2007

Using Criminal Means to Arrive at a Legitimate Purpose: JCE Liability and Notice in Light of the Prosecutor v. Brima, Kamara and Kanu Judgment

Niki Dasarathy

CASE WESTERN RESERVE UNIVERSITY
SCHOOL OF LAW

MEMORANDUM FOR THE SPECIAL COURT FOR SIERRA LEONE

Issue: Using Criminal Means to Arrive at a Legitimate Purpose: JCE Liability and Notice in Light of the *Prosecutor v. Brima, Kamara and Kanu* Judgment

Prepared by Niki Dasarathy
J.D. Candidate, 2009
Fall Semester, 2007

Table of Contents

Table of Authorities

Cases

1. *Lipohar v. The Queen*, [1999] H.C.A. 65.
2. *Peters v. The Queen*, [1998] H.C.A. 7.
3. *Pettibone v. U.S.*, 148 U.S. 197, 202 (1893).
4. *Prosecutor v. Babic*, Case No. IT-03-72-A, Appeals Judgment (July 18, 2005).
5. *Prosecutor v. Blagojević , Jokic*, Case No. IT-02-60-T, Trial Judgment (Jan. 17, 2005).
6. *Prosecutor v. Brdanin*, Case No. IT-99-36-T, Trial Judgment (Sept. 1, 2004).
7. *Prosecutor v. Brima, Kamara, Kanu*, Case No. SCSL-04-16-T, Trial Judgment (June 20, 2007).
8. *Prosecutor v. Fofana, Kondewa,* Case No. SCSL-03-14-I, Trial Judgment (Aug. 2, 2007).
9. *Prosecutor v. Furundzija*, Case No. IT-95-17/1-T, Appeals Judgment (July 20, 2000).
10. *Prosecutor v. Krnojelac*, Case No. IT-97-25-A, Appeals Judgment (Sept. 17, 2003).
11. *Prosecutor v. Krstic*, Case No. IT-98-33-A, Appeals Judgment (Apr. 19, 2004).
12. *Prosecutor v. Krstic*, Case No. IT-98-33-T, Trial Judgment (Aug. 2, 2001).
13. *Prosecutor v. Kvocka*, Case No. IT-98-30/1-A, Appeals Judgment (Feb. 28, 2005).
14. *Prosecutor v. Kvocka*, Case No. IT-98-30/1-T, Trial Judgment (Nov. 2, 2001).
15. *Prosecutor v. Limaj, Bala, Musliu*, Case No. IT-03-66-T, Trial Judgment (Nov. 30, 2005).
16. *Prosecutor v. Ntakirutimana & Ntakirutimana*, Case Nos. ICTR-96-10-A and ICTR-96-17-A, Appeals Judgment (Dec. 13, 2004).
17. *Prosecutor v. Simba*, Case No. ICTR-01-76-T, Trial Judgment (Dec. 13, 1005).
18. *Prosecutor v. Simic, Tadić, Zaric*, Case No. IT-95-9-T, Trial Judgment (Oct. 17, 2003).
19. *Prosecutor v. Stakic*, Case No. IT-97-24-A, Appeals Judgment (Mar. 22, 2006).
20. *Prosecutor v. Stakic,* Case No. IT-97-24-T, Trial Judgment (July 31, 2003).

21. *Prosecutor v. Tadić*, Case No. IT-94-1-A, Appeals Judgment (July 15 1999).

22. *Prosecutor v. Tadić*, Case No. IT-94-1-T, Trial Judgment (May 7, 1997).

23. *Prosecutor v. Vasiljevic*, Case No. IT-98-32-T, Trial Judgment (Nov. 29, 2002).

24. *State v. Burnham*, 15 N.H. 396 (1844).

25. *U.S. v. Pan-American Petroleum Co.*, 6 F.2d 43 (Cal. Dist. Ct. 1925).

26. *U.S. v. Pan-American Petroleum Co.*, 273 U.S. 456 (1927).

Statutes

27. Crimes and Criminal Procedure, Conspiracy to Commit Offense or to Defraud United States, 18 U.S.C.A. § 371 (1984).

28. Criminal Law Act 1977, c. 45 (Eng.).

29. Rome Statute of the International Criminal Court, July 17, 1998, 37 I.L.M. 999, *available at* http://www.icc-cpi.int/library/about/officialjournal/Rome_Statute_120704-EN.pdf.

30. Statute of the International Criminal Tribunal for the Former Yugoslavia, May 25, 1993, 32 I.L.M. 1192, *available at* http://www.un.org/icty/legaldoc-e/basic/statut/statute-feb06-e.pdf.

31. Statute of the International Tribunal for Rwanda, Nov. 8, 1993, 33 I.L.M. 1598, available at http://69.94.11.53/ENGLISH/basicdocs/statute/2004.pdf.

32. Statute of the Special Court of Sierra Leone, Oct. 4, 2000, S.C. Res. 1315, U.N. Doc S/2000/915, *available at* http://www.sc-sl.org/scsl-statute.html.

Indictments

33. *Prosecutor v. Brima, et al.*, Case No. SCSL-04-16-PT, Further Amended Consolidated Indictment (Feb. 18, 2005).

34. *Prosecutor v. Brdanin*, Case No. IT-99-36-T, Sixth Amended Indictment (Dec. 9, 2003).

35. *Prosecutor v. Krnojelac*, Case No. IT-97-25-A, Third Amended Indictment (June 25, 2001).

36. *Prosecutor v. Norman, Fofana, Kondewa,* Case No. SCSL-03-14-I, Indictment (Feb. 4, 2004).

37. *Prosecutor v. Stakic*, Case No. IT-97-24-A, Fourth Amended Indictment (Apr. 10, 2002).

38. *United States et al., v. Goering, et al.,* Indictment *reprinted in* THE TRIAL OF MAJOR WAR CRIMINALS BEFORE THE INTERNATIONAL MILITARY TRIBUNAL, NUREMBERG 14 NOVEMBER 1945 - 1 OCTOBER 1946 (Vol. 1) (1945).

Law Reviews and Articles

39. Antonio Cassesse, *The Proper Limits of Individual Responsibility Under the Doctrine of Joint Criminal Enterprise*, 5 J. INT'L CRIM. JUST. 109 (1997).

40. Christian Davis, et al., *Federal Criminal Conspiracy*, 44 AMER. CRIM. L. REV. 523 (2007).

41. Aaron Fichtelberg, *Conspiracy and International Criminal Justice*, 17 CRIM. L. F. 149 (2006).

42. Katrina Gustafson, *The Requirement of an "Express Agreement" for Joint Enterprise Liability*, 5 J. INT'L. CRIM. J. 134 (2007).

43. Zoila Hinson, *An Examining of Joint Criminal Enterprise in the Special Court's Decision of the AFRC Trial*, SIERRA LEONE COURT MONITORING PROGRAM, July 28, 2007, http://www.slcmp.org/drwebsite/articles/An_Examining_of_Joint_Criminal_Enterprise_in_the_Special_Court_s_Decision_of_the_AFRC_Trial.shtml#_ednref6.

44. Allison Marston Danner and Jenny S. Martinez, *Guilty Associations: Joint Criminal Enterprise, Command Responsibility, and the Development of International Criminal Law*, 93 CAL. L. REV. 76 (2005).

45. *Milosevic found dead in his cell*, BBC NEWS, Mar. 11, 2006, http://news.bbc.co.uk/2/hi/europe/4796470.stm.

46. Jens David Ohlin, *Three Conceptual Problems with the Doctrine of Joint Criminal Enterprise*, 5 J. INT'L. CRIM. J. 69 (2007).

47. Alexander Orakhelashvili, *Restrictive Interpretation of Human Rights Treaties in the Recent Jurisprudence of the European Court of Human Rights*, 14 EUR. J. INT'L L. 529 (2003).

48. Steven Powles, *Joint Criminal Enterprise: Criminal Liability by Prosecutorial Ingenuity and Judicial Creativity*?, 2 J. INT'L CRIM. JUST. 606 (2004).

49. Jacob Ramer, *Hate By Association: Joint Criminal Enterprise Liability for Persecution*, 7 CHI.-KENT J. INT'L COMP. L. 31 (2007).

50. William A. Schabas, *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 ENGLAND L. REV. 1032 (2003).

51. William A. Schabas, *Professor William Schabas on AFRC Decision Special Court for Sierra Leone Rejects Joint Criminal Enterprise*, THE TRIAL OF CHARLES TAYLOR (2007), http://charlestaylortrial.org/expert-commentary/professor-william-schabas-on-afrc-decision/.

52. Joseph A.K. Sesay and Zoila Hinson, *Special Court for Sierra Leone delivers judgments on the CDF Trial*, SIERRA LEONE COURT MONITORING PROGRAM, Aug 2, 2007, http://www.slcmp.org/drwebsite/reports/Special_Court_for_Sierra_Leone_delivers_judgments_on_the_CDF_Trial.shtml.

53. *S. Leone War Crimes Indictee Hinga Norman Dies*, REUTERS, Feb. 22, 2007, http://www.reuters.com/article/idUSL22286656.

54. Elies van Sliedregt, *Criminal Responsibility in International Law Liability Shaped by Policy Goals and Moral Outrage*, 14 EUR. JOUR. CRIME 81-114 (2006).

Books

55. ROBERT CRYER, ET AL., AN INTRODUCTION TO INTERNATIONAL CRIMINAL LAW AND PROCEDURE (2007).

56. CHRISTOPHER HARDING, CRIMINAL ENTERPRISES: INDIVIDUALS, ORGANIZATIONS AND CRIMINAL RESPONSIBILITIES (2007).

57. KARIM A.A. KHAN, ET AL, ARCHBOLD INTERNATIONAL CRIMINAL COURTS PRACTICE, PROCEDURE AND EVIDENCE (2005).

58. WAYNE LAFAVE, CRIMINAL PROCEDURE 614 (2003).

59. J. G. MERRILLS, THE DEVELOPMENT OF INTERNATIONAL LAW BY THE EUROPEAN COURT OF HUMAN RIGHTS (1993).

60. GUENAEL METTRAUX, INTERNATIONAL CRIMES AND THE AD HOC TRIBUNALS (2005).

61. MOHAMED C. OTHMAN, ACCOUNTABILITY FOR INTERNATIONAL HUMANITARIAN LAW VIOLATIONS, THE CASE OF RWANDA AND EAST TIMOR (2005).

62. WILLIAM A. SCHABAS, THE UN INTERNATIONAL CRIMINAL TRIBUNALS (2006).

63. MICHAEL P. SCHARF, BALKAN JUSTICE: THE STORY BEHIND THE FIRST INTERNATIONAL WAR CRIMES TRIAL SINCE NUREMBERG (1997).

64. JAMES WALLACE BRYAN, THE DEVELOPMENT OF THE ENGLISH LAW OF CONSPIRACY (1909).

65. GERHARD WERLE, PRINCIPLES OF INTERNATIONAL CRIMINAL LAW (2005).

Other

66. Biography of William Schabas, http://www.nuigalway.ie/human_rights/Staff/william_schabas.html (last visited Nov. 25, 2007).

67. Memorandum from Hilary Garon Brock, Case Western Reserve University School of Law, to the Office of the Prosecutor of the International Criminal Tribunal for Rwanda, Issue: Analyze the Judgment of *The Prosecutor v. Brdjanin* from the ICTY re: Joint Criminal Enterprise. How does this Holding Affect the future use of Joint criminal Enterprise? (Spring 2005) (Available at: http://law.case.edu/war-crimes-research-portal/memoranda/brock_hilarygaron.pdf).

68. Memorandum from Rajiv K. Punja, Case Western Reserve University School of Law, to the Office of the Prosecutor of the International Criminal Tribunal for Rwanda, Issue: What is the distinction between "Joint Criminal Enterprise" as defined by the ICTY case law and conspiracy in common law jurisdictions? (Fall 2003) (Available at: http://law.case.edu/war-crimes-research-portal/memoranda/JointCriminalEnterprise.pdf).

69. *Prosecutor v. Brdanin & Talic*, Case No. IT-99-36, Decision on Form of Further Amended Indictment and Prosecution Application to Amend (June 26, 2001).

70. *Prosecutor v. Brdanin & Talic*, Case No. IT-99-36, Decision on Objections by Momir Talic to the Form of the Amended Indictment (Feb. 20, 2001).

71. *Prosecutor v. Krnojelac*, Case No. IT-97-25, Decision on Form of Second Amended Indictment (May 11, 2000).

72. Summary of Appeals Chamber Judgment, the Prosecutor v. Dusko Tadić, http://www.un.org/icty/pressreal/tad-sumj990715e.htm (last visited Nov. 25, 2007).

73. Summary of Appeals Judgment for Milomir Stakic, http://www.un.org/icty/stakic/appeal/judgement/sta-summ060322e.htm (last visited Nov. 25, 2007).

I. Introduction

A. Scope

This memorandum examines the recent Special Court of Sierra Leone's (SCSL) June 20, 2007 decision in the *Prosecutor v. Brima, Kamara and Kanu*, which dismissed the allegation of Joint Criminal Enterprise (JCE)[1] against defendants.[2] The Court, as well as international war crimes experts such as William Schabas,[3] claimed that the Prosecution alleged a JCE for a crime not listed in the Statute and dismissed the JCE charge.

This memorandum provides ammunition to refute the argument that it is necessary that a JCE itself be criminal and applies a means-based test instead. If one person committed crimes in order to further a common purpose, even if that purpose is not criminal, a JCE exists. Furthermore, jurisprudence from the International Criminal Tribunal for the Former Yugoslavia (ICTY) holds that general or vague pleadings of JCE are acceptable, as long as the nature of the crimes infers a JCE and the Defendant can properly respond to the charge alleged.

---

* "What are some compelling arguments against the position of William Schabas and the AFRC decision maintaining that JCE liability applies only to groups that have a criminal purpose, not to groups of people that use criminal means to arrive at a non-criminal purpose? Furthermore, what are the notice and liability requirements for alleging a JCE?"

[1] Joint Criminal Enterprise is also referred to as "common purpose" or "common design." All three are used interchangeably in this memorandum. *See* Steven Powles, *Joint Criminal Enterprise: Criminal Liability by Prosecutorial Ingenuity and Judicial Creativity*?, 2 J. INT'L CRIM. JUST. 606, 607 (2004) [reproduced in accompanying notebook at Tab 48].

