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A Memorandum In Support Of The Brdjanin Decision On Interlocutory Appeal Regarding The Application Of The Theory Of Responsibility Under The Third Category Of Joint Criminal Enterprise Vis-À-Vis The Crime Of Genocide

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MEMORANDUM FOR THE IRAQI SPECIAL TRIBUNAL

ISSUE: A MEMORANDUM IN SUPPORT OF THE *BRDJANIN* DECISION ON INTERLOCUTORY APPEAL REGARDING THE APPLICATION OF THE THEORY OF RESPONSIBILITY UNDER THE THIRD CATEGORY OF JOINT CRIMINAL ENTERPRISE VIS-À-VIS THE CRIME OF GENOCIDE

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I. ISSUE AND SUMMARY OF CONCLUSIONS

A. Issue*

There has been a great deal of debate regarding the application of the theory of responsibility under the third category of Joint Criminal Enterprise vis-à-vis the crime of genocide. In the interlocutory appeal decision in the case of *Prosecutor v. Brdjanin*, the International Criminal Tribunal for the Former Yugoslavia ("ICTY") Appeals Chamber reversed the Trial Chamber's decision to grant *Brdjanin's* motion for acquittal of a charge of genocide based on joint criminal enterprise, noting that "[t]he Trial Chamber erred by conflating the *mens rea* requirement of the crime of genocide with the mental requirement of the mode of liability by which criminal responsibility is alleged to attach to the accused." This position has been referenced and adopted by trial chambers in both the ICTY and International Criminal Tribunal for Rwanda ("ICTR"). This memorandum discusses the relevant jurisprudence of the ICTY and ICTR regarding joint criminal enterprise as a mode of liability and the specific *mens rea* required as an element of genocide. This memorandum concludes that *Brdjanin* was correctly decided, both as a matter of doctrine and policy, and that other Tribunals should follow the *Brdjanin* decision.

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*__Issue__: There has been a great deal of debate regarding the application of the theory of responsibility under the third category of Joint Criminal Enterprise ("JCE3") vis-à-vis the crime of genocide, with specific emphasis on the required specific intent *mens rea*. In the interlocutory appeal decision in the case of *Prosecutor v. Brdjanin*," the ICTY Appeals Chamber reversed the Trial Chamber decision to grant accused's motion for acquittal of a charge of genocide based on JCE 3, noting that "[t]he Trial Chamber erred by conflating the *mens rea* requirement of the crime of genocide with the mental requirement of the mode of liability by which criminal responsibility is alleged to attach to the accused." This position has been referenced and adopted by trial chambers in both the ICTY and ICTR. Set forth and analyze the relevant jurisprudence of the ICTY and ICTR regarding JCE3 as a mode of liability and the specific *mens rea* required as an element of genocide, with particular emphasis on the Appeals Chambers. Adopt a position in support of or against the ICTY/ICTR Appeals Chamber position and justify your position.

B. Summary of Conclusions

1. The *Brdjanin* decision expanded the theory of joint criminal enterprise to cover those leaders who were reckless or indifferent to the circumstances leading to genocide, even though they may not have had actual knowledge of those circumstances.

In order to prove an accused's criminal responsibility for genocide or other crimes provided for in the Statutes of the ICTY and ICTR under the theory of joint criminal enterprise, the prosecution must now prove "the participation of the accused in the common plan."[1] The crime itself need not have previously arranged, but may "materialize extemporaneously and be inferred from the fact that a plurality of persons acts in unison to put the plan into effect."[2] Finally, it is not necessary that the accused was aware that such crimes were the possible consequence of an enterprise, but instead that the accused was reckless or indifferent to that risk.

2. Following *Brdjanin*, the Appeals Chamber's decision in *Karemera* upheld the expansive interpretation of joint criminal enterprise, holding that a defendant could be found guilty of genocide under the theory of responsibility of JCE3.

Karemera reinforced the *Brdjanin* Appeals Chamber's decision, finding that customary international law precedent supports the expanded theory of joint criminal enterprise. Furthermore, the court stated that even if the joint criminal enterprise extended across an entire region, the accused may still be liable where the crimes that occurred were forseeable.

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[1] The Prosecutor v. Brdjanin, Case No. IT-99-36-A, Judgment, at para. 260 (September 2004)[reproduced in accompanying notebook at Tab 40]; *See also*, The Prosecutor v. Tadic, ase No. IT-94-1, Appeals Judgment, at para. 227 [reproduced in accompanying notebook at Tab 15].

[2]Brdjanin, Judgment, at para. 262 [reproduced in accompanying notebook at Tab 40].

3. **The Appeals Chamber decision in *Stakic* determined that joint criminal enterprise is a form of criminal participation governed by broader principles of derivative liability than had previously been allowed.**

Specifically, the Appeals Chamber in *Stakic* applied a very similar standard for liability under joint criminal enterprise applied by the Appeals Chamber in *Brdjanin*, i.e. that the crimes alleged were reasonably foreseeable consequences of the acts of the accused, even if the accused did not have specific knowledge of the crimes.

4. **The *Brdjanin* decision provided courts with an improved theory of participatory liability so that those criminally responsible for mass atrocities can be prosecuted even without proof of direct knowledge.**

The expanded theory of joint criminal enterprise provides a mode of proving the intent element of a crime through reasonable foresight.

5. **A reduced *mens rea* requirement to prove involvement in a joint criminal enterprise is a practical way to ensure that those leaders responsible for mass atrocities are held liable.**

Due to the complex and vast nature of international crimes of war added to the fact that many cases pending before the ICTY and the ICTR involve multiple defendants, an expanded version of joint criminal enterprise liability is practical. To legitimize the *Brdjanin* decision, and ensure that it is used fairly, a reduced sentence for an accused convicted of genocide under JCE3 is necessary.

6. **As long as the leaders most criminally responsible are the ones being implicated, not their subordinates, then the *Brdjanin* theory of joint criminal enterprise poses little threat to the legitimacy of international tribunals.**

7. **By imposing evidentiary standards that the prosecution must meet to prove the accused's involvement in a joint criminal enterprise, trial chambers can promote a just and fair result.**

Such requirements would both restrict the scope of the joint criminal enterprise the prosecution is able to charge, and would help ensure that the joint criminal enterprise theory of criminal responsibility is used primarily for senior leaders, especially in the case of genocide charges.

8. The *Brdjanin* decision serves a practical purpose within the context of trial chamber judgments, because it helped to reinforce the methods of adjudication that some trial chambers were already carrying out.

The Appeals Chamber in *Rwamakuba* affirmed the *Brdjanin* decision, and the opinion of the Chambers clearly illustrates why the *Brdjanin* decision is useful for trial chambers in international tribunals.

9. If prosecutors want to rely on the *Brdjanin* decision to convict defendants under the theory of joint criminal liability, they must follow the proper trial procedures in order to avoid potential pitfalls illustrated by the cases of *Rwamakuba*, *Ntagerura,* and *Krnojelac.*

The theory of joint criminal enterprise must be pleaded specifically in the indictment for the trial chambers to recognize it.

II. FACTUAL BACKGROUND

A. The *Brdjanin* Trial

During the conflict in Bosnia and Herzegovina surrounding the 1990 elections, the Bosnian Serb leadership formed the Assembly of the Serbian People, which developed a scheme to create an ethnically-cleansed Bosnian Serb state, also known as the "Strategic Plan."[3] Radoslav Brdjanin was named President of the Autonomous Region of Krajina in May 1992, and he enjoyed substantial political influence over

[3] O-Rourke, *Recent Development: Joint Criminal Enterprise and Brdjanin: Misguided Overcorrection*, 47 HARV. INT'L L.J. 307, 316 (2006) [reproduced in accompanying notebook at Tab 22].

