SCHOOL OF LAW
CASE WESTERN RESERVE UNIVERSITY

Case Western Reserve University
School of Law Scholarly Commons

War Crimes Memoranda | War Crimes

2006

Where an ongoing joint criminal enterprise exists, what is necessary to bring about its termination as a matter of law or to terminate an individual's membership in the joint criminal enterprise?

Michael A. Glazer

Follow this and additional works at: https://scholarlycommons.law.case.edu/war_crimes_memos

 Part of the Criminal Law Commons, and the International Law Commons

Recommended Citation

Glazer, Michael A., "Where an ongoing joint criminal enterprise exists, what is necessary to bring about its termination as a matter of law or to terminate an individual's membership in the joint criminal enterprise?" (2006). *War Crimes Memoranda*. 149.
https://scholarlycommons.law.case.edu/war_crimes_memos/149

This Memo is brought to you for free and open access by the War Crimes at Case Western Reserve University School of Law Scholarly Commons. It has been accepted for inclusion in War Crimes Memoranda by an authorized administrator of Case Western Reserve University School of Law Scholarly Commons.

CASE WESTERN RESERVE UNIVERSITYSCHOOL OF LAW
INTERNATIONAL WAR CRIMES RESEARCH LAB

MEMORANDUM FOR THE OFFICE OF THE PROSECUTOR OF THE SPECIAL COURT FOR SIERRA LEONE

ISSUE: WHERE AN ONGOING JOINT CRIMINAL ENTERPRISE EXISTS, WHAT IS NECESSARY TO BRING ABOUT ITS TERMINATION AS A MATTER OF LAW OR TO TERMINATE AN INDIVIDUAL'S MEMBERSHIP IN THE JOINT CRIMINAL ENTERPRISE?

Prepared by Michael A. Glazer
Spring 2006

TABLE OF CONTENTS

INDEX OF AUTHORITIES

TREATISES AND BOOKS

1) Michael P. Scharf, *Slobodan Milosovic on Trial* (Continuum New York 2002)

2) Michael P. Scharf, *Balkan Justice: The Story Behind the First War Crimes Trial Since Nuremberg* (Carolina Academic Press 1997)

3) Wayne R. LaFave, *Criminal Law* (Thompson West 2003)

CASES

4) *Trial of Erich Heyer and Six others*, British Military Court for the Trial of War Criminals, Essen, 18th-19th and 21st-22nd December, 1945 UNWCC, vol. 1, p. 88

5) *The Prosecutor v. Tadic*, Case No. IT-94-1-T, Trial Chamber Opinion and Judgment, 7 May 1997

6) *The Prosecutor v. Tadic*, Case No. IT-94-1-A, Appeals Chamber Judgment, 15 July 1999

7) *Kurt Goebell et al.* Charge Sheet, in U.S. National Archives Microfilm Publications, (on file with the International Tribunal's Library)

8) *The Prosecutor v. Milutinovic*, Case No: IT-99-37-AR72, Appeals Chamber Decision, 21 May 2003

9) *Trial of Martin Gottfried Weiss and thirty-nine others*, General Military Government Court of the United States Zone, Dachau, Germany, 15th November-13th December, 1945, UNWCC, vol. XI, p. 5

10) *The Prosecutor v. Krnojelac*, Case No: IT-97-25-T, Trial Chamber II Judgment, 15 March 2002

11) *The Prosecutor v. Brdjanin*, Case No. IT-99-36-T, Trial Chamber Judgment, 1 September 2004

12) *The Prosecutor v. Vasiljevic*, Case No. IT-98-32-A, Appeals Chamber Judgment, 25 February 2004

13) *The Prosecutor v. Vasiljevic*, Case No. IT-98-32-T, Trial Chamber II Judgment, 29 November 2002

14) *Iannelli v. United States*, 420 U.S. 770, (1975)

15) *Salinas v. Unites States*, 522 US 52 (1997)

16) *United States v. Gallishaw*, 428 F.2d 760 (2nd Cir. 1970)

17) *United States v. Sassi*, 966 F.2d 283 (7th Cir. 1992)

18) *United States v. Shabani*, 513 U.S. 10 (1994)

19) *Yates v. United States*, 354 U.S. 298 (1957)

20) *Pinkerton v. United States*, 328 U.S. 640 (1946)

21) *United States v. Cherry*, 217 F.3d 811 (10th Cir. 2000)

22) *United States v. Dabbs*, 134 F.3d 1071 (11th Cir. 1998)

23) *United States v. United States Gypsum Co*., 438 U.S. 422 (1978)

24) *United States v. Gornto*, 792 F.2d 1028 (11th Cir. 1986)

25) *United States v. Herron*, 825 F.2d 50 (5th Cir. 1987)

26) *United States v. Marolla*, 766 F.2d 457 (11th Cir. 1985)

27) *Fiswick v. United States*, 329 U.S. 211 (1946)

28) *Krulewitch v. United States*, 336 U.S. 440 (1997)

29) *Prosecutor v. Multinovic*, Case No. IT-99-37-AR72, Appeals Chamber Opinion on Challenge by Ojdanic to Jurisdiction-Joint Criminal Enterprise, May 21, 2003

30) *The Prosecutor v. Kvocka*, Case No. IT-98-30/1-A, Appeals Chamber Judgment, 28 February 2005

31) *The Prosecutor v. Martic*, Case No. IT-95-11-PT, Trial Chamber Decision, 2 June 2003

32) *The Prosecutor v. Brdjanin*, Case No. IT-99-36-T, Sixth Amended Indictment, 9 December 2003

33) *The Prosecutor v. Bala*, Case No. IT-03-66-T, Trial Chamber II Judgment, 30 November 2005

34) *The Prosecutor v. Kvocka*, Case No. IT-98-30/1, Trial Chamber Judgment, 2 November 2001

JOURNALS AND LAW REVIEWS

35) Steven Powles, *Joint Criminal Enterprise: Criminal Liability by Prosecutorial and Judicial Creativity?*, 2 J. Int'l Crim. Just. 606 (June 2004)

36) 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 (Jan. 2005)

37) Mark J. Osiel, *Modes of Participation in Mass Atrocity*, 38 Cornell Int'l L.J. 793 (Fall 2005)

38) Paul Marcus, *Criminal Conspiracy Law: Time to Turn Back from an Ever Expanding, More Troubling Area*, 1 Wm. & Mary Bill Rts. J. 1 (Spring, 1992)

39) Edward M. Wise, *RICO and Its Analogues: Some Comparative Considerations*, 27 Syracuse J. Int'l & Com. 303 (2000)

40) Kumar Katyal, *Criminal Conspiracy*, 112 YLJ 1307 (April 2005)

41) Mark Lippman, *Defending Against the Co-Conspirator Hearsay Exception*, 21 –AUG Champion 16 (August 1997)

42) Daryl A. Mundis & Fergal Gaynor, *Current Developments at the Ad Hoc International Criminal Tribunals*, 2 J. Int'l Crim. Just. 642 (June 2004)

43) Alan O'Rourke, *Joint Criminal Enterprise and Branin: Misguided Overcorrection*, 47 Harv. Int'l L.J. 307 (Winter 2006)

44) Daryl A. Mundis & Fergal Gaynor, *Current Developments at the Ad Hoc International Criminal Tribunals*, 2 J. Int'l Crim. Just. 879 (September 2004)

45) *Background Note on the Application of the Exclusion Clauses: Article 1F of the 1951 Convention Relating to the Status of Refugees*, 15 Int'l J. Refugee L. 502 (Sept. 2003)

46) Richard P. Barrett & Laura E. Little, *Lessons of Yugoslav Rape Trials: A Role for Conspiracy Law in International Tribunals*, 88 MINN. L. REV. 30 (Nov. 2003)

47) 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 (Winter 2006)

48) William Schabas, *Mens Rea and the International Criminal Tribunal for the Former Yugoslavia*, 37 New Eng. L. Rev. 1015 (Summer 2003)

STATUTES AND OTHER INTERNATIONAL INSTRUMENTS

49) Statute of the International Tribunal for the Prosecution of Persons Responsible for Serious Violations of International Humanitarian Law Committed in the Territory of the Former Yugoslavia since 1991, U.N. 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)

50) 18 U.S.C.A. § 371. Conspiracy to Commit Offense or to Defraud United States (1994)

I. INTRODUCTION AND SUMMARY OF CONCLUSIONS

A. Issues

This memorandum addresses joint criminal enterprise doctrine. In particular, this memorandum examines the issue of where an ongoing joint criminal enterprise exists, what is necessary to bring about its termination as a matter of law or to terminate an individual's membership in the joint criminal enterprise. Individuals accused of conspiracy, which is similar to joint criminal enterprise doctrine in many ways, can limit their criminal liability by showing their withdrawal from the conspiracy or by showing that the conspiracy has terminated. This memorandum will explore how the aforementioned defenses to conspiracy could be used in the context of joint criminal enterprise.

B. Summary of Conclusions

1. Withdrawal Is Not Effective Defenses for Individuals Accused of Participation in a Joint Criminal Enterprise.

Domestic conspiracy law provides the closest analogy to joint criminal enterprise doctrine. Those accused of conspiracy can limit their liability by showing that they withdrew from the conspiracy. This can either limit liability for substantive crimes committed after the individual's withdrawal or limit liability by showing that the statute of limitations has run since the individual's withdrawal. This defense has little application to joint criminal enterprise doctrine because if an accused is found to have the requisite mens rea and actus reus, he is liable for all crimes committed pursuant to the common plan. Also, an accused cannot benefit from the running of a statute of limitations because the ICTY has jurisdiction over any crimes provided for in the statute that occurred in the territory of the former Yugoslavia since 1991. However, an individual can escape criminal liability for crimes committed in the context of a systemic joint

criminal enterprise by showing that the crimes occurred either before his arrival or after his departure from the prison camp.

