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Does The Conspiracy Charge on Our Current Charge Sheet for Hamdan Constitute a War Crime of Other Crime Triable by Military Commission?

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MEMORANDUM FOR THE OFFICE OF THE PROSECUTOR FOR THE UNITED STATES DEPARTMENT OF DEFENSE

ISSUE: DOES THE CONSPIRACY CHARGE ON OUR CURRENT CHARGE SHEET FOR HAMDAN CONSTITUTE A WAR CRIME OF OTHER CRIME TRIABLE BY MILITARY COMMISSION?

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44. *Regina v. Stewart* [1995] 3 All ER 159

45. *Rex v. Jones*, 110 Eng. Rep. 485 (1832)

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54. *United States v. Salim Ahmed Hamdan*, Charge Sheet

I. Introduction and Summary of Conclusions[1]

This memorandum argues that Hamdan's conspiracy charge is a charge triable by military commission. Conspiracy has roots in international law dating back to post-World War II Military Tribunals. In addition, the theory of conspiracy is very similar, if not the same as, the doctrine of joint criminal enterprise as defined by the International Criminal Tribunal for the Former Yugolsavia.

Part III of this memorandum discusses the background of conspiracy law and its use in the United States and the United Kingdom. It details the elements of the crime and the rationale behind it. Part IV begins with the Nuremberg Tribunal's application of conspiracy to crimes to commit war of aggression and the controversy behind that charge, which seems to have instilled great reluctance in the international community from continuing to use that term except with respect to charges of genocide. Other Tribunals in France and Britain charged individuals with conspiracy, but used it as a theory of liability, rather than as an offense in itself. The International Criminal Tribunals for the former Yugoslavia and Rwanda, however, have established conspiracy as a crime, but have limited its use to the context of genocide. In order to punish guilty individuals who could potentially slip through holes in the ICTY statute, the Appeals Chamber in *Prosecutor v. Tadic* established the doctrine of joint criminal enterprise, which is essentially the same thing as the form of conspiracy used by the French and British Military Tribunals after WWII. Lastly, conspiracy law is established in several different countries outside the United States, suggesting that the concerns of *ex post facto* application of law are no longer a legitimate concern.

Based on this information it can be concluded that:

[1] Issue: Does the conspiracy charge on our current charge sheet for Hamdan constitute a war crime or other crime triable by military commission?

(a) The elements of conspiracy (as a crime) and the internationally recognized doctrine of joint criminal enterprise/common purpose are the same.[2]

(b) The rationale behind both joint criminal enterprise and conspiracy is to punish those individuals involved in criminality who cannot be found guilty of committing criminal offenses on their own (due to lack of evidence or peripheral role) or through the theory of command responsibility.

(c) In joint criminal enterprise, an overt act must be committed in addition to the agreement. These elements are the same as are required by the Rules and Regulations of the Department of Defense with respect to the crime of conspiracy.

II. Factual Background

Qaida-Al-Jihad, better known as Al Qaida, was established by Osama Bin Laden in 1988 in response to the Soviet occupation of Afghanistan. The goal of the organization is to promote Muslim brotherhood and protect the law of God (according to Al-Qaida's fundamentalist interpretation of Islam) by overthrowing Western governments who are considered to be interfering with the goals of these Islamic nations by acting in the interest of the western governments and western corporations.[3] From the time of inception to the present date, Al Qaida has been training militants from many regions to obey the *fatwa* (legal pronouncement based on Islamic religious law) that declared "to kill Americans and their allies, civilians and military, is

[2] *See generally*, RAJIV K. PUNJA, WHAT IS THE DISTINCTION BETWEEN "JOINT CRIMINAL ENTERPRISE" AS DEFINED BY THE ICTY CASE LAW AND CONSPIRACY IN COMMON LAW JURISDICTIONS?, http://law.case.edu/war-crimes-research-portal/memoranda/JointCriminalEnterprise.pdf (Fall 2003) [Reproduced in accompanying notebook at Tab 22] (This memo discusses the lack of clarity in the elements of both joint criminal enterprise and conspiracy. In its extensive analysis, this memo only draws on the main distinctions between the two doctrines, but not the similarities.)

[3] *Al Qaida*, http://en.wikipedia.org/wiki/Al-Qaida [Reproduced in accompanying notebook at Tab 51]

an individual duty of every Muslim who is able."[4] Under the guidance of Osama Bin Laden and other Al-Qaida leaders, militants have actively sought to fulfill this mission. Although Al Qaida has been responsible for many plots to further this goal, the largest attacks that this organization is believed to have been responsible for are the September 11, 2001 attacks on the World Trade Center and the Pentagon. In addition to these, Al Qaida is believed to have been responsible for the attacks against the United States Embassies in Kenya and Tanzania in August 1998, as well as the attack against the U.S.S. Cole in October 2000.[5]

In the aftermath of the World Trade Center attacks, President Bush issued a Military Order stating that the attacks on the United States created an armed conflict and an extreme state of emergency, authorizing the trial of individuals subject to the military order by military commission.[6] Any non-United States citizen who has "engaged in, aided or abetted, or conspired to commit acts of international terrorism, or acts in preparation therefore" is subject to this order.[7]

According to the Rules and Regulations of the United States Department of Defense[8], defendant Salim Ahmed Hamdan ("Hamdan") was charged with willfully and knowingly

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[4] *Al Qaida*, http://en.wikipedia.org/wiki/Al-Qaida [Reproduced in accompanying notebook at Tab 51]

[5] *United States v. Salim Ahmed Hamdan*, Charge Sheet at ¶ 11 (hereinafter "Hamdan Charge Sheet") [Reproduced in accompanying notebook at Tab 54]

[6] PRESIDENTIAL MILITARY ORDER ON THE DETENTION, TREATMENT, AND TRIAL OF CERTAIN NON-CITIZENS IN THE WAR AGAINST TERRORISM, 66 Fed. Reg. 57833 (2001) [Reproduced in accompanying notebook at Tab 52] (This order was written based on the Commander-in-Chief power vested in the President of the United States, along with a Joint Congressional Resolution authorizing the use of military force. See Public Law 107-40, 115 Stat. 224)

[7] *Id.* at §2(a)(ii).

[8] *See* Rules and Regulations of the Department of Defense CRIMES AND ELEMENTS OF TRIALS BY MILITARY COMMISSION, 68 Fed. Reg. 39381 (2003) [Reproduced in accompanying notebook at Tab 53] (This document specifies conspiracy as an alternate form of liability, stating that a person is criminally liable as a principal, even if another individual perpetrated the offense. Conspiracy occurs when an individual enters into an agreement to commit certain substantive offenses, or if the individual joins an enterprise of persons who shared a common criminal purpose that intended to commit substantive offenses triable by military commission.)

conspiring with Osama Bin Laden and other Al-Qaida leaders and members to commit the following offenses triable by military commission: attacking civilians, attacking civilian objects, murder by an unprivileged belligerent, destruction of property by an unprivileged belligerent and terrorism.[9]

Between the years of 1996-2000, Hamdan delivered and picked up weapons, ammunition and other supplies to Al-Qaida members and Taliban warehouses for Al-Qaida use, bought and made available Toyota Hi Lux trucks to protect Osama Bin Laden, and served as a driver for Osama Bin Laden and other Al-Qaida leaders at the time of the attacks on the U.S. embassies in Kenya and Tanzania, and the September 11th attacks on the World Trade Center.[10]

III. A General Discussion of Conspiracy in the United States and the United Kingdom

The inception of conspiracy can be traced back to the reign of Edward I. His conspiracy statute was narrow in scope, stating that people who combine forces to bring false appeals, obtain false indictments or pursue vexatious litigation could be regarded as conspirators.[11] The *Poulterer's Case* expanded the theory of conspiracy, so that it resembled the principles applied in many countries today. This case gave rise to the notion that the essence of conspiracy is the agreement, so the agreement is punishable even when the purpose is not achieved.[12] About a century later, conspiracy law took a very broad turn to reflect the climate of the courts, and an

[9] Hamdan Charge Sheet, *supra* note 5 at ¶12 [Reproduced in accompanying notebook at Tab 54]

[10] *Id.* at ¶13(b) subsections 1-4

[11] *See* P. WINFIELD, HISTORY OF CONSPIRACY AND ABUSE OF LEGAL PROCEDURE (Cambridge University Press 1921) [Reproduced in accompanying notebook at Tab 7] *cited* in WAYNE R. LA FAVE, CRIMINAL LAW (4th ed. West Group 2000) [Reproduced in the accompanying notebook at Tab 12]

[12] *See Poulterer's Case*, 77 Eng. Rep. 813 (1611) [Reproduced in accompanying notebook at Tab 37] (In this case, the defendants had combined forces to bring a false claim against a clearly innocent man. Since the man was not found guilty, the defendants claimed that there was no conspiracy.)

agreement to do anything immoral (even if the act was not in violation of a law) was punishable as a conspiracy.[13] In 1832, Lord Denman made his famous statement that in order for someone to be indicted for conspiracy, they must "either do an unlawful act or a lawful act by unlawful means."[14] This definition is currently used by the United Nations War Crimes Commission to define conspiracy.[15]