Serbian paramilitary groups.[4] Brdjanin promoted the Strategic Plan, and his political position enabled him to facilitate the ethnic cleansing of Bosnian Croats and Muslims through a nefarious propaganda campaign. He also placed all of the instruments of state power in the hands of the Serb governing bodies and those persons committed to an ethnically pure Serb state.[5]

The indictment against Brdjanin consisted of 12 charges including genocide; complicity in genocide; crimes against humanity by persecution, extermination, torture, deportation, and inhumane acts; grave breaches of the Geneva Conventions by willful killing, torture, and unlawful and wanton extensive destruction and appropriation of property; and violation of the laws or customs of war by wanton destruction or devastation of villages and religious institutions.[6]

The prosecution did not allege that Brdjanin physically perpetrated any of the crimes. Instead, the prosecution alleged that he was criminally responsible for each of the crimes listed in the indictment for having participated in a joint criminal enterprise under Article 7(1) of the ICTY Statute. Specifically, the prosecution argued that Brdjanin should be subject to individual criminal responsibility "pursuant to an extended form of joint criminal enterprise, the purpose of which was the commission of the crimes of deportation and forcible transfer, whereby the commission of the other crimes charged in the Indictment was alleged to have been a natural and foreseeable consequence of the

[4]The Editorial Staff of International Legal Materials, *ICTY: Prosecutor v. Radoslav Brdjanin,* The American Society of International Law (October 2004) http://www.asil.org/ilib/ilib0717.htm#j2 [reproduced in accompanying notebook at Tab 34].

[5] *Id.* [reproduced in accompanying notebook at Tab 34].

[6]The Prosecutor v. Brdjanin, Case No. IT-99-36-A, Sixth Amended Indictment (December 2003) [reproduced in accompanying notebook at Tab 39]; O'Rourke, 47 HARV. INT'L L.J. 307, 317. [reproduced in accompanying notebook at Tab 22].

perpetration of the crimes of deportation and forcible transfer."[7] This "extended form" of joint criminal enterprise is commonly referred to as JCE3.

B. The Trial Chamber Decision

The Trial Chamber ultimately held that:

> the specific intent required for a conviction of genocide was incompatible with the lower *mens rea* standard of a third category joint criminal enterprise. A third category joint criminal enterprise requires that the Prosecution prove only awareness on the part of the accused that genocide was a foreseeable consequence of the commission of a separately agreed upon crime. This awareness of the likelihood of genocide being committed is not as strict a *mens rea* requirement as the specific intent required to establish the crime of genocide. [8]

The Trial Chamber also concluded that the *mens rea* required to prove criminal responsibility under the third category of joint criminal enterprise fell short of the threshold necessary for a conviction of genocide under Article 4(3)(a) of the ICTY Statute.[9]

C. The Prosecution's Appeal

The prosecution filed an appeal arguing that the Trial Chamber erred in law in concluding that the third category of joint criminal enterprise is incompatible with the specific intent requirement of genocide. [10] The crux of the prosecution's argument was that the Trial Chamber confused the *mens rea* required for the offence of genocide with the mental state required to establish criminal responsibility under a particular mode of

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[7] The Prosecutor v. Brdjanin, Case No. IT-99-36-A, Judgment (September 2004)[reproduced in accompanying notebook at Tab 40].

[8] The Prosecutor v. Brdjanin, Case No. IT-99-36-A, Decision on Interlocutory Appeal (March 2004) at para. 2 [reproduced in accompanying notebook at Tab 41].

[9] *Id*. [reproduced in accompanying notebook at Tab 41].

[10] *Id.* [reproduced in accompanying notebook at Tab 41].

liability.[11] The prosecution reasoned that while the two concepts of *mens rea* are related, they are not the same. The prosecution then asked the Appeals Chamber to reverse the Trial Chamber Decision and to reinstate the proceedings on the charge of genocide under the third category of joint criminal enterprise liability. [12]

D. Decision on Interlocutory Appeal

The Appeals Chamber subsequently concluded that an accused convicted of a crime under the third category of joint criminal enterprise "need not be shown to have intended to commit the crime or even to have known with certainty that the crime was to be committed."[13] Rather, the Appeals Chamber stated that "it is sufficient that that accused entered into a joint criminal enterprise to commit a different crime with the awareness that the commission of that agreed upon crime made it reasonably foreseeable to him that the crime charged would be committed by other members of the joint criminal enterprise, and it was committed."[14] In a case alleging genocide, the Appeals Chamber held that the prosecution should only be required to establish that "it was reasonably foreseeable to the accused that an act specified in Article 4(2) would be committed and that it would be committed with genocidal intent."[15] If this "reasonably foreseeable" standard is established, criminal liability can attach to an accused for any crime

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[11] *Id*. [reproduced in accompanying notebook at Tab 41].

[12]The Prosecutor v. Brdjanin, Case No. IT-99-36-A, Prosecution's Appeal From Trial Chamber's Decision Pursuant to 98bis (December 2003) at paras. 6-8 [reproduced in accompanying notebook at Tab 6].

[13] The Prosecutor v. Brdjanin, Case No. IT-99-36-A, Decision on Interlocutory Appeal, (March 2004) [reproduced in accompanying notebook at Tab 41].

[14] *Id*. [reproduced in accompanying notebook at Tab 41].

[15] *Id*. [reproduced in accompanying notebook at Tab 41].

committed in relation to the joint criminal enterprise, even if that crime falls outside the boundary of what the accused specifically agreed to or had knowledge of.[16]

The Appeals Chamber ultimately found that the Trial Chamber erred by conflating the *mens rea* requirement of the crime of genocide with the mental requirement of the mode of liability by which criminal responsibility is alleged to attach to the accused. The Trial Chamber's decision to acquit Brdjanin of genocide, with respect to the third category of joint criminal enterprise liability, was reversed.

E. The Final Judgment

Despite the interlocutory appeal decision holding that joint criminal enterprise was a mode of liability for which Brdjanin could be held criminally responsible for genocide and other crimes, in its final judgment, the Trial Chamber acquitted him for both genocide and complicity in genocide under the theory of joint criminal enterprise. The Trial Chamber concluded that the prosecution had failed to establish a common plan amounting to an agreement between the accused and the physical perpetrators of the crimes in question to commit the crime of genocide envisaged in the ICTY Statute.[17] It is not disputed that Brdjanin promoted the Strategic Plan. It is also not disputed that many of the relevant physical perpetrators who carried out the objectives of the Strategic Plan were from various paramilitary organizations. However, these two events did not add up to an arrangement between the two entities to commit genocide. According to the Trial

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[16] *Id*. [reproduced in accompanying notebook at Tab 41].

[17] The Prosecutor v. Brdjanin, Case No. IT-99-36-A, Judgment (September 2004) [reproduced in accompanying notebook at Tab 40].

