

# TESTING THE LEGITIMACY OF THE JOINT CRIMINAL ENTERPRISE DOCTRINE IN THE ICTY: A COMPARISON OF INDIVIDUAL LIABILITY FOR GROUP CONDUCT IN INTERNATIONAL AND DOMESTIC LAW

CATHERINE H. GIBSON\*

## INTRODUCTION

On June 14, 1992, a group of armed men entered Jaskici, a village in the Prijedor region of Bosnia.<sup>1</sup> The group summoned Jaskici residents from their homes and separated the men from the women and children.<sup>2</sup> The men were beaten and removed from the village, and after the group left the area, five men from Jaskici were found dead.<sup>3</sup> In the first trial before the International Criminal Tribunal for the Former Yugoslavia (ICTY), several witnesses identified Dusko Tadic as one of the armed men who had entered Jaskici, but none of them could specifically link him to these killings.<sup>4</sup> Despite this lack of direct evidence, the ICTY Appeals Chamber held that Tadic could be found criminally responsible for the deaths of these five men.<sup>5</sup>

Tadic's liability in this case was based on the joint criminal enterprise (JCE) doctrine. Though ICTY prosecutors now frequently employ this doctrine, it has proven controversial in the international community. On one hand, the ICTY Appeals Chamber asserts that recognition of group criminality is essential for the enforcement of international criminal law because "[m]ost of the time these [international] crimes do not result from the criminal propensity of single in-

---

\* J.D. and LL.M., Duke University School of Law. For helpful comments and suggestions, I thank Sara Sun Beale, Ralf Michaels, and the editors of the *Duke Journal of Comparative & International Law*.

1. Prosecutor v. Tadic, Case No. IT-94-1-A, Judgment, ¶ 178 (July 15, 1999).

2. *Id.*

3. *Id.* ¶ 181.

4. *Id.* ¶ 233.

5. For a detailed description of Tadic's trial see MICHAEL P. SCHARF, BALKAN JUSTICE 93-205 (1997).

dividuals but constitute manifestations of collective criminality.”<sup>6</sup> On the other hand, as one critic of JCE liability has argued, “[w]hen JCEs are very large or have circuitous command structures, the accused and the triggerman can be far removed from each other” and “fairness and the need to establish legitimacy oppose allowing JCE [liability] to become a doctrine of guilt by association.”<sup>7</sup> Some scholars have even argued that JCE liability “has the potential to stretch criminal liability to a point where the legitimacy of international criminal law will be threatened . . . .”<sup>8</sup>

Despite this controversy, JCE liability is actually one of many schemes in both international and domestic law that base individual liability on conduct of a group. This paper compares four prominent examples of such liability, and concludes that variations in these schemes correspond to particular characteristics of the groups and individuals targeted. On this logic, the breadth of JCE liability is justified if the purpose of the tribunal requires broad constructions of individual criminal liability for group conduct.

Part I of this paper summarizes the elements of JCE liability in the ICTY. Part II describes three similar doctrines in international and domestic law, compares them to JCE liability, and offers an explanation of variations among the elements of each scheme. Finally, Part III considers whether the broad scope of JCE liability can be justified in light of the conduct targeted by the ICTY.

---

6. Prosecutor v. Tadic, Case No. IT-94-1-A, Judgment, ¶ 191 (July 15, 1999). Similarly, ICTY prosecutors argue that JCE liability is necessary to achieve the punishment of large-scale international crimes. As stated by one former legal advisor at the ICTY’s Office of the Prosecutor, “every instance of misconduct [before the ICTY] is a segment of a more widespread and systematic criminal activity and is perpetrated in execution of a precise criminal design. The investigation of a single instance of misconduct should, therefore, be an opportunity to try to identify the criminal network to which it was related.” Nicola Piacente, *Importance of the Joint Criminal Enterprise Doctrine for the ICTY Prosecutorial Policy*, 2 J. INT’L CRIM. JUST. 446, 446 (2005).

7. Allen O’Rourke, *Recent Development: Joint Criminal Enterprise and Brdanin: Misguided Overcorrection*, 47 HARV. INT’L L. J. 307, 315 (2006).

8. Allison Marston Danner & Jenny S. Martinez, *Guilty Associations: Joint Criminal Enterprise, Command Responsibility, and the Development of International Criminal Law*, 93 CAL. L. REV. 75, 132 (2005).

## I. JOINT CRIMINAL ENTERPRISE LIABILITY IN THE ICTY

### A. Introduction

The JCE doctrine is not explicitly recognized in the Statute of the ICTY (ICTY Statute)<sup>9</sup> or in its Rules of Procedure and Evidence.<sup>10</sup> In fact, the plain language of the ICTY Statute could be construed to limit the liability of an individual defendant to his own actions: As article 7 provides, persons “who planned, instigated, ordered, committed or otherwise aided and abetted in the planning, preparation or execution of [grave breaches of the Geneva Conventions of 1949, war crimes, genocide, and crimes against humanity] shall be *individually responsible for the crime*.”<sup>11</sup>

Despite this language of individual liability, the Appeals Chamber has held that “joint criminal enterprise was provided for in the Statute of the Tribunal and . . . existed under customary international law [at the time of the Yugoslav conflict].”<sup>12</sup> The Appeals Chamber has ruled that the plain language of the ICTY statute is not dispositive because it “is not and does not purport to be . . . a meticulously detailed code providing explicitly for every possible scenario and every solution thereto. It sets out in somewhat general terms the jurisdictional framework within which the Tribunal has been mandated to operate.”<sup>13</sup> Finding that “all persons who participate in the planning, preparation or execution of serious violations of international humanitarian law contribute to the commission of the violation and are therefore individually responsible,” the Appeals Chamber has held that JCE liability falls within article 7.<sup>14</sup>

Further, the Appeals Chamber regards JCE liability “not as a form of accomplice liability, but as a form of ‘commission’” under ar-

---

9. The Secretary-General, *Report of the Secretary-General Pursuant to Paragraph 2 of Security Council Resolution 808 (1993)*, presented 3 May 1993, U.N. Doc. S/25704 (May 3, 1993) [hereinafter ICTY Statute].

10. Rules of Procedure and Evidence, International Tribunal for the Prosecution of Persons Responsible for Serious Violations of International Humanitarian Law Committed in the Territory of the Former Yugoslavia since 1991, U.N. Doc. IT/32/Rev. 39 (Sept. 22, 2006), available at <http://www.un.org/icty/legaldoc-e/basic/rpe/IT032Rev39e.pdf>.

11. ICTY Statute, *supra* note 9, arts. 2-5, 7 (emphasis added).

12. Prosecutor v. Milutinovic, Case No. IT-99-37-AR72, Decision on Dragoljub Ojdanic’s Motion Challenging Jurisdiction – *Joint Criminal Enterprise*, ¶ 18 (May 21, 2003).

13. *Id.*

14. *Id.* ¶ 19.

ticle 7.<sup>15</sup> JCE liability may be distinguished from aiding and abetting liability based on the knowledge of the individual defendant: Where an individual “only knows that his assistance is helping a single person to commit a single crime, he is only liable for aiding and abetting that crime . . . even if the principle perpetrator is part of a joint criminal enterprise involving the commission of further crimes.”<sup>16</sup> However, if an individual “knows that his assistance is supporting the crimes of a group of persons involved in a [JCE] and shares that intent, he may found criminally responsible for the crimes committed in furtherance of that common purpose as a co-perpetrator.”<sup>17</sup>

## B. Requirements for JCE liability

The JCE doctrine actually encompasses three different forms of liability. In all three, the prosecution must show (1) “[a] plurality of persons;” (2) “[t]he existence of a common plan, design or purpose which amounts to or involves the commission of a crime provided for in the [ICTY] Statute;” and (3) “[p]articipation of the accused in the common design.”<sup>18</sup> For each type of JCE liability, the required showing of *mens rea* differs. Thus, the requirements of JCE liability may be divided into requirements for the group (a plurality of persons and a common purpose) and requirements for the individual (participation and *mens rea*).

