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Contemporary Justice Review

Issues in Criminal, Social, and Restorative Justice

ISSN: (Print) (Online) Journal homepage: www.tandfonline.com/journals/gcjr20

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To cite this article: Kevin Aquilina & Klejda Mulaj (13 Jun 2024): The International Criminal Court and responsibility for mass atrocities: Can JCE enhance capacity to hold masterminds accountable?, Contemporary Justice Review, DOI: 10.1080/10282580.2024.2364034

To link to this article: https://doi.org/10.1080/10282580.2024.2364034

Published online: 13 Jun 2024.

CONTEMPORARY JUSTICE REVIEW
https://doi.org/10.1080/10282580.2024.2364034

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RESEARCH ARTICLE

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The International Criminal Court and responsibility for mass atrocities: Can JCE enhance capacity to hold masterminds accountable?

Kevin Aquilina[a] and Klejda Mulaj[b]

[a]Professor of Law, Faculty of Laws, University of Malta, Msida, Malta; [b]Senior Lecturer in International Relations, Department of Social and Political Sciences, Philosophy, and Anthropology, University of Exeter, Exeter, UK

ABSTRACT

Mass atrocity crimes constitute a grave affront to international peace and security as well as to human rights. Due to their deep reach in society, they also constitute a very major social predicament. It is undignifying to allow perpetrators of these crimes to be left un-investigated or unpunished. This paper considers how behind the scenes high-ranking military and political indirect perpetrators of mass atrocity crimes should be adjudged guilty of collective criminal responsibility. One mode of collective criminal responsibility – Joint Criminal Enterprise (JCE) – is hereby analysed. Considering the International Criminal Court's praxis in rejecting certain approaches to JCE, we propose two amendments to the ICC's Rome Statute, namely: incorporating JCE into Article 25(3)(a) to include acts through another person via JCE, and adding provisions to define elements of Article 25A to guide the Court's interpretation. This will enable the ICC to apply JCE like the international *ad hoc* tribunals have done in the past, in the process enhancing the capacity to hold masterminds accountable and buttressing the causes of restorative and social justice in societies grappling with the effects of mass atrocities.

ARTICLE HISTORY
Received 15 February 2024
Accepted 30 May 2024

KEYWORDS
International Criminal Court; mass atrocity crimes; joint criminal enterprise; mastermind planners and organisers; criminal, restorative, and social justice

1. Introduction

Mass atrocity crimes – that by very nature are international crimes – have been for a very long time, and continue to be, a persistent source of both human pain and reflection. Past and ongoing armed conflicts in Ukraine, Sudan, Syria, Myanmar, and elsewhere bring to the fore human suffering and loss, as well as the necessity to hold accountable officials and their accomplices responsible for planning, aiding and abetting, and executing mass atrocities. For the truly wretched, dehumanising acts which comprise these crimes, the attribution of responsibility is much needed for the impacted societies to be able to move on with their recovery and healing, and achieve a modicum of restorative justice, and also social justice (Capehart & Milovanovic, 2020; González & Buth, 2019; Muschert, 2023;

CONTACT Kevin Aquilina kevin.aquilina@um.edu.mt Faculty of Laws, University of Malta, New Humanities Building, Block A, Room 216, Msida MSD 2080, Malta

This article has been corrected with minor changes. These changes do not impact the academic content of the article.

Winslade, 2019). Indeed, postwar settings of Afghanistan, Bosnia, Iraq, and elsewhere show that allowing mastermind perpetrators run scot-free by avoiding criminal accountability incurs serious impediments to restorative justice, peace, and stability. The judicial determination of mass atrocity crimes is part and parcel of restorative justice. These two brands of justice are complementary (Clark, 2008). An enhanced capacity to hold masterminds of mass atrocity crimes accountable constitutes a brand of social justice.

The term 'mass atrocity crimes' was coined by David Scheffer who considers them to be 'high-impact crimes of severe gravity that are of an orchestrated character . . . that result in a significant number of victims' (Scheffer, 2006). The term encompasses war crimes, crimes against humanity, and genocide. These are therefore crimes of 'large-scale and systematic – extraordinary – criminality committed within specific political, ideological, and societal contexts. Individual violent acts are perpetrated in the context of other grave, widespread, or systematic crimes. They are committed by a multiplicity of actors against a multiplicity of victims who suffer far-reaching consequences' (Holá et al., 2022). Mass atrocity crimes are therefore very large-scale, directly violent crimes – unlike, for instance, white-collar crimes which although being committed collectively (such as by business and government professionals, including public corruption, money laundering, security fraud, and health-care fraud) are not directly violent (Payne, 2011). Mass atrocity crimes are perpetrated *both* by mastermind planners and organisers (i.e. indirect perpetrators who are ultimately responsible for orchestrating these crimes without necessarily being physically involved in their commission) *and* direct perpetrators (those individuals who physically perpetrate these crimes) who assist, execute, and implement the orders imparted to them by the mastermind planners and organisers. Moreover, such crimes may be committed not only by individuals but also by organisations, including states, official and non-official armed forces such as gangs, militias, paramilitary groups, and other criminal networks. Such crimes may also be perpetrated by commission or by omission, and in the latter sense by neglecting or failing to carry out a particular legal duty (Ambos, 2020; Sánchez, 2008).

Mass atrocity crimes are a very grave affront to international peace and security and the safeguarding of human rights. For this reason, they are also referred to as 'mass human rights violations' (O'Brien, 2022). Due to their scale, they shock the conscience of humankind and consequently raise the expectation that the international community ought to focus on them and elicit an international response such that perpetrators are held responsible before courts of law. Yet, despite the very large scale, international justice has over time 'shifted towards individualizing responsibility and punishment, through investigating and prosecuting a limited number of persons, focusing mainly on high-level perpetrators bearing the greatest responsibility' (Zyberi, 2017). Moreover, this selective attribution of criminal responsibility has not been complemented consistently with alternative manifestations of restorative justice such as apologies, truth commissions, lustration, or reparations (Clark, 2008; Savelsberg, 2023).

Human rights scholars and activists are rightly concerned that, so frequently, accused persons for mass atrocities are not investigated, prosecuted, and punished despite such crimes endangering international peace and security, and causing immense suffering and hardship to millions of people, and generally to humankind. How to overcome diverse stumbling blocks for international criminal justice to prevail has over the years preoccupied many legal and political scientists. Jens David Ohlin, for instance, raised the *vexata*

quaestio of 'how to develop a sophisticated doctrine that navigates between the collective nature of international criminality and the individualised determinations of criminal law' (Ohlin, 2011). Many political and social scientists have joined calls for postconflict, transitional/restorative justice which, more often than not, is hampered by lack of accountability and redress for very heinous crimes (Heberer & Matthäus, 2008; Kritz, 1995; Newman, 2019).

Because planners and abettors of mass atrocity crimes are the most consequential obstructors of peace and stability of the affected societies, it is pertinent in this context to consider a mode of group criminal responsibility that ensures the conviction of top-ranking military and civilian leaders who are responsible for the perpetration of these crimes. In adding our thinking in this field of investigation, the politico-legal node that this paper addresses is how should behind-the-scene high-ranking military and political indirect perpetrators of mass atrocity crimes ('the mastermind planners and organisers') be adjudged guilty when they are not the physical co-perpetrators thereof (that is, the material executioners). This leaves the direct violence to be completed by subordinates, followers, or contractors ('the physical perpetrators'), even if the mastermind planners and organisers are responsible for enacting the criminal policy. We consider this question in the setting of the mode of group criminal responsibility of Joint Criminal Enterprise (JCE) within the context of the International Criminal Court's (ICC) Statute and the Court's praxis (UNGA, 1998). JCE is a mode of criminal liability adopted by international mass atrocity crimes courts and tribunals which extends criminal liability to willing members of criminal groups. In particular, it permits criminal courts and tribunals to try and find guilt in the case of those accused persons who would have knowingly and voluntarily participated in a criminal association as co-perpetrators in the commission by that criminal association of mass atrocity crimes, notwithstanding that there might be no cogent proof that these accused persons physically perpetrated such mass atrocity crimes.

