Joint criminal enterprise in international criminal law after *Jogee*

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"Joint criminal enterprise" (JCE) is a mode of liability that applies where two or more persons set out to commit a crime. If, in the course of that venture, a crime is committed that falls within the scope of the parties' agreement, each participant is jointly liable. In its extended form ("EJCE" or "parasitic accessorial liability"), the doctrine holds a participant liable for a crime that, although outside the scope of the parties' agreement, he or she foresaw a co-participant might commit in the course of the venture.

In 1999, the doctrine of JCE in both its basic and extended forms was declared to be customary international law by the Appeals Chamber of the International Criminal Tribunal for the former Yugoslavia (ICTY) in *Prosecutor v Tadić*.[2] However, in early 2016, the Supreme Court of the United Kingdom held that EJCE reflected a "wrong turn" in the law taken thirty years prior by the Privy Council. That "wrong turn" was to "equate foresight with intent to assist" rather than treating foresight as merely "evidence of intent".[3]

Since *Jogee*, the doctrine of EJCE has been reviewed by the High Court of Australia, Hong Kong Final Court of Appeal, Supreme Court of New Zealand and Court of Appeal of Ireland. On the international stage, the United Nations Mechanism for International Tribunals (UNMICT), the successor body to the ICTY, has been asked to review EJCE in the *Karadžić* appeal.[4]

This paper provides an overview of the reasoning in *Jogee* and subsequent consideration of the decision in the United Kingdom, Australia, Hong Kong, New Zealand and Ireland. The final section outlines the development of the doctrine of JCE at the ICTY, noting the divergent approaches taken by other international criminal tribunals, and provides a brief summary of the submissions in the *Karadžić* appeal.

1. United Kingdom: *R v Jogee; Ruddock v The Queen*

On 18 February 2016, the Supreme Court of the United Kingdom held that the Privy Council took a "wrong turn" thirty years earlier in *Chan Wing-Siu v The Queen* [1985] AC 168.[5] The

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[2] *Prosecutor v Tadić (Judgement)* (Appeals Chamber, Case No IT-91-1-A, 15 July 1999) at [220].
[3] *R v Jogee; Ruddock v The Queen* [2016] UKSC 8; [2016] UKPC 7 at [87].
[4] Any remaining functions of the ICTY will be carried out by UNMICT. UNMICT was established in 2010 and has taken over the work of the International Criminal Tribunal for Rwanda (ICTR) since it officially closed on 31 December 2015. The only remaining matters before the ICTY are *Prosecutor v Ratko Mladić* (Trial Chamber) and *Prosecutor v Prlić, Stojić, Praljak, Petković, Corić and Pusić* (Appeals Chamber).
[5] *R v Jogee; Ruddock v The Queen* [2016] UKSC 8; [2016] UKPC 7 at [87].

"wrong turn" was to "equate foresight with intent to assist" by holding that if two or more persons set out to commit "crime A", and in the course of that enterprise one of them commits "crime B", each participant is liable for "crime B" if he or she *foresaw the possibility* that the co-participant might commit "crime B".[6]

Both of the appellants had been convicted of murder by juries directed in accordance with *Chan Wing-Siu*. In *Jogee*, the trial judge directed the jury that the appellant was guilty of murder if he participated in the attack on the deceased realising that co-participant Mr Hirsi might use a knife with the intention to cause at least serious bodily harm to the deceased.[7] In *Ruddock*, the jury was directed that the appellant was guilty of murder if he took part in the robbery of a taxi driver knowing that there was a "real possibility" that the co-accused might "have a particular intention".[8]

The Supreme Court held that the "*Chan Wing-Siu* principle" could not be supported for five reasons.[9] The first was expressed as follows:

> Firstly, we have had the benefit of a much fuller analysis than on previous occasions when the topic has been considered. In *Chan Wing-Siu* only two English cases were referred to in the judgment – *Anderson and Morris* and *Davies*. More were referred to in the judgments in *Powell and English*, but they did not include (among others) *Collison*, *Skeet*, *Spraggett* or notably *Reid*.[10]

The Court considered that there was an important line of cases beginning with *R v Collison* (1831) 4 Car & P 565 that confined liability to crimes committed in the course of carrying out a common purpose that the accused expressly or implicitly authorised or assented to "should the occasion arise" for their commission.[11] This line of authority emerged in the 19th century during the shift in focus from objective intent (liability for the probable consequences of one's conduct) to subjective intent.[12] According to the Court, the decisions in *Anderson and Morris* and the two Australian cases cited in *Chan Wing-Siu* correspond with the *Collision*

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[6] *R v Jogee; Ruddock v The Queen* [2016] UKSC 8; [2016] UKPC 7 at [2]. See *Chan Wing-Siu v The Queen* [1985] AC 168 at 175 ("The case must depend rather on the wider principle whereby a secondary party is criminally liable for acts by the primary offender of a type which the former foresees but does not necessarily intend'); *R v Powell; R v English* [1999] 1 AC 1 at 27 ("it is sufficient to found a conviction for murder for a secondary party to have realised that in the course of the joint enterprise the primary party might kill with intent to do so or with intent to cause grievous bodily harm").

[7] *R v Jogee; Ruddock v The Queen* [2016] UKSC 8; [2016] UKPC 7 at [101]-[104].

[8] *R v Jogee; Ruddock v The Queen* [2016] UKSC 8; [2016] UKPC 7 at [108]-[116].

[9] For discussion of each of these reasons in the Australian context, see Sarah Pitney, "Undoing a Wrong Turn: The Implications of R v Jogee; Ruddock v The Queen for the doctrine of extended joint criminal enterprise in Australia" (2016) 40 *Criminal Law Journal* 110. See also Stephen Odgers, "McAuliffe Revisited Again" (2016) 40 *Criminal Law Journal* 55.

[10] *R v Jogee; Ruddock v The Queen* [2016] UKSC 8; [2016] UKPC 7 at [80].

