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SADRŽAJ

PREDGOVOR

Povodom obilježavanja deset godina od osnivanja Akademija pravnih znanosti Hrvatske je u suradnji s Hrvatskim udruženjem za kaznene znanosti i praksu 28. studenog 2011. godine na Pravnom fakultetu Sveučilišta u Zagrebu organizirala međunarodni znanstveni skup pod nazivom „Osobna kaznena odgovornost u praksi Međunarodnog kaznenog tribunala za bivšu Jugoslaviju". Na znanstvenom skupu međunarodnog karaktera koji je organiziran uz financijsku potporu Ministarstva pravosuđa Republike Hrvatske predstavljena je monografija „Zajednički zločinački pothvat i međunarodno kazneno pravo – izazovi i kontroverze" čiji su autori redoviti članovi Akademije pravnih znanosti Hrvatske prof.emerit. dr.sc. Željko Horvatić, prof.dr.sc. Davor Krapac, prof.dr.sc. Maja Seršić, prof. dr.sc. Igor Bojanić i prof.dr.sc. Davor Derenčinović. U ovom broju Godišnjaka sadržani su prijepisi zvučnog zapisa sa znanstvenog skupa na kojem su, uz moderiranje predsjednika Akademije prof.emerit.dr.sc. Željka Horvatića, izlaganja imali autori navedene studije prof.dr.sc. Maja Seršić, prof.dr.sc. Igor Bojanić, prof.dr.sc. Davor Derenčinović i recenzent prof. Steven Becker iz SAD. Kao priznati međunarodni stručnjak za međunarodno kazneno pravo, prof. Becker je održao izlaganje na temu oblika osobne kaznene odgovornosti kroz povijest međunarodnog kaznenog prava i sudovanja. Osim izlaganja, u radu su sadržana i autorizirana sudjelovanja u raspravi sudionika znanstvenog skupa. Uz pristanak autora, u prilogu je objavljen rad bivšeg suca Međunarodnog kaznenog tribunala za bivšu Jugoslaviju i Međunarodnog kaznenog tribunala za Ruandu prof. Wolfganga Schomburga „ *Jurisprudence on JCE – revisiting a never ending story about a judge made mode of criminal liability before some International Criminal Tribunals*" koji zbog spriječenosti nije bio u mogućnosti sudjelovati u radu znanstvenog skupa.

Zagreb, svibanj 2012.

Glavni urednik

PRIJEPIS ZVUČNOG ZAPISA SA ZNANSTVENOG SKUPA „OSOBNA KAZNENA ODGOVORNOSTI U PRAKSI MEĐUNARODNOG KAZNENOG TRIBUNALA ZA BIVŠU JUGOSLAVIJU“, Pravni fakultet Sveučilišta u Zagrebu, 28. studenog 2011.

Prof.emerit.dr.sc. Željko Horvatić, predsjednik Akademije pravnih znanosti Hrvatske: Zadovoljstvo mi je u ime Akademije i Pravnog fakulteta Sveučilišta u Zagrebu i Hrvatskog udruženja za kaznene znanosti i praksu pozdraviti sve referente i sve nazočne i doista je lijepo, ugodno i zadovoljstvo vidjeti punu dvoranu Vijećnice koja ima bogatu tradiciju. No, da ne duljimo u ovom uvodnom dijelu predajem riječ Dekanu kao prvom govorniku. Izvolite.

Prof.dr.sc. Zoran Parać, Dekan pravnog fakulteta Sveučilišta u Zagrebu: Hvala vam lijepa. Dame i gospodo meni je pripala osobita čast i zadovoljstvo što mogu prvi govoriti na ovoj konferenciji. Ja bih prije svega iskazao zahvalnost predsjedniku Akademije pravnih znanosti Hrvatske prof.emerit.dr.sc. Željku Horvatiću i samoj Akademiji, a naravno i mojoj vlastitoj kući, na organizaciji ovoga savjetovanja i na prilici da se ono održi upravo ovdje. Ovo savjetovanje, koliko sam čuo, nije prvo u redoslijedu. To je već drugi put da se društvo odličnika sastaje da bi raspravilo temu koja je neobično intrigantna. Koja je vjerojatno intrigantna već zadnjih 50-ak i više godina, ali danas osobito i posebno mi je drago što Pravni fakultet može biti domaćin skupu kojem je za cilj da problematiku rada Haškog tribunala, problematiku pojedinih instituta kaznenopravne odgovornosti, problematiku koja je povezana sa razvojem, usuđujem se reći međunarodnog kaznenog prava, razmotri, analizira, prouči sa znanstvenog aspekta. O problemima o kojima je ovdje riječ dakako da je bilo puno govora i na način koji možda ne odgovara u potpunosti onome što je standard znanstvenog razmišljanja. Mislim da su ovakvi skupovi prilika da se upravo to ispravi i da se ta tematika razradi na način koji odgovara potrebama znanosti i potrebama u krajnjoj liniji razvitka, kao što rekoh, međunarodno kaznenopravnih znanosti. Meni je zadovoljstvo što Vas mogu pozdraviti ovdje u ovolikom broju. Meni je osobito zadovoljstvo što mogu pozdraviti naše inozemne goste i referente i što vam mogu zaželjeti uspješan rad i rezultate koji će sasvim sigurno biti značajni i važni. Neobično mi je isto tako drago što će referati s ovoga savjetovanja biti zabilježeni u Zborniku koji sam imamo prilike dobiti malo prije prevedeni na engleski jezik, što je sasvim sigurno jedna vrlo lijepa i vrlo značajna edicija. Ja ne bih više uzurpirao vaše vrijeme te bih prepustio dalje riječ profesoru Horvatiću.

Prof.emerit.dr.sc. Željko Horvatić: Zahvaljujem Dekanu. Prije svega zahvaljujem mu na sudjelovanju i riječima, ali i Pravnom fakultetu za pomoć u radu i

djelovanju Akademije, ustupanjem prostora za sjedište Akademije i svim ostalim pomoćima, uključujući i financijsku pomoć. Bez Pravnog fakulteta u Zagrebu gdje je Akademija, utemeljila, ako si dozvoljavam reći, rodila prije deset godina, pa je još u djetinjoj dobi. Stoga, kad vidim ovdje državne odvjetnike koji su se bavili maloljetnicima, onda si dozvoljavam konstataciju da naša Akademija još četiri godine ne spada pod kaznenu odgovornost. Ali, ipak, ostavljajući ovu digresiju i napomenu kao slučajnu i nevažnu, Akademija ima veliku odgovornost, prije svega, znanstvenu. Zajedničko organiziranje znanstvenog skupa o Haškom tribunalu, *ad hoc* tribunalu, njegovim presudama, optužnicama i zapravo široj temi međunarodnog kaznenog prava na početku 21. stoljeća je već, skoro bih rekao, tradicija. Dekan je spomenuo da je ovo drugo savjetovanje. Ja ću podsjetiti neke od ovdje nazočnih da je 2005. godine, dakle prije šest godina, također Akademija zajedno s Pravnim fakultetom organizirala također međunarodni, ako možemo kolegu Damašku sa sveučilišta Yale staviti u međunarodni kontekst, okrugli stol o kaznenopravnoj analizi optužbe pred Tribunalom u Haagu protiv visokih dužnosnika i vojnih zapovjednika Republike Hrvatske za zajednički zločinački pothvat u akciji „Oluja". To je bila sasvim ciljana tema. Danas kad imamo već prvostupanjsku presudu protiv trojice optuženih generala od kojih je jedna oslobađajuća i imamo praksu tog međunarodnog suda i u drugim presudama, možemo, rekapitulirajući i recenzirajući ono što smo tada konstatirali, rekli, govorili i mislili, danas ići korak dalje. Zbog toga smo za danas i proširili temu. Prva zamisao je bila da to bude tema „Međunarodno kazneno pravo kroz praksu međunarodnih sudišta u prvoj deceniji 21. stoljeća", ali onda smo išli ciljano na individualnu odgovornost jer je očigledno danas jedan od ključnih, aktualnih teoretskih, znanstvenih i praktičnih problema u međunarodnom kaznenom pravu, upravo individualna odgovornost koja je kao jedno od temeljnih načela pravednosti kaznenog prava dovedena u pitanje i, dozvoljavam si reći oskvrnuta konstrukcijom zajedničkog zločinačkog pothvata. Budući da je ovaj skup organiziran povodom desetogodišnjice od utemeljenja Akademije pravnih znanosti Hrvatske dozvolit ću si samo ukratko nekoliko riječi o Akademiji. Akademija je osnovana, utemeljena, povodom dana fakulteta i uobičajenog obilježavanja dana Pravnog fakulteta 7. studenog 2001. godine s 52 utemeljitelja, doktora pravnih znanosti. Danas Akademija ima 113, dakle više nego dvostruko više redovitih članova i 34 suradnika. Akademija nije jako popularizirana ni u medijskim ni u svakodnevnim događajima, ali je Akademija u suradnji sa Vladom Republike Hrvatske, sa Hrvatskim saborom, sa pojedinim ministarstvima od kojih pozdravljam i predstavnike Ministarstva pravosuđa s kojima smo posebno surađivali, radila na brojnim znanstvenim projektima. Ja ću samo spomenuti neke. Osim ovog zajedničkog zločinačkog pothvata i našeg upućivanja ove Studije o kojoj će više reći profesor Derenčinović, predsjedniku Međunarodnog *ad hoc* tribunala i radeći kao Savjet prijatelja suda radili smo i na problemu terorizma. Pozdravljam ovdje nazočne predstavnike iz resora unutarnjih poslova i stručnjaka za

borbu protiv terorizam s kojima sam imao prilike surađivati i na međunarodnim konferencijama Ujedinjenih naroda. Govorili smo i raspravljali o medicinski potpomognutoj oplodnji koja još uvijek nije potpuno riješena ni u zakonskim sadržajima ni u praktičnoj primjeni. O tome smo imali ovdje jedan znanstveni skup zajedno s Akademijom medicinskih znanosti. Na Pravnom fakultetu u Osijeku organizirali smo skup o lokalnoj samoupravi i upravi. Nedavno smo aktivno s konkretnim pisanim prijedlozima u suradnji zajedno sa HAZU i sa Društvom sveučilišnih nastavnika sudjelovali u raspravi o najavljenom novom zakonskom uređenju visokog obrazovanja i znanosti u Republici Hrvatskoj. Uvijek se rado i sa zadovoljstvom, ali, s obzirom na rezultat tog našeg zalaganja, i sa izvjesnom tugom, sjećam naših prvih istupa u javnosti o spornom pitanju ZERP-a kao nedvojbenog pravno opravdanog interesa Republike Hrvatske ovoga stoljeća. Ono što smo tada izjavili o ZERP-u još uvijek jest i bit će aktualno i kad budemo raspravljali i o arbitraži sa Slovenijom i kad se budemo našli u situaciji kao punopravni članovi Europske unije. Želim ovime naglasiti, da je organizacija ovog današnjeg skupa zapravo samo jedna u nizu djelatnosti Akademije pravnih znanosti. O Akademiji više neću govoriti jer ćemo imati to prilike i na predstojećoj redovnoj Skupštini, ali samo ću podsjetiti zašto je Akademija osnovana, da bi omogućio vašu ocjenu da li smo možda u ovih deset godina prema vašim spoznajama učinili ono što smo namjeravali. Naime, kad smo dali inicijativu za osnivanje Akademije onda smo napisali da dosadašnje iskustvo upozorava kako se u različitim dijelovima naše izvršne, zakonodavne i sudbene vlasti prerijetko koriste spoznaje iz pravne znanosti i da se s nedovoljnim respektom odnosi prema toj znanosti. Dugogodišnje djelovanje stručnih pravnih udruga o okupljanju pravnika i specijalnosti ocijenili smo vrlo uspješnim, ali dozvolili smo si konstatirati da postupanje onih kojima su rezultati u tim udrugama namijenjeni nisu bili na zadovoljavajući način prihvaćeni ni u javnosti ni u zakonodavnom ni u izvršnom ni u sudbenom dijelu. Još je, tada rečeno i napisano: „ Stoga, o uzrocima i posljedicama takvog stanja ne želimo govoriti, ali okupljamo sve znanstvenike pravne struke u Akademiju da bismo zajedničkim sinkroniziranim djelovanjem, svaki u svom dijelu specijalnosti, omogućili i izvršnoj i zakonodavnoj vlasti i sudbenoj vlasti znanstveni aspekt ne *ex cathedra* nego poštujući praksu, poštujući političke porive za donošenje zakona različitih kvaliteta, ali ne ustručavajući se ukazati na ono što znanost misli o tim zakonima.„ Koliko smo uspjeli u toj našoj nakani, to će ocijeniti budućnost. Sada dajem riječ profesoru Derenčinoviću.

Prof.dr.sc. Davor Derenčinović, predsjednik Hrvatskog udruženja za kaznene znanosti i praksu: Hvala lijepa profesore. Moja pozicija je ovdje unekoliko specifična s obzirom da ja, kako bi rekli u zapadnom svijetu, sjedim ispod dva šešira, a u našim krajevima se ne spominju šeširi već se spominju stolice. Dakle, sjedim na dvije stolice na neki način s obzirom da sam i u funkciji tajnika Aka-

demije pravnih znanosti Hrvatske i u funkciji predsjednika Hrvatskog udruženja za kaznene znanosti i praksu inače jednog od najvećih strukovnih udruženja u Republici Hrvatskoj koje okuplja sve one koji se ili bave kaznenim pravom kroz praksu ili teoriju bilo one koje kazneno pravo i kaznene znanosti zanimaju. Imamo nešto manje od 400 članova, redovito godišnje organiziramo velika savjetovanja. Ovaj tjedan nam je iznimno dinamičan s obzirom da početkom prosinca u Opatiji organiziramo veliko godišnje savjetovanje o novostima u hrvatskom kaznenom pravu i praksi osobito s osvrtom na stupanje na snagu Zakona o kaznenom postupku i nekih drugih zakona iz područja kaznenog prava. Nama je jako drago da smo u prilici uveličati, uza sve vas koji ste evo odvojili svoje vrijeme i došli danas na ovu međunarodnu konferenciju, i 10 godina od osnivanja Akademije pravnih znanosti Hrvatske. Ovo dakako nije prvi put da Hrvatsko udruženje za kaznene znanosti i praksu surađuje sa Akademijom pravnih znanosti Hrvatske. Mi smo već i dosad radili zajedno na organiziranju savjetovanja, okruglih stolova, mogu se sjetiti 2009. godine kada je i Predsjednik Akademije bio nazočan jednom specijalističkom znanstvenom skupu o prekršajnom pravu koje je održano na otoku Krku. Isto tako, ovo nije niti prvi događaj ovakve vrste kojeg organizira Akademija, a tiče se Međunarodnog kaznenog prava i suđenja za ratne zločine. Jedno od naših specijalističkih savjetovanja organizirano je još 2000. godine u suradnji sa Hrvatskim pravnim centrom, a kome je među inima nazočio i tadašnji predsjednik Haškog tribunala za bivšu Jugoslaviju. Tada zajednički zločinački pothvat kao tema nije bio u fokusu premda je primijenjen 1999. godine u drugostupanjskoj presudi u predmetu Tadić, ali sjećam se da se raspravljalo o zapovjednoj odgovornosti, pitanjima jurisdikcije Tribunala, njegove budućnosti i utjecaja kojeg će njegovo nasljeđe imati na prostor bivše države, dakle bivše Jugoslavije, ali i na razvitak Međunarodnog kaznenog prava u cjelini. Akademija pravnih znanosti Hrvatske je objavila publikaciju „Teorija zajedničkog zločinačkog pothvata i Međunarodno kazneno pravo izazovi i kontroverze“ na hrvatskom i na engleskom jeziku. Radi se o identičnim tekstovima, a razlog tome je što nam je bila zamisao da se svi relevantni čimbenici i svi oni koji jesu zainteresirani za ovu temu u oblasti pravosuđa, politike, ali i šira javnost upoznaju sa stajalištima hrvatske pravne znanosti o ovoj problematici. Ja ću iskoristiti prigodu i reći s punom odgovornošću da hrvatska pravna znanost nikada nije šutjela o zajedničkom zločinačkom pothvatu. Mi smo progovarali često, mi smo progovarali argumentirano i mi smo progovarali kritički. Nismo bili selektivni nismo branili nacionalne boje već smo kritizirali zajednički zločinački pothvat kao jednu tvorevinu Međunarodnog kaznenog tribunala za bivšu Jugoslaviju koja nije bila dijelom međunarodnog običajnog prava, o tome će više govoriti profesorica Seršić, u vrijeme kada je donesena drugostupanjska presuda u predmetu Tadić. Valja reći da Studija nije dovršena 2011. godine. Naime knjiga je otisnuta 2011. u gotovo neizmijenjenom tekstu Studije koju je Akademija radila za potrebe Vlade Republike Hrvatske kojoj je i bila dosta-

vljena još 2007. godine. Mi smo u Akademiji dosta raspravljali oko toga postoji li potreba za ažuriranjem Studije s obzirom na nove presude i razvitak prava i pred Haškim tribunalom ali i pred drugim međunarodnim tribunalima u prvom redu stalnim Međunarodnim kaznenim sudom, ali i tzv. „hibridnim" tribunalima ili internacionaliziranim sudovima za Sierra Leone, Libanon, Kambodžu. Na kraju smo se suglasili da bi najbolje zapravo bilo ostaviti onaj originalni tekst iz 2007. godine i to stoga što su gotovo svi izlučni zaključci Studije koji se nalaze na kraju ove monografije zapravo anticipirali daljnji razvitak događanja. Neću reći da smo baš u svemu bili u pravu, ali vjerujem da ćete i kroz izlaganja koja će uslijediti od strane kolega uvidjeti da smo ocijenili u kojem će pravcu zapravo ići daljnja primjena te teorije i do kakvih će tektonskih poremećaja međunarodnog kaznenog prava i sudovanja raširena primjena ove teorije u konačnici dovesti. Evo ja sada više ne bih govorio o tome, ali bi dopustite da izrazim svoju zahvalnost još jednom svima Vama koji ste došli, gospodinu Dekanu i Pravnom fakultetu u Zagrebu, posebice Ministarstvu pravosuđa, evo gospođa Državna tajnica je ovdje, na aktivnoj potpori, kad kažem aktivnoj ne samo moralnoj potpori nego i financijskoj potpori u publiciranju ove Studije, dakako i gospodinu Markotiću i dakle kolegama iz Ministarstva pravosuđa i evo nadam se da će sljedećih dva sata proteći u jednom konstruktivnom dijalogu svih zainteresiranih. Drago mi je da vidim među Vama i odvjetnike, dakle kolege koji se u praksi bave ovom problematikom i nadam se da ćemo zajedno doći do daljnjih odgovora vezanih uz ovu spornu teoriju. Hvala.

Prof.emerit.dr.sc. Željko Horvatić: Zahvaljujem profesoru Derenčinoviću i time smo završili s uvodnim dijelom pa zahvaljujem Dekanu i otpuštam ga sa ovoga mjesta i profesoru Derenčinoviću kojeg također otpuštam s ovoga mjesta dok se ne vrati kao referent. Još nekoliko riječi o organizaciji ovoga Skupa. Profesor Wolfgang Schomburg iznenadnom spriječenošću bolešću nije mogao doći, ali zato ste dobili njegov referat preveden na jezik kojim se prevodi ono što je on govorio u Sarajevu. Prema tome naše isprike što to nije hrvatski jezik nego jezik kojim je on govorio o toj temi u Sarajevu. Da li je to bošnjački da li je to srpsko-bošnjačko-hrvatski? To je u svakom slučaju vjerojatno jezik Haškog tribunala kad prevodi. Ali mi vam ga činimo dostupnim da biste ga mogli imati na raspolaganju i odlučili smo da nitko neće sažetke Schomburgovog izlaganja ovdje iznositi jer bi mogao nešto propustiti ili početi govoriti o svojim vlastitim zapažanjima prema tome njegovo predavanje će biti objavljeno, a vi ga imate kao da ga čujete. Drugo, s obzirom na to da imamo samo četiri, sada izvanredno vrijedna referenta, možda ćemo, ovisno o njihovoj disciplini da se drže unutar 30 minuta, u jednom bloku završiti sva četiri referenta, nakon toga ići na stanku za kavu i konačno završiti s jednosatnom raspravom o svim referatima, s tim da svatko tko sudjeluje u raspravi ima pravo i mogućnost da pismenim dodatkom usmenog izlaganja bude uvršten u posebnu publikaciju Akademije. Prema tome pet minuta rasprave ne znači skraćivanje mogućnosti široke rasprave o svim pi-

tanjima koja su referenti iznosili ili koji se uopće odnose na rad *ad hoc* tribunala jer to sve može i još pored toga napisati i onda objaviti - *Quod non est in scriptis non est in mundo*. Koristim i ovu priliku, posebno pozdraviti predsjednika Odvjetničke komore, kao i jednog od istaknutih uglednih odvjetnika koji nas često iz Haaga obavještava o svojim naporima, kolegu Mikuličića. Prvi referent na našoj listi je gospodin Steven Becker, odvjetnik u Odvjetničkom društvu Becker-Stephenson specijaliziran za pitanja kaznenog prava te ovlašten za zastupanje klijenata kako pred sudovima države Illionois tako i pred federalnim sudovima uključujući američki Vrhovni sud. Prije pokretanja vlastitog odvjetničkog ureda radio je kao zamjenik Državnog branitelja po službenoj dužnosti u žalbenim postupcima. Osim sa značajnim uspjesima u svojoj odvjetničkoj praksi gospodin Becker može se pohvaliti autorstvom više od 30 članaka i poglavlja u knjigama na polju ustavnog, kaznenog i međunarodnog prava. Njegova djela prevedena su na francuski, portugalski, rumunjski i hrvatski. Zajedno s profesorom Derenčinovićem 2008. godine uredio je i izdao knjigu „International Terrorism: the Future Unchained?". Gospodin Becker predavao je na znanstvenim skupovima u Americi, Europi, Kini, Rusiji i Brazilu. Kao dobitnik Fulbrightove stipendije 2008. godine boravio je u Hrvatskoj i predavao na Pravnom fakultetu u Zagrebu. Od 2003. glavni je koordinator natjecanja simuliranog suđenja koje se svake godine održava u okviru seminara iz Međunarodnog kaznenog prava za mlade penaliste na Istituto Superiore Internazionale di Scienze Criminali u Sirakuzi (Italija). Gospodin Becker diplomirao je *cum laude* na Pravnom fakultetu Sveučilišta DePaul gdje je i predavao kao vanjski suradnik. Bio je glavni su-urednik časopisa „Međunarodna revija za kazneno pravo", a trenutno obnaša dužnost zamjenika Glavnog tajnika Međunarodne udruge za kazneno pravo (AIDP). Dozvolite da dodam, onog trenutka kad sam pročitao da je gospodin Becker već godinama aktivan u organizaciji seminara za mlade penaliste na Istituto Superiore Internazionale di Scienze Criminali u talijanskoj Sirakuzi, moram ponoviti jednu konstataciju iz mog osobnog života i iz života međunarodnog kaznenog prava. Prije 30 godina u tom Institutu profesor Zlatarić i moja malenkost, sudjelovali smo na prvom skupu pod predsjedavanjem prof. M. Cherifa Bassiounia i tamo smo oko jednoga maloga bazena u Villa Politi slagali prvi tekst (Kodeks) međunarodnog kaznenog prava iz konvencija koje su tada bile na snazi. Na nekoliko mjesta sam u zadnjih 20-tak godina pisao i govorio da sam tada imao nadu da će taj Kodeks jednog dana stupiti na snagu i da će to biti temelj za pravedna suđenja za one međunarodne zločine koji su od interesa za čovječanstvo. Već 2005. godine sam ovdje, u ovoj Vijećnici mog Fakulteta, izjavio da sam duboko razočaran što se dogodilo u međuvremenu s međunarodnim kaznenim pravom. O svojim razočaranjima neću govoriti ali hoću reći da je Institut na čelu s Bassiounijem imao veliku ulogu u stvaranju međunarodnog kaznenog prava koje se danas razvija po nekim čudnim pravilima o kojima će govoriti referenti. Dajem riječ gospodinu Beckeru.

Steven Becker: Good morning to all of you. I wish to thank the Academy for having me here and Professor Derenčinović for inviting me. It is a great pleasure to be back in Zagreb again. Good morning Zlata. I wish to speak today for you on the origins of individual criminal responsibility, and I also wish to address some of the pitfalls of individual criminal responsibility and ask if it might not be a time for a reassessment of those particular principles. Also, I want to thank the translators because I am probably the only person in the entire room who needs translations from Croatian, so I appreciate very much your effort. I just arrived in Zagreb from Chicago, and in the United States we recently had our Thanksgiving holiday, which is somewhat unique to our country and dates back to 1620 when the Pilgrims first landed in our country. They had a special dinner with the American Indians at the time, which was the first Thanksgiving. The reason I mention this is that one of my ancestors was there at the first Thanksgiving. His name was Richard Warren, and he was one of the Pilgrims who landed on the coast of Massachusetts. And he is also one of the individuals who signed what is called the Mayflower Compact, which is one of our famous documents of religious liberty. The reason this is relevant to our particular topic today is: Many centuries before, there was an individual named John de Warren, who was Richard Warren's early ancestor, and he, at the time of the invasion of Scotland by Edward I, was put in charge of Scotland. The Scots, however, do not take very kindly to invaders. So a very famous freedom fighter by the name of William Wallace, with whom my Scottish ancestors fought, took on the English at the time, and there was a famous battle between Wallace and John de Warren at Sterling Bridge on actually a more-famous September 11th date: September 11th, 1297. And that is when the Scots beat the English at Sterling Bridge. Edward came back shortly thereafter at Falkirk and defeated the Scots. The reason I mention this is that the trial of William Wallace, which occurred after he was betrayed at Glasgow by Edward I, may technically be looked at as the first international criminal trial based on individual criminal responsibility. William Wallace was alleged to have been involved in a campaign of extermination of the English people. The indictment read that he spared neither age, nor sex, monk, nor nun. There was actually a commission established in order to try William Wallace in London. He was tried for extermination and for treason and was eventually convicted of treason, even though he never took an oath of allegiance to Edward I. So this is the first instance in which we can see individual criminal responsibility beginning. In the next century there was a trial of an individual named Peter von Hagenbach, and this took place in Breisach, Germany. Hagenbach took over a particular town, and he ended up being involved in murders and rapes of the citizenry, and the German mercenaries there rebelled, along with the townspeople. This was the first international commission we know of formed from 28 different towns that came together to try Peter von Hagenbach. He pled, for the first time, the defense of obedience to superior orders, which will come into our

discussion later. But that was rejected by the international commission at the time, and the commission said he had violated the laws of God and therefore he was executed. Today if you go to the interesting Torture Museum in Rothenberg o.d. Tauber in Germany, you will actually see illuminated manuscripts of Peter von Hagenbach's execution in Breisach. In the centuries that followed, the principles of chivalry started to emerge after the Thirty Years War. Then we had what was called the Peace of Westphalia, and this is where we developed some of the principles of international law that are very familiar today: the equality of states, the non-interference with domestic affairs, sovereign immunity for states involved in state-centered activities, and, of course, sovereign immunity for heads of state and government leaders. During that time period we had an epic of what we may call civilized warfare, where it was understood that war should take place between armed militaries, but it should not involve civilians in the conduct of warfare. You can see this represented later on with the Napoleonic precedent. After Napoleon's campaign across Europe, he was exiled to Elba and later to St. Helena. But there was not a true criminal trial of Napoleon for individual criminal responsibility but rather a collective decision that he should instead be placed in exile. So, at that time, leaders did not understand that they would be put in the dock and hung, if they were unsuccessful in an armed conflict. Instead, there was pacific settlement between states. And then, after World War I, we had the first hint of possible individual criminal responsibility with Kaiser Wilhelm II under article 227 of the Versailles Treaty. But that did not allege a violation of criminal law, but rather the supreme offense against international morality and the Law of Treaties. So it was much more a political indictment than it was a criminal indictment. So let us now fast-forward to the Nuremberg trials where, for the first time, individual criminal responsibility was established. Let us first look at the origins. Remember, we tend to think of Nuremberg, at least in the United States that is how it is portrayed, as a wonderful phenomenon in which we finally ended impunity for world leaders. But, if you recall, the British and the Americans actually wanted to summarily execute the German leaders. So their initial emphasis was not on trials, but was actually on executions. And, strangely enough, the call for trials first came from Stalin - not because he was particularly interested in combating impunity, but because he did not want the world to think the Soviet Union was politically executing its enemies. And during the London conference at the time, there was a large debate between the Americans and the Soviets, on what one meant by "a trial." The Soviets meant that we are going to have a trial because in the Moscow Declaration we had already declared the Germans guilty, so we just need to conduct a trial so they can be executed. That was not the version of the Americans. They said, in our system, if we have an indictment, it does not mean the individual is guilty. We still have to have a trial to see whether or not he, in fact, might be innocent. So, these are some of the origins of the beginnings of individual criminal responsibility at Nuremberg. Of course, article 7

essentially eliminated what we know as substantive immunity. This was the huge innovation at Nuremberg. There is an important difference between substantive immunity and procedural immunity. In the Congo vs. Belgium case, which we know as the Arrest Warrant case, the International Court of Justice made a distinction between procedural and substantive immunities. Meaning that procedural is akin to temporal immunity, so if someone is functioning as a head of state or as a foreign minister, they are entitled to this immunity during the time of their office. But that does not mean that they cannot still be found criminally responsible later, based on the elimination of head-of-state or what we know as substantive immunity. Now at Nuremberg there was a problem that was recognized quite early, because of something called the "Führerprinzip". This was an oath of office which all the German military officials took to Adolf Hitler, and so very quickly, when starting to compile the thoughts for the Nuremberg trials, the Allies realized that they would have a large difficulty because Hitler died at the end of the war. And that meant that every one of the generals and military officers could invoke the defense of obedience to superior orders as an affirmative defense. There were several professors, especially professor Glueck at Harvard and professor Lauterpach at Cambridge, who realized that when the law gets in the way you have to remove it. And so that is what they did. In the American and British military manuals they used to, in fact, have an affirmative defense of obedience to superior orders. So right before the Nuremberg trials they eliminated this defense from both of the manuals. And then they went ahead and, in article 8 of the Nuremberg Charter, eliminated the defense so that the German defendants could not use it. And that was, to me, quite illegal, it was certainly an *ex post facto* violation at the time, but this is how they were able to commence the Nuremberg trials. Now let us fast-forward to the International Criminal Tribunal for the Former Yugoslavia. We are talking about individual criminal responsibility, and one finds that enunciated in article 7(1) of the Yugoslavia Statute, which reads 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. So that is the statute we are now dealing with. You can see, just like in Nuremberg, article 7 had to connect individual criminal responsibility with the elimination of the defense of obedience to superior orders and the elimination of substantive immunity, as well as the concept of command responsibility. All of these precepts are set forth in article 7. Now according to the ICTY, the concept of joint criminal enterprise, which is the main emphasis of the volume that was prepared by the Academy, participation in a joint criminal enterprise is a form of commission under article 7(1). Now, in my personal opinion, this is no different than the elimination of the defense of obedience to superior orders. It is, in fact, an ex post facto violation. It violates the *nullum crimen sine lege* principle. I think that the several precedents relied upon by the Tribunal did not at all

express a valid historical basis for, especially, extended joint criminal enterprise. And clearly it was not the law at the time of the conflict here in the former Yugoslavia. Lastly, I want to turn my remarks today to some of the pitfalls that I see in individual criminal responsibility. These are some things you may not have thought of before, but I would like to throw them out to you, because I think they are very important in assessing the directions in which criminal responsibility is headed. The first is the concept of victor's justice. This is something that really came up back in the Nuremberg trials, but I think it has some applications to the Yugoslavia Tribunal, as well. You can see at Nuremberg the Soviets, of course, were responsible for the Katyn forest massacre, and yet they were never tried for that particular atrocity. The Allied governments, both the United States and the British government, were responsible for a horrendous group of fire bombings of civilians. I think most horrifically at Dresden where there were as many as 150,000 to some estimates of 70,000 people killed in February 1945, all of them civilians. And yet the Americans and the British likewise have never been tried for those atrocities. And I think if you are looking at the concept of equality of law - that is essential. If one side just tried the vanquished in each particular conflict - that is not going to bring about justice. Especially in the eyes of the vanquished and that will certainly create hostilities between those countries in the future. That is not what we are looking for pacific settlements after wars. And you can still see today, you have Germans who are 80 or 90 years old being hauled in on hospital beds for trials in Germany to this date. And yet you have Soviets involved in the Katyn forest massacre who are still living well on pensions in Moscow. This is a definite problem that we have to solve in international criminal law in my opinion, if we are to have credibility for individual criminal responsibility across the world. Secondly, I think a very important concept is that assigning individual criminal responsibility, as we know it today, may actually contribute to greater violence during armed conflict. Let me explain what I mean by that: The Security Council has talked about the ICTY helping to prevent war crimes in the future. But, as you look how warfare used to take place, especially according to the Vattel's famous Law of Nations from the 17th century, opponents were looking to try to end conflicts quickly, and not to impose harsher conditions on their adversaries. Because, otherwise, they may become your enemy very soon again, which is exactly what happened after World War I. The Allies did not learn their lesson, they imposed harsh conditions on Germany, and of course, it came back to bite them in World War II. But I think this concept of individual criminal responsibility may very well lead to what we know as Total Warfare. Because, if you think about it, now political leaders and generals feel that if they come out on the losing side in the war, they will not find themselves in a settlement posture after the conflict, but, as a matter of fact, they will find themselves in a criminal dock, being tried, and potentially executed, by the victors for war crimes. So I think this concept that we now have may actu-

ally be quite counterproductive and may actually result in greater violence during conflicts because generals and political leaders feel that they have to come out on the winning side or they will be prosecuted. That can, in fact, lead to much greater atrocities in war, as opposed to reconciliations. The final concept I wish to review today is the idea of historical trials. This, I believe, has direct application not only to Nuremberg, but to the Former Yugoslavia Tribunal. You will see in much literature, individuals have talked about the importance of the Yugoslavia Tribunal creating an accurate historical record for the future. This is done not only for history's sake, but also to help appease the victims of the conflict, and to bring about reconciliation with the various countries involved in the conflict. The question is: Is a tribunal, a court of law, actually suited to make historical judgments? In other words - is a court competent to write history in the first place, or, as a matter of fact, should it be more involved in simply determining whether the defendant is guilty or not guilty? Now, what are some of the particular pitfalls of a court's ability to write history? First of all, do they actually have all of the relevant information that they need to make decisions? In an adversarial process – I am a defense attorney back in the United States -- I know a good part of my job is to keep out evidence that is harmful to my client. Well, if I am successful in doing that, then obviously a tribunal is not going to have all of the information necessary to write an accurate historical record, and many of the procedural postures of the tribunals are now adversarial in nature. Secondly, you have governments that seal records. They do not like courts obtaining records of their own political decisions. You can see that with the Yugoslavia Tribunal. I have been counsel for individuals in the United States on so called terrorism-related cases, and I know how difficult it is to get government records because, at least in the United States, they classify records for 50 years, and those based on intelligence they classify for 70 years. They are certainly not very apt to turn those records over to a tribunal, and those documents might contain the most-important information in establishing history. Also, in criminal tribunals, especially internationally, you have protected witnesses, who sometimes lie, and you cannot necessarily find out all of the information upon which their testimony is predicated. Next, you have the motivation of the parties, in other words, trial strategy. Let us say you have someone who has committed multiple murders, and the prosecution – it is to their advantage to simply try only one person for those murders, even though there are a number of accomplices. And you may have a defense counsel who wishes to plead that the defendant is insane, as an attempt to eliminate or mitigate his guilt, even though there might be accomplices. So, as part of trial strategy, a defense attorney does not want to have accomplices involved because that would demonstrate that his client was not, in fact, insane, but was acting rationally. So, you have trial strategy that also comes into play as to how facts are portrayed to the tribunal. And, lastly, if you have victims involved in the tribunal process, you may have emotion that enters into the case, which, at least in our

adversarial system, also changes the outcome. How about plea bargains that may enter into a case? You cannot possibly get an accurate historical record if you have a plea bargain! In addition, the defendant may go ahead and plea even though he is not guilty, but simply for other strategic reasons. And what about cases like the Eichmann case, which are considered to be "nation building" in nature? In other words, they are there to create a myth for the country, like in the Eichmann case. That case was not much about Adolf Eichmann but very much about Israel attempting to establish its status as a state, claiming that there was a connection between the Jewish people and the Israeli state with respect to World War II, even though, in fact, Israel had not been established as a state until after the war. So does the ICTY function in the same manner, in other words, does it functions for a particular political purpose? Or, some might argue, that it may not have the same motivation as a country within a domestic sphere to create a mythos. But I think that I would beg to differ with that; I think it does have a particular political bent, and maybe from looking at the Gotovina judgment, and the recent Haradinaj case, I think that at least the prosecution may be wishing to find all of the parties guilty of some crimes in order to bring about general reconciliation. In other words, not everyone was innocent, but everyone was somewhat guilty. And that may, in fact, be what the prosecution is doing. Because I think there is really no basis in law for the prosecution in the Gotovina case, and I am very suspect of the appeal of the prosecution in the Haradinaj case after he was acquitted of crimes there. So I think this may be the political bent of the tribunal – that is just my own personal opinion. And then you also have, for example, the Rwanda Tribunal in the Karemera case. Not only do you have the Yugoslavia Tribunal writing history, but then you have the Rwanda Tribunal taking judicial notice in other trials of its own historical judgments, and that I find to be very problematic. So, in conclusion, I would say that, before we begin to pat ourselves on the back too much for our advancement in the relatively new field of international criminal law, we really need to reassess individual criminal responsibility. Especially, extended joint criminal enterprise and see in which direction it is headed. For irrespective of our best intentions to combat impunity, I think that we have created a net so large that the prosecution, especially in the Yugoslavia Tribunal, is not only able to catch, but is able to convict, the guilty, and the innocent, as well. Thus, I think we have created a monster that we need to destroy before it devours the very principles that we are trying to protect. Thank you very much for your time and attention.