Chamber, the accused and the physical perpetrators "could espouse the Strategic Plan and form a criminal intent to commit crimes with the aim of implementing the Strategic Plan *independently from each other* and without having an understanding or entering into any agreement between them to commit a crime."[18]

The Trial Chamber also examined whether an agreement could be inferred from the fact that the accused and the physical perpetrators acted in unison to implement the Strategic Plan. However, given the distance between the accused and the physical perpetrators and the fact that most of the physical perpetrators had not been found or identified, the Trial Chamber was not convinced such an agreement existed. The theory of joint criminal enterprise was therefore dismissed as a mode of liability, and Brdjanin was found not guilty of genocide, complicity in genocide, and extermination.[19] He was sentenced to 32 years imprisonment for other crimes, however.

III. LEGAL ANALYSIS

A. The Effect of the *Brdjanin* Decision on Other Trials

Based on the *Brdjanin* decision, the prosecution must now prove only "the participation of the accused in the common plan involving the perpetration of one of the crimes provided for in the Statute."[20] The common plan must also involve "an understanding or an agreement between two or more persons that they will commit a crime."[21] The crime itself need not have been previously arranged, but "may materialize

[18] *Id.* [reproduced in accompanying notebook at Tab 40].

[19] *Id.* [reproduced in accompanying notebook at Tab 40].

[20] The Prosecutor v. Brdjanin, Case No. IT-99-36-A, Judgment, at para. 260 (September 2004)[reproduced in accompanying notebook at Tab 40]; *See also*, The Prosecutor v. Tadic, ase No. IT-94-1, Appeals Judgment, at para. 227 [reproduced in accompanying notebook at Tab 15].

extemporaneously and be inferred from the fact that a plurality of persons acts in unison to put the plan into effect."[22] In other words, the common plan may be inferred from the surrounding circumstances.[23]

Participants in a joint criminal enterprise may contribute to the common plan in a variety of ways. The term participation is defined broadly and may include assistance in, contribution to, or execution of the common plan. An accused's involvement in the criminal act must still form a link in the chain of causation.[24] This means that, at a minimum, the prosecution must establish that the accused took action in furtherance of the criminal plan. However, it is not necessary that the participation be a *conditio sine qua non*, or that the offence would not have occurred but for the accused's participation.[25]

Moreover, the *mens rea* requirement for criminal liability under the third category of joint criminal enterprise is dependent upon the subjective state of mind of the accused. To establish the *mens rea* requirement, the prosecution must prove that "the accused was aware that such a crime was a possible consequence of the execution of that enterprise, and, with that awareness, participated in that enterprise." For example, in the *Tadic* Appeals Judgment, which the *Brdjanin* Trial Chamber cited with approval, the Appeals Chamber explained the *mens rea* requirement as follows:

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[21] The Prosecutor v. Vasiljevic, Case No. IT-98-32-T, Appeals Judgment, paras. 97 and 99 (April 2004)[reproduced in accompanying notebook at Tab 7]; *See also*, The Prosecutor v. Krnojelac, Case No. IT-97-25-A, Judgment, at paras. 80-82 [reproduced in accompanying notebook at Tab 8]. The Trial Chamber interprets the *Krnojelac* Appeal Judgment as requiring an agreement between an accused and the principal offenders for the first and third category of joint criminal enterprise, while not requiring proof that there was a more or less formal agreement between all the participants in the second category of JCE as long as their involvement in a system of ill-treatment has been established.

[22]Brdjanin, Judgment, at para. 262 [reproduced in accompanying notebook at Tab 40].

[23] *Id*. [reproduced in accompanying notebook at Tab 40].

[24] *Id*. [reproduced in accompanying notebook at Tab 40].

[25] *Id.* [reproduced in accompanying notebook at Tab 40].

> Criminal responsibility may be imputed to all participants within the common enterprise where the risk of death occurring was both a predictable consequence of the execution of the common design and the accused was either *reckless or indifferent* to that risk. . . What is required is a state of mind in which a person, although he did not intend to bring about a certain result, was aware that the actions of the group were most likely to lead to that result but nevertheless willingly took that risk. In other words, the so-called *dolus eventualis* is required (also called "advertent recklessness" in some national legal systems).[26]

Thus, even if the prosecution cannot affirmatively prove that the accused actually knew that a predictable consequence of the joint criminal enterprise's activities could be death or destruction, he or she can still be held liable for their recklessness or indifference to the possible risk of such a result.

B. The *Karemera* Trial

The first cases directly impacted by the *Brdjanin* Appeals Chamber decision have been those involving large scale joint criminal enterprises, where the accused are "structurally remote from the triggermen," and therefore it is ambiguous as to whether or not the accused had actual knowledge of crimes carried out by the joint criminal enterprise.[27] *The Prosecutor v. Karemera* is one such case. When the genocide occurred in Rwanda, Karemera held a top leadership position in Rwanda's *Mouvement Revolutionnaire Nationale pourle Developpement* ("MRND").[28] Members of this political party attended meetings where decisions about how the genocide would be

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[26] The Prosecutor v. Tadic, Case No. IT-94-1, Judgment, at paras. 204 and 220 [reproduced in accompanying notebook at Tab 9]; Allen O-Rourke, *Recent Development: Joint Criminal Enterprise and Brdjanin: Misguided Overcorrection*, 47 HARV. INT'L L.J. 307, 321 (2006) [reproduced in accompanying notebook at Tab 22].

[27] *Id*. O-Rourke, at 321 [reproduced in accompanying notebook at Tab 22]

[28] The Prosecutor v. Karemera, Case No. ICTR-98-44-I, "Amended Indictment" (February 2005) [reproduced in accompanying notebook at Tab 10].

carried out were made.[29] The MRND also controlled the funds used to fuel the genocide through the purchase of weapons.[30] Members of the MRND, including Karemera, were also involved in training the *Interahamwe,* the youth militia that became the arms and legs of the genocide.[31]

One of the issues in *Karemera*, a case which is still a pending, is that very little evidence exists to prove that the accused carried out the charged crimes or that he formed any agreements with the *Interahamwe*. Consequently, the prosecution needed to use a theory of liability under which *Karemera* could be found culpable despite the lack of concrete evidence proving that he physically perpetrated genocide or that he knowingly agreed to commit genocide through a conspiracy.

The prosecution opted to proceed under the third category of joint criminal enterprise, arguing in the indictment that the accused was criminally responsible for genocide, complicity in genocide, and rape, because those crimes were "the natural and foreseeable consequences of the execution of the object of the joint criminal enterprise, and that the accused was aware that such crimes were the possible outcome of the execution of the joint criminal enterprise."[32] The prosecution cited to the Appeals Chamber decision in *Brdjanin* to support this position.

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[29] *Id*. [reproduced in accompanying notebook at Tab 10].

[30] *Id*. [reproduced in accompanying notebook at Tab 10].

[31] *Id.* [reproduced in accompanying notebook at Tab 10].

[32] The Prosecutor v. Karemera, Case No. ICTR-98-44-I, Amended Indictment (February 2005) at para. 7 [reproduced in accompanying notebook at Tab 10].

