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THE INTERNATIONAL CRIMINAL TRIBUNAL
FOR THE FORMER YUGOSLAVIA

CASE No. IT-99-36-A

IN THE APPEALS CHAMBER

Before: Judge Theodor Meron, President

Judge Mohamed Shahabuddeen

Judge Mehmet Guney

Judge Amin El Mahdi

Judge Ines Monica Weinberg de Roca

Registrar: Mr. Hans Holthuis

Date Filed: 5 July 2005

THE PROSECUTOR

v.

RADISLAV BRDJANIN

AMICUS CURIAE BRIEF OF

ASSOCIATION OF DEFENCE COUNSEL--ICTY

The Office of the Prosecutor:

Mr. Mark J. McKeon

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Chrissa Loukas, Acting President

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The Physical Perpetrator Must be a Member of the Joint Criminal Enterprise

Introduction

1. *A group of men, bent on ridding the area of members of a certain ethnic group, enter a village, or neighborhood. They forcibly remove some civilians at gunpoint. They burn houses of other civilians. In the course of their activities, people are killed.*

2. This scene has been played out many times in Bosnia, Croatia, Kosovo, and Rwanda. The responsibility of the men physically committing these crimes is clear. But what of the regional administrator who favored ethnic cleansing but knew nothing of these men? Or the national leader who spoke passionately of a mono-ethnic State? Or the President of a country across the Atlantic who supported one side of the conflict which was known to have engaged in ethnic cleansing?

3. The Association of Defence Counsel--ICTY ("ADC") agrees with the position of the Appellant in his Motion to Dismiss that the Appeals Chamber should not consider matters which are theoretical. Allowing the Prosecution to advance a position opposite to that which it maintained in the Trial Chamber is, in and of itself, unprecedented. The ADC therefore accepts the Appeals Chamber's invitation to file an amicus brief with that qualification.

4. The ADC has viewed with alarm the Appeals Chamber's creation and expansion of the doctrine of joint criminal enterprise ("JCE"). The ADC disagrees with, but accepts as binding precedent, the decision in *Tadic*[1] that JCE was part of customary international law, and the decision in *Ojdanic*[2] that JCE is included in Article 7(1) despite its omission from the language of the Statute.

5. The important issue before the Appeals Chamber in this case concerns the liability of others for the crimes of physical perpetrators. The Trial Chamber's holding that the physical perpetrator must be a member of the JCE was an attempt to set reasonable limits on a broad doctrine susceptible to overreaching and abuse. The ADC contends that those limits are consistent with customary international law, the Appeals Chamber's own precedents, and the object and purpose of international criminal justice.

The Brdjanin Trial Chamber Decisions Were Correct

6. The holding appealed from in this case[3] was as follows:

> "[I]n order to hold the Accused criminally responsible for the crimes charged in the Indictment pursuant to the first category of JCE, the Prosecution must, *inter alia*, establish that between the person physically committing a crime and the Accused, there was an understanding or an agreement to commit that particular crime. In order to hold him responsible pursuant to the third category of JCE, the Prosecution must prove that the Accused entered into an agreement with a person to commit a particular crime (in the present case the crimes of deportation and/or forcible transfer) and that this same person physically committed another crime, which was a natural and foreseeable consequence of the execution of the crime agreed upon."[4]

7. As the Prosecution has conceded, this was consistent with the position it explicitly took at trial.[5]

8. The issue had also arisen in the pre-trial stage of the case during proceedings concerning the amendment of the indictment. At that time, the Trial Chamber held that:

> "…it *is* necessary for the Prosecution to prove that, between the person who personally perpetrated the further crime charged and the person charged with that crime, there was an agreement

(or a common purpose) to commit at least *a* particular crime, so that it can then be determined whether the further crime charged was a natural and foreseeable consequence of executing *that* agreed crime. Without such proof, it cannot be held that the accused was a member of a joint criminal enterprise together with the person who committed the further crime charged."[6]

9. Moreover, the Trial Chamber went on to warn the Prosecution that:

"The real difficulty which the Prosecution faces in identifying the agreed criminal object of the enterprise in which *these* accused were members together with the persons who committed the crimes charged may lie in the extraordinarily wide nature of the case which it seeks to make in the present Prosecution."[7]

"…That very difficulty [the remoteness of the accused to the physical perpetrators] may, of course, indicate that a case based upon a joint criminal enterprise is inappropriate in the circumstances of the present Prosecution."[8]

10. Nevertheless, the Prosecution decided to proceed to trial with its amended indictment. Therefore, in this very case, before, during, and after the trial, six Judges of the Trial Chamber and six trial prosecutors agreed that the physical perpetrator of a crime must be a member of the JCE. An analysis of the jurisprudence of the ICTY, post World War II cases, and national systems demonstrates that they were correct.