The various modes of individual criminal responsibility are listed in Article 25(3) of the ICC Rome Statute and comprise commission, ordering, soliciting or inducing, facilitating, aiding and abetting, assisting in the commission, attempted commission of, or providing the means for commission of, core crimes. Furthermore, the provision allows for joint commission of a crime, perpetration-by-means of a crime, incitement to commit genocide, and attempts to commit crimes. Of all these crimes, this paper restricts its focus to a discussion of only one mode of group criminal responsibility – that of JCE. This limitation is necessary for two reasons. First, JCE is a mode of criminal responsibility that has been rejected by the ICC, notwithstanding its effectiveness as evidenced by the judicial output of the international *ad hoc* tribunals. There is urgency therefore to avoid further exclusion of JCE as a mode of criminal responsibility acceptable under the Rome Statute, provided of course that the criticisms levelled at it in the literature are addressed. Second, the space available does not allow to study and assess altogether the other modes of criminal responsibility, such as complicity, conspiracy, command responsibility, and indirect perpetration.

The paper interrogates the prevalent framework advocating criminal culpability of the invisible mastermind planners and organisers of mass atrocity crimes that has been adopted by international *ad hoc* tribunals – JCE, which provides for group crimes wherein individual perpetrators act in accordance with a shared criminal design (on JCE, see section 3 below). Although JCE has been successfully embraced by the international *ad*

hoc tribunals, the ICC has so far rejected it notwithstanding that, despite its deficiencies, JCE has proven to be an effective mode of responsibility in many International Criminal Law (ICL) cases adjudged by these tribunals. We think that JCE can enhance the ICC's capacity to hold masterminds accountable. To this end, JCE should be (i) salvaged and specifically written into Article 25(3)(a) of the ICC Statute; (ii) developed through a new provision authorising the adoption of elements of modes of group criminal responsibility under the Statute – on the same lines of the Elements of Crimes authorised by Article 9 of the Rome Statute; and (iii) further enhanced by the Court in its judgments so that JCE is thereby made available for effective prosecution of mass atrocity crimes. This threefold approach will establish a more uniform standard across ICL institutions that can take advantage of the best aspects of JCE and the other responsibility modes already established by that treaty provision. The paper proceeds by first clarifying the meaning of criminal responsibility for mass atrocity crimes. Subsequently, the meaning of JCE is unpacked with the view of reconciling it with the ICC Statute and identifying its deficiencies that should be addressed in any future amendment to that Statute. We then consider the jurisprudential activity of the ICC in relation to control of the crime and why the international court has refused to embrace JCE, and we present a proposal for bringing JCE within the fold of the said Statute as aforesaid followed by observations on the proposed provision. We conclude by advocating the convocation of an ICC Review Conference that would socialise our proposed provision in the letter and praxis of ICL. In the spirit of complementarity of criminal, restorative, and social justice, this contribution should be read also as advocating for the causes of the latter. Because in the aftermath of very heinous crimes there can be no restorative and social justice without establishing an account of events beyond reasonable doubt and without holding masterminds accountable – attributes which criminal justice has the potential to fulfil. Moreover, though more data is needed, there exists literature which suggests that criminal justice responses to mass atrocities may deter political and military leaders from continuing, or engaging, with grave violations of human rights, and improve human rights records, even if modestly (Hyeran & Simmons, 2016; Sikkink, 2011). The integral interdependence of criminal and restorative justice should not be overlooked.

2. Criminal responsibility for mass atrocity crimes

ICL provides that criminal responsibility can be personal or collective. Individual criminal responsibility is personal when a mass atrocity crime is committed by a single person. Alternatively, individual criminal responsibility is collective when a mass atrocity crime is perpetrated by several persons serving an organisation notably a state, or a unit within a state, or any other criminal organisation such as armed forces, gangs, militias, terrorists, and paramilitary groups, or when a mastermind co-perpetrator uses another co-perpetrator to put into effect the criminal enterprise. Such is the complexity of these group crimes that it is very challenging to identify the specific contribution of individual members in the group criminal enterprise. A similar problem arises where the mass atrocity crime is committed through another person, that is, where a perpetrator-by-means holds a superior position and uses another person as a tool to achieve his/her objective because – of their own nature – mass atrocity crimes cannot be committed by a single person. Further,

there exist organisations that back such crimes and finance them. Moreover, there can be a section of the population that applauds the perpetration of mass atrocity crimes, defends them, encourages them, or condones their actualisation. In addition, the mind and will behind the mass atrocity crime does not physically commit the crime himself/herself but serves as a behind the scene instigator, director, leader, prime mover, mastermind, and architect for their perpetration: indeed, these are the indirect perpetrators of mass atrocity crimes who do not commit these crimes physically themselves but are the persons who plan and order their perpetration. It is due to their deep reach in societies that mass atrocity crimes are very major social problems.

The difficulty posed by individual criminal responsibility is that holding penally 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 to physically 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 liability' (ICTY Tadić, 1999, para. 192). For it is mastermind planners and organisers who determine the occurrence of mass atrocity crimes: indeed, without their significant, nay indispensable, input, no mass atrocity crime is completed. In the case of collective crimes, this warrants a departure from the principle of individual culpability, that is, that a person is responsible for the consequences of his/her acts and not that of others. Collective crimes cannot be gauged in light of extant principles indicative of individual personal (as opposed to individual collective – or common or shared or group) criminal responsibility. In order to address the prosecution of such heinous crimes, international *ad hoc* tribunals such as the International Criminal Tribunal for Former Yugoslavia (ICTY), and the International Criminal Tribunal for Rwanda (ICTR), and other tribunals, have applied one mode of criminal responsibility, namely, that of JCE, that caters for 'manifestations of collective criminality: the crimes are often carried out by groups of individuals acting in pursuance of a common criminal design' (ICTY Tadić, 1999, para. 191). An alternative mode of criminal responsibility has also been developed by the ICC, namely that of indirect perpetration based on joint control over the crime – that can be inferred from Article 25(3)(a) of the ICC Statute – which has, however, so far replaced JCE, rather than complemented it. The notion of indirect perpetration focuses on the commission of a crime through another person and originates in the works of Claus Roxin who developed a theory of indirect perpetration by means of control over an organised power structure (Roxin, 2011). This notion was first incorporated by the ICC in its judgment of *Prosecutor* v. *Lubanga Dyilo* (ICTY Lubanga, 2007, paras. 328 & 338). The ICC has also developed the said mode of criminal liability to include indirect co-perpetration in *Prosecutor v. Katanga and Ngudjolo Chui* (ICTY Katanga et al, 2008, paras 492 & 512–522).

Nevertheless, both modes of responsibility have not been explicitly embedded within the text of Article 25(3)(a) of the ICC Statute, though they can be inferred therefrom, even if – in the case of JCE – it is not to the exact breadth as set out in the international *ad hoc* tribunals judgments. In turn, this has raised several criticisms as to their formulation and application through past judicial output. As the ICC is applying indirect perpetration based on joint control over the crime as a mode of criminal responsibility yet overlooking JCE, the focus of this paper is to study JCE, identify its problems, and attempt to address them through two changes to the ICC Statute, one through an amendment to Article

25(3)(a) and another through the addition of a new provision regulating the elements of modes of group criminal responsibility. But before doing so, it is necessary to explain first more fully what is JCE in ICL.

