What makes valid law? Shifting modes of responsibility in international criminal law
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A Valid International Problem vs. A Valid International Law: Shifting modes of responsibility in International Criminal Law

1. Introduction

War crimes, crimes against humanity and genocide crimes are committed in the context of group tensions, often during conflict over control of a State or self determination. Since its inception in 1999, Joint Criminal Enterprise (JCE) has been applied by some international and domestic courts as a way of holding individuals responsible for such collective crimes. The doctrine has its roots in the decision of the Appeals Chamber of the International Tribunal for Former Yugoslavia (ICTY) in the renowned Tadić case. Although it has been accepted and utilized by various chambers of the same tribunal, it remains steeped in controversy both in the ICTY and in the practice and doctrine of international criminal law outside the ICTY. JCE was invented by judges who were faced with a legitimate international problem: no modes of responsibility in the statute governing the tribunal were sufficient to hold an individual responsible for crimes of mass atrocity which, by definition, are committed by groups, when the individual’s exact participation is difficult to prove. At the same time, a monumental shift was made in core tenets of international criminal law such as the principle of legality and the sources of international law. It has since been hotly debated whether the reliance on scant and flimsy case law sufficed to prove the status of JCE as customary law. Creativity may well be required to deal with new ways in which these crimes of mass atrocity are committed, but we must be wary that we are not shifting modes of responsibility beyond the basic tenets of criminal law.

Of particular interest is the way in which this mode of liability seems to have grown from its judicial inception to more general application despite uncertainty as to its status under international law. While JCE has been a useful answer to a valid international problem, the central question we will deal with is whether this notion can now be accepted as a valid mode of liability in international criminal law (ICL).

Some important questions we will consider in this context include the sources of international criminal law, whether the principle of legality should prevent shifts in recognized modes of responsibility, or whether the problems particular to the international nature of ICL warrant acceptance of such shifts. If a concept in ICL cannot be found directly in one of the sources of international law, is there some other way by which it has become accepted law?

Recently the Pre-Trial Chamber at the Extraordinary Chambers in the Courts of Cambodia invited amicus curiae briefs on the question of the development in law of the doctrine of JCE and its applicability in the first case before it. Professors Antonio Cassese and Kai Ambos submitted briefs that exemplify the equivocal response to the doctrine. Partly in response to the amicus briefs, this paper aims to identify the process by which JCE has been presented as valid law within international criminal law, including both the virtues and some of the problems of this process.

Firstly, the creation and application of JCE will be traced from its inception at the ICTY to its application in other settings, namely hybrid and domestic courts where

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1 Tadic Judgment, (IT-94-1-A), Appeals Chamber, 15 July 1999. (Hereinafter Tadic.)
subject matter and jurisdiction is predicated upon domestic penal legislation. We will demonstrate in this section why we are not convinced by the dubious argument that JCE can be grounded in customary law. The restrictive role of the principle of legality will also be discussed here. Secondly we will focus on the process by which JCE appears to have become accepted law through application and interpretation in various judicial forums, despite its dubious status under acknowledged sources of international law. The language used in diverse judgments and the reification which has taken place will be analysed critically. Thirdly, through this discussion we hope to be able to identify whether or not this process has been sufficient to consider JCE a valid mode of liability under international criminal law. Although this notion cannot be discovered by mere reference to the sources of international law, it appears that there is a subtle, dynamic process at hand by which the content of norms in international criminal law is derived. This process can be described as one of communication based on authority, rather than simply a process of discovery of pre-existing rules. But we argue that such a process must be tested against the principle of legality.

2. The inception of JCE – is JCE valid law?

Much has been written since the inception of JCE about its validity and applicability. In particular many authors have difficulty with the attempt to source this notion in customary international law, when the reasoning and results thereof are highly questionable. We will not repeat all those arguments and criticisms here, but we will give an overview of the inception and recent development of the notion, and demonstrate why we question the validity of JCE under international criminal law.

2.1. The common purpose doctrine

In its seminal Tadic decision in 1999, the judges of the ICTY Appeals Chamber took great pains to resolve a serious problem of individual criminal liability. The defendant had been convicted of committing various war crimes and crimes against humanity. In appeal one of the questions raised was whether it could be proven beyond reasonable doubt that he was also responsible for the murder of five Bosnian men. While Tadic’s presence in the village in question was verified, as was his participation in forcefully removing the victims from their homes, his participation in, and responsibility for, the deaths of the victims was not certain. The Trial Chamber had found that the “bare possibility” that it had been him was not enough to secure a conviction on this count. Nonetheless, the Appeals Chamber took a different line of reasoning, and considered the legal question to be “whether the acts of one person can give rise to the culpability of another where both participate in the execution of a common criminal plan”. Because Tadic was proven to have been present as a member of the Serb forces and to have been involved in other related crimes, the Appeals Chamber found that he could also be held responsible for crimes which were a foreseeable consequence of the actions of the group, and with regard to which he was reckless or had an indifferent state of mind. This individual criminal liability for crimes committed in relation to a common plan or purpose with other perpetrators marked the birth of the controversial notion of joint criminal enterprise.

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2 Ibid at para 175.
3 Ibid at para 181-183.
4 Ibid at para 185.
5 Ibid at para 237
To reach this conclusion, the Appeals Chamber took a long and winding path, and came up with three categories of this form of individual criminal liability for crimes committed in the context of collective actions. The distinction between the three categories will not be further discussed here, except to say that JCE I and II has caused less discord in the literature that has followed *Tadic* and other cases, whereas JCE III is the most controversial and least accepted, since it goes the furthest in attributing culpability of an individual based on inference from the very presence of that person in the vicinity of those who may actually have committed the crime - guilt by association.

To lawyers from a European “civil law” tradition, JCE is considered essentially to be a form of co-perpetration, but to lawyers from the Anglo “common law” tradition, where co-perpetration is not recognised in so many words, the common purpose doctrine is analysed somewhat differently. It is this difference in domestic criminal law perspective which has led to the greatest controversies and disagreements as to the content and validity of JCE.

### 2.2. The problem of sources

To define each of the three categories of JCE, the ICTY Appeals Chamber made much use of World War II trials and some domestic case law. The notion of JCE, and in particular the third category, has raised debate due to the attempt to ground it in customary law and the uncertainty as to its roots in any other source of law. International criminal law has principles and notions drawn from domestic criminal law systems, and yet is considered to be a branch of public international law. The question of which sources of law apply is therefore pertinent, and sometimes complex. Unlike domestic systems of criminal law, where the legislature has clear frameworks within which it can operate and the judges can expand upon or develop the law according to a tradition of common law, civil law or otherwise, in the international arena it seems that the number, kind and hierarchy of sources must be re-examined in each new judicial forum. There are therefore two questions that must be answered in order to consider whether JCE is valid law: firstly, what law is applicable? And secondly, does JCE fall under this law?

