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What Is The Distinction Between "Joint Criminal Enterprise" As Defined By The Icty Case Law And Conspiracy In Common Law Jurisdictions?

Rajiv K. Punja

CASE WESTERN UNIVERSITY
SCHOOL OF LAW
INTERNATIONAL WAR CRIMES RESEARCH LAB

MEMORANDUM FOR THE OFFICE OF THE PROSECUTOR OF THE ICTR

ISSUE: WHAT IS THE DISTINCTION BETWEEN "JOINT CRIMINAL ENTERPRISE" AS DEFINED BY THE ICTY CASE LAW AND CONSPIRACY IN COMMON LAW JURISDICTIONS?

PREPARED BY RAJIV K. PUNJA
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7) UNGAOR, 72nd plenary meeting, 52nd sess., 15 December 1997, U.N. Doc. A/52/PV.72

I. Introduction and Summary of Conclusions[1]

This memorandum compares the doctrine of "joint criminal enterprise" as defined by the decisions 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 ("ICTY") and the doctrine of criminal conspiracy in common law jurisdictions.[2] Part II of the memorandum begins with a brief overview of the factual background followed in Part III by an analysis of the ICTY's definition of joint criminal enterprise with particular focus on the Appeals Chamber decision in *Prosecutor v. Dusko Tadic*[3]. The focus of this part will be on the customary international law from which the court draws the notion of a 'common plan' and the object and purposes of the ICTY statute that implicitly lead the court to the conclusion that participation in a joint criminal enterprise leaves one with responsibility for crimes other than those agreed upon in the common plan, that might be committed by other members of the joint enterprise.

Part IV of this memorandum examines the doctrine of criminal conspiracy in common law jurisdictions. The section begins with a brief historical overview of the doctrine of conspiracy in the common law, followed by elements of the doctrine that are common across these jurisdictions, highlighting deviations between the jurisdictions. In

[1] ISSUE: What is the distinction between "joint criminal enterprise" as defined by the ICTY case law and conspiracy in common law jurisdictions?

[2] *See generally* U.N.S.C. Res. 827, adopted 25 May 1993 [Reproduced in accompanying notebook at Tab 42].

[3] *The Prosecutor v. Tadic*, Case No.: IT-94-1-T, Judgment in Appeals Chamber, 15 July 1999 (hereinafter "*Tadic* Judgment"). [Reproduced in accompanying notebook at Tab 26].

examining the current state of the law deviation between statutory conspiracy and the common law will be taken into account.

Part V will conclude this memorandum with a comparison of the similarities and differences between the two doctrines with respect to *actus reus* and *mens rea* requirements. Policy arguments based on the differing rationale for the two doctrines will be compared in light of the types of crimes that each doctrine is intended to deal with, and the validity of joint criminal enterprise as a doctrine for liability in international criminal tribunals will be examined.

Summary of Conclusions

(1) The mens rea requirement for conviction under the doctrine of "joint criminal enterprise" needs to be clearly defined.

The mens rea required for conviction under the doctrine of joint criminal enterprise as defined by the Appeals Chamber of the ICTY in the *Tadic* case is vague and inconsistent. The Tribunal mentions the concept of *dolus eventualis* as the requisite intent, i.e. the crime was foreseeable and the accused willingly took the risk. However the court also implies that if a crime is merely predictable and the accused remains indifferent he still may be liable under joint criminal enterprise. Although the former standard was eventually applied by the case, one wonders which one of these two principles was in fact the requisite intent. In this respect German criminal law which divides "intention" into three categories, dolus eventualis being one of them, might prove to be useful for comparative analysis to help solidify the all important mental element for the crime. Furthermore, the concept of felony murder, particular to US criminal jurisprudence, with its notions of transferred intent might also prove helpful in this regard.

(2) The wide scope of criminal responsibility under joint criminal enterprise must be clearly outlined in order strengthened the doctrine's validity.

While the doctrine of conspiracy limits its scope to the act of agreement as the essence of the crime itself, the ICTY has primarily used the doctrine of joint criminal enterprise to extend the sphere of criminal liability beyond the object of the common plan. Thus although it imposes liability on individuals for involvement with the common plan, similar to the doctrine of conspiracy, its reach extends much further by imposing liability for the crimes of other participants in the common plan that are a natural and foreseeable consequence of such involvement. Although this wide scope of liability has been criticized in some jurisdictions as being unconstitutional, it is limited by the fact that the doctrine is only used to prosecute the most heinous violators of international humanitarian law who do not fall within the ambit of command responsibility. However, although the doctrine is justifiable as a consequence of the heinous nature of the crimes committed its legal foundations are still susceptible to criticism. Just as the doctrine of command responsibility has been restricted by notions of commander control, joint criminal enterprise would be well served if the outer limits of liability encompassed by it were clearly outlined. This could be achieved by a more concrete definition of the intent required for the crime.

(3) Conspiracy as it is defined in common law jurisdictions is significantly different from joint criminal enterprise and does not offer mush guidance as to how the scope of the doctrine might be restricted.

Although conspiracy and joint criminal enterprise share several similarities structurally, the crimes themselves are substantively quite different. While the notion of a common plan is almost identical in character to the concept of the agreement, the agreement forms the essence of the crime of conspiracy. Such is not the case with the common plan. A more appropriate concept for comparative study would be the doctrines

of complicity and accessorial liability in common law jurisdictions. An examination of theses concepts might lend invaluable guidance to how the limits of liability in joint criminal enterprise could be better defined.

II. Factual Background

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 was established by U.N. Security Council mandate pursuant to its authority under Chapter VII of the U.N. Charter. Its first indictment was issued to Dusko Tadic, who was charged with 34 counts of crimes within the jurisdiction of the International Tribunal.[4] Thus Dusko Tadic, a 40 year old pub owner and karate instructor, became the first defendant to be tried by an international tribunal since World War II.[5]

One of the charges accused Tadic of murdering five men from the village of Jaskici.[6] On appeal Tadic claimed that the evidence brought before the tribunal could not satisfy, beyond a reasonable doubt, that he had played any part in the killing of the five men. In an attempt to expand the concept of individual responsibility and overcome evidentiary inadequacies the tribunal laid out the doctrine of "joint criminal enterprise." In an extensive discussion of the concept, the tribunal suggested that between May and December 1992, there existed in the Prijedor region of Yugoslavia a policy to commit

[4] *See generally* U.N.S.C. Res. 827, adopted 25 May 1993 [Reproduced in accompanying notebook at Tab 42]; U.N. Charter Chapter VII [Reproduced in accompanying notebook at Tab 38].

[5] MICHAEL P. SCHARF, BALKAN JUSTICE: THE STORY BEHIND THE FIRST WAR CRIMES TRIAL SINCE NUREMBERG 92 (Carolina Academic press 1997). [Reproduced in accompanying notebook at Tab 3].

[6] VIRGINIA MORRIS AND MICHAEL P. SCHARF, AN INSIDER'S GUIDE TO THE INTERNATIONAL CRIMINAL TRIBUNAL FOR THE FORMER YUGOSLAVIA (New York, Transnational Publishers, 1995), Vol. 1. [Reproduced in accompanying notebook at Tab 5].

inhumane acts against the non-Serb civilian population of the region in an attempt to achieve the creation of a Greater Serbia.[7] A furtherance of this policy was achieved through a recognizable plan, of which the attacks on Jaskici formed a part. Tadic as an armed member of an armed group took active part in this plan by rounding up and severely beating some of the men from Jaskici.[8] Thus the tribunal concluded that although a lack of evidence might have precluded proof beyond a reasonable doubt that Tadic had actually committed the killings, the doctrine of joint criminal enterprise would allow for his prosecution as the killings were a natural and foreseeable consequence of the common plan that Tadic was admittedly a part of. This seminal decision has been continually cited in subsequent tribunal decisions and forms the foundational precedent for the doctrine of joint criminal enterprise.[9]

III. Joint Criminal Enterprise

A joint criminal enterprise, as defined by the International Criminal Tribunal for the Former Yugoslavia ("ICTY"), is a venture by two or more persons to effect a criminal result, in which each member of the enterprise is held responsible for the specific acts of the other members.[10] In the opinion of the ICTY, a defendant might be charged with the crime committed by another participant that goes beyond the object of a "common plan" or joint enterprise if, (i) the crime was a natural and foreseeable consequence of the

[7] *See Tadic* Judgment, *supra* note 3, at ¶ 230-233 (Outlines the background to the conflict in the Prijedor) [Reproduced in accompanying notebook at Tab 26].

[8] *Tadic* Judgment, *supra* note 3, at ¶ 232 [Reproduced in accompanying notebook at Tab 26].

[9] *See generally The Prosecutor v. Galic*, Case No. IT-98-29-T, Judgment, October 3 2002 [Reproduced in accompanying notebook at Tab 26]; *The Prosecutor v. Krnojelac*, Case No: IT-97-25, Judgment 15 march 2002 [Reproduced in accompanying notebook at Tab 27].

[10] MICHAEL P. SCHARF, SLOBODAN MILOSEVIC ON TRIAL (Continuum New York 2002) [Reproduced in accompanying notebook at Tab 3], *infra* note 11, at 160 [Reproduced in accompanying notebook at Tab 3].

enterprise, and (ii) the accused was aware that the crime was a foreseeable consequence when she or he agreed to participate in the enterprise.[11] An individual participates in a "joint criminal enterprise" either by physically perpetrating a crime, being present at the time when the crime is committed or assisting another in the commission of a crime.[12] More controversially, an individual who participates in such a "joint criminal enterprise" may be found guilty for the acts that others commit in pursuance of the criminal enterprise, regardless of the part that they play in the commission of the crime itself.[13]

Article 7(1) of the ICTY Statute establishes that persons committing serious violations of international humanitarian law will be held individual responsibility for their violations.[14] This provision embodies the principle of personal culpability for criminal responsibility, *nulla poena sine culpa*[15], at the foundation of many legal systems. The Appeals Chamber conceded that "common purpose" or "joint criminal enterprise" liability is not included within the "enumeration of forms of participation" in article 7(1) of the ICTY Statute.[16] However the tribunal believed that that the Statute did not confine itself to providing jurisdiction merely over the individuals responsible for the

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[11] MICHAEL P. SCHARF, SLOBODAN MILOSEVIC ON TRIAL (Continuum New York 2002) [Reproduced in accompanying notebook at Tab 3]; *see also Prosecutor v. Dusko Tadic*, Case No. IT-94-1-A, Judgment, 15 July 1999 ("*Tadic* Judgment"). [Reproduced in accompanying notebook at Tab 26].

