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The Contours Of The Common Purpose / Joint Criminal Enterprise Doctrine Under The Jurisprudence Of The International Tribunals And Article 15(B)(4) Of The Ist Statute

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**CASE WESTERN RESERVE UNIVERSITY SCHOOL OF LAW
INTERNATIONAL WAR CRIMES RESEARCH LAB**

**MEMORANDUM FOR THE
IRAQI SPECIAL TRIBUNAL**

**ISSUE: THE CONTOURS OF THE COMMON PURPOSE / JOINT CRIMINAL
ENTERPRISE DOCTRINE UNDER THE JURISPRUDENCE OF THE
INTERNATIONAL TRIBUNALS AND ARTICLE 15(b)(4) OF THE IST STATUTE**

**Prepared by Ruth Mary Hackler
Spring 2005**

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I. INTRODUCTION AND SUMMARY OF CONCLUSIONS

Article 15(b)(4) of the Iraqi Special Tribunal (“IST”) Statute provides that an individual who in any way contributes to the commission of a crime within the Tribunal’s jurisdiction can be held criminally responsible and liable for punishment, even if he does not perpetrate the crime himself.¹ A form of this “common purpose” liability has been fashioned into a substantial amount of “joint criminal enterprise” (“JCE”) jurisprudence at the International Criminal Tribunal for the Former Yugoslavia (“ICTY”), the International Criminal Tribunal for Rwanda (“ICTR”), and the Special Court for Sierra Leone (“SCSL”). Part III of this memorandum will explore the evolution of JCE, how the international tribunals have shaped the theory, and the evidentiary requirements of the doctrine. Part IV of this memo will examine how Article 15(b)(4) of the IST differs from the relevant provisions of its counterparts, how these differences may affect the use of JCE at the IST, and whether the new “common purpose” wording might open the door for prosecutors to charge conspiracy under this provision. Part V will then address how a prosecutor might apply the facts from two series of events in Iraq to charge particular defendants before the Court under Article 15(b)(4).

Summary of Conclusions

1. Article 15(b)(4) of the IST Statute encompasses Joint Criminal Enterprise.

The ICTY, ICTR and SCSL have established that individuals can be held criminally responsible for participating with others who have a “common purpose” to commit a crime that falls within the tribunals’ jurisdiction. Case law from these courts reveals that “common

¹ Liability arises if the individual “[i]n any other way contributes to the commission or attempted commission of such a crime by a group of persons acting with a common purpose. Such contribution shall be intentional and shall either: (i.) Be made with the aim of furthering the criminal purpose of the group, where such activity or purpose involves the voluntary commission of a crime within the jurisdiction of the Tribunal; or (ii.) Be made in the knowledge of the intention of the group to commit the crime.” The Statute of the Iraqi Special Tribunal [hereinafter Iraqi Statute], *available at* http://www.cpa-iraq.org/human_rights/Statute.htm. [Reproduced in accompanying Notebook 1 at Tab 11].

purpose” liability has become interchangeable with “joint criminal enterprise” liability, and the evidentiary requirements for the doctrine have been set forth and followed in a host of cases spanning more than ten years. In keeping with this jurisprudence, because Article 15(b)(4) of the IST Statute explicitly provides for common purpose liability, it also encompasses joint criminal enterprise.

2. The wording of Article 15(b)(4) differs from the comparable JCE provisions of the other tribunals.

Article 15(b)(4) of the IST Statute is identical to Article 25(3)(d) of the Rome Statute of the International Criminal Court (“ICC”) and differs textually from the provisions used at the ICTY, ICTR and SCSL to impose joint criminal enterprise liability. This textual difference raises two important issues. First, the IST provision directly provides for common purpose liability, whereas the other courts have had to interpret common purpose liability is implied by their statutes. The clear provision of Article 15(b)(4) is likely to bolster the legitimacy of the IST’s use of the JCE doctrine since it is now recognized both by statute and by the jurisprudence of the other courts. Second, the IST provision explicitly spells out the mental states necessary to incur liability for crimes committed by persons acting with a common purpose, rather than relying on a judge-made doctrine that defines the contours of the theory. However, the IST *mens rea* requirements are not the same as those set forth in the jurisprudence of the other tribunals, so the IST must decide how to handle this discrepancy.

3. The *mens rea* requirements in Article 15(b)(4) seem to preclude use of the Extended JCE, which has been highly successful in prosecuting powerful individuals before the other tribunals.

The wording of the IST Statute calls for a higher *mens rea* than that required by the jurisprudence of the other tribunals. While this higher requirement seems to continue to allow the IST to prosecute individuals using the first two categories of JCE liability, it seems to

preclude use of the third category, known as the Extended JCE. Specifically, the IST provision requires the accused to *know* of the group's intention to commit a crime, but if the crime is committed by another member of the group and falls outside the scope of the original common purpose, the defendant quite possibly could not have known it would happen. The Extended JCE used by the ICTY and the other tribunals allows for such a possibility, imposing responsibility if it was foreseeable that such a crime could occur and the accused continued to participate in spite of the risk. This "dolus eventualis" or "advertent recklessness" *mens rea* standard has been criticized, but the Extended JCE has also been widely and successfully used in cases against individuals with the highest levels of authority when other forms of liability may have failed. If the IST Statute precludes use of this type of JCE, successful prosecution of such individuals may be problematic.

4. If the IST determines that the *mens rea* requirements of Article 15(b)(4) do indeed preclude use of the Extended JCE as set forth by the other tribunals, the IST might still choose to follow the jurisprudence of the other courts.

The IST may choose to apply the jurisprudence of the other international tribunals (which allows for the Extended JCE) because it reflects general legal principles and customary international law. Following established case law serves several interests: it holds the most blameworthy criminal masterminds liable for atrocities from which they are far removed, it maintains consistency between the international criminal law courts and presents a unified precedent, and it signals an interest in upholding international law principles. However, it also deviates from the IST Statute, which may allow for conviction but delegitimize the proceedings.

5. If the IST precludes use of the Extended JCE and does not choose to follow the jurisprudence of the other tribunals, it may choose to adopt conspiracy as another form of common purpose liability in order to prosecute blameworthy individuals.

Several circumstances favor interpreting Article 15(b)(4) to encompass conspiracy as a form of common purpose liability. First, the Nuremberg Tribunal recognized conspiracy as a theory of liability and as a substantive crime, establishing important precedent for the use of conspiracy in trials against war criminals. Second, the international community recognizes conspiracy as a crime when it is connected to serious crimes such as genocide, drug trafficking and apartheid, and the crimes within the jurisdiction of the IST are equally grave. Third, the ICTY Appeals Chamber in *Tadic* set precedent that a form of common purpose liability may be implied by the statute. Fourth, the use of conspiracy in the IST context is upheld by the legality principle because the Iraqi penal code has recognized conspiracy as a crime since at least 1969, unlike many other national legal systems. Finally, by adopting a restricted application of conspiracy and by clearly defining its evidentiary requirements in order to dispel the confusion and criticism associated with conspiracy at the Nuremberg trials, defendants could still be held responsible for agreeing and intending to commit a crime whether the crimes that resulted fell outside the scope of the original agreement or not.

II. FACTUAL BACKGROUND

Before proceeding to the legal analysis, it is necessary to discuss two series of crimes that were perpetrated against Iraqi citizens in the 1980s.² The legal analysis that follows will explore how these facts fit the contours of “common purpose” liability so that individual participants

² As the facts were presented in the Jan. 3, 2005 privileged e-mail sent by the assigning contact at the IST to Professor Michael P. Scharf for the purposes of the War Crimes Research Project. No additional sources were consulted to confirm or substantiate the facts as presented therein.

before the Iraqi Special Tribunal may be held criminally responsible for their involvement in committing these crimes.

A. Al-Dujayl

On July 11, 1982, a motorcade carrying Saddam Hussein was traveling through the village of Al-Dujayl when it was stopped by a group of local villagers. After one woman marked the vehicle believed to be carrying Saddam Hussein with red paint, an unknown number of other individuals began to fire upon the car with AK-47s and other small weapons, killing several bodyguards. The ensuing gunfight left approximately 150 people dead. Unbeknownst to the assailants, Saddam Hussein had moved to another car in the convoy before the attack began and was able to escape by calling in reinforcements from the army. In response to the attack, Saddam Hussein allegedly ordered certain individuals to conduct reprisals against the inhabitants of the town. According to press and Internet reports, large portions of Al-Dujayl were bulldozed, 247,000 acres of orchards and palm groves were destroyed, residents of the town were deported to Iran, 387 residents were detained until as late as 1986, and as many as 500 people from Al-Dujayl (including children) were summarily killed. It is even reported that Saddam Hussein ordered all of the date trees in town to be cut down.

B. Operation Anfal

Between February 23, 1988 and September 6, 1988, soldiers from the Iraqi army conducted a series of eight military operations (collectively named Operation Anfal) against members of the Kurdish minority residing in northern Iraq. Estimates from Human Rights Watch indicate that more than 100,000 Kurdish men, women, and children were killed by mass executions, chemical attacks, and systematic firing squads. Approximately 2,000 villages near the border of Iran and elsewhere in Iraq were destroyed. Not only did soldiers destroy residential

structures in civilian areas, but they also looted civilian property and farm animals, arbitrarily arrested villagers captured in designated “prohibited areas,” and carried out mass deportations and relocations from northern Iraq to camps located in non-Kurdish areas of the country.

III. LEGAL DISCUSSION

Hitler was the chief villain. But for the defendants to put all blame on him is neither manly nor true. We know that even the head of the state has the same limits to his senses and to the hours of his days as do lesser men. He must rely on others to be his eyes and ears as to most that goes on in a great empire. Other legs must run his errands; other hands must execute his plans.³

- *Robert H. Jackson, Chief Prosecutor at Nuremberg*
On the Guilt of the Leader and His Followers
July 26, 1946

A. Individual Criminal Responsibility

Article 15 of the IST Statute imposes individual criminal responsibility on defendants who commit or help commit crimes within the Tribunal’s jurisdiction. The emphasis on holding individuals responsible for their participation in war crimes can be traced back to the Nazi war criminal trials held more than sixty years ago in Nuremberg. Seven principles emerged from these proceedings, which still form a solid foundation for modern-day trials at the ICTY, ICTR, SCSL, and now, the IST.⁴ In short, the Nuremberg principles established that a person who committed a crime or was complicit in the commission of a crime under the Nuremberg Tribunal’s jurisdiction was criminally responsible and liable for punishment, even if the

³ MICHAEL R. MARRUS, THE NUREMBERG WAR CRIMES TRIAL, 1945-46: A DOCUMENTARY HISTORY 184 (1997). [Reproduced in accompanying Notebook 3 at Tab 41.]

⁴ JOHN R.W.D. JONES, THE PRACTICE OF THE INTERNATIONAL CRIMINAL TRIBUNALS FOR THE FORMER YUGOSLAVIA AND RWANDA 125 (2d ed. 2000). [Reproduced in accompanying Notebook 3 at Tab 40.]

individual was acting as a head of State, a Government official, or on the order of a superior.⁵ Today, all of the tribunal statutes contain similar provisions: Article 7 of the ICTY Statute,⁶ Article 6 of the ICTR⁷ and SCSL Statutes,⁸ and Article 15 of the IST Statute.⁹

From the moment the war crimes tribunals were conceived, it was understood that they would be used to seek punishment for key individuals who “orchestrated crimes of such magnitude as to attract international concern, rather than the individual executants.”¹⁰ The U.N. Security Council endorsed the prosecutorial policy that “civilian, military and paramilitary leaders should be tried before [the Tribunals] in preference to minor actors.”¹¹ One legal advisor at the ICTR noted that Article 6(1) of the ICTR Statute ensures that an accused head of State or other Government official does not evade responsibility just because he held office when the crime was committed.¹² In addition, the *Kordic* Trial Chamber stated that “a superior who orders the killing of a civilian may be held responsible . . . as might a political leader who plans

⁵ Principles of International Law Recognized in the Charter of the Nürnberg Tribunal and in the Judgment of the Tribunal, *available at* <http://www.un.org/law/ilc/texts/nurnberg.htm>. [Reproduced in accompanying Notebook 1 at Tab 5.]

⁶ Statute of the International Criminal Tribunal for the Former Yugoslavia, S.C. Res. 827, U.N. SCOR, U.N. Doc S/RES/827 (1993) [hereinafter *Yugoslavia Statute*], *available at* <http://www.un.org/icty/legal/doc/index.htm>. [Reproduced in accompanying Notebook 1 at Tab 9.]

⁷ Statute of the International Criminal Tribunal for Rwanda, S.C. Res. 955, U.N. SCOR, U.N. Doc. S/RES/955 (1994) [hereinafter *Rwanda Statute*], *available at* <http://www.un.org/ict/statute.html>. [Reproduced in accompanying Notebook 1 at Tab 10.]

⁸ Statute of the Special Court for Sierra Leone, S.C. Res. 1315, U.N. SCOR, U.N. Doc S/RES/1315 (2000) [hereinafter *Sierra Leone Statute*], *available at* www.sc-sl.org/scsl-statute.html. [Reproduced in accompanying Notebook 1 at Tab 12.]

