# JOINT CRIMINAL ENTERPRISE LIABILITY IN THE IRAQI HIGH TRIBUNAL

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## I. Introduction

In the midst of ongoing violence and international scrutiny, the justices of the Iraqi High Tribunal had to ascertain whether Saddam Hussein and his co-defendants were guilty of crimes under international and Iraqi law. The commission of a crime requires both a guilty mind (*mens rea*) and a guilty action *(actus reus*). As simple as this definition may be, proving that the defendant exhibited both elements can be extremely difficult. In the simplest form, irrefutable evidence would show that the defendant intentionally committed the crime himself. In oppressive, violent and conflict-ridden states like that of the Iraqi Ba'athist government, however, the most powerful and most responsible individuals rarely engage directly in the most atrocious acts. Prosecutors in post-conflict situations therefore face significant challenges in connecting high profile defendants to the crimes of their regime.

To adjudicate responsibility, customary international law has adopted a number of different liability theories. As Part II reviews in detail, direct commission, accomplice liability, and command responsibility have been well grounded in international law since at least the mid-1940s. However, various forms of collective criminality—including conspiracy, organisation and joint criminal enterprise liability—have created controversy and spawned continued challenges to their very existence as legal doctrines since their inception under international law. This Article focuses on this last form of liability, exploring whether the Iraqi High Tribunal applied joint criminal enterprise in the *Al Dujail* trial pursuant to standards set forth in international criminal law.

Since the late 1990s, *ad hoc* international tribunals have expressly applied joint criminal enterprise liability, or "JCE," in cases where the defendants acted pursuant to a common criminal plan.[1] Also known as the common purpose doctrine, JCE is divided into three categories - "basic," "concentration camp," and "extended." While the general *actus reus* requirements are the same for all three categories, the *mens rea* elements are substantially different. The evidence needed to prove participation in, and thus liability for, a joint criminal enterprise is therefore distinct from one category to the next. In examining the use of JCE in the Iraqi High Tribunal's jurisprudence, particular attention is paid to the court's selection of which category to apply and whether the requisite *mens rea* elements were indeed satisfied for that category.

The Iraqi High Tribunal,[2] formerly the Iraqi Special Tribunal,[3] is a domestic Iraqi court created specifically to try the former leaders of the Iraqi Ba'ath regime. This Iraqi court, while technically domestic, can nevertheless be viewed as part of the tradition of international criminal justice beginning after the Second World War. Thus, when interpreting the IHT Statute, it is necessary to contextualise the court through the jurisprudence of the Nuremberg[4] and Tokyo Tribunals,[5] the International Criminal Tribunal for the Former Yugoslavia ("ICTY"),[6] the International Criminal Tribunal for Rwanda ("ICTR"),[7] the Special Court for

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[1] *See*, *e.g.*, Prosecutor v. Brima, et. al., Case No. SCSL-04-16-T, Trial Chamber, ¶ 62 (June 20, 2007); Prosecutor v. Elizaphan and Gérard Ntakirutimana, Case No. ICTR-96-10-A and ICTR-96-17-A, Appeals Judgments, ¶ 461 (Dec. 13, 2004); Prosecutor v. Tadić, Case No. IT-94-1-A, Appellate Judgement, ¶ 185 (July 15, 1999).

[2] Qanoon Al-Mahkamat Al-Jeena'eyyat Al-Eraqiyyat Al-Mukhtas [Statute of the Iraqi High Tribunal], 4006 Al-Waqa'I Al-Iraqiya [Official Gazette of the Republic of Iraq] (Oct. 18, 2005), *translation available at* http://tiny.cc/ksazg [hereinafter IHT Statute]. The court is sometimes referenced in cited literature as the Iraqi Special Tribunal, Iraqi High Criminal Court, Iraqi Supreme Criminal Court or Supreme Iraqi Criminal Court. They are all the same institution. This Article will refer to the court as the Iraqi High Tribunal or IHT.

[3] The Statute of the Iraqi Special Tribunal, Dec. 10, 2003, *translated in* 43 I.L.M. 231 [hereinafter IST Statute].

[4] Agreement for the Prosecution and Punishment of the Major War Criminals of the European Axis, Aug. 8, 1945, 59 Stat. 154, 82 U.N.T.S. 279 [hereinafter IMT Charter].

[5] IHT Statute, *supra* note 2, at art. 17(b) ("In interpreting Articles 11, 12, 13 of this law, the Cassation Court and Panel may resort to the relevant decisions of the international criminal courts.").

[6] Statute of the International Tribunal, U.N. Doc. S/25704 at 36, annex (1993) and S/25704/Add.1 (1993), adopted by Security Council on 25 May 1993, U.N. Doc. S/RES/827 (1993) [hereinafter ICTY Statute].

[7] Statute of the International Tribunal for Rwanda, S.C. Res. 49/955, U.N. Doc. S/Res/955/Annex (Nov. 8, 1994) [hereinafter ICTR Statute].

Sierra Leone ("SCSL")[8] and the International Criminal Court ("ICC"),[9] among others.

In order to understand what liability theories were available to the IHT, and how the court applied them, this Article begins with a historical analysis of criminal responsibility under international law. After distinguishing the five liability theories used in the post-World War II trials - direct commission, accomplice liability, command responsibility, conspiracy and organisation liability - Part II examines how the ICTY Appeals Chamber determined that the JCE doctrine was implied in customary international law. It reviews the impact of *Prosecutor v. Tadić* on other international tribunals and examines how the doctrine has developed over the last decade. This Part argues that, while the foundations of the common purpose doctrine may be somewhat suspect, it is now firmly established in international law. A review of cases before December 2006 indicates that the Iraqi High Tribunal could have availed itself of a significant corpus of international jurisprudence pertaining to JCE. The Part ends with an analysis of the various critiques of JCE and how they colour the use of the doctrine in the international tribunals. Throughout, this Part draws on and reviews the relevant literature pertaining to JCE and other related liability theories.

Whereas Part II examines joint criminal enterprise generally, Part III examines JCE in the Iraqi High Tribunal. It begins with some background on the court, and a discussion of where the IHT fits into the tradition of international criminal justice. Part III then examines some of the broad legal issues confronted by the IHT before moving on to analyse the Tribunal's indictments and judgement in the *Al Dujail* case. Here, the discussion centres on what liability theories were used to charge the defendants and whether those doctrines were adequately pled. Since the primary focus of the analysis is on joint criminal enterprise, other liability theories are discussed only in so far as they intersect with JCE. Much of Part III focuses on the IHT's choice to apply category two, or "concentration camp" JCE. Before a brief examination of the almost equally brief appeal in the *Al Dujail* case, Part III ends by exploring some of the legal implications of the IHT's jurisprudence surrounding joint criminal enterprise liability.

This rather narrowly focused examination of JCE in the Iraqi High Tribunal limits itself to the court's first decision, that pertaining to the so-called *Al Dujail* incident. While the IHT also employed JCE in the sec-

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[8] Agreement Between the United Nations and the Government of Sierra Leone on the Establishment of a Special Court for Sierra Leone, U.N.- Sierra Leone, Jan. 16, 2002, 2178 U.N.T.S. 138 [hereinafter SCSL Statute].

[9] United Nations Diplomatic Conference of Plenipotentiaries on the Establishment of an International Criminal Court, July 17, 1998, *Rome Statute of the International Criminal Court*, U.N. Doc. A/CONF.183/9, *available at* http://tiny.cc/uueb8 [hereinafter ICC Statute].

ond trial - the *Al Anfal* case - the analytical issues pertaining to that opinion are different from those of the present analysis. As no in-depth examination of JCE in the lengthy *Al Anfal* opinion has yet been conducted, that case remains fertile territory for future investigation. With regard to the *Al Dujail* opinion, it should be noted that the United States Department of Justice's English translation is of rather "poor quality."[10] Though the language may be difficult to read in places, the substantive issues of the court's judgement, which are this article's focus, are not affected.

This article concludes with a discussion of why the IHT's jurisprudence is so significant both to international law and to international relations. For a court tasked with helping to restore the rule of law in a country crippled by decades of oppression, violence and war, faithfulness to the law was of utmost importance.[11] Given that the tribunal saw itself as part of the tradition of international criminal justice, beginning with Nuremberg and continuing with the ICTY, ICTR, SCSL and ICC, [12] the court should have exercised extreme caution in ensuring that it remained consistent with the jurisprudence of those tribunals in applying the law. Additionally, the court was no doubt aware of the intense national and international scrutiny that would accompany the trials of Saddam Hussein and the other deposed leaders of the Iraqi Ba'ath regime.[13] This article, therefore, has bearing not only on whether the IHT met its obligations under international law, but whether its jurisprudence can be considered valid and persuasive precedent for confronting one of the most difficult tasks in transitional settings: holding former leaders accountable for their actions.

## II. The Development of Joint Criminal Enterprise Liability

Joint criminal enterprise liability is a relatively new doctrine under international law.[14] Its roots, however, can be found in the jurisprudence

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[10] Nehal Bhuta, *Fatal Errors: The Trial and Appeal Judgments in the Dujail Case*, 6 J. Int'l Crim. Just. 39, 41 n.16 (2008).

[11] *See* M. Cherif Bassiouni, *Post-Conflict Justice In Iraq: An Appraisal of the Iraqi Special Tribunal*, 38 Cornell Int'l L.J. 327, 335-36, 344 (2005); Michael A. Newton, *A Near Term Retrospective on the Al-Dujail Trial & the Death of Saddam Hussein*, 17 Transnat'l L. & Contemp. Probs. 31, 48 (2008).

[12] *See* IHT Statute, *supra* note 2, at art. 17(b).

[13] Franklin Crawford, *Visiting Iraqi Judge who Indicted Saddam Hussein Says Trials Sent Message that 'No One is Above the Law,'* Cornell Chronicle, March 26, 2008, http://www.news.cornell.edu/stories/March08/Iraqi.Judge.Lecture.html.

[14] Beatrice I. Bonafé, *Finding a Proper Role for Command Responsibility*, 5 J. Int'l Crim. Just. 599, 615 (2007) ("[R]ecent case law has developed a new form of 'direct' liability that is ever-increasingly relied upon to deal with international crimes perpetrated by organized groups, and that can considerably facilitate the establishment of the individual criminal responsibility of members of a criminal group."); Allison Marston Danner & Jenny S. Martinez, *Guilty Associations: Joint*

of the various post-World War II trials, primarily the International Military Tribunal at Nuremberg ("IMT").[15] The Nuremberg jurists were the first to confront the challenge of holding political figures accountable for mass atrocities in a trans-national setting.[16] Drawing in large part on Anglo-American common law, the IMT relied on five different liability theories to connect the defendants to the horrors committed under Nazi rule: direct commission, accomplice liability, command responsibility, conspiracy and organisation liability. This Part begins, therefore, by distinguishing these five liability theories. After a cursory review of three of them - direct commission, accomplice liability and command responsibility - the analysis broadens to encompass some of the history by which United States domestic law was injected into the IMT. Examining the use of conspiracy and organisation liability in greater detail helps shed light on why collective criminal action and the means of holding individuals accountable for it remain contentious issues under international law. This analysis sets the stage for a discussion of joint criminal enterprise liability in the ICTY's *Tadić* decision, which is the main focus of this Part. After tracing some of the post-*Tadić* developments surrounding the requisite procedures for applying the doctrine - both in the ICTY and in other international tribunals - this Part ends with an examination of some of the ongoing controversy surrounding JCE.

### A. *Liability Theories in Post-World War II Tribunals*

#### 1. Direct Commission

Fundamental to the rule of law is the notion that anyone who engages in conduct considered illegal at the time of its commission may be held individually responsible for the criminal offence.[17] Many would argue that Nuremberg's most important legacy was establishing individual criminal accountability under international law.[18] Under direct commission, the guilty party is deemed to have personally perpetrated the crime and is

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*Criminal Enterprise, Command Responsibility, and the Development of International Criminal Law*, 93 CAL. L. REV. 75, 103-04 (2005).

[15] Jens Meierhenrich, *Conspiracy in International Law*, 2 AN. REV. LAW. & SOC. SCI. 341, 346 (2006).

[16] *See* KINGSLEY CHIEDU MOGHALU, GLOBAL JUSTICE: THE POLITICS OF WAR CRIMES TRIALS 32-33 (2006).

[17] *See*, *e.g.*, International Covenant on Civil and Political Rights art. 15(1), Dec. 16, 1966, 999 U.N.T.S. 171, *entered into force* Mar. 23, 1976 [hereinafter ICCPR] ("No one shall be held guilty of any criminal offence on account of any act or omission which did not constitute a criminal offence, under national or international law, at the time when it was committed.").

[18] Christopher Burchard, *The Nuremberg Trial and its Impact on Germany*, 4 J. INT'L CRIM. JUST. 800, 801 (2006); Paul L. Hoffman, *Justice Jackson, Nuremberg and Human Rights Litigation*, 68 ALB. L. REV. 1145, 1146 (2005).

therefore fully responsible for it.[19] Article 6 of the IMT Charter sets forth a series of crimes with which the defendants can be charged.[20] If any individual directly commits "Crimes Against Peace," "War Crimes," and "Crimes Against Humanity," he can be held criminally responsible for his actions.[21] The gravity of these crimes, however, helps indicate why "direct commission" is seldom the liability theory used to hold major figures accountable in post-conflict settings. High profile individuals rarely commit the most egregious crimes by themselves.[22] In international law, therefore, other liability theories tend to be more instrumental in connecting political leaders to the crimes of their regimes.

2. Accomplice Liability

Aiding and abetting is a liability theory enumerated in the statutes of all the major international criminal tribunals. [23] The primary variety of accomplice liability, aiding and abetting allows for an individual who assists in the commission of the crime - but does not directly commit it - to be held liable. "[A]iding and abetting in international criminal law requires practical assistance, encouragement, or moral support which has a substantial effect on the perpetration of the crime."[24] This assistance can occur before, during or after the substantive offence.[25] Unlike someone who directly commits a crime, those who aid and abet a crime are considered accomplices to it, not perpetrators.

In post-conflict settings, there are compelling reasons for wanting to consider the former regime leaders to be perpetrators of international crimes and not merely accomplices to them. As Chief Nuremberg Prosecutor Robert Jackson wrote in his report to President Truman on June 6, 1945,

> we do not accept the paradox that legal responsibility should be the least where power is the greatest. We stand on the principle of responsible government declared some three centuries ago to King

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[19] Danner & Martinez, *supra* note 14, at 102.

[20] IMT Charter, *supra* note 4, at art. 6 (enumerating Crimes Against Peace, War Crimes and Crimes Against Humanity).

[21] *Id.*

[22] *See generally*, Carla Del Ponte, *Investigation and Prosecution of Large-Scale Crimes at the International Level: The Experience of the ICTY*, 4 J. INT'L CRIM. JUST. 539 (2006).

[23] *See* IMT Charter, *supra* note 4, at art. 6; ICTY Statute, *supra* note 6, at art. 7(1); ICTR Statute, *supra* note 7, at art. 6(1); SCSL Statute, *supra* note 8, at art. 6(1); ICC Statute, *supra* note 9, at art. 25(3)(c); IHT Statute, *supra* note 2, at art. 15(b)(3).

[24] Doe I v. Unocal Corp., 395 F.3d 932, 950 (9th Cir. 2002) (quoting Prosecutor v. Furundzija, Case No. IT-95- 17/1-T, Trial Judgement, ¶ 235 (Dec. 10, 1998).

[25] Prosecutor v. Kordiæ and Èerkez, Case No. IT-95-14/2-T, Trial Judgment, ¶ 389 (Feb. 26, 2001).

James by Lord Chief Justice Coke, who proclaimed that even a King is still "under God and the law."[26]

Thus, even when aiding and abetting may be applicable in international tribunals, the prosecutor will often try to use a liability theory that produces a more direct link between the accused and the crime. This logic is one of the primary rationales for joint criminal enterprise. As will be discussed in greater detail below, JCE is not a form of accomplice liability, but a derivative of direct commission.[27]

3. Command Responsibility

The doctrine of command responsibility under international law was predominantly established in the 1945 U.S. military trial of a Japanese general.[28] From October 1944 to September 1945, General Tomoyuki Yamashita served as the military governor of the Philippines, as well as commander of all Japanese forces in the area.[29] During this time, his subordinates committed numerous atrocities in the region.[30] After a trial that lasted from October 29 to December 7, 1945, the military commission found General Yamashita individually responsible for his troops' crimes.[31] General Yamashita's counsel appealed the decision to the U.S. Supreme Court, which upheld the ruling 7-2.[32]

Simply put, command responsibility holds superior officials - military or civilian - accountable for their subordinates' crimes.[33] This accountability, however, comes in two varieties: active and passive. [34] The active or direct variant encompasses instances where the commander directly ordered his subordinates to engage in illicit conduct.[35] Passive or indirect command responsibility, on the other hand, occurs when the commander is aware of his subordinates' illegal behaviour, yet does nothing to stop

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[26] Letter from Robert Jackson, Chief of Counsel for the United States, to Harry S. Truman, President of the United States (June 6, 1945), *available at* http://tiny.cc/trumanlib.

[27] Elizabeth J. Rushing et al., *Updates From the International Criminal Courts*, 14 HUM. RTS. BRIEF 55, 56 (2007) ("[A]iding and abetting is a form of accomplice liability, whereas participation in a joint criminal enterprise is a type of direct commission of a crime with other persons.").

[28] Major James D. Levine II, *The Doctrine of Command Responsibility and its Application to Superior Civilian Leadership: Does the International Criminal Court Have the Correct Standard?*, 193 MIL. L. REV. 52, 58-59 (2007).

[29] *Id.* at 58 (citing Transcript of Record at 31-32, United States v. Tomoyuki Yamashita, (U.S. Military Comm'n 1945)).

