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Joint Criminal Enterprise - What Is the Degree of Participation Required for Conviction? An Exhaustive Memo of The Jurisprudence on Joint Criminal Enterprise.

Christopher J. Knezevic

CASE WESTERN RESERVE UNIVERSITY
SCHOOL OF LAW
INTERNATIONAL WAR CRIMES RESEARCH LAB

MEMORANDUM FOR THE OFFICE OF THE PROSECUTOR OF THE INTERNATIONAL CRIMINAL TRIBUNAL FOR RWANDA

ISSUE: JOINT CRIMINAL ENTERPRISE - WHAT IS THE DEGREE OF PARTICIPATION REQUIRED FOR CONVICTION? AN EXHAUSTIVE MEMO OF THE JURISPRUDENCE ON JOINT CRIMINAL ENTERPRISE.

PREPARED BY CHRISTOPHER J. KNEZEVIC
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33) U.N.S.C Res. 827, adopted May 25, 1993

34) U.N. Charter Chapter VII

35) 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)

I. Introduction and Summary of Conclusions

This memorandum examines the jurisprudence in the International Criminal Tribunal for the former Yugoslavia ("ICTY") concerning the doctrine of joint criminal enterprise.[1] Part II of the memorandum begins with a brief overview of the background of and context in which joint criminal enterprise was developed. Part III contains analysis of the cases in which joint criminal enterprise is dealt with substantially by both the ICTY Trial Chamber and the Appeals Chamber. The focus of this part will be the legal holdings regarding the doctrine of joint criminal enterprise and how it is applied to the factual findings of the respective cases. The cases deal with a wide array of allegations pertaining to individuals spanning from lower-level civilians (such as taxi drivers) to prominent officials (such as the president of Yugoslavia). Part IV will conclude this memorandum with a summary of the ICTY holdings regarding the doctrine of joint criminal enterprise.

Summary of Conclusions

The Appeals Chamber in *Tadic*, after examining post-World War II cases, found that the doctrine of joint criminal enterprise is firmly established in customary international law and in addition is implicitly supported by the Statute of the International Tribunal itself. Joint criminal enterprise is a way of imputing guilt to a person who participates in a form of collective criminal activity. The Appeals Chamber laid out three distinct categories of joint criminal enterprise, along with the required *actus reus* and *mens rea*, which differs for each category. The first category includes cases where all co-

[1] The issue I was given is as follows: Joint criminal enterprise: What is the degree of participation required for conviction? We would appreciate an exhaustive memo of the jurisprudence on joint criminal enterprise.

defendants, acting pursuant to a common design, possess the same criminal intention. The second category includes the "concentration camp" cases in which offences 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. The third category involves cases in which perpetrators, acting in furtherance of a common design, commit an act which, while outside the common design, was nevertheless a natural and foreseeable consequence of the execution of that common purpose. The *actus reus* for joint criminal enterprise, which is the same for each category, is a plurality of persons, the existence of a common plan, design or purpose which amounts to or involves the commission of a crime provided for in the Statute, and Participation of the accused in the common design. The *mens rea* for the first category is intent to perpetrate a specific crime; the next category requires the accused to have personal knowledge of the system of ill-treatment as well as the intent to further this concerted system of ill-treatment; and the third category requires the intent to participate in and further the criminal activity or purpose and to contribute to the joint criminal enterprise or to the commission of the crime. In addition, responsibility for a crime other than the one agreed upon in the common plan arises only if it was foreseeable that such a crime might be perpetrated by one or other members of the group and the accused willingly took that risk.

II. Factual Background

The ICTY was established by U.N. Security Council mandate pursuant to its authority under Chapter VII of the U.N. Charter.[2] Article 7(1) of the Statute of the Tribunal lays out several forms of individual criminal responsibility that apply to all the crimes falling within the Tribunal's jurisdiction. The provision reads as follows:

Article 7
Individual criminal responsibility

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.[3]

The ICTY has created, through its case law, another type of complicity or participation, known as "joint criminal enterprise".[4] The Appeals Chamber in *Prosecutor v. Tadic* acknowledged that joint criminal enterprise liability is not included within the "enumeration of forms of participation" in article 7(1).[5] However, the Appeals Chamber in *Tadic* referred to a Secretary General's 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."[6] The Appeals Chamber buttresses the Secretary General's Report by stating

[2] See U.N.S.C Res. 827, adopted May 25, 1993 [Reproduced in accompanying notebook at Tab 33]; U.N. Charter Chapter VII [Reproduced in accompanying notebook at Tab 34]

[3] *See also* Articles 2-5 of the Statute [Reproduced in accompanying notebook at Tab 35]

[4] MICHAEL P. SCHARF, SLOBODAN MILOSEVIC ON TRIAL (Continuum New York 2002) (hereinafter "Scharf") [Reproduced in accompanying notebook at Tab 2]

[5] *The Prosecutor v. Tadic*, Case No.: IT-94-1-T, Judgment in Appeals Chamber, 15 July 1999 (hereinafter "*Tadic* Judgment") [Reproduced in accompanying notebook at Tab 23]

that all those who engaged in such humanitarian law violations, "whatever the manner in which they may have perpetrated, or participated in the perpetration of those violations, must be brought to justice."[7] Most of the common crimes in wartime situations are carried out by groups of individuals acting in pursuance of a common design.[8] As a result, applying criminal liability as a co-perpetrator or as an aider and abettor as provided in Article 7 of the Statute would not suffice. For example, if the person who physically performs the act is held criminally liable, then the role of all those who made the criminal act possible as co-perpetrators would be disregarded. However, "to hold the latter liable as aiders and abettors might understate the degree of their criminal responsibility."[9] As a result, the joint criminal enterprise theory was developed.

III. Legal Discussion - Status of Joint Criminal Enterprise

A. Development of Joint Criminal Enterprise

Simply put, a joint criminal enterprise has developed when two or more persons have an agreement, even if it is only inferred and of which there is no direct proof, to carry out a crime.[10] When the person actually commits a crime or assists or encourages another to commit the crime, then that individual can be considered to actually participate

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[6] *Tadic* Judgment, *supra* note 5 at ¶ 190 [Reproduced in accompanying notebook at Tab 23]; *citing* Report of the Secretary General Pursuant to Paragraph 2 of Security Council Resolution 808 (1993), U.N. Doc. S/25704, 3 May 1993

[7] *Tadic* Judgment, *supra* note 5 at ¶ 190 [Reproduced in accompanying notebook at Tab 23]

[8] *Tadic* Judgment, *supra* note 5 at ¶ 191 [Reproduced in accompanying notebook at Tab 23]

[9] *Tadic* Judgment, *supra* note 5 at ¶ 192 [Reproduced in accompanying notebook at Tab 23]

[10] SCHARF, *supra* note 4 at 120 [Reproduced in accompanying notebook at Tab 2]

in a joint criminal enterprise.[11] In addition, an individual may be guilty for the acts that others commit in pursuance of the criminal enterprise, regardless of the part he or she plays in the commission of the crime.[12]

The Appeals Chamber in *Tadic*, when articulating the theory of joint criminal enterprise, relied largely on jurisprudence derived from the post-World War II Nuremberg trials. The Appeals Chamber derived from customary international law three categories of joint activity that could subject a perpetrator to liability for the acts of others.[13] The first category is where all co-defendants, acting pursuant to a common design, possess the same criminal intention. For example, the co-perpetrators have a plan to kill, "where, in effecting this common design (and even if each co-perpetrator carries out a different role within it), they nevertheless all possess the intent to kill."[14] The Appeals Chamber pointed to a few cases establishing this category, beginning with the *Almelo Trial* in which a British court found three Germans guilty of killing a British prisoner of war under the doctrine of "common enterprise".[15] The court reasoned that the three Germans were co-perpetrators of murder since they all had the intent to kill the

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[11] SCHARF, *supra* note 4 at 120 [Reproduced in accompanying notebook at Tab 2]

[12] SCHARF, *supra* note 4 at 120 [Reproduced in accompanying notebook at Tab 2]

[13] Richard P. Barrett, *Lessons of Yugoslav Rape Trials: A Role for Conspiracy Law in International Tribunals*, 88 MINN. L. REV. 30, 39 (November 2003) (hereinafter "*Barrett*") [Reproduced in accompanying notebook at Tab 6]

[14] *Tadic* Judgment, *supra* note 5 at ¶ 196 [Reproduced in accompanying notebook at Tab 23]

[15] *See Trial of Otto Sandrock and three others*, British Military Court for the Trial of War Criminals, Almelo, Holland, on 24th-26th November, 1945, UNWCC, vol. I, p. 35 (hereinafter "*Almelo Trial"*) [Reproduced in accompanying notebook at Tab 27]; *cited in Tadic* Judgment, *supra* note 5 at ¶ 197 [Reproduced in accompanying notebook at Tab 23]

British soldier even though only one of the co-perpetrators inflicted the fatal blow.[16] The Judge Advocate also stated that if the individuals were all present at the same time taking part in an unlawful common enterprise, each one assisting the common purpose of all, then they were all equally guilty in law.[17] This theory of common purpose was extended in the *Schonfeld* case in which ten Germans were charged with killing a member of the Royal Air Force, a member of the Royal Canadian Air Force and a member of the Royal Australian Air Force.[18] The three airmen were unarmed and hiding in a home when they were killed in a raid.[19] The Judge Advocate stated:

> "If several persons combine for an unlawful purpose or for a lawful purpose to be effected by unlawful means, and one of them, in carrying out the purpose, kills a man, it is murder in all who are present, whether they actually aid or abet or not, provided that the death was caused by a member of the party in the course of his endeavors to effect the common object of the assembly."[20]

The Appeals Chamber noted that other post-World War II trials held in other countries, in particular Italy and Germany, used the same theory of liability but used the theory of co-perpetration instead of common purpose or common design.[21]

The second category is referred to as the "concentration camp cases" mainly because they deal with cases in which common purpose liability is applied to offenses alleged to have been committed by "members of military or administrative units such as

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[16] *Tadic* Judgment, *supra* note 5 at ¶ 197 [Reproduced in accompanying notebook at Tab 23]

[17] *Almelo Trial*, *supra* note 15 at 40 [Reproduced in accompanying notebook at Tab 27]; see also *Tadic* Judgment, *supra* note 5 at note 234 at 84 [Reproduced in accompanying notebook at Tab 23]

[18] *Trial of Franz Schonfeld and others*, British Military Court, Essen, June 11-26, 1946, UNWCC, vol. XI, p. 64 (hereinafter "*Schonfeld* case") [Reproduced in accompanying notebook at Tab 28]; *cited in Tadic* Judgment, *supra* note 5 at ¶ 198 [Reproduced in accompanying notebook at Tab 23]

