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Attribution of Criminal Liability A Critical Comparison of The US Doctrine of Conspiracy and The ICTY Doctrine of Joint Criminal Enterprise from an American Perspective

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ATTRIBUTION OF CRIMINAL LIABILITY: A CRITICAL COMPARISON OF THE U.S. DOCTRINE OF CONSPIRACY AND THE ICTY DOCTRINE OF JOINT CRIMINAL ENTERPRISE FROM AN AMERICAN PERSPECTIVE

In its very first case, the Appeals Chamber of the International Criminal Tribunal for the Former Yugoslavia (ICTY) confronted the difficulty of prosecuting the type of group activity that resulted in mass atrocities during the Yugoslav war. Strictly applying the principles for attributing criminal responsibility found in the ICTY Statute, the Trial Chamber had acquitted Tadić *of the most serious charges he faced, the murders of five individuals that occurred during the ethnic cleansing of the village of Jaškići. The* Tadić *Appeals Chamber remedied the problem by elaborating the doctrine of Joint Criminal Enterprise (JCE), which it held was customary international law that was encompassed within the framework of ICTY Statute.*

In two of its three forms – JCE I (shared intent) and JCE III (extended liability for reasonably foreseeable crimes) – JCE closely resembles liability for substantive crimes committed during the course of a conspiracy. So-called Pinkerton *liability has its roots in a case decided by the United States Supreme Court in 1946, and although the Appeals Chamber in* Tadić *did not rely on specifically on* Pinkerton *as a source for its holding, the similarities between the two cases are plain.*

The purpose of this article, and the lecture on which it was based, is two compare the two doctrines to determine how they assign criminal

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*liability and which one better comports with the principle of culpability; that is, punishing a criminal defendant appropriately based upon his mental state (*mens rea*) at the time the crime was committed. The conclusions reached were mixed.*

It appears that Pinkerton *attributes liability more broadly to non-participating defendants in some cases of shared intent than does JCE I. This is because a defendant is liable for substantive crimes committed during the course of the conspiracy so long as he is a member of the conspiracy, i. e., has intentionally entered into the conspiratorial agreement with the intent that its objectives be achieved. Other than agreement, no other act by the non-participating defendant is required; whereas under JCE I some affirmative act that actually furthers the purpose of the enterprise is a necessary pre-requisite for attribution.*

In other cases, however, where criminal liability is attributed vertically, up a chain of command, JCE attribution is broader because for JCE liability to occur, a defendant need not necessarily ratify the enterprise's purpose so long as his acts further it. The necessity of proving the intent to enter into a conspiratorial agreement thus serves to limit attribution under Pinkerton *in these cases.*

Moreover, conspiracy more closely comports with the principal of culpability since it punishes, as a substantive crime, participation in group activity whereas JCE expressly does not. Ultimately, the analysis reveals the apparent need in international criminal law for a theory which directly punishes participation in an organization which commits crimes, rather than approximating such punishment by attributing liability for crimes via JCE to defendants who played no role in them.

Criminal law provides for ways to attribute criminal liability to individuals other than those who perform all the acts necessary to the completion of the crime on the justification that such attribution is necessary because significant wrongdoers would otherwise go unpunished.[1] However, punishing wrongdoers as to whom criminal liability has been attributed, rather than those who are directly responsible, arguably violates one of the fundamental principles of criminal law that punishment should reflect culpability. Since at least the 18th C, the cornerstone for assessing appropriate punishment in the common law legal systems has been the defendant's culpability (criminal intent or *mens rea*). Culpability is the measuring stick by which the appropriate degree of punishment is calibrated. It is seen as a continuum of awareness from negligence to

[1] Prosecutor v. Tadić, Judgement ICTY Appeals Chamber, at para. 191, Case No. IT-94-1-A (July 15, 1999) [hereinafter Tadić Appeal Judgement].

recklessness to knowledge to intent with the degree of punishment paralleling this continuum from the least serious for negligent conduct to the harshest for intentional conduct. Theories that attribute criminal liability to those other than the principal authors of the crime can contradict the principle of culpability since individuals who do not intend to commit crimes, or even know that crimes have been committed, may be among those most seriously punished.[2]

Joint Criminal Enterprise (JCE) liability, which has its roots in *Prosecutor v. Tadić*, the first case decided by the International Criminal Tribunal for the Former Yugoslavia (ICTY), is one such theory.[3] The criticisms of JCE – *inter alia* that it lacks a solid doctrinal foundation, that it overlaps and conflicts with the doctrines of complicity and superior responsibility, or that it over punishes some and under punishes others – are well documented in the literature and it is not my purpose to rehash those arguments.[4]

Instead, I propose to compare JCE and American conspiracy law as theories for attributing criminal liability in an attempt to determine whether JCE more accurately attributes guilt and comports with the principle of culpability than American conspiracy law. This analysis will focus on the *Tadić* case in the ICTY and *Pinkerton v. United States*[5] in the U.S. Supreme Court. These two cases established the doctrines of criminal attribution for which they have come to stand and, despite the criticisms of them,[6] the basic principles remain substantially the same today as they did when the cases were decided.[7]

Joint Criminal Enterprise

In *Tadić*, the Appeals Chamber of the ICTY faced a dilemma. Tadić had been acquitted by the Trial Chamber of some of the most serious crimes with which he was charged, the murders of five individuals in the Jaskići and Sivic areas of opština Prijedor. His participation in those crimes did not amount

[2] *See* Ronald C. Slye and Beth Van Schaack, Essentials, International Criminal Law 293 (2009).

[3] Allison Marston Danner & Jenny S. Martinez, Guilty Associations: Joint Criminal Enterprise, Command Responsibility, and the Development of International Criminal Law, 93 Cal. L.Rev. 75, 147 (2005) [hereinafter Guilty Associations]:

… JCE, has the potential to push the boundaries of the traditional criminal law paradigm, particularly with respect to the mens rea and culpability principles that are central to criminal law. In general, offenses committed with a high level of intent or purposefulness are viewed as more serious and morally blameworthy than offenses committed recklessly or negligently.

[4] *See, e.g.,* Guilty Associations, *supra* note 3 and Kai Ambos, Joint Criminal Enterprise and Command Responsibility, 5 J. of Int'l. Crim. Justice 159 (2007) (hereinafter, Ambos).

[5] Pinkerton v. United States, 328 U.S. 640 (1946).

[6] *Supra* note 4.

[7] *See, e.g.,* Ambos, *supra* note 4 at 160.

either to direct perpetration,[8] complicity (aiding and abetting),[9] or superior responsibility,[10] the rules found in the ICTY statute for attributing to individuals the responsibility for international crimes. Absent another theory of individual responsibility, the Trial Chamber's decision would have to stand. Consequently, the Appeals Chamber searched for and found what it deemed to be a theory of customary international law[11] that justified Tadić's conviction. The theory was "common purpose" liability,[12] which the *Tadić* court said "encompasses three distinct categories of collective criminality."[13] I will briefly describe the essential features of each category.