[30] Jenny S. Martinez, *Understanding Mens Rea in Command Responsibility: From Yamashita to Blaskic and Beyond*, 5 J. INT'L CRIM. JUST. 638, 648 (2007).

[31] Danner & Martinez, *supra* note 14, at 123.

[32] Yamashita v. Styer, 327 U.S. 1 (1946).

[33] Danner & Martinez, *supra* note 14, at 120.

[34] *Id.*

[35] *Id.*

it.[36] Command responsibility is a form of perpetrator liability, not accomplice liability. [37] "It is important to realize that, under command responsibility, the commander is convicted of the actual crime committed by his subordinate and not of some lesser form of liability, such as dereliction of duty."[38] Consequently, it is a popular doctrine in post-conflict settings. The difficulty is, however, that the prosecutor must prove either that the subordinates were acting under orders, or that the superior official actually knew about his subordinates' crimes.[39] In many cases, therefore, command responsibility is not applicable, either because the superior-subordinate relationship did not exist, or because the requisite *mens rea* cannot be proven.

Having now distinguished the other major forms of liability in post-World War II jurisprudence, this review of liability theories engages in a relatively in-depth analysis of conspiracy and organisation liability in the Nuremberg jurisprudence. The three liability theories discussed above - direct commission, accomplice liability and command responsibility - remain viable in international law. Collective criminal liability, on the other hand, has been contentious from the outset.

### 4. Collective Criminal Liability

Lieutenant Colonel Murray C. Bernays of the United States Army Judge Advocate General's Corps planted the seeds of joint criminal enterprise liability in a 1944 memorandum to the U.S. War Department.[40] In the memo, Bernays, a New York attorney, outlined a plan for how to confront the challenges of holding Germans legally accountable for pre-war crimes and of developing a system to handle the overwhelmingly large numbers of individuals implicated in crimes on account of their membership in the SS and other Nazi organisations.[41] Bernays' respective solutions to these problems ultimately helped infuse notions of collective criminal liability into international criminal justice. Both solutions were controversial at the time, and remain so to this day.

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[36] *Id*.

[37] *Id*. at 121.

[38] *Id*.

[39] *Id.* For a general discussion of the development of command responsibility and the controversies surrounding its application, see Danner & Martinez, *supra* note 14.

[40] Murray C. Bernays, *Trial of European War Criminals*, *in* THE AMERICAN ROAD TO NUREMBERG: THE DOCUMENTARY RECORD 1944–1945, at 33-37 (Bradley F. Smith, ed., 1982).

[41] TELFORD TAYLOR, THE ANATOMY OF THE NUREMBERG TRIALS: A PERSONAL MEMOIR 35-36 (1992).

a. *Conspiracy*

In order to hold Germans liable for pre-war crimes, Bernays resorted to the United States domestic law of criminal conspiracy.[42] According to the Model Penal Code, which provides general guidance as to the criminal laws of the United States, a conspiracy occurs when two or more individuals agree to engage in criminal conduct or agree to aid in the planning or commission of a crime.[43] This definition, however, has two different applications. Conspiracy is both a theory of liability and a substantive offence.[44] In other words, criminal conspiracy under U.S. law can be used to hold someone responsible for a crime, and at the same time be a crime itself. If three men agree among themselves to kill someone, even if one of them does not participate directly in the killing, he may be held fully liable both for the murder and for the conspiracy to commit murder.

By showing that the Germans colluded to engage in the crimes of the Holocaust and Second World War, the Allied jurists would be able to pin liability on the Germans for their pre-war actions as well as their conduct during the war.[45] While potentially effective, this doctrine met with a good deal of opposition, especially from the French and Soviets.[46] As Telford Taylor, one of the primary architects of the IMT, writes, "The Anglo-American concept of conspiracy was not part of European legal systems and arguably not an element of the internationally recognized laws of war."[47] As will be discussed at greater length below, the use of conspiracy in international law remains a contentious issue. Nevertheless, conspiracy seemed to be the best option.

U.S. Secretary of War and fellow New York attorney Henry Stimson was convinced by Bernays' arguments. As part of his job was to develop a plan for the creation of a war crimes tribunal, Stimson presented the conspiracy proposal to U.S. President Franklin Roosevelt. As Stimson wrote in his diary, Roosevelt

> gave his very frank approval when I said that conspiracy with . . . representatives of all classes of actors brought in from top to bottom, would be the best way to try it and would give us a record and also a

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[42] Jacob A. Ramer, *Hate by Association: Joint Criminal Enterprise Liability for Persecution*, 7 CHI.-KENT J. INT'L & COMP. L. 31, 40 (2007).

[43] Model Penal Code § 5.03(1) (1985).

[44] Pinkerton v. United States, 328 U.S. 640, 643 (1946).

[45] TAYLOR, *supra* note 41, at 35-36.

[46] Danner & Martinez, *supra* note 14, at 115 ("Conspiracy was controversial at Nuremberg, both because of the absence of this crime in continental criminal systems and because of the perceived malleability of conspiracy to aggressive prosecutorial strategies."); STANISLAW POMORSKI, CONSPIRACY AND CRIMINAL ORGANIZATIONS, IN THE NUREMBERG TRIAL AND INTERNATIONAL LAW, 218-19 (George Ginsburg & V.N. Kudriavtsev eds., Martinus Nijhoff Publishers 1990).

[47] TAYLOR, *supra* note 41, at 36.

> trial which would certainly persuade any onlooker of the evil of the Nazi system.[48]

After Roosevelt's death, President Harry Truman inherited this plan. He then imparted it to Justice Robert Jackson of the U.S. Supreme Court, his appointee as Representative of the United States and Chief Counsel "in preparing and prosecuting charges of atrocities and war crimes against such of the leaders of the European Axis powers . . . as the United States may agree with any of the United Nations to bring to trial before an international military tribunal."[49]

The result of Bernays' arguments concerning conspiracy can be found in article 6 of the IMT Charter. Arguably the most important provision of the IMT Charter, this article specifies the primary crimes for which the defendants may be held liable.[50] Furthermore, it specifies the theories of liability by which the defendants may be connected to those crimes.[51] "Conspiracy" is invoked twice in this article, once as a freestanding crime and once as a liability theory.[52]

In the subsection on Crimes Against Peace, the Charter criminalises "planning, preparation, initiation or waging of a war of aggression, or a war in violation of international treaties, agreements or assurances, or participation in a common plan or conspiracy for the accomplishment of any of the foregoing."[53] As used in this section, conspiracy is a substantive offence. Just as waging a war of aggression is deemed a crime against peace, so too is conspiring to wage aggressive war. Neither of the other two subsections - War Crimes and Crimes Against Humanity - mentions conspiracy directly, making this subsection the only one in which conspiracy is enumerated as an independent offence and not a form of liability.

Article 6 concludes with the provision: "[l]eaders, organisers, 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."[54] Unlike in the subsection on Crimes Against Peace, conspiracy here - along with "common plan" - is being used as a liability theory, not a crime.[55] Whereas conspiring to wage an otherwise illegal war is an independent offence, conspiring to commit crimes against humanity or war crimes will only make the conspiring party responsible for the substantive crime against humanity or war crime.

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[48] *Id.* at 37 (quoting Stimson's diary).

[49] *Id.* at 39 (quoting Truman's Executive Order wherein he appoints Robert H. Jackson Representative of the United States and Chief of Counsel).

[50] IMT Charter, *supra* note 4, at art. 6.

[51] *Id.*

[52] *Id.*

[53] *Id*. at art. 6(a).

[54] *Id*. at art. 6.

[55] POMORSKI, *supra* note 46, at 223-24.

b. *Organisation Liability*

Bernays' solution to the other problem - that of how to handle the huge volume of individuals implicated in criminal behaviour by virtue of their membership in the various Nazi organisations - was perhaps even more controversial than his suggestion that U.S. conspiracy law be applied internationally.[56] As the IMT itself explained, "A criminal organisation is analogous to a criminal conspiracy in that the essence of both is cooperation for criminal purposes."[57] Instead of prosecuting each of the individuals separately, Bernays proposed that the war crimes tribunal indict the organisations themselves. [58] Individual criminal responsibility, therefore, would be predicated on association with a criminal organisation.

Bernays' recommendation regarding the criminalisation of organisations is encompassed in articles 9 to 11 of the IMT Charter. Article 9 empowers the tribunal to classify any group to which a defendant belonged as a "criminal organisation."[59] Membership in such organisation thereby becomes a criminal offence in and of itself.[60] Once an organisation has been deemed criminal by the tribunal, the national courts of the signatory nations are authorised by article 10 to indict individuals for being members.[61] If an individual is convicted of membership in a criminal organisation, article 11 also allows national courts to try those individuals for additional crimes and impose penalties above and beyond those imposed by the IMT. [62]

While seven organisations were indicted by the IMT, only four were convicted.[63] The SS, SD, Gestapo and Nazi Party Leadership were all deemed "criminal organisations."[64] But the use of this liability theory ended there.

> 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 criminal purpose. This burden-shifting resulted in the lack of widespread summary trials for membership in criminal

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[56] Allan A. Ryan, *Nuremberg's Contributions to International Law*, 30 B.C. INT'L & COMP. L. REV. 55, 62 (2007).

[57] 1 Trial of the Major War Criminals Before the International Military Tribunal 256 (1946).

[58] Ramer, *supra* note 42, at 40.

[59] IMT Charter, *supra* note 4, at art. 9.

[60] Meierhenrich, *supra* note 15, at 346.

[61] IMT Charter, *supra* note 4, at art. 10.

[62] *Id*. at art. 11.

[63] Ramer, *supra* note 42, at 43-45.

[64] *Id.* at 44.

> organizations. The mass justice envisioned by Bernays was largely replaced with an administration de-Nazification program.[65]

The practicalities of organisation liability, therefore, were never tested with regard to individual criminal responsibility.

The post-World War II developments regarding individual liability for collective criminal activity helped provide the ICTY with a basis for alleging the existence of a customary international law theory of liability determined by one's participation in a joint criminal enterprise.[66] The next section reviews the development of the international criminal justice system since Nuremberg. This historical discussion lays the groundwork for a review of *Tadić* and the birth of joint criminal enterprise. Further, it allows for the Iraqi High Tribunal in Part III to be contextualised in the field of international criminal law.

### B. *The Birth and Development of Joint Criminal Enterprise*

After the conclusion of the post-World War II trials, no international criminal tribunals were established for almost half a century.[67] And while they were not in international tribunals, the 1962 trial of Adolf Eichmann in Israel and the 1987 trial of Klaus Barbie in France were the only major high profile post-conflict trials between the late 1940s and the early 1990s. Neither trial furthered the definitions of liability theories under international law. Since Eichmann admitted to his actions, the Israeli courts did not need to employ any complex liability theories to convict him under Israeli law.[68] Barbie, on account of the forty-year gap between his crimes and the trial, was only charged with crimes against humanity in the form of deportation of Jews.[69] The French court, as the Israeli court had done with Eichmann, held him accountable for the direct commission of these

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[65] *Id.* at 44-45 (internal citations omitted).

[66] *Id*. at 46.

[67] Ruti Teitel, *Transitional Justice: Postwar Legacies*, 27 CARDOZO L. REV. 1615-16 (2006).

[68] *See generally*, EICHMANN INTERROGATED: TRANSCRIPTS FROM THE ARCHIVES OF THE ISRAELI POLICE (Jochen von Lang & Claus Sibyll eds., Ralph Manheim trans., Lester & Orpen Dennys Publishers 1983); HANNAH ARENDT, EICHMANN IN JERUSALEM: A REPORT ON THE BANALITY OF EVIL (Penguin Books 1964); Matthew Lippman, *Genocide: The Trial of Adolf Eichmann and the Quest for Global Justice*, 8 BUFF. HUM. RTS. L. REV. 45 (2002). Eichmann famously quipped: "I have the most profound conviction that I am being made to pay here for the glass that others have broken." Mark Osiel, *The Banality of Good: Aligning Incentives Against Mass Atrocities*, 105 COLUM. L. REV. 1751, 1764 (2005) (quoting from ENRIQUE GIMBERNAT ORDEIG, AUTOR Y CÓMPLICE EN DERECHO PENAL [PERPETRATOR AND ACCOMPLICE IN CRIMINAL LAW] 187 (Colum. L. Rev. trans., 1996)).

[69] Jonathan Yovel, *How Can A Crime Be Against Humanity? Philosophical Doubts Concerning a Useful Concept*, 11 UCLA J. INT'L L. & FOREIGN AFF. 39, 42-44 (2006).

crimes, again avoiding the need for complex liability theories.[70] Despite its august beginnings, the field of post-conflict justice found no room for growth amid the tensions of the Cold War.[71] Its rebirth came in 1993 when the United Nations Security Council interpreted its authority under the UN Charter to allow it to create the International Criminal Tribunal for the Former Yugoslavia, based at The Hague in the Netherlands.

Dusko Tadić was the first defendant tried before an international tribunal since post-World War II courts ceased operating.[72] Among other things, Tadić was accused of participating with others in perpetrating various crimes - including beatings, sexual assault and rape, killings, and other cruelties - against Bosnian Muslims.[73] He was indicted by the ICTY in 1995, found guilty in May 1997, and sentenced to twenty years in prison.[74] It was in Tadić's case before the Appeals Chamber that the doctrine of joint criminal enterprise was first articulated as such.

1. Article 7 of the ICTY Statute

Individual criminal liability under the ICTY Statute is predicated on article 7(1), which reads: "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."[75] Articles 2 to 5 specify "Grave breaches of the Geneva Conventions of 1949,"[76] "Violations of the laws or customs of war,"[77] "Genocide,"[78] and "Crimes against humanity."[79] The liability theories employed by the ICTY overlap with those used in the post-World War II tribunals, but are distinguishable in some important regards. Article 7(1) expressly provides for both direct

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[70] Leila Sadat Wexler, *The Interpretation of the Nuremberg Principles by the French Court of Cassation: From Touvier to Barbie and Back Again*, 32 COLUM. J. TRANSNAT'L L. 289, 361 (1994). Indeed, some commentators argue that the French Court misunderstood the provision of IMT Charter Article 6, and thus glossed over criminal liability inappropriately. The Court de Cassation held that direct commission of crimes against humanity required "that the defendant must intend to further a 'common plan' of a state practicing a hegemonic political ideology." *Id.* This confusion, Wexler suggests, was born of the absence of conspiracy-based liability in French law.

[71] Ruti Teitel, *The Law and Politics of Contemporary Transitional Justice*, 38 CORNELL INT'L L.J. 837, 839 (2005).

[72] Ramer, *supra* note 42, at 50.

[73] Prosecutor v. Tadić, Case No. IT-94-1-T, Trial Judgement, ¶ 9 (May 7, 1997).

[74] Prosecutor v. Tadić, Case No. IT-94-1-T, Sentencing Judgement, ¶ 74 (July 14, 1997).

[75] ICTY Statute, *supra* note 6, at art. 7(1).

[76] *Id.* at art. 2.

[77] *Id.* at art. 3.

[78] *Id.* at art. 4.

[79] *Id.* at art. 5.

commission ("committed") and accomplice liability ("aiding and abetting").[80] Additionally, command responsibility, implicated by "instigated" and "ordered" in article 7(1), is also expressly defined in a separate section, article 7(3).[81]

Neither conspiracy liability nor organisation liability, however, is made available to the ICTY prosecutor. The only mention of conspiracy in the ICTY Statute is in article 4(3)(b). [82] Just as conspiracy to wage an illegal war was an independent crime under the Nuremberg Charter, here the ICTY considers "conspiracy to commit genocide" as a distinct substantive crime.[83] Additionally, the words "common plan" do not appear in the Statute.[84]

2. Looking Beyond Article 7

Confronted with the limitations of article 7(1), the jurists of the ICTY were challenged to determine whether Tadić could "be held criminally responsible for the killing of the five men from Jaskici even though there is no evidence that he personally killed any of them."[85] In the process of analyzing the requisite *actus reus* and *mens rea* of the offence, the Appeals Chamber articulated a new standard for individual criminal liability under international law.[86] Finding the text of article 7(1) too restrictive, the judges sought the article's "object and purpose"[87] by turning to the UN Secretary-General's Report on the creation of the Statute.[88] The Report reads: "The Secretary-General believes that *all* persons who *participate* in the planning, preparation or execution of serious violations of international humanitarian law in the former Yugoslavia

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[80] *Id.* at art. 7(1).

[81] Danner & Martinez, *supra* note 14, at 120-21 ("Active command responsibility falls within Article 7(1) of the ICTY Statute and the parallel provisions of the ICTR and ICC Statute . . . .").

[82] ICTY Statute, *supra* note 6, at art. 4(3)(b).

[83] *See id.* art 4.

[84] *See generally* ICTY Statute, *supra* note 6.

[85] Prosecutor v. Tadić, Case No. IT-94-1-A, Appellate Judgement, ¶ 185 (July 15, 1999).

[86] *See*, *e.g.*, Rebecca L. Haffajee, *Prosecuting Crimes of Rape and Sexual Violence at the ICTR: The Application of Joint Criminal Enterprise Theory*, 29 HARV. J. L. & GENDER 201, 212 (2006) (noting that JCE was "a relatively new individual responsibility theory in international criminal law"); Nicola Piacente, *Importance of the Joint Criminal Enterprise Doctrine for the ICTY Prosecutorial Policy*, 2 J. INT'L CRIM. JUST. 446, 450 (2004); Steven Powles, Note, *Joint Criminal Enterprise: Criminal Liability by Prosecutorial Ingenuity and Judicial Creativity?* 2 J. INT'L CRIM. JUST. 606, 606 (2004) ("Thus, it fell to the Judges of the ICTY, through both Trial Chamber and Appeals Chamber decisions, to identify, articulate and define this 'new' basis of criminal liability.").

[87] *Tadić*, Case No. IT-94-1-A ¶ 191.