Tadic Established that the Physical Perpetrator Must be a Member of the JCE

11. The Appeals Chamber in *Tadic* has stated at least seven times that the physical perpetrator must be a member of the JCE.[9]

- The Appeals Chamber held that the ICTY statute "does not exclude those modes of participating in the commission of crimes 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."[10]

- The Appeals Chamber noted that "{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."[11]

- When giving an example of JCE liability, the Appeals Chamber noted that "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."[12]

- After reviewing the post-World War II jurisprudence, the Appeals Chamber concluded that "the requirements which are established by these authorities are twofold: that of a criminal intention to participate in a common criminal design and the forseeability that criminal acts other than those envisaged in the common criminal design are likely to be committed by other **participants** in the common design."[13]

- When the Appeals Chamber summarized its findings, it found that JCE had been applied in three categories of cases. It described the first category as "where all **participants** in the common design possess the same criminal intent to commit a crime (and one of **them** actually perpetrate the crime)."[14]

- When describing the third category, the Appeals Chamber held that it was appropriate to apply the doctrine only where there was "(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 forseeability of the possible commission **by other members of the group** of offenses that do not constitute the object 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."[15]

- The Appeals Chamber held that for this third category, "responsibility for a crime other than that 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*."[16]

12. In addition to these explicit references, as the Prosecution has recognized,[17] *Tadic* required as an element of JCE that the common plan "**involves** the commission of a crime provided for in the Statute."[18] This implies that the physical perpetrator must be a member of the common plan or JCE.

13. Therefore, the question posed by the Prosecution's appeal in this case has already been answered by the Appeals Chamber in *Tadic*. The physical perpetrator must be a member of the JCE.

Post World War II Precedents do not Support the Prosecution

14. The Appeals Chamber in *Tadic* held that JCE was firmly established in customary international law. In so holding, it scoured the post-World War II jurisprudence and located cases in which it believed the doctrine had been employed. Notably, in all of these cases, the physical perpetrator was a member of the JCE.

15. In finding support for the first category of JCE, where the crime committed was that envisaged by the parties, the *Tadic* decision referred to the *Almelo Trial*,.[19] the *Hoelzer et al* case,[20] *Jepsen and others*,[21] *Schonfeld*,[22] and the *Einsatzgruppen* case.[23] In each case, the physical perpetrators of the killings were members of the JCE.

16. In finding support for the third category of JCE, [24] where the crime committed was different than that envisaged by the parties, the *Tadic* decision relied upon the *Essen Lynching Case*[25] and the *Borkum Island Case.*[26] In those cases, both the physical perpetrators and the accused were members of a mob who assaulted and murdered prisoners of war.

17. As noted in a recent law review article by Professors Danner and Martinez:

"In each one of the cases cited in *Tadic*, all of the defendants were

present or in the immediate vicinity of the murders, and none of the defendants was charged with participation in some larger plan outside of the unlawful treatment of the prisoners involved….What [these cases] do not do is provide any legal basis for the sweeping JCEs, many of which span several years and extend throughout entire regions and even countries, used by contemporary international prosecutors."[27]

18. In its appeal brief, the Prosecution purports to rely upon some famous post-World War II cases such as the Nuremberg trial of the Nazi leaders,[28] the *Justice* case,[29] and the *RuSHA* case.[30] These cases were surely known to the *Tadic* Appeals Chamber.[31] Had these cases involved JCE, they would have undoubtedly been prominently featured in the *Tadic* decision. Instead, their absence evidences a clear choice not to conflate WW II conspiracy jurisprudence with JCE.

19. In the Nuremburg Trial of the Major War Criminals before the International Military Tribunal, the judges declined to make a distinction between perpetrators and accomplices, or principals and aiders and abetters. "Individual responsibility was put under the heading of criminal participation….No distinction in parties to a crime was made, variance in role and degree was expressed in the sentence."[32]

20. The judges "eschewed the most controversial implications of the organizational and conspiracy charges by defining conspiracy narrowly… [and] justified these limitations by stating that they were in accordance with well settled legal principles, one of the most important of which is that criminal guilt is personal and that mass punishment should be avoided."[33]

21. Since there was no need to classify a defendant as "perpetrator" or "accomplice", there was nothing in the Nuremberg judgement that attempted to define the relationship between the physical perpetrators of murders and the accused. Thus it cannot be said that JCE formed the basis for any of the verdicts of the Nuremberg trial.