These questions will be answered differently in different judicial forums, which means there may be no single answer to the question whether or not JCE is valid law. The applicable law in each judicial forum may differ according to situation for which each one has been established: the ICTY has a limited jurisdiction *rationae temporae* and with respect to the *locus delicti*, and yet is instructed to apply the laws and customs of international humanitarian law; the ICC has a much less limited

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8 See articles 8 of the Statute of the ICTY.
jurisdiction and a more detailed list of crimes and applicable law; and on the other end of the scale the new Special Tribunal for Lebanon applies Lebanese law. Still, both domestic and international tribunals dealing with questions on ICL must look to public international law sources. It has been pointed out that “[i]t is the very ad-hocness of international tribunals (the fact that they post-date the alleged crimes) that places them at a disadvantage in relation to sources of law.”

In the following analysis, the limited doctrine of sources, often drawn from the text of art 38 (1) of the Statute of the International Court of Justice (ICJ), will be compared to the way in which JCE has been developed. It would appear that the way in which JCE was conceived is difficult to place under any of the recognised sources of international law.

i. Treaties
Tribunals and courts established to deal with international criminal law are, to date, governed by a statute which has the status of a treaty (for instance the Rome Statute of the ICC) or, in the extraordinary cases of the ICTY and ICTR, a decision of the UN Security Council. Even the internationalised courts, whereby both the domestic law of the State in question and international law are deemed to apply (for instance the Special Court for Sierra Leone, and the Extraordinary Chambers in the Courts of Cambodia) are established by way of an agreement with the UN and are governed by a specially enacted Statute. These statutes, which have the status of a treaty, prescribe what law is applicable in any case before these courts, and refer to the generally recognized sources of public international law, with priority given to the law of the statute itself.

In the Statute of the ICTY there is no mode of responsibility provided for which resembles JCE, or the common purpose doctrine. In some other Statutes it does appear, for instance in the Rome Statute of the ICC and most recently in the Statute for the Special Tribunal for Lebanon. In the Tadic judgment, the bench had found that although JCE does not appear in the statute, it could nonetheless construe it as a mode of liability which falls under art 7(1) of the statute, which reads:

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9 See articles 5 to 8 of the Rome Statute for the International Criminal Court for the list of crimes, and art 21 for applicable law.
10 See article 2 of the Statute of the Special Tribunal for Lebanon.
11 Sluiter *ibid* at p 80.
12 A/CONF.183/9, adopted 17/7/1998
13 S/Res/827 (1993) and S/Res/955 (1994) respectively, both of which contain the statute of the relevant tribunal. According to art 25 of the UN Charter, decisions of the Security Council are binding on all members of the UN, and therefore have a prevailing status under international law as a source of obligation. The Statutes are however only applicable to the tribunals themselves: the binding nature for States lies in the obligation to cooperate with the tribunals in their work to investigate and prosecute crimes which fall under their jurisdiction.
14 See articles 3, 4, 5 and 6 of the Statute of the Special Court, S/Res/1315 (2000).
16 See for example the preamble of the Statute of the ICTY, art 1 and 21 of the Rome Statute of the ICC.
17 Art 25 (3) (d) of the Rome Statute
18 Art 3 (1) (b) of the Statue of the Special Tribunal for Lebanon. It should be noted that the applicable law is deemed to be the criminal code of Lebanon, but the modes of individual liability follows art 25 of the Rome Statute *verbatim*. For comment on this, see below under ...
“A person who planned, instigated, ordered, committed or otherwise aided and abetted in the planning, preparation or execution of a crime […] shall be individually responsible for the crime.”

JCE was considered to be a form of “commission”, due to the argument that the moral gravity of participation is no less when an individual participates in the crime indirectly, even when the actual role played is difficult to prove. As well the bench relied on the rule of interpretation of treaties which says that the ordinary meaning must be given to terms in their context and in light of the object and purpose object of the treaty, which object and purpose they construed to mean prosecuting all persons responsible for serious violations of international humanitarian law. Essentially anyone who could possibly be held responsible for a crime was regarded as falling under the jurisdiction of the tribunal, regardless of whether the mode of participation most appropriate for the acts of that person was explicitly part of the Statute or not.

The statutes of the ICTY and ICTR were not drawn up in the same detail as the Rome Statute of the ICC and the statutes of other subsequent international and hybrid tribunals, all of which had the benefit of being built on the shoulders of the ad-hoc tribunals. This meant that the ICTY statute was somewhat limited and onconclusive on many more detailed questions, including modes of responsibility. Where the statute itself is unclear or onconclusive on a matter, the travaux preparatoires must be consulted in order to determine the intention of the drafters. In an appeal against his conviction based on participation in a JCE, Ojdanic relied on this rule of interpretation in making the argument that the drafters of the ICTY statute had intended to exclude a mode of liability such as JCE. Ojdanic argued that the travaux of the statute of the ICTY shows that conspiracy was rejected as a form of liability and that JCE is based on the notion of conspiracy and must therefore also be rejected. Furthermore, the fact that commission of a crime by a group of persons with a common purpose is explicitly included in the Rome Statute and not included in the ICTY statute is reason to conclude that the drafters did not intend to allow such a mode of responsibility under the jurisdiction of the tribunal. The Appeals Chamber rejected these arguments, and relied on the Tadic judgment as its sole reason for doing so.

While the absence of a rule or a legal notion in a treaty cannot itself be a reason for assuming that rule or legal notion does not exist, the Appeals Chamber disregarded a strong argument based on the doctrine of sources of international law in favour of one of its own judgments. The priority given to this judgment as a source of law is dubious, and will be questioned below in the context of reification.