⁹ Iraqi Statute, *supra* note 1.

¹⁰ JONES, *supra* note 4, at 130.

¹¹ S.C. Res. 1329 (Nov. 30, 2000). [Reproduced in accompanying Notebook 1 at Tab 8.]

¹² Alex Obote-Odora, *The Statute of the International Criminal Tribunal for Rwanda: Article 6 Responsibilities*, 1 LAW & PRAC. INT’L CTS. & TRIBUNALS 343, 343 (Aug. 2002). [Reproduced in accompanying Notebook 3 at Tab 50.]

that certain civilians or groups of civilians should be executed, and passes these instructions on to a military commander.”¹³ Thus, prosecutors have indicted leaders such as Slobodan Milosevic, Radovan Karadzic, Ratko Mladic, Radislav Krstic, Clemen Kayishema, Charles Taylor, and Samuel Hinga Norman for formulating or endorsing criminal plans even though other actors physically carried them to fruition.¹⁴

Former ICTY Judge Antonio Cassese explained that bringing such “culprits” to justice not only establishes individual responsibility and exonerates the rest of the population from guilt, but it also dissipates the call for revenge, helps victims find reconciliation because they know their tormentors have paid for their crimes, and establishes a fully reliable record of the atrocities so future generations can remember and be made fully cognizant of what happened.¹⁵ These

¹³ *Prosecutor v. Kordic et al.*, Case No. IT-95-14/2-T, Judgement, 26 Feb. 2001, para. 373 [hereinafter *Kordic Trial Judgement*]. [Reproduced in accompanying Notebook 1 at Tab 18.]

¹⁴ *Prosecutor v. Milosevic*, Case No. IT-02-54-T, Decision on Motion for Judgement of Acquittal, 16 June 2004, para. 140 (Prosecution accused former Serb leader Milosevic of participating in a joint criminal enterprise to destroy Bosnian Muslims as a group) [reproduced in accompanying Notebook 2 at Tab 27]; *Prosecutor v. Karadzic & Mladic*, Case No. IT-95-5-R61 and IT-95-18-R61, Review of the Indictments Pursuant to Rule 61 of the Rules of Procedure and Evidence, 11 July 1996, para. 86 (found that there were reasonable grounds to believe that the former Serb leaders planned and ordered genocide, crimes against humanity, and war crimes or, at the very least, did not prevent or punish them) [reproduced in accompanying Notebook 1 at Tab 17]; *Prosecutor v. Krstic*, Case No. IT-98-33-A, Judgement, 19 April 2004, para. 237-239 (the Appeals Chamber overturned Bosnian Serb General Krstic’s conviction as a participant in a joint criminal enterprise to commit genocide but upheld that he willingly participated in the joint criminal enterprise to forcibly transfer Bosnian Muslim women, children and elderly out of Srebrenica, which amounted to persecution, a crime against humanity) [reproduced in accompanying Notebook 2 at Tab 23]; *The Prosecutor v. Kayishema et al.*, Case No. ICTR-95-1-T, Judgement, 21 May 1999, para. 567-568 (the former prefect was convicted on four counts of genocide for ordering and participating in four massacres that resulted in the deaths of thousands of ethnic Tutsis in 1994, upheld on appeal) [reproduced in accompanying Notebook 2 at Tab 34]; *The Prosecutor v. Charles Ghankay Taylor*, Case No. SCSL-03-01-I, Indictment, 7 Mar. 2003, para.23-25 (charged the former President of the Republic of Liberia with participation in a joint criminal enterprise to gain political power and control over Sierra Leone and its diamond mines, resulting in unlawful killings, abductions, forced labor, physical and sexual violence, and other crimes) [reproduced in accompanying Notebook 2 at Tab 39]; *The Prosecutor v. Samuel Hinga Norman et al.*, Case No. SCSL-03-14-I, Indictment, 5 Feb. 2004, para. 19 (charged the former National Coordinator of the CDF with the participating in the common plan to use any means necessary to defeat the RUF/AFRC forces and to gain and exercise control over the territory of Sierra Leone, which led, inter alia, to unlawful killings, looting, terrorizing civilians, destruction of private property, and use of child soldiers) [reproduced in accompanying Notebook 2 at Tab 37].

¹⁵ Antonio Cassese, *Reflections on International Criminal Justice*, 61 MOD. L. REV. 1, 5-6 (Jan. 1998). [Reproduced in accompanying Notebook 3 at Tab 48].

were important aims for the Nuremberg Tribunal, and they remain chief goals of the tribunals of today.¹⁶

The main criticisms aimed at the Nuremberg war crimes trials involved the perception that the Tribunal was applying laws *ex post facto*, inadequately protecting the rights of the accused, and administering “victor’s justice.”¹⁷ The ICTY acknowledged that it made a conscious effort to avoid some of the flaws of its predecessor, but one commentator concluded the new proceedings would still invite many of the same criticisms that faced the first international war crimes Tribunal.¹⁸ To help legitimize the proceedings in the eyes of the public, the statutes of the contemporary tribunals strike a balance between civil and common law traditions and blend universal characteristics and principles found in domestic criminal law, international human rights law, and transitional justice.¹⁹

For example, the tribunals’ individual criminal responsibility provisions follow the criminal law paradigm, holding that people who freely choose to do criminal acts are responsible for the resulting evil and deserve commensurate punishment for their deliberate wrongdoings.²⁰ The provisions also promote the goals of international human rights law because they represent the interests of the victims, and effective enforcement may deter potential actors from carrying

¹⁶ Michael P. Scharf, *The Legacy of the Milosevic Trial*, 37 NEW ENG. L. REV. 915, 916 (Summer 2003). [Reproduced in accompanying Notebook 3 at Tab 54.]

¹⁷ MICHAEL P. SCHARF, BALKAN JUSTICE – THE STORY BEHIND THE FIRST INTERNATIONAL WAR CRIMES TRIAL SINCE NUREMBERG 11 (1997). [Reproduced in accompanying Notebook 3 at Tab 43.]

¹⁸ *Id.* at 70.

¹⁹ Allison Marston Danner & Jenny S. Martinez, *Guilty Associations: Joint Criminal Enterprise, Command Responsibility, and the Development of International Criminal Law*, 93 CAL. L. REV. 75, 78. [Reproduced in accompanying Notebook 3 at Tab 49.]

²⁰ J.C. SMITH & BRIAN HOGAN, CRIMINAL LAW 4 (9th ed. 1999). [Reproduced in accompanying Notebook 3 at Tab 44.]

out egregious human rights violations in the future.²¹ Finally, the provisions serve the transitional justice model because they help confront the wrongs perpetrated by leaders of the preceding regime, separating the old government from the new one—one that respects the rule of law and promotes democracy.²²

Lessons learned from the Nuremberg Tribunal have given the modern criminal tribunals a solid foundation to administer justice that is perceived both as fair and in keeping with internationally accepted legal principles. But in the burgeoning field of international criminal law, the tribunals have had to confront new situations where no clear precedent exists. In this setting, the theory of common purpose liability has emerged as a crucial tool for international prosecutions.

B. The Five Forms of Direct Responsibility in the Tribunals' Statutes

The ICTY, ICTR and SCSL Statutes reflect the Nuremberg principles by attaching criminal responsibility to anyone who “[1] planned, [2] instigated, [3] ordered, [4] committed or [5] otherwise aided and abetted in the planning, preparation or execution of a crime” within the Tribunal’s jurisdiction.²³ These five forms of direct responsibility encompass two forms of principal liability and three accessorial, as explained in the *Kordic* Trial Chamber Judgement.²⁴ In other words, a defendant can be found guilty as a principal for physically committing the crime himself or planning it with others, or he can be found guilty as an accessory by relying on

²¹ Danner & Martinez, *supra* note 19, at 87.

²² Ruti G. Teitel, *Transitional Justice Genealogy*, 16 HARV. HUM. RTS. J. 69, 69 (Spring 2003). [Reproduced in accompanying Notebook 3 at Tab 55.]

²³ Yugoslavia Statute, *supra* note 6, Art. 7(1); Rwanda Statute, *supra* note 7, Art. 6(1); Sierra Leone Statute, *supra* note 8, Art. 6(1).

²⁴ *Kordic* Trial Judgement, *supra* note 13, para. 373.

someone else to physically commit the crime.²⁵ Thus, if the defendant interacted with others by aiding and abetting the crime, instigating it, or ordering it, and the other individuals carried the crime to completion, the defendant is just as blameworthy as if he physically committed the crime himself—he shares equally in the liability with the principal.

C. Interpreting the Statutes to Include Common Purpose Liability, or Joint Criminal Enterprise (“JCE”)

In the first case before the ICTY, café owner and local politician Dusko Tadic²⁶ was convicted for the persecution, beatings, and abuse of non-Serbs as part of a Serbian “ethnic cleansing” policy,²⁷ but he was acquitted of the murder of five men in the village of Jaskici because no evidence established that he was personally responsible for executing them.²⁸ On appeal, the murder acquittal was reversed.²⁹ The Appeals Chamber explained that because Tadic committed inhumane acts as part of the attack on Jaskici, he “actively took part in the common criminal purpose to rid the Prijedor region of the non-Serb population” when it was foreseeable that non-Serbs might be killed, and he willingly took the risk that the actions of his group would lead to such killings.³⁰ Thus, his participation in the common criminal plan of “ethnic cleansing” made him liable for the murders, even if he did not kill the men himself. The judges established that liability from participation in a “common purpose” was implicit in the Statute.

²⁵ Danner & Martinez, *supra* note 19, at 102.

²⁶ *Prosecutor v. Tadic*, Case No. IT-94-1-T, Opinion and Judgment, 7 May 1997, para. 181, 188 [hereinafter *Tadic* Trial Judgment]. [Reproduced in accompanying Notebook 2 at Tab 30.]

²⁷ JONES, *supra* note 4, at 4-5.

²⁸ Richard P. Barrett & Laura E. Little, *Lessons of Yugoslav Rape Trials: A Role for Conspiracy Law in International Tribunals*, 88 MINN. L. REV. 30, 39 (Nov. 2003). [Reproduced in accompanying Notebook 3 at Tab 47.]

²⁹ *Prosecutor v. Tadic*, Case No. IT-94-1-A, Judgement, 15 July 1999, para. 233 [hereinafter *Tadic* Appeals Judgement]. [Reproduced in accompanying Notebook 2 at Tab 31.]

³⁰ *Id.*, para. 231-233.

The ICTY Appeals Chamber conceded that liability for participation in a common plan was not one of the Statute's enumerated five forms of direct responsibility, but the Statute did not exclude it, either.³¹ It explained that the grave nature of international war crimes justified this interpretation:

Although only some members of the group may physically perpetrate the criminal act (murder, extermination, wanton destruction of cities, towns or villages, etc.), the participation and contribution of the other members of the group is often vital in facilitating the commission of the offence in question. It follows that the moral gravity of such participation is often no less – or indeed no different – from that of those actually carrying out the acts in question.³²

The Appeals Chamber clarified its interpretation that common purpose liability (or joint criminal enterprise) was implied by the Statute in its decision on a motion challenging the tribunal's jurisdiction over joint criminal enterprise in a separate case.³³ The Appeals Chamber explained that when the ICTY was formed, the Secretary-General's Report to the Security Council³⁴ indicated that the court's jurisdiction was determined both by the Statute and by customary international law.³⁵ The principles of legality and *nullem crimen sine lege, nulla poena sine lege*³⁶ required the Tribunal to consider when the alleged acts were committed and

³¹ *Id.*, para. 190.

³² *Id.*, para. 191.

³³ *Prosecutor v. Milutinovic et al.*, Case No. IT-99-37-AR72, Decision on Dragoljub Ojdanic's Motion Challenging Jurisdiction – Joint Criminal Enterprise, 21 May 2003 [hereinafter *Milutinovic* decision]. [Reproduced in accompanying Notebook 2 at Tab 28.]

³⁴ *Report of the Secretary-General Pursuant to Paragraph 2 of Security Council Resolution 808* (1993), para. 29, Presented 3 May 1993 (S/25704), available at <http://www.un.org/icty/basic/statut/S25704.htm>. [Reproduced in accompanying Notebook 1 at Tab 6.]

³⁵ *Milutinovic* decision, *supra* note 33, para. 9.

³⁶ No crime without law, no punishment without law.

apply the law that was customary and binding at that time.³⁷ Because the *Tadic* Appeals Chamber had determined that JCE was customary international law around 1992, it was binding at the time of Ojdanic's alleged crimes in 1998-1999, the tribunal had jurisdiction, and the motion was dismissed.³⁸

D. JCE is Frequently Used by the Tribunals

Joint criminal enterprise has become increasingly important at the ICTY—81% of all indictments between June 25, 2001 and January 1, 2004 based liability on this doctrine.³⁹ Prosecutors at the SCSL are following the ICTY's example in using JCE to hold defendants liable. The key leaders of the three groups that were involved in the armed conflict in Sierra Leone have all been charged with participating in joint criminal enterprises to gain control over the territory and its diamond mines.⁴⁰ The indictments allege that this participation led to numerous atrocities such as unlawful killings, physical mutilations, abductions, destruction of civilian property, and sexual violence. While the SCSL cases are in the early phases of

³⁷ *Milutinovic* decision, *supra* note 33, para. 9-10.

