

Hate By Association:
Joint Criminal Enterprise Liability for Persecution

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Far from being a vehicle for revenge, it is a tool for promoting reconciliation and restoring true peace. If responsibility for the appalling crimes perpetrated in the former Yugoslavia is not attributed to individuals, then whole ethnic and religious groups will be held accountable for these crimes and branded as criminal. In other words, "collective responsibility" – a primitive and archaic concept – will gain the upper hand; eventually whole groups will be held guilty of massacres, torture, rape, ethnic cleansing, the wanton destruction of cities and villages. The history of the region clearly shows that clinging to feelings of "collective responsibility" easily degenerates into resentment, hatred and frustration and inevitably leads to further violence and new crimes.¹

Introduction

Perpetrating heinous acts against another solely on the basis of "otherness" has been a common theme throughout human history. Whether it has been due to ethnic, racial, religious or political differences, certain governments and private actors have attempted to cleanse their territory of the "pollution" that appeared to threaten their ideology or existence.² Oftentimes, purging campaigns resulted in mass death, such as during the Spanish Inquisition, which claimed tens of thousands of suspected non-believers. Although the Holocaust was the most well-known, and certainly most well-organized, instance of persecution in the twentieth century, it does not lie in isolation. During World I, the Turkish government killed approximately 1.5 million Armenians living in the Ottoman Empire. Between 1975 and 1979, the Khmer Rouge oversaw the deaths of up to three million people, a large portion because they were non-Cambodian or did

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¹ *Report of the International Tribunal for the Prosecution of Persons Responsible for Serious Violations of International Humanitarian Law Committed in the Territory of the former Yugoslavia since 1991*, U.N. GAOR/SCOR, 49th Sess., U.N. Doc. A/49/342-S/1994/1007, ¶ 16 (Aug. 29, 1994).

² See generally BARRINGTON MOORE, JR., *MORAL PURITY AND PERSECUTION IN HISTORY* (2000).

not square with the communist regime's remaking of Cambodian society. Many other notable examples easily come to mind.

Persecution is frequently associated with death, but death, whether widespread or not, is not necessary for there to have been persecution. Persecution may manifest itself through other violent means, or it may rear its head through the restraint of access to the necessities of life. The overarching belief, though, is that the "other" is always viewed by what it is not.³ Thus, the application is easy, regardless of location, language, belief system, or any other means of distinguishing oneself from another.

For centuries, ruthless leaders and culpable underlings escaped retribution for their policies; if they did suffer consequences, it was only at the hands of a violent coup or a conquering people, usually resulting in their summary execution. The regime of international criminal law seeks to reverse the long-standing cynical notion that "one murder makes a villain; millions a hero."⁴ But if anyone was ever to be held liable for policies that led to incalculable deaths, the most complex question, both in practical and theoretical terms, has been how to individualize responsibility when countless people participated. Modern international law, as has always been the case in municipal law, now imposes individual—rather than collective—criminal responsibility for actions deemed contrary to humanity.

This article considers the crime of persecution in international criminal law and how it has collided with the doctrine of joint criminal enterprise ("JCE") at the International Criminal Tribunal for the former Yugoslavia ("ICTY"). The first section of this article briefly discusses the emergence of individual criminal responsibility in international criminal law. The second section analyzes the doctrine of JCE, including its legal underpinnings in jurisprudence arising

³ *Id.* at 3.

⁴ BEILBY PORTEUS, *DEATH: A POETICAL ESSAY*, Line 154 (1759). Beilby Porteus (1731-1809) was the bishop of London and a staunch abolitionist.

from World War II, its modern formulation at the ICTY, and its similarities to conspiracy and accomplice liability in the U.S. The doctrine of JCE liability attributes one's actions to another if both were part of a common criminal plan. Through the third of three categories of JCE liability, an individual may be vicariously liable for another's acts if those acts are a foreseeable consequence of the joint enterprise. The third section examines the origins and elements of the crime of persecution, which is a specific intent crime requiring the intent to discriminate on a given basis. Because the crime's foundation stems from "crimes against humanity" and is now considered as a crime against humanity, the elements common to all crimes against humanity are also addressed. Next, the fourth section considers "hate crimes" legislation in the U.S., and how their analytical framework can deepen understanding of the proper role between discrimination and vicarious liability. The fifth section discusses the convergence of specific intent crimes, namely persecution and genocide, with the doctrine of JCE. The final section proposes two improvements to the future use of JCE liability.

This article specifically argues that before liability attaches for participation in a JCE, the individual should have contributed significantly to that enterprise. Minor participation in a common plan should not be enough to expand liability to far-reaching consequences. The second modification would be that the third category of JCE should not be used for specific intent crimes. Attributing the direct perpetrator's thoughts to the non-direct perpetrator, where that individual did not possess or intend such thoughts, is unjust and should be reconsidered. It is no longer necessary to find a smoking gun or evidence of a direct order or participation; a muted form of guilt by association has effectively replaced such requirements.

By incorporating these suggestions, modern international criminal law will refocus its energies on those most responsible for mass atrocities. International law should not loosely

apply doctrines that dilute individual responsibility; doing so denigrates the importance of the very principles these institutions are meant to uphold. Because of the relatively recent reemergence of individual criminal responsibility, and the political will around the world to enforce it, there is now a great opportunity to hone international criminal law into a regime that will never leave the world stage again.

I. International Law and Individual Criminal Responsibility

Under classical international law, only States held legal personality. If a particular action was a crime under international law, the State alone was responsible; no international entity doled out punishments (or benefits) to individual persons. This all changed in the immediate aftermath of World War II.⁵

Prior to the Nuremberg Trial in 1945, individuals were charged under national law, usually military law, and tried before national courts.⁶ The Nuremberg Trial was the first clear enunciation of the notion that individuals have concrete duties under international law.⁷ In order to justify this new concept, the judges had to make a dramatic analytical leap from the international treaties they were citing, which mentioned nothing on individual duties, to the notion of individual criminal responsibility for "crimes" found within those treaties.⁸ In

⁵ See generally Kai Ambos, *Individual Criminal Responsibility in International Criminal Law: A Jurisprudential Analysis – From Nuremberg to The Hague*, in *SUBSTANTIVE AND PROCEDURAL ASPECTS OF INTERNATIONAL CRIMINAL LAW* 5, Vol. I (Gabrielle Kirk McDonald & Olivia Swaak-Goldman eds., 2000).

⁶ Andrew Clapham, *Issues of complexity, complicity and complementarity: from the Nuremberg trials to the dawn of the International Criminal Court*, in *FROM NUREMBERG TO THE HAGUE: THE FUTURE OF INTERNATIONAL CRIMINAL JUSTICE* 31 (Philippe Sands ed., 2003).

⁷ *Id.* at 30, 31.

⁸ *Id.* at 32.

language familiar to the current politico-legal debate within the U.S. about the nature of a judge's role, one commentator has characterized what occurred at Nuremberg to be "judicial activism."⁹

Attributing individual responsibility to military leaders was not an incredible legal stretch, though, because military courts had tried leaders for war crimes before. For example, the Treaty of Versailles granted the Allies power to try individuals before their military courts "for violations of the laws and customs of war."¹⁰ Holding civilian leaders responsible, on the other hand, proved much more tenuous. There was no precedent for trying civilians for international crimes prior to Nuremberg.¹¹ The "Hang the Kaiser" moniker after World War I never came to fruition,¹² mostly because the Netherlands granted asylum to him, and international pressure and interest eventually subsided in the proposition. Despite its unsteady foundation, however, the concept has been widely accepted and subsequently used. Individual criminal responsibility for certain acts, whether for military personnel or civilians, has arguably become customary international law.

Due largely to the Cold War, the leaders of wayward regimes and destructive paramilitary groups never faced retribution before an international tribunal. If such individuals ever faced justice, it was usually in the way of summary executions. States meted out punishment as they deemed fit for their own political purposes, oftentimes without proper trials.

⁹ *Id.* Clapham quotes the Nuremberg Judgment, which stated: "The law of war is to be found not only in treaties, but in the customs and practices of states which gradually obtained universal recognition, and from general principles of justice applied by jurists, and practised by military courts. This law is not static, but by continual adaptation follows the needs of a changing world. Indeed, in many cases treaties do no more than express and define for more accurate reference the principles of law already existing."

¹⁰ Treaty of Versailles, June 28, 1919, arts. 228(1), 229(1), (2), Consol. T.S. 225. Germany was supposed to cooperate and hand over certain identified individuals under Articles 228(2) and 230, but it was uncooperative and few German nationals ever faced justice, either inside or outside Germany.

¹¹ Richard Overy, *The Nuremberg trials: international law in the making*, in FROM NUREMBERG TO THE HAGUE: THE FUTURE OF INTERNATIONAL CRIMINAL JUSTICE 1, 3 (Philippe Sands ed., 2003).

¹² *Id.* at 3. The Treaty of Versailles stated in Article 227(1): "The Allied and Associated Powers publicly arraign William II of Hohenzollern, former German Emperor, for a supreme offence against international morality and the sanctity of treaties." Under Article 227(2), an international tribunal was to be set up to try the Kaiser, but he fled Germany to The Netherlands where he was afforded refuge.

International law and its fundamental adherence to a strict version of sovereignty did not allow for interference. Influence and internationally-recognized retribution stopped at the borders. This "live and let live" attitude finally changed when televisions across the world began to air shocking images from the Bosnian War and its sister conflicts of the early 1990's.

The international community, horrified by the sight of mass graves and stories of ethnic cleansing, launched an investigation to determine what crimes, if any, had been committed in the former Yugoslavia, and who had ordered or participated in such crimes.¹³ Tasked with the investigation, a five-member U.N. commission detailed specific violations of international humanitarian law, and perhaps more importantly, provided in its report the overall contextual framework for the conflict.¹⁴ In 1993, before the report was actually complete, the U.N. Security Council passed a resolution to create an international tribunal to prosecute those involved in the wars related to the breakup of Yugoslavia.¹⁵ The International Criminal Tribunal for the former Yugoslavia opened its doors in 1994 and received its first suspect one year later. This modern incarnation of individual criminal responsibility before an international tribunal proved highly valuable to the movement of international criminal law. The creation of the ICTY spurred a proliferation of tribunals. In 1994, the Security Council established a tribunal to deal with the atrocities in Rwanda. Internationalized national courts, which incorporate international criminal law and sit international judges alongside national judges, were also established with international backing. These "hybrid" courts sprouted up in Sierra Leone, Kosovo, and East Timor to address the heinous crimes committed during conflict in their respective territories.

¹³ S.C. Res. 780, U.N. SCOR, 47th Sess., 3119th mtg. at 1, U.N. Doc. S/RES/780 (1992). U.N. Security Council Resolution 780 established a commission of experts to investigate "grave breaches of the Geneva Conventions and other violations of international humanitarian law" committed in the former Yugoslavia.

¹⁴ *Final Report of the United Nations Commission of Experts Established Pursuant to Security Council Resolution 780 (1992)*, U.N. Doc. S/1994/674 (May 27, 1994).

¹⁵ S.C. Res. 827, U.N. SCOR, 48th Sess., 3217th mtg. at 6, U.N. Doc. S/RES/827 (May 25, 1993), 32 I.L.M. 1203 (1993).

With memories of wide-scale humanitarian violations still fresh in their minds from the early and mid-1990's, the world came together in Rome in 1998 and finally settled on the creation of the first permanent institution to try persons accused of crimes such as genocide, crimes against humanity, and war crimes.¹⁶ Four years later, in 2002, the Rome Statute had enough signatories to begin setting up the International Criminal Court.

II. The Development of Joint Criminal Enterprise

The concept of joint criminal enterprise has been called "the most complex and conceptually challenging theory in international criminal law."¹⁷ Its recent emergence (or re-emergence for its staunch defenders) has provoked vigorous debate about its legitimacy. The origins of the doctrine are generally attributed to events preceding and during World War II, but despite this early arrival, the ensuing fifty years contributed little, if anything, to the concept, until the ad hoc tribunals of the 1990's.

Human rights groups herald the imposition of this doctrine and argue that it is grounded in customary international law.¹⁸ Several international criminal tribunals employ it today.¹⁹

¹⁶ Rome Statute of the International Criminal Court, July 17, 1998, 2187 U.N.T.S. 90 (*entered into force* July 1, 2002).

¹⁷ Allison Danner & Jenny S. Martinez, *Guilty Associations: Joint Criminal Enterprise, Command Responsibility, and the Development of International Criminal Law*, 93 CAL. L. REV. 75, 103 (2005). Danner and Martinez also note that the Appeals Chamber's judgment in *Tadic* referred to this concept by a variety of names and used them interchangeably: "common criminal plan," "common criminal purpose," "common design or purpose," "common criminal design," "common purpose," "common design," "common concerted design," "criminal enterprise," "common enterprise," and "joint criminal enterprise" (citing *Prosecutor v. Brdjanin and Talic*, Decision on Form of Further Amended Indictment and Prosecution Application to Amend, ICTY Trial Chamber, ¶ 24, Case No. IT-99-36/1 (June 26, 2001)).

¹⁸ See, e.g., Bogdan Ivanisevic, *'Crime of Opinion' is One Thing, But War Crime is Another*, Human Rights Watch Commentary (Feb. 11, 2005), at <http://hrw.org/english/docs/2005/02/11/serbia10173.htm> (last visited Dec. 1, 2006).

¹⁹ For example, the Special Court for Sierra Leone originally indicted Charles Taylor for his participation in a joint criminal enterprise that had as its purpose "to take any actions necessary to gain and exercise political power and control over the territory of Sierra Leone," which included the murder, abduction, forced labor, physical and sexual violence, the use of child soldiers, and the destruction of civilian structures. Notably, the indictment alleged that these acts were either within the joint criminal enterprise or were a reasonably foreseeable consequence of the joint criminal enterprise. *Prosecutor against Charles Ghankay Taylor*, Indictment, The Special Court for Sierra Leone, Case No. SCSL-03-I (Mar. 3, 2003), available at <http://www.sc-sl.org/Documents/SCSC-03-01-I-001.html> (last visited Feb. 15, 2007). The amended indictment dropped the phrase "joint criminal enterprise" and instead referred

Nowhere does the Statute of the ICTY explicitly provide for the doctrine, yet since its "introduction" by the *Tadic* Appeals Chamber decision in 1999, it "has become the magic bullet of the Office of the Prosecutor."²⁰ The doctrine had immediate effect at the ICTY, as the Prosecutor amended earlier indictments to include such liability, most notably in the *Milosevic* case.²¹ JCE liability appears to have now supplanted others as the favored theory of liability at the ICTY.²² The concept has been referred to by many names, but the ICTY has settled on "joint criminal enterprise" as the preferred term.²³ The following section discusses the doctrine and its precursors at the Nuremberg and Tokyo Tribunals, as well as the doctrine's comparison to vicarious liability in the U.S.

A. The Nuremberg Tribunal

Faced with trying leaders far removed from the battlefields and concentration camps, the founders and judges of the Nuremberg Tribunal considered several distinct doctrines that are central to understanding the foundations of vicarious liability in modern international criminal law. First, the Charter of the International Military Tribunal provided for liability based on

to a "common plan, design or purpose." *Prosecutor against Charles Ghankay Taylor*, Amended Indictment, The Special Court for Sierra Leone, Case No. SCSL-03-I (Mar. 17, 2006), available at <http://www.scs-l.org/Documents/SCSL-03-01-I-75.pdf> (last visited Feb. 15, 2007).

²⁰ 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). See generally Statute of the International Criminal Tribunal for the former Yugoslavia, U.N. SCOR, 48th Sess., 3217th mtg., U.N. Doc. S/RES/827 (May 25, 1993) [hereinafter, ICTY Statute].

²¹ Shane Darcy, *An Effective Measure of Bringing Justice?: The Joint Criminal Enterprise Doctrine of the International Criminal Tribunal for the Former Yugoslavia*, 20 AM. INT'L L. REV. 153, 168-69 (2004) (noting that the first two indictments of *Prosecutor v. Milosevic* did not include such language, but the second amended indictment did include an allegation of participation in a joint criminal enterprise and that each individual was individually liable for transpired acts; the August 2001 indictment alleged his participation in a joint criminal enterprise with Bosnian Serb military and civilian leaders).

²² See, e.g., *Prosecutor v. Limaj et al.*, Second Amended Indictment, ICTY, Case No. IT-03-66-PT, (Feb. 12, 2004). The original indictment and first amended indictment did not allege or refer to a joint criminal enterprise.

²³ See *Brdjanin and Talic*, Decision on Form of Further Amended Indictment and Prosecution Application to Amend, *supra* note 17, ¶ 24; *Prosecutor v. Milutinovic et al.*, Decision on Dragoljub Ojdanic's Motion Challenging Jurisdiction—Joint Criminal Enterprise, ICTY Appeals Chamber, ¶ 36, Case No. IT-99-37-AR72 (May 21, 2003).

membership, and second, the Charter incorporated aspects of conspiracy law.²⁴ A third doctrine, common plan or common design liability, which was used by national military authorities in proceedings following the Nuremberg Tribunal, later contributed to the development of imputed responsibility.²⁵ This third doctrine is examined in the discussion relating to the ICTY.

Liability based on membership in a criminal organization can be attributed to Lieutenant Colonel Murray C. Bernays, a lawyer in the U.S. War Department's three-man "Special Project Branch," which had been given in September 1944 the job of developing a postwar justice system for Europe.²⁶ At that time, the notion of justice imposed through a formal legal process was far from a foregone conclusion. Throughout the war Franklin D. Roosevelt and Winston Churchill favored summary executions for those involved in the war, and they continually tried to persuade the other Allies to go along with the plan.²⁷ Interestingly, the Soviet Union was the earliest advocate of a postwar tribunal, largely based on its own experiences with show trials.²⁸ But despite his early stance and the most vocal camp in his administration arguing for summary executions, Roosevelt ultimately sided with those in favor of an international tribunal.

With the debate ongoing, Bernays doggedly approached the assignment. Perhaps the two most difficult issues he had to address were how to punish prewar crimes against German citizens (including German Jews) and non-Germans, and how to deal with the millions of Germans who were members of the Nazi party, Gestapo, SS, and other organizations deemed

²⁴ Agreement for the Prosecution and Punishment of the Major War Criminals of the European Axis, and Charter of the International Military Tribunal, arts. 6, 9-10, 82 U.N.T.S. 280, *entered into force* Aug. 8, 1945.

²⁵ Danner & Martinez, *supra* note 17, at 110-120. Danner and Martinez separate World War II-era jurisprudence into three categories: "common plan liability" or "common design liability," conspiracy, and criminal organizational liability.

²⁶ HOWARD BALL, PROSECUTING WAR CRIMES AND GENOCIDE: THE TWENTIETH-CENTURY EXPERIENCE 46 (1999).

²⁷ RICHARD H. MINEAR, VICTORS' JUSTICE: THE TOKYO WAR CRIMES TRIAL 8-9 (1971). Great Britain was even calling for summary executions as late as April 1945. In a letter sent to FDR on April 23, 1945, a British aide wrote, "[His Majesty's Government is] deeply impressed with the dangers and difficulties of this course [judicial proceedings], and they think that execution without trial is the preferable course. [A trial] would be exceedingly long and elaborate, [many of the Nazis' deeds] are not war crimes in the ordinary sense, nor is it at all clear that they can properly be described as crimes under international law."

²⁸ BALL, *supra* note 26, at 45.

critical to the machinery of death and destruction.²⁹ The first issue raised new legal concerns because war crimes, by traditional definition, could only occur during a time of war and could only be perpetrated upon another States' citizenry. The world had just witnessed large-scale carnage, but they had been directed by a State against its own people, and they had occurred before the outset of war—realms of behavior outside traditional humanitarian law at the time. This is discussed in further detail below in section three relating to crimes against humanity. For the second issue, Bernays looked to Anglo-American conspiracy law, noting precedents such as the Smith Act of 1938 in the U.S. and the British India Act of 1836.³⁰ Bernays drew up his proposal within a few weeks, commonly referred to as "Bernays' Plan," and Roosevelt submitted it to Churchill and Joseph Stalin at the Yalta Conference in February 1945.³¹

Under Bernays' Plan, organizations would be charged and tried at the Nuremberg Tribunal alongside the two dozen individual defendants. The judges would determine whether the organizations engaged in criminal behavior and should be designated as a criminal organization. Once an organization was deemed criminal, subsequent military trials would be held for individual defendants where they would have to defend against their membership in the organization. Judges would only have to determine whether the accused joined the organization voluntarily, and defendants would be unable to assert their ignorance as to the organization's criminal purpose. The plan was meant to facilitate convictions and deal with an extremely large number of people involved in criminal activity.³²

²⁹ *Id.* at 46.

³⁰ *Id.*

³¹ *Id.* at 48. The British disapproved of the plan and still sought summary executions. Churchill had even called for summary executions as late as April 1945.

³² Danner & Martinez, *supra* note 17, at 113 (citing Stanislaw Pomorski, *Conspiracy and Criminal Organizations, in THE NUREMBERG TRIAL AND INTERNATIONAL LAW* 213, 216 (George Ginsburgs & V.N. Kudriavtsev eds., 1990)).

With Bernays' Plan on the table, the Allies met in 1945 in London to discuss postwar justice. The concept of conspiracy figured prominently at the conference and provoked heated debates about the substantive and procedural law to be applied to those on the losing side of the war. American lawyers sought the inclusion of conspiracy as a means of attaching liability to individuals where the relationship between them and the crimes was tenuous at best. Because their underlings carried out the orders, most civilian leaders did not have "direct" involvement in the commission of atrocities. The Americans took the lead in establishing the strike zones that the Tribunal would later use. Some delegations apparently first picked their targets, and next worked out the legal principles that would snare the greatest number of high ranking and prominent alleged criminals.³³ Conspiratorial liability allowed them to cast a wide net.

