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# THE PROBLEM OF RISK IN INTERNATIONAL CRIMINAL LAW

MARK A. SUMMERS\*

## I. INTRODUCTION

Calibrating individual responsibility for group criminality is one of the most difficult challenges international criminal law faces. Beginning at Nuremberg and continuing with the *ad hoc* tribunals, courts have struggled with this issue.<sup>1</sup> International crimes are, by definition, large-scale operations involving hundreds, even thousands, of participants.<sup>2</sup> Because the mission of international criminal law is to punish “the most serious crimes of concern to the international community,”<sup>3</sup> its targets are defendants who occupy civilian or military leadership positions while the crimes they are prosecuted for are committed by individuals loosely connected to the leaders on battlefields miles away.<sup>4</sup> The leaders, who set in motion a campaign of ethnic cleansing or genocide, are obviously more culpable than those who implement the plan. But should the leaders be held responsible for all the crimes committed by their subordinates, even if those crimes were not part of the original plan?

One solution could be enterprise liability; that is, defendants are liable because of their membership in the group and not for crimes committed by others in the group that are attributed to them. This solution was attempted at Nuremberg based on a United States proposal that the International Military Tribunal (IMT) would “try the criminality of the organizations themselves” and individual defendants would then be convicted based on their membership in those organizations.<sup>5</sup> The IMT partially rejected this

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1. Neha Jain, *The Control Theory of Perpetration in International Criminal Law*, 12 CHL.J.INT’L L. 159, 160 (2011).

2. *Id.* at 161.

3. Rome Statute of the International Criminal Court, Preamble, July 17, 1998, 2187 U.N.T.S. 3 [hereinafter Rome Statute].

4. Jain, *supra* note 1, at 161–62.

5. Allison Marston Danner & Jenny S. Martinez, *Guilty Associations: Joint Criminal Enterprise, Command Responsibility, and the Development of International Criminal Law*, 93 CAL. L. REV. 75, 113 (2005) [hereinafter Danner & Martinez]; Charter of the International Military Tribunal at Nuremberg, Annex to the London Agreement, art. 10, Aug. 8, 1945, 82 U.N.T.S. 279 [hereinafter Nuremberg Charter].

solution by placing the burden on the prosecution to prove that a defendant voluntarily and knowingly participated in the group's criminal activities.<sup>6</sup> Since Nuremberg, no international criminal court has accepted group membership alone as a basis for individual criminal liability.<sup>7</sup>

While enterprise liability was not accepted in international criminal law, conspiracy, as a way of attributing liability for crimes committed by members of a criminal group, was.<sup>8</sup> Article 6 of the Nuremberg Charter<sup>9</sup> provided that defendants who participated in the common plan or conspiracy were responsible "for *all acts* performed by *any persons* in execution of such plan." This was the seed from which the International Criminal Tribunal for Yugoslavia's (ICTY) doctrine of joint criminal enterprise grew.<sup>10</sup>

In 1993, the U.N. Security Council created the ICTY to prosecute crimes that occurred during the war in Yugoslavia.<sup>11</sup> A year later, the Security Council established another *ad hoc* tribunal, the International Criminal Tribunal for Rwanda (ICTR), to prosecute the crimes that occurred during the genocide in Rwanda.<sup>12</sup> Although these tribunals had jurisdiction over crimes, which by their very nature are usually collective,<sup>13</sup> their governing statutes seemingly ignored this fact in the provisions dealing with individual criminal responsibility. Those provisions stipulated that "a person who planned, instigated, ordered, [or]

In cases where a group or organization is declared criminal by the Tribunal, the competent national authority of any Signatory shall have the right to bring individuals to trial for membership therein before national, military or occupation courts.

6. Danner & Martinez, *supra* note 5 at 115; *see also* Saira Mohamed, Remarks by Saira Mohamed, 105 AM. SOC'Y INT'L L PROC. 321 (Mar. 23–26 2011) (observing that the IMT "certainly placed significant limitations on the reach of conspiracy liability and the criminal organizations doctrine").

7. Danner & Martinez, *supra* note 5 at 109.

8. *Id.* at 116.

9. Nuremberg Charter, *supra* note 5, art. 6 provides:

Leaders, organizers, instigators and accomplices participating in the formulation or execution of a 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.

*Id.* (emphasis added).

10. Statute of the International Criminal Tribunal for the Former Yugoslavia, art. 7, U.N. Doc. S/RES/827 (May 25, 1993) [hereinafter ICTY Statute].

11. *Id.*

12. Statute of the International Criminal Tribunal for Rwanda, U.N. Doc. S/RES/955 (Nov. 8, 1994) [hereinafter ICTR Statute].

13. *See, e.g.*, Rome Statute, *supra* note 3, art. 8 (War crimes are "committed as part of a plan or policy or as part of a large scale commission of such crimes") and art. 7 (Crimes against humanity are "part of a widespread or systematic attack directed against any civilian population"); *see also* Jain, *supra* note 1 ("An international crime such as genocide typically involves widespread participation by a very large number of people. . . .").

committed” a crime was individually responsible without mentioning attribution of criminal liability for crimes committed by others who were members of a group to which the defendant belonged.<sup>14</sup> They contained no analog to Article 6 of the Nuremberg Charter or any other type of associational liability, except aiding and abetting another person in the planning, preparation, or execution of a crime.<sup>15</sup> But because aiders and abettors need only know that they are providing assistance to the principal perpetrator of the crime, they are viewed as having a “lower level of criminal culpability,”<sup>16</sup> which would inadequately reflect the guilt of those in leadership positions.<sup>17</sup>

Not surprisingly, then, the ICTY faced the issue of how to attribute liability for crimes among the members of a group in its first case.<sup>18</sup> The *Tadić* court solved the problem by finding that a defendant, who was part of a joint criminal enterprise (JCE), was liable for crimes committed by other members of the group.<sup>19</sup> The *Tadić* Appeals Chamber discovered three forms of JCE liability—JCE I (basic/shared intent); JCE II (systemic/prison camp); and JCE III (extended/other foreseeable crimes)<sup>20</sup>—which it said were grounded in customary international law.<sup>21</sup>

Because it makes members of a JCE III liable for crimes that are outside the criminal purpose of the enterprise so long as those crimes are “foreseeable,”<sup>22</sup> the *Tadić* Court’s conclusion that the extended form of liability (JCE III) is customary law has been vigorously challenged by

14. ICTY Statute, *supra* note 10, art. 7(1); ICTR Statute, *supra* note 12, art. 6(1). The statutes of other post-Nuremberg *ad hoc* tribunals are identical in this respect to those of the ICTY and ICTR: See Statute of the Special Court for Sierra Leone, art. 6(1), U.N. Doc. S/RES/1315 (Aug. 13, 2000), available at <http://www.sc-sl.org/LinkClick.aspx?fileticket=uCInd1MJeEw%3D&>; Law on the Establishment of the Extraordinary Chambers, art. 29, 27(NS/RKM/1004/006) (Oct. 27, 2004), available at [http://www.eccc.gov.kh/sites/default/files/legaldocuments/KR\\_Law\\_as\\_amended\\_27\\_Oct\\_2004\\_Eng.pdf](http://www.eccc.gov.kh/sites/default/files/legaldocuments/KR_Law_as_amended_27_Oct_2004_Eng.pdf).

15. Significantly, none of these statutes provided for attribution of liability by conspiracy as the Nuremberg Charter did. See *supra* text accompanying note 9; See, e.g., ICTY Statute, *supra* note 10, art. 7(1).

16. Gunel Guliyeva, *The Concept of Joint Criminal Enterprise and ICC Jurisdiction*, 5 EYES ON THE ICC 49, 51 (2008–2009) (quoting Prosecutor v. Tadić, Case No. IT-94-I-A, Appeals Judgment (Int’l. Crim. Trib. for the Former Yugoslavia July 15, 1999) [hereinafter Tadić Appeal Judgment]).

17. *Id.* (There are “situations where the weight of other participants’ contributions is no less than that of physical perpetrators and where the previously mentioned modes of participation do not fairly reflect ‘the moral gravity’ of such contributions.”) (quoting Appeals Tadić Appeal Judgment).

18. Tadić Appeal Judgment, *supra* note 17.

19. *Id.* ¶¶ 226–28.

20. Guliyeva, *supra* note 16, at 52. The criteria for liability under the three forms of JCE will be discussed in greater detail in Part II, *infra*.

21. Tadić Appeal Judgment, *supra* note 17, ¶¶ 226–28.

22. *Id.* ¶ 204 *passim*.

scholars.<sup>23</sup> Also, it has been argued that there is no basis for JCE III liability in the statutes of the international criminal tribunals.<sup>24</sup> Despite these criticisms and many others,<sup>25</sup> JCE I and II, as well as JCE III, have been “adopted without modification by most subsequent cases.”<sup>26</sup>

The Rome Statute of the International Criminal Court (ICC),<sup>27</sup> unlike the ICTY and ICTR statutes, has two provisions dealing with group criminality. Article 25(3)(a) provides that a person who “[c]ommits . . . a crime [within the jurisdiction of the Court] whether as an individual, [or] jointly with another or through another person . . . is criminally responsible.”<sup>28</sup> Article 25(d) makes a person criminally liable who “[i]n any other way contributes to the commission or attempted commission of such a crime by a group of persons acting with a common purpose.”<sup>29</sup> Joint liability in Article 25(3)(a) reflects the concept of co-perpetration,<sup>30</sup> while Article 25(d) resembles a form of aiding and abetting collective criminality.<sup>31</sup>

Like JCE I, Article 25(a) makes a co-perpetrator liable for crimes that are expressly part of a plan formulated by a group of which he was a member even though he did not perform every act necessary to complete the crimes.<sup>32</sup> Since the Rome Statute was elaborated, however, it has been the subject of intense scholarly debate whether Article 25(a)(3) attributes liability for so-called “deviant” crimes, i.e., those that are not part of the plan but are nonetheless foreseeable consequences of it.<sup>33</sup>

23. Jens David Ohlin, *Joint Intentions to Commit International Crimes*, 11 CHI. J. INT’L L. 693, 709, 711–12 (2010–2011) (questioning whether prior to *Tadić* “there was a single case applying international criminal law or the international law of war that held a defendant vicariously responsible for the foreseeable actions of other members of a common criminal enterprise that nonetheless fell outside the scope of the criminal plan”); *Id.* at 712 (concluding that “there remains no non-question-begging rationale for JCE III in customary international law”); George P. Fletcher & Jens David Ohlin, *Reclaiming Fundamental Principles of Criminal Law in the Darfur Case*, 3 J. INT’L CRIM. JUST. 539, 548 (2005) (“The history of the doctrine [JCE] is one of judicial creativity.”).

