

**Academy of Croatian Legal Sciences**

**THEORY OF JOINT  
CRIMINAL ENTERPRISE  
AND INTERNATIONAL  
CRIMINAL LAW –  
CHALLENGES AND  
CONTROVERSIES**

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**“True peace is not merely the absence of tension: it is the presence of justice.”**  
Martin Luther King Jr.

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# **CHAPTER ONE**

## **DERIVED INDIVIDUAL CRIMINAL RESPONSIBILITY FOR COLLECTIVE INTERNATIONAL CRIMINAL OFFENCES PURSUANT TO THE PROVISIONS OF THE STATUTE OF THE INTERNATIONAL CRIMINAL TRIBUNAL FOR THE FORMER YUGOSLAVIA**

### **1. A Reconceptualization of Substantive Criminal Law in the Practice of International Criminal Tribunal for the Former Yugoslavia**

In international criminal law only physical (natural) persons as individuals are subject to criminal responsibility. This is the tradition of domestic criminal law, on which the first attempts at trying war crimes relied after the First World War, especially of the German Kaiser Wilhelm II, on the basis of Article 227 of the Versailles Peace Treaty of 28 June 1919, proceedings before the German military court in Leipzig and some particular peace treaties with defeated states. Although the Statute of the International Military Court in Nuremberg also foresaw the responsibility of “criminal organizations” and the SS, the Gestapo, the secret police and the leadership of the Nazi party were declared to be such organizations, still none of them received punishment, but that responsibility was only declared in the judgment, leaving the right to the authorities of the signatory states to bring before their own courts on the basis of that declaration individuals who belonged to those organizations. After the trials in Nuremberg and Tokyo, the General Assembly of the UN declared the principle of individual criminal responsibility for international crimes to be the first in a series of seven “Nuremberg principles”.<sup>1</sup> It reads:

“Principle I: Any person who commits an act which constitutes a crime under international law is responsible thereof and liable to punishment.”

The history of this principle from Versailles to the Statutes of the International Criminal Tribunals for the Former Yugoslavia and Rwanda, together with many other statutes of international criminal law, shows, in the work of five ad hoc international investigative commissions, four ad hoc international criminal courts and several national trials, strengthened by international law for international crimes, the constant mingling of law and politics during the establishing of substantive law and procedural standards, which mingling – in the system of legal rules from various legal sources and in the extremely fragmented international criminal jurisprudence – always gives politics an important influence.<sup>2</sup> This practically means that the use of a legal principle, in the end will depend on the functional methods of its interpretation. They, as is well known, in establishing the sense of the component parts of a legal principle or legal standards, begin with the question of the purpose of that legal standard. Since that question, in the management of every developed social structure, is always

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<sup>1</sup> Affirmation of the Principles of International Law Recognized by the Charter of the Nuremberg Trial, G.A. Res. 95(I) od 11. XII. 1946, UN Doc. A/64/Add.1.

<sup>2</sup> BASSIOUNI 2003, 393-444

linked to the question of the legitimacy of the leading political power, the principles of international criminal law are applied in practice in such a way that they will become and remain acceptable tools for maintaining the international political order. The statutes of international criminal courts so far – including what are known as mixed or internationalized criminal courts – adopt the principle of individual criminal responsibility in their introductory or general provisions. In his report to Resolution 808 of the Security Council of the UN approving the Statute of the ICTY, the Secretary General of the UN mentioned that almost all comments (on the draft Statute) he received requested that the Statute contain provisions relating to individual criminal responsibility of heads of state, government officials and all persons who acted within the framework of any official duty” and that “these requests referred to the precedents after World War II.”<sup>3</sup> Thereby international criminal law, despite some attempts in the preparations for the adoption of the Rome Statute of the permanent International Criminal Court (ICC) which wanted to introduce the criminal responsibility of legal entities into international criminal law (albeit with the exclusion of the state and other public and non-profit organizations), accepted the traditional orientation of criminal law towards a physical person as the direct perpetrator of a criminal offence and possible co-perpetrators, instigators and aiders and abettors.<sup>4</sup> The individual criminal responsibility of a physical person for international criminal offences is also accepted in the practice of ad hoc international criminal courts (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, the ICTY, and the International Tribunal for Rwanda, the ICTR). This is for example confirmed by the enacting terms of the second instance decision in the Tadić case, on the interlocutory appeal against the first instance dismissal of the objection of the jurisdiction of the ICTY, which determines that the principle of individual criminal responsibility is also applied according to customary international criminal law to cases of internal armed conflicts.<sup>5</sup> The case law of the ICTY demands that in the indictment the “form of criminal responsibility” is defined, from Article 7(1) of the Statute, with which, according to the assessment of the Prosecutor, based on the provisions of paragraphs 1 or 3 of that Article, the perpetrator of an international crime is charged, in order to satisfy the postulates of the principle of fair proceedings, which demand that in that definition the factual basis for the judgement be defined, and the accused enabled to prepare his defence.<sup>6</sup> The ICTY has established five such forms of criminal responsibility in Article 7 of its Statute<sup>7</sup>: two principal and three accessorial: the principal forms include direct commission of a criminal offence and planning the commission of a criminal offence (independently or together with other persons),

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<sup>3</sup> Report of the Secretary-General Pursuant to Paragraph 2 of Security Council Resolution 808 (1993), UNSC, UN Doc. S/25704 (1993), §55

<sup>4</sup> NOVOSELEC 2004, 487

<sup>5</sup> Prosecutor v. Tadić, Decision on the defence motion for interlocutory appeal on jurisdiction of 2 October 1995, §128-129

<sup>6</sup> JONES-POWLES 2003, 6.2.28 in quoting the first instance judgment in the Furundžija case of 10. XII. 1998, §189

<sup>7</sup> DANNER-MARTINEZ 2005, 103

where the perpetrator must have the intent to commit or plan the offence or at least “the awareness of the substantial likelihood that a criminal act or omission would occur as a consequence of his conduct.”<sup>8</sup> “Accessorial” forms of criminal responsibility relate to cases of participation in a narrow sense (according to Croatian law), such as instigating and aiding and abetting, but also to other persons who in any way contribute to planning or committing the crime.<sup>9</sup> In this way, as is well known, it is the case law of the ICTY, under the influence of the Anglo-American legal construction, to accept what is called the single definition of the perpetrator as any physical person who made a causal contribution to an international crime. However, within this definition of the term “perpetrator” the boundaries of individual criminal responsibility are extended in two ways, by “reconceptualization” of the traditional institutes of the general part of the criminal code such as complicity and guilt.<sup>10</sup> First, on the level of participation, alongside the avoidance of establishing individual forms of participation in criminal offences in a broad sense and acceptance of what is known as the monistic model of “the single concept of a perpetrator” (according to which a perpetrator is deemed to be any person who has made a causal contribution to the commission of a criminal offence, regardless whether he/she directly physically committed the crime or planned, instigated, ordered, committed or otherwise aided and abetted in the planning, preparation or execution of a crime; Art. 7(1) of the Statute of the ICTY) which makes a difference between them only in the proportion of punishment, practice has introduced and developed two legal theories which are not founded on the direct, autonomous criminal responsibility of the individual for his own behaviour, but derive that responsibility from the behaviour of some other persons who acted within a certain association, in which some activity was divided according to hierarchy or coordinating methods of achieving a common (criminal) goal. Since according to these theories individual criminal responsibility is founded or derived from actions (which do not always have to be a criminal offence) of other persons, these theories can be talked about in a wider sense as vicarious or theories of derived (individual) criminal responsibility. These are the theories of command responsibility (founded on the provisions of Article 7(3) of the Statute), and “joint criminal enterprise (founded on the provisions of Article 7(1) of the Statute on forms of criminal responsibility for international crimes, which the provision, it is true, does not prescribe directly, but the judges of the ICTY have by interpretation (*analogia iuris*) claimed that it comes into the scope of the definition). Theories of vicarious responsibility are known in Anglo-American law. Historically they arose in the field of medieval civil law responsibility for damage by a principle caused to third persons by his servants or commissioners according to the maxim *respondeat superior*<sup>11</sup>, but

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<sup>8</sup> Kvočka I, § 251

<sup>9</sup> Kordić I, § 373

<sup>10</sup> DRUMBL 2005, 540

<sup>11</sup> *Respondeat superior* (lat. Let the master answer). This is a private law concept of the responsibility of the employee for the actions and omissions of his employees in doing their tasks. *Respondeat superior* is in essence what is known as vicarious responsibility whose aim is: 1. to prevent future injuries 2. To ensure compensation of damages to the injured party, and 3. Fair management of loss caused in business. In case law this concept is opposite to the principle of guilt since it implies the responsibility of the employer regardless of his guilt of having committed the offence or regardless whether the employee acted with intent or without. Despite the in principle broad concept of



because of the frameworks of responsibility for participation in criminal law, different from the frameworks of co-responsibility for damage in civil law, they have not been applied in criminal courts.<sup>12</sup> However, when at the beginning of the 20<sup>th</sup> century they came first of all into use for misdemeanour responsibility, and then in use for establishing criminal responsibility of legal entities, the way was open for their transfer to international criminal law – which happened thanks to the Nuremberg military tribunal with the command responsibility of those accused of war crimes<sup>13</sup>. The legal constructions of command responsibility and “joint criminal enterprise” make it possible through the established guilt of other persons for certain criminal offences, the established form of responsibility and penalty aimed at those persons, to count and ascribe them to the accused who is charged with that form of construction and he is punished for them “as though” he committed them himself. In legal dogmatic terms this is in the domain of so-called formal criminal offences or criminal offences of pure action in common law criminal law (known as inchoate offences), where the essential elements (ger. Tatbestand) of the criminal offences are exhausted in the action of the perpetrator itself, regardless of the effect on the object of the action, which may be separate in terms of place and time from the action, such as a punishable attempt, incitement or a “criminal plot or conspiracy”<sup>14</sup>. The latter is the case of participation in a criminal offence where the participants are responsible for all criminal offences committed in the realization of a common purpose, even those which they did not originally envisage, insofar as this “excess” could have been foreseen as actually possible. The construction “conspiracy” makes it possible not only by punishing the early stages in commission of a criminal offence (agreement, planning, preparations), to achieve a preventive effect in criminal law, but it also facilitates criminal prosecution: the prosecutor who is not able to satisfy the rules on the burden of proof of the criminal offence, which the participants originally committed, is enabled to “take refuge in a reserve position”, that is to alter the indictment to “criminal conspiracy” of the participants to commit that criminal offence and so prove the stage of its realization they have reached (some English authors call this a “double life” in the practice of the institution of conspiracy).<sup>15</sup> In view of the form of participation it should be mentioned that in contrast to the Statute

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respondeat superior, in those legal systems where it is prescribed (e.g. USA, the Netherlands) vicarious responsibility is limited to only some criminal offences related to the economy and some activities which are not punishable, and in case law that concept is interpreted restrictively (so for example the supreme court of California in one decision took the stance that a hospital cannot be convicted on the basis of vicarious responsibility for sexual abuse of patients by a doctor). HORVATIĆ et al. 2002.

<sup>12</sup> SAYRE 1930, 694-701

<sup>13</sup> In general on the arduous filling of gaps in the sub regulated general part of international criminal law in the work of the Nuremberg and Tokyo military tribunals, cf. BASSIOUNI 2003, 290-320

<sup>14</sup> In Croatian linguistic practice both terms are in use, “urota” and “zavjera”. However in the Croatian Encyclopaedic Dictionary of 2004 (issued by Jutarnji list and Novi liber in Zagreb) we find a small difference from which we may conclude that the English conspiracy is closer to the word “zavjera”; urota is a “secret agreement on joint action against someone or something (HER, vol. 11, 226) and zavjera is “(1) a secret plan by several persons to commit a crime or cause harm and (2) the very act of organizing this plan (HER, vol. 12, p.145, which however alongside this definition is compared with “urota”). For the inclusion of the criminal nature of this association, it is better to use the word “zavjera”.

<sup>15</sup> PADFIELD 2000, 137

of the ICTY, which does not recognize “conspiracy” nor JCE, the Rome Statute of the ICC, in Article 25, paragraph 3, point d prescribes, amongst other things, responsibility for the behaviour of a participant by which he, “..in any other way contributes to the commission or attempted commission of such a crime by a group of persons acting with a common purpose”, and it immediately goes on to say, “such contribution shall be intentional and shall either: (i) be made with the aim of furthering the criminal activity or criminal purpose of the group where such activity or purpose involves the commission of a crime within the jurisdiction of the Court; or (ii) be made in the knowledge of the intention of the group to commit the crime”. Moreover, it establishes the difference between the perpetrator and the participant (in a narrow sense), by accepting what is known as the dualistic model close to German and Croatian law, although not consistently, as for all forms of participation of several people in a crime the same penalty framework is prescribed, and it is not graduated to be more mild towards those considered to be less dangerous, such as for example those aiding. Secondly, in terms of guilt, the unification of the reasons for excluding unlawfulness and the reasons for excluding guilt in the „grounds for excluding criminal responsibility“, ad hoc tribunals to a larger and the Rome Statute to a lesser extent have thrown aside differentiation between unlawfulness and guilt, reducing the element of intent as a form of guilt, introducing a special form of “recklessness” and made changes to some other institutions of unlawfulness (self-defence, necessity) and guilt (which for example exclude not only the misapprehension, but also the command of a superior).<sup>16</sup> This results in the application of the construction of command responsibility and the joint criminal enterprise. Leaving aside for a moment the justification and legal foundation of this “reconceptualization” of criminal law, it should be pointed out that there are several reasons for this change in the elements of the traditional general part of (internal) criminal law before international criminal courts. We can roughly divide them into political-ideological and legal.

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<sup>16</sup> NOVOSELEC 2004, 488 and 493

## 1.1. Political-Ideological Reasons

Political-ideological reasons arise from the fact that international crimes take place in armed conflicts which are mass in character. Contemporary western civilization sees mass violence as something which is always “larger than the sum of its parts” and which always affects, to an exceptionally large extent, the elementary values of the global community, as in the case of genocide, war crimes, crimes against humanity and terrorism. These attacks on universal values may today however, like all other criminal offences, be suppressed only by the “classical” institutions of criminal justice. In order to “normalize” punishment, that is, to take it through the usual (bureaucratic) procedure, criminal justice system must publicly economize its punishment (in the sense of Foucault’s theory of political economy of punishment), that is, subject only a selected and limited number of perpetrators of the attacks to punishment, and moreover, that the punishment be imposed in “fair” criminal proceedings in line with traditional institutions of individual criminal responsibility and executed in a specific form of imprisonment in some national penitentiary.<sup>17</sup> Therefore one of the first postulates of this “economization” requires that from the mass of delinquents – the direct perpetrators, military commanders and administrative officials, and political and military leaders, those be separated out who are “most responsible” for international crimes. On the basis of what criteria? If as a criterion we take the “severity of the crime”, which in social psychological terms is the oldest criterion for division, many contemporary theoreticians and practitioners have answered the question negatively as to whether the perpetrators of the most serious international crimes can be seen as “ordinary criminals”, thereby implying the consequences which the medieval doctrine of *crimina atrocissima* linked to the most serious criminal offences. So for example even recently, Richard Goldstone, the former prosecutor of the ICTY, requested that political leaders and superior officers in the chain of command, which implies a greater responsibility for performing their duties properly, be selected for criminal prosecution and more strictly punished for mass international crimes.<sup>18</sup> This stance was adopted by the ad hoc courts for the former Yugoslavia and Rwanda – thereby opening the question of the legitimacy of selective criminal prosecution and punishment policies for the crimes within their jurisdiction. So the first instance Chamber of the ICTY in the Martić case stated that those should be brought “before the face of justice” who could “have criminal influence” on events, due to the greater authority inherent in their position in the social hierarchy, before those who are only “following orders” – because the former could to a greater extent undermine the “international public order”.<sup>19</sup> Although both the ICTY and the ICTR in their judgments have stated that they have the same jurisdiction over ordinary perpetrators of international crimes and those who are of “higher rank”<sup>20</sup>, still several years after their foundation, the political viewpoint is completely accepted that before these courts “prominent personalities” should be primarily criminally prosecuted and made public, that is, those who planned, agreed

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<sup>17</sup> DRUMBL 2005, 542

<sup>18</sup> GOLDSTONE 1995, quoted by DRUMBL 2005, 569

<sup>19</sup> Prosecutor v. Martić, Review of indictment pursuant to Rule 61 of 8. III. 1996, § 21

<sup>20</sup> Erdemović I, § 83

and organized international crimes, “who caused the anxiety of the international community”, and not individual perpetrators who, as “minor actors” it would be better for national courts to prosecute and punish.<sup>21</sup> This was expressed in the Security Council Resolution UN 1329 of 30. 11. 2000, which states:

“...Noting the significant progress being made in improving the procedures of the International Tribunals, and convinced of the need for their organs to continue their efforts to further such progress, taking note of the position expressed by the International Tribunals that civilian, military and paramilitary leaders should be tried before them in preference to minor actors ...”

This stance was later confirmed in the statement by the president of the Security Council of 23.07.2001, which states:

“The ICTY should concentrate its work on the prosecution and trial of the civilian, military, and paramilitary leaders suspected of being responsible for serious violation of international humanitarian law... rather than on minor actors”<sup>22</sup>

This is taken over from the so-called “exit strategy” of the ICTY and the ICTR, noted first in Security Council resolution UN 1503 of 28. VIII. 2003. (S/RES/1503(2003)) which calls on those courts “to take all possible measures to complete investigations by the end of 2004, to complete all trial activities at first instance by the end of 2008, and to complete all work in 2010” (point 7) on the basis of those strategies in the UN Security Council resolution UN 1534 of 26. IV. 2004 is formulated, which, amongst other things, in point 5 calls on the ICTY and the ICTR:

"... in reviewing and confirming any new indictments, to ensure that any such indictments concentrate on the most senior leaders suspected of being most responsible for crimes within the jurisdiction of the relevant Tribunal as set out in resolution 1503(2003);"

And requires of those courts:

"... to provide to the Council, [by 31 May 2004 and] every six months [thereafter], assessments by its President and Prosecutor, setting out in detail the progress made towards implementation of the Completion Strategy of the Tribunal, explaining what measures have been taken to implement the Completion Strategy and what measures remain to be taken, including the transfer of cases involving intermediate and lower rank accused to competent national jurisdictions; ...".

On the basis of this understanding, in “exit strategies” of the ICTY and the ICTR, various administrative measures are taken in those courts, through changes to their organizational and functional law. From the beginning of its work, on the basis of its

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<sup>21</sup> JONES-POWLES 2003, 6.2.13

<sup>22</sup> Statement of the President of the Security Council S/PRST/200221

authority from Article 15 of the Statute<sup>23</sup>, by means of its own rules, to regulate proceedings and hearing of evidence independently, after adopting the Rules of Procedure and Evidence on 11 February 1994<sup>24</sup>, the ICTY changed its procedures 37 times up to the beginning of 2006. So frequent changes, unusual to continental lawyers unaccustomed to the autonomous character of legal sources in procedural law, are the result of the specific amalgam of Anglo-American criminal procedure of the accusatory or “party” type with the continental “inquisitorial” type. Some commentators optimistically welcomed this “blending of procedures and traditions”, believing that the ICTY, which in practice had moved away from procedure mainly “party” in character (except in the question of admissibility of evidence, which was resolved on the “inquisitor” model) towards the procedure of the “inquisitor” character, it represents “emergence of common international procedures” which can “..retain the unity of the international legal system” and create “a global legal culture” as a “set of values if not also common practice”.<sup>25</sup> There were however, more critical voices warning of the procedural problems on the path of expedite and fair proceedings before the ICTY.<sup>26</sup> These are: the excessive length of proceedings, including the main trial hearing and insufficient funds of court administration made available to the ICTY to resolve those failings, unilateral prosecution investigations, at the end of which the defence finds it hard to gain insight into the prosecution’s evidence (even after the introduction of special pre-trial judges supposed to encourage the mutual acquaintance of the parties with evidence and organize evidence for presentation at the trial), so it is unable to prepare properly for the trial, the differing practice of Trial Chambers in the application of their authority to present evidence *ex officio*, the previous acquaintance of the trial judges with written statements by prosecution witnesses, the increasingly numerous and broader exceptions to the principle of direct presentation and assessment of evidence (or the prohibition of presentation of “second-hand evidence” hearsay etc), where the use by the ICTY of plea bargaining seems particularly disputable, through which it attempted, after the defendant’s admission of the charges, to avoid a trial in a large number of cases, and thereby save resources, does not see the danger of violating fairness.<sup>27</sup> Therefore, examining the procedure and practice of the ICTY by the three parameters of the principle of “fair proceedings” – the defendant’s right to defence counsel, the “equality of arms” and the right to an independent and unbiased judge – some authors notice that the criterion for assessment of the validity of proceedings before the ICTY is not the question of whether the trial of Milošević (which some in the ICTY saw as the “trial of the century”) was conducted according to that principle, but the question whether the ICTY in its procedure provided for every defendant

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<sup>23</sup> Until the beginning of 2006, the Statute of the ICTY was amended by UN SC Resolutions 1166 of 13 May 1998, 1329 of 30 November 2000, 1411 of 17 May 2002, 1431 of 14 August 2002, 1481 of 19 May 2003, 1597 of 20 April 2005 and 1660 of 28 February 2006.

<sup>24</sup> Critical presentations of the case law and updating of substantive and procedural criminal law of the ICTY are frequent in literature. For more recent ones: BOAS, 2001, 41-90; the same writer: 2001, 167-183; MUNDIS-GAYNOR 2005, 1134-1160.

<sup>25</sup> BURKE-WHITE 2004, 975-6

<sup>26</sup> BOURGNON 2004, 526 etc.

<sup>27</sup> HENHAM-DRUMBL 2005, 49-87

before its chambers to have the same fair proceedings as Milošević had.<sup>28</sup> However it was quickly seen that this amalgam brought limited possibilities for questioning a large number of witnesses in line with the principles of contradictoriness, public character and immediacy, and that it limited the possibilities of resolving some other issues of protection of the defendants' right to defence. If we ignore the desire to provide through regulations for procedural and extra-procedural protection of victims of criminal offences and for them to testify before the ICTY,<sup>29</sup> the many new features of its proceedings always had the goal of simplifying and shortening the proceedings. The new provisions of Rule 11bis enabled the ICTY to transfer criminal proceedings that have already begun against perpetrators of international crimes to lower ranked national courts according to the criteria of "the severity of the criminal offence" and the "degree of responsibility of the accused." The ICTY used this possibility up to the beginning of September 2006, in that in five cases it rendered a decision to transfer the criminal proceedings against nine defendants to Bosnia and Herzegovina, and in one case with two defendants to Croatia. Since the provisions of Rule 11bis gave broad authority to the ICTY to assess the severity of the defendant's crime, the hierarchical rank of the accused and the suitability of domestic law for conduct of the ceded criminal proceedings ex officio, here some appeals by defendants were without success whose cases were transferred to Bosnia and Herzegovina, where they explained by allegations that the defendants would be criminally prosecuted before nationally biased courts or that transferring was prohibited by their rank or the severity of the defendant's criminal offences (ICTY, Decision on Rule 11bis Referral in the case of Gojko Janković (IT-96-23/2-AR11bis.2) of 15. I. 2005. In contrast to the ICTY, transferring proceedings to courts before the ICTR never got going because of the unsuitability of the national system in Rwanda, although the prosecutor of that tribunal had already previously sent about thirty of its files to that country for a decision on taking over criminal prosecution.<sup>30</sup> Whether that goal, i.e. simplifying and shortening the proceedings, has been legitimately achieved remains an open question.<sup>31</sup>

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<sup>28</sup> COGAN 2002, 111-140.

<sup>29</sup> "Victim-witnesses are the soul of war crimes trials at the ICTY" according to the former judge of that court, Patricia Wald (WALD 2001, 81 etc., 108).

<sup>30</sup> Cf. MUNDIS-GAYNOR 2006.

<sup>31</sup> "Many legal scholars believe [that] the >institutional bias towards the prosecution that defense have reported at international prosecutions from Nuremberg to the ICTY and ICR< will remain". Cf. MCGONIGLE 2005, 10-14.

## 1.2. Legal Reasons

The legal reasons why the international criminal courts have not more precisely established the type of participants in crime nor resolved the theoretical questions of their differentiation, lie in the fact that international crimes as a rule are committed collectively and systematically, whereby the individual contribution is not easily noticed. This is also a result of the fact of the understanding of mass war crimes as a form of organized crime, where the proof of the individual contribution of their perpetrators is questionable, because individual criminal offences, in terms of their quantity, are “merged” into what is known as “international crime”, one single criminal offence, for which responsibility exists according to international criminal law, but not the domestic criminal law of individual states. Moreover, it is usually held that in organized crime, as the most dangerous form of collective crime, the most responsible persons stand behind the direct perpetrators and control the criminal organizations. Experience shows that it is almost impossible to prove that such people formed the intention of the direct perpetrator: on the one hand because between them and the members of the criminal organization who physically committed the crime there are several mediators, and on the other hand because as a rule they do not care, and often do not know which member will physically commit the crime. Therefore international criminal courts, under the political imperative mentioned of convicting politically prominent perpetrators of war crimes, used the theory of responsibility of the “perpetrator behind the perpetrator”, by which the criminal responsibility is established of an influential person in the criminal organization, and the immediate physical perpetrators of the crime lose their importance<sup>32</sup> and they extended the legal construction of individual criminal responsibility for participation in an international crime. Common to these theories is the idea that the criminal responsibility of the individual arises either from his position or function in the interaction of a specific social organization (state, military) or from his contribution to an international crime.<sup>33</sup> In the first case, we talk about the “supervisory model” of criminal responsibility, founded on the understanding that the “perpetrator behind the perpetrator” is the person who had authority over some form of social organization, which was proportionate to his position in the hierarchy, used to direct the behaviour of the other members according to its will (theory of authority over an organization), and the understanding that a military leader, due to his authority over his subordinates, must be responsible for their criminal activities (the theory of command responsibility of military officers, later extended into the theory of the responsibility of the superior officer).<sup>34</sup> In the second case, the responsibility of individuals is derived from the “system” in which he acts (the systemic model) and is founded on three key elements: the specific behaviour of a person in the system consisting of his action or omission of a specific duty, the specific interaction of its members, which in terms of its character may be characterised as “criminal” and criminal offences or actions committed within the system. This second element – the interaction between members of the system – brings together the first and third elements, regardless

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<sup>32</sup> DAMAŠKA 2005

<sup>33</sup> AMBOS 2006, § 7, no 12

<sup>34</sup> Ibid. no 29, 57

whether the action or omission by a person was the direct cause of a criminal offence, and according to this understanding each person who with intent and knowledge contributed to the action of the system is criminally responsible for every crime within the system, if he could and should have foreseen it, regardless of whether he had available specific knowledge in terms of the place time and manner of its commission.<sup>35</sup> The case law of the ICTY has constructed two legal instruments to establish the criminal responsibility of individuals according to these theories. The “supervisory model”, accepted through so-called indirect command responsibility (command responsibility in the narrow sense, Article 7(3) of the Statute), and the “systemic model” through the construction of so-called joint criminal enterprise, an institution which it extracted from the general regulations on participation in a criminal offence in Article 7(1). Knowledge of the sense, origins and evolution of these legal instruments in case law is decisive for an analysis and critique of the indictments which the Prosecution of the ICTY has frequently based on them, and the ICTY (as well as the ICTR according to the provisions of Article 6(3) of its Statute) accepted them in its judgements. Therefore we will first of all consider their main characteristics and then move on to the issue of the questions they raise.

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<sup>35</sup> VOGEL 2002, quoting an article by Klaus Marxen



## 2. Command Responsibility

Command responsibility is a normative construction of international criminal law. In its narrow sense, as so-called indirect command responsibility, it is derived from omissions in the duty of military commanders in armed conflicts in which they issue orders to their subordinates, to also supervise the execution of those orders and, in cases of disobedience, to use disciplinary and other necessary and appropriate measures. Neglect of this duty, on the one hand established by the military hierarchy, and on the other prescribed by international humanitarian law, which requires every military commander to undertake military operations according to its regulations, justifies the responsibility of the military commander: the legitimacy of that responsibility does not therefore lie in a violation of the duty of commanding according to military regulations (for which the commander is only responsible to his hierarchy and not the social or international community) but in the violation of his duty to manage effectively a group of armed men who represent a very great potential risk for the lives and property of others.<sup>36</sup> According to the case law of the ICTY, a distinction should be made between the command responsibility of a superior as the independent perpetrator and the situation when the intention of the superior also includes the commission of criminal offences by his inferiors. Then the commander becomes a participant<sup>37</sup> and is responsible for the most serious forms of command responsibility by omission, although in the opinion of some authors, this unjustifiably extends the punishability to every commander who knew that one of his subordinates would commit a criminal offence only because he perhaps even silently gave him a signal that that offence would remain unpunished.<sup>38</sup> As is well known, the concept of command responsibility exists not only in military hierarchy but also in other forms of social integration founded on a hierarchy as a form of division of labour: in order for some “pyramid” social organizational form to function effectively, superiority requires those in hierarchically superior positions not only to discharge their authority to coordinate the work of their inferiors but also to organize their organization and to manage it according to rational demands, where the requirement is prominent for knowledge and information necessary for that coordination and responsibility for omissions in that context. The understanding of responsibility is founded on this, for example of the director and various managing bodies of a company in economic business, ministers, members of the government and other state officials and even the historically oldest form of responsibility, of parents for the behaviour of their under-aged children who are not yet legally responsible. The forms of this responsibility may differ, from civil law to disciplinary and/or criminal law to political responsibility. The rules regulating the institute, known in contemporary law as command responsibility, are found in some very old sources. So for example in the Chinese Sun Tzu of 500 B.C. which is considered to be the oldest military handbook in the world, it was prescribed that the collapse of military discipline or confusion in military units cannot be justified by natural reasons, but is ascribed to the responsibility of the military commander. At the trial of Duke Peter von Hagenbach,

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<sup>36</sup> WEIGEND 2004, 1004 referring to JESCHECK-WEIGEND 1996, 628

<sup>37</sup> Naletilić and Martinović I, § 81, Stakić I, § 465

<sup>38</sup> WEIGEND 2004, 1007-8

held in 1474 before a Chamber consisting of 28 judges of the Holy Roman Empire, for murder, rape, perjury and other crimes committed by his soldiers against divine and human law, the defendant based his defence on the commands of his superiors. That however, was not accepted by the Trial Chamber and Hagenbach was convicted because he did not prevent the crimes of his inferiors, which, as a knight, he was bound to do. The Swedish King Gustav Adolf in 1621 adopted the “Rules of The Law of War” by which “the commander may not order his soldiers to act against the law”. Judges could impose on commanding officers who did not keep this obligation a punishment “at their own discretion”. The rules of war adopted in April 1775 by the temporary Congress of the State of Massachusetts also contained provisions on the responsibility of commanders for the behaviour of their inferiors.<sup>39</sup> In its contemporary form, command responsibility in international criminal law is derived from the treaty law of the Geneva Conventions of 1949, and especially from two protocols from 1977. The Geneva Conventions of 1949 originally prescribed the direct responsibility of commanding officers for issuing orders to commit an international crime, which would consist of a grave breach of its provisions and obliged the state parties to bring perpetrators to trial and punish them. These breaches, defined as actions forbidden by the Convention during military conflicts, also include issuing orders for them to be committed. Criminal responsibility for these commands may be seen in one of the forms of participation in a criminal offence prescribed in the national law of the state parties, which condemns that form of violation (co-perpetration, incitement or abetting) and we will not consider it in more detail here. This point of view is the peak of the previous codification of international customary rules of war (*iura in bello*) which began at the end of the 19<sup>th</sup> and beginning of the 20<sup>th</sup> centuries, especially in the provisions of the Hague Conventions of 1907 (the Geneva Conventions however are not a comprehensive codification because there exist certain customary rules on waging war outside of it). The first use of the title “command responsibility” actually stems from the trials of military commanders before national military courts up to World War II.<sup>40</sup> However, in criminal proceedings conducted for crimes committed in World War II the institute of command responsibility was extended in two directions. On the one hand the construction of the indirect responsibility of a commander appeared, in the sense described above (which resulted in implications for the form of perpetration and participation in the criminal offence), and on the other hand, command responsibility was extended to non-military commanders. The best known and most disputed precedent for this was the decision by the military commission of the USA of December 1945 by which the Japanese General Tomoyuki Yamashita was condemned to death for crimes committed by soldiers subordinate to him during the occupation of the Philippines against a large number of prisoners of war and the civilian population. Although he really did not know about these crimes nor could he have known nor been informed (he was in a distant central military base without the possibility of communication, which had been effectively cut off by a strong allied counter-offensive), according to the military commission and Supreme Court of the

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<sup>39</sup> For a very exhaustive presentation of the historical development of the institute of command responsibility see PARKS 1973, 1-105.

<sup>40</sup> Which is today altered to “the responsibility of the superior” see NOVOSLEC 2004, 495.

USA in a majority decision, relying, amongst other things, on the Hague Conventions of 1907, Yamashita violated the duty of a military commander to provide effective supervision of his troops “as required by the circumstances”, by which he became responsible for the crimes which were undoubtedly committed by Japanese soldiers and local officers who supervised those crimes: he, that is to say, should have known in view of his high position in the hierarchy (with which, in the nature of things, goes the increasing completeness of available information towards the top), and in view of the large number and spread of the crimes, that his subordinate officers and soldiers were committing such crimes. This point of view suffered severe doctrinal criticism, which still stands today. The International Military Tribunal in Nuremberg and its successors, “small” Nuremberg courts, pursuant to Article 10 of the Control Council Law, and the Tokyo war crimes court, also based their verdicts on the construction of command responsibility, albeit in a somewhat narrower sense than Yamashita, because they set higher standards for establishing the commander’s knowledge of the commission of crimes. In the case of General List, it was established that he also failed to obtain information about the crimes of subordinates which was available to him, but his responsibility did not stem from the “spread of the crime” but from the availability of specific information about it. This was confirmed in the case of General von Leeb, who was acquitted of the murders of Russian prisoners of war committed by his subordinates, because it was established that he was not the operative commander on the field and he did not know about the crimes committed. A similar attempt to “subjectivize” the (almost objective) responsibility of a commander by the requirement of establishment of elements of their guilt according to Anglo-American standards of *mens rea*, which required that a military commander knew about crimes or that in his usual care to discharge his duty in a correct manner he should have known about them, but failed to prevent them (so-called imputed responsibility)<sup>41</sup>, appeared in some judgements of the Tokyo court; but this was less to do with an assessment of the cognitive aspects of the perpetrators’ guilt, and more from an operative aspect, (that is, the question of whether the commander failed to foresee, prevent or react to crimes committed) or from a functional aspect, that is the question whether the commander discharged a function, which, because of its high hierarchical position, enabled him to oppose such crimes.<sup>42</sup> But the demand for the “subjectivization” of the responsibility of a commander, however, was not satisfied completely by the judgements of those courts (mainly due to the difficulties in proving the relevant facts of the commander’s knowledge of the crimes or neglect to inform about the crimes and duty to act differently) and it remained disputed in terms of the question of the extent to which a military commander neglected to take the necessary steps to find out that his subordinates had committed a criminal offence or that they were preparing to do so.<sup>43</sup>

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<sup>41</sup> DAMAŠKA 2001, 401 etc.

<sup>42</sup> The “functional”, “cognitive” and “operational” aspects of command responsibility are mentioned by the ICTY in the judgment of Delalić I, § 346 which is also followed by its other decisions. Cf. also van SLIEDREGT 2003, 144

<sup>43</sup> DANNER-MARTINEZ 2005, 123 etc.

## 2.1. The Establishment of Contemporary Defining Aspects of Command Responsibility

The question of “subjectivization” of indirect command responsibility remained open however, not only because of difficulties proving it, but also because of the lack of clarity of the legal construction. In the judgement of the Appeals Chamber in the Delalić et al. case, it is emphasized that command responsibility is not a form of strict objective responsibility:

“The doctrine of command responsibility is ultimately predicated upon the power of the superior to control the acts of his subordinates. A duty is placed upon the superior to exercise this power so as to prevent and repress the crimes committed by his subordinates, and a failure by him to do so in a diligent manner is sanctioned by the imposition of individual criminal responsibility in accordance with the doctrine... A superior may only be held liable for the acts of his subordinates if it is shown that he “knew or had reason to know” about them. The Appeals Chamber would not describe superior responsibility as a vicarious liability doctrine, insofar as vicarious liability may suggest a form of strict imputed liability”.<sup>44</sup>

According to the doctrine of command responsibility a superior is not considered liable only because he is in a superior position:

“... for a superior to be held liable, it is necessary to prove that he “knew or had reason to know” of the offences and failed to act to prevent or punish their occurrence. Superior responsibility, which is a type of imputed responsibility, is therefore not a form of strict liability”.<sup>45</sup>

In contrast to the opinions which begin with the generally accepted stance that command responsibility in itself is not objective responsibility and state that guilt in respect of offences by omission (ger. *unechte Unterlassungsdelikte*) is not in doubt (in that the intellectual component of the intent must have additional content covering the facts of the case in the specific situation in which the commander found himself and awareness of the *Garantenstellung*),<sup>46</sup> in practice this question has been constantly reiterated: in cases which occurred during the Vietnam war, conflicts in the Middle East etc. The reason for this lies in the frequent uncertainty about the sense of the legal standard of “the commander’s knowledge” of the facts of the behaviour of his subordinates, which should have been known to him. On the one hand, the very text of the relevant international provisions on command responsibility and on the other hand, the precedent case law of the international criminal tribunal after World War II contributed to this doubt. The first normative instrument in international conventional law regulating indirect command responsibility were the provisions of Articles 86 and 87 of the Additional Protocol to the Geneva Conventions of 12 August 1949 on protection of victims of international armed

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<sup>44</sup> Delalić II, § 197, 239

<sup>45</sup> Kordić i dr. I, §369

<sup>46</sup> BAČIĆ 2001, 145

conflicts (Protocol I) of 8 July 1977.<sup>47</sup> As is well-known, according to the provisions of Art. 86, paragraph 2 of Protocol I, for serious violations of the Geneva Conventions, alongside the subordinate who committed them, his commanding officer is also liable if he did not take all the possible measures he could to prevent or punish, even though he (a) knew or (b) should have known what happened. These provisions read:

"The fact that a breach of the Conventions or of this Protocol was committed by a subordinate does not absolve his superiors from penal or disciplinary responsibility, as the case may be, if they knew, or had information which should have enabled them to conclude in the circumstances at the time, that he was committing or was going to commit such a breach and if they did not take all feasible measures within their power to prevent or repress the breach".

When adopting the Protocol, delegations at the Conference were divided in their opinions about the normative standard under (b) that the commander "should have known", in the sense that he "had information that should have enabled him to conclude in the given circumstances"<sup>48</sup>, and only with the adoption of the next Article 87 of the Protocol was the question clarified, in that this Article defines precisely the obligation of the state, in that it must "require" the commanding officer to prevent, suppress and report violations of the Conventions and Protocols and to initiate disciplinary or penal action against the violators. Therefore, not only taking preventive and repressive measures, but also gathering all important information on the behaviour of subordinate which in the nature of things is necessary to take those measures. The Statutes of the international criminal tribunals for the former Yugoslavia and Rwanda also prescribed that the criminal offence under their jurisdiction "committed by a subordinate does not relieve his superior of criminal responsibility if he knew or had reason to know that the subordinate was about to commit such acts or had done so and the superior failed to take the necessary and

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<sup>47</sup> Official Gazette of the Republic of Croatia, International Agreements 5/1994; see text in: LAPAŠ-ŠOŠIĆ 2005, 940-1009

<sup>48</sup> Due to the differences in the English and French texts of the Protocol (...information which should have enabled them to conclude... as opposed to ...des informations leur permettant de conclure...) questions of interpretation arose regarding the commander's guilt: according to the English text, the requirement of the Protocol in terms of the form of guilt related to negligence where the commander fails to give subjective due attention, that is, "closes his eyes" to information about crimes which meet his subjective possibilities of foreseeing danger and adjusting his behaviour, and according to the French text, to the negligence where the commander fails in his objective due attention demanded from each conscientious person in his position. The commentary on the Protocol prepared by the International Committee of the Red Cross points out this contradiction and suggests that the interpretation should go with the French version, since it is "in line with the aim of the agreement" (DANNER-MARTINEZ 2005, 126-127), but the authors of the commentary are not completely certain what proving the commander's guilt (*mens rea*) should cover, since in another place it points out that not every form of negligence constitutes criminal responsibility, but only those that are close "... to malicious intent apart from any link between the conduct in question and the damage that took place." But here a higher form of guilt does not mean a higher requirement in the sense of proving the subjective side of the criminal offence, since in the Anglo-American sense of intent, the intellect and volition components are united in the "mental element" of the crime, it is not necessary to establish them at the same time, but to establish one or the other.

reasonable measures to prevent such acts or to punish the perpetrators thereof.” (Art. 7(3) ICTY Statute, Art. 6(3) of the ICTR Statute). However, their case law came to define all today’s elements of command responsibility only through the process of evolution. In this, commentators notice that the most frequent controversy arises around the issue of the commander’s guilt, whose form those courts have tried to limit by interpretation to intent or at least conscious negligence bordering on indirect intent (*dolus eventualis*).<sup>49</sup> At first, the first instance Chamber of the ICTR in its judgment in the Akayesu case, pointed out that command responsibility arises from the criminal law principle of individual guilt and must be founded on direct intent (malicious intent) or negligence bordering on intent, that is which is at least so serious that it is equal to accepting the offence, that is, “closing the eyes” to its consequences.<sup>50</sup> This standpoint was taken by the first instance judgment of the ICTY in the Delalić case of 16 November 1998, in which the court stated that despite the individual judgments by international criminal courts after World War II, from which at first sight it arises that the commander is responsible for each volitional failure to obtain information on the behaviour of his subordinates, still customary international criminal law demands a higher standard, that is that a superior can only be held criminally responsible if some specific information was in fact available to him which would provide notice of offences committed by his subordinates. This information need not be such that it by itself was sufficient to compel the conclusion of the existence of such crimes. It is sufficient that the superior was prompted to make further inquiries by the information, or, in other words, that it indicated the need for additional investigation in order to ascertain whether offences were being committed or about to be committed by his subordinates. From this it follows that the commander’s guilt may have two forms (a) intent, which includes the commander’s real knowledge of the behaviour of his subordinates, proved by direct or indirect evidence, circumstantial evidences (one of which is high rank in the military hierarchy); (b) negligence, arising from violations of a commander’s duty to know or that he had reason to know that his subordinates had committed or were preparing to commit criminal offences (a superior is not permitted to remain wilfully blind to the acts of his subordinates).<sup>51</sup> However in the time between the first instance and the second instance judgement in the Delalić case, the ICTY resolved the question of guilt in command responsibility in a way that was “one of the most controversial applications of the theory of command responsibility” and by which the “spirit of objective responsibility from the Yamashita case” was resurrected.<sup>52</sup> These were the well-known statements in the first instance judgement in the Blaškić case, in which that court, faced with difficulties in proving the fact that the commander could have known about the behaviour of his subordinates, formulated a stance by which he “had reason to know within the meaning of the Statute of the court” and that in view of his position in the chain of command and the “circumstances of the event” he could not defend his behaviour by lack of knowledge, which was the consequence of negligent

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<sup>49</sup> DAMAŠKA 2001, 461 etc. DANNER-MARTINEZ 2005, 127-130

<sup>50</sup> Akayesu I, § 489

<sup>51</sup> Delalić I, § 393

<sup>52</sup> DANNER-MARTINEZ 2005, 128

discharge of duty.<sup>53</sup> Indications that the ICTY would take this stance in this case were seen in the decision by the first instance Chamber, by which the request was denied by the defence to specify the legal elements of the command responsibility of the defendant before the main trial, adding that “before the presentation of evidence this decision cannot be made”. Commentators have justifiably criticized this indecision, since a request for clarification of legal standards, which need not be established until the trial, has nothing in common with questions of proof or the special circumstances of the case, but is founded on the postulate that the substantive criminal law standards of the defendant’s responsibility must be known, not only before the trial, but also before the offence is committed, so that the principle of legality would not be violated (the Secretary General in his report on the Statute of the ICTY (§34) had already clearly pointed out that the principle of legality “demands that the international tribunal apply the rules of international humanitarian law which have undoubtedly become part of customary law”).<sup>54</sup> After Damaška subjected this interpretation by the first instance court in the Blaškić case to sharp criticism, mentioning that it is impossible to support it by the principles of guilt in national criminal law,<sup>55</sup> the second instance Chamber in its decision of 29 July 2004 amended the stance of the first instance Chamber on the commander’s negligence, stating that the criteria of the commander’s guilt must be applied as formulated in the second instance decision mentioned in the Delalić case.<sup>56</sup> This view was taken up by the ICTR too in the decision by its second instance Chamber in the Bagilishema case, so contemporary commentators conclude that today in the practice of those two ad hoc international criminal courts, the criteria of commander’s guilt in the Delalić case is the accepted and unquestioned standard.<sup>57</sup> If the confirmed first instance judgement in the Delalić case of 16 November 1998 is taken as a precedent, we may, according to the standard commentaries,<sup>58</sup> differentiate the following current components of the notion of indirect command responsibility (the responsibility of the superior) in the practice of the ICTY: a) functional: the position of the superior person in a hierarchical relationship with subordinates; b) cognitive: the knowledge of the superior that subordinates are preparing or committing crimes and c) operative: the superior failed to take the necessary and reasonable measures to prevent the crime or to punish the perpetrators. We will consider the legal content of these components, to observe their complexity. It places a heavy burden of proof before the prosecutors of the ICTY. Faced, moreover, with cases of spectacular political weight, such as the trial of Milošević – which always require the ascribing of “authorship” of some policy to a specific political leader – the prosecutors of the ICTY, in the case of mass war crimes and the responsibility of their initiators, began in the indictments, and the judges continued in their judgements, to establish that responsibility, with the help of another normative construction, the joint criminal enterprise (according to some

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<sup>53</sup> Blaškić I, § 332; for more details about the differences to the judgment in Delalić see: van SLIEDREGT 2003, 160-164

<sup>54</sup> JONES-POWLES 2003, 6.2.134-135

<sup>55</sup> DAMAŠKA 2001, 456

<sup>56</sup> Blaškić II, § 257-58

<sup>57</sup> DANNER-MARTINEZ 2005, 130

<sup>58</sup> van SLIEDREGT 2003, 144 etc.; JONES-POWLES 2003, 6.2.112

calculations since 2000 81% of indictments have been founded on the construction of the joint criminal enterprise).<sup>59</sup> Here, as we will see below, the establishment of cognitive and functional components is laid aside, and indirect intent as a form of guilt is formulated, in that the intellectual part (the awareness of the possibility of the commission of an offence) also covers the “collateral” crimes, of which the superior officer knew nothing, but could have foreseen them, due to the nature of the criminal “plan” or goal.

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<sup>59</sup> DANNER-MARTINEZ 2005, 107



### 2.1.1. The Functional Component of Command Responsibility

The functional component: the relationship between the superior and the subordinate person. According to the stance of the ICTY in the Delalić case, the relationship of the superior and subordinate persons may be defined as a formal rank or position in the hierarchy and also the factual authority to issue orders to subordinates (“individuals in positions of authority, whether civilian or within military structures, may incur criminal responsibility under the doctrine of command responsibility on the basis of their de facto as well as de jure positions as superiors”, §354) and command responsibility is also applied to political and civilian leaders and not only to military commanders (“..the applicability of the principle of superior responsibility in art. 7(3) extends not only to military commanders but also to individuals in non-military positions of superior authority”, §363). Here the de facto supervision which a superior has over a subordinate is important (“..a position of command is a necessary precondition for the imposition of command responsibility. However, this statement must be qualified by the recognition that the existence of such a position cannot be determined by reference to formal status alone. Instead, the factor that determines liability for this type of criminal responsibility is the actual possession, or non-possession, of powers of control over the actions of subordinates. Accordingly, formal designation as a commander should not be considered to be a necessary prerequisite for command responsibility to attach, as such responsibility may be imposed by virtue of a person's de facto, as well as de jure, position as a commander”, §370). In an analysis of the case law of the international military tribunals after World War II, the first instance judgement in the Delalić case established that the construction of command responsibility was not only applied to military commanders regarding the behaviour of persons immediately subordinate to them, but also much more widely: regarding the behaviour of persons who were not subordinate to them, but they were able to supervise them, regarding commanders of an occupied zone for offences committed by civilians outside their command authority, to commanders with operative and not command authority, and to civilians who had real “effective” authority and supervision over a certain circle of people<sup>60</sup> (e.g. the director of a company which employed prisoners in concentration camps, the head of the office of the military governor, and even the foreign minister as a member of the government regarding the crimes of military personnel otherwise subordinate to the ministry of defence - the case of Hirota from the case law of the Tokyo tribunal of 1948)<sup>61</sup>. But in terms of civilians, command responsibility must be founded on real authority and supervision over subordinates, which must be “similar” to true command and supervision of military commanders over military personnel (“..it is the Trial Chamber's view that, in order for the principle of superior responsibility to be applicable, it is necessary that the superior have effective control over the persons committing the underlying violations of international humanitarian law, in the sense of having the material ability to prevent and punish the commission of these offences. With the caveat that such authority can have a de facto as well as a de jure character,

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<sup>60</sup> Delalić I, § 370-376.

<sup>61</sup> For the Hirota case cf. van SLIEDREGT 2003, 129-130, 145.

the Trial Chamber accordingly shares the view expressed by the International Law Commission that the doctrine of superior responsibility extends to civilian superiors only to the extent that they exercise a degree of control over their subordinates which is similar to that of military commanders”, §378). If a person has formal and true authority to command, it is possible that the scope of real authority may be greater than formal.<sup>62</sup> In the *Aleksovski* case, the defendant was sentenced for criminal offences committed by prison guards under his command, but he was acquitted of those committed by members of the reserve units of the HVO who were not subordinate to him and therefore he did not have any real supervision of them<sup>63</sup>, but commentators criticized this stance, believing that the commanders of concentration camps must take care of the safety of the prisoners and do all they can within their authority to be informed of any form of abuse of prisoners in order to prevent it.<sup>64</sup> Issuing orders or exercising authority usually ascribed to military commanders is a strong indication that a person is in fact a commander. But these are not the only relevant indicators.<sup>65</sup> When establishing command responsibility, it is necessary to establish what is known as “effective control”. This notion in the sense of the actual possibilities of preventing or punishing criminal behaviour, regardless how that control is exercised – is the threshold which must be reached in order to show the existence of the relationship of subordination and superiority for the needs of Article 7(3) of the Statute.<sup>66</sup> The requirement of establishing effective control was also set by the Trial Chamber in the *Blaškić* case:

„In order for the principle of superior responsibility to be applicable, it is necessary that the superior have effective control over the persons committing the underlying violations of international humanitarian law, in the sense of having the material ability to prevent and punish the commission of these offences. Accordingly, a commander may incur criminal responsibility for crimes committed by persons who are not formally his (direct) subordinates, insofar as he exercises effective control over them. Therefore, the "actual ability" of a commander is a relevant criterion, the commander need not have any legal authority to prevent or punish acts of his subordinates. What counts is his material ability, which instead of issuing orders or taking disciplinary action may entail, for instance, submitting reports to the competent authorities in order for proper measures to be taken”<sup>67</sup>.

The indicators of effective control are more a matter of evidence than substantive law and those indicators are limited to evidence of the fact that the defendant had power to prevent, punish or take steps to institute proceedings against the perpetrator when appropriate.<sup>68</sup> The temporary character of some military units is not in itself sufficient to exclude the relationship of subordination between members of the unit and its commander. To be able to hold a commander responsible for the acts of people under him on an ad hoc or temporary basis, it must be shown that they, at the time they

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<sup>62</sup> *Akayesu* I, § 76.

<sup>63</sup> *Aleksovski* I, § 106-111, 119.

<sup>64</sup> *van SLIEDEREGT* 2003, 148.

<sup>65</sup> *Kunarac et al. I*, § 397.

<sup>66</sup> *Delalić et al. II*, §256.

<sup>67</sup> *Blaškić I*, §300-302.

<sup>68</sup> *Blaškić II*, §69.

committed the crimes of which he is charged in the indictment, those people were “under the effective control of that specific person”.<sup>69</sup> The commander or superior is the person who has authority and ability, whether de iure or de facto to prevent the crimes of subordinates or to punish the perpetrators of crimes after the crimes are committed. The Appeal Chamber, in the Delalić case pointed out as follows:

“The power or authority to prevent or to punish does not solely arise from de jure authority conferred through official appointment. In many contemporary conflicts, there may be only de facto, self-proclaimed governments and therefore de facto armies and paramilitary groups subordinate thereto. Command structure, organised hastily, may well be in disorder and primitive. To enforce the law in these circumstances requires a determination of accountability not only of individual offenders but of their commanders or other superiors who were, based on evidence, in control of them without, however, a formal commission or appointment. A tribunal could find itself powerless to enforce humanitarian law against de facto superiors if it only accepted as proof of command authority a formal letter of authority, despite the fact that the superiors acted at the relevant time with all the powers that would attach to an officially appointed superior or commander. Whereas formal appointment is an important aspect of the exercise of command authority or superior authority, the actual exercise of authority in the absence of a formal appointment is sufficient for the purpose of incurring criminal responsibility. Accordingly, the factor critical to the exercise of command responsibility is the actual possession, or non-possession, of powers of control over the actions of the subordinates.”<sup>70</sup>

The criterion of effective control of a superior assumes that for the same criminal offence committed by a subordinate, several people may be held accountable.<sup>71</sup> In the case of Krnojelac, the Trial Chamber took the stance that two or more superior officers could be seen to be responsible for the same crime committed by the same individual, if it is proven that the main perpetrator at the time in question was under the command of both superior officers.<sup>72</sup> From the requirement for the existence of effective control it arises that even civilians may be responsible on the basis of Article 7(3) of the Statute of the ICTY:

„A civilian must be characterised as a superior pursuant to Article 7(3) if he has the ability de jure or de facto to issue orders to prevent an offence and to sanction the perpetrators thereof. A civilian’s sanctioning power must however be interpreted broadly. ...It cannot be expected that a civilian authority will have disciplinary power over his subordinate equivalent to that of the military authorities in an analogous command position... The Trial Chamber therefore considers that the superior’s ability de jure or de facto to impose sanctions is not essential. The possibility of transmitting reports to the appropriate authorities suffices once the civilian authority, through its position in the hierarchy, is expected to report whenever crimes are committed, and that, in the light of this position, the likelihood that those reports will trigger an investigation or initiate disciplinary or even criminal measures is extant.”<sup>73</sup>

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<sup>69</sup> Kunarac et al. I, §399.

<sup>70</sup> Delalić et al. II, §192-194, Aleksovski I, §76.

<sup>71</sup> Blaškić I, §303.

<sup>72</sup> Krnojelac I, §93.

<sup>73</sup> Cf. Aleksovski I, §78.

The element of “effective supervision” and “effective control” is key:

a) for the responsibility of the superior de jure and de facto, for on the one hand in a double chain of command the responsibility falls on the one who in fact gives command (in the first instance judgment in the Krstić case, although the defence claimed that after the fall of Srebrenica the Serbian army took commands from General Mladić – who ordered mass execution – and not only General Krstić, it was determined that Mladić’s issuance of direct orders did not de facto suspend the chain of command, of which General Krstić was head<sup>74</sup>), and on the other hand, a military commander is not only responsible for the actions of his subordinates within the formal military hierarchy, but also for the actions of all persons over whom he has actual authority, such as people from other military units or civilians in the occupied areas<sup>75</sup>, of course under the condition that the burden of proving the fact of that authority is not reduced. Here it is not important that the authority of command also includes the possibility of imposing sanctions on subordinates.

b) to determine the scope of command responsibility of non-military persons which is determined by hierarchical and not psychological relations: according to the opinion of commentators, the ICTY, in the second instance decision in the Delalić case, correctly overruled the previous opinion of the ICTR expressed on 21 May 1999 in the Kayishema & Ruzindana case, that actual supervision of subordinates is founded on the psychological “power of influence”, stating that supervision in command responsibility does not consist of substantial influence over subordinates, but in the hierarchical relationship characterised by authority and submission to that authority (an element of that relationship is also financing subordinates), whilst other relationships of the participants in a criminal offence relevant in criminal law may be founded on the psychological influence, such as for instance aiding and abetting.<sup>76</sup> If true supervision were only founded on psychological influence then it would be possible, as shown in the case of Musema before the ICTR, to convict an employer for neglecting to prevent a criminal offence by his employee, because otherwise the possibility of giving him the sack or denying him his wages is a sufficiently strong psychological measure. This naturally is an unacceptable extension of the zone of criminality. Its boundaries are the circumstances that the superior took on the supervision of a “source of danger” and that there were expectations in the public eye that the measures involved in that supervision would actually be used to prevent criminal offences.<sup>77</sup> Proving “effective” supervision of subordinates has in practice been resolved by the ICTY by establishing various indications: who appeared before the immediate perpetrators as the command bearer<sup>78</sup>, whom did the camp prisoners

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<sup>74</sup> Krstić I, § 625.