A. The Elements of Conspiracy

In general, the elements of the common law crime of conspiracy are: (a) an agreement between two or more persons, which constitutes the act, and (b) intent[16] to achieve the objective of the agreement.[17]

As stated earlier, the crux of conspiracy is the agreement. By criminalizing the agreement, law enforcement agents are able to prevent (or attempt to prevent) crimes before they occur, while attacking against the dangers of group criminality.[18] In theory, if the agreement

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[13] *See* FRANCIS B. SAYRE, CRIMINAL CONSPIRACY, 35 Harv. L. Rev. 393 (1922) (hereinafter "SAYRE") [Reproduced in accompanying notebook at Tab 16]

[14] *See Rex v. Jones*, 110 Eng. Rep. 485 (1832) [Reproduced in accompanying notebook at Tab 45]

[15] VIRGINIA MORRIS & MICHAEL P. SCHARF, THE INTERNATIONAL CRIMINAL TRIBUNAL FOR RWANDA (Transnational Publishers, 1998) (hereinafter "MORRIS & SCHARF ICTR") [Reproduced in accompanying notebook at Tab 10]

[16] *See* WAYNE R. LA FAVE, CRIMINAL LAW (4th ed. West Group 2000) 628 (hereinafter "LA FAVE") [Reproduced in accompanying notebook at Tab 12] (The focus of conspiracy has always been on the agreement which is not only the act, but it is predominantly a mental act. Thus, the required mental state for this crime has not been clear and "has often been dealt with ambiguously by the courts[.]" Technically, there are two mental states required to commit conspiracy- (a) the intent to agree and (b) the intent to achieve the criminal objective. The confusion results because the intent to agree is so inherent in the agreement itself that it is assumed that the act of agreement reveals the intent to agree. Therefore, it seems that the mental state required to make the agreement criminal is the intent to achieve a criminal objective.); *See also United States v. Gallishaw*, 428 F.2d 760 (1970) [Reproduced in accompanying notebook at Tab 47] (The main issue on appeal in this case are jury instructions, however when determining intent for conspiracy, the court cited a case saying that conspiracy cannot exist without at least the degree of criminal intent needed for the substantive offense itself.); *See also* DEVELOPMENTS IN THE LAW CRIMINAL CONSPIRACY, 72 Harv. L. Rev. (1959) [Reproduced in accompanying notebook at Tab 15]

[17] LA FAVE (4th ed. West Group 2000), *supra* note 16 at 621 [Reproduced in accompanying notebook at Tab 12]

[18] LA FAVE (4th ed. West Group 2000), *supra* note 16 at 620 [Reproduced in accompanying notebook at Tab 12]; *see also* KENNETH A. DAVID, THE MOVEMENT TOWARD STATUTE-BASED CONSPIRACY LAW IN THE UNITED KINGDOM

itself is the crime, persons who wish to withdraw from the conspiracy can still help prevent the crime from occurring and avoid being criminally charged.[19]

Traditionally, conspiracy is a "product of courts rather than of legislatures."[20] However in recent years, Britain and the United States have attempted to codify the law.[21] Although British attempts to codify the law were initially more successful than attempts in the United States, today many states as well as the United States Federal Government have codified conspiracy.[22]

Many of these statutes require that in addition to the agreement, an overt act[23] must be committed in furtherance of the common objective.[24] If there is no statute governing the crime, Common Law conspiracy (which does not require an overt act) is applied.[25] It is important to

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AND THE UNITED STATES, 25 Vand. J. Transnat'l L. 951, 953 (1993) [Reproduced in accompanying notebook at Tab 19]

[19] *See* MODEL PENAL CODE § 5.03 (6) (1962) [Reproduced in accompanying notebook at Tab 27]

[20] KENNETH A. DAVID, THE MOVEMENT TOWARD STATUTE-BASED CONSPIRACY LAW IN THE UNITED KINGDOM AND THE UNITED STATES, 25 Vand. J. Transnat'l L. 951, 953 (1993) (hereinafter "DAVID") [Reproduced in accompanying notebook at Tab 19]

[21] *Id*. at 959

[22] 18 U.S.C.A. § 371 [Reproduced in accompanying notebook at Tab 26]

[23] DAVID, 25 Vand. J. Transnat'l L. 951 (1993), *supra* note 20 at 959 [Reproduced in accompanying notebook at Tab 19] (The Criminal Law Act of 1977, which was the first codification of conspiracy in Britain, does not seem to have required an overt act.)

[24] LA FAVE (4th ed. West Group 2000), *supra* note 16 at 626 [Reproduced in accompanying notebook at Tab 12]; *See also United States v. Hyde & Schneider*, 225 U.S. 347 (1912) [Reproduced in accompanying notebook at Tab 48] ("Conspiracy cannot alone constitute an offense. It needs the addition of an overt act. […] It constitutes the execution or part execution of the conspiracy and all incur guilt by it, or rather complete their guilt by it."); *See also Yates v. United States*, 354 U.S. 298 (1957) [Reproduced in accompanying notebook at Tab 50]:

> "It is not necessary that an overt act be the substantive crime charged in the indictment as the object of the conspiracy. […] The function of the overt act in a conspiracy is simply to manifest that the conspiracy is still at work, and is neither a project still resting solely in the minds of the conspirators nor a fully completed operation no longer in existence."

[25] *United States v. Sassi*, 966 F.2d. 283 (1992) [Reproduced in accompanying notebook at Tab 49]

note, however, that there is some debate as to whether the overt act is evidence or an element of the offense.[26] The issue is still open to construction even though the current United States Supreme Court considers the act as evidence of the offense.[27] For example, the federal statute governing conspiracy states that persons can be punished if they conspire *and* act to effect the object of the conspiracy.[28] Similarly, the elements of conspiracy in the Department of Defense Rules also include the overt act as an element of the offense.[29]

B. The Rationale for Conspiracy

In the United States, conspiracy is regarded as one of the most useful prosecutorial tools.[30] In many cases, conspiracy allows prosecution against guilty individuals who could escape punishment simply because they did not commit the actual crime, or their acts were not blatantly obvious.[31] The all-encompassing nature of this crime has been highly criticized by many, because in theory, there are no limits as to what defines "unlawful."[32] As a result, there is not complete unanimity in the law. Civil-law countries have a narrow interpretation of conspiracy, limiting it by statute to only the most dangerous situations, while common law

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[26] *United States v. Sassi*, 966 F.2d. 283 (1992), *supra* note 25 [Reproduced in accompanying notebook at Tab 49]

[27] *United States v. Sassi*, 966 F.2d 283 (1992), *supra* note 25 [Reproduced in accompanying notebook at Tab 49]; *see United Stated v. Hyde & Schneider*, 225 U.S. 347 (1912), *supra* note 24 [Reproduced in accompanying notebook at Tab 48] (As detailed in this case, the Supreme Court did not always consider the overt act evidence of the offense; it was an element.)

[28] 18 U.S.C.A. § 371 [Reproduced in accompanying notebook at Tab 26]

[29] Rules and Regulations of the Department of Defense CRIMES AND ELEMENTS OF TRIALS BY MILITARY COMMISSION, 68 Fed. Reg. 39381 (2003), *supra* note 8 [Reproduced in accompanying notebook at Tab 53]

[30] LA FAVE (4th ed. West Group 2000), *supra* note 16 [Reproduced in accompanying notebook at Tab 12]

[31] DEVELOPMENTS IN THE LAW CRIMINAL CONSPIRACY, 72 Harv. L. Rev. 920 (1959) (hereinafter "CRIMINAL CONSPIRACY") [Reproduced in accompanying notebook at Tab 15]

[32] LA FAVE (4th ed. West Group 2000), *supra* note 16 [Reproduced in accompanying notebook at Tab 12]

countries have used a broader approach, relying on judicial interpretation.[33] However, it remains the concern of both civil and common law countries that "collective action toward an antisocial end involves a greater risk than individual action toward the same end."[34]

The idea is that collective activity makes it more likely that crime will succeed because sheer numbers allow for more efficient division of labor; all co-conspirators support and encourage one another; the type and ability of harm increases because what one person cannot accomplish, several can.[35] The view that collective criminality is worse than individual criminality is the basis for making the agreement the focus of conspiracy, thereby enabling law enforcement officials the opportunity of early detection and prevention.[36]

In the United States, conspiracy is a crime. In the international setting, conspiracy has generally been regarded as a theory of liability. Therefore, internationally, the use of conspiracy is more limited. However, conspiracy, or crimes resembling conspiracy have been established in both the international system as well as in countries outside the United States. Furthermore, the elements of conspiracy are the same as the elements of other crimes tried in the Military Tribunals.