[19] *Schonfeld* case, *supra* note 18 at 64 [Reproduced in accompanying notebook at Tab 28]

[20] *Schonfeld* case, *supra* note 18 at 68 [Reproduced in accompanying notebook at Tab 28]; *see also Tadic* Judgment, *supra* note 5 at ¶ 198 [Reproduced in accompanying notebook at Tab 23]

[21] *Tadic* Judgment, *supra* note 5 at ¶ 201 [Reproduced in accompanying notebook at Tab 23]

those running concentration camps; i.e. by groups of persons acting pursuant to a concerted plan."[22] The Appeals Chamber in *Tadic* relied on two cases in describing this category. The first is the *Dachau Concentration Camp* case, in which members of the Dachau Concentration Camp were charged with participation in a common design to mistreat the prisoners.[23] In order to establish a case against each accused the prosecution had to show (1) that there was a system in place to mistreat the prisoners and commit the crimes, (2) that each accused was aware of the system, and (3) that each accused, by his conduct, "encouraged, aided and abetted or participated " in enforcing this system.[24] The court found that there existed in the camp a general system of cruelties and murders of the inmates and that the members of the staff had knowledge of the system and actively participated in the system.[25] The second case on which the Appeals Chamber relied, the *Belsen* case, also dealt with allegations of mistreatment, physical suffering and death of prisoners in the camps at Auschwitz and Belsen.[26] The Appeals Chamber in *Tadic* pointed out that the Judge Advocate in *Belsen* adopted three requirements for establishing guilt, which were almost identical to the ones laid out in the *Dachau* case: 1) a system

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[22] *Tadic* Judgment, *supra* note 5 at ¶ 202 [Reproduced in accompanying notebook at Tab 23]

[23] *Trial of Martin Gottfried Weiss and thirty-nine others*, General Military Government Court of the United States Zone, Dachau, Germany, 15 November – 13 December, 1945, UNWCC, p. 12 (hereinafter "*Dachau Concentration Camp* case") [Reproduced in accompanying notebook at Tab 29]

[24] *Dachau Concentration Camp* case, *supra* note 23 at 13 [Reproduced in accompanying notebook at Tab 29]

[25] *See Dachau Concentration Camp* case, *supra* note 23 at 15: "Such a course of conduct, then, was held by the court in this case to constitute 'acting in pursuance of a common design to violate the laws and usages of war.' Everybody who took any part in such common design was held guilty of a war crime, though the nature and extent of the participation may vary."

[26] *Trial of Josef Kramer and 44 others*, British Military Court, Luneberg, 17th September-17th November, 1945, UNWCC, vol. II, p. 1 [hereinafter the "*Belsen* case"] [Reproduced in accompanying notebook at Tab 26]

organized to mistreat the prisoners; 2) the accused was aware of the system; and 3) the accused in some way participated in enforcing the system.[27] The Judge Advocate in *Belsen* found that the camp staff knew a system and course of conduct was in place and the staff was deliberately taking part in a common design to mistreat the detainees.[28]

Finally, the Appeals Chamber in *Tadic* described a third category of joint criminal enterprise, consisting of cases involving a common design where one of the perpetrators commits an act which was outside the common design but is nevertheless a natural and foreseeable consequence of carrying out the common design.[29] The Appeals Chamber explained that an example of this category would be a common, shared intention to commit ethnic cleansing by forcibly removing people of a certain ethnicity from their homes and towns. If someone is killed during the ethnic cleansing, then criminal responsibility can be imputed to all members within the common enterprise because the killing was a predictable consequence of the enterprise.[30] The two cases used by the Appeals Chamber to illustrate this category are the *Essen Lynching* case and the *Borkum Island* case. These cases deal with "mob violence", that is, where multiple offenders each commit offenses against a victim, "but where it is 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 caused to the victims is similarly indeterminate."[31]

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[27] *Tadic* Judgment, *supra* note 5 at ¶ 202 [Reproduced in accompanying notebook at Tab 23]

[28] *Belsen* case, *supra* note 26 at p. 121 [Reproduced in accompanying notebook at Tab 26]

[29] *Tadic* Judgment, *supra* note 5 at ¶ 204 [Reproduced in accompanying notebook at Tab 23]

[30] *Tadic* Judgment, *supra* note 5 at ¶ 204 [Reproduced in accompanying notebook at Tab 23]

[31] *Tadic* Judgment, *supra* note 5 at ¶ 205 [Reproduced in accompanying notebook at Tab 23]

In the *Essen Lynching* case decided by the British Military Court, a German captain, a German soldier, and five civilians were charged with brutally killing three prisoners of war.[32] As the prisoners were being transported under control of the soldier, the captain announced to a crowd that had gathered that the soldier guarding the prisoners was under orders not to prevent civilians from attacking the prisoners, adding that the prisoners ought to be shot. The soldiers led the prisoners through the streets as members of the crowd repeatedly struck them and threw sticks and stones at them. An unknown German soldier even wounded a prisoner by shooting him. Members of the crowd then threw the prisoners off a bridge. Those who did not die from the fall were killed by the members of the crowd.[33]

The prosecution in the *Essen Lynching* case argued that it is impossible to separate one aggressive action from another; therefore, every person who took action against the prisoners "is guilty in that he is concerned in the killing." The prosecution also argued that proving the intent of each of the accused is not necessary because an unlawful killing, such as manslaughter, may exist where there is no intent to kill but merely the doing of an unlawful act of violence.[34] Even though not all of the accused had the intent to kill, they were all found guilty of murder because they were all "concerned in the killing." The court agreed with the prosecution finding that the persons who struck

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[32] *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. I, p. 89 (hereinafter "*Essen Lynching* case") [Reproduced in accompanying notebook at Tab 25]; *See Tadic* Judgment, *supra* note 5 at ¶ 207 (citing *Essen Lynching* case) [Reproduced in accompanying notebook at Tab 23]

[33] *Essen Lynching* case, *supra* note 32 at p. 89 [Reproduced in accompanying notebook at Tab 25]

[34] *See Tadic* Judgment, *supra* note 5 at ¶ 207, 208 (citing *Essen Lynching* case p. 89) [Reproduced in accompanying notebook at Tab 23]

the prisoners or implicitly incited the murder could have foreseen that others would kill the prisoners; therefore, they too were guilty of murder.[35]

In the *Borkum Island* case, a U.S. military court ruled in a very similar manner to the British court in the *Essen Lynching* case.[36] A U.S. military plane was shot down on the German island of Borkum.[37] The seven crew members were taken prisoner and marched through the city during which members of the Reich's Labour Corps beat the prisoners with shovels at the order of a German officer. The town's mayor further incited the mob and the civilians beat the prisoners while the escorting guards either watched or took part. The German soldiers then executed the prisoners. The accused, which consisted of the German soldiers, the mayor, a civilian and some policemen, were charged with "willfully, deliberately and wrongfully encouraging, aiding abetting and participating" in the assaults upon and the killing of the prisoners.[38]

The prosecution argued that not all of the accused participated in the same manner; instead, "it is the composite of the actions of all the accused that results in the crime."[39] In other words, the prosecution argued that there was no distinction between those who caused the victims to be subject to the mob, those who incited the mob, and

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[35] *Tadic* Judgment, *supra* note 5 at ¶ 209 [Reproduced in accompanying notebook at Tab 23]

[36] *Tadic* Judgment, *supra* note 5 at ¶ 210 [Reproduced in accompanying notebook at Tab 23]

[37] *See Kurt Goebell et al.* Charge Sheet, in U.S. National Archives Microfilm Publications, I (on file with the International Tribunal's Library) (hereinafter "*Borkum Island* case"), *cited in Tadic* Judgment, *supra* note 5 at ¶ 210 [Reproduced in accompanying notebook at Tab 23]

[38] *See Tadic* Judgment, *supra* note 5 at ¶ 210 (citing *Borkum Island* case) [Reproduced in accompanying notebook at Tab 23]

[39] *See Tadic* Judgment, *supra* note 5 at ¶ 210 (citing *Borkum Island* case, p. 1186) [Reproduced in accompanying notebook at Tab 23]

those who dealt the fatal blows.[40] The prosecution described the accused as "cogs in the wheel of common design", all equally important to the "wheel of murder".[41] All the accused were found guilty of pursuing a criminal common design, whereas some were also found guilty of murder.[42] According to the Appeals Chamber in *Tadic*, "presumably, this was on the basis that the accused, whether by virtue of their status, role or conduct, were in a position to have predicted that the assault would lead to the killing of the victims by some of those participating in the assault."[43]

The Appeals Chamber in *Tadic* continued its development of joint criminal enterprise by analyzing some cases brought before Italian courts after World War II regarding war crimes committed by military personnel belonging to the "Repubblica Sociale Italiana" ("RSI").[44] In *D'Ottavio et al*., some armed civilians had been chasing two prisoners of war who had escaped from a concentration camp. During the chase, one civilian shot a prisoner without intending to kill him, but the prisoner died as a result of the shooting. The Italian Court of Cassation held that the members of the civilian group were guilty of both "illegal restraint" and manslaughter.[45] The court went on to state that there must exist a material and psychological causal nexus between the result intended by

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[40] *See Tadic* Judgment, *supra* note 5 at ¶ 210 (citing *Borkum Island* case, p. 1186) [Reproduced in accompanying notebook at Tab 23]

[41] *See Tadic* Judgment, *supra* note 5 at ¶ 210 (citing *Borkum Island* case, p. 1186) [Reproduced in accompanying notebook at Tab 23]

[42] *Tadic* Judgment, *supra* note 5 at ¶ 213 [Reproduced in accompanying notebook at Tab 23]

[43] *Tadic* Judgment, *supra* note 5 at ¶ 213 [Reproduced in accompanying notebook at Tab 23]

[44] *Tadic* Judgment, *supra* note 5 at ¶ 214 [Reproduced in accompanying notebook at Tab 23]

[45] *See D'Ottavio et al, cited in Tadic* Judgment, *supra* note 5 at ¶ 215 [Reproduced in accompanying notebook at Tab 23]

the group and the different actions carried out by an individual of the group.[46] The court further stated that the psychological causality existed "as all the participants had the intent to perpetrate and knowledge of the actual perpetration of an attempted illegal restraint, and *foresaw the possible commission of a different crime*."[47]