[11] *R v Jogee; Ruddock v The Queen* [2016] UKSC 8; [2016] UKPC 7 at [22]-[23]. See also [23]-[27], [33]-[35], [72]-[74], [80] discussing *R v Skeet* (1866) 4 F&F 931, *R v Spraggett* [1960] Crim LR 840 and *R v Reid* (1976) 62 Cr App R 109.

[12] *R v Jogee; Ruddock v The Queen* [2016] UKSC 8; [2016] UKPC 7 at [21].

approach.[13] For example, the Supreme Court emphasised that in *Johns v The Queen* (1980) 143 CLR 108, it was stated there was "ample evidence from which the jury could infer that the applicant gave his assent to …the discharge, of a loaded gun, in the event that [the victim] resisted or sought to summon assistance".[14]

The Court considered that the reliance in *Chan Wing-Siu* upon remarks in *Davies v DPP* [1954] AC 378 was misplaced because the question in *Davis* was whether an accomplice warning should have been given:

> There is a major difference between saying that in the absence of evidence of knowledge of the knife there was no cause to give an accomplice warning, and saying that knowledge of the knife and the possibility of its use would of itself constitute the mens rea needed for guilt of murder as an accessory.[15]

The Court concluded that the *Chan Wing-Siu* principle was therefore based on an "incomplete, and in some respects erroneous, reading of the previous case law, coupled with generalised and questionable policy arguments".[16]

The four other reasons given for overturning the *Chan Wing-Siu* principle were as follows:

> Secondly, it cannot be said that the law is now well established and working satisfactorily. It remains highly controversial and a continuing source of difficulty for trial judges. It has also led to large numbers of appeals.
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> Thirdly, secondary liability is an important part of the common law, and if a wrong turn has been taken, it should be corrected.
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> Fourthly, in the common law foresight of what might happen is ordinarily no more than evidence from which a jury can infer the presence of a requisite intention. It may be strong evidence, but its adoption as a test for the mental element for murder in the case of a secondary party is a serious and anomalous departure from the basic rule, which results in over-extension of the law of murder and reduction of the law of manslaughter. Murder already has a relatively low mens rea threshold, because it includes an intention to cause serious injury, without intent to kill or to cause risk to life. The *Chan Wing-Siu* principle extends liability for murder to a secondary party on the basis of a still lesser degree of culpability, namely foresight only of the possibility that the principal may commit murder but without there being any need for intention to assist him to do so. It savours, as Professor Smith suggested, of constructive crime.

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[13] *R v Jogee; Ruddock v The Queen* [2016] UKSC 8; [2016] UKPC 7 at [41]-[45] referring to *Johns v The Queen* (1980) 143 CLR 108 and *Miller v The Queen* (1980) 55 ALJR 23.
[14] *R v Jogee; Ruddock v The Queen* [2016] UKSC 8; [2016] UKPC 7 at [43] citing *Johns v The Queen* (1980) 143 CLR 108 at 131.
[15] *R v Jogee; Ruddock v The Queen* [2016] UKSC 8; [2016] UKPC 7 at [39]-[40] referring to *Davies v Director of Public Prosecutions* [1954] AC 378 at 401 (Lord Simonds LC).
[16] *R v Jogee; Ruddock v The Queen* [2016] UKSC 8; [2016] UKPC 7 at [79]. See also [46], [74]-[75] noting that the Court in *Chan Wing-Siu* addressed the relevant policy considerations in only two sentences (*Chan Wing-Siu v The Queen* [1985] AC 168 at 177) and at [56] noting that Lord Steyn's reference to policy considerations in *R v Powell; R v English* [1991] 1 AC 1 at 14.

> Fifthly, the rule brings the striking anomaly of requiring a lower mental threshold for guilt in the case of the accessory than in the case of the principal.[17]

The Court considered that "the doctrine of secondary liability is a common law doctrine … and, if it has been unduly widened by the courts, it is proper for the courts to correct the error"[18] and stated that the proper rule is as follows:

> If the jury is satisfied that there was an agreed common purpose to commit crime A, and if it is satisfied also that D2 must have foreseen that, in the course of committing crime A, D1 might well commit crime B, it may in appropriate cases be justified in drawing the conclusion that D2 had the necessary conditional intent that crime B should be committed, if the occasion arose; or in other words that it was within the scope of the plan to which D2 gave his assent and intentional support. But that will be a question of fact for the jury in all the circumstances.[19]

Subsequent consideration of *Jogee* in the United Kingdom

The most detailed subsequent consideration of *Jogee* is provided by decisions of the Court of Appeal in *R v Johnson* [2016] EWCA Crim 1613[20] and *R v Anwar* [2016] EWCA Crim 551.

In *Anwar*, the Court allowed the Crown's appeal against the trial judge's dismissal of charges of attempted murder and possession of a firearm, holding that it would be open to a jury to find that each defendant knew of the presence of a loaded firearm and that "the planning for the robbery included agreement as to the means to threaten the victim and the willingness to use the weapon if occasion for its use occurred".[21] The Court of Appeal noted that it was "common ground" that the decision in *Jogee* did not assist in determining whether or not there was a case to answer and stated:

> [W]e find it difficult to foresee circumstances in which there might have been a case to answer under the law before *Jogee* but, because of the way in which the law is now articulated, there no longer is.
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[17] *R v Jogee; Ruddock v The Queen* [2016] UKSC 8; [2016] UKPC 7 at [81]-[84].
[18] *R v Jogee; Ruddock v The Queen* [2016] UKSC 8; [2016] UKPC 7 at [81]-[85].
[19] *R v Jogee; Ruddock v The Queen* [2016] UKSC 8; [2016] UKPC 7 at [94]. Some academic commentary suggests that the notion of "conditional intent" set out in *Jogee* diverges from *R v Woollin* [1999] 1 AC 82 (see e.g. David Ormerod and Karl Laird, "Jogee: Not the End of a Legal Saga but the Start of One?" [2016] *Criminal Law Review* 539). *Woollin* held that intent may be found where an unwanted consequence is foreseen as a "virtual certainty". However, the two cases may be reconcilable by requiring that the accused be virtually certain that the other participant will perpetrate the collateral crime upon a particular contingency arising: see Dennis Baker, "Jogee: Jury Directions and the Manslaughter Alternative" [2017] *Criminal Law Review* 51.
[20] Leave to appeal to the Supreme Court refused: *R v Garwood* [2017] EWCA Crim 59.
[21] *R v Anwar* [2016] EWCA Crim 551 at [25]-[27].

