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Joint Criminal Confusion: Exploring the merits and demerits of joint enterprise liability*

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In February 2016, the UK Supreme Court fundamentally changed the criminal law principles of accessorial liability when it handed down its decision in *R v Jogee*. The Court abolished the head of liability known as 'joint criminal enterprise' (JCE) and replaced it with the ordinary principles of aiding and abetting, which it re-stated for this purpose. JCE features prominently in international criminal law (ICL) where it has an equally contentious status. The full implications of *Jogee* remain at present uncertain, underexplored and divisive. In this chapter, I evaluate the merits and demerits of joint enterprise by comparing JCE in English law and ICL. A cross-jurisdictional analysis of joint enterprise reveals more deeply the role the notion plays in the overall taxonomy of criminal responsibility. There are different concepts of joint enterprise with different theoretical groundings. By not recognising this, past debates of joint enterprise liability have failed to appreciate the concept's merits alongside complicity liability.

I. Introduction

On 18 February 2016 in the cases of *R v Jogee* and – sitting as Privy Council – in *Ruddock v The Queen* (hereinafter *Jogee*)[1], the UK Supreme Court, by restating the principles of joint enterprise liability, curbed joint enterprise's broad boundaries and, by equating it to complicity liability, essentially abolished the concept altogether.[2] This was a landslide decision[3] that was welcomed by many in the legal community, scholars, legal practitioners and

* This is an extended version of the author's inaugural address held at University of Leeds, School of Law on 1 December 2016.

[1] R v *Jogee* [2016] UKSC 8, at 29 ('Restatement of Principles').

[2] M. Dyson, 'Shorn off-complicity', *Cambridge Law Journal*, 2016; F. Stark, 'The Demise of "Parasitic Accessorial Liability": Substantive Judicial Reform, Not Common Law Housekeeping', (2017) *CLJ 75* (3) 550-579; AP Simester et al., *Simester and Sullivan's Criminal Law*, 6th edn, (Oxford, Hart Publishing, 2016) at 245–6.

[3] For commentaries: R Buxton, 'Jogee: upheaval in secondary liability for murder', (2016) *CLR* 324–333; D. Ormerod and K. Laird, 'Jogee: not the end of a legal saga but the start of one?, (2016) *CLR* 539–552; M. Dyson and R. Buxton, Letter to the Editor, 2016 *CLR* 638–643; AP Simester, 'Accessory Liability and Common Unlawful Purpose', *Law Quarterly Review* 2017, 73–90.

Chapter in Beatrice Krebs (ed.), Accessorial Liability After Jogee (Hart Publishing 2019)

activists.[4] The concept of joint enterprise had been over-extended[5] and the law was complicated. It enabled a conviction for murder of those on the margins of wrongdoing whilst being so complex that it led to a very high number of appeals (22 per cent of appeals in 2013).

Over the years, a rich debate had developed around the theory of joint enterprise, not just in English law.[6] The concept features prominently in international criminal law (ICL) where it has an equally contentious status.[7] Joint criminal enterprise (JCE) in ICL is largely based on the English doctrine of common purpose, the precursor of joint enterprise in English law. This explains why joint enterprise in English law and in ICL share a number of features. First, joint enterprise developed alongside complicity to capture group conduct that does not fit the strictures of complicity liability. Second, joint enterprise in both English law and ICL is prone to over-expansion as a result of the loose terminology of 'pursuing a common criminal purpose' and 'being concerned in' the crime. Finally, the nature of joint enterprise is ambiguous. Joint enterprise in both English law and ICL has a hybrid nature; it complies with principles of cause-based complicity liability yet can also be viewed as agency liability.[8] In English law and in ICL, the debate on joint enterprise liability has clustered around three issues: (i) its broad foresight-test (ii) its nature, and (iii) its propensity to expand.

To date, the debates on joint enterprise in English law and ICL have not been linked. This is not surprising since they exist in separate legal spheres and epistemic communities. Yet with *Jogee* this has changed. It has been argued

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[4] Eg, G Virgo, Joint Enterprise is Dead: Long Live Accessorial Liability' [2012] *Crim LR* 850; W Wilson and D Ormerod, 'Simply Harsh to Fairly Simple: Joint Enterprise Reform' (2015) *Crim LR* 3; C Sjölin, 'Killing the Parasite' (2016) *Nottingham Law Journal* 129–140. See also the website of the JENGbA Campaign who fight against the Joint Enterprise Law: jointenterprise.co

[5] Leading to many convictions, see: M McClenaghan, M McFadyean and R Stevenson, 'Revealed: Thousands Prosecuted Under Controversial Law of Joint Enterprise', available at www.thebureauinvestigates.com/stories/2014-03-31/data-joint-enterprise-in-numbers (accessed 8 October 2018).

[6] Eg, JC Smith, 'Criminal Liability of Accessories: Law and Reform' (1997) 113 *LQR* 453; AP Simester, 'The Mental Element in Complicity' (2006) *LQR* 578; B Krebs, 'Joint Criminal Enterprise' (2010) *MLR* 578; B Krebs, 'Mens Rea in Joint Enterprise: A Role for Endorsement?, (2015) *CLJ* 480–504; M Dyson, 'The Future of Joint-Up Thinking: Living in a Post-accessory Liability World', (2015) *Journal of Criminal Law* 181–197; A Green and C McGourlay, 'The wolf packs in our midst and other products of criminal enterprise prosecutions' (2015) *Journal of Criminal Law* 280–297.

[7] Eg, JS Martinez and AM Danner 'Guilty Associations: Joint Criminal Enterprise, Command Responsibility, and the Development of International Criminal Law' (2005) 93 *Califfornia Law Review* 75; SS Powles, Joint Criminal Enterprise – Criminal Liability by Prosecutorial Ingenuity and Judicial Creativity, (2004) *JICJ* 606; JD Ohlin, 'Three Conceptual Problems with the Doctrine of Joint Criminal Enterprise' (2007) 5 *JICJ*, 69–90; HG van der Wilt, 'Joint Criminal Enterprise. Possibilities and Limitations', 5 *JICJ* (2007), 91–108; E. van Sliedregt, 'Joint Criminal Enterprise as a Pathway to Convicting Individuals for Genocide' (2007) 5 *JICJ* 184–207.

[8] See ch 2 in this volume.

Chapter in Beatrice Krebs (ed.), Accessorial Liability After Jogee (Hart Publishing 2019)

that JCE in ICL lacks a legal basis after the UKSC in *Jogee* essentially abolished the concept of joint enterprise. This argument was put forward by counsel for Jogee who took their fight to the international tribunal in the case against Radovan Karadžić. They argued that his conviction should be quashed now that the UKSC found that the law on joint enterprise had taken a 'wrong turn'.[9] A similar case had been brought by Jogee's counsel before the Hong Kong Court of Final Appeal in the case of *Chan Kam Shing*.[10]

So far, *Jogee* has not led to abolishing joint enterprise in jurisdictions outside England and Wales. It was not followed by the highest courts in Australia and Hong Kong. The Australian High Court found that extended joint enterprise was still good law[11] and the Hong Kong Court of Final Appeal held that the law did not take a wrong turn[12]. On 20 March 2019, the ICTY Appeals Chamber in the *Karadžić* case found that it was not bound by findings of the UKSC (or any other domestic or international court).[13] It held that a shift in domestic law should not compel the tribunal to change "well-established jurisprudence" on JCE, not in the least since *Jogee* "has not been followed in other common law jurisdictions".[14] Indeed, the fact that joint enterprise continues to exist in jurisdictions outside England and Wales, undermines the persuasiveness of the legal argument in *Jogee*. Furthermore, it calls into question the decision to align joint enterprise liability to complicity. In ICL, JCE has always been distinguished from complicity/aiding and abetting liability. This makes comparing joint enterprise in ICL and in English law so interesting; it allows us to explore the added value of joint enterprise liability alongside complicity.

In this chapter, I challenge the view that we can do without joint enterprise and fully rely on complicity liability. The premise of the chapter is that, while the Supreme Court's ruling in *Jogee* may be welcomed for clarifying how joint enterprise comports to complicity, by aligning it fully to complicity liability, it has curtailed it too much. A cross-jurisdictional comparison and analysis of joint enterprise reveals more deeply the role the notion plays in the overall taxonomy of criminal responsibility. Analysis of joint enterprise in English law and ICL reveals there are different concepts of joint enterprise with different theoretical groundings. By not recognising this, past debates of joint

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[9] Counsel for Jogee submitted a motion before the United Nations Mechanism for International Tribunals (UNMICT), the successor body to the ICTY, has been asked to review JCE *Karadžić* appeal. See *Prosecutor v Karadžić* (Trial Chamber, Case No IT-95-5/18-T, 24 March 2016), Submissions available online at www.unmict.org/en/cases/mict-13-55. A similar case had been argued before the Hong Kong Court of Final Appeal in the case of Chan Kan Shing: *HKSHAR v Chan Kam Shing*, FACC 2017.

[10] *HKSHAR v Chan Kam Shing*, FACC 2017.

[11] *Miller v The Queen* [2016] HCA 30.

[12] *HKSHAR v Chan Kam Shing*, FACC 2017. For a commentary, B Krebs, 'Hong Kong Court of Final Appeal: Divided by a Common Purpose' (2017) *Journal of Criminal Law* 271–274.

[13] *Prosecutor v Karadžić* (Appeals Chamber, Case No IT-95-5/18-T, 20 March 2019), para. 434.

[14] Ibidem, para 436.

Chapter in Beatrice Krebs (ed.), Accessorial Liability After Jogee (Hart Publishing 2019)

enterprise liability have failed to appreciate the concept's merits alongside complicity liability.

Evaluating the merits and demerits of joint enterprise informs debates in both English law, ICL and beyond. Joint enterprise is still relevant in common law jurisdictions outside England and features prominently in statutes of international courts and tribunals. Rather than committing joint enterprise to the history books as a result of *Jogee*[15], I argue we need to rethink it. One way of doing that is by understanding its rise and learning from its fall.