It should be pointed out that these statutes are not themselves a general source of law, since they are only applicable to the tribunals which they respectively govern. So

19 Tadic, supra note 1 at para 188.
21 The bench cited the report of the Secretary General on the jurisdiction and mandate of the ICTY, see Tadic at para 189-190.
23 Ojdanic, supra note Error! Bookmark not defined..
24 Ibid at para 14.
26 See infra paragraph 3.3.
where JCE appears in a statute as a mode of liability, it provides no precedent nor
general rule to apply this mode in other tribunals or courts. The International Military
Tribunal at Nuremberg applied the same analysis, that the statute only gave a
restriction on the jurisdiction of the tribunal, and was not a source of law itself.28 Even
the Rome Statute, which is seen by many as indicative of developments in ICL,
cannot be relied upon as a general source of law when it comes to a mode of
responsibility - art 25 on individual criminal responsibility instructs the ICC, and no
other courts, as to what modes of responsibility are applicable before it.

ii. Customary law

Customary law as a source of norms in ICL is problematic, since this is such a nascent
branch of international law, and there is a lack of both State practice and opinio juris,
the two requirements for determining a rule of customary law. Nonetheless it appears
to be the source most heavily relied upon by judges of international and
internationalised (hybrid) courts dealing with uncertainties in ICL. The ICTY Appeals
Chamber construed JCE as a customary norm by inquiring into some post-World War
II case law. As we will demonstrate below, when norms of uncertain origin are
construed as custom, and are applied by judiciaries as such, it may be the case that
this leads to acceptance of the norm even if it did not actually fall under customary
law according to a strict application of the doctrine of sources. (It may later become
custom by repeated use??) The way in which norms of customary law develop is the
most interesting process to observe in attempting to answer whether or not JCE is
valid law.

Because customary norms are derived from the customs and practices of States,
judicial decisions are important in assessing potential customary norms in ICL. In the
Furundžija decision, the Trial Chamber at the ICTY gave three preconditions for
relying on national laws and judicial decisions in order to ascertain whether a norm
can be said to be customary law.29 The first is that reliance upon national legislation is
justified only when international criminal rules do not clearly define a notion of
criminal law; the second is that reference should be made to more than one national
legal system (unless otherwise indicated, for example due to the applicable law
restrictions in a statute); the third is that “account must be taken of the specificity of
international criminal proceedings when utilising national law notions”,30 due to the
unique traits of international proceedings and the procedural differences in national
systems. These preconditions have not been stipulated as such outside the ICTY, but
in any case the notion that more than one legal system should be referred to is
understood generally to be a condition of ascertaining a customary law norm.31

The Tadic Appeals Chamber examined the case law of post World War II trials, but it
should be noted that almost all of the cases relied upon were decided by British,
American or Canadian military tribunals, all of which stem from a common law
tradition.32 This is significant because where the Chamber referred to decisions of

28 Ibid.
29 Furundžija, Judgment, (IT-95-17/1), Trial Chamber, 10 December 2008, para 175.
30 Ibid.
31 …
32 For example, the Almelo trial at Tadic para 197 and the Jepsen trial at Tadic para 198, decided in
British courts; the Hoelzer case at Tadic para 198 decided in a Canadian court, the Einzatsgruppen case
at Tadic para 200, decided by a US court.
domestic courts from civil law traditions, the notion of “co-perpetration” was recognised, but no notion of common purpose or JCE as such. In other words, while the common purpose doctrine could be seen as a common element in some jurisdictions which share a legal tradition, it is artificial to draw the conclusion that it is a norm of customary law, since there are so many differences in the customs and practices of States.

As has been pointed out by some critics of the notion of JCE, this “survey style” of deriving a customary norm is dubious. Language barriers, inaccessibility of materials, and lack of understanding of the legal system from whence a particular law or decision hails, all lead to a highly selective survey of state practice. European systems dominate the results of such case law survey, rarely is reference made to Russian, Chinese, Indian or African state practice.

The preference for certain legal traditions goes even further. Even within the chambers of the ICTY there has been disagreement over the validity of JCE, and this seems to stem from the different legal traditions in which the participants have been trained. The prosecution, which is dominated by lawyers trained in common law systems, has embraced the notion and used it in endless indictments where the participation of the accused was either indirect or difficult to prove, or simply as an alternative mode of responsibility in an attempt to catch all the fish before the ICTY. On the other hand, dissent has been voiced by some judges of a civil law background, the most outspoken of which has been Judge Per Lindholm who said in no uncertain terms that JCE does not have any substance of its own and “is nothing more than a new label affixed to a since long well-known concept or doctrine in many jurisdictions as well as in international criminal law, namely co-perpetration.”

The status of World War II case law as customary law is itself questionable, since these military courts and the statutes under which they prosecuted Axis members had no precedent, and were at the time hotly debated. They also applied national laws, as there was no agreed international framework under which to operate. At best this demonstrates a historical precedent for decisions taken in the ad hoc tribunals of the end of the 20th century, but this does not in itself amount to a customary norm. The inconsistencies are too great. “It’s been done before” is not a sufficient basis on which to form customary norms.

On a technical note, reference was made in the Nuremberg judgment to a common plan or enterprise, however contrary to the argument made by the ICTY, this was not
in reference to a mode of responsibility, but rather a construction of evidence in order to fulfill the requirements of the charge of the crime of conspiracy.40 In any case such a notion was never expanded as widely as Tadic and subsequent ICTY decisions would argue. Relying on the Nuremberg decision as a customary norm basis for JCE has little, if any, grounding.

Of course, much depends on one’s definition of customary law, and there are some who argue that the traditional requirements of State practice and *opinio juris* can be interpreted in a flexible way. Professor D’Amato argues that we can only know what is custom and what is a violation thereof (rather than a new customary rule emerging) by waiting to see how States react to any assertion that an action or rule is customary.41 In other words, customary law is fluid and ever changing. Professor Shahabuddeen argues that pre-existing State practice is not necessary if it can be said that a customary law principle could reasonably be applied in a new set of circumstances.42 And those who adhere to a communication model of international law assert that in order for a customary rule to emerge, it must be communicated by a participant who has sufficient authority and “controlling intent” (the capability to enforce the rule), and that the rule must have a policy content.43 The emergence of JCE as custom could fit any of these definitions, as long as one is willing to accept a more fluid and open definition of customary law. This does, however, raise concerns as to the rule of law and legal certainty, which are of particular importance in any criminal law system due to the rights of the defendant.

iii. General Principles

It has never been asserted that JCE can be derived from general principles, especially considering the disparity in domestic laws regarding participation in collective crimes. But this source of international law is of interest because of the special role it plays in ICL and in fact because some general principles of ICL may argue against the broader application of JCE as a mode of responsibility.

The notion of general principles of law is by definition quite vague, but it remains an important source of international law. Particularly when it comes to protecting the due process rights of the accused, general principles have been relied upon in the absence of a general treaty covering ICL procedure. General principles can be derived from domestic laws and judicial decisions, as well as from treaty provisions, yet they are considered a source of law unto themselves.

