

TORTURED LAW/TORTURED “JUSTICE”—JOINT CRIMINAL ENTERPRISE IN THE CASE OF ALOYS SIMBA

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I. INTRODUCTION

Joint criminal enterprise (JCE)—a judicially interpreted doctrine¹—has become a “hallmark” mode of liability at the international Tribunals. This concept has been referred to as the “magic bullet of the OTP”² and the “nuclear bomb of the international prosecutor’s arsenal.”³ It is obvious as to why: with these three words, the Prosecution has charged collective and institutional guilt, in one fell swoop. At the International Criminal Tribunal for Rwanda (ICTR), the Prosecution encapsulates its theory of a conspiracy

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1. JCE has been held to be part of “committing” under Articles 6(1) and 7 of the Statute of the International Tribunal for Rwanda; *see generally* Prosecutor v. Milutinovic et al., Case No. IT-99-37-AR72, Decision on Ojdanic Challenge to JCE Jurisdiction (Int’l Crim. Trib. for the Former Yugoslavia May 21, 2003), Separate Opinion by Judge David Hunt.

2. William A. Schabas, *Mens Rea and the International Criminal Tribunal for the Former Yugoslavia*, 37 NEW ENG. L. REV. 1015, 1032 (2003).

3. Allison Marston Danner & Jenny S. Martinez, *Guilty Associations: Joint Criminal Enterprise, Command Responsibility and the Development of International Criminal Law*, 93 CAL. L. REV. 75, 137 (2005).

of government (both at the national and local level)—military Hutu intelligentsia, whom it alleges planned and committed the crimes of 1994—all within the allegation of JCE.

Perhaps more than any other judicial doctrine, these three words “joint criminal enterprise” have routinely violated the fair trial rights of defendants at the Tribunals and diluted the requirements for the special intent needed for genocide. Many legal scholars have identified and criticized the legal problems of this “guilt by association” template, especially in respect to the third category of JCE and the mens rea,⁴ the conflation and confusion between conspiracy and JCE by the Prosecution,⁵ and the distinction, if any, between JCE and acting in concert,⁶ to name just a few issues. These problems inherent in the JCE doctrine are exacerbated by the additional failures of the Prosecution and Tribunals to follow the jurisprudence, which mandates strict construction in the pleading and proof of JCE.⁷

4. There is a plethora of literature on this point, especially in the last five years. *See, e.g.*, Goran Sluiter, *Symposium: Guilty by Association: Joint Criminal Enterprise on Trial*, 5 J. INT’L CRIM. JUST. 67, 67–68 (2007); *see also* Danner & Martinez, *supra* note 3, at 124; Schabas, *supra* note 2, at 1017; David L. Nersessian, *Whoops, I Committed Genocide! The Anomaly of Constructive Liability for Serious International Crimes*, 30 FLETCHER F. WORLD AFF. 81, 82 (2006); Mark Osiel, *The Banality of Good: Aligning Incentives Against Mass Atrocity*, 105 COLUM. L. REV. 1751, 1802 (2005) (discussing elasticity and vagueness problems, and quoting from an interview with an ICTY Prosecutor that “it is really rather haphazard who gets tossed into the pot” of a given enterprise).

5. Despite the Prosecution’s erroneous and continuous practice of treating conspiracy and JCE as legally fungible, appellate jurisprudence draws a distinction between a substantive crime and a mode of liability. *See* Prosecutor v. Kvočka et al., Case No. IT-98-30/1-A, Appeal Judgment, ¶ 91 (Int’l Crim. Trib. for the Former Yugoslavia Feb. 28, 2005) (“Joint criminal enterprise is simply a means of committing a crime; it is not a crime in itself.”).

6. *See* Separate and Partly Dissenting Opinion of Judge Per-Johan Lindholm in Prosecutor v. Simić et al., Case No. IT-95-9-T, Trial Chamber Judgment, ¶ 2 (Int’l Crim. Trib. for the Former Yugoslavia Oct. 17, 2003).

I dissociate myself from the concept or doctrine of joint criminal enterprise in this case as well as generally. The so-called basic form of joint criminal enterprise does not, in my opinion, have any substance on its own. It is nothing more than a new label affixed to a since long well-known concept or doctrine in most jurisdictions as well as international criminal law, namely co-perpetration.

Id.