24. Kai Ambos, *Joint Criminal Enterprise and Command Responsibility*, 5 J. INT’L CRIM. JUST. 159, 173 (2007) (“JCE II and III constitute new and autonomous (systemic) concepts of imputation without an explicit basis in written international criminal law.”). Art. 6 of the Nuremberg Charter contradicts this conclusion. In fact, it goes even further than JCE III by imposing liability for “all acts,” not just foreseeable ones. Nuremberg Charter, *supra* note 5.

25. The criticisms of JCE are catalogued in Guliyeva, *supra* note 16, at 59–65.

26. Ambos, *supra* note 24, at 171.

27. Rome Statute, *supra* note 3.

28. *Id.* art. 25(3)(a).

29. *Id.* art. 25(3)(d).

30. Jain, *supra* note 1, at 182–83; Ambos, *supra* note 24 at 170–71.

31. Ambos, *supra* note 24, at 172.

32. See *infra* note 54 and accompanying text.

33. Compare, e.g., ANTONIO CASSESE, INTERNATIONAL CRIMINAL LAW 212 (2d ed. 2008) (finding that all three types of JCE are included in Article 25(3)(a)), with Fletcher & Ohlin, *supra* note

The search for an answer to the question whether the Rome Statute includes a form of such liability depends upon another of its provisions, Article 30, which states that “[u]nless otherwise provided, a person shall be criminally responsible and liable for punishment for a crime within the jurisdiction of the Court only if the material elements are committed with intent and knowledge.”<sup>34</sup> In the first case decided by an ICC Trial Chamber, *Prosecutor v. Lubanga*,<sup>35</sup> the court explicitly rejected the earlier holding of a Pre-Trial Chamber<sup>36</sup> when it decided that liability based on some form of recklessness or *dolus eventualis* (JCE III)<sup>37</sup> was “deliberately excluded” from Article 30.<sup>38</sup>

Despite the *Lubanga* Trial Chamber’s rejection of recklessness and its civil law cousin, *dolus eventualis*, as mental states which could support a conviction for a violation of international criminal law, some theory of liability for conduct where the mental state of the perpetrator is less than intentional or knowing is essential if the ICC is to carry out its mandate to “put an end to impunity for the perpetrators of these crimes.”<sup>39</sup> Moreover, since risk-taking is an essential feature of recklessness,<sup>40</sup> the *Lubanga* Trial Chamber opened the door to such an approach when it held that the implementation of the co-perpetrators’ common plan must “[embody] a sufficient risk that, if events follow the ordinary course, a crime will be committed.”<sup>41</sup>

There is, however, a lack of clarity in international criminal law regarding the standard that should be applied in attributing liability for risky conduct.<sup>42</sup> An approach that is too lax can result in overly expansive liability that exceeds culpability.<sup>43</sup> An approach that is too restrictive can produce impunity for conduct that is worthy of punishment.<sup>44</sup> This Article

23, at 548 (arguing that Article 25(3)(a) “effectively replaced” JCE as it was applied by the ICTY), and Ambos, *supra* note 24, at 171–72 (asserting that JCE I is a form of co-perpetration within the meaning of Article 25(3)(a) but JCE II and III are not).

34. Rome Statute, *supra* note 3, art. 30(1).

35. *Prosecutor v. Lubanga*, Case No. ICC-01/04-01/06-248, Judgment (Mar. 14, 2012) [hereinafter *Lubanga Judgment*].

36. *Prosecutor v. Lubanga*, Case No. ICC-01/04-01/06, Decision on the Confirmation of Charges (Jan. 29, 2007) [hereinafter *Lubanga PTC Decision*].

37. See Johan D. van der Vyver, *infra* note 138, at 243–44.

38. *Lubanga Judgment*, *supra* note 35, at ¶ 1011.

39. Rome Statute, *supra* note 3, at Preamble.

40. MODEL PENAL CODE, cmt. § 2.02 (1985).

41. *Lubanga Judgment* at ¶ 984.

42. See, e.g., *infra* pp. 685–86.

43. Ronald C. Slye & Beth Van Schaack, INTERNATIONAL CRIMINAL LAW: THE ESSENTIALS 293 (2009).

44. *Id.*

will explore the causes of this lack of clarity beginning with the *Tadić* case and the post-*Tadić* decisions of the ICTY. Then it will analyze the nascent case law of the ICC to see how the Court has dealt with this problem so far. Finally, this Article will suggest a solution, based on the Model Penal Code approach to recklessness, which strikes the proper balance between over attribution and under punishment.

## II. *TADIĆ* AND CRIMINAL LIABILITY BASED ON RECKLESSNESS

In *Tadić*, the Appeals Chamber of the ICTY faced a dilemma. *Tadić* had been acquitted by the Trial Chamber of the most serious crimes with which he was charged, the murders of five individuals from the village of Jaskići.<sup>45</sup> His participation in those crimes did not amount to direct perpetration,<sup>46</sup> nor was he liable under the theory of superior responsibility.<sup>47</sup> Without another theory of individual responsibility,<sup>48</sup> the Trial Chamber's decision would have to stand. Consequently, the Appeals Chamber searched for and found what it deemed to be a theory of customary international law<sup>49</sup> that justified *Tadić*'s conviction. The theory was "common purpose" liability,<sup>50</sup> which the *Tadić* court said "encompasses three distinct categories of collective criminality,"<sup>51</sup> which have come to be known as Joint Criminal Enterprise (JCE) I, II and III.<sup>52</sup>

45. *Tadić* Appeal Judgment ¶ 172.

46. Direct perpetration is planning, instigating, ordering or committing. ICTY Statute, *supra* note 10, art. 7(1). For an analysis of the evidence against *Tadić*, see *infra* p. 676.

47. ICTY Statute, *supra* note 10, art. 7(3).

48. *Tadić* could have been held liable as an aider and abettor under ICTY Statute, art. 7(1), but to have done so would have "understate[d] the degree of [his] criminal responsibility." *Tadić* Appeal Judgment at ¶ 192.

49. *Tadić* Appeal Judgment ¶¶ 194–95.

50. *Tadić* Appeal Judgment ¶ 195.

51. *Id.*

52. Commentators have criticized the *Tadić* Appeals Chambers' conclusion that the third category of JCE (JCE III) is customary international law. See, e.g., Danner & Martinez, *supra* note 5, at 110 ("The cases cited in *Tadić* . . . do not support the sprawling form of JCE, particularly the extended form of this kind of liability, currently employed at the ICTY."); Kai Ambos, Amicus Curiae Brief in the Matter of the Co-Prosecutors' Appeal of the Closing Order Against Kaing Guek Eav "Duch" dated 8 August 2008, 20 Criminal Law Forum 353, 385–86 (2009), available at <http://www.springerlink.com/content/1046-8374/20/2-3/>. More recently, one of the *ad hoc* post-ICTY tribunals, the Extraordinary Chambers in the Courts of Cambodia, held that JCE III was not customary international law in 1975–1979, the time period relevant to Case 002. Prosecutor v. Ieng et al., Decision of the Pre-Trial Chamber on the Appeals Against the Co-Investigative Judges Order on Joint Criminal Enterprise (JCE), ¶¶ 77–78, and 87, Case No. 002-19-09-2007-ECCC/OCIJ (PTC38) (May 20, 2010), available at [http://www.eccc.gov.kh/sites/default/files/documents/courtdoc/D97\\_15\\_9\\_EN.pdf](http://www.eccc.gov.kh/sites/default/files/documents/courtdoc/D97_15_9_EN.pdf).

While this Article focuses principally on JCE III, a brief description of all three forms is appropriate.

#### A. JCE I

The most basic, and least controversial, form of JCE liability is the common enterprise/shared common intention category (JCE I).<sup>53</sup> The *Tadić* Appeals Chamber described JCE I as,

... all co-defendants, acting pursuant to a common design possess the same criminal intention; for instance, the formulation of a plan among the co-perpetrators to kill, where, in effecting this common design (and even if each co-perpetrator carries out a different role with it), they nevertheless all possess the intent to kill. . . .<sup>54</sup>

Unfortunately, this form of JCE could not support a finding that Tadić had participated in the murders. While the evidence proved that he “actively took part in the common criminal purpose to rid the Prijedor region of the non-Serb population,” and that it was “beyond doubt” that he was “aware of the killings accompanying the commission of inhumane acts against the non-Serb population,”<sup>55</sup> evidence of awareness (knowledge) was insufficient to prove beyond a reasonable doubt that Tadić shared the intention to kill the victims.

#### B. JCE II

The second category of JCE liability—the “systemic form”<sup>56</sup>—is not relevant to the facts in *Tadić*.<sup>57</sup> This form of liability is derived from the concentration camp cases where, in order to establish the liability of the camp commander, or others higher up the chain of command, the prosecution must prove:

(i) the existence of an organized system to ill-treat detainees and commit the various crimes alleged; (ii) the accused’s awareness of the nature of the system; and (iii) the fact that the accused in some way actively participated in enforcing the system, i.e., encouraged,

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53. See Ambos, *supra* note 24, at 160.

54. *Tadić* Appeal Judgment ¶ 196.

55. *Id.* ¶ 231.

56. *Id.* ¶¶ 202–03; Ambos, *supra* note 24, at 160 (describing JCE II as the “systemic form” of JCE).

57. *Tadić* Appeal Judgment ¶ 203.



aided and abetted or in any case participated in the realisation of the common criminal design.<sup>58</sup>

Based on these criteria, JCE II requires knowledge of the result (ill treatment of prisoners) and some affirmative act of participation in the enterprise. JCE II could not solve the problem the *Tadić* Appeals Chamber faced because, most obviously, the crimes did not take place in a prison camp setting. So the *Tadić* court had to look even further, venturing into what some believe was entirely new territory,<sup>59</sup> where it found JCE III.