On appeal, Karemera challenged the prosecution's broad interpretation of joint criminal enterprise. First, he argued that "the Tribunal lacks jurisdiction to impose third category joint criminal enterprise liability for crimes committed by participants in a vast joint criminal enterprise – particularly those structurally or geographically remote from the accused – because the Appellant sees no evidence specifically showing that customary international law permits imposition of third category joint criminal enterprise liability for their crimes."[33] Second, Karemera argued that "the Tribunal lacks jurisdiction to consider third category joint criminal enterprise liability when there is no direct relationship alleged between the accused and the physical perpetrators of the crime."[34]

The Appeals Chamber rejected the above portion of Karemera's arguments and concluded that there is indeed customary international law precedent for the third category of joint criminal enterprise liability.[35] Moreover, the court stated, "not once has either Appeals Chamber suggested that joint criminal enterprise liability can arise only from participation in enterprises of limited size or geographical scope."[36] The Appeals

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[33] The Prosecution v. Karemera, Case Nos. ICTR-98-44-AR72.5, ICTR-98-44-AR72.6, Decision on Jurisdictional Appeals: Joint Criminal Enterprise, at para. 14 (April 2006)[reproduced in accompanying notebook at Tab 11].

[34] *Id*. at para. 2 [reproduced in accompanying notebook at Tab 11].

[35] The concept that the broadening of the theory of joint criminal enterprise was in part a harkening back to fundamental principles of customary international law as well as international humanitarian law is discussed further in this memo in a later section.

[36] Here, the Appeals Chamber directly cited *The Prosecutor v. Brdjanin*, "Decision on Interlocutory Appeal," (March 2004) to reinforce the broader theory of joint criminal enterprise procured by the Appeals Chamber in *Brdjanin*. The Prosecutor v. Karemera, Case Nos. ICTR-98-44-AR72.5, ICTR-98-44-AR72.6, Decision on Jurisdictional Appeals: Joint Criminal Enterprise, at para. 16 (April 2006) [reproduced in accompanying notebook at Tab 11]; Additionally, as a matter of policy, the Appeals Chamber opined that even though the appellant argued that it would be bad public policy to permit third category joint criminal

Chamber cited the *Tadić* judgment to support their conclusion that liability may be imposed on an accused for involvement in a joint criminal enterprise that spans across a large region.[37] The opinion states that liability may be imposed "in a situation in which murders are committed as a foreseeable but unintended consequence of a joint criminal enterprise that seeks 'to forcibly remove members of one ethnicity from their . . . *region.* '"[38] Finally, the Appeals Chamber limited third category joint criminal enterprise culpability to situations involving crimes that were foreseeable.[39] Thus, "to the extent that structural or geographic distance affects foreseeability, scale will matter."[40]

C. The *Stakic* Trial

Dr. Milomir Stakic was a leading political figure in the Municipality of Prijedor in 1992.[41] Stakic served as President of the Prijedor Crisis Staff, an organization whose members acted in concert in the planning of hostilities against the non-Serb community in Prijedor.[42] Specifically, the Crisis Staff worked in concert with the military and police authorities to plan attacks against Bosnian Muslims and Bosnian Croats.[43] The Crisis

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enterprise liability for crimes committed by participants in "vast JCEs," and that permitting this kind of liability would produce unfair convictions, the Appeals Chamber considered this to be "unfounded."

[37] The Prosecutor v. Tadic, Case No. IT-94-1-T, Judgment, at para. 204 (July 1999)[reproduced in accompanying notebook at Tab 9].

[38] *Id*. at para. 16 [reproduced in accompanying notebook at Tab 9].

[39] *Id*. [reproduced in accompanying notebook at Tab 9].

[40] *Id.* at para. 17 [reproduced in accompanying notebook at Tab 9].

[41] The Prosecutor v. Milomir Stakic, Case No. IT-97-24-T,, Judgement, at para. 90 (July 2003) [reproduced in accompanying notebook at Tab 12].

[42] *Id.* at paras. 377-401 [reproduced in accompanying notebook at Tab 12].

[43] *Milomir Stakic Transferred to the ICTY*, U.N. Press Release, The Hague (March 2001)[reproduced in accompanying notebook at Tab 13].

Staff also established and controlled the brutal concentration camps at Omarska, Trnopolje, and Keraterm.[44]

The Trial Chamber found Stakic guilty of persecution and extermination as crimes against humanity and murder as a violation of the laws and customs of war. The Trial Chamber found him not guilty of genocide, complicity in genocide, and forcible transfer.[45] Stakic was sentenced to life imprisonment, and both Stakic and the prosecution appealed the judgment.

The Appeals Chamber hearing took place in 2005, after *Brdjanin* had been decided. In its decision, the Trial Chamber had rejected the application of joint criminal enterprise as a mode of liability for the crimes pleaded in the indictment, and instead applied a new mode of liability it termed "co-proprietorship." Accordingly, the Appeals Chamber scrutinized the Trial Chambers' misapplication of liability, on its own accord, *proprio motu*.[46]

The Appeals Chamber found that although the indictment did not expressly refer to joint criminal enterprise as a mode of liability, the factual allegations therein relied in part on the third category of joint criminal enterprise, namely, "the participation of the accused in the common plan involving the perpetration of one of the crimes provided for

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[44] The Prosecutor v. Milomir Stakic, Case No. IT-97-24-T, "Judgment," at para. 90 (July 2003) [reproduced in accompanying notebook at Tab 12].

[45] *Summary of Appeals Judgment for Milomir Stakic*, U.N. Judgment Summary, the Hague (March 2006)[reproduced in accompanying notebook at Tab 14].

[46] *Id*. The Appeals Chamber noted that the introduction of "new modes of liability" into Tribunal jurisprudence may generate uncertainty and confusion, to the determination of what the law is and how the Trial Chambers should apply it. The Appeals Chamber chose to intervene *proprio motu* to assess the mode of liability that would best serve the Stakic decision. [reproduced in accompanying notebook at 14].

in the Statute."[47] The Appeals Chamber concluded that Stakic was responsible for the war crimes of murder and for the crimes against humanity of extermination and murder under the third category of joint criminal enterprise.[48]

Stakic had argued in his appellate brief that "the Trial Chamber impermissibly enlarged the *mens rea* requirement" for the crimes implicated in the joint criminal liability charge-namely murder, extermination, and persecution as crimes against humanity, as well as murder as a war crime.[49] The Appeals Chamber rejected this argument and reiterated that the use of *dolus eventualis* within the context of the third category of joint criminal enterprise did not violate the principles of *nullum crimen sine lege* and *in dubio pro reo.*[50] Plainly, the Appeals Chamber in *Stakic* applied a very

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[47] The Prosecutor v. Brdjanin, Case No. IT-99-36-A, Judgment (September 2004), at para. 260. [reproduced in accompanying notebook at Tab 40]; See also, The Prosecutor v. Tadic, Case No. IT-94-1, Judgement, at para. 227 (July 1999)[reproduced in accompanying notebook at Tab 9].

[48] *Summary of Appeals Judgment for Milomir Stakic,* U.N. Judgment Summary, The Hague (March 2006)[reproduced in accompanying notebook at Tab 14].

[49] The Prosecutor v. Stakic, Case No. IT-97-24-T, Judgment, at paras. 274, 322, 336, 351 (March 2006)[reproduced in accompanying notebook at Tab 12].

[50] *Id.* [reproduced in accompanying notebook at Tab 12].

The term *dolus eventualis* refers to "where a perpetrator foresees consequences other than those directly desired as a possibility, and not necessarily a certainty, but nevertheless proceeds with a criminal act." David L. Nersessian, *The Contours of Genocidal Intent: Troubling Jurisprudence from the International Criminal Tribunals*, TEXAS INT'L L.J. 37 (2001-2002) [reproduced in accompanying notebook at Tab 15]; *See* generally, E. Van Sliedregt, *Joint Criminal Enterprise as a Pathway to Convicting Individuals for Genocide*, 5 J. Int'l Criminal Justice, note 38 (March 2007)[reproduced in accompanying notebook at Tab18].

