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What are the Requirements of Pleading JCE in an Indictment? What are the Requirements of Pleading co-perpetration in and Indictment under the ICC Statute?

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MEMORANDUM FOR THE EXTRAORDINARY CHAMBERS IN THE COURTS OF CAMBODIA

ISSUE: WHAT ARE THE REQUIREMENTS OF PLEADING JCE IN AN INDICTMENT? WHAT ARE THE REQUIREMENTS OF PLEADING CO-PERPETRATION IN AND INDICTMENT UNDER THE ICC STATUTE?

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J.D. Candidate, May 2011
Fall Semester, 2009

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- 32. Rome Statute of the International Criminal Court, July 17, 1998, 38 I.L.M 999.
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35. Jens David Ohlin, *Three Conceptual Problems with the Doctrine of Joint Criminal Enterprise*, 5 J. INT'L CRIM. J. 69 (2007).
36. Elise van Sliedregt, *Joint Criminal Enterprise as a Pathway to Convicting Individuals for Genocide*, 5 J. INT'L CRIM. J. 184 (2007).
37. Ciara Damgaard, *The Joint Criminal Enterprise Doctrine: A "Monster Theory of Liability" or a Legitimate and Satisfactory Tool in the Prosecution of the Perpetrators of Core International Crimes?*, in [Individual Criminal Responsibility for Core International Crimes](#), 127-261, 2008.
38. Antonio Cassese, *The Proper Limits of Individual Responsibility Under the Doctrine of Joint Criminal Enterprise*, 5 J. J. INT'L CRIM. J. 109 (2007).
39. Alan O'Rourke, *Joint Criminal Enterprise and Brdanin: Misguided Overcorrection*, 47 Harv. Int'l L.J. 307 (Winter 2006).

Student Memorandum

40. Memorandum from Niki Dasarathy, Case Western Reserve University School of Law, to the office of the prosecutor of the Special Court for Sierra Leone, Issue: What are some compelling arguments against the position of William Schabas and the AFRC decision maintaining that JCE liability applies only to groups that have a criminal purpose, not to groups of people that use criminals means to arrive at a non-criminal purpose? Furthermore what are the notice and liability requirements for alleging a JCE? (Fall 2007) (Available at http://law.case.edu/war-crimes-research-portal/memoranda/dasarathy_niki.pdf)

INTRODUCTION AND SUMMARY OF CONCLUSIONS

a. Scope

This memorandum examines the requirements of pleading Joint Criminal Enterprise (hereinafter JCE) in indictments at the *ad hoc* and hybrid tribunals and co-perpetration at the International Criminal Court (hereinafter ICC).^{*} In particular this memorandum will examine the development of JCE and co-perpetration as a doctrines of individual criminal responsibility and the rules that developed along with them concerning the proper pleading of both in indictments.

It must be noted at the beginning that because the indictment must set out the material facts of the prosecution's case with enough detail to give the defendant notice of the crimes he is being charged with¹, the prosecution must plead both the crimes committed and the mode of liability. First the prosecution must plead enough material facts to establish the objective (*actus reus*) and subjective (*mens rea*) elements of the crime committed. Second the prosecution must also plead sufficient facts to establish the accused's criminal liability through the mode of criminal responsibility by showing that the accused fulfilled the objective (*actus reus*) and subjective (*mens rea*) elements of the mode of criminal responsibility.

The first section of this memorandum will examine the origins of JCE and its original scope of liability. The first section will continue by considering the development of the scope

^{*} "What are the requirements of pleading JCE in an indictment? What are the requirements of pleading co-perpetratorship in an indictment under the ICC statute?"

¹ *Prosecutor v. Ntakirutimana & Ntakirutimana*, Case Nos. ICTR-96-10-A and ICTR 96-17-A, Appeals Judgment, ¶470 (Dec. 13, 2004) [Reproduced at tab 16]; Regulation 52 of the Regulations of the Court [Reproduced at tab 30].

and pleading rules of JCE at the *ad hoc* international criminal tribunals. It will then examine the common criticisms of the doctrine of JCE and the challenges that have arisen in cases concerning the scope of its applicability and rules regarding its proper pleading. The first section of the memorandum will finish with a survey of the most recent cases regarding the scope and pleading of JCE.

The second section of this memorandum will examine the adoption of co-perpetratorship as a mode of individual criminal responsibility at the ICC. Again because co-perpetration is a mode of criminal responsibility the prosecution must substantively plead both the crimes committed and the mode of liability. Thus the second section will again begin with the examination of the objective (*actus reus*) and subjective (*mens rea*) and elements of co-perpetration. The second section will then continue to examine the pleading and evidentiary standards set forth in the Rome Statute. It will then examine the three pre-trial judgments rendered thus far concerning co-perpetration. The second section will finish with an examination of what the requirements are pleading of co-perpetratorship in light of the pre-trial judgments.

This memorandum will finish with a comparison of the pleading requirements for JCE and co-perpetratorship.

b. Summary of Conclusions

i. The indictment must set out the material facts of the prosecution's case with enough detail to give the defendant notice of the crimes he is being charged with.

Case law from the international tribunals recognizes that the rights of the accused to a fair trial require that the indictment plead sufficient material facts to give the accused notice of the crimes he is being charged with.

- ii. JCE and Co-perpetration are modes of criminality and not crimes themselves; the prosecution must make a twofold pleading concerning the actual crimes perpetrated and the proper mode of criminal responsibility.**

Because the indictment must set out the material facts of the prosecution's case with enough detail to give the defendant notice of the crimes he is being charged with, the prosecution must plead both the crimes committed and the mode of liability. Furthermore because the standards for indictments at the international tribunals as well the ICC requires that the accused be put on notice of the crimes he is being charged with, the prosecution must not only provide sufficient evidence to support the crimes committed but also sufficient evidence to impute the proper mode of liability.

- iii. The prosecution must define what the common design, purpose, or plan of the JCE is and must identify which form of liability it seeks for each criminal count charged.**

Lack of specificity in an indictment concerning the form of criminal liability the accused is charged with gives rise to ambiguity that should be avoided. Thus it held that the prosecution must identify which form; basic, systemic, or extended form JCE at the international tribunals, or direct perpetration, co-perpetration, or indirect perpetration at the ICC.

- iv. The prosecution must identify as precisely as possible the principal perpetrators of the crime and the co-perpetrators within the JCE.**

In order to provide the accused with proper notice the prosecution must identify in the indictment who the principal perpetrators of the crime are and who the other members of the JCE or co-perpetration are. While the prosecutor must identify the plurality of persons belonging to the JCE, it is not necessary to identify all members by name and in some circumstances it is sufficient to refer to categories or groups of persons.

- v. The prosecution should endeavor to plead both the elements of the crime charged and the elements of the mode of liability with the greatest degree of specificity possible in order to avoid challenges of improper notice.**

It is the opinion of this author that the prosecution should for all intents and purposes plead both the elements of the crime charged and the elements of the mode of liability with the greatest degree of specificity possible in order to avoid challenges of improper notice. While the prosecution need not outline its entire case in the indictment it should consider whether there will be any confusion concerning the mode of liability it is charging with regards to the crimes actually perpetrated. It is no longer sufficient to ask the courts to impute JCE liability themselves; the defendant should be put on notice of what crimes he is accused of committing and by what means.

41. JOINT CRIMINAL ENTERPRISE²

a. The Origins of Joint Criminal Enterprise – *Tadic*

The origins of the use of JCE liability at the *ad hoc* tribunals traces back to the Appeals Judgment in *Prosecutor v. Tadic*. Dusko Tadic was a nationalist political leader for the Bosnian Serbs who was brought before the International Criminal Tribunal for the Former Yugoslavia (hereinafter ICTY) to stand trial for crimes committed in the Omarska detention camp in Prijedor municipality in the course of 1992, when he was president of the local board of the Serbian Democratic Party, SDS, in Kozarac.³ The Prosecutor indicted Tadic on 34 counts of war crimes and crimes against humanity encompassed in the ICTY statute and jurisdiction.⁴ While the Trial

² This section on JCE, concerning the origins of JCE through the Trial Judgment in *Prosecutor v. Brima*, owes its basis to Niki Dasarathy's memorandum for the Special Court for Sierra Leone *Using Criminal Means to Arrive at a Legitimate Purpose: JCE Liability and Notice in Light of the Prosecutor v. Brima, Kamara and Kanu Judgment*, [Reproduced at tab 34].

³ Summary of Appeals Chamber Judgment, the *Prosecutor v. Dusko Tadic*, <http://www.un.org/icty/pressreal/tad-sumj990715e.htm>, [Reproduced at tab 3].

⁴ *Id.*

Chamber found Tadic guilty of several counts of war crimes, it acquitted him of multiple charges of murder on the basis that there was no evidentiary support that Tadic had taken any part in the killings. The Trial Chamber held that it was satisfied beyond reasonable doubt that Tadic was a member of the group of armed men that entered the village of *Jaskici* that searched for men and beat them, and that after the group left five dead men were found dead in the village. However, it held that it could not be satisfied beyond reasonable doubt that Tadic has any part in the killing of the five men.⁵

Both the Prosecutor and Tadic appealed the Trial Chamber's decision and presented the Appeals Chamber with the difficult question of whether there was any way to hold Tadic criminally responsible for the murders that he had jointly planned the commission of. In examining the statute providing the Court's jurisdiction, particularly Article 7(1), the Chamber deduced the doctrine of JCE.⁶ Article 7(1) of the ICTY Statute states that "a person who planned, instigated, ordered, committed, or otherwise aided and abetted in the planning, perpetration or execution of a crime referred to in article 2 to 5 of the present Statute, shall be individually responsible for the crime".⁷ The Appeals Chamber considered that failing to hold co-perpetrators responsible for war crimes would therefore be contrary to the purpose of the

⁵ *Prosecutor v. Tadic*, Case No. IT-94-1-T, Trial Judgment, ¶373 (May 7, 1997) [Reproduced at tab 1].

⁶ *Prosecutor v. Tadic*, Case No. IT-94-1-A, Appeals Judgment, ¶189 (July 15, 1999), [Reproduced at tab 2].

⁷ Statute of the International Criminal Tribunal for the Former Yugoslavia, ¶7(1), May 25, 1993, 32 I.L.M. 1192, available at <http://www.icty.org/sid/135> (hereinafter ICTY Statute) [Reproduced at tab 24].

court, especially when the court had express jurisdiction over them.⁸ Thus despite the fact that the indictment against Tadic did not charge him with participation in a JCE, the Appeals Chamber nevertheless found that his participation in the JCE could be inferred from the ICTY Statute and the nature of the crimes alleged in the indictment. The Appeals Chamber held that “the notion of common design as a form of accomplice liability its firmly established in customary international law and...is upheld, albeit implicitly in the Statute of the International Tribunal.”⁹

b. Forms of Joint Criminal Enterprise

While the Appeals Chamber in Tadic concluded that “international criminal responsibility embraces actions perpetrated by a collectivity of persons in furtherance of a common criminal design”¹⁰, the ICTY Statute did not specify the objective (*actus reus*) and subjective (*mens rea*) elements of JCE. Thus the Appeals Chamber turned to customary international law to determine what these elements were, relying heavily on the jurisprudence of post-World War II cases.¹¹ Thus the Appeals Chamber identified three forms of JCE: basic form, systemic form, and extended form.

i. Basic Form (First Category JCE)

⁸ Jens David Ohlin, *Three Conceptual Problems with the Doctrine of Joint Criminal Enterprise*, 5 J. INT’L CRIM. J. 69 (2007), [Reproduced at tab 31].

