CASE WESTERN RESERVE UNIVERSITY
SCHOOL OF LAW

INTRODUCTION TO INTERNATIONAL CRIMINAL LAW

MOOC taught by Professor Michael P. Scharf

Module #4:

Unique Modes of Liability

International Criminal Law
Module #4
Special Modes of Criminal Liability

On-Line Simulation

This simulation is based on the underlying facts regarding the fictional Togoland Square massacre from Module #2.

1. Recall that Togoland has a population of four million people, comprised of two main ethnic groups, the Tumani (45 percent of the population) and the Hottami (55 percent of the population). After the death of Togoland's President on May 1, 2013, a military faction seized power in a bloodless coup. The military regime was led in partnership by General Thomas Cederick (a member of the majority Hottami tribe who was the former Chief of Staff of the army in the prior Administration), and General Rafiki Biambi (a member of the majority Hottami tribe who was the former head of the Togoland National Guard).

2. In the days following the coup, opponents of the military regime launched a series of employment strikes in the Cobalt mines and street demonstrations in the cities of Togoland. On June 17, 2013, ten thousand people, mostly members of the Tumani tribe, gathered in front of the Capital building at Togoland Square, chanting "Bring back democracy, bring back democracy." Several hundred of the protesters were armed with rifles, which they periodically fired into the air.

3. At a meeting at noon on June 17, General Cederick told General Biambi, "You should do something about the growing protests before things really get out of hand." An hour later, General Biambi ordered the National Guard to "wipe out" the protesters at

Togoland Square. Without warning, the National Guard's Armored Division circled the protesters and mowed them down with machine gun and mortar fire. Seven thousand civilians were killed in fifteen minutes. After that overwhelming show of force, there were no more protests and the Cobalt miners went back to work. Neither General Cederick nor General Biambi took disciplinary action related to the perpetrators of the massacre.

4. The U.N. Security Council referred the situation of Togoland to the International Criminal Court. The Court ended up trying General Cederick for crimes against humanity related to the Togoland Square massacre.

5. The Trial Chamber's Judgment concludes: "Although General Biambi was not technically General Cederick's subordinate, and although we found no evidence that General Cederick knew that General Biambi would order the massacre at Togoland Square, we nonetheless find Cederick criminally liable under both command responsibility and joint criminal enterprise liability, and sentence him to 20 years in prison."

Assume that the Defense has appealed the Trial Chamber's judgment, and that you are the Judge of the Appeals Chamber assigned to draft the opinion. Based on these facts and the readings below, you are invited to upload a submission in the form of a brief Appeals Chamber Opinion concerning whether the Trial Chamber should be affirmed or reversed.

In order to complete the optional on-line simulations for this course, students must go to the Navigation Bar on the left panel. Under the Exercises section, you will find a button for "on-line simulations." The simulations for each session are available under this button. Written work can be submitted directly or through file upload. Students who post five or more on-line submissions of over 200 words in length during the course (simulations and discussions) will be awarded a Statement of Accomplishment with Distinction for the course.

I. Command Responsibility

Anne E. Mahle, The Yamashita Standard, PBS Justice and the Generals, available at: http://www.pbs.org/wnet/justice/world_issues_yam.html

The modern legal standard governing the doctrine of command responsibility in the United States rests upon the precedent established by the United States Supreme Court in the case of General Tomoyuki Yamashita. The Court's holding has become known as the "Yamashita Standard."

General Tomoyuki Yamashita was the Commanding General of the Fourteenth Army Group of the Japanese Imperial Army and the Military Governor on the Philippine Islands from October 1944 until full control of the Islands was assumed by United States forces in September 1945. In the waning days of World War II, numerous atrocities were committed by troops under General Yamashita's control against the civilian population of the Philippines. Pursuant to Japan's unconditional surrender to the United States at the end of the war, General Yamashita also surrendered to United States troops present in the Philippines and immediately became a prisoner of war. He was detained by the United States Army in the Commonwealth of the Philippines.

Upon his arrest as a prisoner of war, General Yamashita was charged by the Army's Judge Advocate General's Department with violations of the law of war. Included in this charge were allegations that forces under his command engaged in a "deliberate plan to massacre and exterminate a large part of the civilian population of Batangas Province as a result of which more than 25,000 men, women, and children all unarmed noncombatant civilians, were brutally

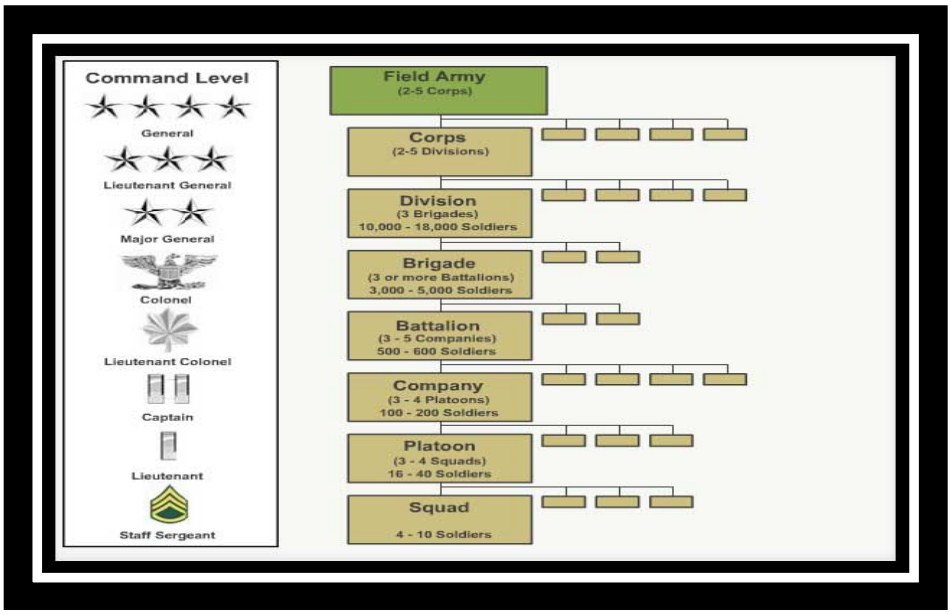
mistreated and killed." General Yamashita was appointed six lawyers from within the JAG corps to serve as defense counsel, and was tried before a United States military commission of five United States Army Officers. General Yamashita pled not guilty to all charges. He asserted that he did not personally engage in the criminal acts committed by the Japanese troops, that he did not order these acts to be committed, and that he did not have control over the troops under his command. He was found guilty by the commission after it heard testimony from two hundred and eighty-six witnesses. Upon his conviction, General Yamashita filed a writ of habeas corpus with the Supreme Court of the Commonwealth of the Philippines. In his writ, General Yamashita challenged the jurisdiction of the military commission, asserted that he did not commit a violation of the law of war, and claimed that he was denied a fair trial under the United States Articles of War, the Geneva Convention, and the United States Constitution. The Supreme Court of the Commonwealth of the Philippines denied his writ in total. The General then appealed to the United States Supreme Court.

In the Supreme Court's decision, rendered in February 1946, the Court articulated a clear standard for military commanders with respect to the actions of their subordinates. In responding to General Yamashita's assertion that he did not personally participate in or order the commission of these offenses, the Court described the heart of the charge as being "an unlawful breach of duty by [General Yamashita] as an army commander to control the operations of members of his command by 'permitting them to commit' the extensive and widespread atrocities." The Court recognized that international law, through the law of war, "presupposes that [violations of the law of war] are to be avoided through the control of the operations of war by commanders who to some extent are responsible for their subordinates." The Court believed that absent such a duty upon commanders, nothing would prevent occupying forces from committing atrocities upon the civilian population. The Court held that General Yamashita was, by virtue of his position as commander of the Japanese forces in the Philippines, under an "affirmative duty to take such measures as were within his power and appropriate in the circumstances to protect prisoners of war and the civilian population." General Yamashita's writ was denied, and he was executed by hanging by the United States military.

Since the Supreme Court's decision in 1946, the United States Congress and federal courts throughout the country have relied on the Yamashita standard. Many important human rights cases cite directly from the Supreme Court decision, as does the legislative history of the Torture Victims Protection Act ("TVPA"). In citing to the Yamashita Standard for support in the interpretation of the TVPA, the United States Senate Committee stated, "under international law, responsibility for torture, summary execution, or disappearances extends beyond the person or persons who actually committed those acts -- anyone with higher authority who authorized, tolerated, or knowingly ignored those acts is liable for them." The Second and Ninth Circuits of the United States Court of Appeals affirmed this standard in their decisions Kadic v. Karadzic, 70 F.3d 232 (1995) and Hilao v. Estate of Marcos, 103 F.3d 767 (1996), and it has been repeatedly recognized as the standard in numerous human rights cases litigated under the TVPA and the Alien Tort Claims Act ("ACTA") in federal courts across the country.