22. The same holds true for the cases decided under Control Council Law No. 10. The Prosecution has cited the *Justice* case.[34] In that case the judges made it plain that "the record is replete with evidence of specific criminal acts, but they are not the crimes charged in the indictment. They constitute evidence of the intentional participation of the defendants and serve as illustrations of the nature and effect of the greater crimes charged in the indictment."[35]

23. Thus the accused were judged on their personal "participation" and not on their relationships with the physical perpetrators. No distinction between perpetrators and accomplices was even attempted in the *Justice* case.[36] Had the judges in the *Justice* case employed the concept of JCE sought to be applied by the Prosecution at the ICTY there would have been no acquittals of members of the notorious SS.

24. Yet there were several acquittals. Altstoetter himself, a department chief in the Ministry of Justice, was found guilty of being a member of the SS, but not guilty of war crimes or crimes against humanity.[37] Judge Cuhorst, the Chief Judge of the Stuttgart Special Court, was described as a "fanatical Nazi and ruthless judge."[38] He was acquitted when it could not be shown that he had personally discriminated against Poles who were tried in his court.[39] Had Altstoetter and Cuhorst been tried under the ICTY Prosecution's JCE theory, once it was established that they agreed with the overall criminal objectives of Hitler and the SS to discriminate against Jews and Poles, and participated in the Ministry of Justice or Special Courts, they would have been responsible for all foreseeable crimes committed by any persons in furtherance of those objectives.

25. These acquittals reinforce the conclusion that JCE did not form the basis for the verdicts in the *Justice* case.

26. The Prosecution also has cited the *RuSHA case*.[40] This was a Prosecution of leaders of four organizations responsible for racial crimes against foreigners. These crimes included taking their infants away, forcing them to join the German army, and plundering their property. While the organizations cooperated in various aspects of Hitler's program, the officers of one organization, *Lebensborn*, despite being members of the SS, were acquitted because its

organization "did everything within its power to adequately provide for the children…placed in its care."[41]

27. Had the *Lebensborn* defendants been tried under the ICTY Prosecution's JCE theory, once it was established that they agreed with the overall criminal objectives of Hitler and the SS to take away infants from foreigners, they would have been responsible for all foreseeable crimes committed by any persons in furtherance of those objectives, including those in the other three organizations. By restricting their liability to their own acts, the Tribunal demonstrated that it was not applying the concept of JCE in the *RuSHA case*.[42]

28. The Prosecution in this case has read too much into the Appeals Chamber's observation in *Rwamakuba* that defendants in some of the post-World War II cases

were held criminally liable on a basis "equivalent to that of joint criminal enterprise."[43] The Appeals Chamber was merely referring to the fact that persons occupying high positions were convicted without having personally perpetrated the crimes themselves. It did not, and could not, decide that the accused had been convicted of "perpetration" as opposed to "accomplice" liability, since, as it acknowledged, the post World War II Tribunals never made such distinctions.[44]

29. In fact, the Appeals Chamber in *Rwamakuba*, as it had in *Tadic*, used language which answers the very issue in this appeal:

> "[I]t is clear that the post-World War II judgements discussed above find criminal responsibility for genocidal acts that are **physically committed** by other **persons with whom the accused are engaged** in a common criminal purpose."[45]

Domestic Precedents do not Support the Prosecution

30. In addition to looking at post-World War II international cases, the Appeals Chamber in *Tadic* also surveyed the laws and jurisprudence of several domestic jurisdictions where the notion of common purpose "had its underpinning."[46] An examination of those authorities referred to in *Tadic* demonstrates that the physical perpetrator must be a member of the JCE.

31. The Appeals Chamber reviewed several Italian cases decided in the aftermath of World War II.[47] It concluded that "[I]n these cases courts indisputably applied the notion that a person may be held criminally responsible for a crime committed by **another member of a group** and not envisaged in the criminal plan."[48]

32. Similarly, the cases cited by *Tadic* from England and Wales all involved crimes in which the physical perpetrator was a member of the JCE.[49] The rule was stated to be that "where two persons embark on a joint enterprise one party would be liable for an act which he anticipated might be carried out **by the other party** in the course of that joint enterprise even if he had not tacitly agreed to that act."[50]

33. The Canadian statute cited in *Tadic*, Criminal Code section 21 (2) provides for JCE liability where "two or more persons form an intention to carry out an unlawful purpose and to assist each other therein and any one of **them**, in carrying out the common purpose, commits an offence." (emphasis added) The Canadian cases cited in *Tadic* also involved crimes in which the physical perpetrator was a member of the JCE.[51]