⁹ *Prosecutor v. Tadic*, Case No. IT-94-1-A, Appeals Judgment, ¶220 (July 15, 1999), [Reproduced at tab 2].

¹⁰ *Id.* at ¶193.

¹¹ Ciara Damgaard, *The Joint Criminal Enterprise Doctrine: A “Monster Theory of Liability” or a Legitimate and Satisfactory Tool in the Prosecution of the Perpetrators of Core International Crimes?*, in [Individual Criminal Responsibility for Core International Crimes](#), 127-261, 2008. [Reproduced at tab 33].

The first category identified by the Appeals Chamber in *Tadic* involves cases where there is an agreement between multiple persons to intentionally commit a crime. The agreement need not be explicit but instead may be inferred by the circumstances surrounding the crime. All that is required to infer an agreement is that all codefendants acted pursuant to a common design and possessed the same criminal intention.¹² The accused must also voluntarily participate in the act and intend the result. This category of JCE also applies to cases where co-perpetrators share the same intent to commit the crime and one of the co-perpetrators physically carries out the objective elements of the crime.¹³

ii. Systematic Form (Second Category JCE)

The second category identified by the Appeals Chamber in *Tadic* is often referred to as “concentration camp” cases in relation to its systemic and structural nature.¹⁴ In this form of JCE there is a systemic plan to commit a criminal act (such as concentration camp crimes) and the presence of an individual within such a structure can be used to infer their assent and consent to join in the criminal enterprise. In this form of JCE the accused must always be in a position of authority within the system.¹⁵

iii. Extended Form (Third Category JCE)

The final category of JCE identified by the Appeals Chamber in *Tadic* involves cases where the accused is a member of a common plan and another member of the JCE, while acting

¹² *Prosecutor v. Tadic*, Case No. IT-94-1-A, Appeals Judgment, ¶193 (July 15, 1999), [Reproduced at tab 2].

¹³ *Id.* at ¶192-206.

¹⁴ *Id.* at ¶202.

¹⁵ *Id.* at ¶193.

outside of the scope of the plan, commits a criminal act. In such cases the accused is held principally liable if the co-perpetrators act was “a natural and foreseeable consequence of the effecting of that common purpose”.¹⁶ The reasoning behind this is to hold those who effectuated the common plan liable for the foreseeable consequences of their actions.

c. Elements of Joint Criminal Enterprise

i. Objective Elements (*Actus Reus*)

After establishing the three forms of JCE the Appeals Chamber in *Tadic* further held that all three forms require the following three *actus reus* elements. First there must be a plurality of persons involved in the JCE, although they need not necessarily be organized in a military, political, or administrative structure.¹⁷ While there must be some structure in order for JCE to exist, such a structure can come into existence upon the mere agreement between multiple persons to a common plan or design. Second there must exist “a common plan, design or purpose which amounts to or involves the commission of a crime provided for in the Statute”.¹⁸ A common plan need not exist prior to the commission of the crime, rather when a group of persons act in unison to jointly commit a crime an inference can be made as to the existence of a

¹⁶ *Prosecutor v. Tadic*, Case No. IT-94-1-A, Appeals Judgment, ¶204 (July 15, 1999), [Reproduced at tab 2].

¹⁷ *Id.* at ¶227; *Prosecutor v. Stakic*, Case No. IT-97-24-A, Appeals Judgment, ¶64 (Mar. 22, 2006). [Reproduced at tab 4].

¹⁸ *Prosecutor v. Tadic*, Case No. IT-94-1-A, Appeals Judgment, ¶226 (July 15, 1999). The language “common plan, design, or purpose” is meant to encompass all situations in which a JCE might arise. This memorandum uses the words “plan, design, and purposefully” interchangeably in order to appropriately address differing situations concerning JCE’s and the use of any one word is to be understood as encompassing all three.

common plan.¹⁹ Finally the accused must in joining the JCE must commit, assist, or contribute to a punishable crime under the Statute.²⁰ The Appeals Chamber further held that there need not be any prior planning to form a JCE, that the formation of a JCE may occur extemporaneously, and that the accused must always have the intent to commit the crime identified under the Statute.²¹

ii. Subjective Elements (*Mens Rea*)

In regards to the subjective elements of JCE, however, the requisite *mens rea* differs depending upon the form of JCE alleged against the accused.²² The basic and systemic form of JCE require an intention to participate in and further the criminal activity or purpose of the group, and requires that all participants in the JCE possess the same criminal intent.²³ For extended form JCE the accused must only intend to participate in and further the criminal plan. However because extended form JCE applies to crimes that fall outside the criminal purpose of the JCE, it must be foreseeable to the accused that another member of the group might perpetrate the crimes that were actually committed, and the accused must willingly accept the risk of the commission of such crimes.²⁴

¹⁹ *Id.*

²⁰ *Prosecutor v. Tadic*, Case No. IT-94-1-A, Appeals Judgment, ¶226 (July 15, 1999). [Reproduced at tab 2].

²¹ *Id.* at ¶227.

²² *Prosecutor v. Babic*, Case No. IT-03072-A, Appeals Judgment, ¶38 (July 18, 2005). [Reproduced at tab 5].

²³ Elise van Sliedregt, *Joint Criminal Enterprise as a Pathway to Convicting Individuals for Genocide*, 5 J. INT'L CRIM. J. 184 (2007) [Reproduced at tab 32].

²⁴ *Id.*

d. Continued Development/Narrowing of JCE

In *Tadic* the prosecution did not specifically allege Joint Criminal Enterprise; rather the Appeals Chamber found that JCE could be inferred from a combination of the charges alleged and Article 7(1) of the Statute.²⁵ Following the *Tadic* decision the *ad hoc* international tribunals were left to craft pleading rules guided only by their Statutes and Rules of Procedure. At the ICTY the applicable article of the Statute is Article 18(4) and the applicable rule is Rule 47(C) of the Rules of Procedure. Similarly at the ICTR the applicable article of the Statute is Article 17(4) and the applicable rule is Rule 47(C) of the Rules of Procedure²⁶. Article 18(4) of the Statute provides that the indictment must set out “a concise statement of the facts and the crime or crimes with which the accused is charged”.²⁷ Similarly Rule 47(C) of the Rules provides that the indictment shall set out the name and particulars of the suspect as well as “a concise statements of the facts of the case”.²⁸ While both requirements are to be read in light of the Article 21(4)²⁹ provisions concerning the rights of the accused to a fair trial, the international tribunals nevertheless began allowing broad and general pleading of JCE in indictments under

²⁵ *Prosecutor v. Tadic*, Case No. IT-94-1-A, Appeals Judgment, ¶189-90 (July 15, 1999), [Reproduced at tab 2].

²⁶ The provisions of the ICTR Statute were copied directly from the ICTY statute. Both tribunals share the same Rules of Procedure. The difference in numbering here has arisen due to the revisions that have been made to the ICTY statute. While this memorandum will only address the ICTY statute directly, any such discussion should also be understood as addressing the relevant provisions in the ICTR statute.

²⁷ Article 18(4) of the ICTY and 17(4) of the ICTR Statutes, [Reproduced at tabs 24 and 26].

²⁸ Rule 47(C) of the Rules of Procedure for the ICTY and ICTR, [Reproduced at tabs 25 and 27].

²⁹ Article 20(4) at the ICTR, [Reproduced at tab 26].

blanket indictments alleging that the accused is liable under all modes of liability outlined in Article 7(1) of the ICTY Statute.³⁰

However due to continual challenges by defense teams alleging that the vagueness in pleadings infringed upon the accused's Article 21(4) rights, the tribunals were eventually forced to address the issue of specificity in pleading JCE. This section of the memorandum will examine the rules of pleading that developed in the international tribunals in the wake of *Tadic*.

iii. The prosecution must identify which form; basic, systemic, or extended, of liability it seeks for each criminal count charged

One of the early issues that the tribunals had to deal with was whether the prosecution could generally plead the accused's participation in a JCE or if it had to identify a specific form of JCE liability for each charge in the indictment. In *Prosecutor v. Krnojelac* the Appeals Chamber noted that a lack of specificity in an indictment concerning the form of criminal liability the accused is charged with gives rise to ambiguity that should be avoided. Thus it held that the prosecution must identify which form; basic, systemic, or extended, of liability is applicable to each criminal count charged.³¹ The Appeals Chamber in *Prosecutor v. Kvočka* similarly held that in order for the accused to be put on proper notice the indictment should include the particular form of JCE alleged.³²

³⁰ Ciara Damgaard, *The Joint Criminal Enterprise Doctrine: A "Monster Theory of Liability" or a Legitimate and Satisfactory Tool in the Prosecution of the Perpetrators of Core International Crimes?*, in [Individual Criminal Responsibility for Core International Crimes](#), 127-261, 2008, [Reproduced at tab 33].

³¹ *Prosecutor v. Krnojelac*, Case No. IT-97-25-A, Appeals Judgment, ¶138 (Sept. 17, 2003). [Reproduced at tab 6].

³² *Prosecutor v. Kvočka*, Case No. IT-98-30/1-A, Appeals Judgment, ¶28 (Feb. 28, 2005). [Reproduced at tab 7].

iv. The prosecution is allowed to plead multiple forms of JCE for the same crimes

In light of the fact that the it held that the prosecution must identify the form of the accused's JCE liability in relation to each charge, the Appeals Chamber in *Krnojelac* had to further deal with was whether the prosecution could plead multiple forms for the same criminal charge. The Chamber held that while the prosecution is allowed allege more than one form of JCE so long as it is done a clear manner that gives proper notice to the accused.³³

v. The Prosecution must define the common design, purpose, or plan

The Appeals Chamber in *Kronjelac* further held that regardless of the form of JCE alleged, the prosecution is required to strictly define the common plan and identify as precisely as possible the principal perpetrators of the crimes committed.³⁴ The Chamber held that the underlying reason for this is because the prosecution must put the accused on proper notice of the crimes he is charged with and "the accused must know whether the system he is charged with having contributed to involves all the acts being prosecuted or only some of them".³⁵ While the common plan need not have been previously arranged or formulated and may materialize extemporaneously, inferred from the fact that a plurality of person acted in unison to effectuate the JCE³⁶, the purpose of the JCE nevertheless must be identified.

vi. The Prosecution must specify whether the accused's "commission" is the physical commission of the crime or the participation in a JCE, or both.

³³ *Prosecutor v. Krnojelac*, Case No. IT-97-25-A, Appeals Judgment, ¶115 (Sept. 17, 2003). [reproduced at tab 6]

³⁴ *Id.*

³⁵ *Id.* at ¶117

³⁶ *Prosecutor v. Furundzija*, Case No. IT-95-17/1, Trial Judgment, ¶39-41 (Dec. 10, 1998) [Reproduced at tab 8].