On the other side of the table, the French and Soviet delegations distrusted conspiracy law and expressed strong criticisms about its use. According to one account of the conspiracy debates at the London Conference:

[T]he Russians and French seemed unable to grasp all the implications of the concept; when they finally did grasp it, they were genuinely shocked. The French viewed it entirely as a barbarous legal mechanism unworthy of modern law, while the Soviets seemed to have shaken their head in wonderment--a reaction, some cynics may believe, prompted by envy.³⁴

But despite French and Soviet reservations, they eventually conceded and the Allies incorporated conspiracy law into the Charter of the International Military Tribunal for the Trial of the Major War Criminals of the European Theater, setting forth the authority of an international tribunal to prosecute those most responsible for the horrific crimes committed in Europe.³⁵

³³ See MINEAR, *supra* note 27, at 37. One chief British representative at the London Conference stated: "What is in my mind is getting a man like Ribbentrop or Ley. It would be a great pity if we failed to get Ribbentrop or Ley or Streicher. Now I want words that will leave no doubt that men who have originated the plan or taken part in the early stages of the plan are going to be within the jurisdiction of the Tribunal."

³⁴ Danner & Martinez, *supra* note 17, at 115 (citing Pomorski, *supra* note 32, at 216-17 (citation omitted)).

³⁵ Article 6(a) of the Nuremberg Charter provides: "Leaders, organizers, instigators and accomplices participating in the formulation or execution of a common plan or conspiracy to commit any of the foregoing crimes are responsible for all acts performed by any persons in execution of such plan." Professor Cherif Bassiouni notes that "[o]n its face, such a formulation derives from the common law and does not have much in common with the Romanist-

At Nuremberg conspiracy law played a role both as a substantive crime (conspiracy to commit crimes against peace) and as a means of liability, in that one could be convicted of others' acts that were within the execution of a common plan or conspiracy.³⁶ The first count against the individual defendants, as well as the seven organizations, expressly reflected the concept of conspiracy as a substantive crime, which was titled "Count One – The Common Plan or Conspiracy."³⁷ The indictment alleged, in summation, that all were guilty of:

a common plan or conspiracy for the accomplishment of Crimes against Peace; of a conspiracy to commit Crimes against Humanity in the course of preparation for war and in the course of prosecution of war; and of a conspiracy to commit War Crimes not only against the armed forces of their enemies but also against non-belligerent civilian populations...³⁸

Following the language of the Charter, the indictment further alleged that the defendants had "participated as leaders, organizers, instigators, or accomplices in the formulation or execution" of the common plan or conspiracy, and that they were each responsible "for their own acts and for all acts committed by any persons in the execution of such plan or conspiracy."³⁹ During the judgment deliberations, the British and Soviet judges accepted the validity of conspiracy as a sound legal doctrine along the lines of those set forth by the American prosecutors.

French judge Donnedieu de Vabres disagreed and argued the case against the use of conspiracy law.⁴⁰ He, along with his French alternate, wanted all of Count One thrown out.⁴¹ They believed that the substantive crime absorbed the conspiracy, rendering the charge unnecessary.⁴² An American judge, Francis Biddle, even sympathized with the French because

Civilist-Germanic systems." CHERIF BASSIOUNI, *CRIMES AGAINST HUMANITY IN INTERNATIONAL CRIMINAL LAW* 382 (1999).

³⁶ Danner & Martinez, *supra* note 17, at 116.

³⁷ Counts 2, 3, and 4 were, respectively, "Crimes Against Peace," "War Crimes," and "Crimes Against Humanity."

³⁸ International Military Tribunal, Indictment, Oct. 6, 1945, *reprinted in* THE NUREMBERG WAR CRIMES TRIAL: 1945-46: A DOCUMENTARY HISTORY 64 (Michael R. Marrus ed., 1997).

³⁹ *Id.*, *reprinted in* THE NUREMBERG WAR CRIMES TRIAL: 1945-46: A DOCUMENTARY HISTORY 58 (Michael R. Marrus ed., 1997).

⁴⁰ THE NUREMBERG WAR CRIMES TRIAL: 1945-46: A DOCUMENTARY HISTORY 231 (Michael R. Marrus ed., 1997).

⁴¹ *Id.*

⁴² *Id.*

of his own experiences with overly broad conspiracy charges in the U.S.⁴³ But Biddle's reservations were quite different than those of the French. Where the French disagreed with the concept in general, Biddle disagreed with its potentially abusive application, in that too many Germans might be collared if the organizations were found guilty of conspiracy.⁴⁴ The judges ultimately compromised and determined that the conspiracy charge was limited to the conspiracy to plan and wage aggressive war, but they dropped the charges of conspiracy in Count One relating to the commission of war crimes and crimes against humanity.⁴⁵ The Tribunal ruled that Article 6 of the Charter did not define, and therefore could not support, the crimes of conspiracy to commit war crimes and conspiracy to commit crimes against humanity, unlike the crime of conspiracy to commit crimes against peace that was expressly provided for in Article 6(a).⁴⁶ The Tribunal subsequently concluded that the common planning to prepare and wage aggressive war had been established.

Although not as significant as the prosecution would have liked, conspiracy as a means of attributing liability also played a role in the proceedings at Nuremberg. At the time, co-conspirator liability was well-known in common law jurisdictions, but no civil law country had embraced the doctrine.⁴⁷ Apart from of the doctrine's level of acceptance around the world, it has been argued that co-conspirator liability was effectively discounted at the Tribunal, as evidenced by the fact that those convicted of conspiracy to commit aggressive war were either those who had directly participated in the planning or those who were among Hitler's most senior

⁴³ *Id.* at 231-32.

⁴⁴ *Id.* at 232.

⁴⁵ *Id.*

⁴⁶ Article 6 listed three crimes: (a) crimes against peace; (b) war crimes; and (c) crimes against humanity. Marrus notes that the charge of "crimes against peace" was the central concept and is critical to understanding the framework of the indictment; it was the conspiracy to commit crimes against peace that ultimately led to the other crimes—i.e., crimes against humanity and war crimes. Because of the overlapping nature of the crimes, the prosecution had a difficult time separating the first two counts. *Id.* at 122.

⁴⁷ Danner & Martinez, *supra* note 17, at 115, (citing Edward M. Wise, *RICO and Its Analogues: Some Comparative Considerations*, 27 SYRACUSE J. INT'L L. & COM. 303, 312 (2000)).

leadership.⁴⁸ It has also been pointed out that the judgment did not mention conspiracy (or common plan liability) in its discussion of those found guilty of crimes against humanity or war crimes.⁴⁹ This finding is significant because JCE liability, as discussed below, is solely a vehicle for imputing liability; it is not a substantive crime in itself.

Regarding criminal organizational liability, under Articles 9 and 10 of the Charter,⁵⁰ the prosecution charged seven organizations with being "criminal organizations": Nazi Party leadership; Reich cabinet; Nazi government ministers; SS; Gestapo; SD; Sturmabteilung (SA); storm troopers; and the military high command, which comprised Germany's army, navy and air force commanders-in-chief. The Tribunal ruled that three findings must be established before holding an organization to be criminal: first, a majority of the organization's members must have been volunteers; second, the organization's public activities must have included one of the crimes falling within Article 6 of the Charter; and third, a majority of the members must have been knowledgeable or conscious of the organization's criminal activities or purpose.⁵¹ Using this framework, four of the groups (Nazi Party leadership, Gestapo, SS, SD) were found to be criminal.

The next step in Bernays' Plan--the adjudication of individuals--never materialized. The judges at Nuremberg tweaked Bernays' Plan and shifted the burden, in that the prosecution had to prove that the accused not only joined voluntarily but also had knowledge of the organization's

⁴⁸ Danner & Martinez, *supra* note 17, at 116.

⁴⁹ *Id.* at 116-17.

⁵⁰ Article 9 of the Charter provided that "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." Article 10 of the Charter provided: "In cases where a group or organization is declared criminal by the Tribunal, the competent national authority of any Signatory shall have the right to bring individuals to trial for membership therein before national, military or occupation courts. In any such case the criminal nature of the group or organization is considered proved and shall not be questioned." In order to be found guilty, the individual must have joined voluntarily, must have joined intentionally, and must have known that the organization was criminal.

⁵¹ BASSIOUNI, *supra* note 35, at 385.

criminal purpose.⁵² This burden-shifting resulted in the lack of widespread summary trials for membership in criminal organizations. The mass justice envisioned by Bernays was largely replaced with an administration de-Nazification program.⁵³

The link between prosecuting organizations at Nuremberg and conspiracy law is found in Chief of Counsel Robert H. Jackson's opening statement on the criminality of organizations, when he stated that "proceedings against organizations are closely akin to the conspiracy charge."⁵⁴ To illustrate the legitimacy of the process Jackson discussed conspiracy liability laws on the books in several countries.⁵⁵ He broadly concluded that "[o]rganizations with criminal ends are everywhere regarded as in the nature of criminal conspiracies and their criminality is judged by the application of conspiracy principles."⁵⁶ Jackson noted, however, that organization liability, although grounded heavily in conspiracy law, was not the exclusive product of national conspiracy law. Looking to the language of the Charter, Jackson argued that it did not refer solely to "conspiracy,"⁵⁷ thus hedging his bets if conspiracy law fell out of favor with the judges.

The judges considered the similarities between a conspiracy and a criminal organization in that for the latter to exist, "there must be a group bound together and organized for a common

⁵² Danner & Martinez, *supra* note 17, at 114 (citations omitted).

⁵³ *Id.*

⁵⁴ ROBERT H. JACKSON, THE LAW UNDER WHICH NAZI ORGANIZATIONS ARE ACCUSED OF BEING CRIMINAL, ARGUMENT BY ROBERT H. JACKSON, FEBRUARY 28, 1946, *reprinted in*, THE NURNBERG CASE: AS PRESENTED BY ROBERT H. JACKSON, at 104 (1971). *But see* BASSIOUNI, *supra* note 35, at 382-83 (arguing that Jackson fell victim to the confusion between conspiracy and membership in criminal organization liability, in that Article 6(a) of the Charter linked conspiracy to "crimes against peace," and that the Nuremberg Tribunal did not rely on Article 6(a) for "crimes against humanity").

⁵⁵ JACKSON, *supra* note 54, at 106-07. Jackson stated: "The German courts in dealing with criminal organizations proceeded on the theory that all members were held together by a common plan in which each one participated even though at various levels. Moreover, the fundamental principles of responsibility of members, as stated by the German Supreme Court, are strikingly like the principles that govern the Anglo-American law of conspiracy."

⁵⁶ *Id.* at 107.

⁵⁷ *Id.* at 108. Jackson recounted how he had urged the court: "The Charter did not define responsibility for the acts of others in terms of 'conspiracy' alone. The crimes were defined in nontechnical but inclusive terms, and embraced formulating and executing a 'common plan' as well as participating in a 'conspiracy.' It was feared that to do otherwise might import into the proceedings technical requirements and limitations which have grown up around the term 'conspiracy.' There are some divergences between the Anglo-American concept of conspiracy and that of either Soviet, French, or German jurisprudence. It was desired that concrete cases be guided by the broader considerations inherent in the nature of the social problem, rather than controlled by refinements of any local law."

purpose. The group must be formed or used in connection with the commission of crimes denounced by the Charter."⁵⁸ The apparent linkage between conspiracy law and membership liability, however, did nothing to assuage later critics of the latter form of liability. Renowned international criminal law professor M. Cherif Bassiouni argues that the notion of group or collective responsibility had no basis in international law at that time, thus violating the principle of legality.⁵⁹ Even though reservations abounded in Nuremberg and there have been strong criticisms since, however, the means of vicarious liability used at Nuremberg did add greatly to the development of individual criminal responsibility in international law.

B. The Tokyo Tribunal

Often overlooked due to Nuremberg's long shadow, the Tokyo Tribunal also contributed to the development of international criminal law. Set up to try Japanese war criminals for alleged crimes committed from the early 1930's to 1945, the Tokyo Tribunal lasted two and a half years, including the seven months taken by the judges in reaching a verdict, and resulted in a 49,000-page transcript and 1,218-page judgment.⁶⁰ The indictment charged twenty-eight individuals--nine civilians and nineteen professionals. In contrast, of the twenty-two defendants at Nuremberg, seventeen were civilians.⁶¹ Along with the several dozen counts of crimes against peace, there were counts of murder, crimes against humanity, and war crimes.⁶² The core of the case revolved around the conspiracy to wage aggressive war, in contravention to several international agreements.

⁵⁸ BASSIOUNI, *supra* note 35, at 390 (citation omitted).

⁵⁹ *Id.* at 384.

⁶⁰ Charter of the International Military Tribunal for the Far East, Apr. 26, 1946, T.I.A.S. No. 1589. *See generally* ARNOLD C. BRACKMAN, *THE OTHER NUREMBERG: THE UNTOLD STORY OF THE TOKYO WAR CRIMES TRIALS* (1987). In contrast to the Tokyo judgment, the judgment at Nuremberg was 270 pages.

⁶¹ BRACKMAN, *supra* note 60, at 83.

⁶² *Id.* at 84.

As in Nuremberg, conspiracy law played a central role in the proceedings in Tokyo. In his opening statement, Chief Prosecutor Joseph B. Keenan, a former U.S. Attorney that had written the Lindberg kidnapping law and led the gang-busting division at the Department of Justice, wanted to define conspiracy in terms of U.S. practice.⁶³ He defended his proposal by stating, "This offense is known to and well recognized by most civilized nations, and the gist of it is so similar in all countries that the definition of it by a Federal court of the United States may well be accepted as an adequate expression of the common conception of this offense."⁶⁴ One American supporter even argued that the proposed application was "modest" in comparison to Soviet and Anglo-Saxon law, and that it was more in accordance with French, German, Chinese, and Japanese notions of conspiracy law.⁶⁵

The defense immediately attacked the conspiracy charge as dubious. In its own opening statement, the defense argued that conspiracy had no longstanding tradition and was "unique in the Anglo-American legal system ... [and] cannot be deemed to constitute international law."⁶⁶ Lead defense counsel Takayanagi Kenzo argued that it was "a peculiar product of English legal history," citing several Western legal scholars in support of his viewpoint.⁶⁷ One of the commentators Kenzo cited had written that it was "a doctrine as anomalous and provincial as it is unhappy in its results. It is unknown to the Roman law; it is not found in modern Continental codes; few Continental lawyers ever heard of it."⁶⁸ After hearing arguments from both sides,

⁶³ MINEAR, *supra* note 27, at 40. The prosecution team was made up of eleven Allied nations, each nation contributing an assistant (not including the U.S.) to the team under the direction of Chief Prosecutor Joseph B. Keenan, an American.

⁶⁴ *Id.* at 41 (quoting TRIAL OF JAPANESE WAR CRIMINALS 8-9, U.S. DEPT OF STATE, Publication 2613 (1946)). The case Keenan is referring to is *Marino v. United States*, 91 F.2d 691 (9th Cir. 1937).

⁶⁵ BRACKMAN, *supra* note 60, at 85. Brendan F. Brown, the dean of law at Catholic University, expressed this sentiment to the executive committee of the prosecution team.

⁶⁶ *Id.* at 284.

⁶⁷ MINEAR, *supra* note 27, at 41 (citation omitted).

⁶⁸ *Id.*

however, the court ruled that conspiracy was indeed a crime under international law and continued the proceedings.⁶⁹

In language similar to the Nuremberg indictment, Count One of the Tokyo indictment alleged participation as "leaders, organizers, instigators, or accomplices in the formulation or execution of a common plan or conspiracy ...[to] wage wars of aggression, and war or wars in violation of international law."⁷⁰ This count proved extremely successful, as all except two of the defendants were found guilty.⁷¹ Interestingly, two of the defendants found guilty of conspiracy to wage wars of aggression were found guilty of nothing else.⁷² With respect to the other counts in the indictment, the court threw out all but ten of the forty-five counts,⁷³ and of those ten, only two did not relate to the waging of war.⁷⁴ Thus, the waging of war, rather than other crimes, figured most prominently in Tokyo.

⁶⁹ Judge Pal of India dissented and stated: "After giving my anxious thought to the question I have come to the conclusion that 'conspiracy' by itself is not yet a crime in international law." President Webb of Australia agreed, who said that international law "does not expressly include a crime of naked conspiracy," and that the Tokyo Tribunal "has no authority to create a crime of naked conspiracy based on the Anglo-American concept." *Id.* at 42.

⁷⁰ BRACKMAN, *supra* note 60, at 378. Count One of the indictment read: "All the accused together with other persons, between the 1st January, 1928, and the 2nd September, 1945, participated as leaders, organizers, instigators, or accomplices in the formulation or execution of a common plan or conspiracy, and are responsible for all acts performed by any person in execution of such plan." The alleged object of this conspiracy was the domination of East Asia, the Pacific and Indian Oceans, and all bordering countries.

⁷¹ *Id.* at 374. The judgment read: "These far-reaching plans for waging wars of aggression, and the prolonged and intricate preparation for and waging of these wars of aggression were not the work of one man. They were the work of many leaders acting in pursuance of a common plan for the achievement of a common object. That common object, that they should secure Japan's domination by preparing and waging wars of aggression, was a criminal object. Indeed, no more grave crime can be conceived of than a conspiracy to wage a war of aggression or the waging of a war of aggression, for the conspiracy threatens the security of the peoples of the world, and the waging disrupts it. The probable result of such a conspiracy, and the inevitable result of its execution, is that death and suffering will be inflicted on countless human beings. The Tribunal does not find it necessary to consider whether there was a conspiracy to wage wars in violation of the treaties, agreements and assurances specified in the particulars annexed to Count 1. The conspiracy to wage wars of aggression was already criminal in the highest degree. The tribunal finds that the existence of the criminal conspiracy to wage wars of aggression ... has been proved." *Id.* at 414.

⁷² MINEAR, *supra* note 27, at 42.

⁷³ BRACKMAN, *supra* note 60, at 379. The dismissed counts were thrown out due to lack of jurisdiction, or because the count was redundant, had merged with another count, or was obscurely stated. *Id.* at 373.

⁷⁴ *Id.* at 380. Those two counts were 54 and 55. Under Count 54, the Tribunal found five defendants guilty of having "ordered, authorized, and permitted" inhumane treatment of POWs and others. Under Count 55, the court found seven defendants guilty of having "deliberately and recklessly disregarded their duty" to take appropriate and adequate steps to prevent atrocities from occurring.

The Tokyo Tribunal reinforced the concept of conspiracy within international criminal law but did little to clarify or modify the appropriateness of its use. The judges felt somewhat constrained in their discretion, and they looked heavily towards the proceedings simultaneously underway in Nuremberg. In one instance, when the prosecution began to present its case in relation to Japan's preparations for war in the Pacific and the attack on Pearl Harbor, the opening statement referred to a document from 1934. One of the judges interrupted and stated:

We have just received [the Nuremberg judgment], and the court there stresses the point that evidence of a conspiracy should not go too far back; it should be comparatively recent. ... When you consider the Nuremberg judgment you may decide to cut down some of the material you intend to put before the court.⁷⁵

Clearly, decisions made at Nuremberg affected the substance and procedure administered in Tokyo.

One historian of the Tokyo Tribunal stated that it actually suffered from the wake of Nazi atrocities and the Nuremberg Tribunal. Richard H. Minear, in a respected account of the trial, argued that the charges of conspiracy in Tokyo were the result of overzealous prosecutors blindly applying the unique context of Nazi Germany to Imperial Japan. He stated that Tojo was not Hitler, there was no Nazi Party, the Japanese constitution and government was fully functioning, the leaders did not usurp any power, and the context of the Pacific War was totally different from the European theater.⁷⁶ Those differences may be notable, but in spite of whether it was prudent for the judges to apply conspiracy law to the Japanese context, they clearly found conspiracy law to be firmly grounded in international law.

⁷⁵ *Id.* at 226.

⁷⁶ MINEAR, *supra* note 27, at 127-134.

C. The International Criminal Tribunal for the Former Yugoslavia

In 1998, the Trial Chamber in *Delalic and Delic* at the ICTY referred to a "common criminal purpose."⁷⁷ The Trial Chamber did not elaborate on the concept, but the brief mention opened the floodgates to a doctrine the ICTY would later call "joint criminal enterprise." Less than one year later, the Appeals Chamber in *Tadic* employed similar language and provided teeth to the doctrine.⁷⁸

The first full-length trial at the ICTY ended with mixed results. Supporters pointed to Dusko Tadic's conviction in 1997 as a victory for human rights and the enforcement of individual criminal responsibility within international law. Not since Nuremberg and its immediate progeny had an individual been subject to an international criminal tribunal. The Tribunal found Tadic guilty on several counts, but he was also acquitted on several others. Despite their disappointment, human rights and post-conflict justice advocates could point to the acquittals as legitimizing the tribunal; it could not simply be dismissed as a case of victors' justice. Had the process been a mere show trial, Tadic would have been found guilty on all counts. The Appeals Chamber later reversed some of the acquittals, and in the process generated a heated debate regarding the proper limits of individual criminal responsibility within international law.

Dusko Tadic, like many other Yugoslavians before the breakup of the country, lived in a multi-ethnic community. As the owner of a local café and former karate instructor, the ethnic

⁷⁷ *Prosecutor v. Delalic and Delic*, Judgment, ICTY Trial Chamber, ¶ 328, Case No. IT-96-21-T (Nov. 16, 1998) (holding that where there is a pre-existing plan to commit crimes "or where there otherwise is evidence that members of a group are acting with a common criminal purpose, all those who knowingly participate in, and directly and substantially contribute to, the realisation of this purpose may be held criminal responsible under Article 7(1) for the resulting criminal conduct"). See also *Prosecutor v. Furundzija*, Judgment, ICTY Trial Chamber, ¶¶ 211-13, Case No. IT-95-17/1-T (Dec. 10, 1998); Schabas, *supra* note 20, at 1031 (observing that the doctrine of joint criminal enterprise stems from the *Delalic* court's discussion of complicity).

⁷⁸ *Prosecutor v. Tadic*, Judgment, ICTY Appeals Chamber, Case No. IT-94-1-A (July 15, 1999) [hereinafter, *Tadic*, Appeals Judgment].

Serb interacted with Muslims on a regular basis prior to the unrest of the early 1990's. During the time when Milosevic and Belgrade began to incite ethnic nationalism among their Serbian population, Tadic rose to become a local party leader of the Serbian Democratic Society in the Prijedor municipality in Bosnia and Herzegovina. As a member of the paramilitary forces, he helped Serbian and Bosnian Serb forces take over the region. Tadic later facilitated the expulsion and "resettlement" of the entire non-Serb population in his area. His intimate knowledge of the community allowed him to pick out Muslim leaders, as well as other prominent local leaders, deemed detrimental to Serbian policies. Such individuals were severely mistreated after being identified. During the conflict many civilians were beaten, robbed and killed, and many others were taken to the detention camps of Omarska, Keraterm, and Trnopolje.

