UNITED NATIONS

	International Tribunal for the Prosecution of Persons Responsible for Serious Violations of International Humanitarian Law Committed in the Territory of the Former Yugoslavia since 1991	Case No.: IT-94-1-A Date: 15 July 1999 Original: English

IN THE APPEALS CHAMBER

Before: **Judge Mohamed Shahabuddeen, Presiding**
Judge Antonio Cassese
Judge Wang Tieya
Judge Rafael Nieto-Navia
Judge Florence Ndepele Mwachande Mumba

Registrar: **Mrs. Dorothee de Sampayo Garrido-Nijgh**

Judgement of: **15 July 1999**

PROSECUTOR

v.

DU[KO TADI]

JUDGEMENT

The Office of the Prosecutor:

Mr. Upawansa Yapa
Ms. Brenda J. Hollis
Mr. William Fenrick
Mr. Michael Keegan
Ms. Ann Sutherland

Counsel for the Appellant:

Mr. William Clegg
Mr. John Livingston

Jaski}i could have been the "unauthorized and unforeseen act of one of the force that entered Sivci".

2. The Individual Criminal Responsibility of the Appellant for the Killings

(a) Article 7(1) of the Statute and the Notion of Common Purpose

185. The question therefore arises whether under international criminal law the Appellant can be held criminally responsible for the killing of the five men from Jaski}i even though there is no evidence that he personally killed any of them. The two central issues are:

(i) whether the acts of one person can give rise to the criminal culpability of another where both participate in the execution of a common criminal plan; and

(ii) what degree of *mens rea* is required in such a case.

186. The basic assumption must be that in international law as much as in national systems, the foundation of criminal responsibility is the principle of personal culpability: nobody may be held criminally responsible for acts or transactions in which he has not personally engaged or in some other way participated (*nulla poena sine culpa*). In national legal systems this principle is laid down in Constitutions,[228] in laws,[229] or in judicial decisions.[230] In international criminal law the principle is laid down, *inter alia,* in Article 7(1) of the Statute of the International Tribunal which states 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. (emphasis added)

This provision is aptly explained by the Report of the Secretary-General on the establishment of the International Tribunal, which states the following:

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[228] An example is provided by Article 27 para. 1 of the Italian Constitution ("*La responsibilità penale è personale."* ("Criminal responsibility is personal.") (unofficial translation)).

[229] *See* for instance Article 121-1 of the French *Code pénal* ("*Nul n'est responsable pénalement que de son propre fait*"), para. 4 of the Austrian *Strafgesetzbuch* ("*Strafbar ist nur, wer schuldhaft handelt"* ("Only he who is culpable may be punished") (unofficial translation)).

[230] This rather basic proposition is usually tacitly assumed rather than explicitly acknowledged. For an example of where it was expressly stated, however, *see*, for Great Britain, *R. v. Dalloway* (1847) 3 Cox CC 273. *See* also the various decisions of the German Constitutional Court, e.g., BverfGE 6, 389 (439) and 50, 125 (133), as well as decisions of the German Federal Court of Justice (e.g., BGHSt 2, 194 (200)).

> An important element in relation to the competence *ratione personae* (personal jurisdiction) of the International Tribunal is the *principle of individual criminal responsibility*. As noted above, the Security Council has reaffirmed in a number of resolutions that persons committing serious violations of international humanitarian law in the former Yugoslavia are individually responsible for such violations.[231]

Article 7(1) also sets out the parameters of personal criminal responsibility under the Statute. Any act falling under one of the five categories contained in the provision may entail the criminal responsibility of the perpetrator or whoever has participated in the crime in one of the ways specified in the same provision of the Statute.

187. Bearing in mind the preceding general propositions, it must be ascertained whether criminal responsibility for participating in a common criminal purpose falls within the ambit of Article 7(1) of the Statute.

188. This provision covers first and foremost the physical perpetration of a crime by the offender himself, or the culpable omission of an act that was mandated by a rule of criminal law. However, the commission of one of the crimes envisaged in Articles 2, 3, 4 or 5 of the Statute might also occur through participation in the realisation of a common design or purpose.

189. An interpretation of the Statute based on its object and purpose leads to the conclusion that the Statute intends to extend the jurisdiction of the International Tribunal to *all* those "responsible for serious violations of international humanitarian law" committed in the former Yugoslavia (Article 1). As is apparent from the wording of both Article 7(1) and the provisions setting forth the crimes over which the International Tribunal has jurisdiction (Articles 2 to 5), such responsibility for serious violations of international humanitarian law is not limited merely to those who actually carry out the *actus reus* of the enumerated crimes but appears to extend also to other offenders (see in particular Article 2, which refers to committing or *ordering* to be committed grave breaches of the Geneva Conventions and Article 4 which sets forth various types of offences in relation to genocide, including *conspiracy*, *incitement*, *attempt* and *complicity*).

[231] *Report of the Secretary-General Pursuant to Paragraph 2 of Security Council Resolution 808 (1993)*, U.N. Doc. S/25704, 3 May 1993 ("Report of the Secretary-General"), para. 53 (emphasis added).

190. It should be noted that this notion is spelled out in the Secretary General's Report, according to which:

> The Secretary-General believes that *all* persons who *participate* in the planning, preparation or execution of serious violations of international humanitarian law in the former Yugoslavia are individually responsible for such violations.[232]

Thus, all those who have engaged in serious violations of international humanitarian law, whatever the manner in which they may have perpetrated, or participated in the perpetration of those violations, must be brought to justice. If this is so, it is fair to conclude that the Statute does not confine itself to providing for jurisdiction over those persons who plan, instigate, order, physically perpetrate a crime or otherwise aid and abet in its planning, preparation or execution. The Statute does not stop there. It does not exclude those modes of participating in the commission of crimes which occur where several persons having a common purpose embark on criminal activity that is then carried out either jointly or by some members of this plurality of persons. Whoever contributes to the commission of crimes by the group of persons or some members of the group, in execution of a common criminal purpose, may be held to be criminally liable, subject to certain conditions, which are specified below.

191. The above interpretation is not only dictated by the object and purpose of the Statute but is also warranted by the very nature of many international crimes which are committed most commonly in wartime situations. Most of the time these crimes do not result from the criminal propensity of single individuals but constitute manifestations of collective criminality: the crimes are often carried out by groups of individuals acting in pursuance of a common criminal design. Although only some members of the group may physically perpetrate the criminal act (murder, extermination, wanton destruction of cities, towns or villages, etc.), the participation and contribution of the other members of the group is often vital in facilitating the commission of the offence in question. It follows that the moral gravity of such participation is often no less – or indeed no different – from that of those actually carrying out the acts in question.

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

[232] *Ibid.*, para 54 (emphasis added).

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.

193. This interpretation, based on the Statute and the inherent characteristics of many crimes perpetrated in wartime, warrants the conclusion that international criminal responsibility embraces actions perpetrated by a collectivity of persons in furtherance of a common criminal design. It may also be noted that – as will be mentioned below – international criminal rules on common purpose are substantially rooted in, and to a large extent reflect, the position taken by many States of the world in their national legal systems.

194. However, the Tribunal's Statute does not specify (either expressly or by implication) the objective and subjective elements (*actus reus* and *mens rea*) of this category of collective criminality. To identify these elements one must turn to customary international law. Customary rules on this matter are discernible on the basis of various elements: chiefly case law and a few instances of international legislation.

195. Many post-World War II cases concerning war crimes proceed upon the principle that when two or more persons act together to further a common criminal purpose, offences perpetrated by any of them may entail the criminal liability of all the members of the group. Close scrutiny of the relevant case law shows that broadly speaking, the notion of common purpose encompasses three distinct categories of collective criminality.

