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For two decades, the need for prosecution of mass atrocities including war crimes, crimes against humanity, genocide, and violations of basic human rights norms has been met by the creation and proliferation of international and hybrid criminal tribunals.[1] Like the Nuremberg and Tokyo tribunals,[2] these international judiciaries were designed to impose individual criminal responsibility for mass atrocities and violations of international humanitarian and human rights law. These brief notes will discuss one aspect of this individual criminal responsibility through the case law of the ICTY, as a means of paying tribute to Professor Linda Carter, for her invaluable and constant contributions and distinguished scholarship addressing issues connected with international criminal justice, which I myself have benefited from—through our numerous, common endeavours—and for which I wish to express my sincerest gratitude.

One of the main features of the perpetration of massive international crimes lies in the consideration that such atrocities are most frequently achieved through the cooperation of many persons in furtherance of a common criminal purpose, while at the same time, are often not directly attributable to a single individual's criminal conduct. Such collective criminality often creates an evidentiary hurdle whereby the highest-ranking officials, the most culpable offenders, or most influential members of the group sharing a common purpose are those against whom there is the least amount of evidence of direct criminal conduct, resulting in functional impunity.

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* Professor Emeritus, University of Milan; Judge and former President, International Criminal Tribunal for the former Yugoslavia ("ICTY"). I would also like to thank my Associate Legal Officer, Ms. Nicole Rangel, for her thoughtful review of this article. Ms. Rangel is an alumna of the University of Pacific McGeorge School of Law (class of 2010) and in that capacity, expresses her sincere appreciation to Professor Linda Carter for her mentorship, guidance, and inspiration.

1. The ICTY and International Criminal Tribunal for Rwanda ("ICTR") were created by the Security Council under its Chapter VII authority and thus may be categorized as international tribunals. *See* S.C. Res. 827, ¶ 2, U.N. Doc. S/RES/827, at 2 (May 25, 1993) (establishing the ICTY), *and* S.C. Res. 955, ¶ 1, U.N. Doc. S/RES/955, at 202 (Nov. 8, 1994) (establishing the ICTR). Hybrid tribunals are those adjudicated by a combination of internationally and nationally appointed judges and may exist within the respective national judiciary such as the Special Court for Sierra Leone and the Extraordinary Chambers in the Courts of Cambodia. While the *ad hoc* tribunals were the first international tribunals, the International Criminal Court ("ICC") is the only international criminal tribunal thus far set up under a multilateral treaty. *See* Rome Statute of the International Criminal Court, July 17, 1998, 2187 U.N.T.S. 90. *See also* Fausto Pocar, *The International Proliferation of Criminal Jurisdictions Revisited: Uniting or Fragmenting International Law, in* COEXISTENCE, COOPERATION, AND SOLIDARITY 1705, 1723 (2010).

2. DEPARTMENT OF STATE, OFFICE OF THE HISTORIAN, THE NUREMBERG TRIAL AND THE TOKYO WAR CRIMES TRIALS (1945–1948), https://history.state.gov/milestones/1945-1952/nuremberg (last visited Aug. 22, 2016) (on file with *The University of the Pacific Law Review*).

The international and hybrid criminal tribunals were designed to combat this impunity and to prosecute those most responsible for crimes against international law. In executing this mandate, the ICTY reviewed the relevant customary international law and concluded that customary international law includes liability for the commission of crimes through "collective criminality" under Joint Criminal Enterprise ("JCE").[3]

Although the applicability of JCE as a specific mode of liability has been debated, the idea of imposing individual criminal responsibility for crimes committed by a group in furtherance of a common plan is widely accepted in national jurisdictions throughout the globe.[4]

The concept of JCE was first articulated and applied in the *Tadić* Appeal Judgement.[5] The prosecution appealed, *inter alia,* that the Trial Chamber improperly applied the "common purpose doctrine" in concluding that it was not proven beyond a reasonable doubt that Duško Tadić ("Tadić") played any part in the five Jaskići village murders.[6] Acknowledging that the group to which Tadić belonged had committed these murders, the Appeals Chamber then determined "whether the acts of one person can give rise to the criminal culpability of another where both participate in the execution of a common criminal plan," and if so, what *mens rea* is required.[7]