(prijepis zvučnog zapisa izlaganja prof. Stevena Beckera: Doc.dr.sc. Anna Maria Getoš, docent na Katedri za kazneno pravo Pravnog fakulteta Sveučilišta u Zagrebu; Ivan Pavlović, demonstrator na Katedri za kazneno pravo Pravnog fakulteta Sveučilišta u Zagrebu).

Prof.emerit.dr.sc. Željko Horvatić: Zahvaljujem. Putovanje prema pravednosti ili propasti – vrlo impresivno. U Vašem izlaganju bilo je nekoliko tvrdnji i opažanja koja su potpuno identična s kontinuitetom već napisanog i rečenog, ali upravo zato ponavljanje i stajalište koje se iznosi danas od uglednog pravnika i poznavatelja međunarodnog kaznenog prava nas uvjerava u nekoliko činjenica. Prije svega citirat ću profesora Damašku, znanstvenika koji se već dugi niz godina bavi međunarodnim kaznenim pravom. On je u ovoj Vijećnici prije šest godina rekao da su Hrvati eksperimentalni kunići u laboratoriju međunarodnog kaznenog pravosuđa koje još uvijek traži svoj pravi put i čija je legitimnost još uvijek iznimno krhka. To su vrlo oštre riječi, ali očigledno je da se to pitanje ponavlja. Ono što je u izlaganju S. Beckera bilo za mene posebno ponovno zanimljivo, a vjerujem i vama, je ta ravnopravnost između saveznika u II. svjetskom ratu i onih koji su taj rat i dobili. Sama činjenica da se zločin agresije pravno i faktički ne tretira na *ad hoc* tribunalu je zapravo *a prima vista* pokušaj negiranja ne jednakopravnosti nego zapravo negiranja činjenica koje tu jednakopravnost izvode iz činjenice tko je agresor, a tko se brani. To je reklo bi se, *circulus vitiosus* koji je opasan za one koji su pogođeni agresijom. I dobro je što je S. Becker ponovno to istaknuo da se taj princip jednakopravnosti ne poštuje iako je jasno tko je počeo rat i tko ga je izgubio i ovdje kad se apsolutno negira činjenica tko je počeo rat i tko ga je dobio ili izgubio i zašto ga je izgubio i tko se branio i tko je napadao. I još samo jedna primjedba kad s time bavimo, a rekli smo već više puta, ako je Sud u Haagu pod političkim utjecajima, bit ću oprezan u izričaju, pod ovako ili onako izraženim političkim utjecajima, kako je onda moguće pravnim sredstvima te političke utjecaje eliminirati!? Nikako, jer će politika uvijek pobijediti. Ne samo u momentu suđenja nego i nešto kasnije, ali istina će pobijediti mnogo kasnije u povijesti. Ali mi smo tu da spriječimo predugački put od sadašnjosti prema povijesti. I još samo jedna kratka primjedba. Čini mi se da danas u zajedničkom zločinačkom pothvatu govorimo po prilici onako kao stranom tijelu u kaznenom pravosuđu kao što su nekad govorili o nehaju. Jedan naš znanstvenik, profesor Singer, je doktorirao na ovom Fakultetu s temom „Nehat – kamen smutnje u krivičnom pravu“. I danas kad govorimo o individualnoj kaznenoj odgovornosti onda se pitamo kako je moguće studentima objasniti konstrukciju - nije bio svjestan svoga djela, ali je bio dužan i mogao biti svjestan da će nastupiti posljedica, dakle njegova individualna krivnja kroz nehaj je vrlo upitna u odnosu na anglosaksonski *mens rea* i slično. No pojam nehaja je izveden iz nužde, a ovdje zajednički zločinački pothvat nije bila nužda jer su postojali instrumenti i to je ono što stalno tvrdimo, sudioništva, poticanja i na kraju zapovjedne odgovornosti koja je skoro bih rekao ako ne kristalno čista ali znanstveno moguće opravdana ne u 21. stoljeću nego i 2000 godina prije toga. Zapovjedna odgovornost! Hvala vam lijepa još jedanput svima, riječ ima profesor Derenčinović na temu: „Izvedena kaznena odgovornost - zapovjedna odgovornost i zajednički zločinački pothvat“.

Prof.dr.sc. Davor Derenčinović: Zahvaljujem profesore. Moja uloga je pomalo i otežana s obzirom da s nama nije profesor Schomburg koji je trebao govoriti o trećem obliku, onom najspornijem, tzv. proširenog zajedničkog zločinačkog pothvata pa ću ja bez ambicije ulaziti u njegovu prezentaciju, nešto više reći i o tome jer pretpostavljam da je to posebno zanimljiva tema i da o njoj treba reći nešto više. Kao što je Steven Becker proveo izvjesno vrijeme u Hrvatskoj tako sam i ja svojedobno 2004.-2005. proveo godinu dana na Sveučilištu koja je njegova alma mater, a to je DePaul gdje sam imao prigode raditi i sa velikanom međunarodnog kaznenog prava Cherifom Bassiounijem, spomenuo ga je i profesor Horvatić. Sjećam se prvog sastanka i razgovora sa profesorom Bassiounijem kojom prilikom me pitao: „A što je to zajednički zločinački pothvat?". Ja sam mu na to odgovorio: „Ne znam, ja za to nikad nisam čuo, nadam se da mi Vi možete nešto više reći o tome." Ono što sam također zapamtio je jedan plakat koji je stajao na ulazu u njegov kabinet, na kojem je pisalo da postoje tri nerazdružive vrijednosti suvremenih civilizacija a to su: pravda, istina i mir. Ako nedostaje samo jedna od tih vrijednosti ne možemo zatvoriti krug i ne možemo računati s dugoročnim mirom i sa dugoročnom stabilnošću, a upravo je to jedan od razloga kojeg jasno iščitavamo iz Rezolucije 827 Vijeća sigurnosti UN zbog kojih je Međunarodni kazneni tribunal za bivšu Jugoslaviju bio osnovan. I upravo je taj zatvoreni krug za kojim tragamo i o kojem smo u konačnici napisali knjigu, zapravo i misao vodilja našeg djela s uvodnim citatom da pravi i istinski mir nije samo nepostojanje ili odsutnost tenzija, već je to prisutnost pravde. Kako i na koji način međunarodno kazneno pravosuđe provodi rekoncilijaciju odnosno pomirenje između dvije naoko nepomirljive veličine, a to su osobna kaznena odgovornost i masovni odnosno kolektivni zločini? Da li instrumentarij tradicionalnog kaznenog prava kada je riječ o masovnim povredama i o teškim kršenjima međunarodnog humanitarnog prava zločinima protiv čovječnosti i ratnim zločinima može biti učinkovit? Za razliku od tradicionalnog kriminaliteta osoba koja neposredno ostvaruje obilježja bića kaznenog djela nije ujedno i ona koja je ključna odnosno središnja kriminalna figura. Ona je zapravo najčešće tek puki egzekutor u realizaciji kriminalnog plana. Ono što je izazov međunarodnog kaznenog pravosuđa od povijesnih suđenja koja su ovdje spomenuta jest kako premostiti tu distancu između nalogodavaca, odnosno ključnih kriminalnih figura i onih koji su neposredno na terenu činili teška kaznena djela. Tri su modela osobne kaznene odgovornosti do dana današnjeg iskristalizirana pred međunarodnim kaznenim tribunalima. To su zapovjedna odgovornost, zajednički zločinački pothvat i posredno počiniteljstvo. Ja neću govoriti previše o posrednom počiniteljstvu. O tome će govoriti profesor Bojanić, a ja ću pokušati reći nešto osnovno o zapovjednoj odgovornosti i na koji način i kako i zbog čega je u međunarodnom kaznenom pravosuđu u prvom redu na Haškom tribunalu došlo do tranzicije od zapovjedne odgovornosti prema zajedničkom zločinačkom pothvatu. Zapovjedna odgovornost koja se također nalazi u članku 7. ali i u stav-

ku 3. Haškog Statuta sadrži tri elementa: funkcionalnu, kognitivnu i operativnu. Ono što je ključno za funkcioniranje zapovjedne odgovornosti jest da mora postojati odnos podređenosti i nadređenosti, potom kaznena djela koja su počinjenja od strane podređenih osoba i naposljetku da je nadređeni koji je *de facto* obnašao funkciju vojnog zapovjednika i propustio poduzeti dužnu činidbu kako bi spriječio djela koja su kasnije počinili podređeni ili ih, nakon što su oni ta djela počinili, propustio kazniti. Razvitak primjene zapovjedne odgovornosti, koja je u početku do one sada već povijesne presude u predmetu Tadić, zapravo bila dominantan oblik osobne kaznene odgovornosti, započinje u predmetu Delalić i dr. koji je poznatiji pod nazivom Čelebići u kojem su jasno istaknuti elementi zapovjedne odgovornosti. Međutim, već u predmetu Blaškić dolazi do izvjesne povećane fleksibilnosti i tužiteljstva i suda što je u konačnici dovelo do toga da je, unatoč tome što tužiteljstvo nije uspjelo dokazati efektivnu kontrolu vojnog zapovjednika nad njegovim podređenima, prvostupanjsko vijeće donijelo osuđujuću presudu. Taj test koji je primijenio prvostupanjski sud, pritom značajno oslabivši one kriterije iz predmeta Delalić i dr., drugostupanjsko je vijeće izmijenilo vraćajući se na početne pozicije i inzistirajući upravo na toj efektivnoj kontroli s obrazloženjem da se bez postojanja tog elementa u suštini radi o objektivnoj odgovornosti. Najbolji primjer za to je suđenje japanskom generalu Yamashiti nakon II. svjetskog rata na kojem je on proglašen krivim po osnovi zapovjedne odgovornosti premda nije dokazano da je imao efektivnu kontrolu i mogućnost zapovijedanja nad svojim trupama. Osnovni problem koncepta zapovjedne odgovornosti je u tome da se njegovom primjenom povrede međunarodnog humanitarnog prava, genocid i zločine protiv čovječnosti koji su po definiciji namjerna kaznena djela činjenjem, artificijelno preobražavaju u nečinjenje (odgovornost zbog propusta) s nehajnim oblikom odgovornosti (niži stupanj krivnje). To, kada je riječ o najtežim povredama međunarodnog humanitarnog prava, nije opravdano i u izravnoj je suprotnosti s didaktičnom funkcijom međunarodnog kaznenog pravosuđa. Ono zbog čega je zapovjedna odgovornost značajna i zbog čega je jednim dijelom i ona i dovela do raširene primjene zajedničkog zločinačkog pothvata jest nemogućnost dokazivanja upravo elementa efektivne kontrole. Ne zaboravimo da se radi o vremenu u kojem se Tribunal koji je osnovan sa svrhom suđenja „gospodarima rata“ još uvijek bavi počiniteljima „niskog profila“. U tim je uvjetima trebalo osmisliti novi koncept odgovornosti što bi olakšalo poziciju tužiteljstva i omogućilo osude. To je bilo pravo vrijeme za plasman nikad ranije korištenog i dovoljno rastezljivog pojma zajedničkog zločinačkog pothvata. Neki ga komentatori, ne bez razloga, nazivaju i „čarobnim metkom tužiteljstva“. Radi se o, za tužitelje, omiljenom obliku odgovornosti na kojem se, prema nekim procjenama, temelji više od 80% optužnica otkako je žalbeno vijeće u predmetu Tadić utvrdilo da je ZZP bio dijelom međunarodnog običajnog prava u vrijeme sukoba na području bivše SFRJ. Za kontinentalne pravnike je nezamislivo da sud u određenoj zakonskoj normi pronađe nešto što tom zakonskom normom nije

eksplicitno propisano. Uistinu, ako uzmete i vrlo detaljno proučite Statut Haškog tribunala nećete naići na zajednički zločinački pothvat. Jednostavno zato što ga tamo nema. Međutim, to nije spriječilo žalbeno vijeće u predmetu Tadić da utvrdi kako je ZZP implicitno sadržan u članku 7. stavak 1. Statuta. Inače, u predmetu Tadić okrivljeniku je stavljeno na teret razdvajanje i ubojstva nekolicine Bošnjaka od strane jedne grupe Srba u okolici Prijedora. Prvostupanjska je presuda bila oslobađajuća s obzirom da nije bilo dokaza da je optuženi Tadić izravno sudjelovao u tim ubojstvima, ali je žalbeno vijeće, na inicijativu tužiteljstva utvrdio da je raspravno vijeće pogrešno primijenilo teoriju „zajedničke nakane" prema kojoj je bilo dovoljno utvrditi da je on bio član naoružane grupe i da je kao takav pristao na sve posljedice koje su iz aktivnosti te opasne grupe proizašle. Rekli bismo, vrlo slično anglosaksonskom modelu zavjere (*conspiracy*) s tom razlikom da kod zavjere mora postojati jasna namjera koja se dijeli između svih počinitelja i traži se određeni doprinos, a kod zajedničkog zločinačkog pothvata čak niti to. Pozivajući se na, a o tome će više govoriti profesorica Seršić, na neke presude u tzv. malim nürnberškim procesima vođenim nakon II. svjetskog rata, na neke međunarodne ugovore od kojih neki u to vrijeme nisu niti stupili na snagu, te na zakonodavstva i praksu svega nekoliko odabranih država, žalbeno je vijeće u predmetu Tadić došlo do zaključka da je zajednički zločinački pothvat čvrsto ukorijenjen u međunarodnom običajnom pravu. Ne zaboravimo da je osnovni pravni dokument Haškog tribunala jedan iznimno podnormirani Statut koji dopušta različite interpretacije i koji je zapravo i doveo do raširene primjene ove teorije. Postoje dakle tri oblika ZZP-a: osnovni, sistemski i prošireni. Objektivni elementi su isti za sva tri oblika: pluralitet osoba, zajednički plan i doprinos realizaciji zajedničkog plana. Premda se u prijevodima presuda govori o udruženom zločinačkom pothvatu, smatram da je ispravnije govoriti o zajedničkom zločinačkom pothvatu s obzirom da u konkretnom slučaju ne mora raditi o udruživanju osoba jer te grupe ne moraju biti strukturirane, one ne moraju biti organizirane već se i manje difuzne grupe smatraju zajedničkim zločinačkim pothvatom. Svaki do pripadnika ZZP mora dati doprinos realizaciji plana, no taj se doprinos ne sastoji nužno u počinjenju nekog kaznenog djela te difuzno organizirane skupine već bilo kakav doprinos održavanju zajedničkog plana koji, *nota bene*, i ne mora biti kriminalni plan. Kada je riječ o subjektivnim elementima, ono što se traži po trećoj kategoriji ZZP je predvidivost što znači da svatko tko se pridruži određenoj grupi mora biti u stanju razumno predvidjeti sve posljedice koje iz pridruživanja toj grupi mogu proizaći. To je, moram reći, u Kaznenom pravu potpuno neprihvatljivo s obzirom na načelo krivnje. Imajući u vidu da su sva kaznena djela iz nadležnosti Tribunala namjerna kaznena djela, a kod nekih od tih kaznenih djela je potrebno dokazati i više od obične namjere (primjerice kod genocida - *dolus specialis*, dakle da je osoba neposredno postupala sa ciljem potpunog ili djelomičnog uništenja neke skupine kategorizirane i homogenizirane po etničkom, nacionalnom, vjerskom i rasnom ključu ili recimo

kod zločina protiv čovječnosti progonom gdje se traži *dolus coloratus*) ispada zapravo da je uvođenjem tog oblika odgovornosti ne samo značajno olakšan posao tužiteljstvu jer tužiteljstvo ne mora dokazati ništa osim natruha zajedničkog plana čime se znatno snižavaju kriteriji odnosno elementi krivnje kod ovih kaznenih djela. Prevedeno na jezik materijalnog kaznenog prava to znači da je za namjerno kazneno djelo moguće osuditi i osobu koja je *tempore criminis* postupala iz nehaja. U većini država, uključujući i one u kojima figuriraju različite varijante ZZP, donesen je niz odluka Ustavnih sudova o neprihvatljivosti snižavanja standarda krivnje kod namjernih kaznenih djela. Tako je, primjerice, raspravno vijeće u predmetu Tadić propustilo spomenuti predmet R v. Logan u kojem je Vrhovni sud Kanade utvrdio da se snižavanjem kriterija krivnje putem uvođenja zajedničkog plana kao oblika odgovornosti krši načelo krivnje koje je zaštićeno Poveljom o temeljnim pravima. Jedan od prigovora koji se može uputiti praksi Haškog tribunala je i kreativno kombiniranja elemenata ZZP i zapovjedne odgovornosti. Naime oba se oblika odgovornosti izvode iz odgovornosti neposrednih počinitelja s tim da je zapovjedna odgovornost vertikalna, a zajednički zločinački pothvat je horizontalni. Tako se, primjerice, u nepravomoćnoj presudi protiv Gotovine i Markača, govori u njihovoj odgovornosti kao članova ZZP zbog podržavanja atmosfere nekažnjivosti, dakle stavlja im se na teret to što su znali za počinjene zločine, a nisu poduzeli ništa kako počinitelje tih kaznenih djela. Ako i niste u materiji, lako ćete zaključiti da je njihova odgovornost za sudjelovanje u zajedničkom zločinačkom pothvatu utvrđena na temelju elemenata zapovjedne odgovornosti. Ovdje je, kao i u mnogim drugim predmetima, došlo do miješanja elemenata zapovjedne odgovornosti i zajedničkog zločinačkog pothvata što znači da se na temelju istih činjenica kumulira kaznena odgovornost što je neprihvatljivo. Uz sve navedene, raširena primjena teorije ZZP ima još jednu negativnu posljedicu. To je trivijalizacija odgovornosti gospodara rata na ovim prostorima. Naime, držati nekoga kao što je, primjerice, Slobodan Milošević, odgovornim po osnovi sudjelovanja u zajedničkom zločinačkom pothvatu, a ne po osnovi tzv. izravnih oblika odgovornosti, ne znači ništa drugo no trivijalizaciju međunarodnog kaznenog prava i pravosuđa. Zašto? Zato što je postojalo i previše dokaza za kazneni progon po osnovi planiranja (članak 7. stavak 1.) ili posrednog počiniteljstva o čemu će više govoriti profesor Bojanić. Nadalje, svjedoci smo da se ZZP se vrlo selektivno primjenjuje. Neobično je da u predmetu tzv. vukovarske trojice zajedničkog zločinačkog pothvata, oni nisu optuženi (niti osuđeni) čak niti za zločin protiv čovječnosti već samo za kršenje zakona i običaja ratovanja premda je žalbeno vijeće utvrdilo da su osobe koje su odvedene iz vukovarske bolnice bile *hors de combat*. To je pravna logika koju je vrlo teško razumjeti. Isto tako, Momčilo Perišić, načelnik Generalštaba VJ koji je, što je prvostupanjskom presudom i utvrđeno, bio jedan od prvih suradnika Slobodana Miloševića, nije osuđen kao pripadnik ZZP već kao pomagatelj premda je dobro poznato da se prema teoriji o vlasti nad djelom svaki suštinski

doprinos počinjenju kaznenih djela, a Perišićev je to nedvojbeno bio, mora pravno kvalificirati kao počiniteljstvo. To potvrđuju i izjave Karadžića i Mladića da bez pomoći VJ ne bi bilo moguće voditi rat u Bosni i Hercegovini niti u Hrvatskoj. Konačno, raširenom primjenom teorije ZZP u potpunosti se ignorira zakonodavstvo i praksa sudova bivše SFRJ. Sukladno Statutu, Haški tribunal mora voditi računa o zakonodavstvu i sudskoj praksi u bivšoj SFRJ. To je jasno naznačio i nedavno preminuli Antonio Cassese u izdvojenom mišljenju u presudi Erdemoviću u kojem je konstatirao da bi „Haški sud morao biti daleko osjetljiviji kada je u pitanju nacionalno pravo koje je bilo na snazi *tempore criminis*, dakle u vrijeme kada su navodni zločini bili počinjeni. U tadašnjem saveznom niti republičkom kaznenom zakonodavstvu nije bilo moguće zasnovati kaznenu odgovornost po osnovi zajedničkog zločinačkog pothvata. Utoliko je vrlo zanimljiv zaključak do kojeg je došlo žalbeno vijeće u predmetu Tadić, a koji je kasnije ponovljen u Odluci po prigovoru na nenadležnost u predmetu Ojdanić i dr., da „postoji zapanjujuća sličnost između zajedničkog zločinačkog pothvata i odgovornost organizatora zločinačkog udruženja po tadašnjem KZ SFRJ“. Taj zaključak ne stoji s obzirom da postoje vrlo značajne razlike između ova dva oblika odgovornosti. Naime po tadašnjem KZ SFRJ mogao je kazneno odgovarati samo organizator zločinačkog udruženja, a ne i svi ostali. Nadalje, za razliku od ZZP, organizator je bio odgovoran samo za ona djela koja su bila obuhvaćena kriminalnim planom, a ne i za djela za koja su bila razumne i predvidive posljedice zločinačkog plana. Nadalje, mogao je odgovarati i onda kad nije dao bitan doprinos u počinjenju djela no samo ako se radilo o djelu koje je bilo dogovoreno, dakle nije odgovarao za ekscese. Po Haškom pravu se odgovara i za ekscese ako su oni predvidive posljedice fleksibilno definiranog zajedničkog plana pa stoga i čudi nepodnošljiva lakoća kojim je Haški sud bez ikakve argumentacije i komparativne analize izveo zaključak o sličnosti ovih dvaju oblika odgovornosti. Zaključno, moglo bi se još dosta toga reći o ZZP, ali zbog ograničenosti vremenom moram svoje izlaganje privesti kraju. Rekao sam da mi je jako drago da smo objavili Studiju sa sadržajem iz 2007. godine, da nismo mijenjali originalni tekst i da smo u većini zaključaka koji su navedeni na kraju ove publikacije zapravo anticipirali daljnji razvitak međunarodnog kaznenog pravosuđa. Navesti ću samo dva zaključka u potkrjepu ove teze. Jednim ću malo ući u područje profesorice Seršić no nadam se da mi ona na tome neće zamjeriti. Naime, jedno od pitanja koje smo postavili glasi: je li ZZP bio dijelom međunarodnog običajnog prava u vrijeme sukoba u bivšoj SFRJ? Odgovor je, naravno, negativan. Do tog je zaključka dosta kasnije došlo i raspravno vijeće Suda za Kambodžu, internacionaliziranog kaznenog tribunala ovlaštenog za suđenja protiv pripadnika Crvenih Kmera za zločine počinjene u razdoblju od 1975. do 1979. godine. To je vijeće utvrdilo da u tom razdoblju treći oblik zajedničkog zločinačkog pothvata (koji i jest najsporniji) nije bio dijelom međunarodnog običajnog prava pa bi njegova primjena značila kršenje načela zakonitosti s obzirom da odgovornost

po toj osnovi optuženicima u vrijeme kada su činili kaznena djela koja im se stavljaju na teret nije bila predvidiva (*foreseeable*). Drugi zaključak su alternative za ZZP. Konkretno, profesor Bojanić je napisao jedno poglavlje u kojem ukazuje na potrebu raširenije primjene posrednog počiniteljstva kao alternative za ZZP. Radi se o jednom obliku odgovornosti o kojem ja sad neću govoriti, ali koji je vrlo zanimljiv jer na neki način reducira sve ove prigovore koji se upućuju ZZP – da je u suprotnosti s načelom krivnje, zakonitosti, da zanemaruje doprinos optuženika počinjenju kaznenih djela odnosno realizaciji zajedničkog plana itd. Kod posrednog počiniteljstva se radi o tome da je središnja kriminalna figura tzv. počinitelj za pisaćim stolom, dok su svi ostali tek neposredni fizički egzekutori koji su zamjenjivi i bez kojih organizirani sustav zlostavljanja i nadalje može nesmetano funkcionirati. Nekoliko godina nakon što smo dovršili Studiju, Stalni međunarodni kazneni sud je u gotovo svim postupcima umjesto ZZP primijenio posredno počiniteljstvo kao oblik kaznene odgovornosti optuženika. Prije nekoliko dana na Haškom je tribunalu održana međunarodna konferencija „The Global Legacy of the ICTY" na kojoj su, među inima, trebali sudjelovati i profesori kaznenog i međunarodnog prava s područja bivše SFRJ. Koliko je meni poznato, na Pravni fakultet u Zagrebu nikad nije stigao poziv, koliko znam ni u Osijek, ne znam da li kolege iz Splita i Rijeke imaju kakva druga saznanja, no čini mi se da nitko iz Hrvatske akademske zajednice, barem koliko je meni poznato, nije tamo sudjelovao. Na konferenciji je ZZP potvrđen kao jedan od najkorištenijih modaliteta kaznene odgovornosti na međunarodnim suđenjima koji je definiran u odluci žalbenog vijeća u predmetu Tadić i kasnije dodatno profiliran u predmetima Kvočka i drugi, Brđanin, Krajišnik itd. Ovi su zaključci indikativni jer upućuju na to da Haški tribunal nema namjeru preispitati svoja stajališta o ovom spornom obliku kaznene odgovornosti. Vrijeme će pokazati kakve će biti posljedice takvog stajališta ne samo na nasljeđe Haškog tribunala već i na međunarodno kazneno pravo i sudovanje u cjelini. Hvala Vam lijepa na pozornosti.

Prof.emerit.dr.sc. Željko Horvatić: Prof.dr.sc. Davor Derenčinović predstojnik je Katedre za kazneno pravo Pravnog fakulteta Sveučilišta u Zagrebu, na kojem je i doktorirao 2000. godine s tezom „Kaznenopravni sadržaji u suprotstavljanju korupciji". Akad. godinu 2004/05 kao dobitnik Fulbrightove stipendije za poslijedoktorsko usavršavanje proveo je na Međunarodnom institutu za ljudska prava, pri pravnom fakultetu DePaul u Chicagu, a stručno se u više navrata usavršavao na Istituto Superiore Internazionale di Scienze Criminali (Međunarodnom institutu za napredne studije u kaznenopravnim znanostima) u Sirakuzi, Akademiji za Europsko pravo u Trieru i na London School of Economics. Osnivač je i direktor međunarodnog poslijediplomskog tečaja "Crime Prevention through Criminal Law and Security Studies" pri Interuniverzitetskom centru u Dubrovniku. Samostalno i u suautorstvu potpisuje desetak knjiga i više od pedeset znanstvenih i stručnih radova s područja kaznenog prava i zaštite lju-

dskih prava. Osim na Pravnom fakultetu u Zagrebu, predavao i predaje i na niz dodiplomskih i poslijediplomskih studija u zemlji i inozemstvu. Član je više radnih skupina, voditelj jednog i suradnik na većem broju domaćih i međunarodnih znanstvenih projekata, te stručni savjetnik UN-ovog ureda za droge i kriminal. *Ad hoc* je sudac Europskog suda za ljudska prava, dopredsjednik Nezavisne skupine stručnjaka za provedbu Konvencije za djelovanje u borbi protiv trgovanja ljudima Vijeća Europe (GRETA), Predsjednik Hrvatskog udruženja za kaznene znanosti i praksu, te jedan od utemeljitelja i tajnik Akademije pravnih znanosti Hrvatske. Nadalje, profesor Derenčinović je član Nadzornog odbora Društva sveučilišnih nastavnika i ostalih znanstvenika u Zagrebu i zamjenik predsjednika Državnoodvjetničkog vijeća. Profesor Derenčinović je nositelj Spomenice Domovinskog rata. Njegovo je izlaganje, kao i uvijek, bilo vrlo zanimljivo i skoro bih rekao prebogato informacijama koje mu se stalno nameću jer se s time stalno bavi, pa onda nema ni vremena ni mogućnosti da sve to iznese i dovede u međusobno suglasje iako je to nevjerojatno jasno iznio. Ono na što bih se htio, jer mi to kao moderatoru i dužnost, osvrnuti, jest njegovo opravdano i znanstveno utemeljeno inzistiranje na tome da je pred *ad hoc* tribunalom u Haagu, po brojnim dokazanim činjenicama, evidentna superiornost tužiteljstva nad obranom. Ta superiornost ne proizlazi iz činjenice da su oni pravno superiorni već je posljedica toga što im se omogućava iznošenje činjenica koje su predmet optužbe kao unaprijed dokazanih. Sjetimo se situacije u kojoj se Carla del Ponte, kad sam joj prigovarao i od Vijeća sigurnosti u ime hrvatske države tražio njezino nečasno razrješenje, postavljala kao tužitelj u poziciju suda. Kad je govorila o svojim postupcima govorila je o postupcima Haškoga tribunala. S druge strane, svaka vanjska kritika rada tužiteljstva interpretirana je kao kritika Haškoga tribunala. Takva identifikacija jedne stranke u postupku sa sudom pred kojim je ona potpuno ravnopravna s obranom je neviđena, osim u nekim procesima koji su vođeni, a koje treba što prije zaboraviti. Ili nikad ne zaboraviti da bismo se podsjetili na njih. I još nešto, sada kad smo već ušli u temu odnosa prema zajedničkom zločinačkom pothvatu i odnosa suda prema čitavim strukturama koje se kažnjava i proglašava krvim izravno ili neizravno za počinjene individualne zločine na terenu za vrijeme ili nakon ratnih zbivanja. Mi imamo dvije optužnice od kojih je za jednu donesena prvostupanjska presuda i drugu protiv šestorice za djelovanja na području Bosne i Hercegovine za koje se optužuje hrvatski državni vrh. Pitanje koje ću postaviti u raspravi nakon referata biti će – što hrvatska država mora učiniti da bi se otklonila odgovornost čitave državne strukture i to ne samo zbog povijesti već i zbog čistoće prava i pravednosti? To stoga što većina pripadnika tih struktura, s obzirom da nisu imali formalni status optuženika, nije imala pravo na obranu. Drugim riječima, je li dužnost države u postupku pred sudom obraniti te strukture kad već one same nisu imale pravnu mogućnost obraniti se od široko formuliranih optužnica? To je, eto, jedno od pitanja koje bi moglo biti od koristi za našu državu nakon ovog znanstvenog

skupa. Sada s osobitim zadovoljstvom predstavljam sljedećeg referenta, profesoricu Maju Seršić koja je predstojnica katedre za međunarodno pravo na PFZ-u, na kojem se zaposlila 1992. godine, neposredno nakon stjecanja doktorata znanosti 1991. godine. Prije toga, radila je kao sudska pripravnica, pravna zastupnica American Express kompanije te asistentica u Jadranskom zavodu HAZU. Profesorica Seršić usavršavala se u Institutu Lester Pearson za međunarodni razvoj Sveučilišta Dalhousie u Halifaxu, Max Planck Institutu u Heidelbergu, Istraživačkom centru Haaške akademije za međunarodno pravo, Asser institutu u Haagu, Institutu za međunarodno javno pravo i međunarodne odnose u Solunu, Međusveučilišnom institutu u Luksemburgu te Interuniverzitetskom centru u Dubrovniku. Kao pozvani predavač izlagala je na konferencijama i držala nastavu na poslijediplomskim studijima u Genovi, Nijmegenu, Anacapriju, Agrigentu, Haagu, Napulju, Tunisu, Ženevi, Ateni, Ljubljani, Splitu i Dubrovniku. Sudjelovala je na više znanstvenih projekata. Od 1998. profesorica Seršić članica je Europske komisije protiv rasizma i nesnošljivosti (ECRI) Vijeća Europe; a od 2002. i arbitar za rješavanje sporova o okolišu i prirodnim izvorima na Stalnom arbitražnom sudu u Haagu. Od 2004. do 2006. godina predstavljala je Hrvatsku u Stalnom Odboru za društvene znanosti Europske znanstvene zaklade (ESF); te je obnašala dužnost potpredsjednice Upravnog odbora Udruženja europskih pravnih fakulteta /ELFA/. Profesorica Seršić autorica je i koautorica desetak udžbenika, knjiga i poglavlja u knjigama te više od 30 znanstvenih radova. Ono što nije ovdje rečeno, a ja ću si dozvoliti to dodati, koliko se ja razumijem u njezin CV, ona je i bila član tima koji je zastupao Hrvatsku državu pred Međunarodnim sudom pravde u Haagu za tužbu genocida protiv Srbije i sada je nedavno, koliko se sjećam, imenovana i kao predstavnica Republike Hrvatske kod Arbitražnog povjerenstva za spor oko granice sa Slovenijom.