2. Termination Is Not Effective Defenses for Individuals Accused of Participation in a Joint Criminal Enterprise.

Those accused of conspiracy can also limit their liability by showing that the conspiracy terminated. This can limit liability for substantive crimes committed after the termination or limit liability by showing that the statute of limitations has run since the termination of the conspiracy. This defense has little application to joint criminal enterprise doctrine because if an accused is found to have the requisite mens rea and actus reus, he is liable for all crimes committed pursuant to the common plan. Once again, an accused cannot benefit from the running of a statute of limitations because no such statute of limitation is in place in the ICTY.

3. Although Withdrawal and Termination do not provide effective defenses against the application of joint criminal enterprise doctrine, there are other ways in which an accused can show that a joint criminal enterprise did not exist.

This can be accomplished by showing a lack of an agreement between the accused and the physical perpetrators of the crimes. This precedent was established by the *Brdjanin* Judgment. There the Trial Chamber significantly restricted the application of the joint criminal enterprise doctrine. This precedent limits the size of potential the joint criminal enterprise because now there must be an agreement between the accused and the people who actually commit the crimes. It is also possible to show that a joint criminal enterprise does not exist as a matter of law where the Indictment does not sufficiently identify the member of the enterprise or make their identification possible.

It is possible for an individual to show that he was not a member of a joint criminal enterprise by showing that he lacked the necessary mens rea to be criminally liable under the

doctrine. In this instance it is still possible to be criminally liable as an aider and abettor. This scenario is demonstrated by the *Vasiljevic* Decision. It is also possible for an individual to demonstrate that he was not a member of a joint criminal enterprise by showing that his contribution was not substantial enough for criminal liability to attach.

II. BACKGROUND

A. Early Joint Criminal Enterprise Cases

The joint criminal enterprise doctrine has been applied by international criminal tribunals throughout the twentieth century. The *Essen Lynching case* is an important example of an early case applying the joint criminal enterprise doctrine.[1] That case, before a British military court, concerned the lynching of three British prisoners of war on December 13, 1944. Two German servicemen and five German civilians were charged with committing a war crime because they were concerned in the killing of the British prisoners.[2]

German Captain Erich Heyer assigned a German soldier the task of escorting the British prisoners to a Luftwaffe unit for interrogation. As the prisoners were marched through the streets of Essen, the crowd of civilians began to hit them and throw sticks and stones at them. When the prisoners reached a bridge, they were thrown off of it. The fall killed one of the prisoners and the two remaining prisoners were either shot or kicked and beaten to death by members of the crowd. [3]

The Defense stressed that in order for the Defendants to be liable for the killings, the prosecution must show that each Defendant had the intent to kill.[4] The Prosecution argued that each defendant was "concerned in the killing" of the prisoners, so under British law, they would be guilty of either murder or manslaughter.[5] The prosecution added, "every person in that crowd

---

[1] *Trial of Erich Heyer and Six others*, British Military Court for the Trial of War Criminals, Essen, 18th-19th and 21st-22nd December, 1945 UNWCC, vol. 1, p. 88. [Reproduced in accompanying notebook at Tab 4]

[2] *The Prosecutor v. Tadic*, Case No: IT-94-1-A, Appeals Chamber Judgment, 15 July 1999 at para. 207. [Reproduced in accompanying notebook at Tab 6]

[3] Id.

[4] Id.

[5] Id.

who struck a blow is both morally and criminally responsible for the deaths of those three men."[6] The Court agreed with the rationale of the Prosecution. This is evident because seven Defendants were found guilty of the murder of the prisoners. The Court upheld the idea that although not all of the guilty defendants intended to kill the prisoners, they all intended to participate in the unlawful ill treatment of the prisoners. They were "concerned in the killing of the prisoners, so they were found guilty of murder. The Court inferred that the convicted Defendants who struck the prisoners or implicitly incited the murder could have foreseen that others would kill the prisoners, and for this reason they were found guilty.[7] The Court in the *Tadic* case relied on this precedent to establish support for the application of the joint criminal enterprise doctrine.[8]

A United States military court took a similar position to the *Essen Lynching case* in *Kurt Goebell et al.* a.k.a. the *Borkum Island case.* The *Tadic* Court cited the *Borkum Island case* to gather further support for the joint criminal enterprise doctrine.[9] In that case, a United States Flying Fortress was forced down on the German island of Borkum. The plane's seven crewmembers were taken prisoner and forced to march through the streets of Borkum where they were beat by members of the Reich's Labour Corps and German civilians, who beat them with shovels, upon the order of a German officer. The escorting guards did not protect the prisoners;

---

[6] *Trial of Erich Heyer and Six others*, British Military Court for the Trial of War Criminals, Essen, 18th-19th and 21st-22nd December, 1945 UNWCC, vol. 1, p. 88.

[7] See generally *The Prosecutor v. Tadic*, Case No: IT-94-1-A, Appeals Chamber Judgment, 15 July 1999

[8] Id.

[9] Id. at para. 210

rather they fostered the assault and took part in the beating. When the prisoners reached the city hall they were all shot and killed by German soldiers.[10]

The Defendants were charged with "willfully, deliberately and wrongfully encourag[ing], aid[ing], abett[ing] and participat[ing] in the killing" of the airmen and with "willfully, deliberately and wrongfully encourag[ing], aid[ing], abett[ing] and participat[ing] in assaults upon" the airmen.[11] Not all of the Defendants participated in the crimes in the same manner. However,

> "the ultimate act might have been something in which the former actor did not directly participate [,e]very time a member of a mob takes any action that is inclined to encourage, that is inclined to give heart to someone else who is present, to participate, then that person has lent his aid to the accomplishment of the final result."[12]

The Prosecutor argued that the Defendants were "cogs in the wheel of common design, all equally important, each cog doing the part assigned to it. And the wheel of wholesale murder could not turn without all the cogs."[13] If it is proven that "each one of these accused played his part in mob violence which led to the unlawful killing of the seven American flyers, ... under the law each and every one of the accused is guilty of murder."[14]

Six Defendants were found guilty on charges of the killing and the assault.[15] Eight Defendants were found guilty of just the assault.[16] The Defendants who were found guilty were

---

[10] Id.

[11] *See Kurt Goebell at al.* Charge Sheet, in U.S. National Archives Microfilm Publications, (on file with the International Tribunal's Library) [Tab 7]

[12] Id. at para. 1186

[13] Id. at para. 1190

[14] Id.

[15] *The Prosecutor v. Tadic*, Case No: IT-94-1-A, Appeals Chamber Judgment, 15 July 1999 at para. 268

held responsible for pursuing a criminal common design. Their guilt regarding the murders presumably stemmed from the fact that their status, role or conduct placed them in a position where they could have predicted that the assault would lead to the killing of the victims by other members of the mob.[17] Those who were found guilty were held responsible for pursuing a common criminal design. They had the intent to assault the prisoners, and for those found guilty of murder, it was foreseeable that the murders would occur.[18] This case provides another example of an early application of the joint criminal enterprise doctrine, or a doctrine quite similar to it. This precedent was sighted by the *Tadic* court to marshal support for their application of the joint criminal enterprise doctrine to the ICTY.

B. Article 7(1) of the ICTY Statute

The joint criminal enterprise doctrine has now been clearly established as a mode of criminal liability in ICTY jurisprudence. It has been routinely utilized by the prosecution in a wide array of cases, most notably against former President Slobodan Milosevic.[19] The form of liability known as "joint criminal enterprise" or "common plan" is not explicitly described in the ICTY Statute, however, the judges have found that it is implicitly included in the language of Article 7(1) of the ICTY Statute.[20] Under this form of liability, an individual may be held responsible for all crimes committed pursuant to the existence of a common plan or design

---

[16] Id. at para. 269

[17] Id. at note 213

[18] Id.

[19] Steven Powles, *Joint Criminal Enterprise: Criminal Liability by Prosecutorial and Judicial Creativity?*, 2 J. Int'l Crim. Just. 606 at 619(June 2004) [Reproduced in accompanying notebook at Tab 35]

[20] Allison Marston Danner & Jenny S. Martinez, *Guilty Associations: Joint Criminal Enterprise, Command Responsibility, and the Development of International Criminal Law*, Cal. L. Rev. (Jan. 2005) [Reproduced in accompanying notebook at Tab 36]

provided that the Court has subject matter jurisdiction over the crimes alleged.[21] 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.[22]

Article 7(1) of the ICTY provides that "1. 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."[23] Although the ICTY Statute does not specifically mention joint criminal enterprise as a crime, the ICTY has noted that all those who have engaged in serious violations of international humanitarian law, whatever the manner in which they may have perpetrated, or participated in the perpetration of those violations, must be brought to justice.[24] The Statute does not confine itself to providing for jurisdiction over those persons who plan, instigate, order, physically perpetrate a crime or otherwise aid and abet in its planning, preparation or execution. The ICTY Statute does not exclude modes of participating in the commission of crimes that occur where

---

[21] Id.

[22] Steven Powles, Joint Criminal Enterprise: Criminal Liability by Prosecutorial and Judicial Creativity?, 2 J. Int'l Crim. Just. 606 at 606(June 2004) This is not ideal -- criminal law, especially international criminal law, requires clear and certain definitions of the various bases of liability, so as to enable the parties, both the prosecution and, perhaps more importantly, the defense, to prepare for and conduct a trial.