7. *See* Prosecutor v. Brđanin, Case No. IT-99-36, Appeal Decision, ¶ 428 (Int’l Crim. Trib. for the Former Yugoslavia Apr. 3, 2007) (The Appeals Chamber emphasized that “JCE is not an open-ended concept that permits convictions based on guilt by association. On the contrary, a conviction based on the doctrine of JCE can occur only where the Chamber finds all necessary elements satisfied beyond a reasonable doubt.”); Prosecutor v. Kordić & Cerkez, Case No. IT-95-14/2-T, Trial Judgment, ¶ 219 (Int’l Crim. Trib. for the Former Yugoslavia Feb. 26, 2001) (The Trial Chamber warned that “[s]tretching notions of individual mens rea too thin may lead to the imposition of criminal liability on

It is evident to anyone who has had to defend a client against the charge of JCE that the notion is legally convoluted, and its use or application is illogical and violates the rights of defendants. Its ubiquitous presence in the ICTR and International Criminal Tribunal for the former Yugoslavia (ICTY) cases illustrates the urgency of the Tribunals to assign collective guilt—even if that is based on unpleaded and unproven allegations involving a named defendant and an unnamed, amorphous infinite universe of JCE members. Moreover, these are allegations against which a defendant can neither legally nor logically completely defend himself.⁸ Thus, in the quest for collective guilt, blame, and punishment, the legally defective doctrine of JCE has been permitted, wrongly in my view, to assume “center stage” in the indictments and convictions at the Tribunals. Although there are clearly multiple contenders for the “lowest point” of Tribunal jurisprudence, JCE continues to claim its place at the top of the charts.

II. THE SIMBA CASE

The *Simba* case was one of the first single defendant cases at the ICTR in which the Prosecution alleged JCE.⁹ Aloys Simba was charged with genocide, or alternatively, complicity in genocide, murder, and extermination as crimes against humanity.¹⁰ The basic defence in *Simba* was alibi, which was accepted by the Trial Chamber for part of the period of time in question, but rejected for the period during which his

individuals for what is actually guilty by association, a result that is at odds with the driving principles behind the creation of this international Tribunal.”).

8. As Ohlin points out, “there is no warrant for extending liability to a JCE simply because the very nature of these crimes is collective. The question is not whether it is collective or not but what kind of collective action is criminal under the ICTY Statute.” Jens David Ohlin, *Three Conceptual Problems with the Doctrine of Joint Criminal Enterprise*, 5 J. INT’L CRIM. JUST. 70, 74 (2007).

9. I think there was one single defendant case, prior to *Simba*, where “common scheme” was charged. However, appellate jurisprudence requires strict adherence to the requirements of JCE notice, regardless of the exact words charged. *Prosecutor v. Giacumbitsi*, Case No. ICTR-01-64-A, Appeal Judgment, ¶¶ 158–179, 289 (July 7, 2006) (The Appeals Chamber dismissed the Prosecution’s appeal of error in the Trial Chamber judgment that it could not make a finding on JCE because it was not pleaded clearly enough to permit the Accused to defend himself, holding that although the absence of the words “joint criminal enterprise” is not in itself defective, the question is whether the Accused has been meaningfully informed of the nature of the charge.).

10. See *Prosecutor v. Simba*, Case No. ICTR-01-76-1, Amended Indictment Pursuant to 6 May 2004 Decision, III (May 10, 2004) [hereinafter *Simba Amended Indictment*]. The Prosecution withdrew the counts of complicity and murder as a crime against humanity in its Closing Brief. *Prosecutor v. Simba*, Case No. ICTR-01-76-T, Trial Judgment, ¶ 13 (Dec. 13, 2005) [hereinafter *Simba Trial Judgment*].

participation was alleged in massacres and killings.¹¹ On December 13, 2005, the Trial Chamber convicted Aloys Simba, a retired Lieutenant Colonel in the Rwandan Army and a former member of the Rwandan Parliament for the National Republican Movement for Democracy and Development (MRND), which party he left in September 1993, of genocide and extermination as a crime against humanity for participation in a JCE to kill Tutsi civilians at two sites: Murambi Technical School and Kaduha Parish, both in the Gikongoro prefecture.¹² Simba was sentenced to twenty-five years.¹³ On appeal, the judgment was affirmed.¹⁴ In 2009, he was transferred from Arusha to Benin, where he is now serving his sentence.¹⁵