[12] *See* SCHARF, *supra* note 11 at 120 [Reproduced in accompanying notebook at Tab 3].

[13] SCHARF, *supra* note 11, at 120 [Reproduced in accompanying notebook at Tab 3].

[14] *See* ICTY Statute Art. 7(1) (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. (Emphasis added)) [Reproduced in accompanying notebook at Tab 37]

[15] *See generally* LAFAVE, CRIMINAL LAW (West Group 2000) (*nulla poena sine culpa* – nobody may be held criminally responsible for acts or transactions in which he has not personally engaged or in some other way participated.) [Reproduced in accompanying notebook at Tab 2]

[16] *Tadic* Judgment, *supra* note 11, at ¶ 188 [Reproduced in accompanying notebook at Tab 26]; *see generally* ICTY Statute [Reproduced in accompanying notebook at Tab 37].

physical perpetration of a crime, or otherwise aiding or abetting, ordering or directly planning the criminal conduct. Rather, included within its ambit are "modes of participation in the commission of crimes … where several persons having a common purpose embark on criminal activity that is then carried out either jointly or by some members of this plurality of persons."[17] The object and purpose of the ICTY statute combined with the heinous nature of many international crimes committed during times of war warranted this interpretation.[18] This 'collective criminality' implicated people who had participated or contributed to the common plan with a moral depravity equivalent to the physical perpetrators of the crimes themselves. The judges in the *Tadic* case pointed to the Secretary General's report to further substantiate their claim that "all those who [had] engaged in serious violations of international humanitarian law, whatever the manner in which they may have perpetrated, or participated in the perpetration of those violations, must be brought to justice."[19]

A. Customary International Law and "Common Enterprise Liability"

The ICTY's use of the doctrine of joint criminal enterprise in the prosecution of Dusko Tadic, the first person to appear before the tribunal, was rather

[17] *Tadic* Judgment, *supra* note 11, at ¶ 190 (This conclusion was reached because the tribunal believed that the ICTY statute had to be interpreted based upon its object and purpose detailed in article 1 which implies that its jurisdiction extends to all those "responsible for serious violations of international humanitarian law" committed in the former Yugoslavia. Accordingly the responsibility for serious violations of international humanitarian law was not limited to those who actually physically perpetrated the enumerated crimes, but also extends to other offenders as suggested by articles 2 and 4 [Reproduced in accompanying notebook at Tab 41]. *See also* ICTY Statute Article 2 (Referring to committing or the ordering to be committed of grave breaches of the Geneva Convention); ICTY Statute Article 4 (which sets forth various types of offenses in relation to genocide, including conspiracy, incitement, attempt and complicity.) [Reproduced in accompanying notebook at Tab 37].

[18] *Tadic* Judgment, *supra* note 11, at ¶ 189 [Reproduced in accompanying notebook at Tab 41].

[19] *Report of the Secretary-General Pursuant to Paragraph 2 of Security Council Resolution 808 (1993)*, U.N. Doc. S/25704, 3 May 1993 ("Report of the Secretary-General"), ¶ 54 [Reproduced in accompanying notebook at Tab 41].

surprising considering the novelty of the principle. As the ICTY statute did not specify the objective and subjective elements of "collective criminality", the tribunal turned to customary international law for some guidance.[20] Customary rules regarding collective criminal responsibility were drawn from international treaties[21] and case law, particularly the World War II international military tribunal cases concerning war crimes that used the principle of a "common criminal purpose" to ascribe criminal liability to members of a group that had acted collectively in furtherance of a common goal.[22] A category of cases evolved involving the notion of a "common design" to pursue a single course of conduct in the furtherance of which one of the perpetrators commits an act, "which while outside the common design, was nevertheless a natural and foreseeable consequence of effecting that common purpose."[23] A strongly illustrative analogy was drawn between this type of "mob violence" and "joint criminal enterprise" as both crimes involve multiple offenders trying to achieve a common purpose against a victim.[24] It is also usually impossible to ascertain exactly which acts were carried out by a particular perpetrator, and to establish a causal link between an act and the harm caused by it. The

[20] *Tadic* Judgment, *supra* note 11, at ¶ 205 (The Tribunal believed that liability based on adherence to a common plan or design has strong historical precedent in the Military Tribunal decisions of the post World War II era.) [Reproduced in accompanying notebook at Tab 26].

[21] *Tadic* Judgment, *supra* note 11, at ¶ 221 (The Appeals Chamber mentions the International Convention for the Suppression of Terrorist Bombing adopted by the United Nations General Assembly through a resolution on December 15, 1997 which makes specific reference to "acting with a common purpose" which involve an intentional contribution made with the aim of furthering the general criminal activity or purpose of a group.) [Reproduced in accompanying notebook at Tab 26]; *see also* The Report of the Sixth Committee (25 November 1997, A/52/653) [Reproduced in accompanying notebook at Tab 42]; UNGAOR, 72nd plenary meeting, 52nd sess., Mon. 15 December 1997, U.N. Doc. A/52/PV.72) [Reproduced in accompanying notebook at Tab 42].

[22] *Tadic* Judgment, *supra* note 11, at ¶ 193 [Reproduced in accompanying notebook at Tab 26].

[23] *Tadic* Judgment, *supra* note 11, at ¶ 204 [Reproduced in accompanying notebook at Tab 26].

[24] *Tadic* Judgment, *supra* note 11, at ¶ 205 [Reproduced in accompanying notebook at Tab 26].

Essen Lynching case and the *Borkum Island* cases are illustrative of this principle and discussed below.

(1) The Essen Lynching Case

On December 13, 1944, a mob of German civilians savagely lynched three British prisoners of war who were being escorted by German soldiers taking them to a Luftwaffe unit for interrogation.[25] A Captain Eric Heyer, the commanding officer of the soldiers, had ordered the escort not to interfere if German civilians should "molest the prisoners."[26] He also suggested that the prisoners ought to be shot, or would be, in a loud voice from the steps of the barracks so that the crowd that had gathered could hear.[27] As the prisoners were paraded through the streets the crowd started hitting them with sticks and stones, and an unknown German corporal even fired a revolver at one of the prisoners wounding him in the head.[28] The airmen were later thrown off a bridge and those who were not killed by the fall were shot by members of the crowd or kicked and beaten to death.[29]

Two servicemen and five civilians were charged with the war crime of unlawfully killing prisoners of war. Defense counsel claimed that proof of each of the accused's intent to kill was required for conviction. However the prosecution suggested that "you can have an unlawful killing, which would be manslaughter, where there is not an intent

[25] *See generally Trial of Erich Heyer and six others*, British Military Court for the Trial of War Criminals, Essen, 18th-19th and 21st-22nd December, 1945, UNWCC, vol. I, p. 88, at p. 91. (Hereinafter "*Essen Lynching case*") [Reproduced in accompanying notebook at Tab 27].

[26] *See Tadic* Judgment, *supra* note 11, at ¶ 207 (Citing the Essen Lynching case) [Reproduced in accompanying notebook at Tab 26].

[27] *See generally Essen Lynching case*, *supra* note 25 [Reproduced in accompanying notebook at Tab 27].

[28] *See generally Essen Lynching case*, *supra* note 25 [Reproduced in accompanying notebook at Tab 27].

[29] *See Essen Lynching case*, *supra* note 25, at 89 [Reproduced in accompanying notebook at Tab 27].

to kill but merely the doing of an unlawful act of violence."[30] Thus the prosecution argued that the only proof that was required was that "each was concerned with the killing" in circumstances that would under British law amount murder or manslaughter.[31] Since each person in the mob voluntarily took aggressive action against the prisoners, each was "guilty in that he was concerned with the killing."[32] Thus the prosecution concluded that every person in the crowd was both morally and criminally responsible for the deaths of the three men.[33] Of the people found guilty for this horrendous crime, not all had the intent to kill, but they were nevertheless found guilty of murder as a result of being *concerned in the killing*.[34] (Emphasis added). It is this principle of concerted action in pursuance of a common goal that the *Tadic* court uses in justifying its notion of a common plan.[35]

(2) The Borkum Island Case

In this case a U.S. military tribunal took a very similar position to the British military court in the *Essen Lynching case*. In August 1944, a U.S. air force Flying Fortress

[30] *See* transcript in Public Record Office, London, WO 235/58, p. 65, (Hereinafter "Transcript") *cited in Tadic* Judgment, *supra* note 11, at ¶ 208 (Copy on file with the International Tribunal's Library) [Reproduced in accompanying notebook at Tab 26].

[31] *See* Transcript, *supra* note 30 (The Prosecution analogized the situation to slapping another person's face with not intent to kill, but by some misfortune, such as a weak skull, resulting in the death of the other. The person striking the blow in this case would be guilty of manslaughter under British law.).

[32] *See* Transcript, *supra* note 30 (In the Prosecution's opinion, it was impossible to separate any one of the attackers from the rest of the mob. This fact regarding the nature of the crowd categorized it as a "lynching".).

[33] *See* Transcript, *supra* note 30 (The prisoners were doomed the moment they left the barracks and thus every person in the crowd that struck a blow was both morally and criminally responsible for the deaths of the victims.).

[34] *Tadic* Judgment, *supra* note 11, at ¶ 209 (As the *Tadic* case suggests, the court seems to have assumed that accused that simply struck a blow or incited murder could have foreseen that the others would kill the prisoners and thus were guilty of murder.) [Reproduced in accompanying notebook at Tab 26].