In the *Aratano et al*. case, a group of RSI militiamen were arresting a group of partisans when one of the militiamen, intending to scare the group, fired a few shots into the air. This prompted the partisans to shoot back which quickly escalated into a shoot-out in which one of the partisans was killed.[48] The Court of Cassation, reversing the trial court, held that the militiamen did not intend to kill the partisans and were not guilty of murder. The court held that "the murder of one of the partisans was an unintended event and consequently could not be attributed to all the participants."[49]

With regard to the required causal nexus, the Court of Cassation in *Mannelli* explained that "for there to be a relationship of material causality between the crime willed by one of the participants and the different crime committed by another, it is necessary that the latter crime should constitute the logical and predictable development of the former."[50] Instead, if there exists full independence between the two crimes, one

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[46] *Tadic* Judgment, *supra* note 5 at ¶ 215 [Reproduced in accompanying notebook at Tab 23]

[47] *Tadic* Judgment, *supra* note 5 at ¶ 215 [Reproduced in accompanying notebook at Tab 23]

[48] *Aratano et al., cited in Tadic* Judgment, *supra* note 5 at ¶ 216 [Reproduced in accompanying notebook at Tab 23]

[49] *Tadic* Judgment, *supra* note 5 at ¶ 216 [Reproduced in accompanying notebook at Tab 23]

[50] *See Guistizia penale* , 1950, Part II, cols. 696-697, *cited in Tadic* Judgment, *supra* note 5 at ¶ 218 [Reproduced in accompanying notebook at Tab 23]

may find, depending on the particular circumstances, that a merely incidental relationship exists.[51]

After analyzing this case law, the Appeals Chamber in *Tadic* concluded that "the notion of common design as a form of accomplice liability is firmly established in customary international law and in addition is upheld, albeit implicitly, in the Statute of the International Tribunal."[52]

While the notion of common design is established in customary international law, it is also rooted in the national law of many states.[53] Countries such as Germany and the Netherlands follow the principle that where multiple persons participate in a common purpose or common design with the same intent to perpetrate the crime envisaged in the common purpose, then all are responsible for the ensuing criminal conduct. If one of the participants commits a crime not envisaged in the common purpose, then he alone will incur responsibility for the crime.[54] Other countries, such as civil law countries France and Italy and common law countries England and Wales, Canada, the United States, Australia and Zambia, also take the position that persons taking part in a common plan to commit a crime are all criminally responsible for the crime, whatever the role they each played. However, these countries generally find that if one of the persons taking part in

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[51] *Tadic* Judgment, *supra* note 5 at ¶ 218 [Reproduced in accompanying notebook at Tab 23]

[52] *Tadic* Judgment, *supra* note 5 at ¶ 220 [Reproduced in accompanying notebook at Tab 23]

[53] *Tadic* Judgment, *supra* note 5 at ¶ 224 [Reproduced in accompanying notebook at Tab 23]

[54] *Tadic* Judgment, *supra* note 5 at ¶ 224 [Reproduced in accompanying notebook at Tab 23]

the common plan commits a crime that is outside the common plan, then all the persons are fully liable for the offense so long as the offense was foreseeable.[55]

The Appeals Chambers found that the "consistency and cogency of the case law coupled with the general principles on criminal responsibility laid down in both the Statute and general international criminal law and in national legislation, warrant conclusion that case law reflects customary rules of international criminal law."[56] The Appeals Chamber in the *Tadic* case then took an important step when it laid out the first and most important ruling in the International Tribunals on the theory of joint criminal enterprise.

B. The Doctrine of Joint Criminal Enterprise

The Appeals Chamber in *Tadic* stated:

> In sum, the objective elements (*actus reus*) of this mode of participation in one of the crimes provided for in the Statute (with regard to each of the three categories of cases) are as follows[57]:
>
> i. *A plurality of persons.* They need not be organized in a military, political or administrative structure, as is shown by the *Essen Lynching* case.
>
> 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.* There is no necessity for this plan, design or purpose to have 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.

[55] *Tadic* Judgment, *supra* note 5 at ¶ 224 [Reproduced in accompanying notebook at Tab 23]

[56] *Tadic* Judgment, *supra* note 5 at ¶ 226 [Reproduced in accompanying notebook at Tab 23]

[57] *Tadic* Judgment, *supra* note 5 at ¶ 227 [Reproduced in accompanying notebook at Tab 23]

> iii. *Participation of the accused in the common design* involving the perpetration of one of the crimes provided for in the Statute. This participation need not involve commission of a specific crime under one of those provisions (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.[58]

The first category is commonly referred to as the "basic" form of joint criminal enterprise, the second is known as the "systemic" form,[59] while the third category is referred to as an "extended" form of joint criminal enterprise.[60] The Appeals Chamber in *Krnojelac* concisely summarized the *mens rea* requirements laid out in the *Tadic* case:

> "The Appeals Chamber considered that the *mens rea* differs according to the category of common design under consideration":
>
> - The first category of cases requires the intent to perpetrate a specific crime (this intent being shared by all the co-perpetrators).
>
> - For the second category which, as noted above, is a variant of the first, the accused must have personal knowledge of the system of ill-treatment (whether proven by express testimony or inferred from the accused's position of authority), as well as the intent to further this concerted system of ill-treatment.
>
> - The third category requires the *intent* 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. In addition, responsibility for a crime other than the one agreed upon in the common plan arises only if, in the circumstances of the case, (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*.[61]

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[58] *Tadic* Judgment, *supra* note 5 at ¶ 227 [Reproduced in accompanying notebook at Tab 23]

[59] *The Prosecutor v. Krnojelac*, Case No: IT-97-25, Judgment 17 September 2003 (hereinafter "*Krnojelac* Judgment") [Reproduced in accompanying notebook at Tab 15]

[60] *The Prosecutor v. Simic et al.*, Case No: IT-95-9-T, Judgment 17 October 2003 (hereinafter "*Simic* Judgment") at ¶142 [Reproduced in accompanying notebook at Tab 21]

[61] *Krnojelac* Judgment, supra note 59 at ¶ [Reproduced in accompanying notebook at Tab 15]; *citing Tadic* Judgment, *supra* note 5 at ¶ 228 [Reproduced in accompanying notebook at Tab 23]

The Appeals Chamber in *Tadic* then distinguished between acting in pursuance of a common purpose or design to commit a crime on the one hand and aiding and abetting on the other[62]:

> (i) The aider and abettor is always an accessory to a crime perpetrated by another person, the principal.
>
> (ii) In the case of aiding and abetting no proof is required of the existence of a common concerted plan, let alone of the pre-existence of such a plan. No plan or agreement is required: indeed, the principal may not even know about the accomplice's contribution.
>
> (iii) The aider and abettor carries 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.), and this support has a substantial effect upon the perpetration of the crime. By contrast, in the case of acting in pursuance of a common purpose or design, it is sufficient for the participant to perform acts that in some way are directed to the furthering of the common plan or purpose.
>
> (iv) In the case of aiding and abetting, the requisite mental element is knowledge that the acts performed by the aider and abettor assist the commission of a specific crime by the principal. By contrast, in the case of common purpose or design more is required (i.e., either intent to perpetrate the crime or intent to pursue the common criminal design plus foresight that those crimes outside the criminal common purpose were likely to be committed), as stated above.[63]

This holding by the Appeals Chamber has had far-reaching effects. As one author has stated, joint criminal enterprise has become "the magic bullet of the Office of the Prosecutor".[64] The following will contain summaries of the cases that dealt substantially with joint criminal enterprise, beginning with *Tadic*.

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[62] *Tadic* Judgment, *supra* note 5 at ¶ 229 [Reproduced in accompanying notebook at Tab 23]

[63] *Tadic* Judgment, *supra* note 5 at ¶ 229 [Reproduced in accompanying notebook at Tab 23]

[64] William Schabas, *Mens Rea and the International Criminal Tribunal for the Former Yugoslavia*, 37 NEW ENG. L. REV. 1015, 1032 (Summer 2003) (hereinafter "*Schabas*") [Reproduced in accompanying notebook at Tab 4]

C. Tadic

The judgment in the first international war crimes trial since World War II involved a Bosnian-Serb café owner, karate instructor and part-time traffic cop named Dusko Tadic.[65] One of the thirty-one charges against Tadic was for the murder of five men in the village of Jaskici.[66] The Prosecution appealed the Trial Chamber's determination that it could not be satisfied beyond a reasonable doubt that the accused had any part in the killings that took place in the village of Jaskici.[67] The prosecution argued that because Tadic participated in the attack on Sivci and Jaskici and because the

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[65] MICHAEL P. SCHARF, BALKAN JUSTICE THE STORY BEHIND THE FIRST WAR CRIMES TRIAL SINCE NUREMBERG (Carolina Academic Press 1997) [Reproduced in accompanying notebook at Tab]; *See also* Michael P. Scharf, *Trial and Error: An Assessment of the First Judgment of the Yugoslavia War Crimes Tribunal*, 30 N.Y.U. J. INT'L & POL. 167, 167 (Fall 1997/Winter 1998) [Reproduced in accompanying notebook at Tab 8]

[66] VIRGINIA MORRIS AND MICHAEL P. SCHARF, AN INSIDER'S GUIDE TO THE INTERNATIONAL CRIMINAL TRIBUNAL FOR THE FORMER YUGOSLAVIA Vol. I (New York, Transnational Publishers, 1995) [Reproduced in accompanying notebook at Tab 3]

[67] *Tadic* Judgment, *supra* note 5 at ¶ 172 [Reproduced in accompanying notebook at Tab 23]; *See Prosecutor v. Tadic*, Case No. IT-94-1-T, Opinion and Judgment, 7 May 1997 (hereinafter "*Tadic* Trial Chamber Judgment") at ¶ 373 [Reproduced in accompanying notebook at Tab 22]. The *Tadic* Trial Chamber held the following:

> "This Trial Chamber is satisfied beyond reasonable doubt that the accused was a member of the group of armed men that entered the village of Jaskici, searched it for men, seized them, beat them, and then departed with them and that after their departure the five dead men named in the Indictment were found lying in the village and that these acts were committed in the context of an armed conflict. However, this Trial Chamber cannot, on the evidence before it, be satisfied beyond reasonable doubt that the accused had any part in the killing of the five men or any of them. Save that four of them were shot in the head, nothing is known as to who shot them or in what circumstances. It is not irrelevant that their deaths occurred on the same day and at about the same time as a large force of Serb soldiers and tanks invaded the close-by and much larger village of Sivci, accompanied by much firing of weapons. Again it is not irrelevant that the much larger ethnic cleansing operation conducted that day in Sivci involved a very similar procedure but with no shooting of villagers. The bare possibility that the deaths of the Jaskici villagers were the result of encountering a part of that large force would be enough, in the state of the evidence, or rather, the lack of it, relating to their deaths, to prevent satisfaction beyond reasonable doubt that the accused was involved in those deaths. The fact that there was no killing at Sivci could suggest that the killing of villagers was not a planned part of this particular episode of ethnic cleansing of the two villages, in which the accused took part; it is accordingly a distinct possibility that it may have been the act of a quite distinct group of armed men, or the unauthorized and unforeseen act of one of the force that entered Sivci, for which the accused cannot be held responsible, that caused their death."