The Appeals Chamber in *Krnojelac* further held that in the indictment the prosecution must specify what it means by the when it charges the accused with the “commission” one of the crimes under the statute within the meaning of Article 7(1). The Chamber thus held that the prosecution must identify whether the accused’s “commission” of a crime under the Statute was the physical commission of the crime or the accused’s participation in a JCE, or both.³⁷

vii. The indictment must set out the material facts of the prosecution’s case with enough detail to give the accused proper notice and allow him a chance to prepare his defense.

In *Prosecutor v. Ntakirutimana* at the International Criminal Tribunal for Rwanda (ICTR) the Appeals Chamber held that the standard of specificity required in an indictment is “dependant upon whether it sets out the material facts of the Prosecution case with enough detail to inform a defendant clearly of the charges against him or her so that he or she may prepare his or her defence [sic].”³⁸ It thus held that in the case before it the indictment had been improperly plead because it did not mention JCE and because “the mere reference by the Prosecution to the joint criminal enterprise illustrating the ‘dolus eventualis’ doctrine in its Pre-Trial and Closing Briefs cannot be understood as an unambiguous pleading of participation in the first form of joint criminal enterprise which is the form the Prosecution advances in this appeal.”³⁹

viii. The prosecution must identify as precisely as possible the principal perpetrators of the crime and the co-perpetrators within the JCE.

³⁷ *Prosecutor v. Krnojelac*, Case No. IT-97-25-A, Appeals Judgment, ¶38 (Sept. 17, 2003). [Reproduced at tab 6].

³⁸ *Prosecutor v. Ntakirutimana & Ntakirutimana*, Case Nos. ICTR-96-10-A and ICTR 96-17-A, Appeals Judgment, ¶470 (Dec. 13, 2004), [Reproduced at tab 17].

³⁹ *Id.* at ¶479.

In *Krnojelac* the Appeals Chamber held that the prosecution must identify as precisely as possible the principal perpetrators of the crimes committed.⁴⁰ This requirement was expanded upon in *Prosecutor v. Kvočka* where Appeals Chamber held that “if the Prosecution relies on a theory of joint criminal enterprise, then the prosecutor must plead the purpose of the enterprise, *the identity of the participants*, and the nature of the accused’s participation in the enterprise.”⁴¹ Thus the chamber held that not only must the prosecution identify the physical perpetrators of the crime but also the co-perpetrators of the JCE. As such, in *Prosecutor v. Bala* the Trial Chamber held that JCE was inappropriately plead where the prosecution did not identify the identities of the participants.⁴² In *Bala*, Bala was accused of participating in a JCE involving the detention of civilians in a prison camp. The Chamber held that while in this situation it may have been possible to infer from the circumstances and the structure of the prison camp his participation in a JCE, the failure to identify other participants caused the allegations of JCE to fail.⁴³

ix. The Prosecution must show that the accused shares the *mens rea* of the other members of the JCE in joining the JCE and perform acts that are directed at furthering the common design.

⁴⁰ *Prosecutor v. Krnojelac*, Case No. IT-97-25-A, Appeals Judgment, ¶116 (Sept. 17, 2003) [Reproduced at tab 6].

⁴¹ *Prosecutor v. Kvočka*, Case No. IT-98-30/1-A, Appeals Judgment, ¶28 (Feb. 28, 2005), [Reproduced at tab 7]. The Appeals Chamber in *Kvočka* held that these requirements must especially be plead for extended for m JCE because the natural and foreseeable consequences of an individuals participation are subjective and may not be what is natural and foreseeable to another person. Thus particularly for extended form JCE these factors need to be identified in order for the accused to know whether he is being charged with all of the crimes encompassed by JCE or only some of them.

⁴² *Prosecutor v. Linaj, Bala, Musliu*, Case No. IT-03-66-T, Trial Judgment, ¶666 (Nov. 30 2005) [Reproduced at tab 9].

⁴³ *Id.*

A further restriction on pleading JCE arose in *Prosecutor v. Babic* where the Appeals Chamber stated that to be held as a co-perpetrator in a JCE the accused must share the *mens rea* of his co-perpetrators in joining the JCE and perform acts that are directed at furthering the common design.⁴⁴ However where there is a lack of direct evidence concerning intent, the circumstances surrounding the JCE can be used to infer intent.⁴⁵

x. If the objective of the JCE changes such that it is different in nature from the original plan then a new JCE has been established.

An additional restriction on pleading JCE concerns when the objective of the JCE changes. In *Prosecutor v. Blagojevic* the Trial Chamber held that when the objective of the JCE changes such that it is different in nature from the original design, purpose, or plan, then a new JCE has been established. The Trial Chamber further held that when a new JCE has been established and substantive and procedural requirements of JCE must be met. Thus where the prosecution has identified a change in the JCE it must plead the indictment the nature of the new JCE as well as identify the other participants in the JCE.⁴⁶

e. Criticisms of JCE

Due to its broad nature and its widespread use at the *ad hoc* international tribunals, JCE as a doctrine has come under much scrutiny and criticism from both scholars and practitioners of international criminal law. One of the most common criticisms of JCE is that it overextends the scope of individual criminal responsibility. More specifically it has been alleged by some

⁴⁴ *Prosecutor v. Babic*, Case No. IT-03-72-A, Appeals Judgment, ¶38 (July 18, 2005), [Reproduced at tab 5].

⁴⁵ *Prosecutor v. Kvočka*, Case No. IT-98-30/1-A, Appeals Judgment, ¶243 (Feb. 28, 2005), [Reproduced at tab 7].

⁴⁶ *Prosecutor v. Blagojevic, Jokic*, Case No. It-02-60-T, Trial Judgment, ¶700 (Jan. 17, 2005), [Reproduced at tab 10].

experts that JCE establishes an objective test for the subjective requirements concerning *mens rea*.⁴⁷ Thus because intent has been allowed to be “inferred” from the circumstances, JCE has been criticized because it evaluates criminal responsibility purely on a persons actions, the joining of the JCE, and not their state of mind in doing so.

Furthermore, extended form JCE has come under specifically harsh criticism for its “foreseeability” standard, which has been interpreted as applying a recklessness or negligence standard of guilt to crimes that require elevated levels of intent such as knowledge and purposefulness.⁴⁸ This is especially true in the case where JCE has been alleged in conjunction with the crime of genocide because genocide is a specific intent crime, which itself requires multiple elements of elevated intent.⁴⁹ A further criticism of the scope of JCE liability is that it is overly broad and allows criminal liability to be imputed between structurally remote members of the JCE who may not even know each other or each other’s actions.⁵⁰ Additionally, JCE has also been criticized as a form of “organizational liability” where individuals are held liable for their associate’s actions even where there is no causal link between the accused’s actions and intent and the crime that was committed.⁵¹

⁴⁷ Ciara Damgaard, *The Joint Criminal Enterprise Doctrine: A “Monster Theory of Liability” or a Legitimate and Satisfactory Tool in the Prosecution of the Perpetrators of Core International Crimes?*, in [Individual Criminal Responsibility for Core International Crimes](#), 216, 2008, [Reproduced at tab 33].

⁴⁸ *Id.* at 214-218.

⁴⁹ Elise van Sliedregt, *Joint Criminal Enterprise as a Pathway to Convicting Individuals for Genocide*, *Journal of International Criminal Justice* 5 (2007) 188, 190-191, [Reproduced at tab 32].

⁵⁰ *Id.*

⁵¹ Antonio Cassese, *The Proper Limits of Individual Responsibility Under the Doctrine of Joint Criminal Enterprise*, 5 *J. Int’l Crim. Just.* 109, 114 (1997), [Reproduced at tab 34].

f. Reactionary Judgments to the criticisms of JCE

xi. *Prosecutor v. Brdanin*

In 2004 the *Prosecutor v. Brdanin* Trial Judgment attempted to realign the international community's understanding of the scope of JCE. Not only did the Judgment introduced the requirement that an indictment must specifically identify the groups involved in the JCE⁵², later expanded upon in *Kvocka*, but it also proposed to establish an additional elements to establish the existence of a JCE.

The Trial Chamber held that for JCE liability to appropriately be applied to the accused the common plan must exist directly between the accused and the physical perpetrators of the crime.⁵³ Understanding the criticisms of the scope of JCE, the Chamber stated that it is not sufficient to prove merely an agreement to commit the crime between the accused and the superior of the actual perpetrator. Instead, the Chamber held that accused must have entered into and agreement with the physical perpetrator to commit the crime, or the crime perpetrated must be the natural and foreseeable consequence of the crime agreed upon between the accused and the physical perpetrators.⁵⁴ In *Brdanin* the Trial Chamber rejected the inference of the necessary agreement because of the “physical and structural remoteness between the Accused and the

⁵² *Prosecution v. Brdanin & Talic*, Case No. IT-99-36, Decision on Objections by Momir Talic to the Form of the Amended Indictment, ¶21 (Feb. 20 2001), [Reproduced at tab 11].

⁵³ Alan O'Rourke, *Joint Criminal Enterprise and Brdanin: Misguided Overcorrection*, 47 Harv. Int'l L.J. 307 (Winter 2006) at 318, [Reproduced at tab 35].

⁵⁴ *Prosecution v. Brdjanin*, Case No. IT-99-36-T, Trial Judgment, ¶347 (Sept. 1 2004), [Reproduced at tab 12].

Relevant Physical perpetrators and the fact that the Relevant Physical Perpetrators in most cases have not even been personally identified.”⁵⁵

xii. *Brdanin* Appeals Judgment

After the Trial Judgment in *Brdanin* the prosecution appealed to the Appeals Chamber for clarification as to the general applicability of JCE as a mode of criminal liability.⁵⁶ The prosecution’s first ground of appeal posed the question of whether the Trial Chamber had correctly held that the principal perpetrators of the crime must themselves be members of the JCE.⁵⁷ The Appeals Chamber held that the Trial Chamber had erred and found that a member of a JCE could be held responsible for crimes committed by non-members of the enterprise, provided that the crime could be imputed to *one* member of the JCE and that that member, when using the non-member principal perpetrator, was acting in accordance with the common plan.⁵⁸ The Appeals Chamber held that for basic form JCE the question is not whether a the principal perpetrator of the crime is a member of the JCE, but rather whether the crime committed was part of the common purpose of the JCE. It additionally held that in cases where the principal perpetrator of the crime is not a member of the JCE, the determination of whether the crimes forms a part of the criminal purpose may be inferred from the circumstances of the crime and the JCE.⁵⁹

⁵⁵ *Prosecution v. Brdjanin*, Case No. IT-99-36-A, Appeals Judgment, ¶354 (April 3, 2007). [Reproduced at tab 13].

⁵⁶ *Id.* at ¶361

⁵⁷ *Id.* at ¶366

⁵⁸ *Id.* at ¶410

⁵⁹ *Prosecution v. Brdjanin*, Case No. IT-99-36-A, Appeals Judgment, ¶410 (April 3, 2007). [Reproduced at tab 13].