34. The Appeals Chamber in *Tadic* cited the United States Supreme Court's *Pinkerton* decision.[52] That decision has uniformly been interpreted to require that the physical perpetrator be a member of the conspiracy.[53] The two State cases cited in *Tadic* also involved instances where the physical perpetrator was a member of the JCE.[54]

35. The Australian case cited in *Tadic* likewise held that:

> "If one or the other **of the parties** to the understanding
>
> or arrangement does, or they do between them, in accordance

> with the continuing understanding or arrangement, all those things which are necessary to constitute the crime, they are all equally guilty of the crime regardless of the part played by each in its commission."[55]

36. An important policy rationale in cases from national jurisdictions employing the JCE concept, and some of the cognate concepts such as felony murder, was to encourage criminals to choose their accomplices wisely. In other words, those who conspire with others to perpetrate crimes should make sure they can trust their colleagues to stay within the parameters of the agreement, lest they be found guilty for acts that were not planned but that might be objectively foreseeable.[56] This purpose would be defeated if one is held liable for 'accomplices' that one did not choose.

37. Another important underpinning of the third category of JCE, predictability, would likewise be undermined by making persons liable for the acts of persons outside of the JCE.[57]

38. Therefore, the Prosecution's position that the physical perpetrator need not be a member of the JCE is not supported by the domestic underpinnings of the JCE doctrine.

ICTY Precedents Since *Tadic* do not Support the Prosecution

39. The Prosecution claims that in the facts of specific cases decided at the Tribunal, there is no consistent requirement that the physical perpetrator be a member of the JCE.[58] This ignores the express language of *Tadic* quoted above.[59] In fact, in every case decided at the ICTY, the physical perpetrator **was** a member of the JCE.

40. In *Tadic*, the physical perpetrator was one or more of Tadic's companions in the village of Jakici.[60] In *Furundzija*, the physical perpetrator was Furundzija's partner in the interrogation of the witness.[61] In *Krstic*, the physical perpetrators were the soldiers in the Drina Corps which General Krstic commanded,[62] and in *Blagojevic* the officers of the Army and

members of the military police.[63] In *Vasilijevic*, the physical perpetrators were the accused's companions in the shooting of seven men on the banks of the Drina River.[64] In *Simic*, the physical perpetrators were the police, paramilitaries, and 17th Tactical Group of the Army—all of whom were included as members of the JCE.[65]

41. The rule sought by the Prosecution in this case—that the physical perpetrator need not be a member of the JCE—would thus be a complete departure from the jurisprudence of this Tribunal.

"Perpetration by Means" is Inapplicable

42. As an example of a situation in which the physical perpetrator of a crime may not necessarily be a member of the JCE, the Prosecution has referred to the situation where the physical perpetrator has been used as a tool or instrument by another to commit the crime.[66] This situation has come to be known as "perpetration by means."[67]

43. It is true that a person who uses another human as his tool or instrument incurs liability as if he were the physical perpetrator.[68] In common law systems, this has been known as the "innocent agent" doctrine.[69] Some civil law systems, such as Germany, extend this doctrine to physical perpetrators who are not innocent, in that they also have the requisite *mens rea* and capacity to commit the crime.[70] This has become known as liability for being the "perpetrator behind the perpetrator." However, this doctrine requires that the person "behind" completely dominate the person carrying out the physical act.[71]

44. The statute of the International Criminal Court incorporates both of these principles by providing in Article 25(3)(a) for liability of a person who "commits such a crime, whether as an individual, jointly, with another or through another person, regardless of whether that other person is criminally responsible."

45. In his commentary on the statute, Professor Kai Ambos confirms that "perpetration by means' goes beyond the common law "innocent agent" doctrine and also provides responsibility for physical acts committed by persons with the necessary *mens rea*. He notes an important limitation:

> "However, attribution in these cases may go too far if the indirect perpetrator cannot dominate the direct perpetrator sufficiently so as to justify attributing to him the latter's conduct as if it were his own. Generally speaking, perpetration by means requires a sufficiently tight control by the *Hintermann* over the direct perpetrator, similar to the relationship between superior and subordinate in the case of command responsibility."[72]

46. This doctrine of "perpetration by means" is neither an exception to the rule that the physical perpetrator must be a member of the JCE, nor a justification for jettisoning that rule. In a case of "perpetration by means", the manipulator *becomes* the physical perpetrator, using a human as his tool or instrument. Therefore, the rule that a physical perpetrator (in this situation, the manipulator) must be a member of the JCE still applies. On the facts of our case, where the physical perpetrators were numerous and not under the domination of one person, the doctrine of "perpetration by means" is simply inapplicable. [73]