The Appeals Chamber began this inquiry determining that under the principle of personal culpability, a person may only be held responsible for crimes in which that person engaged or participated in some way,[8] and that this principle is enshrined in Article 7(1) of the ICTY Statute which lays out the modes of liability for establishing the personal responsibility of an accused.[9] Therefore, the Appeals Chamber was left to determine whether commission of a crime through participation in a common criminal purpose was within the ambit of Article 7(1) of the ICTY Statute.[10]

Applying the rules of statutory interpretation, the Appeals Chamber concluded that liability for common or collective criminality was included in

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3. Prosecutor v. Tadić*,* Case No. IT-94-1-A, Judgement, ¶ 191, 194–95, 229 (Int'l Crim. Trib. for the Former Yugoslavia Jul. 15, 1999) [hereinafter *Tadić* Appeal Judgement]; Prosecutor v. Krnojelac, Case No. IT-97-25-A, Judgement, ¶ 29 (Int'l Crim. Trib. for the Former Yugoslavia Sept. 17, 2003). *See also* Fausto Pocar & Nicole Rangel, *Individual Criminal Responsibility for Collective Criminality: A Comparative Analysis of the Development of Joint Criminal Enterprise at the International Criminal Tribunals, in* THE GLOBAL COMMUNITY YEARBOOK OF INTERNATIONAL LAW & JURISPRUDENCE 275 (2011).

4. *See e.g., Tadić* Appeal Judgement, *supra* note 3, at ¶¶ 195–226, 233.

5. *Id.* at ¶ 201.

6. *Id.* at ¶¶ 172–73.

7. *Id.* at ¶¶ 185,180.

8. *Id.* at ¶ 186.

9. *Id.* at ¶¶ 186, 189–90. The Statute of the ICTY also provides for personal criminal liability through command responsibility under Article 7(3) of the ICTY Statute.

10. *Id.*

Article 7(1) of the ICTY Statute as a means of commission of a crime.[11] It held that Article 7(1) of the ICTY Statute undoubtedly included liability for physical perpetration of crimes but that "the commission of one of the crimes [. . .] of the Statute might also occur through participation in the realisation of a common design or purpose."[12]

Furthermore, the Appeals Chamber correctly concluded that the object and purpose test, applied to the ICTY Statute, provides for collective criminality because it seeks to convict "*all* those 'responsible for serious violations of international humanitarian law' committed in the former Yugoslavia."[13] The Secretary General echoed this sentiment in his report, stating that, "*all* persons who participate in the planning, preparation or execution of serious violations of international humanitarian law in the former Yugoslavia are individually responsible for such violations."[14]

Similarly, the Appeals Chamber recognized that the very nature of the crimes prosecuted at the ICTY frequently involve common criminality. In other words, although only one person may have physically perpetrated the crime, "the participation and contribution of the other members of the group is often *vital in facilitating the commission of the offence* in question," and thus those members of the group are often those "most responsible"[15] for the commission of such crimes and should be held criminally responsible.

The Appeals Chamber affirmatively determined that criminal responsibility exists for "actions perpetrated by a collectivity of persons in furtherance of a common criminal design."[16] However, it acknowledged that the ICTY Statute does not explicitly, or implicitly, provide the substantive elements of this mode of liability.[17] Thus, the Appeals Chamber engaged in a comprehensive review of the applicable rules of customary international law in order to determine the substantive elements for proving liability through collective criminality.[18]

The Appeals Chamber reviewed the Nuremberg Charter, Control Council Law No. 10, various post WWII cases,[19] treaties,[20] and national case law,[21] and

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11. *Id.* at ¶ 188–93.

12. *Id.* at ¶ 188.

13. *Id.* at ¶ 189 (emphasis in original).

14. U.N. SECRETARY-GENERAL, REPORT OF THE SECRETARY-GENERAL PURSUANT TO PARAGRAPH 2 OF SECURITY COUNCIL RESOLUTION 808 ¶ 53, U.N. Doc. S/25704 (May 3, 1993) (emphasis added); *see also Tadić* Appeal Judgement, *supra* note 3, at ¶ 190.

15. *Tadić* Appeal Judgement, *supra* note 3, at ¶ 191 (emphasis added). The ICTY's mandate provides for the prosecution of those "most responsible" for the atrocities committed in the region of the former Yugoslavia. Effectively executing this mandate requires that "commit" under Article 7(1) of the ICTY Statute implicitly includes commission by common criminality (*i.e.* JCE liability) because many of these accused authored or participated in these common criminal purposes in their capacity as high ranking officials or politicians.

16. *Id.* at ¶ 193.