> [T]he same facts which would previously have been used to support the inference of *mens rea* before the decision in *Jogee* will equally be used now. … Thus, the evidential requirements justifying a decision that there is a case to answer are likely to be the same even if, applying the facts to the different directions in law, the jury might reach a different conclusion.[22]

It has been suggested by some, including the Hong Kong Court of Final Appeal,[23] that this statement in *Anwar* indicates that the Court of Appeal is simply reverting to the position pre-*Jogee*. This, it is said, is evidence of the difficulties with the concept of "conditional intent". However, the question in *Anwar* was simply whether there was a case to answer. As one academic has emphasised, "it does not follow that the outcome of the trial will necessarily be the same post-*Jogee*".[24]

The other Court of Appeal decision, *Johnson*, deals with a group of cases "not connected save for the need to consider, individually for each case, the impact on convictions" of *Jogee*.[25] Each of the 13 applicants/appellants were convicted prior to *Jogee* and, with the exception of one appellant, all sought leave to appeal, or leave to add grounds of appeal based on *Jogee*, out of time.[26]

The Court of Appeal considered that two of the convictions did not in truth involve application of "parasitic accessorial liability".[27] In respect of a further eight convictions, the Court of Appeal inferred that the jury must have found that there was a common purpose to inflict really serious bodily injury on the victim of the kind that caused the victim's death and thus the verdicts would have been "no different post *Jogee*".[28]

Disposal of the remaining three applications, however, required consideration of the doctrine of "conditional intent" described in *Jogee*. In respect of applicants Burton and Terrelonge, the Court of Appeal inferred that the jury, in returning verdicts of murder, must have found that

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[22] *R v Anwar* [2016] EWCA Crim 551 at [20].
[23] *HKSAR v Chan Kam Shing* [2016] HKCFA 87 at [80]-[92].
[24] David Ormerod and Karl Laird, "Jogee: Not the End of a Legal Saga but the Start of One?" [2016] *Criminal Law Review* 539 at 542.
[25] *R v Johnson* [2016] EWCA Crim 1613 at [1].
[26] An applicant for leave to appeal out of time against a conviction arrived at by "faithfully applying the law as it stood at the time" in the United Kingdom must demonstrate "substantial injustice: *R v Johnson* [2016] EWCA Crim 1613 at [12] citing *R v Jogee; Ruddock v The Queen* [2016] UKSC 8; [2016] UKPC 7 at [100]. See also *R v Ordu* [2017] EWCA Crim 4 (no substantial injustice because "[a]part from the stigma of having suffered conviction and the unpleasant experience of serving 4½ months in a prison nearly 10 years ago there are no continuing consequences of this conviction": at [22]). However, where the applicant has already unsuccessfully appealed his or her conviction, the appropriate avenue is to approach the Criminal Cases Review Commission: *R v Skinner* [2016] NICA 40 at [93].
[27] *R v Johnson* [2016] EWCA Crim 1613 at [95]-[96] and [122]. See also *R v Sherrief* [2016] EWCA Crim 1923; *R v Witter* [2016] EWCA Crim 2243 at [22].
[28] *R v Johnson* [2016] EWCA Crim 1613 at [56]-[57] and [159].

the applicants were parties to a JCE "to attack the deceased, knowing one of their number had a knife, and knowing that the knife might be used with the relevant intention"[29] and held:

> [T]his court can safely draw the conclusion that the applicants had the necessary conditional intent (at the very least) that the knife would be used with intent to kill or cause grievous bodily harm should the occasion arise. In other words, the use of the knife with intent to kill or cause grievous bodily harm was within the scope of the plan to which they gave their assent and intentional support…[30]

In relation to the final applicant, Hall, the Court of Appeal inferred that the jury must have concluded that the applicant was a party to a common purpose to inflict unlawful violence on a group of three persons and held that:

> The jury must by their verdict have concluded that he foresaw that Holmes would attack the third member of the group, the deceased, with intent to cause really serious bodily injury. In the circumstances it would have been open to them to infer that he had the necessary conditional intent now required.[31]

Again, some critics have suggested that *Johnson* reflects a retreat to *Chan Wing-Siu*. However, it is important to remember that each of the convictions was entered pre-*Jogee*. The Court of Appeal was therefore required to interpret the convictions in light of the way in which the jury was directed – i.e. in terms of *Chan Wing-Siu* – in order to assess whether the outcome would have been different post-*Jogee*.

Ultimately, it is probably too early to draw any conclusions as to how *Jogee* will affect criminal trials in the United Kingdom.