3. The joint criminal enterprise

JCE is a mode of criminal responsibility which has procured quite an efficient criminal conviction rate, ensuring that several co-perpetrators are held accountable and has thereby helped to reduce impunity of civilian and military leaders for mass atrocity crimes. Most recently, the 2021 *Prosecutor v. Radko Mladić* judgment of the International Residual Mechanism for Criminal Tribunals (IRMCT) has found that Mr Mladić – in his capacity of General in the Serb Army of Republika Srpska – significantly contributed to, and shared in, the intent of four JCEs that led to genocide, crimes against humanity, and violations of the laws or customs of war under Articles 3, 4, and 5 of the Statute of the ICTY committed between 12 May 1992 and 30 November 1995 on the territory of Bosnia and Herzegovina (IRMCT Mladić, 2021, paras 3 & 592). The ICTY grounded JCE in international customary law that goes back to World War II precedents (ICTY *Tadić*, paras. 197–201 & 205–221). The ICTR (Ngirumpatse, 2014), the IRMCT (Mladić, 2021, paras 3 & 592), the Special Court for Sierra Leone (Sierra Leone Sesay et al, 2009), the Special Panels for Serious Crimes of East Timor (East Timor, Barros, 2005) the Iraqi High Tribunal (Iraqi High Tribunal Hussein et al., 2006), and the Kosovo Specialist Chambers (Kosovo Specialist Chambers, Thaçi, 2021) have all applied this mode of criminal responsibility even if not expressly mentioned in their constituent statutes' provisions on group criminal responsibility. The Special Tribunal for Lebanon, 2011 admits JCE as a mode of criminal responsibility, and in so far as JCE III is concerned, has held that 'an individual should not be charged as a co-perpetrator for an act of terrorism if he did not have the special intent to commit the act of terrorism' (Interlocutory Decision on the Applicable Law, 2021). For JCE III to be successful, it must be proved that a mass atrocity crime was a natural and foreseeable consequence of the act perpetrated by a person forming part of a criminal association and that the accused person participating in that enterprise voluntarily assumed that risk (more on this below). However, JCE could be arrived at by necessary intendment from ICL conventions establishing these *ad hoc* tribunals – and through the application of customary international law that develops an effective mode of individual collective criminal responsibility intended to secure a conviction for mass atrocity crimes committed by mastermind planners and organisers.

JCE is primarily case law driven. As indicated above, it has enabled international tribunals to convict genocidaires and other mass atrocity crimes' perpetrators – who have not committed such crimes physically and in person – and thereby avoiding justice evasion if the said tribunals were to strictly apply ordinary international criminal rules of culpability for individual, as opposed to group, criminal responsibility. However, it is questionable whether this doctrine will survive with the winding up of the international *ad hoc* tribunals (such as the ICTR and ICTY and, not so far away, the IRMCT) because, to date, the ICC has gone its own way with the adoption of a different mode of group criminal responsibility – that of indirect perpetration based on joint control over the crime.

We think, nonetheless, that JCE should not fall into disuse and that it should not remain the product of (a) case law which is not universally accepted as binding on all international criminal courts and tribunals, and (b) customary international law which, at times, is unclear as to the exact rules that regulate this mode of criminal responsibility once it is unwritten in treaty law and thus difficult to discern the attendant uncertainties and lack of detail. If criminal responsibility continues to be undefined in ICL, it will remain within the subjective interpretation of individual courts and tribunals and compositions thereof. By codifying JCE, on the contrary, homage is paid to the general principles of criminal law such as *nullum crimen sine lege* and *nulla poena sine lege* with a view of providing more certainty in the law regarding criminal offences. These principles could be extended to apply to group criminal responsibility. To this end, JCE should be explicitly embedded within Article 25(3)(a) of the ICC Statute and – based on the jurisprudential activity of the international *ad hoc* tribunals – progressively developed to enable the ICC to punish mass atrocity crimes effectively. In the case of the ICC Statute that already has its own structure for modes of criminal responsibility in Article 25, it is this provision that should embed unambiguously JCE to allow the ICC Prosecutor to choose the best mode of criminal responsibility listed in that Article that fits the precise circumstances of each case. Then the elements of JCE could be developed in terms of a new provision in the Rome Statute that would authorise the adoption of elements of modes of group criminal responsibility under the Statute. In this way, JCE can afford a significant inroad into the principle of personal culpability that is the foundation of criminal responsibility.

The ICTY Prosecutor referred to mastermind planners and organisers accused of mass atrocity crimes as 'cogs in the wheel of common design, all equally important, each cog doing the part assigned to it. And the wheel of wholesale murder could not turn without all the cogs' (ICTY Tadić, 1999, para. 210). JCE doctrine in its current formulation originated in World War II cases (Ramsundar, 2020; Yanev, 2018). This mode of criminal responsibility was adopted by the ICTY first in the *Tadić* Appeals Chamber judgment (ICTY Tadić, 1999, paras. 185–229) and then reiterated in subsequent ICTY judgments (Pocar, 2017). Kai Ambos rightly opines, with reference to the *Tadić* case that the 'Chamber looked for a theory of international criminal participation that takes sufficiently into account the *collective, widespread and systematic context* of such [atrocity] crimes and, thus, helps to overcome the typical difficulty in proving the – sometimes hardly visible – contributions of individual participants' (Ambos, 2007). The unifying factor here is the common design to all the mass atrocity crimes' perpetrators. It is this common design that gives rise to the 'basic form' of JCE. The *Tadić* judgment, referred to above, set out the following three categories of JCE:

JCE I: where, pursuant to a common design, all co-defendants possess the same criminal intention. In this case, the accused's free and consensual participation is essential in an aspect of the common design and the accused, even if not personally realising the crime, must nevertheless intend the result of that crime;

JCE II: concentration camp cases where the offence charged is committed by personnel assigned to military or administrative units running concentration camps and are acting pursuant to a concerted plan. Here, the accused holds a position of authority within the hierarchy of the concentration camps. Three requirements are necessary to establish guilt: (i) an organised system must be in place aimed at ill-treating detainees and to commit the

diverse offences charged; (ii) the accused must be aware of the nature of the system; and (iii) the accused must somehow have actively contributed to implement the system, that could be achieved by encouraging, aiding, and abetting or participating in the execution of the common criminal design; and

JCE III: where perpetrators pursue a course of action comprising a common design to commit an act that, although going beyond the common design, is considered as a natural and foreseeable effect of realising that common design. In this case, all participants who have shared in the common enterprise are responsible should there be a risk of death that could ensue if this was either predictable from the realisation of the common design or there was an element of recklessness or indifference to that risk (ICTY Tadić, 1999, paras.196–213).

Yet, of all three categories, it is the third (JCE III or the extended form) that has attracted so far, a deluge of criticisms which are summed up in the following section.

According to the *Tadić* judgment, the objective elements (that is, the *actus reus*) (Cryer et al., 2019) regarding each of the three categories of cases are threefold, these being (a) a plurality of persons, (b) a common design, and (c) the accused's participation in the JCE. By the first element, the accused are not requested to be grouped together into any military, political, or administrative structure. As to the second element, the common plan need not be previously designed it may come into being 'extemporaneously and be inferred from the fact that a plurality of persons acts in unison to put into effect a joint criminal enterprise' (ICTY Tadić, 1999, paras.196–213). With regard to the third element, participation does not imply commission of a specific crime but may be by way of 'assistance in, or contribution to, the execution of the common plan or purpose' (ICTY Tadić, 1999, paras.196–213).

As to the *mens rea* element of JCE, this varies in terms of the class of the common design. The first subset mandates that all co-perpetrators share a common intent to commit a crime. Here, the *dolus specialis* must be shared amongst all perpetrators. It is thus imperative that the co-perpetrators were aware of the system of ill-treatment and realised together with a shared intention to further this ill-treatment system. The last subset requires co-perpetrators to intend their participation in the group criminal enterprise or in the group crime commission. Moreover, criminal responsibility for a crime not forming part of the JCE materialises only when: (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*' (ICTY *Tadić*, para. 220). In other words, the accused need not have directly perpetrated the crime requiring *dolus specialis* provided that s/he could have foreseen such perpetration.

Extended JCE is considered to apply when participants in a common plan who intend to perpetuate a crime are liable for other non-jointly planned crimes that are a natural and foreseeable result of the JCE. Hence, the perpetrator not only contributes to the plan's execution but goes beyond that through the commission of these non-jointly planned crimes. The consequences for co-perpetrators in the case of extended JCE is that once they have all agreed to a common design prior to its actualisation – they participate in a criminal enterprise and are jointly and severally responsible together for the perpetration of mass atrocity crimes in different degrees and measures, irrespective of (a) the exact input of each and every single-component member participant of the enterprise, and (b) their contribution and

input to the achievement of the common design. In other words, once all co-perpetrators are involved in the planning of that group crime, they are all responsible for each other's behaviour within that group for external measures that are in accordance with, and in furtherance of, the common design. It could well be that a co-participant is not privy to the exact single measures taken by another co-participant in the execution of the common design. But once those measures are compliant fully with, and give effect to, the common design, s/he attracts criminal responsibility for his/her individual crime/s committed as part of a JCE and for those of his/her co-participants also committed for the same purpose, without garnering specific knowledge of the measures performed in achieving the common design. When one co-participant goes beyond the remit of the common design, or acts contrary thereto, then his/her criminal conduct should be considered as individual and unimputable to the other co-perpetrators.