196. The first such category is represented by cases where all co-defendants, acting pursuant to a common design, possess the same criminal intention; for instance, the formulation of a plan among the co-perpetrators to kill, where, in effecting this common design (and even if each co-perpetrator carries out a different role within it), they nevertheless all possess the intent to kill. The objective and subjective prerequisites for imputing criminal responsibility to a participant who did not, or cannot be proven to have, effected the killing are as follows: (i) the accused must voluntarily participate in one aspect of the common design (for instance, by inflicting non-fatal violence upon the victim, or by providing material assistance to or facilitating the activities of his co-perpetrators); and (ii) the accused, even if not personally effecting the killing, must nevertheless intend this result.

197. With regard to this category, reference can be made to the *Georg Otto Sandrock et al.* case (also known as the *Almelo Trial*).[233] There a British court found that three Germans who had killed a British prisoner of war were guilty under the doctrine of "common enterprise". It was clear that they all had had the intention of killing the British soldier, although each of them played a different role. They therefore were all co-perpetrators of the crime of murder.[234] Similarly, in the *Hoelzer et al.* case, brought before a Canadian military court, in his summing up the Judge Advocate spoke of a "common enterprise" with regard to the murder of a Canadian prisoner of war by three Germans, and emphasised that the three all knew that the purpose of taking the Canadian to a particular area was to kill him.[235]

198. Another instance of co-perpetratorship of this nature is provided by the case of *Jepsen and others.*[236] A British court had to pronounce upon the responsibility of Jepsen (one of several accused) for the deaths of concentration camp internees who, in the few weeks leading up to the capitulation of Germany in 1945, were in transit to another concentration camp. In this regard, the Prosecutor submitted (and this was not rebutted by the Judge Advocate) that:

> [I]f Jepsen was joining in this voluntary slaughter of eighty or so people, helping the others by doing his share of killing, the whole eighty odd deaths can be laid at his door and at the door of any single man who was in any way assisting in that act.[237]

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[233] *Trial of Otto Sandrock and three others*, British Military Court for the Trial of War Criminals, held at the Court House, Almelo, Holland, on 24th-26th November, 1945, UNWCC, vol. I, p. 35).

[234] The accused were German non-commissioned officers who had executed a British prisoner of war and a Dutch civilian in the house of whom the British airman was hiding. On the occasion of each execution one of the Germans had fired the lethal shot, another had given the order and a third had remained by the car used to go to a wood on the outskirts of the Dutch town of Almelo, to prevent people from coming near while the shooting took place. The Prosecutor stated that "the analogy which seemed to him most fitting in this case was that of a gangster crime, every member of the gang being equally responsible with the man who fired the actual shot" (*ibid.,* p. 37). In his summing up the Judge Advocate pointed out that:

> "There is no dispute, as I understand it, that all three [Germans] knew what they were doing and had gone there for the very purpose of having this officer killed; and, as you know, if people are all present together at the same time taking part in a common enterprise which is unlawful, each one in their (*sic*) own way assisting the common purpose of all, they are all equally guilty in point of law" (*see* official transcript, Public Record Office, London, WO 235/8, p. 70; copy on file with the International Tribunal's Library; the report in the UNWCC, vol. I, p. 40 is slightly different).

All the accused were found guilty, but those who had ordered the shooting or carried out the shooting were sentenced to death, whereas the others were sentenced to fifteen years imprisonment (*ibid.*, p. 41).

[235] *Hoelzer et al.,* Canadian Military Court, Aurich, Germany, Record of Proceedings 25 March-6 April 1946, vol. I, pp. 341, 347, 349 (RCAF Binder 181.009 (D2474); copy on file with the International Tribunal's Library).

[236] *Trial of Gustav Alfred Jepsen and others, Proceedings of a War Crimes Trial held at Luneberg, Germany* (13-23 August, 1946), judgement of 24 August 1946 (original transcripts in Public Record Office, Kew, Richmond; on file with the International Tribunal's Library).

[237] *Ibid.,* p. 241.

In a similar vein, the Judge Advocate noted in *Schonfeld* that:

> if several persons combine for an unlawful purpose or for a lawful purpose to be effected by unlawful means, and one of them in carrying out that purpose, kills a man, it is murder in all who are present […] provided that the death was caused by a member of the party in the course of his endeavours to effect the common object of the assembly.[238]

199. It can be noted that some cases appear broadly to link the notion of common purpose to that of causation. In this regard, the *Ponzano* case,[239] which concerned the killing of four British prisoners of war in violation of the rules of warfare, can be mentioned. Here, the Judge Advocate adopted the approach suggested by the Prosecutor,[240] and stressed:

> [...] the requirement that an accused, before he can be found guilty, must have been concerned in the offence. [T]o be concerned in the commission of a criminal offence […] does not only mean that you are the person who in fact inflicted the fatal injury and directly caused death, be it by shooting or by any other violent means; it also means an indirect degree of participation […]. [I]n other words, he must be the cog in the wheel of events leading up to the result which in fact occurred. He can further that object not only by giving orders for a criminal offence to be committed, but he can further that object by a variety of other means […].[241]

Further on, the Judge Advocate submitted that while the defendant's involvement in the criminal acts must form a link in the chain of causation, it was not necessary that his participation be a *sine qua non*, or that the offence would not have occurred but for his participation.[242] Consonant with the twin requirements of criminal responsibility under this category, however, the Judge Advocate stressed the necessity of knowledge on the part of the accused as to the intended purpose of the criminal enterprise.[243]

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[238] *Trial of Franz Schonfeld and others,* British Military Court, Essen, June 11th-26th, 1946, UNWCC, vol. XI, p. 68 (summing up of the Judge Advocate).

[239] *Trial of Feurstein and others*, Proceedings of a War Crimes Trial held at Hamburg, Germany (4-24 August, 1948), judgement of 24 August 1948 (original transcripts in Public Record Office, Kew, Richmond; on file with the International Tribunal's Library).

[240] The Prosecutor had stated the following:

> "It is an opening principle of English law, and indeed of all law, that a man is responsible for his acts and is taken to intend the natural and normal consequences of his acts and if these men […] set the machinery in motion by which the four men were shot, then they are guilty of the crime of killing these men. It does not – it never has been essential for any one of these men to have taken those soldiers out themselves and to have personally executed them or personally dispatched them. That is not at all necessary; all that is necessary to make them responsible is that they set the machinery in motion which ended in the volleys that killed the four men we are concerned with" (*ibid.,* p. 4).

[241] *Ibid.,* summing up of the Judge Advocate, p. 7.

[242] In this regard, the Judge Advocate noted that: "[o]f course, it is quite possible that it [the criminal offence] might have taken place in the absence of all these accused here, but that does not mean the same thing as saying […] that [the accused] could not be a chain in the link of causation […]" (*ibid.,* pp. 7-8).

[243] In particular, it was held that in order to be "concerned in the commission of a criminal offence," it was necessary to prove:

200. A final case worthy of mention with regard to this first category is the *Einsatzgruppen* case.[244] With regard to common design, a United States Tribunal sitting at Nuremberg noted that:

> the elementary principle must be borne in mind that neither under Control Council Law No. 10 nor under any known system of criminal law is guilt for murder confined to the man who pulls the trigger or buries the corpse. In line with recognized principles common to all civilized legal systems, paragraph 2 of Article II of Control Council Law No. 10 specifies a number of types of connection with crime which are sufficient to establish guilt. Thus, not only are principals guilty but also accessories, those who take a consenting part in the commission of crime or are connected with plans or enterprises involved in its commission, those who order or abet crime, and those who belong to an organization or group engaged in the commission of crime. These provisions embody no harsh or novel principles of criminal responsibility [...].[245]

"that when he did take part in it he knew the intended purpose of it. If any accused were to have given an order for this execution, believing that it was a perfectly legal execution, that these four soldiers had been sentenced to death by a properly constituted court and that therefore an order for the execution was no more than an order to carry out the decision of the court, then that accused would not be guilty because he would not have any guilty knowledge. But where [...] a person was in fact concerned, and [...] he knew the intended purpose of these acts, then that accused is guilty of the offence in the charge" (*ibid.,* p. 8).