2. Australia: *Miller v The Queen; Smith v The Queen; Presley v DPP (SA)*

On 24 August 2016, the High Court in *Miller* held that the decision in *Jogee* rendered it appropriate for the Court to reconsider *McAuliffe v The Queen* (1995) 183 CLR 108 but declined (Gageler J dissenting) to overrule *McAuliffe*.[32]

The joint judgment in *Miller* set out the law as stated in *McAuliffe* as follows:

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[29] *R v Johnson* [2016] EWCA Crim 1613 at [81].
[30] *R v Johnson* [2016] EWCA Crim 1613 at [82]. See also *R v Brown* [2017] EWCA Crim 167 at [34] ("[T]his was a case in which it could properly be inferred that all acts committed against the complainant, including the robbery, were within the scope of the joint enterprise….").
[31] *R v Johnson* [2016] EWCA Crim 1613 at [189].
[32] *Miller v The Queen* [2016] HCA 30 at [2]. As noted by the joint judgment at [2] and [40], *McAuliffe* was subject to a previous unsuccessful challenge in *Clayton v The Queen* (2006) 231 ALR 500 (affirming *McAuliffe* 6:1, Kirby J dissenting) and was considered by the Court in *Gillard v The Queen* (2003) 219 CLR 1 and *R v Taufahema* (2007) 228 CLR 232. Gageler J at [106] also noted that the Court declined to revisit "when a person should be criminally responsible for the acts of another" in *Likiardopoulos v The Queen* (2012) 247 CLR 265.

> [A] joint criminal enterprise comes into being when two or more persons agree to commit a crime. The existence of the agreement need not be express and may be an inference from the parties' conduct. If the crime that is the object of the enterprise is committed while the agreement remains on foot, all the parties to the agreement are equally guilty, regardless of the part that each has played in the conduct that constitutes the actus reus. Each party is also guilty of any other crime ("the incidental crime") committed by a co-venturer that is within the scope of the agreement ("joint criminal enterprise" liability). An incidental crime is within the scope of the agreement if the parties contemplate its commission as a possible incident of the execution of their agreement. Moreover, a party to a joint criminal enterprise who foresees, but does not agree to, the commission of the incidental crime in the course of carrying out the agreement and who, with that awareness, continues to participate in the enterprise is liable for the incidental offence ("extended joint criminal enterprise" liability).[33]

As the above paragraph shows, the "scope" of an enterprise has been defined more broadly in Australia than in the United Kingdom. It is said to encompass crimes that, although not intended, were mutually contemplated by the parties as a possibility. The joint judgment thus observed that if the High Court were to follow *Jogee* by rejecting foresight as a sufficient mental element, this would "affect the foundation of joint criminal enterprise liability generally in Australian law" (as mutual intent, rather than mutual contemplation, would be required to bring a crime within the scope of the parties' agreement).[34]

Turning to the *Collison* line of cases emphasised in *Jogee*, the joint judgment noted Professor KJM Smith's observation in *A Modern Treatise on the Law of Criminal Complicity* that "no tolerably clear authoritative principle" emerged in shift in the 19th century "from the objective test for liability to some form of subjective requirement".[35] Their Honours also noted that Sir Samuel Griffith, in drafting the *Criminal Code* (Qld) at the close of the 19th century, considered that the position at common law was that a person was liable for any crime he or she ought to have "known to be a probable consequence" of executing a common purpose.[36] The joint judgment concluded its discussion of the history of the law as follows:

> The cases are not easy to reconcile. As late as 1930, there are decisions in England, and in this country, in which the conclusion of liability of a secondary party for murder or infliction of grievous bodily harm with intent committed by the principal in

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[33] *Miller v The Queen* [2016] HCA 30 at [4].
[34] *Miller v The Queen* [2016] HCA 30 at [10].
[35] *Miller v The Queen* [2016] HCA 30 at [12] citing KJM Smith, *A Modern Treatise on the Law of Criminal Complicity* (1991) at 210-211.
[36] *Miller v The Queen* [2016] HCA 30 at [15]. Section 8 of the *Criminal Code 1899* (Qld) provides that "When 2 or more persons form a common intention to prosecute an unlawful purpose in conjunction with one another, and in the prosecution of such purpose an offence is committed of such a nature that its commission was a probable consequence of the prosecution of such purpose, each of them is deemed to have committed the offence". See also *Criminal Code Act Compilation Act 1913* (Western Australia) App B s 8(1) and *Criminal Code* (Tas) s 4 which contain almost identical provisions.

> the course of carrying out a planned robbery reveals more than a trace of Foster's objective test.[37]

In respect of the discussion of *Johns* in *Jogee*, the joint judgment stated that:

> Their Lordships observed there was ample evidence from which the jury could infer that Johns gave his assent to a criminal enterprise which involved the discharge of a firearm should the occasion arise. Nonetheless, there may be discerned a difference in principle between the parties' contemplation of the possible commission of the incidental offence and a requirement of proof of conditional intent that the incidental offence be committed.[38]

Noting the Supreme Court's description of the *Chan Wing-Siu* principle as "anomalous" in *Jogee*, the joint judgment stated:

> The wrong in the case of the aider and abettor is grounded in his or her contribution to the principal's crime. The wrong in the case of the party to the joint criminal enterprise lies in the mutual embarkation on a crime with the awareness that the incidental crime may be committed in executing their agreement. Acknowledgement of the *sui generis* nature of the secondary liability that arises from participation in a joint criminal enterprise may be thought to resolve at least some of the anomalies that are suggested to arise from allowing foresight of the possible commission of the incidental offence by a co-venturer as a sufficient mental element of liability.[39]

The joint judgment also emphasised the "difficulty, in the case of criminal activity, of establishing the contributions made by individual members" and Lord Steyn's observation in *R v Powell; R v English* that JCEs "only too readily escalate".[40] Their Honours noted that in *Clayton*, the majority rejected arguments that JCE occasioned injustice or rendered criminal trials unduly complex and observed that no change should be undertaken to the law of EJCE without "examining the whole of the law with respect to secondary liability for crime".[41] The joint judgment further noted that since *Clayton*, the common law of complicity was abolished in Victoria however the Parliaments of South Australia and New South Wales have "not chosen to reform the law as stated in *McAuliffe*.[42]

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[37] *Miller v The Queen* [2016] HCA 30 at [16]
[38] *Miller v The Queen* [2016] HCA 30 at [21]
[39] *Miller v The Queen* [2016] HCA 30 at [34]. See also at [135]-[141] (Keane J). Compare Gageler J (dissenting) at [85], stating that there is a real and unresolved question as to whether accessorial liability and JCE liability are "distinct in concept, and in particular as to whether joint criminal enterprise liability is anything more than a subcategory of accessorial liability".
[40] *Miller v The Queen* [2016] HCA 30 at [35]-[36] citing *R v Powell; R v English* [1999] 1 AC 1 at 14. See also at [145] (Keane J) noting the element of "unpredictability" in the pursuit of a JCE.
[41] *Miller v The Queen* [2016] HCA 30 at [40]-[41] citing *Clayton v The Queen* (2006) 231 ALR 500 at [19], [21].
[42] *Miller v The Queen* [2016] HCA 30 at [42]. See *Crimes Act 1958* (Vic) ss 323-4, 324C. See also Victoria Department of Justice, *Complicity Reforms* (Victoria Department of Justice, 2014).