³⁸ *Id.*, para. 10, 17, 45.

³⁹ Danner & Martinez, *supra* note 19, at 107. (Prior to July 2004, phrases like acting “in concert” were read as implicit references to the JCE theory, thus 34 out of 43 indictments in the approximately 2.5 year period incorporated JCE.) See also Kelly D. Askin, *Reflections on Some of the Most Significant Achievements of the ICTY*, 37 NEW ENG. L. REV. 903, 910-11 (Spring 2003) (“In the last two years, it appears that participating in a joint criminal enterprise has become the principal charging preference in ICTY indictments, and it is particularly effective when charged in conjunction with persecution.”). [Reproduced in accompanying Notebook 3 at Tab 46.]

⁴⁰ *The Prosecutor v. Charles Ghankay Taylor*, *supra* note 14, para. 23-25 (charged the former President of the Republic of Liberia and other AFRC leaders with participating in a joint criminal enterprise to gain political power and control over Sierra Leone and its diamond mines, resulting in unlawful killings, abductions, forced labor, physical and sexual violence, and other crimes); *The Prosecutor v. Samuel Hinga Norman et al.*, *supra* note 14, para. 19 (charged former CDF leaders with participating in a common plan to use any means necessary to defeat the RUF/AFRC forces, leading, *inter alia*, to unlawful killings, looting, terrorizing civilians, destruction of private property, and use of child soldiers); *The Prosecutor v. Issa Hassan Sesay et al.*, Case No. SCSL-2004-15-PT, Amended Consolidated Indictment, 13 May 2004, para. 36-38 (charged the former RUF leaders with participating in a joint criminal enterprise to gain and exercise political power and control over the territory of Sierra Leone and its natural resources, particularly the diamonds, which led to unlawful killings, abductions, forced labor, physical and sexual violence, use of child soldiers, and other crimes). [*Sesay* is reproduced in accompanying Notebook 2 at Tab 38.]

prosecution and have yet to be decided, the strategic use of JCE is clearly an important tool for making sure these individuals are held criminally responsible for such crimes.

The ICTR, however, has been slower to embrace joint criminal enterprise as a liability theory in its jurisprudence, perhaps because the crimes that took place there fit more appropriately under conspiracy to commit genocide, removing the need for recourse to JCE.⁴¹ However, at least two recent indictments at the ICTR do rely in part on JCE principles, mentioning common schemes and acting in concert with others, but these have not yet gone to trial for the ICTR to construe the JCE jurisprudence from the ICTY.⁴²

For these reasons, the bulk of the jurisprudence analysis that follows will be based on JCE cases tried before the ICTY.

E. The Tribunals Divide JCE into Three Categories

The *Tadic* Appeals Chamber essentially created a new theory of individual criminal responsibility not defined by the ICTY Statute, so it devoted a substantial part of its written decision clarifying the contours of the doctrine. First, it concluded that “broadly speaking, the notion of common purpose encompasses three distinct categories of collective criminality,” basing its analysis on an extensive scrutiny of post-World War II war crimes case law involving complicit liability.⁴³

⁴¹ Danner & Martinez, *supra* note 19, at 169 n. 135.

⁴² *Id.* See, e.g., *The Prosecutor v. Zigiranyirazo*, Case No. ICTR-2001-73-I, Amended Indictment, 5 Nov. 2003, para. 10 (alleging that Zigiranyirazo by agreement with or in concert with others “ordered, authorised or participated in various meetings of regional and local administrative officials . . . in order to plan, organise or facilitate attacks on the Tutsis in the Gisenyi prefecture”)[reproduced in accompanying Notebook 2 at Tab 36]; *The Prosecutor v. Seromba*, Case No. ICTR-2001-66-I, Indictment, 8 June 2001, para. 33 (alleging that Seromba “established a plan or a common scheme to execute the extermination of Tutsi in Kivumu commune”. [Reproduced in accompanying Notebook 2 at Tab 35.]

⁴³ *Tadic* Appeals Judgement, *supra* note 29, para. 195; see also Christopher J. Knezevic, *Case Western Reserve University School of Law International War Crimes Research Lab: Joint Criminal Enterprise – What is the Degree of Participation Required for Conviction? An Exhaustive Memo of the Jurisprudence on Joint Criminal Enterprise*, at 10-18, available at <http://law.case.edu/War-Crimes-Research-Portal/memoranda/Cknezevic.pdf> (Spring 2004)

The first category of cases involves joint criminal enterprise at its most basic form (“Basic JCE”), where perpetrators act pursuant to a common design and share the same criminal intention.⁴⁴ For example, co-perpetrators may formulate a plan to kill. One perpetrator may inflict non-fatal violence upon the victim, another may provide a place or the means to carry out the plan, and a third might serve as a lookout while the fourth member strikes the fatal blow. Although they all participated in different ways and to different degrees, they all intended the result and would thus all be liable for murder.⁴⁵ The Court noted that it was not necessary for the perpetrator’s involvement to be a crucial link in causing the end result, but knowledge of the intended purpose of the criminal enterprise *was* required.⁴⁶ Thus, an omission to stop a crime from being committed when there was a duty to act could also be considered participation in the joint enterprise.

The second category of joint criminal enterprise relates to concentration camps or systems of ill-treatment and can be labeled the “Systemic JCE.”⁴⁷ Factors in assessing the penalty for participation in this type of enterprise include the position of authority held by the accused and the individual’s degree of participation in enforcing the system that ill-treats the detainees.⁴⁸

(for a more thorough analysis of the post-World War II war crimes cases that supported the Chamber’s decision). [Reproduced in accompanying Notebook 3 at Tab 58.]

⁴⁴ *Tadic Appeals Judgement*, *supra* note 29, para. 196.

⁴⁵ *Id.*, para. 196-201.

⁴⁶ *Id.*, para. 199.

⁴⁷ *Prosecutor v. Vasiljevic*, Case No. IT-98-32-A, Judgement, 25 Feb. 2004, para. 98 [hereinafter *Vasiljevic Appeals Judgement*]. [Reproduced in accompanying Notebook 2 at Tab 33.]

⁴⁸ *Tadic Appeals Judgement*, *supra* note 29, para. 203.

The third category of joint criminal enterprise is the “Extended JCE,”⁴⁹ which has been criticized because it involves offenses that fall outside the original common design, and often such consequences seem attenuated from the enterprise.⁵⁰ In this category, if a perpetrator intends to participate in a common design pursuing one course of conduct and another perpetrator commits an act outside of that plan, the first perpetrator is criminally liable if the act was a natural and foreseeable consequence of carrying out the joint criminal enterprise.⁵¹ For example, if a group is forcibly evicting civilians belonging to a particular ethnic group by burning their houses, if some of the participants, in carrying out the plan, set a house on fire while a civilian is still inside, all of the other participants in the plan are criminally responsible for killing that civilian because it was foreseeable that an individual might be inside a home and unable to escape.⁵² While the death of the civilian was not part of the original common purpose, it was a predictable consequence of carrying out the plan to evict civilians by burning their homes, and the participants were either reckless or indifferent to that risk.⁵³

Because the Extended JCE goes beyond the original common purpose of the enterprise and thus has additional evidentiary requirements, it is important for prosecutors to classify a joint criminal enterprise correctly in order to meet the burden of proof required for that particular category of JCE.

⁴⁹ *Vasiljevic Appeals Judgement*, *supra* note 47, para. 99.

⁵⁰ *Barrett & Little*, *supra* note 28, at 40.

⁵¹ *Tadic Appeals Judgement*, *supra* note 29, para. 204.

⁵² *Id.* See also *Kordic Trial Judgement*, *supra* note 13, para. 396.

⁵³ *Tadic Appeals Judgement*, *supra* note 29, para. 204.

F. The Tribunals Define the Evidentiary Requirements of JCE

“[C]rime exists only when *actus reus* and *mens rea* coincide” because an act does not make a man guilty of a crime unless his mind is guilty also.⁵⁴ Just as with other criminal violations, to successfully prosecute a defendant for a crime within the IST’s jurisdiction, prosecutors must prove both the *actus reus* and the *mens rea* prongs of the crime. The specific *actus reus* and *mens rea* requirements of joint criminal enterprise liability have been set forth in the jurisprudence of the tribunals. Each of the three categories of JCE has its own specific evidentiary requirements, so the contours of the doctrine are set forth in detail below.

1. The *Actus Reus* Prong of JCE

The first aspect of a crime that the prosecution must prove is the *actus reus*, or the forbidden act. The *Tadic* Appeals Chamber requires three *actus reus* elements to prove for each JCE category:

- (1) a “plurality of persons” that need not be organized in any particular military, political or administrative structure;
- (2) the “existence of a common plan,” which amounts to or involves the commission of a crime listed in the Tribunal Statute; and
- (3) participation in the “execution of the common plan.”⁵⁵

Clearly, more than one person must take part in committing the crime to satisfy the first element of *actus reus*, but the second element is less clear. The *Krnjelac* Trial Chamber shed some light on how the existence of a common plan could be established:

The understanding or arrangement need not be express, and its existence may be inferred from all the circumstances. It need not have been reached at any time before the crime is committed. The

⁵⁴ SMITH & HOGAN, *supra* note 20, at 28, and 28, n. 7.

⁵⁵ *Tadic* Appeals Judgement, *supra* note 29, para. 227. See also *Kordic* Trial Judgement, *supra* note 13, para. 397.

circumstances in which two or more persons are participating together in the commission of a particular crime may themselves establish an unspoken understanding or arrangement amounting to an agreement formed between them then and there to commit that crime.⁵⁶

Thus, an agreement does not have to be spoken or show any advance planning. If an understanding between the parties forms, either before the outlawed crime is committed or extemporaneously, and that understanding can be inferred from all of the surrounding circumstances, a common plan exists.

In connection with the third prong of the *actus reus* test, at least one Trial Chamber presiding over a Systemic JCE case required a “substantial level of participation” that rises above following orders to perform some low-level function in the criminal endeavor on a single occasion.⁵⁷ The level of participation attributed to the accused and whether that participation is deemed “significant” depends on several factors, perhaps most importantly the seriousness and scope of the crimes committed.⁵⁸ Others include:

[T]he size of the criminal enterprise, the functions performed, the position of the accused, the amount of time spent participating after acquiring knowledge of the criminality of the system, efforts made to prevent criminal activity or to impeded the efficient functioning of the system, the seriousness and scope of the crimes committed and the efficiency, zealousness or gratuitous cruelty exhibited in performing the actor’s function.⁵⁹

⁵⁶ *Prosecutor v. Krnojelac*, Case No. IT-97-25-T, Judgement, 15 Mar. 2002, para. 80. [hereinafter *Krnojelac* Trial Judgement]. [Reproduced in accompanying Notebook 1 at Tab 20.]

⁵⁷ *Prosecutor v. Kvočka et al.*, Case No. IT-98-30/1-T, Judgement, 2 Nov. 2001, para. 311 [hereinafter *Kvočka* Trial Judgement]. [Reproduced in accompanying Notebook 2 at Tab 24.]

⁵⁸ *Id.* (The Trial Chamber noted: “even a lowly guard who pulls the switch to release poisonous gas into the gas chamber holding hundreds of victims would be more culpable than a supervising guard stationed at the perimeter of the camp who shoots a prisoner attempting to escape.”)

⁵⁹ *Id.*

A recent ICTY Appeals Chamber, however, disagreed. “Contrary to the holding of the Trial Chamber, the Tribunal’s case-law does not require participation as co-perpetrator in a joint criminal enterprise to have been significant, unless otherwise stated.”⁶⁰

2. The *Mens Rea* Prong of JCE

In addition to proving the *actus reus*, determining if a perpetrator had the relevant *mens rea*, or guilty mind, is crucial to prosecution because “[c]riminal law does not, as a general rule, address accidental behaviour,” and those who break the law are expected to intend the consequences of their acts.⁶¹

The ICTY, ICTR and SCSL Statutes do not contain a provision that directly mentions the *mens rea* requirements associated with joint criminal enterprise, but from their earliest rulings, the tribunal judges “have simply assumed that *mens rea* is an essential element of the offences within their jurisdiction.”⁶² Once again, it is necessary to turn to commentary in the tribunals’ case law to find clarification on this aspect of the evidentiary requirement for common purpose liability.

The *Tadic* Appeals Chamber established different *mens rea* requirements for each category of JCE.⁶³ For joint criminal enterprise liability to attach, the following mental states must be present:

⁶⁰ *Prosecutor v. Kvočka et al.*, Case No. IT-98-30/1-A, Judgement, 28 Feb. 2005, para. 187 [hereinafter *Kvočka* Appeals Judgement]. [Reproduced in accompanying Notebook 2 at Tab 26.]

⁶¹ William A. Schabas, *Mens Rea and the International Criminal Tribunal for the Former Yugoslavia*, 37 NEW ENG. L. REV. 1015, 1015 (Summer 2003). [Reproduced in accompanying Notebook 3 at Tab 53.]

