

**International Criminal Law****Quick Reference Rules of Law**

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**"The Justice Case" (Case 3), United States v. Josef Altstoetter et al.**

Allied country (P) v. Nazi judges (D)

Trials of Individuals Before the Nuremberg Military Tribunals Under Control Council

Law No. 10, 1946-1949, Vol. III (1951). Opinion and Judgment, at 954-84.

**NATURE OF CASE:** Post-World War II trial of Nazi judges by a U.S. military tribunal in Germany.**FACT SUMMARY:** Judges (D) who were part of the Nazi regime were charged with various crimes, including crimes against humanity, conspiracy to commit war crimes, and "judicial murder," on the grounds that they had destroyed law and justice in Germany and then utilized the emptied forms of legal process for persecution, enslavement, and extermination on a large scale. **RULE OF LAW**

- (1) The military tribunal draws its power and jurisdiction to punish violations of international law from the Control Council, as an international body temporarily governing Germany.
- (2) International law recognizes more than violations of laws and customs of war as offenses.
- (3) The *ex post facto* rule does not apply to international law, so that the principle *nullum crimen sine lege* cannot be used as a defense to international crimes.

**FACTS:** After World War II, a series of trials took place at Nuremberg and other locations in Germany under Control Council Law No. 10 (C.C. Law 10). The Control Council governed occupied Germany, and was made up of representatives from the U.S. (P), U.S.S.R (P), France (P), and England (P). In U.S. occupied zones, trials were held before U.S. judges. In 1947, the U.S. Military Government for Germany created Military Tribunal III to try what was called the "Justice Case", where the Defendants (D) were judges in the Nazi regime. They were charged with "judicial murder and other atrocities, which they committed by destroying law and justice in Germany, and then utilizing the emptied forms of legal process for the persecution, enslavement, and extermination on a large scale," and were accused of conspiracy to commit war crimes against civilians in German-occupied territories (including German civilians and nationals) and against soldiers of countries at war with Germany. They were also accused of crimes against humanity. In addition, some were charged with being members of the SS, SD, and Nazi Party leadership corps, all of which had been declared criminal organizations. All the Defendants (D) pled not guilty. Military Tribunal III rendered its judgment.

**ISSUE:**

- (1) Does the military tribunal draw its power and jurisdiction to punish violations of international law from the

Control Council, as an international body temporarily governing Germany?

- (2) Does international law recognize more than violations of laws and customs of war as offenses?
- (3) Does the *ex post facto* rule apply to international law, so that the principle *nullum crimen sine lege* can be used as a defense to international crimes?

**HOLDING AND DECISION:** [Judge not stated in casebook excerpt.]

- (1) Yes. The military tribunal draws its power and jurisdiction to punish violations of international law from the Control Council, as an international body temporarily governing Germany. It has always been recognized that a state with a functioning government may punish war crimes of perpetrators that come within the state's jurisdiction, but at the state's discretion. The situation here is different, since there is no functioning German government. Thus, the power to punish violations of international law in Germany is not solely dependent on the enactment of rules of substantive criminal law that are applicable only in Germany. Instead, the military tribunal may punish violations of the common international law because Germany is under the temporary control of the Control Council, an international body that has assumed and exercised the power to establish judicial machinery for the punishment of such violations. Such an international body could not, without consent, assume or exercise such power in a state that had a functioning national government that could exercise its sovereignty.
- (2) Yes. International law recognizes more than violations of laws and customs of war as offenses. Violations of laws and customs of war are no longer the only offenses recognized by common international law. Given the "force of circumstance, the grim fact of worldwide interdependence, and the moral pressure of public opinion," crimes against humanity committed by the Nazis have also been recognized as violations of international law. One such crime is genocide, which has been confirmed as a crime under international law by the U.N. General Assembly. The commission of genocide is punishable regardless of whether those who committed it were private individuals, public officials, or statesmen, and regardless of whether it was committed on religious, racial, political, or any other grounds. Whether the crime against humanity is the product of statute,