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[33] DAVID, 25 Vand. J. Transnat'l L. 951 (1993), *supra* note 20 at 959 [Reproduced in accompanying notebook at Tab 19]

[34] CRIMINAL CONSPIRACY, 72 Harv. L. Rev. 920 (1959), *supra* note 31 [Reproduced in accompanying notebook at Tab 15]

[35] *Id.*

[36] *See* DAVID, 25 Vand. J. Transnat'l L. 951 (1993), *supra* note 20 at 959 [Reproduced in accompanying notebook at Tab 19]; s*ee also* CONSPIRACY LAW, 72 Harv. L. Rev. 920 (1959), *supra* note 31 [Reproduced in accompanying notebook at Tab 15] (This law review also noted that conspiracies are not limited to the particular instance. That is to say that one conspiracy leads to another conspiracy, making it a continuous act. So, this further buttresses the argument that the focus of conspiracy should be on the agreement because that allows prevention of crime.) *United States v. Braverman*, 317 U.S. 49 (1942) [Reproduced in accompanying notebook at Tab 46], (holds the opposite view regarding continuous conspiracy, saying that a single agreement does not become several conspiracies because it continues over a period of time.)

IV. The Use of Conspiracy and Conspiracy like Theories Worldwide

A. The crime of "conspiracy to commit crimes of aggression" was established at Nuremberg.

In order to effectively prosecute the individuals of the Nazi regime for their horrific deeds, the United States proposed that Article 6 of the Nuremberg Charter[37] include conspiracy to commit any of the crimes enumerated therein. However, this proposal was met with resistance.[38] It was agreed that conspiracy to commit the crime of aggression was a separate offense, however conspiracy to commit war crimes or crimes against humanity was not.[39] It should be noted, however, that according to the last paragraph of Article 6 of the Nuremberg Charter, the use of the word "conspiracy" suggests complicity to commit war crimes or crimes against humanity, thereby making conspiracy a theory of liability instead of a technical offense.[40]

One might argue that including conspiracy in the Nuremberg Charter was a great mistake, as the decision was among the most heavily criticized aspects of the Nuremberg trials. One member of the defense counsel argued that conspiracy could not apply as no agreement existed because (a) when the members of the Nazi party accused of conspiracy joined the regime, they could not have known the criminal nature of the acts to be taken in the future; and (b) there is no

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[37] THE CHARTER AND JUDGMENT OF THE NUREMBERG TRIBUNAL: HISTORY AND ANALYSIS (United Nations, New York, 1949) (hereinafter "NUREMBERG CHARTER") [Reproduced in accompanying notebook at Tab 25]

[38] VIRGINIA MORRIS AND MICHAEL P. SHARF, AN INSIDER'S GUIDE TO THE INTERNATIONAL CRIMINAL TRIBUNAL FOR THE FORMER YUGOSLAVIA (New York, Transnational Publishers, 1995) (hereinafter "MORRIS & SCHARF ICTY") [Reproduced in accompanying notebook at Tab 11]; *see also* HOWARD S. LEVIE, THE ICTY STATUTE FOR THE FORMER YUGOSLAVIA: A COMPARISON WITH THE PAST AND A LOOK TO THE FUTURE, 21 Syracuse J. of Int'l L. & Com.1 (1995) [Reproduced in accompanying notebook at Tab 17] (This article offers a general discussion of the evolution of the Military Tribunals, noting that the crime of conspiracy concerned civil law countries.)

[39] UNITED NATIONS WAR CRIMES COMMISSION LAW REPORTS OF TRIALS OF WAR CRIMINALS, VOLUME XV (London, His Majesty's Stationary Office, 1949) (hereinafter "U.N. LAW REPORTS") [Reproduced in accompanying notebook at Tab 9]

[40] NUREMBERG CHARTER (United Nations, New York, 1949), *supra* note 37 at 73 [Reproduced in accompanying notebook at Tab 25]

such thing as voluntary agreement in a dictatorship.[41] With respect to this argument, the Tribunal said that a Nazi member would have known of the numerous murders that occurred; continuous assistance of this illegality constituted knowledge and commission.[42] Other defense counsel argued that this charge of conspiracy criminalized actions *ex post facto* and was therefore illegal.[43] The *ex post facto* argument bears some merit, as the concept of conspiracy was foreign to Germany at the time, and retroactive application of law would never be permitted in an American court.[44] However, the Tribunal was not content with acquitting Nazi members of the ghastly crimes they committed. The court relied on the Kellogg-Briand Pact of 1939, wherein 63 nations, Germany included, declared that war was not the solution to international controversies, and in so doing renounced non-pacific means of conflict resolution, including aggressive war.[45]

It can be inferred, from the defense criticisms and the prosecution's retorts that the elements of "conspiracy to commit war of aggression" are: (a) knowledge of the criminal purpose of the organization; (b) voluntary association with the organization despite having knowledge; (c) acts or omissions in furtherance of the common criminal purpose.[46] Thus, the

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[41] *See* NAZI CONSPIRACY AND AGGRESSION, OPINION AND JUDGMENT Vol. 1, Office of the United States Chief of Counsel for Prosecution of Axis Criminality at 40 (hereinafter "NAZI CONSPIRACY") [Reproduced in accompanying notebook at Tab 6]

[42] NAZI CONSPIRACY, *supra* note 41 [Reproduced in accompanying notebook at Tab 6]

[43] NAZI CONSPIRACY, *supra* note 41 [Reproduced in accompanying notebook at Tab 6]; *see also* SHELDON GLUECK, THE NUREMBERG TRIAL AND AGGRESSIVE WAR (New York, Alfred A. Knopf, 1946) (hereinafter "GLUECK") [Reproduced in accompanying notebook at Tab 8]

[44] MICHAEL P. SCHARF, SLOBODAN MILOSEVIC ON TRIAL (Continuum New York 2002) (hereinafter "SCHARF-MILOSEVIC") [Reproduced in accompanying notebook at Tab 4]

[45] NUREMBERG CHARTER (United Nations, New York, 1949), *supra* note 41 at 43-46 [Reproduced in accompanying notebook at Tab 25]

[46] GLUECK (New York, Alfred A. Knopf, 1946), *supra* note 43 [Reproduced in accompanying notebook at Tab 8]

Tribunal established that conspiracy could be triable as a military crime. Though the Nuremberg application of conspiracy (as a theory of liability) was different from the U.S. application (where conspiracy is a crime in itself), conspiracy had been established in the international setting, by a prominent military tribunal.

B. Other post WWII military tribunals recognized conspiracy to commit war crimes.

Despite the Nuremberg Tribunal's resistance to broaden conspiracy to include war crimes and crimes against humanity, several French and British military tribunals[47] found that conspiracy to commit a war crime was triable by military commission. Based on the French *Code Penal*, which states that any undertaking by an association formed to commit crimes against persons or property is a crime against public peace,[48] the French Military Tribunal at Marseilles found Henri Georges Stadelhofer guilty of conspiracy.[49] Albert Raskin was similarly found guilty of conspiracy by a French Military Tribunal at Lyon.[50]

In the British Military Court at Almelo, Holland, Otto Sandrock and three others were charged with violating the laws and usages of war when they killed Pilot Officer Gerald Hood (a British prisoner of war) and Bote van der Wal (a Dutch civilian).[51] Although all four members

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[47] These cases were discussed in *The Prosecutor v. Dusko Tadic*, Case No. IT-94-1-A, Judgment, 15, July, 1999 [Reproduced in accompanying notebook at Tab 39]

[48] U.N. LAW REPORTS (London, His Majesty's Stationary Office, 1949), *supra* note 39 [Reproduced in accompanying notebook at Tab 9]

[49] *Id.*

[50] *Id.*

[51] THE ALMELO TRIAL: *Trial of Otto Sandrock and three Others*, UNITED NATIONS WAR CRIMES COMMISSION LAW REPORTS OF TRIALS OF WAR CRIMINALS, VOLUME I (London, His Majesty's Stationary Office, 1949) (hereinafter "THE ALMELO TRIAL") [Reproduced in accompanying notebook at Tab 31] (Non-commissioned German officers executed both the British Pilot Officer and Bote van der Wal, whose house the officer was hiding out in. For each execution, one officer stood guard by the car to prevent people from going near the area while the execution took place, one gave the order and the other officer fired the shot.)

of the group did not commit the murders, the Judge Advocate held that all three knew that they were going into the woods with the purpose of killing the officer and each member assisted in his own way.[52] The same sequence of acts was repeated several days later when killing the Dutch civilian. Even though there was indication that the accused were acting according to Sandrock's orders, there is nothing that suggests that they were unaware of the proper laws and usages of war.[53] Thus, the British Tribunal found that the accused members who did not fire the guns were equally guilty because they were aware of the unlawful common enterprise and they each contributed by acting accordingly.[54]

In *Kurt Goebell et al*.,[55] a United States Military Court held that the senior officers, some policemen, the Mayor of Borkam, some privates, a civilian, and the leader of the Reich Labour Corps were all guilty of war crimes since they "willfully, deliberately and wrongfully encouraged, aided and abetted, and participated in the assaults."[56] The Prosecutor in this case put forth the idea of common purpose by describing the accused as "cogs in the wheel of common design, all equally important, each cog doing the part assigned to it. And the wheel of wholesale murder could not turn without all the cogs."[57]

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[52] THE ALMELO TRIAL (London, His Majesty's Stationary Office, 1949), *supra* note 51 [Reproduced in accompanying notebook at Tab 31]

[53] *Id.*

[54] *Id.*

[55] In August 1944, a United States Flying Fortress was forced to land on the German island of Borkum. The seven crew members were taken as prisoners of war and paraded through the streets of Borkum, where members of the Reich Labor Corps. struck them with shovels, and then the Mayor instructed civilians kill these prisoners "like dogs." Eventually, all the prisoners were shot by German soldiers.

