

**Have the International Criminal Tribunal for Yugoslavia (ICTY) judges
exercised their judicial discretion fairly?**

**A case study of the formulation and application of Joint Criminal
Enterprise (JCE)**

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PhD Thesis

I, Prakash Puchooa, confirm that the work presented in this thesis is my own. Where information has been derived from other sources, I confirm that this has been indicated in the thesis.

.....
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Abstract

This thesis examines how judges at the International Criminal Tribunal for Yugoslavia (ICTY) have exercised their discretion in formulating and applying the criminal doctrine of Joint Criminal Enterprise (JCE). The principal goal is to explore whether judicial discretion has been exercised fairly.

This thesis is accordingly divided into four Parts. Part 1 explains what it means to exercise discretion fairly in interpreting law at the ICTY. It examines how discretion was present at the ICTY, explores what fairness means in practice and outlines how differences in legal culture influence the exercise of discretion. Part 2 then applies this meaning to evaluate the formulation of JCE. It questions whether the judges exercised their discretion fairly. In doing so, it reveals several flaws of the literature and more importantly draws attention to new material which ICTY judges did not take into account. Part 3 then examines the fairness in applying JCE. Part 4 provides conclusions regarding the fairness of JCE's formulation and application. It also revisits discussions regarding the influence of legal culture at the ICTY which Part 1 discussed. It explores whether any of these discussions influenced the exercise of discretion in formulating and applying JCE.

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Completing a PhD thesis is a long and tiring journey. It is therefore common for PhD candidates to thank a host of people for supporting them during this period. My journey however was more than just long and tiring. It lasted for just under seven years (on a full-time basis) and challenged me in more than just one way.

Although it began in January 2009, I found myself at the starting line again after eight months as I had changed supervisors. Then, in 2010 I travelled to The Hague to undertake an internship with the International Criminal Court for four months. That meant that alongside completing research work for the court, I had to complete research work of my own. After finally making significant progress in 2010, I then unfortunately had to deal with two serious physical injuries in 2011. It took two years of therapy and regular exercise to make a full recovery. Finally, after the viva was held in 2014, I was asked to rewrite the thesis. This took fifteen months. I resubmitted in February 2016 and then at the end of May 2016, the thesis was finally accepted. In short, what initially was supposed to be a three to four-year project eventually became a long drawn-out seven-year endeavour. Looking back at this whole process, it was undeniably a difficult period to get through alone. For this reason, there are many individuals for me to thank.

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Table of Abbreviations

A. Ch.	Appeals Chamber
AP II	Additional Protocol II to the Geneva Conventions 1949
ARK	Autonomous Region of Krajina
BMC	British Military Court
CAH	Crime against humanity
CIL	Customary International Law
Control Council Law No. 10	CCL10
Deputy Judge Advocate General	DJAG
ECCC	Extra-Ordinary Chambers in the Courts of Cambodia
ECCC PTC	Extra-Ordinary Chambers in the Courts of Cambodia Pre-Trial Chamber
ECHR	European Convention of Human Rights
ECtHR	European Court of Human Rights
FRY	Federal Republic of Yugoslavia
GA resolutions	General Assembly resolutions
GC	Grand Chamber
HRC	Human Rights Committee
IAC	International Armed Conflict
IACtHR	Inter-American Court of Human Rights
ICC	International Criminal Court
ICCPR	International Covenant on Civil and Political Rights
ICJ	International Court of Justice
ICL	International Criminal Law
ICRC	International Committee of the Red Cross
ICSID	International Centre for Settlement of Investment Disputes

ICTs	International Criminal Tribunals
ICTR	International Criminal Tribunal for Rwanda
ICTY	International Criminal Tribunal for Yugoslavia
IHL	International Humanitarian Law
ILA	International Law Association
ILC	International Law Commission
IMT	International Military Tribunal
IMTFE	International Military Tribunal for the Far East
JCE	Joint Criminal Enterprise
LRTWC	Law Reports of Trials of War Criminals
NIAC	Non-International Armed Conflict
NCSL	<i>Nullem Crimen Sine Lege</i>
NMT	Nuremberg Military Tribunals
NPSC	<i>Nulla Poene Sine Culpa</i>
NPSL	<i>Nulla Poena Sine Lege</i>
OED	Oxford English Dictionary
PCA	Permanent Court of Arbitration
POW	Prisoner of War
PTC	Pre-Trial Chamber
RICO Statute	Racketeer Influenced and Corrupt Organisation Statute
RPE	Rules of Procedure and Evidence
RPP	Relevant Physical Perpetrator
SC resolutions	Security Council resolutions
SCSL	Special Court for Sierra Leone
SFRY	Socialist Federal Republic of Yugoslavia
STL	Special Tribunal for Lebanon
T. Ch.	Trial Chamber
UN	United Nations

UNSC	United Nations Security Council
UNWCC	United Nations War Crimes Commission
VCLT	Vienna Convention on the Law of Treaties
WTO	World Trade Organisation

Introduction

In 1993, the United Nations Security Council established the International Criminal Tribunal for Yugoslavia (ICTY).¹ It was the first international tribunal set up after the period of the Nuremberg Trials. Its objective was to try those individuals most responsible for perpetrating atrocities committed in the Balkans during the 1990s. Having now spent over two decades interpreting and applying international criminal law, it is necessary to ask an important question: did it exercise its discretion fairly? Several reasons underlie the need for this enquiry.

Foremost, the ICTY Statute was drafted hastily with little guidance provided about procedural and substantive law.² Many areas of law were left unregulated³ or characterised by ‘open-textured’ language.⁴ Secondly, there was an absence of an international legislature that defined the applicable rules or could amend them.⁵ Thirdly, the judges were recruited from different national systems,⁶ making the law unpredictable and creating possibilities of clashes of legal culture.⁷ Lastly, the state of international criminal law (ICL) at that time, can at best, be described as fledgling,⁸ expansionary⁹ and incoherent.¹⁰ For these reasons, the state of ICTY law was uncertain.

Given this uncertainty, this thesis will examine whether the ICTY judges exercised their judicial discretion fairly. Remarkably, ICTY scholarship has to date neither examined how discretion has been exercised in this Tribunal nor launched a specific enquiry as to whether it was fair. Recently, some studies have examined the concept of prosecutorial discretion¹¹ and that of judicial creativity in International Criminal Law (ICL).¹² These studies may be seen as shedding some light on how judges are expected to exercise their discretion. However, the question concerning the fairness of discretion, which this thesis intends to examine, remains outside the scope of their analyses. For this reason, a notable gap concerning the fairness of discretion still remains within ICL literature.

In determining an appropriate case study, several matters could be examined through the lens of discretion. These range from trial procedures to evidence exclusion to sentencing.¹³ However, at the ICTY, an intriguing question is how the liability theory called Joint Criminal Enterprise (JCE) was formulated and applied by exercising discretion. This doctrine is a useful case study because to date JCE has not been examined in this manner and JCE was

¹ UNSC Res. 808.

² Statute was cursory and laconic, see Zacklin (2004) 367; Powderly (2010) 18.

³ Defences and sentencing under UNSC Res 808, paras. 58, 110 and 121; Wald (2005-2006) 323, noting pithy definitions of crimes, lack of precedents.

⁴ Article 5 of ICTY Statute: ‘other inhumane acts’ is an example.

⁵ *Oric* Appeals Judgment, Declaration of Judge Shahabuddeen, ICTY, para 12.

⁶ Common law, civil law and mixed legal systems.

⁷ Wald (2005-2006) 323, noting that ICTY counsel believed the law applied depended on the judge’s nationality; Judge Cassese noting that during a trial, judicial ‘views become closer and closer (a normal occurrence in the work of a collegiate body),’ see *Erdemovic* Appeals Sentencing Judgment, Separate and Dissenting Opinion of Judge Cassese.

⁸ Von Hirsch (2003) 136.

⁹ Tallagren (2002) 562.

¹⁰ View of Judge McDougall at the IMT, see Cryer and Boyster (2008) 303.

¹¹ Betti (2006); Brubacher (2004); Nsereko (2005); Cote (2005); Jallow (2005) and Schabas (2008).

¹² Darcy and Powderly (2010).

¹³ See Hawkins (1992); Pattenden (1992); Galligan (1986).

furthermore not part of the ICTY Statute. Consequently, its non-statutory existence raises the pertinent question of how judicial discretion was exercised.

In tracing the doctrine's origin, we begin with the *Tadic* Appeals Judgment.¹⁴ Rendered in 1999, the Appeals Chamber judges were tasked with interpreting the mode of liability known as 'commission.' Article 7(1) included this liability and read as follows:

‘A person who planned, instigated, ordered, *committed* or otherwise aided and abetted in the planning, preparation or execution of a crime (...) shall be individually responsible for the crime.’

The Appeals Chamber judges argued that the wording of this article is not exhaustive.¹⁵ The meaning of commission could accordingly be extended beyond its semantic formulation of perpetration to include JCE.¹⁶ The judges thus exercised discretion by interpreting the statutory wording broadly.¹⁷ In defence of this exercise of discretion, they firstly argued that although JCE is not found in the Statute, it can be read implicitly from it.¹⁸ Secondly, they held that JCE is firmly established in a different source of law to the Statute: customary international law (CIL).¹⁹ However, following this judgment, a series of criticisms emerged from defendants and numerous scholars. These concerned whether a non-statutory doctrine could be formulated in this manner and whether its elements can be considered fair. Claims were made about a violation of *nullem crimen sine lege* and unfair convictions.²⁰

Following its formulation, JCE found wide support in many cases. It figured in approximately 60% of indictments²¹ and was the selected mode of liability in almost 40% of convictions at the ICTY.²² Nevertheless, its application, in a similar vein to its formulation, was also met by much criticism. Commentators questioned whether the application of JCE violated defendants' rights, whether individuals were held guilty by association and whether the doctrine was expanded unfairly.²³

Given these criticisms related to JCE's formulation and application, this thesis asks the following question:

‘Have the ICTY judges exercised their judicial discretion fairly? A case study of the formulation and application of JCE’

This thesis is concerned with the exercise of discretion in interpreting law only. To address this question, this thesis will explore three matters. Firstly, Part 1 explains what it means to exercise discretion fairly within the context of the ICTY. Secondly, Part 2 will apply this

¹⁴ *Tadic* Appeals Judgment, ICTY.

¹⁵ *Ibid* para. 190.

¹⁶ *Ibid*.

¹⁷ The judges did not explicitly refer to discretion. Chapter 2 explains how their reasoning involved an exercise of discretion.

¹⁸ *Tadic* Appeals Judgment, ICTY, para. 220.

¹⁹ *Ibid*.

²⁰ Chapter 2.3.2.

²¹ 33 out of 57 cases, see Appendix C (statistics valid as of December 2015). The only other statistical JCE-based survey is relevant until 2005, see Danner and Martinez (2005). Ohlin has noted how in 2009 how no statistical analysis has been produced, see Ohlin (2009) 407, fn. 4.

²² 24 out of 57 cases, see Appendix C.

²³ Part 3.

understanding to examine the fairness of JCE's formulation. Thirdly, Part 3 will analyse the fairness of discretion in applying JCE. Through this approach, this thesis makes a significant contribution in three ways. Firstly, it reveals new material which the *Tadic* Appeals Judges omitted. Secondly, by critically reviewing the JCE-based literature, it demonstrates eight flaws. These flaws originate from a misunderstanding of factors that affect the exercise of discretion and the meaning of fairness. Thirdly, it questions whether the exercise of discretion has been influenced by the development of a *sui generis* legal culture at the ICTY. In carrying out this analysis, the methodology of this thesis is both of a qualitative and quantitative nature.²⁴

²⁴ The qualitative analysis includes an examination of scholarly literature and judgments that define the concept of judicial discretion and explore arguments related to the formulation and application of JCE. The quantitative analysis concerns the amount of case law referring to JCE and JCE-related concepts.

**PART 1: EXPLAINING THE FAIRNESS OF
DISCRETION AT THE ICTY**

1.1 INTRODUCTION

As stated in the introduction to this thesis, this study is concerned with how an exercise of discretion, in interpreting law (to formulate and apply JCE), is considered fair. This chapter will therefore explain the fairness of discretion in interpreting law at the ICTY. To do so, we firstly need to examine some of the key features of the ICTY Statute and its jurisprudence.

In doing so, we find that the ICTY Statute did not expressly refer to discretion. The Statute presented two grounds of appeal in the form of errors of law and errors of fact with no mention of an erroneous exercise of discretion.¹ In addition, the first judicial treatment of discretion only came nine years after the establishment of the ICTY, in the *Milosevic* Decision on Assignment of Counsel.² This decision outlined how discretion involves the interpretation of law and how it can be appealed.³ However, it neither defined the concept nor explained the meaning of a fair exercise of discretion.⁴ As a result, if we are to explain the meaning of a fair exercise of discretion within the context of the ICTY, we ought to address several matters.

Firstly, a thorough enquiry about how discretion was present at the ICTY is necessary. This enables us to understand the need for discretion, its use at the ICTY, its possible evolution and the limits placed on it. Secondly, we need to elaborate the concept of fairness itself. Insofar as is possible, it is necessary to substantiate the significance of fairness and how we evaluate it. Thirdly, it is important to illustrate the meaning of fairness through relevant examples.

To address these matters, the next sections are structured accordingly. Section 1.2 will examine how discretion was present at the ICTY. Section 1.3 then expounds the meaning of fairness before section 1.4 demonstrates its meaning through three examples.

1.2 HOW WAS DISCRETION PRESENT AT THE ICTY?

In examining how discretion was present at the ICTY, we may return to the brief discussion in the introduction. The introduction noted how ICTY judges possessed discretion owing to the state of ICL and the cursory nature of the ICTY Statute. The implicit contention was that judges were vested with discretion. However, despite this well-known fact, a more elaborate explanation is needed in order to understand the manifestation of discretion in interpreting law and its limits.

To do so, we need to explore the ICTY Statute and the state of ICL. We further need to discuss the influences and limitations that one may consider when exercising discretion at the ICTY. Lastly, it is necessary to explore the background of ICTY judges and identify any differences in legal culture. This section addresses these matters.

¹ Article 25 of the ICTY Statute.

² See *Milosevic* Decision on Assignment of Counsel, ICTY, paras. 9-10.

³ *Ibid.*

⁴ It only elaborated four grounds of appeal related to the fairness of a trial without defining fairness.

1.2.1 Features of the ICTY and the ICL system

In beginning the first part of this discussion, we find a convergence of views among academic and judicial commentaries regarding ICTY and ICL features. ICTY judges noted how the court had ‘little precedent to guide it’⁵ and that ‘in many respects, it (was) establishing legal precedents in uncharted waters.’⁶ Judge Wald added her own critical views in several academic publications. She noted that ICL was ‘a body of law which had lain largely motionless,’⁷ that there were ‘pithy definitions of war crimes and crimes against humanity in the ICTY Charter’⁸ and that there ‘was no precedent or statutory base to rely upon to determine what the law was.’⁹ Unsurprisingly, she concluded that ‘judges were left pretty much on their own to decide what international humanitarian law required’¹⁰ and that ‘creativity was the mantra of the new Courts (ICTY and ICTR).’¹¹ Similarly, Powderly and Darcy noted the gaps in law left by a ‘laconic Statute’¹² and a substantial lack of codifications of criminal prohibitions.¹³ To add to this lack of rules and precedents was the absence of an international legislature.¹⁴

The implication of these features, in the context of interpreting law, was that judges had ‘to fill gaps or deficiencies.’¹⁵ The judges were left with no option but to exercise discretion when faced with a gap-filling role.

1.2.2 Discretion: Limitations and influences

Given that ICTY judges were expected to exercise their discretion, we must next consider the possible influences and limitations on discretion. In this manner, we can understand how discretion is exercised in interpreting law, in particular since JCE was not part of the ICTY Statute. Broadly speaking, two concerns underpin the interpretation of law. Romano refers to judicial activism and judicial restraint:

‘at one end of the spectrum there is “judicial activism,” which results in, or does not exclude, some form of lawmaking role for the judiciary in interpreting the law. At the other end lies “judicial restraint,” which explicitly rejects a lawmaking role for judges.’¹⁶

The process of interpreting law takes place within these two boundaries. Within an ICTY context, these two aspects need to be elaborated to understand the limitations on the exercise of discretion as well as the influences.

⁵ *Tadic* Decision on Protective Measures, para. 20.

⁶ *Ibid.*, para. 31.

⁷ Powderly (2010) 18.

⁸ Wald (2005-2006) 323.

⁹ *Ibid.*

¹⁰ *Ibid.*

¹¹ Wald (2010) xxxvi.

¹² Powderly (2010) 18.

¹³ Darcy (2010) 130.

¹⁴ *Oric* Appeals Judgment, Declaration of Judge Shahabuddeen, para. 12: ‘(...) there is no legislature to which the task is left.’

¹⁵ Van Schaack (2008) 125.

¹⁶ Terris and others (2007) 103.

In identifying limitations (judicial restraint), our concern begins with the role that a judge plays. As widely acknowledged, judges do not make law but declare it.¹⁷ This prevents the process of interpreting law from becoming an arbitrary one.¹⁸ However, as conceded by former ICTY Judge Wald, ‘drawing the line between applying the law and not creating it is not so simple in practice.’¹⁹ Yet, two limitations appear to be unanimously agreed upon. These limitations, which act as ‘controlling elements,’²⁰ are the use of a source of law and *nullum crimen sine lege* (NCSL) requirements. Firstly, it is vital that the interpretation of law is in accordance with a source of law, in particular, if interpretation leads to non-textual interpretation. Secondly, NCSL, as a fair trial right, ensures that the individual is protected by being put on fair notice and being given adequate warning of non-textual interpretation.²¹

These two concerns have been highlighted in the UN Secretary General Report accordingly:

‘In the view of the Secretary-General, the application of the principle *nullum crimen sine lege* requires that the international tribunal should apply rules of international humanitarian law 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. This would appear to be particularly important in the context of an international tribunal prosecuting persons responsible for serious violations of international humanitarian law.’²²

Within the ICTY context, Darcy and Powderly have further acknowledged these limitations. They have noted that the only barriers to judicial creativity in interpreting law were NCSL and fidelity to CIL as a source of law.²³ They were considered to be the ‘golden rules’²⁴ of the bench in interpreting the Statute. Yet, a difficulty still persists in understanding the limitations they impose. If we examine both limitations closely, there is an inherent difficulty in defining them. Foremost, CIL is known for being a malleable source of law.²⁵ There is much uncertainty regarding its formulation. As Judge Wald had pointed out based on her experience at the ICTY:

‘Customary law assuredly was “out there” but not to be found in any single or set of books or opinions; its components lie quiescent in national court opinions, treatises, treaties, conventions, and declarations of international bodies.’²⁶

Secondly, as per the UN Secretary General Report above, no specific definition of NCSL was outlined. NCSL (also known as the principle of legality) may adopt different definitions depending upon the jurisdiction. It is therefore necessary to address two specific matters when examining the role of CIL and NCSL as controlling elements. Firstly, we need to define an acceptable methodology or acceptable methodologies for CIL. Secondly, a definition of NCSL, as applicable within an ICTY context, is necessary. Part 2 will address these two

¹⁷ Shahabuddeen (2010) 184.

¹⁸ Terris and others (2007) 103.

¹⁹ Wald (2010) xxxvii.

²⁰ Prott (1979) 95.

²¹ Ashworth (2009) 58-63.

²² UN Secretary General Report, para. 34.

²³ Darcy and Powderly (2010) 4.

²⁴ Schabas (2006) 63.

²⁵ Chapter 5.3.3 will pursue this argument in detail.

²⁶ Wald (2010) xxxvi.

matters in detail.²⁷ In this chapter, section 1.4 will explain the difficulties that ICTY judges encountered in defining and applying NCSL. As well as demonstrating NCSL's importance, it will reveal the disagreements among judges about its meaning.

Besides the concern regarding limitations, we also need to examine the opposite end of the spectrum in interpreting law: judicial activism. In this regard, our concern shifts towards the substance of law and the need to construe law beyond textual wording. As conceded by Terris, Romano and Swigart, 'is there such a thing as a truly objective judge, one who can simply apply existing laws, without adding, subtracting, or changing them? If so, is such a machine-like judge desirable?'²⁸

The undesirability of such a judge stems from the fact that gaps may have to be filled occasionally. As Lauterpacht has stated within the context of international law, '(j)udicial legislation, so long as it does not assume the form of a deliberate disregard of the existing law, is a phenomenon both healthy and unavoidable.'²⁹ In the context of the ICTY, this was unavoidable as section 1.2.1 has already highlighted concerns regarding lacunae in the Statute and the need for gap-filling. Therefore, one of the questions judges would ask in construing 'commission' is whether the definition as provided by the ICTY Statute was adequate. Alternatively, would they need to expand the definition? This question lies at the heart of JCE's formulation and the fair exercise of discretion.

These discussions, in short, explain how discretion is exercised in interpreting law. They are central to this thesis' study as they concern the fair formulation of a non-statutory theory of 'commission.' Before concluding this section however, one final point remains which concerns both influences and limitations at the ICTY. In 2003, the judges held that it is 'appropriate to consider an issue of general importance where its resolution is deemed important for the development of the Tribunal's case-law and it involves an important point of law that merits examination.'³⁰ This statement may be seen as a self-delegated ability to review the law. It vests the Appeals Chamber with the choice to modify or reverse law if it believes that it is of general importance to the Tribunal. Described in this manner, it provides the judges with the ability to exercise discretion as they see fit. In the context of JCE's formulation and application, it may be related to its evolution which may concern the need to impose limitations or further develop the doctrine. Part 3 of this thesis will examine the possible implications of this self-delegated form of review when addressing JCE's application.

1.2.3 Legal culture at the ICTY

Building on these discussions of influences and limitations, the next important analysis concerns the impact of legal culture. The very existence and influence of different legal cultures within an international tribunal is not a novel discussion. Prott, in examining the role of legal culture at the International Court of Justice (ICJ), has noted how judges from diverse

²⁷ Chapter 5.3 will examine CIL methodologies and chapter 6 will define NCSL in detail.

²⁸ Terris and others (2007) 102.

²⁹ Lauterpacht (1982) 156.

³⁰ See *Krnjelac* Appeals Judgment, ICTY, para. 7. This standard of review has been imported into ICTY jurisprudence from the ICTR, see *Akayesu* Appeals Judgment, ICTR, paras. 23 and 24. See *Akayesu* Appeals Judgment, Dissenting Opinion of Judge Nieto-Navia, ICTR, paras. 2-10 for dissent about this standard of review.

national backgrounds approach the adjudicative task differently.³¹ Their thinking is largely shaped by their legal training in a national context.³² In contrast, Romano, Swigart and Terris have noted how judges in international law may not be influenced by national decisions but are concerned with whether they agree with the principles of the decision.³³ To develop this discussion further, we need to clarify the meaning of legal culture and examine how it applies within the context of the ICTY.

Meaning of legal culture

At the heart of understanding legal culture lies the term, ‘judicial predispositions.’³⁴ Prott defines this term as an ‘attitude with which a judge approaches every case.’³⁵

In many ways, judicial predispositions are related to the conception of the judicial role, national training and individual personalities. These aspects regarding legal culture are inter-related. For example, the manner in which a judge will develop an understanding of his role may depend upon his training. Likewise, judicial predispositions may be influenced by judicial training which will in turn shape the conception of the judicial role. As Prott has argued, ‘(a judge’s) training in a particular system of national law has significantly, sometimes even decisively, moulded his conception of his role.’³⁶ He illustrates this point noting how at the ICJ, ‘the training of an ICJ judge has an important influence on the jurisprudence of the International Court.’³⁷ This reasoning would apply equally to an ICTY context, implying that the training of an ICTY judge would influence the jurisprudence of the ICTY. Our main focus is to therefore identify how judicial predispositions are manifested and how they are linked to training, personality and judicial role. To shed light on this matter, we may draw from relevant literature from Prott, Romano, Terris and Swigart.

Prott refers to predispositions as including ‘not only preconceived possible solutions which are later justified by a choice among various acceptable methods of reasoning, but rather all those *habits of mind* which influence the activity and jurisprudence of the judges (...), whether these be possible methods, conceptual structures, judgment styles, legal remedies or other factors which have been programmed by the judges’ training.’³⁸ To fully explore this aspect, we may have to scrutinise the life experience of the judge as it is his ‘entire life experience (which) moulds his *judicial attitudes and personal conception* of his role’³⁹ Judicial predispositions may also involve what Prott labels a ‘hunch:’ ‘feeling for a solution (...) conditioned by (...) legal training – judicial intuition is refined by experience.’⁴⁰ Finally, judicial predispositions may be driven by the need to understand the audience for which a judgment is intended. Prott holds that:

‘the judge’s conception of his audience influences his view as to what arguments are acceptable, what techniques can be properly used, and what style of judgment is

³¹ Prott (1979) xix.

³² Ibid 217-221.

³³ Terris and others (2007) 122.

³⁴ Prott (1979) 191.

³⁵ Ibid 191.

³⁶ Ibid xix.

³⁷ Ibid.

³⁸ Ibid 192 (emphasis added).

³⁹ Ibid 199 (emphasis added).

⁴⁰ Ibid 200.

appropriate. In answering those questions the judge will unconsciously follow instincts inculcated by his early training.⁴¹

Collectively, these statements from Prott explain the relationship between national training, judicial role and individual personality. However, a note of caution is required. Within an international context, one should note how civil law and common law distinctions may not always influence decision-making. Sometimes, in embracing a gap-filling role, international judges may choose law regardless of their training and regardless of the decision's origin. For example, in examining the role of the international judge, Romano, Terris and Swigart noted how one Special Court for Sierra Leone (SCSL) judge stated that attitudes towards national court jurisprudence varied from one court to another and from one judge to another.⁴² The SCSL judge who was interviewed noted specifically:

'We go wherever we can find a suitable decision with principles that we agree with (...) Sometimes where possible, where it's relevant, we go to the jurisprudence of civil law courts.'⁴³

The aforementioned scholars also carried out an interview with an ICL judge who revealed that '(t)he conflict between civil and common law is overstated.'⁴⁴ Therefore, in an international environment, it is arguable that national judicial training may not play as significant a role, as Prott contends. However, this can only be determined on a case-by-case basis.

How does it apply at the ICTY?

Having explained these features, we may now turn to the ICTY context to examine their relevance. We would question how the discussions above apply in this context.

To begin, the influence of the audience is evident. In an international criminal context, several parties are involved. The audience would not be limited to defendants but would also include victims, witnesses and those seeking justice for the perpetration of international crimes. Judges may therefore take into account how their national training prepares them for interpreting commission for such an audience.

In regards to national training, ICL judges hail from a variety of backgrounds: common law,⁴⁵ civil law, mixed legal systems⁴⁶ and academic backgrounds.⁴⁷ It is not surprising therefore that the ICTY has acknowledged that it draws from both 'common law and civil law aspects.'⁴⁸ The reality of this mixture of different systems is that it impacts directly on adjudication. For instance, in the early days at the ICTY, lawyers believed that the law might

⁴¹ Prott (1979) 203.

⁴² Terris and others (2007) 122.

⁴³ Ibid.

⁴⁴ Ibid, 111.

⁴⁵ Many judges originated from the common law background and this is generally attributed to the fact that common law countries were the principal donors.

⁴⁶ An example is Judge Siddwa who is a Pakistani judge.

⁴⁷ Former ICTY Judge, A. Cassese, acknowledged that he was not a criminal law judge. As a Professor of International law, he had to spend time in courts to understand criminal trials prior to working as an ICTY judge, see interview by Cassese at New York University in 2003, available at URL: <http://www.ejiltalk.org/nino-in-his-own-words/>, last accessed 10th December 2015.

⁴⁸ *Tadic* Decision on Protective Measures, para. 22.

be applied depending on the judge's nationality.⁴⁹ This reveals a predisposition towards national training which falls in line with Prott's thinking as mentioned above. However, as noted above, it is not the only judicial predisposition. In this regard, I will outline three specific commentaries regarding judicial predispositions which will become the framework for examining how legal culture influences the exercise of discretion at the ICTY.

The first perspective is that judges will draw from their own experience, namely their national training. Karnavas, who has represented several ICTY defendants, has made two pertinent comments as an academic regarding this point. Firstly, he has noted that:

‘Because the judges come from different legal traditions, it is to be expected that each will approach the various judicial functions, such as the admission or assessment of evidence, the application of the Rules of Evidence and Procedure (RPE), and the interpretation of the Statute, from his or her own frame of reference, *i.e.*, his or her own legal tradition and experiences.’⁵⁰

He has added that:

‘Effectively, some judges apply their own judicial traditions to the Rules; that is, they try to make the Rules fit their legal tradition, as opposed to adjusting their judicial thinking and behaviour to the Rules. Recognizing that the judges are inexorably prisoners of their own legal training and experiences, and that they cannot be expected to think and act as automatons, they should be expected to honour the Statute and interpret and apply the Rules as intended.’⁵¹

In support of this contention, we may argue that ICTY Judge Wald was such a judge. Prior to working as an ICTY judge, she was a US judge. She had no experience in international law and she described adjudication in ICL as international judging and not judging alone. She stated ‘(j)udging I knew something about; international judging nothing.’⁵² By establishing a distinction between judging and international judging, one would question how her judicial predispositions as influenced by US law would play a key role at the ICTY. In fact, in 2001, she noted how decision making at the ICTY was based on ‘what comes naturally.’⁵³ It could be argued that for a judge who was unfamiliar with international judging, relying on domestic precedents and experience from national courts is what would ‘come naturally.’ In her case, it is likely that her knowledge of US criminal law and procedures was a natural predisposition.

The second perspective abandons this notion that ICTY judges are influenced by their national training. The most vocal advocate of this view is ICTY Judge Robinson. He has stated that the ‘debate as to the nature of the legal system established by the ICTY's Statute and Rules of Procedure and Evidence is ultimately unproductive and unnecessary: it is neither common law accusatorial nor civil law inquisitorial; nor even an amalgam of both: it is *sui generis*.’⁵⁴ According to this view, we need not be concerned with the origin of the law or its nature. Any such discussion serves no purpose.

⁴⁹ Wald (2005-2006) 323.

⁵⁰ Karnavas (2011) 1062.

⁵¹ Ibid 1063.

⁵² Wald (2005-2006) 320.

⁵³ Wald (2001) 90.

⁵⁴ Robinson (2000) 569.

The third perspective emanates from Judge Cassese. He presents a different view regarding predispositions, arguing that the process of working with different colleagues has meant that with time, views ‘become closer and closer.’⁵⁵ He has called this ‘a normal occurrence in the work of a collegiate body.’⁵⁶ This contention suggests that legal concepts or specific ways of thinking may be borrowed from different systems. However, while working together, judges agree with the result because it is considered an acceptable solution. We could argue that the predispositions previously mentioned such as ‘a hunch,’ ‘personal experience,’ ‘habits of mind,’ ‘judicial attitudes and personal conception of role’ initially play a role in finding an acceptable solution. Judges, while working together, then agree with these ‘hunches,’ ‘habits of mind’ or other such predispositions.

Conclusions

In conclusion, we should be cautious in determining how legal cultures influence the exercise of discretion. As per the analysis in this section, I have provided three different views about how legal culture at the ICTY can shape the interpretation of commission. Chapter 10 will revisit these discussions in the context of formulating and applying JCE.

1.3 EXPOUNDING FAIRNESS

Having explained these aspects of discretion at the ICTY, it is now necessary to develop an understanding of ‘fairness.’ The term fairness figures prominently within legal discourse, statutory provisions⁵⁷ and as a ground of appeal.⁵⁸ It is discussed in several contexts: an unfair conviction,⁵⁹ the exclusion of information,⁶⁰ an unfair interpretation,⁶¹ a trial’s ‘fundamental fairness’⁶² and even an exercise of discretion.⁶³ However, the concern of this thesis is the fairness of exercising discretion in interpreting law at the ICTY and not a broad sense. Yet, we may nevertheless draw from this broad discussion of fairness to explain what a fair interpretation of law entails.

Within this literature, several scholars acknowledge that defining fairness presents a number of challenges as there is no settled definition. Allen describes fairness as a ‘contested concept’⁶⁴ while Zuckerman argues that the ‘notion of fairness can refer to a multitude of aspects.’⁶⁵ In a similar vein, Sharpe argues that ‘(n)o “essentially contested concept” of fairness arises when fairness is to be considered in relation to one specific participant in the criminal process rather than in relation to the criminal process as a whole.’⁶⁶ From these opinions, we gather that fairness remains a value-laden concept. When exercising discretion,

⁵⁵ *Erdemovic* Appeals Sentencing Judgment, ICTY, Separate and Dissenting Opinion of Judge Cassese, Contents D (i).

⁵⁶ *Ibid.*

⁵⁷ Articles 20 and 21 of the ICTY Statute.

⁵⁸ Article 83(2) of ICC Statute: Appeal can be challenged on grounds of fairness.

⁵⁹ *Rutaganda* Appeals Judgment, ICTR, Separate Opinions of Judge Meron and Jorda, para. 1.

⁶⁰ *Kvočka* Appeals Judgment, ICTY, para. 435.

⁶¹ *Brdjanin* Appeals Judgment, ICTY, Separate Opinion of Judge Van Den Wyngaert.

⁶² Wald (2004) 467.

⁶³ The Black Law Dictionary (4th Edition, 2009): an exercise of discretion is ‘the exercise of judgment by a judge or court based on what is *fair* under the circumstances and guided by the rules and principles of law.’

⁶⁴ Allen (1990) 84.

⁶⁵ Zuckerman (1987) 55.

⁶⁶ Sharpe (1998) 158.

fairness cannot be viewed solely in relation to a particular right or party but ought to be examined in relation to ‘the whole proceedings.’⁶⁷ Based on these comments, we can define the concept of fairness by pursuing a step-by-step enquiry regarding four inter-related arguments and queries. Several scholars and judges provide useful commentaries regarding these arguments.

If we begin with the proposition that a decision is fair because it ought to address the whole proceedings (all parties’ concerns and all rights involved), then a normative enquiry into a decision’s fairness concerns its legitimacy⁶⁸ or acceptability.⁶⁹ In essence, when we argue that a decision is unfair, we are suggesting that it is unacceptable. We are criticising its legitimacy and arguing that the decision is unacceptable for a given reason/s. This contention leads to the next query which concerns the reason/s why a decision would be considered unacceptable.

Drawing from the discussion in section 1.2.3, a judge’s role is to communicate to an intended audience.⁷⁰ He does so because he desires to address the expectations of that audience.⁷¹ For a decision to be accepted, it must convince the audience it is intended for and meet those expectations.⁷² Any reason critical of a judgment would then be grounded in the expectations that a judgment ought to meet. Therefore, the reasons for describing a judgment as ‘unacceptable’ are directly connected to the expectations that the intended audience has set out. This leads to the third proposition which concerns the meaning of expectations.

Our expectations of judgments relate to all procedural and substantive matters regarding the outcome. These involve a non-exhaustive list of matters, which may include but is not limited to a reasoned opinion,⁷³ principles,⁷⁴ policies,⁷⁵ procedural rights,⁷⁶ principles of natural justice,⁷⁷ matters related to substance,⁷⁸ how we interpret a legal instrument⁷⁹ and the use of sources of law.⁸⁰ This list would depend upon the context when applying it to a specific case. However, the central argument is that all matters would be concerned with both procedure and substance. Although from the outset, procedure and substance appear to be two different matters, for the purposes of examining fairness, it is unnecessary to distinguish the two. As Romano, Swigart and Terris point out:

⁶⁷ Ibid.

⁶⁸ Dennis (2007) 49-58 for discussion of legitimacy.

⁶⁹ Prott (1979) 203: ‘the judge’s conception of his audience influences his view as to what arguments are acceptable.’

⁷⁰ Ibid 119: ‘a Court’s justification of its decisions is essential to the public acceptance of its role.’

⁷¹ Ibid 120: ‘A judge who wishes to carry out his job conscientiously will always do his best to convince the public of the rightness of his decision in the course of his judgment.’

⁷² Ibid 105: ‘the technique of judicial justification is significant for the smooth functioning of any Court. By this means a Court convinces its audience (its role transmitters) that a decision accords with the established pattern of rules and reduces anxiety that legal certainty will be affected.’

⁷³ Lord Bingham of Cornhill (2007) 72

⁷⁴ Croquet (2011) 99.

⁷⁵ Fletcher (1998) 21: Fletcher refers to the ‘outcome-determinative’ test where certain standards are so important that they ‘determine the outcome of litigation.’

⁷⁶ Franck and Fairley (1980) 318; DiPaolo (2009) 496.

⁷⁷ Dennis (2007) 35-37.

⁷⁸ Ashworth (1991) 437: Ashworth refers to ‘result-pulled reasoning’ based on specific goals to be achieved when exercising discretion

⁷⁹ Rodriguez (2004) 286: ‘the professional duty of a judge ‘to be transparent; to show which methods or canons of construction of the law he is using.’

⁸⁰ Meron (2005) 817: ‘methods of interpretation should be used predictably.’

‘As every lawyer knows, procedure is substance (...) Rules of procedure of an international court do not merely address matters of internal organization of the court, like judges’ terms, precedence, status, disciplining and removal of judges, election of the president and registrar and deliberations.....They also govern issues directly affecting the parties, like institution and conduct of proceedings.’⁸¹

Besides this example of rules of procedure, two other examples can be provided, which have already been referred to in section 1.2.2: NCSL and CIL. As a fair trial right, NCSL is important as a matter of procedure. Judges, in interpreting law need to take into account its importance as part of the process. However, its application also affects the substance of law. For example, while judges are required to ensure that the law was foreseeable and accessible, these considerations influence the extent to which substantive law can be addressed. Similarly, in using CIL, questions regarding process and substance arise. As section 1.2.2 stated, CIL’s methodology is controversial because of its procedural formula. Clarity is required, as a matter of procedure, to determine how it ought to be used methodologically. Yet, the manner in which it is used (its procedural formula) influences the content and substance of law. Therefore, underlying its use are matters related to both substance and procedure. For this reason, this thesis will not attempt to distinguish procedure and substance. Instead, it concludes with the argument that a decision’s fairness relates to all matters (procedure and substance) that we expect to find in a judicial outcome. From here onwards, as a matter of terminology, this thesis will refer to any aspect (either procedure and/or substance) related to a decision’s fairness by the term ‘factor.’

The fourth and final point that concludes this discussion concerns the term ‘factor.’ A factor is significant either because of its role regarding the outcome or because of its role as a judicial restraint. This reasoning comports with judges’ concerns regarding judicial activism and judicial restraint. As an example in the context of interpreting law at the ICTY, we can argue that CIL (or other non-statutory sources of law) and NCSL are two important factors because of their role as restraints in interpreting law.

If we apply this reasoning in the context of formulating JCE, a discussion of CIL and NCSL, however, does not suffice. A further elaborate enquiry of other factors is needed. Since JCE emerged from the interpretation of ‘commission,’ we ought to question whether judges should or can expand the existing definition of ‘commission’ as found under the ICTY Statute. This may require a certain level of judicial activism given its substance as a mode of liability. This draws our attention to other factors relevant to interpreting modes of liability. Yet, any such form of judicial activism has to address restraints that this chapter has already emphasised, namely CIL and NCSL. This brief discussion regarding the need to identify all factors sets out the general understanding of exercising discretion fairly in interpreting commission.

Part 2 will revisit this discussion and examine this matter in detail when addressing the fairness in formulating JCE. More specifically, it will explore whether all ‘factors’ related to a fair outcome have been identified.

⁸¹ Terris and others (2007) 104.

1.4 EXAMPLES OF A FAIR EXERCISE OF DISCRETION

To demonstrate how this discussion of fairness applies in practice, section 1.4 provides three examples. These examples serve an important purpose. Firstly, each example, although brief, illustrates how judges were engaged in identifying ‘factors’ relevant to the exercise of discretion and examining their role in accordance with the criteria mentioned above. Secondly, the examples demonstrate the role of CIL and NCSL as limitations, as explained in the previous sections of this chapter. Thirdly, they indicate, from a chronological perspective, how judges grappled with the meaning of NCSL.

The first two examples concern the exercise of discretion in interpreting law at the ICTY while the final example concerns the exercise of discretion in interpreting law at the SCSL. Although the latter is a SCSL case, it is still relevant within an ICTY context as the SCSL and ICTY Statutes shared several similarities and the difficulties in interpreting law fairly were similar.

1.4.1 *Tadic* Appeals Decision on Jurisdiction, 1995

The first case is the *Tadic* Appeals Decision on Jurisdiction. In 1995, the *Tadic* Appeals Chamber was tasked with determining the scope of article 3 of the ICTY Statute. This article is concerned with the laws of war.⁸² The most important part of the article states:

‘The International Tribunal (ICTY) shall have the power to prosecute persons violating the laws or customs of war. (...)’

The question faced by the judges was whether this article is restricted to an International Armed Conflict (IAC) or whether it can be interpreted to include a Non-International Armed Conflict (NIAC).⁸³ The two classifications of IAC and NIAC are important because different rules apply. For example, a person could be convicted for a crime under an IAC (rape, for example) but not for the same crime under a NIAC. The question concerning the scope of this article therefore has a significant bearing on a morally sound decision (outcome). Clearly, in determining this matter, an exercise of discretion is involved in interpreting article 3.

In interpreting the scope of this article, the Prosecutor and the defence counsel provided different views.⁸⁴ The Prosecutor argued that this article can be applied to a NIAC and that *Tadic* should be charged with certain crimes pertaining to the laws of war.⁸⁵ The defence argued that article 3 can only be applied to an IAC⁸⁶ and that *Tadic* could not be charged with the crimes cited by the Prosecutor because the conflict, involving *Tadic*, was of an NIAC nature.⁸⁷ To add to this uncertainty, the International Committee of Red Cross (ICRC) shared the defence counsel view that article 3 could only be applied to IACs.⁸⁸ As an internationally recognised and impartial authority,⁸⁹ its position carried significant weight. However, none of

⁸² Also known as IHL.

⁸³ *Tadic* Appeals Decision on Jurisdiction, ICTY, para. 67.

⁸⁴ *Ibid*, paras. 67-91.

⁸⁵ These were murder, cruel treatment by forcible sexual intercourse, cruel treatment, paras 4.3, 5.3, 5.6 and 5.9, 5.12, 5.15, 5.18 5.21, 5.24, 5.27, 5.30 of indictment.

⁸⁶ *Ibid*, para. 78.

⁸⁷ *Ibid*, para. 65.

⁸⁸ *Ibid* para. 73; Cassese interview, pg. 17.

⁸⁹ *Ibid*, para. 73.

these interpretations, whether from the Prosecutor, defence counsel or the ICRC, were binding on the Appeals Judges. It was for the *Tadic* Appeals judges to exercise its discretion in light of the factors relevant to achieve a fair outcome.

It began its examination by exploring the wording of article 3. It concluded that this article, on the basis of a literal interpretation, would suggest that article 3 applies to an IAC only.⁹⁰ However, the *Tadic* Appeals Judges chose to exercise their discretion differently. By referring to various examples of state practice and *opinio juris*,⁹¹ it concluded that, under customary international law (CIL), article 3 can be applied to a NIAC.⁹²

Given this outcome, it is important to question the judgment's reasoning and understand the factors at play. It is furthermore important to understand the role of CIL since the judges determined that a literal interpretation of article 3 confines its scope to an IAC. To do so, we may turn to an interview of one of the judges, who sat on the Appeals bench, Judge Cassese. He offered important insights about the use of discretion,⁹³ the factors that need to be addressed when exercising discretion and the importance of these factors.⁹⁴

He acknowledged that it would have been fair to apply this rule only to IACs as it had been drafted in that manner and understood accordingly by both *Tadic* and the ICRC. However, Cassese also argued that there was a need to get rid of an 'unacceptable distinction'⁹⁵ that allowed a person who commits murder, rape or torture in a NIAC to be acquitted while he would be convicted under an IAC:

'The defence had argued that "you can't apply some rules because these alleged crimes have been committed within an internal armed conflict (...)" So we were stuck. So we said that we have no jurisdiction because this is an internal armed conflict, we can't apply rules which only apply to international armed conflict or shall we move forward and be creative? At that point I said to my colleagues, should we stick to the traditional concept that war crimes can only be committed in international armed conflict? This to me is crazy! A rape is a rape; a murder is a murder, whether it is committed within the framework on an international armed conflict, a war proper, or a civil war.'⁹⁶

The fact that the judges chose to be creative indicates their willingness to exercise discretion because of the concern related to a literal application of law. In examining this reasoning, we could argue that one of the factors that drove judicial decision-making was the policy of social defence. According to this policy, criminal law may be used against any form of activity that threatens good order or is thought reprehensible.⁹⁷ In this case, it would be to extend the law to convict those guilty of crimes in a NIAC. However, Cassese's colleagues also drew his attention to the need for acting cautiously:

⁹⁰ Ibid, para. 71.

⁹¹ Ibid, paras. 96-127.

⁹² Subject to four conditions, see *Tadic* Appeals Decision on Jurisdiction, ICTY, para. 94.

⁹³ See Interview with Judge Cassese at NYU: <http://www.ejiltalk.org/nino-in-his-own-words/>, last accessed 10th December 2015 (hereafter Cassese interview). Cassese refers to judicial creativity and not discretion, see Cassese interview, p. 16. The two concepts share similar characteristics.

⁹⁴ Cassese interview.

⁹⁵ Ibid, pg. 17.

⁹⁶ Ibid.

⁹⁷ Ashworth (2009) 53.

‘My colleagues said “yes we agree with what you are saying, (...) but how can you create this criminal offense? (...) if you can show that there is some custom in international law supporting your views, we will go along with it. But try to find some sort of evidence.”’⁹⁸

The creation of an offence was therefore perceived as unsupported without proof of its existence under CIL. Use of a source of law in the form of CIL was thus another factor that was key in the exercise of discretion. In line with the discussion in section 1.2.2, it acted as an important limitation regarding the extent to which laws can be extended or added. Arguably, without such proof, it would be impossible for judges to legitimise their creativity or for them to argue that their discretion was fair.

This example explains and clarifies the two key factors underlying the use of discretion: the policy factor which was significant in relation to the consequences of the outcome and CIL as a key judicial restraint. While the policy factor ensured that crimes do not go unpunished, proof under CIL was non-negotiable. Based on Cassese’s interview, the judges were conscious of both factors’ significance but also CIL’s greater role.

However, one important criticism needs to be made. The *Tadic* Appeals Decision on Jurisdiction does not discuss the implications of NCSL.⁹⁹ Section 1.2.2 emphasised the importance of this standard in interpreting law. It may be argued that the use of CIL in this context entailed that NCSL was not violated. This conclusion could be reached by arguing that the law cited under CIL was foreseeable and accessible to the defendants and that it provided fair warning. However, neither did Cassese’s colleagues mention this nor did the decision refer to it. Therefore, the *Tadic* Appeals Decision on Jurisdiction can be criticised for failing to take into account this factor.

Yet, in contrast, the *Tadic* Trial Decision on Jurisdiction, in fact, recognised NCSL’s importance. It reached the same conclusion as the Appeals Decision, namely that article 3 applies to a NIAC but for a different reason. It held ‘that the character of the conflict, whether international or internal, does not affect the subject-matter jurisdiction of the International Tribunal under Article 3.’¹⁰⁰ It held that ‘common Article 3 (of the Geneva Conventions) imposes obligations that are within the subject-matter jurisdiction of Article 3 of the Statute because those obligations are a part of customary international law.’¹⁰¹ At that stage, it supported its argument that it would be fair to embrace such reasoning as it is in accordance with NCSL. It referred to NCSL in five different paragraphs.¹⁰² It noted how ‘(i)mposing criminal responsibility upon individuals for these violations (of common article 3 of the Geneva Conventions) does not violate the principle of *nullum crimen sine lege*.’¹⁰³ It justified this decision by arguing that common Article 3 is beyond doubt part of customary international law, therefore the principle of *nullum crimen sine lege* is not violated by incorporating the prohibitory norms of common Article 3 in Article 3 of the Statute of the International Tribunal.¹⁰⁴ It highlighted the importance of NCSL noting that ‘the principle *nullum crimen* is designed to protect a person only from being punished for an act that he or

⁹⁸ Ibid.

⁹⁹ *Tadic* Appeals Decision on Jurisdiction, paras. 87-127.

¹⁰⁰ Ibid, paras. 58, 64.

¹⁰¹ Ibid, para. 65.

¹⁰² Ibid, paras. 65, 69, 72, 73 and 74.

¹⁰³ Ibid, para. 65. Also referred to in para. 73.

¹⁰⁴ Ibid, para. 72.

she reasonably believed to be lawful when committed.’¹⁰⁵ It then concluded that ‘(a)dditional support for the finding that there is no violation of the principle of *nullum crimen sine lege* is that by incorporating the prohibitory norms of common Article 3 into its national law, the former Yugoslavia has criminalized these offences.’¹⁰⁶

This reasoning offers a different perspective to the Appeals Chamber reasoning regarding the extent to which laws can be added. The Trial Chamber concern pertaining to NCSL can be seen as two-fold. Firstly, by arguing that a defendant can only be punished for conduct which he reasonably believed was unlawful, the judges ensured that any interpretation of law was foreseeable to the defendant. Secondly, by stating that the former Yugoslavia had incorporated these laws into its national law, the judges were aware that the law should be accessible to the defendant. Although the two terms, foreseeable and accessible, were not explicitly spelt out, they can be deduced from the chamber’s reasoning.

However, this decision too is subject to some criticism. While the judges cited NCSL, they refrained from defining NCSL elaborately. They did not set out a specific definition for NCSL which would have addressed whether it includes strict interpretation, the principle of *in dubio pro reo* or *lex stricta* (no law is permitted other than written law). These are important to understand the specific role that NCSL plays in limiting the exercise of discretion.

Yet, seven years later, the *Vasiljevic* Trial Chamber provided clarity regarding NCSL implications. It addressed the use of CIL and further explored the relationship between CIL and NCSL, which no judgment prior to this period had ever done.¹⁰⁷

1.4.2 *Vasiljevic* Trial Judgment, 2002

The case concerned the actions of a small paramilitary unit which consisted of Bosnian Serbs. It included Vasiljevic, the co-accused Lukic and two other unidentified individuals. These individuals were accused of forcibly taking seven Bosnian Muslim civilians to the Eastern bank of the Drina River in Bosnia and Herzegovina, forcing them to line up and then opening fire on them. As a result, five of the seven men died while two civilians survived without physical injury. However, they jumped into the water when the shooting started and pretended to be dead.¹⁰⁸

The Prosecutor charged Vasiljevic for the killing of the five men. He was charged with extermination as a crime against humanity, persecution as a crime against humanity and murder as both a crime against humanity and as a war crime.¹⁰⁹ The Prosecutor further argued that the attempted murder of the two survivors was an ‘inhumane act’ as a crime against humanity and ‘violence to life and person’ as a war crime.¹¹⁰ Among these charges, the Trial Chamber’s main concern was the last charge.

¹⁰⁵ Ibid, para. 69.

¹⁰⁶ Ibid, para. 73.

¹⁰⁷ To the author’s knowledge, this is correct.

¹⁰⁸ *Vasiljevic* Trial Judgment, para. 98.

¹⁰⁹ Ibid, para. 96.

¹¹⁰ Ibid.

The Trial Chamber did not deny that common article 3 of the Geneva Conventions lists ‘violence to life and person’ as a prohibited act.¹¹¹ In fact, it cited the *Tadic* Appeals Chamber statement that customary international law imposes criminal liability for all serious violations of common Article 3.¹¹² It also conceded that ‘violence to life’ ‘generally constitutes a serious violation of common article 3’¹¹³ and that individual criminal responsibility may be imposed in case of a breach.¹¹⁴ However the difficult question that the Trial Chamber was confronted with was whether ‘violence to life and person’ was ‘sufficiently defined and was sufficiently accessible at the relevant time for it to warrant a criminal conviction and sentencing.’¹¹⁵ Its support for this proposition was drawn from the reasoning in three ECHR cases: *SW v. United Kingdom*; *G v. France*, and *Kokkinakis v. Greece*. All three cases were concerned with NCSL implications. As a result, the *Vasiljevic* Trial Chamber stated:

‘From the perspective of the *nullum crimen sine lege* principle, it would be wholly unacceptable for a Trial Chamber to convict an accused person on the basis of a prohibition which, taking into account the specificity of customary international law and allowing for the gradual clarification of the rules of criminal law, is either insufficiently precise to determine conduct and distinguish the criminal from the permissible, or was not sufficiently accessible at the relevant time. A criminal conviction should indeed never be based upon a norm which an accused could not reasonably have been aware of at the time of the acts, and this norm must make it sufficiently clear what act or omission could engage his criminal responsibility.’¹¹⁶

From the outset, it is evident that this definition of NCSL is clearer than that provided for by the *Tadic* Trial Decision on Jurisdiction. The judgment can be seen as focussing on three aspects: specificity of CIL to ensure that the law is sufficiently precise, foreseeability of law (as it stated that the defendant should be reasonably aware at the time of the acts) and accessibility of the decision. Unlike the *Tadic* Trial and Appeals Chamber Decisions on Jurisdiction, there is a greater concern regarding the use of CIL and how it ought to be foreseeable and accessible to the defendant.

In applying this reasoning to the facts, the Trial Chamber was critical of the Prosecutor’s use of CIL to justify criminalising ‘violence of life and person.’ Its response to the Prosecutor’s claim that this crime is found under CIL was that it was ‘unable to find any conclusive evidence of state practice – prior to 1992 – which would point towards the definition of that crime.’¹¹⁷ It emphasised that it ‘is (...) obliged to ensure that the law which it applies to a given criminal offence is indeed customary’¹¹⁸ noting how ‘(t)his limitation placed upon the jurisdiction of the Tribunal is justified by concerns for the principle of legality.’¹¹⁹ It then cited ECHR jurisprudence to reinforce NCSL implications by stating that NCSL does not ‘prevent a court from interpreting and clarifying the elements of a particular crime or preclude the progressive development of the law by the court.’¹²⁰ However ‘under no circumstances may the court create new criminal offences after the act charged against an

¹¹¹ *Ibid*, para. 193.

¹¹² *Vasiljevic* Trial Judgment, para. 193 citing *Tadic* Appeals Decision on Jurisdiction, para. 134.

¹¹³ *Vasiljevic* Trial Judgment, para. 193.

¹¹⁴ *Ibid*.

¹¹⁵ *Ibid*.

¹¹⁶ *Ibid*.

¹¹⁷ *Ibid*, para. 194.

¹¹⁸ *Ibid*, para. 198.

¹¹⁹ *Ibid*, para. 197.

¹²⁰ *Ibid*, para. 196.

accused either by giving a definition to a crime which had none so far, thereby rendering it prosecutable and punishable, or by criminalising an act which had not until the present time been regarded as criminal.’¹²¹ Its analysis concluded with the statement that:

‘The Trial Chamber must further be satisfied that this offence was defined with sufficient clarity for it to have been foreseeable and accessible, taking into account the specificity of customary international law.’¹²²

If we analyse this decision, the reasoning provides useful insights regarding influences and limitations in interpreting law. On one hand, the judges explicitly noted how the prohibited acts listed under common article 3 of the Geneva Convention (which includes violence to life and person) are criminalised. Undoubtedly, the need to criminalise conduct of this nature influenced their decision-making process. However, the judges’ primary concern was specificity of CIL followed by foreseeability and accessibility. Unrestrained judicial activism would not be fair in light of CIL and NCSL restraints. These two factors carried such importance as limitations that criminalising conduct under common article 3, which was already considered part of CIL, was deemed unacceptable.¹²³

1.4.3 CDF Decision on lack of jurisdiction, 2004

The final example concerns a SCSL decision which was issued two years after the *Vasiljevic* Trial Judgment. It involved the criminalisation of conduct and at the centre of its reasoning lay concerns pertaining to the appropriate use of CIL and the correct application of NCSL.

The defendant was Samuel Hinga Norman, the former leader of the Civil Defence Forces (CDF). The Prosecutor charged Norman along with two other accused persons, Fofana and Kondewa for enlisting children into armed forces as article 4 (c) of the SCSL Statute. This article contained a catch-all provision permitting the prosecution for arguably three separate crimes: ‘*conscripting* or *enlisting* children under the age of 15 years into armed forces or groups or *using them* to participate actively in hostilities.’¹²⁴ However, the indictment did not specify a time at which the enlistment offence was committed. It simply referred to ‘times relevant to the indictment.’¹²⁵ This was a contentious matter because the temporal jurisdiction of the SCSL to prosecute international crimes began on 30th November 1996 but the Prosecutor did not clarify how the enlistment offence had crystallised in ICL prior to that date. It simply argued that such conduct was a CIL offence prior to 30th November 1996 and declined to refer to a date.¹²⁶ Its justification that it was found under CIL was based on the Geneva Conventions establishing the protection of children under fifteen as an undisputed norm of international humanitarian law.¹²⁷ It argued that the number of states making the practice of child soldier recruitment illegal under domestic law and the international

¹²¹ *Vasiljevic* Trial Judgment, para. 196.

¹²² *Ibid*, para. 198.

¹²³ Cassese disagreed with this decision. He argued that violence to life and person could be considered serious bodily harm and this form of conduct is considered a crime in all legal systems. Therefore, it is an international crime, see Cassese (2004) 272.

¹²⁴ *Norman* Appeals Decision on child recruitment, para. 1 (a) (emphasis added). See *Norman* Appeals Decision on child recruitment, Dissenting Opinion of Judge Robertson, para. 5, stating how the article provides for three differently defined crimes.

¹²⁵ *Norman* Appeals Decision on child recruitment, para. 1 (a).

¹²⁶ *Norman* Appeals Decision on child recruitment, Dissenting Opinion of Judge Robertson, para. 2.

¹²⁷ *Norman* Appeals Decision on child recruitment, para. 2 (a).

conventions doing so demonstrate the CIL existence of this crime.¹²⁸ It then argued that the ICC Statute (ratified in 2002) codified existing CIL and that NCSL should not be applied rigidly to an act universally regarded as abhorrent.¹²⁹

The defence, in response, did not argue that IHL prohibited the recruitment of children under the age of fifteen years at the time the defendant committed the act. It did, however, argue that a prohibition does not entail criminal responsibility.¹³⁰ It further claimed that article 4(c) is not part of CIL¹³¹ and that this article violates NCSL.¹³² Finally, it requested that the Court ‘pinpoint the moment at which (...) recruitment became a crime.’¹³³ The two main issues were therefore the methodology employed by the Prosecutor to determine that such conduct was criminal in international law and how that conduct did not violate NCSL. Evidently, both concerns relate to the limitations in interpreting law.

The Appeals Chamber made several important comments regarding the state of law, its specificity and NCSL. Firstly, it held that the prohibition on child recruitment had crystallised under CIL.¹³⁴ In finding that customary law supported the criminalization of child recruitment into armed forces, it relied on the widespread ratification of several treaties as evidence of state practice. These included Additional Protocol II (which protects fundamental guarantees of children), the Convention on the Rights of the Child and the African Charter on the Rights and Welfare of the Child.¹³⁵ It also held that almost all states had prohibited child recruitment under fifteen before 1996.¹³⁶ It was further satisfied that: such conduct was a crime in international law; that it does not need to be expressly prohibited under conventional law to be a crime and that the ICTY and ICTR had previously prosecuted violations of Additional Protocol II.¹³⁷ In addressing the principle of specificity, it was content in noting that the objective and subjective elements of the crime had been specified under the Elements of Crime of the Rome Statute and that a large proportion of the global community had specified these elements.¹³⁸ In addressing NCSL implications, it noted that the law must be foreseeable and accessible¹³⁹ and then concluded that NCSL had not been violated. However, in its view, it was ‘sufficient to mention a few examples of national legislation criminalising child recruitment prior to 1996’¹⁴⁰ to explain that NCSL had not been violated. Yet, it did not explain how such legislation was foreseeable or accessible to the defendants.¹⁴¹

Although this decision was issued by the majority, Judge Robertson issued a strong critical dissenting opinion. Overall, he was concerned with how the Appeals Chamber reached the above-mentioned conclusions. One of his chief concerns was the extent to which judges can make laws. He expressed this concern by emphasising the distinction between the ‘question

¹²⁸ Ibid, para. 2 (b).

¹²⁹ Ibid, para. 2 (d).

¹³⁰ Ibid, para. 1 (a). 3.

¹³¹ Ibid, para. 1 (a).

¹³² Ibid, para. 1 (b).

¹³³ Ibid, para. 3.

¹³⁴ Ibid, para. 17.

¹³⁵ Ibid, paras. 17-24.

¹³⁶ Ibid, para. 18.

¹³⁷ Ibid, paras. 38-40.

¹³⁸ Ibid, para. 40.

¹³⁹ Ibid, para. 24.

¹⁴⁰ Ibid, para. 45.

¹⁴¹ Ibid, paras. 30-53.

of *whether and when conduct had been criminalised*¹⁴² and the ‘question of whether it *should be* or should have been criminalised.’¹⁴³ Underlying both questions were concerns related to judicial activism and judicial restraint. Judge Robertson’s attention was clearly centred on exercising appropriate judicial restraints. With this focus in mind, he raised a number of issues regarding the criminalisation of child soldier enlistment, the use of CIL and NCSL.

Firstly, he was unconvinced that ICL, as of 1996, had criminalised this form of conduct. He accepted that forcible recruitment of child soldiers was undoubtedly a war crime at the time and that child soldier enlistment remained abhorrent. But, there was no evidence, in his opinion, that the enlistment of child soldiers was a crime.¹⁴⁴ It was not specifically mentioned in the UN Secretary General Report for the SCSL, which referred to ‘abduction and forced recruitment’ of child soldiers.¹⁴⁵ Article 4(c) of the SCSL Statute was worded differently and therefore its legality ought to be questioned. Since, it is doubtful whether it was a crime, the benefit of doubt must be given to the defendant in accordance with NCSL.¹⁴⁶ By continuing to focus on NCSL implications and arguing that it is a ‘fundamental principle of criminal law,’¹⁴⁷ Judge Robertson highlighted that:

‘it is precisely when the acts are abhorrent and deeply shocking that the principle of legality must be most stringently applied, to ensure that a defendant is not convicted out of disgust rather than evidence, or of a non-existent crime. *Nullem crimen* may not be a household phrase, but it serves as some protection against the lynch mob.’¹⁴⁸

He reiterated similar concerns raised by the *Vasiljevic* Trial Judgment and the *Tadic* Trial Decision on Jurisdiction regarding foreseeability of law and accessibility. However, in advocating a doctrine of ‘strict legality’¹⁴⁹ and citing Cassese’s work that defined NCSL,¹⁵⁰ he expressed these ideas through different terminology:

‘(f)or an international court to recognise the creation of a new criminal offence without infringing the *nullem crimen* principle, I would formulate the test as follows:

- i) The elements of the offence must be clear and in accordance with fundamental principles of criminal liability;
- ii) That the conduct could amount to an offence in international criminal law must have been capable of reasonable ascertainment at the time of commission;
- iii) There must be evidence (or at least inference) of general agreement by the international community that breach of the customary rule would or would now entail international criminal liability for individual

¹⁴² *Norman Appeals Decision on child recruitment, Dissenting Opinion of Judge Robertson, para. 7* (emphasis added).

¹⁴³ *Ibid*, para. 7 (emphasis added).

¹⁴⁴ *Ibid*, paras. 33-44.

¹⁴⁵ *Ibid*, para. 4.

¹⁴⁶ *Ibid*, para. 6.

¹⁴⁷ *Ibid*, para. 14.

¹⁴⁸ *Ibid*, para. 12.

¹⁴⁹ *Ibid*, para. 15.

¹⁵⁰ *Ibid*, paras. 15-17 citing Cassese (2003) 142-143.

perpetrators, in addition to the normative obligation on States to prohibit the conduct in question in their domestic law.¹⁵¹

The first strand of his test arguably refers to clarity of law. In this context, CIL needs to state clearly that a specific form of conduct is prohibited. The second strand, presumably refers to the foreseeability of law and the third part concerns criminalising prohibited actions and ensuring that their criminalisation is accessible to the defendant. Therefore, although worded differently, the implications are no different to certain previous judgments.

If we compare the majority decision with Judge Robertson's view, the difference lies in the relaxed application of CIL and the scant attention devoted to NCSL. The Appeals Chamber's exercise of discretion was skewed more towards policy reasons for criminalising conduct whereas Judge Robertson's exercise of discretion embraced the opposite view. These two conflicting views further demonstrate tensions in interpreting law fairly while respecting appropriate bounds of judicial activism.

1.4.4 Preliminary conclusions

Having analysed the exercise of discretion in these three cases, two important observations can be made.

The first concerns the order of factors in exercising discretion. To illustrate, in *Tadic*, the Trial and Appeals Chamber judges could not hold that article 3 could apply in a NIAC without the CIL requirement. The Trial Judges included an additional requirement by discussing NCSL implications. Likewise, in *Vasiljevic*, the judges could not permit 'violence against the person' to be considered a crime without specific proof of CIL, foreseeability and accessibility of law. Similarly, in the *CDF* Decision on lack of jurisdiction, the SCSL Appeals Chamber judges could not have justified their exercise of discretion without referring to CIL and NCSL. Therefore, while CIL and NCSL are two requirements that are part of the exercise of discretion, they occupy a more important place than other factors when interpreting law. They are non-negotiable and judges address their importance in a specific order. Foremost, it is necessary that judges use an appropriate CIL methodology, illustrating the specificity of CIL. Secondly, such law would need to be foreseeable and accessible to the defendant (NCSL). Without meeting these requirements, the judges could not argue that their exercise of discretion was fair. Chapter 7 will revisit this argument regarding the order of factors in formulating JCE.

The second point is that the definition and specific implications of NCSL are unclear. If we examine the three cases closely, we find three different approaches in defining and applying NCSL. The *Tadic* Trial Decision on Jurisdiction appears to have appealed to foreseeability and accessibility as two essential requirements. However, it did not explicitly cite them. The *Vasiljevic* Trial Judgment, however, did refer to these two aspects. Yet, it was also concerned that crimes are 'specific' in the indictment. Finally, the *CDF* Decision on Jurisdiction did not take into account foreseeability and accessibility. Judge Robertson, nevertheless cited them as essential criteria to be met when interpreting law. Chapter 6 will therefore conduct a holistic appraisal regarding how NCSL ought to be applied at the ICTY.

¹⁵¹ Ibid, para. 17.

1.5 CONCLUSIONS AND GOALS OF THESIS

In conclusion, this chapter has explained the requirements for exercising discretion fairly within the context of the ICTY. The central focus, as explained in this chapter, is the acceptability of decisions based on the identification of key factors. This chapter has furthermore illustrated the validity of this discussion through three examples. Before proceeding to the next chapter, it is necessary to restate the goals of this thesis, considering the different arguments chapter 1 has advanced.

The goals set out in this thesis are three-fold. Firstly, this thesis will examine the fairness in formulating and applying JCE.¹⁵² It will critique the literature and outline eight different flaws.¹⁵³ Secondly, it will reveal new material regarding post-WWII case law concerning the CIL existence of JCE.¹⁵⁴ Thirdly, it will examine whether there is an emergence of a specific legal culture at the ICTY in light of the discussion in section 1.2.3.¹⁵⁵

¹⁵² Parts 2 and 3.

¹⁵³ Parts 2 and 3.

¹⁵⁴ Part 2, chapter 5.

¹⁵⁵ Chapter 10.

**PART 2: EXERCISING DISCRETION IN
FORMULATING JCE**

PART 2: INTRODUCTION

Having explained the fairness of discretion in Part 1, Part 2 will now apply this understanding to examine the formulation of JCE. Chapter 2 begins by explaining how JCE was formulated at the ICTY. It is divided in two sections. Section 2.1 examines the definition of commission at the ICTY and explains prosecutorial theories of commission and the *Tadic* Trial Chamber reasoning. Section 2.2 then provides the analysis regarding the exercise of discretion by the *Tadic* Appeals Chamber. It outlines the prosecutorial grounds of appeal followed by a brief overview of the difference between the trial and appellate chamber reasoning. It then carries out a brief review of the JCE-based literature to establish how the scholarship has approached the question of fairness.

Outlining JCE

2.1 THE CONTEXT OF *TADIC* AND COMMISSION

2.1.1 Article 7(1) and commission

‘Commission’ was not an elaborately defined mode of liability at the ICTY. The Statute only provided one article concerning commission, article 7(1). It read:

‘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.’ (Emphasis added).

This rule was not subject to any lengthy consultative process during the drafting phase.¹ It resulted from one draft only which was subsequently approved by the Security Council.² Some States had initially proposed that the theory of conspiracy be included in this article.³ However, this proposal was rejected. None of the other articles in the Statute or the *travaux preparatoires* further elaborated the meaning of commission. The ICTY Statute therefore presented the judges with a singular article comprising of five distinct forms of liability, one of which was commission.

2.1.2 Facts and the Prosecutor’s theory of commission

The facts of *Tadic* concerned an armed conflict that took place in Prijedor, a Municipality located in Bosnia and Herzegovina.⁴ This region witnessed attacks between Bosnian Muslims, Bosnian Croats and Bosnian Serbs.⁵ According to the ICTY, these attacks were driven by a policy of inhumane acts against the non-Serb population.⁶ In one incident, two different groups had attacked two villages in this Municipality.⁷ The groups were of a small scale and the prosecutor had not discussed whether any agreement bound the members of the group.⁸ The Prosecutor had simply referred to ‘armed Serbs’⁹ that were acting as ‘groups’¹⁰ in its indictment. As part of the attack, one of the groups entered the village of Sivci while the other attacked the village of Jaskici. Tadic was a member of both groups.¹¹

¹ Powderly (2010) 18 and 23: ‘ICTY Statute was laconic and not subject to wide-range consulting process.’

² Zacklin (2004) 361: ‘The whole Statute was approved after only one draft.’

³ The US, France, Canada, Italy and Slovenia proposed to include conspiracy. This proposal was rejected, see Morris and Scharf (1995) 384-387.

⁴ Bosnia and Herzegovina is one of the six Republics of the Former Yugoslavia.

⁵ This occurred between May to December 1992. For more about this conflict and its origin, see *Stakic* Trial Judgment, paras. 21-67.

⁶ *Tadic* Trial Judgment, para. 660; *Tadic* Appeals Judgment, para. 230.

⁷ This occurred in June 1992.

⁸ *Tadic* Second Amended Indictment, para. 2.6.

⁹ *Ibid* 12.

¹⁰ *Tadic* Initial Indictment, paras. 7.1 and 8.1.

¹¹ Second Amended Indictment, para. 12; *Tadic* Trial Judgment, para. 373; *Tadic* Appeals Judgment, para. 181.

The armed group that had entered Jaskici committed several criminal acts, among which it beat residents and killed five male villagers.¹² In relation to the latter, the indictment had accused Tadic of the killings.¹³ This accusation was not based on any evidence that Tadic was a physical perpetrator of the killings.¹⁴ In fact, the Prosecutor noted ‘that there was no direct evidence that the accused (Tadic) shot and killed the men who were murdered.’¹⁵ Yet, as explained in its closing brief, Tadic was ‘guilty of those murders’¹⁶ because:

‘He was *acting in concert* with the other Serbs there that day, they were there for a *common purpose*, to remove the men from that village. Killing Muslim men in villages that were cleansed (...) was part of the overall persecution that was going on (...) in which the accused was fully participating, committing, aiding, abetting, encouraging, ordering. He is guilty of the murders as well as the beatings that occurred there that day.’¹⁷

According to this paragraph, Tadic was liable for ‘acting in concert’ and according to a ‘common purpose.’ Yet, such theories were not included in the ICTY Statute. Regardless, in subsequent arguments, the Prosecutor explained that the ‘statutory language (of article 7(1)) is such as to encompass *all forms of liability* (...).’¹⁸ It supported this view stating that in ‘the findings phase, the issue should be whether the accused’s acts render him liable under any theory of liability, not that the prosecution must select a theory and then other theories *are foreclosed*.’¹⁹ This broad perception of commission was based on its understanding of the Statute. This is reflected in the Prosecutor’s comments that:

‘Any participation which contributes to the preparation, commission of the offense renders him criminally liable under the *broad* language of the statute. To assist you in your deliberations we have suggested various bases for liability, but those suggestions are in no way *limiting*. Depending on your assessment of the evidence, you may have *different views of liability*.’²⁰

These statements indicate that the Prosecutor refrained from providing a specific definition of commission. Rather, he engaged in a broad discussion of article 7(1) and culpability, noting how it is possible to exercise discretion to include the theory of common plan under article 7(1).

2.1.3 Tadic Trial Chamber theory of commission

Following this interpretation of article 7(1), the Trial Chamber provided its own construction of the article. It was the first chamber to do so at the ICTY²¹ and therefore had a central role to play in interpreting commission and the other forms of liability under article 7(1). As part of the ICTY Structure, the Trial Chamber was not bound by the prosecutor’s theory. It could

¹² Second Amended Indictment, Count 29.

¹³ *Tadic* Prosecution Closing brief, 81 and 88; also referred to in *Tadic* Trial Judgment, para. 343.

¹⁴ *Ibid* 81 and 88; Count 29 of the second amended Indictment, 1999.

¹⁵ *Ibid* 81.

¹⁶ *Ibid* 81. The charges were a grave breach of the Geneva Conventions (wilful killing), murder as a war crime and murder as a crime against humanity, see counts 29, 30 and 31 of the second amended indictment 1999.

¹⁷ *Tadic* Prosecution Closing Brief, 81 (emphasis added).

¹⁸ *Ibid* 20 (emphasis added).

¹⁹ *Ibid*.

²⁰ *Ibid* (emphasis added).

²¹ *Tadic* Trial Judgment, para. 662. The case prior to *Tadic* was *Erdemovic*.

exercise its discretion by either rejecting the theory of common plan or adopting it if it chose to.

Before making its choice, it firstly set out to determine whether Tadic bore any direct responsibility for the killings of the five persons. It reviewed the evidence and agreed that Tadic ‘was a member of the group of armed men that entered the village of Jaskici, searched it for men, seized them, beat them, and then departed with them and that after their departure the five dead men named in the Indictment were found lying in the village (...).’²² It further agreed that there was a common policy to commit inhumane acts which Tadic had contributed to.²³ Nevertheless, it could not attribute the deaths to Tadic because ‘nothing was known as to who shot the five men and under what circumstances.’²⁴ It also underlined that the killings may have been committed by the Serbian soldiers who were involved in an ethnic cleansing operation in the other village, Sivci.²⁵ Consequently, there may not have been a common policy to kill at all.²⁶ Given these doubts coupled with the lack of evidence, Tadic was acquitted of the charges. As a result, the Trial Chamber did not discuss any matters pertaining to the law of joint enterprise or any other theory of culpability that could find Tadic guilty for the killings. This conclusion may suggest that the Trial Chamber had not exercised any form of discretion. However, this finding is not reflective of the entire judgment.

Besides charging him with the killings of the five men, the indictment had accused Tadic of perpetrating and participating in several other crimes.²⁷ In determining the levels of culpability for these crimes, the Trial Chamber was called upon to exercise its discretion in interpreting article 7(1) and its forms of liability. Its interpretation drew support from the Prosecutor’s view of this article’s broad nature.²⁸ It interpreted article 7(1) in a general manner rather than formulate a specific theory of liability related to any of its five forms. It conducted a survey of customary international law (CIL) to assist its evaluation of appropriate theories of responsibility that befit article 7(1).²⁹

It began by examining the jurisprudence of previous ICTs that had discussed individual criminal responsibility in ICL. It scrutinized the case law and statutory law³⁰ of the Nuremberg³¹ and Tokyo Trials³² and analysed the interpretation of forms of liability found in

²² Ibid 373.

²³ Ibid 714, 730, 735 and 738.

²⁴ Ibid 373.

²⁵ Ibid.