The Trial Chamber convicted Tadic on several counts of crimes against humanity and war crimes and he was sentenced to twenty years' imprisonment. It was the Trial Chamber's acquittal on one charge, though, that eventually led to the development of JCE liability. The prosecution charged Tadic with the murder of five Muslim men in the Bosnian village of Jaskici. The Trial Chamber had determined beyond a reasonable doubt that Tadic was in fact a member of an armed group that entered Jaskici, that the group searched the village for Muslim men, and that the five Muslim men who were found shot to death after the group left the village had all been alive when the group first entered the village.⁷⁹ Nevertheless, the Trial Chamber noted that it "cannot, on the evidence before it, be satisfied beyond a reasonable doubt that the accused had any part in the killing of the five men."⁸⁰ Notably, the Trial Chamber did, however, find that the

⁷⁹ *Prosecutor v. Tadic*, Judgment, ICTY Trial Chamber, ¶ 373, Case No. IT-95-1-A (May 7, 1997) [hereinafter, *Tadic*, Trial Judgment].

⁸⁰ *Id.*

murders temporally occurred after Serbian forces entered the village and engaged in ethnic cleansing in a nearby village.⁸¹

The prosecution appealed this point and the Appeals Chamber reversed, holding that "the only reasonable conclusion the Trial Chamber could have drawn is that the armed group to which [Tadic] belonged killed the five men."⁸² According to the Appeals Chamber's review of the Trial Chamber's findings, Tadic had, "with other armed men, participated in the removal of men, who had been separated from women and children, from the village of Sivici to the Keraterm camp, and also participated in the calling-out of residents, the separation of men from women and children, and the beating and taking away of men in the village of Jaskici" where "five men were killed."⁸³ The Appeals Chamber reasoned that the Trial Chamber's findings of such evidence were sufficient to attach liability. Direct evidence linking Tadic to the murders did not exist, yet the Appeals Chamber reversed the Trial Chamber and found that Tadic had acted pursuant to a common criminal design and was liable under Article 7(1) of the ICTY Statute.⁸⁴ Specifically, Tadic intended to further the criminal purpose "to rid the Prijedor region of the non-Serb population, by committing inhuman acts against them," and he was aware that it was foreseeable, and knowingly took the risk, that the group would kill non-Serbs in effecting this criminal aim.⁸⁵ This holding became the foundation for the modern doctrine of JCE.

⁸¹ *Id.*

⁸² *Tadic*, Appeals Judgment, ¶ 183.

⁸³ *Id.* ¶ 178.

⁸⁴ See ICTY Statute, *supra* note 20, at art. 7(1). Article 7(1) provides: "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."

⁸⁵ *Tadic*, Appeals Judgment, ¶ 232. Specifically, the tribunal stated, Tadic "had the intention to further the criminal purpose to rid the Prijedor region of the non-Serb population, by committing inhumane acts against them. That non-Serbs might be killed in the effecting of this common aim was, in the circumstances of the present case, foreseeable. The Appellant was aware that the actions of the group of which he was a member were likely to lead to such killings, but he nevertheless willingly took that risk."

In finding liability the Appeals Chamber discussed whether participation in a JCE even falls within the language of Article 7(1) of the ICTY Statute.⁸⁶ The court first confirmed the doctrine's legitimacy and then noted that Article 7(1) covers not only direct physical perpetration of the crime, but also that "commission of one of the crimes envisaged in Articles 2, 3, 4, or 5 of the Statute might also occur through participation in the realisation of a common design or purpose."⁸⁷ This position has been affirmed by the Appeals Chamber in later decisions.⁸⁸ Specifically, the court determined that participation in a JCE is a form of "commission" within the ambit of Article 7(1).

Seeking to preempt the doctrine's critics, the Appeals Chamber stated that liability stemming from participation in a JCE is not tantamount to guilt by association. A "guilt by association" charge would fuel critics and de-legitimize a principle it was embracing, and the court wished to attack those charges head-on. The Appeals Chamber referred to the 1993 Report of the U.N. Secretary-General on Security Council Resolution 808, which had rejected outright the notion of guilt by association in stating that the Tribunal should not have jurisdiction over persons simply based on their membership in a particular organization.⁸⁹ The court reaffirmed the principle of personal culpability, holding that "nobody may be held criminally responsible for acts or transactions in which he has not personally engaged or in some other way participated."⁹⁰

⁸⁶ See *supra* note 84.

⁸⁷ *Tadic*, Appeals Judgment, ¶ 188.

⁸⁸ See, e.g., *Milutinovic et al.*, Decision on Dragoljub Ojdanic's Motion Challenging Jurisdiction—Joint Criminal Enterprise, *supra* note 23, ¶ 20; *Prosecutor v. Krnojelac*, Judgment, ICTY Appeals Chamber, ¶ 73, Case No. IT-97-25-A (Sept. 17, 2003) [hereinafter, *Krnojelac*, Appeals Judgment]. But see Steven Powles, *Joint Criminal Enterprise: Criminal Liability by Prosecutorial Ingenuity and Judicial Creativity?*, 2 J. INT'L CRIM. JUST. 606, 611 (2004) (noting that it is difficult to understand how "committing" can include third-category JCE; he has no problem with first-category JCE and the "committing" language, because the individual intends the act, but he has a problem with third-category JCE falling within the ambit of the language of "committing").

⁸⁹ *Report of the Secretary-General Pursuant to Paragraph 2 of Security Council Resolution 808*, U.N. Doc. S/25704, ¶ 56 (May 3, 1993).

⁹⁰ *Tadic*, Appeals Judgment, ¶ 186.

The Appeals Chamber then laid the general framework for JCE liability, which has been consistently followed ever since. There are three categories of JCE, and each one must satisfy three requirements: 1) a plurality of persons; 2) the existence of a common plan, design or purpose that involves the commission of a crime provided for in the Statute; and 3) the participation of the accused in the common plan involving the perpetration of the crime provided for in the Statute.⁹¹ These three objective elements comprise the *actus reus* for all three categories. The *mens rea*, in contrast, is different for each category.⁹²

The first category of JCE involves the situation in which all the co-participants share the same criminal intent, e.g., where all the co-perpetrators formulate a plan to kill a particular individual. Although only one member of the group may physically commit the act, the others are no less responsible for the killing as a result of their shared intent. To be liable for others' acts the individual must have voluntarily participated in one aspect of the common design and must have intended the result.⁹³

The second category is a variant of the first category, growing out of the so-called "concentration camp" cases.⁹⁴ In these cases, the *actus reus* is "the active participation in the enforcement of a system of repression, as it could be inferred from the position of authority and the specific functions held by each accused," and the *mens rea* comprises "(i) knowledge of the

⁹¹ *Prosecutor v. Blagojevic & Jokic*, Judgment, ICTY Trial Chamber, ¶ 698, Case No. IT-02-60-T (Jan. 17, 2005) (citing *Tadic*, Appeals Judgment, ¶ 227).

⁹² *Tadic*, Appeals Judgment, ¶ 228.

⁹³ *Id.* ¶ 196. The Appeals Chamber stated: "for imputing criminal responsibility to a participant who did not, or cannot be proven to have, effected the killing are as follows: (i) the accused must voluntarily participate in one aspect of the common design (for instance, by inflicting non-fatal violence upon the victim, or by providing material assistance to or facilitating the activities of his co-perpetrators); and (ii) the accused, even if not personally effecting the killing, must nevertheless intend this result."

⁹⁴ *But see* Powles, *supra* note 88, at 609-610 (arguing that the concentration camp cases are more akin to third-category JCE rather than first-category JCE because if, for example, the guard participated in the oversight but did not know of particular acts but those acts were foreseeable, then the guard would still be liable, and this sounds like third-category JCE, not the first-category JCE where the guard would have intended the illegal acts).

nature of the system and (ii) the intent to further the common concerted design to ill-treat inmates."⁹⁵

The third category, sometimes referred to as the "extended" category, under which the Appeals Chamber convicted Tadic of the Jaskici murders, concerns cases involving "a common design to pursue one course of conduct where one of the perpetrators commits an act which, while outside the common design, was nevertheless a natural and foreseeable consequence of the effecting of that common purpose."⁹⁶ The now-classic example, as provided by the Appeals Chamber, is the shared intention by a group of individuals to remove forcibly an ethnic group from their village, which during the process a victim is shot and killed.⁹⁷ In such a case, "[w]hile murder may not have been explicitly acknowledged to be part of the common design, it was nevertheless foreseeable that the forcible removal of civilians at gunpoint might well result in the deaths of one or more of those civilians."⁹⁸ In other words, "[c]riminal responsibility may be imputed to all participants within the common enterprise where the risk of death occurring was both a predictable consequence of the execution of the common design and the accused was either reckless or indifferent."⁹⁹ The Appeals Chamber supported this category with case law from World War II-era national military courts dealing with, inter alia, mob violence. These cases are cited as evidence of what some refer to as common plan or common design liability.¹⁰⁰

The Appeals Chamber asserted that JCE liability is present in many national legal systems and is grounded in customary international law. Several commentators avowedly

⁹⁵ *Tadic*, Appeals Judgment, ¶ 203.

⁹⁶ *Id.* ¶ 204.

⁹⁷ *Id.*

⁹⁸ *Id.*

⁹⁹ *Id.*

¹⁰⁰ Danner and Martinez, *supra* note 17, at 110.

disagree with that proposition,¹⁰¹ especially with respect to the third category. Steven Powles argues that third-category JCE, upon closer inspection, is not uniformly practiced.¹⁰² Powles attacks the Appeals Chamber's use of the *Essen Lynching*¹⁰³ and *Borkum Island*¹⁰⁴ cases, stating that they do not stand for the propositions cited by the Tribunal in *Tadic*. In the *Essen Lynching* case, a crowd of German civilians participated in the group-beating and killing of three British prisoners of war while they were under the escort of a German soldier. Determining who dealt the final death blows to the victims was not practically feasible. Before a British military court, the prosecution argued that if the attackers had the intent to kill the prisoners, then they were guilty of murder; if they had no such intent, then they could still be found guilty of manslaughter.¹⁰⁵ Powles suggests that the murder convictions only illustrate the fact that the court found the attackers to have intended to kill the airmen, not, as the Appeals Chamber in *Tadic* suggests, that the defendants were found guilty based solely on the fact that they had knowledge that others' lethal acts were foreseeable yet continued their participation.¹⁰⁶

Powles similarly finds little support for third-category JCE in the *Borkum Island* case.¹⁰⁷ After being shot down in the German town of Borkum, seven American prisoners were forced to march through the streets while being subjected to mob violence by the local civilians.¹⁰⁸ German officials and soldiers facilitated and participated in beating and firing at the men,

¹⁰¹ See, e.g., *id.* (noting that the two types of cases cited are those involving unlawful killings of Allied POWs by German soldiers and by German townspeople, and those involving concentration camps).

¹⁰² Powles, *supra* note 88, at 615-16. For a commentator supporting the *Tadic* Appeals decision with respect to third-category JCE, see ANTONIO CASSESE, INTERNATIONAL CRIMINAL LAW 187 (2003) (stating that the court had demonstrated that third-category JCE "was based on case law, had a solid underpinning in many national legal systems, and in addition was consonant with the general principles on criminal responsibility laid down both in the ICTY Statute and in customary international law" (citing *Tadic*, Appeals Judgment, ¶¶ 224-229)).

¹⁰³ *Trial of Erich Heyer and Six Others (Essen Lynching Case)*, British Military Court for the Trial of War Criminals, in I LAW REPORTS OF TRIALS OF WAR CRIMINALS 88, U.N. War Crimes Commission (1947).

¹⁰⁴ *Tadic*, Appeals Judgment, ¶¶ 210-213 (discussing the *Borkum Island* case).

¹⁰⁵ See *id.* ¶ 208.

¹⁰⁶ Powles, *supra* note 88, at 616.

¹⁰⁷ *Id.*

¹⁰⁸ *Tadic*, Appeals Judgment, ¶ 210.

resulting in their deaths. The Appeals Chamber in *Tadic* considered the prosecution's opening statement in *Borkum Island* and determined that it had espoused a form of common design liability, namely, first-category JCE whereby each individual shared the same intent to commit the crime.¹⁰⁹ The Appeals Chamber then took great liberty and "presumed" that because all of the accused had been found guilty pursuant to a criminal common design to assault the POWs, and because some of those accused had also been found guilty of murder, then "[p]resumably, this was on the basis that the accused, whether by virtue of their status, role or conduct, were in a position to have predicted that the assault would lead to the killing of the victims by some of those participating in the assault."¹¹⁰ Citing this case strained credulity and did little in the way of providing evidence that the expanded form of JCE has deep roots within international law.

Powles does agree, however, with the Appeals Chamber's interpretation of the post-World War II Italian case *D'Ottavio et al.*¹¹¹ as support for the third category, but he notes that one case alone, out of several cited, does not warrant the finding that this form of vicarious liability is customary international law.¹¹² *D'Ottavio et al.* involved the shooting of an escaped prisoner during the course of the crime of "illegal restraint," and because it was foreseeable that one of the participants might shoot and kill the prisoner as a result of their common criminal plan, all participants were found guilty of manslaughter.¹¹³ The Appeals Chamber cited several other Italian cases but none of them appear to conclusively support third-category JCE.¹¹⁴ Professors Allison Danner and Jenny Martinez also argue that the World War II-era case precedent cited by the Appeals Chamber does not support the extended form of JCE. Instead,

¹⁰⁹ *Id.* ¶¶ 210-211.

¹¹⁰ *Id.* ¶ 213.

¹¹¹ *Id.* ¶ 215 (discussing *D'Ottavio et al.*, Court of Cassation, Mar. 12, 1947).

¹¹² Powles, *supra* note 88, at 616-617.

¹¹³ *Tadic*, Appeals Judgment, ¶ 215.

¹¹⁴ *Id.* ¶¶ 216-219.

they argue that more similarities may be drawn from two concepts present at Nuremberg, neither of which was cited as support for third-category JCE: criminal organization prosecution and the crime of conspiracy.¹¹⁵ Both of these concepts are discussed above.

Other prominent commentators tend to pass over the legitimacy of third-category JCE-- the category that certainly requires the most justification. For example, in his 2003 international law textbook, former justice and president of the ICTY Antonio Cassese devotes less than a page to criminal responsibility for non-agreed-upon yet foreseeable crimes of other participants in a criminal plan, whereas he spends almost seven pages justifying individual responsibility for non-direct perpetrators that had intended the commission of the crime within a criminal plan.¹¹⁶ Cassese reviews the cases mentioned by the *Tadic* Appeals Chamber concerning the first and second category of JCE but passes over the cases supposedly supporting the third category.

The *mens rea* sufficient for liability under third-category JCE also stretches notions of individual criminal responsibility. With respect to the first category, the accused must have shared the intent to commit the crime actually committed.¹¹⁷ If the accused had the intent to commit the crime and participated in the commission of that crime, then culpability is easily justifiable. With respect to second-category JCE, the accused must have had knowledge of the system of repression in which he participates, and must have intended to further that common design involving ill-treatment.¹¹⁸ Again, the accused must have had the specific intent to participate in specific criminal activity.

Third-category JCE differs greatly on the *mens rea* required to find liability. Under the third category, the accused is responsible for crimes that go beyond the object of the JCE if he

¹¹⁵ Danner & Martinez, *supra* note 17, at 112.

¹¹⁶ CASSESE, *supra* note 102, at 181-87.

¹¹⁷ *Tadic*, Appeals Judgment, ¶ 228.

¹¹⁸ *Id.*

was: 1) aware that those non-agreed-upon crimes were a foreseeable consequence of the JCE; and, 2) with that awareness, he willingly took the risk that that the additional crime may occur and continued his participation in the criminal enterprise.¹¹⁹ The Trial Chamber in *Brdjanin and Talic*¹²⁰ explained that the first element as to whether the crime was a natural and foreseeable consequence is objective, whereas the second element as to the individual's awareness of that natural and foreseeable consequence is subjective. That is, the accused need not have intended the co-actor to have committed any further crime, and he need not have possessed the other direct perpetrator's state of mind for that further crime in order to be found liable.

As seen from the Tribunal's expositions on the subject, the first and second categories require an intent to perpetrate the crime, whereas the third category merely requires knowledge that a certain crime is foreseeable, regardless of the *mens rea* of the accused concerning the actual foreseeable crime.¹²¹ Therefore, the first and second categories have a much stricter standard and are more difficult to prove, whereas a participant may be found liable under third-category JCE under a much lower culpable state of mind. In both situations, the non-direct perpetrator is liable. If the prosecution wishes to prove liability under first-category JCE, it needs to establish the participant's specific intent to commit the agreed-upon criminal act that

¹¹⁹ *Prosecutor v. Krstic*, Judgment, ICTY Trial Chamber, ¶ 613, Case No. IT-98-33-T (Aug. 2, 2001) [hereinafter, *Krstic*, Trial Judgment]. The Trial Chamber dichotomized the doctrine into those cases where the crime was within the purpose of the enterprise and those cases where the crime was outside the purpose but was nevertheless a foreseeable consequence of the enterprise. The Trial Chamber stated, "if the crime charged fell *within* the object of the joint criminal enterprise, the prosecution must establish that the accused shared with the person who personally perpetrated the crime the state of mind required for that crime. If the crime charged went *beyond* the object of the joint criminal enterprise, the prosecution needs to establish only that the accused was aware that the further crime was a possible consequence in the execution of that enterprise and that, with that awareness, he participated in the enterprise."

¹²⁰ *Brdjanin and Talic*, Decision on Form of Further Amended Indictment and Prosecution Application to Amend, *supra* note 17, ¶ 31.

¹²¹ See E. Katselli, *The Notion of Individual Criminal Responsibility for Participation in a Joint Criminal Enterprise in the New International Criminal Law with Respect to the Crime of Genocide and in View of the New Charges for Bosnia Against Slobodan Milosevic*, in *THE NEW INTERNATIONAL CRIMINAL LAW* 1028 (Kalliopi Koufa ed., 2003) (noting that the stricter requirement of proof in the first category of cases is not present in the latter category of foreseeable crimes).

was subsequently committed. Proving intent is generally difficult, not considering the system employed. Conversely, if the prosecution wishes to pursue liability under third-category JCE, it only needs to prove that the act committed was foreseeable based on the participant's intent to further the original criminal purpose (setting aside for a moment the "willingness" aspect of *mens rea*). This leads to an objective standard—a much easier and evidence-friendly means of proving "intent." Taking this distinction into consideration, it is surprising that the prosecution ever pursues a defendant under first-category JCE rather than the wildly more encompassing third-category JCE.

Upon inspection, the requisite *mens rea* for third-category JCE seems awfully similar to a standard of negligence—a standard of guilt generally considered inappropriate for serious crimes carrying lengthy prison sentences.¹²² Objective criteria, such as foreseeability, are accepted in negligence-based crimes, but those crimes do not carry the stiffest criminal penalties. Such crimes are "a form of anti-social behaviour judged by a different yardstick" than those committed with malice and premeditation.¹²³ Professor William Schabas argues that JCE, and command responsibility for that matter, "establish an objective rather than a subjective standard for the assessment of *mens rea* [in that 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."¹²⁴ Schabas is correct to a certain extent but he does not address the "willingness" aspect of third-category JCE espoused in later jurisprudence of the ICTY. The crime must not only have been a natural and foreseeable

¹²² See Schabas, *supra* note 20, at 1033 (referring to such serious-crimes convictions based on "negligence-like standard of guilt").

¹²³ *Id.* Schabas further writes: "The use of objective criteria to measure knowledge and intent is well-accepted in criminal justice systems in the case of negligence based-offences ... [but that] negligence-type offences are not treated as the most serious crimes, and they do not attract the most serious penalties."

¹²⁴ *Id.*

consequence—a strictly objective element—but the accused must also have known of the foreseeable consequence and nevertheless "willingly" taken the risk.¹²⁵ Even with the inclusion of the "willingness" sub-element, however, the mental element still remains largely objective. If the prosecution successfully argues that a crime is a foreseeable consequence of a stated common plan, then the accused's actual state of mind will be difficult to rebut. In fact, even if the individual knew of the foreseeable crime and took steps to avoid such consequences, that individual would nevertheless be responsible for all acts committed within the scope of that common enterprise. Thus, the apparent subjective inclusion into the requisite mental element does little to protect against improper findings of personal culpability.

D. Joint Criminal Enterprise In Comparison to Vicarious Liability in the U.S.

JCE may sound familiar to lawyers trained in the U.S. Even foreign lawyers will recognize some aspects of JCE liability because in certain municipal legal systems, one may be found liable for another person's criminal acts. Two forms of vicarious liability in particular allow for such attribution. Although often used synonymously, "conspiratorial liability" and "accomplice liability" are distinct doctrines and should be considered separately. Examining them as such reveals that JCE liability has characteristics of both.

Throughout its history conspiracy law has met with skepticism. Because of the great potential to cast a wide net, conspiracy law has been referred to as the "darling of the modern

¹²⁵ See *Prosecutor v. Babic*, Sentencing Judgment, ICTY Appeals Chamber, ¶ 27, Case No. IT-03-72-A (July 18, 2005) (accused is liable under third-category JCE if "so long as the secondary crimes were foreseeable and the Appellant *willingly* undertook the risk that they would be committed, he had the legally required 'intent' with respect to those crimes") (emphasis added); *Prosecutor v. Kvočka*, Judgment, ICTY Appeals Chamber, ¶ 83, Case No. 98-30/1-A (Feb. 28, 2005) [hereinafter, *Kvočka*, Appeals Judgment] ("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").

prosecutor's nursery."¹²⁶ Even U.S. Supreme Court Justice Robert H. Jackson once stated that the "crime of conspiracy is so vague that it almost defies definition"¹²⁷ and described it as a "dragnet device capable of perversion into an instrument of injustice in the hands of a partisan or complacent judiciary."¹²⁸ Yet Jackson concluded that it "has an established place in our system of law ...[and there is] no constitutional authority for taking this weapon from the Government."¹²⁹ Interestingly, these comments came only half a decade after leading the U.S. prosecution team in Nuremberg.