[56] *The Prosecutor v. Tadic*, Case No.: IT-94-1-T, Judgment in Appeals Chamber, 15 July 1999 (hereinafter "*Tadic* Judgment") at ¶210 [Reproduced in accompanying notebook at Tab 39]

[57] *Tadic* Judgment, *supra* note 56 at ¶ 210 [Reproduced in accompanying notebook at Tab 39]

Similarly, in the *Essen Lynching* case,[58] a German Army Captain gave a German private orders to take three allied prisoners of war to a *Luftwaffe* unit for interrogation. The captain told the private not to interfere if the crowd began to molest or attack the airman. The captain also suggested that these airmen should be shot.[59] All of these orders were given to the private within earshot of the crowd that gathered near the barracks. The men were finally killed by being thrown off a bridge by the mob. The prosecutor argued that the acts leading up to the deaths were inseparable, and that even though the captain did not take any part in the physical acts that killed the airmen, he was as responsible as anyone else.[60]

The elements of conspiracy to commit war crimes, as established by these French and British Tribunals are (a) knowledge of criminal purpose, and (b) an act in furtherance of the criminal purpose. These cases suggest that if there is knowledge of the criminal purpose and individuals act to further it, there is an implied agreement between them. Again, these cases use conspiracy as a theory of liability, rather than as a crime itself. Therefore, unlike the U.S. system, the focus is not on the agreement. However, as can be inferred by the statements of the Judges and Judge advocates, the rationale for conspiracy as used in these post-Nuremberg Tribunals is the same as the rationale in U.S. conspiracy law- to punish individuals who collectively acted to commit crimes.

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[58] *Cited in Tadic* Judgment, *supra* note 56 [Reproduced in accompanying notebook at Tab 39]

[59] THE ESSEN LYNCHING CASE *The Trial of Erich Heyer and Six Others*, British Military Court for the Trial of War Criminals, UNITED NATIONS WAR CRIMES COMMISSION LAW REPORTS OF TRIALS OF WAR CRIMINALS, VOLUME I, 88 (London, His Majesty's Stationary Office, 1949) (hereinafter "THE ESSEN LYNCHING CASE") [Reproduced in accompanying notebook at Tab 33]

[60] THE ESSEN LYNCHING CASE (London, His Majesty's Stationary Office, 1949), *supra* note 59 [Reproduced in accompanying notebook at Tab 33]

C. Conspiracy to Commit Genocide as defined by the International Criminal Tribunal for Rwanda ("ICTR").

As stated above, the decision to include conspiracy as a war crime at Nuremberg was subject to much criticism after the conclusion of the trial. Perhaps, in an effort to avoid such criticism, the drafters of the ICTY and the ICTR statutes declined to include conspiracy to commit an offense within the Tribunals' jurisdiction, except for conspiracy to commit genocide.[61]

Unlike the Nuremberg Tribunal that recognized individual criminal responsibility through membership in a criminal organization,[62] the drafters of the ICTY and ICTR statutes chose to apply conspiracy to the crime of genocide.[63] Thus, for the first time in an international Tribunal, conspiracy was recognized as a crime itself. Furthermore, the ICTY and ICTR made it possible for persons to be convicted of both conspiracy to commit genocide as well as the crime of genocide.[64]

In *Prosecutor v. Musema* the ICTR Trial Chamber noted that the serious nature of genocide justifies criminalization of the agreement to commit the underlying offense, instead of

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[61] STATUTE OF THE INTERNATIONAL TRIBUNAL FOR THE PROSECUTION OF PERSONS RESPONSIBLE FOR SERIOUS VIOLATIONS OF INTERNATIONAL HUMANITARIAN LAW COMMITTED IN THE TERRITORY OF THE FORMER YUGOSLAVIA SINCE 1991, U.N. Doc. S/25704 at 36, annex (1993) and S/25704/Add.1 (1993), adopted by Security Council on 25 May 1993, U.N. Doc S/RES/827 (1993) (hereinafter "ICTY Statute") [Reproduced in accompanying notebook at Tab 30]; (In Article 4(3)(b) of the ICTY statute and Article (2)(3)(b) of the ICTR statute specifically list conspiracy to commit genocide a crime triable by military commission.); *see The Prosecutor v. Alfred Musema*, Case No. ICTR-96-13-T, Judgment in Trial Chamber, 27, January, 2000, at ¶ 185 [Reproduced in accompanying notebook at Tab 38] (The Trial Chamber, citing the summary records of the Sixth Committee of the General Assembly, 21 September- 10 December 1948, noted that "the Genocide Convention suggest[s] that the rationale for including such as offense was to ensure, in view of the serious nature of the crime of genocide, that the mere agreement to commit genocide should be punishable even if no preparatory act has taken place.")

[62] NUREMBERG CHARTER (United Nations, New York, 1949), *supra* note 41 [Reproduced in accompanying notebook at Tab 25]

[63] MORRIS & SCHARF ICTR (Transnational Publishers, 1998), *supra* note 15 [Reproduced in accompanying notebook at Tab 10]

[64] *Id.*

committing the actual offense.[65] More importantly, the Chamber distinguished between the Civil Law and Common Law theories of conspiracy. In Civil Law, simple conspiracy exists when two or more persons have a concerted agreement to act, while second level conspiracy exists when the concerted agreement is followed by preparatory acts.[66] The Common Law crime of conspiracy is defined as an agreement, between two or more persons, to further a common, criminal objective.[67] The Civil Law definition of simple conspiracy is quite narrow in scope, making it more logical to use the Civil Law definition of second level conspiracy for more serious crimes.[68] The elements of conspiracy as defined by the Department of Defense are the same- agreement followed by preparatory acts.[69]

Despite its restricted use, conspiracy to commit genocide, like other forms of conspiracy, requires an agreement to commit genocidal acts.[70] The ICTR's use of conspiracy is similar to

[65] *The Prosecutor v. Alfred Musema*, Case No. ICTR-96-13-T, Judgment in Trial Chamber, 27, January, 2000, (hereinafter "*Musema* Judgment") at ¶ ¶ 185-198 [Reproduced in accompanying notebook at Tab 38]

[66] *Musema* Judgement, *supra* note 65 at ¶ 189 [Reproduced in accompanying notebook at Tab 38]

[67] *Id*. at ¶ 190.

[68] *Musema* Judgement, *supra* note 65 [Reproduced in accompanying notebook at Tab 38]

[69] Rules and Regulations of the Department of Defense CRIMES AND ELEMENTS OF TRIALS BY MILITARY COMMISSION, 68 Fed. Reg. 39381 (2003), *supra* note 8 [Reproduced in accompanying notebook at Tab 53]

[70] Statute of the International Tribunal for the Prosecution of Persons Responsible for Genocide and Other Serious Violations of International Humanitarian Law Committed in the Territory of Rwanda and Rwandan Citizens responsible for genocide and other such violations committed in the territory of neighbouring States between 1 January 1994 and 31 December 1994, adopted by Security Council on 8 November 1994, U.N. Doc. S/RES/955 (1994) (hereinafter "ICTR Statute") at Article (2) [Reproduced in accompanying notebook at Tab 29]; *See also* MORRIS & SCHARF ICTR (Transnational Publishers, 1998), *supra* note 15 [Reproduced in accompanying notebook at Tab 10] (The crime consists of two essential elements: (1) the requisite intent of mental state, and (2) the prohibited act or omission. The mental state for genocide is the "intent to destroy, in whole or in part, a national, ethnical, racial or religious group.")

the use of conspiracy in the United States.[71] More importantly, the ICTY and ICTR statutes' definition of conspiracy recognized conspiracy as a crime in itself, not just a theory of liability.