JCE I

The most basic, and least controversial, form of JCE liability is the common enterprise/shared common intention category (JCE I).[14] The *Tadić* Appeals Chamber described JCE I as,

> where all co-defendants, acting pursuant to a common design possess the same criminal intention; for instance, the formulation of a plan among the co-perpetrators to kill, where, in effecting this common design (and even if each co-perpetrator carries out a different role with it), they nevertheless all possess the intent to kill.[15]

[8] Direct perpetration is planning, instigating, ordering or committing. Security Council of the U.N., Statute of the International Criminal Tribunal for the Former Yugoslavia, at art. 7(1), U.N. Doc. S/res/827 (1993) [hereinafter ICTY Statute].

[9] ICTY Statute at art. 7(1) ("otherwise aided and abetted in the planning, preparation or execution of a crime").

[10] ICTY Statute at art. 7(3).

[11] Tadić Appeal Judgement, at paras. 194-95. The *Tadić* Appeals Chamber's conclusion that the third category of JCE (JCE III) is customary international law has been criticized by commentators. See, *e.g.*, Guilty Associations, *supra* note 3 at 110 ("The cases cited in *Tadić* … do not support the sprawling form of JCE, particularly the extended form of this kind of liability, currently employed at the ICTY.") and Kai Ambos, Amicus Curiae Brief in the Matter of the Co-Prosecutors' Appeal of the Closing Order Against Kaing Guek Eav "Duch" dated 8 August 2008, 20 Criminal Law Forum 353, 385-86 (2009), *available at* http://www.springerlink.com/content/1046-8374/20/2-3/. More recently, one of the post-ICTY tribunals, the Extraordinary Chambers in the Courts of Cambodia, has rejected that conclusion. Prosecutor v. Ieng, *et. al.*, Decision of the Pre-Trial Chamber on the Appeals Against the Co-Investigative Judges Order on Joint Criminal Enterprise (JCE), at para. 77, Case No. 002-19-09-2007-ECCC/OCIJ (PTC38) (May 20, 2010), *available at* http://www.eccc.gov.kh/sites/default/files/documents/courtdoc/D97_15_9_EN.pdf.

[12] Tadić Appeal Judgement, at para. 195.

[13] *Id.*

[14] *See* Ambos, *supra* note 4 at 160.

[15] Tadić Appeal Judgement, at para. 196.

This form of JCE could not have supported a finding that Tadić had participated in the murders. While the evidence proved that he "actively took part in the common criminal purpose to rid the Prijedor region of the non-Serb population," and that it was "beyond doubt" that he was "aware of the killings accompanying the commission of inhumane acts against the non-Serb population,"[16] evidence of awareness (knowledge) was insufficient to prove beyond a reasonable doubt that Tadić shared the intent to kill the victims.

JCE II

The second category of JCE liability – the "systemic" form[17] – is not relevant to the facts in *Tadić*,[18] and it will not be the subject of this article because it has no analogue under *Pinkerton*. However, a brief description is warranted. This form of liability is derived from the concentration camp cases where, in order to establish the liability of the camp commander for individual crimes committed by the prison guards, the prosecution must prove:

> (i) the existence of an organized system to ill-treat detainees and commit the various crimes alleged; (ii) the accused's awareness of the nature of the system; and (iii) the fact that the accused in some way actively participated in enforcing the system, *i.e.*, encouraged, aided and abetted or in any case participated in the realization of the common criminal design.[19]

JCE II requires knowledge of the result (criminal ill treatment of prisoners) and some affirmative act of participation in the enterprise. JCE II could not solve the problem the *Tadić* Appeals Chamber faced because, most obviously, the crimes did not take place in a prison camp setting, and there was no evidence that Tadić occupied a superior position vis à vis those who committed the murders. So the *Tadić* court had to look even further, venturing onto what some believe was entirely new territory,[20] where it found JCE III.

[16] Tadić Appeal Judgement, at para. 231.

[17] Tadić Appeal Judgement, at paras. 203-203; Ambos, *supra* note 3 at 160.

[18] Tadić, Appeal Judgement, at para. 203.

[19] Tadić, Appeal Judgement, at para. 202.

[20] *See supra* note 11 and Ambos, *supra* note 4 at 173 ("... JCE II and III constitute new and autonomous (systemic) concepts of imputation without an explicit basis in written international criminal law.")

JCE III

The third category of JCE, the "so-called 'extended' joint enterprise," [21] exists where one of the co-actors commits a crime not within the scope of the common plan but which constitutes a "natural and foreseeable consequence" of the execution of the plan.[22] The *Tadić* Appeals Chamber gave an example of JCE III that was eerily similar to the facts in *Tadić* itself. It posited a hypothetical common plan to ethnically cleanse a village during which one or more of the villagers was killed. While killing civilians was not part of the plan, "it was nevertheless foreseeable that the forcible removal of civilians at gunpoint might well result in the deaths of one or more [of them]."[23]

Here, unlike JCE I or JCE II, attribution of criminal liability for the murders is cut loose from the *mens rea* requirements of intent to produce, or even knowledge of, the result. Instead criminal attribution rests on the more elastic negligence concept of foreseeability. No wonder ICTY prosecutors have used JCE as a theory of liability so frequently;[24] it relieves them to a substantial degree of their burden of proof and exposes defendants to punishment for the most serious offenses on proof arguably amounting to little more than simple negligence.[25]

The *Tadić* Appeals Chamber would dispute this analysis. It tried to allay fears that JCE III could impose maximum liability for minimum culpability when it stated:

> It should be noted that more than negligence is required. What is required is a state of mind in which a person, although he did not intend to bring about a certain result, was aware that the actions of the group were most likely to lead to that result but nevertheless willingly took that risk. In other words, the so-called *dolus eventualis* is required (also called 'advertent recklessness' in some legal systems).[26]

Despite these reassuring words, the Appeals Chamber's statement nonetheless amounts to an argument that recklessness is a sufficient *mens rea* for imposing maximum punishment, a position that runs counter to accepted prin-

[21] Ambos, *supra* note 4 at 160.

[22] Tadić Appeal Judgement, at para. 204.

[23] *Id.*

[24] One study showed that from its genesis in *Tadić* until 2004, JCE was alleged in 64% of the ICTY indictments. If "acting in concert" is added as a theory for attributing liability, the total rises to 81%. Guilty Associations, *supra* note 3 at 107.

[25] *Id.* at 108-09.

[26] Tadić Appeal Judgement, at para. 220.

ciples of culpability.[27] As for whether the standard really requires *dolus eventualis*, suffice it to say that drawing the line between negligence and recklessness is not always easy. Likewise, imposing criminal punishment based on the conduct of others often produces less than satisfactory results, especially if the results are to be judged by the measuring stick of whether the punishment fits the crime.

Next, I will outline the basic principles of American conspiracy law.

