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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-98-30/1-A
Date: 28 February 2005
Original: English

IN THE APPEALS CHAMBER

Before: Judge Mohamed Shahabuddeen, Presiding
Judge Fausto Pocar
Judge Florence Ndepele Mwachande Mumba
Judge Mehmet Güney
Judge Inés Mónica Weinberg de Roca

Registrar: Mr. Hans Holthuis

PROSECUTOR

v.

**MIROSLAV KVOČKA
MLAĐO RADIĆ
ZORAN ŽIGIĆ
DRAGOLJUB PRCAĆ**

JUDGEMENT

The Office of the Prosecutor:

Mr. Anthony Carmona
Ms. Helen Brady
Ms. Norul Rashid
Mr. David Re
Ms. Kelly Howick

Counsel for the Accused:

Mr. Krstan Simić for Miroslav Kvočka
Mr. Toma Fila for Mlađo Radić
Mr. Slobodan Stojanović for Zoran Žigić
Mr. Goran Rodić for Dragoljub Prcać

offence in question. It follows that the moral gravity of such participation is often no less – or indeed no different – from that of those actually carrying out the acts in question.¹⁸⁹

81. A joint criminal enterprise requires a plurality of co-perpetrators who act pursuant to a common purpose involving the commission of a crime in the Statute.

82. Three broad forms of joint criminal enterprise have been recognised by the International Tribunal's jurisprudence.¹⁹⁰ In the first form of joint criminal enterprise, all of the co-perpetrators possess the same intent to effect the common purpose.¹⁹¹ The second form of joint criminal enterprise, the "systemic" form, a variant of the first form, is characterized by the existence of an organized criminal system, in particular in the case of concentration or detention camps.¹⁹² This form of joint criminal enterprise requires personal knowledge of the organized system and intent to further the criminal purpose of that system.¹⁹³

83. The third, "extended" form of joint criminal enterprise entails responsibility for crimes committed beyond the common purpose, but which are nevertheless a natural and foreseeable consequence of the common purpose.¹⁹⁴ The requisite *mens rea* for the extended form is twofold. First, the accused must have the intention to participate in and contribute to the common criminal purpose. Second, in order to be held responsible for crimes which were not part of the common criminal purpose, but which were nevertheless a natural and foreseeable consequence of it, the accused must also know that such a crime might be perpetrated by a member of the group, and willingly take the risk that the crime might occur by joining or continuing to participate in the enterprise.¹⁹⁵

84. The Appeals Chamber understands that the Trial Chamber considered the crimes in Omarska camp to have been committed primarily as part of a systemic type of joint criminal enterprise. As the Trial Chamber explained:

Although the first two categories enunciated by *Tadić* are quite similar, and all three are applicable to this case to some degree, the second category, which embraces the post war "concentration camp" cases, best resonates with the facts of this case and is the one upon which the Trial Chamber will focus most of its attention. The Trial Chamber will examine and elaborate upon the

¹⁸⁹ *Tadić* Appeal Judgement, para. 191.

¹⁹⁰ *Ibid.*, paras 195-226.

¹⁹¹ *Ibid.*, para. 196. See also, *Krnjelac* Appeal Judgement, para. 84 ("[A]part from the specific case of the extended form of joint criminal enterprise, the very concept of joint criminal enterprise presupposes that its participants, other than the principal perpetrator(s) of the crimes committed, share the perpetrators' joint criminal intent.")

¹⁹² *Tadić* Appeal Judgement, paras 202-203; *Krnjelac* Appeal Judgement, para. 89.

¹⁹³ *Tadić* Appeal Judgement, paras 203, 220, 228.

¹⁹⁴ *Ibid.*, para. 204 ("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.")

¹⁹⁵ *Tadić* Appeal Judgement, paras 228 and also 204, 220; *Vasiljević* Appeal Judgement, para. 99.

88. The Trial Chamber considered that a co-perpetrator of a joint criminal enterprise shares the intent to carry out the joint criminal enterprise and actively furthers the enterprise. An aider or abettor, on the other hand, need not necessarily share the intent of the other participants; he need only be aware that his contribution assists or facilitates a crime committed by the other participants. The Trial Chamber held that the shared intent may be inferred from the knowledge of the criminal nature of the enterprise and the continued significant participation therein. It acknowledged that there may be difficulties in distinguishing between an aider or abettor and a co-perpetrator, in particular in the case of mid-level accused who did not physically commit crimes. When, however, an accused participated in a crime that advanced the goals of the criminal enterprise, the Trial Chamber considered him more likely to be held responsible as a co-perpetrator than as an aider or abettor.²⁰¹

89. The Appeals Chamber notes that in the *Vasiljević* Appeal Judgement, the Appeals Chamber discussed the correct distinction between co-perpetration by means of a joint criminal enterprise and aiding and abetting:

(i) 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, 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.