Wide acceptance of the Yamashita Standard does not render it immune from critique. There have been a number of legal questions raised as to the reach of the Standard and the degree to which it imposes strict liability on a military commander for the actions of his or her

subordinates. For example, the jurisprudence of the International Criminal Tribunal for the Former Yugoslavia ("ICTY") has rejected a strict liability standard for military commanders, in part as a response to the reality it faces: many of those charged under the doctrine of command responsibility under the jurisdiction of the ICTY were not commanders of armies of recognized states, as was Yamashita, instead they exerted military command over militarized troops of non-recognized entities such as the Republika Srpska and the Republic of Herzeg-Bosna. The Yamashita Standard, however, no doubt will arise in the trial of Slobodan Miloöevic, and others who were in command positions in recognized nation states and will play a role in the jurisprudence of the International Criminal Court.



The Doctrine of Command/Superior Responsibility, by Guenael Mettraux, PJI, available at: http://www.peaceandjusticeinitiative.org/

"Command or superior responsibility" is often misunderstood. First, it is not a form of objective liability whereby a superior could be held criminally responsible for crimes committed by subordinates of the accused regardless of his conduct and regardless of what his knowledge of these crimes. Nor is it a form of complicity whereby the superior is held criminally responsible for some sort of assistance that he has given to the principal perpetrators. Instead, superior responsibility is a form of responsibility for omission to act: a superior may be held criminally responsible under that doctrine where, despite his awareness of the crimes of subordinates, he culpably fails to fulfill his duties to prevent and punish these crimes.

The commission of one or more crimes attributable to a subordinate is a pre-requisite for the application of that doctrine. In addition, the following requirements have been identified as forming part of the doctrine of superior responsibility under customary international law:

(i) A relationship of superior-subordinate linking the accused and those who committed the underlying offences at the time of the commission of the crime;
(ii) The knowledge on the part of the superior that his subordinates have committed or taken a culpable part in the commission of a crime or are about to do so; and
(iii) A failure on the part of the superior to take necessary and reasonable measures to prevent or to punish those crimes.

This doctrine might apply, in principle, to military commander (at whatever level in the military structure), civilian officials (regardless of the nature of their function, including heads of state or ministers) or paramilitary leaders. Whilst, under customary international law, the elements of the doctrine are the same as a matter of law (though not necessarily at the evidential level) regardless of the nature of the authority which the superior exercised, the ICC Statute is drawing certain differences between military and non-military superiors.

The person to whom the doctrine is relevant must be superior, hierarchically, to those who have committed the crimes in the sense that there must have existed between them a hierarchical relationship within a common chain of authority or command. That relationship may be *de jure* (i.e., it is recognised and sanctioned in the relevant – internal or domestic – legal regime) or *de facto* (where the relationship of authority is one based, not on legal regulations, but on a state of affair). There is contradictory jurisprudence as to the time that is relevant to establishing the existence of such a link (the time when the crimes were committed or the time when the superior is said to have failed in his duty).

"Superior responsibility" could apply, in theory, to any person who is able to exercise "effective control" over one or more people. The requirement of "effective control", which must be met in relation to all and any sort of superior means that he must have had the material ability, at the time relevant to the charges, to prevent or punish the crimes of subordinates. Mere influence or charisma, even if significant, would not meet that standard. In all cases, there must be an expectation of obedience to orders on the part of the superior and a parallel expectation of subjection to his authority on the part of those who are under his authority.

The superior must also have been sufficiently aware of the commission of a crime by subordinates and/or of the real and concrete likelihood that a crime was about to be committed. Under customary law, the superior must be shown to have "known" (i.e., he actually knew) or "had reason to know" (i.e. the superior possessed some general information putting him on notice of the commission of crimes of his subordinates or that such information as was available to him put him on notice of the strong likelihood that they were about to be committed) of the underlying crimes. The ICC Statute has added one form of culpable *mens rea* ("owing to the circumstances at the time, should have known") for military or military-like superiors, whereby a superior might be liable where he might not have known of the crimes (whether in actual or "had reason to know" form) but should have known of those. The exact scope of this new form of *mens rea* is uncertain and has been subject to serious criticism, although it could be constructed in such a way as to reduce the risks involved with this form of *mens rea*.

To be liable under that doctrine, the superior must also have failed to prevent or punish crimes committed by subordinates. A failure to fulfill either or both of these separate obligations

("duty to prevent" and "duty to punish") could render a superior liable. Not every sort of failure would trigger his superior liability. To meet his obligations, a superior is required to adopt "necessary and reasonable" measures. The dereliction of duty attributable to the superior must be gross so that not any kind of failure to fulfill his duty would automatically render a superior responsible under that doctrine. There is some doubt in the literature and jurisprudence as to whether the dereliction must be causally linked in some ways with the crimes of the subordinates. The text of the ICC Statute makes it clear, however, that liability would be engaged where the crimes have been committed "as a result" of the superior's failure.

In sum, the doctrine of superior or command responsibility could be defined as follows: A superior, whether *de jure* or *de facto*, may be held criminally responsible under that doctrine in relation to crimes committed by subordinates where, at the time relevant to the charges, he was in a relationship of superior-subordinate with the perpetrators, knew or had reason to know (or, in the case of military superiors at the ICC, "should have known") that these crimes had been committed or were about to be committed and, with and despite that knowledge, wilfully and culpably failed to prevent or punish these crimes.

Maria Nybondas, The Relationship Between Individual Criminal and Command Responsibility, January 2004, available at: http://www.asser.nl/default.aspx?site_id=9&level1=13337&level2=13383

The *Čelebići* case was the first case in which the ICTY Trial Chamber held that not only military commanders but also non-military superiors may incur responsibility under the doctrine of superior responsibility. In that case, the accused were camp commanders, and as such not

directly in the military chain of command. The decisive question was whether a superior-subordinate relationship could be established.

This is also where the difference between superior responsibility for military and non-military (hereinafter, civilian) leaders starts. When it comes to military commanders, there usually exists a formal command structure, in which the duties of the commander are laid down. Accordingly, the possibility to prove the existence of a superior-subordinate relationship can be based on the fact that the position of the superior obligated him to exercise command and control over his subordinates.

For civilian superiors the establishment of a superior-subordinate relationship usually cannot be drawn from the official position of the person. The Trial Chamber in *Čelebići* recognised that the Statute of the ICTY does not contain guidance as to how the Tribunal should establish responsibility in such cases. However, it found that the term 'superior' is broad enough to include other superiors than those in a *de jure* position of authority. The Chamber was of the view that 'individuals in positions of authority, whether civilian or within military structures, may incur criminal responsibility under the doctrine of command responsibility on the basis of their *de facto* as well as *de jure* positions as superiors'.

The Chamber explained what should be understood by a position as a *de facto* superior by mentioning 'persons effectively in command of more informal structures, with power to prevent and punish the crimes of persons who are in fact under their control'.

The 'effective authority' argument was upheld in the *Aleksovski* case. The Trial Chamber in *Kordić* also confirmed the view stated in the *Čelebići* case. Consequently, there seems to be an established view, articulated in the cases of the ICTY, that a leader can incur superior responsibility also where, as in the case of the conflicts in the former Yugoslavia, the formal command structures have ceased to exist or are no longer clearly discernible.

Importantly, the *Čelebići* Trial Chamber stressed that whether *de facto* or *de jure* authority is being considered, a superior is someone who has the power to prevent and repress the violations of his subordinates.

It is when he fails to fulfill this duty that he can be held individually responsible under the doctrine of superior responsible. On the other hand, where a person does not have this power, the doctrine cannot be applied. In the reasoning of the Chamber, this was of great importance, as the basic idea is that persons are held responsible for their own acts, and as there is a danger of injustice being done if the responsibility of superiors is not considered with care.

Compared to the Statutes of the *ad hoc* Tribunals, the ICC Statute, which entered into force on 1 July 2002, contains more elaborate provisions on what in its Article 28 is called 'Responsibility of commanders and other superiors'. Contrary to the Statutes of the *ad hoc* International Criminal Tribunals, the ICC Statute makes an explicit differentiation between the responsibility of military commanders and that of 'other superiors'. While responsibility arises for both military commanders and other superiors 'as a result of his or her failure to exercise proper control', a significant difference in the formulation of the responsibility for the two

categories of superiors is the explicit mention that responsibility for 'other superiors' only arises where '[t]he crimes concerned activities that were within the effective responsibility and control of the superior', in Article 28 (b)(2).