²⁶ Ibid.

²⁷ Second Amended Indictment includes 34 counts, paras. 4-11. Count 1: direct perpetration and participation in acts of persecution (killings, torture, sexual assault); Counts 2-4: committed forcible sexual intercourse; Counts 5- 11, 24-28 and 29-34: participation in killing of civilians; Counts 5-11: participation in inhumane acts (sexual acts); Counts 12-17: participation in beatings of prisoners in Omarska camp; Counts 18-20 and 21-23: participation in beatings and abuse of prisoners in Omarska camp.

²⁸ *Tadic* Trial Judgment, para. 670.

²⁹ Ibid 669.

³⁰ Ibid 664 and 674. It noted that the most relevant sources for the determination of culpability were the Nuremberg Trials.

³¹ The trials consist of the 177 defendants who were tried under Control Council Law No. 10. They are either referred to as the Nuremberg Trials, the subsequent proceedings, the American Military Tribunals or the United States Military Tribunals. In this thesis, I have adopted Heller’s usage of the term ‘Nuremberg Military Tribunals (NMT),’ see Heller (2011) 1.

³² This Tribunal is known as the International Military Tribunal of the Far East (IMTFE). It was considered a US Military Tribunal that tried 28 defendants, see Boyster and Cryer (2008).

international treaties. These included Article 4 of the Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment³³ and Article 3 of the International Convention on the Suppression and Punishment of the Crime of Apartheid.³⁴ Both articles are concerned with the perpetration of crimes committed in groups. On the basis of this law, the Trial Chamber acknowledged that complicity is an appropriate basis for criminal culpability.³⁵ It stated that this law has a credible foundation in CIL and reflects participation in the various ways as provided for in article 7(1). However, it left the question of whether complicity refers either to principalship or accessorial liability unanswered.³⁶ It established that its role was to determine whether the accused, in light of his criminal participation, was ‘a principal, an accessory or a participant.’³⁷ This finding indicates that its concern was centred more on criminal participation rather than the meaning of commission.

Its acceptance that the law of complicity significantly influences the meaning of article 7(1) led it to embrace the notions of enterprise,³⁸ common design,³⁹ common purpose⁴⁰ and common enterprise.⁴¹ Citing widely from the Nuremberg Military Tribunals,⁴² it carved out a definition of participation in a common plan based on intent which involves awareness of the act of participation coupled with a conscious decision to participate by planning, instigating, ordering, committing, or otherwise aiding and abetting in the commission of a crime.⁴³ It added that a contribution to the crime is necessary with the level of contribution having a direct and substantial effect on the commission of the illegal act.⁴⁴ Its definition of a complicity/common plan theory was not restricted to any pre-arranged plan, prior arrangement or agreement⁴⁵ and it may apply to concentration camp cases.⁴⁶ With the law set out in this manner, it proceeded to examine the charges.

The Trial Chamber convicted⁴⁷ Tadic of several charges mentioned in the indictment.⁴⁸ Four were on the basis that the latter had intentionally assisted in a common criminal purpose.⁴⁹ The background to these convictions involved beatings of prisoners in camps. The common plan was defined as the infliction of physical suffering upon them.⁵⁰ The charges involved

³³ This article uses the phrase ‘complicity or participation in torture.’

³⁴ This article uses the phrase ‘participate in, directly incite, or conspire in [or] . . . [d]irectly abet, encourage or cooperate in the commission of the crime.’

³⁵ *Tadic* Trial Judgment, paras. 666, 667, 668, 670, 674, 684, 687 and 688. It took into account the law of French, Norwegian, Dutch and British war crimes trials.

³⁶ Complicity may refer either to a form of aiding or abetting or as a theory that imposes liability as a principal, see Smith (1991). Chapter 4 will explore this discussion in detail when comparing the usage of complicity by the Trial Chamber with the terminologies used by the *Tadic* Appeals Chamber.

³⁷ *Tadic* Trial Judgment, para. 669.

³⁸ *Ibid* 665 and 676.

³⁹ *Ibid* 668 and 682.

⁴⁰ *Ibid* 685 and 730.

⁴¹ *Ibid* 685.

⁴² *Ibid* 674-689.

⁴³ *Ibid* 674.

⁴⁴ *Ibid* 688, 689, 692.

⁴⁵ *Ibid* 677.

⁴⁶ *Ibid* 676.

⁴⁷ Tadic was convicted of several crimes, *inter alia*, participation in acts of persecution (paras. 714 and 718); participation in inhumane acts (paras. 726 and 730); beatings of prisoners (paras. 735, 738, 742, 752 and 754); participation in cruel treatment (paras. 762 and 763), participation in inhumane acts through beatings and forcible removals (para. 764).

⁴⁸ See n. (27).

⁴⁹ *Tadic* Trial Judgment, paras. 726, 730, 735 and 738.

⁵⁰ *Ibid* 726 and 735 with the latter noting the infliction of severe physical suffering.

cruel treatment as a grave breach⁵¹ of the Geneva Conventions and inhumane treatment as a crime against humanity.⁵² For two charges of cruel treatment, the Trial Chamber held that in some instances, he was the direct perpetrator of the beatings.⁵³ In the two other applications of the common plan theory, the Trial Chamber underlined that there was ‘no direct evidence that the accused (had) physically participated in the beating of prisoners.’⁵⁴ Yet the fact that he had ‘intentionally assisted directly and substantially in the common purpose of the group to inflict severe physical suffering’⁵⁵ meant that he was individually responsible for aiding and abetting in the commission of the crimes (cruel treatment under the Geneva Conventions,⁵⁶ inhumane treatment as a crime against humanity).⁵⁷

Drawing from this analysis, the *Tadic* Trial Chamber did not refrain from exercising its discretion to consider the common plan theory and complicity although article 7(1) did not refer to them. It had therefore not limited its theory of culpability to direct perpetratorship (or aiding and abetting) but had included the notion of common purpose whereby crimes are committed by a plurality of persons. The Trial Chamber had therefore exercised some form of discretion. However, it had not explicitly formulated a doctrine of JCE or even labelled its theory of common plan as a theory within the concept of commission as found in article 7(1). Its common plan doctrine was based on a plausible interpretation of article 7(1) alone.

2.2 TADIC APPEALS CHAMBER JUDGMENT: FORMULATING JCE

Following the acquittal for the killings, the Prosecutor appealed on two grounds.⁵⁸ Its appeal may be seen as providing the impetus for formulating JCE.

Firstly, it argued that the Trial Chamber had wrongly applied the test for evaluating evidence (standard of proof of beyond reasonable doubt). Secondly, the Prosecutor argued that the Trial Chamber had incorrectly determined the scope of the common purpose doctrine.⁵⁹ The scope of the common plan doctrine, in its view,⁶⁰ should extend beyond the crimes committed in the common plan. It should include the terms ‘natural and probable’ so that ‘if a person knowingly participates in a criminal activity with others, he or she will be liable for all illegal acts that are *natural and probable* consequences of that common purpose.’⁶¹ It therefore did not matter whether Tadic was personally responsible for the killings of the five villagers. So long as the Appeals Chamber could determine that the group to which Tadic belonged had perpetrated the crime, then Tadic could be held liable for these crimes since killing is a natural and probable consequence of a common plan that involves committing inhumane acts against non-Serbs. This was an innovative argument at the ICTY that the judges had not previously used. The *Tadic* Defence Brief, in turn, argued that criminal responsibility can only be established if Tadic ‘personally committed the crime, that he agreed to it in an

⁵¹ Counts 10 and 13 of the Indictment, see *Tadic* Trial Judgment, paras. 726 and 730 respectively.

⁵² Counts 11 and 14 of the Indictment, see *Tadic* Trial Judgment, paras. 735 and 738 respectively.

⁵³ *Tadic* Trial Judgment, paras. 726 and 730.

⁵⁴ *Ibid* 726, 730, 735 and 738

⁵⁵ *Ibid* 735 and 738.

⁵⁶ *Ibid* 726 and 735.

⁵⁷ *Ibid* 730 and 738.

⁵⁸ The Prosecutor’s appeal concerned several other legal matters. However, these are not the subject of review in this thesis.

⁵⁹ *Tadic* Prosecution Brief in Reply.

⁶⁰ *Ibid* 3.19.

⁶¹ *Ibid* 3.17. (emphasis added)

explicit manner, that he was an instigator or that he was an accomplice.’⁶² This argument implicitly suggests that the judges cannot exercise any discretion.

On the basis of these prosecutorial and defence arguments, the Appeals Chamber proceeded to review the Trial Judgment. However, it faced two difficulties. Firstly, the ICTY Statute had not set out standards of review for the Appeals Chamber. The Statute only states that the Appeals Chamber can hear an appeal on a question of law that invalidates the decision or an error of fact that occasions a miscarriage of justice.⁶³ It does not refer to an erroneous exercise of discretion. The second difficulty was that the *Tadic* Appeals bench was the first chamber to hear an appeal at the ICTY.⁶⁴ At that time, there was no law covering the circumstances under which an appeals chamber could review a judgment for error. These errors were only explained in a post-*Tadic* period as errors of law, fact, procedure or discretion.⁶⁵ In this regard, the *Tadic* Appeals Judgment had not set out how it would address this appeal on the basis of errors. It referred neither to an exercise of discretion by the Trial Chamber nor to its unfairness. Despite this absence of discussion, we can infer strongly that the appeals chamber considered there to be two errors:⁶⁶ an error of fact based on the Prosecutor’s appeal pertaining to the evidence and an error of law based on the state of the law regarding commission and the common plan doctrine.

The Chamber firstly addressed the error of fact through its own evidentiary assessment. It held that the Trial Chamber had misapplied the test of proof beyond reasonable doubt.⁶⁷ The Trial Chamber had not referred to any other witnesses suggesting responsibility for the killings by another armed group.⁶⁸ The Appeals Chamber argued that the only reasonable conclusion was that the armed group to which Tadic belonged was responsible for the killing. It thus rejected any contention that the killings were the result of an ‘unforeseen and unauthorized act’⁶⁹ of the Serbian soldiers who entered Sivci. Since, it had reached a different conclusion to that of the Trial Chamber for the killings, it could examine whether Tadic was responsible for these crimes as had been argued by the Prosecutor. It then exercised its discretion in relation to the error of law.

It examined the Trial Chamber theory of common plan which it had used as a basis for conviction. The Appeals Chamber’s response was not to overturn this law. Instead, it accepted the need for a common plan doctrine but chose to use different language. It expressly embraced the phrase ‘common plan’ and created its own terminology in the form of JCE. It also focused on a specific form of liability under which JCE can be categorised. It argued that JCE is a form of commission.⁷⁰ It ‘encompasses three distinct categories of collective criminality:’⁷¹ the first category (JCE 1), the second category (JCE 2) and the third category of JCE (JCE 3). The judges argued that this theory of liability is based on ‘international criminal responsibility (for) actions perpetrated by a collectivity of persons in

⁶² Ibid 3.4. (Defence reply not available).

⁶³ Article 25 of ICTY Statute.

⁶⁴ *Tadic* Appeals Judgment, para. 1. The first case was the *Erdemovic* case. No standards of review had been set out by the judges at that time.

⁶⁵ *Furundzija* Appeals Judgment, paras. 34-38; *Kvocka* Appeals Judgment, para. 18.

⁶⁶ The errors of law and fact involved an exercise of discretion: fact-finding and formulating the applicable law respectively.

⁶⁷ *Tadic* Appeals Judgment, para. 183.

⁶⁸ Ibid 182.

⁶⁹ Ibid 184.

⁷⁰ *Tadic* Appeals Judgment, paras. 188, 190.

⁷¹ Ibid 195 and 230.

furtherance of a common criminal design.⁷² JCE 1 and 2 were set out as two different factual variants of the common plan theory⁷³ with the former applying to a common criminal plan in general and the latter applying to a common criminal plan in the context of concentration camp cases only. JCE 3, on the other hand, was a theory of liability that addressed responsibility for crimes committed outside of the common plan. We can therefore conclude that the three forms (JCE 1, 2 and 3) were theories of commission formulated through discretion.

This exercise of discretion reveals a similarity with the Trial Chamber's exercise of discretion but also three differences. The similarity is the acknowledgment by both chambers of a need for a common plan theory. The first difference is that, while the Appeals Chamber preferred to employ the terms JCE 1 and 2, as two different factual variants, the Trial Chamber was content with the semantic formulation of 'common plan or doctrine or enterprise.' This difference however, is merely a choice of terminology. The common plan theory and common purpose doctrine are widely accepted terminologies for JCE 1 and 2⁷⁴ according to established literature. The second difference concerns the association of the common plan doctrine with a specific form of liability. While the Trial Chamber accepted the common plan doctrine as a relevant theory of culpability for article 7(1) in general, the Appeals Chamber underlined that JCE is a specific theory of commission and not a general theory of liability arising under article 7(1). The third difference lies in the scope of the doctrine. The appellate exercise of discretion extended the application of commission beyond the scope of the common plan by referring to JCE 3 while the Trial Chamber did not.

This preliminary assessment indicates that while both chambers had exercised discretion, the appellate form of discretion differs in scope from that of the Trial Chamber. To explore the fairness of discretion, the next section will outline extracts from the *Tadic* Appeals Judgment. As mentioned above, the judgment did not explicitly refer to an exercise of discretion or fairness when formulating JCE. However, the following extracts reveal key discussions related to the departure from statutory language, legal process and rights and discussions related to the substance of commission.⁷⁵ In this regard, they indicate how the exercise of discretion is related to criteria concerned with fairness. The *Tadic* Appeals Judges can be seen as identifying three different factors.

2.2.1 Appellate exercise of discretion

These three factors are culpability (fair labelling implicitly), the principle of individual criminal responsibility and customary international law (CIL).⁷⁶

⁷² Ibid 193.

⁷³ Section 2.2.2 explains how they differ. Some see this as controversial, see n. (108).

⁷⁴ *Odjanic* Decision on JCE, para. 36; ICTY Sixth Annual Report, see section 2.2.2 below. This does not apply to JCE 3.

⁷⁵ See Part 1.4.

⁷⁶ This is not in the same order as the Appeals Judgment.

Culpability

At several points, the judges referred to culpability and connotations of culpability such as responsibility and liability.⁷⁷ Through these discussions, they emphasised the need to address collective criminality. They stated:

‘all those who have engaged in serious violations of international humanitarian law, whatever the manner in which they may have perpetrated, or participated in the perpetration of those violations, must be brought to justice. (The Statute) does not exclude those modes of participating in the commission of crimes which occur where several persons having a common purpose embark on criminal activity that is then carried out either jointly or by some members of this plurality of persons. Whoever contributes to the commission of crimes by the group of persons or some members of the group, in execution of a common criminal purpose, may be held to be criminally liable, subject to certain conditions (...).’⁷⁸

In continuing its culpability-led analysis, the judges referred explicitly to the role that the moral gravity of crimes plays in determining the degree of culpability:

‘Although only some members of the group may physically perpetrate the criminal act (murder, extermination, wanton destruction of cities, towns or villages, etc.), the participation and contribution of the other members of the group is often vital in facilitating the commission of the offence in question. It follows that the *moral gravity* of such participation is often no less – or indeed no different – from that of those actually carrying out the acts in question.’⁷⁹

This focus on the moral gravity of crimes led the judges to question how those who commit or participate in crimes, as part of the common plan,⁸⁰ ought to be labelled and how the five forms of liability, as mentioned in article 7(1), should differ in terms of degrees of culpability:

‘(...) to hold criminally liable as a perpetrator only the person who materially performs the criminal act would disregard the role as co-perpetrators of all those who in some way made it possible for the perpetrator physically to carry out that criminal act. At the same time, depending upon the circumstances, to hold the latter liable only as aiders and abettors might understate the degree of their criminal responsibility.’⁸¹

NPSC

Having discussed the need to address culpability, they underlined the need for *nulla poena sine culpa* (NPSC). They stated that ‘the foundation of criminal responsibility is the principle

⁷⁷ Ibid 185, 186, 187, 192, 193, 196, 205 and 208. Chapter 3 will explain how these are connotations of liability based on scholarly discourse.

⁷⁸ Ibid 190.

⁷⁹ Ibid 191.

⁸⁰ Reference to ‘moral gravity of crimes’ applies only to the formulation of JCE 1 and 2, see sections 2.2.2 and 2.3.2.

⁸¹ *Tadic Appeals Judgment*, para. 192.

of personal culpability: nobody may be held criminally responsible for acts or transactions in which he has not personally engaged or in some other way participated.⁸²

However, while they referred to NPSC, they did not substantiate it beyond this statement and further failed to examine how JCE 1 and 3 conform to NPSC requirements.

CIL

After explaining the need for a common plan theory and referring to NPSC, the judges then argued that JCE, although not found in the Statute, is ‘firmly established in customary international law.’⁸³ It is generally acknowledged that CIL is established by citing proof of two elements, namely state practice and *opinio juris*.⁸⁴ The former consists of evidence of actual practice of states⁸⁵ while the latter refers to the practice being followed out of a belief of legal obligation.⁸⁶ In the *Tadic* Appeals Judgment, there was no elaborate definition of state practice or *opinio juris*. CIL was simply defined as being ‘discernible on the basis of various elements: chiefly case law and a few instances of international legislation.’⁸⁷ With this formulation of CIL, the judgment supported the three forms of JCE on the basis of case law derived from the Nuremberg Military Tribunals (NMT),⁸⁸ the International Military Tribunal (IMT)⁸⁹ and post-World War II domestic systems.

In support of JCE 1, it cited sixteen cases of state practice.⁹⁰ This included one NMT case,⁹¹ four British Military Court Trial cases,⁹² one Canadian Military Court case,⁹³ five Italian post-WW II cases⁹⁴ and five German post-WW II cases.⁹⁵

⁸² *Tadic* Appeals Judgment, para. 186.

⁸³ *Ibid* 220.

⁸⁴ *NCS* case, ICJ, para. 44 and *Continental Shelf* case, ICJ, para. 27, noting that both are required. Chapter 5.3 will explain all eligible CIL formulations.

⁸⁵ *Continental Shelf* case, ICJ, para. 27: ‘It is of course axiomatic that the material of customary international law is to be looked for primarily in the actual practice and *opinio juris* of States.’

⁸⁶ *NCS* case, ICJ, paras. 77.

⁸⁷ *Tadic* Appeals Judgment, para. 194.

⁸⁸ See n. (31).

⁸⁹ The IMT is also known as the Nuremberg War Crimes Trial. It is the trial of twenty-two high ranking Nazi defendants, see Blue Series at http://www.loc.gov/rr/frd/Military_Law/NT_major-war-criminals.html, last accessed 10th November 2015.

⁹⁰ *Tadic* Appeals Judgment, ICTY, paras. 197-201. Decision of 10 August 1948 of the German Supreme Court for the British Zone in *K. and A.*, in *Entscheidungen des Obersten Gerichtshofes für die Britische Zone in Strafsachen*; Decision of 22 February 1949 in *J. and A.*, *ibid.*; Decision of the District Court (*Landgericht*) of Cologne of 22 and 23 January 1946 in *Hessmer et al.*, in *Justiz und NS-Verbrechen*; Decision of 21 December 1946 of the District Court (*Landgericht*) of Frankfurt am Main in *M. et al.* and the Judgement of the Court of Appeal (*Oberlandesgericht*) of 12 August 1947 in the same case; Decision of the District Court of Braunschweig of 7 May 1947 in *Affeldt*.

⁹¹ *Ibid* 200: *Einsatzgruppen* case.

⁹² *Ibid* 197-199: *Almelo Trial*, *Schonfeld and others*, *Jepsen et al.* and *Ponzano* case.

⁹³ *Ibid* 197: *Hoelzer et al.*

⁹⁴ *Ibid* 201, fn. 246: *Annalberti et al.*; *Rigardo et al.* case; *P.M. v. Castoldi*; *Imolesi et al.*; *Ballestra*.

⁹⁵ *Ibid* 201, fn. 247: Decision of *K. and A.*, in *Entscheidungen des Obersten Gerichtshofes für die Britische Zone in Strafsachen*; Decision of 22 February 1949 in *J. and A.*, *ibid.*; Decision of the District Court (*Landgericht*) of Cologne of 22 and 23 January 1946 in *Hessmer et al.*, in *Justiz und NS-Verbrechen*; Decision of 21 December 1946 of the District Court (*Landgericht*) of Frankfurt am Main in *M. et al.* and the Judgement of the Court of Appeal (*Oberlandesgericht*) of 12 August 1947 in the same case; Decision of the District Court of Braunschweig of 7 May 1947 in *Affeldt*.

For JCE 3, it cited seventeen cases.⁹⁶ These consisted of two British Military Court Trial cases,⁹⁷ one US Military Court case⁹⁸ and fourteen post-WW II Italian cases.⁹⁹

In addition, it referred to treaty law which included the International Criminal Court (ICC) Statute (which had not yet come into force) and the International Convention for the Suppression of Terrorist Bombing.¹⁰⁰ It considered the ICC Statute as representative of *opinio juris* because it was supported by many States and must be taken as being their legal position.¹⁰¹

By using these three factors, the judges formulated the three forms of JCE: JCE 1, JCE 2 and JCE 3. In the following paragraphs, I will outline the general structure of these forms and their elements (*actus reus* and *mens rea*).¹⁰²

2.2.2 Elements of JCE 1, 2 and 3

General structure

The general structure of JCE is that it consists of:

i. *A plurality of persons.* They need not be organised in a military, political or administrative structure, (and comprises of)

ii. *The existence of a common plan, design or purpose which amounts to or involves the commission of a crime provided for in the Statute.* There is no necessity for this plan, design or purpose to have been previously arranged or formulated. The common plan or purpose may materialise extemporaneously and be inferred from the fact that a plurality of persons acts in unison to put into effect a joint criminal enterprise.¹⁰³

*The first category: JCE 1*¹⁰⁴

‘The first category (of the common plan) is represented by cases where all co-defendants, acting pursuant to a common design, possess the same criminal intention.’¹⁰⁵

This paragraph confirms that the *mens rea* for JCE 1 is intention.¹⁰⁶

⁹⁶ Ibid 205, 207, 215-219.

⁹⁷ Ibid 205, 207, fn. 255: *Essen Lynching* case and para. 210, fn. 263 referring to fn. 240 *Trial of Feurstein and others*, (*Ponzano* case).

⁹⁸ Ibid 205, 210, footnote 261-267: *Borkum Island* case.

⁹⁹ Ibid 215-219: *D’Ottavio et al*; *Aratano et al.*; *Tossani*; *Ferrida*; *Bonati et al.*; *Mannelli* case; *Peveri* case; *P.M. v. Minapo*; *Montagnino*; *Solesio et al.*; *Minapò et al.* and *Antonini* case, *Torrazzini* Judgment; *Palmia* Judgment.

¹⁰⁰ Ibid 221.

¹⁰¹ Ibid 223.

¹⁰² The *actus reus* is known as the conduct element or objective element. The *mens rea* is known as the fault element or subjective element, see Simester and Sullivan (2010) 67 and 125; Simester (2011) 381.

¹⁰³ *Tadic* Appeals Judgment, para. 227.

¹⁰⁴ Also known as the basic form, see *Krnojelac* Appeals Judgment, para. 83.

¹⁰⁵ *Tadic* Appeals Judgment, para. 196.

¹⁰⁶ Also confirmed by para. 220: ‘all participants in the common design possess the same criminal intent to commit a crime (and one or more of them actually perpetrate the crime, with intent).’

*The second category: JCE 2*¹⁰⁷

JCE 2, as the second category, is merely a variant of the first.¹⁰⁸ It embraces the notion of a common criminal plan within the context of concentration camp cases only. It applies ‘to instances where the offences charged were alleged to have been committed by members of military or administrative units such as those running concentration camps; i.e., by groups of persons acting pursuant to a concerted plan.’¹⁰⁹

The *mens rea* element for JCE 2 differs from JCE 1 in that it ‘comprise(s) (of both): (i) knowledge of the nature of the system and (ii) the intent to further the common concerted design to ill-treat inmates.’¹¹⁰

Actus reus for JCE 1 and 2

The *actus reus* for both forms of JCE¹¹¹ is based on a causation rationale.¹¹² However, causation in this instance is not defined according to a but-for causation theory whereby the offence would not have occurred but for the accused’s participation.¹¹³ Causation is based on ‘*participation of the accused in the common design* (that may involve) the perpetration of one of the crimes provided for in the Statute. This participation need not involve commission of a specific crime under one of those provisions (for example, murder, extermination, torture, rape, etc.), but may take the form of assistance in, or contribution to, the execution of the common plan or purpose.’¹¹⁴ In a subsequent paragraph, the judgment substantiated this *actus reus* by stating that ‘(...) it is sufficient for the participant to perform acts that *in some way* are directed to the furthering of the common plan or purpose.’¹¹⁵ In relation to JCE 2, the *actus reus* is ‘the active participation in the enforcement of a system of repression, (which can) be inferred from the position of authority and the specific functions held by each accused.’¹¹⁶

Given these two descriptions, JCE 2 can be subsumed under JCE 1. As a factual variant, it only differs from JCE 1 in that it applies to concentration camp cases only and requires an additional *mens rea* of knowledge. This thesis will therefore not analyse the fairness of JCE 2.¹¹⁷ The analysis of the common plan theory is restricted to JCE 1.

¹⁰⁷ Also known as the concentration camp cases, see *Kvočka* Appeals Judgment, para. 82.

¹⁰⁸ *Tadić* Appeals Judgment, para. 203. Some scholars suggest that JCE 2 is in fact different to JCE 1, see Van Der Wilt (2007) 97; Ambos (2007) 172.

¹⁰⁹ *Ibid* 202.

¹¹⁰ *Ibid* 203.

¹¹¹ The *Tadić* Appeals Judgment stated that this definition applies to the three forms of JCE. However, this is a controversial point. This thesis will apply this definition of the *actus reus* to the first two forms and will explore in greater depth the *actus reus* of JCE 3 below.

¹¹² *Ibid* 199: ‘appear broadly to link the notion of common purpose to that of causation.’

¹¹³ *Ibid* 199.

¹¹⁴ *Ibid* 227.

¹¹⁵ *Ibid* 229 (iii) (emphasis added).

¹¹⁶ *Ibid* 203.

¹¹⁷ This thesis acknowledges that some consider JCE 2 to be different to JCE 1, see fn. (108).

*The third category: JCE 3*¹¹⁸

In contrast to JCE 1, JCE 3 captures liability for ‘a crime committed by another member of a group and not envisaged in the criminal plan.’¹¹⁹ It is an extended version of JCE 1, requiring proof of the latter. It is thus for the Prosecutor to firstly prove that the accused had the intention to participate in the common plan and further it.

The judges explained that this form of criminal responsibility is needed to address ‘situations of disorder where multiple offenders act out a common purpose, where each of them commit offences against the victim, but where it is unknown or impossible to ascertain exactly which acts were carried out by which perpetrator, or when the causal link between each act and the eventual harm caused to the victims is similarly indeterminate.’¹²⁰

However, having explained the need for such a theory in this manner, the judges paid less attention to the certainty of its elements. They referred to several prosecutorial extracts¹²¹ in the absence of available judgments¹²² and made ‘inferences’ and ‘assumptions’ about what CIL state practice may have been.¹²³ Additionally, they explicitly acknowledged that in some of the cases, the *mens rea* was not ‘clearly spelled out.’¹²⁴ Such an approach led to uncertainty regarding three areas: the *mens rea*, the *actus reus* and the case law cited by the judges.

Regarding the *mens rea*, the judges firstly stated that ‘(c)riminal responsibility may be imputed to all participants within the common enterprise (for the collateral offence) where its occurrence was both a *predictable consequence* of the execution of the common design and the accused was either *reckless or indifferent* to that risk.’¹²⁵ The same sentence contains both an objective and a subjective test. They then argued that JCE 3 requires ‘*foreseeability* that criminal acts other than those envisaged in the common criminal design *are likely to be* committed by other participants in the common design.’¹²⁶ Finally in its two concluding paragraphs and a separate paragraph which summarises the elements, other forms of *mens rea* can be noted. It is worth quoting these at length:

‘Accordingly, it would seem that, with regard to the *mens rea* element required for the criminal responsibility of a person for acts committed within a common purpose but not envisaged in the criminal design, (the relevant cases) either applied the notion of an *attenuated form of intent (dolus eventualis)* or required a *high degree of carelessness (culpa)*.’¹²⁷

¹¹⁸ Also known as the extended form of JCE, see *Kvočka Appeals Judgment*, para. 83.

¹¹⁹ *Tadić Appeals Judgment*, para. 218.

¹²⁰ *Ibid* 205.

¹²¹ *Ibid* 208, referring to the Prosecutor Major Tayleur’s reasoning, para. 210: referring to the Prosecutor’s theory of common design.

¹²² *Ibid* 212: ‘no judge Advocate stated the law;’ para. 218: ‘*mens rea* not clearly spelt out.’

¹²³ *Ibid* 208: ‘assumed that the court accepted the prosecution arguments;’ para. 209: ‘warranted to infer from arguments of parties;’ para. 209: ‘inference seems justified;’ para. 212: ‘it may be fairly assumed;’ para. 213: ‘it may be inferred from this case;’ ‘presumably;’ para. 218: ‘it may nevertheless be assumed;’ para. 219: ‘accordingly, it would seem that.’

¹²⁴ *Ibid* 218.

¹²⁵ *Ibid* 204.

¹²⁶ *Ibid* 206.

¹²⁷ *Ibid* 219.

‘With regard to the third category of cases, it is appropriate to apply the notion of “common purpose” only where the following requirements concerning *mens rea* are fulfilled: (i) the intention to take part in a joint criminal enterprise and to further – individually and jointly – the criminal purposes of that enterprise; and (ii) the *foreseeability* of the possible commission by other members of the group of offences that do not constitute the object of the common criminal purpose. Hence, the participants must have had in mind the intent, for instance, to ill-treat prisoners of war (even if such a plan arose extemporaneously) and one or some members of the group must have actually killed them. In order for responsibility for the deaths to be imputable to the others, however, everyone in the group *must have been able to predict* this result. It should be noted that *more than negligence* is required. What is required is a state of mind in which a person, although he did not intend to bring about a certain result, *was aware that the actions of the group were most likely to lead to that result* but nevertheless *willingly took* that risk. In other words, the so-called *dolus eventualis* is required (also called “*advertent recklessness*” in some national legal systems).’¹²⁸

‘responsibility for a crime other than the one agreed upon in the common plan arises only if, under the circumstances of the case, (i) it was foreseeable that such a crime *might be perpetrated* by one or other members of the group and (ii) the accused *willingly took* that risk.’¹²⁹

On the basis of these paragraphs, if we were to list the *mens rea* requirements for JCE 3, we are left with: a ‘predictable’ event, ‘recklessness,’ ‘indifference,’ ‘attenuated form of intent,’ ‘*dolus eventualis*,’ ‘high degree of carelessness,’ ‘foreseeability,’ ‘more than negligence,’ ‘awareness that actions are most likely to lead and willingly taking this risk,’ ‘a crime might be perpetrated’ and ‘advertent recklessness.’ However, we can conclude (although not with certainty) that the JCE 3 elements are foresight and foreseeability. This conclusion follows the cumulative reasoning of the paragraphs above which refer to foresight and foreseeability. However, it is unclear whether both foresight and foreseeability are required from its wording. This thesis will consider that both are required since case law post-*Tadic* has applied the two elements.¹³⁰

The second area of uncertainty is the requirement of an objective element for JCE 3. Previously, it was noted that this matter had been addressed clearly for JCE 1 and 2. However it is unclear for JCE 3. According to the paragraph that outlined the threshold of participation for JCE 1 and 2,¹³¹ the same definition of the conduct element applies for JCE 3.¹³² This means that no participation is required for JCE 3 since a contribution is only required in respect of furthering the common criminal plan. In an additional paragraph, judges confirmed this point as they omitted any reference to an objective element:

‘responsibility for a crime other than the one agreed upon in the common plan arises only if, under the circumstances of the case, (i) it was foreseeable that such a crime

¹²⁸ Ibid 220.

¹²⁹ Ibid 228 (emphasis added).

¹³⁰ Chapter 4.4.2 explains this point.

¹³¹ See n. (111) to (116).

¹³² *Tadic* Appeals Judgment, para. 227: ‘the objective elements (*actus reus*) of this mode of participation (with regard to each of the three categories of cases) are as follows.’

might be perpetrated by one or other members of the group and (ii) the accused willingly took that risk.¹³³

However, the state practice cited was derived in part from post-WW II Italian case law. Two cases referred to a causation connection between the acts of the participant and the perpetration of the collateral offence which raises the question of whether discretion was exercised correctly in formulating JCE 3.¹³⁴

The Court de Cassation case of *D'Ottavio et al.* stated:

‘For this type of criminal liability to arise (JCE 3), it was necessary that there exist not only a material but also a psychological “causal nexus” between the result all the members of the group intended to bring about and the different actions carried out by an individual member of that group.’¹³⁵

The Court of Cassation Judgment in *Mannelli* provided a more detailed explanation:

‘The relationship of material causality by virtue of which the law makes some of the participants liable for the crime other than that envisaged, must be (...) strictly differentiated from an incidental relationship (*rappporto di occasionalita*). (...) the cause, whether immediate or mediate, direct or indirect, simultaneous or successive, can never be confused with mere coincidence. For there to be a relationship of material causality between the crime willed by one of the participants and the different crime committed by another, it is necessary that the latter crime should constitute the logical and predictable development of the former (*il logico e prevedibile sviluppo del primo*). Instead, where there exists full independence between the two crimes, one may find, depending upon the specific circumstances, a merely incidental relationship (*un rapporto di mera occasionalita*), but not a causal relationship. In the light of these criteria, he who requests somebody else to wound or kill cannot answer for a robbery perpetrated by the other person, for this crime does not constitute the logical development of the intended offence, but a new fact, having its own causal autonomy, and linked to the conduct willed by the instigator (*mandante*) by a merely incidental relationship.’¹³⁶

Given the reasoning of these two cases, it appears that a causal connection between the agreed crime and the collateral offence is required, based on what is considered a logical development. According to *Mannelli*, this may involve immediate, direct or indirect relationship. However, the judges in *Tadic* did not clarify this point. In one paragraph, they argued that ‘with regard to the third category, what is required is the intention to participate in and further the criminal activity or the criminal purpose of a group and to contribute to the joint criminal enterprise or in any event to the commission of a crime by the group.’¹³⁷ In another, they stated that a JCE 3 crime is one which ‘while outside the common design, was nevertheless a *natural and foreseeable* consequence of the effecting of that common purpose.’¹³⁸ It is uncertain whether the phrase ‘natural and foreseeable’ is related to a direct,

¹³³ Ibid 228.

¹³⁴ Chapter 5 will address this in detail.

¹³⁵ Ibid 215.

¹³⁶ Ibid 218.

¹³⁷ Ibid 228.

¹³⁸ Ibid 204.

indirect or incidental relationship between the actions of the participant and the collateral offence or the definition of the common plan and the collateral offence.

The third and final point concerning JCE 3 is the range of case law cited in support of the theory. Although the judges relied on several judgments as evidence of CIL, it additionally referred to a range of domestic case law, not as evidence of CIL, but to support its theory of JCE 3. This included Australian,¹³⁹ Canadian,¹⁴⁰ French,¹⁴¹ Zambian, Italian,¹⁴² US¹⁴³ and UK¹⁴⁴ law. Of importance here is the reference to the controversial US case of *Pinkerton* and English case law of *Hyde, Anderson and Morris* and *Hui Chi-Ming*. It is highly questionable whether such case law is based on JCE 3.¹⁴⁵

From the above discussion of the JCE elements, a summary of JCE 1 and JCE 3 is as follows:

JCE 1: requires contribution + intent

JCE 3: requires the existence of JCE 1 (contribution + intent to participate in the common plan) and ‘subjective foresight/*dolus eventualis*/foreseeability’¹⁴⁶ as to the commission of other offences by JCE members.

2.2.3 Conviction of Tadic

In light of these three forms of JCE, the Appeals Chamber examined whether Tadic bore any liability for the killings of the five villagers. It agreed with the Trial Chamber’s finding that there was a common plan. It defined the common plan as ‘to rid the Prijedor region of the non-Serb population, by committing inhumane acts against them.’¹⁴⁷ Tadic’s intent in furthering the common criminal plan was evidenced through his participation in the attacks in Jaskici with a group of armed men. He was, therefore, part of a joint criminal enterprise (JCE 1). It then described the killing of non-Serbs as a foreseeable consequence of the common plan of committing inhumane acts.¹⁴⁸ It concluded that Tadic was aware that the actions of the group were likely to lead to such killings.¹⁴⁹ The Appeals Chamber convicted Tadic under JCE 3¹⁵⁰ and referred the sentence to the Trial Chamber.¹⁵¹

¹³⁹ Ibid 224, fn. 290.

¹⁴⁰ Ibid 224, fn. 288.

¹⁴¹ Ibid 224, fn. 285.

¹⁴² Ibid 224, fn. 286.

¹⁴³ Ibid 224, fn. 289.

¹⁴⁴ Ibid 224, fn. 287.

¹⁴⁵ Chapter 4.4.2.

¹⁴⁶ Ibid 204, 206, 218, 219, 220 and 229.

¹⁴⁷ Ibid 231-232.

¹⁴⁸ Ibid 232.

¹⁴⁹ Ibid 232.

¹⁵⁰ A grave breach (wilful killing), murder as a war crime and murder as a crime against humanity.

¹⁵¹ *Tadic* Appeals Judgment, para. 327. He received twenty-four years each for willful killing as a grave breach and murder as a war crime and twenty-five years for murder as a crime against humanity. The Appeals Chamber overturned this ruling and sentenced Tadic to twenty years for each count.

2.2.4 Reviewing the *Tadic* Appeals Judgment

In light of this conviction and reasoning, the next chapters will evaluate the fairness of discretion in formulating JCE 1 and JCE 3.¹⁵² However, before doing so, we need to take into account the current discourse regarding this newly created mode of liability.

The first noteworthy comment is that this body of literature is vast. Post-*Tadic*, numerous ICTY cases applied the doctrine of JCE. Defendants including foot soldiers,¹⁵³ generals¹⁵⁴ and politicians¹⁵⁵ were charged under JCE and, to date, twenty-four out of fifty-seven cases¹⁵⁶ have applied the doctrine. Furthermore, beyond its ICTY application, other ICTs such as the ICTR, the SCSL and the ECCC¹⁵⁷ have also applied it on the basis of its CIL existence. The literature therefore includes numerous defence counsel and prosecutorial motions, *amicus curiae* briefs, judgments and scholarly publications.¹⁵⁸ Yet, the second noteworthy comment is that, despite the abundance of publications examining this doctrine, cogent reasons prompt the need for a thorough scrutiny of this literature. While some scholars note how discretion played a key role,¹⁵⁹ they have not fully addressed all factors influencing the exercise of discretion and JCE's fairness. In this thesis, I will illustrate how several comments regarding these matters can be criticised because they are either unsound or incomplete. These comments are of particular concern as some have originated from two of the judges who were part of the *Tadic* Appeals bench, namely Judges Cassese and Shahabuddeen. I will furthermore indicate how there is a need to identify and examine the importance of all factors influencing the exercise of discretion when evaluating JCE's fairness. Current discourse, including key judgments do not embrace this approach.¹⁶⁰

Identifying the factors

To develop the analysis, I will firstly identify the factors that affect the exercise of discretion in interpreting commission. In all, four factors play crucial but different roles.

The first factor is fair labelling. If the ICTY judges believe that 'commission' as defined by article 7(1) of the ICTY Statute is inadequately defined, then they may choose to exercise their discretion to include non-statutory forms of committing crimes. They would do so to ensure that their exercise of discretion addresses the appropriate label for committing crimes. This is the central goal of fair labelling. As a well-established legal standard in criminal law,¹⁶¹ its purpose is to ensure that 'widely felt distinctions between (...) degrees of

¹⁵² See section 2.2.2 where I explained that JCE 2 is only a factual variant of JCE 1 and the thesis will subsequently only examine the fairness of JCE 1.

¹⁵³ For example, *Babic* Guilty plea.

¹⁵⁴ For example, *Krstic* Trial and Appeals Judgment.

¹⁵⁵ For example, *Stakic* Appeals Judgment.

¹⁵⁶ See Appendix C.

¹⁵⁷ Other ICTs include the East Timor Special Panels for Serious Crimes and the Supreme Iraqi Criminal Tribunal, see Boas, Bischoff and Reid (2007) 133-140.

¹⁵⁸ This thesis will take into account the most widely cited publications and the most important judgments and briefs.

¹⁵⁹ Boot, notes that 'the reasoning in the *Tadic* Appeals Judgment (concerning JCE) demonstrates the scope of *discretion* the Tribunals tend to take,' see Boot, (2002) 288-289; Danner and Martinez refer to the highly *discretionary* nature of ICL in framing a liability theory, see Danner and Martinez (2005) 79; Robinson notes the use of judicial *discretion* in forming JCE, see Robinson (2008) 941.

¹⁶⁰ Chapter 7 addresses this matter.

¹⁶¹ Fair labelling was previously known as representative labelling, see Ashworth (1981) 53. Chalmers and Leverick note that a detailed treatment of fair labelling is missing from English criminal law scholarship, see

wrongdoing are respected and signalled by the law, and (...) labelled so as to represent fairly the nature and magnitude of the law-breaking.¹⁶² Its importance lies in not misleading ‘the public as to the culpability of the individual.’¹⁶³ In relation to interpreting commission, fair labelling is important because of the gravity of ‘committing’ a crime and not participating in a crime through a different mode of liability. For example, committing a crime is not tantamount to aiding and abetting one and likewise aiding and abetting one is not the equivalent of committing one. The difference lies in the degree of culpability with ‘committing’ symbolising a high degree of culpability or the ‘highest degree of participation in a crime.’¹⁶⁴ In criminal law literature, this high-level characterisation is often described as that of a ‘principal’¹⁶⁵ or ‘perpetrator.’¹⁶⁶ These labels differ from that of an accessory since while an accessory bears a certain degree of culpability, it is usually not on a par with that of a principal.¹⁶⁷ Therefore, fair labelling as a factor in interpreting commission is important because it attributes the label of a ‘principal’ to a person who commits a crime.

In examining the ICTY Statute, none of the articles referred to the terms, fair labelling, principal or perpetrator. However, the ICTY Statute held that jurisdiction extends to ‘all those “responsible for serious violations of international humanitarian law.”’¹⁶⁸ In determining levels of ‘responsibility,’ fair labelling assumes a central role. Judges would be required to determine which label would be appropriate for each perpetrator who is responsible in perpetrating crimes. When applying ‘commission’ as a mode of liability, judges are expected to use the label of a ‘principal.’ Chapter 3 will pursue this argument in greater depth when examining the formulation of both JCE 1 and 3. It will question whether the label of principal applies to both JCE 1 and JCE 3 perpetrators since JCE is a form of commission.

The second factor is NPSC. As a principle, it is important because it ensures that the individual is held responsible for his participation. This is particularly important within the context of group crimes where individuals play different roles. It is particularly important in relation to JCE’s formulation since the latter was a non-statutory form of liability. Within the ICTY Statute, the Secretary General’s Report noted its significance, stating:

‘An important element in relation to the competence *ratione personae* (personal jurisdiction) of the International Tribunal is the principle of individual criminal

Chalmers and Leverick (2008) 218-219. However, I believe that Ashworth’s explanation provides a concise definition, see n. (162). For general discussions, see Chalmers and Leverick (2008); Ashworth (1981) 45, 53; Horder (1994) 351; Horder (1995) 761; Nersessian (2007) 255-256.

¹⁶² Ashworth (2009) 78.

¹⁶³ Chalmers and Leverick (2008) 238.

¹⁶⁴ *Simic* Trial Judgment, ICTY, para. 137; Werle (2007) 953, 957, 961 and 974.

¹⁶⁵ *Delalic* Appeals Judgment, ICTY, paras. 342-343, characterising commission as ‘principal liability,’ see. Also see Smith (1991) 27-30; Van Sliedregt (2012) (a) 71-72; Smith and Hogan (2011) 185 for reference to ‘principal.’

¹⁶⁶ Ohlin (2008) 739, 744.

¹⁶⁷ The term accessory may also be used to refer to the other participant in a group crime who is not the direct perpetrator. When used in this manner, it has no bearing on the degree of culpability. Instead, it is simply used to distinguish other participants from the direct perpetrator. Similar terms have been used such as ‘accomplice’ or ‘secondary party,’ see *Powell and English*, (UKHL), 545, 549 and 550; *Chan Wing-Siu* (UK Privy Council) 168, 171; *R v. Rahman* (UKHL), para. 7; Simester and Sullivan (2010) 206-210; Smith and Hogan (2011) 187-193. Also see discussions at the ICTY, *Odjanic* JCE Decision, Separate Opinion of Judge Shahabuddeen, paras. 9, 10 and 11 acknowledging the term accessory and that it may be used to refer to ‘an accessory to the principal’ which is not a discussion about the level of culpability and *Milutinovic* Decision on Jurisdiction, ICTY, Separate Opinion of Judge Bonomy, paras. 29-30.

¹⁶⁸ *Ibid* 189.

responsibility. (...) the Security Council has reaffirmed in a number of resolutions that persons committing serious violations of international humanitarian law in the former Yugoslavia are individually responsible for such violations.

The Secretary-General believes that all persons who participate in the planning, preparation or execution of serious violations of international humanitarian law in the former Yugoslavia contribute to the commission of the violation and are, therefore, individually responsible.¹⁶⁹

Yet, although the Report highlighted NPSC's importance, it had not defined it clearly. For example, one may question the circumstances under which it suffices to hold an individual responsible: is it sufficient that the accused person satisfies the *actus reus* of the offence, do we need to take into account the *mens rea* of the accused person or is there a sliding scale between the threshold level of the *actus reus* and the *mens rea*? Chapter 4, when examining the significance of NPSC, will address these questions.

Besides fair labelling and NPSC, the two other factors are that the law is found under a source and that interpretation beyond textual wording meets NCSL requirements. While they are not directly relevant to interpreting the mode of liability, 'commission,' they are important in interpreting substantive law. As evidenced from chapter 1 in the analysis and three examples provided, these limitations are central to protect the defendant from an unfair exercise of discretion. They apply equally within the context of formulating JCE since it is imperative that an exercise of discretion to formulate a non-statutory mode of liability requires proof of its existence under a source of law and that such discretion meets NCSL requirements. The UN Secretary General Report highlighted these concerns in the following manner:

'In the view of the Secretary-General, the application of the principle *nullum crimen sine lege* requires that the international tribunal should apply rules of international humanitarian law 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. This would appear to be particularly important in the context of an international tribunal prosecuting persons responsible for serious violations of international humanitarian law.'¹⁷⁰

In formulating JCE, the judges did indeed resort to the use of source of law, namely CIL. In examining its use, there are two specific concerns. Firstly, the judges should determine the elements of the non-statutory form of liability with precision. Therefore, the elements, as articulated by them, should reflect the law (cases, decisions and judgments) they have cited. Secondly, CIL should be used according to an acceptable methodology. Chapter 5 will examine these two concerns related to the use of CIL. Chapter 6 will then address the NCSL requirements when exercising discretion. It will draw from the three examples used in chapter 1 when examining the impact of NSCL.

¹⁶⁹ Ibid 53 and 54.

¹⁷⁰ UN Secretary General Report, para. 34.

Examining fairness and analysing the literature

This brief discussion has enabled us to identify the factors required to exercise discretion fairly in interpreting commission. The central concern is that if judges choose to exercise discretion beyond textual wording, CIL and NCSL are non-negotiable factors. As argued in chapter 1, they are the two barriers to judicial creativity. Furthermore, since the judges are formulating a theory of liability related to commission, NPSC assumes a similar non-negotiable role.¹⁷¹ Therefore, it is necessary to examine whether the exercise of discretion meets all four requirements. Chapter 3 to 7 will now develop this analysis further and critically examine the reasoning of the *Tadic* Appeals Judgment and the relevant literature.

However, in analysing the literature, the following point should be noted. Some scholarly publications, regarding JCE, only examine one or more than one of the four factors. For example, Clarke only examines the role of CIL in formulating JCE 1 and 3.¹⁷² On the other hand, other publications are concerned with the discussion of JCE's fairness overall (namely involving all factors) rather than a discussion of one of the factors only. For instance, Cassese's analysis of JCE in 2007¹⁷³ and several ICTY and ECCC judgments¹⁷⁴ reviewed JCE's overall fairness and not merely the significance of one or more of the factors. Therefore, the review of the literature for each chapter will take into account this feature. Chapter 7, furthermore, will note specific publications when discussing the fairness of JCE 1 and 3 based on the significance of the four factors.

¹⁷¹ This thesis notes that there are certain areas where NPSC does not play a role such as vicarious liability (command responsibility). Chapter 4 takes this into account.

¹⁷² Clarke (2011).

¹⁷³ Cassese (2007) (b).

¹⁷⁴ *Odjanic* JCE Decision; *Brdjanin* Appeals Judgment; *Brdjanin and Talic* Decision.

3

JCE 1 and 3: Fair labelling and commission

3.1 INTRODUCTION

Chapter 3 begins with the examination of fair labelling. Section 3.2 will analyse its role in formulating JCE 1. Section 3.3 will do so for JCE 3. A review of the critique will follow in each section.

3.2 FORMULATING JCE 1: THE COMMON PLAN THEORY

3.2.1 Key features of the common plan theory

To examine fair labelling's role in formulating JCE 1, we need to explore the main features surrounding the perpetration of crimes in *Tadic*. We may return to these features as outlined in the previous chapter. Chapter 2 explained that both the Trial and Appeals Chamber reached similar conclusions regarding the facts.¹

Two different armed groups, of which Tadic was a member, perpetrated several crimes. One of the groups, which committed several crimes for which Tadic was convicted, had specific characteristics. The group was small. There was no express agreement to commit these crimes but there was a shared common intention. The common criminal purpose was to commit inhumane acts against the villagers. Tadic had taken part in beating villagers, removing families and inflicting cruel treatment as part of the common plan.²

The difference between the Trial and Appeals Chamber concerned the classification of the common plan theory. While the Trial Chamber did not specify that this theory belongs to any mode of liability under article 7(1),³ the Appeals Chamber argued that this theory falls under the mode of liability 'commit.' It reached this conclusion by underlining three characteristics of how group crimes are committed.

The first is the notion of system criminality.⁴ This term refers to 'a situation where collective entities order or encourage international crimes to be committed, or permit or tolerate the committing of international crimes.'⁵ It is an acknowledged feature of many ICL crimes. The *Tadic* Appeals Chamber recognised this. However, it did not refer to system criminality explicitly. It alluded to it through 'collective criminality,' by stating:

¹ Chapter 2.1.3 and 2.2.

² Chapter 2.1.2.

³ Chapter 2.1.3.

⁴ For more about system criminality, see Drumbl (2004-2005) 1310; Nollkaemper and Van Der Wilt (2009); Van Sliedregt (2006) 92; Van Sliedregt (2007); Cassese (2007) (b) 110; Fletcher and Ohlin (2005) 544.

⁵ Nollkaemper and Van der Wilt (2009) 16.

‘Most of the time (...) crimes do not result from the criminal propensity of single individuals but constitute manifestations of *collective criminality*: the crimes are often carried out by groups of individuals acting in pursuance of a common criminal design.’⁶

The second point was that this factual context involves direct perpetrators and participants (others excluding the direct perpetrators who, from here onwards, will be called co-perpetrators):

‘Although only some members of the group may *physically perpetrate* the criminal act (murder, extermination, wanton destruction of cities, towns or villages, etc.), the participation and contribution of the other members of the group is *often vital* in facilitating the commission of the offence in question.’⁷

The third and final point concerns the actions of all participants. For the direct perpetrator who commits crimes as part of a group, these actions consist of physically perpetrating the crime and intending it.⁸ For co-perpetrators, these actions concern causation-contribution and the subjective element of intention. *Tadic* provided several paragraphs explaining these elements. The most important concern how:

- ‘the accused (participant who is not the direct perpetrator) must *voluntarily participate* in one aspect of the common design (for instance, by inflicting non-fatal violence upon the victim, or by providing material assistance to or facilitating the activities of his co-perpetrators); and the accused, even if *not personally effecting* the killing, must nevertheless *intend* this result;’⁹
- ‘(t)hat while the defendant’s involvement in the criminal acts must form a link in the chain of causation, it was not necessary that his participation be a *sine qua non*, or that the offence would not have occurred but for his participation;’¹⁰ and
- ‘(t)his participation need not involve commission of a specific crime under one of those provisions (for example, murder, extermination, torture, rape, etc.), but may take the form of assistance in, or contribution to, the execution of the common plan or purpose.’¹¹

In addition to these paragraphs, *Tadic* also compared the threshold level for aiding and abetting with that of the co-perpetrator under JCE. It noted that while an aider and abettor’s contribution should have a substantial effect upon the perpetration of the crime, it suffices that the co-perpetrator in a JCE ‘performs acts that in some way are directed to the furthering of the common plan or purpose.’¹² Some scholars have perceived this paragraph as controversial because it indicates a higher threshold level than that for aiding and abetting.¹³

⁶ *Tadic* Appeals Judgment, ICTY, para. 191 (emphasis added).

⁷ *Ibid.*

⁸ *Ibid* 196.

⁹ *Ibid* (emphasis added).

¹⁰ *Ibid* 199.

¹¹ *Ibid* 227.

¹² *Ibid* 229 (iii).

¹³ Sluiter and Zahar (2007) 225, 232, 236, 240, 241 and 248; Danner and Martinez (2005) 150; Ambos (2007) 171; Van Sliedregt (2003) 359; Van Sliedregt (2007) 203; Haan (2005) 183; Bigi (2010) 62; Jain (2014) 32; Guilfoyle (2011) 270: ‘The degree of participation required in ICTY case law is very low. Crucially, it is lower even than that which is required for aiding and abetting.’

However, as confirmed by post-*Tadic* case law and scholarly commentaries, the threshold level of participation for the co-perpetrator is substantial/significant contribution.¹⁴ I will address this matter in further detail in section 3.2.3, where I review the critique. For present purposes, it suffices to state that the level of contribution required for the co-perpetrator is substantial/significant. Given these elements, we may now examine whether the direct perpetrator and co-perpetrator have been fairly labelled as ‘committing’ crimes.

3.2.2 Examining the label: Determining a principal in a common plan

As explained in the previous chapter, the label that befits the mode of liability, commission, is that of a principal.¹⁵ In this thesis, a principal adopts two different meanings.¹⁶

The first sense embodies the naturalistic meaning of a principal.¹⁷ A principal is a person who is the direct perpetrator of the crime. He is the one who most immediately causes the *actus reus* of the offence.¹⁸ The second sense is the normative sense. The principal is the person who bears the greatest degree of responsibility. He is the one who is ‘most responsible’ in the ‘sense of having decisive influence on the commission of the crime, without necessarily physically committing it.’¹⁹ The example typically given in criminal law literature is a criminal mastermind who stands in the background to direct a crime without physically participating in it.²⁰ The latter, while not being the direct perpetrator, plays an influential role. This illustration, however, is only one possible example of a high degree of responsibility. Different factual scenarios would have to be examined on a case-by-case basis to determine the meaning of ‘high-level.’ These may involve determining the weight of the *actus reus* (the level of contribution), the form of *mens rea* (whether of a low or high form), policy reasons which influence why we hold an accused person answerable for his actions as a principal and theories of responsibility in general.²¹ The next paragraphs will examine how these two definitions of a principal apply in the context of the JCE direct perpetrator and the JCE co-perpetrator.

Foremost, for a direct perpetrator who is part of a criminal enterprise, the label of a principal is fair since it is used according to its naturalistic sense. The direct perpetrator physically

¹⁴ The *Kvocka* Appeals Judgment stated that participation does not have to be substantial but ought to be significant, see *Kvocka* Appeals Judgment, paras. 289 and 309. This thesis acknowledges that there is no practical difference between the terms significant and substantial. Furthermore, Cassese, who was one of the *Tadic* Appeals Judges, commented in 2007, that the threshold level is substantial, see Cassese (2007) (b) 116 and 121.

¹⁵ Chapter 2.2.4.

¹⁶ Fletcher proposes three theories that help define a perpetrator: objective theory based on the gravity of actions related to the *actus reus* of the offence (for example in the case of murder, the perpetrator is the person who physically performs the act of killing); subjective theory based on the state of mind of the defendant and ownership of his actions and the control theory based on control and hegemony over the crime, see Fletcher (2000) 654-657. These theories, nevertheless, fall under the classifications I have provided.

¹⁷ Van Sliedregt (2012) (a) 71-72 for use of term naturalistic.

¹⁸ Van Sliedregt (2012) (a) 71-72; Smith (1991) 27, 28. Smith and Hogan (2011) 287; Simester and Sullivan (2013) 205; Krebs (2010) 585; Sliedregt, Ohlin and Weigend (2013). Several ICTY cases also refer to this definition of ‘commit.’ *Limaj* Trial Judgment, para. 209: ‘covers first and foremost the physical perpetration of a crime by the offender himself (...);’ *Galic* Trial Judgment, para. 168; *Stakic* Trial Judgment, para. 439; *Krstic* Trial Judgment, para. 601.

¹⁹ Van Sliedregt (2012) (a) 72.

²⁰ *Ibid.*

²¹ These derive mainly from Hart’s four-fold definition of responsibility in the form of causation-responsibility; liability-responsibility; capacity-responsibility and role-responsibility. Also see Tadros (2007) chapter 1.

commits the *actus reus* of the crime. Therefore, no controversy surrounds labelling the direct perpetrator a principal.

However, for the co-perpetrator, more substantial analysis regarding the normative sense of a principal is required. This enquiry concerns the gravity of both the objective and subjective elements. In this instance, we need to address whether the label of a principal is a fair label when attributing it to a perpetrator who is answerable for causation-contribution and intention. In this regard, criminal law theories and doctrines provide a commonly accepted answer concerning the gravity of both elements. Foremost, it is widely acknowledged that the degree of causation is a pre-condition to criminal liability and that it is relative to culpability.²² While causation in general remains a complex topic,²³ a substantial level of contribution towards the perpetration of a crime,²⁴ (although not of *sine qua non* level), bears a great degree of responsibility.²⁵ It ought to be distinguished from a low level of contribution whereby, for example, a person may merely assist in the perpetration of a crime. We find a similar conclusion regarding the *mens rea* of intention. As a subjective element, intention occupies an important place within the discussion of culpability. Several scholars agree that it denotes the highest level of culpability.²⁶ It is often distinguished from lesser forms of *mens rea* such as knowledge, foresight and foreseeability which bear lesser degrees of responsibility.²⁷ In this regard, we should note that the *Tadic* Appeals Chamber exercised its discretion by underlining intention as the *mens rea* of the participant.²⁸ It did not refer to knowledge (awareness), foresight or foreseeability. Therefore, in conclusion, the combination of causation-contribution and intention reflects culpability of a high-level and nothing less.

Conclusions and analysis of Tadic

From this analysis, labelling the direct perpetrator and the co-perpetrator as principals were fair labels. The *Tadic* Appeals Chamber judges were left with no option but to interpret the mode of liability, ‘commission,’ in this manner. In support of this argument, we may examine a different perspective. This contention involves another possible interpretation regarding the application of other modes of liability under article 7(1). These were: order, plan, instigate and aid and abet.

These modes of liability may apply in different ways based on diverse factual scenarios related to system criminality. For example, in the case of a participant who physically ‘plans’ the crimes to be committed in group, the latter could be held liable under the mode of liability ‘plan.’ For a participant who ‘orders’ the perpetration of crimes (such as a general to his

²² Hart and Honore (1985) 104, 123-4, 226, 236-237 and 297.

²³ Ashworth (2009) 113.

²⁴ As noted in n. (14), there is much controversy surrounding the threshold level of participation. I do not recognise a difference between either a ‘substantial’ or a ‘significant’ level of participation.

²⁵ For discussions of types of causation such as intervening causes, multiple causes, causal salience, see Smith (1991) 64-73; Simester and Sullivan (2013) 85-88; Hart and Honore (1985).

²⁶ Simester (1996) 71, ‘intention has moral primacy;’ Duff (1990) 108, ‘intention as the most serious form of *mens rea*;’ Duff (1990) 99, ‘an agent is most responsible for intending a crime;’ Moore (2011) 179-180, ‘intention is a marker of serious culpability;’ Simester and Sullivan (2013) 126, ‘intention attracts greater censure;’ Tadros (2005) 233, explaining the link between intention and level of commitment to pursue an end.

²⁷ Ohlin (2007) 80, intentional killing is a more significant moral violation than reckless killing; Duff (1990) 126, ‘recklessness is a lesser species of fault than intention;’ Moore (2011) 184, ‘intention is top at the scale of culpability.’ For a different view, see Alexander and Ferzan (2009) 31, ‘some instances of recklessness are more culpable than some instances of knowledge.’

²⁸ Chapter 2.2.2.

soldiers), the former may be held liable under ‘order.’²⁹ Lastly, for a participant who sells weapons to ‘assist’ the perpetration of crimes, the latter may be held liable under ‘aid and abet.’ Yet these would not be appropriate modes of liability given the gravity of the elements attached to them.

Under these modes of liability (plan, instigate, order and aid and abet), the level of contribution is either ‘substantial’³⁰ or requires a ‘causal link.’³¹ However, the subjective element either includes awareness of substantial likelihood,³² or knowledge (awareness)³³ or intention.³⁴ It does not include intention exclusively as the mode of liability, ‘commit,’ does. These lower forms of *mens rea*³⁵ imply that those who either plan, order, instigate or aid and abet cannot be considered principals. As chapter 2 had explained, the central purpose of fair labelling is to ensure that ‘widely felt distinctions between (...) degrees of wrongdoing are respected and signalled by the law, and (...) labelled so as to represent fairly the nature and magnitude of the law-breaking.’³⁶ The importance of fair labelling lies in not misleading ‘the public as to the culpability of the individual.’³⁷ Therefore, if we hold a person who plans a crime as part of a group as a planner when he in fact ‘intends’ to commit a crime as part of a group, this label would understate his degree of culpability. If the perpetrator is only aware of the substantial likelihood that a crime may be committed or knows that a crime may be committed, we may label such a perpetrator an accessory instead of a principal.³⁸ The two labels of accessory and principal are used in accordance with the respective levels of culpability.

Within the *Tadic* Appeals Judgment, we find similar reasoning. In distinguishing committing from aiding and abetting, the judges stated:

‘(...) to hold criminally liable as a perpetrator only the person who materially performs the criminal act would *disregard the role as co-perpetrators* of all those who in some way made it possible for the perpetrator physically to carry out that criminal act. At the same time, depending upon the circumstances, to hold the latter liable only as aiders and abettors might *understate the degree* of their criminal responsibility.’³⁹

²⁹ One may also consider command responsibility under article 7(3).

³⁰ Planning: *Kordic and Cerkez* Appeals Judgment, para. 26; Instigate: *Kordic and Cerkez* Appeals Judgment, para. 27; *Brdjanin* Trial Judgment, para. 269; Order: *Kordic and Cerkez* Appeals Judgment, para. 30; *Blaskic* Appeals Judgment, paras. 41-42; Aid and abet: *Blaskic* Appeals Judgment, para. 46; *Strugar* Trial Judgment, para. 349; *Blagojevic and Jokic* Trial Judgment, para. 726; *Furundzija* Trial Judgment, para. 234.

³¹ For ordering, see *Strugar* Trial Judgment, para. 332.

³² *Kordic and Cerkez* Appeals Judgment, para. 31; *Kordic and Cerkez* Appeals Judgment, para. 32;

³³ Aiding and abetting: *Blaskic* Appeals Judgment, para. 45; *Limaj* Trial Judgment, para. 518; *Strugar* Trial Judgment, para. 350;

³⁴ *Limaj* Trial Judgment, para. 513, *Brdjanin* Trial Judgment, para. 269. *Kordic and Cerkez* Trial Judgment, para. 387.

³⁵ Judgments noting that awareness of substantial likelihood is lower than direct intent, see *Blaskic* Appeals Judgment, paras. 41-42; *Kordic and Cerkez* Appeals Judgment, para. 30;

³⁶ Ashworth (2009) 78.

³⁷ Chalmers and Leverick (2008) 238.

³⁸ Danner and Martinez agree in part with this reasoning. They hold that a ‘principal’ applies to a person who either commits or plans while an ‘accessory’ applies to the modes, aid and abet, order and instigate, see Danner and Martinez (2005) 102.

³⁹ *Tadic* Appeals Judgment, para. 192 (emphasis added).

Although this paragraph only refers to aiders and abettors, the underlying reasoning applies equally within the context of planning, instigating and ordering. Therefore, it would be inappropriate to argue that the planner of crimes, the general who orders crimes and the weapons seller who assists indirectly,⁴⁰ should be held liable under any other form.⁴¹ If they intend the crime as part of group crimes and they contribute substantially, the choice of ‘commit’ captures the gravity of their actions.

3.2.3 Criticisms of JCE 1: A review

In analysing the literature, four points are of concern.

Failure to examine the Tadic Trial Chamber reasoning

The first criticism is the absence of analysis regarding the *Tadic* Trial Chamber reasoning. Instead, several scholars have only focused on the *Tadic* Appeals Chamber judgment.⁴²

Examining the Trial Chamber reasoning is important because it had exercised its discretion in a similar manner to the Appeals Chamber by formulating a non-statutory form of liability. It had labelled this theory as the common plan theory and further described *Tadic* as a perpetrator in the common plan. The Trial Chamber exercise of discretion was therefore just as concerned as the Appeals Chamber in searching for a fair label. Yet, such reasoning has surprisingly not been subjected to the level of scrutiny that the Appeals Chamber reasoning has.

In this regard, chapter 2 of this thesis has provided an important chronological and analytical account of the formulation and acceptance of the common plan theory (JCE) which current literature has failed to do. It has explained important similarities between the *Tadic* Trial Chamber and the Appeals Chamber reasoning.

Analysis of fair labelling

The second important observation is the substantial lack of analysis pertaining to fair labelling in ICL discourse. As noted in chapter 2 and this chapter, fair labelling, is an important standard in criminal law. In 1981, it had originally been coined by Ashworth as ‘representative labelling.’⁴³ Ever since, it has been applied and discussed in several English law publications.⁴⁴ However, in ICL, it has not been addressed in detail. Some scholars have referred to it with Robinson providing a definition and examination of fair labelling and JCE 3.⁴⁵ But within the context of formulating JCE 1, its importance is essential to examine three matters: identifying its role in interpreting commission, understanding its association with the label of a ‘principal’ and conducting a thorough enquiry regarding the possible meanings of a principal. Various publications regarding JCE⁴⁶ do not embrace this approach, including

⁴⁰ So long as they all intend to participate in the common plan, including the weapons seller. An exception of a weapons seller who may not fit this example is a professional armourer. He would be an accessory and not a principal because of lack of intention.

⁴¹ Guilfoyle disagrees with this view, see Guilfoyle (2011) 263-273.

⁴² Danner and Martinez (2005); Robinson (2008); Sassoli and Olson (2000); Jain (2014); Ohlin (2007).

⁴³ Ashworth (1981) 53.

⁴⁴ See chapter 2, fn. (160).

⁴⁵ Nersessian (2007); Guilfoyle (2011); Robinson (2008) 927-952.

⁴⁶ Danner and Martinez (2005); Robinson (2008); Sassoli and Olson (2000); Jain (2014) 30-44; Ohlin (2007).

important comments from Judge Cassese in defence of JCE.⁴⁷ Instead, the concern of many JCE commentators⁴⁸ is ‘system criminality’ in ICL. In their view, system criminality prompts the formulation of JCE. However, as explored in this thesis, system criminality or collective criminality is only the context in which crimes are perpetrated. It is against this factual background that judges are expected to use a fair label to attribute guilt appropriately.

Level of contribution (objective element)

The third criticism concerns the level of contribution required for JCE. The mainstream academic view is that there is a lower standard applied to JCE in contrast to aiding and abetting.⁴⁹ While the level for aiding/abetting is that of a substantial contribution, JCE requires less.⁵⁰ Part of the reasoning that leads to this conclusion lies in the following *Tadic* Appeals Chamber paragraph:

‘Participation of the accused in the common design involving the perpetration of one of the crimes provided for in the Statute. This participation need not involve commission of a specific crime under one of those provisions (for example, murder, extermination, torture, rape, etc.), but may take the form of assistance in, or contribution to, the execution of the common plan or purpose.’⁵¹

This paragraph does not specify the level of ‘assistance’ required. It merely states that the objective element takes the form of ‘assistance in or contribution to.’ It could be argued that *Tadic* failed to address this point altogether. This, however, does not lead to the conclusion that the level of assistance is less for JCE than that for aiding and abetting. As I argued in section 3.2.3, the threshold level for the objective element is, in fact, ‘substantial/significant’ despite this omission in *Tadic*. Three reasons underpin this conclusion.

Firstly, I have taken into account a scholarly publication from Judge Cassese. In 2007 (eight years after the *Tadic* Appeals Judgment), he argued that the concept of JCE, as advanced by *Tadic*, needed ‘tightening up.’⁵² The definition of the objective element was one of those areas. He stated that the level of contribution should in fact be substantial, which at that time was the manner in which the *Kvočka* Trial Judgment had characterised the level of contribution.⁵³ If we analyse this comment in light of the aforementioned *Tadic* Appeals Chamber reasoning, it appears that in hindsight Cassese would have preferred that the judgment adopted that language. Yet, his comment can nevertheless be criticised, as it did not take into account the *Kvočka* Appeals Judgment (already issued at that time) which provided a different view to the Trial Judgment. It held that contribution does not need to be substantial but only significant.⁵⁴ Overall, this leads to confusion regarding a clear and acceptable level of participation since it is difficult to ascertain the exact meaning of contribution that is not substantial but yet significant. However, the difference between ‘substantial’ and ‘significant’ can be dismissed as it ought to be seen as theoretical distinction which bears no significance in practice. By definition, it is difficult to differentiate

⁴⁷ Cassese (2007) (b); Cassese *amicus curiae* brief.

⁴⁸ Ohlin (2007) 69, Van Sliedregt (2006) 81, Van der Wilt (2007) 91, Gustafson (2007) 134,135, Danner and Martinez (2005), Sassoli and Olson (2000), Sluiter and Zahar (2008) 223-234.

⁴⁹ See fn. (13).

⁵⁰ See fn. (30).

⁵¹ *Tadic* Appeals Judgment, para. 227 (iii).

⁵² Cassese (2007) (b) 109.

⁵³ *Ibid.*

⁵⁴ *Kvočka* Appeals Judgment, para. 97.

‘substantial’ from ‘significant’ or vice-versa.⁵⁵ The two terms substantial and significant, can be seen as referring to the same gravity. In addition, no judgment post-*Kvočka* has stated that a level of contribution is not substantial but is, in fact, significant.⁵⁶ Therefore, the use of these two terms is more a matter of a semantic difference rather than a practical one.

The second reason why the level of contribution required is ‘substantial/significant,’ is that to date, no post-*Tadić* ICTY JCE-based case law has defined the required threshold as less than substantial/significant.⁵⁷ Several judgments explicitly refer to significant. Among the convictions, one particular case that stands out is *Krnjelac*.⁵⁸ The Appeals Judges argued that Krnjelac, who had initially been convicted of aiding and abetting crimes, should be convicted of participating in a JCE. The difference between the Trial and Appeals Chamber reasoning concerned the interpretation of the subjective element (intention). While the Trial Chamber was unconvinced that the accused had intended to participate in a JCE, the Appeals Chamber concluded that he did. However, both the Trial and Appeals Chambers agreed that the level of contribution was substantial.⁵⁹ This reasoning indicates that the level of contribution for aiding and abetting could be considered satisfactory for participating in a JCE. Among ICTR cases, the only decision that stands out is the 2006 *Mpambara* Trial Judgment. It stated that ‘the *actus reus* may be satisfied by any participation, no matter how insignificant.’⁶⁰ However, in this case, although the judges advanced this particular definition, they nevertheless failed to demonstrate how it applies in practice and furthermore acquitted the accused for participating in a JCE.⁶¹ Therefore, from a practical perspective it is difficult to understand the meaning of ‘insignificant.’

The third reason is that the CIL state practice mentioned in *Tadić* refers to a ‘substantial/significant’ threshold level. Chapter 5.2 will address this point since it examines the state practice in detail.

Mislabelling JCE as conspiracy and conflating JCE 1 with JCE 3

The two remaining criticisms concern misunderstandings of JCE’s nature. Firstly, while many scholars and judges have noted the difference between conspiracy and JCE,⁶² other

⁵⁵ OED, available at URL: <http://www.oed.com/view/Entry/193050?redirectedFrom=substantial#eid>, <http://www.oed.com/view/Entry/179569?redirectedFrom=significant#eid>, last accessed 10th December 2015.

⁵⁶ See fn. (57).

⁵⁷ *Furundzija* Trial Judgment, para. 274; *Furundzija* Appeals Judgment, para. 120; *Krnjelac* Trial Judgment, para. 97; *Krnjelac* Appeals Judgment, para. 110; *Martić* Trial Judgment, paras. 448-453; *Martić* Appeals Judgment, para.3; *Krstić* Trial Judgment, para. 612; *Kvočka* Trial Judgment, para. 372; *Kvočka* Appeals Judgment, para. 599; *Dorđević* Trial Judgment, para. 2154; *Babić* Trial Sentence Judgment, paras. 36, 40; *Limaj and others* Trial Judgment, para. 667; *Krajišnik* Trial Judgment, paras. 921-974, 1119-1222; *Vasiljević* Trial Judgment, paras 209, 212, 239; *Vasiljević* Appeals Judgment, para. 134; *Stakić* Appeals Judgment, paras. 74-76; *Popović and others* Trial Judgment, paras. 1090, 1163, 1166, 1179, 1181, 1192, 1170, 1173, 1174; *Milutinović* Trial Judgment, paras. 131, 143, 147, 159, 160, 200, 213, 231, 239, 248, 252, 271-276, 299-301, 325, 328, 331, 400-402, 427, 441, 456, 458-467, 469, 517, 528, 538, 609, 612, 618, 766, 1050, 1118; *Simić and others* Trial Judgment, para. 994; *Momir Nikolić* Trial Sentencing Judgment, paras. 123, 176; *Miroslav Deronjić* Trial Sentencing Judgment, para. 129; *Kordić and Cerkez* Trial Judgment, paras. 830 and 831; *Darko Mrđa* Trial Judgment, para. 29; *Dragan Obrenović* Trial Judgment, paras. 79-85; *Banović* Trial Judgment, para. 6, 28; *Gotovina* Trial Judgment, para. 2370;

⁵⁸ *Krnjelac* Trial Judgment, para. 487.

⁵⁹ *Krnjelac* Appeals Judgment, paras. 112-114; *Krnjelac* Trial Judgment, paras. 488-489.

⁶⁰ *Mpambara* Trial Judgment, para. 14.

⁶¹ *Ibid*, para. 76.