[35] *Id.* at ¶ 220.

aircraft was shot down on the German island of Borkum.[36] The seven crew members take prisoner were marched through the streets under military guard, and were beaten with shovels by members of the Reich's Labor Corps under the orders of a German officer of the *Reichsarbeitsdienst*.[37] The mayor of the town further incited the mob that had gathered to kill the prisoners as they were being beaten by civilians and the guards who were escorting them. By the time they reached City Hall all the prisoners had been shot by German soldiers.[38] The accused, who included the mayor, German soldiers as wel as member of the mob, were charged with war crimes, including "willfully, deliberately and wrongfully encouraging, aiding, abetting and participating in the killing of the airmen and with willfully, deliberately, and wrongfully encouraging, aiding, abetting and participating on the assaults upon the airmen."[39] The prosecution argued that although all of the accused did not participate in exactly the same way, "the composite action[s] of all [of them] results in the commission of the crime."[40] The Prosecutor compared the accused to "cogs in the wheel of a common design" with each cog playing an assigned part that was integral to the working of the whole.[41]

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[36] *See Kurt Goebell et al.* Charge Sheet, in U.S. National Archives Microfilm Publications, I (on file with the International Tribunal's Library) (Hereinafter "*Charge Sheet*"), *cited in Tadic* Judgment, *supra* note 11, at ¶ 210 [Reproduced in accompanying notebook at Tab 26]; see also *Kurt Goebell et al, cited in Tadic* Judgment, *supra* note 11, at ¶ 210 [Reproduced in accompanying notebook at Tab 26].

[37] *See Borkum Island case*, supra note 36, at 1186 [Reproduced in accompanying notebook at Tab 26].

[38] *See generally Tadic* Judgment, *supra* note 11 (For a discussion of the facts of the Borkum Island case.) [Reproduced in accompanying notebook at Tab 26].

[39] *See Charge Sheet, supra* note 36 [Reproduced in accompanying notebook at Tab 26].

[40] *Id.*. at 1186 [Reproduced in accompanying notebook at Tab 26].

[41] *Id.* at 1188 [Reproduced in accompanying notebook at Tab 26].

It was from this case that the *Tadic* opinion culled the notion of a common design and shared criminal intent.[42] The inference made from this case was that since all the accused were found guilty, they must have been held responsible for pursuing a criminal common design of assaulting the prisoners.[43] Some were found guilty of murder even though there was no actual evidence "by virtue of their status, role or conduct", as they were in a position to predict that the assault would possibly lead to the killing of the victims by some of those participating in the assault.[44]

(3) Cases Brought Before Italian Courts after World War II

The *Tadic* decision in its examination of customary international law precedent also referred to war crimes cases brought before Italian courts after World War II.[45] These cases concerned actions by military personnel belonging to the *Repubblica Sociale*

[42] *Id.* at 1188 (The prosecutor specifically stated that "the wheel of wholesale murder could not turn without all its cogs. Thus it was concluded that if proved beyond a reasonable doubt that each accused played his part in the mob violence, and this led to the unlawful killing of the prisoners, then under the law each and every one of the accused was guilty of murder.") [Reproduced in accompanying notebook at Tab 26].

[43] *Tadic* Judgment, *supra* note 11, at ¶ 211 (The tribunal also highlights the fact that defense counsel did attempt to question the validity of the doctrine itself but rather attempts to deny the applicability of the doctrine based on the facts of the case. This is cited as reinforcing the validity of the common design doctrine as it was used before the Court of Cassation.) [Reproduced in accompanying notebook at Tab 26].

[44] *Id.* at ¶ 213 (The ICTY's use of the cases brought before the Italian courts in its examination of historical precedent has been criticized because they were decided under national legal principles. The ICTY chamber concludes that an overview of national legislation has *not* shown general principles of law recognized by the world in this field. The Chamber went on to suggest that even if this legislation is uniform it cannot be seen as incorporating customary international law, as it does not originate from the implementation of international law but rather runs parallel to and precedes international regulation. Nonetheless the chamber went on to the conclusion that "the consistency and cogency of the case law and the treaties referred to above, as well as their consonance with the general principles on criminal responsibility laid down in the statute and general international criminal law and in national legislation, warrant the conclusion that the case law reflects rules of customary international law.") [Reproduced in accompanying notebook at Tab 26]; *see also* Marco Sassoli & Laura M. Olson, *The Judgment of the ICTY Chamber on the Merits in the Tadic Case: New Horizons for International Humanitarian and Criminal Law?*, I.R.R.C. No. 839, 733-769 (Sept. 2000) (A review of the Appeals Chamber analysis of customary international law precedent in the *Tadic* case.) [Reproduced in accompanying notebook at Tab 10].

[45] *Id.* at ¶ 214-219 [Reproduced in accompanying notebook at Tab 26].

Italiana ("RSI")[46] following the declaration of war against Germany on October 14, 1943. In *D'Ottavio et al.*[47] for example, some armed civilians had unlawfully pursued two prisoners of war who had escaped from a concentration camp. One of the pursuers had shot at the escaping prisoners with the intention of killing them, but merely wounding one of them who subsequently succumbed to his injuries. The Court of Cassation upheld the trial court's judgment that the other members of the group were not only accountable for "illegal restraint" but also for manslaughter.[48] It was argued that "there was not only a material but a psychological "causal nexus" between the result all the members of the group intended to bring about, and the different actions carried by individual members of that group."[49] The court clearly stated that the responsibility of a particular participant was not based on his notion of objective responsibility, but rather on the "fundamental principle of concurrence of independent causes."[50] The court concluded that the surrounding and pursuing of two fleeing prisoners with a rifle and a gun with the object of illegally capturing them was the indirect cause of the subsequent event of shooting at them. Furthermore, "all the participants had the intent to perpetrate,

[46] *Id.* at ¶ 214 [Reproduced in accompanying notebook at Tab 26].

[47] *See D'Ottavio et al, cited in Tadic* Judgment, *supra* note 11, at ¶ 215 [Reproduced in accompanying notebook at Tab 26].

[48] *Id.* at ¶ 215 [Reproduced in accompanying notebook at Tab 26].

[49] *Id.* at ¶ 215 [Reproduced in accompanying notebook at Tab 26].

[50] *Id.* at ¶ 215 (The Court of Cassation discussed the principle of concurrent independent causes by virtue of which all participants are accountable for crimes which they both directly and indirectly cause in keeping with the well established cannon of *causa causae est causa causati.*) [Reproduced in accompanying notebook at Tab 26].

and knowledge of actual perpetration of an illegal restraint, and foresaw the possibility of commission of a different crime."[51]

Contrastingly in *Aratano et al.*, the Court of Cassation dealt with RSI soldiers who fired shots into the air while trying to arrest some partisans with the intent of scaring them.[52] The partisans shot back and a shootout ensued in which one of the partisans was killed by an RSI soldier. Here the trial court's conviction of all the men for murder was overturned because the murder was an unforeseeable consequence.[53] Also referred to in the *Tadic* opinion were "the amnesty cases" where the Court of Cassation held a person criminally liable for "a crime committed by another member of a group not envisaged in the criminal plan."[54] These cases collectively point to the fact that "for there to be a relationship of material causality for the crime willed by one of the participants and the different crime committed by another, it is necessary that the latter crime constitute a logical and predictable development of the former"; a mere incidental relationship would not be sufficient.[55]

It was from this notion of a common plan established in customary international law that the *Tadic* decision identified an "attenuated form of intent," namely *dolus eventualis*

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[51] *Id.* at ¶ 215 [Reproduced in accompanying notebook at Tab 26].

[52] *Aratano et al., cited in Tadic* Judgment, *supra* note 11, at ¶ 216 [Reproduced in accompanying notebook at Tab 26].

[53] *Id.* at ¶ 216 [Reproduced in accompanying notebook at Tab 26].

[54] *Id.* at ¶ 217 [Reproduced in accompanying notebook at Tab 26].

[55] *See* GIUSTIZIA PENALE, 1950, Part II, cols. 696-697 (The Court stated that a mere coincidence or chance relationship would not be sufficient. The Court's example was a person who requests that someone be wounded or killed. The logical development of this crime would not allow the person to be convicted for a robbery perpetrated by the fellow criminal. The crime of robbery has its own causal autonomy and is linked to the original request for murder or assault by a mere incidental relationship.) [Reproduced in accompanying notebook at Tab 39].

as the required mens rea for criminal responsibility under the doctrine of joint criminal enterprise.[56] The example the Tribunal uses is the shared intention on the part of a group to forcibly remove members of a particular ethnicity from a town, village or region i.e., to effect "ethnic cleansing." While murder may not explicitly be part of the plan, it is nevertheless foreseeable that forcible removal of civilians at gun point might result in a few deaths. According to the *Tadic* opinion criminal responsibility may be imputed to all participants within the common design where "the risk of death occurring was both a predictable consequence of the execution of the common design and the accused was either reckless or indifferent to that risk."[57]

B. The Causal Connection and Mens Rea Requirement: What is dolus eventualis?

In order to obtain a conviction under "joint criminal enterprise" the prosecution must prove that a defendant had, (i) a criminal intention to participate in a common plan or criminal enterprise, (ii) the act committed by a perpetrator that the defendant is guilty of, even if outside the common design, was still "a natural and foreseeable consequence of the effecting of the common purpose", and (iii) the accused was aware of this when he or she agreed to participate. [58]

The Mens Rea Requirement

The ICTY Statute is silent with regards to a mens rea requirement in the commission of the crimes enumerated within the statute. Nevertheless, the ICTY justices have simply assumed that mens rea is an essential element of the offenses within their

[56] *Tadic* Judgment, *supra* note 11, at ¶ 220 [Reproduced in accompanying notebook at Tab 26].

[57] *Id.* at ¶ 204 [Reproduced in accompanying notebook at Tab 26].