[2] *Prosecutor v. Brima, Kamara, Kanu*, Case No. SCSL-04-16-T, Trial Judgment (June 20, 2007) [*hereinafter Prosecutor v. Brima et al.* or *Brima*] [relevant pages reproduced in accompanying notebook at Tab 7].

[3] William Schabas is the Director of the Irish Centre for Human Rights at the National University of Ireland, Galway, where he is also the chair in human rights law. His biography is available at http://www.nuigalway.ie/human_rights/Staff/william_schabas.html [reproduced in accompanying notebook at Tab 66].

ICTY jurisprudence serves as the proper guide to define the scope of common purpose liability. JCE decisions from the ICTY greatly influence the broader development of international criminal law and serve as the best precedent for future tribunals to follow.[4] The ICTY is the first international criminal tribunal since the Trials at Nuremberg, which took place over fifty years ago.[5] In fact, the *Tadić* Judgment, although drawn from Nuremberg jurisprudence and customary international law, is hailed as the defining case for JCE; its principals still followed by the ICTY and other tribunals today.[6]

The first section of this memorandum discusses the origins of the JCE doctrine defined in the *Prosecutor v. Tadić*. The next section discusses the evolution of the JCE doctrine. Section IV analyzes the *Brima* Judgment and how the SCSL erred in its decision. Finally, the last section is a public policy argument on the importance of JCE and argues that the SCSL made a mistake in dismissing the JCE charge.

---

[4] Katrina Gustafson, *The Requirement of an "Express Agreement" for Joint Enterprise Liability*, 5 J. INT'L. CRIM. J. 134, 158 (2007) [reproduced in accompanying notebook at Tab 42].

[5] Michael P. Scharf, BALKAN JUSTICE: THE STORY BEHIND THE FIRST INTERNATIONAL WAR CRIMES TRIAL SINCE NUREMBERG 3 (1997) [relevant pages reproduced in accompanying notebook at Tab 63].

[6] *See Prosecutor v. Limaj, Bala, Musliu*, Case No. IT-03-66-T, Trial Judgment (Nov. 30, 2005) [relevant pages reproduced in accompanying notebook at Tab 15]; *Prosecutor v. Blagojević , Jokic*, Case No. IT-02-60-T, Trial Judgment (Jan. 17, 2005) [relevant pages reproduced in accompanying notebook at Tab 5]. Both of these cases repeat the analysis of the *Tadić* decision and agree that Article 7(1) of the ICTY Statute contains the basis to charge individuals with individual criminal liability. These individuals share a common purpose to embark on criminal activity carried out jointly or by some members in this group of persons. *See Prosecutor v. Limaj, Bala, Musliu*, Case No. IT-03-66-T, Trial Judgment, ¶510 (Nov. 30, 2005) [relevant pages reproduced in accompanying notebook at Tab 15]; *Prosecutor v. Blagojević , Jokic*, Case No. IT-02-60-T, Trial Judgment, ¶695 (Jan. 17, 2005) [relevant pages reproduced in accompanying notebook at Tab 5]; *see generally* Statute of the International Criminal Tribunal for the Former Yugoslavia, May 25, 1993, 32 I.L.M. 1192, *available at* http://www.un.org/icty/legaldoc-e/basic/statut/statute-feb06-e.pdf [hereinafter ICTY Statute] [reproduced in accompanying notebook at Tab 30]; *Prosecutor v. Tadić*, Case No. IT-94-1-A, Appeals Judgment (July 15, 1999) [relevant pages reproduced in accompanying notebook at Tab 21].

B. Summary of Conclusions

1. If the Means are Criminal, there is a JCE.

ICTY jurisprudence holds that a JCE itself does not have to be criminal. A common purpose may be legitimate, but when crimes are committed in order to achieve a common purpose, there is a JCE. The actual motive behind the common purpose is irrelevant. Similarly, in cases of conspiracy, a form of criminal liability similar to JCE, when defendants pursued criminal means in order to achieve a common purpose, courts consistently found a conspiracy. Therefore, the Indictment in the *Prosecutor v. Brima*, which alleged that defendants committed crimes to further a common purpose or were foreseeable results of the common purpose, properly alleged a JCE.

2. The Specificity Required by the *Brima* Judgment is in Conflict with the ICTY's Jurisprudence Regarding Proper Notice of JCE.

ICTY jurisprudence not only set a precedent for allowing general allegations of JCE, but also found a JCE despite the indictment neglecting to specifically allege one. From the nature of the crimes alleged, courts may infer a JCE. In particular, the ICTY courts found JCEs existed in cases where defendants committed war crimes, even though the indictments did not explicitly allege a JCE. In addition, ICTY jurisprudence shows that it is possible to find defendants guilty of crimes pursuant to furthering a JCE, even though the indictment alleges crimes not provided for in the Statute.

3. The SCSL Trial Chamber Erred in Ruling that JCE Cannot Change Over Time.

The SCSL Trial Chamber held that if the common plan to control Sierra Leone's diamond mines involved crimes, this plan commenced at the inception of the agreement among the group. If the JCE changed, the Court argued, the Prosecution must plead the new purposes in

the Indictment, which they did not. This argument is incorrect for several reasons. First, a JCE need not be criminal from inception. Second, the rule requiring new facts and evidence of the "new" JCE is not found anywhere in ICTY jurisprudence. Finally, the Trial Chamber's argument defies its own logic. The Trial Chamber held that the prosecution pled JCE incorrectly by alleging a crime not listed in the SCSL Statute. Then the Trial Chamber said that there was a JCE in the beginning but that the Prosecution failed to provide facts for the new JCE. Therefore the Trial Chamber simultaneously held the existence and nonexistence of a JCE from the beginning of the agreement.

4. The SCSL's Decision in the *Brima* Judgment is Against Public Policy.

JCE has its critics and there is a backlash against the broad application of JCE in indictments. The *Brima* Judgment was an attempt by the SCSL to reign in the extensive use of JCE. This was especially easy because the evidence was clear that defendants' physically perpetrated the acts. However, from a public policy standpoint this was a poor decision because its logic flies in the face of ICTY jurisprudence and the definition of JCE as applied after the *Tadić* decision.

II. The Beginnings of Joint Criminal Enterprise Liability: the *Tadić* Decision.

Dusko Tadić was a Bosnian Serb café owner who became a nationalist political leader,[7] but remained a low-level participant in Serbian politics.[8] The ICTY Prosecutor indicted him on 34 counts of crimes within the ICTY's Statute and jurisdiction.[9] The Trial Chamber convicted Tadić on several counts of war crimes, but acquitted him of murder as a crime against humanity. In particular was the murder of five Muslim men in Jaskici, a Bosnian village.[10] The Trial Chamber held that it could not "on the evidence before it, be satisfied beyond reasonable doubt that the accused had any part in the killing of the five men."[11] Both sides appealed.

A. The Factual Background of the *Prosecutor v. Tadić.*

The Appeals Chamber in Tadić faced an important issue: could international criminal law find Tadić criminally liable for the murder of five men even though there was no evidence that he personally pulled the trigger and killed any of them? Ignoring the joint plan to commit these crimes would ignore the collective and conspiratorial nature of these atrocities.[12] The Appeals Chamber looked to the Statute that provides the Court's jurisdiction and found that "serious

---

[7] *Prosecutor v. Tadić*, Case No. IT-94-1-T, Trial Judgment, ¶181, 188 (May 7, 1997) [relevant pages reproduced in accompanying notebook at Tab 22].

[8] Allison Marston Danner and Jenny S. Martinez, *Guilty Associations: Joint Criminal Enterprise, Command Responsibility, and the Development of International Criminal Law*, 93 CAL. L. REV. 76, 104 (2005) [reproduced in accompanying notebook at Tab 44].

[9] Summary of Appeals Chamber Judgment, the *Prosecutor v. Dusko Tadić*, http://www.un.org/icty/pressreal/tad-sumj990715e.htm (last visited Nov. 25, 2007) [relevant pages reproduced in accompanying notebook at Tab 72].

[10] Danner and Martinez, *supra* note 8, at 104-05 [reproduced in accompanying notebook at Tab 44].

[11] *Prosecutor v. Tadić*, Case No. IT-94-1-T, Trial Judgment, ¶373 (May 7, 1997) [relevant pages reproduced in accompanying notebook at Tab 22].

[12] Jens David Ohlin, *Three Conceptual Problems with the Doctrine of Joint Criminal Enterprise*, 5 J. INT'L. CRIM. J. 69 (2007) [reproduced in accompanying notebook at Tab 46].

violations of international law is not limited merely to those who actually carry out the *actus reus* of the enumerated crimes but appears to extend also to other offenders."[13] The Appeals Chamber deduced the JCE doctrine from Article 7(1)[14] which refers to the nature and collective aspect of crimes and war crimes.[15] The Appeals Chamber believed that failing to hold co-perpetrators responsible for war crimes and atrocities disregards co-perpetrators' roles in committing or furthering to commit heinous acts. It was evident that but for these people, perpetration of these crimes would not exist nor be possible.[16] Despite the Indictment against Tadić lacking any allegation that he was part of a JCE, the Appeals Chamber found that the ICTY Statute, as well as the nature of the crimes alleged in the Indictment, inferred his participation in a common plan.

The Appeals Chamber also held that customary international law, and in particular jurisprudence from the Nuremberg Trials, provided the theory behind *mens rea* and *actus reus* in determining a JCE.[17] The Appeals Chamber held that "the notion of common design as a form

---

[13] *Prosecutor v. Tadić*, Case No. IT-94-1-A, Appeals Judgment, ¶189 (July 15, 1999) [relevant pages reproduced in accompanying notebook at Tab 21].

[14] ICTY Statute, *supra* note 6, ¶7(1) [reproduced in accompanying notebook at Tab 30]. This provision deals with individual criminal responsibility. In particular, it holds that "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." *Id.* Articles 2 through 5 include grave breaches of the 1949 Geneva Convention, violations of the laws or customs of war, genocide, and crimes against humanity.

[15] Ohlin, *supra* note 12.

[16] *Prosecutor v. Tadić*, Case No. IT-94-1-A, Appeals Judgment, ¶192 (July 15, 1999) [relevant pages reproduced in accompanying notebook at Tab 21].

[17] *Id.* at ¶189-220 (July 15, 1999); *see generally* Elies van Sliedregt*, Criminal Responsibility in International Law Liability Shaped by Policy Goals and Moral Outrage*, 14 EUR. JOUR. CRIME 81-114 (2006) [reproduced in accompanying notebook at Tab 54].

of accomplice liability is firmly established in customary international law and. . . is upheld, albeit implicitly, in the Statute of the International Tribunal."[18]

The Appeals Chamber divided JCE liability into three types.

B. The First Category of JCE, the Basic Form.

The first category involves cases where there is an agreement among two or more people to commit a crime. It is not required, however, that this be an expressed agreement. Instead, the circumstances may infer the agreement.[19] All the codefendants "acted pursuant to a common design, possess the same criminal intention; for instance, the formulation of a plan among the co-perpetrators to kill, where, in effecting this common design . . . they nevertheless all possess the intent to kill."[20] The accused must voluntarily participate in the act or acts and intend the result.[21] This method of liability also applies in co-perpetration cases, in which all the participants have the same intent to commit a crime, and one or more of the participants commits the crime.[22]

C. The Second Category of JCE, the Systemic Form.

The second category of JCE is the "so-called 'concentration camp' cases."[23] This category consists of cases where members of the military, such as those persons who ran concentration camps, carried out the offenses. In most cases, the accused acted in pursuance of a

---

[18] *Prosecutor v. Tadić*, Case No. IT-94-1-A, Appeals Judgment, ¶220 (July 15, 1999) [relevant pages reproduced in accompanying notebook at Tab 21].

[19] *Id.* at ¶227.

[20] *Id.* at ¶196.

[21] *Id.* at ¶196.

[22] *Id.* at ¶192-206.

[23] *Id.* at ¶202.

common plan or design to kill or hurt prisoners and intended to commit war crimes. The accused was always in a position of authority at the concentration camp. In both the first and second categories of JCE, all members of the JCE are potentially criminally responsible for all crimes that fell within that common design.[24]

D. The Third Category of JCE, the Extended Form.

The final category is arguably the most controversial[25] and involves cases with a common design or purpose where one of the accused commits an act, and while outside the common purpose or design, was still "a natural and foreseeable consequence of the effecting of that common purpose."[26] For example, there is a common purpose to forcibly remove members belonging to an ethnic group from a town. It is a likely consequence that in removing these people against their will the murder of one or more persons will occur. Those who took part in effectuating the common purpose are therefore guilty of murder under the 3rd type of liability of JCE since it was foreseeable that this common purpose would ultimately result in criminal deaths.[27]

E. The *Actus Reus* and *Mens Rea* Required to be Liable Under a JCE Theory of Liability.

The Appeals Chamber further held that there are three requirements in order to have the *actus reus* to commit a JCE. First, there must be a plurality of persons involved. It is not necessary to have the organization in a specific structure, such as a militarily group. Second,

---

[24] Danner and Martinez, *supra* note 8, at 106 [reproduced in accompanying notebook at Tab 44].

[25] *Id.* at 109 (2005).

[26] *Prosecutor v. Tadić*, Case No. IT-94-1-A, Appeals Judgment, ¶204 (July 15, 1999) [relevant pages reproduced in accompanying notebook at Tab 21].

[27] *Id.* at ¶204.

there must exist "a common plan, design or purpose which amounts to or involves the commission of a crime provided for in the Statute."[28] It is not necessary that this plan be previously arranged or formulated and may materialize extemporaneously. The fact that a group of persons acted in unison to effectuate a joint criminal enterprise also gives rise to the inference of a common plan.[29] Finally, the Statute must list the crime committed as a punishable crime. "This participation need not involve commission of a specific crime under one of those provisions…but may take the form of assistance in, or contribution to, the execution of the common plan or purpose."[30]

As mentioned above, there is no requirement of any prior planning for a JCE and the crimes may arise extemporaneously. When there is an understanding that resembles an agreement between two or more people that they will commit a crime, there is a JCE. "The understanding or arrangement need not be express, and its existence may be inferred from all the circumstances." The understanding could also be unspoken or could be an actual agreement. In either situation the accused must have had the intent to commit the crime.[31]

The *mens rea* required for JCE liability, however, differs according to the category of the JCE.[32] Under the first category, the only requirement is intent to commit the act or acts. The prosecution must demonstrate that all those charged, as well as the principal offender, had the

[28] *Prosecutor v. Tadić*, Case No. IT-94-1-A, Appeals Judgment, ¶226 (July 15, 1999) [relevant pages reproduced in accompanying notebook at Tab 21].