D. The ICTY Doctrine of Joint Criminal Enterprise[72]

Joint Criminal Enterprise was first established by the ICTY in *Prosecutor v. Tadic*.[73] In general, it exists when two or more people agree to carry out a crime, and participate in physically committing the crime by encouraging, aiding, abetting or assisting another to commit the crime.[74] In formulating the doctrine of joint criminal enterprise, the Appeals Chamber in *Tadic* predominantly relied on jurisprudence from post-Nuremberg Control Council Law No. 10 trials, as well as a variety of other European Military Tribunals.[75]

In *Tadic* the Appeals Chamber was to determine whether or not one person is criminally responsible for another's acts if both persons were acting to further a common plan.[76] The Appeals Chamber made a basic assumption that criminal responsibility is the principle of

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[71] MORRIS & SCHARF ICTR (Transnational Publishers, 1998), *supra* note 63 [Reproduced in accompanying notebook at Tab 10]

[72] *See generally* 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, http://law.case.edu/war-crimes-research-portal/memoranda/Cknezevic.pdf [Reproduced in accompanying notebook at Tab 13]

[73] *See generally Tadic* Judgment, *supra* note 56 [Reproduced in accompanying notebook at Tab 39]

[74] SCHARF- MILOSEVIC, (Continuum New York 2002), *supra* note 44 [Reproduced in accompanying notebook at Tab 4]

[75] *See Prosecutor v. Mulitinovic et al*., Case No: IT-99-37-AR72, Decision on Dragoljub Ojdanic's Motion Challenging Jurisdiction- Joint Criminal Enterprise 21 May 2003 (hereinafter "*Ojdanic* Judgment") [Reproduced in accompanying notebook at Tab 43] (Despite the Tribunal's establishment of substantial case law from World War II in the *Tadic* Judgment, Ojdanic argued that joint criminal enterprise was not in the jurisdiction of the ICTY. The Appeals Chamber disagreed and said that a crime or form of liability does not need to be explicitly stated in the statute to come under the jurisdiction of the Tribunal, although the Chamber argued that joint criminal enterprise was included in the "non-exhaustive nature" of Article 7(1).)

[76] *Tadic* Judgment, *supra* note 56 at ¶ 185 [Reproduced in accompanying notebook at Tab 39]

personal culpability in both national and international legal systems.[77] The purpose of this doctrine was not only to punish those who acted criminally, even though they may not have materially performed the criminal act, but to hold them liable without "understate[ing] their degree of criminal responsibility."[78] This idea is embodied in the Secretary General's report, which states: "The Secretary-general believes that *all* persons who *participate* in the planning, preparation or execution of serious violations of international humanitarian law in the former Yugoslavia are individually responsible for such violations."[79] This statement is very similar to the "cogs of a wheel" concept discussed in the *Borkum Island* Case.[80] Embodying these ideas, the Appeals Chamber divided the doctrine of joint criminal enterprise into three categories. Although the Chamber distinguished between mental states for each category, the focus remained on the agreement and participation of the common criminal purpose or design.

i. Category One: All co-defendants possess the same criminal intention.

In this category of joint criminal enterprise, the co-defendants must participate in at least one aspect of the common design voluntarily, with intent to commit the crime.[81] The Chamber

[77] *Tadic* Judgment, *supra* note 56 at ¶ 189 [Reproduced in accompanying notebook at Tab 39]; *see also* U.N.S.C. Res. 827, adopted May 25, 1993 [Reproduced in accompanying notebook at Tab 30] (Article 7(1) says, " A person who planned, instigated, ordered committed or otherwise aided and abetted in the planning, preparation or execution of a crime referred to in articles 2 to 5 of the present Statute, shall be individually responsible for the crime." In addition, the ICTY statute lists grave breaches of the Geneva Conventions which recognize conspiracy, incitement, attempt and complicity for crimes of genocide. *See* Art. 4(3))

[78] *Tadic* Judgement, *supra* note 56 [Reproduced in accompanying notebook at Tab 39]

[79] *Tadic* Judgment, *supra* note 56 at ¶ 190, *citing* Report of the Secretary-General of Security Council Resolution 808 (1993), U.N. Doc. S/25704, 3 May 1993 (emphasis added) at ¶ 2 [Reproduced in accompanying notebook at Tab 39]

[80] See note 57 above

[81] *Tadic* Judgment, *supra* note 56 at ¶ 196 [Reproduced in accompanying notebook at Tab 39]

made reference to the *Almelo Trial* discussed above. The Appeals Chamber then discussed the *Einsatzgruppen* case, in which the tribunal stated:

> the elementary principle must be borne in mind that neither under Control Council Law No. 10 nor under any known system of criminal law is guilt for murder confined to the man who pulls the trigger or buries the corpse. […] Thus, not only are principles guilty but also accessories, those who take a consenting part in the commission of crime or are connected with plans or enterprises involved in its commission, those who order or abet crime, and those who belong to an organization or group engaged in the commission of crime. These provisions embody non harsh or novel principles of criminal responsibility […][82]

This statement is a perfect example of the idea that the international legal system is not willing to leave a person who engages in group criminality unpunished. A person who has knowledge of the crime and willingly takes part in promoting the crime is just as guilty as the person who committed the substantive offense.

ii. Category Two: "Concentration Camp" Cases[83]

As was the case in *Tadic*, this group of cases does not apply to the facts of the present case because the present facts do not involve an organized system designed to mistreat individuals. However, it is important to note that the requisite elements needed to find someone guilty of category two offenses include awareness.

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[82] *Tadic* Judgment, *supra* note 56 at ¶ 200 [Reproduced in accompanying notebook at Tab 39], *citing The United States v. Otto Ohlendorf et al*, TRIALS OF WAR CRIMINALS BEFORE THE NUREMBERG MILITARY TRIBUNALS UNDER CONTROL COUNCIL LAW NO. 10, VOLUME IV 3(U.S. Gov. Printing Office, Washington, 1951)

[83] *See Prosecutor v. Kvocka et al.*, Case No: IT-98-30/1, Judgment 2 November 2001 (hereinafter "*Kvocka* Judgment") [Reproduced in accompanying notebook at Tab 42]; *see also* KELLY D. ASKIN, STEPHAN A. REISENFELD SYMPOSIUM 2002: PROSECUTING WARTIME RAPE AND OTHER GENDER- RELATED CRIMES UNDER INTERNATIONAL LAW, 21 Berkeley J. Int'l L. 288 (2003) [Reproduced in accompanying notebook at Tab 18]; (Kvocka, Prcac, Kos, Zigic and Radic were all charged with persecuting detainees of the Omarska concentration camp by committing abuses such as rape, torture, murder and sexual assault. The Trial Chamber says that "criminal liability will attach to staff members of the concentration camps who have knowledge of the crimes being committed there, unless their role is not 'administrative' or 'advisory' or 'interwoven with illegality' or, unless despite having a significant status, their actual contributions to the enterprise was insignificant.")

The second category applies the notion of common purpose or design to kill or mistreat groups by means of organized systems.[84] The *mens rea* of this offense consists of (a) awareness of the existence and the nature of the entity designed to kill and mistreat detainees; and (b) the accused's intent to further the common criminal design of the entity. The *actus reus* is simply active participation (including encouraging, aiding and abetting) in the enforcement of the system.[85]

Even though the Chamber added awareness, the focus remained on the voluntary agreement and participation in common criminal conduct.

iii. Category Three: Pursuing a single course of conduct with natural and foreseeable consequences.

Under this category, the accused must have intent to participate in a common criminal purpose, but there appears to be an equivalent of the U.S. strict liability standard for unplanned actions that occur as a natural and foreseeable consequence of the furthering of the common purpose.[86] It is worthy to note that this category of joint criminal enterprise is essentially the same as the Felony Murder Doctrine in the Untied States, which says that "a felon and her

[84] *Tadic* Judgment, *supra* note 56 at ¶ 202 [Reproduced in accompanying notebook at Tab 39]

[85] *Tadic* Judgment, *supra* note 56 at ¶ 202 [Reproduced in accompanying notebook at Tab 39], *citing Dachau Concentration Camp Cases*, LAW REPORTS VOLUME XI 14 [Reproduced in accompanying notebook at Tab 32]

[86] *Prosecutor v. Krstic*, Case No: IT-98-33, Judgment 2 August 2001 (hereinafter "*Krstic* Judgment") [Reproduced in accompanying notebook at Tab 41] (Over the period of several days in July 1995, Bosnian Muslim men, women and children were forcibly separated from each other. The Trial Chamber found Krstic guilty of being a member of a joint criminal enterprise for two related incidents. The purpose of the first joint criminal enterprise was to forcibly transfer Bosnian Muslim women, children and elderly from Potocari, during which many murders, beatings and rapes were committed. The purpose of the second joint criminal enterprise was to remove Bosnian Muslim men from Srebrenica, in the commission of which many of the men were killed. The Chamber found that Krstic was aware that these murders, rapes and beatings were likely to happen while achieving their genocidal purpose.)

accomplices [can be held] liable for murder when a killing is committed in 'either the perpetration or attempt to perpetrate a felony.'"[87]

The Appeals Chamber described this category of cases in terms of "ethnic cleansing," where people were forced to leave their homes, most likely against their will. Clearly, the group's common purpose was to "cleanse" the community of what they believed to be impure. The common purpose was not to commit murder. However, while attaining this purpose, it was foreseeable that people would be murdered, even though murder was not the objective of the common design.[88] In its analysis, the Appeals Chamber drew upon the *Essen Lynching* and *Borkum Island* cases discussed above.[89]

The Appeals Chamber, whose President, Judge Cassese was from Italy, then looked to certain Italian precedent, which discussed the material and psychological "causal nexus" between the common object and the different actions.[90] The *Tadic* Appeals Chamber quoted the Italian Court in the *D'Ottavio et al.* case, which stated:

> "[i]ndeed the responsibility of the participant […] is not founded on the notion of objective responsibility […] but on the fundamental principle of the concurrence of interdependent causes […]; by virtue of this principle all the participants are accountable for the crime both where they directly cause it and where they indirectly cause it, in keeping with the well-known canon *causa causae est causa causati*."[91]

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[87] KATE BLOCH & KEVIN MCMUNIGAL, CRIMINAL LAW: A CONTEMPORARY APPROACH, (unpublished 2002) [Reproduced in accompanying notebook at Tab 3]

[88] *Tadic* Judgment, *supra* note 56 at ¶ 204 [Reproduced in accompanying notebook at Tab 39]

[89] *Tadic* Judgment, *supra* note 56 at ¶ 206 [Reproduced in accompanying notebook at Tab 39]; *See* ESSEN LYNCHING CASE, *supra* note 59 [Reproduced in accompanying notebook at Tab 33] (In the *Essen Lynching* case, a German captain ordered a soldier to take three British prisoners of war for interrogation and told the soldier not to interfere with German civilian attacks on the prisoners.)

