JUDICIAL CREATIVITY OR JUSTICE BEING SERVED? A LOOK AT THE USE OF JOINT CRIMINAL ENTERPRISE IN THE ICTY PROSECUTION.

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The development of joint criminal enterprise at the International Criminal Tribunal for the Former Yugoslavia (ICTY) has been controversial since the doctrine was first created in 1997. For the judgments rendered by the ICTY to be perceived as legitimate, the doctrines used to bring charges against defendants must also be perceived as legitimate. The purpose of my thesis is to study the application of joint criminal enterprise at the ICTY and examine how the doctrine has influenced the length of sentences given. I find that joint criminal enterprise may be influencing longer sentences and the three categories of joint criminal enterprise are being used differently on defendants of different power levels. By empirically analyzing the patterns developing at the ICTY, I can see how joint criminal enterprise is influencing sentencing and the fairness of trials.
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CHAPTER 1

INTRODUCTION

In 1993, the United Nations Security Council (UNSC) established the International Criminal Tribunal for the Former Yugoslavia (ICTY or the Tribunal) to “prosecute persons responsible for serious violations of international humanitarian law committed in the territory of the former Yugoslavia” after January 1, 1991 (UNSC Resolution 827, ICTY Statute). As the first international criminal tribunal formed since the end of the Nuremberg and Tokyo Tribunals, the formation of the ICTY sent a powerful message that the United Nations would not take grave breaches of international humanitarian law lightly. Using prior international law as a guide for determining the rules, regulations, and structure of the Tribunal, the ICTY began hearing cases in 1996.

From the first cases heard before the Tribunal, the ICTY broke new ground in developing and interpreting international law. The Tribunal was charged with the duty of providing justice to the worst offenders in the Yugoslavian conflict. In order to do this, individual criminal responsibility had to be assigned to avoid blame being placed on entire groups or states. Those most responsible for the crimes committed during the conflict would receive judgment for the violations of common international humanitarian law, in part to build a history of what happened during the conflict and also to show that these gross violations of international law will not be tolerated by the international community at large. The Statute for the International Criminal Tribunal for the Former Yugoslavia states that individual responsibility can be ascribed to anyone who “planned,
instigated, ordered, committed, or otherwise aided and abetted in the planning, preparation, or execution of a crime,” under Article 7(1).

To fulfill the mandate of the ICTY, new doctrines were developed to fill the gaps in prior customary international law. Post-World War II tribunals alluded to the fact that common plans existed between players in the conflict, but there was not a formal legal doctrine in place to prosecute individuals for their role in the common plan.

The creation of joint criminal enterprise (JCE) changed this. The development of JCE provided a mechanism for the ICTY to prosecute players in common criminal plans. JCE is a mode of liability that allows individuals to be held liable for their participation in crimes that were part of a larger common plan among a group of individuals. Such a doctrine recognizes that mass human rights violations do not occur by individuals in isolation, but rather are the product of a collective group of participants acting in concert. The Tadić Appeals Chamber (1997) developed three categories of how JCE can be applied. The first category of JCE could be applied to individuals who were participants in the common criminal plan; the second category was commonly applied to concentration camp workers; the third category allowed individuals to be held liable for foreseeable crimes. These categories, to be described in greater detail later in the thesis, allow individuals to be held liable for the acts of others who were also part of the criminal plan and acts that are foreseeable based on knowledge of a common criminal plan. This means that individuals may be held liable "as a principal or an accessory or otherwise as a participant" even without physical participation or physical presence at the
time of the crime. JCE allows individuals to be held responsible for acts of the collective (Cassese 2007, 110).

Joint criminal enterprise quickly became the ‘darling notion’ of the ICTY’s Prosecution (Cassese 2007), and was used as the primary mode of liability in sixty-four percent of indictments filed by the Prosecution from 2001 to 2004; an additional seventeen percent of indictments filed in this time frame incorporate elements of JCE (Danner and Martinez 2005). Because of the frequent use of JCE at the Tribunal it is important for the doctrine to be studied. In particular, it is imperative to know how the doctrine impacts sentencing decisions at the Tribunal.

It is significant to study sentencing practices at the ICTY for three reasons. First, the ICTY Statute and Rules and Procedure of Evidence (RPE) do not provide clear guidelines for how judges should make decisions. Judges have a great deal of discretion when making sentencing decisions. As a result, the individual perceptions judges have of specific doctrines and how they should be applied in cases could influence sentencing decisions. Second, decisions given at the Tribunal will provide guidelines for future international criminal tribunals. As the first criminal tribunal in over forty years, the ICTY is setting the stage for developments of modern international criminal law. Third, not only will sentences influence future tribunals, sentencing decisions will be the legacy of the Tribunal. If sentencing decisions made at the ICTY are not perceived as following the Statute, RPE, or standards in customary international law, the legacy of the Tribunal may be flawed and viewed as potentially illegitimate.

One of the most controversial and frequently used modes of liability at the
tribunal is JCE. Because JCE was formally developed at the Tribunal there is no direction for how it should be applied by the Office of the Prosecutor (OTP). Even though the OTP quickly began using JCE as a mode of liability when prosecuting individuals, legal scholars were not convinced that the Tadić Appeals Chamber had accurately proven that JCE was grounded in prior customary international law.

Part of the controversy stems from the hybrid structure of the ICTY. The Tribunal incorporates elements of traditional common law systems together with traditional civil law systems; when the Tadić Appeals Chamber originally outlined how joint criminal enterprise should be used at the Tribunal, the language was vague and similar to other legal doctrines, such as superior criminal liability and co-perpetration, a common doctrine in civil law systems. The unclear description combined with similarities to other doctrines lead even players at the ICTY to not fully understand what JCE meant or how it could accurately be used at the Tribunal. Through a series of cases, the definition of JCE continues to be clarified, but there are still unanswered questions about how it can be used and whether the use of JCE affects the fairness of sentencing decisions.

While ICTY cases were continuing to define JCE, some scholars questioned the validity of JCE as a legal mode of liability in the Tribunal all together (Powles 2004). Powles believes JCE has not been fully challenged by the defense or prosecution. He believes the Tadić Appeals Chamber drew conclusions from international law that are not as well defined and substantiated in prior international law. If the doctrine is not grounded in prior customary international law then its use may not be legal at the
Tribunal based on the UNSC Resolutions that established the ICTY. Without clearly defining the legal basis for using joint criminal enterprise at the tribunal, Powles says there will be an “unfortunate miscarriage of justice” (2004, 619). It is important for the Tribunal to ensure that every defendant receives a fair trial.

In a fair trial, every aspect of the trial is in accordance with the rules and practices of customary international law. As such, a fair trial should err on the side of caution in favor of a defendant when a doctrine is unclear or poorly defined. Given that JCE is a new doctrine that has not existed prior to the ICTY, the judges and attorneys at the ICTY were not always able to determine how JCE should be used properly during trials. Liberal applications of JCE might result in defendants receiving longer sentences with a lesser proof of guilt. As the definition of JCE continues to be challenged and clarified, the required connection between a crime and the defendant is weakened. For this reason, the legality of the use of JCE should be examined. If we find that JCE was used inappropriately at the ICTY, it raises questions about the appropriateness and legitimacy of the court’s decisions.

This thesis focuses on sentencing decisions handed down by the ICTY judges to answer the question: is joint criminal enterprise being used fairly and consistently at the International Criminal Tribunal for the former Yugoslavia? This thesis proceeds in the following manner. First, I outline the goals of war tribunals, the theory and historical origins of JCE, case law and international precedent coming from ICTY, and arguments for and against the application of JCE. Second, I create a theory to explain how JCE is used at the Tribunal and factors that might influence the Tribunal’s use of JCE. Third, I
seek to answer hypotheses about the use of JCE to analyze whether JCE is being used
differently than other modes of liability, used differently against defendants of different
power levels, and whether the three categories of JCE impact sentence lengths
differently. My goal is to determine whether any of the three aforementioned factors
influences how JCE effects sentences at the Tribunal and ultimately determine whether
sentencing patterns in cases using JCE are fair and consistent. Using regression models, I
test the effect JCE has on sentence lengths. Finally, I conclude with a brief discussion
about the importance of studying the use of JCE and sentencing patterns, the impact the
ICTY may have on future international criminal law, and offer suggestions for future
research.
CHAPTER 2
LITERATURE REVIEW

War Tribunals and JCE

War tribunals are intended to assign responsibility for crimes committed during conflicts to the individuals most responsible. By bringing individuals to justice, the idea is that reconciliation and a lasting peace can be expedited in the region that has experienced conflict. However, it is often difficult to assign individual responsibility to the highest level officials because they are often less closely tied to the actual conflict. Theoretically, those most responsible for the crimes committed during the conflict should receive judgment for the violations of common international humanitarian law, in part to provide a history of what happened during the conflict and to show that gross violations of international law will not be tolerated by the international community at large.