[29] *Id.* at ¶226.

[30] *Id.* at ¶226.

[31] *Id.* at ¶227(ii); *Prosecutor v. Furundzija*, Case No. IT-95-17/1-T, Appeals Judgment, ¶119 (July 20, 2000) [relevant pages reproduced in accompanying notebook at Tab 9].

[32] *Prosecutor v. Babic*, Case No. IT-03-72-A, Appeals Judgment, ¶38 (July 18, 2005) [relevant pages reproduced in accompanying notebook at Tab 4]; *Prosecutor v. Simic, Tadić, Zaric*, Case No. IT-95-9-T, Trial Judgment, ¶158 (Oct. 17, 2003) [relevant pages reproduced in accompanying notebook at Tab 18].

same common state of mind required for the crime and performed an act or acts to further the common purpose.[33] The second category requires personal knowledge of the system as well as the intent to further the common goal. Finally, the third category requires an intention to participate in and further the criminal purpose. If it was foreseeable that a crime might take place by one of the other members of the group and the accused willingly took that risk, the accused may be held responsible for a crime other than the one agreed upon.[34] When the Prosecution relies on an inference, it must, of course, be reasonable and substantiated by evidentiary support.

F. Analysis of the Tadić Decision.

Some aspects regarding the manner in which the Appeals Chamber found JCE liability in *Tadić* are particularly noteworthy. First, the ICTY statute never formally outlines JCE liability. The prosecutor in *Tadić* also never explicitly relied on a concept of a common design, common purpose, or a common plan.[35] Instead, the Appeals Chamber, on its own, found a JCE inferred from the charges alleged as well as Article 7(1), and claimed that JCE was "grounded in post-war jurisprudence, which has become part of customary international law.[36] Yet, the Appeals Chamber never explicitly mentioned Nuremberg in its review of the precedents for common plan

[33] *Prosecutor v. Brdanin & Talic*, Case No. IT-99-36, Decision on Form of Further Amended Indictment and Prosecution Application to Amend, ¶26 (June 26, 2001) [reproduced in accompanying notebook at Tab 69].

[34] *Prosecutor v. Tadić*, Case No. IT-94-1-A, Appeals Judgment, ¶228 (July 15, 1999) [relevant pages reproduced in accompanying notebook at Tab 21].

[35] Danner and Martinez, *supra* note 8, at 111 [reproduced in accompanying notebook at Tab 44].

[36] ICTY Statute, supra note 6 [reproduced in accompanying notebook at Tab 30]; *Prosecutor v. Tadić*, Case No. IT-94-1-A, Appeals Judgment, ¶¶189-90 (July 15, 1999) [relevant pages reproduced in accompanying notebook at Tab 21]; GERHARD WERLE, PRINCIPLES OF INTERNATIONAL CRIMINAL LAW 121 (2005) [relevant pages reproduced in accompanying notebook at Tab 65].

liability.[37] The Appeals Chamber also found that through the nature of crimes alleged, many of which required joint participation, customary international law provided a basis for the existence of JCE liability.[38] The Nuremberg Tribunal's jurisprudence found that the Nazis were guilty of a common plan and conspiracy to commit war crimes. Reviewing cases from the Nuremberg Tribunal, such as the *Almelo Case* and the *Essen Lynching* Trial, the *Tadić* Court found that there was a customary basis for liability for co-perpetration in cases where the parties engaged in a common design to commit a crime. From there the Appeals Chamber found the three forms of JCE, even though neither Nuremberg case explicitly relied on the concept of a common design, purpose or plan.[39] Nevertheless, the notion of JCE as a form of individual criminal liability is now a major weapon in the international criminal prosecutor's arsenal.[40]

III. The Evolution of the JCE Doctrine.

Since the *Tadić* decision, the courts expanded the prerequisites needed for JCE guilt, while keeping intact the basic fundamentals of JCE liability required in *Tadić.* Generally, the participant of a JCE must perform the acts directed at furthering the common plan or purpose. The ICTY held that "co-perpetratorship in a joint criminal enterprise . . . only requires that the accused shares the *mens rea* or the 'intent to pursue a common purpose' and performs some acts

---

[37] Danner and Martinez, *supra* note 8, at 117 [reproduced in accompanying notebook at Tab 44].

[38] *Prosecutor v. Tadić*, Case No. IT-94-1-A, Appeals Judgment, ¶¶191,195 (July 15, 1999) [relevant pages reproduced in accompanying notebook at Tab 21]; ROBERT CRYER, ET AL., AN INTRODUCTION TO INTERNATIONAL CRIMINAL LAW AND PROCEDURE 305 (2007) [relevant pages reproduced in accompanying notebook at Tab 55].

[39] *Prosecutor v. Tadić*, Case No. IT-94-1-A, Appeals Judgment, ¶220 (July 15, 1999) [relevant pages reproduced in accompanying notebook at Tab 21]; CRYER, *supra* note 38, at 306 [relevant pages reproduced in accompanying notebook at Tab 55]; Danner and Martinez, *supra* note 8, at 111 [reproduced in accompanying notebook at Tab 44].

[40] Rome Statute of the International Criminal Court, art 25(d)(3), July 17, 1998, 37 I.L.M. 999, *available at* http://www.icc-cpi.int/library/about/officialjournal/Rome_Statute_120704-EN.pdf [hereinafter Rome Statute] [reproduced in accompanying notebook at Tab 29].

that 'in some way are directed to the furtherance of the common design.'"[41] The ICTY also held that, given the absence of direct evidence, the circumstances give rise to an inference of intent.[42]

A. Indictment Specificity in Charging JCE.

In *Prosecutor v. Krnojelac*, decided four years after *Tadić*, the Appeals Chamber addressed the issue of specificity in an indictment alleging a JCE. The Appeals Chamber remarked that the issue was of general importance, even though the Prosecution did not request the Court to review this issue.[43] The Appeals Chamber said that allegations of a JCE in an indictment require a strict definition of common purpose, identifying as precisely as possible the principal perpetrators of the crimes. In other words, the accused must know whether the indictment charges him with having contributed to a system involving all the acts under prosecution or only some of them.[44] It also required that the prosecution state a theory it considered most likely to establish the accused's responsibility in the JCE.[45] The Appeals Chamber effectively restricted how far JCE liability could stretch with regard to describing the membership and activities of the enterprise.[46] The Appeals Chamber also held that the

---

[41] *Prosecutor v. Babic*, Case No. IT-03-72-A, Appeals Judgment, ¶38 (July 18, 2005) [relevant pages reproduced in accompanying notebook at Tab 4]. *See also Prosecutor v. Brdanin*, Case No. IT-99-36-T, Trial Judgment, ¶263 (Sept.1, 2004) [relevant pages reproduced in accompanying notebook at Tab 6]; *Prosecutor v. Simic, Tadić, Zaric*, Case No. IT-95-9-T, Trial Judgment, ¶158 (Oct. 17, 2003) [relevant pages reproduced in accompanying notebook at Tab 18]; *Prosecutor v. Kvocka*, Case No. IT-98-30/1-T, Trial Judgment, ¶289 (Nov. 2, 2001) [relevant pages reproduced in accompanying notebook at Tab 14],which all held that a JCE requires that the accused took action to further the common purpose.

[42] *Prosecutor v. Kvocka*, Case No. IT-98-30/1-A, Appeals Judgment, ¶243 (Feb. 28, 2005) [relevant pages reproduced in accompanying notebook at Tab 13].

[43] *Prosecutor v. Krnojelac*, Case No. IT-97-25-A, Appeals Judgment, ¶128 (Sept. 17, 2003) [relevant pages reproduced in accompanying notebook at Tab 10].

[44] *Id.* at ¶116-17.

[45] *Id.* at ¶117.

[46] Gustafson, *supra* note 4 [reproduced in accompanying notebook at Tab 42].

prosecution must state the theory or theories it considered most likely to establish the accused's responsibility within accepted time-limits.[47] Therefore the JCE must be clear in what it alleges. The specificity required in *Krnojelac*, however, is limited only to acts which sought to further the common purpose, not to extraneous criminal acts.[48] For the crimes that do not fit into the common purpose of the alleged system, the Court held that the prosecution should state the basis it considered as the responsibility of the accused.[49] Never does the Court hold, however, that the Prosecution was too vague in its allegation of JCE, but rather, the common purpose alleged was too broad.

B. The Rome Statute and Criticism of JCE.

The Rome Statute to the International Criminal Court now incorporates JCE into in Article 25(d)(3).[50] Article 25 makes the distinction between aiding and abetting and holds a person liable for a JCE when he or she "contributes to the commissions of such a crime by a group of persons acting with a common purpose."[51] It is also interesting to note that Article 25(d)(3) does not seem to recognize that JCE has any outer limits.[52] JCE liability is a judge-made rule based on customary international law, and helps to determine liability of those who

[47] *Prosecutor v. Krnojelac*, Case No. IT-97-25-A, Appeals Judgment, ¶117 (Sept. 17, 2003) [relevant pages reproduced in accompanying notebook at Tab 10].

[48] *Id.* at ¶118.

[49] *Id.* at ¶120.

[50] Rome Statute, *supra* note 40, at art. 25 [reproduced in accompanying notebook at Tab 29].

[51] Rome Statute, *supra* note 40, at art. 25 [reproduced in accompanying notebook at Tab 29]; KARIM A.A. KHAN, ET AL, ARCHBOLD INTERNATIONAL CRIMINAL COURTS PRACTICE, PROCEDURE AND EVIDENCE 516 (2005) [relevant pages reproduced in accompanying notebook at Tab 57].

[52] CRYER, *supra* note 38, at 308-09 [relevant pages reproduced in accompanying notebook at Tab 55]; Rome Statute, supra note 40, at art. 25(d)(3) [reproduced in accompanying notebook at Tab 29].

did not physically commit the crime.[53]

JCE receives its fair share of criticism, however. Many say that this is "judicial creativity" and stretches past the bounds of criminal liability.[54] In fact, William Schabas argued that JCE liability is overused and stands for "Just Convict Everyone."[55] He argues against the objective nature of JCE and the presumption of a reasonable person. He claims that JCE liability establishes an objective rather than a subjective standard for the assessment of *mens rea*. "The Tribunal can remain uncertain about what the offender actually believed, intended and knew, as long as it is satisfied with how a reasonable person in the same circumstances would have judged the situation and reacted."[56] He finds the third form of JCE particularly troublesome because it

---

[53] The *Babic* Appeals Judgment held for JCE liability to attach it is not necessary that the accused be physically present to commit the crime. "Participation in a joint criminal enterprise does not require that the accused commit the *actus reus* of a specific crime provided for in the Statute," *Prosecutor v. Babic*, Case No. IT-03-72-A, Appeals Judgment, ¶38 (July 18, 2005) [relevant pages reproduced in accompanying notebook at Tab 4]. The *Kronlejac* Appeals decision also held that once a defendant in a JCE "shares the intent of that enterprise, his participation may take the form of assistance or contribution with a view to carrying out the common plan or purpose. [He] need not physically and personally commit the crime or crimes set out in the joint criminal enterprise." *Prosecutor v. Krnojelac*, Case No. IT-97-25-A, Appeals Judgment, ¶81 (Sept. 17, 2003) [relevant pages reproduced in accompanying notebook at Tab 10] *quoting Prosecutor v. Tadić*, Case No. IT-94-1-A, Appeals Judgment, ¶227 (July 15, 1999) [relevant pages reproduced in accompanying notebook at Tab 21].

[54] Zoila Hinson, *An Examination of Joint Criminal Enterprise in the Special Court's Decision of the AFRC Trial*, SIERRA LEONE COURT MONITORING PROGRAM, July 28, 2007, http://www.slcmp.org/drwebsite/articles/An_Examining_of_Joint_Criminal_Enterprise_in_the_Special_Court_s_Decision_of_the_AFRC_Trial.shtml#_ednref6 [reproduced in accompanying notebook at Tab 43]; Antonio Cassesse, *The Proper Limits of Individual Responsibility Under the Doctrine of Joint Criminal Enterprise*, 5 J. INT'L CRIM. JUST. 109 (1997) [reproduced in accompanying notebook at Tab 39].

[55] William A. Schabas, *Professor William Schabas on AFRC Decision Special Court for Sierra Leone Rejects Joint Criminal Enterprise*, THE TRIAL OF CHARLES TAYLOR (2007), http://charlestaylortrial.org/expert-commentary/professor-william-schabas-on-afrc-decision/ [herein after Schabas online article] [reproduced in accompanying notebook at Tab 51].

[56] William A. Schabas, *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 ENGLAND L. REV. 1032, 1033 (2003) [hereinafter Schabas, *The ICTY at Ten*] [reproduced in accompanying notebook at Tab 50].

appears to hinge on a negligence standard of guilt, which "is a form of anti-social behaviour [sic] judged by a different yardstick than those who commit crimes with malice and premeditation."[57] Convictions based on the third form of JCE liability, Schabas argues, diminish the Tribunals' significance and compromise their historical legacy.[58] Although defendants have a sense of "willingness" that allows the consequences to occur, the mental element remains objective because if the crime is foreseeable, then the *mens rea* of the accused is irrelevant. [59]

For example, the ICTY Prosecution could not find actual evidence of Slobodan Milosevic's guilt of intending to committing war crimes. Instead, they alleged his guilt under a JCE because it was reasonably foreseeable that his subordinates might commit atrocities in order to carry out his common purpose. Schabas claims that this type of liability is similar to the case of gangster Al Capone, where he was guilty of tax evasion and sent to Alcatraz, because U.S. federal prosecutors could not find enough proof of murder. Schabas implicitly questions whether this type of liability provides the justice defendants deserve. [60]

Those critics who agree with Schabas also claim that JCE finds defendants guilty by association, resembling a type of "organizational liability."[61] An individual is guilty for others' actions because he associated with them. Therefore, there is no causal link between a

---

[57] Schabas, *The ICTY at Ten*, *supra* note 56, at 1033 [reproduced in accompanying notebook at Tab 50].