I take three steps to build my argument. In the *first step* ('Understanding Joint Enterprise Liability'), I discuss joint enterprise in each of the two jurisdictions that are central to the analysis. I will start with English law after which I discuss joint enterprise in ICL. This is an elaborate and lengthy part of the overall argument but is essential as the basis on which I build my argument. I discuss the origins, development and nature of joint enterprise liability. In the *second step* ('Determining its Merit'), I discuss inchoate complicity and the relationship between joint enterprise liability and complicity. In the *third step* ('Redrawing Boundaries'), I propose new ways of limiting broad, 'collateral' notions of joint enterprise. Unlike the UKSC in *Jogee*, I conclude that there still is a place for collateral joint enterprise. The argument that follows from the analysis and that underpins the conclusion is that *mens rea* and *actus reus* should be viewed in terms of a hydraulic relationship or a set of scales: when we attach less weight to one, the other should be bolstered. When a foresight-test is employed there has to be a stricter *actus reus* outweighing the *mens rea*, preventing an imbalance and over-expansion.

STEP I: Understanding Joint Enterprise

II. Joint Enterprise as Collateral Liability

Joint enterprise is based on the common law doctrine of common purpose[16] and is applied in a number of jurisdictions: England and Wales, Canada, Australia, South Africa and Hong Kong and in ICL. In its basic form, it enables holding secondary party D2 criminally liable for the crime that was the subject of an unlawful common purpose (crime A), pursued by both D2 and D1 and

[15] Counsel for Jogee, after the UKSC decision in *Jogee/Ruddock*, submitted a motion before the United Nations Mechanism for International Tribunals (UNMICT), the successor body to the ICTY, has been asked to review JCE *Karadžić* appeal. See *Prosecutor v Karadžić* (Trial Chamber, Case No IT-95-5/18-T, 24 March 2016), Submissions available online at www.unmict.org/en/cases/mict-13-55.

[16] For an overview see Stark, supra n 2. See also KJM Smith, *A Modern Treatise on the Law of Criminal Complicity* (Oxford Monographs on Criminal Law & Justice), 209–234.

Chapter in Beatrice Krebs (ed.), Accessorial Liability After Jogee (Hart Publishing 2019)

committed by the principal-perpetrator D1 'in pursuance of the common intent'.[17]

More controversial is the collateral modality of joint enterprise where D2 is liable for the further or extended crime (crime B) committed by D1 in the course of committing crime A, and which D2 *foresaw* while continuing to participate in the enterprise. The collateral modality has been termed 'parasitic accessorial liability' (PAL)[18] in English law, and 'extended' joint criminal enterprise (JCE) liability in Australian law and ICL. PAL is most controversial in murder cases where secondary participant D2 is found guilty of murder despite the lack of intent to kill or cause grievous bodily harm. To illustrate the workings of joint enterprise liability I briefly discuss the *Jogee* case.

Jogee and Hirsi had gone to the home of the victim (Fyfe) and behaved aggressively. Hirsi stabbed Fyfe who died of his wounds. Jogee had come beside Hirsi in the area where the stabbing took place, with a bottle raised in his hand, leaning towards Fyfe saying he wanted to smash the bottle over his head. Both were convicted for murder. The judge had directed the jury that Jogee was guilty of murder if he took part in the attack on Fyfe and realised that it was possible that Hirsi might use the knife with intent to cause serious harm. Foresight sufficed as intent for murder.

The UK Supreme Court adopted a more stringent approach. First of all, it held that for a murder conviction proof is required that Jogee (D2) encouraged or assisted Hirsi (D1) to commit murder (crime B).[19] Pursuing a common criminal purpose is no longer relevant for liability of D2; liability is construed along the lines of 'ordinary' complicity. In Simester's words: all forms of complicity must now be channelled through the 'aid, abet, counsel, or procure formula – in essence encouragement or assistance'.[20] Assisting or encouraging is more precise language than 'taking part in an attack' (jury instruction). The Supreme Court holds that assisting or encouraging does not require active engagement in the stabbing; agreement (to go to the house of Fyfe and threaten him) can be a form of encouragement.[21] More generally, the court found that supportive presence, when there is no agreement and people come together spontaneously to commit an offence, can be encouragement triggering liability for crime B.[22] Secondly, with regard to *mens rea*, the Supreme Court held that the law took a 'wrong turn' in the case of *Chan Wing-Siu* where foresight was considered sufficient for murder.[23] Instead, the Court found that foresight is *evidence* of intent rather than intent proper.[24] When D2 is party to a violent attack and has no intent for murder yet the violence

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[17] *R v Macklin* (1838) 2 Lew. CC225, 168 ER 1136.
[18] The expression was coined by JC Smith (1997), supra, n 6.
[19] *R v Jogee* [2016] UKSC 8 [78].
[20] Simester, supra n 3, at 75.
[21] Ibid.
[22] Ibid.
[23] *R v Chan Wing-Siu* [1985] AC 168 [86].
[24] [87].

Chapter in Beatrice Krebs (ed.), Accessorial Liability After Jogee (Hart Publishing 2019)

escalates and results in death caused by D1, D2 is not guilty of murder.[25] Instead, if D2 participates in an attack, which 'all sober and reasonable people' realise carries the risk of 'some harm (not necessarily serious) to another', and death in fact results, D2 is guilty of manslaughter.[26]

A concept similar to PAL exists in ICL: extended JCE or Third Category JCE (JCE3) [27]. It has been applied for the first time by the International Criminal Tribunal for the Former Yugoslavia (ICTY) and concerns those cases where a person agrees to a common purpose to commit crime A and one of the confederates to the joint venture goes further and commits crime B, which, while outside of the common purpose, was foreseen by D2 as a *natural and foreseeable consequence* of pursuing that common purpose.[28]

Other international courts, such as the Special Court for Sierra Leone, the Special Tribunal for Lebanon (STL), and the Extraordinary Chambers of the Court of Cambodia (ECCC aka the Cambodia Tribunal) apply variants of the theory.[29] The Statute of the International Criminal Court (ICC) provides for common purpose-liability in Article 25(3)(d) which, read in conjunction with the provision on the mental element – Article 30 ICC Statute – rules out collateral joint enterprise since the latter provision requires that 'in relation to a consequence, that person means to cause that consequence or is aware that it *will* occur in the ordinary course of events [emphasis added, *EvS*]'.[30] This is stricter than foreseeing the possibility of a crime.

III. The Elusive Concept of PAL

A. Common Purpose: non-collateral joint enterprise

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[25] [95–6].
[26] [96].
[27] *Prosecutor v Tadić,* Judgment, Case No IT-94-1-A, ICTY, A. Ch., July 15, 1999, para 196, 228, See further, section 5.A.
[28] Ibid.
[29] For an overview, see L Yanev, *Theories of Co-perpetration*, (Brill/Nijhof: Dordrecht, 2018); N Jain, *Perpetrators and Accessories in International Criminal Law: Individual Modes of Responsibility for Collective Crimes* (Oxford, Hart Publishing, 2014); R Cryer et al., *An Introduction to International Criminal Law and Procedure* (Cambridge, Cambridge University Press, 2010); G Boas et al., *International Criminal Law Practitioner Library, Elements of Crimes under International Law* (Cambridge, Cambridge University Press, 2008).
[30] The ICC Statute provides for a broad concept of co-perpetration where liability is premised on pursuing a common plan, making it overlap with certain aspects of common purpose liability in art 25(3)(a) of the ICC Statute. Co-perpetration, however, requires proof of an 'essential contribution' to the common purpose, which is not the case with common purpose in art 25(3)(d) of the Statute. See on the differences and overlap between common purpose liability and co-perpetration: L Yanev, 'On Common Plans and Excess Crimes: Fragmenting the Notion of Co-Perpetration in International Criminal Law', (2018) *Leiden Journal of International Law* 1-26; M Cupido, 'Common Purpose Liability versus Joint Enterprise: A Practical View on the ICC's Hierarchy of Liability Theories' (2016) *Leiden Journal of International Law*, 897–915.

Chapter in Beatrice Krebs (ed.), Accessorial Liability After Jogee (Hart Publishing 2019)

Understanding PAL and how it comports to complicity/aiding and abetting means going back to the beginning: to common purpose liability, the liability theory from which, PAL developed.

According to KJM Smith in his magnificent work on criminal complicity, it is unclear what motivated the creation of the doctrine of common purpose and what its nature, status and relationship to general complicity is.[31] Throughout the centuries the common law has known the concept by which D1 and D2 pursue a common criminal purpose to do crime A and where D2, whilst present but without proof of having actually assisting or encouraging D1, is equally guilty of A.[32] This is the basic form of common purpose liability, where crimes remain within the scope of the agreement.[33] It was recognised as a distinct theory of liability alongside accessorial liability.[34]

At the same time, from its inception common purpose liability was closely related to complicity. Common purpose is an amalgam of the *mens rea* and *actus reus* requirements of complicity of abettors, those who instigate or encourage others *during* the offence.[35] Intangible encouragement by way of presence is the hallmark of common purpose liability in the older case law. The person present is referred to as 'principal' rather than accomplice. Hale observes:

> If divers come to commit an unlawful act and be present at the time of Felony committed, though one of them only doth it, they are all Principals.[36]

Presence compensates for the lack of action on the part of D2. Consider Turner's 12th edition of *Russell on Crime* (1964) where presence pursuant to a common purpose is treated as a form of participation:

> if a special verdict against a man as a principal does not show that he did the act, or was present when it was done, or did some act at the time in aid which shows that he was present, he…cannot be convicted.[37]

Over the years, courts have taken a broader view of what constitutes the *actus reus* of aiding or abetting, ie classic complicity. Presence at the scene of a crime is generally not required.[38] Mere presence, on the other hand, is not sufficient for aiding and abetting liability. And here common purpose liability remained relevant (pre-*Jogee*); D2's presence constitutes encouragement or assistance when it is part of pursuing an agreement to commit a crime. With *Jogee* this is now complicity liability rather than common purpose.[39]

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[31] Smith, supra, n 14, at 209.
[32] Simester, supra n 3, at 76; Stark, supra n 2; Smith, supra n 14, 209–232.
[33] *R v Tyler and Price* (1838); *R v Wilkes* (1839) 9 *Carrington and Payne* 437; 173 ER 901; *R v Skeet* (1866) *Foster and Finlayson* 931; 176 ER 854. See Sjölin, supra n. 2, at 133.
[34] Sjölin, supra n 4, at 130.
[35] Smith, supra n 14, at 224.
[36] *Pleas of the Crown* (1678) at p 215, Cited by Simester, supra n 3, at 76.
[37] JWC Turner, *Russell on Crime*, 12th edn (Londo,: Sweet & Maxwell, 1964), at 139.
[38] D Ormerod & K Laird, *Smith, Hogan and Ormerod's Criminal Law*, 15th edn, (Oxford, Oxford University Press, 2018), at 187.
[39] Ibid, at 193.