Prof.dr.sc. Maja Seršić: Još sam se od fakulteta bojala profesora Horvatića. Uvek je bil strašno strog. A profesor Derenčinović mi je uništio suspense. Da vas podsjetim, imala sam i neki powerpoint, ali neće biti potrebno. Samo ću vas podsjetiti kako je uopće došlo do osnivanja Međunarodnog suda za bivšu Jugoslaviju. Sud je osnovan rezolucijom Vijeća sigurnosti 1993. godine i to, što je važno nama u Međunarodnom pravu reći, u okviru Glave VII Povelje UN, što znači da je to jedna od mjera za uspostavljanje mira te je zato suradnja svih članica UN u osnivanju i djelovanju suda i provođenju njegovih odluka obvezatna. To čisto spominjem zbog onih silnih rasprava kod nas da li ćemo surađivati sa sudom, nećemo itd. Tad je doneseno i izvješće Glavnog tajnika UN u čijem je prilogu bio Statut suda. Već smo čuli da u Statutu suda nije bilo ni spomena o ovoj temi koja nas danas zanima - zajedničkom zločinačkom pothvatu. Čuli smo i to, ali još jedan kažem s obzirom da je to važno za moju temu, da se u Izvješću Glavnog tajnika koje je bilo u prilogu rezolucije Vijeća sigurnosti ističe da primjena načela zakonitosti zahtijeva da Međunarodni kazneni sud primjeni pravila međunarodnog

humanitarnog prava koja su izvan svake sumnje dio međunarodnog običajnog prava tako da ne bude pitanja o tome da su samo neke a ne sve stranke koje budu pred sudom države, stranke određenih konvencija. Ovu važnu smjernicu iz Izvješća Glavnog tajnika razmotrili bismo s aspekta međunarodnopravne teorije i konkretne prakse Međunarodnog suda. Naravno, treba napomenuti da bi suci Međunarodnog kaznenog suda i bez ove napomene morali biti dužni poštivati načelo zakonitosti, ali još je, kažem, i specijalno to istaknuto u Izvješću Glavnog tajnika. Prisjetimo se sad međunarodnog prava. Jedan od izvora međunarodnog prava prema članku 38. Statuta međunarodnog suda je međunarodni običaj. Riječ je o nepisanom pravu koje nastaje u praksi država i praćeno je pravnim uvjerenjem, pravnom sviješću o obvezatnosti takve prakse. Dakle, iako je neko pravno pravilo nepisano, države se u praksi ponašaju u skladu s tim pravilom pri čemu su svjesne da je upravo takvo ponašanje pravno obvezatno. Zato se kaže da postoje dva elementa običajnog prava i to objektivni - praksa država i subjektivni - *opinio iuris* ili pravno uvjerenje, pravna svijest da je upravo takvo ponašanje pravno obvezatno. Kako bi praksa država bila relevantna za postojanje običajnog prava ona mora biti stalna, jednoobrazna i kontinuirana. A pošto je običajno pravo nepisano, dokazivanje njegova sadržaja ponekad može biti komplicirano. Kako se dokazuje postojanje i sadržaj međunarodnog običajnog prava? Pri tom dokazivanju glavni su oslonci unutarnje pravo, međunarodna judikatura, međunarodni ugovori, zakoni i mjere državnih organa, akti međunarodnih konferencija ili akti međunarodnih organizacija te naučavanje najuglednijih publicista. Dakle, onaj tko tvrdi da postoji neko običajno pravno pravilo mora u načelu dokazati putem ovih sredstava koje sam navela stalnu jednoobraznu i kontinuiranu praksu što drugim riječima znači da treba navesti što veći broj primjera iz prakse u kojima su države postupale u skladu s određenim pravilom i na temelju te dokazane prakse se ustanovljuje opinio iuris. Metode utvrđivanja, postojanja i sadržaja običajnog prava bile su više puta predmetom razmatranja Međunarodnog suda (ovog International Court of Justice, kojeg mi nazivamo Međunarodni sud bez dodatka - pravde - jer u našem jeziku court ne znači još i dvorište pa u francuskom i engleskom moraju dodati - *court of justice* - tako da bi se po nekim pravilima finog prevođenja ovo – pravde - trebalo izostavljati i referirati se samo na Međunarodni sud). Tako je u presudi u sporu o razgraničenju u Sjevernom moru Međunarodni sud posebno naglasio da praksa država mora biti široka i uključivati reprezentativno sudjelovanje najrazličitijih država, pri čemu je važno da u toj praksi uzmu učešća države koje su posebno zainteresirane za materiju u kojoj se običajno pravo stvara. Takva široka i uniformna praksa mora se odvijati na način koji pokazuje široko priznanje država da je riječ o pravnoj obvezi. Treba istaći još jednu stvar koja je relevantna u ovom kontekstu, da ispitivanju postojanja običajnog prava treba pristupiti bez unaprijed stvorenih zaključaka ili zadanog zadatka i potrebna je pažljiva analiza prakse država kako bi se došlo do zaključka o stalnoj jednoobraznoj i kontinuiranoj praksi koju prati *opinio iuris*.

Sada prijeđimo na to kako su se zapravo ta običajnopravna pravila ustanovljavala u praksi Međunarodnog suda. Čuli smo danas u nekoliko navrata da se na, između ostalog, za ovaj slučaj najkobniji način običajno pravo pozivalo drugostupanjsko vijeće u presudi Tadić i prema kojem je zajednički zločinački pothvat čvrsto utemeljen u međunarodnom običajnom pravu. Tu tvrdnju je Vijeće potkrijepilo pozivanjem na presude, kao što je rekao profesor Derenčinović, tzv. malih nürnberških sudova, talijanskog kasacijskog suda i na neke međunarodne ugovore. Kapitalni slučajevi koje sudsko vijeće navodi kao dokaz o običajnopravnom značaju proširenog oblika zajedničkog zločinačkog pothvata bili su tzv. slučaj Essenski linč pred britanskim vojnim sudom, zatim Kurt Goebbel slučaj pred američkim vojnim sudom te presuda talijanskog Kasacijskog suda iz 1947. u predmetu D'Ottavio i drugi. Analizom prvo navedena dva slučaja dolazimo do zaključka da oni ne mogu biti oslonac tvrdnjama drugostupanjskog vijeća u slučaju Tadić o utemeljenosti zajedničkog zločinačkog pothvata u međunarodnom običajnom pravu. Naime, niti u jednom od tih slučajeva sudovi nisu izričito rekli da su neki od sudionika pothvata kažnjeni već na temelju toga što je postojao predvidiv rizik da će u realizaciji zajedničkog zločinačkog poduhvata doći do određenog zločina. Raspravno vijeće u slučaju Tadić je, dakle, samo pretpostavilo da su pojedini sudionici pothvata kažnjeni, a da nije ustanovljena namjera počinjenja djela. Jedini slučaj koji udovoljava kakvim takvim zahtjevima kaznenopravne struke je, s obzirom na tvrdnje u predmetu Tadić, onaj iz presude talijanskog Kasacijskog suda u predmetu D'Ottavio i dr. No, on je ostao potpuno izolirani slučaj i praksa je krenula u potpuno drugom smjeru. U pogledu slučajeva iz nacionalnog zakonodavstva iz sudske prakse koju je također spomenuo profesor Derenčinović, treba reći da i samo sudsko vijeće u predmetu Tadić ističe da nacionalno zakonodavstvo ni praksa u ovom pitanju nisu jednoobrazni. Čak niti kada je riječ o državama *common law* sustava. Dakle, niti pozivanje na nacionalno zakonodavstvo i praksu nije moglo nikako biti dokaz o postojanju običajnopravnog pravila koje bi se odnosilo na zajednički zločinački pothvat. Uz navedene slučajeve iz judikature, drugostupanjsko vijeće u slučaju Tadić kao dokaz o tome da je zajednički zločinački pothvat dio običajnog međunarodnog prava navodi i odredbe dvaju međunarodnih ugovora: članak 25. stavak 3. Rimskog statuta i članak 2. stavak 3. Međunarodne konvencije o suzbijanju terorističkih napada eksplozivnim napravama iz 1997. godine. Međutim, kad pogledamo i te odredbe vidimo da nikako ne mogu biti dokaz o postojanju zajedničkog zločinačkog pothvata jer iz tih odredbi nikako ne proizlazi da optuženik može biti proglašen krivim čak i ako nije namjeravao krajnji ishod svoje akcije. Međutim, čak i da se ta dva članka mogu tumačiti u prilog kao dokaz postojanja instituta zajedničkog zločinačkog pothvata to ne bi bio valjan dokaz s obzirom da su obje konvencije zaključene nakon počinjenja djela za koje je nadležan međunarodni kazneni sud i ne može se navoditi neke konvencije koje su zaključene desetak godina kasnije kao dokaz postojanja običajnog prava 1991.

godine. Osim toga, postoji i dodatna zapreka što se tiče Rimskog statuta. Naime, neke najvažnije države na svijetu su čak povukle potpis na Rimski statut, a bez tih nekih, najznačajnijih država svijeta, ne može se tvrditi da je kompletan tekst određenog međunarodnog ugovora dio običajnog prava. Znači, možemo zaključiti da sud nije naveo nikakve valjane dokaze o postojanju prakse država i pravnog uvjerenja država u pogledu instituta zajedničkog zločinačkog pothvata, odnosno nije naveo niti jedan dokaz da bi se radilo o institutu međunarodnog običajnog prava. Zato nam se ne čini pretjeranim tvrditi da su u tom slučaju, primjenjujući ovaj institut unatoč tome što se ne radi o običajnom pravu, suci u slučaju Tadić preuzeli ulogu zakonodavca koja im nikako ne pripada. Kasnije su ih slijedila i druga vijeća Međunarodnog kaznenog suda za bivšu Jugoslaviju nekritički preuzimajući njihove zaključke o utemeljenosti zajedničkog zločinačkog pothvata u međunarodnom običajnom pravu. Budući da su primijenili pravilo u Tadiću i kasnije, a da pri tome nisu naveli nikakve dokaze prema kojima se radi o međunarodnom običaju izgleda, bit ću vrlo ironična, da su suci međunarodnog kaznenog suda zapravo smatrali da je *opinio iuris* pravno uvjerenje samih sudaca o postojanju običajnopravnog pravila. Treba reći, da niti institut zavjere iz anglosaksonskog prava (*conspiracy*) o kojem je govorio profesor Derenčinović, a na kojem je sud izgradio institut proširenog zajedničkog zločinačkog pothvata, nije dijelom običajnog prava. Taj je institut, za razliku od ZZP, bio predviđen Londonskim statutom te su ga nürnberški veliki i mali sudovi primjenjivali po toj osnovi. Time je, barem na prvi mah, načelo zakonitosti zadovoljeno iako je zbog neodređenosti tog pojma pravnicima koji nisu bili iz kruga *common law* sustava bila potrebna njegova dodatna sudbena interpretacija. Ipak, nisu išli ovako daleko kao kod zajedničkog zločinačkog pothvata. Treba reći sa aspekta Međunarodnog prava još nešto što ovdje nije rečeno. Načela koja su bila osnova prakse Nürnberškog suda formulirala je Komisija UN za međunarodno pravo 1950. i tamo je istaknuto da kažnjivost sudjelovanja u zajedničkom planu ili zavjeri postoji samo za počinjenje zločina protiv mira, a i ne za počinjenje ratnih zločina i zločina protiv čovječnosti. Podsjećam i na nacrt Kodeksa zločina protiv mira i sigurnosti čovječanstva kojeg je izradila Komisija za međunarodno pravo 1996. U komentaru tog Kodeksa posebno se ističe da su načelo individualne odgovornosti i kažnjavanje zločina prema međunarodnom pravu temelji međunarodnog kaznenog prava koji su potvrđeni u Nürnbergu i reafirmirani u statutima Međunarodnog kaznenog suda za bivšu Jugoslaviju i Međunarodnog suda za Ruandu. Znači, posebno se ističe načelo individualne odgovornosti. Treba se vratiti na Rimski statut i treba reći da je Rimski statut pokušao riješiti ove zamke koje nosi pretjerano diskrecijsko ovlaštenje sudaca međunarodnih kaznenih sudova i to u članku 21. gdje zapravo uvodi hijerarhiju pravila koje sud primjenjuje. U toj hijerarhiji prvenstvo imaju sam Statut i pravila donesena u skladu s tim Statutom, ona pravila koja se normalno donose da bi se olakšala primjena odredaba iz Statuta koji obično nisu previše detaljni, na

drugom mjestu nakon odredaba samog Statuta se navode međunarodni ugovori i običajna pravna pravila uključujući i ona sadržajna u konvencijama kojima se kodificira međunarodno pravo. Isto tako u stavku 2. tog članka 21. se zapravo kaže da sud može primjenjivati načela i pravila onako kako ih je tumačio u prijašnjim presudama, dakle drugim riječima sud nije obvezan to činiti i njegove presude nemaju nužno snagu presedana. Taj članak 21. Rimskog statuta trebao bi eliminirati ili bar ograničiti kreativnost sudaca koja je bila posebno vidljiva u praksi MKSJ, a posebno u pogledu zajedničkog zločinačkog pothvata i treba usmjeriti suce prvenstveno na odredbe samog Rimskog statuta. Naime, običajno pravo je prema stavku 1.b članka 21. samo podredan izvor, a još je važnije da se iz načina formulacije navedenog stavka može tvrditi, što potvrđuju i brojni autori, da sud ne mora dokazivati običajni karakter pravila, dakle *ni opinio iuris*, jer se Statut referira prvenstveno na kodificirana pravila običajnog prava. Što možemo zaključiti? Ono što smo već rekli i na početku i prije referata da, iako neutemeljen, zaključak o običajnopravnom karakteru zajedničkog zločinačkog pothvata prvi puta spomenut u slučaju Tadić nije doveden u pitanje ni u kasnijoj praksi MKSJ. Time je stvorena jedna čudna situacija. Polazeći od krive premise da je u slučaju proširenog zajedničkog zločinačkog pothvata riječ o običajnopravnim pravilima, MKSJ je u svojoj praksi primjenjivao pravila koja nisu dio međunarodnog običajnog prava i tako je kreirao presedane koji su preuzeti od drugih vijeća tog suda i od drugih sudova. No, praksa jednog suda koji je kreirao presedane bez pravnog temelja ne može stvoriti običajno pravo. Praksu MKSJ u pogledu zajedničkog zločinačkog pothvata kritiziraju ne samo naši domaći pravnici, tu bi se mogla prigovoriti pristranost, nego i najugledniji strani stručnjaci. Tako, recimo, Schabas upozorava da ni teški zločini počinjeni na području bivše Jugoslavije ne opravdavaju olake osude prema teoriji zajedničkog zločinačkog pothvata koja je postala „magična formula“ tužiteljstva i panacea koja omogućuje osude čak i u nedostatku dokaza. On ističe i da takve osude umanjuju didaktički značaj presuda Međunarodnog kaznenog suda za bivšu SFRJ i kompromitiraju nasljeđe koje taj sud ostavlja povijesti. Dakle, jedan od najuglednijih pravnika, (nije to nikakav hrvatski profesor koji je ljut zbog toga što će osuditi Gotovinu). Kada smo pisali Studiju 2007. godine nadali smo se da će MKSJ u završnoj fazi korigirati svoje stavove ili barem pooštriti kriterije u praksi primjene instituta zajedničkog zločinačkog pothvata, ili kako ga od milja zovemo ZZP, pomnije ispitujući individualnu odgovornost. U tom smislu smo sugerirali da bi se u slučajevima optužnica za zajednički zločinački pothvat moralo osigurati da optužnice budu poduprte odgovarajućim dokazima i da se dokazi rigorozno ispitaju kako bi se poduzele sve mjere da se spriječi donošenje neutemeljenih presuda. To se, nažalost, barem kada je riječ o MKSJ, nije dogodilo. Vidimo da naši kaznenopravni stručnjaci koji to prate više od mene, smatraju da je praksa Stalnog Međunarodnog kaznenog suda krenula u dobrom smjeru i da se Rimski statut tumači na način koji više ne dopušta ovakve konstrukcije. I za

sam kraj, postavljam sebi i Vama jedno pitanje s obzirom da smo vidjeli koje su karakteristike nepisanog običajnog prava. Pitam se u kojoj je mjeri nepisano običajno pravo prikladno kao izvor međunarodnog kaznenog prava s obzirom da načelo zakonitosti traži preciznost i detaljnost koju nepisano običajno pravo nema. Ja sam čak nekako bliže zaključku da običajno nepisano pravo nije prikladan izvor međunarodnog kaznenog prava, no čini se da u teoriji ipak prevladava suprotno shvaćanje i da je to i dalje neophodan izvor međunarodnog kaznenog prava jer postoji bojazan da bi u slučaju nepostojanja nepisanog odnosno pisanih izvora ili kodificiranog običajnog prava najveće okrutnosti mogle ostati nekažnjene. Loše strane, kao što smo vidjeli, koje može donijeti nepisano običajno pravo i zbog čega sam ja jako sumnjičava prema njemu kao izvoru međunarodnog kaznenog prava, jest da ono nužno donosi pretjeranu kreativnost sudaca koju, čini se, nije moguće sasvim isključiti i zapravo ostaje na sucima i sudačkoj savjesti da paze da ne prijeđu Rubikon koji dijeli pravo od poželjnih rješenja. Dakle sami suci bi, ako se i dalje ostane pri tome da nepisano običajno pravo bude izvor međunarodnog kaznenog prava, trebali imati stalno na umu da načelo *nullum crimen nullua poena sine lege* zabranjuje međunarodnim kaznenim sudovima da sudjeluju u progresivnom razvitku međunarodnog prava. Hvala lijepa.

Prof.emerit.dr.sc. Željko Horvatić: Iskreno zahvaljujem profesorici Seršić. Još uvijek sam pod utjecanjem njezinog obraćanja na moju strogost. Objasnit ću u ovom komornom sastavu da je moja strogost prema ženskoj populaciji na ovom fakultetu bila samo rezultat moje velike sklonosti prema ženskoj populaciji. Kako sam se suzdržavao pokazati tu svoju simpatiju, trudio sam se biti stroži no što jesam da se ne bi otkrilo što podsvjesno mislim. Što se tiče ovog ozbiljnog, profesorica Seršić je, ja sam strašno zadovoljan, uvučena na inzistiranje profesora Derenčinovića i moje i stjecaja okolnosti, u međunarodno kazneno pravo. Iako su međunarodno pravo i kazneno pravo, gotovo bih rekao, utemeljeni na različitim načelima, ona je dala predivan primjer običajnog prava koje u kaznenom pravu s obzirom na načelo *nullum crimen nulla poena sine lege* ne može uopće egzistirati, ali se uvuklo stjecajem okolnosti. Od samoga naziva tog međunarodnog kaznenog prava govorimo o jednoj, skoro bih rekao, konfliktnoj simbiozi. Radi se o konfuziji koja je rezultat stjecaja okolnosti i to od pradavnih vremena, ali u kojoj prevladavaju i moraju prevladavati načela kaznenog prava, jer kad ne bi bilo tako, onda bi civilizacija bila dovedena za nekoliko milijuna koraka unatrag na samovolju i ono što se godinama, stoljećima, izgrađivalo u kaznenom pravu - sigurnost da nitko ne može biti kažnjen dok mu se ne dokaže krivnja i to krivnja za zločin koji je u vrijeme počinjenja bio zakonom propisan kao takav. Bez toga nema niti namjere, *mens rea*, nema ničega. Zanimljiv je i odnos međunarodnih sudova. Nakon što su uspostavljeni međunarodni kazneni *ad hoc* sudovi, a nakon toga i Stalni međunarodni kazneni sud, ja se pitam tko je

iznad njih? Tko može spriječiti samovolju da si sudac XY, da mu ne spomenem sad ime i prezime koje je ionako poznato iz posljednjih slučajeva, a vrlo ga dobro poznajem i sretali smo se u brojnim situacijama, dozvoljava da je njegovo osobno mišljenje *opinio iuris* kojim on kreira pravo. I sve priče o tome da je međunarodno kazneno pravo u razvitku ne može biti na štetu ljudskih prava. Ja ću spojiti suce iz Strasbourga s Europskog suda za ljudska prava sa sucima Stalnog međunarodnog kaznenog suda i ove *ad hoc* suce i tužitelje, Brammertza, Del Ponte i Arbour i dovest ću ih na Vijeće sigurnosti, pa ću ih pitati: Sad mi recite o čemu se radi? Tko je kome nadležan? Tko je kome superioran? Zna se da u Hrvatskoj, Italiji ili Njemačkoj postoje vrhovni sudovi koji rješavaju u konačnoj instanci za sve sudove u toj državi. A kad postoji međunarodni kazneni sud, onda ne znam koji sud je iznad toga suda. Sami sebi su iznad pa se valjda na kavi dogovore kako će prvostupanjsko vijeće u odnosu na drugostupanjsko vijeće obrazložiti da mu drugostupanjsko vijeće to potvrdi. Ja ih ne insinuiram. Ja samo konstatiram hodajući po hodnicima tog suda da "nekaj ne štima" kako bi rekli naši Zagorci… Sljedeći referent je profesor Bojanić. On je predstojnik Katedre za kaznenopravne znanosti i Dekan Pravnog fakulteta Sveučilišta Josipa Jurja Strossmayera u Osijeku. Diplomirao je na Pravnom fakultetu u Osijeku (1986.), magistrirao na Pravnom fakultetu u Zagrebu (1996.) i doktorirao na Pravnom fakultetu u Osijeku (2002.). Na temelju iskustava stečenih tijekom boravka u SAD (listopad, 1994.), ustrojio je i vodio posebni Program praktičnih vježbi iz kaznenog prava, koji je organiziran uz potporu ABA (American Bar Association) i CEELI (Central and Eastern European Law Initiative). Od 2007. član je hrvatske delegacije u GRECO-u (Skupina država protiv korupcije) u okviru Vijeća Europe i ekspert GRECO-a. Profesor Bojanić redoviti je član Akademije pravnih znanosti Hrvatske od 2007., član Upravnog odbora Hrvatskog udruženja za kaznene znanosti i praksu te član Međunarodnog udruženja za kazneno pravo (AIDP). Kao nacionalni izvjestitelj sudjelovao je u projektu "Čast i kazneno pravo" Max-Planckova instituta za poredbeno i međunarodno kazneno pravo u Freiburgu (Njemačka), u projektu „Sustav maloljetničkog kaznenog prava - "Systems of the Juvenile Criminal Law in Europe – current situation, reform developments and models of good practice" (u okviru AGIS programa Europske unije) te je bio nacionalni izvjestitelj za I. sekciju (General criminal law: The expanding forms of preparation and participation) 18. međunarodnog kongresa Međunarodnog udruženja za kazneno pravo, o općem dijelu kaznenog prava, konkretno o proširenim oblicima pripremnih radnji i sudioništva. Profesor Bojanić autor je većeg broja znanstvenih i stručnih radova.

Prof.dr.sc. Igor Bojanić: Zahvaljujem mojim prethodnicima koji su jasno ukazali na neprihvatljiva stajališta Haškog tribunala kad je riječ o zajedničkom zločinačkom pothvatu. Ja bih ovdje u sažetom obliku podsjetio da je ta konstrukcija često s pravom nazivana *joint criminal confusion*. Radi se o vrlo širokoj

koncepciji supočiniteljstva koja omogućava odgovornost i za ekscese supočinitelja, što znači i mogućnost nehajne odgovornosti. Ono što je zapravo nama posve nepoznato u europskom kontinentalnom pravu je odgovornost supočinitelja samo na temelju zajedničke odluke bez bitnog doprinosa počinjenju kaznenog djela. S obzirom na trenutni razvitak međunarodnog kaznenog prava za očekivati je da taj zajednički zločinački pothvat neće još dugo biti praksa međunarodnog kaznenog pravosuđa. To prije svega treba zahvaliti Statutu Stalnog međunarodnog kaznenog suda odnosno autorima toga Statuta koji su prihvatili tzv. dualistički počiniteljsko-sudionički model uređenja sudjelovanja više osoba u počinjenju kaznenog djela koji podrazumijeva jasno razlikovanje između pojedinih pojavnih oblika počiniteljstva s jedne strane u koje se tradicionalno ubrajaju neposredno, posredno i supočiniteljstvo i sudioništva u užem smislu s druge strane (tradicionalno poticanje i pomaganje). Mogući su i neki drugi načini podupiranja, ali oni u svakom slučaju ne predstavljaju počiniteljstvo. Taj model, doduše, nije dosljedno prihvaćen jer se za sve sudionike propisuju isti kazneni okviri. Međutim, jasno diferenciranje pojedinih pojavnih oblika počiniteljstva i sudioništva otvara pitanje i jednog pravilnog teorijski dosljednog pristupa kada je riječ o razgraničenju počinitelja i sudionika. S tim u vezi već u praksi ovog Haškog tribunala sudac Schomburg, koji nažalost danas nije ovdje, pokušao je ukazati da postoje i drugi modeli koji bi doveli do prikladnijih rješenja kad je riječ o sudjelovanju više osoba u počinjenju kaznenog djela, ukazujući pri tome na dostignuća njemačke kaznenopravne dogmatike osobito kada je riječ o supočiniteljstvu gdje je on zagovarao primjenu tzv. funkcionalne vlasti nad djelom i posrednog počiniteljstva što je zapravo sve skupa došlo do izražaja u predmetu Stakić, gdje je Schomburg bio predsjednik prvostupanjskog sudskog vijeća. Nažalost, taj pokušaj nije uspio. Naravno, i ne treba očekivati neke promjene u ustaljenoj praksi toga suda. No, on je zapravo potaknuo interes sudaca koji sudjeluju u radu međunarodnih tribunala, a to se danas posebno tiče sudaca i tužitelja Stalnog međunarodnog kaznenog suda, za druge teorije o počiniteljstvu. U prvi plan je tu došla do izražaja Roxinova teorija o vlasti nad djelom. To je teorija koju prihvaća i hrvatsko kazneno zakonodavstvo i koja na jedan vrlo zoran, praktičan način, ukazuje na to tko se ima smatrati počiniteljem. Počinitelj je, prema Roxinu, ključna figura zbivanja koji se ocjenjuje kao kazneno djelo. Ta ključna figura dolazi do izražaja na različite načine, odnosno njezina vlast nad djelom dolazi do izražaja na različite načine kod raznih pojavnih oblika počiniteljstva. Tako kod neposrednog počiniteljstva kao vlast nad radnjom, kod supočiniteljstva kao funkcionalna vlast nad djelom, a kod posrednog počiniteljstva kao vlast nad voljom drugoga. Budući da je tema mog predavanja posredno počiniteljstvo i njegova afirmacija u međunarodnom kaznenom pravu, valja prvenstveno ukazati na odredbu Rimskog statuta o posrednom počiniteljstvu koja propisuje da se kazneno djelo može počiniti posredstvom drugoga neovisno o tome je li ta osoba kazneno odgovorna ili ne. Što to znači za dogmatiku posrednog počiniteljstva?

Tradicionalni pristup posrednom počiniteljstvu jest takav da se kao sredstva u pravilu tretiraju neposredni počinitelji s određenim nedostacima, bilo zbog toga što postupaju pod prisilom, u krajnjoj nuždi, u zabludi bez potrebne namjere bez potrebne kvalifikacije itd. S druge strane, desetljećima se, osobito u njemačkoj kaznenopravnoj dogmatici, raspravlja o tome do koje mjere razvijati tu pravnu figuru posrednog počinitelja? Je li moguća i pravna figura počinitelja iza posve odgovornog počinitelja? Anglosaksonska doktrina ostala je na razini posrednog počiniteljstva gdje se kao neposredni počinitelj pojavljuje osoba koja nije kazneno odgovorna, no upravo maloprije spomenuti Roxin i vladajući dio njemačke pravne dogmatike zagovara mogućnost primjene posrednog počiniteljstva i kada je neposredni počinitelj posve odgovoran. Tu konstrukciju pod nazivom posredno počiniteljstvo na temelju organiziranog aparata moći ili tzv. organizacijske vlasti Roxin je započeo davne 1963. godine, a njegov uzor za tu teoriju je bio slučaj A. Eichmanna. S tim u vezi, Roxin je oblikovao tezu da osobe iz pozadine mogu biti posredni počinitelji kaznenih djela i u slučaju kada im na raspolaganju stoji jedan dobro uhodani, hijerarhijski čvrsto strukturirani aparat moći koji omogućuje izvršavanje njihovih naredbi, zapovjednih naloga, zahvaljujući tome što su u okviru tog aparata moći neposredni počinitelji zamjenjivi kotačići u tom dobro uhodanom stroju moći. Radi se o osobama koje su u svakom trenutku i u pravilu zamjenjive drugima, tako da će, otklone li one počinjenje kaznenog djela iz bilo kojeg razloga, na njihovo mjesto zahvaljujući dobrom funkcioniranju tog aparata moći doći netko drugi. Eichmann nije osuđen kao posredni počinitelj u Jeruzalemu 1963. već kao supočinitelj, ali u obrazloženju te presude ima dosta elemenata koje je Roxin preuzeo u svoju koncepciju. Tamo se, naime, ističe da, iako Eichmann nije bio u najužem vrhu vlasti, da je on ipak bio relativno visoko rangiran i vrlo predan u ostvarivanju ideje Konačnog rješenja zajedno s mnogim drugim počiniteljima koji su vrlo pomno planirali i pripremali počinjenje masovnoga zločina. Na toj je osnovi on osuđen kao supočinitelj. Roxin u njemu vidi tipičan primjer tog počinitelja za pisaćim stolom. I na temelju tog primjera formulira tu svoju tezu o organiziranom aparatu moći. Za funkcioniranje tog mehanizma bitne su tri stvari: dobro ustrojeni aparat moći, gotovo automatska zamjenjivost neposrednih počinitelja i okolnost da taj aparat moći funkcionira potpuno izvan zahtjeva pravnog poretka. Zanimljiv je put koji je ta teorija zapravo doživjela kasnijim razvitkom. Roxin ju je, sukladno nekim kritikama, malo upotpunjavao, dotjerivao, no jako dugo nije bilo njene praktične primjene. Interesantno, ona je kao jedan tipičan njemački izvozni proizvod prvi put primijenjena pred argentinskim sudom sredinom 80-tih godina u suđenju vođama argentinske vojne hunte. Još jedna zanimljivost s tim u vezi. Tada je zamjenik državnog tužitelja u Argentini bio Luis Moreno Ocampo, sadašnji tužitelj pred Stalnim međunarodnim kaznenim sudom. Argentinski sud je izričito primijenio Roxinovu doktrinu ukazujući na mehanizme djelovanja tog aparata moći koji se u tom, ali i u kasnijem primjeru, zapravo svodi na to da osobe iz pozadine imaju na ra-

spolaganju vojsku, policiju, tajne službe, dakle mehanizme koji im doista jamče da će njihovi nalozi u krajnjem slučaju biti realizirani. U tom kontekstu taj se neposredni počinitelj doista pojavljuje u odnosu na njih kao jedna manje važna, gotovo beznačajna figura. Pravna figura počinitelja iza posve odgovornog neposrednog počinitelja u njemačkoj je praksi prvi puta primijenjena 1988. godine u jednom slučaju poznatom pod nazivom „Kralj mačaka" u kojem je optuženica uspjela nagovoriti na pokušaj ubojstva poluretardiranu osobu koja je povjerovala u to da ubojstvo čini radi spasa čovječanstva, dakle koja je postupala u otklonjivoj zabludi o protupravnosti. Otklonjiva zabluda o protupravnosti smanje krivnju, ali je ne isključuje. Radi se o odgovornoj osobi i u toj odluci njemački Savezni sud prvi puta spominje i Roxinovu konstrukciju prema kojoj se radi o počinitelju iza počinitelja. Konačno, 1994. godine dolazi do glasovite odluke njemačkog Saveznog suda prema kojoj su članovi Nacionalnog vijeća obrane bivšeg DDR-a osuđeni kao posredni počinitelji ubojstava počinjenih od strane graničara na bivšoj unutarnjemačkoj granici. Kod tih neposrednih počinitelja nije bilo sporno da se radi o neposrednim počiniteljima ubojstava. No prvotnu kvalifikaciju tužiteljstva da se radi samo o običnom poticanju Savezni je sud osporio s iscrpnim obrazloženjem pozivajući se ne samo na Roxina nego i na neke druge njemačke autore, primjerice Schroedera koji je davne 1965. godine napisao značajno djelo „Počinitelj iza počinitelja" gdje je kao ključno obilježje takve konstrukcije uzeo bezuvjetnu spremnost neposrednih počinitelja na počinjenje kaznenih djela u zadanim uvjetima. Tu ideju kasnije prihvaća i Roxin i dopunjuje svoju teoriju četvrtim elementom koji označava kao povećanu sklonost odnosno spremnost neposrednih počinitelja na počinjenje kaznenog djela. Nadalje, Roxinove ideje primijenjene su i u malo prije spomenutoj prvostupanjskoj odluci Haškog tribunala u slučaju Stakić, premda doduše u jednoj posebnoj kombinaciji posrednog počiniteljstva i supočiniteljstva. Stakić je bio šef civilne administracije u Prijedoru koji je zajedno sa šefovima civilne policije i vojske organizirao progon stanovništva. Oni su osuđeni kao supočinitelji, ali istodobno i posredni počinitelji, jer je svatko ispod sebe imao dio aparata vlasti kojeg je u potpunosti kontrolirao. Iza tog slučaja Stakić, slijedi odluka peruanskog Vrhovnog suda u slučaju diktatora Fujimorija koji je osuđen za teška kršenja humanitarnog prava i zločine protiv čovječnosti na 25 godina zatvora. U obrazloženju svoje presude sud se poziva na cijeli niz doprinosa ne samo njemačke već i španjolske kaznenopravne dogmatike kao i dogmatike južnoameričkih država koje idu u prilog primjene teorije o vlasti nad djelom kod posrednog počiniteljstva. Naposljetku došli smo i do stajališta Stalnog međunarodnog kaznenog suda. Ovdje su značajna tri slučaja: Lubanga, zatim Katanga i Chui i konačno Al Bashir koji je možda i najzvučnije ime jer radi se o predsjedniku države. Ako bi ga uspoređivali sa Fujimorijem, to bi otprilike bila ista razina. U sva tri slučaja Stalni međunarodni kazneni sud služi se pravnom figurom posrednog počinitelja na temelju organiziranog aparata moći. Između

ostalog oni se pozivaju i na neke dosadašnje odluke međunarodnih tribunala (valjda se misli na slučaj Stakić), na brojna kaznena zakonodavstva koja dopuštaju primjenu ove pravne figure kao i mnoga teorijska stajališta gdje zapravo prednjače njemački kaznenopravni teoretičari i u nešto manjoj mjeri španjolski. Za ovu pravnu figuru mogli bismo zaključno reći da ona nudi veće garancije da će se daleko strožim kriterijima kada je riječ o načelu krivnje doći do odgovornosti najviše rangiranih osoba u okviru organiziranih aparata moći. S druge strane, time se ne zadire u opseg odgovornosti koji je u okviru zapovjedne odgovornosti. Zapovjedna odgovornost je odgovornost za nečinjenje. Ovdje se, kod primjera teorije o vlasti nad djelom uključujući i posredno počiniteljstvo, radi o odgovornosti za namjerna kaznena djela činjenjem. Dakle nečinjenje je jedna sasvim druga osnova kaznene odgovornosti, tu se radi o povredi dužnosti sprječavanja počinjenja kaznenih djela i u svakom slučaju o protudužnosnom ponašanju. Ostaje mjesta i za ostale tradicionalne dobro poznate pravne figure supočiniteljstva na način kako ga doživljavamo i mi ovdje i većina europskih kontinentalnih pravnih sustava po modelu funkcionalne vlasti nad djelom. Rimski statut otvorio je vrata razvitku međunarodne kaznenopravne dogmatike i međunarodnog kaznenog sudovanja koje će u značajnijoj mjeri voditi računa o temeljnim načelima kaznenog prava. Zahvaljujem.

