a powerful tool JCE really is and how we would best like to use and limit that tool. JCE has the capacity to catch all actors in one way or the other, indiscriminately, and we must consider if they really should be caught.

4.7 Discussion

The aim of this thesis is to find what risk extended JCE brings with it. During the analysis of the level of proof, several risks were identified. We will analyse the risk related to *actus reus* first and then add the context of armed conflict.

After placing extended JCE in a specific location within the context of well-established principles of international criminal law, we see that it does behave rather strangely.

Despite creating extended JCE to apply to accused liable for more severe crimes than aiding and abetting, the ICTY gave extended JCE lower *mens rea* requirements than any other mode of liability. Not a single mode of liability come close to the low level in the recklessness criterion.

As extended JCE’s origin in international criminal law is uncertain, we cannot derive a reason for the low *mens rea*. We can only speculate on this subject.

²⁷¹ Danner and Martinez, 2004, *supra* note 105, p. 56.

²⁷² *Tadić, AC, supra* note 2, para. 181.

The best guess may be that the level of proof followed the principle of extended JCE from where it existed in national jurisdictions and that those criteria were directly applied in the international context.²⁷³ Certain national jurisdictions seem to be the only place where extended JCE has a natural existence. In this national legislation, surely extended JCE make up a part of an intricate web of legislation creating a well-established place for this type of principle. When moving extended JCE out of this context and without prior consideration of history place it within international criminal law, it is only natural that it does not seem to fit within the pre-existing web of legislation. This would explain how the level of proof in extended JCE is atypical to the other modes of liability of international criminal law.

This low *mens rea* has received the most attention when applying it to the crime of genocide. In the backdrop of awful crimes, genocide is put in a special pedestal in international criminal law, as it is seen as the worst crime. Yet, the specific intent of genocide is easily brushed away by the magic wand of extended JCE. Instead of the rigorous *mens rea* requirement, the highest of all, the lowest of all is sufficient. What this will do for our civilisations respect for the crime of genocide is yet to be seen. It can certainly be argued that genocide's special place as the worst of all crimes is due to the rigorous *mens rea* requirement and the lessened criteria will water down this principle.

Astonishing enough, when comparing extended JCE to the modes of liability it closely resembles, the difference is still vast. Command responsibility and aiding and abetting are also innovative modes of liability with a lesser degree of *mens rea* than other crimes have. Yet they maintain their *mens rea* standards high above the recklessness criterion of extended JCE.

When looking at the difference in *mens rea* of principals and accomplices, it is clear that this area needs substantial clarification. The rule of requiring intent for principals and knowledge of intent for accomplices is not carried out to its full extent, or even carried out at all, as it concerns extended JCE. When aiding and abetting is only for accomplices, and extended JCE may encompass both principals and accomplices, why does the latter have a lower degree of *mens rea*. According to the rule, it should at least require knowledge of the principal's intent.

The strive toward further specifying the categories of JCE could be a great attempt to clarify and elevate the *mens rea* requirement. It seems this division may have started for some reason and is now hesitating when it sees the consequences, *i.e.* that the *mens rea* for extended JCE is lower than prescribed for accomplices. What court will be so bold as to brake through the persistent case law of the ICTY Appeals Chamber to elevate the *mens*

²⁷³ See the conclusion is made in chapter 3.3.4.

rea requirements of extended JCE? Will the ICC be our knight in shining armour?

Against the background of the lack of legality when creating the principle, a more moderate *mens rea* would be presumed and certainly one that could fit the pre-existing structure of *mens rea*. To guard against wrongful conviction, for a crime without basis in international criminal law, certainly a higher level of proof should have been chosen.

These specific circumstances of group violence in armed conflict are vital to understanding how international criminal law should be used. As the reality of warfare changes, international humanitarian and criminal law must adapt to be able to continue to punish the perpetrators of these crimes. JCE, and especially extended JCE seems to be the perfect tool to adapt and secure conviction in many cases where it otherwise would not be possible. Should such a beautiful tool be criticised? Why not merely praise it and find us blessed by its existence?

This principle should be scrutinised even more vigorously than normal, just because it is such a good tool. Its flexibility really multiplies the impact it has and such a huge impact will make a large impact on international criminal law. Therefore, we must be sure what way we would like international criminal law to take, and if JCE will further that path.

When this perfect tool is used to widely, not to convict the worst criminals, but ordinary people doing what they have to, it may make a mockery of international criminal law itself.