⁶² Danner and Martinez (2005) 118: JCE and conspiracy are distinct; *Krajišnik* Appeals Judgment, Separate Opinion of Judge Shahabuddeen, para. 22 and *Odjanic* Prosecution response, para. 13 noting that conspiracy,

commentators have not as they have referred to the two forms of liability interchangeably. These include scholars,⁶³ defence counsel motions⁶⁴ and even ICTY Judge Hunt.⁶⁵ JCE is undoubtedly similar to conspiracy.⁶⁶ However, there are two significant differences between the two theories. Foremost, JCE requires completion of the act while conspiracy is an inchoate crime.⁶⁷ Secondly, JCE allows for the conviction of participants for offences committed outside the common purpose while conspiracy does not.⁶⁸

The last argument concerns confusion surrounding JCE 1's elements which subsequently casts doubt on whether JCE 1 attributes a fair label. In 2007, Cassese provided an example and commentaries regarding JCE 1. He argued that, in addition to shared intent, *dolus eventualis* (recklessness or advertent recklessness) 'may also suffice to hold all participants in the common plan criminally liable.'⁶⁹ The example he cited was:

'if a group of servicemen decides to deprive civilians of food and water in order to compel them to build a bridge necessary for military operations or to disclose the names of other civilians who have engaged in unlawful attacks on the military, and then some civilians die, the servicemen should all be accountable not only for a JCE to commit the war crimes of intentionally starving civilians and 'compelling the nationals of the hostile party to take part in operations of war directed against their own country;' they should also be held guilty of murder. Indeed, even if the servicemen did not intend to bring about the death of the civilians, the death was the natural and foreseeable consequence of their common criminal plan and the follow-up action.'⁷⁰

This paragraph refers to a 'natural and foreseeable consequence.' Yet, Cassese provided this example in the context of JCE 1. Recalling the reasoning in *Tadic*, holding individuals liable for crimes which are 'natural and foreseeable consequences' are JCE 3 crimes and not JCE 1. It could be argued that Cassese conflated the elements of JCE 1 and 3 or that he believed that the war crime of intentionally starving civilians was a JCE 1 crime while murder was JCE 3. Yet, from this paragraph, it is difficult to ascertain whether Cassese had failed to distinguish the two crimes or whether he genuinely implied that a JCE 1 crime could be committed if it

membership in a collective organisation and JCE are distinguishable; *Odjanic* JCE Trial Decision, pgs. 6-7; *Odjanic* JCE Motion, paras. 22-26; Haffajee (2006) 215: conspiracy has a lower burden of proof than JCE and is a freestanding crime in and of itself; Bogdan (2006) 112: JCE and conspiracy analogous.

⁶³ Ohlin (2007), referring to conspiracy and co-conspirators throughout his publication that analyses JCE; Ambos (2007), who analyses JCE and command responsibility but regularly refers to JCE as conspiracy; Van der Wilt (2007), who does not establish the distinction between JCE and conspiracy and uses the terms interchangeably.

⁶⁴ *Odjanic* JCE Motion, paras. 6 and 10; *Odjanic* JCE Appeal, para. 21.

⁶⁵ Judge Hunt who has been described as a 'leading judge' on JCE (Danner and Martinez (2005) 119), has referred to it as conspiracy, see *Odjanic* JCE Decision, Separate Opinion of Judge Hunt, para. 23.

⁶⁶ JCE may be considered conspiracy-driven since both share a similar characteristic involving an agreement, see Smith (1991) 47 for discussion of conspiracy as a mode of complicity.

⁶⁷ For ICTY discussion, see *Odjanic* JCE Decision, para. 45: 'JCE and conspiracy are two different forms of liability; see *Musema* Trial Judgment, ICTR, para. 193; *Nahimana et al. Trial Judgment*, ICTR, paras. 107-110. For broader discussions in ICL, see Sluiter and Zahar (2007) 183; Boas, Bischoff and Reid (2007) 283. Since conspiracy, as applied in ICL, is considered an Anglo-Saxon doctrine (*Musema* Trial Judgment, ICTR, para. 187), see discussions in English law for meaning of conspiracy, Smith (1991) 47; Smith and Hogan (2011) 426-459; Simester and Sullivan (2013) 300-326.

⁶⁸ The exception is the US *Pinkerton* doctrine. *Pinkerton* extended conspiracy to include liability for crimes that were foreseeable. For analysis, see Brenner (1991); Smith (1991) 49-53.

⁶⁹ Cassese (2007) (b) 111.

⁷⁰ *Ibid* 111-112.

was a natural and foreseeable consequence. However, regardless of this explanation, the comment as it stands creates confusion. Jain, in examining this example, has criticised Cassese for including concepts of recklessness, *dolus eventualis* and foreseeability under JCE 1.⁷¹ This thesis however argues that Jain may be correct in criticising Cassese's re-articulation of JCE if Cassese meant that JCE includes a 'natural and foreseeable' consequence. However, a different plausible argument is that murder is a JCE 3 crime and Cassese was merely illustrating the usefulness of applying JCE and its ability to hold all JCE members liable for crimes although they do not share the intention.

3.3 FORMULATING JCE 3: THE EXTENDED THEORY

Section 3.3 now turns attention to JCE 3. In formulating this doctrine, the judges also imposed liability as a principal. They stated the following:

'(...) a person *may* be held *criminally responsible* for a crime committed by another member of a group and not envisaged in the criminal plan.'⁷²

The above language used in constructing JCE 3 explains that the accused 'may' be held responsible. Using permissive language 'may' entails that certain conditions apply. In similar fashion to the analysis of JCE 1, we need to pay attention to these circumstances. The following paragraph explains these conditions.⁷³

3.3.1 Fair labelling and risk taking

The first requirement is that the participant is a JCE 1 member. He has to intend the common plan and contribute.⁷⁴ He is then held liable for the perpetration of a collateral crime which is a 'natural, predictable and foreseeable consequence'⁷⁵ of the common plan that he foresees.⁷⁶

⁷¹ Jain (2014) 58.

⁷² *Tadic* Appeals Judgment, ICTY, para. 218 (emphasis added). This paragraph does not mention the level of culpability. However, liability as a principal can be inferred from its reasoning and conclusions.

⁷³ I have referred to the elements of JCE 3 as defined in the conclusions of *Tadic*, para. 220 (lack of objective element, foreseeability, advertent recklessness, actions of group would most likely lead to crime) and which have been followed by the majority in post-*Tadic* case law. However, not all cases have provided the same definition for JCE 3. See 'Foresight and foreseeability' and 'awareness of actions most likely to lead to,' as referred to in *Tadic* Appeals Judgment, para. 220, have been interpreted differently. Post-*Tadic*, we find 'reasonably foresee,' see *Milutinovic* Trial Judgment, para. 95 and *Brdjanin* Appeals Decision, paras.5 and 6; 'substantial foreseeability,' see *Tolimir* Trial Judgment, para. 1140; 'sufficient knowledge,' see *Kvočka* Appeals Judgment, para. 86. 'awareness of a possible consequence,' *Krstic* Trial Judgment, para. 613; 'probability that other crimes may result,' see *Krstic* Appeals Judgment, para. 150; 'merely a possible consequence rather than substantially likely to occur,' see *Blaskic* Appeals Judgment, para. 33; *Tolimir* Trial Judgment, para. 1173: 'was reasonably foreseeable (...) that the targeted killings would be committed.'

However, the majority judgments have held that the elements of JCE 3 do not require any objective element but require the *mens rea* of foresight and foreseeability, see ICTY cases: *Kvočka* Trial Judgment, para. 267; *Kvočka* Appeals Judgment, para. 86; *Stakic* Appeals Judgment, para. 101; *Vasiljevic* Appeals Judgment, para. 101; *Blaskic* Appeals Judgment, para. 39; *Krnjelac* Appeals Judgment, para. 32; *Martic* Trial Judgment, para. 439.

⁷⁴ Chapter 3.2.2 and 3.2.3 noted the discussion about the characterisation of the objective element, i.e. that it is substantial.

⁷⁵ *Tadic* Appeals Judgment, ICTY, paras. 218, 220 and 228.

⁷⁶ *Ibid*, para. 204.

In *Tadic*, this is reflected in the fact that he was a member of the JCE 1. The killing of the five villagers was a natural, predictable and foreseeable consequence⁷⁷ of the common plan of committing inhumane acts against the villagers⁷⁸ and Tadic foresaw it.⁷⁹

The difference between JCE 1 and JCE 3 is evident from these elements. JCE 1 is premised on causation-responsibility and the *mens rea* of intention. On the other hand, JCE 3, while requiring participation in a JCE 1, is concerned with objective risk-taking (foreseeability) and conscious risk-taking (subjective recklessness). The JCE participant is held liable for a risk that he foresees and which is foreseeable. This observation leads to the following question: does JCE 3 impose a fair label upon a perpetrator who neither intends nor participates in a crime but only foresees the crime (and it is foreseeable).⁸⁰ This question sets the background for analysing JCE 3 and fair labelling.

3.3.2 Examining the label: Convicting a JCE participant as a principal under JCE 3?

In examining the elements of JCE 3, this section will consider foresight and foreseeability separately as their meanings differ.

As an objective standard, foreseeability, is based on the test of what the reasonable man would foresee. For some scholars, the objective nature of the standard implies that foreseeability is not a *mens rea*.⁸¹ It does not establish a connection between this perpetrator's guilty mind and the crime. For this reason, we may dismiss it altogether as we cannot compare it with other fault elements. For example, we cannot compare foreseeability with intention where the perpetrator bears the highest degree of culpability⁸² for his voluntary choice in committing the proscribed conduct. We furthermore cannot compare it with either knowledge or awareness where there is a guilty mind, albeit to a lesser extent. Yet, adopting this approach altogether would disregard the role that an objective standard such as foreseeability plays in holding individuals culpable. For example, in the UK, offences such as death by dangerous driving and careless driving⁸³ refer to the objective standard of the reasonable man. In ICL, command responsibility, in part, refers to an objective standard.⁸⁴ A commander will be liable for a crime committed by his subordinates if he 'had reason to know'⁸⁵ or 'should have known'⁸⁶ that crimes were about to be committed.⁸⁷ However, the basis for such liability in these two examples derives not only from an objective standard but

⁷⁷ Ibid, para. 232. This paragraph refers to foreseeable.

⁷⁸ Ibid, para. 231.

⁷⁹ Ibid, para. 232.

⁸⁰ Chapter 2.2.2 for the elements of JCE 3.

⁸¹ Simester and Sullivan (2013) 151, negligence is not a *mens rea*; Duff (1990) 154: 'negligence if it is culpable at all;' Smith and Hogan (2010) 147, noting how writers differ as to whether it is a *mens rea*; Hart includes negligence as a *mens rea*, see Hart (2008) 140.

⁸² The only other *mens rea* would be specific intent, see chapter 8.

⁸³ UK law, Road Traffic Act 1988, s. 1 and 2A.

⁸⁴ In ICL, command responsibility refers to 'knew' as well, see n. (85 and 86).

⁸⁵ Article 7(3) ICTY Statute.

⁸⁶ Article 28 of ICC Statute.

⁸⁷ Whether the *mens rea* for command responsibility includes a negligence-based standard is controversial. The ICC Statute appears to include negligence, while ICTY case law has generally rejected such an approach, Cryer *et al.* (2010) 393-394. See Van Sliedregt (2012) 183-209; Mettraux (2009); Cryer (2010); Martinez (2007) 638 for detailed discussions.

also because of other aspects such as causation,⁸⁸ the role of the accused person⁸⁹ or a public policy reason.⁹⁰ Yet, as noted in chapter 2, there is no causation-nexus required for JCE 3. Furthermore, JCE 3 was not set out to address a specific legal role of the participant such as a general or a commander⁹¹ and *Tadic* had not provided a policy reason for JCE 3.⁹² Therefore, the standard of foreseeability cannot entail liability as a principal.

In contrast to foreseeability, the *mens rea* of foresight plays a different role. While foreseeability focuses on the accused's normative position, foresight focuses on the degree to which an accused was at fault because of a subjective risk. It is thus concerned with the accused's guilty mind. To examine its significance, we may compare it with other *mens rea*. The most significant comparison would be with intention. Although criminal law does not advocate a formally recognised hierarchy of *mens rea*, it is commonly accepted that intention is the highest form and recklessness is lower.⁹³ Section 3.2.2 had noted this when explaining the gravity of committing a crime with intention. Therefore the degree of culpability based on foresight is lower than that for intention. By analogy, since JCE 1 which is based on intention imposes liability as a principal, JCE 3 should impose a lower form. This argument does not suggest that the JCE participant bears no degree of fault at all but simply that liability is lower. Yet, this comparison does not end the discussion of foresight. A further enquiry is necessary considering the characterisation of foresight. Although *Tadic* referred to advertent recklessness, within the same paragraph, it also mentioned '(awareness) that the actions of the group were *most likely to lead* to that result.'⁹⁴ Such language explains that the risk a JCE participant takes is higher than foresight of a possibility alone. However even under these circumstances, if we compare this *mens rea* with intention, it does not match its level of culpability. Had the *Tadic* Appeals judges referred to foresight of virtual certainty (which is known as oblique/indirect intention),⁹⁵ a stronger connection would have been established between the participant's state of mind and perpetration of the collateral offence. This *mens rea* stands in contrast to foresight alone or even awareness that crimes were most likely to occur. Yet the judges did not provide such an explanation.

Drawing from this analysis, we reach the following conclusions. Since foresight represents the *mens rea* for JCE 3 (and not foresight of virtual certainty), the label should be relative to the accused person's guilt. In practice, this means that if the direct perpetrator of murder is held liable as a principal, the JCE participant who only foresees a crime that is foreseeable cannot be held liable to the same extent. He cannot be described as a principal because his degree of culpability is limited to 'foresight' which is not the equivalent of intention. In

⁸⁸ In the case of death by dangerous driving, not only has the driver failed to act according to the standard of a competent driver but his act of dangerous driving caused death.

⁸⁹ Command responsibility entails liability for generals and commanders by virtue of their role and their duty to act.

⁹⁰ Ashworth (2009) 188-189: Policy considerations to protect the public from incompetent and reckless behaviour or to avoid harming interests of citizens.

⁹¹ The role may be considered an aggravating factor in sentencing.

⁹² It stated that JCE 3 is used in situations where it is 'impossible to ascertain exactly which acts were carried out by which perpetrator,' see chapter 2.2.2. Judges Cassese and Shahabuddeen have used reasoning related to public policy considerations. I address them below.

⁹³ See n. (27); *Aleksovski* Trial Judgment, ICTY, para. 56: recklessness is not proof of intent; *Powell and English*, UKSC, Lord Steyn 550: 'Foresight and intention are not synonymous terms,' Simester and Sullivan (2010) 148, noting the moral distinction between recklessness and intention.

⁹⁴ *Tadic* Appeals Judgment, ICTY, para. 220 (emphasis added).

⁹⁵ Under English law, foresight of virtual certainty is considered oblique intention, see academic commentaries, Smith and Hogan (2011) 106-112; Simester and Sullivan (2010) 132.

conclusion, holding a JCE participant fully liable (as a principal) for a collateral offence is an unfair label. *Tadic* was therefore incorrect in imposing a label of a principal for JCE 3.

3.3.3 Review of literature

Having argued that JCE 3 imposes an unfair label of a principal, we may now analyse the critique. Within the literature, this aspect of JCE 3 is the most discussed. Virtually all commentators, with a few exceptions,⁹⁶ have agreed that JCE 3 imposes an unfair label.⁹⁷ However, the approach of many scholars is flawed. Four key points can be noted.

Firstly, only some scholars have criticised the foreseeability aspect of JCE 3 rather than engage with both foresight and foreseeability.⁹⁸ Secondly, others have chosen to criticise JCE 3 because they perceive it as either a form of strict liability,⁹⁹ vicarious liability,¹⁰⁰ a species of negligence¹⁰¹ or analogous to aiding and abetting.¹⁰² These characterisations are incorrect based on the discussions of the JCE 3 elements.¹⁰³

Is there a coherent account for the elements of JCE 3 and fair labelling?

Thirdly, despite the many commentaries of JCE 3, it appears that only Fletcher has mentioned that the JCE participant should bear some degree of liability for foresight.¹⁰⁴ Other scholarly or judicial commentaries do not mention this.¹⁰⁵ This absence of discussion indicates how many commentators have not recognised that attributing a lower level of liability under JCE 3 would be appropriate because of foresight. As a result, we may argue that the literature falls

⁹⁶ Sassoli and Olson (2000) 753: JCE 3 represents a sound development of ICL subject to some caveats. Judges Cassese and Shahabuddeen also defend JCE 3. Danner and Martinez provide contradictory views. They argue that JCE 3 leads to guilt by association because of foreseeability but they hold that *Tadic* was justly convicted for murder, see Danner and Martinez (2005) 137 and 150. I will address their views separately.

⁹⁷ Ohlin (2008) 742: ‘analyze the accused’s level of participation and insist that his criminal liability match it;’ Ohlin (2007) 81: ‘For non-agreed foreseeable acts, a lower level of liability is warranted;’ *Case 002* JCE Decision, ECCC, para. 87: ‘a standard of *mens rea* lower than direct intent (...) in relation to crimes committed outside the common criminal purpose and amount to commission; *Martic* Appeals Judgment, Separate Opinion of Judge Schomburg, para. 3: JCE 3 lacks specificity; Badar (2006) 301: the JCE participant is unfairly held liable for crimes he neither participated in nor intended; Robinson (2008) 927 and 939: JCE 3 violates fair labelling and culpability; Powles (2004) 611: it is difficult to argue someone has committed a crime in the absence of intention and where they only should have been aware of it; Schabas (2003) 1033; ‘negligence-type offences are not treated as the most serious crimes, and they do not attract the most serious penalties;’ *Ambos amicus curiae* brief, para. 3: ‘JCE III only entails accomplice liability;’ Sluiter and Zahar (2008) 223: ‘one may be responsible for committing crimes depending upon a small number of additional elements;’ *Tolimir* Appeals Brief, para. 58.

⁹⁸ Badar (2006) 301; Ohlin (2007) 80: ‘those who intentionally commit murder demonstrate a more malignant heart than those who kill someone as a result of their negligence.’

⁹⁹ Ambos (2007) 174; Fletcher and Ohlin (2005) 550.

¹⁰⁰ Van Sliedregt (2009) 197; *Ambos amicus curiae* brief, pg. 13; Ohlin (2007) 81, 83-84.

¹⁰¹ Ohlin (2007) 83.

¹⁰² *Ambos amicus curiae* brief, pg. 13.

¹⁰³ It requires foresight. It is not a form of aiding and abetting which requires substantial contribution to the crime, see chapter 3.2.2. Accessorial liability is not vicarious liability, see Wilson (2002) 195. For more about strict and vicarious liability, see Smith and Hogan (2011) 273-283, 155-180; Simester and Sullivan (2010) 173-198, 263-279.

¹⁰⁴ To my knowledge, only Fletcher has done so, Fletcher (2002) 1541-1542: ‘those who generate a climate of moral degeneracy bear some of the guilt for the criminal actions that are thereby endorsed.’

¹⁰⁵ Danner and Martinez (2005) Shahabuddeen (2010); Cassese (2007) (b); Cassese *amicus curiae* brief; *Ambos amicus curiae* brief; Ohlin (2007).

short of addressing the significance of foresight in relation to fair labelling. In this regard, several commentaries are worthy of mention.

Firstly, Ohlin in analysing the formulation of JCE calls for an explicit discussion of culpability.¹⁰⁶ Yet he does not advance any specific theory or engage with the significance of fair labelling in holding perpetrators liable relative to their guilt. In the context of JCE 3, his analysis is limited to negligence, recklessness and foreseeability but does not include foresight.¹⁰⁷

Secondly, Danner and Martinez provide unclear reasoning regarding JCE 3's elements and its ability to hold individuals liable. They state that:

‘Some individuals, particularly senior political or military figures, may justly be charged with wrongdoing that encompasses atrocities committed over several years and throughout a particular region. For this reason, we do not recommend jettisoning Category Three of JCE. These kinds of JCEs play an important role in international criminal law, even, in some cases, for low-level perpetrators. It is hardly unjust to hold Tadic responsible for murders committed in his presence as part of a frenzy of ethnic cleansing in which he actively participated. Holding Tadic liable, however, for all the crimes visited upon Bosnian Muslims in the early 1990s would seem patently unjust.’¹⁰⁸

Such reasoning, based on what is ‘just’ fails to clarify how, in a criminal law context, we evaluate what is considered ‘just.’ It is incomprehensible why they argued that Tadic was justly convicted for murder but could not be justly convicted for all crimes committed at that time. While from the outset, it appears that it would be correct not to hold Tadic liable for ‘all’ crimes, analysis related to culpability-finding and fair labelling is lacking and necessary to address this matter for purposes of clarity and consistency.

Finally, Sassoli and Olson provide similar deficient reasoning. Although they argue that JCE 3 was not found under CIL, they nevertheless welcomed its existence, stating:

‘The more important question is whether the third category constitutes a sound development of international criminal law. We think it does, subject to some caveats inherent in a requirement the Appeals Chamber mentions in passing for that category, which should not be forgotten: there must be a criminal enterprise and the intention of the co-perpetrator to participate in and further such an enterprise’¹⁰⁹

Yet, such reasoning also fails to engage with the propriety of JCE 3. While JCE 3 can be described as necessary to hold certain individuals liable for crimes committed as part of a group, it is also essential that judges attribute the appropriate level of guilt.

Justifications of JCE 3 from judges

The fourth and final concern involves the different justifications for JCE 3 as advanced by Judges Cassese, Shahabuddeen and Schomburg.

¹⁰⁶ Ohlin (2007) 80.

¹⁰⁷ Ibid 83.

¹⁰⁸ Danner and Martinez (2005) 150.

¹⁰⁹ Sassoli and Olson (2000) 753-754.

a) A causation-nexus or ‘control over the crime’

Cassese had referred to a causation-nexus between the crime/s of the enterprise and the collateral offence. He had cited from the reasoning of one of the CIL-based cases, the Italian Court of Cassation *D’Ottavio et al.* The reasoning offered was that:

‘for a criminal event to be held to constitute the consequence of the participant’s action, it is necessary that there be a causation nexus - which is not only objective but also psychological - between the fact committed and willed by all the participants and the different fact committed by one of the participants. This is so because the participant’s responsibility (...) is grounded not in the notion of collective responsibility (...), but in the fundamental principle of concurrence of interdependent causes, upheld and specified in Arts 40 and 41 of the Criminal Code. By virtue of the latter principle, all the participants answer for a crime both where they are the direct cause of the crime and where they are the indirect cause, in accordance with the canon *causa causae est causa causati* [the cause of a cause is also the cause of the thing caused; i.e. whoever voluntarily creates a situation bringing to, or resulting in, criminal conduct is accountable for that conduct whether or not he willed the crime.]¹¹⁰

In his view, a causation-nexus based on the JCE participant’s actions ensures that he is held liable fairly for certain crimes. This argument is valid for defending a JCE 3 theory if such causation is either of a direct nature or based on a natural and probable consequence of the contribution of the participant. We could argue that this level of participation focuses on the contributory factor of each participant towards the collateral offence. It would vary from one participant to another but it would suffice to hold an individual liable as a principal if a direct connection or one based on a natural and probable consequence is established. However, as chapter 2.2 indicated, such a connection is not part of the JCE 3 formula. Therefore, such reasoning cannot be accepted.

The second argument, which is of a similar nature, is articulated by Judge Schomburg. He argues that JCE 3 is defective because it lacks specificity and an objective criterion.¹¹¹ He argues that the inclusion of ‘control over the crime’ would remedy this imbalance.¹¹² This thesis agrees with this view. A possible reformulation of JCE 3 in light of this criterion would state that if a crime committed by a JCE participant is outside the common plan, another JCE member could be held liable if he exercised control over the latter participant. Control establishes a sufficient connection indicating the gravity of the objective criterion between the JCE participant and the collateral offence. However, once again, this aspect of JCE 3 was not part of the JCE 3 formula or even found under CIL.

b) Foresight as intention

The second justification is intention as raised by Judge Shahabuddeen. Although not mentioned in *Tadic*, this form of *mens rea* became part of the discussion as Judge

¹¹⁰ Cassese (2007) (b) 119-120, fn. 12 citing *D’Ottavio et al.*

¹¹¹ *Martic* Appeals Judgment, Separate Opinion of Judge Schomburg, para. 3.

¹¹² *Ibid.*

Shahahabuddeen noted that, the reference in *Tadic*, is merely proof of intention.¹¹³ He supported this position by referring to Lord Scarman's comments in the English case of *Hancock*.¹¹⁴ In this case, Lord Scarman had noted that 'foresight of consequences is no more than evidence of the existence of intent.' By using this reasoning, Shahabuddeen argued that the JCE participant, in fact, shared the intention of the direct perpetrator of the collateral offence.¹¹⁵ His comment therefore suggests that the *Tadic* Appeals Judgment implied that intention was the *mens rea* for JCE 3, rather than foresight.

If the *mens rea* is that of intention and not foresight, then this thesis also agrees that such participation entails liability as a principal. Under these circumstances, the JCE participant no longer takes a risk which he foresees, but rather intends the collateral offence to be perpetrated (although it is outside the common plan). This *mens rea* indicates choice or will rather than a risk which may materialise. However, Judge Shahabuddeen's view is flawed for two reasons. Firstly, this was not the *mens rea* agreed in *Tadic*. Secondly, Judge Shahabuddeen has failed to fully grasp the scholarship regarding intention and foresight under English law. His reference to *Hancock and Shankland* is outdated. Under current English law, foresight of virtual certainty rather than mere foresight is taken as a form of intention (oblique intention).¹¹⁶ Therefore, his indirect reference to *Moloney* bears no weight. Instead, he should have referred to foresight of virtual certainty.

c) Policy reasons based on criminal law objectives

The third defence of JCE 3 concerns public policy considerations. As articulated by Judges Cassese¹¹⁷ and Shahabuddeen,¹¹⁸ it holds that the international community should protect itself against those who commit crimes in groups even if the participant does not intend the crime but is aware of it. To support this view, both judges relied on the comments of Lords Steyn¹¹⁹ and Hutton¹²⁰ in the English case of *Powell and English*.¹²¹

While this argument may appear to justify JCE 3 and is supported by English law jurisprudence, it is nevertheless not a consideration that explains why the level of culpability related to JCE 3 should be that of a principal. It bears no significance as to why we hold individuals liable for their role, liability or causation and capacity.¹²² Consequently, it does

¹¹³ *Brdjanin* Appeals Decision, Separate Opinion of Judge Shahabuddeen, paras. 2 and 8; *Krajisnik* Appeals Judgment, Separate Opinion of Judge Shahabuddeen, para. 32.

¹¹⁴ *Krajisnik* Appeals Judgment, Separate Opinion of Judge Shahabuddeen, para. 34, citing Lord Scarman's comments. This is no longer the position in English law. The correct interpretation of foresight is foresight of virtual certainty, see *Woollin* (UKHL), 82-87, noting that the court can find intention if the defendant foresaw that the consequence is virtually certain, confirmed in *Matthews and Alleyne*. Chapter 4.4.3 discusses this aspect in detail when examining parity of culpability.

¹¹⁵ *Krajisnik* Appeals Judgment, Separate Opinion of Judge Shahabuddeen, para. 32.

¹¹⁶ It is not a form of intention *per se*, but the court can find intention from it. The correct interpretation of foresight is foresight of virtual certainty, see *Woollin* (UKHL), 82-87, noting that the court can find intention if the defendant foresaw that the consequence is virtually certain, confirmed in *Matthews and Alleyne*.

¹¹⁷ Cassese (2007) (b) 117-118; Cassese *amicus curiae* brief, para. 82.

¹¹⁸ *Krajisnik* Appeals Judgment, Separate Opinion of Judge Shahabuddeen, paras. 32-51; Shahabuddeen (2010) 194.

¹¹⁹ A 'prime function of (criminal law) must be to deal justly but effectively with those who join with others in criminal enterprises. Experience has shown that joint criminal enterprises only too readily escalate into the commission of greater offences,' see *Powell and English* (UKHL) (1997) 551.

¹²⁰ Criminal law should 'give effective protection to the public against criminals operating in gangs, see *Powell and English* (UKHL) (1997) 561.

¹²¹ *Powell and English* (UKHL) (1997) 545.

¹²² Hart (2008) 212; Tadros (2007) 21.

not become a factor for attributing the highest degree of liability to a participant who only foresees a crime. If a policy consideration bears any significance at all, we may argue that it ought to be considered in the sentencing process. Participation in group crimes should be deterred and the sentence should reflect this because of the policy consideration. An accused person may therefore receive a higher sentence for a crime he foresees while participating in an enterprise. However, liability does not result in that of a principal.

d) The policy of ease of proof

The final justification is based on the policy of ease of proof. Defined as requiring little proof from the prosecution in order to convict an individual for a crime perpetrated,¹²³ this argument is used by Cassese. He argues that it is difficult to ‘pinpoint the specific contribution made by each individual participant in the collective criminal enterprise’¹²⁴ in ICL. As participants contribute in different ways, evidence may either be difficult or impossible to find. He nevertheless argues that it would be immoral and contrary to the purposes of criminal law to let the actions go unpunished.¹²⁵ However, this argument is flawed because it is equally immoral and inconsistent to convict an individual in the absence of evidence and mainly because a JCE member has previously participated in a criminal enterprise. This reasoning is not based on any explicit ground of culpability but instead seems to be a form of punishment for the JCE participant being part of the enterprise. If so, then it may be a policy consideration to be addressed within the sentencing phase. However, it does not entail that liability should be that of a principal.

In conclusion, among the four reasons cited above, the two policy-based reasons are invalid justifications for arguing that JCE 3 imposes a fair label. However, the discussions of causation, control over the crime and intention lead to parity of culpability because of their gravity. Yet, they cannot be accepted because they were not part of JCE 3’s formulation.

Final conclusions concerning JCE 3’s liability as a principal

Three conclusions emerge from this section’s analysis. The first is that the label of a principal, under JCE 3 is unacceptable because its elements do not reflect such level of liability. Secondly, my arguments in support of this conclusion do not suggest that the JCE participant does not bear any liability for a crime that he foresees is most likely to occur. I have only argued that such culpability is not that of a principal. Instead, if we revise the elements of JCE 3 in light of a theory that imposes liability as a principal, we may either endorse Judge Cassese’s reference to the causation-nexus or Judge Schomburg’s inclusion of ‘control over the crime’ or Judge Shahabuddeen’s perspective concerning oblique intention (although Judge Shahabuddeen has cited outdated and incorrect precedents for English law on oblique intention). Thirdly, the critique’s perspective fails to engage in a thorough discussion of culpability. Many commentators have remained content with criticising JCE 3 for attributing liability as a principal.¹²⁶ However, as I have argued, a JCE participant bears a degree of responsibility for foresight of crimes although liability is not that of a principal. Many commentators have neither addressed this matter nor engaged with the arguments of Judges Shahabuddeen, Schomburg and Cassese. As a result, culpability within a JCE 3 context remains a substantially under-analysed subject within the literature.

¹²³ Ashworth (2009) 73-74. He also argues that the burden of proof is on the defence. This does not apply here.

¹²⁴ Cassese (2007) 109, 110; Cassese *amicus curiae* brief, paras. 30-32.

¹²⁵ Ibid.

¹²⁶ To my knowledge, Fletcher’s brief commentary is the only exception, see n. (104).

3.4 CONCLUSIONS OF CHAPTER 3

The key conclusion of this chapter is that while JCE 1 imposes a fair label, JCE 3 does not. Chapter 3 has furthermore demonstrated in detail how the critique, regarding both JCE 1 and 3, is flawed for several reasons. The most important criticisms concerns the lack of analysis pertaining to fair labelling in ICL discourse and the divergent but yet incompatible justifications for JCE 3 by Judges Cassese and Shahabuddeen.

4

NPSC and JCE

4.1 INTRODUCTION

This chapter will examine whether JCE 1 and 3 violate the principle of NPSC. Section 4.3 addresses this matter for JCE 1 and section 4.4 will do so for JCE 3. Before engaging with this analysis however, it is necessary to clarify the meaning of NPSC.

4.2 DEFINING NPSC

In chapter 2, I had noted certain difficulties in fully understanding the meaning of NPSC. While the UN Secretary General Report and the ICTY Statute had highlighted its importance, certain difficulties remained in understanding its specific implications. On one hand, the UN Secretary General Report stated that those who ‘*participate*’¹ in the ‘planning, preparation or execution of crimes’² shall be ‘individually liable.’³ On the other hand, article 7(1) of the ICTY Statute stated that a person who planned, instigated, ordered, committed or otherwise aided and abetted in the planning, preparation or execution of a crime ‘(...) *shall be individually responsible* for the crime.’

From these two definitions, neither is the term ‘individually responsible’ nor the term ‘participate’ defined clearly. Therefore, the precise meaning of NPSC is not discernible. Consequently, defining these terms and explaining NPSC fully was a task left to the judges. Yet, none of the ICTY Judgments, including *Tadic*, had done so. Therefore, to pursue an enquiry regarding JCE and its adherence to NPSC, we need to develop an elaborate understanding of the principle. To do so, we may turn to existing criminal law scholarship. Several features assist in defining NPSC.

Foremost, scholars widely agree that NPSC ensures that the defendant’s culpability is personal⁴ and not collective. Framed in this manner, it is dependent upon the context and needs to be established in light of the connection between the accused person’s actions and the crime. Secondly, NPSC does not apply to all contexts of criminal conduct as, for example, it does not apply to strict or vicarious liability offences.⁵ Yet, where it does apply, its meaning raises questions about the accused person’s actions. As chapter 3 indicated that the gravity of the perpetrator’s actions (and consequently fair labelling) is contingent upon the subjective and objective elements, similar concerns arise in the context of NPSC. These

¹ UN Secretary General Report, para. 54 (emphasis added).

² Ibid.

³ Ibid.

⁴ See Kadish (1985) 323, 327, 373, 374 referring to personal conduct and blame; Van Sliedregt (2003) 58 and 343, referring to individual behaviour; Van Sliedregt (2012) (b) 1174, 175, 1180 underlining NPSC to prevent a conviction based on guilt by association; Wilson (2002) referring to accomplice’s actions and Damgaard (2008) 12 underlining ‘individual’ and ‘criminal’ in contrast to ‘collective responsibility.’

⁵ These crimes do not require *culpa*. Furthermore, accessorial liability is not vicarious liability, see Wilson (2002) 195. For more about strict and vicarious liability, see Smith and Hogan (2011) 273-283, 155-180; Simester and Sullivan (2010) 173-198, 263-279.

may translate into the following questions: does NPSC necessitate the perpetration of the *actus reus* of a crime or is a causal-connection sufficient; how relevant is the *mens rea*; can the accused person be removed from the scene of the crime and under those circumstances, does using or exercising control over a perpetrator make a difference? These questions are all related to an accused person's actions.

Given the significance of these questions, this chapter argues that the application of NPSC concerns the principle of *mens rea* and analysis related to causation-connection.⁶ The former principle is concerned with the subjective element.⁷ It holds that criminal liability is only imposed 'on persons who are sufficiently aware of what they are doing and of the consequences it may have.'⁸ The latter is concerned with the objective element and its threshold level in relation to the perpetration of the crime. Together, they enable us to determine liability based on 'what the perpetrator has done and his mental attitude,'⁹ thus acting as 'parameters of culpability.'¹⁰ In carrying out this examination, it is not necessary that the *mens rea* is always intention, which as noted in chapter 3, is the highest form of *mens rea*.¹¹ The subjective element could be lowered in favour of a higher threshold for the objective element (*actus reus*) and vice-versa, thus establishing a sliding scale between the two elements. To determine this, the participation of the defendant would have to be examined against the factual background specifically. This analysis, overall, enables us to understand the scope of NPSC and its implications.

4.3 DOES JCE 1 VIOLATE NPSC?

In light of this explanation, we can now examine whether JCE 1 violates NPSC. As previously argued, JCE 1 involves two types of perpetrators: the direct perpetrator who fulfils the *actus reus* and shares the *mens rea* of the crime and the co-perpetrator (the person who is not the direct perpetrator but still a JCE member).

In relation to the direct perpetrator, NPSC is evidently not violated. The direct perpetrator commits the crime by fulfilling the *actus reus* and sharing the *mens rea* of the crime.¹² Since he fulfils both the objective and subjective elements, he is therefore correctly labelled a principal.

In relation to the co-perpetrator however, a more detailed explanation is required since the co-perpetrator does not fulfil the *actus reus* of the crime. He is known, however, to contribute

⁶ For discussion of causation related to voluntary conduct and in particular accomplice liability, see Hart and Honore (1985) 136; Wilson (2002) 195.

⁷ Many scholars refer to the strength of the *mens rea* when arguing that responsibility is personal. For discussions related to free will, choice, attitude and autonomy, see Van Sliedregt (2003) 58, Ashworth (2009) 81, Moore (1993) 51, Duff (1990) 102, 141, 153, Ashworth (2008) 232, 239, Kenny (1978) 25, Tadros (2005) 44, 45, Gardner (1998) 240-241.

⁸ Ashworth (2009) 154-155.

⁹ Wilson (2002) 195.

¹⁰ Van Sliedregt (2006) 81, 86 and 97.

¹¹ Chapter 3.2.2, n. (26).

¹² This depends upon the JCE 1 crime. If it includes specific intent (persecution or genocide), the *mens rea* needs to be specific intent and not just intention, see *Popovic et al.* Trial Judgment, ICTY, para 1022; *Krnjelac* Trial Judgment, para. 487; *Krnjelac* Appeals Judgment, paras. 111-112; *Babic* Trial Sentence Judgment, para. 31; *Kvočka et al.* Trial Judgment, para. 288 and *Simic et al.* Trial Judgment, para. 156.

substantially to the common plan¹³ and moreover intends to further it. We can therefore argue that the gravity of these two elements are sufficient to hold that responsibility, in the form of the secondary party's physical and mental actions, is personal. The co-perpetrator is a principal because of the gravity of the subjective element combined with the substantial contribution made towards the common plan. Therefore, overall, JCE 1 does not violate NPSC for either of the two perpetrators.

4.4 DOES JCE 3 VIOLATE NPSC?

In applying the same analysis to JCE 3 however, a different conclusion is reached. Unlike JCE 1, the extended form of JCE does not require any form of participation. There is no causation-nexus requirement and the *mens rea* is not intention. The subjective elements are foresight and foreseeability only. Therefore, in determining whether JCE 3 violates NPSC, we ought to address how the absence of an objective element coupled with the *mens rea* of foresight and foreseeability are concerned with the crime perpetrated. I will address the significance of both subjective elements separately considering their different nature.

4.4.1 Foreseeability and the principle of *mens rea*

As an objective standard (a standard external to the defendant), it is evident that foreseeability does not establish a connection between the participant's actions and the crime. A conviction based on what the person 'ought to have foreseen' does not reflect his guilty mind or actions. However, as chapter 3 explained, when considering foreseeability, it is often in light of the *actus reus* or a causation-connection or the role which may be driven by a policy consideration. Yet, as chapter 2 noted, JCE 3 does not require any participation or a causation-nexus and does not attribute liability because of a specific role. Therefore, under foreseeability, NPSC is violated.

4.4.2 Foresight and the principle of *mens rea*

In contrast to foreseeability, the subjective standard of foresight explores what the defendant actually foresaw. In this vein, it does not violate the principle of *mens rea* which, as previously argued (section 4.2), is part of NPSC.

However, in line with discussions in chapter 3.3, the characterisation of foresight matters. Foresight on its own differs from foresight of high probability or foresight of virtual certainty because of the lower degree of probability anticipated by the defendant. Two examples may serve to clarify this difference. Duff cites the example of a terrorist who plants a bomb on a plane with the intention of damaging property only.¹⁴ According to this example, although the terrorist does not intend (direct intention, namely intends to cause a specific result) to kill passengers, he foresees with virtual certainty that their death will happen. We cannot argue that their death *may* happen. It is virtually certain that it will. The terrorist, who therefore foresees with virtual certainty that it will happen, is fully liable for this crime of murder. In a different example, however, we may refer to a group of robbers who intend to rob a bank (JCE 1 crime). If one of the robbers then decides to carry a gun and this fact is known to the other members, we could argue that one of the members could foresee that the armed robber

¹³ See chapter 3.2.3 for conclusion that threshold level is substantial.

¹⁴ Duff (1990) 74-75.

may use his gun.¹⁵ In the eventuality that he does, the member could be held liable for foreseeing that the armed robber may use his gun.¹⁶ Yet, he is not liable to the extent of a principal. He does not physically commit the crime and only foresees that his partner may commit it. As he foresees the crime, he is liable to a certain extent.¹⁷ The main difference between these two examples concerns the degree of risk that a member of a criminal group takes. In the former case, the risk is virtually certain, thereby carrying a greater degree of liability (namely that of a principal) than a risk that is only foreseen, as in the latter case.

In applying this reasoning to JCE 3, the conclusion is that NPSC is violated. As JCE 3 imposes liability as a principal on the basis of a low *mens rea* requirement (foresight and not foresight of a higher degree), it violates NPSC.¹⁸ Had the *Tadic* Appeals judges advanced a different theory of JCE 3 by establishing a lower form of culpability, then it is arguable that NPSC may not have been violated. However, considering that the formulation of JCE 3 is premised on foresight alone, NPSC has been violated.

4.5 CONCLUSIONS AND REVIEW OF THE CRITIQUE

4.5.1 Conclusions and review of *Tadic* Appeals Judgment

From the above analysis, the conclusions are the following: JCE 1 does not violate NPSC but JCE 3 does.

The *Tadic* Appeals judges failed to substantiate the meaning of NPSC in respect of both forms of JCE. They only noted its significance without clarifying how it applied specifically for either form.¹⁹

4.5.2 Criticisms of JCE 1: A review

Within the JCE-based literature, three comments are of concern. Firstly, there is a significant lack of analysis regarding the meaning and specific implications of NPSC. In similar fashion to the *Tadic* Appeals Judgment, several scholars fail to provide a definition of NPSC.²⁰ As section 4.4 demonstrated, an elaborate definition is necessary as it enables us to analyse specifically why JCE 3 violates the principle.

Secondly, Robinson contends that JCE 1 violates NPSC because it requires only an insignificant contribution. This argument is flawed.²¹ As chapter 3 had previously argued that the level of contribution for JCE 1 is substantial/significant,²² reference to an ‘insignificant’ level is not justified. Furthermore, no case law to date has convicted a JCE participant for an

¹⁵ This depends upon available information.

¹⁶ *Ibid.*

¹⁷ Chapter 3 had explained the degree of liability in detail, see chapter 3.3.2.

¹⁸ One could not argue that fair labelling has been violated but not NPSC.

¹⁹ Chapter 2.2.1.

²⁰ Danner and Martinez (2005) 79; Osiel (2005) 1766; Fletcher (2002) 1541-1542; Van Sliedregt (2006) 82; Ohlin (2007) 76-88. Robinson provides the clearest definition, arguing that NPSC requires personal engagement and participation and sufficient knowledge and intent in relation to the conduct that is personally reproachable, see Robinson (2008) 926.

²¹ Robinson (2008) 939: ‘insignificant level of participation for JCE 1.’

²² *Ibid* 940.

‘insignificant’ level of contribution.²³ Although the ICTR *Mpambara* Appeals Judgment referred to ‘insignificant,’ it nevertheless did not convict the accused.

Thirdly, Ambos, Fletcher and Ohlin incorrectly argue that JCE 1 violates NPSC because it imposes equal liability for participants regardless of their role in the enterprise.²⁴ Individual roles, based on varying degrees of substantial contribution, are addressed during sentencing. This reflects the individual level of culpability for different principals in a JCE. The ICTY has endorsed this approach by considering superior roles an aggravating factor, for example.²⁵ This argument, therefore, does not take into account that culpability in a criminal enterprise is firstly established on grounds of substantial/significant contribution (which leads to liability as a principal) and secondly individually addressed during the sentencing phase.

4.5.3 Criticisms of JCE 3: A review

In reviewing the literature related to JCE 3, several commentators concede that this form violates NPSC.²⁶ This conclusion falls in line with that of this thesis. However, three specific comments need to be made considering the lack of analysis regarding an elaborate meaning of NPSC.

Firstly, we may argue that Badar’s reasoning related to JCE 3 and NPSC is flawed. He argues that the ‘participant (is) held liable unfairly for neither intending nor participating’²⁷ in JCE 3 and adds that the liability of the direct perpetrator is tested subjectively while that of the JCE participant is tested objectively.²⁸ As JCE 3 concerns both a subjective and an objective test, this view is flawed.

Secondly, Danner and Martinez advance flawed arguments. They argue that JCE 3 violates NPSC²⁹ because it leads to guilt by association owing to the foreseeability requirement.³⁰ They further argue that NPSC ought to be applied strictly in ICL³¹ conceding that some domestic systems have relaxed the application of NPSC³² but ICL ‘cannot afford to follow a similar path.’³³ This reasoning is defective for several reasons. Firstly, JCE 3 does not lead to guilt by association because it is not only based on the objective test but also the subjective

²³ See chapter 3.2.3, n. (57) for cases.

²⁴ Ambos (2007) 173: ‘JCE (...) conflicts with the principle of culpability (...) there still exists a tendency to render all participants equal on the level of attribution; Fletcher and Ohlin (2005) 550: ‘all parties (...) equally responsible for the criminal acts of the group, regardless of their individual ‘role and function in the commission of the crime.’ This (...) clearly violates the basic principle that individuals should only be punished for personal culpability.’

²⁵ For conviction of a general, see *Krstic* Trial Judgment, para. 705. For conviction of a leader, see *Stakic* Appeals Judgment, para. 409.

²⁶ Robinson (2008) 939 and 942: JCE 3 problematic in terms of fair labelling and culpability and it contradicts personal culpability when someone is held liable for an offence when he neither satisfies the objective or subjective elements of the crime; Ambos *amicus curiae* brief, ECCC, pgs. 16-18; *Martic* Appeals Brief, paras. 54-60, noting how the principle of culpability is violated under JCE 3.

²⁷ Badar (2006) 301.

²⁸ *Ibid.*

²⁹ Danner and Martinez (2005) 98: JCE 3 enables ‘all crimes committed against a particular group within an entire region over a period of years to be attributed to a defendant if he was part of a group that intended to perpetrate these crimes.’

³⁰ *Ibid* 137, noting the requirement of foreseeability.

³¹ *Ibid* 146.

³² They refer to the Pinkerton doctrine and RICO Statute under US law, Danner and Martinez (2005) 98.

³³ Danner and Martinez (2005) 98.

one. Secondly, their analysis does not engage with a normative discussion of NPSC. Their comments only define NPSC as requiring that the ‘individual is personally responsible’³⁴ and that ‘punishment may not justly be imposed where the person is not blameworthy.’³⁵ Thirdly, they do not explain why ICL cannot follow the path of a relaxed application of NPSC as in some domestic jurisdictions. If we assume that their interpretation of NPSC is that it is limited to direct perpetratorship, then judges cannot address the guilt of co-perpetrators in a JCE. As I had argued in chapter 3, a co-perpetrator is responsible to a certain degree for foreseeing a crime committed by another co-perpetrator. Therefore, a lower level of guilt than that of a principal would be acceptable.³⁶

The third and final flawed argument within the critique emerges from Cassese. He has argued that JCE 3 does not violate NPSC because of the causal link between the JCE participant and the collateral offence.³⁷ However, as chapter 2 indicated³⁸ that there is no causation-nexus as part of JCE 3, this argument is defective.

³⁴ Ibid 79.

³⁵ Ibid 83.

³⁶ Under English law, Krebs provides a similar view. She argues that under the extended theory of JCE (known as the parasitic form of liability), liability is *sui generis* accomplice, Krebs (2010) 578-604.

³⁷ Cassese ECCC *amicus curiae* brief, para. 82, noting the causal link between the defendant’s mental and physical conduct and the extra crime perpetrated; Cassese (2007) (b) 120, referring to the causation-connection of the defendant.

³⁸ Chapter 2.2.2, pgs 49-52.

CIL and JCE

5.1 INTRODUCTION

This chapter examines the use of CIL. As chapter 2 explained, two principal concerns underlie its use in formulating JCE 1 and 3.¹ Foremost, we need to question whether the elements for both forms, as cited by *Tadic* were, in fact, correct according to the state practice referred to.² Secondly, we need to examine the methodology employed by *Tadic* in using CIL. Both matters are important for different reasons.

As two of the examples in chapter 1 indicated (*Vasiljevic* Trial Judgment and *CDF* Decision on lack of Jurisdiction), specificity when using CIL is important. In this context, it is necessary to specify whether the jurisprudence cited (mainly post-WW II), referred to the objective and subjective elements mentioned. Secondly, using CIL according to an acceptable method is important as a matter of certainty in using sources of law. The ILC has recently emphasised this point as part of its study regarding the ‘identification and formation of customary international law.’³ Under the guidance of ILC Special Rapporteur, Sir Michael Wood, it has produced three reports to date.⁴ This chapter will refer to them insofar as they are relevant.

To address these two matters, this chapter adopts the following structure. Section 5.2 conducts a detailed enquiry regarding the elements for JCE 1 and 3, cited by *Tadic*. It will review this material but will also examine case law and reviews omitted by the *Tadic* Appeals Judgment. Section 5.3 then evaluates CIL methodology applied by *Tadic*. As part of the analysis, this chapter will illustrate several flaws of the literature concerned with both matters.

5.2 CIL AND JCE ELEMENTS

5.2.1 Analysis of JCE 1-based case law

Tadic cited sixteen cases⁵ to support its claim that JCE 1 is ‘firmly established in CIL.’⁶ Out of these sixteen cases, only the facts of six are available.⁷ *Tadic* merely referred to the other ten cases in footnotes.⁸ These six cases are:

¹ Chapter 2.2.4.

² This chapter does not conduct a broader normative enquiry regarding the possible formulation of JCE 1 and 3 under other post-WWII case law not cited by *Tadic*. For this matter, see Jain (2014) 42-44.

³ ILC 2013 (First Report), para. 38: ‘as in any legal system, there must in public international law be rules for identifying the sources of the law.’

⁴ See ILC 2013 (First Report); ILC 2014 (Second Report) para. 13; ILC 2015 (Third Report).

⁵ Chapter 2.2.2, n. (102).

⁶ *Tadic* Appeals Judgment, ICTY, para. 220.

⁷ The other ten were cited in footnotes only.

⁸ *Ibid*, para. 201, fns. 246 and 247.

- One NMT case: *Einsatzgruppen* case
- Four British Military Court Trial (BMC) cases: *Almelo Trial*, *Schonfeld et al*, *Jepsen et al* and *Ponzano*
- One German post-WW II case: *Decision of K. and A*

Two enquiries need to be conducted regarding this case law:

- a) Firstly, do these cases refer to the common plan theory?
- b) Secondly, do they refer to the two elements of intention and causation-contribution?

I will analyse all six cases to examine how they addressed these two issues before summarising the findings.

Einsatzgruppen case, NMT (Vol. IV)

The *Einsatzgruppen* were armed units which committed atrocities during WW II. It consisted of four main units: *Einsatzgruppe A*, *Einsatzgruppe B*, *Einsatzgruppe C* and *Einsatzgruppe D*. Each unit had between 800 - 1200 people and the units followed the Fuehrer Order. This Order called for the summary killing of ‘Jews, gypsies, insane people, Asiatic inferiors, communist functionaries, and asocials.’ It is claimed that the four units were responsible for the killing of over two million people.⁹

Initially, the indictment charged twenty-four defendants who belonged to the *Einsatzgruppen* with crimes against humanity (count one), war crimes (count two), and membership in criminal organizations (count three). However, the number was reduced to twenty-two¹⁰ as one defendant committed suicide¹¹ and one other was severed from the case.¹² The defendants held different positions: commanding officers, deputy chief officers, officers and members. Among the three charges, the two most important to determine whether a common plan theory existed were count one (crimes against humanity) and count two (war crimes). Count three only concerned membership of a criminal organisation. In convicting under this count, judges would not be required to determine how members of the armed unit (*Einsatzgruppen*) perpetrated crimes under the Fuehrer Order.

The applicable law was Control Council Law No. 10 (CCL10), which referred to a common plan theory. Article 2(2) of the CCL10 stated:

‘Any person (...) is deemed to have *committed* a crime (...) if he was (a) a principal or (b) was an accessory to the commission of any such crime or ordered or abetted the same or (c) took a consenting part therein or (d) was connected with plans or enterprises involving its commission.’¹³

⁹ NMT, Vol. IV, pgs. 412-488.

¹⁰ Otto Ohlendorf, Heinz Jost, Erich Naumann, Erwin Schulz, Franz Six, Paul Blobel, Walter Blume, Martin Sandberger, Eugen Steimle, Ernst Biberstein, Werner Braune, Walter Haensch, Gustav Nosske, Adolf Ott, Eduard Strauch, Waldermar Klingelhofer, Lothar Fendler, Waldermar von Radetzky, Felix Ruehl, Heinz Schubert, Mathias Graf and Willy Seilbert.

¹¹ Emil Haussmann, NMT, Vol. IV, pg. 411.

¹² Otto Rasch, NMT, Vol. IV, pg. 411.

¹³ Emphasis added.

The Prosecutor had referred to the common plan doctrine by stating that ‘not only are principals guilty but also accessories, those who take a consenting part in the commission of crime or are connected with plans or enterprises involved in its commission, those who order or abet crime, and those who belong to an organization or group engaged in the commission of crime.’¹⁴ To support this argument and explain how it applied to four deputy chief officers (who were not in command positions),¹⁵ the prosecutor used the following examples:

‘Any member who assisted in enabling the (*Einsatzgruppen*) units to function, knowing what was afoot, is guilty of the crimes committed by the unit. The cook in the galley of a pirate ship does not escape the yardarm merely because he himself does not brandish a cutlass. The man who stands at the door of a bank and scans the environs may appear to be the most peaceable of citizens, but if his purpose is to warn his robber confederates inside the bank of the approach of the police, his guilt is clear enough. And if we assume, for the purposes of argument, that the defendants (...) have succeeded in establishing that their role was an auxiliary one, they are still in no better position than the cook or the robbers’ watchman.’¹⁶

In response, the defence centred its arguments on superior orders, jurisdiction, necessity, national emergency and non-involvement.¹⁷

In examining these two positions, the NMT judges rejected the defence arguments.¹⁸ They embraced the prosecutor’s reasoning regarding accessories connected with criminal plans. However, they focused on the extent of involvement in order to convict. To explain this reasoning fully, I will examine the convictions as expressed in the form of individual judgments for each defendant. Firstly, I will illustrate how the judges concluded that crimes were committed by a group. Secondly, I will list the important commentaries regarding the subjective and objective elements. Finally, I will review the acquittal of two deputy chief officers based on lack of participation in the common plan and their *mens rea*.

Among those convicted were fifteen commanding officers,¹⁹ three deputy officers,²⁰ one officer²¹ and one member of the unit.²² In convicting these individuals, the judges refrained from making an explicit statement referring to a common plan.²³ However within the individual judgments, they used the following terminology strongly indicative of such a theory: ‘the criminal purpose (of the) organisation,’²⁴ that defendants ‘formed part of an organization (which) engaged in atrocities, offenses, and inhumane acts against civilian populations,’²⁵ that accused persons ‘took a consenting part in criminal activities’²⁶ or ‘an active part’²⁷ and that the four *Einsatzgruppen* units were executing the Fuehrer Order.²⁸

¹⁴ NMT, Vol. IV, pg. 371-372.

¹⁵ Radetsky, Ruehl, Schubert and Graf, see NMT, Vol. IV, pg. 373.

¹⁶ NMT, Vol. IV, pg. 373.

¹⁷ Ibid, pgs. 483 and 488.

¹⁸ NMT, Vol. IV, pgs. 462-493.

¹⁹ Ohlendorf, Jost, Naumann, Schulz, Six, Biberstein, Blobel, Blume, Sandberger, Steimle, Braune, Haensch, Nosske, Ott, Strauch.

²⁰ Fendler, Von Radetsky, Seilbert

²¹ Schubert.

²² Klingelhoefner.

²³ NMT, Vol. IV, pgs. 453-462 for general views about the law to be applied (not individual cases).

²⁴ Jost, NMT. Vol. IV, pg. 512.

²⁵ Six, NMT, Vol. IV, pg. 526.

²⁶ Fendler, NMT, Vol. IV, pg. 573.

²⁷ Six, NMT, Vol. IV, pg. 526.

Such language indicates unequivocally the existence of a theory whereby those acting in concert or acting in group are responsible for the crimes committed as part of that group.²⁹

In regards to identifying the participation requirements, we find two difficulties. Firstly, the judges did not articulate a general standard for the subjective and objective elements to evaluate levels of guilt. Secondly, several of the individual judgments failed to provide a detailed enquiry regarding levels of participation and *mens rea*.³⁰ Therefore, in some individual judgments, we find greater clarity regarding the extent of participation and the state of defendants' minds than others. As a result, we need to examine the different definitions for objective and subjective elements to draw appropriate conclusions.

In respect of the commanding officers who did not physically perpetrate crimes, we find similar evidentiary examinations and findings regarding their role and levels of participation. The convictions state the following: Jost, as Chief of *Einsatzgruppe A* co-operated with the army command and was responsible for all operations conducted in his territory;³¹ Naumann as Commanding Officer of *Einsatzgruppe B* met from time to time with his *Kommando* leaders and had the power of command;³² Blume was given command of *Sonderkommando 7a* and instructions on the task of exterminating Jews;³³ Schulz as Commanding Officer of *Einsatzkommando 5* of *Einsatzgruppe C* retained control of the *Kommando* until the actual arrival of his successor;³⁴ Biberstein, Commanding Officer of *Einsatzkommando 6* of *Einsatzgruppe C* ordered the death of sixty-five persons and supervised their very executions;³⁵ Haensch as Commanding Officer of *Sonderkommando 4b* of *Einsatzgruppe C* planned operations and had control over officers taking part in the movement;³⁶ Steimle as Commanding Officer of *Sonderkommando 7a* of *Einsatzgruppe B* authorized and approved of killings in violation of law and was guilty of murder;³⁷ Strauch as Commanding Officer of *Einsatzkommando 2* of *Einsatzgruppe A* was present during part of a mass execution and witnessed about two hundred being killed.³⁸

In addition to this discussion of command role and control over junior officers, we find several references to the Commanding Officers' states of mind: 'aware of the criminal purpose to which that organization was put';³⁹ 'knew that they were giving full effect to the Fuehrer Order (and) knew that executions were taking place';⁴⁰ being 'on notice as to what was expected of the *Einsatz* units';⁴¹ 'went along willingly with the execution of the Fuehrer

²⁸ Ohlendorf, NMT, Vol. IV, pg. 511; Jost, NMT, Vol. IV, pg. 512; Naumann, NMT, Vol. IV, pg. 517; Schulz, NMT, Vol. IV, pg. 520; Six, NMT, Vol. IV, pg. 526; Blume, NMT, Vol. IV, pg. 529; Sandberger, NMT, Vol. IV, pgs. 532 – 533; Steimle, NMT, Vol. IV, pg. 541; Braune, NMT, Vol. IV, pgs. 545 – 546; Haensch, NMT, Vol. IV, pg. 550; Nosske, NMT, Vol. IV, pg. 556; Klingelhofer, NMT, Vol. IV, pgs. 569 – 570.

²⁹ That group which was carrying out the Fuehrer Order.

³⁰ Ohlendorf, NMT, Vol. IV, pg. 511; Paul Blobel, NMT, Vol. IV, pg. 528; Walter Blume, NMT, Vol. IV, pg. 529; Gustav Nosske, NMT, Vol. IV, pg. 556; Adolf Ott, NMT, Vol. IV, pg. 560.

³¹ NMT, Vol. IV, pg. 513.

³² Ibid, pg. 517.

³³ Ibid, pg. 529.

³⁴ Ibid, pg. 520.

³⁵ Ibid, pg. 545.

³⁶ Ibid, pg. 549.

³⁷ Ibid, pg. 541.

³⁸ Ibid, pgs. 565 – 566.

³⁹ Jost, NMT, Vol. IV, pg. 512.

⁴⁰ Naumann, NMT, Vol. IV, pg. 517.

⁴¹ Schulz, NMT, Vol. IV, pg. 520.

Order;⁴² ‘knew of the Fuehrer Order;’⁴³ ‘knew that Jews were executed;’⁴⁴ ‘thoroughly aware of the instructions (and) had full knowledge of the main purpose of the *Einsatzgruppe*’⁴⁵ and ‘thoroughly aware of the activities of *Einsatzgruppe D*.’⁴⁶

Based on these comments, we can deduce that a strong connection between the defendants and the perpetration of group crimes is required for guilt to be established. This includes both a clear contribution to the plan in the form of exercising control over killings and executions as well as displaying an appropriate state of mind (awareness, willing, full knowledge). Yet, in other instances, where levels of participation in criminal activities were not as evident, judges were concerned about the defendants’ *mens rea* and actions other than ‘a form of control.’ In this regard, two cases regarding lower-level members require scrutiny.

The first is that of Klingelhofer. He was a member of *Sonderkommando 7b* of *Einsatzgruppe B*.⁴⁷ He stated that his function in the *Einsatzgruppe* operation was restricted to that of an interpreter. However, the judges argued that:

‘even if this were true it would not exonerate him from guilt because in locating, evaluating and turning over lists of Communist party functionaries to the executive department of his organization he was aware that the people listed would be executed when found. In this function, therefore, he served as an accessory to the crime.’⁴⁸

According to this case, guilt was not contingent upon the ability to exercise control over executions or order them. It concerned the ability to assist in executions coupled with the awareness that executions would take place.

The second case is that of Fendler, Deputy Chief of *Sonderkommando 4b* of *Einsatzgruppe C*.⁴⁹ Fendler claimed that his work with the *Kommando* was restricted to a specific department, which was isolated from other departments. In this manner, he was unaware of other ongoing activities, including criminal ones. His role was furthermore limited to the gathering of information only.⁵⁰ However, the NMT judges dismissed this claim. They made the following important comments regarding his state of mind and actions:

‘It is absurd to assume that Fendler could not know what (...) officers (in other departments) were doing, especially in view of the fact that Fendler was the second senior officer in the *Kommando* (...) it is maintained that he was part of an organization committed to an extermination program.’⁵¹

‘The defendant knew that executions were taking place. (...) But, there is no evidence that he ever did anything about it. As the second highest ranking officer in the *Kommando*, his views could have been heard in complaint or protest against what he

⁴² Sandberger, NMT, Vol. IV, pgs. 532 – 533.

⁴³ Braune, NMT, Vol. IV, pgs. 545 – 546.

⁴⁴ Von Radetsky, NMT, Vol. IV, pg. 577.

⁴⁵ Schubert, NMT, Vol. IV, pg. 584.

⁴⁶ Seilbert, NMT, Vol. IV, pg. 539.

⁴⁷ NMT, Vol. IV, pg. 568.

⁴⁸ *Ibid*, pg. 569.

⁴⁹ *Ibid*, pgs. 570 – 571.

⁵⁰ *Ibid*, pgs. 570 – 571.

⁵¹ *Ibid*, pg. 571.

now says was a too summary procedure, but he chose to let the injustice go uncorrected.⁵²

As with Klingelhofer, this case emphasises the state of mind of the defendant (knowledge) and his actions which are not concerned with a command and control position. Instead, they were based on the failure to protest against executions, which thereby indicate a consenting part in criminal activities coupled with knowledge of such executions.

The final important analysis concerns the two acquittals. They are revealing because of how the judges emphasised the lack of participation and lack of intent.

The first case is that of Ruehl, who was an Officer of *Sonderkommando* 10b of *Einsatzgruppe* D.⁵³ The prosecutor had argued that he was criminally involved in migrating a large group of Jews from the German controlled territory into Romania.⁵⁴ However, no evidence was produced at trial regarding this matter. Instead, the judges found that Ruehl acted as a courier between the Chief of the *Einsatzgruppe* and the escorting Romanian officers of the so-called transport. They held that ‘there (was) no evidence that Ruehl in any way maltreated these Jews, and certainly he did not participate in the execution of any of them.’⁵⁵ They added that:

‘Although it is evident that Ruehl had knowledge of some of the illegal operations of *Sonderkommando* 10b, it has not been established beyond a reasonable doubt ‘that he was in a position to *control, prevent, or modify the severity of its program.*’⁵⁶

They concluded that he ‘remained with the *Einsatz* organization for no more than three months and during the entire period took part in no executive operation nor did his low rank place him automatically into a position where his lack of objection in any way contributed to the success of any executive operation.’⁵⁷

If we compare the convictions of the aforementioned Commanding Officers with this acquittal, the reasoning provides greater clarity regarding the level of participation required. None of the other judgments had highlighted that guilt was dependent upon the ability to ‘*control, prevent, or modify*’ illegal operations (criminal activities). This phrase therefore sets out in clearer terms a threshold level for the objective element.

The second acquittal is that of Graf. Unlike the other defendants, he was not a Commanding Officer or Deputy Chief. He was only an Officer of *Einsatzkommando* 6 of *Einsatzgruppe* C.⁵⁸ Therefore, he did not play a role in ordering executions or overseeing them. Nevertheless, the prosecution used reports illustrating that *Einsatzkommando* 6 had engaged in various criminal operations and attempted to establish a link with Graf’s actions and role in this unit.⁵⁹ In examining the evidence, the judges conceded that Graf ‘knew of at least some of these executions.’⁶⁰ However, they argued that ‘more than mere knowledge of illegality or

⁵² Ibid, pg. 572.

⁵³ Ibid, pg. 578.

⁵⁴ Ibid, pg. 580.

⁵⁵ Ibid, pg. 580-581.

⁵⁶ Ibid, pg. 580 (emphasis added).

⁵⁷ Ibid, pg. 581.

⁵⁸ Ibid, pg. 584.

⁵⁹ Ibid, pg. 585.

⁶⁰ Ibid.

crime is required in order to establish guilt under counts one and two of the indictment.⁶¹ Furthermore, coupled with this argument, the judges examined in detail Graf's actions and role. They held:

‘in view of his various absences from the *Kommando* it cannot be assumed that his membership in the organization of itself proves his presence at and knowledge of any particular executive operation, (...) it is not to be assumed that the commander of the organization would take Graf into his confidence in planning an operation. As a non-commissioned officer he would not participate in officers' conferences. Since there is no evidence in the record that Graf was at any time in a position to protest against the illegal actions of others, he cannot be found guilty as an accessory under counts one and two of the indictment. Since there is no proof that he personally participated in any of the executions or their planning, he may not be held as a principal.’⁶²

As with Ruehl, the judges did not assume that membership in a unit entails guilt. By scrutinising the evidence and emphasising lack of participation, the predominant concern appeared to be the need for proof of involvement rather than presence in a unit and a state of mind that reveals more than ‘knowledge of illegality.’

In conclusion, if we examine the analysis underlying the convictions of the Commanding Officers, the Officers and the two acquittals, the following can be said of the *Einsatzgruppen* case: it applied common plan theory, it set out a threshold for participating in the common plan which requires the ability to ‘prevent, control or modify’ operations and it referred to *mens rea* which required more than just ‘mere knowledge of illegality’ but included awareness or full knowledge to carry out the plan.

Almelo Trial, British Military Court Trial case

The second case is the *Almelo Trial*, which was tried by the British Military Court (BMC).⁶³ This court was structured differently to the IMT or NMT. A Judge Advocate was responsible for summing up the law only while members of the court, who would include military officials (for example a Brigadier, Commander or Lieutenant), would evaluate the evidence and issue the decision. They may or may not provide legal reasoning.

The case involved four accused persons, Sandrock, Schweinberger, Wiegner and Hegemann. Sandrock was in command of a SS party, which consisted of Schweinberger, Wiegner and Hegemann. They were all involved in the killing of a British POW and a Dutch civilian who had been living in hiding in the house of a Dutch person. Two specific incidents led to these killings. In the first incident, Sandrock, Schweinberger and Hegemann were involved. Sandrock told the POW that he had been condemned to death. Sandrock gave specific orders to Hegemann and Schweinberger. Schweinberger shot him from behind while Sandrock dug the grave and Hegemann was left standing by the car. He helped carry the POW to the grave. In the second incident, exactly the same procedure was followed in killing the Dutch civilian, Van der Wal. The only difference on that day was that Hegemann was not present and Wiegner took his place.⁶⁴

⁶¹ Ibid.

⁶² Ibid.

⁶³ LRTWC, Vol. I, pg. 35; *Tadic* Appeals Judgment, para. 197.

⁶⁴ LRTWC, Vol. I, pg. 36.

The Prosecution charged all four with committing a war crime under Regulation 8(ii) of the Royal Warrant. This provision, which all four BMC cases applied, stated:

‘Where there is evidence that a war crime has been the result of concerted action upon the part of a unit or group of men, then evidence given upon any charge relating to that crime against any member of such unit or group may be received as *prima facie* evidence of the responsibility of each member of that unit or group for that crime. In any such case, all or any members of any such unit or group may be charged and tried jointly in respect of any such war crime and no application by any of them to be tried separately shall be allowed by the Court.’⁶⁵

Adding to this, the Prosecutor stated that the analogy ‘which seemed to him most fitting (...) was that of a gangster crime, every member of the gang being equally responsible with the man who fired the actual shot.’⁶⁶ The Prosecutor used several witnesses at trial to establish the facts. The defence in turn argued that they were forced to carry out the shooting and that it was ‘quite possible that the two were liable to be shot (claim of superior force).’⁶⁷

The one-page judgment, in the form of the summing up of the Judge Advocate, presents strong evidence in favour of the common plan theory, active contribution to the plan and intention. The two most important parts of the summing up are the following:

‘there was no dispute that (the POW) was taken and killed by a shot in the back of the neck, that the shot was fired by the accused Ludwig Schweinberger, and that with him taking part in the execution, were the accused Sandrock and Hegemann. There was no dispute that all three *knew what they were doing* and had gone there for the *very purpose of having this officer killed*. If people were all present together at the same time taking part in a *common enterprise which was unlawful*, each one in his own way *assisting the common purpose* of all, they were all equally guilty in law. The party was under the command of Sandrock and in that sense he was probably directing the course of events (in the incident).’⁶⁸

‘all three (Sandrock, Schweinberger and Hegemann in the case of (the POW), and Sandrock, Schweinberger and Wiegner in the case of (the civilian) *knew what they were doing* and that they had gone to the wood for the *very purpose of having the victims killed*. If people were all present together at the same time, *taking part in a common enterprise which was unlawful*, each one in their own way *assisting the common purpose* of all, they were all equally guilty in law.’⁶⁹

In further elaborating the levels of participation, the Law Report stated that ‘Sandrock commanded the two parties, Schweinberger did the actual shooting and Hegemann in the first case (and) Wiegner in the second assisted by staying at the car and preventing strangers from disturbing the other two while they were engaged in the crime.’⁷⁰

⁶⁵ Ibid, pg. 43.

⁶⁶ Ibid, pg. 37.

⁶⁷ Ibid, pgs. 37, 39.

⁶⁸ Ibid, pg. 40 (emphasis added).

⁶⁹ Ibid, pg. 43 (emphasis added).

⁷⁰ Ibid, pg. 43.

Given these statements, no substantial analysis is required since the decision refers to the common plan theory, contribution and purpose. The level of contribution includes assistance which encompasses both physically perpetrating the criminal act and assisting in a substantial manner. The *mens rea* referred to were: ‘knew what they were doing’ and acting ‘for an (unlawful) purpose.’

Jepsen et al, British Military Court Trial case

The third case, *Jepsen et al*, is also a British Military Court case. However, it is not available in any of the LRTWC. Furthermore, Cassese only referred to certain extracts of the judgment in a publication⁷¹ and only part of the judgment is on file with the author.⁷²

The facts concern the killings of approximately eighty POWs on or around 2 April 1945. Initially, three to four hundred POWs and concentration camp detainees were transported by train to Mariensiel, near Wilhelmshaven, Germany. They were transported in this manner as they were unfit to march. Their destination was the parent camp at Nuengamme, another German town. Within a space of nine days, all of them were dead, with the exception of two or three survivors. Many of them died because of a bombardment carried out by the British Royal Air Force on Luneburg while the train containing the prisoners was standing in the siding. However, approximately eighty of them were still alive after that bombardment.⁷³

The Prosecution accused the three defendants of the deaths of these eighty POWs. The accused were Jepsen, a Dane who was a member of the Waffen SS; Freitag, a German who was the head of the local Gestapo and Muller, a German who was a local police commander. They were jointly charged with a war crime ‘in that they at Luneburg and elsewhere (...) in violation of the laws and usages of war were concerned in the ill-treatment and killing of Allied nationals, internees of concentration camps, during a train journey.’⁷⁴

Jepsen made a statement, conceding that he was responsible for the death of no fewer than six of these internees. He claimed that he executed them under orders as he was acting under duress. He said that the order he received (known as a service order) carried the death penalty in instances of disobedience. He argued that he was told and believed that if he did not carry out that order he would be shot.⁷⁵

Unlike Jepsen, it does not appear that either Muller or Freitag provided a statement. However, the Judge Advocate who was responsible for summing up the case and presenting points of law examined the evidence provided by the prosecutor in detail. He questioned whether Freitag, as the head of the local Gestapo, and Muller, a local policeman, knew of the acts before they took place or whether they were merely involved in the burial of the POWs.⁷⁶ In respect of Muller, he stated that ‘the presence of (the) policeman up at the place of burial may or may not indicate knowledge on the part of the authorities of what had taken place; but knowledge acquired after the event does not make a man liable in respect of that event.’⁷⁷ In respect of Freitag’s involvement, he stated that he ‘suppose(d) that Freitag’s

⁷¹ Cassese (2007) (a) 228

⁷² Received from the ICTY Library.

⁷³ Cassese (2007) (a) 228; Judgment, pg. 241.

⁷⁴ Judgment, pgs. 234 – 235.

⁷⁵ Ibid, pg. 239.

⁷⁶ Ibid, pgs. 242-243.

⁷⁷ Ibid, pg. 243.

implication in the matter is shown by the nature of the instructions which the police (working under his supervision) received.⁷⁸ In summing up the case, he concluded:

‘Can you say on the evidence which has been given before you that there is anything even approaching proof that either these two men, Freitag or Muller, were responsible for these killings?’⁷⁹

In deciding this case, the Court ruled that Freitag and Muller were in effect not guilty in light of the lack of evidence. On the other hand, Jepsen was. While the Court did not provide specific reasoning, the points of law raised by the Judge Advocate are central in understanding how the BMC referred to the common plan theory and set out essential participation requirements. Regarding proof of evidence, it stated:

‘the prosecution must prove either that JEPSEN and indeed the other two also *actively indulged* in conduct directed against those internees which can properly be described as ill-treatment; or that there was laid upon him by law a responsibility for their well-being which he *wilfully* and not from mere force of circumstances omitted to discharge. (...) the isolated acts of individual guards, even if he were in charge of the convoy, (cannot) be laid at his door so as to make him responsible unless he had *knowledge of what those guards were doing* and had the power to stop it but *deliberately refrained from stopping it*.’⁸⁰

This statement alludes to a common plan doctrine as the basis for convicting Jepsen. It viewed Jepsen as acting in concert with the other officers who carried out the shooting but not Freitag or Muller, as evidence of their participation was lacking. While it refers to ‘knowledge,’ the idea that a person associates himself with others to commit crimes strongly suggests that intention is required along with the assistance provided. In the subsequent paragraph, the judgment provided further commentary emphasising this level of participation and addressing indirectly the appropriate form of *mens rea*:

‘There is a Latin tag which I think will be familiar to both the defending advocates, *qui facit per alium facit per se*, which means a person who does something by the hand of another is responsible in law for what has been done. If you get somebody else to commit a crime for you, you are as much liable for that crime as the cats’ paw you employed. If JEPSEN *actively associated himself* with and *assisted the other guards* in a wholesale slaughter, the act of every one of those persons became the act of all. (...). If JEPSEN was joining in this voluntary slaughter of eighty or so people, helping the others by doing his share of killing, the whole eighty odd deaths can be laid at his door and at the door of any single man who was in any way *assisting in that act*.’⁸¹

Finally, it added that ‘(o)n a charge of this nature a man is not responsible for the acts of his subordinates unless he is conscious of them and approves them either explicitly or implicitly.’⁸²

⁷⁸ Ibid, pg. 242.

⁷⁹ Ibid, pg. 243.

⁸⁰ Ibid, pg. 238 (emphasis added).

⁸¹ Ibid, pg. 241 (emphasis added).

⁸² Ibid, pg. 243.