[58] *Id.* at 1033-34.

[59] Jacob Ramer, *Hate By Association: Joint Criminal Enterprise Liability for Persecution*, 7 CHI.-KENT J. INT'L COMP. L. 31, 61 (2007) [reproduced in accompanying notebook at Tab 49].

[60] Schabas, *The ICTY at Ten*, *supra* note 56, at 1034 [reproduced in accompanying notebook at Tab 50]. Milosevic died in his prison cell in March 2006, and was never formally convicted as being part of a JCE, the common purpose being to create a larger Serbian State. *See Milosevic found dead in his cell*, BBC NEWS, http://news.bbc.co.uk/2/hi/europe/4796470.stm [reproduced in accompanying notebook at Tab 45].

[61] Hinson, *supra* note 54 [reproduced in accompanying notebook at Tab 43].

defendant's action or intention and the crime committed.[62]

A year before the decision in *Prosecutor v. Brima, Kamara and Kanu*, Schabas argued in his book that in order to allege a JCE, the prosecutor must, with care, plead that the common purpose was criminal.[63] Schabas said that a common criminal purpose must involve perpetration of a crime enumerated within the Statute. He ominously predicted that the prosecution's Indictment alleging a JCE in *Prosecutor v. Brima, Kamara and Kanu* was not within the Court's jurisdiction because the common purpose was not a crime found in the SCSL Statute.[64]

C. JCE Rejected in the *Prosecutor v. Brima, Kamara and Kanu*.

The SCSL Statute, drafted in 2000, came one year after *Tadić* with the concept of JCE in mind and also with an understanding that prosecutors prefer the expansive form of JCE.[65] Although noteworthy that the International Criminal Tribunal for Rwanda (ICTR) and the SCSL both contain no express provision of JCE in their Statutes,[66] a special provision is unnecessary, as the ICTY found JCE inferred in its Statute. Similarly, the ICTR and SCSL may infer JCE from their statutes as well.[67] Article 6 of the SCSL Statute states that "a person who planned,

---

[62] *Id.*; Antonio Cassesse, *The Proper Limits of Individual Responsibility Under the Doctrine of Joint Criminal Enterprise*, 5 J. Int'l Crim. Just. 109, 114 (1997) [reproduced in accompanying notebook at Tab 39].

[63] WILLIAM A. SCHABAS, THE UN INTERNATIONAL CRIMINAL TRIBUNALS 311 (2006) [relevant pages reproduced in accompanying notebook at Tab 62].

[64] Schabas, *supra* note 63 at 312 [relevant pages reproduced in accompanying notebook at Tab 62].

[65] Danner and Martinez, *supra* note 8, at 104-05, 142-43 [reproduced in accompanying notebook at Tab 44].

[66] Statute of the International Tribunal for Rwanda, Nov. 8, 1993, 33 I.L.M. 1598, available at http://69.94.11.53/ENGLISH/basicdocs/statute/2004.pdf [relevant pages reproduced in accompanying notebook at Tab 31]; Statute of the Special Court of Sierra Leone, Oct. 4, 2000, S.C. Res. 1315, U.N. Doc S/2000/915 available at http://www.sc-sl.org/scsl-statute.html [hereinafter SCSL Statute] [relevant pages reproduced in accompanying notebook at Tab 32].

[67] CRYER, *supra* note 38, at 305 [relevant pages reproduced in accompanying notebook at Tab 55].

instigated, ordered, committed or otherwise aided and abetted in the planning, preparation or execution of a crime referred to in Articles 2 to 4 of the present Statute shall be individually responsible for the crime."[68] Similar to Article 7(1) of the ICTY Statute, Article 6 of the SCSL Statute gives rise to the inference of JCE. Although the ICTR does not often allege JCE, this may be because their Statute, unlike the SCSL Statute, encompasses conspiracy to commit genocide, which is a larger crime than JCE and is frequently alleged by the prosecution, removing a need for using JCE as a recourse.[69]

In June of 2007, the SCSL tried defendants Alex Tamba Brima, Brima Bazzy Kamara and Santigie Borbor Kanu of various crimes. The Trial Chamber II found the three guilty of counts 3, 4, 5, 9, 10, 12, and 13 of the Indictment in the Bombali region of Sierra Leone.[70] These crimes included exterminating persons through shooting, hacking and burning to death, committing sexual violence, enlisting child soldiers, forcing labor and committing other inhumane acts.[71] The Trial Chamber found the three involved themselves in these alleged acts as members in a military capacity, either with the Revolutionary United Front, the Civil Defense Forces or the Armed Forces Revolutionary Council.[72]

---

[68] Danner and Martinez, *supra* note 8, at 155 [reproduced in accompanying notebook at Tab 44]; SCSL Statute, *supra* note 66 [relevant pages reproduced in accompanying notebook at Tab 32].

[69] WERLE, *supra* note 36, at 121 n.178 [relevant pages reproduced in accompanying notebook at Tab 65];]; SCSL Statute, *supra* note 66 [relevant pages reproduced in accompanying notebook at Tab 32]; Danner and Martinez, *supra* note 8, at 108 n.135 [reproduced in accompanying notebook at Tab 43].

[70] *Prosecutor v. Brima, Kamara, Kanu*, Case No. SCSL-04-16-T, Trial Judgment, ¶¶2104-06 (June 20, 2007) [relevant pages reproduced in accompanying notebook at Tab 7].

[71] *Prosecutor v. Brima, et al.*, Case No. SCSL-04-16-PT, Further Amended Consolidated Indictment, ¶41-66 (Feb. 18, 2005) [relevant pages reproduced in accompanying notebook at Tab 33].

[72] *Id.* at ¶7; *Prosecutor v. Brima, Kamara, Kanu*, Case No. SCSL-04-16-T, Trial Judgment, ¶11-13 (June 20, 2007) [relevant pages reproduced in accompanying notebook at Tab 7].

The prosecution argued in their Indictment that Brima, Kamara and Kanu "shared a common plan, purpose or design (joint criminal enterprise) which was to take any actions necessary to gain and exercise political power and control over the territory of Sierra Leone, in particular the diamond mining areas."[73] In particular, ¶34 alleged that

> The joint criminal enterprise included gaining and exercising control over the population of Sierra Leone in order to prevent or minimize resistance to their geographic control, and to use members of the population to provide support to the members of the joint criminal enterprise. The crimes alleged in this Indictment, including unlawful killings, abductions, forced labour, physical and sexual violence, use of child soldiers, looting and burning of civilian structures, were either actions within the joint criminal enterprise or were a reasonably foreseeable consequence of the joint criminal enterprise.[74]

The Prosecution argued that the defendants were liable under both the first and third categories of JCE liability. The Trial Chamber held instead that the Indictment alleging a JCE was "defectively pleaded" and ruled that it would not consider JCE as a mode of criminal responsibility.[75] The Trial Chamber said that the common purpose must be criminal and because "any actions necessary" is not a crime under the SCSL statute, JCE was not properly alleged.[76] The Court further held that although JCE can arise extemporaneously, because the time period

---

[73] *Prosecutor v. Brima, et al.*, Case No. SCSL-04-16-PT, Further Amended Consolidated Indictment, ¶33-34 (Feb. 18, 2005) [relevant pages reproduced in accompanying notebook at Tab 33].

[74] *Prosecutor v. Brima, Kamara, Kanu*, Case No. SCSL-04-16-T, Trial Judgment, ¶34 (June 20, 2007) [relevant pages reproduced in accompanying notebook at Tab 7].

[75] *Id.* at ¶85.

[76] *Id.* at ¶67 states

> With the greatest respect, the Trial Chamber does not agree with the decision of our learned colleagues that the Indictment has been properly pleaded with respect to liability for JCE, since the common purpose alleged… is not a criminal purpose recognised [sic] by the Statute. The common purpose pleaded in the Indictment does not contain a crime under the Special Court's jurisdiction. A common purpose "to take any actions necessary to gain and exercise political power and control over the territory of Sierra Leone" is not an international crime.

alleged in the Indictment covers all times relevant to the Indictment, the JCE must have been criminal from its inception.[77] The Trial Chamber ruled, however, when defendants formed the agreement the common purpose was not criminal and therefore, there was no JCE.[78] The Trial Chamber then states that in looking at the evidence, the alleged common purpose must have changed, but the Prosecution failed to provide material facts of this new or changed common purpose. The SCSL held that "all those new and different purposes have to be pleaded in the indictment and the Prosecution cannot be permitted to mould the case against the Accused as the trial progresses."[79]

The Trial Chamber found defendants guilty of the crimes related to the alleged JCE; however defendants' direct guilt was not difficult to prove since all the defendants actually committed the atrocities alleged and were field commanders who personally carried out the alleged acts.[80] However, with the dismissal of the JCE charge, the Trial Chamber rejected much of the prosecution's case regarding crimes committed elsewhere in Sierra Leone.

The Trial Chamber also noted that prosecuting rebellion, acts of rebellion and challenges to the authority of the State are charges purely for the State to decide and there "is no rule against rebellion in international law." Schabas, in claiming that he warned the Court of this ruling the year before, maintained that the prosecution's "suggestion seems rather close to a just war theory, by which rebels are inherently part of a joint criminal enterprise whereas those who

---

[77] *Id.* at ¶77. The Court held that the Indictment failed to contain the time period over which the JCE existed. The prosecution, however, argued that the time frame applied should be all the times that are relevant to the Indictment.

[78] *Id.* at ¶79 (June 20, 2007).

[79] *Prosecutor v. Brima, Kamara, Kanu*, Case No. SCSL-04-16-T, Trial Judgment, ¶80 (June 20, 2007) [relevant pages reproduced in accompanying notebook at Tab 7].

[80] Schabas online article, *supra* note 55 [reproduced in accompanying notebook at Tab 51].

defend entrenched authority are not."[81] He predicted that the JCE rejection will have "potentially [] devastating consequences for the prosecution" and could be detrimental to future cases, such as the case against Charles Taylor, who never stepped foot in Sierra Leone and did not have his troops in Sierra Leone at the time of the commission of these alleged atrocities. [82]

D. JCE Charges in *Prosecutor v. Norman, Fofana and Kondewa.*

In February of 2004 the SCSL prosecution charged defendants Norman, Fofana and Kondewa with counts of war crimes and crimes against humanity.[83] The indictment did not allege a JCE explicitly, but instead alleged a common purpose or plan to use any means necessary to defeat rival forces and gain and exercise control over the territory of Sierra Leone. The prosecution's indictment further alleged that this included the complete elimination of the rival militia as well as their supporters and sympathizers.[84] The indictment claimed that each defendant is individually criminally responsible pursuant to Article 6.1 of the SCSL Statute "for the crimes referred to in Articles 2, 3, 4 of the Statute . . . which crimes each of them planned, instigated, ordered, committed . . . or which crimes were within a common purpose, plan or design in which each Accused participated or were a reasonably foreseeable consequence of the common purpose, plan or design. . . ."[85]

The Trial Chamber rejected the JCE plea. It claimed that there was no evidence that the

[81] Schabas, *supra* note 63, at 312 [relevant pages reproduced in accompanying notebook at Tab 62].

[82] Schabas online article, *supra* note 55 [reproduced in accompanying notebook at Tab 51].

[83] *Prosecutor v. Norman, Fofana, Kondewa,* Case No. SCSL-03-14-I, Indictment (Feb. 4, 2004) [relevant pages reproduced in accompanying notebook at Tab 36].

[84] *Id.* at ¶19.

[85] *Id.* at ¶20.

defendants, Fofana and Kondewa,[86] ordered a common purpose, plan or design to commit criminal acts. Further, the Trial Chamber said that there was no evidence beyond a reasonable doubt proving that such a plan existed.[87] It is extremely noteworthy to point out that the Trial Chamber I, unlike Trial Chamber II in *Prosecutor v. Brima, Kamara and Kanu*, did not mention anything about the Indictment's lack of sufficient pleading. Indeed Trial Chamber I rejected defense claims that the Prosecution did not plead the indictment with sufficient specificity.[88] The Trial Chamber I held that it does not need to examine whether a defendant knew precisely of the crime committed, but rather whether he was aware that "a number of crimes would probably be committed" by his subordinates, in furtherance of the common plan intended by the defendant.[89] Although the Trial Chamber I's decisions do not affect Trial Chamber II decisions and vice versa, the Trial Chamber I nevertheless did not find any defects in the indictment, which was quite similar to the *Brima* Indictment.

IV. Analysis of the *Brima* Judgment.

The Trial Chamber's dismissal of JCE in the *Prosecutor v. Brima, Kamara and Kanu* is not a ruling worthy of broad interpretation. The Indictment specifically alleged that the defendants engaged in a JCE to "take any actions necessary" to effectuate control of Sierra

[86] Defendant Norman died in February 2007 and the Trial Chamber would not provide any findings regarding his guilt or innocence. Joseph A.K. Sesay and Zoila Hinson, Special Court for Sierra Leone delivers judgments on the CDF Trial, SIERRA LEONE COURT MONITORING PROGRAM, Aug 2, 2007, http://www.slcmp.org/drwebsite/reports/Special_Court_for_Sierra_Leone_delivers_judgments_on_the_CDF_Trial.shtml [reproduced in accompanying notebook at Tab 52]; *S. Leone war crimes indictee Hinga Norman Dies*, REUTERS, Feb. 22, 2007, http://www.reuters.com/article/idUSL22286656 [reproduced in accompanying notebook at Tab 53].

[87] *Prosecutor v. Fofana, Kondewa,* Case No. SCSL-03-14-I, Trial Judgment, ¶¶771, 850, 858, 859, 865, 866, 915, 929, 949 (Aug. 2, 2007) [relevant pages reproduced in accompanying notebook at Tab 8].

[88] Sesay and Hinson, *supra* note 86, [reproduced in accompanying notebook at Tab 52].

[89] *Prosecutor v. Fofana, Kondewa,* Case No. SCSL-03-14-I, Trial Judgment, ¶724 (Aug. 2, 2007) [relevant pages reproduced in accompanying notebook at Tab 8].