Additionally, in order to meet the principle of *nullum crimen sine lege*, it "must only be foreseeable and accessible to a possible perpetrator that his concrete conduct was punishable at the time of commission. Whether his conduct was punishable as an act or an omission, or whether the conduct may lead to criminal responsibility, disciplinary responsibility or other sanctions is not of material importance." See, The Prosecutor v. Enver Hadzihasanovic et al., Case No. IT-01-47-PY Decision on Joint Challenge to Jurisdiction (November 2002) [reproduced in accompanying notebook at Tab 16].

similar standard for liability under joint criminal enterprise applied by the Appeals Chamber in *Brdjanin*, i.e. that the crimes alleged were reasonably foreseeable consequences of the acts of the accused, even if the accused did not have specific knowledge of the crimes.[51] Consequently, the Appeals Chamber in *Stakic* accepted the broader view of the *mens rea* standard required for an accused to be convicted of joint criminal enterprise, even though the prosecution's indictment did not specifically refer to joint criminal enterprise.[52]

F. The *Brdjanin* decision provided courts with an improved theory of participatory liability so that those criminally responsible for mass atrocities can be prosecuted even without proof of direct knowledge

Critics of the broader interpretation of joint criminal enterprise liability assert arguments similar to those the defense asserted in the *Brdjanin* interlocutory appeal.[53] First, they argue that the Appeals Chamber's interpretation of the joint criminal enterprise

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The principle *of dubio pro reo* articulates that any ambiguity must accrue to the defendant's advantage. *Tadic Sentence Increased to 25 Years Imprisonment,*U.N. Press Release, The Hague (November 1999)[reproduced in accompanying notebook at Tab17].

[51] The Appeals Chamber found Stakic not guilty of genocide, but guilty of other crimes against humanity. Stakic's prison sentence was set to forty years. *Summary of Appeals Judgment for Milomir Stakic*, U.N. Judgment Summary, The Hague (March 2006)[reproduced in accompanying notebook at Tab 14].

[52] The Appeals Chamber noted that "although the Indictment does not expressly refer to categories of joint criminal enterprise liability , the allegations therein nonetheless made it clear that the Prosecution intended to rely on both the first and third categories of joint criminal enterprise. Upon a close review of the Trial Judgment , the Appeals Chamber holds that the Trial Chamber's factual findings support the conclusion that the Appellant participated in a joint criminal enterprise." *Summary of Appeals Judgment for Milomir Stakic*, U.N. Judgment Summary, The Hague (March 2006) [reproduced in accompanying notebook at Tab 14].

[53] Hilary Garon Brock, *Issue: Analyze the Judgment of The Prosecutor v. Brdjanin from the ICTY Re: Joint Criminal Enterprise. How Does This Holding Affect the Future Use of Joint Criminal Enterprise?* Memorandum for the Prosecutor at the International Criminal Tribunal for Rwanda, Case Western Law School War Crimes Research Lab (2005)[reproduced in accompanying notebook at Tab 19]

doctrine allows for abuse and overreach.[54] These critics argue that the *Brdjanin* decision violates the principle of individual culpability, "namely that nobody may be held criminally responsible for acts or transactions in which he has not personally engaged or in some other way participated."[55] Similarly, these critics argue that the doctrine of joint criminal enterprise as it is now interpreted under *Brdjanin* has the potential to lapse into "guilt by association," thereby undermining the fairness and legitimacy of international criminal law.[56] The argument is that defendants may be unjustly convicted for "the violent trauma experienced by entire nations."[57] Similarly, others argue that certain forms of joint criminal enterprise that tolerate a reduced *mens rea* requirement should not be used in cases involving specific intent crimes such as genocide and persecution.[58]

These arguments misjudge the fairness and legitimacy of the *Brdjanin* decision, a rationale that has helped to clarify the theory participatory liability in the context of the mass atrocities. Participatory liability has its own mental element through which the

[54] The Prosecutor v. Brdjanin, Case No. IT-99-36-A, Response to the Prosecution's Brief on Appeal" (May 2005)[reproduced in accompanying notebook at Tab 20].

[55] Allen O-Rourke, *Recent Development: Joint Criminal Enterprise and Brdjanin: Misguided Overcorrection*, 47 HARV. INT'L L.J. 307, 320 (2006)[reproduced in accompanying notebook at Tab 22].

[56] Allison M. Danner & Jenny S. Martinez, *Guilty Associations: Joint Criminal Enterprise, Command Responsibility, and the Development of International Criminal Law*, 93 CAL. L. REV. 75, 79 (2005) [reproduced in accompanying notebook at Tab 21]; These "fairness and legitimacy" standards are often articulated in terms of Western domestic law standards. For example, the United States Supreme Court's stated that guilt by association is a "thoroughly discredited doctrine." Uphaus v. Wyman, 360 U.S. 72, 79 (1959). However, because of the mass atrocities being adjudicated at international tribunals, and because of the complex structures of the joint criminal enterprises, a narrow form of guilt by association may be legitimate, *if* the prosecution offers the requisite proof that the accused was reckless or indifferent to the mass atrocities committed while the accused was in power.

[57] *Id*. at 100 [reproduced in accompanying notebook at Tab 21].

[58] *Id*. at 79 [reproduced in accompanying notebook at Tab 21].

mental element of the underlying crime is established.[59] As Judge Shahabuddeen reasoned in his dissenting opinion to the *Brdanin* appeal judgment:

> In my respectful interpretation, the third category of joint criminal enterprise . . . provides a mode of proving intent in particular circumstances, namely, by proof of foresight in those circumstances. (...)[60]

Critics argue that genocidal intent is such a distinctive element of the crime that it always requires proof of "intent to destroy."[61] However, special intent crimes like genocide are governed by general principles of derivative liability, thus genocide can be proven by relying on the *mens rea* and *actus reus* of criminal participation.[62] The intent element may be proved through a foresight test. A participant in genocide does not need to have genocidal intent himself or herself before a conviction for genocide can be entered.[63]

G. A reduced *mens rea* requirement to prove involvement in a joint criminal enterprise is a practical way to ensure that those leaders responsible for mass atrocities are held liable.

Next, critics of the *Brdjanin* decision argue that unlike cases such as *Tadic*, where the alleged joint criminal enterprise covered single municipalities, *Brdanin* involved an enormous joint criminal enterprise covering an entire region. Like the defense in

[59] E. Van Sliedregt, *Joint Criminal Enterprise as a Pathway to Convicting Individuals for Genocide*, 5 J. Int'l Criminal Justice, note 106 (March 2007)[reproduced in accompanying notebook at Tab18].

[60] The Prosecutor v. Brdjanin, Case No. IT-99-36-A, Dissenting Opinion of Judge Shahabuddeen, Brdanin Interlocutory Appeal Decision (March 2004)[reproduced in accompanying notebook at Tab 41].

[61] *Id.* E. Van Sliedregt, at note 64 [reproduced in accompanying notebook at Tab 18].

[62] *Id.* [reproduced in accompanying notebook at Tab 18].

[63] *Id.* [reproduced in accompanying notebook at Tab 18].