Collectively, these statements demonstrate that for a person to be held liable for group crimes, a specific threshold level is necessary in respect of both the objective and subjective elements. For the acts of one to become the acts of all, assistance should reflect ‘active indulgence’ directed towards the perpetration of crimes. While the judges referred to ‘knowledge of criminal activities’ and the need to be conscious explicitly/implicitly of acts of subordinates, it nevertheless appears that more than knowledge is required if one is actively assisting in crimes and wants to ‘get somebody else to commit a crime’ for him. We may conclude that intention to perpetrate crimes reflects a more appropriate requirement in light of the Judge Advocate’s statements.

Schonfeld et al. British Military Court Trial case

The fourth case is the BMC Trial of *Schonfeld et al.*⁸³ This case involved ten defendants who were charged with committing a war crime because they were ‘concerned in the killing of’⁸⁴ three airmen (members of the British, Canadian and Australian Air Forces). Among them, only four were found guilty. The Judge Advocate, however, only provided evidentiary analysis for some of the convictions. In addition, the ‘notes on the case’⁸⁵ provided in the Law Report do not shed light on all convictions and acquittals. They only refer to possible theories of convictions.⁸⁶ Therefore, this section can only take into account the reasoning regarding certain convictions, acquittals and the applicable law cited by the Judge Advocate.

The ten defendants were Schonfeld, Roesner, Schwanz, Klingbeil, Rotschopf, Brendle, Harders, Rafflenbeul, Koeny and Cremer. Harders was in charge of an office of the German Security Police in Holland. The purpose was to suppress the Dutch Resistance Movement. On 9th July 1944, three cars left this office under the orders of an officer who was not among the accused but was in charge of the squads who went out to make arrests. The cars contained all of the accused except Schonfeld, Klingbeil, Harders and Koeny. During the raid, the three airmen, who were in hiding, were shot by Rotschopf. The victims were not armed.⁸⁷

Harders claimed that he did not question the use of any cars other than ensuring that petrol was being used for official purposes.⁸⁸ Schwanz, claimed that he was simply ordered to drive the car containing Roesner, Rotschopf and the captured Dutchman, to Tilburg. He did not know that anyone was to be arrested.⁸⁹ Cremer stated that he was told during the journey that the object was to raid the headquarters of a Resistance Movement, some members of which, including the Dutchman in the leading car, had been captured during the night. He denied shooting at any of the victims and claimed that the object of the mission was to make arrests. Roesner helped Cremer over a wall and he saw Rotschopf in the next yard with three bodies which appeared to be dead. Rotschopf claimed that the three men had intended to attack him, and that this was why he shot them. Rafflenbeul’s defence was that he merely received orders to drive the third car to Tilburg.⁹⁰ Brendle, the driver of another of the cars, argued that he

⁸³ LRTWC, Vol. XI, pg. 68.

⁸⁴ Ibid, pg. 64.

⁸⁵ Ibid, pg. 68.

⁸⁶ The ‘Notes on the Case’ refer to three possible theories: acting as principals in the second degree, acting pursuant to a common plan to murder and committing a war crime as a result of concerted action, see LRTWC, Vol. XI, pg. 70. Two theories point strongly towards the use of the common plan theory.

⁸⁷ LRTWC, Vol. XI, pg. 65.

⁸⁸ Ibid.

⁸⁹ Ibid, pg. 65.

⁹⁰ Ibid, pg. 66

was not told the purpose of the mission and was merely told to follow the leading car, and later, on arrival at Tilburg, to watch over the Dutchman.

The Judge Advocate did not evaluate the evidence for all defendants. However, he did state the following in respect of some of the defendants who were eventually acquitted. He noted that ‘the evidence connecting Klingbeil with the offence was ‘shadowy.’ There was also some positive evidence that neither Klingbeil nor Schonfeld were in Tilburg on the day.⁹¹ Furthermore, there was no direct evidence to support the proposition that it was on Schonfeld’s recommendation that the squad left for Tilburg.⁹² The Judge Advocate lastly stated that no evidence implicated Koeny in the events.⁹³

The judge then directed his attention to the following matters: the state of the law, that Rotschopf had shot all three civilians and the role of three accused persons, Roesner, Cremer and Schwanz. These were the four accused persons who were convicted.⁹⁴

In summing up the law, he stated the following:

‘if several persons *combine for an unlawful purpose* or for a lawful purpose to be effected by unlawful means, and one of them in *carrying out that purpose*, kills a man, it is murder in all who are present (...) provided that the death was caused by a member of the party in the course of his endeavours to effect the *common object* of the assembly.’⁹⁵

In applying this reasoning to the case, he stated that:

‘If (...) the object of the visit (...) was in its origin lawful, that is to say, to effect arrests, and was being carried out by lawful means, but that, in the course of its prosecution, Rotschopf killed the three men, but that the others did not aid or abet such killing, then no doubt the court would find them not guilty of the charge of ‘being concerned in the killing.’ If the court were to find, however, that anyone of them did aid and abet Rotschopf in the act of killing, then no doubt the court would arrive at a different finding.’⁹⁶

Regarding the facts, he then held that:

‘Rotschopf, (...) is the axle upon which the wheel of this case turns. If Rotschopf is to be expunged from this case altogether on the basis that he has committed no crime then automatically it must follow that the other accused are equally not guilty.’⁹⁷

He then stated to the Court that ‘(y)our decision in the cases of these accused must primarily depend upon your decision in the case of Rotschopf. If you find Rotschopf guilty, then you must consider whether his guilt must be shared in some degree by those others, who were

⁹¹ Ibid, pg. 67.

⁹² Ibid.

⁹³ Ibid.

⁹⁴ Ibid.

⁹⁵ Ibid, pg. 68 (emphasis added).

⁹⁶ Ibid, pgs. 68-69.

⁹⁷ Ibid, pg. 70

near at hand ready to afford him assistance.⁹⁸ Those who were close were Schwanz, Cremer and Rosener. The notes regarding this case, as found in the Law Report stated as follows:

‘In the present case, (a) it was shown that there had been a plan at the very least to make arrests, and (b) the killing was the result of such a plan in the sense that had the raid never taken place the murder would not have been committed. The Court may therefore have taken the view that the evidence against Rotschopf could, (...) be taken as *prima facie* evidence against the other three who were found guilty, and that the evidence produced in defence of the three men was not strong enough to rebut the presumption that they too were responsible for the crime.’⁹⁹

From these statements, there is a clear indication that the law applied was that of the common plan theory. We could argue that the unlawful common plan was that to commit murder and those involved were the four convicted. However, the judges did not explain how each defendant participated individually. Nevertheless, we can deduce that intention is necessary since this is the only applicable *mens rea* if a group combine for an unlawful purpose. Secondly, ‘contribution’ is necessary. However, the Judge Advocate did not clarify the level of contribution. Therefore, while this case confirms the use of the common plan theory and we can deduce that intention is required to contribute to the unlawful purpose, the case does not clarify the threshold level for the objective element.

Ponzano, British Military Court Trial case

The fifth case is the BMC Trial of *Ponzano*.¹⁰⁰ This case involved five accused persons and two separate incidents. However, since *Tadic* only referred to the first incident as proof of the common plan theory, this section addresses those facts, convictions and acquittals only.¹⁰¹

The five accused were: Knesebeck (Advisor to the Commanding General), Zastrow (Lieutenant and in charge of the German Military Police), Sommer (Junior Commander of the Defence Platoon or Captain of Platoon), Von Menges (officer at the corps responsible for passing messages, Intelligence Officer) and Feurstein (Commanding General of a Division).¹⁰²

They were charged with committing a war crime because they were ‘concerned in the killing’ of two British POWs in Italy in 1943.¹⁰³ The two POWs were killed following orders from General Ziehlberg who had provided instructions to shoot any person interfering with operations. At that time, the General was acting under the Fuehrer Order which was the same Order mentioned in the *Einsatzgruppen* case.¹⁰⁴ In accordance with this Order, the two POWs were captured, brought to Headquarters for interrogation and stayed there for forty-eight hours before they were shot.¹⁰⁵ The five accused persons were alleged to have contributed in

⁹⁸ Ibid.

⁹⁹ Ibid, pg. 71.

¹⁰⁰ *Tadic* Appeals Judgment, para. 199, fn.239 and fn. 263; Cassese (2007) (a) 238; Judgment on file with author (*Ponzano* Summing up).

¹⁰¹ The second incident does not involve a common plan theory and no one was convicted either.

¹⁰² *Ponzano* Summing up, Day 13, pgs. 7 – 9; Day 14, pgs. 10 - 25 and closing address statements for all defence counsel.

¹⁰³ Ibid, Day 14, pg. 6.

¹⁰⁴ Ibid, Day 13, pgs. 4 and 6 (Fuehrer Order was known as Commando Order).

¹⁰⁵ Day 13, pgs. 8 – 15.

different ways given their positions. However, only Knesbeck and Sommer were convicted.¹⁰⁶

In evaluating the evidence, the judge acknowledged the lack of participation of those who were eventually acquitted. He held that there was evidence that Von Menges knew nothing of the prisoners' capture and that he had left the area on the eve of the execution.¹⁰⁷ He questioned several matters regarding Zastrow's involvement: his presence at the execution, his role (if any), whether he reported this to Knesbeck or whether he even knew anything at all.¹⁰⁸ He questioned Feurstein's involvement in a similar manner.¹⁰⁹ On this basis, all three were acquitted.

However, according to the Judge Advocate, Knesbeck was the person who carried out General Ziehlberg's order.¹¹⁰ Knesbeck did not deny that he took certain steps in the preparations for this execution. This involved instructing which soldiers would be selected, how they should dress, finding a suitable place for the execution and ensuring that the officer who would carry out the execution would report back to him.¹¹¹ Sommer, on the other hand, was the person considered the most suitable to carry out General Ziehlberg's request and was present at the execution.¹¹² He 'went into the defence platoon billets and called the men on to the road, dressed and armed (them) for the execution.' The Judge Advocate stated that '(t)hat is exactly what you could expect to happen.'¹¹³ For this reason, only Sommer and Knesbeck were convicted.

In examining the Judge Advocate's comments, he failed to outline a specific theory clearly. Instead, he provided different reasons why a person could be held liable in a series of non-successive statements that appear on different pages.¹¹⁴ It is therefore difficult to ascertain whether the basis for conviction was the common plan theory alone. Firstly, he made the two following comments that collectively appear to refer to a common plan theory:

'to be concerned in the commission of a criminal offence (...) does not only mean that you are the person who in fact inflicted the fatal injury and directly caused death, be it by shooting or by any other violent means; it also means an *indirect degree of participation*, that is to say, a person can be concerned in the commission of a criminal offence, who, without being present at the place where the offence was committed, took such a part in the preparation for this offence as *to further its object*; in other words, he must be the *cog in the wheel of events* leading up to the result which in fact occurred.'¹¹⁵

'where you are of opinion that a person was concerned in the commission of a criminal offence, you must also be satisfied that when he did take that part in it he *knew the intended purpose* of it.'¹¹⁶

¹⁰⁶ Day 14, pg. 26.

¹⁰⁷ Day 13, pg. 11; Day 14, pg. 17.

¹⁰⁸ Day 14, pg. 16.

¹⁰⁹ Ibid, pg. 21.

¹¹⁰ Day 13, pg. 10.

¹¹¹ Day 14, pg. 9.

¹¹² Day 14, pg. 13.

¹¹³ Day 13, pg. 13.

¹¹⁴ Day 14, pgs. 7 and 8.

¹¹⁵ Day 14, pg. 7 (emphasis added).

¹¹⁶ Day 14, pg. 8.

According to this paragraph, we could argue that General Ziehlberg, Sommer and Knesebeck acted as a group to further the common object of executing the two POWs (their intended purpose). This argument is further strengthened by the fact that the Judge Advocate rejected Knesebeck's argument that he 'could not be a chain in the link of causation.'¹¹⁷

However, in the first paragraph cited above, the Judge added the following when referring to furthering an object:

'He can further that object not only by giving orders for a criminal offence to be committed, but he can further that *object by a variety of other means*, and the person who so furthers an object, the result of which is the commission of a criminal offence, can be guilty of that offence not only by an act of commission but also by an *act of omission*.'¹¹⁸

As the Judge referred to 'other means' and 'indirect participation,' we could advance other theories of liability. We could hold that either Sommer or Knesebeck exercised control over a soldier (direct perpetrator) or used a soldier as a tool to execute the two POWs. These theories, as forms of co-perpetratorship, differ from the common plan theory.¹¹⁹ While it is likely that they involve a common plan, it is inappropriate to describe them solely in this manner. Therefore, from this reasoning, three different interpretations of the law are possible so far. Firstly, we could argue that Sommer, Knesebeck and General Ziehlberg acted together in accordance with a common plan. Secondly, we could argue that while Sommer, Knesebeck and Ziehlberg were part of a common plan, either Sommer or Knesebeck used a soldier as a tool to execute the POWs. Thirdly, either Sommer or Knesebeck exercised control over the soldier to do so in order to fulfil a common plan.

Adding to these theories is another possible basis of conviction. In the paragraph above where the Judge Advocate referred to an 'act of omission,' he added:

'a person is guilty not only if he does a positive act but he is also guilty if he does nothing in a case where there *is a legal duty upon him* to do something. You will therefore have to ask yourselves again in each case, first of all, what, if anything, did this accused do to further the object of the execution or executions; and then you will have to ask yourselves, even if the accused did not commit a positive act to further that object, *did he fail to act when he should have done?*'¹²⁰

From this statement, since, there is no direct suggestion that there was a common plan, the Judge Advocate could have inferred that Sommer's basis of liability derived from his failure to act. As Sommer was Junior Commander, he could have been held liable under command responsibility for failing to either punish or prevent the act. However, we could also argue that his failure to act was their contribution to further the object of executing the two POWs.

Therefore, in all, four possible theories underlie the conviction of Knesebeck and Sommer:

¹¹⁷ Day 14, pgs. 7 – 8.

¹¹⁸ Day 14, pg. 7 (emphasis added).

¹¹⁹ Olasolo (2009) 265-302. Olasolo discusses different forms of co-perpetratorship. Chapter 8 addresses this subject in detail.

¹²⁰ Day 14, pg.7.

- a) A common plan theory (to execute POWs) involving Knesebeck, Sommer and General Ziehlberg;
- b) A common plan theory, involving indirect perpetratorship;
- c) A common plan theory, where either Sommer or Knesebeck exercised control over the soldier executing the POWs.
- d) A failure to act by Sommer (command responsibility).

Decision of K. and A, Arnsberg District Court (Germany)

The final case is that of the German *Decision of K. and A.*¹²¹ Rendered on 10th August 1948 by the Arnsberg District Court, it is difficult to fully elaborate the facts and reasoning as it is only one-page long. However, in the ‘reasons’ provided in the judgment, it is possible to sketch the facts of the case and draw out the key theory used as the basis for conviction.

According to the judgment, K had been a Nazi party member (allegedly of the SA, which was the original paramilitary wing of the Nazi Party) since 1931. He was considered a so-called veteran, and at the time of the crime an SA medical officer. The judgment therefore viewed and described K as an activist for the SA.¹²²

The judgment refers to other participants in this case, known as S and H (it can only be assumed they were part of the SA too). The judgment states that H went to the home of K with S and other participants in view of an operation. K was instructed to ‘come watch the Jewish business.’¹²³ He was then seen at times in front of a synagogue and sometimes in the courtyard while it was being destroyed. The judgment does not state who was responsible for destroying the synagogue. However, since S, H and other unnamed participants are referred to in the decision, it appears that they were the perpetrators. After this ‘operation,’ K met up with the other participants in a café known as the L café. The Criminal Chamber on this basis considered the accused a local party authority and his overall conduct as support and mental involvement in the crime. The judgment stated:

‘It is immaterial whether K was already present when entry was forced into the synagogue. He does not have to have lent psychological support to each and every act performed. And there is no proof that he laid hand on anything. But he was usually close by events, and in fact not a curious onlooker or a disinterested outsider. On this basis the Criminal Chamber rightly assumed that, given his position in the party and the SA, and his social standing, he wanted the crimes committed against the synagogue as his own. Accomplice is already whoever through such a mental attitude lends psychological support to the actual perpetrator(s) without participating personally. His presence as a veteran at the scene at the time of the crime constitutes such mental involvement and namely as both a crime against humanity and a violation pursuant to paragraph 305 of the Criminal Code., which stands to reason and is consistent with paragraph 47 of the Criminal Code.’¹²⁴

At the beginning of the judgment is the following statement, which can only be assumed to be a summary of the law applied:

¹²¹ *Tadic* Appeals Judgment, para. 201, fn. 247; Judgment on file with author.

¹²² Judgment, pg. 5

¹²³ *Ibid*, pg. 5.

¹²⁴ *Ibid*, pgs. 5-6.

‘Accomplice of a crime against humanity (destruction of a synagogue) is also someone who does not assist physically but who is privy to the operation and is a respected party member who is at times present at the scene of various crimes, wants the misconduct of the immediate perpetrators as his own, and lends the latter psychological support.’¹²⁵

If this reasoning represents the law applied, then the following is a possible interpretation of the law stated. Since K acted with S, H and other unnamed participants (all possible SA members), he was acting in concert with them. The judges considered that K’s presence was a sufficient contribution because he was not an innocent bystander or onlooker. Coupled with this contribution, he wanted the crimes against the synagogue to be committed. Therefore, he acted collectively with the other members, participated through his presence and wanted the outcome (possible suggestion of direct intention). In light of the available statements, this appears to be a plausible interpretation of the case.

Conclusions

In light of this analysis, Table 1 below lists all the aforementioned findings in a summarised format.

Overall, we can deduce the following. Three of the six cases refer to the common plan theory in strong terms: *Einsatzgruppen* case, *Almelo Trial* and *Jepsen et al.* It is highly likely that the *Decision of K. and A* also refers to the common plan theory given the characteristics of the incident. In *Schonfeld et al.* and *Ponzano*, the common plan theory was either applied or at least considered.

Although none of the cases referred to causation-contribution (substantial/significant contribution)¹²⁶ and intention explicitly, they can be deduced from the reasoning in all six cases. Regarding the objective element, cases refer to the ability to ‘prevent, control or modify’¹²⁷ operations, ‘assisting’¹²⁸ the common purpose, ‘actively associating,’¹²⁹ ‘combining’¹³⁰ for an unlawful purpose, ‘indirect degree of participation,’¹³¹ ‘cog in the wheel’¹³² and ‘link in the chain of causation.’¹³³

Regarding the subjective element, the cases refer to ‘knowledge,’¹³⁴ ‘awareness,’¹³⁵ ‘more than knowledge of illegality’¹³⁶ and ‘intention/purpose.’¹³⁷

Given these findings, we may describe the *Tadic* appellate exercise of discretion as lacking in specificity in several respects. Firstly, *Tadic* did not specify the level of contribution required

¹²⁵ Ibid, pg. 5.

¹²⁶ Chapter 3.2.2.

¹²⁷ *Einsatzgruppen* case.

¹²⁸ *Almelo Trial*.

¹²⁹ *Jepsen et al.*

¹³⁰ *Schonfeld et al.*

¹³¹ *Ponzano*.

¹³² Ibid.

¹³³ Ibid.

¹³⁴ *Einsatzgruppen; Almelo Trial*.

¹³⁵ *Einsatzgruppen*.

¹³⁶ *Einsatzgruppen*.

¹³⁷ *Einsatzgruppen; Almelo Trial; Ponzano; Jepsen et al.; Schonfeld et al* and *Decision of K and A*.

for participating in a JCE. It did not provide detailed analysis regarding the cases it cited to derive precisely how the objective element should have been formulated. Secondly, it did not cite all the different *mens rea* referred to in the cases. Thirdly, it did not examine whether other possible theories of conviction could have been formulated in *Ponzano*. Its examination of *Ponzano* was centred solely on the paragraphs that strongly suggested the use of the common plan theory. However, it did not take into account the other paragraphs illustrating different rationales for convicting individuals taking part in group crimes.

TABLE 1: JCE 1 – CIL

	Case	Common plan	Objective element	Intention or other <i>mens rea</i>
1.	<i>Einsatzgruppen</i>	No specific plan but the judgment refers to the execution of the Fuehrer Order which was a common plan executed at national level	Prevent, modify or control operations	Knowledge, awareness, more than knowledge of illegality and intention
2.	<i>Almelo Trial</i>	Common plan to commit a war crime	Physical perpetration and assistance	Knew what they were doing Purpose of having the officer killed
3.	<i>Schonfeld et al.</i>	The Judge Advocate cited the common plan theory	Direct perpetration and contribution (aid and abet)	(must have been intention)
4.	<i>Jepsen et al.</i>	Acting in association with others	Actively indulge in conduct	A man is not responsible for the acts of his subordinates unless he is conscious of them and approves them either explicitly or implicitly
5.	<i>Trial of Feurstein and others (Ponzano)</i>	Possibly for the first incident	Indirect degree of participation; cog in the wheel; further the object of execution	Knew the intended purpose
6.	<i>Decision of K and A, German Supreme Court</i>	Acting with other participants of the SA	Wants the misconduct of the immediate perpetrators as his own, and lends the latter psychological support	To want the crimes as your own

5.2.2 Criticisms of JCE 1: A review

In examining ICL literature, three points are of interest. Firstly, some publications that have carried out a detailed survey acknowledge that the JCE 1 elements are found under CIL.¹³⁸ However, as indicated above, a substantial analysis is required since *Tadic* did not explain how elements were derived from what judges (or Judge Advocates) were reported to have said (where available). Secondly, others have not conducted a thorough analysis of the six available cases cited by *Tadic*. For example, Sluiter and Zahar have only analysed *Schonfeld*, *Einsatzgruppen* and the *Almelo Trial*.¹³⁹ The McGill University *amicus curiae* brief only examines *Schonfeld* and the *Almelo Trial*.¹⁴⁰ Ambos, in the *amicus curiae* brief submitted in 2008 only examines *Schonfeld*, *Einsatzgruppen* and the *Almelo Trial*.¹⁴¹ Without providing any substantial analysis, Jain has argued that in almost all cases cited in *Tadic*, the accused was part of a large undefined group and was presumed to have shared a common intention.¹⁴² As illustrated in this chapter, this conclusion is unsupported in *Almelo*, *Jepsen et al.*, *Ponzano* and *Schonfeld et al.*

The third point draws from this need of a detailed examination in order to specify the *actus reus* for group crimes. In chapter 3, I explained how the threshold for the objective element is ‘substantial/significant.’¹⁴³ I defended this through two arguments based on Cassese’s commentaries and ICTY jurisprudence. In this chapter, I have added a third argument illustrating how CIL state practice confirms this standard. According to the cases, all defendants who actively participated or engaged in criminal activities were convicted. On the other hand, all acquittals were on grounds of insufficient participation or lack of participation and lack of knowledge. Therefore, the analysis in this chapter assists in identifying the CIL-established standard for characterising JCE 1’s *actus reus*.

5.2.3 Analysis of JCE 3-based case law

The analysis regarding JCE 3-based case law is more complex than that for JCE 1. Firstly, we need to examine whether the cases cited applied the common plan theory and if they did, whether they cited the elements mentioned in *Tadic*. Secondly, it may be difficult to specify the law as *Tadic* made several ‘assumptions’ and ‘inferences’ of judicial reasoning and it further relied on prosecutorial extracts as statements of law. Thirdly, although *Tadic* referred to seventeen cases, only seven are available. The ten unavailable are the unpublished post-WW II Italian cases. Serious doubts may therefore be cast on whether JCE 3 (the elements) is ‘firmly established in CIL.’¹⁴⁴ Nevertheless, this section will conduct a holistic enquiry of the available case law to examine the nature of these inferences and the actual state of law. Three matters, regarding the CIL state practice mentioned by *Tadic*, require scrutiny:

- a) Were the cases cited actually based on a common plan doctrine;
- b) If so, do they indicate an objective element; and
- c) Do they refer to the *mens rea* of foresight and the element¹⁴⁵ of foreseeability?¹⁴⁶

¹³⁸ Cassese *amicus curiae* brief, paras. 43-46; *Case 002* JCE Decision, ECCC, paras. 62-70.

¹³⁹ Sluiter and Zahar (2008) 223-232.

¹⁴⁰ McGill University *amicus curiae* brief, paras. 16-22.

¹⁴¹ Ambos *amicus curiae* brief, pgs. 16-24.

¹⁴² Jain (2014) 35.

¹⁴³ Chapter 3.2.3.

¹⁴⁴ *Tadic* Appeals Judgment, para. 220. This conclusion was in relation to all forms of JCE.

¹⁴⁵ It is arguable that foreseeability is not a *mens rea*, see chapter 3.3.2.

The next paragraphs will conduct a thorough scrutiny (where possible) of the seven cases.¹⁴⁷ These cases are:

- Two British Military Court Trial cases: *Essen Lynching* and *Trial of Feurstein and others*, (*Ponzano* case)
- One US Military Court case: *Borkum Island* case
- Four post-WW II Italian cases: *D'Ottavio et al*; *Aratano et al.*; *Tossani* and *Mannelli*.

Trial of Erich Heyer and six others (Essen Lynching), British Military Court Trial

The first case was a BMC Trial conducted in the absence of a Judge Advocate (a Lieutenant Colonel presided instead).¹⁴⁸ Given this absence, there was no summing up of the law. However, following convictions by the BMC, three appeals¹⁴⁹ were made (available from the ICC legal tool base).¹⁵⁰ They were heard by a Deputy Judge Advocate General (DJAG) four years after the initial convictions.¹⁵¹ While it is not clear whether the advice from the DJAG was accepted, the advice provided is considered to be the law.¹⁵² In this case, the DJAG provided commentary regarding evidentiary matters and points of law. However, the *Tadic* Appeals Judgment did not cite this material. Therefore, we ought to examine both the Military Trial notes available in the Law Report and the appeals.

The facts, as stated in the Law Report, were that seven defendants (two German soldiers and five German civilians) were charged with the war crime of being ‘concerned in the killing’¹⁵³ of three British POWs. The two German soldiers were Heyer (Captain in the German Army) and Koenen (a private in the German Army). The five civilians were Braschoss, Kaufer, Boddenberg, Hartung and Sambol. The incidents took place in Essen and the civilians were inhabitants of Essen. The allegations were that Heyer gave instructions that a party of three British Allied POWs were to be taken to a unit for interrogation. Heyer ordered the escort (who was not tried) not to interfere if civilians should molest the prisoners on their way. Some German witnesses also confirmed (though not admitted by Heyer), that he made remarks to the effect that the airmen ought to be shot or that they would be shot. The POWs were marched through one of the main streets of Essen. During this march, the crowd around the prisoners grew bigger and started hitting them and throwing sticks and stones at them. An unknown German corporal actually fired a revolver at one of the airmen and wounded him in the head. When they reached the bridge, the airmen were eventually thrown over the parapet of the bridge; one of the airmen was killed by the fall; the others were not dead when they

¹⁴⁶ This chapter does not explore whether the subjective element of *dolus eventualis* (civil law concept) is the equivalent of the subjective element of foresight (common law concept). Views differ as to whether they bear the same meaning. For a discussion suggesting that they differ, see Sassoli and Olson (2000) 749-750, fn. 53; Boot (2002) 293; Fletcher and Ohlin (2005) 554. For a discussion suggesting that they are identical, see Cassese (2003) 168 and Cassese *amicus curiae* brief, para. 27. For other discussions of *dolus eventualis*, see Badar (2005) 243; Bohlander (2009) 63; Fletcher (2000) 445-449; Van Sliedregt (2003) 46; *Stakic* Trial Judgment, ICTY, para. 587; *Blaskic* Appeals Judgment, ICTY, para. 39; *Delalic* Trial Judgment, ICTY, para. 433; *Strugar* Trial Judgment, ICTY, para. 235.

¹⁴⁷ Chapter 2.2.2, fns. 97-99.

¹⁴⁸ LRTWC, Vol. I, pg. 91.

¹⁴⁹ Appeals from Boddenberg, Koenen and Kaufer.

¹⁵⁰ A search involving ‘Essen Lynching’ on the ICC legal database: <http://www.legal-tools.org/en/search>. Judgment on file with author.

¹⁵¹ 4th August 1949.

¹⁵² LRTWC, Vol. I, pg. 91, LRTWC, Vol. XI, pg. 72 and LRTWC, Vol. XV, pg. 1, fn. 3.

¹⁵³ LRTWC, Vol. I, pg. 88.

landed, but were killed by shots from the bridge and by members of the crowd who beat and kicked them to death.¹⁵⁴

The Prosecutor argued the following. Heyer, as an army captain, was as responsible, if not more responsible, for the deaths of the three men as anyone else concerned because of his orders expressed through his words.¹⁵⁵ Although Koenen had not committed a crime, he was responsible because, as an army member, he had a duty not only to prevent the POWs from escaping but also of seeing that they were not molested.¹⁵⁶ He may not be as guilty as the others but because of this duty, he was ‘concerned with the killing.’¹⁵⁷ In respect of the civilians, the Prosecutor argued that while Heyer ‘lit the match,’ each civilian who struck a blow was ‘putting flame to the fuel.’ Every civilian was thus concerned with the killing. It was impossible to separate any one of these acts from another. They all made up what is known as a ‘lynching.’¹⁵⁸

Considering that there was no Judge Advocate, the Law Report states that it is only possible to derive the law by inference from the verdicts and counsel arguments.¹⁵⁹ However, in addition, I will review the analysis provided by the DJAG in light of the appeals.

The verdicts were as follows. Among the seven accused, five were convicted. Heyer was found guilty and sentenced to death, arguably on the basis that he ordered that no one interferes if the POWs are molested. Koenen was found guilty and sentenced to five years because he arguably failed to prevent the killings. Three civilians (Braschoss, Kaufer and Boddenberg) were found guilty because presumably every one of them had in one form or another taken part in the ill-treatment which eventually led to the death of the victims. Boddenberg, as one of them, had expressly admitted having hit the airmen with his belt.¹⁶⁰ The two civilians, Hartang and Sambol, were acquitted because the Court considered the allegations against them by the witnesses not beyond reasonable doubt.¹⁶¹

Given these inferences, we can furnish two possible interpretations of the law applied. On one hand, we could argue that the five convicted were acting in accordance with a common plan to execute the POWs. This group was not formed spontaneously as while Heyer provided the instructions and Koener failed to act, the other three civilians only joined the enterprise at a later stage. They were not aware of the plans to execute and only became part of it through their actions. Yet the prosecutor could have referred to such a theory if it deemed it appropriate. Therefore, a second plausible interpretation may be offered. Since the BMC had expressly referred to language involving a common plan in previous cases (the ones mentioned in section 5.2.1), it is highly likely that the common plan theory was not a basis for conviction. The prosecutor would have argued that the seven accused were part of a plan to execute the POWs. It would have cited reasons to that effect. Yet, it did not in this case, thereby casting doubt on the use of such a theory. Another reason which lends support to the absence of a common plan theory is the DJAG commentaries.

¹⁵⁴ LRTWC, Vol. I, pg. 88 – 90.

¹⁵⁵ LRTWC, Vol. I, pg. 89.

¹⁵⁶ Ibid.

¹⁵⁷ Ibid, pg. 90.

¹⁵⁸ LRTWC, Vol. I, pg. 89.

¹⁵⁹ Ibid, pg. 91.

¹⁶⁰ Ibid, pg. 90.

¹⁶¹ Ibid, 91.

Following the convictions, three appeals were made by Koenen, Kaufer and Boddenberg. None of these appeals referred to the existence or participation in a common plan theory. In examining Kaufer's appeal, which concerned missing witness statements at trial, the DJAG held that his conviction should be quashed because of the 'flimsy material'¹⁶² presented at trial. However, he did not state that the lack of evidence demonstrates a lack of participation in a common plan. In addressing Boddenberg's appeal, the DJAG stated the following:

'Boddenberg took an active part in the assault on the airmen. He struck one or more of them several times with his belt and was in the centre of the crowd which finally threw the airmen over the bridge. (...) In view of this evidence, Boddenberg, was in my opinion, present aiding and abetting and was legally convicted of the charge.'¹⁶³

As with Kaufer, there is no discussion of a common plan. Instead, there appears to be a focus on how the accused was connected with the killing only. The most important commentaries dismissing the application of the common plan theory are found in Koenen's appeal. The DJAG stated:

'Koenen was responsible for their safety and that in standing by, in accordance with the orders he had received from Heyer, and making no effort to intervene while the prisoners were being beaten by the civilians and finally thrown over the bridge, he made himself a party to the killing. In my opinion his conviction upon that footing was correct in law. Nevertheless he was in a very invidious position and you may perhaps already feel that having served three years of his sentence he has received sufficient punishment. This is one of the cases which were tried in the very early days of War Crimes trials, when it appears that *zeal occasionally outran discretion and there was a tendency to cast the net too wide and charge a number of accused against some of whom there was but little evidence.*'¹⁶⁴

Two points can be drawn from this statement. Firstly, Koenen's conviction was based on his failure to intervene. No comments regarding participation in a common plan are evident. Secondly, this statement emphasised the need to exercise caution in developing theories of liability which may not link the perpetration of the crime to the individual, or as the judge stated, 'cast the net too wide.' The *Tadic* Appeals judges had not considered this when formulating JCE 3, thereby omitting important available material from their analysis.

Overall, it is therefore difficult to argue that *Essen Lynching* provides strong inferences of a common plan theory. However, even if we accept that there was a common plan to 'lynch,' it is further difficult to establish a collateral offence which constitutes the basis of JCE 3. There is no discussion of such a theory or mention of an objective element or subjective elements such as foresight. As a result, *Tadic* can be criticised because its reasoning appears to be driven by the need to make the case fit the theory. It argued that there was, in fact, a common plan to participate in the unlawful ill-treatment of the POWs but they were all held guilty of murder.¹⁶⁵ This conclusion is untenable.

¹⁶² Kaufer's appeal.

¹⁶³ Boddenberg's appeal.

¹⁶⁴ Ibid.

¹⁶⁵ *Tadic* Appeals Judgment, para. 209.

USA v. Goebell et. al. (Borkum Island), US Military Government Court

The second case that *Tadic* relied on was the *Borkum Island* case. The charges, sentences, appeals and commentaries are available from two online resources: an article by Koessler¹⁶⁶ and the review and recommendations of the Deputy Judge Advocate (DJA), Advocate G.E Straight.¹⁶⁷ As with *Essen Lynching* where *Tadic* failed to address the review by the DJAG, it also failed to take into account the appeals in this case and important analysis from the article. Together, both publications offer crucial insights as there was no Judge Advocate in this case. It is therefore necessary to review this online material since three principal shortcomings can be identified in the *Tadic* Appeals Judgment analysis. Firstly, it only mentions the facts briefly. It fails to substantiate matters of detail pertaining to the role of the key accused persons. Koessler's article and the DJA recommendations provide greater detail than *Tadic*. Secondly, it fails to highlight the two distinct charges in this case properly. It only cites and relies on prosecutorial statements.¹⁶⁸ Thirdly, since there was no Judge Advocate, the comments from the DJA are key in understanding whether there was a common plan but also how and why liability may be extended for crimes beyond the common plan. This is important as Koessler has described the initial judgment rendered as 'compressed in an omnibus accusation'¹⁶⁹ and only containing a 'bare answer to the question of guilt.'¹⁷⁰ This section's analysis will therefore examine the DJA comments and Koessler's article to describe the roles of the accused persons (where necessary)¹⁷¹ and the possible theories of convictions.

The case involved the killing of seven US POW's by German soldiers and citizens. Initially, the US soldiers were apprehended after their aircraft crashed on the German island of Borkum. The soldiers were captured and were supposed to be transported to a military unit. However, instead they were marched through a town where they were attacked, beaten and killed in accordance with a Nazi policy of lynching (inflicting cruel acts/mistreating) allied fliers.¹⁷² In one incident, one of the fliers was initially shot. After this, in a separate incident, the other six were shot.¹⁷³ There were two charges to this incident. The first charge was for the assault of the seven prisoners during the march. The second charge was for the killing of the seven prisoners.¹⁷⁴ The accused persons for both charges involved five officers (lieutenants and sergeants), five members of the guard and five civilians (including the police chief of Borkum and the Mayor of Borkum).¹⁷⁵ They all played different roles in planning, attacking and eventually killing the POWs.

Among these individuals, only one person was acquitted (no reasons provided).¹⁷⁶ Of the fourteen convicted, all were liable under the first count of assault but only five were

¹⁶⁶ Koessler (1956-1957).

¹⁶⁷ The *Borkum Island* Review is available at <http://www.uni-marburg.de/icwc/forschung/2weltkrieg/usadachau>, last accessed 10th December 2015 (DJA Review).

¹⁶⁸ *Tadic* Appeals Judgment, paras. 210-211.

¹⁶⁹ Koessler (1956-1957) 194.

¹⁷⁰ *Ibid* 193.

¹⁷¹ The facts of this case are complex. Koessler states that the trial transcript contains 1296 pages. This section only examines the facts and discussions relevant to proving/disproving the application of JCE 1 and JCE 3.

¹⁷² Koessler (1956-1957) 183.

¹⁷³ *Ibid* 188.

¹⁷⁴ *Ibid* 191.

¹⁷⁵ *Ibid* 191.

¹⁷⁶ *Ibid* 192.

convicted of both assault and murder.¹⁷⁷ Nevertheless, all fourteen appealed. The DJA addressed the basis of conviction for all appeals. However, the most important part of his reasoning concerns the appeals for the five convicted under both counts. The reasoning differed slightly but for four of the accused, it included the following:

‘All who join as participants in a plan to commit an unlawful act, the *natural and probable* consequence of the execution of which involves the contingency of taking human life, are legally responsible as principals for a homicide committed by any of them in pursuance of or in furtherance of the plan.’¹⁷⁸

This statement applied in the case of Seiler, Wentzel, Schmitz and Akkermann. In examining their role, the rationale for applying such reasoning becomes clearer. Lieutenant Seiler was responsible for the handling process of the POWs in consultation with the Naval Captain.¹⁷⁹ Seiler’s role was to instruct Lieutenant Wentzel and sergeant Schmitz to escort the prisoners to the naval port along with members of the guard detail. However, in doing so, he also instructed Schmitz not to protect the prisoners against any attacks.¹⁸⁰ Wentzel’s role in escorting the prisoners was eventually to act as an interpreter for the prisoners. He was then to report to his superior. However, during the march, his role changed.¹⁸¹ He provided directions to Schmitz about the routes to follow since Schmitz was unfamiliar with the roads. He also participated in the assault of the airmen and tolerated the acts of mistreatment against the POWs.¹⁸² Akkermann was the Mayor of the town. He received an order about implementing the Nazi policy to lynch the allied fliers. Akkermann ensured that the police chief of the town, Rommell, complied with that order. He then provided similar instructions over the phone to Meyer-Gerhards, an acting chief of a uniformed organisation called ‘Air Raid Police’ and Mammenga, the phone operator of that organisation.¹⁸³ He expressed hope to both of them that the Air Raid Police would mistreat the prisoners. It is this conspiracy between military and civilian authority that left prisoners unprotected against assaults by civilians attacking them while they were marching through the town. After the march began, Akkermann stood on the streets, making inflammatory statements to the crowd, urging them ‘to beat the dogs.’¹⁸⁴

In respect of the fifth accused, Captain Goebell, his role differed in that he was arguably the architect of the plan. As Lieutenant Seiler, he was also responsible for the handling of the POWs before they were transported to the military unit. However, prior to the march, he made a phone call and initially spoke to the police chief of the town, Rommell, about implementing the Nazi policy of lynching allied fliers. Rommell was unsure of doing this. It was then that Goebell’s adjutant provided similar instructions to Akkermann over the phone and the latter attempted to convince Rommell in implementing the plan. Therefore, according to the evidence, Captain Goebell was the organiser/planner of the atrocities. It is therefore unsurprising that the DJA stated in regards to Goebell:

¹⁷⁷ Ibid 192.

¹⁷⁸ Seiler: DJA Review, pg. 25; Wentzel: DJA Review, pg. 25; Schmitz: DJA Review, pg. 25; Akkermann: DJA Review, pg. 25.

¹⁷⁹ Koessler (1956-1957) 184.

¹⁸⁰ Ibid 185.

¹⁸¹ Ibid 185.

¹⁸² Ibid 186.

¹⁸³ Ibid 186.

¹⁸⁴ Ibid 187.

‘he issued the orders which set in motion the chain of events (...) the essential overall plan for this atrocity were conceived by him and (...) he gave comparatively detailed orders implementing the same to the principal military and civilian officials on the island.’¹⁸⁵

Considering these facts and the DJA’s aforementioned statements regarding a ‘plan’ for all five participants, the case unequivocally indicates that the common plan doctrine was used. The common plan was to assault/mistreat the POWs. Even for the other accused who were only convicted for assault, the DJA comments refer to a ‘plan’ and that the accused ‘actively furthered or contributed’¹⁸⁶ to the plan. It is unclear from the DJA commentaries why these accused were not held liable for murder. However, these references suffice to confirm the use of JCE 1.

The second key point in this case is the definition of the collateral offence and the conditions under which it applies. According to the above DJA commentaries, the collateral offence in this case was murder. The five accused were convicted of this crime since it was a ‘natural and probable consequence’ of the common plan to assault. However, the phrase ‘natural and probable’ imposes a condition for holding individuals liable which is that of direct causation. From the DJA comments, holding a participant liable for a crime other than the common plan requires that this condition is satisfied. As is evident, this formula differs from that articulated in *Tadic* given this requirement and that the DJA did not consider the need for any *mens rea* such as foresight or foreseeability. Therefore, *Tadic*’s reasoning is flawed for this reason.

The final point is whether besides this theory, other rationales of liability may have played a role in convicting the accused given their roles. Koessler, in commenting on the case, strongly believes that this may have happened. He refers to Krolkowski’s conviction. The latter was a Captain but played no part in the ordeal. He learned of it from a phone call from Goebell at a later stage. When he heard of the assault by the civilians in the crowd, he dispatched a captain to look after the prisoners but it was too late.¹⁸⁷ He later made phone calls to Goebell about the incident. Goebell had directed Krolowski to interrogate the guards and write a report. He did request a memorandum that explained the incidents. This memorandum was prepared by Wentzel and Krolkowski eventually signed it. The memorandum stated that the official and sole attribution of death of the prisoners was the assaults by the civilians.¹⁸⁸ Koessler is unsure whether Krowlikowski was convicted because he either failed to take measures to protect the POWs or because he fabricated a false memorandum or both. However, it is doubtful whether this is correct, since none of the DJA commentaries confirm this. The DJA in his case, stated that his actions ‘were compatible with the plan and in furtherance thereof.’¹⁸⁹

In conclusion, *Borkum Island* applied the common plan theory and imposed liability for murder so long as the natural and probable consequence of executing the common was the ‘taking of life.’

¹⁸⁵ DJA Review, pg. 15.

¹⁸⁶ Wentzel: DJA Review, pg. 21; Weber: DJA Review, pg. 23; Seiler, DJA Review, pg. 25; Schmitz, DJA Review, pg. 27; Pointner, DJA Review, pg. 29; Albrecht, DJA Review, pg. 31; Geyer, DJA Review, pg. 32; Witzke, DJA Review, pg. 34; Akkermann, DJA Review, pgs. 36-37; Rommel, DJA Review, pgs. 36-37; Mammenga, pg. 40; Heinemann, DJA Review, pgs. 42-43.

¹⁸⁷ Koessler (1956-1957) 188-189.

¹⁸⁸ Ibid 189.

¹⁸⁹ DJA Review, pgs. 15-16.

Ponzano, British Military Court Trial case

Tadic also referred to *Ponzano* as support for JCE 3. However, section 5.2.1 has already examined this case in regards to JCE 1. It concluded that it may have referred to the common plan theory and that this was a likely possibility among four different theories of conviction. Yet, even if we accept that the case applied the common plan theory, it cannot be considered a JCE 3 precedent because it did not involve a collateral offence or even refer to the language suggested by *Tadic*. The judges in *Tadic* held that *Ponzano* referred to causation (a JCE 3 requirement) as part of its reasoning.¹⁹⁰ However, its support for this position was based on the Prosecutor's argument and not a Judge Advocate's. The footnote, referring to the Prosecutor's contention, stated:

‘a man is responsible for his acts and is taken to intend the *natural and normal consequences* of his acts and if these men (...) set the machinery in motion by which the four men were shot, then they are guilty of the crime of killing these men. (...) all that is necessary to make them responsible is that they set the machinery in motion which ended in the volleys that killed the four men we are concerned with.’¹⁹¹

As section 5.2.1 indicated, the Judge Advocate had neither convicted Sommer nor Knesebeck for such reasons. Therefore, since *Ponzano* did not refer to a collateral offence and did not take into account liability for ‘natural and normal consequences,’ it is not a relevant JCE 3 precedent.

D'Ottavio et al. The Teramo Court of Assize and the Court of Cassation

Turning to the four Italian cases, the most important is *D' Ottavio et al.* *Tadic* cited this case in support of JCE 3 but to also justify the ‘causal nexus’ between the acts intended by the group and those committed by an individual of the group.¹⁹² *Tadic* did not fully elaborate the facts and legal reasoning. However, one of Cassese's publications did.¹⁹³ The facts can be summarised accordingly.

Two Yugoslav war prisoners escaped from a concentration camp in Italy and made their way to a village. On 19th May 1944, they went to the village fountain and were suddenly surrounded by four locals (D' Ottavio, Valeri, Pia and Forti). While one of the prisoners (Captain Mirko) managed to flee, the other man (Giovanni Vusović) was instead hit by two gunshots fired by D' Ottavio with his hunting rifle. The four aggressors then immediately left the scene. The injured man was wounded on his right arm. This wound was left unattended for forty-eight hours and the man developed infections which led to his death in hospital (in Teramo) eleven days later. Following questioning by the doctor and the police, the wounded man stated that, while sitting quietly and unarmed by the fountain, he and his companion were attacked by four individuals of whom he only knew one (D' Ottavio). According to him, D' Ottavio had probably acted out of jealousy over one or two women. He added that D'Ottavio had also struck two blows on his head with the rifle butt.¹⁹⁴

¹⁹⁰ *Tadic* Appeals Judgment, para. 210, fn. 263.

¹⁹¹ *Ibid*, para. 199, fn. 240.

¹⁹² *Ibid*, para. 215.

¹⁹³ Cassese (2007) (a) 232.

¹⁹⁴ *Ibid*.

The Teramo Court d'Assize held that all the other members of the group were accountable not only for 'illegal restraint' (*sequestro di persona*) but also for manslaughter (*omicidio preterintenzionale*). It applied article 116 of the Italian Criminal Code and stated that '(w)henever the crime committed is different from that willed by one of the participants, also that participant answers for the crime, if the fact is a consequence of his action or omission. If the crime committed is more serious than that willed, the penalty is decreased for the participant who willed the less serious offence.'¹⁹⁵ The four appealed. D'Ottavio claimed self-defence while the other three argued that article 116 was misapplied. The Court of Cassation however rejected their appeals.¹⁹⁶ According to Cassese's translation of the case, it made several important comments regarding the nexus between the common plan and the collateral offence and the *mens rea* of the participants. In relation to the 'causal nexus,' it stated:

'By virtue of this provision (article 116 of the Italian Criminal Code), where the crime committed is other than the one willed by one of the participants, also that participant is accountable for the crime if the criminal result is a consequence of his action or omission. In order for a criminal event to be held to constitute the consequence of the participant's action, it is necessary that there be a causation nexus -- which is not only objective but also psychological -- between the fact committed and willed by all the participants and the different fact committed by one of the participants. This is so because the participant's responsibility envisaged in Article 116 is grounded not in the notion of collective responsibility (provided for in Article 42(3) of the Italian Criminal Code) but in the fundamental principle of concurrence of interdependent causes, upheld and specified in Articles 40 and 41 of the Criminal Code. By virtue of the latter principle, all the participants answer for a crime both when they are the direct cause of the crime and when they are the indirect cause, in accordance with the canon *causa causae est causa causati* [the cause of a cause is also the cause of the thing caused; i.e. whoever voluntarily creates a situation bringing to, or resulting in, criminal conduct is accountable for that conduct whether or not he willed the crime].'¹⁹⁷

In applying this reasoning to the case, it stated:

'Here lies the nexus of objective causation: all participants have directly cooperated in the crime of attempted illegal detention of persons (provided for in Article 605 of the Criminal Code) by surrounding and chasing two fugitive prisoners of war, armed with a gun and a musket for the purpose of unlawfully capturing them (...) This crime was the indirect cause of the subsequent and connected event consisting of the rifle shot that D' Ottavio alone fired at one of the fugitives , a rifle shot that caused a wound followed by death (see Article 584 on manslaughter [*omicidio preterintenzionale*]).'¹⁹⁸

Collectively, these statements indicate the existence of a common plan (illegal detention of persons) and that a participant can be held liable for a collateral offence (murder). However, they also emphasise an important causal connection between both offences. In this case, there was a direct connection since the rifle shot killed the war prisoner (the judgment however

¹⁹⁵ Ibid 233.

¹⁹⁶ *Tadic* Appeals Judgment, para. 215.

¹⁹⁷ Ibid 233-234.

¹⁹⁸ Ibid 234.

characterised this as an ‘indirect cause’). Yet, if we examine the reasoning in *Tadic*, there is no such mention of a necessary (direct or indirect) link between the common plan and the collateral offence. Therefore, if *D’ Ottavio et al.* was a JCE 3 precedent, part of its reasoning has not been included in the JCE formula.

There is further uncertainty regarding the *mens rea* requirements. It appears that the translations provided by Cassese and the *Tadic* Appeals Judgment offer two slightly different definitions. *Tadic* stated:

‘Furthermore, there existed psychological causality, as all the participants had the intent to perpetrate and knowledge of the actual perpetration of an attempted illegal restraint, and foresaw the possible commission of a different crime. This foresight (*previsione*) necessarily followed from the use of weapons: it being predictable (*dovendo prevedersi*) that one of the participants might shoot at the fugitives to attain the common purpose (*lo scopo comune*) of capturing them.’¹⁹⁹

However, Cassese’s translation stated:

‘There also exists a psychological causation in that all the participants *shared the conscious will* to engage in an attempt to unlawfully detain a person while *foreseeing* a possible different crime, as can be inferred from the use of weapons: *it was to anticipate* that one of them might have shot at the fugitives with a view to achieving the common purpose of capturing them.’²⁰⁰

The first translation refers to ‘predictable’ which indicates an objective standard (foreseeable) whereas the second translation refers to ‘anticipate.’ It is unclear which translation is considered the correct one. In conclusion, while *D’ Ottavio et al* provides clarity regarding liability for JCE 3, it introduces elements such as a causation-nexus, foresight and foreseeability, among which the causation-nexus seems to have been omitted by *Tadic*.

Aratano et al. Special Section of the Florence Court of Assize and Court of Cassation

The second Italian case was *Aratano et al.* Like *D’ Ottavio et al*, it was concerned with the connection between the collateral offence and the common plan. However, the focus of this case was the subjective element requirement. Cassese provided a partial translation of the case.²⁰¹ However, the motion submitted by *Karadzic* appears to have provided a clearer translation explaining this requirement.²⁰²

The Court of Cassation described the facts as follows: ‘a squad of fascist brigades, commanded by Aratano and made up of Stevaneto, Castellaro, Raimondi, Dell’ Antonia and Favretto (...) called on the house of Pietro Florian to arrest partisans meeting there. In the shootout that followed, Florian was killed.’²⁰³ The lower court held responsible all those who took part in the sweep, because Florian’s death was the consequence of their criminal action. This was the opinion even though some of them had not willed the murder, and acted only

¹⁹⁹ *Tadic* Appeals Judgment, para. 215, fn. 271.

²⁰⁰ Cassese (2007) (a) 234.

²⁰¹ *Ibid* 241.

²⁰² *Karadzic* JCE 3 Dismissal Motion, para. 25.

²⁰³ Cassese (2007) (a) 241.

with the intent to round-up the partisans.’²⁰⁴ The Court of Cassation overturned the convictions of Dell’ Antonia and Raimondi stating:

‘The shootout that followed was intended to frighten the partisans so as to make them surrender; one must, therefore, rule out that the militiamen intended to kill — all these circumstances have been established in point of fact by the lower Court. Hence, it is evident that the participants may not be charged with the event [murder], which was not willed. The criminal offense committed was in sum more serious than the one intended; one must, therefore, apply notions different from that of voluntary murder. This Supreme Court has (observed) that to hold somebody responsible for murder committed in the course of a police sweep in which many persons have participated, it would be necessary to establish that in taking part in such operation, all participants also voluntarily intended to perpetrate murder. It follows that while the position of other appellants who must answer for other murders or vicious ill-treatment must remain as it stands, Dell’ Antonio and Raimondi may not be held guilty of voluntary murder.’²⁰⁵

Assuming that this case involves a common plan (the only translations are from Cassese and the *Karadzic* JCE 3 motion), this reasoning nevertheless runs contrary to the current formula of JCE 3. It does not hold that perpetrators may be held liable for collateral offences if they foresee it. They can only be held liable if the crime is intended. Therefore, this case does not lend support for the current JCE 3 formula.

Mannelli, Court of Cassation

The third Italian case is *Mannelli*. Although, it is not available online, Cassese has produced translations of these cases in a separate academic publication.²⁰⁶ *Mannelli* is important because it imposed strict conditions regarding causation. The facts, as provided by Cassese, were that ‘Mannelli asked two other persons, Capra and De Amicis, to beat up or even cause serious injuries to Orsi, against whom he fostered strong resentment on political grounds. In addition to carrying out the request by aggressing and threatening the victim, however, the two also robbed him.’²⁰⁷ All three were convicted and sentenced for robbery as well as illegal possession of weapons. In his appeal, Mannelli claimed that he was not responsible for robbery, and invoked to this effect Article 116 of the Italian Criminal Code.²⁰⁸ The Court of Cassation overturned the conviction on grounds of misunderstanding the law regarding the objective element. It referred to a ‘material causality nexus’ which is to be differentiated from a nexus that is ‘accidental’ or ‘incidental.’ It specifically stated that a participant cannot answer for a crime that does not ‘constitute the logical development of the intentional crime’ and if it has its ‘own causal autonomy.’ It stated:

‘Indeed, a cause, whether immediate or not, direct or indirect, simultaneous or subsequent, should never be confused with the mere occasion.’²⁰⁹

²⁰⁴ Cassese (2007) (a) 241.

²⁰⁵ *Karadzic* JCE 3 Dismissal Motion, para. 25.

²⁰⁶ These are from Judge Cassese, see Cassese (2007) (a); Cassese *amicus curiae* brief, paras. 49-62.

²⁰⁷ Cassese (2007) (a) 243.

²⁰⁸ *Ibid* 243.

²⁰⁹ *Ibid*.

In this case, the judges acquitted the defendant of robbery since it was not a logical development of intention to assault:

‘whoever commissions other persons to injure or kill a person, is not accountable for the robbery perpetrated by the persons who carried out the commission, because the crime does not constitute the logical development of the crime that he willed, but a new fact, having its own causal autonomy (*autonomia causale*), linked to the fact willed by the commissioning person by an accidental nexus.’²¹⁰

In a similar manner to *D’ Ottavio et al.* and *Aratano et al.*, this case emphasises important restraints in holding individuals liable. It highlights similar concerns as *D’ Ottavio et al.* regarding whether the cause was direct or indirect but adds a requirement that the further crime must be a logical development. It is striking to note that the *Tadic* JCE 3 formula did not specify the need for examining whether the further crime was a logical development of the common plan or causes that may be considered direct or indirect.

*Tossani, The Extraordinary Court of Assize of Bologna*²¹¹ and *The Court of Cassation*²¹²

In the final Italian case, the facts and the law are both unclear, thereby leading one to question its significance in a JCE 3 context.

According to Cassese’s translation, the facts involved an individual named Tossani, who was involved in a police mop-up operation on 6th November 1943. An individual named, Sartori (the victim), was killed. The Bologna police headquarters issued a report, stating that during this operation Tossani did not actively participate, that he attended on the request of the acting leader of the local Fascist party, that he had a passive role and was unarmed. Although the lower court had convicted him of murder among other crimes,²¹³ the Court of Cassation overturned this. It held that ‘the death was the consequence of an event that was exceptional and unforeseen [*eccezionale e imprevisto*]: during the search operation Sartori [the victim] tried to avoid arrest by escaping through the roof and for this reason was shot and killed by a German soldier.’²¹⁴ It further held that ‘(i)n light of the above, any causality nexus, either material or psychological, between the conduct of the appellant and the death of Sartori, must be ruled out.’ An amnesty was granted and applied in this case. However, it appears that Cassese found this case relevant to JCE 3 because of the discussion of causality above. Nevertheless, according to Cassese’s translation, it is not clear whether a common plan was even considered. One can only assume that the police mop-up operation was the common plan and that murder was the collateral offence. However, this reasoning did not figure in Cassese’s translation. Despite this absence, if we consider this case a JCE 3 precedent, it adds a causation-nexus requirement which does not sit easily with the *Tadic* JCE 3 formula. This case only refers to ‘material and psychological’ while *Tadic* explicitly refers to foresight and foreseeability.

²¹⁰ Cassese (2007) (a) 244.

²¹¹ 7th August 1945.

²¹² 12th September 1946.

²¹³ Crimes were: collaborating with the enemy, robbery against Laura Trigari and others, illegal detention, see Cassese (2007) (a) 230.

²¹⁴ Cassese (2007) (a) 230-231.

Conclusions regarding CIL state practice and findings in Tadic

Having provided these analyses, Table 2 (below) summarises the main findings for each case.

TABLE 2: JCE 3 - CIL

Case	Common plan	Collateral offence	Objective element	Foresight	Foreseeability	Other <i>mens rea</i>
<i>Essen Lynching</i>	No common plan	N/A	N/A	N/A	N/A	N/A
<i>Borkum Island</i>	Common plan mentioned in Review and recommendations	Murder	Natural and probable consequence of execution, which involves contingency of taking human life	N/A	N/A	N/A
<i>Ponzano</i>	Possibility of common plan	N/A	N/A	N/A	N/A	N/A
<i>Mannelli</i>	To cause serious injuries	Theft	Material causality required for conviction	N/A	Logical and foreseeable development	N/A
<i>D' Ottavio et. al.</i>	Illegal detention of persons	Murder	Causation link	Foresight	Foreseeability	N/A
<i>Aratano et. al.</i>	Common plan to round up partisans	Murder	N/A	N/A	N/A	intention
<i>Tossani</i>	A police mop-up operation	Murder	None	N/A	N/A	N/A

In conclusion, we can state the following regarding the use of the common plan theory, reference to an objective element and the use of *mens rea*. Out of the seven cases available, six may be considered to apply the common plan doctrine: the four post-WW II Italian cases (*D'Ottavio et al.*; *Aratano et al.*; *Tossani*; *Mannelli*), the BMC trial of *Ponzano* and the US Military Trial of *Borkum Island*. Out of these six cases, only five refer to a collateral offence, with *Ponzano* being the exception.

Of these six cases, three refer to a causation-nexus:²¹⁵ the two Italian cases of *Mannelli* and *D'Ottavio et al.* and the US Military Trial case of *Borkum Island*. However, they present different conceptions of causation.²¹⁶ The *Borkum Island* case referred to 'natural and probable consequence' of the common plan. *D'Ottavio et al.* provided a broader conception of causation by holding participants liable for crimes when they are the direct/indirect cause of the crime. *Mannelli*, echoed a similar view stating that 'a cause, whether immediate or not, direct or indirect, simultaneous or subsequent, should never be confused with the mere occasion.'

Among the six cases, only *D' Ottavia et al* referred to foresight and foreseeability. This is based on a translation outlined in *Tadic. Aratano et al*, in fact, referred to intention.

Conclusions

In light of these findings, the *Tadic* appellate reasoning can be criticised for several reasons. Firstly, it relied on the *Essen Lynching* case. While, from the outset it appeared to have embraced a cautious approach by stating that it reviewed the case at length,²¹⁷ the approach adopted reveals several weaknesses. It inferred the theory of JCE 3 in the absence of any available judgment, it based its reasoning on prosecutorial statements and furthermore omitted important commentary from the DJAG. It nevertheless concluded that there was a collateral offence which the analysis above has refuted.

Secondly, its analysis of the *Borkum Island* case is flawed. I argued that this case is based on the common plan doctrine by drawing from the Deputy Judge Advocate's legal opinion and scholarly discussions of the case. In contrast, the judges in *Tadic* centred their analysis, once again, on presumptions of law and inferences based on prosecutorial comments.²¹⁸ They did not refer to the Review and Recommendations of the Deputy Judge Advocate. More importantly, *Tadic* argued that the common plan in this case was to commit murder. As illustrated above, this is incorrect. It was to assault the POWs.

Thirdly, the reasoning of the *Tadic* Appeals Judgment and its conclusion do not fall in line with the discussions regarding the objective element. In its analysis, which only included two cases, *D'Ottavio et al.* and *Mannelli*, the judgment noted and emphasised the causation-nexus. Yet, in its conclusion, it omitted any such reference. *Tadic* merely used the phrase 'natural and foreseeable' consequence without underlining the specific causation link between the intended crime and the collateral one. It did not explain how it is based on the nature of the common plan or the logical development of it. In the absence of this discussion, it may be assumed that it borrowed the phrase 'natural and probable' either from the ICTY

²¹⁵ The reference to 'natural and normal consequences' in *Ponzano* is derived from a prosecutorial statement.

²¹⁶ See n. (56) for brief discussion of causation, noting its complexities. In this section, I only refer to the forms of causation appropriate to the cases cited. For others forms, see Hart and Honore (1985).

²¹⁷ *Tadic* Appeals Judgment, para. 207.

²¹⁸ *Ibid*, paras. 211-213.

Prosecutor's comments in its Brief in Reply²¹⁹ or from the BMC Trial Prosecutor's reference in *Ponzano*.²²⁰ It also failed to address the 'natural and probable' reference in *Borkum Island*. However, this omission results from the failure to examine the Deputy Judge Advocate recommendations.

Fourthly, the *mens rea* differs from that in *Aratano et al* (intention). The *Tadic* Appeals Judgment's inferences and assumptions of law based on the seventeen cases included *dolus eventualis*, advertent recklessness, foresight and foreseeability and a host of other forms (indifference, more than negligence, high degree of carelessness).²²¹ The judges' inferences were not based on any thorough explanation of the cases or how in the absence of any judgments, the only conclusion was that these *mens rea* were applied. Such detailed analysis would have confirmed the high likelihood and strength of any inferences drawn. However, in the absence of any such analysis, there is much uncertainty regarding their conclusions for JCE 3. As indicated above, these cases do not reveal a common standard of *mens rea*. One can therefore only conclude that this exercise of discretion was arbitrary since it includes diverse *mens rea*.

5.2.4 Other JCE 3-related matters

The analysis regarding the elements of JCE 3 and CIL does not end with the examination of the state practice cited. It is necessary to explore three other matters:

- a) Is the *opinio juris* cited relevant?
- b) Does JCE 3 fail to take into account important discussions related to culpability-finding; and
- c) Do the domestic cases cited in support of JCE 3 (not CIL state practice) refer to the formula of JCE 3 in the exact manner outlined by *Tadic*?

Opinio juris

Tadic cited article 25 (3) (d) of the ICC Statute which holds that an accused can be liable for committing a crime under the common plan theory. It then argued that the ratification of the ICC Statute represents the view of many states and constitutes evidence of *opinio juris*.²²² Although its reference to this Statute was for JCE in general, it also applies to JCE 3. However, the judges erred in referring to this article. According to the preparatory works of the ICC Statute, recklessness²²³ was included in the 1996 Preparatory Committee Report,²²⁴ the 1996 Preparatory Committee Consolidation of Proposals²²⁵ and even the final ICC Draft Statute.²²⁶ Yet, it was eventually rejected from the ICC Statute itself meaning that it was not unanimously endorsed during the final negotiations. Therefore, if any conclusion about the ICC Statute as *opinio juris* can be drawn, it is that international law does not support

²¹⁹ *Tadic* Prosecution Brief in Reply, para. 3.17.

²²⁰ 'Natural and probable consequences of an act,' see *Tadic* Appeals Judgment, para. 210, fn. 263 referring to para. 199, fn. 240.

²²¹ Chapter 2.2.2, pg.

²²² *Tadic* Appeals Judgment, para. 223.

²²³ It also included gross negligence.

²²⁴ ICC Preparatory Committee Report, para. 200, noting that there are differing views about including recklessness and gross negligence as *mens rea* for the Statute.

²²⁵ ICC Preparatory Committee Volume II, Article H, pg. 92.

²²⁶ ICC Draft Statute, pg. 56, referring to recklessness, highly unreasonable risk and indifference to risk.

recklessness. The judges' exercise of discretion is therefore misguided owing to its cursory review of the ICC Statutory preparatory works.

Missing elements in the formulation

The *Tadic* Appeals Judgment can be further criticised for failing to address three important questions regarding JCE 3.

The first is whether the perpetrator of the collateral offence must perform the *actus reus* with the required *mens rea*. This question is important because a JCE participant is being convicted for a crime and not simply the *actus reus* of a crime. In *Tadic*, the latter was convicted of 'killing of villagers'²²⁷ which is only the *actus reus* of murder. While it is undisputable that murder was committed in the context of an armed conflict, it is nevertheless important for the judges to address the *mens rea* of the perpetrators for *Tadic* to be fairly convicted of murder and not unlawful killing.²²⁸

The second question is whether the JCE participant foresaw the *actus reus* of the collateral crime only or the *actus reus* and the *mens rea*.²²⁹ This question is significant because, although crimes are defined differently, there may be similarities in elements. We may use the example of genocide and murder to demonstrate. Genocide and murder share a similar *actus reus* in the form of 'an act of killing.'²³⁰ Yet, their *mens rea* differ as genocide requires specific intent²³¹ while the *mens rea* for murder is intention. Specific intent is a different and higher form of *mens rea* than intent.²³² Therefore, if we argue that under JCE 3, a JCE participant only needs to foresee the *actus reus* of the crime and use genocide as an example of a collateral offence, the participant could be convicted of genocide on the basis of killing alone. The *Tadic* Appeals Judgment did not address this matter, leaving a serious lacuna in the formula of JCE 3. Chapter 9 will explore this matter in further detail when considering the application of JCE 3 to specific intent crimes. At this stage, it is important to note this matter.

The third question concerns the stage at which the JCE participant foresaw the crime. If the inclusion of foresight serves any purpose, then surely, it would be fair to include foresight before taking part in the enterprise or before the collateral offence was committed. The *Tadic* Appeals judges did not discuss this point or include any such defence. They therefore failed to address an important defence, concerning foresight of a crime at a particular stage, which is also part of a fair exercise of discretion.²³³ Post-*Tadic*, Judge Cassese, argued that JCE 3 includes such a defence.²³⁴ However, to date, it has never been applied, leading to further uncertainty.

²²⁷ *Tadic* Appeals Judgment, ICTY, para. 231: 'the Appellant had been aware of the killings'.

²²⁸ *Brdjanin* Appeals Decision, Separate Opinion of Judge Shahabuddeen, para. 4, noting that the *mens rea* of the crime has to be proven, if not the case should be dismissed.

²²⁹ This is a controversial point in English law, see *Rahman* (UKHL) (2008), Lord Bingham, paras. 24 and 25.

²³⁰ The *actus reus* for genocide also includes other forms.

²³¹ Under English law, a specific intent crime is one where 'evidence of voluntary intoxication negating *mens rea* is a defence,' see Smith and Hogan (2011) 320. Such crimes include murder, theft and robbery.

²³² Chapter 8 explains specific intent.

²³³ English law provides a defence that the defendant foresaw a crime that was 'fundamentally different' from the one committed, see Smith and Hogan (2011) 220-226.

²³⁴ Cassese ECCC *amicus curiae* brief, para. 82, arguing that JCE 3 is needed when the participant fails to prevent or stop the extra crime or to drop out of the criminal enterprise or to avoid being a participant in the extra crime.

Reference to other case law

The final matter concerns the law cited by *Tadic* used to support the existence of JCE 3 beyond its CIL foundation. These were derived from seven domestic jurisdictions: France, Italy, England, US, Canada, Australia and Zambia.²³⁵ Upon scrutiny, the cases from these jurisdictions do not refer to all three elements of foresight, foreseeability and a lack of an objective element. The analysis of some of these jurisdictions suffices to prove this point. Foremost, under English law, the extended theory of JCE, also known as the wider principle of joint enterprise or parasitic liability,²³⁶ requires foresight but not foreseeability.²³⁷ Secondly, under US law, the judicially created *Pinkerton* doctrine is based on conspiracy and not JCE. Furthermore, while it requires foreseeability of crimes committed in furtherance of the conspiracy, it does not require foresight.²³⁸ It is also a controversial case because of its unclear elements, uncertain scope and lack of support in prior case law.²³⁹ One of the dissenting judges in the case called the doctrine a dangerous precedent which was not cited in *Tadic*.²⁴⁰ Thirdly, Canadian law refers to subjective foresight only²⁴¹ and the Australian cases refer to contemplation/foresight without a further requirement of foreseeability.²⁴² Furthermore, a dissenting opinion against an extension of JCE can be found under Australian law.²⁴³ Therefore, these cases do not provide support for the JCE 3 theory, as formulated by the *Tadic* Appeals Judgment. Yet, the *Tadic* appellate reasoning did not take this into account.

5.2.5 Final conclusions regarding JCE 3

To sum up the analysis of sections 5.2.3 and 5.2.4, six important conclusions have been drawn regarding the formulation of JCE 3. Firstly, only six cases may be considered to apply the common plan theory with five referring to a collateral offence. Secondly, of these six cases, three refer to a causation-nexus. Thirdly, only one case refers to foresight and foreseeability. Fourthly, the reference to *opinio juris* (ICC Statute) reveals that recklessness is not accepted in international law. Fifthly, there are three missing elements to the doctrine of JCE 3. Sixthly, domestic case law used as support for JCE 3 does not reflect the definition of JCE 3 arrived at the Appeals Chamber.

²³⁵ Chapter 2.2.2.

²³⁶ *Gnango* (UKHL) 2011, paras. 15, 22, 23 and 24.

²³⁷ Smith and Hogan (2011) 215-226; n. (229) and *ibid.* English law also differs because it provides for a defence in the form of the collateral crime perpetrated was 'fundamentally different' to what the participant foresaw, see n. (233).

²³⁸ *Pinkerton* (US) (1946); Smith (1991) 47-51.

²³⁹ Brenner (1991) for discussion of its scope and controversy.

²⁴⁰ *Pinkerton* (US) (1946), Dissenting Opinion of Justice Routledge at 649, noting that it is a dangerous precedent.

²⁴¹ *Logan* (S.C.R) (1990) 735; *Rodney* (S.C.R) (1990).

²⁴² *Clayton* (HCA), para. 17: 'If a party to a joint criminal enterprise foresees the possibility that another might be assaulted with intention to kill or cause really serious injury to that person, and, despite that foresight, continues to participate in the venture, the criminal culpability lies in the continued participation in the joint enterprise with the necessary foresight;' see also *Gillard* (HCA), para. 25.

²⁴³ *Clayton* (HCA), per Kirby J, para. 108: 'To hold an accused liable for murder merely on the foresight of a possibility is fundamentally unjust. (...) it introduces a serious disharmony in the law (...).'

5.2.6 Post-*Tadic* literature and review of critique

Post-Tadic literature

Following these conclusions, two key points need to be made. These concern various criticisms and conflicting commentaries pertaining to the elements of JCE 3 articulated in post-*Tadic* case law.

Firstly, in respect of the objective element, three judges have articulated different views. On one hand, Judge Hunt and the *Brdjanin and Talic* Trial Decision described the ‘natural and foreseeable/predictable’ aspect of the doctrine as its ‘objective element.’²⁴⁴ These terms refer to the standard under which the JCE participant is held accountable and they do not depend upon the state of the mind of the accused. However, there appears to be a connection between the common plan and the collateral offence based on what is ‘predictable.’ On the other hand, Judge Cassese strongly defended JCE 3 on grounds of a causation-nexus, in line with the two Italian cases.²⁴⁵ He explained that JCE 3 is not just any crime but it has to be an ‘outgrowth’²⁴⁶ crime of the original criminal plan. He further provided an example to illustrate this: if a group of servicemen deprive civilians of food and water during an armed conflict and some civilians eventually die, the servicemen should not only be held liable for the war crime of intentional starvation but also murder.²⁴⁷ Yet, this example does not reflect the *Tadic*-articulated formula of JCE 3. Instead, this example resembles the *Borkum Island* reference of ‘natural and probable’ consequences or the Italian case law reference to direct causation since the act of starvation causes the death of civilians. *Tadic* did not formulate JCE 3 in this manner. To add to this confusion, Judge Shahabuddeen has argued that a causation-nexus is not required.²⁴⁸ Therefore, among the three judges, no clear view can be formulated regarding an objective element.

Secondly, several judicial comments have been made regarding JCE 3’s *mens rea*. Judge Hunt noted that it is ‘unfortunate that expressions conveying different shades of meaning were used.’²⁴⁹ The *Brdjanin and Talic* Trial Decision echoed a similar view.²⁵⁰ Yet, Judge Hunt and the *Brdjanin and Talic* decision both concurred that foresight and foreseeability are nevertheless required.²⁵¹ Yet, Judges Shahabuddeen and Cassese have provided interpretations of foresight. In addressing the meaning of foresight Judge Shahabuddeen has noted that the reference in *Tadic* is merely proof of intention.²⁵² He supported this position by

²⁴⁴ *Odjanic* JCE Decision, Separate Opinion of Judge Hunt, para. 11; *Brdjanin and Talic* Trial Decision, ICTY, para. 30.

²⁴⁵ Cassese *amicus curiae* brief, para. 55: ‘for a participant to be held liable for crimes other than the one intended, there had to be a “causation nexus—which is not only objective but also psychological—between the fact committed and willed by all participants and the different fact committed by one of the participants.”’

²⁴⁶ Cassese (2007) 118-119.

²⁴⁷ *Ibid* 111-112. He also provides an example of detaining and enslaving women (common plan) and their rape (collateral offence), *Ibid* 113.

²⁴⁸ Shahabuddeen (2010) 192-194, referring to the *Borkum Island* and *Mannelli* cases. He notes that a JCE 3 crime ought to be a logical development of the original crime. But he does not establish a clear causation-nexus as Cassese does.

²⁴⁹ *Odjanic* JCE Decision, ICTY, Separate Opinion of Judge Hunt, para. 10.

²⁵⁰ *Brdjanin and Talic* Decision, ICTY, para. 29.

²⁵¹ *Odjanic* JCE Decision, ICTY, Separate Opinion of Judge Hunt, paras. 10-12. This is confirmed by other judgments, see chapter 3.3.1.

²⁵² *Brdjanin* Appeals Decision, Separate Opinion of Judge Shahabuddeen, paras. 2 and 8; *Krajisnik* Appeals Judgment, Separate Opinion of Judge Shahabuddeen, para. 32.

referring to Lord Scarman's comments in the English case of *Hancock*.²⁵³ In this case, Lord Scarman had noted that 'foresight of consequences is no more than evidence of the existence of intent.' By using this reasoning, Shahabuddeen argued that the JCE participant, in fact, shared the intention of the direct perpetrator of the collateral offence.²⁵⁴ His comment therefore suggests that the *Tadic* Appeals Judgment implied intention was the *mens rea* for JCE 3, rather than foresight. Judge Cassese, on the other hand, defended JCE 3's formulation by referring to diverse *mens rea*: reasonable certainty,²⁵⁵ extremely likely,²⁵⁶ fully aware of likelihood²⁵⁷ and objective foreseeability.²⁵⁸ In addition, he defended JCE 3 as applied in ICL by drawing a parallel with the English case of *Chan Wing-Siu*.²⁵⁹ The latter case referred to contemplation and foresight and not foreseeability.²⁶⁰ His approach therefore differs substantially from Judge Shahabuddeen.