Chapter in Beatrice Krebs (ed.), Accessorial Liability After Jogee (Hart Publishing 2019)

B. PAL: collateral joint enterprise

Before *Jogee*, the Court of Appeal distinguished three categories of cases in which there is resort to joint enterprise:

1. Where two or more people join in committing a single crime, in circumstances where they are, in effect, all joint principals ('plain vanilla' joint enterprise).
2. Where D assists or encourages P to commit a single crime (accessorial liability).
3. Where P and D participate together in one crime (crime A) and in the course of it P commits a second crime (crime B) which D had foreseen he might commit (PAL). [40]

The third category is collateral liability: PAL, with *Chan Wing-Siu*[41] being the leading case. This case will be examined below (section C). First, we need to explore PAL's pedigree. PAL, whilst shrouded in terms of common purpose liability, is generally traced back to (collateral forms of) accessorial liability before the fact; cases of 'variation', where D1 deviates from the common plan by committing the further crime (crime B).[42] An early example is mentioned in Foster's *Crown Law*:

A adviseth B to rob C, he doth rob him, and in so doing, either upon resistance made, or to conceal the fact, or upon any other motive operating at the time of the robbery, killeth him. A is accessary to this murder.[43]

Questions arise over the mens rea-test that justifies attributing responsibility for crime B. In Foster's example, liability was premised on an objective test: whether crime B, committed by D1, was a probable consequence of the advice/instigation by D2. Initially, the probability-test had been applied solely to counselling or procuring.[44] Eventually it was applied beyond such cases and became part of the common purpose lexicon. In later cases, the law moved towards requiring a subjective test (intent and foresight) with regard to crime B. [45] Thus, PAL developed from an instigation/abetting-type of liability (A adviseth B and C) and eventually employed a subjective foresight test.

While the 'variation rule' can be viewed as an early precedent of collateral liability, we should not ignore differences with PAL. In Foster's example the relationship between A (D2) and B (D1) is premised on a one-sided relationship of instigation rather than participating in a joint criminal venture pursuing a common agreement. Moreover, and related, in variation-cases, the

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[40] *R v A*, EWCA Crim 1622; [2011] QB 841 (CA), at [7], 845, per Hughes LJ.
[41] *R v Chan Wing-Siu* [1985] AC 168 [86].
[42] Stark, supra n 2. See Smith, supra n 14, 209–222. See also *R v* Jogee [2016] UKSC 8, [20–21].
[43] M Foster, A Report of Some Proceedings on the Commission for the Trial of the Rebels in the Year 1746, in the County of Surry; And of Other Crown Cases: to which are Added Discourses Upon a Few Branches of the Crown Law (*Foster's Crown Law*), at 370.
[44] Stark, supra n 2, 566–67.
[45] Ibid, 568–576.

Chapter in Beatrice Krebs (ed.), Accessorial Liability After Jogee (Hart Publishing 2019)

liability of D2 who *instigates* crime A and is liable for crime B is less of a 'moral stretch' than in PAL-cases, where D2 is liable for B for being present with foresight that D1 might commit B. In Foster's example, the defendant set the chain of events in motion. That is a different moral position than D2 in a PAL-situation.

C. Chan Wing-Siu: the 'wider principle'

PAL's lineage can be most clearly traced back to the *Chan Wing Siu* case decided in 1985. This is where the 'wider principle' of foresight was endorsed, where D2 was found 'criminally liable for acts by the primary offender of a type which the former foresees but does not necessarily intend'.[46] Defendants in this case had gone to the victim's house to collect a debt but had been attacked by the latter with a knife. Two of the three defendants knew that the others carried knives while two denied being involved in the stabbing. All were convicted of murder. Foresight with regard to the killing was sufficient for liability for murder.

Chan Wing Siu was approved by the House of Lords in *Powell and Daniels, English*[47] and *Rahman*[48]. It was endorsed by the Court of Appeal[49] and by the Supreme Court in *Gnango*.[50] Establishing foresight essentially came down to proof of knowledge on the part of D2 that D1 carried a weapon that was subsequently used to kill the victim. In those cases where the weapon was fundamentally different from what D2 thought D1 might use, there was no liability ('fundamentally different rule').[51] In *Jogee*, the Supreme Court rejected the foresight-test. It held that *Chan Wing-Siu* constituted a legal wrong turn.[52]

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[46] [1985] AC 168 [86] per Sir Robin Cooke, at 175.
[47] [1999]AC1, [1997] 4 All ER
[48] [2008] UKHL 45.
[49] In a number of cases: *R v Smith*, EWCA Crim 1342; *R v ABCD* [2010] EWCA Crim 1622; *R v Mendez* [2010] EWCA Crim 516; *R v Lewis* [2010] EWCA Crim 496; *R v Badza* [2010] EWCA Crim 1363; *R v Montague* [2013] EWCA Crim 1781; *R v Bristow* [2013] EWCA Crim 1540; *R v Ali* [2014] EWCA Crim 2169.
[50] [2011] UKSC 59. This was a rather special case of PAL and some would argue it was not really PAL. See for a good discussion J. Herring, *Criminal Law, Text, Cases and Materials*, 7th edn (Oxford, Oxford University Press, 2016), 838–848 (discussion in 8th edn (2018) is shorter: 824–826).
[51] '[t]he use of a knife was fundamentally different to the use of a wooden post'…but… 'if the weapon used by the primary party is different to, but as dangerous as, the weapon which the secondary party contemplated he might use, the secondary party should not escape liability for murder because of the difference in the weapon, for example, if he foresaw that the primary party might use a gun to kill and the latter used a knife to kill, or vice versa.' *Powell and Daniels, English,* [1999]AC1, [1997] 4 All ER summing up Lord Hutton, at 30. In *Jogee*, the 'fundamentally different-rule lives on in circumscribing liability in case of an 'overwhelming supervening event' breaking the chain of events: *R v Jogee* [2016] UKSC 8 [97].
[52] Ibid, [3, 82, 83, 85, 87].

Chapter in Beatrice Krebs (ed.), Accessorial Liability After Jogee (Hart Publishing 2019)

Foresight and knowledge of a weapon can still be evidence of what D2's intention was. But 'it is evidence and no more'.[53]

This is arguably the biggest change brought about by *Jogee*. The *mens rea* for secondary participation in murder requires proof that D2 had intent to assist or encourage D1 to commit murder. This includes intent that D1 has the necessary mens rea for murder.[54] This aligns with complicity/aiding and abetting where the aider and abettor is required to act with intent and in the knowledge of the essential matters of the crime committed by D1.[55]

PAL has unclear origins and since *Chan Wing Siu* it developed into an expansive liability theory employing lax evidentiary standards.[56] Aside from the broad foresight-test, the actus reus is not much more than agreeing to commit crime A, in the course of which crime B is committed. Evidence of encouragement or assistance establishing a causal link is not required. Indeed, proof of the conspiracy does the work.[57] PAL has been particularly problematic in murder cases where it comes with an incongruence: it generates murder liability for D2 who has mere *foresight* of the possibility of D1's *intentional* conduct. In all this, we are reminded of the fact that murder carries a mandatory life sentence.

D. Nature

Is PAL complicity liability or a *sui generis* mode of liability? As an 'offshoot' of the 'variation rule' of instigation/abetting liability, PAL is cause based complicity liability. D2's liability derives from that of D1; he causes D1 to commit the crime and is punished on an equal footing as D1.[58] This explains

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[53] Ibid, [98]. Stark disagrees. In his view, the law on PAL did not take a wrong turn. Stark supra n 2 550–579. He traces the foresight-test back to nineteenth century riot and poaching cases where D2 was liable for the killing of a constable by D1 during rioting because it could be *presumed* he shared an intention with P to 'resist all opposers'. He argues that a tacit agreement to violently resist opposition is a presumed foresight-test. Stark, supra n 2, at 556, referring to M. Hale, *Historia Placitorum Coronæ*, vol 1 (London 1736), at 443-4. See also Sjölin, supra n 4, at 133.

[54] *R v* Jogee [2016] UKSC 8, [90].

[55] *Johnson v Youden* [1950] 1KB 544 (KB) 546: '[b]efore a person can be convicted of aiding and abetting. . . he must at least know the essential matters which constitute that offence'.

[56] Research by Dyson shows that the types of evidence used are most commonly phone records and CCTV evidence. Phone and CCTV evidence can show how people are linked together. Dyson, supra n 6, at 187–188. This practice has had unwarranted social and possibly discriminatory consequences. It led the House of Commons Justice Committee to express its concern that a large proportion of those convicted of joint enterprise offences are young black and mixed race men. House of Commons, Justice Committee, *Joint Enterprise: Joint Enterprise: Follow-up, 4th Report of Session 2014-15*, para 24, at 12.

[57] Simester, supra n 3, at 78.

[58] On causation as the philosophical underpinning for complicity: SH Kadish, 'Complicity, Cause and Blame: A Study in the Interpretation of Doctrine,' *California Law Review*, 329–410; HLA Hart and AM Honoré, *Causation in the Law* (Oxford, Clarendon Press, 1959); J Gardner, 'Complicity and Causality', in J Gardner, *Offences and Defences: Selected Essays in*

Chapter in Beatrice Krebs (ed.), Accessorial Liability After Jogee (Hart Publishing 2019)

much of the debate around PAL and its foresight test. As complicity liability, PAL would require proof of a contribution to the crime - ie causing the crime - coupled with intent and knowledge of the essential matters of the base crime. Foresight falls short of this hence the ruling in *Jogee* where the UKSC brought PAL back into the complicity fold, insisting on intent.

PAL can also be viewed as agency liability, based on an act of authorisation and assent. This is because complicity itself can be viewed as agency based. Rebecca Williams in Chapter 2 of this volume discusses how the law of complicity straddles competing identities of agency and causation.[59] A number of commentators support the view that complicity is not securely anchored in the structure of causation and can be better viewed as premised on agency/authorisation.[60] As agency, liability is based on association by D2 with D1's actions, where the accomplice authorises the principal's conduct. Causation plays a reduced role; it explains the connection between D2 and the crime but does not rely on it.[61]

Complicity liability, when viewed as agency liability, turns on *mens rea*. Relying on authorisation as the theoretical basis for complicity implies that D2 can only be held liable for acts (s)he authorised. If we regard PAL as agency liability, the central question is: to what extent can crime B be regarded as authorised when it was collateral?