Conspiracy law involves two separate, but interrelated, key concepts: conspiracy as an inchoate offense and conspiracy as a complicity doctrine.¹³⁰ Regarding the criminal offense, in U.S. state common law a conspiracy is "an agreement by two or more persons to commit a criminal act or series of criminal acts, or to accomplish a legal act by unlawful means."¹³¹ An accused may be guilty of a conspiracy itself; the commission of an underlying act is not required. Unlike conspiracy, a JCE, standing alone, is not a crime *per se*. JCE is only a complicity doctrine.

Critics of conspiracy as a crime in itself decry its inchoate nature, and they argue that such a crime defies expectations of criminal justice. The fact that an individual may be found guilty of conspiracy despite not having committed an act in perpetration of any crime is hard for

¹²⁶ *Harrison v. United States*, 7 F.2d 259, 263 (2d Cir. 1925).

¹²⁷ *Krulewitch v. United States*, 336 U.S. 440, 446 (1949) (Jackson, J., concurring).

¹²⁸ *Dennis v. United States*, 341 U.S. 561, 572 (1951). Jackson also referred to conspiracy law as "awkward and inept."

¹²⁹ *Id.* at 577.

¹³⁰ JOSHUA DRESSLER, UNDERSTANDING CRIMINAL LAW 423 (3rd ed. 2001). See also Kathy Diener and Teisha C. Johnson, *Federal Criminal Conspiracy*, 42 AM. CRIM. L. REV. 463 (2005) (providing a brief overview of conspiracy law).

¹³¹ DRESSLER, *supra* note 130, at 423. Section 5.03(1) of the Model Penal Code defines "conspiracy" as: A person is guilty of conspiracy with another person or persons to commit a crime if with the purpose of promoting or facilitating its commission he:

- (a) agrees with such other person or persons that they or one or more of them will engage in conduct that constitutes such crime or an attempt or solicitation to commit such crime; or
- (b) agrees to aid such other person or persons in the planning or commission of such crime or of an attempt or solicitation to commit such crime.

many to accept. Mere agreement by two or more persons to commit a crime, with no further positive act required, including the partial or full commission of the crime, is enough to find guilt of conspiracy in some jurisdictions. Conspiracy law, therefore, primarily focuses on the *mens rea* rather than the physical perpetration of any underlying crime.¹³² Because of this emphasis, one commentator has commented on the risk that "persons will be punished for what they say rather than for what they do, or [simply] for associating with others who are found culpable."¹³³

The ICTY Appeals Chamber addressed the relationship between conspiracy and JCE, stating that the latter requires not only a meeting of the minds but also positive action in furtherance of the common plan.¹³⁴ To support this, the Tribunal quoted the U.N. War Crimes Commission, which stated, "the difference between a charge of conspiracy and one of acting in pursuant [sic] of a common design is that the first would claim that an agreement to commit offences had been made while the second would allege not only the making of an agreement but the performance of acts pursuant to it."¹³⁵ The Appeals Chamber also distinguished JCE from liability arising from membership in an organization.¹³⁶ Unlike the Nuremberg Charter, organizational liability did not fall within the Statute of the ICTY.¹³⁷

Comparing JCE liability to the crime of conspiracy raises interesting similarities and distinctions. A conspiracy, as in JCE liability, requires two or more persons. Likewise, those persons must possess all required intents. For example, if three persons intend to agree, but only two of them intend to commit the underlying offense, then that third person is not guilty of a

¹³² Justice Jackson stated that conspiracy "is always 'predominantly mental in composition' because it consists primarily of a meeting of minds and an intent." *Krulwitch*, 336 U.S. at 447-48 (Jackson, J., concurring) (footnote omitted).

¹³³ Phillip E. Johnson, *The Unnecessary Crime of Conspiracy*, 61 CAL. L. REV. 1137, 1139 (1973).

¹³⁴ *Milutinovic et al.*, Decision on Dragoljub Ojdanic's Motion Challenging Jurisdiction—Joint Criminal Enterprise, *supra* note 23, ¶ 23.

¹³⁵ *Id.* n.65 (citing XV LAW REPORTS OF TRIALS OF WAR CRIMINALS 97-98, U.N. War Crimes Commission (1948)).

¹³⁶ *Id.* ¶ 25.

¹³⁷ *Id.*

conspiracy even though the other two are guilty. Also similar to JCE, an express agreement amongst the parties is not required for there to be a conspiracy.¹³⁸ The agreement may be inferred and may arise extemporaneously.

Furthermore, common law conspiracy is a specific intent crime, as is the case with persecution and genocide. Conspiracy requires from two or more persons: 1) the intent to agree; and, 2) the intent that the object of their agreement be completed.¹³⁹ Unless at least two persons possess these two specific intents, no conspiracy exists.¹⁴⁰ Conspiracy's specific-intent nature oftentimes results in a higher culpability for the crime of conspiracy as compared to the object of the conspiracy. For example, if two individuals agree to burn a house and an occupant dies in the process, they may be found guilty of conspiracy to commit arson, the underlying crime of arson, and the crime of murder (based on reckless indifference to human life), but they are not guilty of conspiracy to commit murder unless that was an object of their agreement.¹⁴¹ Although U.S. state common law splits on the question of whether conspiracy liability (i.e., liability for the crime of conspiracy) requires a higher level of culpability for attendant circumstances above that of what is required for the substantive offense of the criminal purpose,¹⁴² the Model Penal Code favors a higher culpability requirement.

As stated before, the Tribunal has held that there is no distinct crime of JCE, and therefore, conspiracy as a substantive stand-alone inchoate offense is not directly applicable to ICTY jurisprudence on JCE. JCE is solely a means of attaching liability, and thus, it is

¹³⁸ DRESSLER, *supra* note 130, at 427.

¹³⁹ *Id.* at 433.

¹⁴⁰ Under U.S. common law, the term "intent" encompasses two distinct mental states: "purpose" and "knowledge." That is, an individual "intends" to commit an act if: "(1) it is his desire (i.e., his conscious object) to cause the harm; or (2) he acts with knowledge that the social harm is virtually certain to occur as a result of his conduct." *Id.* at 119.

¹⁴¹ *See id.* at 438 (citing MODEL PENAL CODE § 210.2(1)(b)).

¹⁴² *Id.* at 437.

conspiratorial liability (i.e., vicarious liability for the acts of a co-conspirator) that is most similar to JCE liability and most relevant for the purposes of this discussion.

Conspiratorial liability is best understood when examining it alongside the doctrine of accomplice liability. Teasing out the distinctions is important to understanding when a defendant might be vicariously responsible for acts committed by others not intended by the defendant. Conspiratorial liability is potentially broader, and more encompassing, than accomplice liability.¹⁴³ One commentator distinguishes the two in the following manner: "an agreement between two or more persons to participate in the commission of a crime is the key to a conspiracy and, therefore, to conspiratorial liability. Actual assistance in the crime is not required. Accomplice liability requires proof that an actor at least indirectly participated (assisted) in the crime; an agreement to do so is not needed."¹⁴⁴ This distinction demonstrates that it is possible for one to be a conspirator without being an accomplice,¹⁴⁵ and one can be liable as an accomplice without being a conspirator.

In laying the foundation for JCE, the Appeals Chamber in *Tadic* referred to "the notion of common design as a form of accomplice liability."¹⁴⁶ The Appeals Chamber refrained from further discussion, and it does not appear that the court considered the distinction between accomplice liability and conspiratorial liability. Nevertheless, based on this distinction above, JCE appears to be a hybrid resembling both accomplice liability and conspiratorial liability. Similar to accomplice liability, JCE liability requires participation in a common plan involving a criminal offense. Similar to conspiratorial liability, JCE liability requires the existence of a

¹⁴³ *Id.* at 487.

¹⁴⁴ *Id.*

¹⁴⁵ See, e.g., *Pinkerton v. United States*, 328 U.S. 640, 646-47 (1946).

¹⁴⁶ *Tadic*, Appeals Judgment, ¶ 220. The Appeals Chamber stated that "the notion of common design as a form of accomplice liability is firmly established in customary international law and in addition is upheld, albeit impliedly, in the Statute of the International Tribunal."

common plan—i.e., a meeting of the minds. Thus, JCE appears to merge two theories of liability found within U.S. state common law.

Another example helps demonstrate this distinction. Consider a Serb happening upon a group of Bosnian Serbs beating a Bosnian Muslim at night. The Serb realizes what is transpiring, and, unbeknownst to the group, turns on the lights with the intention that the beating be more productive. Under U.S. common law, even though he did not throw a punch, the Serb might be found guilty of battery under accomplice liability because he participated in and facilitated the criminal act. He would not be guilty, however, under a conspiratorial liability theory because there was no meeting of the minds between his and the group's. If the Serb had earlier met the group at a café, and indicated that he would turn on the lights at a specific moment to initiate the beating, but later reneged on this act, he would still be guilty of battery through conspiratorial liability because he had conspired to commit battery and his co-conspirators carried out the plan. He would also be guilty of conspiracy because actual positive assistance is not required. Neither of these two examples, however, would result in JCE liability.

The different legal phrases associated with these separate theories of liability further clarify the distinction. Under an accomplice liability theory, an individual is generally liable for the "natural and probable consequences" of his intentional assistance in a given crime. Therefore, a natural and probable consequence of participation in an armed robbery would be the shooting and killing of a bank teller. Even if the individual indicated to his partner-in-crime that he, under no circumstances, wanted anyone to die, he is still liable. When considering conspiratorial liability, U.S. common law generally looks to whether the non-agreed-upon crime was a "reasonably foreseeable" act in furtherance of the conspiracy. This rule of vicarious liability, espoused by the U.S. Supreme Court in *Pinkerton v. United States*, holds that a

conspirator may be held liable for the reasonably foreseeable acts of a co-conspirator committed in furtherance of the conspiracy.¹⁴⁷ The critical component of this analysis is the starting point: how broadly does the prosecution define the conspiracy? If the conspiracy is broadly defined, then many acts will be foreseeable consequences of the plan, but if the conspiracy is limited in scope, not much will be considered foreseeable as a result of the original conspiratorial plan. Several U.S. states and federal law follow *Pinkerton* liability, but several other jurisdictions and the Model Penal Code have rejected the approach.¹⁴⁸

III. The Development of the Crime of Persecution

A. The Foundation of Crimes Against Humanity

The phrase "crimes against humanity" is often credited to the Nuremberg Charter but permutations are found much earlier in the century. Several international instruments that regulated armed conflict, most notably the 1899 and 1907 Hague Conventions, had already prohibited certain acts that would comprise what were later known as crimes against humanity.¹⁴⁹ For example, the Preamble to the 1907 Hague Convention addressed "the rule of the principles of the law of nations, as they result from the usages established among civilized peoples, from the *laws of humanity*, and the dictates of public conscience."¹⁵⁰ The 1907

¹⁴⁷ *Pinkerton*, 328 U.S. at 646-47 (established the rule of vicarious liability in conspiracy cases). *See also United States v. Newsome*, 322 F.3d 328, 338 (4th Cir. 2003) (holding that a conspirator is liable for all the reasonably foreseeable acts of a co-conspirator committed in furtherance of the conspiracy).

¹⁴⁸ Danner & Martinez, *supra* note 17, at 115-16 (citing SANFORD H. KADISH & STEPHEN J. SCHULHOFER, CRIMINAL LAW AND ITS PROCESSES: CASES AND MATERIALS 693 (7th ed. 2001)).

¹⁴⁹ BASSIOUNI, *supra* note 35, at 42; Convention Respecting the Laws and Customs of War on Land (Hague IV), Oct. 18, 1907 (*entered into force*, Jan. 26, 1910); Convention with Respect to the Laws and Customs of War on Land (Hague II), July 29, 1899 (*entered into force* Sept. 4, 1900).

¹⁵⁰ The Preamble states: "Until a more complete code of the laws of war has been issued, the High Contracting Parties deem it expedient to declare that, in cases not included in the Regulations adopted by them, the inhabitants and the belligerents remain under the protection and the rule of the principles of the law of nations, as they result from the usages established among civilized peoples, from the laws of humanity, and the dictates of the public conscience." This has generally been referred to as the Marten's Clause, named after Russian diplomat Fyodor Martens who drafted it. Later in the century, similar language was used in Protocol Additional to the Geneva

Preamble, along with the similarly-worded 1899 Preamble, may be considered the legal basis for crimes against humanity.¹⁵¹

Less than a decade later, on May 28, 1915, France, Great Britain, and Russia declared that the Ottoman Empire had massacred the Armenian population in Turkey, constituting "crimes against civilization and humanity" for which the perpetrators should be held responsible.¹⁵² Had it not been for the U.S.' apprehension of what legal content, or lack thereof, comprised crimes against humanity, the Treaty of Versailles might have used such language.¹⁵³

The first positive formulation in international criminal law for crimes against humanity arose from the London Conference in the summer of 1945.¹⁵⁴ As discussed above in section two, the Allies met in London to hash out issues of postwar justice. They debated the components of international law rather than what constituted German municipal law, which is what was later considered for Control Council Law No. 10.¹⁵⁵ On August 8, 1945, the Allies settled on the London Agreement, which provided the authority to set up the Nuremberg Tribunal. Crimes against humanity, along with war crimes and crimes against peace, took center

Conventions of 12 Aug. 1949, and Relating to the Protection of Victims of International Armed Conflicts (Additional Protocol I), arts. 1 and 2, June 8, 1977, 1125 U.N.T.S. 3; and in Protocol Additional to the Geneva Conventions of 12 Aug. 1949, and Relating to the Protection of Victims of Non-International Armed Conflicts (Additional Protocol II), Preamble, Jan. 23, 1979, 1125 U.N.T.S. 609.

¹⁵¹ BASSIOUNI, *supra* note 35, at 42.

¹⁵² *Id.* at 62. Nothing amounted to this declaration, but nevertheless, the rhetoric of crimes against humanity was being formulated.

¹⁵³ *Id.* at 63.

¹⁵⁴ *Id.* at 1. See Charter of the International Military Tribunal, *supra* note 24, at art. 6(c).

¹⁵⁵ *Id.* at 8. The four occupying postwar powers of Germany adopted Control Council Law No. 10 as a charter for conducting war crimes trials in their respective territories. The purpose of the law, which was a hybrid of German national and international law, was to try war criminals that were not major enough to go before the Nuremberg Tribunal. Control Council Law No. 10, Punishment of Persons Guilty of War Crimes, Crimes Against Peace and Against Humanity, Dec. 20, 1945, 3 OFFICIAL GAZETTE OF THE CONTROL COUNCIL FOR GERMANY 50-55 (1946). Article II 1(c) of Law No. 10 read: "Crimes against Humanity. Atrocities and offenses, including but not limited to murder, extermination, enslavement, deportation, imprisonment, torture, rape, or other inhumane acts committed against any civilian population, or persecutions on political, racial or religious grounds whether or not in violation of the domestic laws of the country where perpetrated..."

stage. The judgment at the Tokyo Tribunal, on the other hand, gave little consideration to the issue of persecution, or crimes against humanity for that matter.¹⁵⁶

The Nuremberg Charter listed three crimes falling within the Tribunal's jurisdiction: "crimes against peace," "war crimes," and "crimes against humanity." The Allies, notably the American, British, and Soviet delegations, realized that many of the atrocious acts committed during the war fell outside the parameters of the contemporary law of armed conflict, including war crimes and crimes against peace, and thus, they agreed upon this third category of crimes. The framers included "crimes against humanity" in the Charter to avoid a gross injustice that would have resulted had they rigidly adhered to the classes of people protected under the classical law of armed conflict. In other words, war crimes did not cover many of the victims of Nazi Germany's Final Solution, as well as others who were targeted, because most were German nationals or nationals of German allies. Moreover, war crimes could only occur during a time of war. Crimes against humanity attempted to close that legal loophole. Article 6(c) of the Charter defined "crimes against humanity" as: "murder, extermination, enslavement, deportation, and other inhumane acts committed against any civilian population, before or during the war, or persecutions on political, racial or religious grounds in execution of or in connection with any crime within the jurisdiction of the Tribunal, whether or not in violation of the domestic law of the country where perpetrated."¹⁵⁷

The U.N. War Crimes Commission highlighted several novel phrases in the definition that made crimes against humanity particularly pertinent.¹⁵⁸ First, the crimes could be

¹⁵⁶ Olivia Swaak-Goldman, *Persecution*, in *SUBSTANTIVE AND PROCEDURAL ASPECTS OF INT'L CRIMINAL LAW* at 249, Vol. I (Gabrielle Kirk McDonald & Olivia Swaak-Goldman eds., 2000).

¹⁵⁷ Article 6(c) served as the model for Article II(c) of the Allied Control Council Law No. 10 (1945) and Article 5(c) of the Tokyo Charter (1946). See BASSIOUNI, *supra* note 35, at 1-3.

¹⁵⁸ HISTORY OF THE UNITED NATIONS WAR CRIMES COMMISSION AND THE DEVELOPMENT OF THE LAWS OF WAR 192-194, United Nations War Crimes Commission (1948).

committed against "any civilian population," which necessarily includes a country's own citizens. No longer would nationality be a procedural bar. Second, the crimes could be committed "before or during the war" as opposed to only being committed during war. Third, crimes against humanity may occur "whether or not in violation of the domestic law of the country where perpetrated." The drafters were well-aware that many of the criminal acts committed by the Nazis were not "criminal" under German law due to discriminatory laws passed under Hitler's direction. These principles ensured that no Nazi atrocity would be barred from prosecution.

This arguably new category of crimes generated much discussion. The drafters at the London Conference debated whether "crimes against humanity" could be supported under any of the sources cited by the Permanent Court of International Justice: international conventions, customary international law, general principles of law recognized by civilized nations, or writings and legal decisions by distinguished jurists.¹⁵⁹ After concluding in the affirmative, the attendees then were faced with the more difficult task of determining the contents of the crime.¹⁶⁰

Because of the crime's dubious and uncertain parameters, the drafters presumably were heavily concerned with the principle of legality. Professor Bassiouni sheds light on the formulaic process, stating that the drafters had to "stitch together different elements of pre-existing law and to extrapolate therefrom new legal elements while satisfying the requirements of the 'principles of legality.'"¹⁶¹ The drafters determined that crimes against humanity "are simply an extension of war crimes because the category of protected persons is the same in the

¹⁵⁹ Statute of the Permanent Court of International Justice, art. 38, Dec. 16, 1920, 6 L.N.T.S. 390.

¹⁶⁰ BASSIOUNI, *supra* note 35, at 9.

¹⁶¹ *Id.* at 9, and *generally* Ch. 4. Bassiouni asserts that although there is little record of discussions involving the principle of legality, this is probably because the drafters did not want to give evidence to the defense counsel and opponents of the Tribunal as to the dubious nature of "crimes against humanity" and that it violated the principles of legality, see page 31.

two crimes, the difference being whether the violators were of the same or another nationality."¹⁶² Thus, crimes against humanity were originally grounded in international humanitarian law and should be understood as such. Linking this new category of crimes with the already well-established category of war crimes would, perhaps, allay potential problems arising from the principle of legality.¹⁶³

But why was it not until 1945 before such crimes were covered under international law? New laws are often mere responses to events never imaginable or problems previously dormant. Bassiouni refers to the events from 1932-1945 as highly indicative of this principle, writing that it was a "case where the facts went beyond what international law had posited" because "the law seldom anticipates the unthinkable."¹⁶⁴ Prewar international law definitely did not cover events such as the Holocaust, but the Nazis were far from being the first to perpetrate mass evil upon a specific population. It was, however, the first time when several leading countries had the political will and existing network to cooperate in pushing international law in such a direction.

B. Common Elements to Crimes Against Humanity

Since the Nuremberg Tribunal, crimes against humanity have become entrenched as a legitimate and identifiable category of crimes. No longer do lawyers and scholars debate the merits of the existence of such a category. Over the past sixty years, however, the individual elements of these crimes proved elusive. ICTY jurisprudence has changed this considerably. Article 5 of the Statute gives the Tribunal power to prosecute persons responsible for crimes against humanity, and since its first trial, the Tribunal has added greatly to the development of crimes against humanity. Crimes against humanity now have a checklist of components, thus

¹⁶² *Id.* at 10.

¹⁶³ *Id.* at 17.

¹⁶⁴ *Id.* at 42.

ensuring uniformity in application. Because of its tremendous influence on modern international criminal law (and because of its wholehearted acceptance and widespread use of the doctrine of JCE), the ICTY's decisions concerning crimes against humanity figures prominently in this article, and thus, all definitions and stated elements are garnered from the ICTY.

There are four elements common to all crimes against humanity. First, there must be an armed conflict, either international or internal in character.¹⁶⁵ Second, "the acts of an accused must be part of a widespread or systematic attack."¹⁶⁶ Importantly, the attack need not be both widespread and systematic; either is sufficient. "Widespread" is generally defined as "the large-scale nature of the attack and the number of targeted persons," whereas "systematic" refers to "the organised nature of the acts of violence and the improbability of their random occurrence."¹⁶⁷ It is the attack, not the individual criminal acts of the accused, that must be widespread or systematic.¹⁶⁸ The acts of the accused need only be a part of the attack and a "single or limited number of acts" may constitute a crime against humanity "unless those acts may be said to be isolated or random."¹⁶⁹ For example, "[p]atterns of crimes, in the sense of the non-accidental repetition of similar criminal conduct on a regular basis, are a common

¹⁶⁵ See ICTY Statute, *supra* note 20, at art. 5. Article 5 of the ICTY Statute provides: "The International Tribunal shall have the power to prosecute persons responsible for the following crimes when committed in armed conflict, whether international or internal in character, and directed against any civilian population."

¹⁶⁶ *Prosecutor v. Kordic and Cerkez*, Judgment, ICTY Appeals Chamber, ¶ 93, Case No. IT-95-14/2-A (Dec. 17, 2004) (underline original) [hereinafter, *Kordic and Cerkez*, Appeals Judgment] (citing *Prosecutor v. Blaskic*, Judgment, ICTY Appeals Chamber, ¶ 98, Case No. IT-95-14-A (July 29, 2004) [hereinafter, *Blaskic*, Appeals Judgment]).

¹⁶⁷ *Kordic and Cerkez*, Appeals Judgment, ¶ 94 (citing *Blaskic*, Appeals Judgment, ¶ 101, referring to *Prosecutor v. Kunarac, Kovac, & Vukovic*, Judgment, ICTY Appeals Chamber, ¶ 96, Case No. IT-96-23 & IT-96-23/1-A (June 12, 2002) [hereinafter, *Kunarac*, Appeals Judgment]).

