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978-0-521-87831-9 - Forms of Responsibility in International Criminal Law

Gideon Boas, James L. Bischoff and Natalie L. Reid

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# 1

## Introduction

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### 1.1 Forms of responsibility in international criminal law

When the United Nations Security Council decided to establish the International Criminal Tribunal for the former Yugoslavia (ICTY), the first international criminal tribunal since the immediate post-war period, it tasked the Secretary-General with the preparation of the legal design of the new tribunal. The latter, in turn, instructed lawyers in the Secretariat of the international organisation, who drew on the relevant fundamental principles of customary international law and drafted the statute of the tribunal in accordance with those tenets.<sup>1</sup> The result was a relatively spare document, which delimited the extent of the tribunal's personal, temporal, geographic and subject-matter jurisdiction in its first eight articles. After reaffirming that contemporary international criminal law was concerned with the penal responsibility of individuals,<sup>2</sup> and articulating the core crimes which were to be the concern of the tribunal,<sup>3</sup> the Statute of the International Criminal Tribunal for the Prosecution of Persons Responsible for Serious Violations of International Humanitarian Law Committed in the Territory of the former Yugoslavia since

<sup>1</sup> See Security Council Resolution 808, 22 February 1993, UN Doc. S/RES/808 (1993), p. 2, para. 2 (requesting the Secretary-General to prepare a report on the creation of the tribunal, and to include specific proposals where appropriate); Report of the Secretary-General Pursuant to Paragraph 2 of Security Council Resolution 808 (1993), UN Doc. S/25704, 3 May 1993 ('Secretary-General's Report'), para. 17 (responding to that request by developing and presenting specific language for the draft statute, invoking, *inter alia*, existing international instruments and texts prepared by the International Law Commission).

<sup>2</sup> Statute of the International Criminal Tribunal for the Prosecution of Persons Responsible for Serious Violations of International Humanitarian Law Committed in the Territory of the former Yugoslavia since 1991, 32 ILM 1159 (1993), as amended by Security Council Resolution 1660 of 28 February 2006 ('ICTY Statute'), Arts. 1, 6.

<sup>3</sup> *Ibid.*, Arts. 2–5.

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*Forms of responsibility in international criminal law*

1991 ('ICTY Statute') set forth a list of the ways in which an individual could be said to participate in, or be responsible for, those crimes:

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.

[. . .]

The fact that any of the acts referred to in articles 2 to 5 of the present Statute was committed by a subordinate does not relieve his superior of criminal responsibility if he knew or had reason to know that the subordinate was about to commit such acts or had done so and the superior failed to take the necessary and reasonable measures to prevent such acts or to punish the perpetrators thereof.<sup>4</sup>

As the report accompanying the draft statute explained:

The Secretary-General believes that all persons who participate in the planning, preparation or execution of serious violations of international humanitarian law in the former Yugoslavia contribute to the commission of the violation and are, therefore, individually responsible.<sup>5</sup>

In fact, all the international or hybrid courts and tribunals that have come after the ICTY have similar provisions in their statutes or constitutive instruments, which set forth the forms of responsibility under their jurisdiction, and which cover similar substantive ground.<sup>6</sup>

Such, then, is the purpose of forms of responsibility in international criminal law: to capture all of the methods and means by which an individual may contribute to the commission of a crime, or be held responsible for a crime under international law.<sup>7</sup> To a limited extent, therefore, the forms of responsibility resonate with that area of substantive or general criminal law in domestic jurisdictions that describes the parties to a crime and ascribes liability according to their personal conduct and mental states with regard to the crime.<sup>8</sup> Certain of the forms, such as aiding and abetting or instigating,

<sup>4</sup> *Ibid.*, Art. 7(1), 7(3).    <sup>5</sup> Secretary-General's Report, *supra* note 1, para. 54.

<sup>6</sup> See Chapters 2–5 for specific citations to the relevant provisions of those instruments.