Leone's lucrative diamond mines. [90] The Indictment specifically alleged the crimes defendants committed in order to further the JCE, or were a reasonably foreseeable consequence of the joint criminal enterprise.[91] The Trial Chamber found that this common purpose was not criminal in nature nor a crime found in the Statute, both requirements of JCE liability.[92] Schabas claimed that the SCSL prosecution team disregarded the care that the prosecution team from the ICTY took in alleging a JCE and that they "rather inexpertly alleged a joint criminal enterprise to commit something which is not a crime."[93] For the reasons set forth below, this is unwarranted criticism.

A. Criminal Means Create Illegitimate Ends.

At the ICTY, the courts found defendants criminally liable of a JCE when they engaged in illegal means to further a common purpose. Illegal means fall under the crimes listed in the appropriate statute as prosecutable. The most common example from the ICTY was the participation in a common plan to create an all-Serbian State and the performance of illegal measures, such as the commission of mass killings, in order to achieve this purpose. A purpose may be non-criminal, but through criminal means, such as systematic rape, unlawful killings and forced labor, the ICTY courts found a criminal enterprise. In the *Prosecutor v. Brima, Kamara and Kanu*, the Trial Chamber found that the common purpose of taking any means necessary to control diamond mines was not a crime within the Court's Statute. The Court further held that

[90] *Prosecutor v. Brima, et al.*, Case No. SCSL-04-16-PT, Further Amended Consolidated Indictment, ¶33 (Feb. 18, 2005) [relevant pages reproduced in accompanying notebook at Tab 33].

[91] *Id.* at ¶34.

[92] *Prosecutor v. Brima, Kamara, Kanu*, Case No. SCSL-04-16-T, Trial Judgment, ¶67 (June 20, 2007) [relevant pages reproduced in accompanying notebook at Tab 7].

[93] Schabas online article, *supra* note 55 [reproduced in accompanying notebook at Tab 51].

"the contribution to a joint criminal enterprise need not be criminal in nature," but the purpose must be inherently criminal.[94] In other words, the Trial Chamber held that there is a JCE only if the common purpose is itself a crime within the Statute. This concept is in opposition to ICTY jurisprudence. The common purpose need not be criminal. Often, defendants committed crimes in an attempt to effectuate a legitimate common purpose and the ICTY found individual criminal liability based on a theory of JCE. As the Appeals Chamber held in *Prosecutor v. Kvocka*, a "joint criminal enterprise is simply a means of committing a crime; it is not a crime in itself."[95]

1. The Criminal Means Interweave with the Common Purpose.

The Indictment in the *Prosecutor v. Brima, Kamara and Kanu* alleged that defendants committed crimes as a part of the JCE. The alleged crimes are punishable according to the SCSL's statute and are within the SCSL's jurisdiction. [96] ICTY cases held that JCE participation consists of crimes that are direct and significant.[97] Sometimes defendants engage in a particularized criminal purpose; one subset for the purposes of forced labor, while another for systemic rape. The end result is one large final purpose made up of several criminal acts. [98] This

[94] *Prosecutor v. Brima, et al.*, Case No. SCSL-04-16-PT, Further Amended Consolidated Indictment, ¶74 (Feb. 18, 2005) [relevant pages reproduced in accompanying notebook at Tab 33].

[95] *Prosecutor v. Kvocka*, Case No. IT-98-30/1-A, Appeals Judgment, ¶91 (Feb. 28, 2005) [relevant pages reproduced in accompanying notebook at Tab 13]; KHAN, *supra* note 51, at 517 [relevant pages reproduced in accompanying notebook at Tab 57], *quoting Prosecutor v. Kvocka*, Case No. IT-98-30/1-A, Appeals Judgment (Feb. 28, 2005) [relevant pages reproduced in accompanying notebook at Tab 13].

[96] *Prosecutor v. Brima, et al.*, Case No. SCSL-04-16-PT, Further Amended Consolidated Indictment, ¶34 (Feb. 18, 2005) [relevant pages reproduced in accompanying notebook at Tab 33] reads "The crimes alleged in this Indictment, including unlawful killings, abductions, forced labour [sic], physical and sexual violence, use of child soldiers, looting and burning of civilian structures, were either actions within the joint criminal enterprise or were a reasonably foreseeable consequence of the joint criminal enterprise."

[97] *Prosecutor v. Kvocka*, Case No. IT-98-30/1-T, Trial Judgment, ¶275 (Nov. 2, 2001) [relevant pages reproduced in accompanying notebook at Tab 14].

[98] *Id.* at ¶308.

large-scale systematic scheme incurs individual criminal liability.[99] In the *Prosecutor v. Kvocka* the Appeals Chamber drew from Nuremberg jurisprudence and held that within a JCE there may be other subsidiary criminal enterprises.[100] These smaller crimes may arise extemporaneously and without prior planning or thought, in order to effectuate a larger common purpose. In *Prosecutor v. Brima* the defendants took any means necessary, including committing crimes, to effectuate their common purpose and control the diamond mines. This larger plan could not have occurred without these crimes and they became inseparable from the common purpose. [101] Defendants took whatever actions they could to control these mines. These extemporaneous smaller crimes combined and performed in order to further the larger purpose became so interwoven it is difficult, if not impossible, to separate them. While it is possible to distinguish each crime as a separate JCE, it is unnecessary since the crimes wove themselves into the larger common purpose. The Indictment clearly alleged the crimes taken were to further or were foreseeable to the common purpose. Although it is possible that these crimes arose extemporaneously, they were all part of the common design.

---

[99] *Prosecutor v. Kvocka*, Case No. IT-98-30/1-T, Trial Judgment, ¶308 (Nov. 2, 2001) [relevant pages reproduced in accompanying notebook at Tab 14].

[100] *Id.* at ¶307. The Court held

> Within a joint criminal enterprise there may be other subsidiary criminal enterprises. For example, were the entire Nazi regime to be considered a joint criminal enterprise, that would not preclude a finding that Dachau Concentration Camp functioned as a subsidiary of the larger joint criminal enterprise, despite the fact that it was established with the intent to further the larger criminal enterprise. Within some subsidiaries of the larger criminal enterprise, the criminal purpose may be more particularized: one subset may be established for purposes of forced labor, another for purposes of systematic rape for forced impregnation, another for purposes of extermination, etc. *Id.*

[101] *Prosecutor v. Brima, et al.*, Case No. SCSL-04-16-PT, Further Amended Consolidated Indictment, ¶34 (Feb. 18, 2005) [relevant pages reproduced in accompanying notebook at Tab 33].

2. Use Conspiracy Doctrine to Find Criminal Liability for the JCE.

JCE and conspiracy doctrines both share similar characteristics for finding responsibility and individual criminal liability. Both methods require two or more people to form an agreement to openly commit an illegal act in order to further a common plan or conspiracy. [102] In conspiracy law, whose doctrine comes primarily from common law countries, [103] that act does not have be unlawful nor need to be the substantive offense that the indictment charges.[104] Parties possess knowledge of the conspiracy and at least one conspirator committed an act openly to further the conspiracy. JCE appears to be a hybrid that resembles both accomplice and conspiratorial liability. JCE requires actual commission of a crime or crimes[105] and merges two theories of liability, capturing "such crucial organisational [sic] actors as serious offenders, and lifts their veil of legitimacy by establishing an overarching criminal motivation and dedication."[106] The extended or third form of JCE is most similar to limited conspiracy.[107]

However, unlike conspiracy, JCE standing alone is not a crime. It is only a complicity doctrine.[108] The ICTY Appeals Chamber in *Tadić* addressed the relationship between conspiracy

---

[102] CHRISTOPHER HARDING, CRIMINAL ENTERPRISES: INDIVIDUALS, ORGANIZATIONS AND CRIMINAL RESPONSIBILITIES 248 (2007) [relevant pages reproduced in accompanying notebook at Tab 56].

[103] Aaron Fichtelberg, *Conspiracy and International Criminal Justice*, 17 CRIM. L. F. 149, 151-52 (2006) [reproduced in accompanying notebook at Tab 41].

[104] Christian Davis, et al., *Federal Criminal Conspiracy*, 44 AMER. CRIM. L. REV. 523, 526, 534 (2007) [reproduced in accompanying notebook at Tab 40].

[105] Ramer, *supra* note 59, at 65 [reproduced in accompanying notebook at Tab 49].

[106] HARDING, *supra* note 102, at 248 [relevant pages reproduced in accompanying notebook at Tab 56].

[107] MOHAMED C. OTHMAN, ACCOUNTABILITY FOR INTERNATIONAL HUMANITARIAN LAW VIOLATIONS, THE CASE OF RWANDA AND EAST TIMOR 220, n.222 (2005) [relevant pages reproduced in accompanying notebook at Tab 61].

[108] Ramer, *supra* note 59 at 62 [reproduced in accompanying notebook at Tab 49].

and JCE and found that JCE requires a meeting of the minds and an action to further the common plan.[109] Conspiracy liability requires only making an agreement to commit an offense, while JCE liability requires not only making the agreement but also actually carrying out an act to further the common purpose.[110] JCE is therefore a slight limitation of accountability vis-à-vis conspiracy.[111] JCE liability also requires establishing that there is a "common purpose which amounts to or involves the commission of a crime."[112] This implies that when criminal means are taken to further a common purpose, there is JCE liability.

Since JCE and conspiracy law have similar requirements for finding criminal liability, it is possible to use conspiracy law in assigning liability for JCE.[113] In conspiracy law the act committed does not have to be unlawful nor need to be the substantive offense that the indictment charges.[114] A conspiracy exists when two or more people get together to do an unlawful act or a lawful act by unlawful means.[115] Analogously, even if the common purpose is not criminal, if defendants commit criminal acts to effectuate the larger purpose, there is JCE liability. The entire common purpose, in effect, becomes inherently criminal, especially because defendants took illegitimate means to further the common purpose.

---

[109] Ramer, *supra* note 59 at 63 [reproduced in accompanying notebook at Tab 49].

[110] OTHMAN, supra note 107, at 220 [relevant pages reproduced in accompanying notebook at Tab 61].

[111] *Id.*

[112] *Prosecutor v. Kvocka*, Case No. IT-98-30/1-A, Appeals Judgment (Feb. 28, 2005) [relevant pages reproduced in accompanying notebook at Tab 13].

[113] HARDING, *supra* note 102, at 248 [relevant pages reproduced in accompanying notebook at Tab 56].

[114] Davis, *supra* note 104, at 526, 534 [reproduced in accompanying notebook at Tab 40].

[115] Fichtelberg, *supra* note 103 at 152 [reproduced in accompanying notebook at Tab 41].

Conspiracy law is an ancient doctrine found in English common law. Lord Denman made the classic statement that came to embody the definition of conspiracy in *Rex v. Jones*.[116] He said that a conspiracy indictment must "charge a conspiracy either to do an unlawful act or a lawful act by unlawful means."[117] In *Rex v. Seward*, there was a conspiracy to procure a marriage between a "male pauper and female pauper" for the purpose of "throwing the woman's maintenance upon the husband's parish."[118] The Court of the King's Bench held that this was not indictable because "the purpose of the transaction . . . was not illegal, provided no unlawful means were used."[119] Justice Littledale said "[i]f parties conspire to do an unlawful act, or a lawful act by unlawful means, this is a conspiracy, for which they may be indicted."[120] The United States also employed the same definition of conspiracy to its laws. An example is the 1844 case *State v. Burnham*, where the Superior Court of the Judicature of New Hampshire held that "a conspiracy is a confederacy to do an unlawful act, or a lawful act by unlawful means, whether to the prejudice of an individual or of the public, and it is not necessary that its object

---

[116] JAMES WALLACE BRYAN, THE DEVELOPMENT OF THE ENGLISH LAW OF CONSPIRACY 99 (1909) [relevant pages reproduced in accompanying notebook at Tab 64].

[117] WAYNE LAFAVE, CRIMINAL PROCEDURE 614 (2003) [relevant pages reproduced in accompanying notebook at Tab 58] *quoting Rex v. Jones*, 110 Eng. Rep. 485 (1832); BRYAN, *supra* note 116, at 99 [relevant pages reproduced in accompanying notebook at Tab 64]; *see also* Memorandum from Rajiv K. Punja, Case Western Reserve University School of Law, to the Office of the Prosecutor of the International Criminal Tribunal for Rwanda, Issue: What is the distinction between "Joint Criminal Enterprise" as defined by the ICTY case law and conspiracy in common law jurisdictions? (Fall 2003) (*available at*: http://law.case.edu/war-crimes-research-portal/memoranda/JointCriminalEnterprise.pdf) [reproduced in accompanying notebook at Tab 68].

[118] BRYAN, *supra* note 116, at 108 [relevant pages reproduced in accompanying notebook at Tab 64], *quoting Rex v. Seward,* 3 M.&M. 557 (1834).

[119] *Id.* at 108.

[120] *Id.* at 108, *quoting Rex v. Seward,* 3 M.&M. 557, 558 (1834).

should be the commission of a crime."[121] In another U.S. case, *Pettibone v. U.S.*, the Supreme Court defined conspiracy as "a combination of two or more persons, by concerted action, to accomplish a criminal or unlawful purpose, or some purpose not in itself criminal or unlawful, by criminal or unlawful means, and the rule is accepted . . . ."[122] More recently, the United Kingdom's Criminal Law Act of 1977, still in action today, defines a conspiracy as when "a person agrees with any other person or persons that a course of conduct shall be pursued which, if the agreement is carried out in accordance with their intentions . . . amounts to or *involves the commission of any offence or offences* by one or more of the parties to the agreement" (emphasis added).[123] Likewise, the United States Supreme Court defined a conspiracy as, "two or more persons to effect an illegal object as an end or means, and joint purpose or intent need not be to commit a crime, or even unlawful act, if it is intended to accomplish the act by surreptitious or unlawful means. . . ."[124] Congress codified this definition and found criminal liability when "two or more persons conspire either to commit any offense against the United States . . . and one or more of such persons *do any act to effect the object of the conspiracy* . . ." (emphasis added).[125]

---

[121] *The State v. Burnham*, 15 N.H. 396 (1844) [relevant pages reproduced in accompanying notebook at Tab 24]. The Burnham Court held that although the object of respondents, to procure employment in a company, was lawful, because of the fraudulent means taken, there was a criminal conspiracy. *Id.*

[122] *Pettibone v. U.S.*, 148 U.S. 197, 202 (1893) [relevant pages reproduced in accompanying notebook at Tab 3].