Prior to the International Criminal Tribunal for the Former Yugoslavia (ICTY), the concept of joint criminal enterprise (JCE) was not formally developed, but cases from the Tokyo, Nuremberg, other post-World War II tribunals, and domestic courts helped establish sentencing decisions that were used to justify the development of JCE at the ICTY. Other post-World War II tribunals examined questions of how to prosecute individuals who committed crimes as part of a greater common plan. Domestic courts frequently grapple with similar problems with mafia and other conspiracy cases. When developing JCE, the Tadić Appeals Chamber relied heavily on these cases from the Nuremberg and Tokyo Tribunals and domestic courts. In this section I briefly discuss
important cases from the post-World War II tribunals and domestic courts that were highly influential in the development of JCE. In the post-World War II tribunals, there was much discussion of how individuals should be held liable for their role within larger crimes. Although each individual may have had knowledge of their criminal goals, if only one person actually carried out a crime (e.g. murder), was the entire group responsible or only the individual who physically committed the crime?

The ICTY Statute follows the Nuremberg Tribunal’s decision that following orders of a government official or superior is not an acceptable defense and does not exclude oneself from individual responsibility for his or her actions (Article 7(4)). As the Appeals Chamber in Tadić noted in citing cases from British and Canadian military courts, defendants were guilty as co-perpetrators of murder while participating in a “common enterprise” (ICTY 1999, paragraph 197).

Military case law also dealt with the issue of who was responsible for crimes committed at concentration camps. Two cases heard before British military courts established that anyone present during a murder is responsible for the act of murder if they acted to further the will of the collective. British courts also held that the defendant’s actions must be related to the crime he or she is on trial for, but it is not necessary for the defendant’s participation to be sine qua non, depending on the participation of the defendant. These cases strongly influenced the ICTY Appeals

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2 See ICTY 1999, footnote 238 and 239.
Chamber judges when justifying using JCE in cases regarding concentration camp workers.

Perhaps the most influential cases used to justify the development of JCE involved the way individuals who did not intend to be a part of a criminal plan would be held liable for criminal activity or how individuals who committed foreseeable crimes would be held liable for their role in furthering the will of the common criminal plan. Some cases cited by the Tadić Appeals Chamber implied that individuals who give orders or commands to others to commit crimes will be held liable for the actions of their subordinates if it is foreseeable that other crimes could take place. Another cited case upheld the same implication that individuals can be held liable for foreseeable crimes, but others also specified that not everyone who carries out a foreseeable crime has reason to know the further crime would take place. There was also precedent in Italian case law that a clear mens rea does not necessarily need to be established for individuals to be held liable for participation in the execution of crimes that further the will of a common plan (ICTY 1999, footnote 277).

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3 See ICTY 1999, footnote 255. This case, known as the Essen Lynching or Essen West determined that a German military Captain could be held liable for the murder of three British soldiers although he was not physically present during the murder.

4 See ICTY 1999, paragraph 210. In this United States Military Case, Kurt Goebell, et al (1946), the court ruled that, although many people were present at the murder of US soldiers, only those who could foresee that marching the soldiers through a German town could result in the murder of the soldiers could be held liable for both assault and murder. Those who were present for both, but only had no reason to foresee the murder of the US soldiers could only be held liable for assault.

5 Mens rea is Latin for guilty mind. The term is used to define the intent an individual has to commit a criminal act.
Establishing the ICTY

The Statute for the International Criminal Tribunal for the Former Yugoslavia, developed by UNSC 827 (1993)\(^6\), states that direct responsibility can be ascribed to anyone who “planned, instigated, ordered, committed, or otherwise aided and abetted in the planning, preparation, or execution of a crime”(International Criminal Tribunal for the Former Yugoslavia Statute, Article 7(1)). As former ICTY Judge Antonio Cassese stated,

\[\text{[t]rials establish individual responsibility over collective assignation of guilt, i.e., they establish that not all Germans were responsible for the holocaust, nor all Turks for the Armenian genocide, nor all Serbs, Muslims, Croats, or Hutus but individual perpetrators…Victims are prepared to be reconciled with their erstwhile tormentors, because they know that the latter have now paid for their crimes; a fully reliable record is established of atrocities so that future generations can remember and be made fully cognizant of what happened (Cassese 1998).}\]

Ideally, by bringing individuals to justice, it is hoped that a sense of reconciliation and peace would be fulfilled in the former Yugoslav states.

However, holding individuals accountable is not enough. The rights of the defendant must be considered and trials must follow international law standards. If the work of the ICTY is seen as illegitimate, then it could result in continued factionalism and an international lack of respect for the Tribunal’s work. As the first international criminal tribunal in fifty years, the ICTY has a significant impact on future international tribunals and the further development of international law. The developments made at the Tribunal will shape how future tribunals are seen in the international community; thus it is important that these tribunals are trusted and taken seriously. Since JCE originated at

\(^6\) UN Security Council Resolution 827, 25 May 1993
the International Criminal Tribunal for the Former Yugoslavia and has been used extensively in cases heard before the Tribunal, it is important for the doctrine to be studied, analyzed, and challenged to ensure justice is carried out in accordance with international legal norms.

The ICTY Statute was originally penned in 1993 with the express purpose of prosecuting those responsible for “serious violations of international humanitarian law,” as indicated by the ICTY’s complete title7 (ICTY Statute). The Statute was never intended to be all inclusive and it was based on treaty and international customary law (Zacklin 2004). Nevertheless, the Tribunal faced harsh criticisms that its goal was not solely to bring justice to individuals most responsible for the conflict in the former Yugoslavia, but rather to assuage the guilt of the Western world for not intervening in the conflict (Danner and Martinez 2005). The United Nations (UN) Security Council drafted the Statute in accordance with UN Charter Chapter XII which allows the Security Council to draft the Statute and make it legally binding to all UN states. This decision was controversial and, while it brought the ICTY into existence much more quickly, it supported the idea that the ICTY was being created to benefit the West.

Development of JCE at the ICTY

JCE was developed as a mode of liability intended to assign responsibility to individuals for their role in carrying out the will of a common criminal plan. However, it

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7 Although the Tribunal is commonly referred to as the International Criminal Tribunal for the Former Yugoslavia, the complete name is the International Tribunal for the Persecution of Persons Responsible for Social Violations of International Humanitarian Law Committed in the Territory of the Former Yugoslavia since 1991.
is very difficult to formally define what JCE is. The Tadić Appeals Chamber outlined JCE in response to the appeals presented by the prosecution team.

In Prosecutor v. Tadić (1995), the first trial completed at the ICTY, the defendant was a relatively low-level official. He was indicted for war crimes and crimes against humanity, including the deportation and expulsion of Muslims and Croats in the Prijedor, Bosnia, and participating in a “reign of terror” by killing, raping, and abusing Muslims and Croatians (ICTY, 1995). During his trial, Tadić was acquitted of one count of murder as a crime against humanity when it could not be determined that he did not physically participate in the murder of thirteen Muslim prisoners. After the sentencing phase of his trial was complete, the Prosecution appealed this acquittal on several grounds, two of which directly pertained to JCE. The Prosecution’s first ground for appeal concerned whether an individual can be held criminally responsible for acts made by multiple participants of a common criminal plan. The second questioned the degree of mens rea required to prosecute an individual for joint crimes (ICTY 1999).

Considering the first ground of appeal, the panel of judges in the Tadić Appeals case concluded that the basis of criminal responsibility lies within the individual. The court in the Tadić Appeals case ruled that, although the ICTY Statute did not explicitly allow for JCE, there was enough support of the doctrine in domestic and international law for the Tribunal to justify its use. Article 1 of the ICTY Statute and the Secretary General’s Report stress that the ICTY has jurisdiction to hold all individuals responsible for planning and committing crimes in the Former Yugoslavia (ICTY Statute).
Categories of JCE

In international law, the idea of holding individuals responsible for participation in a crime that is part of a common purpose was quite common following the World War II tribunals. The Tadić Appeals Court judges ruled that JCE was allowed to be used at the tribunal if “a common plan, design or purpose which amounts to or involves the commission of a crime provided for in the Statute” could be proven (ICTY 1999). Further expanding the use of JCE, the Krstić Trial Chamber (2001a) ruled that indictments do not have to explicitly mention JCE as a mode of liability to be convicted on JCE.

The Tadić Appeals Chamber addressed the second ground of the Tadić Prosecution’s appeal by outlining three separate categories of JCE. The three categories are commonly known as the basic, systematic, and extended versions of JCE and all three were extracted from post World War II decisions. In developing the three JCE categories, the Appeals Chamber outlined the appropriate level of mens rea required to hold individuals responsible under each of the three categories and also explained what prior international legal decisions they based their claims of legitimacy upon.

The first category of JCE is also known as the basic form. Under this category, “all codefendants, acting pursuant to a common design, possess the same criminal intention” (ICTY 1999). This means that anyone who participates in even the most minor aspects of a JCE can be held criminally liable for crimes committed by the JCE. Individuals accused of participating in a JCE under the basic category are often
individuals who willingly commit any crime (e.g. murder, torture, deportation) to further the JCE.

The basic category of JCE is the easiest to understand since individuals indicted under this category were members of the JCE plan, although some members will have a deeper level of involvement than others. The most important part of the first category of JCE is that individuals can be held liable without physically carrying out any acts. The Stakić judgment (2003c) ruled that a shared intent or dolus eventualis could also be sufficient cause to hold all participants liable for crimes committed (Cassese 2007). Dolus eventualis, meaning recklessness, can be used to prosecute individuals under the basic form of JCE for crimes of “persecutions, deportation and inhumane acts” (ICTY 2006, paragraph 104). The basic form of JCE allows individuals to be held guilty for crimes regardless of their level of participation in the JCE, but it also allows for varying degrees of punishment that are taken into account at sentencing (Cassese 2007).