<sup>7</sup> See *Prosecutor v. Muvunyi*, Case No. ICTR-00-55A-T, Judgement, 11 September 2006 ('*Muvunyi* Trial Judgement'), paras. 459–460; *Prosecutor v. Gacumbitsi*, Case No. ICTR-2001-64-T, Judgement, 14 June 2004, para. 267; *Prosecutor v. Semanza*, Case No. ICTR-97-20-T, Judgement and Sentence, 15 May 2003, para. 377; *Prosecutor v. Kayishema and Ruzindana*, Case No. ICTR 95-1-T, Judgement, 21 May 1999, paras. 195–196; *Prosecutor v. Delalić, Mucić, Delić, and Landžo*, Case No. IT-96-21-T, Judgement, 16 November 1998, paras. 321, 331; *Prosecutor v. Akayesu*, Case No. ICTR-96-4-T, Judgement, 2 September 1998 ('*Akayesu* Trial Judgement'), para. 473; *Prosecutor v. Tadić*, Case No. IT-94-1-T, Judgement, 14 July 1997, paras. 661–662.

<sup>8</sup> See, e.g., Wayne R. LaFave, *Principles of Criminal Law* (2003), pp. 509–534, 551–557 (describing the common law classification scheme for attribution of responsibility to 'several persons or groups which play distinct roles before, during and after the offense', as well as statutory modifications) (quotation at p. 509); Jean Pradel, *Droit pénal comparé* (2nd edn 2002), pp. 312–325 (reviewing the jurisprudence and codifications of the law on identifying the participants in a crime in several jurisdictions).

which are discussed in Chapters 4 and 5, respectively, are readily identifiable as what has been termed accomplice or accessory liability in certain domestic jurisdictions;<sup>9</sup> that is, either primary or secondary participation in the commission of a crime by a person who is not the physical perpetrator.<sup>10</sup> Others, however, reflect particularities of international criminal law, and its justifiable preoccupation with ensuring that mid- or high-level accused persons or defendants, who are frequently removed to varying degrees from the actual perpetration of the crime, do not escape liability for their own roles in the atrocities that constitute international crimes. The species of commission called ‘joint criminal enterprise’ is one such form of responsibility, and is the subject of Chapter 2; superior responsibility, the subject of Chapter 3, is another quintessentially and uniquely international form of responsibility that has no true parallel in domestic criminal law.<sup>11</sup> Indeed, as domestic and international avenues for international criminal adjudication proliferate, and regional and international politics become more conducive to supporting such proceedings, cases before international tribunals have increasingly focused on those

<sup>9</sup> See *Black's Law Dictionary* (8th edn 2004), pp. 15, 17 (defining ‘accessory’ and ‘accomplice’). For judicial exposition of these terms in the context of forms of responsibility in international law, see *Prosecutor v. Tadić*, Case No. IT-94-1-A, Judgement, 15 July 1999, paras. 220, 223; *Muvunyi* Trial Judgement, *supra* note 7, para. 460; *Prosecutor v. Mpambara*, Case No. ICTR-01-65-T, Judgement, 11 September 2006, para. 37; *Prosecutor v. Orić*, Case No. IT-03-68-T, Judgement, 30 June 2006, para. 292; *Prosecutor v. Blagojević and Jokić*, Case No. IT-02-60-T, Judgement, 17 January 2005 (‘*Blagojević and Jokić* Trial Judgement’), para. 776; *Prosecutor v. Brđanin*, Case No. IT-99-36-T, Judgement, 1 September 2004 (‘*Brđanin* Trial Judgement’), para. 727; *Prosecutor v. Nindabahizi*, Case No. ICTR-2001-71-I, Judgement and Sentence, 15 July 2004, para. 456; *Prosecutor v. Kordić and Čerkez*, Case No. IT-95-14/2-T, Judgement, 26 February 2001, para. 373; *Prosecutor v. Furundžija*, Case No. IT-95-17/1-T, Judgement, 10 December 1998, para. 257; *Akayesu* Trial Judgement, *supra* note 7, paras. 468, 532. Unfortunately, there appears to be no consensus on the meaning of the terms, and certain chambers have employed them in a manner that is inconsistent with either their common meaning or the law pertaining to individual criminal responsibility. For the purposes of the analysis in this book, and unless otherwise indicated, ‘accomplice liability’ should be understood to encompass joint criminal enterprise, planning, instigating and ordering, and ‘accessory liability’ as limited to aiding and abetting. See Chapter 4, text accompanying note 1. As the doctrine of superior responsibility is unique to international law, it does not lend itself to categorisation by labels derived from domestic criminal practice.