¹⁶⁸ *Kordic and Cerkez*, Appeals Judgment, ¶ 94 (citing *Blaskic*, Appeals Judgment, ¶ 101, referring to *Kunarac*, Appeals Judgment, ¶ 96).

¹⁶⁹ *Kordic and Cerkez*, Appeals Judgment, ¶ 94 (citing *Blaskic*, Appeals Judgment, ¶ 101, referring to *Kunarac*, Appeals Judgment, ¶ 96); *Prosecutor v. Brdjanin*, Judgment, ICTY Trial Chamber, ¶ 135, Case No. IT-99-36-T (Sept. 1, 2004) [hereinafter, *Brdjanin*, Trial Judgment].

expression of such systematic occurrence."¹⁷⁰ An "attack is not limited to the use of armed force; it encompasses any mistreatment of the civilian population."¹⁷¹

An important distinction is that between an "attack" and an "armed conflict." According to the Trial Chamber in *Brdjanin*, the two concepts are:

distinct and independent from each other. The attack could precede, outlast or continue during the armed conflict, without necessarily being part of it.¹⁷² To establish whether there was an attack, it is not relevant that the other side also committed atrocities against its opponent's civilian population.¹⁷³ Each attack against the other side's civilian population would be equally illegitimate and crimes committed as part of such attack could, all other conditions being met, amount to crimes against humanity.¹⁷⁴

The Trial Chamber further stated that the temporal and geographical relationship between the crime and the attack need not be necessarily tight. The criminal acts "need to objectively 'form part' of the attack by their nature or consequences,¹⁷⁵ as distinct from being committed in isolation, but they do not need to be committed in the midst of the attack."¹⁷⁶ The Trial Chamber additionally noted that "a crime committed several months after, or several kilometres away from the main attack could still, if sufficiently connected otherwise, be part of that attack."¹⁷⁷ Article 5 of the Statute grants jurisdiction over crimes "committed in armed conflict," but the Trial Chamber in *Brdjanin*, citing favorably the Appeals Chamber in *Kunarac*, held this to be different than that required in Article 3 crimes (violations of the laws and customs of war), which requires

¹⁷⁰ *Kordic and Cerkez*, Appeals Judgment, ¶ 666 (citing *Kunarac*, Appeals Judgment, ¶ 94; *Blaskic*, Appeals Judgment, ¶ 101).

¹⁷¹ *Kordic and Cerkez*, Appeals Judgment, ¶ 666 (citing *Kunarac*, Appeals Chamber, ¶ 86); *Brdjanin*, Trial Judgment, ¶ 131.

¹⁷² *Brdjanin*, Trial Judgment, ¶ 131 (citing *Tadic*, Appeals Judgment, ¶ 251; *Kunarac*, Appeals Judgment, ¶ 86; *Prosecutor v. Krnojelac*, Judgment, ICTY Trial Chamber, ¶ 54, Case No. IT-97-25-T (Mar. 15, 2002) [hereinafter, *Krnojelac*, Trial Judgment]).

¹⁷³ *Brdjanin*, Trial Judgment, ¶ 131 (*Prosecutor v. Kunarac, Kovac, and Vukovic*, Judgment, ICTY Trial Chamber, ¶ 580, Case No. IT-96-23-T & IT-96-23/1-T (Feb. 22, 2001) [hereinafter, *Kunarac*, Trial Judgment]; *Kunarac*, Appeals Judgment, ¶ 87).

¹⁷⁴ *Brdjanin*, Trial Judgment, ¶ 131 (citing *Kunarac*, Appeals Judgment, ¶ 87).

¹⁷⁵ *Brdjanin*, Trial Judgment, ¶ 132 (citing *Tadic*, Appeals Judgment, ¶ 248; *Kunarac*, Appeals Judgment, ¶¶ 85, 99-101).

¹⁷⁶ *Brdjanin*, Trial Judgment, ¶ 132 (citing *Kunarac*, Trial Judgment, ¶ 417 et seq.).

¹⁷⁷ *Id.*

a "close relationship" between the acts of the accused and the armed conflict.¹⁷⁸ Instead, "the nexus with the armed conflict under Article 5 is 'a purely jurisdictional prerequisite which is satisfied by proof that there was an armed conflict and that objectively the acts of the accused are linked geographically as well as temporally with the armed conflict.'"¹⁷⁹

Significantly, crimes against humanity do not require that the acts of the accused and the attack itself must have been committed pursuant to a pre-existing policy or plan.¹⁸⁰ The existence of a plan or policy, however, may be relevant when proving the elements, namely, whether the attack was widespread or systematic, and whether the attack was directed against the civilian population.¹⁸¹ But these elements may be sufficiently proved through reference to other evidence without resorting to proving up a plan or policy.¹⁸² Other factors that may be considered in determining whether an attack is widespread or systematic include the consequences of the attack upon the targeted population; the number of victims from the attack; the nature of the acts within the attack; the participation, if any, of officials and authorities; and any identifiable patterns of crimes.¹⁸³

The third common element to all crimes against humanity is that the widespread or systematic attack must be "directed against a civilian population."¹⁸⁴ When determining what constitutes a "civilian population," the court must look to the state of customary international law at the time of commission of the act.¹⁸⁵ The Appeals Chamber in *Kordic and Cerkez* established that the definition of civilians and civilian populations used in Article 50 of Additional Protocol I

¹⁷⁸ *Brdjanin*, Trial Judgment, ¶ 133 (citing *Kunarac*, Appeals Judgment, ¶¶ 57-60, 83).

¹⁷⁹ *Brdjanin*, Trial Judgment, ¶ 133 (quoting *Kunarac*, Appeals Judgment, ¶ 83).

¹⁸⁰ *Kunarac*, Appeals Judgment, ¶ 98.

¹⁸¹ *Blaskic*, Appeals Judgment, ¶ 120; *Kunarac*, Appeals Judgment, ¶ 98.

¹⁸² *Blaskic*, Appeals Judgment, ¶ 120 (quoting *Kunarac*, Appeals Judgment, ¶ 98 (footnote omitted)).

¹⁸³ *Brdjanin*, Trial Judgment, ¶ 136 (citing *Kunarac*, Appeals Judgment, ¶ 95).

¹⁸⁴ *Kordic and Cerkez*, Appeals Judgment, ¶ 93 (citing *Blaskic*, Appeals Judgment, ¶ 98).

¹⁸⁵ *Kordic and Cerkez*, Appeals Judgment, ¶ 97 (citing *Blaskic*, Appeals Judgment, ¶ 110).

reflects customary international law.¹⁸⁶ The Appeals Chamber in *Blaskic* affirmed the Appeals Chamber's elaboration in *Kunarac* on the meaning of a "civilian population," stating that:

the use of the word "population" does not mean that the entire population of the geographical entity in which the attack is taking place must have been subjected to that attack. It is sufficient to show that enough individuals were targeted in the course of the attack, or that they were targeted in such a way as to satisfy the Chamber that the attack was in fact directed against a civilian "population", rather than against a limited and randomly selected number of individuals.¹⁸⁷

The phrase "directed against" is satisfied when the civilian population is "the primary object of the attack," which may be found after considering, inter alia, the means and method of the attack, the status and number of the victims, the discriminatory nature of the attack and the crimes committed in its course, and the resistance to the attackers and the extent to which they complied with the precautionary requirements of the laws of war.¹⁸⁸ If the alleged crimes were committed in the course of an armed conflict, the court will look to the laws of war in order to assess the nature of the attack and the lawfulness of those acts.¹⁸⁹

The burden of proof as to whether a person falls within one of the protected civilian categories lies with the prosecution.¹⁹⁰ The Appeals Chamber in *Blaskic* determined, after considering Article 4(A) of the Third Geneva Convention¹⁹¹ and Article 50 of Additional Protocol I,¹⁹² that:

members of the armed forces, and members of militias or volunteer corps forming part of such armed forces, cannot claim civilian status. Neither can members of organized resistance groups, provided that they are commanded by a person responsible for his subordinates, that they have a fixed distinctive sign recognizable at a distance, that they carry arms openly, and that they conduct their operations in accordance with the laws and customs of war. However, the Appeals Chamber considers that the presence within a population of members of resistance groups, or former combatants, who have laid down their arms, does not alter its civilian characteristic.¹⁹³

¹⁸⁶ *Id.* See Additional Protocol I, *supra* note 50, at art. 50.

¹⁸⁷ *Blaskic*, Appeals Judgment, ¶ 105 (quoting *Kunarac*, Appeals Judgment, ¶ 90 (footnote omitted)).

¹⁸⁸ *Blaskic*, Appeals Judgment, ¶ 106 (quoting *Kunarac*, Appeals Judgment, ¶ 91 (footnote omitted)).

¹⁸⁹ *Id.*

¹⁹⁰ *Blaskic*, Appeals Judgment, ¶ 111.

¹⁹¹ Geneva Convention (III) Relative to the Treatment of Prisoners of War, Aug. 12, 1949, 75 U.N.T.S. 135 (*entered into force* Oct. 21, 1950).

¹⁹² Additional Protocol I, *supra* note 150, at art. 4(A).

¹⁹³ *Blaskic*, Appeals Judgment, ¶ 113 (citing Common Article 3 of the Geneva Conventions and stating that it reflects customary international law).

The language seems workable upon first glance but it leaves open the question as to what happens when the attack was directed towards individual combatants who are among the "civilian population." Because the population is considered civilian in nature despite the presence of soldiers or members of a resistance group, does an attack on those individuals constitute a widespread or systematic attack on the "civilian population"?

The answer might be found in the *Brdjanin* Trial Judgment. When discussing the victims of an attack, the Trial Chamber noted that the attack does not have to target the entire civilian population in that area, but it also must not have been directed against a "limited and randomly selected number of individuals."¹⁹⁴ Therefore, this language suggests that a limited attack on a specifically targeted (i.e., non-random) small group of insurgents, for example, would not be considered an attack for purposes of this element.¹⁹⁵

The fourth common element is that the perpetrator must act with "knowledge that his acts formed part of the broader criminal attack." This mental element may be further broken down into two distinct mental sub-elements: 1) knowledge that there is an attack on a civilian population; and 2) knowledge that his acts comprise part of that attack. Regarding both sub-elements, actual knowledge must be present; knowledge of the risk is not enough. The Appeals Chamber in *Blaskic* stated, "The Trial Chamber, in stating that it 'suffices that he knowingly took the risk of participating in the implementation of the ideology, policy or plan,' did not correctly

¹⁹⁴ *Brdjanin*, Trial Judgment, ¶ 134 (citing *Kunarac*, Appeals Judgment, ¶ 90) ("It is also not necessary that the entire civilian population of the geographical entity in which the attack is taking place be targeted by the attack. It must, however, be shown that the attack was not directed against a limited and randomly selected number of individuals.").

¹⁹⁵ See also *Limaj et al.*, Judgment, ICTY Trial Chamber, ¶¶ 191-228, Case No. IT-03-66-T (Nov. 30, 2005). The Trial Chamber held that the targeting of suspected collaborators with Serbian authorities did not constitute an attack on the civilian population.

articulate the *mens rea* applicable to crimes against humanity."¹⁹⁶ The Blaskic Appeals further explained:

the motives of the accused for taking part in the attack are irrelevant and a crime against humanity may be committed for purely personal reasons. Furthermore, the accused need not share the purpose or goal behind the attack. It is also irrelevant whether the accused intended his acts to be directed against the targeted population or merely against his victim. It is the attack, not the acts of the accused, which must be directed against the target population and the accused need only know that his acts are part thereof. At most, evidence that he committed the acts for purely personal reasons could be indicative of a rebuttable assumption that he was not aware that his acts were part of that attack.¹⁹⁷

Earlier decisions at the ICTY, such as the Trial Judgment in *Kunarac*, determined that that knowledge would be satisfied if the offender willingly took the risk that his acts comprised part of a larger criminal act, regardless of whether he had actual knowledge. Later decisions disagreed, holding that the accused must have knowledge of the attack and knowledge that his act is part thereof.¹⁹⁸ The offender does not, however, need to have intimate or even peripheral details of the attack.

In addition to the two *mens rea* sub-elements, there is a third mental intent that must exist—the intent to commit the underlying criminal act that constitutes the crime against humanity.¹⁹⁹ No further intent is required. Unlike the crime of persecution, crimes against humanity (as a whole) do not require discriminatory intent.²⁰⁰

¹⁹⁶ *Blaskic*, Appeals Judgment, ¶ 126.

¹⁹⁷ *Id.* ¶ 124 (quoting *Kunarac*, Appeals Judgment, ¶ 103 (footnotes omitted)).

¹⁹⁸ See, e.g., *Blaskic*, Appeals Judgment, ¶ 126; *Kunarac*, Appeals Judgment, ¶¶ 99, 103.

¹⁹⁹ *Kordic and Cerkez*, Appeals Judgment, ¶ 99 (citing *Blaskic*, Appeals Judgment, ¶ 124, referring to *Tadic*, Appeals Judgment, ¶ 248; *Kunarac*, Appeals Judgment, ¶ 99, 102) (stating that the *mens rea* for crimes against humanity is "satisfied when the accused has the requisite intent to commit the underlying offence(s) with which he is charged, and when he knows that there is an attack on the civilian population and also knows that his acts comprise part of that attack.").

²⁰⁰ *Tadic*, Appeals Judgment, ¶ 305. Other international instruments support the proposition that crimes against humanity in general, excluding persecution, do not require a discriminatory intent. Those instruments include the Tokyo Charter, Control Council No. 10 and its jurisprudence, and the Rome Statute. Notably, the Statute of the International Criminal Tribunal for Rwanda differs, in that discriminatory intent is explicitly required for all crimes against humanity. See Swaak-Goldman, *supra* note 156, at 256-257.

C. Elements of Persecution as a Crime Against Humanity

Since World War II, the concept of persecution has crept more and more into the lexicon of international law. Several legal instruments have applied to various contexts the principle that one should not be targeted or discriminated against based solely on an inherent characteristic such as ethnicity or a set of beliefs such as religion or politics.²⁰¹ But even though many post-1945 international conventions and declarations denounce discriminatory practices that result in persecution, none of them, except for the 1973 Apartheid Convention, actually criminalizes violations.²⁰² Within municipal law, Professor Bassiouni has noted that there is no crime by the name of "persecution" in any of the world's major legal systems.²⁰³ After considering the common beliefs and definitions of "persecution" used in pre-1945 dictionaries in those countries, however, his proposed definition is:

"State action or policy" leading to the infliction upon an individual of harassment, torment, oppression, or discriminatory measures, designed to or likely to produce physical or mental suffering or economic harm, because of the victim's beliefs, views, or membership in a given identifiable group (religious, social, ethnic, linguistic etc.), or simply because the perpetrator sought to single out a given category of victims for reasons peculiar to the perpetrator.²⁰⁴

In its first full trial on the merits, the ICTY considered this definition in determining the elements of persecution and the contexts in which it should be considered.²⁰⁵

The crime of persecution is among the crimes against humanity enumerated in Article 5 of the ICTY Statute, along with murder, extermination, enslavement, deportation, imprisonment,

²⁰¹ See generally Swaak-Goldman, *supra* note 156, at 247-261.

²⁰² BASSIOUNI, *supra* note 35, at 328 (citing Universal Declaration of Human Rights, G.A. Res. 217A, U.N. Doc. A/810 (Dec. 10, 1948); International Covenant on Civil and Political Rights, Dec. 16, 1966, 999 U.N.T.S. 171; International Covenant on Economic, Social, and Cultural Rights, Dec. 19, 1966, 993 U.N.T.S. 3; International Convention on the Elimination of Racial Discrimination, Dec. 21, 1965, 660 U.N.T.S. 195; Declaration on the Elimination of All Forms of Racial Discrimination, G.A. Res. 1904 (XVIII) (Nov. 20, 1963); International Convention on the Suppression and Punishment of the Crime of Apartheid, G.A. Res. 3068 (XXVIII) (Nov. 30, 1973); Declaration on the Elimination of Discrimination Against Women, G.A. Res. 2263 (XXII), U.N. Doc. A/RES/2263 (Nov. 7, 1967); Convention on the Elimination of All Forms of Discrimination Against Women, Dec. 18, 1979, 1249 U.N.T.S. 13; Declaration on the Elimination of All Forms of Intolerance and of Discrimination Based on Religion or Belief, G.A. Res. 36/55, U.N. Doc. A/36/684 (Nov. 25, 1981)).

²⁰³ *Id.* at 327.

²⁰⁴ *Id.*

²⁰⁵ *Tadic*, Trial Judgment, ¶ 695.

torture, rape, and "other inhumane acts."²⁰⁶ Because persecution, like many other offenses in international criminal law, has not a long history of positive formulations and was largely without case law precedent, the Tribunal first needed to provide the elemental framework. After its initial elucidations, over the years the Tribunal has continually reexamined the substance of the crime.²⁰⁷ This has resulted in numerous permutations on the exact elements and definition of persecution.

Despite the unclear, and sometimes conflicting, jurisprudence on persecution, the Tribunal now prefers and commonly uses the formulation espoused by the Appeals Chamber in *Kordic and Cerkez*. It defined persecution that constitutes a crime against humanity as:

an act or omission which:

1. discriminates in fact and which denies or infringes upon a fundamental right laid down in international customary or treaty law (the *actus reus*); and
2. was carried out deliberately with the intention to discriminate on one of the listed grounds, specifically race, religion or politics (the *mens rea*).²⁰⁸

This definition clearly demonstrates that there are two distinct elements to persecutions. Another definition that has been used on several occasions is the "the gross or blatant denial, on discriminatory grounds, of a fundamental right, laid down in international customary or treaty law, reaching the same level of gravity as the other acts prohibited in Article 5."²⁰⁹ Although the

²⁰⁶ Article 6 of the Statute of the International Criminal Tribunal for Rwanda mirrors the language of Article 7 of the Statute of the ICTY, and thus, provides for the same crimes enumerated as crimes against humanity. See Statute of the International Tribunal for Rwanda, U.N. Doc. S/RES/955 (1994), 33 I.L.M. 1598 (1994).

²⁰⁷ For an examination of early jurisprudence on persecution at the ICTY, see generally, Ken Roberts, *The Law of Persecution Before the International Criminal Tribunal for the Former Yugoslavia*, in 15 LEIDEN J. INT'L L. 623-639 (2002); William J. Fenrick, *The Crime Against Humanity of Persecution in the Jurisprudence of the ICTY*, in NETHERLANDS YEARBOOK OF INT'L LAW 81-96 (2001).

²⁰⁸ *Kordic and Cerkez*, Appeals Judgment, ¶ 101 (quoting *Blaskic*, Appeals Judgment, ¶ 131, referring to *Tadic*, Appeal, ¶ 248; *Kunarac*, Appeals Judgment, ¶¶ 99, 103). See also *Krnjelac*, Trial Judgment, ¶ 431; *Prosecutor v. Vasiljevic*, Judgment, ICTY Trial Chamber, ¶ 244, Case No. IT-98-32-T (Nov. 29, 2002) [hereinafter, *Vasiljevic*, Trial Judgment]; *Prosecutor v. Stakic*, Judgment, ICTY Trial Chamber, ¶ 732, Case No. IT-97-24-T (July 31, 2003) [hereinafter, *Stakic*, Trial Judgment]; *Prosecutor v. Simic et al.*, Judgment, ICTY Trial Chamber, ¶ 47, Case No. IT-95-9-T (Oct. 17, 2003) [hereinafter, *Simic*, Trial Judgment]; *Prosecutor v. Naletilic and Martinovic*, Judgment, ICTY Trial Chamber, ¶ 634, Case No. IT-98-34-T (Mar. 31, 2003) [hereinafter, *Naletilic*, Trial Judgment].

²⁰⁹ *Kupreskic*, Judgment, ICTY Trial Chamber, ¶ 621, Case No. IT-95-16-T (Jan. 14, 2000) [hereinafter, *Kupreskic*, Trial Judgment].

two are similar, the Appeals Chamber has predominantly used the two-part definition in recent cases.²¹⁰

The first element of the definition of persecution comprises two sub-elements: 1) the act or omission must discriminate in fact; and 2) the act or omission must deny or infringe upon a fundamental right. Regarding the first sub-element, early Tribunal jurisprudence held that the *actus reus* must have discriminatory consequences in fact, that is, there is a discriminatory element to the *actus reus*, in that discriminatory intent alone was not sufficient.²¹¹ In *Kvočka*, however, the Trial Chamber rejected this approach, instead stating that "if a person was targeted for abuse because she was suspected of belonging to the Muslim group, the discrimination element is met even if the suspicion proves inaccurate."²¹² This seemed to be an anomaly as the Trial Chamber in *Krnjelac* later contradicted *Kvočka* on this point, noting that "[t]he existence of a mistaken belief that the intended victim will be discriminated against, together with an intention to discriminate against that person because of that mistaken belief, may in some circumstances amount to the inchoate offence of *attempted* persecution, but no such crime falls within the jurisdiction of this Tribunal."²¹³ The Trial Chamber in *Krnjelac* sided with what it deemed to be the view consistently taken since the Tribunal first addressed the issue (minus the *Kvočka* Trial Chamber decision),²¹⁴ and stated that it is the discriminatory consequences in addition to the discriminatory intent that give persecution its unique character and sets it apart

²¹⁰ See, e.g., *Kvočka*, Appeals Judgment, ¶ 320; *Krnjelac*, Appeals Judgment, ¶ 185; *Prosecutor v. Vasiljevic*, Judgment, ICTY Appeals Chamber, ¶ 113, Case No. IT-98-32-A (Feb. 25, 2004) [hereinafter, *Vasiljevic*, Appeals Judgment]; *Blaskic*, Appeals Judgment, ¶ 131; *Kordic and Cerkez*, Appeals Judgment, ¶ 101.

²¹¹ *Krnjelac*, Trial Judgment, ¶ 432.

²¹² *Prosecutor v. Kvočka*, Judgment, ICTY Trial Chamber, ¶ 195, Case No. IT-98-30/1-T (Nov. 2, 2001) [hereinafter, *Kvočka*, Trial Judgment].

²¹³ *Krnjelac*, Trial Judgment, n.1292.

