

**Joint Criminal Enterprise in the Jurisprudence
of the International Criminal Tribunal for the
Former Yugoslavia and the Prosecution of
Senior Political and Military Leaders:
The *Krajišnik* Case**

*Giulia Bigi**

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I. Introduction

The Joint Criminal Enterprise (JCE) doctrine as a mode of personal criminal liability¹ has emerged in the jurisprudence of the International Criminal Tribunal for the Former Yugoslavia (ICTY) since the *Tadić* Appeal Judgement in 1999² and has been subsequently relied upon also by other international criminal courts and tribunals.³ Since then, there

¹ See, generally, C. Barthe, *Joint Criminal Enterprise (JCE) – Ein (originär) völkerstrafrechtliches Haftungsmodell mit Zukunft?*, 2009; A. Cassese, *International Criminal Law*, 2008, 2nd edition, 187 et seq.; V. Haan, *Joint Criminal Enterprise – Die Entwicklung einer mittäterschaftlichen Zurechnungsfigur im Völkerstrafrecht*, 2008; H. Olásolo, *The Criminal Responsibility of Senior Political and Military Leaders as Principals to International Crimes*, 2009; A. O'Shea, "Individual Criminal Responsibility", in: R. Wolfrum (ed.), *The Max Planck Encyclopedia of Public International Law*; A. Zahar/ G. Sluiter, *International Criminal Law. A Critical Introduction*, 2008, 221et seq.

² ICTY, *Prosecutor v. Dusko Tadić*, IT-94-1-A, Appeals Chamber, Judgement, 15 July 1999. The *Tadić* Appeal Judgement did in fact use the wording "common purpose" and not "joint criminal enterprise". As to the variety of terms used to indicate the theory under consideration see V. Haan, "The Development of the Concept of Joint Criminal Enterprise at the International Criminal Tribunal for the Former Yugoslavia", *International Criminal Law Review* 5 (2005), 167 et seq. (170).

³ Based on article 6 of their respective Statutes, the International Criminal Tribunal for Rwanda and the Special Court for Sierra Leone have incorporated the JCE doctrine into their jurisprudence. On this particular issue see A.M. Danner/ J.S. Martinez, "Guilty Associations: Joint Criminal Enterprise, Command Responsibility and the Development of International Criminal Law", *Cal. L. Rev.* 93 (2005), 75 et seq. (154 et seq.). The doctrine has been relied upon also by the Extraordinary Chambers in the Courts of Cambodia (ECCC). In this regard, see ECCC, in the Matter of the Co-

have been many occasions for the ICTY to pronounce on JCE, which can now be considered as a consolidated concept of international criminal law, capable of providing a legal framework to inculcate perpetrators of mass crimes whose particular structure and magnitude are a direct consequence of their international nature. In fact, international crimes such as war crimes, crimes against humanity and genocide are mainly committed against a large group of victims and are often extended across wide geographical areas.⁴ One basic characteristic of those crimes (which distinguishes them from the domestic criminal offences) is that behind their commission there is usually a collective plan or policy implemented by individuals acting at different levels and in different capacities, each of them giving different contributions to the achievement of the final goal. The person concretely committing the crime can often be regarded as a mere participant in a broader criminal venture planned and organised by senior political or military leaders. Under these circumstances, the exclusion or the underestimation of the latter's criminal liability would disregard their crucial role in the commission of the offence as well as the "moral gravity" of their behaviours.

The Yugoslav Tribunal relies on JCE as the best theory to address the issues deriving from, on the one hand, the general main features of many international crimes and, on the other, the evident inadequacy of the modes of criminal liability expressly envisaged in the ICTY Statute to cover the various intensities of culpability of the participants in a common criminal purpose. Thus, since *Tadić*, the ICTY has been satis-

Prosecutors' Appeal of the Closing Order against Kaing Guek Eav "Duch", 001/18-07-2007-ECCC/OCIJ (PTC 02), Pre-Trial Chamber, *Amicus Curiae Brief Submitted by the Centre for Human Rights and Legal Pluralism, McGill University, Montreal (Québec) Canada*, 8 August 2008; in the same case, *Amicus Curiae Brief the Matter of the Co-Prosecutors' Appeal of the Closing Order against Kaing Guek Eav "Duch"* submitted by Professor Kai Ambos, 8 August 2008; *Amicus Curiae Brief of Professor Antonio Cassese and Members of the Journal of International Criminal Justice on Joint Criminal Enterprise Doctrine*, 27 October 2008, regarding the question whether JCE can be applied by the International Criminal Court, see below.

⁴ A. Nollkaemper, "Introduction", in: A. Nollkaemper/ H. van der Wilt (eds), *System Criminality in International Law*, 2009, 1 et seq., where "system criminality" is defined as "a situation where collective entities order or encourage international crimes to be committed, or permit or tolerate the committing of international crimes", (16).

fied that in cases of collective criminality every member of the joint endeavour may be held equally responsible as a co-perpetrator, even if materially and causally remote from the actual commission of the crimes. In its subsequent jurisprudence, the Tribunal has mainly used the JCE notion to frame the criminal responsibility of political and military individuals who had contributed to the perpetration of the criminal offences in a wider context.

In this regard, the recent *Krajišnik* Trial and Appeal Judgements confirm some of the rulings already delivered in previous “leadership” pronouncements and introduce a new key concept for the application of the doctrine under consideration. Being the first Judgements delivered by the ICTY in a “large leadership case” basing on JCE, their relevance for the analysis of its application to high-ranking political and military leaders becomes evident. In fact, the importance of the common purpose doctrine to these situations has been highlighted by the Trial Chamber itself, which described it as the “most appropriate” mode of liability due to the very nature of the case.

II. The Origins of JCE in the ICTY Jurisprudence

In the *Delalić* Trial Judgement, the ICTY explicitly referred for the first time to the so-called “‘common-purpose’ doctrine”, meaning the knowing “participation in a criminal venture with others”, as a mode of individual criminal liability. The Chamber seemed, however, not to clearly distinguish this theory from other forms of individual liability such as “aiding and abetting”.⁵ An unambiguous and definite statement in this regard was made by another Trial Chamber some weeks later in the *Furundžija* case, where it was expressly stated that “two separate categories of liability for criminal participation appear to have crystallized in international law – co-perpetrators who participate in a joint criminal enterprise, on the one hand, and aiders and abettors, on the other.”⁶

⁵ ICTY, *Prosecutor v. Zejnil Delalić, Zdravko Mucić, Hazim Delić, Esad Landžo*, IT-96-21-T, Trial Chamber, Judgement, 16 November 1998, para. 322. See also the findings of the Appeals Judgement (ICTY, *Prosecutor v. Zejnil Delalić, Zdravko Mucić, Hazim Delić, Esad Landžo*, IT-96-21-A, Appeals Chamber, Judgement, 20 February 2001), paras 345 et seq.

⁶ ICTY, *Prosecutor v. Anto Furundžija*, IT-95-17-T, Trial Chamber, Judgement, 10 December 1998, para. 216.

As already mentioned, JCE has been subsequently spelled out in detail in the *Tadić* Appeal Judgement of 1999.⁷ The issue had been raised by the Prosecutor, who – in his second ground of cross-appeal – had maintained that the appellant could be held criminally liable for the killing of five men by the armed group which he himself belonged to, even though there was no evidence that he had personally perpetrated any of the crimes charged. The Appeals Chamber approached the Prosecution’s submission by firstly underlying that both in national legal systems as well as at the international level “the foundation of criminal responsibility is the principle of personal culpability”, which requires that nobody may be accountable for criminal offences in which he has not personally engaged or participated. The concept of *nulla poena sine culpa* was considered to be provided for in article 7 (1) of the ICTY Statute, which stipulates that,

“A person who planned, instigated, ordered, committed or otherwise aided and abetted in the planning, preparation or execution of a crime referred to in Articles 2 to 5 of the present Statute, shall be *individually responsible* for the crime.” (emphasis added)

By interpreting the provision in the light of the Statute’s object and purpose, the Appeals Chamber affirmed that the Tribunal’s jurisdiction was meant to extend over *all* those persons responsible for serious violations of international humanitarian law: namely, not only over those who materially perform the crimes, but also over those who contribute to their commission by a group or by some members of the group in execution of a common criminal purpose. This conclusion was supported by the express wording of the Report of the Secretary-General on the establishment of the ICTY, which states that “*all* persons who *participate* in the planning, preparation or execution of serious violations of international humanitarian law in the former Yugoslavia are individually responsible for such violations.”⁸ (emphasis added)

In the light of these considerations, the compatibility between the notion of individual culpability enshrined in the Statute and that of common purpose suggested by the Prosecution was then examined under the following main aspects,

“(i) whether the acts of one person can give rise to the criminal culpability of another where both participate in the execution of a

⁷ *Tadić* Appeal Judgement, see note 2, paras 172 et seq.