The prosecution's second ground of appeal posed the question of whether the Trial Chamber had erred in holding that the prosecution must prove that the accused had a specific agreement with the principal perpetrator to commit a particular crime.⁶⁰ The Appeals Chamber again held that the Trial Chamber had erred and held that a showing of a specific agreement between the accused and the principal perpetrator is unnecessary in view of the common plan necessarily shared by all JCE members. Nonetheless, the Appeals Chamber held that the Prosecution must still prove other elements, including the fact that the accused shared the common criminal purpose and that the crime in question forms part of that common criminal purpose.⁶¹

The prosecution's final ground of appeal posed the question of whether the Trial Chamber had appropriately held that JCE applies only to "small-scale" cases.⁶² In this regards the Appeals Chamber again held that the Trial Chamber erred in finding that the doctrine of JCE applies only to relatively small- scale cases. The Appeals Chamber held that prior cases provided clear authority for the use of JCE liability on scales much larger than the one municipality it was alleged to have existed in with relation to Brdanin.⁶³ In the wake of *Brdanin* many commentators noted that had the Trial Judgment been allowed to stand, the application of JCE as a mode of criminal liability would have been scaled back immensely.⁶⁴ While the Trial Judgment

⁶⁰ *Id.* at ¶377

⁶¹ *Id.* at ¶419

⁶² *Id.* at ¶386

⁶³ *Id.* at ¶422-245

⁶⁴ Antonio Cassese, *The Proper Limits of Individual Responsibility Under the Doctrine of Joint Criminal Enterprise*, 5 J. Int'l Crim. Just. 109, 114 (1997) [Reproduced at tab 34]

ultimately did not stand, the applicability of JCE and the rules regarding its proper pleading in indictments has nevertheless continued to attract controversy.

xiii. *Prosecutor v. Brima, Kamara, Kanu*

In particular the case of *Prosecutor v. Brima, Kamara, Kanu* (hereinafter *Brima*), at the Special Court for Sierra Leone (SCSL), presented another case where a Trial Chamber attempted to scale back the scope of JCE and the rules of pleading concerning it. In *Brima* the Trial Chamber held that the indictment was improperly plead because it did not provide adequate notice to the defendants of the criminal purpose that they had allegedly agreed upon.⁶⁵

In *Brima* the prosecution alleged that the defendants were involved in a JCE to “take any actions necessary to gain and exercise political power and control over the territory of Sierra Leone, in particular the diamond mining areas.”⁶⁶ More specifically the prosecution alleged that the defendants were liable under Basic (first) and Extended (third) category JCE where:

The joint criminal enterprise included gaining and exercising control over the population of Sierra Leone in order to prevent or minimize resistance to their geographic control, and to use members of the population to provide support to the members of the join criminal enterprise. The crimes alleged in this Indictment, including unlawful killings, abductions, forced labour [sic], physical and sexual violence, use of child soldiers, looting and burning of civilian structures, were either actions within the joint criminal enterprise or were a reasonably foreseeable consequence of the join criminal enterprise.⁶⁷

⁶⁵ *Prosecutor v. Brima, Kamara, Kanu*, Case No. SCSL-04-16-T, Trial Judgment, ¶71 (June 20, 2007), [Reproduced at tab 18].

⁶⁶ *Prosecutor v. Brima, Kamara, Kanu*, Case No. SCSL-04-16-PT, Further Amended Consolidated Indictment, ¶33-34 (Feb. 18, 2005), [Reproduced at tab 19].

⁶⁷ *Prosecutor v. Brima, Kamara, Kanu*, Case No. SCSL-04-16-T, Trial Judgment, ¶34 (June 20, 2007), [Reproduced at tab 18].

However the Trial Chamber held that the Indictment was defectively pleaded and as such it would not consider JCE as a mode of criminal responsibility.⁶⁸ The Trial Chamber held that for JCE liability to arise the common purpose in a JCE must be criminal. It reasoned that “any actions necessary” was not a crime under the SCSL statute and thus JCE had been improperly alleged.⁶⁹

The Chamber further held that because the Indictment failed to specify a period of time during which the JCE existed or was created, it had to assume that the JCE was criminal from its inception.⁷⁰ The Chamber thus reasoned that because the common purpose was not criminal at the time the defendants agreed to it, no JCE existed.⁷¹ The Chamber recognized based upon the evidence that the original non-criminal common purpose eventually changed into criminal common purpose, but noted that the Prosecution failed to proffer material evidence as to the creation of the new criminal common purpose. Thus the Chamber noted that in a situation where a non-criminal common purpose has changed into a criminal common purpose, the new purpose(s) must be pled in the indictment.⁷² In the end the Chamber found the defendants guilty of the crimes alleged in relation to the JCE, but only because the defendants had directly carried out the alleged crimes.

xiv. *Brima Appeals Judgment*

⁶⁸ *Prosecutor v. Brima, Kamara, Kanu*, Case No. SCSL-04-16-T, Trial Judgment, ¶85 (June 20, 2007), [Reproduced at tab 18].

⁶⁹ *Id.* at ¶67

⁷⁰ *Id.* at ¶77

⁷¹ *Id.* at ¶79

⁷² *Id.* at ¶80

Following the Trial Judgment in *Brima* the prosecution appealed to the Appeals Chamber on the grounds that the Trial Chamber had improperly dismissed the charges of JCE for vagueness in the indictment.⁷³ In considering the prosecution's appeal the Appeals Chamber began by examining the general requirements of specificity in indictments. The Appeals Chamber thus held that the prosecution is obliged to plead material facts with a sufficient degree of specificity, which are to be examined within the context of the particular case.⁷⁴ The Chamber further noted that the degree of specificity required varies according to the form participation alleged.⁷⁵

In relation to the prosecution's appeal concerning the issue of adequate pleading of JCE, the Appeals Chamber, citing ICTY precedent, concluded that the requirement that the common plan of a joint criminal enterprise be inherently criminal means that the plan must either have as its objective a crime within the Statute or contemplate crimes within the Statute as a means of achieving its objective.⁷⁶ Thus the Appeals Chamber held that the common purpose of the JCE

⁷³ *Prosecutor v. Brima, Kamara, Kanu*, Case No. SCSL-2004-16-A, Appeal Judgment, ¶27 (Feb. 22, 2008)

⁷⁴ *Id.* at ¶37.

⁷⁵ *Id.* at ¶38.

⁷⁶ *Id.* at ¶77-80. In particular the Appeals Chamber cited *Prosecutor v. Kvočka*, and the indictments in *Prosecutor v. Martić* and *Prosecutor v. Haradinaj*, where the common designs of the JCE's were not inherently criminal under the ICTY Statute but the tribunal nevertheless allowed the use of JCE where the means to achieve the goal of the design constituted crimes within the Statute. Another clear example of this can be seen in *Prosecutor v. Stakić*, Case No. IT-97-24-A, Appeals Judgment (Mar. 22, 2006). In *Stakić* the indictment claimed that the purpose of the JCE was the permanent forcible removal of Bosnian Muslims and Croats. This purpose of forcible removal, while deplorable, is not a crime falling under the Statute of the ICTY. However the Appeals Chamber nevertheless held Stakić liable for both Basic (first) and Extended (third) category JCE. The ICTY has thus allowed for prosecution through JCE where the common purpose has been to create an all-Serbian State and criminal actions have occurred in the process.

in *Brima* was not defectively pleaded.⁷⁷ Although the objective of gaining and exercising political power and control over the territory of Sierra Leone was not a crime under the SCSL Statute, the actions contemplated, as a means to achieve that objective did constitute crimes within the Statute.

The Appeals Chamber finished its consideration of the prosecution’s appeal by examining whether the Trial Chamber erred in holding that the prosecution could not plead both basic form JCE liability, and extended form JCE in the alternative, concerning the same crime on the basis that the two forms of liability were mutually exclusive. In this regards the Appeals Chamber held that the Trial Chamber did indeed err because the pleading of basic and extended forms of JCE in the alternative “is now a well-established practice in the international criminal tribunals.”⁷⁸

g. Recent Cases

This section of the memorandum will now examine the current status of JCE as a mode of criminal responsibility and two important recent decisions made at the ICTY with regards to the proper pleading of JCE.

xv. *Prosecutor v. Martić*

In *Prosecutor v. Martić*, the Trial Chamber found Milan Martić guilty of participating in a JCE, “the common purpose of which was the establishment of an ethnically Serb territory through the displacement of the non-Serb population” through both basic and extended for

⁷⁷ *Prosecutor v. Brima, Kamara, Kanu*, Case No. SCSL-2004-16-A, Appeal Judgment, ¶84 (Feb. 22, 2008), [Reproduced at tab 20].

⁷⁸ *Id.* at ¶85

JCE.⁷⁹ At the Appeals Chamber, Martić challenged the Trial Chamber’s finding of a link between the physical perpetrators of the criminal acts charged in the indictment and himself. Specifically Martić alleged that the Trial Chamber erred in concluding that the crimes were committed by forces under his control of the control of another member of the JCE because the crimes were committed by unidentified individuals and “renegade” units. Martić further submitted that the crimes occurred “spontaneously”.⁸⁰

In addressing Martić’s challenges the Appeals Chamber applied the standards set forth by the Appeals Chamber in *Brdanin*, which held that the decisive issue under basic form JCE is whether the crime committed well within the common criminal purpose of the JCE, not whether it was committed by a member of the JCE. The Appeals Chamber in Martić further adhered to the *Brdanin* decision that for extended form JCE:

The accused may be found responsible provided that he participated in the common criminal purpose with the requisite intent and that, in the circumstance of the case: (i) it was foreseeable that such a crime might be perpetrated by one or more persons used by him (or by any other member of the JCE) in order to carry out the *actus reus* of the crimes forming part of the common purpose; and (ii) the accused willingly took that risk. Thus the Chamber noted that members of a JCE may be held liable for crimes committed by principal perpetrators who are not members of the JCE provided that the crimes can be imputed to at least one member of the JCE and that the member, when using the perpetrator, acted in accordance with the common plan.⁸¹

The Appeals Chamber in *Martić* affirmed that the establishment of a link between the crimes committed and the accused member of the JCE is a matter to be dealt with on a case-by-case basis. It then affirmed the Appeals Chamber’s methodology in *Prosecutor v. Stakić* in assessing whether it is reasonable for a Trial Chamber to impute crimes to an accused, as a member of a JCE, when other members of the JCE used the principal perpetrators of the crime to

⁷⁹ *Prosecutor v. Martić*, Case No. IT-95-11-A, Appeals Judgment, ¶3 (Oct. 8, 2008). [Reproduced at tab 14].

⁸⁰ *Id.* at ¶165.

⁸¹ *Id.* at ¶168.

further the common purpose. Thus the Appeals Chamber in *Martić* considered that in respect to crimes falling within the common criminal purpose, the determination of whether the crimes can be imputed focuses on whether the accused intended to further this common purpose. In relation to crimes falling outside the scope of the JCE, the Appeals Chamber considered the following in determining whether the crimes could be imputed:

- Whether crimes outside the common purpose occurred,
- Whether such crimes were a natural and foreseeable consequence of the implementation of the common purpose, and;
- Whether the accused acted in furtherance of the common purpose despite an awareness of the risk that such crimes were a possible consequence.⁸²

Thus the Appeals Chamber reiterated that “in order to convict a member of a JCE for crimes committed by non-members of the JCE, a Trial Chamber must be satisfied beyond a reasonable doubt that the commission of the crimes by non-members of the JCE formed part of a common criminal purpose (basic form JCE), or an organized criminal system (systemic form JCE), or were a natural and foreseeable consequence of a common criminal purpose (extended form JCE).⁸³

The Appeals Chamber further held that liability under extended form JCE requires that the crime was a foreseeable consequence for the accused and he willingly took that risk. Thus it held that it is insufficient that an accused merely create the conditions making the crimes falling outside the common purpose possible.⁸⁴

⁸² *Prosecutor v. Martić*, Case No. IT-95-11-A, Appeals Judgment, ¶3 (Oct. 8, 2008), [Reproduced at tab 14].