[23] Statute of the ICTY [Reproduced in accompanying notebook at Tab 49]

(Article 2 states that the Tribunal shall have the power to prosecute persons committing or ordering to be committed grave breaches of the Geneva Conventions, namely the following acts against persons or property; willful killing, torture or inhuman treatment, including biological experiments, willfully causing great suffering or serious injury to body or health, extensive destruction and appropriation of property, not justified by military necessity and carried out unlawfully and wantonly, compelling a prisoner of war or a civilian to serve in the forces of a hostile power, willfully depriving a prisoner of war or a civilian of the rights of fair and regular trial, unlawful deportation or transfer or unlawful confinement of a civilian, taking civilians as hostages.)

(Article 5 states that the Tribunal shall have the power to prosecute persons responsible for the following crimes when committed against any civilian population in an international or internal armed conflict; murder, extermination, enslavement, deportation, imprisonment, torture, rape, persecutions on political, racial and religious grounds, other inhumane acts.)

[24] *Prosecutor v. Tadic*, Case No: IT-94-1-A, Appeals Chamber Judgment, 15 July 1999 at para. 190

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.[25]

An accused's participation in a joint criminal enterprise does not constitute a crime merely because of that person's membership in the organization. The accused is not to be considered a mere accomplice or aider and abettor. The Appeals Chamber in the Ojdanic Decision held that co-perpetration in a joint criminal enterprise is a form of commission pursuant to Article 7(1) of the Statute, rather than as a form of accomplice liability. A participant shares the purpose of the joint criminal enterprise, as opposed to merely knowing about it. He or she cannot be regarded as a mere aider and abettor to the crime that is contemplated. The Appeals Chamber regards joint criminal enterprise as a form of "commission" pursuant to Article 7(1) of the Statute.[26]

Furthermore, criminal liability under a theory of joint criminal enterprise is not liability simply from an individual's membership in a criminal enterprise. Post World War II war crimes tribunals had the ability to punish defendants who knowingly and voluntarily were members of organizations that committed crimes on a wide scale. No such offense was included in the ICTY Statute. Only natural persons, as opposed to entities are liable under the ICTY Statute, and mere membership in a particular criminal organization does not establish individual criminal responsibility.[27]

---

[25] Id.

[26] *The Prosecutor v. Milutinovic*, Case No. IT-99-37-AR72, Appeals Chamber Decision, 21 May 2003, at para. 20. [Reproduced in accompanying notebook at Tab 8]

[27] Id. at para. 25

C. The *Tadic* Judgment

The *Tadic* Judgment is seen as the starting point for joint criminal enterprise liability in the ICTY. The context of *Tadic* helps explain the early development of joint criminal enterprise. *Tadic* was an enthusiastic but relatively low-level participant in the crimes that occurred in Bosnia in the early 1990s. In 1995 the ICTY Prosecutor indicted *Tadic* on a number of charges. At trial, he was convicted of several counts of war crimes and crimes against humanity. He was acquitted of one of the most serious charges, murder as a crime against humanity. He had been indicted for the murder of five Muslim men in the Bosnian village of Jaskici. The Trial Chamber found that *Tadic* was a member of a group of armed men who entered Jaskici and beat its inhabitants. The Trial Chamber noted that the five victims, who were alive when the armed group entered the town, were found shot to death after the group's departure. In the end, the Trial Chamber determined that it could not based on the evidence, they were not convinced beyond a reasonable doubt that the accused was involved in the killing of the five men. It also found that the deaths occurred at the same time as a larger force of Serb soldiers was involved in an ethnic cleansing operation in a neighboring village.[28]

The Prosecution appealed Tadic's acquittal of the charge of killing the five men. The Prosecution argued that the Trial Chamber had misapplied the test of proof beyond reasonable doubt. The Appeals Chamber agreed with the Prosecution.[29] They concluded that "the only reasonable conclusion the Trial Chamber could have drawn is that the armed group to which [Tadic] belonged killed the five men."[30]

---

[28] Allison Marston Danner & Jenny S. Martinez, *Guilty Associations: Joint Criminal Enterprise, Command Responsibility, and the Development of International Criminal Law*, Cal. L. Rev. at 104 (Jan. 2005)

[29] Id.

[30] *Prosecutor v. Tadic*, Case No. IT-94-1-A, Appeals Chamber Judgment, 15 July 1999, at para. 183

The Appeals Chamber then decided whether Tadic could be found guilty of the killing the five men, despite the lack of proof that he had personally shot them. The Appeals Chamber first reviewed the language of Article 7(1).[31] It noted that the forms of liability contained in that described "first and foremost the physical perpetration of a crime by the offender himself," it also noted that the crimes within the jurisdiction of the Tribunal "might also occur through participation in the realisation of a common design or purpose."[32] To determine the relevant requirements for common purpose liability, the Appeals Chamber also looked to customary international law, which it derived chiefly from case law of military courts set up in the wake of World War II (the *Essen Lynching Case* and the *Borkum Island Case).*

The Appeals Chamber also established that "the notion of common purpose encompasses three distinct categories of collective criminality."[33] The *Tadic Judgment* discussed these three distinct categories of joint criminal enterprise, as well as the requisite actus rea and mens rea for each of the categories.[34]

III. LEGAL DISCUSSION

A. The Three Categories of Joint Criminal Enterprise

1. Basic Joint Criminal Enterprise

The first category of joint criminal enterprise established by the Appeals Chamber in *Tadic*, also referred to as basic joint criminal enterprise, deals with cases where all co-defendants act pursuant to a common design and possess the same criminal intent.[35] An example of this

[31] Allison Marston Danner & Jenny S. Martinez at para 105

[32] *Prosecutor v. Tadic*, Case No. IT-94-1-A, Appeals Chamber Judgment, 15 July 1999 at para. 188.

[33] Id. at para. 195.

[34] See generally *Prosecutor v. Tadic*, Case No: IT-94-1-A, Appeals Chamber Judgment, 15 July 1999.

[35] Id. at para. 196.

would be if the co-perpetrators of the joint criminal enterprise formulate a plan to commit murder. In carrying out this common design they all possess the intent to kill. It does not matter if each co-perpetrator carries out a different act within the common design.[36] In order for criminal liability to attach, the accused must voluntarily participate in one aspect of the common design (for instance, by inflicting non-fatal violence upon the victim, or by providing material assistance to or facilitating the activities of his co-perpetrators); and the accused, even if not personally effecting the killing, must nevertheless intend this result.[37]

It is not necessary that the accused play a vital role in the alleged crimes. For example, if a killing is alleged, there is no requirement that the accused inflicted the fatal injury. It is only required that the accused was a cog in the wheel of events leading up to the final result which is the common purpose of the joint criminal enterprise. The accused can further that objective through a variety of means. It is not necessary to show that but for the defendant's participation, the criminal act could not have occurred.[38]

2. Systemic Joint Criminal Enterprise

The second category of joint criminal enterprise, also called systemic joint criminal enterprise, is in many respects similar to the first category of joint criminal enterprise. Systemic joint criminal enterprise addresses "concentration camp" like cases.[39] The ICTY gathered support for the application of this type of joint criminal enterprise by pointing to World War II

[36] Id.

[37] Id.

[38] Id. at para. 199.

[39] Id. at para. 202.

cases that prosecuted participants in Nazi concentration camps.[40] In those cases, the notion of common purpose was applied to situations 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.) In those World War II cases the accused held some position of authority within the hierarchy of the concentration camps.[41] To be criminally liable under this category of joint criminal enterprise, the defendant must actively participate in a system of repression, and this fact can be inferred from the defendant's position of authority.[42] Also, the defendant must have knowledge of the nature of the system as well as the intent to further the common concerted design to ill-treat the prisoner.[43] It is less necessary to prove intent where the defendant's high rank or authority indicates an awareness of the common design and intent to participate in the common design.[44]

3. Extended Joint Criminal Enterprise

The third category of joint criminal enterprise concerns cases involving a common design, where crimes occurring outside the common design, were natural and foreseeable consequences of the execution of the common purpose.[45] For example, this type of joint criminal enterprise could occur where a group had a common plan to forcibly remove members of one ethnic group from a town or village, and in the process of doing so, victims were shot and killed. The killings were not explicitly acknowledged to be part of the common plan, however,

[40] See Generally the Trial of Martin Gottfried Weiss and thirty-nine others, General Military Government Court of the United States Zone, Dachau, Germany, 15th November-13th December, 1945, UNWCC, vol. XI, p. 5. [Reproduced in accompanying notebook at Tab 9]

[41] *Prosecutor v. Tadic*, Case No: IT-94-1-A, Appeals Chamber Judgment, 15 July 1999, at para. 202.

[42] Id. at para. 203

[43] Id.

[44] Id. at para. 203.

[45] Id. at para. 204.

the killings were a natural and foreseeable consequence of the forced removal of the victims. Defendants may be found criminal liable if the risk of death occurring was both a predictable consequence of the execution of the common plan and the defendant was either reckless or indifferent to that risk.[46] This category of joint criminal enterprise was applied to perpetrators of mob violence in World War II cases such as the *Essen Lynching* case and the *Borkum Island* case. In those cases, there were multiple offenders, and it was unknown or impossible to ascertain exactly which acts were carried out by which perpetrator, or when the causal link between each act and the eventual harm is also unknown.[47]

B. Actus Reus Required for Conviction Under Joint Criminal Enterprise Doctrine

The Appeals Chamber in the *Tadic* case laid out the actus reus requirements for conviction under the theory of joint criminal enterprise. The same actus reus is required regardless of which category of joint criminal enterprise is being applied. The actus reus for criminal liability under a theory of joint criminal enterprise is as follows: (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.[48]

First, with regard to the plurality requirement, there is no requirement that the group of persons be organized in a military, political or administrative structure.[49] The plurality of persons can occur in any form, whether it is formal or informal, so long as the group includes more than one person. Second, regarding the common design requirement, there is no necessity

[46] Id. at para. 204.