⁸ *Report of the Secretary-General Pursuant to Paragraph 2 of Security Council Resolution 808 (1993)*, Doc. S/725704 of 3 May 1993, paras 54 et seq.

common criminal plan; and (ii) what degree of *mens rea* is required in such a case.”⁹

The meaning and content of both elements was derived by the Appeals Chamber from general international law. Despite the fact that the Tribunal’s Statute does not make any explicit reference to JCE, it was held that the notion of collective criminality under consideration is “firmly established in customary international law”¹⁰ and that it is implicitly upheld in the ICTY Statute. According to the Appeals Chamber, a detailed perusal of the World War II case-law showed that the JCE had been applied in three distinct situations and that it may be divided into three different categories: basic, systematic and extended.¹¹ With regard to the *actus reus*, the Appeals Chamber stated that all forms of JCE share the same material elements, namely a plurality of persons participating in the criminal plan, the existence of a common purpose which amounts to or involves the commission of a crime, and, finally, the accused’s participation in the common design.¹²

The basic form of JCE concerns cases where “all participants to the criminal enterprise possess the same criminal intention to commit a crime (and one or more of them actually perpetrate the crime, with intent).” Voluntary participation in the criminal plan is also required. The second category of JCE, which was defined as a “variant” of the basic form, differs from the latter in that it refers to the so-called “concentration-camps”, namely cases where the crimes are committed due to the existence of an organised system of ill-treatment. As to the requisite *mens rea*, the Prosecution shall prove the accused knowledge of the criminal concerted system, his awareness of its nature and his voluntary and active participation in its enforcement.¹³ Extended JCE¹⁴ comprises

⁹ *Tadić* Appeal Judgement, see note 2, para. 185.

¹⁰ For an in-depth critic of the asserted customary nature of the JCE doctrine, see M.E. Badar, “Just Convict Everyone! – Joint Perpetration: From *Tadić* to *Stakić* and Back Again”, *International Criminal Law Review* 6 (2006), 293 et seq.; J.D. Ohlin, “Three Conceptual Problems with the Doctrine of Joint Criminal Enterprise”, *Journal of International Criminal Justice* 5 (2007), 69 et seq.; Zahar/ Sluiter, see note 1, 223 et seq. Doubts have also been raised by ICTY judges, such as in *Prosecutor v. Milan Martić*, IT-95-11-A, Appeals Chamber, Judgement, 8 October 2008, Separate Opinion of Judge Schomburg on the Individual Criminal Responsibility of Milan Martić.

¹¹ *Tadić* Appeal Judgement, see note 2, para. 220.

¹² *Ibid.*, para. 227.

¹³ *Ibid.*, para. 202.

cases involving the commission of an act which, even if falling outside the common plan or purpose, was nevertheless a natural and foreseeable consequence of the execution of the criminal design itself. The individual responsibility of the participants in the common purpose for the commission of the crimes which were not agreed upon arises only if it is established that “(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*.”¹⁵ (emphasis in the original)

In the light of these considerations, and especially of the acknowledged customary nature of JCE, the Appeals Chamber concluded for the theory’s compatibility with the principle of individual criminal culpability. It was then determined that responsibility under that doctrine falls under article 7 (1) of the ICTY Statute and in particular within the scope of “committing” a crime;¹⁶ the immediate consequence of this finding is that all participants in the JCE may be regarded as co-perpetrators of the criminal act(s) performed by the actual perpetrator and bear the same individual liability.¹⁷

¹⁴ L. Engvall, “The Future of Extended Joint Criminal Enterprise – Will the ICTY’s Innovation Meet the Standards of ICC?”, *Nord. J. Int’l L.* 76 (2007), 241 et seq.; H. Olásolo, “Joint Criminal Enterprise and its Extended Form: A Theory of Co-Perpetration Giving Rise to Principal Liability, a Notion of Accessorial Liability, or a Form of Partnership in Crime?”, *Criminal Law Forum* 20 (2009), 263 et seq.

¹⁵ *Tadić* Appeal Judgement, see note 2, para. 228.

¹⁶ *Ibid.*, para. 190: “[T]he Statute does not confine itself to providing for jurisdiction over those persons who plan, instigate, order, physically perpetrate a crime or otherwise aid and abet in its planning, preparation or execution. The Statute does not stop there. It 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. Whoever contributes to the commission of crimes by the group of persons or some members of the group, in execution of a common criminal purpose, may be held to be criminally liable, subject to certain conditions.” See also ICTY, *Prosecutor v. Milomir Stakić*, IT-97-24-T, Trial Chamber, Judgement, 31 July 2003, para. 438.

¹⁷ Pursuant to article 24 (2) of the Statute, “[I]n imposing the sentences, the Trial Chambers should take into account such factors as the gravity of the offence and the individual circumstances of the convicted person.” Thus, the varying degrees of culpability, mainly dependant on the different role played by each member in the implementation of the criminal plan, may be taken into account for the purposes of sentencing and result in the imposi-

The Appeals Chamber further stressed that JCE must be clearly distinguished from aiding and abetting, due to some general differences between these two forms of criminal responsibility. In this regard, the Judges clarified that the aider and abettor is always an accessory to a crime perpetrated by another person and that there is no need to prove the existence of a common plan or purpose, since the principal perpetrator may not even be aware of the other's contribution. Moreover, it was emphasised that the aider and abettor willingly gives practical assistance, encourages or lends moral support to the author of the crime and that this contribution has a substantial effect upon its perpetration. On the contrary, the most recent ICTY pronouncements state that such a high (substantial) involvement referred to the performance of the criminal act is not required under JCE, as it is sufficient that the member of the enterprise merely furthers the common plan or purpose giving a *significant* contribution thereto.¹⁸ As far as the subjective element is concerned, the Appeals Chamber explained that, in the case of aiding and abetting, the accessory perpetrator is aware that his acts assist the principal in the commission of the crime: in this aspect resides another divergence from the JCE, since in this latter case a higher degree of mental attitude (namely, the different forms of intent envisaged above) is required.¹⁹

tion of penalties which are proportionate to the gravity of each conduct. In this regard, see ICTY, *Prosecutor v. Zlatko Aleksovski*, IT-95-14/1-A, Appeals Chamber, Judgement, 24 March 2000, paras 182 et seq.; *Delalić* Appeal Judgement, see note 5, paras 731 et seq.; ICTY, *Prosecutor v. Vidoje Blagojević, Dragan Jokić*, IT-02-60-T, Trial Chamber, Judgement, 17 January 2005, para. 702.

¹⁸ See below, Part III.

¹⁹ *Tadić* Appeal Judgement, see note 2, para. 229. The differentiation between committing and aiding and abetting a crime is not without importance, but may play a role at the sentencing stage. In fact, aiding and abetting generally involves a lesser degree of culpability than the commission of the criminal act.

III. The Application of the JCE Theory before the ICTY after the *Tadić* Appeal Judgement

In its successive case-law, the ICTY has further specified the content of JCE's material and mental elements.²⁰ Various controversial issues, common to each of the three categories, emerged from the concrete application of the doctrine. These included, among others, the level of the accused's contribution to the performance of the criminal design in order to show his participation in the common endeavour, the need of an "express agreement" between the actual perpetrator and the other members of the group and, lastly, the strength of the link among the JCE affiliates. These jurisprudential debates demonstrate not only the impreciseness of the doctrine initially articulated by the *Tadić* Appeal Judgement, but also some attempts of ICTY Judges at avoiding creative legal theories by not extending the accused's liability beyond the limits of individual criminal culpability. In fact, after the *Tadić* case, JCE has been frequently utilised by the Prosecution as a better way to assign liability than the other forms specifically provided for in the Statute, since it allows an acceptance of the same level of responsibility for every member of the common design, even if not physically involved in the actual commission of the crime.²¹

²⁰ For an overview of the issues which have been clarified by the subsequent ICTY jurisprudence see A. Bogdan, "Individual Criminal Responsibility in the Execution of a Joint criminal Enterprise in the Jurisprudence of the ad hoc International Tribunal for the Former Yugoslavia", *International Criminal Law Review* 1 (2006), 63 et seq.