[88] *Id.* at ¶¶ 190-91.

are individually responsible for such violations."[89] This language is broader than that of the Statute. Under article 7(1), a person who plans a crime or aids or abets the planning of a crime can be held accountable.[90] Under the Secretary-General's Report, mere participation in the planning is sufficient for individual responsibility.[91] The distinction therefore falls on the requisite level of participation.

Upholding the object and purpose of the ICTY Statute over its text, the Appeals Chamber found that it was not confined by the liability theories specified in article 7(1) saying,

> [the ICTY Statute] does not exclude those modes of participating in the commission of crimes which occur where several persons having a common purpose embark on criminal activity that is then carried out either jointly or by some members of this plurality of persons. Whoever contributes to the commission of crimes by the group of persons or some members of the group, in execution of a common criminal purpose, may be held to be criminally liable . . . .[92]

This passage provides a succinct, albeit basic, definition of joint criminal enterprise. Given, however, that the tribunal was outlining a doctrine neither specified in the Statute nor previously articulated in international law, the Appeals Chamber had to explain itself in significant detail.

While the object and purpose of the ICTY Statute was the primary rationale for turning to JCE and not merely adhering to the text of article 7(1), the Appeals Chamber also justified itself in light of the offences with which Tadić had been charged.[93] Noting that most international crimes are committed in "wartime situations," the Appeals Chamber reasoned that their commission was usually the product of "groups of individuals acting in pursuance of a common criminal design."[94] While only a limited number of people actually carry out the crimes, "the participation and contribution of the other members of the group is often vital" to their commission.[95] In rationalising its formulation of JCE - a new form of perpetrator liability - the Appeals Chamber concluded "that the moral

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[89] The Secretary-General, *Report of the Secretary-General Pursuant to Paragraph 2 of Security Council Resolution 808 (1993)*, ¶ 54, U.N. Doc. S/25704 (May 3, 1993) (*emphasis added*) (*quoted in Tadić*, Case No. IT-94-1-A ¶ 190) [hereinafter *Secretary General Report*].

[90] ICTY Statute, *supra* note 6, at art. 7(1).

[91] *Secretary General Report*, *supra* note 89, at ¶ 54.

[92] *Tadić*, Case No. IT-94-1-A ¶ 190.

[93] *Id*. ¶ 191.

[94] *Id*.

[95] *Id*.; Danner & Martinez, *supra* note 14, at 98 ("Joint criminal enterprise, in theory, allows for all crimes committed against a particular group within an entire region over a period of years to be attributed to a defendant if he was part of a group that intended to perpetrate these crimes . . . .").

gravity of such participation is often no less - or indeed no different - from that of those actually carrying out the acts in question." [96]

The IMT had addressed collective criminality with both conspiracy and criminal organisation liability; the ICTY distanced itself from those two approaches[97] and did not even discuss the IMT jurisprudence.[98]

> The Tribunal's failure even to mention IMT precedents on conspiracy and criminal organizations is at first puzzling, given Nuremberg's revered status as the bedrock of customary international law in this area. In fact, this silence speaks volumes about the ICTY's apparent desire to dissociate itself from widely questioned aspects of those proceedings, even if the IMT's actual verdicts were far more cautious than its Charter or prosecutor's indictments and courtroom arguments.[99]

Section 4 of this Part will examine further some of the controversy surrounding conspiracy, organization liability, and the common purpose doctrine, but a breakdown of the different categories of JCE is first necessary to understand the criticism.

### 3. The Categories of Joint Criminal Enterprise Liability

Using the post-World War II trials as a starting point, the ICTY Appeals Chamber sought to prove the existence of JCE in customary international law, drawing "chiefly on case law and a few instances of international legislation."[100] In its examination of prior cases pertaining to common criminal design, the ICTY Appeals Chamber found three different types of collective criminal behaviour.[101] These three categories each implicate different *mens rea* elements, thereby supplementing the general *actus reus* requirements of JCE.[102] Discerning which one to apply depends on the factual circumstances of the alleged offence.[103] The first category is also known as JCE I or "basic" joint criminal enterprise, and comprises situations in which the defendant shared with others in a criminal intention, and acted "pursuant to a common design."[104] In this first category, the shared criminal intent is the key. There are no specific

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[96] *Tadić*, Case No. IT-94-1-A ¶ 191.

[97] Danner & Martinez, *supra* note 14, at 109 ("[T]he Appeals Chamber has subsequently rejected arguments that joint criminal enterprise amounts either to conspiracy or to organizational liability, both of which were extensively used at the International Military Tribunal at Nuremberg.").

[98] Osiel, *supra* note 68, at 1793.

[99] *Id.*

[100] *Tadić*, Case No. IT-94-1-A, ¶ 194.

[101] Gerhard Werle, *Individual Criminal Responsibility in Article 25 ICC Statute*, 5 J. INT'L CRIM. JUST. 953, 959 (2007).

[102] Ramer, *supra* note 42, at 54.

[103] Bhuta, *supra* note 10, at 45.

[104] *Tadić*, Case No. IT-94-1-A ¶ 196.

requirements regarding the relationship between the members of the criminal collective, other than that they share in the same design. [105] Additionally, their participation in the group can be varied, as long as their actions are directed toward the common criminal end.[106]

The second category, which will be the focus of Part III, is a "variant" on the first and centres on the relationship between the members of the criminal enterprise.[107] Whereas "basic" JCE is fairly straightforward, JCE II is far more nuanced. The ICTY arrived at this category by examining post-World War II cases in which the various tribunals "tried members of military or administrative units who had been involved in a concerted plan of the mistreatment and killings of prisoners."[108] As the Appeals Chamber explains it, JCE II, "concentration camp" or "systemic" joint criminal enterprise "was applied to instances where the offences charged were alleged to have been committed by members of military or administrative units such as those running concentration camps; i.e., by groups of persons acting pursuant to a concerted plan."[109] While the first category required the *mens rea* of shared intent, this second category infers that intent based on the positions of the defendants. "[T]he 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. Again, the accused must have had the specific intent to participate in specific criminal activity."[110]

Category II JCE appears similar to organisation liability at first glance. But unlike organisation liability, JCE II requires an active contribution to a criminal end, not just membership in an organisation that has a criminal purpose.[111] In organisation liability, membership confers guilt; in JCE II, however,

> [t]he accused would be found guilty if he or she were aware of the system of repression and had intended to further the common design to mistreat the inmates. The required *actus reus* was active participa-

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[105] *Id.*

[106] *Id.* (requiring that "(i) the accused must voluntarily participate in one aspect of the common design . . . and (ii) the accused, even if not personally effecting the killing, must nevertheless intend this result.").

[107] *Id*. ¶ 203 ("This category of cases . . . is really a variant of the first category . . . . The accused, when they were found guilty, were regarded as co-perpetrators of the crimes of ill-treatment, because of their objective position of authority within the concentration camp system and because they had the power to look after the inmates and make their life satisfactory but failed to do so.") (internal citations omitted).

[108] Harmen van der Wilt, *Joint Criminal Enterprise: Possibilities and Limitations*, 5 J. INT'L CRIM. JUST. 91, 96 (2007).

[109] *Tadić*, Case No. IT-94-1-A ¶ 202.

[110] Ramer, *supra* note 42, at 58.

[111] *See* van der Wilt, *supra* note 108, at 106 (noting the ICTY's acknowledgement that the second category of JCE requires a substantial contribution to the criminal enterprise.).

> tion in the enforcement of the system of repression. Nonetheless, the accused's actual position of authority within the hierarchy of the concentration camp served the dual purpose of bolstering proof of both the requisite *mens rea* and *actus reus*.[112]

This use of the defendant's official position as an evidentiary tool to prove the various elements does not equate to a tacit criminalisation of the organisation. Membership in an organisation, or even holding an office in one, is not a sufficient basis for determining guilt, because "[u]nder the second category (JCE II) . . . the accused must have personal knowledge of the system of ill-treatment (which may be inferred from the accused's position of authority) as well as the intent to further the system."[113]

The third category, known as JCE III, is often referred to as "extended" joint criminal enterprise. In this category of JCE, individuals who share with others in a joint criminal plan are held liable for the "natural and foreseeable consequence of the effecting of that common purpose."[114] In other words, all conduct incidental to the execution of the criminal plan is attributable to those who share in that plan. The last section of this Part will examine some of the controversy surrounding JCE III, as it is often argued that "extended" joint criminal enterprise is nothing more than conspiracy liability—a doctrine which has been rejected under international law. [115] Having explored these three areas of criminal responsibility as contained in prior cases, the ICTY Appeals Chamber concluded that JCE was firmly established in customary international law.[116] Consequently, it felt justified in interpreting the ICTY Statute to include JCE as a liability theory.[117] To further support this contention, it then turned its attention to recent instances of international legislation.[118]

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[112] *Id.* at 96.

[113] Katrina Gustafson, *The Requirement of An 'Express Agreement' For Joint Criminal Enterprise Liability: A Critique of Brdanin*, 5 J. INT'L CRIM. JUST. 134, 137 (2007).

[114] *Tadić*, Case No. IT-94-1-A ¶ 204.

[115] *See, e.g.*, Jens David Ohlin, *Three Conceptual Problems with the Doctrine of Joint Criminal Enterprise*, 5 J. INT'L CRIM. JUST. 69 (2007).

[116] *Tadić*, Case No. IT-94-1-A ¶ 220.

[117] *Id.* ("In sum, the Appeals Chamber holds the view 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 implicitly, in the Statute of the International Tribunal.").

[118] *Id.* ¶ 221 (continuing argument by appealing to two international treaties).

4. References to Joint Criminal Enterprise in United Nations Documents

Given its attempt to dissociate itself from the Nuremberg Charter and IMT jurisprudence,[119] the ICTY drew on two other international documents in its first articulation of joint criminal enterprise: the International Convention for the Suppression of Terrorist Bombings[120] and the Rome Statute of the International Criminal Court.[121] Neither of the two UN instruments - adopted in December 1997 and July 1998 respectively - were actually in force at the time of the *Tadić* decision.[122] Nevertheless, their language suggested that the concept of joint criminal enterprise liability already existed in international law.[123]

After establishing criminal liability for accomplices to crimes and for those who ordered or instigated crimes, the International Convention for the Suppression of Terrorist Bombings established liability for an individual who

> [i]n any other way contributes to the commission of [one of the enumerated crimes] . . . by a group of persons acting with a common purpose; such contribution shall be intentional and either be made with the aim of furthering the general criminal activity or purpose of the group or be made in the knowledge of the intention of the group to commit the offence or offences concerned.[124]

Though the Appeals Chamber found no guidance concerning this provision in the legislative history of the Convention, it interpreted the broad language as an indication that the UN understood collective criminality centred on shared criminal intent to be an existing theory of liability under international law.[125]

As noted above, the other document to which the ICTY looked for support was the "Rome Statute" which established the ICC.[126] In 1998, the UN General Assembly adopted the Rome Statute, and while only seven countries voted against the creation of the ICC, it is relevant to note that both Iraq and the United States were among them.[127] Since the

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[119] *See* Osiel, *supra* note 68, at 1793.

[120] *Tadić*, Case No. IT-94-1-A ¶221 (referring to the International Convention for the Suppression of Terrorist Bombings art. 2[3], G.A. Res. 52/164, at 4, U.N. GAOR, 52d Sess., 72d plen. mtg., U.N. Doc. A/RES/52/163, Jan. 9, 1998, *entered into force* May 23, 2001.).

[121] *Id.* ¶ 222 (referring to ICC Statute, *supra* note 9).

[122] *Id.* ¶¶ 221-23.

[123] *See id.* ¶¶ 221-25.

[124] International Convention for the Suppression of Terrorist Bombings, *supra* note 120, at art. 2[3].

[125] *Tadić*, Case No. IT-94-1-A ¶¶ 222-26.

[126] *Id.* ¶ 222 (referring to ICC Statute, *supra* note 9).

[127] Talitha Gray, *To Keep You is No Gain, to Kill You is No Loss – Securing Justice Through the International Criminal Court,* 20 ARIZ. J. INT'L & COMP. LAW 645, 651

Iraqi High Tribunal later copied the language of ICC Statute article 25(3)(d), it is worth examining the full text of the provision. [128] It establishes criminal accountability for anyone who:

> (d) In any other way contributes to the commission or attempted commission of such a crime by a group of persons acting with a common purpose. Such contribution shall be intentional and shall either:
>
> (i) Be made with the aim of furthering the criminal activity or criminal purpose of the group, where such activity or purpose involves the commission of a crime within the jurisdiction of the Court; or
>
> (ii) Be made in the knowledge of the intention of the group to commit the crime . . . .[129]

As the next section explores in greater detail, this article of the ICC Statute sets forth the primary elements of joint criminal enterprise liability.[130] Since the Rome Statute was an attempt to articulate both customary international law and *opinio juris*, the ICTY Appeals Chamber felt justified in determining that liability predicated on individuals acting in furtherance of a common criminal purpose was firmly established in international law.[131]

5. The Elements of Joint Criminal Enterprise Liability

After establishing the existence of joint criminal enterprise, the *Tadić* court had to define its parameters. It found that three elements are required in every JCE:

> i. A plurality of persons . . . .
>
> ii. The existence of a common plan, design or purpose which amounts to or involves the commission of a crime provided for in the Statute . . . .
>
> iii. Participation of the accused in the common design involving the perpetration of one of the crimes provided for in the Statute . . . .[132]

These *actus reus* requirements, however, can only be used to establish liability for an underlying substantive offence (e.g. genocide, war crimes, etc.). They do not articulate a freestanding crime.

The *mens rea* required to hold someone liable for a crime on the basis of JCE, however, is category dependent. "With regard to the first cate-

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(2003) ("In 1998, the United States, along with China, Iraq, Libya, Yemen, Qatar, and Israel, were the only seven nations to vote against the Rome Statute.").

[128] *Compare* ICC Statute, *supra* note 9, at art. 25(3)(d) *with* IHT Statute, *supra* note 2, at art. 15(b)(4).

[129] ICC Statute, *supra* note 9, at art. 25(3)(d).

[130] *Id.*

[131] *Tadić*, Case No. IT-94-1-A ¶ 223.

[132] *Id*. ¶ 227.

gory, what is required is the intent to perpetrate a certain crime."[133] In the second category, which will be crucial to the analysis in Part III, "personal knowledge of the system of ill-treatment is required (whether proved by express testimony or a matter of reasonable inference from the accused's position of authority), as well as the intent to further this common concerted system of ill-treatment."[134] The third category requires that the defendant intended "to participate in and further the criminal activity or the criminal purpose of a group and to contribute to the joint criminal enterprise or . . . to the commission of a crime by the group."[135] The main difference between this category and the first two, however, is that "responsibility for a crime other than the one agreed upon in the common plan arises [only when] . . . (i) it was foreseeable that such a crime might be perpetrated by one or other members of the group and (ii) the accused willingly took that risk."[136] Only by clarifying these elements of JCE is it possible to distinguish fully the common purpose doctrine from other liability theories. Though the tribunal conceded that the roots of JCE are found in domestic law traditions of common purpose liability, it could not point to any one nation's domestic law for the definition of JCE.[137]

While similar and historically related to both conspiracy and organisation liability, JCE is different from both of the controversial liability mechanisms employed by the IMT.[138] As Danner and Martinez explain, a conspiracy exists the moment the agreement is made between the parties, even if no other "overt acts" are taken.[139] JCE, on the other hand, requires that the parties act in furtherance of the enterprise.[140] "This participation need not involve commission of a specific crime . . . but may take the form of assistance in, or contribution to, the execution of the common plan or purpose."[141] Given the similarity of this requirement to that of accomplice liability, further distinction is necessary.

Recognising the potential confusion between aiding and abetting and participating in a joint criminal enterprise, the ICTY went into considerable depth distinguishing the two doctrines, arriving at four main points of

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[133] *Id.* ¶ 228.

[134] *Id.*

[135] *Id.*

[136] *Id*.

[137] *Id*. ¶¶ 224-25.

[138] Danner & Martinez, *supra* note 14, at 118 ("It should be noted that, despite the close similarities between JCE and conspiracy (either as it is recognized under international or municipal law), they are distinct. Most notably, JCE never constitutes a substantive crime, while conspiracy may act both as a substantive crime and as a theory of liability.").

[139] *Id*. at 119.

[140] *Id*.

[141] Steven Powles, *Joint Criminal Enterprise: Criminal Liability by Prosecutorial Ingenuity and Judicial Creativity?*, 2 J. INT'L CRIM. JUST. 606, 608 (2004).

divergence.[142] First, "[t]he aider and abettor is always an accessory to a crime perpetrated by another person, the principal," whereas one who participates in a JCE is also a perpetrator.[143] Second, aiding and abetting does not require the existence of a plan, whereas JCE does.[144] Third,

> [t]he aider and abettor carries out acts specifically directed to assist, encourage or lend moral support to the perpetration of a certain specific crime . . . [while] in the case of acting in pursuance of a common purpose or design, it is sufficient for the participant to perform acts that in some way are directed to the furthering of the common plan or purpose.[145]

Finally, "[i]n the case of aiding and abetting, the requisite mental element is knowledge that the acts performed by the aider and abettor assist the commission of a specific crime by the principal."[146] The *mens rea* requirements of JCE - as discussed above - are clearly distinct. It should be noted, however, that joint criminal enterprise liability is not necessarily mutually exclusive with any other liability theory.[147] Thus, for example, one individual may be guilty of crimes both on the basis of command responsibility and JCE.

Returning to the language of article 7(1) of the ICTY Statute, the Statute criminalises "planning" and the "aiding and abetting" of planning,[148] but as the Appeals Chamber clarified, JCE is an altogether different doctrine.[149] As Ambos notes:

> While the Court saw no explicit basis for participation through JCE in article 7(1) of its Statute, it found an implicit basis in the term "committed" since "the commission of crimes . . . might also occur through participation in the realization of a common design or purpose" and article 7(1) "does not exclude those modes of participating."[150]

Therefore, the ICTY would argue that JCE is a variant of the first liability theory employed in the post-World War II tribunals, direct commission. In other words, JCE does not replace conspiracy and organisation liability, but rather redefines the way in which one may commit a crime.