40 Judgment, International Military Tribunal at Nuremberg, at para...
41 Anthony D’Amato, INTERNATIONAL LAW SOURCES; COLLECTED PAPERS, VOLUME THREE, Martinus Nijhoff Publishers, Leiden, 2004 at p 152.
Art 7 (2) of the European Convention on Human Rights, and the identical art 15 (2) of the International Convention on Civil and Political Rights both allow for general principles as a source of law for a recognised crime: “This Article shall not prejudice the trial and punishment of a person for any act or omission which at the time when it was committed, was criminal according to the general principles of law recognized by the community of nations.” \(^{44}\) Similarly, the ICTY was left to decide on which defences would be applicable according to “general principles of law recognised by all nations.” \(^{45}\)

This would suggest some flexibility in discovering and determining some aspects of ICL, however there must be some limits on this, especially when it comes to the normative content of the law which affects the individual accused. As has been mentioned, the difference between each and every criminal law system means caution should be applied in ascertaining a “general” principle of ICL. Furthermore, as will be discussed below, the general principle of *nullum crimen* may in fact preclude JCE from being valid law.

**iv. Judicial decisions and authoritative opinions**

Judicial decisions as a source of international law may be only considered as subsidiary sources under the doctrine of the Statute of the ICJ, but international criminal law relies heavily upon decisions of both international tribunals and domestic courts. This is because it is a branch of international law which is still nascent, but moreover because it is a branch which deals specifically with individuals whose rights must be protected according to the basic tenets of (domestic) criminal law. This is especially important for the accused, but must also be considered when it comes to the role of victims and witnesses.

At the same time, the fact that we are dealing with an international system which has grown as a hybrid of common law and civil law traditions, it is difficult to ascertain the decisive value of any domestic judgment as a source of law. There may be many procedural and substantive differences between a decision of a particular domestic court and the law applicable in any given tribunal. Criminal law is, by its nature, a branch of law which relies upon a case by case analysis. Because ICL is by definition casuistic, problems such as suitable modes of responsibility must also be tested on a case by case basis. \(^{46}\)

In this respect, the ICTY took a logical step in looking to both post World War II case law as well as more recent domestic case law for instruction as to the applicability of the common purpose doctrine (although it should be noted that the ICTY did this in an effort to assert its argument of customary law, not because it depended on these judicial decisions as a source unto themselves). Subsequent tribunals and courts look to judgments of the ICTY in the same way. However in all cases it must be carefully considered whether the judgment being referred to could in fact be considered a

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\(^{44}\) In the ECHR the term “civilised nations” is used in place of “the community of nations”.


source of law unto itself, or whether it should be seen in a restrictive sense as only being applicable to the judicial context in which it was made.

In other words, two questions must be posed: firstly whether the ICTY Appeals Chamber has been justified in relying upon domestic case law as a source for the common purpose doctrine, and secondly whether subsequent judiciaries can rely upon the ICTY judgments as a source of law.

An interesting conflict appears in the reasoning applied by the Tadic bench when it comes to relying on domestic judicial decisions. First of all a series of domestic laws and judgments are noted where some notion of common purpose is espoused,\(^{47}\) in order to demonstrate some underpinning of the concept in domestic law. But thereafter the bench states that domestic law cannot be relied upon as a source since the differences between the modes of participation in each jurisdiction are too great.\(^{48}\) It is difficult to know in this context whether the judges mean to examine these laws and decisions in order to extrapolate a customary law norm, or in order to source the concept of JCE in domestic laws and judicial decisions. The line of argument the bench takes seems to rely heavily on the idea of a customary norm, however it is not always entirely clear which source of international law it wishes to apply in its analysis.

In any case the first question, whether the Appeals Chamber was justified in relying on domestic case law as a source for JCE, should be answered in the negative, by virtue of its own analysis that the discrepancies are too great.

ICL is casuistic by definition, which means that case law from domestic, international and hybrid courts will become increasingly important as a source for clarifying notions in ICL. But does this mean case law prevails as a source? D’Amato argues that in any case decisions from the ICJ may be authoritative and objective validators of a norm in international law, since this world court has an international \textit{de facto} status of recognition, but that domestic courts are only contributing to international law through custom, since they have no international acknowledgment.\(^{49}\) And yet in ICL there seems to be a kind of feedback process at hand, whereby an international tribunal such as the ICTY looks to domestic case law to derive the customary status of a notion of JCE, following which domestic cases refer to the case law of this ad hoc tribunal as a source of law. The more often this feedback process takes place, the more embedded the notion of JCE – or any other notion which may develop along this same process – seems to be in accepted law, despite its uncertain origins.

The second question must therefore remain open, whether subsequent courts and tribunals can rely on judgments of the ICTY as a source of law. A lack of hierarchy among international courts means that it is unclear what role the ICTY plays as a lawmaker.\(^{50}\) It would seem that judgments of this tribunal could certainly be instructive to subsequent tribunals and courts, but the context in which the ICTY operates must always be kept in perspective. It was established to deal with a specific conflict, with a limited jurisdiction and a specific set of crimes. To translate the solutions that judges

\(^{47}\) \textit{Tadic} para 224.
\(^{48}\) \textit{Tadic} para 225.
\(^{49}\) D’Amato, \textit{supra} note 41 at p 24.
\(^{50}\) See e.g. Ben Kingsford, \textit{Is The Proliferation of International Courts a Problem?}, \textit{\ldots}
have come up with to solve problems of individual criminal responsibility to other legal and cultural contexts is to assume the judges got it right in the first place and that their solutions are universal. Both these conclusions are dubious.

It would therefore appear from the above analysis that JCE cannot fall under any of the recognised sources of international law without some creative twists and turns in legal reasoning. This is the first major reason a negative answer must be given to the question whether JCE is valid law. A further important reason lies in the fundamental criminal law notion of *nullum crimen*.

### 2.3. *Nullum crimen and the principle of legality*

Arguments have been raised, both before the ICTY and in the literature, that JCE breaches the fundamental principle of *nullum crimen*, as it creates criminal responsibility where there was previously none.\(^{51}\) This argument is raised in the wake of objections to the assertion that JCE can be grounded in customary law. Of particular concern is the third category of JCE, which imposes a duty to be aware of what other individuals are or may be doing, with the risk of culpability for their criminal actions. Because this category goes much further than the common purpose doctrine itself, and because there are the greatest divergences in domestic laws when it comes to this kind of liability, it is understandable that defendants before an international tribunal object to the imposition of this new form of liability as a breach of *nullum crimen*.