[47] Id. at para. 205.

[48] Id. at para. 227.

[49] Id.

that the design has been previously arranged or formulated. The common plan or purpose may materialize extemporaneously and be inferred from the fact that a plurality of persons acts in unison to put into effect a joint criminal enterprise.[50] Finally, with respect to the participation requirement, the participation need not involve commission of a specific crime provided for in the ICTY Statute (for example, murder, extermination, torture, rape, etc.), but may take the form of assistance in, or contribution to, the execution of the common plan or purpose.[51]

C. Mens Rea Required for Conviction Under Joint Criminal Enterprise Doctrine

By contrast, the mens rea element differs according to the category of common design under consideration. With regard to basic joint criminal enterprise, an accused must have intent to perpetrate a certain crime (this being the shared intent on the part of all co-perpetrators).[52] With regard to systemic joint criminal enterprise, 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.[53] Regarding extended joint criminal enterprise, the intention 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 is required.[54] In addition, responsibility for a crime other than the one agreed upon in the common plan arises only if, under the circumstances of the case, (i) it was foreseeable that such a

[50] Id.

[51] Id.

[52] Id. at para. 228

[53] Id.

[54] Id.

crime might be perpetrated by one or other members of the group and (ii) the accused willingly took that risk.[55]

When applying the third category of joint criminal enterprise, it is important to note that more than just negligence is required to possess the proper mens rea. What is required is a state of mind in which a person, although he did not intend to bring about a certain result, was aware that the actions of the group were most likely to lead to that result but nevertheless willingly took that risk. In other words, the so-called *dolus eventualis* is required (also called advertent recklessness in some national legal systems).[56]

The ICTY has stated that where a crime is being prosecuted under a theory joint criminal enterprise, "the prosecution must establish that the accused shared with the person who personally perpetrated the crime the state of mind required for that crime."[57] When the prosecution seeks to apply the third category of joint criminal enterprise, and "the crime charged went beyond the object of the joint criminal enterprise, the prosecution needs to establish only that the accused was aware that the further crime was a possible consequence in the execution of that enterprise and that, with that awareness, he participated in that enterprise."[58]

D. Joint Criminal Enterprise v. Command Responsibility

When the ICTY decides to prosecute an accused war criminal, the tribunal must make a basic legal choice between prosecuting that individual under a theory of Joint criminal enterprise,

---

[55] Id.

[56] Steven Powles, *Joint Criminal Enterprise: Criminal Liability by Prosecutorial and Judicial Creativity?,* 2 J. Int'l Crim. Just. 606 at 619(June 2004) citing *Tadic* at para. 220.

[57] *The Prosecutor v. Krnojelac*, Case No. IT-97-25-T, Trial Chamber II Judgment, 15 March 2002, at para. 613 [Reproduced in accompanying notebook at Tab 10]

[58] *The Prosecutor v. Brdjanin*, Case No. IT-99-36-T, Trial Chamber Judgment, 1 September 2004 [Reproduced in accompanying notebook at Tab 11]

or under a theory of command responsibility.[59] Article 7(3) of the ICTY Statute provides for command (superior) responsibility as a form of individual criminal liability. Article 7(3) reads;

> The fact that any of the acts referred to in articles 2 to 5 of the present Statute was committed by a subordinate does not relieve his superior of criminal responsibility if he knew or had reason to know that the subordinate was about to commit such acts or had done so and the superior failed to take the necessary and reasonable measures to prevent such acts or to punish the perpetrators thereof.[60]

Individuals can be found guilty of criminal conduct in spite of the fact that the acts were carried out by subordinates.[61]

E. Joint Criminal Enterprise v. Aiding and Abetting

It is important to distinguish criminal liability as a co-perpetrator under a theory of joint criminal enterprise from criminal liability for aiding and abetting the commission of crimes. These two forms of liability are similar in some respects, however, they are fundamentally different forms of criminal liability. Both forms of liability are prosecuted under Article 7(1) of the ICTY Statute.[62] Article 7(1) states that "[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

---

[59] Mark J. Osiel, *Modes of Participation in Mass Atrocity*, 38 Cornell Int'l L.J. 793 at 793(Fall 2005) [Reproduced in accompanying notebook at Tab 37]

[60] ICTY Statute Section 7(3).

[61] *Danner and Martinez*, Cal. L. Rev. (Jan. 2005) at 145. (It is possible to convict an accused war criminal for the same crime under both Article 7(1) and Article 7(3) of the ICTY statute, however criminal liability each article should be understood as divergent modes of liability. Criminal liability can be alleged under both Article 7(1) and 7(3), however, they both Articles are seldom alleged concurrently for the same count. The ICTY has overwhelmingly decided to pursue conviction under a theory of joint criminal enterprise more often than under a theory of command responsibility. Prosecutors appear to be attempting to fit as many political and military leaders under the joint criminal enterprise framework in preference to command responsibility liability, even in cases where the latter arguably better describes the actions of the accused. The ICTY prosecution has been much more successful in reaching convictions under joint criminal enterprise than under command responsibility, and this has lead to what some would call an overexpansion of the joint criminal enterprise doctrine.)

[62] *Prosecutor v. Mitar Vasiljevic*, Case No. IT-98-32-A, Appeals Chamber Judgment, 25 February 2004 at para. 94. [Reproduced in accompanying notebook at Tab 12]

crime." (emphasis added)[63] Co-perpetration under a theory of joint criminal enterprise doctrine is different from aiding and abetting in the degree of seriousness of the offense as well as the requisite actus reus and mens rea.[64]

G. Termination of Conspiracy: an Analogy to Joint Criminal Enterprise

1. Conspiracy

There is little information available concerning termination of a joint criminal enterprise or termination of an individual's membership in a joint criminal enterprise. The crime of conspiracy provides the closest analogy. Conspiracy resembles joint criminal enterprise doctrine in many ways. Both doctrines seek to expand the potential liability of defendants far beyond their physical perpetration of crimes and both doctrines attach the criminal liability of the defendants to the acts committed within the scope of the enterprise.[65]

The crime of conspiracy, like other crimes, requires certain acts as well as a certain mental state. There needs to be: (1) an agreement between two or more persons, which constitutes the act; and (2) an intent thereby to achieve a certain objective which, under the common law definition, is the doing of either an unlawful act or a lawful act by unlawful means. Many U.S. jurisdictions also require that the accused has committed some overt act in

---

[63] ICTY Statute Article 7(1).

[64] *The Prosecutor v. Vasiljevic*, Case No. IT-98-32-T, Trial Chamber II Judgment, 29 November 2002 (Regarding actus reus, the aider and abettor must carry out acts specifically directed to assist, encourage or lend moral support to the perpetration of a certain specific crime (murder, extermination, rape, torture, wanton destruction of civilian property, etc.).[64] The actus reus for co-perpetration under a theory of joint criminal enterprise is different because in that case, it is sufficient for a participant to perform acts that in some way are directed to the furtherance of the common design.[64] With regard to the mens rea for aiding and abetting, the requisite mental element is knowledge that the acts performed by the aider and abettor assist the commission of the specific crime of the principal. Alternatively, in the case of participation in a joint criminal enterprise as a co-perpetrator, the accused must have the intent to pursue the common purpose which is the goal of the joint criminal enterprise. The fact that the aider and abettor does not share the intent of the principal offender generally lessens his criminal culpability from that of an accused acting pursuant to a joint criminal enterprise who does share the intent of the principal offender.) [Reproduced in accompanying notebook at Tab 13]

[65] Allison Marston Danner & Jenny S. Martinez, *Guilty Associations: Joint Criminal Enterprise, Command Responsibility, and the Development of International Criminal Law*, Cal. L. Rev. at 117 (Jan. 2005)

furtherance of the conspiracy. This is usually viewed as an evidentiary requirement rather than another element of the offense.[66]

The agreement is said to be the "essence" of the conspiracy.[67] There continues to be some uncertainty as to the exact meaning of agreement in the context of conspiracy. However, it is certain that the meaning of agreement in this context is more lax than the meaning elsewhere, for example, the agreement or "meeting of the minds" concept in the context of contracts.[68] There is no requirement that the agreement be explicit. Instead, the agreement can be inferred from the facts and circumstances of the case.[69] It is not necessary that each conspirator agree to commit or facilitate every part of the substantive offense. One can be a conspirator by agreeing to facilitate only some of the acts leading up to the substantive offense.[70]

Regarding the second element, that of intent (the mens rea required to commit conspiracy), this must be understood as intent to achieve the objective of the agreement rather than intent to agree. The intent to agree is so closely related to the agreement (the actus reus), which is mental in nature, it cannot be said to constitute a separate element of the offense.[71] To be guilty of conspiracy, the accused must have the intent to achieve the objective of the agreement. This means that the accused must have the intent to achieve a particular result that is criminal.[72] This intent does not have to be so particular that the conspirator has in mind a

---

[66] LaFave, *Criminal Law*, (2003) at 621. [Reproduced in accompanying notebook at Tab 3]

[67] *Iannelli v. United States*, 420 U.S. 770, (1975). [Reproduced in accompanying notebook at Tab 14]

[68] LaFave at 622.

[69] *Iannelli v. United States*, 420 U.S. 770, (1975).

[70] *Salinas v. Unites States*, 522 US 52 (1997). [Reproduced in accompanying notebook at Tab 15]

[71] LaFave at 629.