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[142] *Tadić*, Case No. IT-94-1-A ¶ 229.

[143] *Id*.

[144] *Id*.

[145] *Id*.

[146] *Id*.

[147] Danner & Martinez, *supra* note 14, at 120-21 (discussing possibility of concurrent liability theories).

[148] ICTY Statute, *supra* note 6, at art. 7(1).

[149] *Tadić*, Case No. IT-94-1-A ¶¶ 227-29.

[150] Kai Ambos, *Joint Criminal Enterprise and Command Responsibility*, 5 J. INT'L CRIM. JUST. 159, 160 (2007) (quoting *Tadić*, Case No. IT-94-1-A ¶¶ 188, 190.).

6. Joint Criminal Enterprise in the ICTY After *Tadić*

Since the *Tadić* decision, the ICTY has continued to use JCE to indict, try and convict individuals for the crimes specified in its Statute.[151] After *Tadić*, the most significant ICTY case on JCE is probably *Prosecutor v. Kvočka.* The former head of the Omarska Camp - an infamous war prison and concentration camp - Kvočka was charged with numerous offences. His liability was predicated both on command responsibility and on participation in a joint criminal enterprise. In assessing whether the prosecution had met the elements of JCE as established by the Appeals Chamber in *Tadić*, the court in *Kvočka* sought to further clarify the difference between aiding and abetting and JCE. It wrote:

> Where the aider and abettor only knows that his assistance is helping a single person to commit a single crime, he is only liable for aiding and abetting that crime. This is so even if the principal perpetrator is part of a joint criminal enterprise involving the commission of further crimes. Where, however, the accused knows that his assistance is supporting the crimes of a group of persons involved in a joint criminal enterprise and shares that intent, then he may be found criminally responsible for the crimes committed in furtherance of that common purpose as a co-perpetrator.[152]

The *Tadić* decision, combined with this further clarification of the common purpose doctrine, has since provided guidance for other international tribunals.

The other relevant clarification in ICTY jurisprudence regarding JCE has been a consistent holding that in order for the prosecution to avail itself of JCE, it must specifically plead the elements of the doctrine.[153] While the term "committed" in article 7(1) was deemed the textual basis of JCE, the Appeals Chamber has since "stressed that if the Prosecution is relying on the mode of liability of JCE, it is not sufficient for an indictment to charge an accused for 'committing' the crimes in question."[154] Since 2000 - long before the U.S.-led Coalition even entered Iraq - the ICTY has required that JCE be specifically pleaded.[155]

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[151] Werle, *supra* note 101, at 960 ("The Yugoslavia Tribunal's jurisprudence on joint criminal enterprise can be viewed as settled.").

[152] Prosecutor v. Kvočka et al., Case No. IT-98-30/1-A, Appeals Judgment, ¶ 90, (Feb. 28, 2005).

[153] Prosecutor v. Simic, Case No. IT-95-9-A, Appeals Judgment, ¶ 2 (Nov. 28, 2006).

[154] Frédéric P. Bostedt, *The International Criminal Tribunal for the Former Yugoslavia in 2006: New Developments in International Humanitarian and Criminal Law*, 6 CHINESE J. INT'L L. 403, 430 (2007).

[155] *See* Prosecutor v. Aleksovski, Case No. IT-95-14/1-A, Appeals Judgment, ¶¶ 167-71 (Mar. 24, 2000).

Indeed, the ICTY Prosecution changed its approach to indictments after the *Tadić* case.[156] Nicola Piacente, former Advisor to the Office of the Prosecutor, explains the burden on the prosecution with regard to JCE:

> When investigating serious crimes, allegedly committed by military or political high-level perpetrators, it is necessary to prove:
>
> (1) the existence of a plurality of persons;
>
> (2) the existence of a common purpose and/or joint criminal enterprise;
>
> (3) the existence of a common criminal plan within the criminal enterprise;
>
> (4) the participation of the accused in the joint criminal enterprise;
>
> (5) the specific role played by the accused in the enterprise;
>
> (6) the intent of the accused to participate in the criminal enterprise;
>
> (7) the aim of the criminal enterprise;
>
> (8) the inclusion of the crimes committed in the plans of the criminal enterprise.[157]

In *Prosecutor v. Aleksovski*, which was decided shortly after *Tadić*, the ICTY insisted that the prosecution clarify which mode of responsibility it intended to rely upon for each charge.[158] To use JCE, therefore, it would subsequently have to prove the eight elements on Piacente's list. All the other tribunals that have adopted JCE have also adopted this requirement of specific pleading.

### C. *Joint Criminal Enterprise in Other International Tribunals*

#### 1. International Criminal Tribunal for Rwanda

While there is no *stare decisis* in international law, the decisions of an international tribunal provide persuasive precedents for other international cases, especially when those decisions are grounded in customary international law. [159] Once the ICTY Appeals Chamber had determined that JCE was a well-established theory of liability in international law, implicitly available to international tribunals regardless of the actual language of their founding Statutes, the ICTR began to follow the *Tadić* precedent.

As in the ICTY, the common purpose doctrine of JCE is not explicitly contained in the Statute of the ICTR. Similar to that of the ICTY, the liability provision of the ICTR Statute, article 6(1), states: "A person who

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[156] *See* Piacente, *supra* note 86, at 451.

[157] *Id*. at 449.

[158] *See Aleksovski*, Case No. IT-95-14/1-A at ¶¶ 167-71.

[159] Statute of the International Court of Justice arts. 38(1)(d), 59, June 26, 1945, 59 Stat. 1031, 33 U.N.T.S. 993, *available at* http://tiny.cc/hv44o.

planned, instigated, ordered, committed or otherwise aided and abetted in the planning, preparation or execution of a crime referred to in articles 2 to 4 of the present Statute, shall be individually responsible for the crime."[160] The first ICTR case to go to trial, *Prosecutor v. Akayesu*, explored the parameters of the various liability theories expressly available to the tribunal.[161] With regard to the presence of "planning" in the Statute (which also appears in the same form in article 7(1) of the ICTY Statute), the Trial Chamber wrote:

> The first form of liability set forth in article 6 (1) is planning of a crime. Such planning is similar to the notion of complicity in Civil law, or conspiracy under Common law . . . . But the difference is that planning, unlike complicity or plotting, can be an act committed by one person. Planning can thus be defined as implying that one or several persons contemplate designing the commission of a crime at both the preparatory and execution phases.[162]

The court did not, however, go so far as to arrive at the doctrine of joint criminal enterprise liability, as the *Tadić* court did a year later.[163]

While the court in *Akayesu* cites the Trial Chamber opinion in *Tadić* regarding individual criminal responsibility, the ICTY Appeals Chamber had not yet articulated joint criminal enterprise liability when *Akayesu* was decided. When the ICTR decided *Prosecutor v. Rutaganda*, however, it had the benefit of the *Tadić* Appeals Chamber judgement. [164] It nevertheless confined itself to the specified language of the ICTR Statute and concluded that "aiding and abetting alone is sufficient to render the accused criminally liable."[165] As noted above, however, the virtue of JCE over aiding and abetting is that the defendant can be held liable as a perpetrator in the former, but only an accomplice in the latter.[166] Indeed, it was not until 2004 that the ICTR was willing to look beyond the text of its Statute to incorporate JCE liability into its jurisprudence.[167]

The requirement that JCE be specifically pleaded has arisen in several ICTR cases. The Trial Chamber in *Prosecutor v. Simba* discusses the use

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[160] ICTR Statute, *supra* note 7, at art. 6(1).

[161] Prosecutor v. Akayesu, Case No. ICTR-96-4-T, Trial Judgment, ¶¶ 471-91 (Sept. 2, 1998).

[162] *Id.* ¶ 480 (Article 2(3), referenced in this passage, criminalises conspiracy to commit genocide in the same way as Article 4(3) of the ICTY Statute).

[163] *See id.* ¶ 491.

[164] Prosecutor v. Rutaganda, Case No. ICTR-96-3-T, Trial Judgement and Sentence, (Dec. 6, 1999).

[165] *Id.* at ¶ 43.

[166] *See* Rushing et. al., *supra* note 27, at 56 ("[A]iding and abetting is a form of accomplice liability, whereas participation in a joint criminal enterprise is a type of direct commission of a crime with other persons.").

[167] Prosecutor v. Elizaphan and Gérard Ntakirutimana, Case No. ICTR-96-10-A and ICTR-96-17-A, Appeals Judgments, ¶ 461 (Dec. 13, 2004).

of JCE, both summarising its history in the jurisprudence of the tribunal and assessing its continued applicability. In referencing all the prior cases in which the ICTR used the common purpose doctrine,[168] the court reiterated "that participating in a joint criminal enterprise is a form of liability which exists in customary international law and that it is a form of 'commission' under Article 6(1)."[169] Classifying the three categories of JCE as "basic, systemic and extended," the *Simba* court reviewed the elements of JCE.[170] Drawing heavily on *Tadić* and *Kvočka*, the Trial Chamber reaffirmed the nuances of JCE and went on to emphasise the importance of properly pleading it, stating:

> [i]f the Prosecution intends to rely on the theory of joint criminal enterprise to hold an accused criminally responsible as a principal perpetrator of the underlying crimes rather than as an accomplice, the indictment should plead this in an unambiguous manner and specify on which form of joint criminal enterprise the Prosecution will rely.[171]

Just as the prosecutor would have to plead and prove the substantive elements - both of the *actus reus* and *mens rea* - of a crime, so too must she plead and prove the elements of JCE.[172] While previous cases had already established this principle in the ICTR,[173] this decision provides the clearest explanation of how a prosecutor should properly avail herself of the common purpose doctrine. These same requirements were recently emphasised by the SCSL as well.

2. Special Court for Sierra Leone

By the time the SCSL was established in 2002, the language and jurisprudence pertaining to JCE had already figured in legal discourse for sev-

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[168] Prosecutor v. Simba, Case No. ICTR-01-76-T, Trial Judgment, ¶ 385 n.384 (Dec. 13, 2005). The doctrine was first described by the Appeals Chamber in Prosecutor v. Tadić, Case No. IT-94-1-A, Appellate Judgement, ¶¶ 188, 195-226 (July. 15, 1999); *see also* Prosecutor v. Kvočka et al., Case No. IT-98-30/1-A, Appeals Judgment, ¶¶ 79-80, 99, (Feb. 28 2005); *Elizaphan and Gérard Ntakirutimana*, Case No. ICTR-96-10-A and ICTR-96-17-A ¶¶ 461-62, 466, 468; Prosecutor v. Rwamakuba, Case No. ICTR-98-44-AR72.4, Decision on Interlocutory Appeal Regarding Application of Joint Criminal Enterprise to the Crime of Genocide, ¶ 31 (Oct.22, 2004) (recognizing applicability of joint criminal enterprise to the crime of genocide); Prosecutor v. Vasiljević, Case No. IT-98-32-A, Appeals Judgement, ¶¶ 94-95 (Feb. 25, 2004).

[169] *Simba*, Case No. ICTR-01-76-T ¶ 385.

[170] *Id*. ¶¶ 386-88.

[171] *Id*. ¶ 389.

[172] *Id*.

[173] *Elizaphan and Gérard Ntakirutimana*, Case No. ICTR-96-10-A and ICTR-96-17-A (drawing on the ICTY decision in Prosecutor v. Aleksovski, Case No. IT-95-14/1-A, Appeals Judgment, ¶ 171 n.319 (Mar. 24, 2000)).

eral years. Interestingly, however, the Sierra Leonean and UN drafters of the Statute did not see fit to include explicit reference to the common purpose doctrine.[174] Instead, it directly copied ICTR Statute article 6 pertaining to individual criminal responsibility, making article 6(1) of both Statutes identical.[175]

Even by the time the Iraqi High Tribunal was established and had begun operating, the SCSL had not yet rendered its first decision. Indeed, Saddam Hussein had been executed before the first opinion of the SCSL was published. That opinion, however, has bearing on this analysis. The Trial Chamber in the consolidated Armed Forces Revolutionary Council ('AFRC') case ruled that it would not consider the liability of JCE, because the prosecution had "defectively pleaded" it.[176] The SCSL wrote that

> the Prosecution is required to plead all material facts, including the precise mode of liability under article 6 of the Statute it intends to rely on. With regard to JCE, the *Kvočka* Appeal Judgment unambiguously established that failure to plead the category of JCE charged constitutes a defect in the indictment.[177]

This massive blow to the prosecution establishes that precedents from the ICTY and ICTR are seen as definitively establishing the principles surrounding the application of JCE. Insufficiency of the pleadings can therefore prevent a prosecutor from being able to use JCE as a liability theory.[178]

### D. *Controversy Surrounding Joint Criminal Enterprise*

As Danner & Martinez admit, "Joint criminal enterprise . . . has largely been created by the judges and prosecutors of the Yugoslav Tribunal."[179] And as Nicola Piacente concedes, prosecutorial policy in the ICTY shifted after the advent of JCE in *Tadić*.[180] It is not surprising, therefore, that defence attorneys initially worked to reject the doctrine. In a recent and extensive study on *Defense Perspectives on Law and Politics in International Criminal Trials*, Jenia Iontcheva Turner examined some of the

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[174] Danner & Martinez, *supra* note 14, at 155.

[175] *Compare* ICTR Statute, *supra* note 7, at art. 6(1) *with* SCSL Statute, *supra* note 8, at art. 6(1).

[176] Zoila Hinson, *An Examining of Joint Criminal Enterprise in the Special Court's Decision of the AFRC Trial*, Sierra Leone Court Monitoring Program, (July 28, 2007), *available at* http://tiny.cc/slcmp.

[177] Prosecutor v. Brima, et. al., Case No. SCSL-04-16-T, Trial Chamber, ¶ 62 (June 20, 2007).

[178] William Schabas, The UN International Criminal Tribunals: The Former Yugoslavia, Rwanda and Sierra Leone 312 (Cambridge Univ. Press 2006).

[179] Danner & Martinez, *supra* note 14, at 103-04.

[180] Piacente, *supra* note 86, at 450-51.

reactions to the advent JCE.[181] Naturally, attorneys argued against the existence of the doctrine and against the courts' ability to use it, given the absence of textual support in their respective Statutes, claiming that "its use violated the prohibition on retroactive criminal laws."[182] These arguments, however, have all been rejected.[183] The ICTY maintains that JCE is firmly rooted in customary international law.[184]

Since blanket challenges to the validity of JCE have failed, defence attorneys have focused on category-based challenges.[185] Category III JCE has been the most controversial, as it is often deemed the functional equivalent of conspiracy.[186] As one commentator has argued, "[t]o suggest that defendants should be liable for the criminal acts of their co-conspirators, even when these actions fall outside the scope of the original criminal agreement, is a strong and unwarranted conclusion, especially when the Statute governing the ICTY restricted liability to planning, instigating, and aiding and abetting."[187] Given that the ICTY relied in part on the language of the Rome Statute to determine the existence of JCE under customary international law, many fixate on the legislative history behind the ICC when criticising JCE III. [188] While JCE I and II may be considered as co-perpetration and as such be included in Article 25(3)(a) of the ICC Statute - joint commission - the collective and conspiracy-like JCE III liability could not (even) be read into Article 25(3)(d) of the ICC Statute since this would mean bypassing the will of the drafters who rejected the conspiracy liability in the first place.[189]

Despite the ICTY's avoidance of conspiracy and organisation liability in the *Tadić* opinion, there is little question that the doctrines are related, and indeed overlap.[190] As noted above, the Nuremberg Tribunal considered conspiracy and organisation liability to be connected to each other. Joint criminal enterprise, however, is a broader theory that shares some of the same elements as conspiracy and organisation liability, but stands

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[181] Jenia Iontcheva Turner, *Defense Perspectives on Law and Politics in International Criminal Trials*, 48 VA. J. INT'L L. 529, 562 (2008).

[182] *Id*.

[183] *Id*.

[184] Prosecutor v. Karemera, Case Nos. ICTR-98-44-AR72.5, ICTR-98-44-AR72.6, Decision On Jurisdictional Appeals: Joint Criminal Enterprise, ¶ 16 (Apr. 12, 2006) (affirming that JCE is firmly established in customary international law); Prosecutor v. Tadić, Case No. IT-94-1-A, Appellate Judgment, ¶ 194 (July. 15, 1999); Werle, *supra* note 101, at 955; Fergal Gaynor & Barbara Goy, *Current Developments at the Ad Hoc International Tribunals*, 5 J. INT'L CRIM. JUST. 544, 553 (2007).

[185] *See generally* Ohlin, *supra* note 115.

[186] *Id*. at 76.

[187] *Id*.

[188] *Id*. at 77.

[189] Ambos, *supra* note 150, at 172-73.

[190] Meierhenrich, *supra* note 15, at 346.

alone as a distinct theory of liability.[191] Even before the ICTY articulated JCE in *Tadić*, the United Nations War Crimes Commission stated that

> 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.[192]

The nuanced distinctions among liability theories require that courts devote meticulous attention to applying them. The aim of this discussion was not so much to elucidate the issues with category three JCE, but to show that each category has its own pitfalls. With that in mind, Part III examines how the Iraqi High Tribunal made use of joint criminal enterprise liability in the Al Dujail trial.