Conspiracy

Conspiracy has deep roots in the common law. Like solicitation and attempt, conspiracy was aimed at crime prevention, punishing inchoate crimes, even though the actors' criminal objective was not fulfilled.[28] But unlike its common law ancestor, in modern American law conspiracy does not disappear when the object offense is completed.[29] It remains as a substantive offense, punishing the criminal agreement on the theory that joint criminal activity is more dangerous than individual activity and therefore warrants more punishment.[30]

In addition to deterring and punishing crime, conspiracy is the basis for a rule of evidence that permits the use out-of-court statements of co-conspirators as exceptions to the hearsay rule.[31] Conspiracy also permits the attribution of liability for a substantive offense committed by one co-conspirator to other, non-participating co-conspirators.[32] It is this last use of conspiracy doctrine, as a vehicle for attributing liability that is focus of this article.

Mens Rea

At common law, conspiracy was defined as an agreement between two or more persons to commit an unlawful act or to commit a lawful act unlawful-

[27] *Supra* note 3 and accompanying text.

[28] Beth Van Schaack and Ronald C. Slye, INTERNATIONAL CRIMINAL LAW AND ITS ENFORCEMENT: CASES AND MATERIALS 867 (2d ed. 2010) (noting that "the original purpose of conspiracy doctrine … was to deter preparatory criminal activity").

[29] *Id.*

[30] *Id.* ("[C]onspiracy should be criminalized … to diffuse the danger associated with group criminality.")

[31] F.R.Evid. 801(d)(2)(E).

[32] Joshua Dressler, UNDERSTANDING CRIMINAL LAW 493 (5th ed. 2009) [hereinafter Dressler];Van Schaack and Slye, *supra* note 26.

ly.[33] The essence of the offense is the unlawful agreement.[34] Common law conspiracies were punished as misdemeanors, even if no act in furtherance of the criminal purpose had taken place.[35] Since no act, other than the agreement, is required for conviction, the intent of the putative co-conspirators is especially important. Indeed, conspiracy is one of the few "double" specific intent (*dolus specialis*) offenses. Thus, the co-conspirators must: 1) intend to enter into the conspiratorial agreement with 2) the specific intent to accomplish the object of the conspiracy.[36] This intent requirement, by definition, limits those offenses which can be the objects of conspiracies to intentional offenses; that is to say, one cannot intend to commit a negligent or reckless crime. So, for example, some courts hold that only first degree murder, which requires premeditation and deliberation in addition to intent to kill, can be the object offense of a conspiracy to commit murder.[37] In this sense, the *mens rea*/culpability required for a conviction for conspiracy is even greater than that required for conviction of the object offense.

The Agreement

All of the co-conspirators must enter into the same criminal agreement.

> [T]he agreement takes the law beyond the individual mental states of the parties, in which each person separately intends to participate in the commission of an unlawful act, to a shared intent and mutual goal, to a spoken or unspoken understanding by the parties that they will proceed in unity toward their shared goal.[38]

[33] *Id.* at 429. Conspiracies of the second type where the objective is the commission of a lawful act unlawfully are rare and of dubious validity. See *id.* at 437-38. The Model Penal Code requires that the object of the conspiracy be a criminal offense. American Law Institute, Model Penal Code (1962) § 5.03 [hereinafter MPC].

[34] Dressler, *supra* note 33 at 434.

[35] There are statutory conspiracies that do require the commission of an overt act in furtherance of the conspiracy; e.g., 18 U.S.C. § 371 making it an offense to conspire to commit an offense against, or defraud, the United States. The manual for U.S. federal prosecutors lists the elements of a Section 371 conspiracy as "including an illegal agreement, criminal intent, and proof of an overt act." 9 U.S. Attorneys' Manual, Criminal Resource Manual 923.

[36] Dressler, *supra* note 33 at 440.

[37] *See, e.g.*, People v. Cortez, 960 P.2d 537, 538 (Cal. 1998).

[38] Dressler, *supra* note 33 at 434. As a consequence, at common law there was no such thing as a unilateral conspiracy; that is, one could not enter into a conspiracy with an undercover police officer because the officer does not intend to carry out the conspiratorial agreement. *Id.* at 446. The Model Penal Code adopts the unilateral approach. MPC, Comment to § 5.03 at 393.

Thus, the term conspiracy properly refers to the criminal agreement and not, as it is often misused by lawyers and judges, to the group of conspirators.[39] Consider this example. A and B agree to rob a bank. At the scene of the crime, C renders some assistance. C has aided and abetted the commission of the offense of bank robbery, but is C also a co-conspirator? If conspiracy is taken to mean the "group of conspirators," then arguably he is because he aided and abetted the "group," making him guilty of the additional crime of conspiracy. This analysis would, however, be wrong. C can be a co-conspirator only if he participated in the formation of the agreement or ratified it later on. Since C did not participate in the agreement, or even know of its existence, he is not guilty of conspiracy.

Finally, it is clear that a single agreement can encompass the commission of more than one crime. As the Supreme Court stated in *Braverman v. United States*,[40] "one agreement cannot be taken to be several agreements and hence several conspiracies because it envisages the violation of several statutes rather than one."[41] This rule sounds simple but can present problems in application. For example, if A and B steal a car, it may reasonably be inferred that they did so pursuant to an agreement. But what if a week later A and B steal a second car? Is that theft a part of the original conspiracy, in which case A and B are guilty of one conspiracy and two car thefts, or is it a separate conspiracy, in which case they are guilty of two conspiracies and two car thefts. The answer depends upon the nature of the original conspiratorial agreement. Was it to steal cars? Or to steal ONE car? The issue may be further complicated if the object crimes are dissimilar, *e.g.*, a week after the theft of the second car, A and B burglarize a house to steal the owner's property. Now are they guilty of one conspiracy encompassing three substantive crimes; one conspiracy encompassing two substantive crimes and one conspiracy encompassing one substantive crime; or three conspiracies, each encompassing a separate substantive crime? The answer depends upon the nature of the conspiratorial agreement.

The Parties to a Conspiracy

Conspiracy is an offense that requires the participation of more than one person. Accordingly, *Wharton's Rule* provides that an offense which by definition requires the participation of two persons cannot be the object of a con-

[39] Dressler, *supra* note 33 at 436-37. I owe Professor Dressler for the example which follows in the text.

[40] Braverman v. United States, 317 U.S. 49 (1942).