Brdjanin, they argue that the joint criminal enterprise doctrine was not intended to apply to such enormous crimes.[64]

All of the arguments stated above are based in part on the principle of individual culpability, which is the foundation of many domestic criminal law systems, and the idea that an individual should only be punished for conduct for which he is personally responsible.[65] I would argue that because of the nature of international crimes and because many of the cases pending at the ICTY and ICTR involve multiple defendants, a somewhat reduced *mens rea* requirement for genocide cases being tried under the theory of joint criminal responsibility should be allowed. One way to combat the notion that an accused could be unfairly punished for genocide via the joint criminal enterprise mode of liability is to lower the sentence of an accused convicted of genocide under JCE3. Trial chambers already allow plea and sentence bargaining during the pre-trial phase as a means to stipulate certain facts, charges, and possible sentences for an accused. Similarly, a reduced sentence stipulated for a conviction of joint criminal enterprise vis-à-vis genocide could help prosecutors fairly and legitimately utilize the extended theory of joint criminal enterprise.

H. As long as the leaders most criminally responsible are the ones being implicated, not their subordinates, then the *Brdjanin* theory of joint criminal enterprise poses little threat to the legitimacy of international tribunals.

International crimes are typically committed by hundreds and thousands of people. It has been recorded that the Rwandan genocide involved thousands of

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[64] [Allen O-Rourke, *Recent Development: Joint Criminal Enterprise and Brdjanin: Misguided Overcorrection*, 47 HARV. INT'L L.J. 307, 320 (2006)[reproduced in accompanying notebook at Tab 22].

[65] *Id*. at 79 [reproduced in accompanying notebook at Tab 21]; One example of this notion of individual criminal responsibility is exemplified in the French Criminal Code, which states that, "one may be held criminally responsible only for his own actions," *See,* Code Penal, art. 121-1 (Fr.) [reproduced in accompanying notebook at Tab 1].

perpetrators, as illustrated by the fact that in 1997 over 120,000 genocide suspects were detained in Rwandan jails.[66] Therefore, some would argue that a broader-reaching application of joint criminal enterprise puts people other than those most responsible in jeopardy of liability.[67]

This argument is easily refutable. Should subordinate leaders be prosecuted in the Tribunal context, which is unlikely due to the already overflowing docket of cases of those leaders in the highest bracket of political power, it is unlikely that the prosecution would use a theory of joint criminal enterprise, because most of the lower subordinate leaders were actually personally and physically responsible for some of the atrocities related to genocide. Many of the subordinate leaders in the Rwandan genocide were the "runners" who physically killed Tutsi and moderate Hutu citizens, or at least they had personal knowledge and agreed to the killings.

It is those leaders who were in the highest bracket of political power who have been and are being charged with genocide and other crimes under the theory of joint criminal enterprise.[68] As long as the leaders most responsible for the commission of crimes on the scale of genocide are the ones being implicated, not their subordinates, then the *Brdjanin* theory of joint criminal enterprise poses little harm to the legitimacy of international tribunals and the interest of justice.

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[66]Bernard Muna, *War Crimes Tribunals: The Record and the Prospects: The Rwanda Tribunal and its Relationship to National Trials in Rwanda*, 13 AM. U. INT'L L. REV. 1469 (1998) at 1474 [reproduced in accompanying notebook at Tab 22].

[67]Allison M. Danner & Jenny S. Martinez, *Guilty Associations: Joint Criminal Enterprise, Command Responsibility, and the Development of International Criminal Law*, 93 CAL. L. REV. 75, 99 (2005) [reproduced in accompanying notebook at Tab 21].

[68] Stephanie Nieuwoudt, *Slow Progress at Rwandan Tribunal*, Institute for War and Peace Reporting (July 2006) http://www.globalpolicy.org/intljustice/tribunals/rwanda/2006/0727slow.htm [reproduced in accompanying notebook at Tab 16].

I. By imposing evidentiary standards that the prosecution must meet to prove the accused's involvement in a joint criminal enterprise, trial chambers can promote a just and fair result.

Critics also argue that the *Brdjanin* Appeals Chamber overreached by expanding the forseeability standard of *mens rea* to specific intent crimes, and by doing so, lowered the evidentiary standard required for the prosecution to prove an accused's culpability with regard to the joint criminal enterprise.[69] They argue that the JCE 3, after the *Brdjanin* decision, is highly attractive to the prosecution, "raising the possibility of elegantly overcoming typical evidentiary problems in international criminal law prosecutions, especially where proof of direct participation is lacking."[70] Thus, critics argue that the scope of the *Brdjanin* decision should be limited to a knowledge standard of *mens rea* to prove an accused's culpability with regards to a joint criminal enterprise.

This argument ignores the fact that many Trial Chambers have imposed evidentiary standards that the prosecution must meet to prove an accused's involvement in a joint criminal enterprise when they cannot directly prove the accused's knowledge. Instead of seeking to restrict the scope of joint criminal enterprises in an across-the-board fashion, as many critics of the *Brdjanin* decision say should be done, trial judges can set forth more stringent requirements of proving that the defendant has made a substantial contribution to the joint criminal enterprise charged. These requirements would both restrict the scope of the joint criminal enterprise the prosecution is able to charge, and would help ensure that the joint criminal enterprise theory of criminal responsibility is

[69] Kai Ambos, *Joint Criminal Enterprise and Command Responsibility*, 5 J. Int. Criminal Judtice, note 110 (2007) [reproduced in accompanying notebook at Tab 23].

[70] *Id.* at note 103 [reproduced in accompanying notebook at Tab 23].

used primarily for senior leaders, especially in the case of genocide charges.[71] While some argue that such a requirement will ban the prosecution's ability to prove a lower-level defendant's contribution to a joint criminal enterprise occurring within a country over a multi-year period, in the case of the ICTY and ICTR, most of the defendants standing trial are not lower-level leaders.[72]

In the *Kvocka* case, the Trial Chamber identified a series of factors that the prosecution should prove in order to assess whether an individual's participation in a joint criminal enterprise is "significant":

(1) the size of the criminal enterprise,

(2) the functions performed,

(3) the position of the accused

(4) the seriousness and scope of the crimes committed,

(5) the efficiency, zealousness or gratuitous cruelty exhibited in performing the actor's function.[73]

These factors should guide prosecutors and Trial Chambers in their assessment of whether an individual has made a substantial contribution to the joint criminal enterprise alleged in the indictment.[74]

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[71] *Id*. at note 147 [reproduced in accompanying notebook at Tab 23].

[72] Stephanie Nieuwoudt, *Slow Progress at Rwandan Tribunal*, Institute for War and Peace Reporting (July 2006) http://www.globalpolicy.org/intljustice/tribunals/rwanda/2006/0727slow.htm [reproduced in accompanying notebook at Tab 16].

[73] The Prosecutor v. Kvocka, Case No. IT-98-30/I-T, Judgment (November 2001)[reproduced in accompanying notebook at Tab 24].

[74] Allison M. Danner & Jenny S. Martinez, *Guilty Associations: Joint Criminal Enterprise, Command Responsibility, and the Development of International Criminal Law*, 93 CAL. L. REV. 75, 135 (2005) [reproduced in accompanying notebook at Tab 21]; Additionally, this memorandum's discussion of *The*

J. The *Brdjanin* decision serves a practical purpose within the context of trial chamber judgments, because it helped to reinforce the methods of adjudication that some trial chambers were already carrying out.