The "Object and Purpose of International Criminal Law" is to do Justice

47. The Prosecution's fall-back position appears to be that the Appeals Chamber should dispense with the requirement that the physical perpetrator be a member of the JCE because it interferes with its ability to label high-ranking accused as "perpetrators".[74]

48. This conceptual difficulty arises from an untidy intersection of civil and common law employed at this Tribunal. While civil law jurisdictions find the distinction between perpetrators and accomplices of great significance, common law jurisdictions generally ignore it. The desire to affix a label cannot serve as a justification for further dilution of the "basic assumption" stated in *Tadic* that "the foundation of criminal responsibility is the principle of personal culpability: nobody may be held criminally responsible for acts or transactions in which he has not personally engaged or in some other way participated."[75]

49. The JCE doctrine at the ICTY has been said to "in practice, strayed too far from the focus on individual culpability that distinguishes the criminal law paradigm."[76] Professors Danner & Martinez warned:

> "In the development of the joint criminal enterprise doctrine, concern for symbolic vindication of violations of victims' human rights have proven a more potent influence than worries over potential violations of defendants' rights…We are concerned that this expansive orientation dispenses too quickly with the protections of the criminal law that seeks to ensure that an individual is convicted for his own, deliberate wrongdoing."[77]

50. JCE has been described as the "magic bullet" of the Office of the Prosecutor[78] and the "nuclear bomb" of the prosecutor's arsenal.[79] In this appeal, the Prosecution is seeking to dismantle one further protection of the individual culpability regime by eliminating the requirement that the physical perpetrator be a member of the JCE.

51. The Appeals Chamber is strongly urged to resist this short-sighted approach. Professors Danner and Martinez suggest that "as currently formulated, the doctrine [of joint criminal enterprise] has the potential to stretch criminal liability to a point where the legitimacy of international criminal law will be threatened…"[80] Professor Schabas warns that relaxing of such requirements will result in "discounted convictions that inevitably diminish the didactic significance of the Tribunal's judgements and that compromise its historical legacy."[81]

52. The expansion of JCE liability beyond those crimes committed by members of the enterprise will also undermine the Tribunal's objective of promoting reconciliation. Adherence to a close connection between the crime and the individual held responsible for it "makes clear that the horrific crimes witnessed by our century were not collectively committed by 'the Serbs', 'the Germans', 'the Croats', or 'the Hutus', but by criminal individuals."[82] The United Nations Secretary General has said:

> "If responsibility for the appalling crimes perpetrated in the former Yugoslavia is not attributed to individuals, then whole ethnic and religious groups will be held accountable for these crimes and branded as criminal. In other words, "collective responsibility"—a primitive and archaic concept—will gain the upper hand: eventually whole groups will be held guilty of massacres, torture, rape, ethnic cleansing, the wanton destruction of cities and villages. The history of the region clearly shows that clinging to feelings of collective responsibility easily degenerates into resentment, hatred and frustration and inevitably leads to further violence and new crimes."[83]

Conclusion

53. The requirement that the physical perpetrator be a member of the JCE is well-established in international and domestic jurisprudence. It serves as a protection against misuse of the JCE doctrine. The Trial Chamber wisely "chose a restrictive approach to a potentially wide-ranging form of criminal liability."[84] Other Trial Chambers and Judges have expressed similar discomfort with a broad application of the JCE doctrine.[85]

54. Simply put, the requirement that the physical perpetrator be a member of the JCE is consistent with the object and purpose of international criminal justice and should be maintained.[86] Accordingly, the Appeals Chamber should reject any attempts by the Prosecution to broaden the scope and limits of the JCE doctrine.

Respectfully submitted,

CHRISSA LOUKAS

Acting President

Association of Defence Counsel[87]

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[1] *Prosecutor v Tadic*, No. IT-94-1-A, *Judgement* (15 July 1999)

[2] *Prosecutor v Milutinovic et al*, No. IT-99-37-AR72, *Decision on Dragoljub Ojdanic's Motion Challenging Jurisdiction—Joint Criminal Enterprise* (21 May 2003)

[3] Prosecution's Brief at para. 3.1

[4] *Prosecutor v Brdjanin*, No. IT-99-36-T, *Judgement* (1 September 2004) at para. 344 (hereinafter "Trial Chamber Judgement") The Trial Chamber was comprised of Judges Agius, Janu, and Taya.

[5] It answered the Trial Chamber's question: "In order to establish responsibility of the first category of JCE, is it necessary to show that the physical perpetrators of the crimes for which the accused is held responsible entered into an agreement with the accused…?" by responding, "Yes. It is necessary to show that there was an understanding or arrangement amounting to an agreement between two or more persons that they will commit a crime." *Prosecution's Final Trial Brief* (17 August 2004) Appendix A, question 1, page 1, para. 2. The Trial Chamber Judgement reflects that the Prosecution was represented by attorneys Joanna Korner, Anna Richterova, Ann Sutherland, and Julian Nicholls.