International criminal law operates in a context vastly different from national law does. Wartime actors will not behave with the same reason that they may do in an organised state of peace. Within this chaos, international criminal law has the difficult task of separating what is acceptable behaviour and what is not.

Armed conflict, by its very nature, is designed to injure people. Man has tried for a long time to regulate in what manner it is acceptable to kill.²⁷⁴ There is a fine line to draw between what should be acceptable behaviour in armed conflict and what should not. The division between civilians and combatants has been a founding principle to determine the lawfulness of conduct in war. This division is not as clear as it used to be and we may see the beginning of the end of the usefulness of that principle, complicating humanitarian law further.

In the new wars, as in the old, behaviour that is normal and reasonable in a civilized society should not be criminalised. It goes without saying that international criminal law must elevate the *ratione materiae* above the level of normal and logical human conduct in the situation of armed conflict. International criminal law certainly has a very important place in armed

²⁷⁴ See for example Kaldor, 1999, *supra* note 237, p. 27.

conflict, and in the reconciliation work that follows, but it may lose its role if it becomes a tool for victors' justice or includes "catch all" tools used to secure conviction where all else fails.²⁷⁵

Regarding the degree of participation, the principle of JCE effectively includes all possible participation in a group, by military or civilians, and in different degrees.

The ICTY Trial Chamber has set a good standard of the degree of participation in the terms "substantially contributed". As many in the ethnic group will further their own group, the contribution must be seen to be targeted specifically to pursue the criminal aim, and not a general aim of the ethnic group. This assertion may seem basic, but bear in mind that the Prosecutor of the SCSL feels satisfied stating a general, non-criminal, aim in his indictments and we do not know the outcome of this action yet.

Similarly, the intent to further the group's aim should be intrinsically linked to a criminal aim and not a general cultural identification.

It must be noted that foreseeability will be more difficult to define in a war where heinous crimes are committed on a daily basis.²⁷⁶ If in the wrong place, most things might be foreseeable. The level of foreseeability must be elevated to a higher plane, preferably to the level that the accused knew, or ought to have known that the crime would be committed. How else could one separate "normal" participation in a group under terrible circumstances from criminal participation? There is no other way to ensure that innocent persons are not wrongfully convicted of crimes over which they had no control other than to elevate the *mens rea* requirement of extended JCE.

Depending on how broadly the aim of the enterprise is defined and how loosely the foreseeability is construed in this context, the number of possible perpetrators can vary dramatically.²⁷⁷

The *mens rea* level of recklessness is far too low for the context of armed conflict. Where people are in a daily fight to save their lives, they will be reckless. Such are not the crimes that the *ratione materiae* of international criminal law should include.

When combining an uncertain degree of participation with the lowest possible form of *mens rea* in an extremely flexible, catch all-style mode of liability, the judges of the ICTY and ICTR have created a trap. Just about anyone in the wrong place, at the wrong time, belonging to the wrong ethnic group, doing what is natural for such a person, can be liable for genocide, regardless that the person had no control of the situation whatsoever.

²⁷⁵ Powles, 2004, *supra* note 77, p. 618.

²⁷⁶ Danner and Martinez, 2004, *supra* note 105, p. 58.

²⁷⁷ *Ibid.*, p. 58

We must ask ourselves if the natural ability of people to team up in hardship should be enough to make them liable for all the group's action. Is this natural urge to stick with your own, enough to incur liability in international criminal law, including liability for genocide, the worst of all crimes?

Obviously not all participants in groups in armed conflict are innocent bystanders, a large portion may have the intent to commit or further a crime within the Statutes of the Tribunals and those are important criminals to pursue.²⁷⁸ JCE is certainly a tool we should use to combat such participation. This does not mean we need to set the standards of liability in JCE as low as in extended JCE, where innocent people are at risk. The risk of an innocent person being caught in the web of extended JCE is enough to revise the principle.

At this stage, it would be useful to return to the initial issue of this chapter, guilt by association. Guilt by association is the despised practice of holding someone criminally liable merely for that person's membership in a group with a criminal aim.

If membership in a criminal group is the only substantial requisite for extended JCE, it incorporates guilt by association.

It must be noted that the analysis of the level of proof must be seen as a two-stage process; first looking at the legal requirements and secondly, seeing how well they function in the practical context. The result is the most accurate level of proof.

The legal requirements of extended JCE are vague and poorly defined. The *mens rea* lies at a record-breaking low level. The *actus reus* requirements may encompass most levels of participation imaginable.