[41] *Id.* at 53.

spiratorial agreement.[42] This is because in those offenses, such as bribery, the parties do not share the same criminal purpose – one is a bribe giver, the other is a bribe taker. On the other hand, when more than two participate in the crime, such as when A and B agree to bribe C, a conspiracy to commit bribery can exist. For the same reason, if the only two parties to the alleged conspiracy are the defendant and an undercover police officer, no conspiracy exits because the undercover officer never intends to commit the object offense.[43]

More complicated scenarios involve situations where one conspiracy is charged but more than one conspiratorial agreement is proved. Some older U.S. Supreme Court cases focused on this single versus multiple conspiracy issue. *Kotteakos v. United States*[44] involved a so-called wheel conspiracy. In that case, Brown was a broker who arranged for fraudulent loans to thirty-one different recipients who belonged to eight different groups.[45] Brown and the other thirty-one individuals were charged with being members of a single conspiracy. There was no evidence that the individuals in the eight groups were aware of each others' existence or that they all had obtained their fraudulent loans through Brown.[46]

The prosecution in *Kotteakos* argued that all the conspirators were connected by virtue of their common link, Brown, the "hub" of the wheel.[47] The defendants countered that there could be no single conspiracy unless the spokes – the eight groups – were also connected by a rim; that is, some evidence that there was a necessary relationship between the groups. The Supreme Court agreed with the defense that in *Kotteakos* each fraudulent loan agreement stood on its own and that there was no relationship between the spokes.[48] In other words, there was no community of interest, and no shared or common objective. Instead, there was merely parallel conduct by the eight groups who were similarly situated.

Of course the fact that there was not a single conspiracy does not mean that there was no conspiracy. In *Kotteakos*, each of the eight spokes of the wheel constituted a separate "chain" conspiracy.[49] Indeed, it is possible to have a single conspiracy that has characteristics of both a wheel and a chain. That would have been the case in *Kotteakos*, if there had been a community of interest and shared common objective – a rim – tying together the spokes in the wheel.[50]

[42] Dressler, *supra* note 33 at 461.
[43] *Id.* at 440.
[44] Kotteakos v. United States, 328 U.S. 750 (1946).
[45] *Id.* at 754-55.
[46] *Id.*
[47] *Id.* at 755.
[48] *Id.*
[49] Dressler, *supra* note 33 at 455.
[50] *Id.* at 455-56.

Putting aside the different images used to describe conspiracies, a basic point should be underscored: It is not fatal to the existence of a conspiracy that some of the conspirators have never communicated with each other or that they know of each other's existence, so long as the evidence reveals that the conspirators have an awareness of "both the scope and the objective of the enterprise"[51] and that there is a shared "community of interest [among the parties]."[52] However, "[m]ere knowledge of illegal activity, even in conjunction with participation in a small part of the conspiracy, does not by itself establish that a person has joined in the grand conspiracy."[53]

Whether there is one or more than one conspiracy is not just a question for academic curiosity. It can have considerable consequences. For example, it can affect whether the co-conspirator exception to the hearsay rule applies[54] or whether the defendants may be properly joined together for trial.[55] However, the consequence which is of central importance in this article is whether guilt for crimes committed by a co-conspirator may be attributed to the other members of the conspiracy. If there is a single conspiracy, such attribution can take place. If there are multiple conspiracies, it cannot.

"Pinkerton" Liability

In *Pinkerton v. United States*, two brothers, Daniel and Walter, were charged with tax violations stemming from unlawful possession, transportation and dealing in whiskey.[56] There was no question that the brothers were properly convicted of conspiracy. The issue was whether Daniel could be convicted of substantive offenses committed by Walter while Daniel was in jail.[57] As to the substantive offenses, there was also no question that they furthered the conspiracy since many of them were also charged as overt acts.[58] In deciding that Daniel had been properly convicted of the substantive offenses, the Supreme Court said:

[51] United States v. Evans, 970 F.2d 663,670 (10th Cir. 1992).

[52] Dressler, *supra* note 33 at 454, *quoting* Kilgore v. State, 305 S.E.2d 82, 90 (Ga. 1983).

[53] United States v. Evans, 970 F.2d at 670. (The *Evans* court rejected the government's contention that knowledge that cocaine came from the Medellin cartel could make a street dealer a member of the worldwide Medellin conspiracy.)

[54] F.R.Evid., Rule 801(d)(2)(E).

[55] F.R.Crim.Pro., Rule 8(a).

[56] Pinkerton v. United States, 328 U.S. at 648 (Rutledge, J., dissenting).

[57] *Id.*

[58] *Id.* at 642.

> The unlawful agreement contemplated precisely what was done. It was formed for the purpose. The act done was in execution of the enterprise. The rule which holds responsible one who counsels, procures, or commands another to commit a crime is founded on the same principle. That principle is recognized in the law of conspiracy when the overt act of one partner in crime is attributable to all.[59]

The Court noted, however, that it would be a "different case" if the substantive offenses committed by one of the conspirators were not "in furtherance of the conspiracy, did not fall within the scope of the unlawful project, or [were] merely a part of the ramifications of the plan that *could not be reasonably foreseen as a necessary or natural consequence of the unlawful agreement.*"[60] Since none of those factors was present in *Pinkerton*, this last statement by the Court was *obiter dictum,* not binding in subsequent cases.[61] Nonetheless, it is the foundation for a substantial body of U.S. case law attributing criminal liability to co-conspirators on the grounds that the crimes were "reasonably foreseen as a natural consequence of the unlawful agreement."[62]

The Two Theories Compared

Attribution of Criminal Liability: JCE I and Conspiracy

While attribution of liability for crimes committed by a JCE requires the existence of a common plan or purpose, the *Tadić* court made it clear that "[t]here is no necessity for the plan, design or purpose to have been previously arranged or formulated."[63] It "may materialize extemporaneously and be inferred from the fact that a plurality of persons acts in unison..."[64] Once the enterprise comes into existence, whether by prior plan or extemporaneously, all the members of the enterprise are responsible for its crimes so long as they

[59] *Id.* at 647. Justice Robert Jackson, the chief Nuremberg prosecutor who was on leave from the U.S. Supreme Court at the time *Pinkerton* was decided, criticized it on his return to the Court as a theory of criminal attribution resting "upon the novel and dubious theory that conspiracy is equivalent in law to aiding and abetting." Krulewitch v. United States, 336 U.S. 440, 451 (1949) (Jackson, J. concurring).

[60] *Id.* at 647-48.

[61] Note, Developments in the Law – Criminal Conspiracy, 72 Harv. L. Rev. 920, 994 (1959).

[62] Dressler, *supra* note 33 at 494 (cautioning that many of the cases adopting *Pinkerton* could have reached the same result using principles of accomplice liability).

[63] Tadić Appeal Judgement, at para. 227 (iii).

[64] *Id.*

perform "acts (of any kind) that 'in some way' are directed to the furthering of the common plan or purpose."[65]

Courts and commentators have seized on the "participation" requirement as the factor that distinguishes JCE from conspiracy and presumably narrows the circumstances in which criminal liability may be attributed.[66] But, as we shall see, this is at best only partially true.

The common law required only an agreement in order for the conspirators to be guilty of the substantive crime of conspiracy.[67] In cases of "pure" agreement, however, conspiracy does not function as a rule of attribution. This is because, when conspiracy is used as a rule of attribution, at least one substantive crime (other than the conspiracy itself) must have been committed by one of the co-conspirators.[68] Thus, conspiracy attribution occurs when: 1) the defendant enters into the conspiratorial agreement, and 2) a crime is committed by any of the co-conspirators, and 3) the crime is one of the explicit objectives of agreement.