international law, or both, it is not unjust to try the perpetrators, who are chargeable with the knowledge that their acts were wrong and punishable when committed. The Defendants' (D) contention that they should not be found guilty because they acted within the authority and by the command of German laws must be rejected, since C.C. Law 10 provides for punishment regardless of whether the acts were in accord with or in violation of domestic laws at the time. The Nuremberg Tribunals are not German courts and are not enforcing German law, nor are the charges based on violations of German law. Instead, they are international tribunals enforcing international law as superior to any German statute or decree. Although German courts during the Nazi regime were required to follow German law (i.e., Hitler's will) even though it was contrary to international law, no such limitation may be applied to the tribunal here. In fact, the very essence of the case here is that German law—the Hitlerian decrees and corrupt and perverted Nazi judicial system—itsself constituted the substance of war crimes and crimes against humanity. Thus, the participation in the enactment and enforcement of that law amounts to complicity in crime. Moreover, governmental participation is a material element of the crime against humanity, since only when public officials participate in atrocities and persecutions do those crimes assume international proportions. Because governmental participation is an element of the crime, it cannot also be a defense thereto.

- (3) No. The *ex post facto* rule does not apply to international law, so that the principle *nullum crimen sine lege* cannot be used as a defense to international crimes. The *ex post facto* rule, which under written constitutions condemns statutes that define as criminal those acts committed before the law was enacted, cannot apply to international law, which is not the product of statute, but of multipartite treaties, conventions, judicial decisions, and customs. It is "sheer absurdity" to suggest that the rule can be applied to a treaty, custom, or decision of an international tribunal. If the rule were applied to these, there would be no common international law—it would have been strangled at birth. Thus, the principle of *nullum crimen sine lege* does not limit the tribunal's power to punish violations of international law when committed. Not only is this principle not a limitation of sovereignty, it is a principle of justice, so that to assert that it is unjust to punish those who defy treaties and international assurances is untrue, since the perpetrators must know that what they have done is wrong and it would be unjust to allow the perpetrators to go unpunished.

 **ANALYSIS**

A basic precept of criminal law prohibits *ex post facto* prosecutions (*nullum crimen sine lege*; *nulla poena sine*

*lege*). Arguably, since many of the crimes against humanity, such as genocide and mass killing, were already crimes under every legal system, it would not be unjust under *ex post facto* principles to prosecute and punish perpetrators of such crimes, since arguably the crimes were merely "internationalized" by the IMT Charter.

**Quicknotes**

**EX POST FACTO** After the fact; a law that makes subsequent activity criminal or increases the punishment for a crime that occurred, or eliminates a defense that was available to the defendant prior to its passage.

**INTERNATIONAL LAW** The body of law applicable to dealings between nations.

**JURISDICTION** The authority of a court to hear and declare judgment in respect to a particular matter.

**Prosecutor v. Milutinović et al.****International prosecutor (P) v. Government official accused of international crimes (D)**

Int'l Crim. Trib. for the former Yugoslavia, I.C.T.Y. Case No. IT-05-87-T, Summary of

Trial Chamber Judgment (Feb. 26, 2009).

**NATURE OF CASE:** Trial before the International Criminal Tribunal for the former Yugoslavia of Serbian and Yugoslavian government officials accused of instigating and aiding and abetting war crimes and crimes against humanity in Kosovo.

**FACT SUMMARY:** Milutinović (D), Šainović (D), Ojdanić (D), Pavković (D), Lazarević (D), and Lukić (D), who were either Serbian or Yugoslavian government officials, were each accused of participating in a joint criminal enterprise to modify the ethnic balance in Kosovo and instigating and aiding and abetting various war crimes and crimes against humanity, as set out in Articles 7(1) and 7(3) of the Statute of the Tribunal of the International Criminal Tribunal for the former Yugoslavia, to further the goals of that criminal enterprise.