[58] *Tadic* Judgment, *supra* note 11, at ¶ 220 [Reproduced in accompanying notebook at Tab 26].

jurisdiction.[59] In the *Tadic* judgment the court briefly touches on the issue, but the mens rea of the offences were not considered presumably because Tadic used an alibi defense which does not raise questions of intent.[60] The judgments of the ICTY have systematic treated mens rea as an element of all the offenses with the exception of two situations, namely "command responsibility" and joint criminal enterprise.[61] For joint criminal enterprise the mens rea required is definitely more than negligence. It is a state of mind in which a person, although he did not intend to bring about a certain result, was "aware that the actions of the group were likely to lead to the result but nevertheless willingly took the risk."[62] This has been referred to as dolus eventualis or "advertent recklessness" in some national legal systems such as Germany and Canada.[63]

The concept of dolus eventualis is highlighted by the following example. A is given a contract to burn down a house. He knows that B is inside the house probably sleeping. A also knows that by setting fire to the house, B may die, not having enough time to escape. A's goal is to burn the house down and collect on his contract. However, A in setting the house on fire accepts, or is indifferent, that as a side-effect, B may die.

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[59] William A. Schabas, *Mens Rea and the International Criminal Tribunal for the Former Yugoslavia*, 37 NEW ENG. L. REV. 1015, 1018 (Summer 2003) [Reproduced in accompanying notebook at Tab 11].

[60] Schabas, *supra* note 59, at 1018 [Reproduced in accompanying notebook at Tab 11].

[61] *See generally* Schabas, *supra* note 59 [Reproduced in accompanying notebook at Tab 11].

[62] *Tadic* Judgment, *supra* note 11, at ¶ 220 [Reproduced in accompanying notebook at Tab 26].

[63] *Id.* at ¶ 224 [Reproduced in accompanying notebook at Tab 26]. *See also* Francois Lareau, *The Distinction Between Conscious Negligence and Recklessness*, 2 December 2001 *available at* http://home.achilles.net/~flareau/article-consciousnegligence.html (Discussing the German legal system that divides intention into three categories (i) a situation where the perpetrator aims at achieving the relevant unlawful consequences, (ii) a situation where the perpetrator foresees such unlawful consequences as certain to follow from his conduct, although this is not his aim or purpose, and (iii) dolus eventualis) [Reproduced in accompanying notebook at Tab 39]

The mens rea ascribed to A is that of advertent recklessness or dolus eventualis.[64] With this concept of recklessness it would seem that the result is voluntary and includes indifference and foresight to the occurrence of a result. This is because as many commentators including Jacques Fortin and Louis Viau in Canada have suggested, to "reconcile" oneself with a possible result is simply to accept the possible result, i.e. to live with it if it happens.

The Actus Reus Requirement

The ICTY Appeals Chamber summarized the objective elements, or actus reus, required for participation in a joint criminal enterprise as, (i) a plurality of persons that need not be organized into a military political or administrative structure,[65] (ii) the existence of a common plan, or design that amounts to or involves the commission of a crime provided for in the Statute,[66] and (iii) the participation of the accused in the common design involving the perpetration of one of the crimes provided for in the Statute.[67]

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[64] *See generally* C.R. SYNMAN, CRIMINAL LAW (3rd Ed.Durban, Buttersworth 1995) [Reproduced in accompanying notebook at Tab 5].

[65] *See Tadic* Judgment, *supra* note 11, at ¶ 227 (The fact that the plurality requirement does not need an organized military, political or administrative structure is supported by the military tribunal decision in the *Essen Lynching Case* and the *Borkum Island Case* discussed above.) [Reproduced in accompanying notebook at Tab 26].

[66] *Id.* at ¶ 227 (The Chamber stressed the need for a common plan previously arranged or formulated. Furthermore its purpose could "materialize extemporaneously" or could be inferred from the fact that a plurality of persons acts in unison to put into effect a joint criminal enterprise.) [Reproduced in accompanying notebook at Tab 26].

[67] *Id.* at ¶ 227 (The Chamber also suggested that participation need not involve commission of a specific crime under statute provisions, but could take the form of assistance in, or contribution to, the common plan. Aiding and abetting the perpetration of a crime was clearly distinguished from the participation in a common plan since the abettor is always an accessory, no proof of an agreement or common plan is required, and the abettor carries acts specifically directed to assist or encourage a certain specific crime.) [Reproduced in accompanying notebook at Tab 26].

IV. The Origins of the Doctrine of Conspiracy in Common Law Jurisdictions

The emergence of the contemporary crime of conspiracy in common law jurisdictions can be traced back to the enactment of a series of statutes during the reign of Edward I.[68] These statutes limited conspiracy to certain offenses against the administration of justice, namely "combinations to procure false indictments or to bring false appeals or to maintain vexatious suits."[69] The crime was completed only after the falsely accused person had been indicted and acquitted.[70] This doctrine was expanded in the *Poulterer's Case* where the court articulated the current doctrine suggesting that the crux of a conspiracy is the "agreement", and that this agreement is punishable even if its purpose is not achieved.[71] The Star Chamber in that case further established that no overt act other than "agreement" was required.[72] In the seventeenth century courts began to broaden the crime of conspiracy by making the attempt to commit *any offense* a

[68] *See generally* P. WINFIELD, HISTORY OF CONSPIRACY AND ABUSE OF LEGAL PROCEDURE (1921) (A detailed account of the history of conspiracy in the common law.) [Reproduced at Tab 6]; *see also* R. WRIGHT, THE LAW OF CRIMINAL CONSPIRACIES AND AGREEMENTS (1887) [Reproduced in accompanying notebook at Tab 6]; Sayre, *Criminal Conspiracy*, 35 HARV. L. REV. 393 (1922) *cited in* GOODE, CRIMINAL CONSPIRACY IN CANADA (1975)[Reproduced in accompanying notebook at Tab 1]; WAYNE R. LAFAVE, CRIMINAL LAW (2000) (hereinafter referred to as "LAFAVE"); STUART, CANADIAN CRIMINAL LAW (2001) [Reproduced in accompanying notebook at Tab 2].

[69] Sayre, *supra* note 68, at 396 [Reproduced in accompanying notebook at Tab 1].

[70] *Id.* at 397 [Reproduced in accompanying notebook at Tab 10].

[71] *See Poulterer's Case*, 77 ENG.REP. 813 (1611), *cited in* LAFAVE, *supra* note 68, at 568, (The defendants in the case "conspired" to bring false accusations against one Stone. Stone was so clearly innocent that the grand jury refused to indict him. The defendants argued that there was no conspiracy because of the lack of an indictment. However the court decided otherwise.) [Reproduced in accompanying notebook at Tab 2].

[72] STUART, *supra* note 68, at 675 [Reproduced in accompanying notebook at Tab 4].

punishable conspiracy.[73] During this period courts rejected the notion that a combination could be criminal even if the object thereof was not.[74]

In 1716, the influential Judge William Hawkins stated that "there can be no doubt, but that all confederacies whatsoever, wrongfully to prejudice a third person are highly criminal at common law."[75] The Hawkins doctrine broadened the notion of conspiracy, although a vast majority of decisions continued to require that either the object or the means used be criminal.[76] In 1832 Lord Denman famously stated that a conspiracy indictment must charge a "conspiracy to do an unlawful act, or a lawful act by unlawful means."[77] Although this statement could have been interpreted to mean criminal acts, courts in England and the United States gave it a broad reading.[78] Thus in jurisdictions that continue to retain common law crimes a conspiracy is defined as "a combination between two or more persons formed for the purpose of doing either an unlawful act or a

[73] LAFAVE, *supra* note 68, at 568 [Reproduced in accompanying notebook at Tab 2]; *see also* Sayre, *supra* note 68, at 398-400. (The Court of King's Bench extended conspiracies to all crimes including misdemeanors and felonies.) [Reproduced in accompanying notebook at Tab 10].

[74] LAFAVE, *supra* note 68, at 568 [Reproduced in accompanying notebook at Tab 2]. *But see* Starling's Case, 82 ENG.REP. 1039 (1664) (Accepting the argument that a conspiracy could be criminal even if its object was not.) [Reproduced in accompanying notebook at Tab 23].

[75] W. HAWKINS, PLEAS OF THE CROWN 348 (6th ed. 1716) [Reproduced in accompanying notebook at Tab 2].

[76] *See generally Rex v. Journeymen Taylors of Cambridge*, 88 ENG.REP. 9 (721) (Applying the Hawkins doctrine) [Reproduced in accompanying notebook at Tab 23]. *But see* Sayre, note 68, at 404 (Elucidating the continued requirement of a criminal act, either in the object or the means used, for indictment in conspiracy cases.) [Reproduced in accompanying notebook at Tab 10].

[77] *Regina v. Jones*, 110 ENG.REP. 485 (1832), *cited in* LAFAVE, *supra* note 68, at 568 [Reproduced in accompanying notebook at Tab 22].

[78] *See generally State v. Burnham*, 15 N.H. 396 (1844) (The court stated that the statement "means must be unlawful" does not imply that the means must amount to indictable offences in order to make the conspiracy complete. The court took the view that "corrupt, dishonest, fraudulent, immoral, and in that sense illegal" practices would suffice.) [Reproduced in accompanying notebook at Tab 24].

lawful act by unlawful means."[79] Prosecutors often took advantage of the broad nature of conspiracy law to further their governmental agendas.[80]

Where conspiracy is defined by statute, the definition is followed with language that makes it apparent which non criminal activities are also covered, unless the jurisdiction has limited conspiracy to criminal objectives.[81] Today, conspiracy continues to be a powerful weapon of prosecutors because of the charge's ambiguities, procedural advantages, and potential for abuse.[82] Legislatures in common law jurisdictions have attempted, through codification, to minimize the confusion surrounding conspiracy law.[83] Legislatures in civil law states have been far more active in defining the bounds of conspiracy, as they take a much narrower view of the doctrine.[84] In the US for example,

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[79] LAFAVE, *supra* note 68, at 569 [Reproduced in accompanying notebook at Tab 2].

[80] *See* Kenneth A. David, *The Movement Toward Statute-Based Conspiracy Law in the United Kingdom and the United States*, 25 VAND. J. TRANSNAT'L L. 95, 956 (British prosecutors used the conspiracy charge to stifle critics of the government and to prevent demonstrations calling for religious, social and political reform.) [Reproduced in accompanying notebook at Tab 8]; *see also* Sayre, *supra* note 68, at 408 (Discussing the use of conspiracy charges in the 20th century by British and United States governments to thwart the unionization movement.) [Reproduced in accompanying notebook at Tab 10].