[6] *Prosecutor v Brdjanin*, No. IT-98-36-PT, *Decision on Form of Further Amended Indictment and Prosecution Application to Amend* (26 June 2001) at para. 44. The Trial Chamber was comprised of Judges Hunt, Mumba, and Liu.

[7] *Id*, at para. 44

[8] *Id*, at para. 45. The Decision indicates that in addition to the prosecutors named in the Trial Chamber's Judgement, Andrew Cayley and Nicolas Koumjian represented the Prosecution.

[9] No. IT-94-1-A, *Judgement* (15 July 1999)

[10] para. 190 (emphasis added)

[11] para. 191 (emphasis added)

[12] para 204 (emphasis added)

[13] para. 206 (emphasis added)

[14] para 220 (emphasis added)

[15] para. 220 (emphasis added)

[16] para. 228 (emphasis added)

[17] Prosecution's Brief at para 3.40

[18] *Tadic* at para. 227 (emphasis added)

[19] *Trial of Otto Sandrock and three others*, Law Reports of Trials of War Criminals, United Nations War Crimes Commission, volume I, page 35 as discussed in *Tadic* at para. 197 and fn 234 (three German officers convicted of murdering a British prisoner of war though only one had fired the fatal shot.)

[20] *Hoelzer et al*, Canadian Military Court, Aurich, Germany, Record of Proceedings 25 March-6 April 1946, vol I, pp 341,347,349 (RCAF Binder 181.009 (D2474) as discussed in *Tadic* at para. 197 (three Germans had taken a Canadian prisoner of war to an area where one of them killed him)

[21] *Trial of Gustav Alfred Jepsen and others, Proceedings of a War Crimes Trial held at Luneberg, Germany* (13-23 August 1946) judgement of 24 August 1946 (men who had participated in the killing of 80 concentration camp internees who were in transit to another camp)

[22] *Trial of Franz Schoenfeld and others,* Law Reports of Trials of War Criminals, United Nations War Crimes Commission, volume XI, page 68 as discussed in *Tadic* at para. 198. (the Judge Advocate said that all of those present at a killing were guilty of murder "provided that the death was caused by a **member** of the party in the course of his endeavors to effect the common object of the assembly.")

[23] *United States v Ohlenforf et al*, Trials of War Criminals before the Nuremberg Military Tribunals under Control Council Law No. 10, volume IV, page 3, as discussed in *Tadic* at para. 200 and fn. 245 (a Prosecution of leaders and members of the *Einsatz* units "whose express mission…was to carry out a large scale program of murder")

[24] The second category of JCE—the "concentration camp"/systemic form—was not at issue in the Brdjanin case and, hence, is not within the scope of this brief. *Brdjanin Trial Judgement* at para. 259. Because the "systemic" form is limited to a structured "system", there may be reasons for applying different rules to this form of JCE. See,

i.e. *Prosecutor v Krnojelac*, No. 97-25-A, *Judgement* (17 September 2003) at para. 97; Danner & Martinez, *Guilty Associations: Joint Criminal Enterprise, Command Responsibility and the Development of International Criminal Law,* 93 California Law Review 75, 135 (January 2005)(hereinafter "Danner & Martinez").

[25] *Trial of Eric Heyer and others,* Law Reports of Trials of War Criminals, United Nations War Crimes Commission, volume I, page 88 as discussed in *Tadic* at paras. 207-09 and fns. 259-60

[26] Discussed in *Tadic* at paras. 210-13

[27] Danner & Martinez at p.111-12

[28] Prosecution Brief at paras. 3.17-18

[29] Prosecution Brief at paras. 3.19-21

[30] Prosecution Brief at fn. 40

[31] In fact, the Justice case was cited at footnote 328 in *Tadic*.

[32] van Sliedregt, *The Criminal Responsibility of Individuals for Violations of International Humanitarian Law*, TMC Asser Press, The Hague (2003) at pages 27,31.

[33] Danner & Martinez at p.120, quoting from Trial of the Major War Criminals before the International Criminal Tribunal, vol I, page 256 (1947).

[34] *United States v Altstoetter et al*, Trials of War Criminals before the Nuremburg Military Tribunals under Control Council Law No. 10, vol III, page 956 (1950).