Prof.emerit.dr.sc. Željko Horvatić: Zahvaljujem profesoru Bojaniću. Neću komentirati njegovo briljantno izlaganje zato da bih pružio svima mogućnost da se ponudimo sa kavom i sa zakuskom, a u 13,00 je nastavak s tim da molim one koji će uzeti riječ, bilo da postavljaju pitanja referentima bilo da izlažu svoja mišljenja o ovoj temi, da na komadić papira napišu svoje ime i prezime i funkciju, itd. Svi će dobiti riječ. Nakon pauze konstatiram činjenično stanje. Neki su popili, pojeli i otišli. Dobar tek svima koji su otišli i zahvaljujem vama koji ste se vratili. Ja imam tri prijavljena sudionika u raspravi. Patricija Kajić Kudelić, Goran Mikuličić i Hrvoje Kačić redoviti član Akademije i jedan od naših aktivnih sudionika u praćenju haških sudovanja i osobnih doprinosa o tome, uvijek nedovoljno zadovoljan s onim što se događa, u čemu smo potpuno jednaki. Prvo bih molio dragog mi prijatelja gospodina Mikuličića da uzme riječ.

Goran Mikuličić: Poštovane kolegice i kolege, uvijek je posebno zadovoljstvo sudjelovati na skupu u kojem se sublimiraju znanstvena teorija i pravna praksa kojom se bavim kao odvjetnik praktičar. Zahvalan sam na pozivu i mogućnosti sudjelovanja. Tema osobne odgovornosti kako je primjenjuje ICTY svakako je uvijek svježa, otvorena i nadasve intrigantna. Rekao bih, posebno gledajući iz rakursa nas praktičara koji se time bavimo. Gotovo na dnevnoj bazi susrećemo se sa iznenađujućim procesnim i materijalnim rješenjima u sudovanju koja, na žalost, obeshrabrujuće daju svoj doprinos razvoju kaznenopravne prakse i teorije. Ovo se posebno odnosi na implementaciju osobne kaznene odgovornosti u institutu tzv. JCE – zajedničkog zločinačkog pothvata. Uvažena profesorica

Seršić prethodno je ukazala na žalosno pogrešno tumačenje instituta *opinio iuris* kao preduvjeta za prihvaćanje nekog materijalnopravnog rješenja koje navodno egzistira u općeprihvaćenoj praksi međunarodnog nepisanog običajnog prava kao jednog od izvora materijalnog prava koji je ICTY ovlašten primjenjivati. Na stranu što je izrazito dvojbeno da li nepisano običajno pravo uopće može biti izvor kaznenog prava jer se čini da je takvo rješenje, bez obzira što je predviđeno u Izvješću Glavnog Tajnika UN, suprotno načelu *nullum crimen sine lege stricta* – dodao bih i „*scripta*", ali Žalbeno vijeće u predmetu Tadić pokrenulo je praksu primjene ovog instituta u sudovanju pred Tribunalom lakonski zaključivši da je institut JCE nedvojbeno dio međunarodnog običajnog prava. Ovo i usprkos što tijekom postupka u tom pravcu Tužitelj nije izvodio nikakve dokaze. Nastavno, raspravna vijeća započela su primjenjivati ovaj institut i opet u izostanku izvedenih dokaza koji bi upućivali na zaključak da je riječ o nesumnjivom institutu običajnog prava. Kako tužitelj nije izvodio dokaze u tom pravcu, tako obrana nije niti mogla izvoditi kontra-dokaze. Krajnji rezultat je poražavajuća situacija da je sud preuzeo ulogu zakonodavca i da je sam sebi utvrdio pravnu praksu. Ovo je još puno opasnija privilegija od one kada tužiteljstvo Tribunala inklinira preuzeti na sebe ingerencije samog suda. Pri tome se opravdano postavlja pitanje (sudac Schomburg) zbog čega je to uopće bilo potrebno kada se problem odgovornosti pojedinaca mogao tretirati općeprihvaćenim institutima kaznenog prava kao što je suizvršilaštvo, poticanje, pomaganje i sl. Jedini logički odgovor na pitanje motiva „invencije" JCE i njegove sveprisutne primjene u praksi Tribunala jest bitno olakšanje položaja tužitelja u postupku kome je znatno olakšano dokazivanje odgovornosti jer se pod kišobranom JCE sakrivaju neprihvatljivo simplificirani elementi dokazivanja kaznene odgovornosti optuženika. *Nota bene*, nakon Tadićeve žalbene presude, tužiteljstvo u 80% podignutih optužnica koristi ovaj institut! Dakle, pri primjeni inovativnog instituta JCE (posebno trećeg, tzv. proširenog oblika) prvenstveno se dovodi u pitanje *iurisdictio ratione materie* (jer Tribunal nije ovlašeten primjenjvati pravne institute koji nisu bili nesumnjivi dio običajnog prava *tempore acti delicti comissi*), a potom i pitanje nedopustive devalvacije pravnih standarda kaznenog prava koja su općeprihvaćena u suvremenim jurisdikcijama. Institut JCE III izrazito je protivan načelu legaliteta (*nullum crimen sine lege, nulla poena sine lege*) ali i načelu krivnje kada namjeru izvršenja, kao nužan prerogativ za teške povrede humanitarnog prava, transformira u nehaj – izvršitelj je trebao razumno predvidjeti kaznena djela proizašla iz JCE, makar i ne bila dogovorena! No, haški je Tribunal otišao i korak dalje u svojoj inventivnosti glede utemeljenja nekih novih oblika krivnje. Tako je primjerice u predmetu Gotovina i dr. inaugurirao oblike osobne kaznene odgovornosti dotad nepoznate u kaznenom pravu:

- *guilt by association* ili krivnja po pripadnosti zajednici – članovi JCE (među inim) su i različiti pripadnici političkih struktura u RH, HDZ kao i druge znane i neznane osobe

- *guilt by forseeability* ili krivnja zbog predvidljivosti – jer optuženici nisu predvidjeli zločine koji su se dogodili iako čak nisu bili planirani u navodnom zločinačkom planu
- *guilt by proximity of crime scene* ili krivnja zbog prisutnosti u blizini počinjenog zločina – optuženikovi podređeni viđeni su u blizini zapaljenih kuća
- *guilt by creating atmosphere of impunity* – krivnja zbog stvaranja atmosfere nekažnjavanja - jer optuženik nije kaznio počinitelje koji *nota bene* nisu niti identificirani, a optuženik nije bio niti ovlašten voditi istragu o počiniteljima

Premda se ovo doima izrazito ironično, ali istina je da raspravno vijeće primjenjuje rečene argumente kada obrazlaže krivnju optuženika, naravno ne doslovno nazivima oblika krivnje koji su nazivi ipak produkt sarkazma braniteljapraktičara. Zaključno, čini se da je jedino pravo tumačenje kratice JCE dao prof. Mohamed Elewa Badar koje glasi: „*JUST CONVICT EVERYONE*“. Na kraju želio bih izraziti osobitu zahvalnost u ime mojih kolega i u moje osobno ime Akademiji pravnih znanosti Hrvatske čija znanstvena studija o teoriji JCE je bila nezamjenjiv alat u rukama nas odvjetnika praktičara i neprocjenjiva pomoć u obnašanju našeg posla.

Prof.emerit.dr.sc. Željko Horvatić: Zahvaljujem kolegi Mikuličiću od kojeg, doista moram reći, uvijek nešto novo naučimo ili ako ništa drugo, potvrdimo svoje znanstvene slutnje o onome što se u praksi može dogoditi. Ostaje moja zamolba, koju sam naveo na početku, da i ovo i pismeno, ako je moguće i ako imate vremena, učinite dostupnim za publikaciju s ovog skupa. Ja bih si još dozvolio dodati, s obzirom na naše vrijeme, a i svega tri prijavljena kandidata za raspravu, da kažem nekoliko riječi o onome što se dogodilo od 2005. do danas kad je kolega Goran Mikuličić pitao kolegu Damašku, dakle ono što mene sasvim konkretno interesira, koji su kriteriji anglosaksonskog prava u individualiziranju članova zajedničkog zločinačkog pothvata? Tada ste to pitali, a M. Damaška je rekao: „…prije nego što Vam ovo odgovorim želio bih se sasvim ukratko osvrnuti na jednu prikrivenu slabost Haaškog tribunala jer me na to potaknuo prof. Horvatić svojom intervencijom. Slabost se sastoji u neskladu proklamiranih ciljeva Tribunala. Dovoljno je za ilustraciju ukazati na tenziju koja postoji između ambicija da se utvrdi povijesna istina i da se prikaže da su sukobi na području bivše Jugoslavije krivnja malog broja političara koji su potpalili itd. No, da odgovorim na pitanje gospodina Mikuličića…“ kaže Damaška „…iako su se angloamerički pojam urote, konspiracije i pojam zajedničkog zločinačkog pothvata izlegli u istom pojmovnom gnijezdu, postoje među njima mnogostruke razlike. Najvažnija razlika za potrebe ovoga skupa sastoji se u tome da za odgovornost urotnika po angloameričkom pravu treba dokazati vezu koja među njima postoji kroz neki oblik organizacije...“ i nastavlja „…kad bi postojao in-

teres obrane za tim, američki bi sud zacijelo uvažio zahtjev da se iz dopunjene optužnice protiv Čermaka, Gotovine i Markača, izbace navodi o sudjelovanju osoba u zajedničkom pothvatu čija međusobna veza nije optužbom označena." To je tada odgovorio Damaška i unatoč tome se nastavlja taj isti proces. Riječ ima Patricija Kajić Kudelić.

Patricija Kajić Kudelić: Hvala lijepa. Ja ću se pridružiti riječima odvjetnika Mikuličića i zahvaliti što sam ovdje jer mislim da su sva izlaganja bila iznimno korisna i ono što mene osobno iznimno veseli, a to je činjenica da se rad suda povezuje sa činjenicom utvrđivanja povijesne istine. Dakle ono što je sud sebi uzeo za pravo, uzeo u svoj zadatak, a što već neko vrijeme nije dovedeno u pitanje, to je mogućnost i pravo te institucije u smislu utvrđivanja povijesne istine. Također me iznimno veseli što je profesor Derenčinović spomenuo tri pojma. Ja sam inače diplomirana pravnica, magistar sam europske kriminologije, pa uvijek taj svoj pravni aspekt nekako povezujem sa elementima kriminologije. Iznimno me veseli da ste spomenuli tri pojma, a to su pojam istine, pravde i mira koji je jako važan kad govorimo o nekakvim pravnim institucijama pogotovo o Međunarodnom kaznenom sudu za bivšu Jugoslaviju. Ovdje je već bilo riječi, iako se nedovoljno ističe u široj javnosti, o ulozi tužiteljstva i posljedicama njegova rada na ostavštinu suda. Naime, i ovdje je rečeno, ali ponavljam, mislim da se u javnosti ne ističe dovoljno činjenica da tužiteljstvo ponekad, a možda čak i puno češće od ponekad, izlazi iz nekakvih klasičnih okvira uloge tužiteljstva. Da li je to u vidu skraćivanja optužnica kad su u pitanju nekakve nagodbe, da li je to u vidu sastavljanja optužnica u kojima je, primjerice u slučaju „Vukovarske trojke" zajednički zločinački pothvat sasvim drugačije sastavljen i prezentiran no u slučaju „Oluje", pa do načina sastavljanja polugodišnjih izvješća kod kojih, kao što je i profesor Horvatić spomenuo, postoje elementi političkog pritiska, i konačno do načina prikupljanja dokaza u vidu primjerice „topničkih dnevnika". Ono što ja postavljam kao pitanje, ali ne očekujem odgovor nego mislim da će svatko od nas imati i nekakav svoj osobni stav, jest kakve dugoročne posljedice donose ovakve, nazovimo ih tako, loše presude koje su vrlo često donesene temeljem loših optužnica. Dakle, dugoročno gledano posljedice će biti dalekosežne. Završit ću riječima Pape Ivana Pavla II koji je jednom prilikom rekao, a mislim da je ovo što se suda tiče baš izjava na pravom mjestu: „Nema mira bez pravde". A postavlja se veliko pitanje da li ovaj sud zaista donosi pravdu? Dugoročno, možemo reći da će, ukoliko se ovakva praksa nastavi, posljedice biti puno veće, a onda se pitam da li je ta uloga nekakve pomirbe koja je opet van okvira klasičnog sudbenog tijela uopće ostvariva. Najljepša hvala.

Prof.emerit.dr.sc. Željko Horvatić: Zahvaljujem kolegici Patriciji Kajić Kudelić. Da li želi netko odgovoriti kolegici?

Steven Becker: Yes, thank you very much for your remarks. I think that there is a problem with this kind of view of the Tribunal where it places itself in a historical position. It is very problematic when a court takes on the responsibility that I do not think it can competently handle. It is my personal opinion that the court should not write history. I do not think that the introduction of evidence during the proceeding provides for that opportunity, and I think, just like in the Nuremberg trials, when judges present themselves as giving a historical record, they actually falsify history because history can only be written by historians. And it often takes decades, maybe centuries, before the truth can actually come out about what a political structure or a government is doing. And I think that their task should be simply to determine guilt or innocence, or I should say, whether the accused is "guilty" or "not guilty," as opposed to writing history. I have close friends who work on legacy projects for the Tribunal. We have talked about this, and I think if you are going to declare every party in a conflict to be equally guilty in an attempt to reconcile the countries, that is going to be a failed effort. So I feel that this is going to be the unfortunate legacy of the Tribunal.

Prof.emerit.dr.sc. Željko Horvatić: I would like to add something. Apologize for speaking English. Because it is international conference despite the fact that only one speaker speaks English and all the other Croatian. But never mind. Kolegice Kajić Kudelić, ja vam ne mislim odgovarati na to ništa originalno, ali ću, kao što već u zadnje vrijeme radim, citirati samoga sebe jer ne nalazim bolji izvor. Tako sam u ovoj dvorani na spomenutom znanstvenom skupu 2005. godine na slično pitanje odgovorio sljedeće: „…sada je, moram iskreno reći, nakon proteklog desetogodišnjeg iskustva o djelovanju međunarodnog kaznenog pravosuđa i upravo na primjeru Tribunala u Dan Haagu optimizam o međunarodnom kaznenom pravu ozbiljno narušen. Štoviše, spreman sam dokazati da je djelovanje tog suda zapravo nanijelo veliku štetu zamisli međunarodnog kaznenog pravosuđa i značajno reduciralo očekivano povjerenje njegova djelovanja i učinka. Onako kako je to pravosuđe zamišljeno da mora predstavljati optimum pravednosti čovječanstva koje nije opterećeno nacionalnim interesima pojedinih država ili bilo čijim političkim interesima". Tada sam rekao i ovo: „…šteta koju je nanio Haški tribunal u svojim postupcima je, skoro bih rekao, veća od mogućnosti da se ona vremenom ispravi…" *Full stop*. I sada to ponavljam. Šteta koju nanosi u tim presudama, pa čak i onda kad se čitaju pojedine izjave tužiteljstva, a koje su u presudama akceptirane bez kritičnosti je nepopravljiva šteta međunarodnom pravosuđu, a bojim se da će na kraju biti i nepopravljiva šteta i za suverenitet hrvatske države. Kolega Derenčinović, izvolite. Vi ste htjeli nešto reći.

Prof.dr.sc. Davor Derenčinović: Hvala Vam profesore. Na prvoj godini studija učili smo da ono što ne valja od početka ne može vremenom konvalidirati. Kako

je utemeljen Haški tribunal?! Rezolucijom Vijeća sigurnosti. Jedna od temeljnih premisa neovisnog pravosuđa u sustavu trodiobe vlasti je da sud ne smije biti ni na koji način ovisan o djelovanju egzekutivnih, u krajnjoj liniji političkih tijela. Ovdje nemamo taj slučaj. Pitanje je ima li Vijeće sigurnosti ovlast za osnivanje suda? S obzirom da može poduzeti sve u okviru poglavlja VII Povelje UN kako bi uspostavili odnosno održali mir i sigurnost u svijetu (poduzimanje kolektivnih vojnih akcija, nametanje gospodarskih sankcija itd.), analogijom se došlo do zaključka da ima i ovlast osnovati međunarodni sud. To je, dakako, vrlo dvojbeno. Ono što je sadržano u Rezoluciji 827 Vijeća sigurnosti u kojoj se kao razlog osnivanja suda navodi održavanje trajnog mira na području bivše SFRJ na neki je način možda i zavelo Haški tribunal u smislu prihvaćanja koncepcije po kojoj bi taj sud trebao postupati ne kao sudbena institucija već kao institut suvremene povijesti. To je u suštini pogrešno. Da li je osnivanje suda dovelo do mira na području bivše SFRJ? Nije. Ne zaboravimo da su neki od najstrašnijih zločina, primjerice genocid u Srebrenici, počinjeni nakon njegova osnivanja. Posljednji događaji u Libiji i intervencija Vijeća sigurnosti koje je Glavnom tužitelju Stalnog međunarodnog kaznenog suda naložilo istragu zločina libijske vlade (ne i pobunjeničkih snaga) ukazuje na postojanje tzv. selektivne i distribucijske pravednosti. Prema tome, u dosta je slučajeva angažman Vijeća sigurnosti u ovoj osjetljivoj domeni donio više štete no koristi, a nedvojbeno je da je i Rezolucija 827 doprinijela ovakvoj pogrešnoj interpretaciji vlastitog poslanja i preuzimanju odgovornosti za „progresivni razvitak međunarodnog prava“. I sad mi dozvolite još jednu stvar. Mi smo dosta govorili o propisima, o člancima Rimskog statuta, Haškog statuta itd. no nismo rekli jednu stvar koja je dosta bitna. Tko su zapravo tužitelji na ovim sudovima? Pred Haškim tribunalom su to uglavnom ili većim dijelom bili Amerikanci koji su primjenjivali RICO zakone, zakone protiv organiziranog kriminaliteta, zakone protiv mafije gdje postoji mogućnost suđenja na temelju zločinačke zavjere (*conspiracy*). S druge strane, značajan broj tužitelja na Stalnom međunarodnom kaznenom sudu dolazi iz južnoameričkih država, dakle iz pravnog kruga koji ne primjenjuje, kao što je rekao profesor Bojanić, teoriju zajedničkog zločinačkog pothvata već posredno počiniteljstvo kao oblik osobne kaznene odgovornosti za masovne zločine. Da je cjelokupna vertikala haškog pravosuđa od početka drugačije postavljena, recimo, da su Južnoamerikanci ili Nijemci, dakle oni koji zastupaju nekakvu civilnopravnu bilo europsku bilo južnoameričku pravnu doktrinu i praksu, bili zastupljeniji u tužiteljstvu i na sudu, epilog bi vjerojatno bio drugačiji. No čini mi se da to nekome nije bilo u interesu. Hvala lijepa.

Prof.emerit.dr.sc. Željko Horvatić: Hvala profesoru Derenčinoviću na odgovorima i stilu. Ja, s obzirom na vrijeme koje nam teče, upozoravam da se pitanja i izlaganja iz auditorija ograničavaju na pet minuta, a odgovori na tri minute i to bez obzira na to o kome se radi. Sljedeći je dr.sc. Hrvoje Kačić.

Dr.sc. Hrvoje Kačić: Pursuant to the UN Charter, the UN Security Council passed Resolution 827 of 25 May 1993, establishing the International Criminal Tribunal for the former Yugoslavia (ICTY), located in the Hague, the Netherlands (hereinafter the Hague Tribunal). The structure of this Tribunal with all its bodies is regulated by a special Statute. The basic objective of the Tribunal was to implement effective means for the protection of humanitarian law, implementation of justice and establishment of truth. It should be clarified at the very beginning that the composition of the Hague Tribunal, together with some procedural regulations is established (together with the court) by the Office of the Prosecutor (OTP) which is explicitly said to be independent from the Hague Tribunal in its activities, and that the OTP is not obliged to receive or request instructions either from the governments of individual states or any other body. Accordingly, in the evaluation of the work of this ad hoc established Tribunal, one should assess the independence of the OTP in relation to the Hague Tribunal. However, since, nominally, the OTP itself is within the framework of the Hague Tribunal, such distinctions will be listed only when necessary. Such an approach is justifiable because the Hague Tribunal, like any other court – by presenting the reasons and clarifications and passing verdicts – has the possibility of influencing the work and actions of the OTP. If the case is reverse, when tacitly, i.e. by silence, the mistakes and oversights of the OTP are tolerated; such consequences inevitably burden the respect and the evaluation of the Tribunal itself. It could rightly be expected that in performing its obligations, the Hague Tribunal would have the basic duty of determining the truth, and based on real evidence and implementing the law, achieve the realization of justice, especially in the case of the conduct of the armed forces, where the basic human rights, including the civilian right to life, were not only threatened but also violated. With regard to the circumstances and conditions which are the reason for the establishment of the Hague Tribunal, grave mistakes have been made because it ignored basic facts testimonies of the suffering of the population, tragic destruction of towns, loss of human lives.
Commanding Responsibility. In a great number of cases in the work of the Hague Tribunal so far, in the indictments, but also in the verdicts, one should specially consider the position of the commander, but also of individual officers who were in charge of commanding, and the qualification of commanding responsibility. The institute of commanding responsibility relates to the state of war and contains elements of vertical or absolute responsibility, and the subjectivity or guilt is denoted and defined by omission in the prevention, or failure in the prevention of the subordinates from committing criminal acts. Such guilt or criminal responsibility also relates to the cases of not undertaking or failure to undertake necessary actions to start criminal procedures against those who commit war crimes where the commander was in charge. Discussing the institute of commanding responsibility or vertical responsibility, the principles of impartiality and appropriateness demand primary application to physical persons who are

on top commanding positions, because they are the main factors of undertaking attacks in war operations and aggressive operations, and they are also protagonists of causing bloodshed, thus being responsible for the committed criminal actions and war crimes. Such a requirement is not only the consequence of the due respect for the profession and lexical meaning of the nomenclature of this institute of criminal law, but it is required by the principle of equity and honesty, on condition the verdicts for such acts can be passed only on the basis of proven facts and valid evidence, and not by construed presumptions and individual conclusions. With frequent and repeated application of the institute of criminal law, the commanding responsibility, it is incomprehensible that the commander-in-chief of the so-called Yugoslav People's Army has not been processed, i. e. has not been included in the indictment of the Hague tribunal. Beside avoiding his prosecution, not a single general from the co-called Yugoslav Army headquarters, which had complete supreme competence over both the army, navy and air force of the Yugoslav army – has not been indicted by the Hague Tribunal. It is really hard to understand that this indisputable omission of the Tribunal primarily relates to the criminal acts of General Blagoje Adžić, who was Chief of Staff of the Yugoslav People's Army in Belgrade from the onset of the aggression on Croatia to mid-May 1992. General Adžić displayed his war-mongering and aggressive inspiration to 150 subordinate colonels and majors in the speech held 5 July 1991 at the Military Academy in Belgrade, under the title "We have lost the battle but not the war", and the speech was published in the media, although not integrally. This was immediately following the failed military operation against Slovenia after the Slovenian Parliament passed the Declaration of Independence of Slovenia, i.e. on the same day when an identical declaration was accepted by the Croatian Parliament. According to the severity of expression, the offensive directives and hatred, Adžić's speech is a sad episode in the whole twentieth century in Europe. I will just quote several statements and commands:

The multi-party system has brought the peoples into clashes…..

A foreign intervention of Germany, Austria, Hungary and Czechoslovakia is impending….

The Federal Government and Marković have secretly conspired with the U.S. and the West upon the disintegration of Yugoslavia.

Regardless of the attitude of the Presidency we shall strike with all our might,

"**Traitors should be killed outright, without mercy or premeditation…..**

We have to use fear to make the enemy capitulate, and henceforth use all your forces and open fire at anyone opposing our actions…

Finally, comrade officers, I demand complete use of all your knowledge and skills in the battles to realize the ideals of the October Revolution and in the struggle for Yugoslavia."

In order to inform the world public about the behaviour of the Yugoslav Army's Commander-in-chief, I personally handed the complete transcript of Adžić's speech, translated into English. General Adžić was directly involved in the aggression and destruction of both Vukovar and Dubrovnik. His activity is unquestionable in the interventions of MIGs from the Bihać airport on the Zagreb city centre on 7th October 1991. We should also consider the case of shelling the EU helicopter by two jet MIG planes at the beginning of January 1992, when four Italian and one French observer from the EU mission were killed. Emir Šišić, the pilot of MIG21 was tried in Rome (convicted for 15 years). It is beyond doubt that that pilot is responsible for performing the shelling and for killing the five EU representatives – observers, but why was the guilt of those criminals who gave the command for the operation neglected and ignored? The command for the operation was given from Belgrade, from the very top of the military command of the then Yugoslav People's Army. Following the violent reaction of the world public at the time, the National Defence secretary in the Yugoslav Government general Veljko Kadijević publicly declared that he would start investigation to establish the guilt for shelling the EU helicopter. This declaration initiated the deposition of Minister Kadijević who formally handed in his written resignation on 7th January 1992, and the main protagonist of this deposition was precisely Blagoje Adžić who remains to be the main and the most responsible person in the commanding structure of the Yugoslav People's Army. In the criminal proceedings in the court in Rome the indictment was extended to the ex-general Blagoje Adžić. So, Adžić is being processed in the Court in Italy for this single crime, although this criminal act was committed on the territory of Croatia near Novi Marof, and he has never been brought to justice for many greater crimes. This is a very clear example of commanding responsibility why it is not possible to understand how such Commander-in-chief of the Yugoslav army was not convicted for crimes like bombardments from the sea and air over a vast area of the territory of Croatia in the autumn of 1991 and January 1992. In his testimony at the trial against general Strugar before the Hague Tribunal, Admiral Miodrag Jokić, acting in the capacity of the Commander of the VPS "BOKA" testified that the order for the attacks on Dubrovnik was ordered by Blagoje Adžić. In its aggressive operations Yugoslav Army used all kinds of heavy arms. Such crimes fall within the jurisdiction of the Hague Tribunal and in great number of performed crimes fall within the definition of aggression as elaborated by the United Nations. The only explanation for the absence of imputation is a deliberate omission with the intention of the Tribunal to decide that the then Yugoslavia and/or Serbia, had committed aggression against Croatia. **Agression.** The numerous resolutions passed by the UN Security Council used very powerful rhetoric directed at Serbia and Montenegro, upon which sanctions were imposed from May 1992. However, the qualification of using armed forces in the attack on Croatia was never qualified as aggression. The same approach is followed by the Hague