### C. JCE III

The third category of JCE, the “so-called ‘extended’ joint enterprise,”<sup>60</sup> exists where one of the co-actors commits a crime not within the scope of the common plan but which constitutes a “natural and foreseeable consequence” of the execution of the plan.<sup>61</sup> The *Tadić* Appeals Chamber gave an example of JCE III that was eerily similar to the facts in *Tadić* itself. It posited a hypothetical common plan to ethnically cleanse a village during which one or more of the villagers were killed.<sup>62</sup> While killing civilians was not part of the plan, “it was nevertheless foreseeable that the forcible removal of civilians at gunpoint might well result in the deaths of one or more [of them].”<sup>63</sup>

Here, unlike JCE I or JCE II, attribution of criminal liability for the murders is cut loose from the *mens rea* requirements of intent to produce, or even knowledge of, the result. Instead criminal attribution rests on the more elastic concept of foreseeability. No wonder ICTY prosecutors have used JCE as a theory of liability so frequently;<sup>64</sup> it relieves them to a substantial degree of their burden of proof and exposes defendants to punishment for the most serious offenses on proof arguably amounting to little more than simple negligence.<sup>65</sup>

58. *Id.* ¶ 202.

59. See *supra* note 52; see also Ambos, *supra* note 24, at 173.

60. Ambos, *supra* note 24, at 160.

61. *Tadić* Appeal Judgment ¶ 204.

62. *Id.*

63. *Id.*

64. One study showed that from its genesis in *Tadić* until 2004, JCE was alleged in 64% of the ICTY indictments. Danner & Martinez, *supra* note 5, at 107–08. If “acting in concert” is added as a theory for attributing liability, the total rises to 81%. *Id.*

65. *Id.* at 108–09.

*Tadić* set out the elements that must be proven to establish membership in a JCE III.<sup>66</sup> There are three *actus reus* elements that are the same for all three categories of JCE:<sup>67</sup> (1) a plurality of persons; (2) a common plan, design or purpose amounting to or involving the commission of a crime within the ICTY statute; and (3) a participation element—the members of the group must assist in or contribute to the execution of the plan.<sup>68</sup>

The *mens rea* element, however, is different for JCE I and JCE III. For JCE I, the *mens rea* is “the intent to perpetrate a certain crime” shared by all the co-perpetrators.<sup>69</sup> By contrast, for JCE III, there must be “the *intention* to participate in and further the criminal activity or the criminal purpose of a group . . . or in any event to the commission of a crime by the group,”<sup>70</sup> and for a defendant to be liable for a crime other than one included in the group’s plan, it must have been “*foreseeable* that such a crime might be perpetrated by one or other members of the group and . . . the accused *willingly took that risk*.”<sup>71</sup>

The post-*Tadić* cases did not interpret its holding consistently, leading to substantial confusion, especially regarding the required level of risk awareness<sup>72</sup> and the likelihood that the risk would materialize.<sup>73</sup> Since the *Tadić* opinion itself is the basis for much of this confusion, it is there we turn first in search of its understanding of risk.

66. JCE III was not alleged in the indictment as a basis for the defendant’s liability for the murders in Jaskići. *Id.* at n.130.

67. *Tadić* Appeal Judgment ¶¶ 227–28.

68. *Tadić* Appeal Judgment ¶ 227 iii.

69. *Id.* ¶ 228.

70. *Id.* In most, if not all, cases whether the prosecution proves the *mens rea* element will depend on the defendant’s conduct because “[i]n practice, the significance of the accused’s contribution will be relevant to demonstrating that the accused shared the intent to pursue the common purpose.” *Prosecutor v. Kovčeka, et al.*, Case No. IT-98-30/1-A, Judgment ¶ 97 (Int’l Crim. Trib. for the Former Yugoslavia Feb. 28, 2005), available at <http://www.icty.org/x/cases/kvocka/acjug/en/kvo-aj050228e.pdf> [hereinafter *Kovčeka* Appeal Judgment].

71. *Tadić* Appeal Judgment ¶ 228.

72. Compare *Kovčeka* Appeal Judgment ¶ 86 (“A participant may be responsible for such crimes only if the Prosecution proves that the accused had sufficient knowledge such that the additional crimes were a natural and foreseeable consequence to him.”), with *Prosecutor v. S. Milosević*, Case No. IT-02-54, Decision on Motion for Judgment of Acquittal ¶ 290 (Int’l Crim. Trib. for the Former Yugoslavia June 16, 2004), [http://www.icty.org/x/cases/slobodan\\_milosevic/tdec/en/040616.pdf](http://www.icty.org/x/cases/slobodan_milosevic/tdec/en/040616.pdf) (stating that attribution is appropriate if “it was reasonably foreseeable to him” that other crimes would be committed by a participant in the joint criminal enterprise).

73. Compare *Prosecutor v. Krstić*, Case No. IT-98-33-A, Judgment ¶ 150 (Int’l Crim. Trib. for the Former Yugoslavia Apr. 19, 2004), <http://www.icty.org/x/cases/kvocka/acjug/en/kvo-aj050228e.pdf> (“[T]he accused participated in that enterprise aware of the probability that other crimes may result.”), with *Prosecutor v. S. Milosević*, Case No. IT-02-54, Decision on Motion for Judgment of Acquittal ¶ 290 (stating that the crime charged must be a “possible consequence” of executing the JCE).

#### *D. Risk and Mens Rea*

The facts supporting the existence of, and Tadić's participation in, a JCE were: (1) he was "an armed member of an armed group;"<sup>74</sup> (2) the armed group attacked the village of Jaskići and Tadić "actively took part in this attack, rounding up and severely beating some of the men;"<sup>75</sup> (3) the armed group was violent, beating some of the men from the village "into insensibility[] as they lay on the road"<sup>76</sup> and threatening witnesses with death as the men were being taken away; and (4) five men, who had been alive, were found dead, after the armed group, including Tadić, had left the village.<sup>77</sup> Based on this evidence the Appeals Chamber concluded:

[T]he only possible inference to be drawn is that the Appellant had the intention to further the criminal purpose to rid the Prijedor region of the non-Serb population, by committing inhumane acts against them. That non-Serbs might be killed in the effecting of this common aim was, in the circumstances of the present case, foreseeable. The Appellant was aware that the actions of the group of which he was a member were likely to lead to such killings, but he nevertheless willingly took that risk.<sup>78</sup>

In just this brief passage, the Appeals Chamber used two different terms—"foreseeable" and "aware"—when describing the *mens rea* required to prove participation in a JCE III. To further complicate the picture, in an earlier portion of the opinion, the Court stated "everyone in the group must have been able to *predict* this result."<sup>79</sup> As one post-*Tadić* Trial Chamber observed, "[i]t is unfortunate that expressions conveying different shades of meaning have been used . . . apparently interchangeably."<sup>80</sup>

74. Tadić Appeal Judgment ¶ 232.

75. *Id.*

76. *Id.*

77. *Id.* ¶ 181.

78. *Id.* ¶ 232.

79. *Id.* ¶ 220 (emphasis in the original). The Tadić Appeals Chamber described this state of mind as *dolus eventualis* or advertent recklessness. *Id.* Advertent recklessness is recognized in English law. See Stephen P. Garvey, *What's Wrong with Involuntary Manslaughter?*, 85 TEX. L. REV. 333, 340 n.38 (2006).

80. Prosecutor v. Brđanin and Talić, Case No. IT-99-36-PT, Decision on Form of Further Amended Indictment and Prosecution Application to Amend, ¶ 29 n.112 (Int'l Crim. Trib. for the Former Yugoslavia June 26 2001), available at <http://www.icty.org/x/cases/brdanin/tdec/en/10626 FI215879.htm>.

Nonetheless, that same Trial Chamber concluded that the words “predictable” and “foreseeable” are truly interchangeable in this context.<sup>81</sup> Both terms involve foretelling that a future event (consequence) will happen.<sup>82</sup> Awareness, on the other hand, is equated with knowledge.<sup>83</sup> It would seem to be epistemologically impossible to have actual knowledge that conduct will bring about a particular result. The *Lubanga* Trial Chamber recognized this impossibility when it observed that the “co-perpetrators only ‘know’ the consequences of the conduct once they have occurred.”<sup>84</sup> Thus, a certain amount of contingency as to the result is built into whichever of the three terms is used, although arguably awareness requires a higher degree of certainty than foreseeability or predictability.<sup>85</sup>

It is important to note that the *Tadić* Appeals Chamber used these three terms in different contexts. The murders of non-Serbs by members of the JCE were a foreseeable consequence of the plan to ethnically cleanse the villages by forcibly displacing the residents.<sup>86</sup> “Aware,” on the other hand, referred to the defendant’s knowledge “that the actions of the group of which he was a member were likely to lead to such killings.”<sup>87</sup> “Predictability,” as it is used in *Tadić*, seems to quantify the likelihood that the risk will materialize, which is very high indeed if “everyone in the group”<sup>88</sup> must be able to predict the specific crime that will be committed.<sup>89</sup>

A source of disagreement among the post-*Tadić* Courts is whether the foreseeability of the commission of a crime not within the common plan is determined objectively (from a reasonable person’s standpoint) or subjectively (from the defendant’s standpoint).<sup>90</sup> The language used by the *Tadić* Appeals Chamber unequivocally adopts the subjective standard:

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81. *Id.*

82. 1 THE NEW SHORTER OXFORD ENGLISH DICTIONARY 1003 (Leslie Brown ed., 1993) (defining foresee as “be aware of beforehand; predict”); 2 THE NEW SHORTER OXFORD ENGLISH DICTIONARY 1003 (Leslie Brown ed., 1993) (defining predict as “[a]nnounce as an event that will happen in the future”).

83. 1 THE NEW SHORTER OXFORD ENGLISH DICTIONARY 157 (Leslie Brown ed. 1993).

84. *Lubanga* Judgment ¶ 1012.

85. The Model Penal Code recognizes that absolute certainty is not required. It defines the required level of certainty for “knowledge” as “practical certainty.” THE MODEL PENAL CODE § 2.20(2)(b)(ii) (1985).

86. See *Tadić* Appeal Judgment ¶ 204. Indeed, in some of the cases relied upon by the *Tadić* Court, the courts posited a causal relationship between the planned and unplanned crime. *Id.* ¶ 218.

87. *Id.* ¶ 232.

88. *Id.* ¶ 220.

89. *Id.* ¶ 220.

90. The jurisprudence of the ICTY provides no clear guidance on this question. See Danner & Martinez, *supra* note 5, at 106. The law in the United States is probably no better. See Note, *Developments in the Law—Criminal Conspiracy*, 72 HARV. L. REV. 920, 996 (1959).