²¹ On this particular trend, see N. Piacente, "Importance of the Joint Criminal Enterprise Doctrine for the ICTY Prosecutorial Policy", *Journal of International Criminal Justice* 2 (2004), 446 et seq.; S. Powles, "Joint Criminal Enterprise. Criminal Liability by Prosecutorial Ingenuity and Judicial Creativity?", *Journal of International Criminal Justice* 2 (2004), 606 et seq. As noted by Danner/ Martinez, see note 3, 108, the possibility for the Prosecution to rely on JCE has been significantly increased since the *Krstić* Trial Judgement (ICTY, *Prosecutor v. Radislav Krstić*, IT-98-33-T, Trial Chamber, Judgement, 2 August 2001, para. 602), where it was ruled out that the accused could be convicted on the basis of JCE even if the Indictment did not explicitly refer to it. In the subsequent *Simić* Trial Judgement (*Prosecutor v. Blagoje Simić, Miroslav Tadić, Simo Zarić*, IT-95-9-T, Trial Chamber, Judgement, 17 October 2003), it was then argued that "[v]arious labels have been used by the Appeals Chamber and Trial Chambers of the Tribunal to refer to a theory of criminal liability based on the participation

The doctrine's attitude towards being extensively resorted to and creating a potentially immeasurable class of (equally responsible) co-perpetrators explains the Tribunal's efforts to identify the proper limits of this mode of individual criminal responsibility²² and to define its scope of application in the light of the general principles on individual criminal culpability enshrined in the Statute. In this regard, the ICTY jurisprudence tends however to fluctuate from a broad to a narrow approach of the JCE concept. In some cases, the Tribunal seems in fact to highlight the importance of JCE and its invaluable ability to "capture multifarious criminal conduct of high-ranking political and military individuals dispersed across vast geographical regions and temporal frameworks";²³ while, in others, the fears of possible dangers deriving from an expansive and liberal interpretation and application of the doctrine prevail in the Judges' final considerations regarding the propriety of its use.²⁴ An overall examination of the ICTY's jurisprudence seems,

of more than one person in the execution of a common criminal plan. 'Joint criminal enterprise', however, appears to have been preferred [...]. 'Acting in concert together' plainly means acting jointly, and on the face of it in a criminal context, would refer to co-perpetratorship. It is commonly accepted that a reference to 'acting in concert together' means acting pursuant to a joint criminal enterprise" (para. 149). It follows from these findings that any use of the mentioned wordings in the Indictments would be considered as an implicit reference to JCE and would thus allow the Chambers to resort to this doctrine even if not expressly pleaded in the initial prosecutorial act.

²² See ICTY, *Prosecutor v. Milorad Krnojelac*, IT-97-25-A, Appeals Chamber, Judgement, 17 September 2003, para. 116: "The Appeals Chamber holds 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. That principle applies irrespective of the category of joint criminal enterprise alleged. The principal perpetrators of the crimes constituting the common purpose [...] or constituting a foreseeable consequence of it should also be identified as precisely as possible."

²³ C. Farhang, "Point of No Return: Joint Criminal Enterprise in Brđanin", *LJIL* 23 (2010), 137 et seq. (138); see also H. van der Wilt, "Joint Criminal Enterprise: Possibilities and Limitations", *Journal of International Criminal Justice* 5 (2007), 91 et seq.

²⁴ In his Separate and Partly Dissenting Opinion to the *Simić* Trial Judgement, see note 21, Judge Lindholm even dissociated himself from the application of the JCE concept to the case at hand as well as generally.

however, to show that the first tendency is mainly preferred.²⁵ An analysis of some leading cases may clarify these considerations.

The *Krstić* Trial Judgement²⁶ found the accused to be a member of two distinct but related JCEs having the aim to “forcibly ‘cleanse’ the Srebrenica enclave of its Muslim population and to ensure that they left the territory otherwise occupied by the Serbian forces”²⁷ and to “guarantee that the Bosnian Muslim population would be permanently eradicated from Srebrenica.”²⁸ These crimes were considered to amount to, respectively, inhumane acts and persecution as crimes against humanity, and genocide. During the relevant indictment period, the accused had been appointed as VRS²⁹ Drina Corps Commander, a military formation whose involvement in the furtherance of the entire Srebrenica operation had been of utmost importance. According to this leading position, the doctrine of common purpose was considered to be the most appropriate concept to frame the accused’s criminal liability. In this regard, the Trial Chamber characterised *Krstić*’s assistance as “tangible and substantial”, his technical support as “unavoidable”,³⁰ the control exercised over the troops as “effective”³¹ and his participation in the common design as “clearly indispensable.”³² It finally concluded that, given the key position held by the accused at the leadership level, he could be considered as a co-perpetrator to the crimes committed in furtherance of the criminal endeavour.

The findings about *Krstić*’s participation in the genocidal JCE were subsequently dismissed on appeal because of insufficient proof of his asserted intent to commit genocide. He was therefore convicted as aider and abettor to genocide and not as a principal perpetrator. However, the re-evaluation of the evidentiary material raised no doubt about the existence of a criminal design concerning persons other than the defendant. Nor did it lead to different conclusions regarding the main aspects of the JCE doctrine as defined in the Trial Judgement, including the high

²⁵ In this regard, see Barthe, see note 1, 101 et seq.

²⁶ *Krstić* Trial Judgement, see note 21.

²⁷ *Ibid.*, para. 610.

²⁸ *Ibid.*, para. 619.

²⁹ The VRS was the military force of the self-proclaimed Republika Srpska and its leader was General Ratko Mladić.

³⁰ *Krstić* Trial Judgement, see note 21, para. 624.

³¹ *Ibid.*, para. 631.

³² *Ibid.*, para. 644.

threshold of the accused's involvement giving rise to his responsibility under JCE.

The level of contribution to the implementation of the common plan required by the Tribunal's relevant case-law tends however to be somewhat lower. In fact, the *Kvočka* Trial Judgement stated that "the participation in the enterprise must be significant," meaning that the conduct under consideration shall make the common design "efficient or effective."³³ On appeal, the Tribunal pronounced itself again on the issue and asserted that the accused participation needs not to be a *sine qua non* one "without which the crimes could or would not have been committed."³⁴ Consequently, it was concluded that "in general, there is no specific legal requirement that the accused make a *substantial* contribution to the joint criminal enterprise."³⁵ (emphasis added).

These findings echo and contextually further extend a previous statement made by the same Chamber in the *Vasiljević* case with regard to the threshold of participation required: there, it had been ruled out that "it is sufficient for a participant in a joint criminal enterprise to perform acts that *in some way* are directed to the furtherance of the common design"³⁶ (emphasis added). As explained by commentators, JCE's broad scope of application defined in the *Kvočka* 2005 Appeal Judgement is in line with the essence of the liability theory under discussion, because "it is the state of mind with which the contribution is made, and not the significance of the contribution, that marks the distinction between principals and accessories to the crimes."³⁷

³³ ICTY, *Prosecutor v. Miroslav Kvočka, Milojica Kos, Mlado Radić, Zoran Žigić, Dragoljub Prcać*, IT-98-30/1-T, Trial Chamber, Judgement, 2 November 2001, para. 309, which deals in particular with the second category of JCE relating to prison camp cases.

³⁴ ICTY, *Prosecutor v. Miroslav Kvočka, Milojica Kos, Mlado Radić, Zoran Žigić, Dragoljub Prcać*, IT-98-30/1-A, Appeals Chamber, Judgement, 28 February 2005.

³⁵ *Ibid.*, para. 97.

³⁶ ICTY, *Prosecutor v. Mitar Vasiljević*, IT-98-32-A, Appeals Chamber, Judgement, 25 February 2004, para. 102.

³⁷ Olásolo, see note 1, 163, where the author relies on ICTY, *Prosecutor v. Milan Milutinović, Nikola Šainović, Dragoljub Ojdanić*, IT-99-37-AR72, Appeals Chamber, Decision on Dragoljub Ojdanić's Motion Challenging Jurisdiction – *Joint Criminal Enterprise*, 21 May 2003, para. 20, which states that "insofar as a participant shares the purpose of the joint criminal enterprise (as he or she must do) as opposed to merely knowing about it,

As anticipated, the doctrine's application to concrete situations gave rise to some problematic issues also with regard to the level of connection among the members of the common endeavour and the actual perpetrator of the criminal acts. In other words, it was questioned whether the person who physically commits the criminal act must necessarily be a participant to the common design. The *Brđanin* Trial and Appeal Judgements suggested two differing solutions in this regard, which reflect the Tribunal's different approaches to the use of JCE.

The *Brđanin* Trial Chamber³⁸ dismissed the Prosecution's allegations regarding the accused's participation in a vast criminal endeavour to forcibly remove Bosnian-Muslims and Bosnian-Croats from Bosnian-Serb held territory and did not consider JCE to be the correct concept for the case at issue. This conclusion was reached despite the fact that the accused had been a leading political figure and had held key positions at the municipal, regional and republic levels during the indictment period. With special regard to the first and the third category of JCE, it was stated that this form of liability could arise only if it could be proven beyond reasonable doubt that the accused had "an understanding or entered into an agreement" with the principal perpetrators.³⁹ Although the mutual arrangement requirement had not been expressed in the *Tadić* Appeal Judgement, it was nevertheless justified by the consideration that that Appeals Chamber, in defining JCE, "had in mind a somewhat smaller enterprise than the one that is invoked in the present case." Additionally, "given the extraordinary broad nature" of the criminal endeavour the defendant was involved in and the fact that he was "structurally remote" from the crimes charged, JCE could not be regarded as an appropriate mode to describe his responsibility.⁴⁰ In this regard, the Trial Chamber seemed not to be aware of the doctrine's unique value, especially in so-called "leadership cases" where the politi-

he or she cannot be regarded as a mere aider and abettor to the crime which is contemplated."