## III. Joint Criminal Enterprise Liability in The Iraqi High Tribunal

### A. *The Creation and Composition of the Iraqi High Tribunal*

#### 1. General Background on the Tribunal

On December 10, 2003, the Coalition Provisional Authority passed a Statute creating the Iraqi Special Tribunal.[193] Born of a negotiation between Coalition and Iraqi lawyers, the IST was endowed with jurisdiction to try any Iraqi nationals for war crimes, crimes against humanity, genocide or other specified crimes between July 17, 1968 and May 1, 2003.[194] After several iterations of governance in Iraq, the IST was subsumed by the country's new constitution on October 15, 2005, making it a part of the national judiciary.[195] At this point, the name of the court was changed to the Iraqi High Tribunal[196] and the jurisdiction of the court was broadened to cover any action that was a crime under Iraqi law at the time of its commission.[197]

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[191] For a discussion of the difference between JCE, conspiracy, and organisation liability by the ICTY Appeals Chamber, see Prosecutor v. Multinović, Case No. IT-99-37-AR72, Decision on Dragoljub Ojdanic's Motion Challenging Jurisdiction: Joint Criminal Enterprise, (May 21, 2003).

[192] U.N. War Crimes Commission, XV Law Reports of Trials of War Criminals 97-98, (His Majesty's Stationery Office 1949) (quoted in *Multinović*, Case No. IT-99-37-AR72 at n.65).

[193] IST Statute, *supra* note 3.

[194] IHT Statute, *supra* note 2, at art. 1(b).

[195] M. Cherif Bassiouni & Michael Wahid Hanna, *Ceding the High Ground: The Iraqi High Criminal Court Statute and the Trial of Saddam Hussein*, 39 Case W. Res. J. Int'l L. 21, 54-55 (2007).

[196] *Id*. at 56-57; *see also* note on names of the tribunal, *supra* note 2.

[197] Bassiouni & Hanna, *supra* note 195, at 54-55.

The language of the Statute for the IHT was drawn heavily from the Statutes of other international tribunals, especially the ICC.[198] While there is no international common law, meaning that a court decision has no binding effect on any other case, the IHT Statute specifically states in article 17(b), that "to interpret Articles 11, 12, 13, the [court] may resort to the relevant decisions of international criminal courts." [199] Though the IHT is a domestic tribunal, it is fashioned after international tribunals, so it can be considered as a part the international criminal justice system.

Though this Article does not examine any of the challenges to the IHT's legitimacy or organisation, it is relevant to note some of the controversy that has surrounded the court's operation. Perhaps the most contentious feature of the Iraqi High Tribunal is the role played by the United States government.[200] The tribunal's Statute requires that the court appoint external advisors to "provide assistance to the judges with respect to international law and the experience of similar tribunals . . . and to monitor the protection by the Tribunal of general due process of law standards." [201] The IHT appointed the United States Department of Justice, an executive agency of the United States government, to fill this role. "All IHT functions with the exception of trial chamber and cassation judges rely heavily on the Regime Crimes Liaison Office (RCLO), [which is comprised of mostly US personnel]." [202] It is also important to note that "[t]he US has contributed some $128 million in funding, which dwarfs the Tribunal's own budget."[203] Relatively little has been written exploring the influence of the RCLO on the operation of the Iraqi High Tribunal, but there is little question that it had a significant impact on the court's jurisprudence.[204] Insofar as the present argument is concerned, further investigation should be done to determine whether some of the

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[198] *Id*. at 70-72.

[199] IHT Statute, *supra* note 2, at art. 17(b). Articles 11 to 13 specify the international crimes with which IHT defendants may be charged, namely war crimes, crimes against humanity and genocide.

[200] *See*, *e.g.*, Sylvia de Bertodano, *Were There More Acceptable Alternatives to the Iraqi High Tribunal?*, 5 J. INT'L CRIM. JUST. 294, 295-96 (2007).

[201] IST Statute, *supra* note 3, at art. 6(b); *see also* Jane Stromseth, *Pursuing Accountability After Conflict: What Impact on Building the Rule of Law?*, 38 GEO. J. INT'L L. 251, 312-13 (2007).

[202] Miranda Sissons & Ari S. Bassin, *Was the Dujail Trial Fair?* 5 J. INT'L CRIM. JUST. 272, n.16 (2007) (citing J.B. Bellinger. III, Legal Advisor, U.S. Dep't of State, speech delivered at Chatham House, London: *Supporting Justice and Accountability in Iraq* (Feb. 9, 2006)).

[203] *Id.*

[204] *See generally*, John C. Johnson, *The Iraqi High Tribunal and the Regime Crimes Liaison's Office*, ARMY LAW. 36 (July 2008); Bassiouni & Hanna, *supra* note 195, at 41.

tribunal's errors might be attributable to this unusual arrangement.[205] This article, however, does not attempt to address those issues in any way.

2. Liability Theories in the Iraqi High Tribunal

The Iraqi High Tribunal Statute combines international and Iraqi law. Both the Iraqi Penal Code, Law No. 111 of 1969 and the Iraqi Code of Criminal Procedure, Law No. 23 of 1971, were intended to complement the provisions of international law set forth in the IHT Statute. [206] Section Five of the 1969 Penal Code specifies three main liability theories: direct commission, accomplice liability and conspiracy.[207] Interestingly, direct commission expressly includes co-perpetration. [208] Additionally, the Code distinguishes between perpetrators and accessories.[209] Though it does not use the term, command responsibility is also implied in a number of provisions.[210] So while the Iraqi Code allows for prosecution on the basis of conspiracy, joint criminal enterprise is the only liability theory that appears in international law but not Iraqi domestic law.

Unlike the Yugoslav, Rwandan and Sierra Leonean tribunals, which all share similar provisions regarding individual criminal responsibility, the IHT Statute benefits from having duplicated the language on which the ICTY based its initial analysis of joint criminal enterprise liability.[211] Article 15 of the IHT Statute is nearly identical to article 25 of the ICC Statute.[212] Subsection (a) of the former embodies the notion of direct commission: "A person who commits a crime within the jurisdiction of this Tribunal shall be personally responsible and liable for punishment in accordance with this statute." [213] Subsection (b), however, spells out all the variations on criminal responsibility. It begins: "In accordance with this Law, and the provisions of Iraqi criminal law, a person shall be criminally responsible if that person . . . ." [214] The remainder of the subsection is identical to that of the ICC and provides liability for anyone who:

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[205] Bassiouni & Hanna, *supra* note 195, at 41 ("While these U.S. prosecutors and investigators had significant experience with complex investigations and prosecutions . . . they had limited experience with international criminal law and little knowledge of local factors or of the Iraqi judicial system and its legal culture.").

[206] IHT Statute, *supra* note 2, at arts. 16-17.

[207] Iraqi Penal Code, Law No. 111 of 1969, arts. 47-59.

[208] *Id*. art. 47 ("Any person who commits an offence by himself or with others . . . .").

[209] *Id*. arts. 49-50.

[210] *See*, *e.g.*, *Id*., ¶ 191.

[211] *See* Ian Ralby, Note, *Prosecuting Cultural Property Crimes in Iraq*, 37 GEO. J. INT'L L. 165, 178-80 (2005).

[212] *Compare* IHT Statute, *supra* note 2, at art. 15 *with* ICC Statute, *supra* note 9, at art. 25.

[213] IHT Statute, *supra* note 2, at art. 15(a).

[214] *Id.* art. 15(b).

A. Commits such a crime, whether as an individual, jointly with another or through another person, regardless of whether that other person is criminally responsible or not;

B. Orders, solicits or induces the commission of such a crime which in fact occurs or is attempted;

C. For the purpose of facilitating the commission of such a crime, aids, abets or by any other means assists in its commission or its attempted commission, including providing the means for its commission;

D. In any other way with a group of persons, with a common criminal intention to commit or attempt to commit such a crime, such participation shall be intentional and shall either:

1. Be made for the aim of consolidating the criminal activity or criminal purpose of the group, where such activity or purpose involves the commission of a crime within the jurisdiction of the Court; or
2. Be made with the knowledge of the intention of the group to commit the crime . . . .[215]

Subsection F also provides for Command Responsibility.[216] Since article 15(b)(4) is identical to the ICC's language on which the ICTY relied in *Tadić*, the IHT is the first court to take a case to trial when operating with statutory authority to use joint criminal enterprise liability.

Joint criminal enterprise liability is available to the IHT under international law, but since the doctrine does not appear in Iraqi law, it will still be necessary to determine whether it would have been applicable as a mode of criminal responsibility at the time of the charged offences. As explained in Part II, each of the three categories of JCE must be treated separately when evaluating their compliance with applicable principles of law. That methodology will be extremely important as this analysis proceeds to look at the manner in which the IHT actually applied JCE.

## B. *The Al Dujail Trial*

### 1. The Alleged Offences

The Iraqi High Tribunal is distinguishable from the other international tribunals in that it opted to bifurcate the trials and hold separate proceedings for each of the alleged criminal actions.[217] On July 17, 2005, the thirty-seventh anniversary of the Ba'ath party's ascent to power, the chief investigative judge of the Iraqi High Tribunal charged eight individuals

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[215] *Id*.

[216] *Id*. art. 15(b)(6).

[217] *See* Andy Mosher, *Iraqi Panel Files Case Against Hussein: Deposed Leader Accused In 1982 Shiite Massacre*, WASH. POST, July 18, 2005, at A1, *available at* http://tiny.cc/mosh.

with crimes relating to the so-called Al Dujail incident.[218] According to the initial charges, the incident unfolded as follows:[219] In 1982, a group of Shi'as from Al Dujail allegedly attempted to assassinate Saddam Hussein as he drove through the town in his motorcade. In retaliation for the attempt, and at the orders of Saddam Hussein, Barzan Ibrahim and Taha Yassin Ramadan, several Iraqi military and intelligence units entered Al Dujail with force, killing a number of individuals, and destroying much of the town. Around one hundred and fifty individuals were arrested, imprisoned, deprived of basic necessities and tortured. Roughly nine of them died from this treatment. Afterward, 148 Shi'as from Al Dujail, including in absentia those who had already died, appeared before the Revolutionary Command Court. Without even examining evidence, Awwad Hamad Al-Bandar, the presiding judge, sentenced all of the defendants to death. Saddam Hussein ratified the sentence, and the 148 individuals were executed.

Before proceeding to examine how the Iraqi High Tribunal determined the liability of the individual defendants, it is helpful to examine some of the court's general holdings. In characterising the Al Dujail incident, the court attempted to determine whether the conduct of the Iraqi government could be considered an "attack" under both Iraqi and international law. The court writes "The Iraqi penal code defines the word "attack as a kind of behaviour that results in committing several acts classified among the ten crimes stipulated in the first provisions of article 12 of the Iraqi High Court . . . ."[220] By making this connection, the court was able to classify the alleged attack against the town of Al Dujail as a possible crime against humanity.

For the incident to rise to the level of a crime against humanity, however, it would have to meet the ICTY's standard set forth in *Prosecutor v. Krnojelac*. That case established the following requisite elements:

i. there must be an "attack";
ii. the acts of the accused must be part of the attack;
iii. the attack must be directed against any civilian population;
iv. the attack must be widespread or systematic;
v. the principal offender must know of the wider context in which his acts occur and know that his acts are part of the attack.[221]

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[218] *Id*.

[219] *See generally,* Republic of Iraq v. Saddam Hussein, Accusation Document, (Iraqi High Trib., May 15, 2006), *translated at* http://tiny.cc/saddam_accusation [hereinafter Hussein Indictment].

[220] Al Dujail Lawsuit, Case No. 1/9 First/2005, Judgment, pt. 1, at 13-14 (Iraqi High Trib., Nov. 3, 2006), *translated at* http://tiny.cc/al_dujail_judgment [hereinafter Al Dujail Judgment].

[221] Prosecutor v. Krnojelac, Case No. IT-97-25-T, Trial Judgment, ¶ 53 (Mar. 15, 2002).

While the evidence before the IHT allegedly showed the existence of the attack, its targeting of civilians[222] and its widespread and systematic nature,[223] the court was confronted with a challenge of determining whether the defendants were part of the attack and whether they knew the wider context of their acts.

In explaining that wider context, the court suggested that any "kind of plan or pre-programmed policy is enough" to meet the initial requirements of there being a premeditated attack.[224] This pronouncement appears to be drawn from dicta in *Krnojelac*.[225] There the ICTY wrote:

> This Trial Chamber is satisfied that there is no requirement under customary international law that the acts of the accused person (or of those persons for whose acts he is criminally responsible) be connected to a policy or plan. Such plan or policy may nevertheless be relevant to the requirement that the attack must be widespread or systematic and that the acts of the accused must be part of that attack.[226]

In other words, a widespread and systematic attack does not automatically indicate the existence of a common criminal plan. On the other hand, the existence of a common criminal plan is evidence that an attack was systematic. Furthermore, the existence of a systematic attack may provide evidence that the leaders of the attack had both knowledge of and intent for its occurrence - elements of joint criminal enterprise. As *Krnojelac* instructs, therefore, it is important to keep the two matters - a systematic, organised attack and a criminal plan - separate.

Both in the indictments and the decision, the IHT repeatedly characterises the defendants' conduct toward the residents of Al Dujail as part of a widespread and systematic attack.[227] As the court writes,

> There are multiple elements that prove that the attack was either widespread or systematic, including . . . the direct involvement of the authorities in committing multiple crimes, or the presence of a known policy aimed against a certain community, and the involvement of the higher commands, political or military commands, etc.[228]

Here the IHT appears to be following the direction of *Krnojelac* in that it is purportedly using the existence of a "known policy" to prove that the Al Dujail incident meets the standards for classification as a crime against

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[222] Al Dujail Judgment, *supra* note 220, pt. 1, at 14.

[223] *Id*. at 16.

[224] *Id*. at 14.

[225] *Id.* pt. 2, at 10.

[226] Prosecutor v. Krnojelac, Case No. IT-97-25-T, Trial Judgment, ¶ 58 (Mar. 15, 2002).

[227] *See, e.g.*, Hussein Indictment, *supra* note 219; Al Dujail Judgment, *supra* note 220.

[228] Al Dujail Judgment, *supra* note 220, pt. 2, at 9.

humanity. The way in which the IHT determined the existence of that policy, however, bears further examination. To do so, this chapter now moves to examine the indictments and jurisprudence of the IHT in regard to each of the defendants.

2. A Defendant-by-Defendant Analysis of the Indictments and Trial

a. *The "Lesser" Defendants*

Eight individuals were indicted by the Iraqi High Tribunal in the Al Dujail case: Saddam Hussein, Barzan Ibrahim Al-Hasan, Taha Yassin Ramadan, Awwad Hamad Al-Bandar, Muhammad Azzawi Ali, Muzhir 'Abdallah Kahdim Ruwayyid, Ali Dayih Ali, and 'Abdallah Kahdim Ruwayyid.[229] While the initial indictments were issued on July 17, 2005, before the trials began, the final indictments were not produced until May 15, 2006, several months into the trial.[230] Of these defendants, half were "major" figures in the Ba'ath Regime, while the other four were lesser officials. Since none of the lesser figures was actually held accountable on the basis of joint criminal enterprise, an in-depth analysis of those cases is not helpful. A brief note, however, does help in evaluating the overall sufficiency of the IHT pleadings.

After laying out - in extremely broad strokes - the charges and the related facts, the indictments all proceed: "Based on the above, you have committed crimes in violation of Article 12 . . . ."[231] All four indictments of the lesser defendants further specify: "You are liable for these crimes in accordance with" inter alia article [15(b)(4)] of the IHT Statute.[232] As discussed above, that provision is functionally identical to the language of the ICC Statute on which the ICTY Appeals Chamber in *Tadić* partially

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[229] Hussein Indictment, *supra* note 219; Republic of Iraq v. Barzan Ibrahim Al-Hasan, Accusation Document, (Iraqi High Trib., May 15, 2006) [hereinafter Barzan Indictment], *translated at* http://tiny.cc/barzan_accusation; Republic of Iraq v. Taha Yassin Ramadan, Accusation Document, (Iraqi High Trib., May 15, 2006) [hereinafter Ramadan Indictment], *translated at* http://tiny.cc/ramadan_accusation; Republic of Iraq v. Awwad Hamad Al-Bandar, Accusation Document, (Iraqi High Trib., May 15, 2006) [hereinafter Al-Bandar Indictment], *translated at* http://tiny.cc/awwad_accusation; Republic of Iraq v. Muhammad Azzawi Ali, Muzhir, Accusation Document, (Iraqi High Trib., May 15, 2006), *translated at* http://tiny.cc/azzawi_accusation; Republic of Iraq v. Muzhir 'Abdallah Kahdim Ruwayyid, Accusation Document, (Iraqi High Trib., May 15, 2006) [hereinafter Muzhir Indictment], *translated at* http://tiny.cc/muzhir_accusation; Republic of Iraq v. Ali Dayih Ali, Accusation Document, (Iraqi High Trib., May 15, 2006), *translated at* http://tiny.cc/dayih_accusation; Republic of Iraq v. 'Abdallah Kahdim Ruwayyid, Accusation Document, (Iraqi High Trib., May 15, 2006), *translated at* http://tiny.cc/ruwayyid_accusation.

[230] Mosher, *supra* note 217.

[231] *See, e.g.*, Hussein Indictment, *supra* note 219.

[232] *See, e.g.*, Muzhir Indictment, *supra* note 229.

based its analysis of JCE.[233] Referencing this provision indicates that the prosecutor wishes to argue that the defendants are liable on account of their participation in a joint criminal enterprise, yet none of the elements of JCE are actually addressed in any of the four indictments. This lack of specificity renders the pleadings defective according to the standards set forth by the other international tribunals.[234]

Despite the allegation that the defendants were liable on the basis of article 15(b)(4), the Iraqi High Tribunal did not actually apply JCE to any of the lesser defendants. One was acquitted,[235] while the other three were each sentenced to fifteen years in prison for crimes against humanity.[236] With regard to one offence, the IHT found the defendants had committed the crime individually, with another person or through another person,[237] making them liable on the basis of article 15(b)(1).[238] For all three offences, the IHT found the defendants liable pursuant to article 15(b)(3)[239] of the tribunal Statute, meaning that they had aided, abetted or otherwise assisted in the commission of the offences listed.[240] The ICTY Appeals Chamber in *Kvočka*, however, held that minor defendants should not be considered to have aided and abetted a joint criminal enterprise; they should just be deemed lesser participants in the JCE.[241] As the next section shows, the common purpose doctrine was the central liability theory used to convict the four major defendants. Though such analysis falls outside the focus of this article, further investigation should be conducted to determine whether the IHT's judgment with regard to the lesser defendants is consistent with international standards pertaining to the various liability theories.

b. *The "Major" Defendants*

The indictments and judgments of the four major defendants, Awwad Hamad Al-Bandar, Taha Yassin Ramadan, Barzan Ibrahim Al-Hasan, and Saddam Hussein are each distinct and best examined individually. Some commonality, however, does exist among them. As in the indictments of the "lesser" defendants, the indictments of the four major defendants all refer to article 15(b)(4) as one of the provisions on which the liability of the defendants is based. Joint criminal enterprise, there-

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[233] *See supra* notes 120-21 and accompanying text.