Next, the *Brdjanin* decision serves a practical purpose within the context of trial chamber judgments in international tribunals. With the growing complexity of war crimes, including the complexity of leadership structures in joint criminal enterprises; and the remoteness of the accused from the actual "triggermen" who physically carry out the acts of genocide, courts often (before the *Brdjanin* decision) had difficulty classifying the criminal responsibility of the accused into existing legal categories of culpability, because the knowledge standard of *mens rea* was too high a threshold. As the Appeals Chamber articulated in the *Rwamabuka* "Decision on Interlocutory Appeal Regarding Application of Joint Criminal Enterprise to the Crime of Genocide," post-World-War II cases being tried before international tribunals did not "always fit neatly into the so-called 'three categories' of joint criminal enterprise . . . in part because the tribunals' judgments did not always dwell on the legal concepts of criminal responsibility."[75]

Instead, many trial chambers conclude that, based on the evidence, the accused was either "connected with," "concerned in," "inculpated in," or "implicated in" war crimes and/or crimes against humanity.[76] Indeed, it is more practical for trial chambers to make their own determinations as to the involvement of the accused in a joint criminal enterprise. It is clear that trial chambers, after the *Brdjanin* decision, may now find

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Prosecution v. Krnojelac later on also illustrates how the prosecution can plead a theory joint criminal enterprise with greater specificity.

[75] Rwamakuba v. Prosecutor, Case No. ICTR-98-44-AR72, Decision on Interlocutory Appeal Regarding Application of Joint Criminal Enterprise to the Crime of Genocide, at para. 24 (October 2004)[reproduced in accompanying notebook at Tab 28].

[76] *Id*. [reproduced in accompanying notebook at Tab 28].

criminal responsibility for genocidal acts that are "physically committed by other persons with whom the accused are engaged in a criminal common purpose."[77] The Appeals Chamber decision in *Rwamakuba* discussed above affirmed the *Brdjanin* decision, and the opinion of the Chambers clearly illustrates why the *Brdjanin* decision is useful for trial chambers in international tribunals.

K. If prosecutors want to rely on the *Brdjanin* decision to convict defendants under the theory of joint criminal liability, they must follow the proper trial procedures in order to avoid potential pitfalls illustrated by the cases of *Rwamakuba, Ntagerura,* and *Krnojelac*

It has been established that the *Brdjanin* Appeals Chamber decision was correctly decided, giving prosecutors a means to convict those accused who are responsible for mass atrocities where some proof of actual knowledge is lacking. It follows that if prosecutors want to rely on the *Brdjanin* Appeals Chamber decision to convict defendants under the theory of joint criminal liability, they must follow the proper trial procedures in order to avoid pitfalls illustrated in the cases of *Rwamakuba*, *Ntagerura,* and *Krnojelac.*

1. The *Rwamakuba* Trial

Andre Rwamakuba worked as a doctor and public health specialist in Rwanda. After the death of President Habyarimana, Rwamakuba was appointed minister of Primary and Secondary Education in the Interim Government.[78] In the indictment, he was charged with genocide, or alternatively, complicity in genocide regarding acts allegedly committed in Gikomero *commune* and at Butare University Hospital.[79]

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[77] *Id.* [reproduced in accompanying notebook at Tab 28].

[78] The Prosecutor v. Rwamakuba, Case No. ICTR-98-44-C-I, Judgment (September 2006) [reproduced in accompanying notebook at Tab 25].

[79] *Id.* [reproduced in accompanying notebook at Tab 25].

In 2004, before Rwamakuba's trial began, the prosecution requested the severance of Rwamakuba from the Joint Indictment. The prosecution stated "that it intended to focus the case entirely on Rwamakuba's 'direct participation in crimes,'" thereby removing any allegation of conspiracy to commit genocide or joint criminal enterprise responsibility.[80] According to the prosecution, the case against Rwamakuba was to be based on his own acts and omissions and not an "attempt to bring in proof of Rwamakuba's meeting and conspiring with other interim government ministers and other MRND leaders to commit genocide."[81]

Accordingly, the prosecution removed from the original indictment those pleadings regarding 'common purpose' that implicated Rwamakuba as a co-perpetrator of crimes committed in furtherance of a government conspiracy to commit genocide in Rwanda.[82] Instead, the prosecution stated that it intended to offer evidence of Rwamakuba's ministerial appointment "to prove elements of the prosecution's case such as *mens rea* for genocide."[83] The Trial Chamber agreed to allow the severance of Rwamakuba from the Joint Indictment.[84]

It was not until the latest stage of the trial that the prosecution submitted in its closing brief that Rwamakuba might also have criminal liability attached under the theory

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[80] *Id.* [reproduced in accompanying notebook at Tab 25].

[81] *Id*. [reproduced in accompanying notebook at Tab 25].

[82] The Prosecutor v. Karemera et al, Case No. ICTR-98-44-PT, Decision on Severance of Rwamakuba and for Leave to File Amended Indictment (February 2005)[reproduced in accompanying notebook at Tab 26]; *see also* Prosecutor v. Karemera, Case No. ICTR-98-44-PT, Decision on the Prosecutor's Motion for Leave to File an Amended Separate Indictment against Karemera, Ngirumpatse and Nzirorera, at paras. 11 and 14 (November 2004)[reproduced in accompanying notebook at Tab 27].

[83] *Id.* at para. 3 [reproduced in accompanying notebook at Tab 26].

[84] *Id.* [reproduced in accompanying notebook at Tab 26].

of joint criminal enterprise or conspiracy. The prosecution argued that Rwamakuba was responsible as a minister of the Interim Government, for the crimes carried out against the Tutsi population.[85] In response to this new development, the defense argued in its closing argument that "command responsibility, joint criminal enterprise, were out and that the relevance of his being a minister was confined to disposition and ideology."[86]

The Trial Chamber noted that "it would . . . be contrary to the fundamental right of the Accused to a fair trial, including his right to defend himself and to know the charges against him, if the Chamber were to accede to a prosecution request to find the Accused criminally responsible for omissions which were neither set forth in the Indictment nor subsequently notified by timely, clear, and consistent information from the prosecution."[87] The court reiterated that "the prosecution is expected to know its case before it goes to trial rather than seek to mould its case at the end of the trial depending on how the evidence unfolded."[88]

When the final judgment came down, Rwamakuba was acquitted on all charges in the Indictment.[89] The Trial Chamber concluded that the prosecution had produced

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[85] The Prosecutor v. Rwamakuba, Case No. ICTR-98-44C-T, "Judgment," at para. 26 (September 2006)[reproduced in accompanying notebook at Tab 25].

[86] *Id.* at para. 27 [reproduced in accompanying notebook at Tab 25].

[87] At this point in the Judgment, the Chambers cited *The Prosecutor v. Ntagerura*, where a similar move was made by the Prosecution, i.e. seeking to pull in a theory of joint criminal enterprise at the last minute. A discussion of that case is included subsequently in this memo.

[88] The Prosecutor v. Rwamakuba, Case No. ICTR-98-44C-T, Judgment, at para. 27(September 2006)[reproduced in accompanying notebook at Tab 25]. Indeed, Trial Chambers have even refused to consider a Prosecutor's argument of joint criminal enterprise when it was included in the Pre-trial brief, instead of the indictment, The Prosecutor v. Krnojelac, Case No. IT-97-25-A, Judgment (September 2003)[reproduced in accompanying notebook at Tab].