Tribunal. The only explanation for such behaviour is in the attitude to avoid defining which country was the aggressor and which country was the victim, with the purpose to equalize the guilt for all suffering, loss of lives, and destruction. The fourth section of the present publication in its third edition has been identified with a title EUROPE RECOGNISES THE AGGRESSOR. This is the result from my experience accumulated during the crucial period, over the years 1991/1992, and a result of contacts, communications, views and advices, as privately expressed or declared in public by distinguished and extremely qualified politicians and diplomats from European countries, the United States and Canada. This has influenced us to maintain the position that Croatia is defending from aggression, which was implemented by the Republic of Serbia aiming to conquest and extend its western frontiers over a greater part of Croatian territory (the 'three K line' Koprivnica-Karlovac-Karlobag). The aggressive operations were commanded by Blagoje Adžić and were under full control of the leading Serbian political dictator Slobodan Milošević. We were convinced that Croatia had achieved its independence after the Croatian Parliament brought its Constitutional decision on the Sovereignty and Independence on 25th June 1991. Regarding the date of its independence, the Arbitration Commission established by the European Community by its Declaration on Yugoslavia under the Chairmanship of Mr. Robert Badinter decided that Croatia and Slovenia had become independent states as from 7th September 1991. Therefore, it is evident and accepted by all states that armed confrontations by artillery and tanks, but also army airplanes and navy vessels used over the territory of Croatia, were ordered by the Belgrade dictators. It has to be recorded that the Croatian Parliament ascertained by its decision on 8th October 1991 that Yugoslavia as a common state does not exist any more. On the same date, at the session of all sections of the Croatian parliament it was explicitly concluded "that armed aggression had been effected against Croatia by the Republic of Serbia and the so-called JNA (Yugoslav People's Army), and that Croatia was forced to defend itself from the aggression by all available means. " All these decisions of the Croatian Parliament were published in the Official Gazette and available to Serbian authorities and highest ranks of army officials, but no contest or opposite remarks were made from the Serbian side. Nevertheless they were sure, that, due to their army supremacy, the military offensive operations would achieve their aims within a short time period. Furthermore they were sure that there were no prospects or chances that anybody might be successful in contesting aggression operations which were under way against Croatia. Serbia considered that when the aims of their military operations were achieved, such results would be acceptable at international level. Unfortunately such considerations on international political sources prevailed until the expiry of the first decade of December 1991. Those who are not inclined to accept such views on happenings prevailing over the territory of Croatia as a typical example of aggression over European territory at expiry of

the second millennium should be acquainted with valuable evidence as recorded in the book written by Alois Mock under the title "Dossier Balkan and Croatia", and the subtitle "War Aggression in the Former Yugoslavia – Perspectives for the Future". It is necessary to remember the definition of aggression adopted by the UN General Assembly on 14th Dec.1974 by its Resolution 3314 (XXIX). For the full text of the definition of aggression, see Appendix No.12. By the end of April 2012, when the fourth edition of this book is prepared to printing, quite a substantial number of individuals were condemned responsible and guilty for war crimes at the Hague Tribunal. Still, there were no findings or qualification recorded in any of these judgements that any of those individuals had been participating in aggressive operations or actions committed under the orders or instructions either by the authorities of the Republic of Serbia or by the Yugoslav Army. Nevertheless, I feel it would not be appropriate to modify the quoted title as already published in my book, but I feel obliged to explain the reasons why my predictions were justified. It is necessary to underline that the above mentioned decisions as introduced on 8th October 1991 by the Croatian Parliament were based on facts and in accordance with the prevailing international public law. In many official decisions and resolutions passed by the UN Security Council with a very strong rhetoric it was clear that the aggression was directed from Serbia and Montenegro, upon which sanctions introduced by the UN Security Council in May 1992 were implemented, but unfortunately events and actions of the military forces in the armed attacks against Croatia were never qualified as aggression. The same treatment has been manifested by the Hague Tribunal. The explanation for such behaviour is the prevailing attitude to avoid identification which party or state in armed confrontations was the aggressor and which country defended its population and territory. In order that truth and justice is respected I shall refer to the decision passed by the Serbian Government at its session held on 4th October 1991, and dated 5th October 1991, attached as Appendix 6 in its original wording written in Cyrillic version and supported with English translation. Section 2 reads: "Your decision to use the town of invaluable historical and cultural value to deploy your paramilitary formations, black legions and numerous foreign mercenaries, and from that area start armed attacks on inhabited places in Herzegovina and Boka Kotorska, is an extremely uncivilized, inhuman and ignoble act." It is necessary to take into consideration the proceedings and the verdict at the Hague tribunal against Admiral Miodrag Jokić, commander of the VPS "BOKA" district. Omissions and lack of impartial treatment in passing the verdict against this admiral are impossible to explain or justify. At the offices of Yugoslav Navy in Tivat* on 29th October 1991 I asked Admiral Jokić to admit before the distinguished diplomatic dignitaries that the document signed by Dragutin Zelenović, the Prime Minister of Serbia at the time on behalf of the Government of the Republic of Serbia contained monstrous lies: Mr.Jokić avoided to give any reply and did not wish to give any comment. This

document is **clear evidence that the aggression on the Croatian territory was undertaken with the approval of and on behalf of the Government of the Republic of Serbia.** There is no proof that this material was used in the criminal proceedings against Dragutin Zelenović, and the indictment against the President of the Government of Serbia has never been started. It is necessary to underline that this document has been used in the trial against Milošević, and when Nikola Samarđić, the former Minister of foreign affairs of Republic Montenegro in course of years 1990-1992 appeared as a witness, full wording of this document was presented on the screen and it was read in front of Milošević. Samarđić testified that this document was circulated by Serbian Government and represented many lies. His comment of the statement was that it was cynical, in Goebel's style. Admiral Jokić appeared before the court voluntarily, and in the "bargaining" negotiations the indictment was narrowed, since he pleaded guilty and expressed his sincere regret for the shelling and destruction of Dubrovnik. The justification of the Hague tribunal's ruling lists the "sincere regret" and pleading guilty, and repeatedly says that there had been two victims and three wounded on 6th Dec. However, following the JNA attacks, on that day there were 19 victims and over 60 wounded. Admiral Jokić took over the position of commander of the VPS "BOKA" on 6th October 1991, and he remained in charge of that function over the following seven months, and during the time when he was the commander of the Dubrovnik area there were unfortunately more than 400 victims. The previous commander of the same area was Captain Krsto Gjurović who was killed after leaving the helicopter upon its landing on the field near the village of Popovići at 15.15 hours on 5th October 1991. The reason for killing that high ranking navy officer of the Yugoslav navy was his rejection to advance further toward west and conquer the rest of Konavle and Dubrovnik. Namely, the roads between Trebinje over Grab and Mrcine (Dubravka) and Vodovođa to Debeli Brijeg and Hercegnovi were already under the full control of Yugoslav military forces, and transport over respective roads was safe for everybody including Yugoslav army. As the airport of Ćilipi was also under control of army units, Gjurović stated that all orders were already fulfilled. Nevertheless on 4th October in course of phone conversation with army headquarters in Belgrade Krsto Gjurović, in the capacity of commander of VPS "Boka" received the order to advance with his units westward. He was instructed that Serbian Government on that day had decided that Croatian military forces and armed units should be destroyed in order to stop bombardments of settlements in Hercegovina and the Bay of Kotor. Gjurović replied that it was not true. No bombardments had been taking place on inhabited areas. Because he had rejected to lead forces under his command in further advances toward Dubrovnik, this was the reason for his assassination. There is recorded information in the media in Podgorica already in year 1993 and subsequently also in Belgrade. But these facts were disregarded by Serbian authorities because otherwise high ranking

officials would be accused and jailed because of this terrible crime. Furthermore, it is very sad that in the first instance proceedings against admiral Jokić, the judge Alphonsee Orie failed to put the question to admiral Jokić why he had not established how Krsto Gjurović lost the life, and why no investigations were made in order to establish the truth, particularly because at the time high level Serbian authorities were investigating the assassination of Krsto Gjurović, Jokić was in charge of military affairs since he was Defence Minister in the Serbian Government at that time. This was not only to help Miodrag Jokić to hide the real truth but also that such decisions were made by those acting on high positions in Serbia or Yugoslavia. In November 1991, the Titograd daily "Pobjeda" published a big photograph of Admiral Jokić (and this is separately printed in the monthly issue of the then leading daily in Montenegro, under the slogan "WAR FOR PEACE"), stating literally the following: "It is not far from assuming that the ustashe, who do not care about any values except for their own skin, will destroy the old Dubrovnik themselves, to attribute this atrocity to the JNA units." This document was also not used in the proceedings against Admiral Jokić, because many conclusions made were contrary to the real evidence. It was at the disposal of the prosecutors of the Hague Tribunal. Nevertheless, in Case No. IT-01-42/1-S, in the first instance sentencing Judgement dated 18th March 2004, Section 5, under the title Personal circumstances, the trial counsel of the Hague Tribunal recorded the testimony of the retired Admiral Pogačnik who described Miodrag Jokić as a "very humane and professional officer". According to this witness, Miodrag Jokić "was for full equality of all nations and ethnic groups. This was his main point, and he really believed in it". Since that testimony was not contested by the Prosecution, one of the conclusive findings under the title DETERMINATION OF THE SENTENCE it is recorded that "The trial Chamber deemed that Miodrag Jokić's substantial cooperation with the Prosecution, his sincere regret demonstrated already on 6 December 1991 and his subsequent remorse, were of exceptional importance". The "remorse" by Admiral Jokić was acceptable for the killing of two persons on 6 December, while 19 persons were killed in Dubrovnik on the same day, and while he was the commander of Dubrovnik area, more than 400 (four hundred) persons were killed under the commanding responsibility of Miodrag Jokić. He was responsible for the assassination of the innocent and honest Commander of VPS Boka Krsto Gjurović whom he succeeded. What kind of person is he to express the remorse for all that, and what kind of persons can accept this remorse as being sincere? Truth and justice require that the members of the Trial Chamber sentencing Jokić should express remorse for the errors and failures they have made. Apparently, they were influenced by Carla del Ponte and her ambitions that the Hague Tribunal should offer false history to the world. She was the first person from ICTY who met Admiral Jokić accompanied by his daughter in his first visit to the Hague. Personal bargaining of Carla del Ponte with Admiral Jokić was contrary to ethical and moral

values, and it is the obligation of her successors to become familiar with the facts and the truth. **Absurdity for the imputation of the "joint criminal enterprise".** It is not fair to discuss the tragedy known to the world as Srebrenica without assessing the conditions, commitments and responsibilities imposed on many factors and leading members of the UN Security Council, especially in those crucial moments. Operation "Storm" cannot be and will never be fairly evaluated ignoring the causes and the situation in this area, especially in the first half of 1995, and the consequence of which is the tragedy of the civilian population in Srebrenica and Žepa. In order to protect the endangered population, in 1992, the UN Security Council decided to establish UNPA areas in Croatia and Bosnia-Herzegovina. Remembering the experience with the escalation of violence, starting in Kosovo in the 1980-ies, this decision was implemented by establishing what is known as "Protected areas". (UNPAs) Based on previous experience, representatives of the international community estimated that due to increasing danger, specific areas or towns, and not only the "protected areas" deserve a greater degree of safety. In order to establish a higher degree of safety, the UN Security Council introduced special decisions to establish what is known as "Safety Zones". Thus the UN Security Council's Resolution 819, passed on the 16th April 1993, and proclaimed Srebrenica a safety zone. Considering the decision useful and necessary, especially for the protection of the civilian population, several weeks later, UN Security Council Resolution 824, (passed May 6th 1993) extended the UN Safety zones to Bihać, Sarajevo, Žepa, Goražde and Tuzla. UN military forces were obliged to provide protection in those safety zones. As it is known, the prerequisite for the mandate of the UN military forces when coming to Croatia, and, later, to Bosnia-Herzegovina, was to agree on ceasefire and peace-keeping, for all warring parties i.e. maintenance of the already agreed peace. Relating to the system of protection and the degree of obligations taken by the UN forces, their units had the obligation of peace implementing and peace enforcement. This protection was not brought for declaratory motives but rather to protect the endangered population, and this was the established obligation of the UN forces on the ground to use all available means to protect the established safety zones. The French general Morillon publicly announced to the endangered population that they would never be abandoned by the UN. In spite of this, even after the proclamation of the "safety zones", there were violent attacks on Sarajevo, and especially Bihać, where the population was exposed to terrible suffering, left without food and medicines, and many saw their last days in prison camps. Y. Akashi, as special envoy of the UN Secretary General, unsuccessfully tried to stop the escalation of Serbian paramilitary forces on the population of the Bihać and Cazin area. At the end of May 1995, on the territory of Bosnia-Herzegovina, Serbian military forces started capturing numerous UNPROFOR members, keeping them as hostage, with much cruelty. In such circumstances negotiations started between the representatives of the UN and of Serbian military

forces. On 4th June 1995, in the Zvornik hotel "Vidikovac" there was a meeting of Bertrand Janvier, the then commander-in-chief of the UN forces in ex-Yugoslavia and Ratko Mladić, the commander of the Bosnian Serbian army forces. One of the essential conditions of the coordinated agreement was the obligation related to the Serb forces to release all UNPROFOR hostages, under the condition UNPROFOR forces stop using aircraft in military operations on the territory controlled by Serbian forces. This agreement was approved by the UN Secretary General's special envoy. In such circumstances, what followed was the aggressive attack of Serbian forces on Srebrenica, and Srebrenica and Žepa were conquered in a very short time, while the UNPROFOR forces in the two proclaimed "safety areas" were unable to defend the local population without the protection of the UN air forces. The population in the "safety zones" rightly expected that everybody, especially the children, old people and women would indeed be protected by the UN forces. However, the brutal force continued, while the representatives of the international community revealed their incompetence and powerlessness. Karadžić and Mladić, with their Belgrade protagonists and protectors, launched offensive operations in early July 1995. Srebrenica experienced apocalypse faced by the entire world from 8 to 13 July, with genocidal massacres where over 8600 people, mainly men, were killed, while women and children were expelled, thus causing the crime of ethnic cleansing. Several days later, Serbian conquerors repeated similar outrages and crimes in Žepa, whose population had been guaranteed safety by the UN Security Council. The UN forces demonstrated their indecisiveness and confusion, together with a worrying degree of lack of organization. These qualifications were given by respectable sources of the international community. The Serbian forces saw this as additional incentive to continue performance of their criminal plans, which can be checked from subsequently published phonograms and telephone conversations between Mladić and Karadžić. They arranged details how to continue the offensive to take Goražde and Bihać. In the meantime, in the USA and the UK, and especially in France and the Netherlands, extensive and incontestable evidence had been collected, on the basis of which even the high circles in the governments of those countries admitted that UNPROFOR people had made a lot of mistakes. However, there were no proceedings for such accumulated negligence. We should also consider standpoints taken in the document issued by the specialized UN institution, Report of the UN Economic and Social Council of the 22nd August 1995, where item 93 reads as follows: "The fall of Srebrenica and Žepa brought tragedy, loss of life and serious human rights violations to those areas. At the same time, it seriously undermined the credibility of the Security Council, the Secretary General and the whole United Nations system." Pursuant to Art. 51 of the UN Charter, Croatia had the right to launch the military-police operation "Storm". Complying with its constitutional obligations, supported by all people in the protection of the sovereignty and territorial integrity of the country to fi-

nally liberate the occupied parts of Banovina, Lika and northern inland part of Dalmatia, Croatia undertook the commitment to prevent further tragedies of the population in Cazinska krajina and Bihać. Croatia really did save Bihać, and Cazin, and Goražde. The commitments undertaken by the units of UNPROFOR were actually done by Croatia, thus preventing consequences even more tragic than those that occurred. The action of the Croatian army put an end to suffering of the tormented population of the UN proclaimed safety areas of Bihać and Goražde, which improved the disturbed reputation of the UN and the position of many UN officials of the time. The UN Brahimi report attributes the Srebrenica tragedy to wrong assessment and incompetence to correctly assess the risks to which the population was exposed. But nobody in the environment from which the UN representatives came and where the institutes of commanding criminal responsibility were established, pleads for the same criteria of the legal institute of vertical responsibility to be applied for the mistakes thus made. This opens up the question why the active participants of operation "Storm" whose merits in saving the innocent population are indisputably enormous, are subjected to incriminations on the commanding or vertical responsibility. Each war is a sad reality, and on this occasion we should remember the message of the great Croatian Renaissance dramatist Marin Držić who proclaimed that war is "the bane of human nature". Accordingly, all those who have provoked war and incited violence deserve to be faced with both the criteria and the criminal responsibility, while those who were involved in defence and personally were not involved in any criminal act, but rather, putting their own lives at stake, have contributed in saving a great number of civilians and bringing about peace, do not deserve to be incriminated on the grounds of individual responsibility without their personal guilt. Finally, beside the juridical criteria, we have to take into consideration, also humanistic, moral and ethical principles and criteria, we should also take into account all facts and circumstances in which certain participants have taken part to meet the requirements of impartiality. Any activity to the contrary is just a manifestation of partial treatment and biased behaviour, which is not a tolerable omission for all officials. How can one apply the institute of commanding or vertical responsibility to those who saved the population of Goražde and Bihać? Their efforts prevented many people whose rights, not only civil and human rights, but also the right to life, were threatened from experiencing the fate of the population of Srebrenica. At the same time, there is a much greater number of those whose failure to comply with the obligations they had undertaken made obvious mistakes in the tragedy of the population of Srebrenica and Žepa and have never been called to answer for it. Finally, too long have the promoters of violence, of armed power against civilian population with the use of professional army and heavy arms, i.e. both airplanes and tanks, and in some cases also war ships, been accepted as peace-makers in the Hague, Geneva, London, Paris, Dayton and Rambouillet. The criminal liability for war crimes should primarily

be applied to the directors and accomplices and commanders-in-chief of the war violence, for numerous breaches of the military law and especially to those who committed war crimes. When the first six hundred bodies were buried on the Srebrenica cemetery early in April 2003, Kofi Annan, the UN Secretary General, publicly admitted that the tragedy of Srebrenica is a stain on the face of the UN. It is really justifiable to put the question who should be praised that there were not many more such stains on the UN face because of the impending tragedy in Goražde, Bihać and the complete Cazinska krajina? At that time foreign diplomats estimated that by protecting Bihać Croatia saved tens of thousands of people from massacre. Why Tadeusz Mazowiecki is not called as a witness at the International Criminal for the territory of the former Yugoslavia, or why are at least three of four of his eighteen reports not handed to the court as evidence? This evidence would definitely contribute to not accepting the qualification of the "Storm" as a "criminal enterprise". Finally, all the representatives of Croatia should realize as their duty to show, and to prove to the world, and especially to all the members of the European Union that it was just the Croatian military-police operation "Storm" that, regarding the population of Bihać and the complete Cazinska krajina, fulfilled the obligations which were previously undertaken but not performed by the UN Security Council. It is Croatia's duty to cooperate constructively with the Hague tribunal, but this does not mean that one can tolerate omissions to present facts and evidence in our favour. The representatives of Croatia in the international community institutions are obliged to oppose any attempt to qualify the "Storm" as a criminal enterprise, because this is a clear example of blanket criminalization, which can be applied to many individuals by using the institute of commanding responsibility for their participation in the operation "Storm". Tolerating this by silence (*qui tacet consentire videtur*) makes it possible for individual subjects to take the position that without taking specific procedures Croatia inadequately cooperates with the Hague tribunal. This could be used for additional imposition of unequal status of Croatia in the negotiations with international institutions. Namely, it is our duty to state that in such circumstances Croatia and Bosnia-Herzegovina signed the so-called Split accord, 22 July 1995, by which the neighbouring state agrees that the Croatian armed forces can act on the territory of Bosnia-Herzegovina to stop the violence committed by Serbian paramilitary units. In that dramatic state and circumstances, Tadeusz Mazowiecki, the special representative (Rapporteur) of the European Community and the UN for human rights on the territory of the former Yugoslavia, who had spent two years and eleven months on the territory of Bosnia-Herzegovina, but also in Croatia, Macedonia and Serbia, handed in his resignation on 27 July 1995, explaining he was doing this because of inefficiency of UNPROFOR and the hypocrisy of the international community. Here are just short quotes from Mr Mazowiecki's letter addressed to the Chairman of the United Nations Commission on Human Rights: "Events in recent weeks in Bosnia and Herzegovina, and

above all the facts that the United Nations has allowed Srebrenica and Zepa to fall, along with the horrendous tragedy which has beset the population of those "safe havens" guaranteed by international agreements, oblige me to state that I do not see any possibility of continuing the mandate of Special Rapporteur…. The creating of "safe havens" was from the very beginning a central recommendation in my reports. The recent decisions of the London conference which accepted the fall of Srebrenica and resigned itself to the fall of Zepa are unacceptable to me. Those decisions did not create the conditions necessary for the defence of all "safe havens". These events constitute a turning point in the development of the situation in Bosnia. At one and the same time, we are dealing with the struggle of a State, a member of the United Nations, for its survival and multi-ethnic character, and with the endeavour to protect principles of international order. One cannot speak about the protection of human rights with credibility when one is confronted with the lack of consistency and courage displayed by the international community and its leaders. The reality of the human rights situation is illustrated by the tragedy of the people of Srebrenica and Žepa. Human rights violations continue blatantly. There are constant blockades of the delivery of the humanitarian aid. …. And the "blue helmets" and representatives of humanitarian organizations are dying. Crimes have been committed with swiftness and brutality and by contrast the response of the international community has been slow and ineffectual…..But the present critical moment forces us to realize the true character of those crimes and the responsibility of Europe and the international community for their own helplessness in addressing them." It is not justified or right to agree that Dayton brought about the end of war operations in Bosnia-Herzegovina. It cannot be tolerated that Croatian representatives speak to the world saying that Dayton, or rather the "Dayton accord" provided peace to Bosnia-Herzegovina, without mentioning the above-mentioned contribution of the "Storm". The successful military-police operation "Storm" (within 82 hours) stopped the bloodshed and tragic clash also on the territory of the neighbouring state, Bosnia-Herzegovina. The myth on the invincible Serbia had finally been finished. We should inform the world public that even Dobrica Ćosić, member of the Serbian Academy of Sciences and Arts, contaminated his public and poisoned the Serbian young people with his public speeches where he inspired them to aggressive warfare saying that "Serbia loses in peace what it has won in war". Joop Scheffer (the ambassador of the Netherlands in Zagreb in 1994-1998 and subsequently representative of the Netherlands at UN stated explicitly: "In order to understand the situation after the fall of Srebrenica one should keep in mind the fact that Bosnian Serbs can no longer be persuaded not to take other protected zones….. The same destiny awaited Bihać". It is obvious that many important documents were not presented in the hearing of evidence against the persons indicted in the Hague court. Thus, for example, at the plenary meeting of the Conference on Yugoslavia, held in the Hague on 18th October 1991, chaired by Lord Carrington, a draft "Agreement on Ceasefire without Delay" was pro-

posed. The conditions of this draft agreement were to be sent by the presidents Tuđman and Milošević to all armed forces. The draft contained three paragraphs (see Annex 6). The meeting was attended by the presidents of all republics and the president of the federal government. There were no objections to the draft except by Dr Tuđman who proposed that the text of paragraph one reading "unconditional ceasefire without delay" should be amended to read with additional provision "that all units should refrain from advancing from their present positions". Lord Carrington put this proposal for debate, but the proposal was not seconded by anyone, not even by President Izetbegović of Bosnia-Herzegovina, so Lord Carrington rejected the proposal explaining that it was not seconded or supported by any other party, This evidence is also in the files of the Hague Conference. If the proposal had been accepted there would have been no shelling and conquest of Vukovar, Škabrnja and many other territories of the Republic of Croatia. It is a fact that numerous "ceasefire" agreements have remained without the expected positive results, but it is also a fact that the ceasefire agreement proposed by Cyrus Vance at the meeting in Sarajevo 2 January 1992 incorporated and accepted this condition, i.e. commitment to refrain from advancement, and it is true that this agreement was followed by a stop in the conquest and destruction on the territory of Croatia. However, how can one make accusations on the "joint criminal enterprise" and the forcible division of the territory of neighbouring countries when the use of such facts and thus establishing the truth are blocked? Due to the numerous omissions in many cases we point and prove that THE HAGUE TRIBUNAL OMITS ESTABLISHMENT OF THE TRUTH. THIS MEANS THAT IT DOES NOT ACHIEVE THE FUNDAMENTAL GOALS FOR WHICH THE TRIBUNAL WAS ESTABLISHED. Such treatment indicates that there is no wish to establish that Serbia made decision on military operations (from land, air and sea) against Croatia on indisputably Croatian territory, by which really and juridical the court avoids determining that aggression on Croatia has been made. At the same time, by concealing the facts, fabricating the objectives of definite operations and events, falsifying the final reason of influential statements by which definite conclusions are construed, there is a wish to impose the view that the aggression on Bosnia-Herzegovina was not done only by Serbia, i.e. Yugoslavia, but also by Croatia. The problem of the "artillery logs" and the follow-up of this issue are really worrying. There are numerous declarations and witnesses whether the shelling of Knin lasted one or two hours longer and resulted in the loss of one citizen, and this is without doubt also an innocent victim. At the same time there are no investigations regarding artillery logs in the bombardments of Vukovar, Vinkovci, Osijek, Sisak, Gospić, Zadar, Dubrovnik etc, resulting in many hundreds of victims, and numerous children that were killed. The Hague tribunal was silent, and the institutions at home follow the policy of "forgiveness" which was brought at the time when one expected the Hague tribunal to be impartial. This farce has been going on too long, and the consequences can be painful and our population is entitled to expect that it will be liberated from

painful targets as were conceived by Carla Del Ponte. The investigation report and findings as recently delivered to the ICTY by twelve American, Canadian and British military experts has not been accepted by the ICTY. Nevertheless it is not appropriate to believe that findings and results of these respectable and independent experts will be disregarded by the judges in the appealing court in the Gotovina-Markač case. I hope that they should become aware of the nature and errors done by Alphonse Orie acting as presiding judge in the first instance trial not only of this case but also in the Miodrag Jokić case. Nevertheless, in order to achieve the necessary concept of the activities of Alphonse Orie, it would be appropriate for the judges to get acquainted with his neglect and errors and intentional aim he followed to avoid proper findings and facts since he was put in charge as presiding judge in the first instance trial against Admiral Jokić, which is elaborated above. However, the Gotovina/Markač case is at the Court of Appeals, and I hope that the first instance judgement may be rectified. It is obvious that judgement in connection with the Jokić case is final, and cannot be changed and we can disregard the destiny of the Miodrag Jokić and his life in the future. But we cannot disregard the importance of activities of the judge Orie as manifested in both of these cases. But the president of the ICTY needs to be acquainted with the handling of the Jokić case by the first instance judge in respect of the facts and truth, because what has manifested and happened in the Jokić case may seriously diminish the reputation and dignity of the Hague Tribunal. I hope that the influence of Carla del Ponte as it has been manifested and very successful in respect of judge Orie will not prevail any more and that it will be to the benefit not only to the Hague Tribunal but to the United Nations and international community. The President of the ICTY and all judges of this Tribunal are bound to take care of the dignity of the court and now the President and all judges have at their disposal respective evidence and proofs. Justice requires that facts and truth should prevail, and should not be kept under discretion and even hidden in some instances. Content as presented in this section of extended part of fourth edition is dedicated to the evidence and documents in relation to facts and happenings which so far have not been taken into consideration by activities of ICTY (Legal interpretations and explanations are elaborated by the highly esteemed university professors and experienced scientists). Please note that just recently has been published the book under title "Theory of joint Criminal Enterprise and International Criminal Law –Challenges and Controversies"- Publisher "Croatian Academy of Legal Sciences"- Zagreb. It is available at Library of the faculty of law in Zagreb, and on the web side of the Academy of Law Science (http://www.pravo.unizg.hr/apzh), and those who wish to be informed on legal aspects of the relevant issues should be acquainted by the quoted valuable scientific and professional volume). Nevertheless, justice and truth require that the presented elements should not remain disregarded and secret.

NAPOMENA: Ovo izlaganje je bilo na hrvatskom jeziku, a prilikom autoriziranja teksta i u suglasju s najavljenom mogućnošću sudionika skupa, prof. Kačić je dostavio ovaj tekst.

Prof.emerit.dr.sc. Željko Horvatić: Hvala. Ono što kolega Hrvoje Kačić iznosi su detalji s kojima se on bavi i ja ga molim i nadam se da će kako je iznio to i napisati da bude objavljeno, a tko će to koristiti i u kojem svojstvu to ostaje otvoreno pitanje koje sam postavio na početku i ne očekujem dogovor na njega bilo od predstavnika Ministarstva pravosuđa niti od samoga sebe niti od bilo koga. Htio sam Goranu Mikuličiću prije neki dan poslati poruku pa mu reći ako su svi znani i neznani, kao što je on rekao, optuženi, neka onda pita sudsko vijeće da li je profesor Željko Horvatić, predsjednik Akademije pravnih znanosti Hrvatske, također među tim znanim i neznanima kao Predsjednik Vladine komisije za ratne zločine i da li je Hrvoje Kačić koji je bio predsjednik saborskog Odbora za vanjsku politiku također među tim neznanima koji su optuženi, pa da se čuje odgovor na to pitanje. Bio je jedan zanimljivi odvjetnik iz Varaždina, nećemo spominjati ime, sin od jednog mog dobrog pokojnog prijatelja, koji je podigao tužbu jer je bio zastupnik u Županijskom domu Hrvatskog sabora, tada Hrvatskog državnog sabora, i rekao da se optužba Carle del Ponte i na njega odnosi i moli da mu se ona izjasni da li šteti njegovim ljudskim pravima. Jer on spada među one neznane u vodstvu hrvatske države. Nikada nije dobio odgovor na to niti mu je ikad pružena prilika da na Sudu za ljudska prava u Strasbourgu bude raspravljano o odgovornosti Carle Del Ponte koja se usudila u optužnici to napisati. Dakle molim pismeni uradak prof. Kačića koji će biti objavljen. Riječ ima profesor Srećko Jelinić, redoviti član Akademije s Pravnog fakulteta u Osijeku.

Prof.dr.sc. Srećko Jelinić: Gospodine predsjedniče i svi ostali prisutni, moj prilog otvorenoj raspravi nije u obliku pitanja, niti možebitnog doprinosa raspravi o nekom konkretnom ili spornom pitanju ili dilemi, već u iznošenju jednog mog osobnog pogleda, za koji držim da je osobito važan za sve nas i one pravnike i akademičare koji nisu među nama, a izrečena je još u Justinijanovom kodeksu – *Non suficit litem instituere, si non in ea perseveres*. **Nije dovoljno pokrenuti parnicu, ako u njoj ne bi ustrajao**. Dakako, nije riječ ni o kakvoj parnici niti o tomu tko ju je pokrenuo, već je naglasak na osobnom odnosu prema „parnici". A on počiva primarno u vjeri u ono što se radi i poduzima u interesu svoje strane i u ustrajnosti da se postigne ono za što se zalažete. U ovoj pomalo, ja bih rekao, deprimirajućoj situaciji koja nam se nameće, posebno nakon izlaganja i prikaza „stvari kako stoje" svima nama dragog i uvaženog prijatelja i učitelja, meni i bližeg suradnika u mlađim danima sedamdesetih godina prošlog stoljeća kada sam se i sam počeo baviti pomorskim pravom, a profesor Kačić je vrstan i uvaženi znalac iz područja pomorskog prava, doista se postavlja pitanje u stilu svima znane sentence i upita „*Quo vadis Domine*". Kamo ideš Gospodine. Naime, prema legendi kad se sv. Petar spremao ostaviti Rim zbog progona kršćana, susreo je na Apijevoj cesti Krista i upitao ga – *Quo vadis Domine*? Kamo ideš Gospodine? A Krist mu je odgovorio - *Venio Romam iterum crucifigi*. Dolazim u Rim da budem ponovno razapet na križu. Nato se sv. Petar vratio u Rim, gdje je umro

mučeničkom smrću na križu. Svaka asocijacija na ovakav „finale“ mi je strana, ali nije mi strana asocijacija na žrtve, pa i poraze, koji se ponekad moraju pretrpjeti da bi se u konačnici ostvario jedan drugi uzvišeni cilj. *Non temere credere est nervus sapientiae*. Ne povjerovati tako lako, je smisao mudrosti. Upravo želim pozvati na vjeru, na ustrajnost, ne povjerovati lako u „poraz i na pravnom polju“. Ovakav pristup odudara od svih oblika defetizma, malodušnosti, izgubljenosti, nevjere u vlastite akcije. Tomu imam, baš u području odnosa, koje razmatramo, jedan sjajan dokaz ili primjer. Dopustite mi da svoje daljnje kazivanje nastavim upravo u svezi s netom izrečenim. Poznajem našega predsjednika, uvaženog profesora Horvatića, pa i sada ovom našem zasjedanju nazočnog gospodina Mikuličića, obojicu sam upoznao u njihovim odvojenim funkcijama, još iz devedesetih godina prošlog stoljeća i milenija, iz vremena kada sam se, ne znam kako, našao, nakon odluka Vlade RH u funkciji utemeljitelja i prvog predstojnika Vladinog ureda za suradnju sa Haškim sudom. Dužan sam spomenuti mnogima možda nejasnu okolnost da u vrijeme imenovanja, pa niti kasnije, nisam bio članom tada vladajuće pozicijske stranke - Hrvatske demokratske zajednice. Ovo mi je dalo prevagu samouvjerenju kako nisam pozvan ili imenovan na političku funkciju, već na funkciju, istina i objektivno vrlo tešku i odgovornu, u obavljanju koje se od mene očekuje primarno i prvenstveno ustrajati na ispunjavanju obveza RH, kada je bila u pitanju suradnja s Tribunalom u Haagu. Moram naglasiti, a tako sam to i razumio, kako pitanje suradnje nije bilo utemeljeno tek ili kao puki dogovor gospode (engl. *gentlemen's agreement*) odnosno prijateljski sporazum zasnovan na međunarodnom moralu na razini svjetske zajednice odnosno Ujedinjenih naroda, već kako je ovoj suradnji ustanovljen i dan odgovarajući **pravni okvir** (engl. „*legal frame*“) u okviru kojeg sam jasno dobio i gabarite svojih ovlasti i mogućnosti, ali i obaveze, za koje se očekivalo da ih savjesno i bez odvlačenja (bez odgode) ispunjavam. Sada i ovako javno ističem kako meni, kao rekao bih pravniku profesionalcu, koji se nikada i nije bavio bilo kakvim parapravnim ili nepravnim poslovima, već jedino radeći ili kao sveučilišni profesor ili nastavnik pravnih predmeta ili kao pravnik praktičar u distriktalnom pravosuđu ovakav pristup ne samo da nije bio stran, već mi je jedino i odgovarao. Vrlo brzo nakon utemeljenja Ureda, rješavanja presudnih materijalnih i organizacijskih, pa i, kako se to voli reći – personalnih, pitanja da bi se uopće moglo početi s radom suočio sam se s nečim sasvim iznenadnim, politički iznimno teškim, a pravno zanimljivim slučajem. Govoriti ću o čemu je riječ s iznimno preciznošću, jer takve stvari se rijetko zaboravljaju. S nadnevkom od 15. siječnja 1997. sutkinja McDonald, pozivom na odgovarajuće odredbe iz Statuta i Pravila o postupku na zahtjev tadašnje tužiteljice g. Louise Arbour izdala je ***subpoena duces tecum*** prema Republici Hrvatskoj i njezinom ministru obrane g. Gojku Šušku naređujući da se Sudu odnosno Tužiteljstvu dostavi 13. specificiranih kategorija dokumenata odnosno dokaza, koji su se odnosili na tzv. slučaj Blaškić s rokom dostave 14. veljače 1997. godine. U *subpoeni* je nadalje stajalo

da se u slučaju nedostavljanja traženih dokumenata, predstavnik Republike Hrvatske i g. Šušak odnosno njihovi predstavnici izvole pojaviti na sudu 14. veljače 1997. godine u 9.00 h i izvole objasniti zašto zahtjevu nije udovoljeno. U pismu Tribunalu (Registrar) od 13. veljače 1997. godine (u roku) u ime Vlade Republike Hrvatske izložio sam stajališta u pogledu *subpoene*, dakako s pozivom zašto jedan ovakav zahtjev (*supoena*) ne može biti usmjeren prema suverenim državama, te koje su pravni argumenti neutemeljenosti ovakvog traženja prema pojedinačno imenovanim državnim dužnosnicima. Moram priznati, i za mene osobno, sve je bila jedna zbunjujuća situacija. Diplomatsko dopisivanje i jedna vrsta odgovora ne dopušta veliku znanstvenu elaboraciju o primjeni *subpoene duces tecum*, sada i u radu jednog međunarodnog kaznenog tribunala, ali nadasve u međunarodnom pravu u odnosu na suverene države i njezine dužnosnike, ali jednako tako nije bilo dopustivo jednostavno odbijanje primljenog zahtjeva, jer bi se to lagano moglo protumačiti kao jednostrano odbijanje suradnje s dalekosežnim posljedicama. Pripremio sam odgovor. Relativno kratak, ali s naglašenim pravničkim pristupom i obrazloženjem s pravnim stajalištima zašto se tako postavljenoj *subpoeni* ne može udovoljiti. Uostalom sve je i dan danas lako vidljivo, pa i na internetu, a koliko mi je poznao i u nekim svjetski referentnim djelima (Lauterpacht, Maogoto…) u raspravama o institutu *subpoene* citiraju se dijelovi iz odgovora Tribunalu. Sada nije prigoda izlagati što se u konačnici s izdanom *subpoenom* dogodilo i kako je cijela ova „priča“ završila, no ono što želim naglasiti je slijedeće: **Da se cijeli „postupak oko *subpoene*“ odnosno o njezinoj utemeljenosti, nije pokrenuo** njezinom protivljenju zasigurno bi bili uskraćeni od brojnih pravnih promišljanja na ovu temu, konačno i relevantne sudske odluke, a koja svojim sadržajem u najboljoj mjeri potvrđuje ispravnost određenih navoda i iznesenih stajališta u tijeku cijelog postupka osporavanja izdane „*subpoene*“. **Alternativa je bila** – pokoriti se naredbi iz jedne ovako visoke međunarodne institucije, a za što sam se, u ime prava i u onoj mjeri u kojoj sam ja sudjelovao u postupku osporavanja *subpoene* (prethodnom postupku prije raspravljanja na samom Tribunalu i pred Apelacijskim vijećem) s pozicije predstojnika Ureda za suradnju s Haškim Tribunalom, odlučno zalagao. Međunarodno pravo, u konačnici, obogaćeno je novim dodatnim sadržajem. Sa sudom treba razgovarati jezikom suda, jezikom pravnika, pravničkim jezikom. U Uredu smo ubrzo primili oštre dopise, prve odgovore gospođe Louise Arbour koja je odmah nakon toga došla i u Zagreb. Dočekao sam je, primio sam je. Razgovarala je samo sa mnom i ni sa kim drugim. Razgovarali smo pravničkim jezikom, jer nemojte zaboraviti g. Arbour je i sama sveučilišna profesorica prava. Iskoristio sam ovaj događaj iz 1997. godine možda da bih upozorio ili opravdao jedan pristup, koji sam uporno njegovao u svom radu, a izrekao sam ga kroz tezu – sa sudom treba razgovarati primarno jezikom prava, pravnim argumentima. **U mjeri u kojoj raspolažete pravnim argumentima raste i vaš optimizam u povoljno konačno rješenje.** Nije zabranjeno biti prihvatljivo agresivan u prezentaciji

pravnih argumenata, kojima raspolažete i u pobijanju pravnih argumenata druge strane, dok vas ništa ne treba sprječavati razobličavati svaki drugi ili drugačiji pristup, a koji se u stvarima ovakve vrste možda i ne može isključiti. Često puta znam reći kako se sudskim odlukama koje su već donijete ili koje će se još donijeti, pišu stranice povijesti i zato je obveza od koje se ne može odstupiti ili odustati baš da se u ime povijesne istine, ali i, kako se to zna reći „*for the sake of future generation*" ne dopusti iskrivljavanje povijesti. Još nešto -pravnici nisu jedini, koji su pozvani sudjelovati u pisanju povijesti, ali stjecajem okolnosti i sve sudske procese koji su se vodili ili se još vode i činjenice koje se u ovim postupcima utvrđuju zasigurno ne samo da su upućeni u primjenu prava, već sudjeluju i u procesu formalnopravnog utvrđivanja istine. Zato je i njihova zadaća i uloga iznimna. **Zaključno**, dopustite mi jedno pitanje samom sebi – da li sam u sadašnjoj situaciji i u svezi s onim što sada raspravljamo optimista u pogledu konačnice ili pesimista. Do sada postignuto mi umanjuje optimizam, ali i nadalje ostajem legalista, promotor prava i borac za primjenu prava, možda i razložno bio bih agresivniji. Želim zapravo sugerirati da u razgovoru sa pravosudnim institucijama treba prvenstveno biti legalista. Treba biti agresivan u primjeni prava, pogotovo ako ste uvjereni ili ako smo uvjereni, da je pravo na našoj strani. U tom kontekstu ja gledam i doprinos i vrijednost ovog skupa, ovoga znanstvenog simpozija. Na kraju dopustite zahvalu na pozornosti, koja je iskazana slušanju mojih riječi. Kada se načelno složimo o pristupu (o primjeni prava, kaznenog, međunarodnog javnog prava itd., općih pravnih i moralnih načela), o obavezi prema istini i isključimo nepravne argumente u dostizanju pravne odluke puno smo učinili. To istovremeno ne znači da se i kroz pravnu raspravu ne treba dati ocjena svih argumenta koji se iznose, makar oni i ne bili pravni. Jer i to je borba za pravo.