It should be noted that more than negligence is required. What is required is a state of mind in which a person, although he did not intend to bring about a certain result, was aware that the actions of the group were most likely to lead to that result but nevertheless willingly that risk.<sup>91</sup>

Nonetheless, some of the post-*Tadić* courts<sup>92</sup> and, significantly, the late Professor/Judge Antonio Cassese, who was on the panel that decided *Tadić*, concluded that objective (reasonable person) foreseeability was the standard.<sup>93</sup> The implications are quite significant, because if foreseeability is objectively determined then the standard for attributing liability for the most serious crimes is reduced to something akin to negligence.<sup>94</sup> Since objective foreseeability demands only that a reasonable person in the defendant's position would have foreseen the risk that crimes beyond the criminal purpose of the JCE were likely, then the defendant, even if she was not actually aware, "should" have been aware of that risk as well.<sup>95</sup> Imposing liability for serious crimes based upon less than some form of actual risk awareness would run afoul of the principle of culpability.<sup>96</sup>

It is unclear how "reasonable foreseeability" found its way into the post-*Tadić* case law.<sup>97</sup> The *Tadić* Court drew on a number of diverse sources, including post-World War II British and U.S. war crimes cases,<sup>98</sup> World War II war crimes cases prosecuted in the Italian courts,<sup>99</sup> international treaties,<sup>100</sup> and national law cases from both civil and

91. *Tadić* Appeal Judgment ¶ 220.

92. See, e.g., *infra* note 113 and cases cited therein.

93. Cassese, *supra* note 33, at 201; see also *Amicus Curiae* Brief of Professor Antonio Cassese, ¶ 26, *Prosecutor v. Kaing ("Duch")*, Case No. 001/18-07-2007-ECCC/OCIJ (PTC 02) at 298–99.) (Extraordinary Chambers in the Courts of Cambodia October 27, 2008) ("It would, however, also be necessary for the 'secondary offender' . . . to be in a position, under the man of reasonable prudence test, to predict the rape.").

94. Danner & Martinez, *supra* note 5, at 108–09.

95. See Cassese, *supra* note 33, at 200–01 (arguing that this "lower threshold" of liability is appropriate).

96. See Guliyeva, *supra* note 16, at 62 (citing Ambos, *supra* note 24, at 175).

97. The only support for this position in the *Tadić* case itself comes from its citation of the *Pinkerton* doctrine (*United States v. Pinkerton*, 328 U.S. 640 (1946)) which it said imputed criminal responsibility "for acts committed in furtherance of a common criminal purpose, whether the acts are explicitly planned or not, provided that such acts might have been reasonably contemplated as a probable consequence or likely result of the common criminal purpose." *Tadić* Appeal Judgment, ¶ 224 n.289. All the other cases cited in *Tadić* that specifically addressed the question required subjective foreseeability. See e.g., *Tadić* Appeal Judgment ¶ 224 nn.287, 288 and 290.

98. *Id.* ¶¶ 205–15.

99. *Id.* ¶¶ 214–19.

100. *Id.* ¶¶ 221–23.

common law countries.<sup>101</sup> From its survey of these sources, the *Tadić* Court concluded that there was a “consistency and cogency of the case law and the treaties” that supported the conclusion that JCE III was customary international law.<sup>102</sup> It observed, however, that the “major legal systems of the world [do not] take the same approach to this notion.”<sup>103</sup> And, while the *mens rea* “was not clearly spelled out” in those cases, a fair inference was that they “required that the event must have been *predictable*.”<sup>104</sup> Several paragraphs later, the Court was even more specific regarding what level of foresight was required when it said, “everyone in the group must have been able to *predict* the result.”<sup>105</sup>

By requiring that deviatory crimes be predictable to every member of the JCE, the Appeals Chamber established a *mens rea* for attributing liability via JCE III that substantially exceeds “mere foreseeability.”<sup>106</sup> Former ICTY Judge Shahabuddeen, who also was on the panel that decided *Tadić*, described the *mens rea* as exceeding awareness:

In *Tadić*, the Appeals Chamber did use the word ‘aware’ but its judgment shows that it was speaking of more than awareness. It was referring to a case in which the accused, when committing the original crime, was able to ‘predict’ that a further crime would be committed by his colleagues as the ‘natural and foreseeable consequence of the effecting of [the] common purpose’ of the parties . . . and that he nevertheless ‘willingly’ took the ‘risk’ of that further crime being committed.<sup>107</sup>

Thus, JCE III liability occurs only when the risk of a crime outside the common purpose was “a predictable consequence of the execution of the common design.”<sup>108</sup> Predictability or foreseeability, in turn, is directly linked to the purpose of the JCE in which the defendant intentionally participated.<sup>109</sup> This goes well beyond a general awareness that other

101. *Id.* ¶¶ 224–25.

102. *Id.* ¶ 226.

103. *Id.* ¶ 225.

104. *Id.* ¶ 218.

105. *Id.* ¶ 220 (emphasis in the original).

106. *Ambos, supra* note 24, at 172–73.

107. *Prosecutor v. Brđanin*, Case No. IT-99-36-A, Decision on Interlocutory Appeal, ¶ 7 (Int’l Crim. Trib. for the Former Yugoslavia Mar. 19, 2004) (Separate Opinion of Judge Shahabuddeen).

108. *Tadić* Appeal Judgment ¶ 204.

109. Some of the cases discussed in *Tadić* describe a causal relationship between the agreed upon crime and the deviatory crime.

“For there to be a relationship of material causality between the crime willed by one of the participants and the different crime committed by another, it is necessary that the latter crime

crimes might occur. Instead, it requires that the defendant be able to predict a specific crime that actually did occur and that he “willingly” took that risk.<sup>110</sup> Thus, in *Tadić*, murder was a predictable consequence of ethnic cleansing by the commission of inhumane acts directed at the non-Serb population of Prijedor.<sup>111</sup>

From the foregoing analysis, two points regarding the *Tadić* Appeals Chamber’s approach to risk are clear: (1) foreseeability requires knowledge of the risk of commission of specific crimes that could have been, but were not, part of the agreement or common plan, and (2) the test is actual foreseeability (subjective) and not reasonable foreseeability (objective). Unfortunately, not all the post-*Tadić* courts have seen it that way, especially on the question of whether the assessment of risk awareness is a subjective<sup>112</sup> or objective determination.<sup>113</sup>

Another source of disagreement among the post-*Tadić* courts regards the substantiality of the risk, i.e., how likely it is that the risk will

should constitute the logical and predictable development of the former.”

*Tadić* Appeal Judgment ¶ 218 (quoting *Mannelli*, a decision of the Italian Court of Cassation, July 20, 1949).

110. See, e.g., Brđanin, Case No. IT-99-36-A, Judgment, ¶ 411 (Int’l Crim. Trib. for the Former Yugoslavia Apr. 3, 2007) (stating that the deviatory crime was foreseeable “in order to carry out the *actus reus* of the crimes forming part of the common purpose”); Prosecutor v. S. Milosević, Case No. IT-02-54-T, Decision on Motion for Judgment of Acquittal, ¶ 292 (Int’l Crim. Trib. for the Former Yugoslavia June 16, 2004) (observing it was foreseeable that genocide would be committed by other participants in the JCE “as a consequence of the commission of those crimes [that were part of the common plan]”).

111. *Tadić* Appeal Judgment ¶ 232.

112. See, e.g., Kovčeka, Appeal Judgment ¶ 86 (“A participant may be responsible for such crimes only if the Prosecution proves that the accused had sufficient knowledge such that the additional crimes were a natural and foreseeable consequence to him.”); Prosecutor v. Krstić, Case No. IT-98-33-A, Judgment, ¶ 150 (Int’l Crim. Trib. for the Former Yugoslavia Apr. 19, 2004) (holding that “it is sufficient that their occurrence [other criminal acts] was foreseeable to him”); Prosecutor v. Stakić, Case No. IT-97-24-A, Judgment, ¶ 65 (Int’l Crim. Trib. for the Former Yugoslavia Mar. 22, 2006) (“[T]he crime must be shown to have been foreseeable to the accused in particular.”)

113. Prosecutor v. S. Milosević, Case No. IT-02-54, Decision on Motion for Judgment of Acquittal, ¶ 290 (Int’l Crim. Trib. for the Former Yugoslavia June 16, 2004) (stating that attribution is appropriate if “it was reasonably foreseeable to him” that other crimes would be committed by a participant in the joint criminal enterprise); Prosecutor v. Brđanin, Case No. IT-99-36-A, Decision on Interlocutory Appeal, ¶ 5 (Int’l Crim. Trib. for the Former Yugoslavia Mar. 19, 2004), available at <http://www.icty.org/x/cases/brdanin/acdec/en/040319.htm> (stating that it is sufficient that it was “reasonably foreseeable to the accused that the crime charged would be committed by other members of the joint criminal enterprise”); *Amicus Curiae* Brief of Professor Antonio Cassese, at 298-9926, Prosecutor v. Kaing (“Duch”), Case No. 001/18-07-2007-ECCC/OCIJ (PTC 02), (Extraordinary Chambers in the Courts of Cambodia Oct. 27, 2008) (“It would, however, also be necessary for the ‘secondary offender’ . . . to be in a position, under the man of reasonable prudence test, to predict the rape.”).

materialize, because *de minimus* risks should not result in criminal punishment.<sup>114</sup>

The *Tadić* Court set the risk level that deviant crimes will occur at “most likely.”<sup>115</sup> A subsequent ICTY Trial Chamber stated that “most likely” means “probable (if not more).”<sup>116</sup> But, according to the Trial Chamber, because *Tadić* said that its standard was the same as *dolus eventualis*, that “would seem to reduce [the risk] . . . to a possibility.”<sup>117</sup> It is not at all clear why the Trial Chamber opted for “possibility,” especially since it acknowledged that there are stronger and weaker versions of *dolus eventualis*.<sup>118</sup> Moreover, Professor Cassese observed that a “good definition” of *dolus eventualis* is found in the New York Penal Law, inspired by the Model Penal Code, which requires that the defendant is “aware of and consciously disregards a substantial and unjustifiable risk that such result will occur.”<sup>119</sup> The drafters of the Model Penal Code described recklessness as an “awareness . . . of risk, that is of a probability less than substantial certainty.”<sup>120</sup> The risk is substantial and unjustifiable if consciously disregarding it is a “gross deviation from the standard of conduct that a law-abiding person in the actor’s situation would observe.”<sup>121</sup> Thus, the Model Penal Code defines recklessness “in terms of both greater risk and subjective awareness.”<sup>122</sup>

*Tadić* is essentially consistent with this approach. The deviant crime must be related closely enough to the common plan that the risk of its occurrence is a “natural and foreseeable consequence” of carrying out the common plan (substantial risk). The specific deviant crime that occurs must have been predictable to every member of the JCE (actual

114. David M. Treiman, *infra* note 121, at 337–38.

115. *Tadić* Appeal Judgment ¶ 220.