<sup>75</sup> Blaškić I, § 445, 451, 464; DERENČINOVIĆ 2001, 35.

<sup>76</sup> Delalić II, § 258-265; van SLIEDEREGT 2003, 151.

<sup>77</sup> WEIGEND 2004, 1013.

<sup>78</sup> Prosecutor v. Nikolić, the decision on review of the indictment of 20 October 1995, § 24. The top ranking officers have no direct authority to issue commands, and so they cannot be ascribed with responsibility for violations of military discipline by subordinates, and cannot be considered to be those who have effective control; Delalić II, § 266, 300.

point out as the commander and describe his behaviour before the guards<sup>79</sup>, who according to workers in international humanitarian organizations behaved like a commander and made decisions.<sup>80</sup> An important indication previously was also the fact of the financing of subordinates, which made the conclusion possible that the “payer” had “overall control” over them. The second instance judgment in the Tadić case, in resolving the question whether there was an international conflict in Bosnia and Herzegovina because the military operations of the Bosnian Serb forces could be ascribed to the military leadership of the SRY as the body which regulated the actions of the otherwise functionally differentiated Serbian military systems, stated that not only were the high ranking officers of the former JNA retained in command positions in the army of the Republika Srpska after the renaming of the JNA as the Yugoslav Army on 19 May 1992, although they did not have their origin or residence in the Republika Srpska, but also the government of the SR of Yugoslavia continued paying them when they were serving in the RS army, regardless of the fact of whether they were Bosnian Serbs or not.<sup>81</sup> However after the judgment by the International Court of Justice of 26 February 2007 in the dispute between Bosnia and Herzegovina and Serbia and Montenegro for the violation of the Convention on prevention and punishment of genocide, this criterion was brought into question as too broad: removing the “overall control” test mentioned<sup>82</sup>, the International Court of Justice, in resolving the question whether the genocide in Srebrenica could be ascribed to the accused Serbia and Montenegro on the basis of the behaviour of its state bodies, stated that the prosecutor in the dispute “did not show that the army of the defendant or its political leaders, took part in preparing, planning or executing the massacre,” because from the otherwise undisputed fact that “it was shown by many pieces of evidence that the official army of the (then) SRY took part before the event in Srebrenica in the military operations in Bosnia and Herzegovina, together with the army of the Bosnian Serbs, it cannot be proved that there was any kind of participation of this nature in the massacre committed in Srebrenica.” Regardless of the fact that this judgement does not directly affect the ICTY legally as a court with different jurisdiction than the International Court of Justice, it may still be said that by it the International Court of Justice in fact raises the standard of proof in establishing (criminal) responsibility for collective criminal offences, requiring both for the actual action of the criminal offence and also for the responsibility of the

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<sup>79</sup> Delalić I, § 763.

<sup>80</sup> Prosecutor v. Mrkšić, Radić & Šljivančanin, decision on control of the indictment of 3. IV. 1996, § 16.

<sup>81</sup> Tadić II, § 145, 150.

<sup>82</sup> The International Court of Justice in its judgment (§ 403, 404-406) states that it “carefully considered the arguments of the second instance chamber of the ICTY (in Tadić) but could not accept them because the ICTY in the Tadić case could not decide on questions of the responsibility of the state so going into them, it resolved something which was not “vital for the execution of their jurisdiction”. It could have it is true made use of the test of overall control to assess the subordinate nature of individuals to some superior authority within the framework of the standards of international criminal law, but it could not state that that test also be used for assessment of the relationship between the state formations on the basis of the standards of international law, since the use of the overall control test would extend the responsibility of the state beyond the scope of the basic principles of international law, which postulate that a state may only be responsible for its own behaviour.

perpetrator “complete evidence”, similar to the way, in the history of continental criminal proceedings over many centuries, it demanded so-called legal evidence theory<sup>83</sup>. The reasons for this will be the subject of future studies; but already here we can propose the hypothesis that this, as a legal sequel, may be linked with the construction of the proceedings before the International Court of Justice as party disputes over the application of standards of international law, in which the established legally relevant facts are founded on the opposition of two contradictory hypotheses. This kind of construction is clearly not satisfactory in cases such as genocide, in which the judges’ need for knowledge could only be met by shedding intensive light on the conditions for the application of the highly postulated policies of the international community (in the Convention for the prevention and punishment of genocide), implemented in the form of official investigations by qualified state bodies<sup>84</sup>, enhancing the accuracy of the evidence contained in the written documents, in any case the only evidence and vital for the right outcome of the long lasting and erratic proceedings before the International Court of Justice<sup>85</sup>, which the International Court of Justice could not obtain “in the full text of certain documents”<sup>86</sup> from the defendant Serbia and Montenegro and the ICTY.

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<sup>83</sup> Cf. BAYER 1995, 66, 95 etc., 114, 135.

<sup>84</sup> The quotation of the summary of the judgment of 26 February 2007 gives §§ 202-230 of the judgment which states that the International Court of Justice in its earlier decision regarding armed activities in the area of Congo (in the case D.R. of Congo v. Uganda) the evidence “..merits special attention” which comes from questioning people who were directly involved in the event and who were afterwards subject to cross-examination by the judges who were “..skilled in examination and experienced in assessing large amounts of information..”

<sup>85</sup> In relation to the construction of proceedings of the party and investigative type with epistemological judicial adjudication cf. DAMAŠKA 2003, 122 etc., 127 etc.

<sup>86</sup> Ibid., p. 9 (Questions of proof, §§ 202-230).

### 2.1.2. The Cognitive Component of Command Responsibility

The cognitive component: guilt in command responsibility. We mentioned that the provisions of Article 86, paragraph 2 of the Additional Protocol to the Geneva Conventions of 1977 already prescribed that for serious violations of the Geneva Conventions, alongside the subordinate who committed the offence, his commander was also responsible if he failed to take all the measures he could to prevent or punish, even though he “has known or should have known” what happened. This requirement is the central issue of command responsibility for crimes of subordinates, because the commanders’ responsibility will be narrower depending on the interpretation of this question, as derived from his actual knowledge of the actions of his subordinates (intent) or broader, without that knowledge – depending on the severity of the neglect of his duty to know about those crimes – as one form of negligence or even objective responsibility. In the case law of the ICTY, after the judgement by the ICTR in the Akayesu case, which stated that command responsibility is founded on the principle of individual criminal responsibility and founded on intent as a form of guilt, or negligence which was so “serious that it was close to assent for the crime” (in our understanding it becomes indirect intent /*dolus eventualis*/)<sup>87</sup> and the provisions of Article 7(3) of the Statute of the ICTY, which prescribe the responsibility of the superior “if he knew or had reason to know that the subordinate was about to commit such acts or had done so and the superior failed to take the necessary and reasonable measures to prevent such acts or punish the perpetrators thereof”, are interpreted such that the necessary knowledge of the superior, who may not deliberately remain blind to the crimes of his subordinates, must be proven by direct or indirect evidence. This is taken to be information which the superior officer obtained from subordinates or international peace monitors, on the number of criminal offences, their type and severity, the time and place they were committed, the number and type of military units, the frequency and *modus operandi* of criminal behaviour, operative officers and local commanders and others.<sup>88</sup> However, the ICTY did not give an answer to the question of how far the duty of the superior officer extends to supervise his subordinates and how specific the information has to be to establish his responsibility, although it did establish that international customary law *tempore criminis* in the former Yugoslavia, only allowed the conviction of commanders if they had available “specific information of the actions of their subordinates”. This kind of information does not have to relate directly to the crime but it must be such that it shows the commander the need “for additional investigation, in order to establish whether his subordinates had committed a criminal offence or were preparing to commit one.”<sup>89</sup> This stance was confirmed by the Appeals Chamber in the same case, on the basis of the principle that command responsibility must not represent the objective responsibility of a commander, but he must answer according to the principle of guilt, which must be established at least on the level of conscious negligence, that is, when he had information available on the behaviour of his subordinates which could have “warned him of their criminal

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<sup>87</sup> Akayesu I, § 489

<sup>88</sup> Delalić I, § 386

<sup>89</sup> Ibid. § 393

offences”<sup>90</sup> Therefore the second instance judgment stated the stance that command responsibility is not objective since it rests on the principle of guilt, but as a possible form of guilt it appears not only as intent but also negligence if the commander “had reason to know” of the behaviour of his subordinates, that is, when he had information available by which he should have known about their criminal offences. Therefore it may be concluded that today with command responsibility the standard accepted by the ICTY establishes the commander’s guilt for all criminal offences by subordinates about which the commander knew and for those about which he did not know due to neglect of this due care and attention over his subordinates. Thereby the form of guilt established from the judgement by the ICTR in the Akayesu case, is reduced to negligence. This is completely understandable for pragmatic reasons, since proving the awareness of a superior of a subordinate committing or preparing to commit a criminal offence is “very difficult”.<sup>91</sup> This is instructively pointed out by commentators, thereby accusing the international courts of the inability to define precisely, in the case of command responsibility, the standard forms of guilt and the burden of their proof:

“Much of the controversy over Yamashita and modern-day command responsibility cases has stemmed from issues of evidence and proof. Because indirect or passive command responsibility cases are based mostly on circumstantial evidence, they involve difficult inferential judgements about what a commander should have known and should have done differently. These circumstantial judgements, like many other factual conclusions in such trials, are highly contestable for those inclined by political sympathy to view the evidence more charitably to the defendant. The failure of some courts and tribunals, beginning with Yamashita, to precisely articulate what legal standards they are applying in terms of mens rea and proof of effective control has generated an equal, if not greater, measure of controversy, inviting accusations that convictions are based on something akin to strict liability”.<sup>92</sup>

A similar criticism is expressed by Weigend<sup>93</sup>, who points out the difference between the scope of the duty of the superior to be completely informed at all times about all the activities of his subordinates where he must himself take care to obtain information about any possible crimes that they are planning, established in the judgments of the ICTR, and the scope of duty of a superior to take the necessary measures only when he had information and should have concluded that his subordinates were planning crimes, established in the judgments of the ICTY. He concludes that the legal construction of command responsibility in international criminal law is close to the domestic law of those traditions who do not insist on a clearly defined differentiation between members of a group based on their guilt, but prescribes broad possibilities for their punishment, such as common law (in the so-called “felony murder” rule, which punishes every participant for murder for the death of a person, regardless whether the death occurred accidentally or due to someone’s excess) or French law (in the figure *responsabilité pour fait d’autrui*) and thereby actually favours the efforts to convict before international criminal courts for

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<sup>90</sup> Delalić II, § 241

<sup>91</sup> NOVOSELEC 2004, 497

<sup>92</sup> DANNER-MARTINEZ 2005,125

<sup>93</sup> WEIGEND 2004, 1022-25



the most serious mass crimes, expressed such that “...those who are culpable of the commission of a crime ... cannot escape responsibility through legalistic formalities.”<sup>94</sup>

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<sup>94</sup> Kayishema&Ruzindana I, §222

### 2.1.3. The Operative Component of Command Responsibility

The Operative Component: the failure of a superior to take necessary and reasonable measures in order to prevent a crime or punish the perpetrator. In the first instance judgement in the Delalić case, the ICTY stated that all who have a superior position in a hierarchy, due to the nature of their position, are bound to undertake all necessary and reasonable measures to prevent crimes by their subordinates, or if the crimes have already been committed, to punish them.<sup>95</sup> Neglect of that duty – as required by international law – establishes the responsibility of the superior. It does not depend, as it says, on the formal position of the superior in the chain of command, but on his essential ability to prevent and punish by necessary and reasonable measures the behaviour of his subordinates: it cannot be expected from a superior that he take “impossible” measures, and which measures are “necessary and reasonable” depends on the circumstances of the case and cannot be determined in advance.<sup>96</sup> However, since the superior needs to take not any action within his scope of responsibility, but what is necessary with the aim of preventing the crime, it is clear that he must be led by the criteria of effectiveness.<sup>97</sup> However, since the superior does not necessarily have independent authority for punishing his subordinates, it is sufficient for him to neglect to report or send the appropriate notice about the criminal offences by the subordinates which may result in their punishment.<sup>98</sup> This is disputable, both in terms of the legal basis for this responsibility in international law, as well as regarding its legal consequences. In terms of the legal basis, commentators point out that the judgments of the international military tribunals after World War II did not take neglect to punish subordinates as the only basis for the responsibility of superior officers<sup>99</sup> and that it arises for the first time in the provisions of Article 86(2) (together with the obligation to institute criminal or disciplinary proceedings in Article 87(3) of the Additional Protocol to the Geneva Conventions of 1977 which was later adopted by the Statutes of the ICTY and the ICTR and some judgments of the ICTY<sup>100</sup> were declared it to be international customary law).<sup>101</sup> Regarding the legal consequences, several questions arise. On the one hand, if the foundation of the responsibility of the superior lies in covering up a criminal offence of his subordinates, then it may be deemed that it only exists in cases when the subordinate was only preparing to commit a criminal offence or when he began it (since that punishment would prevent him from the attempt or completion of the act) but not in the case when the criminal offence was actually finished, so punishment could no longer prevent it; however, through this kind of equalizing of cases when the superior did not prevent the commission of the criminal offence and cases when punishment could no longer achieve this, the provisions of Article 7(3) of the Statute of the ICTY and its application show that the ICTY completely eliminates the causal effect of

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<sup>95</sup> Delalić I, § 346

<sup>96</sup> Ibid. § 394-395

<sup>97</sup> WEIGEND 2004, 1014

<sup>98</sup> Aleksovski I, § 78

<sup>99</sup> DAMAŠKA 2001, 489-493

<sup>100</sup> Hadžihanović II, § 18

<sup>101</sup> WEIGEND 2004, 1020

what was not done as a component of command responsibility.<sup>102</sup> On the other hand, the responsibility of a superior is established in every failure to report criminal offences of subordinates, and also those which they committed under another superior person<sup>103</sup> which is in clear contradiction to the requirement that for the responsibility of the superior it is necessary for him to have “effective control” over the subordinates who are preparing or committing a criminal offence.<sup>104</sup> However, the contemporary case law of the ICTY passes over both these objections, as well as over the argument of the defence in the appeal against the indictment in the Blaškić case, that the failure to punish subordinates does not represent an independent basis for the criminal responsibility of a superior in international customary law. This objection was already rejected earlier by the decision of the first instance Chamber of 4 April 1997, founded, amongst other things, on the stance that the ICTY itself and not the UN Security Council, which is not a legislative body, is authorized to establish what constitutes standards of international law and determine their own jurisdiction.<sup>105</sup> When a superior fails to take the necessary and reasonable measures to prevent a criminal offence by subordinates or to punish a crime they have committed (Art. 7(3) of the Statute of the ICTY) by this attitude, they may show subordinates or offer moral support for further criminal offences they will commit. Therefore they may be found responsible – in ideal circumstances – for aiding and abetting those criminal offences according to the provisions of Article 7(1) of the Statute of the ICTY.<sup>106</sup> Here it is necessary to point out that it is possible to extend the responsibility of the superior as the aider or abetter of the criminal offences which the subordinates committed before he took command of them, if it can be proven that they knew of his intention to cover up their criminal offences in future and this contributed to their decision to commit them.<sup>107</sup> We may therefore conclude that these components of the notion of command responsibility show the structure of that legal figure, which is founded: a) on the failure to act in line with duty by a commander or superior person as a form of commission of a criminal offence of failure to act; b) on the existence of the duty within the framework of the hierarchy, which means the position of authority of the superior person over third persons, over whose behaviour, which is dangerous, the superior person must exercise control and on c) guilt aimed at omission of necessary control (and not the behaviour of the subordinates). Forms of this guilt, we have seen, are the intent or negligence of the superior, in that in comparison with “classical” criminal offences of commission, the elements of his awareness must not only cover the situation in which his subordinates commit an international criminal offence and his own possibility to control them, but also his assent to the crime of which he knew or had reason to know, that is, when he had information available from which he should have known about it (negligence).

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<sup>102</sup> Delalić I, § 398

<sup>103</sup> Prosecutor v. Hadžihasanović, decision by the first instance chamber on the objection to the jurisdiction of the court of 12. XI. 2002, § 201

<sup>104</sup> van SLIEDEREGT 2003, 168; JONES-POWLES 2003, 6.2.137; WEIGEND 2004, 1020

<sup>105</sup> JONES-POWLES 2003, 6.2.140

<sup>106</sup> Blaškić I, § 337; Kordić and Čerkez I, § 371

<sup>107</sup> van SLIEDEREGT 2003, 173

## **2.2. Criticism of the Institution of Command Responsibility**

The most serious violations of international law, such as war crimes, crimes against humanity, and genocide, are characterised by the fact that their perpetrators regularly act with intent (in some crimes this intent is particularly expressed, as in for example genocide) and what marks the essence of those criminal offences in most cases is realized by active participation (perpetration). These are intentionally committed crimes. On the other hand, the institution of command responsibility, in the strict sense, which imputes the most serious international crimes to persons who had “effective control” over subordinates, is a combination of crimes of omission and a minimal level of guilt, found on the borders of negligence and objective responsibility. This, for international criminal law, very unusual combination, brings into question the purpose of punishment, whose “dictate of justice” suggests a “deserved” punishment, that is, sanctions which mean an appropriate reaction to guilt of unlawful behaviour, that is, the manifestation of personal departure from the demands of the legal order. The construction of responsibility for negligence, when it is a matter of the most serious violations of international humanitarian law in international criminal law, is to say the least in divergence with most national criminal law systems. In the majority of criminal legislation negligence is considered a less severe form of guilt. So for negligence milder forms of punishment are prescribed. Moreover, the fact that punishing negligence is an exception is also confirmed by the fact that according to most national criminal legislations responsibility for intent is the rule, and for negligence only when this is prescribed by a separate act. The form of guilt is also the basis for the division of criminal behaviour in comparable legal systems. So it is, for instance, with the division into serious (*Verbrechen*) and minor (*Vergehen*) criminal behaviour in German law. More serious criminal behaviour is exclusively intentional acts (*vorsätzliche Handlungen*) punishable by life imprisonment or imprisonment longer than three years. National criminal law systems have a similar relationship towards acts of omission. So in French criminal law, the failure to carry out a duty or neglect of due care and attention, imposed by the law or some other regulations, in situations when the perpetrator neglected this due care, bearing in mind where it is applied and the nature of his role or function, may be the foundation for criminal responsibility for minor forms of criminal behaviour – misdemeanours (*delits*). Responsibility for criminal offences as the most serious form of punishable behaviour in French law only exists if the perpetrator acted with intent, and as a rule, by commission. The combination of neglect and omission, although these institutions cannot be criticized if they are considered separately, is problematic because it prescribes responsibility without a strong element of guilt or an element of independent choice, which is usually seen in active behaviour. There follows below a presentation of several critical points of the institute of command responsibility which is the result of the combination of negligence and omission. These are critical points for the question of the applicability of the standard of command responsibility to non-military leaders and establishing the element of causation in command responsibility.

### **2.2.1. The Application of the Standard of Command Responsibility to Non-Military Commanders**

As has already been said, according to the practice of the ICTY so far to pronounce guilty on the basis of Article 7(1) of the Statute of the ICTY, for the Prosecution it was sufficient to prove that the commander had de facto control over the actions of his subordinates. This opened the question of whether other persons, for whom it was proven that they had that kind of control over the perpetrators of the crimes, not just military commanders, could be found responsible in the sense of the concept of command responsibility. The Chambers of the ICTY on that question, as was talked about earlier, answered positively, as shown by an analysis of the applied law and the ratio legis of its origins. Analyzing Article 7(3) of the Statute of the ICTY, it may be concluded that it does not only relate to military commanders, but it may also be applied to civilians. This is particularly the case if Article 7(3) is interpreted in connection with Article 7(2) (which relates to the responsibility of high ranking state officials regardless of their official position). This stance was also expressed by the American UN representative on acceptance of Resolution 827 and in the indictment of Milan Martić, where, amongst other things, it is stated: “The Tribunal has jurisdiction over persons who, in view of their position in political or military authority were able to command the perpetrators of crimes which are within the jurisdiction of this court *ratione materiae* as well as over persons who knowingly (consciously) did not prevent or punish the perpetrators of these crimes”. According to Article 28 of the Rome Statute, command responsibility extends to military commanders or persons who actually act as military commanders and to all other superiors (paragraph 2), that is people who are not military commanders or who do not actually act as military commanders. The responsibility of the latter is formulated more narrowly than the responsibility of military commanders (paragraph 1). In the explanatory notes to the Draft Code of Crimes against Peace and Security of Mankind of the Commission for International Law it states that the word “superior” is sufficiently broad to include and cover not only military commanders but also representatives of civilian authority, who are in a similar command position and who exercise and have a similar level of control towards their subordinates. The case law of the ICTY and the ICTR has so far expressed itself positively regarding command responsibility of civilians. In the statement of reasons of the judgement in the Delalić case and the Aleksovski case, the Chambers referred to the judgements of the military tribunals for the Far East rendered after World War II. After World War II many representatives of civilian authority were convicted on the basis of command responsibility. One of them was the Japanese foreign minister Koki Hirota, who was found responsible on the basis the concept of of dereliction of duty. That is to say, soon after the entry of the Japanese military forces into Nanking, he received reports on all the events and crimes committed by the Japanese army against the civilians there. The court judged that Hirota, despite the fact that according to the reports he knew what was happening, simply abandoned his duty, neglecting to insist in the government that all necessary and rapid action be taken to prevent the situation on the ground. Hirota it is true, counted on the promises of the War Ministry that the crimes would end, but he personally did not do anything within his scope to bring an end to

the crimes. In relationship to the consequences he acted out of negligence. The foreign minister Mamoru Shigemitsu was also found responsible later on the basis of command responsibility, since, as a government minister he was obliged to carry out an investigation into the situation in prisons and the treatment of prisoners of war, but did not do so. In the case of the Flick et al., the court found the accused Weiss and Flick, leading German industrialists of that time, guilty for their voluntary involvement in running a program of slave labour in German factories in their ownership during World War II. In a similar way the High Military Court in the French occupied zone in Germany in the Roechling case established that the director and owner of the factory was responsible not only for inhuman treatment of prisoners of war and deported persons, whose labour was used in production, but also because he allowed this treatment, which he knew about, and even supported it, and because he did nothing to stop the abuse.<sup>108</sup> The opinion of the court in the High Command case was confirmed in the judgement by the American military court in the Hostage case – although those people could be responsible for their own behaviour, which represented a criminal offence, they could not be responsible as commanders on the basis of command responsibility. This is because they were part of the chain of command responsibility and they were not authorized to make decisions, but to execute them by issuing so-called implementing orders. All a subordinate commander can do in these circumstances is get in touch with his commander and warn him, and the command responsibility is his. The Tokyo tribunal took a different stance in the Muto case. General Akira Muto was the chief of staff of General Matsui at the time when the crimes were taking place in Nanking, but also chief of staff of General Yamashita during the crimes committed by the Japanese army in the Philippines. He was convicted on the basis of command responsibility because he was “in a position of influence in politics”, that is, over his superiors, which he did not make use of. The court rejected his defence that he did not know that crimes were being committed on the ground. What is problematic in this case is the general statement by the court that the accused was “in a position of influence in politics”. Here, that is to say, it is not sufficiently clearly defined how the accused could realize this and even if it was mentioned (e.g. by a complaint to the commander, reporting to superiors and finally requesting release), it is not clear that he would thereby be in a position to “prevent the crimes and punish their perpetrators”.<sup>109</sup> In seeking an answer to the question not only of whether the provisions of Article 7(3) of the ICTY Statute relate to civilians<sup>110</sup>, but also, if the answer is positive, is there any sense or justification for something like that, in view not only of international humanitarian law but also international rules of war, it is necessary to recall what the ratio legis was for introducing command responsibility into international criminal law. This hybrid form

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<sup>108</sup> In the Roechling case the court found that the defendant’s duty was “as director (the accused Hermann Roechling was the director of the company of the same name in which people were abused as forced labour) to inform himself of how foreign workers and prisoners of war were being treated, whereby the employment of the latter in munitions factories was forbidden by the rules of war, which he could not have been unaware of; he cannot distance himself from responsibility by a statement that he was not interested in that matter” DERENČINOVIĆ 2000.

<sup>109</sup> Ibid.

<sup>110</sup> Cf. VETTER 2000.

of derived criminal responsibility, which is a combination of negligence and omission, arose as an expression of the need to issue a warning by punishing military commanders to those formal structures those military commanders represent. They also, by the same token, represent a side in the conflict at which the symbolic warning was aimed in the end. It should not be forgotten that international criminal law since World War II has still remained focused in a formal sense on physical persons as the only subject of criminal responsibility. However, to punish only the direct physical perpetrators (when it is even at all possible to establish who they are) does not seem to be an appropriate reaction to the mass violations of humanitarian law in the conditions of an armed conflict. For this reason command responsibility *stricto sensu* was introduced to international criminal law. It remained the only instrument by which a warning could be sent to entire structures, communities and states, through people who, in view of their formal positioning in the hierarchy of the command structure, gave legitimacy to those structures in relation to third parties. It would perhaps be too bold to claim that command responsibility remains as a relict of collective responsibility in international criminal law, but there is absolutely no doubt that precisely through that institution an attempt is being made to reconcile two extremes – individual criminal responsibility and mass crimes. Precisely for this reason punishment for command responsibility has a special symbolic dimension, which, to a significant extent goes beyond the principle that the punishment must be proportional to the perpetrator's guilt. In a victim-oriented system of justice, the punishment, alongside its real effect, must also have a visible effect. This is only possible by punishing people who were in a formal sense part of the command structure, by which a warning is sent to the structures of that unit. This is the basis of the imputation of actions of other persons (*actus reus*) to the commander in command responsibility. The institute of command responsibility is the consequence of the command position which military commanders have within the structure of the armed forces, their awareness of their own guaranteed position, both in the regulations and practice on which that position is founded. Let us illustrate this by one example. In the practice of the ICTY, the stance was adopted that one of the measures of not preventing the commission of crimes by subordinates is considered to be the omission of the military commander to teach them the relevant content of international humanitarian law and their duty to respect those standards. It is questionable how far, in the conditions of completely disintegrated formal military structures, which without a doubt existed during the war in Bosnia and Herzegovina, it is possible to demand knowledge of that content from an *ad hoc* commander. In August 1992 the presidency of Bosnia and Herzegovina issued an order on “the Application of the Regulations of International Rules of War in the Armed Forces of Bosnia and Herzegovina” which came into force on 5 September of the same year. This order related to the commanders of units and all members of the armed forces who were individually responsible for its application. Military commanders are obliged to take all measures prescribed in those regulations against persons who violate them. Also, the regulations prescribe that all members of armed forces be subject to training to be acquainted with those rules. It is clear that those rules are completely intended only for those who hold various functions within the formal structure of the armed forces. Apart from those Rules, there were regulations already

inherited from the former SFRY, relating to the actions of the armed forces. So in the indictment against Mrkšić, it is emphasized that he, as an officer in a command position in the JNA, was obliged to observe all the regulations of the JNA, such as the Strategy of Armed Conflict (1983), the Act on General Civil Defence (1982), the Act on Service in the Armed Forces (1985), the Rules of Service (1985), and Regulations on the application of the rules of international war law in the armed forces of the SFRY (1988). These regulations regulated the role and tasks of officers of the JNA, their position in the chain of command, and they bound officers and their subordinates to keep the rules of war. It is simply unrealistic to expect from people who, very often, by force of circumstances had to take on certain command functions, although they had had nothing to do with military strategy, tactics and techniques previously, to know the contents of all these regulations and the related sources which regulate the behaviour of members of armed forces in conditions of armed conflict. The attribution of the responsibility of a commander is founded on the duties that commander has in view of his position in the military hierarchy. Therefore acts committed by subordinate soldiers in the field in a certain sense may generalize the legal responsibility of the organization as a whole. Moreover, it is appropriate to require officers, who hold important functions within the military structure, to ensure respect for international rules of war from the military enterprise to which they too belong. Military commanders have gone through sophisticated and demanding training for action in the conditions of armed conflict. They have been educated in the content and application of the rules of international humanitarian law. Moreover, they have available the structure of military discipline in the implementation of that system. Military commanders conduct training of their units from the beginning of their military service. Precisely this continuous command link allows for permanent and cumulative control by military commanders of the subordinate members of the armed forces. Military commanders are considered to be the last line of defence of international humanitarian law and for that reason their responsibility is defined more broadly even in relation to the direct, that is, the physical perpetrators.<sup>111</sup> All these reasons do not support the complete application of the doctrine of command responsibility in conditions where there is no clear chain of responsibility and authority between the military commanders and their subordinates. The lack of this chain also has a negative effect on the degree of control which is significantly smaller outside the military structure. All these reasons were taken into consideration by representatives of the states at the diplomatic conference in Rome, when they established one, stricter standard of command responsibility for military commanders than for other actual commanders, who could also be civilians. In this sense, the ICTY must take account of the fact that, especially when it is a matter of civilians charged pursuant to Article 7(3) of the Statute, the Prosecutor must prove additional circumstances related to guilt and causation.

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<sup>111</sup> SHANY-MICHAELI 2001-2002.



### 2.2.2. Command Responsibility and the Causation in Crimes by Omission

The foundation of command responsibility on the basis of failure of the duty to act pursuant to Article 7(3) of the Statute ICTY is the result of the acceptance of the concept of dereliction of duty.<sup>112</sup> In the statement of reasons of the judgement in the Delalić case, the Trial Chamber stated that “it must be a case of measures or activities which for the responsible person are within the circle of his material capacity”. This means that it is not justified to require the impossible of responsible superior persons, but to take those measures and activities which, in the circumstances of the case, the responsible person could and should have taken. So for example fifteen minutes of class instruction of a theoretical nature on the laws and customs of war is nowhere near sufficient for subordinates to know what is permitted, and what is not, and what is expected of them in the situations waiting for them in the field. That is why it is necessary in military training to conduct simulations, e.g. the rules of evacuation of civilians, the correct reaction to sniper fire, correct forms of interrogation and treatment in general of enemy military prisoners etc. No military commander can have complete control over all events in the field, but his omission to take all the necessary preventive measures in order to prevent violations of the law and customs of war and violations of other sources of international law, in view of the circumstances of the case, constitute the valid basis of his command responsibility for dereliction of duty. The concept of “dereliction of duty” should be interpreted in relation to violations of international criminal law committed by subordinate persons, and not separate from those violations. In other words, there must be causation between the omission of the superior to take the necessary and reasonable measures to prevent the commission of criminal offences by his subordinates and later violations which his subordinates actually committed. In the Delalić case the Trial Chamber stated that the element (principle) of causation is not applied in establishing command responsibility:

“Notwithstanding the central place assumed by the principle of causation in criminal law, causation has not traditionally been postulated as a *condicio sine qua non* for the imposition of criminal liability on superiors for their failure to prevent or punish offences committed by their subordinates. Accordingly, the Trial Chamber has found no support for the existence of a requirement of proof of causation as a separate element of superior responsibility, either in the existing body of case law, the formulation of the principle in existing treaty law, or, with one exception, in the abundant literature on this subject”<sup>113</sup>

The Trial Chamber came to this conclusion, taking into consideration the responsibility of a superior for omission to punish, which according to Article 7(3) and customary law, shows that “the condition of causation does not exist as a separate element of the doctrine of superior responsibility.”<sup>114</sup> The Trial Chamber in the Delalić case, and here they mainly followed the cases law of other court Chambers, expressed itself negatively only in relation to proving causation in situations in which

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<sup>112</sup> DERENČINOVIĆ 2000.

<sup>113</sup> Delalić I, §398.

<sup>114</sup> Ibid. §399.

the superior failed to punish subordinate perpetrators of criminal offences. A contrario, when it is a matter of failure to undertake action and measures in order to prevent the commission of criminal offences by subordinates, from the judgement of the Trial Chamber it follows that causation is the element of responsibility of the superior on that basis:

“This is not to say that, conceptually, the principle of causality is without application to the doctrine of command responsibility insofar as it relates to the responsibility of superiors for their failure to prevent the crimes of their subordinates. In fact, a recognition of a necessary causal nexus may be considered to be inherent in the requirement of crimes committed by subordinates and the superior’s failure to take the measures within his powers to prevent them. In this situation, the superior may be considered to be causally linked to the offences, in that, but for his failure to fulfil his duty to act, the acts of his subordinates would not have been committed.”

According to Article 7(3) of the Statute of the ICTY, the failure of a commander consists of not taking necessary and reasonable measures to prevent criminal offences by his subordinates, or to punish the perpetrators. When it is a matter of a failure to punish the perpetrator, it is actually a matter of a cover up of the crime committed by his subordinates.<sup>115</sup> Since the commander accused according to Article 7(3) of the Statute of the ICTY is not liable on the basis of personal criminal responsibility from Article 7(1), precisely because he does not participate, neither indirectly, in the action of perpetrating the specific criminal offence, it is necessary to establish from where his responsibility is derived. The only possible answer would be that in those provisions it is a question of the responsibility which in civil law systems is better known as the responsibility of the guarantor (Garant in German) for the commission of criminal acts. A guarantor is the person who guarantees that consequences will not occur. The characteristic of a guarantor (or guarantee position, *Garantenstellung* in German) is a necessary hallmark of the unlawful criminal offence of omission, as they can only be committed by persons with this characteristic. In order for the responsibility of the guarantor for the unlawful criminal offence of omission to exist, four preconditions must be met: the guarantor must be capable of action, omission must by effect and significance be equal to commission of the same act of commission, there must be causation of omission and the same form of guilt which is required in relation to the criminal offence for commission. In the case of the unlawful criminal offence of omission, the link between the omission and the consequences is the assumption of responsibility for those consequences. Since omission cannot cause anything (Latin: *ex nihilo nihil fit*: nothing comes from nothing), in this case pseudo-causation is mentioned. This causation is only possible as a hypothetical causation which is established in the hypothetical process of adding the omitted act: in the thoughts, the action is added which the perpetrator was obliged to undertake, and if even under that assumption the consequences followed, there is no causation, and if they did not, causation exists (in the case of a mother who killed her child because she did not feed it, causation exists if the child would not have died if the mother had fed it). Here to establish causation it is sufficient to establish that

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<sup>115</sup> NOVOSELEC 2001, 108.

the consequences would not have occurred with a high level of probability. If there is no such probability, the principle of *in dubio pro reo* is to be applied, and to assume that the required action would not have prevented the consequences.<sup>116</sup> The guarantor therefore, is a perpetrator who is legally bound to prevent the occurrence of the consequences described. It must be a legal obligation, which means that moral obligations are not sufficient. Since this provision is general, the task of legal theory and case law is to define the guarantor's obligation more precisely. According to the formal theory of legal duty or the theory of sources, the guarantor's obligations are those that arise from the law, agreements and previous dangerous actions. According to the functional theory of legal duty, the function of a legal duty towards a legal good is decisive. According to this criterion, all the guarantor's obligations are divided into the duty to protect the legal good, and the duty to supervise a source of danger. The duty to protect some legal good may be founded on a natural connection (members of the close family are obliged to rescue each other from danger to their lives and body even when they do not live together), a narrow community (e.g. an extra-marital or a relationship which has arisen within the framework of a dangerous enterprise where the members of the expedition are guarantors for each other), and voluntary obligation (most frequently from a contract, such as an employment contract, so for example a night watchman is the guarantor for the property entrusted to his care). The duty of supervision of a source of danger arises from the principle that the duty of supervision of a source of danger also brings with it the duty to prevent harmful consequences which that may arise from that source. This may be a duty based on previous dangerous activities (whoever causes danger is obliged to prevent the harmful consequences which may arise from it), the duty to supervise sources of danger within the authority of the perpetrator (the owner must put out a fire on his property to prevent it spreading), and the duty to supervise third persons who are a risk (e.g. the duty of a superior to prevent criminal offences by his subordinates).<sup>117</sup> When it is a matter of command responsibility *stricto sensu* under the assumption that the functional theory of legal duty is accepted, the responsibility of the commander is founded on his duty to supervise third persons who represent a risk. This construction of guarantor responsibility, however, is only possible when it is a matter of the responsibility of a commander who did not take all the necessary measures to prevent his subordinates committing a criminal offence. Then, it could be said, he is violating his own guarantor responsibility, which arises from the duty to supervise third persons who represent a risk. Precisely this omission was one, but very important, link in the chain of causation, which in the end led to the realization of all the characteristics of the essence of the criminal offence (e.g. genocide realized by the deliberate killing of members of an ethnic group). It is however a completely different situation when it is a matter of a commander who *post delictum* failed to punish the perpetrators of a criminal offence. In this case his omission was not the co-cause of the consequences that occurred, and from this position he cannot be considered responsible in the capacity of guarantor. Although there perhaps exists a moral obligation which also implies some form of moral reproof or rebuke, it is

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<sup>116</sup> NOVOSELEC 2004, 156-157.

<sup>117</sup> *Ibid.* 144.

absolutely certain that there is no legal obligation which would demand from the guarantor to take certain actions *ex post facto*. That is to say, after the criminal offence is finished (by the physical perpetrators), in a formal and material sense, all the actions of the person who is responsible for supervision, cannot, in a criminal law sense, be considered to be actions of guarantee, arising from the guarantor's obligation. Since in that case there can certainly be no talk of the guarantor's unlawful criminal act of omission, there is no ground for the commander to be punished for crimes committed by persons subordinate to him. That is to say, the failure to punish the perpetrator could possibly be a separate criminal offence of aiding after the fact (*auxilium post delictum*) as is the case in most criminal legislation, but in no way can it be considered to be co-perpetration in the preceding criminal offence. It is necessary to agree with commentators who believe that the inclusion of "omission to punish the direct perpetrator" in Article 7(3) of the Statute of the ICTY is one form of aiding after the commission of the offence, "promoted" to co-perpetration of the preceding criminal offence.<sup>118</sup> The commander is in that way found responsible as a co-perpetrator without the establishment of any contribution by him to the commission of the criminal offence. Even in the older doctrines of international law, it was emphasized that "no one who is innocent may be punished for the wrong committed by someone else", which was confirmed in the case of the *United States v. Wilhelm von Leeb* (in literature entitled "High Command") in which the judge Harding stated amongst other things that command responsibility is not unlimited and that it is fixed:

"according to the customs of war, international agreements, fundamental principles of humanity, and the authority of the commander which has been delegated to him by his own government. As pointed out heretofore, his criminal responsibility is personal...that can occur only...where his failure to properly supervise his subordinates constitutes criminal negligence on his part..."<sup>119</sup>

Let us return for a moment to the stance of the Trial Chamber in the *Delalić* case according to which the element of causation is an inherent condition for crimes committed by subordinates and the omission of the superior to take measures within his authority to prevent them. Not denying the principle element of causation in these situations, it does seem that the Chamber was satisfied with presumed causation (it may be considered that the causal link between the superior and the criminal offence is established, because if he had not omitted to do his duty to take measures, his subordinates would not have committed the crime). The stance by which the causation is assumed is not well-founded. That is to say, command responsibility according to Article 7(3) of the Statute is constructed on the basis of the responsibility of the guarantor for the unlawful criminal offence of omission. In the theory of criminal law, it is accepted that causation in these criminal offences is hypothetical in nature. It consists of adding on the omitted action. The *condicio sine qua non* for establishing the criminal responsibility of the perpetrator for the criminal offence by omission is to conduct the process of establishment of hypothetical

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<sup>118</sup> NOVOSELEC 2001.

<sup>119</sup> The case is dealt with in full in the Trial Chamber judgment in the *Kvočka et al.* case.

causation. That is to say, it is not sufficient to suppose that the lack of action by the guarantor caused the consequences. It is necessary, through the hypothetical process of addition, to establish that the consequences would not have occurred, with a high degree of probability. Therefore the burden of proof is always on the prosecution. In line with the teaching on causation in guarantors' criminal offences, if the prosecutor does not prove this probability, the principle of *in dubio pro reo* is applied and it is taken that the performance of duty would not have prevented the consequences. The simplified presumption of causation extends to the area of culpability and makes the prosecutor's position easier, and command responsibility becomes a pure form of responsibility for the actions of others. In order to overcome that objection, the trial Chambers of the ICTY should insist on proof of the causation between the omission of the superior person postulated by Article 7(3) of the Statute of the ICTY and the criminal offences committed by his subordinates.

### 3. Joint Criminal Enterprise

It is clear that the elements of the institute of command responsibility demand additional effort from the prosecutor in the proceedings before international courts in terms of proving the legally relevant facts of the act committed and the guilt of the commander or superior person. Therefore it is no wonder that at the same time as the institute of command responsibility is applied pursuant to Article 7(3) of the Statute of the ICTY, as the control model of individual criminal responsibility for mass international criminal offences, another legal construction appears, known as the joint criminal enterprise, as the “systemic model” of that responsibility. But since the Statute of the ICTY did not prescribe it, it seemed appropriate to the judges and prosecutors to derive it from the general regulations on participation in a criminal offence from Article 7(1) of the Statute. This legal construction, as we will see below, is founded on a different regulative structure: it prescribes commission as a form of committing a criminal offence, and does not imply the existence of a hierarchy between the participants in a criminal enterprise, and the question of guilt is linked with the existence of their prior “criminal plan” so that each one of them is responsible not only for their own participation in the criminal offences, but also for the actions of other participants, which were not covered by their intent or negligence, but on the basis of that plan they could have been foreseen. Therefore in the theory of international criminal law it is very debatable. But since we will consider its disputed legal aspects later in more detail, here we will briefly present the main characteristics of the construction of the joint criminal enterprise, and the cases in which the ICTY applied the institution of command responsibility and joint criminal enterprise at the same time, despite the fact that these are in terms of construction two different criminal law institutions. In the proceedings against Tadić, the first instance Chamber could not establish the defendant’s participation in the murder of five Muslim civilians in the village of Jaškići near Prijedor, committed by Serbian paramilitary units, engaged in “ethnic cleansing” of Prijedor and the surrounding area, despite the fact that the defendant’s abuse of the non-Serb population of the village was proven. On the appeal by the Prosecution against the acquitting part of the judgement against the defendant, the second instance Chamber, accepting the assertion in the appeal that the first instance Chamber could have concluded that the paramilitary group to which the defendant belonged actually did kill five people, concluded that guilt for that murder could be ascribed to him although he personally did not commit it – according to the “systemic” model of individual criminal responsibility. The second instance Chamber drew this model from the provisions of Article 7(1) of the Statute, which prescribes various forms of commission of criminal offences, so, apart from individual perpetration, also co-perpetration, or participation, in the realization of a joint (criminal) purpose (common purpose) or common design. The second instance Chamber then, in its decision of 15 July 1999, analysed the practice of national and international military tribunals after World War II (§§ 188, 226, 194 etc.) in which they found the defendant guilty on the grounds of old Anglo-American constructions of criminal responsibility such as

common purpose and conspiracy.<sup>120</sup> The second instance Chamber of the ICTY concluded that from these cases, and from two international agreements (International Convention for the Suppression of Terrorist Bombings from 1997, in Article 2, paragraph 2, point c talks about an act committed by a group of persons acting with a common purpose; the Rome Statute in Article 25, paragraph 3, point d mentions an attempted or committed criminal offence by a group of persons acting with a common purpose), it is possible to extract sufficient arguments for the standpoint by which these constructions may be seen as generally accepted rules of international law (regardless of the fact that in comparative criminal law there is no agreement of national law and practice regarding the JCE as a form of participation in a criminal offence by which it could be concluded that it evolved into customary international law) and this implicated meeting of the conditions of the legal definition of this form of criminal responsibility.<sup>121</sup> A criticism of this stance, illustrated by an analysis of the cases of the so-called “little Nuremberg courts” in which members of the German army and civilians were found guilty of murdering imprisoned allied soldiers, or in which officers from some of the German concentration camps were convicted, is given by Danner and Martinez, Engvall and some other writers.<sup>122</sup> After the judgment in the Vasiljević case (first instance judgment of 29 November 2002, § 63 etc.), Kvočka (first instance judgement of 2 November 2001, § 265 etc, 312) and Furundžija (second instance judgement of 21 July 2000, § 119 i sl.), in the case law of that court, the title Joint Criminal Enterprise (JCE) became established<sup>123</sup>. This stance, despite occasional justifications<sup>124</sup>, came up against serious criticism in literature<sup>125</sup>, for example by Danner and Martinez, Bogdan<sup>126</sup>, Engvall<sup>127</sup> and other scholars who begin with a historical analysis of case, which the ICTY took as precedents for its construction of the JCE, and point out that the hasty acceptance of the institution of vicarious criminal responsibility by the ICTY is harmful for the development of criminal law, especially since a broad and undefined construction of command responsibility and JCE have a bad effect on national legal order and the

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<sup>120</sup> On the historical roots of the theory of common purpose from the legal notions of medieval English law, such as e.g. common consent in the 14<sup>th</sup> century, cf. SMITH 1991, 209; for its contemporary scope in countries with a common law tradition, cf. the instructively described trial of twelve defendants charged with the murder of a policeman in South Africa in 1988 in DURBACH 1999.

<sup>121</sup> ENGVALL 2005, 19-28

<sup>122</sup> DANNER-MARTINEZ 2005, 111 etc.; ENGVALL in the place quoted

<sup>123</sup> Cf. the decision on objections on the jurisdiction of the ICTY in the Ojdanić case of 21 May 2003, in which the ICTY confirmed its own authority to interpretative establishment of forms of criminal responsibility according to the Statute

<sup>124</sup> The former deputy Prosecutor before the ICTY, Nicola Piacente, after establishing that the Prosecution after the decision by the second instance Chamber in the Ojdanić case confirmed the construction that the JCE may be considered perpetration from “Article 7, paragraph 1 of the Statute of the ICTY and not a form of participation, expressed cautious satisfaction because in that way the criminal prosecution was made easier of people in high positions in the pyramid structure of power. PIACENTE, 2004, 448 etc.

<sup>125</sup> The latest attempts at systematic criticism of the JCE are found in the works of the participants (Ohlin, van der Wilt, Cassese, Gustafson, Ambos, van Sliedregt, Hamdorf, quoted below in the references) in a symposium on the JCE organized recently by the Journal of International Criminal Justice and published in no. 1/2007 edited by G. Sluiter.

<sup>126</sup> BOGDAN 2006.

<sup>127</sup> DANNER-MARTINEZ 2005, 111 etc.; ENGVALL 2005, in the place quoted

future practice of international criminal courts.<sup>128</sup> Despite this fact, the notion of the JCE today is firmly rooted in the ICTY.<sup>129</sup> Relying therefore firmly on the JCE, the ICTY has also influenced the ICTR, and also recently on the international criminal courts for Sierra Leone and East Timor.<sup>130</sup> Werle<sup>131</sup> especially points out the criminal court in Sierra Leone (established by an agreement between the UN and the government of Sierra Leone of 16 February 2002, founded on UN Security Council Resolution 1315 of 14 August 2000, whose statute in Article 20, paragraph 3 prescribes that the judge of that court must have a working knowledge of the decisions of the second instance Chamber of the ICTY) – but notes that this is less important for the ICTR, whose statute in Article 2(3) point b, expressly prescribes responsibility for conspiracy for genocide, and there was no need to create it.<sup>132</sup> Why did this happen? The answer to that question is similar to the answer to the question of why at the Nuremberg trials the theory arose and was developed on the one hand of the “collective criminality” of the Nazi apparatus, whose members had to give account to the Allied court, as individuals it is true, but also as representatives of criminal associations such as the National-Socialist Party, Hitler’s government, the Gestapo and other Nazi organizations, and on the other hand, the theory of “criminal organizations” whose numerous members had to give account before lower, national criminal courts – without the accompanying difficulties in proving their guilt.<sup>133</sup> The idea for this is ascribed to Colonel Murray C. Bernays, a member of the staffing management of the headquarters of the US army and assistant to the Chief Prosecutor Jackson, who in the preparations for adoption of the Treaty of London and statute in a memorandum, said that “behind each Axis war crime is the criminal motive of Nazi doctrine and politics, which must be established, since only in that way can the conviction of individuals attain its moral and legal significance”.<sup>134</sup> The realization of this idea was made possible by the legal construction of Anglo-American law,

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<sup>128</sup> DANNER-MARTINEZ 2005, 156 etc., 167 etc. These two authors conclude that the requirement for careful application of the institute of the JCE and command responsibility does not only rest on the fundamental principle of guilt in criminal law, but also on the importance of post-transition societies having legitimate execution of justice and protection of fundamental human rights. Especially, “the truth-telling aspect of transitional justice adds special urgency to the production of an accurate and nuanced historical record from international prosecutions”, the writers conclude, mentioning that “...high-profile international trials shaped historical inquiry and collective memory – both for good and for ill” (168). And some judges of the ICTY in their minority, separate votes, rejected the theory of the JCE as a “confusion and a waste of time” (P.J. Lindholm in Simić I, § 4)

<sup>129</sup> The Trial Chamber in the Milošević case (IT-02-54-T) invited the amicus curiae Prof. Timothy L.H. McCormack to give an opinion on the defendant’s responsibility on the basis of the JCE construction from the indictment (Prosecutor v. Slobodan Milošević, Order on amicus curiae observations proprio motu on the alternative bases of individual criminal responsibility alleged in the case ... of 1 July 2005) but this opinion was not given since the proceedings were halted after the defendant died.

<sup>130</sup> DANNER-MARTINEZ 2005, 155-156

<sup>131</sup> WERLE 2005, 121

<sup>132</sup> Although cf. Ntakirutimana II, § 462 and 467. and Simba I, § 386-388.

<sup>133</sup> For the history of international criminal prosecution and trials of war crimes, cf. in general BASSIOUNI 2003, 393 etc.; 405 etc. AMBOS 2006, 91 etc., 101-104

<sup>134</sup> Quoted in van SLIEDREGT 2003, 16. The influence of Bernays on the formation of the foundation of the Nuremberg trials is described by TAYLOR in his book “The Anatomy of the Nuremberg Trials” (Boston 1992, 35-36, 41, 42, 45, 75 etc.).



“criminal conspiracy”, which despite the controversy which it caused amongst continental lawyers, was included in the provisions of Article 6(2) of the Statute, and the single notion of the perpetrator of a criminal offence as any physical person who made a causal contribution to an international crime, only differing for the needs of the choice and proportion of punishment from the principals and accomplices. The difference based only on the title, and not on the real contribution of individual participants in the criminal offence, led in the practice of criminal proceedings in countries of the common law tradition to a levelling of the procedural role of participants in the criminal offence and to easing the burden of proof for bodies of criminal prosecution<sup>135</sup>. In Anglo-American law, conspiracy is a criminal offence of association of two or more persons with the aim of undertaking some form of unlawful behaviour, which coincides with the responsibility for participation in a criminal offence by persons who did not directly participate in the realization of the criminal offence but contributed to it in another way. What they have in common is that they establish criminal responsibility for each member of the association regarding each offence arising from their joint plan, not regarding the degree of objective contribution to the criminal offence, and the historical root is in the principle of medieval canon law *versari in re illicita* founded on the moral postulate that the one who knows about a crime, is capable and obliged to prevent it but fails to do so, himself commits a crime.<sup>136</sup> The institution of conspiracy in Anglo-American theory is also subject to criticism<sup>137</sup>, both from the point of view of the principle of the precision of criminal law, which points out that in the practical application of

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<sup>135</sup> Informed continental observers of Anglo-American law on participation, after noting that this law only began its modern differentiation of participants in a criminal offence in the middle of the 19<sup>th</sup> century, when the English Accessories and Abettors Act of 1861 extended the previous difference between principals and accomplices in felonies to all categories of incriminated behaviour, point out that the prosecutor today in criminal proceedings is not obliged to adapt the indictment to differential forms of participation, and it is possible that participants regardless of the (minimal) accessory nature of their responsibility (dependant on the responsibility of the main perpetrator) are themselves responsible for his crime, and are treated equally to him within the framework of the punishment for that crime (guilty of the full offence). Here, as in systems of limited accessory participation (NOVOSELEC 2004, 299), it is not required for the main perpetrator to be guilty, but the *actus reus* and *mens rea* of each participant is assessed independently according to the requirements arising from the nature of the criminal offence. For example, if it is difficult to prove that the murderer killed the victim himself or he (as the abettor) ordered the murder, it is easier for the prosecution to gain a conviction if in their assertions they do not differentiate the facts with which the main and the associated participants are charged. The lesser importance of the procedural differentiation between the main perpetrator and other participants led in the USA to further “softening” of the notion of accessory or a shift in the principles of participation precisely in the case of conspiracy, where the activity of all participants is judged from the standpoint of equivalence, so if it is established that the activity of each one of them was *sine qua non* for the offence committed, there is no justification for differentiating between the main and associated perpetrators and all are equally responsible, albeit independently of each other. Therefore such unusual court constructions are also possible, such as the criminal responsibility of the persons who are judged to be co-perpetrators of the criminal offence although at the time of the commission they were in prison (the case of *Pinkerton v. United States* from 1946, 328 US 640). Cf. : MANSDÖRFER 2005, 136-161.

<sup>136</sup> KADISH 1997, 376 with ref in note 19 to other authors.

<sup>137</sup> One of the first critics in more recent American case law was Robert Jackson, a Federal Supreme Court judge after World War II, in his separate opinion in the case *Krulewitch v. United States* (336 U.S. 440, 453, (1949)). For more recent criticism cf. FLETCHER 1978, 663

conspiracy, convictions are not founded on the clear and precise criteria of this legal construction (research into the appeal decisions confirming convictions for conspiracy has shown that the outcomes of first instance trials could be diametrically opposed), and from the point of view of the principle of fairness of the proceedings, whose components cannot be realized in more complex cases with a large number of defendants and criminal offences.<sup>138</sup> However, despite this, it still has powerful proponents<sup>139</sup> and is a “well-loved” institution of Anglo-American case law<sup>140</sup>, especially for public prosecutors<sup>141</sup> as part of suppression of unlawful trade in drugs and money laundering, after the adoption of federal laws in the USA, such as the Racketeer Influenced and Corrupt Organizations Act /RICO/ of 1970. and some later laws on suppressing fraud by mail and telecommunications. They in their indefinite and “elastic” definitions of incriminated behaviour and criminal groups, inversions of the burden of proof to the detriment of the defendant and many exceptions from the principle of direct presentation and assessment of evidence, increased the danger in case law of court errors and unjustified decisions.<sup>142</sup> The application of conspiracy before the Nuremburg tribunal, on the one hand, in terms of the responsibility of the heads of the Nazi organization for crimes within the jurisdiction of the court, prescribed the responsibility of “leaders, organizers, inciters, and participants who took part in the formation or execution of a common plan or conspiracy, to commit any of those crimes for all the crimes committed by any person in the execution of that plan”. On the other hand, Bernays’ idea enabled the conviction before lower courts of many members of three Nazi organizations (Gestapo, SD and SS), proclaimed to be criminal organizations before the international military tribunal in Nuremburg, for every crime committed by any member, merely on the basis of the fact of their membership of the criminal organization, under the condition that the indictment proved how their knowledge of it could be “ascribed in general” since they participated in an association which had a “collective goal”, that that goal could be considered to be criminal, if it was convincing and accepted by its members and that he agreed to it.<sup>143</sup> The punishment of organized criminal associations is otherwise known in comparative criminal law, but it is far from being able to represent some

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<sup>138</sup> Cf. ALLEN 1996, 86-87 with the references.

<sup>139</sup> Cf. KATYAL 2003, 1315 etc. which from the point of view of economic analysis of organization and management responsibility in capital companies, combined with psychological opinions on social identification of individuals in small groups, refutes the criticism aimed at the purpose of punishing conspiracy and shows that, due to the increased danger of socially unacceptable activities by small groups, additional punishment of conspiracy is acceptable, the more so if the focus of the consideration of the purpose of punishment is transferred from a moral to a utilitarian postulate.