⁸³ *Id.* at ¶171.

⁸⁴ *Id.* at ¶83.

xvi. *Prosecutor v. Krajisnik*

In *Prosecutor v. Krajisnik* the Trial Chamber found Krajisnik guilty of crimes committed while participating in a JCE whose objective was the permanent removal, by force or other means, of Bosnian Muslims and Croats and other non-Serb's through the commission of various crimes.⁸⁵ On appeal it was alleged that the Trial Chamber did not correctly identify the participants of the JCE by referring to generic groups, thus casting doubt on the existence of a common link between them and Krajisnik.⁸⁶ However the Appeals Chamber held that while the Trial Chamber must identify the plurality of persons belonging to the JCE, it is not necessary to identify all members by name and that in some circumstances it is sufficient to refer to categories or groups of persons.⁸⁷ More importantly the Appeals Chamber considered whether the Trial Chamber made sufficient findings as to whether the expanded crimes, crimes not originally encompassed by the JCE, formed part of the JCE and thus could be imputed to Krajisnik.⁸⁸

In *Krajisnik* the original crimes of the JCE were deportation and forcible transfer, however, the Trial Chamber held that when the members of the JCE were informed of new crimes and took no effective measures to prevent their recurrence, then those new crimes were

⁸⁵ *Prosecutor v. Krajisnik*, Case No. IT-00-39-A, Appeal Judgment, ¶153 (March 17, 2009), [Reproduced at tab 15].

⁸⁶ *Id.* at ¶154.

⁸⁷ *Id.* at ¶156.

⁸⁸ Previously the Trial Chamber in *Prosecutor v. Blagojevic, Jokic*, Case No. It-02-60-T, Trial Judgment, ¶700 (Jan. 17, 2005), [Reproduced at tab 10], held that if the objective of the JCE changes such that it is different in nature from the original plan then a new JCE has been established. However no court had previously ruled on whether subsequent crimes that did not alter the purpose of the JCE could be incorporated into the JCE. Rather, in the past courts have focused on imputing the crimes to the accused individuals instead of the original JCE itself.

incorporated into the original JCE.⁸⁹ Thus the Trial Chamber held that the new crimes did not form a new JCE, which would have required the prosecution to plead the existence of such new JCE in the indictment.⁹⁰

While the Appeals Chamber ultimately decided that the Trial Chamber improperly imputed the new crimes into the JCE, it clarified that it is possible for the Trial Chamber to do so and outlined what findings the Trial Chamber would have to make. Thus the Appeals Chamber held that in order to impute responsibility under the basic form of JCE for the additional crimes the leading members of the JCE must have been informed of the crimes and done nothing to prevent the recurrence of the expanded crimes and continued the implementation of the original criminal purpose. Furthermore the Appeals Chamber held that in order to impute crimes that arose subsequent to the creation of the JCE the Trial Chamber must identify when the expanded crimes became incorporated into the common purpose.⁹¹

It is important first to note that while the Appeals Chamber found that the Trial Chamber failed to establish these elements, it did so in relation to the conclusion that the additional crimes were incorporated into the common criminal plan in relation to basic form JCE liability only. Thus the Appeals Chamber noted that had the Trial Chamber proceeded to impute the crimes through extended form JCE the crimes would properly have been imputed to Krajisnik.⁹²

⁸⁹ *Prosecutor v. Krajisnik*, Case No. IT-00-39-A, Appeal Judgment, ¶170 (March 17, 2009), [Reproduced at tab 15].

⁹⁰ *Prosecutor v. Blagojevic, Jokic*, Case No. It-02-60-T, Trial Judgment, ¶700 (Jan. 17, 2005), [Reproduced at tab 10].

⁹¹ *Prosecutor v. Krajisnik*, Case No. IT-00-39-A, Appeal Judgment, ¶171 (March 17, 2009), [Reproduced at tab 15].

⁹² *Id.* at ¶167.

h. The Current Status of JCE and its Proper Pleading

This final section concerning JCE will first examine what the current status of JCE is as a mode of individual criminal responsibility. It will then conclude with an examination of the current rules regarding the proper pleading of JCE.

xvii. Prosecutor v. Boskoski, Tarculovski,

Prosecutor v. Boskoski, Tarculovski, best summarizes the current status of JCE as a form of criminal responsibility. In *Boskoski* the Trial Chamber clearly outlined what is necessary for JCE. The Trial Chamber identified and expanded upon the three *actus reus* of the participant is common to all three forms of JCE.

- First there must be a plurality of person, although they need not be organized in a military, political or administrative structure.
- Second there must exist a common plan, which amounts to or involves the commission of a crime provided for in the Statute. This plan need not be previously formulated nor does it require an understanding or agreement between the accused and the physical perpetrator of the crime to commit the crime. The common plan may materialize extemporaneously and may be inferred from the fact that a plurality of persons acted in unison to effectuate a JCE.
- Third, the accused must have participated in the common plan; either directly in the commission of the crime, or by assisting or contributing to the execution of the common plan. In the situation where the accused contributed to the execution of the common plan, the contribution need not be necessary, or even substantial as a matter of law, to achieve the common criminal purpose. The contribution should be significant however and not every type of conduct amounts to a sufficiently significant contribution to impute

criminal liability. The presence of the accused in the JCE at the time of the commission of the crime is not required.⁹³

The Trial Chamber in *Boskoski* further identified the differing *mens rea* requirements of JCE concerning each form of JCE alleged.

- Basic form JCE requires that the accused intended to perpetrate a crime and the intent was shared by all co-perpetrators.
- Systemic form JCE requires that the accused had knowledge of the system of repression, in the enforcement of which he participates, and the intent to further the common concerted design to ill-treat the inmates of a concentration camp.
- Extended form JCE, concerning cases where a participant commits a crime outside the common plan, requires twofold *mens rea*. First the accused must have the intention to take part in or contribute to the common plan. Second, in order to be held responsible for crimes committed outside of the common criminal plan, the crimes must be the natural and foreseeable consequence of the common plan and the accused must know that such a crime might be perpetrated and willingly accept the risk of it occurring by joining or continuing to participate in the JCE. The determination of whether the crimes committed outside the purpose of the JCE were natural and foreseeable consequences is assessed in relation to the knowledge of the accused; the Prosecution must prove the accused had sufficient knowledge that the additional crimes were the natural and foreseeable consequences of the effectuation of the common plan.⁹⁴

Furthermore the Trial Chamber outlined that the physical perpetrators of the crime need not be members of the JCE, so long as the crime committed formed part of the common purpose

⁹³ *Prosecutor v. Boskoski, Tarculovski*, Case No. IT-04-82-T, Trial Judgment, ¶395 (July 10, 2008), [Reproduced at tab 16].

⁹⁴ *Id.* at ¶396.

can be imputed to at least one member of the JCE, who used the perpetrator in with the purpose of furthering the common plan. In such a situation the fact that the physical perpetrator knows of the existence of the JCE may be taken into consideration in determining whether the crime forms a part of the common plan.⁹⁵

The accused may also be found responsible when the direct perpetrator commits a crime beyond the common purpose of the JCE so long as the crime committed is the natural and foreseeable consequence of effectuating the JCE. In this situation it must be foreseeable that a crime might be perpetrated, by one or more persons used by the accused, in order to carry out the *actus reus* of the crimes forming part of the JCE, and the accused willingly assumed the risk that such crimes might occur.⁹⁶

xviii. Current Status of Pleading JCE

The current pleading of JCE is still guided by the foundations set in the various statutes of the international tribunals as well as the precedent developed by the international tribunals themselves. Thus pursuant to Article 18(4) of the ICTY Statute, Article 17(4) of the ICTR Statute, and similarly at the other international tribunals, the basis for indictments shall be a concise statement of the facts and the crime(s) with which the accused is charged.⁹⁷ Furthermore the precedent set forth by the decisions of the international tribunals holds that:

⁹⁵ *Prosecutor v. Boskoski, Tarculovski*, Case No. IT-04-82-T, Trial Judgment, ¶397 (July 10, 2008), [Reproduced at tab 16].

⁹⁶ *Id.*

⁹⁷ Article 18(4) and 17(4) of the ICTY ICTR Statutes [Reproduced at tabs 24 and 26].

- The Prosecution must strictly define what the common design, purpose, or plan of the JCE is.⁹⁸
- The prosecution must identify which form; basic, systemic, or extended, of liability it seeks for each criminal count charged.⁹⁹
- The prosecution is allowed to plead multiple forms, in the alternative, of JCE for the same crimes.¹⁰⁰
- The prosecution must identify as precisely as possible the principal perpetrators of the crime and the co-perpetrators within the JCE.¹⁰¹ While the prosecutor must identify the plurality of persons belonging to the JCE, it is not necessary to identify all members by name and in some circumstances it is sufficient to refer to categories or groups of persons.¹⁰²

⁹⁸ *Prosecutor v. Krnojelac*, Case No. IT-97-25-A, Appeals Judgment, ¶116 (Sept. 17, 2003), [Reproduced at tab 6].

⁹⁹ *Prosecutor v. Krnojelac*, Case No. IT-97-25-A, Appeals Judgment, ¶138 (Sept. 17, 2003), [Reproduced at tab 6]; *Prosecutor v. Kvočka*, Case No. IT-98-30/1-A, Appeals Judgment, ¶28 (Feb. 28, 2005), [Reproduced at tab 7].

¹⁰⁰ *Prosecutor v. Krnojelac*, Case No. IT-97-25-A, Appeals Judgment, ¶115 (Sept. 17, 2003), [Reproduced at tab 6].

¹⁰¹ *Prosecutor v. Krnojelac*, Case No. IT-97-25-A, Appeals Judgment, ¶116 (Sept. 17, 2003), [Reproduced at tab 6].; *Prosecutor v. Kvočka*, Case No. IT-98-30/1-A, Appeals Judgment, ¶28 (Feb. 28, 2005), [Reproduced at tab 7].; *Prosecutor v. Bala*, Case No. IT-03-66-T, Trial Chamber II Judgment, ¶666 (Nov. 30, 2005), [Reproduced at tab 9].