[72] Id. at 629.

particular time, place and victim, but the intent must relate to a particular type of criminal activity.[73]

Under common law, the crime of conspiracy was punishable even though the conspirators committed no act beyond making the agreement. This is still the rule in the absence of a statute providing otherwise.[74] Most U.S. States, however, require that an overt act in furtherance of the plan be proven for all or specified conspiratorial objectives. Often, this overt act must constitute a "substantial step" towards the commission of the crime.[75] Under Federal U.S. law, an overt act is specifically required by the general conspiracy statute.[76] This indicates that in the U.S., the absence of an overt act requirement in subsequently enacted federal conspiracy statutes reflects Congress' intent to follow the common law standard, not requiring an overt act.[77]

The purpose of having an overt act requirement in a conspiracy is simply to demonstrate that the conspiracy is at work, and it is neither a "project resting solely in the minds of the conspirators nor a fully completed operation no longer in existence."[78] Therefore, the overt act must be the substantive offense, which was the object of the conspiracy, but may not be simply a part of the act of agreement.[79] U.S. courts have held that the overt act must be a step towards the execution of the conspiracy, an act that tends to carry out the conspiracy, or a step in preparation

[73] *United States v. Gallishaw*, 428 F.2d 760 (2nd Cir. 1970). [Reproduced in accompanying notebook at Tab 16]

[74] *United States v. Sassi*, 966 F.2d 283 (7th Cir. 1992). [Reproduced in accompanying notebook at Tab 17]

[75] LaFave at 626.

[76] 18 U.S.C.A. § 371. [Reproduced in accompanying notebook at Tab 50]

[77] *United States v. Shabani*, 513 U.S. 10 (1994). [Reproduced in accompanying notebook at Tab 18]

[78] *Yates v. United States*, 354 U.S. 298, 334 (1957). [Reproduced in accompanying notebook at Tab 19]

[79] LaFave at 627.

for affecting the object. Thus, if the agreement has been established but the object has not been attained, virtually any act will satisfy the overt act requirement. [80]

2. The Pinkerton Doctrine: The Extended Form of Conspiracy

In the United States, it is possible for a conspirator to be held responsible for crimes committed by his co-conspirators as long as such crimes were in furtherance of the agreement and were reasonably foreseeable. This doctrine closely resembles the extended form of joint criminal enterprise.[81] This rule of liability was established by the Supreme Court in 1946 in Pinkerton v. United States.[82] The crimes themselves do not have to have been agreed upon, intended or even discussed. Liability attaches when it was reasonably foreseeable to the accused that the crime would be committed.[83] This doctrine allows the government to hold an accused criminally liable for all reasonably foreseeable acts of co-conspirators regardless of actual knowledge, intent, or participation. Thus, if the government cannot prove an accused's guilt relating to a substantive crime, it only needs to prove that the accused was a party to the conspiracy where the commission of the substantive crime was reasonably foreseeable.[84]

Pinkerton liability or any similar doctrine has not been embraced in any civil law jurisdictions.[85] Today, many U.S. states, as well as the Model Penal Code, have rejected

---

[80] Id. at 627.

[81] Allison Marston Danner & Jenny S. Martinez, *Guilty Associations: Joint Criminal Enterprise, Command Responsibility, and the Development of International Criminal Law*, Cal. L. Rev. at 140 (Jan. 2005)

[82] *Pinkerton v. United States*, 328 U.S. 640 (1946). [Reproduced in accompanying notebook at Tab 20]

[83] Paul Marcus, *Criminal Conspiracy Law: Time to Turn Back from an Ever Expanding, More Troubling Area*, 1 Wm. & Mary Bill Rts. J. 1 at 6 (Spring, 1992). [Reproduced in accompanying notebook at Tab 38]

[84] Id. at 7.

[85] Edward M. Wise, *RICO and Its Analogues: Some Comparative Considerations*, 27 Syracuse J. Int'l & Com. 303 at 312 (2000). [Reproduced in accompanying notebook at Tab 39]

Pinkerton liability, although it still plays role in federal prosecutions.[86] U.S. courts have recognized that Pinkerton liability, which is predicated on foreseeable but unintended crimes, poses problems of fundamental fairness in cases where the link between an individual's wrongdoing and criminal liability is highly attenuated.[87] United States Federal Courts have refused to extend the Pinkerton doctrine to convictions of first-degree murder. In *United States v. Cherry*, the 10th Circuit Court of Appeals held that if they were to apply Pinkerton liability to the defendant (who was involved in a conspiracy to distribute drugs), the government would apparently render every minor drug distribution co-conspirator, regardless of knowledge, the extent of the conspiracy, its history of violence, and like factors, liable for first degree murder. The Court held that such a result is incompatible with the due process limitations.[88] The Pinkerton doctrine, the closest analogy to extended joint criminal enterprise, has far greater limitations placed on it than does the application of extended joint criminal enterprise in the ICTY.[89]

3. Withdrawal from Conspiracy

It is possible for a member of a conspiracy limit his criminal liability by withdrawing from the conspiracy. An accused may attempt to establish his withdrawal as a defense for substantive crimes subsequently committed by co-conspirators. Or, the accused may seek to prove his withdrawal to show that he cannot be held liable because the statute of limitations has run.[90]

---

[86] Allison Marston Danner & Jenny S. Martinez. at 116.

[87] Id. at 141.

[88] *United States v. Cherry*, 217 F.3d 811, 818 (10th Cir. 2000). [Reproduced in accompanying notebook at Tab 21]

[89] Allison Marston Danner & Jenny S. Martinez at 141.

[90] LaFave at 651.

Conspiracy law sets a tough standard for withdrawal.[91] A defendant must show "that he has taken affirmative steps . . . to disavow or to defeat the objectives of the conspiracy; and . . . that he made a reasonable effort to communicate those acts to his co-conspirators or that he disclosed the scheme to law enforcement."[92] The "disclosed the scheme to law enforcement" prong of withdrawal aids information extraction because it lowers the sentences of those who provide such information to authorities.[93] The "communicate [to] co-conspirators" prong, permitting withdrawal without informing law enforcement, destabilizes conspiracies in two ways. Because defection from groups is more common when members believe their activities are coming to a close, the withdrawal of one member can prompt defection from the others, thus weakening the group and providing additional opportunities for information extraction.[94] Affirmative acts inconsistent with the object of the conspiracy and communicated in a manner reasonably calculated to reach co-conspirators have generally been regarded as sufficient to establish withdrawal.[95] The mere cessation of activity in furtherance of conspiracy is insufficient to constitute withdrawal from the conspiracy.[96]

In the United States, withdrawal from a conspiracy ends liability for further substantive offenses, but not the initial liability for the offense of conspiring or other substantive crimes

---

[91] Kumar Katyal, *Criminal Conspiracy*, 112 YLJ 1307 at 1378 (April 2005). [Reproduced in accompanying notebook at Tab 40]

[92] *United States v. Dabbs*, 134 F.3d 1071, 1083 (11th Cir. 1998). [Reproduced in accompanying notebook at Tab 22]

[93] Kumar Katyal at 1378.

[94] Id.

[95] *United States v. United States Gypsum Co.*, 438 U.S. 422, 464-65 (1978) [Reproduced in accompanying notebook at Tab 23]

[96] *United States v. Gornto*, 792 F.2d 1028, 1033 (11th Cir. 1986). [Reproduced in accompanying notebook at Tab 24]

already committed while the person was a member.[97] Furthermore, conspiracy is an inchoate offense that is complete regardless of whether the object of the conspiracy is achieved, withdrawal is impossible once an overt act is committed.[98] However, an accused could successfully escape criminal liability by showing that he withdrew before an overt act or substantive crime was committed by a co-conspirator.[99]

4. Termination of Conspiracy

It is also possible for a member of a conspiracy limit his criminal liability by showing that the existence of the conspiracy was terminated. An accused may raise this defense to escape liability for substantive crimes occurring after the termination of the conspiracy. Or, the accused may argue that a conspiracy has been terminated because the statute of limitations begins running once the termination is complete.[100]

There are two ways in which a conspiracy can terminate. A conspiracy can terminate upon the completion of the last overt act, or when the primary purpose of the conspiracy has been accomplished.[101] Regarding termination after the last overt act, although the result of a conspiracy may be continuing, the conspiracy does not thereby become a continuing one. Continuity of action to produce the unlawful result and continuous co-operation of the conspirators is necessary. The statute of limitations, unless suspended, runs from the last overt act during the existence of the conspiracy. The overt acts averred and proved thus marks the

[97] *United States v. Herron*, 825 F.2d 50, 59 (5th Cir. 1987). [Reproduced in accompanying notebook at Tab 25]

[98] *United States v. Marolla*, 766 F.2d 457, 461 (11th Cir. 1985). [Reproduced in accompanying notebook at Tab 26]

[99] LaFave at 651.

[100] Id.

[101] Mark Lippman, *Defending Against the Co-Conspirator Hearsay Exception*, 21 –AUG Champion 16 at 17 (August 1997). [Reproduced in accompanying notebook at Tab 41]

duration of the conspiracy.[102] Regarding termination after the purpose of the conspiracy has been accomplished, once the goal that is the reason for the conspiracy's existence has been realized, the conspiracy is terminated and the statute of limitations begins to run.[103]

H. Conspiracy v. Joint Criminal Enterprise

Joint criminal enterprise doctrine, while similar to conspiracy, is a distinct and very different doctrine. Judge Hunt of Australia, a leading authority on JCE at the ICTY, has characterized the argument that joint criminal enterprise is a form of conspiracy as "entirely fallacious because conspiracy is a crime unto itself and not a mode of individual criminal responsibility for the commission of a crime."[104] Joint criminal enterprise is a form of commission pursuant to Article 7(1) of the Statute. Criminal liability does not attach because of an individual's membership in the joint criminal enterprise, rather, an individual can be held liable for crimes committed under the ICTY Statute through a theory of joint criminal enterprise.[105]

The ICTY Appeals chamber has stated that while mere agreement is sufficient to establish criminal liability in the case of conspiracy, the liability of a member of a joint criminal enterprise will depend on the commission of criminal acts in furtherance of that enterprise.[106]

---

[102] *Fiswick v. United States*, 329 U.S. 211, 216 (1946). [Reproduced in accompanying notebook at Tab 27]

[103] *Krulewitch v. United States*, 336 U.S. 440, 443 (1997). [Reproduced in accompanying notebook at Tab 28]

[104] *Prosecutor v. Multinovic*, Case No. IT-99-37-AR72, Appeals Chamber Opinion on Challenge by Ojdanic to Jurisdiction-Joint Criminal Enterprise, May 21, 2003, at para. 23. [Reproduced in accompanying notebook at Tab 29]

[105] Daryl A. Mundis & Fergal Gaynor, *Current Developments at the Ad Hoc International Criminal Tribunals*, 2 J. Int'l Crim. Just. 642 (June 2004) at 653. [Reproduced in accompanying notebook at Tab 42]

[106] *Prosecutor v. Multinovic*, Case No. IT-99-37-AR72, Appeals Chamber Opinion on Challenge by Ojdanic to Jurisdiction-Joint Criminal Enterprise, May 21, 2003, at para. 23.

