UNITED NATIONS

International Tribunal for the Prosecution of Persons Responsible for Serious Violations of International Humanitarian Law Committed in the Territory of Former Yugoslavia since 1991

Case No. IT-98-30/1-T

Date: 2 November 2001

Original: English

IN THE TRIAL CHAMBER

Before: **Judge Almiro Rodrigues, Presiding**
Judge Fouad Riad
Judge Patricia Wald

Registrar: **Mr. Hans Holthuis**

PROSECUTOR

v.

MIROSLAV KVO^KA
MILOJICA KOS
MLA\O RADI]
ZORAN ŽIGI]
DRAGOLJUB PRCA]

JUDGEMENT

The Office of the Prosecutor:

Ms. Susan Somers
Mr. Kapila Waidyaratne
Mr. Daniel Saxon

Counsel for the Accused:

Mr. Krstan Simi} for Mr. Kvo~ka
Mr. @arko Nikoli} for Mr. Kos
Mr. Toma Fila for Mr. Radi}
Mr. Slobodan Stojanovi} for Mr. @igi}
Mr. Jovan Simi} for Mr. Prca}

inhumane acts" and, more particularly, that he "was an armed member of an armed group that, in the context of the conflict in the Prijedor region, attacked Jaski}i ... The Appellant actively took part in this attack, rounding up and severely beating some of the men from Jaski}i".[463] Tadi} was considered to be a co-perpetrator of the joint criminal enterprise. In the *Kupreški}* case, some of the defendants were originally convicted as co-perpetrators of persecution on the basis of a joint criminal enterprise theory. The joint criminal enterprise involved a "common plan for the execution of the cleansing campaign in the village" of Ahmi}i.[464] Four of the defendants were found to have been directly involved in attacks upon one or more Bosnian Muslim homes resulting in killings and expulsions, a participation explicitly amounting to co-perpetration of the criminal enterprise for two defendants. A fifth was found guilty of aiding and abetting the enterprise because he stood by, ready to lend assistance, but did not participate directly in the attack.[465]

276. In the *Dachau Concentration Camp* case, which was expressly based on a theory of joint criminal enterprise (referred to as "common design" by the US Prosecutor), the Law Reports summarise the required participation of the accused in the criminal enterprise as follows:

> (a) if his duties were such as to constitute in themselves an execution or administration of the system that would suffice to make him guilty of participation in the common design, or,
>
> (b) if his duties were not in themselves illegal or interwoven with illegality he would be guilty if he performed these duties in an illegal manner.[466]

277. The Prosecution in *Dachau* had argued that any person engaged in any administrative or supervisory capacity in the camp, in which group it included anyone who was appointed by and took orders from the SS, was guilty of "participation" in the common design. The Prosecution and the Defense differed over whether guards and prisoner functionaries, who were the lowest in the hierarchy of those on trial, could fall into this group. By convicting the three guards and the three prisoner functionaries concerned, the Court appeared to accept the proposition that they were indeed engaged in an administrative or protective capacity. The Prosecution explained the criminal participation of the guards as "the men who stood in readiness to prevent any prisoner from extricating himself from this camp. They were thus aiding and abetting in the execution of the common design."[467]

278. The concentration camp cases seemingly establish a rebuttable presumption that holding an executive, administrative, or protective role in a camp constitutes general participation in the crimes

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[463] *Tadi}* Appeals Chamber Judgement, paras 231-232.
[464] *Kupreški}* Trial Chamber Judgement, para. 782. See also para. 814 with respect to Drago Josipovi} and para. 828 with respect to Vladimir Santi}.
[465] *Kupreški}* Trial Chamber Judgement, para. 803.
[466] *Dachau Concentration Camp*, p 13.
[467] *Dachau Concentration Camp*, p 13.

committed therein. An intent to further the efforts of the joint criminal enterprise so as to rise to the level of co-perpetration may also be inferred from knowledge of the crimes being perpetrated in the camp and continued participation which enables the camp's functioning.[468]

279. A similar approach can be discerned in the judgement of the US Military Tribunal in the *Einsatzgruppen* case, involving the notorious special extermination units of the Third Reich, and in which the U.S. Military Tribunal considered liability for participating in a joint criminal enterprise. The Prosecution argued that only a low threshold of participation was required. With respect to four of the lower level defendants, the Prosecution maintained that

> [e]ven though these men were not in command, they cannot escape the fact that they were members of *Einsatz* units whose express mission, well known to all the members, was to carry out a large scale programme of murder. Any member who assisted in enabling these units to function, knowing what was afoot, is guilty of the crimes committed by the unit. The cook in the galley of a pirate ship does not escape the yardarm merely because he himself does not brandish a cutlass.[469]

280. However, the Military Tribunal apparently did not accept the Prosecution submission that any participation was sufficient, regardless of how low the accused was in the hierarchy of the enterprise. Thus, two of the four lowest level members of the unit who also did not physically commit crimes were acquitted of the most serious charges against them for atrocities committed by the Einsatz unit; they were not acquitted, however, of being members of a criminal organization.[470]

281. The *Einsatzgruppen* Judgement stands for the proposition that mere membership in a criminal organisation would not amount to co-perpetrating or aiding and abetting in the criminal endeavor implemented by that organization, despite knowledge of its criminal purpose. For liability to attach, it must be shown that either (1) the accused participated in some significant way, or (2) the accused held such a position of responsibility – for example commander of a sub-unit – that participation could be presumed.[471] In *Einsatzgruppen*, significant participation included acts such as obtaining ammunition for the forces and arranging vehicles in preparation for a "liquidation", with knowledge of their intended use.

282. It is possible, then, to trace in the jurisprudence of the concentration camp cases a theory in which criminal liability will attach to staff members of the camps who have knowledge of the crimes being committed there, unless their role is not "administrative" or "supervisory" or

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[468] *Dachau Concentration Camp* pp 15-16 (citation ommitted).

[469] *The United States of America v. Otto Ohlenforf et al.*, Trials of War Criminals Before the Nuremberg Military Tribunals under Control Council Law No.10, Vol. IV, p 373 (hereafter "*Einsatzgruppen*"). The defendants were Von Radetzky, Ruehl, Schubert, and Graf.

[470] See *Einsatzgruppen*, pp 581 and 587.

[471] For example, with regard to imputing knowledge from an accused's status in the organization, the Tribunal remarked that: "[i]f it were established that Ruehl really served as commander of the unit even for brief periods during such times as the Kommando was engaged in liquidating operations, guilt under counts one and two would be conclusive." *Einsatzgruppen*, p 579.