[123] United Kingdom Criminal Law Act 1977 (c.45) (Eng.) Part I(1), found at http://www.statutelaw.gov.uk/content.aspx?LegType=All+Legislation&title=criminal+law+act&searchEnacted=0&extentMatchOnly=0&confersPower=0&blanketAmendment=0&sortAlpha=0&TYPE=QS&PageNumber=1&NavFrom=0&parentActiveTextDocId=793250&ActiveTextDocId=793254&filesize=8205 [relevant pages reproduced in accompanying notebook at Tab 28].

[124] *U.S. v. Pan-American Petroleum Co.*, 6 F.2d 43 (Cal. Dist. Ct. 1925) [relevant pages reproduced in accompanying notebook at Tab 25], conspiracy definition *aff'd*, 273 U.S. 456 (1927) [relevant pages reproduced in accompanying notebook at Tab 26].

[125] Crimes and Criminal Procedure, Conspiracy to Commit Offense or to Defraud United States, 18 U.S.C.A. § 371 (1984) [relevant pages reproduced in accompanying notebook at Tab 27].

The High Court of Australia also holds that conspiracy is an "agreement of two or more to do an unlawful act, or to do a lawful act by unlawful means."[126] In *Queen v. Churchill and Walton*, Viscount Dilhorne said that "*mens rea* is only an essential ingredient in conspiracy in so far as there must be an intention to be a party to an agreement to do an unlawful act."[127] In the recent case *Lipohar v. The Queen* the High Court of Australia further held that, "[p]arties can join, or leave, a conspiracy after it has been formed, and acts done in furtherance of a conspiracy will constitute continuing performance, as well as evidence, of the unlawful agreement." Further, the Court held that with respect to the position held in England defining a conspiracy, when defendants form an agreement to commit a lawful act by unlawful means, this suffices to support a charge of a conspiracy under Australian common law. The Court held that it was clear from the facts in *Lipohar* that Defendants took criminal steps in furtherance of the agreement between themselves and that is sufficient to support a charge of conspiracy.[128] Therefore, if defendants employ illegitimate means, even in an effort toward a legitimate end, common law courts consider it a conspiracy.

Conspiracy liability is foreign to civil law countries, but has become a norm in international criminal liability, especially in regard to genocide.[129] The most obvious example is

---

[126] *Peters v. The Queen*, [1998] H.C.A. 7, ¶51 *citing Mulcahy v. The Queen,* [1868] LR 3 HL 306, 317 [relevant pages reproduced in accompanying notebook at Tab 2].

[127] *Id* at ¶54 [relevant pages reproduced in accompanying notebook at Tab 2], *citing R v. Churchill and Walton* at [1967] 2 AC 224, 237.

[128] *Lipohar v. The Queen*, [1999] H.C.A. 65, ¶112 [relevant pages reproduced in accompanying notebook at Tab 1].

[129] Fichtelberg, *supra* note 103, at 151-52 [reproduced in accompanying notebook at Tab 41]; *see* Rome Statute, *supra* note 40 [reproduced in accompanying notebook at Tab 29]; ICTY Statute, *supra* note 6 [reproduced in accompanying notebook at Tab 30]; Statute of the International Tribunal for Rwanda, Nov. 8, 1993, 33 I.L.M. 1598, *available at* http://69.94.11.53/ENGLISH/basicdocs/statute/2004.pdf [relevant pages reproduced in accompanying notebook at Tab 31].

the treatment of conspiracy at Nuremberg. The Nuremberg Court to a dramatic step outside of the common law approach and the prosecution tried to use conspiracy as a means to criminalize an entire organization.[130] In the Indictment in the *United States, et al. v. Goering, et al.*, the Prosecution alleged that defendants

> participated as leaders, organizers, instigators, or accomplices in the formulation or execution of a common plan or conspiracy to commit, or which involved the commission of, Crimes against Peace, War Crimes, and Crimes against Humanity …are individually responsible for their own acts and for all acts committed by any persons in the execution of such plan or conspiracy…. In the development and course of the common plan or conspiracy it came to embrace the commission of War Crimes…. The common plan or conspiracy contemplated and came to embrace as typical and systematic means, and the defendants determined upon and committed, Crimes against Humanity, both within Germany and within occupied territories, including murder, extermination, enslavement, deportation, and other inhumane acts committed against civilian populations before and during the war, and persecutions on political, racial, or religious grounds, in execution of the plan for preparing and prosecuting aggressive or illegal wars, many of such acts and persecutions being violations of the domestic laws of the countries where perpetrated.[131]

This attempt at assigning conspiracy liability worked partly: the judges ruled that an organization's members were liable on their individual accountability for a certain criminal act. Yet, the Tribunal saw the correlation between group criminality and conspiracy.[132] The conspiracy doctrine made a heavy impact in Nuremberg and became enshrined as part of international criminal law.[133]

---

[130] Fichtelberg, *supra* note 103, at 161 [reproduced in accompanying notebook at Tab 41].

[131] *United States et al., v. Goering, et al.,* Indictment (1945) *reprinted in* THE TRIAL OF MAJOR WAR CRIMINALS BEFORE THE INTERNATIONAL MILITARY TRIBUNAL, NUREMBERG 14 NOVEMBER 1945 - 1 OCTOBER 1946, at 29 (Vol. 1) (1945) [relevant pages reproduced in accompanying notebook at Tab 38].

[132] Fichtelberg, *supra* note 103, at 163 [reproduced in accompanying notebook at Tab 41].

[133] *Id.*

Therefore, because conspiracy law and JCE are similar to each other and both rely on the furtherance of a common plan, the same means-based test used in conspiracy law is useable in finding JCE liability. There is a move by the tribunals toward this direction. For example, in *Prosecutor v. Kvocka*, the Appeals Chamber held that an individual does not need to know of each crime committed to further the JCE to be criminally liable. Knowing that crimes are being committed within a system is enough.[134]

3. Motive Behind the Common Purpose is Irrelevant.

The suspect's motive or ultimate aim behind the common purpose is inconsequential in determining criminal liability. In the *Prosecutor v. Brdanin* the Trial Chamber held that although the common purpose must amount to or involve an understanding or agreement between two or more people that they will commit a crime within the corresponding Statute, "the underlying purpose for entering into such an agreement (i.e., the ultimate aim pursued by the commission of the crimes) is irrelevant for the purposes of establishing individual criminal responsibility pursuant to the theory of JCE."[135] Similarly, the court in the *Prosecutor v. Kvocka* held that an accused's motive is immaterial when assessing his intent and criminal responsibility.[136] "The personal motive of the perpetrator of the crime [] may be, for example, to obtain personal economic benefits, *or political advantage or some sort of power*. The existence of a personal motive does not preclude the perpetrator from also having the specific intent to

[134] *Prosecutor v. Kvocka*, Case No. IT-98-30/1-A, Appeals Judgment, ¶276 (2005) [relevant pages reproduced in accompanying notebook at Tab 13].

[135] *Prosecutor v. Brdanin*, Case No. IT-99-36-T, Trial Judgment, ¶342 (Sept. 1, 2004) [relevant pages reproduced in accompanying notebook at Tab 6].

[136] *Prosecutor v. Kvocka*, Case No. IT-98-30/1-A, Appeals Judgment, ¶105 (Feb. 28, 2005) [relevant pages reproduced in accompanying notebook at Tab 13].

commit [a crime]" (emphasis added).[137] Furthermore, *Krnojelac* held that "shared criminal intent does not require the co-perpetrator's personal satisfaction or enthusiasm or his personal initiative in contributing to the joint enterprise."[138] It is clear that ICTY jurisprudence does not evaluate motive in assessing JCE liability. Yet, the SCSL held otherwise.

In *Brima* the prosecution alleged in their Indictment that the defendants formed a common plan and acted upon that plan (which included committing crimes listed in the SCSL statute) to effectuate control of diamond mines. However, the Trial Chamber held that international law does not prosecute for acts of rebellion against the State. The Trial Chamber therefore ignores the *Brdanin*, *Kvocka* and *Krnojelac* decisions which all held that the aim behind the common plan is irrelevant for establishing JCE individual criminal liability. [139] Instead, the Trial Chamber develops its own rule, which effectively negates the ICTY decisions which served as precedent on which the Prosecutor relied.

The SCSL therefore misses the concept behind the common purpose doctrine. JCE finds criminal responsibility not based on personal commission, but on a suspect's criminal participation in a common plan.[140] The motive behind the common purpose in *Brima*, rebellion against the State, is irrelevant in determining JCE liability. From their intent to commit crimes defendants are criminally liable for a JCE to gain political power in Sierra Leone.

---

[137] *Id.* at ¶105-06 (Feb. 28, 2005) [relevant pages reproduced in accompanying notebook at Tab 13].

[138] *Prosecutor v. Krnojelac*, Case No. IT-97-25-A, Appeals Judgment, ¶100 (Sept. 17, 2003) [relevant pages reproduced in accompanying notebook at Tab 10].

[139] *Prosecutor v. Brima, Kamara, Kanu*, Case No. SCSL-04-16-T, Trial Judgment, ¶67 (June 20, 2007) [relevant pages reproduced in accompanying notebook at Tab 7].

[140] Hinson, *supra* note 54 [relevant pages reproduced in accompanying notebook at Tab 43].

B. The Trial Chamber Erred in Ruling that a JCE Cannot Change Over Time.

The Trial Chamber held that the JCE alleged in the Indictment must be criminal from its inception. It argued that if the common plan to control Sierra Leone's diamond mines involved crimes, the plan started at the beginning of this agreement. However, because many of these crimes were extemporaneous or there was no agreement to commit these crimes originally, the Trial Chamber believed the JCE changed. The Trial Chamber claimed that the Prosecution was required to demonstrate this in their Indictment, but failed to do so and was another reason why the Court dismissed the JCE charge. This holding runs contrary to ICTY precedent which holds that a JCE may contain initially lawful agreements that transform over time to involve crimes.[141]

The Prosecution argued that the time period of the JCE is relevant to all times listed in the Indictment. Yet, the Trial Chamber made an unfounded evidentiary argument and claimed that the Prosecution must plead the new and different purposes in the Indictment. The Court held that although there is no dispute that a new JCE may arise from a different common purpose, "it is more important for the Prosecution to provide material facts of this new or changed common purpose in the Indictment."[142] The Court quoted *Prosecutor v. Blagojević* which says that if the objective of the JCE changes, "such that the objective is fundamentally different in nature and scope from the common plan or design to which the participants

[141] *Prosecutor v. Tadić*, Case No. IT-94-1-A, Appeals Judgment, ¶227(ii) (July 15, 1999) [relevant pages reproduced in accompanying notebook at Tab 21], holding that "there is no necessity for this plan, design or purpose to have been previously arranged or formulated. The common plan or purpose may materialise [sic] extemporaneously and be inferred from the fact that a plurality of persons acts in unison to put into effect a joint criminal enterprise."

[142] *Prosecutor v. Brima, Kamara, Kanu*, Case No. SCSL-04-16-T, Trial Judgment, ¶79 (June 20, 2007) [relevant pages reproduced in accompanying notebook at Tab 7].

originally agreed, then a new and distinct joint criminal enterprise has been established."[143] However, the overall purpose, control of the diamond mines, did not change. As ICTY jurisprudence holds, crimes may arise extemporaneously to further the common purpose. In addition, each crime committed was to further the common purpose and intertwined with the common purpose to become indistinguishable. Further, the *Blagojević* decision says nothing about the requirement to provide new proof, but only says that "for this joint criminal enterprise, like the original joint criminal enterprise, the three elements must be established for criminal responsibility to attach."[144] The Trial Chamber presented this problem as a defective pleading. However, it appears to be more of an evidentiary issue, and further, creates an unprecedented strict requirement for what the Prosecutor must prove.[145] Finally, this reasoning is illogical. The Court holds that a JCE must be criminal. However, if the JCE changed, as the Trial Chamber believes, it changed from being non-criminal to criminal. Yet, the Trial Chamber claimed there can be no JCE if it is not criminal. Therefore, the Trial Chamber holds two diverging opinions: a JCE must be a crime and a JCE does not have to be a crime. [146]

C. The Specificity Required by the SCSL Runs Contrary To ICTY Jurisprudence.

The SCSL requires a certain specificity in the Indictment that is at odds with prior ICTY JCE cases. The courts usually permitted general allegations of JCE, as long as the indictments put the Defendant on notice of his or her crimes. In the Indictment in *Brima*, the prosecution did

[143] *Id.* at ¶78; *Prosecutor v. Blagojević, Jokic*, Case No. IT-02-60-T, Trial Judgment, ¶700 (Jan. 17, 2005) [relevant pages reproduced in accompanying notebook at Tab 5].

[144] *Prosecutor v. Blagojević , Jokic*, Case No. IT-02-60-T, Trial Judgment, ¶700 (Jan. 17, 2005) [relevant pages reproduced in accompanying notebook at Tab 5].

[145] Hinson, *supra* note 54 [relevant pages reproduced in accompanying notebook at Tab 43].

[146] *Id.*

this by clearly listing the crimes alleged in the Indictment.[147] In contrast, in other indictments from the ICTY, the Court found JCE inferred from the nature of the crimes. Paragraph 34 of the Indictment also lists the alleged crimes defendants committed in order to either further the JCE, or were foreseeable consequences arising from pursuit of the JCE. The ICTY therefore created a type of precedent of how to argue for JCE, of which the Indictment adhered.

1. ICTY Cases Inferred JCE from the Nature of Charges Alleged.

The specificity the SCSL requires is in opposition to the jurisprudence found in similar cases at the ICTY.[148] The ICTY Trial and Appeals Chambers not only set a precedent for allowing general allegations of JCE, but found a JCE existed when it was not alleged in the indictment. *Tadić* held that the nature of the crimes alleged in the Indictment gave rise to the inference of a JCE, since a plurality of persons acted in unison to effectuate a JCE.[149] Therefore, it is not necessary that the Indictment specifically alleges a JCE.

First, in *Prosecutor v. Krstic*, the prosecution failed to plead JCE in the indictment. Yet, the Trial Chamber found JCE inferred by the nature of the crimes committed and charged.[150] The Trial Chamber also found that the indictment sufficiently pled facts to find Krstic responsible for taking part in the alleged crimes in concert with others and that he was

[147] *Prosecutor v. Brima, et al.*, Case No. SCSL-04-16-PT, Further Amended Consolidated Indictment ¶34 (Feb. 18, 2005) [relevant pages reproduced in accompanying notebook at Tab 33].