<sup>10</sup> See *infra*, text accompanying notes 18–22, for an explanation of the term ‘physical perpetrator’, as well as other terms of art used in this book.

<sup>11</sup> Superior responsibility is not different from individual criminal responsibility; it is a part of it. Despite the propensity of the drafters of international criminal statutes to place superior responsibility in a different provision from the other forms of responsibility under the court’s jurisdiction, see generally Chapter 3, and contrary to the language of certain *ad hoc* chambers, see, e.g., *Prosecutor v. Aleksovski*, Case No. IT-95-14/1-A, Judgement, 24 March 2000, para. 170; *Prosecutor v. Krnojelac*, Case No. IT-97-25-PT, Decision on the Defence Preliminary Motion on the Form of the Indictment, 24 February 1999, paras. 3, 9, it is clear that superior responsibility is an integral part of the law of individual criminal responsibility in international criminal law. See *Prosecutor v. Blaškić*, Case No. IT-95-14-T, Judgement, 3 March 2000, para. 261 (noting that it is a part of individual criminal responsibility); Draft Code of Crimes Against the Peace and Security of Mankind, in Report of the International Law Commission on the Work of Its Forty-eighth Session, UN Doc. A/51/10 (1996), Art. 2(3)(c) (including it in the same provision with the other forms, with a cross-reference to the article laying out its elements in greater precision). Although superior responsibility is, in many key respects, different from any other form of responsibility, it is at its core a method for the imposition of penal liability on individuals for their own illegal conduct. See Chapter 4, note 327.

believed to be most responsible – civilian and military leaders – and on the forms of responsibility that have developed to reflect the liability of the reputed masterminds or architects of the entire range of alleged criminal conduct.

### 1.2 Scope of this book and terminology used

This book focuses on the law of individual criminal responsibility as applied in international criminal law, and will provide a thorough review of the forms of criminal responsibility. First and foremost, it presents a critical analysis of the elements of individual criminal responsibility as set out in the statutory instruments of the international and hybrid criminal courts and tribunals and their jurisprudence. As such, although this book is primarily intended for the practitioner of international criminal law, the analysis will also be relevant and useful for academics and students of this subject, because it surveys the available subject-matter law in a detailed and comprehensive manner.

Although ‘commission’ is always one of the forms of responsibility listed in an international or hybrid court’s provision on individual criminal responsibility, this book will limit its discussion of commission to joint criminal enterprise, a form of responsibility the jurisprudence has also classified under the rubric of commission. This choice stems from a simple fact that is rarely explicitly acknowledged in the jurisprudence: unlike the forms of responsibility discussed in this book, which are independent of the crimes to which they may be applied, and are typically designed to apply to all the crimes under the jurisdiction of the court in question, the elements of physical commission vary widely, because they are the elements of the crime itself – the *actus reus* (physical conduct and causation) and *mens rea* (culpable mental state).<sup>12</sup> As such, those elements are worthy of an entirely separate discussion that draws on the wealth of scholarship and jurisprudence articulating and applying the core international crimes, and are beyond the scope of the present volume.<sup>13</sup> For similar reasons, this book will not echo the error of most judgements and decisions in referring to the physical and mental elements of the forms of responsibility as *actus reus* and *mens rea*, because they are not in themselves criminal, but only serve to attribute criminality to

<sup>12</sup> See *Muvunyi* Trial Judgement, *supra* note 7, para. 461; *Prosecutor v. Kvočka, Kos, Radić, Žigić and Prcać*, Case No. IT-98-30/1-T, Judgement, 2 November 2001 (*Kvočka et al.* Trial Judgement’), para. 250. See also *Black’s Law Dictionary*, *supra* note 9, p. 39 (‘The wrongful deed that comprises the physical components of a crime and that generally must be coupled with *mens rea* to establish criminal liability’); *ibid.*, p. 1006 (‘The state of mind that the prosecution . . . must prove that the defendant had when committing a crime[:] . . . the second of two essential elements of every crime at common law’).

<sup>13</sup> The elements of the core crimes under international law will be discussed in the second book in this series.

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the accused when combined with the criminal conduct and mental state of the physical perpetrator.