It can also be noted that such a common design need not be written down in an official document, nor fully fleshed out with exact precision to the minutest detail and, therefore, an element of leeway must be allowed for its reasonable and proportionate interpretation. Nevertheless, provided that such a measure is reasonably likely, and proportionate, to the attainment of the common design, it would be difficult to make a case against extended JCE once all co-perpetrators planned together and agreed upon the mass atrocity crime. The common design ensures that the co-perpetrators are held collectively responsible for all acts carried out by them in furtherance thereto and comprises responsibility for unintended offences falling within the aegis of the common design. The advantage of JCE is that it goes beyond agreement on the singular measures to be taken in furtherance of the common design as it encapsulates the perpetration of crimes not originally intended, foreseen, or planned down to the minutest of all details. In this way, all co-perpetrators are responsible for the acts of the other group co-perpetrators that ensue from the execution of the common design even if such crimes were not envisaged as part of the original mass atrocity crime/s but fall within that design.

This notwithstanding, prior to the establishment of the ICC, JCE was a recognised mode of criminal responsibility, and its application by several international and national criminal courts and tribunals was evidence thereto. Indeed, it was reasonable to expect that JCE would have continued to be applied 'in accordance with its widely accepted traditional definition' (Olasolo, 2009). Nevertheless, the ICC in 'its earliest decisions has rejected this doctrine, and it has resorted instead to a complex form of co-perpetration and indirect perpetration, based on the concept of "control over the crime"' (Manacorda & Meloni, 2011). However, on the ground of success that JCE has had at the international a*d hoc* tribunals and domestic courts, and bearing in mind that the criticisms levied against the extended version of JCE (that JCE trials do not result in fair proceedings) can be addressed – as proposed below – through an alteration of the ICC Statute, JCE should not be discarded completely. The JCE should be retained in conjunction with other complementary modes of group criminal responsibility such as indirect perpetration set out in Article 25(3) of the ICC Statute – an article that, in an amended form, can be brought in line with the principle of legality with the view to address, to the extent possible, valid criticisms that have been levelled against it. No further elaborate rendering of JCE will be provided here because this has already been dwelt upon elsewhere (Cassese, 2009; Ohlin, 2007). The paper proceeds now to first identify in the next Section the problems of JCE,

and in the following how it can be included in the ICC Statute without replicating therein these deficiencies.

4. Main criticisms of joint criminal enterprise

Being judge-made, the JCE doctrine is subject to interpretation which can change through the passage of time or from one court or tribunal (or composition thereof) to another (the Extraordinary Chambers in the Courts of Cambodia (ECCC), *Thirith and others*, 2010). Indeed, perhaps, this is why JCE has been challenged on several counts. It has been criticised on the grounds that, *inter alia*, it was not set out in the ICTY/ICTR Statutes, that it wrongly unifies both civil law and common law legal systems, that it fails to distinguish JCE from aiding and abetting, that it resembles collective criminal responsibility, and that it contains inconsistencies with the principle of legality (Guliyeva, 2008–2009).

Lacking universal acceptance in case law and scholarly analysis, JCE raises admissibility doubts at least in relation to its extended version (Lyons, 2011). A case in point concerning case law is the reluctance to apply extended JCE by the Pre-Trial Chamber (PTC) of the ECCC that declined to recognise the extended version of JCE (ECCC, Thirith and others, 2010); and that there is no international treaty that obliges international courts and tribunals to apply JCE in preference to other modes of group criminal responsibility. Nevertheless, in the *Amicus Curiae Brief to the Pre-Trial Chamber Extraordinary Chambers in the Courts of Cambodia in relation to Case File 001*, it was submitted to the ECCC – though without the desired positive outcome – that 'JCE doctrine may be embraced by the Extraordinary Chambers in keeping with the principle *nullum crimen sine lege* and should be applied where appropriate to accurately reflect the full gravity of crimes and ensure consistency in uses of modes of liability in international criminal law' (Cassese, 2009).

Briefly, the main criticisms levelled are that JCE was not expressly laid down in the statutes of the international *ad hoc* tribunals and, consequently, was an invention of the judges presiding those tribunals (ICTY Tadić, 1999, para 194). This implies that the tribunals could revise, or even abandon that doctrine at their own discretion outside the strictures of ICL. Another criticism is that JCE runs counter to the criminal law criterion of personal culpability where a co-perpetrator may only be held liable for a crime in which s/he was engaged or participated, as it imposes liability for the foreseeable crimes of a perpetrator that can bypass the common design (Stewart, 2012). Critics suggest – too – that JCE allows the prosecution to obtain a conviction of a co-perpetrator for crimes that were neither perpetrated by, nor known to, the accused co-perpetrator. JCE can be interpreted extensively such that it goes beyond what ICL considers to constitute the boundaries of individual criminal culpability. Moreover, it is argued that certain general principles of ICL are not reflected adequately in JCE (van Sliedregt, 2007). Other authors contend that JCE meshes national law concepts of common law states (accomplice liability/complicity) with those of civil law states (co-perpetration) in a way that creates more confusion, than clarity, as to the elements of a JCE (Cassese, 2007); whilst at times, it is not clear what the difference is between JCE and aiding and abetting, on the one hand, and between JCE and conspiracy (as a mode of criminal responsibility, as distinct from conspiracy as a crime in its own right), on the other (Cassese, 2007). The point has also been made that through the application of criminal responsibility based on foresight and risk, a form of strict liability has been introduced (Cassese, 2007).

In the literature, it is also submitted that JCE may be perceived to give rise to a crime through the association or membership in a criminal organisation – guilt by association rather than guilt by commission, even though, strictly speaking, it requires the participation of an accused co-perpetrator – not group association in the commission of the crime (Gustafson, 2007). In addition, the case law on JCE III allows a JCE co-perpetrator to be held liable for crimes committed by non-JCE members, provided that the latter was used by a JCE co-perpetrator to further the common design (ICTY Brđanin, 2007, paras. 410–414). Serious concerns can be raised that the mastermind co-perpetrator might be physically remote from the physical co-perpetrator, thereby raising the question about the exact link and relationship that exists between the mastermind co-perpetrator and the physical co-perpetrator, more so if the latter is not known to the former, and vice-versa (Pérez-León-Acevedo, 2019).

These shortcomings, nonetheless, are not insurmountable. The purpose of shedding light on the main deficiencies of JCE is to prepare the ground for addressing them in a proposal to amend the ICC Statute with a view of embracing JCE within its fold. The above criticisms are addressed in the two draft amendments to the ICC Statute proposed in the Section 6 below. Nonetheless, what is suggested in Section 6 below is not only the codification of the court decisions of the international *ad hoc* tribunals that have elaborated upon the subjective and objective elements of this mode but also its progressive development based on the aforesaid identified deficiencies. By doing so, not only will clarity be added to the ICC Statute but this insertion will also allow JCE to be usable within the context of that Statute, will improve its operation when compared to the difficulties identified in the case law and literature in relation to the international *ad hoc* tribunals' application of JCE and will further improve the international *ad hoc* tribunals' preferred mode of liability – JCE. Incorporation of JCE into the ICC Statute will also enrich the ICC Prosecutor's choice of modes of liability that may act as a deterrent for the commission of future mass atrocity crimes. Such incorporation will enable the ICC Prosecutor and the ICC to make proper use of this mode if, and when, circumstances warrant, which may then result in a more successful conviction output bearing in mind the positive outcome of JCE in national courts and international *ad hoc* tribunals sentencing and that the arguments that trials do not result in fair proceedings can be addressed through changes to the ICC Statute.