The second, systematic, category of JCE is similar to the definition of the basic category but includes concentration-camp cases (ICTY 1999, paragraph 220). This form of JCE implies that an individual had knowledge of, or participated in, ill-treatment. While individuals with knowledge of criminal activities taking place might not have physically harmed anyone, by carrying out their role, whether it is in the role of a guard or administrator, they were creating a situation where crimes could be carried out. As such, they became a fundamental part of the criminal plan since, without their willful assistance, prisoners would not be held and their inhumane treatment within camps would not be possible.
It is important to clarify that workers at, or affiliated with, internment and concentration camps need not be part of a criminal plan prior to working at camps, but can be held responsible for furthering the intent of others to commit crimes. The burden falls to the prosecution to prove the accused had knowledge of crimes. For the most part, this is rather easy to prove if individuals were in a position to see death records, view violent acts being carried out, or were present during times when the ill-treatment of prisoners occurred. Based on prior domestic and international case decisions, the Tadić appeals chamber ruled that the *mens rea* to be convicted under this category of JCE was only knowledge of the common plan and the intent to help the plan progress. This makes the *mens rea* for the first and second categories very similar.

The third, extended, form of JCE is used to prosecute crimes committed outside the JCEs’ explicit plans, but occurred because of the JCE. This category of JCE is the most complicated and difficult to understand, but also has the lowest level of intent in the perpetration of the crime. In order to be held criminally liable for acts under the third category of JCE, participants do not have to share the same *mens rea*. The Prosecution must prove that the crime was a natural and foreseeable consequence from the JCE’s plan and, also, that the accused knew that the crime might occur based on the JCE’s plan and the accused participated anyway. In addition, the Prosecution must prove that the accused was not reckless in their action but rather that there was an intentional action, albeit the intentional action may not include the crimes committed.

A common example of this category of JCE is a bank robbery. If four individuals make a plan to rob a bank, they are all part of a common plan. Hypothetically, all four
individuals have decided to enter the bank unarmed; however, before they enter the bank, Group Member 1 notices that Group Member 2 is carrying a gun. Group Members 3 and 4 think that everyone is unarmed, as planned. During the robbery, things get out of hand and Member 2 ends up shooting and killing a bank teller. In this situation, Group Member 2 will be charged with armed robbery and murder. Since he or she knew Group Member 2 carried a gun and it was possible that someone could be killed or hurt, Group Member 1 will also be responsible for the robbery and the murder. Group Members 3 and 4 had no reason to believe that anyone could be killed during their robbery due to lack of knowledge about Member 2’s gun and will only be liable for the armed robbery (Cassese 2007). While the robber who knew his associate was carrying a weapon could have called off the robbery or insisted that the armed robber leave their weapon behind, he or she willingly went into the bank knowing that it is possible the gun could be used.

All three categories of JCE must be proven to have the same actus reus according to the jurisprudence in the Tadić Judgment (ICTY 1999). Tadić requires the prosecutor prove three things: 1) “plurality of persons,” 2) “a common plan, design or purpose which amounts to or involves the commission of a crime provided for in the Statute,” 3) “participation of the accused in the common design” (ICTY 1999, paragraph 227).

The second and third elements of actus reus have since been reinterpreted in other cases at the Tribunal. A “common plan” has been reinterpreted as an “understanding or arrangement amounting to an agreement between two or more persons that they will commit a crime” (ICTY 2002a, paragraph 78). Under the third category, “participation” includes both direct and indirect participation in crimes. The accused does not need to be
present when a crime was committed, commit the crime personally, or witness a crime being committed. An individual can be charged for assisting or contributing to a JCE if he or she has performed any act that furthers the JCE efforts. While Tadić, and cases since Tadić, allowed for the use of JCE at the tribunals, observers of the Tribunal and scholars of international criminal law have questioned the doctrine and the extent to which it should be used since its inception.

JCE-Strengths and Weaknesses

Support for JCE

The controversy surrounding JCE has led to arguments for and against the use of the doctrine at the Tribunal. Common arguments in support of JCE assert that the doctrine is well grounded in prior customary international law, justified by the ICTY Statute, and necessary for prosecuting the types of crimes being tried at the ICTY. As a new doctrine fully defined and outlined at the ICTY, the justification of JCE was questioned early on (ICTY 2003c). Although there are scholars who criticize JCE as not well grounded in prior customary international criminal law, former Tribunal actors like Carla del Ponte, former Chief Prosecutor at the ICTY, and Antonio Cassese have convincingly argued in its defense. According to Antonio Cassese, former president of the ICTY, whenever the ICTY Statute is silent, the gaps in are to be filled by customary international law (2007, 114).

In particular, JCE is favored because of the many uses for the OTP at the Tribunal. As the “darling notion” of the OTP, JCE allows the Prosecution to levy more
charges against an individual and, depending on the category of JCE used, make the prosecution team’s job easier; the doctrine is very valuable to the OTP (Cassese 2007). Shane Darcy (2007) suggests JCE is especially critical for prosecuting high-level officials. If the OTP uses JCE as a mode of liability, there does not need to prove a clear intent to commit crimes. However, the praise of JCE has been significantly muted compared to the criticisms.

**Opponents of JCE**

The criticisms of JCE also underscore the complexity of developing an international tribunal. While there is heavy criticism that the doctrine was ill-defined initially, this was compounded by the hybrid nature of the Tribunal. The most severe criticisms have been reserved for the third category since it requires less proof for a conviction and does not require crimes be committed by members of a JCE for conviction. This section will discuss common criticisms of JCE.

**Definition of JCE**

In the *Tadić* Appeals Chamber, the judges discussed their reasoning for developing JCE in detail, however they failed to detail how the doctrine varied from other established modes of liability. The original definition of JCE was vague and did not fully clarify how JCE is different from other modes of liability outlined in Article 7(1) of the Statute (committing, planning, ordering, instigating, and aiding and abetting) (Ambos 2007; Cassese 2007; Danner and Martinez 2005; and Powles 2004). Steven
Powles calls JCE a “catch all” doctrine since there are few limits on JCE as originally defined (2004, 619). The ICTY was able to define and shape what JCE was and how it would be used in trials.

The definition of JCE has been challenged many times. In *The Prosecutor v. Milutinovic et al.* (2006b), the defense challenged the jurisdiction of the charges against clients being held liable under a JCE. The Milutinovic defense team challenged how the *Tadić* Appeals Chamber’s interpretation of JCE was relevant to the Statute. The judges ruled that the ICTY Statute was not written as a “meticulously detailed code providing for every possible scenario and every solution” (ICTY 2006b). While *Tadić* allowed for JCE under Article 7(1) based on the word “committed,” *Milutinovic* ruled that Article 7(1) is non-exhaustive as implied in the phrase “or otherwise aided and abetted” (ICTY 1999, 2006b).

*Hybrid Nature of the ICTY*

The confusion over what JCE entailed was compounded by the hybrid nature of the ICTY. Since the three categories of JCE were largely defined and accepted from post World-War II case law, many civil law judges and attorneys were unfamiliar with the process. In the civil law system, courts do not typically make judicial decisions based on precedents set by other cases. Because many of the judges are from the civil law tradition and were familiar with the concept of co-perpetration and command responsibility, many of them confused these concepts with JCE (Cassese 2007). Co-perpetration was not an accepted mode of liability at the ICTY and command
responsibility required a hierarchy of command be established before crimes were committed.

Originally challenged in the *Stakić* Trial Chamber (ICTY 2003c, paragraph 436-438), and later in separate opinion by Judge Per-Johan Lindholm in the *Simić* appeals chamber (ICTY 2003b), the belief that JCE “does not […] have any substance of its own” was becoming prominent from judges with a civil law background. Judge Lindholm elaborated in his separate opinion that JCE was “nothing more than a new label affixed to a since long well-known concept or doctrine in many jurisdictions as in international criminal law, namely co-perpetration” (ICTY 2003b). The *Stakić* Trial Chamber ruled that using JCE as a mode of liability was stretching the boundary of the word “committed” that the *Tadić* Appeals Chamber had used to justify the use of JCE under Article 7(1) of the ICTY Statute. The Trial Chamber then proceeded to use “co-perpetration” as a mode of liability.

The *Stakić* judgment (2003c) tried to end the ongoing confusion between co-perpetration and JCE, but it has not necessarily clarified the doctrine. Ultimately, the *Stakić* Appeals Chamber reversed the trial chamber arguing it had used a mode of liability outside the jurisdiction of the tribunal (co-perpetration) and reconsidered the case using the doctrine of JCE (Darcy 2007). While the *Tadić* appeals judgment clearly allowed for JCE to be used as a mode of liability at the Tribunal, the terms “perpetrator” and “co-perpetrator” referring to offenders in the course of the ICTY written opinions has served to continue confusion (Van Sliedregt 2007). The *Stakić* Appeals Chamber also alluded to the fact that indictments do not have to explicitly state what category of JCE
the Prosecution is using as the allegations often gives sufficient evidence to the intended category (ICTY 2006a).