The requisite knowledge of each participant, even if deducible only by implication, was also stressed in the *Stalag Luft III* case*, Trial of Max Ernst Friedrich Gustav Wielen and Others,* Proceedings of the Military Court at Hamburg, (1-3 July 1947) (original transcripts in Public Record Office, Kew, Richmond; on file with the International Tribunal's Library), which concerned the killing of fifty officers of the allied air force who had escaped from the Stalag Luft III camp in Silesia. The Prosecutor in his opening remarks stressed that:

"everybody, particularly every policeman of whatever sort it may be, knew quite well that there had been a mass escape of prisoners of war on the 25th March 1944 [...] [such] that every policeman knew that prisoners of war were at large. I think that is important to remember, and particularly with regard to some of the minor members of the Gestapo who are charged before you that is important to remember because they may say they did not know who these people were. They may say they did not know they were escaped prisoners of war but [in fact] they all knew [...]" (*ibid.,* p. 276).

Furthermore, in two cases concerning an accused's participation in the *Kristallnacht* riots, the Supreme Court for the British zone stressed that it was not required that the accused knew about the rioting in the entire *Reich*. It was sufficient that he was aware of the local action, that he approved it, and that he wanted it "as his own" (unofficial translation). The fact that the accused participated consciously in the arbitrary measures directed against the Jews was sufficient to hold him responsible for a crime against humanity (Case no. 66, Strafsenat. Urteil vom 8 Februar 1949 gegen S. StS 120/48, p. 284-290, 286, vol. II). *See* also Case no. 17, vol. I, 94-98, 96, where the Supreme Court held that it was irrelevant that the scale of ill-treatment, deportation and destruction that happened in other parts of the country on that night were not undertaken in this village. It sufficed that the accused participated intentionally in the action and that he was "not unaware of the fact that the local action was a measure designed to instil terror which formed a part of the nation-wide persecution of the Jews" (unofficial translation).

[244] *The United States of America v. Otto Ohlenforf et al., Trials of War Criminals before the Nuremberg Military Tribunals under Control Council Law No. 10*, United States Government Printing Office, Washington, 1951, vol. IV, p. 3.

[245] The tribunal went on to say:

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

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 Italian[246] and German[247] cases.

202. The second distinct category of cases is in many respects similar to that set forth above, and embraces the so-called "concentration camp" cases. The notion of common purpose was applied to instances where the offences charged were alleged to have been committed by members of military or administrative units such as those running concentration camps; i.e., by groups of persons acting pursuant to a concerted plan. Cases illustrative of this category are *Dachau Concentration Camp,*[248] decided by a United States court sitting in Germany and *Belsen,*[249] decided by a British military court sitting in Germany. In these cases the accused held some position of authority within the hierarchy of

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brandish a cutlass. The man who stands at the door of a bank and scans the environs may appear to be the most peaceable of citizens, but if his purpose is to warn his robber confederates inside the bank of the approach of the police, his guilt is clear enough. And if we assume, for the purposes of argument, that the defendants such as Schubert and Graf have succeeded in establishing that their role was an auxiliary one, they are still in no better position than the cook or the robbers' watchman" (*ibid*., p. 373; emphasis added).

In this connection, the tribunal also addressed the contention that certain of the commanders did not participate directly in the crimes committed, noting that:

"[w]ith respect to the defendants such as Jost and Naumann, […] it is […] highly probable that these defendants did not, at least very often, participate personally in executions. And it would indeed be strange had they ?who were persons in authorityg done so. […] Far from being a defense or even a circumstance in mitigation, the fact that ?these defendantsg did not personally shoot a great many people, but rather devoted themselves to directing the over-all operations of the *Einsatzgruppen*, only serves to establish their deeper responsibility for the crimes of the men under their command" (*ibid.*).

[246] *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.

[247] *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.

[248] *Trial of Martin Gottfried Weiss and thirty-nine others*, General Military Government Court of the United States Zone, Dachau, Germany, 15th November-13th December, 1945, UNWCC, vol. XI, p. 5.

[249] *Trial of Josef Kramer and 44 others*, British Military Court, Luneberg, 17th September-17th November, 1945, UNWCC, vol. II, p. 1.

the concentration camps. Generally speaking, the charges against them were that they had acted in pursuance of a common design to kill or mistreat prisoners and hence to commit war crimes.[250] In his summing up in the *Belsen* case, the Judge Advocate adopted the three requirements identified by the Prosecution as necessary to establish guilt in each case: (i) the existence of an organised system to ill-treat the detainees and commit the various crimes alleged; (ii) the accused's awareness of the nature of the system; and (iii) the fact that the accused in some way actively participated in enforcing the system, i.e., encouraged, aided and abetted or in any case participated in the realisation of the common criminal design.[251] The convictions of several of the accused appear to have been explicitly based upon these criteria.[252]

203. This category of cases (which obviously is not applicable to the facts of the present case) is really a variant of the first category, considered above. The accused, when they were found guilty, were regarded as co-perpetrators of the crimes of ill-treatment, because of their objective "position of authority" within the concentration camp system and because they had "the power to look after the inmates and make their life satisfactory"[253] but failed to do so.[254] It would seem that in these cases the required *actus reus* was the active

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[250] *See Dachau Concentration Camp* case, UNWCC, vol. XI, p. 14:

> "It seems, therefore, that what runs throughout the whole of this case, like a thread, is this: that there was in the camp a general system of cruelties and murders of the inmates (most of whom were allied nationals) and that this system was practised with the knowledge of the accused, who were members of the staff, and with their active participation. Such a course of conduct, then, was held by the court in this case to constitute 'acting in pursuance of a common design to violate the laws and usages of war'. Everybody who took any part in such common design was held guilty of a war crime, though the nature and extent of the participation may vary".

[251] The Judge Advocate summarised with approval the legal argument of the Prosecutor in the following terms:

> "The case for the Prosecution is that all the accused employed on the staff at Auschwitz knew that a system and a course of conduct was in force, and that, in one way or another in furtherance of a common agreement to run the camp in a brutal way, all those people were taking part in that course of conduct. They asked the Court not to treat the individual acts which might be proved merely as offences committed by themselves, but also as evidence clearly indicating that the particular offender was acting willingly as a party in the furtherance of this system. They suggested that if the Court were satisfied that they were doing so, then they must, each and every one of them, assume responsibility for what happened." (*Belsen* case, UNWCC, vol. II, p. 121.)

[252] In particular, the accused Kramer appears to have been convicted on this basis. (*See ibid.,* p. 121: "The Judge Advocate reminded the Court that when they considered the question of guilt and responsibility, the strongest case must surely be against Kramer, and then down the list of accused *according to the positions they held*." (emphasis added).

[253] *Ibid.,* p.121.

[254] In a similar vein, the *Case against R. Mulka et al.* ("*Auschwitz concentration camp* case") can be mentioned. Although the court reached the same result, it nevertheless did not apply the doctrine of common design but instead tended to treat the defendants as aiders and abettors as long as they remained within the framework provided by their orders and as principal offenders if they acted outside this framework. This meant that if it could not be proved that the accused actually identified himself with the aims of the Nazi

participation in the enforcement of a system of repression, as it could be inferred from the position of authority and the specific functions held by each accused. The *mens rea* element comprised: (i) knowledge of the nature of the system and (ii) the intent to further the common concerted design to ill-treat inmates. It is important to note that, in these cases, the requisite intent could also be inferred from the position of authority held by the camp personnel. Indeed, it was scarcely necessary to prove intent where the individual's high rank or authority would have, in and of itself, indicated an awareness of the common design and an intent to participate therein. All those convicted were found guilty of the war crime of ill-treatment, although of course the penalty varied according to the degree of participation of each accused in the commission of the war crime.