The question of the nature of PAL – cause based or agency-based, whether it is distinct from complicity or a form of complicity – remains unresolved to today. In a way, it is no longer relevant since PAL is now aligned to complicity in *Jogee*. More generally, however, it is a pertinent question. If collateral joint enterprise is understood as agency and hence *mens rea* is the central tenet of liability, does a foresight-test suffice? In ICL foresight is accepted as a test for collateral joint enterprise, as it is in Hong Kong and Australian law. Does the fact that it has been rejected in *Jogee* mean that it is incompatible with collateral joint enterprise in general? This is a relevant question bearing in mind the foundational role of English law with regard to joint enterprise and to which we return in the third part. At this point, we need to take a step back and turn to joint enterprise liability in ICL. We start with its origins in World War II case law.

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the Philosophy of Criminal Law (Oxford,: Oxford University Press, 2007); KJM Smith, 'Complicity and Causation' 1986 *Crim LR* 663; C Kutz, 'Causeless Complicity' (2007) *Criminal Law and Philosophy*, 289–305.

[59] Williams, supra n 8.

[60] Kadish, supra n 61, at 354; Virgo, supra n 4, at 860. Support in case law: *R. v A* [2010] EWCA Crim 1622; *R v Gnango* [2011] UKSC 59, [52]–[55] and *Wilcox v Jeffrey* [2016] 2 WLR 681.

[61] Williams, supra n 8.

Chapter in Beatrice Krebs (ed.), Accessorial Liability After Jogee (Hart Publishing 2019)

IV. Common Purpose: WWII case law

In the aftermath of World War II, mid-level and lower Nazi defendants were tried by the Allied Powers before their own (military) courts sitting in the occupied zones in Germany. The courts relied on Control Council Law No 10 (CCL10), drafted by the Allied Powers and based on the Statute of the Nuremberg Tribunal, providing for a uniform basis of prosecution. The military courts interpreted the law in domestic terms.[62] The relevant provision sates that any person is deemed to have committed a crime '[i]f he was connected with plans or enterprises involving its commission' or '[w]as a member of any organization or group connected with the commission of any such crime'.[63]

In *Werner Rohde & Eight others,*[64] concentration camp staff members were charged with being concerned in the murder of four British women, liaison officers in France. None of the accused was charged with the actual killing. The Judge Advocate emphasised that:

> If two or more men set out on a murder and one stood half a mile away from where the actual murder was committed, perhaps to keep guard, although he was not actually present when the murder was done, if he was taking part with the other man with knowledge that that other man was going to put the killing into effect then he is just as guilty as the person who fired the shot or delivered the blow.[65]

Important in this case is the insistence on equal guilt. The accused, who had not been present at the scene of the crimes were all convicted of murder because they *knew* of the crime. A strict *mens rea* outweighed a broad *actus reus*. Guilt was attributed to a wide range of different contributions to the crime. The same was done in the *Max Wielen* case where 'concerned in the killing' ranged from shooting prisoners, and acting as escorts, to holding off the public. [66]

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[62] Reliance on this case law comes with a disclaimer: the cases are decided by (lay) military courts with advice from Advocate General; case law is not very sophisticated. Courts largely dispensed with specifying criminal conduct in any of the modes of liability nor did they distinguish clearly between principals and accessories. See A Von Knieriem, *The Nuremberg Trials* (Chicago, H. Regnery, 1959), 204–210.

[63] Art II(2) Control Council Law No 10, Punishment of Persons Guilty of War Crimes, Crimes Against Peace and Against Humanity, December 20, 1945, 3 *Official Gazette Control Council for Germany* 50-55 (1946).

[64] British Military Court, Wuppertal, 29 May – 1 June 1946, *United Nations War Crimes Commission, Law Reports*, Vol V, Case No 31

[65] *Werner Rohde & Eight others*, Vol V, at 56.

[66] Advocate-General: 'If people are all present, aiding and abetting one another to carry out a crime they knew was going to be committed, they are taking their respective parts in carrying it out, whether it be to shoot or whether it is to keep off other people or act as an escort whilst these people were shot, they are all in law equally guilty of committing that offence, though their individual responsibility with regard to punishment may vary'. British Military Court, 1–3 September 1947 (Hamburg), United Nations War Crimes Commission, Law Reports of Trial of War Criminals, Vol XI, 31–53, at 43–44. See also the *Otto Sandrock et al.* ('*Almelo* case'),

Chapter in Beatrice Krebs (ed.), Accessorial Liability After Jogee (Hart Publishing 2019)

In a number of cases, common purpose liability captured liability of what would normally be charged as instigation or abetting liability, ie accessorial liability before the fact. In the *Adam Golkel*-case, none of the defendants had taken direct part in the execution of British parachutists. They were, however, viewed as the ones setting the chain of events in motion and equally guilty to those executing the prisoners. [67] As in Foster's example in English law, this type of common purpose-instigation carries a particular moral weight that justifies a conviction as principal.

Common purpose liability in WWII cases was a useful prosecutorial tool; it captured a wide range of contributions to the criminal endeavour.[68] This 'flattening' of criminal responsibility was typical for the 'concerned in'-variant of joint enterprise and useful in dealing with collective violence. There was another 'advantage'. In mob violence situations, overdetermined events where multiple causes had led to the commission of crimes, no exact identification of the causal contribution was required. At this point, we need to briefly discuss the *Essen Lynching* and *Borkum Island* cases, important precedents for JCE3 in ICL.

In *Essen Lynching*, the case of the lynching of three British prisoners of war by German civilians, the German captain Erich Heyer had said loudly that the escorting soldiers should not interfere if German civilians would molest the prisoners; effectively encouraging the crowd to attack the prisoners. At trial, it was impossible to determine who had struck the fatal blow in each case. The Judge-Advocate stated:

> It was therefore, the submission of the Prosecution that every person who, following the incitement to the crowd to murder these men, voluntarily took aggressive action against anyone of these three airmen, was guilty in that he was concerned in the killing. It was impossible to separate anyone of these acts from another; they all made up what is known as a lynching.[69]

The defendants were all convicted as principals in murder.[70] Erich Heyer, who was considered the main villain, was sentenced to death while the others received prison sentences ranging from five years to life. All were equally guilty of murder but there was a different sentence depending on the role they had played in the killing.

British Military Court, 24–26 November 1945, *United Nations War Crimes Commission, Law Reports* Vol I, at 40

[67] *Adam Golkel & Thirteen Others*, *Law Reports of Trials of War Criminals*, Vol III (London, His Majesty's Stationary Office, 1947–1949) Vol V, Case No 30, at 53.

[68] See E van Sliedregt, *Individual Criminal responsibility in International Law*, Oxford monographs in International Law (Oxford, Oxford University Press, 2012) 30–36.

[69] British Military Court (Essen),18–22 December 1945, United Nations War Crimes Commission, Law Reports of Trial of War Criminals, Vol I, Case No 8, 88–92.

[70] Ibid at 91-2.

Chapter in Beatrice Krebs (ed.), Accessorial Liability After Jogee (Hart Publishing 2019)

The *Borkum Island* case concerned the lynching of seven American airmen by German soldiers and civilians.[71] In convicting the defendants, no distinction was made between the mayor of the town, who had instigated the crowd but who had not participated in the killing, and the mob who had attacked the airmen. The mayor was found liable as principal perpetrator of murder.[72] With regard to *mens rea* of the mayor the court found:

> All who join as participants in a plan to commit an unlawful act, the *natural and foreseeable consequence* of the execution, which involves the contingency of taking human life, are legally responsible as principals for a homicide committed by any of them in the furtherance of the plan [italics, EvS].

The *Bokrum Island* case is the only WWII precedent that provides for the natural and foreseeable consequences-test. Together with the *Essen Lynching* case, this ruling constitutes an important precedent for collateral joint criminal enterprise (JCE3) in ICL.[73]

V. Joint Enterprise Liability in ICL

A. JCE

The Appeals Chamber of the ICTY read JCE into 'committing' in Article 7(1) of the ICTY Statute.[74] Justifying this interpretation, the Chamber pointed to the object and purpose of the Statute and the collective nature of crimes committed in warlike situations.[75] JCE, the Appeals Chamber held, was part of customary international law since it was relied upon in post-WWII case law. According to the Appeals Chamber in the case of *Tadic*, these cases proceed 'upon the principle that when two or more persons act together to further a common

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[71] *United States v Kurt Goebell et al.* - Review and Recommendations of the Deputy Judge Advocate's Office, U.S. National Archives Microfilm Publications, I (available via ICC Legal Tools: www.legal-tools.org/en/doc/aeb036/).

[72] The court took into account other active conduct. The mayor had shouted 'beat the murderers' and had furthered the plan 'very actively' while he 'exerted strong influence in inciting the civilian population to anger against the fliers'. *United States v Kurt Goebell et al.* - Review and Recommendations of the Deputy Judge Advocate's Office, U.S. National Archives Microfilm Publications, I (available via ICC Legal Tools: www.legal-tools.org/en/doc/aeb036/). at 37.

[73] Caution is, however, warranted. The natural and foreseeable consequence-reasoning was only applied to the mayor. There is little evidence in the *Borkum Island* case that an accused who had no intent to kill was found guilty of murder as a result of taking a foreseeable risk that murder would occur. See Powles, supra n 7, at 616.

[74] *Tadic* Appeals Judgment, supra n 13, paras 186–193. Art 7 (1): A person who planned, instigated, ordered, committed or otherwise aided and abetted in the planning, preparation or execution of a crime referred to in articles 2 to 5 of the present Statute, shall be individually responsible for the crime.

[75] '[t]he crimes are often carried out by groups of individuals acting in pursuance of a common criminal design…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'. *Tadic* Appeals Judgment, supra n 25, para 191.

Chapter in Beatrice Krebs (ed.), Accessorial Liability After Jogee (Hart Publishing 2019)

criminal purpose, offences perpetrated by any of them may entail the criminal liability of all the members of the group'.[76] The Appeals Chamber held that equal guilt and a broad approach to the *actus reus* fits the collective nature of war crimes, crimes against humanity and genocide.