Gageler J (dissenting) considered that the moment the common law "came to admit of foresight as a sufficient basis for criminal liability" could be traced "to a comment on *Chan Wing-Siu* by Professor JC Smith in the *Criminal Law Review* in 1990":

> Professor Smith there pointed out in relation to the critical passage in *Chan Wing-Siu* that "contemplation" is not the same thing as "authorisation" and that "the general effect of the passage is that contemplation or foresight is enough". Until then, *Chan Wing-Siu* had not been understood that way by courts in England or in Australia.[43]

His Honour considered the "awkwardness" of the resulting common law doctrine was "reflected in the labels the new doctrine came to be given" (*parasitic* accessory liability in the United Kingdom and *extended* JCE in Australia)[44] and that the explanation given in *McAuliffe* for EJCE liability was inadequate:

> Just one reason was stated in *McAuliffe* for following *Chan Wing-Siu* and *R v Hyde*. That reason, as has already been noted, was that to hold a secondary party liable for a crime committed by a primary party on the basis of the secondary party's participation in a joint criminal enterprise with foresight of that crime accorded with the general principle of the criminal law that a person who intentionally assists in or encourages the commission of a crime may be convicted of that crime.
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> The problem is that the general principle does not explain why a secondary party should be liable for a crime committed by a primary party which the secondary party neither intentionally assisted nor encouraged.[45]

Gageler J held that two of the criticisms of EJCE raised in *Jogee* were "unanswerable":

> The first is that making a party liable for a crime which that party foresaw but did not intend disconnects criminal liability from moral culpability. The second is that making the criminal liability of the secondary party turn on foresight when the criminal liability of a principal party turns on intention creates an anomaly.[46]

His Honour rejected the proposition that these criticisms are answered by the suggestion that the culpability "lies in the continued participation in the joint enterprise with the necessary foresight".[47] Gageler J also considered that, contrary to the prosecution's submission, EJCE liability is not necessary to prevent a "gap" in the law by addressing "the important social problem of escalating gang violence":

> What the prosecution seeks to characterise as a gap in the law is nothing more or less than the difference between the limit of secondary criminal liability as traditionally

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[43] *Miller v The Queen* [2016] HCA 30 at [94].
[44] *Miller v The Queen* [2016] HCA 30 at [100].
[45] *Miller v The Queen* [2016] HCA 30 at [108]-[110].
[46] *Miller v The Queen* [2016] HCA 30 at [111]-[112].
[47] *Miller v The Queen* [2016] HCA 30 at [120].

> understood and the limit of secondary criminal liability as extended following *Chan Wing-Siu*. There is in truth no gap to be filled. Absent the extension of secondary criminal liability, there would be no hole in the legal fabric which would need to be mended. There would be an absence of secondary criminal liability in circumstances now covered solely by the extension. There would be an alignment of criminal liability with moral culpability.[48]

Contrary to the majority's view that EJCE liability should not be reconsidered without reconsideration of the law of secondary liability more generally, Gageler J held that "adoption of the doctrine was a discrete judicial development" that was "capable of discrete judicial reversal".[49] His Honour concluded that *McAuliffe* should be overruled:

> The doctrine of extended joint criminal enterprise is neither deeply entrenched nor widely enmeshed within our legal system. The problem the doctrine has created is one of over-criminalisation. To excise it would do more to strengthen the common law than to weaken it. Where personal liberty is at stake, no less than where constitutional issues are in play, I have no doubt that it is better that this Court be "ultimately right" than that it be "persistently wrong".[50]

3. Hong Kong: *HKSAR v Chan Kam Shing*

On 16 December 2016, the Hong Kong Final Court of Appeal in *HKSAR v Chan Kam Shing* [2016] HKCFA 87 upheld its earlier decision in *Sze Kwan Lung v HKSAR*, declining to follow *Jogee* for three key reasons.[51]

First, the Court disagreed with the view expressed in *Jogee* that foresight is an "unacceptable basis for liability and is to be regarded at most as evidence of the requisite intention".[52] Citing the separate judgment of Keane J in *Miller*, the Court reasoned that the culpability of the secondary party may "be seen to be based on implied authorisation of the actual perpetrator to act 'as the instrument of the other participants to deal with the foreseen exigencies of carrying their enterprise into effect'".[53]

Second, the Court considered that following *Jogee* would create "a serious gap in the law of complicity" by abolishing a "valuable principle for dealing with dynamic situations involving

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[48] *Miller v The Queen* [2016] HCA 30 at [122].
[49] *Miller v The Queen* [2016] HCA 30 at [126].
[50] *Miller v The Queen* [2016] HCA 30 at [128].
[51] *Sze Kwan Lung v HKSAR* [2004] HKCFA 85 held at [34]-[36] that a participant in a JCE is liable for a crime that he or she "foresaw as a possible incident of the execution" of the JCE, citing *Chan Wing-Siu*, *R v Powell; R v English* and *McAuliffe*. While *Chan Wing-Siu* was an appeal to the Privy Council from Hong Kong, the Court of Final Appeal has served as the highest judicial body in Hong Kong since 1997 (when sovereignty was transferred from the UK to the People's Republic of China).
[52] *HKSAR v Chan Kam Shing* [2016] HKCFA 87 at [58], [60].
[53] *HKSAR v Chan Kam Shing* [2016] HKCFA 87 at [64], [70] citing *Miller v The Queen* [2016] HCA 30 at [139] (Keane J).