### 1. Group requirements

The group requirements necessary for establishing JCE liability in the ICTY are minimal. The first requirement, a plurality of persons, may be satisfied by a relatively informal group. As the Appeals Chamber has stated, the plurality of persons “need not be organized in a military, political, or administrative structure.”<sup>19</sup> Thus, the plurality of persons element is satisfied when the prosecution proves that the group “included the leaders of political bodies, the army, and the police who held power [in a given area]” without a showing that persons in these disparate groups were acting together in an organized fashion.<sup>20</sup>

---

15. *Id.* ¶ 31.

16. Prosecutor v. Kvočka, Case No. IT-98-30/A-A, Judgment, ¶ 90 (Feb. 28, 2005).

17. *Id.*

18. Prosecutor v. Tadić, Case No. IT-94-1-A, Judgment, ¶ 227 (July 15, 1999).

19. Prosecutor v. Vasiljević, Case No. IT-98-32-A, Judgment, ¶ 100 (Feb. 25, 2004).

20. Prosecutor v. Stakić, Case No. IT-97-24-A, Judgment, ¶ 69 (Mar. 22, 2006).

The second requirement, the existence of a common purpose, may be established even if that purpose was not “previously arranged or formulated.”<sup>21</sup> In these cases, “the purpose may materialise extemporaneously and be inferred from the facts.”<sup>22</sup> Generally, no formal agreement is required to satisfy the common purpose element.<sup>23</sup> However, the common criminal purpose element is not satisfied if alleged JCE members committed crimes for reasons of personal revenge, rather than to effectuate a criminal purpose shared with others, even when these crimes are committed systematically.<sup>24</sup> Therefore, in *Prosecutor v. Limaj*, though the Appeals Chamber found that soldiers of the Kosovo Liberation Army (KLA) had “systematically beat[en] detainees [in a prison camp], committing the crimes of cruel treatment and torture,”<sup>25</sup> the common purpose element was not satisfied because the evidence did not rule out the possibility that these soldiers were acting for reasons of personal revenge, rather than to effect a common purpose of the KLA.<sup>26</sup>

## 2. Individual requirements

To be convicted of a crime by JCE, an individual must (1) have participated in the JCE and (2) have acted with the requisite *mens rea*. The first requirement, participation, is fulfilled by a showing of minimal contribution to the group in question. As the Appeals Chamber has stated, “once a participant in a joint criminal enterprise 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.”<sup>27</sup> Further, the presence of the accused when the crime is committed is not necessary to establish guilt in JCE liability.<sup>28</sup> In fact, “the Prosecutor need not demonstrate that the accused’s participation is a *sine qua non*, without which the crimes could or would not have been committed.”<sup>29</sup> For example, an ICTY trial

---

21. *Vasiljevic*, Case No. IT-98-32-A ¶ 100.

22. *Id.*

23. See *Prosecutor v. Brdanian*, Case No. IT-99-36-A, Judgment, ¶ 417 (Apr. 3, 2007).

24. *Prosecutor v. Limaj*, Case No. IT-03-66-A, ¶¶ 113-115, (Sept. 27, 2007).

25. *Id.* ¶ 105.

26. *Id.* ¶¶ 112-117.

27. *Prosecutor v. Krnojelac*, Case No. IT-97-25-A, Judgment, ¶ 81 (Sept. 17, 2003).

28. *Id.*

29. *Prosecutor v. Kvocka*, Case No. IT-98-30/A-A, Judgment, ¶ 98 (Feb. 28, 2005). The Appeals Chamber has noted, however, that some cases will require a more substantial showing

chamber recently convicted a high-ranking police official, Milan Martić, of war crimes and crimes against humanity based on JCE liability, though he was not present when the crimes were committed and was not a necessary element to their commission.<sup>30</sup> The court found that Martić was part of a JCE with the common criminal purpose of committing war crimes and crimes against humanity to displace the non-Serb population in parts of the former Yugoslavia.<sup>31</sup> Martić was found guilty under the JCE doctrine because he had participated in the crimes by “fueling the atmosphere of insecurity [in the regions] through radio speeches wherein he stated he could not guarantee the safety of the non-Serb population”<sup>32</sup> and by “deliberately refrain[ing] from intervening against perpetrators who committed crimes against the non-Serb population.”<sup>33</sup>

The *mens rea* requirement may be fulfilled in one of three ways, each constituting a different form of JCE liability. In the first form of JCE liability, the prosecution must prove that the perpetrator acted with “the intent to perpetrate a certain crime.”<sup>34</sup> In other words, the prosecutor must show that “the accused . . . voluntarily participate[d] in one aspect of the common design” and “the accused, even if not personally effecting the [crime] . . . intend[ed] this result.”<sup>35</sup> For this type of JCE, “what matters . . . is not whether the person who carried out the *actus reus* of a particular crime is a member of the JCE, but whether the crime in question forms a part of the common purpose.”<sup>36</sup> However, when holding members of a JCE responsible for crimes committed by outsiders, “it has to be shown that the crime can be imputed to one member of the joint criminal enterprise, and that this member – when using a principal perpetrator – acted in accordance with the common plan.”<sup>37</sup> Therefore, under this “basic” form of JCE liability, an individual defendant may be held responsible for the actions of a JCE if he participates in that enterprise with a plurality of

---

of participation in order to convict an individual defendant of criminal acts under JCE liability. *Id.* ¶ 97.

30. Prosecutor v. Martić, Case No. IT-95-11-T, Judgment, ¶ 434 (June 12, 2007).

31. *Id.* at ¶ 442.

32. *Id.* at ¶ 450.

33. *Id.* at ¶ 451.

34. Prosecutor v. Tadić, Case No. IT-94-1-A, Judgment, ¶ 228 (July 15, 1999).

35. *Id.* ¶ 196.

36. Prosecutor v. Brdanić, Case No. IT-99-36-A, Judgment, ¶ 410 (Apr. 3, 2007).

37. *Id.* ¶ 413.

persons and has the specific intent to achieve a common purpose that violates the ICTY statute.

The second form of JCE liability, the “systemic” form, is recognized when an individual holds a position of authority in a military or administrative unit and participates in some way in an organized system of criminality perpetrated by that unit.<sup>38</sup> In this form of JCE liability, the accused must have “personal knowledge of the system of ill-treatment” and “inten[d] to further this common concerted system of ill-treatment.”<sup>39</sup> Because the enterprise implicated in this form of JCE may involve a large number of people, the Appeals Chamber has noted that *mens rea* must be “assessed in relation to the knowledge of a particular accused.”<sup>40</sup> Specifically,

[w]hat is natural and foreseeable to one person participating in a systemic [JCE] might not be natural and foreseeable to another, depending on the information available to them. Thus, participation in a systemic joint criminal enterprise does not necessarily entail criminal responsibility for *all* crimes, which, though not within the common purpose of the enterprise, were a natural or foreseeable consequence of the enterprise. *A participant may be responsible for such crimes only if the Prosecution proves that the accused had sufficient knowledge such that the additional crimes were a natural and foreseeable consequence to him.*<sup>41</sup>

For example, under the systemic form of JCE liability, the court may hold a warden responsible for torture committed by others in his prison if the prosecution proves that the warden knew torture was taking place there but failed to stop it.<sup>42</sup>

---

38. *Tadic*, Case No. IT-94-1-A ¶ 202.

39. *Id.* ¶ 228.

40. *Prosecutor v. Kvočka*, Case No. IT-98-30/A-A, Judgment, ¶ 86 (Feb. 28, 2005).