17. *Id.* at ¶ 194.

18. *Id.* at ¶¶ 194–228.

19. With respect to: basic JCE *see id.* at ¶¶ 196–201; systemic JCE *see id.* at ¶¶ 202–03; extended JCE *see id.* at ¶¶ 204–19.

determined that "[c]lose scrutiny of the relevant case law shows that broadly speaking, the notion of common purpose encompasses three distinct categories of collective criminality."[22]

The three forms of JCE recognized in the *Tadić* Appeal Judgement are: (i) basic ("JCE 1") in which "all co-defendants, acting pursuant to a common design, possess the same criminal intention" to commit a crime[23]; (ii) systemic or concentration camp cases ("JCE 2") in which the accused is aware of and intends to further a system of ill-treatment[24]; and (iii) extended ("JCE 3"), "where one of the perpetrators commits an act which, while outside the common design, was nevertheless a natural and foreseeable consequence of the effecting of that common purpose."[25]

The *Tadić* Appeal Judgement determined that all three types of JCE have the same *objective element*,[26] which can be proved through the existence of: (i) a plurality of persons or identifiable group[27]; (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"[28]; and (iii) the participation[29] of the accused in this common plan.[30]

By contrast, the Appeals Chamber further deduced that the *subjective element* required to impose criminal responsibility under JCE differs for each type of JCE. It concluded that:

> JCE 1 requires "the intent to perpetrate a certain crime (this being the shared intent on the part of all co-perpetrators)."[31] This means that all

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20. *See id.* at ¶¶ 221–23.

21. *Id.* at ¶¶ 224–25.

22. *Id.* at ¶ 195.

23. *Id.* at ¶ 196*; See also id.* at ¶¶ 197–201.

24. *Id.* at ¶¶ 202–03.

25. *Id.* at ¶ 204*; See also id.* at ¶¶ 205–19.

26. *Id.* at ¶ 227.

27. *See id.* at ¶ 227. Such a group need not be militarily or hierarchically organized.

28. *Id.* This common plan need not have been previously arranged and may materialize extemporaneously.

29. *Id.*; Prosecutor v. Kvocka et al., Case No. IT-98-30/1-A, Judgement, ¶ 97 (Feb. 28, 2005). This participation need not entail the commission of the crime and need not be substantial; the accused need only significantly participate in someway with the required *subjective element.*

30. Each of these elements and the corresponding evidentiary standards have been further defined in subsequent cases before the ICTY and ICTR. *See* e.g., Prosecutor v. Kvočka et al*.,* Case No. IT-98-30/1-A, Judgement, ¶ 421 (Feb. 28, 2005); Prosecutor v. Brđanin, Case No. IT-99-36-A, Judgement, ¶ 410 (Apr. 3, 2007); Prosecutor v. Krajišnik, Case No. IT-00-39-A, Judgement, ¶ 662 (Mar. 17, 2009); Prosecutor v. Šainović et al., Case No. IT-05-87-A, Judgement, ¶ 1,682 (Jan. 23, 2014); Prosecutor v. Popović et al., Case No. IT-05-88-A, Judgement, ¶¶ 1670–1674 (Jan 30, 2015); Prosecutor v. Ntakirutimana and Ntakirutimana, Case Nos. ICTR-96-10-A ICTR-96-17-A, Judgement, ¶¶ 466–468 (Dec. 13, 2004); Prosecutor v. Munyakazi, Case No. ICTR-97-36A-A, Judgement, ¶¶ 160–161 (Sept. 28, 2011); Nizeyimana v. Prosecutor, Case No. ICTR-00-55C-A, Judgement, ¶¶ 327–333 (Sept. 29, 2014).

31. *Tadić* Appeal Judgement, *supra* note 3, at ¶ 228.

> members of the JCE must share the intent to commit the crimes alleged in the common purpose, and that the prosecution must prove that, at the time of the commission of the crime, the accused had such intent.