evidential and situational uncertainties".[54] The Court emphasised that, for example, in murder cases there may be "evidential uncertainty as to who struck the fatal blow".[55] EJCE, according to the Court, was developed to determine liability "when criminal co-adventurers react to situational uncertainties" which "inevitably exist as to what may happen … when implementing the plan".[56]

Finally, the Court considered that the concept of "conditional intent" introduced by *Jogee* would give rise to "significant conceptual and practical problems".[57] At the outset, the Court queried whether there was "any practical difference between that concept and the principle of assigning liability on the basis of foresight of the possible commission of an offence" as both are mental states generally established "by drawing inferences from the conduct of the participant".[58] The Court suggested that conditional intent might be understood as requiring proof that the accused "desired or believed as a virtual certainty that [the further offence] should contingently occur", a requirement that the Court considered would "impose an unjustifiably high burden on the prosecution".[59] The Court suggested *Johnson* and *Anwar* demonstrate some of the difficulties with "conditional intent" and indicate that the Court of Appeal is interpreting the concept "in much the same way as the foresight requirement in *Chan Wing-Siu*"[60] (see discussion above).

4. Ireland: *DPP v Kelly*

On 21 December 2016, the Court of Appeal of Ireland in *DPP v Kelly*, noting the decision in *Jogee*, stated that "Irish law never took that 'wrong turning'".[61] According to the Court, "the focus of Irish law, no doubt influenced and indeed directed by s 4 of the *Criminal Justice Act 1964*, has remained on intention rather than foreseeability".[62] The law of joint enterprise in Ireland as set out in *DPP v Cumberton* in 1994 and recently approved in *DPP v Dumbrell* requires examination of "what was tacitly agreed between the parties and whether what happened was within the common design".[63]

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[54] *HKSAR v Chan Kam Shing* [2016] HKCFA 87 at [58], [71].
[55] *HKSAR v Chan Kam Shing* [2016] HKCFA 87 at [21].
[56] *HKSAR v Chan Kam Shing* [2016] HKCFA 87 at [29], [45].
[57] *HKSAR v Chan Kam Shing* [2016] HKCFA 87 at [58].
[58] *HKSAR v Chan Kam Shing* [2016] HKCFA 87 at [77]-[78].
[59] *HKSAR v Chan Kam Shing* [2016] HKCFA 87 at [79].
[60] *HKSAR v Chan Kam Shing* [2016] HKCFA 87 at [80]-[92].
[61] *DPP v Kelly* [2016] IECA 404 at [46].
[62] *DPP v Kelly* [2016] IECA 404 at [46]. Section 4 (entitled "Malice") provides: (1) Where a person kills another unlawfully the killing shall not be murder unless the accused person intended to kill, or cause serious injury to, some person, whether the person actually killed or not. (2) The accused person shall be presumed to have intended the natural and probable consequences of his conduct; but this presumption may be rebutted. Compare *Criminal Justice Act 1967* (UK) s8.
[63] *DPP v Cumberton* (Unreported, 5th December, 1994, Blayney J); *DPP v Dumbrell* [2014] IECCA 22 at [79]-[80]. See also *DPP v Gibney* [2016] IECA 336 (1 November 2016) noting at [13] that the parties agreed that *Jogee* provided a helpful review of the law of joint enterprise.

5. New Zealand: *Uhrle v The Queen*

The applicant in *Uhrle* sought leave to appeal against her conviction for murder on the basis that the trial judge's directions to the jury were inconsistent with *Jogee*.[64] In a brief judgment delivered on 13 June 2016, the Supreme Court of New Zealand dismissed the application on the basis that the position in New Zealand is "covered by s 66(2)" of the *Crimes Act 1961* (NZ).[65] That section provides that:

> Where 2 or more persons form a common intention to prosecute any unlawful purpose, and to assist each other therein, each of them is a party to every offence committed by any one of them in the prosecution of the common purpose if the commission of that offence was *known to be a probable consequence* of the prosecution of the common purpose. (emphasis added)

6. International Criminal Tribunal for the Former Yugoslavia

***Prosecutor v Tadić (Judgement)* (Appeals Chamber, Case No IT-91-1-A, 15 July 1999)**

In 1999, the Appeals Chamber in *Tadić* held that "common design" liability was part of customary international law:

> [T]he notion of common design as a form of accomplice liability is firmly established in customary international law and in addition is upheld, albeit implicitly, in the Statute of the International Tribunal.[66]

The Appeals Chamber considered that "three distinct categories of cases" in which common purpose liability has been applied could be distilled from the international criminal trials held in the aftermath of World War II:

> First ... where all participants in the common design possess the same criminal intent to commit a crime …. Secondly, in the so-called 'concentration camp' cases, where the requisite *mens rea* comprises knowledge of the nature of the system of ill-treatment and intent to further the common design of ill-treatment. … [T]he third category of cases … where the following requirements concerning *mens rea* are fulfilled: (i) the intention to take part in a joint criminal enterprise and to further – individually and jointly – the criminal purposes of that enterprise; and (ii) the foreseeability of the possible commission by other members of the group of offences

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[64] The same argument was raised before the High Court of New Zealand in *Harmer v R* [2016] NZHC 2155. In a judgment delivered on 13 September 2016, Clifford J noted (at [56]) that his Honour was bound by *Uhrle v The Queen* [2016] NZSC 64.