Unfortunately, the Tribunal made bad law in respect to JCE (as well as other issues) in the *Simba* case. This brief paper addresses only two of the erroneous holdings in the Trial Chamber's judgment: (a) the Trial Chamber's conclusion that the manner in which the Prosecution gave notice of its theory of JCE did "not in any way render the trial unfair,"¹⁶ and (b) the Trial Chamber's conclusion that Simba possessed "momentary" genocidal intent, at the site, which he shared with the countless unnamed others at the site.¹⁷ Both of these points—the pleading of JCE, particularly in respect to the material element of identity of membership; and the "on the spot" mens rea finding—illustrate the dangers and illegalities of the JCE doctrine. The points on proof in reference to JCE are not addressed here.¹⁸

11. Simba Trial Judgment, *supra* note 10, ¶ 384.

12. As the Trial Chamber stated in its Summary of the Judgment, this trial was the first case in the Tribunal concerning the events in the Gikongoro prefecture (Simba's prefecture). Hence, Simba was the first person from this area to be convicted. It was the Defence's view that this was significant, and the lack of prior convictions from this area was an added impetus to find Simba guilty.

13. See generally Simba Trial Judgment, *supra* note 10.

14. See generally Simba v. Prosecutor, Case No. ICTR-01-76-A, Appeal Chamber Judgment (Nov. 27, 2007) [hereinafter Simba Appeal Judgment].

15. International Criminal Tribunal for Rwanda, *ICTR Detainees—Status on 17 January 2011*, available at <http://www.unict.org/Cases/StatusofDetainees/tabid/202/Default.aspx> (last visited Mar. 24, 2011).

16. Simba Trial Judgment, *supra* note 10, ¶ 396.

17. *Id.* ¶ 418.

18. The Defence argued that the Prosecution did not prove beyond a reasonable doubt that a joint criminal enterprise existed, and did not prove that a criminal nexus existed between Aloys Simba and the persons named in paragraph 14. Moreover, the Prosecution could not prove that a criminal nexus existed between Simba "and others" (who were unnamed) alleged to be in the joint criminal enterprise. Lastly, the Defence raised reasonable doubt that Aloys Simba had any criminal connection or relationship to the named persons in paragraph 14 for the purpose of carrying out the objective of a joint criminal enterprise.

III. THE “LOOSE” APPLICATION OF JCE PLEADING RULES, ESPECIALLY AS TO THE IDENTITY OF JCE MEMBERS—FAIR TRIAL ERRORS IN THE TRIAL CHAMBER AND APPEAL JUDGMENTS

Specificity in pleading is a general principle of notice. The rules of JCE pleading are simple and direct. JCE must be pleaded in an “unambiguous manner” and the form of JCE on which the Prosecution is relying must be specified.¹⁹ In pleading the form of JCE, the Prosecution must also plead the mens rea, which is specific to each of the three forms.²⁰ In addition, the Prosecution must plead the following material elements of JCE: its purpose, the identity of the co-participants, and the nature of the accused’s participation in the enterprise.²¹ The Prosecution is expected to know its case, and not mold its theory as the evidence evolves.²²

Despite the abundance of appellate jurisprudence on the requirement of notice, and the due process requirements found in international law and conventions, it often appears that the Prosecution and the Trial Chamber take the position that JCE is somehow exempt from, or not an urgent matter of, notice.²³ These legal requirements are regularly violated by the Prosecution, as illustrated by the multiple pleadings on defects in the indictment, found in *Simba* and other cases.

19. Prosecutor v. Ntagerura, Case No. ICTR-99-46-T, Trial Chamber Judgment, ¶ 34 (Feb. 25, 2004) (affirmed on appeal, July 7, 2006). See Prosecutor v. Brđnanin & Talić, Case No. IT-99-36, Decision on Form of Further Amended Indictment and Prosecution Application to Amend, ¶ 81(4a), (4b) (Int’l Crim. Trib. for the Former Yugoslavia June 26, 2001) (The Trial Chamber ordered that the Prosecution plead (a) whether the crimes alleged fell within or outside the object of the joint criminal enterprise; and (b) that the Accused had the mens rea required for those crimes within the object of the enterprise.). See also Prosecutor v. Krnojelac, Case No. IT-97-25, Decision on Form of the Second Amended Indictment, ¶ 16 (Int’l Crim. Trib. for the Former Yugoslavia May 11, 2000).