In extended JCE, membership in the group is the most tangible piece of evidence. It is well defined in case law as a simple criterion and is easily proven in a practical context of armed conflict.

The most relevant question here is whether a membership in a criminal group is the only real requisite for extended JCE. At this stage, it would be unfair to say so. Despite the low level of proof for *mens rea* and *actus reus*, these are still relevant criteria. Mere membership in a group may still amount to substantial proof of extended JCE, but a conviction cannot succeed without at least some circumstantial proof of *mens rea* or *actus reus*.

Even if extended JCE does not encompass guilt by association, the dangers of guilt by association are uncomfortably near. To avoid moving further towards guilt by association, the level of proof for extended JCE must be strengthened.

The level of proof for extended JCE is far too low. It threatens the rule of law, as innocent persons may be found guilty on very loose grounds. It

²⁷⁸ *Kvočka et al.*, TC, *supra* note 14, para. 310.

makes a mockery to the strife to convict the worst criminals, as the level of proof is lowered to encompass for example, all Hutus in Rwanda. The liability in international criminal law must be distinguished, it must rise above the differences of national law to provide a common agreed subject matter to obliterate impunity in armed conflict. With its harsh consequences for the accused, often convicted of life imprisonment, it must rise above the frailties or incapacity of national law, It must hold and maintain a high respect of the agreed human rights norms so that criticism will damage it. Extended JCE brings with it a low level of proof that make a mockery of the noble attempts of international criminal law. It provides ammunition for the critics of international law, and a doubt in the minds of its supporters. Although the level of proof needed for extended JCE does not amount to guilt by association, it is highly damaging to the concept of international criminal law.

5 Conclusion

The authors of the *Tadić* decision probably had the best intentions when creating extended JCE as a mode of liability in international criminal law. There was a need for a mode of liability to better cover the realities of modern day armed conflict. However, extended JCE entails a number of risks to international criminal law.

The first category of risks is related to the lack of legality. The ICTY violated the principles of legality when applying a mode of liability without any basis in law. These are fundamental principles of criminal law in the national as well as the international context and cannot be taken lightly. The fact that a UN institution has blatantly violated such a fundamental norm can only reflect badly on that institution. Moreover, if not even a UN based Tribunal cares to uphold such a norm, national courts may find no reason to make an effort to do so either. The violation of the principles of legality may lead to a lack of respect for the Tribunal, both of the value of its case law and the respect of its condemnation of the terrible crimes committed in the former Yugoslavia. The critics of the ICTY have been given a free load of ammunition by the tribunal itself.

The second category of risks relate to the level of proof. The level of proof for extended JCE is far too low for extended JCE to be seen as a credible mode of liability, targeting the worst criminals. Instead, almost anyone, in the wrong place at the wrong time, belonging to the wrong ethnic group, may be caught in its web. Extended JCE can secure convictions for individuals very remote from the crime committed. This results in a substantial risk that innocent persons are found guilty. The level of proof resembles guilt by association, although its few, although low and vague, requisites save it from including guilt by association.

Several risks are apparent. The future of international criminal law will show how deeply these risks are allowed to affect the credibility of

international criminal law. Not much can be done about the lack of legality at this stage, but there is ample opportunity to elevate the standard of proof.

When it comes to the development of the SCSL, the future looks bleak. The version of extended JCE in the indictments show an even lower degree of *mens rea* and *actus reus* than before. If this is upheld, international criminal law has taken a turn for the worst. With the level of proof so low already, to further lower it would be a tragedy. Let us hope that the SCSL avoids such a tragedy and at least upholds the level of proof set out by the ICTY.

The most obvious institution that will carry the legacy of international criminal law forward is the ICC. The ICC sets a high general level of proof in Article 30 of the Rome Statute and the more specific requirements hold an even higher standard. Extended JCE will most likely be separated into two categories, one encompassing principals and the other accomplices. This may amount to a better-defined criterion for *mens rea* and *actus reus*. It is important to stress that the ICC should uphold its high standards of *mens rea* and increase the specificity of *actus reus*. If this is done, extended JCE may be transformed into a useful and safe tool.

It will be interesting to see what road the future of international criminal law will take. To lower the level of proof means taking the easy road. The conclusion of this thesis is, that while an elevation of the level of proof may be the more difficult path and perhaps may lead to fewer convictions, it is the only right way to go to further develop an international criminal law that respects the human rights obligations of the world today.

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