When it comes to human rights, under which the protection of the due process rights of an accused must fall, it has been asserted that general principles of law are a more important source than custom.\(^{52}\) This reverses the order in which the sources appear in the statute of the ICJ, but there is no consensus on whether the order in which they appear is indicative of a hierarchy of norms.\(^{53}\)

If this is so, then the principle outlined in the human rights treaties quoted above,\(^{54}\) that of *nullum crimen*, must always be taken into account while considering developments in holding individuals criminally responsible for collective crimes. As much as the sources of ICL can be drawn from both domestic laws and public international law sources, leaving much up to judiciaries to clarify, it also has a diversity of goals it purports to serve, sometimes with conflicting principles from which judiciaries must select. The fact that ICL has been established over recent years in response to human rights violations means that there could be a victim-centred approach. At the same time, the fact that many crime definitions focus on international humanitarian law means that the opposing notions of humanitarianism and military necessity come into play. There are also the aims of transitional justice, where a society wrought by mass atrocities hopes that applying some justice system will help move through and beyond the traumas experienced. And still a fourth set of concerns

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\(^{51}\) Cassandra Steer LL.M.

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\(^{52}\) Supra section 2.2 (iii).
must be considered, those of defendant-centred rights, since courts dealing with these crimes have the ultimate power to punish and remove the liberty of the individual.\textsuperscript{55}

While all these paradigms are at play, essentially we are dealing with a criminal justice system, and so the criminal law paradigm must be preserved, to ensure the due process rights take priority (though not at any cost) over competing principles from other paradigms. Furthermore, because there is a significant prosecutorial and judicial discretion inherent in the international criminal system, which lacks the greater context of a mature legal system with checks and balances,\textsuperscript{56} the culpability model of individual criminal liability, protected by the \textit{nullum crimen} principle, must take priority.

This has been emphasised by the UN Secretary General in its report on the ICTY:

“In the view of the Secretary General, the application of the principle \textit{nullum crimen sine lege} requires that the international tribunal should apply rules of international humanitarian law which are beyond any doubt part of customary law […] This would appear to be particularly important in the context of […] prosecuting persons responsible for serious violations of international humanitarian law.”\textsuperscript{57}

Beyond the rights of the defendant, the principle of legality is fundamental to criminal law in general, and even more so in ICL, in terms of preserving the legitimacy of the proceedings. Without this legitimacy, the concurrent paradigms of human rights, transitional justice and international humanitarian law may also be undermined,\textsuperscript{58} and the acceptance of international criminal procedures by injured societies as well as the international community at large will be a greater challenge. As it has elsewhere been succinctly put:

“Because of the wide discretion granted to international prosecutors […], because of the novelty of the international forum, because of the political nature of many of the prosecutions, and because of the lack of consensus about the meaning of some of the crimes in [ICL], it is especially important that international criminal judges protect defendants through careful attention to the culpability principle and similar doctrines that seek to ensure that defendants are convicted for their own conduct and not for the violent trauma experienced by entire nations.”\textsuperscript{59}

Not all of the facets of the principle of legality can be fulfilled in the international system, but it is important that judiciaries interpret crimes, modes of liability and sources of law within the limited jurisdiction of their respective courts and tribunals, and that where the requirements of \textit{lex certa} have not been fulfilled, those of \textit{nullum crimen} are adhered to.

\textsuperscript{56} \textit{Ibid} at p 96.
\textsuperscript{57} Report of the Secretary-General on the ICTY, para 34.
\textsuperscript{58} \textit{Ibid} at p 97.
\textsuperscript{59} \textit{Ibid} at p 100.
This poses a problem if the assertion that JCE can be grounded in customary law cannot be upheld. Indeed, this has been the source of objections raised by various defendants before the ICTY since Tadic.\(^60\) Even Judge Per Lindholm’s dissention in the Simic case, quoted earlier, demonstrates that while co-perpetration has its undisputed place in ICL, the newness and unfamiliarity of the notion of JCE leads to the suspicion that we are dealing with a breach of *nullum crimen*.

Any notion that the peculiarities of ICL should mean there is more room to allow for new modes of responsibility than perhaps in domestic systems, must be discounted. If anything, the principle of *nullum crimen* should be even more strictly adhered to on the international plane because of the factors espoused above.

The Appeals Chamber laid out three pre-conditions for a mode of responsibility to be applicable before the tribunal: (1) It must be explicitly or implicitly provided for in the statute. An implicit provision could be construed by interpreting the statute according to its object and purpose; (2) the mode of responsibility must have existed under customary law at the relevant time; and (3) the law must have been sufficiently accessible at the time the crime was committed.\(^61\) To answer this last condition the Chamber relied upon the law in the Former Republic of Yugoslavia, even thought the law it applied was that of the statute. The above analysis demonstrates that the Chamber constructed careful arguments to fulfil each of these conditions, but that nothing is in fact certain.

3. Assuming JCE is valid law - The application of JCE through in other courts

Despite the conclusion which the above analysis leads to, namely that JCE cannot squarely be placed under one of the recognised sources of international law, and that in fact the principle of *nullum crimen* may even preclude JCE from being valid law, it has still found a level of acceptance and application at the judicial level which seems to defy this conclusion. We are therefore led to ask a further question: how has JCE been applied and can this application by way of deviation lead to validation of JCE? Is there a risk in accepting the doctrine of JCE in any form in a domestic court when the question of applicability is still alive and well at the international/hybrid level?

3.1. Domestic cases in Bosnia and Herzegovina

Prosecution for international crimes has, of course, not been limited to permanent and/or ad-hoc international tribunals. Recent years have reflected a marked increase in domestic prosecutions for genocide, crimes against humanity and war crimes. Spurred on by the principle of complimentarity, states have adopted new and/or amended criminal legislation proscribing acts that uphold their obligations to challenge impunity for international crimes.\(^62\) In turn, the states engage in a dynamic process to understand and apply the standards that have been co-opted into the domestic legal structure. This process leads to unique divergent understandings and

\(^{60}\) See e.g Ojdanic, *supra* note Error! Bookmark not defined.; \(^{61}\) Stakić, (IT-97-24-T), Trial Chamber, 31 July 2003; \(^{62}\) See analysis by Vera Haan, *supra* note Error! Bookmark not defined. at p 176-179.
applications between states, particularly in regard to definitions of crimes and modes of responsibility. The concept of JCE has recently made its appearance in the state Court of Bosnia and Herzegovina (BiH); the internationised domestic court developed to prosecute the majority of the current war crimes cases in BiH.\footnote{63} Examining the process by which the Court assumed the principle into its legal structure reveals the interplay between international law and domestic law and may go toward a better understanding of the process by which the disciplines engage one another to reify law.