There are two other key terms of art in the book that are used to describe concepts fundamental to this area of the law; both have been chosen for their aptness, and for the sake of clarity and consistency.<sup>14</sup> First, while the jurisprudence alternatively refers to the means by which an accused is held responsible for a crime as ‘forms’,<sup>15</sup> ‘heads’,<sup>16</sup> or ‘modes’,<sup>17</sup> of responsibility or liability, this book has adopted and employed the single term ‘forms of responsibility’. Second, although the jurisprudence alternatively deems the person who physically perpetrates a crime the ‘principal perpetrator’,<sup>18</sup> the ‘principal offender’,<sup>19</sup> the ‘immediate perpetrator’,<sup>20</sup> or the ‘physical perpetrator’,<sup>21</sup> this book will use only the term ‘physical perpetrator’.<sup>22</sup>

The richest source of the law of individual criminal responsibility comes from the ICTY and the International Criminal Tribunal for Rwanda (ICTR) (collectively, ‘Tribunals’ or ‘*ad hoc* Tribunals’), so the jurisprudence of these Tribunals will be the main focus of the book. However, for completeness of analysis, and in recognition that these Tribunals are nearing the end of their mandates, most chapters also include a section that reviews the instruments and the practice to date of five other international or hybrid criminal courts or tribunals with regard to individual criminal responsibility: the International Criminal Court (ICC), the Special Court for Sierra Leone (SCSL), the Special Panels for Serious Crimes in East Timor (SPSC), the Extraordinary

<sup>14</sup> Cf. William R. Anson, *Principles of the Law of Contract* (3rd Am. edn 1919), p. 9 (‘Accurate legal thinking is difficult when the fundamental terms have shifting senses.’).

<sup>15</sup> See, e.g., *Prosecutor v. Krstić*, Case No. IT-98-33-A, Judgement, 19 April 2004, para. 268; *Prosecutor v. Strugar*, Case No. IT-01-42-T, Judgement, 31 January 2005, para. 331; *Brđanin* Trial Judgement, *supra* note 9, para. 257 n. 683.

<sup>16</sup> See, e.g., *Prosecutor v. Blaškić*, Case No. IT-95-14-A, Judgement, 29 July 2004 (‘*Blaškić* Appeal Judgement’), para. 91; *Prosecutor v. Bagilishema*, Case No. ICTR-95-1A-A, Judgement, 3 July 2002, para. 34; *Blagojević and Jokić* Trial Judgement, *supra* note 9, para. 679.

<sup>17</sup> See, e.g., *Prosecutor v. Kordić and Čerkez*, Case No. IT-95-14/2-A, Judgement, 17 December 2004, para. 25; *Prosecutor v. Halilović*, Case No. IT-01-48-T, Judgement, 16 November 2005, para. 94 n. 215.

<sup>18</sup> See, e.g., *Prosecutor v. Kvočka, Radić, Žigić, and Prcać*, Case No. IT-98-30/1-A, Judgement, 28 February 2005 (‘*Kvočka et al.* Appeal Judgement’), para. 90; *Blaškić* Appeal Judgement, *supra* note 1616, para. 48; *Prosecutor v. Krnojelac*, Case No. IT-97-25-A, Judgement, 17 September 2003 (‘*Krnojelac* Appeal Judgement’), para. 84.

<sup>19</sup> *Kvočka et al.* Appeal Judgement, *supra* note 18, para. 251; *Krnojelac* Appeal Judgement, *supra* note 18, para. 75; *Blagojević and Jokić* Trial Judgement, *supra* note 9, para. 702.

<sup>20</sup> See, e.g., *Prosecutor v. Ademi and Norac*, Case No. IT-04-78-PT, Decision for Referral to the Authorities of the Republic of Croatia Pursuant to Rule 11bis, 14 September 2005, para. 36; *Prosecutor v. Martić*, Case No. IT-95-11-PT, Decision on Preliminary Motion Against the Amended Indictment, 2 June 2003, para. 29.

<sup>21</sup> See *Brđanin* Trial Judgement, *supra* note 9, para. 334 n. 881; *Kvočka et al.* Trial Judgement, *supra* note 12, para. 261; *Prosecutor v. Karemera, Ngirumpatse, and Nzirorera*, Case No. ICTR-98-44-AR72.6, Decision on Jurisdictional Appeals: Joint Criminal Enterprise, 12 April 2006, para. 2.