204. The third category concerns cases involving a common design to pursue one course of conduct where one of the perpetrators commits an act which, while outside the common design, was nevertheless a natural and foreseeable consequence of the effecting of that common purpose. An example of this would be a common, shared intention on the part of a group to forcibly remove members of one ethnicity from their town, village or region (to effect "ethnic cleansing") with the consequence that, in the course of doing so, one or more of the victims is shot and killed. While murder may not have been explicitly acknowledged to be part of the common design, it was nevertheless foreseeable that the forcible removal of civilians at gunpoint might well result in the deaths of one or more of those civilians. Criminal responsibility may be imputed to all participants within the common enterprise where the risk of death occurring was both a predictable consequence of the execution of the common design and the accused was either reckless or indifferent to that risk. Another example is that of a common plan to forcibly evict civilians belonging to a particular ethnic group by burning their houses; if some of the participants in the plan, in carrying out this

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regime, then the court would treat him as an aider and abettor because he lacked the specific intent to "want the offence as his own" (*see* in particular the *Bundesgerichtshof* in *Justiz und NS-Verbrechen,* vol. XXI, pp. 838 *ff.*, and especially pp. 881 *ff*). The BGH stated, p. 882:

> "[The view] that everybody who had been involved in the destruction program of the [KZ] Auschwitz and acted in any manner whatsoever in connection with this program participated in the murders and is responsible for all that happened is not correct. It would mean that even acts which did not further the main offence in any concrete manner would be punishable. In consequence even the physician who was in charge of taking care of the guard personnel and who restricted himself to doing only that, would be guilty of aiding and abetting murder. The same would even apply to the doctor who treated prisoners in the camp and saved their lives. Not even those who in their place put little obstacles in the

plan, kill civilians by setting their houses on fire, all the other participants in the plan are criminally responsible for the killing if these deaths were predictable.

205. The case-law in this category has concerned first of all cases of mob violence, that is, situations of disorder where multiple offenders act out a common purpose, where each of them commit offences against the victim, but where it is unknown or impossible to ascertain exactly which acts were carried out by which perpetrator, or when the causal link between each act and the eventual harm caused to the victims is similarly indeterminate. Cases illustrative of this category are *Essen Lynching* and *Borkum Island.*

206. As is set forth in more detail below, the requirements which are established by these authorities are two-fold: that of a criminal intention to participate in a common criminal design and the foreseeability that criminal acts other than those envisaged in the common criminal design are likely to be committed by other participants in the common design.

207. The *Essen Lynching* (also called *Essen West*) case was brought before a British military court, although, as was stated by the court, it "was not a trial under English law".[255] Given the importance of this case, it is worth reviewing it at some length. Three British prisoners of war had been lynched by a mob of Germans in the town of Essen-West on 13 December 1944. Seven persons (two servicemen and five civilians) were charged with committing a war crime in that they were concerned in the killing of the three prisoners of war. They included a German captain, Heyer, who had placed the three British airmen under the escort of a German soldier who was to take the prisoners to a *Luftwaffe* unit for interrogation. While the escort with the prisoners was leaving, the captain had ordered that the escort should not interfere if German civilians should molest the prisoners, adding that they ought to be shot, or would be shot. This order had been given to the escort from the steps of the barracks in a loud voice so that the crowd, which had gathered, could hear and would know exactly what was going to take place. According to the summary given by the United Nations War Crimes Commission:

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way of this program of murder, albeit in a subordinate position and without success, would escape punishment. That cannot be right." (unofficial translation).

[255] *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.

> [w]hen the prisoners of war were marched through one of the main streets of Essen, the crowd around grew bigger, started hitting them and throwing sticks and stones at them. An unknown German corporal actually fired a revolver at one of the airmen and wounded him in the head. When they reached the bridge, the airmen were eventually thrown over the parapet of the bridge; one of the airmen was killed by the fall; the others were not dead when they landed, but were killed by shots from the bridge and by members of the crowd who beat and kicked them to death.[256]

208. The Defence laid stress on the need to prove that each of the accused had the intent to kill. The Prosecution took a contrary view. Major Tayleur, the Prosecutor, stated the following:

> My friend [the Defence Counsel] has spoken to you about the intent which is necessary and he says that no evidence of intent to kill has been brought before you. In my submission there has been considerable evidence of intent to kill; but even if there were not, in my submission *to prove this charge you do not have to prove an intent to kill*. If you prove an intent to kill you would prove murder; but you can have an unlawful killing, which would be manslaughter, where there is *not an intent to kill but merely the doing of an unlawful act of violence*. A person might slap another's face with no intent to kill at all but if through some misfortune, for example that person having a weak skull, that person died, in my submission the person striking the blow would be guilty of manslaughter and that would be such killing as would come within the words of this charge. In my submission therefore what you have to be satisfied of – and the onus of proof is of course on the prosecution – is that *each and everyone of the accused, before you can convict him, was concerned in the killing* of these three unidentified airmen in circumstances which the British law would have amounted to either murder or manslaughter.[257]

The Prosecutor then went on to add:

> the allegation of the prosecution is that every person who, following the incitement to the crowd to murder these men, voluntarily took aggressive action against any one of these three airmen *is guilty in that he is concerned in the killing.* It is impossible to separate any one of these from another; they all make up what is known as lynching. In my submission from the moment they left those barracks those men were doomed and the crowd knew they were doomed and *every person in that crowd who struck a blow is both morally and criminally responsible for the deaths of those three men*.[258]

Since Heyer was convicted, it may be assumed that the court accepted the Prosecution arguments as to the criminal liability of Heyer (no Judge Advocate had been appointed in this case). As for the soldier escorting the airmen, he had a duty not only to prevent the prisoners from escaping but also of seeing that they were not molested; he was sentenced to imprisonment for five years (even though the Prosecutor had suggested that he was not criminally liable). According to the Report of the United Nations War Crimes Commission,

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[256] *Ibid.*, p. 89.
[257] *See* transcript in Public Record Office, London, WO 235/58, p. 65 (emphasis added; copy on file with the International Tribunal's Library).
[258] *Ibid.*, p. 66 (emphasis added).

three civilians "were found guilty [of murder] because every one of them had in one form or another taken part in the ill-treatment which eventually led to the death of the victims, though against none of the accused had it been exactly proved that they had individually shot nor given the blows which caused the death".[259]

209. It would seem warranted to infer from the arguments of the parties and the verdict that the court upheld the notion that all the accused who were found guilty took part, in various degrees, in the killing; not all of them intended to kill but all intended to participate in the unlawful ill-treatment of the prisoners of war. Nevertheless they were all found guilty of murder, because they were all "concerned in the killing". The inference seems therefore justified that the court assumed that the convicted persons who simply struck a blow or implicitly incited the murder could have foreseen that others would kill the prisoners; hence they too were found guilty of murder.[260]

210. A similar position was taken by a United States military court in *Kurt Goebell et al.* (also called the *Borkum Island* case). On 4 August 1944, a United States Flying Fortress was forced down on the German island of Borkum. Its seven crew members were taken prisoner and then forced to march, under military guard, through the streets of Borkum. They were first made to pass between members of the Reich's Labour Corps, who beat them with shovels, upon the order of a German officer of the *Reichsarbeitsdienst.* They were then struck by civilians on the street. Later on, while passing through another street, the mayor of Borkum shouted at them inciting the mob to kill them "like dogs". They were

[259] UNWCC, vol. 1, p. 91. In addition to Heyer and the escort (Koenen), three civilians were also convicted. The first of the accused civilians, Boddenberg, admitted to have struck one of the airmen on the bridge, after one of them had already been thrown over the bridge, knowing "that the motives of the crowd against them [the airmen] were deadly, and yet he joined in" (Transcript in Public Record Office, London, WO 235/58, p. 67; copy on file with International Tribunal's Library); the second, Kaufer, was found to have "beaten the airmen" and taken "an active part" in the mob violence against them. Additionally, it was alleged that he tried to pull the rifle away from a subordinate officer to shoot the airmen below the bridge and that he called out words to the effect that the airmen deserved to be shot (*ibid.,* pp. 67-68). The third, Braschoss, was seen hitting one of the airmen on the bridge, descending beneath the bridge to throw the airman, who was still alive, into the stream. He and an accomplice were further alleged to have thrown another of the airmen from the bridge (*ibid.,* p. 68). Two of the accused civilians, Sambol and Hartung, were acquitted; the former because the blows he was alleged to have inflicted were neither particularly severe nor proximate to the airmen's death (comprising one of the earliest to be inflicted) and the latter because it was not proved beyond reasonable doubt that he actually took part in the affray (*ibid.,* pp. 66-67, UNWCC, vol. I, p. 91).