Prof.emerit.dr.sc. Željko Horvatić: Zahvaljujem profesoru Jeliniću. Mi smo zajedno bili soba do sobe. On sa jednom savjetnicom, a ja bez ijedne, tamo u Savskoj odnosno Ulici grada Vukovara. Onda ja njega pitam: „Što ti dolaziš ovdje, s kim ti komuniciraš, nemaš faks, nemaš telefon, nema ničeg?" Kaže: „sve će biti u redu". Prije smo prestali s radom no što je to profunkcioniralo. Onda sam ja preselio gore u Banske dvore pa mi je bilo malo lakše jer sam s dr. Kostovićem kao potpredsjednikom Vlade mogao nešto raditi. No onda su došli akti o pomilovanju pa je sve bilo drugačije. Ja sam primio Louise Arbour koja je rekla da je došla prikupiti iz Ministarstva obrane dokumente koji im trebaju. Ja sam joj rekao da mora dati popis dokumenata. Da ne može tek tako ući unutra. Ona je rekla: „Sjajno! Vi ste briljantan pravnik." Pokupila se i otišla. Dakle ovako, sada bi trebale biti završne riječi. Ja mislim da završnih riječi ne treba osim odgovora na jedno pitanje. Što sada još treba učiniti? Neki šapću, a neki glasno govore: nema šanse. Ja sam se sporio još prije nekoliko mjeseci kad je došla prvostupanjska presuda s kolegom Damaškom koji je rekao da Haški sud neće odustati

od zajedničkog zločinačkog pothvata. A ja sam tada odgovorio za javnost da mi nije važno da li će oni odustati od zajedničkog zločinačkog pothvata nego da li će odustati od ovakvog zajedničkog zločinačkog pothvata za kakvog se zalažu, bilo da se radi o prvoj, drugoj ili trećoj varijanti jer je zajednički zločinački pothvat kojeg primjenjuju na ova dva slučaja u najmanju ruku neprihvatljiv s pravne i faktične strane. S pravne strane zbog svega onoga što smo rekli, a s faktične strane uzmite tzv. brijunske transkripte na kojima se temelji optužnica. Karikiram, zar bih trebao optužiti sada nekoga tko mi je rekao da znam postupati sa ženama. Što on pod tim misli?! Da li insinuira i ako je to u transkriptu hoću li sutra biti optužen za zlouporabu profesorskog položaja jer će naći tri izmišljene svjedokinje koje su sada i stare gospođe itd. Razumijete o čemu govorim? Prema tome, jedan od mogućih zaključaka ovoga skupa jest da hrvatska država još uvijek ima i vremena i mogućnosti da u drugostupanjskom postupku protiv Gotovine i Markača i u prvostupanjskom postupku protiv šestorice Hrvata iz Bosne i Hercegovine, učini potrebne napore i pokuša formulirati svoje stajalište. U jednom memorandumu koji mi je slučajno dostupan zato jer mi je upućen od Ministarstva pravosuđa na mišljenje, nude se od strane stručnjaka iz SAD dvije opcije. Jedna je da ustrajemo kao prijatelji suda, a druga je da se uključimo u postupak kao zainteresirana strana. Hrvatska je država pružala pomoć i do sada, i to govorim jasno, glasno i odgovorno. Pružala je pomoć obrani i trojice i šestorice u okviru svojih mogućnosti, ne financijskih, nego u okviru svojih mogućnosti kao suverena država članica UN čiji su građani optuženi pred sudom i koji imaju svoju legalnu obranu. I putem prijatelja suda odnosno Savjeta za pripremu prijatelja suda koji je u određenom trenutku prestao djelovati. Da je i nastavio djelovati možda se ne bi ništa bitnoga dogodilo ako s jedne strane govorimo o političkom utjecaju na Haški tribunal i nemogućnosti djelovanja pravnim sredstvima. Onda se govorilo o tihoj diplomaciji. I danas se govori o tihoj diplomaciji. Ako tvrdimo da hrvatska država tihom diplomacijom može nešto učiniti, znači li to da se time ukazuje na politički karakter Haškoga suda i to kad je i njoj u interesu to da djeluje na njega politički. E sad, o čemu se radi? Treba li ostati častan i dostojanstven do kraja i priznati da je taj politički motivirani sud s druge strane, ali ne i sa Hrvatske, ili pokušati kroz ove ili one kanale intervenirati na to jer to znači priznati da i Hrvatska spada u red onih koji interveniraju na MKSJ? Ja govorim o brojnim mogućnostima i alternativama. Ali o tome će odlučiti politika hrvatske države. Prema tome, kad smo se prvi put pojavili kao prijatelji suda, onda su nas Carla del Ponte i Nikiforov etiketirali kao nekoga tko se svrstava na zločinačku stranu. To je citirano u predgovoru ove knjige. Kad prof. Jelinić pitao zbog čega se toliko čekalo s objavljivanjem Studije, rekao sam mu neka pročita predgovor gdje se nalazi čitava kronologija. Sve je tamo navedeno. I tko je na tome radio, zašto je radio, kome je radio, gdje je rad stajao, kada je upućen i gdje. Valja reći da je pravovremeno upućen jer ga je Robinson dobio u veljači ove godine, a presuda je bila 15.4. Dakle, mogao je otići u susjednu

sobu i reći predsjedniku vijeća: „…čuj Orie, ovi tamo sumanuti profesori koje je Carla del Ponte proglasila nerazumnim ljudima pišu nekakve bedastoće. Ali ipak pišu pa vidi o čemu se radi.“ A on, znate li što bi on odgovorio? „Sve ja to znam, ali presuda je donesena.“ Hvala Vam svima na pozornosti. Sada je 14,04. Završavamo konferenciju. Hvala svima.

PRILOG

Wolfgang Schomburg*

JURISPRUDENCE ON JCE – REVISITING A NEVER ENDING STORY ABOUT A JUDGE MADE MODE OF CRIMINAL LIABILITY BEFORE SOME INTERNATIONAL CRIMINAL TRIBUNALS

1. INTRODUCTION

This paper intends to demonstrate that the doctrine of Joint Criminal Enterprise (aka JCE, an abbreviation not intended to mean "Just Convict Everyone" as interpreted by some scholars[1]) is an unnecessary and even dangerous attempt to describe a mode of liability not foreseen in the Statutes of today's international tribunals, in particular not in the Statutes of ICTY[2] and ICTR[3], however invented and applied by the Appeal Chamber of both Tribunals. This artefact has all the potential of violating in part the fundamental right not to be punished without law (*nullum crimen, nulla poena, sine lege)*. This potential risk unfortunately has realized itself for the first time ever before the SC/SL[4] as will be shown below. First the definition as developed before ICTY, and later ICTR, shall be described. This will be done by summarizing the jurisprudence of both ICTY and ICTR, including inherent criticism and dissenting opinions. On purpose, the deluge of efforts to support or to annihilate this doctrine by academics will be ignored. These secondary sources could serve rather for confusion. The only authentic account of this doctrine is the chain of judgments, interlocutory decisions and dissenting opinions. When criticizing the majority's opinion of the Appeal Chambers of ICTY and ICTR, I will mainly refer to my own dissenting opinions, in order not to invent the wheel twice. This method at the same time allows me to avoid to comment on own decisions and opinions. Specific reference will be made to the Stakić Trial Judgment[5] that should be seen as a separate opinion to the main-stream jurisprudence and can be seen even as a dissenting opinion to

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1 Cf. e.g. *Badar, M. E.* „Just Convict Everyone!" – Joint Perpetration: From *Tadić* to *Stakić* and Back Again, 6 International Criminal Law Review (2006), pp.293 et seq.

2 International Criminal Tribunal for the former Yugoslavia.

3 International Criminal Tribunal for Rwanda.

4 Special Court for Sierra Leone.

5 *Prosecutor v. Stakić* (Trial Judgment) IT-97-24-T (31 July 2003).

it. The Stakić Trial Bench was composed of judges from Civil Law countries (a judge from Argentina, replacing a judge from Morocco, when it came to start the defence case, and judges from Ukraine and Germany). This Trial Judgment was an attempt by all judges acting in concert to harmonise the already established jurisprudence with modes of liability established in their home countries and, most importantly, the law applicable in the former Yugoslavia and today in the new countries on the territory of the former Yugoslavia. (Let me pause here for a split of a second and turn to an issue forming not directly part of this article, being however of serious concern also in this context. No doubt, international criminal law is a law *sui generis*. However, what about acceptance and respect vis-à-vis the domestic law in the areas of the tribunals' responsibility? It has been already a fundamental mistake to impose Anglo-American procedural law into areas of responsibility (Yugoslavia/Rwanda) not acquainted with this totally different approach in terms of truth-finding and understanding for the people concerned.) This general remark also holds true for the applicable substantive law, here the general part of it. Why was it necessary at all to again impose a new doctrine (JCE), absolutely unknown in both areas of responsibility, this even in light of the broad scope of Article 15 ICCPR, a topic which cannot be discussed here in greater detail? Why unnecessarily run the risk of infringing in an additional way the principle of *nullum crimen, sine lege praevia,* when comparing the jurisprudence of both ad hoc-tribunals with the law applicable in both areas of responsibility? The need to depart from the latter had arisen only when the domestic law was able or even intended to shelter the most senior responsible ones from criminal responsibility. For me it is abundantly clear that on the contrary the general part of the applicable domestic law in both areas was even better placed to accomplish the necessary:

a) in general: to bring to justice without legal gaps and effectively the most serious actors in campaigns of genocide and ethnical cleansing;
b) to hold responsible the perpetrators behind the perpetrators, the allegedly untouchables;
c) not to run the risk that those perpetrators with clean hands escape as mere aiders and abettors (a trivialization realized in later judgments of ICTY/ICTR);
d) not to confuse the membership in a JCE with a membership in a criminal group, the latter forming a separate broader (and thus least grave) mode of participation[6], not foreseen in the Statutes of the UN ad hoc-tribunals, however in the Rome Statute for the permanent ICC (Art. 25(3)(d):an additional *argumentum e contrario*);
e) not to run the risk that, exactly opposed to the primary goal of International Criminal Law, members of groups, or ethnicities would be punished solely based on a common purpose or intent, i.e. nearly every likeminded person.

[6] Cf. *Werle, G.*, Principles of International Criminal Law, The Hague, 2006 para. 493 at p. 184.

This paper will show that in particular the third category of JCE has no basis in both the Statutes of ICTY and ICTR.[7] The principle of *nullum crimen, nulla poena, sine lege stricta* forbids the application of the JCE doctrine at least in its third category against the clear wording of both Statutes. From the outset it has to be pointed out that in principle the first and the second category of JCE will not be discussed in greater detail as these categories by and large overlap with traditional definitions of the term "committing". As regards these two categories it was only a unnecessary academic game first to invent a new doctrine and than to subsume this doctrine under one of liability, explicitly foreseen in the Statute. A waste of time and human resources for the ad hoc Tribunals. A nice but misleading challenge for academics.

It is primarily the third category that in its broadness and vagueness infringes the principle of *nullum crimen, nulla poena, sine lege stricta*. It is only the third category that takes issue with the fundamental basis of International Humanitarian Law, in that "[c]rimes against international law are committed by men, not by abstract entities, and only by punishing individuals who commit such crimes can the provisions of international law be enforced"[8]. It is again the principle of individual guilt to criminalize the *mens rea* of a person without an exhaustively and precisely described *actus reus*. In short, the mere membership *e.g.* in an ethnical group can never be punished. The membership in a criminal group is, opposed to the law of many countries[9] or, more importantly, the Statute of the ICC[10], not punishable under the Statutes of ICTY and ICTR. However, the striking similarity to the concept of JCE should have served as a warning. The paper will demonstrate that reference to a mode of liability not foreseen in the Statutes was not necessary to establish a criminal liability of in particular the most serious offenders in macro criminality. The paper will discuss that in International Criminal

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[7] Article 7 ICTY Statute, Article 6 ICTR Statute.

[8] Trial of the Major War Criminals before the International Military Tribunal, Nuremberg, 1949, p. 223.

[9] See, e.g. § 129 (1) German Criminal Code which reads as follows: "Whosoever forms an organisation the aims or activities of which are directed at the commission of offences or whosoever participates in such an organisation as a member, recruits members or supporters for it or supports it, shall be liable to imprisonment of not more than five years or a fine."

[10] Article 25(3)d of ICC-Statute which reads as follows: "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[.]" This norm, however, regulates a new form of participation. It does not deal with a form of perpetration, but constitutes the broadest, and the least grave, mode of participation (cf. *Werle, G.,* Principles of International Criminal Law, 2nd ed., The Hague, 2009, at para. 493).

Law there can be only one exhaustive enumeration of modes of liability. For this purpose, by contrast, also jurisprudence of ICC[11], SC/SL[12], and most recently of ECCC[13] has briefly to be revisited. In its conclusion the paper will finally discuss the most preferable general part of criminal law dealing with modes of criminal liability. Having discussed this, the floor may be open to recommendations by academics how best to develop an entirely new (or for the first time ever) general part of substantive criminal law for the future of this unalienable part of justice: International Criminal Justice.

2. THE JURISPRUDENCE OF ICTY AND ICTR FROM TADIĆ TO SEROMBA

Now it is time to give the floor to judges and benches. (The authors minimalistic comments will be found in Italics; additional emphasises will be added by underlining) Focussing exclusively on the jurisprudence this chapter shall show the development of JCE from its invention in Tadić[14] for unknown reasons based on some out singled judgments of the past only, via Ojdanić[15], limiting JCE to a definition of "committing", and finally Seromba[16], an Appeals Judgment that in essence without saying embarked on the objective limitation by the criterion of *Tatherrschaft* (control over the act).[17]*Let us now start with*

1) Prosecutor v. Tadić (Appeal Judgement) IT-94-1 (15 July 1999), paras 192, 201, 220, 227-228, inventing three categories of JCE.[18] Before doing so, it has to be recalled what exactly is punishable in accordance with Article 7(1) ICTY Statute and Article 6(1) ICTR Statute. They have in common the following wording which must be the point of departure as it is strictly binding the judges:

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[11] International Criminal Court, in: *The Prosecutor v. Lubanga* (Pre-Trial Chamber Decision on the Confirmation of Charges) ICC-01/04-01/06 (29 January 2007), *The Prosecutor v. Katanga et al*. (Pre-Trial Chamber Decision on the Confirmation of Charges) ICC-01/04-01/07 (30 September 2008), *The Prosecutor v. Bemba* (Pre-Trial Chamber Decision on the Confirmation of Charges) ICC-01/05-01/08 (15 June 2009).

[12] Special Court for Sierra Leone, in: *Prosecutor v. Sesay, Kallon and Gbao* (Appeal Judgment), SCSL-04-15-A (26 October 2009).

[13] Extraordinary Chambers in the Courts of Cambodia, in: Order on the Application at the ECC of the Form of Liability Known as Joint Criminal Enterprise, Office of the Co-Investigating Judge, Case File No.: 002/19-09-2007-ECCC-OCIJ (8 December 2009). (Appeal pending at the time this article was finalized).

[14] *Prosecutor v. Tadić* (Appeal Judgment) IT-94-1 (15 July 1999).

[15] *Prosecutor v. Milutinović et al*. (Decision on Draguljub *Ojdanić's* Motion Challenging Jurisdiction – Joint Criminal Enterprise) IT-99-37-AR72 (21 May 2003).

[16] *The Prosecutor v. Seromba* (Appeal Judgment) ICTR-2001-66-A (12 March 2008).

[17] Ibid. at, paras. 171-174.

[18] *Prosecutor v. Tadić* (Appeal Judgement) IT-94-1 (15 July 1999), paras 185-229.

"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 […] of the present Statute, shall be individually responsible for the crime."
Sorry to pause and comment again: It has to be recalled that Tadić had already been accused by the German federal prosecutor (Generalbundesanwalt) and the case was ready for the hearing before a court in Munich when primacy was exercised by ICTY, thus the case had to be transferred to The Hague on 12 November/8 October 1994.[19] *In Germany he was accused for having "committed" crimes based on a strong degree of suspicion as it would have been in former Yugoslavia. Why translate this into JCE? In light of this it can be reasonably assumed that some judges felt obliged to lay down what they always wanted to express without necessity in fact or law. This has to be called what it was: an obiter dictum as it had no impact on the outcome of the case at hand.*
The judgment starts precisely to the point at on Art. 192-201:
"192. Under these circumstances, to hold criminally liable as a perpetrator only the person who materially performs the criminal act would disregard the role as co- perpetrators of all those who in some way made it possible for the perpetrator physically to carry out that criminal act. At the same time, depending upon the circumstances, to hold the latter liable only as aiders and abettors might understate the degree of their criminal responsibility."...
"201. It should be noted that in many post-World War II trials held in other countries, courts took the same approach to instances of crimes in which two or more persons participated with a different degree of involvement. However, they did not rely upon the notion of common purpose or common design, preferring to refer instead to the notion of co-perpetration. This applies in particular to Italian246[20] and German247[21] cases."
Comment: However, continuing unfortunately at para.

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[19] Cf. *Schomburg, W.,* and *Nemitz, J.* in: Schomburg et.al., Internationale Rechtshilfe in Strafsachen, 4th ed., Munich 2006, VI,A,3 para 27 at p. 1747.

[20] *See* for instance the following decisions of the Italian Court of Cassation relating to crimes committed by militias or forces of the "*Repubblica Sociale Italiana*" against Italian partisans or armed forces: *Annalberti et al.*, 18 June 1949, in *Giustizia penale* 1949, Part II, col. 732, no. 440; *Rigardo et al.* case, 6 July 1949, *ibid.,* cols. 733 and 735, no. 443; *P.M. v. Castoldi*, 11 July 1949, *ibid.,* no. 444; *Imolesi et al.,* 5 May 1949, *ibid.,* col. 734, no. 445. *See* also *Ballestra,* 6 July 1949, *ibid.,* cols. 732-733, no. 442.

[21] *See* for instance the decision of 10 August 1948 of the German Supreme Court for the British Zone in *K. and A.*, in *Entscheidungen des Obersten Gerichtshofes für die Britische Zone in Strafsachen*, vol. I, pp. 53-56; the decision of 22 February 1949 in *J. and A.*, *ibid.,* pp. 310-315; the decision of the District Court (*Landgericht*) of Cologne of 22 and 23 January 1946 in *Hessmer et al.*, in *Justiz und NS-Verbrechen,* vol. I, pp. 13-23, at pp. 13, 20; the decision of 21 December 1946 of the District Court (*Landgericht*) of Frankfurt am Main in *M. et al.* (*ibid.,* pp. 135-165, 154) and the judgement of the Court of Appeal (*Oberlandesgericht*) of 12 August 1947 in the same case (*ibid.,* pp. 166-186, 180); as well as the decision of the District Court of Braunschweig of 7 May 1947 in *Affeldt*, *ibid.,* p. 383-391, 389.

"220. […] [T]he Appeals Chamber holds the view that the notion of common design as a form of accomplice liability is firmly established in customary international law and in addition is upheld, albeit implicitly [*sic: no reasoning is given for this statement*], in the Statute of the International Tribunal. As for the objective and subjective elements of the crime, the case law shows that the notion has been applied to three distinct categories of cases.

First, in cases of co-perpetration, where all participants in the common design possess the same criminal intent to commit a crime (and one or more of them actually perpetrate the crime, with intent).

Secondly, in the so-called "concentration camp" cases, where the requisite *mens rea* comprises knowledge of the nature of the system of ill-treatment and intent to further the common design of illtreatment. Such intent may be proved either directly or as a matter of inference from the nature of the accused's authority within the camp or organisational hierarchy.

With regard to the third category of cases, it is appropriate to apply the notion of "common purpose" only where the following requirements concerning *mens rea* are fulfilled: (i) the intention to take part in a joint criminal enterprise and to further – individually and jointly – the criminal purposes of that enterprise; and (ii) the foreseeability of the possible commission by other members of the group of offences that do not constitute the object of the common criminal purpose. Hence, the participants must have had in mind the intent, for instance, to ill-treat prisoners of war (even if such a plan arose extemporaneously) and one or some members of the group must have actually killed them. In order for responsibility for the deaths to be imputable to the others, however, everyone in the group must have been able to *predict* this result. 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 national legal systems)."

The Appeals Chamber continues, at paras 227-229:

"227. In sum, the objective elements (*actus reus*) of this mode of participation in one of the crimes provided for in the Statute (with regard to each of the three categories of cases) are as follows:

i. *A plurality of persons*. They need not be organised in a military, political or administrative structure, as is clearly shown by the *Essen Lynching*[22] and the *Kurt Goebell*[23] cases.

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[22] *Trial of Erich Heyer and six others*, British Military Court for the Trial of War Criminals, Essen 18th-19th and 21st-22nd December, 1945, UNWCC, vol. I, p. 88, at p. 91.

[23] Also called the *Borkum Island* case. *See*, Charge Sheet, in U.S. National Archives Microfilm Publications, I.

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 (for example, murder, extermination, torture, rape, etc.), but may take the form of assistance in, or contribution to, the execution of the common plan or purpose.
228. By contrast, the *mens rea* element differs according to the category of common design under consideration.
With regard to the first category, what is required is the intent to perpetrate a certain crime (this being the shared intent on the part of all co-perpetrators).
With regard to the second category (which, as noted above, is really a variant of the first), personal knowledge of the system of ill-treatment is required (whether proved by express testimony or a matter of reasonable inference from the accused's position of authority), as well as the intent to further this common concerted system of ill-treatment.
With regard to the third category, what is required is the *intention* 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, under the circumstances of 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*."
Comment: Unfortunately the last element has been at times ignored. Only in Blaškić[24] *and Kordić and Čerkez*[25] *it was clarified that to meet the standard of dolus eventualis the perpetrator must willingly accept or approve that risk.*
2) Prosecutor v. Milutinović et al. (Decision on Draguljub ***Ojdanić*'s** Motion Challenging Jurisdiction – Joint Criminal Enterprise) IT-99-37-AR72 (21 May 2003), paras. 18-20, *limiting JCE to "committing")*
"18. The appellant in this case has advanced no cogent reason why the Appeals Chamber should come to a different conclusion than the one it reached in the *Tadić* case, namely, that joint criminal enterprise was provided for in the Statute of the Tribunal and that it existed under customary international law at the relevant time. The Defence's first contention is that the Appeals Chamber

[24] *Prosecutor v. Tihomir Blaškić,* Appeal Judgement, Case No. IT-95-14-A, of 29 July 2004
[25] *Prosecutor v. Dario Kordić and Mario Čerkez ,* Appeal Judgement, Case No. IT-95-14/2-A, of 17 December 2004

misinterpreted the drafters' intention as, it claims, they would have referred to joint criminal enterprise explicitly had they intended to include such a form of liability within the Tribunal's jurisdiction. As pointed out above, the Statute of the International Tribunal sets the framework within which the Tribunal may exercise its jurisdiction. A crime or a form of liability which is not provided for in the Statute could not form the basis of a conviction before this Tribunal.55[26] The reference to that crime or to that form of liability does not need, however, to be explicit to come within the purview of the Tribunal's jurisdiction.56[27] The Statute of the ICTY is not and does not purport to be, unlike for instance the Rome Statute of the International Criminal Court, a meticulously detailed code providing explicitly for every possible scenario and every solution thereto. It sets out in somewhat general terms the jurisdictional framework within which the Tribunal has been mandated to operate."

Comment: Do the two second to last sentences survive the test of nullum crimen sine lege stricta?

"19. As noted in the *Tadić* Appeal Judgment, the Secretary-General's Report provided that "all persons" who participate in the planning, preparation or execution of serious violations of international humanitarian law contribute to the commission of the violation and are therefore individually responsible.57[28] Also, and on its face, the list in Article 7(l) appears to be non exhaustive in nature as the use of the phrase "or otherwise aided and abetted" suggests. But the Appeals Chamber does not need to consider whether, outside those forms of liability expressly mentioned in the Statute, other forms of liability could come within Article 7(l). It is indeed satisfied that joint criminal enterprise comes within the terms of that provision."

Comment: Vicious circle or circle conclusion?

"20. In the present case, Ojdanić is charged as a co-perpetrator in a joint criminal enterprise the purpose of which was, inter alia, the expulsion of a substantial portion of the Kosovo Albanian population from the territory of the province of Kosovo in an effort to ensure continued Serbian control over the province.58[29] The Prosecution pointed out in its indictment against Ojdanić that its use of the word "committed" was not intended to suggest that any of the accused physically perpetrated any of the crimes charged, personally. "Committing", the Prosecution wrote, "refers to participation in a joint criminal enterprise as a co-perpetrator".59[30] Leaving aside the appropriateness of the use of the expression "co-per-

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[26] Footnote omitted.

[27] The Tribunal has accepted, for instance, that Article 3 of the Statute was a residual clause and that crimes which are not explicitly listed in Article 3 of the Statute could nevertheless form part of the Tribunal's jurisdiction (ref to *Tadić*).

[28] *Tadić* Appeal Judgment, par 190, citing Secretary-General's Report, par 54.

[29] Footnote omitted.

[30] Indictment, par 16.

petration" in such a context, it would seem therefore that the Prosecution charges co-perpetration in a joint criminal enterprise as a form of "commission" pursuant to Article 7(l) of the Statute, rather than as a form of accomplice liability. The Prosecution's approach is correct to the extent 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, he or she cannot be regarded as a mere aider and abettor to the crime which is contemplated. The Appeals Chamber therefore regards joint criminal enterprise as a form of "commission" pursuant to Article 7(l) of the Statute. [31]"

3) ***Prosecutor v. Stakić*** (**Trial Judgement**) IT-97-24-T (31 July 2003), paras 437-442 *in its unsuccessful attempt to make the best of it by joining JCE with stricter modes of liability...*

"437. The Trial Chamber notes with special reference to the *mens rea* of joint criminal enterprise that Article 7(1) lists modes of liability only. These can not change or replace elements of crimes defined in the Statute. In particular, the *mens rea* elements required for an offence listed in the Statute cannot be altered.

438. The Trial Chamber emphasises that joint criminal enterprise is only one of several possible interpretations of the term "commission" under Article 7(1) of the Statute and that other definitions of co-perpetration must equally be taken into account. Furthermore, a more direct reference to "commission" in its traditional sense should be given priority before considering responsibility under the judicial term "joint criminal enterprise".

439. The Trial Chamber prefers to define 'committing' as meaning that the accused participated, physically or otherwise directly or indirectly,942[32] in the material elements of the crime charged through positive acts or, based on a duty to act, omissions, whether individually or jointly with others. 943[33] The accused himself need not have participated in all aspects of the alleged criminal conduct.

440. In respect of the above definition of 'committing', the Trial Chamber considers that a more detailed analysis of co-perpetration is necessary. For co-perpetration it suffices that there was an explicit agreement or silent consent to reach a common goal by coordinated co-operation and joint control over the criminal conduct. For this kind of co-perpetration it is typical, but not mandatory, that one perpetrator possesses skills or authority which the other perpetrator does

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[31] Emphasis added by the author.

[32] Indirect participation in German Law (*mittelbare Täterschaft*) or "the perpetrator behind the perpetrator"; terms normally used in the context of white collar crime or other forms of organised crime.

[33] *Kvočka* Trial Judgement, para. 251.

not. These can be described as shared acts which when brought together achieve the shared goal based on the same degree of control over the execution of the common acts. In the words of *Roxin*: "The coperpetrator can achieve nothing on his own…The plan only 'works' if the accomplice944[34] works with the other person."945[35] Both perpetrators are thus in the same position. As *Roxin* explains, "they can only realise their plan insofar as they act together, but each individually can ruin the whole plan if he does not carry out his part. To this extent he is in control of the act."946[36] *Roxin* goes on to say, "[t]his type of 'key position' of each co-perpetrator describes precisely the structure of joint control over the act."947[37] Finally, he provides the following very typical example:

> If two people govern a country together - are joint rulers in the literal sense of the word - the usual consequence is that the acts of each depend on the co-perpetration of the other. The reverse side of this is, inevitably, the fact that by refusing to participate, each person individually can frustrate the action.948[38]

441. The Trial Chamber is aware that the end result of its definition of co-perpetration approaches that of the aforementioned joint criminal enterprise and even overlaps in part. However, the Trial Chamber opines that this definition is closer to what most legal systems understand as "committing"949[39] and avoids the misleading impression that a new crime950[40] not foreseen in the Statute of this Tribunal has been introduced through the backdoor.951[41]

442. In respect of the *mens rea*, the Trial Chamber re-emphasises that modes of liability can not change or replace elements of crimes defined in the Statute and that the accused must also have acted in the awareness of the substantial likelihood that punishable conduct would occur as a consequence of coordinated co-operation based on the same degree of control over the execution of common acts. Furthermore, the accused must be aware that his own role is essential for the achievement of the common goal."

4) *The answer follows immediately in the* ***Appeal Judgment*** *(it has to be noted that no party had appealed the legal assessment of the Trial Chamber):* ***Prosecutor v. Stakić*** IT-97-24-A (22 March 2006), para. 62

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[34] In this context the term 'accomplice' is used interchangeably with 'co-perpetrator' (footnote added). See also *Krnojelac* Trial Judgement, para. 77.

[35] *Roxin, Claus,* Täterschaft und Tatherrschaft (Perpetration and control over the act), 6th Edition, Berlin, New York, 1994, p. 278.

[36] *Ibid.*

[37] *Ibid.*

[38] *Ibid*. p. 279

[39] See *supra Roxin* as one example for the Civil Law approach. For the Common Law approach see: *Sworth, Andrew*, Principals of Criminal Law, 2nd Edition, Oxford 1995, p. 409 ff and *Fletcher, George P.*, Rethinking Criminal Law, Oxford, 2000, p. 637ff.

[40] *E.g*. "membership in a criminal organization".

[41] Defence Final Brief, paras 168, 170, and 178.

"62. Upon a careful and thorough review of the relevant sections of the Trial Judgement, the Appeals Chamber finds that the Trial Chamber erred in conducting its analysis of the responsibility of the Appellant within the framework of "co-perpetratorship". This mode of liability, as defined and applied by the Trial Chamber, does not have support in customary international law or in the settled jurisprudence of this Tribunal, which is binding on the Trial Chambers. By way of contrast, joint criminal enterprise is a mode of liability which is "firmly established in customary international law"148[42] and is routinely applied in the Tribunal's jurisprudence.149[43] Furthermore, joint criminal enterprise is the mode of liability under which the Appellant was charged in the Indictment, and to which he responded at trial.150[44] In view of these reasons, it appears that the Trial Chamber erred in employing a mode of liability which is not valid law within the jurisdiction of this Tribunal. This invalidates the decision of the Trial Chamber as to the mode of liability it employed in the Trial Judgement."

5) *The* ***Prosecutor v. Seromba*** (Appeal Judgement) ICTR-2001-66-A (12 March 2008), paras 171-172: *Comment: Finally a silent convergence?*

"171. On the basis of these underlying factual findings, the Appeals Chamber finds that Athanase Seromba approved and embraced as his own the decision of Kayishema, Ndahimana, Kanyarukiga, Habarugira, and other persons to destroy the church in order to kill the Tutsi refugees. It is irrelevant that Athanase Seromba did not personally drive the bulldozer that destroyed the church. What is important is that Athanase Seromba fully exercised his influence over the bulldozer driver who, as the Trial Chamber's findings demonstrate, accepted Athanase Seromba as the only authority, and whose directions he followed. The Appeals Chamber finds, Judge Liu dissenting, that Athanase Seromba's acts, which cannot be adequately described by any other mode of liability pursuant to Article 6(1) of the Statute than "committing", indeed were as much as an integral part of the crime of genocide as the killings of the Tutsi refugees.411[45] Athanase Seromba was not merely an aidor and abettor but became a principal perpetrator in the crime itself.

172. The Appeals Chamber observes, Judge Liu dissenting, that Athanase Seromba's conduct was not limited to giving practical assistance, encouragement or moral support to the principal perpetrators of the crime, which would merely

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[42] *Tadić* Appeal Judgement, para. 220.