The first mention of JCE as a valid mode of responsibility under BiH law seems almost inconsequential for its failure to provide any foundation or reasoning for including JCE within the judgment.\footnote{64} In the \textit{Prosecutor v. Momcilo Mandic}, the Court stated that, although not applicable in the case at hand, the principle of JCE was a valid mode of responsibility pursuant to Article 180(1) of the BiH Criminal Code.\footnote{65}

The following year, panel two of the state Court of BiH provided reasoning for finding systemic JCE a valid mode of responsibility under the BiH CC. In the \textit{Prosecutor v. Mitar Rašević and Savo Todović},\footnote{66} The accused Rasevic and Todovic were found guilty of crimes against humanity for acts perpetrated while engaged in their respective positions as the commander of prison guards and the deputy warden in KP Dom in Foća municipality during the period of April 1992 to October 1994. The accused incurred personal criminal liability for the crime of persecution against inmates of the KP Dom. The acts of the accused were committed as part of a systemic JCE. The reasoning of the Court reflects the interplay between BIH domestic law and international law, with the ICTY Statute as the agent of international law. Article 180, the article within which JCE was established as a mode of criminal liability in BiH law, is a direct adoption of Article 7 of the ICTY Statute. The Court stated that Article 7 is international law “by virtue of its having been drafted pursuant to the powers of the United Nations.”\footnote{67} The Court further reasoned that, pursuant to well established principles of international law, “…when international law is incorporated into domestic law, ‘domestic courts must consider the parent norms of international law and their interpretation by international court’.”\footnote{68} Therefore, the Court determined that because Article 180(1) of the BiH CC was a direct derivation of Article 7(1) of the ICTY Statute it must include the definitions and interpretations of the ICTY. Specifically, the term “perpetrated” as it appears in both articles, provides that JCE is a form of co-perpetration by which individual criminal responsibility would attach. Additionally, the Court determined that “perpetration” as it appears in Article 7(1) of the ICTY Statute and Article 180(1) of the BiH CC includes knowing participation in a JCE and that the elements of JCE are established in customary international law.\footnote{69}

On the other hand, the Court has used very critical language when analysing the prosecutions arguments for a broad application of JCE liability that would include almost the entire military hierarchy present during the temporal and geographic scope of the indictment in the *Kravica* case.\(^{70}\) The Court stated that an application of JCE as envisaged by the Prosecution would violate the fundamental principles of international law, customary law and the law of war. The language of the *Kravica* verdict certainly creates perimeters for the application of JCE within the state Court.

The question remains how the notion of JCE will continue to be applied, and whether the court will distinguish between the three forms of JCE in addressing the validity of this mode of responsibility?

### 3.2. *The amicus briefs for the ECCC*

Prudent dialogue assessing whether liability under JCE is applicable in courts prosecuting for international offences that occurred prior to the determinations of the ICTY Appeals Chamber without violating the principle of *nullem crime sine lege* is still quite active. Professors Antonio Cassese and Kai Ambos recently submitted amici curiae at the behest of the Extraordinary Chambers for the Courts of Cambodia (ECCC) on this very question of JCE.\(^ {71}\) The Court asked for submissions on two issues, (1) the development of the theory of JCE, and (2) the application of JCE as a mode of liability before the Court. The relevant law applicable in the ECCC is the law of Cambodia, thus, the central query is was whether JCE was a mode of liability under customary international law during the relevant time period of 1975-1979. The submitted briefs reflect the disparate views on the doctrine and the recognition of all three categories as custom under international law.

Cassese argues on the one hand that the *Tadić* Appeals Chamber did not develop the doctrine itself but, rather, elucidated a mode of liability that had been a part of customary international law since the aftermath of WWII.\(^ {72}\) As support, Cassese cites the cases relied upon in the *Tadić* Appeals Decision. Indeed, Cassese’s argument remains largely centred upon that which was put forth in *Tadić*, alongside the supposition that the element of collective criminality inherent to international crimes invokes a specific need for JCE and considerations of public policy aid in justifying its use.\(^ {73}\)

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\(^{71}\) On 5 September 2008, the Office of the Co-Prosecutors filed an Appeal brief requesting the Pre-Trial Chamber to amend the Closing Order of the Co-Investigative Judges to include Joint Criminal Enterprise as a mode of liability in the indictment against Kaing Guek Eav, aka “Duch”. Following the Appeal Brief, the Pre-Trial Chamber invited amici curiae on the subject.

\(^{72}\) *Amicus Curiae* Brief of Professor Antonio Cassese and Members of the *Journal of International Criminal Justice* on Joint Criminal Enterprise Doctrine, Case No. 001/18-07-2007-ECCC/OCIJ (PTC 02), Pre-Trial Chamber, 27 October 2008, para. 20.

\(^{73}\) Ibid., para. 35. Cassese refers to the Martens Clause as allowing for social and moral need for observance of rules and the expression of legal views by a number of states or international entities about the binding value of the principle to establish principle or customary rule even if there is no widespread or consistent state practice.
On the other hands, Ambos begins his analysis by recognizing that the doctrine of JCE is far from universally or even broadly applied, pointing out that of the mixed tribunals established in the aftermath of the ICTY, only the East Timorese Special Panel for Serious Crimes has applied the doctrine. In addition, the ICC has dissociated itself from JCE in so far as it goes beyond the concept of co-perpetration.74

In contrast to Cassese’s determination, Ambos finds that JCE I and II are the only forms that can be said to have a basis in customary international law while JCE III cannot: thus, only the first two forms can be construed under Cambodian law and applied in cases before the ECCC. In his argument, Ambos takes issue with the Co-Prosecutors argument that JCE must be applied in order to meet the goal of prosecuting the senior leaders of the Democratic Kampuchea, stating that such application is flawed in that it does not differentiate between the categories of JCE.75

JCE I, which exemplifies a mode of liability that contains a shared intent, resembles co-perpetration in the traditional sense and as such can be considered as “commission” within the meaning of Article 7(1) of the ICTY Statute,76 while JCE III demonstrates something closer to a form of accomplice liability and cannot be seen as commission of an offence as proscribed by the Statute. The threshold of “foreseeability” for an act that was not intended nor a part of the common design is far too low to encompass the type of “knowledge” required for co-perpetration and, thus, commission of the act under the Statute. Consequently, the third form of JCE does not have an explicit basis in codified international criminal law. Article 25(d) of the ICC Statute, for example, limits contribution to a group with a common purpose to intentional acts or contributions made with knowledge of the intent of the group. Thus, the ICC Statute codifies a form of contribution that requires the intent of co-perpetration or JCE I.