⁶² *Id.*, at 1017-18.

⁶³ *Tadic* Appeals Judgement, *supra* note 29, para. 228.

Basic JCE (Category One):

The intent to perpetrate a certain crime (shared by all of the co-perpetrators);

Systemic JCE (Category Two):

- (a) Personal knowledge of the system of ill-treatment (which can be proven by express testimony or by reasonable inference from the accused's position of authority); and
- (b) The intent to further this common concerted system of ill-treatment.

The Extended JCE (Category Three):

- (a) The intent to participate in and further the criminal activity or the criminal purpose of a group and to contribute to the JCE or in any event to the commission of a crime by the group.
- (b) If a crime other than the one agreed upon in the common plan arises, responsibility for that crime arises only if:
 - i. It was foreseeable that such a crime might be perpetrated by one or other members of the group and
 - ii. The accused willingly took that risk.⁶⁴

To be clear, the participant's intent in a Basic or Systemic JCE must be to further the enterprise or system of ill-treatment. The participant does not have to have the intent to commit the specific crimes that result in carrying out the goals of the enterprise to be held liable. Furthermore, participants in a Basic or Systemic JCE must share the required intent of the principal perpetrators, so if the *mens rea* of a crime combines an additional element with intent, the Prosecution must demonstrate that the accused shared the additional element as well in order to find him liable as a co-perpetrator in a JCE.⁶⁵ For example, the crime of persecution requires

⁶⁴ *Id.*

⁶⁵ *Kvocka Appeals Judgement, supra* note 60, para. 109-10.

discriminatory intent, so the co-perpetrator's mental state must have a discriminatory element also. But "[i]f the accused does not share the discriminatory intent, then he may still be liable as an aider and abettor if he knowingly made a substantial contribution to the crime."⁶⁶

The Extended JCE lowers the *mens rea* from intent to "dolus eventualis" or "advertent recklessness,"⁶⁷ garnering great criticism because "it effectively lowers the *mens rea* required for commission of the principal crime without affording any diminution in the sentence imposed."⁶⁸ One expert warns that stretching the notion of individual *mens rea* too thin might wind up imposing criminal liability on individuals for guilt by association—a result at odds with the underlying principle of the international tribunals seeking to punish the most blameworthy individuals.⁶⁹ Indeed, diluting the *mens rea* standard when relying upon joint criminal enterprise as a theory of criminal liability may "inevitably diminish the didactic significance of the Tribunal's judgements and . . . compromise its historical legacy."⁷⁰

3. An Illustrative Example of the Evidentiary Requirements of JCE

An example based loosely on one supplied by the *Tadic* Appeals Chamber⁷¹ may help illustrate how the evidentiary requirements work together: Suppose a defendant willingly and intentionally takes part in a plan to evict civilians belonging to a particular ethnic group from a village. He supplies guns to other participants in the enterprise so that they may hold the

⁶⁶ *Id.*

⁶⁷ E. VAN SLIEDREGT, THE CRIMINAL RESPONSIBILITY OF INDIVIDUALS FOR VIOLATIONS OF INTERNATIONAL HUMANITARIAN LAW 99 (2003). [Reproduced in accompanying Notebook 3 at Tab 45.]

⁶⁸ Danner & Martinez, *supra* note 19, at 109. (The authors note, however, that British common purpose doctrine is used almost exclusively for acts that fall outside the main purpose of the agreement between co-conspirators.)

⁶⁹ Schabas, *supra* note 61, at 1035.

⁷⁰ *Id.*, at 1033-34.

⁷¹ *Tadic* Appeals Judgement, *supra* note 29, para. 204. The Appeals Chamber set the basis for these examples, which are elaborated upon here for illustrative/clarification purposes.

villagers at gunpoint and forcibly remove them from the community, which they do. As part of a Basic JCE, he is criminally liable for a crime against humanity. First, the *actus reus* requirements are met: there is (1) a plurality of persons, (2) a common plan to forcibly evict civilians from their homes, which is outlawed by the Statute, and (3) the defendant participated by supplying the guns that allowed the other participants to evict the villagers using a threat of force. The *mens rea* requirements are also satisfied for a Basic JCE—the co-perpetrators all shared the intent to evict the ethnic group from the village.

Taking this example one step further, suppose a co-perpetrator's gun accidentally fires during the eviction and mass chaos ensues, leaving 150 civilians dead.⁷² What began as a Basic JCE escalated to an Extended JCE where crimes were committed that fell outside of the original scope of the enterprise. The *actus reus* analysis for liability remains the same and has already been satisfied, so the defendant's liability under an Extended JCE hinges on his *mens rea*. The defendant might argue that he joined the enterprise to evict the villagers so he could move into a nicer home—not because he wanted to “ethnically cleanse” the neighborhood, and he certainly never wanted to kill anyone. Is he criminally liable for the killings? Under the Extended JCE, he is. It is not necessary to show the defendant had the intent to commit the killings, the intent is tied to furthering the criminal enterprise of evicting the civilians.⁷³ As demonstrated in the Basic JCE analysis, it has already been established that he had the intent to participate in and further the criminal enterprise of evicting civilians. Now, a prosecutor would have to show: (1) it was foreseeable that such a crime might be perpetrated by another member of the group, and (2) the

⁷² *Id.* Again, this example is based loosely on the scenario set forth by the Appeals Chamber, with details and analysis added for illustrative/clarification purposes.

⁷³ *Id.*, para. 228.

defendant willingly took that risk.⁷⁴ In this case, it was foreseeable that providing guns for the purpose of forcibly evicting civilians from their homes would lead to a volatile situation where emotions were on edge and someone could get shot. Even if the situation had involved a calm eviction, putting guns in the hands of other people carries the risk that at least one of those participants might use the gun to kill someone. Nevertheless, the defendant took that risk and participated in the enterprise to evict the civilians. JCE liability attaches.

G. Distinguishing Between JCE and Aiding and Abetting

Each form of direct responsibility listed in the ICTY, ICTR and SCSL individual criminal responsibility provision has its own *actus reus* requirements that stand apart from those of JCE.⁷⁵ But keeping “aiding and abetting” separate from pursuing a common purpose or joint criminal enterprise is problematic because both seem to involve providing some form of assistance.⁷⁶ The Tribunals first draw a distinction in who receives the assistance. The aider and abettor helps a single person commit a single crime, but the co-perpetrator supports the crimes of a group of persons involved in a joint criminal enterprise.⁷⁷

The second distinction lies in the *mens rea* requirement. The aider and abettor must have *knowledge* that the act will assist the commission of a specific crime by the principal.⁷⁸ The co-perpetrator, however, must have *intent* to further the criminal purpose of a group. In a recent decision, the Appeals Chamber noted that whenever an accused participated in a crime that

⁷⁴ *Id.*

⁷⁵ See *Kordic* Trial Judgement, *supra* note 13, para. 385-388, 395-400 (for a thorough discussion on the *mens rea* and *actus reus* requirements and other evidentiary considerations surrounding the five forms of direct responsibility).

⁷⁶ Traditionally, to “aid” in a crime means to assist and to “abet” means to encourage, so when “carrying out a common purpose” also involves providing some form of assistance, the distinction is blurred.

⁷⁷ *Kvočka* Appeals Judgement, *supra* note 60, para. 90.

⁷⁸ *Tadić* Appeals Judgement, *supra* note 29, para. 229(iv) (emphasis added).

advanced the goals of the criminal enterprise, the Trial Chamber considered him more likely to be held responsible as a co-perpetrator than as an aider or abettor.⁷⁹

Understanding the distinctions between contributing to a JCE and aiding and abetting allows prosecutors to charge defendants more accurately and effectively, while the judiciary can better fix an appropriate sentence and render consistent decisions that prevent future confusion.⁸⁰

H. Applying the Evidentiary Requirements – A Look at the Tribunals’ Jurisprudence

1. Category One: The Basic JCE

Vasiljevic Trial

Mitar Vasiljevic was convicted by an ICTY Trial Chamber for crimes against humanity and violations of the laws or customs of war.⁸¹ His crimes included murder, inhumane acts, and persecution, all of which were found to stem from his participation in a joint criminal enterprise to murder seven Muslim men.⁸² In short, the Trial Chamber found that there was an understanding amounting to an agreement between Vasiljevic and at least two other men to kill seven Muslim men.⁸³ Furthermore, Vasiljevic participated in this JCE to murder by preventing the seven Muslim men from fleeing by pointing a gun at them while they were detained at the Vilina Vlas Hotel, by escorting them to the bank of the Drina River while pointing a gun at them to prevent their escape, and by standing behind the Muslim men with his gun together with the

⁷⁹ *Kvocka Appeals Judgement*, *supra* note 60, para. 88.

⁸⁰ *Id.*, para. 92. *See also Kvocka Appeals Judgement*, *supra* note 60, para. 87-92 (for a more thorough discussion on the differences between the two forms of liability).

⁸¹ *Prosecutor v. Vasiljevic*, Case No. IT-98-32-T, Judgement, 29 Nov. 2002, para. 307 [hereinafter *Vasiljevic Trial Judgement*]. [Reproduced in accompanying Notebook 2 at Tab 32.]

⁸² *Vasiljevic Appeals Judgement*, *supra* note 47, para. 88.

⁸³ *Id.*, para. 89.

other offenders.⁸⁴ The men were forced to line up facing the river, and the perpetrators opened fire, killing five of the seven.⁸⁵

Vasiljevic Appeal

Vasiljevic appealed his conviction on the grounds, *inter alia*, that the Trial Chamber erred in applying the concept of joint criminal enterprise because it erred in finding that an agreement existed.⁸⁶ He also contended the Trial Chamber erred when it found that he provided assistance to the other perpetrators, and there was no proof he actually participated in the shooting.⁸⁷

Before reviewing the alleged errors, the Appeals Chamber determined that the “Drina River incident” fell into the basic, first category of joint criminal enterprise.⁸⁸ Although the facts of the case might have fit under Extended JCE liability, the Court rejected classifying the case as such because the Prosecution did not plead it at the trial level.⁸⁹ Then the Court reiterated that a “common plan or purpose may materialise extemporaneously and be inferred from the fact that a plurality of persons acts in unison to put into effect a joint criminal enterprise.”⁹⁰ Even if there was no formal understanding between Vasiljevic and his companions, the findings of fact from the Trial Chamber indicated Vasiljevic acted in unison with his companions, which allowed an inference that a joint criminal enterprise existed to kill the seven Muslim men. Whether or not

⁸⁴ *Id.*

⁸⁵ *Vasiljevic Trial Judgement, supra* note 81, para. 5.

⁸⁶ *Vasiljevic Appeals Judgement, supra* note 47, para. 90.

⁸⁷ *Id.*

⁸⁸ *Id.*, para. 103-107.

⁸⁹ *Id.*, para. 106.

⁹⁰ *Id.*, para. 109 (quoting *Prosecutor v. Furundzija*, Case No. IT-95-17/1-A, Judgement, 21 July 2000, para. 119 [reproduced in accompanying Notebook 1 at Tab 16]).

Vasiljevic pulled the trigger was irrelevant once it was determined that a JCE was in effect and all participants in the JCE were criminally liable for the actions of the other perpetrators.

2. Category Two: The Systemic JCE

***Kvocka* Trial – The Omarska Prison Camp**

The *Kvocka* case provides a good example of jurisprudence related to Systemic JCEs because Omarska was one of the most brutal prison camps in all of Bosnia and perhaps the first to capture the rest of the world's attention. Patricia McGowan Wald, a former Judge for the ICTY who sat on the *Kvocka* trial in 2000-2001,⁹¹ recounted the conditions of the camp:

Omarska [was] a hastily-converted mining complex with open pits and huge hangar-like buildings, [which] housed up to 1,000 men while another thousand 'had to lie on their bellies' on the tarmac outside. Armed guards ordered excruciating tortures of their civilian prisoners, forcing them to castrate other prisoners, engage in acts of cannibalism, and violate each other. The prisoners received no medical help, were kept on starvation diets, and allowed no visitors. 'All the grass has been eaten by the people,' Gutman wrote. When the camp closed down, 500 to 1,000 prisoners remained 'missing' and were never subsequently accounted for.⁹²

The Serb defendants eventually brought before the ICTY to face charges regarding the crimes at Omarska were not the commandant of the camp or the top officials in the region.⁹³ Instead, *Kvocka* and three of his four co-defendants characterized themselves as guards without responsibility.⁹⁴ The fifth defendant, Zoran Zigic, was not a guard but was allowed to enter the

⁹¹ Patricia McGowan Wald, *The Omarska Trial—A War Crimes Tribunal Close-Up*, 57 SMU L. REV. 271, 278 (Winter 2004). [Reproduced in accompanying Notebook 3 at Tab 57.]

⁹² *Id.* at 271 (citing Roy Gutman, *A Witness to Genocide* 90-101 (1993)).

⁹³ *Id.* at 278. (The Chief of Public Security who signed the order establishing Omarska and two other prison camps committed suicide in the course of being apprehended, while the commandant of the camp was at large until a few months ago.)