41. *Id.* (second emphasis added). Though the ICTY’s statements of the *mens rea* required for systemic JCE liability are somewhat inconsistent in U.S. criminal law terms, a requirement of knowledge is probably the closest analogy. The tribunal’s references to defendant’s “intent to further” a known system of ill treatment, *see supra* note 39 and accompanying text, suggest purposeful conduct under U.S. law. MODEL PENAL CODE § 2.02(2)(a) (Proposed Official Draft 1962). However, holding a defendant liable for the “natural and foreseeable” consequences of the JCE’s activities, *see supra* 41 and accompanying text, is closer to the U.S. standard of recklessness. MODEL PENAL CODE § 2.02(2)(c) (Proposed Official Draft 1962). Since both statements refer to the knowledge of the particular defendant—with respect to the system of ill treatment, and with respect to the particular activities of the JCE—the closest analogy in U.S. law is probably a *mens rea* of knowledge. *Id.* § 2.02(2)(b).

42. *Prosecutor v. Krnojelac*, Case No. IT-97-25-A, Judgment, ¶ 110 (Sept. 17, 2003).

The most controversial form of JCE liability, the extended form, is established where an individual manifests “a criminal intention to participate in a common criminal design” and “criminal acts other than those envisaged in the common criminal design are likely to be committed by other participants in the common design.”<sup>43</sup> With respect to this form of liability, two findings of *mens rea* are required:

First, the accused must have the intention to participate in and contribute to the common criminal purpose. Second, in order to be held responsible for crimes which were not part of the common criminal purposes, but which were nevertheless a natural and foreseeable consequence of it, the accused must also know that such a crime might be perpetrated by a member of the group, and willingly take the risk that the crime might occur by joining or continuing to participate in the enterprise.<sup>44</sup>

This extended form of JCE liability is controversial because it allows the prosecution to impute criminal liability to individuals for crimes they neither committed nor knew were taking place.

Tadic was convicted of the Jaskici killings under the extended form of JCE liability. According to the Appeals Chamber, the group of armed men who entered the village shared the “common criminal purpose to rid the Prijedor region of the non-Serb population, by committing inhumane acts.”<sup>45</sup> Though their purpose was not to *kill* all non-Serb men, the court found that Tadic “had been aware of [previous] killings accompanying the commission of inhumane acts against the non-Serb population.”<sup>46</sup> Further, the Appeals Chamber found that Tadic “actively took part in this attack, rounding up and severely beating some of the men from Jaskici,” therefore fulfilling the participation requirement.<sup>47</sup> Finally, the *mens rea* requirement was satisfied because Tadic “was aware that the actions of the group of which he was a member were likely to lead to . . . killings, but he nevertheless willingly took that risk.”<sup>48</sup> Anchored in these conclusions, the court found Tadic guilty of the murders of the five Jaskici men, based on his participation in the group believed to have committed the crimes.

---

43. Prosecutor v. Tadic, Case No. IT-94-1-A, Judgment, ¶¶ 204, 206 (July 15, 1999).

44. *Kvočka*, Case No. IT-98-30/A-A ¶ 83.

45. *Tadic*, Case No. IT-94-1-A ¶ 231.

46. *Id.*

47. *Id.* ¶ 232.

48. *Id.*



## II. COMPARISON

Though JCE liability may appear unique at first glance, the doctrine actually resembles many other liability schemes in international and domestic law. Specifically, a similar form of individual liability for group conduct was used in the international context in the Nuremberg proceedings, and is used in domestic law under the Racketeer Influenced and Corrupt Organizations Act (RICO),<sup>49</sup> and under the provision prohibiting material support to foreign terrorists organizations (FTOs) under the Anti-Terrorism and Effective Death Penalty Act (AEDPA).<sup>50</sup> This section briefly discusses the elements of liability under these other criminal schemes and compares them with those of JCE liability in the ICTY. In addition, this section links the differences in these elements of liability to differences in the type of criminal conduct targeted in each scheme. To facilitate comparison with JCE liability, each scheme is divided into its group and individual requirements for conviction.

### A. The Nuremberg proceedings

The International Military Tribunal at Nuremberg heard allegations against twenty-two individual defendants and six organizations.<sup>51</sup> These organizations—the Leadership Corps of the Nazi Party, the Gestapo, the SS, the SA, the Reich Cabinet, and the General Staff and High Command of the Nazi Party—were allegedly criminal due to their role in the perpetration of acts of aggression, war crimes, and crimes against humanity, the three substantive crimes within the tribunal's jurisdiction.<sup>52</sup> During subsequent individual trials, also held in

---

49. 18 U.S.C. §§ 1961-1968 (2004).

50. Pub. L. No. 104-32, 110 Stat. 1214.

51. *See, e.g.*, Prosecutor v. Brdanin, Case No. IT-99-36-A, Judgment, ¶¶ 393, 404 (Apr. 3, 2007).

52. These organizations were prosecuted under article 9 of the London Charter, which provides,

At the trial of any individual member of any group or organization the Tribunal may declare (in connection with any act of which the individual may be convicted) that the group or organization of which the individual was a member was a criminal organization.

After the receipt of the Indictment the Tribunal shall give such notice as it thinks fit that the prosecution intends to ask the Tribunal to make such declaration and any member of the organization will be entitled to apply to the Tribunal for leave to be heard by the Tribunal upon the question of the criminal character of the organization. The Tribunal shall have power to allow or reject the application. If the application is al-

Nuremberg, members of organizations deemed criminal by the Nuremberg Tribunal were prosecuted for their association in the group.<sup>53</sup> These criminal organization proceedings differed from JCE liability in the ICTY, however, because membership in a criminal organization was itself a crime at Nuremberg—individual members were not held liable for the crimes committed by other members of the organization, even if those crimes were foreseeable or even known. In addition, because the criminal nature of the organization and the criminal liability of individual members were separate questions, the Nuremberg tribunal and subsequent courts determined individual and group criminality in bifurcated trials. Since the ICTY often cites the Nuremberg tribunal as its predecessor in international law, this comparison is particularly relevant.

### 1. Elements of liability

#### a. Group requirements

Recognizing that “the Tribunal should make such declaration of criminality so far as possible in a manner to insure that innocent persons will not be punished” the tribunal defined criminal organizations narrowly.<sup>54</sup> As stated in the judgment,

A criminal organisation is analogous to a criminal conspiracy in that the essence of both is cooperation for criminal purposes.

---

lowed, the Tribunal may direct in what manner the applicants shall be represented and heard.

Agreement between by the Government of the United States of America, the Provisional Government of the United Kingdom of Great Britain and Northern Ireland and the Government of the Union of Soviet Socialist Republics for the Prosecution of the Major War Criminals of the European Axis and Charter of the International Military Tribunal, art. 9, Aug. 8, 1945, 59 Stat. 1544.

53. The crimes punishable under Control Council Law No. 10 were crimes against peace, war crimes, crimes against humanity, and membership in a criminal organization. Control Council Law No. 10, Dec. 20, 1945, Control Council for Germany, Official Gazette, Jan. 31, 1946, at 50, available at <http://www.yale.edu/lawweb/avalon/imt/imt10.htm>. In fact, the crime of membership in a criminal organization was punishable by death. *Id.* Liability extended to both direct and indirect participants in criminal organizations:

Any person . . . is deemed to have committed a crime . . . if he was (a) a principal or (b) was an accessory to the commission of any such crime or ordered or abetted the same or (c) took a consenting part therein or (d) was connected with plans or enterprises involving its commission or (e) was a member of any organization or group connected with the commission of any such crime.