In *Tadic* the Tribunal essentially distinguished two types of JCE: basic and extended JCE.[77] In a basic JCE participants are liable for crimes that are *within* the scope of the common plan.[78] Basic JCE is close to concepts of joint or co-perpetration in Romano-Germanic/civil law systems and 'plain vanilla' joint enterprise in English law where two people pursue a common criminal plan and commit a single crime. Extended JCE, or JCE3, concerns cases where one of the perpetrators commits an act which, while *outside* the common design, was nevertheless a natural and foreseeable consequence of pursuing that common criminal design.[79] Initially, the ICTY used the term common purpose. Later, it adopted the term JCE to refer to 'collateral enterprises'[80], which then prevailed as the term to refer to all types of JCE.[81]

B. JCE3

The *Tadic* case is the leading case on JCE3.[82] Tadić was charged with crimes against humanity and war crimes. One of the charges related to the killing of

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[76] Ibid, para 195.

[77] It actually distinguished three types of JCE: JCE1 (basic JCE), JCE2 (systemic JCE) and JCE3 (extended JCE) but JCE2 has hardly been used and is not fundamentally different from JCE1 since in both JCE1 and JCE2 crimes remain *within* the common purpose. The relevant paragraph in the *Tadić* Appeals Judgment (para 220) reads: '[t]he case law shows that the notion has been applied to three distinct categories of cases. First, in cases of co-perpetration, where 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). Secondly, in the so-called 'concentration camp' cases, where the requisite mens rea comprises knowledge of the nature of the system of ill-treatment and intent to further the common design of ill- treatment. Such intent may be proved either directly or as a matter of inference from the nature of the accused's authority within the camp or organisational hierarchy. 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.'

[78] Ibid, para 196.

[79] Ibid.

[80] Decision on Form of Further Amended Indictment and Prosecution Application to Amend, *Prosecutor v Radoslav Brdanin & Momir Talić,* Case No IT-99-36-PT, ICTY, T. Ch. II, 26 June 2001, para 29. See also *Prosecutor v Krnojelac*, Case No. IT-97-25-T, T.Ch., 25 March, para 78

[81] *Milutinović et al.* (IT-05-87-PT) Decision on Odjanić Motion Challenging Jurisdiction: Indirect Co-Perpetration (*Milutinović et al* PT Decision on indirect co-perpetration), 22 March 2006, para 36

[82] Early commentaries on this case, M Sassòli and LM Olsen, 'The Judgement of the ICTY Appeals Chamber on the merits in the Tadić case. New horizons for international humanitarian

Chapter in Beatrice Krebs (ed.), Accessorial Liability After Jogee (Hart Publishing 2019)

five men in the village of Jaskici. There was no evidence linking him directly to the killing; he was not present in the village. All the prosecutor could prove was that he was part of a group of armed men who were engaged in ethnically cleansing the Prejidor region and that he had previously taken part in the beating of men in a neighbouring village.[83] Tadić was charged with aiding and abetting crimes but found not guilty. On appeal the prosecutor changed tack and charged him under JCE. The Appeals Chamber found Tadić guilty on the basis of JCE3 liability. The court relied on the mob violence cases discussed above: *Essen Lynching* and *Borkum Island*. The deaths in Jaskici were considered natural and foreseeable consequences of the common purpose to ethnically cleanse Prijidor.[84] With regard to the *mens rea* the Appeals Chamber found:

> 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. (…) 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.[85]

In finding Tadić guilty the Appeals Chamber read the Essen Lynching case as employing a foresight-test. Those who simply struck a blow or incited the murder, 'could have foreseen that others would kill the prisoners; hence they were found guilty of murder'.[86] However, there is no mention of foresight in the *Essen Lynching* case. The latter is an overdetermined event-case. By not requiring identification of individual contributions to the crime, leaving undefined who gave the final blow, it enabled a pronouncement of equal guilt for all those participating in the lynching. The foresight-test can, however,be traced back to the *Borkum Island* case. Yet in that case it had a more limited reach since it was only applied to the mayor who was present at the scene of the crime and egged on the mob. The legal basis of JCE3 in WWII case law is weak to say the least.

Tadić had not instigated those who killed the men in the village of Jaskici. Nor had he been present at the scene of the crimes. He was liable for the killings because he was a member of a group that had actively taken part in an ethnic cleansing campaign during which inhumane acts such as severe beatings frequently occurred.[87] It is telling that the Appeals Chamber referred to 'Pinkerton conspiracy' to substantiate that JCE3 has equivalents in domestic

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and criminal law?', 82 *IRRC* (2000), at 733–769; M Sassòli and LM Olsen, *'Prosecutor v Tadić* (Judgement)', 94 *AJIL* (2000), 57 *et seq*.

[83] *Prosecutor v Tadic*, Case No IT-94-1-T, 7 May 1997, paras 369–388.

[84] *Tadić* Appeals Judgment, supra n 25, paras 232–33.

[85] Ibid, para 220. As an aside we should note that the conflation of *dolus eventualis* and recklessness is inappropriate. Recklessness does not contain a volitional element (accepting a risk) while *dolus eventualis* does, making *dolus eventualis* a form of intent.

[86] Tadic Appeals Chamber, supra n 25, para 209.

[87] Ibid, para 232.

Chapter in Beatrice Krebs (ed.), Accessorial Liability After Jogee (Hart Publishing 2019)

jurisdictions. Pinkerton conspiracy is developed by US federal courts, making each member of a conspiracy liable for substantive offences carried out by co-conspirators in furtherance of the conspiracy, even when there is no evidence of their direct participation in, or positive knowledge of such offences.[88] Pinkerton conspiracies extend liability to offences that are 'reasonably foreseen as a necessary or natural consequence of the unlawful agreement'.[89] JCE3 in *Tadić* is less akin to abetting/instigation liability - ie classic complicity - than the common purpose concept in WWII case law. On the other hand, ICTY judges have referred to it as a form of complicity liability, different from aiding and abetting yet complying with the traditional derivative structure of complicity.[90]

The foresight-test of JCE3 is stricter than foresight in PAL. It must be established that D2 intended the original crime A and that the collateral crime B is a natural and foreseeable consequence of the JCE (objective test). The accused must have realised that the collateral crime was a *possible* consequence of the common purpose (subjective test). Here a sufficiently substantial risk that the crime may be committed is sufficient.[91] Tadić had participated in the rounding up of men and beating them.[92] In the course of the ethnic cleansing, killings frequently occurred. He had been aware of those (previous) killings. The risk that people in Jaskići would be killed was foreseeable, a risk Tadić accepted or at least was indifferent to, which can be inferred from the fact that he continued to engage with the group and support ethnically 'cleansing' the area. Acceptance of the risk is a volitional element, which makes it more stringent than the PAL foresight-test, which is purely cognitive. The Supreme Court's requirement in *Jogee* of 'assent' to the expanded scope of the criminal objective (crime B) seems to similarly require volition.[93] Krebs has argued in favour of such a test in English law when she suggested PAL require proof of endorsement with regard to the collateral offence.[94]

Foresight in ICL is *dolus eventualis*, the lowest degree of intent. In general, common purpose and joint enterprise in ICL come with a broad approach to *actus reus*, which, at least in the early cases, is offset by *mens rea*.

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[88] *Pinkerton v U.S.*, 328 US 640 (1946).
[89] Ibid, see dictum.
[90] The *Tadic* Appeals Chamber referred to common purpose/JCE as 'a form of accomplice liability'. *Prosecutor v Tadić,* Judgment, Case No IT-94-1-A, ICTY, A. Ch., July 15, 1999, para 101. Confusingly it also refers to participants in a JCE as 'co-perpetrators' or 'joint principals'. Seeinfra, under section (D).
[91] Yanev, see supra n 27, 238–239
[92] Tadic Appeal judgment, supra n 25, paras 230–33
[93] *R v* Jogee [2016] UKSC 8, [78].
[94] Krebs, supra n 6.

Chapter in Beatrice Krebs (ed.), Accessorial Liability After Jogee (Hart Publishing 2019)

C. 'Just Convict Everyone'

Over the years, JCE transformed and expanded. In *Tadić* joint enterprise liability was applied to small-scale, mob violence situations with a circumscribed common purpose. JCE beyond *Tadić*, however, was applied to large enterprises establishing liability of senior military and political leaders. Prominent examples are the cases of, *Krajisnik*[95], *Brdnin*[96], *Martić*[97] and *Sainović et al.*[98] Common plans or objectives have a vast scope in temporal and geographical terms and are formulated at aggregate level, as deportation, persecution, forcible transfer or even the aim to modify the ethnic balance of Kosovo.[99] The plan and its objectives are achieved through the commission of multiple crimes such as murder, torture and rape.[100]

The structure of this type of JCE-liability with criminal objectives formulated by senior military and political figures at meta-level and crimes carried out by perpetrators on the ground (referred to as relevant physical perpetrators (RPP)) with no common purpose that connects the two levels, generated a theory of liability which can be termed as leadership JCE or vertical JCE (opposed to horizontal *Tadić*-type JCE). Crimes committed by those on the ground were imputed to those in leadership positions who were far removed from the physical perpetrators.

The leading case that endorsed leadership JCE is the *Brđnin* case.[101] Its key finding is that the principal perpetrator does not have to be a member of the JCE and that no proof of an agreement is required between those in leadership positions and the principal perpetrators. The Appeals Chamber held that '[w]hat matters is…whether the crime in question forms part of the common purpose'.[102] To hold a member of the JCE responsible for crimes perpetrated by a non-member, it was sufficient to show that at least one member of the JCE could be linked to a non-member. When the latter is used by the former as a tool to carry out the common criminal purpose, the other participants of the JCE are equally liable for the crimes.[103] Proof of intention in

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[95] *Prosecutor v Krajisnik*, Case No IT-00-39-A, ICTY, A. Ch., 17 March 2009.
[96] *Brđanin* Appeal Judgment, see supra n 83.
[97] *Prosecutor v Martić*, Case No IT-95-11-A, ICTY, A.Ch., 8 October 2008.
[98] *Sainović et al* Trial Judgment, 26 February 2009. This case was formerly known as *Milutinović et al*. (Milutinović was acquitted), Case No IT-05-87-T, 26 February 2009.
[99] Amended Joinder Indictment, *Prosecutor v Milutinović et al/ Sainović et al*, Case Nos. IT-03-70-PT and IT-99-37-PT, 16 August 2005, para 19; Separate Opinion of Judge David Hunt on Challenge by Ojdanic to Jurisdiction Joint Criminal Enterprise, Milutonovic. et al. (IT-99-37-AR72), 21 May 2003, para 31.
[100] Judgement, *Prosecutor v Kvočka et al* Cases No IT-98-30/1-A, ICTY, A. Ch., 25 February 2008, paras 319–320.
[101] *Prosecutor v Brđnin*, Case No IT-99-36-A, ICTY, A. Ch., 3 April 2007 (*Brđnin* Appeal Judgment). For a commentary see C Farhang, 'Point of no return: Joint Criminal Enterprise in *Brđnin'*, (2010) *LJIL,* 137–164.
[102] *Brđnin* Appeal Judgement, para 410.
[103] Ibid, para 413.