[65] *Uhrle v The Queen* [2016] NZSC 64. A similar provision applies in Canada: see *Criminal Code 1985* (RSC) 1985 c C-46 s 21(2) and the discussion of that provision in *R v Logan* [1990] 2 SCR 731.

[66] *Prosecutor v Tadić (Judgement)* (Appeals Chamber, Case No IT-91-1-A, 15 July 1999) at [220]. Article 7(1) of the Statute of the ICTY provides that a person is individually criminally responsible where he or she "planned, instigated, ordered, committed or otherwise aided and abetted in the planning, preparation or execution of a crime referred to in articles 2 to 5".

> that do not constitute the object of the common criminal purpose. … What is required is a state of mind in which a person, although he did not intend to bring about a certain result, was aware that the actions of the group were most likely to lead to that result but nevertheless willingly took that risk.[67]

These three forms of common purpose liability are identified in international criminal jurisprudence as "JCE I", "JCE II" and "JCE III", the latter of which corresponds with EJCE.

The Appeals Chamber considered that liability for an offence that was "outside the common plan but nevertheless foreseeable" has an "underpinning in many national systems".[68] Among those cited were the United Kingdom and Australia.[69] The Appeals Chamber also considered that Art 25(3)(d) of the Rome Statute represented a "substantially similar notion" to JCE III.[70]

***Prosecutor v Karadžić (Decision on Prosecution's Motion Appealing Trial Chamber's Decision on JCE III Foreseeability)* (Appeals Chamber, Case No IT-95-5/18-AR72.4, 25 June 2009)**

A decade later, in an interlocutory appeal in the *Karadžić* case, the Appeals Chamber confirmed that the mental element for JCE III liability is foresight of the *possibility*, as opposed to the *probability*, that a co-participant might commit the further crime in the execution of the common purpose.[71] The Appeals Chamber considered that despite the "variable formulations"[72] in *Tadić* and the use of the ambiguous phrase "probability that

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[67] *Prosecutor v Tadić (Judgement)* (Appeals Chamber, Case No IT-91-1-A, 15 July 1999) at [220]. See also [195]ff.

[68] *Prosecutor v Tadić (Judgement)* (Appeals Chamber, Case No IT-91-1-A, 15 July 1999) at [224]-[225].

[69] *Prosecutor v Tadić (Judgement)* (Appeals Chamber, Case No IT-91-1-A, 15 July 1999) at [224] citing *McAuliffe* and *Hui Chi-Ming v R* [1992] 3 All ER 897 (a decision affirming *Chan Wing- Siu*). The Appeals Chamber also stated that such liability is accepted in France, Italy, Canada, the United States and Zambia. However, as acknowledged by the Appeals Chamber in the accompanying footnotes, the requisite *mens rea* varies. For example, in Canada the crime must have been subjectively foreseen as a *probable* consequence (*Criminal Code* s 21(2) as interpreted in *R v Logan* [1990] 2 SCR 731), while under the *Pinkerton* doctrine in the United States, objective foresight is sufficient (*Pinkerton v United States* 328 US 640).

[70] *Prosecutor v Tadić (Judgement)* (Appeals Chamber, Case No IT-91-1-A, 15 July 1999) at [222].

[71] In March 2009, Karadžić filed a motion requesting that the Trial Chamber dismiss certain allegations on the basis that it had no jurisdiction to prosecute crimes alleged to have been foreseen as a possible, as opposed to probable, consequence of executing a JCE. The Trial Chamber held that the appropriate mental element was foresight that the further crimes would probably be committed: *Prosecutor v Karadzic (Decision on Six Preliminary Motions Challenging Jurisdiction)* (Trial Chamber, Case No IT-95-5/18-PT, 28 April 2009).

[72] See extract above: "possible commission", "most likely to lead to that result". See also *Prosecutor v Tadić (Judgement)* (Appeals Chamber, Case No IT-91-1-A, 15 July 1999) at [228] ("foreseeable that such a crime might be perpetrated").

other crimes may result" in *Krstić*,[73] the weight of subsequent jurisprudence demonstrated that foresight of a "probability" was not required.[74]

***Prosecutor v Đorđević (Judgment)* (Appeals Chamber, Case No IT-05-87/1-A, 27 January 2014)**

The Appeals Chamber was later asked in *Đorđević* to "revisit" JCE III on account of subsequent developments in other international criminal tribunals. In 2010, the Extraordinary Chambers in the Courts of Cambodia ("ECCC") held that the materials relied on in *Tadić* did not provide a sufficient basis to conclude that JCE III was part of customary international law at the time of the crimes within the ECCC's jurisdiction (1975-1979).[75] In 2011, the Special Tribunal for Lebanon's (STL) held that JCE III should not be applied in respect of crimes requiring proof of specific intent.[76]

The Appeals Chamber declined to revisit JCEIII, stating that the doctrine finds support in "both civil and common law jurisdictions … in relation to crimes committed outside the common plan but that are nonetheless foreseeable".[77]

***Prosecutor v Karadžić* – Appeal to UNMICT**

On 24 March 2016, Karadžić was convicted of genocide, war crimes and crimes against humanity by the Trial Chamber of the ICTY. On appeal to UNMICT, the decision in *Jogee* forms the basis for Ground 29 of Karadžić's appeal.