(ii) 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 the specific crime of the principal. By contrast, in the case of participation in a joint criminal enterprise, i.e. as a co-perpetrator, the requisite *mens rea* is intent to pursue a common purpose.²⁰²

90. Applying the *Vasiljević* definition, the Appeals Chamber considers that whether an aider and abettor is held responsible for assisting an individual crime committed by a single perpetrator or for assisting in all the crimes committed by the plurality of persons involved in a joint criminal enterprise depends on the effect of the assistance and on the knowledge of the accused. The requirement that an aider and abettor must make a substantial contribution to the crime in order to be held responsible applies whether the accused is assisting in a crime committed by an individual or in crimes committed by a plurality of persons. Furthermore, the requisite mental element applies equally to aiding and abetting a crime committed by an individual or a plurality of persons. Where the aider and abettor only knows that his assistance is helping a single person to commit a single crime, he is only liable for aiding and abetting that crime. This is so even if the principal perpetrator is part of a joint criminal enterprise involving the commission of further crimes. Where, however,

²⁰¹ Trial Judgement, para. 284.

²⁰² *Vasiljević* Appeal Judgement para. 102; see also *Tadić* Appeal Judgement, para. 229; *Krnjelac* Appeal Judgement paras 31-33.

The participation in the enterprise must be significant. By significant, the Trial Chamber means an act or omission that makes an enterprise efficient or effective; e. g. a participation that enables the system to run more smoothly or without disruption. Physical or direct commission of a serious crime that advances the goal of the criminal enterprise would constitute a significant contribution.²⁰⁹

The Trial Chamber went on to consider that the significance of the contribution to the joint criminal enterprise is to be determined on a case by case basis, taking into account a variety of factors, among them the position of the accused, the amount of time spent participating with knowledge of the criminal nature of the system, the level and efficiency of the participation, and any efforts to prevent crimes. The Trial Chamber attributed particular importance to any evidence of a shared intent or agreement with the criminal system, and the physical perpetration of crimes.²¹⁰

96. The Appeals Chamber has explained the *actus reus* of the participant in a joint criminal enterprise as follows:

First, a plurality of persons is required. They need not be organised in a military, political or administrative structure. Second, the existence of a common purpose which amounts to or involves the commission of a crime provided for in the Statute is required. There is no necessity for this purpose to have been previously arranged or formulated. It may materialise extemporaneously and be inferred from the facts. Third, the participation of the accused in the common purpose is required, which involves 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 the provisions (for example murder, extermination, torture or rape), but may take the form of assistance in, or contribution to, the execution of the common purpose.²¹¹

97. The Appeals Chamber notes that, in general, there is no specific legal requirement that the accused make a substantial contribution to the joint criminal enterprise. However, there may be specific cases which require, as an exception to the general rule, a substantial contribution of the accused to determine whether he participated in the joint criminal enterprise.²¹² In practice, the significance of the accused's contribution will be relevant to demonstrating that the accused shared the intent to pursue the common purpose.

98. The Appeals Chamber agrees that the Prosecutor need not demonstrate that the accused's participation is a *sine qua non*, without which the crimes could or would not have been committed.²¹³ Thus, the argument that an accused did not participate in the joint criminal enterprise because he was easily replaceable must be rejected.²¹⁴

²⁰⁹ *Ibid.*, para. 309.

²¹⁰ *Ibid.*, para. 311.

²¹¹ *Vasiljević* Appeal Judgement, para. 100 (footnotes omitted).

²¹² *See e. g.* below, para. 599 (the case of "opportunistic visitors" who enter the camp to commit crimes).

²¹³ *Tadić* Appeal Judgement paras 191, 199.

²¹⁴ *Prcać* Appeal Brief, para. 356 ("the accused did not have any special knowledge, skills or talents and, in the nature of things, he was easily replaceable."); *Radić* Appeal Brief, para. 62 ("The Defence can only conclude that the system would have functioned in the same way even without the presence of the accused Radić"); *Radić* Reply Brief, para. 34