116. Prosecutor v. Brđanin and Talić Case No. IT-99-36-PT, Decision on Form of Further Amended Indictment and Prosecution Application to Amend, ¶ 29 (Int’l Crim. Trib. for the Former Yugoslavia June 26, 2001).

117. *Id.*

118. *Id.* ¶ 29 n.112. (“The extent to which the possibility must be perceived differs according to the particular country in which the civil law is adopted, but the highest would appear to be that there must be a “concrete” basis for supposing that the particular consequence will follow.”); see also Kai Ambos, *Critical Issues in the Bemba Confirmation Decision*, 22 LEIDEN J. OF INT’L L. 715, 718 (2009) (“In this regard one must not overlook the fact that the ‘commonly agreed’ standard [for *dolus eventualis*] invoked by the Chamber is by no means the only one.”).

119. Cassese, *supra* note 33, at 67 n.21 (quoting N.Y. PENAL CODE § 15.05(3)); see also MODEL PENAL CODE § 2.02 (2)(c) (1985).

120. MODEL PENAL CODE § 2.02 cmt. 3(1985).

121. *Id.*; David M. Treiman, *Recklessness and the Model Penal Code*, 9 AM. J. CRIM. L. 281, 337 (1981).

122. Wayne R. LaFave, CRIMINAL LAW § 5.4 (b), 282–83 n.26 (5th ed. 2010).



awareness). And, finally, the defendant must willingly take the risk (conscious risk taking).<sup>123</sup>

Nonetheless, the post-*Tadić* ICTY cases are in disarray.<sup>124</sup> Little wonder, then, that *Tadić* has been criticized for its inherent instability and tendency to produce inconsistent results.<sup>125</sup>

### III. FROM THE ICTY TO THE ICC

As the caseload at the ICC began to ramp up, it was apparent that the ICTY's approach to recklessness approach lacked clarity.<sup>126</sup> *Tadić*'s formulation (some say creation) of JCE III had been widely criticized.<sup>127</sup> There was disagreement whether the *mens rea* for JCE III was objective or subjective and the ICTY had adopted no clear standard for risk quantification.<sup>128</sup> Moreover, neither the language nor the drafting history of Article 30 suggested that it embraced recklessness.<sup>129</sup> It was, therefore, somewhat surprising that in the first opinion dealing with the subject, ICC Pre-Trial Chamber I concluded that Article 30 "also encompasses other

123. See *supra* pp. 687–88.

124. Compare Prosecutor v. Krstić, Case No. IT-98-33-A, Judgment ¶ 150 (Int'l Crim. Trib. for the Former Yugoslavia Apr. 19, 2004) ("[T]he accused participated in that enterprise aware of the probability that other crimes may result."); Prosecutor v. Brđanin, Case No. IT-99-36-A, Decision on Interlocutory Appeal, ¶ 5 (Int'l Crim. Trib. for the Former Yugoslavia Mar. 19 2004) (stating that JCE III liability for deviant crimes is established if the accused participated in the enterprise "with the awareness that the commission of that agreed upon crime made it reasonably foreseeable to him that the crime charged *would* be committed") with Prosecutor v. S. Milosević, Case No. IT-02-54, Decision on Motion for Judgment of Acquittal ¶ 290 (Int'l Crim. Trib. for the Former Yugoslavia June 16, 2004) (stating that the crime charged must be a "possible consequence" of executing the JCE); Prosecutor v. Stakić, Case No. IT-97-24-T, Judgment ¶ 587 (Int'l Crim. Trib. for the Former Yugoslavia July 31, 2003) (equating *dolus eventualis* to the U.S. concept of reckless or "depraved heart" murder and observing that "if the killing is committed with 'manifest indifference to the value of human life', even conduct of minimal risk can qualify as intentional homicide."). See also Prosecutor v. Bemba Gombo, Case No. ICC-01/05-01/08, Pre-Trial Chamber II, Decision Pursuant to Article 61(7)(a) and (b) of the Rome Statute on the Charges of the Prosecutor Against Jean-Pierre Bemba Gombo, ¶ 363 (June 15, 2009) [hereinafter Bemba Decision].

125. See Harmen van der Wilt, *Guilty by Association: Joint Criminal Enterprise on Trial*, 5 J. INT'L CRIM. L. 91, 101 (2006).

126. See *supra* notes 72–73 and accompanying text.

127. See *supra* note 52 and accompanying text.

128. See *supra* notes 112, 113, 124, and 125 and accompanying text.

129. THE INTERNATIONAL CRIMINAL COURT: THE MAKING OF THE ROME STATUTE 205 (Roy S. Lee ed., 1999).

There was agreement that, in principle, all the crimes within the jurisdiction of the Court would require intent and knowledge unless specifically provided otherwise. After it was pointed out that the word recklessness did not appear anywhere in the definitions of crimes, it was agreed that a definition of that concept was unnecessary. The article was then adopted.

See also WILLIAM A. SCHABAS, AN INTRODUCTION TO THE INTERNATIONAL CRIMINAL COURT 86–87 (2001).

forms of the concept of *dolus [eventualis]* which have already been resorted to by the jurisprudence of the *ad hoc* tribunals.”<sup>130</sup> Some scholars endorsed the opinion;<sup>131</sup> others did not.<sup>132</sup>

Two years later, in the *Bemba* decision, Pre-Trial Chamber II reached the opposite conclusion.<sup>133</sup> The Pre-Trial Chamber looked to the language of Article 30 that requires at minimum, “[u]nless otherwise specified,” that a defendant have an “awareness that . . . a consequence will occur in the ordinary course of events.”<sup>134</sup> The Pre-trial Chamber concluded that this language “does not accommodate a lower standard than the one required by *dolus directus in the second degree* (oblique intention).”<sup>135</sup> Later on, after observing that Article 30 requires that the “occurrence is close to certainty,” the Pre-Trial Chamber opined that “[t]his standard is undoubtedly higher than the principal standard commonly agreed upon for *dolus eventualis*—namely, foreseeing the occurrence of the undesired consequences as a mere likelihood or possibility.”<sup>136</sup> *Bemba* too had its detractors<sup>137</sup> and supporters.<sup>138</sup>

Thus, the issue was joined and awaited (at least temporary) resolution in the ICC’s first Trial Chamber decision.

130. PTC Decision ¶ 352 (citing the *Tadić* Appeal Judgment ¶ 219 and the *Stakić* Trial Judgment ¶ 587).

131. Thomas Weigend, *Intent, Mistake, and Co-Perpetration in the Lubanga Decision on Confirmation of Charges*, 6 J. INT’L CRIM. JUST. 471, 484 (2008) (approving the Pre-Trial Chamber’s inclusion of a strong form of *dolus eventualis* as consistent with Article 30).

132. Jens David Ohlin, *Joint Intentions to Commit International Crimes*, 11 CHI. J. INT’L L. 693, 724 (2011) (observing that “it is not at all clear” that *dolus eventualis* satisfies the requirements of Article 30).

133. Bemba Decision ¶ 360.

134. Rome Statute, art. 30 (1), (2)(b),(3).

135. Bemba Decision ¶ 360. The Pre-Trial Chamber defined *dolus directus in the second degree* as:

*Dolus Directus in the second degree* does not require that the suspect has the actual intent or will to bring about the material elements of the crime, but that he or she is aware that those elements will be the almost inevitable outcome of his acts or omissions, i.e., the suspect ‘is aware that [. . .] [the consequence] will occur in the ordinary course of events’ (article 30(2)(b) of the Statute).

*Id.* ¶ 359.

136. *Id.* ¶¶ 362–63.

137. Kai Ambos, *Critical Issues in the Bemba Confirmation Decision*, 22 LEIDEN J. INT’L L. 715, 718 (2009) (“In this regard one must not overlook the fact that the ‘commonly agreed’ standard invoked by the Chamber is by no means the only one. In fact, there are other, more cognitive concepts of *dolus eventualis* (requiring awareness or certainty as to a consequence) and these may indeed be included in Article 30.”)

138. Johan D. van der Vyver, *Prosecutor v. Jean-Pierre Bemba Gombo*, 104 AM. J. INT’L L. 241 (2010).

### A. Lubanga

In *Prosecutor v. Lubanga*, the Trial Chamber defined co-perpetration in Article 25(3)(a) of the Rome Statute as including a risk-taking element.<sup>139</sup> It held that committing a crime jointly with another or through another person provided for liability based on co-perpetration.<sup>140</sup> Co-perpetration, in turn, requires adherence by the defendant to an agreement or common plan . . . The plan can, but need not, be “intrinsically criminal,” so long as it includes “a critical element of criminality.”<sup>141</sup> The “critical element of criminality” has both an objective and subjective element. The objective element is satisfied if the “implementation [of the plan] embodies a sufficient risk that, in the ordinary course of events, a crime will be committed.”<sup>142</sup> The subjective element, found in Article 30(3), is satisfied if the “co-perpetrators are aware of the risk that the consequence, prospectively, will occur.”<sup>143</sup>

In addition to agreeing to the common plan and being aware of its risk of criminality, the defendant must make an “essential contribution” to its implementation.<sup>144</sup> Whether the contribution is essential “is to be based on an analysis of the common plan and the role that was assigned to, or was assumed by the co-perpetrator, according to the division of tasks.”<sup>145</sup> Moreover, there must be proof that the defendant “was aware that he provided an essential contribution to the implementation of the common plan.”<sup>146</sup> Finally, the crime must be “the result of the combined and coordinated contributions of those involved, or at least two of them.”<sup>147</sup>

As to the *mens rea*, the Trial Chamber’s opinion is hardly a model of clarity. Having predicated liability on a plan that presented a risk that a certain result would occur, the Trial Chamber acknowledged that at the time the plan was formed, at best, the co-perpetrators could only have an

139. Lubanga Judgment ¶¶ 985–86.

140. *Id.* ¶ 980.