The Statute of the International Criminal Court contains the following provision on the responsibility of superiors for the acts of their subordinates:

Article 28
Responsibility of commanders and other superiors

In addition to other grounds of criminal responsibility under this Statute for crimes within the jurisdiction of the Court:

(a) A military commander or person effectively acting as a military commander shall be criminally responsible for crimes within the jurisdiction of the Court committed by forces under his or her effective command and control, or effective authority and control as the case may be, as a result of his or her failure to exercise control properly over such forces, where:

(i) That military commander or person either knew or, owing to the circumstances at the time, should have known that the forces were committing or about to commit such crimes; and

(ii) That military commander or person failed to take all necessary and reasonable measures within his or her power to prevent or repress their commission or to submit the matter to the competent authorities for investigation and prosecution.

(b) With respect to superior and subordinate relationships not described in paragraph (a), a superior shall be criminally responsible for crimes within the jurisdiction of the Court committed by subordinates under his or her effective authority and control, as a result of his or her failure to exercise control properly over such subordinates, where:

(i) The superior either knew, or consciously disregarded information which clearly indicated, that the subordinates were committing or about to commit such crimes;

(ii) The crimes concerned activities that were within the effective responsibility and control of the superior; and

(iii) The superior failed to take all necessary and reasonable measures within his or her power to prevent or repress their commission or to submit the matter to the competent authorities for investigation and prosecution

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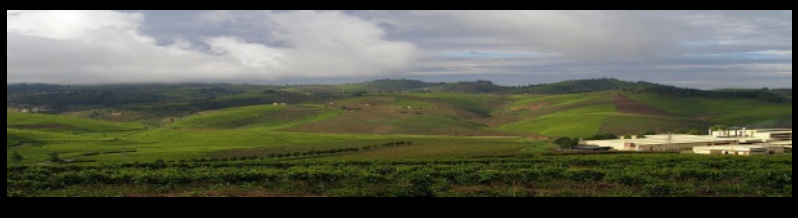
Should command responsibility apply to civilian superiors?

At the time of the Rwandan genocide, Alfred Musema was the Director of the Gisovu Tea Factory in Kibuye Prefecture. His employees were repeatedly involved in attacks on Tutsis and he did not attempt to stop them or discipline them.



THE PROSECUTOR
v.
ALFRED MUSEMA
Case No. ICTR-96-13-A
January 27, 2000

JUDGMENT

5.4 Musema's Authority

863. In relation to Article 6(3) of the Statute, the nature of the authority exercised by an individual is crucial to an assessment of whether that individual exercised a superior responsibility over perpetrators of acts detailed in Articles 2 to 4 of the Statute, and whether, as a result, that individual attracts individual criminal responsibility for those acts.

864. It is, therefore, necessary for the Chamber to assess the nature and extent of the authority, whether *de facto* or *de jure*, and the effective control exercised by Musema in the context of the events alleged in the Indictment. The Chamber will make that assessment of Musema's authority, firstly by examining the testimonies of witnesses before the Chamber and the documents tendered to it, and secondly by presenting its factual findings on the matter.

Factual findings

879. The Chamber finds that it has been established beyond reasonable doubt that Musema exercised *de jure* authority over employees of the Gisovu Tea Factory while they were on Tea Factory premises and while they were engaged in their professional duties as employees of the Tea Factory, even if those duties were performed outside factory premises. The Chamber notes that Musema exercised legal and financial control over these employees, particularly through his power to appoint and remove these employees from their positions at the Tea Factory. The Chamber notes that Musema was in a position, by virtue of these powers, to take reasonable measures, such as removing, or threatening to remove, an individual from his or her position at the Tea Factory if he or she was identified as a perpetrator of crimes punishable under the Statute. The Chamber also finds that, by virtue of these powers, Musema was in a position to take reasonable measures to attempt to prevent or to punish the use of Tea Factory vehicles, uniforms or other Tea Factory property in the commission of such crimes. The Chamber finds that Musema exercised *de jure* power and *de facto* control over Tea Factory employees and the resources of the Tea Factory.

880. In relation to other members of the population of Kibuye *Préfecture*, including *thé villageois* plantation workers, while the Chamber is satisfied that such individuals perceived Musema as a figure of authority and as someone who wielded considerable power in the region, it is not satisfied beyond reasonable doubt on the basis of the evidence presented to it that Musema did, in fact, exercise *de jure* power and *de facto* control over these individuals.

881. The Chamber finds, therefore, that it has been established beyond reasonable doubt that there existed at the time of the events alleged in the Indictment a *de jure* superior-subordinate relationship between Musema and the employees of the Gisovu Tea Factory.

II. Joint Criminal Enterprise Liability

Michael P. Scharf, *Joint Criminal Enterprise, The Nuremberg Precedent, and the Concept of "Grotian Moment,"* in ACCOUNTABILITY FOR COLLECTIVE WRONGDOING (Cambridge University Press, 2012).

I. INTRODUCTION

During a sabbatical in the fall of 2008, I had the unique privilege of being invited to serve as Special Assistant to the International Prosecutor of the Extraordinary Chambers in the Courts of Cambodia (ECCC). During the time I spent in Phnom Penh, my most important assignment was to draft the Prosecutor's brief in reply to the Defense Motion to Exclude "Joint Criminal Enterprise" (JCE), and in particular the extended form of JCE known as JCE III, as a mode of liability from the trial of the five surviving leaders of the Khmer Rouge.

JCE III is a form of liability somewhat similar to the American "felony murder rule," in which a person who willingly participates in a criminal enterprise can be held criminally responsible for the reasonably foreseeable acts of other members of the criminal enterprise. Since the decision of the Appeals Chamber of the International Criminal Tribunal for the Former Yugoslavia (ICTY) in the 1998 *Tadic* case, it has been accepted that JCE is a mode of liability applicable to international criminal trials. Dozens of cases before the ICTY, the International Criminal Tribunal for Rwanda ("ICTR"), the Special Court for Sierra Leone ("SCSL") and the Special Panels for the Trial of Serious Crimes in East Timor have recognized and applied the three forms of JCE liability.

Under the international law principle of *nulem crimin sine lege* (no crime without law), the Cambodia Tribunal, however, can only apply the substantive law and associated modes of liability that existed as part of customary international law in 1975-1979 -- the time of the atrocities committed by the Khmer Rouge regime. Therefore the question at the heart of the brief I drafted was whether Nuremberg and its progeny had established JCE as part of customary international law following World War II.

The Khmer Rouge Defendants argued that Nuremberg and its progeny provided too scant a sampling to constitute the widespread state practice and *opinio juris* required to establish JCE as a customary norm as of 1975. In response, the Prosecution brief argues that Nuremberg constituted what some commentators call "a Grotian Moment" – an instance in which there is such a fundamental change to the international system that a new principle of customary international law can arise with unusual rapidity.

This chapter explores the concept of "Grotian Moment" in the context of the validity of applying JCE to the Cambodia Tribunal's cases. It begins with an analysis of whether the "joint plan" mode of liability applied by the Nuremberg Tribunal and its progeny was equivalent to the modern JCE concept. Next it examines whether the Nuremberg precedent fits within the profile of a legitimate "Grotian Moment." The Chapter then considers whether, as a "Grotian Moment," both the substantive crimes and modes of liability can be deemed to have crystallized into customary international law by 1975.

Very little has previously been written about the concept of "the Grotian Moment." Indeed, an electronic search of law review databases revealed only sixty-one previous references to the term, and few that use the term in the way it is being considered here. While this chapter focuses on the concept in the context of the trial of the Khmer Rouge leaders before the Cambodia Tribunal, this analysis has implications far beyond the sub-field of international criminal law.

II. DID THE NUREMBERG PRECEDENT ESTABLISH JCE AS CUSTOMARY INTERNATIONAL LAW?

A. APPLICATION OF JCE AT NUREMBERG

The Nuremberg Charter and Judgment never specifically mention the term "Joint Criminal Enterprise." Yet, a close analysis of the Nuremberg Judgment and the holdings of several Control Council Law #10 cases reveal that the Nuremberg tribunal and its progeny applied a concept analogous to JCE, which they called the "common plan" mode of liability.

Prior to Nuremberg, liability for participation in a common plan had existed in some form in the national legislation or jurisprudence of numerous common law and civil law countries since at least the nineteenth century. Indeed, many advanced jurisdictions recognized modes of co-perpetration similar to JCE III; these included conspiracy, the felony murder doctrine, the concept of *association de malfaiteurs* and numerous other doctrines of co-perpetration.