[90] *Tadic* Judgment, *supra* note 56 at ¶ 215 [Reproduced in accompanying notebook at Tab 39]

[91] *Tadic* Judgment, *supra* note 56 at ¶ 215 [Reproduced in accompanying notebook at Tab 39] *citing D'Ottavio et al* (unpublished) Judgment, on file with International Tribunal's Library

In another case, an Italian Court specified that coincidence cannot be confused with a causal relationship, for unless the unintended act is a "logical development" of the objective offense, a mere incidental relationship is created.[92]

In sum, the *actus reus* elements for all three categories are the same in that they all require (a) a plurality of persons; with a (b) a common plan, design or purpose (though the plan does not have to have been previously devised); that (c) the accused participated in to further that common purpose.[93]

However, the three categories differ with regards to the *mens rea*.[94] The first category requires criminal intent (shared by all co-perpetrators) to commit a crime. The second category, or "concentration camp" cases require (a) personal knowledge of the nature of the system of ill-treatment and (b) intent to further the common design of the system, thus expanding on the mental state needed for category one. The third category requires intent to participate in furthering the common design of the group, however a member can be additionally liable if an unplanned act occurs and it was (a) foreseeable that the act could happen in furtherance of the common purpose; and (b) that the accused willingly took that risk.[95]

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[92] *Tadic* Judgment, *supra* note 56 at ¶ 218 [Reproduced in accompanying notebook at Tab 39] *citing* Court of Cassation, *Manelli* case, GIUSTIZIA PENALE, PART II, COL. 906, NO. 599, 20 July 1949

[93] *Tadic* Judgment, *supra* note 56 at ¶ 227 [Reproduced in accompanying notebook at Tab 39]

[94] *See Prosecutor v. Krnojelac*, Case No: IT-97-25-T, Judgment 15 March 2002 (hereinafter "*Krnojelac* Judgment") [Reproduced in accompanying notebook at Tab 40] (In this case, the Tribunal did not find Krnojelac guilty of participating in a joint criminal enterprise. It was found that the defendant did not have the shared intent or the shared agreement to participate in furthering a common purpose.)

[95] *Tadic* Judgment, *supra* note 56 at ¶ 228 [Reproduced in accompanying notebook at Tab 39]

E. Conspiracy, or Something Like It[96]

Conspiracy, accessorial liability, and other such offenses are criminal actions because in all of the above, members gather together and somehow aid in the perpetration of a criminal offense. While it is true that there are differences in the application of these offenses, the underlying goal that is common to all these offenses is to punish criminal thoughts and actions (group criminality). The point is that many countries include crimes of conspiracy, common purpose or sometimes both, suggesting that even countries outside of the U.S. recognize the importance of using these offenses to further criminal justice.

i. Canada

The law of conspiracy in Canada has been derived primarily from English Law.[97] Accordingly, the *actus reus* for conspiracy is agreement, while the *mens rea* is the intent to further the common purpose (with an understood intent to agree).[98] Furthermore, the rationale in Canada, like in the Untied States, is to prevent crimes and to attack against group danger.[99] Instead of re-discussing what was already said about conspiracy in the United States, it is better to examine the law in other countries and to note that conspiracy is just as useful a tool in countries outside the U.S.

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[96] *See generally*, COMPARATIVE JURISPRUDENCE ON PARTICIPATION OFFENSES: JOINT CRIMINAL ENTERPRISE, AIDING, AND ABETTING, http://law.case.edu/war-crimes-research-portal/memoranda/Compjuris.pdf (November 2002) [Reproduced in accompanying notebook at Tab 14]

[97] MATTHEW R. GOODE, CRIMINAL CONSPIRACY IN CANADA (Carswell Co. Limited, 1975) (hereinafter "GOODE") [Reproduced in accompanying notebook at Tab 5]

[98] *Id.*

[99] *Id.*

ii. South Africa

In South Africa, the crime of conspiracy is punishable according to the Riotous Assembly Act 17 of 1956 §18(2)(a),[100] which states that a person, who conspires with another person to aid in the commission of or to commit any offense, is guilty of conspiracy.[101] This statute says that "it is impossible to come to an agreement with another person without intending to do so." This is the same question of mental state discussed earlier.[102] A person is guilty of conspiracy not only if he agrees to commit an offence as a perpetrator or co-perpetrator (section 5.2)[103] but also if he "agrees to promote or facilitate its commission […]"[104] According to the code, conspiracy is a preliminary offense.

Interestingly, South Africa also has "common purpose", a theory of liability for parties to an offense. Criminal Code § 5.3 states that two or more people, who act together in furtherance of a common purpose, are guilty of the common object even if "prior conspiracy" (agreement) is not shown (express).[105] In addition, a person has still acted under the common purpose and can be punished for an unplanned act occurring in furtherance of the criminal objective.[106]

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[100] The Riotous Assembly Act was modeled after the American Model Penal Code §5.03.

[101] C.R. SNYMAN, UNIVERSITY OF SOUTH AFRICA, A DRAFT CRIMINAL CODE FOR SOUTH AFRICA (1995) 83 [Reproduced in accompanying notebook at Tab 28]

[102] *See* footnote 16 above

[103] Section 5.2 refers to the section of the South African code that defines perpetrators.

[104] C.R. SNYMAN, UNIVERSITY OF SOUTH AFRICA, A DRAFT CRIMINAL CODE FOR SOUTH AFRICA (1995) 83 [Reproduced in accompanying notebook at Tab 28]

[105] *Id.*

[106] *Id.*, Criminal Code § 5.3(6) [Reproduced in accompanying notebook at Tab 28]

It seems that the difference between these theories of culpability is that conspiracy focuses on the preliminary actions, while common purpose focuses on the objective of the common design. Thus, they can be deemed to be two halves of the same offense.

iii. Scotland

Conspiracy law in Scotland is comparable to conspiracy law in the United States. According to Scottish criminal law, conspiracy occurs when two or more people agree to further or achieve a criminal purpose. A person can be found guilty of conspiracy even when the criminal purpose is not achieved, because the crime is the agreement.[107] The fact that in most cases persons commit an overt act that manifest the agreement[108] is consistent with the South African notion that there is no way to agree to a crime without intending to commit offenses in furtherance of it.

In specific, "art and part" crimes echo the doctrine of joint criminal enterprise as established by the ICTY. If persons have conspired together to commit something through criminal means, they may be charged as art and part of the crimes without being charged with conspiracy.[109] Thus, art and part guilt punishes group criminality by charging the accused as being part of the underlying offense, instead of being found guilty of conspiracy. The elements of the crime do not change even though the application does. Nonetheless, conspiracy is still recognized as a major crime in Scotland and sometimes courts charge individuals with

[107] SIR GERALD H. GORDON, THE CRIMINAL LAW OF SCOTLAND VOLUME I (Scottish Universities Law Institute Ltd, 2000) (hereinafter "GORDON") [Reproduced in accompanying notebook at Tab 2]

[108] *Id.*

[109] *H.M. Advocate v. Al Megrahi*, (2000) S.C.C.R. 177, at 181D to 182E [Reproduced in accompanying notebook at Tab 35]

conspiracy instead of art and part guilt.[110] This mixed practice can most likely be attributed to the fact that Scottish criminal law is not codified; as a result, some courts believe that conspiracy is simply an aggravation of the offense, while others believe that intent to commit the crime is the same as actually committing the crime.[111]

iv. Australia

The Australian concept of common purpose is currently used to find persons guilty of criminal offenses, even if he did not commit the substantive act. The elements of this theory of liability are the same as joint criminal enterprise. In fact, the terms common purpose, joint criminal enterprise, common design and concert are all interchangeable terms.[112]

Australia's Criminal Code (Q) § 7(1)(b) states that every person who acts (or omits to act) for the purpose of aiding another person to commit a criminal offense is guilty of that criminal offense themselves.[113] Common purpose is defined when two or more persons reach an understanding or agreement[114] that they will commit a crime. If any one of the agreeing

[110] *H.M. Advocate v. Al Megrahi*, (2000) S.C.C.R. 177, at 181D to 182E, *supra* note 109 [Reproduced in accompanying notebook at Tab 35]; *see also* GORDON (Scottish Universities Law Institute Ltd, 2000), *supra* note 107 [Reproduced in accompanying notebook at Tab 2]

[111] GORDON (Scottish Universities Law Institute Ltd, 2000), *supra* note 107 at 230 [Reproduced in accompanying notebook at Tab 2]

[112] *McAuliffe v. The Queen*, [1995] 183 CLR 108 [Reproduced in accompanying notebook at Tab 36]

[113] *Gilbert v. The Queen*, [2000] HCA 15 [Reproduced in accompanying notebook at Tab 34] (Gilbert (defendant), his brother and another man were charged with murder of a man who died as the result of a vicious assault. These three men drove the victim to a secluded place with the purpose of assaulting him. The defendant argued that he was wrongfully charged with murder because all he knew of was his brother's intent to assault the victim, not kill him. Although defendant's issue in appeal was that the trial court had erred by removing the possibility of manslaughter from the jury instructions, this case is an example of the use of the doctrine of common purpose in Australia and points to the section of the Australian Criminal Code that serves as a basis for the doctrine.)