⁹⁴ *Kvocka* Trial Judgement, *supra* note 57, para. 330, 423, 473, 508.

camp to torture prisoners.⁹⁵ From the outset, the Trial Chamber recognized that “none of the accused was instrumental in establishing the camps or determining official policies practiced on the detainees therein.”⁹⁶

Meeting the three conditions to qualify as a Systemic JCE was fairly straightforward in this case. First, there was an organized system of ill-treatment at Omarska, which had already been well documented in the *Tadic* trial, and second, the five defendants stipulated to the deplorable conditions in the camp,⁹⁷ indicating an awareness of the nature of the system. Finally, as guards at the camp, the first four men were undeniably participating in enforcing the system of ill-treatment, and the fifth defendant voluntarily came into the camp to commit heinous acts of abuse against Muslim prisoners, so his participation was indisputable as well.

These findings satisfied the *mens rea* requirements for a Systemic JCE. Personal knowledge was stipulated, and the intent to further the system of ill-treatment was evidenced by the defendants’ continued employment at the camp (or in Zigic’s case, his frequent visits to the camp to abuse the prisoners).

The Court also evaluated the *actus reus* elements. Clearly, a plurality of persons was required to run Omarska, the criminal enterprise. The goal of that enterprise was to imprison Bosnian Muslims, which was a crime against humanity within the ICTY Statute.⁹⁸ Thus, the first and second *actus reus* conditions were satisfied. The third and final *actus reus* element regarding whether the defendants’ level of participation rose to the level “significant” enough for liability to attach was the main issue of this case.

⁹⁵ Wald, *supra* note 91, at 280.

⁹⁶ *Kvocka* Trial Judgement, *supra* note 57, para. 4.

⁹⁷ Wald, *supra* note 91, at 280.

⁹⁸ Yugoslavia Statute, *supra* note 6, Art. 5(e).

To assess participation in such an enterprise, the court evaluated several relevant factors, such as the position of authority held by the accused and the individual's degree of participation in enforcing the system that ill-treated the detainees.⁹⁹ The Trial Chamber stated that when it previously found General Krstic guilty as a co-perpetrator of a joint criminal enterprise, his position of high authority allowed the conclusion that he was a principal perpetrator in the JCE.¹⁰⁰ But here, as Judge Wald put it, "was the mere status of being a guard supervisor or administrative aide enough to qualify a man as a perpetrator of a war crime or a crime against humanity?"¹⁰¹

The Court turned to cases considered by the *Tadic* Appeals Chamber and other post-World War II cases to "shed light on whether persons holding mid-level positions who do not individually commit crimes should be held accountable for crimes collectively, particularly when the roles they play or functions they perform are simply part of their assigned jobs."¹⁰² Ultimately, it determined:

[W]hen a detention facility is operated in a manner which makes the discriminatory and persecutory intent of the operation patently clear, anyone who knowingly participates in a significant way in the operation of the facility or assists or facilitates its activity, incurs individual criminal responsibility for participation in the criminal enterprise, either as a co-perpetrator or an aider and abettor, depending upon his position in the organizational hierarchy and the degree of his participation.¹⁰³

⁹⁹ *Tadic* Appeals Judgement, *supra* note 29, para. 203.

¹⁰⁰ *Kvočka* Trial Judgement, *supra* note 57, para. 292.

¹⁰¹ Wald, *supra* note 91, at 281.

¹⁰² *Kvočka* Trial Judgement, *supra* note 57, para. 293; *see also* para. 294-305 (for the ICTY's analysis of post-World War II cases considering what level of participation rises to significant enough to incur JCE liability).

¹⁰³ *Id.*, para. 306.

This case turned, therefore, on whether the defendants' participation in the joint criminal enterprise was "significant enough" to incur criminal responsibility under the evidentiary requirements of a Systemic JCE. The Court found all five defendants guilty as co-perpetrators in running the Omarska prison camp, a criminal enterprise, because without their guarding function to keep the prisoners captive in deplorable surroundings where they were subjected to abuse, there could have been no camp at all.¹⁰⁴ In spite of the fact that Kvocka worked at the camp a mere 17 days, the trial court found that he was widely perceived as the camp commandant's deputy and as an experienced police officer who condoned the abuses and deplorable conditions there, thus he was criminally liable.¹⁰⁵ Zigic, "the opportunistic abuser who did not even hold a camp position but gratuitously imposed his own reign of terror as a random night visitor to the camp" was sentenced to 25 years as a co-perpetrator for playing a significant role in perpetrating crimes as part of the enterprise, even though he had no position of authority there.¹⁰⁶

Kvocka Appeal

Four of the five defendants appealed, challenging their participation in a joint criminal enterprise by arguing that a significant contribution could not be inferred from their low positions of employment at the camp.¹⁰⁷ The Court responded that a position of authority is only one piece of "relevant evidence for establishing the accused's awareness of the system [and] his

¹⁰⁴ *Id.*, para. 706.

¹⁰⁵ *Id.*, para. 405, 708. (On December 17, 2003, the Appeals Chamber of the ICTY granted provisional release pending appeal to Kvocka, who by that time had served over 80% of his sentence. *Prosecutor v. Kvocka*, Case No. IT-98-30/1-A, Decision in the Request for Provisional Release of Miroslav Kvocka, 17 Dec. 2003 [reproduced in accompanying Notebook 2 at Tab 25].)

¹⁰⁶ Wald, *supra* note 91, at 285-86; *see also Kvocka Trial Judgement*, *supra* note 57, para. 610, 682, 684, 750.

¹⁰⁷ *Kvocka Appeals Judgement*, *supra* note 60, para. 77, 100.

participation in enforcing or perpetuating the common criminal purpose of the system.”¹⁰⁸ In addition, the Appeals Chamber unequivocally disagreed with the Trial Chamber’s stance requiring a significant contribution and asserted that “the Tribunal’s case-law does not require participation as co-perpetrator in a joint criminal enterprise to have been significant, unless otherwise stated.”¹⁰⁹

After examining the *actus reus* aspect of the appeal, the Court turned to the subjective *mens rea* challenges. Kvočka advanced several arguments to illustrate that he lacked the requisite intent to be a co-perpetrator in a joint criminal enterprise. The judges reviewed whether the Trial Chamber was reasonable to infer that Kvočka had the intent in light of all the surrounding circumstances, giving him the benefit of any doubt. Ultimately, the Appeals Chamber affirmed that he possessed intent and upheld the finding that he was guilty as a co-perpetrator of crimes committed as part of the JCE.¹¹⁰

3. Category Three: The Extended JCE

One of the most compelling justifications for use of the Extended JCE is the notion that it is unfair to convict and imprison a middle-level officer of war crimes while his superior—the principal offender—walks free because the court has no way to physically connect him to the crimes that he orchestrated. The superior “pulling the strings” behind the scenes may not fit the role of an accomplice who facilitates a crime, but he is still a perpetrator of the crime.¹¹¹

The flexibility of this category of joint criminal enterprise has given prosecutors an increasingly effective way to build cases against key leaders where other forms of liability may

¹⁰⁸ *Id.*, para. 100.

¹⁰⁹ *Id.*, para. 187.

¹¹⁰ *Id.*, para. 246.

¹¹¹ VAN SLIEDREGT, *supra* note 67, at 15.

be difficult to establish.¹¹² Professor William A. Schabas has called joint criminal enterprise the “magic bullet” of the Office of the Prosecutor,¹¹³ perhaps largely because of the amount of prosecutorial and judicial discretion it allows.¹¹⁴ How broadly or narrowly prosecutors describe the criminal goal of the enterprise or judges construe foreseeability could have a dramatic impact on an individual’s liability.¹¹⁵ Also, the lowered *mens rea* requirement for the category makes it more appealing for prosecution.

With these caveats in mind, the following analysis examines one ICTY case where the defendant was a high-ranking official charged with responsibility for some of the most horrific crimes in the Yugoslavian conflict.

Krstic Trial

The trial of General Radislav Krstic was the first ICTY trial to try the charge of genocide through to completion.¹¹⁶ When it began, General Krstic was the most senior military official to stand trial at The Hague.¹¹⁷ The Trial Chamber, in a Judgement rendered after hearing more than 110 witnesses and reviewing mounds of evidence, poignantly painted what it described as

¹¹² See *Prosecutor v. Delalic, et. al.*, Case No. IT-96-21-T, Judgement, 16 Nov. 1998, para. 720-21 (prosecution failed to prove that Delalic had *de jure* or *de facto* control over the camp; Delalic was acquitted of liability under Article 7(3)). [Reproduced in accompanying Notebook 1 at Tab 15].

¹¹³ Schabas, *supra* note 61, at 1032-33 (Summer 2003).

¹¹⁴ Danner & Martinez, *supra* note 19, at 135-36. (“Many JCEs, in fact, are described in expansive terms. The indictment of Milan Martić, for example, alleges that he was a participant in a JCE, the purpose of which was the ‘forcible removal of a majority of the Croat, Muslim and other non-Serb population from approximately one-third of the territory of the Republic of Croatia . . . and large parts of the Republic of Bosnia and Herzegovina.’ That these indictments have all been confirmed by a judge at the ICTY indicates that there is no systemic objection to allegations of JCEs of great breadth.”)

¹¹⁵ *Id.*, at 135.

¹¹⁶ Patricia McGowan Wald, *General Radislav Krstic: A War Crimes Case Study*, 16 GEO. J. LEGAL ETHICS 445, 462 (Spring 2003) [hereinafter General Radislav Krstic]. [Reproduced in accompanying Notebook 3 at Tab 56.]

¹¹⁷ *Id.* at 453.

“nine days of hell” in Srebrenica.¹¹⁸ Nonetheless, the Court was careful to note that “[t]his defendant, like all others, deserves individualised consideration and can be convicted only if the evidence presented in court shows, beyond a reasonable doubt, that he is guilty of acts that constitute crimes covered by the Statute of the Tribunal.”¹¹⁹

In short, units of the Bosnian Serb Army (“VRS”) launched a 9-day attack on the village of Srebrenica, located in Bosnia-Herzegovina, despite the fact that the area was designated as a U.N. safe area.¹²⁰ Approximately 25,000 Bosnian Muslims living there were uprooted and, “in an atmosphere of terror,” transported on overcrowded buses across conflict lines into Bosnian-Muslim held territory.¹²¹ The military-aged Bosnian Muslim men of Srebrenica, however, were “taken prisoner, detained in brutal conditions and then executed. More than 7,000 people were never seen again.”¹²²

Facts later revealed:

[T]housands . . . were slaughtered in ‘carefully orchestrated mass executions’ that ‘followed a well established pattern.’ The men were lined up in groups of ten, blindfolded, wrists bound with wire ligatures, shoes removed and then shot. Miraculously, a handful escaped to testify later at the Hague. Immediately afterward and sometimes even during the execution, earth-moving equipment arrived and their bodies were buried. Months later they were reburied further north in Serb-held territory to avoid discovery as the Dayton Accord negotiations began.¹²³

¹¹⁸ *Prosecutor v. Krstic*, Case No. IT-98-33-T, Judgement, 2 Aug. 2001, para. 1-4 [hereinafter *Krstic* Trial Judgement]. [Reproduced in accompanying Notebook 2 at Tab 22.]

¹¹⁹ *Id.*

¹²⁰ Fran Pilch, *The Prosecution of the Crime of Genocide in the ICTY: The Case of Radislav Krstic*, 12 U.S.A.F. ACAD. J. LEGAL STUD. 39, 39 (2002/2003). [Reproduced in accompanying Notebook 3 at Tab 52.]

¹²¹ *Krstic* Trial Judgement, *supra* note 118, para. 1.

¹²² *Id.*

¹²³ General Radislav Krstic, *supra* note 116, at 449.

The area where these events took place fell within the zone of responsibility of the Drina Corps, a formation of the VRS.¹²⁴ In his role as Chief of Staff and then Commander of the Drina Corps when the atrocities occurred, Krstic was charged with, *inter alia*, genocide and crimes against humanity that included extermination, murder, persecution and deportation.¹²⁵ Prosecutors charged Krstic under Article 7(1) of the ICTY Statute, but they did not specify a form of direct responsibility.¹²⁶ In spite of defense arguments that joint criminal enterprise liability was therefore not available because it had not been pled, the Trial Chamber found that the Indictment contained sufficient references to alleged crimes committed in concert with others to allow it.¹²⁷

Krstic was charged under both Article 7(1) of the ICTY Statute and the command responsibility provision of Article 7(3). The command responsibility theory could hold Krstic criminally liable for crimes committed by his troops if (1) he knew or should have known about the crimes, and (2) he did not take reasonable and necessary steps to either prevent the crimes or punish his subordinates for their misdeeds.¹²⁸ But rather than find him vicariously liable using command responsibility, the Trial Chamber seemed inclined to make it as clear as possible that Krstic was *directly* responsible for the events at Srebrenica.¹²⁹ “[W]here a commander

¹²⁴ *Krstic* Trial Judgement, *supra* note 118, para. 3.

¹²⁵ Pilch, *supra* note 120, at 43.

¹²⁶ *Krstic* Trial Judgement, *supra* note 118, para. 602.