Would the outcome be any different under JCE I? In both JCE I and conspiracy there is a common criminal purpose, whether we label it enterprise or agreement.[69] And, under both theories the defendant to whom liability is attributed must have had the specific intent that a crime that is explicitly part of the common criminal purpose be carried out. That leaves only the nature of the defendant's participation (the *actus reus*) as a basis for distinction.

In a common law conspiracy the defendant's "act" would be agreeing to participate in the conspiracy. In a JCE I every defendant must act "in some way" that contributes to the common plan. Thus, the question boils down to: Does "agreeing" in and of itself satisfy the participation requirement for a JCE?

"Mere agreement, [as] to a single specific object" is sufficient for *Pinkerton* liability to attach.[70] By comparison, while "the precise threshold of participation in JCE has not been settled,"[71] it is obviously higher than "mere agreement":

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[65] Ambos, *supra* note 4 at p. 171, *quoting* Tadić Appeal Judgement, at para. 229.

[66] *See, e.g.*, Prosecutor v. Milutinović, *et. al.*, Decision on Dragoljub Ojdanić's Motion Challenging Jurisdiction – Joint Criminal Enterprise, Case No. IT-99-37-AR72 (May 21, 2003), *available at* http://www.icty.org/x/file/Legal%20Library/jud_supplement/supp41-e/milutinovic-a.htm [hereinafter Milutinović Appeal Decision].

[67] *Supra* note 35 and accompanying text.

[68] Courts frequently overlook this distinction. See, Note, New Frontiers in the ATS: Conspiracy and Joint Criminal Enterprise Liability after Sosa, 28 Berkeley J. Int'l L. 619, 628-29 (2010).

[69] *See*, Milutinović Appeal Decision.

[70] Note, Developments in the Law – Criminal Conspiracy, 72 Harv. L. Rev. 920, 996 (1959).

[71] Prosecutor v. Kovčka, *et. al.*, ICTY Trial Chamber Judgement, at para. 289, Case No. IT-98-307/1 (November 2, 2001); see also, Ambos, *supra* note 4 at 171.

> 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.[72]

Thus, for attribution to occur in a JCE the defendant's act must actually assist in or contribute to the "*execution* of the common purpose," whereas under *Pinkerton* "merely agreeing," while doing nothing to carry out the agreement, would be enough. It follows that in this situation attribution under conspiracy theory is broader than it would be in a JCE.

In either case, however, attribution presents little danger of imposing liability in excess of culpability. Under either JCE I or conspiracy, all of the defendants must intend that the object crime of the JCE/conspiracy be committed and that crime is committed. Thus, there is no unfairness in punishing a defendant because a crime that he intended was committed by another member of a group to which he belonged. Indeed, one might legitimately ask whether in the limited circumstance where JCE I attribution does not occur, it actually under punishes the agreeing, but non-participating, members.

Vertical Attribution of Criminal Liability: JCE III v. Pinkerton

Vertical attribution of criminal liability takes place when the criminal organization is hierarchical. In these instances, those at the top of the hierarchy do the planning and issue the orders and those at the bottom carry them out. And, while those at the bottom bear the greater direct responsibility for the commission of the crimes, those at the top reap the greatest benefit.

Neither the *Tadić* Appeals Chamber nor the *Pinkerton* Court considered the implications of vertical attribution of criminal liability.[73] The later ICTY cases have applied JCE theory to hierarchical organizations also without considering whether the theory was suited for that purpose.[74] This article will consider how JCE III and *Pinkerton* attribute liability vertically and in those cases which theory imposes the more expansive form of liability.

[72] Prosecutor v. Vasiljević, Appeal Judgement, at para. 100, Case No: IT-98-32-A (February 25, 2004); see also, Milutinović Appeal Decision.

[73] *Cf.* Guilty Associations, *supra* note 3 at 109.

[74] *See, e.g.*, Prosecutor v. Krstic, ICTY Appeals Chamber Judgement, at para. 150, Case No. IT-98-33-A (April 19, 2004) [hereinafter Krstić Appeal Judgement].

Soldiers in regular army units may commit war crimes but their officers are not also automatically held responsible. In order for liability to be attributed back up the chain of command, in the ICTY the prosecution will be required to prove either: 1) that the officers directly participated in (usually by ordering) the commission of crimes;[75] or 2) that the officers were liable under the theory of command responsibility;[76] or 3) that the soldiers and their commanding officers are members of a JCE. It is only the last of these three forms of liability that is within the scope of this article.

Tadić set out the elements that must be proved to establish membership in a JCE III. There is a participation element[77] – the members of the group must assist in or contribute to the execution of the plan[78] – and a *mens rea* element – "the intention to participate in and further the criminal activity or criminal purpose of a group or in any event to the commission of a crime by the group."[79] In most, if not all cases, whether the prosecution proves the *mens rea* element will depend on the defendant's conduct because "[i]n practice, the significance of the accused's participation will be relevant to demonstrating that the accused shared the intent to pursue the common purpose."[80] But what kind of proof is sufficient to establish "the intention to participate in and further the criminal activity or criminal purpose of a group or in any event to the commission of a crime by the group"?[81]

In using the term "intention," the *Tadić* Appeals Chamber cannot have meant "the intent to perpetrate a certain crime," [82] otherwise the *mens rea* for JCE I and JCE III would be identical, rendering JCE III superfluous. What, then, did it mean? An analysis of the facts and reasoning in *Tadić* suggests the answer.

The facts supporting Tadić's membership in a JCE were: 1) he was "an armed member of an armed group;" 2) the armed group attacked the village of Jaskići and Tadić "actively took part in this attack, rounding up and severely

[75] *See, e.g.*, Prosecutor v. Blaškić, ICTY Trial Chamber Judgement, at para. 495, Case No. IT-95-14-T (March 3, 2000).

[76] ICTY Statute, art. 7(3).

[77] The participation element is the same for all three forms of JCE. Only the *mens rea* element changes. Tadić Appeal Judgement, at paras. 227-28.

[78] It should be noted that in *Tadić*, JCE was not alleged in the indictment as a basis for the defendant's liability for the murders in Jaskići nor was it relied upon by the prosecution during trial. The court inferred the common criminal purpose – " to rid the Prijedor region of the non-Serb population by committing inhumane acts" – "from the evidence adduced and accepted." Tadić Appeal Judgement, at para. 231.

[79] Tadić Appeal Judgement, at para. 228.

[80] Prosecutor v. Kovčka *et al.*, ICTY Appeals Chamber Judgement, at para. 97, Case No. IT-98-30/1-A (Feb. 28, 2005) [hereinafter Kovčka Appeal Judgement].

[81] Tadić Appeal Judgement, at para. 228.