The drafters of the Nuremberg Charter, like the drafters of the ICTY Statute 48 years later, recognized that the unique nature of atrocity crimes justifies and requires a unique mode of liability. This was explained in *Tadic*:

> Most of the time these crimes do not result from the criminal propensity of single individuals but constitute manifestations of collective criminality: the crimes are often carried out by groups of individuals acting in pursuance of a common criminal design. Although only some members of the group may physically perpetrate the criminal act (murder, extermination, wanton destruction of cities, towns or villages, etc.), the participation and contribution of the other members of the group is often vital in facilitating the commission of the offence in question. It follows that the moral gravity of such participation is often no less – or indeed no different – from that of those actually carrying out the acts in question.

This passage has been quoted in a number of subsequent judgments of the ICTY, and in *Karemera* the ICTR Trial Chamber articulated a similar rationale for the JCE doctrine:

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

Similarly, Antonio Cassese, the former President of the ICTY, has opined:

> International crimes such as war crimes, crimes against humanity, genocide, torture, and terrorism share a common feature: they tend to be expression of collective criminality, in that they are perpetrated by a multitude of persons, military details, paramilitary units or government officials acting in unison or, in most cases, in pursuance of a policy. When such crimes are committed, it is extremely difficult to pinpoint the specific contribution made by each individual participant in the criminal enterprise or collective crime. […] The notion of joint criminal enterprise denotes a mode of criminal liability that appears particularly fit to cover the criminal liability of all participants in a common criminal plan.

Consistent with the doctrine's historic origins in an international agreement (the 1945 London Charter establishing the Nuremberg Tribunal) and the jurisprudence of international judicial bodies (the Nuremberg and Control Council Law #10 Tribunals), Professor van Sliedregt concludes that "JCE is a merger of common law and civil law. JCE in international law is a unique (*sui generis*) concept in that it combines and mixes two legal cultures and systems." Specifically, the Major Powers sought to create an approach in the Nuremberg Charter that would combine the Anglo-American conspiracy doctrine with the approach in France and the Soviet Union where conspiracy was not recognized as a crime. Thus, Article 6 of the London Charter implemented a modified form of the initial American proposal to include conspiracy, providing that "leaders, organizers, instigators and accomplices participating in the formulation or *execution ofa common plan* or conspiracy to commit any of the foregoing crimes are responsible for all acts performed by any persons in execution of such plan."

During the Nuremberg Trial, Justice Robert Jackson, the Chief U.S. Negotiator of the Nuremberg Charter and Chief U.S. Prosecutor at Nuremberg explained to the Tribunal the meaning of "common plan," as distinct from the U.S. concept of conspiracy:

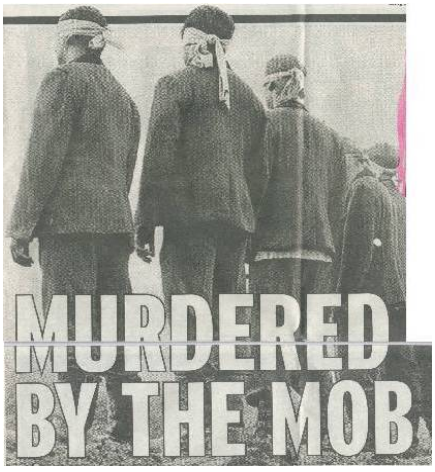
> The Charter did not define responsibility for the acts of others in terms of "conspiracy" alone. The crimes were defined in non-technical but inclusive terms, and embraced formulating and executing a "common plan" as well as participating in a "conspiracy." It was feared that to do otherwise might import into the proceedings technical requirements and limitations which have grown up around the term "conspiracy." There are some divergences between the Anglo-American concept of conspiracy and that of either Soviet, French, or German jurisprudence. It was desired that concrete cases be guided by the broader considerations inherent in the nature of the social problem, rather than controlled by refinements of any local law.

In harmony with this statement, the Nuremberg Tribunal and the Control Council Law Number 10 Tribunals accepted their own version of the "common plan" concept, thereby transforming it into what has now become known as the doctrine of JCE. These tribunals found that "the difference between a charge of conspiracy and one of acting in pursuance of a common design is that the first would claim that an agreement to commit offences had been made while the second would allege not only the making of an agreement but the performance of acts pursuant to it." In other words, conspiracy is a crime in its own right, while acting in pursuance of a common design or plan, like JCE, was a mode of liability that attaches to substantive offences. In developing JCE liability from pre-existing approaches in domestic jurisdictions, the Nuremberg Tribunal declared that its conclusions were made "in accordance with well-settled legal principles, one of the most important of which is that criminal guilt is personal and that mass punishments should be avoided".

While the Nuremberg Tribunal tried the 22 highest ranking surviving members of the Nazi regime, Control Council Law Number 10 was jointly promulgated by the Allied Powers to govern subsequent trials of the next level of suspected German war criminals by U.S., British, Canadian, and Australian military tribunals, as well as German courts, in occupied Germany. Under the authority of Control Council Law Number 10, the tribunals were to follow the Charter and jurisprudence of the Nuremberg Tribunal. As such, the case law from those tribunals is viewed as an authoritative interpretation of the Nuremberg Charter and Judgment and a reflection of customary international law.

An analysis of several of the Control Council Law Number 10 cases supports the conclusion that the JCE doctrine was in fact employed by those tribunals in 1946–7. In reaching its conclusion about the existence of JCE, the Appeals Chamber of the Yugoslavia Tribunal in *Tadic* relied partly on ten different post-World War II cases—six regarding JCE I, two regarding JCE II, and two regarding JCE III. Most of these cases were published in summary form in the 1949 Report of the UN War Crimes Commission. In addition to these ten, we included in the Prosecution's Brief another sixteen cases published in the 1949 UN War Crimes Commission Report and the U.S. Nuremberg War Crimes Tribunal Report in which the Control Council Law Number 10 tribunals also applied the common plan or design/JCE concept. All of these cases clarified the meaning of Nuremberg's common plan liability – the forerunner of JCE. Summing

up this extensive case law and explaining the difference between common design and simple co-perpetration, the UN War Crimes Commission Report states: "the prosecution has the additional task of providing the existence of a common design, [and] once that is proved the prosecution can rely upon the rule which exists in many systems of law that those who take part in a common design to commit an offence which is carried out by one of them are all fully responsible for that offence in the eyes of the criminal law." Consistent with this explanation, the Appeals Chamber of the Yugoslavia Tribunal in the *Milutinovic* case, after considering extensive filings by the parties on whether JCE is part of customary international law, found that JCE and common plan liability are one and the same.



Given that JCE III is the most controversial type of JCE liability, the three Control Council Law Number 10 cases dealing with that mode of JCE liability are worth examining in some detail. The first is the trial of Erich Heyer and six others -- known as the *Essen Lynching Case*.According to the official summary of the trial published in the UN War Crimes Commission Report, this case concerned the lynching of three British prisoners of war by a mob of Germans. Though the case was tried by a British military court, it did so under the authority of Control Council Law Number 10, and it was therefore "not a trial under English law." One of the accused, Captain Heyer, had placed three prisoners under the escort of a German soldier, Koenen, who was to take them for interrogation. As Koenen left, Heyer, within earshot of a waiting crowd, ordered Koenen not to intervene if German civilians molested the prisoners and stated that the prisoners deserved to be and probably would be shot. The prisoners were beaten by the crowd and one German corporal fired a revolver at a prisoner, wounding him in the head. One died instantly when they were thrown over a bridge and the remaining two were killed by shots from the bridge and by members of the crowd who beat them to death. The defence argument that the prosecution needed to prove that each of the accused—Heyer, Koenen and five civilians—had intended to kill the prisoners was not accepted by the court. The prosecution argued that in order to be convicted the accused had to have been "concerned in the killing" of the prisoner. Both Heyer and Koenen were convicted of committing a war crime in that they were concerned in the killing of the three prisoners, as were three of the five accused civilians. Even though it was not proven which of the civilians delivered the fatal shots or blows, they were convicted because "[f]rom the moment they left those barracks, the men were doomed and the crowd knew they were doomed and every person in that crowd who struck a blow was both morally and criminally responsible for the deaths of the three men."