Therefore, although Judges Cassese and Shahabuddeen both sat on the *Tadic* Appeals bench, they appear to have disagreed significantly about its elements. The two judges who agreed on the conviction of *Tadic* for murder disagreed about the underpinnings of the JCE theory.

Review of critique

Within the literature, several scholars have noted some of the points mentioned in this thesis: the lack of a common plan basis and overall lack of support for JCE 3;²⁶¹ the uncertainty of the *Tadic* appellate reasoning regarding *mens rea*;²⁶² the uncertainty of the *Tadic*-formulated elements,²⁶³ the irrelevance of domestic law support.²⁶⁴ However, the literature falls short of providing a necessary in-depth analysis of available historical material, in particular, the Deputy Judge Advocate reviews in *Essen Lynching* and *Borkum Island*. Many scholars in fact

²⁵³ *Krajisnik* Appeals Judgment, Separate Opinion of Judge Shahabuddeen, para. 34, citing Lord Scarman's comments. This is no longer the position in English law. The correct interpretation of foresight is foresight of virtual certainty, see *Woollin* (UKHL), 82-87, noting that the court can find intention if the defendant foresaw that the consequence is virtually certain, confirmed in *Matthews and Alleyne*. Chapter 4.4.3 discusses this aspect in detail when examining parity of culpability.

²⁵⁴ *Krajisnik* Appeals Judgment, Separate Opinion of Judge Shahabuddeen, para. 32.

²⁵⁵ Cassese (2007) (b) 113; Cassese *amicus curiae* brief, para. 26.

²⁵⁶ Cassese (2007) (b) 117.

²⁵⁷ Cassese *amicus curiae* brief, para. 27.

²⁵⁸ Cassese (2007) (b) 123.

²⁵⁹ *Ibid* 118, fn. 11.

²⁶⁰ *Chang Wing-Siu*, 175.

²⁶¹ Sassoli and Olson (2000) 752: *Essen Lynching* and *Borkum Island* do not support theory of JCE 3; *Ambos amicus curiae* brief, pgs. 28-29: no basis for JCE 3 in post-WW II cases; post-WW II Italian cases led to dissenting opinions undermining certainty; Olasolo (2009) 57: Italian case law does not establish a distinction between a principal and an accessory. It is a unitary system; Powles (2004) 615-616: the authorities cited by *Tadic* provided limited support for JCE 3, in particular *Essen Lynching* and *Borkum Island*; Powles (2004) 617: Only the *D'Ottavio et al.* case is proof of JCE 3; Boas, Bischoff and Reid (2007) 20-21: Law based on reliance of prosecutorial arguments instead of judgments, no written decisions and no reasons for verdict; Danner and Martinez (2005) 110, 142-143: post-WW II cases offer no or little support; Ohlin (2007) 75: precedents are of dubious value; Bogdan (2006) 110-11: unpublished post-WW II Italian cases provide minimum support; Clarke (2011) 861: IMT Charter, IMT Judgment, IMTFE and trials under Control Council. No. 10 do not support JCE 3.

²⁶² Sassoli and Olson (2000) 749-750: 'One may wonder which standard (*mens rea*) the Chamber finally applies;' Boas, Bischoff and Reid (2007) 73, querying whether to apply the objective or subjective standards or both according to *Tadic*.

²⁶³ Sassoli and Olson (2000) 749-750, 753: noting the uncertainty of *mens rea*; Boas, Bischoff and Reid (2007) 71 and 73: noting inconsistent definitions and questioning whether the *mens rea* is objectively foreseeable, subjective foresight or both.

²⁶⁴ Bogdan (2006) 111: case law does not support JCE 1 or 3.

argue that the *Borkum Island* case is not based on the common plan doctrine.²⁶⁵ Clarke notes the review and recommendations provided in the *Borkum Island* case. However, he does not examine the reasoning in detail. Lastly, there is no mention of the missing elements²⁶⁶ from the formula, the rejection of recklessness at the ICC and the important differences of view between Cassese and Shahabuddeen.

5.3 JCE AND METHODOLOGY OF CIL

This section addresses the CIL methodology applied by *Tadic*. The principal issue is whether the ‘state practice and *opinio juris*’²⁶⁷ cited represent evidence²⁶⁸ of CIL’s existence. The mainstream scholarly view is critical of the methodology applied by *Tadic*. To assess the criticisms, it is necessary to first review the approach endorsed by *Tadic*.

5.3.1 *Tadic* appellate methodology of CIL

To recapitulate, the *Tadic* appellate assessment of CIL involved reviewing ‘chiefly case law and a few instances of international legislation.’²⁶⁹ The reasoning did not include a thorough discussion of *opinio juris*. It only cited the ICC Statute as evidence of *opinio juris* for both JCE 1 and 3.²⁷⁰

For JCE 1, it used sixteen cases: one NMT case, four British Military Court Trial cases, one Canadian Military Court case, five Italian post-WW II cases and five German post-WW II cases.²⁷¹ For JCE 3, it cited seventeen cases: two British Military Court Trial cases, one US Military Court case and fourteen post-WW II Italian cases.²⁷²

In examining the critique’s perspective, we find a polarised opinion about this methodology.

5.3.2 Criticism of the methodology applied in *Tadic*

Many critics argue that the *Tadic* Appeals Judgment does not offer satisfactory evidence of CIL.²⁷³ Five reasons underpin this conclusion. They apply to both JCE 1 and 3 and concern the use of state practice, *opinio juris* and the balance between the two elements.

²⁶⁵ Boas, Bischoff and Reid (2007) 20-22: not clear whether Borkum Island is based on common plan doctrine.

²⁶⁶ Boas, Bischoff and Reid (2007) 70, noting that the Chamber did not make discrete findings whether *Tadic* had the intent to commit murder.

²⁶⁷ *Continental Shelf* case, ICJ, para. 27: ‘the material of customary international law is to be looked for primarily in the actual practice and *opinio juris* of States;’ also *NSCS* case, ICJ, para. 44.

²⁶⁸ Meron (2005) 817, 819 and 823, using the term ‘evidence’ when explaining CIL requirements.

²⁶⁹ *Tadic* Appeals Judgment, para. 194.

²⁷⁰ *Ibid*, para. 223.

²⁷¹ See chapter 2.2.1.

²⁷² *Ibid*.

²⁷³ These include defence counsel, scholars, the ECCC PTC and ICTY judges, see *Odjanic* JCE Motion; *Odjanic* JCE Appeal; *Martic* Appeals Brief; Bodgan (2006); Boot (2002) 292-304; Powles (2004); Boas, Bischoff and Reid (2007); *Case 002* JCE Decision, ECCC, paras. 79-83, only for JCE 3; *Tolimir* Appeals Brief, para. 54.

For ICTY Judges, see views of Judges Schomburg and Shahabuddeen. Judge Shahabuddeen has expressed contradictory views. He has argued that JCE is not found under CIL, see Shahabuddeen (2010) 202: ‘an error of the Tribunal (...) the question whether joint criminal enterprise was customary international law.’ However, he has also stated that JCE is found under CIL, see *Odjanic* Decision on JCE, Separate Opinion of Judge Shahabuddeen, ICTY, para. 27: ‘*Tadic* was of course right: joint criminal enterprise is recognised in customary

The first three criticisms are related to the use of state practice. Firstly, it is considered to be insufficient.²⁷⁴ Secondly it is considered to be selective.²⁷⁵ Thirdly it has been criticised because decisions of national courts and Military Trial decisions do not reflect international law and, even if they do, such law does not reflect the elements of JCE 1 and 3 as formulated by the *Tadic* Appeals Judgment.²⁷⁶ This criticism is used either for JCE 1 only²⁷⁷ or JCE 3 only²⁷⁸ or both JCE 1 and 3.²⁷⁹ The fourth criticism is that evidence of *opinio juris* is inappropriate²⁸⁰ because the ICC Statute and the International Convention for the Suppression of Terrorist Bombing both entered into force after 2000²⁸¹ while the majority of crimes committed in the Balkans occurred between 1992 and 1993.²⁸² The fifth criticism concerns the balance between *opinio juris* and state practice. Some critics argue that the formulation of CIL must be based only on widespread, consistent and sufficient state practice coupled with *opinio juris*.²⁸³ *Tadic*, in their view, did not apply CIL in this manner. Others, while not advocating this view, have criticised the judgment for its unclear methodology because it was unconventional and does not offer sufficient evidence.²⁸⁴

In response, many defenders of JCE have asserted that JCE 1 and 3 are found in CIL. These include most ICTY Judgments,²⁸⁵ ICTR Decisions,²⁸⁶ some scholars²⁸⁷ and the ICTY

international law.’ For Judge Schomburg’s view, see *Martic* Appeals Judgment, Separate Opinion of Judge Schomburg, ICTY, para. 4: ‘it was an unsupported *dictum* when the Appeals Chamber (...) held that “joint criminal enterprise” is (...) firmly established in (CIL).’

²⁷⁴ *Ieng Sary* JCE Motion, ECCC, para. 18 noting the limited case law used for JCE 1 and 3; Boot (2002): ‘cases too few;’ Powles (2004) 617, noting how only one Italian case law refers to JCE 3 and that it is difficult to establish that JCE 3 is firmly established in CIL.

²⁷⁵ Sluiter and Zahar (2008) 224, 226 and 239: ‘examples of Second World War cases being utilised selectively;’ *Ieng Sary* JCE Motion, ECCC, para. 1: ‘JCE is a judicial construct created through a selective analysis.’

²⁷⁶ See chapter 4.3.2 (JCE 1) and chapter 4.4.2 (JCE 3) for this discussion. This section uses the conclusions insofar as they relate to this argument.

²⁷⁷ *Dordevic* Appeals Brief, para. 59 citing *Erdemovic* Appeals Judgment, Joint Separate Opinion of Judge McDonald and Judge Vohrah, paras 53-54: The Einsatzgruppen case was criticised for its questionable international law character as it applied American law.

²⁷⁸ Ambos *amicus curiae* brief, ECCC, pgs. 23, 28, 29: Post-WW Italian cases are based on national law (article 116 of Italian Criminal Code) and not international law, not uniform and led to dissenting opinions; Sassoli and Olson (2000) 751: not sure why *Tadic* used Italian precedents because they were based on explicit Italian Criminal Code of 1931; *Case 002* JCE Decision, para. 82: ‘cases, in which domestic courts applied domestic law, do not amount to international case law and the Pre-Trial Chamber does not consider them as proper precedents;’ Linda (2007) 246: ‘Domestic Italian law accepts extended JCE, and it is therefore not the least bit strange that extended JCE was used. This case is an example of national and not international criminal law.’

²⁷⁹ Boas, Bischoff and Reid (2007) 21-22: international judicial decisions are not state practice; Bogdan (2006) 110-11: NMT cases are not valid international precedents; *Odjanic* JCE Appeal, ICTY, para. 48: ‘cases were based upon a specific section of the Italian Penal Code of 1931, not on any notions of international law;’ Boot (2002) 297-304, noting that case law cited does not provide support.

²⁸⁰ Sassoli and Olson (2000) 752; Powles (2004) 617; *Ieng Sary* JCE Motion, ECCC, paras. 1 and 18; Ambos *amicus curiae* brief, ECCC, pg. 4; Linda (2007) 247.

²⁸¹ The ICC Statute in 2002 and the other Convention in 2001.

²⁸² Other crimes have occurred beyond this period. The Srebrenica massacre for example was committed in 1995 (see *Jelusic* Appeals Judgment, ICTY) and the crimes in Kosovo in 1999 (see *Haradinaj* Trial Judgment, ICTY, *Odjanic* JCE Decision, para.11).

²⁸³ Olasolo (2009) 52: no consistent and cogent case law; Sluiter and Zahar (2008) 224.

²⁸⁴ Sluiter and Zahar (2008) 224: CIL ‘poorly explained by the judges;’ Boas, Bischoff and Reid (2007) 17 and 21: ‘unconventional methodology open to justifiable criticism;’ Bogdan (2006) 109-110; Olasolo (2009) 52; Ohlin (2007) 71: ‘evidence insufficient;’ Van Sliedregt (2009) 199, noting the fluid rules of CIL; Boot (2002) 293, conclusion that JCE is based in CIL is ‘far-fetched.’

²⁸⁵ *Odjanic* JCE Decision, ICTY, para. 29; *Odjanic* JCE Decision, Separate Opinion of Judge Hunt, para. 17; *Stakic* Appeals Judgment, paras. 100-103; *Martic* Appeals Judgment, ICTY, para. 81, noting how the defence

Prosecutor.²⁸⁸ However, many of these commentators offer little or no supporting reasoning. They do not engage in an examination of *Tadic* by scrutinising the state practice and *opinio juris* cited by the Appeals Chamber. For example, the ICTY Prosecutor has said:

‘(the Appellant) has not shown how one instance of State practice regarding World War II cases, a handful of instances of a somehow more restrictive State practice, and the lack of written judgements in two of the several cases looked at by the *Tadic* Appeals Chamber, can affect the conclusion reached by the Appeals Chamber that (JCE) is firmly established in customary international law (...)’²⁸⁹

In a similar vein, the *Odjanic* JCE Decision stated:

‘The Appeals Chamber does not propose to revisit its finding in *Tadic* concerning the customary status of (JCE). It is satisfied that the state practice and *opinio juris* reviewed in that decision was sufficient to permit the conclusion that such a norm existed under customary international law.’²⁹⁰

Only a few scholars who have defended JCE 1 and 3 have based their arguments on domestic law precedents that refer to JCE²⁹¹ and additional post-WW II case law (IMT, NMT and domestic cases) which supports JCE 1²⁹² and JCE 3.²⁹³ Furthermore, the only response in relation to the balance between state practice and *opinio juris* has come from Judge Cassese. In an *amicus curiae* brief submitted to the ECCC, he has argued that CIL is not only formulated on the basis of widespread and consistent state practice.²⁹⁴ Instead he argues ‘the social and moral need for observance of rules, and the expression of legal views by a number of states or international entities about the binding value of the (...) rule, may suffice to establish (CIL).’²⁹⁵ Using this reasoning, Cassese added that the ‘criterion of widespread practice may be eclipsed and *opinio juris* separated and elevated’²⁹⁶ in assessing the evidence for the existence of a rule of CIL. Such *opinio juris* exists, Cassese claims, in the form of the Martens Clause. This Clause, which figures in the Preamble to the 1899 Hague Convention II and is restated in the 1907 Hague Convention IV, states:

failed to show that JCE is not part of CIL; *Babic* Trial Sentence Judgment, ICTY, para. 33. For exception, see views of Judges Shahabuddeen and Schomburg, n. (273).

²⁸⁶ *Karemera et al.* ICTR, JCE Appeals Decision, para. 16, noting that JCE is firmly established in CIL.

²⁸⁷ Cassese *amicus curiae* brief, ECCC; Ambos *amicus curiae* brief, ECCC (for JCE 1 only).

²⁸⁸ *Odjanic* Prosecutor Response, paras. 7, 17, 46; *Odjanic* Prosecution Appeals Response, ICTY, paras. 8-10.

²⁸⁹ *Odjanic* Prosecution Response, ICTY, para. 46.

²⁹⁰ *Odjanic* JCE Decision, ICTY, para 29. No other analysis has ever been conducted at the ICTY, see *Stakic* Appeals Judgment, ICTY, paras. 100-103; *Martic* Appeals Judgment, ICTY, para. 435.

²⁹¹ Van Sliedregt (2006) 96-97: ‘quite a few national jurisdictions provide for JCE ‘equivalents;’ Cassese *amicus curiae* brief, ECCC, paras. 63 and 65, noting twelve countries (common law and civil law jurisdictions) that support both JCE 1 and 3; McGill University *amicus curiae* brief, ECCC, paras. 25-39.

²⁹² Ambos *amicus curiae* brief, ECCC, pgs. 25-26, noting that JCE 1 is found under CIL based on Art. 5 and 6 of the IMT Charter and other NMT cases; Sassoli and Olson (2000) 748 and 751: JCE 1 and 2 is based on ‘reasonable, useful and important crystallisation of international and national precedents and of legal thinking’ and British and American Trials based on international law; Cassese *amicus curiae* brief, paras. 43-46; *Case 002* JCE Decision, ECCC, paras. 62-70; McGill University *amicus curiae* brief ECCC, paras. 12-14, 16-19.

²⁹³ Cassese *amicus curiae* brief, ECCC, paras. 49-62; Cassese (2007) (b); McGill University *amicus curiae* brief, ECCC, paras. 12-14, 23-25.

²⁹⁴ Cassese *amicus curiae* brief, ECCC, para. 35.

²⁹⁵ *Ibid.*

²⁹⁶ *Ibid.*

‘Until a more complete code of the laws of war is issued, the High Contracting Parties think it right to declare that in cases not included in the Regulations adopted by them, populations and belligerents remain under the protection and empire of the principles of international law, as they result from the usages established between civilized nations, from *the laws of humanity and the requirements of the public conscience*.’²⁹⁷

By referring to this Clause,²⁹⁸ Cassese underlined the need for protection of individuals as a requirement of public conscience.²⁹⁹

Considering these polarised views, we ought to question what constitutes a fair formulation of CIL first. This analysis enables us to identify how the two elements of state practice and *opinio juris* can be used to formulate eligible methodological formulae of CIL. The next section will explore this question by examining the nature of CIL as a source of law.

5.3.3 Nature of CIL

Many commentators,³⁰⁰ in discussing CIL’s nature, agree that it is fluid,³⁰¹ malleable,³⁰² indeterminate,³⁰³ inherently flexible³⁰⁴ and possesses a ‘penumbra of uncertainty.’³⁰⁵ This results from the fact that it is an ‘informal process of rule-creation’³⁰⁶ and is ‘not an exact science.’³⁰⁷ It depends upon what constitutes state practice and *opinio juris* and how much state practice and *opinio juris* are required.³⁰⁸ For this reason, it is not uncommon to find criticisms regarding the ‘inconsistent and incoherent’³⁰⁹ use of CIL, whether in international law or ICL. For example, the ICJ *Nicaragua* case was criticised because it did not refer to any state practice or *opinio juris*³¹⁰ although it argued that Articles 1 and 2 of the Geneva Conventions 1949 constitute CIL. Likewise, the ICJ *Arrest Warrant* case was also criticised for its methodology in arguing that state officials have absolute immunity from criminal jurisdiction.³¹¹ Within an ICTY context, we find similar criticisms. Powderly has criticised the *Tadic* Appeals Decision on Jurisdiction for referring almost exclusively to examples of *opinio juris* when holding that AP II is part of CIL.³¹² Van den Herik has added to this list of criticisms, noting how the ICTY’s CIL methodology has at times been haphazard, its

²⁹⁷ Emphasis added.

²⁹⁸ For more on Cassese’s view of the Martens Clause, its use and influence in IHL, see Cassese (2000) and Cassese (2008) 161.

²⁹⁹ This argument may be seen as related to Cassese’s policy argument for JCE 3, see chapter 4.4.3 (critique’s perspective).

³⁰⁰ Discourse related to CIL is vast. For established scholarly views see Brownlie (2008); D’Amato (1971); Higgins (1994) 34; Roberts (2001); Meron (2005); ILA Report (2000); ICRC Study (2005) and Lepard (2010) for an updated review of use of CIL.

³⁰¹ Van Sliedregt (2009) 199.

³⁰² Sluiter and Zahar (2008) 231.

³⁰³ Kelly (2000) 451; Mettraux (2005) 13; Koskeniemi (1989) 361-362 ; ILC 2014 (Second Report), para. 3.

³⁰⁴ ILC 2014 (Second Report), para. 12.

³⁰⁵ Mendelson (1998) 170.

³⁰⁶ ILA Report (2000) 2.

³⁰⁷ Mettraux (2005) 14.

³⁰⁸ Treaties and declarations can be considered either state practice or *opinio juris*, see Roberts (2001) 757-758; Lepard (2010) 35; D’Amato (1971) 89-90, 160.

³⁰⁹ Bantekas (2006) 121.

³¹⁰ Powderly (2010) 27.

³¹¹ Powderly (2010) 27; See *Arrest Warrant Case*, Dissenting Opinion of Judge Van den Wyngaert, paras. 24-28.

³¹² Powderly (2010) 28.

decisions have at times not cited evidence for a rule and treaties have been invoked without any mention of their relevance.³¹³

Considering these criticisms, it is evident that there is a need to review the nature of CIL and determine its acceptable methodologies. In this section, I argue that judges cannot determine CIL ‘as a matter of taste.’³¹⁴ Their discretion in using CIL is guided by five principal criteria related to a qualitative (meaning of state practice and *opinio juris*) and quantitative (balance between the two elements) examination of this source of law.³¹⁵ I have derived these criteria from important jurisprudential discussions, in particular recent comments from Michael Wood, the ILC Special Rapporteur who is investigating the identification and formation of CIL for the ILC.³¹⁶ The first ILC report provided interesting insights as it questioned whether diverse fields apply CIL differently³¹⁷ with *opinio juris* as the only requirement for certain fields. The second report however dismissed this view.³¹⁸ It, nevertheless, noted that there may be a difference in the application of the two-element approach.³¹⁹ It may be that in some fields, state practice plays a major role in contrast to others.³²⁰ These views will be incorporated in discussing the five criteria below.

The first concern is what constitutes acceptable evidence of state practice.³²¹ Any example of a rule will not suffice. Specific examples that adduce evidence of conduct of a state should be used.³²² To date, these have included verbal acts of States,³²³ military manuals,³²⁴ practice of judicial organs³²⁵ and other examples related to state conduct.³²⁶ Among examples not accepted as state practice,³²⁷ the ILA³²⁸ Report has considered acts that are not public,³²⁹ acts of individuals and corporations which are not on behalf of a state³³⁰ and acts of governmental

³¹³ Van den Herik (2010) 105.

³¹⁴ Kelly (2000) 451.

³¹⁵ Three points need to be mentioned briefly. Firstly, no scholarly publication specifically outlines these five criteria. They have been derived from judgments and key scholarly publications regarding CIL’s formation and use. Secondly, in addition to these five criteria, two other approaches may be considered when using CIL. The first method is citing a previous judgment that has already applied a CIL-based rule rather than enquire about state practice and *opinio juris*, see Alvarez-Jimenez (2011) 698 and Meron (2005) 823. The second method is determining that a treaty or state practice symbolises CIL. This is referred to as implicit recognition, Alvarez-Jimenez (2011) 701. The third point is that many cases (in particular at the ICJ) can be criticised for not following these criteria, see Cassese (2007) 249, 251 criticising the *Bosnia Genocide* case, ICJ; Lee (2006) 242 who criticises the *Barcelona Traction* case, ICJ, for applying general principles of law rather than CIL; Lillich (1971) 572-573, also critical of the *Barcelona Traction* case, ICJ, use of CIL. This does not suggest that criteria are invalid. Instead, the cases can be faulted for not adhering to them.

³¹⁶ See ILC 2013 (First Report); ILC 2014 (Second Report); ILC 2015 (Third Report).

³¹⁷ ILC 2013 (First Report), para. 19; ILC 2014 (Second Report), para. 28.

³¹⁸ ILC 2014 (Second Report), para. 28.

³¹⁹ ILC 2015 (Third Report), Section II.

³²⁰ ILC 2014 (Second Report), para. 28.

³²¹ ILA Report (2000) 13; ILC 2014 (Second Report), para. 32.

³²² ILC 2014 (Second Report), para. 34, 37, 41-47.

³²³ *Fisheries Jurisdiction* case, ICJ, pg. 47; *Nicaragua case*, ICJ, para. 190; *Gabčíkovo-Nagymaros case*, ICJ, paras. 49-58.

³²⁴ *Tadic* Appeals Decision on Jurisdiction, ICTY, para. 99.

³²⁵ *Nottebohm* case, ICJ, pg. 22; *Lotus* case, PCIJ, pgs. 23, 26, 28-29; *Jurisdictional Immunities* case, ICJ, para. 55.

³²⁶ For a wide examination of types of state practice, see ILA Report (2000) 13-20; Brownlie (2008) 6-7.

³²⁷ To date, case law has not confirmed any example of state conduct that does not represent an illustration of state practice, see Lepard (2010) 34, 218-220 for examples of ‘what constitutes state practice.’

³²⁸ ILA Report (2000).

³²⁹ ILA Report (2000) 15.

³³⁰ *Ibid* 16.

entities which do not enjoy separate international legal personality.³³¹ The second criterion concerns the weight of state practice.³³² We may use the ICJ North Sea Continental Shelf Case (*NSCS*) case as an example to highlight this point since it is widely cited as the authority for CIL's formulation.³³³ In this case, the ICJ Judges examined fifteen instances of state practice cited by the parties.³³⁴ The judges did not argue that the examples do not constitute state practice.³³⁵ However, they dismissed the examples because they did not constitute reliable 'guides as precedents.'³³⁶ Two grounds deprived them of 'weight as precedents.'³³⁷ The first was that they were not relevant to the legal question.³³⁸ The second was that *opinio juris* was required.³³⁹ The latter holds 'that acts must not only amount to a settled practice but they must also be carried out in such a way, as to be evidence of a belief that this practice is rendered obligatory by the existence of a rule of law requiring it.'³⁴⁰ In the *NSCS* case, the judges considered that the fifteen instances of state practice were not carried out as a matter of international law. This requirement of *opinio juris* has been confirmed not only by the *NSCS* case but by many other cases too.³⁴¹ We may therefore consider *opinio juris* as the third criterion for CIL.³⁴² Examples may include treaties, GA resolutions and SC resolutions.³⁴³ The fourth criterion concerns the relevance of *opinio juris*. Currently, to the author's knowledge, no case law has described an example of *opinio juris* as irrelevant. However, within the system of ICL, this matter would have to be carefully scrutinised if CIL is used to prove the existence of a rule at a particular point in time when the crime was committed.³⁴⁴

The fifth criterion concerns the quantitative assessment of CIL. It is related to the balance between the two elements, state practice and *opinio juris*.³⁴⁵ The Third ILC Report (2015) regarding the identification of CIL made two interesting comments pertaining to this matter. It noted that in some cases 'a particular form (or particular instances) of practice or particular evidence of acceptance of law may be more relevant than in others'³⁴⁶ and that the 'assessment of the constituent elements needs to take account of the context in which the alleged rule has arisen and is to operate.'³⁴⁷ Unsurprisingly, the commission's report echoes well-established approaches in the academic literature. The literature advances two possible

³³¹ Ibid 16.

³³² ILC Report (2000) 13; ILC (2014) (Second Report), para. 52-59.

³³³ Meron (2005) 819; Roberts (2001) 757-758

³³⁴ *NSCS* case, ICJ, para. 75.

³³⁵ They were examples of state conduct, see *NSCS* case, ICJ, para. 75.

³³⁶ *NSCS* case, ICJ, para. 75.

³³⁷ *NSCS* case, ICJ, para. 75. The judges mentioned 'several grounds.' However, only two are identifiable.

³³⁸ The legal dispute concerned continental shelf delimitation. The judges dismissed the examples cited by the Parties because they were not related to international boundary delimitations and were only examples of delimitations between the State parties themselves. They did not represent reliable guides as precedents.

³³⁹ *NSCS* case, ICJ, paras. 75-77.

³⁴⁰ *NSCS* case, ICJ, para. 77.

³⁴¹ *Lotus case*, PCIJ, paras. 18, 29; *Nottebohm*, ICJ, paras. 4, 22; *S.S. Wimbledon*, PCIJ, para. 25; *Continental Shelf case*, ICJ, para. 27; *Jurisdictional Immunities case*, ICJ, para. 55. However, not all cases cite evidence of *opinio juris* as part of their reasoning, see *Fisheries Jurisdiction case*, ICJ; *Barcelona Traction case*, ICJ; *Arrest Warrant case*, ICJ; *LaGrand case*, ICJ.

³⁴² ILC (2014) (Second Report), para. 60.

³⁴³ *Corfu Channel case*, ICJ; *Nicaragua*, ICJ; *Legality of the Threat or Use of Nuclear Weapons case*, ICJ; *Legal Consequences of the Construction of a wall case*, ICJ.

³⁴⁴ CIL is not always used as a source of law to validate the existence of a crime in ICL. It has been used in other contexts such as determining the immunity of the ICRC, see *Simic Trial Decision on Immunity*, ICTY.

³⁴⁵ ILC (2015) (Third Report), para. 7, section II.

³⁴⁶ Ibid, para. 17.

³⁴⁷ Ibid.

methods regarding a balance between state practice and *opinio juris*.³⁴⁸ The first is known as the traditional method.³⁴⁹ Judges use state practice which is constant,³⁵⁰ virtually uniform (but not universal),³⁵¹ widespread and representative³⁵² and supported by *opinio juris* (although the latter remains a secondary consideration relative to state practice).³⁵³ Within this method, the meaning of ‘widespread and representative’ remains uncertain.³⁵⁴ The second method has been referred to as the modern method.³⁵⁵ State practice does not have to be widespread and representative but can be supported by a greater level of *opinio juris*.³⁵⁶ While case law does not seem to explicitly acknowledge this form of CIL³⁵⁷ in contrast to the traditional method,³⁵⁸ important scholarly commentaries, including those from judges, uphold its existence.³⁵⁹ Therefore, in short, the five requirements for using CIL fairly are:

- a. Identifying appropriate state practice;
- b. Identifying state practice of sufficient weight;
- c. Referring to *opinio juris*;
- d. Identifying what constitutes acceptable *opinio juris*; and
- e. Identifying what constitutes an appropriate balance between the quantity of state practice and *opinio juris* required to support the existence of a CIL rule.

In light of this explanation, it is evident that judges are capable of exercising their discretion within certain limits. We may argue that the traditional method embodies a *lex lata* role (what the law is) while the modern method assumes a *lex ferenda* one (what the law ought to be).³⁶⁰ Defined in this manner, CIL can be used to fulfil an important gap-filling function through its *lex ferenda* role. As explained in the introduction to this thesis, there were many such gaps to be filled where statutory law did not furnish answers. Through the use of a malleable source as CIL, judges could do so subject to the aforementioned constraints.³⁶¹ A key example, where CIL, has acted in such a manner, is the *Tadic* Appeals Decision on Jurisdiction. Chapter 1.4 explained the background to this case and illustrated how CIL acted as evidence

³⁴⁸ There may be disagreements as to whether a CIL rule is based on a traditional or modern form. For example, Alvarez-Jimenez disagrees with Meron’s characterisation of the ICJ Arrest Warrant Case as one of modern method, see Alvarez Jimenez (2011) 694.

³⁴⁹ See Roberts (2001) 758 and Meron (2005) 821 and 823. Alvarez-Jimenez argues that a different method, called the strict-inductive method, is similar to the traditional method, see Alvarez-Jimenez (2011) 689. However, the strict-inductive method is different. It requires the following: widespread ratification of a treaty, no reservations to the treaty, passage of a considerable amount of time and a high threshold for *opinio juris*, see Alvarez-Jimenez (2011) 686. Roberts’ definition, as explained above, differs.

³⁵⁰ *Asylum* case, ICJ, pg. 14: ‘constant and uniform usage.’

³⁵¹ *Ibid.*

³⁵² *NSCS case*, ICJ, para. 73.

³⁵³ Roberts (2001) 758.

³⁵⁴ Tasioulas acknowledges this point, see Tasioulas (1996) 93.

³⁵⁵ See Roberts (2001) 758; Meron (2005) 819.

³⁵⁶ Roberts (2001) 758.

³⁵⁷ Cases considered to acknowledge this form are the *Nicaragua* case, ICJ, paras. 187-193 (principle of non-intervention); *Arrest Warrant* case, ICJ, *LaGrand* case, ICJ.

³⁵⁸ *NSCS case*, ICJ, paras. 73-77; *Fisheries Jurisdiction* case, ICJ, para. 50.

³⁵⁹ Meron (2005) 817-818; Cassese *amicus curiae* brief, ECCC, para. 35; Tasioulas (1996) 96-97, 109-115; Kirgis (1987) 149-151; Lepard (2010) 97-98, 138.

³⁶⁰ Roberts (2001) 763 and 789, noting the *lex lata* and *lex ferenda* roles of state practice and *opinio juris*. Higgins (1971) 340-341, exploring how Judge Fitzmaurice in the *Barcelona Traction* case drew a distinction between the *lex lata* and *lex ferenda* approaches in international law. Lepard (2010) 53, providing a similar description of how CIL can be used as either an empirical or normative authority.

³⁶¹ Several scholars acknowledge CIL’s gap-filling role in ICL, see Van Schaack (2008) 165; Fan (2012); Henckaerts (2012) and its role in developing international law, see Tasioulas (1996) 109-115; Chinkin (1989); Raman (1965).

of existing law. It enabled judges to determine that article 3 of the ICTY Statute could be applied to a NIAC in the absence of any positive law. ICJ Judge Greenwood described this case as ‘carefully reasoned and innovative.’³⁶² Furthermore, only few commentaries have criticised this judgment on grounds of excessive judicial power and possible NCSL violation rather than an inappropriate use of CIL.³⁶³ Yet upon close scrutiny, this decision did not refer to a method of CIL.³⁶⁴ Moreover, it only referred to eleven instances of state practice³⁶⁵ and two references of *opinio juris*.³⁶⁶ This amount of state practice is less than that cited for JCE 1 and 3.³⁶⁷ Therefore, one may question why the use of CIL in this decision has not received any criticism while the *Tadic* Appeals Judgment methodology for JCE has.

The next sections will therefore examine the use of state practice and *opinio juris* and the methodology applied by the *Tadic* Appeals Judgment. A review of the critique will follow.

5.3.4 JCE 1 and CIL

Which formulation of CIL?

The first concern regarding the judgment’s use of CIL is its method. While it did not explicitly state its methodology,³⁶⁸ it is highly likely that it was referring to a traditional form for three reasons. Firstly, it referred to sixteen instances of state practice.³⁶⁹ Secondly, it stated that this cited case law for JCE 1 and 3 is consistent and cogent with general ICL and national legislation.³⁷⁰ This is reflected in its state practice which covered a wide range of jurisdictions including Britain, US, Germany, Canada, Italy and NMT law. Thirdly, while it did not refer to an abundance of evidence as *opinio juris*, it referred to the ICC Statute as such evidence.

From this perspective, the problem is less one of choice of methodology but more one of weight and quantity of state practice and the relevance of *opinio juris*.

State practice and opinio juris: Weight and quantity

JCE 1’s formulation was based on sixteen cases: one NMT case; four BMC Trial cases; one Canadian Military Court case; five Italian post-WWII cases and five German post-WW II cases.³⁷¹ However, as the *Furundzija* Trial Judgment previously held, ‘one should *constantly be mindful of the need for great caution* in using national case law for the purpose of determining whether customary rules of international criminal law have evolved in a particular matter.’³⁷² In the context of formulating JCE, the need for being mindful concerns

³⁶² Greenwood (1996) 265, 282. He did so in a scholarly capacity and not as a judge.

³⁶³ See Sluiter and Zahar (2008) 112 who question whether the judges would have reached the same conclusion in the absence of state practice; *Tadic* Appeals Decision on Jurisdiction, Separate Opinion of Judge Li, para. 13: the decision is an ‘unwarranted assumption of legislative power which has never been given to this Tribunal by any authority;’ Darcy (2010) 118-119, questioning whether the judgment violates NCSL.

³⁶⁴ *Tadic* Appeals Decision on Jurisdiction, para. 95. It is however most likely to be traditional.

³⁶⁵ *Ibid*, paras. 100-132,

³⁶⁶ *Ibid*, para. 133.

³⁶⁷ JCE1 used sixteen examples of state practice and JCE 3 referred to seventeen, see chapter 2.2.2.

³⁶⁸ Chapter 5.3.1.

³⁶⁹ Sixteen can be considered to satisfy the widespread argument.

³⁷⁰ *Tadic* Appeals Judgment, para. 226.

³⁷¹ Chapter 5.3.1.

³⁷² *Furundzija* Trial Judgment, ICTY, para. 194 (emphasis added).

the weight of state practice. Although sixteen cases were used, many of these cases are not valuable precedents for CIL. Ten of these cases are lacking in *opinio juris*³⁷³ because they were not decided in light of international law but on the basis of domestic law. These are the Italian and German cases.³⁷⁴ The Italian cases applied articles 110 and 116 of the Italian Criminal Code 1931³⁷⁵ and the German cases were decided on the basis of several articles from the German Criminal Code.³⁷⁶ The decisions were clearly based on national statute law and not international law. Furthermore, if we examine the content of these ten cases, only one of the German cases³⁷⁷ may be considered relevant to JCE 1 because of its similarity with the doctrine's elements. Therefore, ten out of the sixteen cases lack significant weight.

Following this conclusion, only six cases remain: the NMT Judgment, the four BMC Trials and the Canadian case. In examining their legal basis, most if not all, can be said to have applied international law. As Heller has noted, the NMTs were inter-allied special tribunals that applied international law³⁷⁸ because the international community had ratified the London Charter as international law and the judges argued that the crimes under CCL10 reflected pre-existing rules of international law.³⁷⁹ This is reflected in many NMT Judgments.³⁸⁰ The same conclusion applies for the four BMC Trials where the Judge Advocate noted in several trials that the Court was applying international law.³⁸¹ Furthermore, Lord Wright who has commented on the legal basis and state of municipal trials at that time³⁸² confirms this point.³⁸³

However, no conclusive evidence can be found regarding the legal basis of the Canadian case. Available material from the LRTWC, states that the Canadian Military courts followed the BMC Trials.³⁸⁴ On this basis, one can only assume that it was based on international law. Therefore, in conclusion, we can either argue that five cases unequivocally represent international law or if we include the Canadian case, the number increases to six.

The final point regarding the judgment's reference to CIL concerns the *opinio juris* cited. It referred to the ICC Statute as such evidence. However, even if we consider the treaty to be relevant evidence, in this instance, it carries no weight. The ICC Statute was adopted in 1998

³⁷³ Chapter 5.3.3, n. (339 and 340).

³⁷⁴ No judgments from either of these jurisdictions can be found in the LRTWC prepared by the UNWCC regarding international law. See LRWTC, Vol. XV 23-48 for legal basis of several post-WW II Municipal Courts which applied international law.

³⁷⁵ Sassoli and Olson (2000) 751; *Odjanic* JCE Appeal, ICTY, para. 48; *Tadic* Appeals Judgment, para. 224, fn. 286.

³⁷⁶ These are articles 47, 66, 67 and 305 of the German Criminal Code. The judgment is on file with author.

³⁷⁷ Chapter 4.3.2. The German Supreme Court Judgment is on file with author.

³⁷⁸ Woetzel has noted how the IMT was an international court because it was sanctioned by the international community whereas the NMTs were not, see Woetzel (1962) 42-57. Lord Wright however describes the NMTs as International Courts, see LRTWC, Vol. VI. Heller is the only scholar to have conducted a thorough examination of NMT Judgments. He compares the character of national and international tribunals and concludes that the NMTs were inter-allied special tribunals which nevertheless applied international law, see Heller (2011) 109-132.

³⁷⁹ Heller (2011) 122-123.

³⁸⁰ For NMT Judgments applying international law, see *Justice* case, 962-967; *Hostages* case, 1237-1253; *Einsatzgruppen* case 442, 454, 457; *Rusha* case, 285-288.

³⁸¹ See *Essen Lynching*, LRTWC, Vol. XV 57; *Schonfeld*, LRTWC, Vol. XI, 72, noting that even if the law applied is municipal law, it supported and did not substitute international law; *Almelo* Trial, LRTWC, Vol. I 42; *Buck et al* case, LRTWC, Vol. V 42-53.

³⁸² Lord Wright wrote the foreword to the UNWCC, see LRTWC, Vol. XV.

³⁸³ Lord Wright's foreword in LRTWC, Vol. XV viii.

³⁸⁴ LRTWC, Vol. XV 28-29.

and ratified in 2002.³⁸⁵ It therefore does not provide evidence of the state of *opinio juris* for crimes committed from 1992-1995.

In conclusion, only five (or six at most) instances of state practice are relevant while the *opinio juris* is irrelevant. For this reason, JCE 1 cannot be considered to be founded on an eligible method of CIL.

5.3.5 JCE 3 and CIL

We can apply the same reasoning to examine the CIL methodology for JCE 3. In this instance, the *Tadic* Appeals Judgment referred to seventeen cases: two BMC Trial cases; one US Military Court case and fourteen Italian post-WW II cases. The *opinio juris* cited also consists of the ICC Statute.

As for JCE 1, all the Italian cases cited for JCE 3 can be dismissed because they were not based on international law. In addition, ten of them were unpublished, further undermining their significance as valuable precedents. However, the US Military Court case of *Borkum Island* was based on international law³⁸⁶ and furthermore referred to the common plan doctrine. Yet, as chapter 4.4.2 indicated, its elements do not reflect the JCE 3 formula. Therefore, it is also irrelevant. Lastly, of the two remaining BMC Trials, neither can be considered relevant because they did not refer to the JCE 3 theory as formulated by *Tadic*. This conclusion remains although these two cases applied international law.

In sum, none of the state practice cited can be used as precedents for JCE 3. They either fail to qualify as state practice because they are not reflective of international law or because they did not apply the common plan doctrine or, if they did, they do not reflect the JCE 3 formula cited by *Tadic*. Considering that the same conclusion regarding the use of the ICC Statute as evidence of *opinio juris* applies, JCE 3 cannot be said to be found under CIL.

5.4 CONCLUSIONS FOR CIL AND REVIEW OF THE CRITIQUE

The overall conclusion of section 5.3 is that the *Tadic* Appeals judges have not used an acceptable method of CIL in formulating either JCE 1 or JCE 3.

In light of this conclusion, we may review the critique's perspective. Drawing from section 5.3.2, some of the views are correct, namely those who argue that the Italian cases do not represent international law, that the case law is insufficient, that evidence cited for *opinio juris* is irrelevant³⁸⁷ and Cassese's articulation that state practice can be lowered in favour of *opinio juris* because of the modern form of CIL. However, there are three specific points that need to be mentioned.

³⁸⁵ See URL available: http://www.icc-cpi.int/en_menus/icc/about%20the%20court/frequently%20asked%20questions/pages/faq.aspx, last accessed 10th December 2015.

³⁸⁶ Koessler (1956) 195, noting that US Tribunals were national courts in contrast to the IMT and NMT. However, they did not apply US law but international law.

³⁸⁷ See n. (283 and 284).

Firstly, arguing that the state practice was selective is not a valid criterion to describe the use of CIL as unfair.³⁸⁸ As explained in section 5.3.3, judges are entitled to exercise their discretion within certain limits. They may choose state practice so long as it serves a valuable guide as a precedent. Secondly, in analysing individual commentaries regarding CIL, some scholars have not identified that it can be used according to two eligible methods. These concern criticisms from Sluiter and Zahar, Danner and Martinez, Bogdan, Boas, Bischoff and Reid and defence counsel motions.³⁸⁹ Thirdly, although I have reached the same conclusion as some critics, which is that CIL has been used unfairly, I have done so for different reasons.³⁹⁰ I have firstly provided a holistic appraisal of CIL's methodology rather than a cursory one. I have then applied this methodology to examine the *Tadic* appellate reasoning. Within the literature, none of the individual commentaries from scholars,³⁹¹ *amicus curiae* briefs or defence counsel motions have embraced this approach.³⁹²

5.5 REFERENCE TO DOMESTIC JURISDICTIONS

Before addressing NCSL in the next section, it is important to question another aspect of the *Tadic* Appeals Judgment related to support for JCE. Chapter 2.2.1 noted that the judgment referred to the law of seven domestic jurisdictions that applied JCE 1 and JCE 3.³⁹³ It also cited two jurisdictions that do not apply these doctrines.³⁹⁴

One may ask whether the judges intended to use such law as an additional 'justification' for JCE. A possible explanation along these lines is that the *Tadic* Appeals judges intended to prove that JCE is a 'general principle of law' in ICL. The latter is a recognised source of law in international law³⁹⁵ which is defined as 'principles shared by domestic legal systems of the world.'³⁹⁶ This reference would imply that JCE, although not a statutory defined form of liability, exists under a different source of law. However, if this were the judge's intention, its reasoning is flawed.

As a general principle of law is defined as principles shared by domestic systems of the world, it could only be proved by a wide global survey of case law.³⁹⁷ The *Tadic* Appeals judgment, however, only referred to seven jurisdictions and furthermore noted two countries where JCE is not applied. Since this description does not fit that of a general principle of law, it serves no purpose. It is therefore impossible to ascertain why the *Tadic* Appeals judges exercised their discretion in mentioning it. Within the literature, JCE critics have not questioned whether such law was intended to be used as a general principle of law.³⁹⁸

³⁸⁸ See n. (275).

³⁸⁹ See n. (387).

³⁹⁰ See n. (273).

³⁹¹ See n. (388).

³⁹² Namely whether state practice is selective or *opinio juris* unacceptable or the state practice lacks weight.

³⁹³ France, Italy, US, Canada, England and Wales, Australia and Zambia.

³⁹⁴ Germany and Netherlands.

³⁹⁵ See Article 38(1) (c) of the ICJ Statute: 'the general principles of law recognized by civilized nations;' also see article 7(2) of the ECHR and article 15(2) of the ICCPR, which refers to general principles of law.

³⁹⁶ See Lepard (2010) 164-165; Lammers (1980) 59-66; Schachter (1991) 50-53; Schlesinger (1957); Raimondo (2008) 4.

³⁹⁷ Raimondo (2008) 4, noting how a general principle of law cannot be derived from either a couple or a handful of cases but it should be universally recognised.

³⁹⁸ Some have questioned whether its reference to CIL reflects that of a general principle of law, see Bogdan (2006) 109-112; Boot (2002) 297-304. The ECCC Prosecutor however requested the ECCC Trial Chamber to

However, many JCE critics have recognised that JCE is not found in the criminal law practices of many nations.³⁹⁹

consider JCE 3 as a general principle of law, see *Case 002*, ECCC, Prosecutor's request for JCE 3 as alternative mode, ECCC.

³⁹⁹ Bogdan (2006) 111: JCE was not a recognised general principle of law at the time of *Tadic* and that the judgment only provided a cursory reference to the laws of some countries; Boot (2002) 304: 'domestic case law cannot be used as source of international principles or rule or as a general principle of law, legislation and case law not uniform;' Danner and Martinez (2005) 109: many national systems such as Germany, Netherlands, Switzerland do not recognise JCE 3.

6

JCE and NCSL

6.1 INTRODUCTION

Chapter 6 examines the importance of the fourth and final factor: the implications of NCSL (the principle of legality).¹ Chapter 2 noted briefly how the *Tadic* Appeals judgment was silent about this factor.² Given this absence, this chapter adopts the following structure to examine whether JCE violates NCSL requirements and how the literature has approached this question.

Foremost, section 6.2 will explain the views as found within the critique. Section 6.3 then examines in detail the formulation and meaning of NCSL at the ICTY and provides a partial review of the critique. Sections 6.4 and 6.5 will then evaluate whether JCE 1 and 3 violate NCSL before section 6.6 provides the remaining criticisms of the literature.

6.2 THE CRITIQUE

The literature advances two opposing claims regarding NCSL. The first view, as shared by defence counsel³ and scholars,⁴ is that JCE violates NCSL. Four arguments form the basis of this claim. Firstly, NCSL is violated because JCE was not a statutory form of liability or found under CIL.⁵ For some scholars, the law regarding commission can only be viewed according to how it is defined by the Statute.⁶ The Statute provides ‘fair warning’⁷ of punishable conduct and since it did not refer to it, JCE is a product of ‘judicial creation’ that violates NCSL.⁸ The second argument is that the law should be interpreted strictly or follow the principle of *in dubio pro reo*.⁹ It means that, even if JCE is found under CIL, it cannot be

¹ Some authors argue that the principle of legality and NCSL are synonymous, see Acquaviva (2011) 883; Bassiouni (1996) 72; Van Schaack (2008) 121. However, Gallant argues that this depends upon the jurisdiction, see Gallant (2009) 11-18.

² Chapter 2.2.1.

³ *Martic* Appeals Brief, para. 50; *Odjanic* JCE Motion, para. 413; *Stakic* Final Trial Brief, paras. 168-170.

⁴ McGill University *amicus curiae* brief para. 10; Danner and Martinez (2005) 103; Bogdan (2006) 115 and 119; Robinson (2008) 926, 934 and 939; Sassoli and Olson (2000) 767.

⁵ Linda (2007) 247.

⁶ Robinson (2008) 926 and 943 noting that the Statute in fact stopped with its wording; Danner and Martinez (2005) 84, JCE is not mentioned in the Statute; Bogdan (2006) 114, 119: JCE violates principle of legality, NCSL and prohibition against *ex post facto* law; not found under CIL or is a general principle of law, not in existence at time crimes were committed; Powles (2004) 611: Article 7(1) is exhaustive, drafters did not contemplate list would be added to; *Stakic* Final Trial Brief, paras. 168, 170, 171 and 178 and *Krajisnik* Appeals Brief, para. 2 and 6: noting how article 7(1) is exhaustive, JCE was not contemplated by the Statute drafters, JCE is judicially created, JCE is without textual basis and is improper; *Martic* Defence Closing Arguments, T. 11325-11327: application of JCE is beyond competence of Tribunal and can only be established by UNSC; *Kordic* Defence Brief, paras. 397-398: JCE not part of Statute; *Odjanic* JCE Motion, para. 10: not part of Statute.

⁷ Danner and Martinez (2005) 83: Statute provides fair warning.

⁸ *Stakic* Final Trial Brief, paras. 168 and 190.

⁹ Also defined as ‘when in doubt, interpret in favour of the accused,’ see *Limaj* Appeals Judgment, Partially Dissenting and Separate Opinion and Declaration of Judge Schomburg, paras. 17-20.

accepted given its absence in the statute.¹⁰ Some JCE critics¹¹ also contend that the principle of strict interpretation/*in dubio pro reo* should be applied at the ICTY because NCSL is defined accordingly at the ICC. Article 22(2) of the ICC Statute states:

‘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.’

Thirdly, JCE 1 and 3 were not foreseeable¹² and fourthly they were not accessible¹³ to *Tadic* (or in other ICTY cases, the defendants).

In response, defenders of JCE (ICTY judges, prosecutors and some scholars) have argued that JCE 1 and 3 meet the requirements of NCSL.¹⁴ They advance this view on the basis of several grounds. Foremost, they argue that JCE is found under CIL;¹⁵ secondly that NCSL does not prevent interpretation within reasonable limits;¹⁶ thirdly its formulation does not require an assessment of *in dubio pro reo*¹⁷ because JCE was already found under CIL and fourthly it is both foreseeable and accessible to *Tadic* on the basis of available domestic law in the SFRY.¹⁸ Yet, this position is not supported by elaborate reasoning. As chapter 5 noted, there was no enquiry that revisited the *Tadic* formulation of CIL.¹⁹ Furthermore, there was no explanation as to how the law cited by *Tadic* was foreseeable or accessible to *Tadic* or any other defendants tried at the ICTY.²⁰ These concerns leave one to question whether the *Tadic* appellate exercise of discretion and the response fully addressed the requirements of NCSL.

¹⁰ Danner and Martinez (2005) 84: ‘ambiguous criminal statutes be construed in accordance with the interpretation most favourable to the accused, often referred to as the rule of lenity;’ Robinson (2008) 926 and 934: the law should be strictly construed (*in dubio pro reo*, rule of lenity); *Odjanic* JCE Motion, paras. 21-22; *Odjanic* JCE Appeal, paras. 33-34.

¹¹ Robinson (2008) 926 and 939; *Martic* Appeal Brief, para. 50: ‘the well-recognized principle of both domestic laws and international law — *in dubio pro reo*. This rule is confirmed in the ICC Statute in Article 22 (2);’ Bogdan (2006) 117, citing ICC article 22(2).

¹² *Case 002* JCE Decision, ECCC, para. 87, noting how JCE 3 is not foreseeable to Cambodians in 1975-1979; *Ambos amicus curiae* brief, ECCC, pg. 30.

¹³ *Ambos amicus curiae* brief, ECCC, pg. 30.

¹⁴ McGill University *amicus curiae* brief, ECCC, para. 13 and pg. 27; Cassese *amicus curiae* brief, ECCC, para. 21, noting amount of decisions, national law and sufficient notice provided.

¹⁵ *Odjanic* JCE Decision, ICTY, para. 29; *Odjanic* JCE Decision, Separate Opinion of Judge Hunt, para. 17; *Stakic* Appeals Judgment, paras. 100-103; *Martic* Appeals Judgment, ICTY, para. 81, noting how the defence failed to show that JCE is not part of CIL; *Babic* Trial Sentence Judgment, ICTY, para. 33; *Odjanic* Prosecutor Response, paras. 7, 17, 46; *Odjanic* Prosecution Appeals Response, ICTY, paras. 8-10.

For exceptions, see views of Judges Shahabuddeen and Schomburg. Judge Shahabuddeen has expressed contradictory views. He has argued that JCE is not found under CIL, see Shahabuddeen (2010) 202: ‘an error of the Tribunal (...) the question whether joint criminal enterprise was customary international law.’ However, he has also stated that JCE is found under CIL, see *Odjanic* Decision on JCE, Separate Opinion of Judge Shahabuddeen, ICTY, para. 27: ‘*Tadic* was of course right: joint criminal enterprise is recognised in customary international law.’ For Judge Schomburg’s view, see *Martic* Appeals Judgment, Separate Opinion of Judge Schomburg, ICTY, para. 4: ‘it was an unsupported *dictum* when the Appeals Chamber (...) held that “joint criminal enterprise” is (...) firmly established in (CIL).’

¹⁶ *Odjanic* JCE Decision, para. 38: ‘NCSL does not prevent a court from creating new law or from interpreting existing law beyond the reasonable limits of acceptable clarification.’

¹⁷ *Odjanic* JCE Decision, paras. 27 and 28, noting that the principle of *in dubio pro reo* is not required because JCE is found under CIL.

¹⁸ *Odjanic* JCE Decision, para. 43, Cassese *amicus curiae* brief, ECCC, paras. 71-79.

¹⁹ Chapter 5.3.2.

²⁰ See chapter 2.2.2 for reasoning of *Tadic*.

6.3 DISCRETION IN DEFINING NCSL AT THE ICTY

Given these different views, we ought to begin the analysis by examining NCSL's definition at the ICTY. Regarding this matter, chapter 1 and 2 noted that the UN Secretary General Report only provided a terse reference.²¹ Furthermore, the three examples provided in chapter 1 indicated that judges held different views about NCSL. The *Vasiljevic* Trial Judgment had focused on specificity of law, the *Tadic* Trial Decision on Jurisdiction recognised NCSL implications and the CDF Decision on Jurisdiction acknowledged foreseeability and accessibility requirements. Consequently, in the absence of an elaborate definition and different views, it is unsurprising that JCE commentators have offered a range of perspectives about NCSL.

This section will therefore provide a normative definition of NCSL within an ICTY context. This explanation enables us to define NCSL, compare it with the ICTY judges' definition and further determine whether some commentators may have incorrectly identified its meaning. To engage with this discussion, we need to bear in mind that NCSL embodies different definitions.²² The national definition of NCSL may differ from an international definition.²³ The ICTY is not under any obligation to import a domestic definition of NCSL within its context. On several occasions, the ICTY has cautioned against the mechanical importation of procedural and substantive law from other jurisdictions.²⁴ The same reasoning would therefore apply when defining NCSL in this Tribunal.

One of the questions this court would ask itself would be, if an *ex post facto* court is to exercise discretion in interpreting law fairly, what should NCSL's definition comprise of? The starting point to any such discussion concerns how NCSL, in a contemporary period, is considered an important fair trial right.²⁵ This may not have been the case for the Nuremberg Trials and the post-WW II cases where commentaries indicate that NCSL was only 'a principle of justice'²⁶ and that it remained largely undeveloped in international law²⁷ in contrast to national law.²⁸ In a contemporary context, NCSL occupies an important place in trials. The ICTY judges should therefore define it so that it provides the minimum fair trial standards which are internationally acknowledged. In this regard, although the law of the ICCPR and ECtHR are not binding on the ICTY *per se*, reference to such law ensures that minimum standards of a fair trial are respected. Such reasoning not only falls in line with ICTY Judgments which have acknowledged the relevance of ECtHR law (although noting it

²¹ Chapter 1.2.2, chapter 1.4 and chapter 2.2.4.

²² It is widely acknowledged that NCSL embodies different definitions, see Westen (2007) 229; Gallant (2009) 11-18.

²³ Ferdinandusse (2006) 231, acknowledging that the international principle of legality differs from its national counterparts; Westen (2007) 229, acknowledging that criminal law scholars approach legality in different ways.

²⁴ *Barayagwiza* Decision on applicable law, ICTR, para. 40, noting how the ICCPR, ECHR and IACHR are persuasive authority and evidence of custom but not binding of their own accord on the ICTY; *Tadic* Decision on protective measures, para. 28, noting how the ICTY must interpret its provisions in its own context and that the ECHR only applies to ordinary criminal law provisions and not ICL; *Milosevic* Decision on Rule 98 *bis*, Separate Opinion of Judge Robinson, ICTY, para. 7 warning against the importation of domestic procedures, 'lock, stock and barrel.'

²⁵ Gallant (2009) 3 and 302, noting how NCSL embodies an internationally recognised human right.

²⁶ IMT Judgment 219.

²⁷ IMTFE Judge Roling stated in an interview with Cassese that in 1948, NCSL in ICL was merely a principle of justice and liberty. It only gained prominence with the Universal Declaration of Human Rights (article 2) and the ICCPR adopted in 1966, see Roling and Cassese (1993) 69.

²⁸ *Justice* case, NMT 973; *Hostages* case, NMT, 1241, 1240.

is not binding as a strict precedent)²⁹ but also the UN Secretary General Report which had emphasised the need for fair trial standards.³⁰

In developing this discussion, we would take into account the wording of NCSL and its subsequent jurisprudence. The ICCPR defines NCSL under article 15 and the ECHR under article 7. While these articles do not share precisely the same definition, the semantic differences are minor. I will therefore refer to the wording of article 7 since I will eventually analyse its jurisprudence:³¹

‘1. No one shall be held guilty of any criminal offence on account of any act or omission which did not constitute a criminal offence, *under national or international law, at the time when it was committed.* (...).

2. This article shall not prejudice the trial and punishment of any person for any act or omission which, at the time when it was committed, was *criminal according to the general principles of law recognized by the civilised nations.*’³²

The wording of this article draws attention to aspects of judicial restraint and aspects where interpretation beyond textual wording is permissible. For example, the fact that applicable law is not confined to national jurisdiction, but also includes international law and general principles of law, enables judges to exercise discretion in interpreting law, where appropriate. On the other hand, the requirement that such law should be found at the time when the act was committed, is a form of judicial restraint. ECtHR judges have further elaborated these aspects. They have developed a consistent body of jurisprudence that clarifies specific aspects of restraint and creativity. The next section examines this body of jurisprudence. It illustrates how NCSL consists of four strands: reasonable and non-arbitrary interpretation, foreseeability and accessibility.³³

Reasonable and arbitrary interpretation: Ability to depart from statutory language

The first strand of NCSL is reasonable interpretation. Many cases have argued that interpretation is reasonable because it is founded on a ‘clear legal basis.’³⁴ Clear legal bases include written law and unwritten law. Written law encompasses codified sources of law such as Acts of Parliament, treaties and conventions. Unwritten law³⁵ may include sources such as

²⁹ See n. (24) for reference to ECtHR law as ‘evidence of custom.’

³⁰ UN Secretary General Report, paras. 106-107, underlining the significance of rights of accused at the ICTY.

³¹ The Human Rights Committee provides very limited jurisprudence which examines violations under the ICCPR, see <http://www.unhchr.ch/tbs/doc.nsf> and <http://www.bayefsky.com/>, last accessed 10th November 2015. Furthermore, Gallant who has conducted a wide survey regarding NCSL concluded in 2009 that there has not been one single violation of NCSL under the ICCPR, see Gallant (2009) 303. For available comments about HRC jurisprudence, see Nowak (2005) 360.

³² Article 7 of the ECHR (emphasis added). The wording of article 15 of the ICCPR differs slightly. It refers to ‘community of nations’ instead of ‘civilised nations’ but its essence remains the same. This is confirmed in Gallant (2009) 178-188, 203.

³³ Under English law, these are considered three strands of the principle of legality. Accessibility and foreseeability of law are considered part of the same strand, see *Purdy*, (UKHL), para. 40; *Rimmington and Goldstein* (UKHL), para. 35. Other scholarly comments also define NCSL in ICL in this manner, see Spiga (2011) 11-16; Acquaviva (2011) 883-885; Van Schaack (2008) 133-172; Shahabuddeen (2004) 1008.

³⁴ *Kononov v. Latvia*, GC, para. 187; *Sunday Times v. UK*, para. 49: ‘prescribed by law.’

³⁵ Unwritten means that the law is not codified under national law.

international law,³⁶ general principles of law³⁷ and common law.³⁸ Reference to such law transforms NCSL into *nulle crimen sine iure* (written and uncodified law)³⁹ which is to be contrasted with NCSL *scripta* which concerns codified law only.⁴⁰ Beyond these legal bases, judges have accepted that the interpretation of written law (for example a legal provision) is considered ‘an inevitable element of judicial interpretation (where there is a) need for elucidation of doubtful points and for adaptation to changing circumstances.’⁴¹ An additional discussion related to reasonable interpretation is that it excludes arbitrary interpretation. Many cases have held that the law must be ‘construed and applied (...) in such a way as to provide effective safeguards against arbitrary prosecution (and) conviction (...).’⁴²

Foreseeability and accessibility

The two remaining restraints of NCSL are foreseeability and accessibility.⁴³ They ensure that the law ‘is sufficiently accessible to the individual who is affected by the restriction, and sufficiently precise to enable him to understand its scope and foresee the consequences of his actions so that he can regulate his conduct without breaking the law.’⁴⁴ Accessibility can be determined ‘from the wording of the relevant provision and, if need be, with the assistance of the court’s interpretation of it what acts and omissions will make him criminally liable.’⁴⁵ Foreseeability of the consequences of his actions does not have to be of ‘absolute certainty.’⁴⁶ The latter has been considered impossible to achieve.⁴⁷ It suffices that foreseeability is reasonable.⁴⁸

The application of foreseeability and accessibility ‘depends to a considerable degree on the content of the instrument in issue, the field it is designed to cover and the number and status of those to whom it is addressed.’⁴⁹ Yet, regardless of the instrument in question and the field, the importance of these requirements is to ensure that the defendant ‘could have known (...) what acts and omissions would make him criminally liable for such crimes and regulated his conduct accordingly.’⁵⁰ Defined in this manner, foreseeability and accessibility protect the defendant by ensuring that discretion in stating the law was clear to the defendant when he perpetrated the crime at the time.

³⁶ *Kolk and Kislyiy v. Estonia*, pg. 9, noting how conduct may be considered criminal under international law even if national law does not state so; *Kononov v. Latvia*, GC, para. 209, acknowledging the use of international law; *Streletz, Kessler and Krenz v. Germany*, para. 51.

³⁷ Article 7(2) of the ECHR.

³⁸ *S.W v. UK*, para. 37 and 42; *Sunday Times v. UK*, para. 47; *X Ltd and Y v. UK*, para. 6.

³⁹ Gallant (2009) 14; Van Schaack (2008) 161-162; *S.W v. UK*, para. 33.

⁴⁰ Gallant (2009) 12-14.

⁴¹ *S.W v. UK*, para. 36; *K.H.W. v Germany*, para. 85; *Kononov v. Latvia*, GC, para. 185; *Maktouf and Damjanovic v. Bosnia and Herzegovina*, GC, para. 66; *Baskaya and Okcuoglu v. Turkey*, GC, para. 39; *Del Rio Prada v. Spain*, GC, para. 93; *X Ltd and Y v. UK*, para. 7.

⁴² *Puhk v. Estonia*, para. 24; *Kononov v. Latvia*, GC, para. 185; *Kafkaris v. Cyprus*, para. 137.

⁴³ *Kononov v. Latvia*, GC, para. 187; *Sunday Times v. UK*, para. 47-49; *Streletz, Kessler and Krenz v. Germany*, para. 51; *Baskaya and Okcuoglu v. Turkey*, GC, para. 36; *Del Rio Prada v. Spain*, GC, para. 91.

⁴⁴ *Purdy* (2009) UKHL, para. 40; *S.W v. UK*, paras. 34-36 and 43, noting that so long as the law is foreseeable and accessible, NCSL cannot be breached; *Sunday Times v. UK*, para. 49; *Hasan and Chaush v. Bulgaria*, GC, para. 84.

⁴⁵ *Purdy* (2009) UKHL, para. 41; *Kononov v. Latvia*, GC, para. 185; *Veeber v. Estonia* (2), para. 31.

⁴⁶ *Sunday Times v. UK*, para. 49; *Baskaya and Okcuoglu v. Turkey*, GC, para. 39.

⁴⁷ *Ibid.*

⁴⁸ *Ibid.*

⁴⁹ *Groppera Radio AG and others v. Spain*, para. 68; *Kononov v. Latvia*, GC, para. 235.

⁵⁰ *Kononov v. Latvia*, GC, para. 187; *Streletz, Kessler and Krenz v. Germany*, para. 51; *K.-H. W. v. Germany*, para. 46; *Korbely v. Hungary*, ECtHR, GC, para.73.

Strict interpretation and certainty of law: In dubio pro reo, lex stricta and lex certa

Having illustrated that NCSL consists of a four-fold definition, an important observation is that ECtHR jurisprudence has not included *in dubio pro reo* (when in doubt, interpret in favour of the accused),⁵¹ *lex stricta* (nothing is required unless imposed by written law)⁵² or *lex certa* (requirement of certainty in criminal law)⁵³ within its definition. Neither have such phrases figured within the discussion of reasonable interpretation nor have they been included in those of foreseeability and accessibility. There is therefore no compelling reason to incorporate them as a minimal standard of fairness at the ICTY.

ICTY jurisprudence

It is now necessary to compare the above definition of NCSL with the ICTY's jurisprudence. This enables us to examine whether the ICTY judges have applied the same definition or defined NCSL differently.

The first observation is that in the early years at the ICTY, much uncertainty prevailed about NCSL's meaning. In chapter 1, I indicated through the three examples how the judges viewed NCSL differently.⁵⁴ Besides these examples, further confusion can be found at the ICTY. The *Delalic* Trial Judgment explicitly stated it was 'not certain to what extent (the principles of legality) have been admitted as part of international legal practice.'⁵⁵ Another example of NCSL's uncertainty concerns disagreements between Judges Schomburg and Shahabuddeen regarding the principle of *in dubio pro reo*. Judge Schomburg argued that it does not apply to the interpretation of law while Judge Shahabuddeen argued that it does.⁵⁶

Yet, despite these differences, the majority of ICTY judgments and decisions appear to have settled with the aforementioned ECtHR's definition. In many decisions, judges have argued that NCSL, in respect of interpreting a form of liability, must meet the following requirements:⁵⁷

- a) It must be provided for in the Statute, explicitly or implicitly;
- b) It must have existed under customary law at the relevant time;
- c) The law providing for that form of liability must have been sufficiently accessible at the relevant time to anyone who acted that way; and
- d) Such person must have been able to foresee that he could be held criminally liable for his actions if apprehended.

⁵¹ See n. (9).

⁵² Gallant (2009) 12.

⁵³ Ibid 274.

⁵⁴ Although the *CDF* Decision on Jurisdiction is not an ICTY-based case.

⁵⁵ *Delalic* Trial Judgment, ICTY, para. 403.

⁵⁶ *Stakic*, Trial Judgment, para. 416, para. 510, fn. 1082, noting that this principle applies to the interpretation of facts only and not the law. Judge Schomburg was the Presiding Judge. He reiterated this view in *Limaj* Appeals Judgment, Partially Dissenting and Separate Opinion and Declaration of Judge Schomburg, ICTY, para. 15. Judge Shahabuddeen however argued that it applies to the interpretation of law, see *Limaj* Appeals Judgment, Declaration of Judge Shahabuddeen, ICTY, paras. 2-6.

⁵⁷ *Odjanic* JCE Decision, ICTY, para 21; *Milutinovic* Trial Decision, ICTY, para. 15; *Hadzihasanovic* Appeals Decision on Jurisdiction, para. 34; *Aleksovski* Appeals Judgment, paras. 126 and 127; *Blagojevic and Jokic* Trial Judgment, para. 625.

The first two criteria concern reasonable interpretation⁵⁸ and the final two relate to foreseeability and accessibility.

Conclusion of NCSL definition and partial review of critique

In light of this conclusion, the ICTY judges have accepted the minimal standards of NCSL as applied in international law. Given this conclusion, part of the critique may be reviewed.

Those who argue that NCSL includes the principle of *in dubio pro reo* or *lex stricta* (either because of the ICC definition or because they perceive it as necessary for NCSL) have erred.⁵⁹ Their argument can be dismissed for three reasons. Firstly, NCSL was not defined at the ICTY in this manner. Secondly, the ECtHR has not defined it in such a manner. Thirdly, even if judges could exercise their discretion in importing it within the ICTY, it would be detrimental since it would keep the law in a straightjacket.⁶⁰

Following this conclusion, the next sections will address the fairness of JCE 1 and 3 in light of the four requirements. A complete review of the critique's remaining arguments will follow.

6.4 JCE 1 AND NCSL

Reasonable interpretation: Using CIL law

In examining whether the *Tadic* appellate exercise of discretion was reasonable, the judgment cannot be criticised for departing from statutory wording. It justified the existence of JCE 1 on the basis of CIL. Its discretion was therefore reasonable because of unwritten law (*nullem crimen sine iure*). Furthermore, the *Tadic* Appeals Judgment cannot be singled out for using the common plan doctrine as three preceding cases, namely the *Tadic* Trial Judgment,⁶¹ the *Furundzija* Trial Judgment⁶² and the *Delalic* Trial Judgment⁶³ also employed the common plan doctrine as a basis of conviction.

However, as chapter 5 concluded that the judges did not use an eligible method of CIL, the exercise of discretion was arbitrary. While using CIL is reasonable, the manner in which it was used was methodologically unfair. On this basis, there is no further need to enquire whether the foreseeability and accessibility requirements were met. It suffices to argue that JCE violates NCSL because it was based on unreasonable interpretation. However, in the next section, I will indicate that, had CIL been used according to an eligible formula, the two requirements of foreseeability and accessibility would nevertheless not be satisfied.

⁵⁸ An additional comment is that NCSL 'does not prevent creating new law or from interpreting existing law beyond the reasonable limits of acceptable clarification,' see *Odjanic* JCE Decision, ICTY, para. 38.

⁵⁹ See n. (11); Damgaard (2008) 239.

⁶⁰ Hunt (2004) 59.

⁶¹ Chapter 2.1.3.

⁶² *Furundzija* Trial Judgment, paras. 193-226.

⁶³ *Delalic* Trial Judgment, para. 328.

Was JCE 1 foreseeable and accessible to the ICTY defendants?

The foreseeability and accessibility requirements of NSCL relate to the use of written and unwritten law.⁶⁴ In the case of JCE's formulation, the principal focus is the use of unwritten law in the form of CIL.⁶⁵ Yet, this task is not as simple as it appears given CIL's malleability (as detailed in chapter 5.3.3). It does not suffice to argue that a rule is foreseeable and accessible because it is found under this source of law. It is necessary to question whether the content of CIL, in the form of its balance of state practice and *opinio juris*, are foreseeable and accessible to the accused.⁶⁶ It is at this stage, that specific scrutiny is required. ICL discourse has not addressed this type of examination in detail.⁶⁷ On the other hand, some domestic courts have.⁶⁸

The scrutiny involves questioning whether liability under a common plan doctrine was foreseeable and accessible to the defendants in SFRY. The ECtHR has applied the foreseeability requirement of law according to an objective test. It has stated that the 'law be sufficiently precise to avoid all risk of arbitrariness and to allow the citizen – if need be, with appropriate advice – to foresee, to a degree that is reasonable in the circumstances of the case, the consequences which a given action may entail.'⁶⁹ Applying such reasoning to the formulation of JCE, it would be unreasonable for defendants in SFRY to foresee that their actions would be considered criminal because of the origin and nature of the sixteen cases cited in *Tadic* that reflect this mode of liability. Given the domestic nature of these cases, the fact that many of them did not provide judgments and furthermore that some judgments were not widely available, it is hardly conceivable that the law as found in these cases would fulfil the requirements of foreseeability or, for that matter, accessibility. They would simply not be known to the defendants in the Former Yugoslavia. Therefore, JCE 1 fails the two tests of foreseeability and accessibility.

However, it could be argued that JCE 1 was both foreseeable and accessible to the defendants in the Balkans. The Socialist Federal Republic of Yugoslavia (SFRY) Criminal Code enacted in 1977 provided for two articles hinting at such law.⁷⁰ Article 253 of the Criminal Code, entitled 'Conspiracy for the purpose of the commission of a criminal act defined in the federal law,' states:

⁶⁴ Unwritten in the sense of not being codified in domestic written law.

⁶⁵ Unwritten law may also include general principles of law. However, as chapter 5 indicated, the reference to some domestic jurisdictions does not suggest that JCE is a general principle of law. It should be noted that some commentaries concede that there is no difference between CIL and general principles of law, see Lepard (2010) 162-164 while others concede that a difference is controversial, see Wolfke (1993) 105-108. This thesis however focuses solely on CIL.

⁶⁶ Chapter 6.3, n. (46).

⁶⁷ Meron (2005), addressing the implications of NSCL when using CIL. However, he does not examine how requirements of foreseeability and accessibility are met when using CIL. In contrast, see views of Judge Robertson in *Norman Appeals Decision on child recruitment*, SCSL, paras. 6, 11, 12, 17, 18, 20, 21 SCSL. He addresses the relationship between CIL and foreseeability under NSCL.

⁶⁸ For a wide analysis of how domestic courts have addressed NSCL in light of CIL, see Ferdinandusse (2006) 221-248. For a relevant example of domestic law overturning a CIL-based criminal conviction because it was neither foreseeable nor accessible, see *ReBourtese*, Netherlands, in Ferdinandusse (2006) 229-231. Under English law, see comments of Buxton LJ in *Hutchinson v. Newbury Magistrates' Court* (2000) ILR 499, para. 11, noting that precision and the degree of certainty are required when using CIL to ascertain the *lex lata* of an individual state.

⁶⁹ *Medvedyev and others v. France*, ECtHR, GC, para. 80.

⁷⁰ Available at URL: http://pbosnia.kentlaw.edu/resources/legal/bosnia/criminalcode_fry.htm, last accessed 10th December 2015.

‘Whoever plots with another to commit a criminal act defined in the federal law, (...) shall be punished by imprisonment for a term not exceeding one year.’

Article 254, entitled, ‘Joining for the purpose of the commission of criminal acts defined in the federal law,’ states:

‘Whoever organizes a group of persons for the purpose of the commission of criminal acts defined in the federal law, (...) shall be punished by imprisonment for a term exceeding three months but not exceeding five years. (...).’

These articles reveal that JCE 1 could have been considered foreseeable and accessible to the defendants.⁷¹ However, this point was not raised by the ICTY judges.

6.5 JCE 3 AND NCSL

In relation to JCE 3, we can apply the same reasoning as above. Since chapter 5 concluded that it was not found under an eligible method of CIL, it also is not based on reasonable interpretation. Furthermore, even if the state practice and *opinio juris* cited constitutes a form of CIL, they would not meet the requirements of foreseeability and accessibility as the law cited for JCE 3 was domestic law. They were not judicial decisions from international tribunals such as the IMT or NMT. It is hardly conceivable that, unpublished post-WW II Italian decisions, a US Military Court Trial and British Military Court Trial cases represent decisions that defendants in the SFRY can foresee may, hold them liable for a collateral offence. The law was neither foreseeable nor accessible. Furthermore, the ICC Statute, cited as *opinio juris*, was neither foreseeable nor accessible. In conclusion, JCE 3 is based on arbitrary interpretation and is neither foreseeable nor accessible.