[260] The charge, in a strict legal sense, was the commission of a war crime in violation of the laws and usages of war for being "concerned in the killing" of the airmen rather than murder as this was "not a trial under English law" (*ibid.,* at p. 91). For all intents and purposes, however, the charge appeared to be treated as a murder charge, as it appeared to have been accepted in the course of the proceedings that "as long as everyone realised

then beaten by civilians while the escorting guards, far from protecting them, fostered the assault and took part in the beating. When the airmen reached the city hall one was shot and killed by a German soldier, followed by the others a few minutes later, all shot by German soldiers. The accused included a few senior officers, some privates, the mayor of Borkum, some policemen, a civilian and the leader of the Reich Labour Corps. All were charged with war crimes, in particular both with "wilfully, deliberately and wrongfully encourag[ing], aid[ing], abett[ing] and participat[ing] in the killing" of the airmen and with "wilfully, deliberately and wrongfully encourag[ing], aid[ing], abett[ing] and participat[ing] in assaults upon" the airmen.[261] In his opening statement the Prosecutor developed the doctrine of common design. He stated the following:

> [I]t is important, as I see it, to determine the guilt of each of these accused in the light of the particular role that each one played. *They did not all participate in exactly the same manner*. Members of mobs seldom do. One will undertake one special or particular action and another will perform another particular action. It is the composite of the actions of all that results in the commission of the crime. Now, all legal authorities agree that where a common design of a mob exists and the mob has carried out its purpose, then no distinction can be drawn between the finger man and the trigger man *(sic). No distinction is drawn between the one who, by his acts, caused the victims to be subjected to the pleasure of the mob or the one who incited the mob, or the ones who dealt the fatal blows.* This rule of law and common sense must, of necessity, be so. Otherwise, many of the true instigators of crime would never be punished.
>
> Who can tell which particular act was the most responsible for the final shooting of these flyers? Can it not be truly said that any one of the acts of any one of these accused may have been the very act that produced the ultimate result? Although the ultimate act might have been something in which the former actor did not directly participate [, e]very time a member of a mob takes any action that is inclined to encourage, that is inclined to give heart to someone else who is present, to participate, then that person has lent his aid to the accomplishment of the final result.[262]

In short, noted the Prosecutor, the accused were "cogs in the wheel of common design, all equally important, each cog doing the part assigned to it. And the wheel of wholesale murder could not turn without all the cogs".[263] As a consequence, according to the Prosecutor, if it were proved beyond a reasonable doubt "that each one of these accused

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what was meant by the word 'murder' for the purposes of this trial, [there …] was ?nog difficulty" (*ibid.,* pp. 91-92).

[261] *See* Charge Sheet, in U.S. National Archives Microfilm Publications, I (on file with the International Tribunal's Library).

[262] *Ibid.,* p. 1186 (emphasis added). *See* also p. 1187.

[263] *Ibid.,* p. 1188. *See*, further note 240 and accompanying text, with regard to the comments made regarding causation in the *Ponzano* case.

played *his part* in mob violence which led to the unlawful killing of the seven American flyers, […] under the law *each and every one of the accused* [*was*] *guilty of murder"*.[264]

211. It bears emphasising that by taking the approach just summarised, the Prosecutor substantially propounded a doctrine of common purpose which presupposes that all the participants in the common purpose shared the same criminal intent, namely, to commit murder. In other words, the Prosecutor adhered to the doctrine of common purpose mentioned above with regard to the first category of cases. It is interesting to note that the various defence counsel denied the applicability of this common design doctrine, not, however, on principle, but merely on the facts of the case. For instance, some denied the existence of a criminal intent to participate in the common design, claiming that mere presence was not sufficient for the determination of the intent to take part in the killings.[265] Other defence counsel claimed that there was no evidence that there was a conspiracy among the German officers,[266] or they argued that, if there had been such a plot, it did not involve the killing of the airmen.[267]

212. In this case too, no Judge Advocate stated the law. However, it may be fairly assumed that in the event, the court upheld the common design doctrine, but in a different form, for it found some defendants guilty of both the killing and assault charges[268] while others were only found guilty of assault.[269]

213. It may be inferred from this case that all the accused found guilty were held responsible for pursuing a criminal common design, the intent being to assault the prisoners of war. However, some of them were also found guilty of murder, even where there was no evidence that they had actually killed the prisoners. Presumably, this was on the basis that the accused, whether by virtue of their status, role or conduct, were in a position to have predicted that the assault would lead to the killing of the victims by some of those participating in the assault.

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[264] *Ibid.,* p. 1190 (emphasis added). *See* also pp. 1191-1194.
[265] *See* e.g. *ibid.,* pp. 1201, 1203-1206.
[266] *See ibid.,* pp. 1234, 1241, 1243.
[267] *See ibid.,* pp. 1268-1270.
[268] The accused Akkerman, Krolikovski, Schmitz, Wentzel, Seiler and Goebbel were all found guilty on both the killing and assault charges and were sentenced to death, with the exception of Krolikovski, who was sentenced to life imprisonment (*ibid.,* pp. 1280-1286).
[269] The accused Pointner, Witzke, Geyer, Albrecht, Weber, Rommel, Mammenga and Heinemann were found guilty only of assault and received terms of imprisonment ranging between 2 and 25 years (*ibid.*).

214. Mention must now be made of some cases brought before Italian courts after World War II concerning war crimes committed either by civilians or by military personnel belonging to the armed forces of the so-called *"Repubblica Sociale Italiana"* ("RSI"), a *de facto* government under German control established by the Fascist leadership in central and northern Italy, following the declaration of war by Italy against Germany on 13 October 1943. After the war several persons were brought to trial for crimes committed between 1943 and 1945 against prisoners of war, Italian partisans or members of the Italian army fighting against the Germans and the RSI. Some of these trials concerned the question of criminal culpability for acts perpetrated by groups of persons where only one member of the group had actually committed the crime.

215. In *D'Ottavio et al.*, on appeal from the Assize Court of Teramo, the Court of Cassation on 12 March 1947 pronounced upon one of these cases. Some armed civilians had given unlawful pursuit to two prisoners of war who had escaped from a concentration camp, in order to capture them. One member of the group had shot at the prisoners without intending to kill them, but one had been wounded and had subsequently died as a result. The trial court held that all the other members of the group were accountable not only for "illegal restraint" (*sequestro di persona*) but also for manslaughter (*omicidio preterintenzionale*). The Court of Cassation upheld this finding. It held that for this type of criminal liability to arise, it was necessary that there exist not only a material but also a psychological "causal nexus" between the result all the members of the group intended to bring about and the different actions carried out by an individual member of that group. The court went on to point out that:

> [i]ndeed the responsibility of the participant (*concorrente*) […] is not founded on the notion of objective responsibility […], but on the fundamental principle of the concurrence of interdependent causes […]; by virtue of this principle all the participants are accountable for the crime both where they directly cause it and where they indirectly cause it, in keeping with the well-known canon *causa causae est causa causati*.[270]

[270] *See* handwritten text of the (unpublished) judgement, p. 6 (unofficial translation; kindly provided by the Italian Public Record Office, Rome; on file with the International Tribunal's Library). *See* also *Giustizia penale,* 1948, Part II, col. 66, no. 71 (containing a headnote on the judgement).