impetus behind the attack was to rid the region of Prijedor of the non-Serb population by committing inhumane and violent acts, "the only conclusion reasonably open from all the evidence is that the killing of the five victims was entirely predictable as part of the natural and probable consequences of the attack."[68] As a result, Tadic should have been found guilty under Article 7(1) of the Statute regardless of who actually killed the five victims.[69] The defense contended that it must be shown that the common purpose in the attack in which Tadic allegedly participated included killing as opposed to ethnic cleansing and that it was not possible to find beyond a reasonable doubt that Tadic was involved in a criminal enterprise with the design of killing.[70]

After finding that the armed group to which Tadic belonged killed the five men in Jaskici,[71] the Appeals Chamber set out to determine "whether under international criminal law the Appellant can be held criminally responsible for the killing of the five men in Jaskici even though there is no evidence that he personally killed any of them."[72] The Appeals Chamber decided that the Trial Chamber erred in holding that it could not be satisfied beyond a reasonable doubt that Tadic had any part in the killing of the five men from Jaskici.[73] The common criminal purpose, the Appeals Chamber reasoned, was not to kill all non-Serb men, although killings frequently occurred in the effort to rid the Prijedor region of the non-Serb population. The context in which the Trial Chamber

[68] *Tadic* Judgment, *supra* note 5 at ¶ 175 [Reproduced in accompanying notebook at Tab 23]

[69] *Tadic* Judgment, *supra* note 5 at ¶ 175 [Reproduced in accompanying notebook at Tab 23]

[70] *Tadic* Judgment, *supra* note 5 at ¶ 176 [Reproduced in accompanying notebook at Tab 23]

[71] *Tadic* Judgment, *supra* note 5 at ¶ 178-183 [Reproduced in accompanying notebook at Tab 23]

[72] *Tadic* Judgment, *supra* note 5 at ¶ 185 [Reproduced in accompanying notebook at Tab 23]

[73] *Tadic* Judgment, *supra* note 5 at ¶ 233 [Reproduced in accompanying notebook at Tab 23]

should have seen the attack on Jaskici and Tadic's participation therein was that Tadic "had been aware of the killings accompanying the commission of inhumane acts against the non-Serb population."[74] The Appeals Chamber found that Tadic participated in the five killings in Jaskici, which were committed as part of a widespread or systematic attack on a civil population; therefore, the Trial Chamber should have found Tadic guilty under the provisions of Article 7(1) of the Statute.[75] The Appeals Chamber would later comment in *Mulitinovic* that joint criminal enterprise formed the *sole* legal basis upon which Tadic was convicted.[76]

D. Ojdanic

Some very helpful guidance regarding joint criminal enterprise recently emerged from the Appeals Chambers' decision in the *Ojdanic* case. Ojdanic was charged as a co-perpetrator in a joint criminal enterprise the purpose of which was the expulsion of the Kosovo Albanian population from the province of Kosovo in an effort to ensure continued Serbian control over the territory.[77] In one of his grounds for appeal, Ojdanic argued that joint criminal enterprise does not come within the Tribunal's jurisdiction.[78] Although the *Tadic* case already stated that joint criminal enterprise was provided for in the Statute and did exist under customary international law, Ojdanic argued that the

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[74] *Tadic* Judgment, *supra* note 5 at ¶ 231 [Reproduced in accompanying notebook at Tab 23]

[75] *Tadic* Judgment, *supra* note 5 at ¶ 233 [Reproduced in accompanying notebook at Tab 23]

[76] *The Prosecutor v. Mulitinovic et al.*, Case No: IT-99-37-AR72, Decision on Dragoljub Ojdanic's Motion Challenging Jurisdiction – Joint Criminal Enterprise 21 May 2003 (hereinafter "*Ojdanic* Decision") at ¶ 16 [Reproduced in accompanying notebook at Tab 19]

[77] *Ojdanic* Decision, *supra* note 76 at ¶20 [Reproduced in accompanying notebook at Tab 19]

[78] *Ojdanic* Decision, *supra* note 76 at ¶8 [Reproduced in accompanying notebook at Tab 19]

drafters of the Statute did not explicitly include joint criminal enterprise, therefore, it was their intention to exclude such a form of liability. The Appeals Chamber disagreed. It first noted that the scope of the Tribunal's jurisdiction *ratione materiae* is determined by both the Statute and by customary international law, insofar as the crime listed in the Statute exists at the time the crime was allegedly committed.[79] The Appeals Chamber then explained that while the Statute sets out the framework within which the Tribunal may exercise jurisdiction, a crime or a form of liability does not need to be explicit to come within the Tribunal's jurisdiction. "The Statute of the ICTY is not and does not purport to be, unlike for instance the Rome Statute of the International Criminal Court, a meticulously detailed code providing explicitly for every possible scenario and every solution thereto."[80] Rather, it sets out in "somewhat general terms" the jurisdictional framework within which the Tribunal may operate.[81] The Appeals Chamber pointed out that Article 7(1) is non-exhaustive in nature, as is evident by the phrase "*or otherwise* aided and abetted". As a result, the Appeals Chamber was satisfied that joint criminal enterprise is included within the terms of Article 7(1).

The Appeals Chamber in *Ojdanic* next considered the prosecution's indictment, which stated that the use of the word "committed" did not intend to suggest that Ojdanic physically perpetrated the crimes charged.[82] Instead, the prosecution used the word "committed" to refer to participation in a joint criminal enterprise as a co-perpetrator.[83]

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[79] *Ojdanic* Decision, *supra* note 76 at ¶9 [Reproduced in accompanying notebook at Tab 19]

[80] *Ojdanic* Decision, *supra* note 76 at ¶18 [Reproduced in accompanying notebook at Tab 19]

[81] *Ojdanic* Decision, *supra* note 76 at ¶18 [Reproduced in accompanying notebook at Tab 19]

[82] *Ojdanic* Decision, *supra* note 76 at ¶20 [Reproduced in accompanying notebook at Tab 19]

The Appeals Chamber held that the prosecution's approach was "correct to the extent that, insofar as a participant shares the purpose of the joint criminal enterprise (as he or she must do) as opposed to merely knowing about it, he or she cannot be regarded as a mere aider and abettor to the crime which is contemplated."[84] The Appeals Chamber thus regarded joint criminal enterprise as a form of "commission" pursuant to Article 7(1).[85]

Ojdanic also argued that the absence of "conspiracy" from the Statute was evidence that the drafters intended to exclude joint criminal enterprise from the jurisdiction of the Tribunal. The Appeals Chamber disagreed, pointing out that joint criminal enterprise and conspiracy are two different forms of liability.[86] The Appeals Chamber stated:

> Whilst conspiracy requires a showing that several individuals have agreed to commit a certain crime or set of crimes, a joint criminal enterprise requires, in addition to such a showing, that the parties to that agreement took action in furtherance of that agreement. In other words, while mere agreement is sufficient 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. Thus even if it were conceded that conspiracy was excluded from the realm of the Tribunal's Statute, that would have no impact on the presence of joint criminal enterprise as a form of "commission" pursuant to Article 7(1) of the Statute.[87]

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[83] *Ojdanic* Decision, *supra* note 76 at ¶1 [Reproduced in accompanying notebook at Tab 19]; *citing Ojdanic* Indictment, ¶ 16

[84] *Ojdanic* Decision, *supra* note 76 at ¶20 [Reproduced in accompanying notebook at Tab 19]

[85] *Ojdanic* Decision, *supra* note 76 at ¶20 [Reproduced in accompanying notebook at Tab 19]

[86] *Ojdanic* Decision, *supra* note 76 at ¶23 [Reproduced in accompanying notebook at Tab 19]

[87] *Ojdanic* Decision, *supra* note 76 at ¶23 [Reproduced in accompanying notebook at Tab 19]

The Appeals Chamber, consistent with its holding in *Tadic*, insisted that joint criminal enterprise was both provided for in the Statute and existed under customary international law at the relevant time in regard to Ojdanic's case.[88]

E. Krstic

General Radislav Krstic, the former Commander of the elite Drina Corps of the Bosnian Serb Army, was charged with genocide, crimes against humanity and war crimes arising out of the events following the downfall of Srebrenica.[89] On July 12, 1995, men, women and children in Potocari were forcibly separated from each other. Some 25,000 Muslim women and children were transported out of the territory while the men were forced into makeshift holding quarters such as schools, warehouses and trucks. On July 13, Serb soldiers herded at least 1,000 into a warehouse and murdered them. Over the next few days, Serb soldiers captured and slaughtered thousands of other men in carefully orchestrated mass executions that followed a well-established pattern[90]

Krstic was found guilty of being a member of a joint criminal enterprise whose objective was to forcibly transfer Bosnian Muslim women, children and elderly from Potocari. As a result, Krstic also incurred liability for the incidental murders, rapes, beatings and abuses committed in the execution of this criminal enterprise.[91] The Trial

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[88] *Ojdanic* Decision, *supra* note 76 at ¶30 [Reproduced in accompanying notebook at Tab 19]

[89] Patricia M. Wald, *General Radislav Krstic: A War Crimes Case Study*, 16 Geo. J. Legal Ethics 445, 446 (Spring 2003) (hereinafter "Wald") [Reproduced in accompanying notebook at Tab 5]

[90] *The Prosecutor v. Krstic*, Case No: IT-98-33, Judgment 2 August 2001 (hereinafter "*Krstic* Judgment") [Reproduced in accompanying notebook at Tab 16]

[91] *Krstic* Judgment, *supra* note 90 at ¶ 617 [Reproduced in accompanying notebook at Tab 16]

Chamber determined that Krstic participated in a joint criminal enterprise to kill the Bosnian Muslim men from Srebrenica from the evening of July 13 onward. The court acknowledged that Krstic may not have devised the killing plan or made the decision to destroy the Bosnian Muslims through a criminal enterprise, "but there can be no doubt that, from the point he learned of the widespread and systematic killings and became clearly involved in their perpetration, he shared the genocidal intent to kill the men."[92]