However, as with JCE 1, it is arguable that JCE 3 was covered under SFRY Criminal Code. Article 26 of the SFRY Criminal Code states:

‘Anybody creating or making use of an organisation, gang, cabal, group or any other association for the purpose of committing criminal acts is criminally responsible for all criminal acts resulting from the criminal design of these associations and shall be punished as if he himself has committed them, irrespective of whether and in what manner he himself directly participated in the commission of any of those acts.’

The ICTY judges could have drawn from this article and its jurisprudence to support the foreseeability and accessibility of JCE 3. However, they did not do so.

6.6 CONCLUSIONS AND REVIEW OF THE CRITIQUE

This section has examined whether the formulation of JCE 1 and 3 violated NCSL. It began by examining the definition of NCSL at the ICTY and then provided an elaborate definition of this factor. In light of this analysis, it reaches the following conclusions.

⁷¹ Further analysis would be required regarding the jurisprudence related to these articles.

Firstly, the *Tadic* Appeals Judgment can be faulted for not discussing NCSL at all. It failed to explain whether NCSL was even required or whether proof under CIL implies that NCSL requirements have been met. It has therefore not justified its exercise of discretion in light of NCSL requirements. However, since I have defined NCSL according to four requirements, discretion can be criticised for two specific reasons: it was not based on reasonable interpretation (unfair method of CIL) and did not address the elements of foreseeability and accessibility.

Having set out these conclusions, we may return to the critique's perspectives to examine their arguments. As previously mentioned, some comments can be criticised for importing the principle of *in dubio pro reo* without questioning whether this is an acceptable definition of NCSL at the ICTY. Four other criticisms, along similar lines, can be noted. The most important and obvious criticism is that none of the JCE commentators have provided a normative definition of NCSL within an ICTY context. As noted above, this is an essential starting point for the analysis. Yet, the literature fails to engage with this question. Secondly, we can criticise the view that NCSL has been violated because of JCE's non-statutory existence.⁷² Scholars who hold this view fail to take into account that NCSL does not prevent discretion in interpreting law beyond textual wording. Thirdly, JCE critics have failed to recognise that the doctrine of common plan had not been developed by the *Tadic* Appeals Judgment but had already been used in three previous judgments: the *Tadic* Trial Judgment, *Furundzija* Trial Judgment and *Delalic* Trial Judgment.⁷³ Fourthly, however, those who have argued that the requirements of foreseeability and accessibility have not been met, were correct in doing so.⁷⁴

⁷² See n. (6 and 8).

⁷³ See n. (61, 62 and 63).

⁷⁴ See n. (12 and 13).

Conclusions regarding JCE's fairness

7.1 INTRODUCTION

Having identified the four factors and examined their significance for the exercise of discretion, chapter 7 will now evaluate JCE 1 and 3's fairness. It will draw from previous conclusions regarding the fairness of discretion in interpreting law and, in particular, the three examples cited in Part 1.

7.2 JCE AND FAIRNESS

7.2.1 Evaluating fairness and the role and order of factors

As previously argued, an exercise of discretion will be fair if all criteria regarding its fairness are met.¹ We need to examine the role of these criteria based on their importance as restraints or their impact on the consequences of the outcome. In the context of interpreting 'commission,' fair labelling played a significant role regarding the outcome² since it enabled judges to capture the liability of co-perpetrators for JCE 1 and even liability for JCE 3 crimes.³ On the other hand, NPSC, CIL and NCSL were non-negotiable restraints on the exercise of discretion. Therefore, a fair exercise of discretion requires that judges address all four factors if they decide to interpret 'commission' beyond statutory wording. If judges fail to do so, then the exercise of discretion is arbitrary.

As Part 1 also argued, an order among factors emerges when interpreting law. In the three examples cited in chapter 1, CIL and NCSL were two such factors that were more important than the others because of their role as restraints. Judges were required to demonstrate that their non-statutory interpretation of law was found according to a source of law and that such law was furthermore foreseeable and accessible. This was the case in determining whether article 3 could be applied to a NIAC,⁴ whether violence to life was a crime in ICL⁵ and whether the recruitment of child soldiers was a crime at a time when the CDF soldiers committed it.⁶ In terms of ordering these two factors, proof according to a source of law would be the first requirement and the need to demonstrate that foreseeability and accessibility were met, would be the second.

¹ Chapter 1.3.

² Fair labelling may also be said to play a restrictive role in the sense that the label is restricted to the culpability of the individual. This is evident in the case of JCE 3. However, since *Tadic* interpreted commission beyond its textual wording, in this instance, fair labelling's role was driven more by the need for judicial activism than restraint.

³ In the case of JCE 3, the label of a principal was unfair. I argued, however, that the co-perpetrator bore a lesser degree of liability than that of a principal.

⁴ Chapter 1.4.1.

⁵ Chapter 1.4.2.

⁶ Chapter 1.4.3.

In the context of interpreting ‘commission,’ a similar order of factors emerges. Even if judges’ primary concern was that ‘commission’ be interpreted so as to address the gravity of culpability (fair labelling), they would nevertheless have to explain how that level meets NPSC requirements. Therefore, NPSC would be considered the next important factor. If discretion then meets this requirement, the judges would have to demonstrate that their discretion is further found according to a source of law (CIL). Lastly, even if this law is found according to an acceptable source of international law, the relevant rule of liability would need to be foreseeable and accessible to the defendants (NCSL).

7.2.2 Was JCE 1 fair?

In light of this analysis regarding fairness and the order of factors, we may question how the *Tadic* Appeals Judges approached the task of exercising discretion. Of concern would be whether the judges addressed all four factors since they believed that the ‘Statute does not stop’ with the text.⁷ The evident conclusion is that they failed to do so. If we examine the *Tadic* Appeals Judgment in detail, it is surprising to note that it devoted seven paragraphs to fair labelling (for JCE 1),⁸ one paragraph to NPSC,⁹ one paragraph to explain CIL’s methodology,¹⁰ nine paragraphs citing state practice under CIL¹¹ but no paragraphs at all for NCSL.

Since they did not identify NCSL as a factor, their exercise of discretion was unfair. However, even had they provided such an explanation, discretion would nevertheless be unfair as an eligible method of CIL had not been used. Therefore, discretion would be unfair for that reason alone.

From this analysis, we gather that the exercise of discretion in formulating JCE 1 was unfair because foremost an eligible CIL method had not been used and secondly NCSL requirements were not met.

7.2.3 Was JCE 3 fair?

In applying the same reasoning to examine the fairness of JCE 3, we reach a similar conclusion although for different reasons. Chapter 3 had indicated how the label of a principal was unfair for the co-perpetrator in respect of the JCE 3 crime. Furthermore, chapter 4 indicated that NPSC had been violated; chapter 5 explained that the elements were not found under state practice and that an eligible CIL method had not been used and chapter 6 lastly illustrated how NCSL requirements were not met.

Therefore, the exercise of discretion did not comply with any of the four factors identified. The conclusion is that discretion was also unfair.

⁷ *Tadic* Appeals Judgment, para. 190.

⁸ *Ibid*, paras. 185, para. 187, 190-194

⁹ *Ibid*, para. 186.

¹⁰ *Ibid*, para. 194.

¹¹ *Ibid*, paras. 195-203.

7.3 REVIEW OF THE LITERATURE

In reviewing the literature, an important point needs to be reiterated.¹² Chapter 2 noted how the JCE-based literature consists of two different sets of publications. The first set has only analysed some of the factors related to fairness. The second set has, however, addressed the fairness of JCE and not just the relevance of some factors. This chapter is therefore concerned with the latter part of the literature.

In reviewing this section of the critique, particular attention will be paid to important defence motions,¹³ key JCE-based judgments,¹⁴ specific JCE commentaries¹⁵ and analyses from Judges Cassese, Shahabuddeen, Schomburg and Antonetti. Judges Cassese and Shahabuddeen have written about the fairness of JCE in academic publications.¹⁶ Judge Schomburg has provided pertinent comments regarding JCE's fairness in different judicial opinions.¹⁷ Judge Antonetti is the only ICTY Judge to have questioned the existence of JCE under CIL and discussed the validity of JCE at the ICTY.¹⁸

In short, three criticisms of the literature can be advanced. Firstly, JCE critics (including Judge Antonetti) have not identified fair labelling's role as a factor when exercising discretion to interpret commission. Secondly, JCE advocates have failed to examine the role of NPSC, CIL and NCSL. The final criticism concerns the lack of analysis regarding the order of factors in exercising discretion.

7.3.1 Identifying fair labelling

Firstly, several JCE critics have failed to understand the role of fair labelling. For example, many defence counsel motions argue that article 7(1) is exhaustive, omitting any analysis related to fair labelling.¹⁹ This particular position, however, is understandable as the argument that judges cannot interpret beyond statutory wording is in the interests of defence counsel.

Yet, in a similar vein, Robinson as a JCE critic, has argued that the text of the ICTY Statute stopped with its wording.²⁰ In substantiating this reasoning, he implies that fair labelling has no role to play in interpreting 'commission' beyond statutory wording. Yet, he further argues that JCE 3 contravenes fair labelling.²¹ It is therefore difficult to understand why he has criticised the formulation of JCE 3 for violating fair labelling but not recognised its importance in providing an appropriate label for the co-perpetrator in JCE 1. Similarly,

¹² Chapter 2.2.4.

¹³ The principal defence counsel challenges were made in: *Odjanic*, *Brdjanin*, *Stakic*, *Martic* and *Krajisnik*.

¹⁴ *Simic* Trial Judgment; *Limaj* Appeals Judgment; *Odjanic* JCE Decision; *Stakic* Appeals Judgment; *Martic* Appeals Judgment; *Case 002* JCE Decision, ECCC; *Krstic* Trial Judgment.

¹⁵ Jain (2014), Karnavas (2011), Daamgard (2008), Van Sliedregt (2012), Linda (2007).

¹⁶ Cassese (2007), Shahabuddeen (2010).

¹⁷ Only two judges, Judge Per-Johan Lindholme and Judge Wolfgang Schomburg, have dissented against the formulation of JCE: see *Simic* Trial Judgment, Separate and Partly Dissenting Opinion of Per-Johan Lindholme, para. 2 and *Martic* Appeals Judgment, Separate Opinion of Judge Schomburg; *Simic* Appeals Judgment, Separate Opinion of Judge Schomburg and *Limaj* Appeals Judgment, Separate Opinion of Judge Schomburg.

¹⁸ *Tolimir* Appeals Judgment, Separate and Partially Dissenting Opinion of Judge Antonetti.

¹⁹ *Odjanic* JCE Motion, para. 5; *Krajisnik* Appeal Brief, para. 6; *Martic* Defence Closing Arguments, T. 11325-11327.

²⁰ Robinson (2008) 943: 'Yet the text of the Statute did stop there.'

²¹ *Ibid* 941-943.

Sluiter and Zahar contend that JCE was ‘neither obvious nor necessary’²² with little reasoning to support their position and Bogdan’s analysis of JCE neglects questions of how to address culpability or system criminality.²³ These statements do not highlight how fair labelling plays a substantial role in formulating JCE.

Among ICTY judges, only Judge Antonetti has been critical of JCE. In 2015, he issued a Separate and Partially Dissenting Opinion in the *Tolimir Appeals Judgment*, arguing *inter alia*, that ‘there was absolutely no need for *Tadic* case law.’²⁴ He stated that article 7(1) had provided appropriate forms of liability, obviating the need for JCE.

‘One need simply return to the text and take into consideration the spirit of article 7(1) of the Statute which fully grasps the commission of offences resulting from a common plan. First, there are planners, then there are those who instigate the commission of crimes through the media, there are those who give orders to translate the common plan into action on the ground and those on the ground who carry out the plan; it is the latter who commit the crimes on the ground contemplated under the articles of the statute who fall into the very specific category of perpetrators, and not of planners, instigators or persons giving the orders.

For this reason, it seems to me incongruous to place those committing the crimes on the same level as those planning them, as the JCE theory the “*Tadic* way” would suggest. In my view, the JCE based on a project of common design falls into the category of planning.’²⁵

Such reasoning is defective because it fails to disclose the different levels of gravity that each form of liability under article 7(1) attributes. Neither does it concede a principal-accessory distinction or even why JCE, falls under ‘planning.’ It furthermore does not take into that different forms of commission are plausible under both domestic and international law (so long as NPSC, CIL and NCSL requirements are met). As stated in chapter 3, it is acceptable to argue that a perpetrator could commit a crime as part of JCE from a perspective of fair labelling. This would include the planners, those who order and instigate. Their level of guilt is aptly reflected through commission in a common plan rather than the individual forms of liability under article 7(1).

7.3.2 Examining the role of NPSC, CIL and NCSL

The second criticism concerns the treatment of NPSC, CIL and NCSL as found in key JCE-based judgments, the views of Judge Schomburg, Judge Antonetti and extra-judicial analyses.

Key judgments and ICTY Judge Antonetti’s Separate and Partially Dissenting Opinion

Foremost, none of the ICTY judgments ever addressed JCE 3’s violation of NPSC. Despite the comment in *Tadic* that NPSC limits the extent to which an individual can be held liable,²⁶ no other ICTY judgment ever questioned the role and significance of NPSC. To date, there

²² Sluiter and Zahar (2008) 223.

²³ Bogdan (2006) 109-120.

²⁴ *Tolimir Appeals Judgment*, Separate and Partially Dissenting Opinion of Judge Antonetti, pg. 106.

²⁵ *Ibid.*

²⁶ Chapter 2.2.1.

has never been a thorough enquiry by a judgment much less a finding that JCE 3 violates NPSC.

Secondly, we find a lack of judicial oversight regarding CIL's methodology. In 2003, the *Odjanic* JCE Decision, as one of the first decisions to address CIL's formula, stated the following:

'The Appeals Chamber does not propose to revisit its finding in *Tadic* concerning the customary status of (JCE). It is satisfied that the state practice and *opinio juris* reviewed in that decision was sufficient to permit the conclusion that such a norm existed under customary international law in 1992.'²⁷

This statement refers neither to the amount of state practice required nor to the need to include appropriate *opinio juris*. It therefore demonstrates the judicial reluctance to address CIL's methodology and consequently the limitations that an acceptable methodology places on judicial discretion. Besides this comment, the ICTY judges never conducted any further analysis. In 2006, the *Stakic* Appeals Judgment remained content in not addressing JCE's CIL foundation and simply agreed with the *Tadic* methodology.²⁸ In 2008, the *Martic* Appeals Judgment placed the onus of reviewing CIL methodology on the defence counsel stating that it had failed to show that JCE was not found under CIL.²⁹ In 2009, the *Krajisnik* Appeals Judgment held that *Tadic* provided 'detailed reasoning for inferring the grounds for conviction in the [post-World War II] cases it cited.' Therefore, from a chronological perspective, the ICTY failed to address an acceptable CIL methodology. At the ICTR, judges followed a similar approach. The *Karemera et al.* JCE Appeals Decision simply held that JCE is firmly established in CIL without any analysis.³⁰

Yet, a noteworthy point in this regard is that in 2010, the ECCC became the first and only ICT to have reached a different view about JCE 3's formulation. The PTC of the ECCC held that JCE 3 is not found under CIL. By reviewing the content of the authorities cited in *Tadic* and the number used, it held that the authorities 'do not provide sufficient evidence of consistent state practice or *opinio juris*.'³¹ It noted the absence of 'reasoned judgment'³² in the *Essen Lynching* and *Borkum Island* cases. It added that the post-WW II Italian cases were 'not proper precedents'³³ for CIL and thereafter concluded that:

'the Pre-Trial Chamber does not find that the authorities relied upon in *Tadic*, (...) constitute a sufficiently firm basis to conclude that JCE III formed part of customary international law.'³⁴

This is a bold decision reached by an ICT which has been commended by Karnavas.³⁵ However, although the ECCC raised this matter in 2010, the ICTY never fully analysed the reasoning. After 2010, several ICTY cases continued to apply both JCE 1 and 3 without

²⁷ *Odjanic* JCE Decision, ICTY, para. 29.

²⁸ *Stakic* Appeals Judgment, paras. 100-103.

²⁹ *Martic* Appeals Judgment, para. 81.

³⁰ *Karemera et al.* JCE Appeals Decision, ICTR, para. 16.

³¹ *Case 002* JCE Decision, ECCC, para. 77.

³² *Ibid*, para. 79.

³³ *Ibid*, para. 82.

³⁴ *Ibid*, para. 83.

³⁵ Karnavas (2011) 1066-1074; Karnavas (2010) 485-494.

revisiting its CIL foundation.³⁶ ICTY judges chose to dismiss concerns raised by defendants that JCE did not exist as part of CIL, in spite of the PTC ECCC Decision. One example worth citing where the defendant provided cogent reasons for departing from ICTY jurisprudence is the *Dordevic* case.³⁷ Among the arguments advanced, *Dordevic* argued that the *Tadic* reasoning is ‘shallow and uncertain’³⁸ and that the reasoning placed ‘inappropriate weight’ on certain post-WW II cases.³⁹ These arguments resemble those of the PTC of the ECCC. Yet, unlike the ECCC which analysed the case law in detail, the ICTY *Dordevic* Appeals Chamber stated that it ‘is not persuaded that these sources are obscure and unpublished.’⁴⁰ By noting the extract cited in *Tadic*, namely the ‘consistency and cogency of case law (IMT, NMT and post-WW II),’⁴¹ it held that the sources were ‘reliable.’⁴² It added the following reasoning regarding the ECCC decision, explaining why it would not be prompted to exercise its discretion differently:

‘the ECCC Decision on Joint Criminal Enterprise of 20 May 2010 is not binding on the Appeals Chamber and, as such, does not constitute a cogent reason to depart from its well-established case law. In any event, the Appeals Chamber notes that the ECCC did not determine whether or not the third category of joint criminal enterprise liability was a part of customary international law.’⁴³

While the ICTY was correct in arguing that ECCC jurisprudence is not binding on the ICTY, the ECCC decision did, in fact, provide cogent reasons to depart from jurisprudence and it furthermore did examine whether JCE 3 was part of CIL. Therefore, the *Dordevic* Appeals Chamber reasoning is wholly unconvincing and unpersuasive.⁴⁴

One final comment related to CIL concerns the views of Judge Antonetti in the *Tolimir* Appeals Judgment. As noted above, he criticised JCE 1 as unnecessary. However, he is the only judge, following the aforementioned *Dordevic* Appeals Judgment to have argued that *Tadic* ‘could not draw the conclusion that the form of liability joint criminal enterprise existed in customary international law.’⁴⁵ By noting that ‘there has not been sufficient discussion’⁴⁶ related to the question of CIL and JCE, his argument focused on CIL methodology. However, his opinion lacks specific analysis regarding the case law cited by *Tadic*. He merely stressed that the process of finding CIL is only complete when the two elements, state practice and *opinio juris* are present.⁴⁷ He added that:

‘a degree of flexibility in this method should be allowed. Customary process in fact corresponds to a balance between international forces at a given time, to a

³⁶ *Tolimir* Trial Judgment, *Stanisic and Zupljanin* Trial Judgment, *Prlic et al* Trial Judgment, *Dordevic* Appeals Judgment, *Popovic et al* Appeals Judgment, *Tolimir* Appeals Judgment.

³⁷ *Dordevic* Appeals Brief, paras. 20-77, *Dordevic* Appeals Judgment, para. 5. *Tolimir* also challenged JCE’s CIL existence. However, no cogent reasons were provided, see *Tolimir* Appeals Brief, para. 54; *Tolimir* Appeals Judgment, para. 281.

³⁸ *Dordevic* Appeals Brief, para. 21.

³⁹ *Ibid*, paras. 56-67.

⁴⁰ *Ibid*, para. 41.

⁴¹ *Ibid*, para. 41.

⁴² *Ibid*, para. 41.

⁴³ *Ibid*, para. 41.

⁴⁴ Karnavas, as the lawyer for Ieng Sary at the ECCC echoes a similar view, see his blog, available at URL: <http://michaelgkarnavas.net/blog/2015/01/26/the-fiction-of-jce-iii/>, date last accessed 15th December 2015.

⁴⁵ *Tolimir* Appeals Judgment, Separate and Partially Dissenting Opinion of Judge Antonetti, pg. 99.

⁴⁶ *Ibid*, pg. 96.

⁴⁷ *Ibid*, pg. 100.

confrontation of legal subjects with an international problem. (...) Nonetheless, the existence of a custom must meet formal requirements.⁷⁴⁸

In applying this CIL methodology to examine the reasoning in *Tadic*, Judge Antonetti concluded that '(i)t seems that the Appeals Chamber in the *Tadic* case wanted to "speed things up" by not taking into account these strict conditions imposed upon it.'⁴⁹ In his view, CIL methodology should include reference to both state practice and *opinio juris*. However, he never explained whether there was either a lack of state practice or inappropriate *opinio juris* in the *Tadic* methodology. By leaving this question unanswered, it is difficult to fully endorse Judge Antonetti's conclusion that *Tadic* could not draw the conclusion regarding JCE's CIL basis.

Finally, none of the ICTY judgments ever questioned whether the formulation of JCE meets NCSL requirements. Although the two strands of foreseeability and accessibility had been highlighted by the ICTY,⁵⁰ neither did *Tadic* nor any other judgments question whether the CIL state practice cited was foreseeable or accessible to the defendants at the ICTY. This matter was neither addressed by the *Odjanic* JCE Decision,⁵¹ nor the *Krstic* Trial Judgment⁵² (the first ICTY case to have applied JCE) nor other key JCE-based cases.⁵³

Yet, in a similar fashion to the review of CIL state practice, the PTC of the ECCC held that JCE 3 was not foreseeable to the defendants in its tribunal.⁵⁴ As CIL, this matter has never been revisited at the ICTY, except for a few comments made by Judge Antonetti. Although, he never explicitly stated that JCE violates the principle of legality, he took into account the ECCC decision and *Tolimir's* claim that JCE violates NCSL.⁵⁵ However, as with his analysis of CIL, he never fully addressed whether JCE violates NCSL.

Views of Judge Schomburg

In addition to these comments, it is necessary to address Judge Schomburg's perspective regarding JCE. Although the latter has never overtly argued that JCE cannot be applied at the ICTY, he has expressed concern regarding the interpretation of 'commission' beyond textual wording and limitations on the formulation of non-statutory theories of commission. We can therefore deduce that his comments concern the role of the three factors, NPSC, CIL and NCSL in interpreting commission. His views are found in different opinions in ICTY cases (Separate Opinions, Declarations and Dissenting Opinion). We can examine their relevance to the three factors by analysing all comments collectively.

Foremost, as previously noted in chapter 3, he was critical of the elements of JCE 3. In the *Martic* Appeals Judgment, he wrote a Separate Opinion stating:

'I am primarily concerned with the definition of (JCE 3 which) lacks both in specificity and objective criteria – such as control over the crime. Precisely defining

⁴⁸ Ibid, pg. 101.

⁴⁹ Ibid, pg. 102.

⁵⁰ See chapter 6.3.

⁵¹ Paras. 35-43.

⁵² *Krstic* Trial Judgment, ICTY, paras. 620-640.

⁵³ *Stakic* Appeals Judgment, ICTY, para. 58 and *Martic* Appeals Judgment, ICTY, paras. 81-84.

⁵⁴ *Case 002* JCE Decision, para. 87.

⁵⁵ *Tolimir* Appeals Judgment, Separate and Partially Dissenting Opinion of Judge Antonetti, pgs. 110-112.

these missing elements would better describe the criminal conduct and provide the sharp contours necessary in substantive criminal law (...). Finally, the compartmentalized theory of JCE does not assist in focusing on the individual criminal contribution to a crime, an element indispensable for determining the appropriate sentence.⁵⁶

Although Judge Schomburg does not refer to NPSC explicitly in this opinion, his comment intimates indirectly at the role that NPSC plays in ensuring that criminal responsibility is individual. His reference to ‘control over the crime’ and that JCE does not assist in focusing on the ‘individual contribution’ implies strongly that the formulation of JCE can be criticised for not addressing how the individual is being held responsible for a crime. JCE 3, as defined by *Tadic*, in his view cannot be accepted because of its elements that violate NPSC. To date, no other judgment or judge at the ICTY has ever articulated a similar opinion. His opinion can therefore be seen as one of the most critical judicial opinions of JCE 3 and NPSC.

Secondly, regarding the use of CIL, he has stated that:

‘Nowhere does the Statute mention the term “joint criminal enterprise.” It was therefore nothing but an unsupported *dictum* when the Appeals Chamber (...) held that: “joint criminal enterprise” is (...) firmly established in (CIL).’⁵⁷

Although this comment is devoid of any criticism related to the state practice and *opinio juris* cited in *Tadic*, it provides a strong counter-argument to the mainstream judicial view that JCE is firmly established in CIL. One could interpret this comment as suggesting that JCE does not have a CIL foundation as he stated that *Tadic* provided an ‘unsupported dictum.’ Therefore, besides the ECCC view that JCE 3 is not found under CIL, Judge Schomburg’s perspective is the next most critical judicial opinion of JCE 3’s foundation.

Finally, Judge Schomburg provides two comments specific to NCSL. Firstly, he argues that ‘(t)o go beyond the explicit and exhaustive wording of Article 7 of the Statute might even be seen as a violation of the principle *nullum crimen sine lege*.’⁵⁸ Secondly, he has stated that:

‘The interpretation of the word “committing” contained in Article 7(1) of the Statute should never give the impression of being or tending to be arbitrary: the principle of *nullum crimen sine lege stricta* is also applicable to this general part of substantive criminal law.’⁵⁹

These two comments were made in two different Opinions and in relation to JCE’s formulation. However, they do not specifically comment on whether JCE’s formulation is fair or whether they meet NCSL requirements. They do not provide further analysis regarding the need for foreseeability and accessibility. We therefore cannot conclude that Judge Schomburg viewed JCE as a violation of NCSL. However, although they fall short of a complete analysis regarding JCE and NCSL requirements, in analysing them, we may argue that they reveal Judge Schomburg’s concern about the extent to which a Tribunal can accept a non-

⁵⁶ *Martic* Appeals Judgment, Separate Opinion of Judge Schomburg, ICTY, para. 3.

⁵⁷ *Ibid*, para. 4

⁵⁸ *Ibid*, para. 4.

⁵⁹ *Limaj* Appeals Judgment, Partially dissenting and separate opinion and declaration of Judge Schomburg, para. 11.

statutory theory of commission. No other judge or ICTY judgment has provided similar commentaries related to JCE and NCSL.

Extra-judicial commentaries

Finally, comments from two important judges need to be thoroughly scrutinised: Judges Cassese and Shahabuddeen. As previously stated, Judge Cassese was the President of the Appeals Chamber and widely considered to be the author of JCE.⁶⁰ Judge Shahabuddeen was also part of the *Tadic* Appeals bench and has furthermore been part of several important JCE trials.⁶¹ One of the ICTY convicted persons, Dordevic, described both judges as the ‘fathers of JCE jurisprudence.’⁶² Yet, although they both sat on the same bench and despite this description, they offer different views about JCE’s formulation, in particular, its CIL-basis.

Cassese’s commentaries emanate from a 2007 scholarly publication and a 2008 *amicus curiae* brief he submitted at the ECCC.⁶³ They arose out of a need to defend all three forms of JCE in light of JCE criticisms post-*Tadic*.⁶⁴ His concern was that JCE was being ‘harshly attacked.’⁶⁵ While he argued that ‘most criticisms are off the mark,’⁶⁶ he noted several concerns, namely that *Tadic* was wrong in using terminology from civil law and common law traditions, that JCE 3 cannot be applied to specific intent crimes, that the level of contribution for JCE 1 should be substantial and that physical perpetrators should be part of the JCE.⁶⁷ Of these comments, one is pertinent to NPSC, namely the fact that a JCE 1 contribution should be substantial. It indicates that the co-perpetrator is being held liable fairly for his role in the enterprise. Yet, while Cassese addressed this matter, he failed to fully address other concerns regarding CIL methodology, CIL state practice and *opinio juris* and more importantly NCSL.

In his article in 2007, he failed to explore whether JCE is found under CIL according to an eligible methodology.⁶⁸ He simply stated that the ICTY judges used CIL legitimately and did not formulate JCE through any exercise of judicial creativity.⁶⁹ JCE, was in his words, ‘provided for in customary international law.’⁷⁰ However, in 2008, when defendants at the ECCC challenged the foundations of JCE, in particular JCE 3, he then argued that CIL can be used by lowering the requirement of state practice and elevating that of *opinio juris*.⁷¹ This was a novel argument not raised in *Tadic* or in the 2007 publication. It shows that there are valid concerns related to CIL that Cassese felt compelled to address in 2008. Recent ILC

⁶⁰ *Karadzic* JCE 3 Motion, para. 11, stating that Cassese is the author of the judgment. This has also been confirmed by Judge Shahabuddeen in a JCE-related publication, Shahabuddeen (2010) 201.

⁶¹ ICTY cases: *Stakic* Appeals Judgment, *Brdjanin* Appeals Judgment and *Krajisnik* Appeals Judgment.

⁶² *Dordevic* Appeals Brief, para. 118.

⁶³ He also addresses several other issues in this publication which not related to JCE’s overall fairness such as the civil law/common law nature of JCE, indirect co-perpetration, analysis of ICTY jurisprudence and reliance on JCE at the ICC.

⁶⁴ Cassese (2007) (b). He has also defended JCE 1 and 3 in Cassese *amicus curiae* brief submitted to the ECCC. He analyses the use of CIL and implications of NCSL and NPSC. However, I am concerned with the former article because of his approach and conclusions regarding JCE criticisms. Furthermore, the *amicus curiae* brief was submitted in response to an invitation by the ECCC PTC, see Cassese *amicus curiae* brief, ECCC, para. 1. The Chamber sought clarification regarding specific matters.

⁶⁵ Cassese (2007) (b) 109.

⁶⁶ *Ibid* 109.

⁶⁷ Cassese (2007) (b) 109.

⁶⁸ *Ibid* 114-115.

⁶⁹ *Ibid*.

⁷⁰ Cassese (2007) (b) 110.

⁷¹ Cassese *amicus curiae* brief, ECCC, para. 35.

commentaries have noted that in some contexts, state practice may play a greater role than *opinio juris*.⁷² However, it is surprising to note that this argument was only raised by Cassese in 2008. Furthermore, even if it may be considered to apply in the case of JCE's formulation, this reasoning is still questionable. Although *Tadic* referred to various examples as proof of state practice, chapter 5 demonstrated how many were deemed irrelevant.

Cassese's analysis also omits any discussion of NCSL⁷³ and discussions related to JCE 3's adherence to NPSC.⁷⁴ Yet, he nevertheless concluded that JCE has 'passed the test of judicial scrutiny'⁷⁵ and that 'the dangers of abuse and misapprehension of the doctrine (...), feared by a number of commentators, have not materialized.'⁷⁶ As indicated in this chapter and the analysis in preceding ones, there are several concerns related to both JCE 1 and 3 pertaining to NPSC,⁷⁷ CIL and NCSL.

In contrast to Cassese, Judge Shahabuddeen has provided detailed analysis about the extent to which judicial creativity can be used to formulate a non-statutory theory of commission. His concern was two-fold: the use of CIL and the meaning and place of judicial creativity in interpreting law. He expresses these views in a chapter regarding JCE and judicial creativity⁷⁸ and various judicial opinions.⁷⁹ However, when drawing together these views, it is difficult to formulate a clear and coherent picture about his position. Instead, his views portray a contradictory and unclear perspective regarding a fair interpretation of commission and the formulation of JCE.

Foremost, in 2003, he stated that '(t)*adic* was of course right: joint criminal enterprise is recognised in customary international law.'⁸⁰ However, in 2010, he argued that JCE is not found under CIL. He stated that it was 'an error of the Tribunal (...) the question whether joint criminal enterprise was customary international law.'⁸¹ 'Joint criminal enterprise is not entitled to be regarded as customary international law.'⁸² Without discussing matters related to NCSL such as the need to demonstrate that judge-made law is foreseeable and accessible to the defendant, he then justified the existence of JCE as emerging from a legitimate exercise of judicial creativity. In his view, 'judicial creativity enables the ICTY to say that joint criminal enterprise forms part of international criminal law, arguably on the basis that states which establish an international criminal court are presumed to vest it with that power.'⁸³ In his opinion, judicial creativity is a 'power inherent in the activities of the court.'⁸⁴ 'States, having established an international criminal court, are to be regarded as also vesting it with a

⁷² ILC 2014 (Second Report), para. 28.

⁷³ Cassese (2007) (b) 114-115, fn. 2, simply noting the UN Secretary General Report citation of NCSL.

⁷⁴ He also addressed concerns of an imprecise foreseeability standard under JCE 3 by arguing that a causation-nexus is required. However, as argued in chapter 4, this was not the JCE 3 definition *Tadic* agreed on, see *Ibid*, 117-123.

⁷⁵ *Ibid* 133.

⁷⁶ *Ibid* 133.

⁷⁷ Not for JCE 1.

⁷⁸ Shahabuddeen (2010).

⁷⁹ *Odjanic* Decision on JCE, Separate Opinion of Judge Shahabuddeen, ICTY, *Gacumbitsi* Appeals Judgment, Separate Opinion of Judge Shahabuddeen, *Krajisnik* Appeals Judgment, Separate Opinion of Judge Shahabuddeen, *Limaj* Appeals Judgment, declaration of Judge Shahabuddeen.

⁸⁰ *Odjanic* Decision on JCE, Separate Opinion of Judge Shahabuddeen, ICTY, para. 27.

⁸¹ Shahabuddeen (2010) 202.

⁸² *Ibid* 203.

⁸³ *Ibid* 203.

⁸⁴ *Ibid* 186.

power of judicial creativity.’⁸⁵ Adding to these comments, he emphasised that ‘judicial creativity is not licence for unregulated action.’⁸⁶

These comments merit scrutiny as this unexplained emphasis on judicial creativity as a power does not explain how judicial creativity ought to be exercised fairly. Shahabuddeen’s comments are highly questionable as they portray judicial creativity as judicial power with no limitations. In contrast, in this thesis, I have argued that creativity in interpreting law is bound by the need to use a source of law and abide by NCSL requirements. The three examples in Part 1 exemplified these requirements. In chapter 1, I further explained how the UN Secretary General Report underlined the use of CIL beyond doubt and that the interpretation of law should be in line with NCSL. If we therefore view the Secretary General’s Report as a delegation of power by States, then that power is limited by the two requirements of CIL and NCSL. These requirements seem to have no place in Judge Shahabuddeen’s definition of judicial creativity as a separate source of power.

Therefore, it is difficult on one hand to accept Judge Shahabuddeen’s views that JCE was part of CIL but on the other that it was an error made by the tribunal that it was found under CIL. Furthermore, his reference to judicial creativity as a separate power delegated by states does not clarify how such power is limited. His defence of JCE in 2010 as not found under CIL but as derived from judicial creativity is therefore highly problematic. The two requirements of a source of law and NCSL are indispensable.

7.3.3 Order of factors

In section 7.2.1, I explained how NCSL plays a particularly important role and how an order of factors emerges. In contrast to this analysis, the literature subjects the formulation of JCE to a different analysis. Two authors do not recognise this order but instead refer to a ‘balance.’

Damgaard argues that JCE ‘raises a number of grave concerns. It, arguably (...) undermines the principle of individual criminal responsibility in favour of collective responsibility, infringes the *nullum crimen sine lege* principle and infringes the right of the accused to a fair trial.’⁸⁷ She then holds that ‘(t)here is no doubt that the application of JCE is the consequence of a complicated balancing act.’⁸⁸ She derives this conclusion given the factors that prompt the need for formulating such a theory as well as the need to do so in line with criminal law principles such as NPSC and NCSL.

Yet, if we engage in a discussion of ‘balance’ and agree with this terminology, the suggestion is that factors are to be applied proportionately in light of a balance. However, as chapter 2 explained, discretion in interpreting ‘commission’ requires that four factors are met if judges interpret law beyond statutory wording. There is no discussion of a balance which would necessitate an enquiry into applying standards proportionately. This is a particular discussion relevant to the human rights context where rights may have to be balanced against each

⁸⁵ Shahabuddeen (2010) 187.

⁸⁶ Ibid 187.

⁸⁷ Damgaard (2008) 129.

⁸⁸ Ibid 236.

other.⁸⁹ However, in the context of formulating JCE, the four factors (fair labelling, NPSC, CIL and NPSC) ought to be addressed without a discussion of a balance.

The argument from Van Sliedregt can also be criticised for this reason. In 2003, she argued that:

‘System-criminality generates system-responsibility and leads to the broadening of certain participation modes to the extent that these concepts border on collective responsibility. This results in a balancing exercise between criminal law principles and humanitarian aims, which in the end should be settled in favour of criminal law principles (NPSC-based discussions follow).’⁹⁰

She argued that the formulation of JCE resulted from such an exercise. Yet, Van Sliedregt does not explain what a balance requires and why it should be in favour of criminal principles. This thesis argues that the contention pertaining to a ‘balance’ does not apply in the context of formulating JCE.

Besides this comment, other JCE articles that address the doctrine’s fairness do not highlight the role that the four factors play in formulating JCE and that NCSL, as a limitation on the interpretation of law, occupies a central and unique role. This discussion is absent from the analyses provided by Danner and Martinez,⁹¹ Karnavas,⁹² Engvall⁹³ and Sassoli and Olson.⁹⁴

7.4 CONCLUSIONS

Chapter 7 has demonstrated why both JCE 1 and 3 are unfair. Through this analysis, I have illustrated the need to identify all factors related to fairness and how an order among the factors exists. Contrary to this approach, the critique does not offer such an analysis. Some scholars focus on certain factors only. Key judgments have failed to address NPSC’s significance, the need for an eligible CIL method and NCSL requirements. The literature does not provide substantial analysis pertaining to the individual importance of all four factors and the order of factors. More importantly, Judges Cassese and Shahabuddeen’s justifications for JCE 1 and 3’s fairness are unacceptable.

⁸⁹ Proportionality is determined in relation to the legitimate aims pursued. See body of literature related to proportionality under ECHR law, see Arai-Takahashi (2001); Skinner (2014); Blake (2002).

⁹⁰ Van Sliedregt (2003) 357.

⁹¹ Danner and Martinez (2005).

⁹² Karnavas (2010), Karnavas (2011).

⁹³ Engvall (2007).

⁹⁴ Sassoli and Olson (2000).

PART 2: CONCLUSIONS

The objective of Part 2 was to examine the fairness of JCE 1 and 3. To do so, chapters 2 to 7 applied the understanding of fairness developed in Part 1. The conclusions are as follows:

Formulating JCE 1: Unfair

As chapter 7 indicated, JCE 1 is unfair because of the unacceptable CIL methodology and the failure to address NCSL implications.

Formulating JCE 3: Unfair

JCE 3 is unfair because it did not meet any of the four requirements: fair labelling, NPSC, CIL and NCSL.

Review of literature

Each chapter has further illustrated several flaws in the literature regarding fair labelling,¹ NPSC,² CIL,³ NCSL⁴ and fairness.⁵

¹ Chapter 3.2.3 and 3.3.3.

² Chapter 4.5.2 and 4.5.3.

³ Chapter 5.2.2, 5.2.6 and 5.4.

⁴ Chapter 6.6.

⁵ Chapter 7.3.

**PART 3: EXERCISING DISCRETION
IN APPLYING JCE**

PART 3: INTRODUCTION

Part three examines whether the ICTY Judges exercised their discretion fairly in applying JCE 1 and 3. This question is important for at least four reasons.

Firstly, post-*Tadic*, JCE was not be applied by the same judges who formulated it. In 2000, Judge Cassese resigned¹ and among the remaining four *Tadic* Appeals Judges, only Judge Shahabuddeen sat on all central cases involving the application of JCE.² A change of judges may be problematic in the sense that judges who are not familiar with the doctrine either may be unable to apply it consistently with the *Tadic*-formulated definition or may prefer other theories of commission.

Secondly, the factual scenarios were different to *Tadic*. To recapitulate *Tadic* consisted of a small group of participants who shared a common intention plan.³ The group was easily identifiable. However, in post-*Tadic* cases, crimes were committed over several regions with participants ranging from low-level perpetrators (soldiers) to mid-level commanders (generals) and high-level actors (senior politicians). The defendants were structurally remote from the areas of conflict unlike in *Tadic*. Not only may the judges have to re-engage in theorising the commission of a crime but they also have to answer the questions that *Tadic* had left unresolved: the meaning of a common plan, how to identify participants and the scope of JCE 3. These questions challenge whether the judges could remain faithful to the definitional elements of JCE.

Thirdly, as indicated in Part 2, evidence of CIL and proof of NCSL requirements are central to the exercise of discretion. Post-*Tadic*, it is questionable whether judges addressed the significance of both factors when applying JCE to new factual scenarios.

Fourthly, despite the abundance of literature regarding the formulation of JCE, there is relatively less analysis pertaining to the application of JCE 1 and in particular, JCE 3. For these reasons, the next two chapters will conduct a detailed examination, paying attention to the use of CIL and NCSL and key issues related to the fairness of discretion. Chapter 8 begins with the examination of JCE 1 and chapter 9 examines the application of JCE 3.

¹ See ICTY website: <http://www.icty.org/sid/7735>, last accessed 10th December 2015.

² See *Furundzija* Appeals Chamber Judgment, *Krstic* Appeals Chamber Judgment, *Stakic* Appeals Chamber Judgment, *Brdjanin* Appeals Chamber Judgment and *Krajisnik* Appeals Chamber Judgment.

³ Chapter 2.1.2.

Fairness in reconceptualising JCE 1

8.1 INTRODUCTION

In examining the application of JCE 1, this chapter will explore how the doctrine was reconceptualised. The case primarily responsible for this development is the *Brdjanin* Appeals Judgment.¹ The judges applied JCE in the following manner. They held that a direct perpetrator does not need to be part of the criminal enterprise.² A JCE member can be held liable for a crime committed by such a non-JCE member so long as the crime is part of the common plan and the JCE member uses the non-JCE member (direct perpetrator) as a tool to commit the crime.³ In addition, other JCE members who also share the common plan are liable for the crime perpetrated by this direct perpetrator who is being used as a tool.⁴

This version of JCE differs from the one defined by the *Tadic* Appeals Judgment in three different ways. Firstly, it applies to cases where the direct perpetrator is not part of the joint enterprise. Secondly, it incorporates the notion of using a person as a tool to commit crimes. Thirdly, it attaches liability to a JCE participant for a crime perpetrated by a non-JCE member (direct perpetrator) although there is no established culpability-nexus between the individual and the JCE participant. In these ways, the *Brdjanin* Appeals judges reconceptualised JCE.⁵ The objective of chapter 8 is to examine this newly-defined version of JCE 1.

To do so, section 8.2 will firstly explain key chronological developments prior to the reconceptualization of JCE. It begins by outlining the exercise of discretion by the *Brdjanin* Trial Judgment. It then scrutinises how the *Milutinovic* Trial Decision addressed matters pertaining to JCE.⁶ Although this decision was unrelated to the facts of *Brdjanin*,⁷ it is important because Judge Bonomy issued a Separate Opinion which the *Brdjanin* Appeals Judgments considered ‘instructive’ and further cited from. Section 8.3 then substantiates how the *Brdjanin* Appeals Judgment reconceptualised JCE by addressing the errors of the *Brdjanin* Trial Judgment and embracing Judge Bonomy’s reasoning. Lastly, section 8.4 will scrutinise the fairness of the *Brdjanin* appellate exercise of discretion.

¹ The *Krajisnik* Trial Judgment also reconceptualised JCE: ‘a JCE may exist even if none or only some of the principal perpetrators are part of it, because, for example, they are not aware of the JCE or its objective and are procured by members of the JCE to commit crimes which further that objective,’ para. 883. However, it did not provide elaborate reasoning regarding ‘procurement.’ The *Brdjanin* Appeals Judgment, however provided a detailed explanation of using a relevant physical perpetrator (RPP) who is outside of the JCE. It therefore suffices to examine the *Brdjanin* Appeals Judgment when scrutinising the reconceptualization of JCE. Furthermore, judgments post-*Krajisnik* and post-*Brdjanin* refer to the *Brdjanin* appellate JCE formula when applying the doctrine, see *Martic* Appeals Judgment, paras. 168-169; *Limaj et al.* Appeals Judgment, para. 120; *Krajisnik* Appeals Judgment, paras. 225 and 226.

² *Brdjanin* Appeals Judgment, paras. 410-411.

³ *Ibid.*

⁴ See n. (2), paras. 411, 413 and 430.

⁵ See n. (2), paras. 389-431.

⁶ This decision was rendered two years after the *Brdjanin* Trial Judgment.

⁷ *Milutinovic* belonged to a different JCE than *Brdjanin*.

8.2 KEY CHRONOLOGICAL DEVELOPMENTS

8.2.1 Brdjanin Trial Judgment: Rejecting JCE

In explaining the factual background of *Brdjanin*, the most important feature is the accused's political role in Bosnia and Herzegovina. He was a member of the Bosnian Serb political party called the SDS.⁸ This party was one among three parties competing for power prior to the conflict that began in 1992.⁹ Its main goal, as set out in 1991,¹⁰ was to link 'Serb-populated areas in Bosnia and Herzegovina (...) together, to gain control over these areas and to create a separate Bosnian Serb state, from which most non-Serbs would be permanently removed.'¹¹ This plan was known as the 'Strategic Plan.'¹² It involved the perpetration of several crimes¹³ against Bosnian Muslims and Bosnian Croats.¹⁴ The Prosecutor alleged that, as a result of the Strategic Plan, there was a JCE to commit several crimes which involved numerous participants.¹⁵ These included armed civilians, army soldiers, police officers, political leaders and other unnamed individuals.¹⁶ They participated in this plan in different Municipalities and regions across the whole of Bosnia and Herzegovina. Brdjanin, not only participated in this JCE through his political role in the SDS party, but also through other political organs that were set up by Bosnian Serbs to further the goal of creating a Bosnian State.¹⁷ Through these various political roles, Brdjanin was capable of working closely with a variety of participants namely army members, Bosnian Serb police officers, Serb paramilitary groups, Serb political leaders, Bosnian Serb armed individuals and other unnamed individuals.¹⁸ In this capacity, Brdjanin orchestrated and facilitated the perpetration of crimes at a regional, municipal and national level.¹⁹

However, considering that Brdjanin was remotely removed from the crime scenes and given his political roles, he may not have known many participants of the enterprise including the direct perpetrators. (From here onwards, I will refer to direct perpetrators as Relevant

⁸ *Brdjanin* Trial Judgment, ICTY, paras. 10 and 287.

⁹ The two other parties were the Bosnian Croat party (HDZ) and Bosnian Muslim party (SDA). For more about the conflict in Bosnia and Herzegovina and the role of political parties, see *Stakic* Trial Judgment, paras. 44-66. *Stakic* was a participant in the same JCE as Brdjanin, see *Krajisnik* Trial Judgment, paras. 376 and 471.

¹⁰ This was a plan implemented through several stages from April to December 1991, see *Brdjanin* Trial Judgment, paras. 165-168.

¹¹ *Brdjanin* Trial Judgment, para. 65.

¹² For a detailed explanation of the Strategic Plan, see *Brdjanin* Trial Judgment, paras. 80-119; *Stakic* Trial Judgment, paras. 23-66.

¹³ The crimes were genocide, deportation, inhumane acts, persecution, extermination, wilful killing and torture, see *Brdjanin* Trial Judgment, paras. 11-16; 230-256.

¹⁴ For more about the crimes, participants and involvement of individuals, see *Stakic* Trial Judgment, paras. 822-823; *Brdjanin* Trial Judgment, paras. 80-119; 230-256.

¹⁵ *Brdjanin* Sixth Indictment, paras. 20.1 and 27.2.

¹⁶ *Brdjanin* Appeals Judgment, para. 445.

¹⁷ These include organisations such as the Crisis Staff and the Autonomous Region of Krajina (ARK), an area within the planned Bosnian Serb State which eventually took over the Crisis Staff in implementing SDS goals, see *Brdjanin* Trial Judgment, paras. 2-9. For more about the role of Crisis Staff, see *Brdjanin* Trial Judgment, paras. 188-196. For more about the role of the ARK, see *Brdjanin* Trial Judgment, paras. 170, 197-256.

¹⁸ *Stakic* Trial Judgment, paras. 336-363; *Brdjanin* Appeals Judgment, paras. 10, 345-347. The Trial Chamber noted that the term 'others' as applied in the Indictment cannot be invoked to include groups that are not specifically mentioned in the Indictment.

¹⁹ See *Brdjanin* Trial Judgment, paras. 286 and 291 specifically. For more about his role, see *Brdjanin* Trial Judgment, paras. 293-304.

Physical Perpetrators (RPPs)).²⁰ The Trial Judgment took note of this aspect and exercised caution when applying JCE. It addressed two questions when applying JCE:

a) *Is there a need for an agreement between the RPP and the JCE participant?*

The first question was whether there is a need for an agreement between the RPP and the JCE participant. In answering this question,²¹ the judges held that there ought to be an agreement. They specifically stated:

‘(i)t is not sufficient to prove an understanding or an agreement to commit a crime between the Accused and a person in charge or in control of a military or paramilitary unit committing a crime. The Accused can only be held criminally responsible (...) if the Prosecution establishes beyond reasonable doubt that he had an understanding or entered into an agreement with the RPPs to commit the particular crime eventually perpetrated or if the crime perpetrated by the RPPs is a natural and foreseeable consequence of the crime agreed upon by the Accused and the RPPs.’²²

They added that an ‘agreement between two persons to commit a crime requires a mutual understanding or arrangement with each other to commit a crime.’²³ In advancing this reasoning however, the judges did not justify their exercise of discretion according to any ICTY precedents or any other precedents in ICL. This raises serious concerns about the decision’s support in CIL.

b) *Does JCE apply to a vast enterprise?*

The second question concerned the scope of the enterprise. The *Brdjanin* Trial judges answered this question by stating that ‘JCE is not an appropriate mode of liability (...) given the extraordinarily broad nature of this case (and where there is) a person as structurally remote from the commission of the crimes.’²⁴ It explained its exercise of discretion by interpreting the *Tadic* Appeals Judgment accordingly:

‘it appears that, in providing for a definition of JCE, the (*Tadic*) Appeals Chamber had in mind a somewhat smaller enterprise than the one that is invoked in the present case.’²⁵

It also referred to four other ICTY precedents in support of this view. It cited the *Krstic* Trial Judgment,²⁶ noting how the JCE was limited to a specific military operation and only to members of the armed forces; the *Simic* Trial Judgment, noting how the JCE was restricted to a geographical area;²⁷ the *Vasiljevic* Trial Judgment which concerned a small group of armed

²⁰ The term Relevant Physical Perpetrator (RPP) is used in the *Brdjanin* Appeals Judgment, see para. 362. It is a different terminology for the direct perpetrator.

²¹ Ibid 344, 347 and 352.

²² Ibid 347.

²³ Ibid 352.

²⁴ Ibid 355.

²⁵ Ibid.

²⁶ Ibid 355, fn. 890, citing *Krstic* Trial Judgment, para. 610.

²⁷ Ibid, citing the *Simic* Trial Judgment, paras. 894-895.

men acting jointly to commit a certain crime²⁸ and the *Krnojelac* Trial Judgment, which concerned a JCE 2 case and was limited to one detention camp.²⁹

Conclusions

Having answered these two questions accordingly, the Trial Judges exercised their discretion by not applying JCE. Following this decision, the Prosecutor appealed. However, before the appeal was heard, the *Milutinovic* Trial Chamber issued a decision³⁰ regarding the application of JCE. Judge Bonomy further issued a Separate Opinion³¹ concerning the judgment's reasoning and several areas related to the scope and application of JCE.

8.2.2 The *Milutinovic* Trial Decision: Contours of JCE and indirect co-perpetration

The Trial Chamber judges addressed two questions:³²

a) *Does the enterprise include the RPP?*

The first question was whether the enterprise should include the RPP. In answering this question, the judges held that any decision concerning the inclusion/exclusion of the RPP ought to be determined at a trial phase. Since this question concerns the 'contours of JCE,'³³ it is for the Trial Judges who are applying the theory to answer it. Consequently, they chose not to address this question.

b) *Can the ICTY apply indirect co-perpetration?*

The second question was whether the judges could apply the theory of indirect co-perpetration. This prosecutorial request intended that the judges formulate a novel theory of commission at the ICTY.

In addressing this question, the judges took into account the Prosecutor's brief description of indirect co-perpetration and its possible foundations in ICL.³⁴ The Prosecutor defined this theory as 'the accused (...) has an agreement with others, plays a key role in the agreement and one or more of the participants (are) used others to carry out crimes.'³⁵ 'Indirect perpetration (does not require) a common understanding or agreement between the accused and the person who commits the crime. Rather the accused uses another person to carry out the *actus reus* of the crime the accused intends.'³⁶ Beyond these statements, it did not provide any further details regarding this theory.

²⁸ Ibid, citing the *Vasiljevic* Trial Judgment, para. 208.

²⁹ Ibid, citing the *Krnojelac* Trial Judgment, para. 84.

³⁰ *Milutinovic* Trial Decision, ICTY.

³¹ *Milutinovic* Trial Decision, Separate Opinion of Judge Bonomy, ICTY.

³² See n. (30), para. 11 where the judges stated the two questions that they would consider.

³³ See n. (30), para. 23.

³⁴ The judges examined the *Stakic* Trial Judgment which they believed concerned indirect co-perpetration. However, it applied a doctrine called co-perpetration. This doctrine is based on 'co-perpetration through joint control.'

³⁵ *Milutinovic et al.* Prosecution Response, para. 3.

³⁶ Ibid 9.

We can, however, substantiate this theory in light of ICL discussions. Indirect co-perpetration is a synthesis of both co-perpetration based on common intention and indirect perpetration.³⁷ Foremost, there is an agreement or understanding to commit crimes among a group of persons. This implies that there is a common intention to commit crimes. Secondly, one of the participants commits a crime through another person who may not be a JCE member. This is known as the theory of indirect perpetration.³⁸ Thirdly, a member who shares the common intention is also liable for the crime committed by the RPP so long as he is aware of the factual circumstances enabling the other participant to commit a crime through another person.³⁹

Regarding its foundation in ICL, the Prosecutor argued that the theory of indirect co-perpetration ought to be applied at the ICTY⁴⁰ because it is found under CIL. Alternatively, it can be applied because it is a general principle of law.⁴¹ However, the *Milutinovic* Trial judges disagreed. They held that indirect co-perpetration does not exist in CIL⁴² because of insufficient case law.⁴³ It however did not address its possible status as a general principle of law.

In response to these findings, Judge Bonomy issued a Separate Opinion. He addressed three areas: the inclusion of the RPP within the enterprise, the ‘contours of JCE’⁴⁴ and the theory of indirect perpetration.⁴⁵ His views are important because the *Brdjanin* Appeals Judgment cited them in support of its application of JCE.

Judge Bonomy’s view: Inclusion of the RPP

Firstly, in contrast to the majority which chose not to answer whether the RPP needs to be a JCE member, Judge Bonomy explicitly held that the RPP does not. He justified this point by arguing that ICTY case law, which includes *Tadic* and other cases,⁴⁶ has generally assumed but not specifically addressed whether the RPP needs to be a member of the JCE.⁴⁷ In the absence of explicit guidance:

³⁷ It may be defined differently. Indirect co-perpetration may also involve the notion of control over the crime where a group participant exercises control over the RPP and another group participant is aware of such control. For further detail about both theories, see Munoz-Conde and Olasolo (2011) 119, 121 and 127; Olasolo (2004); Ohlin, Van Sliedregt and Weigend (2013) 734-740; Manacorda and Meloni (2011) 171-175; Weigend (2011) 110-111; Wirth (2012) 984-986; *Katanga and Chui* Confirmation of Charges Decision, ICC, para. 493.

³⁸ For more about the theory of indirect perpetration, see Bohlander (2009) 156, referring to principal by proxy. For a comparison with the English doctrine of innocent agency, see Simester and Sullivan (2010) 98-99. For indirect perpetration in ICL, see Olasolo (2010) 109-151. Ambos defines indirect perpetrators as those who ‘really control the will of the RPP,’ see Ambos (2005) 209 cited in Olasolo (2010) 116, fn. 168.

³⁹ *Katanga and Chui* Confirmation of Charges Decision, ICC, para. 534: ‘the suspects are aware of the factual circumstances enabling them to exercise control over the crime through another person. (...) the suspects must be aware of the character of their organisations, their authority within the organisation, and the factual circumstances enabling near automatic compliance with their orders.’ See other paragraphs for ‘awareness,’ paras. 534, 537, 538, 539 and 562.

⁴⁰ See n. (35), paras. 2 and 10.

⁴¹ See n. (35), paras. 2 and 10; also see *Milutinovic et al.* Prosecution Book of authorities cited in n. (30), para. 7, fn. 20.

⁴² See n. (30), paras. 38, 39, 40.

⁴³ *Ibid.*

⁴⁴ *Milutinovic* Trial Decision, Separate Opinion of Judge Bonomy, para. 26.

⁴⁵ *Ibid.* 27-30.

⁴⁶ *Ibid.* 9. His analysis also includes *Krstic*, *Brdjanin* and *Limaj*, see paras. 9-11.

⁴⁷ *Ibid.* 5.

‘it is not inconsistent with the jurisprudence of the Tribunal for a participant in a JCE to be found guilty of commission where the crime is perpetrated by a person or persons who simply act as an instrument of the JCE, and who are not shown to be participants in the JCE. There is certainly no binding decision of the Appeals Chamber that would prevent the Trial Chamber from finding an accused guilty on that basis.’⁴⁸

However, his analysis was not based on any understanding of the CIL state practice cited by *Tadic*.

Judge Bonomy’s application of JCE

Having argued that a RPP does not need to be part of the enterprise, Judge Bonomy then provided a different interpretation of JCE. He argued that JCE can be applied ‘where there was a *close link* between the participants in the JCE and the physical perpetrators of the crimes (and) where the physical perpetrators’ criminal responsibility was not *considered and determined*.’⁴⁹

This statement offers two unique perspectives about the application of JCE. Firstly, it holds that the RPP’s responsibility does not need to be ‘considered and determined.’ Judge Bonomy substantiated this point stating that judges do not need to consider ‘the criminal responsibility of the physical perpetrators,’⁵⁰ namely whether they committed the *actus reus* with the required *mens rea* or with the intention of furthering the JCE. Secondly, this statement holds that JCE can be applied where there is a close link between JCE participants and RPPs. Judge Bonomy however did not provide any criteria that explains the meaning of a close link. To further explain Judge Bonomy’s reasoning, I will refer to the two NMT cases that the judge relied upon to support his interpretation: the *Justice*⁵¹ and *RuSHA*⁵² cases. Both cases applied Control Council Law No. 10 (CCL10) which chapter 5 had mentioned.⁵³ To recap, article 2(2) of the CCL10 stated:

‘Any person (...) is deemed to have *committed* a crime (...) if he was (a) a principal or (b) was an accessory to the commission of any such crime or ordered or abetted the same or (c) took a consenting part therein or (d) was connected with plans or enterprises involving its commission.’⁵⁴

In applying this provision, the *Justice* case examined the liability of individuals who perpetrated crimes ‘in the name of law by the authority of the Ministry of Justice, and through the instrumentality of the courts.’⁵⁵ The indictment alleged that ‘German criminal laws, through a series of expansions and perversions by the Ministry of Justice (...) embraced passive defeatism, petty misdemeanours and trivial private utterances as treasonable for the purpose of exterminating Jews or other nationals of the occupied countries. Indictments, trials and convictions were transparent devices for a system of murderous extermination, and death

⁴⁸ Ibid 13.

⁴⁹ Ibid 26, where he also refers to the ICTR Appeals Judgment of *Rwamakuba*. He also refers to this case in para. 14. (Emphasis added).

⁵⁰ Ibid 15.

⁵¹ NMT, Vol. III.

⁵² NMT, Vols. IV and V.

⁵³ Chapter 5.2.1.

⁵⁴ Emphasis added.

⁵⁵ See n. (51) 985.

became the routine penalty (...) Non-German nationals were convicted of and executed for “high treason” (...) The above-described proceedings resulted in the murder, torture, unlawful imprisonment, and ill-treatment of thousands of persons.’⁵⁶ Although there were fifteen defendants⁵⁷ in the *Justice* case, Judge Bonomy’s reasoning focused only on the liability of Lautz and Rothaug.⁵⁸ Lautz was the Chief Public Prosecutor of the People’s Court and Rothaug was the former Chief Justice of the Special Court in Nuremberg.⁵⁹

The NMT stated that, pursuant to Article 2(2) of CCL10, the prosecution had to show the following, for an accused connected with a criminal plan or enterprise to be found liable:

‘The material facts which must be proved in any case are (1) the fact of the great pattern or plan of racial persecution and extermination; and (2) specific conduct of the individual defendant in furtherance of the plan. This is but an application of general concepts of criminal law.’⁶⁰

It further required that the accused have ‘knowledge of an offense charged in the indictment and established by the evidence’⁶¹ and ‘consciously participated in the plan or took a consenting part therein.’⁶²

The NMT found that there was a ‘pattern and plan of racial discrimination’⁶³ to enforce the criminal laws against Poles and Jews. The NMT further found that Lautz, the Chief Public Prosecutor of the People’s Court, knew of this plan.⁶⁴ He had authorised indictments charging a number of Poles with high treason for ‘leaving their places of work and attempting to escape Germany by crossing the border into Switzerland.’⁶⁵ The Poles were sentenced to death and executed. On the basis of this evidence, the Military Tribunal concluded that Lautz had consciously participated in the national plan of racial discrimination ‘by means of the perversion of the law of high treason.’⁶⁶ The NMT found that he ‘was criminally implicated in enforcing the law against Poles and Jews which were deemed to be a part of the established governmental plan for the extermination of those races.’⁶⁷ The Tribunal convicted him of war crimes, crimes against humanity⁶⁸ and genocide.⁶⁹ The NMT also found that Rothaug knew of the plan of racial discrimination.⁷⁰ The Tribunal convicted Rothaug of crimes against humanity for his role in convicting and sentencing to death three Poles and a Jew ‘in conformity with the policy of the Nazi State of persecution, torture, and extermination of (the Jewish and Polish) races.’⁷¹

⁵⁶ See n. (51), Indictment, para. 11.

⁵⁷ See n. (51) 15-17; Heller (2011) 89.

⁵⁸ See n. (31) paras. 15-20.

⁵⁹ See n. (51) 16.

⁶⁰ See n. (51) 1063; n. (31), para. 17.

⁶¹ See n. (51) 1093; n. (31), para. 17.

⁶² See n. (51) 1081; n. (31), para. 17.

⁶³ See n. (51), pgs. 985 and 1123.

⁶⁴ See n. (51), pg. 985.

⁶⁵ See n. (51), pgs. 1093 and 1143.

⁶⁶ See n. (51), pgs. 1120-1121.

⁶⁷ See n. (51), pg. 1128.

⁶⁸ See n. (51), pg. 1123.

⁶⁹ See n. (51), pg. 1128.

⁷⁰ See n. (51), pg. 985.

⁷¹ See n. (51), pg. 1155.

In analysing this judgment, Judge Bonomy emphasised that the NMT ‘appears to have imposed criminal responsibility on both accused for their participation in the common criminal plan although they did not perpetrate the *actus reus* of the crimes of which they were convicted; the *actus reus* was instead perpetrated by executioners simply carrying out the orders of the court.’⁷² His opinion, however, is not based on certainty since he stated that the NMT ‘appears to have imposed.’ Yet, despite this uncertainty, he went on to argue:

‘Nowhere did the Tribunal discuss the mental state of the executioners who carried out the death sentences imposed as a result of the actions of Lautz, Rothaug (...), or whether such persons even had knowledge that the death sentences formed part of a plan to pervert the law for the purpose of exterminating Jews and other “undesirables.”’⁷³

Yet, Judge Bonomy never questioned whether by acting on behalf of Lautz and Rothaug, the executioners, through their actions, became members of the common plan. He provided similar analysis regarding the *RuSHA* case.⁷⁴

In this case, the NMT addressed the liability of several officials who belonged to a German SS branch, called ‘*RuSHA*’.⁷⁵ The purpose of the SS organizations was to effect ‘the ideology and program of Hitler.’⁷⁶ The program consisted of a ‘two-fold objective of weakening and eventually destroying other nations while at the same time strengthening Germany, territorially and biologically, at the expense of conquered nations.’⁷⁷ Among the *RuSHA* officials charged and convicted, Judge Bonomy was only concerned with the liability of two individuals: Hofmann who was the Chief of *RuSHA* and Hildebrandt who was a SS member who held a high-ranking role.⁷⁸ The indictment alleged that there was a common plan, known as the ‘Germanisation’ plan.⁷⁹ ‘The object of this program was to strengthen the German nation and the so-called “Aryan” race at the expense of such other nations and groups by imposing Nazi and German characteristics upon individuals selected.’⁸⁰ This program was carried out through several acts: kidnapping the children of foreign nationals in order to select for Germanization those who were considered of ‘racial value;’ encouraging and compelling abortions on Eastern workers for the purposes of preserving their working capacity as slave labour and of weakening Eastern nations; taking away, for the purpose of extermination or Germanization, infants born to Eastern workers in Germany; executing, imprisoning in concentration camps, or Germanizing Eastern workers and prisoners of war who had had sexual intercourse with Germans, and imprisoning the Germans involved; preventing marriages and hampering reproduction of enemy nationals; and participating in the persecution and extermination of Jews.⁸¹

The NMT found that the leadership of *RuSHA* and particularly the accused Hofmann and Hildebrandt, adhered to and enthusiastically participated in the execution of this ‘Germanisation’ plan by effecting, through *RuSHA* agents, abortions on foreigners

⁷² See n. (31), para. 20.

⁷³ Ibid.

⁷⁴ NMT. Vols. IV and V; Heller (2011) 98-99.

⁷⁵ NMT, Vol. IV, pg. 599.

⁷⁶ Ibid 599.

⁷⁷ Ibid 599.

⁷⁸ Ibid 609.

⁷⁹ Ibid 609-611.

⁸⁰ Ibid 610.

⁸¹ Ibid 609-610.

impregnated by Germans, punishment for sexual intercourse between Germans and non-Germans, the slave labour of Poles and other Easterners, the persecution of Jews and Poles, and the kidnapping of foreign children.⁸² It held both Hofmann and Hildebrandt liable for, *inter alia*, kidnappings and forcible abortions carried out by others.⁸³

Judge Bonomy's analysis of this case was that 'in relation to neither the kidnappings nor the abortions did the Tribunal consider and determine the state of mind of the perpetrators.'⁸⁴ He added that '(n)o mention is made of the examiners' and abductors' state of mind, or whether they agreed with, or knew of, the Germanisation plan.'⁸⁵ By providing such reasoning, Judge Bonomy reached the following conclusion regarding the *Justice* and *RuSHA* cases:

'(B)oth cases are examples of international tribunals applying international humanitarian law and attributing criminal responsibility for participation in a joint criminal enterprise where there was a close link between the participants in the JCE and the physical perpetrators of the crimes, but where the physical perpetrators' criminal responsibility was not considered and determined.'⁸⁶

Judge Bonomy's Opinion: Merging JCE with indirect perpetration

Judge Bonomy's final comment that merits attention concerns his understanding of the theory of indirect perpetration. I have previously defined this theory as an accused person being held liable for a crime when he uses another person as an instrument or tool to physically perpetrate this crime.⁸⁷ Judge Bonomy provided a similar definition, adding that it applies, regardless of whether the RPP is himself culpable or is an innocent agent.⁸⁸ He then referred to several domestic systems that apply this theory: Germany,⁸⁹ France,⁹⁰ Poland,⁹¹ Argentina⁹² and Colombia.⁹³ From this analysis, he concluded that indirect perpetration 'is a general principle of criminal law.'⁹⁴ However, he did not distinguish it from JCE. Instead, he argued that it is an 'aid to the interpretation and delineation of the contours of JCE.'⁹⁵ Yet, he did not explain how indirect perpetration is related to the application of JCE. Such reasoning raises serious concerns about NCSL limitations and the extent to which a form of liability can be modified.

Brief conclusions

In light of Judge Bonomy's views, we can provide the following brief comments. His argument that the JCE does not need to include the RPP is not found under any precedent. As per his words, no case law had expressly or specifically stated that the enterprise ought to

⁸² NMT, Vol. V, pgs. 160-161.

⁸³ Ibid 106, 160-161.

⁸⁴ See n. (31), para. 23.

⁸⁵ See n. (31), para. 24.

⁸⁶ See n. (31), para. 26.

⁸⁷ See n. (38).

⁸⁸ See n. (44), para. 28.

⁸⁹ See n. (31), para. 28: Citing Article 25 of German Criminal Code and Roxin (1994) 242-252, 278-279, 653-654.

⁹⁰ Ibid: Citing French Cour de Cassation case law.

⁹¹ Ibid: Article 18 (1) of the Polish Criminal Code.

⁹² Ibid: Article 45 of the Argentine Penal Code.

⁹³ Ibid: Article 29 of the Colombian Penal Code.

⁹⁴ See n. (31), para. 30.

⁹⁵ Ibid.

include the RPP.⁹⁶ However, likewise, he did not cite any cases where there was explicit guidance that the RPP does not need to be a JCE member. Therefore, the propriety of such reasoning ought to be carefully examined.

Secondly, his understanding that JCE can be applied when there is a close link between the RPPs and the JCE participants and that the judges do not need to determine the *mens rea* of the RPPs, is based on his interpretation of the *Justice* and *RuSHA* cases. No other precedents or scholarly analyses appear to support this view.⁹⁷ Lastly, his failure to explain how indirect perpetration is an aid to the interpretation of JCE leaves the application of JCE uncertain. Many criminal law theorists consider indirect perpetration a stand-alone theory of commission, which is distinct to JCE.⁹⁸ His view that the two can be merged should therefore be treated with much caution considering that the *Tadic* Appeals Judges had already defined JCE according to specific elements based on how the doctrine was ‘firmly established in CIL.’⁹⁹ *Tadic* did not include indirect perpetration as part of the theory or even refer to it as a possibility.¹⁰⁰

8.3 RECONCEPTUALISING JCE 1: BRDJANIN

Having explained the *Brdjanin* Trial Judgment and the *Milutinovic* Trial Decision, this section will now examine how JCE was reconceptualised. It reviews the *Brdjanin* Appeals Judgment exercise of discretion which relied significantly on Judge Bonomy’s reasoning.

8.3.1 The *Brdjanin* Appeals Judgment

The Prosecutor appealed on three grounds:¹⁰¹

1. Does the RPP need to be part of the enterprise and, if he does not, can he be used as a tool by a JCE participant to commit JCE crimes?¹⁰²
2. Is it necessary to prove an agreement between the RPP and the JCE participant?¹⁰³
3. Is JCE limited to small cases?¹⁰⁴

Inclusion of the RPP and using the RPP as a tool

In addressing the first ground of appeal, the *Brdjanin* Appeals Judges noted that no Appeals Chamber has ever explicitly answered this question.¹⁰⁵ The appeal itself concerns two distinct matters: firstly, whether the RPP needs to be part of the enterprise and secondly, if he does not, whether he can be used as a tool by a JCE participant. These two aspects of the first

⁹⁶ See n. (46, 47 and 48).

⁹⁷ Other than the *Brdjanin* Appeals Judgment where Judge Shahabuddeen dissented.

⁹⁸ See n. (38) for scholarly analyses related to indirect perpetration. All commentaries consider indirect perpetration a different theory to JCE.

⁹⁹ See chapter 2.2.2.

¹⁰⁰ See chapter 2.2.2.

¹⁰¹ The Prosecutor, in fact, appealed on two grounds only, see *Brdjanin* Appeals Judgment, para. 358. However, the Appeals Chamber addressed these two grounds under three separate headings, see *Brdjanin* Appeals Judgment, ICTY, para. 392.

¹⁰² *Brdjanin* Prosecution Appeal Brief, ICTY, paras. 3.1 and 3.3.

¹⁰³ *Ibid* 4.1.

¹⁰⁴ *Ibid*.

¹⁰⁵ *Brdjanin* Appeals judgment, para. 366.

ground of appeal are inter-related. Yet, the judges only proceeded to examine ‘whether the person who carried out the *actus reus* of a crime must be a member of the JCE for liability to attach to a member for this crime.’¹⁰⁶ There was no mention of whether the RPP can be used as a tool if he is not a JCE member. Thus the approach they took in reviewing case law was flawed. They should have examined whether the RPP does not need to be a JCE member and whether he can be used as a tool. Their case law analysis consisted of NMT and ICTY law.

In reviewing NMT law, they referred to the two cases mentioned by Judge Bonomy, the *Justice* and *RuSHA* cases. They noted that these two cases are ‘apposite’ for this ground of appeal.¹⁰⁷ They further described Judge Bonomy’s analysis of these cases as ‘instructive’¹⁰⁸ and ‘apt.’¹⁰⁹ They then cited the principal extracts of his reasoning¹¹⁰ and agreed with Judge Bonomy that the cases do not examine the *mens rea* of the RPP’s or whether they had acted to further the criminal enterprise.¹¹¹ Their conclusion was that:

‘Post-World War II jurisprudence recognizes the imposition of liability upon an accused for his participation in a common criminal purpose, where the conduct that comprises the criminal *actus reus* is perpetrated by persons who do not share the common purpose.’¹¹²

In examining ICTY jurisprudence, they also referred to Judge Bonomy’s views. The *Brdjanin* Appeals judges, once again, agreed with Judge Bonomy, concurring that the *Tadic* Appeals Judgment had not ‘clearly’¹¹³ resolved whether the RPP’s need to be part of the enterprise.¹¹⁴ They stated that it cannot ‘be considered conclusive as to whether principal perpetrators must be members of the JCE.’¹¹⁵ They then turned to other ICTY judgments. The most important part of their analysis was that the *Krstic* and *Stakic* Appeals Judgments provided evidence that the RPP’s need not be part of the enterprise.¹¹⁶ In *Krstic*, there were two JCE’s. The *Krstic* Trial Chamber found the accused guilty of inhumane acts and persecution as crimes against humanity for his participation in the first JCE and genocide for his participation in the second JCE. The members of these JCE’s included only high-ranking Bosnian Serb political and military leaders but not the principal perpetrators. The *Brdjanin* Appeals judges argued that ‘the principal perpetrators, though not mentioned explicitly, were probably privates and other low-ranking members of the (army).’¹¹⁷ They noted that the *Krstic* Appeals Judgment did not review this finding.¹¹⁸ In their view, *Krstic* was therefore liable for crimes by RPP’s who were not part of the JCE. In examining the *Stakic* Appeals Judgment, the judges noted that the JCE was:

¹⁰⁶ Ibid 392.

¹⁰⁷ Ibid 393.

¹⁰⁸ Ibid 398.

¹⁰⁹ Ibid 399.

¹¹⁰ Ibid 398-403.

¹¹¹ Ibid 400-403.

¹¹² Ibid 404.

¹¹³ Ibid 405.

¹¹⁴ See section 7.2.2.

¹¹⁵ *Brdjanin* Appeals judgment, para. 406.

¹¹⁶ Ibid 408. They also reviewed the *Vasiljevic* and *Krnojelac* Appeals Judgments, noting that these two cases do not conclusively prove that a RPP does not need to be part of the enterprise, see Ibid 407.

¹¹⁷ Ibid 408.

¹¹⁸ Ibid 408.