³⁸ ICTY, *Prosecutor v. Radoslav Brđanin*, IT-99-36-T, Trial Chamber, Judgement, 1 September 2004.

³⁹ *Ibid.*, para. 347. It has to be noted that this statement did not consider a former Appeals Chamber's Judgement, where (referring to the second category of JCE) it had been stated that "it is less important to prove that there was a more or less formal agreement between all the participants than to prove their involvement in the system" (*Krnjelac* Appeal Judgement, see note 22, para. 96).

⁴⁰ *Ibid.*, para. 355.

cal and military leaders are the real orchestrators of the crimes at issue.⁴¹

The stringent approach described above was, however, reversed in the subsequent 2007 Appeal Judgement, where JCE's notion and scope of application were broadened again. This might be due to the fact that the Trial Chamber's assertions expressly contradicted some previous interlocutory appeal decisions where a different view had already been expressed. In fact, with special regard to the nature and dimension of JCE falling under the Tribunal's jurisdiction as provided for by customary international law, the Appeal Judges had stated that the JCE doctrine can apply to a massive criminal campaign and that there is no geographical limitation on it.⁴² Moreover, it had also been established that "liability for participation in a criminal plan is as wide as the plan itself, even if the plan amounts to a nation-wide government-organized system of cruelty and injustice." In other words, the accused's liability arising via the concept under consideration "may be as narrow or as broad as the plan in which he willingly participated. The fact that certain prosecutions [in the post-World-War II framework] charged participation in small-scale plans involving few victims or in the operation of specific concentration camps does not suggest that customary international law forbade punishment for genocide [nor for other international crimes] committed through plans formulated and executed on a nationwide scale."⁴³

Relying on the post-World War II case-law as well as on former ICTY jurisprudence, the *Brđanin* Appeals Chamber accepted the Prosecution's submissions that JCE may even consist only of members who do not materially commit the crimes agreed upon, but who use or otherwise instrumentalise other individuals to have the crimes carried

⁴¹ A. O'Rourke, "Joint Criminal Enterprise and Brđanin: Misguided Overcorrection", *Harv. Int'l L. J.* 1 (2006), 307 et seq.; K. Gustafson, "The Requirement of an 'Express Agreement' for Joint Criminal Enterprise Liability", *Journal of International Criminal Justice* 5 (2007), 134 et seq.; contra, Cassese, see note 1, 209-211.

⁴² ICTR, *Prosecutor v. Édouard Karemera, Mathieu Ngirumpatse, Joseph Nzirorera*, ICTR-98-44-AR72.5, ICTR-98-44-AR72.6, Appeals Chamber, Decision on Jurisdictional Appeal: Joint Criminal Enterprise, 12 April 2006.

⁴³ ICTR, *Prosecutor v. André Rwamakuba*, ICTR-98-44-AR72.4, Appeals Chamber, Decision on Interlocutory Appeal Regarding Application of Joint Criminal Enterprise to the Crime of Genocide, 22 October 2004, para. 25.

out. Consequently, the actual perpetrator shall not necessarily be a member of the common criminal design.⁴⁴ As to the asserted requirement of the existence of an understanding between the JCE participants and the outside principal perpetrators to commit the particular offences charged, the Appeal Judges, again basing on the Tribunal's former decisions, stated that JCE responsibility arises for all its members even if no agreement is demonstrated.⁴⁵ Indeed, what matters is that the perpetrated crimes form part of the common purpose and that one of its members, when using the principal perpetrator as "tool" to execute it, acted in furtherance of the common plan. According to the Appeals Chamber, the existence of such a link shall be assessed on a case-by-case basis.

In this pronouncement, the Tribunal seemed to re-discover JCE's essential rationale as the most effective means to attach individual criminal responsibility to the leaders of criminal activities, and did not share the concerns about possible risks deriving from an unrestrained use of the doctrine. In this regard, it was stated that a correct interpretation of the theory may not exclude large-scale cases from its scope of application, nor, at the same time, turn it into an "open-ended concept that permits convictions based on guilt by association."⁴⁶ On the contrary, the Appeals Chamber emphasised that the requirement of the accused's participation, if accompanied by the requisite *mens rea*, rigorously delimits JCE's scope of application by distinguishing it from guilt based on mere membership in a criminal organisation.⁴⁷ The latter consideration was apparently directed at expressly confronting the concerns that

⁴⁴ ICTY, *Prosecutor v. Radoslav Brđanin*, IT-99-36-A, Appeals Chamber, Judgement, 3 April 2007, paras 407 et seq., followed by the *Martić* Appeal Judgement, see note 10, paras 168-202. On the findings on JCE in the *Brđanin* Appeal Judgement see Farhang, see note 23. The same issue had been raised in ICTY, *Prosecutor v. Milan Milutinović, Nikola Šainović, Dragoljub Ojdanić, Nebojša Pavković, Vladimir Lazarević, Vlastimir Djordjević, Sreten Lukić*, IT-05-87-PT, Trial Chamber, Decision on Ojdanić's Motion Challenging Jurisdiction: Indirect Co-Perpetration, 22 March 2006.

⁴⁵ *Brđanin* Appeal Judgement, see note 44, paras 416 et seq.

⁴⁶ *Ibid.*, para. 428.

⁴⁷ *Ibid.*, para. 431: "Where all these requirements for JCE liability are met beyond reasonable doubt, the accused has done far more than merely associate with criminal persons. He has the intent to commit a crime, he has joined with others to achieve this goal, and he has made a significant contribution to the crime's commission."

a broad reading of JCE may be equivalent to liability by association, which is not compatible with the principle of individual culpability encompassed in the Statute.

IV. The *Krajišnik* Trial and Appeal Judgements: The Consolidation of JCE's Application to "Leadership Cases"

As anticipated, the *Krajišnik* Judgements constitute an important moment in the ICTY's jurisprudence, as they have imposed the first conviction in a large "leadership case" applying JCE.⁴⁸ While both the *Brđanin* Trial and Appeals Chambers had (partly) dismissed the application of the common purpose doctrine and opted for other modes of individual criminal liability, in the case under consideration JCE was found to be the best way to describe the accused's responsibility due to the particular nature of his involvement in the commission of the crimes charged. Equally, the application of the theory to high-ranking political and military leaders appears problematic; the structural and geographical remoteness from the crime scene may constitute an apparent obstacle to the continuity of the link between the actual (usually, low-level) perpetrators and the orchestrators of the collective criminal design.

From October 1991 until November 1995 the accused had performed the official role of the President of the Bosnian-Serb Assembly, which was vested by the Constitution of the self-proclaimed Republika Srpska with constitutional and legislative authority. In this capacity, in May 1992 *Krajišnik* had been included in the so-called Expanded Presidency, which also comprised the three original members of the Republic Presidency and the Prime Minister.⁴⁹ Additionally, he was a close friend of the President of the Bosnian-Serb Republic, *Radovan*

⁴⁸ In the Indictments against *Slobodan Milošević* (ICTY, *Prosecutor v. Slobodan Milošević*, IT-02-54), it had been alleged that the then President of the Federal Republic of Yugoslavia had participated, together with other individuals, in a joint criminal enterprise extending to three different countries (Kosovo, Croatia and Bosnia and Herzegovina) and comprising a multitude of criminal offences. However, Milošević's death on 11 March 2006 determined the termination of the proceedings against him before any Judgement could be rendered.

⁴⁹ The Expanded Presidency's members were thus Radovan Karadžić, Biljana Plavšić, Nikola Koljević, Branko Đerić and the accused.

Karadžić, and one of the closest associates of the VRS Main Staff commander, General *Ratko Mladić*. These positions and associations conferred *Krajišnik* not only a formal authority but also a *de facto* control over the Bosnian-Serb political and governmental organs and its armed forces.⁵⁰ Basing on these contentions, the indictment had alleged that the accused had participated with other prominent political figures in a JCE whose objective was the permanent removal, by force or other means, of Bosnian Muslims and Bosnian Croats from large parts of Bosnia-Herzegovina through the commission of the crimes encompassed in the Statute.⁵¹ In particular, the Tribunal found that there was a JCE whose members were situated throughout the territories of the Bosnian-Serb Republic and that there was a centrally-based core component of the group, which included – among others – the accused. The JCE rank and file was found to consist of local politicians, military and police commanders and paramilitary leaders, who were based in the regions and municipalities and maintained close links with the leadership. The factual situation the Trial Chamber was faced with was thus extremely complex, especially given the participation of a multitude of persons having different ranks and positions.⁵²

The Trial Chamber established the defendant's responsibility by firstly focusing on his (and, more generally, the Bosnian-Serb leadership's) knowledge and support of the various operations and activities carried out at different levels in furtherance of the JCE's objective.⁵³ In this regard, it was established that there was no one else who could be better informed about the criminal events taking place in the contested territories than the Assembly President who was, *de jure* and *de facto*, one of the most important figures in the political and military establishment during the indictment period. Additionally, given the "central

⁵⁰ ICTY, *Prosecutor v. Momčilo Krajišnik*, IT-00-39-T, Trial Chamber, Judgement, 27 September 2006, Parts I., II., III.