[43] *See Kvočka* Appeal Judgement, para. 79; *Vasiljević* Appeal Judgement, para. 95; *Krsti´c* Appeal Judgement, paras 79–134; *Ojdanić* Decision on Jurisdiction, paras 20, 43; *Furundžija* Appeal Judgement, para. 119; *Krnojelac* Appeal Judgement paras 29-32; *Celebići*Appeal Judgement, para. 366; *Tadić* Appeal Judgement, para. 220, *Prosecutor v. Radoslav Brđanin & Momir Talić,* Case No: IT-99-36-PT, Decision on Form of Further Amended Indictment and Prosecution Application to Amend, 26 June 2001, para. 24; *Babić* Judgement on Sentencing Appeal, paras 27, 38, 40.

[44] Footnote omitted.

[45] Cf. Gacumbitsi Appeal Judgement, para. 60.

constitute the *actus reus* of aiding and abetting.412[46] Quite the contrary, the findings of the Trial Chamber allow for only one conclusion, namely, that Athanase Seromba was a principal perpetrator in the killing of the refugees in Nyange church. The Appeals Chamber therefore finds that Athanase Seromba's conduct can only be characterized as "committing" these crimes."

In his dissenting opinion attached to this judgment Judge Liu made exactly this point, later heavily applauded by some scholars of the Cassese-school:

"8. Thirdly, it is widely recognized that in various legal systems, however, "committing" is interpreted differently such that co-perpetratorship and indirect perpetratorship are also recognized as forms of "committing".15[47] Co-perpetrators pursue a common goal, either through an explicit agreement or silent consent, which they can only achieve by co-ordinated action and shared control over the criminal conduct. Each co-perpetrator must make a contribution essential to the commission of the crime.16[48] Indirect perpetration on the other hand requires that the indirect perpetrator uses the direct and physical perpetrator as a mere "instrument" to achieve his goal, *i.e.*, the commission of the crime. In such cases, the indirect perpetrator is criminally responsible because he exercises control over the act and the will of the direct and physical perpetrator.17[49]The Majority reasoned that "[i]t is irrelevant that Athanase Seromba did not personally drive the bulldozer that destroyed the church" in order to find Athanase Seromba responsible for committing genocide, and that, "[w]hat is important is that Athanase Seromba fully exercised his influence over the bulldozer driver who, as the Trial Chamber's findings demonstrate, accepted Athanase Seromba as the only authority, and whose directions he followed."18[50] Evident in this reasoning is the attribution of liability for "committing" to the "perpetrator behind the perpetrator"19[51] without the obvious characterization of Athanase Seromba's conduct as co-perpetratorship or indirect perpetratorship.

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[46] *Blaškić* Appeal Judgement, para. 46.

[47] *Gacumbitsi* Appeal Judgement, Separate opinion of Judge Schomburg, para. 16.

[48] *Gacumbitsi* Appeal Judgement, Separate opinion of Judge Schomburg, para. 17 and fn. 31, referring to C. Roxin, *Täterschaft und Tatherrschaft*, 7th edn. (2000), pp. 275-305. *See* also K. Ambos, in: O. Triffterer (ed.), *Commentary on the Rome Statute of the International Criminal Court* (1999), Art. 25 marginal no. 8.

[49] *Gacumbitsi* Appeal Judgement, Separate opinion of Judge Schomburg, para. 18 and fn. 33, referring to C. Roxin, *Täterschaft und Tatherrschaft*, 7th edn. (2000), pp. 142-274. *See* also K. Ambos, in: O. Triffterer (ed.), *Commentary on the Rome Statute of the International Criminal Court* (1999), Art. 25 marginal no. 9.

[50] Appeal Judgement, para. 171.

[51] *Gacumbitsi* Appeal Judgement, Separate opinion of Judge Schomburg, para. 20 and fn. 36 ("As indirect perpetratorship focuses on the indirect perpetrator's control over the will of the direct and physical perpetrator, it is sometimes understood to require a particular "defect" on the part of the direct and physical perpetrator which excludes his criminal responsibility.")

9. Whilst the Majority's approach would make it much easier to hold criminally liable as a principal perpetrator those persons who do not directly commit offences, this approach is inconsistent with the jurisprudence. In the *Stakić* Appeal Judgement, the Appeals Chamber held that the Trial Chamber erred in conducting its analysis of the responsibility of the appellant within the framework of co-perpetratorship, and unanimously and unequivocally said of co-perpetratorship that, "[t]his mode of liability, as defined and applied by the Trial Chamber, does not have support in customary international law or in the settled jurisprudence of this Tribunal, which is binding on the Trial Chambers."20[52] Consequently, the Appeals Chamber concluded that it "is not valid law within the jurisdiction of this Tribunal."21[53]..."
Let me now turn to

3. SEPARATE/DISSENTING OPINIONS BEFORE AD HOC TRIBUNALS ARGUING AGAINST THE JCE DOCTRINE

1) ***Prosecutor v. Simić*** **(Trial Judgement)** IT-95-9-T (17 October 2003), Separate and Partly Dissenting Opinion of **Judge Per-Johan Lindholm**, paras 2 and 5
"2. I dissociate myself from the concept or doctrine of joint criminal enterprise in this case as well as generally. The so-called basic form of joint criminal enterprise does not, in my opinion, have any substance of its own. It is nothing more than a new label affixed to a since long well-known concept or doctrine in most jurisdictions as well as in international criminal law, namely co-perpetration. What the basic form of a joint criminal enterprise comprises is very clearly exemplified by Judge David Hunt in his Separate Opinion in *Milutinović, Šainović and Ojdanić*.2355[54] The reasoning in the *Kupreškić* Trial Judgement is also illustrative.2356[55] The acts of – and the furtherance of the crime by – the co-perpetrators may of course differ in various ways.2357[56] If something else than participation as co-perpetrator is intended to be covered by the concept of joint criminal enterprise, there seems to arise a conflict between the concept and the word "committed" in Article 7(1) of the Statute. Finally, also the *Stakić* Trial Judgement limited itself to the clear wording of the Statute when interpreting "committing" in the form of coperpetration. *Stakić* requires that co-perpetrators "can only realise their plan insofar as they act together, but each individually can ruin the whole plan if he does not carry out his part. To this extent he is in

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52 *Stakić* Appeal Judgement, para. 62.
53 *Stakić* Appeal Judgement, para. 62.
54 Footnote omitted.
55 *Prosecutor v. Kupreškić et al.*, IT-95-16-T, Judgement, 14 January 2000, paras 772, 782.
56 Footnote omitted.

control of the act."2358[57] The *Stakić* Trial Judgement can, based on the doctrine of "power over the act" ("Tatherrschaft"), be read as distancing itself from the concept of joint criminal enterprise.2359[58]"

5. ..."The concept or "doctrine" has caused confusion and a waste of time, and is in my opinion of no benefit to the work of the Tribunal or the development of international criminal law."

2) ***Prosecutor v. Simić*** **(Appeal Judgement**) IT-95-9-A (28 November 2006), Dissenting opinion of **Judge Schomburg**, paras 2-3, 11-21, 23

"3. The wording of the Statute ultimately limits its interpretation. It follows that the only crimes or modes of liability are those foreseen in the Statute. Even within the scope of the Statute, any interpretation may not exceed what is recognized by international law.9[59] Therefore, it is necessary and at the same time sufficient to plead a specific crime and a specific mode of participation as set out in the explicit provisions of the Statute. The Prosecution is consequently not required to plead any legal interpretation or legal theory concerning a mode of participation that does not appear in the Statute, such as joint criminal enterprise, in particular as the Appeals Chamber has held that joint criminal enterprise is to be regarded as a form of "committing".10[60]"

"11. On a more general note, I wish to point out that it would have been possible to interpret Article 7(1) of the Statute17[61] as a monistic model of perpetration (*Einheitstäterschaft*) in which each participant in a crime is treated as a perpetrator irrespective of his or her degree of participation.18[62] Such an approach would have allowed the Prosecution to plead Article 7(1) of the Statute in its entirety without having to choose a particular mode of participation. In that case, the

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[57] Quoting *Roxin*, *Claus*, Täterschaft und Tatherrschaft (Perpetration and control over the act), 6th ed. Berlin, New York, 1994, p. 278.

[58] *Prosecutor v. Stakić*, IT-97-24-T, Judgement, 31 July 2003, paras 436-438.

[59] *See* Report of the Secretary-General, U.N. Doc. S/25704, para. 34.

[60] As to this, *see Karemera, Ngirumpatse and Nzirorera* Decision on Defence Motions Challenging the Pleading of a Joint Criminal Enterprise in a Count of Complicity in Genocide in the Amended Indictment, 18 May 2006, para. 8 and para. 5; *Odjanić* Decision Joint Criminal Enterprise, para. 20.

[61] *See* ICTY Statute, Art. 7(1): A person who planned, instigated, ordered, committed or *otherwise* aided and abetted […] *(*emphasis added). Art. 6(1) of the ICTR Statute is identical to this provision. My views therefore also apply to the ICTR Statute as stated in *Gacumbitsi* Appeal Judgement, Separate Opinion of Judge Schomburg on the Criminal Responsibility of the Appellant for Committing Genocide, para. 6.

[62] *See*, for example, *Strafgesetzbuch* (Austria), Sec. 12: "Treatment of all participants as perpetrators"; for further details, *see W. Schöberl*, Die Einheitstäterschaft als europäisches Modell (2006), pp. 50-65; 197-227. *See* also *Straffeloven* (Denmark), Sec. 23(1), reprinted in Danish and in German translation in *K. Cornils* and *V. Greve*, Das Dänische Strafgesetz, 2nd edn. (2001); for further details, *see K. Cornils*, *ibid*., p. 9. *See also Straffelov* (Norway), Sec. 58; for further details regarding Norway, *see W. Schöberl*, Die Einheitstäterschaft als europäisches Modell (2006), pp. 67-102; 192-227.

Judges would have been able to assess the significance of an accused's contribution to a crime under the Statute at the sentencing stage, thereby saving the Tribunal the trouble of developing an unnecessary participation doctrine. Unfortunately, the Tribunal's jurisprudence has come to distinguish on a case-by-case basis between the different modes of liability.

12. In the case at hand, the Trial Chamber applied the theory of joint criminal enterprise. However, this concept is not expressly included in the Statute and is only one possible interpretation of "committing" in relation to the crimes under the Statute.19[63]

13. Indeed, the laws of the former Yugoslavia and the laws of the successor States on the territory of the former Yugoslavia all include the concept of co-perpetratorship:

State	Relevant Provision (in part as an unofficial translation)
Former Yugoslavia (*Krivični Zakon*, 1990)	Art. 22: "If several persons jointly commit a criminal act by participating in the act of commission or in some other way, each of them shall be punished as prescribed for the act."
Bosnia and Herzegovina (*Krivični Zakon Federacije Bosne i Hercegovine*, 2003)	Art. 29: "If several persons, by participating in the perpetration of a criminal offence or by taking some other act by which a decisive contribution has been made to its perpetration, jointly perpetrated a criminal offence, each shall be punished as prescribed for the criminal offence."
Croatia (*Kazneni Zakon*, 1999)	Article 35 (3): "Co-principals of a criminal offence are two or more persons who, on the basis of a joint decision, commit a criminal offence in such a way that each of them participates in the perpetration or, in some other way, substantially contributes to the perpetration of a criminal offence."
The former Yugoslav Republic of Macedonia (*Krivicen Zakonik*, 2004)	Art. 22: "If two or more persons, with their participation or any other special contribution to the perpetration of the crime, jointly commit a crime, each of them shall be punished with the sentence prescribed for that crime."
Montenegro (*Krivični Zakonik*, 2004)	Art. 23: "If several persons who, by participating in the perpetration of a criminal offence or by carrying out some other act, have jointly perpetrated a criminal offence, each shall be punished with the penalty prescribed for the criminal offence."
Serbia (*Krivični Zakon Republike Srbije*, 2005)	Art. 33: "Co-perpetrators: If several persons who, by participating in the perpetration of a criminal offence, have jointly perpetrated a criminal offence, or jointly perpetrated a criminal offence out of negligence, or in the course of the realization of a joint decision decisively contributed to the commission of the offence with some other act, each person shall be punished by the penalty prescribed for the criminal offence."
Slovenia (*Kazenski zakonik*, 1995)	Art. 25: "If two or more persons are engaged jointly in the committing of a criminal offence by collaborating in the execution thereof or by performance of any act representing a decisive part of the committing of the offence in question, each of these persons shall be punished according to the limits set down in the statutes for the offence in question."

The Statute of the Tribunal in Article 24(1) explicitly only provides for the Tribunal to have recourse to the general practice regarding prison sentences in the former Yugoslavia. However, this does not exclude the possibility that the Tribunal should also, by the same token, and (at least) as a matter of judicial fairness and courtesy have recourse to the relevant substantive laws applicable on the territory of the former Yugoslavia.

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[63] *See in particular* Participation in Crime: Criminal Liability of Leaders of Criminal Groups and Networks, Expert Opinion, Commissioned by the United Nations – International Criminal Tribunal for the Former Yugoslavia, Office of the Prosecutor- Project Coordination: Prof. Dr. Ulrich Sieber., Priv. Doz. Dr. Hans-Georg Koch, Jan Michael Simon, Max-Planck-Institut für ausländisches und internationales Strafrecht, Freiburg, Germany ("Expert Opinion"), 2006.

14. Moreover, in many other legal systems, committing is interpreted differently from the jurisprudence of the Tribunal. Since Nuremberg and Tokyo, both national and international criminal law have come to accept, in particular, co-perpetratorship as a form of committing20[64]. For example, the recent Comparative Analysis of Legal Systems, carried out by the Max-Planck-Institute, Freiburg, Germany, illustrates that, *inter alia*, the following States include co-perpetratorship in their criminal codes21[65]:

State	Relevant Provision (in part as an unofficial translation)
Cameroon (*Livre I du Code pénal*)	Art. 96: "Est coautor celui qui participle avec autrui et en accord avec lui à la commission de l'infraction."
Chile (*Código Penal*)	Art. 15: "Se consideran autores: 3° Los que, concertados para su ejecución, facilitan los medios con que se lleva a efecto el hecho o lo presencian sin tomar parte inmediate en él."
Czech Republic (*Trestní zákon*)	Sec. 9(2): "If a crime is committed by the joint conduct of two or more persons, each of them shall be criminally liable as if he alone had committed the crime (accomplice)".
Germany (*Strafgesetzbuch*)	Sec. 25(2): "If more than one person commit the crime jointly, each shall be punished as a perpetrator (co-perpetrator)."
Greece (*Poinikos Kodikas*)	Art. 45: "Co-Perpetrators: If two or more persons commit a criminal offence jointly, each of them shall be punished as a perpetrator."
Hungary (*1978. évi IV. Törvény a Büntetö Törvénykönyvröl*)	Art. 20(2): "Co-principals are the persons who jointly realize the legal facts of an intentional crime in awareness of each other's activities."
Israel (חוק העונשין)	Section 29(b): "Participants in the commission of an offence, who perform acts for its commission are joint perpetrators, and it is immaterial whether all acts were performed jointly or some were performed by one person and some by another."
Japan (刑法 *Keihō*)	Art. 60: "(Co-principals): Two or more persons who jointly commit a criminal act shall all be dealt with as principals."
Mexico (*Código Penal*)	Art. 13(3): "Son autores o partícipes del delito: Los que lo realicen conjuntamente."
Netherlands (*Wetboek van Strafrecht*)	Art. 47(1): "As perpetrators of a criminal offence will be punished: Those who commit a criminal offence, who cause a criminal offence to be committed or who jointly commit a criminal offence."
Poland (*Kodeks Karny*)	Art. 18 §1 "Not only the person who has committed a prohibited act himself or together and under arrangement with another person, but also a person who has directed the commission of a prohibited act by another person or taken advantage of the subordination of another person to him, orders such a person to commit such a prohibited act, shall be liable for perpetration."
Portugal (*Código Penal*)	Art. 26: "É punível como autor quem executar o facto, por si mesmo ou por intermédio de outrem, ou tomar parte directa na sua execução, por acordo ou juntamente com outro ou outros, e ainda quem, dolosamente, determiner outra pessoa à prática do facto, desde que haja execução ou começo de execução."
Republic of Korea (*Hyeong-beop*)	§ 30: "Co-perpetratorship: If two or more persons commit a criminal offence jointly, each shall be punished as a perpetrator."
Spain (*Código Penal*)	Art. 28: "Son autores quienes realizan el hecho por sí solos, conjuntamente o por medio de otro del que se sirven como instrumento."

[64] With all due respect, I maintain my position that co-perpetratorship is firmly entrenched in customary international law. Unfortunately, when the *Stakić* Trial Judgement was rendered, the Trial Chamber – solely composed of civil law judges – took it for granted that the notion of co-perpetratorship need not be academically supported by reference to State practice. With the availability of the Expert Opinion, supra *note* 19 [i.e. supra *note* 63 of this article], such an *empirical basis can now be delivered*.

[65] *See* Expert Opinion, *supra* note 19 [i.e. supra *note* 63 of this article]. Moreover, this research illustrates that even States which do not codify co-perpetratorship in their criminal codes recognize this concept, as demonstrated by settled jurisprudence. This includes Sweden (Expert Opinion, Report on Sweden, p. 10) and France (Expert Opinion, Report on France, p. 6). Although not included in the legal analysis of the Expert Opinion, Switzerland's courts have also developed a similar approach: *see M. A. Niggli* and *H. Wiprächtiger* (eds.), Basler Kommentar – Strafgesetzbuch I, Vor Art. 24 marginal number 7 et seq.

In addition, the following States have accepted the concept of co-perpetratorship:

State	Relevant Provision (in part as an unofficial translation)
Colombia *(Código Penal)*	Art. 29: "Son coautores los que, mediando un acuerdo común, actúan con división del trabajo criminal atendiendo la importancia del aporte."
Finland *(Rikoslaki)*	Chapt. 5, Sec. 3: "If two or more persons have committed an intentional offence together, each is punishable as an offender."
Paraguay *(Código Penal)*	Art. 29(2): "También será castigado como autor el que obrara de acuerdo con otro de manera tal que, mediante su aporte al hecho, comparta con el otro el dominio sobre su realización."

"17. As an *international* criminal court, it is incumbent upon this Tribunal not to turn a blind eye to these developments in modern criminal law and to show open-mindedness, respect and tolerance – unalienable prerequisites to all kinds of supranational or international cooperation in criminal matters – by accepting internationally recognized legal interpretations and theories such as the notion of co-perpetratorship. Co-perpetratorship differs slightly from joint criminal enterprise with respect to the key element of attribution.26[66] However, both approaches widely overlap and have therefore to be harmonized in the jurisprudence of both *ad hoc* Tribunals. Such harmonization could at the same time provide all categories of joint criminal enterprise with sharper contours by combining objective and subjective components in an adequate way. As pointed out by the Appeals Chamber in the *Kunarac* Appeal Judgement, "the laws of war 'are not static, but by continual adaptation follow the needs of a changing world.'"27[67] In general, harmonization will lead to greater acceptance of the Tribunal's jurisprudence by international criminal courts in the future and in national systems, which understand imputed criminal responsibility for "committing" to include co-perpetratorship[…]"

"20. Modern criminal law has come to apply the notion of indirect perpetration even where the direct and physical perpetrator is criminally responsible ("perpetrator behind the perpetrator").31[68] This is especially relevant if crimes are committed through an organized structure of power. Since the identity of the direct and physical perpetrator(s) is irrelevant, the control and, consequently, the main responsibility for the crimes committed shifts to the persons occupying a leading position in such an organized structure of power.32[69] These persons must there-

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[66] While joint criminal enterprise is based primarily on the common state of mind of the perpetrators (subjective criterion), co-perpetratorship also depends on whether the perpetrator exercises control over the criminal act (objective criterion).

[67] *Kunarac* Appeal Judgement, para. 67, quoting the International Military Tribunal at Nuremberg.

[68] For a detailed analysis and references, *see Gacumbitsi* Appeal Judgement, Separate Opinion of Judge Schomburg on the Criminal Responsibility of the Appellant for Committing Genocide; *see also C. Roxin*, Täterschaft und Tatherrschaft, 8th edn. (2006), pp. 141-274; *see also Héctor Olásolo* and *Ana Pérez Cepeda*, 4 ICLR (2004), pp. 475-526.

[69] In one of its leading cases, the *Politbüro* Case, the German Federal Supreme Court (*Bun-*

fore be regarded as perpetrators irrespective of whether the direct and physical perpetrators are criminally responsible themselves or (under exceptional circumstances) not."

3) ***Prosecutor v. Martić*** (Appeal Judgement) IT-95-11-A (08 October 2008), Separate Opinion of **Judge Schomburg** on the Individual Criminal Responsibility of Milan Martić, paras 2, 5-9

"2. However, I feel compelled to write separately because I firmly believe that Martić's criminal conduct has to be qualified as that of a (co)-perpetrator under the mode of liability of "committing" pursuant to Article 7(1) of the Statute of the International Tribunal. My concern is that Martić's criminal conduct is primarily qualified as relying on membership in a group – the so-called joint criminal enterprise (JCE) – which cannot be reconciled with the Statute and on the contrary seems to trivialize Martić's guilt. Martić has to be seen as a high-ranking principal perpetrator and not just as a member of a criminal group."

"5. The Statute does not penalize individual criminal responsibility through JCE. The Statute does not criminalize the membership in any association or organization. The purpose of this International Tribunal is to punish individuals and not to decide on the responsibility of states, organizations or associations. As stated in Nuremberg:

> Crimes against international law are committed by men, not by abstract entities, and only by punishing individuals who commit such crimes can the provisions of international law be enforced.6[70]

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desgerichtshof) held three high-ranking politicians of the former German Democratic Republic responsible as indirect perpetrators for killings of persons at the East German border by border guards (German Federal Supreme Court (Bundesgerichtshof), Judgement of 26 July 1994, *BGHSt*.. 40, pp. 218-240); Argentinean Courts have entered convictions for crimes committed by members of the Junta regime based on indirect perpetratorship (*See* Argentinean National Appeals Court, *Judgement on Human Rights Violations by Former Military Leaders* of 9 December 1985. For a report and translation of the crucial parts of the judgement, *see* 26 ILM (1987), pp. 317-372. The Argentine National Appeals Court found the notion of indirect perpetratorship to be included in Art. 514 of the Argentine Code of Military Justice and in Art. 45 of the Argentine Penal Code. The Argentine Supreme Court upheld this judgement on 30 December 1986). The Expert Opinion gives further examples: In Portugal a law was enacted to address the crimes during the *Estado Novo* which made it possible to convict those organising the crimes "behind the scenes" by relying only on their function and power within the organisational system: Lei n.° 8/75 de 25 Julho de 1975, published in Boletim do Ministério da Justiça N° 249 de Outubro de 1975, p. 684 *et seq*. (cited in Report on Portugal, p. 15). The Spanish Tribunal Supremo employed the notion of "perpetrator behind the perpetrator" in a case dating from 1994: Sentencia Tribunal Supremo núm. 1360/1994 (cited in Report on Spain, p. 15). On a more general note *see C. Roxin*, Täterschaft und Tatherrschaft, 8th ed. (2006), pp. 242 - 252.

[70] International Military Tribunal, Judgement and Sentence of 1 October 1946, Criminals before the International Military Tribunal, Nuremberg, 14 November 1945 – 1 October 1946, Vol. I, p. 223.

Consequently, any idea of collective responsibility, shifting the blame from individuals to associations or organizations and deducing criminal responsibility from membership in such associations or organizations, must be rejected as not only *ultra vires* but also counterproductive to the International Tribunal's mandate of bringing peace and reconciliation to the territory of the former Yugoslavia. It is therefore that I cannot agree with this Judgement when it describes a perpetrator as "a member of a JCE"7[71], when it speaks of "members of a JCE [who] could be held liable for crimes committed by principal perpetrators who were not members of the JCE"8[72] and when it refers to the accused's "fellow members [of the JCE]."9[73] While the Appeals Chamber has in the past explicitly stated that "criminal liability pursuant to a joint criminal enterprise is not a liability for mere membership or for conspiring to commit crimes,"10[74] the constant expansion of the concept of JCE in the jurisprudence of the International Tribunal suggests the contrary. In this context, I recall the report of the Secretary-General of the United Nations, in which he stated that:

> The question arises … whether a juridical person, such as an association or organization, may be considered criminal as such and thus its members, for that reason alone, be made subject to the jurisdiction of the International Tribunal. The Secretary-General believes that this concept should not be retained in regard to the International Tribunal. The criminal acts set out in this statute are carried out by natural persons; such person would be subject to the jurisdiction of the International Tribunal irrespective of membership in groups.11[75]

6. I need not reiterate the fact that the Appeals Chamber of this International Tribunal has unnecessarily and without any reasoning proprio motu discarded internationally accepted definitions of the term committing, such as the concepts of co-perpetration, perpetrator behind the perpetrator or indirect perpetrator, all of them forming part of customary international law13[76] as was held in particular in the most important recent decisions of the International Criminal Court.14[77] Suffice it to say that it is not helpful at all, at this stage of the development of

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[71] Footnote omitted.

[72] Footnote omitted.

[73] Footnote omitted.

[74] *Prosecutor v. Milan Milutinović* Challenging Jurisdiction – Joint Criminal Enterprise, 21 May 2003, para. 26.

[75] The Secretary General, *Report of the Secretary-General pursuant to Paragraph 2 of the Security Council Re808 (1993)*, U.N. Doc S/25704 (3 May 1993), para. 51.

[76] See for a detailed argument: *Prosecutor v. Blagoje Simić*, Case No. IT-95-9-A, Appeal Judgement, Dissenting Opinion of Judge Schomburg, 28 November 2006 and *Sylvestre Gagumbitsi v. The Prosecutor*, Case No. ICTR-2001-64-A, Appeal Judgement, Separate Opinion of Judge Schomburg on the Criminal Responsibility of the Appellant for Committing Genocide, 7 July 2006

[77] Footnote omitted.

international criminal law, that there now exist two competing concepts of commission as a mode of liability. The unambiguous language of both decisions rendered by Pre-Trial Chamber I of the International Criminal Court endorses the concept of co-perpetration when interpreting the word "to commit" under Article 25(3)(a) of the ICC Statute.15[78] For this mode of liability, there can be only one definition in international criminal law.16[79]

7. Furthermore, the Appeals Chamber's constant adjustment of what is encompassed by the notion of JCE17[80] raises serious concerns with regard to the principle of *nullum crimen sine lege*. The lack of an objective element in the so-called third ("extended") category of JCE is particularly worrying. It cannot be sufficient to state that the accused person is liable for any actions by another individual, where "the commission of the crimes … were a natural and foreseeable consequence of a common criminal purpose."18[81] What is missing here is an additional objective component, such as control over the crime,19[82] as would be provided under the concepts of co-perpetration or indirect perpetration. This necessary element of having control over the crime would on the one hand serve as a safeguard to adequately limit the scope of *individual* criminal responsibility, and on the other hand properly distinguish between a principal and an accessory. By contrast, the current shifting definition of the third category of JCE has all the potential of leading to a system, which would impute guilt solely by association.

8. To avoid any misunderstanding: In the present case, based on the sum of all findings of the Trial Chamber, Martić exercised the necessary control over the criminal conduct and was consequently a principal perpetrator of all the crimes for which he was convicted. It is immaterial that he was physically removed from many of the crimes. As was posited by the Jerusalem District Court in the *Eichmann* case:

> In such an enormous and complicated crime as the one we are now considering, wherein many people participated at various levels and in vari-

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[78] *The Prosecutor v. Germain Katanga and Mathieu Ngudjolo Chui*, Case No. ICC-01/04-01/07, Decision on the Confirmation of Charges, 30 September 2008, para. 510. *The Prosecutor v. Thomas Lubanga Dyilo*, Case No. ICC-01/04-01/06, Decision on the Confirmation of Charges, 29 January 2007, para. 338.

[79] Footnote omitted.

[80] See for instance the varying language employed in the *Tadić* Appeal Judgement (paras 204 *et seq*., para. 228), the *Brđanin* Appeal Judgement (paras 410 *et seq*., paras 418 *et seq*.), the *Limaj* Appeal Judgement (para. 119), explicitly limiting the responsibility for crimes committed by members [*sic*] of the JCE, whereas in this Judgement, at para. 171, such limitation is explicitly rejected.

[81] Judgement, para. 171

[82] See *The Prosecutor v. Germain Katanga and Mathieu Ngudjolo Chui*, Case No. ICC-01/04-01/07, Decision on the Confirmation of Charges, 30 September 2008, para. 485 with further exhaustive references.

> ous modes of activity – the planners, the organizers and those executing the acts, according to their various ranks – there is not much point in using the ordinary concepts of counselling and soliciting to commit a crime. For these crimes were committed en masse, not only in regard to the number of the victims, but also in regard to the numbers of those who perpetrated the crime, and the extent to which any one of the many criminals were close to, or remote from, the actual killer of the victim, means nothing as far as the measure of his responsibility is concerned. On the contrary, in general, the degree of responsibility increases as we draw further away from the man who uses the fatal instrument with his own hands and reach the higher ranks of command…20[83]

9. I also note with concern that neither the artificial concept of JCE nor its compartmentalization in three categories has any added value when it comes to sentencing. The decisive element must be in principle the individual contribution of an accused. At times, the incorrect impression is given that the third category of JCE attracts a lower sentence simply because of its catch-all nature. However, in principle, a person's guilt must be described as increasing in tandem with his position in the hierarchy: The higher in rank or further detached the mastermind is from the person who commits a crime with his own hands, the greater is his responsibility.21[84]

4) ***Gacumbitsi v. The Prosecutor*** (Appeal Judgement) ICTR-2001-64-A (7 July 2006), Separate Opinion of **Judge Schomburg** on the Criminal Responsibility of the Appellant for Committing Genocide, paras 19-22, 24-27

"19. Especially the notion of indirect perpetration has been employed in cases concerning organized crime, terrorism, white collar crime or state induced criminality. For example, Argentinean Courts have entered convictions for crimes committed by members of the Junta regime based on indirect perpetratorship.34[85] In one of its leading cases, the *Politbüro* Case, the German Federal Supreme Court

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[83] *Attorney General of Israel v. Adolf Eichmann,* District Court of Jerusalem, Judgement of 12 December 1961, 36 ILR 18 (168), para. 197.

[84] Footnote omitted.

[85] *See* Argentinean National Appeals Court, *Judgement on Human Rights Violations by Former Military Leaders* of 9 December 1985. For a report and translation of the crucial parts of the judgement, see 26 *ILM* (1987), pp. 317-372. The Argentinean National Appeals Court found the notion of indirect perpetratorship to be included in Art. 514 of the Argentinean Code of Military Justice and in Art. 45 of the Argentinean Penal Code. The Argentinean Supreme Court upheld this judgement on 30 December 1986. *See* also K. Ambos and C. Grammer, *Tatherrschaft qua Organisation. Die Verantwortlichkeit der argentinischen Militärführung für den Tod von Elisabeth Käsemann*, in: T. Vormbaum (ed.), 4 Jahrbuch für juristische Zeitgeschichte (2002/2003), pp. 529-553 (official Legal Opinion on the Responsibility of the Argentinean Military Leaders for the Death of Elisabeth Käsemann, commissioned by the (German) Coalition against Impunity). On the (German) Coalition against Impunity, *see* <http://www.fdcl-berlin.de>.

(*Bundesgerichtshof*) held three high-ranking politicians of the former German Democratic Republic responsible as indirect perpetrators for killings of persons at the East German border by border guards.35[86]

20. Modern criminal law has come to apply the notion of indirect perpetration even where the direct and physical perpetrator is criminally responsible ("perpetrator behind the perpetrator").36[87] This is especially relevant if crimes are committed through an organized structure of power in which the direct and physical perpetrator is nothing but a cog in the wheel that can be replaced immediately. Since the identity of the direct and physical perpetrator is irrelevant, the control and, consequently, the main responsibility for the crimes committed shifts to the persons occupying a leading position in such an organized structure of power.37[88] These persons must therefore be regarded as perpetrators irrespective of whether the direct and physical perpetrators are criminally responsible themselves or (under exceptional circumstances) not. This approach was applied, for example, by German courts in cases concerning killings at the East German border: as far as border guards who had killed persons were identified and brought to trial, they were generally convicted as perpetrators. This, however, did not reduce the criminal responsibility of those who had acted "behind the scenes". As the German Federal Supreme Court (*Bundesgerichtshof*) held in the aforementioned *Politbüro* Case:

> [I]n certain groups of cases, however, even though the direct perpetrator has unlimited responsibility for his actions, the contribution by the man behind the scenes almost automatically brings about the constituent elements of the offence intended by that man behind the scenes. Such is the case, for example, when the man behind the scenes takes advantage of certain basic conditions through certain organisational structures, where his contribution to the event sets in motion regular procedures. Such basic conditions with regular procedures are found particularly often among organisational structures of the State […] as well as in hierarchies of command. If the man behind the scenes acts in full awareness of these circumstances, particularly if he exploits the direct perpetrator's unconditional willingness to bring about the constituent elements of the crime, and if he wills the result as that of his own actions, then he is a perpetrator by indirect perpetration. He has control over the action […]. In such cases, failing to treat the man behind the scenes as a perpetrator would not do justice to the significance of his contribution to the crime,

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[86] German Federal Supreme Court (Bundesgerichtshof), Judgement of 26 July 1994, *BGHSt* 40, pp. 218-240.

[87] As indirect perpetratorship focuses on the indirect perpetrator's control over the will of the direct and physical perpetrator, it is sometimes understood to require a particular "defect" on the part of the direct and physical perpetrator which excludes his criminal responsibility.

[88] *See* C. Roxin, *Täterschaft und Tatherrschaft*, 7th edn. (2000), pp. 242 - 252.

especially since responsibility often increases rather than decreases the further one is from the scene of the crime […].38[89]

21. For these reasons, the notion of indirect perpetratorship suits the needs also of international criminal law particularly well.39[90] It is a means to bridge any potential physical distance from the crime scene of persons who must be regarded as main perpetrators because of their overall involvement and control over the crimes committed. This was recognized upon the establishment of the International Criminal Court whose Statute, in Article 25(3)(a), includes both the notion of co-perpetration and indirect perpetration ("perpetrator behind the perpetrator)"... Given the wide acknowledgement of co-perpetratorship and indirect perpetratorship, the ICC Statute does not create new law in this respect, but reflects existing law.