<sup>22</sup> These choices will not affect quotations from judgements, which will retain the original terminology used by the chamber.

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Chambers in the Courts of Cambodia (ECCC), and the Supreme Iraqi Criminal Tribunal (SICT).<sup>23</sup>

Notwithstanding – or perhaps because of – the completion strategies at the two *ad hoc* Tribunals,<sup>24</sup> their chambers remain extremely active, releasing interlocutory decisions and judgements relevant to the forms of responsibility at least once a month. In addition, the newer courts and tribunals have begun to, or will soon, produce relevant jurisprudence, or are nearing the stage where the first judgements will be issued. As a consequence, readers should note that this analysis is current as of 1 December 2006. Since that date, the following relevant decisions and judgements have been issued, or can be expected in the first half of 2007:

- *Prosecutor v. Ndindabahizi*, ICTR-01-71-A, ICTR Appeal Judgement
- *Prosecutor v. Brđanin*, Case No. IT-99-36-A, ICTY Appeal Judgement
- *Prosecutor v. Nahimana, Barayagwiza and Ngeze*, Case No. ICTR-96-11-A, ICTR Appeal Judgement
- *Prosecutor v. Muhimana*, Case No. ICTR-95-1B-A, ICTR Appeal Judgement
- *Prosecutor v. Seromba*, Case No. ICTR-2001-66-T, ICTR Trial Judgement
- *Prosecutor v. Karera*, ICTR-01-74-T, ICTR Trial Judgement
- *Prosecutor v. Norman, Fofana and Kondewa*, Case No. SCSL-2004-14, SCSL Trial Judgement
- *Prosecutor v. Brima, Kamara and Kanu*, Case No. SCSL-04-16-T, SCSL Trial Judgement
- *Prosecutor v. Martić*, Case No. IT-95-11-T, ICTY Trial Judgement
- *Prosecutor v. Mrksić, Radić, and Šljivančanin*, Case No. IT-95-13/1-T, ICTY Trial Judgement.

<sup>23</sup> Formerly known as the Iraqi Special Tribunal (IST). Although the SICT is not, strictly speaking, a hybrid or internationalised tribunal, it is included in these comparative analyses because the portion of its Statute on individual criminal responsibility is clearly modelled on the Rome Statute of the International Criminal Court, and the crimes within its jurisdiction include the core crimes under international law. See Chapter 2, note 783 and accompanying text. Though its practice and jurisprudence are limited, and its proceedings criticised and often chaotic, discussion of the manner in which the law on individual responsibility has been applied by the SICT is nevertheless useful for illustrating the difficulties of adapting international practice and jurisprudence to a particular kind of domestic context.

<sup>24</sup> See Chapter 2, note 798 and accompanying text.

## 2

## Joint criminal enterprise

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Article 7(1) of the ICTY Statute, which has served as the model for the statutes of three other courts applying international criminal law,<sup>1</sup> sets forth a seemingly exhaustive list of the forms of responsibility within the jurisdiction of the Tribunal:

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.<sup>2</sup>

‘Committed’, in this context, would appear to refer only to physical perpetration by the accused of the crime with which he is charged. Beginning in 1999,<sup>3</sup> however, the ICTY Appeals Chamber has consistently held that ‘committing’ implicitly encompasses participation in a joint criminal enterprise (JCE), even though that term does not expressly appear anywhere in the Statute. As it has been developed in the jurisprudence of the *ad hoc* Tribunals, JCE is a theory of

<sup>1</sup> Article 6(1) of the ICTR Statute and Article 6(1) of the Statute of the Special Court for Sierra Leone are essentially identical to Article 7(1) of the ICTY Statute; Article 29 of the Law on the Establishment of the Extraordinary Chambers in the Courts of Cambodia for the Prosecution of Crimes Committed during the Period of Democratic Kampuchea mirrors Article 7(1)’s list of forms of responsibility, but does not reproduce it exactly. See *infra* notes 735–738, 774–782, and accompanying text (full discussion of the statutes and practice of the Sierra Leone and Cambodia examples).

<sup>2</sup> Statute of the International Criminal Tribunal for the Prosecution of Persons Responsible for Serious Violations of International Humanitarian Law Committed in the Territory of the former Yugoslavia since 1991, 32 ILM 1159 (1993), as amended by Security Council Resolution 1660 of 28 February 2006 (‘ICTY Statute’), Article 7(1).