[81] *See generally* David, *supra* note 80 [Reproduced in accompanying notebook at Tab 8].

[82] *See generally Regina v. Parnell*, 14 Cox 508 (Q.B.D. 1881), *cited in* David, *supra* note 13, at 957 (A British court suggested that conspiracy was unique within the legal system, and although criminal law required a necessary degree of certainty, conspiracy was vague and uncertain.)[Reproduced in accompanying notebook at Tab 22]; *see also Krulewitch v. United States*, 336 U.S. 440 (1949) (U.S. Supreme Court Justice Jackson stated that conspiracy had a place in the legal system in spite of the fact that the doctrine was "elastic, sprawling and pervasive … and a loose practice" that was a serious threat to the administration of justice.) [Reproduced in accompanying notebook at Tab 16].

[83] *See generally Inchoate Offenses: Conspiracy Attempt and Indictment*, 6 Law Commission Working Paper No. 50 (June 5, 1973) [hereinafter "Working Paper"] (The outcome of a British attempt to establish a clear and uniform conspiracy law. It resulted in Part I of the Criminal Law Act of 1977 that eliminated most common law conspiracies and replaced them with a statutory scheme. The only common-law conspiracies to survive codification were conspiracy to defraud and conspiracies to corrupt public morals and outrage public decency.) [Reproduced in accompanying notebook at Tab 40]; *see also* MODEL PENAL CODE, §5.03 cmt. at 386 (1985) [Reproduced in accompanying notebook at Tab 36].

[84] *See generally* GEORGE P. FLETCHER, RETHINKING CRIMINAL LAW (1978). (Common law states rely more on conspiracy since civil law states utilize other legal devices to achieve the same goals.) [Reproduced in accompanying notebook at Tab 1].

efforts to clarify conspiracy through federal statutes have been generally unsuccessful and Congress has been content to give the judiciary considerable latitude to develop the doctrine.[85] This has been achieved by broadly tailored statutes that codify the punishments but not the elements of the offense itself.[86] Similarly, in Britain, Parliament has left the task of defining the parameters of the crime to the courts by using vague statutory language.[87] This struggle to define the crime of conspiracy is emblematic of most common law jurisdictions, including Canada, Australia, the United Kingdom and the United States. We see a consistent movement away from the common law definition of the crime to its statutory codification in an attempt to clarify the principles of this often ambiguous doctrine.

A. The Basic Requirements Common to Most Jurisdictions

As with most crimes conspiracy requires proof of an *actus reus* (i.e. an act) and a *mens rea* (i.e. a mental element or "a guilty mind").[88] The *actus reus* in a conspiracy is the agreement itself which forms the basis of the conspiracy.[89] The *mens rea* for this crime is the intent to carry out the agreement and *not* the intent to agree.[90] (Emphasis added).

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[85] David, *supra* note 80, at 959 [Reproduced in accompanying notebook at Tab 8].

[86] *See* James Ball, *Criminal Conspiracy: A Balance Between the Protection of Society and the Rights of the Individual*, 16 ST. LOUIS U. L.J. 254 (1971) [Reproduced in accompanying notebook at Tab 7].

[87] David, *supra* note 80, at 959 [Reproduced in accompanying notebook at Tab 8].

[88] *See* J.C. SMITH & BRIAN HOGAN, CRIMINAL LAW 258 (1988) [Reproduced in accompanying notebook at Tab 4].

[89] *See* SMITH & HOGAN, *supra* note 88, at 281-284 [Reproduced in accompanying notebook at Tab 4].

[90] *See* LAFAVE, *supra* note 68, at 578 [Reproduced in accompanying notebook at Tab 2].

(1) The Agreement

Defining the concept of "agreement" has been a difficult task in the context of conspiracy, and there continues to be some uncertainty as to it precise meaning.[91] There is a general consensus that neither a writing nor the speaking of words that expressly communicate agreement is required.[92] Although the agreement need not be formal and can be either expressed or implied, courts have stressed that "something more is required than acquiescence or knowledge of a plan."[93] There is also no requirement that the parties physically meet or even know of each other's existence.[94] Courts have also summarily rejected any analogy to a contractual agreement.[95] English judges have also drawn a distinction between the concept of "agreement" and its confusingly similar sibling "negotiation."[96] Although as a result of the ambiguous definition of "agreement"

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[91] *See* MODEL PENAL CODE § 5.03, Comment at 419 (1985) (Stating that "it is universally conceded that an agreement need not be express, although whether the idea of an implied agreement connotes only an unspoken, actual consensus or has broader, fictional components is by no means clear.") [Reproduced in accompanying notebook at Tab 36].

[92] *See American Tobacco v. United States*, 328 U.S. 781, 66 S.Ct. 1125, 90 L.Ed 1575 (1946) [Reproduced in accompanying notebook at Tab 12]; *United States v. Amiel*, 95 F.3d 135 (2nd Cir 1996) [Reproduced in accompanying notebook at Tab 28]. *See also* GOODE, CRIMINAL CONSPIRACY LAW IN CANADA 13 (1975) (The author discusses the definition of the "agreement" in Canadian law and concludes that although there is much speculation over the exact definition, one of the general propositions that may be confidently put forth is that no formal agreement is required, either of word or deed.)[Reproduced in accompanying notebook at Tab 1].

[93] *See* Stuart, *supra* note 68, at 683 [Reproduced in accompanying notebook at Tab 4].

[94] *See United States v. Fincher*, 723 F.2d 862 (11th Cir 1984) (The court noted that it made no difference that a non-conspirator government undercover agent is the go-between linking the conspirators.)[Reproduced in accompanying notebook at Tab 30]; *see also* GOODE, *supra* note 92, at 13 (Echoes the same principle from the Canadian Perspective.)[Reproduced in accompanying notebook at Tab 1].

[95] *See* LAFAVE, *supra* note 68, at 575[Reproduced in accompanying notebook at Tab 2].

[96] *See* GOODE, *supra* note 92, at 14-15 (The author highlights the distinction between the concepts in English case law coming to the conclusion that an agreement is achieved when the parties reach a consensus at the end of negotiations. Furthermore, a "sufficiently substantial mental reservation may be evidence of a lack of consensus sufficient to negate the inference of agreement. The author also distinguishes between mental reservations before and after the fact of agreement.)[Reproduced in accompanying notebook at Tab 1].

the precise difference between the terms is open to question.[97] However, for the existence of a conspiracy one has to be involved in more than criminal negotiation.[98]

The *actus reus* requirement for conspiracy is also faced with what many commentators have described as an "overriding evidentiary problem."[99] The clandestine nature of the crime makes the gathering of direct evidence to prove an "agreement" extremely difficult. Courts have been sympathetic to this problem, and as a result it is well established that "inferences drawn from the course of conduct of the conspirators" is enough to serve as evidence of an agreement.[100] This evidentiary presumption often becomes necessary to prove the existence of an agreement. However, although the evidentiary requirements rest upon overt acts done in pursuance of the conspiracy, the offence itself requires no overt act besides the agreement.[101] Some commentators have argued that it is possible to become part of a crime directly committed by another without

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[97] *See* Orchard, *"Agreement" in Criminal Conspiracy*,]1974] CRIM. L.R. 335 AT 343 ("Perhaps the most that can be said is that there must be two or more parties that intend to pursue or to further an unlawful object 'if it is possible or propitious to do so', and they must so express themselves as to reveal such a common intention."), *cited in* GOODE, *supra* note 92, at 15 [Reproduced in accompanying notebook at Tab 1].

[98] *See generally* GOODE, *supra* note 92, 14-15 [Reproduced in accompanying notebook at Tab 1].

[99] *See* Cousens, *Agreement as an Element of Conspiracy*, 23 VA.L.REV. 989 (1937), (Discussing the evidentiary problem and its solution in the United States.)[Reproduced in accompanying notebook at Tab 7].

[100] *See generally Paradis v. R*, S.C.R. 165 AT 168 (1934), *cited in* GOODE, *supra* note 92, at 16 [Reproduced in accompanying notebook at Tab 18]. *See also Interstate Circuit v. United States*, 306 U.S. 208 59 S.Ct. 467, 83 L.ED. 610 (1939), (Suggesting that there are limits to what inferences might be drawn.)[Reproduced in accompanying notebook at Tab 15]; *McBrady v. State*, 460 N.E.2d 1222 (Ind. 1984) (An example of an impermissible inference in a U.S. court.) [Reproduced in accompanying notebook at Tab 17].

[101] *See* Orchard, *supra* note 30, at 298 ("It is nevertheless clear [*sic*] that even if the minds of several persons can be said to be "agreed" on the furtherance of an illegal object there can be no conspiracy unless the fact of such agreement is manifested by some kind of physical communication between two or more parties." The author goes on to suggest that "it is now clear [*sic*] that no actual meeting is required and parties may be co-conspirators even though they have not been in direct communication with each other." These two statements together suggest that the physical communication that the author refers to is only required as evidence for the existence of an agreement.) [Reproduced in accompanying notebook at Tab 9].

any agreement or communication of any kind between the two parties.[102] The predominant view is that the crime of conspiracy is separate from its object. Thus one may become a conspirator without agreement only if the assistance provided is the bringing together of the other conspirators with the intention that they reach an agreement to commit a crime.[103]

(2) The Mental Element

A primary distinction that must be made with regard to the *mens rea* requirements of the crime of conspiracy is one that exists between the intention of the actors to agree, and the intention of the actors to achieve the object of the crime.[104] This problem arises because conspiracy involves two crimes, namely the object of the conspiracy, and the conspiracy itself which is intimately connected with the former.[105] There are deviations between jurisdictions over whether an intent to agree is necessary for the performance of the crime.[106] The United States has taken the view that the intent to agree is "without

[102] *See* LAFAVE, *supra* note 68, at 578 (This position is supported by courts that have take the position that aiding a conspiracy with knowledge of its purposes is enough to make one a party to the conspiracy. This is because one who aids in something that he knows to be a conspiracy deserves to be punished because he has the necessary evil intent and has acted to bring his intent to fruition.)[Reproduced in accompanying notebook at Tab 2]; *see also United States v. Kasvin*, 757 F.2d 887 (2nd Cir. 1985) [Reproduced in accompanying notebook at Tab 31]; *United States v. Galiffa*, 734 F.2d 306 (7th Cir. 1984) (Although the US Supreme Court has not ruled on this issue, these cases represent some of the lower court decisions in the U.S. that support this view point.) [Reproduced in accompanying notebook at Tab 31].