**RULE OF LAW**

Government officials accused of engaging in a joint criminal enterprise and instigating and aiding and abetting war crimes and crimes against humanity will be convicted only where there is sufficient compelling evidence of their participation in such an enterprise and crimes.

**FACTS:** Milutinović (D), Šainović (D), Ojdanić (D), Pavković (D), Lazarević (D), and Lukić (D), who were either Serbian or Yugoslavian government officials, were each accused of participating in a joint criminal enterprise to modify the ethnic balance in Kosovo and instigating and aiding and abetting various war crimes and crimes against humanity, as set out in Articles 7(1) and 7(3) of the Statute of the Tribunal of the International Criminal Tribunal for the former Yugoslavia, to further the goals of that criminal enterprise. Specifically, the crimes the accused were alleged to be responsible for were: deportation, a crime against humanity (count 1); forcible transfer as "other inhumane acts," a crime against humanity (count 2); murder, a crime against humanity and a violation of the laws or customs of war (counts 3 and 4); and persecution, a crime against humanity (count 5). The accused allegedly participated, along with others, in a joint criminal enterprise to modify the ethnic balance in Kosovo to ensure continued control by the Federal Republic of Yugoslavia (FRY) and Serbian authorities over the province. The purpose of the joint criminal enterprise was to be achieved through a widespread or systematic campaign of terror or violence against the Kosovo Albanian population, including various crimes specified in each of the counts of the indictment. The Kosovo Albanians were forced out of Kosovo through

a campaign of violence and terror, which included killings, property destruction, destruction or damage of religious sites, theft, sexual assaults, beatings, and other crimes that were carried out by the FRY and Serbian forces. At the time of these alleged crimes, approximately from the end of March 1999 to the beginning of June 1999, Milutinović (D) was the President of the Republic of Serbia; Šainović (D) was a Deputy Prime Minister of the FRY as well as the head of the Joint Command, which had authority over the Yugoslav Army (VJ) and Serbian forces known as "MUP" forces deployed in Kosovo; Ojdanić (D) was the Chief of the General Staff of the VJ; Pavković (D) was the Commander of the VJ 3rd Army; Lazarević (D) was the Commander of the VJ Priština Corps; and Lukić (D) was the Head of the Serbian Ministry of Interior Staff for Kosovo, referred to as the MUP Staff. Allegedly, each of the accused exercised command authority and/or effective control over VJ and MUP forces involved in the commission of the alleged crimes. They were also accused of having planned, instigated, ordered, or otherwise to have aided and abetted the crimes. During this period, NATO forces began an aerial bombing campaign against targets in the FRY in an attempt to end an armed conflict between the FRY and Serbian forces and the Kosovo Liberation Army (KLA). During the bombing, around 700,000 Kosovo Albanians left their homes and crossed the borders into Albania and Macedonia. Witnesses for the Prosecution (P) indicated this was a result primarily of the violent and coercive actions of the FRY and Serbian forces. Witnesses for the Defendants (D), however, denied any organized expulsion of the Kosovo Albanians. Other reasons people left the area were that they were instructed to do so by the KLA; they wanted to avoid combat; and they wanted to avoid NATO bombing that was close to their homes. Nevertheless, none of the Kosovo Albanians who testified cited the NATO bombing as among the reasons for their departure. Furthermore, even though the NATO bombings struck targets in the FRY, people did not leave the bombed areas in the massive numbers that fled Kosovo. The MUP attempted to conceal the killing of Kosovo Albanians by transporting the bodies of those murdered to other areas of Serbia. There was evidence of numerous events in numerous municipalities and sites involving the burning of houses, the firing of weapons, killing, sexual abuse, and other acts of violence committed by police and military forces aimed at the Kosovo Albanians, who were rounded up and ordered to leave, or who were put on buses and deported. Witnesses

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from the VJ and MUP described their own participation in the killing or expulsion of Kosovo Albanians. The Trial Chamber assessed the evidence and rendered its judgment, of which it provided a summary.