⁵¹ ICTY, *Prosecutor v. Momčilo Krajišnik and Biljana Plavšić*, Amended Consolidated Indictment, 7 March 2002. The accused was charged with genocide, persecutions on political, racial and religious grounds, extermination, murder, deportation and inhumane acts as crimes against humanity, and murder as violation of the laws and customs of war.

⁵² The extreme complexity of the JCE structure was specifically stressed by the Trial Chamber, which stated that: "The Chamber does not find it possible on the evidence to specify fully the membership of the JCE; and even if it were possible, it is neither desirable nor necessary to do so" (*Krajišnik* Trial Judgement, see note 50, para. 1086).

⁵³ *Ibid.*, Part VI.

position” *Krajišnik* had held in the JCE, it was argued that he had “not only participated in the implementation of the common objective but [had been] one of the driving forces behind it.”⁵⁴ From these circumstances the Trial Judges inferred the accused’s intent to commit the crimes in furtherance of the common endeavour.

Against this backdrop, the Chamber analysed and further specified the meaning of the three essential JCE elements defined in the *Tadić* Appeal Judgement – namely, plurality of persons, common objective and contribution. As far as the first aspect is concerned, the Trial Chamber basically focused its attention on the existence of “links forged in pursuit of a common objective” between individuals which “transform” them into members of a joint criminal plan. In this regard, it accepted the Prosecutor’s submissions relating to the difference between the perpetrators of crimes acting as part of a JCE and the persons not part of it and nevertheless committing similar offences. Among the so-called “distinguishing factors” some indicia – such as the explicit or implicit ratification of the perpetrator’s acts or the consistency of the perpetrated crimes with the pattern of similar acts committed by JCE members against similar kinds of victims – were enumerated by the Prosecution in a non-exhaustive list and considered by the Trial Chamber to be important aspects capable of proving the real connections and relationships among persons acting together in furtherance of a common design. In fact, “a person not in the JCE may share the general objective of the group but not be linked with the operations of the group” itself. On the other hand, JCE affiliates “rely on each other’s contributions, as well as on acts of persons who are not members of the JCE but who have been procured to commit crimes, to achieve criminal objectives on a scale which they could not have attained alone.”⁵⁵ As a consequence of the “large and indefinite group of persons” forming the JCE which the accused was involved in and the impossibility to determine its detailed membership, it was held that the decisive element was the defendant’s sufficient connection and concern with “persons who committed crimes pursuant to the common objective in various capacities, or who procured other persons to do so.”⁵⁶

As to the common objective, the Tribunal characterised it as “fluid in its criminal means,”⁵⁷ i.e. comprising the possibility of an expansion

⁵⁴ Ibid., para. 1119.

⁵⁵ Ibid., para. 1082.

⁵⁶ Ibid., para. 1086.

⁵⁷ Ibid., para. 1098.

of the criminal acts aimed at its implementation. This may occur, according to the Trial Chamber, when new types of crimes are committed and JCE members accept the common design to be carried out also through the perpetration of different criminal offences and to be no longer limited to the original ones. In this regard, (discriminatory) deportation and forced transfer were considered to be the “original crimes”, while other offences like persecution, murder and extermination were added at a later stage; the inclusion of new criminal acts among the means through which the joint objective was meant to be achieved came to redefine and enlarge the range of crimes necessary to the latter’s realisation. Basing on the above-mentioned findings regarding *Krajišnik*’s overall information about the events occurring in the contended territories, the Trial Chamber drew the conclusion that he had accepted the greater set of acts and that he had nevertheless persisted in the furtherance of the criminal plan. According to the Trial Judges, this indicated the accused’s intention to pursue the criminal design even through the new means.⁵⁸

Regarding the last aspect, the Tribunal based its findings on the premise that *Krajišnik*’s role in the realisation of the criminal plan was to help establish the party and state structures that were “instrumental” to the commission of the crimes. The accused’s involvement was then measured by analysing each of the modes of contribution alleged by the Prosecution (such as his promotion and encouragement of the Bosnian Serb governmental policies intended to develop JCE’s objectives); the appraisal of the evidentiary material confirmed *Krajišnik*’s overall role in the implementation of the criminal endeavour.⁵⁹ The accused’s contribution was held to have been so manifestly decisive, his position and authority in the political and military institutions so high, that the Trial Chamber was satisfied that his participation was significant enough to demonstrate his membership in the JCE.

It has to be noted that the above-mentioned findings on *Krajišnik*’s responsibility are to be read in the light of a general introductory statement, which points out the Tribunal’s idea about JCE’s fundamental es-

⁵⁸ Ibid., para. 1118. It has to be noted that the present Judgement based its reasoning on the basic form of JCE, and particularly on the distinction between the “original” and the “added” crimes as means of furthering the JCE’s objective, both of which are *intended* by the members of the common design.

⁵⁹ *Krajišnik* Trial Judgement, see note 50, paras 1120-1121.

sence. Referring to the first two aspects (plurality of participants and common objective), it was argued that,

“[I]t is the common objective that begins to transform a plurality of persons into a group or enterprise, as this plurality has in common the particular objective. It is evident, however, that a common objective alone is not always sufficient to determine a group, as different and independent groups may happen to share identical objectives. Rather, *it is the interaction or cooperation among persons – their joint action – in addition to their common objective, that makes those persons a group*. The persons in a criminal enterprise must be shown to act together, or in concert with each other, in the implementation of a common objective, if they are to share responsibility for the crimes committed through the JCE.”⁶⁰ (emphasis added)

This declaration was expressly directed at overruling the different approach taken in the *Brđanin* Trial Judgement, where proof of an understanding or agreement to commit the crimes at issue had been required.⁶¹ In fact, the mentioned passage concludes as follows,

“A concern expressed by the Trial Chamber in *Brđanin* about the issue of alleged JCE participants acting independently of each other, is sufficiently addressed by the requirement that *joint action* among members of a criminal enterprise is proven.”⁶² (emphasis added)

Thus, this pronouncement introduced a key concept in the interpretation of the JCE: namely, the so-called “joint action” between a plurality of individuals, which constitutes the connection making them a group capable of acting jointly and in reciprocal coordination. The requirement of an organised action stresses the substantial connections among JCE affiliates and does not focus on formal and more rigorous aspects such as evidence of an agreement or understanding. In fact, the Trial Judgement is principally aimed at assessing whether *Krajišnik* acted in line with the common criminal plan. Once satisfied about the existence of such an involvement and coordinated work, the Chamber concluded that the accused committed the crimes charged as a member of the JCE.

On appeal, *Krajišnik* was authorised to represent himself and to retain the services of two counsels on the special subject of JCE. Addi-

⁶⁰ Ibid., para. 884.

⁶¹ As mentioned above, the Trial Chamber’s decision on this issue was subsequently reversed by the Appeals Chamber.

⁶² *Krajišnik* Trial Judgement, see note 50, para. 884.

tionally, the Appeals Chamber invited the participation of an *amicus curiae* to assist it by arguing in favour of the appellant's interests. Large parts of the Judgement were dedicated to the review of the trial findings on the common purpose doctrine. This determined a new analysis of some main aspects of the concept as specified therein. Following the Tribunal's jurisprudential trend, the higher Chamber seemed to opt for a narrower reading and application and, in this context, a more precise assessment of the evidentiary material at its disposal.

In his third ground of appeal, *amicus curiae* had argued that the Trial Chamber had erred in failing to give an exhaustive list of the participants to the JCE and in referring to generic groups without identifying the single individuals. In fact, the Trial Judgement expressly stated that it was "neither desirable nor necessary"⁶³ to fully specify the JCE membership: the identification of the alleged participants in the common criminal plan was accordingly voluntarily unspecific. Basing on the *Limaj* Appeal Judgement,⁶⁴ the Appeals Chamber in the present case held that a precise indication by name was not necessary and that the required establishment of the identity of the alleged persons sharing a common plan could be satisfied even by referring to "categories and groups of persons."⁶⁵ However, notwithstanding this rather low standard of proof, it was found that the Trial Chamber had erred in this respect and that its identification of the JCE affiliates was "impermissibly vague."⁶⁶ The inclusion of persons in the common endeavour merely by their classification in its rank and file and the broad definition of the enterprise's geographical scope by simply referring to "regions and municipalities of the Bosnian-Serb Republic" were finally considered ambiguous and erroneous. This sub-ground was thus granted.

The Appeals Chamber's control over the correct application of JCE and its rather restrictive approach in this respect become evident if one looks at its analysis of the distinction between the "original" and the "expanded" crimes put forward in the Trial Judgement. In particular, it

⁶³ Ibid., para. 1086.