[234] *See* discussion of requirements for pleading joint criminal enterprise liability, *supra* notes 153-58 and accompanying text.

[235] Al Dujail Judgment, *supra* note 220, pt. 6, at 50.

[236] *Id.* pt. 6, at 21, 35-36, 47-48.

[237] *Id*.

[238] IHT Statute, *supra* note 2, at art. 15(a).

[239] Al Dujail Judgment, *supra* note 220, pt. 6, at 21, 35-36, 47-48.

[240] IHT Statute, *supra* note 2, at art. 15(c).

[241] Prosecutor v. Kvočka et al., Case No. IT-98-30/1-A, Appeals Judgment, ¶ 91 (Feb. 28, 2005); van der Wilt, *supra* note 108, at 99.

fore, is a possible liability theory in each of these indictments. This analysis consequently focuses on how JCE was addressed in the indictments, and how the IHT then applied the doctrine in its opinion.

i. Awwad Hamad Al-Bandar

Awwad Hamad Al-Bandar was "the Chief Judge of the Revolutionary Command Court."[242] According to his indictment, "after holding a brief trial lasting only one session in the (disbanded) Revolutionary Command Court, you issued an irrevocable sentence to hang all 148 detainees to death."[243] All of the defendants are alleged to be responsible in some form or another for the deaths of these 148 people. But it was this trial in the Revolutionary Command Court that served as the mechanism by which the majority of the victims were sent to their deaths. In establishing that Al-Bandar's actions constituted crimes against humanity, the indictment states that it considers the trial "a complementary part of a methodical and widespread attack carried out against the townspeople of Al-Dujayl town for the purpose of annihilating a large number of the residents and destroying their properties and lands."[244] The indictment falls short, however, of asserting on what basis the prosecution intends to hold him liable. Joint criminal enterprise, though referenced via article 15(b)(4), is not otherwise mentioned, and no category of it is specified. Despite the insufficiency of the pleadings under international standards, the IHT nevertheless found Al-Bandar liable on the basis of JCE.

Implying that being president of the Revolutionary Command Court was a criminal offence, the Iraqi High Tribunal characterised Awad Hamad Al-Bandar's admission that he held that position as a "confession."[245] The tribunal found that, by virtue of this judicial office, Al-Bandar

> made himself a tool for collective killing of a group of people he had never met before . . . by a criminal premeditated intention to kill these victims in a systematic and programmed plan for collective killing of a group of people.[246]

In determining that Al-Bandar's intent was premeditated, the court relied on "the joint prior preparation and planning in advance of perpetration of the crime (planning, agreement and prior time period . . . .)."[247] Indeed the court based its conclusion on Al-Bandar's concession that "within a programmed, systematic course and on purpose," the order to

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[242] Al-Bandar Indictment, *supra* note 229.

[243] *Id.*

[244] *Id.*

[245] Al Dujail Judgment, *supra* note 220, pt, 2, at 28.

[246] *Id*. pt. 1, at 21.

[247] *Id*. pt. 2, at 8.

execute the 148 individuals was made "without reference to the law and without the presence of any evidence of condemnation."[248]

According to the IHT, Awad Al-Bandar

> contributed to a joint criminal act with a group of people inside and outside the Revolutionary Court and with a joint "mens rea" for committing a joint criminal act. The deliberate participation of the accused Al-Bandar had the purpose of furthering the criminal activity and the criminal purpose for [a] number of organizations of the state and Ba'ath party, including the intelligence service which was presided over by the defendant Barzan Ibrahim during the incident of 1982, and the Office of the Presidency which was under the command of the defendant Saddam Hussein who also used to lead the Ba'ath party and who in turn used to command all the country's apparatus (organizations).[249]

The court's finding indicates that Al-Bandar's *mens rea*, as inferred from his official position, was to further the criminal aims of various Iraqi organisations. In the context of JCE, this form of intent is exclusive to the second category.[250] Even within an analysis of joint criminal enterprise, however, the court's emphasis on the criminal purpose of the Iraqi institutions is unusual; the IHT appears to be classifying those agencies as criminal organisations. This feature of the court's jurisprudence will be discussed further in section B.3.b of this Part.

By virtue of Al-Bandar's position in the governmental apparatus and pursuant to category two JCE, the court inferred he had the requisite *mens rea* under the common purpose doctrine. According to the IHT, Awad Al-Bandar's knowledge of and intent to participate in the attack on the people of Al Dujail "arises . . . from the position he used to occupy as president of the Revolutionary Court."[251] In further explaining Al-Bandar's collaboration with the other defendants, the court writes:

> The knowledge of the accused Al-Bandar of the intent of the leaders of these organizations to perpetrate the crime arises from many of its aspects including the fact that he was president of one of these organizations which is the (disbanded) Revolutionary Tribunal, and which through its name one can deduce that it was not only under the state but also under the authority of the Ba'ath party whose leaders always used to say that the party leads the revolution.[252]

Instead of searching for actual evidence of shared criminal intent, therefore, the IHT implied collective criminality by virtue of Al-Bandar's

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[248] *Id*. pt. 1, at 22.

[249] *Id*. pt. 2, at 31-32.

[250] *See* discussion of elements of category two JCE, *supra* notes 108-13 and accompanying text.

[251] Al Dujail Judgment, *supra* note 220, pt. 2, at 29-30.

[252] *Id*. at 32.

position. Since the factual scenario is not one of systematic ill treatment, however, this constitutes an inappropriate use of category two JCE.

ii. Taha Yassin Ramadan

Taha Yassin Ramadan was "a member of the (disbanded) Revolutionary Command Counsel, the Vice President of the Republic of Iraq, and the (former) General Commander of the Popular Army . . . ."[253] Each of the enumerated charges that follow this introduction is tied directly to these various official positions. The indictment proceeds:

> considering that you were the General Commander of the Popular Army and the Head of the Security Committee formed on the same day to investigate the assassination attempt . . . you issued orders for your forces to launch a wide scale and systematic attack to kill, arrest, detain and torture large numbers [of] residents of Al-Dujayl (men, women, and children).[254]

Command responsibility appears to be invoked by the emphasis on orders both in this clause and in the one which reads "subject to torture by intelligence officers under your direct orders . . . ."[255] The list of applicable provisions under article 15 includes that of command responsibility, supporting that contention.

Though the words "wide scale and systematic attack," are the trigger words for a crime against humanity, it appears that the prosecutor also wishes to equate participation in that attack with collective criminality. The tie between the official positions and that attack ("considering you were the General Commander . . . .") suggests that some form of organisation-based liability is the aim of the prosecutor. Such a theory also seems to be operating in the phrase: "[a]s a member of the (disbanded) Revolutionary Command Counsel, you participated in issuing Decision number (1283) on October 24, 1982 to confiscate the agricultural lands and orchards belonging to the townspeople of Al-Dujayl."[256] Here, again, the act is tied to organisation membership. This vague indication of liability contravenes the requirement of unambiguous pleading articulated in the various international tribunals.[257] Again, however, the IHT made no issue of the defective pleadings and applied JCE in Ramadan's case.

Taha Yassin Ramadan "was one of the few people who were in direct contact with the Accused Saddam Hussein since he held advanced official

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[253] *See* Ramadan Indictment, *supra* note 229.

[254] *Id.*

[255] *Id.*

[256] *Id.*

[257] *See* discussion of requirements for pleading joint criminal enterprise liability, *supra* notes 153-58 and accompanying text.

and Baath party positions in the country."[258] Though Ramadan claimed he did not know about what had happened in Al Dujail, the court determined that

> he had firm reason to know being a member in the revolution command council (dissolved) and a deputy prime minister and a major member in the regional leadership of the Baath party and a general leader of the popular army and the head of a committee that was formed upon an order from the Accused Saddam Hussein a few hours after the incident.[259]

The committee referenced in this passage was allegedly established by Hussein to handle the incident, and Ramadan chaired its first meeting. To be certain, the use of Ramadan's positions was evidence of his command responsibility. As in Al-Bandar's case, however, the court also inferred Ramadan's *mens rea* pertaining to joint criminal enterprise from his positions in the former regime—a methodology exclusive to "concentration camp" JCE.

Beyond merely refuting Ramadan's contention that he was ignorant of the Al Dujail incident, the IHT found

> that there was a joint criminal act in which the Accused Taha Yassin Ramadan had played a large role and that there was a joint criminal intention that the extremely important deliberate participation of the Accused Taha Yassin aimed at furthering the criminal activity of those security and intelligence and Baath party services and also to further the criminal intention of the Baath party regime under the leadership of the Accused Saddam Hussein.[260]

Here, the IHT claims that Ramadan's intent, like Al-Bandar's, was not to accomplish a specific criminal end, but rather to advance the institutionalised criminal objectives of the Iraqi government and Ba'ath party. According to the court, his actions were "aimed at furthering the criminal activities of the Baath party staff which constituted the backbone of the popular army as well as the military and security and intelligence forces . . . ."[261] This provides a strong indication that the court was applying "concentration camp" JCE.

In summarising Ramadan's criminal responsibility, the IHT again relies on the defendant's position in the former government to prove his culpability.

> Thus the Accused Taha Yassin Ramadan is criminally responsible for a joint criminal act in which he participated actively and deliberately [as proven by] him heading the committee that met at the national assembly on the day of the incident and his being the general leader

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[258] Al Dujail Judgment, *supra* note 220, pt. 5, at 34.
[259] *Id.* at 35.
[260] *Id.* at 35-36.
[261] *Id.* at 34.

> of the popular army . . . and since he had a joint criminal intention with the other participants and that he knew about the intention of these other participants and that he knew that his action is part of a widespread systematic attack for the reasons mentioned above; and since he knew that his participation and his role in this joint criminal act aimed at furthering the criminal activity of the members of the popular army and the military and part of Intelligence Services and he knew also that his action at that time was to further the criminal intentions of the Baath party regime.[262]

As with Al-Bandar, the IHT here applies the elements of concentration camp JCE to prove that Ramadan "participated in a joint criminal act with a joint criminal intention . . . ."[263] Again, as will be discussed at greater length below, this was a misapplication of the common purpose doctrine.

iii. Barzan Ibrahim Al-Hasan

Barzan Ibrahim Al-Hasan, the half-brother of Saddam Hussein, was "Chief of the Intelligence Service and in charge of the Security Protection of the former President of the Republic . . . ."[264] Command responsibility predominates his indictment. According to the investigating judge,

> you issued orders to the Intelligence Service members, the security and military authorities, the popular army and the disbanded Al-Ba'th Party organizations in Al-Dujayl, to launch a wide scale and systematic attack to shoot and use all kinds of weapons and helicopters to kill, arrest, detain, and torture large numbers of the residents of Al-Dujayl (men, women, and children). Afterwards, you issued orders to remove their orchards and demolish their houses.[265]

The "systematic" attack language appears again, but this time it is the product of several organisations including the "disbanded Al-Ba'th Party organizations." [266] The strongest indication of an attempt at organisation-based liability - perhaps in the mindset of category two JCE - is the summary assertion: "As the Head of the Intelligence Service, you were one of the chief officials of the former regime and directly responsible for ordering the imprisonment and interrogation of individuals detained by the Intelligence Department, which was under your supervision."[267] This phrasing implies that the defendant is liable based on his position in the government, in addition to his direct orders. This indictment, however,

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[262] *Id*. at 43.

[263] *Id*. at 38.

[264] Barzan Indictment, *supra* note 229.

[265] *Id*.

[266] *Id*.

[267] *Id*.

provides no clear indication of whether the prosecution intends to use JCE, and if so, which category it plans to apply.

Just as Barzan Ibrahim's indictment was more focused on command responsibility than the other two indictments discussed so far, the IHT's treatment of Ibrahim's liability is slightly different from its approach to the liability of Al-Bandar and Ramadan. Whereas for Al-Bandar and Ramadan, the court appeared to infer liability based primarily on the defendants' positions in the Iraqi government, the court specifically states that for Barzan Ibrahim, it is not taking this same approach.

> The participation of the accused Barzan Ibrahim in these criminal objectives, which included intentional killings, did not spring from only his being the head of the intelligence apparatus. This court is in accordance with the international courts' resolutions, which say that being a member of any oppressive government apparatus or in a criminal organization is not enough to conclude that this member took part in implementing a joint plot in some way or another.[268]

While the IHT here claims to be in accordance with other international courts, it is attempting to be in accordance with those courts in its application of category two joint criminal enterprise. Despite this professed attempt at addressing the requisite elements of JCE, it is still applying the wrong elements in the first place. Furthermore, its jurisprudence suggests that it based Ibrahim's liability on his positions in the Iraqi regime regardless.

Consistent with the court's findings as to the intent of both Ramadan and Al-Bandar, the court found Ibrahim's actions "were intentional and aimed at re-enforcing the criminal objectives of the Baath Party Regime under the leadership of the accused Saddam Hussein."[269] In fact, the court repeated this pronouncement at least three times, [270] and explained that the Ba'ath "regime was based on committing crimes that fall under the specialty of this court's authority as they are crimes against humanity." [271]

In connecting Ibrahim to a joint criminal enterprise aimed at furthering the criminal objectives of the Ba'ath regime, the IHT used both documentary evidence[272] and "its logical deductions."[273] In addition to being a "pillar"[274] of the Ba'ath regime, Ibrahim was also a member of Saddam Hussein's immediate family. The court explained its logical deductions, reasoning that Barzan Ibrahim's

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[268] Al Dujail Judgment, *supra* note 220, pt. 4, at 36.

[269] *Id*. pt. 4, at 38, 43, 44.

[270] *Id*. pt. 4, at 38, 43, 44; pt. 5, at 4.

[271] *Id*. pt, 4, at 38.

[272] *Id*.

[273] *Id*.

[274] Al Dujail Judgment, *supra* note 220, pt. 4, at 44.

> participation aimed at furthering the criminal activities of the Baath Party regime, and the fact that the Accused Barzan Ibrahim knew that the Accused Saddam Hussein had the intention to commit this crime as the Accused Barzan had direct contact with him because the Intelligence Service that participated in planning for the orchard razing and land confiscation was directly linked to the Revolution Command Council of which Accused Saddam Hussein was the Chairman, and as the Accused Barzan Ibrahim knew about the Accused Saddam's decision due to his close family relations with him being his half-brother . . . .[275]

The IHT, therefore, is not holding Ibrahim liable merely because he was a "member of any oppressive government apparatus or in a criminal organization."[276] Instead, it seems to base that liability on the combination of his position in the Iraqi regime, his direct involvement in the incident and his familial ties to Saddam Hussein.

As in the cases of Al-Bandar and Ramadan, the IHT inappropriately imposes category two JCE on an incongruous set of facts pertaining to Barzan Ibrahim's involvement in the Al Dujail incident. Ibrahim may have tortured the former residents of Al Dujail after their imprisonment, but he was not part of a system of ill treatment in the same sense as someone who works at a concentration camp. Since the court deduced part of Ibrahim's mens rea on his kinship with Saddam Hussein, it is not surprising that the latter was held liable on similar grounds.

### iv. Saddam Hussein

One of the highest profile defendants to ever face international criminal charges, Saddam Hussein was "the President of the Republic of Iraq, the Commander-in-Chief of the Armed Forces, and the Chairman of the former Revolutionary Command Council."[277] According to the charges,

> you issued orders to the military and security organizations, the Intelligence Service, the Popular Army, and the Ba'th Party organization in Al-Dujayl to launch a wide scale and systematic attack to shoot and use all kinds of weapons and helicopters to kill, arrest, detain, and torture large numbers of the residents of Al-Dujayl (men, women, and children). Afterwards, you issued orders to remove their orchards and demolish their houses.[278]

Again, a mix of command responsibility and some form of collective criminality seems to be the basis of the alleged liability, though the latter is rather vague.

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[275] *Id.* pt. 5, at 4.

[276] *Id.* pt. 4, at 36.

[277] Hussein Indictment, *supra* note 219.

[278] *Id.*

The indictment also implicates the various organs of the Iraqi government. "Based on your direct orders, the National Security Affairs Department of the disbanded Presidential Diwan referred 148 people to the dissolved Revolutionary Command Council Court . . . ."[279] While Hussein is not alleged to have ordered the death of the 148 people, he is alleged to have sent the individuals to the Revolutionary Command Council Court to be sentenced to death by Awwad Hamad Al-Bandar. Additionally,

> You promptly issued and signed Presidential Decree No. 778 on June 16, 1984 which ratified the abovementioned sentence for mass execution. On October 24, 1982, you issued Revolutionary Command Council Decree No. 1283 in your capacity as chairman of the disbanded Revolutionary Command Council. Revolutionary Command Council Decree No. 1283 confiscated the agricultural lands and orchards of Al-Dujayl residents and ordered those orchards destroyed.[280]

It appears from these charges that Hussein would be liable by virtue of command responsibility. The indictment provides no clear indication of whether the prosecutor intended to use the common purpose doctrine, and certainly no mention of a category of joint criminal enterprise. The IHT applied JCE anyway.