‘(c)omposed only of the leaders of political bodies, the military and the police. Its common purpose was however clearly carried out by a larger number of individuals, including Bosnian Serb police, military, and paramilitary forces. (...) Stakic was convicted of certain crimes (murder and extermination) committed by non-members under the third (also “extended”) form of joint criminal enterprise. This is a precedent not to be lightly dismissed by the Appeals Chamber.’¹¹⁹

Based on this analysis, the *Brdjanin* Appeals Judges made several points regarding JCE. The first concerned how it ought to be applied. They held that ‘what matters in a first category JCE is not whether the person who carried out the *actus reus* of a particular crime is a member of the JCE, but whether the crime in question forms part of the common purpose.’¹²⁰ This statement is revealing for two reasons. It focuses on ‘a crime perpetrated’ rather than ‘a group of persons committing crimes collectively.’ Secondly, it concedes that a JCE member can be held liable for a crime committed by a non-JCE member. In a separate paragraph, the judges substantiated this point and stated that ‘to hold a member of a JCE responsible for crimes committed by non-members of the enterprise, it has to be shown that the crime can be imputed to one member of the joint criminal enterprise, and that this member – when using a principal perpetrator – acted in accordance with the common plan. The existence of this link is a matter to be assessed on a case-by-case basis.’¹²¹ The statement established liability for crimes committed by non-JCE members who are being used by JCE members. It introduced the notion of ‘using a person to commit crimes’ within the JCE theory.

With this new definition set out, the judges clarified the levels of liability of JCE members who use the non-JCE RPP and liability of other JCE members who do not use the RPP. They stated:

‘When the accused, or any other member of the JCE, in order to further the common criminal purpose, uses persons who, in addition to (or instead of) carrying out the *actus reus* of the crimes forming part of the common purpose, commit crimes going beyond that purpose, the accused may be found responsible for such crimes provided that he participated in the common criminal purpose with the requisite intent and that, in the circumstances of the case, (i) it was foreseeable that such a crime might be perpetrated by one or more of the persons used by him (or by any other member of the JCE) in order to carry out the *actus reus* of the crimes forming part of the common purpose; and (ii) the accused willingly took that risk – that is the accused, with the awareness that such a crime was a possible consequence of the implementation of that enterprise, decided to participate in that enterprise.’¹²²

This reasoning set out liability for all JCE members based on one JCE member using another RPP to carry out crimes. Of importance, here, is the fact that the JCE member who uses the non-JCE RPP is liable because the RPP is committing a crime of the enterprise and is being used for this purpose. However, there is no explanation regarding the nexus between the other JCE member who is not using the RPP (but remains part of the enterprise) and the actions of the RPP. The reference to ‘foreseeable’ and ‘awareness of a possible consequence,’ in this paragraph, concerns the application of JCE 3. The judges did not engage in any specific discussion of intention, knowledge or awareness on behalf of the JCE member who is not

¹¹⁹ Ibid 409.

¹²⁰ Ibid 410.

¹²¹ Ibid 413.

¹²² Ibid 411.

using the RPP. Had the judges referred to an awareness that another JCE member is using a RPP to commit crimes, the discussion concerning culpability would be of a different nature. I will return to this discussion in the analysis when addressing liability for the JCE member not using the RPP.

Is there a need for proof of an agreement between the RPP and the participant?

In addressing the second ground of appeal, the Appeals Judges also referred to the *Justice* case, the *RuSHA* case and ICTY jurisprudence. By using these precedents, they concluded that liability under JCE ‘does not require an understanding or an agreement between the accused and the principal perpetrator of the crime to commit that particular crime.’¹²³ They thus overturned the *Brdjanin* Trial Judgment reasoning.¹²⁴

The most important parts of their reasoning concerned the fact that there was no agreement between the executioners of the court orders and Lautz and Rothaug in the *Justice* case. A similar conclusion applies to the *RuSHA* case as there was no agreement between the executioners of the abortions and Hofmann and Hildebrandt.¹²⁵ They also referred to the language used in the *Tadic* Appeals Judgment: ‘the common purpose need not be previously arranged or formulated; it may materialize extemporaneously.’¹²⁶ Additionally, they referred to the *Krnjelac* Appeals Judgment which held:

‘it is less important to prove that there was a more or less formal agreement between all the participants than to prove their involvement in the system.’¹²⁷

Is JCE limited to small cases?

In addressing the final ground of appeal, the *Brdjanin* Appeals Judges held that a JCE can be applied to a large-scale case, contrary to the Trial Chamber conclusion.¹²⁸ They held that the *Brdjanin* Trial Chamber had misinterpreted the *Tadic* Appeals Judgment in noting that JCE only applies to small cases. They stated that *Tadic* spoke of a ‘common, shared intention on the part of a group to forcibly remove members of one ethnicity from their town, village or region.’¹²⁹ The fact that *Tadic* referred to a ‘region’ is indicative of the large scale of the enterprise. They further cited the *Tadic* appellate reference to the NMT case of *Einsatzgruppen* which concerned large mass killings across a vast area of Europe.¹³⁰ Their final rationale for reaching this conclusion was the ICTR *Rwamakuba* Appeals Chamber reasoning. This decision reviewed the *Justice* case and stated that this case ‘shows that liability for participation in a criminal plan is as wide as the plan itself, even if the plan amounts to a “nation-wide government organized system of cruelty and injustice.”’¹³¹

¹²³ *Brdjanin* Appeals Judgment, para. 415.

¹²⁴ See section 8.2.1.

¹²⁵ *Brdjanin* Appeals Judgment, paras. 395-404.

¹²⁶ Ibid 418 referring to the *Tadic* Appeals Judgment, para. 227 (ii).

¹²⁷ Ibid 416 referring to the *Krnjelac* Appeals Judgment, para. 96.

¹²⁸ Ibid 420-425.

¹²⁹ Ibid 422, referring to the *Tadic* Appeals Judgment, para. 204.

¹³⁰ Ibid 422, fn. 900.

¹³¹ Ibid 423, citing the *Rwamakuba* Appeals Decision, para. 25.

Important safeguards

After addressing the three grounds of appeal, the Appeals Judges turned to defence counsel¹³² concerns regarding the ‘limits of liability under JCE.’¹³³ The judges underlined that the application of JCE ‘provides sufficient safeguards against overreaching or lapsing into guilt by association.’¹³⁴ They substantiated these safeguards, emphasising several points. Firstly, ‘the accused must possess the requisite intent.’¹³⁵ Secondly, judges ‘must find beyond reasonable doubt that a plurality of persons shared the common criminal purpose.’¹³⁶ Thirdly, ‘that the accused made a contribution to this common criminal purpose.’¹³⁷ Fourthly, ‘that the commonly intended crime (or, for convictions under the third category of JCE, the foreseeable crime) did in fact take place.’¹³⁸

As they had reconceptualised JCE by including liability for a crime committed by a non-JCE member, they set out a list of requirements for judges to meet. These requirements prevent any conviction through guilt by association. They can be seen as safeguarding the fairness of the newly formulated JCE theory. They include ‘establish(ing) that the crime (committed by the non-JCE RPP) can be imputed to at least one member of the joint criminal enterprise, and that this member – when using the (RPP) – acted in accordance with the common plan; (...) identify(ing) the plurality of persons belonging to the JCE (not necessary to identify by name each of the persons involved); specify(ing) the common criminal purpose in terms of both the criminal goal intended and its scope (for example, the temporal and geographic limits of this goal, and the general identities of the intended victims); mak(ing) a finding that this criminal purpose is not merely the same, but also common to all of the persons acting together within a joint criminal enterprise; and characteriz(ing) the contribution of the accused in this common plan.’¹³⁹

According to the judges, these requirements, when met, ensure that ‘the accused has done far more than merely associate with criminal persons.’¹⁴⁰ The judges were satisfied that the accused ‘is (being) appropriately held liable not only for his own contribution, but also for those actions of his fellow JCE members that further the crime (first category of JCE) or that are foreseeable consequences of the carrying out of this crime.’¹⁴¹ They emphasised that ‘it is not decisive whether these fellow JCE members carried out the *actus reus* of the crimes themselves or used principal perpetrators who did not share the common objective.’¹⁴²

Conviction of Brdjanin

Despite this appeal and the change of JCE elements, Brdjanin was not convicted of the crimes charged.¹⁴³ This was due to an *inter partes* agreement¹⁴⁴ between the Prosecutor and the

¹³² See *Brdjanin* Response to Prosecution Brief, paras. 3-42. The *Brdjanin* Association of Defence Counsel (ADC) *amicus curiae* brief also raised similar concerns, see paras. 11-41.

¹³³ *Brdjanin* Appeals Judgment, para. 426.

¹³⁴ *Ibid.*

¹³⁵ *Ibid.* 429.

¹³⁶ *Ibid.* 430.

¹³⁷ *Ibid.*

¹³⁸ *Ibid.*

¹³⁹ *Ibid.* 430.

¹⁴⁰ *Ibid.* 431.

¹⁴¹ *Ibid.*

¹⁴² *Ibid.*

¹⁴³ See n. (13).

defence. This agreement emerged as a result of the different positions adopted by the Prosecutor. During the trial phase, it had argued that the RPP needs to be a JCE member. However, during the appeal, it changed its opinion. As a result, the Prosecutor stated that even if the Appeals Chamber holds that the RPP does not need to part of the enterprise, ‘the JCE in the present case must include the physical perpetrators’¹⁴⁵ because of its position at the trial phase. The Appeals Chamber shared this view, noting that it would be unfair to ‘enter new convictions based on a finding that principal perpetrators do not need to be JCE members.’¹⁴⁶ After agreeing with this view, the judges held that they could not determine that the RPP’s were part of the enterprise.¹⁴⁷ Consequently, they could not convict Brdjanin under JCE.

Dissenting view of Judge Shahabuddeen

The final important point regarding the exercise of discretion concerns the Partly Dissenting Opinion of Judge Shahabuddeen.¹⁴⁸ As noted throughout this thesis, Judge Shahabuddeen was one of the *Tadic* Appeals judges who provided several commentaries regarding its formulation. In addition, he sat on all important Appeals Judgments concerning the application of JCE.¹⁴⁹ His dissenting views therefore merit attention.

In *Brdjanin*, he advanced different views about the interpretation of the *Justice* and *RuSHA* cases, the exclusion of the RPP and the meaning of a JCE member. Firstly, he disagreed with the majority’s interpretation of the two NMT cases. He noted that the NMT judges did address the *mens rea* of the RPP’s:

‘In those two cases, the intention of the accused to commit certain crimes was proved by showing that the accused participated in carrying out schemes which purported to require the obedience of physical perpetrators to perpetrate the constitutive acts.’¹⁵⁰

Regarding the inclusion of the RPP, he noted that ‘the liability of an existing member of a JCE for a crime committed by a physical perpetrator can only be demonstrated if the physical perpetrator is a member of the JCE, and therefore within the agreement which the JCE incorporates for each member to be liable for crimes committed by fellow members.’¹⁵¹ It is therefore ‘necessary to prove that the physical perpetrator was a member of the JCE, for it is only if he was that the accused is caught by the understanding underlying the JCE that the intention of members (who include the accused) was that they were to be liable for certain crimes committed by fellow members.’¹⁵²

The most important comment however concerns his disapproval of the judgment’s reference to a link between the RPP who is a non-JCE member and the JCE participant. Judge Shahabuddeen noted that ‘a physical perpetrator, who acquiesces in the JCE and perpetrates a crime within its common purpose, thereby becomes a member of the JCE, if he is not already

¹⁴⁴ *Brdjanin* Prosecution Appeal Brief, para. 3.3.

¹⁴⁵ *Ibid.*

¹⁴⁶ See n. (108), para. 361.

¹⁴⁷ *Ibid* 449.

¹⁴⁸ In addition, Judge Van Den Wyngaert issued a Declaration and Judge Meron issued a Separate Opinion. However, both the Declaration and the Separate Opinion supported the majority reasoning.

¹⁴⁹ ICTY cases: *Stakic* Appeals Judgment, *Brdjanin* Appeals Judgment and *Krajisnik* Appeals Judgment.

¹⁵⁰ *Brdjanin* Appeals Judgment, Partly Dissenting Opinion of Judge Shahabuddeen, para. 16.

¹⁵¹ *Ibid* 3.

¹⁵² *Ibid* 17.

a member.¹⁵³ Judge Shahabuddeen supported this view by referring to an extract from the IMT Judgment:

‘A plan in the execution of which a number of persons participate is still a plan, even though conceived by only one of them. (...) Hitler could not make aggressive war by himself. He had to have the co-operation of statesmen, military leaders, diplomats, and business men. When they, with knowledge of his aims, gave him their cooperation, they made themselves parties to the plan he had initiated.’¹⁵⁴

Judge Shahabuddeen concluded, noting that ‘a JCE is an agreement but that it does not have to be an agreement of a contractual kind.’¹⁵⁵ He disagreed that there was a need to use the analogy of ‘using a tool,’ stating:

‘the case of a physical perpetrator acting “as a tool” of a member of the JCE does not prove the opposite of what is put forward here. (...) I am of opinion that the *actus reus* was, in law, perpetrated by the member of the JCE in the same way as if he had used an inanimate instrument to accomplish his will; so the real perpetrator was in any event a member of the JCE.’¹⁵⁶

This led him to state that ‘(w)here the crime was committed by a physical perpetrator, the “link” between the accused member and the crime can only be provided by showing that the physical perpetrator was himself a member of the JCE and therefore within the intention of the accused member to take responsibility for certain crimes when committed by fellow members.’¹⁵⁷

The overall effect of his dissent provides a contrasting view regarding the reconceptualization of JCE. It is crucial in examining the fairness of discretion because it engages with the reasoning underlying the NMT judgments (understanding of important CIL state practice) rather than endorse Judge Bonomy’s view without any critical analysis. It further opposes the idea that JCE ought to incorporate the idea of ‘using a RPP as a tool’ and reaffirms that there is no need to reconceptualise JCE at all. I will return to these comments when providing the analysis in the section below.

8.4 ANALYSING THE *BRDJANIN* APPEALS JUDGMENT: WAS DISCRETION FAIR?

Having provided the factual background of *Brdjanin* and the main extracts of the Appeals Chamber reasoning, this section will explore the fairness of discretion. Since the *Brdjanin* Appeals judges referred to a JCE group and a non-JCE group, the analysis will focus on two JCE participants. The first is the JCE participant who uses the RPP as a tool. I will label this JCE participant as the ‘indirect participant.’ The second is the JCE participant who does not use the RPP but is nevertheless liable because he is a JCE member. I will label the latter an ‘ordinary participant.’ To clarify the roles, link and liability of such participants, I have provided three diagrams below. Diagram 1 illustrates the role and link among participants.

¹⁵³ Ibid 4.

¹⁵⁴ Ibid 8, citing the IMT Judgment, pgs. 468-469.

¹⁵⁵ Ibid 5.

¹⁵⁶ Ibid 13.

¹⁵⁷ Ibid 18.

Diagram 2 clarifies the interaction between the JCE group and the non-JCE group. Diagram 3 explains the rationale for holding individuals culpable. The analysis is structured accordingly.

Section 8.4.1 will explore the three grounds of appeal. It examines how each ground of appeal is related to some or all of the four factors concerning fairness (fair labelling, NPSC, CIL and NCSL). These factors are evident in the judgment as the reasoning explores the degree of culpability of the indirect and ordinary participants (fair labelling) and refers to CIL (in the form of NMT law and how pre-*Brdjanin* case law applied JCE based on precedents). Given the references to fair labelling and CIL, we ought to examine whether the label applied violates NPSC and whether the law found under CIL comports with NCSL considerations. After addressing these matters, section 8.4.2 will draw together the conclusions and question whether it is fair to hold the indirect and the ordinary participants liable. Section 8.4.3 provides a normative perspective, explaining how the ICTY judges could have exercised their judicial discretion. Section 8.4.4 examines the critique's perspective.

DIAGRAM 1

BRDJANIN AND OTHER PARTICIPANTS

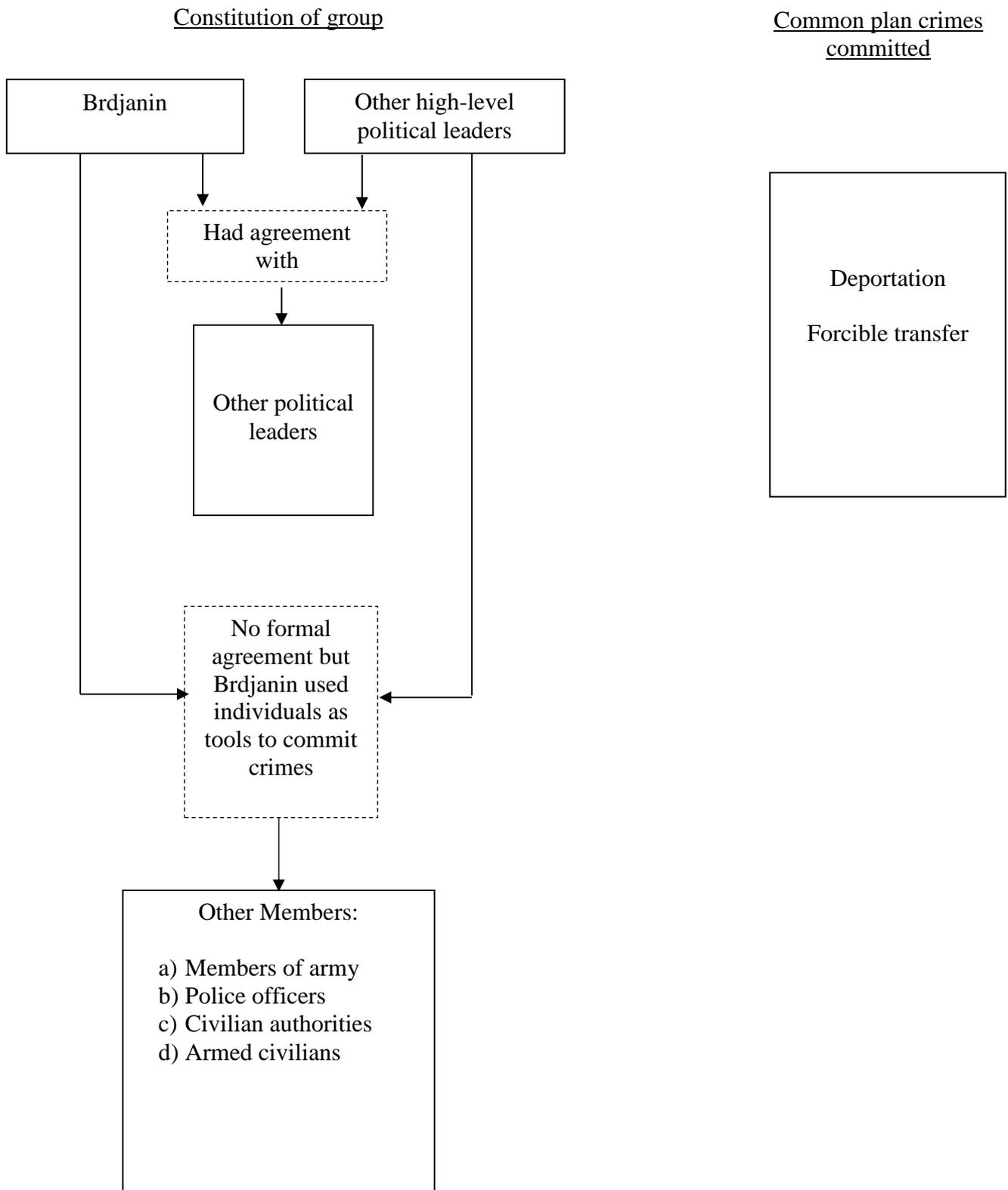


DIAGRAM 2

RELATIONSHIP BETWEEN PARTICIPANTS TO A CRIME AND EACH OTHER

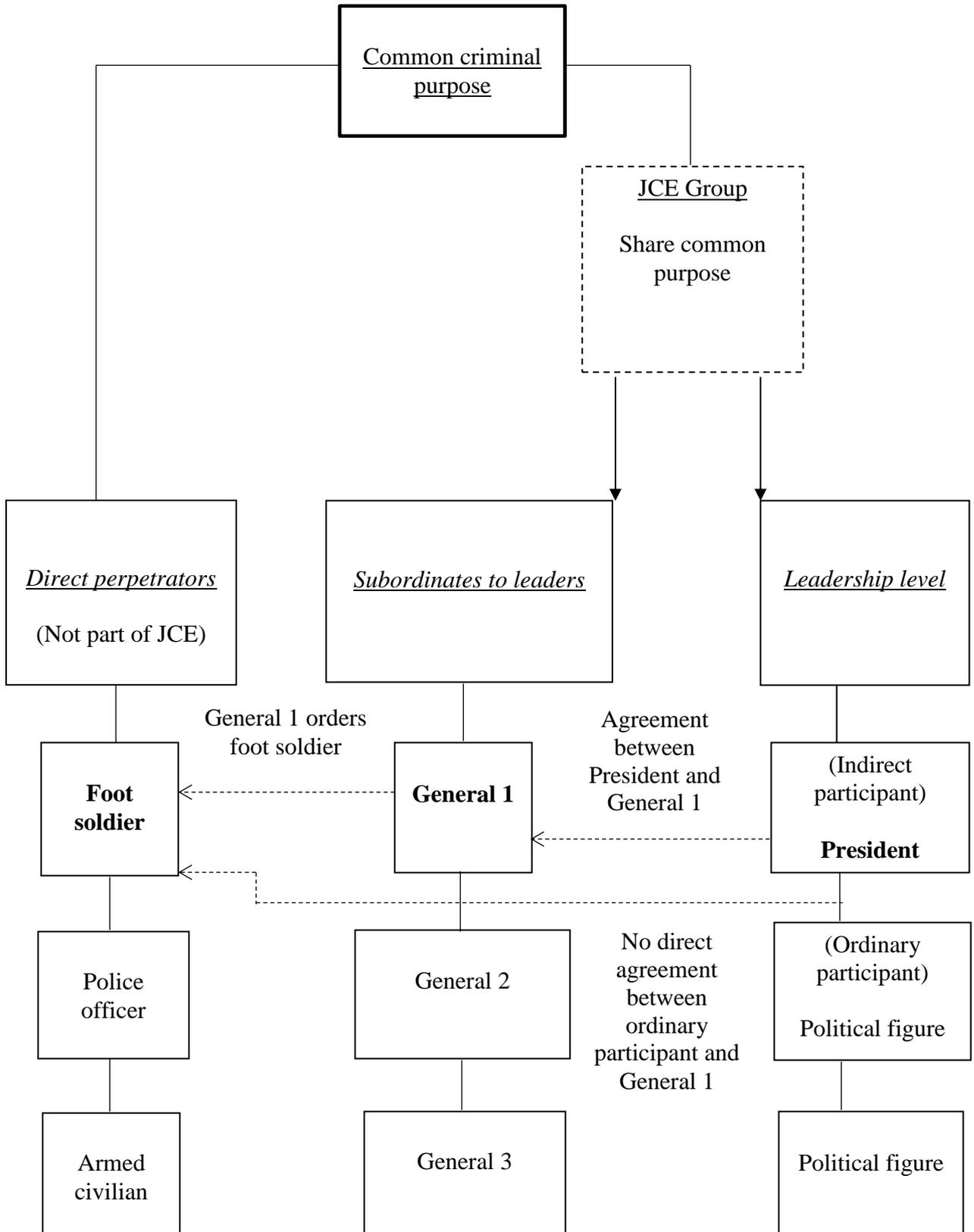
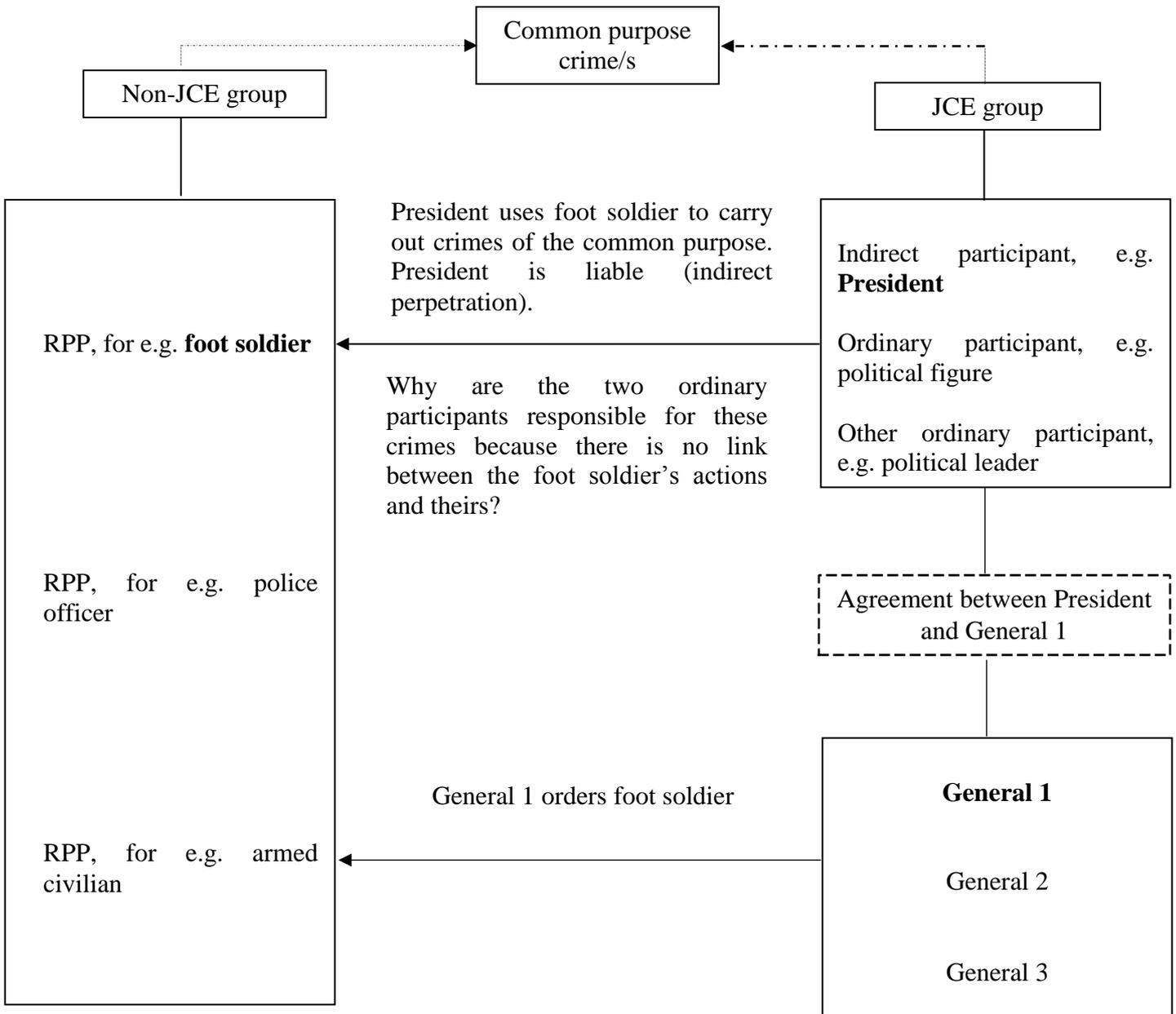


DIAGRAM 3

CULPABILITY OF PARTICIPANTS: INTENTION AND USING A PERSON AS AN INSTRUMENT



8.4.1 Examining the three grounds of appeal

In this section, I will firstly examine grounds two and three since they are not concerned with the liability of the ordinary and indirect participants. They are concerned with general matters regarding the application of JCE (scope of enterprise and need for agreement).

Second ground of appeal: Scope of enterprise

Regarding the scope of the enterprise, the *Brdjanin* Appeals Judges were correct in arguing that an enterprise can be large. Two reasons justify this conclusion. Firstly, this conclusion does not violate NPSC. If the evidence proves that the JCE member intended to participate in the JCE, then he is being held liable for his role in the enterprise. He is being convicted for his personal contribution.

Secondly, the idea that a criminal enterprise can be large falls in line with the reasoning provided by *Tadic*, other ICTY cases and more importantly, CIL precedents. *Tadic* defined an enterprise as ‘a plurality of persons that may “be organised in a military, political or administrative structure.”’¹⁵⁸ It did not restrict the scope of JCE to a small or geographically restricted size. Other ICTY decisions, such as *Deronjic* and *Nikolic*, provided similar reasoning as they referred to a criminal enterprise that included soldiers, generals and high-level politicians.¹⁵⁹ Furthermore, in instances, such as *Banovic* and *Krstic*, where only generals and soldiers were held liable,¹⁶⁰ the enterprises were nevertheless large-scale. In turning to post-WW II case law, one finds several precedents (representative of international state practice)¹⁶¹ which confirm these types of enterprises. One of the examples is the *Einsatzgruppen* case. Chapter 5 examined this case in detail, explaining how the four different units of this group committed several crimes. The units were large in number with over eight hundred people each. Another example is the *RuSHA* case, cited by *Brdjanin*. It involved a large scale JCE consisting of numerous SS individuals.¹⁶² Besides these two cases, other NMT examples may be cited as CIL evidence. These include the ‘Medical case’ which involved twenty-three defendants but concerned the actions of numerous unnamed doctors,¹⁶³ the ‘Pohl case,’ which concerned large units that mistreated POWs¹⁶⁴ and the ‘Hostages case’¹⁶⁵ which involved the mistreatment of hostages by numerous German troops in several areas. The conclusion, in light of such case law, is that an enterprise can be large in accordance with CIL state practice.

Third ground of appeal: Need for an agreement

The judges were also correct in arguing that the application of JCE does not require an express agreement. As with ground one, this reasoning falls in line with previous case law and does not violate NPSC. To demonstrate these points, we may examine the *Tadic*

¹⁵⁸ *Tadic* Appeals Judgment, ICTY, para. 227.

¹⁵⁹ *Deronjic* Trial Judgment, paras. 125-127; *Nikolic* Trial Sentence Judgment, paras. 30-33, 174.

¹⁶⁰ *Banovic* Trial Sentence Judgment, paras. 25-28 and *Krstic* Trial Judgment, paras. 608-611. For other cases, see: *Furundzija* Trial Judgment, para. 90; *Krnjelac* Trial Judgment, para. 118; *Obrenovic* Trial Judgment, paras. 80-85; *Mrda* Trial Sentence Judgment, paras. 8-12; *Kvočka* Appeals Judgment, paras. 233-236; *Kordic and Cerkez* Trial Judgment, para. 827; *Simic et al.* Trial Judgment, para. 156.

¹⁶¹ Chapter 5.3.4.

¹⁶² NMT, Vol. IV, pgs. 610-611.

¹⁶³ NMT, Vol. IV, pgs. 184-187.

¹⁶⁴ NMT, Vol. V, pgs. 962-974.

¹⁶⁵ NMT, Vol. XI, pgs. 1230-1240.

appellate reasoning, other ICTY cases and CIL precedents. Firstly, *Tadic* had stated the following:

‘There is no necessity for (the common) plan, design or purpose to have been previously arranged or formulated. The common plan or purpose may *materialise extemporaneously* and *be inferred* from the fact that a plurality of persons acts in unison to put into effect a joint criminal enterprise.’¹⁶⁶

This paragraph suggests strongly that there is no need for an express agreement. It is the responsibility of judges to determine and explain on a case-by-case basis how common plans have been formed either extemporaneously or through inferences. Four years after *Tadic*, the *Krnjelac* Appeals Judgment, provided similar reasoning stating that ‘it is less important to prove that there was a more or less formal agreement between all the participants than to prove their involvement in the system.’¹⁶⁷ The focus in that case was whether the participants were acting collectively rather than based on an agreement. Adding to this example is a series of JCE cases, where the following reasoning has been used: ‘an arrangement or understanding *need not be express*, and it *may be inferred from all the circumstances*.’¹⁶⁸ Such language confirms that an express agreement is unnecessary. Given this reasoning, it would be inappropriate for the *Brdjanin* Appeals Judges to restrict the application of JCE to an agreement. However, to determine whether this was the correct approach, it is necessary to prove that such law is found under CIL and not ICTY precedents. For this purpose, the three cases of *Einsatzgruppen*, *Justice* and *RuSHA* suffice. In all three cases, there was no express agreement among the defendants. In *Einsatzgruppen*, the atrocities were committed to fulfil the Fuehrer Order. There was no express agreement among all the eight hundred members of each unit. In the *Justice* case, the members of the German Ministry of Justice acted together rather than in accordance with an agreement. In the *RuSha* case, an agreement was likewise absent. However, SS officials had acted collectively to effect the Hitler program.

As mentioned above, the second point besides CIL concerns NPSC. In a JCE-based case where there is no agreement, it is still possible to hold an accused person liable without infringing this principle. As with ground one, as long as the evidence indicates the intention to participate with others collectively to commit certain crimes, NPSC has not been infringed. To further explain this point and demonstrate that an agreement is unnecessary to prove a ‘common’ plan, an example from the ICTY context may be cited. The case is *Furundzija*.

The latter was a military commander who interrogated a female witness on two occasions. During the first interrogation, she was forced by a commander to undress and remain naked before soldiers in a large room. *Furundzija* interrogated her and the commander threatened her with assault. The female witness was then left in the custody of the commander who raped her while *Furundzija* remained outside of the room. The witness was then kept in another room, naked and in front of soldiers and was raped again by the commander in front of *Furundzija*. When he was not present in the room, he was present in the vicinity and knew that rape was taking place. In a parallel interrogation, another female witness was also

¹⁶⁶ *Tadic* Appeals Judgment, ICTY, para. 227.

¹⁶⁷ *Krnjelac* Appeals Judgment, ICTY, para. 96.

¹⁶⁸ ICTY cases only: See *Vasiljevic* Trial Judgment, para. 66; *Krnjelac* Trial Judgment, para. 80 (emphasis added). For similar views not requiring proof of a pre-existing plan and inferring the plan from circumstances, see *Kupreskic* Trial Judgment, para. 772; *Furundzija* Appeals Judgment, para. 120; *Kordic and Cerkez* Trial Judgment, paras. 829-831; *Krstic* Trial Judgment, para. 611; *Vasiljevic* Trial Judgment, para. 66; *Krnjelac* Trial Judgment, paras. 487 and 113; *Deronjic* Trial Judgment, para. 127; *Brdjanin and Talic* Trial Decision, para. 32.

interrogated by Furundzija and assaulted by the commander. Furundzija and the commander divided the interrogation process between them with the former responsible for questioning while the latter assaulted and threatened the victims to elicit required information.¹⁶⁹

In examining this factual scenario, the Trial Chamber stated that ‘(t)here was no need for evidence proving the existence of a prior agreement between the Appellant and (commander) (...) The way the events in this case developed precludes any reasonable doubt that the Appellant and (the commander) knew what they were doing to (the female witness) and for what purpose they were treating her in that manner.’¹⁷⁰

This case indicates both proof of a joint enterprise in the absence of an agreement and Furundzija’s liability given his role.

First ground of appeal

Unlike grounds two and three, the first ground of appeal was incorrectly addressed. Regarding this ground of appeal, two questions are of concern:

- a) Can the RPP be excluded and can he be used as a tool?
- b) Can the element of ‘using a RPP as a tool/instrument’ be incorporated with the elements of JCE?

Can the RPP be excluded and can be used as a tool?

In examining the first question, the approach taken by the judges was flawed. As section 8.3.1 explained, the first ground of appeal concerned two distinct matters: excluding the RPP and using the latter as a tool to commit crimes. Yet, as part of their review, the judges only examined ICTY and NMT precedents to determine whether the enterprise needs to include the RPP. They did not examine any of the cases they cited to determine whether a RPP is actually being used as a tool if he is not a JCE member.¹⁷¹ Section 8.3.1 outlined the important extracts of their reasoning, noting how the extracts do not refer to any appraisal of whether NMT or ICTY law had applied JCE in this manner. The *Brdjanin* Appeals judges simply cited from the cases and concluded that a RPP does not need to be a JCE member. Yet, in spite of the absence of analysis regarding the use of a non-JCE member (RPP) as a tool, the judges nevertheless concluded that a JCE member can be held liable if he uses the RPP as a tool. The judges therefore exercised their discretion arbitrarily by introducing the notion of ‘using a perpetrator’ although their analysis did not address this matter.

In addition, the judicial analysis of the NMT and ICTY precedents was flawed. To support this position, I share the view of Judge Shahabuddeen who noted that, in the *Justice* and *RuSHA* cases, the RPP’s were in fact connected with the enterprises and considered JCE members. Neither does the *Justice* or the *RuSHA* case explicitly state that they were not part of the common criminal plans. Furthermore, the reasoning of these cases provides ample support that those who were convicted, whether RPP’s or participants, were connected with the enterprise and not outside of it. In the *RuSHA* case, participants were connected either because they belonged to the SS or were following orders from SS officials.¹⁷² In the *Justice*

¹⁶⁹ *Furundzija* Trial Judgment, ICTY, paras 124-130.

¹⁷⁰ *Furundzija* Appeals Judgment, ICTY, para. 120.

¹⁷¹ Chapter 8.3.1.

¹⁷² NMT, Vol. V, pgs. 89-154.

case, the executioners were connected because they were carrying out orders from those who worked in the Ministry of Justice.¹⁷³ In addition, the judgments do not refer to any link between a non-JCE RPP and a JCE participant or even mention ‘using a RPP as a tool.’ It therefore appears that the initial reasoning of Judge Bonomy which was cited by the *Brdjanin* Appeals Judges, is unsupported by the very reasoning of these cases. One could further argue that his interpretation of the two NMT cases was simply lifted and imported within the *Brdjanin* Appeals Judgment without any further questioning. The judges should have exercised their discretion in a more cautious manner by examining the cases in detail.

Regarding the *Brdjanin* appellate review of ICTY jurisprudence, several points can be made. Firstly, it is necessary to acknowledge that the *Brdjanin* Appeals Judges had rightly conceded that the *Tadic* Appeals Judgment did not provide an explicit answer whether a RPP needs to be part of the JCE. However, they failed to examine this case closely. Had they done so, they would have deduced that a strong inference from this case is that a RPP does need to be a JCE member as *Tadic* was convicted for crimes perpetrated by other JCE participants who were direct perpetrators.¹⁷⁴ In addition, two cases, besides *Tadic*, also convicted direct perpetrators for their role in a criminal enterprise.¹⁷⁵ Secondly, we can criticise the judgment’s reasoning for not addressing previous ICTY precedents in greater detail. Although, none of these cases had explicitly stated that a RPP needs to be a JCE member, two decisions provided strong guidance to the contrary.¹⁷⁶ The *Brdjanin and Talic* Decision stated that ‘(it) is clear (...) that in relation to (JCE 1 and 2), the prosecution must demonstrate that all of the persons charged and all of the persons who personally perpetrated the crime charged had a common state of mind.’¹⁷⁷ In addition, the *Krnjelac* Appeals Judgment held that ‘(t)he principal perpetrators of the crimes constituting the common purpose (...) should also be identified as precisely as possible.’¹⁷⁸ It also stated that the ‘very concept of (JCE) presupposes that its participants, other than the principal perpetrator(s) of the crimes committed, share the perpetrators’ joint criminal intent.’¹⁷⁹ Thirdly, if these arguments based on precedents and judicial reasoning fail to indicate that the RPP needs to be a JCE member, then it suffices to argue that it would run contrary to the structure of JCE to hold co-perpetrators liable for the crime committed by RPPs if the RPPs were excluded from the enterprise. A JCE that does not include the RPPs simply cannot be considered a criminal enterprise.

In conclusion, the only argument that could be advanced that suggests that the direct perpetrator does not need to be part of the enterprise is that no case law had explicitly stated so. However, this would be an unconvincing conclusion given the reasons that this section has provided. These include the analysis of *Tadic*, important extracts from other ICTY case law and the premise of JCE which consists of holding group participants liable for a crime committed because the RPP is acting jointly with them.

¹⁷³ NMT, Vol. III, pgs. 992-1081.

¹⁷⁴ See chapter 2.2.

¹⁷⁵ *Kupreskic* Trial Judgment, para. 782; *Vasiljevic* Trial Judgment, para.106.

¹⁷⁶ The *Popovic* Indictment Decision also deferred answering this question, see para. 21: ‘Whether the physical perpetrator must be a participant in the JCE is therefore an issue to be addressed at trial.’

¹⁷⁷ *Brdjanin and Talic* Decision, para. 26.

¹⁷⁸ *Krnjelac* Appeals Judgment, para. 116.

¹⁷⁹ *Ibid*, para. 84.

Can the element of ‘using a RPP as a tool/instrument’ be incorporated with the elements of JCE?

The second question calls for an enquiry about the original definition of JCE as well as how this definition should be construed in light of fair labelling, NCSL, NPSC, the use of CIL and important procedural safeguards. I will address these matters in respect of liability for the indirect and ordinary participants.

The indirect participant:

Holding the indirect participant liable for the crime of the RPP does not violate fair labelling. Although the judges stated that the RPP does not need to be a JCE member, the indirect participant ought to be held liable as a principal because he is using the RPP as a tool. His degree of culpability derives from the fact that he is acting through the RPP to commit crimes. The actions of the RPP are therefore those of the JCE member because the JCE member intends the crime and is deliberately acting through someone else. Imposing liability as a principal is thus fair because of the intent and actions of the indirect participant.

The *Brdjanin* Appeals Judges, however, did not provide any analysis explaining their grounds for attributing this level of liability. Unlike *Tadic*, they did not refer to ‘morality’ or to the fact that holding *Brdjanin* liable as an aider and abettor would, for example, ‘understate the degree of criminal responsibility.’¹⁸⁰ However, despite the absence of this explanation in the majority judgment, Judge Van den Wyngaert’s Separate Opinion sheds some light. By endorsing the majority reasoning, she acknowledged that, had the *Brdjanin* Trial Judgment become the legal standard, it would have been an ‘unacceptable’ situation.¹⁸¹ She underlined that restricting JCE to an agreement would be ‘under-inclusive in respect of high-level perpetrators who use subordinates to commit crimes.’¹⁸² This statement implicitly acknowledges that the exercise of discretion should attribute a fair label to the high-level perpetrator. Either acquitting this person or labelling him an aider and abettor would not achieve this goal. Fair labelling has not been violated.

We can also conclude that the exercise of discretion does not violate NPSC. Although the judgment does not even refer to NPSC when reconceptualising JCE, we can reach this conclusion in light of NPSC’s definition, as chapter 4.3 explained. Its application in this context suggests that the indirect participant is being held liable fairly for his actions given the close connection between his intentional use of the RPP and the perpetration of the crime. However, although this exercise of discretion so far does not violate fair labelling and NPSC, three arguments can be raised regarding CIL and NCSL.

Firstly, as mentioned above, it is based on a misreading of NMT and ICTY jurisprudence. The judges had not provided a reasonable and acceptable interpretation of the *Justice* and *RuSHA* cases. Therefore, it is not based on any reasonable interpretation of law. Secondly, the judges did not conclude that their interpretation concerning the use of a RPP is found under CIL. Based on chapter 5’s analysis of CIL,¹⁸³ we cannot accept that only two NMT cases,

¹⁸⁰ Chapter 4.3.1.

¹⁸¹ *Brdjanin* Appeals Judgment, Separate Opinion of Judge Van den Wyngaert, para. 2.

¹⁸² *Ibid* 3.

¹⁸³ Chapter 5.3.

Justice and *RuSHA*, represents an acceptable evidentiary basis for drawing conclusions about CIL. In addition, neither did the judges advocate a methodology for CIL nor explain how their exercise of discretion is found under some other source of law. Thirdly, we can further criticise the reasoning since it does not explain how it meets NCSL requirements. Throughout the entire judgment that considers NMT and ICTY law, the judges do not refer to any NCSL requirements at all. If we conduct further analysis regarding this matter, we may argue that discretion violates NCSL because the elements of JCE have been interpreted beyond reasonable limits. As chapter 6.3 had explained, reasonable interpretation includes interpretation of existing provisions. The ECtHR has noted that ‘the role of adjudication vested in the courts is precisely to dissipate (any) interpretational doubts (that) remain’¹⁸⁴ since ‘there will always be a need for elucidation of doubtful points and for adaptation to changing circumstances.’¹⁸⁵ Other judgments have also clarified that NCSL does not ‘(outlaw) the gradual clarification of the rules of criminal liability through judicial interpretation from case to case, provided that the resultant development is consistent with the *essence of the offence* and could *reasonably be foreseen*.’¹⁸⁶ In applying this definition of NCSL to the reconceptualization of JCE, the essential elements of JCE have been modified substantially. Therefore, discretion in respect of the indirect participant’s liability violates NCSL.

The ordinary participant:

We can apply the same reasoning as above in respect of the ordinary participant. In doing so, the most important concern is the absence of an explanation regarding the culpability-nexus between the ordinary participant and the RPP. As chapter 8.3.1 explained, the judges did not clarify how his actions are related to the perpetration of the crime by the non-JCE RPP. We can reach two conclusions regarding this absence of explanation: either the judges advertently omitted this explanation or they simply made an assumption about the culpability-nexus without explaining it explicitly. A more detailed explanation could have included knowledge, intention or awareness that another JCE member is using a non-JCE RPP. At the ICC, the *Katanga and Chui* Confirmation of Charges Decision referred to ‘awareness.’¹⁸⁷ However, in the absence of any explanation, it is unclear why it is fair to hold the ordinary participant liable for the crime. Not only would it be unfair to hold him liable as a principal, but it is also unfair to even consider holding him liable at all. This reasoning further violates NSPC, is not found under CIL and provides no explanation regarding NCSL.

8.4.2 Is it fair to hold the indirect and ordinary participants liable?

Given this analysis related to the first ground of appeal, we may now examine whether it was fair to hold the indirect and ordinary participants liable. The conclusions of the above analysis can be summarised as follows:

¹⁸⁴ *Kafkaris v. Cyprus*, ECtHR, GC, para. 141.

¹⁸⁵ *Ibid.*

¹⁸⁶ *Kononov v. Latvia*, ECtHR, GC, para. 185; *Streletz, Kessler and Krenz v. Germany*, ECtHR, GC, para. 50; *K.-H.W. v. Germany*, ECtHR, GC, para. 85; *Jorgic v. Germany*, ECtHR, paras. 101-109; *Korbely v. Hungary*, ECtHR, GC, para. 69-71; *Del Rio Prada v. Spain*, ECtHR, GC, para. 93 (emphasis added).

¹⁸⁷ See n. (39).

Holding the indirect participant liable	Holding the ordinary participant liable
<ul style="list-style-type: none"> - Attributes a fair label - Does not violate NPSC - Is not found under CIL - Violates NCSL 	<ul style="list-style-type: none"> - Attributes an unfair label - Violates NPSC - Is not found under CIL - Violates NCSL
Unfair	Unfair

Liability for the indirect participant

Given these conclusions in respect of the indirect participant, it is clear that discretion is unfair. To explain this conclusion, we may draw from the reasoning of chapter 7 where I examined the fairness of JCE’s formulation. In that chapter, I had argued that CIL and NCSL are two indispensable factors when interpreting law. Applying this reasoning in the context of reconceptualising JCE, the latter form is neither found under CIL nor meets NCSL requirements. Therefore, regardless of the fact that the label is fair and that it does not violate NPSC, discretion is unfair. The judges should have reviewed CIL state practice in further detail before reaching their conclusions.

Liability for the ordinary participant

For similar reasons, discretion in holding the ordinary participant liable is also unfair. However, in this instance, discretion fails to satisfy not only CIL and NCSL requirements but also NPSC considerations given the lack of connection between the RPP and the ordinary participant.

Conclusions

In conclusion, liability for both the indirect and ordinary participants is unfair.

8.4.3 How should the *Brdjanin* Appeals Judges have exercised their discretion?

Post-*Brdjanin*, ICTY case law continued to apply the aforementioned reasoning set out by the *Brdjanin* Appeals Judgment.¹⁸⁸ However, such an unfair exercise of discretion could have been prevented. The *Brdjanin* Appeals judges could have exercised their discretion in two different ways, at least in respect of the indirect participant. This would have ensured that discretion meets the four requirements (fair labelling, NPSC, CIL and NCSL).

¹⁸⁸ *Dordevic* Appeals Judgment, paras. 141, 165 and 169.

Overturing the Milutinovic Trial Decision: Embracing indirect co-perpetration

The first choice is that the judges could have formulated a theory of indirect co-perpetration. Although the *Milutinovic* Trial Decision had argued that this theory is not found under CIL, this was not a final decision at the ICTY. Therefore, Appeals Chamber judges could have reviewed whether the *Milutinovic* decision was correct in its examination of CIL law.

To do so, they could have referred to the judicially articulated ground of appeal which I mentioned in chapter 1.¹⁸⁹ To recapitulate, this ground of appeal stated that judges could determine matters of general importance to the jurisprudence of the Tribunal if it were necessary. In the context of reconceptualising JCE, the judges could have argued that it is essential for the court to determine whether indirect co-perpetration is found in many domestic systems of the world. Although the *Milutinovic* Trial Judges had previously concluded that there was insufficient case law, it would be important to revisit this finding if state practice from countries across the world stated otherwise. As a matter of fact, in examining this issue, several important ICC decisions and scholarly commentaries,¹⁹⁰ confirm that there is sufficient jurisprudence to argue that indirect co-perpetration is either part of CIL or a general principle of law. As a result, we may argue that indirect co-perpetration is found under a source of law applicable at the ICTY and it may be considered. Therefore, the *Brdjanin* Appeals judges could have exercised their discretion accordingly and subsequently leave the elements of JCE intact. In addition, proof that such law was foreseeable and accessible to the defendants would be supported by jurisprudence that was familiar to such defendants. To support this position, Judge Schomburg had analysed the case law of several countries in a dissenting opinion and concluded that indirect co-perpetration is found in ICL. These countries included the Former Yugoslavia, Montenegro, Bosnia and Herzegovina, Croatia, Former Yugoslav Republic of Macedonia, Slovenia and Serbia.¹⁹¹ Therefore, such discretion would also meet NCSL requirements.

Construing the term 'joint'

The second choice that the judges could have adopted was to exercise their discretion by interpreting the term 'joint' skilfully. A JCE does not require that each JCE member knows each other. As noted by *Tadic*, JCE is applied to capture liability for those who commit crimes on the basis of a shared common intention. In light of the reasoning of the *Brdjanin* Appeals Chamber, one could still argue that the non-JCE RPP is part of the enterprise because the crime he commits is a crime ordered by indirect participant but passed on to non-JCE RPP through General 1 (See Diagram 3). The intention to commit crimes as part of a group is shared because it is reflected through the actions of the individuals. In this manner, the non-JCE RPP is still part of the enterprise as he is furthering its goals.

This exercise of discretion is neither inconsistent with the *Tadic* Appeals Judgment nor any previous ICL precedents that have applied the common plan doctrine. The Dissenting Opinion of Judge Shahabuddeen illustrates this point vividly. He explained that an agreement is not a contract and he further referred to the common plan organised by Hitler but which

¹⁸⁹ Chapter 1.2.2.

¹⁹⁰ See n. (39); *Lubanga* Confirmation of Charges Decision, para. 362(a); *Lubanga* Trial Judgment, ICC, para. 994; *Abu Garda* Confirmation of Charges Decision, ICC, para. 157; *Banda* Confirmation of Charges Decision, ICC, para. 126; *Muthaura* Confirmation of Charges Decision, ICC, para. 300; See scholarly publications in n. (37).

¹⁹¹ *Simic and others* Appeals Judgment, Dissenting Opinion of Judge Schomburg, paras. 13-14.

many other participants had contributed to. As a result of their contribution, they were part of the plan. The important point is therefore that, when applying JCE, judges should focus on construing the term ‘joint’ so that it explains how individuals are acting collectively. While there is no need for an agreement among all members, significant/substantial contribution coupled with intention to further ‘the’ common criminal plan rather than ‘a’ common plan suffices to be a member.

8.4.4 Criticisms of applying JCE 1: A review

Having analysed the fairness of discretion in applying JCE 1, this section will review the critique. It should be noted that only few comments have been made regarding the size of the enterprise, the need for an agreement and the *Brdjanin* appellate exercise of discretion.

Size of enterprise

In relation to the size of the enterprise, only two defence motions have argued that JCE cannot be applied to large-scale cases.¹⁹² However, as previously explained, this argument is flawed because it fails to take into account the *Tadic* commentary that a JCE may ‘be organised in a military, political or administrative structure (...).’¹⁹³ Furthermore, CIL state practice had also provided evidence to this effect.

Need for an agreement and meaning of ‘joint’

Secondly, the critique offers few commentaries regarding the need for an agreement within an enterprise. For example, Boas, Bischoff and Reid have noted that the *Brdjanin* Trial Judges ‘engaged in little detailed analysis of the (preceding) authorities on JCE’¹⁹⁴ when arguing that proof of a JCE requires an agreement. This thesis agrees with this point as section 8.2.1 highlighted that the *Brdjanin* Trial Chamber did not refer to any precedents regarding this matter. In addition, Gustafson has argued that it was conceptually unsound that an express agreement is necessary in a JCE.¹⁹⁵ This thesis also agrees with this point in light of the enterprise demonstrated in *Furundzija*. Besides these two points, no further commentaries can be found regarding the requirement of an express agreement.

However, some commentators have turned their attention to a related matter, which concerns the meaning of ‘joint’ in ‘joint enterprise.’ They have criticised the interpretation of this term for being unclear, undefined and elastic.¹⁹⁶ However, this view cannot be fully endorsed as the interpretation of ‘joint’ can be elastic since there are several ways in which individuals can act jointly. Yet, this does not entail that an elastic definition is unclear. For example, in addressing this matter, the *Krajisnik* Trial Judgment stated that ‘a common objective alone is not always sufficient to determine a group, as different and independent groups may happen to share identical objectives. Rather, it is the interaction or cooperation among persons – their joint action – in addition to their common objective, that makes those persons a group.’¹⁹⁷ In other words, their interaction provides the evidence that they are acting jointly. This can be

¹⁹² *Brdjanin* Response to prosecution brief, paras. 16-42; *Krajisnik* Final Trial Brief, para.102.

¹⁹³ See n. (158).

¹⁹⁴ Boas, Bischoff and Reid (2007) 93.

¹⁹⁵ Gustafson (2007).

¹⁹⁶ Sluiter and Zahar (2008) 236 and 241, for argument that joint is undefined and that JCE is imprecise in relation to the strength of the link between members; Osiel (2005) (a) 105, noting the common plan’s elasticity.

¹⁹⁷ *Krajisnik* Trial Judgment, para. 884.

demonstrated in different ways, implying that the term ‘joint’ should not be interpreted in a restrictive manner. It should be subject to an evidentiary examination and a clear judicial explanation as to how participants are acting jointly. Three ICTY cases have embraced this approach, refusing to apply JCE owing to lack of evidence and proof of a common plan.¹⁹⁸ Therefore, in conclusion the term ‘joint’ ought to be interpreted depending upon circumstances and remain elastic.

Reconceptualising JCE and the four factors

Finally, regarding the reconceptualization of JCE 1, it appears that there are no commentaries that engage with a discussion of all four factors (fair labelling, NPSC, CIL and NCSL). For example, Olasolo has merely described the application of JCE as ‘creative.’¹⁹⁹ Yet, he does not explore whether such creativity was fair. Similarly, Van Sliedregt in analysing *Brdjanin*, argues that the case is a ‘breakthrough’²⁰⁰ on the law of JCE. However, her analysis only focuses on CIL and NPSC with no subsequent analysis regarding whether this breakthrough case is acceptable. In addressing CIL, she holds that the judgment’s reference to the *Justice* and *RuSHA* cases was ‘not sufficient to sustain a customary law basis’²⁰¹ which this thesis concurs with. In respect of NPSC, she expressed concern at the loosening of the link between participants in the JCE at the leadership level and the execution level, leading to convictions based on guilt by association. However, as argued in several sections of this chapter, such a concern does not arise if the evidence indicates that a JCE member used a RPP. Under those circumstances, NPSC is not violated. However, Van Sliedregt fails to examine NPSC considerations in the case of the ordinary participant who has no connection whatsoever with the RPP. She is not the only commentator to have failed to have done so. No analysis regarding this participant appears to form part of any scholarly scrutiny, including analyses from Ohlin,²⁰² Olasolo,²⁰³ Bigi²⁰⁴ and a recent publication from Jain.²⁰⁵

8.5 CONCLUSIONS

This chapter set out to examine the fairness in reconceptualising JCE 1. It explored the three grounds of appeal addressed by the *Brdjanin* Appeals Judgment. It further explained how they are related to the four factors. As evidenced through this chapter’s analysis, there are serious concerns about limitations on the exercise of discretion.

While the *Brdjanin* appellate exercise of discretion emphasised the need to address fair labelling, it did so at the expense of the other three factors (NPSC, CIL and NCSL). It did not establish the culpability-nexus between the JCE participant who does not use the RPP as a tool (ordinary participant) or explain how such discretion meets NPSC requirements. Its discretion was not based on a correct interpretation of NMT and ICTY law. It further failed to provide a fair methodological formula of CIL and did not explain how its discretion meets requirements of foreseeability and accessibility. The result of such discretion has led to a new

¹⁹⁸ See *Krnojelac* Appeals Judgment, para. 111; *Haradinaj* Trial Judgment, paras. 475-477 and *Limaj* Trial Judgment, para. 118.

¹⁹⁹ Olasolo (2009) 202.

²⁰⁰ Van Sliedregt (2012) 163.

²⁰¹ *Ibid.*

²⁰² Ohlin (2008); Ohlin (2009).

²⁰³ Olasolo (2009) 200-205.

²⁰⁴ Bigi (2010).

²⁰⁵ Jain (2014) 30-45.

formulation of JCE which holds both the indirect participant and ordinary participant liable unfairly.

Fairness in applying JCE 3

9.1 INTRODUCTION

Chapter 9 examines the fairness of discretion in applying JCE 3. Within ICL literature, this subject matter remains a substantially under-analysed area. Some commentaries have been made regarding the application of JCE 3 to specific intent crimes.¹ Fewer comments have been made concerning the application of foresight and foreseeability.² More importantly, defence counsel in 2008 has still continued to cite the out-dated 2005 Danner and Martinez article regarding JCE 3's application.³ It could be argued that given JCE 3's unfairness, its application has not been deemed a subject matter worthy of scholarly attention. Applying the doctrine will always be unfair because its formulation is unfair. However, as twelve cases⁴ applied the doctrine post-*Tadic*, leading to twenty-two convictions⁵ and eight acquittals,⁶ a quantitative and qualitative appraisal of the doctrine's application is necessary. For this reason, chapter 9 will examine how JCE 3 was applied. It will include analyses from recent judgments in 2014⁷ and 2015.⁸

It explores three matters.⁹ The first concerns the definition of the common plan. Since a JCE 3 crime is a natural and predictable consequence of the common plan that the perpetrator foresees and is foreseeable, it is necessary to examine how judges have construed the common plan. Section 9.2 will explore this matter, illustrating that common plans have been defined widely, narrowly and inconsistently. The second aspect concerns how judges interpreted the requirements necessary to hold a perpetrator liable under JCE 3. These involve the meaning of the phrase 'natural and predictable,' the definition and application of foresight and the application of the objective test of foreseeability. Section 9.3 addresses these matters. The third aspect, as addressed in section 9.4, concerns whether judges can apply JCE 3 to specific intent crimes (persecution and genocide).

¹ Section 9.4.3.

² Section 9.3.1.

³ *Krajisnik* Appeals Brief, para. 14.

⁴ *Tadic, Krstic* (1st JCE only), *Stakic, Deronjic, Milan Babic, Martić, Milutinovic et al (Sainovic et al), Popovic et al.* (2 JCEs), *Dordevic, Tolimir, Stanisic and Zuplanin, Prlic et al.*

⁵ *Tadic, Krstic, Stakic, Deronjic, Milan Babic, Martić, Milutinovic et al (Sainovic et al)* (Sainovic, Lukic and Pavkovic), *Popovic et al.* (Popovic, Beara, Miletic, Nikolic), *Dordevic, Tolimir, Stanisic and Zuplanin, Prlic et al* (Prlic, Stojic, Praljak, Petkovic, Coric),

⁶ See *Milutinovic et al.* (Milutinovic, Lazarevic, Odjanic), *Popovic et al.* (Pandurevic, Borovcanin, Nikolic and Gvero) and *Prlic et al* (Pusic).

⁷ *Dordevic* Appeals Judgment, *Sainovic et al* Appeals Judgment.

⁸ *Tolimir* Appeals Judgment.

⁹ A fourth matter could be examined, which is the application of JCE 3, post-*Brdjanin*. Since the reconceptualization of JCE entails responsibility for the ordinary and the indirect participant, convicting an ordinary participant under JCE 3 is controversial because the latter may have no connection whatsoever with the RPP, see *Dordevic* Appeals Judgment, paras. 141-142. This chapter will not address this issue owing to the limited scope.

9.2 DEFINING THE COMMON PLAN

In examining how the ‘common plan’ has been defined, one should note that this task does not begin with an exercise of judicial discretion. It starts with that of prosecutorial discretion. In either the indictment,¹⁰ the pre-trial brief¹¹ or the final brief,¹² the Prosecutor defines the common plan, its constituent crimes and the collateral offence(s). Yet, regardless of how it exercises its discretion, neither is the Trial Chamber nor the Appeals Chamber bound by the prosecutor’s decision. The Trial Chamber reviews the exercise of prosecutorial discretion and in turn the Appeals Chamber reviews the Trial Chamber’s exercise of discretion. This review involves how the evidence is interpreted and how judges define the crimes of the common plan (whether widely or narrowly). Three key observations can be noted regarding the case law.

9.2.1 Narrow, wide and inconsistent discretion in defining the common plan

Defining the common plan differently to the Prosecutor

The first is that several judgments have defined the common plan differently to the Prosecutor.¹³ This follows a flawed prosecutorial approach. In several, if not all indictments, the Prosecutor refers to a series of crimes that are allegedly part of the common plan. She then argues that if these crimes are not part of the common plan, they are all natural and foreseeable consequences of the common plan.¹⁴ This approach is devoid of an evidentiary assessment which distinguishes the JCE 1 crime from the JCE 3 crime. In contrast, several judgments have underlined the need for determining the common plan according to an evidentiary examination.¹⁵ This determination ensures that defendants are convicted for their participation in crimes as demonstrated by the evidence and that such discretion does not violate NPSC. This particular type of examination acts as a judicial restraint on the exercise of discretion limiting how wide the common plan can be defined by distinguishing the JCE 1 intended crime from the JCE 3 unintended crime. The consequence is that judges cannot define the common plan as they please. Instead they should define the common plan in accordance with the evidence so as to prevent an exercise of arbitrary discretion.

Defining the common plan widely and in an uncertain manner

The second observation follows from the implications of an evidentiary examination. As judges define the common plan according to the evidence, the common plan cannot be

¹⁰ *Brdjanin* Fourth Indictment, ICTY, para. 20.1.

¹¹ *Kvočka* Prosecutor Pre-Trial Brief, ICTY, paras. 220-229.

¹² *Dordevic* Prosecutor Final Brief, ICTY, paras. 7 and 8.

¹³ *Plavsic*, where Trial Judges rejected genocide; *Obrenovic*, where Trial Judges rejected forcible transfer of women; *Krajisnik*, where the Trial Judges rejected genocide.

¹⁴ For examples, see *Predrag Banovic* Indictment 2002, para. 19; *Biljana Plavsic* Indictment 2002, para. 5; *Dragan Obrenovic* Indictment 2002, para. 30; *Martic* Indictment 2003, para. 5; *Krajisnik*, Indictment 2002, para. 5.

¹⁵ *Haradinaj* Trial Judgment, ICTY, para. 471 noting need for ‘direct evidence;’ *Krajisnik* Appeals Judgment, ICTY, para. 193, arguing for proof of whether the evidence determines (...) means to realise the common objective; *Dordevic* Trial Judgment, ICTY, para. 2003: ‘focuses, in its analysis of the evidence, on the existence of a common purpose’ and *Popovic* Trial Judgment, para. 1028: ‘the evidence shows that the JCE members agreed on this expansion of means.’

defined widely. It should be defined strictly according to the evidence. The *Krnojelac* Appeals Judgment noted and underlined this point. It stated:

‘(u)sing the concept of joint criminal enterprise to define an individual’s responsibility for crimes physically committed by others requires a *strict definition of common purpose*. That principle applies irrespective of the category of joint enterprise alleged.’¹⁶

This reasoning falls in line with the NMT judgment of *France v. Goering et al.* which held that the common plan or conspiracy must be clearly outlined in its criminal purpose.¹⁷ However, the *Krnojelac* Appeals Judgment was the only judgment among the twenty-four JCE-based cases to have embraced this reasoning. This reference was never cited in any other case law.

As a result, the definition of the common plan has led to two different groups of cases (see Table 1 below). In the first group, the common plan has been defined strictly according to specific crimes. These include murder, deportation, forcible transfer and torture. Such discretion, in accordance with the evidence, does not violate NPSC and puts the defendant on notice of the charges. In the second group however, the judges have included vaguely and broadly defined crimes such as persecution or inhumane acts. Persecution is defined as ‘an act or omission which: (firstly) discriminates in fact and which denies or infringes upon a fundamental right laid down in international customary or treaty law (the *actus reus*); and (secondly) was carried out deliberately with the intention to discriminate on one of the listed grounds, specifically race, religion or politics (the *mens rea*).’¹⁸ Currently, there is no comprehensive list of ‘what may constitute the underlying acts of persecution.’¹⁹ It may include destruction of property,²⁰ unlawful arrest or detention or confinement,²¹ deportation, forcible transfer and forcible displacement,²² murder,²³ torture,²⁴ extermination,²⁵ rape,²⁶ sexual assault,²⁷ terrorising civilian population²⁸ and forced labour.²⁹ The definition of an inhumane act bears similar characteristics. As a crime that falls under the category of crimes against humanity, it requires proof of a criminal act which is widespread and systematic. The *Naletilic and Martinovic* Trial Judgment defined it as ‘“(an act or omission) intended to cause deliberate mental or physical suffering to the individual.”’³⁰ As persecution, the scope of inhumane acts is also very wide.³¹

¹⁶ *Krnojelac* Appeals Judgment, ICTY, para. 116 (emphasis added). It also noted that the principal perpetrators should be identified as precisely as possible, see para. 116.

¹⁷ *France et al. v. Goering et al.*, (1946) 22 IMT 411.

¹⁸ *Deronjic* Appeals Judgment, para. 109.

¹⁹ *Lukic* Trial Judgment, para. 993.

²⁰ *Blaskic* Appeals Judgment, paras. 147 and 148.

²¹ *Simic et al.*, Trial Judgment, paras. 59, 60, 62 and 63.

²² *Blaskic* Appeals Judgment, para. 152.

²³ *Kordic and Cerkez* Appeals Judgment, para. 106.

²⁴ *Ibid.*

²⁵ *Ibid.*

²⁶ *Brdjanin* Trial Judgment, paras. 1008-1009.

²⁷ *Ibid.* 1012.

²⁸ *Blagojevic and Jokic* Trial Judgment, para. 589.

²⁹ *Krnojelac* Appeals Judgment, para. 199.

³⁰ *Naletilic and Martinovic* Trial Judgment, para. 247.

³¹ These include forcible displacement and transfer (*Blagojevic and Jokic* Trial Judgment, paras. 629-630; *Brdjanin* Trial Judgment, para. 544); mutilation and other types of severe bodily harm (*Kvočka et al.* Trial Judgment, para. 208); serious physical and mental injury (*Blaskic* Trial Judgment, para. 239).

Considering that these two vaguely defined crimes do not provide clarity regarding the scope of the joint enterprise, the defence is not capable of knowing which crime he is being held liable for.³² It is therefore inappropriate to include them within the JCE unless the scope of the JCE is explicitly clarified. One of the examples that illustrates such uncertainty is the recent case of *Dordevic*. In this case, the accused was convicted of committing ‘deportation, forcible transfer, murder, and persecution through such acts’³³ as part of a JCE 1. The common plan itself was defined as ‘campaign of terror and extreme violence in Kosovo directed against Kosovo Albanian people.’³⁴ However, the crimes of terror and violence are hardly specific. It was therefore unsurprising when both the Trial Chamber and Appeals Chamber argued that ‘even if the (aforementioned) crimes (of deportation, forcible transfer, murder, and persecution) had not been intended as part of the JCE, the evidence also supported a finding that they were the natural and foreseeable consequence of the common plan.’³⁵ Such reasoning does not provide clarity about the specific crimes that form part of the common plan and those that fall under JCE 3. This case can therefore be criticised for providing a vague definition of a common plan and demonstrating uncertainty about the specific JCE 1 and JCE 3 crimes.

³² See *Kordic* pre-trial brief, paras. 122-134 for claim that the crime of persecution and inhumane act violates NCSL. For judicial discourse where caution has been exercised regarding inhumane acts, see *Stakic* Trial Judgment, para. 273 which denied ‘removal of individuals to detention facilities’ as any other inhumane act.

³³ *Dordevic* Trial Judgment, paras. 2010-2026, 2035, 2051; *Dordevic* Appeals Judgment, para. 192.

³⁴ *Dordevic* Trial Judgment, para. 2130.

³⁵ *Dordevic* Appeals Judgment, para. 192 which refers to *Dordevic* Trial Judgment, paras. 2139, 2141, 2147, 2153.

TABLE 1: DEFINITION OF THE COMMON PLAN

Specifically defined common plan		Vaguely defined common plan	
Murder (execution)	<ul style="list-style-type: none"> • <i>Obrenovic</i> T.Ch • <i>Mrda</i> T. Ch • <i>Momir Nikolic</i> T. Ch and A.Ch • <i>Popovic et al.</i> T. Ch • <i>Tolimir</i> T. Ch 	Crime(s)/acts of persecution	<ul style="list-style-type: none"> • <i>Tadic</i> T. Ch and A. Ch • <i>Plavsic</i> T. Ch • <i>Krnjelac</i> T. Ch and A. Ch • <i>Kvocka</i> T. Ch and A. Ch • <i>Babic</i> T. Ch • <i>Deronjic</i> T. Ch and A. Ch • <i>Kordic and Cerkez</i> T. Ch and A. Ch • <i>Stakic</i> A. Ch • <i>Martic</i> T. Ch and A. Ch • <i>Krajisnik</i> T. Ch and A. Ch • <i>Momir Nikolic</i> T. Ch and A. Ch
Torture	<ul style="list-style-type: none"> • <i>Furundzija</i> T. Ch and A. Ch 	Inhumane acts	<ul style="list-style-type: none"> • <i>Tadic</i> A. Ch • <i>Stanisic and Zupljanin</i> T. Ch • <i>Stakic</i> A. Ch
Rape	<ul style="list-style-type: none"> • <i>Zelenovic</i> T. Ch and A. Ch 	Ethnic cleansing	<ul style="list-style-type: none"> • <i>Krstic</i> T. Ch
Forcible removal/transfer	<ul style="list-style-type: none"> • <i>Tolimir</i> T. Ch • <i>Krstic</i> A. Ch • <i>Popovic et al.</i> T. Ch • <i>Stanisic and Zupljanin</i> T. Ch • <i>Milutinovic et al.</i> T. Ch 	Terror and violence	<ul style="list-style-type: none"> • <i>Milutinovic et al.</i> T. Ch • <i>Dordevic</i> T. Ch
Ill-treatment	<ul style="list-style-type: none"> • <i>Banovic</i> T. Ch 	Forcibly cleansing	<ul style="list-style-type: none"> • <i>Krstic</i> T. Ch
Deportation	<ul style="list-style-type: none"> • <i>Krajisnik</i> A. Ch 	Forcible removal by committing crimes	<ul style="list-style-type: none"> • <i>Babic</i> A. Ch

Defining the common plan inconsistently for participants of the same JCE

The third matter is whether judges always define the common plan consistently when trying participants who belong to the same JCE. While this section will not review all JCE judgments, it explains briefly how the Trial Chambers in *Martic* and *Babic* exercised their discretion inconsistently by defining the common plan differently for the two accused persons who were part of the same enterprise.³⁶

In 2004, *Babic* had entered a guilty plea. In the same year, the Trial Chamber sentenced the accused for participating in a JCE 1.³⁷ The common plan did not include deportation. However, *Babic* was convicted of perpetrating deportation under JCE 3.³⁸ A year later, the *Babic* Appeals Sentence confirmed this conviction.³⁹ However, in 2007, the *Martic* Trial Judgment,⁴⁰ included deportation as a JCE 1 crime contrary to the *Babic* Judgments.⁴¹ While the Appeals Chamber eventually overturned *Martic*'s conviction for deportation on evidentiary grounds (but not because of a previous chamber's exercise of discretion),⁴² this example indicates how discretion may be exercised inconsistently for participants belonging to the same JCE.

9.2.2 Review of the critique

Within the JCE-based literature, only some commentators have analysed the definition of the common plan. They have noted how JCE's have been defined in 'expansive terms',⁴³ how judges have failed to 'limit the scope of JCE's that a prosecutor may charge'⁴⁴ and instead confirmed indictments of JCE's of 'great breadth'⁴⁵ without 'any clear criteria for defining the enterprise.'⁴⁶

However, these commentaries are not based upon any thorough analysis of case law. Instead, they are founded on assumptions about how discretion may be exercised. As indicated from the analysis and in particular Table 1, while the prosecutor's approach is not evidentiary-based, some cases have defined the common plan strictly while other cases have not. Therefore, not all JCE 3 convictions can be criticised.

9.3 EXAMINING JCE 3 REQUIREMENTS: NATURAL AND PREDICTABLE, FORESIGHT AND FORESEEABILITY

The second matter regarding JCE 3's application concerns the conditions under which a JCE participant may be held liable for the collateral offence. *Tadic* outlined three different requirements: the crime should be a 'natural and predictable' consequence of the common

³⁶ *Martic* Trial Judgment, ICTY, paras. 5, 37, 137; *Babic* Trial Sentence Judgment, para. 24.

³⁷ *Babic* Trial Sentence Judgment, para. 32.

³⁸ *Ibid*, para. 24.

³⁹ *Babic* Appeals Sentence Judgment, paras. 2 and 79.

⁴⁰ 12th June 2007.

⁴¹ *Martic* Trial Sentence Judgment, paras. 452-455.

⁴² *Martic* Appeals Sentence Judgment, paras. 183 and 212.

⁴³ Danner and Martinez (2005) 135.

⁴⁴ *Ibid* 143.

⁴⁵ *Ibid* 136.

⁴⁶ Osiel (2005) (a) 1800; See also Osiel (2005) (b) 199, arguing that the number of enterprises is unclear.

plan, it should be ‘foreseeable’ to the defendant and the latter should ‘foresee’ it.⁴⁷ However, as chapter 5 indicated, the origin, meaning and implications of ‘natural and predictable’ are unclear and the inclusion of foreseeability and foresight was not found under CIL.⁴⁸ It is therefore necessary to examine how in a post-*Tadic* period, judges reviewed and applied these three elements.

9.3.1 What is a ‘natural and predictable’ consequence?

In examining the phrase ‘natural and predictable,’ we could argue that in theory, it should limit the exercise of discretion. As a JCE 3 crime is a ‘natural and predictable’ consequence of the common plan, it cannot be considered any crime. However, it appears that this phrase has not constrained the exercise of discretion at all.

If we begin by revisiting the reasoning in *Tadic*, the judges applied JCE 3 without explaining why the killing of villagers was a ‘natural and predictable consequence’ of the criminal plan to commit inhumane acts. The judges did not set out a precedent explaining how either the term ‘natural’ or the term ‘predictable’ ought to be applied.