Chapter in Beatrice Krebs (ed.), Accessorial Liability After Jogee (Hart Publishing 2019)

these leadership JCEs is inferred from presence at meetings where the common purpose is discussed and agreed upon. For instance, in *Brđnin* the establishment of a separate Serbian state was planned by way of detaining non-Serbs in camps to create a corridor to link Serb territories.[104] The ICTY found that torture and unlawful killing in the camps was an integral part of implementing the strategy agreed upon at leadership level and hence could be imputed to Brđnin despite the fact that there was no proof of an agreement with the physical perpetrators.[105] A leadership JCE is very similar to Pinkerton-type conspiracies in that in essence it constitutes (choate) conspiracy liability; conspirators are liable for the crimes they plotted.

To date, JCE has a controversial reputation, particularly JCE3. JCE is jokingly referred to as the acronym for Just Convict Everyone. Basic JCE, or JCE1, where crimes remain within the scope of the purpose is uncontroversial and has been accepted as a form of joint perpetration. JCE3, however, has sparked debate amongst practitioners and legal commentators. Its legal basis in WWII case law is weak and, more importantly, there is a lack of differentiation in the moral position of those who intend and those who merely have foresight. Participants in a JCE, because JCE is a form of *committing*, are regarded as perpetrators who are more deserving of punishment than aiders and abettors (see further below, under subsection D).[106] This is problematic since JCE3, like aiding and abetting, generates liability that is not on the same par as participation in a JCE with (full) intent. It connotes a different moral position.[107] As Ohlin observes: 'the most basic problem with the doctrine of joint criminal enterprise' is 'its imposition of equal culpability for all members of a joint enterprise'.[108]

The controversy over JCE, in particular JCE3, has led some courts to reject it (Cambodia Tribunal,[109] ICC[110]) or limit its application.[111]

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[104] *Prosecutor v Brđnin*, Case No IT-99-36-T, ICTY, T. Ch., 1 September 2004 (*Brđnin* Trial Judgment), para 118.

[105] Such as using 'uncontrolled' police and units that ran detention camps and committed crimes against civilians detained in those camps, *Brđnin* Trial Judgment, para 119.

[106] Van Sliedregt, supra n 5, 189–190.

[107] Judge Learned Hand's description of intentional participation of having 'a stake in it' or displaying a 'purposive attitude' marks the difference with knowing participation. *United States v Peoni*, 100 F.2d 401 (1938). See also Kutz, supra n 61, at 162.

[108] Ohlin, supra n 7, at 85. See also G Boas et al. *International Criminal Law Practitioner*, Vol I, (Cambridge, Cambridge University Press, 2011) at 65–66.

[109] Extraordinary Chambers in the Courts of Cambodia (ECCC), Supreme Court Chamber Judgment Appeal, *Prosecutor v Nuon Chea and Khieu Sampan*, Judgment, No 002/19-09-2007-ECCC/SC, 23 November 2016.

[110] The ICC Statute does not provide for it because of its strict *mens rea* element in art 30. See text accompanying n 26.

[111] The UN Special Tribunal for Lebanon does not regard it applicable with regard to special intent crimes such as terrorism: Interlocutory Decision on the applicable law: terrorism, conspiracy, homicide, perpetration, cumulative charging, Case No STL-11-01/I, A. Ch., 16 February 2011, paras 248–249.

Chapter in Beatrice Krebs (ed.), Accessorial Liability After Jogee (Hart Publishing 2019)

D. Nature

From its inception, JCE was distinguished from aiding and abetting.[112] For joint enterprise there is a less stringent contribution element and hence a looser causal requirement: acts performed by the participant should 'in some way' further the common purpose.[113] For aiding and abetting liability, proof is required of a 'substantial effect' on the perpetration of the crime.[114] The Appeals Chamber in *Brđanin* somewhat qualified the contribution to a JCE by requiring 'a significant contribution to the crimes', probably anticipating critique of its broadening of the law on JCE in others respects.[115] In practice it is not clear what the meaning of 'significant' is and how it differs from 'substantial', the standard for aiding and abetting. For aiding and abetting liability, the requisite mental element is knowledge that the acts performed by the aider and abettor assist the commission of a specific crime by the principal. For JCE it suffices to prove that the defendant either had intent to pursue the common criminal design or that he had foresight that crime(s) might be committed.

The Appeals Chamber distinguished JCE from aiding and abetting yet in another way. It found that where people participated in a JCE, to convict them '[o]nly as an aider and abettor might understate the degree of their criminal responsibility'.[116] Participants in a JCE are regarded on the same par as principal perpetrators. In fact, they can be more culpable than principal perpetrators when they occupy senior positions and plotted the crimes that are then committed by principals.[117] This does not comport with the principles underlying (classic) cause-based complicity liability which is derivative.

Indeed, the nature of JCE liability is unclear. It can be best described as a hybrid of perpetration and complicity liability. It is liability for crimes committed by another person (the physical principal) with whom there is some form of association via assistance or encouragement. This is a typical feature of common law complicity and an indication that liability is derivative. At the same time, JCE has evolved into a concept with a remote link to physical perpetrators. The ICTY Appeals Chamber uses the terms 'perpetrator' and 'co-perpetrator' to refer to all participants in a JCE, also the remote ones. They are not secondary parties or accomplices; they are regarded as liable in their own right, as if they had committed the crime they are held liable for.[118] Leadership JCEs are agency-based, conspiracy-like constructions rather than liability akin to (cause-based) complicity.

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[112] *Tadic Appeal* judgment, supra n 25, para 229. See also N Jain, supra n 24, at 32.
[113] *Tadic Appeal* judgment, supra n 25, para 229.
[114] Ibid.
[115] *Brđanin* Appeal Judgment, see supra n 83, para. 430.
[116] *Tadić* Appeal Judgement, supra n 25, para 192.
[117] See empirical research by Hola: B. Hola et al., 'International Sentencing Facts and Figures. Sentencing Practice at the ICTY and ICTR' (2011) *JICJ* at 417; B Hola et al, 'Is ICTY Sentencing predictable? An Empirical Analysis of ICTY Sentencing Practice' (2009) *LJIL* 79–97.
[118] *Tadic* Appeal Judgment, supra n 25, para 192.

Chapter in Beatrice Krebs (ed.), Accessorial Liability After Jogee (Hart Publishing 2019)

VI. Interim Conclusion

A brief summing-up of joint enterprise in English law and ICL is warranted.

A. Non-collateral common purpose

Nowadays, in English law, common purpose is subsumed under complicity/aiding and abetting liability since the latter has broadened by no longer requiring tangible contributions to the crime. In ICL, common purpose is distinct from complicity liability. The central tenet of liability is the common criminal purpose, which offsets the broad *actus reus* and essentially captures any contribution to the criminal endeavour. Common purpose in ICL has two main purposes: (i) to overcome causality problems for overdetermined events, and (ii) to provide for equal guilt of those engaged in pursuing a criminal purpose and – especially in leadership JCEs – to express a perpetrator-like status of those who mastermind crimes. Equal guilt does not mean equal punishment. Role-variance can still be reflected in the sentence. Hence the different sentences that were imposed by military tribunals to participants found equally guilty for pursuing a common design or purpose..

B. Collateral Liability

PAL and JCE3 have the propensity to expand. Illustrative in ICL is the transformation of joint enterprise from small scale mob violence-JCE to leadership JCE. For PAL, the 'wider principle' of *Chan Wing Siu* opened the door to expansive forms of collateral liability. In *Jogee*, PAL was reigned in to the extent that it now aligns to aiding and abetting-liability, requiring proof of intent rather than foresight. JCE3 still generates collateral liability based on a foresight-test. This is, however, more stringent than foresight in PAL since it comes with a voluntary element; acceptance of a risk one foresees.

C. Nature

While in their origin cause-based liability, PAL and JCE3, as (expansive forms of) collateral liability, identify more with agency-based complicity. Neither is anchored in a clear theoretical basis. This causes them to drift and - in the words of Krebs - to function as an 'interloper': '[u]ndermining the more rigorous *mens rea* requirements of aiding and abetting'.[119] While PAL is back into the complicity fold, JCE3 remains distinct. It constitutes (quasi)perpetration rather than secondary liability/complicity.

Summarising:

[119] Krebs (2010), supra n 6, at 588.

Chapter in Beatrice Krebs (ed.), Accessorial Liability After Jogee (Hart Publishing 2019)

- PAL and JCE3 can be traced back to 'collateral common purpose' in Foster's Crown law and WWII case law, respectively, criminalising setting a chain of events into motion with foresight of further crimes;
- Common purpose/joint enterprise in ICL, despite generating equal guilt, allows for differentiation in sentencing;
- JCE3 in ICL is more 'balanced' than PAL in English law: it employs a broad *actus reus* but the *mens rea* contains a voluntary element, which makes it more stringent than foresight in English law. It is a form of intent in Roman-Germanic systems (*dolus eventualis*);
- Joint enterprise liability in ICL has developed into a sui generis form of complicity. In its expansive leadership modality, it identifies as a type of (non-physical) perpetration rather than liability that derives from the principal (D1).

STEP II: Determining its Merit

VII. Inchoate Complicity

With leadership JCEs but also with certain cases of PAL, it is difficult to sustain that it is cause-based liability. The link to the crime via an identifiable act contributing towards causing the crime is weak. At this point we should discuss Christopher Kutz' work on complicity.