<sup>140</sup> The English House of Lords, ruling on the appeal against the decision by the Queen’s Bench, referred to conspiracy as a possible ground for the responsibility of General Pinochet for criminal offences by Chilean officials during his rule (R v. Bow St. Metro. Stipendiary Magistrate, ex parte Pinochet (No. 3), 2000 A.C., 147, 190, 235-236 (H.L. 1999).

<sup>141</sup> Cf. MARCUS 2002, 67 etc.

<sup>142</sup> ALLEN (quoted, 86) says explicitly: “The questions submitted to juries in large and complex conspiracy prosecutions, especially those pertaining to persons alleged to have acted on the fringes of a conspiratorial agreement, often cannot be resolved with reasonable prospects of justice to many of those placed in jeopardy of severe criminal sanctions.”

<sup>143</sup> van SLIEDREGT 2003, 21; DANNER-MARTINEZ 2005, 114

“general legal principle”<sup>144</sup> which would be “generally accepted” in national legal systems and thereby be considered to be a source of international law. Precisely the notion “criminal conspiracy”, of Anglo-American law in count 1 of the indictment of the Nuremberg trial, charged the defendants with both their own crimes and participation with others in formulating or executing a joint (criminal) plan from which the crimes of others arose as the basis for individual criminal responsibility, and so, similar to the doctrine formulated in the precedent of the Supreme Court of the USA in *Pinkerton v. United States* from 1946, at the same time it became an independent criminal offence, and the criminal law form of participation in the criminal offences of others, committed in execution of the conspiracy. However in contrast to the present day ICTY, judges of the international military tribunal in Nuremberg were only prepared to accept the notion of “criminal conspiracy” in a limited form, accepting this legal basis in the crime against peace only regarding eight of the total of 22 defendants who were accused of it<sup>145</sup> and applying a restrictive interpretation of that notion, with the requirement that the voluntary participation of the defendant in the “criminal conspiracy” and his knowledge of it as a member of the criminal organization be proven. For the international military tribunal this restrictive interpretation was an expression of the postulate of individual guilt which is opposed to political demands for unlimited proliferation of punishment for war crimes. Similar to the situation in Nuremberg, faced on the one hand with the acts of ethnic cleansing to which criminal motives could also be ascribed, and on the other hand questions of the burden of proving the individual contribution of each participant in these acts, who were not related to the vertical hierarchical relationship, but only horizontal relationships in the coordination or division of labour, meaning it was impossible to prove the defendant’s indirect command responsibility according

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<sup>144</sup> The question of the root of conspiracy in international customary law arose in the proceedings against Salim Ahmed Hamdan, the former body guard and personal driver of Osama bin Laden. In the proceedings before the military commission he was accused, amongst other things, of conspiring to attack the civilian population and terrorism. In the indictment actions taken by the defendant are mentioned allegedly in the period between 1996 and 2001 in the furtherance of the enterprise and conspiracy. Since the prosecution did not have available any evidence of his direct participation in the commission of the crimes he was charged with, they made use of the crime of conspiracy. In the Brief of amici curiae Danner and Martinez they correctly concluded that what Hamdan was accused of, that is, conspiracy in attacks on the civilian population, murder and terrorism, was not within the jurisdiction of the military commission. This was primarily because Congress had not included conspiracy in the criminal offences for which military commissions have jurisdiction. Moreover, with the exception of conspiracy to commit genocide and the conspiracy to commit crimes against peace (aggression) conspiracy is not a criminal offence in international law. The lack of specific provisions on the criminal offence of conspiracy in the statutes of the ICTY and the ICTR, apart from where they reproduce the Convention on Prevention and Punishment of the Crime of Genocide, indicates conscious refusal to extend the concept of conspiracy beyond its limited use in the context of an indictment for genocide. In the brief by the amici curiae the similarity is noted and the differences between conspiracy and JCE (conspiracy is a substantive crime, whilst JCE is a mode of liability) with the conclusion that in the specific case it is not possible to apply the JCE theory to the defendant. This is because its application in the case law of the ICTY so far had been restricted to high ranking civilian officials and military commanders (high level perpetrators), distanced from the site of the commission of the specific crimes, or to low level perpetrators, physically present at the site of the commission of the crime (e.g. Tadić) and with Hamdan, neither of these conditions was met.

<sup>145</sup> DANNER-MARTINEZ 2005, 117.

to Article 7(3) of the Statute, the second instance Chamber of the ICTY in the *Tadić* case established that individual crimes of ethnic cleansing did not arise from the criminal tendencies of individuals, but were a manifestation of the collective criminality of a group or individuals acting in the realization of a common criminal design.<sup>146</sup> Although this form of committing a criminal offence is not prescribed in the Statute, the second instance Chamber concluded that it may be derived from the provisions of Article 7(1) on personal criminal responsibility, which prescribes forms of commission of criminal offences since co-perpetration also lies within the scope of the notion of “commission” of a criminal offence in realizing a common goal or purpose. According to this opinion, the provisions of Article 7(1) of the Statute do not exclude forms of participation where several people begin a criminal activity with a common goal, which is carried out either together or by some “members” of that group of people.<sup>147</sup> Still, apart from the similarity with “criminal conspiracy” in the Nuremberg trials, the creation of the JCE by the ICTY shows significant differences. Commentators<sup>148</sup> mention several: (a) JCE is not considered to be an individual criminal offence (since this is already not permitted by the text of the Statute) whilst conspiracy in Anglo-American law may be used as an independent criminal offence and as a form of participation (albeit mainly in US federal law); (b) although criminal conspiracy and the JCE represent an agreement between individuals about committing crimes, the ICTY, in contrast to the international military tribunal, does not define what the agreement consists of, but seeks evidence of intent to carry out a “common criminal plan”<sup>149</sup>; (c) “criminal conspiracy” usually does not require proof that the conspirator played a major role in its execution or that he had detailed information about its character, the JCE requires proof of the activities of its members aimed at realizing the plan (“..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”).<sup>150</sup> The JCE therefore, establishes responsibility for crimes in the execution of conspiracy but not also for the act of joining the conspiracy. But, these differences are not too obvious even for the judges of the ICTY themselves, amongst whom there are some who hold that “criminal conspiracy” is an independent criminal offence and not a form of participation.<sup>151</sup> Commentators notice<sup>152</sup> that the advantages of the application of the legal construction of the JCE in complex cases for ICTY judges are many: it removes the needs to establish a causal link between the defendant’s behaviour with the consequences of his crimes or the crimes of others, especially in cases in which he

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<sup>146</sup> *Tadić* II, § 191.

<sup>147</sup> Art. 7(1) does not exclude those modes of participating .. which occur where several persons having a common purpose embark on criminal activity that is then carried out either jointly or by some members of this plurality of persons“, *Tadić* II, § 190.

<sup>148</sup> DANNER-MARTINEZ 2005, 120; BARETT-LITTLE 2003, 54-56.

<sup>149</sup> *Stakić* I, § 435.

<sup>150</sup> *Prosecutor v. Ojdanić*, decision by the Appeals Chamber in connection with jurisdiction for JCE, § 23.

<sup>151</sup> *Prosecutor v. Milutinović*, decision by the Appeals Chamber on the Motion Challenging Jurisdiction - JCE of 21. V. 2003, § 23.

<sup>152</sup> HAAN 2005, 173-75.

did not participate in them directly but only acted as a “desk perpetrator” in some higher degree of formal or even informal structural social power; the possibility for the contribution of participants in a JCE to be established more broadly and with less precision than demanded by the postulates of the principle of legality (it is sufficient to establish that the member of the JCE was a member of a group which aimed collectively and/or realized its planned results; avoidance of the need to establish the components of guilt of one member of the JCE which would link him to the crimes of the other members (“..while a JCE may have a number of different criminal objects, it is not necessary for the prosecution to prove that every participant agreed to every one of the crimes being committed”).<sup>153</sup> However it should be pointed out that despite the width of its legal construction, the JCE sometimes may reduce the chances of a conviction of a perpetrator of collective criminal offences, especially if the prosecution is more concerned with proving the commission of the crimes, from which the conclusion should be drawn of the existence of a “common plan” and less with the facts which indicate only planning<sup>154</sup> in contrast to conspiracy, for whose existence no evidence is required of the commission of a crime; this failing of the JCE was noted by commentators mainly in the acquittals for crimes within the jurisdiction of the ICTY committed of collective rape<sup>155</sup>.

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<sup>153</sup> Prosecutor v. Brđanin, the decision by the first instance chamber on the motion for acquittal pursuant to Rule 98bis of 28. XI. 2003, § 17

<sup>154</sup> The first instance judgment in the Krstić case requires evidence that the defendant “..shared with the person who personally perpetrated the crime the state of mind required for that crime“, Krstić I, § 613

<sup>155</sup> BARETT-LITTLE 2003, 54-55 explaining how in the Kunarac case it was avoided that the defendant be convicted for individual responsibility “only” for the several rapes of women prisoners he committed in the camp of which he was the commander and the abetting of many other rapes committed by other camp guards, for which he was otherwise acquitted on the basis of command responsibility, but he was convicted by the application of the construction of “conspiracy”; 65)

### 3.1. Dilemmas in Relation to the Application of the Joint Criminal Enterprise Theory

The creation of the JCE in the second instance decision in the Tadić case opened many questions and controversies, from legal political to legal dogmatic.<sup>156</sup> Postulating that for the selected components of the notion of conspiracy, some continental standards of participation and guilt are applied, the ICTY created a “mixed” form of guilt, especially regarding *dolus eventualis*, which are not known in any of the existing systems of criminal law. So one commentator of this construction recalled the statement of James Rowe, a member of the prosecuting team during the Nuremberg trials, about the fact that the “American conspiracy was one of those things which the more it is talked about, the less clear it becomes”<sup>157</sup>, and another criticized the theory of the JCE saying that in the ICTY it leads to “discounted convictions that inevitably diminish the didactic significance of the Tribunal judgement's and that compromise its historical legacy”.<sup>158</sup> The ICTY, after the conviction in the Tadić case, in several cases applied the institute of command responsibility and joint criminal enterprise at the same time, gradually transferring the emphasis to JCE and allowing it to be used in situations with a plurality of participants in various aspects of the plurality of their criminal offences (for instance the participation of one or more persons in several JCEs). But this led to contradictions between individual indictments, especially those relating to political and military leaders, leaders whose activities were covered in the indictments by the JCE construction: for example, the indictment in the Milošević case, founded on the JCE of the Serbian president with several other members of the leadership of the Bosnian and Croatian Serbs, in comparison with the indictments of those same leaders (such as B. Plavšić, M. Martić and N. Stanišić) also founded on the JCE, shows significant differences regarding the criminal activities described – which of course, in the words of one commentator, illustrates the “enormous elasticity of the JCE” and clearly indicates the problems that are faced by the defendant in understanding the precise subject of the indictment he has to face.<sup>159</sup> Still, a hint that at least from a criminal policy point of view, the JCE construction should not be ascribed with greater importance than other legal constructions of co-perpetration, could be noticed in the first instance decision in the Stakić case, in which the Trial Chamber stated that a restrictive interpretation of the provisions of the Statute on commission, founded on the national interpretive method, would be more desirable, in order to avoid the danger that the JCE, as a new form of crime, not foreseen in the Statute, be introduced through the “back door” into the case law of the ICTY.<sup>160</sup> The legal notion of the JCE is a broad form of co-perpetration. It represents a legal

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<sup>156</sup> We especially point out the question of the lack of harmony between the JCE and the principle of legality in criminal law; see Chapter 2

<sup>157</sup> METTRAUX 2005, 286

<sup>158</sup> SCHABAS 2003, 1015

<sup>159</sup> METTRAUX, 2005, 293

<sup>160</sup> Stakić I, § 441

fiction<sup>161</sup> to establish a form of co-perpetration in (international) crimes within the jurisdiction of the ICTY and the ICTR. It allows the criminal prosecution and conviction of a person for a crime, even when one did not intend to contribute to the crimes of the other, nor did he know of those activities by the other person: “the JCE theory is the “conspiracy theory” dressed in terminology of contemporary economy, which previously used the expression “joint enterprise” to denote a mixed company between the capitalist and the former socialist systems”.<sup>162</sup> The customary notion of co-perpetration, which according to certain criteria is differentiated from other forms of participation in a criminal offence, in continental theory, rests on the concept of control of the act, according to which all co-perpetrators, in control of their function, which is important for the realization of the criminal plan, have control over the part as of the whole.<sup>163</sup> In this, the joint plan is not only the ground for the criminal law responsibility of all members, but also the ground for limitation of responsibility since the co-perpetrator will not be responsible for crimes committed in excess of that plan. However, the ICTY, which, it is true, accepted in practice the “dualistic” model, mentioned earlier, of division between the perpetrator and other participants in the crime under the influence of Anglo-American law<sup>164</sup>, differentiates the perpetrators (or authors) from other participants (accomplices) who made a contribution in a different manner before or after the crime, helping the others in realization of the criminal offence (participants in a narrow sense, known as aiders and abettors), and co-perpetrators are counted as those who planned, incited and ordered the commission of the offence and not only those who had the functional authority over the crime. Moreover, under the influence of the conspiracy figure, the ICTY believes that each member is responsible for criminal offences beyond the plan, if, in terms of the characteristics of the plan, they could have foreseen such excessive crimes and consciously assented to them. For the existence of a JCE elements are required on the objective and subjective sides of the co-perpetrator. This is the result of the constructive division of criminal responsibility in the theory of Anglo-American law into the components of human behaviour (the conduct elements of a crime), the subjective components of the accountability of a person and their subjective relationship towards the crime (criminal states of mind) and the objection by the defence to criminal responsibility (general and special defences) which in the specific case annul the material unlawfulness of the punishable offence. According to that right, the objective element, in a group entitled *actus reus*, covers the act, the consequences, the causation and certain objective elements of responsibility for omission (the existence of guarantor duty) or responsibility for negligence (the existence of a violation of due care); the subjective elements, under the title *mens rea* cover “the state of consciousness and will” which establish criminal responsibility, such as intent, knowledge (knowledge of a certain type of facts which, it is true, is not an independent form of subjective element, but alongside intent, is looked for

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<sup>161</sup> Which consists of “..an understanding or arrangement amounting to an agreement between two or more persons that they will commit a crime“, Krnojelac I, § 80

<sup>162</sup> FLETCHER-OHLIN 2005, 548

<sup>163</sup> The theory of authority over part (*Tatherrschaftslehre*) arose in German theory after World War II and was adopted e.g. in Article 35, paragraph 3 of the Croatian CC (NOVOSELEC 2004, 296-297).

<sup>164</sup> van SLIEDREGT 2003, 62

especially in certain criminal offences), recklessness, and negligence, which may be gross negligence and carelessness<sup>165</sup>. The ICTY has built these components into the objective and subjective sides of its construction of the JCE. On the objective side, the requirement is: the existence of a common plan, design or purpose: the second instance judgement in the Kupreškić et al. case, states that “co-perpetration requires 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”.<sup>166</sup> The common plan does not need to precede the criminal offence, but may be simultaneous and spontaneous, so its existence may be derived from the circumstances; moreover, it is required that several people work together in accord, with the aim of realizing a form of criminal enterprise – the second instance decision in the Tadić case states: “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”.<sup>167</sup> This action does not need to be only the perpetration of some specific criminal offence, but may consist of aiding and various other forms of contribution to the execution of the common plan. On the subjective side there are three variants of guilt for the JCE and accordingly three forms of criminal responsibility. The first category, known as “basic” is the one in which all participants in the JCE share the same criminal intent. This category of JCE would cover, for example, participants in a JCE who share the intention to kill a person as the goal of the JCE, and each of them makes a considerable contribution to that goal. Here the JCE mainly relies on the doctrine of Anglo-American law of criminal conspiracy, in the form accepted in American practice, which differentiates the conspiracy and responsibility for the crime in execution of the conspiracy: although in terms of conspiracy the prosecutor must prove the existence of both a “criminal agreement”, and the fact that the defendant became a member of the conspiracy voluntarily, as we have already mentioned above, it is not necessary to establish further whether this conspirator played some important role in its execution or whether he was acquainted in detail with its character.<sup>168</sup> The second category, known as “systemic”, relates to cases of concentration camps. The grounds for responsibility of participants in the JCE is membership in an organized system of abuse, such a work or concentration camp etc.<sup>169</sup> The participant in this form of JCE, which is also known as the “systemic” JCE, will be criminally responsible for the commission of all criminal offences by members of the camp military or administrative staff, which, on the basis of a common purpose, were committed as a consequence of the organization of a system of abuse. He must have knowledge of the existence of this

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<sup>165</sup> Cf. in more detail PADFIELD 2000, 21 etc. , 39 etc.

<sup>166</sup> Kupreškić II, § 772

<sup>167</sup> Tadić II, § 227

<sup>168</sup> This was confirmed in the decision in the proceedings against Moussaoui for the air attacks against the USA on 11 September; United States v. Moussaoui, 282 F. Supp. 2d 480, 485; E.D. Va. 2003

<sup>169</sup> The second instance judgment in the Krnojelac case states that this category, which is otherwise characteristic for cases of concentration or liquidation camps from World War II, may also be used for cases within the jurisdiction of the ICTY. Krnojelac II, § 89



system. The third and also the most disputed form of JCE is the extended JCE. This is a category where all participants share the common intention to commit certain criminal offences (for example forced displacement of the civilian population), and in which some of them commit a crime which is excessive, that is, which was not covered by the common intention – e.g. killing civilians during the forced displacement. In this case all members of the JCE will be considered criminally responsible on the basis of Article 7(1) of the Statute of the ICTY if the crime was a “natural and foreseeable consequence” of the realization of the goals of the agreed JCE. The difference in the subjective side according to the first two categories is, therefore, in that the participants not only share the common intent to participate in the realization of a joint criminal enterprise, but also voluntarily take on the risk of responsibility for the crimes which were not part of the originally agreed goal, but were its “natural and foreseeable consequence”.<sup>170</sup> Precisely this element of the construction of the extended JCE, which makes it possible to see any consequence as “natural and foreseeable” and therefore ascribe it to the subjective behaviour of every member of the JCE, is the most frequent subject of criticism, which holds that the extended JCE actually comes down to the objective responsibility of the participants for excessive criminal offences which were not part of the plan. This unacceptable extension of the criminal zone lies “at the heart of the confusion between collective and individual responsibility: the individual only has to answer for his own actions and for participation in the criminal activities of others only on the basis of punishability arising from the common purpose with which all participants agreed.”<sup>171</sup> From the above it emerges that the components of the JCE on the objective side (in Anglo-American terminology *actus reus*) are three-fold and identical for all three forms of JCE. The case law of the ICTY and commentators<sup>172</sup> find them in: (a) the existence of a “criminal enterprise” and the participation of the defendant in it<sup>173</sup> where there is a plurality of persons (who are not necessarily organized in some formal military, political or administrative structure);<sup>174</sup> (b) the existence of a “common criminal purpose” which represents or includes the commission of some criminal offence from the Statute of the ICTY (that goal does not need, as we have already mentioned, to have been previously established or formulated, but may subsequently “materialize” and be derived indirectly from the circumstances of the case;<sup>175</sup> and (c) the participation of the defendant (since according to the understanding in the second instance decision in the Vasiljević case the participation of the defendant did not require his direct participation in the action of the criminal offence, in the initial phases of the application of the JCE the form of the perpetrator’s participation was disputed, but after the judgements in the Milutinović, Krstić and Kvočka the standpoint became predominant that the form of participation is determined according to the concrete contribution by the defendant to the JCE). When the components of the subjective side (in Anglo-American

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<sup>170</sup> Tadić II, § 28, Vasiljević II, § 101

<sup>171</sup> FLETCHER-OHLIN, 2005, 550

<sup>172</sup> HAAN V., 2005, 179-183, 186-88, 191

<sup>173</sup> Tadić II, § 227, Krnojelac I, § 79

<sup>174</sup> Vasiljević II, § 100

<sup>175</sup> Ibid.

terminology mens rea) are added to the objective side, which vary, as we have seen, according to the form of JCE (in the first mentioned “basic” category of JCE it has to be established that the defendant had the intent to commit a criminal offence, which all the other co-perpetrators also had<sup>176</sup>; in the second mentioned “systemic” category of JCE, it must be established that the defendant had personal knowledge of a system of abuse and the intent to support it;<sup>177</sup> and in the third the “extended” category of JCE, it must be proved that the defendant has the intention to participate and support the criminal activity and criminal goal of some group and contribute in each case to the commission of a criminal offence by any member of the group, even those which were not covered by the plan but the participant could have foreseen them and he took the risk that they would be committed), we come to the next theoretical constellation of criminal responsibility for JCE<sup>178</sup>:

- Co-perpetrators are all those who: (aa) participated in the joint commission of a criminal offence by direct realization of at least one characteristic of that criminal offence; (bb) undertook actions at the time of the commission of the criminal offence which, it is true, do not constitute the direct characteristics of a criminal offence, but which, according to the division of roles, represent an important contribution to other members of the criminal plan in commission of some criminal offence (and which consist of intentional aiding and abetting the other members to commit the crime, as mentioned in Article 7, paragraph 1 of the Statute); (cc) undertook or omitted actions which did not actually have the direct characteristics of a criminal offence, but which they could take or omit due to their position in the system of authority, with the knowledge of the criminal plan (which may also be present) and the will to support it. All these therefore, divide the subjective element through the awareness of the existence of a common purpose and the will for it to be realized.

- Other participants in a JCE may be persons who are not co-perpetrators but help them in the realization of the JCE in that by their substantial contribution they facilitate, support, speed it up, etc and the co-perpetrators need not even know about them. The subjective element of the other participants is in the awareness that they support the (co-) perpetrators from the JCE in their activities and in the assent to the criminal offences from the plan.

The division into these constellations is founded on the traditional doctrine of the division of participation (co-perpetration) in a wider and narrower sense<sup>179</sup> according to which the roles of several persons in committing the criminal offence are assessed according to the type of their contribution and the criminal responsibility of some is determined in dependence on the (main) criminal offence of the others. But it is not easy to answer the question of which variant and doctrine the ICTY applies in its case law, because in its judgements the contribution of members of a JCE, when the existence of a joint criminal goal is established, is assessed according to the factual greater or lesser degree of their “influence” on the event and the other participants,

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<sup>176</sup> Vasiljević II, § 101

<sup>177</sup> Ibid. § 101, 105

<sup>178</sup> METTRAUX 2005, 290-291

<sup>179</sup> ZLATARIĆ-DAMAŠKA 1966, 298

without going in more detail into the question of what form of participation it was, under the influence of Anglo-American law, which, as it well-known, differentiates between the individual contribution of participants in the criminal offence (perpetrators and accomplices, secondary parties) but only uses this in the choice and scope of the punishment.<sup>180</sup> Only in the first instance judgement in the Kvočka case was there an attempt to establish a difference between co-perpetration and aiding according to an objective element, according to which only those with direct intent may be considered to be co-perpetrators of the JCE, whilst the others are only participants in a broader sense, that is, accomplices,<sup>181</sup> but the second instance decision amended it, stating that for both of them only a “significant contribution” to the JCE was necessary.<sup>182</sup>

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<sup>180</sup> For example, in the first instance judgment in the Furundžija case the defendant was found guilty of rape as a criminal offence of violation of the law and customs of war in Article 3 of the Statute although he did not commit it himself, but he helped a third person commit it. Furundžija I, § 296

<sup>181</sup> Kvočka I, § 273

<sup>182</sup> Kvočka II, § 90

#### **4. Conclusion on the Relationship of the Two Forms of Derived Criminal Responsibility According to the Statute of the International Criminal Tribunal for the Former Yugoslavia**

Between the institute of command responsibility and the JCE theory, there are many points of contact. Both forms of responsibility basically represent responsibility for the actions of other people. The element of imputation or attribution of responsibility for certain actions or omissions is present in both command responsibility and the JCE. The common characteristic of command responsibility and the JCE is also the fact that both forms of responsibility reduce the degree of guilt it is necessary to prove to find a person guilty of a serious violation of international humanitarian law. Both command responsibility and the JCE have their roots in Anglo-Saxon law. The conceptual basis of command responsibility is the institute of private law *respondere superior*, whilst the construction of the JCE is built on the foundations of legislation designed for the needs of dealing with organized crime (the RICO law in the USA). One of the major advantages of command responsibility and the JCE theory and the reason why these forms of responsibility are preferred in proceedings before ad hoc international criminal tribunals in relation to other forms of personal criminal responsibility (inciting, aiding, abetting etc), is the possibility of applying them to a very wide circle of subjects. Although the title of the institute suggests otherwise, in the case law of the tribunal the conception is accepted of applying command responsibility to civilians who de facto performed a command function in the conditions of an armed conflict. The JCE theory, especially its extended version, may be applied both to military and civilian structures. Both forms of responsibility in some segments have been “fine tuned” in the jurisprudence of the tribunals for the former SFRY and for Rwanda, so they would “fit” into the context of the facts of the situation, and so the question arises of their alignment with the international customary law which was in force at the time of the conflicts in those states.<sup>183</sup> The imposition of these institutions as ready solutions and their application in relation to defendants who were not acquainted with this form of legal standard at the time they committed the crime (e.g. command responsibility of civilians or the extended JCE) brings into question whether the requirements are met related to the subjective content of the principle of legality, which are foreseeability and accessibility. These are, of course, only some characteristics by which command responsibility and the JCE are, in terms of concept and content, two very similar forms of responsibility. However, there are some very significant differences between them too. The reason why the JCE became the favourite tool of the prosecution in proceedings before the ICTY is found precisely in the difficulties related to proving command responsibility such as the relationship of superiority and subordination, and, especially, effective control by the de facto or de jure commander over his subordinates.<sup>184</sup> Moreover,

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<sup>183</sup> On the discrepancy between the content of international and national law regarding command responsibility see DAMAŠKA 2001

<sup>184</sup> Osiel believes that the shift from command responsibility towards the JCE should be sought in the fact that the latter sounds “more serious” and implies a greater stigmatism of the defendants who are found to be “perpetrators of crimes” and not merely accessory participants in their commission. The

the more distant the superior officer is physically, the more additional evidence is needed to prove that he knew about the crime. This reduces the possibility of proving the command responsibility of persons in civilian authority who are highly positioned in the system of government, and are usually physically distant from the location where the crimes are committed. These circumstances make it significantly more difficult to prove command responsibility when it is a case of high level officials in civilian authority, who, in a formal sense may be indicted on the basis of command responsibility, but this accusation is very difficult to prove for the reasons mentioned. In the case law of the ICTY the overlapping of command responsibility and the JCE is permitted. The first instance judgment in the Krstić case of 2 August 2001 states in paragraph 605 that command responsibility, in a case in which the commander participates by “planning”, “instigating ” or “ordering” the commission of the crime, is subsumed under the responsibility of the superior for participation in a JCE. In that case the first instance Chamber first concluded that the defendant had a central role in a genocidal JCE that the entire Muslim population would be forcibly removed from Srebrenica and that all Muslim men able to serve in the army would be killed (§§ 610, 612, 615, 619 etc.) and that in terms of crimes covered by the JCE, he shared the same intent with other members of the JCE, and regarding the excessive criminal offences, he must have been aware that they were being committed as the “natural and foreseeable consequences of the ethnic cleansing campaign” (§ 615, 616, 620) whereby, by his participation “of an extremely significant nature and at the leadership level,” he became responsible as a co-perpetrator or the principal perpetrator in the JCE of genocide (§ 642, 644). Although the first instance chamber a little later in the judgement also referred to the command responsibility of the defendant Krstić, since the crimes were committed by units under his command but he failed to prevent their behaviour or punish them afterwards (§ 624 etc., 647 etc.), the judgement in this case however is not founded on the provisions of Article 7(3) of the Statute of the ICTY, as the Chamber took the stance that the defendant’s guilt was sufficiently defined by applying the JCE construction (§ 652). Therefore the question of the overlap of command responsibility with the JCE is resolved here “to the benefit” of the JCE on the basis of the example of the rules on apparent concurrence by consumption, by which the rule on responsibility according to Article 7(1) would cover all criminal content from the narrower rule of Article 7(3) of the Statute (§ 605). Apart from in the Krstić case, the ICTY applied the JCE construction at the same time as command responsibility in some other cases too, in which commentators<sup>185</sup> notice that these were not cases of high-ranking defendants (who by that very fact alone would have made a more significant contribution to the JCE) but those who were in lower or even the lowest positions on the hierarchical ladder. So in the Kvočka case, the first instance Chamber in its judgement of 2.11.2001, applied the construction of the systemic JCE to the case of the Omarska concentration camp, in which the crimes consisted of “a broad mixture of serious crimes committed intentionally, maliciously, selectively, and in some instances sadistically” (§ 319) with “the intent to persecute and subjugate non-Serb detainees” (§ 320) and all five accused camp guards were

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other reason for this reverse should be sought in the difficulties related to proving “effective control” in command responsibility. OSIEL 2005

<sup>185</sup> Ibid.

found guilty of co-perpetration (and not some other form of participation) in the JCE (§ 398, 459, 469, 497, 575, 682), where one of them (Radić) for whom there was sufficient evidence for the fact of a hierarchical relationship with subordinates and therefore also grounds for the application of command responsibility, stated that there was no need for this application since his liability was already covered by the JCE construction (§ 570). The Appeals Chamber agreed with this in the case, when it stated that the JCE and command responsibility are different forms of individual criminal responsibility and in a case where the legal requirements of both forms of responsibility are met, a conviction should be entered on the basis of Article 7(1) only, and the superior position should be taken into account as an aggravating factor in sentencing.<sup>186</sup> A similar thing happened in the cases of Obrenović and Blagojević&Jokić in which the defendants were officers with the rank of colonel or deputy brigade commander. But the best-known case of the concurrence of the JCE and command responsibility mentioned in literature<sup>187</sup> was the Milošević case, in which the Pre-Trial Chamber, in adjudicating on the degree of foundation of the suspicion that the defendant committed the criminal offences according to the standards of proof from Rule 98bis, stated that Milošević, together with the Serbian leaders in Bosnian command, participated in the JCE with the aim of destroying parts of the Muslim population in Bosnia<sup>188</sup> and that it would have been wise for him to presume that other members of the JCE would commit various criminal offences, including genocide (§ 289) in that, in relation to the intention of genocide, it referred to the Decision by the Appeals Chamber on the interlocutory appeal in the Brđanin case, in which specific genocidal intent was not necessary on the part of members of the JCE, but only the fact that for the defendant that crime was reasonably foreseeable (§ 291, 292). In that way the difference was established between the basic and the extended JCE in which Milošević participated: in the basic form, all members of the JCE had to share the same intent, and in the “extended” form the foreseeability of the criminal offence of one of the members was sufficient for the responsibility of each of them. At the same time this decision stated that Milošević could be responsible for the crime of genocide by command responsibility too, since he was the commander of a number of people for whom he knew or had reason to know that they would commit genocide or they had committed it and he failed to take the necessary measures to prevent it or punish the perpetrators (§ 309), curtly rejecting the warning by the *Amici Curiae*, that the specific intent required for genocide cannot be reconciled and is not compatible with the simple *mens rea* requirement of command responsibility under Article 7(3) of the Statute, as “unmeritorious” (§ 300). Commentators however, justifiably raise the question whether this standpoint by the ICTY can be reconciled on the one hand with the traditional standards of criminal jurisprudence (such as the principle of legal definition of the incriminated offence and the rules on the burden of proof), and on the other hand, with the legally dogmatic characteristics of the JCE and command responsibility. A broader analysis lends supports to those who warn of the “problematic aspects” of the JCE construction and

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<sup>186</sup> Kvočka II, § 104

<sup>187</sup> AMBOS 2000, 965, 966

<sup>188</sup> Prosecutor v. Milosevic, Decision on Motion for Judgment of Acquittal of 16. VI. 2004. § 143 etc.

suggest it be narrowed and made more precise.<sup>189</sup> In view of the fact that the ICTY allows “overlapping” of the JCE and command responsibility in indictments, in consideration of the relationship of these two institutions of derived responsibility, it is necessary to refer to the question of whether cumulative convictions are justified on the basis of Article 7(1) and 7 (3) of the Statute of the ICTY. In the first instance judgement in the Stakić case it was pointed out that within the framework of the case law of that court it was in a legal sense admissible for someone to be found guilty of one criminal offence according to Article 7(1) and Article 7(3). However:

“While there have been cases where a conviction has been entered for one Count pursuant to both Article 7(1) and Article 7(3), there have been others where a Trial Chamber exercised its discretion to enter a conviction under only one head of individual criminal responsibility even when it has been satisfied that the legal requirements for entering a conviction pursuant to the second head of responsibility have been fulfilled. In such cases, the Trial Chamber has entered a conviction under the head of responsibility which better characterizes the criminal conduct of the accused.”<sup>190</sup>

The Trial Chamber in the Blaškić case took the position that “It would be illogical to hold a commander criminally responsible for planning, instigating or ordering the commission of crimes and, at the same time, reproach him for not preventing or punishing them.”<sup>191</sup> In the Trial Chamber judgement in the Krnojelac it is emphasized that:

“The Trial Chamber is of the view that it is inappropriate to convict under both heads of responsibility for the same count based on the same acts. Where the Prosecutor alleges both heads of responsibility within the one count, and the facts support a finding of responsibility under both heads of responsibility, the Trial Chamber has a discretion to chose which is the most appropriate head of responsibility under which to attach criminal responsibility to the Accused.”<sup>192</sup>

Article 7(3) of the Statute of the ICTY serves primarily as a framework clause in situations where the primary grounds of responsibility in Article 7(1) of the Statute cannot be applied. The Trial Chamber in the Stakić case adopted the stance of the Trial Chamber in the Krnojelac case that: “In cases where the evidence leads a Trial Chamber to the conclusion that specific acts satisfy the requirements of Article 7(1) and that the accused acted as a superior, ... a conviction should be entered under Article 7(1) only and the accused’s position as a superior taken into account as an aggravating factor”.<sup>193</sup> From the case law of the ICTY to date, and the meaning and essence of Article 7(3), in which responsibility is contained, subsidiary responsibility pursuant to Article 7(1) of the Statute of the ICTY, it clearly arises that cumulative convictions on both qualifications, on the basis of the same factual circumstances, are not permissible.

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<sup>189</sup> HAAN 2005, 194 etc.

<sup>190</sup> Stakić I, §463

<sup>191</sup> Blaškić I, §337

<sup>192</sup> Krnojelac I, §173

<sup>193</sup> Stakić I §465

# CHAPTER TWO

## JOINT CRIMINAL ENTERPRISE AND THE PRINCIPLE OF LEGALITY

### 1. *Nullum crimen nulla poena sine lege* and International Criminal Law

The International Criminal Tribunal for the Former SFRY has jurisdiction for the criminal prosecution of persons responsible for serious violations of international humanitarian law committed in the territory of the former Yugoslavia since 1991, pursuant to the provisions of the Statute of the ICTY. The serious violations of international humanitarian law for which the ICTY has jurisdiction are: serious violations of the Geneva Convention of 1949 (Article 2 of the Statute of the ICTY), violations of the laws and customs of war (Article 3), genocide (Article 4), and crimes against humanity (Article 5). In the provisions on the subject matter jurisdiction of the Tribunal, the Security Council covered only those standards of international law which have without doubt become part of customary international law. As was pointed out in the Report by the Secretary general of the United Nations, in line with paragraph 2 of Security Council Resolution 808 of the United Nations, The Geneva Conventions comprise the rules of international humanitarian law and they are the heart of customary law applicable for international armed conflicts”<sup>194</sup> The same may be said for the fourth Hague Convention on the Laws and Customs of War on Land of 1907 and the regulations in addition to that Convention. The Convention on the Prevention and Punishment of the Crime of Genocide of 1948 also became part of customary international law, which undoubtedly stems from the Advisory Opinion of the International Court of Justice on reservations to that Convention.<sup>195</sup> Crimes against humanity were also established as part of customary international law in the Principles of International Law recognized in the Statute of the International Military Tribunal in Nuremberg and the Judgement drawn up by the International Law Commission at its second session held in 1950 and submitted for adoption to the General Assembly of the United Nations.<sup>196</sup> The JCE is not mentioned in any of the provisions in Articles 2-5 of the ICTY Statute. From this it may be concluded that the JCE is not a criminal offence within the jurisdiction of the ICTY. Alongside the provisions on criminal offences which are within the subject-matter jurisdiction of the Tribunal, for this consideration the provisions on individual criminal responsibility are also important. Pursuant to Article 7, paragraph 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”. So-called indirect command responsibility (command responsibility

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<sup>194</sup> Report of the Secretary-General Pursuant to Paragraph 2 of Security Council Resolution 808(1993), 22. Feb. 1993., U.N. Doc. S/25704

<sup>195</sup> Reservations to the Convention on the Prevention and Punishment of the Crime of Genocide, International Court of Justice, Advisory Opinion of 28 May 1951.

<sup>196</sup> Principles of International Law Recognized in the Charter of the Nürnberg Tribunal and in the Judgment of the Tribunal, International Law Commission, International Law Commission, 1950, Yearbook of the International Law Commission, 1950, vol. II, para. 97.



stricto sensu) is contained in the provisions of Article 7, paragraph 3 of the Statute. Even in these provisions of the Statute there is no sign of the concept of a JCE. This conclusion, which we could say, is actually the only one possible, was reached without any major problems by the Appeals Chamber in the Tadić case. It also noted that the Tribunal's Statute does not specify (either expressly or by implication) the objective and subjective elements (actus reus and mens rea) of this category of collective criminality. Therefore, to identify these elements one must "turn to customary international law."<sup>197</sup> In that law "Customary rules on this matter are discernible on the basis of various elements: chiefly case law and a few instances of international legislation"<sup>198</sup> Despite the fact that it is obvious that the JCE is not prescribed in any form in the Statute of the ICTY, which the Appeals Chamber also established in the Tadić case, this same Chamber, considering the responsibility of the accused for the murder of five persons in the village of Jaškići in June 1992, remarked that "international criminal responsibility embraces actions perpetrated by a collectivity of persons in furtherance of a common criminal design" adding that "rules on common purpose are substantially rooted in, and to a large extent reflect, the position taken by many States of the world in their national legal systems."<sup>199</sup> Acting in line with the Report by the Secretary General which states that the "application of the principle of nullum crimen sine lege demands that the International Court applies the rules of international humanitarian law, which have beyond any doubt become part of customary law", the Appeals Chambers in the Tadić case tried to answer the question of whether the JCE had become part of customary law beyond any doubt. As support for the hypothesis established later that the JCE was essentially rooted in customary international law and that it is implicitly contained in Article 7(1) of the Statute within the notion of "commission" of criminal offence, some decisions by courts are given in proceedings for crimes committed during World War II, several national legal systems are mentioned in which the concept of the JCE is part of the current law and two international treaties – the Rome Statute of the International Criminal Court and the International Convention for the Suppression of Terrorist Bombings. On the basis of this analysis the Appeals Chamber concluded:

"...that the consistency and cogency of the case law and the treaties referred to above, as well as their consonance with the general principles on criminal responsibility laid down both in the Statute and general international criminal law and in national legislation, warrant the conclusion that case law reflects customary rules of international criminal law."<sup>200</sup>

This stance of the Appeals Chamber in the Tadić case was adopted by almost all the Chambers in the proceedings that followed. So on the basis of the conclusions of the Appeals Chamber in the Tadić case, in the Decision on the objection in the

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<sup>197</sup> Tadić II, § 194

<sup>198</sup> Ibid.

<sup>199</sup> Tadić II, § 193

<sup>200</sup> Ibid. § 226

Ojdanić case in which the question of the prescription of the JCE was considered in customary international law, it was pointed out that the ICTY has authority *ratione personae* to establish and interpret itself any form of criminal responsibility according to the Statute if it meets four conditions:

- (i) it must be provided for in the Statute, explicitly or implicitly;
- (ii) it must have existed under customary international law at the relevant time;
- (iii) the law providing for that form of liability must have been sufficiently accessible at the relevant time to anyone who acted in such a way; and
- (iv) such person must have been able to foresee that he could be held criminally liable for his actions if apprehended.<sup>201</sup>

It is interesting that the Chambers of the ICTY did not re-examine the conclusions reached by the Appeals Chamber regarding the customary status of the JCE in the Tadić case. So, when deciding on the objection mentioned to the jurisdiction in the Ojdanić case, the Appeals Chamber pointed out:

“The Appeals Chamber does not propose to revisit its finding in Tadić concerning the customary status of this form of liability. It is satisfied that the state practice and the *opinio juris* reviewed in that decision was sufficient to permit the conclusion that such a norm existed under customary international law in 1992 when Tadić committed the crimes for which he had been charged and for which he was eventually convicted.”<sup>202</sup>

Bearing in mind the feeble arguments on which the Appeals Chamber based its thesis in the Tadić case, the passivity of the Chambers of the ICTY is truly incredible and their lack of readiness, insofar as they support this stance, to attempt to offer additional arguments to support it, or, if they believe it to be unfounded, to offer reasons why it is unfounded. Even in those proceedings in which an attempt was made to point out the unsuitability of the JCE concept, there was not sufficient determination or arguments to indicate its essential weaknesses, but some, we might say, eclectic solutions were offered, but without the appropriate reasoning. It has, however, to be admitted that the defence in all the proceedings to date, in which the responsibility of the accused is based on the JCE, has been superficial in their criticism of that concept. There has also never been any more serious attempt through the institution of the *amicus curiae* to direct any serious objections to that theory. It is certain that all these reasons, some more, some less, led to the fact that the theory that the JCE is “firmly established in customary international law” has survived all these years almost unscathed. As may be seen, the JCE theory, as a form of responsibility was introduced into the case law of the ICTY in an indirect way. This, of course, led to a widespread scholarly debate about whether this violated the principle of legality, especially from the aspect of that principle which prohibits *ex post facto* application of the law.<sup>203</sup> The principle of legality, as one of the fundamental

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<sup>201</sup> Decision Dragoljub Ojdanić’s motion challenging jurisdiction - JCE, 21.05 2003., §21

<sup>202</sup> *Ibid.* §29

<sup>203</sup> HAAN 2005; ENGVALL 2005.; DARCY 2004-2005; DANNER.-MARTINEZ 2005; POWLES 2004

principles of contemporary criminal law, is the incarnation of a number of imperatives, without which the functioning of the legal system in democratic states would be unimaginable. The principle of the rule of law arises in liberal civil doctrine from the end of the 18<sup>th</sup> century, in contrast to the absolute authority of an individual or a few.<sup>204</sup> Strongly imbued with the idea of freedom as the possibility to live in harmony with the law, the liberal idea of that time, recognizable in the works of Montesquieu, Rousseau, the encyclopaedists, Beccaria and others,<sup>205</sup> the principle of legality with almost all the premises on which it is still founded today, was defined as a guarantee against the arbitrariness and inequality of criminal law in the past.<sup>206</sup> The premises on which in contemporary criminal law the principle of legality is founded are: the prohibition of the retrospective application of the law (*nullum crimen sine lege praevia*), the prohibition of analogy (*nullum crimen sine lege stricta*), the requirement for the law to be written down (*nullum crimen sine lege scripta*), the requirement for the specific legal descriptions (*nullum crimen sine lege certa*), the principle that there is no punishment without a law (*nulla poena sine lege*). The obligation to respect the principle of legality is also prescribed in the fundamental international legal documents on human rights – the International Covenant on Civil and Political Rights (Art. 15), The Universal Declaration of Human Rights (Art. 11, paragraph 2) and the Council of Europe Convention for the Protection of Human Rights and Fundamental Freedoms (Article 7).<sup>207</sup> The ratio legis of Article 7 of the

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<sup>204</sup> Even in Ancient Greece the notion of *isonomia* appeared in opposition to the arbitrary authority of tyranny. The original notion describes conditions which Solon established in Athens when he “gave the people not so much control over public affairs as the security that he would rule on the basis of the law aligned with well-known regulations”. In that sense the notion of *isonomia*, adopted by English law at the end of the 18<sup>th</sup> century is a synonym for “the equality of the law for all citizens” The principle of legality as the incarnation of the original principles of the rule of law, in the time of the Roman republic, was limited to the prohibition of the retrospective action of the law. However, that prohibition was not absolute. Cicerone testifies to this in his apology on the retrospective action of criminal law for behaviour which *tempore criminis* was not defined as punishable, asserting that behaviour was “publishable in itself” or *mala in se*.

<sup>205</sup> The principle of legality was defined for the first time in Article 8 of the Declaration of the Rights of Man and Citizens of 1789, and repeated in the French Constitution of 1791, and in the Code Criminal which came into force in the same year. After that the principle of legality became part of the Bavarian criminal legislation of 1813, and it is believed that Feuerbach, also the creator of that law and a German professor of criminal law, was the author of the Latin maxim *nullum crimen sine lege, nulla poena sine lege* which is still used today as a synonym for the principle of legality.

<sup>206</sup> Beccaria writes about this, amongst other things: "It is sad but true that even today Carpzov's opinion about an old custom pointed out by Clarus and the torture recommended with malicious joy by Farinacius represent the law which is applied without hesitation by those who should not be permitted to have control of the lives of people and their property without dread.", BECCARIA 1978

<sup>207</sup> Sources of international law, regardless if they are convention law, international customary law or general principle of international law, as well as national legal orders, recognize the legality of criminal offences and penalties. This assumes that there is no criminal offences without the law (*nullum crimen sine lege*), no penalty without the law (*nulla poena sine lege*) and there is no *ex post facto* application of the law.<sup>18</sup> Thereby the principle of legality found application in international criminal law too, as the untouchable principle of protection of legal security. The principle of legality in international criminal law is particularly interesting in terms of the

Convention is protection from random or arbitrary judgement and punishment or judgement and punishment for actions which at the time of commission were not a criminal offence. It is also forbidden to impose a heavier penalty for the perpetrator than the one that was applicable at the time the criminal offence was committed. Fundamentally in paragraph 2 there is the requirement that regardless whether a form of behaviour was a criminal offence in national law, it is subject to punishment if at the time it was committed it was a criminal offence according to the “general principles of law recognised by civilised nations.” This provision, almost literally taken from Article 38 of the Statute of the International Court of Justice<sup>208</sup>, was also recorded in the Tokyo and Nuremberg principles, in the trials of members of the defeated armies in World War II for actions which at the time they were committed were not qualified as criminal offences (e.g. war crimes or crimes against peace).<sup>209</sup> When it is a matter of the retroactive application of the law in cases with an international element, the Law on Punishing Nazis and Nazi Collaborators should be remembered, adopted by the Israeli Knesset in 1950, that is a few years after Nuremberg, and on which the indictment in the case against Adolf Eichman was based. The act prescribed the punishability, for example, of crimes against humanity, crimes against the Jewish nation etc. committed in an “enemy country” (Germany or the occupied territory) in the period from 30 January 1933 to 8 May 1945. The law is in many ways different from the Nuremberg law founded on the Treaty of London. Apart from the fact that the jurisdiction *ratione temporis* of Israeli courts was extended in relation to that of the International Military Tribunal in Nuremberg to the period before the outbreak of World War II, the definition of “enemy organization” in that law was much broader than the definition of a criminal organization according to Nuremberg law. According to the Israeli law, it was sufficient to prove that the defendant was a member of a specific organization which existed on the territory of the enemy country and whose aim was to carry out or assist in carrying out actions of an

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obligation of *lex certa*. Descriptions of criminal offences in sources of international criminal law are not, that is to say, so precisely defined as in catalogues of incriminations in national legal orders. Moreover, only rare sources of international criminal law contain what is known as a “general part” defining the principle of legality, and other principles on which the application of the special part of international criminal law is founded. An analysis of the sources of international criminal law (a total of 274 conventions containing criminal elements) confirms that the standards of that law in the main do not meet the requirements for precision of legal descriptions and this is a problem which will have to be resolved in future in view of the position of international criminal law and its direct application in national legal systems. See on this BASSIOUNI 2003.

<sup>208</sup> According to Article 38 of the Statute of the International court of Justice the sources of international law are:

- a. international conventions, whether general or particular, establishing rules expressly recognized by the contesting states;
- b. international custom, as evidence of a general practice accepted as law;
- c. the general principles of law recognized by civilized nations;
- d. subject to the provisions of Article 59, judicial decisions and the teachings of the most highly qualified publicists of the various nations, as subsidiary means for the determination of rules of law.

<sup>209</sup> SAUTENET Crimes Against Humanity And The Principles Of Legality: What Could the Potential Offender Expect? source

[http://www.murdoch.edu.au/elaw/issues/v7n1/sautenet71\\_text.html](http://www.murdoch.edu.au/elaw/issues/v7n1/sautenet71_text.html), 1.8.2009.

enemy administration directed against persecuted persons. On the other hand, the usual membership of a criminal organization without establishment of the active contribution by the defendant to its activities was not sufficient as a basis for criminal responsibility in Nuremberg. The military court of Israel in the case of *Honigman v. Attorney-General* concluded without hesitation that by the law under consideration, the prohibition of the ex post facto action of the law had been violated, but this was justified by the extraordinary circumstances under which it was adopted:

„The law under consideration is fundamentally different in its characteristics, legal and moral principles and in the spirit in which it was written, from all other laws containing criminal offences. The law is retroactive and exterritorial, and its purpose is to found responsibility for criminal offences which are not otherwise foreseen in the criminal legislation of the State of Israel, and which are the consequence of the policy of persecution of the civilian population by the Nazi regime. It is moreover, much stricter than other criminal laws. What is the reason for this? There is only one possible answer: the circumstances in which those crimes were committed were exceptional, and therefore it was only just and suitable for the law, in the application and purpose which the legislator had in mind when he adopted it, to also be so exceptional as the circumstances leading to its adoption.“<sup>210</sup>

The European Court of Human Rights<sup>211</sup> in the cases of *S.W. v. the United Kingdom* and *C.R. v. the United Kingdom* from 1995<sup>212</sup> established that the guarantee enshrined in Article 7, which is an essential element of the rule of law, occupies a prominent place in the Convention system of protection, as is underlined by the fact that no derogation from it is permissible under Article 15 (art. 15) in time of war or other public emergency.<sup>213</sup> This provision is a safeguard against arbitrary proceedings, conviction and punishment. The court also referred to the opinion in the case of *Kokkinakis v. Greece* of 1993<sup>214</sup> for which Article 7 is the incarnation of the principle of legality (*nullum crimen nulla poena sine lege*). From these principles it stems that the criteria of Article 7 are met if the individual from the expression of a specific provision, and insofar as it is necessary, with the help of court interpretation, may conclude which action or omission makes him criminally responsible. The word “law” in Article 7, as in the

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<sup>210</sup> GREEN 1962

<sup>211</sup> PAVIŠIĆ 2006

<sup>212</sup> *S.W. v. United Kingdom*, 20166/92 of 22.11.1995. and *C.R. v. United Kingdom*, 20190/92

<sup>213</sup> „ In time of war or other public emergency threatening the life of the nation any High Contracting Party may take measures derogating from its obligations under this Convention to the extent strictly required by the exigencies of the situation, provided that such measures are not inconsistent with its other obligations under international law. No derogation from Article 2, except in respect of deaths resulting from lawful acts of war, or from Articles 3, 4 (paragraph 1) and 7 shall be made under this provision. Any High Contracting Party availing itself of this right of derogation shall keep the Secretary General of the Council of Europe fully informed of the measures which it has taken and the reasons therefor. It shall also inform the Secretary General of the Council of Europe when such measures have ceased to operate and the provisions of the Convention are again being fully executed “.

<sup>214</sup> *Kokkinakis v. Greece*, 14307/88 of 25.05.1993.

whole convention, represents the written and unwritten law and implies the subjective criteria of assessment, especially of accessibility and foreseeability of criminal prosecution and punishment.<sup>215</sup> Although in the Statute of the ICTY there are no provisions on the principle of legality, in the Report by the Secretary General it is mentioned that “the application of the principle of *nullum crimen sine lege* requires that the International Court applies the rules of international humanitarian law, which have beyond any doubt become part of customary law, so that the problem would not arise that only some, and not all states support certain international conventions”. In the case law of the ICTY it has been established that certain legal standards must represent the authoritative law at the time of commission of the criminal offences with which the defendant is charged, for otherwise a violation of the fundamental principles could occur, whereby substantive criminal law cannot be applied retroactively.<sup>216</sup> This confirms the customary status of the principle of legality.<sup>217</sup> There follows below a brief presentation of the deliberations of the Appeals Chamber in the Tadić case, on the basis of which the conclusion was rendered that the JCE is “firmly established in customary international law”.

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<sup>215</sup> *Miloslavsky v. United Kingdom*, 18139/91 of 13.07.1995.

<sup>216</sup> *Stakić I*, §412

<sup>217</sup> The separate and Dissenting opinion of the Judge Cassesse on the judgement by the Appeals Chamber in the Erdemović case, §11: „...a policy-oriented approach in the area of criminal law runs contrary to the fundamental customary principle *nullum crimen sine lege*.“

## 2. Joint Criminal Enterprise in the Case Law of Courts after World War II

The Appeals Chamber in the Tadić case based its theory of the “establishment of the JCE in customary international law” amongst other things on court proceedings conducted after World War II, in which the JCE is accepted as one form of criminal responsibility:

“Many post-World War II cases concerning war crimes proceed upon the principle that when two or more persons act together to further a common criminal purpose, offences perpetrated by any of them may entail the criminal liability of all the members of the group. Close scrutiny of the relevant case law shows that broadly speaking, the notion of common purpose encompasses three distinct categories of collective criminality.”<sup>218</sup>

In the period from the end of 1945 to the end of 1949 13 trials were conducted in Nuremberg,<sup>219</sup> one before the International Military Tribunal, and the others before national courts, or the courts of the occupying forces in Germany. The legal basis was the Treaty of London and the appending Statute of the International Military Tribunal, and Act no. 10 of the Control Council for Germany. The International Military Tribunal tried the most prominent military and political leaders of Nazi Germany.<sup>220</sup> In 12 so-called small or auxiliary Nuremberg proceedings, individual groups of defendants were tried, depending on their role in the Nazi government. The fundamental legal act for these trials was Control Act of the Council no. 10 of 20<sup>th</sup> December 1945, which placed within the jurisdiction of the occupying authorities the trials of suspects of war crimes within the area of its jurisdiction. Proceedings before the US Military Commission with its seat in Nuremberg ran from 9 December 1946 to 13 April 1949, and 142 defendants were convicted there, of which 24 were sentenced to death. Below there follows a brief presentation of historical cases which the ICTY considered in its Appeal judgement in the Tadić case, and on the basis of which the Appeals Chamber concluded that in customary international law there are three forms of JCE. The first two cases which we shall consider were mentioned by the Appeals Chamber of the ICTY as evidence of the existence of systemic JCE in customary international law, whilst the other three cases relate to what is known as the “extended” JCE. The goal of the trial of Martin Gottfried Weiss et al., better known as the Dachau Case of 1945, was to convict the people who set up and ran Dachau, the first concentration camp in Germany, in which from March 1933 to April 1945 a large number of people were killed in various cruel ways, mainly Russian, Polish and Czech civilians. Although the exact number of people killed cannot be established with any certainty, according to some estimates, as many as

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<sup>218</sup> Tadić II, §195

<sup>219</sup> The question of the principle of legality also arose in the Nuremberg trials when the indictment charged the defendants with conspiracy, not only in conducting an aggressive war, but also war crimes and crimes against humanity. Since this criminal offence was not prescribed by the Charter, the Tribunal rejected count 1 of the indictment and gave its attention only to establishing conspiracy in conducting an aggressive war.