²¹⁴ *Id.* ¶ 432.

from other crimes against humanity.²¹⁵ But again, the Tribunal changed course on this point and stated in *Brdjanin* that persecution can occur in the case of mistaken identity.²¹⁶

The second sub-element (i.e., that the act or omission must deny or infringe upon a fundamental right) is less concrete. The Statute of the ICTY does not provide a list of acts that may constitute persecutions as a crime against humanity, but the Tribunal has established a jurisdictional limit. The Appeals Chamber in *Kordic and Cerkez* stated that "the acts underlying persecutions as a crime against humanity, whether considered in isolation or in conjunction with other acts, must constitute a crime of persecutions of gravity equal to the crimes listed in Article 5 of the Statute."²¹⁷ Thus, the act must "constitute a denial of or infringement upon a fundamental right laid down in international customary or treaty law,"²¹⁸ and for purposes of legality, the act must have constituted a crime against humanity in either customary international law or international treaty law at the time of commission.²¹⁹

Notably, all persecutions will involve the denial of a fundamental human right but not all denials of fundamental human rights will constitute persecution.²²⁰ Certain denials may not reach the level of seriousness required. Determining what constitutes a denial or infringement upon a fundamental right is imprecise but the contents of the Statute provide a foundation.

²¹⁵ *Id.* ¶ 435.

²¹⁶ *Brdjanin*, Trial Judgment, ¶ 993. The Trial Chamber stated that "it is not necessary that the victim of the crime of persecutions be a member of the group against whom the perpetrator of the crime intended to discriminate. In the event that the victim does not belong to the targeted ethnic group, 'the act committed against him institutes discrimination in fact, vis-à-vis other [members of that different group] who were not subject to such acts, effected with the will to discriminate against a group on grounds of ethnicity.'" (quoting *Krnjelac*, Appeals Judgment, ¶ 185)).

²¹⁷ *Kordic and Cerkez*, Appeals Judgment, ¶ 102 (citing *Blaskic*, Appeals Judgment, ¶ 135, referring to *Krnjelac*, Appeals Judgment, ¶¶ 199, 221).

²¹⁸ *Kordic and Cerkez*, Appeals Judgment, ¶ 103 (citing *Blaskic*, Appeals Judgment, ¶ 139).

²¹⁹ *Id.*

²²⁰ *Simic*, Trial Judgment, ¶ 48 (citing *Prosecutor v. Kordic and Cerkez*, Judgment, ICTY Trial Chamber, ¶ 196, Case No. IT-95-14/2-T (Feb. 26, 2001) [hereinafter, *Kordic and Cerkez*, Trial Judgment]; *Kvočka*, Trial Judgment, ¶ 185; *Krnjelac*, Trial Judgment, ¶ 434).

The criminal acts underlying a charge of persecution may be enumerated within Article 5 or elsewhere in the Statute, or may even be found outside the Statute.²²¹ Crimes enumerated in Article 5 are "by definition" serious enough to constitute a crime against humanity. For instance, murder, extermination, enslavement, deportation, imprisonment, torture, rape, and other inhumane acts will all sustain a charge of persecution. Other crimes enumerated elsewhere in the Statute as well as those not enumerated in the Statute, must meet an additional test. They "must reach the same level of gravity as the other crimes against humanity enumerated in Article 5 of the Statute," which "will only be met by gross or blatant denials of fundamental human rights."²²² Interestingly, the language of this test mirrors language used in the earlier definition of persecution provided by the Tribunal. Several crimes found within Article 2 are also found within Article 5, and thus, they undoubtedly meet the gravity test and require no analytical justification.²²³

Crimes not enumerated within the Statute itself but that may rise to the level of the Article 5 crimes include, for example, the use of human shields²²⁴ and outrages upon personal dignity, including harassment, humiliation, and psychological abuse.²²⁵ An example of a crime that does not in itself constitute persecution would be unlawful arrest.²²⁶ The crime constitutes the denial and infringement upon a personal right, but standing alone, it does not amount to the level of gravity as the enumerated Article 5 crimes against humanity. The unlawful arrest would need to be combined with other acts, such as unlawful detention or inhumane living conditions,

²²¹ See, e.g., *Tadic*, Trial Judgment, ¶ 703; *Simic*, Trial Judgment, ¶ 48.

²²² *Simic*, Trial Judgment, ¶ 48 (quoting *Krnjelac*, Trial Judgment, ¶ 434; *Kupreskic*, Trial Judgment, ¶ 621; *Naletilic*, Trial Judgment, ¶ 635).

²²³ For example, Articles 2(a), (b), and (g), are, respectively, willful killing; torture or inhuman treatment; and unlawful deportation, transfer or unlawful confinement of a civilian.

²²⁴ See *Blaskic*, Appeals Judgment, ¶ 155; *Kordic and Cerkez*, Appeals Judgment, ¶ 107; *Kordic and Cerkez*, Trial Judgment, ¶ 204, n.360.

²²⁵ See *Kvocka*, Appeals Judgment, ¶ 324.

²²⁶ *Simic*, Trial Judgment, ¶ 69.

in order to warrant a finding of persecution.²²⁷ In this respect, the Tribunal takes a holistic approach when determining whether a set of circumstances, rather than an individual act, combine to form the crime of persecution.

Significantly, physical injury to the person is not required for there to have been persecution. The *Blaskic* Appeals Chamber favorably quoted the Trial Judgment, stating that persecutions "may take forms other than injury to the human person, in particular those acts rendered serious not by their apparent cruelty but by the discrimination they seek to instill within humankind."²²⁸ Therefore, the confiscation or destruction of private dwellings and businesses, symbolic or historical buildings, or the means of subsistence, may all constitute persecution.²²⁹ Attacks on personal property might even warrant a finding of persecution if the attack was committed with the requisite discriminatory intent. Whereas an attack on the physical person may not be as contextually-based, instances dealing with the arguably less-serious attack on personal property require a high degree of contextualization. For example, the burning of a car, by itself, does not amount to persecution. However, if that car was the only means of transport the head-of-household had to get to work and go to market, and was essential to the family's survival, then a finding of persecution may be more warranted.²³⁰ Attacks on communal property also may amount to persecution. The destruction of and damage to religious and educational institutions might arise to the level of gravity as those crimes enumerated in Article 5.²³¹

The appropriate method of deducing whether a crime has reached the requisite level of gravity is elusive. Based on the Tribunal's decisions, it is unclear how to consider fully the

²²⁷ *Id.*

²²⁸ *Blaskic*, Appeals Judgment, ¶ 136 (quotations omitted).

²²⁹ *Id.* ¶ 144.

²³⁰ *See id.* ¶ 149, *Kupreskic*, Trial Judgment, ¶ 631.

²³¹ *See Kordic and Cerkez*, Trial Judgment, ¶ 206.

interplay between the first and second elements of persecution (i.e., the relationship between the act and the discriminatory intent) in determining what crimes may amount to persecution. What factor or factors contribute to the gravity analysis in determining the seriousness of the crime? In other words, should the court determine whether the act itself (considered without any discriminatory intent) reaches the same gravity, essentially considering the act in a vacuum? Or may an act reach the level of gravity by way of the act when combined with discriminatory intent, thus taking a more contextually-based approach?

In *Blaskic*, the Appeals Chamber considered whether the Trial Chamber appropriately addressed this issue. The Appeals Chamber found that the Trial Chamber had erred in failing to consider the gravity of the underlying acts by themselves, and held that "it is not enough that the underlying acts be perpetrated with a discriminatory intent."²³² The Trial Chamber had "appeared to consider, erroneously, that underlying acts are rendered sufficiently grave if they are committed with a discriminatory intent."²³³ This view was supported by the Appeals Chamber in *Kordic and Cerkez*, which stated that "not every act, if committed with the requisite discriminatory intent, amounts to persecutions as a crime against humanity."²³⁴ This language, however, does not fully settle the issue. At other points in the *Blaskic* judgment, the Appeals Chamber approvingly quoted the Trial Chamber, stating that "'the crime of 'persecution' encompasses not only bodily and mental harm and infringements upon individual freedom but also acts which appear less serious, such as those targeting property, *so long as the victimized*

²³² *Blaskic*, Appeals Judgment, ¶ 160.

²³³ *Id.* ¶ 138.

²³⁴ *Kordic and Cerkez*, Appeals Judgment, ¶ 103 (citing *Blaskic*, Appeals Judgment, ¶ 139).

persons were specially selected on grounds linked to their belonging to a particular community."²³⁵ The Appeals Chamber further quoted the Trial Chamber:

It is the specific intent to cause injury to a human being because he belongs to a particular community or group, rather than the means employed to achieve it, that bestows on it its individual nature and gravity and which justifies its being able to constitute criminal acts which might appear in themselves not to infringe directly upon the most elementary rights of a human being, for example, attacks on property. In other words, the perpetrator of the acts of persecution does not initially target the individual but rather membership in a specific racial, religious or political group.²³⁶

By focusing on the discriminatory nature of the act, as opposed to the act itself, the number of acts includable becomes limitless. In *Kvocka*, the Trial Chamber raised holdings by World War II trials that found certain denials to Jews, such as the freedom to marry, to bank accounts, and to educational and employment opportunities, constituted persecution, and thus, "acts that are not inherently criminal may nonetheless become criminal and persecutorial if committed with discriminatory intent."²³⁷ Such an approach allows any act to become persecution by sole reason of its discriminatory application.

The Appeals Chamber in *Blaskic* proposed a method for determining what acts may constitute persecution, but it does not fully complete the issue. The court simply rehashes previous statements that the court should first determine whether the act underlying the persecution constituted a crime against humanity in customary international law, which in turn must involve a denial or infringement upon a fundamental right granted under customary international law.²³⁸ The proposal suggests that not every act, even if committed with discriminatory intent, would amount to a persecution as a crime against humanity.²³⁹ The principle of legality, or *nullum crimen sine lege*, must be considered throughout the process,²⁴⁰ in

²³⁵ *Blaskic*, Appeals Judgment, ¶ 137 (quoting *Prosecutor v. Blaskic*, Judgment, ICTY Trial Chamber, ¶ 233, Case No. IT-95-14-T (Mar. 3, 2000) (emphasis added) [hereinafter, *Blaskic*, Trial Judgment]).

²³⁶ *Blaskic*, Appeals Judgment, ¶ 137 (quoting *Blaskic*, Trial Judgment, ¶ 235).

²³⁷ *Kvocka*, Trial Judgment, ¶ 186.

²³⁸ *Blaskic*, Appeals Judgment, ¶ 139.

²³⁹ *Id.*

²⁴⁰ *Id.* ¶ 140.

that the Tribunal may only convict someone of a crime if it was a violation of customary international law or international treaty law at the time of commission.²⁴¹ But despite this attempted formulation, and its focus on the significance of the act itself in examining whether it amounts to persecution, the Appeals Chamber in *Blaskic*, as well as in *Kordic and Cerkez*, fails to state outright the role of discriminatory intent in the analysis of gravity.

A proposed clarification, then, would be to consider only the act itself, without any consideration of potential or alleged discriminatory intent, and determine whether the act is of equal gravity as the enumerated crimes in Article 5. If the act, standing alone, reaches the level of rape or murder, for example, then the act will constitute persecution when committed with discriminatory intent. Allowing acts to become persecution simply by way of an evil intent behind them is a dangerous precedent and is tantamount to hate crimes statutes, legislation that is not altogether popular in the U.S. This type of analysis would provide the Tribunal with clarity and fairness in determining what acts may constitute persecution.

The second part in the definition of persecution—the mental element—also consists of several parts. In addition to the three intents required for all crimes against humanity, which are the knowledge of an attack, the knowledge that his criminal acts are a part of that attack, and the intent to commit the underlying act, the act must also have been committed with the specific intent to discriminate on political, religious, or racial grounds.²⁴² The Statute conjunctively lists the three grounds: "persecutions on political, racial *and* religious grounds";²⁴³ but nevertheless,

²⁴¹ *Id.* ¶ 141.

²⁴² *Kordic and Cerkez*, Appeals Judgment, ¶ 110 (quoting *Blaskic*, Appeals Judgment, ¶ 164, referring to *Krnjelac*, Appeals Judgment, ¶ 184; *Vasiljevic*, Appeals Judgment, ¶ 113).

²⁴³ See ICTY Statute, *supra* note 20, at art. 5(h) (emphasis added).

the Tribunal rejected the notion that all three bases must be present in order to constitute persecution.²⁴⁴ Only one ground is necessary to establish a finding of persecution.²⁴⁵

The distinct mental element of persecution sets it apart from other crimes. The crime of persecution, when considered amongst the other crimes against humanity, "derives its unique character from the requirement of a specific discriminatory intent."²⁴⁶ For this discriminatory intent, "[i]t is not sufficient for the accused to be aware that he is in fact acting in a way that is discriminatory; he must consciously intend to discriminate. While the intent to discriminate need not be the primary intent with respect to the act, it must be a significant one."²⁴⁷ As with crimes against humanity in general, persecution does not require the existence of a plan or policy to discriminate, and if a plan or policy does exist, there is no requirement that the accused be aware that his persecutory act is a part of the larger plan or policy.

One important question is the manner in which the prosecution may establish and the Trial Chamber may find discriminatory intent. Documents and other incriminating direct evidence of the perpetrator's intent are often lacking or difficult to obtain.²⁴⁸ The prosecution has attempted to remedy this by inferring discriminatory intent for the individual act from the general discriminatory nature of a broader attack. Early cases appeared to support this stance,²⁴⁹ but later cases were more equivocal. Although the Appeals Chamber in *Kvočka* stated that discriminatory intent may not be inferred solely from the discriminatory nature of an attack, it also stated that intent "may be inferred from such a context as long as, in view of the facts of the

²⁴⁴ *Tadic*, Trial Judgment, ¶ 713.

²⁴⁵ Interestingly, in *Kvočka* one defendant argued that the discrimination was based on the issue of secession (of Bosnia from Yugoslavia) rather than race or religion, but unsurprisingly, the Appeals Chamber used his own words against him by noting that political grounds are also a basis for persecution. Thus, the issue of secession constitutes a political ground that can form the basis for persecution. *See Kvočka*, Appeals Judgment, ¶ 456.

²⁴⁶ *Krnjelac*, Trial Judgment, ¶ 435.

²⁴⁷ *Id.*

²⁴⁸ *See, e.g., Kordic and Cerkez*, Appeals Judgment, ¶ 715.

²⁴⁹ *See Tadic*, Trial Judgment, ¶ 652.

case, circumstances surrounding the commission of the alleged acts substantiate the existence of such intent."²⁵⁰ Those circumstances include the "systematic nature of the crimes committed against a racial or religious group and the general attitude of the alleged perpetrator as demonstrated by his behaviour."²⁵¹ Inferring discriminatory intent for a specific individual act from the discriminatory nature of a larger attack may result in the correct conclusion for many of the acts committed within that discriminatory context, but not correct for others because "there may be acts committed within the context that were committed either on discriminatory grounds not listed in the Statute, or for purely personal reasons."²⁵² There must be evidence linking a discriminatory intent to the specific act rather than the attack in general, which, as explained above, does not need be discriminatory.²⁵³

Despite its alleged reluctance, on several occasions the Tribunal has inferred discriminatory intent from larger contextual attacks.²⁵⁴ For example, in *Krnojelac* and *Kvocka* the Appeals Chamber found that beatings and detentions, respectively, were perpetrated largely against the non-Serb population, and therefore, it was reasonable to conclude that the individual acts were committed based on discriminatory purposes, involving the requisite discriminatory intent.²⁵⁵ Specifically, in *Kvocka*, the Appeals Chamber affirmed the Trial Chamber's inferred discriminatory intent as a result of the accused's "knowledge of the persecutory nature of the

²⁵⁰ *Kvocka*, Appeals Judgment, ¶ 460 (citing *Krnojelac*, Appeals Judgment, ¶ 184; *Blaskic*, Appeals Judgment, ¶ 164). See also *Kordic & Cerkez*, Appeals Judgment, ¶¶ 110, 715.

²⁵¹ *Id.*

²⁵² *Vasiljevic*, Trial Judgment, ¶ 249. See also *Krnojelac*, Trial Judgment, ¶ 436.

²⁵³ See, e.g., *Krnojelac*, Trial Judgment, ¶ 436. See also *Simic*, Trial Judgment, ¶ 51 ("The discriminatory intent must relate to the specific act or omission underlying the charge of persecution as opposed to the attack in general, notwithstanding the fact that the attack may also in practice have a discriminatory intent.").

²⁵⁴ See, e.g., *Kvocka*, Trial Judgment, ¶ 195 (Trial Chamber first established that the general attack was discriminatory, and therefore concluded that the individual acts comprising the act were discriminatory as well).

²⁵⁵ *Kvocka*, Appeals Judgment, ¶ 366 (citing *Krnojelac*, Appeals Judgment, ¶ 186; *Kordic and Cerkez*, Appeals Judgment, ¶ 950).

crimes, and his knowing participation in the system of persecution pervading Omarska camp."²⁵⁶ In another example, in its legal finding on General Krstic's responsibility for alleged persecutions, the Trial Chamber found him guilty but did not address the specific intent of General Krstic, instead quickly summing in a one-sentence paragraph that "[t]he Trial Chamber has previously determined that a widespread and systematic attack was launched against the Bosnian Muslim population of Srebrenica from 11 July onwards, by reason of their belonging to the Bosnian Muslim group."²⁵⁷ The Trial Chamber then concluded that the crime of persecution had been committed.²⁵⁸ Thus, despite language suggesting that discriminatory intent may not be inferred from the general discriminatory nature of the attack, it appears that a perpetrator's discriminatory intent may be inferred from knowledge of the surrounding events.

Another means through which the Tribunal has found intent is based on the perpetrator's apparent tendencies. In *Kordic and Cerkez*, the Appeals Chamber found the requisite discriminatory intent for persecutions, based on evidence "concerning Kordic's political activities and inclinations, his strongly nationalist and ethnical stance, and his desire to attain the sovereign Croatian state within the territory of Bosnia and Herzegovina at seemingly any cost."²⁵⁹ This suggests that one's general racist, discriminatory attitude towards a certain people is enough to justify finding one's individual acts are discriminatory, essentially discrimination *per se*. This effectively shifts the burden of proof to the defense, having to prove that he committed the act with a non-discriminatory intent. Such a burden-shifting scheme is anathematic to the basic principles of criminal law, whether in the municipal or international arena.

²⁵⁶ *Kvočka*, Appeals Judgment, ¶ 367. See also *Simic*, Trial Judgment, ¶ 51.

²⁵⁷ *Krstic*, Trial Judgment, ¶ 536.

²⁵⁸ *Id.* ¶ 538.

²⁵⁹ *Kordic and Cerkez*, Appeals Judgment, ¶ 722.

Notably, a discriminatory intent should not be confused with a "persecutory intent." The former is the signature element of persecutions as a crime against humanity whereas the latter is not required.²⁶⁰ The Appeals Chamber in *Blaskic* stated that "there is no requirement in law that the actor possess a 'persecutory intent' over and above a discriminatory intent."²⁶¹ In other words, "a showing of a specific persecutory intent behind an alleged persecutory plan or policy, that is, the removal of targeted persons from society or humanity, is not required to establish the *mens rea* of the perpetrator carrying out the underlying physical acts of persecutions."²⁶²

Discriminatory intent should not be confused or conflated with motive. The Appeals Chamber in *Kvočka* distinguished motive from discriminatory intent, agreeing with the Trial Chamber that "crimes against humanity can be committed for *purely* personal reasons,"²⁶³ and that "[p]ersonal motives, such as settling old scores, or seeking personal gain, do not exclude discriminatory intent."²⁶⁴ Motive is only relevant at the sentencing stage for purposes of mitigation or aggravation; it plays no role in the finding of criminal intent.²⁶⁵

Yet despite the court's valid attempt in *Kvočka* to distinguish motive from discriminatory intent, the approach it used seemingly discounted the express language of the Statute that requires the specific intent to discriminate on one of only three grounds: racial, religious, or political. Crimes against humanity in general, because they do not require a discriminatory intent, may be committed for purely personal reasons. Persecution, conversely, requires discriminatory intent, and the court in *Kvočka* should have specified that persecution may not be committed on the basis of purely personal reasons (unless, of course, those personal reasons were

²⁶⁰ *Blaskic*, Appeals Judgment, ¶ 165.

²⁶¹ *Id.* See also *Kordic and Cerkez*, Appeals Judgment, ¶ 111.

²⁶² *Blaskic*, Appeals Judgment, ¶ 165.

²⁶³ *Kvočka*, Appeals Judgment, ¶ 463 (emphasis added).

²⁶⁴ *Id.* (citing *Tadic*, Appeals Judgment, ¶ 269).

²⁶⁵ *Kvočka*, Appeals Judgment, ¶ 463 (citing *Tadic*, Appeals Judgment, ¶¶ 269, 272).

based on discrimination). For example, if a Bosnian Serb killed a Bosnian Muslim on the basis of his ethnicity, say, in the name of a Greater Serbia, persecution certainly has occurred.

However, if the Serb took advantage of the chaos ensuing in a conflict and opportunistically killed the Muslim for purposes of an old debt, the basis for the act was not discriminatory, especially not on the basis of the three grounds. Nonetheless, the *Kvočka* Appeals Chamber attempted to illustrate the interconnectedness of a discriminatory intent and the motive:

Edin Ganic only became a possible object of Zigic's demands because he was detained as a Muslim and could offer no resistance, whereas Zigic was, as a member of the security forces, in a position of authority over him. The discriminatory intent and the personal covetous motive are not mutually exclusive, rather closely interlocked. In fact, the coercive demands for money from the detainees helped to create the atmosphere of insecurity, harassment and humiliation in the camps.²⁶⁶

The situation described above occurred only after a Muslim had been detained on discriminatory grounds, and despite a potentially non-discriminatory personal motive for extorting money, the Appeals Chamber upheld the conviction.

This approach effectively eliminates the specific intent required in persecutions, and lowers the requisite *mens rea* to one of knowledge that the perpetrator's position over the victim (which allows for the personal motive to be acted upon) was based on discriminatory grounds. This suggests that even if the motivation was purely personal, but that the accused was aware of a larger discriminatory attack, he would be considered to have the requisite discriminatory intent, despite his purely personal reasons for committing the specific act. This is further reinforced by the notion that the crime of persecution targets the group rather than the individual, and thus, if one kills another for purposes of a debt or family reprisal, the individual has been targeted rather than the group.²⁶⁷

What if discriminatory intent is only part of the reason for perpetrating the crime?