A second example (surprisingly not cited in *Tadic)*, which the UN War Crimes Commission specifically found analogous to the *Essen Lynching Case*, is the *Trial of Hans Renoth and Three Others*. In that case, two policemen (Hans Ronoth and Hans Pelgrim) and two customs officials (Friedrich Grabowski and Paul Nieke) were accused of committing a war crime in that they "were concerned in the killing of an unknown Allied airman, a prisoner of war." According to the allegations, the pilot crashed on German soil unhurt, and was arrested by Renoth, then attacked and beaten with fists and rifles by a number of people while the three other defendants witnessed the beating but took no active part to stop it or to help the pilot. Renoth also stood by for a while, and then shot and killed the pilot. "The case for the prosecution was that there was a common design in which all four accused shared to commit a war crime, [and] that all four accused were aware of this common design and that all four accused acted in furtherance of it." All the accused were found guilty, presumably based on the foreseeability that the pilot would eventually be killed during the beating at the hands of the crowd or by one of them.

A third example is the case of *Kurt Goebell et. al* (the *Borkum Island Case*). Although not published in the Report of the UN War Crimes Commission, a detailed record of this case is publicly available through the U.S. National Archives Microfilm Publications. Moreover, a detailed report of the trial (based on trial transcripts) was published in the *Journal of Criminal Law* in 1956. According to that report, the mayor of Borkum and several German military officers and soldiers were convicted of the assault and killing of seven American airmen who had crashed-landed. The prosecution argued that the accused were "cogs in the wheel of common design, all equally important, each cog doing the part assigned to it." It further argued that "it is proved beyond a reasonable doubt that each one of the accused played his part in mob violence which led to the unlawful killings" and "therefore, under the law each and every one of the accused is guilty of murder." After deliberating in closed session, the judges rendered an oral verdict in which they convicted the mayor and several officers of the killings and assaults. From the arguments and evidence submitted, it is apparent that the accused were convicted pursuant to a form of common design liability equivalent to JCE III. Essentially, the court decided that though certain defendants had not participated in the murder nor intended for it to be committed, they were nonetheless liable because it was a natural and foreseeable consequence of their treatment of the prisoners.

International judicial decisions, like domestic court cases, can evince state practice and *opinio juris*, establishing customary international law. The Khmer Rouge Defendants objected that these Control Council Law Number 10 cases are "unpublished cases" or, in some instances, mere summaries of unwritten verdicts. The suggestion being that the Court could not validly rely on them to glean the substance of customary international law because defendants could not be deemed to have constructive knowledge of unpublished works with respect to the doctrine that ignorance of law is no excuse (*ignorantia juris non excusat*). It is significant, however, that two of the three Control Council Law #10 JCE III cases described above were published in summary form in the official UN War Crimes Commission Report in 1949. According to those Reports' foreword, the "main object of these Reports [was] to help to elucidate the law, i.e., that part of International Law which has been called the law of war". This authoritative and widely disseminated multi-volume account of the trials, in which the war crimes tribunals recognized

and applied JCE liability, supports the argument that the Khmer Rouge leaders had sufficient constructive notice in 1975–79 that their mass atrocity crimes would attract criminal responsibility under the JCE doctrine.

While the *Borkum Island Case* was not included in the Report of the UN War Crimes Commission, it is significant that the charging instrument, transcript (including oral bench judgment), and other documents of the case have been publicly available from The United States Archives. In addition, as mentioned above a detailed account and analysis of the *Borkum Island Case* was published in 1956 in the *Journal of Criminal Law*. It may be an open question whether a judgment that was the subject of a scholarly article in a widely read prestigious publication and which was available in public archives years before the Khmer Rouge launched their genocidal campaign can be viewed as a published judicial decision for this purpose.

Given the nature of international crimes and mass atrocities, the rationale behind the existence of JCE and the relative infrequency with which trials for such crimes arise, it is unsurprising that there are few examples of national jurisprudence applying forms of JCE liability in the years after Nuremberg. The most notable example is the Jerusalem District Court and Israeli Supreme Court's decisions in the *Eichmann case*. Those decision demonstrate that, as of 1961, domestic courts recognized JCE as developed by the immediate post-World War II laws and jurisprudence. The Jerusalem District Court's approach to determining Adolf Eichmann's individual responsibility for participating in a common criminal plan to extinguish the Jews in Europe closely resembled that applied by the Control Council Law Number 10 cases cited above (several of which were cited by the Jerusalem District Court). This can be seen clearly in its statement:

> Hence, everyone who acted in the extermination of Jews, knew about the plan for the Final Solution and its advancement, is to be regarded as an accomplice in the annihilation of the millions who were exterminated during the years 1941-1945, irrespective of the fact of whether his actions spread over the entire front of the extermination, or over only one or more sectors of that front. His responsibility is that of a 'principal offender' who perpetrated the entire crime in co-operation with the others.

The District Court found that Eichmann was made aware of the criminal plan to exterminate the Jews in June of 1941; he actively furthered this plan via his central role as Referent for Jewish Affairs in the Office for Reich Security as early as August of 1941; and he possessed the requisite intent (specific intent here, because the goal was genocide) to further the plan as evidenced by "the very breadth of the scope of his activities" undertaken to achieve the biological extermination of the Jewish people. On the basis of these findings, Eichmann was held criminally liable for the "general crime" of the Final Solution, which encompassed acts constituting the crime "in which he took an active part in his own sector *and the acts committed by his accomplices to the crime in other sectors* on the same front". In so holding, the District Court ruled that full awareness of the scope of the plan's operations was not necessary noting that many of the principal perpetrators, including the defendant, may have possessed only compartmentalized knowledge. The Israeli Supreme Court also cited the 1946 General Assembly Resolution affirming the Nuremberg principles, stating: "if fifty-eight nations unanimously agree on a statement of existing law, it would seem that such a declaration would be all but conclusive evidence of such a rule, and agreement by a large majority would have great value in determining what is existing law."

B. NUREMBERG AS A "GROTIAN MOMENT."

The United Nations' International Law Commission (ILC) has recognized that the Nuremberg Charter, Control Council Law Number 10, and the post-World War II war crimes trials gave birth to the entire international paradigm of individual criminal responsibility. The ILC has described the principle of individual responsibility and punishment for crimes under international law recognized at Nuremberg as the "cornerstone of international criminal law" and the "enduring legacy of the Charter and Judgment of the Nuremberg Tribunal."

Importantly, on 11 December 1946, in one of the first actions of the newly formed United Nations, its General Assembly unanimously affirmed the principles from the Nuremberg Charter and judgments. This action arguably affirmed as customary international law both the substantive law and the theory of individual criminal liability (including "common plan" liability) codified in the Nuremberg Charter and applied by the Nuremberg Tribunal. As a consequence, a compelling case can be made that common plan (now known as JCE) liability was rendered just as much a part of customary international law as the other fundamental concepts of international criminal liability reflected in the Nuremberg Principles which the ECCC applies. These concepts include: command responsibility, the principle that obeying superior orders is not a defence, the idea that leaders can be held liable for international crimes despite their official position and the notion that a perpetrator is responsible for an act that constitutes a crime under international law notwithstanding the fact that domestic law does not impose a penalty for this act. Although General Assembly resolutions are by their nature "non binding," domestic and international courts have long recognized that they are official expressions of the governments concerned and consequently are relevant and entitled to be given weight as evidence of state practice and *opinio juris*—the two components of customary international law.

Subsequently, the International Law Commission (ILC) was directed by the UN General Assembly to formulate the Principles of International Law Recognized in the Charter of the

Nuremberg Tribunal and in the Judgment of the Tribunal. In 1950, the ILC submitted the following seven principles to the United Nations:

> Principle I: Any person who commits an act which constitutes a crime under international law is responsible therefor and liable to punishment.
>
> Principle II: The fact that internal law does not impose a penalty for an act which constitutes a crime under international law does not relieve the person who committed the act from responsibility under international law.
>
> Principle III: The fact that a person who committed an act which constitutes a crime under international law acted as Head of State or responsible Government official does not relieve him from responsibility under international law.
> Principle IV: The fact that a person acted pursuant to order of his Government or of a superior does not relieve him from responsibility under international law, provided a moral choice was in fact possible to him.
>
> Principle V: Any person charged with a crime under international law has the right to a fair trial on the facts and law.
>
> Principle VI: The crimes hereinafter set out are punishable as crimes under international law:
>
> > (a) Crimes against peace: Planning, preparation, initiation or waging of a war of aggression or a war in violation of international treaties, agreements or assurances; (ii) Participation in a common plan or conspiracy for the accomplishment of any of the acts mentioned under (i).
> >
> > (b) War crimes: Violations of the laws or customs of war include, but are not limited to, murder, ill-treatment or deportation to slave-labour or for any other purpose of civilian population of or in occupied territory, murder or ill-treatment of prisoners of war, of persons on the seas, killing of hostages, plunder of public or private property, wanton destruction of cities, towns, or villages, or devastation not justified by military necessity.
> >
> > (c) Crimes against humanity: Murder, extermination, enslavement, deportation and other inhuman acts done against any civilian population, or persecutions on political, racial or religious grounds, when such acts are done or such persecutions are carried on in execution of or in connection with any crime against peace or any war crime.
>
> Principle VII: Complicity in the commission of a crime against peace, a war crime, or a crime against humanity as set forth in Principle VI is a crime under international law.