The Trial Chamber then found that Krstic's intent to kill the Bosnian Muslim men rose to the level of an intent to destroy a substantial part of the Bosnian Muslim group. Krstic was "undeniably aware" of the dramatic impact that killing the men would have on the ability of the Bosnian Muslim community of Srebrenica to survive. As a result, Krstic participated "in genocidal acts of killing members of the group under Article 4(2)(a) with the intent to destroy part of the group."[93] Krstic was held responsible for the killings and for causing serious bodily and mental harm as a co-participant in a joint criminal enterprise to commit genocide. While the objective of the joint criminal enterprise was the actual killing of the Bosnian Muslim men, the terrible bodily harm and mental suffering of victims was clearly a natural and foreseeable result of the enterprise.[94]

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[92] *Krstic* Judgment, *supra* note 90 at ¶ 633 [Reproduced in accompanying notebook at Tab 16]

[93] *Krstic* Judgment, *supra* note 90 at ¶ 633 [Reproduced in accompanying notebook at Tab 16]; *See* Statute of the Tribunal: Article 4 - 2. Genocide means any of the following acts committed with intent to destroy, in whole or in part, a national, ethnical, racial or religious group, as such: (a) killing members of the group. [Reproduced in accompanying notebook at Tab 35]

[94] *Krstic* Judgment, *supra* note 90 at ¶ 635-636 [Reproduced in accompanying notebook at Tab 16]

Ultimately, the Trial Chamber held that Krstic's behavior rendered him culpable under joint criminal enterprise theory.[95] Krstic planned and forcibly caused refugees to flee Potocari and, as Commander of the Drina Corps, effectively participated in executions by rendering "tangible and substantial assistance and technical support."[96] The court found that there was "no basis for refusing to accord the status of a co-perpetrator to a member of a joint criminal enterprise whose participation is of an extremely significant nature and at the leadership level."[97] The Trial Chamber concluded:

> In the present case, General Krstic participated in a joint criminal enterprise to kill the military-aged Bosnian Muslim men of Srebrenica with the awareness that such killings would lead to the annihilation of the entire Bosnian Muslim community at Srebrenica. His intent to kill the men thus amounts to a genocidal intent to destroy the group in part. General Krstic did not conceive the plan to kill the men, nor did he kill them personally. However, he fulfilled a key coordinating role in the implementation of the killing campaign. In particular, at a stage when his participation was clearly indispensable, General Krstic exerted his authority as Drina Corps Commander and arranged for men under his command to commit killings. He thus was an essential participant in the genocidal killings in the aftermath of the fall of Srebrenica. In sum, in view of both his *mens rea* and *actus reus*, General Krstic must be considered a principal perpetrator of these crimes.[98]

It is important to note that the defense argued that the Trial Chamber could not apply the joint criminal enterprise doctrine because it was not pleaded in the indictment.[99] The Trial Chamber rejected this argument; therefore, the prosecution need not necessarily explicitly plead this theory of responsibility in the indictment. The Trial Chamber

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[95] Wald, *supra* note 89 at 466 [Reproduced in accompanying notebook at Tab 5]

[96] *Krstic* Judgment, *supra* note 90 at ¶ 624 [Reproduced in accompanying notebook at Tab 16]

[97] *Krstic* Judgment, *supra* note 90 at ¶ 642 [Reproduced in accompanying notebook at Tab 16]

[98] *Krstic* Judgment, *supra* note 90 at ¶ 644 [Reproduced in accompanying notebook at Tab 16]

[99] *Krstic* Judgment, *supra* note 90 at ¶ 602 [Reproduced in accompanying notebook at Tab 16]

convicted Krstic of murders as violations of the laws or customs of war, murders as crimes against humanity, extermination, and murders as acts of persecution.

F. Kvocka

The *Kvocka* case dealt with five accused men who worked in or regularly visited the Omarska prison camp. During the camp's three months of operation, over 3,000 men and thirty-six women were detained in the Omarska camp. Physical and mental abuses, murder, torture and rape were rampant throughout the camp as the detainees were subject to inhumane treatment.[100] The accused in the case were Miroslav Kvocka, a Serb police officer who worked at the camp and had some degree of control over the guards; Draglojub Prcac, a retired policeman who worked at the camp for about twenty-two days as an administrative aid of the Omarska camp commander; Milojica Kos, a guard shift leader in the camp; Mlaco Radic, who also served as a guard shift leader during the entire three months the camp was operational; and Zoran Zigic, a taxi driver who would frequented the Omarska camp to abuse the detainees.[101] These five men were charged with persecuting non-Serb detainees in the Omarska camp through a wide range of abuses such as murder, torture and beating, sexual assault and rape, humiliation and psychological abuse and confinement in inhumane conditions.[102]

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[100] Kelly D. Askin, *Stefan A. Reisenfeld Symposium 2002: Prosecuting Wartime Rape and Other Gender-related Crimes Under International Law*, 21 BERKELEY J. INT'L L. 288 (2003) (hereinafter "*Askin*") [Reproduced in accompanying notebook at Tab 10]

[101] *The Prosecutor v. Kvocka et al.*, Case No: IT-98-30/1, Judgment 2 November 2001 at ¶ 4 (hereinafter "Kvocka Judgment") [Reproduced in accompanying notebook at Tab 17]

[102] *Askin supra* note 100 at 341 [Reproduced in accompanying notebook at Tab 10]

In *Kvocka*, the Trial Chamber elaborated extensively on the theories of joint criminal responsibility under Article 7(1) of the ICTY Statute. The Trial Chamber began by affirming its ruling that joint criminal enterprise can still be applied even if it has not been explicitly plead in the Amended Indictment. The Appeals Chamber agreed stating: "Although greater specificity in drafting indictments is desirable, failure to identify expressly the exact mode of participation is not necessarily fatal to an indictment if it nevertheless makes clear to the accused the nature and cause of the charge against him."[103]

While all three joint criminal enterprise categories laid out in *Tadic*[104] are applicable to this case to some degree, the Trial Chamber decided that the second category, the "concentration camp" cases, fit best with the facts of the case.[105] Because none of the accused in this case was organizers of the camps or in a high-level position within the military, the Trial Chamber focused its attention on the participation of lower-level actors in a criminal enterprise.[106] After analyzing the *Dachau Concentration Camp* case and the *Einsatzgruppen* case[107], the Trial Chamber extracts the theory that "criminal liability will attach to staff members of the concentration camps who have knowledge of the crimes being committed there, unless their role is not 'administrative' or 'advisory' or

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[103] *Kvocka* Judgment, *supra* note 101 at ¶ 274; *citing Celebici* Appeals Chamber Judgment ¶ 351, with reference to Article 21(4)(a) of the Statute. [Reproduced in accompanying notebook at Tab 17]

[104] *See Tadic* Judgment, *supra* note 5 at ¶ 227 [Reproduced in accompanying notebook at Tab 23]

[105] *Kvocka* Judgment, *supra* note 101 at ¶ 274 [Reproduced in accompanying notebook at Tab 17]

[106] *Kvocka* Judgment, *supra* note 101 at ¶ 289 [Reproduced in accompanying notebook at Tab 17]

[107] *See The United States of America v. Otto Ohlendorf et al*., Trials of War Criminals Before Nuremberg Military Tribunals under Control Council Law No. 10, Vol. IV, p 373 (hereinafter "*Einsatzgruppen* case") [Reproduced in accompanying notebook at Tab 31]; *cited in Kvocka* Judgment, *supra* note 101 at ¶ 279-282 [Reproduced in accompanying notebook at Tab 17]

'interwoven with illegality' or, unless despite having a significant status, their actual contributions to the enterprise was insignificant."[108]

While the *Tadic* decision drew the distinction between aiding and abetting a crime and acting in pursuance of a joint criminal enterprise, it did not explain exactly how a person could aid and abet a criminal enterprise.[109] The Trial Chamber in *Kvocka* addressed this issue by finding that a co-perpetrator of a joint criminal enterprise shares the intent to carry out the enterprise and performs an act or omission in furtherance of the enterprise, while an aider and abettor of a joint criminal enterprise need only be aware that his contribution is assisting or facilitating a crime committed by the enterprise. If an aider or abettor's participation lasts for an extensive period of time or becomes more involved in maintaining the functioning of the enterprise, then that person may become a co-perpetrator.[110] According to the Trial Chamber, "once the evidence indicates that a person who substantially assists the enterprise shares the goals of the enterprise, he becomes a co-perpetrator."[111]

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[108] *Kvocka* Judgment, *supra* note 101 at ¶ 282 [Reproduced in accompanying notebook at Tab 17]

[109] *Kvocka* Judgment, *supra* note 101 at ¶ 283 [Reproduced in accompanying notebook at Tab 17]

[110] *Kvocka* Judgment, *supra* note 101 at ¶ 284 [Reproduced in accompanying notebook at Tab 17]

[111] *Kvocka* Judgment, *supra* note 101 at ¶ 284 [Reproduced in accompanying notebook at Tab 17]. The Trial Chamber used the following example to show the difference between the levels of participation required for an aider and abettor and a co-perpetrator:

> "For instance, an accountant hired to work for a film company that produces child pornography may initially manage accounts without awareness of the criminal nature of the company. Eventually, however, he comes to know that the company produces child pornography, which he knows to be illegal. If the accountant continues to work for the company despite this knowledge, he could be said to aid or abet the criminal enterprise. Even if it was also shown that the accountant detested child pornography, criminal liability would still attach. At some point, moreover, if the accountant continues to work at the company long enough and performs his job in a competent and efficient manner with only an occasional protest regarding the despicable goals of the company, it would be reasonable to infer that he shares the criminal intent of the enterprise and thus becomes a co-perpetrator. The man who merely cleans the office after hours, however, and who sees the child photos and knows that the company is participating in criminal activity and

The Trial Chamber in *Kvocka* then proceeded to assess the level of participation needed to incur criminal responsibility as either an aider and abettor or a co-perpetrator in a criminal enterprise.[112] The court began by analyzing post-World War II trials, much the same way the Appeals Chamber did in *Tadic*. The Trial Chamber first examined the *Stalag Luft III* case, in which recaptured Allied prisoners of war were executed by axis powers to serve as a deterrent to other POW's who might attempt to escape.[113] The prosecution argued that regardless of the position the accused held, they were all involved in the killing of prisoners of war and were all acting for a common purpose.[114] The defense took the position that the accused were merely low-level actors following orders and that they would be punished if they disobeyed. The court in *Stalag Luft III* held that the accused's position was not relevant and held them to be "concerned in the killing" and thus criminally responsible if the function they served satisfied the following criteria: "[T]he persons concerned must have been part of the machine doing some duty, carrying out some performance which went on directly to achieve the killing, that it had some real bearing on the killing, would not have been so effective or been done so expeditiously if

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who continues to clean the office, would not be considered a participant in the enterprise because his role is not deemed to be sufficiently significant in the enterprise.