[35] page 985

[36] "The foregoing documents and facts show without dispute that several of the defendants participated to one degree or another either as a principal, or ordered, or abetted, took a consenting part in, or were connected with the execution or carrying out of the Hitler ['Night and Fog'] scheme or plan." (page 1056); "the person who persuades another to commit murder, the person who furnishes the lethal weapon for the purpose of its commission and the person who pulls the trigger are all principals or accessories to the crime." (page 1063)

[37] page 1171

[38] page 1158

[39] page 1158

[40] *United States v Ulrich Greifelt et al*, Trials of War Criminals before the Nuremburg Military Tribunals under Control Council Law No. 10, vol V, page 88 (1950)

[41] page 163

[42] See also the acquittals of Brueckner (director of repatriation office who drafted order that was never carried out) Trials of War Criminals before the Nuremburg Military Tribunals under Control Council Law No. 10, vol V, page 147; Meyer-Hetling (chief of planning in Staff Main office not personally connected with crimes) at page 156; Schwerzenberger (chief of finance for Staff Main office) at page 157

[43] *Prosecutor v Rwamakuba,* No. ICTR-98-44-AR72.4, *Decision on Interlocutory Appeal Regarding Application of Joint Criminal Enterprise to the Crime of Genocide* (22 October 2004) at para. 15

[44] *Rwamakuba*, at para. 24. The *Justice Case* was decided by judges from the United States, where the form of liability is irrelevant to the verdict. Title 18, United States Code, section 2: "Whoever commits an offense against the United States, or aids, abets, counsels, commands, induces or procures its commission is punishable as a principal."

[45] *Rwamakuba* at para. 24 (emphasis added)

[46] para. 225

[47] These included the *D'Ottavio* case, in which a prisoner of war had been shot by a group of armed civilians, the *Aratano* case where a partisan had been killed by a member of a group of government militia, and cases involving "mopping up" operations by groups of soldiers in which partisans had been killed.

[48] *Tadic*, at para. 218 (emphasis added)

[49] *R v Hyde* [1991] 1 QB 134 (three men attacked a victim outside a pub); *R v Anderson & Morris* [1966] 2 QB 110 (two men assaulted a victim); *Hui Chi-Ming v R* [1991] 3 All ER 897 (five men assaulted a victim); referred to in *Tadic* at fn. 287

[50] *Anderson & Morris, supra*. (emphasis added)

[51] *R v Logan* [1990] 2 SCR 731 (three men robbed a convenience store, one shot the clerk); *R. v Rodney* [1990] 2 S.C.R. 687 (three men kidnapped the wife of a supermarket manager who was later killed by one) referred to in *Tadic* at fn. 288

[52] *Pinkerton v United States*, 328 U.S. 640, 66 S.Ct. 1180, 90 L.Ed 1489 (1946) referred to in *Tadic* at fn 289

[53] *United States v Jensen*, 41 F.3d 946, 955-56 (5th Cir. 1994); *United States v Gonzales*, 121 F.3d 928 (11th Cir. 1997); *United States v Cherry*, 217 F.3d 811,817

(10th Cir. 2000): "We have described *Pinkerton's* liability as follows: 'During the existence of a conspiracy, each member of the conspiracy is legally responsible for the crimes of **fellow coconspirators**." (emphasis added) See also 32 Code of Federal Regulations 11.6(c)(6)(i) (2003) where regulations for United States Military Commissions trying "enemy combatants" include a requirement that the act be committed by "one of the coconspirators or enterprise members."

[54] *State v Walton*, 227 Conn. 32, 630 A.2d 990 (1993)(group of people selling drugs out of a house); *State v Diaz*, 237 Conn. 518, 679 A.2d 902 (1996) (five people shot at 2 cars, killing one person). In language appropriate to our case, *Diaz* warned against holding a person responsible for acts that were too attenuated, saying that "in such a case, a *Pinkerton* charge would not be appropriate".

[55] *McAuliffe v R.*, 183 CLR 108,114 (1995)(emphasis added). See also section 66(2) of the New Zealand Crimes Act which provides that: "Where two or more persons form a common intention to prosecute any unlawful purpose, and to assist each other therein, each of them is a party to every offence committed by any **one of them** in the Prosecution of the common purpose if the commission of that offence was known to be a probable consequence of the Prosecution of the common purpose." (emphasis added)

[56] *R v Logan* [1990] 2 SCR 731, 746 (Supreme Court of Canada)

[57] *Tadic* at para. 204; *Prosecutor v Blaskic*, No. IT-95-14-A, *Judgement* (29 July 2004) at paras. 38,41

[58] Prosecution Brief at para. 3.27

[59] see para. 9

[60] *Prosecutor v Tadic*, No. IT-94-1-A, *Judgement* (15 July 1999) at para. 233