<sup>3</sup> See *Prosecutor v. Tadić*, Case No. IT-94-1-A, Judgement, 15 July 1999 (‘*Tadić* Appeal Judgement’), para. 188. Although the *Furundžija* Trial Judgement was the first time either *ad hoc* Tribunal recognised the existence of common-purpose liability, the *Tadić* Appeal Judgement is the first time any Chamber held that JCE was included within the term ‘committed’ in the article on forms of responsibility and the first time that JCE was used to impose criminal liability on any accused before the *ad hoc* Tribunals.

common-purpose liability:<sup>4</sup> it permits the imposition of individual criminal responsibility on an accused for his knowing and voluntary participation in a group acting with a common criminal purpose or plan.

The doctrine of JCE has its critics, both within and outside the Tribunals.<sup>5</sup> It is certain, however, that JCE is now firmly established in modern international criminal law as a form of responsibility that responds to the concern of how to characterise the role of individual offenders in contemporary armed conflicts, in which collective and organised criminality is notoriously present. Although international courts are bound to comply with the fundamental principle of criminal law that an individual may only be held liable for his conduct,<sup>6</sup> the advantage of JCE lies in its utility in describing and attributing responsibility to those who engage in criminal behaviour through oppressive criminal structures or organisations, in which different perpetrators participate in different ways at different times to accomplish criminal conduct on a massive scale. Indeed, although it took some years to evolve, JCE has become the principal methodology used by international prosecutors to describe the liability of accused in such circumstances.<sup>7</sup>

<sup>4</sup> The ICTY has alternatively referred to joint criminal enterprise with the terms ‘common criminal plan’, ‘common criminal purpose’, ‘common design or purpose’, ‘common criminal design’, ‘common purpose’, ‘common design’, and ‘common concerted design’. See *Prosecutor v. Brđanin and Talić*, Case No. IT-99-36-PT, Decision on Form of Further Amended Indictment and Prosecution Application to Amend, 26 June 2001 (*Brđanin and Talić* June 2001 Pre-Trial Decision), para. 24; *Prosecutor v. Milutinović, Šainović and Ojdanić*, Case No. IT-99-37-AR72, Decision on Dragoljub Ojdanić’s Motion Challenging Jurisdiction – Joint Criminal Enterprise, 21 May 2003 (*Milutinović et al.* JCE Appeal Decision), para. 36 (‘the phrases “common purpose” ... and “joint criminal enterprise” ... refer to one and the same thing’).

<sup>5</sup> See *infra* text accompanying notes 455–591 (section discussing the *Brđanin* Trial Judgement’s attempt to restrain JCE); text accompanying notes 600–603 (discussing the *Stakić* Trial Judgement’s disapproval of JCE because of its overtones of group criminality, or the impression that liability is imposed for mere membership in a criminal organisation); *Prosecutor v. Simić, Tadić and Zarić*, Case No. IT-95-9-T, Judgement, 17 October 2003 (*Simić et al.* Trial Judgement), Separate and Partially Dissenting Opinion of Judge Per-Johan Lindholm, para. 2 (‘I dissociate myself from the concept or doctrine of joint criminal enterprise in this case as well as generally.’). See also Shane Darcy, ‘An Effective Measure of Bringing Justice?: The Joint Criminal Enterprise Doctrine of the International Criminal Tribunal for the Former Yugoslavia’, (2004–2005) 20 *American University International Law Review* 153; Allison Marston Danner and Jenny S. Martinez, ‘Guilty Associations: Joint Criminal Enterprise, Command Responsibility, and the Development of International Criminal Law’, (2005) 93 *California Law Review* 75; William A. Schabas, ‘*Mens rea* and the International Tribunal for the Former Yugoslavia’, (2001) 37 *New England Law Review*, 1025, 1032–1034 (arguing that the JCE doctrine has been used to achieve ‘discounted convictions’); Mohamed Elewa Badar, ‘“Just Convict Everyone!” – Joint Perpetration: From *Tadić* to *Stakić* and Back Again’, (2006) 6 *International Criminal Law Review* 293, 301 (criticising the third category of JCE).

