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**UNITED
NATIONS**



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

Case No.: IT-97-25-A
Date: 17 September 2003
Original: English
French

IN THE APPEALS CHAMBER

Before: Judge Claude Jorda, Presiding
Judge Wolfgang Schomburg
Judge Mohamed Shahabuddeen
Judge Mehmet Güney
Judge Carmel Agius

Registrar: Mr. Hans Holthuis

Judgement of: 17 September 2003

PROSECUTOR

v.

MILORAD KRNOJELAC

JUDGEMENT

The Office of the Prosecutor:

Mr Christopher Staker
Ms Helen Brady
Mr Anthony Carmona
Ms Norul Rashid

Defence Counsel:

Mr Mihajlo Bakrač
Mr Miroslav Vasić

civilians. Criminal responsibility may be imputed to all participants within the common enterprise where the risk of death occurring was both a predictable consequence of the execution of the common design and the accused was either reckless or indifferent to that risk [...]. The case law in this category concerned first of all cases of mob violence, that is situations of disorder where multiple offenders act out a common purpose, where each of them commit offences against the victim but where it is unknown or impossible to ascertain exactly which acts were carried out by which perpetrator, or when the causal link between each act and the eventual harm caused to the victims is similarly indeterminate. The cases most illustrative of this category are *Essen Lynching* and *Borkum Island*.⁴⁰

31. The same Judgement then sets out the constituent elements of the *actus reus* and *mens rea* of this form of liability. The Appeals Chamber declares that the *actus reus* of this mode of participation in one of the crimes provided for in the Statute is common to each of the three categories of cases set out above and comprises the following three elements:

(i) *A plurality of persons*. They need not be organised in a military, political or administrative structure, as is demonstrated clearly by the *Essen Lynching* and the *Kurt Goebell* cases.

(ii) *The existence of a common plan, design or purpose which amounts to or involves the commission of a crime provided for in the Statute*. There is no necessity for this plan, design or purpose to have been previously arranged or formulated. The common plan or purpose may materialise extemporaneously and be inferred from the fact that a plurality of persons acts in unison to put into effect a joint criminal enterprise.

(iii) *Participation of the accused in the common design* involving the perpetration of one of the crimes provided for in the Statute. This participation need not involve commission of a specific crime under one of those provisions (murder, extermination, torture, rape, etc.), but may take the form of assistance in, or contribution to, the execution of the common plan or purpose.⁴¹

32. The Appeals Chamber considered that the *mens rea* differs according to the category of common design under consideration:

- The first category of cases requires the intent to perpetrate a specific crime (this intent being shared by all the co-perpetrators).
- For the second category which, as noted above, is a variant of the first, the accused must have personal knowledge of the system of ill-treatment (whether proven by express testimony or inferred from the accused's position of authority), as well as the intent to further this concerted system of ill-treatment.
- The third category requires the *intent* to participate in and further the criminal activity or the criminal purpose of a group and to contribute to the joint criminal enterprise or, in any event, to the commission of a crime by the group. In addition, responsibility for a crime other than the one agreed upon in the common plan arises only if, in the circumstances of

⁴⁰ *Tadić* Appeals Judgement, para. 204.

⁴¹ *Ibid.*, para. 227.

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*.⁴²

2. Differences between participating in the joint criminal enterprise as a co-perpetrator and aiding and abetting

33. Also in the *Tadić* Appeals Judgement, the Appeals Chamber made a clear distinction between acting in pursuance of a common purpose or design to commit a crime and aiding and abetting the commission of a crime.

(i) The aider and abettor is always an accessory to a crime perpetrated by another person, the principal.

(ii) In the case of aiding and abetting no proof is required of the existence of a common concerted plan, let alone of the pre-existence of such a plan. No plan or agreement is required: indeed, the principal may not even know about the accomplice's contribution.

(iii) The aider and abettor carries out acts specifically directed to assist, encourage or lend moral support to the perpetration of a certain specific crime (murder, extermination, rape, torture, wanton destruction of civilian property, etc.), and this support has a substantial effect upon the perpetration of the crime. By contrast, in the case of acting in pursuance of a common purpose or design, it is sufficient for the participant to perform acts that in some way are directed to the furthering of the common plan or purpose.

(iv) In the case of aiding and abetting, the requisite mental element is knowledge that the acts performed by the aider and abettor assist the commission of a specific crime by the principal. By contrast, in the case of common purpose or design more is required (i.e., either intent to perpetrate the crime or intent to pursue the common criminal design plus foresight that those crimes outside the criminal common purpose were likely to be committed), as stated above.⁴³

⁴² *Ibid.*, para. 228.

⁴³ *Ibid.*, para. 229.