[89] The Prosecutor v. Rwamakuba, Case No. ICTR-98-44C-T, Judgment, at para. 220 (September 2006)[reproduced in accompanying notebook at Tab 8].

insufficient evidence to prove genocide or complicity in genocide, even though the prosecution had sought to establish that the accused was criminally liable through conspiracy among other theories. In addition, the Trial Chamber accepted the argument of the Defense that the accused had sufficient alibi to "levy additional doubt" as to his culpability and that the prosecution had failed to call any witnesses to rebut this alibi.[90]

It is possible that the prosecution would have gained a conviction had it left the theory of joint criminal enterprise liability in the indictment. In 2004, the Appeals Chamber rejected the Rwamakuba's interlocutory appeal challenging the Indictment on grounds that the Tribunal lacked jurisdiction to try him for genocide on a theory of joint criminal enterprise, because under the doctrine of "common purpose" the accused's involvement in a joint criminal enterprise "was confined to crimes with great specificity in relation to the identity and the relationship between co-perpatrators and victims . . . "[91] In its decision, the Appeals Chamber reasoned that "liability for participation in a criminal plan is as wide as the plan itself, even if the plan amounts to 'a nation wide government-organized system of cruelty and injustice.'"[92] Thus, an accused's liability under a "common purpose" mode of responsibility in connection with a joint criminal enterprise may be as narrow or as broad a the plan in which the accused participated.

Consequently, since the Trial Chamber had previously accepted this broad construction of joint criminal enterprise theory, the prosecution could have benefited

[90] *Id*. at paras. 195, 199, 200 [reproduced in accompanying notebook at Tab 8].

[91] Rwamakuba v. The Prosecutor, Case No. ICTR-98-44-AR72.422, Decision on Interlocutory Appeal Regarding Application of Joint Criminal Enterprise to the Crime of Genocide, at para. 24 (October 2004)[reproduced in accompanying notebook at Tab 28].

[92] *Id*. at para. 25 [reproduced in accompanying notebook at Tab 28].

from the *Brdjanin* decision had it not made the strategic error of disclaiming joint criminal enterprise liability in the indictment.

2. The *Ntagerura* Trial

As in *Rwamakuba*, had the prosecution in *Ntagerura* left the theory of joint criminal enterprise in the indictment, the defendant may have been convicted on at least that count. In *Ntagerura*, the prosecution's first and only attempt at trial to suggest the theory of joint criminal enterprise liability was in its closing arguments.[93] The Trial Chamber reprimanded this approach, stating:

> If the Prosecutor intends to rely on the theory of joint criminal enterprise to hold the accused criminally responsible as a principal perpetrator of the underlying crimes rather than as an accomplice, the indictment should plead this in an unambiguous manner and specify upon which form of joint criminal enterprise the Prosecutor will rely.[94]

Additionally, the Chambers stated that the prosecutor must also plead the purpose of the enterprise, the identity of the co-participants, and the nature of the accused's participation in the enterprise.[95] The Chambers stated, "an application of the principle *non bis in idem* in Article 9 of the Statute depends on the precise and specific particulars which clearly and unambiguously identify the crime and the accused's participation in it. Similarly, a precise indictment is also essential to establishing responsibility for crimes included in a joint criminal enterprise."

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[93] The Prosecutor v. Ntagerura, Case No. ICTR-99-46-T, Judgment and Sentence, at para. 34 (February 2004)[reproduced in accompanying notebook at Tab 29].

[94] *Id*. [reproduced in accompanying notebook at Tab 29].

[95] *Id.* [reproduced in accompanying notebook at Tab 29].

Ntagerura was found not guilty on all counts in the indictment.[96] A similar speculation could be made as was articulated regarding *Rwamakuba*, namely that the *Brdjanin* decision on joint criminal enterprise has the potential to help prosecutions gain convictions in cases such as this one where evidence is not substantial enough to prove a crime, but may reach the threshold necessary for a lesser liability under joint criminal enterprise.

3. The *Krnojelac* Trial

Both *Rwamakuba* and *Ntagura* have illustrated that if the prosecution wishes to use the theory of joint criminal enterprise to support their theory of criminal responsibility for the accused, they must make it clear as early in the trial process as possible. The prosecution must plead the theory of joint criminal enterprise with great specificity and detail, making clear the nature of the accused's participation in the enterprise.

One case from the ICTY, *The Prosecutor v. Krnojelac*, further clarifies the timing and the specificity with which the prosecution must plead the joint criminal enterprise theory. In *Krnojelac*, the Trial Chamber refused to consider whether JCE3 applied, because the prosecution mentioned the theory for the first time in the Pre-Trial brief.[97] The Appeals Chamber upheld this decision and stated that the prosecution must specify the basis for the accused's responsibility under the theory of joint criminal enterprise in the indictment. The Appeals Chamber stated that "it would contravene the rights of the

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[96] *Id.* [reproduced in accompanying notebook at Tab 29].

[97] The Prosecutor v. Krnojelac, Case No. IT-97-25-A, Judgment (September 2003)[reproduced in accompanying notebook at Tab 8]; Steven Powles, *Joint Criminal Enterprise: Criminal Liability by Prosecutorial Ingenuity and Judicial Creativity?* 2 J. Int. Criminal Justice, note 65 (Jun 2004) [reproduced in accompanying notebook at Tab 30].

defense if the Trial Chamber . . . to chose a theory not expressly pleaded by the Prosecution."[98] The Appeals Chamber went on to specify what must be pleaded in the indictment for the prosecution to successfully argue the theory of joint criminal enterprise:

> (1) The nature or purpose of the joint criminal enterprise (it's "essence")
> (2) The time at which or the period over which the enterprise is said to have existed;
> (3) The identity of those engaged in the enterprise-so far as their identity is known, but at least by reference to their category as a group; and
> (4) The nature of the participation by the accused in that enterprise.[99]

If the prosecution intends to rely upon an allegation of joint criminal enterprise, it must do so in a timely manner and plead such allegations with great accuracy and as much detail as possible.[100]

IV. CONCLUSION

This memorandum concludes that *Brdjanin* was correctly decided, both as a matter of doctrine and policy, and that other Tribunals should follow the *Brdjanin* decision. To avoid accusations of overreaching and unfairness to defendants, however, prosecutors should assert *Brdjanin* joint criminal enterprise theory only in cases where they give fair notice to defendants by asserting it in the initial indictment. Moreover, Tribunals should only *Brdjanin* joint criminal enterprise liability in cases where it is fair, in view of all the circumstances, to say that the defendant's prior agreement to and

[98]The Prosecutor v. Krnojelac, Case No. IT-97-25-A, Judgement, at para 117 (September 2003) [reproduced in accompanying notebook at Tab 8].

[99]The Prosecution v. Krnojelac, Case No. IT-97-25, Decision on Form of Second Amended Indictment, Krnojelac, at para 16 (11 May 2000)[reproduced in accompanying notebook at Tab 31].

[100]Steven Powles, "Joint Criminal Enterprise: Criminal Liability by Prosecutorial Ingenuity and Judicial Creativity?" 2 J. Int. Criminal Justice, note 69 (June 2004)[reproduced in accompanying notebook at Tab 30].

specific involvement in the joint criminal enterprise obviated the need to find specific intent by that individual defendant to commit genocidal acts carried out in furtherance of the joint criminal enterprise.

To mark the distinction between the basic and the extended form of JCE with regard to genocide, where participants in the former have genocidal intent and participants in the latter do not, conviction and sentence should differ. In the case of JCE3, a participant should be convicted of participating in genocide rather than of genocide. Such conviction would carry a lower sentence than committing genocide with the requisite knowledge or intent *mens rea.*