141. *Id.* ¶ 984.

142. *Id.* ¶ 987.

143. *Id.* ¶ 986.

144. Lubanga Judgment ¶ 999. The Trial Chamber thus rejected both the Pre-Trial Chamber’s conclusion, urged by the defense, that the defendant’s role had to be a *conditio sine qua non* of the crime; that is, that the failure of the defendant to perform the tasks assigned to him would frustrate the plan. It also rejected the prosecutor’s argument that the defendant’s contribution need only be “substantial.” *Id.* ¶¶ 989–92.

145. *Id.* ¶ 1000.

146. *Id.* ¶ 1013.

147. *Id.* ¶ 994.

awareness of a contingent result, even as to the crimes they had agreed upon, until those crimes were committed.<sup>148</sup>

Article 30 of the Rome Statute sets out the mental element that must be proved in order for a defendant to be held criminally responsible for a crime within the jurisdiction of the Court. “Unless otherwise provided,” the prosecution must prove “intent and knowledge” as to each material element.<sup>149</sup> Similar to the approach taken in the Model Penal Code, different mental states relate to different material elements.<sup>150</sup> As to a conduct element, the person must act with intent; that is, the “person means to engage in the conduct.”<sup>151</sup> As to the result or consequence, the defendant may either intend to cause the consequence or be aware (know) that the consequence “will occur in the ordinary course of events.”<sup>152</sup>

From the language in Article 30(2)(b) of the Rome Statute, the Trial Chamber concluded that co-perpetration requires an “awareness” of the risk that a consequence of the agreement or common plan “will occur in the ordinary course of events.”<sup>153</sup> The Trial Chamber, however, rejected the Pre-Trial Chamber’s conclusion that Article 30 encompasses *dolus eventualis*,<sup>154</sup> because the drafting history of the Rome Statute “suggests” that this form of *mens rea* was not included in Article 30.<sup>155</sup> According to the Trial Chamber, the distinction between the knowledge required by Article 30 and *dolus eventualis* is that Article 30 requires awareness that consequences “will occur,” while *dolus eventualis* requires only awareness that the consequences “may occur.”<sup>156</sup>

Despite the Trial Chamber’s insistence that its approach to the *mens rea* required for the “risk” element of co-perpetration is different from the Pre-Trial Chamber’s, on closer examination, their differences appear to be more a matter of labeling than substance.<sup>157</sup> The Pre-Trial Chamber identified two forms of *dolus eventualis*: substantial risk and low risk. It defined the objective element of substantial risk as a likelihood that that

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148. *Id.* ¶ 1012 (“The co-perpetrators only ‘know’ the consequences of the conduct once they have occurred.”).

149. Rome Statute, *supra* note 3, art. 30(1).

150. Compare Rome Statute, *supra* note 3, art. 30(1), (2), (3), with MODEL PENAL CODE § 2.02(2) (1985).

151. Rome Statute, *supra* note 3, art. 30(2)(a).

152. *Id.* art. 30(2)(b).

153. Lubanga Judgment ¶¶ 1011–12.

154. Lubanga PTC Decision ¶ 355.

155. Lubanga Judgment ¶ 1011.

156. *Id.*

157. PTC Decision ¶¶ 352–54.

the risk “will occur in the ordinary course of events.”<sup>158</sup> In substantial risk situations, the defendant’s *mens rea* is established by proof that she was aware of the substantial likelihood that her actions “would result” in the commission of a crime and her decision to act “despite such awareness.”<sup>159</sup> In low risk situations the defendant “must have clearly or expressly accepted the idea” that the crime “may” occur.<sup>160</sup>

In substantial risk situations, there is little, if any, practical distinction between the language used by the Pre-Trial Chamber and that used by the Trial Chamber. At one point the Trial Chamber defines knowledge of a future event, per Article 30(3), as “awareness by the co-perpetrators that a consequence will occur (in the future), [which] necessarily means that the co-perpetrators are aware of the risk that the consequences, prospectively, will occur.”<sup>161</sup> Later on, it stated its view that awareness of a future consequence “means that the participants anticipate, based on their knowledge of how events ordinarily develop, that the consequence will occur in the future.”<sup>162</sup> And finally, the Trial Chamber found that when the co-perpetrators agree on the common plan, they “must know [of] the existence of a risk that the consequence will occur” and the “degree of the risk . . . must be no less than awareness on the part of the co-perpetrator that the consequence ‘will occur in the ordinary course of events.’” A low risk will not be sufficient.<sup>163</sup>

What does this mean other than that the risk of the commission of a crime must have been substantial at the time the defendants entered into the common plan?<sup>164</sup> Moreover, this approach is practically the same as that of the Pre-Trial Chamber.<sup>165</sup> In substantial risk cases, the Pre-Trial Chamber characterized the requisite level of awareness as “the substantial likelihood that his or her actions or omissions would result in the realisation of the objective elements of the crime.”<sup>166</sup> Thus, at least in the substantial risk cases, there appears to be no significant difference in the

158. *Id.* ¶ 353.

159. *Id.*

160. *Id.* ¶ 354. I agree with Professor Weigand that the Pre-Trial Chamber’s formulation of low risk *dolus eventualis*, if that form exists, would not satisfy Article 30(2)(b) of the Rome Statute. Weigand, *supra* note 131, at 484.

161. Lubanga Judgment ¶ 986.

162. *Id.* ¶ 1012.

163. *Id.*

164. See Weigand, *supra* note 131, at 482.

165. The Pre-Trial Chamber did not say, as the Trial Chamber implied, that it is sufficient if such awareness is that the consequence “may” result from the defendant’s conduct. . . . PTC Decision, ¶ 353.

166. *Id.*

approaches to *mens rea* taken by the Pre-Trial and Trial Chambers and, therefore, the observations of one commentator regarding the Pre-Trial Chamber's opinion are equally applicable to the Trial Chamber's opinion:

Criminal lawyers from common law jurisdictions would hardly describe this mental requirement as anything close to intentional or purposeful. At most, it is a form of advertent recklessness. Criminal lawyers from civil law jurisdictions will often refer to this mental element as *dolus eventualis* and consider it uncontroversial, but the ICC's use of the concept here bears scrutiny.<sup>167</sup>

If this observation is correct, and I think it is, then the very same questions about the *mens rea* for attributing liability that have plagued the ICTY have already surfaced in the ICC.<sup>168</sup> Three ICC cases (all decided before the *Lubanga* Trial Chamber decision) suggest that the ICC, so far, is no better than the ICTY in its approach to risk analysis.

### B. Bemba

Jean-Pierre Bemba was the president of the Mouvement de Libération du Congo (MLC) and commander of its military arm, the Armée de Libération du Congo (ALC).<sup>169</sup> The MLC was based in the Democratic Republic of Congo (DRC).<sup>170</sup> Bemba ordered MLC troops sent to the aid of Patassé, the democratically elected president of the Central African Republic (CAR).<sup>171</sup> According to witness testimony credited by the Pre-Trial Chamber, Bemba's instructions to the MLC troops were to "destabilize all the enemies' coming from the DRC" and "defend the president [Patassé]."<sup>172</sup> Based on this evidence, the Pre-Trial Chamber could not conclude that "Bemba was aware that, in the ordinary course of events, the commission of rape would be the virtually certain consequence of his action."<sup>173</sup>

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167. Ohlin, *supra* note 23, at 723–24.

168. In this regard, it is important to note that the *Lubanga* Trial Chamber was dealing only with the issue of *mens rea* for crimes that were part of the agreement or common plan. *Lubanga Judgment*, ¶ 1. In fact, illegally enlisting child soldiers was the only international crime charged in furtherance of the common plan "to ensure that the UPC/FPLC had an army strong enough to achieve its political and military aims." *Id.* ¶ 1347.

169. Bemba Decision ¶ 455.

170. *Id.* ¶ 99.

171. *Id.* ¶ 392.

172. *Id.*

173. *Id.* ¶ 396.

Nor could it find that evidence that Patassé was informed that crimes had been committed by Bemba's troops, coupled with evidence showing frequent communications between Patassé and Bemba, was sufficient to prove that Bemba learned about the commission of crimes from Patassé.<sup>174</sup> Finally, the prosecution argued that Bemba's *mens rea* was established by his continued implementation of the common plan despite evidence that: (1) media had broadcast that the MLC had committed crimes in the CAR; (2) the MLC had informed Bemba of the commission of crimes in the CAR; and (3) Bemba had acknowledged the commission of these crimes himself.<sup>175</sup>

The Pre-Trial Chamber, nonetheless, rejected the prosecution's argument that this evidence satisfied Article 30 stating:

In particular, the Chamber cannot infer that he was aware that by keeping his troops in the CAR, it was a virtually certain consequence that these crimes would be committed in the ordinary course of events. As the Disclosed Evidence indicates, the most that can be inferred is that Mr. Jean-Pierre Bemba may have foreseen the risk of occurrence of such crimes as a mere possibility and accepted it for the sake of achieving his ultimate goal—that is, to help Mr. Patassé retain power. In the Chamber's opinion, this does not meet the required standard for article 30 of the Statute—namely, *dolus directus in the second degree*.<sup>176</sup>

### C. Banda and Jerbo

In this case, the ICC prosecutor charged the defendants with organizing and commanding an armed attack against a compound of UN peacekeepers in Darfur, Sudan.<sup>177</sup> The Pre-Trial Chamber found substantial evidence to support a finding that the defendants ordered the attack, personally participated in it, led their troops during the attack and therefore “meant to engage in the attack.”<sup>178</sup> In these circumstances, the Pre-Trial Chamber had little difficulty concluding that, although there was

174. *Id.* ¶ 397.

175. *Id.* ¶ 398.

176. *Id.* ¶ 400.

177. Prosecutor v. Banda and Jerbo, Case No. ICC-02/05-03/09, Corrigendum of the “Decision on the Confirmation of Charges” ¶¶ 4–5 (Mar. 7, 2011) [hereinafter Banda]. They were charged with violence to life and attempted violence to life under the Rome Statute, *supra* note 3, arts. 8(2)(c)(i), 25(3)(a) and 25(3)(f), intentionally attacking a peacekeeping mission under arts. 8(2)(e)(iii), and 25(3)(a) and pillaging under arts. 8(2)(e)(v) and 25(3)(a). *Id.* ¶ 5.