Milutinovic et al. declared that membership in a JCE is not enough of a reason to be implicated because membership does not equate participation. It also clearly separated conspiracy from JCE, calling them “different forms of liability.” Agreement is enough to convict an individual of conspiracy, while individuals must actually commit or commission acts to further the will of the JCE in order to be held liable for the crime of JCE (ICTY 2006b).

The Third Category of JCE

While the structure of the Tribunal and the original definition of JCE has been controversial, the biggest controversy surrounding JCE was the use of the third category. In particular, the third category of JCE has been frequently challenged because holding individuals criminally liable for crimes that are perceived as foreseeable risks is imprecise, and the concept is not present in many domestic law systems. Most common law systems do not allow individuals to be held liable for foreseeable crimes, and states that do, such as Britain and Canada, often disagree with the lower level of mens rea required (Danner and Martinez 2005). At the ICTY, the Prosecution must prove that the defendant had knowledge prior to circumstances that led to an additional crime. Also, the prosecution must prove that the incidental crime was foreseeable given the scope of the crimes agreed upon by members of the JCE (Cassese 2007).

The third category is also difficult to distinguish from superior criminal liability.
Superior criminal liability is defined in the ICTY Statute under Article 7(3). In cases regarding high-level officials, it is common for indictments to cite both Article 7(1), specifically a JCE, and Article 7(3) as modes of liability. An individual can be charged with superior criminal liability if they fit the following three requirements: 1) the presence of an established superior-subordinate relationship, 2) the superior did not take adequate measures to prevent criminal actions performed by their subordinates, or 3) the superior had reason to believe a crime was going to be committed or had been committed (Ambos 2007). The main difference between JCE and superior criminal liability is that JCE requires an act while superior criminal liability simply requires an omission of an action (Ambos 2007).

In the Krstić trial judgment (2001a), two individuals were charged with committing genocidal acts under both sections of Article 7. The trial chamber ruled that when both modes of liability were used, JCE subsumes superior criminal liability (2004b). Again in the Kvocka et al. case (ICTY 2004), despite four individuals being charged with both JCE and superior criminal liability, only one was deemed to have sufficient evidence of an established superior-subordinate relationship. In this instance, the Chamber concluded that his responsibility under JCE made Article 7(3) superfluous (Ambos 2007).

The latest case to try to define and limit the use of JCE and command responsibility at the Tribunal is the Prosecutor v. Brdjanin (ICTY 2007). In this case, the Prosecution felt that the Trial Chamber’s decision that JCE was not the proper mode of liability for Brdjanin’s case. The Prosecution believed that the Trial Chamber was
incorrect to believe that the “principle perpetrator” of an office must be a member of the JCE (concerning the Prosecutions first appeal) and that there must be a specific agreement between all JCE members regarding crimes (concerning the Prosecution’s second ground for appeal) (ICTY 2007). The Defense counsel submitted an *amicus curiae* (friend of the court) brief in support of the Prosecution’s position on their first ground of appeal. This 2007 judgment, controversial in itself, has set a new bench mark for how JCE can be used in the tribunal. It specified that individuals do not have to have a specific intent, in the case of Brdjanin, genocidal intent, but rather the crime must only be reasonably foreseeable to the individual.

The *Brdjanin* Appeals case set a standard that allowed the *Milosevic* case to further clarify the difference between JCE and superior responsibility. In *Prosecutor v. Milosevic* (2003a), the Trial Chamber ruled that Milosevic could be held liable by Categories 1 and 3 of JCE as well as superior command responsibility (Ambos 2007). This shows that, despite several instances where the two doctrines are listed jointly in the indictment and JCE is given preference, it is possible for JCE and superior criminal liability to be used simultaneously in the Tribunal’s judgment.

The development of JCE has received praise and criticism, but there has been little empirical study of its application at the Tribunal. In the next section, I develop a theory to consider how JCE has been applied at the ICTY for the purposes of examining in how JCE influences sentencing lengths.
CHAPTER 3
THEORY

While criticisms about joint criminal enterprise (JCE) abound, little empirical research has questioned how the doctrine impacts sentencing decisions at the International Criminal Tribunal for the Former Yugoslavia (ICTY). In this section, I discuss three conditions that could influence how sentence lengths are determined: the mode of liability used in the indictment and sentencing, the power level of the individual on trial, and the specific category of JCE used by the ICTY Prosecutors in the indictment.

Sentencing

No crimes within the ICTY Statue have mandatory minimum sentences and the Rules and Procedure of Evidence (RPE) provide little structure for court sentencing practices. The RPE allow judges to look at sentencing practices of former Yugoslavian states and take the gravity of the defendant’s individual crimes into consideration when making decisions (United Nations 2007). In their study of sentencing determinates at the ICTY, James Meernik and Kimi King (2003) considered many variables, including the level of responsibility the defendant held, mitigating factors, aggravating circumstances, gravity of accused crimes, and the defendant’s ethnicity, as factors that might influence sentencing. They found that a higher level of responsibility and the type of crime committed, combined with certain mitigating factors, such as guilty pleas, had the largest influence on sentencing determinants (Meernik and King 2003, 748).
Without set guidelines influencing the sentencing process, the judges at the ICTY are left to make sentencing decisions based on any criteria they deem important. As a result, their “seemingly random” sentencing may be systematically influenced by certain factors. I expect that the mode of liability presented by the OTP is an important factor, even though the judges have done little to differentiate between the various modes of liability (Taylor 2004). As the Prosecution has a lower burden of proof to prove someone participated in a JCE and the term “enterprise” alludes to a widespread plan, I suspect that the use of JCE correlates with longer sentences because judges are enabled to use the vagueness of the doctrine to hold individuals accountable for crimes committed by other individuals and groups.

I examine the lengths of sentences individuals indicted under JCE receive compared to those indicted with other modes of liability because I expect to find that defendants indicted under JCE will receive longer sentences than individuals indicted under different modes of liability. If my expectation is correct, and those indicted under JCE receive longer sentences, then there must be explanations for why one mode of liability would result in substantially longer sentencing than others.

Hypotheses about JCE, Modes of Liability and Command Authority

Charges of JCE

The mere leveling of the JCE charge may give judges broad discretion in sentencing. Moreover, because judges at the ICTY have no set standards for sentencing, the absence of guidelines, instructions, or provisions in the Statute outlining what judges
should consider and what should weigh heaviest in their decision may lead to disparities in sentencing outcomes as judges may view some crimes as more serious than others. The Furundzija Appeals Chamber cautioned against setting a hierarchy of offences and, instead, encouraged judges to focus on the degree of the accused participation in the crime (ICTY 2000a). Likewise, no hierarchy exists to determine which modes of liability indicate a stronger involvement in the commission of crimes. In fact, the ICTY existed for eleven years before the Appeals Chamber clarified two modes of liability; the Vasiljevic Appeals Chamber clarified that aiding and abetting is a less severe crime than participating as a co-perpetrator within a JCE (ICTY 2004c). Article 24 of the ICTY Statute does indicate that judges can “have recourse” to the sentencing practices used in the former Yugoslavia, but the Blaskić Trial Chamber made it clear that this was not a mandate (ICTY 2004a, paragraph 182). So what do judges consider when they are rendering sentences?

Since the ICTY is the first tribunal to use JCE, there is no standard or precedent for how the doctrine should be considered when it comes to sentencing. There is no standard of use for the judges to use as a guideline when making sentencing decisions and little precedent from the former Yugoslavian courts. Without formal constraints or guidelines on sentencing, the judges at the ICTY can only rely on past cases at the Tribunal involving JCE for a guideline in how to sentence individuals in new cases.

Although JCE is a new doctrine, there are somewhat similar doctrines in domestic courts that could influence how judges consider JCE when making sentencing decisions. At its core, JCE is a complicity doctrine. Complicity laws in domestic courts are
frequently aimed at prosecuting mafia members; similarly, it is often difficult to prove the role an individual plays in actions that are part of a large concert of players like the conflict in the former Yugoslavia. Most directly comparable in the common law tradition would be the U.S. Racketeering Influenced and Corrupt Organizations Act (RICO) created in 1970 to criminalize racketeering through an enterprise (Danner and Martinez 2005). RICO changed the proof of involvement from individual crimes to participation in an organized crime group.

Like RICO, JCE serves a similar function at the ICTY. Individuals can be charged with participation in a JCE if the prosecution team can prove that there is some connection between the defendant and a crime committed. The Tribunal has created a broad definition, however, of how JCE can be applied to defendants and has also refrained from clarifying what an “enterprise” is. For these same reasons, domestic courts have been taking strides to limit similar doctrines within domestic jurisdiction. Similarly, the ICTY lacks restrictions and safeguards to restrict its application or guide how judges should consider JCE during sentencing (Danner and Martinez 2005, 55). While United States Supreme Court Justices are restricting the scope of application for RICO, the judges at the ICTY tend to take an expansive perspective on how JCE can be applied at the Tribunal.