JCE 2 requires that the accused have "personal knowledge of the system of ill-treatment [. . .] as well as the intent to further this common concerted system of ill-treatment."[32]

JCE 3 requires that the accused *intend* "to participate in and further the criminal activity or the criminal purpose of a group and to contribute to the joint criminal enterprise or in any event to the commission of a crime by the group."[33] Additionally, as JCE 3 is an extended form of JCE liability, it provides that the accused may be held responsible for crimes outside of the common criminal purpose if: "(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.*"[34] This foreseeability may vary for each member of the JCE; the prosecution must prove that the crime was foreseeable to the accused personally. Furthermore, the last element, that the accused willingly took the risk that the crime might be committed, is often referred to as the principle of *dolus eventualis* or advertent recklessness—more than mere negligence.[35]

In sum, the *Tadić* Appeal Judgement effectively set out the requirements for, and applicability of, individual criminal responsibility for acts of collective criminality through JCE; and concluded that JCE liability is firmly established in customary international law and thus, can be enforced at the ICTY.

Since the *Tadić* Appeal Judgement, the ICTY has analyzed JCE liability in most of the cases before the Tribunal.[36] In fact, JCE liability is more utilized at the ICTY than at any other international criminal tribunal.[37] Except for the clarification of some aspects of its elements, the jurisprudence inaugurated in the *Tadić* Appeal Judgement has been constantly maintained in its essential features. The most frequent issues faced by the ICTY trial chambers concerned the assessment of the actual existence of the elements of the JCE in concrete cases in light of the evidence adduced by the parties. In that context, there may have been divergences in the appreciation of different trial chambers, or of a trial chamber

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32. *Id.*

33. *Id.*

34. *Id.* (emphasis in original).

35. *Id.* at ¶ 220.

36. *See supra* note 30 (giving examples of cases which have analyzed JCE liability).

37. For example, the Prosecutors at the ICTR have less frequently pursued JCE liability. This may be attributable to the fact that the existence of the Rwandan genocide is an adjudicated fact at the ICTR and thus such crimes can be alleged through incitement and conspiracy to commit genocide. In the early years of the ICTR, these genocide-based offences were preferred over JCE allegations but since the Trial Judgement in the case against Aloys Simba, many ICTR indictments have been amended to include JCE liability. *See* Prosecutor v. Aloys Simba, Case No. ICTR-01-76-T, Judgement, (Dec. 13, 2005) (which is the first ICTR Trial Judgement to convict an accused under JCE).

and the appeals chamber, which do not affect the notion of JCE as initially described by the *Tadić* Appeals Chamber.

However, the possibility that a mere consideration of facts may indirectly affect the law cannot be entirely excluded, and it occurred with the recent Appeal Judgement in the *Gotovina and Markac* case.[38] This is a well-known judgement, dealing with the so called "Operation Storm" whereby Croatia again seized control of the Krajina region, where there was also a numerous Serbian population.[39] According to the indictment, political leaders and members of the Croatian armed forces had committed crimes during the operation in the implementation of a common plan to achieve the deportation and the forced transfer of a significant part of the Serbian population.[40] The Trial Chamber came to the conclusion that there was indeed a JCE, the common purpose of which was the permanent removal of the Serbian population from the region through unlawful attacks against civilians and other types of crimes.[41] It also concluded that general Gotovina shared this common plan and significantly contributed to its achievement.[42] Therefore, the Trial Chamber convicted general Gotovina for persecution and deportation as crimes against humanity pursuant to JCE 1. It also found him guilty of other crimes committed during the implementation of the common plan pursuant to JCE 3.[43] The same occurred with the other accused.

In order to reach its conclusion, the Trial Chamber considered four mutually supporting facts. First, the minutes of a meeting during which the participants, including the two accused, discussed the importance of removing the Serbian civil population from the region as a part of the imminent attacks and as preparation for Operation Storm.[44] Second, the displacement towards Bosnia-Herzegovia and Serbia of at least 20,000 persons as the consequence of the attacks with artillery against civilians ordered by the accused in four towns.[45] Third, the crimes committed by military forces against the Serbian civilian population without any preventive intervention of the accused.[46] Fourth, the discriminatory policy and laws of the Croatian political leaders against the Serbian minority, which favored the return of Croatian refugees, including in the residencies of the Serbs who had left the country.[47]

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38. Prosecutor v. Gotovina and Markač, Case No. IT-06-90-A, Judgement, (Nov. 16, 2012) [hereinafter *Gotovina and Markač* Appeal Judgement].

39. *Id.* at ¶ 3.

40. *Id.*

41. *Id.*

42. *Id.*

43. *Id.*

44. *See e.g.*, Prosecutor v. Ante Gotovina et al., Case No. IT-06-90-T, Judgement, (Apr. 15, 2011), ¶¶ 1970–95, 2304–05, 2310–11 [hereinafter Judgement].