Currently, Article 25(3)(a) of the ICC Statute deals *inter alia* with joint criminal responsibility when it provides for cases where a person commits a core crime 'jointly with another or through another person regardless of whether that other person is criminally responsible'. Although this provision regulates three distinct criminal modes of responsibility – individual liability, joint liability, and perpetrator-by-means liability, it does not set out explicitly the applicable modes that are envisaged in that wording; nor does it study individual liability and perpetrator-by-means liability. Nor does it refer to direct perpetration, indirect perpetration, direct co-perpetration, and indirect co-perpetration. Hence, in order to clarify it better, an amendment to this paragraph is being proposed to specifically enshrine JCE expressly in the wording of that provision.

Therefore, having identified the main deficiencies of JCE in the judicial output of the international *ad hoc* tribunals, it is imperative at this juncture to identify elements that can be formulated to supplement Article 25(3)(a) of the ICC Statute intended to codify the judicial formulation and interpretation of JCE, to iron out its inconsistencies, gaps, and

contradictions in judicial pronouncements, to address the main preoccupations with the institute of JCE in the literature, to clarify better the definition, purpose, meaning, and elements of the said mode of criminal responsibility, and to progressively develop it in the light of extant literature on the subject. The elements identified in the next Section can thus be adopted in full or in part through a new proposed provision to that Statute that would allow the Assembly of State Parties to the ICC Rome Statute to set them out in the same way that the elements of crimes are set out under article 9 of the Statute.

5. The ICC's refutation of JCE

The ICC has rejected JCE in its jurisprudence because this mode of criminal liability is, in the international court's opinion, inconsistent with the Rome Statute, thereby opting instead for the ICC devised control of the crime theory. In Lubanga (ICC Lubanga, 2012), the Pre-Trial Chamber (PTC) excluded JCE from the operation of Article 25(3)(a) and (d) when it concluded that:

> 335. The Chamber considers that this latter concept – which is closely akin to the concept of joint criminal enterprise or the common purpose doctrine adopted by the jurisprudence of the ICTY – would have been the basis of the concept of co-perpetration within the meaning of article 25(3)(a), had the drafters of the Statute opted for a subjective approach for distinguishing between principals and accessories.
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> 336. Moreover, the Chamber observes that the wording of article 25(3)(d) of the Statute begins with the words '[i]n any other way contributes to the commission or attempted commission of such a crime'. (ICC Decision on the confirmation of charges, 2007)

The PTC arrived at this conclusion:

(a) after noting that the Article 25(3)(a) of the Rome Statute applies to offences committed only by principals whilst Article 25(3)(b) to (d) applies to offences committed by accessories (ICC Lubanga, 2012, paras. 320);
(b) essentially agreeing with the Prosecution that opined that Article 25(3)(a) adopts co-perpetration based on control of the crime because (1) a co-perpetrator must have joint control of the crime; and (2) of the co-perpetrator's essential contribution therein. The international court further endorsed the Prosecution's submission that the ICC operates under the Rome Statute that (1) 'sets out modes of criminal liability in great detail' and (2) 'avoids the broad definition found in, for example, article 7(1) of the ICTY Statute' (ICC Lubanga, 2012, paras. 322–323);
(c) after failing to endorse the defence response that control of the crime 'goes beyond the clear terms of co-perpetration and indirect perpetration set out in the Statute and is not supported by either customary international law, or general principles of law derived from legal systems of the world' (ICC Lubanga, 2012, para. 324);
(d) after disagreeing with the Legal Representatives of certain victims who argued that 'the concept of co-perpetration set out in article 25(3)(a) of the Statute pertains to the concept of joint criminal enterprise or common purpose doctrine, the essential component of which is the sharing of a common criminal plan or purpose as opposed to retaining control over the crime' (ICC Lubanga, 2012, para. 325).

The PTC distinguished between the subjective approach (JCE) and control of the crime favouring the latter to the former (ICC Lubanga, 2012, paras. 329–337). It, consequently:

(a) narrowed down the application of Article 25(3)(a) in so far as co-perpetration is concerned, to only one mode of criminal liability – control of the crime;
(b) excluded, at least for the time being, other forms of co-perpetration under the Rome Statute;
(c) gave no weight to the fact that JCE, as declared in the Tadić judgment, established JCE as forming part of international customary law, presumably on the basis of the fact that the Rome Statute has overridden customary international law;
(d) set aside the jurisprudential output of the ICTY in relation to JCE;
(e) ignored the ICTY's consistent application of JCE as a mode of criminal liability;
(f) discarded the fact that the international community of states has adopted JCE to other tribunals, apart from the ICTY, thereby crystallising JCE as part of customary international law and rendering it the prevailing mode of criminal liability in ICL;
(g) rejected the overspilling effect of the ICTY JCE-adopted mode of criminal liability that has percolated into national criminal law post-Tadic judgment; and
(h) that once JCE was the prevalent mode of criminal liability when the Rome Statute was negotiated/adopted, failed to give sufficient weight to the natural presumption that JCE forms part of Article 25(3)(a) once it has not been explicitly excluded therefrom by the Rome Statute as logic dictates within the obtaining historical context.

All these factors cannot be brushed aside as if they never existed, more so that the PTC displaced completely JCE that was the established mode of criminal liability at the time of the conclusion of the ICC treaty both in customary and conventional international law, and that the control of the crime mode of criminal liability was then neither part of customary international law, conventional international law, and the general principles of ICL. However, the PTC not only magically and unexpectedly pulled the rabbit (the control of the crime mode) out of the hat (the Rome Statute) which, in itself might not be objectionable but passed on to liquidate what was thence established by ICL by way of treaty law, customary law, and general principles of law, and which continues to be so bearing in mind that the control of the crime theory has not, so far, transmuted itself into customary international law and a general principle of law. In abstaining from applying JCE, the PTC accepted blind folded the Prosecution's opinion without adequately addressing the objections thereto of defence and the legal representatives of victims placing itself in a narrow straight jacket by scuttling JCE when it could have adopted control of the crime without prejudice to, and without excluding completely recourse to, JCE, if and when circumstances warrant, especially when control of the crime does not suffice to bring about a lawful conviction.

The question that must be posed here is whether JCE can directly or indirectly be grounded in the Rome Statute. Admittedly, an examination of the said Statute clearly demonstrates that JCE is not specifically mentioned by name in any provision thereof. However, to do justice to JCE, the explicit non-inclusion of JCE in the Statute applies also to control of the crime. Hence, what needs to be determined is whether JCE can be inferred from a reading of the Statute's provisions. The authors contend that this can be

done in two ways: from a reading of Article 25 and Article 21 thereof. Reference has already been made above to Article 25(3)(a) whereby it was noted that the language of the Statute is wide enough to embrace JCE in its fold notwithstanding the exclusive interpretation adopted by the PTC. But then there is also Article 25(3)(d) whereby, with reference to this provision, the ICTY Appeals Chamber had pronounced in the Duško Tadić case that: 'A substantially similar notion [to JCE] was subsequently laid down in Article 25 of the Statute of the International Criminal Court, adopted by a Diplomatic Conference in Rome on 17 July 1998 ("Rome Statute")' (ICTY Tadić, 1999, para 222). Notwithstanding the judicial pronouncement of the ICTY, the PTC, nevertheless, once again, has considered JCE to be anathema to its Statute on the basis of Article 25(3)(d). Antonio Cassese, for instance, is one of the jurists who agrees that JCE can be read into the ICC Statute (Cassese, 2007).