Without a proper definition for what an enterprise is, judges are left to their own interpretation of what this means. This could result in variation in the judges’ interpretation of an enterprise, thus influencing how a panel makes its sentencing decision. It is possible that the panel’s sentence is influenced by the large scale impact of
the enterprise carried out (the crime) and not the individual’s involvement in that enterprise (the culpability). Although an individual defendant may have only been involved in a small fraction of the crimes carried out by the enterprise, it is difficult to know how much the judges consider the broader picture of the full criminal enterprise actions. If judges focus on the breadth of crimes committed, they could be more inclined to give longer sentences.

With other, more established modes of liability, the level of participation is more clearly defined by past precedent and definitions. With JCE, the prosecution team does not have to prove the exact role the defendant served in the larger scale of the JCE. This makes the Prosecution’s job much easier, but also leaves more uncertainty for how the judges should determine the length of a sentence. Other modes of liability have more clear definitions and require higher standards of proof before they can be used to hold individuals accountable for crimes. Instead of taking strides to restrict the doctrine of JCE, the Appeals Chamber has expanded the scope and made it even easier for individuals to be held liable under JCE.

In contrast, allegations of JCE allow the OTP team wide discretion in terms of what they have to prove the defendant did. JCE does not require the prosecution prove the exact role the defendant served in the larger criminal enterprise. While this makes the prosecution’s job much easier, it also leaves more uncertainty for how the judges should determine the length of a sentence. Scholars have criticized the doctrine as giving too much leeway to the OTP, but rather than taking strides to restrict JCE as a doctrine, the
Appeals Chamber has expanded the scope and made it even easier for individuals to be held liable under JCE (Danner and Martinez 2005).

The application of JCE at the ICTY has focused on the subjective elements of JCE, specifically the intent of the physical perpetrator with respect to the purpose of the JCE (Haan 2005, 196). Citing cases against General Radislav Krstić, Miomir Stakic, and Blagoje Simic, Haan argues that merely because these men were in a position to give an order, they were held accountable for the acts carried out by others. This use of circumstantial evidence, coupled with the broad definition of JCE allows the OTP to indict individuals for crimes without proving a definitive connection between the individual indicted and the individual who actually committed the crime.

The broad definition and loose application of JCE could lead to longer sentences for those indicted under the doctrine because the evidence connecting individual actions to the specific crimes has a low threshold (Danner and Martinez 2005). By giving a lower evidentiary burden to prove culpability, the OTP may choose to indict defendants for more crimes than would be possible with other modes of liability. In turn, the vagueness of the doctrine, coupled with the increased usage by the OTP may influence the judges’ sentencing decisions. Because of this, I expect there is a correlation between individuals indicted under JCE and longer sentences being rendered by the judges.

Hypothesis 1: Individuals indicted with JCE will receive longer sentences than individuals indicted with other modes of liability.

JCE and the Power of Ranking Officials

As originally defined by the Tadić Appeals Chamber, there are no provisions to
consider defendants differently based on the level of power they held during the conflict. Interestingly, however, few high-level officials have been indicted at the ICTY that do not include some sort of JCE count regarding criminal allegations, and it has been particularly crucial to the prosecution when indicting senior officials (Danner and Martinez 2005). Some scholars have been even more critical arguing that JCE is a “tool for identifying the personal guilt of top leaders who caused followers to commit individual elements of mass crimes” (Lanegran 2007, 172).

While it is short sighted to assume JCE is used solely against top leaders, there is some merit to the criticism. Part of this criticism is a direct result of the OTP’s usage of the doctrine over time. In the early years of the ICTY, mainly low and mid-level officials were apprehended and brought to trial. As the trials and plea agreements of these relatively low and mid-level officials’ occurred, more information came to light, and testimony that clarified individual actors’ roles in committing crimes were brought to the attention of the OTP. As lower level defendants clarified who gave orders to commit crimes, who was with them when the crimes were committed, and the intent regarding criminal activities that were carried out, such evidence implicated other defendants. As a result of the information garnered from earlier cases, more high-level individuals were indicted with JCE participation. The timing of indictments and arrests could explain some of the increase in JCE’s application—as the doctrine continued to develop and more cases were heard, more individuals were indicted for participation in JCE.

Another reason why high-level officials may be more likely to be indicted for participation in a JCE than low or mid-level actors is because of their position. At the
ICTY, high ranking government officials and military leaders have been charged for coordinating and planning the events that took place in the former Yugoslavia. Those in positions of high power are held responsible for their own participation, and they can also be charged with participation in a criminal enterprise. Thus, they can be held liable for the acts of those who they gave orders to or acts that were foreseeable given the circumstances of their activities. While it may appear to be an obvious statement that with greater power comes more responsibility, and thus liability, higher positions of power could have allowed a physical separation from attacks that puts a great burden on the Prosecution. The structure of JCE makes it easier for the OTP to indict defendants for crimes because they do not have to prove what role defendants carried out the actual criminal actions. This is particularly important for high-level officials.

High-level officials were primarily responsible for planning and organizing many of the exterminations, attacks, and other activities that took place during the Yugoslavian conflict, but they were frequently absent during the attacks. Like the U.S. RICO Act, JCE functions as a punishment for participating in a criminal plan. JCE provides a way for the prosecution to charge individuals for many crimes they could not be charged for otherwise. This is especially helpful given that high-level officials could possibly escape prosecution or be indicted on lesser charges without JCE. Because of the way JCE can help the prosecution, I argue that high-level officials are more likely to be indicted for participation in a JCE. Low and mid-level officials are frequently committing the crimes ordered by high-level officials. Following these orders is furthering the will of the JCE and allows these low and mid-level officials to also be held liable for participation in a
JCE. While low and mid-level officials are indicted for participation in JCE, I expect that
JCE is used less frequently in indictments for low and mid-level officials and these
officials receive shorter sentences than higher level officials that coordinated the attacks
and created plans to carry them out.

Broad indictments that included JCE criminal charges, e.g. the 66 counts against
former Serbian President Slobodan Milosevic, cast a wide net that allows other
individuals to be indicted (Danner and Martinez 2005). The organizers of the conflict
had enough foresight to not leave a paper trail explicitly documenting their plans and who
was involved at what level. Many attacks were undocumented, and much speculation
abounds by those that survived the conflict and searched for answers to understand what
happened to their family and friends. In many cases, a guilty plea by a co-participant in
the JCE is the best opportunity the Prosecution has to receive information about who was
involved in planning and what their participation involved. Without an individual willing
to provide information about what did happen, it is often difficult to validate the
individual level of responsibility for every criminal action an individual is suspected to
have participated in.

Without specific knowledge of an individual’s liability for crimes committed, the
ICTY statute does include provisions that allow high-level officials to be indicted without
JCE. The ICTY Statute follows the Nuremberg Tribunal’s decision that following orders
of a government official or superior is not an acceptable defense and does not exclude
oneself from individual responsibility for their actions (Article 7(4)). However, Article
7(3) indicates that superiors will be held liable under superior criminal liability, a
separate mode of liability, for the acts of those they gave orders to (ICTY statute). While many high-level officials could be indicted for superior criminal liability, JCE requires a lower burden of proof. To be indicted for SCL a preexisting power hierarchy must be established between the high-level officials and those they gave orders to.

JCE as a mode of liability requires no preexisting connection or even a known connection at the time the crimes were committed. If the prosecution can prove that a common plan is in existence, then anyone involved in the planning or carrying out of said plan could be accused of participation in a JCE. This means that, in addition to being liable as a superior, JCE also allows for high-level officials to be held individually liable for the actions of their subordinates when their actions were ordered, as well as when crimes committed were foreseeable. Compared to their low and mid-level counterparts, high-level officials often face more opportunities to be charged for crimes. Although most high-level officials indicted at the Tribunal could be held liable under other modes of liability, JCE allows the amount of crimes and possibly the severity of an individual’s charges, to increase exponentially while decreasing the amount of proof the OTP must have compared to other modes of liability. Thus, JCE is favored by the OTP.

The language of JCE has also allowed the ICTY prosecutors to indict officials for more charges. In contrast, superior criminal liability requires a clear connection be established between a superior and their subordinates prior to an incident in order for the superior to be held responsible for the actions of those under them. Without an established connection between the superior and subordinate, superior criminal liability cannot be used as a mode of liability to indict a high-level official for a criminal act.
(Ambros 2007). Conversely, JCE does not require any type of formal relationship to exist between individuals accused of participation. In fact, individuals can be held liable under the third category of JCE for acts committed by individuals not privy to the JCE’s plans if they act to “further the goals” of the JCE under the supervision or acknowledgement of a JCE participant (ICTY 2007).

The language defining JCE does not require an individual’s role within the JCE to be clarified. With a lowered level of proof and increased number of counts included in indictments against them, high-level officials indicted under JCE may receive longer sentences than lower level officials because the ICTY statute’s objective is to assign guilt to those “most responsible” for the crimes committed during the conflict. Higher level officials were in a position to be responsible for more atrocities. If indicted for JCE, high-level officials are not only responsible for their personal involvement, but can also be held liable for any individual who carried out an order to commit a crime.

The Brdjanin Appeals Chamber allowed individuals to be held liable under JCE when the physical perpetrator of a crime was not part of the JCE. Comparatively, mid and low-level officials can be indicted for their cooperation and participation in a JCE, but they will be less likely to be held liable for the crimes of many other individuals.