[103] *See People v. Strauch*, 240 Ill. 60, 88 N.E. 155 (1909) (A father introduced his son to another person with the intent that they would enter into a conspiracy, which they did. The court held that the father had encouraged the making of the unlawful agreement and thus could be considered to have participated in it with the requisite intent.) [Reproduced in accompanying notebook at Tab 20].

[104] *See* Working Paper, *supra* note 83, at ¶ 48 [Reproduced in accompanying notebook at Tab 40].

[105] GOODE, *supra* note 92, at 22 [Reproduced in accompanying notebook at Tab 1].

[106] *See R. v. O'Brien*, S.C.R. 666 (1954) (The court stated that and intent to agree along with an intention to put a common design into effect is necessary for the crime of conspiracy to be proven.) [Reproduced in accompanying notebook at Tab 21].

moral content."[107] Thus in the US, "only if there is a common purpose to attain an objective covered by the law of conspiracy" is there liability.[108] In Canada on the other hand judges do not always distinguish between these two forms of *mens rea* and have often suggested that both an intent to agree as well as an intent to carry out a common objective are necessary for the commission of the crime.[109]

Although there are variations over the intent to agree requirement among jurisdictions, it is generally accepted that the intent to achieve the particular objective of the conspiracy is the mental state required for the crime.[110] It has been suggested that the intent required for conspiracy is at least that degree of the criminal intent necessary for the substantive offense that is its object.[111] Thus since conspiracy requires "an intent to achieve an objective" it implies that there can be no such thing as a conspiracy to commit a crime that is defined "only in terms of recklessly or negligently causing a result."[112]

B. The Limits of Conspiratorial Liability

The quagmire that has resulted from the elusive body of cases that form the foundation of contemporary conspiracy law has meant that jurisdictions have had to make

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[107] *Developments in the Law – Criminal Conspiracy*, 72 HARV.L.REV. 920, 936 (1959) [Reproduced in accompanying notebook at Tab 9].

[108] *See* LAFAVE, *supra* note 68, at 579 [Reproduced in accompanying notebook at Tab 2].

[109] *See* Stuart, *supra* note 68, at 691 [Reproduced in accompanying notebook at Tab 4].

[110] *See generally* LAFAVE, *supra* note 68 [Reproduced in accompanying notebook at Tab 2]; STUART, *supra* note 68 [Reproduced in accompanying notebook at Tab 4]; GOODE, *supra* note 92 [Reproduced in accompanying notebook at Tab 1].

[111] Developments, *supra* note 107, at 939 [Reproduced in accompanying notebook at Tab 9]. *See also United States v. Lichenstein*, 610 F2d 1272 (5th Cir. 1980) (Applying this rule.) [Reproduced in accompanying notebook at Tab 32].

[112] *See generally People v. Palmer*, 964 P.2d 524 (Colo. 1998) (Stated that the crime to commit reckless manslaughter would be an irreconcilable legal and logical conflict.) [Reproduced in accompanying notebook at Tab 19].

choices based on varied interpretations of the common law doctrine. This has led to subtle differences in the drafting and application of statutes in the various common jurisdictions. A good example of this is the conspiratorial objective that may be considered the eventual goal of the conspiracy, i.e. "the unlawful act" that is the object of the agreement. The meaning of "unlawful" is ambiguous in this context and could be interpreted to mean criminal conduct only, or an object that is legal but achieved by illegal means. Different interpretations vary the scope of the crime of conspiracy. The following sections examine similar deviations in the law across jurisdictions seeking to highlight the differences rather than achieve a general consensus on what the law should be. The variations are usually the result of legislative initiatives to define the limits of liability in the law of conspiracy.

(1) The Conspiratorial Objective.

When examining the conspiratorial objective we begin with its common law definition which states that a conspiracy is a combination "either to do an unlawful act, or a lawful act by unlawful means."[113] However not every unlawful purpose is criminal and thus acts that are lawful when performed by an individual may become criminal as a result of group conduct.[114] This common law rule has been changed by the statutes of most jurisdictions to require the object of a criminal conspiracy to be a crime or some

[113] GOODE, *supra* note 92, at 47 (While these words were not meant to be a definition, they are often quoted as a starting point of varying interpretation of the conspiratorial objective.) [Reproduced in accompanying notebook at Tab 1].

[114] *See Commonwealth v. Hunt*, 45 Mass. 111 (1842), *cited in* LAFAVE, *supra* note 14, at 587 (Stating that "we use the terms criminal or unlawful, because it is manifest that many acts are unlawful which are not punishable by indictment or other public prosecution, and yet there is no doubt that a combination by numbers, to do them would be an unlawful conspiracy and punishable by indictment.) [Reproduced in accompanying notebook at Tab 15].

felony.[115] U.S. cases have occasionally held that there can be no indictment for criminal conspiracy if the object is merely *malum prohibitum*.[116] An act that is *malum prohibitum* is a crime merely because it is prohibited by statute, although the act itself is not necessarily immoral. Misdemeanors such jaywalking and running a stoplight are *malum prohibita*. This is contrasted against a rather anomalous decision in *Jean Talon Fashion Center Inc.* (1975) in Canada where the court recognized a conspiracy to breach a by-law.[117] Overall the wide sweep of criminal substantive law has made many acts formerly only unlawful, criminal, significantly increasing the breadth of the law of conspiracy, making it extremely susceptible to prosecutorial and judicial abuse.[118] A good example of this can been seen in the context of business law where several collusive practices that

[115] *See United States v. Meacham*, 626 F.2d 503 (5th Cir. 1980) (Supporting the view that a great majority of modern recodifications of common law conspiracy take this view.) [Reproduced in accompanying notebook at Tab 33]; *but see United States v. Dearmore*, 672 F.2d 738 (9th Cir. 1982) (Suggesting that one might conspire to violate a statutory provision defined in terms of attempting a certain crime.) [Reproduced in accompanying notebook at Tab 30].

[116] *See generally People v. Powell*, 63 N.Y. 88 (1875) (Here the court ruled that implied in the meaning of conspiracy is that the agreement must be entered into "with an evil purpose as distinguished from a purpose to do the act prohibited, in ignorance of the prohibition." This has come to be known in U.S. jurisdictions as the corrupt motive doctrine. For example elections official can overcome a conspiracy charge to violate election law by claiming ignorance of those laws.) [Reproduced in accompanying notebook at Tab 20]; *but see United States v. Blair*, 54 F.3d 639 (19th Cir. 1995) (Summarily rejecting the corrupt motive doctrine by resort to the general rule that ignorance of the criminality of one's conduct is no defense.) [Reproduced in accompanying notebook at Tab 29].

[117] *Jean Talon Fashion Center Inc.*, (1975) 22 C.C.C. (2d) 223 (Que. Q.B.) (Here Judge Rothman held , while admitting that the dividing line was not easy to draw, that some agreements to infringe a municipal by-law or a provincial summary conviction offense would constitute a conspiracy. To determine whether a violation of a regulatory by-law was sufficiently serious enough to constitute an unlawful purpose capable of forming the object of a conspiracy, one should look to the nature, purpose and interest that the law seeks to protect. Justice Rothman suggests that violation of some by laws may sometimes be at least as dangerous to the public as some criminal offenses.) [Reproduced in accompanying notebook at Tab 16]; *see also Celebrity Enterprises Ltd.* (1977) 4 W.W.R. 144 (B.C.Co. Ct.) (Summarizing Justice Rothman's position.) [Reproduced in accompanying notebook at Tab 14].

[118] *See State v. Guthrie*, 265 N.C. 659, 144 S.E.2d 891 (1965) (Prosecuting a conspiracy to interfere with a public school.) [Reproduced in accompanying notebook at Tab 25]; *State v. Goldberg*, 261 N.C. 181, 134 S.E.2d 334 (1964) (Prosecuting a conspiracy formed to bribe an athlete.) [Reproduced in accompanying notebook at Tab 24]; *but see Marcias v. People*, 161 Colo. 233, 421 P.2d 116 (1966) (The court found that there was no conspiracy to burglarize a phone booth, since a phone booth could not be burglarized.), *cited in* LAFAVE, *supra* note 68, at 588 [Reproduced in accompanying notebook at Tab 2].

were formerly only unlawful are now considered criminal under the doctrine of conspiracy.

(2) The Scope of a Conspiracy.

As we have already seen, the agreement is the essential element of a conspiracy and thus is instrumental in defining the scope of the crime. The scope is defined by two elements of the agreement, (1) the parties to the agreement, and (2) the objectives envisioned in the agreement.[119]

Questions regarding the object of a conspiracy arise when the same group has planned or committed several crimes. One could establish the existence of more than one conspiracy by using the same evidence as proof of each.[120] For example, if a group of individuals plan to kill a bank teller and decide to rob the bank in the process, one could use the same evidence to prove conspiracies to commit both crimes. However, if the killing of the teller is merely a consequence of the robbery and not part of the agreement, there is only a single conspiracy. Thus the alternative approach suggests that the focus of the analysis be the agreement rather than acts done in pursuance of it.[121] In the US the issue was resolved in *Braverman v. United* States, where the court suggested that the

[119] LAFAVE, *supra* note 68, at 594 [Reproduced in accompanying notebook at Tab 2].

[120] *See Meyers v. United States*, 94 F.2d 433 (6th Cir. 1938) [Reproduced in accompanying notebook at Tab 18]; *Beddow v. United States*, 70 F.2d 674 (8th Cir. 1934) [Reproduced in accompanying notebook at Tab 13]; *Vlassis v. United States*, 3 F.2d 905 (9th Cir. 1925) [Reproduced in accompanying notebook at Tab 34] (These courts used the "same evidence test", which meant that it was easy to establish the existence of more than one conspiracy by showing that if various objectives were accomplished their proof would be based on different facts.).