According to the Trial Chamber in *Krnojelac*, "[w]hile the intent to discriminate need not be the

²⁶⁶ *Kvočka*, Appeals Judgment, ¶ 463 (citing *Kvočka*, Trial Judgment, ¶ 190).

²⁶⁷ See, e.g., *Naletilic*, Trial Judgment, ¶ 636; *Blaskic*, Trial Judgment, ¶ 235.

primary intent with respect to the act, it must be a *significant* one."²⁶⁸ This raises further questions. Does "significant" mean more than 50-50? If the intent to discriminate does not need to be the "primary intent," then other reasons may be the predominant reason, with discriminatory intent only being an additional thought, or perhaps even an after-thought. Taking this language to its natural conclusion, the Tribunal could, according to *Krnojelac*, find persecution when an individual decided to rob an individual for purely financial gain, as long as that individual harbored any discriminatory intent whatsoever. Consider an armed Kosovar Albanian approaching another man on the street at night intending to rob him, unknowing that his intended victim was Serbian. The Kosovar Albanian shouts at the man to give him his money, and the man responds in a distinct Serbian accent. The Kosovar Albanian shouts again, and this time interjects a racial slur. Does this constitute discriminatory intent, and is it "significant" enough to constitute persecution? Because persecution is a unique crime distinct from other crimes against humanity, and other crimes in general, this question should be answered in the negative. In order to amount to persecution, discriminatory intent should be the primary intent; it need not be the only intent, but it should be the primary intent for perpetrating the underlying criminal act.

IV. Justifications for Criminalizing Persecution: Cues from Bias Crimes Legislation in the U.S.

The rich debate in the U.S. on the validity and wisdom of bias crimes legislation sheds light on the nature of persecution and its enforcement. Although bias crimes are popularly referred to as "hate crimes," such characterization is a misnomer and does not properly encompass the scope of these crimes. Depending on the statute, the crux of a bias crime is

²⁶⁸ *Krnojelac*, Trial Judgment, ¶ 435 (emphasis added).

prejudice rather than hate, that is, bias crimes may be committed without hate, and crimes may be committed with hate but are not necessarily a bias crime.²⁶⁹ Some statutes do, however, require ill-will and animus toward the victim.

Like the persecution clause in Article 5(h) of the ICTY Statute, all state and federal bias crimes statutes list categories of classes that may not be discriminated against (e.g., race, color, ethnicity, national origin, and religion).²⁷⁰ Determining what classes to protect against should be considered with the larger social context in mind.²⁷¹ Classes traditionally subjected to discrimination and victim to widespread antipathy are justifiable inclusions.²⁷²

Professor Frederick M. Lawrence separates bias crime statutes into three distinct models: the "discriminatory selection" model, the "racial animus model," and the "because of" or "by reason" formulations.²⁷³ The "discriminatory selection model" defines the crime in terms of the perpetrator's discriminatory and intentional selection of the victim; the prejudice occurs at the selection process. Hate, racial animosity, or any other reason need not play a role in the selection as long as the victim was selected on the basis of that particular characteristic. The "racial animus model" defines crimes in terms of the perpetrator's prejudicial motivation in selecting the victim.²⁷⁴ The perpetrator selected the particular victim on the basis of racial animosity towards

²⁶⁹ FREDERICK M. LAWRENCE, PUNISHING HATE: BIAS CRIMES UNDER AMERICAN LAW 9 (1999). Lawrence notes: "Hate-based violence is a bias crime only when this hatred is connected with antipathy for a racial or ethnic group or for an individual because of his membership in that group." Thus, "the key factor in a bias crime is not the perpetrator's hatred of the victim *per se*, but rather his bias or prejudice toward that victim."

²⁷⁰ *Id.* at 11.

²⁷¹ *Id.* Lawrence explains: "A prejudiced person usually exhibits antipathy toward members of a group based on false stereotypical views of that group. But in order for this to be the kind of prejudice of which we speak here, the antipathy must exist in a social context, that is, it must be an animus that is shared by others in the culture and that is a recognizable social pathology within the culture."

²⁷² *Id.*

²⁷³ *Id.* at 30.

²⁷⁴ *Id.* Lawrence argues that this model would be more appropriately labeled "class animus" because race is not the only class that the model includes. The "racial animus" model applies to instances where the perpetrator harbors ill-will towards the victim based on the relevant set of characteristics, e.g., race, ethnicity, religion, political affiliation.

that victim's class.²⁷⁵ The third model tends to blur the distinction between the first two models, and statutes within this category are not always clear what and how they will punish under their statutes. If applying Lawrence's trichotomy to the ICTY, it could be said that the Tribunal follows the discriminatory model approach.

Opponents of bias crimes statutes have challenged their constitutionality, but the U.S. Supreme Court recently upheld a state law based on the discriminatory selection model.²⁷⁶ The statute at issue in *Wisconsin v. Mitchell* called for a penalty enhancement for crimes committed with animus. On top of the two years for aggravated battery, the defendant would receive five additional years as a result of the enhancement. Wisconsin argued that the reason for selecting the victim, such as racial animosity or ill-will toward the group, was irrelevant. The only relevant factor was whether he selected the victim based on a listed class. The defendant argued that the statute violated the First Amendment by punishing thoughts, which is what the Wisconsin Supreme Court had previously held.²⁷⁷ The U.S. Supreme Court disagreed and ultimately upheld the law, finding that the penalty enhancement was aimed at conduct not protected by the First Amendment, but it is not altogether clear whether the Court wholeheartedly accepted the discriminatory model.²⁷⁸

After establishing the constitutionality of bias crimes legislation, it is interesting to consider who might be liable for such crimes. In the only U.S. case found by this author that involves accomplice liability for a bias crime, the Wisconsin Court of Appeals vacated a bias

²⁷⁵ Legal scholars more widely accept the racial animus model over the discriminatory selection model. *Id.* at 4.

²⁷⁶ *Wisconsin v. Mitchell*, 508 U.S. 476 (1993). The statute provided for an enhanced penalty for an offense whenever someone "[i]ntentionally selects the person against whom the crime ...is committed...because of the race, religion, color, disability, sexual orientation, national origin or ancestry of that person...." Wis. Stat. § 939.645(1)(b).

²⁷⁷ *Wisconsin v. Mitchell*, 169 Wis.2d 153, 163; 485 N.W.2d 807, 811 (1992).

²⁷⁸ Lawrence suggests that because the Court did not focus much on the distinction between the racial animus model and the discriminatory selection model, the actual motivation for perpetrating the crime did not appear to play a role in their decision. LAWRENCE, *supra* note 269, at 34.

crime penalty enhancement because the jury had not been properly instructed on that particular theory of party-to-a-crime liability.²⁷⁹ The case involved a group of four Asian men that shouted racial epithets at an African-American man after he exited a convenience store. They attacked the man and continued the racial slur onslaught. Other Asian individuals then converged on the scene and the group grew to over fifteen. The defendant, an Asian male, who was perhaps the ninth individual to arrive, joined in the beating along with the others. Racial slurs continued throughout the attack, including before and after the defendant arrived.

The jury found him liable for the bias crime penalty enhancement, which increased his crime from a misdemeanor to a felony punishable by up to two years' imprisonment. On appeal the defendant argued that the jury instructions improperly allowed the jury to find him liable for the penalty enhancement even absent a finding that he was aware the victim had been selected on discriminatory grounds. The Wisconsin Court of Appeals raised the issue of whether an accomplice may be held liable for a bias crime under the "natural and foreseeable consequences" doctrine where the accomplice was unaware of the discriminatory selection. The state argued that such a finding was possible. Instead of ruling on that issue, though, the court of appeals focused solely on the jury instructions, holding that the instructions allowed the jury to find him liable for his co-perpetrators' discriminatory selection even though he was unaware of it. Because that theory of vicarious liability had not been presented in the jury instructions, the court vacated the enhancement.²⁸⁰ Although the court did not expressly allow or disallow vicarious

²⁷⁹ *State v. Yang*, 265 Wis.2d 937, 664 N.W.2d 683 (Wis. Ct. App. 2003).

²⁸⁰ *Id.* The jury instructions read:

"Was the victim of the crime of battery intentionally selected because of his race by the defendant or by another person who committed the battery?" Before you may answer this question 'yes,' you must be satisfied beyond a reasonable doubt that Jay Jay Anjewel [victim] was intentionally selected in whole or in part because of his race by the defendant or another person who committed the battery. If you are satisfied beyond a reasonable doubt that Jay Jay Anjewel was selected in whole or in part because of his race by the defendant ...or by another person who committed the battery, you should answer the question 'yes' as to that defendant."

liability for bias crimes, this is the only case that has raised the issue. The lack of case law provides an opportunity to examine fully the merits of employing vicarious liability for bias crimes.

When considering whether to hold an accomplice liable for the "natural and probable consequences" of, for example, a robbery, a court assesses the situation objectively. If two armed individuals walk into a liquor store, is the killing of the cashier by one of the assailants a natural and probable consequence of the plan to rob the store? Under traditional accomplice liability theory, the answer is yes. The non-shooting participant in the robbery could have foreseen this result as being a natural and probable consequence of the original crime (armed robbery), and therefore, that individual is held responsible as a direct perpetrator for the additional crime (murder). The foreseeability is objectively measured.

But should we apply this same logic to bias crimes, where a co-perpetrator subjectively harbors discriminatory thoughts? Is it objectively foreseeable that the partner-in-crime would discriminatorily select another in the commission of a crime? To answer this question a court must consider the direct perpetrator subjectively, that is, it must add personality and context to the individual's thoughts, and perhaps his actions. The metamorphosis from an armed robbery to a murder is not difficult for a reasonable person to comprehend; the transition from an armed robbery to murder because of the victim's race is highly abnormal. The latter situation is atypical, and thus, from an objective standpoint, the commission of a bias crime would never be a natural and probable consequence of another crime *unless* the court looks into the mind of the direct perpetrator. This leads back to a subjective standard. Therefore, a defendant would be

According to the court of appeals, this left the jury three choices: first, find the defendant personally selected the victim on the basis of race; second, find that "another person who committed the battery" selected the victim on the basis of race; or third, find that no one had intentionally selected the victim on the basis of race. Under these instructions, the court of appeals concluded that the jury could have imposed the bias crime penalty enhancement liability regardless of the defendant's awareness of any such discriminatory selection.

liable not only for his accomplice's direct acts but also for the reasons his accomplice committed those crimes. A defendant could essentially be held liable for his accomplice's thoughts.

But why are bias crimes, and by comparison the crime of persecution, so bad and why should they be legislated against? Why should they be considered separate from their underlying criminal offense? Bias crimes are often assumed to be worse than other crimes. The murdering of a liquor store owner to get at his cash register receives less public attention than when a group of young white men attack and kill an African-American, or when a neo-Nazi assaults a Jewish man while shouting racial epithets. We generally perceive crimes on the basis of skin color, national origin, or any other immutable characteristic to be morally reprehensible. Those crimes are often considered more serious than the same crime when committed in the absence of prejudicial motivation. Should this be the case?

Proponents defend bias crimes legislation on several grounds. First, the perpetrator's motive makes him more culpable. We regularly equate one's motive with culpability, e.g., many perceive a husband facilitating his terminally-ill wife's voluntary poisoning as being less culpable than the same husband killing his healthy wife for the insurance proceeds.²⁸¹ Second, bias crimes may result in greater physical and psychological impact on the victim. The victim may suffer not only from an increased physical injury, usually due to the violent and group-based nature of bias crimes, but also from severe psychological problems.²⁸² The victim might become more isolated, reserved from society, lose relationships, etc. Third, bias crimes greatly affect the group to whom the victim belonged.²⁸³ A bias crime "attacks the victim not only physically but

²⁸¹ JAMES B. JACOBS & KIMBERLY POTTER, HATE CRIMES: CRIMINAL LAW & IDENTITY POLITICS 80 (1998).

²⁸² Jacobs and Potter do not accept this argument. The authors suggest that empirical data do not show that bias crimes are more physically violent than regular crimes, or that victims of bias crimes are subject to more psychological impact than victims of non-bias crimes. *Id.* at 82-84.

²⁸³ Jacobs and Potter do not agree with this argument either. The authors suggest that many crimes have impacts on others, e.g., brutal rape in a park makes others feel threatened and they change their lifestyle, or a string of abductions that make parents feel threatened. *Id.* at 86-88.

at the very core of his identity. It is an attack from which there is no escape."²⁸⁴ When an African-American man is targeted and attacked by a group of white men, African-Americans in that community may feel threatened and vulnerable and begin to fear all whites, or may alter their lifestyle, such as not shopping, eating, or walking in that neighborhood. African-Americans will feel as though they were attacked personally, because a fellow member of their class was attacked, and the arbitrary nature of the crime suggests that it easily could have been them instead of the unfortunate victim. Additionally, members of that class will feel a reverse collective animosity, in that African-Americans will feel angry towards all whites even though only one or a few individuals perpetrated the heinous crime. Fourth, bias crimes affect society as a whole. Bias crimes "can frighten and humiliate other members of the community" and "reinforce social divisions and hatred."²⁸⁵ Individuals will withdraw from community activity, public interaction will decrease, and conflicts may erupt. The Oregon Supreme Court, in upholding a bias crime statute, stated:

[Hate crime] creates a harm to society distinct from and greater than the harm caused by the assault alone. Such crimes—because they are directed not only toward the victim but, in essence, toward an entire group of which the victim is perceived to be a member—invite imitation, retaliation, and insecurity on the part of persons in the group to which the victim was perceived by the assailants to belong.²⁸⁶

Other rationales given for criminalizing bias crimes include moral education and their greater deterrence factor.

Professor Allison Danner advances another (and unique) justification for punishing bias crimes, arguing that bias crimes are legitimately punishable when seen through the prism of crimes against humanity. Rather than advocating the wrongfulness-culpability model of punishment, which focuses on the individual motivations for the act, she focuses on the

²⁸⁴ LAWRENCE, *supra* note 269, at 40.

²⁸⁵ JACOBS & POTTER, *supra* note 281, at 86 (quoting Kent Greenawalt, *Reflections on Justifications for Defining Crimes by the Category of Victim*, ANNUAL SURVEY OF AM. L. 617, 627 (1992/1993)).

²⁸⁶ *State v. Plowman*, 838 P.2d 558 (Ore. 1992).

individual's "choice to act in a particular way within his social context."²⁸⁷ Danner argues that the person who acted discriminatorily, regardless of his motivations, should be punished when he knew how his acts fit within the larger social context and how those acts would affect society as a whole.

All of these reasons, whether successfully argued or not, pertain to justifying the punishment of bias crimes in general. Many of the same reasons are easily applicable to justifying the criminalization of persecution. These reasons do not, however, speak to the punishment of the individual. Justifications for criminal punishment generally fall within two schools of punishment theory: retribution and "consequentialist."²⁸⁸ Retribution theory focuses on making the criminal pay for his crime, essentially the eye-for-an-eye rationale. The "consequentialist" theory of punishment seeks to improve the overall well-being of a society in a utilitarian fashion.²⁸⁹ This theory encompasses four methods in obtaining the maximum utility: general deterrence, specific deterrence, rehabilitation, and incapacitation.²⁹⁰

When taking these theories of punishment into account, we see that holding one liable for another's discriminatory act simply because the direct perpetrator's acts were foreseeable to the other does not bode well with any of these theories. If society condemns discriminatory behavior and requires retribution, then society will improperly hold one responsible for a crime he did not intend. Two methods of the consequentialist theory—rehabilitation and incapacitation—similarly fail. An individual who does not harbor bias (or hate) towards certain groups cannot be rehabilitated—there is no rehabilitation to occur! Incapacitation will not serve any purpose

²⁸⁷ Allison Marston Danner, *Bias Crimes and Crimes Against Humanity: Culpability in Context*, 6 BUFF. CRIM. L. REV. 389, 405-06 (2002).

²⁸⁸ LAWRENCE, *supra* note 269, at 58.

²⁸⁹ *Id.*

²⁹⁰ *Id.*

because it is not likely, based on the unintended discriminatory consequences of his crime, that society will be any safer from discriminatory-based crimes than before incarceration.

The methods of deterrence offer more, although still extremely limited, promise for advocates of vicarious liability for bias crimes and persecution. Aspiring criminals may be dissuaded from engaging in any criminal behavior for fear that their co-perpetrator may commit a crime on discriminatory grounds. Although highly unlikely, these individuals might stay at home altogether. The same holds true for specific deterrence. If someone is punished for the bias crime or persecution by another, that person may forego any criminal behavior for fear of future penalty enhancement due to his discrimination-motivated partner-in-crime. Both specific and general deterrence, however, have very limited utility with respect to punishing an individual for the thoughts of another.

V. The Convergence of Joint Criminal Enterprise Liability and Specific Intent Crimes

The crimes of persecution (as a crime against humanity) and genocide are two specific intent crimes that have figured prominently in the development of the ICTY. Because the Tribunal has considered the crimes to come from the same *genus*, in that the crux of both crimes is the intent to target certain persons based on their belonging to a particular group,²⁹¹ both crimes are examined here. In fact, "from the viewpoint of *mens rea*, genocide is an extreme and more inhuman form of persecution."²⁹²

As discussed above, the crime of persecution requires a specific discriminatory intent, based on political, racial, or religious grounds. This *mens rea* is higher than for other crimes

²⁹¹ *Kupreskic*, Trial Judgment, ¶ 636.

²⁹² *Id.*

against humanity, but lower than that required for genocide,²⁹³ which requires the intent to destroy, in whole or in part, an entire ethnic group.²⁹⁴ Also noted above, JCE liability requires the intent to participate in that enterprise. This leads to yet another interesting question: In addition to the intent to participate in a criminal enterprise, does a participant also need to share the specific intent (i.e., discriminatory intent) for specific intent crimes, before liability attaches to such crimes?

The Appeals Chamber in *Kvocka* did not deem it relevant to distinguish between the intents, stating that:

in the context of the case, the intent to contribute to the joint criminal enterprise and discriminatory intent is one and the same thing. The same conclusion must then be reached when determining whether the facts of the case could have led a reasonable trier of fact to conclude that Kvocka shared the discriminatory intent of the perpetrators of the crimes committed in furtherance of the joint criminal enterprise.²⁹⁵

The Appeals Chamber agreed with the Trial Chamber's finding that Kvocka had the intent to contribute to the JCE, and therefore, he necessarily had the intent to discriminate.²⁹⁶ When Kvocka apparently asserted that "the Trial Chamber erred by not systematically analysing the discriminatory nature of the crimes committed in Omarska camp," the Appeals Chamber referred to the finding of the discriminatory intent of the JCE, thus apparently satisfying the requisite *mens rea*.²⁹⁷ According to the *Kvocka* judgment, the prosecution need not establish a discriminatory intent for each single act (if there are multiple acts), as long as it proves that the JCE was discriminatory and that the individual joined the JCE. This leads to yet another question: does the original fundamental purpose of the JCE need to have been discriminatory in nature, or does the JCE simply need to have committed acts discriminatorily?

²⁹³ *Id.* The Trial Chamber noted that genocide and persecution belong to the same genus.

²⁹⁴ See ICTY Statute, *supra* note 20, at art. 4.

²⁹⁵ *Kvocka*, Appeals Judgment, ¶ 347.

²⁹⁶ *Id.*

²⁹⁷ *Id.* ¶ 346.

The Appeals Chamber in *Kvocka* addressed the issue of whether a participant in a JCE needs to share the discriminatory intent for special intent crimes, and affirmed the Trial

Chamber's holding:

Where the crime requires special intent ... the accused must also satisfy the additional requirements imposed by the crime, such as the intent to discriminate on political, racial, or religious grounds if he is a co-perpetrator. However, if he is an aider or abettor, he need only have knowledge of the perpetrator's shared intent. This shared knowledge too can be inferred from the circumstances. If the criminal enterprise entails random killing for financial profit, for instance, that would not necessarily demonstrate an intent to discriminate on "political, racial or religious grounds". If the criminal enterprise entails killing members of a particular ethnic group, and members of that ethnic group were of a differing religion, race, or political group than the co-perpetrators, that would demonstrate an intent to discriminate on political, racial, or religious grounds. Thus, a knowing and continued participation in this enterprise could evince an intent to persecute members of the targeted ethnic group.²⁹⁸

Kvocka illustrates the distinction between co-perpetratorship and aiding and abetting. For first- and second-category JCE, participants "must be shown to share the required intent of the principal perpetrators. Thus, for crimes of persecution, the Prosecution must demonstrate that the accused shared the common discriminatory intent of the joint criminal enterprise."²⁹⁹ But "[i]f the accused does not share the discriminatory intent, then he may still be liable as an aider and abettor if he knowingly makes a substantial contribution to the crime."³⁰⁰

With respect to third-category JCE, the prosecution must show two distinct intents, each from a different person. First, the direct perpetrator of the crime must have possessed the specific discriminatory intent, and second, the accused must have been "aware" that the crime was a natural and foreseeable consequence of the agreed-upon JCE.³⁰¹ The meaning of foreseeability—i.e., whether it connotes a mere "possibility" of the crime occurring or whether "certainty" is required³⁰²—has been resolved by the Trial Chamber in *Krstic*, stating that the

²⁹⁸ *Id.* ¶ 109 (quoting *Kvocka*, Trial Judgment, ¶ 288).

²⁹⁹ *Kvocka*, Appeals Judgment, ¶ 110 (citing *Krnojelac*, Appeals Judgment, ¶ 111).

³⁰⁰ *Kvocka*, Appeals Judgment, ¶ 110.

³⁰¹ See E. Katselli, *supra* note 121.

³⁰² *Id.*

prosecution only needs to prove that "the accused was aware that the further crime was a *possible* consequence" of the agreed-upon JCE.³⁰³

A. The Relationship Between Joint Criminal Enterprise and Genocide

International criminal lawyers and human rights activists, along with public, generally perceive genocide to be the most shocking of all crimes. The term alone evokes images of unspeakable acts and mass graves from Bosnia, Rwanda, and Sudan. Because of its powerful connotation, States even reserve the word for very limited cases, fearing that the mere mention of genocide will force them to take positive action.³⁰⁴ With such a level of seriousness, both through the prism of law and in the eyes of the public, is genocide compatible with JCE liability?