The court then noted that in the case at issue:

> [t]here existed a nexus of material causality, as all the participants had directly cooperated in the crime of attempted "illegal restraint" […] by surrounding and pursuing two prisoners of war on the run, armed with a gun and a rifle, with a view to illegally capturing them. This crime was the indirect cause of a subsequent and different event, namely the shooting (by d'Ottavio alone) at one of the fugitives, resulting in wounding followed by death. Furthermore, there existed psychological causality, as all the participants had the intent to perpetrate and knowledge of the actual perpetration of an attempted illegal restraint, *and foresaw the possible commission of a different crime*. This *foresight* (*previsione*) necessarily followed from the use of weapons: it being predictable (*dovendo prevedersi*) that one of the participants might shoot at the fugitives to attain the common purpose (*lo scopo comune*) of capturing them.[271]

216. In another case (*Aratano et al.*) the Court of Cassation dealt with the following circumstances: a group of RSI militiamen had planned to arrest some partisans, without intending to kill them; however, to frighten the partisans, one of the militiamen fired a few shots into the air. As a result the partisans shot back; a shoot-out ensued and in the event one of the partisans was killed by a member of the RSI militia. The court held that the trial court had erred in convicting all members of the militia of murder. In its view, as the trial court had found that the militiamen had not intended to kill the partisans:

> [I]t was clear that [the murder of one of the partisans] was an unintended event (*evento non voluto*) and consequently could not be attributed to all the participants: the crime committed was more serious than that intended and it proves necessary to resort to categories other than that of voluntary homicide. This Supreme Court has already had the opportunity to state the same principle, where it noted that in order to find a person responsible for a homicide perpetrated in the course of a mopping-up operation carried out by many persons, it was necessary to establish that, in participating in this operation, a voluntary activity also concerning homicide had been brought into being (*fosse stata spiegata un'attività volontaria in relazione anche all'omicidio*) (judgement of 27 August 1947 *in re: Beraschi*).[272]

217. Other cases relate to the applicability of the amnesty law passed by the Presidential Decree of 22 June 1946 no. 4. The amnesty applied among other things to crimes of "collaboration with the occupying Germans" but excluded offences involving murder. In *Tossani* the question was whether the law on amnesty covered a person who had taken part in a mopping-up operation against civilians in the course of which a German soldier had killed a partisan. The Court of Cassation found that the amnesty should apply. It emphasised that the appellant participating in the operation had not taken any active part in it and did not carry weapons; in addition, the killing was found to have been "an exceptional and

[271] *See* handwritten text of the (unpublished) judgement, pp. 6-7 (unofficial translation; emphasis added).
[272] *See* handwritten text of the (unpublished) judgement, pp. 13-14 (kindly provided by the Italian Public Record Office, Rome; on file with the International Tribunal's Library). For a headnote on this case *see Archivio penale,* 1949, p. 472.

unforeseen (*imprevisto*) event", for during a search a civilian had escaped to avoid being detained and had been shot at by the German soldier.[273] A similar position was taken by the same court in *Ferrida*. The appellant had participated, "only in his capacity as a nurse," in a mopping-up operation in the course of which some partisans had been killed. The court found that he was not guilty of murder; the law on amnesty was therefore applicable to him.[274] In *Bonati et al.* the appellant argued that the crime of murder, not envisaged by the group of persons concerned, had been perpetrated by another member of that group. The Court of Cassation rejected the appeal, holding that the appellant was also guilty of murder. Although this crime was more grave than that intended by some of the participants (*concorrenti*), it "was in any case a consequence, albeit indirect, of his participation".[275]

218. In these cases courts indisputably applied the notion that a person may be held criminally responsible for a crime committed by another member of a group and not envisaged in the criminal plan. Admittedly, in some of the cases the *mens rea* required for a member of the group to be held responsible for such an action was not clearly spelled out. However, in light of other judgements handed down in the same period on the same matter, although not relating to war crimes, it may nevertheless be assumed that courts required that the event must have been predictable. In this connection it suffices to mention the judgement of the Court of Cassation of 20 July 1949 in *Mannelli,* where the court explained the required causal nexus as follows:

> The relationship of material causality by virtue of which the law makes some of the participants liable for the crime other than that envisaged, must be correctly understood from the viewpoint of logic and law and be strictly differentiated from an incidental relationship (*rapporto di occasionalita'*). Indeed, the cause, whether immediate or mediate, direct or indirect, simultaneous or successive, can never be confused with mere coincidence. For there to be a relationship of material causality between the crime willed by one of the participants and the different crime committed by another, *it is necessary that the latter crime should constitute the logical and predictable development of the former* (*il logico e prevedibile sviluppo del primo*). Instead, where there exists full independence between the two crimes, one may find, depending upon the specific circumstances, a merely incidental relationship (*un rapporto di mera occasionalita'*), but not a causal relationship. In the light of these criteria, he who requests somebody else to wound or kill cannot answer for a robbery perpetrated by the other person, for this crime does not constitute the logical development of

[273] Judgement of 12 September 1946, in *Archivio penale,* 1947, Part II, pp. 88-89.
[274] Judgement of 25 July 1946, in *Archivio penale,* 1947, Part II, p. 88.
[275] *See* handwritten text of the (unpublished) judgement of 5 July 1946, p. 19 (kindly provided by the Italian Public Record Office, Rome; on file with the International Tribunal's Library). *See* also *Giustizia penale,* 1945-46, Part II, cols. 530-532.
For cases where the Court of Cassation concluded that the participant was guilty of the more serious crime not envisaged in the common criminal design, *see Torrazzini*, judgement of 18 August 1946, in *Archivio penale* 1947, Part II, p. 89; *Palmia*, judgement of 20 September 1946, *ibid.*

> the intended offence, but a new fact, having its own causal autonomy, and linked to the conduct willed by the instigator (*mandante*) by a merely incidental relationship (emphasis added).[276]

219. The same notion was enunciated by the same Court of Cassation in many other cases.[277] That this was the basic notion upheld by the court seems to be borne out by the fact that the one instance where the same court adopted a different approach is somewhat conspicuous.[278] Accordingly, it would seem that, with regard to the *mens rea* element required for the criminal responsibility of a person for acts committed within a common purpose but not envisaged in the criminal design, that court either applied the notion of an attenuated form of intent (*dolus eventualis*) or required a high degree of carelessness (*culpa*).

220. In sum, the 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, 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 ill-treatment. 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

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[276] *See Giustizia penale,* 1950, Part II, cols. 696-697 (emphasis added).

[277] *See* e.g. Court of Cassation, 15 March 1948, *Peveri* case, in *Archivio penale,* 1948, pp. 431-432; Court of Cassation, 20 July 1949, *Mannelli* case, in *Giustizia penale,* 1949, Part II, col. 906, no.599; Court of Cassation, 27 October 1949, *P.M. v. Minafò*, in *Giustizia penale,* 1950, Part II, col. 252, no. 202; 24 February 1950, *Montagnino*, *ibid.,* col.821; 19 April 1950, *Solesio et al., ibid.,* col. 822. By contrast, in a judgement of 23 October 1946 the same Court of Cassation, in *Minapò et al.,* held that it was immaterial that the participant in a crime had or had not foreseen the criminal conduct carried out by another member of the criminal group (*Giustizia penale,* 1947, Part II, col. 483, no. 382).