*Id.*

54. JUDGMENT OF THE INTERNATIONAL MILITARY TRIBUNAL FOR THE TRIAL OF GERMAN MAJOR WAR CRIMINALS 67 (1946).

There must be a group bound together and organised for a common purpose. The group must be formed or used in connection with the commission of crimes denounced by the Charter . . . . [T]hat definition should exclude persons who had no knowledge of the criminal purposes or acts of the organisation and those who were drafted by the State for membership, unless they were personally implicated in the commission of acts declared criminal[,] . . . the [Nuremberg] Charter as members of the organisation. Membership alone is not enough to come within the scope of these declarations.<sup>55</sup>

Thus, the criminal nature of organizations was judged based on (1) a common criminal purpose; (2) membership on a voluntary basis; and (3) knowledge. Since the tribunal justified its criminal organization findings on judicial efficiency grounds, the group's size also proved relevant.

First, the tribunal found the common criminal purpose requirement fulfilled only when most of the organization's members shared that purpose. Thus, the Leadership Corps was deemed a criminal organization because its members were generally involved in "the Germanisation of incorporated territory, the persecution of the Jews, the administration of the slave labour programe, and the mistreatment of prisoners of war."<sup>56</sup> The SA however, was not declared a criminal organization because, though some members "took part in the beer hall feuds and were used for street fighting in battles against political opponents," their participation was not shown to be "part of a specific plan to wage aggressive war."<sup>57</sup>

Voluntary participation, the tribunal's second consideration, was not judged on the basis of absolute voluntariness but rather on a failure to protest assignment to a particular group. Therefore, membership in the Gestapo and the SD was deemed voluntary even though the members of these organizations "did not have a free choice of assignments within that organization and the refusal to accept a particular position . . . might have led to serious punishment."<sup>58</sup> Since "all members of the Security Police and SD joined the organization voluntarily under no other sanction than the desire to retain their positions

---

55. *Id.*

56. *Id.* at 70.

57. *Id.* at 80.

58. *Id.* at 72-73.

as officials,” the tribunal found that membership in these organizations was sufficiently voluntary.<sup>59</sup>

Finally, the tribunal did require that membership was known. In declining to declare the General Staff and High Command a criminal organization, the Tribunal distinguished that group from the SS, stating,

[w]hen an individual became a member of the SS . . . he did so . . . certainly with the knowledge that he was joining something. In the case of the General Staff and High Command, however, he could not know he was joining group or organisation, for such organisation did not exist except in the charge of the Indictment. He knew only that he had achieved a certain high rank in one of the three services, and could not be conscious of the fact that he was becoming a member of anything so tangible as a ‘group,’ as that word is common used.<sup>60</sup>

The organization’s size also played a role in the tribunal’s criminal organization findings as a means of balancing of individual rights against judicial economy. As the tribunal stated, “[w]here an organization with a large membership is used for such [criminal] purposes, a declaration [of criminality] obviates the necessity of inquiring as to its criminal character in the later trial of members who are accused of participating through membership in its criminal purposes and thus saves much time and trouble. There is no such advantage in the case of a small group.”<sup>61</sup> Therefore, the Reich Cabinet was not deemed a criminal organization because the group was “so small that members could be conveniently tried in proper cases without resort to a declaration that the Cabinet of which they were members was criminal.”<sup>62</sup> Under these criteria, the Nuremberg Tribunal declared only three or-

---

59. *Id.* at 73. Similarly, though the SA was not deemed a criminal organization at Nuremberg, the tribunal did determine that its membership was voluntary despite the fact that some officials were transferred to the SA without their knowledge. *Id.* at 79. Their membership was deemed voluntary because “the Tribunal [was] not satisfied that the members in general endeavored to protest against this transfer or that there was any evidence, except in isolated cases, of the consequences of refusal.” *Id.*

60. *Id.* at 82-83.

61. *Id.* at 81.

62. *Id.* The cabinet had an estimated 48 members, eight of whom were dead and 17 of whom were on trial before the Nuremberg Tribunal. *Id.* Since declaring the Cabinet a criminal organization would therefore play a role in the cases of only 23 individuals, the tribunal declared that “nothing would be accomplished to expedite or facilitate their trials by declaring the Reich Cabinet to be a criminal organization.” *Id.*

ganizations criminal: the Leadership Corps of the Nazi Party, the Gestapo/SD and the SS.<sup>63</sup>

b. Individual requirements

To convict individuals of membership in an organization deemed criminal by the Nuremberg Tribunal, courts required a showing that the individual knew of the organization's criminal activities but did not require a showing that the defendant had participated in or contributed to the organization's crimes.<sup>64</sup> Therefore, some defendants were convicted of a criminal offense simply because they maintained membership in an organization despite knowledge of its criminal purpose. For example, Joseph Altstoetter, a judge in the Bavarian and Reich Ministries of Justice and a member of the legal staff of the SS main office, was convicted of membership in criminal organization because "the activities of the SS and the crimes which it committed . . . are of so wide a scope that no person of the defendant's intelligence . . . could have been unaware of its illegal activities, particularly a member of the organization from 1937 to the surrender."<sup>65</sup> As the tribunal further explained,

Altstoetter not only had contacts with the high ranking officials of the SS . . . but was himself a high official in the Ministry of Justice stationed in Berlin from June 1943 until the surrender. He attended conferences of the department chiefs in the Ministry of Justice and was necessarily associated with the officials of the ministry, including those in charge of penal matters.<sup>66</sup>

---

63. The Tribunal declined to apply that title to the SA, the Reich Cabinet, and the General Staff and High Command. The Tribunal did not, however, specifically require that members of these organizations would not be prosecuted in subsequent proceedings.

64. In reality, however, most individuals found guilty of membership in a criminal organization were also found guilty of directly committing war crimes or crimes against humanity, so a participation requirement would have been satisfied. Karl Brandt, for example, a physician and a member of the SS, was convicted of war crimes and crimes against humanity for his participation in medical experiments on prisoners of war and concentration camp victims. INT'L MILITARY TRIBUNAL, 2 TRIALS OF WAR CRIMINALS BEFORE THE NUERNBERG MILITARY TRIBUNALS UNDER CONTROL COUNCIL LAW NO. 10, at 189-98 (William S. Hein & Co. 1997) (1952) [hereinafter TRIALS OF WAR CRIMINALS]. In finding Brandt also guilty of the crime of membership in the SS, the court simply noted that Brandt had become "a member of the organization in July 1934 and remained in this organization at least until April 1945. As a member of the SS he was criminally implicated in the commission of war crimes and crimes against humanity." *Id.* at 198.

65. 3 TRIALS OF WAR CRIMINALS, *supra* note 64, at 1175.

66. *Id.*

As the court noted, “[s]urely whether or not he took part in such activities or approved of them, he must have known of that part which was played by an organization of which he was an officer . . . . Notwithstanding these facts, he maintained his friendly relations with the leaders of the SS.”<sup>67</sup> On these facts, Altstoetter was convicted of membership in a criminal organization.<sup>68</sup>

Other individuals were convicted because their membership had by itself benefited the organization. For example, in *The Flick Case*, defendants Friedrich Flick and Otto Steinbrinck were both charged with the crime of membership in the SS. Each defendant had contributed more than 100,000 Reichsmarks for cultural projects and other “special purposes” of Heinrich Himmler, Reichsfuehrer of the SS, and each had participated in a small group called the Friends of Himmler.<sup>69</sup> Despite their similar monetary contributions and participation, the court found Steinbrinck, but not Flick, guilty of membership in a criminal organization. As the tribunal explained, Flick had joined the SS and made donations to Himmler partially to compensate for his prior public support of Hitler’s political rivals.<sup>70</sup> Steinbrinck, on the other hand, was “an outstanding naval officer of the First World War [who was] respected and admired by the public” and who had been a member of the organization in a purely honorary fashion.<sup>71</sup> Thus, in finding Steinbrinck guilty of membership in the SS, the tribunal found that he be “justly reproached for voluntarily lending his good reputation to an organization whose reputation was bad.”<sup>72</sup>

---

67. *Id.* at 1176.