[121] *See generally United States v. Anderson*, 101 F.2d 325 (7th Cir. 1939) (A case involving a conspiracy to obstruct interstate transportation of coal and the obstruction of mail.) [Reproduced in accompanying notebook at Tab 28]; *United States v. Mazzochi*, 75 F.2d 497 (2nd Cir. 1935) (A conspiracy to sell heroin one individual and opium to another individual at the same place and the same time.) [Reproduced in accompanying notebook at Tab 32].

same evidence test was not applicable to conspiracy.[122] This was because a single continuing agreement was responsible for several criminal objects.[123] This view is echoed by the drafters of the Model Penal Code who suggest that there is only one conspiracy even if multiple crimes are the result of the same agreement or "a continuing conspiratorial relationship."[124]

The number of parties to the conspiracy in the absence of direct evidence of communication is another difficulty that conspiracy law must face.[125] In the United States conspiracies have been divided into wheel or spoke conspiracies, and chain conspiracies.[126] The former involves a single person dealing with two or more of the other people in the group and the latter a successive chain of communicative operations.[127]

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[122] *See Braverman v. United States*, 317 U.S. 49, 63 S.CT. 99, 87 L.ED. 23 (1942) [Reproduced in accompanying notebook at Tab 14].

[123] *See Blockburger v. United States*, 284 U.S. 299, 52 S.CT. 180, 76 L.ED. 306 (1932) [Reproduced in accompanying notebook at Tab 13]; *but see State v. Mapp*, 585 N.W.2d 746 (Iowa 1998) (This case suggests that even if a court is not inclined to treat agreements to violate several statutes as one conspiracy, that result that result may be obtained in a particular case through the merger doctrine. In this case because willful injury is included in the offense in murder, conspiracy to commit the lesser offense is included in conspiracy to commit murder and the two offenses are merged.) [Reproduced in accompanying notebook at Tab 25].

[124] Model Penal Code § 5.03, Comment at 439 (1985) [Reproduced in accompanying notebook at Tab 36].

[125] *See* Model Penal Code § 5.03(2) (The Model Penal Code provides that if a "guilty person knows that a persons with whom he conspires to commit a crime has conspired with another person to commit the same crime, he is guilty of conspiring with such other person or persons, whether or not he knows their identity, to commit such a crime.") [Reproduced in accompanying notebook at Tab 36].

[126] *See* LAFAVE, *supra* note 68, at 595-599 (For an extensive discussion wheel and spoke conspiracies versus chain conspiracies.) [Reproduced in accompanying notebook at Tab 2].

[127] *See generally United States v. Bruno*, 105 F.2d 921 (2d Cir. 1939) (This is an example of a case that involved both types of relationships, i.e. chain as well as wheel conspiracies. The Wheel arrangement is less likely to the conclusion that the parties had a community interest.) [Reproduced in accompanying notebook at Tab 29]; *but see United States v. Kenny*, 645 F.2d 1323 (9th Cir, 1981) (Stands for the proposition that wheel arrangements may properly constitute a single conspiracy.) [Reproduced in accompanying notebook at Tab 31].

C. The Rationale for Conspiracy Law

The primary justification for conspiracy is that it is "an inchoate crime which aims to reach and deter conduct preparatory to the commission of a substantive offence."[128] Thus the rationale for the doctrine is generally two fold, namely early intervention and the social danger incident to group criminal conduct.[129] However there are subtle differences between how jurisdictions have used these rationales in their justification of conspiracy law.

(1) Early Intervention

Courts have regularly relied on early intervention as a rationale for conspiracy law in most jurisdictions. However, in the US the Supreme Court's reasoning for doing so has not been very clear.[130] The case law does not support the notion that early intervention alone is an adequate basis to justify the law of conspiracy even though it may be enough to justify attempt.[131] Similarly, British and Canadian courts have viewed conspiracy as an extension of attempt law which allows for intervention at an earlier stage than the latter, but have been unwilling to integrate the two.[132] While British

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[128] GOODE, *supra* note 30, at 82 [Reproduced in accompanying notebook at Tab 1].

[129] *See* Dennis, *The Rational of Criminal Conspiracy*, 93 L.Q.REV 39 (1977) [Reproduced in accompanying notebook at Tab 8].

[130] *See* David, *supra* note 80, at 966 [Reproduced in accompanying notebook at Tab 8] *citing United States v. Rabinowich*, 238 U.S. 78 (1915) (This case suggests that since conspiracies are difficult to detect there is a need for extra time to discover the conspiracy.) [Reproduced in accompanying notebook at Tab 33]; *United States v. Feola* 420 U.S. 671 (1975) (The court stated that "criminal intent has crystallized, and the likelihood of actual, fulfilled commission warrants preventative action.") [Reproduced in accompanying notebook at Tab 30].

[131] *See* David, *supra* note 80, at 967 [Reproduced in accompanying notebook at Tab 1].

[132] *See* GOODE, *supra* note 92, at 84 (The British Parliament obviously believes that there is some relationship between the two as evidenced by the fact that the statutory conspiracy established in the Criminal Law Act of 1977 are found in the Criminal Attempts Act of 1981.) [Reproduced in accompanying notebook at Tab 1].

attempt law focuses on "actions that are more than merely preparatory," conspiracy law focuses on the agreement.[133]

(2) Group Conduct

In Britain, the notion that group criminal activity might be more insidious than individual activity finds support in the case law and the reports of the Law Commission.[134] The Commission stated that the doctrine would allow the prosecution of organizers as members of the conspiracy, but believed that this was an added bonus to early intervention which was the primary rationale.[135] In the United States Justice Jackson explained that group criminal activity was more heinous since a group had more "strength opportunities and resources" than a lone wrong-doer.[136] Concerted activity also improves the likelihood of success of a crime. Courts in the United States have taken this into consideration as they have examined the "potential of future harm" unrelated to the agreement itself as significant enough to warrant the application of conspiracy law.[137] This rationale has been summarily criticized by commentators in Canada on two grounds, (i) the logic of the argument, and (ii) the factual basis of it.[138] For example the rationale

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[133] *See* David, *supra* note 80, at 962 [Reproduced in accompanying notebook at Tab 8].

[134] *See* GOODE, *supra* note 92, at 82-83 (A discussion of the Law Commission's "social danger rationale.") [Reproduced in accompanying notebook at Tab 1].

[135] *See* GOODE, *supra* note 90, at 82 [Reproduced in accompanying notebook at Tab 1].

[136] *See generally Krulewitch*, *supra* note 82 (Dissenting opinion of Justice Jackson.) [Reproduced in accompanying notebook at Tab 16].

[137] *See Callanan v. United States*, 364 U.S. 587, 593-594 (1961) [Reproduced in accompanying notebook at Tab 14]; *Iannelli v. United States*, 420 U.S. 770, 778 (1975) [Reproduced in accompanying notebook at Tab 15].

[138] *See* GLANVILLE WILLIAMS, CRIMINAL LAW: THE GENERAL PART (2nd Ed. 1961) [Reproduced in accompanying notebook at Tab 6]; *see generally* Model Penal Code, *supra* note 124 (Supporting this view.) [Reproduced in accompanying notebook at Tab 36].

for conspiracy to commit an act that is not a crime is attacked on the grounds that it fails to measure social harm as the rest of criminal law does.[139] Generally social harm in criminal law is measured by effect. Thus an agreement between two people to hand out leaflets is less socially dangerous that one person robbing a bank. However this rationale seems to suggest that a conspiracy between five people to kill a man is more serious than one between two people to effect the same object. Thus, it has been argued, that it should be solely up to the Legislatures to make certain combinations illegal. These critics suggest that the courts should be allowed to operate only in specifically delimited areas.[140] The force of this criticism is particularly strong when the object of a criminal conspiracy is unlawful but not illegal.

V. Conspiracy and Joint Criminal Enterprise: A Comparison.

In comparing the doctrine of joint criminal enterprise to conspiracy it is important to remember the extent of liability that each crime covers. The former extends the liability of a person involved in a common design or plan to all crimes that are "a natural and foreseeable consequence" of involvement in the criminal enterprise, regardless of the accused's participation in the crime itself.[141] Conspiracy on the other hand focuses on the agreement as the crux of the crime.[142] This section will contrast the two doctrines with a focus on the individual elements of the crimes, including the actus reus and mens rea, as well as the underlying rationale for the doctrines themselves.

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[139] *See* GOODE, *supra* note 85, at 84 [Reproduced in accompanying notebook at Tab 1].

[140] *See* SMITH & HOGAN, *supra* note 88, at 711 [Reproduced in accompanying notebook at Tab 4]; *see also* Model Penal Code, *supra* note 124, at 98 [Reproduced in accompanying notebook at Tab 36].

[141] *See generally* Schabas, *supra* note 59 [Reproduced in accompanying notebook at Tab 11]; *Tadic* Judgment, *supra* note 11, at ¶ 204 [Reproduced in accompanying notebook at Tab 26].

[142] *See* Stuart, *supra* note 68, at 680 [Reproduced in accompanying notebook at Tab 4].

A. The "Agreement" Compared to the "Common Plan."

Structurally the agreement requirement of conspiracy and the common plan requirement of joint criminal enterprise seem extremely similar. The cross-section of terms generally used to describe the agreement extenuates this similarity.[143] The Nuremberg Tribunal often referred to "a common plan or conspiracy to wage an aggressive war."[144] The "common plan" and the "agreement" satisfy the actus reus requirement for the crimes.[145] Both require a plurality of persons,[146] and in general the object of the plan and agreement must be a statutorily prohibited act.[147] As we have already seen[148] neither the common plan nor the agreement need be explicit, and both can be inferred from the actions of a plurality of persons acting in unison.[149] However, with conspiracy the act of agreement constitutes the essence of the crime itself.[150] The

[143] *See* STUART, *supra* note 68, at 680 (Contemporary conspiracy statutes in Canada define the crime as an agreement for a *common purpose*. This notion of a common purpose arises in the common law doctrine of complicity that suggests that when several people act together in pursuance of a "common purpose", every act done in furtherance of such intent by each of them is, in law, done by all.) [Reproduced in accompanying notebook at Tab 4]; *see also* K.J.M. SMITH, A MODERN TREATISE ON THE LAW OF CRIMINAL CONSPIRACY 209-234 (Claredon Press 1991) [Reproduced in accompanying notebook at Tab 4].