[112] *Kvocka* Judgment, *supra* note 101 at ¶ 290 [Reproduced in accompanying notebook at Tab 17]

[113] *Trial of Max Wielen and 17 others*, British Military Court, Hamburg, Germany, 1st July-3rd September, 1947, UNWCC, vol.XI, pp 31-53 (1947), (hereinafter "*Stalag Luft III* case ") [Reproduced in accompanying notebook at Tab 31]

[114] *Kvocka* Judgment, *supra* note 101 at ¶ 295 [Reproduced in accompanying notebook at Tab 17]; *citing Stalag Luft III* case *supra* note 113 at p. 34-35 [Reproduced in accompanying notebook at Tab 31]

that person had not contributed his willing aid."[115] The standard, therefore, was whether the accused's participation made it easier and more efficient to commit the crimes.[116]

The Trial Chamber in *Kvocka* next analyzed the *Almelo* case[117], which dealt with the killing of a British prisoner of war. The accused, a wide range of individuals who followed orders to kill the POW, were subject to collective responsibility. The court in *Almelo* held: "If people were all present together at the same time, taking part in a common enterprise which was unlawful, each one in their own way assisting the common purpose of all, they were all equally guilty in law."[118] Each of the accused performed their role even with the knowledge that the POW would be executed.[119]

After considering four more post-World War II cases,[120] the Trial Chamber in *Kvocka* noted that criminal liability was attributed to mere drivers or ordinary soldiers

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[115] *Kvocka* Judgment, *supra* note 101 at ¶ 296 [Reproduced in accompanying notebook at Tab 17]; *citing Stalag Luft III* case *supra* note 113 at p. 46 [Reproduced in accompanying notebook at Tab 31]

[116] *Kvocka* Judgment, *supra* note 101 at ¶ 296 [Reproduced in accompanying notebook at Tab 17]

[117] *Almelo Trial*, *supra* note 15 at [Reproduced in accompanying notebook at Tab 27]; *cited in Kvocka* Judgment, *supra* note 101 at ¶ 297 [Reproduced in accompanying notebook at Tab 17]

[118] *Kvocka* Judgment, *supra* note 101 at ¶ 297 [Reproduced in accompanying notebook at Tab 17]; *citing Almelo Trial*, *supra* note 15 at p. 35, 43 [Reproduced in accompanying notebook at Tab 27]

[119] *Kvocka* Judgment, *supra* note 101 at ¶ 297 [Reproduced in accompanying notebook at Tab 17]

[120] *See Almelo Trial*, *supra* note 15 at p. 42-43 (excerpting *The Kiel Gestapo* case); *Trial of Rear-Admiral Nisuke Masuda and Four Others of the Imperial Japanese Navy*, U.S. Military Commission, United States Naval Base, Kwajalein Island, Kwajalein Atoll, Marshall Islands, 7th-13th December, 1945, UNWCC, vol. I, pp 71 *et seq*. ("*Jaluit Atoll* case"); *Trial of Heinrick Gerike and Seven Others*, British Military Court, Brunswick, 20th March-3rd April, 1946, UNWCC, vol. VII, pp 76-81 (hereinafter "*Velpke Children's Home*"); *Trial of Alfons Klein and Six Others*, U.S. Military Commission Appointed by the Commanding General Western Military District, USFFT, Weisbaden, Germany, 8th-15th October, 1945, UNWCC, vol. I, p 46-54 (hereinafter "*Hadamer Trial*"); The Tokyo Judgment, the International Military Tribunal for the Far East, 29 April 1946-12 November 1948, Chapter X (Roling & Ruter eds.), 1977, p 458 (hereinafter "IMTFE Judgment"); *cited in Kvocka* Judgment, *supra* note at ¶ 298-305 [Reproduced in accompanying notebook at Tab 27]

made to stand guard while others performed the executions.[121] The court further concluded:

> These cases make clear that when a detention facility is operated in a manner which makes the discriminatory and persecutory intent of the operation patently clear, anyone who knowingly participates in any significant way in the operation of the facility or assists or facilitates its activity, incurs individual criminal responsibility for participation in the criminal enterprise, either as a co-perpetrator or an aider and abettor, depending upon his position in the organizational hierarchy and the degree of his participation.[122]

The Trial Chamber then performed an in-depth analysis the requirements for mid- to low-level participants in a joint criminal enterprise. It held that for persons who work in a job or participate in a system in which crimes are committed on a large scale and on a systematic basis to incur criminal liability, they must "knowingly participate in the criminal endeavor and their acts or omissions must significantly assist or facilitate the commission of the crimes."[123] The participation in the enterprise must be significant enough to make an enterprise efficient or effective – i.e., "a participation that enables the system to run more smoothly or without disruption."[124] The level of participation attributed to the accused and whether that level is deemed significant will depend on a variety of factors, "including the size of the criminal enterprise, the functions performed, the position of the accused, the amount of time spent participating after acquiring knowledge of the criminality of the system, efforts made to prevent criminal activity . . . and the seriousness and scope of the crimes committed."[125] Summarizing its holding on

[121] *Kvocka* Judgment, *supra* note 101 at ¶ 309 [Reproduced in accompanying notebook at Tab 17]

[122] *Kvocka* Judgment, *supra* note 101 at ¶ 306 [Reproduced in accompanying notebook at Tab 17]

[123] *Kvocka* Judgment, *supra* note 101 at ¶ 308 [Reproduced in accompanying notebook at Tab 17]

[124] *Kvocka* Judgment, *supra* note 101 at ¶ 309 [Reproduced in accompanying notebook at Tab 17]

the level of participation required to incur criminal liability under a joint criminal enterprise, the Trial Chamber stated:

> [A]n accused must have carried out acts that substantially assisted or significantly effected the furtherance of the goals of the enterprise, with the knowledge that his acts or omissions facilitated the crimes committed through the enterprise in order to be criminally liable as a participant in a joint criminal enterprise. The culpable participant would not need to know of each crime committed. 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 function effectively or efficiently would be enough to establish criminal liability. The aider or abettor or 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 its functioning.[126]

Taking the above analysis into account, the Trial Chamber in *Kvocka* first found that the Omarska camp functioned as a joint criminal enterprise. The court reasoned that the crimes that took place in the Omarska camp were not only premeditated, but they were also "serious crimes committed intentionally, maliciously, selectively, and in some instances sadistically against the non-Serbs detained in the camp."[127] The camp had a plurality of persons performing a variety of roles and functions of varying degrees of importance. The intent to persecute the non-Serb detainees, which led to crimes including murder, torture, and rape, amounted to joint criminal enterprise pervading the camp.[128] In addition, the Trial Chamber emphasized that anyone regularly working in or visiting the Omarska camp would have to know that crimes pervaded the camp. Even if a person did not actually witness the crimes, evidence of the abuses were evident in the

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[125] *Kvocka* Judgment, *supra* note 101 at ¶ 311 [Reproduced in accompanying notebook at Tab 17]

[126] *Kvocka* Judgment, *supra* note 101 at ¶ 312 [Reproduced in accompanying notebook at Tab 17]

[127] *Kvocka* Judgment, *supra* note 101 at ¶ 319 [Reproduced in accompanying notebook at Tab 17]

[128] *Kvocka* Judgment, *supra* note 101 at ¶ 320 [Reproduced in accompanying notebook at Tab 17]

bloody, injured and emaciated bodies of the prisoners and in the piles of dead bodies present in the camp. The detainees' screams of pain, cries of suffering and begging for food or water provided additional evidence of the abuses.[129] Before reaching the culpability of the accused, the Trial Chamber made clear that "crimes committed in furtherance of the joint criminal enterprise that were natural and foreseeable consequences of the enterprise can be attributed to any who knowingly participated in a significant way in the enterprise."[130]

Kvocka was found responsible for the crimes committed in the Omarska camp. He had knowledge of the criminal nature of the camp and yet willingly continued to work each day in his position of authority and influence in the camp. As a result, Kvocka was found to be substantially involved in the criminal enterprise and found to have actively contributed to the everyday functioning and maintenance of the camp.[131] Kvocka was also convicted under Article 7(1) of the Statute for persecution as a crime against humanity and for murder and torture as violations of the laws of customs of war. He was sentenced to seven years imprisonment.[132]

Prcac was also found to have knowledge of the wide-scale abuses and violence inflicted upon the detainees in the Omarska camp. Despite this knowledge, Prcac continued to work at the camp for at least twenty-two days, performing the tasks required

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[129] *Kvocka* Judgment, *supra* note 101 at ¶ 324 [Reproduced in accompanying notebook at Tab 17]

[130] *Kvocka* Judgment, *supra* note 101 at ¶ 326 [Reproduced in accompanying notebook at Tab 17]

[131] *Kvocka* Judgment, *supra* note 101 at ¶ 407 [Reproduced in accompanying notebook at Tab 17]

[132] *Kvocka* Judgment, *supra* note 101 at ¶ 718 [Reproduced in accompanying notebook at Tab 17]

of him.[133] Because he remained passive while crimes were being committed and because his participation in the camp was significant, the Trial Chamber held that Prcac's actions as an administrative aid to the camp commander substantially contributed to and assisted the facilitation of the joint criminal enterprise to persecute non-Serb detainees at the Omarska camp.[134] Prcac was found guilty of being a co-perpetrator in the joint criminal enterprise and sentenced to five years imprisonment.[135]

Kos, a guard shift leader at the camp, was found to have played an important role in making the camp function efficiently and effectively; therefore, he was a co-perpetrator in the joint criminal enterprise. Kos incurred responsibility for the beating and harassment of detainees through his active participation or his failure to stop the crimes that were committed in his presence or by guards on his shift.[136] Kos was given a six-year imprisonment term.[137]

The final two accused were given much stricter penalties because of their direct involvement in the infliction of abuses on the detainees. Radic, also a guard shift leader at the camp, was in charge when some of the most gruesome acts against the detainees took place, including sexual violence in which Radic took an active role.[138] Like Kos, the Trial Chamber determined that Radic's actions played a crucial role in the efficient and effective functioning of the camp. Not only was Radic responsible for the horrible

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[133] *Kvocka* Judgment, *supra* note 101 at ¶ 449, 457 [Reproduced in accompanying notebook at Tab 17]

[134] *Kvocka* Judgment, *supra* note 101 at ¶ 462, 463 [Reproduced in accompanying notebook at Tab 17]

[135] *Kvocka* Judgment, *supra* note 101 at ¶ 726 [Reproduced in accompanying notebook at Tab 17]

[136] *Kvocka* Judgment, *supra* note 101 at ¶ 503 [Reproduced in accompanying notebook at Tab 17]

[137] *Kvocka* Judgment, *supra* note 101 at ¶ 735 [Reproduced in accompanying notebook at Tab 17]

[138] *Kvocka* Judgment, *supra* note 101 at ¶ 526-536; 546-561 [Reproduced in accompanying notebook at Tab 17]

crimes committed directly by him or by the guards working under him, but Radic was also held responsible for perpetrating crimes of sexual violence against the female detainees at the camp.[139] Radic was sentenced to 20 years in prison.[140]

The final member of the accused, Zigic, received the most severe punishment. Zigic, the taxi driver who visited the camps in order to abuse the detainees, was found guilty of persecution, murder and torture.[141] Zigic was involved in numerous physical abuses not only at the Omarska Camp, but also the Keraterm and Trnopolje camps as well.[142] Zigic was found to be a co-perpetrator of the joint criminal enterprise and was sentenced to twenty-five years in prison.[143]

Ultimately, the Trial Chamber found that the Omarska camp functioned as a joint criminal enterprise and each of the accused participated in a significant way in making the camp function more effectively or efficiently. All five of the accused were convicted of persecution as a crime against humanity for the variety of abuses and crimes committed in the Omarska camp.