68. *Id.* at 1177.

69. 6 TRIALS OF WAR CRIMINALS, *supra* note 64, at 1219-21. The court declined to base liability on monetary contributions, finding that “[t]he giving began long before the war at a time when the criminal activities of the SS, if they had begun, were not generally known.” *Id.* at 1220. In addition, the prosecution did not establish that “any part of the money was directly used for the criminal activities of the SS.” *Id.* However, as the court stated,

It is reasonably clear that some of the funds were used purely for cultural purposes. But during the war and particularly after the beginning of the Russian campaign we cannot believe that there was much cultural activity in Germany . . . . It is a strain upon credulity to believe that [Himmler] needed or spent annually a million Reichsmarks solely for cultural purposes or that the members of the Circle [Friends of Himmler] could reasonably believe that he did.

*Id.*

70. *Id.*

71. *Id.* at 1221.

72. *Id.* at 1222.

## 2. Comparison and explanation

Generally, as compared to JCE liability in the ICTY, the Nuremberg Tribunal's analysis was more nuanced at the group level but more lenient at the individual level. With respect to the group requirements, the Nuremberg Tribunal's consideration of voluntary membership and group size are generally absent from the ICTY's JCE analysis. However, since the tribunal's criminal organization findings fixed the criminality of individuals tried in subsequent proceedings, the imposition of rigid requirements at the group level is logical. In the ICTY, on the other hand, even when one member of a JCE is convicted of a crime, other members may not be held liable if they do not fulfill the mens rea and participation elements.<sup>73</sup> The individual requirements for criminal liability at Nuremberg, however, were more lenient than those of the ICTY because individuals who had not actually participated in any criminal activity nevertheless could be convicted of a crime for their membership in a criminal organization. The Nuremberg tribunal's findings are therefore characterized by rigid group requirements and lax individual requirements.

This liability framework reflects the underlying purposes of the criminal organization findings in the Nuremberg Tribunal and subsequent individual trials. Organizations were included among the accused at Nuremberg because, as stated by Robert Jackson, the U.S. Chief Prosecutor, "organizations indoctrinated and practiced violence and terrorism. They provided the systematized, aggressive, and disciplined execution throughout Germany and the occupied countries of the plan for the crimes [within the jurisdiction of the Nuremberg Tribunal]."<sup>74</sup> Therefore, "[i]nsofar as the Charter of [the Nuremberg] Tribunal contemplates a justice of retribution, it is obvious that it could not overlook these organized instruments and instigators of past crimes."<sup>75</sup> However, because the proceedings at Nuremberg were intended to punish the leaders of the Nazi atrocities without vilifying the entire German people, subsequent individual trials imposed very strong knowledge requirements. Finally, a participation requirement may have been absent from these trials because this form of liability was relatively new or because the scheme was intended to indict those

---

73. See *supra* notes 16-17 and accompanying text.

74. 8 NUREMBERG TRIAL PROCEEDINGS 355.

75. *Id.* at 356.

who knew of but did not prevent the atrocities, rather than those who actually committed them.

## B. RICO

RICO prosecutions in U.S. law also base individual criminal liability on group participation.<sup>76</sup> Section 1962 of RICO prohibits three different activities: As the statute provides,

(a) It shall be unlawful for any person who has received any income derived . . . from a pattern of racketeering activity . . . to use or invest . . . any part of such income . . . in the acquisition of . . . any enterprise.

(b) It shall be unlawful for any person through a pattern of racketeering activity . . . to acquire or maintain . . . any interest in or control of any enterprise.

(c) It shall be unlawful for any person employed by or associated with any enterprise . . . to conduct or participate . . . in the conduct of [an] enterprise's affairs through a pattern of racketeering activity.<sup>77</sup>

Section 1962(d) also criminalizes conspiracy to commit any of these three substantive offenses.<sup>78</sup> "Racketeering activity" under the statute includes murder, kidnapping, gambling, arson, robbery, bribery, dealing in chemical substances or obscene matter, and a variety of other state and federal crimes.<sup>79</sup>

Comparing RICO with JCE liability in the ICTY is particularly useful because defendants charged under both schemes may be far removed from the crime for which they are being prosecuted. In addition, a comparison to RICO provides a useful analogy in domestic law to the ICTY's doctrine.

---

76. In addition to imposing criminal liability, RICO imposes civil liability. NORMAN ABRAMS & SARA SUN BEALE, *FEDERAL CRIMINAL LAW AND ITS ENFORCEMENT* 477 (4th ed. 2006). Because "the number of cases . . . in which private civil plaintiffs seek to invoke RICO dwarfs the criminal caseload," the interpretation of this statute has occurred primarily in the civil context. *Id.*

77. 18 U.S.C. § 1962 (2004).

78. *Id.*

79. *Id.* § 1961.



## 1. Elements of liability

### a. Group requirements

To convict an individual for RICO violations, the prosecution must prove the existence of the requisite group, called an enterprise. Two types of enterprises are recognized under the RICO statute: legal entities and associations-in-fact. As the statute provides, an enterprise “includes any individual, partnership, corporation, association, or other legal entity, and any union or group of individuals associated in fact although not a legal entity.”<sup>80</sup> The Supreme Court has construed the “enterprise” requirement broadly, stating “[t]here is no restriction upon the associations embraced by the definition,”<sup>81</sup> and recognizing that the enterprise requirement may be fulfilled by both legitimate and illegitimate organizations<sup>82</sup> and by organizations with ideological goals and those with economic motives.<sup>83</sup>

Though circuit courts differ on the exact characteristics of RICO “enterprises,” most require some degree of structure.<sup>84</sup> As the Eighth Circuit has stated, “an enterprise must have an ‘ascertainable structure’ distinct from that inherent conduct of a pattern of racketeering activity.”<sup>85</sup> Similarly, according to the Seventh Circuit, “[a] RICO enterprise is ‘an ongoing ‘structure’ of persons associated through time, joined in purpose, and organized in a manner amenable to hierarchical or consensual decision-making.’”<sup>86</sup> An enterprise that is a legal entity, rather than association-in-fact, generally satisfies these requirements because “[a] legal entity necessarily has some built-in le-

---

80. *Id.*

81. *United States v. Turkette*, 452 U.S. 576, 580 (1981).

82. *Id.* at 580-601. In fact, the Court saw both legitimate and illegitimate enterprises as intimately related: “Accepting that the primary purpose of RICO is to cope with the infiltration of legitimate business, applying the statute in accordance with its terms, so as to reach criminal enterprises, would seek to deal with the problem at its very source.” *Id.* at 591.

83. *Nat’l Org. for Women v. Scheidler*, 510 U.S. 249, 252 (1994).

84. As the Seventh Circuit noted, “[t]here must be some structure, to distinguish an enterprise from a mere conspiracy, but there need not be much.” *Burdett v. Miller*, 957 F.2d 1375, 1379 (7th Cir. 1992).

85. *United States v. Bledsoe*, 674 F.2d 647, 665 (8th Cir. 1982). *But see* *United States v. Patrick*, 248 F.3d 11, 19 (1st Cir. 2001) (rejecting structure as a requirement for RICO enterprises).