[144] *See The Nuremberg Trial*, 6 F.R.D. 69 (1946) (The Indictment charges the defendants with conspiring or having a common plan to commit crimes against peace. A plan could have a number of participants even though it was only conceived by only one of them. Furthermore the execution of a common plan or conspiracy to commit any of the crimes enumerated in the Charter resulted in responsibility for all crimes performed in execution of the plan.) [Reproduced in accompanying notebook at Tab 25].

[145] *See Tadic* Judgment, *supra* note 3, at ¶ 227 [Reproduced in accompanying notebook at Tab 26].

[146] *See* LAFAVE, *supra* note 68 [Reproduced in accompanying notebook at Tab 2]; *see Tadic* Judgment, *supra* note 3, at ¶ 227 [Reproduced in accompanying notebook at Tab 26].

[147] *See* STUART, *supra* 68, at 691 [Reproduced in accompanying notebook at Tab 4]; LAFAVE, *supra* note 68, at 587 [Reproduced in accompanying notebook at Tab 2]; *see Tadic* Judgment, *supra* note 3, at ¶ 227 [Reproduced in accompanying notebook at Tab 26].

[148] *See infra* p. 12.

[149] *See* Cousens, *Agreement as an Element of Conspiracy*, 23 VA.L.REV. 989 (1937) [Reproduced in accompanying notebook at Tab 7]; *see Tadic* Judgment, *supra* note 3, at ¶ 227 [Reproduced in accompanying notebook at Tab 26].

agreement is seen to occur before what several common law jurisdictions have defined as the crime of "attempt."[151] This is not the case with joint criminal enterprise which is primarily used by the ICTY to extend the sphere of criminal liability beyond the object of the common plan itself.[152] The ICTY statute also defines crimes such as the attempt and conspiracy to commit genocide.[153] Thus although joint criminal enterprise imposes liability on individuals for involvement with the common plan, similar to the doctrine of conspiracy, its reach extends much further.

The principle that one is responsible for the substantive crimes of fellow conspirators committed in furtherance of a conspiracy has often been expressed in conspiracy cases.[154] But this concept of liability is discussed in terms of a separate crime of complicity to the crimes of the co-conspirator and not necessarily as a part of doctrine of conspiracy which looks to the agreement itself to identify liability.[155] However, even the doctrine of complicity limits liability to criminal acts done in furtherance of the conspiracy, which are dependent upon the encouragement and material support of the group as a whole, in order to treat each member of the conspiracy as a causal agent or accomplice of the

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[150] *See infra* p. 26.

[151] *See* LAFAVE, *supra* note 68, at 535-567 (An extensive discussion of the crime of attempt in U.S. jurisprudence.) [Reproduced in accompanying notebook at Tab 2].

[152] *See infra* p. 10.

[153] *See* ICTY Statute article 2 [Reproduced in accompanying notebook at Tab 37].

[154] *See generally Baker v. United States*, 21 F.2d 903 (4th Cir. 1927) [Reproduced in accompanying notebook at Tab 12].

[155] *See* LAFAVE, *supra* note 68, at 633-635 (A discussion of the distinction between conspiracy and complicity.) [Reproduced in accompanying notebook at Tab 2].

criminal act.[156] Joint criminal enterprise on the other hand extends liability from the common plan to all the acts committed by a member of the group that are "a natural and foreseeable consequence of participation in the common plan," regardless of whether these consequences further the object of the common plan. In a sense it places responsibility for all 'collateral damage' that may result as a consequence of reckless execution of the common plan upon the entire membership involved in effectuating it.

B. The Mens Rea Requirements.

As we have already seen, a conspiracy to commit a crime whose intent requirement is defined in terms of negligence or recklessness has been declared illogical and highly improbably by U.S. courts.[157] Although joint criminal enterprise is similar in the sense that intent greater than negligence is required for the commission of the crime, the *Tadic* opinion defined the mens rea requirement as "advertent recklessness" or *dolus eventualis*.[158] Thus it seems that an egregious degree of carelessness would satisfy the mens rea requirement. This in a sense amounts to a reinterpretation of the doctrine of common purpose found in common law jurisdictions.[159] Not only are all the parties to the common purpose responsible for acts committed in pursuance of that purpose, but also all the acts that might result as a natural and foreseeable consequence of involvement in that purpose. This formulation of the common purpose doctrine spreads the net of

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[156] *See generally* K.J.M. SMITH, A MODERN TREATISE ON THE LAW OF CRIMINAL COMPLICITY (Claredon Press 1991) [Reproduced in accompanying notebook at Tab 4].

[157] *See Palmer v. People*, 964 P.2d 524 (Colo. 1998) (Stating that a conspiracy to commit reckless manslaughter would pose a legal logical conflict that is irreconcilable.) [Reproduced in accompanying notebook at Tab 19].

[158] *See Tadic* Judgment, *supra* note 3, at ¶ 219 [Reproduced in accompanying notebook at Tab 26].

[159] *See* SMITH, *supra* note 156, at 209-234 (An extensive discussion of the doctrine of common purpose and its place in the common law.) [Reproduced in accompanying notebook at Tab 4].

liability much wider as every individual who is part of the common plan is responsible for the acts of all the other members of the plan regardless of whether they occurred in furtherance of the objective; provided the foreseeability requirements are met.[160]

C. What Purpose is Served by these Doctrines?

As we have already seen, the primary rationale for the crime of conspiracy is the possibility of early intervention. Although the doctrine has been plagued by prosecutorial and judicial abuse, it does allow for intervention much earlier than the crime of attempt. This is possible by making the very act of agreement with the appropriate intent a crime. Joint criminal enterprise on the other hand seems retroactive in its focus. The ICTY has justified its use by arguing that the scope of liability is contemplated by the object and purpose of the enabling statute.[161] This extension of liability is also justified on the premise that the crimes envisaged in the statute are such serious violations of international law that liability should not be limited to those that carry out the actus reus for the enumerated crimes but other offenders as well.[162] However this form of liability has been adopted as a fall back in the prosecution's cases taking a back seat to the doctrine of command responsibility, which is comparatively a less attenuated method of ascribing fault.[163] Thus overall it would seem that the primary purpose of the doctrine is to extend the net of liability to egregious violators of intentional humanitarian law that escape the ambit of command responsibility.

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[160] SMITH, *supra* note 156, at 209 [Reproduced in accompanying notebook at Tab 4].

[161] *See Tadic* Judgment, *supra* note 3, at ¶ 189 [Reproduced in accompanying notebook at Tab 26].

[162] *See Tadic* Judgment, *supra* note 3, at ¶ 190 [Reproduced in accompanying notebook at Tab 26].

[163] SCHARF, *supra* note 11, at 123 [Reproduced in accompanying notebook at Tab 3].

VI. Conclusion

The ICTY's definition of joint criminal enterprise has been criticized as vague and inaccurate.[164] However, commentators have agreed that the exercise of liability embodied in the doctrine is not novel particularly in domestic jurisdictions.[165] Although it shares several structural commonalities with the doctrine of conspiracy, it is in substance an extension of the common law doctrine of complicity. Similar to conspiracy, it suffers from vague and divergent interpretations of its objective and subjective elements.

Joint criminal enterprise would be best served if revisited by the ICTY to clarify the ambiguities of the *Tadic* opinion. To begin with, the mens rea element of the crime must be clearly defined. As Sassoli & Olson point out in their article[166], the court's discussion of the mens rea element in the *Tadic* case is not consistent. The Tribunal mentions the concept of *dolus eventualis* as the requisite intent, i.e. the crime must be foreseeable and the accused must have willingly taken the risk. However the court also implies that if a crime is merely predictable and the accused remains indifferent he still may be liable under joint criminal enterprise. Although the former standard was eventually applied by the case, one wonders which one of these two principles was in fact the requisite intent. This is the concern that many commentators have expressed with regards to the constitutionality of the doctrine which seems to stem from this inconsistent

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[164] *See* Sassoli & Olson, *supra* note 44 (Discussing the inconsistent mens rea requirements laid out by the *Tadic* opinion with regard to joint criminal enterprise. "The Appellate Chamber to some extent compares apples to oranges, as is inevitable when comparing answers different legal systems provide for a specific question. The definition of the third category is not very clear and varies throughout the discussion by the chamber.") [Reproduced in accompanying notebook at Tab 10].

[165] *See* Sassoli & Olson, *supra* note 44 [Reproduced in accompanying notebook at Tab 10].

[166] *See* Sassoli & Olson, *supra* note 44 [Reproduced in accompanying notebook at Tab 10].

discussion of the mental element required for conviction. A detailed analysis of the German concepts of intention will help to clarify this discussion. Furthermore, although the broad scope of the doctrine is necessary to bring within its ambit the most heinous violators of international humanitarian law it does need to be restricted to successful counter the scrutiny of constitutional arguments. The doctrine of command responsibility for example is limited by concepts of commander control. Similarly it seems probably that a more stringent definition of the mens rea requirement could shape joint criminal enterprise to combat such criticisms. In this respect the doctrine of conspiracy in common law jurisdictions adds very little to the analysis as it is just too different. The focus of the two crimes is just too divergent. A more useful analysis would be a comparison to the doctrine of complicity as well as accessorial liability in common law jurisdictions. The concept of felony murder, with its imputed mens rea, developed in US courts, could also prove to be very useful in define the scope of the crime. In conclusion if the doctrine is to prove useful in future international criminal tribunals, an express incorporation of the concept into enabling statutes would go a long way in substantiating its legitimacy. Furthermore such an approach would also help to elaborate the distinctive elements of the crime and its use in a prosecutor's case.