Kutz offers an alternative to a cause-based theory of complicity.[120] He argues that the conduct component of complicity is not easily understood in terms of causal difference-making. Complicity liability in his view is fundamentally premised on the sharing of intent with the principal, what he calls 'participatory intent'.[121] He suggests reform of complicity by moving it toward an inchoate theory of liability, which predicates liability on the attempt to aid and abet.[122] Drawing on the US Model Penal Code, he suggests that liability should rest on vaguer grounds than interpersonal causation,

> [s]uch as whether a given defendant has manifested some form of social dangerousness, independent of the causal efficacy of the particular role he played.[123]

Causation still is a factor in determining liability. While the accomplice's act must be of the sort that could have made a difference to the principal's crime, it need not be shown to have *actually* made a difference. This non-cause based, inchoate complicity theory fits overdetermined events where a single-observed effect is determined by multiple causes, which is the reality of collective

[120] Kutz, supra n 61.
[121] C Kutz, *Complicity. Ethics and Law for a Collective Age* (Cambridge, Cambridge University Press, 2000) 66–112.
[122] Kutz, supra n 61, at 164.
[123] Kutz, supra n 61, at 150.

Chapter in Beatrice Krebs (ed.), Accessorial Liability After Jogee (Hart Publishing 2019)

violence and mass atrocities.[124] Another 'advantage' of a non-cause-based theory, also flagged up by Kutz, is that it no longer adheres to a derivative structure, allowing for liability of instigator D2 to be greater than that of D1. This is certainly appropriate for ICL where those who mastermind crimes, and rarely have blood on their hands, are the real villain. They can be punished as the intellectual perpetrator, the *auctor intellectualis*.

Leadership JCEs neatly fit Kutz' theory of inchoate complicity. There is a remote link in place and time between those in leadership positions and those physically committing crimes, which makes case-based attribution of liability difficult. Instead, liability is premised on the agreement of those in leadership positions. As long as the crimes committed by physical perpetrators are within the scope of this agreement they can be imputed to remote participants/perpetrators in leadership positions. Punishment is based on the crimes committed by physical perpetrators with whom there is a weak link. It is, therefore, essential that the crimes committed are *within* the common purpose. Only then is punishment justifiable. This requires the common plan or agreement to be *specific*, avoiding ex-post fact imputation of crimes that are presumed to be part of a plan.

Against that background, it is highly problematic that the Appeals Chamber in *Brađnin* accepted the JCE3 format for leadership JCEs; ie liability for crimes that lie *outside* the common purpose.[125] The pertinent issue, which so far has not been clarified, is whether all participants in a JCE can be liable for crimes that lie outside the scope of the common plan but that were foreseen by one co-participant? In other words, can the *mens rea* of the member-participant who uses the non-member participant, replace the *mens rea* of all the participants? If so, this would make JCE a type of vicarious liability.

When we apply Kutz' inchoate complicity theory to leadership JCEs we uncover the problematic structure of non-cause based collateral liability such as leadership JCEs. While this type of collateral modality can be relaxed in terms of causation, its agency-nature requires more stringent terms with regard to the scope of the common purpose. In principle, there is no liability for crimes that exceed the common purpose.

VIII. Merits of Joint Enterprise

In its original form, as common purpose liability that captures intangible contributions before or during the commission of the crime, joint enterprise, is

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[124] Kutz, supra n 68, at 160. See for an analysis on causation and mass atrocities: JG Stewart, 'Overdetermined Atrocities', (2012) *JICJ* 1189–1218.

[125] The Chamber held that as long as it can be shown that the member who uses non-members as tools to carry out the *actus reus* had the requisite intent, ie that in the circumstances of the case (i) it was foreseeable that such a crime might be perpetrated by one or more of the principal persons and that (ii) he willingly took that risk, all can be held equally liable of that crime. *Brđanin* Appeal judgment, supra n 83, para 411.

Chapter in Beatrice Krebs (ed.), Accessorial Liability After Jogee (Hart Publishing 2019)

cause-based. Its requirements, however, are less burdensome; it has long functioned as 'complicity light'. Pursuing a common criminal purpose is much more vague and indeterminate than requiring a particular act of assistance or encouragement to a particular individual with regard to a particular crime. The contribution and link to the crime can remain under the cover of pursuing a common criminal purpose. Over the years – and this is certainly true for English law– the 'complicity light'-role of joint enterprise has become less obvious. Joint enterprise developed into expansive, *sui generis* liability. Moreover, with the reigning in of PAL, the UKSC has ended common purpose/joint enterprise altogether.

I believe there is a role for joint enterprise liability still. At least three reasons can be mentioned; all three emerged from discussing Kutz' theory of inchoate complicity. When we accept a non-cause based theory of inchoate complicity there is room for accepting liability theories that capture liability for organized and collective forms of violence without abandoning fundamental principles of criminal responsibility.

First of all, joint enterprise has the capacity to capture the liability of remote participants for overdetermined events. Since liability is not cause-based, joint enterprise can capture liability for group or mob violence events where the link to the crime cannot be identified and can stay under the cover of 'participating in a common criminal purpose'. Liability is premised on participatory inten; on pursuing a common criminal aim. Secondly, as collateral liability based on a foresight test, joint enterprise captures conduct that cannot be successfully prosecuted under complicity with its more stringent *mens rea*.[126] This does, however, require setting a limit preventing liability to over-extend (see section IX below). Thirdly, and this is particularly relevant for ICL, joint enterprise, because of its non-derivative, agency nature, coupled with the broad *actus reus* terminology allows for framing the liability of the *auctor intellectualis*. With common purpose liability, the distinction between principals and accessories is immaterial; the persons involved are all referred to as 'parties to a joint enterprise' or 'joint principals'.[127] Those who instigate others to commit crimes are not accessories but participants whose guilt is equal or more serious than that of the physical perpetrator. Joint enterprise allows for the structure of remote principals who control physical perpetrators, using them as tools, to commit crimes.[128] Senior defendants in a leadership JCE are *auctor intellectualis*, intellectual perpetrators. This comports with a broad understanding of perpetration in most civil law jurisdictions. In these

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[126] For a classic piece on the distinction between the mental element of complicity and joint enterprise, see Simester, supra n 6.

[127] *R v Salmon* (1880) 6 QBD 79; *R v Williams and Davies*, 95 Cr App R 1, CA.

[128] This principle is broader than innocent agency where the direct perpetrator is 'innocent'. See C. Roxin, Straftaten im Rahmen organisatorischer Machtsapparate', *Goltdammer's Archiv für Strafrech*t (GA) (1963) for a translation: C Roxin, Crimes as Part of Organized Power Structures, 9 *JICJ* (2011), 193–205. See further S Roxin, *Täterschaft und Tatherrschaft*, (Berlin, De Gruyter, 2006), 242–252, 704–717.

Chapter in Beatrice Krebs (ed.), Accessorial Liability After Jogee (Hart Publishing 2019)

jurisdictions, the concept of principal liability is a normative concept.[129] It attaches to the person who is 'most responsible' not just the person who physically commits the crime. The normative approach to perpetration is attractive from a fair labelling point of view and has appeal in ICL where so often those behind the scene of the crimes, with no blood on their hands, are the real villains.

As always with comparative legal analysis, one has to be mindful of the context within which one discusses legal concepts. It is as much the societal context and legal landscape that accounts for the development of a legal concept as the legal precedents on which it is based. The fact that conspiracy does not feature as a general theory of liability in ICL partially explains why JCE developed into a conspiracy-type concept. Also, international courts have a specific mandate to prosecute and try senior defendants. Often the actual perpetrators are unknown and still at large.

STEP III: Redrawing boundaries

IX. Reappraising the Foresight-test

What have we learnt from this analysis and comparison of joint enterprise in English law and ICL? First of all, that there is not one concept of common purpose or joint enterprise liability. It is helpful to think of joint enterprise liability as a spectre with at one end the agency pole and at the other end the causation pole. PAL and leadership JCE are close to the agency-end of the spectre. Common purpose and concerned in-liability can be positioned towards the cause-based liability-end of the spectre. JCE3 Tadic-style will be somewhere in the middle.

With PAL aligned to complicity post-*Jogee* and JCE3 in ICL increasingly viewed with circumspection,[130] the question arises how to value collateral joint enterprise based on a foresight-test. Australia and Hong Kong still provide for it as do the statutes of some international courts (amongst which the ICTY). Is this concept fundamentally flawed, ie inherently violating the principle of personal culpability? Quite apart from the question whether the law provides for PAL or JCE3 – this is contested – there is a legal-theoretical and policy debate to be had. This requires discussing joint enterprise and common purpose, once again, in their different modalities, as cause-based liability and as agency-liability, and to set out the wrongs they seek to address.

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[129] This analysis draws partly on Vogel's paper who distinguishes twelve models, J Vogel, 'Individuelle verantwortlichkeit im Völkerstrafrecht', (2002) 114 *Zeischrift für die gesamte Strafrechtswissenschaft* 403–436. For an English version: J Vogel, 'How to determine individual criminal responsibility in systematic contexts: Twelve Models' (2002) *Cahiers de Défense Sociale* 151–169.

[130] See text accompanying n 107 and further.

Chapter in Beatrice Krebs (ed.), Accessorial Liability After Jogee (Hart Publishing 2019)

Like classic complicity, cause-based joint enterprise liability seeks to address the setting into motion of events that lead to the commission of a crime. Rather than criminalising distinct acts of encouragement or assistance, joint enterprise criminalises encouraging or assisting *by way of* pursuing a common purpose. As cause-based liability, there is a causal connection to the crime. This does not mean that liability cannot be collateral. We are reminded of the variation rule discussed by Foster, which is an early precedent of collateral common purpose (PAL). The WWII cases are also illustrative of collateral, cause-based common design/purpose liability. In the cases against Erich Heyer and Adam Golkel the wrong was found in setting into motion a chain of events leading to crimes.

The fact that common purpose is cause-based means that there is an inherent limit to collateral liability. Causation requires proximity. Consider the UKSC's ruling in *Jogee* where it held that remoteness can break the causal chain.

