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# 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?

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# Memorandum for the Office of the Prosecutor Of the International Criminal Tribunal for Rwanda

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**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?**

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## I. Introduction and Summary of Conclusions

### *A. Issue*

This memo examines the recent judgment of *The Prosecutor v. Brdjanin* at the International Criminal Tribunal for the former Yugoslavia (ICTY), particularly it's holding on the doctrine of joint criminal enterprise. In this case, the prosecutor from the ICTY attempted to prove liability on the part of the Accused using the theory of first and third degree joint criminal enterprise. (The Prosecutor also alleged other theories of criminal liability, such as aiding and abetting and planning). The Trial Chamber of the ICTY was unwilling to extend the liability theory of joint criminal enterprise to a situation as broad as one alleged by the Prosecutor. This memorandum will examine the judgment in *The Prosecutor v. Brdjanin* and the rationale the Trial Chambers used in denying to extend liability through a joint criminal enterprise.

Section II of this memorandum discusses the origins and policy rationales underlying the doctrine. Section III of this memorandum contains the relevant facts from the *Brjdanin* case and Section IV is an analysis of the *Brdjanin* case that limits the Trial Chamber's holding to the facts and pleadings of *Brdjanin* only. Section V discusses the legal analysis used by the Trial Chamber in regards to joint criminal enterprise. Section VI discusses other cases that have successfully used the doctrine of joint criminal enterprise as a method of imparting liability, and the application thereof to the *Brdjanin* case. Section VII concludes the memorandum with a summary of the findings discussed regarding the doctrine of joint criminal enterprise in relation to *The Prosecutor v. Brdjanin.*

## *B. Summary of Conclusions*

### 1. The Holding of the *Brdjanin* Trial Chamber is Limited Strictly to the Facts of the *Brdjanin* Case.

The first conclusion discussed in the memorandum is that the holding in the *Brdjanin* case is not relevant to other indictments used in the International Criminal Tribunal for the Former Yugoslavia (ICTY), the International Criminal Tribunal for Rwanda (hereinafter the ICTR), or the Special Court for Sierra Leone (hereinafter the SCSL) that would impart liability of an Accused through a joint criminal enterprise. This conclusion is based on the fact that the holding of *Brdjanin* can be limited exclusively to the facts and pleadings of the case and is therefore not applicable to any other cases. The Prosecutor in the *Brdjanin* Indictment did not meet the requirements established by the Trial Chamber in pre-trial motions for specificity in their pleadings.

### 2. The Trial Chamber in *Brdjanin* Erred in their Application of Joint Criminal Enterprise and Did Not Follow the Established Case Law.

The second conclusion, in relation to the legal analysis used by the Trial Chamber in *The Prosecutor v. Brdjanin,* is that the doctrine of joint criminal enterprise was misapplied by the Trial Chamber. Other cases decided in the Trial Chamber and Appeals Chamber of the ICTY, such as *The Prosecutor v. Stakic* and *The Prosecutor v. Krnojelac,* make it clear that the Trial Chamber in *Brdjanin* should have reached a different conclusion in relation to its joint criminal enterprise analysis. Through an analysis of these cases and others, the underlying policy rationale of the doctrine of joint criminal enterprise itself, and other legal analyses, this memorandum reaches the conclusion that the Trial Chamber should have found that Radoslav Brdjanin was guilty of participation in a joint criminal enterprise.

## II. The Origin and Purpose of the Joint Criminal Enterprise Doctrine

Despite the fact that there is no reference to the doctrine of joint criminal enterprise in the statutes for either the ICTY[1] or the ICTR,[2] the Trial Chambers in both tribunals have recognized joint criminal enterprise as a way to impart criminal liability to defendants who may not have actually physically perpetrated a crime. The ICTY justified adopting joint criminal enterprise by finding that the doctrine was firmly established in international criminal law, and was therefore available to the ICTY under the statute.[3]

This doctrine places responsibility for the commission of war crimes and crimes against humanity on those most responsible and guilty for them – the people in command, with responsibility over groups of people, who would have had the power to stop the atrocities. Essentially, the purpose of joint criminal enterprise is to establish individual responsibility over collective assignation of guilt.[4] Individual accountability promotes peace, reconciliation, and

[1] International Criminal Tribunal of the Former Yugoslavia Statute. See Article 7(1). A person who planned, instigated, ordered, committed or otherwise aided and abetted in the planning, preparation or execution of a crime referred to in articles 2 to 5 of the present Statute, shall be individually responsible for the crime. [Reproduced in accompanying notebook 1 at Tab 1].

[2] Statute for the International Criminal Tribunal of Rwanda. See Article 6(1). A person who planned, instigated, ordered, committed or otherwise aided and abetted in the planning, preparation or execution of a crime referred to in Articles 2 to 4 of the present Statute, shall be individually responsible for the crime. [Reproduced in accompanying notebook 1 at Tab 2]

[3] *The Prosecutor v. Tadic*, Case No: IT-94-1, Judgment in Appeals Chamber, (15 July 1999). The Appeals Chamber looked to customary international law and case law of military courts established after World War II in determining the existence of joint criminal enterprise. The Appeals Chamber used several cases from the WWII cases in which military courts convicted individuals on the basis of participating in a common plan. [Reproduced in accompanying notebook 2 at Tab 18] (hereinafter *Tadic* Appeals Chamber Judgment).