G. Krnojelac

While the cases examined above have all dealt with the accused being found guilty of taking part in a joint criminal enterprise, the Tribunal's willingness to find a

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[139] *Kvocka* Judgment, *supra* note 101 at ¶ 571 [Reproduced in accompanying notebook at Tab 17]

[140] *Kvocka* Judgment, *supra* note 101 at ¶ 746 [Reproduced in accompanying notebook at Tab 17]

[141] *Kvocka* Judgment, *supra* note 101 at ¶ 690-691 [Reproduced in accompanying notebook at Tab 17]

[142] *Kvocka* Judgment, *supra* note 101 at ¶ 612-687 [Reproduced in accompanying notebook at Tab 17]

[143] *Kvocka* Judgment, *supra* note 101 at ¶ 718 [Reproduced in accompanying notebook at Tab 17]

joint criminal enterprise does have its limitations.[144] The Trial Chamber in *Krnojelac* found that the accused's actions did not constitute participation in a joint criminal enterprise because of a lack of shared intent and an absence of shared agreement among the participants of the enterprise.[145]

In April 1992, Serb forces entered the town of Foca and began arresting Muslims and non-Serbs. The Foca Kazneno-Popravni Dom (PK Dom), a prison, became the primary detention center for the arrested non-Serbs. Milorad Krnojelac was warden of the KP Dom from April 1992 until August of 1993. As warden, Krnojelac was in a position superior to everyone else working in the camp.[146] The Prosecution alleged that Krnojelac was individually responsible under Article 7(1) of the Statute for, among other things, persecution on political, racial, or religious grounds, torture, inhumane acts, murder and imprisonment as a crime against humanity.[147]

Before deciding the culpability of Krnojelac, the Trial Chamber made findings relevant to joint criminal enterprise law. The Trial Chamber described the first two categories discussed by the Appeals Chamber in *Tadic* as "basic forms" of the joint criminal enterprise.[148] Further, the Trial Chamber stated that a joint criminal enterprise exists when there is an understanding or agreement between two or more persons that they will commit a crime. The understanding or agreement, however, does not need to be

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[144] *Barrett*, *supra* note 13 at p. 39 [Reproduced in accompanying notebook at Tab 6]; *See generally The Prosecutor v. Krnojelac*, Case No: IT-97-25-T, Judgment 15 March 2002 (hereinafter "*Krnojelac* Judgment") [Reproduced in accompanying notebook at Tab 14]

[145] *Barrett*, *supra* note 13 at p. 39 [Reproduced in accompanying notebook at Tab 6]

[146] *Krnojelac* Judgment, *supra* note 144 at ¶ 2-3 [Reproduced in accompanying notebook at Tab 14]

[147] *Krnojelac* Judgment, *supra* note 144 at ¶ 4-11 [Reproduced in accompanying notebook at Tab 14]

[148] *Krnojelac* Judgment, *supra* note 144 at ¶ 78 [Reproduced in accompanying notebook at Tab 14]

express as its existence can be inferred from all the circumstances. Nor does the understanding or agreement have to be reached any time before the crime is committed: There are circumstances in which two or more persons participating together in a crime may establish an unspoken understanding or agreement between them to commit a crime at that present time.[149] The Trial Chamber next found that a person participates in s joint criminal enterprise either:

> (i) by participating directly in the commission of the agreed crime itself (as a principal offender);
>
> (ii) by being present at the time when the crime is committed, and (with knowledge that the crime is to be or is being committed) by intentionally assisting or encouraging another participant in the joint criminal enterprise to commit that crime; or
>
> (iii) by acting in furtherance of a particular system in which the crime is committed by reason of the accused's position of authority or function, and with knowledge of the nature of that system and intent to further that system.[150]

To prove the basic form of joint criminal enterprise, it must be shown that "each of the persons charged and (if not one of those charged) the principal offender or offenders had a common state of mind, that which is required for the crime."[151] Lastly, the Trial Chamber pointed out that even though a particular crime charged has not been specifically pleaded in the indictment as part of the basic joint criminal enterprise, a case based upon the accused's participation in the enterprise to commit that crime may still be considered by the court if it is one of the crimes charged in the indictment and such a case is included in the prosecution's pre-trial brief.[152]

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[149] *Krnojelac* Judgment, *supra* note 144 at ¶ 80 [Reproduced in accompanying notebook at Tab 14]

[150] *Krnojelac* Judgment, *supra* note 144 at ¶ 81 [Reproduced in accompanying notebook at Tab 14]

[151] *Krnojelac* Judgment, *supra* note 144 at ¶ 83 [Reproduced in accompanying notebook at Tab 14]

Turning to Krnojelac's culpability in the case, the Trial Chamber held for several of the charges that Krnojelac had not participated in the joint criminal enterprise. Although Krnojelac was the warden of KP Dom, which means that he held the senior position within the prison and allowed civilians to be detained there, there was no evidence that Krnojelac actually played any part in securing the detention of any of the non-Serb detainees.[153] In addition, the Trial Chamber found that Krnojelac did not share the intent of the joint criminal enterprise to illegally imprison the detainees. The Trial Chamber held that it was more appropriate to characterize Krnojelac as an aider and abettor to the principle offenders of the joint criminal enterprise to illegally imprison non-Serbs.[154]

The prosecution next alleged that Krnojelac incurred responsibility for the inhumane conditions and cruel treatment of the detainees as a participant in a joint criminal enterprise. In order to establish liability on this basis, it must be shown that Krnojelac entered into an agreement with the guards of KP Dom and the military authorities to subject the non-Serb detainees to the inhumane conditions and cruel treatment, and that each of the participants, including Krnojelac, shared the same intent of this crime. The Trial Chamber was not convinced that Krnojelac entered into such an agreement; therefore, he was not held responsible as a participant in the joint criminal enterprise.[155]

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[152] *Krnojelac* Judgment, *supra* note 144 at ¶ 85 [Reproduced in accompanying notebook at Tab 14]

[153] *Krnojelac* Judgment, *supra* note 144 at ¶ 126 [Reproduced in accompanying notebook at Tab 14]

[154] *Krnojelac* Judgment, *supra* note 144 at ¶ 127 [Reproduced in accompanying notebook at Tab 14]

[155] *Krnojelac* Judgment, *supra* note 144 at ¶ 170 [Reproduced in accompanying notebook at Tab 14]

The Trial Chamber also held that there was insufficient evidence to conclude that Krnojelac entered into any agreement for a joint criminal enterprise to commit beatings and torture against the non-Serb prisoners in KP Dom.[156] Although Krnojelac must have known that some of the detainees were being mistreated, he did not have reason to know that the abuses were being inflicted as part of a joint criminal enterprise. Although Krnojelac witnessed the torturing of an inmate, the Trial Chamber held that the isolated incident did not oblige him to investigate the incident in such a way as to put him on notice that others were being tortured in the KP Dom.[157]

Krnojelac also did not incur liability as a member of the joint criminal enterprise to commit murder. Again, the prosecution did not establish that Krnojelac had an agreement to commit murder with the military authorities and the guards at KP Dom.[158] The Trial Chamber found no evidence showing Krnojelac had knowledge of the deaths of any of the detainees.[159]

The prosecution also alleged that Krnojelac incurred criminal responsibility under Article 7(1) as a participant in a joint criminal enterprise with guards and soldiers to persecute the Muslim and other non-Serb detainees. Once again, the Trial Chamber found insufficient evidence to conclude that Krnojelac shared the criminal intent and agreed with the other participants to persecute the detainees. In addition, because it was determined that Krnojelac did not share the intent to commit the underlying crimes of persecution, such as murder, torture, inhumane acts, and cruel treatment, the crime of

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[156] *Krnojelac* Judgment, *supra* note 144 at ¶ 315 [Reproduced in accompanying notebook at Tab 14]

[157] *Krnojelac* Judgment, *supra* note 144 at ¶ 313 [Reproduced in accompanying notebook at Tab 14]

[158] *Krnojelac* Judgment, *supra* note 144 at ¶ 346 [Reproduced in accompanying notebook at Tab 14]

[159] *Krnojelac* Judgment, *supra* note 144 at ¶ 345 [Reproduced in accompanying notebook at Tab 14]

persecution could not be established on the basis of the underlying acts as part of a joint criminal enterprise.[160]

In sum, Krnojelac was not convicted as a participant in a joint criminal enterprise to commit torture, murder, imprisonment and inhumane acts because there was insufficient evidence to prove the existence of an agreement between Krnojelac and the other participants to commit the joint criminal enterprise and that he shared the same intent as the other participants. Krnojelac, however, was convicted of other offenses and was sentenced to 7 ½ years in prison.[161]

H. Krnojelac Appeals Chamber

On appeal, the Appeals Chamber overturned the Trial Chamber and found Krnojelac guilty as a co-perpetrator "for the crimes of persecution (imprisonment and inhumane acts) and cruel treatment (based on living conditions imposed)".[162] The Appeals Chamber also held Krnojelac guilty as an aider and abettor to the crimes.[163] The Appeals Chamber, when making its decision, took into account the fact that Krnojelac was warden at KP Dom for 15 months, that he knew the non-Serbs were being unlawfully detained because of their ethnicity and the guards and military authorities were responsible for the inhuman conditions and abuses suffered by the detainees. The Appeals Chamber also found that by failing to take preventative measures, Krnojelac was