⁶⁴ ICTY, *Prosecutor v. Fatmir Limaj, Isak Musliu, Haradin Bala*, IT-03-66-A, Appeals Chamber, Judgement, 27 September 2007, para. 99, quoting the Trial Judgement (ICTY, *Prosecutor v. Fatmir Limaj, Isak Musliu, Haradin Bala*, IT-03-66-T, Trial Chamber, Judgement, 30 November 2005), para. 669.

⁶⁵ ICTY, *Prosecutor v. Momčilo Krajišnik*, IT-00-39-A, Appeals Chamber, Judgement, 17 March 2009, para. 156.

⁶⁶ Ibid., para. 157.

was conceded that the “criminal means of realising the common objective of the JCE can evolve over time” and that “a JCE can come to embrace expanded criminal means, as long as the evidence shows that the JCE members agreed on this expansion of means.”⁶⁷ Nevertheless, despite the general endorsement of this particular reading of JCE’s basic form, the Trial Chamber was found to have committed a legal error in failing to indicate at which specific point in time the additional criminal acts had become part of the criminal design and whether the group members had any intent in this respect. In other words, it was for the Trial Judges not sufficient to merely state that the common objective was “fluid”, as they were required – according to the higher Chamber – to “precisely find how and when the scope of the common objective broadened in order to impute individual criminal responsibility to Krajišnik for those crimes that were not included in the original plan.”⁶⁸ The accused could thus not be held liable for the “expanded crimes” that fell outside the original common objective and the conviction for those acts was consequently quashed.

Subsequently, the Appeals Judges focused on the level of *Krajišnik’s* overall contribution to the criminal design with special regard to his political authority and activities and mainly confirmed the lower Chamber’s findings. It was firstly underlined that the participation of an accused in a JCE need not involve the commission of a crime, as it may only take the form of assistance in or contribution to the execution of the common purpose entailing the perpetration of criminal acts. In the light of these contentions, it was found that in the present case the accused’s central position in the establishment and furtherance of the criminal design had been rightly inferred by the Trial Chamber from various factual elements, such as his extreme and aggressive statements during the parliamentary sessions as well as his promotion and encouragement of the commission of crimes aimed at furthering the common plan. The Judgement therefore confirmed that *Krajišnik’s* contribution to the criminal design had been significant and that he had participated in its implementation in “various wide-ranging ways.”⁶⁹ In this respect, the appellant had asserted that the Trial Chamber had erred in fact and in law in finding him liable as a JCE member, as during the Indictment period he had merely carried out his political tasks within the lawful competences established by the Bosnian-Serb Constitution. In other

⁶⁷ Ibid., para. 163.

⁶⁸ Ibid., para. 176.

⁶⁹ Ibid., para. 217.

words, to convict him only because of his political activity would amount, according to *Krajišnik*, to an erroneous erasure of the differences between “criminal conduct and legitimate political activity.”⁷⁰ He thus argued that his actions could not be legally classified as any of the crimes sanctionable by the ICTY Statute. However, contrary to these allegations, the Appeals Chamber stated that,

“the Trial Chamber did not find that the political activities of Krajišnik formed the *actus reus* of any of the crimes against humanity of which he was convicted. Instead, Krajišnik was convicted for crimes for which he was found criminally responsible under the mode of liability of JCE, which requires that the defendant ‘has made a significant contribution to the crime’s commission.’ The Tribunal’s jurisprudence does not require such contribution to be criminal *per se*.”⁷¹

As to the necessary link between the JCE members and the actual perpetrators of the crimes, who did not belong to the entourage of the senior political and military hierarchy, the Appeals Chamber recalled its findings in the *Brđanin* and *Martić* Judgements that “all JCE members are responsible for a crime committed by a non-JCE member if it is shown that the crime can be imputed to at least one JCE member, and that this JCE member – when using the non-JCE member – acted in accordance with the common objective.”⁷²

In the light of these conclusions, *Krajišnik*’s contentions about JCE’s illegitimacy, its vulnerability to political influence and unsuitability to large-scale criminal ventures such as the one in the present case were also dismissed by the Appeals Chamber. The appellant was finally convicted to 20 years’ imprisonment.

⁷⁰ Ibid., para. 688.

⁷¹ Ibid., para. 695. The Judgement then recalled that: “Moreover, the Appeals Chamber has repeatedly found that contribution to a JCE ‘may take the form of assistance in, or contribution to, the execution of the common purpose’ and that it is not required that the accused physically committed or participated in the *actus reus* of the perpetrated crime. It is sufficient that the accused ‘perform acts that in some way are directed to the furthering’ of the JCE in the sense that he significantly contributes to the commission of the crimes involved in the JCE. For these reasons, the Appeals Chamber holds that the contribution to a JCE need not, in and of itself, be criminal. JCE counsel’s claim to the contrary is dismissed.”

⁷² Ibid., para. 235, citing the *Brđanin* Appeal Judgement, see note 44, paras 413, 430 and the *Martić* Appeals Judgement, see note 10, para. 68.

V. Does the Most Recent Case-Law on JCE establish the Leaders' Responsibility in a Proper Way?

After the *Tadić* Appeal Judgement, the majority of ICTY cases to which the JCE doctrine has been applied involved the criminal responsibility of high-ranking political and military individuals. As a consequence of their leading positions, the accused had usually not personally participated in the perpetration of the crimes at issue and had only indirectly contributed thereto. Lacking a direct link, their involvement in the commission of the criminal acts was maintained through the broadening of the context taken into consideration and the acceptance that criminal liability may be incurred also for crimes carried out by persons not belonging to the enterprise but used or otherwise instrumentalised by its members in order to further the common criminal design. These conclusions are based on the assumptions that the customary notion of JCE is not limited to small enterprises and the Tribunal's jurisdiction may thus embrace wide criminal endeavours.⁷³

The doctrine under consideration, and especially its particular interpretation and application to high-ranking individuals, in fact bypass the controversial issue regarding the attribution of individual criminal responsibility for crimes which have not been directly committed by the accused and to which he has contributed through his participation in a joint criminal design. The reasons for the Tribunal's large use of JCE are twofold. From a material point of view, this concept does not require a direct link to the criminal acts the accused is charged with, as it postulates a "collective" perpetration of the crime. The fact that the accused joined and in some way furthered the common criminal plan suffices to hold him ultimately liable for the actions performed by other individuals acting in accordance with the criminal design itself. Additionally, ac-

⁷³ Part III., above. With regard to the Tribunal's case law on JCE as applied to "leadership cases", see Olásolo, see note 1, 202-231, where the author defines the notion of "joint criminal enterprise at the leadership level" in the following terms: "This approach reduces the number of participants in enterprises, which aim at committing international crimes in a broad territory over an extended period of time. Furthermore, all participants in the enterprise are members of the political and military leadership and the relationship among them is more of a horizontal than of a hierarchical or vertical nature" (at 206). See also E. van Sliedregt, *The Criminal Responsibility of Individuals for Violations of International Humanitarian Law*, 2003, 351-360.

According to the findings in the *Brđanin* and *Martić* Appeal Judgements,⁷⁴ the actual perpetrator shall not necessarily be affiliated to the joint enterprise and does not even have to share its common purpose. As to the subjective element, intent to pursue the common plan is needed, while this is not the case with regard to each single crime falling under the scope of the JCE.⁷⁵ The broad reading and use of the concept, as resulted in the Tribunal's jurisprudence after *Tadić*, are facilitated by the fact that JCE "lacks clear definitions meticulously determining the scope of individual criminal responsibility."⁷⁶ The initial definition spelled out in *Tadić* could therefore be "adapted" in order to cover also the individual criminal responsibility of leading high-ranking individuals.

Despite the continuity of the ICTY's case-law on this issue, the enunciation of the concept under consideration and especially its application to political and military leaders has been severely criticised by some scholars. Among the recurring concerns and disapprovals, it has more recently been argued that the Yugoslav Tribunal lacked comprehension regarding the limitations inherent to JCE⁷⁷ and that "the way some Chambers interpret JCE seems to fall outside the scope of the Statute."⁷⁸ On the other hand, less critical approaches hold that the Tribunal's jurisprudence "has addressed the problems posed by the application of the traditional notion of joint criminal enterprise to senior po-

⁷⁴ The findings of these Judgements appear to reflect the majority of current opinion emerged among the Appeals Chamber Judges as to how JCE should be interpreted as a mode of individual responsibility (see, in this regard, ECCC, in the Matter of the Co-Prosecutors' Appeal of the Closing Order against *Kaing Guek Eav* "Duch" citing Pre-Trial Chamber, *Amicus Curiae Brief Submitted by the Centre for Human Rights and Legal Pluralism*, see note 3, para. 47).

⁷⁵ For an analysis of the advantages of the JCE doctrine see Haan, see note 2, 174 et seq.