Although the ILC's 1950 formulation neither specifically references nor specifically excludes JCE, it does make clear that anyone who "commits" a crime against peace, a war crime,

or crime against humanity, is criminally liable. It is of note in this regard that the ICTY, the ICTR and the SCSL have all read the word "committed" in their Statutes as including participation in the realization of a common design or purpose.

The UN General Assembly did not pass a resolution endorsing the ILC's 1950 formulation of the Nuremberg Principles, presumably because the General Assembly had four years earlier already confirmed the status of the Nuremberg Principles as international law. Instead, it directed the International Law Commission to codify them in an "International Code of Offences against the Peace and Security of Mankind." It is noteworthy that the ILC's first draft of the Code in 1956 specifically included "the principle of individual criminal responsibility for formulating a plan or participating in a common plan or conspiracy to commit a crime" – thus indicating that the ILC in fact perceived the common plan concept to be part of the Nuremberg Principles.

In submitting the draft statute for the ICTY to the Security Council in 1993, the United Nations Secretary-General emphasized the customary international law status of the principles and rules emanating from the Nuremberg Trial and other post-World War II jurisprudence. Specifically, he stated that the Statute had been drafted to apply only the "rules of international humanitarian law which are beyond any doubt part of customary international law," which included the substantive law and modes of liability embodied in "the Charter of the International Military Tribunal of 8 August 1945." Logic dictates that this 1993 statement about the content of customary international law also holds true for the time of the crimes in question before the ECCC (1975–9), as there were no relevant major developments in international humanitarian law between 1975 and the establishment of the ICTY in 1993. As Ciara Damgaard documents, "the origins of the JCE Doctrine can be found in the events surrounding the end of World War II."

The Khmer Rouge Defendants argued in their brief that even if Nuremberg and a few Control Council Law #10 cases recognized the JCE concept, the number of cases was too limited to constitute customary international law. In response the Prosecutor's brief submitted that Nuremberg and its progeny created a so-called "Grotian Moment." Notably, this was the first time in history an organ of an international tribunal used the term.

C. THE CONCEPT OF "GROTIAN MOMENT"

Hugo Grotius is widely considered to be the "father" of modern international law as the law of nations, and has been recognised for having "recorded the creation of order out of chaos in the great sphere of international relations." In the mid-1600s, at the time that the nation-state was formally recognized as having crystallized into the fundamental political unit of Europe, Grotius "offered a new concept of international law designed to reflect that new reality." In his masterpiece, *De Jure Belli ac Pacis* (The Law of War and Peace), Grotius addresses questions bearing on just war: who may be a belligerent; what causes of war are just, doubtful or unjust; and what procedures must be followed in the inception, conduct, and conclusion of war.

Although NYU Professor Benedict Kingsbury has convincingly argued that Grotius' actual contribution has been distorted through the ages, the prevailing view today is that his treatise had an extraordinary impact as the first formulation of a comprehensive legal order of

interstate relations based on mutual respect and equality of sovereign states. In "semiotic" terms, the "Grotian tradition" has come to symbolize the advent of the modern international legal regime, characterized by positive law and state consent, which arose from the Peace of Westphalia.

The term "Grotian Moment," on the other hand, is a relatively recent creation, apparently coined by Princeton Professor Richard Falk in 1985. Such a moment is said to occur when there is a transformative development in which new rules and doctrines of customary international law emerge with unusual rapidity and acceptance. Usually this happens during "a period in world history that seems analogous at least to the end of European feudalism ... when new norms, procedures, and institutions had to be devised to cope with the then decline of the Church and the emergence of the secular state." Commentators have opined that the creation of the Nuremberg Tribunal at the end of World War II constituted a classic "Grotian Moment," on par with the negotiation of the Peace of Westphalia and the establishment of the UN Charter.

Normally, customary international law crystallizes out of the slow accretion of widespread state practice evincing a sense of legal obligation (*opinio juris*). The process can take decades or even centuries. The International Court of Justice, however, has made clear that customary norms can sometimes ripen quite rapidly, and that a short period of time is not a bar to finding the existence of a new rule of customary international law, binding on all the countries of the world, save those that persistently objected during its formation. Often this will occur during a so-called "Grotian Moment."

It was thus the paradigm-shifting nature of the Nuremberg precedent, and the universal and unqualified endorsement of the Nuremberg Principles by the nations of the world in 1946, rather than the number of cases applying JCE liability at the time, which crystallized this doctrine into a mode of individual criminal liability under customary international law. As such, in accordance with Article 15(2) of the International Covenant on Civil and Political Rights, the ECCC may try international crimes using internationally recognized modes of liability whether or not such crimes or forms of liability were recognized in the domestic law at the time of their commission.

It follows from the above that, in addition to international and hybrid tribunals, domestic courts may legitimately apply the JCE doctrine in criminal prosecutions of war crimes, genocide, and crimes against humanity.

III. CONCLUSION

This Chapter has demonstrated that JCE III does in fact have a venerable lineage, anchored securely in the customary international law established during the Grotian Moment of Nuremberg. Nevertheless, JCE III has been widely criticized by commentators and defense counsel as tilting the playing field too far toward the prosecution. In particular, defense counsel decry that the "foresseability standard" on which JCE III is based introduces a form of guilt by association or strict liability for membership in a criminal organization. By way of concluding observations, I offer a four-part rejoinder to this argument.

First, liability in a JCE is distinguishable from the crime of membership in a criminal organization. The latter was criminalized as a separate offence in Nuremberg and in subsequent trials held under Control Council Law Number 10, where knowing and voluntary membership in an entity deemed to be a criminal organization was sufficient to entail individual criminal responsibility. At Nuremberg, the discrete offence of membership in a criminal organization was adopted to facilitate the later prosecutions of minor offenders. In contrast, criminal liability pursuant to a JCE is not liability for mere membership, but "a form of liability concerned with the participation in the commission of a crime as part of a joint criminal enterprise, a different matter."

Second, the underpinning of the JCE liability is to be found in considerations of public policy. That is, the need to protect society against persons who (1) join together to take part in criminal enterprises, (2) while not sharing the criminal intent of those participants who intend to commit serious crimes outside the common enterprise, nevertheless are aware that such crimes may be committed, and (3) do not oppose or prevent their commission. As the High Court of England and Wales has noted, "[e]xperience has shown that criminal enterprises only too readily escalate into the commission of greater offences". Thus, JCE liability is justified by both the unique threats posed by organized criminality and the unique challenge of prosecuting such perpetrators.

Third, incidental criminal liability based on foresight and risk is a mode of liability that is dependent on, and incidental to, a common criminal plan. The "incidental crime" is the outgrowth of, rendered possible by, and premised on the existence of prior joint planning to commit the concerted crime or primary criminal acts of the JCE. In other words, there is a causal link between the concerted crime and the incidental crime. Although, the secondary offender did not share the intent of the participant that engaged in the incidental crime, his culpability lies in the fact that he could anticipate such conduct, but willingly took the risk that it might occur. He could have prevented the further crime or disassociated himself from its likely commission and his failure to do so entails that he too must be held responsible for its commission. This is to be distinguished from situations where a crime is committed as an outgrowth of a plan that is, in the first place, legal. Under those circumstances, for example, when a military unit carries out a legitimate military action, and a member commits a subsequent and unanticipated illegal act, the culpability for that act is considered that of the perpetrator alone. Moreover, the Court can take into account the different degrees of culpability of the participants in the JCE at sentencing.

Finally and most importantly, national and international judges have historically applied a "foresseability" standard with rigor and fairness in numerous contexts in criminal law. Indeed, an objective "foreseeability" standard is also applicable in the contexts of proving "aiding and abetting" or "command responsibility." Like JCE III, proof of aiding and abetting is based on an objective test, namely whether the defendant was aware that a crime "will probably be committed." And, like JCE III, liability for command responsibility utilizes a "foreseeability" test, namely whether (1) an act or omission incurring criminal responsibility has been committed by other persons than the accused, (2) there existed a superior-subordinate-relationship between the accused and the principle perpetrator, (3) the accused as a superior knew or had reason to know that the subordinate was about to commit such crimes or had done so and (4) the accused as a superior failed to take the necessary and reasonable measures to prevent such crimes or

punish the perpetrator thereof. In fact, the command responsibility "had reason to know" standard is an objective test with an even lower *mens rea* requirement than JCE III.