45. *See e.g.*, *id.* at ¶¶ 1163–1476, 1540–44, 1549–51, 1558–87, 1590–92, 1607–42, 1742–53, 1892–1945, 2305–06, 2311.

46. *See e.g.*, *id.* at ¶¶ 1756–58, 2307.

47. *See e.g.*, *id.* at ¶¶ 1843–46, 1997–2057, 2059–98, 2308–09, 2312.

The Appeals Chamber took a different approach. It revised the conclusions of the *Gotovina et al.* Trial Judgement and declared that there was insufficient evidence to sustain the existence of a JCE. In particular, it stressed that the military attacks on the four towns could not be characterized as indiscriminate attacks and did not violate the principle of distinction under international humanitarian law. As a consequence of these assessments, it reversed the Trial Chamber's finding that a JCE existed to permanently remove the Serb civilian population from the Krajina region by force or threat of force. As a further consequence, it reversed all of the accuseds' convictions for the crimes allegedly committed pursuant to the JCE. Thus, the two accused were acquitted of all charges.[48] This Appeals Chamber judgement was adopted by a majority, with two firm dissenting opinions, including the dissenting opinion of the author of these notes.

Without going into the substance of the debate, it is important to discuss how this Appeal Judgement may have affected the doctrine of individual criminal responsibility through a JCE. Two comments are relevant here.

First, the consideration that the military attacks did not violate international humanitarian law and were therefore lawful does not necessarily entail that a JCE could not exist. The *objective element* of the JCE consists of the participation of a person in a group that shares a common purpose, that is characterized as unlawful—in this case, the permanent removal of a significant part of the Serbian population from the region, as it actually happened through persecutions, deportation, forcible transfer, unlawful attacks against civilians, and discriminatory measures.[49] It does not matter if any of the measures taken to achieve this goal are lawful, if taken in isolation. Their prohibition under JCE liability depends on their adoption in order to implement a plan, characterized by the unlawfulness of its purpose.[50] Affirming with the majority of the Appeals Chamber that all the means deployed for the achievement of the common illegal goal have to be of themselves unlawful improperly adds to the notion of JCE an *objective element,* which was never recognized in the precedent case law of the ICTY. Was it the intention of the majority of the Appeals Chamber to modify the previous jurisprudence of the ICTY? There is no evidence of such an intention, or of an awareness of this legal consequence, apparent in the *Gotovina and Markač* Appeal Judgement, but this is what actually happened.

Second, one should be aware that a modification of the notion of JCE in this direction—*i.e.* requiring the unlawfulness of the means deployed for the achievement of a common unlawful design as an essential element of the existence of a JCE—will entail that in most cases the higher ranking persons

48. *See Gotovina and Markač* Appeal Judgement, *supra* note 38, at ¶¶ 98, 157.

49. *Id.* at ¶ 23.

50. In this respect, the author emphasizes that under JCE liability, a common plan can be characterized as criminal when the goal of the common plan is in and of itself criminal and/or when the common plan, although not necessarily criminal in itself, is intended to be achieved through the commission of international crimes.

accused of international crimes may not be regarded as members of a JCE even when they intend a common criminal goal. However, the doctrine of JCE liability is rooted in and was elaborated precisely in order to allow the prosecution of all the members of a plurality of persons or group pursuing a common criminal purpose, including, in particular, persons of high rank, whether political or military, who may not have been the principle perpetrators of international crimes. As was the case in the penultimate Appeal Judgement of the ICTY, wherein the Appeals Chamber affirmed that "one's contribution to a joint criminal enterprise need not be in and of itself criminal, as long as the accused performs acts (or fails to perform acts) that in some way contribute significantly to the furtherance of the common [criminal] purpose."[51] Whereas to the contrary, a jurisprudence endorsing a modification in line with the *Gotovina and Markač* Appeal Judgement would have serious consequences as it would favor the impunity of those who are most responsible for international crimes, while the role of international criminal justice is precisely to prosecute such persons and convict them, if they are proven guilty beyond reasonable doubt. With this risk in mind and recognizing that our current global environment is still, unfortunately tattered by mass atrocities, one must instead challenge this functional impunity and continue to apply customary international law, including the principle of JCE, which ensures that those proven to be most responsible for such atrocities are held accountable.

51. Prosecutor v. Stanišić and Župljanin, Case No. IT-08-91-A, Judgement, ¶ 110 (Jun. 30, 2016).