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[160] *Krnojelac* Judgment, *supra* note 144 at ¶ 487 [Reproduced in accompanying notebook at Tab 14]

[161] *Krnojelac* Judgment, *supra* note 144 at ¶ 534-535 [Reproduced in accompanying notebook at Tab 14]

[162] *The Prosecutor v. Krnojelac*, Case No: IT-97-25-A, Judgment 17 September 2003, ¶ 113 (hereinafter "*Krnojelac* Appeals Chamber Judgment") [Reproduced in accompanying notebook at Tab 15]

[163] *Krnojelac* Appeals Chamber Judgment, *supra* note 162 at ¶ 112 [Reproduced in accompanying notebook at Tab 15]

encouraging his subordinates to maintain those conditions and furthered the commission of those acts.[164] As a result of all those conditions, the Appeals Chamber held that a trier of fact should reasonably have inferred that Krnojelac was part of the system and thereby intended to further it.[165]

In making its decision, the Appeals Chamber made several key rulings. The Appeals Chamber found that, with regard to the crimes considered within the second category of cases in the *Tadic* judgment (also known as the "systemic form" of joint criminal enterprise), "the intent of the participants other than the principal offenders presupposes personal knowledge of the system of ill-treatment (whether proven by express testimony or a matter of reasonable inference from the accused's position of authority) and the intent to further the concerted system of ill-treatment."[166] It is less important to prove that there was a formal agreement between the participants than to prove their involvement in the system.[167] The court also held that while the Appeals Chamber in *Tadic* mainly drew from World War II concentration camp cases when developing the systemic form of joint criminal enterprise, the systemic form can still be applied to other cases and especially to serious violations of international humanitarian law. "Although the perpetrators of the acts tried in the concentration camp cases were mostly members of criminal organizations, the *Tadic* case did not require an individual to

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[164] *Krnojelac* Appeals Chamber Judgment, *supra* note 162 at ¶ 110 [Reproduced in accompanying notebook at Tab 15]

[165] *Krnojelac* Appeals Chamber Judgment, *supra* note 162 at ¶ 111 [Reproduced in accompanying notebook at Tab 15]

[166] *Krnojelac* Appeals Chamber Judgment, *supra* note 162 at ¶ 96 [Reproduced in accompanying notebook at Tab 15]

[167] *Krnojelac* Appeals Chamber Judgment, *supra* note 162 at ¶ 96 [Reproduced in accompanying notebook at Tab 15]

belong to such an organization in order to be considered a participant in the joint criminal enterprise."[168]

I. Milosevic

Participation in a joint criminal enterprise is a prominent feature in the indictment of former Yugoslavian president Slobodan Milosevic.[169] The indictment charges Milosevic with participating, as a co-perpetrator, in a joint criminal enterprise with the purpose of forcibly and permanently removing the majority of non-Serbs from large areas of Bosnia-Herzegovina.[170] Using the so-called "magic bullet of the Office of the Prosecutor", the prosecutor alleged that Milosevic participated in the joint criminal enterprise with members of the Bosnian Serb military and civilian leaders.[171]

Applying joint criminal enterprise to the *Milosevic* case is important for the prosecution because a joint criminal enterprise exists when an individual acts as part of a system in which the crime is committed by reason of the person's position of authority.[172] Because an individual who participates in a joint criminal enterprise is guilty of any crimes committed as part of that enterprise regardless of the role he plays, Milosevic could be found guilty for the acts that others commit in pursuance of the criminal

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[168] *Krnojelac* Appeals Chamber Judgment, supra note 162 at ¶ 89 [Reproduced in accompanying notebook at Tab 15]

[169] Kelly D. Askin, *The ICTY at Ten: A Critical Assessment of the Major Rulings of the International Criminal Tribunal Over the Past Decade*, 37 NEW ENG. L. REV. 903 (Summer 2003) [Reproduced in accompanying notebook at Tab 9]

[170] *The Prosecutor v. Mulitinovic et al* , Case No: IT-99-37-PT, Indictment 29 October 2001(hereinafter "*Milosevic* indictment" [Reproduced in accompanying notebook at Tab 18]

[171] *Schabas, supra* note 65 at 1032 [Reproduced in accompanying notebook at Tab 4]

[172] SCHARF, *supra* note 4 at p. 120 [Reproduced in accompanying notebook at Tab 2]

enterprise.[173] Because Milosevic held such a dominant position "throughout the political and military structures of what remained of Yugoslavia following the secession of Slovenia, Croatia, Macedonia, and Bosnia and Herzegovina, essentially all criminal acts carried out by official or quasi official can be laid at his door."[174] The key, however, is to prove the existence of a joint criminal enterprise to ethnically cleanse the areas in question.[175] If the prosecution can establish that such a joint criminal enterprise existed, then the only logical conclusion would be that Milosevic was the chief architect.[176]

IV. Conspiracy and Joint Criminal Enterprise

Although joint criminal enterprise and the doctrine of criminal complicity share several similarities, the crimes themselves are substantively different. Conspiracy, just like joint criminal enterprise, requires an "agreement" to commit a crime which can be expressed or implied.[177] However, the act of agreement constitutes the essence of the conspiracy crime itself whereas joint criminal enterprise is used to extend criminal liability beyond the common plan. The Appeals Chamber in *Tadic* found that joint criminal enterprise is justified on the premise that the crimes laid out in the statute are such serious violations of international law that liability should not be limited to those

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[173] SCHARF, *supra* note 4 at p. 120 [Reproduced in accompanying notebook at Tab 2]

[174] SCHARF, *supra* note 4 at p. 121 [Reproduced in accompanying notebook at Tab 2]

[175] SCHARF , *supra* note 4 at p. 121 [Reproduced in accompanying notebook at Tab 2]

[176] SCHARF , *supra* note 4 at p. 122 [Reproduced in accompanying notebook at Tab 2]

[177] *American Tobacco v. United States*, 328 U.S. 781, 66 S.Ct. 1125, 90 L.Ed 1575 (1946) [Reproduced in accompanying notebook at Tab 32]

that carry out the *actus reus* for the enumerated crimes, but to other offenders as well.[178] While both criminal doctrines impose liability on individuals for involvement with a common plan, joint criminal enterprise extends its reach much further than criminal conspiracy.

V. Conclusion

Although the Appeals Chamber in *Tadic* first developed the doctrine of joint criminal enterprise in 1999, the doctrine remains essentially unchanged to this day.[179] The validity of the doctrine has been attacked several times before the Tribunal, yet joint criminal enterprise continues to be applied more and more frequently. The doctrine has become so valuable to prosecutors that joint criminal enterprise was even heavily relied on as a form of liability in the indictment of former Yugoslav President Milosevic.

As with most legal doctrines, convictions under joint criminal enterprise are determined by the circumstances of each case. However, those determinations are based on a legal framework for joint criminal enterprise that is firmly established in the ICTY case law. In summary, joint criminal enterprise has developed into the following:

Three categories of joint criminal enterprise have been identified by the ICTY:

- The first category is a "basic" form of joint criminal enterprise. It is represented by cases where all co-perpetrators, acting pursuant to a common purpose, possess the same

[178] *Tadic* Judgment, *supra* note 5 at ¶ 190 [Reproduced in accompanying notebook at Tab 23]; Rajiv K. Punja, *Case Western Reserve University School of Law International War Crimes Research Lab: What is the Distinction Between "Joint Criminal Enterprise" As Defined By The ICTY Case Law And Conspiracy In Common Law Jurisprudence*, http://law.case.edu/War-Crimes-Research-Portal/memoranda/JointCriminalEnterprise.pdf, p. 42 (Fall 2003) [Reproduced in accompanying notebook at Tab 12]

[179] *See The Prosecutor v. Vasiljevic*, Case No.: IT-98-32-A, Judgment in Appeals Chamber, 25 February 2004 (hereinafter "*Vasiljevic* Judgment") at ¶ 94-102 [Reproduced in accompanying notebook at Tab 24]

criminal intention. An example is a plan formulated by the participants in the joint criminal enterprise to kill where, although each of the participants may carry out a different role, each of them has the intent to kill.

- The second category is a "systemic" form of joint criminal enterprise. It is a variant of the basic form, characterized by the existence of an organized system of ill-treatment. An example is extermination or concentration camps, in which the prisoners are killed or mistreated pursuant to the joint criminal enterprise.

- The third category is an "extended" form of joint criminal enterprise. It concerns cases involving a common purpose to commit a crime where one of the perpetrators commits an act which, while outside the common purpose, is nevertheless a natural and foreseeable consequence of the effecting of that common purpose. An example is a common purpose or plan on the part of a group to forcibly remove at gun-point members of one ethnicity from their town, village or region (to effect "ethnic cleansing") with the consequence that, in the course of doing so, one or more of the victims is shot and killed. While murder may not have been explicitly acknowledged to be part of the common purpose, it was nevertheless foreseeable that the forcible removal of civilians at gunpoint might well result in the deaths of one or more of those civilians.

The *actus reus* of the participant in a joint criminal enterprise is common to each of the three above categories and comprises the following three elements:

- First, a plurality of persons is required. They need not be organized in a military, political or administrative structure.
- Second, the existence of a common purpose which amounts to or involves the commission of a crime provided for in the Statute is required. There is no necessity for this purpose to have been previously arranged or formulated. It may materialize extemporaneously and be inferred from the facts.
- Third, the participation of the accused in the common purpose is required, which involves the perpetration of one of the crimes provided for in the Statute. This participation need not involve commission of a specific crime under one of the provisions (for example murder, extermination, torture or rape), but may take the form of assistance in, or contribution to, the execution of the common purpose.

However, the *mens rea* differs according to the category of joint criminal enterprise under consideration:

- With regard to the basic form of joint criminal enterprise what is required is the intent to perpetrate a certain crime (this being the shared intent on the part of all co-perpetrators).

- With regard to the systemic form of joint criminal enterprise (which, as noted above, is a variant of the first), 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 system of ill-treatment.

- With regard to the extended form of joint criminal enterprise, what is required is the *intention* to participate in and further the common 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. In addition, responsibility for a crime other than the one which was part of the common design arises only if, under the circumstances of the case, (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– that is, being aware that such crime was a possible consequence of the execution of that enterprise, and with that awareness, the accused decided to participate in that enterprise.