Even if, for argument's sake, it is conceded that JCE was not specifically envisaged by, if not intentionally omitted from, the Rome Statute as the ICC has determined, can it be said that JCE is also excluded altogether by the Rome Statute? This question raises the issue of customary international law – a distinct source of ICL. Although not specifically mentioned by the Rome Statute, customary international law is not specifically prohibited therein: indeed, there is no provision in that international convention which dictates that the ICC should not consider customary international law in its deliberations and judgment. The relevance of customary international law to JCE is that even if the latter cannot be admitted through Article 25 of the ICC Statute as the ICC is contending, it can still be embraced through Article 21 of that treaty. Article 21 is the provision that regulates the applicable law to be resorted to by the ICC. In that provision, in paragraph 1(b) thereof, the Statute recognises: 'In the second place, where appropriate, applicable treaties and the principles and rules of international law, including the established principles of the international law of armed conflict'. The principles and rules of international law include customary international law. Furthermore, that same provision, in paragraph (c), states that the ICC can also apply 'general principles of law derived by the Court from national laws of legal systems of the world including, as appropriate, the national laws of States that would normally exercise jurisdiction over the crime'. It is known that JCE is applied in domestic law. If, therefore, JCE has attained the status of customary international law as held by the ICTY and other ad hoc tribunals that followed in its footsteps, and once customary international law forms part of the principles and rules of international law, and of the sources of international law (ICJ Statute, Article 38(1)(b)), then it is reasonable to conclude that JCE ought to form part of the Rome Statute on the basis of customary international law. This inference is in addition to the contention that JCE – although not expressly mentioned by name in the Rome Statute – can be inferred from Article 25(3)(a) and (d) of the Statute, notwithstanding the ICC's restrictive meaning that has cornered itself through interpreting the modes of criminal liability not much in the interests of a proper administration of international criminal justice. Currently, it can be asserted that through the non-application of JCE by the ICC, JCE is incrementally falling into desuetude, unless it is salvaged by the international court itself or, in the latter's absence, by the Assembly of State Parties to the ICC Statute through an amendment to the Rome Statute as proposed below. Indeed, the ICC's reluctance to adopt JCE as a mode of criminal liability does not exclude that sometime in the future it might not reconsider, more so that the control of the crime theory is not bereft of its own inherent defects and the ICC is still in its initial stage of ironing out its far from foolproof judicial interpretation of the Statute.

The international court can always progressively develop its own case law once the Rome Statute does not expressly forbid the application of JCE with such non-application being so far a matter of judicial interpretation, controversial as it is for the time being. However, since the conclusion of the Rome Statute, the prospects for the ICC to adopt JCE appear to be rather dim and it is only the Assembly of State Parties to the Rome Statute that can amend the Statute to inscribe JCE therein and salvage its continued application in ICL.

Finally, that the ICC has ruled out JCE, must be examined in the context of the control of the crime mode being far from perfect and that relying exclusively thereon might procure a miscarriage of justice where co-perpetration is insufficient to convict perpetrators who should have been convicted and could have been so convicted under JCE. Nonetheless, it is not the purpose of this paper to list the main difficulties that the control of the crime raises together with the gaps in this theory that cannot be filled by co-perpetration – as this has already been done by other authors (for instance, Ambos, 2016; Ohlin et al., 2013, pp. 45–48). The existing deficiencies in controlling the crime make a stronger case for the JCE remaining a valid alternative mode of criminal liability.

6. The proposed two changes to the Rome statute on JCE

First, it is being proposed to amend Article 25(3)(a) of the Rome Statute to specifically include JCE as a mode of group criminal liability. The words 'jointly with another or through another person', in Article 25(3)(a) should be substituted by the words 'jointly with another or through another person, including through a joint criminal enterprise', so that Article 25(3)(a), as proposed to be amended, would read as follows:

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

Second, it is being suggested that a new provision is added to the Rome Statute, to be numbered and titled 'Article 25A: Elements of Modes of Group Criminal Liability' and to read as follows: 'Elements of Modes of Group Criminal Liability shall assist the Court in the interpretation and application of article 25. The procedure set out in article 9 for the adoption and amendment of elements of crimes shall apply thereto'.

The proposed elements can be used to develop further Article 25(3)(a) of the ICC Statute whereby it would be clarified that a joint criminal enterprise is a form of commission of a crime as opposed to accomplice liability – and can be divided under the three jurisprudentially and juridically recognised forms, namely JCE I, II, and III.

JCE I is where pursuant to a common design, all co-perpetrators possess the same criminal intention, including the case where an accused co-perpetrator, though not having personally committed the crime, is considered to have intended the result of that crime through that person's voluntary and consensual participation in the joint criminal enterprise. A distinction can be drawn in the case of JCE I between, on the one hand, a mastermind co-perpetrator (or co-perpetrators) who plans or organises the joint criminal enterprise, hereafter 'the mastermind co-perpetrator', and, on the other hand, another co-perpetrator (or other co-perpetrators) who executes the common design and

is hierarchically subordinate to the mastermind co-perpetrator (or co-perpetrators) who are participating in the execution of the common design, hereafter 'the physical co-perpetrator'.

JCE II is where a co-perpetrator holds a position of authority in a military or administrative unit running a concentration camp, a prison, place of detention or similar establishment, and is acting pursuant to a common design where detainees are ill-treated and the offence charged is committed, the said co-perpetrator was aware of the nature of the system, and has made a substantial contribution to implement the system by participating in the execution of the common design.

JCE III is where all co-perpetrators act with the specified *mens rea* for the crime except in the case where a co-perpetrator pursues a course of action comprising a common design to commit an incidental crime that, although going beyond the common design as agreed to by the co-perpetrators is considered as a natural and foreseeable effect of realising that common design. The said co-perpetrator, who shared in the joint criminal enterprise, though not in the physical co-perpetration of the crime, is considered responsible had there been a risk of death or harm that could have ensued if this was either predictable from the realisation of the common design or there was an element of recklessness or indifference to that risk.

Nevertheless, with reference to Article 30 of the Rome Statute, and once it is in the interests of international justice that a co-perpetrator of a group crime should not go unpunished, the Elements should otherwise provide that the said person may still be convicted of a crime that normally requires special intent by substituting *dolus specialis* by *dolus eventualis*. Where a co-perpetrator might not have had a specific intent to commit such crime but it was a natural and foreseen consequence of the JCE to which the co-perpetrator voluntarily consented to and where a co-perpetrator is so found guilty for *dolus eventualis*, that person's punishment should carry a lower sentence of not more than the applicable median punishment than that which would be ordinarily inflicted for committing a specific intent crime.

Where a co-perpetrator pursues a course of action comprising a common design to commit an act that, although going beyond the common design, produces non-agreed foreseeable acts, that co-perpetrator's punishment should carry a lower sentence of not more than the applicable median punishment than that which would be ordinarily inflicted upon the co-perpetrator who decided on his/her own to commit an act that goes beyond the common design. Additionally, it can be clarified that a JCE necessitates a plurality of persons with the physical co-perpetrators being defined as precisely as possible, a strict definition of common design (or joint criminal enterprise), a common design within the criminal enterprise, the aim of the criminal enterprise, and the inclusion of the crime or crimes committed in the common design of the criminal enterprise. Moreover, an accused co-perpetrator must have participated in the joint criminal enterprise, played a specific role in that enterprise, and had the intent to participate therein. In addition, engagement in a concerted action should suffice to prove that there was in existence amongst all co-perpetrators a common design.

Worthy of consideration is also the contribution rendered by a co-perpetrator that need not be essential but suffices to be substantial for the realisation of the common design. A contribution can be considered substantial where the common design is realised through planning or otherwise organising the actual perpetration of the crime

but need not require the taking by a co-perpetrator of any measure related to the physical co-perpetration of the crime undertaken by another co-perpetrator (or other co-perpetrators). Substantial participation can be defined as requiring a significant agreement between the co-perpetrators as to the common design, voluntary acceptance of one's role in the attainment of the common design, the mastermind perpetrator enjoining control over the co-perpetrator (or co-perpetrators) executing the common design, and the possibility of fully disengaging from the joint criminal enterprise.

Where two or more persons carry out a JCE, each is responsible for the acts of the other co-perpetrator (or other co-perpetrators) in carrying out that enterprise. Furthermore, a JCE must exist where two or more persons reach an agreement between them that they will commit a crime. Such arrangement need not be expressed, nor written, but its existence may be inferred from all the circumstances relative thereto. No proof of an explicit agreement between all co-perpetrators should be warranted. It should not be a requirement that the agreement is reached earlier in time prior to the commission of a crime but may be reached between such co-perpetrators when the crime is being committed.