¹²⁷ *Id.*

¹²⁸ STEVEN R. RATNER & JASON S. ABRAMS, ACCOUNTABILITY FOR HUMAN RIGHTS ATROCITIES IN INTERNATIONAL LAW: BEYOND THE NUREMBERG LEGACY 133 (2d ed. 2001). [Reproduced in accompanying Notebook 3 at Tab 42.]

¹²⁹ Danner & Martinez, *supra* note 19, at 144-45. (“[I]nternational criminal prosecutors appear to be attempting to fit as many political and military leaders under the JCE framework in preference to command responsibility liability, even in cases where the latter arguably better describes the actions of the accused” perhaps for the psychological impact. JCE seems to carry more weight and captures the seriousness of the leader’s responsibility for the violent course of events.)

participates in the commission of the crime through his subordinates, by ‘planning’, ‘instigating’ or ‘ordering’ the commission of the crime, any responsibility under Article 7(3) is subsumed under Article 7(1).”¹³⁰

The evidence established that General Krstic, along with others, (1) played a significant role in organizing the transportation of civilians, (2) knew it was a forcible, not voluntary, transfer, and (3) was fully aware of the ongoing humanitarian crisis and mistreatment of civilians by VRS soldiers.¹³¹ The Trial Chamber concluded that the facts compelled the inference that the political and/or military leadership of the VRS formulated a plan to permanently remove the Bosnian Muslim population from Srebrenica and that General Krstic was a key participant.¹³² Thus, the JCE *actus reus* requirements of plurality, a common plan, and participation were established.¹³³

The Court then moved to the *mens rea* aspect of JCE, examining “which crimes fell within and which fell outside the agreed object of the joint criminal enterprise to ethnically cleanse the Srebrenica enclave.”¹³⁴ The Trial Chamber agreed that the first object of the JCE was the forcible transfer of the Muslim civilians out of Srebrenica, and Krstic’s extensive participation in it evidenced his intent for the crime.¹³⁵ Furthermore, the humanitarian crisis was so closely connected to the forcible evacuation of the civilians that it fell within the object of the

¹³⁰ *Krstic* Trial Judgement, *supra* note 118, para. 605 (emphasis omitted).

¹³¹ *Id.*, para. 608-09.

¹³² *Id.*, para. 612.

¹³³ *Id.*

¹³⁴ *Id.*, para. 614.

¹³⁵ *Id.*, para. 615.

enterprise.¹³⁶ Krstic was liable because he organized the military operation on Srebrenica and failed to take any action to alleviate the crisis by providing food, water, or security to the civilian inhabitants of the town, creating the crisis.¹³⁷ The Trial Chamber then recognized that the murders, rapes, beatings and abuses committed against the refugees by the VRS were not the original objective of the joint criminal enterprise, but they were a natural and foreseeable consequence of the ethnic cleansing campaign—thus, Krstic was liable for those crimes as well under the Extended JCE.¹³⁸ Finally, the Court found that he knew that such crimes were related to a widespread attack directed against the Bosnian Muslim civilian population, and his participation undeniably established his intent to discriminate against that group.¹³⁹ Krstic was therefore criminally responsible for the crimes against humanity of inhumane acts and persecution.¹⁴⁰

The plan to ethnically cleanse Srebrenica escalated from forcibly transferring civilians to killing all of the military-aged Bosnian Muslim men of Srebrenica.¹⁴¹ The Trial Chamber found that killing the men “became the object of the newly elevated joint criminal enterprise of General Mladic and VRS Main Staff personnel” and was aimed at permanently eradicating the Bosnian Muslim population from Srebrenica.¹⁴² This was genocide, according to the Trial Chamber.

¹³⁶ *Id.*

¹³⁷ *Id.*

¹³⁸ *Id.*, para. 617.

¹³⁹ *Id.*, para. 618.

¹⁴⁰ *Id.*

¹⁴¹ *Id.*, para. 619.

¹⁴² *Id.*

Next, the Trial Chamber considered whether General Krstic was a member of the escalated joint criminal enterprise and thus liable for genocide or complicity in genocide, as well as other crimes constituted by the killings.¹⁴³ First, it looked at evidence showing that when Krstic found out that thousands of Srebrenica men had been captured, he was aware no adequate measures had been taken for their basic human needs, nor were any arrangements being made for a prisoner-of-war exchange.¹⁴⁴ It concluded at that point, “General Krstic could only surmise that the original objective of ethnic cleansing by forcible transfer had turned into a lethal plan to destroy the male population of Srebrenica once and for all.”¹⁴⁵ From that point on, Drina Corps troops took part in killing episodes, and the Court believed it was “inconceivable that all this occurred without some degree of planning by the top officials, especially since the chain of command was still in place.”¹⁴⁶ The evidence against Krstic mounted, and the Trial Chamber concluded beyond a reasonable doubt that he participated in a JCE to kill the Bosnian Muslim military-aged men from Srebrenica.¹⁴⁷

General Krstic may not have devised the killing plan, or participated in the initial decision to escalate the objective of the criminal enterprise from forcible transfer to destruction of Srebrenica’s Bosnian Muslim military-aged male community, but there can be no doubt that, from the point he learned of the widespread and systematic killings and became clearly involved in their perpetration, he shared the genocidal intent to kill the men. This cannot be gainsaid given his informed participation in the executions through the use of Drina Corps assets.¹⁴⁸

¹⁴³ *Id.*, para. 620.

¹⁴⁴ *Id.*, para. 621.

¹⁴⁵ *Id.*, para. 622.

¹⁴⁶ *Id.*, para. 623-626.

¹⁴⁷ General Radislav Krstic, *supra* note 116, at 466.

¹⁴⁸ *Krstic* Trial Judgement, *supra* note 118, para. 633.

The Trial Chamber then noted that Krstic fulfilled a key-coordinating role of the killing campaign at a stage when his participation was “clearly indispensable” in the genocidal killings.¹⁴⁹ In view of both his *mens rea* and *actus reus*, he was deemed a principal perpetrator of genocide and other connected crimes.¹⁵⁰

Some commentators suggested that the Tribunal’s ruling in *Krstic* might dilute the Extended JCE *mens rea* requirement for the underlying crimes:¹⁵¹

An offender may be convicted of the most serious crimes, and sentenced to lengthy terms in prison, on the basis of what can amount to a negligence-like standard of guilt. General Krstic was convicted of genocide and was sentenced to a term of 46 years in prison, all on the basis of the JCE theory of criminal liability. The Trial Chamber never really concluded that he actually intended to commit genocide—a requirement of the Statute—but only that genocide was a “natural and foreseeable” consequence of a criminal plan to ethnically cleanse Srebrenica, and that a reasonable person would have “surmised” such a development.¹⁵²

Diluting the *mens rea* requirements could have far-reaching implications for the trial of Slobodan Milosevic and beyond:

[I]f it cannot be established that the man who ruled Yugoslavia throughout its decade of war did not actually intend to commit war crimes, crimes against humanity and genocide, but only that he failed to supervise his subordinates or joined with accomplices when a reasonable person would have foreseen the types of atrocities they might commit . . . the door is left ajar for future generations to deny the truth.¹⁵³

¹⁴⁹ *Id.*, para. 644.

¹⁵⁰ *Id.*

¹⁵¹ Schabas, *supra* note 61, at 1033-34; *see also* Danner & Martinez, *supra* note 19, at 108-09. (“[A]t least one ICTR Trial Chamber has suggested that the accused may be responsible for crimes that were objectively foreseeable, even if he did not himself foresee them—effectively lowering the mental state still further to negligence.”)

¹⁵² Schabas, *supra* note 61, at 1033.

¹⁵³ *Id.*, at 1034.

Krstic Appeal

Krstic appealed his conviction, challenging, *inter alia*, that he was criminally responsible for the crimes that arose from his individual participation in a joint criminal enterprise to forcibly transfer civilians, and opposing the finding that he shared a genocidal intent of a joint criminal enterprise to commit genocide against the Bosnian Muslims of Srebrenica.¹⁵⁴ On the first challenge, the Appeals Chamber upheld the finding that the creation of a humanitarian crisis fell within the scope of the intended joint criminal enterprise, and that Krstic participated in that enterprise aware of the probability that other crimes might result.¹⁵⁵ It was unnecessary to establish that he was actually aware other criminal acts were being committed, so the appeal against this conviction was dismissed.¹⁵⁶

Regarding the genocide conviction, the Appeals Chamber reviewed the evidence relied upon by the Trial Chamber to establish intent to commit genocide and concluded the Trial Chamber's assertion was without a proper evidentiary basis—all it established was that “Krstic was aware of the intent to commit genocide on the part of some members of the VRS Main Staff, and with that knowledge, he did nothing to prevent the use of Drina Corps personnel and resources to facilitate those killings.”¹⁵⁷ The Appeals Chamber emphasized that convictions for genocide can only be entered where intent has been unequivocally established, and knowledge alone could not support such an inference.¹⁵⁸ The Court then reassessed what level of

¹⁵⁴ *Prosecutor v. Krstic*, Case No. IT-98-33-A, Judgement, 19 April 2004, para. 79, 145 [hereinafter *Krstic Appeals Judgement*]. [Reproduced in accompanying Notebook 2 at Tab 23.]

¹⁵⁵ *Id.*, para. 149-50.

¹⁵⁶ *Id.*, para. 150-51.

¹⁵⁷ *Id.*, para. 134.

¹⁵⁸ *Id.*

responsibility the evidence did establish, and determined it was accurately characterized under Article 7(1) as an aider and abettor of genocide, not as a perpetrator in a joint criminal enterprise.¹⁵⁹

These findings indicate there are numerous ways prosecutors can use JCE to hold defendants criminally liable for their crimes, but there are also important limits in place that must be observed. The jurisprudence of the other tribunals will act as an important guideline for the IST in its prosecution of war criminals using JCE, but the IST Statute also sets important limits that must be maintained.

IV. ANALYSIS OF ARTICLE 15(b)(4) OF THE IST STATUTE

A. Article 15(b)(4) is Taken from the Rome Statute of the ICC

The language of the IST provision on individual criminal responsibility is somewhat different from that of the other tribunals because it takes its wording from the Rome Statute of the ICC.¹⁶⁰ According to one expert, the ICC provision (and thus the IST provision, since they are identical) “‘repairs’ the technical defaults of complicity liability, which has caused some misunderstanding and resulted in creative law-making at the *ad hoc* Tribunals.”¹⁶¹ Therefore, the statutory provisions warrant closer examination in order to determine how the IST may interpret the JCE doctrine under a statute that contains striking differences to those of the other courts.

¹⁵⁹ *Id.*, para. 138.

¹⁶⁰ Rome Statute of the International Criminal Court, Art. 25(3)(d), U.N. Doc A/CONF. 183/10 (2002), *available at* <http://www.un.org/law/icc/statute/romefra.htm>. [Reproduced in accompanying Notebook 1 at Tab 7.]

¹⁶¹ VAN SLIEDREGT, *supra* note 67, 113.

B. Textual Differences to the ICTY, ICTR, and SCSL Statutes

A comparison of the tribunal statutes quickly reveals two important distinctions. First, Article 15(b)(4) contains specific language regarding common purpose,¹⁶² unlike the other three tribunals' statutes where the judges have interpreted that common purpose (joint criminal enterprise) is *implied* by the statute. Second, the IST Statute explicitly defines the requisite mental state for crimes committed by persons acting with a common purpose, whereas the *Tadic* Appeals Chamber had to define the doctrine's evidentiary requirements, which subsequent rulings have upheld.

1. How Statutory Authorization Impacts the Use of JCE at the IST

The wording of the IST Statute expressly authorizes prosecutors to charge defendants before the Tribunal with common purpose liability, so the IST will not have to endure the criticism that the other tribunals faced about whether it is fair to use judge-made doctrine to hold defendants criminally liable. Express statutory authorization to employ common purpose liability promotes the legitimacy of its use in IST proceedings.

Furthermore, because the *Tadic* Appeals Chamber was not authorized by statute to apply JCE as a form of criminal responsibility, it had to justify the theory by finding that it existed as customary international law in 1992 at the time of the alleged acts. More than ten years have passed since the *Tadic* Appeals Chamber holding, and an extensive body of subsequent case law now supports the notion that joint criminal enterprise is part of customary international law from 1992 onward. But the defendants appearing before the IST committed crimes pre-dating 1992. Prosecutors before the IST may therefore have to demonstrate that JCE liability was customary international law in the 1980s when Al-Dujayl and Operation Anfal took place, but the Statute's

¹⁶² See Iraqi Statute, *supra* note 1, Art. 15(b)(4).

specific authorization of the theory may preempt such a showing. In the event that it does not, the *Tadic* Appeals Chamber’s analysis of post-World War II cases and the practices of various national systems provide a good starting point for this assertion.¹⁶³

2. How the IST Statute’s Wording Affects the Evidentiary Requirements of JCE

Article 15(b)(4) sets the lowest possible standard of *actus reus* to hold perpetrators in a common plan criminally responsible, penalizing ‘any other way’ one contributes to the commission of a crime by a group acting with a common purpose.¹⁶⁴ The focus of this form of liability really lies with the *mens rea* provision. The IST Statute contains a twofold mental standard—the first relates to the participant’s contribution and the other relates to the subsequent crime. First, subparagraph (i) holds that the participant must have the specific intention to promote the practical acts and ideological objectives of the group, or a shared intent with the group.¹⁶⁵ Thus, Basic JCE cases can be brought under this provision. The Systemic JCE cases might also fall under this provision if the participants were clearly “furthering the criminal activity or criminal purpose of the group,” so cases involving individuals in superior positions at the camp could most likely be pursued with this approach.¹⁶⁶

Subparagraph (ii) of Article 15(b)(4) has a major impact on Extended JCEs because the provision eliminates the reckless mental state used with defendants in cases where the accused participated in the enterprise in spite of the risk that additional crimes outside the original scope of the enterprise were foreseeable. The IST provision requires the accused to have *knowledge* of

¹⁶³ See *Tadic* Appeals Judgement, *supra* note 29, para. 195-220 for the Appeals Chamber’s analysis of post World-War II cases and national practices; *see also supra* text accompanying note 43.