<sup>220</sup> HORVATIĆ et al. 2002

160,000 people passed through that death camp.<sup>221</sup> Of forty defendants, nine were commanders of the camp or deputy commanders, whilst the other defendants were guards, medical staff, so-called “camp block leaders” etc. In the indictment they are charged with, acting to implement their common intent to commit crimes, consciously and willingly helping, supporting and participating in subjecting civilians and prisoners of war of the states with which Germany was at war, to cruelty and treatment which included murder, beatings, torture, starvation, abuse of honour and reputation etc. All forty defendants were convicted, of whom as many as 36 were sentenced to death, which in the case of three was replaced by life imprisonment with forced labour. In order to prove the theories from the indictment, the prosecution had to prove three facts: a) that there was a system in the camp of abuse aimed at committing the crimes mentioned in the indictment, b) that the defendants were aware of that system, and c) that each of the defendants by his actions encouraged, helped, supported or in another way took part in the implementation of that system. In this, the position that each of the defendants held within the camp hierarchy was of essential importance. Thus, if it were a matter of, for example, a deputy camp commander or SS doctors, the very fact of the position they held within the camp hierarchy was sufficient to find them guilty. If it were a matter of other persons who held lower positions in that camp hierarchy, e.g. guards, then the prosecution had to prove that the defendant, using his position which was not unlawful per se, took part in abuse of the inmates, and thereby in maintaining the system of abuse. In the comments on the indictment, the defence stated that “common purpose” was not a separate criminal offence, and that that expression was vague, and left the defendant in doubt whether he was being charged with conspiracy or not. In the reply to this comment, the court stated that the defendants were not being charged with “common purpose” as a separate criminal offence, but with breaking the law and customs of war, by participation in the common intent of abuse and killing camp inmates. The stance of the court regarding the other comments by the defence is not completely clear. Although in one place it states that the definition of common purpose is not different from the definition of conspiracy, which would in itself mean that the prosecution has to prove everything it has to prove otherwise for conspiracy (the existence of an agreement between the defendants), it is clear that it gave up on that approach for the simple reason that the prosecution would in fact be unable to prove that sort of conspiracy for several reasons. That is to say, no evidence was offered in the proceedings of the existence of an agreement between the defendants, which is the *condicio sine qua non* of the criminal offence of conspiracy. Moreover, some of the defendants did not even know each other nor did they hold their functions in the camp at the same time. Therefore it is obvious that the burden of proof, although on the prosecution, would be far smaller than it would be if the prosecution had to prove the existence of a conspiracy. In the case against Otto Ohlendorf et al., which is better known as the “Einsatzgruppen”, members of paramilitary units were tried who were under the control of SS units

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<sup>221</sup> Trial of Martin Gottfried Weiss and Thirty-Nine Others, Law-Reports of Trials of War Criminals, The United Nations War Crimes Commission, Volume XI, London, HMSO, 1949, source <http://www.ess.uwe.ac.uk/WCC/dachau.htm>, 1.8.2009.



before and during World War II, and whose main task was to destroy Jews, Roma and political opponents of the Third Reich.<sup>222</sup> Group A operated in the area of central Latvia, Lithuania and Estonia, Group B around Moscow, and Groups C and D in the Ukraine and later in the Caucasian area. According to estimates from the archives of the group itself, it was responsible for the deaths of more than a million people. The historian Hilber estimates that in the period from 1941 to 1945 members of these death squads killed about a million and a half Jews. From what is called the Jager report on the operation Einsatzkommando 3 in Lithuania, almost 140,000 civilians were killed in five months whereby, according to the unit commander Karl Jager, the question of Jews in Lithuania was resolved. The criminal proceedings in the Einsatzgruppen case are considered to be the largest proceedings for mass killings in recent world history. What makes these proceedings different from other proceedings within the so-called small Nuremberg trials is that the defendants, in the words of the prosecution “were not charged with creating plans for mass killings in an office, but with active participation in the implementation of those plans, directly on the ground through supervision, direction and taking on active roles in the bloody harvest.” The defendants in the Einsatzgruppen case were charged with participating in the common plan:

“...The basic principle is that neither according to Act no. 10 of the Control Council, nor according to any known system of criminal law is guilt of murder limited to the man who pulls the trigger or buries the body. In line with the recognized principles which are common to all civilized legal systems, paragraph 2 of Article II of Act no. 10 of the Control Council regulates several forms of relationships with crimes, which are sufficient to establish guilt. Therefore, not only the main perpetrators are guilty, but also participants, those who participate with assent in the commission of a crime or who are linked to the plans and enterprises related to the commission, or those who order to support crime and those who belong to an organization or group included in the commission of the crime These provisions do not embody any draconian or new principles of criminal responsibility.”<sup>223</sup>

In the case against Erich Heyer et al. which is better known in literature as Essen Lynch or Essen West<sup>224</sup>, the British military court tried Captain Heyer, a German soldier and five civilians for the murder of three British prisoners of war. The trial was held in the German town of Essen in December 1945. The accused Heyer, on 13 December 1944 handed the three captured British pilots to guards, who, amongst others included one of the defendants, Koenen. The guards were supposed to take the prisoners to a Luftwaffe unit for questioning. After he handed the soldiers over, Heyer ordered the guards not to interfere if civilians possibly attacked or if they began to abuse the prisoners of war. In the

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<sup>222</sup> United States v. Otto Ohlendorf et al. source

[http://www.ess.uwe.ac.uk/genocide/einsatzgruppen\\_case\\_index\\_page.htm](http://www.ess.uwe.ac.uk/genocide/einsatzgruppen_case_index_page.htm), 1.8.2009.

<sup>223</sup> Ibid.

<sup>224</sup> Trial of Erich Heyer and Six Others, Law-Reports of Trials of War Criminals, The United Nations War Crimes Commission, Volume I, London, HMSO, 1947, source <http://www.ess.uwe.ac.uk/WCC/essen.htm>, 1.8.2009.

proceedings it was shown that the order was given very loudly so that the civilians gathered, who in the end lynched the prisoners of war, could clearly hear it. In the judgement the course of events was presented after Heyer's orders were issued:

“When the prisoners of war were marched through one of the main streets of Essen, the crowd around grew bigger, started hitting them and throwing sticks and stones at them. An unknown German corporal actually fired a revolver at one of the airmen and wounded him in the head. When they reached the bridge, the airmen were eventually thrown over the parapet of the bridge; one of the airmen was killed by the fall; the others were not dead when they landed, but were killed by shots from the bridge and by members of the crowd who beat and kicked them to death.”<sup>225</sup>

The Allied military tribunal pronounced Erich Heyer guilty and condemned him to death by hanging. Koenen was also found guilty and sentenced to five years' imprisonment. Of the five civilians accused, the court found three of them guilty,<sup>226</sup> whilst two were acquitted due to lack of evidence. The facts of the case were very similar in the case of Kurt Goebell et al. better known as “Borkum Island”.<sup>227</sup> The proceedings against Kurt Goebell et al. were conducted before an American military tribunal (actually a military commission) in the German town of Ludwigsburg from 6 February to 22 March 1946. Several senior officers, soldiers, the mayor of Borkum, policemen, a civilian and the leader of the working service of the Reich, were accused that they “consciously, intentionally, and unlawfully incited, aided, abetted and participated in murder” of seven American military pilots who were forced to land on the island of Borkum in the north west of Germany on 4 August 1944. After being captured, the pilots were forced to walk through the town, where they were abused by members of the working service of the Reich and civilians. The soldiers guarding them not only failed to protect the military prisoners, but by their own behaviour they incited civilians to abuse, in which they themselves only partially participated. When they came to the town hall the prisoners of war were shot by the soldiers. The prosecutor stated in the proceedings that the accused were “cogs in the wheel of common design, all equally important, each cog doing the part assigned to it. And the wheel of wholesale murder could not turn without all the cogs”.<sup>228</sup> Of a total of 16 accused, only one was acquitted of the charges whilst the others were found guilty and sentenced to death or long-term prison sentences. In what is known as the Italian case, to which the Appeals Chamber also refers in the Tadić case, members of the armed forces were on trial of the so-called Repubblica Sociale Italiana which Germany placed under control after Italy declared war on Germany in October 1943. In the trial of D'Ottavio et al. armed civilians unlawfully persecuted two prisoners of war who escaped from the concentration camp. One member of the group shot at the prisoners without the intention of killing them, but one prisoner was wounded and as a result he later died. The first instance

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<sup>225</sup> Ibid.

<sup>226</sup> Johann Braschoss was sentenced to death by hanging, Karl Kaufer to life imprisonment, and Hugo Boddenberg to ten years imprisonment.

<sup>227</sup> KOESSLER 1956-1957

<sup>228</sup> Tadić II, §210

court considered that all the members of the group were responsible not only for “unlawful deprivation of freedom” (sequestro di persona) but also for unlawful killing (omicidio preterintenzionale). The Court of Cassation in March 1947 confirmed this, stating that for this form of criminal responsibility there must exist not only a materially important, but also a psychological nexus of causality between the results which all the members of the group wanted to achieve and the different acts committed by individual members of the group. The court then pointed out:

“...indeed the responsibility of the participant (concorrente) [...] is not founded on the notion of objective responsibility [...], but on the fundamental principle of the concurrence of interdependent causes [...]; by virtue of this principle all the participants are accountable for the crime both where they directly cause it and where they indirectly cause it, in keeping with the well-known canon *causa causae est causa causati*.”<sup>229</sup>

The court further established that in the specific case there existed:

“psychological causality, 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. This foresight (previsione) necessarily followed from the use of weapons: it being predictable (dovendo prevedersi) that one of the participants might shoot at the fugitives to attain the common purpose (lo scopo comune) of capturing them.”<sup>230</sup>

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<sup>229</sup> Ibid. §215

<sup>230</sup> Ibid.

### 3. Joint Criminal Enterprise in International Conventions

The Appeals Chamber in the Tadić case pointed out that, apart from the case law mentioned, the concept of a common plan was confirmed by at least two international agreements – the International Convention for the Suppression of Terrorist Bombings of 1997 and the Rome Statute of the International Criminal Court of 1998. According to Article 2(3) c of the International Convention for the Suppression of Terrorist Bombings, a perpetrator of a criminal offence is a person who, *inter alia*, “in any other way contributes to the commission of one or more offences as set forth in paragraph 1 or 2, by a group of persons acting with a common purpose; such contribution shall be intentional, and either made with the aim of furthering the general criminal activity or purpose of the group or be made in the knowledge of the intention of the group to commit the offence or offences concerned.”<sup>231</sup> Although in the appeals judgement it is pointed out that “the negotiating process does not shed any light on the reasons behind the adoption of this text” the Chamber concluded that the Convention was important “because it upholds the notion of a “common criminal purpose” as distinct from that of aiding and abetting”. Although the Convention was not in force at that time,<sup>232</sup> the Appeals Chamber pointed out that “one should not underestimate the fact that it was adopted by consensus by all the members of the General Assembly. It may therefore be taken to constitute significant evidence of the legal views of a large number of States.”<sup>233</sup> The other international agreement which the Appeals Chamber mentioned in support of the theory of the roots of the JCE in customary international law is the Statute of the International Criminal Court adopted at the diplomatic conference in Rome in 1998. According to Article 25, paragraph 3 (d) of that Statute, individually criminally responsible for a criminal offence within the jurisdiction of the Tribunal is who “In any other way contributes to the commission or attempted commission of such a crime by a group of persons acting with a common purpose. Such contribution shall be intentional and shall either:

- (i) Be made with the aim of furthering the criminal activity or criminal purpose of the group, where such activity or purpose involves the commission of a crime within the jurisdiction of the Court; or
- (ii) Be made in the knowledge of the intention of the group to commit the crime;”<sup>234</sup>

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<sup>231</sup> International Convention for Suppression of Terrorist Bombings, New York, 12 January 1998, source [https://www.unodc.org/tldb/en/1997\\_Convention\\_Terrorist\\_Bombing.html](https://www.unodc.org/tldb/en/1997_Convention_Terrorist_Bombing.html), 1.8.2009., The Act Ratifying the International Convention for Suppression of Terrorist Bombings, Official Gazette, International Agreements no. 3/2005. of 20.04.2005.

<sup>232</sup> WIDELL 2005, source <http://www.serbianna.com/columns/widell/003.html>, 1.8.2009.

<sup>233</sup> Tadić II, §221

<sup>234</sup> Rome Statute of the International Criminal Court, izv. <http://untreaty.un.org/cod/icc/index.html>, 1.8.2009., Act to Ratify the Rome Statute of the International Criminal Court, Official Gazette, International Agreements no. 5/2001. of 27.04.2001.

The Appeals Chamber of the ICTY in the Tadić case accepted the assessment of the “legal weight” of the Rome Statute even though it was not yet in force at that time:

“There the Trial Chamber pointed out that the Statute is still a non-binding international treaty, for it has not yet entered into force. Nevertheless, it already possesses significant legal value. The Statute was adopted by an overwhelming majority of the States attending the Rome Diplomatic Conference and was substantially endorsed by the Sixth Committee of the United Nations General Assembly. This shows that that text is supported by a great number of States and may be taken to express the legal position i.e. *opinio iuris* of those States.”<sup>235</sup>

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<sup>235</sup> Tadić II, §223

#### 4. Joint Criminal Enterprise in Comparative Law

In the Tadić case, the Appeals Chamber stated that the “the doctrine of acting in pursuance of a common purpose is rooted in the national law of many States”:

“Some countries act upon the principle that where multiple persons participate in a common purpose or common design, all are responsible for the ensuing criminal conduct, whatever their degree or form of participation, provided all had the intent to perpetrate the crime envisaged in the common purpose. If one of the participants commits a crime not envisaged in the common purpose or common design, he alone will incur criminal responsibility for such a crime“.<sup>236</sup>

As an example of a state in which a co-perpetrator does not answer for the excesses of other co-perpetrators in the judgement Germany and the Netherlands are mentioned. On the other hand, there are also countries which, “also uphold the principle whereby if persons take part in a common plan or common design to commit a crime, all of them are criminally responsible for the crime, whatever the role played by each of them”. However, in these countries, if one of the persons was, “taking part in a common criminal plan or enterprise perpetrates another offence that was outside the common plan but nevertheless foreseeable, those persons are all fully liable for that offence.“<sup>237</sup> The states in which this concept of common criminal intent is accepted in its widest form are France, Italy and the common law systems such as England, Wales, Canada the USA, Australia and Zambia. We could direct at least two objections towards the list defined by the Appeals Chamber. First, some states are not included in it in which the JCE is part of the law in force, such as South Africa, Nigeria and India. In these states elements of the JCE are built into the institution of the common purpose, or common intent. The probable reason for omitting those two states, primarily South Africa, from the list, is the discussion which has been going on in that country for years, especially since the abolition of the apartheid regime, in relation to the grounds for retaining the institution in the national legislation. The reason for the debates, which indicate the doubtful constitutionality of that institution, are some judgements in which there was an inappropriate extension of the institution, opposed to the principle of guilt.<sup>238</sup> These judgements prompted a lively discussion about whether the rule of a “common purpose”, by which the actions of one person are imputed to another person without establishing that

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<sup>236</sup> Ibid. §224

<sup>237</sup> Ibid.

<sup>238</sup> By the judgement in the case of S v. Mgedezi of 1989, the doctrine of “common purpose” was extended to persons who did not make a prior agreement on the commission of the crime, but they were actively and intentionally associated with it (active association). In order for the defendant to be found guilty on the basis of the extended doctrine of “common purpose” the prosecution has to prove: a) that the defendant was present at the site of the commission of the crime, b) that he was aware of the attack; c) that he acted with intent to contribute to the common purpose together with those who participated in the attack and d) that by his actions from which it stems that he had the intention to be actively involved in the attack, he showed that he shared a common purpose with the attackers.

other person caused the prohibited consequences by his behaviour, is in line with the principle of the presumption of the defendant's innocence guaranteed by the constitution.<sup>239</sup> The other objection to the list drawn up by the Appeals Chamber in the Tadić case relates to the statement that these are states in which the "concept of common criminal purpose is accepted in its widest form". On the contrary, in those countries a lively debate is underway on the question of how far the concept of the JCE is in line with the principle of guilt. In that sense, the assertion that the concept of the "common criminal purpose is accepted in its widest form" in one legal system given in that list, that is Canada, in which the Supreme Court's Decision in the case of *R. v. Logan* from 1990, declared the form of the doctrine of the JCE unconstitutional, is completely unfounded.<sup>240</sup> Also in other states to which the court refers, the case law is not unified regarding the application of the concepts which in terms of content fit the extended JCE concept.<sup>241</sup> This however is only one of the shortcuts, used by the Appeals Chamber in the Tadić case to find defendants guilty when there was no evidence that they personally committed the criminal offence they were charged with. Regardless of the differences in the content of the institutions of comparative legislation, which to a greater or lesser extent coincide with the JCE theory, from the judgement of the Trial Chamber in the Tadić case, it could have been concluded that national legislations, in which some form of JCE was detected, were not taken into consideration in the consideration of the roots of that institution in customary international law. That is to say, the Chamber *expressis verbis* relativized the fact that certain type of JCE was in force in some criminal legislation:

"It should be emphasised that reference to national legislation and case law only serves to show that the notion of common purpose upheld in international criminal law has an underpinning in many national systems. By contrast, in the area under discussion, national legislation and case law cannot be relied upon as a source of international principles or rules, under the doctrine of the general principles of law recognised by the nations of the world: for this reliance to be permissible, it would be necessary to show that most, if not all, countries adopt the same notion of common purpose. More specifically, it would be necessary to show that, in any case, the major legal systems of the world take the same approach to this notion. The above brief survey shows that this is not the case. Nor can reference to national law have, in this case, the scope and purport adumbrated in general terms by the United Nations Secretary-General in his Report, where it is pointed out that "suggestions have been made that the international tribunal should apply domestic law in so far as it incorporates customary international humanitarian law". In the area under discussion, domestic law does not originate from the implementation of international law but, rather, to a large extent runs parallel to, and precedes, international regulation."<sup>242</sup>

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<sup>239</sup> BURCHELL 1997

<sup>240</sup> In the second instance judgement in the Tadić case, this fact is mentioned in a footnote and is not given much importance. For criticism see SCHABAS 2002-2003

<sup>241</sup> E.g., in the USA courts mainly rejected the use of the disputed Pinkerton doctrine in establishing the responsibility of conspirators because of its lack of harmony with the principle of guilt.

<sup>242</sup> Tadić II, §225

Despite this reservation, it seems that national legislation influenced the introduction of the JCE theory to the case law of the ICTY to a far greater extent than the Appeals Chamber was willing to admit in the Tadić case. Although a very small number of states in the world have legislation which prescribes some forms of responsibility which are essentially similar to the JCE theory, their influence on world events overall is reversely proportionate to their number. Also these countries are USA and Great Britain who through the trials after World War II had a significant influence on the fact that international criminal law is to a more significant extent modelled on the common law system model. Finally, in the Appeals Chamber in the Tadić case, two of the five members of the Chamber were judges from countries in which the JCE is part of the currently valid law in a certain form. It was easier for them, to a greater extent than the other members of the Chamber, to understand and accept the concept, which exists in a similar form in the legal cultures from which they come. In view of the fact that national law had a much greater role in the acceptance of the theory of the JCE than may be concluded from the judgement by the Appeals Chamber in the Tadić case, and bearing in mind that national legislations mentioned in the judgement do not constitute a coherent legal system, which implies coherent case law, the commentators are right who believe that it was legally incorrect to allow their influence in the formulation of the theory of the JCE, especially its extended variant.<sup>243</sup>

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<sup>243</sup> ENGVALL 2005, 28



## 5. Discussion

In contrast to the assessment by the Appeals Chamber in the Tadić case that the Essen Lynch case was an example of an extended JCE, an analysis of all the facts and circumstances of that case point to the conclusion that there is little evidence for this assertion. That is to say, the defendants acted in accordance with a common purpose which was aimed at abuse of prisoners of war, and included at least the indirect intent to kill them. The prisoners of war were killed after the commander incited his subordinates to do so. There is absolutely no evidence that in that case this was a consequence which goes beyond the framework of the common purpose of all the co-perpetrators. On the contrary, the death of the prisoners of war is the result of the action of the group in the realization of their common purpose,<sup>244</sup> and is completely within the framework of an agreement between co-perpetrators. Moreover, the argument by the prosecution that in the specific case it is not necessary to prove the intent of the defendant to commit murder but the less serious criminal offence of unlawful killing, cannot be a precedent for lowering the criteria of guilt in participation in a JCE and the commission of serious criminal offences where this element is very complex (e.g. genocide). Finally, since in that case no legal advisor to the court was appointed, there is no evidence that the court based its decision on the guilt of the defendant on the JCE theory.<sup>245</sup> When dealing with the Borkum Island case, it may be clearly seen in the judgement that the court, taking account of the real contribution of each of the defendants, which is why some of them were convicted of murder and assault and some only of assault, actually rejected the JCE construction, which the prosecution, although it used different terminology, was clearly trying to prove without success. If the court had accepted the prosecution's theory then all the defendants, as participants in the JCE, would be equally criminally responsible for the criminal offences which were the "natural and foreseeable consequences of the JCE."<sup>246</sup> Here the contradiction may be seen in the legal reasoning of the Appeals Chamber in the Tadić case, in which it is said that "it may be fairly assumed that in the event, the court upheld the common

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<sup>244</sup> The cases of the Essen Lynch and Borkum Island are pure cases of basic JCEs, where all the participants had a common purpose to commit a specific criminal offence. For the formation of that purpose the official policy of the Nazi party played a decisive role, which through its official publications publicly encouraged the lynch of captured allied soldiers, as a sign of revenge against the Allied bombings of German cities. In those messages there is talk of "the barbaric and cynical character of the terrorist attacks whose perpetrators must not be protected from the German people by the German army nor the police." Therefore in the cases in which the "people took justice into their own hands" there cannot be talk of the murders of prisoners of war as a foreseeable excess, but as crimes committed as part of the realization of the common purpose. So in ENGVALL 2005.; DANNER-MARTINEZ 2005; HAAN 2005

<sup>245</sup> ENGVALL 2005, 21

<sup>246</sup> Moreover it is not clear on what the Appeals Chamber in the Tadić case based its decision to include the Island of Borkum case in the third category of JCE, when it admitted itself that in that case "the Prosecutor substantially propounded a doctrine of common purpose which presupposes that all the participants in the common purpose shared the same criminal intent, namely, to commit murder. In other words, the Prosecutor adhered to the doctrine of common purpose mentioned above with regard to the first category of cases." Tadić II §211

design doctrine, but in a different form, for it found some defendants guilty of both the killing and assault charges while others were only found guilty of assault.”<sup>247</sup> In this case again, the Appeals Chamber did not offer clear evidence that the judgement of the military tribunal was founded on the JCE construction. Instead of legal evidence, it offered presumptions and pure hypothesis:

“It may be inferred from this case that all the accused found guilty were held responsible for pursuing a criminal common design, the intent being to assault the prisoners of war. However, some of them were also found guilty of murder, even where there was no evidence that they had actually killed the prisoners. 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.”<sup>248</sup>

The case of D’Ottavio that was considered, is actually the only trial in which the court (and a national one at that) found the defendant guilty of a criminal offence committed as part of an extended JCE.<sup>249</sup> However, here it should also be mentioned that the case law of the Italian Court of Cassation after World War II was not consistent. So for example, that court in the later case Aratano et al. overturned the judgement of the first instance court, by which all the defendants, also members of the police of the RSI, were found guilty of murder. That is to say, whilst they were arresting several Partisans, one of the defendants, in order to frighten them, fired several shots into the air, after which an exchange of fire ensued, in which one of the Partisans was killed. According to the court of cassation, since the first instance court concluded that the members of the police did not intend to kill the Partisans:

“...It was clear that [the murder of one of the partisans] was an unintended event (*evento non voluto*) and consequently could not be attributed to all the participants: the crime committed was more serious than that intended and it proves necessary to resort to categories other than that of voluntary homicide. This Supreme Court has already had the opportunity to state the same principle, where it noted that in order to find a person responsible for a homicide perpetrated in the course of a mopping-up operation carried out by many persons, it was necessary to establish that, in participating in this operation, a voluntary activity also concerning homicide had been brought into being (*fosse stata spiegata un’attività volontaria in relazione anche all’omicidio*).”<sup>250</sup>

A contrario, without him taking intentional action related to the murder, it is not possible to find grounds for the criminal responsibility of the defendant for the criminal offence. This is completely opposite to the mental element of the extended JCE which consists of the objective category of the foreseeability of consequences as natural and reasonable. At the end of this consideration, we could conclude that the thesis of the Appeals Court in the Tadić case is

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<sup>247</sup> Ibid. §212

<sup>248</sup> Ibid. §213

<sup>249</sup> ENGVALL 2005.; DANNER-MARTINEZ 2005; HAAN 2005, 196

<sup>250</sup> Tadić II, §216

unconvincing that the JCE (including its extended variant) is undoubtedly part of customary international law, because of its use in the jurisprudence of courts after World War II. In none of the cases (except D'Ottavio case) which, according to the Appeals Chamber, are examples of extended JCE, is there any evidence that the court founded its judgement on that legal construction. The fragmented quotation of indictments, in which, it is true, a common purpose is mentioned and the formulation of presumptions about whether and how the court recognized those theses, is in no way sufficient, as the Secretary General of the UN stated in his report on paragraph 2 of Security Council Resolution 808, to assert that the JCE theory at the time the criminal offences were committed with which the defendants before the ICTY are charged, was "without any doubt part of customary law". In short, only one judgement by a national court (!?) in the period since World War II in which the court based the guilt of the defendant on something which was close to the concept of the extended JCE is not and cannot be indisputable evidence of the establishment of the JCE in customary international law. It is necessary, in that sense, to agree with many commentators, who consider that the firm legal basis for the extended JCE in international criminal law, which the ICTY found in case law since World War II, does not exist.<sup>251</sup> In the Tadić case the ICTY mentioned in support of the thesis that the JCE theory is "firmly established in customary international law", two international conventions – the International Convention for the Suppression of Terrorist Bombings and the Rome Statute of the ICC. The International Convention for the Suppression of Terrorist Bombings was adopted immediately after the terrorist attacks on the US Embassies in Kenya and Tanzania. In his report in September 1996, the Secretary General of the United Nations emphasized the necessity of considering those areas which were not covered by the sector anti-terrorist conventions. These are the areas of: terrorist bombings, financing terrorism, the arms trade, money laundering, exchange of information on persons and organizations suspected of terrorism, forgery of travel documents, technical cooperation in the implementation of anti-terrorist measures etc. According to the statements by the Secretary General, attention should also be given to drawing up measures to prevent the use of weapons of mass destruction and the use of contemporary information technology by terrorist. On the basis of that report, the General Assembly of the United Nations by Resolution 51/210 founded an Ad hoc committee to draw up a draft international convention for the suppression of terrorist bombings, and subsequently an international convention for the suppression of acts of nuclear terrorism. The first draft, about which a debate was held by the committee, was submitted on behalf of the Group of Seven and Russia, by France. Negotiations in relation to the final text of the Convention were completed in December 1997 with its adoption by the General Assembly of the United Nations. The main innovations contained in the Convention which, amongst other things, later facilitated negotiations on the text of the International Convention for the Suppression of the Financing of Terrorism and the

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<sup>251</sup> For instance in ENGVALL 2005.; DANNER-MARTINEZ 2005; HAAN 2005; DARCY 2004-2005

International Convention for the Suppression of Act of Nuclear Terrorism, relate to an extensive definition of “explosive and other lethal devices” which does not cover only bombs but also various forms of non-conventional devices made by hand, which are mainly used by terrorist groups in their attacks. In contrast to the previous sector conventions, the International Convention for the Suppression of Terrorist Bombings extended punishability in the sense of the circle of potential targets of terrorist attacks to all government infrastructure premise, public transport systems and public places. An important innovation was the omission of provisions on political offence exception, as well as so-called conditional extradition, whilst the provisions of Article 19 may be considered problematic, according to which its application is excluded to activities of the armed forces during military conflicts, as those expressions are understood in international humanitarian law which regulate them, and to activities undertaken by military forces of a state as part of their official duty, to the extent to which they are defined by other standards of international law. Due to the increased danger from terrorist association, in Article 2 the Convention specifies a special form of commission of a criminal offence from the Convention catalogue. According to this provision, a perpetrator of the crime would be anyone who “in any other way contributes to the commission of one or more offences as set forth in paragraphs 1 or 2 by a group of persons acting with a common purpose; such contribution shall be intentional, and either made with the aim of furthering the general criminal activity or purpose of the group or be made in the knowledge of the intention of the group to commit the offence or offences concerned.”<sup>252</sup> This provision, which in terms of its content is very close to the notion of “criminal conspiracy” is built into the Convention after the example of the legal documents of the European Union which regulate international cooperation in suppressing international terrorism, so that by a wide linguistic formulation it is possible to prosecute persons suspected of terrorism. Although in the case of these provisions and the extended JCE this is a case of so-called collective criminality, in the sense of the contents, Article 2c of the Convention is significantly different from the extended JCE formulated in the Tadić case. That is to say, whilst in the extended JCE, for foundation of criminal responsibility of a participant in a JCE it is sufficient for him to foresee the criminal offence committed beyond the framework of the common purpose as a “natural and foreseeable” consequence of the JCE, the perpetrator of the criminal offence according to Article 2c of the Convention must act with intent (the subjective element) and by his actions, contribute to the

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<sup>252</sup> Article 2 of the International Convention for the Suppression of the Financing of Terrorism of 1999 is very similar to that provision, and prescribes, amongst other things, that a person commits a criminal offence if he organizes or directs others to commit an offence from the Convention catalogue, or if he “Contributes to the commission of one or more (such) offences... by a group of persons acting with a common purpose. Such contribution shall be intentional and shall either: (i) Be made with the aim of furthering the criminal activity or criminal purpose of the group, where such activity or purpose involves the commission of an offence as set forth in paragraph 1 of this article (the Convention catalogue) or (ii) Be made in the knowledge of the intention of the group to commit an offence as set forth in paragraph 1 of this article.” Therefore, criminal activity or the criminal purpose of the group is not general in character but must include the “committing a criminal offence” from the Convention catalogue.

commission of the criminal offences by the group (the objective element, which is also required to establish the responsibility of the co-perpetrator in most continental legal systems). It is not necessary to emphasize that for states from the common law and civil law systems it was very difficult to reach a consensus even about this kind of modified variant of conspiracy in which the standard of guilt is set very high. It is absolutely certain that it would be impossible to reach a consensus regarding the much more extensive and less well defined formula of the extended JCE, the more so because it is about terrorism, which in most countries is an especially sensitive issue, which is also indicated by the impossibility of reaching a consensus over the definition of that notion. Furthermore, it is questionable how far an international agreement which had not come into force<sup>253</sup> can be, as the Appeals Chamber in the Tadić case states, “taken to constitute significant evidence of the legal views of a large number of States.” Apart from this, it is not well-founded to apply by analogy the content of the regulatory framework created for the needs of suppressing terrorism, precisely because of its specific nature, in situations where it is a case of serious violations of international humanitarian law, because these are essentially different categories. The provisions of Article 2c of the International Convention for the Suppression of Terrorist Bombings was transferred literally to Article 25 of the Statute of the ICC. After the states of civil and common law could not agree on the provisions on conspiracy which were prescribed in earlier versions of the draft, a solution was adopted which was acceptable to both sides – in Article 25 of the Statute a literal transcription of the provisions of Article 2c of the International Convention for the Suppression of Terrorist Bombings was built in. In contrast to the statutes of the ad hoc international criminal tribunals for the former Yugoslavia and Rwanda, the Statute of the ICC is an international agreement which stems from the agreed will of the states parties. Although it does not contain criminalizing provisions but only provisions on criminal offences which are within the subject matter jurisdiction of the Tribunal, the Statute has a significant influence on national criminal law systems. That is to say, in line with complementarity principle, by which domestic criminal jurisprudence has principle priority (which even after the ratification of the ICC Statute proceeds according to national law), the ICC can take over proceedings from national courts if it is convinced that they do not have the will for criminal prosecution (Article 17), or to conduct a re-trial if it is not satisfied with the decision of the national court (Article 20). Therefore in national law it is important to anticipate all the gaps in both substantive and procedural law and align the content of national law with the Statute of the ICC in order to ensure the jurisdiction of domestic courts and retain their priority over the ICC, especially in situations when the states have a specific interest in punishment (a crime committed on the territory of that state, the victims are its citizens etc). Since “unwilling or unable genuinely to carry out the investigation or prosecution” may be interpreted very broadly and it is still uncertain which criteria the ICC will adopt in that context, it is very important in national law, both substantive and procedural, to provide on

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<sup>253</sup> WIDELL 2005, source: <http://www.serbianna.com/columns/widell/003.html>, 1.8.2009.

the regulative level all the necessary mechanisms so that in practice the principle priority of domestic criminal jurisprudence would actually be realized. In order to ensure the priority of national criminal jurisprudence, arising from complementarity principle, each state party must so regulate its own substantive criminal law so that it may criminally prosecute international crimes prescribed in the Rome Statute according to its own law. For the provisions of Article 25 of the ICC Statute, the same may be said as for Article 2c of the International Convention for the Suppression of Terrorist Bombings. In literature there is also agreement that in this provision it is a matter of one variant of conspiracy or association for the sake of committing a specific criminal offence. The important deviation in relation to conspiracy is found in that fact that the Statute requires a causal contribution from participants in the commission of the crime, which exceeds mere participation in the agreement about committing it. The participant in the group must act in the common purpose with special intent that is, he must act with the aim of promoting the criminal activity or criminal purpose of the group, which includes committing criminal offences within the jurisdiction of the court or knowing the plan of the group to commit such a criminal offence. Moreover, the provisions of Article 22, paragraph 2 should not be forgotten, which prohibit analogy and require the application of the principle in dubio pro reo. From this, it is absolutely clear that, in contrast to the assertion by the Appeals Chamber in the Tadić case, none of the international agreements mentioned contains, whether implicitly or explicitly, the category of the extended JCE. In the decision on the objection in the Ojdanić case, the Appeals Chamber stated that the International Court has authority *ratione personae* if each form of responsibility meets four preconditions, of which two are very important in the context of this consideration, and they relate to the accessibility of the law in force at the relative time and the foreseeability that behaviour in violation of that law will imply individual criminal responsibility.<sup>254</sup> In that decision it is emphasized that “the meaning and scope of the concepts of “foreseeability” and “accessibility” of a norm will, as noted by the European Court of Human Rights, depend a great deal on the content of the instrument in issue, the field it is designed to cover and the number and status of those to whom it is addressed.”<sup>255</sup> It is also pointed out that there is a difference between the meaning of the principle of legality in national and international law, which is also confirmed by the understanding of the American military court in the Justice case:

“Under written constitutions the *ex post facto* rule condemns statutes which define as criminal acts committed before the law was passed, but the *ex post facto* rule cannot apply in the international field as it does under constitutional mandate in the domestic field. (...) International law is not the product of statute for the simple reason that there is yet no world authority empowered to enact statutes of universal application. International law is the product of multipartite treaties, conventions, judicial decisions and customs which have received international acceptance or acquiescence. It would be sheer

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<sup>254</sup> Decision on the motion by Dragoljub Ojdanić challenging jurisdiction – joint criminal enterprise, 21.05 2003., §21

<sup>255</sup> *Groppera Radio AG and Others v. Switzerland*, 10890/84 [1990] ECHR 7 (28.03.1990), §68

absurdity to suggest that the ex post facto rule, as known to constitutional states, could be applied to a treaty, a custom, or a common law decision of an international tribunal, or to the international acquiescence which follows the events. To have attempted to apply the ex post facto principle to judicial decisions of common international law would have been to strangle the law at birth”.<sup>256</sup>

Following the difference between the meaning of the principle of legality in national and international law, it arises that the criteria of accessibility will be met even if in national law there was no express provision on the punishability of some behaviour, but there is a “long and consistent stream of judicial decisions, international instruments and domestic legislation which would have permitted any individual to regulate his conduct accordingly and would have given him reasonable notice that, if infringed, that standard could entail his criminal responsibility”.<sup>257</sup> The Appeals Chamber in the Ojdanić case also points out that:

“...due to the lack of any written norms or standards, war crimes courts have often relied upon the atrocious nature of the crimes charged to conclude that the perpetrator of such an act must have known that he was committing a crime. In the Tadić judgement for instance, the Appeals Chamber noted “the moral gravity” of secondary participants in a joint criminal enterprise to commit serious violations of humanitarian law to justify the criminalisation of their actions. Although the immorality or appalling nature of an act is not a sufficient factor to warrant its criminalisation under customary international law, it may in fact play a role in that respect, insofar as it may refute any claim by the Defence that it did not know of the criminal nature of the acts.”<sup>258</sup>

In contrast to this very extensive interpretation of the criteria of “accessibility” and “foreseeability”, the European Court of Human Rights through its rich case law has set criteria which must be met for a certain source of law to be considered accessible and foreseeable. In line with the jurisprudence of that Court, “accessibility” means that the law (it may be written or unwritten law, which means that common law is also considered “law” in the sense of Article 7 of the Convention for the Protection of Human Rights and Fundamental Freedoms of the Council of Europe), must be accessible to all interested parties so they can become acquainted with its content. Foreseeability, according to case law, means “the clarity and precision of the law”. This means that specific legal provisions must be formulated clearly and precisely so that those affected by legal standards are able to presume the consequences implied by their specific actions.<sup>259</sup> The objective standard for establishing foreseeability in the case of *Streletz, Kessler and Krenz v. Germany*, is converted into the subjective.<sup>260</sup> According to the

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<sup>256</sup> Decision on Dragoljub Ojdanić’s motion challenging jurisdiction – Joint Criminal Enterprise, 21.05 2003, §39

<sup>257</sup> Ibid. §41

<sup>258</sup> Ibid. §42

<sup>259</sup> ARNOLD et al. 2002

<sup>260</sup> For criticism see the dissenting opinion of Judge Zupančić who considers that the objective meaning of law must remain independent and strictly separated from any subjective and arbitrary interpretations. Maintaining the separation of the objective and subjective in law is the only way to secure the principle that no one is above the law. DERENČINOVIC 2001

subjective standard, it is not sufficient to establish the objective ability of the defendant to recognize the imperative or prohibitive standard of criminal law, which implies punishability, but the subjective ability of the specific defendant to anticipate and recognize his own criminal responsibility as a consequence of violating this legal standard. Therefore, the stress is not only on establishing the clarity and precision of a specific legal norm, but the question whether the perpetrator should and could have known that he was committing a criminal offence is assessed according to the subjective standard, or from the position of the defendant.<sup>261</sup> Bearing in mind the criteria of accessibility and foreseeability, it is clear that the national law, which was in force in the former Yugoslavia at the time when the crimes took place, gains a special dimension and the ignoring of the Tribunal of the content and application of that law is slightly incomprehensible. That is to say, whilst for some of the high ranking military commanders and state officials it could perhaps be claimed that, by the nature of their function, they had access to the relevant, authoritative law, primarily regulations of international humanitarian law, this cannot be taken into consideration in the case of defendants who were “active on the ground” and who as a result of their *de facto* and/or *de jure* position did not know, or could not have known the content of the norms and standards of the JCE theory condensed into individual criminal responsibility. They can in no way be required to know that, as members of specific groups within the armed forces, they may be responsible for the murder of civilians committed by someone else, and which they did not intend to commit, although, it is possible, they foresaw that something like that was possible. What can be required of them, as part of the establishment of the criteria of accessibility and foreseeability and which are the *condicio sine qua non* the jurisdiction of the tribunal may require, is at least a personal knowledge, we might say awareness, of the basic legal institutions of the territory of the former SFRY, from which the punishability of certain behaviour and procedures arises. For this reason it is very important, and the Tribunal has not taken this path in any of its proceedings, to establish the content of the relevant criminal law norms of the former SFRY regulating the substantive law material of commission of a criminal offence by a large number of people. With the exception of the Appeals Chamber in the Ojdanić case, in the case law of the ICTY there have not been any serious attempts to establish what in this context was the criminal law and case law in the states of the former SFRY and whether it followed the American-Italian or even the German-Dutch approach.<sup>262</sup> According to Article 24 of the Statute of the ICTY, “in determining the terms of imprisonment, the Trial Chambers shall have recourse to the general practice regarding prison sentences in the courts of the former Yugoslavia”. In the statute there are no provisions about the fact that the Chambers are obliged to consider case law concerning substantive and procedural criminal law. In the Decision already mentioned on Dragoljub Ojdanić’s motion challenging jurisdiction it states “This Tribunal does not apply the law of the former Yugoslavia to the

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<sup>261</sup> ARNOLD et. al. 2002, 25.

<sup>262</sup> SASSOLI-OLSON 2000.



definition of the crimes and forms of liability within its jurisdiction.”<sup>263</sup> As was pointed out earlier, the International Tribunal in terms of its subject matter jurisdiction, applies customary international law. However, it may also make use of national law to establish whether there is a reasonable possibility that the defendant knew that the “criminal offence committed in the way charged in the indictment is prohibited and punishable”. The dissenting opinion of Judge Cassese is along these lines in the judgement in the Erdemović in which the need is pointed out for an analysis of the law of the state from which the defendants originate. That is to say, “a national of one of the States of that region fighting in an armed conflict was required to know those national criminal provisions and base his expectations on their contents.”<sup>264</sup> Therefore it would be appropriate and judicious to have recourse - as a last resort - to the national legislation of the accused, rather than to moral considerations or policy-oriented principles ... this approach would also be supported by the general maxim in dubio pro reo.”<sup>265</sup> By examining the laws which were in force at the relevant time in the former Yugoslavia the Chamber in the Ojdanić case established that those laws “did provide for criminal liability for the foreseeable acts of others in terms strikingly similar to those used to define joint criminal enterprise.”<sup>266</sup> In this sense Article 26 of the Criminal Code of the SFRY is mentioned, which incriminated the responsibility of organizers of so-called criminal association. According to this provision: anybody creating or making use of an organization, gang, cabal, group or any other association for the purpose of committing criminal acts is criminally responsible for all criminal acts resulting from the criminal design of these associations and shall be punished as if he himself has committed them, irrespective of whether and in what manner he himself directly participated in the commission of any of those acts.”<sup>267</sup> After the break-up of the former SFRY the Criminal Code of SFRY of 1976 was adopted by the former republics with slight amendments. So in Bosnia and Herzegovina after the declaration of independence in 1992, a decree was passed with legal force, by which that law was adopted, with a few amendments. In the Republic of Croatia too, that law was adopted in 1993, where it was applied right up until the new Criminal Code came into force on 1.1.1998. It is without doubt therefore that the provisions of Article 26 taken from the Criminal Code of the SFRY were in force in Bosnia and Herzegovina (and in Croatia) at the time when the criminal offences were committed with which the accused are charged before the ICTY. The responsibility of the

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<sup>263</sup> Decision on Dragoljub Ojdanić’s motion challenging jurisdiction – Joint Criminal Enterprise, 21.05 2003., §40

<sup>264</sup> Separate and dissenting opinion of Judge Cassese on the Judgement by the Appeals Chamber in the Erdemović case, §49

<sup>265</sup> Ibid.

<sup>266</sup> Decision on Dragoljub Ojdanić’s motion challenging jurisdiction – Joint Criminal Enterprise, 21.05 2003., §40

<sup>267</sup> The Criminal Code of the SFRY (Official Gazette of the SFRY nos. 44/76, 36/77, 56/77, 34/84, 74/87, 3/90 and 38/90) Criminal Code of the SFRY – adopted at the session of the Federal Assembly of SFRY 28.09.1976; promulgated by a decree by the President of the Republic 28.09.1976; published in the Official Gazette of SFRY no. 44 of 8.10.1976; correction published in the Official Gazette of the SFRY no. 36 of 15.07.1977; came into force 01.07.1977.

organizers of a criminal association which was introduced into the law of the former Yugoslavia on the model of the law of the former USSR for the sake of stricter penalties of so called counter revolutionary criminal acts,<sup>268</sup> was actually a separate form of responsibility for the participants.<sup>269</sup> Three conditions must be met for it to be this form of criminal responsibility:

- above all it is necessary for a person, to create an association for the sake of committing criminal offences, of any form or that he used an already existing association for the same purpose;
- second there must be a plan of criminal association;
- and third, in realizing the activities of the criminal association, at least one or more criminal offences must have been committed.<sup>270</sup>

Whether the criminal offence stemmed from the criminal plan of the association had to be established on the basis of all the circumstances. So the Supreme Court of Croatia in a judgement in 1953., took the standpoint that the organizer of a criminal association was not liable for murder, committed by a member of the group at his own initiative, without the order or subsequent approval of the organizer, who, in fact, had the perpetrator disarmed and firmly condemned the act.<sup>271</sup> Provisions on the responsibility of the organizers of criminal associations are very rarely used in case law, which is mainly very negative towards that form of responsibility of a participator. So in one judgement, of the Supreme Court of Croatia from 1974. the restrictive application of the provisions on the responsibility of the organizers of a criminal association is clearly pointed out:

“The standpoint is not well-founded that this is a case of over-stepping the indictment in the example when the accused were convicted pursuant to Article 100 of the CC (counter-revolutionary threat to the social order), as co-perpetrators, and not as organizers of the criminal association pursuant to Article 100 of the CC in connection with Article 23. The accused did not organize a counter-revolutionary movement, but only within the framework of that movement did they commit a criminal offence which has the elements of a counter-revolutionary attack on the state and social order, pursuant to Article 100 of the CC. For this reason they are not liable as organizers, but only as co-perpetrators of the criminal offence. Since this is not a serious, but a legal qualification, which is more favourable for the accused, the first instance court did not exceed the bounds of the indictment.”<sup>272</sup>

In the science of criminal law too, provisions on the responsibility of organizers of a criminal association have also received sharp criticism due to their lack of alignment with the principle of guilt. So, one of the most prominent legal scholars

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<sup>268</sup> SRZENTIĆ-STAJIĆ 1954, 383-387. This is incidentally confirmed by the fact that this provision was mainly applied in proceedings immediately after World War II, for “reckoning with the enemies of the new regime” and in terms of ideological criminal offences of counter-revolutionary threats to the state (and social!?) order.

<sup>269</sup> BAČIĆ 1995, 304-306

<sup>270</sup> SRZENTIĆ-STAJIĆ 1954, 383-387

<sup>271</sup> Vs NRH u odluci Kž 685/53 od 4.6.1953., cit. po ZLATARIĆ 1956, 124

<sup>272</sup> Pregled SRH, 1974. no. 4,p. 38, by BAVCON et al. 1984, 86

of that time, Bačić, openly supported the repeal of that form of participatory responsibility:

“...it would be best to delete the responsibility of the organizer of criminal association, to abandon this institution and resolve this issue in the manner well established in European continental criminal jurisprudence. This solution is not only lacking in the area of guilt; the question remains open as to the objective contribution of the organizer to the execution of each individual act in which he does not take part. It is not justified that the fact that he created the criminal organization is also the ground for his responsibility for the separate criminal offence of creating a criminal association, and for his responsibility for each individual criminal offence committed; in other words, he is liable for the same act twice.”<sup>273</sup>

The assessment of the Appeals Chamber of the “striking similarity” between the JCE and the provisions on the responsibility of the organizer of a criminal association, no matter how at first sight it seems correct, is actually a generalization, because it was adopted without a systematic analysis of those provisions in national law. A careful analysis, on the contrary, clearly shows that the responsibility of the organizer of a criminal association is in fact significantly different from the responsibility based on the extended JCE. There are three important differences between the responsibility of the organizer of a criminal association as formulated by the Criminal Code of the SFRY and the laws taken on, and the responsibility based on the JCE (extended version) formulated in the Tadić case:

(i) According to Article 26, only the organizer of the criminal association is liable. The organizer is the key person who gathered several people, created a criminal collective and coordinated the criminal activities of its members. Leading experts in criminal law, describe the organizer as the “leader, conductor, the most important person in the criminal organization.”<sup>274</sup> Precisely the organizer is the key criminal figure who determines the goals of the criminal association, the criminal plan, program and activities. This is his contribution to the realization of each individual part executed by the organization within the framework of its criminal plan, in whose execution he does not even have to take part himself.<sup>275</sup> Members of this kind of association are exempt from responsibility on the basis of that provision. They are responsible either for the criminal offence of membership of a criminal association or according to the general regulations on the responsibility of accomplices and/or co-perpetrators. Article 26 of the Criminal Code of the SFRY was significantly different from the previous Article 27 of the earlier General Criminal Code. The provision on the criminal responsibility of members of the organization, gang, cabal, group or any other association is completely omitted. According to the General Criminal Code, their responsibility was extended to all criminal offences which stemmed from the criminal plan or

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<sup>273</sup> BAČIĆ 1995, 304-306

<sup>274</sup> Ibid.

<sup>275</sup> Ibid.

collective, even if they did not take part in the execution of those offences. It was only required for them to be in agreement with those offences and to express this in their actions and behaviour, and that agreement stemmed already from their agreement with the criminal plan of the association. So in the case of normal participants the connection with the commission of the offence was direct, here it is indirect, through the criminal plan of the association. In the explanations accompanying the draft, amongst other things, the reasons are given why this broad conception was abandoned:

„The Draft abandoned this extended criminal responsibility of members of a criminal association, for these reasons: firstly now mere membership in certain criminal organizations is incriminated in a Special Part, as a separate criminal offence. For perpetration of criminal offences within this kind of criminal association, only those members are responsible who acted directly as perpetrators, aiders or abettors. This already stems from the general provisions on participation and therefore new special provisions are not necessary. There is no reason or need, for responsibility of members of criminal associations to be extended to offences in which they did not take part. That leads to complex constructions of causation and guilt and it is in violation of the basic principles of the Draft on criminal responsibility. Moreover, this solution is in essence also unfair.“<sup>276</sup>

In JCE on the other hand not only the organizer or the leader is responsible for the enterprise, but also potentially all persons who accepted that plan. In the end this leads to the fact that the prosecutor can accuse anyone for committing a crime within the JCE who, in his opinion, accepted the criminal plan and, and that could be, as stems from the majority of indictments before the ICTY, “a variety of persons known and unknown”.

(ii) The organizer of the criminal association is responsible only for the crimes committed within the framework of the plan of the criminal association, and not for excesses of the members. According to the most common stance in case law and doctrine, the organizer is not criminally responsible for criminal offences committed by a member of the organization and which are not directly connected with the operations of the organization and its purpose. So in literature the example is given that “the organizer of a terrorist group will not be responsible for the criminal offence of rape committed by a member of the association, insofar as it is not established that he participated in that specific crime in some other way”<sup>277</sup> (e.g. as instigator or perpetrator). In contrast to this, in the extended JCE, each member is responsible (not just the organizer) even for criminal offences which were not committed within the framework of the common purpose if they were its “natural and foreseeable consequence”.

(iii) The organizer of a criminal association which did not in any way directly participate in the commission of the specific criminal offence, may be responsible

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<sup>276</sup> Explanatory notes to the Draft Criminal Code of the FPRY, official gazette of the FPRY, 1951, p. 108.

<sup>277</sup> SRZENTIĆ-STAJIĆ 1954, 383-387

for that offence only if it was specifically defined in the criminal plan in whose creation the organizer was also involved, or if it was agreed to commit precisely that crime, that is, if he knew about that specific offence. This in essence is the same as the basic JCE where there exists a shared intent between the accused and the physical perpetrator. However, responsibility on the grounds of a JCE does not end there. In the extended JCE the participant is liable even when he did not intend and did not even know that a specific offence would be committed, but he could have foreseen that crime as a “natural and foreseeable consequence of the action of the JCE”. It was possible to punish the organizer of a criminal association only if from all the circumstances of the case, his intention could be derived, whilst a participant in a JCE is punished for recklessness, which is in essence a form of conscious negligence.

On the basis of everything mentioned here, it may be concluded that the provisions on the responsibility of the organizer of a criminal association actually differ significantly from responsibility on the grounds of a JCE (extended version) in that they had a very narrow field of application. The different aspects of so-called collective criminality are treated in criminal law either through special incriminations of criminal association or through general provisions on participation by a large number of people in the commission of a criminal offence (participation, co-perpetration).

## 6. Conclusion

The Statute of the ICTY was adopted as an appendix to the UN Security Council Resolution 827 of 25 May 1993, more precisely, as an appendix to the report by the UN Secretary General of 3 May 1993, by which the Security Council adopted this resolution. Therefore that Report may be considered to be a commentary and an authentic interpretation of the provisions of the Statute. With respect for the principle of legality, a judge of the ICTY, even without these instructions by the Secretary General, should punish individuals exclusively for the international crimes which the Statute has entrusted to his jurisdiction, and for those international crimes which are undoubtedly part of customary international law at the time the crime was committed. It is not necessary to point out specially that the authority of a judge is excluded to establish customary rules by himself, not examining the case law of the state and the *opinio juris*, and so apply well established rules. It seems however, that the judges of the ICTY have not also held to this and, in violation of the principle of legality, they have at times taken on the role of legislator, creating by their judgements new institutes and rules, or applying convention solutions which had not yet developed into customary law at the time the criminal offence was committed. These institutes and rules they have declared to be customary rules, and later referred to their own judgements as precedents which prove the existence of general customary rules. Joint criminal enterprise, especially its extended form, look to us like a typical example of this practice by the court. The possibility of similar self-will in case law was foreseen by some international law commentators in relation to Article 19, paragraph 3 of the Draft Articles on the Responsibility of States of the UN Commission for International Law, which up to 2000 contained the concept of international crimes by states, but it did not list them by name, but only by example, in that this list could be supplemented with unlawful acts which would meet the criteria of international crimes by states from paragraph 2 of Article 19 of this Draft. Most international law authors criticized this solution (as well as the concept of the international crime of the State itself), and the most fierce critics compared it with the Third Reich, where the principle of legality was abolished, analogy permitted and the criterion introduced of “the healthy feeling of the people” („gesundes Volksempfinden“) as a criterion by which the list of criminal offences prescribed by law would be completed.<sup>278</sup> It is to be expected that the cases in which excessive creativity may be ascribed to the judges of the ICTY in defining customary international law, such as the joint criminal enterprise, will cause similar reactions in doctrine. Although prominent members of the ICTY claim the complete opposite,<sup>279</sup> an analysis of the case law of the court, leads to the assessment that the judges of the ICTY often do not make an effort to prove the existence of customary international rules in the way required by international law. What this way is may be seen from the provisions themselves of Article 38, paragraph 1, point b of the Statute of the ICJ which gives international customs as

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<sup>278</sup> See e.g. GREEN 1981, 29-30 and MAREK 1978-1979, 465,471,474 etc.

<sup>279</sup> MERON 2005, 817 etc.

one of the sources of international law and from state and case law, of which the judgement should be particularly stressed in the dispute over the boundaries of the North Sea in which back in 1969 the International Court clearly established the method for establishing the existence and content of customary international law.<sup>280</sup> According to Article 38 of the Statute of the ICJ, international custom is “evidence of a general practice, accepted as a law”. Although customary law is unwritten, the institutes of international law (here we are primarily interested in states) in practice behave in accordance with those rules, in that this practice is accompanied by a legal conviction that precisely that practice is a legal obligation. That is why it is said that there are two elements of customary law, that is, that it arises from the merger of two elements: the objective (the practice of states) and the subjective (the legal conscious, *opinio juris*). In order for the practice of institutes of international law to be relevant for the creation of customary law, they must be permanent, uniform and continuous. There is no rule of international law regarding the time period needed for a certain practice to become a customary international legal rule. But it may be said in general that this field is not characterised by rapid technological development (such as for example human rights or international criminal law), as a long period of time is usually needed for the transformation of practice into customary law.<sup>281</sup> For the creation of general customary rules, universal practice is not required; “general practice” is sufficient, that is, the practice of a large number of states, which must include, alongside those who are particularly interested in and important for some area of international law (e.g. coastal state for customary law from maritime law) and the most influential states in the world. It is important that this practice does not encounter resistance from a significant number of states. When a legal conviction arises about the legal obligation regarding a practice (*opinio juris*) a new customary law rule is created, which is binding for all states, even those who were not involved in the related practice and who did not oppose it effectively. If the practice of institutes of international law is not joined by the *opinio juris*, that practice even though it is permanent, uniform and continuous – will never become customary law, but remains in the category of legally unbinding customs and the rules of civility.<sup>282</sup> Customary law is sometimes quite complicated to establish because it occurs as an unwritten rule. As evidence of practice and legal conviction, measures by state bodies, statements, diplomatic notes, state laws, acts of international organizations or those adopted at international conferences, international agreements, international court and arbitration case law, national case law, and the teachings of the most respected publicists are taken. Anyone who claims that a general legal rule exists, must as a rule, prove its permanent, uniform and continuous practice, that is, list as many as possible examples of practice in which the institutes of international law acted in accord with a certain rule. On the basis of the proven practice, the *opinio juris* is founded.<sup>283</sup> Even after

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<sup>280</sup> See International Court of Justice, Reports of Judgements, Advisory Opinions and Orders (hereinafter: ICJ Reports), 1969, §73-81.