As with treaties establishing criminal offences, it is worthwhile establishing the *mens rea* for JCE (discussed in section 3 above). For JCE I, it should be the shared intent of all the co-perpetrators to commit a certain crime; for JCE II, it should be a co-perpetrator having personal knowledge of the ill-treatment system and the intent to further the system; and for JCE III it should be the accused co-perpetrator who intends to participate in and further the criminal activity of the group, contributes to the commission of a particular crime by the group, involves a crime that falls outside the common design and it must be foreseeable that a co-perpetrator might perpetrate the crime and the accused co-perpetrator willingly took that risk.

Other elements that can be embodied in the Elements of Modes of Group Criminal Responsibility are as follows: (a) a non-JCE co-perpetrator who acquiesces in the JCE and perpetrates a crime within its common design is to be considered as having joined the JCE provided that the said co-perpetrator has sufficient knowledge, though not necessarily the exact details, of the common design; (b) the role, specific intent, type of crime perpetrated, and degree of participation may vary from one co-perpetrator to another; and (c) co-perpetrators may be engaged in one or multiple joint criminal enterprises, in an overarching joint criminal enterprise that embraces multiple joint criminal enterprises, and in joint criminal enterprises that may interact together.

7. Observations on the proposed elements of modes of group criminal responsibility specifically recognising JCE

In proposing the above two changes to the ICC Statute, the first question that must be addressed is where to locate JCE therein. Should JCE be placed under Article 25(3)(a) or (d)? Should it be classified under the crime of commission or aiding and abetting? In the jurisprudential activity of the international *ad hoc* tribunals, JCE is classified under commission of a crime, which translates within the framework of the ICC Statute under Article 25(3)(a) and, so as not to depart from this case law, it is deemed prudent to inscribe JCE in that provision. The argument could be made that it could have been placed under Article 25(3)(d). However, this course of action is not feasible because the elements of JCE do not

fit precisely therein, they would end up in conflict therewith, and therefore would not add clarity within the ICC Statute. Such an approach has also been criticised in the literature (Ambos, 2007). In the jurisprudential activity of the international *ad hoc* tribunals, this mode of liability (notwithstanding certain inconsistencies in the case law) is predominantly considered as a crime of commission. Hence, it is deemed more appropriate to include JCE under the commission provision of the treaty without, in the process, affecting or changing the text of that provision as it currently obtains to continue to apply to individual liability, non-JCE joint perpetration (such as the ICC adopted mode of indirect perpetration), and perpetration-by-means. Introducing JCE as a mode of crime commission has the added advantage of allowing the ICC Prosecutor and the ICC to have full recourse to the rich case law of the international *ad hoc* tribunals.

In addition, the proposal only addresses one form of joint commission and does not in any way prejudice the possible inclusion and/or elaboration in the Elements of Modes of Group Criminal Responsibility sometime in the future of other joint forms of commission that can include control of the crime as well. Yet the proposed Elements need not simply content themselves with listing the three forms of JCE but should attempt to flesh out – based on past experience – its distinctive elements. In this way, the words 'jointly with another' in that provision – which can be afforded a restrictive interpretation, such as where there are two perpetrators with one acting as a principal and another as an accomplice – will not conflict with an extended interpretation of those terms to cater for the case of JCE where all accused are co-perpetrators, irrespective of their contribution to the criminal enterprise. This proposed addition to the ICC Statute has also the advantage of preventing the construction of the provision under examination to exclude JCE as a mode of criminal responsibility as such an interpretation would be violative of the Rome Statute. As the ICC has interpreted those words to amount to indirect perpetration based on joint control over the crime, the point needs to be made clear that indirect perpetration is but only one of the possible modes of joint criminal liability and, more importantly, that it is not the exclusive one for even JCE is also a joint mode of criminal responsibility. Finally, if no distinction is made between a principal and an accomplice, because all accused persons in a JCE are considered co-perpetrators, the ICC would not be morally pressured to impose a lesser punishment for accomplices than that afforded to principals, for all co-perpetrators will be considered at a par if the circumstances of the case so dictate, except in the case of JCE III where the provision itself guides the ICC as to the maximum punishment to be inflicted.

JCE has been criticised on the basis that it falls foul of the principle of legality through the application of the foreseeability element in JCE III (Stewart, 2012). Once JCE elements are left undefined by ICL, the resulting uncertainty can give rise to an unwarranted, if not arbitrary, broad application of JCE by criminal courts and tribunals in breach of the *nullum crimen* rule. Hence, the need to set out its elements in the ICC Statute so as to ensure that, should the court adopt it in its case law, it would not fall into the temptation of affording an extensive application thereto. The codification of this element in Article 25(3)(a) of the ICC Statute ensures that JCE adopts a conventional form and thus brings about more certainty as to its application in ICL as opposed to the current reliance on customary international law. Such a course of action should also provide for more consistency in its application by the judicial organs of ICL and national law adopting this definition and any future established international *ad hoc* tribunals that may emulate this inscription in their

founding statute, more so once it then becomes itself part of customary international law. Furthermore, the embodiment of JCE into the ICC Statute will nip in the bud interpretation disputes amongst international *ad hoc* tribunals on JCE's precise elements and purport. Once the ICC will also resort to it – past difficulties in identifying JCE elements would be overcome as the ICC will be able to rule on the exact interpretation of the proposed addition and those rulings can be adopted by states and extant, and any future established, international *ad hoc* tribunals. With JCE's proposed insertion in the ICC Statute, a co-perpetrator of a JCE will have a more arduous task to argue that s/he was unaware that crimes committed outside the common design applied to him/her once the ICC Statute will provide specifically that such co-perpetrator should have foreseen the natural and foreseeable consequences of the realisation of the common design to which s/he had subscribed. In addition, a further benefit of embodying JCE in the ICC Statute is that it can be distinguished without difficulty and with more precision from other modes of criminal liability, such as indirect perpetration based on joint control over the crime, complicity, conspiracy, and membership in a criminal organisation.

The second proposed alteration to the Rome Statute will be written into the text of the suggested Elements of Modes of Group Criminal Responsibility, the elements of JCE I, II, and III that are so far nonexistent in treaty law and further contribute to develop these elements accordingly. For instance, it can be provided that a mastermind co-perpetrator may be physically remote from the physical co-perpetrator when the crimes falling within the common design are executed, that what is of the essence of the JCE is the common design rather than the agreement so much so that the common design can be entered into extemporaneously. In relation to JCE I, a distinction may be drawn between mastermind co-perpetrators and physical co-perpetrators so that the higher liability of the former is accentuated from the lower liability of the latter.

Regarding JCE III, the vexed question had to be considered whether to exclude JCE from special intent crimes or to allow it as per international *ad hoc* tribunals obtaining decisions, or provide for other alternative solutions. The first alternative is not deemed feasible because it can negatively affect the efficacy of JCE given that the crime of genocide, crimes against humanity, and some war crimes require specific intent. The application of JCE to only those war crimes that do not require special intent would render JCE next to irrelevant. Nevertheless, given that the application of the JCE to specific intent crimes is the most critical aspect thereof, the status quo under international *ad hoc* tribunals' case law is unsatisfactory and should not be retained. Thus, the Elements of Modes of Group Criminal Responsibility could propose that although *dolus eventualis* should continue to replace *dolus specialis* in the case of *dolus specialis* crimes, as with current practice, JCE III may be tempered by a provision in the proposed Elements mandating a corresponding reduction in penalty equivalent to the diminution in intent. When *dolus eventualis* is resorted to, the punishment for what is a specific intent crime can then be reduced to a maximum median punishment established for a specific intent crime, that is, to not more than half of the punishment inflicted for a specific intent crime.