**ISSUE:** Will government officials accused of engaging in a joint criminal enterprise and instigating and aiding and abetting war crimes and crimes against humanity be convicted only where there is sufficient compelling evidence of their participation in such an enterprise and crimes?

**HOLDING AND DECISION:** (Bonomy, J.) Yes. Government officials accused of engaging in a joint criminal enterprise and instigating and aiding and abetting war crimes and crimes against humanity will be convicted only where there is sufficient compelling evidence of their participation in such an enterprise and crimes. It was generally proved that the alleged crimes were committed by VJ and MUP forces in many of the locations alleged in the indictment. However, there were a number of allegations that were not proved on the facts, or did not satisfy one or more of the requisite legal elements. It was proved that there was a broad campaign by the forces against Kosovo Albanian civilians involving the alleged crimes, and, although in some instances there was not convincing evidence that in certain sites all named victims were in fact among the dead, the killing of a significant group of people by VJ and/or MUP forces occurred as alleged. It was the deliberate actions of the forces that caused the departure of at least 700,000 Kosovo Albanians from Kosovo in the short period at issue.

Milutinović (D), as Serbia's President, did not have direct individual control over the VJ, a federal institution. His formal role in relation to the VJ was as an ex officio member of the Supreme Defence Council (SDC), which comprised FRY President Slobodan Milošević, along with the Presidents of Serbia and Montenegro, and made strategic decisions with respect to the VJ. However, the alleged common criminal plan was not formulated at the SDC sessions. While he had oversight of the Serbian Government Ministries, he did not have extensive interactions with MUP, nor did he have de facto powers over it. Also no adverse inferences can be drawn against him on the basis of decrees he made during the relevant period. Šainović (D), as head of the Joint Command, was an active participant in its meetings (as were Pavković (D) and Lukić (D), and, on occasion, Lazarević (D)) and issued instructions that resulted in military orders coordinating the activities of VJ and MUP. He was very well informed of events in Kosovo during the relevant period and was aware that criminal acts had been committed by the forces, but failed to use his extensive authority in Kosovo to put a stop to such conduct. Ojdanić (D), as the Chief of the General Staff of the VJ, exercised both de facto and de jure command and control over all units and organs of the VJ. He did not, however, have direct control over the MUP forces. He was an active participant in SDC meetings. He issued orders for the VJ to carry out operations in Kosovo,

including in support of MUP. He also mobilized extra VJ units for deployment in Kosovo during the time the majority of crimes took place. He was well informed of the situation in Kosovo, and although, in response to reports of criminal conduct, he issued orders for adherence to international humanitarian law, mobilized the military justice system, and dispatched senior officers from the Security Administration to investigate, he nevertheless continued to order the VJ to participate in military operations with the MUP in Kosovo. Pavković (D) had a central role in the planning and implementation of the activities of the VJ in Kosovo, in coordination with the MUP. He was involved in the arming of non-Albanian civilians and simultaneously disarming Kosovo Albanians. Despite being informed of the excessive or indiscriminate use of force by his units, he continued to engage them. Through his presence in Joint Command and other meetings, the regular VJ reporting system, and his tours of VJ units deployed across Kosovo, he had a detailed knowledge and understanding of the situation on the ground and the activities of his and the MUP forces. This knowledge extended to the commission of crimes by both the VJ and MUP, including the forcible displacement of Kosovo Albanians, murder, and sexual assaults. In fact, even though he knew about criminal acts committed by VJ members in Kosovo, he sometimes under-reported and minimized the serious criminal wrongdoing in his reports. Although he issued some orders calling for adherence to international humanitarian law in the course of these operations, these do not appear to have been genuine measures to limit the commission of crimes in Kosovo. Lazarević (D) also knew that criminal acts were being committed against civilians and their property by VJ and MUP forces and knew this resulted in displacing a significant number of civilians. He significantly participated in the planning and execution of joint VJ and MUP operations in Kosovo during the relevant period, including in places where crimes were found to have been committed. He continued to do so, despite his knowledge of the commission of crimes. He was not, however, aware of high-level political decisions that generally took place in Belgrade. Lukić (D), as head of the MUP Staff for Kosovo, had significant authority over the MUP forces answering to the MUP Staff—which had a significant role in planning, organizing, controlling, and directing MUP forces in Kosovo. The MUP Staff planned and coordinated operations with the VJ, and served as a link to MUP headquarters. Lukić (D) was perceived to be the commander of MUP forces in Kosovo, and he regularly attended and participated in meetings of the Joint Command and other high-level meetings, including in Belgrade. Thus, he was the de facto commander of MUP forces in Kosovo, and the link between the actions of the MUP on the ground in Kosovo and the overarching policies and plans decided in Belgrade. He had a detailed knowledge of events in Kosovo,