[82] *Id.*

beating some of the men;" 3) the armed group was violent, beating some of the men from the village "into insensibility[] as they lay on the road" and threatening witnesses with death as the men were being taken away; and 4) five men, who had been alive, were found dead, after the armed group, including Tadić, had left the village.[83] From this evidence the Appeals Chamber concluded:

> [T]he only possible inference to be drawn is that the Appellant had the intention to further the criminal purpose to rid the Prijedor region of the non-Serb population, by committing inhumane acts against them. That non-Serbs might be killed in the effecting of this common aim was, in the circumstances of the present case, foreseeable. The Appellant was aware that the actions of the group of which he was a member were likely to lead to such killings, but he nevertheless willingly took that risk.[84]

Thus, the *mens rea* proving membership in a JCE III amounts to membership in a group plus intentional participation in the group's activities with an awareness of the risk that the group's actions are likely to result in the commission of a crime.[85] In order for a crime that was not expressly part of the group's plan[86] to be attributed to a member of the group under JCE III, the defendant must in addition have taken that risk willingly.[87] When these pre-requisites are met, attribution occurs regardless of the hierarchical position of the defendant in the group. In other words, criminal liability is shared equally by all the members of the group.[88]

The pre-requisites for attribution under conspiracy theory are different and can produce different results. On facts similar to *Tadić's,* attribution would not have occurred under *Pinkerton*, most obviously, because there was no evidence of any pre-existing plan. While that is not fatal to the existence of a JCE,[89] it is the essential requirement of a conspiracy.[90] Without evidence that an alleged conspirator had entered into the agreement, no criminal liability for

[83] Tadić Appeal Judgement, at paras. 180-83, 231-32.

[84] Tadić Appeal Judgement, at para. 232.

[85] *See* Ambos, *supra* note 4 at 168 ("Thus his liability [under JCE III] is essentially based on his membership in the group pursuing the JCE.")

[86] Tadić Appeal Judgement, at para. 231.

[87] Krstić Appeal Judgement, at para. 150, Case No. IT-98-33-A (April 19, 2004) ("It is sufficient to show that he was aware that those acts outside the agreed enterprise were a natural and foreseeable consequence of the agreed joint criminal enterprise, and that the accused participated in that enterprise aware of the probability that other crimes may result.")

[88] Ambos, *supra* note 4 at 173 ("While some judgments … try to take into account the *role* and *function* of the accused in the enterprise, there still exists a tendency to render all participants equal on the level of attribution.")

[89] Tadić Appeal Judgement, at para. 227.

[90] *Supra* note 38 and accompanying text.

substantive crimes committed by him may be attributed to the co-conspirators, whether such crimes were expressly part of the agreement (JCE I) or merely a reasonably foreseeable of it (JCE III).

It is possible, however, to infer adherence to a prior conspiratorial agreement based on the conduct of the putative conspirators.[91] So it might be that in cases like *Tadić,* where there is no explicit proof of an agreement, the conduct of the co-conspirators could suffice to establish the existence of one.[92] Such conduct proves membership in the conspiracy only if it demonstrates an awareness of, and the specific intent to participate in, the prior conspiratorial agreement.[93] If, however, the conduct proves only that a person provided substantial assistance to the conspiracy without entering into the agreement, then that person is not a co-conspirator because aiding and abetting a conspiracy is not possible.[94] By contrast aiding and abetting a JCE is.[95] In order to see how these differences in theory play out in practice, I will analyze some hypothetical examples.

First, assume that there is evidence that the commanders of a regular army military unit agreed to ethnically cleanse an area that they planned to attack. That agreement is to be carried out by orders issued to subordinates and passed down the chain of command. In order for liability for the reasonably foreseeable crimes committed by the soldiers carrying out the orders to be attributed to their superiors via *Pinkerton*, the soldiers must be parties to the prior conspiratorial agreement, *i.e.*, they must be co-conspirators. But are they? It seems to me that if adherence to the agreement is proved only by the conduct of a subordinate who carries out a superior's order, such evidence will always be inherently ambiguous – does it prove the subordinate's adoption of the agreement or merely that he is following orders?

Dražen Erdemović's testimony in the *Krstić* trial nicely demonstrates this point.[96] Erdemović was a member of the Drina Corps that was involved in the military operation at Srebrenica. Prior to July 15, 1995, Erdemović's unit had been involved with the assault on Srebrenica and the rounding up of civilians. He was also involved in providing security for Generals Mladić and Krstić when they entered the town on July 11. Ordinarily, his unit was tasked with sabotage. On the morning of July 15th, Erdemović and his unit were ordered to Branjevo farm. On arriving, the following transpired:

[91] *Supra* note 52 and accompanying text.

[92] Dressler, *supra* note 33 at 434-35.

[93] *Id.*

[94] *Supra* note 39 and accompanying text.

[95] Ambos, *supra* note 4 at 170-71 (observing that "JCE III … constitutes only a form of aiding and abetting the JCE").

[96] Prosecutor v. Krstić, Case No. IT-98-33, Proceedings of May 22, 2000, Testimony of Dražen Erdemović, *available at* http://www.icty.org/x/cases/krsitc/trans/en/000522it.htm.

> Brano came back to us and told us that buses would come with civilians from Srebrenica on them. And I and some others started objecting, saying, 'What are we going to do there?' And he said that we would have to execute those people. In the course of this debate, the first bus was already arriving. This may have been 20 minutes later or half an hour later. So the first buses came in about half an hour, as he had said. When the first bus arrived – I know about myself; I don't know exactly about the others, what they said – I said that I did not want to do that, that I cannot do that, that that is not the task of our unit. Brano told me then, 'If you won't do it, stand up with them or give them your rifle, and you will see whether they will shoot you.'[97]

Thereafter, Erdemović and the other members of his unit formed a firing squad that executed between 1000 and 1200 civilians by shooting them in the back. This evidence clearly establishes Erdemovć's membership in a JCE. He was a member of the group and he intentionally participated in its activities with an awareness of its common purpose. It does not, however, prove that he was a co-conspirator because he clearly did not agree with his superiors' plan to kill civilians, and therefore his actions in conformity with the plan do not prove agreement. Thus, his crimes could not be attributed to his superiors via *Pinkerton*.

There is another hypothetical scenario in which the results produced by application of the two doctrines might differ. Assume that the superiors agree to ethnically cleanse an area but issue orders that explicitly forbid killing civilians. Despite that, the members of a unit that is part of the command carry out the order by killing civilians. In a JCE, will liability for those killings be attributed back up the chain of command simply because, as the ICTY has repeatedly said, killing civilians is a reasonably foreseeable consequence of an ethnic cleansing plan? The answer to that question is almost certainly "yes." These facts are almost identical to those in *Krstić* where the Appeals Chamber held that it was proper to attribute liability for "opportunistic" crimes to Krstić despite that fact that he had issued orders that civilians were not to be harmed.[98]

The question is considerably closer if conspiracy theory is applied to these facts. It is certainly possible that a court could find that that the conduct of the unit in so enthusiastically achieving the avowed purpose of ethnic cleansing (even in violation of orders) proves adherence to the agreement. On the other hand, violation of orders could also be viewed as a disavowal of the agreement and evidence of the formation of a separate conspiracy, in which case attribution back up the chain of command would not occur.