> [i]t is a question of fact and degree whether D2's conduct was so distanced in time, place or circumstances from the conduct of D1 that it would not be realistic to regard D1's offence as encouraged or assisted by it.[131]

An analogy with instigation liability is helpful to understand the different ways in which causation may limit attribution of liability for collateral crimes. In German law the limit is drawn by way of an objective (causation) test. Roxin argues that when a statement cannot *objectively* be seen to provoke a certain event or act, it should not be considered an act of criminal participation by 'Anstiftung' (instigation). This resonates in Krebs' suggestion to view PAL as a principle of exculpation rather than a theory of liability. It sets limits to liability for excess crimes. [132] Dutch law adopts a different approach; it sets a limit via *mens rea* where the acceptance of risk plays an important role in determining liability. A *dolus eventualis* test applies in cases of co-perpetration and instigation, which 'absorbs' excess/collateral crimes. Proof is required of an awareness and acceptance of a risk (objective test) on the part of D2 that crime B might materialise. [133] Here it is presumed crime B was part of the order. Also

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[131] *R v* Jogee [2016] UKSC 8, [12].

[132] Krebs (2010), supra n 6, at 579. She bases this on Stephen's commentary. Article 17 ('common purpose') of his Digest of the Criminal Law reads: 'When several persons take part in the execution of a common criminal each is a principal in the second degree, in respect of every crime any one of them in the execution of that purpose. If any of the offenders commits a crime foreign to the common criminal purpose, the others are neither principals in the second degree, nor accessories unless they actually instigate or assist in the commission.'

[133] This is the acceptable standard in The Netherlands and Germany. For Germany, Roxin argues that when a statement cannot *objectively* be seen to provoke a certain event or act, it should not be considered an act of criminal participation by 'Anstiftung' (instigation), C Roxin in: H-H Jescheck and W Ruß (eds), *Strafgesetzbuch: Leipziger Kommentar* § 26 StGB (Berlin, De Gruyter, 1993). In the Netherlands *dolus eventualis* is an accepted fault degree for instigation/ordering. See HGM *Krabbe*, 'Uitlokking', in J L van der Neut (ed), *Daderschap en Deelneming* (Deventer, Gouda Quint, 1999) 127–147. See also Dutch Supreme Court, 12 October 1982, *NJ* 1983, 799; Dutch Supreme Court, 29 April 1997, *NJ* 1997, 654.

Chapter in Beatrice Krebs (ed.), Accessorial Liability After Jogee (Hart Publishing 2019)

in ICL, a *dolus eventualis* test applies for ordering crimes, a specific form of instigation liability. Blaškić was held liable for crimes he had not ordered but nevertheless had accepted as likely consequences.[134] The court ruled that by ordering an attack on villages in an atmosphere of ethnic tension, he increased the chance of a massacre and hence accepted the crimes that ensued from the attack. They were part of the crimes he ordered and he was hence criminally liable for. JCE3 with its natural and foreseeable consequences-reasoning adopts a similar test and is therefore not an outlier when it comes to accepting (cause-based) collateral liability. In fact, it can be argued that JCE3, with its *dolus eventualis* test of acceptance of a risk that a crime might materialise, is liability for crimes that can be presumed to have been *within* the plan: not as desired but as incidental.

Does this mean that a voluntary element-*mens rea* (ie *dolus eventualis* at the least) justifies the attribution of collateral joint enterprise? My answer would be, no not in every case. When it concerns non-cause based joint enterprise, more is needed. Leadership JCEs and PAL are premised on a very weak link to the crime. They are not cause-based. It is rather the association with the perpetrator/principal (D1) and authorising him/her to commit crime A, which makes D2 liable for crime B. Liability is agency-based. Collateral liability should not be accepted and established the same way as for cause-based joint enterprise. To compensate for a tenuous link to crime A, the subjective element should be bolstered. Liability of D2 for crime B should require proof that crime B was within the common plan, desired and not incidental, ie agreed upon by both D1 and D2. Under such circumstances foresight should not suffice as the fault degree. In other words, bearing in mind Kutz' theory of inchoate complicity, there should not be collateral liability for non-cause based joint enterprises.

Another way of restricting expansive notions of collateral liability is via the *actus reus*. In *R v Macklin*[135] proof was required of a separate act of encouragement or assistance for crimes that go *beyond* the common agreement.[136] There is a two-step phase: phase 1 where D1 and D2 agree on crime A and where D2 does not perform any further act of encouragement or assistance; phase 2 where D1 commits the collateral/incidental crime B for which D2 is only liable when he encourages or assists crime B. This is essentially insisting on a cause-based type of liability. In *Brdanin*, a similar attempt was made; by imposing additional *actus reus* conditions the ICTY attempted to reign in JCE. Participants in a leadership JCE must have made a

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[134] 'A person who orders an act or omission with the awareness of the substantial likelihood that a crime will be committed in the execution of that order, has the requisite *mens rea* for establishing liability under article 7(1) pursuant to ordering. Ordering with such awareness has to be regarded as accepting that crime' *Prosecutor v Blaškić*, Case No IT-95-14-A, 29 July 2004, para 42.

[135] *R v Macklin* (1838) 2 Lewin 225; 168 ER 1136.

[136] Sjölin, supra n 4, at 133.

Chapter in Beatrice Krebs (ed.), Accessorial Liability After Jogee (Hart Publishing 2019)

'substantial contribution' to the crimes for which they are to be found liable.[137] So far, no one really knows what 'substantial' means and how it differs from a 'significant contribution' which is required for aiding and abetting. It seems to have been a gesture reassuring those critical of JCE.

Joint enterprise's demerit is not necessarily foresight. As long as we set a limit to remote forms of joint enterprise, it is in my view acceptable as a fault element. Policy reasons provide a justification for accepting foresight. UK government has pointed to the risk of escalation when crimes are committed in groups.[138] An argument raised by Lord Steyn in *Powell* and cited in the Law Commission Report on Joint Enterprise[139] is that especially young people, when acting in groups are more willing to engage in risk-taking and criminality.[140] Moral theory and the work of scholars such as Jens Ohlin and Jonathan Glover support the position that group conduct is more blameworthy and hence worthy of criminalisation than individual conduct.[141] Policy goals certainly play a role in ICL in endorsing joint enterprise and a broad interpretation of *mens rea*. The *dolus eventualis* test in ICL for ordering has been justified by the ICTY 'in light of the type and seriousness of crimes over which the Tribunal has jurisdiction'.[142]

Joint enterprise liability's greatest demerit is arguably the 'parity of culpability'[143] and its failure to fairly label criminal conduct.[144] PAL and JCE3 are most problematic in failing to recognise the difference in moral position between D2 who has foresight and D1 who has intent with regard to crime B. With PAL this lack of differentiation was most pertinent in murder cases since it comes with a mandatory life sentence. At least in ICL, judges have discretion to impose a sentence they deem appropriate. We can take inspiration from WWII case law where quality in guilt did not translate to equality in

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[137] The exact difference between substantial contribution or significant contribution is not entirely clear. See also Boas, supra n 120, at 46–51.

[138] House of Commons, Justice Committee, *Joint Enterprise: Joint Enterprise: Follow-up, 4th Report of Session 2014-15*, para 27. See for a critical reflection on that statement: Green and McGourlay, supra n 6.

[139] Law Commission report No 305, para 3.145, at 89.

[140] Lord Steyn referred to research by NK Katyal 'Conspiracy theory' (2003) *Yale Law Journal* 101 at 104 and 110 and PF Cromwell and others 'Group effects on decision-making by burglars' (1991) *Psychological Reports* 579 at 586. However, Green and McGourlay are critical, supra n 6, 292–295, referring to research which supports a counter-hypothesis: B Marshall, B Webb and N Tilley, *Rationalisation of Current Research on Guns, Gangs and other Weapons* (Jill Dando Institute of Criminal Science: London, 2005).

[141] JD Ohlin, 'Joint intentions to commit international crimes', 11 *Chicago Journal of International Law* (2011), 693–753. J Glover & M J Scott-Taggart, 'It Makes no Difference Whether or Not I Do It,' 49 *Proceedings of the Aristotlean Society*, Supplementary Volumes, (1975), 171–209.

[142] Ibid.

[143] Law Commission, supra n 140, para 1.5.

[144] See also S Way, 'Joint Enterprise: the Need for Reform, 2015 *Journal of Criminal Law* 326.

Chapter in Beatrice Krebs (ed.), Accessorial Liability After Jogee (Hart Publishing 2019)

punishment. While liability was 'flattened' in that all were considered equally guilty despite their different roles, sentencing reflected these different roles.

X. Concluding observations

The merits of joint enterprise are clear; it is an effective tool in countering collective and organised violence. Its demerits are clear too: PAL, and to a certain extent JCE3, are imprecise and blunt instruments. Their use increases the risk of guilt by association, on punishment that goes beyond personal culpability. This does not mean that collateral liability and foresight should be banned altogether. As cause-based liability that is not remote in distance, time and place *and* concerning participants who egg on or instigate the physical perpetrator to commit crime A, which results in crime B, collateral liability should still be able to generate liability for crime B.

So to the question whether there is a role for (collateral) joint enterprise liability alongside complicity, my response would be: yes. As long as we are aware of joint enterprise's propensity to expand. It is helpful to view the *mens rea* and *actus reus* elements in terms of a hydraulic relationship or a set of scales: when we attach less weight to one, the other should be bolstered. Policy choices inform us on how to set this balance. If we want to criminalise collective and organised wrongdoing, we bolster the *mens rea* element at the expense of the *actus reus* element. We need to, however, maintain the right balance. With PAL there was an imbalance, which led to over-criminalisation. And there is a clear limit: foresight is not an appropriate test for agency-based collateral joint enterprise.

The *Jogee* ruling is important as a matter of legal principle.[145] Ultimately its most compelling outcome is that it allows for a differentiation in sentencing in murder cases. Those whose intent was *not* to cause death can be convicted of manslaughter for which there is discretionary sentencing. *Jogee* gets rid of the 'striking anomaly of requiring a lower mental threshold for guilt in the case of an accessory than in the case of a principal'.[146]

The real problem in *Jogee* and the PAL cases before it was mandatory sentencing for murder. This is a harsh rule. As we saw in ICL, there is room for recognizing role-variance in joint enterprise murder cases. Equal liability does not mean equal sentence; it simply enables imputation of the crime committed by the principal.

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[145] See Simester and Sullivan's, n 2, at 245.
[146] [84].