Additionally, argues Ambos, JCE III has no basis in the case law following WWII. Utilizing the Essen Lynching case as a reliable source for the perpetuation of JCE III has been met with criticism. Ambos argued that the facts as they stand make it unclear whether the court determined liability based upon shared intent or foreseeability. Furthermore, the alternative cases argued in Tadić fail for similar reasons, or have not remained good law in the national forum from which they were drawn. Thus, Ambos sees no possibility in allowing JCE III to be applied at the ECCC as either a law recognized within the purview of the Statute or as recognized by customary international law.

In reference to the ECCC Co-Prosecutor’s public policy argument that without the application of JCE the leaders and those “most responsible” may go unpunished, Ambos responds that such assertions cannot trump the letter of the law. This is a fundamental issue. Cassese, similar to the Co-Prosecutor’s stance, seemingly supports the weight given to the public policy argument, invoking the Martens clause to

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75 Id., para. II.2.

76 Article 29 of the ECCC Statute reiterates Article 7(1). Thus, the analysis of Article 7(1) and the limits of JCE liability under the Article apply directly to the laws of the ECCC.
suggest that “social and moral need for observance of rules” coupled with the support of a couple of states suffices to supplant the widespread and consistent practice of nations in establishing customary international law. While the basis for such an inference is admirable, it is a suggestive leap to infer JCE in all of its forms as a rule to be observed. Indeed, JCE describes a mode of liability that has been little understood and oft argued. All this is exemplified by the lack of use by various international tribunals as well as the limited definition proffered by the ICC Statute.

Despite the lack of agreement, the ECCC has chosen to apply JCE as a valid mode of responsibility for crimes committed in the period 1975-1979. This retrospective application and analysis flies in the face of nullum crimen, but demonstrates that perhaps there is a more subtle process at hand whereby ICL is being developed.

4. ICL as a process – can JCE become accepted law?

4.1. Repetition and reification

Given the debate outlined above, it must once again be asked, if JCE is not valid according to the sources of international law, what is its status now that it has found some application in some domestic and international courts? It appears that the lack of consensus as to whether JCE can be grounded in customary law or any other source of international law is no longer determinative of the place JCE takes in ICL. Is it possible that this mode of responsibility could be accepted as valid law through a process of repetition and reification?

Cassese, whose amicus brief is discussed above, was one of the judges on both the Tadic Appeals bench and the prior Furundzija bench. As a judge at the ICTY he has been a strong proponent for the notion of JCE, and as a scholar and professor he has written extensively on the matter, including in his handbook on international law. "this doctrine has been relied upon by the same Tribunal and other international criminal courts to such an extent that it can be regarded as a consolidated (though in some respects still controversial) concept of international criminal law." When he was approached by the ECCC to submit an amicus brief on whether or not JCE can be considered customary law, objections were raised by the defendant and another accused, that Cassese could never be objective in his appraisal since he had a key role in introducing and developing the notion. The argument was even made that it would amount to a conflict of interests, since Cassese could never really remove the hat of judge while advising another court. In his amicus brief, as in almost all his publications on the matter, Cassese repeats the arguments that were made in Tadic almost verbatim. Other scholars refer to these publications, as does the BiH court in its decision above regarding the status of JCE under Bosnian law. If enough repetition and agreement is achieved, eventually it would seem that there is some acceptance of the notion despite the debate surrounding its validity.

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77 Antonio Cassese, INTERNATIONAL CRIMINAL LAW, (2nd ed), Oxford University Press, Oxford, 2008; see also Cassese supra note 77.
78 Cassese, supra note 7 at p 110.
79 Objections by Iang Sery and Duch.
80
Prof Cassese was also heavily involved in the drafting of the Rome statute for the ICC, and the Special Tribunal for Lebanon, both of which have included the common purpose doctrine and share the same wording. As well, Cassese sits as president on the STL, and will be involved in the choice to apply this mode of responsibility. Interestingly in art 2 of the Statute of the STL, it is stipulated that only the Lebanese criminal code applies, and no sources of international law are mentioned. What does this mean about the status of JCE?

The process of reification has occurred within the ICTY itself, as it refers to its own judgments as a source of law. This was already mentioned above in the context of the Ojdanic appeal against a conviction based on JCE, where the Appeals Chamber rejected an argument on the traveaux of the Statute in favour of its own prior decision. While it is understandable that the Appeals Chamber must strive for consistency, there is something Kafka-esque at hand when a court which has no rule of stare decisis would refer to its own prior judgments as blank rejection of any argument against a notion it had itself introduced. This is jus novit curiae taken to an absurd extent.

Yet the Appeals Chamber has continued to follow this line, overturning judgments in the trial chamber which digress from the love-affair with JCE and directing itself to return to the doctrine whenever it seems to stray. As to the role this line of reasoning has outside the ICTY, despite what is asserted in the BiH judgment mentioned above, the case law of the ICTY is not automatically a part of international law. As has already been demonstrated, the role of case law as a source of ICL is increasingly important, but each must always be carefully analysed according to the context in which it was decided and the system of which it is a part. The BiH could well be justified in utilising the case law of the ICTY as guidance, since the jurisdiction of both courts overlap. Such reification is in this case understandable, but still noteworthy for its impact on the wider acceptance of the validity of JCE in ICL.

The language used throughout the development of the notion of JCE is also important to note as part of the reification process. As the Trial Chamber in Brdjanin and Talic noted in retrospect, the Appeals Chamber had labelled the concept variously and, apparently, interchangeably as: a common criminal plan, a common criminal purpose, a common design or purpose, a common criminal design, a common purpose, a common design, and a common concerted design. In Krnojelac the court saw fit to use the acronym “JCE” instead of its full name, as a recognised term of art. Apparently it has become a terminus technicus, at least within the ICTY.

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82 Art 3 (1) (b) of the Statue of the Special Tribunal for Lebanon, art 25 of the Rome Statute of the ICC.
83 See supra paragraph 2.2 (i)
84 Stakić, (IT-97-24-T), Appeals Chamber, 22 March 2006, §62.
86 Decision on Form of Further Amended Indictment and Prosecution Application to Amend, Brdjanin and Talic (IT-99-36), Trial Chamber, 26 June 2001, para. 24.
4.2. Sources of international law in ICL

It is clear from our discussion and analysis that ICL develops as much through case law and academic discussion as it does through law-making treaties and statutes. It is also clear it will continue to do so. The fact that the ICC has recently chosen to apply a mode of responsibility that resembles the Germanic notion of co-perpetration by means of another, rather than the common-law rooted notion of JCE, shows that this process is a continuous, perhaps unpredictable dialectic between domestic and international notions.