As with Ramadan and Ibrahim, part of Saddam Hussein's liability was based on command responsibility. But the IHT also found him to be a member in a joint criminal enterprise that sought to "reinforce the criminal activity and criminal objective of the regime." [281] Again, the court looked to the defendant's position in the government to prove the *mens rea* elements of the JCE. Hussein "was at the time of the incident from July 8, 1982 until January 16, 1989, 'President of the Republic' and 'Commander-in-Chief of the Armed Forces' and 'President of the Revolutionary Council.'"[282] While these positions served as evidence of Hussein's liability on the basis of command responsibility, the IHT also used them as evidence of a joint criminal enterprise.

The court found Saddam guilty of deliberate killing as a crime against humanity on the grounds of "his participation in a collaborative criminal act."[283]

> [Saddam Hussein's] criminal accountability here is based on the collaborative criminal act in the execution of many of the Dujail residents . . . where the accused Saddam Hussein, the head of that regime and the president of the government of it and the chairman

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[279] *Id.*

[280] *Id.*

[281] Al Dujail Judgment, *supra* note 220, pt. 3, at 40.

[282] *Id.* at 11.

[283] *Id.* at 22.

> of the party that was leading that government, and he was occupying most of the top posts in the regime, the government, and the Baath party, and he is the most knowledgeable of the nature of that regime and his intent in supporting it is conspicuous and beyond any doubt to an extent where even during the trial he was openly announcing, inciting and stressing the support of that regime . . . [t]he deliberate participation that was carried out by the accused Saddam Hussein in the killing of the Dujail victims was intended to reinforce the criminal activity of the Baath party and the government he was heading, and because he was the head of that regime and government, he . . . is the first to be aware of the intent to commit deliberate killing as a crime against humanity by the regime, the government, and the party.[284]

The court reiterated several times that Hussein had participated in a JCE in furtherance of the criminal objectives of the Iraqi government, and that he had the requisite *mens rea* to be held liable on account of being the leader of that regime. [285] By using Hussein's official positions as a means to determine his criminal knowledge and intent, the IHT again availed itself of principles applicable only to category two JCE.

As with Ibrahim, the court also relied on the familial relationship between Hussein and his half brother to prove the latter's knowledge.

> Barzan was at a great degree of direct closeness to the accused Saddam, not only because he is the director of the intelligence agency, but also because he was his half-brother from his mother's side, and he was in a position in the Baath party, which was led by the accused Saddama [sic] Hussein, . . . [s]o, what is considered knowledge for the accused Barzan Ibrahim is eventually knowledge for the accused Saddam Hussein, or at least considered a reason to know; especially, when Saddam Hussein is the one who had issued the order to the accused Barzan to supervise the interrogation of the Dujail residents, and on top of that he is accountable for the collaborative criminal act . . . .[286]

This far-reaching assessment of Saddam Hussein's knowledge again indicates that the IHT based its judgement that the defendants engaged in a joint criminal enterprise on their positions, not their individual intent. While the ICTY found such inference to be permissible in situations when the defendant works at a concentration camp, that category two JCE test for *mens rea* cannot be applied to other scenarios. Hussein's criminal intent as determined by the IHT, therefore, falls outside the scope of inference permitted by the ICTY.

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[284] *Id.* at 24.
[285] *Id.* at 35.
[286] *Id.* at 41.

3. Analysis of the Court's Jurisprudence

a. *General Errors*

This unusual sequencing of the indictments - issuing them after the trial began, pursuant to Iraqi criminal procedure [287] - led a number of commentators to argue that the proceedings violated fair trial principles. Professor Kevin Jon Heller of the University of Auckland argues that not formalising the indictments until five months into the trial "blatantly violates the defendant's right to have adequate time and facilities to prepare a defense." [288] In agreeing with Prof. Heller, Kenneth Roth, executive director of Human Rights Watch, criticises the lack of explicit liability theories contained in the indictments.

> The initial indictment basically said, "you are guilty of crimes against humanity because of people who were killed around Dujail" . . . [with no mention of a] theory of liability. Was this command responsibility? Was it aiding and abetting? Were you a principal? No detail and basic element of due process so that you are given the facts so you can prepare your defense.[289]

Professor Nehal Buhta, professor at the University of Toronto, and formerly with the International Justice Program at Human Rights Watch, also cites "a failure to ensure adequately detailed notice of the charges against the defendants" as one of the "fundamental defects" of the trial. [290]

As discussed at the end of Part II, the ICTY, ICTR and SCSL all require specificity when pleading joint criminal enterprise liability.[291] Given that the IHT could only be applying JCE under international law, it would have to follow the requisite standard for pleading, namely that "the indictment should plead this in an unambiguous manner and specify on which form of joint criminal enterprise the Prosecution will rely." [292] As the previous section demonstrated, all of the indictments were vague with regard to liability theories. Not one of them explicitly stated an intention to apply JCE, much less specified a category of it. These indictments, therefore, failed to meet the standards set forth by the international tribunals. While prosecutors in other tribunals have been barred from using JCE at trial on account of inadequate pleadings, the IHT took

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[287] Law on Criminal Proceedings with Amendments, No. 23, ¶ 179 (1971), *available at* http://tiny.cc/e624y.

[288] Symposium: *Debate: Did Saddam get a Fair Trial?*, 39 CASE W. RES. J. INT'L L. 237, 241 (2006).

[289] *Id.* at 244.

[290] Bhuta, *supra* note 10, at 41.

[291] *See* discussion of requirements for pleading joint criminal enterprise liability, *supra* notes 153-58 and accompanying text.

[292] Prosecutor v. Simba, Case No. ICTR-01-76-T, Trial Judgment, ¶ 389 (Dec. 13, 2005).

no issue with the defects in the Al Dujail indictments. The court's application of the common purpose doctrine, however, was also defective, perhaps in part on account of the vague pleadings.

At the outset, the IHT found that the "former governing authority" was the entity that committed the widespread and systematic attack against the civilians of Dujail.[293] It found that, according to documentary evidence, the Ba'athist government proceeded with the intent of "'punishing the people of Al Dujail and teaching then [sic] a lesson,' so that they would be an example for others."[294] Further, the attack was "intended to instil terror and fear among the Iraqi people in general. This was a systematic, calculated plan implemented . . . against everybody who would even entertain the idea of" attempting to assassinate Saddam Hussein.[295]

As the previous section showed, the IHT found that all four of the major defendants participated in the attack on Al Dujail, pursuant to a joint criminal enterprise. When discussing criminal accountability on the basis of a "collaborative criminal act," the IHT draws again on *Prosecutor v. Krnojelac* to outline three modes of involvement: (1) direct participation in the crime, (2) presence at the commission of the crime with knowledge of its commission and either assisting it, or inciting others to participate, and (3) "through an act in which he supports a certain regime during which the crime has taken place." [296] In expanding on this third classification, the court writes,

> That can be through the position of the accused in the government, or through his position with his knowledge of the nature of such regime and his intent to support it . . . to reinforce the criminal activity, or the criminal purpose, of that regime, the group, or the party, with his knowledge of an intent for a crime [to] be committed by this regime, this group, or that party.[297]

The court fixates on this mode of participation, however, in such a manner as to misapply the doctrine entirely.

To interpret how it should apply the doctrine of joint criminal enterprise, the IHT continued to rely on *Prosecutor v. Krnojelac*. Referring to the ICTY's March 15, 2005 decision, it partially quotes a portion of the *Krnojelac* opinion regarding the role of organisations in joint criminal enterprise.[298] The full text from the ICTY case reads:

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[293] Al Dujail Judgment, *supra* note 220, pt. 1, at 16.

[294] *Id*. at 18.

[295] *Id*.

[296] *Id*. pt. 3, at 23.

[297] *Id*. pt. 3, at 23-24; *cf*. Prosecutor v. Krnojelac, Case No. IT-97-25-T, Trial Judgment, ¶ 81 (Mar. 15, 2002).

[298] Al Dujail Judgment, *supra* note 220, pt. 2, at 34.

> Many of the cases considered by the *Tadić* Appeals Chamber to establish this second category appear to proceed upon the basis that certain organisations in charge of the concentration camps, such as the SS, were themselves criminal organisations, so that the participation of an accused person in the joint criminal enterprise charged would be inferred from his membership of such criminal organisation.[299]

The Iraqi High Tribunal seemed to interpret this provision to mean that membership in an organisation that carried out criminal objectives automatically triggered liability on the basis of participation in a joint criminal enterprise. That was not, however, what the ICTY was saying.

While the *Krnojelac* dicta quoted by the IHT is somewhat unclear itself, the ICTY's jurisprudence on this matter is unequivocal. A glaring error in the IHT's examination of *Krnojelac* may have caused the tribunal some confusion: it asserts in numerous places that *Krnojelac* was decided on March 15, 2005 when in fact it was decided on March 15, 2002. It seems, therefore, that the IHT believed that it was citing a decision that was significantly more current than it actually was. Though this may seem an inconsequential clerical error, the correct date clarifies that both *Prosecutor v. Stakić* and *Prosecutor v. Multinović* are more recent opinions out of the ICTY and both refute the manner in which the IHT interpreted the ICTY's 2002 decision.[300] The 2003 *Multinović* case explains that "[c]riminal liability pursuant to a joint criminal enterprise is not liability for mere membership or for conspiring to commit crimes, but a form of liability concerned with the participation in the commission of a crime as part of a joint criminal enterprise, a different matter."[301] Further - and most pertinent to the present analysis - *Stakić* instructs that "joint criminal enterprise can not be viewed as membership in an organisation because this would constitute a new crime not foreseen under the Statute and therefore amount to a flagrant infringement of the principle *nullum crimen sine lege*."[302] An examination of the IHT's use of JCE shows that it failed to heed this warning.

In explaining JCE, the IHT wrote: "In order for a criminal accountability [sic] to be established on the basis of the collaborative criminal act, such (a unanimous) agreement must be proven."[303] This agreement, however, need not be declared or formal. It may be inferred from circumstantial evidence. Thus, drawing on the dicta from *Krnojelac*, the IHT proceeded to focus on the positions of each of the defendants as well as their membership status in the various organisations of the former

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[299] *Krnojelac*, Case No. IT-97-25-T ¶ 78.

[300] Danner & Martinez, *supra* note 14, at 118.

[301] Prosecutor v. Multinović, Case No. IT-99-37-AR72, Decision on Ojdanic's Defence Motion Challenging Jurisdiction, ¶ 26 (May 21, 2003).

[302] Prosecutor v. Stakić, Case No. IT-97-24-T, Judgment, ¶ 433 (July 31, 2003).

[303] Al Dujail Judgment, *supra* note 220, pt. 3, at 23.

Iraqi regime as circumstantial proof that they had engaged in "concentration camp" or "systemic" joint criminal enterprise. As Part II explored in detail, systemic JCE establishes individual liability based on participation in a system of ill treatment. The defendant's position in that criminal mechanism establishes the knowledge and intent requirements necessary to prove involvement in a joint criminal enterprise. By virtue of his job, in other words, he had to know the criminal aims of the system, and had to share in those objectives.

As the previous section showed, the IHT used the official positions of the major defendants to prove the existence of a joint criminal enterprise. Professor Nehal Bhuta criticises the IHT's jurisprudence on JCE on this point:

> In convicting Saddam Hussein, Barzan al-Tikriti and Taha Yassin Ramadan of committing murder, torture, forced displacement and "other inhumane acts" as crimes against humanity, and in convicting Awwad al-Bandar of murder as a crime against humanity, the Trial Chamber concluded first that they had indeed all been participants in a JCE. However, in reaching this conclusion, the Trial Chamber made a basic error of law by misinterpreting and misapplying the relevant legal test for knowledge and intent. It was led to this error because it applied the wrong category of JCE to the factual circumstances of the Dujail case.[304]

The failure of the court to require specificity regarding JCE in the pleadings has been overshadowed by its failure to correctly apply the doctrine in the decisions themselves. The two errors, however, are perhaps related. By neglecting to rigorously examine both the *actus reus* and *mens rea* requirements of JCE, along with the necessary evidence to prove the elements of each, the IHT ended up misapplying the doctrine.

Since the court applied category two JCE, it should have also applied the corresponding *mens rea* requirements.[305] As Bhuta notes:

> The *mens rea* for a "systemic" JCE is somewhat tailored to the factual scenario to which this category is most commonly applied: an organized system of ill-treatment, such as a detention camp. Thus, it must be shown that the accused had personal knowledge of the system of ill-treatment, and intent to further this system of ill-treatment.[306]

While the IHT did attempt to apply the *mens rea* elements of JCE II - namely that by virtue of the defendant's position, he had knowledge of the attack on Al Dujail and that he sought to further the criminal aims of the Ba'ath regime—it failed to recognise the overarching problem that

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[304] Bhuta, *supra* note 10, at 44 (citation omitted).

[305] *See supra* notes 108-12 and accompanying text.

[306] Bhuta, *supra* note 10, at 45 (citation omitted).

the attack on Al Dujail was a distinct series of events, not a system of ill treatment.

As Professor Bhuta states, the facts of the Al Dujail case "in which the crimes unfolded between 1982 and 1986, in several different parts of Iraq and with the involvement of numerous different actors"[307] do not lend themselves to "concentration camp" JCE. While the jurisprudence on second category JCE remains fairly limited, both *Kvočka* and *Kronjelac* examine the factual parameters for applying the doctrine. Later affirmed by the Appeals Chamber, the *Kvočka* Trial Chamber emphasises the systematic nature of the Omarska Camp to hold that its operation constituted a second category joint criminal enterprise. Because that camp was operated by a plurality of persons with the clear intent to "persecute and subjugate non-Serb detainees,"[308] the court could infer the existence of an overarching JCE. It could further infer, therefore, that the leaders of that camp were participating in that JCE. [309] The Appeals Chamber decision in *Krnojelac* further clarifies that the participating members of a category two JCE do not all have to be members of the same organisation; rather the emphasis of the inquiry is on the existence of an organised system designed to accomplish a criminal end.[310]

It seems that the IHT may have equated a "systematic attack" with a "system of ill-treatment." The two characterisations are by no means equivalent. As discussed above, a "systematic attack" is an element of a crime against humanity and can be exhibited in a wide array of factual settings. A single military operation can be considered a systematic attack, as can a more prolonged operation. According to *Tadić*, *Kvočka*, and *Krnojelac*, however, a system of ill treatment for the purposes of JCE II is fairly limited to concentration camps - institutionalised mechanisms of torture, deprivation or killing. While *Krnojelac* indicates that JCE II could potentially be expanded to analogous situations, the application of the doctrine would nevertheless have to remain consistent with the general features of a concentration camp scenario. [311] The "Al Dujail incident," however, was just that: an incident. It was not a system of organised and habitual oppression, and thus does not fit into this category of joint criminal enterprise. A further examination, outside the scope of this Article, might show that JCE could have been applied with respect to category one or three, but the IHT only used category two.

Before proceeding to examine the implications of the IHT's misapplication of JCE, it is important to note that determining the official posi-

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[307] *Id.*

[308] Prosecutor v. Kvočka et al., Case No. IT-98-30/1-A, Appeals Judgment, ¶ 183 (Feb. 28, 2005).

[309] *Id.* ¶ 182.

[310] Prosecutor v. Krnojelac, Case No. IT-97-25-A, Appeals Judgement, ¶ 30 (Sept. 17, 2003).

[311] *Id.*

tions of the defendants was relevant to their criminal liability. But that relevance - on this set of facts - only pertains to their liability on the basis of command responsibility. As the IHT wrote:

> The military units and intelligence, security and party units would not have done, or dared to do what was done, without clear orders from the Commander-in-Chief of the Armed Forces, and from the President of the Republic, the President of the Revolutionary Command Council and the primary official in the Iraq Baath Party . . . .[312]

Without the orders of Saddam Hussein, Barzan Ibrahim and Taha Yassin Ramadan, the Al Dujail incident could not have taken place. And the only reason those orders were followed was that those individuals held high positions in the various departments of the Iraqi government as well as the ruling Ba'ath party. The IHT's error, therefore, was in using those positions to prove JCE as well as command responsibility.

This Article fully agrees with Professor Bhuta that the Iraqi High Tribunal misapplied the doctrine of joint criminal enterprise liability by attempting to avail itself of category two JCE on a set of facts which did not lend themselves to that form of liability. But this article also takes that argument an additional step to examine the implications of the IHT's judicial error. By applying the elements of "concentration camp" JCE outside the context of a system of ill treatment, the IHT effectively classified the various organs of the Iraqi government, as well as the Ba'ath party itself, as criminal organisations. The next section examines this issue in greater detail.

b. *Criminal Organisation*

As has been discussed above, joint criminal enterprise liability is historically, functionally and analytically different from organisation liability.[313] Though the International Military Tribunal at Nuremberg never ultimately applied organisation liability in the individual context, it did convict four Nazi institutions as criminal organisations. In doing so, the court determined 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 [an enumerated international crime]; and third, a majority of the members must have been knowledgeable or conscious of the organization's criminal activities or purpose.[314]

While the Iraqi High Tribunal did not explore the general volition and knowledge of the Ba'ath party membership at large, it did implicitly do so with regard to the Ba'ath party leadership. The four "major" defendants

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[312] Al Dujail Judgment, *supra* note 220, pt. 3, at 16.

[313] *See* Danner & Martinez, *supra* note 14.

[314] Ramer, *supra* note 42, at 44.

constituted the principle leaders of the Ba'ath regime, and for each, the court emphasised their leadership roles, their conscious participation in the regime, and their knowledge of the regime's criminal objectives.