4. DECISIONS RENDERED BY THE ICC TO DISCONTINUE THE USE OF THE CONCEPT OF JCE

*Already in **The Prosecutor v. Lubanga** (Pre-Trial Chamber Decision on the Confirmation of Charges) ICC-01/04-01/06 (29 January 2007) ,*[91] *ICC clearly departs in particular at paras 235 et seq. from the overly subjective concept of JCE.*
*The same Pre-Trial Chamber went on with its in-depth analysis of this mode of liability in **The Prosecutor v. Katanga** et al*. (Pre-Trial Chamber Decision on the Confirmation of Charges) ICC-01/04-01/07 (30 September 2008):
"495. The commission of a crime through another person is a model of criminal responsibility recognised by the world's major legal systems.655[92] The principal (the 'perpetrator-by-means') uses the executor (the direct perpetrator) as a tool

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[89] German Federal Supreme Court (Bundesgerichtshof), Judgement of 26 July 1994, *BGHSt* 40, pp. 218-240, p. 236.

[90] This appears to be acknowledged also by Pre-Trial Chamber I of the International Criminal Court, who stated in a recent decision: In the Chamber's view, there are reasonable grounds to believe that, given the alleged hierarchical relationship between Mr Thomas Lubanga Dyilo and the other members of the UPC and the FPLC, *the concept of indirect perpetration which, along with that of co-perpetration based on joint control of the crime* referred to in the Prosecution's Application, *is provided for in article 25(3) of the Statute*, could be applicable to Mr Thomas Lubanga Dyilo's alleged role in the commission of the crimes set out in the Prosecution's Application. *Prosecutor v. Thomas Lubanga Dyilo*, Decision Concerning Pre-Trial Chamber I's Decision of 10 February 2006 and the Incorporation of Documents into the Record of the Case against Mr. Thomas Lubanga Dyilo, ICC-01/04-01/06, 24 February 2006, Annex I: Decision on the Prosecutor's Application for a Warrant of Arrest, Article 58, para. 96 (emphasis added).

[91] *The Prosecutor v. Lubanga* (Pre-Trial Chamber Decision on the Confirmation of Charges) ICC-01/04-01/06 (29 January 2007), paras 322-367.

[92] See FLETCHER, O.P., Rethinking Criminal Law, New York, Oxford University Press, 2000, p. 639; WERLE, G., "Individual criminal responsibility under Article 25 of the Rome Statute", 5 J. Int'l Criminal Justice 963 (2007).

or an instrument for the commission of the crime. Typically, the executor who is being used as a mere instrument will not be fully criminally responsible for his actions.656[93] As such, his innocence will depend upon the availability of acceptable justifications and/or excuses for his actions. Acceptable justifications and excuses include the person's: i) having acted under a mistaken belief; ii) acted under duress; and/or iii) not having the capacity for blameworthiness.

496. A concept has developed in legal doctrine that acknowledges the possibility that a person who acts through another may be individually criminally responsible, regardless of whether the executor (the direct perpetrator) is also responsible. This doctrine is based on the early works of Claus Roxin and is identified by the term: 'perpetrator behind the perpetrator' (Täter hinter dem Täter).657[94]

497. The underlying rationale of this model of criminal responsibility is that the perpetrator behind the perpetrator is responsible because he controls the will of the direct perpetrator. As such, in some scenarios it is possible for both perpetrators to be criminally liable as principals: the direct perpetrator for his fulfilment of the subjective and objective elements of the crime, and the perpetrator behind the perpetrator for his control over the crime via his control over the will of the direct perpetrator.

498. Several groups of cases have been presented as examples for the perpetrator behind the perpetrator's being assigned principal responsibility despite the existence of a responsible, direct perpetrator (i.e., one whose actions are not exculpated by mistake, duress, or the lack of capacity for blame-worthiness).658[95] This notwithstanding, the cases most relevant to international criminal law are those in which the perpetrator behind the perpetrator commits the crime through another by means of "control over an organisation" (Organisationsherrschaft).659[96]"

a. Control over the organisation

500. For the purposes of this Decision, the control over the crime approach is predicated on a notion of a principal's "control over the organisation". The Chamber relies on this notion of "control over the organisation" for numerous reasons,

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[93] AMBOS, K., "Article 25: Individual Criminal Responsibility", in TRIFFTERER, O. (Ed.), Commentary on the Rome Statute of the International Criminal Court, Baden-Baden, Nomos, 1999, p. 479; JIMENEZ DE ASÜA, L., Lecciones de Derecho Penal, México, Colección Clâsicos del Derecho, 1995, p. 337.

[94] ROXIN, C., „Straftaten im Rahmen organisatorischer Machtapparate", Goltdammer's Archiv für Strafrecht(\963\pp. 193-207.

[95] Such scenarios include, inter alia, cases in which the perpetrator behind the perpetrator commits a crime through the direct perpetrator by misleading the latter about the seriousness of the crime; the qualifying circumstances of the crime; and/or the identity of the victim. See STRATENWERTH, G. & KUHLEN L., Strafrecht, Allgemeiner Teil I, 5th ed., Köln, Heymanns, 2004, § 12/59-67; ROXIN, C., Strafrecht, Allgemeiner Teil II, München, C.H. Beck, 2003, § 25/94-104.

[96] ROXIN, C., „Straftaten im Rahmen organisatorischer Machtapparate", Goltdammer's Archiv für Strafrecht (1963), pp. 193-207; AMBOS, K., La parte general del derecho penal internacional, Montevideo, Ternis, 2005, p. 240.

including the following: (i) it has been incorporated into the framework of the Statute; (ii) it has been increasingly used in national jurisdictions; and (iii) it has been addressed in the jurisprudence of the international tribunals. Such notion has also been endorsed in the jurisprudence of Pre-Trial Chamber III of this Court.

506. This doctrine has also been applied in international criminal law in the jurisprudence of the international tribunals.672[97] In The Prosecutor v. Milomir Stakić Judgement, Trial Chamber II of the ICTY relied on the liability theory of coperpetration of a crime through another person as a way to avoid the inconsistencies of applying the so-called "Joint Criminal Enterprise" theory of criminal liability to senior leaders and commanders.673[98]

507. As noted by the Defence for Germain Katanga,674[99] the Trial Chamber's Judgement was overturned on appeal. However, the reasoning of the ICTY Appeals Chamber's Judgement is of utmost importance to an understanding of why the impugned decision does not obviate its validity as a mode of liability under the Rome Statute.

508. The Appeals Chamber rejected this mode of liability by stating that it did not form part of customary international law.675[100] However, under article 21(l)(a) of the Statute, the first source of applicable law is the Statute. Principles and rules of international law constitute a secondary source applicable only when the statutory material fails to prescribe a legal solution. Therefore, and since the Rome Statute expressly provides for this specific mode of liability, the question as to whether customary law admits or discards the 'joint commission through another person' is not relevant for this Court. This is a good example of the need not to transfer the ad hoc tribunals' case law mechanically to the system of the Court.676[101]

509. Finally, most recently, the Pre-Trial Chamber III of the Court also endorsed this notion of individual criminal responsibility in the case of The Prosecutor v. Jean-Pierre Bemba Gombo. Having established the suspect's position as the leader of the organisation and described the functioning of the militia, the Pre-Trial Chamber III stated:

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[97] ICTR, *Prosecutor v. Gacumbitsi,* Case No. ICTR-2001-64-A, Appeals Judgement, "separate opinion of Judge Schomburg", 7 July 2006, paras 14-22; ICTY, *The Prosecutor v. Milomor Stakić*, Case No. IT-97-24-T, Judgement, 31 July 2003, paras 439 et seq.; paras 741 et seq. According to AMBOS, K., Internationales Strafrecht, München Beck 2006, §7/29, its principles are to be recognized in the Nuremberg's jurisprudence. United States of America v. Alstotter et al. ("The Justice Case"), 3 T.W.C. 1 (1948), 6 L.R.T.W.C. 1 (1948), 14 Ann. Dig. 278 (1948).

[98] ICTY) *The Prosecutor v Milomir Stakić*, Case No. IT-97-24-T, Trial Judgement, 31 July 2003, para. 439, 741 [rest omitted].

[99] ICC-01/04-01/07-698, para. 26.

[100] Footnote omitted.

[101] WERLE, G., "Individual Criminal Responsibility in Article 25 ICC Statute", 5 J. Int'l Criminal Justice 953 (2007), pp. 961-962: "the ICC Statute must be seen on its own as an independent set of rules. Hence, a mechanical transfer of the ad hoc tribunals' case law is definitely not the correct approach; WERLE, G., Volkerstrafrecht, 2nd ed., Tübingen, Mohr Siebeck, 2007, paras 425 et seq.

> In light of the foregoing, the Chamber considers that there are reasonable grounds to believe that, as a result of his authority over his military organisation, Mr. [...] had the means to exercise control over the crimes committed by MLC troops deployed in the CAR.677[102]

510. In sum, the acceptance of the notion of 'control over an organised apparatus of power' in modern legal doctrine,678[103] its recognition in national jurisdictions,679[104] its discussion in the jurisprudence of the ad hoc tribunals which, as demonstrated, should be distinguished from its application before this Court, its endorsement in the jurisprudence of the Pre-Trial Chamber III of the International Criminal Court but, most importantly, its incorporation into the legal

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[102] ICC-01/05-01/08-14-tENG, para. 78.

[103] SANCINETTI, M., Teoria del delito y disvalor de action • una investigación sobre las consecuencias prâcticas de un concepto personal de ilicito circunscripto al disvalor de action, Buenos Aires, Hammurabi, 1991, pp. 712 et seq.; SANCINETTI, M., Derechos humanos en la Argentina post dictatorial, Buenos Aires, Lea, 1988, pp. 27 et seq.; SANCINETTI, M. & FERRANTE, M., El derecho pénal en la protection de los derechos humanos, Buenos Aires,Hammurabi, 1999, p. 313; BACIGALUPO, E., Principios de Derecho Pénal, Parte General, Buenos Aires, Hammurabi, 1987, p. 334; AMBOS, K., La parte general del derecho penal international, Montevideo, Ternis, 2005, pp. 216-240; AMBOS, K., Internationales Strafrecht, München, Beck, 2006, §§ 7/29 et seq.; STRATEN WERTH, G. & KUHLEN, L., Strafrecht, Allgemeiner Teil I, 5* ed., Köln, Heymanns, 2004, § 12/65 et seq.; KÜHL, K., Strafrecht, Allgemeiner Teil, 4th ed., München, Vahlen, 2002, § 20/73 et seq.; WESSELS, J. & BEULKE, W., Strafrecht, Allgemeiner Teil, 36th ed., Heidelberg, Müller, 2006, n. 541; ROXIN, C., „Straftaten im Rahmen organisatorischer Machtapparate", Goltdammer's Archiv für Strafrecht (1963), pp. 193-207; ROXIN, C., Taterschaft und Tatherrschaft, 8th ed., Berlin, De Gruyter, 2006, pp. 248 et seq.; ROXIN, C., „Organistionsherrschaft und Tatentschlossenheit", 7 Zeitschrift für Internationale Strafrechtsdogmatik (2006), p. 294; ROXIN, C., „Anmerkungen zum Vortrag von Prof. Herzberg", in AMELUNG, K. (Ed.), Individuelle Verantwortung und Beteiligungsverhaltnisse bei Straftaten in bürokratischen Organisationen des Staates, der Wirtschaft und der Gesellschaft, Sinzheim, Pro Universitate, 2000, pp. 55 et seq.; HERZBERG, R.D., Täterschaft und Teilnahme, München, Beck, 1977, pp. 42 et seq.; HIRSCH, H., Rechtsstaatliches Strafrecht und staatlich gesteuertes Unrecht, Opladen, Westdeutscher Verlag. 1996, pp. 22-23; BLOY, R., „Grenzen der Täterschaft bei fremdhändiger Tatausfuhrung", Goltdammer's Archiv fur Strafrecht (1996), pp. 425-442; SCHÖNKE, A. & SCHRÖDER, H., Kommentar zum Strafgesetzbuch, 26* ed., München, Beck, 2001, § 25/25a; TRÖNDLE, H. & FISCHER, T., Strafgesetzbuch, Kommentar, 53rd ed., München, Beck, 2006, § 25/7; KÜPPER, G., „Zur Abgrenzung der Täterschaftsformen", Goltdammer's Archiv für Strafrecht (1998), p. 524; SCHLÖSSER, J., Soziale Tatherrschaft, Berlin, Duncker und Humblot, 2004, p. 145 et seq.; RADTKE, H., „Mittelbare Täterschaft kraft Organisationsherrschaft im nationalen und internationalen Strafrecht", Goltdammer ,s Archiv für Strafrecht (2006), pp. 350 et seq.

[104] Federal Supreme Court of Germany, BGHSt 40, 218, at pp. 236 et seq.; 45, 270 at p. 296; BGHSt 47, 100; BGHSt 37, 106; BGH NJW 1998, 767 at p. 769. The Federal Appeals Chamber of Argentina, The Juntas Trial, Case No. 13/84, chap. 7/5. Judgement of the Supreme Court of Justice of Peru, Case No. 5385-200. 14 December 2007. Supreme Court of Chile (investigating magistrate), Fallos de Mes, ano XXXV, noviembre de 1993, 12 November 1993; Supreme Tribunal of Spain,, penal chamber, Case No. 12966/1994,2 July 1994 (Judge Bacigalupo). National Court of Spain, Central investigating tribunal No. 5, 29 March 2006

framework of the Court, present a compelling case for the Chamber's allowing this approach to criminal liability for the purposes of this Decision."

521. Co-perpetration based on joint control over the crime involves the division of essential tasks between two or more persons, acting in a concerted manner, for the purposes of committing that crime. As explained, the fulfilment of the essential task(s) can be carried out by the co-perpetrators physically or they may be executed through another person."

a. Existence of an agreement or common plan between two or more persons

522. In the view of the Chamber, the first objective requirement of co-perpetration based on joint control over the crime is the existence of an agreement or common plan between the persons who physically carry out the elements of the crime or between those who carry out the elements of the crime through another individual. Participation in the crimes committed by the latter without coordination with one's co-perpetrators falls outside the scope of co-perpetration within the meaning of article 25(3)(a) of the Statute.

523. As explained in the Lubanga Decision, the common plan must include the commission of a crime.687[105] Furthermore, the Chamber considered that the agreement need not be explicit, and that its existence can be inferred from the subsequent concerted action of the co-perpetrators.688[106]

b. Coordinated essential contribution by each co-perpetrator resulting in the realisation of the objective elements of the crime

524. The Chamber considers that the second objective requirement of co-perpetration based on joint control over the crime is the coordinated essential contribution made by each co-perpetrator resulting in the realisation of the objective elements of the crime.

525. When the objective elements of an offence are carried out by a plurality of persons acting within the framework of a common plan, only those to whom essential tasks have been assigned - and who, consequently, have the power to frustrate the commission of the crime by not performing their tasks - can be said to have joint control over the crime. Where such persons commit the crimes through others, their essential contribution may consist of activating the mechanisms which lead to the automatic compliance with their orders and, thus, the commission of the crimes.

526. Although some authors have linked the essential character of a task – and hence, the ability to exercise joint control over the crime - to its performance at the execution stage,689[107] the Statute does not encompasses any such restric-

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[105] ICC-01/04-01/06-803-OEN, para. 344.

[106] ICC-01/04-01/06-803-tEN, para. 345.

[107] ROX1N, C., Täterschaft und Tatherrschaft, 8th ed., Berlin, De Gruyter, 2006, pp. 292 et seq. According to ROXIN, those who contribute only to the commission of a crime at the preparatory stage cannot be described as co-perpetrators even if they carry out tasks with a view to imple-

tion. Designing the attack, supplying weapons and ammunitions, exercising the power to move the previously recruited and trained troops to the fields; and/or coordinating and monitoring the activities of those troops, may constitute contributions that must be considered essential regardless of when are they exercised (before or during the execution stage of the crime).

*This jurisprudence was accepted and further fine-tuned in **The Prosecutor v. Bemba** (Pre-Trial Chamber Decision on the Confirmation of Charges) ICC-01/05-01/08 (15 June 2009), there in particular at paras 350-353, 369-371. Space available does not allow to go into further details even though a careful reading of all these three decisions (Lubanga, Katanga, Bemba) is more than warranted.*

However, it has to be observed that in the first decision ever delivered by a trial chamber of the ICC (**Lubanga-Verdict**[108] of March 2012**)** it was only the majority that, convincingly, upheld this approach. The British Judge Fulford, for whatever reasons, felt obliged, to express his preferences for another "interpretation" of "committing", thus departing from the underlying statutory norms. May be the underlying intent is to pave the way for a new kind of JCE, knowing that with a view to the settled jurisprudence and careful analysis of the ECCC (see below V 2) on this basis at least the third extended category can no longer be accepted as being beyond reasonable doubt part of customary international law.

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menting the common plan. This point of view is shared by MIR PUIG, S., Derecho Penal, Parte General, Editorial Reppertor, 6* ed., Barcelona, Editorial Reppertor, 2000, p. 385; HERZEBERG, R.D.,Täterschaft und Teilnahme. , München, Beck, 1977, pp. 65 et seq.: KÖHLER, M., Strafrecht Allgemeiner Teil, Berlin, Springer, 1997, p. 518. However, many other authors do not share this point of view. See inter alia: MUNOZ CONDE, F., "Dominio de la voluntad en virtud de aparatos organizados en organizaciones no desvinculadas del Derecho", 6 Revista Penal (2000), p. 113;PEREZ CEPEDA, A., "Criminalidad en la empresa: problemas de autoria y participación", 9 Revista Penal (2002), p. 106 et seq; JESCHECK, H. & WE1GEND, T., Lehrbuch des Strafrechts, Allgemeiner Teil, 5th ed., Berlin, Duncker und Humblot, 1996, p. 680; KÜHL K., Strafrecht Allgemeiner Teil, 2nd ed., München, Vahlen, 1997, p. 111 ; KINDHÄUSER, U., Strafgesetzbuch, Lehr- und Praxiskommentar, Baden-Baden, Nomos, 2002, para. 25, No. 38.

[108] ICC-01/04-01/06 The Prosecutor v. Thomas Lubanga Dyilo. The verdict was rendered by Trial Chamber I, composed of Judge Adrian Fulford (United Kingdom), as Presiding Judge, Judge Elizabeth Odio Benito (Costa Rica) and Judge René Blattmann (Bolivia). Although the first two judges have written separate and dissenting opinions on some issues, the verdict was unanimous.

5. THE UNEXPECTED REVIVAL OF THE JCE CONCEPT BY HYBRID/INTERNATIONALIZED TRIBUNALS

1) Special Court/Sierra Leone

Prosecutor v. Sesay, Kallon and Gbao (Appeal Judgement), SCSL-04-15-A (26 October 2009), paras 400-402, 475, 485

"400. Based on the legal authorities and reasoning provided for these holdings, and considering that they have been consistently affirmed by the subsequent jurisprudence of both the ICTY and the ICTR,975[109] the Appeals Chamber is satisfied that the holdings reflect customary international law at the time the crimes in the present case were committed, and on that basis endorses them. Kallon's submission that JCE liability cannot attach for crimes committed by principal perpetrators who are not proven to be members of the JCE is therefore dismissed.

401. Kallon fails to develop whether, and if so how, the above holdings in *Brđanin* are contrary to his position that the accused must be shown to have participated "causally" in at least one element of the *actus reus* by the principal perpetrator.976[110] Although the accused's participation in the JCE need not be a *sine qua non*, without which the crimes could or would not have been committed,977[111] it must at least be a significant contribution to the crimes for which the accused is to be found responsible.978[112] As *Brđanin* makes clear, this standard applies also where the accused participates in the JCE by way of using non-JCE members to commit crimes in furtherance of the common purpose.979[113]

402. Lastly, Kallon's submission that the *Brđanin* holdings are inapplicable in the present case is based on the premise that the Common Criminal Purpose found by the Trial Chamber was not inherently criminal. As that premise is erroneous, this submission fails.980[114]

475. At issue here are primarily the mens rea elements for JCE 1 and JCE 3. Under JCE 1, also known as the "basic" form of JCE, liability attaches where the accused intended the commission of the crime in question and intended to participate in a common plan aimed at its commission.1235[115] In other words, JCE 1 liability attaches to crimes within the common criminal purpose.1236[116] By contrast, JCE 3 liability attaches to crimes which are *not* part of the common crimi-

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[109] *Martić* Appeal Judgment, paras 168-169; *Limaj et al*. Appeal Judgment, para. 120; *Krajišnik* Appeal Judgment, paras 225-226; *Milutinović et al*. Trial Judgment, Vol. I, paras 98, 99; *Zigiranyirazo* Trial Judgment, para. 384.

[110] *Kallon* Appeal, para. 48.

[111] *Kvočka et al*. Appeal Judgment, para. 98; *Tadić* Appeal Judgment paras 191, 199.

[112] *Krajišnik* Appeal Judgment, para. 675; *Brđanin* Appeal Judgment, para. 430.

[113] *Brđanin* Appeal Judgment, para. 430.

[114] *See supra*, para. 305.

[115] *Brđanin* Appeal Judgment, para. 365.

[116] *Brđanin* Appeal Judgment, para. 418; *Martić* Appeal Judgment, para. 82.

nal purpose.1237[117] That is why it is often referred to as the "extended" form of JCE.1238[118] However, before an accused person can occur JCE 3 liability, he must be shown to have possessed "the *intention* to participate in and further the criminal activity or the criminal purpose of a group."1239[119] Therefore, both JCE 1 and JCE 3 require the existence of a common criminal purpose which must be shared by the members of the JCE, including in particular the accused.1240[120] Where that initial requirement is met, JCE 3 liability can attach to crimes outside the common criminal purpose committed by members of the JCE or by non-JCE perpetrators used by members of the JCE if it was reasonably foreseeable to the accused that a crime outside the common criminal purpose might be perpetrated by other members of the group in the execution of the common criminal purpose and that the accused willingly took that risk (*dolus eventualis*).1241[121]

485. The Trial Chamber defined the Common Criminal Purpose of the JCE as consisting of the objective to gain and exercise political power and control over the territory of Sierra Leone, in particular the diamond mining areas, and the crimes as charged under Counts 1 to 14 as the means of achieving that objective.1252[122] The Trial Chamber further found that Gbao was a "participant" in the JCE.1253[123] The Appeals Chamber, Justices Winter and Fisher dissenting, considers that in consequence Gbao, as with the other participants of the JCE, would be liable for all crimes which were a natural and foreseeable consequence of putting into effect that criminal purpose."

Consequently we can conclude with two other dissenters the author applauds to:

Prosecutor v. Sesay, Kallon and Gbao (Appeal Judgement), SCSL-04-15-A (26 October 2009)**, Partially Dissenting and Concurring Opinion of Justice Shireen Avis Fisher, paras 17-19, 26, 44-45 (President Judge Winter insofar concurring)**

"17. In affirming Gbao's convictions under JCE, the Majority adopts the Trial Chamber's circular reasoning, but compounds the Trial Chamber's error by collapsing the distinction between JCE 1 and JCE 3. The Majority reasons that it

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117 *See e.g., Stakić* Appeal Judgment, para. 87.

118 *See e.g., Kvočka et al*. Appeal Judgment, para. 83.

119 *Tadić* Appeal Judgment, para. 228.

120 See e.g. *Stakić* Appeal Judgment, paras 85, 86 (establishing that a common criminal purpose existed and that the accused shared its intent and participated in it, before moving on to assess whether the accused could be held liable under JCE 3 for "crimes beyond the scope of that enterprise").

121 *Brđanin* Appeal Judgement, para 365; *Stakić* Appeal Judgment, para. 87; *Tadić* Appeal Judgment, para. 228; *Kvočka et al*. Appeal Judgment, para. 83. The Appeals Chamber recalls that it is not decisive whether these fellow JCE members carried out the actus reus of the crimes themselves or used principal perpetrators who did not share the common purpose. See supra, paras. 393-455.

122 Trial Judgment, paras 1979-1985; *see supra*, para. 305

123 Trial Judgment, para. 1990.

was sufficient for the Trial Chamber to conclude that Gbao was a "participant" in the JCE and therefore shared the Common Criminal Purpose.27[124] By virtue of that conclusion, the Majority reasons, he is responsible for all crimes by members of the JCE that either he intended or were reasonably foreseeable.28[125] Therefore, according to the Majority's reasoning, it matters not whether Gbao intended the crimes in Bo, Kenema and Kono;29[126] given that he was "a member of the JCE," he was liable for the commission of "the crimes in Bo, Kenema and Kono Districts, which were within the Common Criminal Purpose," so long as it was "reasonably foreseeable that some of the members of the JCE or persons under their control would commit crimes."30[127]

18. This reasoning is not only circular, but dangerous. First, describing Gbao as a "participant" under this theory is mistaken because whether or not he was a "participant" is only significant if it means that he shared the common intent of the JCE, that is, the Common Criminal Purpose. The Trial Chamber's findings, unquestioned, and indeed quoted by the Majority, state unequivocally that he did not.31[128]

19. Second, the Majority collapses the distinction between the *mens rea* required for JCE 1 and the *mens rea* applicable to JCE 3 by holding that Gbao can be liable for crimes *within* the Common Criminal Purpose that he did not intend and that were only reasonably foreseeable to him. Such an extension of JCE liability blatantly violates the principle *nullum crimen sine lege* because it imposes criminal responsibility without legal support in customary international law applicable at the time of the commission of the offence. The Majority makes no effort to reason why it considers that this extension of JCE liability was part of the law to which Gbao was subject at the time these offences were committed and it fails to cite a single case in which this extension of liability is recognized as part of customary international law. This dearth of jurisprudential support was acknowledged by the Prosecution which admitted at the Appeal Hearing that there "may be no authority" in international criminal law in which the *mens rea* element for JCE is characterized or applied as the Trial Chamber applied it to Gbao.32[129]"

"26. The Trial Chamber's error with respect to Gbao's *mens rea* is not simply a harmless mistake that can be rectified or overlooked on appeal. Rather, because of this error, the entire legal edifice the Trial Chamber and Majority have constructed for Gbao's JCE liability is so fundamentally flawed that those convictions which rest upon it collapse."

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[124] Appeal Judgment, paras 486, 492.
[125] Appeal Judgment, paras 485, 492.
[126] Appeal Judgment, paras 492, 493.
[127] Appeal Judgment, para. 493.
[128] Appeal Judgment, paras 488-491.
[129] Footnote omitted.

" 44. In concluding, I am obliged to note that the doctrine of JCE, since its articulation by the ICTY Appeals Chamber in *Tadić*, has drawn criticism for its potentially overreaching application. International criminal tribunals must take such warnings seriously,59[130] and ensure that the strictly construed legal elements of JCE are consistently applied60[131] to safeguard against JCE being overreaching or lapsing into guilt by association.61[132]
45. For Gbao, the Trial Chamber and the Majority have abandoned the safeguards laid down by other tribunals as reflective of customary international law. As a result, Gbao stands convicted of committing crimes which he did not intend, to which he did not significantly contribute, and which were not a reasonably foreseeable consequence of the crimes he did intend. The Majority's decision to uphold these convictions is regrettable. I can only hope that the primary significance of that decision will be as a reminder of the burden resting on triers of fact applying JCE, and as a warning of the unfortunate consequences that ensue when they fail to carry that burden."

2) Extraordinary Chambers in the Courts of Cambodia (ECCC)
On 20 May 2010 the intense debate on the applicability of the doctrine of Joint Criminal Enterprise (JCE)[133],[134]) before the ECCC[135] found an interim result in a first decision rendered by the Pre-Trial Chamber.[136] This decision is admirable in its thorough analysis of some post WW II decisions. In the view of the ECCC Pre-Trial Chamber JCE III was not recognized as a form of responsibility applicable to violations of international humanitarian law at the time relevant to the case before it and thus not to be applied by the court in regard to international crimes.[137] It bases this finding on a critical scrutiny of the authorities relied upon

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[130] *See e.g. Brđanin* Appeal Judgment, para. 426; *Krajišnik* Appeal Judgment, paras 657-659, 670, 671; *Krajišnik* Appeal Judgment, Separate Opinion of Judge Shahabuddeen; *Milutinović et al*. Decision on Jurisdiction- JCE, paras 24-26; *Rwamakuba* JCE Decision.
[131] *Krajišnik* Appeal Judgment, para. 671.
[132] *Brđanin* Appeal Judgment, paras 426-431.
[133] An abbreviation not intended to mean "Just Convict Everyone" as interpreted by some scholars. Cf. e.g. *Badar, M. E.* „Just Convict Everyone!" – Joint Perpetration: From *Tadić* to *Stakić* and Back Again, 6 International Criminal Law Review (2006), pp.293 et seq., quoting the father of the cynical remark, Bill Schabas.
[134] Cf. e.g. *Badar, M. E.* „Just Convict Everyone!" – Joint Perpetration: From *Tadić* to *Stakić* and Back Again, 6 International Criminal Law Review (2006), pp.293 et seq., quoting Bill Schabas
[135] Extraordinary Chambers in the Courts of Cambodia.
[136] ECCC/Pre-Trial Chamber, Decision on the Appeals against the Co-Investigative Judges Order on Joint Criminal Enterprise (JCE), Case File No: 002/19-09-2007-ECCC/OCIJ (20 May 2010) [ECCC Decision].
[137] ECCC Decision, *supra* n. 4, para. 77.

by ICTY[138] in Tadić[139], the mother judgement on JCE in international criminal law. Firstly, the Pre-Trial Chamber finds no support for the existence of JCE III as customary international law in the international instruments referred to in Tadić.[140] As to the international case law, the Pre-Trial Chamber refuses to rely upon cases such as Borkum Island and Essen Lynching as these lacked reasoned judgements.[141] The national case law relied upon in Tadić in turn is, in the view of the Pre-Trial Chamber, not to be considered as representing proper precedents for the purpose of determining the status of customary law as these do not amount to international case law.[142] Moreover, the Pre-Trial Chamber, while turning to consider the possible existence of general principals of law in support of JCE III, takes the view that it did not need to decide whether a number of national systems representative of the world's major legal systems recognised a standard of mens rea analogous to the one in JCE III as it was not satisfied that such liability was foreseeable to the charged persons in 1975-1979.[143] In such circumstances, the Pre-Trial Chamber correctly and unanimously concludes, "the principle of legality requires the ECCC to refrain from relying on the extended form of JCE in its proceedings."[144] In a later decisions of the ECCC this approach and the detailed analysis of post WW II jurisprudence was upheld and even fine-tuned.

6. CONCLUSIONS

The doctrine of Joint Criminal Enterprise has its origin in the first judgment ever handed down by an Appeal Chamber of an independent impartial international criminal court not established by the winners of a war. The authors apparently were eager to set the tone and the standard for a not yet existing general part of international crimes. However, neither legally nor factually it was necessary to depart from the strict wording of the ICTY-Statute. The Tadić-case as such did not call for this academic exercise. The intent, no doubt, was good. The goal was to develop a catch all mode of liability abolishing "impunity" in macro-criminality in humanitarian law during times of an armed conflict based on customary international law for the time to come. Something for eternity. In doing so and writing obiter at length the judges went beyond their mandate in the case before them. They did not show the necessary self-restraint. Customary international law and the need to observe, in the framework of Article 15 ICCPR, the principle

138 International Criminal Tribunal for the former Yugoslavia.
139 *Prosecutor v. Tadić* (Appeal Judgment) IT-94-1 (15 July 1999).
140 ECCC Decision, *supra* n. 4, para. 78.
141 ECCC Decision, *supra* n. 4, para. 79-81.
142 ECCC Decision, *supra* n. 4, para. 82.
143 ECCC Decision, *supra* n. 4, para. 87.
144 ECCC Decision, *supra* n. 4, para. 87.

of *nullum crimen sine lege stricta* is like cat and dog. There is the wishful thinking[145] that something "must be punishable", a phrase often heard in legal discussions, and the limitation of both, the wording of binding statutory law, and the dictate not to create retroactively new criminal law. The baby JCE was born. It was and is under the permanent control of the parents, judges of ICTY and ICTR. I am convinced that until today's date no harm was done to any perpetrator before ICTY/ICTR due to the application of the JCE doctrine. On the contrary, as shown above, based on JCE the criminal conduct of a perpetrator was trivialized in a few cases from committing to aiding and abetting, sometimes (*Seromba*) corrected by the Appeals Chamber. The Appeals Chambers of ICTY/ICTR maintained control over the act (Tatherrschaft) in that the majority of judges were eager to maintain this doctrine, always prepared to adjust the doctrine to the needs of a concrete case. However, some jurisprudence hybrid tribunals show that a child grows and becomes independent from parental control. The foreseeable and predicted risk emanating from the vagueness of the third category of JCE has found its realization at least in part in the final conviction of the accused *Gboa* before the SC/SL has convincingly shown by the dissenting judges. This may never happen again. The lesson to be learned is that judges should never yield to the temptation to act as kind of legislator and when only developing the law with legitimate "judicial creativity" they must act with the highest degree of scrutiny always envisaging: what can be in a worst case scenario the result, how can an exaggerated interpretation or application be avoided when a doctrine is no longer subject to own control. We should applaud the mothers and fathers of the Rome-Statute. It shows that a well drafted general part of a code of criminal procedure (with the sufficient time, which was not available for the skeleton Statutes of ICTY and later ICTR) is able to meet the challenges of today's macro criminality. At the end of the day the strict modes of liability and responsibility as laid down there and carefully applied by the acting judges will be the only surviving account in International Criminal Law, immaterial of how they are labelled: Perpetratorship in all its variants or, superfluous but exactly encompassing the same, JCE I or II. No doubt international criminal law will prevail based on a humble, patient but self-confident step by step approach taking also respectfully into account the individual specificities of the area of responsibility, if only they do not militate against the common goal: to achieve peace by justice and to try to achieve justice by finding the truth as far as possible. There is no truth without justice, no justice without truth! And, finally, there will be no peace, if, by way of neo-colonialism, a new judicial system and new substantive law will be imposed by whomsoever against the will of the democratically elected legislator.

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[145] *Simma, B./Alston, P.* in this context refer to a quote by John Humphrey who observed that "human rights lawyers are notoriously wishful thinkers." *Simma, B./Alston, P.*, The Sources of Human Rights Law: Custom, Jus Cogens, and General Principles, 12 Aust. YBIL 82 (84) (1988-1989).