Judgments at the ICTY have expanded the application of the doctrine so that the Prosecution does not have to prove a direct connection between the physical perpetrator of a crime and the high-level official. No judgments or sentences at the Tribunal have determined the extent to which power level should be considered while sentencing, but the Krstić Trial Chamber came close when they ruled that “participation of a high-level
superior in a crime is an aggravating circumstance” (ICTY 2001a). The same judgment also states that a defendant’s rank alone does not equate a higher sentence, but a person exercising power should be held more responsible than individuals who only participate in a crime.

If the Prosecution can prove that a defendant participated in a JCE, the judges will consider the role the defendant played in the enterprise. The broad definition of a JCE allows the Office of the Prosecutor to use JCE frequently in cases against high-level officials. Indicting officials for participating in a JCE can have psychological effects on judges during sentences. Danner and Martinez (2005) emphasize the effect of having JCE as a mode of liability to prove individual responsibility. For high-level officials, the implication of participating in a JCE could lead the judges to give longer sentences. High-level officials charged with participation in a JCE are likely to be instrumental in planning the crimes carried out by the co-perpetrators of the JCE.

On the other hand, mid and low-level officials charged with participation in a JCE may be seen as a lackey sent to carry out the will of the higher level officials. If being a high-level official during the Tribunal is an aggravating circumstance that can be considered during sentencing, it is possible that being an official of a lower power level will be considered by judges as well. Most of the mid and low-level officials indicted at the Tribunal were not planners of the conflicts. Frequently, they were military members who followed orders, gave orders to those of lower ranks, or were in positions that they could have foreseen other crimes taking place. They may receive shorter sentences because, while they are responsible for the crimes they do carry out, judges may consider
their crimes less severe as their crimes were part of a bigger plan orchestrated by the higher level officials. Low and mid-level officials did commit crimes but they were not instrumental in orchestrating the widespread plan.

With few guidelines regarding sentencing, patterns may still be developing. The OTP has an advantage in indicting high level officials for JCE because its level of proof is reduced—making it easier to bring charges against high-level officials. Additionally, higher levels of power and responsibility should be reflected in a longer sentence compared to sentences given to individuals who carried lower levels of responsibility during the conflict. Even with the same mode of liability, sentences should reflect the level of power and influence the defendant carried during the conflict. So, while I expect JCE to be applied to cases for high-level officials more often than defendants within other power levels, I also expect sentences for high-level officials to be longer than those for individuals of low and mid-levels of power.

_Hypothesis 2: High-level officials are more likely to be indicted for participation in a JCE than low and mid-level officials._

_Hypothesis 3: High-level officials indicted with JCE as a mode of liability will receive longer sentences than low and mid-level officials indicted with JCE as a mode of liability._

**Categories of JCE and Sentencing**

The three categories of JCE were developed to help define exactly what could qualify as participation in a JCE. In defining the three categories, there were no guidelines about how to apply the power level of defendants in practice to sentencing decisions. Although it may seem logical that the three categories outlined by _Tadić_ are...
applied differently given their definitions, this is important to consider as some categories, particularly the third, require a lower *mens rea* for conviction. Higher level officials should, and often do, carry a higher level of culpability and blame, but convicting them using a mode of liability that does not require a stringent test of their own *mens rea* could be interpreted as judicial creativity in providing an advantage to force convictions and possibly longer sentences.

The definition of the third category of JCE is very broad and allows the prosecution to draw connections between individuals that could not be connected otherwise. This is very important when trying to indict high-level officials who might not have been present during an attack, but planned the event and ordered it to be carried out. The level of individual responsibility that high-level officials carry will be compounded by the actions of their subordinates and actors on location during conflicts. Low and mid-level officials are more likely to be held individually responsible for their personal participation in furthering the will of the common plan instead of being held responsible for the actions of others. Low and mid-level officials are likely to personally carry out the acts orchestrated by high-level officials which would change their level of responsibility in comparison. I expect that the first and second categories will be applied more heavily to low and mid-level officials, while more high-level officials will be held individually liable under the third category.

The third category allows individuals to be held liable for crimes committed that are even outside the scope of the JCE’s common plan. In one brief in the *Krnojelac*
Appeals case\textsuperscript{8}, the prosecution team claimed that one aim of JCE was to extend responsibility of a crime to those at the highest power levels who were removed from the actual perpetration of offences, but had been deeply involved planning and organizing them.

For more established modes of liability, there is less doubt regarding the application and purpose of the doctrine because the modes of liability are understood and grounded in legal tradition. By contrast, JCE has only existed since the first appeals case at the ICTY. Instead of erring on the side of caution to fully develop the doctrine of JCE, the OTP began to use JCE frequently and liberally. With few sentencing guidelines and no minimum sentencing requirements from the ICTY Statute, judges at the ICTY have established their own patterns in applying JCE. The third category of JCE is the least similar to a prior common doctrine in international law or domestic law. Many domestic legal systems reject holding people liable for crimes outside of the criminal objective. Since the third category will allow guilt to be assigned for crimes committed outside of the scope of the JCE, guilt is applied on the basis of criminal negligence or recklessness (Danner and Martinez 2005). There are fewer precedents to guide judges when sentencing individuals charged with the third category of JCE. I expect that high-level officials indicted under JCE Category 3 will receive longer sentences than other high-level officials indicted under other modes of liability. Common practices at the Tribunal could be enforcing patterns of JCE application and influencing sentencing lengths.

\textsuperscript{8} Prosecution Brief in Krnojelac Appeals, ¶ 2.19.
At the Tribunal, it has become common practice to file joint indictments lumping multiple individuals together into one trial. While this serves a valuable function helping the Tribunal hear cases quickly and expediting the process of documenting what happened during the conflict and assigning responsibility, it is also making it easier to have similar indictment charges for individuals of the same power level. Indictments are only consolidated together when there are similar crimes, circumstances, and often power levels between defendants. The joint indictments filed at the ICTY tend to include individuals of similar levels of power instead of joining a very low-level official together with higher level officials. Often the mode of liability is similar among those indicted together. The joint indictments and trials help solidify the idea of a JCE existing. It is more difficult to dispute the existence of a JCE when more than one individual is on trial for participation in it in the same courtroom. This could lead to longer sentences for those indicted for participation in a JCE as the judges can see individuals accused of working together to commit crimes in one room. While there is no legal doctrine to encourage this, psychologically it could influence the judges’ sentencing decisions.

Joint indictments have become increasingly common later in the existence of the Tribunal as more cases for high-level officials have begun. Common modes of liability used against high-level officials are JCE and superior criminal liability. Most other modes of liability used at the Tribunal have been established in customary international law in prior international tribunals or are commonly used in many domestic law systems and, thus, their application is more established. High-level officials are rarely held responsible for physically committing or aiding and abetting the commission of crimes.
Because superior criminal liability requires a higher level of proof than JCE, the Office of the Prosecution will likely favor using JCE in indictments. The lowered levels of mens rea associated with the third category of JCE may make it easier for more crimes to be connected to the high-level official resulting in longer sentences. Compared to other modes of liability, JCE will allow the prosecution to include more charges that could lead to longer sentences than other modes of liability. If the Prosecution has a lowered burden of proof because of JCE, defendants are increasingly likely to be found guilty of more charges and could receive longer sentences as a result.

In indictments using JCE as a mode of liability, high-level officials are usually indicted with the third category of JCE. While low and mid-level officials are also occasionally indicted under the third category, they are more likely to be responsible for actually committing acts or being present during their commission. Due to the position most mid and low-level officials serve during the conflict, they are more likely to be found guilty for their own acts or omissions of crimes within the JCE. These types of crimes would be more likely to fall under the first or second category of JCE. As a function of their positions during the conflict, the distance between high-level officials and the physical perpetration of crimes may involve many notches in the chain of command. Also, the first and second categories both require a more stringent mens rea requirement that makes it more difficult to indict individuals under. The role low and mid-level officials played in the conduct will be more in line with the first and second category because the Prosecution is more likely to be able to find proof of the mens rea requirement required of the first and second category. Through delegating tasks and
giving orders, high-level officials sought to avoid connection to the crimes committed and have made it difficult for the Prosecution to use modes of liability other than the third category of JCE to hold them individuals responsible for crimes. Because of this, I expect that high-level officials indicted for participation in a JCE are more likely to be indicted based on the third category while low and mid-level officials are likely to be indicted for the first or second categories.

As a new mode of liability developed at the Tribunal, the application of JCE will influence how the doctrine is used in future Tribunals. More focus will be placed on high profile, high power level officials. If high-level officials are being found guilty with a lower \textit{mens rea} this could be considered less than ideal from a legal standpoint. It is important to consider the application of the third category of JCE as it is the least familiar in both international and domestic law. If this mode of liability is resulting in longer sentences that are being received because less proof is required this could damage the reputation of the Tribunal and result in a misapplication of justice.