[97] *Id.* at pp. 3124-25.

[98] Krstić Appeal Judgement, at para. 149.

Then there is also the question of reasonable foreseeability. If the commanders have specifically forbidden certain conduct, can its subsequent occurrence be deemed "reasonably" foreseeable? This depends upon whether reasonable foreseeability is an objective standard, *i.e.* foreseeable by a reasonable person in the defendant's position, or a subjective standard, *i.e.*, foreseeable to the defendant. The jurisprudence of the ICTY provides no clear guidance on this question[99] and the law in the United States is probably no better.[100] Addressing the question of attribution of liability for reasonably foreseeable crimes in a JCE II, the *Kovčka* Appeals Chamber seemed to say that the standard is subjective:

> [P]articipation in a systemic joint criminal enterprise does not necessarily entail criminal responsibility for *all* crimes which, though not within the common purpose of the enterprise were a natural or foreseeable consequence of the enterprise. A participant may be responsible for such crimes only if the Prosecution proves that the accused had sufficient knowledge that such crimes were a natural and foreseeable consequence to him.[101]

If the standard is subjective, then there is a stronger argument that crimes committed in contravention of orders are not reasonably foreseeable to the defendant-superior officer. Nonetheless, and while not specifically addressing this point, the *Krstić* Appeals Chamber's finding of responsibility for crimes the defendant had expressly prohibited is at least an implicit rejection of the subjective standard in the JCE III context.[102]

Conclusions

I hope this article has demonstrated that there are theoretical and practical differences between conspiracy and JCE liability for substantive offenses and that its analytic framework has provided a different perspective on the role that attribution of criminal liability plays in jurisprudence of the ICTY.

There is probably little disagreement that attribution is appropriate when there is shared intent as to specific criminal offenses. And, even though the possibility for attribution is somewhat greater using conspiracy theory, such as where there is only an agreement and a crime committed by one of the

[99] See Guilty Associations, *supra* note 3 at 106.

[100] See Note, Developments in the Law – Criminal Conspiracy, 72 Harv. L. Rev. 920, 996 (1959).

[101] Kovčka Appeal Judgement, at para. 86.

[102] Krstić Appeal Judgement, at para. 149.

conspirators, without any additional participation by the others, since all of the conspirators share the same mental state, none of them is punished in excess of culpability.[103]

Both JCE and *Pinkerton* work less well the larger and more hierarchical the organization becomes. In these instances, the risks of running afoul of the principle culpability are greatest. Conspiracy theory does make vertical attribution of criminal liability somewhat more difficult, and it at least has the virtue of recognizing the danger of group criminality by punishing the defendant separately for his participation in the conspiracy. Conspiracy liability thus more closely reflects actual culpability, which is for membership in the criminal enterprise and not the commission of crimes by others. By contrast, JCE III, which is not a form of enterprise liability,[104] uses the blunt instrument of attribution to approximate the defendant's culpability for participating in group criminality.

That aside, the greatest weakness of both JCE III and *Pinkerton* is that reasonable foreseeablilty imposes no real limit on a defendant's liability for unintended crimes.[105] An enterprise's common purpose can be and, often is, articulated quite broadly; for example, "to rid the Prijedor region of the non-Serb population, by committing inhumane acts [against them]"[106] or " to rid the Prijedor area of Muslims and Croats as part of an effort to create a unified Serbian state."[107] In such circumstances, "does the requirement of foreseeability have any limiting power? Or, in a situation of mass violence or armed conflict, are all international crimes foreseeable? [108]

Conspiratorial agreements can also be expansively worded. However, some U.S. courts have shied away from overly expansive attributions of liability via *Pinkerton*, recognizing the danger of offending due process.[109] There is no evidence that similar constraints exist in the ICTY where prosecutors sometimes

[103] Moreover, such cases are very rare. Indeed, *Pinkerton* is the only one I have found.

[104] Milutinović Appeal Decision.

[105] Guilty Associations, *supra* note 3 at 135 ("As a practical matter, prosecutorial discretion appears to be the only meaningful limit on the extent of wrongdoing attributable to an individual defendant in JCE.")

[106] Tadić Appeal Judgement, at para. 231.

[107] Kovčka Appeal Judgement, at para. 45.

[108] Van Schaack & Slye, *supra* note 29 at 827.

[109] "The extension of co-conspirator liability to 'reasonably foreseeable but originally unintended substantive crimes' must be limited by due process as Alvarez realized. Thus, Alvarez's holding is limited to conspirators 'who played more than a 'minor' role in the conspiracy, or who had actual knowledge of at least some of the circumstances and events culminating in the reasonably but unintended substantive crime.'"

United States v. Mothersill, 87 F.3d 1214, 1218 (11th Cir. 1996), *quoting* United States v. Alvarez,755 F.2d 830, 851n. 27; *see also*, United States v. Cherry, 217 F.3d 811, 818 (10 Cir. 2000).

do not even plead JCE,[110] and it is often the court that articulates the all encompassing common purpose of the enterprise.[111] This disparity in approach has been summed up this way:

> [S]everal U.S. courts have recognized that Pinkerton conspiracy, which closely resembles Category Three JCEs because both are predicated on foreseeable but unintended crimes, poses problems of fundamental fairness in cases where the link between an individual's wrongdoing and criminal liability is highly attenuated. The judges at the ICTY, by contrast, have not yet provided any elaboration on the definition of the term "enterprise" in JCE. Unlike domestic conspiracy theories, then, JCE lacks formal limitations and safeguards.[112]

One potential solution is to punish enterprise liability directly, rather than indirectly by attribution of criminal liability for substantive offenses. As the United States faced threats posed by criminal organizations, like the Italian Mafia, the Colombian drug cartels and al Qaeda, the inadequacies of conspiracy theory became apparent. These criminal enterprises were organizationally too complex to fit neatly within the concept of a single conspiracy whose purpose was the commission of a discrete list of crimes. Moreover, the organizations were intentionally structured to take advantage of these weakness in order to insulate their leaders, who were the most responsible and the most culpable, from punishment.

Beginning in the 1960's, Congress responded to these perceived doctrinal weaknesses by passing statutes with catchy names, like the Racketeer Influenced and Corrupt Organizations Act (RICO),[113] which were designed to target and dismantle criminal organizations and punish their leaders. The cornerstone of this approach was punishing individuals for their participation in a criminal enterprise rather than for crimes committed by others.[114] While I am not recommending RICO as a model, this article has demonstrated the need for some form of enterprise liability in international criminal law.