20. Prosecutor v. Tadić, Case No. IT-94-1-A, Appeal Judgment, ¶¶ 220–28 (Int’l Crim. Trib. for the Former Yugoslavia July 15, 1999).

21. See Prosecutor v. Kvočka et al., Case No. IT-98-30/1-A, Appeal Judgment, ¶¶ 28, 42 (Int’l Crim. Trib. for the Former Yugoslavia Feb. 28, 2005).

22. See, e.g., Prosecutor v. Muvunyi, Case No. ICTR-2000-55A-A, Appeal Judgment, ¶ 19 (Aug. 29, 2008); see also Prosecutor v. Ntagerura, Case No. ICTR-99-46, Appeal Judgment, ¶ 27 (July 7, 2006) and Trial Judgment, ¶ 24 (Feb. 25, 2004); Prosecutor v. Kupreskić, Case No. IT-95-16-A, Appeal Judgment, ¶ 92 (Int’l Crim. Trib. for the Former Yugoslavia Oct. 23, 2001). Note that there is abundant jurisprudence, at both Tribunals, on this point.

23. Unfortunately, other Trial Chambers have not promptly decided Defence objections on the pleading of JCE. For example, in the “Military II” case, the Trial Chamber, in a 2006 decision on a Defence motion, deferred ruling on the JCE objections. Prosecutor v. Ndindiyimana, Case No. ICTR-00-56-T, Decision on Nzuwonemeye’s Motion to Exclude Parts of Witness AOG’s Testimony, ¶ 27 (Mar. 30, 2006). At the time of closing arguments in June 2009, the Trial Chamber still had not made a ruling on JCE.

But what is significant in *Simba* is that even where the Trial Chamber initially ruled that the Prosecution's pleadings were lacking in respect to JCE, the Trial Chamber did not take a position that a remedy was mandated as a matter of fair trial. Instead, its position was to justify the Prosecution's defective pleading, particularly in respect to the material element of identity of members in the JCE and the forms of JCE, and each's respective mens rea, and to provide "legal" rationales to cover the violations.

IV. PROCEDURAL HISTORY

It should be noted that the JCE defects in the indictment were in the context of a generally defective indictment, which was vague, lacked specificity to support elements of the crimes and forms of liability charged, lacked time frames, etc. The Defence's position was that the JCE allegation was a legal fiction: the allegation was neither pleaded in conformity with the legal requirements²⁴ nor, as we argued at closing arguments, proved beyond a reasonable doubt.

The three words, "joint criminal enterprise," first appeared in the first amended indictment, filed in January 2004. In response to Defence objections to the inadequate pleading of JCE, the Trial Chamber acknowledged that the state of mind of the Accused or his alleged partners in the JCE was not specifically pleaded, and "consider[ed] that the amended indictment should be amended to plead the *mens rea* element of joint criminal enterprise."²⁵ However, the Trial Chamber's Order to the Prosecution to provide details was tempered with "if it is in a position to do so." This essentially left the Prosecution an option to decide what it could or would do, if anything. The Prosecution, however, was never "in a position" to comply with the legal pleading requirements for JCE.

In the second amended indictment, filed May 10 to conform with the May 6 decision, the Prosecution simply tacked on the phrase "in concert with others as part of a joint criminal enterprise" to the statutory definition of Article 6(1).²⁶ The Prosecution did not plead mens rea for each form, nor specify any form of JCE, but simply added paragraph 58 which stated that *Simba* "intended to commit the acts above, this intent being shared by all other individuals involved in the crimes perpetrated."

24. See *Prosecutor v. Tadic*, Case No. IT-94-1-A, Appeal Judgment, ¶¶ 220–28 (Int'l Crim. Trib. for the Former Yugoslavia July 15, 1999), and its progeny.

25. *Prosecutor v. Simba*, Case No. ICTR-01-76-I, Decision on Preliminary Defence Motion Regarding Defects in the Form of the Indictment, ¶¶ 11–12 (May 6, 2004).

26. See *Simba Amended Indictment*, *supra* note 10. Numerous cases have rejected this practice and have held that tracking of elements in an indictment does not provide notice. See also *Prosecutor v. Muvunyi*, Case No. ICTR-2000-55A-A, Appeal Judgment, ¶ 44 (Aug. 29, 2008).