The fact that principle of complementarity now plays such a central role in the relationship between domestic courts and the ICC means that this dialectic will continue to grow. States are obliged to legislate so that perpetrators of international crimes can be prosecuted domestically. This will lead to more divergence in domestic approaches to crimes of mass atrocity, and no doubt also to a continuation of the feedback process described above. In attempting to answer the same kinds of problems of individual criminal liability the ICTY has faced, courts will look to the case law of those who have gone before them. Among the sources of public international law, domestic and international case law is likely to prevail and, if the approach of the ECCC and the ICC is indicative, to rely heavily on doctrine and literature. What formally are termed subsidiary sources may well become paramount sources in ICL. As well, the importance of general principles is elevated in ICL, as has been discussed above. Although custom has been relied upon heavily in the reasoning of the ICTY, the uncertainty it brings with it due to the nascence of this branch of law and the discrepancies in domestic laws means any norm based on customary law is likely to be debated in the same way JCE has been.

What does this mean for the doctrine of sources? We can safely say that if a hierarchy of sources exists in public international law, ICL does not follow the same hierarchy. This is not problematic, but is of importance in protecting the due process rights of defendants in this ever shifting field. If treaties are clear, these must be the primary source, as they are the closest thing to codification in international law. But when it comes to interpreting any unclear provisions or gaps, general principles must be leading, followed, as a matter of pragmatism, by judicial decisions and authoritative opinions, which must be interpreted in accordance with the general principles such as nullum crimen. Customary law inevitably takes last place, at least until this branch of law matures to a level where custom is far less disputed and there are enough well established and universal procedural protections in place.

As to how the normative content of these sources is derived, what we have described here is a dynamic process of law. Participants in the process of discovering and applying the law are no longer only State organs, they are now lawyers and judges and academics from various backgrounds, working in both domestic and international arenas, in various judicial forums under diverse frameworks. The feedback dialectic between domestic and international law is key to this process and will continue to occur. Domestic notions may offer useful solutions to problems of international criminal law, and an open dialogue should be encouraged, with the restrictive protections offered by giving general principles of criminal law priority.

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89 Lubanga ... See Mark Osiel, forthcoming
90 See van der Wilt, supra note 46.
This dynamic view of the law can also be termed a communication model of law; in order for a rule to emerge, it must be communicated by a participant who has sufficient authority and "controlling intent" (the capability to enforce the rule), and the rule must have a policy content. Such a view of the law is not compatible with a formal understanding of the doctrine of sources, but is a realistic description of the process by which ICL has, to date, developed. Recognising this process means it can be utilised and limited at the same time, allowing creative developments while still protecting the due process rights of the accused.

It could be said, therefore, that JCE may have found its place in ICL through a dynamic process involving recourse to domestic notions and, rightly or wrongly, through repetition and reification. This last aspect should be protected against, by ensuring the first aspect is in accordance with the requirements of any mature criminal justice system.

5. Conclusion: Process, principles, shifts in modes of responsibility

Whether or not it deserves to, the notion of JCE has gained a certain place in the recent case law history of ICL, despite disagreement as to its origins and validity as a mode of responsibility. We have tried to demonstrate how this has come to be, and what this process by which JCE has gained at least some acceptance means for its status under international law.

Through judicial creativity and questionable reasoning, the concept was conceived of and repeatedly applied in various chambers of the ICTY, but not without dissent. Judges and academics have looked at the doctrine of sources and there is disagreement as to whether JCE can be grounded in customary law, or even based on judicial decisions as a subsidiary source of law. At the same time general principles such as nullum crimen could well stand in the way of such a notion being valid under ICL.

The role of the nullum crimen principle has received deserved attention in the discussions surrounding this notion of JCE. Should this principle prevent shifts and developments in modes of responsibility? Or do the problems particular to the international nature of ICL warrant acceptance of such shifts? We have attempted to answer these questions by demonstrating that nullum crimen does indeed apply to modes of responsibility, and that at the same time the way in which international crimes are committed continues to shift and change with the nature of armed conflict and the persons involved (non-State organs, individuals, civilians). We have concluded that perhaps the specific nature of ICL warrants a more flexible application of the principle of nullum crimen, as long as the due process rights of the accused remain protected.

Modelled on a common law notion of conspiracy/complicity, JCE has grown beyond a form of co-perpetration to live a life of its own in the chambers of the ICTY and in the minds of some international jurists. Some domestic courts in Bosnia have taken this case law and line of reasoning to be a source of law, and copy-pasted the notion

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into domestic case law. We have also asked whether this feed-back process between domestic and international law, and back again, which seems particular to ICL, could warrant the development of notions in ICL even if they were not grounded with certainty in one of the recognised sources of international law. We have concluded that this does not amount to a new source of law, but to a dynamic process by which the normative content of the sources of law are derived and developed.

The diversity of participants and institutions in ICL means that there is a certain divergence in understanding and application of criminal legal doctrine. Considering the changeable nature of the normative application of the law, and the nascent nature of international criminal law, this divergence is inevitable. Many commentators have observed that this divergence is inherent in the nature of international criminal law and that domestic jurisdictions have an important role in its development. This is due partly to the principle of complimentarity and obligations of States party to the Rome Statute in respect of implementing legislation, partly to the fact that the customary nature of international criminal law means that domestic jurisdictions are to be active participants in the process of law and partly to the dynamic nature of international criminal law, which has no uniform prescriptive method of discovery or application. Because there are multiple systems and participants in the process of international criminal law making and application, there are multiple concepts and institutions and multiple methods of discovery and creation.

This analysis leads us to the conclusion that whether or not there is agreement on whether JCE could be found in customary law during or prior to the Yugoslav conflict, in answer to which it was formulated in the ICTY, it seems to have gained a place in ICL through a process of repetition and reification. Concerned criminal lawyers will ask whether this is legitimate, and whether accepting this process would threaten the due process rights of accused persons, to which we would answer that this process in inevitable, but must be limited in its application. As long as due process rights are taken into account, and as long as general principles of criminal law prevail, looking to domestic jurisdictions and case law of other international or internationalised tribunals may well be instructive in solving problems faced by courts dealing with questions in ICL. This must always been done transparently, with reference to relevant case law, the applicable law of the court of tribunal in question, and based on a sturdy jurisprudence. It must not be done as a mere act of judicial creativity, based on limited or irrelevant case law. In this respect the origins of JCE could still be criticised. But given the tack recently taken by the ICC, it remains to be

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94 van der Wilt (2008) supra note 92 at 261.
95 Zahar & Sluiter supra note 27 at 93-95.
seen whether JCE will be such an important mode of responsibility in the future anyway.