[148] *Prosecutor v. Brima, Kamara, Kanu*, Case No. SCSL-04-16-T, Trial Judgment, ¶67 (June 20, 2007) [relevant pages reproduced in accompanying notebook at Tab 7], the Judgment claimed that the Indictment did not properly plead JCE.

[149] *Prosecutor v. Tadić*, Case No. IT-94-1-A, Appeals Judgment, ¶227 (July 15, 1999) [relevant pages reproduced in accompanying notebook at Tab 21].

[150] *Prosecutor v. Krstic*, Case No. IT-98-33-T, Trial Judgment, ¶602 (Aug. 2, 2001) [relevant pages reproduced in accompanying notebook at Tab 12].

responsible in carrying out these crimes.[151] The Trial Chamber said that it "is of the view that the issue of General Krstic's criminal responsibility for the[se] crimes…is most appropriately determined under Article 7(1) by considering whether he participated…in a joint criminal enterprise to forcibly 'cleanse' the Srebrenica enclave of its Muslim population and to ensure that they left the territory otherwise occupied by Serbian forces."[152] Therefore, the nature of crimes alone is enough for a JCE inference.

There are, however, cases where the court found the prosecution's indictment too vague and dismissed the JCE charge. In *Prosecutor v. Krnojelac* the indictment never directly alleged that the accused acted pursuant to a JCE to persecute non-Serbs, but the Court inferred as much from the nature of the crimes the indictment alleged.[153] The indictment accused defendants of acting pursuant to a common plan carrying out crimes such as torture, enslavement, cruel treatment and inhumane acts.[154] Yet the Appeals Chamber upheld the Trial Chamber's decision and said that the indictment, which never alleged a JCE, was too vague to find the third form of JCE liability and found defendants guilty of the first kind of JCE liability only.[155] It also held that "a failure to specify in the indictment which form or forms of liability the Prosecution is pleading gives rise to ambiguity….[S]uch ambiguity should be avoided and…the Prosecution

---

[151] *Prosecutor v. Krstic*, Case No. IT-98-33-T, Trial Judgment, ¶602 (Aug. 2, 2001) [relevant pages reproduced in accompanying notebook at Tab 12].

[152] *Id.* at ¶610.

[153] *Prosecutor v. Krnojelac*, Case No. IT-97-25-A, Third Amended Indictment, ¶5.1 (June 25, 2001) [relevant pages reproduced in accompanying notebook at Tab 35].

[154] *Id.* at ¶5.2.

[155] *Prosecutor v. Krnojelac*, Case No. IT-97-25-A, Appeals Judgment, ¶¶131, 137 (Sept. 17, 2003) [relevant pages reproduced in accompanying notebook at Tab 10].

must identify precisely the form or forms of liability alleged for each count…."[156] The Appeals Chamber required that the indictment inform the accused of the nature and the cause of the charge against him. The Indictment in the *Prosecutor v. Brima, Kamara and Kanu* on the other hand clearly laid out the charges alleged against defendants and furthermore, specifically alleged that defendants committed these crimes in furtherance of the common purpose, or the crimes were a foreseeable cause of furthering the common purpose.[157] It was clear Defendants' crimes fell under the first and third types of JCE liability. In light of *Prosecutor v. Krnojelac*, Defendants were sufficiently on notice of their charges.

In *Prosecutor v. Kvocka*, decided a few years after *Krnojelac* and *Krstic*, the prosecution introduced the theory of JCE in its pre-trial brief, but neglected to do so in their indictment.[158] The defense claimed that the prosecutor did not therefore properly plead JCE and the Court should limit the indictment. Both the Appeals and Trial Chambers disagreed and held that explicit pleading of JCE is not necessary to have in an indictment to find a JCE.[159] While the *Kvocka* Trial Chamber admits that they desire greater specificity in drafting indictments, failure to identify expressly the exact mode of participation is not necessarily fatal to an indictment if the indictment nevertheless makes clear to the accused the nature of the charge against him. The SCSL Trial Chamber judgment cited *Kvocka*, but used it improperly and out of context.[160] The

---

[156] *Prosecutor v. Krnojelac*, Case No. IT-97-25-A, Appeals Judgment, ¶138 (Sept. 17, 2003) [relevant pages reproduced in accompanying notebook at Tab 10].

[157] *Prosecutor v. Brima, et al.*, Case No. SCSL-04-16-PT, Further Amended Consolidated Indictment, ¶34 (Feb. 18, 2005) [relevant pages reproduced in accompanying notebook at Tab 33].

[158] Powles, *supra* note 1, at 618 [reproduced in accompanying notebook at Tab 48].

[159] *Prosecutor v. Kvocka*, Case No. IT-98-30/1-T, Trial Judgment, ¶247 (Nov. 2, 2001) [relevant pages reproduced in accompanying notebook at Tab 14].

[160] *Prosecutor v. Kvocka*, Case No. IT-98-30/1-A, Appeals Judgment, ¶28 (Feb. 28, 2005) [relevant pages reproduced in accompanying notebook at Tab 13]; *Prosecutor v. Brima, Kamara, Kanu*, Case No. SCSL-

Kvocka Appeals Judgment is more concerned with the Defendant's awareness of the charges against him. The Appeals Chamber required that "if the Prosecution relies on a theory of joint criminal enterprise, then the Prosecutor must plead the purpose of the enterprise, the identity of the participants, and the nature of the accused's participation in the enterprise."[161] The Appeals Chamber said, in order for the Defendant to truly understand the charges against him, the indictment should indicate the form of JCE alleged.[162] In the *Brima* Indictment the Prosecution explicitly defined the crimes used to accomplish the joint purpose as well as what forms of JCE liability the prosecution alleges.[163] The Prosecution still aptly described the "any actions necessary" in their Indictment and furthermore, ICTY jurisprudence does not require extensive explicitly or specificity in their Indictments.[164]

In *Prosecutor v. Ntakirutimana* the ICTR reaffirmed that the standard for whether a JCE is pled "with sufficient particularity is dependent upon whether it sets out the material facts of the Prosecution case with enough detail to inform a defendant clearly of the charges against him or her so that he or she may prepare his or her defence [sic]."[165] In *Ntakirutimana* the ICTR found that the Indictments did not put the defendants on notice of JCE. The Appeals Chamber

---

04-16-T, Trial Judgment, ¶62 (June 20, 2007) [relevant pages reproduced in accompanying notebook at Tab 7].

[161] *Prosecutor v. Kvocka*, Case No. IT-98-30/1-A, Appeals Judgment, ¶28 (Feb. 28, 2005) [relevant pages reproduced in accompanying notebook at Tab 13].

[162] *Id.*

[163] *Prosecutor v. Brima, et al.*, Case No. SCSL-04-16-PT, Further Amended Consolidated Indictment, ¶34 (Feb. 18, 2005) [relevant pages reproduced in accompanying notebook at Tab 33].

[164] *Prosecutor v. Brdanin*, Case No. IT-99-36-T, Trial Judgment, ¶342 (Sept. 1, 2004) [relevant pages reproduced in accompanying notebook at Tab 6].

[165] *Prosecutor v. Ntakirutimana & Ntakirutimana*, Case Nos. ICTR-96-10-A and ICTR-96-17-A, Appeals Judgment, ¶470 (Dec. 13, 2004) [relevant pages reproduced in accompanying notebook at Tab 16].

wrote "the mere reference by the Prosecution to the joint criminal enterprise illustrating the 'dolus eventualis' doctrine in its Pre-Trial and Closing Briefs cannot be understood as an unambiguous pleading of participation in the first form of joint criminal enterprise which is the form the Prosecution advances on this appeal."[166] Furthermore, unlike the Indictment in *Brima*, there was no reference to JCE in the Indictment.[167] The *Brima* Indictment specifically alleged the JCE and the crimes defendants allegedly committed in order to further the JCE or which were a foreseeable consequence of the JCE. The Indictment put defendants on notice of their charges and gave them sufficient information to refute those charges as well. The Indictment is not analogous to other ICTY or ICTR Indictments which courts held as vague or too general.

2. Courts Allowed Vague or General Allegations of JCE in the Past.

The Trial Chamber held that paragraphs 33 and 34 of the Indictment did not provide defendants' adequate notice of the criminal purpose defendants allegedly entered into at the inception of their agreement.[168] Further, the SCSL held that engagement in an armed conflict is not an international crime.[169] While this may be true, the Trial Chamber ignores the larger issue. The Indictment clearly alleges, in paragraph 34, that Defendants took action to commit crimes within the statute in order to effectuate control of diamond mines. Furthermore, while it is true

---

[166] *Prosecutor v. Ntakirutimana & Ntakirutimana*, Case Nos. ICTR-96-10-A and ICTR-96-17-A, Appeals Judgment, ¶479 (Dec. 13, 2004) [relevant pages reproduced in accompanying notebook at Tab 16].

[167] *Id.* at ¶478.

[168] *Prosecutor v. Brima, Kamara, Kanu*, Case No. SCSL-04-16-T, Trial Judgment, ¶71 (June 20, 2007) [relevant pages reproduced in accompanying notebook at Tab 7]; *Prosecutor v. Brima, et al.*, Case No. SCSL-04-16-PT, Further Amended Consolidated Indictment, ¶¶33-34 (Feb. 18, 2005) [relevant pages reproduced in accompanying notebook at Tab 33].

[169] *Prosecutor v. Brima, Kamara, Kanu*, Case No. SCSL-04-16-T, Trial Judgment, ¶72 (June 20, 2007) [relevant pages reproduced in accompanying notebook at Tab 7];

that mere membership in a group is not enough to find liability, the focus is on participation.[170] The ICTY held that participation may take place in a variety of forms and may be quite broad.[171] Defendants' participation in this case is easy to find since each was a member of a military force and the Trial Chamber found defendants guilty of the commission of these crimes.

In examining ICTY jurisprudence, prior to July 2004, the ICTY generally ruled that a court could convict a defendant on a theory of JCE liability even if his indictment did not explicitly refer to a JCE. In fact, phrases like "in concert" were enough to implicitly infer a JCE.[172] The *Brima* Indictment goes a step further and, while adhering to ICTY jurisprudence, specifically accuses individuals of participating in a JCE.[173] The SCSL followed the precedent set by the tribunals and the language in the indictment demonstrates that the prosecutor embraces the most expansive application of JCE liability developed by the ICTY."[174]

After 2004, the *Prosecutor v. Brdanin* slightly altered how to allege a JCE. The Trial Chamber ruled that Brdanin was not a participant in the JCE or common plan, and dismissed the

---

[170] *Prosecutor v. Brdanin*, Case No. IT-99-36-T, Trial Judgment, ¶263 (Sept.1, 2004) [relevant pages reproduced in accompanying notebook at Tab 6].

[171] *Prosecutor v. Blagojević , Jokic*, Case No. IT-02-60-T, Trial Judgment, ¶702 (Jan. 17, 2005) [relevant pages reproduced in accompanying notebook at Tab 5]; *Prosecutor v. Brdanin*, Case No. IT-99-36-T, Trial Judgment, ¶263 (Sept.1, 2004) [relevant pages reproduced in accompanying notebook at Tab 6]; *Prosecutor v. Stakic,* Case No. IT-97-24-T, Trial Judgment, ¶435 (July 31, 2003) [relevant pages reproduced in accompanying notebook at Tab 20]; *Prosecutor v. Vasiljevic*, Case No. IT-98-32-T, Trial Judgment, ¶67 (Nov. 29, 2002) [relevant pages reproduced in accompanying notebook at Tab 23].

[172] Danner and Martinez, *supra* note 8, at 108 [reproduced in accompanying notebook at Tab 44]; *see Prosecutor v. Simić*, Case No. IT-95-9-T, Trial Judgment ¶149 (Oct. 17, 2003) holding that "[i]t is commonly accepted that a reference to 'acting in concert together' means acting pursuant to a joint criminal enterprise."

[173] Danner and Martinez, *supra* note 8, at 155 [reproduced in accompanying notebook at Tab 44].

[174] *Id.* at 155-56.

charge.[175] Further, the Trial Chamber said the indictment required greater specificity in accusing those involved in the JCE. The indictment alleged a JCE between "the army of the Republika Srpska, Serb paramilitary forces and others." The Trial Chamber held the indictment must specifically identify groups involved in the JCE and using "others" was insufficient.[176] Even with this slight limitation on pleading a JCE, the *Prosecutor v. Brima et al.* stayed within the contours of this case. The Indictment clearly alleged the JCE, those involved in the JCE and what crimes took place as a result of the JCE.

In the *Prosecutor v. Tadić*, the prosecution never specifically alleged in the indictment Tadić's culpability for murder pursuant to a theory of JCE. After the development of JCE, prosecutors continue to make allegations that are barely specific enough to make a defendant truly aware of all the charges against him. The ICTY Courts allow this practice. The ICTY arguably used JCE as a "catch all" as it was the best standard to prosecute defendants.[177] In effect, ICTY jurisprudence demonstrated that there are no well-defined limits on the scope of JCE that a prosecutor may charge.[178] For example, when charging genocide, it is irrelevant,

---

[175] *Prosecutor v. Brdanin*, Case No. IT-99-36-T, Trial Judgment (Sept. 1, 2004) [relevant pages reproduced in accompanying notebook at Tab 6].

[176] *Prosecutor v. Brdanin & Talic*, Case No. IT-99-36, Decision on Objections by Momir Talic to the Form of the Amended Indictment, ¶21 (Feb. 20, 2001) [reproduced in accompanying notebook at Tab 70], *quoting Prosecutor v. Krnojelac*, Case No. IT-97-25, Decision on Form of Second Amended Indictment, ¶16 (May 11, 2000) [relevant pages reproduced in accompanying notebook at Tab 71]; *Prosecutor v. Brdanin*, Case No. IT-99-36-T, Trial Judgment, ¶346 (Sept. 1, 2004) [relevant pages reproduced in accompanying notebook at Tab 6].

[177] Powles, *supra* note 1, at 618 [reproduced in accompanying notebook at Tab 48].