[278] In the *Antonini* case (judgement of the Court of Cassation of 29 March 1949), the trial court had found the accused guilty not only of illegally arresting some civilians but also of their subsequent shooting by the Germans, as a "reprisal" for an attack on German troops in Via Rasella, in Rome. According to the trial court the accused, in arresting the civilians, had not intended to bring about their killing, but knew that he thus brought into being a situation likely to lead to their killing. The Court of Cassation reversed this finding,

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).

221. In addition to the aforementioned case law, the notion of common plan has been upheld in at least two international treaties. The first of these is the International Convention for the Suppression of Terrorist Bombing, adopted by consensus by the United Nations General Assembly through resolution 52/164 of 15 December 1997 and opened for signature on 9 January 1998. Pursuant to Article 2(3)(c) of the Convention, offences envisaged in the Convention may be committed by any person who:

> [i]n any other way [other than participating as an accomplice, or organising or directing others to commit an offence] contributes to the commission of one or more offences as set forth in paragraphs 1 or 2 of the present article by a group of persons acting with a common purpose; such contribution shall be intentional and either be made with the aim of furthering the general criminal activity or purpose of the group or be made in the knowledge of the intention of the group to commit the offence or offences concerned.

The negotiating process does not shed any light on the reasons behind the adoption of this text.[279] This Convention would seem to be significant because it upholds the notion of a

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holding that for the accused to be found guilty, it was necessary that he had not only foreseen but also willed the killing (*see* text of the judgement in *Giustizia penale,* 1949, Part II, cols. 740-742).

[279] The Report of the Sixth Committee (25 November 1997, A/52/653) and the Official Records of the General Assembly session in which this Convention was adopted made scant reference to Article 2 and did not elaborate upon the doctrine of common purpose (*see* UNGAOR, 72nd plenary meeting, 52nd sess., Mon. 15 December 1997, U.N. Doc. A/52/PV.72). The Japanese delegate during the 33rd meeting of the Sixth Committee nevertheless noted that "some terms used ?in the Conventiong such as […] 'such contribution' (Article 2, para. 3(c)) were ambiguous" (33rd Meeting of the Sixth Committee, 2 December 1997, UNGAOR A/C.6/52/SR.33, p. 8, para. 77). He concluded that his Government would therefore "interpret 'such contribution' […] to mean abetment, assistance or other similar acts as defined by Japanese legislation" (*ibid*).

"common criminal purpose" as distinct from that of aiding and abetting (couched in the terms of "participating as an accomplice [in] an offence"). Although the Convention is not yet in force, one should not underestimate the fact that it was adopted by consensus by all the members of the General Assembly. It may therefore be taken to constitute significant evidence of the legal views of a large number of States.

222. A substantially similar notion was subsequently laid down in Article 25 of the Statute of the International Criminal Court, adopted by a Diplomatic Conference in Rome on 17 July 1998 ("Rome Statute").[280] At paragraph 3(d), this provision upholds the doctrine under discussion 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 [other than aiding and abetting or otherwise assisting in the commission or attempted commission of a crime] 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.

223. The legal weight to be currently attributed to the provisions of the Rome Statute has been correctly set out by Trial Chamber II in *Furund`ija*.[281] There the Trial Chamber pointed out that the Statute is still a non-binding international treaty, for it has not yet entered into force. Nevertheless, it already possesses significant legal value. The Statute was adopted by an overwhelming majority of the States attending the Rome Diplomatic Conference and was substantially endorsed by the Sixth Committee of the United Nations General Assembly. This shows that that text is supported by a great number of States and may be taken to express the legal position i.e. *opinio iuris* of those States. This is consistent

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See also *Report of the Ad Hoc Committee established by General Assembly resolution 51/210 of 17 December 1996*, UNGAOR, 52nd sess., 37th supp., A/52/37.

[280] Rome Statute of the International Criminal Court, U.N. Doc. A/CONF.183/9, 17 July 1998.

[281] "Judgement", *Prosecutor v. Anto Furundžija,* Case No.: IT-95-17/1-T, Trial Chamber II, 10 December 1998, para. 227.

with the view that the mode of accomplice liability under discussion is well-established in international law and is distinct from aiding and abetting.[282]

224. As pointed out above, the doctrine of acting in pursuance of a common purpose is rooted in the national law of many States. Some countries act upon the principle that where multiple persons participate in a common purpose or common design, all are responsible for the ensuing criminal conduct, whatever their degree or form of participation, provided all had the intent to perpetrate the crime envisaged in the common purpose. If one of the participants commits a crime not envisaged in the common purpose or common design, he alone will incur criminal responsibility for such a crime. These countries include Germany[283] and the Netherlands.[284] Other countries also uphold the principle whereby if persons take part in a common plan or common design to commit a crime, all of them are criminally responsible for the crime, whatever the role played by each of them. However, in these countries, if one of the persons taking part in a common criminal plan or enterprise perpetrates another offence that was outside the common plan but nevertheless foreseeable, those persons are all fully liable for that offence. These countries include civil law systems, such as that of France[285] and Italy.[286]

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[282] Even should it be argued that the objective and subjective elements of the crime, laid down in Article 25 (3) of the Rome Statute differ to some extent from those required by the case law cited above, the consequences of this departure may only be appreciable in the long run, once the Court is established. This is due to the inapplicability to Article 25(3) of Article 10 of the Statute, which provides that "?ngothing in this Part shall be interpreted as limiting or prejudicing in any way existing or developing rules of international law for purposes other than this Statute". This provision does not embrace Article 25, as this Article appears in Part 2 of the Statute, whereas Article 25 is included in Part 3.

[283] *See* Para. 25(2) of the *Strafgesetzbuch:* "*Begehen mehrere die Straftat gemeinschaftlich, so wird jeder als Täter bestraft (Mittäter)*". ("If several persons commit a crime as co-perpetrators, each is liable to punishment as a principal perpetrator." (unofficial translation)). The German case law has clearly established the principle whereby if an offence is perpetrated that had not been envisaged in the common criminal plan, only the author of this offence is criminally responsible for it. *See* BGH GA 85, 270. According to the German Federal Court (in BGH GA 85, 270):

> "*Mittäterschaft ist anzunehmen, wenn und soweit das Zusammenwirken der mehreren Beteiligten auf gegenseitigem Einverständnis beruht, während jede rechtsverletzende Handlung eines Mittäters, die über dieses Einverständnis hinausgeht, nur diesem allein zuzurechnen ist*". ("There is co-perpetration (*Mittäterschaft*) when and to the extent that the joint action of the several participants is founded on a reciprocal agreement (*Einverständnis*), whereas any criminal action of a participant (*Mittäter*) going beyond this agreement can only be attributed to that participant." (unofficial translation)).

[284] In the Netherlands, the term designated for this form of criminal liability is "medeplegen". (*See* HR 6 December 1943, *NJ 1944*, 245; HR 17 May 1943, *NJ 1943*, 576; and HR 6 April 1925, *NJ 1925*, 723, W 11393).

[285] *See* Article 121-7 of the *Code pénal*, which reads:

> "*Est complice d'un crime ou d'un délit la personne qui sciemment, par aide ou assistance, en a facilité la préparation ou la consommation. Est également complice la personne qui par don, promesse, menace, ordre, abus d'autorité ou de pouvoir aura provoqué à une infraction ou donné des instructions pour la commettre*". ("Any person who knowingly has assisted in planning or committing a crime or

They also embrace common law jurisdictions such as England and Wales,[287] Canada,[288] the United States,[289] Australia[290] and Zambia.[291]

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offence, whether by aiding or abetting, is party to it. Furthermore, any person who offers gifts, makes promises, gives orders or abuses his position of authority or power to instigate a criminal act or gives instructions for its commission is equally party to it." (unofficial translation)).