What remains contentious is not that JCE liability exists for crimes under international law, but under what conditions such liability should be applied. The jurisprudence of the ICTY, ICTR, and SCSL have gone a long way toward defining the contours of the JCE III doctrine to the point where it is sufficiently precise. Specifically, this is achieved by requiring that in addition to a defendant's significant contribution to the execution of the criminal plan, he or she also: (a) shares the criminal intent or, at a minimum, (b) is aware of the possibility that a crime might be committed as a consequence of the execution of the criminal act and willingly takes the risk. Accordingly, the crime must not only have been a natural and foreseeable consequence of the requisite participation in the plan (which involves an objective test requiring *dolus eventualis*/advertent recklessness), the accused must also have "willingly" taken the risk despite knowing of the foreseeable consequences. Moreover, the ICTY Appeals Chamber has deliberately sought to prevent the JCE doctrine from expanding and becoming amorphous. For example, in *Krnojelac*, it held that using JCE as a mode of liability "requires a strict definition of common purpose," and that the principal perpetrators who physically commit the crime "should be defined as precisely as possible."

Michael P. Scharf, Special Tribunal Issues Landmark Ruling on Definition of Terrorism and Modes of Participation, ASIL Insight, March 4, 2011.

Introduction

In 2007, the UN Security Council established the Special Tribunal for Lebanon ("STL"), the world's first international court with jurisdiction over the crime of terrorism, to prosecute those responsible for the 2005 assassination of Lebanese Prime Minister Rafiq Hariri and twenty-two others. On January 17, 2011, the Tribunal's Prosecutor, Daniel Bellemare, submitted a sealed indictment for the pre-trial judge to confirm. The pre-trial judge, in turn, requested that the Appeals Chamber resolve fifteen questions relating to the substantive criminal law and modes of criminal responsibility to be applied by the STL and to determine whether the STL should charge crimes cumulatively or in the alternative. In response, on February 16, 2011, the STL Appeals Chamber handed down a landmark ruling.

Modes of Participation

The Appeals Chamber opined that the STL was "an international tribunal in provenance, composition, and regulation." The Appeals Chamber further noted that since Article 3 of the STL Statute (setting forth principles of liability) draws verbatim from the Statutes of the *ad hoc* international criminal tribunals, "it reflects the status of customary international law as articulated in the case law of the *ad hoc* tribunals." Consequently, the Appeals Chamber held that the STL may apply the international modes of responsibility, including joint criminal enterprise ("JCE") liability, which the other international tribunals have employed. In so holding, the Appeals Chamber took a swipe at the International Criminal Court's alternative approach to co-perpetrator liability (known as "perpetration by means"), stating that unlike JCE, "the doctrine of perpetration by means ... is not recognised in customary international law."

There are three forms of JCE. JCE I (basic form) attributes individual criminal liability when all co-defendants act pursuant to a common design and possess the same criminal intent, even if each co-perpetrator carries out a different role within the JCE. The *mens rea* required for this form of JCE is the shared intent of all members to commit a certain crime. JCE II (systemic form) is characterized by the existence of an organized criminal system, particularly in the case of concentration or detention camps. The *mens rea* required for this form of JCE is the personal knowledge of the system of ill-treatment and the intent to further this concerted system of ill-treatment. JCE III (extended form) ascribes individual criminal liability in situations "involving a common purpose to commit a crime where one of the perpetrators commits an act which, while outside the common plan, is nevertheless a natural and foreseeable consequence of the effecting of that common purpose." The *mens rea* for this form is either the shared criminal intent of the perpetrators or, at a minimum, the fact that the defendant is "aware of the possibility that a crime might be committed as a consequence of the execution of the criminal act and [she or he] willingly takes the risk."

Of the three forms of JCE, JCE III has engendered the most controversy, as it is seen by defense counsel and some commentators as a form of guilt by association. Perhaps for this reason, the Appeals Chamber sought to limit the use of JCE III before the STL. While noting that Lebanese law recognizes a principle of liability similar to JCE III, the Appeals Chamber concluded that the application of JCE III would not be appropriate for the STL to apply to the crime of terrorism because JCE III utilizes an advertent recklessness (*dolus eventualis*) standard, whereas terrorism is a specific intent crime. In so concluding, the Appeals Chamber recognized that this is a departure from the approach of the ICTY and ICTR, which allow for convictions

under JCE III for the specific intent crimes of genocide and persecution as a crime against humanity. The *ad hoc* tribunals also allow for convictions under the principle of command responsibility for specific intent crimes, even though command responsibility employs a negligent standard (the commander is responsible for the acts of subordinates if he knew or should have known about their crimes and failed to take action to prevent or punish). For the crime of terrorism, the Appeals Chamber asserts, "the better approach" is to treat the secondary offender as an aider and abetter rather than "pin on him the stigma of full perpetratorship."

As a final observation, prior to the STL Appeals Chamber's decision, the doctrine of joint criminal enterprise liability had been applied only to war crimes, crimes against humanity, and genocide, though Judge Cassese presaged application of JCE to the offense of terrorism in a book he authored three years before the issuance of the STL Appeals Chamber opinion. Cassese wrote:

> International crimes such as war crimes, crimes against humanity, genocide, torture, and terrorism share a common feature: they tend to be expression of collective criminality, in that they are perpetrated by a multitude of persons, military details, paramilitary units or government officials acting in unison or, in most cases, in pursuance of a policy. When such crimes are committed, it is extremely difficult to pinpoint the specific contribution made by each individual participant in the criminal enterprise or collective crime. . . . The notion of joint criminal enterprise denotes a mode of criminal liability that appears particularly fit to cover the criminal liability of all participants in a common criminal plan.

Based on the policies articulated in the quote above, it may well be that the STL Appeals Chamber's confirmation that JCE I and JCE II could apply to the crime of terrorism will be taken as a license for domestic application of the doctrine to terrorism cases worldwide.

The Statute of the International Criminal Court contains the following provisions on the liability of co-perpetrators:

Article 25
Individual criminal responsibility

3. In accordance with this Statute, a person shall be criminally responsible and liable for punishment for a crime within the jurisdiction of the Court if that person:

(a) Commits such a crime, whether as an individual, jointly with another or through another person, regardless of whether that other person is criminally responsible;

(b) Orders, solicits or induces the commission of such a crime which in fact occurs or is attempted;

(c) For the purpose of facilitating the commission of such a crime, aids, abets or otherwise assists in its commission or its attempted commission, including providing the means for its commission;

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

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

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

(e) In respect of the crime of genocide, directly and publicly incites others to commit genocide;

III. Incitement to Commit Genocide

Incitement to Genocide in International Law, US Holocaust Museum, Holocaust Encyclopedia, available at: http://www.ushmm.org/wlc/en/article.php?ModuleId=10007839

In the immediate aftermath of World War II, the world was faced with a challenge—how to seek justice for an almost unimaginable scale of criminal behaviour, including the annihilation of European Jewry. Even as a vocabulary emerged to describe the atrocities that would come to be known as the Holocaust, legal experts sought to establish a new body of law to address the unprecedented crimes perpetrated by the Axis powers. A series of war crimes trials convened by the Allied powers and European governments sought to answer tangled questions of guilt, punish the perpetrators, and deter future crimes on this scale.

The trial of leading German officials before the International Military Tribunal (IMT), the best known of the postwar war crimes trials, formally opened in Nuremberg on November 20, 1945, only six and a half months after Germany surrendered. Among the 24 defendants was Julius Streicher, publisher of the antisemitic German weekly *Der Stürmer*. On October 1, 1946, the IMT convicted Streicher of crimes against humanity in connection with his incitement to the mass murder of Europe's Jewish population. Streicher was executed for his crimes. At the time of the IMT, incitement to murder and extermination was considered a form of persecution on political and racial grounds, punishable as a crime against humanity. By holding one of Nazi

Germany's chief propagandists responsible as an accomplice for the destruction of the European Jews, Streicher's conviction established a precedent-setting link between inflammatory speech and criminal action in international law. Soon after the IMT had completed its mission, direct and public incitement to commit genocide became a crime under international law.