Also, the very concept of joint criminal enterprise presupposes that its participants, other than the principal perpetrator(s) of the crimes committed, share the perpetrators' joint criminal intent.[107]

Joint criminal enterprise doctrine has even fewer limits than domestic conspiracy law, and it provides the prosecutor with the ability to expand the boundaries of the range of crimes for which an individual may be held responsible.[108] Thus, once an accused has been found to satisfy the actus reus and mens rea requirements for participation in a joint criminal enterprise, his criminal liability is established and it is not possible to raise withdrawal or termination as a defense.

1. Withdrawal from a Joint Criminal Enterprise

In almost every instance, it is not possible for an accused to successfully escape liability under joint criminal enterprise by showing his withdrawal. Under joint criminal enterprise, an individual may be held responsible for all crimes committed pursuant to the existence of a common plan or design.[109] So long as the accused meets the mens rea and actus reus requirements, withdrawal will not allow him to escape liability from crimes committed after his withdrawal.

Also, in the context of conspiracy, withdrawal is often used as a defense to show that the accused cannot be held liable due to the statute of limitations.[110] Withdrawal cannot serve this purpose within the ICTY. The ICTY Statute provides jurisdiction for crimes delineated in the

[107] Daryl A. Mundis & Fergal Gaynor, *Current Developments at the Ad Hoc International Criminal Tribunals*, 2 J. Int'l Crim. Just. 642 (June 2004) at 654.

[108] Allison Marston Danner & Jenny S. Martinez at 165-165.

[109] Id.

[110] LaFave at 651.

Statute occurring since 1991 in the territory of the former Yugoslavia.[111] An accused cannot escape criminal liability under joint criminal enterprise by showing that the statute of limitations has run since the time of his withdrawal. The Tribunal has jurisdiction over the crime(s) so long as they occurred since 1991 in the territory of the former Yugoslavia. However, it is conceivable that an accused could escape liability by showing that he withdrew from the joint criminal enterprise before the date on which the Tribunal's jurisdiction begins.

The exception to the inability to withdraw from a joint criminal enterprise occurs in the context of systemic joint criminal enterprise. In cases involving concentration camp like scenarios, the ICTY limits the liability of co-perpetrators in a joint criminal enterprise to those times when the accused is a participant in the system of ill treatment.[112] In *The Prosecutor v. Kvocka,* Kvocka was accused, via the joint criminal enterprise doctrine, of committing various crimes at the Omarska Prison Camp. The Appeals Chamber upheld the Trial Chamber's decisions that while Kvocka's physical presence in the camp at the time the crimes were committed was necessary for him to be held criminally responsible, the Tribunal was excluded from finding Kvocka liable for the crimes committed before he arrived at the camp and after he left.[113] Thus, it is possible for an individual accused of co-perpetration through a theory of systemic joint criminal enterprise to escape liability for crimes committed before he arrived at the prison camp as well as crimes committed after he left or "withdrew" from the camp. However the accused need not be present at the camp at the time the crimes were committed to be held criminally liable.

---

[111] ICTY Statute.

[112] See generally *The Prosecutor v. Kvocka*, Case No. IT-98-30/1-A, Appeals Chamber Judgment, 28 February 2005. [Reproduced in accompanying notebook at Tab 30]

[113] Id. at para. 254.

2. Termination of a Joint Criminal Enterprise

Similar to the defense of withdrawal from a joint criminal enterprise, termination is not an effective defense against criminal liability. An accused cannot escape criminal liability by asserting that the joint criminal enterprise had terminated prior to the commission of certain crimes. In *The Prosecutor v. Martic*, the Prosecutor argued, and the Trial Chamber agreed, that an accused "can be held responsible for the effect of criminal actions in which he participated that extend beyond the existence of the joint criminal enterprise."[114] The fact that the existence of a joint criminal enterprise ends on a certain date does not mean that member of the enterprise cannot be held criminally liable for the continuing effects of that enterprise.

Also, the defense of termination is equally ineffective in regards to the statute of limitations. The ICTY has jurisdiction over crimes provided for in the Statute occurring since 1991 in the territory of the former Yugoslavia.[115] An accused cannot escape criminal liability under joint criminal enterprise by showing that the statute of limitations has run since the termination of the joint criminal enterprise.

I. How Can an Accused Show That a Joint Criminal Enterprise Did Not Exist?

The defenses of withdrawal from a joint criminal enterprise and termination of a joint criminal enterprise are severely limited in their effectiveness in the ICTY. The following discussion, while not exactly addressing the question presented, will hopefully be helpful in understanding how an individual can escape criminal liability by showing that a joint criminal enterprise did not exist. The next section discusses ways in which an accused can escape criminal liability by showing that he was not a participant in a joint criminal enterprise.

---

[114] *The Prosecutor v. Martic*, Case No. IT-95-11-PT, Trial Chamber Decision, 2 June 2003, at para. 37. [Reproduced in accompanying notebook at Tab 31]

[115] ICTY Statute.

1. Brdjanin Decision Limited the Application of the Joint Criminal Enterprise Doctrine to Situations Where There Is a Nexus Between the Accused and the Physical Perpetrators of the Crime(s)

In *The Prosecutor v. Brdjanin*, the Trial Chamber changed its conceptualization of the joint criminal enterprise doctrine and limited the situations in which the doctrine can be applied. The controversy arose were the mens rea of the accused and the second actus reus requirement (requiring a common plan, design or purpose which involves the commission of a crime provided for in the Statute) were applied together. The Trial Chamber found that while it is not necessary to prove that every member of the joint criminal enterprise intended every criminal objective of the enterprise, the prosecutor must prove that, between the member of the joint criminal enterprise physically committing the material crime charged and the person held responsible under the joint criminal enterprise for that crime, there was a common plan to commit at least that particular crime. This requires a showing that there was an agreement between the accused and the physical perpetrators of the crimes. The Trial Chamber defined "physical perpetrators of crimes" as those who carry out the crimes' actus reus.[116]

Brdjanin was arrested on July 6, 1999.[117] He was charged with the crimes of genocide; complicity in genocide; crimes against humanity by persecution, extermination, torture, deportation, and inhumane acts; grave breaches of the Geneva Conventions by willful killing, torture, and unlawful and wanton extensive destruction and appropriation of property; and violation of the laws or customs of war by wanton destruction or devastation of villages and religious institutions. [118] The Indictment alleged basic joint criminal enterprise under Article

---

[116] Alan O'Rourke, *Joint Criminal Enterprise and Branin: Misguided Overcorrection*, 47 Harv. Int'l L.J. 307 (Winter 2006) at 318 [Reproduced in accompanying notebook at Tab 43]

[117] Id. at para. 1156.

[118] *The Prosecutor v. Brdjanin*, Case No. IT-99-36-T, Sixth Amended Indictment, at para. 30-64, Dec. 9, 2003. [Reproduced in accompanying notebook at Tab 32]

7(1) for all counts. It also alleged extended joint criminal enterprise under Article 7(1) for all counts except deportation and forcible transfer. Brdjanin's liability depended on whether the joint criminal enterprise's other members included the physical perpetrators of crimes.[119] According to the indictment, the joint criminal enterprise's other members included Momir Talic, other Krajina Crisis Staff members, the Bosnian Serb political leadership, the Krajina Assembly, its Executive Committee, municipal crisis staffs, army personnel, Serb paramilitary forces, and "others."[120] The Trial Chamber concluded that army personnel, Bosnian Serb police, Serb paramilitary groups, Bosnian Serb armed civilians, and unidentified individuals were the only physical perpetrators of crimes among those listed. Other potential physical perpetrators of the crimes were not pleaded in the Indictment, therefore, Brdjanin's liability under joint criminal enterprise depended on finding the necessary agreement between Brdjanin and the relevant physical perpetrators who were properly pleaded, namely the army personnel and Serb paramilitary forces.[121]

In a controversial move, the Trial Chamber stated that it is not sufficient to prove an understanding or an agreement to commit a crime between the Accused and a person in charge or in control of a military or paramilitary unit committing a crime.[122] According to the Trial Chamber, an accused can only be held criminally responsible under a joint criminal enterprise if the Prosecution establishes beyond reasonable doubt that he had an understanding or entered into an agreement with the relevant physical perpetrators to commit the particular crime eventually perpetrated or if the crime perpetrated by the relevant physical perpetrators is a natural and

[119] Alan O'Rourke at 318.

[120] Brdjanin Sixth Amended Indictment, Case No. IT-99-36-T, para. 27

[121] Alan O'Rourke at 318.