Karadžić submits that the Trial Chamber erred in finding him liable for crimes outside the scope of the "Overarching JCE" on the basis that he "acted in furtherance of the Overarching JCE with the awareness of the possibility that the JCE III Crimes might be committed either by members of the Overarching JCE or Serb Forces who were used by him or other members of the Overarching JCE to carry out the common plan".[78] The key submissions in support of this ground of appeal may be summarised as follows:[79]

1. *Jogee* undermines the "underpinning" in domestic law described in *Tadić* and *Đorđević*. Importantly, "the standard adopted by the jurisprudence of this Tribunal …

[73] *Prosecutor v Krstic (Judgement)* (Appeals Chamber, Case No IT-98-33-A, 19 April 2004) at [150].
[74] *Prosecutor v Karadzic (Decision on Prosecution's Motion Appealing Trial Chamber's Decision on JCE III Foreseeability)* (Appeals Chamber, Case No IT-95-5/18-AR72.4, 25 June 2009) at [14]-[18].
[75] *Ieng Thirith et al,* Decision on the Appeals Against the Co-Investigative Judges Order on Joint Criminal Enterprise, PP 002/19-0902007-ECCC/OCIJ (PTC38) (20 May 2010) at [82].
[76] *Interlocutory Decision on the Applicable Law: Terrorism, Conspiracy, Homicide, Perpetration, Cumulative Charging* (Special Tribunal for Lebanon, Appeals Chamber, Case No STL 11-01/I, 16 February 2011) at [245].
[77] *Prosecutor v Đorđević (Judgment)* (Appeals Chamber, Case No IT-05-87/1-A, 27 January 2014) at [49].
[78] *Prosecutor v Karadžić* (Trial Chamber, Case No IT-95-5/18-T, 24 March 2016) at [3524].
[79] Available online at http://www.unmict.org/en/cases/mict-13-55

most closely resembles the law of joint enterprise in common law jurisdictions such as the United Kingdom prior to *Jogee*". The reason for this alignment is that British principles of complicity were regarded in post-WWII war crimes jurisprudence as international law;[80]

2. Foresight of a possibility is insufficient to found liability at the International Criminal Court; instead, Article 25(3)(d), to which the Appeals Chamber drew attention in *Tadić*, requires "knowledge" (which has been construed as requiring "foresight that consequences are a virtual certainty and not a mere possibility");[81]

3. The ECCC has held that JCE III was not part of customary international law. The STL and Special Court for Sierra Leone have also held that JCE III liability does not extend to specific intent crimes,[82] and the STL has "qualified the 'possibility' standard by requiring that the JCE III crimes must be 'generally in line with the agreed upon' crime(s)";[83]

4. The possibility standard has been "highly controversial" in academic commentary and there has been judicial divide as to its proper application;

5. The policy arguments advanced in favour of JCE III are "less persuasive in light of *Jogee*" and "attempts to justify JCE III at this Tribunal as 'no different' to other forms of liability that do not require proof of intent such as aiding and abetting or command responsibility are unconvincing as those modes of liability adopt far more stringent 'knowledge' standards".[84] JCE III raises questions of "fair labeling".

The Prosecution in response[85] argues that Karadžić "inflates the relevance of English case law to ICTY jurisprudence on JCE3". It also argues that the "persuasive value" of *Jogee* is "diminished" by the fact that it has not been followed in Australia or Hong Kong. The Prosecution also emphasizes that "ECCC, SCSL and STL decisions, and academic opinions" are not binding on UNMICT. Interestingly, the Prosecution makes no attempt to criticise the reasoning in *Jogee*.

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[80] Citing *Schonfeld and nine others*, British Military Court, Law Reports of Trials of War Criminals Vol XI at 72; *Renoth and three others*, British Military Court, Law Reports of Trials of War Criminals Vol XI at 77; *Killinger and four others*, British Military Court, Law Reports of Trials of War Criminals Vol III at 69.

[81] Citing *Prosecutor v Lubanga (Judgement)* (International Criminal Court, Appeals Chamber, Case No ICC-01/04-01/06 A 5, 1 December 2014) at [447].

[82] See *Prosecutor v Taylor (Judgment)* (Special Court for Sierra Leone, Trial Chamber, Case No SCSL-03-01-T, 18 May 2012) at [468] and the decisions cited above under *Đorđević*.

[83] *Interlocutory Decision on the Applicable Law: Terrorism, Conspiracy, Homicide, Perpetration, Cumulative Charging* (Special Tribunal for Lebanon, Appeals Chamber, Case No STL 11-01/I, 16 February 2011) at [241].

[84] Citing *Prosecutor v Brđanin (Decision on Interlocutory Appeal)* (Appeals Chamber, Case No IT-99-36-A, 19 March 2004) at [7]; *Prosecutor v Đorđević (Judgment)* (Appeals Chamber, Case No IT-05-87/1-A, 27 January 2014) at [77].

[85] Submissions available online at http://www.unmict.org/en/cases/mict-13-55

In reply,[86] Karadžić notes that the ICTY's jurisprudence closely mirrors English law, and that the Tribunal has previously relied upon English cases such as *R v Powell; R v English* [1999] 1 AC 1 that are no longer good authority.

We will probably have to wait until at least 2018 to see what UNMICT will decide. However, should the Appeals Chamber follow *Jogee*, New South Wales and South Australia will be left as two of the world's few remaining jurisdictions in which EJCE is considered an appropriate mode of liability.

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June 2017

[86] Available online at http://www.unmict.org/en/cases/mict-13-55

CONFERENCE

SHORT BIO

Chrissa Loukas SC is the Junior Vice President of the NSW Bar and a Public Defender. Chrissa appears in the Supreme Court and Court of Criminal Appeal of NSW and the High Court of Australia. She was called to the Bar in December 1989, appointed a Public Defender in 1995 and took silk in 2012. From 2003 to 2006 Chrissa was Defence Counsel at the International Criminal Tribunal for the Former Yugoslavia (ICTY). She is currently a Director of the Law Council of Australia.

Previous appointments include: Acting District Court Judge (1996); Judicial Member, Administrative Decisions Tribunal (1997 - 2003); Director, Criminal Law Review, NSW (2000 - 2001); Vice President, Association of Defence Counsel (ICTY) Hague (2004 - 2006); and Bar Council Member 1991 – 2003, 2007 – 2012 and 2015 to date. Chrissa is also the recipient of the Senior Barrister Award, Lawyers Weekly, Women in Law Award, 2013, Melbourne; and the Woman Lawyer of Achievement Award, presented by the Women Lawyers Association of New South Wales, 2002.