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including allegations of criminal conduct by MUP personnel there. The evidence does not, however, prove that he was involved in the concealment of those crimes through the clandestine transportation of civilian bodies from Kosovo to other parts of Serbia.

As to the joint criminal enterprise set forth in the indictment, proof that there was a common purpose to modify the ethnic balance in Kosovo to ensure continued control by the FRY and Serbian authorities is the evidence establishing a widespread campaign of violence and other crimes directed at Kosovo Albanians and the ensuing massive displacement of that population. This campaign was conducted in an organized manner, utilizing significant state resources. Numerous witnesses also testified that they were directed to leave Kosovo, and that their identification papers were taken from them and never returned. Other evidence that supports this common purpose is that non-Albanian civilians were armed; a breakdown in negotiations to end the Kosovo crisis; and the concealment of the bodies of murdered Kosovo Albanians in other parts of Serbia. The evidence does not support the inference that murder, sexual assault, or the destruction or damage of religious property was within the common purpose, so that with regards to each of the accused, the issue is whether these crimes were reasonably foreseeable in the execution of the common purpose. Satisfied that there was such a common purpose among high-level officials in the FRY and Serbia who were in a position to execute it through the various forces under their control, the Chamber has analyzed whether or not each of the accused participated voluntarily in the joint criminal enterprise, made a significant contribution to it, and shared the intent to commit the crimes or underlying offences that were the object of the enterprise. The result of such analysis is that Milutinović (D) is not guilty. Šainović (D), Pavković (D), and Lukić (D) are guilty of all five counts of the indictment and are sentenced to serve 22 years in prison. Ojdanić (D) and Lazarević (D) are guilty of counts 1 and 2, by aiding and abetting acts falling under Article 7(1), and are sentenced to 15 years in prison.

## ▶ ANALYSIS

While war crimes and crimes against humanity are inevitably committed by individuals, they rarely commit such crimes for their own profit. Instead, such crimes are often caused by collective entities supported by a state apparatus. For international criminal tribunals to be able to place responsibility for such crimes on the leaders of the institutions that have supported such crimes, there must be a legal theory that links the leaders to the acts that they themselves have not committed. That theory, as in this case, is a theory of conspiracy. Previously, the International Military Tribunal (IMT) at Nuremberg following World War II used a remarkably innovative and highly controversial conspiracy theory that revolved around the concept of "criminal organization." In this case, the International

Criminal Tribunal for the Former Yugoslavia (I.C.T.Y.) used a similarly innovative and equally controversial conspiracy theory that revolves around the concept of "joint criminal enterprise," which had a common purpose, was well-organized, had the support of the state, and used state resources.



## Quicknotes

**CONSPIRACY** Concerted action by two or more persons to accomplish some unlawful purpose.

**INDICTMENT** A formal written accusation made by a prosecutor and issued by a grand jury, charging an individual with a criminal offense.