[122] Id.

foreseeable consequence of the crime agreed upon by the accused and the relevant physical perpetrators.[123] Though Brdjanin's actions facilitated or contributed to the commission of crimes by others or assisted in forming those persons' criminal intent, they did not successfully establish the required agreement. The Chamber concluded that no direct evidence existed to satisfy the agreement requirement.[124]

The Trial Chamber addressed whether it was possible to infer agreement from the circumstances. The Trial Chamber rejected the inference of the necessary agreement, "given the physical and structural remoteness between the Accused and the Relevant Physical Perpetrators and the fact that the Relevant Physical Perpetrators in most cases have not even been personally identified."[125] The Trial Chamber found that the evidence inadequate for every joint criminal enterprise member, the Chamber acquitted Brdjanin of all charges under joint criminal enterprise. The Trial Chamber observed generally that joint criminal enterprise was inappropriate to describe Brdjanin's responsibility given the case's extraordinarily broad nature and that Brdjanin was so structurally remote from the commission of the crimes charged.[126]

Following this controversial shift in the conceptualization of joint criminal enterprise doctrine, these new propositions appear to have become accepted law: (1) for joint criminal enterprise, the prosecutor must prove direct, mutual agreement between the accused and the actual physical perpetrators of the crimes; (2) proving that the accused shared the joint criminal enterprise's criminal intent with the superior of the physical perpetrators does not satisfy the requirement; and (3) the joint criminal enterprises anticipated by *Tadic* are smaller in scale than

[123] *The Prosecutor v. Brdjanin*, Case No. IT-99-36-T, Trial Chamber Judgment, 1 September 2004, at para. 347.

[124] Alan O'Rourke at 319.

[125] *The Prosecutor v. Brdjanin*, Case No. IT-99-36-T, Trial Chamber Judgment, 1 September 2004, at para. 354.

[126] Alan O'Rourke at 320.

the one in *Brdjanin*. The first two propositions restrict joint criminal enterprise's ability to describe individual responsibility for mass crimes. The third proposition suggests that the Chamber's overall attitude regarding joint criminal enterprise size motivated the case's outcome.[127]

2. An Accused Can Escape Liability Under a Theory of Joint Criminal Enterprise Where the Prosecution Does Not Sufficiently Plead the Identities of the Members of that Enterprise

Joint criminal enterprise doctrine cannot be invoked against an accused where the co-perpetrators in the enterprise cannot be identified, nor can the doctrine be applied where the purpose of the enterprise cannot be ascertained. In *The Prosecutor v. Bala*, the Trial Chamber found that there was insufficient evidence to find that a joint criminal enterprise existed. The Prosecution alleged the existence of a joint criminal enterprise whereby Bala, along with others, engaged in various criminal acts. The Trial Chamber declined to find the existence of a joint criminal enterprise because they were unable to ascertain the identities of the participants other than Bala.[128]

The Indictment charged Bala with individual criminal liability under Article 7(1) of the Statute for allegedly committing, planning, instigating, ordering, or otherwise aiding and abetting the alleged crimes, including through his participation in a joint criminal enterprise. He was alleged to have personally participated in the enforcement of the detention of civilians in the Lapusnik prison camp, in their interrogation, assault, mistreatment and torture, as well as in the murder of detainees.[129] According to the Trial Chamber, there was absolutely no evidence to

---

[127] Id. at 221-222.

[128] *The Prosecutor v. Bala*, Case No. IT-03-66-T, Trial Chamber II Judgment, 30 November 2005. [Reproduced in accompanying notebook at Tab 33]

[129] Id. at para. 3.

establish how, or on whose decision, the prison camp came to be established, or how or on whose orders Bala took up duties at the camp. While it would be possible to infer that there must have existed some form of joint criminal enterprise which was comprised of unknown persons who were members of the KLA, that is too general and it cannot provide a sufficient categorization to identify the participants in the joint criminal enterprise.[130]

Due to the lack of evidence demonstrating that a group of individuals, whose identities could be established at least by reference to their category as a group, furthered a common plan, and due to the lack of evidence as to the scope of any such plan, the Trial Chamber found that the principal elements of joint criminal enterprise had not been established. The Prosecution was unable to establish beyond reasonable doubt of the existence of a joint criminal enterprise.[131] However, Hardin Bala was found to be criminally liable for his direct involvement in crimes committed in the Lapusnik prison camp.[132]

J. How Can an Accused Show that He Was Not a Member of a Joint Criminal Enterprise?

1. An accused can show that he was not a member of a joint criminal enterprise by showing that he lacked the necessary intent and his criminal liability only raises to that of an aider and abettor

In *Prosecutor v. Mitar Vasiljevic*, on appeal, the defense successfully showed that the accused lacked the necessary mens rea to sustain a finding of criminal responsibility as a co-perpetrator under a theory of joint criminal enterprise. Following his conviction by the Trial Chamber as a member of a joint criminal enterprise in the murder, inhumane acts and persecution committed during the Drina River incident. Mitar Vasiljevic appealed, with several

[130] Id. at para. 666.

[131] Id at para. 669.

[132] Id. at para. 670.

grounds relating to his mens rea for these offences and which the Appeals Chamber considered together. The Appeals Chamber substituted guilty findings as an aider and abettor (rather than as a co-perpetrator, as held by the Trial Chamber) for the crimes of murder and persecution.[133]

The prosecution alleged, and the Trial Chamber agreed, that on 7 June 1992, Vasiljevic, together with his co-accused Milan Lukic and two other unidentified individuals, forcibly detained Seven Bosnian Muslim civilians in the Vilina Vlas Hotel. The seven captives were taken to the reception area of the hotel, where Vasiljevic was already present. The Appeals Chamber found that Vasiljevic guarded the captives and pointed his automatic rifle at them, preventing any of them from leaving the lobby of the hotel. When one of the Muslims asked about their fate, this unidentified man answered that they were to be exchanged for some Serb captives.[134] Vasiljevic, along with the others, then transported the seven Bosnian Muslim civilians to the eastern bank of the Drina River. There, they forced the seven men to line up on the bank of the river and then opened fire on them. Five of the seven men died as a result of the shooting.[135]

The Trial Chamber sought to determine precisely what role Vasiljevic played in the Drina River incident. The Trial Chamber found that when Vasiljevic left the Vilina Vlas Hotel, he knew that the men were not to be exchanged for Serb captives, but rather were to be killed. The evidence of the Accused himself was that he knew that Milan Lukic had committed serious crimes, including killings. The Trial Chamber rejected Vasiljevic's evidence that it was only when the cars transporting the Muslim captives were stopped and the seven men were ordered to

---

[133] Daryl A. Mundis & Fergal Gaynor, Current Developments at the Ad Hoc International Criminal Tribunals, 2 J. Int'l Crim. Just. 879(September 2004) at 881-882. [Reproduced in accompanying notebook at Tab 44]

[134] *The Prosecutor v. Vasiljevic*, Case No. IT-98-32-T, Trial Chamber II Judgment, 29 November 2002, at para 100, note 234.

[135] Id. at para. 97, note 220.

walk towards the bank of the Drina River that he understood that these men were not to be exchanged, but that they were to be killed.[136]

The Trial Chamber found that the Prosecution did not establish beyond reasonable doubt that Vasiljevic personally killed any of the victims.[137] However, it was nevertheless satisfied that the only reasonable inference available on the evidence is that Vasiljevic, by his actions, intended that the seven Muslim men be killed, whether or not he actually carried out any of those killings himself.[138] Regarding the two men who survived the incident, the Trial Chamber was satisfied that Vasiljevic, by his acts, intended to seriously attack their human dignity and to inflict serious physical and mental suffering upon them.[139] The Trial Chamber found that Vasiljevic possessed the necessary mens rea to subject him to criminal liability as a co-perpetrator under a theory of joint criminal enterprise regarding the Drina River incident. This finding was subsequently reversed by the Appeals Chamber, which found that Vasiljevic did not possess the necessary mens rea. Rather, the Appeals Chamber found that Vasiljevic mental state only subjected him to criminal liability as an aider and abettor to the Drina River incident.[140]

On appeal, the defense raised several errors relating to the Trial Chamber's findings of fact and law. Most alleged errors were dismissed. The Appeals Chamber found that the Trial Chamber erred when it found that Vasiljevic knew at the hotel that the seven Muslim men were going to be killed; and that Vasiljevic pointed his gun at the seven Muslim men whilst at the

[136] Id. at para. 105, note 245.

[137] Id. at para. 112.

[138] Id. at para. 113.

[139] Id. at para. 114.

[140] See generally *The Prosecutor v. Vasiljevic*, Case No. IT-98-32-A, Appeals Chamber Judgment, 25 February 2004

hotel. The Appeals Chamber then found that these errors of fact led to a "miscarriage of justice" and the Trial Chamber incorrectly found that Vasiljevic shared in the intent to kill.[141]

The Trial Chamber had inferred from Vasiljevic's actions that he shared the intent to kill. They were satisfied that "the Accused personally participated in this joint criminal enterprise by preventing the seven Muslim men from fleeing by pointing a gun at them while they were detained at the Vilina Vlas Hotel, by escorting them to the bank of the Drina River and pointing a gun at them to prevent their escape, and by standing behind the Muslim men with his gun together with the other three offenders shortly before the shooting started."[142] Vasiljevic argued on appeal that these acts are not conclusive proof of his intention that the seven Muslim men be killed.[143]

In order for the Appeals Chamber to find Vasiljevic individually criminally liable as a co-perpetrator in a joint criminal enterprise, the Prosecution must establish beyond a reasonable doubt that he i) voluntarily participated in one aspect of the common purpose; and ii) that Vasiljevic, even if not personally effecting the crime, nevertheless intended this result.[144] When the Prosecution relies upon proof of the state of mind of an accused by inference, that inference must be the only reasonable inference available on the evidence. "In other words, the question is whether no reasonable tribunal could have found that the only reasonable inference from the evidence was that the Appellant by his actions intended to kill the seven Muslim men."[145]

[141] Id. at para. 86.