¹⁰² *Prosecutor v. Kajisnik*, Case No. IT-00-39-A, Appeal Judgment, ¶156 (March 17, 2009), [Reproduced at tab 15]. Furthermore in *Prosecutor v. Krnojelac*, Case No. IT-97-25-A, Appeals Judgment, ¶116 (Sept. 17, 2003), [Reproduced at tab 6] it was sufficient to establish that the principal perpetrators were ‘civilian and military authorities and/or guards and soldiers present at KP Dom. In *Prosecutor v. Stakic*, Case No. IT-97-24-A, Appeals Judgment, ¶69 (Mar. 22, 2006) [Reproduced at tab 4]. it was sufficient to establish that the participants of the JCE ‘included the leaders of the political bodies, the army, and the police who held power in the Municipality of Prijedor. In *Prosecutor v. Brđjanin*, Case No. IT-99-36-A, Appeals Judgment,

- The Prosecution must specify whether the accused's commission of a crime is the physical commission of the crime or the participation in a JCE, or both.¹⁰³
- If the objective of the JCE changes such that it is different in nature from the original plan then the prosecution must plead that a new JCE has been established and identify the nature and participants of the JCE.¹⁰⁴
- The criminal purpose of a JCE may change if the leading members of the JCE were informed of subsequent crimes not encompassed in the original JCE, did nothing to prevent the recurrence of the expanded crimes, and continued with the implementation of the original criminal purpose. If this situation occurs the prosecution must identify when the expanded crimes became incorporated into the common purpose of the original JCE.¹⁰⁵
- The indictment must set out the material facts of the prosecution's case with enough detail to give the defendant notice of the crimes he is being charged with.¹⁰⁶

¶419 (April 3, 2007) the Appeals Chamber held while must exist a plurality of persons belonging to the JCE, it is not necessary to identify by name each of the persons involved.

¹⁰³ *Prosecutor v. Kajisnik*, Case No. IT-00-39-A, Appeal Judgment, ¶100 (March 17, 2009), [Reproduced at tab 15].

¹⁰⁴ *Prosecutor v. Blagojevic, Jokic*, Case No. It-02-60-T, Trial Judgment, ¶700 (Jan. 17, 2005), [Reproduced at tab 10].

¹⁰⁵ *Prosecutor v. Kajisnik*, Case No. IT-00-39-A, Appeal Judgment, ¶171 (March 17, 2009), [Reproduced at tab 15].

¹⁰⁶ *Prosecutor v. Ntakirutimana & Ntakirutimana*, Case Nos. ICTR-96-10-A and ICTR 96-17-A, Appeals Judgment, ¶470 (Dec. 13, 2004), [Reproduced at tab 17].

- The Prosecution must show that the accused shares the *mens rea* of the other members of the JCE in joining the JCE and perform acts that are directed at furthering the common design.¹⁰⁷
- For crimes committed by non-members of the JCE, the prosecution must show that the commission of the crime by non-members of the JCE formed part of a common criminal purpose, or and organized criminal system, or were a natural and foreseeable consequence of a common criminal purpose.¹⁰⁸

42. CO-PERPETRATION

Co-perpetration is a mode of criminal responsibility identified under article 25(3)(a) of the Rome Statute of the International Criminal Court (ICC).¹⁰⁹ This section of the Statute identifies three distinct modes of perpetration: direct perpetration (direct commission of a crime), co-perpetration (commission of a crime jointly with another person), and indirect perpetration (commission of a crime through another person).¹¹⁰

Co-perpetration as embodied in article 25(3)(a) is to be understood under the pretext of “joint control” over the crime resulting from an individuals “essential contribution” to the crime.¹¹¹ In essence this interpretation of co-perpetration under the Rome Statute differs from the interpretation ascribed to “co-perpetration” at the international tribunals due to its conception

¹⁰⁷ *Prosecutor v. Kvočka*, Case No. IT-98-30/1-A, Appeals Judgment, ¶243 (Feb. 28, 2005), [Reproduced at tab 7].

¹⁰⁸ *Prosecutor v. Martić*, Case No. IT-95-11-A, Appeals Judgment, ¶171 (Oct. 8, 2008), [Reproduced at tab 14].

¹⁰⁹ The Rome Statute of the International Criminal Court, [Reproduced at tab 28].

¹¹⁰ *Prosecutor v. Lubanga*, Case No. ICC-01/04-01/06, Decision on the confirmation of charges, ¶318 (Jan. 29, 2007), [Reproduced at tab 21].

¹¹¹ *Id.* at ¶322

of “joint control” over the crimes as opposed to the broader JCE concept of “common plan or purpose”.¹¹² As the pre-trial chamber in *Prosecutor v. Lubanga* stated “the concept of co-perpetration is originally rooted in the idea that when the sum of the co-ordinated individual contributions of a plurality of persons results in the realization of all the objective elements of a crime, any person making a contribution can be held vicariously responsible for the commissions of all the others, and as a result, can be considered as a principal to the whole crime”¹¹³

In differentiating between principals and accessories, co-perpetration as understood as “control over the crime” holds not only those who physically carry out the objective elements of an offence but also those who control or mastermind its commission liable because of their control over whether and how the crime is committed.¹¹⁴ The Pre-Trial Chamber in *Lubanga* thus held that the concept of co-perpetration as adopted by the Rome Statute involves an objective element concerning actual exercise of control over a crime, and a subjective element concerning the awareness of the individual of their control.¹¹⁵ As such in order to be considered a principle under co-perpetration an individual must have both control over the crime and be aware of having such control. The Pre-Trial Chamber reasoned that these individual may be principals because:

- They physically carry out the objective elements of the offence, they control the will of those who carry out the objective elements of the offence; and

¹¹² In the opinion of the *Lubanga* court this difference in interpretation stems from the fact that the Rome Statute prescribes detailed modes of criminality as opposed to the broader mandates granted towards the *ad hoc* tribunals. *Prosecutor v. Lubanga*, Case No. ICC-01/04-01/06, Decision on the confirmation of charges, ¶323 (Jan. 29, 2007), [Reproduced at tab 21].

¹¹³ *Id.* at ¶326.

¹¹⁴ *Id.* at ¶330.

¹¹⁵ *Id.* at ¶331.

- They have, along with others, control over the offence by reason of the essential tasks assigned to them.¹¹⁶

Thus co-perpetration as understood as joint control over a crime is based upon the principle that the essential tasks of a crime are divided between multiple people acting in concert. The concept of the shared control is based upon the fact that each individual could frustrate the commission of the crime through a refusal to commit their task.¹¹⁷

This differs from the primarily subjective approach taken by the *ad hoc* tribunals to the concept of joint criminal enterprise, which focuses its attention upon the intent of those participating in the “common plan”. Furthermore the concept of JCE is included in the Rome Statute in article 25(3)(d) but is considered primarily to be a concept of residual and indirect accessory liability.¹¹⁸ Article 25(3)(d) is defined as:

- A contribution to the commission or attempted commission of a crime by a group of persons acting with a common purpose;
- With the aim of furthering the criminal activity of the group or in the knowledge of the criminal purpose.¹¹⁹

a. Elements of Co-perpetratorship

xix. Objective Elements (*Actus Reus*)

¹¹⁶ *Prosecutor v. Lubanga*, Case No. ICC-01/04-01/06, Decision on the confirmation of charges, ¶322 (Jan. 29, 2007), [Reproduced at tab 21].

¹¹⁷ *Id.* at ¶342.

¹¹⁸ *Id.* at ¶337 .

¹¹⁹ The Rome Statute of the International Criminal Court, [Reproduced at tab 28].

The first objective element of co-perpetration is the existence of an agreement or common plan between multiple people. As such participation by an individual not connected to the common plan falls outside of co-perpetration.¹²⁰ Furthermore the common plan must include an element of criminality, although it need not be inherently criminal. The Pre-Trial Chamber in *Lubanga* held that it suffices where:

- The co-perpetrators agreed to a plan with a non-criminal goal, with the condition to commit the crime if certain circumstances occur; or
- That the co-perpetrators (a) are aware of the risk that implementing the common plan (which is specifically directed at the achievement of a non-criminal goal) will result in the commission of a crime and (b) accept such an outcome.¹²¹

The pretrial chamber also held that the agreement need not be explicit and can be inferred from the subsequent actions of the co-conspirators.¹²²

The second objective element of co-perpetration is that the co-ordinated essential contribution made by each co-perpetrator resulted in the realization of the objective elements of the crime that was committed.¹²³ This element distinguishes participants between those who exercise joint control over the crime, via their essential tasks and their ability to frustrate the commission of the crime from, from those participants who cannot be said to have joint control over the crime.

¹²⁰ *Prosecutor v. Lubanga*, Case No. ICC-01/04-01/06, Decision on the confirmation of charges, ¶343 (Jan. 29, 2007), [Reproduced at tab 21].

¹²¹ *Id.* at ¶344.

¹²² *Id.* at ¶345.

¹²³ *Id.* at ¶346.

xx. Subjective Elements (Mens Rea)

The first subjective element necessary for co-perpetration is that the individual fulfils all of the subjective elements of the crime with which he or she is charged, including any specific or requisite intent.¹²⁴ Article 30 of the Rome Statute specifies that an individual shall be criminally responsible only:

- If the person is “aware that a circumstance exists or a consequence will occur in the ordinary course of events”¹²⁵; and
- If the person means to engage in the relevant consequence or is aware that it will occur in the ordinary course of events.¹²⁶

The statute further specifically requires a volitional element from the accused individual. This encompasses many situations including where the suspect knows his actions or omissions will bring about the objective elements of the crime, and undertakes such actions or omissions with the concrete intent to bring about the objective elements of the crime (*dolus directus* of the first degree).¹²⁷ It also encompasses situations where a suspect lacking specified intent to commit the crime, is aware of that the elements of such crime will be the necessary outcome of his action or omission (*dolus directus* of the second degree); and where a suspect is aware of the

¹²⁴ *Prosecutor v. Lubanga*, Case No. ICC-01/04-01/06, Decision on the confirmation of charges, ¶349 (Jan. 29, 2007), [Reproduced at tab 21].

¹²⁵ The Rome Statute of the International Criminal Court, [Reproduced at tab 28].

¹²⁶ *Id.*

¹²⁷ *Prosecutor v. Lubanga*, Case No. ICC-01/04-01/06, Decision on the confirmation of charges, ¶351 (Jan. 29, 2007), [Reproduced at tab 21].

risk that the elements of the crime may result from his actions or omissions and accepts the risk of such an outcome (*dolus eventualis*)¹²⁸.

The Pre-Trial Chamber in *Lubanga* found two specific situations in which *dolus eventualis* applies. The first situation is where the risk of the objective elements of the crime being fulfilled is substantial (“will occur in the ordinary course of events”). In this case an individual’s acceptance of such a risk can be inferred from the individual’s awareness of the substantial likelihood that his or her actions or omissions would result in the crime being committed, and the individual’s decision to carry such action or omission anyways.¹²⁹ The second situation is where the risk of the commission of such crimes is low. In this case the individual must have “clearly expressed or accepted” that such crimes may result from his or her actions or omissions.¹³⁰ Furthermore where an individual’s state of mind falls short of accepting that the crime may occur as a result of his or her actions or omissions, such a person will fail to meet the necessary “intent and knowledge” requirement of Article 30.¹³¹

The pretrial chamber in *Lubanga* further noted however that the “intent or knowledge” requirement of article 30 is merely the default rule where a crime under the statute does not have a specified *mens rea* requirement. Where the definition of the relevant crime under the statute contains a different *mens rea* requirement, such *mens rea* is applied.¹³² Thus it is possible for a

¹²⁸ *Prosecutor v. Lubanga*, Case No. ICC-01/04-01/06, Decision on the confirmation of charges, ¶352 (Jan. 29, 2007), [Reproduced at tab 21].