Post-*Tadic*, three cases reviewed these terms. Yet, even in this regard, they failed to provide a clear definition of ‘natural and predictable.’ Firstly, Judge Hunt in the *Odjanic* JCE Decision stated that ‘predictable’ and ‘foreseeable’ are ‘truly interchangeable.’⁴⁹ However, he failed to elaborate the implications of the word ‘natural.’ Following this decision, the *Krajisnik* Trial Judgment described the phrase ‘natural and foreseeable’ as reflecting the objective element that ‘does not depend upon the accused’s state of mind.’⁵⁰ Based on the reasoning of these two cases, the word ‘natural’ serves no purpose and the phrase ‘natural and predictable’ is no different to foreseeability. Yet, in the third case, the *Karadzic* Trial Jurisdiction decision, the judges turned their attention to the word ‘natural.’ They argued that it carries a number of ‘subjective connotations’⁵¹: ‘what is natural in one set of circumstances may not be so in another.’⁵² Yet, in spite of this comment, the judges refrained from explaining what these ‘subjective connotations’ are or how they assist in defining ‘natural.’ Therefore, in the absence of any clarity and given that these connotations are subjective, it is impossible to predict the meaning of the term ‘natural’ and determine the role of the phrase ‘natural and predictable’ altogether.

To further support this conclusion, I have provided a list of cases below (Table 2), explaining how murder has been considered a natural and predictable consequence for many differently defined common plans. None of these cases addressed the meaning of ‘natural and predictable’ or considered whether it adds an additional requirement to foreseeability.

⁴⁷ Chapter 2.2.2.

⁴⁸ Chapter 5.2.

⁴⁹ *Odjanic* JCE Decision, Separate Opinion of Judge Hunt, paras. 10 and 11, does not depend on the state of the mind.

⁵⁰ *Krajisnik* Trial Judgment, para. 882: ‘The objective element does not depend upon the accused’s state of mind. This is the requirement that the resulting crime was a natural and foreseeable consequence of the JCE’s execution.’

⁵¹ *Karadzic* Trial Jurisdiction decision, para. 56.

⁵² *Ibid.*

TABLE 2: DEFINITION OF THE COLLATERAL OFFENCE

Case	Common plan	Collateral offence
<i>Tadic</i> A. Ch	Inhumane act	Murder
<i>Krstic</i> T. Ch (1 st JCE)	Forcibly cleanse	Murder, rape, beating
<i>Stakic</i> A. Ch	Persecution, deportation and other inhumane acts	Murder and extermination
<i>Babic</i> T. Ch	Persecution	Murder
<i>Prlic et al.</i> T. Ch	Displacement, destruction, murder, ill-treatment in detention, use of human shields	Murder
<i>Deronjic</i> T. Ch	Persecution	Murder
<i>Milutinovic et al.</i> T. Ch	Terror and violence, forcible displacement	Murder, sexual assault and destruction of cultural property

9.3.2 Applying and defining foresight

The second matter concerns ‘foresight.’ Unlike the phrase ‘natural and predictable’ which does not restrain the exercise of discretion, foresight does. It is a subjective test that requires an evidentiary examination of what the JCE participant actually foresaw. In this manner, it plays an important role as a judicial restraint. It limits a JCE 3 conviction to a crime that participants may foresee based on their role, location, involvement and knowledge of the direct perpetrator. It means that not every JCE participant may foresee a collateral offence. An example may clarify.

If the common plan is to forcibly remove persons and murder is a foreseeable consequence of this plan, different participants may foresee that a participant may commit murder depending upon their positions and locations. A soldier on the ground would be in a better position to foresee that another soldier may commit murder while a general, who is removed from the scene and is unaware of the activities of the foot soldiers, may not. We may argue that it is foreseeable but to satisfy the requirement of foresight, more than an objective test would be required. Applying the tests of foresight and foreseeability therefore entails different processes. Foreseeability is based on the reasonable man test whereas foresight involves a detailed evidentiary examination of the circumstances surrounding the accused person to determine what he foresaw.

Yet, some ICTY judgments can be criticised for not including an evidentiary examination. If we compare two judgments that applied JCE 3, we find different reasoning pertaining to foresight. In 2004, the *Krstic* Appeals Judgment stated that ‘it was unnecessary for the Trial Chamber to conclude that Radislav Krstić was actually aware that those other criminal acts were being committed; it was sufficient that their occurrence was foreseeable to him and that those other crimes did in fact occur.’⁵³ In contrast, in 2014, the *Sainovic et al* Appeals Judgment stated that ‘(t)he question of whether persecution, through sexual assaults, (was) committed (...) were foreseeable to (the accused) must be assessed in relation to their individual knowledge.’⁵⁴ These two cases provide different perspectives, thereby raising doubt as to whether foresight is an indispensable JCE 3 requirement. To further support the argument that some cases have not taken foresight into account, Table 3 below provides a list of cases under three headings: those that have applied foresight using an evidentiary examination, those that have not and those where it has been construed as ‘must have known.’ The most important conclusion of this analysis is that in three cases, no evidentiary examination (based on the role, knowledge, contribution and location of the participant) took place.

TABLE 3: EVIDENCE OF FORESIGHT

Cases using an evidentiary examination (Reference to knowledge of circumstances, events, awareness of crimes, informed of crimes)	Cases not using any evidentiary examination	Cases interpreting foresight as must have known
<i>Stakic</i> Appeals Judgment, paras. 92-97	<i>Tadic</i> Appeals Judgment	<i>Krstic</i> Trial Judgment, para. 616
<i>Deronjic</i> Trial Judgment, para. 98	<i>Krstic</i> Appeals Judgment	
<i>Babic</i> Trial Judgment, para. 40	<i>Dordevic</i> Trial Judgment	
<i>Martic</i> Trial Judgment, para. 454		
<i>Milutinovic et al.</i> Trial Judgment, paras. 470, 471,		

⁵³ *Krstic* Appeals Judgment, para. 150.

⁵⁴ *Sainovic et al.* Appeals Judgment, para. 1575.

472, 785 and 1134, 1135			
<i>Popovic et al.</i> Trial Judgment, paras. 1169, 1195, 1304, 1332, 1393, 1396, 1427, 1443, 1539, 1978, 2012, 1539, 1727, 1735			
<i>Popovic et al.</i> Appeals Judgment, paras. 1362, 1368, 1393, 1394, 1428, 1435, 1443,			
<i>Tolimir</i> Trial Judgment, paras. 1140 and 1154.			
<i>Stanisic and Zupljanin</i> Trial Judgment, paras. 522-527.			
<i>Prlic et al.</i> Trial Judgment, paras. 280-288, 433, 632, 822, 2008			

Besides this matter, it is necessary to explore one final question regarding foresight. In the cases where judges considered this *mens rea*, it is important to examine how they defined its specificity. To recapitulate, chapter 2 outlined how the *Tadic* Appeals Judges referred to foresight among several other forms of *mens rea*.⁵⁵ However, *Tadic* provided two different standards of foresight. On one hand, it referred to awareness where a crime ‘might be perpetrated.’⁵⁶ On the other hand, it referred to awareness that the crime was ‘most likely’⁵⁷ to occur. Given this ambiguity, determining the specificity of foresight became the subject matter of a contentious appeal post-*Tadic*. Raised by Karadzic, the appeal required that judges clarify the degree of foresight. The specific question was whether the defendant should foresee that it was either a *possibility* or *probability* that the perpetrator committed the collateral offence. However, in examining this question, both the Trial and Appeals Judges showed no regard for how the exercise of discretion is constrained by CIL (state practice) or NCSL considerations (foreseeable or accessible to the defendants). They merely engaged in a cursory review of ICTY jurisprudence post-*Tadic*. It further appears that their conclusion regarding the degree of foresight was based on their own interpretation of specific extracts in *Tadic*.

⁵⁵ See chapter 2.2.2 for other *mens rea* such as indifference, recklessness, attenuated form of intent.

⁵⁶ *Tadic* Appeals Judgment, para. 228.

⁵⁷ *Ibid*, para. 220.

Firstly, the *Karadzic* Trial Jurisdiction decision conceded that it was ‘difficult to be sure that (...) foresight required is that of possibility or probability’⁵⁸ given the two contradictory standards in *Tadic*.⁵⁹ However, the judges then placed emphasis on the paragraph in *Tadic*, which stated that the accused ‘was aware that the actions of the group (...) were *likely to lead to such killings*.’⁶⁰ Their conclusion was that the ‘(c)hamber appeared to be saying that (...) the particular accused must actually have foreseen them as *probable*.’⁶¹ From the language used, namely ‘appeared,’ the judges were evidently unsure about the finding and reasoning of *Tadic*. In addition, it is unclear why they placed significant weight on this paragraph and settled with the probability standard. Instead, as *Tadic* also referred to ‘might be perpetrated’ based on CIL state practice, the judges could have upheld the ‘possibility’ standard. Their choice for this standard is therefore not fully justified. Yet, the Trial Judges’ analysis did not end there. It continued with a cursory review of post-*Tadic* case law. These cases included the *Krstic* Appeals Judgment, the *Brdjanin* Appeals Decision, the *Brdjanin and Talic* Decision and the *Martic* Appeals Judgment.⁶² In reviewing these cases, the judges concluded that some cases referred to the possibility standard while others referred to the probability standard. Given the uncertainty as found in this case law, the judges were confronted with a difficult choice in determining which standard should be applied and more importantly how such a choice should be justified. In reaching their conclusion, the Trial judges stated the following: ‘while subsequent jurisprudence has referred on various occasions to possibility and probability, there does not appear to have been a clear rejection at any stage of the test set in *Tadic*.’⁶³ The fact that none of the cases had explicitly rejected *Tadic* therefore became the basis for accepting the higher ‘probability’ standard. This conclusion is questionable. Since *Tadic* had referred to two standards, it is unclear which is the applicable one. The reasoning provided by the judges does not examine the CIL state practice cited in *Tadic* or probe how JCE 3 ought to be defined. It is based on what ‘appears’ to be correct in *Tadic* in light of certain paragraphs that the judges considered authoritative.

Given this weak reasoning, it is unsurprising that the Appeals Chamber took the opposite view. The judges argued that the various formulations provided in *Tadic* ‘tend more towards a possibility than a probability standard.’⁶⁴ Their reasoning was that ‘the variable formulations (...) at minimum suggest that (*Tadic*) did not definitively set a probability standard as the *mens rea* requirement for JCE 3.’⁶⁵ It supported this reasoning by stating that although *Tadic* did not settle the issue, ‘subsequent Appeals Chamber jurisprudence (did).’⁶⁶ These judgments as found in *Vasiljevic*, *Brdjanin*, *Stakic*, *Blaskic*, *Martic* and *Krnojelac* refer to a crime that ‘might be perpetrated.’⁶⁷ The only judgment that offers a different view is the *Krstic* Appeals Judgment which used an ambiguous phrase in the form of ‘*probability* that other crimes *may* result.’⁶⁸ However, the Appeals Judges held that this ambiguity is overruled by the aforementioned Appeals Chamber judgments. Its approach was therefore based on the

⁵⁸ *Ibid*, para. 50.

⁵⁹ *Karadzic* Trial Jurisdiction decision, paras. 48 and 49.

⁶⁰ *Karadzic* Trial Jurisdiction decision, para. 50 citing *Tadic* Appeals Judgment, para. 232 (emphasis added).

⁶¹ *Karadzic* Trial Jurisdiction decision, para. 50.

⁶² *Ibid*, paras. 51-54.

⁶³ *Ibid*, para. 55.

⁶⁴ *Karadzic* Appeals JCE 3 foreseeability decision, para. 14.

⁶⁵ *Ibid*, para. 14.

⁶⁶ *Ibid*, para. 15.

⁶⁷ *Ibid*.

⁶⁸ *Ibid*, para. 16.

number of Appeals Chamber judgments which referred to the ‘possibility’ standard and that *Tadic* did not set a probability standard.

In conclusion, if we examine both approaches, neither did the Trial Chamber nor the Appeals Chamber conduct a thorough review of the case law (CIL state practice) cited in *Tadic* or consider whether the law being considered (degree of foresight) was foreseeable or accessible to the defendants (NCSL). Both chambers simply adopted the same approach by acknowledging the terminological confusion in *Tadic* but yet they both failed to provide cogent reasons as why the standard should either be ‘possible’ or ‘probable.’ It could be argued that each chamber merely chose a standard that it preferred. Such terse analysis leaves questions regarding limitations in exercising discretion unanswered.

9.3.3 Applying foreseeability

The last JCE 3 requirement that merits scrutiny is foreseeability. As an objective test, it is based on what the reasonable man would foresee.⁶⁹ In examining its significance, one ought to question how discretion is exercised in relation to an objective test. More specifically, can a crime, under this type of test, ever be considered non-foreseeable? In analysing the case law, neither has this question ever been raised nor has any conviction been overturned on the basis of ‘not foreseeable.’⁷⁰ It therefore appears that it does not impose any form of control on the exercise of discretion.

However, post-*Tadic*, Judge Antonetti provided several interesting comments regarding the definition, role and meaning of foreseeability. Unlike other judges who remained content in convicting participants under JCE 3, he raised several critical concerns. Firstly, he stated that the ‘(c)hamber does not specify (...) what it understands by the term “foreseeable” and whether this foreseeability must be assessed subjectively or objectively.’⁷¹ As a French judge who trained in a civil law system,⁷² it is possible that he is unaware of the differences between a subjective standard (foresight) and an objective one (foreseeable) which have common law origins. He may furthermore be unfamiliar with the terminologies used in *Tadic* and their usage.

However, his concern regarding foreseeability was not limited to its meaning but also included its application. As I noted above, no case law has ever determined that a collateral offence was not foreseeable. This may be due to the inability to define ‘foreseeable’ clearly. Judge Antonetti has expressed a similar concern. In a dissenting opinion in 2015, he stated:

‘it is not easy for a tribunal to ascertain whether the criminal conduct of a person participating in a JCE, which lies beyond the scope of the common plan, was

⁶⁹ See comments from Judge Hunt and *Krajisnik* Trial Judgment, see n. (49 and 50). Similar view also confirmed in *Brdjanin and Talic* Decision, ICTY, para. 29 and *Karemera et al.* JCE Appeals Decision, para. 13, noting what a reasonable person would or would not foresee.

⁷⁰ See n. (4, 5 and 6). Judge Liu, however submitted a Dissenting Opinion in *Sainovic et al* Appeals Judgment, arguing that *Sainovic* could not be convicted for murder under JCE 3 because they were not foreseeable. However, his reasoning appears to be based on lack of foresight rather than not foreseeable, see *Sainovic et al* Appeals Judgment, Dissenting Opinion of Judge Liu, paras. 1-10.

⁷¹ *Tolimir* Appeals Judgment, Separate and Partially Dissenting Opinion of Judge Antonetti, pg. 107.

⁷² Profile of judge available, at

http://www.icty.org/x/file/About/Chambers/judges_bios_en/pj_antonetti_Bio_en.pdf, last accessed 10th December 2015.

foreseeable by another participant and whether this other participant deliberately assumed the risk that conduct might be realised.⁷³

Although Judge Antonetti did not substantiate this comment, the ‘unease’ that he refers to may indicate a lack of criteria to determine which crimes are foreseeable and non-foreseeable. These criteria may be able to put the defendant on notice to challenge the foreseeability of a collateral offence. In the absence of any such criteria, the result is that ‘foreseeability’ vests judges with significant discretion, which according to Judge Antonetti’s aforementioned view, remains difficult to discern. As an example to illustrate this difficulty, we may turn to the Dissenting Opinion of Judge Chowhan in the *Milutinovic et al* Trial Judgment. While the majority in this case acquitted the accused individuals for committing sexual assault under JCE 3, Judge Chowhan disagreed noting that such crimes were foreseeable to them. However, he did not provide any reasoning that explains why this crime was foreseeable. In the absence of any such explanation, it is difficult to comprehend why some judges view certain crimes as foreseeable while others may choose to exercise their discretion differently.

9.3.4 Review of the critique

Regarding the three elements discussed above, the following can be said of the critique. The only commentary concerning ‘natural and predictable’ has come from Van Haan. She notes that judges have not yet defined general standards when interpreting ‘natural and predictable.’⁷⁴ She however, does not elaborate this comment, explaining what such standards may be. If judges were to consider interpreting ‘natural and predictable,’ it would have to be in light of how CIL state practice did so since this would be a reasonable interpretation of law. Otherwise, the JCE 3 formula would be clearer if it did not include this phrase.

Regarding foreseeability, many scholars have criticised the objective standard for being imprecise and broad.⁷⁵ They implicitly recognise that it does not impose any form of restraint. However, such scholars have not taken into account how the subjective requirement of foresight acts as a judicial restraint. As Table 3 indicates, several cases have referred to foresight and have not convicted participants because they could not see foresee the crime.⁷⁶ Therefore, not all cases can be criticised. However, some cases can because no evidentiary examination has taken place. This exercise of discretion is of concern as Cassese defended the requirement of foresight within the JCE 3 formula, arguing that if the prosecution fails to prove it, the charge must be dismissed.⁷⁷

⁷³ Ibid, pg. 108.

⁷⁴ Van Haan (2005) 191.

⁷⁵ Ambos (2007): ‘foreseeability standard is neither precise nor reliable;’ Ohlin and Fletcher (2005) 550: ‘as any good lawyer knows, virtually any consequence can be characterized as foreseeable;’ Boas, Bischoff and Reid (2007) 74-81, noting application of different *mens rea* for JCE 3; Danner and Martinez (2005) 137, noting that all crimes are foreseeable.

⁷⁶ For other cases, see *Milutinovic et al* Trial Judgment, ICTY, para. 472 where Sainovic was acquitted because he did not foresee sexual assault.

⁷⁷ Cassese (2007) (b) 117.

9.4 JCE 3 AND SPECIFIC INTENT: GENOCIDE AND PERSECUTION

The final matter regarding JCE 3's application is whether it can be extended to include crimes that involve the *mens rea* of specific/special intent.⁷⁸ While current discourse, in particular judicial reasoning,⁷⁹ does not provide an elaborate definition of this *mens rea*, it is generally understood as requiring not just general intent (*dolus directus*)⁸⁰ but also ulterior motive⁸¹ or ulterior intent (*dolus specialis*)⁸² or 'clear intent.'⁸³ In ICL, two crimes requiring specific intent are genocide⁸⁴ and persecution (discussed in section 9.2.1).⁸⁵ The specific intent requirement of genocide is the 'intent to destroy, in whole or in part, a national, ethnical, racial or religious group, as such.'⁸⁶ The specific intent requirement of persecution is 'the intent to discriminate on political, racial, or religious grounds.'⁸⁷ As specific intent requires more than general intent, it reflects a higher level of culpability.⁸⁸

Given this higher degree, judges would be required to determine how they would apply JCE 3 to a specific intent crime, namely whether they would apply the elements as articulated by *Tadic* which would lead to an unfair result or whether they would exercise discretion to review the elements or whether they would consider not applying it to such crimes. To examine how post-*Tadic* case law addressed this matter, it is necessary to review the *Tadic* Appeals Judgment reasoning in formulating JCE 3. It may have offered insights regarding how discretion ought to be exercised in relation to genocide.

9.4.1 How did the *Tadic* Appeals Judgment define JCE 3?

Two points of concern underlie its reasoning. Firstly, the state practice cited as part of CIL, was only concerned with murder and theft. None of the cases concerned genocide.⁸⁹ Therefore, the CIL law cited does not assist in this matter. Secondly, it is unclear how foresight would apply to genocide as the *Tadic* Appeals Judges had not addressed the requirement of foresight in detail. Chapter 5 underlined how the judges did not discuss whether the JCE participant foresees that the direct perpetrator 'might commit'⁹⁰ the crime

⁷⁸ Either terminology can be used. For reference to special intent only, see Sluiter and Zahar (2008) 163; *Akayesu* Trial Judgment, ICTR, para. 498. However, the *Krstic* Trial Judgment, ICTY referred to both specific and special intent, see paras. 138-142, 681, 684 and 685.

⁷⁹ See *Akayesu* Trial Judgment, ICTR, paras. 518-520 for an inconsistent discussion of specific intent. The judgment initially defined it as a 'clear intent to cause the offence charged.' Yet, it then referred to the *mens rea* as 'should have known' which is an objective standard.

⁸⁰ Intent is described as *dolus directus*, in particular when comparing it with specific intent, see Olasolo (2009) 282.

⁸¹ Ambos (2009) 835. For more on ulterior intent, see Olasolo (2009) 282, fn. 80; Simester and Sullivan (2010) 159.

⁸² Specific intent has been described as the equivalent of *dolus specialis*, see *Krstic* Appeals Judgment, para. 141.

⁸³ *Akayesu* Trial Judgment, ICTR, para. 518: 'clear intent to cause the offence charged.'

⁸⁴ *Krstic* Trial Judgment, ICTY, para. 571; *Jelusic* Trial Judgment, ICTY, paras. 100-108; *Tolimir* Trial Judgment, ICTY, para. 744.

⁸⁵ *Tadic* Trial Judgment, ICTY, para. 697; *Lukic* Trial Judgment, ICTY, para 902; *Kvočka* Trial Judgment, ICTY, para. 313.

⁸⁶ Article 4 of ICTY Statute; *Krstic* Appeals Judgment, para. 142.

⁸⁷ *Tolimir* Trial Judgment, ICTY, para. 849.

⁸⁸ Ambos (2009).

⁸⁹ See chapter 5.2.3.

⁹⁰ I have used this term given the discussion of the 'possible/probable' standard in section 9.3.2.

according to its *actus reus* and *mens rea* or whether only foresight of the *actus reus* is required.⁹¹ These requirements have different implications.

When applying them to genocide, if only foresight of the *actus reus* is required, a JCE participant may be convicted of genocide under JCE 3 if he only foresees ‘an act of killing.’⁹² No proof of specific intent is necessary. Furthermore, the specific degree of foresight, as discussed above (section 9.3.2.), was only settled in 2009 in the *Karadzic* Appeals JCE 3 foreseeability decision.

Considering these points, two conclusions follow. Firstly, *Tadic* failed to provide any specific guidance regarding JCE 3’s application to specific intent crimes.⁹³ Secondly, if judges were to apply the existing formula of JCE 3 (as mentioned in *Tadic*) to specific intent crimes, it would be unfair because it would imply that a JCE participant could be convicted for a specific intent crime if he foresaw the *actus reus* and it was foreseeable.⁹⁴

Yet, as argued above, judges in a post-*Tadic* period were faced with three choices: exercising discretion to review the elements of JCE 3; not applying it or applying it as it is. The next section will explore how judges considered these possibilities.

9.4.2 Post-*Tadic* case law

Several cases applied JCE 3 to both genocide⁹⁵ and persecution.⁹⁶ Four distinct observations can be drawn by critically examining case law from a chronological perspective.

Initial uncertainty of discretion at the ICTY

The first observation concerns the uncertainty of discretion during the early stages at the ICTY. In 2003, the *Stakic* Trial Judgment, as the first judgment to address this question,⁹⁷ argued that JCE 3 cannot be applied to genocide. It held that the elements of a mode of liability cannot replace the elements of a crime⁹⁸ and that ‘conflating the third variant of joint criminal enterprise and the crime of genocide would result in the *dolus specialis* being so watered down that it is extinguished.’⁹⁹ This reasoning was followed in the *Brdjanin* Trial Decision. It noted that a genocide conviction requires specific intent and that JCE 3 only offers a lower *mens rea* in the form of awareness of likelihood that genocide *might* be committed.¹⁰⁰ However, following a prosecutorial appeal from this decision, the Appeals

⁹¹ Chapter 4.4.2.

⁹² *Tadic* Appeals Judgment, para. 231.

⁹³ One could argue that the crime also needs to be foreseeable. However, this argument fails to address the significance of foresight.

⁹⁴ See chapter 5.2.4 for discussions related to JCE 3’s formula that *Tadic* omitted.

⁹⁵ *Brdjanin* Trial Decision, ICTY; *Stakic* Trial Judgment, ICTY, para. 436 and 530; *Tolimir* Trial Judgment, ICTY, para. 1173.

⁹⁶ *Tolimir* Trial Judgment, ICTY, paras. 1140, 1154; *Popovic et al.* Trial Judgment, para. 1195.

⁹⁷ Van Sliedregt argues that Krstic was the first to be convicted for committing genocide under JCE 3, see Van Sliedregt (2007) 191. This is incorrect. Krstic was convicted of participating in two JCE’s. The second JCE involved genocide as a JCE 1 crime, see *Krstic* Trial Judgment, paras. 633-636. This was overturned on appeal, see *Krstic* Appeals Judgment, paras. 135-143.

⁹⁸ *Stakic* Trial Judgment, para. 437.

⁹⁹ *Ibid* para. 530.

¹⁰⁰ See *Brdjanin* Trial Decision, ICTY, para. 55, see also paras. 30 and 57. It should be noted that some cases refer to the *mens rea* for JCE 3 as awareness that a crime *will* be committed which differs from *might*, see

Chamber judges (in the *Brdjanin* Appeals Decision) argued that JCE 3 can be applied to specific intent crimes. This decision, as set out in 2004, set a different precedent at the ICTY.

It created a new formula for JCE 3 which departed from the *Tadic*-articulated elements.¹⁰¹ The most important part of its reasoning was that:

‘(...) under the third category of joint criminal enterprise (an accused) need not be shown to have intended to commit the crime or even to *have known with certainty* that the crime was to be committed. (...) it is sufficient that that accused entered into a joint criminal enterprise to commit a different crime with the *awareness* that the commission of that agreed upon crime made it *reasonably foreseeable* to him that the crime charged *would be committed* by other members of the joint criminal enterprise, and it was committed.’¹⁰²

In the context of genocide, the Prosecutor needs to prove that ‘it was reasonably foreseeable to the accused that an act (according to the definition of genocide) *would be committed* and that it *would be committed* with genocidal intent.’¹⁰³

Judge Shahabuddeen, who had previously sat on the *Tadic* Appeals bench and was also part of this bench, issued a Separate Opinion.¹⁰⁴ He agreed with the conclusion but not ‘for the same reasons.’¹⁰⁵ His reasoning was based on foresight acting as proof of intent. He argued that ‘the third category of joint criminal enterprise mentioned in *Tadic* does not dispense with the need to prove intent; (...) it provides a mode of proving intent in particular circumstances, namely, by proof of foresight in those circumstances.’¹⁰⁶ He added that ‘what (*Tadic*) considered was that intent was shown by the particular circumstances of the third category of joint criminal enterprise.’¹⁰⁷ ‘The case, as I appreciate it, concerned not the principle of having to show intent, but a method of doing so.’¹⁰⁸ As a Judge who had previously sat on the *Tadic* Appeals bench, his view adds further uncertainty regarding the meaning of JCE 3, in particular its *mens rea*. Therefore considering the *Brdjanin* Appeals Decision reasoning and Judge Shahabuddeen’s comments, it appears that JCE 3 has adopted a different meaning, post-*Tadic*, depending upon whose commentaries are accepted. Three points stand out given the uncertainty of this judgment.

Firstly, the *Tadic* Appeals Judgment never defined a JCE 3 crime as one that *would be committed*. It held that a JCE crime ‘would most likely result’¹⁰⁹ from actions of JCE members (although this standard was overruled in favour of the possibility standard as discussed in section 9.3.2. However, this occurred in 2009. This development will be discussed below). The two cases (*Tadic* Appeals Judgment and *Brdjanin* Appeals Decision) therefore, provide a JCE 3 definition, marked by a difference in degree of certainty, with the

Tolimir Trial Judgment, ICTY, para. 1173: ‘was reasonably foreseeable to the Accused that the targeted killings would be committed with genocidal intent as a consequence of the agreed enterprise.’

¹⁰¹ Chapter 2.2.2.

¹⁰² *Brdjanin* Appeals Decision, ICTY (emphasis added).

¹⁰³ *Ibid*, para. 6 (emphasis added).

¹⁰⁴ Some have incorrectly referred to his opinion as a dissenting one, see Sliedregt (2007) 204 and *Karadzic* JCE 3 Dismissal motion, para. 8.

¹⁰⁵ *Brdjanin* Appeals Decision, Separate Opinion of Judge Shahabuddeen, ICTY, para. 1.

¹⁰⁶ *Ibid* 2. Also see Shahabuddeen (2010) 192.

¹⁰⁷ See n. (105) 8.

¹⁰⁸ *Ibid* 5.

¹⁰⁹ *Tadic* Appeals Judgment, para. 220.

Brdjanin Appeals Decision judges applying a higher standard. Secondly the *Brdjanin* Appeals Decision refers to ‘reasonably foresee’ while *Tadic* did not. It had referred to foresight and foreseeability. Thirdly, if Judge Shahabuddeen is correct in arguing that foresight is, in fact intention, then the JCE 3 theory, as articulated by *Tadic* and further applied in many other cases, has been misconstrued. It is furthermore contrary to the *Brdjanin* Appeals Decision which itself refers to the JCE participant who ‘reasonably foresees’ the crime and that the JCE participant does not need to ‘have known with certainty.’ These three comments reflect a re-interpretation of JCE 3 which is different to *Tadic*. Yet, regardless of this re-interpretation, the doctrine nevertheless remains unfair when applied to specific intent crimes. The elements are of a lower nature and cannot entail liability as a principal for a specific intent crime. Furthermore, NPSC is violated because of the absence of a specific connection between the actions of the JCE participant and the specific intent crime committed by the other participant.

Uncertainty in ICL

The second observation concerns uncertainty in ICL following the aforementioned ICTY decisions. While at the ICTY, subsequent judgments and decisions followed the *Brdjanin* Appeals Decision,¹¹⁰ at the Special Tribunal for Lebanon (STL), a different view emerged.¹¹¹

In 2011, the STL Appeals Chamber Decision argued that JCE 3 cannot be applied to specific intent crimes because of the *mens rea* requirement.¹¹² The Presiding Judge of the Chamber was Judge Cassese. As previously noted, Judge Cassese sat on the *Tadic* Appeals Judgment and is widely considered to be the author of the judgment.¹¹³ It may therefore be highly likely that the STL Appeals Judgment’s position reflects his views given his position as Presiding Judge, his role on the *Tadic* Appeals bench and the fact the he expressed his opinion about the scope of JCE 3 in a separate scholarly publication. In that publication, he argued that specific intent is a ‘different category’¹¹⁴ of a crime and that on grounds of ‘logical impossibility,’¹¹⁵ ‘one may not be held responsible for committing a crime that requires special intent (...) unless that special intent can be proved.’¹¹⁶ ‘(P)ersonal culpability’ (...) would ‘be torn to shreds.’¹¹⁷ This thesis agrees with these views given the higher requirements for a specific intent crime conviction and the absence of a connection between the specific intent crime committed and the participant’s actions. However, the important point is that, if we compare the *Brdjanin* Appeals Decision with this judgment, we find two judges, Judges Cassese and Shahabuddeen, who both sat on the *Tadic* Appeals bench but yet reached different conclusions about the scope of JCE 3. This reflects inconsistent discretion.

¹¹⁰ *Milosevic* Trial Decision, ICTY, paras. 290-291; *Tolimir* Trial Judgment, ICTY, para. 1173; *Popovic et al.* Trial Judgment, ICTY, para. 1195.

¹¹¹ *Rwamakuba* Appeals Decision, ICTR, paras. 14, 32: JCE 3 can be applied to specific intent crimes.

¹¹² STL Appeals Judgment on Applicable Law, para. 248.

¹¹³ Chapter 7.3.2, n. (58).

¹¹⁴ Cassese (2007) (b) 120.

¹¹⁵ *Ibid* 121.

¹¹⁶ *Ibid*.

¹¹⁷ *Ibid* 122. He also argued that the notion of ‘causation’ would be ‘torn to shreds.’ However, as noted in chapter 4.4.2, JCE 3 does not require a causation-nexus.

Further uncertainty at the ICTY

The third observation concerns the uncertainty that emerged again at the ICTY, post-2009. Two cases are of concern: the 2009 *Karadzic* Appeals JCE 3 foreseeability decision (already discussed in section 9.3.2.) and the 2014 *Dordevic* Appeals Judgment.

As section 9.3.2 illustrated, one of the concerns in applying foresight concerned the degree of specificity of this *mens rea*. This matter was settled in 2009 with the *Karadzic* Appeals JCE 3 foreseeability decision. However, this decision did not address how foresight based on a possibility standard (foresight that a crime might be perpetrated) applies to specific intent crimes. The judges left this question unanswered. Yet, in 2014, the *Dordevic* Appeals Judges were confronted with this question. In spite of the guidance provided by the *Brdjanin* Appeals Decision, namely that ‘awareness that the specific intent crime would be committed’ is necessary, the Appeals Judges created a new standard. They held that ‘it must be established that it was foreseeable to the accused that the crime might be committed, though it need not be shown that the accused possessed specific intent.’¹¹⁸ The judges would determine, based on the evidence, whether the crimes were ‘a possible consequence of the implementation of the JCE.’¹¹⁹ It is unclear why the *Dordevic* Appeals Judges omitted important material from the *Brdjanin* Appeals Decision since it referred to the decision in one of its footnotes.¹²⁰

As a result, this reasoning indicates how ICTY judges have created standards as they please without regard for previous precedents or limitations established in chapter 1 in the form of CIL and NCSL. No such concerns were raised in any of the cases mentioned in this section. Instead, different judgments and judges have provided their own views about how JCE 3 ought to be applied. The outcome is an unacceptable standard that is marked by inconsistency.

Inconsistency with JCE 1

The fourth and final observation concerns a significant discrepancy between applying JCE 1 to specific intent crimes and applying JCE 3 to such crimes. According to ICTY jurisprudence, if the crime of persecution or genocide is included within the common plan (JCE 1), it is no longer sufficient to prove intention.¹²¹ The prosecutor needs to provide evidence of specific intent. Therefore, JCE 1 imposes a higher standard of proof in contrast to JCE 3. No judgment, so far, has addressed this discrepancy, including the recent *Tolimir* and *Popovic* Trial Judgments.¹²²

Normative perspective in exercising discretion

Having provided these four observations, it is necessary to explain how the judges could have exercised their discretion to ensure a fair outcome. The main concerns involve three of the

¹¹⁸ *Dordevic* Appeals Judgment, para. 919.

¹¹⁹ *Ibid*, para. 920.

¹²⁰ *Ibid*, para. 919, fn. 2719.

¹²¹ *Popovic et al.* Trial Judgment, ICTY, para 1022: ‘under the first category JCE, the accused must possess the intent required for the crime, including the specific intent, when relevant;’ For persecution convictions under JCE 1 and 2, see *Krnojelac* Trial Judgment, para. 487; *Krnojelac* Appeals Judgment, paras. 111-112; *Babic* Trial Sentence Judgment, para. 31; *Kvočka et al.* Trial Judgment, para. 288 and *Simic et al.* Trial Judgment, para. 156. For genocide, see *Krstic* Trial Judgment, paras. 634 and 645.

¹²² *Tolimir* Trial Judgment, ICTY, para. 1173; *Popovic et al.* Trial Judgment, para. 1195.

four factors identified in thesis as necessary for a fair outcome: fair labelling, NPSC and NCSL since no precedents in CIL explained how JCE 3 applies to a specific intent crime.

To prevent any violation of NCSL, the judges could argue that they are interpreting JCE 3 as formulated by *Tadic*, assuming that the theory is recognised as CIL-based, foreseeable and accessible. To do so, they could have relied on article 26 of the SFRY, mentioned in chapter 6.5. This law stated that:

‘Anybody creating or making use of an organisation, gang, cabal, group or any other association for the purpose of committing criminal acts is criminally responsible for all criminal acts resulting from the criminal design of these associations and shall be punished as if he himself has committed them, irrespective of whether and in what manner he himself directly participated in the commission of any of those acts.’

The objective of the judges would be to clarify how such law applies to a new scenario that involves specific intent crimes. They are not creating a new form of liability but are instead clarifying interpretational doubts that remain.¹²³ To ensure that NPSC is not violated and that the elements impose a fair label, the judges would be required to review the elements. They should set out specific requirements that emphasise the gravity of culpability of the JCE participant (participant A) for the collateral specific intent offence committed by another participant (participant B).

Foremost, they should hold that participant A should either *intend* with specific intent the collateral offence (although it was not part of the common plan) or *foresee with virtual certainty* (oblique intention) that the specific intent crime *will be committed* by participant B. It is essential that participant B *will* commit the specific intent crime (*actus reus* and *mens rea* and not just the *actus reus* as suggested by *Tadic*) as opposed to *may*. If under those circumstances, the JCE participant nevertheless continues to be part of the JCE, his gravity of culpability is that of a principal. These elements differ from the fact that participant A foresees, is aware of the likelihood or that participant B *may* commit. They emphasise the specific *mens rea* of participant A, the stage at which participant B intends to commit the crime and the close connection between A and B.

9.4.3 Review of the critique

Current scholarship related to JCE 3 has not addressed its application in much detail. It has not scrutinised the reformulation of JCE 3 in the *Brdjanin Appeals Decision*¹²⁴ or the inconsistent reasoning or case law beyond the ICTY. However, several commentaries argue that JCE 3 cannot be applied to specific intent crimes owing to a lowering of the *mens rea*.¹²⁵ These discussions however do not provide a normative perspective regarding how a reformulated definition of JCE may be able to capture liability for JCE 3. Only one scholar, Van Sliedregt, has provided a different view to mainstream academic commentaries, agreeing with the *Brdjanin Appeals Decision* approach.¹²⁶ Yet, as noted above, this position is

¹²³ Chapter 6.3.

¹²⁴ Boas, Bischoff and Reid (2007) 77 acknowledging that the *mens rea* differed from *Tadic*.

¹²⁵ Robinson (2008) 941: ‘convictions for genocide can be entered only where that intent has been unequivocally established;’ for similar views, see Danner and Martinez (2005) 79 and 151; Olasolo (2009) 283.

¹²⁶ Van Sliedregt (2003) 203: ‘participating in a JCE to commit genocide may be established by being aware of the principal’s genocidal intent and nevertheless continuing to engage in, what turn out to be, genocidal activities. Proof of foresight suffices.’

untenable. An important comment regarding the application of JCE 3 to specific intent crimes is that the judges could have exercised their discretion differently. I have provided the normative perspective above. The judges could have adopted this approach by invoking their judicially created standard of review which chapter 1 mentioned. Under this form of review, judges can review the law if they find it appropriate so as to develop the jurisprudence of the Tribunal. By using this standard of review, the judges could have argued that JCE 3 ought to be reformulated in the context of a specific intent crime.

9.5 CONCLUSIONS

This chapter has illustrated four main points regarding JCE 3's application: Judges have firstly defined the common plan widely in some cases; secondly failed to substantiate the meaning of natural and predictable; thirdly relied on foresight only for some convictions and fourthly applied the doctrine of JCE 3 to specific intent crimes by re-interpreting its elements.

Such an exercise of discretion in regards to two matters could have been avoided. Firstly, the judges could have exercised their discretion in defining the common plan tightly by examining the evidence closely. This would have enabled for narrow definitions of the common plan. Secondly, they could have exercised their discretion differently when presented with factual scenarios of specific intent. This choice could have been made possible by using the judicially articulated form of review which enables them to develop the jurisprudence of the Tribunal when necessary.¹²⁷ In this case, they could have used this form of review and referred to article 26 of the SFRY. They could have interpreted the elements of JCE 3 in a manner that reflects the level of culpability of a principal, as argued above. Yet, they did not exercise their discretion accordingly. Alternatively, Appeals Chamber judges could have reversed the law that holds a JCE participant liable for a specific intent crime under JCE 3. They could have reinstated the *Stakic* Trial Judgment ruling, namely that JCE 3 cannot be applied to specific intent crimes. Instead, discretion post-*Tadic*, has proven to be inconsistent and arbitrary.

¹²⁷ Chapter 1.2.2.

PART 3: CONCLUSIONS

The objective of Part 3 was to evaluate the exercise of discretion in applying JCE 1 and 3. From the analysis in chapters 8 and 9, the following conclusions can be drawn.

Applying JCE 1: Unfair

Reconceptualising JCE 1 led to the conviction of two groups of persons:

- a) JCE participants who *use RPP's as a tool/instrument*, the indirect participants (Diagram 3, chapter 8); and
- b) JCE participants who do not *use such RPP's* but who are part of the enterprise, the ordinary participants (Diagram 3, chapter 8).

As chapter 8 explained in detail, holding the indirect and ordinary participant liable is unfair.

Applying JCE 3: Unfair

The conclusions in chapter 9 were that the application of JCE 3 post-*Tadic* was unfair. Several aspects of the doctrine have not been applied fairly (the definition of common plan, the meaning of natural and predictable and the application of foresight). It was furthermore unfair to apply JCE 3 to convict participants for specific intent crimes.

Review of literature

Chapters 8 and 9 have also illustrated several flaws and shortcomings within the literature regarding the application of JCE 1 and JCE 3.

PART 4: CONCLUSIONS

Reviewing the fairness of discretion

10.1 INTRODUCTION

This thesis set out to analyse the following question: have the ICTY judges exercised their judicial discretion fairly in formulating and applying JCE 1 and 3. To address this question, this thesis explored three matters: it explained what it means to exercise judicial discretion fairly in interpreting law at the ICTY (Part 1), it addressed the fairness in formulating JCE 1 and 3 (Part 2) and finally it addressed the fairness in applying JCE 1 and 3 (Part 3).

Having explored these issues from chapters 3 to 9, this thesis has so far made a significant two-fold contribution. Firstly, it has provided a detailed scrutiny of post-WW II case law, which formed the basis of JCE's existence. It has included new material which the *Tadic* Appeals Judges omitted. Secondly, by critically reviewing the literature, it has demonstrated eight flaws. Part 4 will now summarise the key conclusions regarding JCE's formulation and application and these flaws.

This chapter will then provide a third and final contribution to the literature regarding the exercise of discretion at the ICTY. This contribution concerns a discussion regarding influences pertaining to distinct legal cultures. Chapter 1 explored the meaning of legal culture and its application at the ICTY. This chapter will now revisit this discussion to examine whether any of the three theories mentioned may have contributed to the formulation and application of JCE.

10.2 FAIRNESS IN FORMULATING AND APPLYING JCE

10.2.1 Formulating JCE 1: Unfair

JCE 1 is an unfair doctrine. Although fair labelling played a central role in its formulation¹ and NPSC had not been violated,² restraints on the exercise of discretion in the form of CIL and NCSL were not adhered to. As explained in chapters 5 and 6, neither is JCE 1 found under CIL³ nor does its formulation meet the requirements of NCSL.⁴ Chapters 1 and 7 explained how using CIL is an absolute requirement within the exercise of discretion that cannot be abandoned.⁵ It is a central factor considering that JCE was not included within the ICTY Statute.

¹ Chapter 3.2.

² Chapter 4.3.

³ Chapter 5.3.4.

⁴ Chapter 6.4.

⁵ Chapters 1.4 and 7.

10.2.2 Formulating JCE 3: Unfair

Unlike JCE 1, JCE 3 is unfair for four reasons related to the weight of the four factors. Firstly, it does not attribute a fair label to the JCE participant. He is unfairly labelled as a principal.⁶ This also leads to the conclusion that such a label violates NPSC given the elements of foreseeability and foresight and the absence of an objective element.⁷ Chapter 5 explained how the elements (lack of objective element, foreseeability and foresight) are not found under CIL⁸ and the methodology does not conform to an acceptable formula of CIL.⁹ Finally, chapter 6 indicated how the requirements of NCSL were not met.¹⁰

10.2.3 Applying JCE 1: Unfair

In applying JCE 1, *Brdjanin* reconceptualised the doctrine.¹¹ The reconceptualization concerned two groups of individuals: the JCE member who *uses a non-JCE RPP as a tool*, the indirect participant (Diagram 3, chapter 8) and the JCE participant who has no connection with the non-JCE RPP but is nevertheless liable because of his participation in the JCE, the ordinary participant (Diagram 3, chapter 8).¹² *Brdjanin* held both JCE members liable as principals. Similar to the formulation of JCE, all four factors (fair labelling, NPSC, CIL and NCSL) played a role within the exercise of discretion.

Liability of the indirect participant: Unfair

The exercise of discretion in order to convict the direct participant was unfair. Despite the fact that using the non-JCE RPP as a tool is indicative of high-level responsibility¹³ and that such a conviction does not violate NPSC,¹⁴ there are concerns regarding CIL and NCSL.

The *Brdjanin* Appeals judges had not advanced an acceptable formula of CIL.¹⁵ Furthermore, their reasoning was contrary to JCE's formulation in *Tadic*, the NMT judgments cited (*RuSHA* and *Justice*) and other post-*Tadic* cases¹⁶ which indicated that a direct perpetrator should always be a JCE member.¹⁷ In addition, the exercise of discretion did not meet the other NCSL requirements (foreseeability and accessibility).¹⁸

Liability of the ordinary participant: Unfair

Imposing liability on the ordinary participant was also unfair for three reasons: there was no connection between the ordinary participant and the RPP that explained why culpability was that of a principal (see Diagram 3, chapter 8);¹⁹ this interpretation of the common plan was

⁶ Chapter 3.3.

⁷ Chapter 4.4.

⁸ Chapter 5.2.3.

⁹ Chapter 5.3.5.

¹⁰ Chapter 6.5.

¹¹ Chapter 8.

¹² Chapter 8.3.

¹³ Chapter 8.4.

¹⁴ *Ibid.*

¹⁵ *Ibid.*

¹⁶ *Ibid.*

¹⁷ *Ibid.*

¹⁸ *Ibid.*

¹⁹ *Ibid.*

not found under CIL (not a reasonable interpretation of law) and it violated NCSL requirements (foreseeability and accessibility).²⁰

10.2.4 Applying JCE 3: Unfair

The exercise of discretion, in applying JCE 3, was unfair considering that its formulation was already unfair. However, post-*Tadic*, the level of unfairness was compounded. In some cases, judges defined the common plan widely. In other cases, judges overlooked the requirement of foresight. Judges also chose to exercise discretion unfairly by applying JCE 3 to specific intent crimes.²¹

10.3 FAIRNESS AND THE JCE-BASED LITERATURE

The eight flaws identified in this thesis are the following:²²

Fair labelling, JCE 1 and JCE 3

Fair labelling remains a significantly under-analysed concept in ICL discourse. Unlike English law where the notion of fair labelling/representative labelling has received detailed treatment, neither has ICTY judicial discourse nor has ICL scholarly contribution shed light on its significance. Many JCE-based publications simply refer to system criminality and justify the existence of JCE as necessary to address collective criminality without mentioning fair labelling. On the other hand, this thesis (chapter 3) has centred its discussion on fair labelling as the factor that influences the exercise of discretion in interpreting commission beyond statutory wording. It has argued that system criminality can only be seen as the context in which crimes are perpetrated but it is not the key factor that influences the exercise of discretion. The role of fair labelling is central to the formulation of JCE 1 and even in respect of JCE 3, where the JCE participant bears a degree of responsibility for what he foresees.²³

JCE 1 and the objective element

Chapter 3 further noted how the level of contribution required for JCE 1 is ‘substantial/significant.’ This view stands in contrast to the mainstream academic position that holds that the level of contribution is either less than that for aiding and abetting or can be ‘insignificant.’ I advanced three arguments to support this finding. Firstly, I explained how the two terms, substantial and significant, bear the same meaning. Secondly, I referred to the key paragraphs explaining that to date, no ICTY-based case law has determined the level of contribution to be ‘not substantial’ but ‘significant.’²⁴ Thirdly, the analysis of CIL state practice in chapter 5.2.1 confirms this specific threshold.

²⁰ Chapter 8.4.

²¹ Ibid.

²² Chapters 3 to 6 have outlined several flaws regarding each factor: fair labelling, NPSC, CIL and NCSL. Overall, this thesis has therefore advanced more than just eight flaws. However, the most important ones are the eight cited above.

²³ Chapter 3.3.3.

²⁴ Chapter 3.2.3.

NPSC, JCE 3 and applying JCE 1

Chapter 4 conceded how NPSC played a central role in formulating JCE as well as how the judges in *Tadic* acknowledged its importance. Yet, neither did *Tadic* explain it when applying it to the co-perpetrator nor consider it when formulating JCE 3. As fair labelling, NPSC also remains a significantly under-analysed concept in ICL discourse. In both judgments and scholarly discourse, it was never subjected to the detailed treatment it deserved. The judges were not required to provide a holistic definition of this standard but when exercising discretion to create a new standard related to commission, they ought to have taken into account its impact on fairness, unless they believed otherwise. This is a significant flaw in formulating JCE 3 and also applying JCE 1 (in respect of the ordinary participant).

CIL and JCE 1/JCE 3

CIL, as a factor, is an important judicial restraint. It is an absolute requirement considering the silence of JCE within the ICTY statute. Chapter 5 indicated how it may be used with a wide but yet controlled degree of discretion in the form of the modern method.²⁵ However in the context of JCE, the ICTY judges failed to explain their methodological formulation of CIL altogether. This leaves serious concerns about the exercise of discretion in using this source of law.²⁶

Within the literature, many scholars have argued that CIL has been used unfairly. However, although this conclusion falls in line with that of this thesis, the analysis fails to embrace a holistic approach. None of the publications provide for a detailed examination of all relevant criteria necessary in using CIL. Furthermore, acceptable CIL methodologies (specific reference to the modern method) have not been addressed and state practice has been unfairly criticised for being selective. As chapter 5 indicated, this is not a valid criticism when using this source of law.

NCSL and JCE 1/JCE 3

The ICTY neither fully defined NCSL nor applied it consistently. Chapter 6 illustrated the difficulties in providing a normative definition of NCSL in the absence of a statutory one. However, regardless of this absence, the judges did articulate a fair formula of NCSL.²⁷ Yet, they did not apply this formula when formulating JCE 1 and 3.

Within the JCE-based discourse, the most important criticism is the absence of an elaborate appraisal of NCSL's meaning. Several scholars do not refer to the four strands of NCSL as identified in this thesis. Furthermore, some have criticised judges for not including *in dubio pro reo* and that judges could not exercise their discretion beyond statutory wording.²⁸ In line with NCSL's definition, judges can interpret beyond the text and *in dubio pro reo* is not a NCSL requirement.

²⁵ Chapter 5.3.3.

²⁶ Chapter 5.3.4 and 5.3.5.

²⁷ Chapter 6.3.

²⁸ Chapter 6.6.

Examining the role and order of factors

Within ICL discourse, there is a notable absence of analysis regarding the need to examine all factors that are part of this discussion. Four aspects of the literature can be criticised.

Firstly, the *Tadic* Appeals Judgment can be faulted since it did not use an appropriate formula of CIL and did not take into account NCSL as a key factor. Secondly, critics of JCE do not acknowledge the important factor of fair labelling which is significant in relation to the consequences of the outcome. Thirdly, Cassese and Shahabuddeen's post-*Tadic* publications and certain ICTY judgments that defend JCE, do not fully examine the significance of CIL, NPSC and NSCL as three key restraining factors which are non-negotiable. Fourthly, some of the JCE commentators do not acknowledge an order of factors with NCSL as the fundamental limiting factor. Instead, we find discussions related to a 'balance.'

Applying JCE 1

Several scholarly commentaries acknowledge that *Brdjanin* reconceptualised JCE. However, there is a significant absence of discussion among these commentaries regarding the unfairness of applying JCE 1 in this manner. Questions regarding NPSC and NCSL requirements have not been raised. As chapter 8 indicated, a thorough review of the NMT case law cited is necessary in respect of both the indirect and ordinary participants. Furthermore, questioning whether such law was foreseeable and accessible to the ICTY defendants is a second important consideration. Instead of addressing such questions, some commentators have provided descriptive accounts of *Brdjanin* followed by an examination of whether criminalising conduct in this manner is desirable in order to capture liability of high-level perpetrators (such as senior leaders, generals and political figures).

Applying JCE 3

Regarding the application of JCE 3, chapter 9 provided important insights concerning the following matters: vague and inconsistent definitions of the common plan, the unclear application of foresight, the different meanings of foreseeability, the application of JCE 3 to specific intent crimes and the inconsistent discretion exercised by Judges Cassese and Shahabuddeen when applying JCE 3 to specific intent crimes. This analysis was necessary given the definition of JCE 3 and the need to provide an up-to-date review regarding its application.

In contrast, few commentaries have been made regarding these matters and no analysis regarding the different views offered by Judges Cassese and Shahabuddeen has been provided.

10.4 EXERCISING DISCRETION: IDENTIFYING ICTY LEGAL CULTURE

This section will pursue the third and final discussion of this thesis, which concerns the influence of legal culture at the ICTY. In chapter 1, three specific comments were made regarding this matter.²⁹ I had argued that either common law or civil law traditions may influence the jurisprudence of the court. Alternatively, no such influence may have occurred

²⁹ Chapter 1.2.3.

as ICL is of a *sui generis* nature (ICTY Judge Robinson's contention). The third theory drew from Judge Cassese's comment in the *Erdemovic* Sentencing Decision. It may be the case that when judges work together as a collegiate body, there is a 'meeting of the minds'³⁰ as 'views become closer and closer.'³¹ The discussion of legal influences is not centred on a specific legal system. Instead, the solution may derive from one of the predispositions identified: a 'hunch,' 'judicial philosophy,' 'habits of the mind,' 'personal conception of the role' and experience. The judges then collectively agree with such a solution because they all consider it acceptable.

In the context of formulating and applying JCE, we would question how these theories may have contributed to the advent and development of the doctrine. The analysis involves understanding the background of judges, possible domestic law influences, the possible role of individual personalities, judicial philosophies and how they may be related to identifying factors in interpreting commission fairly. In the following paragraphs, I will explain how some of these aspects may have influenced the formulation and application of JCE 1 and 3.

10.4.1 Formulating JCE 1

Judicial philosophy

To begin the discussion, it is appropriate to question whether certain judicial philosophies played a role in formulating JCE 1. At the ICJ, Prott identified positivism³² and legalism³³ as two theories that influenced ICJ Judges Spender and Fitzmaurice. These theories led them to endorse a narrow perception of the judicial role. However, Prott also referred to ethical and moral considerations that, in contrast, entailed embracing a creative role.³⁴

At the ICTY, among these theories, positivism clearly had no role to play. By endorsing a narrow conception of the judicial role, the judges could not interpret 'commission' to address scenarios such as that in *Tadic*. Instead, the *Tadic* Appeals Judges believed that a creative role would be necessary since JCE was a useful tool to address system criminality. The language used in several paragraphs conveys this point clearly: the '(s)tatute does not stop'³⁵ with the text, the 'moral gravity'³⁶ of co-perpetrators is no less than that for direct perpetrators and it was important to not 'understate the degree of (...) criminal responsibility'³⁷ of co-perpetrators. These phrases indicate the importance judges placed on moral considerations. In light of this reasoning, it is likely that the judges formulated this theory of commission to address the international community's concern in bringing those accountable to justice. This can be deduced from the paragraph that states that 'all those who have engaged in serious violations of international humanitarian law (...) must be brought to justice.'³⁸ With an international audience in mind, a theory that limited the interpretation of 'commission' to its meaning of direct perpetratorship (natural sense) would not be befitting. Positivism could not achieve such a goal. It is furthermore likely that such reasoning drew the

³⁰ Chapter 1.2.3, n (55).

³¹ *Ibid.*

³² Prott (1979) 204.

³³ *Ibid* 205.

³⁴ *Ibid* 204.

³⁵ *Tadic* Appeals Judgment, para. 190.

³⁶ *Ibid* 191.

³⁷ *Ibid* 192.

³⁸ *Ibid* 190.

judges to take into account fair labelling as an important factor in formulating theories of liability.

Therefore, the judges were not influenced by positivism, were mindful of the need to formulate a theory appropriate for an international context and were willing to embrace a creative role.

A common law doctrine, civil law doctrine or neither?

The next question that arises is whether the formulation of this doctrine was common law or civil law influenced or neither. Among the judges who sat on the *Tadic* Appeals bench, we find different nationalities: Judge Cassese (Italian), Judge Shahabuddeen (Guyanese), Judge Wang Tieya (Chinese), Judge Mumba (Zambian) and Judge Nieto-Navia (Colombian). Of these countries, only two are common law: Guyana and Zambia. It is therefore difficult to conclude that JCE was a doctrine formulated by common law judges or that JCE had a specific common law origin. We could argue that JCE 1 was strongly inspired by common law cases as the *Tadic* Appeals Judgment referred to four British Military Court Trial cases.³⁹ Furthermore, JCE is a well-established form of liability in English law.⁴⁰

However, as chapter 6.4 indicated, the *Tadic* Appeals Judgment was not the first case to refer to the common plan theory. ICTY judges did so in the *Tadic* Trial Judgment, the *Furundzija* Trial Judgment and the *Delalic* Trial Judgment. They reached this conclusion by referring to NMT and IMT law.⁴¹ Therefore, since other judges also viewed this theory as a useful tool to convict those perpetrating crimes in group, this doctrine is neither a common law nor civil law-inspired doctrine. It is one that judges from different jurisdictions found useful to apply at the ICTY given the nature of crimes committed (system criminality). Finnish ICTY Judge Per-Johan Lindholm appears to endorse this view. He held that '(the) so-called basic form of joint criminal enterprise (...) is nothing more than a new label affixed to a since long well-known concept or doctrine in most jurisdictions as well as in international criminal law, namely co-perpetration.'⁴²

One final comment regarding the doctrine's origin can be made. Judges Cassese and Mumba were both part of the *Furundzija* Trial Judgment that used the common plan doctrine. They were also on the *Tadic* appeals bench which issued its judgment a year later. It is a plausible theory that a doctrine they applied in *Furundzija* needed further expounding to address the factual scenarios that were appearing before them in several cases. The judges had a 'hunch' that the common plan theory should be crystallised at the ICTY under JCE and decided to exercise their discretion in this manner as appellate judges. In turn, the other judges, post-*Tadic*, agreed with this theory given its usefulness. Given this reasoning, we can conclude that formulating and applying JCE was a result of what Cassese described as a 'meeting of the minds.' Judges in *Tadic* collectively agreed with it as well as judges in post-*Tadic* case law.

³⁹ Chapter 5.3.1.

⁴⁰ Simester and Sullivan (2010) 233; Smith and Hogan (2011) 213.

⁴¹ See *Furundzija* Trial Judgment, paras. 193-226 and *Tadic* Trial Judgment, paras. 664-730. The *Delalic* Trial Judgment merely referred to the *Tadic* Trial Judgment, see *Delalic* Trial Judgment, para. 328.

⁴² *Simic and others* Trial Judgment, Separate and Partly Dissenting Opinion of Judge Per-Johan Lindholm, para. 2.

Legal culture and limitations

The final matter regarding the possible influences of legal culture concerns discussions regarding limitations. Three points can be made in this regard.

Foremost, one of the judges in the *Tadic* Appeals judgment, Judge Nieto-Navia, issued a strong dissenting opinion in the ICTR *Akayesu* Appeals Judgment.⁴³ He was concerned about the powers that the Appeals Chamber judges had drafted for themselves so that they could review judgments if it were necessary to develop the jurisprudence of the Tribunal despite a lack of appeal from either the Prosecutor or defence. His main concern was the limits of judicial activism. Yet, in the *Tadic* Appeals Judgment, he refrained from issuing any separate or dissenting opinion although a new form of liability was created. He raised no concerns regarding limits in the form of CIL methodologies or NCSL implications.

Secondly, it is surprising that a clearer CIL methodology was not used in *Tadic*. In *Hadzihasanovic and Kubura* (issued in 2003), Judge Shahabuddeen issued a dissenting opinion regarding CIL. In respect of the ICC Statute, he argued that the weight of the treaty was not as authoritative as Additional Protocol I to the Geneva Conventions 1977 because the ICC Statute was adopted subsequent to the making of the ICTY Statute.⁴⁴ Yet, he refrained from making a similar comment in *Tadic* although the judgment also referred to the ICC Statute as *opinio juris*.

Thirdly, it is uncharacteristic of any legal system to refrain from addressing NCSL when interpreting law. Judge Cassese, in particular, was aware of NCSL implications, having previously interviewed IMTFE Judge Roling regarding his experience at the IMTFE.⁴⁵ They both discussed the difficulties in interpreting law in an *ex post facto* court. However, Judge Roling in discussing NCSL implications with him at length, noted how ‘the development of human rights law (post-IMTFE) introduced the prohibition of retroactive law into international law.’⁴⁶ Yet, he added that the ICCPR and the ECHR made an exception for acts that were criminal if they were ‘general principles of law recognized by the community of nations.’ Therefore, Judge Cassese was aware of the need to use a source of law appropriately as well as the need to address NCSL implications.

Given these comments, it cannot be argued that the failure to address limitations originated from specific legal cultures. They were failures on behalf of the judges when exercising their discretion. It was possible that since *Tadic* did not address these requirements, there was a considerable reluctance on behalf of judges post-*Tadic* to review them. Chapter 7 examined this matter in detail, noting the difference the ECCC and the ICTY took in accepting JCE 3.

Conclusions

In conclusion, three distinct features regarding the influences of legal culture can be discerned. Foremost, given the notable absence of dissenting opinions regarding JCE 1’s formulation, the predominant judicial philosophy at the ICTY was one driven by moral considerations. Secondly, the doctrine can neither be considered common law nor civil law. It originated from a consensus among judges both pre-*Tadic* and post-*Tadic*. Thirdly, the failure

⁴³ Chapter 1.2.2, n. (30).

⁴⁴ *Hadzihasanovic* Appeals Decision on Jurisdiction, Dissenting Opinion of Judge Shahabuddeen, para. 21.

⁴⁵ Roling and Cassese (1993).

⁴⁶ Roling and Cassese (1993) 70.

to address judicial restraints cannot be explained in accordance with any specific understanding of legal culture.

10.4.2 Formulating JCE 3

Origin of doctrine

In formulating JCE 3, the most important discussion concerns its origin (common law or civil law or *sui generis*). Several points should be noted here.

Foremost, in arguing that Tadic should be convicted for murder (under JCE 3), the Prosecutor did not refer to any legal systems or precedents.⁴⁷ However, as chapter 2 indicated, *Tadic* did. Yet, it relied primarily on post-WW II Italian cases. It could be argued that reference to such law was a direct influence of Italian Judge Cassese. This may create the impression that JCE 3 is a civil law-inspired doctrine. However, as the analysis in chapter 5 indicates, several of these cases do not refer to the elements of JCE 3. Therefore, JCE 3 is not civil law-based.

In turning to a different argument, Judges Cassese and Shahabuddeen defended the doctrine from a policy-based perspective, by referring to English common law cases. They referred to Lords Steyn and Hutton in *Powell and English*.⁴⁸ These cases were not referred to in *Tadic*. However, they may indicate that JCE 3 is a common law-inspired doctrine which aims to be the equivalent of the English law parallel, known as the parasitic form of liability.⁴⁹ However, under English law, the extended form of joint enterprise does not include foreseeability. Therefore, it is not common law-inspired.

A third further comment which fails to indicate the doctrine's origin emanates from Judge Per-Johan Lindholm:

‘(JCE 3) contains neither anything new. It defines the kind of *mens rea* regarded as sufficient to hold co-perpetrator A liable for a crime committed by co-perpetrator B going beyond their common plan. The *mens rea* according to the extended form of joint criminal enterprise is known in Civil Law countries as *dolus eventualis* and in several Common Law countries as (advertent) recklessness.’⁵⁰

Conclusions

Given these diverse views, it appears that JCE 3 has neither a civil law nor common law origin. The range of cases provided in *Tadic* (US Military Court case law, British Military Court case law, post-WW II Italian cases) coupled with the justifications for the doctrine in English law reveal that there is no specific legal culture that led to its formulation. Even if we conclude that it was formulated due to a ‘meeting of the judges’ minds’ in *Tadic* as there was no dissent, this finding is still questionable as both Judges Shahabuddeen and Cassese disagreed about its elements in post-*Tadic* publications. Chapters 5.2.6 and 9.4.2 illustrated this point.

⁴⁷ *Tadic* Prosecution Brief in Reply, paras. 3.17-3.19.

⁴⁸ Cassese (2007) (b) 118, fns. 10 and 11; *Krajisnik* Appeals Judgment, para. 33.

⁴⁹ Chapter 4.5.3, n. (36) and chapter 5.2.4.

⁵⁰ *Simic* Trial Judgment, Separate and Partly Dissenting Opinion of Judge Per-Johan Lindholm, para. 3.

10.4.3 Applying JCE 1

Judicial hunch

In examining the application of JCE 1, the exercise of discretion raises questions about origins of doctrines and individual personalities. It may be argued that the ICTY was neither inspired by civil law nor common law doctrines. Instead, it developed its jurisprudence as it saw appropriate in light of fair labelling. This argument stems from the fact that the new JCE 1 formula (as illustrated in chapter 8) represents a synthesis of doctrinal ideas from both common law and civil law systems. It was necessary for judges to reconceptualise it in order to capture the gravity of conduct of those who use RPPs as tools.

Furthermore, Judge Bonomy, who can be considered the first judge to begin the redrafting of JCE 1 boundaries, referred to NMT law, several Latin American countries and the Continental legal system in his separate opinion in the *Milutinovic* Decision. Yet, Judge Bonomy was a Scottish judge prior to beginning his career as an ICTY judge. It is therefore unlikely that domestic training was a leading factor in influencing a choice of precedents. Instead, precedents which provided support for the purpose of addressing fair labelling were used as influential authorities. In this respect, discretion was not limited to finding authorities from specific jurisdictions but relevant authorities so long as they applied to the case.

Judge Van den Wyngaert, the use of CIL and personal experience

The next point worth considering is CIL methodology. Chapter 8 criticised the *Brdjanin* Appeals Judges' use of CIL for failing to abide by an acceptable methodology. No concern was raised in regards to this matter by any of the judges. Yet, Judge Van den Wyngaert who was one of the judges, issued a strong dissenting opinion in the 2002 ICJ Arrest Warrant case regarding the use of CIL in that case. She raised concerns pertaining to sufficient state practice and the need for the court to be satisfied of the existence of *opinio juris*.⁵¹ Yet, she expressed no such concerns about the use of CIL in the *Brdjanin* Appeals Judgment. An explanation for this reasoning cannot be found but this example indicates that previous judicial decision-making does not apply consistently.

Conclusions

The two conclusions, in this context, are that the reconceptualization of JCE 1 was not driven by specific domestic case law or judges' prior training. It arose out of a need to address fair labelling and to find appropriate case law that supports judicial decision-making. Secondly, as with formulating JCE 1, no specific legal culture can explain why an appropriate CIL methodology was not referred to.

10.4.4 Applying JCE 3

Composition of bench

Chapter 9 indicated the various difficulties in understanding the elements of JCE 3, post-*Tadic*. Several problematic areas were identified regarding foreseeability, the meaning of foresight and the application of JCE 3 to specific intent crimes. None of these can be

⁵¹ *Arrest Warrant case*, Dissenting Opinion of Judge Van den Wyngaert, ICJ, para. 23.

attributed to specific judicial predispositions such as a hunch or judicial experience. It appears that the inability to formulate a clear JCE 3 formula in *Tadic* led judges to exercise their discretion as they desired post-*Tadic*. The only plausible argument to explain the inconsistencies could be that the application of JCE 3 merely depended on the composition of the bench.

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Appendix C: ICTY Case Law

	Case	Prosecution			Trial Chamber			Appeals Chamber		
		JCE 1	JCE 2	JCE 3	JCE 1	JCE 2	JCE 3	JCE 1	JCE 2	JCE 3
1	<i>Tadic</i>	1	N/A	3	1	N/A	N/A	1	N/A	3
2	<i>Furundzija</i>	1	N/A	N/A	1	N/A	N/A	1	N/A	N/A
3	<i>Krnojelac</i>	1	2	3	N/A	R	N/A	N/A	2	N/A
4	<i>Delalic</i>	N/A	2	N/A	N/A	R	N/A	N/A	R/C	N/A
5	<i>Martic</i>	1	N/A	3	1	N/A	3	1	N/A	3
6	<i>Krstic</i> (1st JCE)	1	N/A	3	1	N/A	3	1	N/A	3
	<i>Krstic</i> (2nd JCE)	1	N/A	3	1	N/A	3	R	N/A	R
7	<i>Kvocka</i>	1	2	3	R	2	N/A	N/A	2	N/A
8	<i>Dordevic</i>	1	N/A	3	1	N/A	3	1	N/D	3
9	<i>Brdjanin</i>	1	N/A	3	R	N/A	R	1	N/A	N/A
10	<i>Babic</i> (guilty plea)	1	N/A	3	1	N/A	3	1	N/A	3
11	<i>Limaj et al.</i>	N/A	2	3	N/A	R	R	N/A	R/C	R/C
12	<i>Blagojevic and Jokic</i>	1	N/A	3	R	N/A	R	RC	N/A	RC
13	<i>Krajisnik</i> (original and expanded crimes - no JCE 3)	1	N/A	3	1	N/A	N/A	1	N/A	N/A
14	<i>Vasiljević</i> (1st JCE)	1	2	N/A	1	N/A	N/A	R	N/A	N/A
	<i>Vasiljević</i> (2nd JCE)	1	2	N/A	R	N/A	N/A	R	N/A	N/A

Appendix C: ICTY Case Law

	Case	Prosecution			Trial Chamber			Appeals Chamber		
		JCE 1	JCE 2	JCE 3	JCE 1	JCE 2	JCE 3	JCE 1	JCE 2	JCE 3
15	<i>Stakic</i> (indirect co-perpetration)	1	N/A	3	N/A	N/A	N/A	1	N/A	3
16	<i>Popovic and others</i> (2 JCE's)	1	N/A	3	1	N/A	3	1	N/D	3
		1	N/A	3	1	N/A	3	N/D	N/D	N/D
17	<i>Milan Simic</i> (guilty plea)	N/A	N/A	N/A	N/A	N/A	N/A	N/A	N/A	N/A
18	<i>Rasim Delic</i>	N/A	N/A	N/A	N/A	N/A	N/A	N/A	N/A	N/A
19	<i>Boškoski & Tarčulovski</i>	1		3	R	N/A	R	R/C	N/A	R/C
20	<i>Dragomir Milošević</i>	N/A	N/A	N/A	N/A	N/A	N/A	N/A	N/A	N/A
21	<i>Lukić and Lukić</i>	N/A	N/A	N/A	N/A	N/A	N/A	N/A	N/A	N/A
22	<i>Milutinović et al.</i>	1	N/A	3	1	N/A	3	1	N/A	3
23	<i>Pavle Strugar</i>	N/A	N/A	N/A	N/A	N/A	N/A	N/A	N/A	N/A
24	<i>Naser Orić</i>	N/A	N/A	N/A	N/A	N/A	N/A	N/A	N/A	N/A
25	<i>Hadžihasanović & Kubura</i>	N/A	N/A	N/A	N/A	N/A	N/A	N/A	N/A	N/A
26	<i>Haradinaj et al</i>	1	N/A	3	R	N/A	R	R/C	N/A	R/C
27	<i>Dragan Zelenović</i> (guilty plea)	1	N/A	N/A	1	N/A	N/A	1	N/A	N/A
28	<i>Mrkšić et al.</i>	1	N/A	3	R	N/A	R	NA	N/A	N/A
29	<i>Stanislav Galic</i>	N/A	N/A	N/A	N/A	N/A	N/A	N/A	N/A	N/A
30	<i>Simic et al</i>	1	N/A	N/A	1	N/A	N/A	C/O	N/A	N/A
31	<i>Ivica Rajic</i> (guilty plea)	N/A	N/A	N/A	N/A	N/A	N/A	N/A	N/A	N/A
32	<i>Naletilić & Martinović</i>	N/A	N/A	N/A	N/A	N/A	N/A	N/A	N/A	N/A

Appendix C: ICTY Case Law

	Case	Prosecution			Trial Chamber			Appeals Chamber		
		JCE 1	JCE 2	JCE 3	JCE 1	JCE 2	JCE 3	JCE 1	JCE 2	JCE 3
33	<i>Momir Nikolić</i> (guilty plea)	1	N/A	N/A	1	N/A	N/A	1	N/A	N/A
34	<i>Miroslav -Bralo</i> (guilty plea)	N/A	N/A	N/A	N/A	N/A	N/A	N/A	N/A	N/A
35	<i>Sefer Halilović</i>	N/A	N/A	N/A	N/A	N/A	N/A	N/A	N/A	N/A
36	<i>Miodrag Jokić</i> (guilty plea)	N/A	N/A	N/A	N/A	N/A	N/A	N/A	N/A	N/A
37	<i>Miroslav Deronjić</i> (guilty plea)	1	N/A	3	1	N/A	3	1	N/A	3
38	<i>Dragan Nikolić</i> (guilty plea)	N/A	N/A	N/A	N/A	N/A	N/A	N/A	N/A	N/A
39	<i>Kordić & Čerkez</i> (2 JCE's)	1	N/A	3	1	N/A	R	C/O	N/A	N/A
					1	N/A	N/A	1		N/A
40	<i>Tihomir Blaškić</i>	N/A	N/A	N/A	N/A	N/A	N/A	N/A	N/A	N/A
41	<i>Darko Mrđa</i> (guilty plea)	1	N/A	N/A	1	N/A	N/A	N/A	N/A	N/A
42	<i>Ranko Češić</i> (guilty plea)	N/A	N/A	N/A	N/A	N/A	N/A	N/A	N/A	N/A
43	<i>Dragan Obrenović</i> (guilty plea)	1	N/A	N/A	1	N/A	N/A	N/A	N/A	N/A
44	<i>Predrag Banović</i> (guilty plea)	N/A	2	N/A	N/A	2	N/A	N/A	N/A	N/A

Appendix C: ICTY Case Law

	Case	Prosecution				Trial Chamber				Appeals Chamber		
		JCE 1	JCE 2	JCE 3		JCE 1	JCE 2	JCE 3		JCE 1	JCE 2	JCE 3
45	<i>Biljana Plavšić</i> (guilty plea)	1	N/A	N/A		1	N/A	N/A		N/A	N/A	N/A
46	<i>Kunarac et al.</i>	N/A	N/A	N/A		N/A	N/A	N/A		N/A	N/A	N/A
47	<i>Goran Jelisić</i> (guilty plea)	N/A	N/A	N/A		N/A	N/A	N/A		N/A	N/A	N/A
48	<i>Zlatko Aleksovski</i>	N/A	N/A	N/A		N/A	N/A	N/A		N/A	N/A	N/A
49	<i>Kupreškić et al.</i>	N/A	N/A	N/A		1	N/A	N/A		R	N/A	N/A
50	<i>Stevan Todorović</i> (guilty plea)	N/A	N/A	N/A		N/A	N/A	N/A		N/A	N/A	N/A
51	<i>Sikirica et al.</i>	N/A	N/A	N/A		N/A	N/A	N/A		N/A	N/A	N/A
52	<i>Gotovina et al.</i>	1	N/A	3		1	N/A	3		C/O	N/A	C/O
53	<i>Prlic and others</i>	1	2	3		1	N/A	3		N/D	N/D	N/D
54	<i>Tolimir</i> (2 JCE's)	1	N/A	3		1	N/A	3		1	N/D	3
		1	N/A	3		1	N/A	3		1	N/D	3
55	<i>Stanisic and Zupljanin</i>	1	N/A	3		1	N/A	3		N/D	N/D	N/D
56	<i>Erdemovic</i>	N/A	N/A	N/A		N/A	N/A	N/A		N/A	N/A	N/A
57	<i>Stanisic and Simatovic</i>	1		3		R		R		N/D	N/D	N/D
58	<i>Mejakic and others</i> (not decided yet)											
	Total (number of cases only)	33	8	25	0	28 JCE's (24 cases)	2	12	0	12	2	6

Appendix C: ICTY Case Law

	Case	Prosecution			Trial Chamber			Appeals Chamber		
		JCE 1	JCE 2	JCE 3	JCE 1	JCE 2	JCE 3	JCE 1	JCE 2	JCE 3
	Meaning of abbreviations									
	N/A	not applicable								
	R	Rejected	33 no JCE cases							
	C/O	conviction overturned	24 JCE cases (not including number of JCE's)							
	R/C	rejection confirmed								
	R/O	rejection overturned								
	N/D	Not decided yet								