178. *Id.* ¶ 153.

no substantial evidence that the defendants “specifically meant to cause killings of protected AMIS personnel as a consequence of the attack,”<sup>179</sup> they still knew that killings would occur: “The fact of orchestrating an attack by numerous and heavily armed troops on a relatively small peacekeeping mission itself implies the virtual certainty that killings would ensue, a certainty which is consistent with the subjective element as defined in article 30 of the Statute.”<sup>180</sup>

*D. Kenyatta and Hussein*

In this case, the ICC prosecutor charged the defendants with entering into a common plan to keep the Kenyan pro-Party of National Unity (PNU)<sup>181</sup> in power by “every means necessary,” including “orchestrating a police failure to prevent the commission of crimes,” committing widespread and systematic attacks against their political opponents, and deliberately failing to stop retaliatory attacks.<sup>182</sup> To carry out the plan, Kenyatta mediated between the PNU and a criminal organization, the Mungiki, to obtain the support of the latter for the PNU.<sup>183</sup> After the election, the defendants used the Mungiki to carry out retaliatory attacks against the political opposition in the Rift Valley in order to “strengthen the PNU’s hold on power. . . .”<sup>184</sup> In the course of carrying out the plan, some of the Mungiki raped civilian residents of Nakuru and Naivasha.<sup>185</sup> Although there was no indication that rape was an intended crime, the defendants had directed the Mungiki to take revenge against civilians “in the knowledge of and exploiting the ethnic hatred of the attackers towards their victims,”<sup>186</sup> Accordingly, the Pre-Trial Chamber concluded that the defendants “knew that rape was a virtually certain consequence of the implementation of the common plan.”<sup>187</sup>

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179. *Id.* ¶ 155.

180. *Id.* ¶ 156.

181. Prosecutor v. Muthaura, Kenyatta and Hussein Ali, Case No. ICC-01/09-02/11 Decision on the Confirmation of Charges Pursuant to Article 61(7)(a) and (b) of the Rome Statute, ¶ 102 (Jan. 23, 2012) [hereinafter *Kenyata*].

182. *Id.* ¶ 288.

183. *Id.* ¶ 289.

184. *Id.* ¶ 290.

185. *Id.* ¶ 415.

186. *Id.*

187. *Id.*



### E. Observations

Perhaps the most striking thing about *Banda* and *Kenyatta* is their failure even to refer to risk. Both are cases of co-perpetration.<sup>188</sup> Moreover, unlike *Lubanga*, these cases dealt with deviant crimes; that is, crimes that were not a part of the common plan.<sup>189</sup> Given the fact that both cases involved liability for crimes directly committed by others that were not part of the plan, those crimes were, at best, a risk at the time the defendants entered into the plans. Yet, neither court mentioned risk.<sup>190</sup> Instead both saw the *mens rea* as a straightforward application of Article 30(2)(b).<sup>191</sup>

Almost certainly, the *Lubanga* Trial Chamber decision would change the approach in these two cases to one involving risk analysis. *Lubanga*'s approach to co-perpetration applies in any case where the crime was committed by two or more persons.<sup>192</sup> In such situations the result, in so far as any individual defendant is concerned, is contingent; i.e., "a sufficient risk that, if events follow the ordinary course, a crime will be committed."<sup>193</sup> The *Lubanga* Trial Chamber found that was so even where the crime committed was part of the common plan.<sup>194</sup> It is even more so in cases like *Banda* and *Kenyatta* where deviant crimes are involved. If the crime was not part of the plan, how could its future occurrence be anything more than a risk?

*Bemba*, on the other hand, shows just how hard it can be to find a defendant guilty if a court applies Article 30 literally. Put another way, absent a more flexible approach to attribution of liability, there will be impunity for defendants like Bemba who almost certainly must have known his troops were committing rape in the CAR. *Bemba* is a good illustration of the point made by an author who conducted an extensive study of ICTR Trial Chamber decisions:

The fact-finding challenges identified in the foregoing chapters should cause us to question whether in fact we *could* use traditional doctrines of criminal liability in a great number of international

188. See *Banda*, ¶ 151; *Kenyatta*, ¶ 287.

189. Neither the killings in *Banda* nor the rapes in *Kenyatta* were part of the criminal plan. *Id.*

190. The *Banda* Pre-Trial Chamber cited the PTC Decision in *Lubanga* but did not mention that that court had concluded that Article 30 encompassed *dolus eventualis*. *Banda*, ¶ 150 n.259.

191. *Kenyatta*, ¶ 415; *Banda*, ¶ 156. Rome Statute, *supra* note 3, at art. 30(2)(b) (The "person is . . . aware that [the consequence] will occur in the ordinary course of events.").

192. *Lubanga* Judgment, ¶¶ 980–981.

193. *Id.* ¶ 984.

194. *Id.* ¶¶ 984–987.

criminal cases. No one would deny that it is better to ground criminal convictions on reliable evidence of the defendant's personal commission of criminal acts or omissions. But if such evidence does not exist in the vast run of cases, and if we have not decided to abandon international trials altogether, then it may be more normatively justified to respond to those evidentiary deficiencies by candidly expanding criminal liability doctrines than by ignoring those deficiencies and purporting to base convictions on traditional doctrines.<sup>195</sup>

#### IV. CONCLUSIONS

Risk is baked into co-perpetration.<sup>196</sup> The ICC therefore must develop a consistent approach to risk analysis. Thus far, however, the debate has largely been about whether Article 30 of the Rome Statute includes JCE III (*dolus eventualis*). This is a sterile exercise which distracts from the real work of developing standards that courts can apply uniformly in order to achieve consistent results, a task at which the ICTY failed. The JCE III debate inevitably dredges up this unfortunate history, which the ICC quite rightly should try to avoid repeating.

Based on the cases it has decided so far, it does not appear that the ICC will be any more systematic in its approach to risk analysis than the ICTY was. Nonetheless, one issue that troubled the ICTY does not appear to present a problem for the ICC. The language of Article 30<sup>197</sup> seems to preclude the argument that risk awareness is assessed from an objective "reasonable person" perspective, and none of the cases has even considered that argument.<sup>198</sup>

The question of risk quantification is far less clear. Thus far, only the *Lubanga* Trial Chamber has squarely addressed this issue and it failed to define what degree of risk is necessary in order for criminal liability to attach. Instead, it approached the question from the opposite direction when it stated that a co-perpetrator's awareness of a "low risk will not be

195. NANCY AMOURY COMBS, *FACT-FINDING WITHOUT FACTS: THE UNCERTAIN EVIDENTIARY FOUNDATIONS OF INTERNATIONAL CRIMINAL CONVICTIONS* 333 (2010).

196. See Neha Jain, *supra* note 1, at 170 ("[D]eviations from the common plan that are within the range of relevant acts with which one must normally reckon do not count as an excess. The main test is the foreseeability of the deviant course of action.").

197. Rome Statute, *supra* note 3, art. 30(3) ("For the purposes of this article, 'knowledge' means awareness that a circumstance exists or a consequence will occur in the ordinary course of events.").

198. See e.g., *Lubanga Judgment*, ¶ 1012 ("At the time the co-perpetrators agree on a common plan and throughout its implementation, they must know the existence of a risk that the consequence will occur.").

sufficient.”<sup>199</sup> Clarifying the degree (substantiality) of the risk is critical because “criminal liability ought to require more than an ordinary deviation from a legal norm.”<sup>200</sup> Quantifying the risk by stating what is not sufficient gives other courts no guidance on what is sufficient.

The ICC has also failed to address the issue of risk certainty. On this question, the cases have focused on the language of Articles 30 (2)(b) and (3), providing that a consequence “will occur in the ordinary course of events.”<sup>201</sup> The *Lubanga* Trial Chamber, grappling with this concept, used several different terms conveying different shades of meaning:

[T]he “awareness that a consequence will occur in the ordinary course of events” means that the participants anticipate, based on their knowledge of how events ordinarily develop, that the consequence will occur in the future. This prognosis involves consideration of the concepts of “possibility” and “probability,” which are inherent to the notions of “risk” and “danger.” Risk is defined as “danger, (exposure to) the possibility of loss, injury or other adverse circumstance.”<sup>202</sup>

So must the risk be a “possibility” (“something that may exist or happen”)<sup>203</sup> or a “probability” (“a thing judged likely to be true, to exist, or to happen”)?<sup>204</sup> While it is true that these are closely related concepts, “probability” suggests a somewhat higher degree of certainty. It is significant, therefore, that the Trial Chamber used “possibility” when it defined risk, apparently opting for the lower standard.

More importantly, how does this language square with that used by the Trial Chamber in the preceding paragraph of its opinion when it rejected the proposition that *dolus eventualis* was included in Article 30 because “[t]he plain language of the Statute, and most particularly the use of the words ‘will occur’ in Article 30(2)(b) as opposed to ‘may occur,’ excludes the concept of *dolus eventualis*.”<sup>205</sup> If risk is by definition a “possible” consequence, how can a defendant ever be aware that it “will” occur?

The *Bemba* Pre-Trial Chamber had a slightly different take on the phrase: “will occur in the ordinary course of events.”<sup>206</sup> It opined that this

199. *Lubanga* Judgment, ¶ 1012.

200. Treiman, *supra* note 121, at 337.

201. Rome Statute, *supra* note 3, arts. 30(2)(b) and (3).

202. *Lubanga* Judgment, ¶ 1012.

203. 2 THE NEW OXFORD SHORTER DICTIONARY, *supra* note 78, at 2302.

204. *Id.* at 2362.

205. *Lubanga* Judgment ¶ 1011.

206. *Id.*

phrase “clearly indicate[s] that the required standard of occurrence is close to certainty.”<sup>207</sup> Thus, according to the Pre-Trial Chamber, Article 30 requires a “virtual” or “practical” certainty that the “consequence will follow, barring an unforeseen or unexpected intervention that prevent [sic] its occurrence.”<sup>208</sup> The problem with this approach, as I argued above, is that it is unlikely that any case involving risk could ever satisfy a “virtual” or “practical” certainty standard.<sup>209</sup>

Thus, imprecise use of language and the failure to quantify risk—precisely the same problems that vexed the ICTY—have already surfaced in the ICC. The ICC should look to a new source for inspiration—the U.S. Model Penal Code (MPC).<sup>210</sup> The drafters of the MPC directly confronted the challenge of systematizing an approach to the mental element of crime.<sup>211</sup> Its approach to recklessness, while having similarities to JCE III, is a substantial improvement over it.