⁷⁶ *Limaj* Appeal Judgement, see note 64, Partially Dissenting and Separate Opinion and Declaration of Judge Schomburg, para. 10. According to Judge Schomburg, this can give rise to two possible consequences: "On the one hand, the theory of joint criminal enterprise is too expansive as it *de facto* allows individuals to be punished solely for membership in a criminal organization, however vaguely defined that membership may be. On the other hand, it might be employed in too a limited way."

⁷⁷ Farhang, see note 23, 163.

⁷⁸ Haan, see note 2, 168.

litical and military leaders in a rather ‘creative’ manner⁷⁹ and express concerns regarding the dangers deriving from “overstretching the limits of criminal responsibility.”⁸⁰ According to Professor *Cassese*, the application of JCE to senior leaders by extending “criminal liability to instances where there was no agreement or common plan between the perpetrators and those who participated in the common plan would seem to excessively broaden the notion, which is always premised on the sharing of a criminal intent by all those who take part in the common enterprise.”⁸¹

Bearing in mind the above-mentioned considerations, one can interpret the *Krajišnik* Trial Judgement and especially the subsequent findings made on appeal as an accurate effort to understand the essential rationale of JCE and to apply its first category to “leadership cases” in conformity with the general principle of personal culpability. In this regard, the Trial Chamber in that case highlighted the importance of the “joint action” requirement for a proper reading of the notion under discussion. The Judgement’s reasoning appears to be entirely based on this particular aspect. As President of the Bosnian-Serb Assembly, *Krajišnik* was found to have not acted alone, but to be necessarily involved in the implementation of the Bosnian-Serb political design, whose ultimate goal was to maintain control over the conquered territories and to finally ethnically recompose them. Indeed, his political work was considered to be co-ordinated and concerted with the other members of the Bosnian-Serb leadership. Great emphasis was given to the accused’s knowledge and active support of the armed activities, the take-over operations and the crimes related to the attacks.⁸²

Also his journeys through the contended territories as well as his frequent meetings with the various municipal authorities to discuss the strategic situation and cooperation in logistical matters were considered to be indicative of his overall participation and contribution to the enactment of the mentioned joint endeavour.⁸³ Moreover, the Trial Chamber affirmed that the accused’s style of leadership showed the existence

⁷⁹ Olásolo, see note 1, 202.

⁸⁰ H. van der Wilt, “Joint Criminal Enterprise and Functional Perpetration”, in: Nollkaemper/ van der Wilt, see note 4, 158 et seq. (163).

⁸¹ A. Cassese, “The Proper Limits of Individual Responsibility under the Doctrine of Joint Criminal Enterprise”, *Journal of International Criminal Justice* 5 (2007), 109 et seq. (126).

⁸² *Krajišnik* Trial Judgement, see note 50, paras 925-986.

⁸³ *Ibid.*, paras 987-1005.

of concrete and strong connections between the high-ranking individuals (such as *Krajišnik* himself, *Karadžić* and *Mladić*) and the low-level principal perpetrators. Far from being isolated and remote from the actual commission of the crimes forming part of the JCE, *Krajišnik* and his associates “intervened and exerted direct influence at all levels of Bosnian-Serb affairs, including military operations.”⁸⁴ With regard to the actual policy of the Bosnian-Serbs, it was held that the decisive aspect “was the feedback loop of coordination and support that existed between the [...] forces on the ground and the central leadership.”⁸⁵

While the legal findings of the *Krajišnik* Trial Judgement have been appreciated by some commentators,⁸⁶ it has also been argued that they are not supported by the evidentiary material at the Chamber’s disposal.⁸⁷ A closer look at the factual statements would, accordingly, rather lead to the conclusion that the accused’s aggressive speeches had in fact created the “political climate in which violent crimes could prosper”, but that he was nevertheless only indirectly involved in those crimes.⁸⁸ Hence, *Krajišnik* should not incur criminal responsibility under the JCE, given the doctrine’s inadequacy to “sustain the criminal responsibility of all persons who are somehow involved in a vast enterprise that engages in system criminality.”⁸⁹

As pointed out above, the findings made by the lower Chamber were deeply reviewed on appeal and some conclusions as to the accused’s criminal liability under the JCE were dismissed. In fact, the Appeals Chamber’s central concern appears to have been the strict and careful application of that doctrine to the case at issue. To this end, the correctness of the Trial Judgement’s statements was tested with regard to the settled jurisprudence of the Tribunal. The Appeals Judges mainly based their reasoning on their previous pronouncements in *Brđanin*, relying on the notion of JCE proposed there and highlighting that “JCE member’s liability for crimes committed by a non-member of the JCE who is used by the former in accordance with the common objective, was within ‘the contours of joint criminal enterprise liability in custom-

⁸⁴ Ibid., para. 987.

⁸⁵ Ibid., para. 996.

⁸⁶ Zahar/ Sluiter, see note 1, 254 et seq., where the authors argue that “the doctrine was given a new lease of life, in the *Krajišnik* case”; van der Wilt, see note 80, 175.

⁸⁷ Ibid., 175.

⁸⁸ Ibid.

⁸⁹ Ibid., 181.

ary international law’.”⁹⁰ The main aspects of *Brđanin*’s reading of the theory recalled by the *Krajišnik* Appeals Chamber concerned the required precise identification of the JCE affiliates,⁹¹ the level of material contribution to the furtherance of the common purpose by the accused,⁹² and the use of principal low-level perpetrators as “tools” by any member of the common plan.⁹³ In the light of the defendant’s leading and hierarchically high-ranking position, the establishment of the last mentioned requirement seemed, again, to be the most controversial and problematic issue. There was in fact no direct link which proved *Krajišnik*’s involvement in the commission of the crimes and no direct connection between the Bosnian-Serb leadership on the one hand and the actual perpetrators on the other. In this regard, the Appeals Judges established that,

“[T]he Trial Chamber did not explicitly state that JCE members procured or used principal perpetrators to commit specific crimes in furtherance of the common purpose. The Appeals Chamber finds that, while the Trial Chamber should have made such a finding, this omission, in the circumstances of this case, does not as such invalidate the Trial Judgement, because the Trial Chamber otherwise established a link between JCE members and principal perpetrators of crimes forming part of the common objective.”⁹⁴

Against this background, in the analysis of the trial findings regarding this “otherwise established” link, special attention was given to the relationship between the centrally-based leadership and the different organs of the Republika Srpska’s apparatus as well as to any finding relating to the established connection between each JCE member and the principal perpetrators.

As to the first issue, the Appeals Chamber accepted the Trial Chamber’s implicit holding that an enterprise can embrace numerous participants acting at different levels and in reciprocal cooperation.⁹⁵ In other

⁹⁰ *Krajišnik* Appeal Judgement, see note 65, para. 290.

⁹¹ *Ibid.*, paras 154-157.

⁹² *Ibid.*, paras 209-219.

⁹³ *Ibid.*, paras 220-248.

⁹⁴ *Ibid.*, para. 237.

⁹⁵ The *Krajišnik* Trial Judgement, see note 50, had in fact affirmed that “[i]t is clear that paragraph 7 of the Indictment alleges a JCE consisting of a large and indefinite group of persons” (para. 1086) and that “[t]he Chamber finds that the JCE of which the Accused was a member consisted of *persons*

words, the fact that the criminal plan had been considered to have been designed and implemented by the Bosnian-Serb leadership acting jointly with local political and military authorities was not viewed as an obstacle to the establishment of *Krajišnik's* liability. It was however necessary to verify that the joint action of JCE affiliates met the required level of cohesion and solidarity and that they could be therefore considered to have worked together for the achievement of the common goal.

Upon examination of the trial findings, the Appeals Chamber finally reached the conclusion that only the relations to the VRS, the war presidencies and the war commissions had been precisely ascertained, while the links to the crisis staffs and the paramilitary groups were found to be too weak.⁹⁶ To this end, various factors were taken into account, such as the regular consultations with the Commander of the VRS Main Staff *Ratko Mladić*, the active supervisions of the Bosnian-Serb forces' operations as well as the issuance of instructions for the organisation and work of the different war presidencies and commissions, which were supposed to *inter alia* "establish governmental power."⁹⁷ On the other hand, the specific connections to the actual executors were further examined in detail and the convictions regarding crimes which had not been committed by JCE members by way of using principal perpetrators in furtherance of the common purpose were quashed.⁹⁸ The necessary premise to the mentioned findings on *Krajišnik's* criminal liability under JCE was the establishment of his hierarchical high-ranking position as well as his extensive power and authority.⁹⁹

Finally, also the findings relating to the accused's "shared intent" were analysed. Not persuaded by the arguments raised by *amicus curiae*, the Appeals Chamber stated that the Trial Chamber had correctly identified the required *mens rea* for the first category of JCE. In this respect, its statements were found to have been correct and the appraisal of the evidence cautious and accurate.¹⁰⁰

situated throughout the territories of the Bosnian-Serb Republic" (emphasis added) (para. 1087).

⁹⁶ *Krajišnik* Appeal Judgement, see note 65, paras 238-248. The consequence of this finding was that the crimes committed by the crisis staffs and the paramilitary formations could not be attributed to the JCE members.