The Prosecution amendment (paragraph 58) was essentially a “one-size fits all” mens rea for the three forms of JCE, and a good example of what the Kronjelac Appeals Chamber refers to as “persistent ambiguity” in the pleading of JCE.²⁷ The Defence filed another motion on defects in this second amended indictment, which was denied by the Trial Chamber. It held that the indictment, as a whole, provided adequate notice. The Trial Chamber, however, acknowledged that the indictment referred to JCE without specifying the particular form, but understood this to mean that the Prosecution was relying on all three forms. The Trial Chamber cautioned that each paragraph should not be read in isolation and should be considered in the context of the other paragraphs of the indictment. Thus, with ICTR “jurisprudence parlance,” the Trial Chamber proceeded to “remedy-away” the defect in pleading.²⁸ In its closing brief, the Prosecution—for the first time—gave notice that it was basically pursuing only JCE I.²⁹

In its Judgment, the Trial Chamber stated that the Prosecution provided additional detail on JCE in its Pre-Trial Brief.³⁰ This was its first reference in any decision to the Prosecution Pre-Trial Brief (PTB), filed May 10, 2004, as a form of notice. But, again, the Trial Judgment was less than equivocal in its findings. The Trial Chamber also stated that it “does not exclude that the Prosecution could have pleaded the requisite elements of joint criminal enterprise in a more clear and organized manner in the Indictment.”³¹

However, the PTB sections on the joint criminal enterprise generally suffered from the same problems of vagueness and lack of specificity as the

27. Prosecutor v. Krnojelac, Case No. IT-97-25-A, Appeal Judgment, ¶ 144 (Int’l Crim. Trib. for the Former Yugoslavia Sept. 17, 2003).

28. Prosecutor v. Simba, Case No. ICTR-01-76-T, Decision on the Defence’s Preliminary Motion Challenging the Second Amended Indictment, ¶ 6 (July 14, 2004), which reads:

The Chamber notes that the indictment only refers to joint criminal enterprise without specifying the particular form. In the Chamber’s view, the indictment’s failure to point to a particular form of joint criminal enterprise reflects the Prosecution’s intention to rely on all three forms. Consequently, the indictment must plead the distinct mens rea for each form of joint criminal enterprise. In assessing an indictment, the Chamber is mindful that each paragraph should not be read in isolation but rather should be considered in the context of the other paragraphs in the indictment. (footnotes omitted).

29. Simba Trial Judgment, *supra* note 10, ¶ 386.

30. *Id.* ¶ 391.

31. *Id.*

facially defective amended indictments.³² There was no notice in respect to the different mens rea for each form of JCE and the alleged JCE membership included broad, general categories and simply repeated paragraph 14 of the Amended Indictment. There was no nexus alleged between specific allegations of the Indictment and Simba's alleged participation in a joint criminal enterprise. Thus, the Defence argued that reliance on the PTB to remedy material defects in an indictment was in error and, in the alternative, even if the PTB were accepted, it did not cure any defective notice.³³

In its judgment, the Trial Chamber took the position, following its earlier decision, that in the absence of any form being pleaded, all three forms were being alleged. As to the problem that the mens rea specified in paragraph 58 of the Indictment applied to only one form, the Judgment "resolved" this defect by holding that the Prosecution had, at the close of its case, stated it was principally pursuing form one only and the Trial Chamber, no doubt, was satisfied that form one mens rea was pleaded.³⁴

This "logical" perspective on the [non]pleading of form is a disingenuous representation. In fact, what had occurred was that the Prosecution had molded its case, based on the evidence at trial—a practice legally opposed by a long line of trial and appellate jurisprudence holding that the Prosecution is expected to "know its case" before proceeding to trial.³⁵ The Trial Chamber never held the Prosecution accountable for its failure to plead (or prove) what it had claimed as its theory of JCE liability—all three forms of JCE liability. The Trial Chamber basically "covered up" the Prosecution's failure to give notice on the form and mens rea in any way which was meaningful to the Defendant.

Based on this, the elementary fair trial principle of notice, *i.e.*, that the defendant has a right to be informed in detail of the charges against him

32. See generally *Prosecutor v. Simba*, Case No. ICTR-01-76-T, Prosecutor's Pre-Trial Brief (May 10, 2004) (on file with author).