\textit{Hypothesis 4: High-level officials will be held liable under the third category of JCE more often than low and mid-level officials.}

\textit{Hypothesis 5: High-level officials indicted with the third category of JCE will receive longer sentences than other high-level officials indicted under other modes of liability.}
CHAPTER 4

RESEARCH DESIGN

Despite the growing literature on joint criminal enterprise (JCE) at the International Criminal Tribunal for the Former Yugoslavia (ICTY), there has not been a statistical analysis concerning how the doctrine is used. In order to test the hypotheses outlined in the previous section of this thesis, I examine how modes of liability, particularly JCE, have been used in previous cases and how various modes of liability have impacted sentence lengths. For the purpose of this study, only the Trial Chamber is examined. Many cases that have completed the Trial Chamber stage have not completed the appeals stage, so these cases could not be included. Focusing on the Trial Chamber will provide a better picture of the use and application of joint criminal enterprise in sentencing at the ICTY; excluding Appeals Chamber sentences from this analysis will also provide consistency as each case is being studied at the same stage.

The data examining how JCE is used at the ICTY is organized by individual counts accepted by the Trial Chamber. This structure allows me to use the individual count as the unit of analysis to most accurately consider the influence joint criminal enterprise has on sentencing. Focusing on individual counts, as opposed to focusing on defendants, allows for a more comprehensive analysis of how joint criminal enterprise is used at the Tribunal. Defendants brought before the ICTY can be indicted for multiple counts, but not all counts carry the same mode of liability. By including each individual count in the database, the analysis provides a more complete picture of how the doctrine
of joint criminal enterprise is developed. Individual counts for each defendant whose case has completed the trial stage and was heard before the Tribunal, at the time of writing, are included in the database. Cases that were referred to courts in the former Yugoslavian states are not included. Likewise, cases that did not result in a sentencing judgment because of the death of the defendant are also excluded. I have excluded the counts listed in the indictment that were not accepted by the Trial Chamber since they were not considered when sentencing decisions were made.

Within the database, individual counts are organized by defendant. For each defendant I have collected data reflecting: 1) the defendant’s initial appearance date before the Tribunal, 2) the date the trial sentence was given, 3) the length of sentence received in months, 4) the mode of liability used in the indictment, 5) whether or not JCE was cited in the indictment as a mode of liability for each specific charge, 6) whether or not joint criminal enterprise was accepted as a mode of liability at the Trial Chamber when sentencing an individual at the Tribunal, 7) the power level an individual held during the conflict, and 8) whether or not an individual was found guilty of each specific count accepted by the Trial Chamber. I used information from a data set created by James Meernik and Kimi King for the variables indicating sentence length, initial appearance dates, sentencing dates, power level, individual charges, and indication of guilt. By reading individual case indictments and sentencing judgments located on the

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9 The variable for power level came from James Meernik and Kimi King’s dataset. The variable is broken down into three levels: low-level officials (coded as 1), mid-level officials (coded as 2), and high-level officials (coded as 3). Further information about coding can be found at: http://www.psci.unt.edu/~meernik/International%20Criminal%20Tribunals%20Website.htm

10 Data can be accessed at: http://www.psci.unt.edu/~meernik/International%20Criminal%20Tribunals%20Website.htm
ICTY website,\textsuperscript{11} I coded information on whether joint criminal enterprise was listed as a mode of liability for an individual count in the indictment, the specific mode of liability cited in the indictment (if JCE, which category was used), and whether or not joint criminal enterprise was a mode of liability accepted by the trial chamber when sentencing.

There are 727 individual counts included in the analysis drawn from the seventy-three defendants whose cases have completed sentencing at the trial level from 1996 to April 2008. Looking at the seventy-three cases that have completed the trial sentencing stage, we can see that joint criminal enterprise has been heavily used by the OTP. Of these seventy-three individuals, only eleven defendants were not indicted for participation in a joint criminal enterprise. Of the sixty-two individuals indicted with joint criminal enterprise as a mode of liability, twelve defendants could not be proven to know of or have participated in furthering the goals of a joint criminal enterprise. This means that over sixty-eight percent of individuals sentenced at the trial level to date were sentenced with joint criminal enterprise as a mode of liability (see Table 1). Of the seventy-three cases that have completed sentencing, four were acquitted of all charges.

<table>
<thead>
<tr>
<th>Trials completed</th>
<th>Indictment includes JCE</th>
<th>Guilty of JCE participation</th>
</tr>
</thead>
<tbody>
<tr>
<td>Number of defendants</td>
<td>73 (69)*</td>
<td>62</td>
</tr>
<tr>
<td>Percentage of defendants</td>
<td>--</td>
<td>85%</td>
</tr>
</tbody>
</table>

*number of cases that resulted in a sentence

\textsuperscript{11} All case information can be found at: http://www.un.org/icty/cases-e/index-e.htm
In order to test the five hypotheses outlined previously in this thesis, I employ regression models to study the relationship between the modes of liability used in indictments, the category of joint criminal enterprise used in indictments, the power level of the defendant, and the length of sentence received. These tests will provide more information as to how JCE is being applied by the OTP and how JCE influences sentence lengths.

Regression Models

Mode of Liability

The development of JCE was met with criticism owing, in part, to the lack of detail given in the original definition in the Tadić Appeals Chamber. Without clear explanations of how various modes of liability should be considered when sentencing decisions are made, judges at the ICTY developed their own rules for how modes of liability were used. Rachel Taylor (2004) and Allison Danner and Jenny Martinez (2005) emphasize the lack of differentiation between the various modes of liability used at the Tribunal.

Danner and Martinez (2005) suggest that over time, the judges at the ICTY have used a broad interpretation of JCE and how it should be applied. If this assumption is true and a loose interpretation of JCE exists, I expect that a lowered accepted standard of proof could result in longer sentences. My first hypothesis predicts that individuals indicted with joint criminal enterprise will receive longer sentences than individuals indicted with other modes of liability.
To test Hypothesis 1, I used a regression model with robust standard errors\(^\text{12}\). The dependent variable is the length of sentences in months. Two independent variables were included in the test: 1) indicating that JCE was accepted as a mode of liability by the trial chamber (1 = JCE is a mode of liability, 0 = JCE is not a mode of liability in the indictment) and 2) indicating the level of power defendants held during the conflict (1 = low-level official, 2 = mid-level official, and 3 = high-level official). Only cases that resulted in a sentence were included in the model. Table 2 reports the relationship between sentence lengths and JCE at the ICTY. As Table 2 indicates, I found that when JCE was included as a mode of liability, defendants received sentences that were 119 months longer on average than sentences for individuals who were charged without JCE as a mode of liability. Table 2 also indicates that the power level of individuals in not a statistically significant variable when determining sentence length.

\(^{12}\text{Robust standard errors are clustered on individual trials. Some trials included as few as one count while others included as many as 38. Clustering the observations using robust standard errors controls for non independence within the observations (Arellano 1987, Giles and Zorn 2000). This technique is applied to all following tests. All tests are two tailed.}\)
Danner and Martinez (2005) and Lanegran (2007) perceive JCE as a doctrine frequently used on high-level officials. JCE has been the mode of liability in more cases in recent years; during the same time period, cases for high-level officials have been increasing. With trials against high-level officials beginning later in the Tribunal’s existence, more information about what took place during the conflict had been pieced together. By using the information gathered in prior trials together with JCE as a mode of liability, the OTP can bring more charges against high-level officials than low and mid-level officials.

The OTP may favor JCE as a mode of liability because the loose definition of JCE allows the Prosecution to include more charges in the indictment. While other modes of liability, such as superior criminal liability, require preexisting relationships between the physical perpetrators of crimes and other individuals, JCE does not. The perception of an individual’s role in the greater picture of the conflict could influence the length of sentences assigned by judges. For the reasons listed above, and others outlined in the previous section, I expect that high-level officials are more likely to be indicted for participation in a joint criminal enterprise than low and mid-level officials (Hypothesis Two) and high-level officials indicted with joint criminal enterprise as a mode of liability will receive longer sentences than low and mid-level officials indicted with joint criminal enterprise as a mode of liability (Hypothesis 3).
Table 3: Probit Model of the Impact of JCE in Indictment

| JCE in indictment       | Coefficient | Robust Std. Err. | P>|z| |
|-------------------------|-------------|------------------|-----|
| High-level officials    | .807        | .474             | 0.045 |
| Constant                | .996        | .289             | 0.001 |

Number of observations – 360
Number of clusters - 68
Wald $\chi^2$ – 2.90

Table 4: Regression Model Predicting Sentence Length using JCE

| Sentence length         | Coefficient | Robust Std. Err. | P>|t| |
|-------------------------|-------------|------------------|-----|
| High-level officials    | 121.951     | 61.795           | 0.053 |
| Constant                | 238.698     | 34.583           | 0.000 |

Number of observations – 309
Number of clusters - 59
R-squared - 0.14

Table 3 reports the impact JCE has in indictments. To examine the likelihood that high-level officials will be indicted with JCE as compared to their lower level counterparts, I used a one-tailed probit regression model with the presence of JCE in the indictment as the dependent variable, scored 1 if JCE is present in the indictment and 0 if not. The model includes a variable for high-level officials. I found that the power level of officials is statistically significant in determining whether JCE is used as a mode of liability in the indictment, suggesting Hypothesis 2 is supported by the data. Thus, as critics have argued, JCE is being used by the OTP to prosecute high-level officials.