<sup>281</sup> DEGAN 2000, 79

<sup>282</sup> ANDRASSY-BAKOTIĆ-VUKAS 1995, 2, 14-17; See also ICJ Reports, 1969, §77

<sup>283</sup> DEGAN 2000, 103

an agreement is adopted codifying a certain area of international law, customary law in that field still exists and is binding for states and other entities in international law who are not parties to the codified agreement, as well as parties to that agreement in their relations with non-parties.<sup>284</sup> As far as convention provisions are concerned, it may be asserted that the provisions of those conventions have become general customary international law only if the majority of states have become parties to those conventions. If some important states have refused to bind themselves by those conventions, it cannot be considered that the provisions of those conventions have grown into customary law. A typical example of this are the Protocols from 1977 to the Geneva Conventions on protection of victims of armed conflicts, for which it cannot be claimed that they are entirely part of general customary international law, since for example the USA, Israel, India, Pakistan have not bound themselves by them. This was also taken into account by the writers of the Statute of the ICTY, which in Article 2 only mentions serious violations of the Geneva Convention on Protection of Victims of Armed Conflicts of 1949, and not also the provisions of Protocol I to that Convention, which also regulate “serious violations” of its provisions. Therefore although the SFRY was a party to Protocol I of 1977, and after 1991, and so in 1993, at the time the Statute was adopted, all its successors were too, the writers of the Statute of the ICTY, precisely for the reasons given above, that is the fact that it was not a matter of general customary international law, did not take into consideration serious violations of Protocol I of 1977. This is explained in the part of the report mentioned of the Secretary General of 3 May 1993. Apart from reasons of principle, this could also be important for practical reasons. For example, if before the ICTY – whose Statute does not regulate that only citizens of successor states of the former SFRY can be accused – a defendant appears who is the citizen of one of the states who is not a party to Protocol I, the provisions on serious violations of Protocol I could not be applied against him, since they are not general customary law. And it would be inadmissible for the same crime to be punished or the indictment rejected, depending on the nationality of the defendant. Precisely opposite to the above, the ICTY mentioned, in some cases as a possible ground for the application of certain provisions of Protocol I, that the parties in the conflict as successors of the former Yugoslavia were party to it.<sup>285</sup> If the circumstances were the same, but it concerned for example, a member of the NATO forces who was an American citizen, or the citizen of another state which was not a party to Protocol I, this rule could not be applied, and this would therefore create double standards. For the same reasons it is also inadmissible that the judges also refer, for example, to the Statute of the ICC (the Rome Statute) as

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<sup>284</sup> ANDRASSY-BAKOTIĆ-VUKAS 1995, 36. This was also expressly asserted by the International Court in the Nicaragua case, see ICJ Reports 1986, §177

<sup>285</sup> For example in the judgement in the cases of Blaškić (IT-95-14 of 3 March 2000, see § 172-173) and Galić (IT-98-29 of 5 December 2003, see § 21) the first instance Chamber considered that for the application of certain provisions of Protocol I it was sufficient that the protocol was binding for the parties on the basis of the convention, since the former SFRY was a party to that agreement, and the took it over by succession. Both judgement however mention the bilateral Bosnian-Croatian agreement of 22 May 1992 in which the parties undertook to respect certain provisions of Protocol I, that is Articles 51 and 51.



an agreement whose provisions reflect general, customary international law.<sup>286</sup> Just as the United States stated that it would not apply the provisions of Protocol I, to which it is not a party, the USA's resistance to the Rome Statute is also well known. That is to say, after the United States signed the text of the Statute in 2000, bearing in mind Article 18 of the Vienna Convention on the Law of Treaties of 1969, which foresees certain consequences even in the signing of an international agreement,<sup>287</sup> it informed the depositors that it did not intend to become a party to the Statute and therefore its signature had no legal consequences. Therefore the Rome Statute, like Protocol I, cannot be mentioned as evidence that some rule contained in one of them is part of general customary law. The failure of the United States to accede to that Statute and its open resistance to its provisions, prevent the provisions of the Rome Statute becoming customary law. Reference to the Rome Statute is also inadmissible for another reason of principle – it did not exist at the time of the conflict in the former Yugoslavia nor when the Statute of the ICTY was adopted, and cannot serve as evidence that some rule or institution was part of general customary law at the time the offence was committed which is being tried before the ICTY. If for a provision of the Statute it is thought that it reflects existing customary law, and that it was applicable at the time the criminal offence was committed, this has to be proved, in the way given above. In this context it is important to emphasize that the ICTY, or any other international court, may not retroactively apply more detailed rules on some crime, which it is true, did exist at the time the crime was committed, but these more detailed rules stem from an agreement or the case law of a state from after the crime was committed. In the same way, the ICTY, or any other international court, may not create new rules or crimes within the framework of the crimes entrusted to it by the Statute, if it does not prove that the necessary elements for this exist in customary law, that is the case law of the states and *opinio juris*.<sup>288</sup> In the examination of the existence of customary law, it is necessary to move forward without any conclusions already drawn, strictly keeping to the rules on the need to analyse carefully the case law of the states and the motives of that case law. This kind of objective approach to testing the existence of *opinio juris* has led the ICJ on several occasions to what we could call “negative proof”. That is to say, careful analysis by the Court has frequently led to the conclusion that certain permanent case law has not yet led to the creation of customary law due to the lack of *opinio juris*. One of the examples of this kind of “negative proof”, which had widespread repercussions, was the Advisory Opinion on the Legality of the Threat or Use of Nuclear Weapons of 1996. The Court considered in detail various aspects of this question and on the

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<sup>286</sup> Tadić II, §222

<sup>287</sup> Article 18 of the Vienna Convention on the Law of Treaties states: “A State is obliged to refrain from acts which would defeat the object and purpose of a treaty when: (a) it has signed the treaty or has exchanged instruments constituting the treaty subject to ratification, acceptance or approval, until it shall have made its intention clear not to become a party to the treaty; or (b) it has expressed its consent to be bound by the treaty, pending the entry into force of the treaty and provided that such entry into force is not unduly delayed.”

<sup>288</sup> DEGAN 1991, 448

basis of an analysis of state practice, concluded that the creation of customary law on prohibiting the use of nuclear weapons was prevented by a constant conflict between *opinio juris* in the embryo stage and the still strong insistence on the practice of intimidation using nuclear weapons.<sup>289</sup> The International Court was certainly not satisfied that it had to give this opinion – both because of its content and also because of the reactions which would clearly follow – but a careful, *lege artis*, analysis of the case law of the states led to that conclusion. Therefore, from this and similar examples from the case law of the International Court, we can conclude that the establishment of the existence of *opinio juris* requires a careful analysis of the case law of states and the legal conviction accompanying that case law, that is, the motives for carrying out that case law, without any prior conclusion or task imposed. *Opinio juris* is not the legal opinion of an international judge or an international court, if it does not have the relevant case law of the states which needs to be carefully analysed. “Proving” *opinio juris* without mentioning the case law of states supporting it does not mean much. This is rather the desire for legal regulation of some question *de lege ferenda* or what is more dangerous, the creation of legal rules under the guise of customary law arising from the judge’s fear that there could be a situation “*non liquet*”.<sup>290</sup> It seems that it is precisely this fear that led judges of the ICTY to proclaim as customary law rules which do not have support in the case law of the states. The ICTY has in other ways gone beyond the bounds of its jurisdiction and given opinions on questions which in no way come under its jurisdiction. So, although the Statute of the ICTY does not mention the crime of aggression, for example in the Blaškić judgement, indirectly (not using the word aggression, but giving its definition), it proclaimed the Republic of Croatia the aggressor against the Republic of Bosnia and Herzegovina. It is well known that this assessment may only be given before a court (the International Court) or arbitration, to whom the states have by agreement entrusted jurisdiction to decide on a dispute. The ICTY cannot give an opinion on this nor express an incidental opinion, since by so doing it violates the principle of legality, the more so because in its deliberations, it could not even refer to a decision by the Security Council about this, since it does not exist. The Security Council, within its own authority, examined the situation in detail in the light of the provisions of the Security Council Resolution 3314 (XXIX) of 14 December 1974, and took into account all the circumstances of the case in making its decision about whether it was a case of aggression. In so doing it had in mind Article 2 of the definition, which amongst other things, prescribes that the Council can decide, bearing in mind all the relevant circumstances, that a certain act or its consequences were not of sufficient gravity to constitute aggression. And according to the opinion of some of our writers “in the context of all the events.. it would be hard to assert with certainty that the occasional presence of the Croatian army ... in Bosnia and Herzegovina.. was of

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<sup>289</sup> Advisory Opinion on the Legality of the Threat or Use of Nuclear Weapons, ICJ Reports 1996, §73.

<sup>290</sup> This fear was actually admitted directly by the judge Shahabuddeen in his separate opinion in the case of Gacumbitsi (ICTR-2001-64-A of 7<sup>th</sup> July 2006) before the International Criminal Tribunal for Rwanda, see §51

such gravity or such intensity that it would constitute an act of aggression”.<sup>291</sup> Although it is hard to speculate on the decisions of the Security Council, it seems that this conclusion was the closest to reality. That is to say, if it had been an act of aggression, the Security Council would have reacted. The conclusions of the ICTY on the aggression by the Republic of Croatia against its neighbouring state, given outside the authority of the Court and without any support in international rules, cannot bind anyone and may be considered in legal terms to be non-existent. In fact the Court went into an arbitrary assessment of the aggression, probably because it wanted to establish the existence of an international conflict in order to apply certain rules. But in that case the ICTY should have started from the common Article 2 of the Geneva Conventions on the Protection of Victims of Armed Conflicts of 1949, which gives a definition of international armed conflicts. Article 2, paragraph 1 states that the convention will be applied: “to all cases of declared war or of any other armed conflict which may arise between two or more of the High Contracting Parties, even if the state of war is not recognized by one of them.” Why the ICTY in an assessment of the importance of the conflict did not begin with these provisions and examine the existence of *animus belligerendi*, by an analysis of international agreements concluded between the two states before and after the internal conflicts between the Bosnjak and the Croatian forces, the significance of support from the Republic of Croatia for the forces in Bosnia and Herzegovina and other relevant factors, remains an open question. This blatant oversight gives us the right to speculate whether this path was too demanding or it was avoided because it would lead to unwanted results. Another shadow is cast over the competence of the ICTY – at least in the eyes of lawyers in continental circles – regarding the decision by the Appeals Chamber in the Hadžihasanović case about whether one of the co-defendants (Amir Kubura) could be responsible on the basis of command responsibility for crimes which were mainly committed two months before he took up office as commander.<sup>292</sup> The very fact that the Chamber researched customary law to find an answer to this question seems slightly incredible to continental lawyers. And if they sigh with relief, finding that the Chamber did in the end conclude that Kubura could not be held responsible on the principle of command responsibility for crimes committed before he took up office, since there is no such international legal rule, and assuming that this research by the Court was the result of its excessive pedanticness, they are in for more surprises. That is to say, two judges gave separate opinions on this. One of them, Judge Hunt, asserted that the starting point should be the fact that command responsibility is part of customary law. After that it should be examined whether the purpose and logic of that principle demands its application in the case of Kubura. The second, Judge Shahabuddeen, asserted that this new commander could still have punished the responsible persons for the crimes committed not long before he took office, taking the standpoint that a different opinion collides with the object and purpose of the relevant provisions of

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<sup>291</sup> DEGAN 1991, 460

<sup>292</sup> See Prosecutor v. Hadžihasanović, Decision on Interlocutory Appeal challenging Jurisdiction in relation to Command Responsibility, IT-01-47-AR72, of 17<sup>th</sup> July 2003, §45; see also §46-48 and 50.

Protocol I.<sup>293</sup> Was this reasoning, completely foreign to continental lawyers, who will not go further with their consideration if it is indisputable that the defendant was not commander at the time the crimes were committed, the result of the education of some judges in common law systems, which, especially in the latter stages of development, were basically law created by judges? Or is this exaggerated “creativity” in finding applicable rules the result, as we have already mentioned, of the fear of a situation of “non liquet”? Whatever the reason was, this case is a good illustration of how far the stance of the ICTY may differ from what is for continental lawyers usual, and even indispensable. The question in principle arises, whether the principle of legality is brought into question in the very fact that principles, rules and institutes of common law are introduced into the case law of the ICTY, which are essentially different from those in continental law. That is to say, the defendants are exclusively from countries within the continental circle to which the reasoning given above is foreign. Do not the defendants in this situation find themselves in a position where they are answering for crimes which they could not have expected to be punishable at the time they were committed? One of these situations is the introduction of the institute of the joint criminal enterprise. Here it seems appropriate to quote the statement by the Chamber of the European Court of Human Rights from the judgement already mentioned in the case of *Kokkinakis v. Greece* of 1993, which pointed out that the criminal offence „...must be clearly defined in law. This condition is satisfied where the individual can know from the wording of the relevant provision and, if need be, with the assistance of the court’s interpretation of it, what acts and omissions will make him liable”<sup>294</sup> This generally known rule, which is valid for both national and international criminal law, seems to need to be constantly reiterated. These considerations should be supplemented by the standpoints taken by Judge Shahabuddeen on the fact that the principle of *nullum crimen sine lege* does not prohibit international criminal courts from taking part in the progressive development of the law, under the condition that the law created in this progressive development by the courts contains the very essence of the crime, although that may not correspond to all the details.<sup>295</sup> Although written carefully and in a scholarly manner, this means, in other words, that Judge Shahabuddeen believes that judges have the authority to create new, more detailed rules about a crime which existed at the time the crime was committed, if those detailed rules contain the essence of the crime itself. We have already pointed out that that would mean the retroactive application of more detailed rules which did not exist at the time the crime was committed and the principle of legality would thereby be violated. The benevolent relationship of Judge Meron to these standpoints is

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<sup>293</sup> *Ibid.*, Separate and Partially Dissenting Opinion of Judge David Hunt and Partial Dissenting opinion of Judge Shahabuddeen, §14 and 15. We have already commented on references to Protocol I above

<sup>294</sup> *Kokkinakis v. Greece*, 14307/88 of 25.05.1993.

<sup>295</sup> „Principle of *nullum crimen sine lege* does not bar progressive development of the law, provided that the developed law retains the very essence of the original crime even though not corresponding to every detail of it.“, see SHAHABUDEEN 2004, 1007

astonishing,<sup>296</sup> but after these standpoints by the judges of the ICTY, it becomes clearer to us how it is possible that the dubious institute of the joint criminal enterprise could in time become predominant in indictments and judgements, suppressing institutes which are more legally demanding for prosecutors and judges. Did the Chamber of the ICTY in the second instance judgement in the Tadić case justify its assertion that the institute of the joint criminal enterprise is “firmly established in customary international law and in addition is upheld, albeit implicitly, in the Statute of the International Tribunal.”?<sup>297</sup> Starting from the second assertion, it should be pointed out that we do not see any grounds for claiming that the Statute implicitly upholds the institute of the joint criminal enterprise. Neither paragraph 1, nor paragraph 3 of Article 7 of the Statute relates directly or indirectly to responsibility for crimes which would be the result of participation in a joint criminal enterprise. The “explanation” why the Statute implicitly contains the institute of the joint criminal enterprise is only found in the second instance decision in the Ojdanić case, where it mentions that the list of “forms of liability” in Article 7, paragraph 1 of the Statute, is non-exhaustive, as suggested by the use of the phrase “or otherwise aided and abetted”.<sup>298</sup> It is hard to fathom how the Chamber came to this conclusion. There is no way that the drafters of the Statute would actually give the judges of the ICTY authority to supplement the list of “forms of responsibility”. From everything we have mentioned so far, precisely the opposite conclusion is reached. Precisely to prevent that kind of interpretation, in the Report by the Secretary General of 3 May 1993, it is emphasized that the application of the principle of legality requires that the international court applies rules of international humanitarian law, which are “beyond all doubt part of customary law”. If the creators of the Statute had the application of the institution of the JCE in mind, they would have included it in the Statute. In the second instance judgement in the Tadić case and in later judgements, the ICTY did not clearly define this new form of responsibility, and it would be superfluous to repeat again that criminal law in general and international criminal law too, legally require clear and precise definitions. The assertion by the second instance Chamber in the Tadić case that the JCE is not a separate form of criminal offence but a “form of perpetration” by which a person committed a criminal offence prescribed by the Statute<sup>299</sup> in no way contributes to a clearer definition of that institute. On the contrary, it could be said that it even further confuses the conditions of its application and makes even greater arbitrariness possible for the Prosecution and the Court in its application. The assertion of the firm establishment of the institute of the joint criminal enterprise in customary international law is not well-founded, especially regarding the third “extended” form of the joint criminal enterprise. An analysis of cases which are given in the second instance decision in the Tadić case to support the claim of the firm establishment of the institute of the JCE in customary

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<sup>296</sup> MERON 2005, 825-826

<sup>297</sup> Tadić II, §220

<sup>298</sup> Decision on Dragoljub Ojdanić's Motion Challenging Jurisdiction – Joint Criminal Enterprise (IT-99-37-AR72, of 21<sup>st</sup> May 2003), §19.

<sup>299</sup> Tadić II, §188

international law, shows that in case law the acceptance of this form of responsibility is very limited. Even the second instance Chamber itself points out that in some countries (for example the Netherlands and Germany) a defendant is responsible for crimes arising from a joint criminal enterprise if he shared the same criminal purpose with the other members of the enterprise. However, if one of the participants commits a crime which was not foreseen in the joint criminal enterprise, he alone shall be liable for that crime.<sup>300</sup> The case law of states therefore, is not so uniform, as the Chamber itself admits. Not even the most important cases which the Chamber presents as evidence of the customary law importance of the “extended” form of the joint criminal enterprise: the Essen Lynch before the British military court, and Kurt Goebel et al. (also known as the Borkum Island case, which were presented above) before the American military court<sup>301</sup>, do not offer clear and unambiguous support to the assertions of the second instance Chamber in the Tadić case. That is to say, in none of these cases did the court expressly say that some of the participants in the enterprise were already punished on the basis of the fact that there was a foreseeable risk that in the realization of the joint criminal enterprise a specific crime would take place. The second instance Chamber in the Tadić case, therefore, merely assumed that individual participants of the enterprise were punishable, without establishing the intent to commit the crime.<sup>302</sup> The only case which the second instance Chamber mentions as support for its assertions of the customary law character of the “extended” joint criminal enterprise and which meets all the requirements, is the judgement by the Italian Court of Cassation in 1947, in the case of D'Ottavio et al.<sup>303</sup> Therefore the question may quite rightly be asked on what basis the second instance Chamber in the Tadić case drew the conclusion about the firm establishment of the “extended” form of the JCE in customary international law. Alongside cases from case law, the second instance Chamber in the Tadić case mentions as evidence that the JCE is part of customary international law the provisions of two international agreements: Article 25, paragraph 3 d) of the Rome Statute of the International Criminal Court of 1998 and Article 2, paragraph 3 c) of the International Convention for the Suppression of Terrorist Bombings, adopted by the General Assembly Resolution 52/164 of 15 December 1997.<sup>304</sup> We have already talked about the force of this kind of evidence: agreements concluded fifteen and more years after the crimes were committed cannot be evidence that a criminal offence was part of general customary international law at the time the crime was committed. For the Rome Statute we mentioned the additional reason which hinders this: the fact that some of the most important states refuse to become party to it is a hindrance to its content becoming part of customary international law. A systematic analysis leads to the conclusion that neither in the second instance judgement in the Tadić case, nor in the other judgements by the ICTY, is any convincing evidence offered that the JCE is

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<sup>300</sup> Ibid., §224.

<sup>301</sup> Ibid., §205-213

<sup>302</sup> Cf. POWLES 2004, 606 etc.

<sup>303</sup> Tadić II, §215

<sup>304</sup> Ibid., §221-224

“firmly established in customary international law” and “implicitly upheld in the Statute of the ICTY”. The “creation” of this form of responsibility in the case law of the ICTY is a violation of the principle of legality as one of the fundamental principles of contemporary international criminal law.

# **CHAPTER THREE**

## **OBJECTIVE ELEMENTS OF THE JOINT CRIMINAL ENTERPRISE THEORY**

### **1. Introductory remarks**

The Appeals Chamber in the Tadić case defined three components of the objective element which are common to all forms of JCE. The components, which must be cumulatively established, are:

- i) A plurality of persons, who need not be organised within a political, military or administrative structure;
- ii) The existence of a common plan, design or purpose which amounts to or involves the commission of a crime provided for in the Statute.
- iii) The participation of the accused in the common purpose, which includes the perpetration of one of the crimes provided for in the Statute.<sup>305</sup>

### **2. Plurality of Persons**

In the Kvočka case the Appeals Chamber emphasised that “a joint criminal enterprise can exist whenever two or more people participate in a common criminal endeavour. This criminal endeavour can range anywhere along a continuum from two persons conspiring to rob a bank to the systematic slaughter of millions during a vast criminal regime comprising thousands of participants.”<sup>306</sup> Such vagueness in the sense of numbers of those engaged in JCEs has resulted in uneven practice in compiling indictments. Some indictments for JCEs have been approached highly ambitiously and include almost all the persons, both known and unknown, in the area of conflict, and those who may have been linked with them in any way, while others limit JCEs to just a few persons, who jointly carried out individual armed offensives and/or established or supported particular systems within which crimes were committed. The first way of constructing JCEs is found in Prlić et al., in which the Prosecution stated that “a number of persons participated in this joint criminal enterprise.” Each participant made an essential contribution to the execution of this enterprise and the achievements of its goals, whether by action, inaction, proceedings or conduct, individually, or in collaboration with others or through others. Among the many who participated, along with others, in the JCE, were the following:

- Franjo Tuđman (deceased, 10 December 1999), the President of the Republic of Croatia;
- Gojko Šušak (deceased, 3 May 1998), the Minister of Defence of the Republic of Croatia

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<sup>305</sup> Tadić II, §227

<sup>306</sup> Kvočka I, §307



- Janko Bobetko (deceased, 29 April 2003), General in the Army of the Republic of Croatia;
- Mate Boban (deceased, 8 July 1997), President of the Croatian Community (and Republic) of Herceg-Bosna;
- Jadranko Prlić, Bruno Stojić, Slobodan Praljak, Milivoj Petković, Valentin Ćorić, Berislav Pušić;
- various other officials and members of the Herceg-Bosna/HVO government and political structures, at all levels (including in municipal governments and local organisations);
- various leaders and members of the Croatian Democratic Union and the Croatian Democratic Union of Bosnia and Herzegovina at all levels;
- various officers and members of the Herceg-Bosna/HVO forces, special units, military and civil police, security and intelligence services, paramilitary formations, local defence forces, and other persons who participated under the supervision of or in collaboration with these armed forces, police and other elements;
- various members of the armed forces, police, security and intelligence services of the Republic of Croatia;
- other persons, both known and unknown.

The circle of JCE participants is broadly defined in the joint indictment against Čermak, Markač and Gotovina, in which, along with the accused, the following are mentioned:

“... many persons participated in this joint criminal enterprise. These persons included: Franjo Tuđman (deceased), the President of the Republic of Croatia; Gojko Šušak (deceased), the Minister of Defence of the Republic of Croatia; Janko Bobetko (deceased), the Chief of the Main Staff of the HV until 17 July 1995, when he retired; Zvonimir Červenko (deceased), the Chief of the Main Staff of the HV (appointed 17 July 1995)...<sup>307</sup>

Apart from those named in the indictment, it also mentions “various officers, officials and members of the Croatian government and political structures at all levels (including those in municipal governments and local organisations); various leaders and members of the HDZ; various officers and members of the HV, Special Police, civilian police, military police and other Republic of Croatia security and/or intelligence services, and other persons, both known and unknown.”<sup>308</sup> A broadly defined circle of participants in a JCE is also found in the indictment in the Brđanin case:

“Apart from those accused of this undertaking, a large number of individuals were also involved, including Momir Talić, other members of the ARK Crisis Staff, the leadership of the Serbian republic and the SDS, including Radovan Karadžić, Momčilo Krajišnik and Biljana Plavšić, members of the Assembly of the Autonomous Region of Krajina and the Assembly's Executive Council, the Serb Crisis staffs of the ARK municipalities, the army of the Republika Srpska, Serb paramilitary forces and others.”<sup>309</sup>

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<sup>307</sup> Prosecutor v. Gotovina, Čermak and Markač, joint indictment of 17 February 2006, § 16

<sup>308</sup> Ibid., § 17

<sup>309</sup> Prosecutor v. Radoslav Brđanin, 9.12.2003, §27.4.

A broadly conceived JCE undoubtedly serves the prosecutor's purpose of demonstrating more easily the subjective element of a JCE. Namely, such a construction allows numerous criminal offences to be labelled as the "foreseeable consequences of a criminal design". On the other hand, the fewer participants there are in a JCE, the fewer criminal offences can possibly be categorised as the foreseeable consequences of a criminal design. In the Prlić et al. case, it can be seen from the construction of the indictment that the prosecution distinguished between the "leaders" and "other members" of the JCE. Thus, for example, §23 states that "the leaders and other members of the enterprise, including Franjo Tuđman, Mate Boban and Jadranko Prlić, pursued a two-track policy toward the Republic of Bosnia and Herzegovina and its territory. On the one hand, the leaders and various members of the JCE often claimed publicly to support the Government of Bosnia and Herzegovina (sometimes hereafter "BiH Government") and an independent and sovereign Bosnia and Herzegovina. On the other hand, and less publicly but more substantially, the leaders and other members of the enterprise pursued their objective of a Greater Croatia, along the lines of the Croatian Banovina." However, it is impossible to conclude beyond doubt who, apart from the circle of the accused, were actually "leaders" and who "other members" in this enterprise. Without drawing such a distinction, it is impossible to determine fully and precisely the specific contribution of each category of participants. Furthermore, §25 of the indictment states that "while not every member of the HVO or the HDZ-BiH was part of the joint criminal enterprise, Herceg-Bosna, the HVO and the HDZ-BiH were essential structures and instruments of the joint criminal enterprise." From this it is clear that the indictment lacks not only positive criteria for establishing the circle of persons who are to be considered part of the JCE, but also negative selection, i.e. criteria by which it would be possible to determine the individuals who were members of these "criminal structures", but who were not part of the JCE. This sheds light on contradictions in reference to the JCE in the indictment, which in one place affirms the "criminal" character of Herceg-Bosna, the HVO and the HDZ-BiH, while at the same time reaching the contradictory conclusion that "not every member participated in the JCE". This sort of labelling points to a conclusion on the "criminal character" of certain political organisations (e.g. HDZ BiH), territorial organisational units (Herceg Bosna) and military defence structures (HVO), from which the "incrimination" of the members of these structures is deduced. This is not all in line with regulations governing individual criminal responsibility in the Statute of the ICTY.<sup>310</sup> The practice of determining the circle of participants in a JCE too widely was criticised in the first instance judgement in Brđanin case. By the indictment of 9 December 2003, Radoslav Brđanin, member of the Serbian Democratic Party and president of the Crisis Staff of the "Autonomous region of Krajina", was charged with planning and executing the campaign of ethnic cleansing of the non-Serbian population of the territory of Prijedor.<sup>311</sup> In the absence of evidence that the accused participated personally in

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<sup>310</sup> In the indictment it is not stated that specific crimes were committed by individuals, but the the HVO, HDZ BiH and Herceg-Bosna.

<sup>311</sup> Prosecutor against Radoslav Brđanin, 9 December 2003.

the acts of the commission of the criminal offences with which he is charged, the prosecution used the already established theory of JCE, as formulated in the Appeals Chamber's judgment in the Tadić case, to establish individual responsibility. According to § 27.1 of the indictment against the accused Brđanin:

"The purpose of the joint criminal enterprise was the permanent forcible removal of Bosnian Muslim and Bosnian Croat inhabitants from the territory of the planned Serbian state by the commission of the crimes alleged in Counts 1 through 12." This JCE came into existence "no later than the establishment of the Assembly of the Serbian people in Bosnia and Herzegovina on 24 October 1991 and continued throughout the period of the conflict in Bosnia and Herzegovina until the signing of the Dayton Agreement in 1995."

Starting from the fact that the accused had not personally committed any of the crimes with which he was charged, in our view the Trial Chamber took the correct position in holding that the prosecution must prove the existence of an agreement he had concluded with the direct perpetrator of the criminal offence. Consequently, according to the position of the Trial Chamber, for the accused to be culpable of extended JCE, it is required to prove the existence of this agreement and the fact that the committed criminal offence is a natural and foreseeable consequence of the agreement. This is reasoned in the first instance judgment in the following manner:

"...for the purposes of establishing individual criminal responsibility pursuant to the theory of JCE it is not sufficient to prove an understanding or an agreement to commit a crime between the Accused and a person in charge or in control of a military or paramilitary unit committing a crime. The Accused can only be held criminally responsible under the mode of liability of JCE if the Prosecution establishes beyond reasonable doubt that he had an understanding or entered into an agreement with the Relevant Physical Perpetrators to commit the particular crime eventually perpetrated or if the crime perpetrated by the Relevant Physical Perpetrators is a natural and foreseeable consequence of the crime agreed upon by the Accused and the Relevant Physical Perpetrators."<sup>312</sup>

For an accused person to be found responsible on the ground of JCE, the Prosecution must prove not only his objective contribution to the establishment and/or maintenance of the JCE, but also the existence of an agreement with the direct perpetrator. This was reasoned by the Trial Chamber in the following manner: "...the fact that the acts and conduct of an accused facilitated or contributed to the commission of a crime by another person and/or assisted in the formation of that person's criminal intent is not sufficient to establish beyond reasonable doubt that there was an understanding or an agreement between the two to commit that particular crime. An agreement between two persons to commit a crime requires a mutual understanding or arrangement with each other to commit a crime."<sup>313</sup> After having found that no indirect evidence exists on the basis of which it would find that such an understanding or agreement existed

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<sup>312</sup> Brđanin I, §347.

<sup>313</sup> Ibid., §352.

between the accused and the physical perpetrators of the crime, and that also other reasonable conclusions could be drawn from the fact of the implementation of the Strategic Plan in unison (for example, that the relevant physical perpetrators committed the crimes in question in execution of orders and instructions received from their superiors) other than that an understanding and/or agreement existed between them, the Trial Chamber refused to apply JCE as a form of personal criminal responsibility of the accused in this case, pursuant to Article 7(1) of the ICTY's Statute. The Prosecution filed an appeal against the first instance judgment, in which it pointed out, *inter alia*, that the Trial Chamber acted erroneously by requiring:

- a) that the direct perpetrator must be a member of the JCE;
- b) that it was necessary to prove direct understanding or agreement between the accused member of the JCE and the direct perpetrator of the crime;
- c) that the application of the JCE theory is limited to enterprises of a smaller scale.

In an effort to make the presented appellate allegations more credible and convincing, but also legally justifiable, the prosecution referred to the decision of the Appeals Chamber of the ICTY in the *Rwamakumba* case. Namely, in that case, the jurisprudence of the courts in the post World War II cases *RuSHA* and *Justice* was taken into account, according to which, in the Prosecution's understanding, it is not required that the direct perpetrators of crimes be members of a JCE. According to the interpretations of these cases by the Appeals Chamber of the ICTY in the *Rwamakumba* case, which the ICTY'S Prosecution was ready to assume in the *Brđanin* case, for an accused person to be found guilty it suffices to prove "his conscious participation in a nationwide government-organised system of cruelty and injustice."<sup>314</sup> According to this understanding of the prosecution, the standards accepted in the *Justice* case lead to the conclusion that, under JCE theory, for an accused person to be guilty it suffices to prove that the accused had knowledge of an offence charged in the indictment, and that he or she was connected to the commission of the crime.<sup>315</sup> As pointed out by the prosecution, it is not necessary to insist that a direct perpetrator be a member of a JCE, because a way always exists to connect the crime committed with the existence and activities of a JCE. According to this position of the prosecution, the imputation of responsibility to the accused is legally well founded if it is proven that the direct perpetrator was merely a tool in his hands. In their answer to the allegations of the prosecution, the defence of the accused *Brđanin* argued that a comparison drawn with the two quoted post World War II cases is inaccurate, since in the *RuSHA* case the judgment was not rendered on the basis of JCE, while in the *Justice* case the defendants were actively involved in the commission of the charged crimes.<sup>316</sup> By way of commenting on this first ground for appeal, we deem it necessary to point to the brief submitted to the Appeals Chamber in the capacity of an *amicus curiae* by the Tribunals Association of Defence Counsel

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<sup>314</sup> *Brđanin II*, §368.

<sup>315</sup> *Ibid.*

<sup>316</sup> *Ibid.*, §371.

(hereinafter ADC).<sup>317</sup> Although in its brief the amicus curiae distanced itself from the allegation that the JCE theory does not exist in international customary law, it warned that the elements of the doctrine are defined in the Appellate Chamber judgment in the Tadić case and that these elements constitute a binding precedent for all the Chambers of ICTY. In this sense, ADC supported the conclusion of the Trial Chamber according to which both the accused and the direct perpetrator must be members of a JCE, because this is consistent with the existing international customary law, the precedents of the Appeals Chamber and the subject and purpose of international criminal justice. In the conclusion, ADC points out that should the Appeals Chamber accept the prosecution's arguments, it will undermine the legitimacy of the Tribunal and international criminal law. Namely, to convict Brđanin for crimes committed by persons who were not members of a JCE would question the purpose of ICTY, which is to affirm the idea of reconciliation between the former warring parties on the territory of the former SFRY. In consideration of the question about whether the person who carried out the actus reus must be a member of a JCE, the Appeals Chamber pointed out that in order to find the accused responsible on the grounds of JCE, of relevance is not who committed the specific crime, but whether the crime in question forms part of a common purpose. It indicated that the Appeals Chamber in the Tadić, Vasiljević and Krnojelac cases did not clearly resolve whether the principal perpetrators must have participated in a JCE. Given that in the Tribunal's jurisprudence so far different terms have been used for perpetrator (material perpetrator, physical perpetrator, relevant physical perpetrator), the Appeals Chamber decided to call him the principal perpetrator. However, it made a mistake by doing so because, when it comes to JCE, it transformed the perpetrator, who is in fact in a position of secondary importance, into the central criminal figure in terms of terminology and substance. This wording suggests that perpetrators are in fact central criminal figures, which is not in accordance with the essence of the concept of JCE as derived criminal responsibility. After all, this terminology diverges from that established in the ICTY's jurisprudence until then (see the judgment of the Appeals Chamber in the Krnojelac case, in which it is pointed out that the term principal offender means more than mere physical perpetrator).

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<sup>317</sup> Decision on Association of Defense Counsel Request to Participate in Oral Argument, 7 November 2005. Amicus Brief of the Association of Defense Counsel – ICTY (“Amicus Brief”), 5 July 2005.

## 2.1. Whether the Principal Perpetrator Must Have Participated in a Common Purpose?

It is pointed out in the judgment of the Appeals Chamber in Brđanin that the Tadić case does not clearly resolve whether the principal perpetrator must have participated in a common purpose.<sup>318</sup> However, an analysis of the Appeals Chamber's judgment in this case leads to an entirely different conclusion. The position of the Appeals Chamber in this case in relation to the question whether the direct perpetrator must be a member of a JCE can be discerned when the Tribunal determines, when answering the question whether under international criminal law the appellant can be held criminally responsible for the killing of five men even though there is no evidence that he personally killed any of them, that it should be decided whether the acts of one person can give rise to the criminal culpability of another where both participate in the execution of a common criminal plan.<sup>319</sup> It stems from this that both persons, that is, the accused and the direct perpetrator whose actus reus is included in that of the accused, must jointly participate in the execution of the common criminal purpose. It is precisely this joint participation in the criminal purpose for the commission of the particular crime that forms the basis for counting the acts of the physical perpetrator as those of the accused for whom no evidence exists that he personally participated in the commission of the crime he is charged with. Parts of the Discussion of the Appeals Chamber's judgment in the Tadić case quoted below present a clear and transparent insight into the positions of that Chamber regarding this question:

- "Many post-World War II cases concerning war crimes proceed upon the principle that when two or more persons act together to further a common criminal purpose, offences perpetrated by any of them may entail the criminal liability of all the members of the group".<sup>320</sup>
- "The third category concerns cases involving a common design to pursue one course of conduct where one of the perpetrators commits an act which, while outside the common design, was nevertheless a natural and foreseeable consequence of the effecting of that common purpose".<sup>321</sup>
- "Criminal responsibility may be imputed to all participants within the common enterprise where the risk of death occurring was both a predictable consequence of the execution of the common design and the accused was either reckless or indifferent to that risk. Another example is that of a common plan to forcibly evict civilians belonging to a particular ethnic group by burning their houses; if some of the participants in the plan, in carrying out this plan, kill civilians by setting their houses on fire, all the other participants in the plan are criminally responsible for the killing if these deaths were predictable".<sup>322</sup>
- "As is set forth in more detail below, the requirements which are established by these authorities are two-fold: that of a criminal intention to participate in a common criminal design and the foreseeability that criminal acts other than those envisaged in the common

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<sup>318</sup> Ibid., §406.

<sup>319</sup> Tadić II, §185.

<sup>320</sup> Ibid., §195.

<sup>321</sup> Tadić II, §204.

<sup>322</sup> Ibid.

criminal design are likely to be committed by other participants in the common design”.<sup>323</sup>

- “As for the objective and subjective elements of the crime, the case law shows that the notion has been applied to three distinct categories of cases. First, in cases of co-perpetration, where all participants in the common design possess the same criminal intent to commit a crime (and one or more of them actually perpetrate the crime, with intent)”.<sup>324</sup>

- “With regard to the third category of cases, it is appropriate to apply the notion of ‘common purpose’ only where the following requirements concerning mens rea are fulfilled: (i) the intention to take part in a joint criminal enterprise and to further - individually and jointly - the criminal purposes of that enterprise; and (ii) the foreseeability of the possible commission by other members of the group of offences that do not constitute the object of the common criminal purpose. Hence, the participants must have had in mind the intent, for instance, to ill-treat prisoners of war (even if such a plan arose extemporaneously) and one or some members of the group must have actually killed them”.<sup>325</sup>

The Appeals Chamber finds that cases such as the Vasiljević and Krnojelac cases do not conclusively resolve whether the principal perpetrators must be members of a JCE.<sup>326</sup> Let us recall that in the Vasiljević case the background of the incriminated event was very similar to that in the Tadić case. This was a smaller group of armed persons, and in the absence of evidence that any of them directly committed the crime (these were killings of unarmed civilians), the Trial Chamber based the responsibility of the accused on JCE theory. It concluded that “there was understanding amounting to an agreement between Milan Lukić, the Accused and the two unidentified men to kill the seven Muslim men, including the two survivors.”<sup>327</sup> Given this agreement, the accused is charged with participation in “this joint criminal enterprise to commit a killing by preventing the seven Muslim men from fleeing by pointing a gun at them while they were detained at the Vilina Vlas Hotel, by escorting them to the bank of Drina River and pointing a gun at them to prevent their escape, and by standing behind the Muslim men with his gun together with the other three offenders shortly before the shooting started.”<sup>328</sup> Although it is not explicitly stated that these unidentified men were members of a JCE, the fact that it is necessary to establish the existence of an agreement between the accused and the direct perpetrators implies that they too must be members of the JCE. The Trial Chamber also concluded that if the crime is committed by one or other of the participants in a joint criminal enterprise, all of the participants are equally guilty of the crime regardless of the part played by each in its commission.” In the same case, the Appeals Chamber found that “... 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

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<sup>323</sup> Ibid., § 206.

<sup>324</sup> Ibid., § 220.

<sup>325</sup> Ibid.

<sup>326</sup> Brđanin II, §407.

<sup>327</sup> Vasiljević I, §208.

<sup>328</sup> Ibid.

and to contribute to the joint criminal enterprise or in any event to the commission of a crime by the group”.<sup>329</sup> It also stems from this that the crime must be committed by a group, that is, at least by an individual who belongs to the group in which the common design was formulated. Furthermore, the Appeals Chamber found that the accused is responsible for a crime other than the one which was part of the common design “only if, under the circumstances of the case it was foreseeable that such a crime might be perpetrated by one or other members of the group...”.<sup>330</sup> The Appeals Chamber accepted the standard from the Tadić case that “the common plan or purpose may materialise extemporaneously and be inferred from the fact that a plurality of persons acts in unison to put into effect a joint criminal enterprise.”<sup>331</sup> The argument that the purpose may materialise extemporaneously clearly leads to the conclusion that the direct perpetrator of a crime can only be a person who is a member of a JCE himself and who in this manner puts this plan into action. In other cases conducted before the ICTY, which the Appeals Chamber did not mention in this judgment, we find several instances of support for the argument that the direct perpetrator of a crime must be a member of a JCE. For example, in the Kvočka case:

- “The Trial Chamber considered that a co-perpetrator of a joint criminal enterprise shares the intent to carry out the joint criminal enterprise and actively furthers the enterprise. An aider or abettor, on the other hand, need not necessarily share the intent of the other participants; he need only be aware that his contribution assists or facilitates a crime committed by the other participants”.<sup>332</sup>

- “Where the aider and abettor only knows that his assistance is helping a single person to commit a single crime, he is only liable for aiding and abetting that crime. This is so even if the principal perpetrator is part of a joint criminal enterprise involving the commission of further crimes. Where, however, the accused knows that his assistance is supporting the crimes of a group of persons involved in a joint criminal enterprise and shares that intent, then he may be found criminally responsible for the crimes committed in furtherance of that common purpose as a co-perpetrator”.<sup>333</sup>

- “Appellant Kvočka appears to argue that a co-perpetrator in a joint criminal enterprise must physically commit part of the actus reus of a crime in order to be criminally liable. The Appeals Chamber disagrees. A participant in a joint criminal enterprise need not physically participate in any element of any crime, so long as the requirements of joint criminal enterprise responsibility are met. As the Tadic Appeals Chamber explained, “[a]lthough only some members of the group may physically perpetrate the criminal act (murder, extermination, wanton destruction of cities, towns or villages, etc.), the participation and contribution of the other members of the group is often vital in facilitating the commission of the offence in question””.<sup>334</sup>

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<sup>329</sup> Vasiljević II, §101.

<sup>330</sup> Ibid.

<sup>331</sup> Tadić II, § 227; Vasiljević II, §109.

<sup>332</sup> Kvočka II, §88.

<sup>333</sup> Ibid., §90.

<sup>334</sup> Ibid., §99.



Moreover, also in the Simić case, the Trial Chamber, although indirectly, that is through the element of understanding/agreement to commit a specific crime, accepted that direct perpetrators must be members of a JCE:

- “The Trial Chamber is of the view that the phrase ‘acting in concert with others’ refers to the participation of several persons in a collective commission of a crime”.<sup>335</sup>
- “A person can still be held liable for criminal acts carried out by others without being present – all that is necessary is that the person forms an agreement with others that a crime will be carried out.”<sup>336</sup>
- “A joint criminal enterprise requires, in addition to showing that several individuals agreed to commit a crime, that the parties to the agreement took action in furtherance of that agreement”.<sup>337</sup>

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<sup>335</sup> Simić I, §149.

<sup>336</sup> Simić I, §158; Krnojelac II, § 81.

<sup>337</sup> Simić I, §158.

## 2.2. Is Joint Criminal Enterprise Theory Limited to Enterprises of a Smaller Scale?

The Appeals Chamber in *Brđanin* dismissed the position and explanation of the Trial Chamber that the jurisprudence of the Tribunal regarding the application of JCE theory had so far related to a limited territory, such as Srebrenica, Prijedor and Bosanski Šamac. Stating that it was true that in several of the Tribunal's cases the JCE mode of liability had been applied to cases which did not involve the accused in high positions of a hierarchy of power, the Appeals Chamber concluded that the reason for this was the circumstances of the cases themselves, not the elements of the theory which would limit its application only to such cases. Therefore, in the opinion of the Appeals Chamber, the Trial Chamber erred in concluding that the JCE mode of liability was not appropriate for high ranking accused persons in cases such as this. Criticizing that position of the Appeals Chamber, due warning should be made here of the meaning of this syntagm. Namely, small scale enterprises should not exclusively be understood as enterprises in which a relatively small number of persons have participated or in which a relatively small number of people were killed. They should be understood as the joint actions of certain groups of people who are not positioned at the very top of the hierarchy of civil and/or military power, and which are directed at specific military operations or involve a limited field of activity. „Small scale enterprises“ are also those which include crimes committed within an organized system of abuse limited to one camp, and a small group of armed persons who had acted jointly in connection with the commission of a particular crime. This is also demonstrated by the jurisprudence of the tribunals which were hearing cases for post World War II crimes, for example in the case against Erich Heyer et al., better known in literature as Essen Lynch (Essen West) which was quoted in the *Tadić* case to support its theses that the JCE theory is deeply rooted in international customary law. This was a case before the military tribunal who tried Captain Heyer, a German soldier and five civilians, for the murder of three British prisoners of war. The case against Kurt Goebell et al., better known as the Borkum Island case has a similar profile.<sup>338</sup> In the *Almelo* case three Germans were indicted, who had killed one British prisoner of war. Similarly, in the *Hoelzer* case a Canadian military tribunal convicted three Germans for killing a Canadian prisoner of war. In the *Jepsen* case, the British tribunal decided on the responsibility of Jepsen (one of the several accused) for the death of interns from a concentration camp, who were in transit to another concentration camp several weeks before the capitulation of Germany.<sup>339</sup> In what are called “concentration camp cases” it was also a matter of small scale enterprises. Accordingly, the goal of the trial of Martin Gottfried Weiss et al., better known as the 1945 Dachau trial, was to convict the persons who established and administered Dachau, the first concentration camp in Germany, in which from March 1933 to April 1945, a large number of persons, mainly Russian, Polish and Czech civilians, were killed in

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<sup>338</sup> KOESSLER 1956-1957, 183

<sup>339</sup> Trial of Gustav Alfred Jepsen and others, Proceedings of a War Crimes Trial held at Luneberg, Germany, (13 – 23 August 1946), judgment of 24 August 1946.

various cruel ways.<sup>340</sup> In the proceedings before the ICTY, the JCE construct is applicable mostly to small scale enterprises. Accordingly, for example, Vidoje Blagojević and Dragan Jokić were found guilty of, inter alia, aiding and abetting genocide and prosecution of Bosnian Moslems in the Srebrenica enclave. The deputy commander of the Drina corps of the VRS, Radoslav Krstić, was also convicted of aiding genocide committed in that part of Bosnia and Herzegovina. The administrator of the Foča Kazneno-Popravni Dom Milorad Krnojelac was convicted for subjecting Moslems and other non-Serbs to prolonged and routine imprisonment, repeated torture and beatings, killings, prolonged and frequent forced labor and inhuman conditions and for aiding the deportation and expulsion of majority of Bosnian Moslem men and non-Serbs from the Municipality of Foča. Kunarac, Kovač and Vuković were found guilty of participation in the Bosnian Serb forces campaign in the broader area of Foča, which lasted from the beginning of 1992 until mid 1993, for the purpose of ethnically cleansing this territory of Bosnian Moslems. In the Kvočka et al. case it was a matter of the responsibility of the accused for the administration of the Omarska camp, in which the inmates, mostly Bosnian Moslems, were subjected to inhuman treatment, torture and killing. Milomir Stakić was found guilty of the crimes committed as the result of a campaign to persecute non-Serbs in the municipality of Prijedor during 1992. In the Tadić case, in which elements of the JCE theory were formulated, it was a matter of a small group of armed persons responsible for killing civilians in the village of Jaškići. The situation was also very similar in the Vasiljević et al. case, in which the accused were charged with participation in a military group which terrorized the local Moslem population in the vicinity of Višegrad in the period from 1991 to 1994. In states in which forms of responsibility similar to JCE are applied, we also find confirmation for the theses that this form of responsibility is limited to small scale enterprises. In the *S v. Safatsa* case (better known as the “Shaperville Six”), also quoted in the Trial Chamber judgment in the *Kvočka et al.* case,<sup>341</sup> before the Supreme Court of the Republic of South Africa six of the eight accused were convicted for participation in mob violence which resulted in the death of a town councilor. The court found that the behavior of the accused ranged from preparation of inflammatory materials, holding the victims for other attackers, inciting the mob to kill the victim, throwing stones at the victim and belonging to the part of the group which attacked the victim. In a case with a similar factual background, *S. V. Motaung et al.*, several members of the group were convicted on the basis of the common purpose theory, for killing an alleged police informer. The confirmation that the common purpose theory is only applied in the case law of the South African courts to small scale enterprises is also found in the cases *S v. Mitchell et al.*, *S v. Thabetha et al.*<sup>342</sup> etc. The analysis of the post World War II tribunals’ jurisprudence, the ICTY’s jurisprudence and the case law of national courts in the states in which forms of responsibility similar to JCE are applied, leads to the conclusion that JCE has been constructed as a form of responsibility which can

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<sup>340</sup> See *v. Kvočka I*, §276-278

<sup>341</sup> *Kvočka I*, s. footnote n. 513

<sup>342</sup> *BOISTER* 1992, 167

only be applied to small scale enterprises limited to specific military operations, a limited area of activities, one camp or a small group of armed persons who acted jointly in connection with the commission of a specific crime. Accordingly, the Appeals Chamber's conclusion in the Brđanin case that JCE theory could be applied to large scale enterprises is not legally founded.

### 3. Common Purpose

In its case law the ICTY has adopted the stance that “using the concept of joint criminal enterprise to define an individual’s responsibility for crimes physically committed by others requires a strict definition of common purpose.”<sup>343</sup> The common purpose, in the Tadić case, was defined as “the policy of committing inhumane acts on the non-Serb civilian population of that region in BiH in an attempt to create a Greater Serbia.”<sup>344</sup> The attack on Sivci and Jaškići, of which Tadić was accused, was in this context of inhumane acts perpetrated on numerous victims in accordance with a recognisable plan. The common purpose in the Stakić case was defined in six strategic goals held by the leadership of the Bosnian Serbs in Bosnia and Herzegovina, formulated by Radovan Karadžić, among which the primary goal was the separation of Serbs from “the other two national communities”.<sup>345</sup> The consolidation of Serbian power in the municipality as a goal, i.e. common purpose, was realised by creating an atmosphere of pressure on the non-Serbian inhabitants of the municipality, carrying out a propaganda campaign which contributed to the polarisation of the population, the creation of an atmosphere of terror, and the formation of the Omarska, Keraterm and Trnopolje camps.<sup>346</sup> In the Krstić case, the Trial Chamber established that the accused had participated with “the political and/or military leadership of the VRS formulated a plan to permanently remove the Bosnian Muslim population from Srebrenica, following the take-over of the enclave. From 11 through 13 July, this plan of what is colloquially referred to as “ethnic cleansing” was realised mainly through the forcible transfer of the bulk of the civilian population out of Potočari, once the military aged men had been separated from the rest of the population.”<sup>347</sup> In the Milutinović et al. case, the accused, who were high-ranking military and state officials in the Socialist Republic of Yugoslavia, were accused of participating in a JCE the goal of which was, among other things, “the expulsion of a substantial portion of the Kosovo Albanian population from the territory of the province of Kosovo in an effort to ensure continued Serbian control over the province.”<sup>348</sup> According to the indictment against Milan Martić, the goal of the JCE of which he was accused was “the forcible removal of the majority of the Croats, Muslims and other non-Serb population from approximately one-third of the territory of the Republic of Croatia and a large part of the Republic of Bosnia and Herzegovina in order to make them part of a new Serb-dominated state through the commission of crimes in violation of Articles 3 and 5 of the Statute of the Tribunal”.<sup>349</sup> The indictment in the case of Prlić et al. was also based on the JCE theory. According to the claims of the prosecution, in this case, the goal of the accused's common purpose was “to politically and militarily

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<sup>343</sup> Krnojelac II, §116

<sup>344</sup> Tadić II, §230

<sup>345</sup> Stakić I, §471

<sup>346</sup> Ibid. §475-477

<sup>347</sup> Krstić I, §612

<sup>348</sup> Decision on the objection of Dragoljub Ojdanić to jurisdiction– JCE 21.5.2003, §17

<sup>349</sup> The Prosecutor v. Milan Martić, 14.7.2003, §4.

subjugate, permanently remove and ethnically cleanse Bosnian Muslim and other non-Croats who lived in areas on the territory of the Republic of Bosnia and Herzegovina which were claimed to be part of the Croatian Community (and later Republic) of Herceg-Bosna and to join those areas, as part of a “Greater Croatia”, whether in the short-term or over time and whether as part of the Republic of Croatia or in close association with it, by force, fear or threat of force, persecution, imprisonment and detention, forcible transfer and deportation, appropriation and destruction of property and other means, which constituted or involved the commission of crimes which are punishable under Articles 2, 3, and 5 of the Tribunal Statute. The territorial ambition of the joint criminal enterprise was to establish a Croatian territory with the borders of the Croatian Banovina, a territorial entity that existed from 1939 to 1941. It was part of the joint criminal enterprise to engineer the political and ethnic map of these areas so that they would be Croat-dominated, both politically and demographically”.<sup>350</sup> In the joint indictment against Gotovina, Čermak and Markač, it is stated that the goal of the JCE which existed from at least July to 30 September 1995, was “the permanent removal of the Serb population from the Krajina region by force, fear or threat of force, persecution, forced displacement, transfer and deportation, appropriation and destruction of property or other means.”<sup>351</sup> In the prosecution's Pre-Trial Brief<sup>352</sup> the date of the inception of the JCE was given as 31 July 2005 on Brijuni, at a meeting attended by the President of the Republic of Croatia and the supreme commander of the armed forces of the Republic of Croatia and by “Gotovina, Markač and other political and military leaders, to discuss the imminent attack on the Krajina.”<sup>353</sup> According to transcripts of that meeting, President Tuđman allegedly stated that it was most important to instigate the mass departure of civilians to be followed by the army.<sup>354</sup> It is also alleged that in the transcripts, the accused General Gotovina reported to President Tuđman at that meeting on the confirmed mass evacuation of civilians in the directions of Belgrade and Banja Luka, which, if the pressure were maintained, could lead to mass emigration, with only those Serbs remaining who could not leave, or had nowhere to go.<sup>355</sup> From the prosecutor's Brief it emerges that the formation of a common purpose at the meeting on Brijuni was preceded by political negotiations between the Croatian and Serbian sides held in 1992, with the aim of achieving the so called “humane deportation” in order to create ethnically “cleansed” regions in Croatia and Bosnia and Herzegovina. It is therefore clear that the prosecution considered the JCE, as it was finally formulated by the adoption of a common purpose on Brijuni on 31 July 2005, as merely the continuation of the policy of creating ethnically cleansed

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<sup>350</sup> Prosecutor v. Prlić and others, 16.11.2005., §15

<sup>351</sup> Prosecutor v. Gotovina, Čermak and Markač, Joint Indictment, 6 June 2007, § 12.

<sup>352</sup> Prosecutor v. Ante Gotovina, Ivan Čermak and Mladen Markač, Confidential and Partially Ex Parte Prosecution's Submission Pursuant to Rule 65ter(E), Prosecution's Pretrial Brief, 16 March 2007

<sup>353</sup> Ibid. §16

<sup>354</sup> “...it is important that those civilians set out, and than the army will follow them, and when the columns set out, they will have a psychological impact on each other...we have to inflict such blows that the Serbs will to all practical purposes disappear.” Ibid.