33. Use of the PTB to cure defects in the indictment has been held to be a "less preferred practice." See *Prosecutor v. Kronjelac*, Case No. IT-97-25-A, Appeal Judgment, ¶ 138 (Int'l Crim. Trib. for the Former Yugoslavia Sept. 17, 2003) ("This option, however, is limited by the need to guarantee the accused a fair trial.").

34. *Simba* Trial Judgment, *supra* note 10, ¶ 386. But see *Prosecutor v. Bikindi*, Case No. ICTR-01-72-T, Trial Judgment, ¶ 400 (Dec. 2, 2008), where the Trial Chamber held that "by pleading all three categories of joint criminal enterprise, the Prosecution failed to properly inform Bikindi as to which form of joint criminal enterprise was being alleged." In *Bikindi*, as in *Simba*, the Prosecution stated that it intended to rely on all three categories of JCE.

35. See *Prosecutor v. Muvunyi*, Case No. ICTR-2000-55A-A, Appeal Judgment, ¶ 18 (Aug. 29, 2008).

before (and not after) he presents his case, was violated by the Prosecution and—at times—with the complicity of the Trial Chamber.

V. “NEVER TOO LATE”—THE PROSECUTION’S CHANGE IN THE MATERIAL ELEMENT OF IDENTITY IN THE ALLEGED JCE SEVEN MONTHS AFTER IT HAD CLOSED ITS CASE

The issue of the timing of “notice” was particularly egregious in respect to the identity of the participants of the alleged JCE. Paragraph 14 of the Indictment stated that “[i]n preparing and planning the massacres, which occurred in the Gikongoro and Butare prefectures in April and May 1994, Aloys Simba acted in concert with” eight named persons and others not known to the Prosecution.³⁶ The Defence prepared its case³⁷ based on the allegations that the eight named individuals in paragraph 14, according to the Prosecution, comprised the members of the alleged joint criminal enterprise. The Defence questioned witnesses about Simba’s relationship, if any, to these named persons. The Trial Chamber, as well, questioned witnesses similarly on the names in paragraph 14. Thus, the Defence—as well as the Prosecution and the Trial Chamber—relied on paragraph 14 of the *Simba* Indictment as the factual support for the material element of identity of the named persons in the alleged joint criminal enterprise.

In its Closing Brief, filed on June 22, 2005, the Prosecution changed the identity of the alleged joint criminal enterprise members, by close to fifty percent. The Prosecution identified a new total of fifteen individuals, almost twice as many as in paragraph 14. Seven new persons who did not appear on the paragraph 14 list had been added, and one of the original names had been removed.³⁸

The Defence, obviously taken by surprise, had been—more accurately—ambushed.³⁹ But the Judgment is silent on this fair trial violation. No where can one find a reference in the Judgment to the Prosecution’s nearly fifty percent change of the alleged JCE membership in its Closing Brief.

36. Paragraph 14 included eight named individuals, and others: Faustin Sebhura, Laurent Bucyibaruta, Damien Biniga, Denys Kamodoka, Juvenal Ndabarinze, Lieutenant Colonel Augustin Rwamanya, Joachim Hategekimana, Charles Munyaneza, and others not known to the Prosecution. *Simba Amended Indictment*, *supra* note 10, ¶ 14.

37. Throughout, the Defence maintained that JCE was not pleaded, and did not waive its objections to the defective pleading of joint criminal enterprise. *See generally id.*

38. *Simba Appeal Judgment*, *supra* note 14, ¶ 69.

39. The Defence was informed of this change in the JCE composition after it had rested, when it was impossible to defend against the allegations of the new named members, and preserved objections to this fair trial violation in its subsequent closing arguments.

In fact, the Trial Chamber found that the Indictment “adequately identifies the participants alleged to have materially committed the crimes forming part of the common criminal purpose.”⁴⁰ The Trial Chamber held that “some are named in various paragraphs throughout the Indictment in connection with planning of the attack.”⁴¹

On appeal, the Defence argued that the identity of participants in the joint criminal enterprise is a material element and should be pleaded in the Indictment. The change in close to fifty percent of the composition of the joint criminal enterprise after the close of evidence can hardly be deemed a “minor discrepancy.”⁴² Further, such a material change causes prejudice to the Defence and misleads the Defence.⁴³ The Defence also argued that the Prosecution opted to “surprise” the Defence with its changes in the Closing Brief, after the trial, rather than choose the option of Rule 50,⁴⁴ which provides procedures for amendment of an indictment. The Prosecution did not make any motion, pursuant to Rule 50, to amend the Indictment in respect to the names.