Apart from the above, other possible solutions to the elements of JCE III could have been considered. For instance, it has been argued that JCE III 'may not be admissible when the crime other than that agreed upon requires special intent (this applies to genocide, persecution as a crime against humanity, and aggression). In such cases, the other participants in JCE could only be charged with aiding and abetting the crimes

committed by the "primary offender" if the requisite conditions for aiding and abetting do exist' (Cassese, 2007). The 'primary offender' is 'the person who, in addition to committing the concerted crimes, also perpetrates a crime not part of the common plan or purpose' (Cassese, 2007). Jens David Ohlin supplements the above threefold categorisation to comprise other specific intent crimes such as the war crimes of wilful killing, wilfully causing great suffering, or serious injury to body or health, wilfully depriving a prisoner of war of a fair trial, intentional attacks against the civilian population, intentional attacks against civilian objects, intentional attacks that cause excessive damage to civilian objects, intentional attacks against religious and educational facilities, and the whole category of crimes against humanity (Ohlin, 2011). Another option could have been that of considering two separate modes of criminal responsibility for a JCE. The first mode, to be designated as 'co-perpetrating a JCE' applies to 'individuals who fulfil all three of the following conditions: (1) they participate in a joint criminal endeavour at a high level, (2) they have the intent of furthering the criminal purpose of the group endeavour, and (3) they are indispensable to the success of the joint criminal endeavour' (Ohlin, 2011). This mode of liability is reserved for principals. The second mode, to be named 'aiding and abetting a joint criminal liability' applies to 'individuals who do not satisfy one of the three necessary conditions for co-perpetrating a joint criminal enterprise' (Ohlin, 2011). A third option could be that the accused's criminal liability to crimes committed by non-JCE perpetrators should materialise only where there is proof of express agreement or understanding to such effect (Frahang, 2010).

Nonetheless, these latter three options should be discarded because they lessen the accused's responsibility which voluntary participation in a JCE brings with it. After all, the ICC Statute is addressing the four worst international crimes and, therefore, these options might be considered a dilution of criminal responsibility that mastermind planners and organisers may opt for. Furthermore, the co-perpetrators are not accomplices or secondary parties but co-perpetrators irrespective of who commits whichever core crime of their own common design. That is why JCE is considered as a crime of commission and that there is equal culpability for all offenders who have participated therein. This notwithstanding, a distinction must be introduced between responsibility and punishment. The consideration that an accused co-perpetrator might not have physically committed the crime in question should be factored in when administering punishment rather than when attributing responsibility. For instance, a reduced punishment that can be inflicted could be not more than half of the maximum punishment that would have been inflicted had it been proved that the accused co-perpetrator had the specific intent.

The proposed Elements of Modes of Group Criminal Responsibility serves as a living pronouncement of the legal maxim that ignorance of the law is no excuse. With the further adoption of the proposed Elements into domestic law, the latter will have the effect of placing the perpetrator on guard as to the existence of JCE elements. On the contrary, leaving the determination of the JCE elements to customary international law and international court/tribunal decisions allows for a case to continue to be made that extended JCE breaches legality. Furthermore, once an accused has voluntarily participated in, and consented to, a JCE, s/he should still be convicted of a specific intent crime notwithstanding that s/he might not have had the specific intent for such crime as this should be a natural and foreseen result of the JCE that is a group crime.

Finally, to iron out difficulties in interpretation in relation to JCE I, II, and III, other proposals can be made to elaborate on the proper interpretation of the elements of this mode of criminal liability. For instance, the Elements of Modes of Group Criminal Responsibility can lay out in more detail the relationship between mastermind co-perpetrators and physical co-perpetrators; indicate that co-perpetrators have to engage in a common design rather than an agreement; clarify that JCE does not necessarily require an express or written agreement; posit that JCE can be reached as late as when the crime is being committed; stipulate that the contribution to a JCE need not be essential but of a lower degree, that is, substantial; mandate that all co-perpetrators are responsible for a JCE irrespective of the roles assumed by each and every one of them; require that co-perpetrators can engage in multiple JCEs, in an overarching JCE, or in JCEs that interact with each other; clarify that each co-perpetrator's contribution need not be equal; and establish that a co-perpetrator need not know the exact details of the common design to participate therein.

8. Conclusion

Mass atrocity crimes are an intensely hurtful part of our social world. Because they are made possible by criminal networks of masterminds and because their impact penetrates deeply in society, such crimes usher very major socio-political and legal problems with long-term repercussions for societies involved. There are no easy solutions to these problems. Yet, the experiences of countries emerging from traumas of mass atrocities show that societies cannot heal if the truth of their ordeal is not ascertained, impunity is not challenged, and a modicum of accountability is not achieved. Criminal justice has the potential to offer an important service to this end. Part of the broad responsive repertoire to mass atrocity crimes, criminal justice represents a foundational response that grounds and complements other restorative – and social – justice responses such as apology, lustration, truth commissions, reparations, etc. By offering a constructive critique of a key criminal justice institution, namely the ICC and its relevant law regarding the judicial determination of mass atrocity crimes, by proposing ways to overcome institutional obstacles and making the case for relevant amendments, this paper is not only a contribution to international criminal law (ICL) but presents also social justice – relevant research. An enhanced capacity to hold masterminds accountable benefits social justice.

The paper has considered how behind the scenes high-ranking military and political indirect perpetrators of mass atrocity crimes can be adjudged guilty of collective criminal responsibility and has made the case for more harmony and comprehensiveness in ICL in relation to the modes of criminal liability. It has been observed that whilst the international *ad hoc* tribunals had ample and successful recourse to JCE and that this mode of criminal responsibility – notwithstanding its defects – has stood the test of time, the Damocles' sword is hanging on its head within the realm of ICL. There is a danger that, whilst JCE has been, and continues to be, a success story in national law and before international *ad hoc* tribunals, once the latter are definitively wound up, JCE may meet its untimely death in ICL. From the perspective of international criminal justice, this is not a desirable outcome as past judicial output of international *ad hoc* tribunals has clearly demonstrated that JCE has well proven itself. Nonetheless, the ICC that represents the present and, more importantly, the future of ICL has not yet embraced this tried and

tested mode of criminal liability. The ICC has made a deliberate decision not to apply it and, instead, rejected it and substituted it by indirect perpetration based on joint control of the crime, thereby risking the end of JCE within the realm of ICL. To avoid relegating JCE to the annals of ICL history, to retain its effectiveness, to enhance the ICC Prosecutor's modes of liability arsenal against mastermind co-perpetrators, and to address the criticism against JCE III that JCE trials do not result in fair proceedings, this contribution has proposed to codify JCE in Article 25(3)(a) of the Rome Statute. Based on extant case law of the international *ad hoc* tribunals and having regard to the contribution in the literature that has identified defects in the workings of JCE, the paper has proposed two amendments to the ICC Statute through an addition to Article 25(3)(a) with the view of anchoring JCE therein and to set out the elements of JCE in new Elements of Modes of Group Criminal Responsibility to be made under the Rome Statute and to address the aforesaid criticisms.

The text of the proposed two draft amendments presented above is offered with the hope that it can ignite a wider discussion by an ICC Review Conference to be convened by the Assembly of States Parties to the ICC Statute to consider amending Article 25(3)(a) of the ICC Statute with the proposed amendment thereto and the addition of a new provision authorising the adoption of Elements of Modes of Group Criminal Responsibility, subject to such changes that may be agreed upon during the said Conference. The next annual conference of the Assembly of States Parties can serve as a proper platform to study these proposals, assess them, and make enhancements thereto. Article 116, paragraph 6, of the ICC Statute provides that: 'The Assembly shall meet at the seat of the Court or at the Headquarters of the United Nations once a year and, when circumstances so require, hold special sessions. Except as otherwise specified in this Statute, special sessions shall be convened by the Bureau on its own initiative or at the request of one-third of the States Parties'. With this collective effort, JCE can be retained, solidified, and embedded in the ICC Statute next to the other modes of group criminal responsibility and can continue to serve the ends of international criminal justice as it has done in the past. It can also be emulated as a model for national criminal law, and should it be the case, when new international *ad hoc* tribunals are established in the future. Utilisation of the JCE enhances the capacity to hold masterminds accountable, and in the process buttresses the causes of restorative and social justice in societies grappling with effects of mass atrocities.

Disclosure statement

No potential conflict of interest was reported by the author(s).

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