<sup>355</sup> Ibid.

areas and in that sense, its final realisation. The question arises here on whether these conclusions of the Prosecution are contrary to the adjudicated facts in proceedings against Martić, Šešelj, Stanišić and Simatović. In other words and more generally speaking, does the one JCE exclude the other one on the conflicting side if they are both within the same time, space and contextual framework? In the indictment against Milan Martić, it is mentioned that “this joint criminal enterprise came into existence before 1 August 1991 and continued until at least August 1995.” In the indictment against Stanišić and Simatović, it is stated precisely that the JCE (which, it is true, relates both to Croatia and to B&H) existed no later than 1 August 1991 and continued to at least 31 December 1995.<sup>356</sup> It is interesting that in the joint indictment against Gotovina, Čermak and Markač, it is stated that the JCE which was “formed with the common purpose of the permanent removal of the Serb population from the area of the Krajina by force, fear or threat of force, persecution, forced displacement, transfer and deportation, appropriation and destruction of property and other means”, existed no later than from July to 30 September 1995. From this it arises that in Croatia in the period from July to August 1995 two JCE coincided, one on the Serbian side, acting with the aim of creating an ethnically homogenous Serb area in Croatia and B&H, and the other on the Croatian side, with the aim of permanently removing the Serb population from the area of the Krajina. In the pre-trial brief by the prosecution of 23.3.2007, it is mentioned that the military plans for Operation Storm were finalised on 31 July 1995, that is at the time when the JCE was still functioning in the occupied areas of Croatia led by Milan Martić. Although the existence of one JCE in principle does not exclude the functioning of another JCE, here it is however difficult to escape the impression that the time, space and historical context suggests that the response by the Croatian authorities to the Serbian JCE was completely within the bounds of international law. Furthermore, if we accept the premise of a closed circle, in which the opposed JCE functioned continuously, created on an ethnical basis, and according to which the Serb JCE was a response to the suffering of Serbs in Croatia in the Second World War, and the Croatian JCE formulated in Operation Storm a response to the Serb JCE, which was proven in the Martić case, the question arises of how was it that the JCE of which Čermak, Gotovina and Markač are accused lasted only two months? The next question is: Was it possible to achieve the maximal goal (the permanent removal of the Serb population from the area of the RSK) in such a short period of time? Finally, if that goal was the permanent removal of a complete ethnic group, the question arises as to why the attempt was made to achieve it in such a limited geographical area, which comprises the area of the southern part of the so-called RSK, which was the only place where the criminal offences were committed of which Čermak, Gotovina and Markač are charged in the indictments. Furthermore, if the criminal character of some military campaigns is assessed in the light of the consequences, in the specific case the number of people of Serbian nationality who left Croatia during and after Storm, then it is not clear why Storm is a criminal enterprise, and for example Operation Flash is not, although it may

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<sup>356</sup> The prosecutor v. Stanišić and Simatović, 20 December 2005, §11

be concluded in its case too that the people who took part in planning and executing it (who were mainly the same people who are mentioned as those participating in the JCE in the indictment against Čermak, Gotovina and Markač) could at least have foreseen the removal of the population as a natural and foreseeable consequence of its execution. On the contrary, from several places in the judgement, the positive attitude of the Trial Chamber may be seen towards that military operation, despite some testimonies according to which civilians were also victims of that operation too.<sup>357</sup> It is interesting that in the indictment against Martić no negative connotations are linked to “Storm”. On the contrary in §78 the Prosecution says that by the massive Croatian offensive, commonly known as Operation Storm, control over the RSK was successfully restored to the Republic of Croatia:

“The Serb-held territories in the RSK remained under SVK control until early August 1995. At around that time Milan Martić, together with the RSK political and military leadership, fled Croatian territory during a massive Croatian offensive. This operation, commonly referred to as "Operation Storm," successfully restored Croatian control over the RSK. The remaining area of Serb control in Eastern Slavonia was peacefully re-integrated into Croatia in 1998.”<sup>358</sup>

Concerning this issue we can conclude that one JCE exclude the other one on the conflicting side if they are both within the same time, space and contextual framework. Apart from the fact that the prosecution's arguments on the articulation of state policies through common purpose and the criminal character of Operation Storm contradict evidence already produced in proceedings against Milan Martić and Slobodan Milošević, they do not hold water from the point of view of the actual higher standards of proof required to establish the responsibility of the accused in terms of so-called “collective” crimes, as laid down in the judgment of the International Court of Justice in February 2007 in the case, “Application of the Convention on the Prevention and Punishment of the Crime of Genocide.”

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<sup>357</sup> Martić I, §302, §464

<sup>358</sup> The Prosecutor v. Milan Martić, 14 July 2003, §78



### **3.1. Judgement of International Court of Justice in the Case “Application of the Convention on the Prevention and Punishment of the Crime of Genocide“ (Bosnia and Herzegovina v. Serbia and Montenegro) of 26 February 2007**

In the long-awaited judgment in the case “Application of the Convention on the Prevention and Punishment of the Crime of Genocide“ (Bosnia and Herzegovina v. Serbia and Montenegro) of 26 February 2007,<sup>359</sup> the International Court of Justice pronounced that Serbia, through its organs or persons whose acts engage its responsibility under international common law, had not committed genocide.<sup>360</sup> It was also pronounced that Serbia was not responsible of conspiracy for the purpose of committing the crime of genocide, nor of complicity, according to Article 3 of the Convention on the Prevention and Punishment of the Crime of Genocide.<sup>361</sup> However, the ICJ found that Serbia had violated her obligation to prevent the genocide which occurred in Srebrenica in July 1995.<sup>362</sup> According to the Court ruling, Serbia had also violated the regulations of the Convention by not transferring Ratko Mladić, accused of genocide and complicity in genocide, to the ICTY, thus violating her obligations of full co-operation with the Tribunal.<sup>363</sup> The ICJ pronounced Serbia guilty of violating her obligations in connection with the implementation of provisional measures set by the court on 8 April and 13 September 1993, which might have prevented the genocide in Srebrenica.<sup>364</sup> In view of the stated violations of the Convention on the Prevention and Punishment of the Crime of Genocide, the ICJ ordered Serbia to take the necessary measures, without delay, to ensure complete fulfilment of her obligations, arising from the Convention, relating to the punishment of genocide as defined in Article 2 and

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<sup>359</sup> International Court of Justice, Case concerning the application of the Convention on the prevention and punishment of the crime of genocide, (Bosnia and Herzegovina v. Serbia and Montenegro), 26 February 2007, source <http://www.icj-cij.org/>, 1.8.2009.

<sup>360</sup> “(2) by thirteen votes to two, Finds that Serbia has not committed genocide, through its organs or persons whose acts engage its responsibility under international common law, in violation of its obligations under the Convention on the Prevention and Punishment of the Crime of Genocide.“ Ibid. §471

<sup>361</sup> “(3) by thirteen votes to two, Finds that Serbia has not conspired to commit genocide, nor incited the commission of genocide, in violation of its obligations under the Convention on the Prevention and Punishment of the Crime of Genocide.“

“(4) by eleven votes to four, Finds that Serbia has not been complicit in genocide, in violation of its obligations under the Convention on the Prevention and Punishment of the Crime of Genocide.“ Ibid.

<sup>362</sup> “(5) by twelve votes to three, Finds that Serbia has violated the obligation to prevent genocide, under the Convention on the Prevention and Punishment of the Crime of Genocide, in respect of the genocide that occurred in Srebrenica in July 1995.“ Ibid.

<sup>363</sup> “(6) by fourteen votes to one, Finds that Serbia has violated its obligations under the Convention on the Prevention and Punishment of the Crime of Genocide by having failed to transfer Ratko Mladić, indicted for genocide and complicity in genocide, for trial by the International Criminal Tribunal for the former Yugoslavia, and thus having failed fully to co-operate with that Tribunal.“ Ibid.

<sup>364</sup> “(7) by thirteen votes to two, Finds that Serbia has violated its obligation to comply with the provisional measures ordered by the Court on 8 April and 13 September 1993 in this case, inasmuch as it failed to take all measures within its power to prevent genocide in Srebrenica in July 1995.” Ibid.

other crimes defined in Article 3, and to transfer to the ICJ the individuals accused of genocide and crimes linked to genocide.<sup>365</sup> In stating that the proclamation of Serbia's guilt for failing to prevent genocide and failing to punish the perpetrators was appropriate satisfaction for the victims of the crime of genocide and the prosecution, the ICJ ruled that it would not be appropriate to require payment of compensation for failing to comply with the Convention or violating it.<sup>366</sup> For the first time since its foundation, the ICJ decided in the case of BiH v. Serbia and Montenegro, on the issue of whether and under what conditions a state could be held responsible for violations of the provisions of the 1948 Convention on the Prevention and Punishment of the Crime of Genocide.<sup>367</sup> In the political sense, the judgment could be viewed as a kind of compromise, which was not only contested by all the parties involved, but was also the cause of dissatisfaction among all interested parties in the region. The victims of the Serbian crimes in Bosnia and Herzegovina were denied proper, appropriate moral satisfaction. Although extremely serious crimes had been committed in many parts of BiH, of which some, at least in our judgment, were clearly crimes of genocide,<sup>368</sup> the ICJ declared that genocide had only been committed in the Srebrenica region in July 1995. However, although it was proved that genocide had occurred, the ICJ offered no answer to the question as to who the perpetrators were, although it confirmed who they were not, and who was therefore not responsible, and that was the accused party. This kind of judgment was yet another missed opportunity for the international justice to finally establish who had been responsible for the crime of genocide, which had been committed beyond a shadow of a doubt in Srebrenica in 1995. For we should not forget that not one of those accused of the crime of genocide has so far been sentenced by the ICJ. Krstić, Blagojević and Jokić were not sentenced as the perpetrators of genocide, but as collaborators, or aiders and abettors in genocide. After the death of Milošević the likelihood lessened that the victims and the international public would ever discover who, in fact, had committed the worst crime in Europe since the Second World War. On the other hand, it is indisputable that Serbia, however much she may have hailed the ruling of the ICJ, is the first country in history to have been declared

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<sup>365</sup> “(8) by fourteen votes to one, Decides that Serbia shall immediately take effective steps to ensure full compliance with its obligation under the Convention on the Prevention and Punishment of the Crime of Genocide to punish acts of genocide as defined by Article II of the Convention, or any of the other acts proscribed by Article III of the Convention, and to transfer individuals accused of genocide or any of those other acts for trial by the International Criminal Tribunal for the former Yugoslavia, and to co-operate fully with that Tribunal.” Ibid.

<sup>366</sup> “(9) by thirteen votes to two, Finds that, as regards the breaches by Serbia of the obligations referred to in subparagraphs (5) and (7) above, the Court’s findings in those paragraphs constitute appropriate satisfaction, and that the case is not one in which an order for payment of compensation, or, in respect of the violation referred to in subparagraph (5), a direction to provide assurances and guarantees of non-repetition, would be appropriate.” Ibid.

<sup>367</sup> Application of the Convention on the prevention and punishment of the crime of genocide (Croatia v. Serbia and Montenegro), source <http://www.icj-cij.org/>, 1.8.2009.

<sup>368</sup> The concentration camps of Omarska, Keraterm and Trnopolje are almost textbook examples of the modes of committing the crime of genocide. For more on the reasons for establishing the camps, the conditions in them and the treatment of the inmates, see Prosecutor v. Miroslav Kvočka et al., amended indictment, 21.9.2000. §3-12

responsible of violating the provisions of the Convention on the Prevention and Punishment of the Crime of Genocide. This ruling brought into question the legitimacy of the rise of the Republika Srpska and the entire Dayton Agreement, which Bosniac politicians attempted to capitalise on as soon as it was agreed, by arguing the need to revive the process of constitutional reform in Bosnia and Herzegovina. In the legal sense, the ruling of the ICJ raised several extremely interesting questions, which will, we believe, soon become the subject of scientific interest in international law. We will mention what we think are two of the most important. The question above all others is whether a state which is a subject of international law, but not of international criminal law, can commit genocide or one of the acts enumerated in Article 3 of the Convention on the Prevention and Punishment of Genocide, and in that sense be declared responsible for committing such acts, or whether responsibility can be attributed to such a state if and when the acts were committed by physical persons acting under her control. Genocide is a crime, a serious criminal offence. Apart from the title of the Convention,<sup>369</sup> this undoubtedly arises from the fact that the crime of genocide is proscribed in the criminal laws of the state parties, from which arises the subject matter jurisdiction (*rationae materiae*) of an ad hoc International Criminal Tribunal<sup>370</sup>, as does that of the International Criminal Court.<sup>371</sup> The subjects of criminal law, that is persons charged with crimes, may be physical or legal persons. Legal persons cannot be accountable for crimes of all degrees, but only of some. Although states have the status of legal persons, it is generally considered in the literature that states cannot be accountable for crimes.<sup>372</sup> In some legal systems, this is specifically prescribed in the text of the law.<sup>373</sup> Apart from this, we should also bear in mind the provision of Article 4 of the Convention, which states that persons committing genocide or any of the other acts enumerated in Article 3 of the Convention shall be punished, regardless of whether they are “constitutionally responsible rulers, public officials or private individuals.”<sup>374</sup> From such constructions it follows that the authors of the Convention assumed in principle that a state cannot carry out the crime of genocide or the crimes linked to genocide in Article 3. However, this does not necessarily mean that a state cannot be declared responsible for genocide and

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<sup>369</sup> "Interpretation must above all be based on the text of the agreement“, see *Territorial Dispute (Libyan Arab Jamahiriya/Chad)*, Judgment, I.C.J. Reports 1994, p. 22. §41)

<sup>370</sup> See Article 4 of the ICTY Statute and Article 2 of the International Criminal Tribunal for Rwanda.

<sup>371</sup> See Article 6 of the Statute of the International Criminal Court

<sup>372</sup> See the *Volkel* case and the ruling of the High Court of the Netherlands. *DERENČINOVIĆ* 2003, 56

<sup>373</sup> See Article 6 of the Act on the Responsibility of Legal Persons for Crimes (OG 171&03, 24.9.2003) and Articles 121-2 of the French Penal Code (Loi n° 2000-647 du 10 juillet 2000 art. 8 Journal Officiel du 11 juillet 2000, source <http://admi.net/code/CPENALLL-121-2.html>, 1.8.2009.)

<sup>374</sup> "Persons committing genocide or any of the other acts enumerated in article III shall be punished, whether they are constitutionally responsible rulers, public officials or private individuals." See also Article 6, which mentions “persons accused of genocide”, Convention on the Prevention and Punishment of the Crime of Genocide, Adopted by Resolution 260 (III) A of the U.N. General Assembly on 9 December 1948.

crimes linked to it, on the basis of so-called derived responsibility. Article 9 of the Convention mentions the “responsibility of a state for genocide or any of the other acts enumerated in Article 3”, suggesting that states can be responsible for genocide or other criminal acts linked to genocide.<sup>375</sup> The only logical conclusion which can be drawn from the circumstance that Article 9 speaks of “responsibility of a state for genocide”, rather than “the responsibility of a state for preventing or failing to sanction genocide”, is that the state, although incapable of “committing” genocide or other acts linked to genocide enumerated in Article 3 of the Convention on the Prevention and Punishment of the Crime of Genocide, can be declared responsible for such acts. Among other things, this arises from the very heart of the Convention on the Prevention and Punishment of the Crime of Genocide, which was passed as a direct reaction to the concentration camps and other means used by Nazi authorities, the goal of which was the destruction of certain biological groups, and which formed part of official state policy. The basis of the derived responsibility of a state lies in its function of supervising the individuals or groups who are the physical perpetrators of these crimes. The state can be declared responsible for such crimes if it can be shown that there was effective control over the perpetrators. If, however, the control was merely overall control, then the acts of physical perpetrators cannot be imputed to the state, but the state can be held responsible for failing to prevent such acts from being carried out or failing to punish the perpetrators. We now come to the second question which is particularly important in the context of the deliberations of the possible influence of the judgment by ICJ concerning the further application of the JCE theory before the ICTY. This is the question: under what circumstances can the illegal acts of individuals (physical persons) and groups be imputed or attributed to the state? The case law of international courts regarding this issue shows a variety of opinions.<sup>376</sup> In assessing whether the acts of individuals (physical persons) could be imputed or accredited to the accused party, the ICJ refused to apply the test of overall control adopted by the Appeals Chamber of the ICTY in the Tadić case, demanded by the applicant,<sup>377</sup> and sided with the old test of effective control which it had itself formulated in the Nicaragua case.<sup>378</sup> Since

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<sup>375</sup> For another viewpoint see the International Court of Justice, Case concerning the application of the Convention on the prevention and punishment of the crime of genocide, (Bosnia and Herzegovina v. Serbia and Montenegro), 26 February 2007, Joint declaration of judges Shi and Koroma, source <http://www.icj-cij.org/>, 1.8.2009.

<sup>376</sup> In the case of Nicaragua, the ICJ adopted the test of “effective control”, while the Appeals Chamber of the ICTY in the Tadić case leaned towards the milder test of “overall control”.

<sup>377</sup> “The Applicant relies on the alleged existence of an overall plan to commit genocide throughout the territory, against persons identified everywhere and in each case on the basis of their belonging to a specified group.” International Court of Justice, Case concerning the application of the Convention on the prevention and punishment of the crime of genocide, (Bosnia and Herzegovina v. Serbia and Montenegro), 26 February 2007, §370, source <http://www.icj-cij.org/>, 1.8.2009.

<sup>378</sup> In this case the ICJ resolved the question of whether a foreign state, the United States, owing to the fact that it had financed, organised, trained, equipped and planned the operations of organised military and paramilitary groups of rebels in Nicaragua (the Contras), was responsible for the breaches of international humanitarian law carried out by those rebels. The court concluded that a high degree of control would have been required. It would have been necessary for (i) the party to

genocide is a crime for which it is necessary to show that the perpetrator *tempore criminis* acted with the specific intent (*dolus specialis*) directed towards the destroying a particular group in whole or in part, by insisting on the application of the test of overall control, the prosecution attempted to show that the specific intent of the accused party arose from the Decision on Strategic Goals, issued by Momčilo Krajišnik, the then President of the Assembly of the Republika Srpska in May 1992, resulting in the general pattern of crimes which the Bosnian Serbs, in carrying out this Decision, systematically perpetrated against the Bosnian Muslims and Croats.<sup>379</sup> The ICJ did not accept such an extensive interpretation of the content of specific intent, and rejected the claim of the prosecution that a conclusion could be drawn on its existence based on the Decision on strategic goals (inference). According to the court's understanding, specific intent (*dolus specialis*), as a specific intent to destroy a particular group in whole or in part, must be convincingly proven (demonstrated), given the circumstances of a specific case, unless in that sense the existence of a general plan explicitly including such an intent can be convincingly proven. In order for a particular pattern to be accepted as proof of specific intent, it must indisputably point to the existence of the same.<sup>380</sup> The ICJ assessed that the strategic goals of the Decision already mentioned could have been achieved by resettling the population and occupying the territory, but that the motive of creating a "Greater Serbia" did not necessarily imply or demand the destruction of the Bosnian Muslims and other communities, but rather their expulsion.<sup>381</sup> The applicant, according to the ICJ, did not offer specific proof of the existence of such intent on the part of the accused party, also because it did not succeed in proving the existence of a concerted plan containing such an intent, nor that the events presented in the law suit demonstrated a consistent pattern of conduct, which would indisputably point

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exercise effective control of the military or paramilitary groups and also (ii) to wield control in relation to the actual operation during which the breach took place. The court even established that, in order to confirm the responsibility of the USA for "acts contravening regulations on human rights and humanitarian law", claimed to have been carried out by the Nicaraguan Contras, it would have to be shown that the USA had actually "issued orders and ensured the execution" of such acts. Cited in *Tadić II*, §100. For the original, see International Court of Justice, *Military and paramilitary activities in and against Nicaragua (Nicaragua v. United States of America)*, 27.6.1986, source <http://www.icj-cij.org/>, 1.8.2009.

<sup>379</sup> Decision on Strategic Goals issued in May 1992 by Momčilo Krajišnik as the President of the National Assembly of Republika Srpska. The Strategic Goals were as follows: (1) Separation as a state from the other two ethnic communities; (2) a corridor between Semberija and Krajina; (3) the establishment of a corridor in the Drina River valley, i.e., the elimination of the border between Serbian states; (4) the establishment of a border on the Una and Neretva rivers; and (5) the division of the city of Sarajevo into a Serbian part and a Muslim part, and the establishment of effective State authorities within each part.

<sup>380</sup> "The *dolus specialis*, the specific intent to destroy the group in whole or in part, has to be convincingly shown by reference to particular circumstances, unless a general plan to that end can be convincingly demonstrated to exist; and for a pattern of conduct to be accepted as evidence of its existence, it would have to be such that it could only point to the existence of such intent.", *Ibid.* §373

<sup>381</sup> *Ibid.* §372

to the existence of such an intent.<sup>382</sup> The judgment of the ICJ could have a significant effect on limiting the application of the JCE theory in the practice of the ICTY, both in terms of the range of its application and in the precise determination of its objective and subjective elements. In the criticism of the judgment of the Appeals Chamber in the Tadić case, the ICJ emphasised that the ICTY had not been called upon, either in general or in that particular case, to pass judgments in questions relating to the responsibility of states. That, without doubt, was an open, well-argued criticism of the Tribunal, which had erroneously interpreted its historical mission. In defence of the application of the JCE theory, it is often emphasised that it cannot be used to establish collective responsibility, still less the responsibility of the state and its organs for the perpetration of crimes. This claim has no basis in reality. Although only physical persons have been formally charged at the Tribunal, in practice there is a wide conception of the indictments, which in some cases embrace the entire state and military leadership, and all persons both known and unknown. The ICTY, in attributing de facto the crimes of physical perpetrators to persons in high positions within state and military structures, has attributed those crimes indirectly, not only to the state structures to which the accused belonged in the formal sense, but to all persons who, whether formally charged or not, participated with the accused in creating and executing a common purpose. Every conviction made on the basis of the JCE theory, in that sense, is not only a moral censure, directed at the person found guilty by the Tribunal, but at all those who, *pleno titulo*, or by means of the notion “both known and unknown” which can not be determined, can be identified in such a judgment. This is of course in contradiction of the fundamental principle of contemporary criminal law, which states that a sentence is a moral censure directed exclusively at the person declared guilty of the commission of a crime, and as such must be personal, rather than implicating other people in a larger measure than is necessary. In that sense, it is indisputable that condemning high-ranking state and military officials on the basis of the JCE theory implies not only a kind of moral collective responsibility, but also the moral responsibility of the state as a whole. If the ICTY accepts the ruling of the ICJ and the very demanding conditions set for imputing the crimes of physical perpetrators to the accused, for which it is necessary to prove specific intent (*dolus specialis*), then the JCE construction, particularly in its expanded form, will come under serious scrutiny. The judgment of the ICJ, according to which the conclusion on the existence of intent deriving from a common purpose, in which it is explicitly formulated, brings into question the tolerance of a construction, according to which responsibility for crimes committed, in situations in which those crimes were not part of a plan, but were the “natural, foreseeable consequences” of such a plan, can be attributed to the accused. From the part of the ICJ judgment which states that a conclusion on the existence of intent can only

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<sup>382</sup> "The Court finds that the Applicant has not established the existence of that intent on the part of the Respondent, either on the basis of a concerted plan, or on the basis that the events reviewed above reveal a consistent pattern of conduct which could only point to the existence of such intent.", *Ibid.* §376

be drawn from the fact that it is incontrovertibly included in the common purpose, it follows that the application of the standard from the Tadić case should be seriously questioned, according to which it was found sufficient for the crimes to have been the “reasonable, natural consequences” of the creation and execution of a common purpose, which was not necessarily criminal per se. The possible elimination of the objective standard of foreseeability, which would mean the essential reconceptualisation of the JCE theory and the abolition of the Tribunal's favourite, broadest concept of responsibility, would have a positive effect on the unequal treatment so far of the objective elements of the JCE theory on the part of the Chambers. On the assumption that the ICTY Chambers accept the legal standards contained in the ICJ judgment, the prosecution would be forced, since it cannot prove that intent was built into the common purpose, to pay more attention to proving the other two objective elements, i.e. plurality of persons and their contribution to the commission of the crimes with which they have been charged. Since, in the majority of cases, specific intent cannot be proved by the existence of a common purpose, whether criminal per se or implicitly, the prosecution will have to prove such intent by recourse to the elements of the essential contribution of the accused in the execution of the specific crimes with which they have been charged. This will mean a radical turnaround in the practice so far of presenting evidence (inference) from the objective circumstance of the position of the accused in the hierarchy of power. Instead of this practice, which ignores the requirement of contemporary criminal law that a sentence can only be directed, in the sense of censure, at the perpetrator of a crime, exclusively on the basis of his conduct, by which the prohibitive or imperative norms of criminal law have been breached, in direct contravention of the principle of *nulla poena sine culpa*,<sup>383</sup> the prosecution will be limited to inferring the subjective element of intent from the actual conduct of the accused. Furthermore, this could, as suggested by the Trial Chamber in the Brđanin case, lead to the theory being applied in a limited form only to so-called horizontal JCEs, i.e. to a small group of people low down in the hierarchy, who acted directly in the field to carry out the crimes within the scope of the Tribunal. This is true because in dealing with small groups, it should be possible to draw conclusions on the existence of criminal intent based solely on the conduct of the accused. On the other hand, bearing in mind the structural distance from the *loci delicti commissi*, it will be extremely difficult, if not impossible, to draw conclusions regarding the existence of criminal intent based on the conduct of persons highly placed in the hierarchy of power. So it is only to be expected that, under the influence of the ICJ judgment that the Chambers of the Tribunal will possibly limit application of the theory to cases of group crime, committed within a so-called horizontal JCE, as in the Tadić and/or Vasiljević cases, while the responsibility for systemic crime of those highly placed in the civil or military hierarchy will have to be demonstrated by alternative concepts, such as responsibility for crimes committed through an organised apparatus of power (*Willensherrschaft kraft organisatorischer Machtapparate* or *Organisationsherrschaft*) as a form of indirect perpetration (perpetration by

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<sup>383</sup> See also AMBOS 2007, 173

means) we are dealing with in chapter five.<sup>384</sup> Therefore it is beyond doubt that the judgment of the ICJ could affect the further proceedings of the ICTY and the Tribunal's application of the JCE theory. It has been noted in which direction this could occur. However, in order to answer the question as to whether it will actually occur, we need to answer the following questions: what are the general rules on the functioning and competence of these two global UN courts; are the rulings and legal standards accepted by one of them legally binding on the other, and in that sense, what has been their relationship one to another up to now? The answer to the first question can be given without any deep analysis. The ICTY was founded by the Security Council of the United Nations<sup>385</sup> on the basis of the authority held by that body in accordance with Chapter VII of the UN Charter. Although it does not say explicitly anywhere in the Charter that the Security Council can establish tribunals, the establishment of the ICTY was considered a measure for which the Security Council was authorised by Article 41 of the Charter, in the event of a threat to international peace and security. In that sense the ICTY represents an auxiliary organ of the Security Council, through which the Security Council exercises its authority in accordance with the Charter.<sup>386</sup> The International Court is authorised to prosecute persons responsible for serious violations of international humanitarian law in the region of the former SFRY from 1991 onwards. The ICTY is competent to adjudicate grave breaches of the 1949 Geneva Convention, breaches of the law and the customs of war, genocide and crimes against humanity. The individual competence of the ICTY relates only to physical persons charged with violations of international humanitarian law. In comparison to the ICTY, the ICJ is the principle judicial organ of the UN, according to Article 92 of the UN Charter. The ICJ is actually competent to resolve disputes between UN members entrusted to it. Apart from this, and in accordance with Article 96 of the Charter, the General Assembly or the Security Council may seek an advisory opinion in any legal matter from the ICJ. Other UN organs and specialised institutions which may be granted such powers at any time by the General Assembly, may seek the advice of the ICJ on legal matters arising within the scope of their activities and competencies.<sup>387</sup> The question of whether the decisions and legal standards of one court are legally binding on the other, and of whether the decisions of the ICJ are legally binding on the ICTY, must be answered in the negative. According to Article 59 of the Statute of the ICJ, the judgments of the court are only binding upon the parties to the proceedings and in relation to the subject matter of the dispute (*res judicata facit jus inter partes*). The question of whether the judgments of the ICJ were binding on the ICTY was dealt with by the Appeals Chamber in the 2001 *Delalić et al.* case, (the *Čelebići* case).

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<sup>384</sup> For more on this legal figure see HAMDORF 2007, AMBOS 2007; in domestic literature see BOJANIĆ 2003.

<sup>385</sup> Resolution 827 passed at the UN Security Council's 3,217th meeting, 25 May 1993.

<sup>386</sup> Report of the UN Secretary-General in accordance with paragraph 2 of Resolution 808 of the UN Security Council, §28.

<sup>387</sup> Charter of the United Nations, source <http://www.un.org/en/documents/charter/index.shtml>, 1.8.2009.



According to the allegations of the defence at the appeal, the Trial Chamber had been in error in accepting the findings of the second instance Chamber in the Tadić case, in which the correct legal test in the Nicaragua case had been rejected. The defence argued that the judgment of the ICJ in that case was binding on the ICTY as a precedent. The defence emphasised that the international tribunal must respect the decision by which the ICJ had reached its judgment in a certain question, for two reasons: 1) because of the position held by the ICJ according to the UN Charter and 2) because of the importance of precedents.<sup>388</sup> The defence further emphasised that even if the decisions of the ICJ were not binding on the ICTY, it was “undesirable to have two courts (...) having conflicting decisions on the same issue”.<sup>389</sup> The prosecution contested this, alleging that the competencies of the two courts were different, and in addition, the Statute of the ICJ does not say anything about precedents. Thus the prosecution drew the conclusion that it would be truly strange for the decisions of the ICJ, which were not strictly binding on the court itself, to be binding on the ICTY, which was a court with a different jurisdiction.<sup>390</sup> While taking into consideration the arguments of the defence and the prosecution, the Appeals Chamber emphasised that “at least in relation to international law, the ideals of consistency, stability and predictability do not cease to be valid outside of the boundaries of the International Court” and that it “could not therefore proceed as though completely uninterested in the general legal situation in the international community, whose interests it served.”<sup>391</sup> However, in its conclusion, the Appeals Chamber established that ICTY was “an independent international judicial body” and although the ICJ was “the principal judicial organ (UN Charter Article 92) in the UN system, to which the International Court also belongs, these two courts are not in any hierarchical relationship.”<sup>392</sup> Although it is therefore undisputed that the decisions, legal standards and legal interpretations of the ICJ are not legally binding upon the ICTY and vice versa, the question remains as to the degree to which each court (and let it be noted that both act within the framework of the same system and are equally directed towards achieving the goals of the UN Charter), has so far upheld the precedents established in the other. For within the decentralised structure of international justice, and in the interests of “the ideals of consistency, stability and predictability” of international (criminal) law which will remain for quite some time in statu nascendi in terms of establishing its fragile legitimacy, international courts must show mutual respect for each other’s precedents, legal opinions and standards. In that sense, the judgment of the ICJ, however open to criticism in certain areas, can be seen as a significant step forward in affirming the above principles of international justice. Indeed, although it may not be apparent at first sight, the ICJ has in fact based its judgment for the most part on the jurisprudence

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<sup>388</sup> Delalić II, §21

<sup>389</sup> Ibid.

<sup>390</sup> Ibid. §22

<sup>391</sup> Separate opinion of Justice Shahabuddeen, attached to the Decision, Prosecutor v. Laurent Semanza, case no. ICTR-97-20-A, Appeals Chamber, 31 May 2005, § 25

<sup>392</sup> See also 25 May 2001 Appeals Chamber Decision on Interlocutory appeal by the accused Zoran Žigić against the decision of Trial chamber I dated 5 December 2000.

of the ICTY. We shall present two arguments in support of this claim. In considering the question of whether Serbia could be declared responsible for complicity in genocide, the ICJ leaned heavily on the jurisprudence of the ICTY, primarily on the judgment of the Appeals Chamber in the Krstić case and the judgment of the Trial Chamber in the Blagojević case. The viewpoint of the ICJ was that in order of a respondent state to be held responsible for complicity in genocide, the court had to examine whether organs of that state or individuals whose actions were based on instructions, or who were under the effective control of that state, assisted in carrying out genocide in Srebrenica, in a sense not essentially different from these concepts in general law on international responsibility.<sup>393</sup> The question facing the ICJ was whether complicity presupposed that the participant shared the same specific intent as the main perpetrator (purpose-based approach), or whether it was sufficient for him to be aware of the specific intent of the main perpetrator (knowledge-based approach). Although in the theory and practice of international criminal law the conservative purpose-based approach is dominant, the ICJ Chamber kept to the standard set by the Appeals Chamber of the ICTY in the Krstić case, citing that “it has not been proved beyond reasonable doubt that the Belgrade authorities were aware of or knew that the main perpetrators, whom they actually assisted in financial, logistical and other terms, had a specific genocidal intent and that the assistance received would be used to commit genocide.”<sup>394</sup> Without going into discussion here on the well-foundedness of the approach of the Appeals Chamber in the Krstić case<sup>395</sup>, it should be said that the ICJ reduced the standard of guilt in complicity in genocide by relying on recent ICTY jurisprudence. Apart from the fact that the ICJ gave precedence to ICTY jurisprudence, which meant a significant reduction in the subjective element of complicity in genocide in relation to existing customary international law, and the fact that ratio legis of genocide was clearly emphasised by the adoption of the 1948 Convention on the Prevention and Punishment of the Crime of Genocide<sup>396</sup>, the special influence of the ICTY judgment in the Krstić case on the ICJ in declaring judgment in the case brought by Bosnia and Herzegovina can be seen from the following facts. In the judgment of the ICJ the question arose of whether the court could find the state responsible of genocide in the absence of prior convictions of individuals for genocide by a competent court.<sup>397</sup> In that sense the ICJ confirmed that if a state is

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<sup>393</sup> International Court of Justice, Case concerning the application of the Convention on the prevention and punishment of the crime of genocide, (Bosnia and Herzegovina v. Serbia and Montenegro), 26 February 2007, §418-424, source <http://www.icj-cij.org/>, 1.8.2009.

<sup>394</sup> Ibid. §423

<sup>395</sup> In the Krstić case the Appeals Chamber itself established that the most natural interpretation of Article 4 (2), which begged the conclusion that the demand of Article 4(2), stating that a person accused of genocide must possess the “intent to destroy” a protected group, was relevant to all prohibited acts cited in Article 4 (3), including complicity in genocide. See Krstić II, §142

<sup>396</sup> Ibid.

<sup>397</sup> “Question whether the Court may make a finding of genocide by a State in the absence of a prior conviction of an individual for genocide by a competent court”, International Court of Justice, Case concerning the application of the Convention on the prevention and punishment of

held responsible on the grounds of violating the obligation not to commit genocide, it must be proved that genocide has taken place, in the sense defined in the Convention. This applies to association and complicity and to the obligation to prevent genocide. In argument, Serbia presented the thesis that establishing state responsibility must *condicio sine qua non* be preceded by establishing the responsibility of individuals for perpetrating the crime of genocide, in accordance with the rules of criminal law. The court rejected this objection, starting from different proceedings and the powers of the court and other tribunals which try persons accused of committing crimes, stating that it did not present a legal obstacle, for this courts on their own, without any previous decision, to establish whether or not genocide or other acts mentioned in Article 3 had been committed. The ICJ has the right and authority, bearing in mind the provisions of the Statute and Article 9 of the Convention, according to which a state can be pronounced responsible for genocide or other acts mentioned in Article 3 if these are carried out by her organs, persons or groups whose actions can be attributed to the state. According to the correct understanding of the court, any other interpretation could lead to individual perpetrators in a particular state not being tried for genocide because of political ineptitude, the ICJ could not decide on the responsibility of the state for breaches of the Convention according to Article 9. Thus the court concluded that the responsibility of the state, according to the Convention, for genocide and complicity in genocide can arise, without any individual being tried before another national or international court for those criminal offences. In spite of this viewpoint, which of course is incontestable from the legal point of view, the impression remains that the ICJ would have found it very difficult to qualify the crimes committed in Srebrenica as genocide, if there had not already been a decision with final force and effect in the ruling of the ICTY in the Krstić case.<sup>398</sup> This surely indicates that the ICTY and the ICJ are in fact much more interlinked and interdependent in their functioning than appears at first glance.<sup>399</sup> On the other hand, we could state that on the whole, the ICTY has held to the precedents of the ICJ<sup>400</sup> with the exception of the so-called Nicaragua test, about which the Trial Chamber and the Appeals Chamber could not agree in the Tadić case. While the first instance Chamber concluded that in the particular case the so-called Nicaragua test should be applied, according to which it is necessary to prove that the state had effective control of individuals who carried out specific crimes in the territory of another state, in order to attribute such crimes to the state, the Appeals

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the crime of genocide, (*Bosnia and Herzegovina v. Serbia and Montenegro*), 26 February 2007, §180-182, source <http://www.icj-cij.org/>, 1.8.2009.

<sup>398</sup> "The International Criminal Tribunal for the Former Yugoslavia (ICTY), where Mr. Milosevic is on trial, has already ruled that genocide did occur in Bosnia. Although the ICJ is not bound by that precedent, it would be very troubling, and troublesome for the coherence of international justice if the ICJ judges find otherwise." *A Nation on Trial for its Past*, By Peter Ford & Beth Kampschorr, *Christian Science Monitor*, March 6, 2006, source <http://www.globalpolicy.org/intljustice/icj/2006/0306past.htm>, 1.8.2009.

<sup>399</sup> This is borne out by the fact that the ICJ qualified the non-cooperation of Serbia with the ICTY as failure to punish the perpetrators, in relation to the handing over of the indicted General Ratko Mladić to the Tribunal.

<sup>400</sup> See also DRUMBL 2003

Chamber deviated from this finding, with the explanation that this test made unreasonable demands on the prosecution in terms of providing evidence and that it should be replaced by the test of overall control. In the literature there is a high degree of consensus that, in spite of the non-acceptance of the legal opinion of the ICJ in the Nicaragua case, the ICTY on the whole not only takes jurisprudence<sup>401</sup> into account, but also the provisions of the Statute of that court. This primarily refers to Article 38 of the Statute of the ICJ, which defines law applicable before this court and on the basis of which some concepts which are applied before the ICTY (e.g. the concept of the JCE is directly taken from Article 38 of the Statute of the ICJ, because of its alleged firm basis in international customary law) were formulated. It is therefore obvious that the UN courts on the whole have, up to now, mutually recognised each other's precedents,<sup>402</sup> legal opinions and standards.<sup>403</sup> Justice Shahabuddeen was on the same track in one ICTY decision, when he said that „international differences are not a hindrance to the International Court or the International Court of Justice in taking into account the jurisprudence of the other court in relevant questions, and the International Court can refer to the valid conclusions of decisions made by the ICJ, without being bound by them.“<sup>404</sup>

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<sup>401</sup> See International Court of Justice, Reservations to the Convention on the prevention and punishment of the crime of genocide, Advisory Opinion of 28 May 1951, source <http://www.icj-cij.org/>, 1.8.2009.

<sup>402</sup> They have, however, done this more on the basis of feelings and teleological interpretations of the purpose of their own existence and work, than on the basis of clearly defined criteria, formulated with the goal of harmonising the exceptionally decentralised structure of international justice. And it is precisely this decentralized structure that creates inconsistency not only of international justice system but also of international law as a whole. The general atmosphere of legal uncertainty is good for what in the literature is vividly called forum shopping. This is a syntagm designating the subversion of the legalism of international law, in which states can choose between various legal standards, institutes and concepts, depending on which best suits the politics of the moment or their strategic needs. In the context of trying to avoid such negative consequences of the decentralised structure of international justice, Drumbl's proposal sounds interesting. This involves the creation of some kind of guidelines for understanding between the UN courts, which could lessen the fragmentation of the effects of the functioning of these institutions, offering them some sort of criteria for the mutual evaluation of legal standards. Such guidelines, however, would not of themselves lead to a vertical hierarchy, but a forum for discussion *sui generis*. At the same time, they would leave enough room for each institution to apply the criteria in questions, taking into account the peculiarities of individual cases. These guidelines would form part of the wider process of creating an international legal order, and any institution which deviated from them would have to provide an explanation of its actions. See also DRUMBL 2003.

<sup>403</sup> On the relationship between the two courts Drumbl has interesting thoughts: "This triggers broader questions regarding the role of consistency and stability in international criminal law. Can the ICTY view what happened as genocide while the ICJ does not? Is that a desirable result? Should one judicial body trump the other; or can international institutions – assuredly, young institutions in a youthful area of law – remain viable by floating about heavily yet haphazardly, like Zeppelins? Ibid., 1047

<sup>404</sup> See Delalić II, §22

ICJ President Higgins, having distanced herself from the model of so-called vertical hierarchy, emphasized in several instances that “we just believe that because of our good relationship and our standing as the UN’s senior court that on points of general international law they will naturally look to see if we’ve already pronounced on that particular point of law. If we haven’t, they will have a go themselves, and why not?”<sup>405</sup> Without doubt, the judgment of the International Court of Justice maintained the extremely high standards it set for imputing responsibility as established in its judgment in the case of Nicaragua. In the interest of preventing the process of fragmentation and divergence of international criminal law and justice, the ICTY Chambers should have taken this judgment into account.

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<sup>405</sup> Interview: ICJ Chief on Bosnia Genocide Case, source [http://www.iwpr.net/index.php?apc\\_state=henftri333778&s=o&o=tribunal\\_rh\\_int.html](http://www.iwpr.net/index.php?apc_state=henftri333778&s=o&o=tribunal_rh_int.html), 1.8.2009.

### 3.2. Content of the „Common Purpose“ Element

One of the most important questions concerning the component of a common purpose is the means by which the negative consequences of contradictory appeal judgments could be removed in the Tadić case, in which it was emphasised that “a common plan, design or purpose must amount to or involve the commission of a crime provided for in the Statute.”<sup>406</sup> but at the same time a third category of JCE was formulated, in which the crime committed admittedly falls outside the framework of the design, but can still be attributed to the accused as a “reasonable, foreseeable consequence of its realisation”. In the first situation, the common purpose per se is treated as a crime within the competence of the ICTY. Such situations are not disputed. If, for example, the common purpose is to kill members of a particular national group in order to partially or fully exterminate them, then this plan is per se the crime of genocide.<sup>407</sup> As an example of a situation in which the crime itself was part of a common purpose, the literature cites the purpose of “creating a pure Aryan race”.<sup>408</sup> This plan, it is true, did not necessarily represent the commission of crimes, but it could be assumed, with a high degree of probability, that the realisation of such a plan would imply the commission of crimes. In other words, the commission of crimes as a necessary side effect is *condicio sine qua non* for the realisation of such a plan which, *prima facie* need not necessarily include the features of a criminal plan. Concerning the element of common plan, the most problematic are situations in which a crime neither represents nor is included in a common purpose, but is a reasonable, foreseeable consequence of its realisation. It is in precisely such situations that the flexibility of the concept of the JCE is fully expressed, which in the expression “reasonable and foreseeable consequences” creates a third category, potentially criminalising any plan, action, initiative or strategy which may, depending on the circumstances of the case, imply the commission of crimes, or at least serious violations of international humanitarian law. In such situations, everyone who was in any way, directly or indirectly, involved in formulating and carrying out such a plan is held responsible on the basis of the JCE theory, since they could have predicted that such a plan might lead to the commission of crimes. We will attempt to illustrate the kind of problem involved by giving several examples. In the context of the war against terrorism, in 2006 the Israel carried out several attacks on Lebanese territory. The policy of the Israeli government was to ensure that Hezbollah would no longer be able to carry out land and missile attacks and that this radical, militant organisation would be disarmed in accordance with a UN resolution. The *casus belli*, let us not forget, was Hezbollah's abduction of two Israeli soldiers on 12 July 2006. Therefore it was clear that the destruction of Hezbollah, i.e. the neutralisation of its actions in respect of Israeli territory, was the goal of the common purpose of the Israeli government, which acted to bring it about, without a shadow of a doubt, in collusion with other world powers, foremost among which was the government of the USA. Without entering into the

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<sup>406</sup> Tadić II, §227

<sup>407</sup> v. DAMAŠKA 2005

<sup>408</sup> Ibid.

debate on whether attacking the territory of another state is justified in terms of the UN Charter, or has any basis in international law, the question should be asked as to how and by what means “collateral damage”, as it is callously called in military jargon, can be justified. If the elements of an extended JCE are applied, few would be able to contest that the Israeli leadership could have predicted that the civilian population would suffer as a result of a comprehensive military campaign against Hezbollah. In an air attack on the village of Qana in southern Lebanon, more than 60 Lebanese civilians died, including 37 children.<sup>409</sup> Even if that attack per se had been a legal response to Hezbollah actions, which, it is claimed, had used the village as a base from which to launch several attacks on Israel, it is absolutely certain that the collateral damage represented a crime in terms of international law, as not only could it have been predicted by high-ranking Israeli officials, but they had even reckoned on it, in a fashion, and come to terms with its consequences. This was clear from a statement made by the Israeli Prime Minister, Ehud Olmert, in which he said, “Israel warned the inhabitants of Qana to leave their village before the air attack.”<sup>410</sup> Another example in which the JCE theory might hypothetically be applied is the United States attack on Afghanistan. As a response to the Al-Qaida terrorist attack of 11 September 2001, this attack was interpreted by the international community de facto as an attack on a terrorist organisation. America's allies in Afghanistan, among others, included the so-called Northern Alliance, of whom it might have been assumed that they would not adhere to the rules of international humanitarian law, since they had not done so in previous conflicts. Therefore all those who formed this pact and who could have predicted, both objectively and subjectively, that the forces of the Northern Alliance would probably breach international humanitarian law, could have been held responsible on the basis of an extended JCE. However, it was not only the members of the Northern Alliance who breached international humanitarian law in Afghanistan. According to some estimates, during the intervention more than 1.2 million tons of bombs were deployed, totally obliterating this mountain state already devastated by previous events and the Soviet occupation. The main reason for such a comprehensive attack was the attempt to prevent conflict on the ground and large numbers of American casualties. The Bush administration was nursing fresh memories of its intervention in Somalia, in which eighteen casualties among the American troops turned public opinion against military intervention in that country. Therefore it is not surprising that CNN editors issued instructions to their reporters, forbidding them to mention actual numbers of casualties or the extent of material damage, so that the hard-won support of the public for the “war against terrorism” would not swing in an unwanted direction. So lack of moderation in the intensity of the attacks, which resulted not only in massive damage to the civilian infrastructure but also in huge numbers of civilian deaths, could be interpreted as the consequence of political fear of conflict on the ground. The discovery of a mass grave in Dasht-e-Leili, in which the bodies were found of more than a thousand

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<sup>409</sup> Qana Attack Stirs Worldwide Outcry, U.S. Resists Calls for Immediate Israel-Hezbollah Cease-Fire, CNN, Sunday, July 30, 2006

<sup>410</sup> Israel 'regrets' civilian deaths in Qana, blames Hezbollah, DNA World, Sunday, July 30, 2006

members of the Taliban armed forces, to whom the allies were obliged to grant the status of prisoners of war, is just one piece of evidence in favour of the claim that the military intervention in Afghanistan was not carried out in accordance with the criteria and standards of international law, by which the right of a state to individual or collective self-defence is regulated. This, however, confirms our theory that the extensive construction of a common purpose is possible in case of any armed intervention.<sup>411</sup> The next example in which the formulation of a common purpose, which did not per se represent a crime within the competence of the Tribunal, nor was the commission of a crime the necessary means of carrying it out, is the intervention of NATO air forces in the territory of the SR Yugoslavia. Although the goal of the attack was to destroy the military infrastructure of the state, thus disabling its further aggressive policies towards Kosovo and neighbouring states, many civilians died during the attacks and material damage was caused, not only to buildings which formed part of the infrastructure of the armed forces. Although excesses were involved which had not been formulated in a common purpose, and the collaborators had not actually agreed to such excesses, the fact remains that they should have taken into account their possible occurrence, because these excesses were both objectively and subjectively foreseeable. In any case, it is impossible to plan the execution of any military operation without calculating into it potential collateral damage, which is more or less impossible to avoid on the ground. If one accepts the extensive construction of a common purpose in the indictments of the ICTY, it should be hypothetically applicable not only to other situations, in which the common purpose includes an armed attack, but to any plan which is directed towards changing a particular political set-up.<sup>412</sup> It hardly needs mentioning that the threat is great of such an in extenso approach to the concept of the recently established, international criminal jurisdiction based on a fragile treaty and international criminal law as a whole. Therefore the extensive, in fact “infinitely elastic” construction of the element of common purpose, which includes both the objective and subjective foreseeable “risk” of potential crime occurring beyond its bounds should be dismissed. If not, the further application of such a construction will have far-reaching, negative consequences for international criminal law.

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<sup>411</sup> HERSH 2004

<sup>412</sup> DAMASKA 2005.



#### 4. Participation of the Accused in the Common Purpose

The third component of the objective element of a JCE was defined in the judgment on appeal in the Tadić case as “the participation of the accused in the common purpose.” In this ruling “participation” was not defined precisely, nor the exact contribution of the accused in supporting a JCE or in carrying out a particular crime. According to the standard in the judgment on appeal in the Tadić case, it follows that participation in a JCE which includes committing one of the crimes envisaged in the statute “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.”<sup>413</sup> In the Kvočka case the Trial Chamber emphasised that:

“In the Tribunal jurisprudence, the contribution of persons convicted of participation in a joint criminal enterprise has to date been direct and significant: those convicted have committed crimes or have been actively involved in assisting or facilitating crimes.”<sup>414</sup>

It continued by emphasising that “significant contribution” could be considered as:

“An act or omission that makes an enterprise efficient or effective; e.g., a participation that enables the system to run more smoothly or without disruption. Physical or direct perpetration of a serious crime that advances the goal of the criminal enterprise would constitute a significant contribution.”<sup>415</sup>

According to the case law of the ICTY so far, the content and range of the contribution is impossible to determine in advance, but should be assessed with regard to the circumstances of the case, particularly when the participants in a JCE are of a lower or middle status within the hierarchy and were not the physical perpetrators of crimes:

“It may be that a person with significant authority or influence who knowingly fails to complain or protest automatically provides substantial assistance or support to criminal activity by their approving silence, particularly if present at the scene of criminal activity. In most situations, the aider or abettor or co-perpetrator would not be someone readily replaceable, such that any “body” could fill his place. He would typically hold a higher position in the hierarchy or have special training, skills, or talents. The Trial Chamber notes, however, that much of the post World War II case law discussed above did attribute criminal liability to mere drivers or ordinary soldiers made to stand guard while others performed an execution. In addition, many of the post war cases did not entail repeated participation in a system of criminality, as the accused typically participated on

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<sup>413</sup> Tadić II, §227

<sup>414</sup> Kvočka I, §275

<sup>415</sup> Ibid. §309

an isolated occasion only. Domestic laws too hold individuals accountable for directly or indirectly participating in a single joint criminal endeavour.”<sup>416</sup>

The contribution of the accused in supporting the JCE, and their position in the organisational hierarchy, are the criteria by which participation in a JCE is divided into “perpetrating” and “aiding and abetting”:

”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 organisational hierarchy and the degree of his participation... the amount of time spent participating after acquiring knowledge of the criminality of the system, efforts made to prevent criminal activity or to impede the efficient functioning of the system, the seriousness and scope of the crimes committed and the efficiency, zealotry or gratuitous cruelty exhibited in performing the actor’s function.”<sup>417</sup>

In the same case, the Chamber adopted the view that the “level of participation necessary to render someone a participant in a joint criminal enterprise is less than the level of participation necessary to graduate an aider or abettor to a co-perpetrator of that enterprise.”<sup>418</sup> From ICTY case law so far it can be concluded that there are several relevant forms of participation in a JCE:

a) Committing a crime.

b) Participating in an armed attack. The Appeals Chamber in the Tadić case concluded that the accused “actively took part in the common criminal purpose to rid the Prijedor region of the non-Serb population, by committing inhumane acts” and, more specifically, that he was “an armed member of an armed group that, in the context of the conflict in the Prijedor region, attacked Jaškići. The Appellant actively took part in this attack, rounding up and severely beating some of the men from Jaškići.”<sup>419</sup> In the Kupreškić et al. case it was said of four of the accused that they had been directly involved in attacks on one of more homes of Bosnian Muslims, which resulted in loss of life and expulsion. The participation of two of the accused explicitly reached the level of complicity in a criminal undertaking. The fifth person accused was found guilty of aiding and abetting, because he had been present and ready to assist, although he did not actually take part in the attack directly.<sup>420</sup> Participation in a JCE according to this scheme also includes preventing prisoners from escaping. Thus in the Vasiljević case it was shown that the accused had taken part in “this joint criminal enterprise to murder by preventing the seven Muslim men from fleeing by pointing a gun at them while they were detained at the Vilina Vlas Hotel, by escorting them to the bank of the

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<sup>416</sup> Ibid. §309

<sup>417</sup> Ibid. §306, 311

<sup>418</sup> Ibid. §287

<sup>419</sup> Tadić II, §231, 232

<sup>420</sup> Kupreškić I, §782

Drina River and pointing a gun at them to prevent their escape, and by standing behind the Muslim men with his gun together with the other offenders shortly before the shooting occurred.”<sup>421</sup>

c) Participating at the level of co-ordination. In the Krstić case the Trial Chamber pronounced the accused guilty of being an accomplice in a JCE, since his participation was “of an extremely significant nature and at the leadership level”. In the judgment it was emphasised that “General Krstić did not conceive the plan to kill the men, nor did he kill them personally. However, he fulfilled a key co-ordinating role in the implementation of the killing campaign”<sup>422</sup>

d) Carrying out supervision. The Appeals Chamber in the Krnojelac case confirmed the stance of the Trial Chamber that the position of prison warden of KD Dom and the supervisory function it carried could be regarded as a considerable contribution to a JCE.<sup>423</sup>

From the case law of the ICTY so far, it emerges that the threshold for responsibility of participants in a JCE in regard to the objective element (the act itself) is set lower not only in relation to the physical perpetrator, but also in relation to aiders and abettors (!?). While it is required of aiders and abettors that their complicit support forms a “substantial contribution” to an action carrying out a common purpose or plan, it is sufficient for the participant in the JCE to do something which is “in some way directed to the furthering of the common plan or purpose.”<sup>424</sup>

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<sup>421</sup> Vasiljević II, §89

<sup>422</sup> Krstić I, §642, 644

<sup>423</sup> Krnojelac II, §39

<sup>424</sup> Tadić II, §229

## 5. Conclusion

A “common purpose”, as the second objective component of the JCE theory, has definitely been treated in the case law of the Tribunal so far as the central segment of this theory of derived criminal responsibility. Once the existence of a common purpose having been shown, little attention has then been paid to establishing the presence of the other two components of the objective element of a JCE (plurality of persons and the systematic contribution of the accused to creating or supporting a JCE). Underestimating the first component and the lack of any criteria for establishing it arise from the fact that the JCE theory of responsibility attributed to groups ranges from a few armed persons, active on the ground<sup>425</sup>, through the members of local authorities who acted to carry out strategic plans<sup>426</sup>, to high-ranking military commanders and state officials who participated in the implementation of state policies.<sup>427</sup> Thus, depending on the circumstances of the case, the first component may include a group consisting of only a few persons, to one comprising “persons both known and unknown” and whole structures at the local and central state levels. The content of the first component on the whole depends on specific proofs, which the prosecution, with regard to the incriminating event, had available, and following the pattern – the less evidence, the greater the circle of participants in the JCE (because as the circle grows, so does the potential number of crimes regarded as “reasonable, foreseeable consequences” which can be attributed to the accused). The reason for ignoring the third component of the objective element of a JCE lies in the fact that even today, it is unclear how an accused person should have contributed to a JCE in such a way as to make him guilty of the crime with which he is charged. In that sense, the Tribunal's case law has been inconsistent. In some proceedings it has emphasised that such a contribution must be systematic, while in others it has been considered subject to the “systematic” or “essential” contribution of the aiders and abettors. Eventually this has led to an illogical situation in which the prosecution has found it easier to prove perpetration using the JCE theory, rather than aiding and abetting as a form of complicity, which is traditionally accessory to perpetration. Apart from this, the lack of any reliable criteria for distinguishing an “substantial” contribution from a “non-substantial” one have led to the formation of wrong conclusions regarding the formal position of the accused within the hierarchy of command, by which taking a decision has in itself been considered an “substantial” contribution. This kind of faulty legal reasoning, as a result of the unrestrained powers of discretion of the prosecution in compiling indictments, has led to the broad application not only of systematic JCEs, whose independence within the theory has been brought into question on many occasions,<sup>428</sup> but also the most controversial, extended JCEs.