¹²⁹ *Id.* at ¶353.

¹³⁰ *Id.* at ¶354.

¹³¹ *Id.* at ¶355.

¹³² *Id.* at ¶356.

co-perpetrator to be charged with the commission of a crime that requires only recklessness or negligence rather than purposefulness or knowledge so long as the accused acted or omitted with the requisite intent.¹³³

The second subjective element of co-perpetration based upon joint control over the crime furthermore requires that the suspect and other co-perpetrators:

- Must all be mutually aware of the risk that the implementation of their common plan may result in the commission of the accused crime, and;
- Must all mutually accept such risk.¹³⁴

Where there is a substantial risk of the commission of the crime mutual acceptance by the suspect and co-perpetrators can be inferred from:

- The awareness by the suspect and co-perpetrators of the substantial likelihood that implementing the common plan would result in the crime, and;
- The fact that the suspect and co-perpetrators to implement the common plan anyways.

Where however the risk of the crime being committed is low, the suspect and co-perpetrators must have “clearly or expressly” accepted the risk that their common plan would result in the commission of the crime.¹³⁵

¹³³ Also of note is that the pretrial chamber in *Lubanga* held that there is no conclusive knowledge requirement for the existence of an armed conflict, an individual need only be aware of the factual circumstances that establish the existence of an armed conflict. *Prosecutor v. Lubanga*, Case No. ICC-01/04-01/06, Decision on the confirmation of charges, ¶360 (Jan. 29, 2007), [Reproduced at tab 21].

¹³⁴ Furthermore the Pre-Trial chamber in *Lubanga* holds that it is precisely because of this mutual awareness and acceptance that co-perpetrators can be held liable as principals for crimes physically committed by others. *Id.* at ¶361, 362.

Thus the Pre-Trial Chamber in *Lubanga* held that although some crimes listed under the statute apply lesser volitional requirements such as recklessness to direct responsibility, it would be fundamentally contrary to the nature of co-perpetration to apply the lesser standard to only one individual of the co-perpetration. Instead all co-perpetrators must mutually share in the awareness of the risk and accept it.¹³⁶

The final subjective element of co-perpetration is that the suspect be aware of the circumstance allowing him or her to jointly control the crime. This requires that the suspect be aware:

- That his role is essential to the implementation of the common plan, and;
- That because of his essential role he has the power to frustrate the implementation of the common plan, and thus the commission of the crime, by refusing to complete his task.¹³⁷

b. Pleading Requirements of article 61

The Pre-Trial Chamber of the ICC is responsible for overseeing and regulating the pleading process encompassed in the confirmation hearing under article 61 of the Rome Statute.¹³⁸ The confirmation hearing is held to confirm the charges that the Prosecutor intends to seek at trial. At the confirmation hearing the prosecution is required to support each charge with sufficient evidence to establish “substantial grounds” to believe that the accused committed the crimes charged.¹³⁹ It is the Pre-Trial Chamber’s responsibility to determine whether the

¹³⁵ *Prosecutor v. Lubanga*, Case No. ICC-01/04-01/06, Decision on the confirmation of charges, ¶¶363-364 (Jan. 29, 2007), [Reproduced at tab 21].

¹³⁶ *Id.* at ¶365.

¹³⁷ *Id.* at ¶367.

¹³⁸ The Rome Statute of the International Criminal Court, [Reproduced at tab 28].

¹³⁹ *Id.*

evidentiary standard of “substantial grounds” has been met. If the Pre-Trial Chamber finds that the prosecution has met its evidentiary standard it will confirm those charges in relation to which it has determined that there is sufficient evidence, and commit the person to a Trial Chamber for trial on the charges as confirmed.¹⁴⁰

Sections V and VI of Chapter Five of the Rules of Procedure and Evidence of the ICC contain the procedural provisions regarding the confirmation of charges under article 61 of the Rome Statute. Of primary importance is Rule 121 in section V concerning the document containing the charges. Rule 121(3) states that: “The prosecutor shall provide to the Pre-Trial Chamber and the person, no later than 30 days before the date of the confirmation hearing, a detailed description of the charges together with a list of the evidence which he or she intends to present at the hearing.”¹⁴¹

Furthermore, according to the regulation 52 of the Regulations of the Court the Document Containing the Charges (DCC) must include:

- The full name of the person and any other relevant identifying information
- A statement of the facts, including the time and place of the alleged crimes, which provides a sufficient legal and factual basis to bring the person or person to trial, including relevant facts for the exercise of jurisdiction by the Court; and
- A legal characterization of the facts to accord both with the crimes under articles 6, 7 or 8 and the precise form of participation under articles 25 and 28.¹⁴²

¹⁴⁰ The Rome Statute of the International Criminal Court, [Reproduced at tab 28].

¹⁴¹ Rule of Procedure and Evidence for the International Criminal Court, [Reproduced at tab 29].

¹⁴² Regulations of the Court, [Reproduced at tab 30].

c. Evidentiary Standard of article 61

The Pre-Trial Chamber in *Prosecutor v. Lubanga* held that the purpose of the confirmation hearing is to commit to trial “only those persons against whom sufficiently compelling charges, going beyond mere theory or suspicion, have been brought”.¹⁴³ Thus the Pre-Trial Chamber paid particularly strict attention to interpreting what evidentiary standard would qualify to meet the “substantial grounds” requirement of Article 61(7). In order to define the concept of “substantial grounds” the Pre-Trial Chamber in *Lubanga* looked to international human rights jurisprudence developed by the European Court of Human Rights (ECHR). The Pre-Trial Chamber noted that the ECHR in *Soering v. United Kingdom* defined “substantial grounds to believe” as “substantial grounds have been shown for believing” and further defined “substantial grounds to believe” as “strong grounds for believing” in *Mamatkulov and Askarov v. Turkey*.¹⁴⁴

The Pre-Trial Chamber in *Lubanga* thus concluded that in order “for the Prosecution to meet its evidentiary burden, it must offer concrete and tangible proof demonstrating a clear line of reasoning underpinning its specific allegations.”¹⁴⁵ The Pre-Trial Chamber further held that the “substantial grounds to believe” standard “must enable all the evidence admitted for the purpose of the confirmation hearing to be assessed as a whole.”¹⁴⁶ The *Lubanga* Pre-Trial Chamber concluded that only after scrutinizing all of the evidence, including preliminary witness

¹⁴³ *Prosecutor v. Lubanga*, Case No. ICC-01/04-01/06, Decision on the confirmation of charges, ¶37 (Jan. 29, 2007), [Reproduced at tab 21].

¹⁴⁴ *Id.* at ¶38.

¹⁴⁵ *Id.* at ¶39.

¹⁴⁶ *Id.*

statements, can it determine whether the Prosecution’s allegations are sufficiently strong to commit the accused to trial. Thus in *Lubanga* the Chamber examined the prosecution’s List of Evidence and summarized witness statements in scrutinizing whether the prosecution had met its evidentiary burden, eventually holding that it had.¹⁴⁷

d. Cases at the International Criminal Court

With strict pleading requirements arising from the Rule 121(3) of the Rome Statute Rules of Procedure, that the prosecution must provide “a detailed description of the charges together with a list of the evidence which he or she intends to present at the hearing”, allegations of improper pleading have arisen in all three Pre-Trial decisions that have been rendered so far.

e. *Prosecutor v. Thomas Lubanga Dyilo*

In *Prosecutor v. Lubanga* the defense challenged the pleading based on (1) the factual and legal vagueness of the charges, and (2) the articulation of irrelevant facts used to support the charges sought. In the DCC the prosecution charged Thomas Lubanga Dyilo under articles 8(2)(e)(viii) and 25(3)(a) with war crimes of conscripting and enlisting children under the age of fifteen years into an armed group (the FPLC, a part of the UPC) and using them actively in hostilities in a conflict not of an international character.¹⁴⁸ The prosecution in the DCC submitted that the UPC actively recruited the children to military training in the training camp of Sota¹⁴⁹. The prosecution further submitted that Lubanga participated in the continued systemic enlistment and use of child soldiers and identified multiple additional training camps for these

¹⁴⁷ *Prosecutor v. Lubanga*, Case No. ICC-01/04-01/06, Decision on the confirmation of charges, ¶410 (Jan. 29, 2007), [Reproduced at tab 21].

¹⁴⁸ *Id.* at ¶9.

¹⁴⁹ *Id.* at ¶10.

child soldiers by location.¹⁵⁰ The DCC finished by submitting that Lubanga was criminally responsible for the crimes of recruitment and use of child under the age of fifteen years to participate actively in hostilities as a “co-perpetrator, jointly with other FPLC officers and UPC members and supporters”.¹⁵¹

In contesting the charges against Lubanga the defense claimed that:

“Thomas Lubanga Byilo has the right to be promptly informed of the nature and cause of the charge. The nature of the charge refers to the precise legal qualification of the offence, and the cause of the charge refers to the facts underlying it. In terms of the cause of the charge, the Prosecution must plead all material facts which, to the extent possible, should include the identity of the victims, the place and approximate date of the acts and the means by which the offences were committed.”¹⁵²

The Pre-Trial Chamber in *Lubanga* first held that in order for the prosecution to meet its evidentiary burden it must present concrete and tangible evidence, which “demonstrate(s) a clear line of reasoning underpinning its specific allegation”¹⁵³. The Pre-Trial Chamber explained that the purpose of the decision was for the chamber to “determine whether it is thoroughly satisfied that the prosecution’s allegations are sufficiently strong to commit the suspect for trial.”¹⁵⁴

As such the Pre-Trial Chamber dismissed the defense’s objections, holding that the DCC met the criteria of regulation 52 and was a “detailed” description of the charges against Lubanga. The Pre-Trial Chamber held that the DCC is to be read in conjunction with the Prosecution List

¹⁵⁰ *Prosecutor v. Lubanga*, Case No. ICC-01/04-01/06, Decision on the confirmation of charges, ¶11 (Jan. 29, 2007), [Reproduced at tab 21].

¹⁵¹ *Id.* at ¶12.

¹⁵² *Id.* at ¶148.

¹⁵³ *Id.* at ¶38, 39.

¹⁵⁴ *Id.*

of Evidence¹⁵⁵ and when done so the Chamber found that there was sufficient evidence relating to each paragraph and allegation in the DCC, that the prosecution met its burden.

In relation to defense's claims of legal vagueness in the DCC the Pre-Trial Chamber in *Lubanga* held that the prosecution was under no obligation to articulate its legal interpretation of the modes of liability and crimes alleged. Rather the Pre-Trial Chamber held that the DCC was proper and non-prejudicial to the defense so long as the defense was put on notice by a clear articulation of the alleged crimes themselves and mode of liability.¹⁵⁶

Finally the Pre-Trial Chamber in *Lubanga* also held that nothing prevents the prosecution from including in its pleading the wording "any events which occurred before or during the commission of the acts with which the suspect is charged, especially if that would be helpful in better understanding the context in which the conduct charged occurred."¹⁵⁷ While the Pre-Trial Chamber expressed its desire for the prosecution to plead with greater specificity the context in which the crimes occurred¹⁵⁸ and provide greater specificity in the Prosecution List of Evidence¹⁵⁹, it noted that all of the procedural requirements of pleading had been sufficiently met and thus rejected the defense's allegations of improper pleading.

f. Prosecutor v. Katanga and Chui

¹⁵⁵ *Prosecutor v. Lubanga*, Case No. ICC-01/04-01/06, Decision on the confirmation of charges, ¶150 (Jan. 29, 2007), [Reproduced at tab 21].