¹⁶⁴ VAN SLIEDREGT, *supra* note 67, at 107. (Dr. Van Sliedregt analyzes the common purpose provision of the ICC Statute, Article 25(3)(d). This wording is identical to the IST Statute provision, so the analysis applies here as well.)

¹⁶⁵ *Id.*

¹⁶⁶ *Id.* at 108.

the intention of the group to commit the (additional) crime. This higher mental state requirement seems to preclude the IST from prosecuting Extended JCE cases since the accused in such situations does not *know* of the intention of the group member who commits the additional crime, even if it might be foreseeable.¹⁶⁷ This is a startling consequence, especially since the Extended JCE seems to be the most effective form of criminal liability for prosecuting key leaders on an international level.

C. How to Overcome Preclusion of the Extended JCE

Even though the Extended JCE seems to be statutorily precluded by the wording of Article 15(b)(4), there may still be a way the IST could find key leaders individually responsible for crimes committed outside the scope of the original enterprise.

1. Strategy One: Follow the Other Tribunals' Jurisprudence, Which Allows Extended JCE

One expert suggests that preclusion of the Extended JCE is easily overcome because the jurisprudence of the *ad hoc* tribunals reflects general legal principles and customary international law, so it is available for the IST to draw from and apply.¹⁶⁸ Such a strategy serves several important interests. First, it enables the IST to hold masterminds of heinous atrocities criminally liable for acts carried out in circumstances from which they were far removed. Second, by incorporating the jurisprudence of the *ad hoc* tribunals as much as possible, the IST prevents the development of two diverging bodies of international criminal law.¹⁶⁹ Maintaining consistency between the Tribunals builds a coherent and uniform international criminal law precedent for the future. Finally, following the established jurisprudence of the other tribunals would signal to the

¹⁶⁷ *Id.*

¹⁶⁸ *Id.* at 114.

¹⁶⁹ *Id.* at 115.

international community that the IST has an interest in upholding established principles of international law and legitimizing its proceedings in the court of international opinion.

At the same time, this strategy has one glaring drawback. Even more important than courting public opinion abroad, it is crucial for the Iraqi people to perceive the IST proceedings as fair and to respect the outcome. By turning to a judge-made doctrine with a lower mental state than is required by the IST Statute, the Iraqi people may see the defendants as scapegoats or martyrs because the prosecutors have gone outside the bounds of the statute they are obligated to follow. “Deviation from adherence to strict principles may augment the chances of conviction but it can also threaten the Tribunal’s ability to fulfill its solemn goals.”¹⁷⁰

2. Strategy Two: Expand the Common Purpose Doctrine to Include Conspiracy

Another possible way to overcome preclusion of the Extended JCE is to interpret that the IST Statute’s “common purpose” wording includes conspiracy as another form of individual criminal responsibility. Conspiracy is well suited for prosecuting the criminal masterminds behind modern war crimes. These key players often initiate the agreements to commit the crime, and their charisma, intelligence, and power fuel the conspiratorial process.¹⁷¹ Yet they are also most often capable of eluding conviction, either because of their status and power, or because they have skillfully distanced themselves from actual acts of substantive crime.¹⁷² Furthermore, they may be able to avoid individual responsibility under joint criminal enterprise theories because the prosecution is unable to connect their conduct or state of mind with a particular crime.¹⁷³ In comparison, the evidentiary requirements of conspiracy may be less restrictive.

¹⁷⁰ Schabas, *supra* note 61, at 1036.

¹⁷¹ Barrett & Little, *supra* note 28, at 62-63.

¹⁷² *Id.*, at 63.

¹⁷³ *Id.*

If the IST *does* adopt conspiracy as another form of individual criminal responsibility, it would be wise to apply the charge only to the most culpable individuals who have distanced themselves from the actual commission of crimes but without whom there would be no impetus to commit them. By restricting the use of conspiracy, the IST could establish individual criminal responsibility of the most blameworthy while exonerating the masses from community guilt, curtailing much of the criticism that was aimed at the Nuremberg Tribunal when the conspiracy charge was used in the Nazi war criminal trials.

The arguments both for and against the adoption of conspiracy are set forth below, but a strong legal argument can be made that would justify such an adoption.

a. The Role of Conspiracy at Nuremberg

The law of conspiracy is based in common law, and Allies from countries with civil law traditions considered the concept to be “broad, vague and unfamiliar” when forming the Nuremberg Tribunal, but the crime was included in Article 6 of the Nuremberg Charter nonetheless.¹⁷⁴ The charge was “central” in convicting the major World War II criminals, but unfortunately, it was not defined, and there was substantial room for argument and interpretation as to its meaning.¹⁷⁵ The malleability of the charge was also criticized because it allowed prosecutors to pursue especially aggressive strategies against defendants.¹⁷⁶

A lawyer at the U.S. War Department first proposed the strategy for conspiracy that ultimately prevailed at Nuremberg.¹⁷⁷ Under his plan, the Allies would formally indict the major

¹⁷⁴ VAN SLIEDREGT, *supra* note 67, at 17 (citing B.F. Smith, *Reaching Judgment at Nuremberg* 51 (1977)).

¹⁷⁵ *Id.*, at 18, 20.

¹⁷⁶ Danner & Martinez, *supra* note 19, at 115.

¹⁷⁷ *Id.*, at 113.

Nazi organizations such as the SS and the Gestapo, and the Tribunal would try the criminality of the organizations themselves.¹⁷⁸ Once an organization was declared a criminal group, an individual brought before the court could be prosecuted for the crime of membership, and individual responsibility would be put under the heading of criminal participation.¹⁷⁹ This strategy extended liability from the few men at the head of the Nazi regime to two million collaborators at all levels of the hierarchy who knew of the criminal acts of their fellow members and party leaders and acquiesced in them.¹⁸⁰

The judges trying the Nazi organizations were uncomfortable with such a concept. Ultimately, they acquitted four of the seven indicted organizations and shifted the burden of proof to the prosecution, which had to show that the defendant voluntarily joined the organization and (1) knew it was engaged in crimes within the London Charter's jurisdiction, or (2) personally participated in such crimes.¹⁸¹ This decision "effectively negated the procedural benefits to the prosecution" that could have flowed from the conviction of criminal organizations¹⁸² to hold lower-level individuals criminally responsible. The vision of thousands of trials and mass convictions for membership in criminal organizations never materialized.¹⁸³

Conspiracy was not defined in the Nuremberg Charter,¹⁸⁴ but it was used both as a substantive crime and as a theory of liability at Nuremberg.¹⁸⁵ The Nuremberg Judgement

¹⁷⁸ *Id.*

¹⁷⁹ VAN SLIEDREGT, *supra* note 67, at 22-27.

¹⁸⁰ *Id.*, at 21; *see also* Danner & Martinez, *supra* note 19, at 113.

¹⁸¹ Danner & Martinez, *supra* note 19, at 114.

¹⁸² *Id.*

¹⁸³ *Id.*

¹⁸⁴ MARRUS, *supra* note 3, at 232.

endorsed a restrictive notion of conspiracy, rejecting its application to crimes against humanity and war crimes but allowing conspiracy convictions for members of Hitler's senior leadership who actively participated in the planning to commit aggressive war.¹⁸⁶ The Nuremberg Tribunal said this narrowed use and the additional requirements of proof placed on the prosecution were "in accordance with well-settled legal principles, one of the most important of which is that criminal guilt is personal, and that mass punishment should be avoided."¹⁸⁷

b. The Role of Conspiracy in International Law Today

Critics might argue that conspiracy is in no way widespread or accepted enough to be considered part of customary international law and thus can not be impliedly read into the IST Statute.¹⁸⁸ Nonetheless, a strong argument can be made that when conspiracy is used in a limited fashion for very specific international crimes, such as proposed for the IST, the international community has embraced it.

As discussed *supra*, the Nuremberg precedent has formed much of the basis of contemporary international law, especially as it pertains to the international Tribunals. Since conspiracy was introduced into international jurisprudence at Nuremberg, it has made its way into conventions and treaties dealing with international criminal law matters. Perhaps the most relevant example of widespread acceptance in international criminal law is its use in connection with genocide. "Conspiracy to commit genocide" is a punishable act in the Statutes of the ICTY,

¹⁸⁵ Danner & Martinez, *supra* note 19, at 116.

¹⁸⁶ MARRUS, *supra* note 3, at 234.

¹⁸⁷ *Id.*, at 233.

¹⁸⁸ "Conspiracy's status in international customary law is somewhat ambiguous." Despite this however, it has "frequently, albeit not consistently appeared in international materials." Barrett & Little, *supra* note 28, at 56-57.

the ICTR, and the IST.¹⁸⁹ It is also a crime according to the Genocide Convention, which has 136 parties and 41 signatories.¹⁹⁰ Conspiracy is also proscribed in numerous other conventions and treaties for drug trafficking,¹⁹¹ money laundering,¹⁹² slavery¹⁹³ and apartheid.¹⁹⁴

Many national legal systems also recognize conspiracy, including, most importantly, Iraq. Section 5(2) of Iraq's Criminal Penal Code states, "Any person who attempts to set up a criminal conspiracy or who plays a major part in it is punishable by a term of imprisonment not exceeding 10 years if that offense is a felony."¹⁹⁵ Many Iraqi laws have been incorporated into the IST

¹⁸⁹ See Yugoslavia Statute, *supra* note 6, Art. 4(3)(b); Rwanda Statute, *supra* note 7, Art. 2(3)(b); and Iraqi Statute, *supra* note 1, Art 11(b)(2).

¹⁹⁰ Convention on the Prevention & Punishment of the Crime of Genocide, Dec. 9, 1948, art. III(b), S. Exec. Doc. O, at 7 (1949), 78 U.N.T.S. 277, 280 (including "conspiracy to commit genocide" in a list of punishable acts). [Reproduced in accompanying Notebook 1 at Tab 2.]

¹⁹¹ See United Nations Convention Against Illicit Traffic in Narcotic Drugs and Psychotropic Substances, adopted Dec. 19, 1988, art. 3(1)(c)(iv), 28 I.L.M. 493 (1989) (including "conspiracy to commit [drug trafficking]" as an offence) [reproduced in accompanying Notebook 1 at Tab 14]; Protocol Amending the Single Convention on Narcotic Drugs, 1961, Mar. 25, 1972, art. 14, 1976 Can. T.S. No. 48, 18 (amending art. 36(2)(a)(ii) to include "conspiracy to commit" narcotics offences as a crime).

¹⁹² Signatories to the Council of Europe Convention on Laundering, Search, Seizure and Confiscation of the Proceeds from Crime are encouraged to incorporate the crime of conspiracy in their domestic money laundering statutes. Convention on Laundering, Search, Seizure and Confiscation of the Proceeds from Crime, Nov. 8, 1990, art. 6(1)(d), Europ. T.S. No. 141 (requiring "each party to adopt legislation ... establishing conspiracy to commit laundering offences as an offence under domestic law"). [Reproduced in accompanying Notebook 1 at Tab 1.]

¹⁹³ See International Convention on the Suppression and Punishment of the Crime of "Apartheid", U.N. GAOR, 28th Sess., 2185th plen. Mtg., Annex, Supp. No. 30 at 76, art. III(a), U.N. Doc. A/9030 (1973) (providing for international criminal responsibility for those who "commit, participate in, directly incite or conspire in the commission of the acts [of apartheid]"). [Reproduced in accompanying Notebook 1 at Tab 3.]

¹⁹⁴ See Supplementary Convention on the Abolition of Slavery, The Slave Trade, and Institutions and Practices Similar to Slavery, Sept. 7, 1956, art. 6(1), T.I.A.S. 6418, 3206, 266 U.N.T.S. 3 (making "being a party to conspiracy" to engage in slavery a punishable act) [reproduced in accompanying Notebook 1 at Tab 13]; *see also* Study on Ways and Means of Insuring the Implementation of International Instruments such as the International Convention on the Suppression and Punishment of the Crime of Apartheid, Including the Establishment of the International Jurisdiction Envisaged by the Convention, Hum. Rts. Comm., 37th Sess., Provisional Agenda Item 17, at 35, 76, U.N. Doc E/CN.4/1426 (1981) ("A person commits conspiracy when, with intent to commit a specific offence, he agrees with another to the commission of that offence and one of the members of the conspiracy commits an overt act in furtherance of the agreement.").