86. *Richmond v. Nationwide Casse L.P.*, 52 F.3d 640, 644 (7th Cir. 1995) (quoting *Jennings v. Emy*, 910 F.2d 1434, 1440 (7th Cir. 1990)). The Fourth Circuit has used similar language: “The hallmark concepts that identify RICO enterprises are ‘continuity, unity, shared purpose and identifiable structure.’” *United States v. Fiel*, 35 F.3d 997, 1003 (4th Cir. 1994) (quoting *United States v. Griffin*, 660 F.2d 996, 1000 (4th Cir. 1981)).

gal structure and organizational features.”<sup>87</sup> Courts have held that the RICO enterprise requirement is fulfilled by associations-in-fact including street gangs<sup>88</sup> and motorcycle clubs,<sup>89</sup> but not by a string of business entities<sup>90</sup> or groups lacking decision-making or profit-sharing mechanisms.<sup>91</sup>

#### b. Individual requirements

In addition to the enterprise requirement, RICO prosecutions must establish a pattern of racketeering activities<sup>92</sup> and the appropriate relationship between the defendant and the enterprise. With respect to the “pattern” element, the statute “requires at least two acts of racketeering activity” that are committed within ten years.<sup>93</sup> According to the Supreme Court, the statute “does not so much define a pattern of racketeering activity as state a minimum necessary condition for the existence of such a pattern.”<sup>94</sup> Therefore, in addition to finding two racketeering acts within ten years, the Court requires a showing that these acts bear a relationship to each other and exhibit

---

87. ABRAMS & BEALE, *supra* note 76, at 496.

88. *United States v. Nascimento*, 491 F.3d 25, 33 (1st Cir. 2007). The gang was deemed an enterprise because its members “used a shared cache of firearms that were regarded as property of the gang,” “self-identified as belonging to an organization,” and “kept tabs on one another and informed one another when things would be ‘hot’ because of a recent shooting.” *Id.*

89. *United States v. Fiel*, 35 F.3d 997, 1004 (4th Cir. 1994). The motorcycle club was organized “for the purpose of riding motorcycles and drinking beer.” *Id.* Further, “[t]he group had officers and by-laws; members passed through various levels of membership . . . . It was a continuing entity, with some members retiring as new members joined. The club raised money through dues, fines, raffle tickets and tickets to club-sponsored parties. A percentage of each chapter’s revenue went to the national club.” *Id.*

90. *Richmond*, 52 F.3d at 645. In *Richmond*, the plaintiff alleged that she had been forced to buy insurance beyond her needs by an enterprise consisting of the car dealership, the insurance provider, and other unnamed entities. *Id.* The court found that “such a nebulous, open-ended description” did not satisfy the enterprise requirement. *Id.*

91. *Wagh v. Metris Direct, Inc.*, 363 F.3d 821, 831 (9th Cir. 2003). The plaintiff in *Wagh* alleged mail fraud based on erroneous billing of his credit card by an enterprise consisting of his credit card issuer and the defendant bank. *Id.* at 825. His § 1962(c) claim was dismissed because he failed to allege “a decision-making structure for the enterprise ‘beyond that which was inherent in the acts of racketeering activity’” or a system for distributing the proceeds from the alleged fraud. *Id.* at 831 (quoting *Chang v. Chen*, 80 F.3d 1293, 1300 (9th Cir. 1996)).

92. The pattern of racketeering activities may also help establish the existence of the requisite group. As the Fourth Circuit noted, “[w]here . . . the enterprise charged is a wholly criminal one, proof of its existence may overlap proof of the connecting-pattern of racketeering activity, but ‘proof of one does not necessarily establish the other.’” *United States v. Griffin*, 660 F.2d 996, 999 (4th Cir. 1981) (quoting *United States v. Turkette*, 452 U.S. 576, 583 (1981)).

93. 18 U.S.C. § 1961 (2006).

94. *H.J. Inc. v. Nw. Bell Tel. Co.*, 492 U.S. 229, 237 (1989).

characteristics of continuity.<sup>95</sup> Specifically, “the relationship that [the acts] bear to each other or to some external organizing principle . . . must render[] them ‘ordered’ or ‘arranged.’”<sup>96</sup> Further, “[a] RICO pattern may surely be established if the related predicates themselves involve a distinct threat of long-term racketeering activity, either implicit or explicit.”<sup>97</sup> Therefore, a pattern of racketeering activity is established under RICO based on a showing of two or more acts of racketeering that fall in an arrangement and involve a threat of long-term racketeering activity.

In addition, since RICO § 1962 subjects *persons*, not enterprises, to liability, the appropriate relationship between the racketeering enterprise and the person charged must also be established. However, since § 1961 defines a person as “any individual or entity capable of holding a legal or beneficial interest in property,” RICO defendants need not be natural persons. Further, under subsections (a) and (b) of § 1962, defendant “persons” are not distinguished from the enterprise, so that a single entity can be charged as both the person and the enterprise.<sup>98</sup> Most criminal RICO cases proceed under subsection (c) of § 1962, however, which distinguishes the enterprise from the person who “conduct[s] or participate[s], directly or indirectly, in the conduct of such enterprise’s affairs. . . .”<sup>99</sup>

Finally, the conspiracy provision in § 1962(d) expands the liability of an individual defendant to include the crimes of coconspirators, even if that defendant did not commit or even participate in these crimes. In fact, “[t]he RICO conspiracy provision . . . is even more comprehensive than the general conspiracy offense” because “[t]here

---

95. These requirements are based on a statement from the legislative history of the statute: “The target of [RICO] is thus not sporadic activity. The infiltration of legitimate business normally requires more than one ‘racketeering activity’ and the threat of continuing activity to be effective. It is this factor of *continuity plus relationship* which combines to produce a pattern.” *Sedima, S.P.R.L. v. Imrex Co., Inc.*, 473 U.S. 479, 496 n.14 (1985) (quoting S. REP. NO. 91-617, at 158 (1969)).

96. *H.J., Inc.*, 492 U.S. at 238 (citing 11 Oxford English Dictionary 357 (2d ed. 1989)).

97. *Id.* at 242. “[T]he threat of continuity is sufficiently established where the predicates can be attributed to a defendant operating as a part of a long term association that exists for criminal purposes” or “where it is shown that the predicates are a regular way of conducting the defendant’s ongoing legitimate business. . . .” *Id.* at 242-43.

98. ABRAMS & BEALE, *supra* note 76, at 505.

99. 18 U.S.C. § 1962 (2006). As the Seventh Circuit has stated, this distinction is made under subsection (c) because “[t]he use of the terms ‘employed by’ and ‘associated with’ appears to contemplate that a person distinct from the enterprise.” *Haroco, Inc. v. Am. Nat’l Bank & Trust Co.*, 747 F.2d 384, 400 (7th Cir. 1984).

is no requirement of some overt act or specific act” in § 1962(d).<sup>100</sup> As the Supreme Court has noted, “[a] conspirator must intend to further an endeavor which, if completed, would satisfy all of the elements of a substantive criminal offense, but it suffices that he adopt the goal of furthering or facilitating the criminal endeavor.”<sup>101</sup> Therefore, a defendant who is acquitted of substantive RICO charges may still be convicted of conspiring to violate the statute under § 1962(d) so long as a coconspirator committed substantive violations of the statute.<sup>102</sup>

## 2. Comparison and explanation

In some ways, the RICO enterprise requirements are similar to the group findings in the ICTY. In both schemes, the existence of the requisite group is determined in the same proceeding as individual liability. In addition, the characteristics of enterprises in RICO and JCEs in the ICTY are relatively fluid. RICO is more demanding than the ICTY’s JCE doctrine, however, because RICO enterprises must exhibit structure and continuity, elements that are generally absent in the ICTY’s findings of a simple plurality of persons with a common criminal purpose. Though RICO’s conspiracy liability resembles the JCE doctrine because both hold individuals liable based on crimes committed by other group-members, the RICO offense still differs because defendants are found guilty of *conspiring* to violate RICO, not for the coconspirator’s substantive RICO offense.<sup>103</sup> With respect to the individual requirements, however, RICO is very different from JCE liability because, in the first two forms of RICO liability, the enterprise or group itself may be liable for the criminal activities of its members. The defining characteristic of RICO liability, then, is the blending of the enterprise with its individual members.