Table 4 reports the impact JCE has on sentence lengths for high-level officials. Using a regression model with the length of sentences in months as the dependent variable and high-level officials as an independent variable, I found that high-level
officials will receive sentences that are 122 months longer on average than low and mid-level officials also indicted with JCE as a mode of liability, suggesting that Hypothesis 3 is supported by current data (see Table 4). Thus, it is not only that JCE is being used against high-level officials, but it is also resulting in lengthier sentences against those officials at the highest levels. I do expect that this analysis may change as more cases complete the trial stage at the Tribunal.

*Categories of JCE and Sentencing*

The three categories of JCE, in particular the third category, carry different levels of *mens rea* that could influence the manner in which the OTP uses the categories at the Tribunal. The third, extended category of JCE requires a lower level of proof for individuals to be found guilty. If Lanegran (2007) is correct and JCE is used in connection with high-level officials more frequently than with low and mid-level officials, I anticipate the third category will be used on high-level officials more often than on other officials. High-level officials are frequently separated from the physical commission of crime by greater distances than lower ranking officials making to more difficult to pinpoint what their role in the conflict was. The third category of JCE, especially with the expansion of *Brdjanin* Appeals Chamber (O’Rourke 2006), requires less specific connections between the physical perpetrator of a crime and the high-level officials who ordered the crime be carried out.

Since the third category of JCE requires a lower level of proof connecting the defendant to the physical perpetration of a crime and a lower level of *mens rea*, the OTP
may prefer to use the third category of JCE as a mode of liability when possible. In a
prosecution brief in the case of *Krnojelac vs. Prosecution* (ICTY 2002) the OTP claimed
that one goal of JCE was to prosecute those at the highest level of power that were
separated from offenses. While other modes of liability, like superior criminal liability,
require previously established hierarchies of power, JCE does not require any pre-
established connection between actors. As a result, I expect to find that high-level
officials will be held liable under the third category of joint criminal enterprise more
often than low and mid-level officials (Hypothesis 4) and high-level officials indicted
with the third category of joint criminal enterprise will receive longer sentences than
other high-level officials indicted under other modes of liability (Hypothesis 5).

Table 5: Probit Model of the Third Category of JCE

| JCE Category 3               | Coefficient | Std. Err. | P>|z| |
|------------------------------|-------------|-----------|------|
| High-level officials         | 1.808       | .473      | 0.000|
| Constant                     | -.849       | .244      | 0.000|

Table 5 reports the results of the probit model testing how the third category of
JCE is used on high-level officials. Using a probit regression, I found that high-level
officials are more likely to be indicted with JCE as a mode of liability than low and mid-
level officials (Table 5). Scholars such as Lanegran (2007) and Danner and Martinez
(2005), have discussed JCE as a target for high-level officials; other scholars, for instance
O’Rourke (2006), emphasized how the expansion of the third category of JCE has made
it easier for the OTP to prosecute high-level officials. The results displayed in Table 4
indicate that statistical support exists for Hypothesis 4. This finding supports critics’ claims that the OTP has used the third category of JCE to target high-level officials.

Table 6 reports the results of the regression model testing how modes of liability effects sentence lengths for high-level officials. This model includes only cases where the defendant held a high-level of power. The dependent variable is the length of sentences in months and the independent variables are the modes of liability used in indictments: Category 1 of JCE, Category 3 of JCE, and superior criminal liability.13

<table>
<thead>
<tr>
<th>Table 6: Regression Model of the Modes of Liability in Sentencing High-Level Officials</th>
</tr>
</thead>
<tbody>
<tr>
<td>Number of observations – 77</td>
</tr>
<tr>
<td>Number of clusters – 13</td>
</tr>
<tr>
<td>R-squared – 0.40</td>
</tr>
</tbody>
</table>

| Sentence Length                  | Coefficient | Robust Std. Err. | P>|z| |
|---------------------------------|-------------|------------------|-----|
| JCE Category 1                  | 34          | 10.01            | 0.005 |
| JCE Category 3                  | 334.375     | 57.11            | 0.000 |
| Superior Criminal Liability     | -312        | 8.68             | 0.000 |
| Constant                        | 362         | 10.01            | 0.000 |

High-level officials charged with other modes of liability, not JCE or superior criminal liability, are the reference category. The results show that high-level officials indicted with the third category of JCE as a mode of liability receive much longer sentences, 334 months on average, than other high-level officials indicted with other non-JCE or superior criminal liability modes of liability. This suggests support exists for Hypothesis Five. Superior criminal liability resulted in sentences that were 312 months shorter than other modes of liability and Category 1 of JCE resulted in sentences that were thirty-four

13 There was not enough variation in cases using JCE Category 2 to include in the analysis. Accordingly, I dropped the two cases in which Category 2 was used. However, the inclusion of Category 2 does not substantively change the results.
months longer than cases where the defendant was not indicted with either JCE or superior criminal liability.
CHAPTER 5

CONCLUSION

The goal of this study is to examine the use of joint criminal enterprise at the International Criminal Tribunal for the Former Yugoslavia (ICTY) by studying how the doctrine has influenced sentences. As definitive conclusions cannot be reached until the Tribunal has completed all trials, my conclusions in this thesis should be considered preliminary. With that in mind, I have shown that there are patterns of how joint criminal enterprise is applied with regards to power levels and specific categories of joint criminal enterprise; these patterns are at times consistent with sentencing patterns. The results show that, on average, cases that include joint criminal enterprise (JCE) as a mode of liability in the indictment resulted in longer sentences overall. I also found that high-level officials are not more likely to be indicted with JCE than low and mid-level officials but they are more likely to receive a longer sentence if they are indicted as such.

Joint criminal enterprise has been used in over eighty-five percent of trials so it is critical to understand the impact that the doctrine has on sentencing practices. If JCE is perceived as an unfair doctrine developed with the express purpose of prosecuting high-level officials then the legitimacy of the Tribunal may be challenged. There is evidence that the power level of defendants is related to the category of joint criminal enterprise that they will be held liable with. While scholars like Danner and Martinez (2005) and Lanegran (2007) are critical that JCE is used excessively on high-level officials, I argue that the relationship is more complicated. In alignment with the goals of the ICTY
Statute, the worst offenders during the conflict should be punished at the Tribunal. The expanse of their influence during the conflict is likely a major factor considered during sentencing and the empirical results support this point with respect to the relationship between an individual’s power level and the likelihood of a JCE indictment. As the Tribunal completes more trials with high-level officials, I expect that the findings concerning high-level officials will be different and the relationship between indictments containing joint criminal enterprise and high-level officials will be stronger.

The relationship between the categories of joint criminal enterprise and sentencing are also in need of further examination. The lowered level of *mens rea* required of the third category has been heavily criticized and my findings indicate that the category of joint criminal enterprise may be a significant factor in sentencing decisions. The third category of joint criminal enterprise is being used more heavily on high-level officials. The criticism that the third category is mirrored after domestic laws, such as the American RICO Act, that were created to help in prosecuting individuals participating in a criminal enterprise has created doubt to the legitimacy of sentences for high profile defendants. As previously stated, I expect that the information regarding high-level officials may continue to change as more high-level officials complete their trials. The relationship between superior criminal liability and superior criminal liability also needs to be examined in future research. Superior criminal liability and joint criminal enterprise are often listed together in indictments, particularly in cases involving high-level officials. Gaining a greater understanding of how these modes of liability are used both individually and together could help appease critics of JCE. Since many high-level
officials are indicted with both categories it needs to be determined which mode of liability is more likely to result in longer sentences. It is possible that the Office of the Prosecution could stop using the two modes of liability together, and using superior criminal liability alone would produce the same result.

Many of the lingering questions concerning the use of JCE, as well as other modes of liability, could be answered if sentencing guidelines were developed at the Tribunal. Without clear precedent as to how joint criminal enterprise should be used at the Tribunal, the Judges have developed their own perception of how new modes of liability should be applied to various defendants.

The use of joint criminal enterprise at the ICTY has helped develop a precedent for how the doctrine could be used at other international Tribunals. As the International Criminal Tribunal for the Former Yugoslavia begins hearing final cases, other international tribunals are just beginning. The doctrine has already been adopted by for use in international tribunals in Sierra Leone and Cambodia. However, many in the international community still have strong reservations about using JCE, particularly its third category. The Statute for the International Criminal Court allows elements of joint criminal enterprise to be used, but the third category is not considered an accepted mode of liability. This mixed show of support from the international community indicates that joint criminal enterprise is not fully supported and there are still many doubts concerning the third category. While smaller regional tribunals like those in Sierra Leone and Cambodia have not limited the use of joint criminal enterprise, it is telling that the International Criminal Court has deemed the third category inappropriate for the
Tribunal. If further studies illustrate that part or all of joint criminal enterprise was a legal mode of liability that would result in a fair trial for defendants then doubts about JCE could be subsided.

As Judge David Hunt stated, “the Tribunal will not be judged by the number of convictions which it enters…but by the fairness of its trials” (ICTY 2003a). The legality of joint criminal enterprise needs to be continually studied because it is important for the Tribunal to be perceived as a fair institution. As international tribunals are becoming increasingly common and the permanent criminal court is established, the legality of JCE must be considered. While criticisms of JCE have existed since the doctrine was developed, few empirical studies have been done to examine how it has been used. Before final judgments are made concerning the fairness of trials at the ICTY and whether joint criminal should be used in future, tribunal critics will benefit from focusing on empirical studies of how joint criminal enterprise has been used in past trials.
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