¹⁹⁵ IRAQ PEN. CODE § 5(2), para. 57 (1969). [Reproduced in accompanying Notebook 1 at Tab 4.]

Statute, so to interpret that the recognized crime of conspiracy is encompassed by the “common purpose” wording of Article 15(b)(4) is reasonable.

c. Precedent to Expand Common Purpose Liability Set by *Tadic* Appeals Chamber

The precedent that a common purpose doctrine such as conspiracy could be implied by statute has already been set by the ICTY Appeals Chamber in *Tadic*. As explained previously, the Appeals Chamber concluded that joint criminal enterprise was an implied form of direct responsibility under the ICTY Statute, then it defined the evidentiary requirements of JCE so as to limit its use. The IST could choose to follow this example and interpret that conspiracy is implied by the “common purpose” wording of the IST Statute. If it does read that conspiracy is implied in the IST Statute, it is crucial for the Tribunal to restrict and clearly spell out the evidentiary requirements and boundaries of the doctrine, just as the *Tadic* Appeals Chamber did for JCE and the Nuremberg Tribunal attempted to do with conspiracy.¹⁹⁶

d. The Presence of Conspiracy in the Iraqi Penal Code Helps Overcome Legality Principle Issues

In the context of international criminal law, the concept of *nullum crimen sine lege, nulla poena sine lege* has a “special dimension” because international law is not codified in one uniform source, and what is customary may be open to interpretation.¹⁹⁷ However, a strong argument can be made that the IST may adopt conspiracy liability because conspiracy is part of customary international law when it is restrictively applied to serious international crimes such as those before the IST, and the national nature of the Iraqi Special Tribunal lends additional

¹⁹⁶ MARRUS, *supra* note 3, at 232. (The Judgement on Conspiracy from the Nuremberg Tribunal held “the conspiracy must be clearly outlined in its criminal purpose. It must not be too far removed from the time of decision and of action. The planning, to be criminal, must not rest merely on the declarations of a party program . . . or the political affirmations expressed in *Mein Kampf* in later years. The Tribunal must examine whether a concrete plan to wage war existed, and determine the participants in that concrete plan.”)

¹⁹⁷ RATNER & ABRAMS, *supra* note 128, at 21-22.

strength to the proposal. Conspiracy has been part of Iraq's national fabric since at least 1969, so it is reasonable to charge Iraqi nationals or residents¹⁹⁸ before the IST because they are subject to Iraqi laws, including the 1969 penal code. Based on these authorities and the example set by the *Tadic* Appeals Chamber, the IST could choose to adopt conspiracy as part of common purpose liability. Thus, defendants appearing before the IST for their alleged involvement in Al-Dujayl and Operation Anfal in the 1980s could be found individually liable for conspiracy to commit crimes under the IST's jurisdiction.

e. The IST Must Distinguish Conspiracy from JCE if it Expands Common Purpose Liability

Despite the close similarities between JCE and conspiracy, they are distinct.¹⁹⁹ Both require an agreement among individuals to commit a crime, but JCE is exclusively used as a theory of liability while conspiracy may act both as a substantive crime and as a theory of liability.²⁰⁰ One international judge has asserted that conspiracy does not constitute a liability theory in its own right,²⁰¹ but the Nuremberg precedent counters such criticism. Thus, the IST could choose to adopt conspiracy both as a theory of liability and as a standalone crime.

¹⁹⁸ Iraqi Statute, *supra* note 1, Art. 1(a)(b).

¹⁹⁹ See Rajiv K. Punja, *Case Western Reserve University School of Law International War Crimes Research Lab: What is the Distinction Between "Joint Criminal Enterprise" as Defined by the ICTY Case Law and Conspiracy in Common Law Jurisdictions?* available at <http://law.case.edu/War-Crimes-Research-Portal/memoranda/JointCriminalEnterprise.pdf> (Fall 2003) (for a comparison of conspiracy and JCE and an in-depth look at conspiracy). [Reproduced in accompanying Notebook 3 at Tab 59.]

²⁰⁰ Danner & Martinez, *supra* note 19, at 118.

²⁰¹ Ojdanic argued before the ICTY that the absence of conspiracy as a mode of individual criminal responsibility in the Statute meant that the Security Council consciously intended to exclude JCE as a mode of individual criminal responsibility, but Judge David Hunt of Australia characterized the argument as "entirely fallacious. Conspiracy is not a mode of individual criminal responsibility for the commission of a crime. Conspiracy is itself a crime (of an inchoate nature) which is complete once the agreement between the conspirators has been reached." Whether conspiracy was absent in the Statute or not was irrelevant to the issue raised on appeal. *Prosecutor v. Milutinovic et al.*, Case No. IT-99-37-AR72, Separate Opinion of Judge David Hunt on Challenge by Ojdanic to Jurisdiction Joint Criminal Enterprise, 21 May 2003, para 22-23. [Reproduced in accompanying Notebook 2 at Tab 29.]

The evidentiary requirements of conspiracy may be less problematic for prosecutors to reach in terms of proof than JCE. The *actus reus* that prosecutors must prove is the agreement, which “is not a mere mental operation, but must involve spoken or written words or other overt acts.”²⁰² In other words, the agreement must be manifested by acts of some kind. To meet the *mens rea* requirement of conspiracy, prosecutors must show the defendant had the intent to carry out the agreement, to cause the forbidden result.²⁰³ Whether the defendant could foresee or know that additional crimes would result is irrelevant because what is important under conspiracy is the original agreement and intent to commit a crime, not participation in carrying out the crime or what crime is actually committed.²⁰⁴ Thus, even if the scope of the original enterprise is exceeded, the participants in the enterprise can still be held criminally responsible for agreeing and intending to commit a crime that falls under the IST’s jurisdiction.

V. APPLICATION OF FACTS TO ARTICLE 15(b)(4)

Strategic prosecution of individuals most responsible for events at Al-Dujayl and in connection with Operation Anfal may need to take a different tactic in light of the differences between the IST Statute and that of the other tribunals. As stated previously, the IST may choose to follow the jurisprudence of the other tribunals, or it may choose to adopt conspiracy as a form of liability implied by the common purpose language of the IST Statute. Therefore, this memorandum will apply the basic facts of Al-Dujayl and Operation Anfal using both JCE and conspiracy in order to illustrate how defendants before the IST may be held responsible for

²⁰² SMITH & HOGAN, *supra* note 20, at 273.

²⁰³ *Id.*, at 275.

²⁰⁴ *Id.*, at 274, 277.

crimes associated with these events in light of the limitations of the doctrines and their respective evidentiary requirements.

A. Al-Dujayl

The initial gunfight leaving approximately 150 people dead could arguably be deemed self-defense by Saddam Hussein and the other members of his convoy since the villagers attacked the motorcade and took them by surprise. The events that took place after that are another matter, however.

First, liability for Hussein's order to conduct reprisals against the inhabitants of the town and to destroy the orchards seems to fall under Article 15(b)(2) of the Statute, which provides direct responsibility for issuing such orders. But Hussein and the other defendants might also be successfully prosecuted under the 15(b)(4) provision using either JCE or conspiracy.

1. Basic JCE Analysis

The *actus reus* requirements of a JCE are satisfied. First, a plurality of persons existed, which was clearly exhibited by the massive scale of the reprisals conducted against the villagers of Al-Dujayl. Second, they had a common plan to commit crimes listed in the Tribunal Statute, which was evidenced by the way they acted in unison to demolish thousands of acres of natural resources, organize deportations, summarily kill hundreds of villagers and detain hundreds more, and so on. Finally, as long as prosecutors have evidence to show Hussein and the other defendants acted "in any way" to contribute to the commission of such crimes, the third prong is easily met.

The *mens rea* analysis also supports prosecution using JCE liability. The facts of the events might fit the Basic JCE category since all of the co-perpetrators shared the intent to conduct reprisals using a variety of different crimes to accomplish this enterprise. While

“reprisals” are not a crime under the terms of the IST Statute, prosecutors could argue this was an umbrella term encompassing all of the crimes that were committed that are listed in the Statute, including crimes against humanity (deportation or forcible transfer of civilians, murder, imprisonment), as well as the wastage of national resources and other violations of Iraqi law.

2. Extended JCE Analysis Following the Jurisprudence of the Other Tribunals

It could be argued that the Extended JCE is more fitting for the events of Al-Dujayl since the range and extent of the crimes might be considered outside the scope of the group’s original purpose, although using reprisals as an umbrella term for the host of crimes committed seems to stem that criticism. Nevertheless, classifying the events at Al-Dujayl in the Extended JCE category would have several implications, so a two-fold analysis is required. First, the IST would have to be willing to follow the jurisprudence of the other tribunals in spite of apparent statutory preclusion of the Extended JCE. If this occurs, the prosecution must show the defendants (1) had an intent to participate in the original criminal purpose of the group, and (2) additional crimes were foreseeable, yet the accused willingly continued to participate in spite of that risk. Here, it was foreseeable that a whole range of crimes would arise as part of a campaign of reprisals against the villagers, yet the participants took that risk and participated in spite of it.

3. Conspiracy Analysis

If the IST interprets that its Statute precludes the use of the Extended JCE, but it allows for conspiracy under the common purpose wording of the statute, the basic facts of Al-Dujayl indicate that defendants who allegedly committed crimes there could successfully be prosecuted under conspiracy liability. First, the *actus reus* of an agreement is manifested in the orders of Saddam Hussein to conduct reprisals and cut down the date trees, and by the subsequent actions of those who used a variety of criminal means to do so, punishing the villagers for their actions

against the motorcade. The *mens rea* of intent to carry out the purpose of the group, or reprisals, is also evidenced by these actions—the very nature of which must be intentionally carried out and could not be construed as accidental.

B. Operation Anfal

A similar analysis is appropriate for Operation Anfal, which occurred in 1988 and contains many similarities to the *Krstic* case.

1. Basic JCE Analysis

Based on the facts provided, the *actus reus* requirements for a JCE in any category are satisfied: (1) a plurality of persons existed (2) who had a common plan to commit crimes that fall within the Tribunal's jurisdiction and (3) the individuals involved executed that plan. As previously mentioned, the level of participation required under the IST Statute is easily met with virtually any level of contribution.

The *mens rea* analysis also supports prosecution of defendants before the IST using JCE liability. It might be possible to classify the enterprise as a Basic JCE if the original purpose of the group was to commit crimes against the Kurds. Prosecutors might be able to stay within the confines of the IST Statute by showing that the magnitude of the operations, the coordination required, the types of crimes committed, and the massive scale of destruction all indicate intent at the highest level of the regime or at the very least, knowledge that such crimes and even additional crimes were occurring. But if the original purpose of the enterprise was to commit specific crimes under the guise of military necessity and then the enterprise escalated to another level, the Extended JCE classification may be more appropriate.

2. Extended JCE Analysis

The *Krstic* case contains many factual similarities to the events of Operation Anfal. For example, the government labeled its activities as military operations and used the army to carry out crimes. The facts may indicate that what began as an intent to commit specific crimes under the guise of “military operations” escalated to another level. If that is the case, prosecutors must show that the additional crimes were foreseeable and participants willingly participated in spite of the risk that other crimes might be committed. However, as previously indicated, successful prosecution under these circumstances may only occur if the IST follows the basic principles of jurisprudence from the other Tribunals and the Extended JCE is permitted.

3. Conspiracy Analysis

If the IST interprets that its Statute precludes the use of the Extended JCE and the events do not fit appropriately under the Basic JCE, prosecutors may still be prosecuted under conspiracy liability if the IST permits. The *actus reus* of an agreement is manifested in the sheer level of coordination required to subject 100,000 Kurds to mass executions, chemical attacks, and deportations, as well as to destroy 2,000 villages. The *mens rea* of intent to carry out the crimes is also evidenced by these actions—again, the magnitude, volume, and type of crimes committed precludes the finding that they were anything but intentional.

VI. CONCLUSION

The IST must decide whether it will follow the Extended JCE jurisprudence of the other tribunals that may not be in compliance with the *mens rea* requirements of its Statute, or whether to adopt a new form of common purpose liability in the same fashion that the ICTY Appeals Chamber did in *Tadic*. There are strong arguments on both sides, but the IST must also keep the underlying goals of the Tribunal in perspective in order to ensure that the proceedings are viewed

as legitimate and fair. The people who have been victimized by atrocities deserve to see that justice is sought so that they can build their futures, not seek vengeance for the past.²⁰⁵ Common purpose liability allows prosecutors to seek such justice. How the IST chooses to fashion it remains to be seen.

²⁰⁵ James C. O'Brien, *The International Tribunal for Violations of International Humanitarian Law in the Former Yugoslavia*, 87 AM. J. INT'L L. 639, 659 (Oct. 1993). [Reproduced in accompanying Notebook 3 at Tab 51.]