Such blending of individual and group elements was necessary in order to combat the crime targeted in RICO. Government research conducted before the statute was enacted characterized the groups carrying out organized crime as both “highly structured, separately identifiable organization[s]” and “multiple local groups, not necessar-

---

100. United States v. Salinas, 522 U.S. 52, 63 (1997).

101. *Id.* at 65.

102. *Id.* at 66.

103. This distinction may be immaterial, however, because punishments under § 1962(d) are as harsh as under the substantive provisions of the statute.

ily organized under a unified, nationwide hierarchy.”<sup>104</sup> Existing criminal law had proven ineffective in preventing these large-scale activities because it punished only individual, low-level perpetrators who were easily replaced. By enacting RICO, Congress sought “the eradication of organized crime in the United States by strengthening the legal tools in the evidence-gathering process, by establishing new penal prohibitions, and by providing enhanced sanctions and new remedies to deal with the unlawful activities of those engaged in organized crime.”<sup>105</sup> Therefore, based on this goal, the enterprise requirement in RICO was interpreted broadly to include both legitimate and illegitimate enterprises, as well as those driven by ideological as well as economic goals. Further, because the organized crime groups as well as their individual members were the targets of RICO enactments, the first two forms of liability extend to include the RICO enterprise as well as its individuals.

### C. AEDPA

Individual liability is also based on group conduct in the AEDPA provisions prohibiting material support to groups deemed FTOs.<sup>106</sup> Like the “criminal organization” findings in the Nuremberg Tribunal, the finding of group and individual criminality is bifurcated. First, the Secretary of State designates organizations FTOs for the purposes of the statute. Second, subsequent proceedings determine the individual liability of those allegedly providing material support to these organizations. Unlike defendants in the ICTY, these individuals are not held responsible for the crimes of FTOs—they are punished only for supporting such organizations. Since the material support provisions of the AEDPA constitute a relatively recent attempt to shape U.S. law to address an emerging threat, this statute is particularly relevant to a discussion of JCE liability in the ICTY.

---

104. PAUL A. BATISTA, *CIVIL RICO PRACTICE MANUAL* 22-23 (2d. ed. 1997). To support this proposition, Batista cites *THE CHALLENGE OF CRIME IN A FREE SOCIETY* (1967), a report written by the Katzenbach Commission, created by President Lyndon Johnson to investigate the effectiveness of existing law enforcement and to make recommendations for changes at the national, state, and local levels. Exec. Order No. 11,236.

105. Organized Crime Control Act of 1970, Pub. L. No. 91-452, 84 Stat. 922 (1970).

106. 18 U.S.C. § 2339B (2006).

## 1. Elements of liability

### a. Group requirements

Under the material support provisions of AEDPA, the Secretary of State, rather than a court, makes the requisite group determination.<sup>107</sup> The Secretary may declare an organization an FTO based on three criteria:

- (A) the organization is a foreign organization
- (B) the organization is engaged in terrorist activity . . . or retains the capability and intent to engage in terrorist activity or terrorism; and
- (C) the terrorist activity or terrorism of the organization threatens the security of United States nationals or the national security of the United States.<sup>108</sup>

Terrorist activity under AEDPA includes “premeditated, politically motivated violence perpetrated against noncombatant targets by subnational groups or clandestine agents.”<sup>109</sup>

Though courts do not designate organizations as FTOs, they do hear challenges to these designations upon disclosure. After the Secretary of State publishes an FTO designation, the organization deemed an FTO has thirty days to challenge its designation in court.<sup>110</sup> If this time period passes without challenge, the issue may not be re-litigated in future proceedings.<sup>111</sup> Courts have generally given great deference to the FTO designation procedure, upholding it against a number of constitutional challenges<sup>112</sup> and finding that the Secretary of State’s determination of a threat to U.S. security under the statute is nonjusticiable because “it is beyond the judicial function of a court to review foreign policy decisions of the Executive Branch.”<sup>113</sup>

---

107. 8 U.S.C. § 1189 (2004).

108. *Id.*

109. 22 U.S.C. § 2656f(d)(2) (2006). The Secretary is authorized to use classified information in determining whether a particular group should be designated a FTO under the statute, though this information may be disclosed to a court for in camera proceedings if the designation is challenged. 8 U.S.C. § 1189 (2004).

110. 8 U.S.C. § 1189(c) (2005).

111. *Id.*

112. *E.g.*, *United States v. Hammoud*, 381 F.3d 316, 329 (4th Cir. 2004) (holding that the prosecution for material support for FTOs does not violate the First Amendment right to freedom of association); *United States v. Marzook*, 383 F.Supp 2d. 1056, 1067-68 (N.D. Ill. 2005) (upholding FTO determination in a due process challenge).

113. *People’s Mojahedin Org. of Iran v. Dep’t of State*, 182 F.3d 17, 23 (D.C. Cir 1999).

If the group does not assert a timely challenge to the designation, or if the designation is upheld, an FTO determination is effective until revoked by the Secretary of State or by Congress.<sup>114</sup> Courts have upheld the conclusiveness of the Secretary of State's FTO determinations in prosecutions of individual defendants for material support of these organizations, finding that the opportunity to challenge the designation provided in the statute is sufficient to fulfill constitutional requirements.<sup>115</sup> Forty-two organizations are currently designated as FTOs, including HAMAS, the Continuity Irish Republican Army, and the United Self-Defense Forces of Columbia.<sup>116</sup>

b. Individual requirements

Once an organization is deemed an FTO by the Secretary of State, individuals may be prosecuted for providing material support to such organization. In order to convict an individual defendant, the prosecution must establish both knowledge and participation. The knowledge requirement is fulfilled if the prosecution shows the defendant knew that: (1) "the organization is a designated terrorist organization," (2) "the organization has engaged or engages in terrorist activity," or (3) "the organization has engaged or engages in terrorism."<sup>117</sup>

The participation element of the offense, providing material support, may be established by either financial or physical support. As the statute provides, material support includes

any property, tangible or intangible, or service, including currency or monetary instruments or financial securities, financial services, lodging, training, expert advice or assistance, safe-houses, false documentation or identification, communications equipment, facilities, weapons, legal substances, explosives, personal transportation and other physical assets, except medicine or religious materials.<sup>118</sup>

For example, under this statute, individuals have been charged with material support for FTOs for collecting and donating money to or-

---

114. 8 U.S.C. § 1189 (2005).

115. *United States v. Afshari*, 426 F.3d 1150, 1158-59 (9th Cir. 2005).

116. U.S. DEPARTMENT OF STATE, COUNTRY REPORTS ON TERRORISM (2007), <http://www.state.gov/s/ct/rls/crt/2006/82738.htm>.

117. 18 U.S.C. § 2339B (2004) (citations omitted).