In *Stakic* the prosecution sought conviction of genocide on the basis of the third-category JCE. The Trial Chamber expressly rejected this basis of liability as being proper for genocide, stating that "the concept of genocide as a natural and foreseeable consequence of an enterprise not aiming specifically at genocide does not suffice."³⁰⁵ The Trial Chamber further expounded:

Conflating the third variant of joint criminal enterprise and the crime of genocide would result in the *dolus specialis* being so watered down that it is extinguished. Thus, the Trial Chamber finds that in order to "commit" genocide, the elements of that crime, including the *dolus specialis* must be met. The notions of "escalation" to genocide, or genocide as a "natural and foreseeable consequence" of an enterprise not aimed specifically at genocide are not compatible with the definition of genocide under Article 4(3)(a).³⁰⁶

The Trial Chamber subsequently acquitted *Stakic* of genocide under third-category JCE.³⁰⁷

The Trial Chamber in *Brdjanin* reasoned similarly but the Appeals Chamber overruled that decision, holding that an accused may be held liable for *any* crime that is beyond the agreed-

³⁰³ *Krstic*, Trial Judgment, ¶ 613.

³⁰⁴ The political debates in the U.S. in 1994 and in 2004 surrounding the events in, respectively, Rwanda and Sudan illustrate that governments are reluctant to use the word "genocide" for fear that they will be legally bound to take action.

³⁰⁵ *Stakic*, Trial Judgment, ¶ 558 (emphasis added).

³⁰⁶ *Id.* ¶ 530.

³⁰⁷ *Id.* ¶ 559. *Stakic* was also acquitted of genocide under Article 7(3) liability because the Trial Chamber did not find any of his subordinates had the requisite *dolus specialis*.

upon JCE, including those with a specific intent requirement, provided that the relevant standard is met.³⁰⁸ The accused must have entered into a JCE to commit a specific crime and knew that the commission of the agreed-upon crime made it reasonably foreseeable to him that a separate crime would be committed by other members of the JCE. Genocide is treated the same as crimes with no specific intent requirement; the prosecution simply needs to establish that "it was reasonably foreseeable to the accused that an act specified in Article 4(2) would be committed and that it would be committed with genocidal intent."³⁰⁹

Strikingly, the Appeals Chamber acknowledged that third-category JCE is a "lower *mens rea* standard" than the other two categories.³¹⁰ The Appeals Chamber's characterization of third-category JCE liability simply requires the prosecution to "prove only awareness on the part of the accused that genocide was a foreseeable consequence of the commission of a separate agreed-upon crime. This awareness of the likelihood of genocide being committed is not as strict a *mens rea* requirement as the specific intent required to establish the crime of genocide."³¹¹ The Appeals Chamber's adherence to mere "awareness," and its own admission that this particular *mens rea* does not amount to the "specific intent" for genocide, is difficult to defend. Genocide will always subsume many individual acts; genocide, by definition, comprises hundreds or perhaps thousands of individual crimes: rape, murder, expulsion. Each of those instances generally falls within one of the other crimes enumerated in the ICTY Statute, most likely under crimes against humanity or violations of the laws and customs of war. Whenever an individual commits an individual act within a JCE, under the *Brdjanin* reasoning he may be found guilty of

³⁰⁸ *Prosecutor v. Brdjanin*, Decision on Interlocutory Appeal, ICTY Appeals Chamber, ¶ 9, Case No. IT-99-36-A (Mar. 19, 2004).

³⁰⁹ *Id.* ¶¶ 5-6.

³¹⁰ *Id.* ¶ 2.

³¹¹ *Id.* ¶ 2.

genocide without intending any such event as long as genocide was a foreseeable consequence of the JCE.

In explaining its decision the Appeals Chamber referred to other forms of criminal liability that do not require specific proof of the intent to commit the actual crime, namely, aiding and abetting, which merely requires "knowledge on the part of the accused and substantial contribution with that knowledge."³¹² The Appeals Chamber further explained that with respect to aiding and abetting persecution:

An accused will be held criminally responsible as an aider and abettor of the crime of persecution where, the accused is aware of the criminal act, and that the criminal act was committed with discriminatory intent on the part of the principal perpetrator, and that with that knowledge the accused made a *substantial contribution* to the commission of that crime by the principal perpetrator.³¹³

This reasoning is flawed. It uses aiding and abetting, which is a less direct means of holding an accused responsible, and thus carrying a lesser sentence, to justify a "lower" *mens rea* for specific intent crimes that go beyond an agreed-upon JCE. As seen from the quote above, aiding and abetting requires a "substantial contribution" before liability attaches, whereas no such requirement is present in the direct forms of commission, including participation in a JCE (which is considered a form of "commission"). Aiding and abetting may have a "lower" *mens rea* but the "substantial contribution" requirement serves as a threshold for attributing responsibility.

The judgments in *Krstic* contribute further confusion. The Trial Chamber convicted Krstic on grounds of JCE liability, holding that genocide was a natural and foreseeable consequence of a JCE to ethnically cleanse Srebrenica. The Appeals Chamber overruled Krstic's guilt of genocide (and persecution³¹⁴) on the basis of being a co-participant in a JCE, stating that:

all that the evidence can establish is that Krstic was aware of the intent to commit genocide on the part of some members of the VRS Main Staff, and with that knowledge, he did nothing to prevent the use of Drina

³¹² *Id.* ¶ 7.

³¹³ *Id.* ¶ 8 (citing *Krnojelac*, Appeals Judgment, ¶ 52).

³¹⁴ *Prosecutor v. Krstic*, Judgment, ICTY Appeals Chamber, ¶ 144, Case No. IT-98-33-A (Apr. 19, 2004).

Corps personnel and resources to facilitate those killings. This knowledge on his part alone cannot support an inference of genocidal intent.³¹⁵

Thus, according to the Appeals Chamber in *Krstic*, awareness of others' intention to commit genocide may not be used as a substitute for the requirement that the perpetrator must possess genocidal intent. The Appeals Chamber continued: "[g]enocide is one of the worst crimes known to humankind, and its gravity is reflected in the stringent requirement of specific intent. Convictions for genocide can be entered only where that intent has been unequivocally established."³¹⁶ There must be actual proof that the perpetrator himself possessed the genocidal intent. Although the Appeals Chamber found Krstic not liable as a co-perpetrator for genocide and persecution, it did find him guilty as an aider and abettor of those crimes.³¹⁷

The Tribunal has contradicted itself on the issue of JCE liability for genocide. The Tribunal shouts loudly about the gross nature of genocide and has even reserved findings of guilt for only those most responsible, yet it has also allowed third-category JCE liability for genocide. This practice is dangerous, not only for purposes of clarity, but also for allowing this means of attributing responsibility for the worst crime on the planet. Attributing mass responsibility only results in a watering down of the crime itself, as a theory and in practice, and also lessens the direct perpetrators' liability by spreading liability amongst those not actually responsible.

³¹⁵ *Id.* ¶ 134.

³¹⁶ *Id.*

³¹⁷ *Id.* ¶ 137. In overruling the theory of JCE liability, the Appeals Chamber explained that "it was reasonable for the Trial Chamber to conclude that, at least from 15 July 1995, Radislav Krstic had knowledge of the genocidal intent of some of the Members of the VRS Main Staff. Radislav Krstic was aware that the Main Staff had insufficient resources of its own to carry out the executions and that, without the use of Drina Corps resources, the Main Staff would not have been able to implement its genocidal plan. Krstic knew that by allowing Drina Corps resources to be used he was making a substantial contribution to the execution of the Bosnian Muslim prisoners. Although the evidence suggests that Radislav Krstic was not a supporter of that plan, as Commander of the Drina Corps he permitted the Main Staff to call upon Drina Corps resources and to employ those resources. The criminal liability of Krstic is therefore more properly expressed as that of an aider and abettor to genocide, and not as that of a perpetrator."

B. The Relationship Between Joint Criminal Enterprise and Persecution

Imagine a small squad of government soldiers that decides to imprison the population of a small village due to recent insurgent activity in the area. The soldiers then destroy all the dwellings as a warning to other villages that may harbor or provide assistance to insurgents. If the common plan of the soldiers was criminal, which the imprisonment of civilians and the indiscriminate destruction of property certainly are, it can be said that they were all part of a JCE. Through first-category JCE liability, all of the soldiers would be responsible for all of the other soldiers' acts of imprisonment and destruction. Each participant intended the same result: the imprisonment of the local civilian population and the destruction of civilian property. Should one of the soldiers commit a crime that was outside the original criminal plan (imprisonment and property destruction), his fellow soldiers would nonetheless be responsible if the commission of that crime was a reasonably foreseeable consequence of the original criminal plan. For example, soldier *A* shoots and kills a civilian during the forced expulsion and imprisonment. The other soldiers, say, *B* and *C*, would be responsible for the civilian's death because it is reasonably foreseeable that one of the soldiers would shoot a civilian due to the tense nature of removing villagers from their homes and shuttling them into detention camps. As discussed above, this is classic third-category JCE liability.

But what if the common criminal plan consisted of a general intent crime and the supposed natural and foreseeable crime was a specific intent crime, such as persecution or genocide? It may be foreseeable that *A* commits an act outside the scope of the common plan, but is it foreseeable that *A* will commit that act with a specific discriminatory intent? Is it foreseeable that *A* will specifically target, and then rape or murder a victim because that person is of a different racial, religious, or political background? Such an analytical process requires the

court to look into the mind of a criminal, determine what he was thinking at the moment of commission, and then decide whether his thinking was foreseeable to a non-perpetrating partner.

Given its staunch advocacy of the doctrine, the prosecution at the ICTY would likely argue that *B* and *C* are still responsible for *A*'s discriminatory act. Even if *B* and *C* attempted to stop *A* from committing some persecutory act, they would still be held responsible if that act was foreseeable. *B* and *C* are thus liable for what goes on in *A*'s head, not merely for what acts he commits. Analytically, it is much easier to attach liability to another's acts if those acts are based wholly on physical perpetration; only one step is required. On the other hand, attributing responsibility for one's thoughts first requires the attribution of the direct perpetrator's acts, and also requires the attribution of the direct perpetrator's thoughts. The extra step required stretches the doctrine thin.

The Tribunal has considered the case of a biased indirect perpetrator and an unbiased direct perpetrator with respect to the crime of persecution. In *Stakic*, the Trial Chamber held that an indirect perpetrator (but who was still considered a co-perpetrator for purposes of JCE liability) may be held liable for the direct perpetrator's persecutory acts if the accused possessed discriminatory intent in relation to the actual attack. Whether the direct perpetrator acted with or without discriminatory intent is irrelevant because "the actor may be used as an innocent instrument or tool only."³¹⁸ Requiring proof of discriminatory intent by both the indirect and direct perpetrators, especially in the context of many acts, "would lead to an unjustifiable protection of superiors and would run counter to the meaning, spirit and purpose of the Statute."³¹⁹ In these instances the Trial Chamber held that "proof of a discriminatory attack against a civilian population is a sufficient basis to infer the discriminatory intent of an accused

³¹⁸ *Stakic*, Trial Judgment, ¶ 741.

³¹⁹ *Id.* ¶ 742.

for the acts carried out as part of the attack in which he participated as a (co-)perpetrator."³²⁰

This tends to run counter to individual criminal responsibility.

What, then, if the direct perpetrator was biased and his co-perpetrator was unbiased, in that he did not agree to or intend for the persecutory act to be committed? Again, holding the co-perpetrator responsible for the direct perpetrator's thoughts—that is, the discriminatory basis for directing the crime toward a specific victim—is a dangerous precedent. Persecution should be reserved for the most culpable individuals who harbor ill-will and hatred towards a group; the individuals who translate that hurtful animosity into action are the worst threats. Society must denounce such activity as the worst of the worst, but it must be careful not to overcast the net of liability. Doing so jeopardizes the principle of individual culpability.

VI. Suggestions for Improvement

The introduction of the JCE doctrine within the last decade and its subsequent increased use, especially over the past few years, has proved to be a valuable tool in the ICTY Prosecutor's arsenal. Individuals have increasingly been charged through their participation in criminal enterprises rather than through other modes of participation. In fact, JCE has supplanted command responsibility as the charge of choice, even in cases where a command structure is present. The doctrine of JCE took several years to catch on, during which time the prosecution pursued command responsibility as the favored means to liability. But soon thereafter the prosecution realized the powerful notion of a JCE and began indicting suspected criminals under both command responsibility and JCE liability.³²¹ The prosecution has since flipped its favorite

³²⁰ *Id.*

³²¹ *See, e.g., Prosecutor v. Milosevic et al.*, Second Amended Indictment for Kosovo, Case No. IT-99-37-PT (Oct. 16, 2001); *Prosecutor v. Milosevic*, Second Amended Indictment for Croatia, Case No. IT-02-54-T (July 28, 2004); *Prosecutor v. Milosevic*, Amended Indictment for Bosnia, Case No. IT-02-54-T (Apr. 21, 2004).

theories of liability, and now often seeks prosecution through participation in a JCE rather than through command responsibility.

In order to continue in a legitimate manner, the ICTY should seek to halt its expansion of the JCE doctrine, especially the third category. Although *stare decisis* does not bind the Tribunal, the jurisprudence of the ICTY most likely prevents it from altering its present standpoint. The birth of the International Criminal Court, however, presents a new opportunity to preclude certain aspects of this expansive doctrine from gaining a foothold again in international criminal law. The doctrine itself is not altogether incompatible with international criminal law, or even with the domestic criminal law of the world's major legal systems, but it must be modified and clarified before supporting its application. There are two ways in particular that would strengthen the doctrine.

A. The Significant Contribution Requirement

JCE liability would be strengthened and would gain legitimacy if it required one's participation to constitute a substantial contribution to the enterprise. The jurisprudence of the ICTY currently acknowledges that the second category of JCE does require a substantial contribution to the criminal enterprise. The first and third categories, however, have no such restriction. This absence poses a serious problem to the issue of causation. Suppose a 13-year old aspiring insurgent, *A*, wishes to topple his current regime. Throughout his young life he has experienced oppression at the hands of his autocratic ruler. In the past few years a budding insurgency has grown into a formidable opposition and it has piqued his interest. The opposition is underground, making joining somewhat difficult. Not to be undeterred, *A* goes to the local café known for radicalism and, through a series of introductions, meets an individual with scant

information on joining the insurgency. *A* then follows the instructions and meets *D*, a local leader responsible for a small neighborhood. *D* has approximately ten fighters under his command. After testing *A*'s dedication to the cause and willingness to fight, *D* orders *A* to monitor police movements from a rooftop and report back to *D* everyday. The question, then, is at what point has *A* become liable for the acts of the insurgency? Is it when he actively searches to join the movement? Is it when he has met with *D* and begun his initiation? Is it when he first takes an order from *D*, or when he first steps onto the rooftop for his first assignment? And what specific acts is he then responsible for? Is he responsible only for the criminal acts resulting from his rooftop information, or for all the acts of *D*'s cohorts? What about the insurgency as a whole: Is *A* responsible for acts committed several hundred miles away, if those acts are undertaken with the purpose of overthrowing the current regime?

Testing the expansive nature of JCE liability highlights problems with its current structure. Theoretically, the doctrine could attribute liability to *A* not only for the acts of *D* and his associates but also for the acts of all insurgents fighting for the same cause. Few proponents of the doctrine have expanded the doctrine to such an extent; however, the lack of current limits does not preclude such expansion. Thus, there are two related factors involved in this scenario: the time at which liability attaches, and the specific acts involved at the moment liability attaches.³²²

Requiring a significant contribution to the enterprise would leave *A* free from liability until at least the point when he took up position on the rooftop. Before then he had not provided any assistance to the enterprise. The analysis would then require whether monitoring police

³²² The nature of the acts when liability first attaches may change over time as the individual becomes more involved in the enterprise. That is, if *A* only knows about a certain operation and only wishes to engage in that operation, *A* will only be responsible for that operation. But if *A* continues to participate in the movement and learns of other operations, *A* will be responsible for those as well if those are part of the overall enterprise.

movements from a rooftop constituted a "significant contribution" to the enterprise, which in turn requires the defining of the JCE. At the outset of the hypothetical, the JCE was characterized as being the overthrowing of the regime. Working with this alleged purpose, standing atop a rooftop may be considered too tenuously connected to activities taking place several hundred miles away, even if those activities are undertaken with the goal of overthrowing the regime. But the rooftop lookout *is* closely related to the acts of *D* and his cronies, and therefore, when the criminal enterprise is narrowly defined, those same acts may be considered "significant" rather than when the criminal enterprise is broadly defined. The significance of the acts should be directly related to the breadth of the purpose of the alleged JCE. In other words, monitoring the rooftop is a significant contribution when the purpose of the JCE was the overtaking of Neighborhood X, but the same act is not a significant contribution when the purpose was the overthrowing of the central government.

B. The Disallowance of Third-Category Joint Criminal Enterprise Liability for Specific Intent Crimes

Another modification to JCE liability that would strengthen the doctrine's legitimacy would be to preclude the application of third-category JCE liability to specific intent crimes. In the U.S., whenever someone commits a heinous crime against another individual based simply on discrimination, whether race, nationality, religion, or sexual orientation, the community, rightfully so, condemns such acts as contrary to humanity. Proponents of bias crimes statutes take to the streets advocating for tougher laws, and legislators debate the merits of such legislation. Few would disagree that violent acts perpetrated against another solely due that person's distinguishing characteristics are morally reprehensible. This is not the issue. The issue is the legislating against thought. The law prohibits certain acts: you may not commit assault

and battery, you may not kill, you may not rape. The law does not, however, prohibit certain thoughts; to do so would be tantamount to an Orwellian legal system. As a result, a neo-Nazi passing by an African-American along the street may wish bad things to the unknowing passerby simply because of the man's skin color; in fact, the neo-Nazi may even wish to perpetrate that evil himself. But absent an overt act, the neo-Nazi has committed no crime—this is a fundament of criminal law. The U.S.' strict adherence to freedom of speech has provided outlets to such thoughts, unlike countries such as Germany, which have dramatically different historical reasons for prohibiting certain hateful speech.

What, then, might occur if a white man, with no racist tendencies, became involved with a small group of neo-Nazis, which then conspires to rob a liquor store? The group enters the liquor store, and after muttering racist remarks, one of the neo-Nazis abruptly shoots the African-American store clerk. The confused others quickly pack up the cash and leave the store. Who is liable, and for what?

Under U.S. law, it would be reasonably foreseeable that an armed group entering a store would shoot and kill a store clerk, and thus, all those participating would probably be responsible for the killing even if that was not within the original purpose of the plan to rob. If killing the store clerk was planned, then all would certainly be responsible, including the non-racist, regardless of who actually pulled the trigger. In this case, they all intended to kill the clerk. The crime of murder, therefore, is not a problem for attributing liability. What about the crime of murder with a discriminatory purpose? Such a crime is what is proscribed in the ICTY Statute, under the rubric of persecution as a crime against humanity. Would the non-racist also be responsible for the heightened crime of murder with a discriminatory purpose, that is, the crime of persecution within the language of international criminal law?

The jurisprudence of the ICTY currently leans towards allowing this attribution. The problem with such attribution is the transferring of thought from one individual to another. Not only is the act (i.e., the pulling of the trigger) transferred, but the thoughts in the killer's head are also transferred. Depending on what the killer was thinking at the moment of commission, a separate individual may be liable for both murder and for persecution. If the killer's mind is clear, then the other non-direct perpetrator will be charged with murder. If the killer's mind possessed discriminatory thoughts, the other individual is liable for persecution as well. Specific intent crimes such as persecution overstretch the third category of JCE liability to its breaking point. Attributing responsibility to an individual based on another individual's thoughts is contrary to the fundamentals of individual criminal responsibility. The third category of JCE liability, therefore, should not be used as a vehicle for attributing liability for specific intent crimes.

VII. Conclusion

The crime of persecution in international criminal law is rightfully criminalized. Few other crimes generate such popular condemnation. In fact, unlike the debate in the U.S. over the merits of bias crimes legislation, there is hardly anyone that criticizes the criminalization of persecution. What makes persecution so particularly abhorrent is that it strikes at the diversity inherent in mankind. Murder, rape, and torture are all odious crimes, but committing them simply because the individual is Muslim, Christian, Hutu, Tutsi, Shia or Sunni, heightens the level of brutality. The classification of persecution as a distinct crime has widespread acceptance, but international criminal tribunals should not be quick to open the floodgates of liability. The ICTY is in danger of doing just that.

JCE liability is a new animal in international criminal law. It does have its roots in other doctrines of the past, thus adding to its credibility, but it is far from a one-hundred percent sound and warranted legal principle. Hopefully, the International Criminal Court will work out some of the inconsistencies of the doctrine and clarify other points. The third category of JCE liability especially suffers from flaws, most notably, the application of this extended form of liability to specific intent crimes. Relying on this doctrine does facilitate convictions for serious crimes such as persecution and genocide, but they also "result in discounted convictions that inevitably diminish the didactic significance of the Tribunal's judgments and that compromise its historical legacy."³²³ An oft-cited purpose of international criminal tribunals is the reconciliation they promote. As the opening quote to this article states, "promoting reconciliation and restoring true peace" must be at the forefront of every judgment and every judicial institution. If justice is not seen to be done by those watching their friends, family, and national heroes on trial, then resentment will ensue and credibility for the legal process will wane. Extending liability to another based on the thoughts of the direct perpetrator does not resonate with many peoples' notions of individual responsibility. Without the people's acceptance of their leaders' and brethren's convictions, the future of a post-conflict society remains unstable. Hero-worship of adjudicated criminals does nothing to help the stabilization and reconstruction of fragile societies. The ICTY itself, perhaps the institution most capable and responsible for maintaining the balance between personal liability and justice, said it best:

The expansion of *mens rea* is an easy but dangerous approach. ... Stretching notions of individual *mens rea* too thin may lead to the imposition of criminal liability on individuals for what is actually guilt by association, a result that is at odds with the driving principles behind the creation of this International Tribunal.³²⁴

³²³ Schabas, *supra* note 20, at 1034.

³²⁴ *Kordic and Cerkez*, Trial Judgment, ¶ 219 (reference omitted).

It is hoped that the ICTY heeds its own wise call and reins in the unwarranted expansion of culpability.