[142] Id. at para. 116, note 199

[143] Id. at para. 117, note 201.

[144] Id. at para. 19.

[145] Id at para. 120, note 204.

The Appeals Chamber divided the analysis of Vasiljevic's intent to kill into two separate stages of the Drina River incident. First, the Vilina Vlas Hotel stage and second, the time they arrived near the Drina River immediately before the shootings.[146] The Appeals Chamber found above that the Trial Chamber was reasonable in finding that the Appellant was armed in the Vilina Vlas Hotel but that it erred in finding that the Appellant pointed his gun at the seven men, while at the hotel. Moreover, the Appeals Chamber has found that the Trial Chamber erred in finding that the Appellant had knowledge that the seven Muslim men were to be killed and not exchanged based on the information provided to him.[147]

According to the Appeals Chamber, the issue of whether the Vasiljevic pointed his gun at the seven Muslim men at the hotel is not, as such, a decisive factor in determining the intent of the Appellant to kill the seven Muslim men. Although he was armed in the hotel and thereby assisted in preventing the seven Muslim men from fleeing, the Appeals Chamber found that since the Vasiljevic lacked, at that time, the knowledge that the seven Muslim men were to be killed, the fact that he prevented the Muslim men from fleeing at the hotel is not decisive as to whether or not he shared the intent to kill them. Therefore, no reasonable trier of fact could rely on the actions of the Appellant while at the hotel in support of a conclusion that he had the intent to kill the seven Muslim men at that time.[148]

Moving on to the second stage, the Appeals Chamber notes that at the time the cars containing the seven Muslim men, the perpetrators and Vasiljevic, were parked near the Drina River, Vasiljevic admits that he knew that the seven Muslim men were to be killed.[149] The

[146] Id. at para. 122.

[147] Id at para. 122, note 208.

[148] Id at para. 126.

[149] Id. at para. 128, note 217.

Appeals Chamber considered that when a Chamber is confronted with the task of determining whether it can infer from the acts of an accused that he or she shared the intent to commit a crime, special attention must be paid to whether these acts are ambiguous, allowing for several reasonable inferences. The Appeals Chamber was satisfied that no reasonable tribunal could have found that the only reasonable inference available on the evidence is that Vasiljevic had the intent to kill the seven Muslim men. The Trial Chamber found that Vasiljevic assisted Milan Luki and his men by preventing the seven Muslim men from fleeing. It did not find, however, that Vasiljevic shot at the Muslim men himself, nor that he exercised control over the firing. Compared to the involvement of Milan Luki and potentially one or both of the other men, the participation of Vasiljevic in the overall course of the killings did not reach the same level. The above-mentioned acts of the Appellant were ambiguous as to whether or not the Appellant intended that the seven Muslim men be killed. Appeals Chamber, therefore, concludes that the Trial Chamber erred by finding that the only reasonable inference from the evidence was that Vasiljevic shared the intent to kill the seven Muslim men.[150] Accordingly, the Trial Chamber erred, since, without the proof the Vasiljevic's intent, Vasiljevic would not be responsible as a co- perpetrator in the joint criminal enterprise.[151]

The Appeal Chamber then went on to consider whether Vasiljevic's conduct should subject him to criminal liability as an aider and abettor. The Appeals Chamber had already found that Vasiljevic knew that the seven Muslim men were to be killed; that he walked armed with the group from the place where they had parked the cars to the Drina River; that he pointed his gun at the seven Muslim men; and that he stood behind the Muslim men with his gun

[150] Id. at para. 131.

[151] Id. at para. 132.

together with the other three offenders shortly before the shooting started. The Appeals Chamber found that the only reasonable inference available on the totality of evidence is that Vasiljevic knew that his acts would assist the commission of the murders. The Appeals Chamber finds that in preventing the men from escaping on the way to the riverbank and during the shooting, Vasiljevic's actions had a "substantial effect upon the perpetration of the crime."[152] The Appeals Chamber found that the acts of the Vasiljevic were specifically directed to assist the perpetration of the murders and the inhumane acts and his support had a substantial effect upon the perpetration of the crimes. For this reason, The Appeals Chamber found Vasiljevic guilty for aiding and abetting murder.[153]

2. An Accused Can Show that He Was Not a Member of a Joint Criminal Enterprise by Showing that He Did Not Give a Substantial Enough Contribution to the Enterprise.

An individual accused of being a member of a joint criminal enterprise could show that he was not a member of that enterprise by showing that his contribution was not significant enough to subject him to criminal liability.[154] In *The Prosecutor v. Kvocka*, the Trial Chamber stated that in order to be found criminally liable for participation in a joint criminal enterprise, an accused must have carried out acts that substantially assisted or significantly affected the furtherance of the goals of the enterprise, with the knowledge that his acts or omissions facilitated the crimes committed through the enterprise. Merely knowing that crimes are being committed within a system and knowingly participating in that system in a way that substantially assists or facilitates the commission of a crime or which allows the criminal enterprise to

[152] Id at para. 134, note 226.

[153] Id. at para. 135.

[154] See *Background Note on the Application of the Exclusion Clauses: Article 1F of the 1951 Convention Relating to the Status of Refugees*, 15 Int'l J. Refugee L. 502 (Sept. 2003) [Reproduced in accompanying notebook at Tab 45]

function effectively or efficiently would be enough to establish criminal liability. A co-perpetrator of a joint criminal enterprise contributes to the commission of the crimes by playing a role that allows the system or enterprise to continue functioning. Much like the requirement that an aider and abettor provide substantial assistance to the commission of a crime, the Trial Chamber applied the same requirement an individual's participation in a joint criminal enterprise.[155]

The Tribunal will take into consideration a variety of factors when determining whether an accused's participation in a joint criminal enterprise constitutes a substantial participation. Those factors include the size of the criminal enterprise, the functions performed, the position of the individual in the organization or group, and the role of the individual in relation to the seriousness and the scope of the crimes committed.[156]

IV. CONCLUSION

Joint criminal enterprise doctrine has proven to be a very useful tool of the ICTY. It is a means of liability that has been firmly established under customary international law. The ICTY applies joint criminal enterprise through Article 7(1) of the Statute. Joint criminal enterprise is very frequently used by ICTY prosecutors as a means of imputing individual criminal liability. The actus reus and mens rea elements elements necessary for joint criminal enterprise liability to attach have been firmly established by the *Tadic* Decision.

Domestic conspiracy law provides the closest analogy to joint criminal enterprise doctrine. The two doctrines are similar because they seek to expand the potential liability of

[155] *The Prosecutor v. Kvocka*, Case No. IT-98-30/1, Trial Chamber judgment, 2 November 2001, at para. 312. [Reproduced in accompanying notebook at Tab 34]

[156] *Background Note on the Application of the Exclusion Clauses: Article 1F of the 1951 Convention Relating to the Status of Refugees*, 15 Int'l J. Refugee L. 502 (Sept. 2003) at para. 55.

defendants far beyond their physical perpetration of crimes. However, the two doctrines very different because joint criminal enterprise is a theory of liability used to find individuals liable for the commission of certain crimes, while conspiracy is a crime unto itself. Furthermore, the ICTY applies a much looser standard in finding liability under joint criminal enterprise than do domestic courts in finding liability for conspiracy.

Those accused of conspiracy can limit their liability by showing that they withdrew from the conspiracy. This can either limit liability for substantive crimes committed after the individual's withdrawal or limit liability by showing that the statute of limitations has run since the individual's withdrawal. This defense has little application to joint criminal enterprise doctrine because if an accused is found to have the requisite mens rea and actus reus, he is liable for all crimes committed pursuant to the common plan. Also, an accused cannot benefit from the running of a statute of limitations because the ICTY has jurisdiction over any crimes provided for in the statute that occurred in the territory of the former Yugoslavia since 1991. However, an individual can escape criminal liability for crimes committed in the context of a systemic joint criminal enterprise by showing that the crimes occurred either before his arrival or after his departure from the prison camp.

Those accused of conspiracy can also limit their liability by showing that the conspiracy terminated. This can limit liability for substantive crimes committed after the termination or limit liability by showing that the statute of limitations has run since the termination of the conspiracy. This defense has little application to joint criminal enterprise doctrine because if an accused is found to have the requisite mens rea and actus reus, he is liable for all crimes committed pursuant to the common plan. Once again, an accused cannot benefit from the running of a statute of limitations because no such statute of limitation is in place in the ICTY.

Although withdrawal and termination do not provide effective defenses against the application of joint criminal enterprise doctrine, there are other ways in which an accused can show that a joint criminal enterprise did not exist. This can be accomplished by showing a lack of an agreement between the accused and the physical perpetrators of the crimes. This precedent was established by the *Brdjanin* Judgment. There the Trial Chamber significantly restricted the application of the joint criminal enterprise doctrine. This precedent limits the size of potential the joint criminal enterprise because now there must be an agreement between the accused and the people who actually commit the crimes. It is also possible to show that a joint criminal enterprise does not exist as a matter of law where the Indictment does not sufficiently identify the member of the enterprise or make their identification possible.

It is possible for an individual to show that he was not a member of a joint criminal enterprise by showing that he lacked the necessary mens rea to be criminally liable under the doctrine. In this instance it is still possible to be criminally liable as an aider and abettor. This scenario is demonstrated by the *Vasiljevic* Decision. It is also possible for an individual to demonstrate that he was not a member of a joint criminal enterprise by showing that his contribution was not substantial enough for criminal liability to attach.