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<sup>425</sup> E.g. the Tadić i Vasiljević cases

<sup>426</sup> E.g. the Stakić case

<sup>427</sup> E.g. the Milutinović et al. case

<sup>428</sup> Krnojelac I, §78; Separate opinion of Judge David Hunt on the objection of Ojdanić on the grounds of lack of jurisdiction - JCE, 21.05.2003, §30

# CHAPTER FOUR

## SUBJECTIVE ELEMENTS OF THE JOINT CRIMINAL ENTERPRISE THEORY

### 1. Nulla poena sine culpa and International Criminal Law

The principle of guilt is one of the basic principles in contemporary criminal law. It is expressed in the maxim *nulla poena sine culpa*, or ‘no punishment without guilt’. Guilt (*mens rea*) is a general principle of law in the sense of Article 38 of the Statute of the International Court of Justice.<sup>429</sup> In some legal systems the principle of guilt is a constitutional category, while in many countries it is expressly formulated in the text of the criminal code. Even in those countries in which the principle of guilt is not made explicit in constitutional or legal texts, guilt is a constitutive element of criminal offence and the basis on which punishment is meted out. Objective responsibility, that is punishment for causing certain consequences, has been abandoned in contemporary law.<sup>430</sup> Responsibility for causing consequences has been limited to minor punishable offences (e.g. strict liability offences in common law). Modern criminal law also distances itself from so-called responsibility for the actions of others. The remnants of this, however, can still be seen in common law in the form of vicarious responsibility. The most serious offences in national legal systems are usually called “crimes”, (for example, in Croatian criminal law - “war crimes” or “crimes against humanity”). The severity of genocide, which in the case law of the ICTY is referred to as the “crime above all other crimes”, is based on its subjective element of criminal offence, that is the specific intent accompanying it to destroy, in whole or in part, members of a particular religious, racial, national or ethnic group. The case law of the ICTY and the International Criminal Tribunal for Rwanda has established that it is possible to establish criminal responsibility for genocide, even when only one person has been killed, if the perpetrator acted with specific intent (*dolus specialis*). The difference between “ordinary” murder and murder as the result of genocide lies in the specific intent, which implies harsher punishment. The Preamble to Resolution 827 of the UN Security Council shows how important element guilt is in achieving the aims for which the ICTY was founded. The Preamble emphasises in several places the individual responsibility of perpetrators of crimes which threaten international peace and security.<sup>431</sup> In the Report of the UN Secretary-General submitted according to paragraph 2 of Security Council Resolution

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<sup>429</sup> See SCHABAS 2002-2003

<sup>430</sup> Because of direct contradictions with the principle of guilt in contemporary law, contemporary criminal law has rejected the medieval theory *versari in re illicita*, according to which a person moving in a prohibited sphere could be imputed everything which is a result of the criminal offence (Lat. *versanti in re illicita imputantur omnia quae sequuntur ex delicto*), HORVATIĆ et al. 2002.

<sup>431</sup> UN Security Council Resolution 827 (1993) on the International Criminal Tribunal for the Former Yugoslavia, 25 May 1993, S/Res/827 (1993)

808,<sup>432</sup> it is stated that the principle of individual criminal responsibility, whether in the commission or ordering the commission of grave breaches of the 1949 Geneva Conventions, is an important element. The Report recalls that the Security Council „has in several Resolutions established that persons who have committed grave violations of international law in the former Yugoslavia are individually responsible for such violations.“<sup>433</sup> The principle of guilt is important not only in establishing whether the accused committed the crime with which he has been charged, but also in determining the punishment.<sup>434</sup> This has been confirmed by the practice of international criminal courts. Apart from deterrence, the practice of the ICTY has also singled out retribution<sup>435</sup> as one of the important purposes of punishment. Thus in the Todorović case, the Trial Chamber approved retribution as a principle demonstrating equity and fulfilling the demand for the punishment to fit the crime.<sup>436</sup> Also in the Kupreškić case, although no further explanation was given, retribution is mentioned as the primary purpose of punishment, regardless of its “primitive or negative” associations.<sup>437</sup> The importance of retribution based on the guilt of the perpetrator was also emphasised in the judgment of the Appeals Chamber in the Krnojelac case, while other purposes, such as “the incapacitation of the dangerous and rehabilitation” were seen as less important.<sup>438</sup> Guilt as a subjective element of a criminal offence, even though not expressly prescribed in the Statute of the ICTY nor in its Rules of Procedure and Evidence, is implicit in the description of the criminal offences which fall within the scope of the jurisdiction of the Tribunal. The accused cannot be punished for any of those criminal offences if in proceedings he cannot be proved guilty of committing the crimes with which he has been charged. Guilt as a subjective element (*mens rea*) is graded according to the category of JCE in question. For the basic form of JCE, intent to commit a particular criminal offence is required. This intent must have been shared by all the co-perpetrators, i.e. participants in the JCE. The systematic form of JCE requires personal knowledge of a system of abuse and the intent to contribute to that system. In the extended form of JCE, the perpetrator must act with the intent of participating in the common purpose of the group, and contribute actively to the JCE or criminal offence committed by the group. In the extended form of JCE, the accused bears responsibility for criminal acts which resulted from the common purpose, if, according to the circumstances of the case, it could have been foreseen that one of the members of the group would commit such

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<sup>432</sup> UN Security Council Resolution 827 (1993) on the International Criminal Tribunal for the Former Yugoslavia, 25 May 1993, S/Res/827 (1993)

<sup>433</sup> *Ibid.*

<sup>434</sup> DERENČINOVIĆ 2005; KELLER 2001-2002; DANNER 2001

<sup>435</sup> Retribution (Lat. *rê-tribuo*, to give back, return; *retro dare*: to give someone what they deserve) is a philosophical and ethical notion or concept consisting of retributive or repressive sanctions (Lat. *repressio*: repression), the primary aim of which is to return and repress by force an evil committed or inflicted by crime committed. (HORVATIĆ et al. 2002). See NOVOSELEC 2004; CVITANOVIĆ 1999; HORVATIĆ 1980; HUSAK 2000; KELLOGG 1977-1978; BRADLEY 1999; ALLEN 1975-1976

<sup>436</sup> Todorović I, §30

<sup>437</sup> Kupreškić et al. I, §848

<sup>438</sup> Krnojelac II, §508

an act, and if the accused knowingly accepted that risk.<sup>439</sup> There follows an analysis of the content of guilt for each of the aforementioned forms of JCE.

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<sup>439</sup> Tadić II, §228

## 2. Guilt in a Basic Joint Criminal Enterprise

In a basic JCE the individual responsibility of the participant is the intent which the participant shared with the other co-perpetrators in the JCE to commit the offence. An example would be a plan to murder, formulated by the participants in the JCE, in which each of them, although fulfilling different roles within the plan, shared intent to kill. Apart from shared intent among the participants in the JCE, the prosecution must also show shared intent between the accused and the relevant physical perpetrators.<sup>440</sup> Acting on the basis of shared intent has one rational consequence: if the prosecutor fails to show that the accused and the physical perpetrator acted with the same intent at the time the crime was committed, the accused must be acquitted. The existence of shared intent in a basic JCE was dealt with exhaustively in the judgment on appeal in the Vasiljević case. In the first instance judgment in that case, the Trial Chamber concluded that the accused's intent to kill seven people could be deduced from his actions:

“The Trial Chamber is satisfied that the Accused personally participated in this joint criminal enterprise by preventing the seven Muslim men from fleeing by pointing a gun at them while they were detained at the Vilina Vlas Hotel, by escorting them to the bank of the Drina River and pointing a gun at them to prevent their escape, and by standing behind the Muslim men with his gun together with the other three offenders shortly before the shooting started .”<sup>441</sup>

In its appeal, the defence stated that the Trial Chamber had been in error in concluding that the accused shared the intent to kill seven Muslims. The Appeals Chamber established that, since the accused had not known about the planned shooting of the victims, the fact that he prevented them from escaping the hotel was not decisive in proving his shared intent to kill them. Further, no reasonable arbiter of the facts would argue, on the basis of his actions in the hotel, that the accused intended to murder the seven Muslims.<sup>442</sup> The judgment of the Appeals Chamber stated that because of the error made by the Trial Chamber in establishing the guilt of the accused, justice had not been carried out, for without proof of the Appellant's intent to commit murder, he could not be held responsible as a participant in a joint criminal enterprise. The Appeals Chamber concluded that the only reasonable conclusion to be drawn on the basis of the evidence collected (the accused did not himself shoot the victims, he had no control over the shooting and his degree of participation in the act was far less than that of the other participants), was that the Appellant knew that his acts would assist the commission of the murders. The Appeals Chamber finds that in preventing the men from escaping on the way to the river bank and during the shooting, the appellant's actions had a “substantial effect upon the perpetration of the crime.”<sup>443</sup> The basic category of JCE was applied in the judgment of the Appeals Chamber in the Stakić case. In this case it was established that the accused had taken part in a JCE, made a substantial contribution to the

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<sup>440</sup> Krstić I, §613; Krnojelac II, §84; Vasiljević I, §68; Vasiljević II §97

<sup>441</sup> Vasiljević I, §209

<sup>442</sup> Vasiljević II, §126

<sup>443</sup> Vasiljević II, §134



implementation of the common purpose and acted deliberately to carry it out. The judgment stated that the evidence confirmed that the civil authorities, police and military had acted together at the same level in the municipality of Prijedor, with the aim of achieving the aims of the common purpose at any price, from which it follows that all the participants in the JCE shared the same intent. From this construction it can be seen that in the Stakić case, the Chamber did not make conclusions concerning the responsibility of the accused for crimes committed within a basic JCE on the basis of the proved shared intent of the accused and the relevant physical perpetrators to commit the specific criminal act. Moreover, the aim of the physical perpetrator was never established in that case, nor was the circumstance of whether the physical perpetrator and the accused shared the same intent. Thus the standards of proof required to show shared intent in a basic JCE were significantly lowered. It should however be mentioned, in regard to the lowering of standards of proof required to show shared intent in a basic JCE, that the Stakić case was unfortunately not an exception, but rather conformed to the rule. Thus neither General Krstić nor the local official Blagoje Simić were sentenced by the ICTY for sharing intent with the physical perpetrators of the crimes of which they had been charged, but on the basis de iure and/or de facto of their positions in the system of power, which in some way enabled the physical perpetrators to act in conditions of absolute or relative impunity.<sup>444</sup> The reasons for this approach can be seen in the judgment of the Appeals Chamber in the Stakić case:

“In such a context, to require proof of the discriminatory intent of both the Accused and the acting individuals in relation to all the single acts committed would lead to an unjustifiable protection of superiors and would run counter to the meaning, spirit and purpose of the Statute of this International Tribunal.”<sup>445</sup>

However pragmatically one might understand the reasoning of the court as an expression of the need to deliver effective punishment for a so-called mass crime, in which it was difficult to determine who the physical perpetrator was, his state of mind at the time the crime was committed and his shared intent with participants in the JCE, it is nonetheless legally unacceptable, because it leads to revision of the subjective elements of criminal offences within the scope of the jurisdiction of the ICTY, which of course contradicts the meaning, spirit and purpose of the Statute of the ICTY. This can be clearly deduced, among other things, from the conclusion of the Trial Chamber in the Stakić case that the forms of responsibility in Article 7(1), “in particular, the mens rea elements required for an offence listed in the Statute cannot be altered.”<sup>446</sup> Clearly, therefore, in terms of proving guilt before the ICTY, a gap has been created between the theoretical concept of a basic JCE defined in the judgment of the Appeals Chamber in the Tadić case and later case law, in which these theoretical tenets have been significantly reduced and objectified.

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<sup>444</sup> HAAN 2005

<sup>445</sup> Stakić I, §742

<sup>446</sup> Ibid. §437

### 3. Guilt in a Systematic Joint Criminal Enterprise

In a systematic JCE the perpetrator knows he is included in an organised system of abuse and is aware of the possibility that within that system, certain criminal acts (e.g. murder, rape, etc.) will be carried out. In the so-called “concentration camp” cases, guilt consisted in knowing the nature of the system of abuse and the intent to carry out a common plan of abuse. According to the case law of the ICTY so far, such intent can be shown directly or by inference from the type of authority wielded by the accused within the camp or the organisational hierarchy. Perhaps the best example of criminal proceedings in which the accused were charged with participating in a systematic JCE is the Kvočka et al. case. The accused, who were the camp commandant, his deputy and the captain of the guards in the camp, were charged thus: “Between 24 May 1992 and 30 August 1992, Bosnian Serb authorities in the Prijedor municipality unlawfully segregated, detained and confined more than 6,000 Bosnian Muslims, Bosnian Croats and other non-Serbs from the Prijedor area in the Omarska, Keraterm, and Trnopolje camps.”<sup>447</sup> The Appeals Chamber in the case stated the following:

“The Appeals Chamber affirms that the de facto or de jure position of employment within the camp is only one of the contextual factors to be considered by the Trial Chamber in determining whether an accused participated in the common purpose. A position of authority, however, may be relevant evidence for establishing the accused’s awareness of the system, his participation in enforcing or perpetuating the common criminal purpose of the system, and, eventually, for evaluating his level of participation for sentencing purposes.”<sup>448</sup>

By this ruling the first instance judgment was confirmed, in which the following was stated, among other things:

“The concentration camp cases seemingly establish a rebuttable presumption that holding an executive, administrative, or protective role in a camp constitutes general participation in the crimes committed therein. Intent to further the efforts of the joint criminal enterprise so as to rise to the level of co-perpetration may also be inferred from knowledge of the crimes being perpetrated in the camp and continued participation which enables the camp’s functioning.”<sup>449</sup>

The greatest objection which can be directed at the theoretical construction of the subjective element of a JCE and its application in practice is that, in comparison to a basic JCE, in which it is only possible, after careful, exhaustive analysis of all the circumstances of a particular case, to deduce the accused's intent, here it can be deduced automatically, by virtue of his position in the organised structure of the hierarchy of power and the fact that he participated in supporting the systematic JCE:

“It is important to note that, in these cases, the requisite intent could also be inferred from the position of authority held by the camp personnel. Indeed, it was scarcely necessary to prove

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<sup>447</sup> Prosecutor v. Miroslava Kvočka et al., 21.08.2000, §6

<sup>448</sup> Kvočka II, §101

<sup>449</sup> Kvočka I §278

intent where the individual's high rank or authority would have, in and of itself, indicated an awareness of the common purpose and intent to participate therein."<sup>450</sup>

In the *Delalić et al.* case, which was the first case in which the ICTY had considered the responsibility of a camp commandant for illegal incarceration as a war crime, the Appeals Chamber stated that it was necessary to prove:

“more than mere knowing “participation” in a general system or operation pursuant to which civilians are confined. In the Appeals Chamber's view, the fact alone of a role in some capacity, however junior, in maintaining a prison in which civilians are unlawfully detained is an inadequate basis on which to find primary criminal responsibility of the nature which is denoted by a finding that someone has committed a crime. Such responsibility is more properly allocated to those who are responsible for the detention in a more direct or complete sense, such as those who actually place an accused in detention without reasonable grounds to believe that he constitutes a security risk; or who, having some powers over the place of detention, accepts a civilian into detention without knowing that such grounds exist; or who, having power or authority to release detainees, fails to do so despite knowledge that no reasonable grounds for their detention exist, or that any such reasons have ceased to exist.”<sup>451</sup>

Contrary to this, and relying on the judgment of the Appeals Chamber in the *Tadić* case, the Trial Chamber in the *Kvočka* case established that the basis for responsibility in systematic JCEs was the accused's position within the organisation of the camp and his knowledge that within the context of systematic abuse, crimes might be committed. The basis for this reasoning on the part of the Appeals Chamber came from a judgment delivered by the United States Military Tribunal in the *Einsatzgruppen* case, in which the responsibility of those accused who had held low positions within the camp was debated. The prosecution claimed that only a low threshold of participation was sufficient. In relation to the four accused who had held low positions, the prosecution claimed:

“Even though these men were not in command, they cannot escape the fact that they were members of *Einsatz* units whose express mission, well known to all the members, was to carry out a large scale programme of murder. Any member who assisted in enabling these units to function, knowing what was afoot, is guilty of the crimes committed by the unit. The cook in the galley of a pirate ship does not escape the yardarm merely because he himself does not brandish a cutlass.”<sup>452</sup>

The military tribunal did not accept the claim of the prosecution that any form of participation was sufficient, however low is the position of the accused in the hierarchy of the enterprise. Thus two of the four who held the lowest positions in the unit, who did not themselves commit crimes, were acquitted of the crimes carried out by the *Einsatz* unit. From this, the Trial Chamber in the *Kvočka* case concluded that:

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<sup>450</sup> *Tadić* II, §203

<sup>451</sup> *Delalić i dr. II*, §342

<sup>452</sup> *The United States of America v. Otto Ohlenforf et al.*, *Trials of War Criminals Before the Nuremberg Military Tribunals under Control Council Law No. 10*, vol. IV, p. 373, cit. *Kvočka* I, §279

“In the jurisprudence of the concentration camp cases a theory in which criminal liability will attach to staff members of the camps who have knowledge of the crimes being committed there, unless their role is not “administrative” or “supervisory” or “interwoven with illegality” or, unless despite having a significant status, their actual contribution to the enterprise was insignificant.”<sup>453</sup>

In other words, this means that the knowledge of crimes (the intellectual component) was sufficient grounds for punishing accused persons who held high positions within the organised camp system, unless their contribution to the enterprise (not specifically criminal acts) was insignificant. Apart from the fact that this statement is self-contradictory (it is futile to claim that a person holding the position of camp commander, for example, has an insignificant contribution to make to the functioning of the system in his command), it seriously threatens the foundations of individual criminal responsibility according to Article 7(1) of the Statute and appears to open the back door of opportunity to guilt by association, which is not provided for in the Statute. Trial Chamber in the Kvočka case, dealing with the definition of systematic JCE, adopted the legal opinion from the Dachau concentration camp case, according to which the role of the concentration camp staff indicated the presupposition that the accused had committed a war crime and that presumption could, among other things, be challenged by proving that the accused had carried out his duties for only a short time, or that his position was so insignificant that he could not be said to have taken part in a common purpose. However, this is in complete contradiction to the interpretation which sees a JCE as a crime “committed” according to Article 7(1) of the Statute, and “joint criminal enterprise can not be viewed as membership in an organisation because this would constitute a new crime not foreseen under the Statute and therefore amount to a flagrant infringement of the principle *nullum crimen sine lege*.”<sup>454</sup> Let us return to the problematic practice of drawing conclusions on the existence of the accused's intent on the basis of objective circumstances in a systematic JCE. Apart from in the concentration camp cases, this inference is often used in the practice of the ICTY, even for criminal offences for which specific intent is a constitutive characteristic of the offence (e.g. discriminatory intent in persecution as a crime against humanity). In the Kordić et al. case, the Trial Chamber deduced on more than one occasion the discriminatory intent of the accused in the crime of persecution, by means of his intentional or conscious participation in a campaign of systematic abuse against a specific ethnic, religious or political group. In the first instance judgment in the Jelisić case, the Chamber concluded that the discriminatory intent of the accused could be deduced from the fact that he “consciously participated in a range of extensive, systematic violence carried out against one particular group.” Objectifying otherwise subjective criteria in an attempt to prove intent is a questionable from the aspect of the presumption of innocence principle, which is explicitly stated in Article 21 (3) of the Statute of the ICTY, and according to which the accused is considered innocent until proven guilty in accordance with the provisions of the Statute. The principle of the presumption of innocence was also seriously challenged in the Kvočka case, in which it was emphasised that only in the

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<sup>453</sup> Kvočka I, §282

<sup>454</sup> Stakić I, §433

case of one of the accused raising the question of whether an act had been committed on discriminatory grounds, would the Chamber consider whether the prosecution had proved discriminatory grounds:

“The Trial Chamber notes that there may be particular incidents alleged against an accused where a persecutory nature of the acts remains to be determined. For example, while the Trial Chamber is fully confident that beatings were committed in Omarska camp with intent to discriminate against non-Serbs, there may be beatings of certain victims which were not committed on discriminatory grounds, but for purely personal reasons. In instances in which an accused has raised a question as to whether an act was committed on discriminatory grounds or without the knowing or wilful participation of the accused, the Trial Chamber will consider whether the Prosecution has established that the grounds were discriminatory.”<sup>455</sup>

From this it follows that once the facts which represent the objective element of the criminal offence have been established, the subjective element can be presumed until successfully challenged (presumption *iuris*). Therefore it is sufficient for the prosecution to prove that the accused's conduct contributed objectively to the support and continuation of the system of abuse. It is not necessary to prove that the accused intended to continue the JCE, even in cases of crimes in which specific intent is required, such as genocide and/or the crime against humanity of persecution. Instead, the defence must show why such presumptions are incorrect.<sup>456</sup> This approach is clearly in contravention of Article 21(3) of the ICTY Statute and goes against general provisions regarding the presumption of innocence.<sup>457</sup> In considering the subjective element of systematic JCE the opinion of the Chamber in the Krnojelac case should be taken into account<sup>458</sup>, according to which there was no legal basis in international criminal law for creating a separate category of systematic JCE and lowering the standards of proof:

“The Trial Chamber is satisfied that the only basis for the distinction between these two categories made by the Tadić Appeals Chamber is the subject matter with which those cases dealt, namely concentration camps during World War II. Many of the cases considered by the Tadić Appeals Chamber to establish this second category appear to proceed upon the basis that certain organisations in charge of the concentration camps, such as the SS, were themselves criminal organisations, so that the participation of an accused person in the joint criminal enterprise charged would be inferred from his membership of such criminal organisation. As such, those cases may not provide a firm basis for concentration or prison camp cases as a separate category. The Trial Chamber is in any event satisfied that both the first and the second categories discussed by the Tadić Appeals Chamber require proof that

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<sup>455</sup> Kvočka I, §203

<sup>456</sup> HAAN 2005

<sup>457</sup> International Covenant on Civil and Political Rights, Adopted and opened for signature, ratification and accession by General Assembly resolution 2200A (XXI) of 16 December 1966, source <http://www.hrweb.org/legal/cpr.html>, 1.8.2009., Convention for the Protection of Human Rights and Fundamental Freedoms, CETS No. 005, Rome, 4. XI. 1950.

<sup>458</sup> See Vasiljević I, §64

the accused shared the intent of the crime committed by the joint criminal enterprise. It is appropriate to treat both as basic forms of the joint criminal enterprise.”<sup>459</sup>

Judge David Hunt, in his separate opinion on the Decision on motion challenging jurisdiction in the Ojdanić et al. case, questioned the categorisation of systematic JCE:

“Another difficulty which remains is the existence, as a separate category of joint criminal enterprise, of the second category formulated in the Tadić Conviction Appeal Judgment, in which all of the participants are members of military or administrative groups acting pursuant to a concerted plan. Many of the cases considered in that Judgment concerning this second category appear to proceed upon the basis that certain organisations in charge of the concentration camps, such as Die Schutzstaffeln der Nationalsozialistischen Deutschen Arbeiterpartei (the “SS”), were themselves criminal organisations declared to be so by the Nuremberg Tribunal, so that the participation of an accused person in the joint criminal enterprise charged would be inferred merely from his membership of that criminal organisation. This has no doubt contributed to the confusion of thought on the part of Ojdanić, who has adopted clearly erroneous criticisms that the Tadić Conviction Appeal Judgment has, by recognising a joint criminal enterprise, adopted a principle of collective responsibility. I am not satisfied that the Appeal Chamber in the Tadić Conviction Appeal Judgment demonstrated a sufficiently firm basis for the recognition of these cases as a separate category of joint criminal enterprise.”<sup>460</sup>

This opinion is correct. There is really no substantial difference between killing people within the scope of an organised system of abuse (such as a concentration camp) and killing them in other circumstances, for example killing civilians during an attack on a village. With that in mind, differentiating the first (basic) and second (systematic) categories of JCE is completely artificial and is obviously done in order to make the prosecution's position easier, for it is much easier to prove that a defendant held a position within a system (e.g. a concentration camp) and knew what crimes were being committed there, than it is to prove his shared intent with the actual physical perpetrators of specific crimes.

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<sup>459</sup> Krnojelac I, §78

<sup>460</sup> Separate opinion of Justice David Hunt on the objection of Ojdanić on jurisdiction – joint criminal enterprise, 21.05.2003, §30

#### 4. Guilt in an Extended Joint Criminal Enterprise

In the case law of the ICTY the opinion has been accepted that forms of responsibility cannot “change or replace elements of crimes defined in the Statute. In particular, the mens rea elements required for an offence listed in the Statute cannot be altered.”<sup>461</sup> Nevertheless, by the introduction of extended JCE as a form of responsibility in which it is sufficient to confirm that the accused could have foreseen the possible or probable consequences, the elements of guilt for crimes within the scope of the Tribunal have been altered. In the Tadić case, there are particular elements of the third category of JCE which can be considered the most problematic from the aspect of the principle of guilt.<sup>462</sup> The subjective element in an extended JCE in the Tadić case was described by the Appeals Chamber in three different ways. According to the first claim:

“Criminal responsibility may be imputed to all participants within the common enterprise where the risk of death occurring was both a predictable consequence of the execution of the common purpose and the accused was either reckless or indifferent to that risk .”<sup>463</sup>

In the same decision, the Appeals Chamber claimed that for guilt in an extended JCE to be proved:

“What is required is a state of mind in which a person, although he did not intend to bring about a certain result, was aware that the actions of the group were most likely to lead to that result but nevertheless willingly took that risk. In other words, the so-called *dolus eventualis* is required (also called “advertent recklessness” in some national legal systems).”<sup>464</sup>

Even greater confusion in determining guilt in cases of extended JCE is caused by a third approach, according to which:

“Responsibility for a crime other than the one agreed upon in the common plan arises only if, under the circumstances of the case, (i) it was foreseeable that such a crime might be perpetrated by one or other members of the group and (ii) the accused willingly took that risk.”<sup>465</sup>

The lack of clarity which is obvious in the judgment of the Appeals Chamber in the Tadić case concerning the element of guilt in the third category of JCE has influenced further proceedings before the Tribunal, in which the Chambers have faced several dilemmas. The first is to do with whether a crime committed outside the scope of the JCE must be “probable” or merely “possible”. The second dilemma is whether *dolus eventualis* and recklessness are synonyms, or different forms, that is degrees, of guilt. Finally, there is the dilemma of upon what legal grounds is the introduction of this form of guilt in the case law of the Tribunal based. Let us first deal with what the

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<sup>461</sup> Stakić I, §437

<sup>462</sup> DANNER-MARTINEZ 2005

<sup>463</sup> Tadić II, §204

<sup>464</sup> Tadić II, §220

<sup>465</sup> Tadić II, §228

Chamber in the Tadić case actually understood by the concept of the “foreseeability” of consequences. It can be seen immediately that in the three above formulations there are different categories of foreseeability. The first and third formulations refer to the foreseeability of consequences being “possible”, while in the second, the consequences must be “probable”. We must agree with Judge Hunt in his Separate Opinion on the Decision on the objection on jurisdiction in the Ojdanić case, in which he concluded that, as far as a subjective state of awareness was concerned, “there is a clear distinction between a perception that an event is possible and a perception that the event is likely (a synonym for probable). The latter places a greater burden on the prosecution than the former.”<sup>466</sup> Hunt correctly noted that:

“The word “risk” is an equivocal one, taking its meaning from its context. In the first of these three formulations state (“the risk of death occurring”), it would seem that it is used in the sense of a possibility. In the second formulation, “most likely”, means at least probable (if not more), but its stated equivalence to the civil law notion of *dolus eventualis* would seem to reduce it one more to a possibility. The word “might” in the third formulation indicates again a possibility.”<sup>467</sup>

The second dilemma arising from this decision is in relation to the question of whether *dolus eventualis* and recklessness<sup>468</sup> are synonyms or different forms or degrees of guilt. The Trial Chamber in the Stakić case offered a technical definition of the concept of *dolus eventualis*:

“If the actor engages in life-endangering behaviour, his killing becomes intentional if he “reconciles himself” or “makes peace” with the likelihood of death. Thus, if the killing is committed with “manifest indifference to the value of human life”, even conduct of minimal risk can qualify as intentional homicide. Large scale killings that would be classified as reckless murder in the United States would meet the continental criteria of *dolus eventualis*. The Trial Chamber emphasises that the concept of *dolus eventualis* does not include a standard of negligence or gross negligence.”<sup>469</sup>

On the other hand, the subjective element of recklessness is the prediction (prognosis) of danger and/or risk, while the objective element (upon which responsibility is based) is the conduct of the accused, which deviates significantly from the conduct which one would expect of a reasonable person in similar circumstances. Recklessness is not a specific form of guilt in the system of civil law. In English law, on the other hand, the recklessness was defined in a case dated 1957 when largely subjective criteria for establishing recklessness were determined.<sup>470</sup> According to the

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<sup>466</sup> Separate opinion of Justice David Hunt on the objection of Ojdanić on jurisdiction – joint criminal enterprise, 21.05.2003, §10

<sup>467</sup> Ibid.

<sup>468</sup> Recklessness is sometimes translated differently into Croatian („bezobzirnost“), but since its meaning in Anglo-Saxon law is closer to negligence than indirect intent which includes an element of carelessness. Perhaps “thoughtlessness“ would be a better word, as it clearly expresses the element of will in the concept and its closeness to negligence, as this form of guilt is defined in European continental law.

<sup>469</sup> Stakić I, §587, 747

<sup>470</sup> R v Cunningham (1957)



statutory definition, recklessness is malicious prediction of the possibility of consequences arising and the acceptance of the risk that such consequences will arise. The criteria of recklessness in English law were objectified and the test of obviousness introduced in a case dated 1981. According to the opinion of the court in that case, an accused person acts recklessly when:

“- he does an act which in fact creates an obvious risk that property will be destroyed or damaged; and  
- when he does the act he either has not given any thought to the possibility of there being any such risk or has recognised that there was some risk involved and has nonetheless gone on to do it.”<sup>471</sup>

The test of obviousness introduced into English law in 1981 objectified the criteria of recklessness as a form of guilt. If the consequences were obvious to a reasonable (average) person, then it will be assumed that the accused could have foreseen them. The objectification of the criteria for proving recklessness was criticised in later proceedings, so that in the *R. v. Gemmel and Richards* case of 2002, a subjective test for establishing this form of guilt was reintroduced into English law. According to this test, the accused acted recklessly in being aware of the risks which existed or which would exist, and of the consequences which would arise if he, being aware of the risk and in circumstances known to him, nevertheless unreasonably took that risk.<sup>472</sup> The ICTY Chambers in their case law so far have used the terms *dolus eventualis* and recklessness as synonyms. Cassese, in his book *International Criminal Law*, speaks of these terms as synonyms.<sup>473</sup> However, this view is incorrect. While one aspect of recklessness focuses on the risk which the perpetrator is prepared to take, *dolus eventualis* is linked with his attitude concerning the possible consequences, regardless of the risk of his actions. He is indifferent to such consequences. The punishable aspect is approving and identifying with harmful consequences. If the goal of an armed gang is to eliminate certain opponents in their territory and the members of the groups foresee that someone may die as a consequence of their plan, they are not necessarily acting according to the form of guilt known as *dolus eventualis*. The killing they commit is only *dolus eventualis* if they understand that certain people are going to die, approve of and desire that outcome in their hearts, and decide to proceed with the plan. On the other hand, where recklessness is concerned, the most important factors are the gravity of the risk and the military gains of an operation.<sup>474</sup> Although it is undisputed that the form of guilt known as recklessness in common law, and which is, as we have seen, different from the concept of *dolus eventualis*, is not unknown in comparative law, it is questionable on what legal grounds its use can be justified in proceedings before the ICTY. Actually, this form of guilt is not provided for in the Statute, nor can it be considered a characteristic of the basic elements of any of the crimes within the scope of the jurisdiction of the Tribunal. A great number of contemporary authors agree in

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<sup>471</sup> *R v Caldwell* (1982)

<sup>472</sup> *R v. Gemmel and Richards* (2002)

<sup>473</sup> CASSESE 2003

<sup>474</sup> FLETCHER-OHLIN 2005

claiming that the concept of recklessness as a form of guilt is completely unknown in modern international criminal law.<sup>475</sup> All sources of international criminal law which prescribe the most serious criminal offences, such as crimes against international humanitarian law, genocide and crimes against humanity, operate exclusively on the basis of the intent with which the crime was committed as a form or degree of guilt. Article 2 paragraph 3 (a) of the Draft Code of Crimes against Peace and the Security of Mankind, which regulates individual responsibility, prescribes that physical persons are responsible for crimes prescribed by the Code if, among other things, they intentionally commit such crimes. From an explanation accompanying this provision is evident that the Commission decided to use the phrase „intentionally commit“ in order to emphasise the special subjective element of crimes against peace and the security of mankind.<sup>476</sup> Neither does the Statute of the ICC mention recklessness among the forms of guilt in Article 30:

- “1. Unless otherwise provided, a person shall be criminally responsible and liable for punishment for a crime within the jurisdiction of the Court only if the material elements are committed with intent and knowledge.
2. For the purposes of this article, a person has intent where:
  - (a) In relation to conduct, that person means to engage in the conduct;
  - (b) In relation to a consequence, that person means to cause that consequence or is aware that it will occur in the ordinary course of events.
3. For the purposes of this article, "knowledge" means awareness that a circumstance exists or a consequence will occur in the ordinary course of events. "Know" and "knowingly" shall be construed accordingly.”

This form of guilt was however envisaged in Article 29 (4) of the Draft, in which a person was determined reckless in terms of the circumstances or consequences, if he was aware of the risk of the existence of particular circumstances or that particular consequences will arise, or was indifferent to the same. This was a conditional provision, whose final form and fate depended on definitions of criminal offences within the scope of the jurisdiction of the ICC. After the States Parties agreed that none of the criminal offences within the scope of the jurisdiction of the Tribunal should include responsibility for recklessness, this provision was understandably omitted from the final version of Article 30 of the ICC Statute. It is therefore interesting that although the final version of the ICC Statute omitted this form of guilt, in the Report of the International Commission of Inquiry regarding the genocide in Darfur, it is stated that the mens rea for murder as a crime against humanity is “the criminal intent or recklessness required for the underlying crime.”<sup>477</sup>

We could say that such neglect of the text of the Statute of the ICC and reliance on the case law of the ICTY and the ICTR in the sense of lowering the standards of guilt also for the most serious violations of international humanitarian law, have met with widespread criticism in scientific circles. Fletcher, for example, thinks there are at

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<sup>475</sup> See ENGVALL 2005; FLETCHER-OHLIN 2005

<sup>476</sup> Draft Code of Crimes against Peace and Security of Mankind, UN International Law Commission, source <http://www.un.org/law/ilc/>, 1.8.2009.

<sup>477</sup> Report of the the International Commission of Inquiry on Darfur to the United Nations Secretary-General Pursuant to Security Council Resolution 1564 of 18 September 2004, §180

least three convincing reasons why it is wrong. In the first instance, he refers to Article 30 of the ICC Statute, which limits forms of guilt to direct intent in the first and second degree (intention and knowledge)<sup>478</sup>, unless otherwise prescribed, which means that recklessness and negligence are excluded. Also, Articles 7 and 8 of the ICC Statute, which define war crimes and crimes against humanity, do not include the possibility of punishments for these forms of guilt. The only exception to these rules is Article 28 of the ICC Statute, the regulation on indirect command responsibility, which does not in any way provide legal grounds for the claim that, for other forms of individual criminal responsibility, it is sufficient to have acted out of recklessness.<sup>479</sup> Other exceptions to this rule are Articles 8 paragraph 2 (1), which mentions wilful killing, Article 8 paragraph 2 (iv), which describes conduct characterised as unlawful and wanton, and Article 8 paragraph 2 (xi) which includes the term treacherously. All these specific forms of guilt are considered types of specific intent (*dolus specialis*) and their precise definitions must be confirmed when interpreting the relevant provisions.<sup>480</sup> Apart from this, Fletcher goes on, in common law and civil law there are differences in understanding the content of recklessness as a form of guilt:

„Continental law does not possess the precise equivalent of recklessness, because it divides forms of guilt into intent (*dolus*) and negligence (*culpa*). A literal translation of the definition of recklessness in German would correspond to the form of guilt known as *bewusste Fahrlässigkeit* (conscious negligence).“<sup>481</sup>

Article 30 of the Statute defines intent itself separately in relation to conduct and consequence, and prescribes that intent in relation to conduct includes the intention of the perpetrator to be engaged, and in relation to consequence, the perpetrator means to cause that consequence by his conduct or is aware that the same will occur in the ordinary course of events. Piragoff thinks that intent in relation to action corresponds to *dolus directus*, while intent in relation to consequence also includes *dolus eventualis*, as these concepts are understood in European civil law. But this is not a correct viewpoint.<sup>482</sup> The aforementioned formulation in the Statute referring to the “ordinary course of events” is directed more at cases in which the perpetrator reckons on the consequence occurring with a high degree of probability, since future events cannot be predicted with one hundred percent certainty, and this knowledge is characteristic of second degree direct intent. Accordingly, a convincing conclusion can be reached that Article 30 of the Statute prescribes *dolus directus* exclusively, in relation to both action and consequence.<sup>483</sup> Linguistic, grammatical and teleological interpretations of Article 30 of the ICJ Statute clearly point to the conclusion that this provision does not contain, even in the general clause which has a completely different specific meaning, the legal grounds for applying any form of guilt less than

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<sup>478</sup> Here it should be noted that the Statute unnecessarily separated intent from knowledge, because knowledge is of necessity part of intent. See NOVOSELEC 2001, 114.

<sup>479</sup> FLETCHER-OHLIN 2005

<sup>480</sup> TRIFFTERER O. (ed) 1999, 531

<sup>481</sup> FLETCHER-OHLIN 2005

<sup>482</sup> van DER VYVER 2004

<sup>483</sup> NOVOSELEC 2001, 114

intent. The form of guilt prescribed in that provision is called knowledge. In this form of guilt, the perpetrator's awareness includes knowledge of all the particular circumstances of the criminal offence and the probability of consequences occurring in the ordinary course of events. It is evident that we are dealing with a form of guilt which, for example in German law, is called second degree direct intent, and has nothing to do with recklessness which has been as a form of guilt, in contradiction to current international customary law, established in the case law of the ICTY.

#### **4.1. Extended Joint Criminal Enterprise and Proving Specific Intent (*dolus specialis*)**

The objectification of the standard of guilt in extended JCEs is in direct contradiction to the need to prove specific intent (*dolus specialis*) in the crimes of genocide and persecution (crime against humanity). The 1948 Convention on the Prevention and Punishment of the Crime of Genocide confirms that genocide, whether committed during peacetime or war, is a crime according to international law for which individuals are to be brought before courts and tried. The Convention is today considered part of international customary law, as demonstrated by the International Court of Justice in its 1951 Advisory Opinion on Reservations to the Convention on the Prevention and Punishment of the Crime of Genocide.<sup>484</sup> Intent, in the case of genocide, is the full or partial destruction of a national, ethnic, racial or religious group. The act committed may be killing members of the group; causing serious bodily or mental harm to members of the group; deliberately inflicting on the group conditions of life calculated to bring about its physical destruction in whole or in part; imposing measures intended to prevent births within the group; or forcibly transferring children of the group to another group. In the ICC Elements of Crimes, the purpose of which is to assist the court in interpreting the elements of criminal offences within its scope, along with all forms of acts of genocide, specific intent is made explicit.<sup>485</sup> From the Convention, it follows that the only form of intent in the case of genocide is *dolus specialis*.<sup>486</sup> This intent includes, in relation to conduct, the perpetrator's willingness to be engaged in it, and in relation to consequence, his willingness to cause that consequence by means of his conduct. Particular weight, which implies the universal condemnation of genocide as the "evil above all evils", issues from the particular psychological state of the perpetrator, who proceeds with the aim of destroying, in whole or in part, a particular group, homogenous on the basis of nationality, religion or ethnicity. Reducing the terms of reference of that subjective element, for purely pragmatic reasons related to the difficulty of proving the psychological relationship between the perpetrator and the act would mean relativising the censure which is and must be universal for this crime. The rulings of the ICTY and the ICTR in the Akayesu, Musema and Jelisić cases take this line. In these cases, it was emphasised that it is insufficient in cases of genocide to show that the perpetrator acted with knowledge, but it must also be proved that he acted with direct intent. In the Stakić case, the accused was acquitted of the charge of participating in a JCE for the purpose of genocide:

"The Trial Chamber must be satisfied that he had the requisite intent. Thus, the key and primary question that falls to be considered by the Trial Chamber is whether or not Dr. Stakić possessed the *dolus specialis* for genocide, this *dolus specialis* being the core element of the crime. In relation to "killing members of the group" the Trial Chamber is not satisfied

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<sup>484</sup> Reservations to the Convention on the Prevention and Punishment of the Crime of Genocide, International Court of Justice, Advisory Opinion of 28 May 1951.

<sup>485</sup> International Criminal Court, Elements of Crimes, U.N. Doc. PCNICC/2000/1/Add.2 (2000), source <http://www1.umn.edu/humanrts/instree/iccelelementsofcrimes.html>, 1.8.2009.

<sup>486</sup> GREENWALT 1999

that Dr. Stakić possessed the requisite *dolus specialis* for genocide, but leaves open the question whether he possessed the *dolus eventualis* for killings which may be sufficient to satisfy the subjective elements of other crimes charged in the Indictment.<sup>487</sup>

Furthermore, it was emphasised that „regarding the third category of joint criminal enterprise, the Trial Chamber repeats its finding that according to the applicable law for genocide, the concept of genocide as a natural and foreseeable consequence of an enterprise not aiming specifically at genocide does not suffice“<sup>488</sup> In the Blagojević case, the Trial Chamber adopted the standpoint that “the specific intent requires that the perpetrator seeks to achieve the destruction, in whole or in part, of a national, ethnical, racial or religious group, as such.”<sup>489</sup> It was insufficient for the perpetrator to have merely known that the crime would basically inevitably or probably, lead to the destruction of the group. Destruction, in whole or in part, must be the aim of the underlying crime(s).<sup>490</sup> In the Kvočka et al. case, in which the question of specific intent in the crime of persecution was debated, the Trial Chamber established that “where the crime requires special intent... the accused must also satisfy the additional requirements imposed by the crime, such as the intent to discriminate on political, racial, or religious grounds if he is a co-perpetrator.”<sup>491</sup> In the Decision on the motion for acquittal on the basis of Rule 98 bis, the Trial Chamber in the Brđanin case accepted the defence proposal and acquitted the accused on the first count of genocide in the context of the third category of JCE, with this commentary:

“The Trial Chamber finds that in order to arrive at a conviction for genocide under Article 4(3)(a) the specific intent for genocide must be met. As explained further in paragraphs 55-57 below, this specific intent is incompatible with the notion of genocide as a natural and foreseeable consequence of a crime other than genocide agreed to by the members of the JCE. For this reason the Trial Chamber finds that there is no case to answer with respect to count 1 in the context of the third category of JCE.”<sup>492</sup>

On the occasion of the interlocutory appeal by the Prosecution, the Appeals Chamber in its decision of 19.3.2004 granted the appeal and count 1 was reintroduced into the indictment. Stating that the “Appeals Chamber erred in confusing the element of guilt for genocide and the element of knowledge of the form of punishment for which criminal responsibility has been imputed to the accused”, the Appeals Chamber, in commenting on the decision, noted the following:

“The elements of the crime are those facts which the prosecution must prove in order to establish that the conduct of the perpetrator represented the crime with which he has been charged. The third category of responsibility for a joint criminal enterprise, as well as other forms of criminal responsibility, such as command responsibility for aiding and abetting, is not an element of the crime in question. This is a form of responsibility by which the accused

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<sup>487</sup> Stakić I, §546, 553

<sup>488</sup> Stakić I, §558

<sup>489</sup> Blagojević I, §656

<sup>490</sup> Ibid.

<sup>491</sup> Kvočka I, §288

<sup>492</sup> Decision on the motion for acquittal on the basis of Rule 98 bis, 28.11.2003, §30

may be held individually criminally responsible, regardless of the fact that he was not the direct perpetrator of the crime. In order for the accused to be convicted for a crime on the basis of the third category of joint criminal enterprise, it is not necessary to prove that he intended to commit the crime, or even that he knew with certainty that the crime would be committed. It is sufficient that the accused joined in the joint criminal enterprise in order to commit a different crime, in the knowledge that the commission of this crime would make it reasonably foreseeable that other members of the joint criminal enterprise would commit the crimes with which he has been charged, and that the crime itself was committed.”<sup>493</sup>

As an example of this kind of construction, the Appeals Chamber cited a situation in which:

“The accused engaged in a joint criminal enterprise in order to carry out the crime of forcible removal, and shared the intent of the direct perpetrators to commit this crime. However, if the prosecution can show that the direct perpetrator in fact committed a different crime, and that the accused was aware that this different crime was the natural, foreseeable consequence of the agreement on forcible removal, then the accused may be tried for that other crime. If that other crime was genocide, the prosecution is required to prove that the accused could reasonably have foreseen that the crime in Article 4(2) would be committed, and that it would be committed with genocidal intent.”<sup>494</sup>

It is completely erroneous, even dangerously “liberal”,<sup>495</sup> to adopt the stance that in the third category of JCE it is not necessary to prove that the accused “intended to commit a crime or knew with certainty that the crime would be committed”. This formulation suggests that it follows, from the elements of third category JCE defined in the decision of the Trial Chamber in the Tadić case, that even when intent to commit a crime cannot be proved, a guilty verdict can still be brought. Judge Shahabuddeen was of this opinion and distanced himself from the explanation given by the Appeals Chamber.<sup>496</sup> However, he was also wrong in thinking that the existence of “intent to commit the original crime automatically also includes specific intent to commit genocide, if and when genocide is carried out.” From this it follows that it is sufficient for genocide to be accepted as “natural, foreseeable consequence” of a JCE. Knowledge or awareness that genocide might occur is in itself not sufficient. Reducing the subjective element in genocide to this intellectual component, along with a volitional component which consists of normal acceptance of the consequences, is in direct contradiction of the need to provide proof, particularly of specific intent in the case of genocide (*dolus specialis*), which is what makes this crime so serious. If such a viewpoint were adopted, the distinction in degree of seriousness between other violations of international humanitarian law and genocide would disappear. The specific difference in relation to genocide lies precisely in the fact that the perpetrator acted with specific intent. Any clumsy and definitely erroneous analogy which seeks to equate guilt in an extended JCE with

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<sup>493</sup> Decision on the interlocutory appeal in the Brđanin case, 19.3.2004, §5

<sup>494</sup> Ibid. §6

<sup>495</sup> OSIEL 2005

<sup>496</sup> Separate opinion of Judge Shahabuddeen in the Decision on the Interlocutory appeal in the Brđanin case, 19.3.2004, §1

guilt in terms of aiding and abetting, i.e. command responsibility, also deserves criticism:

“As a form of responsibility, the third category of joint criminal enterprise does not differ from other forms of criminal responsibility for which proof of the accused’s intent to commit the crime is not required in order to impute him with criminal responsibility. Aiding and abetting, for which the knowledge of the accused and the essential contribution of that knowledge are required, is only one example. Culpability on the basis of command responsibility, for which the prosecution must show that the commander knew or had reason to know of the culpability of those in his command, is another example.”

This is completely false analogy. Aiding and abetting, just like indirect command responsibility, are enumerated as forms of individual criminal responsibility in Article 7 of the ICTY Statute. On the other hand, JCEs and extended JCEs are not prescribed by the Statute. What the Appeals Chamber has clearly lost sight of, and which was clearly emphasised in the judgment of the Appeals Chamber in the Tadić case, is the circumstance that, according to the interpretation of this judgment, a JCE is covered by the concept of a crime of “commission” in Article 7 paragraph 1 of the Statute. In the Tadić case, the Appeals Chamber set the standard that a person accused on the basis of a JCE should answer for the “commission” of a crime, even though he may not have participated personally in carrying out the specific (collateral) crime. Bearing this extremely important circumstance in mind, the prosecution must prove all elements of the crime of which the accused is charged, including the form of guilt which must exist in a “commission” of the crime concerned (author's underlining). If this is not done, the accused must be acquitted. In December 2005, in the van Anraat case, the District Court in The Hague, acquitted the accused of participating in genocide, because it could not be established beyond reasonable doubt that he had known of the specific intent of Saddam Hussein to destroy part of the Kurd population of Iraq. Frans von Anraat was a Dutch businessman who during the 1980’s sold large quantities of the chemical thiodiglycol (TDG) to Saddam Hussein's regime. The substance is used as a raw material in the production of poisonous gas, which Saddam's regime used during the war against Iran and to attack the Kurdish civilians in northern Iraq. After returning to the Netherlands from the United States, where he had been used as an informant, van Anraat was indicted in December 2004 for complicity in war crimes and genocide. In proceedings it was emphasised that “the guilt of the perpetrator and the collaborator may not be differentiated too greatly, for this would lead to the trivialisation of the whole concept of the crime of genocide.”<sup>497</sup> Everything that has been mentioned in connection with proving specific intent in genocide also applies to the crime against humanity by persecution. The expression “crime against humanity” was first used by the governments of France, Great Britain and Russia in 1915, in a declaration condemning the massacre of the Armenian population in Turkey. This event was called “a crime against humanity and civilisation, for which all the members of the Turkish government shall be held responsible, along with their agents who were

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<sup>497</sup> van der WILT 2006



involved in the massacre.”<sup>498</sup> The so called Martens clause in the Fourth Hague Convention on the Laws and Customs of War on Land of 1907 speaks of the “practice established among civilised nations, the laws of mankind and the dictates of public conscience.” The Report of the Commission on the Responsibility of the Authors of the War and on Enforcement of Penalties established at the peace conference in Paris in 1919 also mentioned “acts against the laws of humanity (mankind)”.<sup>499</sup> Crimes against humanity as an independent concept and the attribution of individual criminal responsibility for committing them were first recognised in Article 6(c) of the Statute of the International Military Tribunal<sup>500</sup> adopted on the basis of the London Agreement of 8 August 1945,<sup>501</sup> and in Article 2 (1) (c) of Law no. 10 of the Control Council for Germany<sup>502</sup>. According to Article 6 (c) of the Statute of the IMT, crimes against humanity are defined as “murder, extermination, enslavement, deportation and other inhumane acts committed against any civilian population, before or during the war, or persecutions on political, racial or religious grounds.”<sup>503</sup> According to Article 2 of Law no. 10 of the Control Council for Germany, crimes against humanity are “atrocities and offences, including but not limited to murder, extermination, enslavement, deportation, imprisonment, torture, rape, or other inhumane acts committed against any civilian population, or persecutions on political, racial or religious grounds whether or not in violation of the domestic laws of the country where perpetrated.”<sup>504</sup> Along with crimes against peace and war crimes, crimes against humanity were confirmed as part of international customary law in the Principles of International Law acknowledged in the IMT Statute and the Judgment of the Court compiled by the International Law Commission at its second session held in 1950, submitted for adoption by the UN General Assembly.<sup>505</sup> In the period following the Second World War, up to the formation of ad hoc international criminal tribunals for the former Yugoslavia and Rwanda for crimes against humanity, many members and collaborators in the Nazi regime, such as Eichmann, Barbie, Touvier and Finta, were tried before national courts. After Israeli Mossad agents abducted the former high-ranking Nazi official Adolf Eichmann in May 1960 in Argentina, he was sentenced to death in 1961 by a court in Jerusalem for crimes against humanity, pursuant to the 1950 Nazis and Nazi Collaborators (Punishment) Law dealing with the crime of participating in the creation and implementation of the so-called “Final Solution” (Endlösung) to the

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<sup>498</sup> SCHWELB 1946, 178, 181

<sup>499</sup> The Report of the Commission on the Responsibility of the Authors of the War and on Enforcement of Penalties established at the Peace conference in Paris on 25 Jan 1919, Oxford, Clarendon Press, 1919.

<sup>500</sup> Charter of the International Military Tribunal, source <http://avalon.law.yale.edu/imt/imtconst.asp>, 1.8.2009.

<sup>501</sup> London Agreement of August 8th 1945, source <http://avalon.law.yale.edu/imt/imtchart.asp>, 1.8.2009.

<sup>502</sup> Control Council Law No. 10, source <http://avalon.law.yale.edu/imt/imt10.asp>, 1.8.2009.

<sup>503</sup> Charter of the International Military Tribunal, <http://avalon.law.yale.edu/imt/imtconst.asp>, 1.8.2009.

<sup>504</sup> Control Council Law No. 10, source <http://avalon.law.yale.edu/imt/imt10.asp>, 1.8.2009.

<sup>505</sup> Principles of International Law Recognized in the Charter of the Nürnberg Tribunal and in the Judgment of the Tribunal, International Law Commission, International Law Commission, 1950, Yearbook of the International Law Commission, 1950, vol. II, para. 97.

Jewish problem in Germany. The Eichmann case was significant, among other things, because for the first time a national court based its jurisdiction on the principle of universality. In explanation of this proceeding, the court emphasised that in the Eichmann case they were dealing with the most serious crimes, which seriously violated human conscience, and over which all countries had jurisdiction, (in this particular case, Israel), regardless of the location where the crimes were committed or the nationalities of the perpetrator and his victims.<sup>506</sup> In comparison to the Eichmann case, in which the definition of crimes against humanity did not differ in essence from the definition in the IMT Statute, in the judgment for crimes against humanity in the 1987 Klaus Barbie case, the French Cassation Court drew a sharp distinction in its decision between war crimes and crimes against humanity. The specific difference in the definition of a crimes against humanity is the “systematic commission of crimes within the framework of a state policy of ideological supremacy”.<sup>507</sup> According to the Draft Code of Crimes against Peace and the Security of Mankind, compiled in 1996 by the International Law Commission of the United Nations, crimes against humanity are: murder, extermination, torture, enslavement, persecution on political, racial, religious or ethnic grounds, institutionalised discrimination on racial, ethnic or religious grounds, involving the violation of fundamental human rights and freedoms and resulting in seriously disadvantaging a part of the population, arbitrary deportation or forcible transfer of the population, arbitrary imprisonment, forced disappearance, rape, enforced prostitution and other forms of sexual abuse, and other inhumane acts which severely damage physical or mental integrity, health or human dignity, such as mutilation and severe bodily harm.<sup>508</sup> Crimes against humanity are criminal offences over which both the ICTY and the ICTR have jurisdiction. According to Article 5 of the ICTY Statute, a crime against humanity is linked to armed conflict (international or domestic) and directed against any civilian population. Offences which are included in crimes against humanity are: murder, extermination, enslavement, deportation, imprisonment, torture, rape, persecutions on political, racial and religious grounds and other inhumane acts. According to Article 3 of the ICTR Statute, a crime against humanity may also be committed outside an armed conflict. Crimes which are included in crimes against humanity are murder, extermination, enslavement, deportation, imprisonment, torture, rape, persecutions on political, racial and religious grounds and other inhumane acts.<sup>509</sup> A crime against humanity must be committed against any civilian population and be part of a wider, systematic policy of a state, organisation or group. With the exception of the crime of persecution, discriminatory intent is not an element in crimes against humanity. Crimes against humanity must be committed within the framework of a systematic or

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<sup>506</sup> BAADE 1961; GREEN 1962; GREEN 1962-1963; LIPPMAN 1982-1983. For the entire text of the judgment in the Eichmann case see <http://www.nizkor.org/hweb/people/e/eichmann-adolf/transcripts/>, 1.8.2009.

<sup>507</sup> FINKIELKRAUT 1992; SADAT 1994

<sup>508</sup> Draft Code of Crimes against Peace and Security of Mankind, UN International Law Commission, source <http://www.un.org/law/ilc/>, 1.8.2009.

<sup>509</sup> Statute of the International Criminal Tribunal for Rwanda, Security Council Resolution 955 (1994), Adopted by the Security Council at its 3453rd meeting, on 8 November 1994, source <http://www.icttr.org/ENGLISH/Resolutions/955e.htm>, 1.8.2009.

widespread attack directed against a civilian population. The “systematic” and “widespread” elements need not be present cumulatively, so a crime against humanity may be either “systematic” or “widespread”. The systematic element implies that the inhumane acts were committed in a systematic way, i.e. according to a previously conceived plan or policy. The realisation of such a plan or policy could lead to the repeated or long-term commission of inhumane acts. The point of this requirement is to exclude individual and isolated acts which were not committed as part of a wider plan or policy. In the practice of the Allied courts after the Second World War, acts committed within the framework of the politics of terror were considered to be organised and systematic. “Widespread” means that the inhumane acts are carried out widely, in other words that they are directed against a large number of victims. This requirement excludes isolated inhuman acts by perpetrator acting on his own initiative, directed at individual victims. A crime against humanity must be widespread or show systematic character. The second element of the concept of a crime against humanity is that it must be “directed against the civilian population”. The expression “directed against” states precisely that in the context of a crime against humanity, the civilian population must be the primary object of attack. Mention of the civilian population points to the collective character of crimes against humanity. The expression “population” need not mean that the entire population of a geographical area in which an assault takes place (a state, municipality or other defined region) comes under attack. The expression “civilian population” comprises all persons who are civilians, as opposed to members of the armed forces and other legitimate combatants. The population against which the attack is directed must be predominantly civilian. However, the presence of certain non-civilians within the population does not alter its character. The “systematic” element we have mentioned in a crime against humanity excludes all individual, isolated acts which have no connection with a particular plan or policy. It is precisely the political element which gives weight to a crime against humanity. The reason why crimes against humanity are so disturbing to mankind's conscience and why the intervention of the international community is justified is that they are not the isolated acts of individuals, but the result of deliberate efforts directed against a civilian population. Crimes against humanity form part of a system founded on terror or represent a link in a consciously implemented policy directed against a specific group of people. The policy need not be formalised and its existence can be established by the ways in which the events occur. According to the traditional concept, a crime against humanity is always part of state policy, as was the case in Nazi Germany. According to the Commentary on the Draft Code on Crime against Peace and the Security of Mankind, the offences must have been instigated or supervised by the government, or another organisation or group:

“This alternative is intended to exclude the situation in which an individual commits an inhumane act while acting on his own initiative pursuant to his own criminal plan in the absence of any encouragement or direction from either a Government or a group or organization. This type of isolated criminal conduct on the part of a single individual would not constitute a crime against humanity. It would be extremely difficult for a single individual acting alone to commit the inhumane acts as envisaged in article 18. The instigation or direction of a Government or any organization or group, which may or may not

be affiliated with a Government, gives the act its great dimension and makes it a crime against humanity imputable to private persons or agents of a State.”