One of the MPC’s greatest contributions to the development of criminal law is its articulation of a definition for recklessness, which guides courts in distinguishing between criminal and non-criminal conduct.<sup>212</sup> In that regard, the MPC sets out distinctive criteria to ensure that a defendant who engages in risky conduct is sufficiently culpable to warrant criminal punishment.<sup>213</sup> The first requirement is “conscious risk creation.”<sup>214</sup> This means actual awareness (knowledge) of a risk.<sup>215</sup> The risk must be both “substantial” and “unjustifiable.”<sup>216</sup> The MPC does not define “substantial,” but the Commentary characterizes the risk of which the defendant is aware as “a probability less than substantial certainty.”<sup>217</sup> In other words, whether the risk will materialize is “something less than 100% certainty” from the defendant’s perspective at the time she engages

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207. Bemba Decision, *supra* note 125, ¶ 362.

208. *Id.*

209. Perhaps that is why the *Lubanga* Trial Chamber seemed to contradict itself when it followed *Bemba*’s rejection of *dolus eventualis* and then in the next paragraph defined risk in terms of “possibility” and “probability,” rather than virtual certainty.

210. MODEL PENAL CODE, *supra* note 40.

211. *Id.* § 2.02 cmt. 1. The commentary quotes Justice Jackson, who in *United States v. Morissette*, 342 U.S. 246, 252 (1952), wrote: “The unanimity with which [the courts] have adhered to the central thought that wrongdoing must be conscious to be criminal is emphasized by the variety, disparity and confusion of their definitions of the requisite but elusive mental element.”

212. See Treiman, *supra* note 121, at 284–85.

213. MODEL PENAL CODE, *supra* note 40, § 2.02 cmt. 3. (“[T]he jury is to make the culpability judgment in terms of whether the defendant’s conscious disregard of the risk justifies condemnation.”).

214. *Id.*

215. *Id.*

216. *Id.*

217. *Id.*; See also Treiman, *supra* note 121, at 299.

in the conduct.<sup>218</sup> The MPC thus requires knowledge of the risk but somewhat less than knowledge that the result will occur. Nonetheless, the gap between the two is razor thin.<sup>219</sup>

The early ICC cases, like *Bemba*, seem to focus on how certain a defendant is that a particular risk will occur in order to distinguish a *mens rea* that is sufficient for criminal liability (knowledge) from one that it is not (*dolus eventualis*).<sup>220</sup> Interestingly, however, the highest form of culpability, “intent,” requires no level of risk awareness at all.<sup>221</sup> According to the Rome Statute, a person intends a consequence if she “means to cause that consequence.”<sup>222</sup> This approach is substantially the same as that taken by the MPC, which uses the term “purposely” instead of intent, and provides that one acts purposely with regard to a result when it is “his conscious object . . . to cause such a result.”<sup>223</sup> This does not require any degree of knowledge or awareness that the result will occur.<sup>224</sup> So, at least in this respect, recklessness includes an additional *mens rea* element and thus may be even more difficult to prove than intent.

Beyond actual risk awareness, the MPC also makes it clear that some risks, although substantial and foreseen, are justifiable; they are risks worth taking.<sup>225</sup> Comments to an earlier draft of the MPC set out the

218. MARKUS D. DUBBER, CRIMINAL LAW: MODEL PENAL CODE 72 (2002).

219. For example, the MPC provides that in cases of “willful blindness,” when knowledge of the existence of a fact is required, it may be proved “if a person is aware of a high probability of its existence, unless he actually believes that it does not exist.” Model Penal Code, *supra* note 40, § 2.02(7); see also *Id.* at cmt. 9. The commentary acknowledges that whether a defendant acts recklessly or knowingly when he is aware of “the probable existence of a material fact” but ignores it, “presents a subtle but important question.” *Id.* at cmt. 9. The commentary draws a distinction, however, between facts where “knowledge” is required and the results of conduct where recklessness is sufficient because the latter “is necessarily a matter of the future at the time of acting.” *Id.*; See also Wayne R. LaFave, Criminal Law 262 (5th ed. 2010) (stating that the purposely and knowledge provisions of the MPC “contemplate that one knows of present (as opposed to future) events only if he is actually aware of them”).

220. See *supra* note 136 and accompanying text.

221. Dubber, *supra* note 218, at 72–73.

222. Rome Statute, *supra* note 3, art. 30(2)(b).

223. MODEL PENAL CODE, *supra* note 40, § 2.02(a)(i). See Kai Ambos, *Critical Issues in the Bemba Confirmation Decision*, *supra* note 118, at 717 (The drafters of the Rome Statute used § 2.02 of the MPC, relating to the distinction between purpose and knowledge, as “a reference for the ICC Statute in many regards.”).

224. LaFave, *supra* note 122, at 261 n.14 and accompanying text.

225. The example given in the commentary is the surgeon who performs a highly risky operation because there is no other way to save the patient’s life. MODEL PENAL CODE, *supra* note 40, § 2.02 cmt. 3.

factors to be taken into consideration in determining whether the risk is substantial and unjustifiable:

Accordingly to aid the ultimate determination, the draft points expressly to the factors to be weighed in [the] judgment: the nature and degree of the risk disregarded by the actor, the nature and purpose of his conduct and the circumstances known to him in acting.<sup>226</sup>

Requiring that the defendant is aware that the risk her conduct creates is both “substantial” and “unjustifiable” is “useful” but still not “sufficient” to establish criminal culpability because “[s]ome standard is needed for determining *how* substantial and *how* unjustifiable the risk must be.”<sup>227</sup> Thus, the MPC adds two additional requirements. The subjective element is that the defendant must “consciously disregard” the risk.<sup>228</sup> The objective element is that disregarding the risk “involves a gross deviation from the standard of conduct that a law-abiding person would observe in the actor’s situation.”<sup>229</sup> The “gross deviation” standard requires the fact finder to determine that “the defendant’s conduct involved ‘culpability of high degree.’”<sup>230</sup>

The MPC thus gives significantly more guidance to courts than any of the standards thus far articulated by the ICTY or the ICC. It especially focuses on risk quantification, and, as a result, it blunts the criticism leveled at JCE III—that it attributes liability in cases where culpability is lacking.<sup>231</sup> The question remains, however, whether the ICC could adopt an MPC-like approach that would be consistent with the language in Article 30 of the Rome Statute.

226. MODEL PENAL CODE § 2.02 cmt 3, at 125 (Tentative Draft No. 4, 1955). The concept of justifiable risks and assessing whether they are worth taking is already a feature of international criminal law. For example, a commander may order an attack that will cause civilian casualties, so long as it is justified by military necessity. See Protocol Additional to the Geneva Conventions of 12 August 1949, and Relating to the Protections of Victims of International Armed Conflicts (Protocol I), art. 57, June 8 1977, 1125 U.N.T.S. 3.

227. MODEL PENAL CODE, *supra* note 40, § 2.02 cmt. 3.

228. *Id.* § 2.02(22)(c). Conscious disregard of the risk implies an acceptance of the consequences and therefore aligns the MPC with the German theory of *dolus eventualis*, which is sufficient to establish criminal intent. See Dubber, *supra* note 218, at 74–76.

229. MODEL PENAL CODE, *supra* note 40, § 2.02(2)(c).

230. MODEL PENAL CODE, *supra* note 216, § 2.02, cmt. at 125 (Tent. Draft 4 1955).

231. See, e.g., John Laughland, *Conspiracy, Joint Criminal Enterprise and Command Responsibility in International Criminal Law* 3 (Nov. 14, 2009), available at [http://www.heritage.org/tprdefense.org/papers/John\\_laughland\\_Conspiracy\\_joint\\_criminal\\_enterprise\\_and\\_command\\_responsibility.pdf](http://www.heritage.org/tprdefense.org/papers/John_laughland_Conspiracy_joint_criminal_enterprise_and_command_responsibility.pdf).

The potential sticking point is Article 30's requirement of knowledge in relation to consequence. It defines knowledge as "awareness that a circumstance exists or that a consequence will occur in the ordinary course of events."<sup>232</sup> Some of the ICC cases discussed above differentiated this standard from *dolus eventualis* because it requires only awareness that the result "may" occur, while Article 30 stipulates that there must be awareness that it "will" occur.<sup>233</sup> If this approach is followed, then nothing short of virtual certainty that a risk will materialize will support a finding of guilt.

Yet, "awareness that a consequence will occur in the ordinary course of events" must mean something different than "awareness that a circumstance exists." Otherwise Article 30 would have said, "awareness of a consequence or that a circumstance exists." A logical conclusion that can be drawn from the distinction Article 30 makes between the two situations is that knowledge that a fact exists requires a higher degree of certainty ("practical" or "virtual") than knowledge that a particular result "will occur in the ordinary course of events" (contingent or risk awareness).<sup>234</sup>

Thus, the concept that criminal liability may be based on a *mens rea* of less than actual knowledge is arguably built into Article 30. If that premise is correct, then so long as the defendant is actually aware of the risk and consciously decides to take it, her *mens rea* need not also include an element of certainty that the risk will come to pass.<sup>235</sup> By this view, the key to criminal culpability is risk awareness. And, it is plausible to read the language of Article 30 as requiring an "awareness that the risk will occur in the ordinary course of events." Since the risk is now the "consequence," that interpretation would be consistent with the language of Article 30.

I have argued in this paper that the ICC should interpret Article 30 to include the safeguards provided in the MPC for affixing liability for risky conduct. Based on the few cases decided thus far, it already appears that this will be a recurring issue. Eventually, the Court will have to face the question squarely, and when it does, it either will incorporate some form

232. Rome Statute, *supra* note 3, art. 30(3).

233. See, e.g., *supra* pp. 696–97.

234. The difference between knowledge and recklessness comes down to a difference in probabilities. Treiman, *supra* note 121, at 317.

235. See van der Vyver, *supra* note 138, at 245–46 ("If the intervening act or occurrence was 'unforeseen' or 'unexpected,' it would not have been within the perpetrator's contemplation and could therefore not affect the measure of certainty entertained by him or her that the proscribed consequence 'will occur.'").

of recklessness into the Rome Statute, or it will allow political or military leaders to evade punishment for serious international crimes. The result of the latter course would be impunity for those most responsible, which would mean that the Court has failed to carry out one of its central missions.