Enterprise liability is no stranger to international criminal law. Conspiracy, as a tool to punish membership in criminal organizations, was used in the post-

[110] Kovčka Appeal Judgement, at paras. 42-43 (holding that JCE must be pleaded but upholding the conviction on ground that defendant received adequate notice by other means).

[111] See, *e.g.*, Tadić Appeal Judgement, at para. 231; see also, Guilty Associations, *supra* note 3 at 142 (concluding that "international judges have almost invariably elected the most expansive interpretation of the [JCE] doctrine").

[112] Guilty Associations, *supra* note 3 at 140-41.

[113] 18 U.S.C. §§ 1961 *et. seq.*

[114] *Id.* at § 1962.

-World War II cases against the Nazis.[115] Following that, conspiracy largely disappeared from international criminal law, only to re-emerge in the jurisprudence of the ICTY reformulated as JCE.[116] Unfortunately, the International Criminal Court (ICC) statute does not address enterprise liability, although it does contain a rule of attribution similar to JCE.[117] How that rule will be interpreted remains to be seen. But it is unlikely that the ICC could construe its statute as providing for a form of enterprise liability without running afoul of the principle of *nullum crimen sine lege*.[118]

And, even if it could fashion such a rule, the *Tadić* and *Pinkerton* cases illustrate that courts are ill suited to the task of devising rules which function well outside of the context of the specific facts on which they are based. Let us not forget that it is the *Tadić* case which created the *status quo* – punishing group membership indirectly through attribution of liability for substantive criminal offenses. Ultimately if the ICC is denied the tools to properly calibrate punishment for crimes based on membership in a criminal organization, then a statement made by Judge Hunt of the ICTY in a different context could apply equally to it: "This Tribunal will not be judged by the number of convictions which it enters . . . but by the fairness of its trials."[119]

[115] Guilty Associations, *surpa* note 3 at 113-14.

[116] *Id.* at 117-18.

[117] U.N. Diplomatic Conference of Plenipotentiaries on the Establishment of an International Criminal Court, Rome Statute of the International Criminal Court, at art. 25(d), U.N. Doc A/Conf. 183/9 (1998), *available at* http://www.icc-cpi.int/NR/rdonlyres/0D8024D3-87EA-4E6A-8A27-05B987C38689/0/RomeStatutEng.pdf.

[118] In Prosecutor v. Stakić, ICTY Trial Chamber Judgement, at para. 433, Case No. IT-97-37-AR72 (May 21, 2003), the Trial Chamber stated that "joint criminal enterprise cannot be viewed as membership in an organisation because this would constitute a new crime not foreseen under the Statute and therefore [would] amount to a flagrant infringement of the principle *nullum crimen sine lege*."

[119] Prosecutor v. Milosević, Dissenting Opinion of Judge David Hunt on Admissibility of Evidence in Chief in the Form of Written Statements, ICTY Appeals Chamber, at para. 22, Case. No. IT-02-54-AR73.4 (Oct. 21, 2003).

Summary

PRETPOSTAVKE ZA KAZNENU ODGOVORNOST:
KRITIČKA USPOREDBA DOKTRINE O "ZLOČINAČKOJ UROTI"
(CONSPIRACY) U PRAVU SAD TE DOKTRINE
MEĐUNARODNOG KAZNENOG SUDA ZA BIVŠU SFRJ
O "ZAJEDNIČKOM ZLOČINAČKOM POTHVATU"
(JOINT CRIMINAL ENTERPRISE) IZ AMERIČKE PERSPEKTIVE

U svom prvom slučaju, Žalbeno vijeće Međunarodnog kaznenog suda za bivšu Jugoslaviju suočilo se s teškoćom procesuiranja tipa grupnog djelovanja koje je rezultiralo masovnim zločinima za vrijeme rata na području bivše Jugoslavije. Strogo primjenjujući načela za utvrđivanje kaznene odgovornosti iz Statuta MKSJ, Raspravno vijeće oslobodilo je Tadića od najtežih optužbi, ubojstva pet osoba koja su se dogodila tijekom etničkog čišćenja sela Jakšići. Žalbeno vijeće u predmetu Tadić otklonilo je problem razrađujući doktrinu zajedničkog zločinačkog pothvata (ZZP), za koju je utvrdilo da je dio međunarodnog običajnog prava koje je obuhvaćeno u okviru Statuta MKSJ-a.

U dva od svoja tri oblika – ZZP I (zajednička namjera) i ZZP III (proširena odgovornost za razumno predvidljive zločine) – ZZP sliči na odgovornost za samostalna kaznena djela počinjena tijekom zločinačke urote (conspiracy). Takozvana Pinkertonova odgovornost temelji se na predmetu o kojem je odlučio Vrhovni sud Sjedinjenih Država 1946. godine, i iako se Žalbeno vijeće nije oslonilo posebno na predmet *Pinkerton* kao izvor za svoju odluku, sličnosti između dva slučaja su očite.

Svrha ovog članka, i predavanja na kojemu se temelji, jest usporediti dvije doktrine da bi se utvrdilo kako one određuju kaznenu odgovornost i koja se bolje slaže s načelom krivnje; odnosno kažnjavanje okrivljenika u kaznenom postupku na temelju njegova psihičkog stanja (*mens rea*) u vrijeme počinjenja djela. Postignuti zaključci bili su mješoviti.

Čini se da *Pinkerton* šire utvrđuje odgovornost nesudjelujućih okrivljenika u nekim slučajevima zajedničke namjere od ZZP I. To je zato što je okrivljenik odgovoran za samostalna kaznena djela počinjena tijekom zločinačke urote dok god je član zločinačke urote, tj. stupio je u urotnički dogovor s namjerom da se ostvare njezini ciljevi. Osim dogovora, ne traži se niti jedan drugi čin nesudjelujućeg okrivljenika; dok je prema ZZP I određeni afirmativni čin koji stvarno pridonosi svrsi pothvata nužna pretpostavka za kaznenu odgovornost.

U drugim slučajevima, gdje se kaznena odgovornost utvrđuje vertikalno, po zapovjednom lancu, kaznena odgovornost po ZZP-u je šira, jer za nastanak odgovornosti po ZZP-u okrivljenik ne treba nužno pristati na svrhu pothvata dok god joj njegovi čini doprinose. Nužnost dokazivanja namjere za stupanje u urotnički dogovor stoga služi za ograničenje kaznene odgovornosti prema *Pinkertonu* u ovim slučajevima.

Štoviše, zločinačka urota više se slaže s načelom krivnje budući da kažnjava, kao samostalno kazneno djelo, sudjelovanje u djelovanju grupe, dok ZZP izrijekom ne. Konačno, analiza otkriva očitu potrebu u međunarodnom kaznenom pravu za teorijom koja izravno kažnjava sudjelovanje u organizaciji koja čini kaznena djela, umjesto aproksimiranja takvog kažnjavanja utvrđivanjem odgovornosti za zločine preko ZZP-a okrivljenicima koji nisu sudjelovali u njima.