[178] GUENAEL METTRAUX, INTERNATIONAL CRIMES AND THE AD HOC TRIBUNALS 292 (2005) [relevant pages reproduced in accompanying notebook at Tab 60]; Danner and Martinez, *supra* note 8, at 104-05, 142-43 [reproduced in accompanying notebook at Tab 44]; CRYER, *supra* note 38, at 308-09 [relevant pages reproduced in accompanying notebook at Tab 55]; *see generally Prosecutor v. Tadić*, Case No. IT-94-1-A, Appeals Judgment (July 15, 1999) [relevant pages reproduced in accompanying notebook at Tab 21]; *Prosecutor v. Kvocka*, Case No. IT-98-30/1-A, Appeals Judgment (Feb. 28, 2005) [relevant pages

under the third form of JCE, to have the *mens rea* to actually commit genocide.[179] There is an "enormous elasticity" of the JCE doctrine and in the manner the Courts at the ICTY used it.[180]

The ICTR also adheres to the precedent set by the ICTY. In *Prosecutor v. Simba* the Court denied defendant's claim of insufficient notice of JCE. [181] The Trial Chamber held that the Indictment was sufficiently clear, but admitted that the Prosecution could have pleaded the JCE in a more clear and organized manner in the Indictment. However, the Indictment referred to the JCE under all four counts in connection with responsibility under the ICTR Statute.[182] The ICTR Trial Chamber allowed the allegation of JCE to stand. Similar to *Simba*, the Indictment in *Brima* put defendants on sufficient notice of their JCE charge and which forms of liability the Indictment alleged.

3. The Common Purpose Alleged Does Not Have to be in the Statute.

Since the ICTY courts, not the prosecution, found a JCE in *Tadić, Kvocka* and *Krstic*, the ICTY courts created a precedent allowing indirect allegations of a JCE in indictments. Further, the Court considered ambiguous terms, such as "forced removal," a crime within a JCE, although it is not a crime in the statute. [183] For example, in *Prosecutor v. Brdanin*, the indictment claimed

---

reproduced in accompanying notebook at Tab 13]; *Prosecutor v. Krstic*, Case No. IT-98-33-A, Appeals Judgment (Apr. 19, 2004) [relevant pages reproduced in accompanying notebook at Tab 11].

[179] CRYER, *supra* note 38, at 308-09 [relevant pages reproduced in accompanying notebook at Tab 55].

[180] METTRAUX, *supra* note 178, at 292-93 [relevant pages reproduced in accompanying notebook at Tab 60].

[181] *Prosecutor v. Simba*, Case No. ICTR-01-76-T, Trial Judgment, ¶391 (Dec. 13, 2005) [relevant pages reproduced in accompanying notebook at Tab 17]. This case is under appeal and an appeals judgment has not been rendered as of yet.

[182] *Prosecutor v. Simba*, Case No. ICTR-01-76-T, Trial Judgment, ¶391 (Dec. 13, 2005) [relevant pages reproduced in accompanying notebook at Tab 17].

[183] ICTY Statute, supra note 6 [reproduced in accompanying notebook at Tab 30]. Although "forcible removal" is not listed as a crime in the ICTY Statute, prior decisions have ruled that it falls under the

that Brdanin knowingly and willfully participated in a JCE and bore individual criminal liability.[184] The indictment alleged Brdanin's involvement in a common purpose to ensure the cooperation between political authorities and the army in order to create a separate Bosnian Serb State "through the forcible removal of Bosnian Muslim and Bosnian Croat inhabitants from the territory of the planned Serbian state by the commission of the crimes alleged in Counts 1 through 12."[185] The Trial Chamber found that those in charge of the removal used fear and force as a tactic.[186]

The Trial Chamber dismissed the JCE allegation because of Brdanin's lack of involvement in the JCE. The Trial Chamber also dismissed the JCE allegation for the lack of express agreement between the principal perpetrators and the defendant.[187] The Court did not dismiss the JCE for lack of specificity or for vagueness as an improper pleading. The Court never touched on whether the allegation of JCE was unclear or too general, nor did the Trial Chamber claim that the common purpose was not a crime within the ICTY Statute.

In *Prosecutor v. Stakic*, the indictment charged Stakic with participating in a JCE. The indictment, similar to *Brdanin*, claimed that "the purpose of the joint criminal enterprise was the permanent forcible removal of Bosnian Muslim and Bosnian Croat inhabitants…including a campaign of persecutions through the commission of the crimes alleged in Counts 1 to 8 of the

---

purview of "other inhumane acts." *Prosecutor v. Stakic*, Case No. IT-97-24-A, Appeals Judgment (Mar. 22, 2006) [relevant pages reproduced in accompanying notebook at Tab 19].

[184] *Prosecutor v. Brdanin*, Case No. IT-99-36-T, Sixth Amended Indictment (Dec. 9, 2003) [relevant pages reproduced in accompanying notebook at Tab 34].

[185] *Id.* at ¶27.1 [relevant pages reproduced in accompanying notebook at Tab 34].

[186] *Prosecutor v. Brdanin*, Case No. IT-99-36-T, Sixth Amended Indictment (Dec. 9, 2003) [relevant pages reproduced in accompanying notebook at Tab 34].

[187] Gustafson, *supra* note 4, at 150 [reproduced in accompanying notebook at Tab 42].

Indictment."[188] The Appeals Chamber found Stakic guilty of both the first and third category of a JCE through the prosecutor's allegations.[189]

In both *Brdanin* and *Stakic* their Indictments alleged that defendants committed crimes though the common plan of permanent forcible removal. The *Brima* Indictment alleged JCE similarly, with a slight variation in wording.[190] The Indictment read

> the joint criminal enterprise included gaining and exercising control over the population of Sierra Leone in order to prevent or minimize resistance to their geographic control, and to use members of the population to provide support to the members of the joint criminal enterprise. The crimes alleged in this Indictment, including unlawful killings, abductions, forced labour, physical and sexual violence, use of child soldiers, looting and burning of civilian structures were either actions within the joint criminal enterprise or were a reasonably foreseeable consequence of the joint criminal enterprise.[191]

This indictment is similar to other ICTY indictments, where the JCE was the permanent removal of Bosnian Muslims committed by crimes prosecutable under the respective statute. By refusing to consider JCE as a form of individual criminal liability, the SCSL is blatantly ignoring ICTY jurisprudence which holds that a JCE is committed through crimes provided for in the Statute and inferring criminal liability from the crimes alleged, even if the common purpose is not listed as a crime within the appropriate Statute.

---

[188] *Prosecutor v. Stakic*, Case No. IT-97-24-A, Appeals Judgment (Mar. 22, 2006) [relevant pages reproduced in accompanying notebook at Tab 19]; *Prosecutor v. Stakic*, Case No. IT-97-24-A, Fourth Amended Indictment, ¶¶24-25, 27-29 (Apr. 10, 2002) [relevant pages reproduced in accompanying notebook at Tab 37].

[189] Summary of Appeals Judgment for Milomir Stakic, http://www.un.org/icty/stakic/appeal/judgement/sta-summ060322e.htm (last visited Nov. 25, 2007) [relevant pages reproduced in accompanying notebook at Tab 73].

[190] *Prosecutor v. Stakic*, Case No. IT-97-24-A, Appeals Judgment, ¶26 (Mar. 22, 2006) [relevant pages reproduced in accompanying notebook at Tab 19]; *Prosecutor v. Stakic*, Case No. IT-97-24-A, Fourth Amended Indictment (Apr. 10, 2002) [relevant pages reproduced in accompanying notebook at Tab 37].

[191] *Prosecutor v. Brima, et al.*, Case No. SCSL-04-16-PT, Further Amended Consolidated Indictment, ¶34 (Feb. 18, 2005) [relevant pages reproduced in accompanying notebook at Tab 33].

VII. Public Policy Criticism of the Decision.

Although the JCE doctrine has a broad scope, the policy rationale is just, since often those convicted for the commission of war crimes are merely following orders. Without JCE liability, the people convicted of committing heinous acts would consist only of low-ranking officials and soldiers while those who planned and instigated the acts would face little or no punishment. JCE therefore puts the responsibility of the crime upon the shoulders of the person who organized the commission of the crime itself, rendering accountability where it is due. It is difficult at times to find evidence that proves that defendants committed particular crimes. JCE liability helps prosecutors convict those who are responsible when proof may not exist and has a broad interpretive element in order to protect the most fundamental rights.[192]

The idea behind JCE as individual criminal liability is consistent with the purpose behind the ICTY's creation itself: to hold leaders accountable for war crimes and deter leaders from committing war crimes in the future.[193] Looking at the history of JCE, it borrows some of human rights law's most important and expansive methodologies.[194] For example, human rights courts often used the "object and purpose" of treaties to "support an expansive" view of rights.[195] Professor R. Bernhardt, a former President of the European Court of Human Rights, noted that

---

[192] Danner and Martinez, *supra* note 8, at 133 [reproduced in accompanying notebook at Tab 44].

[193] *See* Memorandum from Hilary Garon Brock, Case Western Reserve University School of Law, to the Office of the Prosecutor of the International Criminal Tribunal for Rwanda, Issue: Analyze the Judgment of *The Prosecutor v. Brdjanin* from the ICTY re: Joint Criminal Enterprise. How does this Holding Affect the future use of Joint criminal Enterprise? (Spring 2005) (*available at*: http://law.case.edu/war-crimes-research-portal/memoranda/brock_hilarygaron.pdf) [reproduced in accompanying notebook at Tab 67]; *see also* Scharf, *supra* note 5, at 56-73 [relevant pages reproduced in accompanying notebook at Tab 63].

[194] Danner and Martinez, *supra* note 8, at 133 [reproduced in accompanying notebook at Tab 44].

[195]Danner and Martinez, *supra* note 8, at 133 [reproduced in accompanying notebook at Tab 44] *citing* J. G. Merrills, THE DEVELOPMENT OF INTERNATIONAL LAW BY THE EUROPEAN COURT OF HUMAN RIGHTS 77 (1993) [relevant pages reproduced in accompanying notebook at Tab 59].

"the object and purpose of human rights treaties may often lead to a broader interpretation of individual rights. . . ."[196] Indeed, the European Court of Human Rights read "implied rights" into the European Convention on Human Rights in order to represent what the Court saw as the Convention's object and purpose regarding the protection of an individual's right.[197]

Due to this broad interpretation of individual rights, ICTY jurisprudence and international human rights law often use wide-ranging methodologies to hold those accountable of committing the most heinous crimes. Yet, the Trial Chamber refused to do so in *Prosecutor v. Brima, Kamara and Kanu*. The Trial Chamber ruled the Indictment was too vague in its allegation of JCE, and not properly pled.[198] The Trial Chamber said that this was fixable if the prosecution provided a timely, clear and consistent pre-trial brief, but that the Prosecution failed to provide the Defense with a clear brief properly alleging the JCE.[199] It appears that this Court is punishing the prosecution for a semantic issue; an issue not in line with ICTY jurisprudence. The nature of the crimes gave rise to an inference of JCE. The Indictment was not any more general or vague than other ICTY indictments, and furthermore, followed the prior precedent on how to plead a JCE sufficiently. The Indictment listed the crimes committed that were part of the JCE, which as the ICTY jurisprudence holds, does not have to be a crime in it of itself.

---

[196] Danner and Martinez, *supra* note 8, at 133 [reproduced in accompanying notebook at Tab 44] *citing* Alexander Orakhelashvili, *Restrictive Interpretation of Human Rights Treaties in the Recent Jurisprudence of the European Court of Human Rights*, 14 EUR. J. INT'L L. 529, 534 (2003) [reproduced in accompanying notebook at Tab 47].

[197] Danner and Martinez, *supra* note 8, at 133 [reproduced in accompanying notebook at Tab 44] *citing* J. G. Merrills, THE DEVELOPMENT OF INTERNATIONAL LAW BY THE EUROPEAN COURT OF HUMAN RIGHTS 77 (1993) [relevant pages reproduced in accompanying notebook at Tab 59].

[198] *Prosecutor v. Brima, Kamara, Kanu*, Case No. SCSL-04-16-T, Trial Judgment, ¶74 (June 20, 2007) [relevant pages reproduced in accompanying notebook at Tab 7], stating that "the question remains whether the Prosecution has properly pleaded the 'basic' form of JCE." *See also* Hinson, *supra* note 54 [reproduced in accompanying notebook at Tab 43].

[199] *Id.* at ¶82.

The next question is whether the judgment in the *Prosecutor v. Brima, Kamara and Kanu* is an issue of word choice and the Trial Chamber's way of reigning in the expansive use of JCE, contrary to ICTY and ICTR jurisprudence. The Court did not say whether the answer is simply to claim that Defendants shared a common plan to commit crimes listed in the statute to gain control of diamond mines. Instead, the Trial Chamber dismissed the entire charge. Simply put, the dismissal of the JCE charge is nothing more than an admonishment of the prosecution's error and defies the standards of justice and accountability war crimes tribunals are to provide to protect individuals' implied rights.

VII. Conclusion

The SCSL Trial Chamber's decision in the *Prosecutor v. Brima, Kamara and Kanu* at first sent a message of doom for international criminal prosecutors and appeared to limit JCE liability. However, this decision has a narrow interpretation. First, it disregards tribunals' jurisprudence, particularly, that a JCE itself does not have to be criminal in nature. Instead, a JCE consists of a formed agreement among a plurality of persons to commit crimes or who intend to commit crimes. Since defendants, in *Prosecutor v. Brima*, formed an agreement to commit crimes in order to further a common plan, there was a JCE.

Second, the Trial Chamber engaged in faulty reasoning when it claimed that the Indictment must show how the JCE changed into one that involves the commission of crimes. The Trial Chamber seems to say that the first JCE was not criminal. This is in opposition to its original, albeit incorrect rule that a JCE must be criminal. This theory also does not flow logically and runs contrary to ICTY precedent which says that agreements may transform over time to then involve crimes and arise extemporaneously while part of the same JCE. The Trial Chamber also created a new, strict requirement not found in ICTY jurisprudence.

Third, the Indictment in *Prosecutor v. Brima* alleged that defendants clearly alleged the crimes defendants took to further their common purpose. The "any means necessary" clearly delineated prosecutable crimes listed in the SCSL statute. It is also common for courts to infer criminal liability from the nature of the crimes alleged. Finally, the Trial Chamber's decision in *Brima* is in conflict with prior ICTY precedent and is against public policy arguments. This memorandum maintains that the Trial Chamber erred in dismissing the JCE charge and this *Brima* is not the proper guide for defining notice and what contributes to a finding of JCE liability theory.