In addition to responsibility for crimes committed by more persons, the Court of Cassation has envisaged criminal responsibility for acts committed by an accomplice going beyond the criminal plan. In this connection the Court has distinguished between crimes bearing no relationship to the crime envisaged (e.g. a person hands a gun to an accomplice in the context of a hold-up, but the accomplice uses the gun to kill one of his relatives), and crimes where the conduct bears some relationship to the planned crime (e.g. theft is carried out in the form of robbery). In the former category of cases French case law does not hold the person concerned responsible, while in the latter it does, under certain conditions (as held in a judgement of 31 December 1947, *Bulletin des arrêts criminels de la Cour de Cassation* 1947, no. 270, the accomplice "*devait prévoir toutes les qualifications dont le fait était susceptible, toutes les circonstances dont il pouvait être accompagné*" ("should expect to be charged on all counts that the law allows for and all consequences that might result from the crime" (unofficial translation)). *See* also the decision of 19 June 1984, *Bulletin, ibid.,* 1984, no. 231.

[286] The principles of common purpose are delineated, in substance, in the following provisions of the *Codice Penale*:

"Article 110: Pena per coloro che concorrono nel reato.- *Quando più persone concorrono nel medesimo reato, ciascuna di esse soggiace alla pena per questo stabilità, salve le disposizioni degli articoli seguenti."* ("Penalties for those who take part in a crime.- Where multiple persons participate in the same crime, each of them is liable to the penalty established for that crime, subject to the provisions of the following Articles." (unofficial translation)); and

"Article 116: Reato diverso da quello voluto da taluno dei concorrenti.- *Qualora il reato commesso sia diverso da quello voluto da taluno dei concorrenti, anche questi ne risponde, se l'evento e conseguenza della sua azione od omissione."* ("Crimes other than that intended by some of the participants.- Where the crime committed is different from that intended by one of the participants, he too shall answer for that crime if the event is a consequence of his act or omission." (unofficial translation)).

It should be noted that Italian courts have increasingly interpreted Article 116 as providing for criminal responsibility in cases of foreseeability. *See* in particular the judgement of the Constitutional Court of 13 May 1965, no. 42, *Archivio Penale* 1965, part II, pp. 430 *ff*. In some cases courts require so-called abstract foreseeability (*prevedibilità astratta*) (*see* e.g., instance, Court of Cassation, 3 March 1978, *Cassazione penale,* 1980, pp. 45 *ff*; Court of Cassation, 4 March 1988, *Cassazione penale,* 1990, pp. 35 *ff*); others require concrete (or specific) foreseeability (*prevedibilità concreta*) (*see* e.g., Court of Cassation, 11 October 1985, *Rivista penale,* 1986, p. 421; and Court of Cassation, 18 February 1998, *Rivista penale,* 1988, p. 1200).

[287] *See R. v. Hyde* ?1991g 1 QB 134; *R. v. Anderson; R. v. Morris* [1966] 2 QB 110, in which Lord Parker CJ held that "where two persons embark on a joint enterprise, each is liable for the acts done in pursuance of that joint enterprise, than that includes liability for unusual consequences if they arise from the execution of the agreed joint enterprise". However, liability for such unusual consequences is limited to those offences that the accused foresaw that the principal might commit as a possible incident of the common unlawful enterprise, and further, the accused, with such foresight, must have continued to participate in the enterprise (*see Hui Chi-Ming v. R.* [1992] 3 All ER 897 at 910-911).

[288] Criminal Code, Section 21(2) reads that where:

"two or more persons form an intention to carry out an unlawful purpose and to assist each other therein and any one of them, in carrying out the common purpose, commits an offence, each one of them who knew or ought to have known that the commission of the offence would be a probable consequence of carrying out the common purpose is a party to that offence."

It should be noted that despite the fact that the section refers to an objective foreseeability requirement, this has been modified by the Supreme Court of Canada which held that: "[i]n those instances where the principal is held to a *mens rea* standard of subjective foresight, the party cannot constitutionally be convicted for the same crime on the basis of an objective foreseeability standard" (*R. v. Logan* [1990] 2 SCR 731 at 735). Hence, a subjective standard is applied in the case of offences such as murder. *See* also *R. v. Rodney* [1990] 2 SCR 687.

225. It should be emphasised that reference to national legislation and case law only serves to show that the notion of common purpose upheld in international criminal law has an underpinning in many national systems. By contrast, in the area under discussion, national legislation and case law cannot be relied upon as a source of international principles or rules, under the doctrine of the general principles of law recognised by the nations of the world: for this reliance to be permissible, it would be necessary to show that most, if not all, countries adopt the same notion of common purpose. More specifically, it would be necessary to show that, in any case, the major legal systems of the world take the same approach to this notion. The above brief survey shows that this is not the case. Nor can reference to national law have, in this case, the scope and purport adumbrated in general terms by the United Nations Secretary-General in his Report, where it is pointed out that "suggestions have been made that the international tribunal should apply *domestic law* in so far as it *incorporates* customary international humanitarian law".[292] In the area under discussion, domestic law does not originate from the implementation of international law but, rather, to a large extent runs parallel to, and precedes, international regulation.

226. The Appeals Chamber considers that the consistency and cogency of the case law and the treaties referred to above, as well as their consonance with the general principles on criminal responsibility laid down both in the Statute and general international criminal law

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[289] E.g., in Maine (17 Maine Criminal Code § 57 (1997), Minnesota (Minnesota Statutes § 609.05 (1998)), Iowa (Iowa Code § 703.2 (1997)), Kansas (Kansas Statutes § 21-3205 (19997)), Wisconsin (Wisconsin Statutes § 939.05 (West 1995)). Although there is no clearly defined doctrine of common purpose under the United States' Federal common law, similar principles are promulgated by the Pinkerton doctrine. This doctrine imposes criminal liability for acts committed in furtherance of a common criminal purpose, whether the acts are explicitly planned or not, provided that such acts might have been reasonably contemplated as a probable consequence or likely result of the common criminal purpose (*see Pinkerton v. United States,* 328 U.S. 640, 66 S. Ct. 1180, 90 L. Ed. 1489 (1946); *State v. Walton,* 227 Conn. 32; 630 A.2d 990 (1993); *State of Connecticut v. Diaz,* 237 Conn. 518, 679 A. 2d 902 (1996)).

[290] Under Australian law, when two parties embark on a joint criminal enterprise, a party will be liable for an act which he contemplates may be carried out by the other party in the course of the enterprise, even if he has not explicitly or tacitly agreed to the commission of that act (*McAuliffe v. R.* (1995) 183 CLR 108 at 114). The test for determining whether a crime falls within the scope of the relevant joint enterprise is the subjective test of contemplation: "in accordance with the emphasis which the law now places upon the actual state of mind of an accused person, the test has become a subjective one, and the scope of the common purpose is to be determined by what was contemplated by the parties sharing that purpose" (*ibid.*).

[291] Article 22 of the Penal Code states:

> "When two or more persons form a common intention to prosecute an unlawful purpose in conjunction with one another, and in the prosecution of such purpose an offence is committed of such a nature that its commission was a probable consequence of the prosecution of such purpose, each of them is deemed to have committed the offence."

[292] *See* Report of the Secretary-General, para. 36 (emphasis added).

and in national legislation, warrant the conclusion that case law reflects customary rules of international criminal law.

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* and the *Kurt Goebell* cases.

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

iii. *Participation of the accused in the common design* involving the perpetration of one of the crimes provided for in the Statute. This participation need not involve commission of a specific crime under one of those provisions (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*.

229. In light of the preceding propositions it is now appropriate to distinguish between acting in pursuance of a common purpose or design to commit a crime, and aiding and abetting.

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

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

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

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