<sup>6</sup> This tenet of criminal law is also termed the ‘culpability principle’. See Nicola Pasani, ‘The Mental Element in International Crime’, in Flavia Lattanzi and William A. Schabas (eds.), 1 *Essays on the Rome Statute of the International Criminal Court* (‘*Essays*’) (1999), pp. 121–125 (discussing the principle of culpability, or *nullum crimen sine culpa*, in national and international law); Mirjan Damaska, ‘The Shadow Side of Command Responsibility’, (2001) 49 *American Journal of Comparative Law* 455 (discussing the culpability principle in the context of superior responsibility).

<sup>7</sup> See Daryl A. Mundis and Fergal Gaynor, ‘Current Developments at the *ad hoc* International Criminal Tribunals’, (2005) 3 *Journal of International Criminal Justice* 268; Nicola Piacente, ‘Importance of the Joint Criminal Enterprise Doctrine for the ICTY Prosecutorial Policy’, (2004) 2 *Journal of International Criminal Justice* 446.

This chapter begins with a discussion of the origins and evolution of JCE in the *ad hoc* Tribunals, and continues with an analysis of the elements of the three categories of JCE established by *Tadić*. Separate sections discuss the most contentious issues in this area of the law: two different attempts by trial chambers to limit JCE or revise the Tribunals' approach to common-purpose liability, the reasons for their occurrence, and the manner in which those attempts have been dealt with in subsequent jurisprudence. The chapter then examines, from a comparative perspective, liability for participation in a common design or purpose in the legal instruments, indictments, and jurisprudence of the other international courts and tribunals, including the ICC, the Special Court for Sierra Leone, the Special Panels for Serious Crimes in East Timor, the Extraordinary Chambers in the Courts of Cambodia, and the Supreme Iraqi Criminal Tribunal.

## 2.1 Origins and development of Joint Criminal Enterprise in the jurisprudence of the *ad hoc* Tribunals

Contrary to widely held belief, the first judicial pronouncement from the *ad hoc* Tribunals as to the definition and scope of JCE was not the *Tadić* Appeal Judgement, but the *Furundžija* Trial Judgement, rendered in December 1998 by a bench composed of Judges Florence Mumba, Antonio Cassese and Richard May.<sup>8</sup> The indictment alleged that Anto Furundžija, a commander of the Bosnian Croat anti-terrorist police unit known as the Jokers, interrogated two victims – referred to by the pseudonyms Witness A and Witness D – while Miroslav Bralo, another member of the Jokers, beat them with a baton and forced Witness A to have sex with him.<sup>9</sup> For this incident, Furundžija was

<sup>8</sup> *Prosecutor v. Furundžija*, Case No. IT-95-17/1-T, Judgement, 10 December 1998 ('*Furundžija* Trial Judgement'). The first explicit reference from a chamber of the ICTY to the so-called 'common-purpose' doctrine in the law of individual criminal responsibility occurred in the *Čelebići* Trial Judgement, rendered a few weeks prior to *Furundžija*, in the following terms:

[W]here a [pre-existing plan to engage in criminal conduct] exists, or where there otherwise is evidence that members of a group are acting with a common criminal purpose, all those who knowingly participate in, and directly and substantially contribute to, the realisation of this purpose may be held criminally responsible under Article 7(1) for the resulting criminal conduct.

*Prosecutor v. Delalić, Mucić, Delić and Landžo*, Case No. IT-96-21-T, Judgement, 16 November 1998 ('*Čelebići* Trial Judgement'), para. 328. *Čelebići* did not opine further on the elements or applicability of this doctrine. See also *Prosecutor v. Kayishema and Ruzindana*, Case No. ICTR 95-1-T, Judgement, 21 May 1999 ('*Kayishema and Ruzindana* Trial Judgement'), para. 203 (quoting and endorsing this passage in *Čelebići*). The JCE-related findings of the *Kayishema and Ruzindana* Trial Chamber are discussed in detail below. See *infra* text accompanying notes 114–124.

<sup>9</sup> *Prosecutor v. Furundžija*, Case No. IT-95-17-I, Indictment, 2 November 1995 ('*Furundžija* Indictment'), para. 26 (redacted version). In this indictment, all references to Bralo are redacted, and the indictment as it pertained to Bralo – a revised version of which was issued on 21 December 1998 – remained under seal