The subjective element of a crime against humanity is the perpetrator's intent, which must include knowledge of the fact that the act he is committing is part of a widespread or systematic attack. Along with the intent to commit a particular crime, the perpetrator must know that an attack is being carried out on a civilian population and that his acts represents part of such an attack, or must at least assume the risk of his act becoming part of such an attack. This, however, does not necessarily include detailed knowledge of the attack. The motive of participating in an attack is not characteristic of the subjective element of a crime against humanity.

“A prohibited act committed as part of a crime against humanity, that is with awareness that the act formed part of a widespread or systematic attack on a civilian population, is, all else being equal, a more serious offence than an ordinary war crime. This follows from the requirement that crimes against humanity be committed on a widespread or systematic scale, the quantity of the crimes having a qualitative impact on the nature of the offence which is seen as a crime against more than just the victims themselves but against humanity as a whole.”<sup>510</sup>

The crime of persecution is one of the forms of the commission of a crime against humanity. Persecution of any specific group or community on political, racial, national, ethnic, cultural, religious, sexual or other grounds, which are considered generally impermissible in international law, committed in connection with any act described in this paragraph or with any crime within the competency of the Court, is characterised by the following (ICC Elements of Crime):

1. The perpetrator denies one or more persons their fundamental human rights through the use of violence, contrary to international law.
2. The perpetrator selects the person or persons on the basis of group or collective identity, or deliberately targets that group or collectivity.
3. Selection is carried out on political, racial, national, ethnic, cultural, religious or sexual grounds, as described in Article 7 paragraph 3 of the Statute, or on other grounds which are generally considered impermissible in international law.
4. The act is committed in connection with any act in Article 7 paragraph 1 of the Statute, or any crime which falls within the jurisdiction of the court.
5. The act is committed as part of a widespread or systematic attack aimed against the civilian population.
6. The perpetrator had knowledge that his conduct was part of such an attack, or had the intent of being part of a widespread or systematic attack against the civilian population.

The crime of persecution includes all acts (committed or omitted) by which one or more persons are persecuted on discriminatory grounds, with accompanying discriminatory grounds or discriminatory intent. Such acts need not necessarily take the form of physical or psychological attacks on the integrity of the victims, but may take the form of attack on the property of the victims, carried out precisely because

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<sup>510</sup> Sentencing judgment in the Tadić case, 14.07.1997, §73

the victims belong to a particular group or collectivity (the selective element of persecution). The subjective element of persecution as a mode of carrying out a crime against humanity makes it a graver offence than other crimes against humanity, almost as serious as genocide, which is the gravest international crime. In the jurisprudence of the ICTY, genocide is defined as “the most extreme, most inhumane form of persecution”. Yet there is a difference between genocide and persecution as a crime against humanity. The perpetrator of genocide aims to destroy a group, whether wholly or in part, while the perpetrator of persecution as a crime against humanity aims to discriminate by using violence against a group, seriously and systematically violating their human rights. In order for the condition of discriminatory intent of the accused to be met, the existence of a political discriminatory program is not required. Discriminatory intent must relate to the actual attack with which the accused has been charged as with persecution. It is insufficient for the offence to have occurred within an attack which had a discriminatory aspect.<sup>511</sup> We noted earlier that forms of responsibility may not alter or replace elements of crimes defined in the Statute. This applies in particular to components of guilt which represent the grounds for certain crimes enumerated in the Statute. However, in spite of this, the Tribunal’s Chambers, following the example of the Appeals Chamber’s decision in the Tadić case, have several times altered or replaced elements of crimes defined in the Statute. This has been particularly evident in the “creation” of a third category of JCE, in which it is sufficient to demonstrate that the crime with which the accused has been charged (although he was not the physical perpetrator) was a “natural, foreseeable consequence” of a JCE. There are absolutely no grounds in international criminal law for lowering the standard of guilt in this way in relation to the most serious crimes in the catalogue of violations against human rights. Even in comparative law, which has given us the form of guilt known as recklessness, the accused cannot be pronounced guilty of the most serious crimes. Even in common law systems, this form of guilt is insufficient to convict someone of murder. Recklessness must be accompanied by “circumstances indicating extreme indifference towards the value of human life”. The common law expression for such a great degree of indifference is “an abandoned and malignant heart”.<sup>512</sup> Leaving aside genocide and the crime against humanity by persecution, the terminology of crimes within the scope of the jurisdiction of the Tribunal points to the fact that these are extremely grave violations of international humanitarian law, and therefore any lowering of the standard of guilt must not be tolerated. By introducing the theory of extended JCE, the Tribunal has without doubt acted not only outside the bounds of existing international law, but beyond the mandate it was given by the UN Security Council. The establishment of a Tribunal was the implementation of enforcement measures taken by the Security Council, in the terms of Chapter VII of the UN Charter. The Report in which the mandate of the Tribunal was strictly defined attempted to lessen the fragile legitimacy and the enforcement measures which are characteristic of the court:

“It should be pointed out that, in assigning to the International Tribunal the task of prosecuting persons responsible for serious violations of international humanitarian law, the

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<sup>511</sup> Vasiljević I, §248, 249

<sup>512</sup> FLETCHER-OHLIN 2005

Security Council would not be creating or purporting to “legislate” that law. Rather, the International Tribunal would have the task of applying existing international humanitarian law.”<sup>513</sup>

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<sup>513</sup> Report of the Secretary-General Pursuant to Paragraph 2 of Security Council Resolution 808(1993), 22 Feb 1993, U.N. Doc. S/25704, §29

## 5. Discussion and Conclusion

The types of guilt established in ICTY proceedings on the whole conform to the rules of common law, rather than continental law, which in this sense is more sophisticated and includes criteria for differentiating a greater number of forms and degrees of guilt. Most European continental legal systems differentiate between intent and criminal negligence as the two basic forms of guilt which have intellectual (knowledge) and volitional (will) components. The intellectual component is knowledge of the act, while the volitional component depends on whether the perpetrator intended to commit the offence (direct intent) or acceded to it (indirect intent), or whether he thought it would not happen, or that he could prevent it happening (conscious negligence). On the other hand, in countries where common law prevails, guilt is covered by the broad notion of mens rea (guilty mind), which can be based on subjective or objective criteria, or a combination of both. The prosecution must show, in terms of subjective criterion, that the perpetrator had a psychological relationship to the crime *tempore criminis*, while in terms of objective criterion, a perpetrator who had no psychological relationship to the crime *tempore criminis* is judged on the basis of what is called the reasonable person test. This test allows the court to assess whether another reasonable person, in the same circumstances, would have had the necessary psychological relationship to the crime. The types of guilt in the common law system are intent, recklessness (wilful blindness in United States law, a form which falls very close to conscious negligence in continental law) and criminal negligence. In proceedings the prosecutor must show that the perpetrator acted *tempore criminis* with a guilty mind and that he committed an act which violated imperative or prohibitive legal norms (this is in fact an illegal act, known in common law as *actus reus*). The exceptions to the rule that it is necessary to prove cumulatively elements of mens rea and *actus reus* are so-called strict liability offences, for which the basis is objective responsibility (for consequences caused). This refers to minor offences against civic discipline, which by content correspond to misdemeanours (traffic offences, etc.). In contrast to the ICC Statute, which in Article 30 prescribes the elements and content of guilt as the psychological relationship to the crime (mental element), the ICTY Statute contains no specific provisions concerning the application of forms of guilt and standards for proving it in proceedings. Since a significant number of ICTY judges are from countries which practise common law, it is no wonder that the dominant practice is to use the types of guilt from that legal system, which, as we have said, differ considerably in content from types of guilt in European, continental law. Confusion is caused, which among other things makes the defence's task more difficult, by the ICTY's inconsistent application of standards. This inconsistency is evident in the "creation" of completely new "combined" types of guilt, hitherto unknown in any legal system (for example, it is not clear whether *dolus eventualis*, which is used in the majority of cases, is the form of indirect intent or conscious negligence taken from civil law, the form of guilt known in common law as recklessness, or something quite different). This leads in the end to the gravest negative consequence, which is the reduction of the criteria for proving guilt, and this definitely favours the prosecution in proceedings. This trend is actually most noticeable in the application

of the JCE theory. Therefore the many criticisms of Tribunal decisions are justified, particular in relation to proof of guilt as the psychological relationship of the accused to the crime. The guilt of an accused person in an extended JCE falls into two parts. An accused person who enters deliberately into such an enterprise to commit a particular crime is liable for the commission of another crime by another member of the group outside the plan (purpose) of the joint criminal enterprise, if it was reasonably foreseeable to him that as a consequence of the commission of that particular crime the other crime would be committed by other participants in the joint criminal enterprise.<sup>514</sup> In comparison to a basic JCE, there is no requirement to show the shared intent of the physical perpetrator and a participant in the JCE to carry out a particular crime, but much less - it is sufficient to show the foreseeability of consequences occurring (intellectual component) and willingness to take the risk of such consequences occurring (volitional component). In an extended JCE, both components, the intellectual and the volitional, are problematic. In considering awareness of the occurrence of possible consequences (risk), the view of the Appeals Chamber in the Blaškić case should be taken into account, according to which, “the knowledge of any kind of risk, however low, does not suffice for the imposition of criminal responsibility for serious violations of international humanitarian law.”<sup>515</sup> In that judgment the Chamber answered the question as to whether *dolus eventualis* is a sufficient degree of guilt to establish the command responsibility of the defendant, according to Article 7(1) of the Statute (individual criminal responsibility), in the negative:

“The Appeals Chamber considers that none of the Trial Chamber’s above articulations of the *mens rea* for ordering under Article 7(1) of the Statute, in relation to a culpable mental state that is lower than direct intent, is correct. The knowledge of any kind of risk, however low, does not suffice for the imposition of criminal responsibility for serious violations of international humanitarian law. The Trial Chamber does not specify what degree of risk must be proven. Indeed, it appears that under the Trial Chamber’s standard, any military commander who issues an order would be criminally responsible, because there is always a possibility that violations could occur. The Appeals Chamber considers that an awareness of a higher likelihood of risk and a volitional element must be incorporated in the legal standard. The Appeals Chamber therefore holds that a person who orders an act or omission with the awareness of the substantial likelihood that a crime will be committed in the execution of that order, has the requisite *mens rea* for establishing liability under Article 7(1) pursuant to ordering. Ordering with such awareness has to be regarded as accepting that crime.”<sup>516</sup>

This analogy can be applied to responsibility for committing a crime within an extended JCE. For there is no reason why the elements and standards of guilt for those in command and the actual perpetrators should be different. In the Blaškić case, the Appeals Chamber was absolutely correct in stating that knowledge of a risk, however small, was not enough to pronounce criminal responsibility for serious violations of international humanitarian law. If it were to be accepted that any degree of risk would suffice, then any commander who had ever issued an order could be

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<sup>514</sup> Kvočka II, §83

<sup>515</sup> Blaškić II, §41, 42

<sup>516</sup> *Ibid.*



held criminally responsible, for the possibility of a violation taking place can then always be proved, simply by applying objective standards. The importance of this decision is that it stated “the legal standard must include awareness of a greater probability of risk, and, which is particularly important, an element of volition.” Thus the rather feeble element of volitional acceptance of the risk of consequences occurring, which is as a rule taken to exist, in contravention of the presumption of innocence, is substituted by the element of volition, which suggests beyond doubt that the perpetrator was not indifferent to the consequence, and was willing to accept it, although he may not have defined them in his own mind down to the last detail. However, it is not only in situations of ordering as the primary form of individual criminal responsibility that the standard of guilt is higher than for perpetration within an extended JCE. An analysis of ICTY case law shows that the standard in extended JCEs is also set lower even for secondary forms of individual criminal responsibility according to Article 7(1) of the ICTY Statute. Namely, for this form of imputed responsibility, awareness of “normal risk” of consequences occurring must be shown, while, for example, for incitement with indirect intent, the person must be “aware of the significant possibility that the probable consequence of his actions would be the commission of a crime.”<sup>517</sup> So in the case of incitement as a form of secondary or accessory individual criminal responsibility (accessory in relation to the perpetration/commission), proving the subjective element is much more difficult, because the prosecutor has to prove that the person was aware of the significant possibility of probable consequences occurring, while in an extended JCE he has the easier task of showing that the accused was “aware that the further crime was a possible consequence in the execution of that enterprise and that, with that awareness, he participated in that enterprise.”<sup>518</sup> It is clear even at first glance that there is quite a difference between proving a consequence was “possible” and proving that it was “significantly possible or probable”. The next piece of illogical reasoning, which points to essential problems with the theoretical concept of an extended JCE, is the fact that the prosecutor has an easier task in proving the subjective element of an extended JCE than in proving the guilt (*mens rea*) of aiding and abetting. In the case of aiding and abetting, the state of mind required is knowledge that the act to be committed by the aider and abettor will contribute in the commission of a particular crime on the part of the main perpetrator. On the other hand, in an extended JCE, there must be intent to carry out the JCE, while foreseeing the commission of crimes outside the scope of the JCE. Clearly, then, there is absolutely no subjective connection in an extended JCE (in the sense of the psychological relationship of the perpetrator of the particular crime), between participating in a JCE and committing a particular crime, that is between the state of mind of the participant in an extended JCE and the perpetrator of a particular crime. It is not without reason that in the literature of international criminal law, the JCE theory, particularly in its extended version, has been described as a “magic bullet” for the prosecution. The arbitrarily constructed theoretical concept of an extended JCE (see JCEs and the principle of legality), which undoubtedly fulfils neither the subjective nor objective elements of

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<sup>517</sup> Naletilić i Martinović I, §60

<sup>518</sup> Krstić I, §613

“commission” according to Article 7(1) of the ICTY Statute, makes the job of the prosecutor considerable easier. He is only required to show that a participator in a JCE knew or was aware of the possibility of a crime being committed (foreseeability of a crime). There is no need to show that his intent in regard to the crime fitted in terms of content with the intent of the perpetrator of the particular crime committed outside the scope of the common purpose (an excess). In this category of JCE, proof of guilt is distorted to presuming objective responsibility, for it is sufficient to prove the readiness of the accused to be part of the original concept, and that the crime committed was a “natural, foreseeable consequence of such a concept”. It is interesting that in the most serious forms of violation of international humanitarian law, because of practical reasons to do with proving guilt, intent as a constitutive element of incrimination has been substituted by a hybrid form of guilt, which in most civil law countries corresponds in content to conscious negligence. Thus guilt for these crimes (which is their constitutive element) has in fact been altered from the subjective relationship towards the crime and its consequences into objectified violation of the due diligence requirement. An analysis of forms of responsibility according to Article 7(1) of the Statute indicates that recklessness is an insufficient or inadequate degree of guilt in all forms of responsibility.<sup>519</sup> All these forms of responsibility require acting with intent, and some require specific intent (genocide, plotting to commit genocide, attempted genocide, etc.). In the literature it is emphasised that in international criminal law, only two forms of criminal responsibility require less than intent: command responsibility and extended JCE’s, although in extended JCE’s the criterion for confirming guilt is even lower than for command responsibility, for which the prosecutor must show, among other things, that the person in authority “ought to have known”. In the discussion on proving crimes within the scope of the Tribunal, the time and space context in which the crimes took place should also be borne in mind. We are dealing with situations of armed conflict in which, in contrast to classic peacetime criminality, crimes are committed on a large scale and frequently. In fact the few surviving witnesses are often reluctant to give statements, out of fear or other reasons (the pain of recalling traumatic events), and the availability of other material evidence is often minimal. Furthermore, the acts committed represent serious crimes according to international law and the perpetrators, in the interests of justice and for the purpose of guaranteeing lasting peace, must be brought to trial. This all puts the prosecution in the position of compiling overambitious indictments for the accused, who are charged with crimes in respect of which, for the reasons we have given, their guilt cannot be proven. There is also pressure, frankly, on Chambers which are expected to deliver results – sentencing for the most serious crimes according to international law. All this leads to shortcuts to justice, in which the existing institutes of international criminal law, of which some undoubtedly have the legal character of international customary law, are modelled in ways and means necessary to adapt to the circumstances of the case in question. One such shortcut is the JCE theory. The controversial theoretical concept of JCE (particularly the third category) in practice is additionally extended through evidence proceedings. The rationalisation for such flexibility is quite understandable.

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<sup>519</sup> ENGVALL 2005, 43

The JCE theory is a sufficiently elastic net in which all participants in armed conflict can be caught – commanders, soldiers, members of paramilitary units, armed civilians, high-ranking state officials, the holders of civil powers at the local level, etc. However, although this flexibility is understandable, because it allows “efficiency” in proceedings, it is at the same time unjustifiable and dangerous, because it includes the risk of sentencing at any price, deviation from the principle of guilt and the risk of innocent people being convicted. In the case law of the ICTY it has been shown on many occasions that it is difficult to prove intent:

“Intent, regardless of whether in the special form required for the crime of genocide or the more common forms required for the other crimes under the jurisdiction of the Tribunal, is generally difficult to establish and recourse to the sum of all established facts and circumstances is necessary.”<sup>520</sup>

A JCE as a form of responsibility is based on the presumption that the perpetrator acted as an average, reasonable person. Therefore the criteria for establishing guilt in this form of responsibility are not subjective, but objective. The court does not establish what the perpetrator thought or intended at the time when the crime was committed, but what a reasonable person would think or intend in similar circumstances, and how would he react. Objective standards in proving guilt are acceptable in national systems for negligently committed offences, but definitely not for intentional crimes, which are correctly considered to be serious crimes because of the subjective element, psychological relationship of the perpetrator to the crime. In establishing cases of extended JCE, the focal point of the intellectual component is the foreseeability of the crime. In comparative law and case law this term is used exclusively in connection with the negligent form of guilt. The essence of criminal negligence is the violation of the due diligence requirement. There is a difference between the violation of the objective due diligence, i.e. diligence which would be required of any conscientious person from the circle to which the perpetrator belongs, and the violation of the subjective due diligence, i.e. the diligence required of the particular perpetrator being tried. In order for the perpetrator to be sentenced for criminal negligence, it is therefore first necessary to fulfil the objective, then the subjective criterion. Objective due diligence consists primarily of the obligation to foresee the danger to protected value. This is also called internal diligence. It requires of any person the obligation to consider the conditions under which he carries out an action and to foresee its outcome. Violation of objective due diligence can only occur when the boundaries of permitted risk are crossed. Foreseeability of danger requires appropriate conduct, i.e. conduct by which the acts will be avoided. This is called external diligence.<sup>521</sup> Using the standards of objective due diligence, the ICTY sentenced General Krstić to a long-term prison sentence, although he had not been proved guilty of specific genocidal intent. He was given this particularly harsh sentence as a participator in a JCE, the goal of which was the ethnic cleansing of Srebrenica, and because a reasonable person, in those circumstances, could have concluded that genocide would be a natural, foreseeable consequence of achieving

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<sup>520</sup> Stakić I, §686

<sup>521</sup> NOVOSELEC 2004, 240

that common purpose. A particular way in which the principle of guilt is violated is expressed in an extended JCE, in which it is sufficient to show the readiness of the accused to be part of the original agreement (which need not always be a criminal agreement), and that the crime committed was a “natural, foreseeable consequence of such an agreement”. This annuls the principle of the independent guilt of particular participants, on the basis of the new legal standard of “foreseeability”, which can not be deemed precise and reliable. Namely, the foreseeability of a crime is different in a situation of armed conflict than in peacetime. In the chaotic conditions of armed conflict, individuals often join defined groups, for example in the former SFRY and Rwanda, for national or ethnic reasons, not because they intend to commit crimes as part of such groups, nor because they are indifferent to crimes, but because belonging to the group offers some kind of security. Therefore they do not act with the aim of supporting or prolonging a JCE, but in order to save their own lives and possibly the lives of their loved ones. We might say that such people simply find themselves in the wrong place at the wrong time. They are quite average people who, in such circumstances, would be able to foresee most things. In conditions of armed conflict, the commission of a series of different, but nonetheless extremely serious crimes can be predicted. Therefore, according to the objective criterion, such people can be imputed the responsibility for all crimes committed by other members of their group, for all such acts, in the context of the chaos of armed conflict, are objectively predictable. Since in cases of extended JCEs the element of “substantial contribution” as an objective element of the act is broadly interpreted in case law and at the end of the day is reduced to belonging to a group (particularly if the people concerned are high-ranking civilian or military officials), the objective reckoning of the “foreseeability” of crimes committed by other members of the group puts the accused in a very difficult position, in which he can only avoid responsibility by leaving the group or openly opposing its activities. However, it is unreasonable to expect that in circumstances of ethnic armed conflict, members of a group will expose themselves to the risk of being killed if they leave the group or oppose its activities. The JCE theory is not in accordance with the principle of guilt which in most legal systems has the position of a constitutional category. Thus this legal construction violates the essential procedural rights of the accused, such as the right to a fair trial and the presumption of innocence. It is important to point out that in proceedings so far nobody, not even the court proprio motu has taken into account the exceptionally important decision of the Supreme Court of Canada in the *R. v. Logan* case of 1990<sup>522</sup>, which seriously questioned the constitutionality of the JCE theory and its sustainability in the context of national and international criminal law.<sup>523</sup> In this case, the court had to establish whether, according to the provision of Article 21 (2) of the Canadian Criminal Code, extended JCE contravened the principle of fair trial, fundamental fairness and presumption of the accused's innocence, as guaranteed by the Canadian Charter on Rights and Freedoms, and if so, could this be considered a limitation “necessary in a democratic society” (principle of proportionality). The court established that Article 21(2) of the Criminal Code violated the constitutional

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<sup>522</sup> *R v. Logan*, 2 S.C.R., 1990.

<sup>523</sup> DARCY 2004-2005

principle of proportionality and that in the case of the crime with which the accused had been charged (specifically, attempted murder), the prosecution needed to show particular intent to murder. A contrario, the lowering of criterion in establishing guilt (mens rea) were not in accordance with the principle of guilt nor with constitutional provisions on fundamental fairness, fair trial and presumption of innocence. In passing sentence the court indisputably confirmed:

“1. Does s. 21(2) of the Criminal Code contravene the rights and freedoms guaranteed by s. 7 and/or s. 11(d) of the Canadian Charter of Rights and Freedoms?

Yes, on charges where subjective foresight is a constitutional requirement, to the extent that a party may be convicted if that person objectively "ought to have known" that the commission of the offence would be a probable consequence of carrying out the common purpose.

2.If the answer to question 1 is in the affirmative, is s. 21(2) of the Criminal Code justified under s. 1 of the Canadian Charter of Rights and Freedoms, and therefore not inconsistent with the Constitution Act, 1982?

No.”

The substance of this decision, which was later confirmed in the *R. v. Sit* case of 1991<sup>524</sup>, is a clear argument against the JCE theory, which in legally unacceptable way seeks to reduce the content of personal guilt, thus directly violating the principle *nulla poena sine culpa*, which is an indisputable part of international customary law. The arguments adduced certainly provide a broad base for criticism of the theory, also from the aspect of basic international legal documents on human rights which, among other things, guarantee the right to a fair trial and presumption of the accused's innocence (International Covenant on Civil and Political Rights, Convention of the Council of Europe for the Protection of Human Rights and Fundamental Freedoms).

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<sup>524</sup> *R. v. Sit*, 2 S.C.R., 1991

## CHAPTER FIVE

### QUID FACIT? INDIRECT PERPETRATION (PERPETRATION BY MEANS) AS AN ALTERNATIVE TO JOINT CRIMINAL ENTERPRISE

It is characteristic of contemporary international criminal law to differentiate conceptually between the various forms of participation of various persons in committing a crime. This was most clearly expressed in the Rome Statute, which contains provisions in Article 25 concerning direct perpetration, co-perpetration, indirect perpetration, instigating, assisting and other possible contributions to a collective act. This also means gradually relinquishing the concept of the single perpetrator and moving towards a dualist, perpetrator/participator model; also this differentiation is not evident at the level of possible forms of sentencing (e.g. the possibility of reduced punishment for assisting), because the same penal framework applies to all forms of participation. The case law of the ICTY also reveals differentiation between perpetration and participation, therefore it is necessary to repeat and explain in more detail what we have already outlined concerning co-perpetration and indirect perpetration as forms of commission which are not expressly mentioned in the ICTY Statute, but which, due to the phenomenology of the crimes brought before this court, deserve special attention. In contrast to Article 25 para. 3 (a) of the Rome Statute, which defines co-perpetration as an act committed jointly with another, the ICTY Statute only mentions the commission of crimes and various forms of participation in Article 7 (1). The responsibility of co-perpetrators, on the basis of a joint design, leading to the mutual inclusion of contributions made, was accepted in international criminal law during the Nuremberg Trials<sup>525</sup> and the case law of the ICTY has shaped this legal figure of a JCE for such cases, so that from the Tadić case onwards, it has appeared in three categories of cases. Co-perpetration, therefore, has been accepted by the ICTY in the broadest terms, particularly when referring to the third category of JCE. While the first two can be subjected without too much effort to the concept of co-perpetration common in most legal systems which accept the perpetrator/participator model (cases in which two or more persons commit a crime on the basis of a joint decision or with the contribution to the act carrying a certain weight), the third category, which is concerned with objectively calculating foreseeable consequences, is extremely dubious from the point of view of the principle of guilt. One possible solution to the problems which have arisen in relation to the practical application of the JCE theory could be the acceptance of the theory of functional control over an act, which in the dogmatics of German criminal law was argued by Roxin and which has had a significant influence outside Germany as well.<sup>526</sup> This understanding of co-perpetration can be summarised as follows: co-perpetration is joint, functional control over an act which differs structurally from control over an act in direct and indirect perpetration. It assumes joint, active, intentional participation in the execution phase on the basis of dividing the tasks. Each co-perpetrator must carry out his

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<sup>525</sup> See AMBOS 2002, 548-549

<sup>526</sup> See ROXIN 2000, 275-305, 684-695

function, which is essential to the success of the plan. Success can only be guaranteed by joint action, and the omission of a functionally essential contribution makes the act impossible to carry out as planned. The principle of functional, mutual dependence applies whenever each person, in fulfilling his own tasks while others fulfil theirs, has control over the act as a whole (joint control over the act). Functional control over the act is an open concept, whose content in terms of rendering a contribution outside the essential elements of the crime (Tatbestand) must be fulfilled in each specific case on the basis of a scale of values.<sup>527</sup> The advantage of Roxin's study is that for co-perpetration any contribution based merely on a joint decision is insufficient. The contribution must be functionally essential and go beyond mere assistance, which simply makes the act easier, quicker or more expeditious.<sup>528</sup> From the point of view of international criminal law, however, it is not sufficient for the functional, essential contribution to be limited to the phase of execution, because it is precisely in widespread, systematically carried out crimes that the planning and organisational stages are extremely significant, and labelling them as aiding or instigating would not be a suitable means of reflecting the nature of the injustice committed.<sup>529</sup> Making an essential contribution cannot be separated from the joint decision to carry out the crime. Simply emphasising the joint decision (while minimising the objective contribution) and isolating the observation of intent, particularly in the case of foreseeable excesses on the part of co-perpetrators, leads of necessity to unacceptable conclusions along the lines of the English doctrine of common design/purpose, according to which excessive acts must be foreseeable as "real, actually existent or serious possibilities"<sup>530</sup>, or to the conspiracy concept, which extends the responsibility of the co-perpetrator to include all "reasonably foreseeable" acts which might be carried out by the other perpetrators.<sup>531</sup> A co-perpetrator who remains within the scope of the joint plan cannot control (have control over) events in which he did not take part, even if he could have foreseen them.<sup>532</sup> Indirect perpetration (perpetration by means, mittelbare Täterschaft) is acknowledged as an apparent form of perpetration in all legal systems. Even if it is not expressly prescribed in the criminal code, it is implicitly contained in the concept of commission.<sup>533</sup> Article 25 paragraph 3 (a) of the Rome Statute accepts indirect perpetration as commission of an act "through another person, regardless of whether that other person is criminally responsible". The question of how far the legal figure of indirect perpetration should be developed has been under intense discussion for decades in the dogmatics of German criminal law, within

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<sup>527</sup> Thanks to the German Judge Schomburg, control over the act has been introduced into ICTY case law. See Stakić I, §440. For a detailed account of this judgment see OLÁSOLO/PÉREZ 2004, 475-526

<sup>528</sup> The essential contribution to the commitment of an act in application to a JCE has been argued by DANNER-MARTINEZ 2005, 62-63

<sup>529</sup> See AMBOS 2006, 134.

<sup>530</sup> See ASHWORTH 1996, 431-432

<sup>531</sup> See FLETCHER 2000, 659 and similar

<sup>532</sup> See HAAN 2005, 210 on co-perpetration as a more suitable concept than JCE, but without application of the theory of power over the act.

<sup>533</sup> See FLETCHER 2000, 639

which the most convincing explanation of perpetration by an individual in the background has been given in Roxin's study on control over the act. For the purposes of international criminal law, the apparent form of indirect perpetration on the basis of an organised apparatus of power, or so-called organisational power, which Roxin created more than forty years ago, is most interesting.<sup>534</sup> This concept was supplemented gradually<sup>535</sup> and aligned with contemporary forms of criminality,<sup>536</sup> and today represents the dominant school of thought in German theory.<sup>537</sup> Therefore in what follows it will be useful to present and analyse Roxin's opinion in more detail, as well as the opinions of other authors dealing with the problem of indirect perpetration, in cases in which the direct perpetrator is a fully responsible person, but at the same time is a mean in the hands of another individual in the background. Roxin otherwise differentiates three basic forms of control over the act: control over the action (*Handlungsherrschaft*), control over the will (*Willensherrschaft*) and functional control over the act (*funktionelle Tatherrschaft*). Control over the action (*actus reus*) is equivalent to individual or direct perpetration, whereas functional control over the act represents a guiding notion for determining co-perpetration. Control over the will relates to cases of indirect perpetration and can be carried out in three ways: a person in the background may direct events by means of force (*Willensherrschaft kraft Nötigung*), or by means of deceiving the direct perpetrator, who carries out the planned offence in error (*Willensherrschaft kraft Irrtums*) or, as the person giving orders in an organised apparatus of power, by using substitutable direct perpetrators. Roxin denotes this form of indirect perpetration as organisational control (*Organisationsherrschaft*), or control over the will based on an organised apparatus of power (*Willensherrschaft kraft organisatorischer Machtapparate*). The person in the background may control the apparatus of power, which guarantees the carrying out of orders through its impeccable functioning, without forcing or deceiving the direct perpetrators. In the case of individual refusal or abstention from carrying out orders, an apparatus such as this has at its disposal an adequate number of others who can take over the function of the direct perpetrator. It is specific for this form of indirect perpetration that, as a rule, the person in the background does not know who the indirect perpetrator is. Unlimited substitutability or the fungibility (changeability) of direct perpetrators is a guarantee to the person in the background that the act will be carried out, and enables him to control events. The direct perpetrator is simply a replaceable 'cog' in the machinery of the apparatus of power. The culpability of the direct perpetrator, who by his own hand committed the crime, does not affect judgment of the person giving orders as the indirect perpetrator, because the execution of the act, unlike instigation, does not depend on the decision of the direct perpetrator. In such situations, direct and indirect perpetration are not mutually exclusive, although founded on different presuppositions: direct perpetration on

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<sup>534</sup> See. ROXIN 1963, 193 and similar

<sup>535</sup> *Ibid.* 242-252, 677-683

<sup>536</sup> See ROXIN 1999, 549-561

<sup>537</sup> See ROXIN 2003, note 134, p. 47.



completing the essence of crime (Tatbestand) in person, and indirect perpetration on controlling the apparatus of power. Organisational power, as an apparent form of indirect perpetration, is in legal terms a suitable phrase (name) for the phenomenon of “desk-perpetrator” (Schreibtischtäter) who has control over the act, regardless of the direct perpetrator. The central argument for accepting organisational control is in the fact that the organised apparatus of power develops a life of its own, independently of changes in the status of its members. It functions almost automatically and does not depend on the individuality of the direct perpetrator. Accordingly, the indirect perpetrator, on the basis of organised control of power, may be any person who at any level of the hierarchy within the apparatus of power is able to issue orders to subordinates, and who uses such power to achieve criminal ends. The organised apparatus of power at the disposal of the person in the background must operate wholly outside the legal order in the commission of a crime. The criterion for the operation of the apparatus of power outside the legal order relates only to crimes for which the construction of indirect perpetration is applied, and not to the entire scope of the organisation’s activities. The historical example of the operation of the Nazi Government, particularly the Eichmann case, also influenced Roxin’s understanding of organisational control. All the leading figures in such a government could be sure that their criminal designs would be carried out, thanks to the functioning of the apparatus of power, in which the individuality of direct perpetrators was completely unimportant. Although he did not belong to the highest echelon of the Nazi regime’s command hierarchy, Eichmann was in charge of and responsible for the murders of many Jews, as part of the so-called “Final Solution”. Although he did not take part in the killings personally, the County Court in Jerusalem found him guilty as a co-perpetrator to murder. According to the opinion of the court, distance from the direct perpetrators does not affect the scope of responsibility, moreover, such responsibility is greater in inverse proportion to distance from the direct perpetrators and in direct proportion to the level of command. In such cases of mass crimes, in which many persons are involved at different levels of command, the usual concepts of instigator and accomplice cannot be applied to the creators of plans, organisers or executive bodies at different levels.<sup>538</sup> Although this case did not mention indirect perpetration, Roxin saw in Eichmann a typical example of a desk-perpetrator (Schreibtischtäter), and in the opinions of the court the elements of organisational control were clearly noted: while the accomplice, the further he is from the victims and the direct execution of the action, the more is he pushed to the outer borders of events and excluded from control over the act, here the situation is actually reversed, so that the shortcomings of distance are compensated for by a measure of organisational control, which increases in proportion to the level of the indirect perpetrator’s controlling position within the apparatus of power. So according to Roxin’s opinion, the findings of the court that the relationship between a person in the background and the direct perpetrators could no longer be regarded as instigation, were entirely correct. The legal figure of organisational power is applicable primarily to criminality organised by state

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<sup>538</sup> See AMBOS 2006,185

power or state criminality (Staatskriminalität), which is clearly indicated by all historical examples of the conduct of the governments of totalitarian states. The legal figure also applies to contemporary apparent forms or organised crime. According to Roxin, criminal activity by a state apparatus is a “prototype of organised crime”, because the organisation of the state in the area in which the apparatus operates is usually the widest ranging and most efficient. Organisational control is possible when organised criminality which has nothing to do with the state is concerned, although there is as yet no general consensus regarding an exact concept of organised criminality. In each specific case it is necessary only to examine whether the basic presumptions of organisational power are present: substitutability of direct perpetrators and through this, control of the organised apparatus of power.<sup>539</sup> It is interesting, however, that the Roxin construction of organised control has been applied in practical terms primarily outside Germany, in the trials of the former commanders of the Argentinean military junta, during the 1980’s. In the judgment in the first instance court, it was emphasised that the accused had control over the act, “because they controlled an organisation which designed offences...Within such relationships, the direct perpetrators diminished in significance. The power of those controlling the system over the commission of the crimes they ordered was complete, because if any of the subordinates opposed them, he would automatically be replaced by another, from which it transpires that the planned design could not fail because of the will of the direct perpetrators, who were mere cogs in a gigantic machine. This was not a case of control over the will, which is usual in indirect perpetration. The means used by the individual in the background was the system itself, which was composed of substitutable direct perpetrators...The person controlling the system controlled the anonymous will of all those belonging to it.”<sup>540</sup> German case law expressed an opinion on Roxin’s independent form of indirect perpetration for the first time in 1988 in the so-called Katzenkönig case (BGHSt 35, 353), but only in the form of obiter dictum, applying organisational control as an argument for using the construction “perpetrator behind a responsible, direct perpetrator“. In this case, the problem of indirect perpetration was at the forefront, in a situation in which the direct perpetrator had acted in non-excusable mistake of law (error iuris, Verbotsirrtum). The legal figure of organisational control was only expressly accepted in the famous judgment of the Federal Court (BGHSt. 40, 218) in which members of the National Defence Council of the former GDR were tried as the indirect perpetrators of the murders of refugees, committed by border guards at the internal Berlin Wall border. The decisive part of the statement of reasons of the judgment says, “An individual in the background in cases in which someone acts without mistake (error) and with unlimited capacity for culpability, is, as a rule, not an indirect perpetrator...There is however a group of cases in which, despite the unlimited responsibility of the direct perpetrator, the contribution of the individual in the background almost automatically leads to the realisation of the essence of the crime (Tatbestand) intended. Such cases must exist if the person in

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<sup>539</sup> ROXIN 2000, 556, 561

<sup>540</sup> See AMBOS 2002, 236

the background exploits general conditions determined by the structure of the organisation, within which his contribution to the act sets in motion the normal course of events...If the person in the background in such cases acts with knowledge of the circumstances and exploits the unconditional readiness of the direct perpetrators to carry out the essence of the crime, and if he desires the consequences which occur as a result of his actions, then he is a perpetrator, in the sense of an indirect perpetrator. He has control over the act and controls events more than is necessary in other cases, in which indirect perpetration is accepted without consideration, for example in the use of persons as means, who cannot be perpetrators, because they do not have the required characteristics or do not act with specific intent. In the use of persons as means acting in mistake (error) or incapable of guilt, in many cases the indirect perpetrator controls the occurrence of consequences to a much lesser degree than is here the case. Here the individual in the background has a desire for control over the act, because he knows that the decision of the direct perpetrator does not represent a hindrance to the achievement of the desired results. If, in such cases, the person in the background were not treated as a perpetrator, this would not correspond objectively to the weight of his contribution, the more so since responsibility often increases, rather than decreases, with increasing distance from the scene of the crime. This understanding of indirect perpetration is possible not only in cases of abuse of state power, but in cases of Mafia-style crimes, in which the spatial, temporal and hierarchical distance between the highest level of the organisation responsible for the order and the direct perpetrator argues against co-perpetration on the basis of a division of labour. Indirect perpetration, according to this understanding, applies in cases in which the perpetrator, in order to achieve his own goals, knowingly exploits the apparatus of state, which acts illegally.<sup>541</sup> The common characteristic of all opinions which do not assess the role of the person in the background as indirect perpetration, according to Roxin's understanding of organisational control, is the idea that the direct perpetrator cannot at one and the same time be a fully responsible person and a means in the hands of another. Therefore in such situations it is valid to accept instigation, co-perpetration or parallel perpetration. Since the fungibility (changeability) of direct perpetrators is the central characteristic of Roxin's concept of organisational control, the main objections relate to that characteristic. Above all, the opinion should be contested that a person in the background can be surer that the essence of the crime will be carried out than the instigator, who must relinquish the decision to carry out the crime to the perpetrator. So, for example, Herberg emphasises that the decision of the direct perpetrator not to commit the crime will most likely prevent the instigator from achieving his criminal design, as can be seen in the cases of the former GDR border guards, who deliberately fired to miss refugees, or let them escape. Therefore the person giving orders cannot be sure that the essence of the crime will be fulfilled.<sup>542</sup> Roxin held this argument to be inadequate, because it merely served to show that indirect perpetration (including all its apparent forms) may

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<sup>541</sup> See ROXIN 1998, 124

<sup>542</sup> See HERZBERG 2000, 39

also be reduced to attempt in individual cases. Roxin appeals to the opinion of the Federal Court (BGHSt 40, 236), according to which an indirect perpetrator in cases in which the medium acts in mistake (error) or is incapable of guilt, controls events to a much lesser degree than in cases of organised control. The question is not whether the functioning automatic operation of the apparatus of power was present in each individual case, but whether it functioned as a rule, which cannot be said of instigation.<sup>543</sup> Another objection raised against the notion of the organisational control of a person in the background, is that if a direct perpetrator opposes the crime and is substituted, then it is no longer the same crime. As well, the substitutability of direct perpetrators increases the likelihood of the order being carried out, but control over the act does not mean control over execution of the act, but control during the commission of the act. So the control over the act by a person in the background can only be established if substitution was possible at the very moment of the commission of the crime. This is why in most cases, instigation is the most suitable solution.<sup>544</sup> Renzikowski is another advocate of instigation, who thinks that the acceptance of organised control is incompatible with the principle of personal responsibility or the autonomy of the direct perpetrator. Admittedly, he accepts that a person in the background, thanks to the functioning of the apparatus of power, can carry out his plans regardless of the person of the direct perpetrator, but that this still “cannot replace a lack of real control in individual cases”. The possibility of substituting a direct perpetrator who opposes the crime is hypothetical, and hypothetical considerations cannot establish real control over the act.<sup>545</sup> According to Roxin, a person in the background controls exactly this single act, in organisational control, regardless of the number of direct perpetrators used, and his answer to the objection that in criminal law the hypothetical actions of a third person should not be taken into account is that the functioning of the apparatus which is guaranteed by the substitutability of direct perpetrators is not a hypothesis, but a reality. The control over the act of the person in the background emerges from “control over reserve causes”, which guarantees the fulfilment of the essence of the crime. The responsible proceedings of the direct perpetrator, which differ here from instigation, do not decide whether the orders of the person in the background will be carried out or not.<sup>546</sup> Finally, an objection raised against organisational control and its central characteristic is that it fails in cases of the use of non-substitutable direct perpetrators with specialist skills, without whom the success of the criminal design would not be possible.<sup>547</sup> Roxin accepts this objection and allows that in such cases, instead of indirect perpetration, there is only instigation, unless the person in the background applies force, in the sense of the condition of excusable necessity (Entschuldigender Notstand) The legal figure of organisational control was not created for such exceptional cases, but on the basis of situations in which the substitutability of the direct perpetrators was not in question, as in the case of

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<sup>543</sup> See ROXIN 2003, 50

<sup>544</sup> See ROTSCH 2000, 518, 528 and 560

<sup>545</sup> See RENZIKOWSKI 1997, 89 and similar

<sup>546</sup> See ROXIN 2003, 51

<sup>547</sup> See SCHROEDER 1995, 178

mass murders committed during the Nazi regime, or the murder of refugees from the former GDR. Opposing the potential opinion that the general requirement for the validity of the criterion of fungibility can be overthrown by a single case to the contrary, Roxin rightly points out that organisational control is not a patent remedy to be applied in all imaginable cases, regardless of the specific presuppositions. The constitutive elements of organisational power arise from realities and their existence must be examined in each specific case. Such a legal figure as a rule only excludes the possibility of co-perpetration and instigation within the framework of an organised apparatus of power.<sup>548</sup> Advocates of the opinion that indirect perpetration is not the issue in cases of organised control, but rather co-perpetration, start from the assumption that indirect perpetration is not possible if the direct perpetrator is fully responsible, but it does not deny the person giving the order to commit the crime control over the act. So Jescheck/Weigend considers that “a person at the centre is a co-perpetrator, precisely because he controls the organisation” and “shared decision making concerning commission of an offence is established by the knowledge of the leadership and the executor that the offence in question or several offences of the same kind must be carried out according to instructions.”<sup>549</sup> The idea of co-perpetration is of course less convincing than instigation. Roxin’s critique of this view is extremely exhaustive and is based on the stance that in organisational control, there is no joint decision or joint commission of crime. Co-perpetration is not a suitable concept, because it lacks the element of joint decision. The person in the background and the direct perpetrator mostly do not know each other, do not make decisions together and do not consider themselves equally placed in terms of decision-making. The execution of the order begins by means of issuing a command, not by means of a joint decision. The knowledge that a person is the recipient of an order does not represent a joint decision. For a joint decision to exist, and with it co-perpetration, is it not sufficient for the direct perpetrator of the criminal design to adopt it as his own design conclusively. According to such criteria, each successful act of instigation could be considered co-perpetration, because tacitly established consent would be considered sufficient. But this would be an intolerable broadening of the concept of co-perpetration. In cases characterised as organisational control, joint commission of crimes is lacking. The “desk perpetrator” does not himself carry out the crime; he does not get his hands dirty, but uses a “mean” to achieve his ends. If co-perpetration essentially involves being involved in the execution phase, then co-perpetration must be ruled out from the beginning, because the person giving the order does not participate in that phase, and usually does not know the time or place of the perpetration. If participation in the preparation phase is considered sufficient for co-perpetration, in that case it is insufficient, because the only contribution of the person in the background is to plan and order the commission of the crime. It is not a jointly committed crime, because otherwise the decision to commit the act would represent commission, and instigation co-perpetration, which is hardly compatible

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<sup>548</sup> See ROXIN 2003, 51-52

<sup>549</sup> See JESCHECK-WEIGEND 1996, 670

with legal concepts. There can be no “division of labour”, which is considered the central characteristic of co-perpetration, if the person wielding the power leaves the entire execution of his orders to executive organs. Accepting co-perpetration would mean equating the structural differences between indirect perpetration (commission of an act using another person) and co-perpetration (joint commission of an act). A vertical structure is characteristic of indirect perpetration (the course of events runs from above to below, from the person giving the order to the executor), while co-perpetration is structured horizontally (in the sense that the co-perpetrators act alongside each other).<sup>550</sup> Rejecting indirect perpetration in cases in which completely responsible persons appear as the direct perpetrators is unacceptable from the point of view of the theory of control over the act, because control over the action of the direct perpetrator and control over the will on the part of the person in the background rest on different presumptions: the direct perpetrator has control over the specific action on the basis of committing it by his own hand, while the person in the background has control on the basis of controlling the organised apparatus of power, which does not depend on the individuality of the direct perpetrator. The direct perpetrator is just an anonymous figure in a line of potential, substitutable executors of the order of the person in the background. His role, in comparison with the role of the indirect perpetrator, is incontestably less significant, because as a rule he cannot block the way to the execution of the criminal design of the person in the background. In that sense, organisational control represents a higher degree of control over the act in relation to the control over the act exercised by the indirect perpetrator. Roxin’s concept of organisational control, which is based on the substitutability of direct perpetrators and the immaculate functioning of the strictly hierarchically structured apparatus of power, which is at the disposal of the person in the background, is also acceptable in international criminal law, because the Rome Statute also allows for the possibility of indirect perpetration, when the direct perpetrator is a fully responsible person (legal figure of the “perpetrator behind the perpetrator”). The objective position of the person in the background, who at the top of the apparatus of power issues orders, differs essentially from instigation or co-perpetration. As opposed to an instigator, a person who issues orders is, in cases of organised control, spared the effort of searching for, acquiring or overcoming the possible objections of the direct perpetrator, and the substitutability of the direct perpetrator is an indication that in fact his role, compared to that of the person giving orders, is secondary. Of course, it is not secondary in the sense of being considered as aiding, because carrying out the essence of the crime always means control over the action and establishes direct perpetration. If the person in the background controlling the organised apparatus of power were to be considered merely an accomplice (instigator), that would go against the facts, to put it bluntly. Accepting co-perpetration is equally intolerable. The role of the person in the background could be interpreted as an substantial contribution to the commission of the crime in the preparation phase, but the realisation of the objective components of co-perpetration presume joint decision to act, which is

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<sup>550</sup> See ROXIN 2003, 52-53

hard to imagine between persons who are barely mutually aware of each other's existence (the person giving the order knows that someone will carry out the intended act, while the direct perpetrator know he must carry out the act). Indirect perpetration is the most acceptable solution, because the person giving the order is clearly indicated as the central figure in the events. He is not a borderline figure in an act committed by another (principal) perpetrator, neither is he an equal partner (on the same level) with the other (co)-perpetrators.<sup>551</sup> As we have already mentioned, the concept of control over the act appeared in ICTY case law in the Stakić case. The first instance court sentenced him as a co-perpetrator for the crimes of extermination, murder and expulsion, which included murder and deportation. At the time when the crimes were committed, there were three power structures in Prijedor: the civil administration, the civil police force and the army. None of the leaders had complete control and all were aware that their subordinates were carrying out orders and were in a position to prevent crimes from being carried out at any time. Lower-placed individuals in each power structure, as well as the direct perpetrators, were substitutable, so that the people at the top had control over their wills and therefore over the acts committed.<sup>552</sup> The central crime was the campaign of expulsion, which could only be carried out

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<sup>551</sup> Roxin's concept of organised control, with certain modifications, was basically accepted by Ambos (2006, 140-142). The circumstantial lack of specific substitutability of the direct perpetrator does not in principle represent a hindrance to the perpetration of the person in the background, because he, as a rule, exploits the unconditional readiness of the person used as means to commit the crime. It is more correct, instead of beginning specifically with the substitutability of means, to understand the principle of individual responsibility in the normative sense, with control over the act of the person in the background in combination with realistic and normative components, which are intermingled. The power to control events exists where there are the means to fulfil most completely the essence of the crime, but with a person in the background, this arises from his influence within the organisation to which the direct perpetrator belongs. Since the person in the background has the organisation (apparatus of power) in his grasp, he indirectly controls the means. Control of the organisation therefore makes the direct perpetrator substitutable and he is therefore an insignificant figure. The responsibility for individual acts in the organisation increases with distance from the level of direct perpetration; responsibility is greater as the level of command is higher. Indirect perpetration should however only be attributed to accomplices who belong to the higher echelons of the apparatus of power, and those who are lower down the hierarchy, who are only in control of some of the events within the apparatus, should be considered co-perpetrators. Given the practical relevance of the problem of indirect perpetration in international criminal law, Ambos directs towards the autonomy of study of organisational power in relation to traditional dogmatics on the participation of several persons in the commission of a crime. With regard to this, it is worth mentioning the opinion according to which the organised apparatus of power itself is seen as the central figure, whose control over the act can be assessed in the light of its actions in the entire criminal design, and the realisation of the goals of a criminal organisation. Organisational control can be graded. Thus Vest, (*Humanitätsverbrechen*, 113 ZStW (2001), pp. 236 ff.) instead of the traditional division between perpetrator and accomplice, says that perpetrators who plan and organise criminal activity and who belong to the inner circle of the organisation's leadership are on the highest level, while on the second level are those who hold middle-ranking positions in the hierarchy and have control over parts of the organisation, while on the third level, there are the direct perpetrators, who only appear as accomplices in the the entire criminal enterprise. Van der WILT 2006, 12-17, argues for similarly conceived organisational control (functional perpetration) as an alternative to JCE.

<sup>552</sup> Stakić I, §86-101, 469-498

by the joint functioning of all three organised structures of power. Stakić was at the head of the civil administration which controlled logistical and financial support, and he personally co-ordinated co-operation between the individual structures of power.<sup>553</sup> There was a division of the essential functions between the leaders of these structures, without which the expulsion plan could not have been carried out as planned. The direct perpetrators did not belong to the structure controlled by Stakić, so that his responsibility could not be ascertained merely by using the construction of indirect perpetration. On the other hand, the co-perpetration of the leaders of the three structures of power, based on functional control over the act, could not be overlooked, nor the fact of their control over subordinates. Therefore the Trial Chamber decided to apply jointly the concepts of indirect perpetration and co-perpetration. Stakić did not himself commit a single crime, but he was a co-perpetrator behind the direct perpetrators.<sup>554</sup> The example cited shows that the application of the theory of control over the act is possible and justified when higher-ranking persons appear as defendants, who planned, controlled and managed the commission of crimes, although they did not participate actively in their physical execution. This is an important step in ICTY jurisprudence in the direction of eliminating the undesirable influence of the JCE construction.<sup>555</sup> It is to be expected that the example cited will not remain alone in ICTY case law, in which co-perpetration and indirect perpetration are linked with the theory of control over the act.<sup>556</sup> Given the above arguments on co-perpetration and indirect perpetration, we should conclude that the application of the theory of control over the act in the form of functional control over the act and organisational control (which are only possible in intentional crimes) would convincingly redress the failings of ICTY case law so far, in connection with the legal figure of JCE. This is particularly true of the third category of JCE, which significantly broadens responsibility for the excesses of a co-perpetrator, thus bringing into question the principle that each accomplice should be responsible within the scope of his own guilt (joint decisions on the commission of crimes). In terms of functional control over the act, it is important to emphasise that this requires a significant contribution to the commission of the offence for co-perpetration, as opposed to the first two categories of JCE, for which it is not required, while for the third category it is non-existent. The advantage of organised control is that it resolves the question of the responsibility of those highly-placed in the hierarchy, who by means of the apparatus of power control

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<sup>553</sup> Ibid. §482

<sup>554</sup> Ibid. §741 i 818

<sup>555</sup> It is worth pointing out here that the legal figure of JCE in ICTY case law has been formulated in the example of a low-ranking accused, for whom it could not be proven that he had directly participated in the crime. In the Tadić case, there was in fact no basis for a more serious discussion of functional or organisational control of the act.

<sup>556</sup> Judge Schomburg remained constant in his opinions. Thus, for example, in his separate opinion on the judgment of the Appeals Chamber in the Šimić case, he cited legal provisions on co-perpetration contained in the criminal law of several countries (including the former SFRY) and repeated the argument in connection with the application of the theory of control over the act. See also Prosecutor v. Simić, App. Chamber, Judgement, 28. 11. 2006., Dissenting Opinion of Judge Schomburg, §13-23



the commission of crimes carried out by substitutable direct perpetrators, in the most adequate manner. Functional control over the act in co-perpetration and organised control in indirect perpetration clearly define who should be considered the key figures in events which are assessed as the commission of crimes, so the concept of commission in Article 7 (1) of the ICTY Statute should also be interpreted accordingly.

## **CHAPTER SIX**

### **INSTEAD OF A CONCLUSION - TEN THESIS ON JOINT CRIMINAL ENTERPRISE**

- 1) Joint criminal enterprise was not part of international customary law at the time the offences with which the accused are charged were committed.**
- 2) Joint criminal enterprise is contrary to the principle of guilt, which is one of the fundamental principles of contemporary criminal law.**
- 3) Through the dangerous expansion of the elements of guilt (*mens rea expansion*), joint criminal enterprise has come very close to guilt by association which the Statute does not regulate.**
- 4) Drawing a conclusion on the existence of the accused's intention from objective circumstances (inference) in the second and third category of JCE is questionable from the aspect of the principle of presumption of innocence which, *inter alia*, is regulated by Article 21/3 of the Statute.**
- 5) The ICTY's jurisprudence in relation to JCE theory and the provision of the Statute in which this theory is allegedly contained “by implication” is not in unison and is not consistent with the principles of legal certainty and justice.**
- 6) The extensive application of JCE theory to the entire political and military structures of a state and to other “known and unknown” persons does not fulfil the requirement of precise charges and may produce wrong impression of “political influence” on international criminal justice system.**
- 7) Indictments conceived broadly, following JCE theory, which contain a “collective” accusation of not only the person against whom the proceedings are conducted, but of the entire state and military structures, as well as “persons known and unknown”, mean that the very purpose of the foundation and operation of ICTY is threatened.**
- 8) Giving credibility to JCE theory in international criminal adjudication involves the risk that national criminal prosecution bodies will apply it even more extensively and to the greater detriment of protected human rights. Its application undermines the contemporary criminal law building founded on traditional pillars of legal dogmatics.**
- 9) The extensive application of JCE theory will have negative consequences in the process of the affirmation of international criminal law and adjudication.**

**10) In jurisprudence of international criminal tribunals JCE theory should be replaced by other firmly established concepts of individual criminal responsibility, such as co-perpetration and perpetration by means.**

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