[114] Like conspiracy in the United States, the agreement does not have to be express and may be inferred from the circumstances.

members commits an act that constitutes the intended crime, all parties are equally guilty.[115] This definition is the same as conspiracy (as defined by statutory law) in the United States.

V. Application Of This Established Law To Hamdan's Charge Of Conspiracy

The precedent set by these Military Tribunals and national courts shows that conspiracy and theories very similar to conspiracy not only have been established in international law; they have been expanded more and more over time in order to prosecute guilty individuals. The most expansive interpretation of a Tribunal statute was by the ICTY in their introduction of joint criminal enterprise.[116] While this expansive interpretation leaves a lot of room for abuse of discretion by prosecutors,[117] both joint criminal enterprise and conspiracy seem to serve the retributive and deterrent purposes of criminal punishment, especially crimes that involve such breaches of international law.[118] Before discussing the similarities between joint criminal enterprise and conspiracy, it will be useful to briefly look at command responsibility to understand why joint criminal enterprise was established.

In order to prosecute command officials and other persons in superior position, the Military tribunals have used the theory of command responsibility.[119] Under this theory, high-

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[115] *McAuliffe v. The Queen*, [1995] 183 CLR 108 *supra* note 112 [Reproduced in accompanying notebook at Tab 36]; *See also Regina v. Stewart* [1995] 3 All ER 159 [Reproduced in accompanying notebook at Tab 44]

[116] RICHARD P. BARRETT & LAURA E. LITTLE, LESSONS OF YUGOSLAV RAPE TRIALS: A ROLE FOR CONSPIRACY LAW IN INTERNATIONAL TRIBUNALS, 88 Minn. L. Rev. 30 (2003) (hereinafter "BARRETT") [Reproduced in accompanying notebook at Tab 23]

[117] LA FAVE (4th ed. West Group 2000), *supra* note 16 [Reproduced in accompanying notebook at Tab 12]

[118] WILLIAM A. SCHABAS, SYMPOSIUM: THE ICTY AT TEN: A CRITICAL ASSESSMENT OF THE MAJOR RULINGS OF THE INTERNATIONAL CRIMINAL TRIBUNAL OVER THE PAST DECADE: MENS REA AND THE INTERNATIONAL CRIMINAL TRIBUNAL FOR THE FORMER YUGOSLAVIA, 37 New Eng. L. Rev. 1015 (2003) (hereinafter "SCHABAS") [Reproduced in accompanying notebook at Tab 24]

[119] MIRJAN DAMASKA, THE SHADOW SIDE OF COMMAND RESPONSIBILITY, 49 Am. J. Comp. L. 455 (2001) (hereinafter "DAMASKA") [Reproduced in accompanying notebook at Tab 21]

ranking officials could be held liable for the offense committed by their soldiers or inferiors.[120] However, this type of liability is limited to situations where the officer was aware of the subordinates actions and failed to take precautions against it.[121]

Since command responsibility was limited to higher-up officials, it required the Tribunal to distinguish between superiors and subordinates. So, the ICTY used a broad interpretation of the ICTY Statute, Article 7 and created joint criminal enterprise.[122] This form of liability was used where command responsibility lacked.[123]

In theory, joint criminal enterprise and conspiracy are not much different. However, the two bases of criminality differ, mainly in their application. The Appeals Chamber in the *Ojdanic* Judgment distinguished joint criminal enterprise from conspiracy and stated:

> Whilst conspiracy requires a showing that several individuals have agreed to commit a certain crime or set of crimes, a joint criminal enterprise requires, in addition to such a showing, that the parties to that agreement took action in furtherance of that agreement. In other words, while mere agreement is sufficient in the case of conspiracy, the liability of a member of a joint criminal enterprise will depend on the commission of criminal acts in furtherance of that enterprise.[124]

This statement embodies the primary difference between joint criminal enterprise and conspiracy- the focus on the common purpose as opposed to the focus on the agreement. Both crimes require (a) a plurality of persons; (b) some form of participation (physically or mentally)

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[120] DAMASKA, 49 Am. J. Comp. L. 455 (2001), *supra* note 119 [Reproduced in accompanying notebook at Tab 21]

[121] *See* ICTY Statute, *supra* note 61 at Article 7(3) [Reproduced in accompanying notebook at Tab 30]

[122] BARRETT, 88 Minn. L. Rev. 30 (2003), *supra* note 116 [Reproduced in accompanying notebook at Tab 23]

[123] *Id.*; *see also* ICTY Statute, *supra* note 61 [Reproduced in accompanying notebook at Tab 30]

[124] *Ojdanic* Judgment, *supra* note 75 at ¶23 [Reproduced in accompanying notebook at Tab 43]

of the common objective; (c) the intent required to commit the underlying offense. The differing focus leads to different application, making joint criminal enterprise a theory of complicity-based responsibility, while conspiracy remains a crime in itself, thereby allowing direct responsibility without necessary proof of the underlying offense.[125]

However, it must be noted that the distinction that the Appeals Chamber in *Ojdanic* made does not apply to the present case. The elements of conspiracy applied to Hamdan are: (a) an agreement to commit or the joining of a criminal enterprise with a common purpose with the intent of committing one or more substantive offenses triable by military commission; (b) willfully joining the enterprise with knowledge of the purpose; and (c) committing an overt act to accomplish some objective of the agreement.[126] Conspiracy, as applied by this Military Tribunal, is no different from joint criminal enterprise. In fact, this definition is most similar to the third category of joint criminal enterprise, as stated above.

Notwithstanding their differences in application, joint criminal enterprise and conspiracy both require intent to act in pursuit of a common criminal objective. So, both crimes support the general principle of criminal law that a person is not guilty unless they have a "guilty mind."[127] "Criminal law does not, as a general rule, address accidental behaviour, nor is it interested in vicarious liability […]. Those who offend the criminal law are expected to intend the consequences of their acts."[128]

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[125] BARRETT, 88 Minn. L. Rev. 30 (2003), *supra* note 116 [Reproduced in accompanying notebook at Tab 23]

[126] Rules and Regulations of the Department of Defense CRIMES AND ELEMENTS OF TRIALS BY MILITARY COMMISSION, 68 Fed. Reg. 39381 (2003), *supra* note 8 [Reproduced in accompanying notebook at Tab 53]

[127] SCHABAS, 37 New Eng. L. Rev. 1015 (2003), *supra* note 118 [Reproduced in accompanying notebook at Tab 24]

[128] *Id.*

Joint criminal enterprise was intended to be a sort of "catch-all" mechanism used by the Appeals Chamber in *Tadic* in order to punish those individuals who were just as guilty as the individuals who physically committed the terrible offenses. Conspiracy aims to do the same. However, the word "conspiracy" causes pause in the international community, perhaps because of its general inexistence in the civil law countries.[129] Despite the overall trepidation of conspiracy, it has been used in prosecuting international crimes, as discussed above.[130]

Thus, the similarities between conspiracy and joint criminal enterprise validate the point that conspiracy is not a new concept in international law. It has been established, in fact, that conspiracy has been part of international law from the time of the post-WWII tribunals. Furthermore, conspiracy follows the precedent of broad interpretations of existing Tribunal statutes.

> "By focusing on agreement among parties and by taking on the status of an individual crime, conspiracy allows the prosecution to avoid the unnecessary and sometimes fatal focus on a crime committed by another perpetrator. […] Any concerns that this approach gives prosecutors undue license to pursue vicarious liability can be checked by requiring a clear showing of membership in the conspiratorial group as well as intent to enter into an agreement with a criminal purpose."[131]

The goal is to punish the "masterminds" of conspiracy as well as peripheral members, thereby satisfying the goals of attacking the dangers of group criminality.[132] As detailed above, joint criminal enterprise strives to do the same.