DEFINING A CRIME

The term "genocide" had been coined in 1944 by Raphael Lemkin, a Polish-Jewish lawyer who had fled to the United States. After the war, Lemkin and others lobbied at early sessions of the United Nations for the crime of genocide to become part of the emerging field of international law. On December 9, 1948, the United Nations General Assembly adopted the "Convention on the Prevention and Punishment of the Crime of Genocide" (commonly referred to as the Genocide Convention). Building on the intellectual and legal foundation laid by the IMT in the Streicher decision, Article III (c) of the Genocide Convention declares that "direct and public incitement to commit genocide" is a crime.

Generally speaking, "incitement" means encouraging or persuading another to commit an offense by way of communication, for example by employing broadcasts, publications, drawings, images, or speeches. It is "public" under international law if it is communicated to a number of individuals in a public place or to members of a population at large by such means as the mass media. Among other things, its "public" nature distinguishes it from an act of private incitement (which could be punishable under the Genocide Convention as "complicity in genocide" or possibly not punishable at all). Incitement to genocide must also be proven to be "direct," meaning that both the speaker and the listener understand the speech to be a call to action. Prosecutors have found it challenging to prove what "direct" may mean in different cultures, as well as its meaning to a given speaker. Moreover, public incitement to genocide can be prosecuted *even* if genocide is never perpetrated. Lawyers therefore classify the infraction an "inchoate crime": a proof of result is not necessary for the crime to have been committed, only that it had the potential to spur genocidal violence. It is intent of the speaker that matters, not the effectiveness of the speech in causing criminal action. This distinction helps to make the law preventative, rather than reactive.

INCITEMENT TO GENOCIDE IN RWANDA

The incitement provision of the Genocide Convention took on new importance in the wake of genocide in the Central African nation of Rwanda. Between April and July 1994, members of the Hutu majority, wielding machetes, firearms, and other weapons, killed at least 500,000 people. The vast majority of the victims were members of the Tutsi minority. In 1997, the United Nations International Criminal Tribunal for Rwanda (ICTR) indicted three Rwandans for "incitement to genocide": Hassan Ngeze who founded, published, and edited *Kangura* (Wake Others Up!), a Hutu-owned tabloid that in the months preceding the genocide published vitriolic articles dehumanizing the Tutsi as *inyenzi* (cockroaches) though never called directly for killing them; and Ferdinand Nahimana and Jean-Bosco Barayagwiza, founders of a radio station called *Radio Télévision Libre des Milles Collines* (RTLM) that indirectly and directly called for murder, even at times to the point of providing the names and locations of people to be killed. In the days leading to and during the massacres, RTLM received help from Radio Rwanda, the government-owned station, and programs were relayed to villages and towns throughout the country by a network of transmitters operated by Radio Rwanda. At the heart of the Rwanda "Media Trial" that opened on October 23, 2000, was the issue of free speech rights. "A key question is what kind of speech is protected and where the limits lie," said American lawyer Stephen Rapp, the case's senior prosecutor for the Tribunal. "It is important to draw that line. We hope the judgment will give the world some guidance."

In December 2003, the ICTR handed down its verdict. The three judges (a South African, a Sri Lankan, and a Norwegian) convicted Ngeze, Nahimana, and Barayagwiza for direct and public incitement to genocide. The judges declared: "Without a firearm, machete or any physical weapon, you caused the deaths of thousands of innocent civilians." In framing their verdict, the judges noted: "This case raises important principles concerning the role of the media, which have not been addressed at the level of international criminal justice since Nuremberg. The power of the media to create and destroy fundamental human values comes with great responsibility. Those who control the media are accountable for its consequences." The prosecutors' burden involved the interpretation of euphemisms (in order to prove the "direct" nature of the incitement), such as the phrase "go to work" as a call to kill the Tutsi and the Hutu who opposed

the Rwandan regime. That an individual or group killed someone in response to the radio broadcasts or newspaper articles was not required to prove the incitement to genocide charge.

In January 2007, the lawyers for the defendants in the Rwanda "Media Trial" appealed the tribunal's decisions on numerous grounds. Issuing a decision on November 28, 2007, the Tribunal affirmed the charge of "direct and public incitement to commit genocide" for Ngeze and Nahimana. The judges reversed the finding of guilt on this charge against Barayagwiza, ruling that only RTLM broadcasts made after April 6, 1994 (when the genocide began), constituted "direct and public incitement to commit genocide," and that Barayagwiza no longer exercised control over the employees of the radio station at that time. (The Tribunal did affirm the findings of guilt against Barayagwiza on different grounds, for instigating the perpetration of acts of genocide and crimes against humanity.) Because of the reversal of some charges against the three defendants, the judges lowered the defendants' sentences: Nahimana's from life to 30 years, Negeze's from life to 35 years, and Barayagwiza's from 35 to 32 years.

HATE SPEECH VS. INCITEMENT TO GENOCIDE

What is the difference between hate speech and direct and public incitement to commit genocide? The Rwanda Media Case emphasized that incitement to commit genocide required a calling on the audience (be they listeners or readers) to take action of some kind. Absent such a call, inflammatory language may qualify as hate speech but does not constitute incitement. In many jurisdictions hate speech itself has been criminalized.

Demonstrating that speech meets the legal threshold for the "direct" element of the incitement charge can be extremely complex. Proving such directness often involves a careful parsing of metaphors, allusions, double entendres, and other linguistic nuances: a mode of speech may be perceived as direct in one culture, but not in another. Consider, for example, the Trial Judgment in the case of *Prosecutor v. Simon Bikindi*, handed down by the ICTR on December 2, 2008. Simon Bikindi was a famous composer and singer from Rwanda who distinguished himself in the run-up to the 1994 genocide by using his music and fame to drum up support for the Hutu-led regime, and by fostering ethnic hatred throughout the carnage. He was also held accused of incitement for composing and performing songs like *Nanga Abahutu* ("I Hate These Hutu," an anti-Tutsi song). According to prosecution witnesses who appeared before the ICTR, Bikindi's song was not only an invitation to hate Tutsi, but given the context of the ongoing civil war, to be ready to kill them as well. The ICTR Trial Chamber was not in the end persuaded that Bikindi's songs amounted to incitement to commit genocide. Instead, the judges convicted Bikindi for statements that he made—via loudspeaker—in the Rwandan countryside *during* the genocide (where he asked his audiences, among other things, "Have you killed the Tutsi here?" and referred to Tutsis as "snakes."). The Bikindi case illustrates that a sophisticated understanding of cultural context—notably linguistic usage and subtlety—is critical for the legal determination of the directness of any alleged incitement to genocide.

In contrast to the Rwanda Tribunal, the international crime of direct and public incitement to commit genocide has played virtually no role in the prosecution of genocide at the International Criminal Tribunal for the Former Yugoslavia in The Hague. There the prosecution of atrocities other than genocide has predominated the proceedings. Most experts believe that

mass communication in the former Yugoslavia was employed chiefly for spewing hate propaganda, rather than incitement to commit genocide as defined in strictly legal terms.

INCITEMENT TO GENOCIDE IN CURRENT LEGAL DEBATE

The crime of incitement remains firmly in place on the international legal stage. In 1998, an incitement provision was included in Article 25(3)(e) of the Rome Statute of the International Criminal Court (in conjunction with Article 6—Genocide). And on November 28, 2008, after seven years of negotiations, the European Union (EU) adopted a Framework Decision on combating racism and xenophobia. The document's principal contribution is the EU-wide prohibition of public incitement and hatred against persons of a different race, color, religion, or national or ethnic origin, punishable by a prison sentence of one to three years. This document also prohibits public approval, denial, or gross trivialization of international crimes, notably genocide, and is an outgrowth of pre-existing European laws prohibiting Holocaust denial.

The Genocide Convention's Article III (c) has recently been invoked in the spirit of genocide prevention. On October 26, 2005, Iranian president Mahmoud Ahmadinejad at the "World Without Zionism" conference in Tehran, called for the State of Israel to be "wiped off the map." Ahmadinejad has continued to make public speeches either directly or indirectly calling for Israel's destruction. In 2006, Israeli diplomats proposed to charge Ahmadinejad with direct and public incitement to genocide before the International Criminal Court. Irwin Cotler, the former Canadian Minister of Justice and currently Member of the Canadian Parliament, has also argued that the Iranian president is guilty of state-sanctioned incitement to genocide, incitement that is both "direct and public" as defined in the Genocide Convention. Additionally, in June 2007, the US House of Representatives passed a resolution calling upon the United Nations Security Council to charge Ahmadinejad with violating the Genocide Convention by his repeated calls for Israel to be annihilated. Government officials in the United Kingdom and Australia have adopted similar stances to that of the Americans. To date, no international legal proceedings for incitement to genocide have moved forward against Ahmadinejad.