⁹⁷ *Ibid.*, para. 244.

⁹⁸ *Ibid.*, paras 249-283.

⁹⁹ *Ibid.*, paras 336-360.

¹⁰⁰ *Ibid.*, paras 195-208.

In the light of the above, it can be argued that the *Krajišnik* Judgments applied the (first category of) JCE to a “leadership case” relying on the notion that had been expressly endorsed by the *Brđanin* Appeals Chamber. Both the characteristic features of this particular reading of the concept are in fact present. On the one hand, the criminal context taken into account appears to be very broad, as the crimes at issue had been committed throughout the territories of the Bosnian-Serb Republic. On the other, it was expressly conceded that criminal liability could be incurred by each JCE member despite the fact that the offences had been perpetrated by agents not affiliated to the common venture. Due to the distinct positions of the two accused in the Bosnian-Serb state apparatus, there is, however, a fundamental difference between the JCE notion referred to in *Brđanin* and the one considered in the present case. Indeed, during the indictment period *Radoslav Brđanin* had been a leading political figure in one of Republika Srpska’s autonomous regions, while *Momčilo Krajišnik* had been a member of the state leadership and one of the most influential authorities in terms of political as well as of (*de facto*) military power.¹⁰¹ Consequently, the common plan in which *Krajišnik* had participated and which he had contributed to implement was wider and involved a higher number of members acting at different levels and in different capacities.

Conscious of the risk inherent to the mentioned approach and basically deriving from the acceptance of a decreasing “level of solidarity”¹⁰² among JCE participants, the *Krajišnik* Judges tried to face this issue by emphasising the importance of the “joint action” requirement. First conceived and broadly understood at trial, this concept has then been more rigorously relied upon by the Appeals Chamber. According to the pronouncements under consideration, if this notion is used correctly, it might work as the crucial instrument for testing the essential link that binds JCE affiliates reciprocally. The common purpose doctrine may consequently be applicable also to high-ranking leaders, even if structurally remote from the crime. At any rate, this seems to be the prevailing approach suggested by the latest ICTY jurisprudence on JCE.

¹⁰¹ See above, Part III.

¹⁰² Olásolo, see note 1, 227. According to E. van Sliedregt, “System Criminality at the ICTY”, in: Nollkaemper/ van der Wilt, see note 4, 183 et seq., (195), the so-called “delinking” had already been accepted by the ICTY jurisprudence in the *Brđanin* Appeals Judgement “through the acceptance of non-membership of the actual perpetrator”.

VI. Concluding Remarks

While not explicitly provided for in the Statute's provisions on individual criminal responsibility, the Yugoslav Tribunal considered JCE to be part of customary international law and widely relied upon it in its case-law after the *Tadić* Appeals Judgement. Indeed, as a doctrine postulating the collective perpetration of the criminal offences, JCE's potential has been acknowledged by the ICTY quite soon in its jurisprudence. This notion was found to be one of the most suitable concepts for establishing individual criminal responsibility and, at the same time, capturing the salient and distinctive characteristics of international crimes. The ICTY's jurisdiction in fact mainly extends over crimes committed by low-level perpetrators during a decentralised war throughout the territories of the former Yugoslavia, orchestrated by high-ranking political or military individuals by virtue of their power and authority.

An examination of the most recent pronouncements seems to show the ICTY's tendency to interpret the concept broadly and to apply it to "leadership cases" involving a vast criminal enterprise. This approach demonstrates the Judges' awareness that JCE may prove useful for the purposes of criminal justice in general and the aims and policies of the Tribunal in particular.¹⁰³ Against this background, the recent *Krajišnik* Judgements on the one hand confirmed the Tribunal's large use of JCE as an effective means to link the JCE affiliates to the actual perpetrators of the crimes and to the crimes themselves. On the other hand, they also introduced some necessary adjustments in the doctrine's interpretation by requiring concerted and coordinated activities between the members of the common design. From an evidentiary perspective, the last mentioned notion appears to be quite flexible and mainly focuses on substantial aspects of the participants' conduct. The Tribunal's Judges are therefore required to apply JCE in a balanced and proper way, ensuring that the accused's actual contribution to the furtherance of the joint endeavour be substantial. Such an approach seems to have been followed by the *Krajišnik* Judgements, where, in the present author's opinion, neither misapprehensions nor abuses of the doctrine have occurred.

¹⁰³ C.H. Gibson, "Testing the Legitimacy of the Joint Criminal Enterprise Doctrine in the ICTY: A Comparison of Individual Liability for Group Conduct in International and Domestic Law", *Duke J. Comp. & Int'l L.* 18 (2008), 521 et seq. (547).

One could finally verify whether the International Criminal Court (ICC) can rely upon JCE to establish individual criminal responsibility. In this regard, article 25 (3)(d) provides that,

“In accordance with this Statute, a person shall be criminally responsible and liable for punishment for a crime within the jurisdiction of the Court if that person: [...] (d) 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.” (emphasis added)¹⁰⁴

While at first sight one may argue that this provision can be traced back to the case-law of the Yugoslav Tribunal on JCE and that it clearly authorises the ICC to apply the doctrine under discussion, the first pronouncements of the Court itself seem to go in another direction.

In its decision on the confirmation of the charges in the *Lubanga* case,¹⁰⁵ the ICC Pre-Trial Chamber I explicitly affirmed its autonomy from the ICTY jurisprudence. Indeed, it underlined the differing approaches regarding the distinguishing criterion between principals and accessories to a crime where a criminal offence is committed by a plurality of persons.¹⁰⁶ In this respect, the concept of co-perpetration based

¹⁰⁴ For comments on the mentioned provision, see K. Ambos, “Individual Criminal Responsibility: Article 25”, in: O. Triffterer (ed.), *Commentary on the Rome Statute of the International Criminal Court. Observers’ Notes, Article by Article*, 1999, 475 et seq.; A. Eser, “Individual Criminal Responsibility”, in: A. Cassese/ P. Gaeta/ J.R.W.D. Jones (eds), *The Rome Statute of the International Criminal Court: A Commentary*, 2002, 767 et seq.; G. Werle, “Individual Criminal Responsibility in Article 25 ICC Statute”, *Journal of International Criminal Justice* 5 (2007), 953 et seq.

¹⁰⁵ ICC, *Prosecutor v. Thomas Lubanga Dyilo*, ICC-01/04-01/06, Pre-Trial Chamber, *Decision on the Confirmation of the Charges*, 29 January 2007, paras 317-367. The findings of this Decision have been referred to in ICC, *Prosecutor v. Omar Hassan Ahmad Al Bashir* (“Omar Al Bashir”), ICC-02-/05-01/09, Pre-Trial Chamber I, *Decision on the Prosecution’s Application for a Warrant of Arrest against Omar Hassan Ahmad Al Bashir*, 4 March 2009, para. 139.

¹⁰⁶ See H. Olásolo, “Developments in the Distinction between Principal and Accessorial Liability in the Light of the First Case Law”, in: C. Stahn/ G.

on the notion of “joint control of the crime” was defined based on article 25 (3)(a), which covers principal liability.¹⁰⁷ Despite being considered as “closely akin to the concept of joint criminal enterprise or the common purpose doctrine adopted by the jurisprudence of the ICTY”,¹⁰⁸ liability under mentioned letter (d) was nevertheless defined as a “residual form of accessory liability”¹⁰⁹ as opposed to co-perpetration.

In considering the importance of these divergences it should be finally made clear that the interpretation and application of the Rome Statute should not be used as a means to verify the correctness and validity of the ICTY’s jurisprudence. In fact, the former does not necessarily reflect the status of customary international criminal law. On the contrary, it is often the result of compromised choices made by its drafters. The mentioned tendencies should therefore not be overestimated but be read as the mere effect of different approaches adopted by different international criminal tribunals on the basis of their constitutive instruments.¹¹⁰

Sluiter (eds), *The Emerging Practice of the International Criminal Court*, 2009, 339 et seq.

¹⁰⁷ Article 25 (3)(a) provides that: “In accordance with this Statute, a person shall be criminally responsible and liable for punishment for a crime within the jurisdiction of the Court if that person: (a) Commits such a crime, whether as an individual, *jointly with another or through another person*, regardless of whether that other person is criminally responsible”. It has to be noted that the objective and subjective elements of the notion of “co-perpetration based on joint control over the crime” as defined by the Pre-Trial Chamber in the present case partly recall – without however referring to them – the aspects ruled out by the ICTY for the concept of joint criminal enterprise (such as the “agreement or common plan between two or more persons”, the “co-ordinated essential contribution” and the fulfilment of the “subjective elements of the crime in question”). (Emphasis added).

¹⁰⁸ *Lubanga* Pre-Trial Decision on the Confirmation of the Charges, see note 105, para. 335.

¹⁰⁹ *Ibid.*, para. 338.

¹¹⁰ Again, Olásolo, see note 106, 358.