In addition, the Defence pointed out that the Trial Chamber’s finding that “some [of the JCE members] are named in various paragraphs throughout the Indictment,”⁴⁵ was inconsistent with its own holdings in the Judgment.⁴⁶

As to the vagueness of the category of participants, the Trial Chamber held that “named individuals, as well as the attackers, should be considered as participants in the joint criminal enterprise.”⁴⁷ The Trial Chamber continued that it is “not satisfied that the Prosecution could have provided more specific identification,” and held that identification by category, such as Gendarmes and Interahamwe, is sufficient.⁴⁸

40. Simba Trial Judgment, *supra* note 10, ¶ 392.

41. *Id.*

42. *Cf.* Prosecutor v. Kunarac, Case No. IT-96-23/1-A, Appeal Judgment, ¶ 217 (Int’l Crim. Trib. for the Former Yugoslavia June 12, 2002) (“Minor discrepancies” between the dates in the trial judgment and those in the indictment in respect to rapes were not found to be unreasonable.).

43. *See* Prosecutor v. Rutaganda, Case No. ICTR-96-3-A, Appeal Judgment, ¶ 303 (May 26, 2003).

44. International Criminal Tribunal for Rwanda, Rules of Procedure & Evidence, Rule 50, U.N. Doc. ITR/3/REV.1 (June 29, 1995).

45. Simba Trial Judgment, *supra* note 10, ¶ 392 n.402.

46. Nsengiyumva and Karamage are named in paragraph 15, but this paragraph was found to be defective, and the evidence of Simba’s second visit to Gasarendra Centre (to Karamage’s bar) is not a basis of conviction. Ngogo, Gakuru, Nkusi, and Bakundukize are named in paragraph 57, but the Trial Chamber found no evidence to support the allegations. Simba Trial Judgment, *supra* note 10, ¶¶ 23, 86.

47. *Id.* ¶ 393.

48. *Id.*

In sum, the Trial Chamber's position was so broad as to eviscerate the meaning of notice for material elements of joint criminal enterprise as held by the Appeals Chamber in *Kronjelac* and other cases, and to nullify the legal elements such as findings of shared mens rea, required by *Tadic*.⁴⁹

The Appeals Chamber dismissed all the Appellant's arguments on JCE and notice. It affirmed that: (a) the Indictment provided adequate notice of the JCE⁵⁰ and adequate notice of the identity of the participants in the JCE,⁵¹ and (b) the pleading of the category of JCE was not inadequate.⁵²

The Appeals Chamber found that the Defence arguments about lack of notice in the Closing Brief were "misconceived." It stated that the "Prosecution final trial briefs are only filed at the end of a trial, after the presentation of all the evidence, and therefore are not relevant for the preparation of an accused's case."⁵³

Where the Prosecution gives legally compliant and timely notice to the Defence, one cannot disagree with this statement on final trial briefs. However, the Appeals Chamber totally disregarded the history of the Prosecution's violations of notice in this case, especially on JCE and the Defence's pleadings that it was taken by surprise with the Prosecution's "post-trial notice." At such a point, the Defence could do nothing, for example, to defend against the new JCE allegations which were raised by the Prosecution on the "eve" of closing arguments.

VI. THE "ON THE SPOT" INTENT

The legal and factual impossibility of defending against the unknown is a truism. How can an accused defend against allegations of "shared genocidal intent," as well as an intent to be part of a JCE, with an infinite universe of alleged nameless JCE members? The JCE doctrine, inherently defective, and especially in the hands of a less than legally rigorous and

49. Prosecutor v. Tadic, Case No IT-94-1-A, Appeal Judgment, ¶ 220 (Int'l Crim. Trib. for the Former Yugoslavia July 15, 1999).

50. Simba Appeal Judgment, *supra* note 14, ¶ 68.

51. *Id.* ¶ 75 (adopting the reasoning of the Trial Chamber judgment, paragraphs 392 and 393, which refer to paragraph 14 as the listing for the JCE members, and holds that others are named throughout the indictment and that the Prosecution could not have provided more details about the general categories of participants, Interahamwe or Gendarmes).