118. *Id.* (referring to 18 U.S.C. § 2339A).

ganizations deemed FTOs<sup>119</sup> and for providing a channel of communications to FTOs.<sup>120</sup>

## 2. Comparison and explanation

Though the determination of the requisite group under the AEDPA is very different from the ICTY's JCE determinations, the individual requirements are actually relatively similar. On one hand, the AEDPA group requirements are more inclusive than those applied in JCE liability because groups that merely have the *capability* of carrying out terrorist activities are designated FTOs, as well as those who actually carry out such activities. On the other hand, these group determinations are more exacting than those in the ICTY because groups are limited to foreign organizations engaged in one particular type of activities—terrorism—and this activity must threaten U.S. security. The basic individual requirements for material support under AEDPA, however, are the same as those for JCE liability in the ICTY—both require a degree of participation and the requisite *mens rea*. Unlike in the ICTY, however, individuals charged with material support for FTOs are not held responsible for every act of the group. Instead, as the Ninth Circuit has specifically noted, “[d]onor defendants are penalized [only] for the criminal act of support.”<sup>121</sup>

As with the other forms of liability discussed, the differences in these elements can be explained by examining the conduct targeted in AEDPA's material support provisions. Rather than punishing organization members who have already completed their criminal purposes, the AEDPA material support provisions seek to prevent acts of terrorism by prosecuting those who would facilitate these acts through their monetary and other support. In other words, the AEDPA provision prohibiting material support to terrorism “is primarily aimed at cutting off the supply of money and other resources

---

119. *United States v. Hammoud*, 381 F.3d 316, 326 (4th Cir. 2004). Defendants in this case were convicted of providing material support for terrorism. *Id.*

120. *United States v. Sattar*, 272 F. Supp. 2d 348, 356-57 (S.D.N.Y. 2003). Defendants in this case were not convicted because the court found the statute was unconstitutionally vague in its prohibition of the provision of “communications equipment.” *Id.* at 357-58.

121. *Humanitarian Law Project v. Mukasey*, 509 F.3d 1122, 1132 (9th Cir. 2007). As the court has further explained, the provision “cannot be invoked to punish the donor defendant for crimes committed by the donee foreign terrorist organization. A person cannot be convicted of murder under section 2339B(a) if the foreign terrorist organization committed an act of terrorism that took innocent lives.” *Id.*



to terrorist groups.”<sup>122</sup> Therefore, the designation of a foreign terrorist organization remains discrete from the determination of individual liability so that individuals who may be supporting these organizations have notice of the criminality of their conduct.

Therefore, the JCE doctrine is not a form of liability unique to the ICTY. Several other schemes in both international and domestic law also target individuals for group conduct, particularly the Nuremberg proceedings, RICO, and AEDPA. However, the scope of liability under each scheme differs according to the particular threat targeted. Therefore, the legitimacy of the JCE doctrine depends on whether the conduct that the ICTY seeks to address justifies that doctrine’s breadth.

### III. LEGITIMACY OF JCE LIABILITY

Generally, the elements of JCE liability in the ICTY may be construed as a response to the decentralized nature of the Yugoslav conflict, the difficulty of evidence-gathering in wartime, and the need to punish past atrocities rather than prevent future crimes.

According to a United Nations (UN) report, prior to 1993, the Yugoslav conflict “was characterized by a multiplicity of combatant forces . . . sometimes operating under no established command and control.”<sup>123</sup> Paramilitary groups involved in the conflict included special forces, local police forces, and local armed civilians.<sup>124</sup> During the conflict, special forces “usually operate[d] under the command of a named individual and apparently with substantial autonomy . . . . Many special forces answer[ed] only to senior political officials in the respective governments. Such relationships [were] frequently based on personal political allegiance and are not always publicly known.”<sup>125</sup> Further, “[s]pecial forces are apparently accountable only to senior political officials of the government which they serve. Little is known about their order of battle except that restraint of these units by the regular army is conspicuously absent.”<sup>126</sup>

---

122. NORMAN ABRAMS, ANTI-TERRORISM AND CRIMINAL ENFORCEMENT, ABRIDGED EDITION 18 (2d ed. 2005).

123. Annexes to the Final Report of the Commission of Experts Established pursuant to security Council Resolution 780 (1992), U.N. SCOR, 49th Sess., U.N. Doc. S/1994/674/Add.2 ¶ 22 (1994).

124. *Id.* ¶ 31.

125. *Id.* ¶ 32.

126. *Id.* ¶ 37.

With this type of warfare, the perpetration of crimes during conflict is unsurprising. As noted in the UN report, “[t]he history of war clearly reveals that professional armies that are under effective command and control commit fewer violations than fighting units that are not properly trained in the law of armed conflict and are not under the effective command and control of superior officers.”<sup>127</sup> In the Yugoslav conflict in particular, the UN found that “[a]ll of the combatant forces . . . have committed grave breaches of the Geneva Conventions and other violations of international humanitarian law for which military, and in some cases, civilian commanders are responsible.”<sup>128</sup> Therefore, the ICTY paints JCE liability broadly because that tribunal aims to achieve “rapid and effective justice for the victims and their associates, who used to perceive as war criminals not the political and military leaders but the soldiers and the direct perpetrators.”<sup>129</sup> Accordingly, the Appeals Chamber has recently rejected calls by defendants to limit JCE liability to small-scale operations.<sup>130</sup> Since the groups perpetrating these crimes were by definition unorganized, the inclusion of a structure requirement in JCE liability, similar to the requirement in RICO, would defeat the purpose of the liability scheme.

In addition, the ICTY faces considerable problems because it seeks to try cases based on the events of a chaotic and decentralized war. Even critics of JCE liability acknowledge that a post-war tribunal faces peculiar evidentiary problems in establishing individual criminal liability: “As a practical matter, in the chaotic conditions in which war-time violations occur, and due to the post-war dislocation experienced by many victims, it is often very difficult to locate specific evidence proving that defendants have committed particular crimes. Joint criminal enterprise [liability] helps prosecutor[s] secure convictions when such proof may be lacking.”<sup>131</sup> Further, unlike the Nuremberg Tribunal, the ICTY does not have the benefit of extensive re-

---

127. *Id.* ¶ 42.

128. *Id.* ¶ 40.

129. Piacente, *supra* note 6, at 447.

130. Prosecutor v. Brdanian, Case No. IT-99-36-A, Judgment, ¶¶ 423-425 (Apr. 3, 2007). As the court stated, “there is no risk that attaching JCE liability to an individual who is structurally remote from the crime increases the possibility of the individual being made guilty by ‘mere association’ . . . because responsibility pursuant to JCE does require participation by the accused” regardless of the size of the enterprise. *Id.* ¶ 424.

131. Danner & Martinez, *supra* note 8, at 133.

cord-keeping by the regime whose activities are being punished.<sup>132</sup> Therefore, as one former prosecutor noted, “[t]he amount of information immediately available after the establishment of the ICTY led the [Office of the Prosecutor] to start indicting and prosecuting mainly soldiers, camp commanders, and members of paramilitary groups.”<sup>133</sup>

Finally, unlike AEDPA, the ICTY primarily seeks to punish completed crimes in a past conflict rather than prevent the commission of new crimes in an ongoing conflict. Therefore, members of a JCE are held responsible for the substantive crimes of other group members, rather than for merely supporting the group, as in AEDPA.

Therefore, in sum, though the JCE doctrine does not mirror similar schemes in international and domestic law, it is nevertheless legitimate given the goals of the ICTY. Specifically, the breadth of JCE liability may be justified based on the decentralization of the Yugoslav conflict, the difficulty of gathering evidence during wartime, and the need to punish past crimes rather than prevent new ones. Though the doctrine is controversial, such liability is necessary to allow the ICTY to carry out its mission.

---

132. At the Nuremberg tribunal, documents produced by the German government served as the primary evidence. As stated in a 1946 publication of the Government Printing Office, [a]lthough some pieces of evidence [used at the Nuremberg Tribunal] were secured in Washington and London, by far the greater part was obtained in the land of the enemy. As the American Armies had swept into Germany, military investigating teams had filled document centers with an increasing wealth of materials which were freely made available by the Army to [Office of the Chief of Council] field investigators.

*Preface* to OFFICE OF THE UNITED STATES COUNSEL FOR PROSECUTION OF AXIS CRIMINALITY, 1 NAZI CONSPIRACY AND AGGRESSION 1 (1946), available at [http://www.yale.edu/lawweb/avalon/imt/document/nca\\_voll/preface.htm](http://www.yale.edu/lawweb/avalon/imt/document/nca_voll/preface.htm).

133. Piacente, *supra* note 6, at 447.