¹⁵⁶ *Id.* at ¶151.

¹⁵⁷ *Id.* at ¶152.

¹⁵⁸ *Id.* at ¶153.

¹⁵⁹ *Id.* at ¶150.

In *Prosecutor v. Katanga and Chui* the Pre-Trial Chamber declined to confirm the war crime charges in the indictment of inhuman treatment where the prosecution proffered no evidence showing that the commission of such crimes was intended by the suspects as part of their common plan to “wipe out” Bogoro village.¹⁶⁰ The Pre-Trial Chamber further held that the prosecution had not provided sufficient evidence to establish grounds to believe that, as a result of the implementation of the common plan, these crimes would have occurred in the ordinary course of events.¹⁶¹

The Pre-Trial Chamber further considered how to deal with alternative pleadings in the indictment of criminal responsibility under Article 25. In *Katanga and Chui* the prosecution charged Katanga and Chui as co-perpetrators of a common plan to commit war crimes and crimes against humanity in the village of Bogoro pursuant to Article 25(3)(a)¹⁶² and alternatively with ordering the commission of war crimes and crimes against humanity under Article 25(3)(b) as accessories for ordering their subordinates to attack the civilian population with the requisite intent.¹⁶³ The Pre-Trial Chamber held that the prosecution is properly allowed to plead alternative modes of individual criminal responsibility and further found that where there is sufficient evidence to establish a higher and more direct modes of criminality of co-perpetration

¹⁶⁰ *Prosecutor v. Katanga and Chui*, Case No. ICC-01/04-01/07, Decision on the confirmation of charges, ¶570 (Sept. 20, 2008), [Reproduced at tab 22].

¹⁶¹ *Id.* at ¶571

¹⁶² *Id.* at ¶469

¹⁶³ *Id.* at ¶470

listed as Article 25(3)(a), such findings render moot the consideration of lesser forms of criminal responsibility identified under Article 25(3)(b) to (d).¹⁶⁴

In Judge Anita Usacka's dissenting opinion in *Katanga and Chui* she noted that during the confirmation phase the prosecution's evidentiary burden is lowered, as witness by the allowance of summaries of witness statements and unattested documentary evidence. In her opinion the prosecution's burden is "only to provide enough evidence to establish grounds to believe that the crimes were committed by the suspect, rather than evidence to prove the accused's culpability beyond a reasonable doubt."¹⁶⁵

g. Prosecutor v. Bemba

In *Prosecutor v. Bemba* the prosecution charged Jean-Pierre Bemba Gombo with crimes against humanity and war crimes as a "co-perpetrator" under Article 25(3)(a) of the Rome Statute in relation to crimes committed by his forces from 2002-2003 against the civilian population of the Central African Republic.¹⁶⁶ At the original confirmation hearing the Pre-Trial Chamber chose to adjourn the hearing because it considered the evidence submitted to establish a different mode of criminality under the jurisdiction of the court. The Chamber requested the Prosecution to consider submitting an Amended DCC addressing Bemba's criminal liability under Article 28 of the Statute. Thus in the Amended DCC the Prosecution charged Bemba as a "co-perpetrator"

¹⁶⁴ *Prosecutor v. Katanga and Chui*, Case No. ICC-01/04-01/07, Decision on the confirmation of charges, ¶471 (Sept. 20, 2008), [Reproduced at tab 22].

¹⁶⁵ *Id.* at Dissent ¶2.

¹⁶⁶ *Prosecutor v. Bemba*, Case No. ICC 01/05-01/08, Decision Pursuant to Article 61(7)(a) and (b) of the Rome Statute on the Charges of the Prosecutor Against Jean-Pierre Bemba Gombo, ¶90 (June 15, 2009), [Reproduced at tab 23].

under Article 25(3)(a) or alternatively as a “military commander or superior” under Article 28(a) or (b).¹⁶⁷

In *Bemba* the Pre-Trial Chamber II had to address multiple objections raised by the Defense in regards to the Prosecutions pleadings of the crimes in the Amended DCC. In *Bemba* the Defense first challenged the characterization of the charges as being overly vague. In particular the Defense challenged the use of the expression “include, but (...) not limited to” in listing the particular criminal incidents the suspect was charged in being involved with as being overly vague and failing to give the accused notice of the criminal incidents he was accused perpetrating.¹⁶⁸ However the Pre-Trial Chamber held that article 61(5) of the Statute requires only that the Prosecutor provide “sufficient” evidence to allow the Chamber to determine whether there were substantial grounds to believe the suspect committed the crimes charged. Thus the Pre-Trial Chamber held that the prosecutor need not identify all specific criminal incidents so long as enough are identified to put the suspect on notice and to meet the evidentiary standard.¹⁶⁹

The Defense in *Bemba* further objected to what it considered vaguity in the Prosecutions use of the terms “from on or about 26 October 2002 to march 2003” in the Amended Document Containing the Charges. The Defense claimed that the terms used were imprecise and confusing and that the Prosecution was required to provide precise dates for each specific criminal incident

¹⁶⁷ *Prosecutor v. Bemba*, Case No. ICC 01/05-01/08, Decision Pursuant to Article 61(7)(a) and (b) of the Rome Statute on the Charges of the Prosecutor Against Jean-Pierre Bemba Gombo, ¶341 (June 15, 2009), [Reproduced at tab 23].

¹⁶⁸ *Id.* at ¶65.

¹⁶⁹ *Id.* at ¶66.

alleged.¹⁷⁰ However, while the Chamber agreed that each incident should be identified and dated as precisely as possible as required by regulation 52 of the Regulations, the Chamber found that the Prosecution had provided the requisite information under each count alleged in the DCC and thus provided the accused proper notice of the incidents he was accused of perpetrating, rendering the Defense's objection moot.¹⁷¹

The Defense's final objection to the pleadings alleged that the Prosecutor in the Amended DCC had reopened the defendant's individual criminal responsibility under article 25(3)(a) contrary to the Chamber's Adjournment Decision. In the Chamber's Adjournment Decision the Chamber had requested the Prosecutor to elaborate on the potential use of Article 28 in addressing the defendant's individual criminal responsibility. The Defense thus requested the rejection of the sections of the Amended DCC relating to the charges brought under article 25(3)(a).¹⁷² However after examining the Amended DCC in comparison with the initial DCC the Chamber found that there were no substantive changes to the charges sought under article 25(3)(a) and thus there was no basis for the Defense's objections.¹⁷³

43. Conclusion

All pleading requirements must be read in light of the universally accepted right of the accused to be provided notice of the crimes he is accused of having committed. Thus pleading in

¹⁷⁰ *Prosecutor v. Bemba*, Case No. ICC 01/05-01/08, Decision Pursuant to Article 61(7)(a) and (b) of the Rome Statute on the Charges of the Prosecutor Against Jean-Pierre Bemba Gombo, ¶67 (June 15, 2009), [Reproduced at tab 23].

¹⁷¹ *Id.* at ¶68.

¹⁷² *Id.* at ¶69.

¹⁷³ *Id.* at ¶70.

both JCE and co-perpetration is guided by the fact the fact that both are modes of criminality and not crimes themselves. Thus regardless of charging JCE or co-perpetration, the prosecution must plead enough material facts to establish the objective and subjective elements of the crime committed as well as sufficient facts to establish the objective and subjective elements of accused's mode of criminal responsibility.

a. JCE Requirements

JCE pleading requirements are guided by provisions of the Statutes of the international tribunals such as Article 18(4) of the ICTY Statute and Article 17(4) of the ICTR. Furthermore, ever since the Appeals Judgment in *Tadic* there has developed substantial precedent concerning both the scope of JCE and its pleading requirements.

This precedent shows that JCE is a proper form of individual criminal responsibility, but that because it is such a broad form of responsibility it must be subject to elevated levels of pleading in comparison with other modes of liability. Thus the cases at the international tribunals show that the prosecution must define what the common design, purpose, or plan of the JCE is and identify which form of JCE liability it seeks. Precedent from the international tribunals further sets out that the prosecution must identify the principal perpetrators of the crime and the co-perpetrators of the JCE. It further shows that if the objective of the JCE changes such that it is different in nature from the original plan then the prosecution must plead that a new JCE has been established and identify the nature and participants of the JCE. Alternatively it shows that the criminal purpose of a JCE may change if the leading members of the JCE were informed of subsequent crimes not encompassed in the original JCE and nevertheless continued with the implementation of the original criminal purpose.

b. Co-perpetration Requirements

In order for the prosecution to meet its evidentiary burden it must present concrete and tangible evidence, which “demonstrate(s) a clear line of reasoning underpinning its specific allegation” because the confirmation hearing is held in order for the chamber to “determine whether it is thoroughly satisfied that the prosecution’s allegations are sufficiently strong to commit the suspect for trial.” The DCC is to be read in conjunction with the Prosecution List of Evidence in order to evaluate whether that the prosecution met its burden. The prosecution was under no obligation to articulate its legal interpretation of the modes of liability and crimes alleged. The prosecution plead that the crimes charged, were intended by the suspects as part of their common plan. The prosecution is also allowed to plead alternative modes of individual criminal responsibility.

The Rome Statute requires only that the prosecutor provide “sufficient” evidence in the indictment to allow the Chamber to determine whether there were substantial grounds to believe the suspect committed the crimes charged.

c. Comparing JCE and Co-perpetration

Co-perpetration is a substantively different mode of criminal responsibility than JCE, which has thus far avoided many of the pleading issues that have plagued JCE indictments. Unlike JCE, which was inferred into the statutes of the international tribunals through international common law, co-perpetration is a statutorily defined mode of criminality. As such, where the scope and pleading rules of JCE had to be defined in the chambers of the international tribunals, the scope and pleading rules of co-perpetration are much more narrowly defined in the Rome Statute. While ambiguities still exist, the Statute and Rules of the ICC were drafted in much more precise manners so as to more narrowly define elements of crimes, evidentiary standards, and rules of procedure. Furthermore, the Pre-Trial Chamber has endeavored to outline

a clear and consistent legal interpretation of co-perpetration under article 25(3)(a) so as to avoid many of the problems JCE has encountered.

With the elevated requirements of pleading at the ICC the procedural arguments alleged by the defenses at the international tribunals have not arisen to the same degree. The ICC Document(s) Containing the Charges are exceptionally detailed and while there have been challenges as to the legal interpretations of co-perpetration, there have not been many as to the form of the indictments. Thus it should be considered that while indictments need not outline the entirety of the prosecution's case, the prosecution should endeavor to outline with the utmost specificity the elements of the crimes the defendant is alleged to have committed and the elements of the mode of liability by which the defendant is alleged to have committed the crimes.