52. *Id.* ¶¶ 76–80. The Appeals Chamber, like the Trial Chamber, made the same observation of the Prosecution's failure to specifically name the category of JCE on which it intended to rely in the indictment. However, it agreed that paragraph 58 gave sufficient notice of the mens rea requirement for JCE I, when read together with the rest of the indictment.

53. *Id.* ¶ 73.

scrupulous prosecution, raises this absurd and illogical scenario to a legal travesty.

The Trial Chamber, in respect to the two massacre sites (Kaduha and Murambi) found that “the only reasonable conclusion, even accepting his [Aloys Simba] submissions as true, is that at that moment, he acted with genocidal intent.”⁵⁴ The legal issue on appeal was whether the finding that “on the spot” or “momentary” genocidal intent is supported in law. The Defence argued that for the crime of genocide to occur, the mens rea must be formed prior to the commission of the genocidal acts.⁵⁵ The Defence also argued that the mens rea requirement for the JCE and the mens rea as an element of the crime are two distinct legal concepts. Hence, JCE requires two separate intents—the intent to be part of the JCE, and the intent of the object of the JCE, in this case, the special intent for genocide.⁵⁶ But both the trial and appellate judgments collapse these two intents into one intent—which could, at the moment, be formed.

The Appeals Chamber found no merit in this position, stating that the “inquiry is not whether the specific intent was formed prior to the commission of the acts, but whether at the moment of commission the perpetrators possessed the necessary intent. The Trial Chamber correctly considered whether Appellant and the physical perpetrators possessed genocidal intent at the time of the massacres.”⁵⁷

These holdings could be read to contradict the Prosecution thesis that there was a conspiracy to plan genocide, a point which has been rejected by the appellate jurisprudence in the “Media” case⁵⁸ and others, and recently in the “Military I” and “Military II” cases acquitting the defendants of conspiracy to commit genocide.⁵⁹ If the intent is formed spontaneously or “at the moment” as *Simba* holds, then planning genocide or conspiring to commit genocide, both of which suggest a prior formation of intent, are

54. *Simba* Trial Judgment, *supra* note 10, ¶ 418.

55. *Prosecutor v. Kayishema & Ruzindana*, Case No. ICTR-95-1-T, Trial Chamber Judgment, ¶ 91 (May 21, 1999) (holding undisturbed on appeal). Admittedly, the jurisprudence on this point is minimal.

56. *See Prosecutor v. Brdanin*, Case No. IT-99-36-A, Appeal Judgment, ¶ 365 (Int’l Crim. Trib. for the Former Yugoslavia Apr. 3, 2007) (Where convictions under the first category of JCE are concerned, the accused must both intend the commission of the crime and intend to participate in a common plan aimed at its commission.).

57. *Simba* Appeal Judgment, *supra* note 14, ¶ 266.

58. *See generally Nahimana et al. v. Prosecutor*, Case No. ICTR-99-52-A, Appeal Judgment (Nov. 28, 2007).

59. *See generally Prosecutor v. Bagosora et al.* (“Military I”), Case No. ICTR-98-41-T, Trial Judgment (Dec. 18, 2008). *See also Prosecutor v. Nindiliyimana* (“Military II”), Case No. ICTR-00-56-T, Summary of Trial Judgment (May 17, 2011).

repugnant legal notions. This may be an unintended consequence of the bad law. Not exactly a “silver lining” though, when one considers the legal injustices committed in the name of “JCE.”

VII. CONCLUSION

When litigation of JCE in the *Simba* case commenced, the number of articles on JCE was limited. Perusing the literature today, there is definitely a larger and vocal critique of JCE, in addition to the body of Defence litigation at both Tribunals. This is a positive step, but unfortunately offers no redress to those wrongly convicted under the theory of JCE. Cases can not be “re-opened” based on the increasing acknowledgement of the defects inherent in JCE and these convictions cannot be written off as “collateral damage” in the quest to assign collective blame and responsibility. The defective doctrine of JCE has been a lynchpin in the injustices of the Tribunals, and illustrates how legal doctrine, often nurtured by the Chambers, services the political agenda of the Prosecution. The result is a political and legal legacy of tortured law and tortured “justice.”