[61] *Prosecutor v Furundzija*, No. IT-95-17/1-A (21 July 2000) at para. 115

[62] *Prosecutor v Krstic*, No. IT-98-33-T, *Judgement* (2 August 2001) at para. 610, listing the Drina Corps as members of the JCE

[63] *Prosecutor v Blagojevic & Jokic*, No. IT-02-60-T, *Judgement* (17 January 2005) at para. 709

[64] *Prosecutor v Vasilijevic*, No. IT-98-32-T, *Judgement* (29 November 2002) at para. 210: "if the agreed crime is committed **by one or other of the participants** in a joint criminal enterprise such as has already been discussed, all of the participants in that enterprise are equally guilty of the crime regardless of the part played by each in its commission." (emphasis added)

[65] *Prosecutor v Simic et al*, No. 95-9-T, *Judgement* (17 October 2003) at para. 984

[66] Prosecution's Brief at para. 3.47

[67] van Sliedregt, The Criminal Responsibility of Individuals for Violations of International Humanitarian Law, TMC Asser Press, The Hague (2003) at p. 71

[68] Gillies, *The Law of Criminal Complicity*, Law Book Co. Ltd. (Sydney 1980) at pp. 138-39; Kadish, *Complicity, Cause and Blame: A Study in the Interpretation of Doctrine*, 73 California Law Review 323 (1985)

[69] Model Penal Code sec. 2.06(2)(a)

[70] However, these jurisdictions do not have "extended" joint enterprise liability. They limit responsibility to only those crimes which were actually intended. *Tadic* at para. 224

[71] van Sleidregt, The Criminal Responsibility of Individuals for Violations of International Humanitarian Law, TMC Asser Press, The Hague (2003) at p. 70

[72] Professor Kai Ambos in Triffterer, *Commentary on the Rome Statute of the International Criminal Court*, Nomos Verlagsgesellschaft (Baden Baden 1999) at pp. 479-80

[73] In any event, the doctrine of perpetration by means did not exist in customary international law at the time of the offenses perpetrated in our case and, pursuant to the doctrine of *nullem crimen sine lege,* could not be applied to him or other accused at the ICTY whose alleged crimes predated the coming into force of the Rome Statute.

[74] Prosecution's brief at para. 3.34. It is not contended that the rule interferes with the Prosecution's ability to convict an accused. Indeed, Brdjanin was convicted and given a severe sentence.

[75] *Tadic* at para. 186

[76] Danner, *Joint Criminal Enterprise and Contemporary International Criminal Law,* Proceedings of the American Society of International Law (2004) at p. 188

[77] Danner & Martinez at p. 146

[78] Schabas, *Mens Rea and the International Tribunal for the former Yugoslavia*, 37 New England Law Review 1015, 1032 (2003)

[79] Danner & Martinez at p. 137

[80] Danner & Martinez at p. 132

[81] Schabas, *Mens Rea and the International Tribunal for the former Yugoslavia*, 37 New England Law Review 1015, 1033 (2003)

[82] Sassoli & Olson, *The Judgement of the ICTY Appeals Chamber on the Merits in the Tadic Case*, 82 INT'L REV RED CROSS 733 (2000) at p. 769

[83] *Report of the International Tribunal for the Prosecution of Persons Responsible for Serious Violations of International Humanitarian Law Committed in the Territory of the former Yugoslavia since 1991*, UN GAOR/SCOR, 49th Sess, UN Doc A/49/342/S/1994/1007, para. 16 (1994)

[84] Blumenstock, *The Judgement of the International Criminal Tribunal for the Former Yugoslavia in the Brdjanin Case*, 18 Leiden Journal of International Law (2005) at 72

[85] *Prosecutor v Stakic*, No. IT-97-24-T, *Judgement* (31 July 2003) at para. 441 (use of joint criminal enterprise doctrine declined to "avoid the misleading impression that a new crime not forseen in the Statute of this Tribunal has been introduced through the backdoor."); *Prosecutor v Simic et al*, No. IT-95-9-T, *Separate and Partially Dissenting Opinion of Judge Per-Johan Lindholm* (17 October 2003) at para. 2: ("I disassociate myself from the concept or doctrine of joint criminal enterprise in this case as well as generally.")

[86] Were the Appeals Chamber to change the rule and not require that the physical perpetrator be a member of the JCE, such a new rule could not be applied retroactively to Brdjanin or any of our clients pursuant to the principle of *nullem crimen sine lege*.

[87] The filing of this brief has been approved by the ADC Executive Committee, but was not put to a vote of all the members. The positions taken herein should not be considered binding on any individual member of the ADC or their client.