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[129] *See* note 38

[130] BARRETT, 88 Minn. L. Rev. 30 (2003), *supra* note 116 [Reproduced in accompanying notebook at Tab 23]

[131] BARRETT, 88 Minn. L. Rev. 30 (2003), *supra* note 116 [Reproduced in accompanying notebook at Tab 23]; *see also* DAMASKA, 49 Am. J. Comp. L. 455 (2001), *supra* note 119 [Reproduced in accompanying notebook at Tab 21]

[132] BARRETT, 88 Minn. L. Rev. 30 (2003), *supra* note 116 [Reproduced in accompanying notebook at Tab 23]

A basic understanding of criminal law illustrates the concepts of retribution and deterrence. Retribution seeks to punish a criminal for what he deserves by looking at his past actions and determining his individual blameworthiness.[133] Deterrence aims to reduce the crime with a prospective focus, by instilling fear of the law in a person.[134] These concepts are not limited to the United States idea of criminal justice. They extend even to the international criminal justice system, as the purpose of the Tribunals is to punish the acts of people who have terrorized thousands (even millions).

Conspiracy holds persons directly responsible for their role in committing a crime, thus furthering the deterrent purpose of criminal punishment.[135] The all-encompassing nature or conspiracy, with proper protection in place,[136]serves the retributive goal of international criminal law by punishing each individual that furthered the common criminal objective in the same way joint criminal enterprise has done in previous tribunals.

VI. An Additional Concern Regarding Hamdan's Charge

Hamdan's charge of conspiracy raises an additional concern that may be too complex to detail in this memorandum, given the time constraints as well as the specificity of the original issue presented. However, it should not be left without being discussed. It is very possible that the defense will raise (or have already raised) an objection to being charged with war crimes,

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[133] KATE BLOCH & KEVIN MCMUNIGAL, CRIMINAL LAW: A CONTEMPORARY APPROACH, (unpublished 2002), *supra* note 87 [Reproduced in accompanying notebook at Tab 3]

[134] KATE BLOCH & KEVIN MCMUNIGAL, CRIMINAL LAW: A CONTEMPORARY APPROACH, (unpublished 2002), *supra* note 87 [Reproduced in accompanying notebook at Tab 3]

[135] *See* DAMASKA, 49 Am. J. Comp. L. 455 (2001), *supra* note 119 at 456-65 [Reproduced in accompanying notebook at Tab 21]; *see also* BARRETT, 88 Minn. L. Rev. 30 (2003), *supra* note 116 [Reproduced in accompanying notebook at Tab 23]

[136] As noted in the quotation from Barrett above, charging someone with conspiracy would require that the person was a member of a conspiratorial organization with intent to agree to further a criminal purpose.

arguing that no acts took place within the boundaries of war. Since the analysis for this argument requires a memo in itself, a brief discussion to raise the issues must suffice at the present.

As stated right now, Hamdan has been charged with conspiracy to commit several crimes; but the Department of Defense has not specified whether or not these crimes constitute war crimes (Grave Breaches of the Geneva Convention) or whether they constitute crimes against humanity.[137] Although both categories of crimes are very serious breaches of international humanitarian law, and both should be punished in order to satisfy the goals of criminal law, war crimes are limited to the crimes committed in occupied territory.[138]

The Nuremberg Charter stated that war crimes were acts committed against nationals of another state in connection with war, while crimes against humanity were acts committed against the nationals of the same state as that of the perpetrator, also in connection with war.[139] Scholars have established that now, crimes against humanity under customary international law extend to peacetime as well.[140]

Thus, the statute for the ICTR defines "crimes against humanity" by stating:

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[137] HAMDAN CHARGE SHEET, *supra* note 5 [Reproduced in accompanying notebook at Tab 54]

[138] MICHAEL P. SCHARF, THE LETTER OF THE LAW: THE SCOPE OF THE INTERNATIONAL LEGAL OBLIGATION TO PROSECUTE HUMAN RIGHTS CRIMES, 59-AUT Law & Contemp. Probs. 41 (1996) (hereinafter "SCHARF, SCOPE OF OBLIGATION") [Reproduced in accompanying notebook at Tab 20]

[139] *Id.*

[140] *Id.* (This article says that crimes against humanity extend to peacetime because: (1) Control Council Law No. 10, established after the Nuremberg Tribunal, did not limit crimes against humanity to war; (2) the United Nations War Crimes Commission reports post-Nuremberg and Control Council Law No. 10 held that international law may penalize individuals for crimes against humanity committed in war and peace; (3) the International Law Commission distinguished between inhuman crimes against humanity, which could be committed in peacetime as well from persecutory crimes against humanity, which could only be sanctioned when committed during wartime; (4) the 1968 Convention on the Non-Applicabilit of Statutory Limitations to War Crimes and Crimes Against Humanity says that these limitations do not apply in wartime or peace; and (5) the Secretary General's Report of the ICTY statute said that crimes against humanity were prohibited whether or not in armed conflict.)

> "The International Tribunal for Rwanda shall have the power to prosecute persons responsible for the following crimes when committed as part of a widespread, or systematic attack against *any* civilian population on national, political, ethnic, racial or religious grounds: (a) murder; (b) extermination; (c) enslavement; (d) deportation; (e) imprisonment; (f) torture; (g) rape; (h) persecutions on political, racial and religious grounds; (i) other inhumane acts. (emphasis added)" The ICTY statute says the same, but the ICTR statute is "the most recent codification of crimes against humanity."[141]

Looking at the elements of this definition, it is clear that crimes against humanity are no longer limited to crimes committed against nationals of ones own state. It extends to any civilian population.

With this said, it may be more fruitful to charge Hamdan with conspiracy to commit crimes against humanity, instead of conspiracy to commit war crimes. The only condition that must be met is that the acts must have been part of a widespread, systematic attack based on political, racial and religious grounds. First, the concept of *jihad* is a religious war against those believed to be interfering with the goals of Islamic nations by acting in the interest of the western government.[142] According to the *fatwa* issued in February 1998, it is the duty of all able Muslims to attack against Americans "anywhere they can be found."[143] These attacks occurred in the form of various bombings in different places across the world, specifically attacking the United States. The basis for all the attacks Hamdan has been charged with conspiracy to commit were done on both religious and political grounds in a widespread and systematic manner. The acts that Hamdan assisted with committing include murder, which is clearly stated as a crime against humanity under the ICTR statute, as well as terrorism, which is an "other inhumane act."

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[141] SCHARF, SCOPE OF OBLIGATION, 59-AUT Law & Contemp. Probs. 41 (1996), *supra* note 138; *see also* ICTY STATUTE, *supra* note 61 [Reproduced in accompanying notebook at Tab 20]

[142] *See* note 2 above.

[143] Hamdan Charge Sheet, *supra* note 5 at ¶ 9 [Reproduced in accompanying notebook at Tab 54]

Although this analysis was not in depth and did not explore all the factors that contribute to the boundaries of war or a charge of conspiracy to commit crimes against humanity, it provides a retort to a possible argument that could be raised (or already has been raised) by the defense counsel.

VII. Conclusion

The elements of conspiracy, according to the United States Department of Defense Rules and Regulations for crimes triable by military commission include overt acts.[144] Accordingly, Hamdan was charged with conspiracy to commit crimes such as attacking civilians, attacking civilian object, murder by an unprivileged belligerent, destruction of property by an unprivileged belligerent and terrorism.[145] The rationale of the prior uses of conspiracy, common purpose and joint criminal enterprise all suggest that conspiracy is a valid charge. As discussed in Part II of this memorandum, Al Qaida has committed horrible crimes for many years now by training militants to assist the leaders in accomplishing their tasks. It may be true that Hamdan could have been replaced by another person acting in the same way, but it remains that each role furthering such crimes is an important part of the overall criminal achievement. The "cogs of a wheel" theory[146] holds even today.

Unlike some of the cases in the ICTY, where evidence was lacking or sparse, there is clear evidence that Hamdan was involved with furthering Al Qaida's purpose of *jihad* against the United States and other western countries. However, Hamdan was not a front man, high-ranking official, or even a key player. He was a member of the peripheral group of conspirators that

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[144] Rules and Regulations, Department of Defense, CRIMES AND ELEMENTS OF TRIALS BY MILITARY COMMISSION PART III, 32 CFR Part 11, 68 FR 39381 (2003), *supra* note 8 [Reproduced in accompanying notebook at Tab 53]

[145] Hamdan Charge Sheet, *supra* note 5 at ¶ 12 [Reproduced in accompanying notebook at Tab 54]

[146] The United States Military Court in *Kurt Goebell et al.* held that each "cog in a wheel" is equally important to the overall functioning of the wheel.

supplied the main members with the ammunition required to achieve their goals. He protected the mission by protecting the leaders of Al Qaida and served as their driver. Hamdan's actions may not have been unlawful in themselves, but they contributed to an unlawful purpose.

The retributive and deterrent goals of international criminal law seek to punish precisely this activity. Al Qaida is a prime example of the dangers of group criminality, because the larger the group, the more able they are to commit an innumerable amount of serious crimes.

Thus, not only has conspiracy been established in international law, it will further the goals of international law, just as prior doctrines such as joint criminal enterprise have in the past. This time, the name has just been changed to conspiracy.