Repeatedly, the court referred to the defendants' desires to further the criminal aims of the Ba'ath party, as well as those of the different governmental institutions in which the defendants served as officers.[315] Though no provision of the IHT Statute authorised the court to classify any of the former Iraqi regime's agencies as "criminal organisations" the court nevertheless appears to have done so. In its reasoning surrounding each of the four major defendants, the court discussed the criminal objectives of the Iraqi regime and Ba'ath party.[316] The IHT indicated that these criminal aims were germane to the institutions. The individual defendants were members of and leaders in those institutions, but the criminal aims belonged to the organisations themselves; the individuals merely sought to further those illicit objectives.[317] Accordingly, the IHT effectively classified the leadership of the Iraqi Ba'ath regime as a criminal organisation.

As noted in Part II section A.4.b, the second part of Bernays' plan regarding criminal organisation never met fruition. According to the Nuremberg Tribunal, in order to hold an individual liable on the basis of membership in a criminal organisation the prosecutor would have to show "that the accused not only joined voluntarily but also had knowledge of the organization's criminal purpose." [318] Incidentally, this is what the IHT sought to prove with regard to each of the major defendants' involvement in the various facets of the Iraqi regime.

If the IHT had merely reasoned in dicta that it believed the leadership of the Ba'ath party and former Iraqi government had constituted criminal organisations, there would be no argument that the court committed harmful error. In applying category two JCE, however, the court had to show that the defendants had "personal knowledge of the system of ill-treatment . . . as well as the intent to further the system."[319] Since there was no "system of ill-treatment" of the variety considered by the ICTY in *Tadić*, the court implicitly characterised the attack on Al Dujail to be the system. Yet when determining whether the defendants intended to further that system, the court instead focused on their intent to further the general criminal aims of the regime. Additionally the court based its determination with regard to the defendants' intent on their positions in that regime. Thus, in a factual situation that did not lend itself to concentration camp JCE, the four major defendants were effectively held liable, and subsequently sentenced to death, for being leading members in institutions that the Iraqi High Tribunal deemed to be criminal organisations.

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315 *See supra* note 249 and accompanying text.

316 *Id*.

317 Al Dujail Judgment, *supra* note 220, pt. 2, at 29-30.

318 Ramer, *supra* note 42, at 44-45.

319 Gustafson, *supra* note 113, at 137.

As has been noted above, JCE cannot be used in any way so as to create responsibility for a set of circumstances that would not otherwise be criminal under international law.[320] As the ICTY Trial Chamber established in *Prosecutor v. Stakić*, "joint criminal enterprise can not be viewed as membership in an organisation because this would constitute a new crime not foreseen under the Statute and therefore amount to a flagrant infringement of the principle *nullum crimen sine lege*." [321] Like the ICTY Statute, the IHT Statute does not provide for organisation liability. Since the IHT effectively criminalised membership in the leadership of the Ba'ath party and several of the agencies of the Iraqi government, this analysis must proceed with an examination of *nullum crimen*.

c. *Violation of Nullum Crimen*

It is a well-established principal of international law that an individual cannot be subject to retroactive criminalisation.[322] Article 15(1) of the International Covenant on Civil and Political Rights, of which Iraq is a signatory, stipulates that "[n]o one shall be held guilty of any criminal offence on account of any act or omission which did not constitute a criminal offence, under national or international law, at the time when it was committed."[323] This same principle is enshrined in Iraqi law as well. Article 19(10) of the current Iraqi Constitution specifies: "Criminal law shall not have retroactive effect, unless it is to the benefit of the accused."[324] This doctrine prohibiting *ex post facto* criminal liability is known by its Latin name, *nullum crimen, nulla poena sine praevia lege poenali*, which literally means, 'No crime, no punishment without a previous penal law.'

Professor Bhuta makes the argument that the IHT inappropriately applied "concentration camp" JCE to facts that did not lend themselves to that form of liability. But he expressly stops short of examining any potential violations of *nullum crimen*.[325] In fact, no one to date has conducted such an examination. *Ex post facto* criminalisation remains one of the major criticisms of the Nuremberg trials,[326] so international courts must be extremely careful to avoid infringing on their own validity and legitimacy by contravening this doctrine. Interestingly, the IHT addresses retroactive criminalisation at length in the Al Dujail opinion.

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[320] *See supra* notes 301-02 and accompanying text.

[321] Prosecutor v. Stakić, Case No, IT-97-24-T, Judgment, ¶ 433 (July 31, 2003); *see also supra* note 302 and accompanying text.

[322] ICCPR, *supra* note 17, at art. 15(1).

[323] *Id.*

[324] Constitution of the Islamic Republic of Iraq, at art. 19 (Tenth) (2005).

[325] Bhuta, *supra* note 10, at 59 n.94.

[326] José E. Alvarez, *Trying Hussein: Between Hubris and Hegemony*, 2 J. INT'L CRIM. JUST. 319, 319 (2004).

Consistent with international law, the tribunal writes, "It is impossible to punish a person for an act of which penalty or judgments were not stipulated upon committing such an act."[327] Recognising the sanctity of *nullum crimen*, the court further notes: "The principle of non-retroactivity of criminal law is respected for the purpose of preventing injustice and protecting the innocent."[328] In its lengthy analysis of whether the application of international law generally, and peacetime crimes against humanity specifically, would violate *nullum crimen* with regard to the Iraqi defendants, the IHT emphasised the importance of looking to customary international law at the time of the crime. [329] Ultimately, the court concluded:

> What is important in international penal law is that the act was incriminated by that law at the time of its commitment, and beyond that it does not matter whether the international crime is decided by virtue of a legal rule stipulated for in international conventional law or decided by virtue of an international customary legal code.[330]

Applying the court's own analysis of *nullum crimen* to its jurisprudence pertaining to joint criminal enterprise liability ironically reveals the Iraqi High Tribunal's error. Assuming that the ICTY, ICTR and SCSL have been correct in their assertions that all three categories of JCE are grounded in customary international law arising out of post-World War II trials, then the Iraqi tribunal's use of category two JCE would not, by itself, violate the prohibition on retroactive criminalisation. As this analysis has shown, however, in misapplying category two JCE, the IHT actually criminalised membership in the Ba'ath party leadership and the upper echelons of the Iraqi regime. But at the time of the Al Dujail incident, such membership was not illegal under either Iraqi or international law. In fact, throughout the 1980s, the United States of America, the primary western power, actively supported Saddam Hussein's government.[331] The Ba'ath regime was considered an important western ally, not a criminal organisation. Furthermore, it was actually illegal under Iraqi law to have ties to organisations other than the Ba'ath party.[332] In other words, through misapplying JCE II, the IHT held the four major

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[327] Al Dujail Judgment, *supra* note 220, pt. 1, at 35.

[328] *Id*. pt. 2, at 4.

[329] *Id*. pt. 1, at 38-39.

[330] *Id*. pt. 2, at 5.

[331] CHARLES TRIPP, A HISTORY OF IRAQ, 240 (2d ed. 2000).

[332] Iraqi Penal Code, Law No. 111 of 1969, art. 200

(1) The following persons are punishable by death:
   a) Any person who is a member of the Arab Socialist Ba'ath Party and who wilfully conceals any previous party or political membership or affiliation.
   b) Any person who is or has been a member of the Arab-Socialist Ba'ath Party and who is found to have links during his commitment to the Party with any other political or party organization or to be working for such organization or on its behalf.

defendants accountable on the basis of organisation liability - a liability theory that was not available under either Iraqi or international law.

This particular argument - that the Iraqi High Tribunal violated the principle of *nullum crimen* by misapplying category two JCE en route to criminalising membership in the former Iraqi regime - is novel with regard to this tribunal. A recent analysis of the Special Tribunal for Lebanon, however, indicates that the use of JCE in that court also violated *nullum crimen*.[333] There, however, the court applied the controversial category three extended JCE to a crime which fell exclusively under Lebanese law - a legal system that does not recognise individual liability for the foreseeable crimes of co-criminal collaborators.[334]

In reviewing the jurisprudence of the court, error can be assigned on several matters. First, the court failed to require specificity in the pleadings pertaining to charges brought pursuant to joint criminal enterprise liability. Unaware of the theory on which they were being held liable, the defendants were not provided ample opportunity to prepare their defences. Second, the court applied category two joint criminal enterprise to a set of facts which did not actually lend themselves to "concentration camp" or "systemic" JCE. In its application of JCE II, the court further erred in criminalising membership in the Ba'ath party and the leadership of the Iraqi government. Since membership in the relevant institutions did not constitute crimes under either international or Iraqi law at the time of the Al Dujail incident, the four major defendants were convicted on grounds that violated the legal principle of *nullum crimen, nulla poena sine praevia lege poenali*. These errors are all harmful and thus reversible. They were not, however, addressed on appeal.

### C. *The Al Dujail Appeal*

All four of the major defendants appealed the verdict of the Trial Chamber decision and accompanying death sentences. On December 26, 2006, the Iraqi High Tribunal Appeals Chamber - the court of last resort -

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> c) Any person why [sic] is or has been a member of the Arab Socialist Ba'ath Party and who is found to be, following the termination of his relationship with the Party, a member of any other political or party organisation or to be working for such organisation or on its behalf.
>
> d) Any person who recruits to a political or party organisation another person who is affiliated to the Arab Socialist Ba'ath Party or recruits such person in any way to that organisation following the termination of his affiliation with the Party while being. [sic] aware of that affiliation.

(citations omitted).

[333] Marko Milanovi, *An Odd Couple: Domestic Crimes and International Responsibility in the Special Tribunal for Lebanon*, 5 J. INT'L CRIM. JUST. 1139, 1144 (2007).

[334] *Id.* at 1144-50.

issued an opinion rejecting all of the appeals.[335] A remarkably short decision compared to that of the Trial Chamber, the appellate opinion briefly addresses retroactive criminalisation, but not with regard to the argument posed by this Article. The court upholds the prohibition against *ex post* facto laws, but finds that *nullum crimen* had not been violated with regard to the application of international law.[336]

Joint criminal enterprise is only mentioned with regard to Awwad Hamad Al-Bandar. The court writes: "Awwad Hamad Al-Bandar committed, as a principal actor, a joint criminal act that represents a premeditated murder as a crime against humanity, with the help of others based on the initial and prosecutorial investigations."[337] The court proceeds to emphasise the "mock" nature of the trial conducted by Al-Bandar and leading to the convictions and death sentences of the 148 residents of Al Dujail.[338] The court does not discuss the defendant's liability on the basis of JCE any more than that brief statement.

Since the defendants did not raise the arguments contained in this Article on appeal, the Appeals Chamber would have had to address them *sua sponte*, if at all. It is therefore not surprising that the appellate opinion does not examine the use of JCE II as a surrogate for organisational liability in violation of *nullum crimen*. It is perhaps worth re-emphasising, however, that this Article in no way argues that the defendants were not guilty. Indeed, further investigation may show that the defendants could have been held liable using one of the other two categories of JCE. The present analysis, however, does not purport to evaluate the culpability of the defendants, but merely critiques the tribunal's erroneous application of category two joint criminal enterprise liability.

## IV. Conclusion

The establishment of the Iraqi High Tribunal was met with a mixture of scepticism and hope. On the one hand, the creation of a quasi-international tribunal with no UN backing, seemingly under the control of the United States government, raised concerns as to the independence and legitimacy of the court.[339] On the other hand, the very presence of a post-conflict justice mechanism in Iraq fostered hope for reconciliation and transition to a stable society governed by the rule of law.[340] As one

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[335] *See* Prosecutor v. Saddam Hussein et al., Case No. 29/c/2006, Appeals Judgment (Iraqi High Trib., Dec. 26. 2006), *translated at* http://tiny.cc/1rrgg.

[336] *Id*. at 11-12.

[337] *Id*. at 14.

[338] *Id*. at 14-15.

[339] Kenneth Roth, *Saddam Captured: Now, Try Him in an International Court*, Int'l Herald Trib., Dec. 15, 2003.

[340] Eric N. Ward & Matthew R. A. Heiman, *Iraqi-run Tribunal is Major Progress Toward Democratic Rule of Law*, Christian Science Monitor, July 19, 2005, *available at* http://tiny.cc/vdnuo.

commentator argues, "[t]he use of international criminal justice to reconcile a post-conflict community with its past is especially important in Iraq in light of its past three decades of human rights abuses."[341] Furthermore, "the Iraqi Special Tribunal had the potential to contribute greatly to the reconciliation of the Iraqi ethnic groups with their past."[342] While the IHT was a judicial institution, its significance and sphere of influence went far beyond the legal realm.

Prior to the start of the Al Dujail case, Cherif Bassiouni, one of the leading scholars, advisors and experts on post-conflict justice, outlined the goals and objectives that he believed should have been guiding the IHT. He writes:

> Experiences in various parts of the world since World War II confirm that post-conflict justice in Iraq should not be ignored, and that its goals should include the following:
>
> . . .
>
> 2. Restoring an independent judiciary to Iraq and strengthening the sustainability of a modern legal system in Iraq;
>
> 3. Sustaining the democratic future, territorial integrity, and stability of Iraq, and supporting the establishment of a new democratic government based on the principles of the rule of law;
>
> 4. Creating a precedent in the Arab world for holding officials responsible for systematic repression and abuse and contributing to the worldwide experience of enforcing international criminal justice through domestic legal processes, to which international prosecutions are complementary;
>
> 5. Prosecuting Saddam Hussein and the senior leaders of the Ba'ath regime . . . . To accomplish other goals, these prosecutions must have legitimacy and credibility in the eyes of Iraqis and Arabs, and they must be conducted fairly and effectively.[343]

With a well-executed legal process, the Iraqi High Tribunal could realistically have accomplished this set of objectives. The failures of the Tribunal explored in Part III, combined with other shortcomings, however, may have rendered these aims unobtainable, at least for the foreseeable future. In order to actually accomplish such goals as strengthening the Iraqi legal system, ensuring that the Iraqi government is both stable and devoted to the rule of law, and fostering a sense of governmental and judicial legitimacy, Iraq will now have to explore other processes.

While this Article focuses on a narrow set of issues within the jurisprudence of the Iraqi High Tribunal, the implications of those issues are fairly expansive. The Iraqi justices were trying the former president, vice

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[341] Anna Triponel, *Can the Iraqi Special Tribunal Further Reconciliation in Iraq?*, 15 CARDOZO J. INT'L & COMP. L. 277, 282 (2007).

[342] Id. at 318.

[343] Bassiouni, *supra* note 11, at 335.

president and high ranking officials of their own country. Misapplying the very doctrine that connected those individuals to the crimes of the oppressive former regime discredited the entire process. Though ample evidence existed to convict the defendants, the Iraqi judges did so in an erroneous fashion. This Article expressly denies challenging the guilt of the convicted parties in any way. Instead, it posits that the way in which that guilt was assessed violated firm principles of international law. Those violations in turn constituted harmful and reversible error, rendering the convictions and subsequent death sentences of Saddam Hussein, Taha Yassin Ramadan, Barzan Ibrahim and Awwad Hamad Al-Bandar void.

The Iraqi High Tribunal is part of the tradition of international criminal justice that began with Nuremberg and the other post-World War II tribunals and continued with the ICTY, ICTR, SCSL and ICC. Given the relatively small number of international cases that have been tried, each decision has the potential to make an important contribution to the field. In the context of joint criminal enterprise, this is especially true, given that it remains a fairly new doctrine in international law. The IHT, therefore, had a responsibility to help expand the corpus of international criminal jurisprudence generally and jurisprudence on JCE specifically. This Article argues, however, that on account of the court's erroneous decision, the Al Dujail opinion cannot reasonably be used as persuasive guidance for future cases, either in the IHT itself or in any other tribunal.

Many rejoice in the conviction of Saddam Hussein and his co-defendants, and some would certainly argue that the means by which the IHT accomplished those ends are all but irrelevant. In an institution tasked with helping a country rebuild after decades of oppression and violence, however, the validity of the process was crucially important. This Article is the first to argue that the IHT's erroneous application of second category joint criminal enterprise liability led to the criminalisation of the Ba'ath party and Iraqi regime, thereby violating the principle of *nullum crimen*. Yet this argument only joins a long list of criticisms of the manner in which the IHT trials were conducted. The problems have been so grave that Cherif Bassiouni, who held such high hopes for what the Iraqi High Tribunal might accomplish, has written:

> For one of the authors of this article, who has spent a lifetime involved in the evolution of international criminal justice and who sought to assist the Iraqis in shaping their approach to post-conflict justice, it is particularly painful to write about mistakes that were predicted and could have easily been avoided. In criticizing those whose ignorance and perhaps hubris led to the outcomes discussed below, there is only the sadness of regret. So much was at stake and so little was needed to put Iraqi post-conflict justice on par with the most successful historical precedents. A comprehensive post-conflict justice scheme based on legal legitimacy that drew upon the experiences and lessons of other international criminal prosecutions, war

> crimes trials, and post-conflict justice institutions would have been a great achievement in the history of international criminal justice. Along with rendering a sense of justice, such a process could have imparted closure for many of the victims and instilled hope for a future Iraqi society based on the rule of law.[344]

Bassiouni's bleak reflections are only further supported by the arguments of this Article.

The Iraqi High Tribunal should have brought legitimacy to the post-conflict process in Iraq. Instead, it applied the law illegitimately. It was tasked with helping to ensure a transition to stable democracy. Yet it contravened the rule of law. In not exercising the rigor to diligently apply the elements of joint criminal enterprise liability, the Iraqi High Tribunal created a crime that had not been a penal offence at the time of the Al Dujail incident. Consequently, the former Ba'ath party and Iraqi leaders were held criminally accountable for being members of those ruling institutions. Throughout the 1980s, the United States and other nations had not only recognised the legitimacy of the Iraqi government, but had actively supported and aided it. The Iraqi High Tribunal's 2006 decision - made with the advice of the United States Department of Justice - to criminalise membership in the Ba'ath party leadership during the 1980s not only violated legal principles, but contributed to the political quagmire the country now faces. Though many hoped the Iraqi High Tribunal would significantly assist the legal, political and societal transformation of the war-torn state, it appears to have caused more problems than it has solved.

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[344] Bassiouni & Hanna, *supra* note 195, at 27.