[4] Allison Marston Danner and Jenny S. Martinez, *Guilty Associations: Joint Criminal Enterprise, Command Responsibility, and the Development of International Criminal Law*, Cal. L. Rev, (January 2005), page 14. Citing Antonio Cassese, *Reflections on International Criminal Justice*, 61 Mod. L.Rev. 1, 6 (1998). [Reproduced in accompanying notebook 3 at tab 26].

reduces the prospect of future violations by breaking the collective cycle of guilt that frequently fuels conflicts that result in mass atrocity.[5]

While a joint criminal enterprise may have a number of different criminal objects, it is not necessary for the Prosecution to establish that every participant agreed to every one of the crimes committed.[6] However, it is necessary for the Prosecution to prove that, between the member of the joint criminal enterprise physically committing the material crime charged and the person held responsible under the joint criminal enterprise for that crime, there was a common plan to commit at least that particular crime.[7] To establish responsibility under the first category of joint criminal enterprise, it needs to be shown that the Accused (i) voluntarily participated in one of the aspects of the common plan, and (ii) intended the criminal result, even if not physically perpetrating the crime.[8]

### *A. Development of Joint Criminal Enterprise in The Prosecutor v. Tadic*

The first case in which criminal liability was imparted through joint criminal enterprise was the *Tadic* case.[9] The Appeals Chamber in *Tadic* held that the doctrine of joint criminal enterprise was resolutely established in customary law, and therefore that it was available to the ICTY.[10]

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[5] Id, page 14. *(Quoting Aryeh Neier, War Crimes: Brutality, Genocide, Terror and the Struggle for Justice 211 (1998).*

[6] *Tadic* Appeals Chamber Judgment, *supra* note 3. [Reproduced in accompanying notebook 2 at tab 18]

[7] Id, ¶ 264.

[8] Id.

[9] Id.

[10] Id, ¶ 220. Many countries that have established tribunals or courts to redress war crimes use doctrines established in international criminal law. See, for example, Rome Statute of the International Criminal Court, (July 17, 1998), at arts. 5-8 (genocide, crimes against humanity, and war crimes). [Reproduced in accompanying notebook 1 at tab 3].

Tadic was involved in the crimes committed in Bosnia during the 1990's, but not as a high level participant.[11] Although Tadic was indicted in 1995 on a variety of charges, and was convicted at the trial of several counts of war crimes and crimes against humanity, he was acquitted for the serious charge of murder as a crime against humanity for the murder of five men in the Bosnian village of Jaskici.[12] The Trial Chamber found that although Tadic was a member of the group of men which entered the village and beat its inhabitants, they determined that it could not be satisfied beyond a reasonable doubt, on the evidence before it, that the Accused had any part in the killing of five men.[13] The Appeals Chamber agreed that the Trial Chamber has misapplied the test of "proof beyond a reasonable doubt," and concluded that the only reasonable conclusion the Trial Chamber could have drawn is that Tadic was a member of the group of men which killed the five villagers.[14] The Appeals Chamber found that the crimes within the jurisdiction of the tribunal might occur through participation in the realization of a common design or purpose.[15]

The Appeals Chamber found the doctrine of joint criminal enterprise to apply in three categories of cases, thereby demonstrating the availability and broad scope of the doctrine to impart liability in the Ad Hoc Criminal Tribunals.[16]

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[11]Danner and Martinez, *supra* note 4, pages 23 – 28. [Reproduced in accompanying notebook 3 at tab 26]

[12] *Tadic* Appeals Chamber Judgment, *supra* note 3, at ¶ 22. [Reproduced in accompanying notebook 2 at tab 18]

[13] Id at ¶ 183.

[14] Id at ¶ 185 to 196.

[15] The Appeals Chamber has considered the subject matter jurisdiction of the tribunals and joint criminal enterprise in the Appeals Chamber decision of The Prosecutor v. Multinovic, et al., Decision on Dragoljub Ojdanic's Motion Challenging Jurisdiction – Joint Criminal Enterprise, Appeals Chamber, Case No: IT-99-37-AR72 ¶ 23, (21 May 2003). [reproduced in accompanying notebook 2 at tab 14] (Hereinafter Ojdanic Decision). See also Danner and Martinez, *supra* note 4, at pages 24 – 25. [Reproduced in accompanying notebook 3 at tab 26].

[16] *Tadic* Appeals Chamber Judgment, *supra* note 3, at ¶ 192 to 206. [Reproduced in the accompanying notebook 2 at tab 18].

### *B. First Category Joint Criminal Enterprise*

The first situation to which the doctrine is applicable is known as first category joint criminal enterprise. This method of liability applies in cases of co-perpetration, where all participants in the common design possess the same criminal intent to commit a crime, and one or more of the participants actually perpetrate the crime, with intent.[17] The Appeals Chamber has also required that the Accused has entered into an agreement with other members of the first category of joint criminal enterprise to commit crimes.[18]

### *C. Second Category Joint Criminal Enterprise*

The second situation to which the doctrine is applicable is known as second category joint criminal enterprise (commonly known as the concentration camp cases) and usually involves systems of ill treatment. Here the requisite *mens rea* comprises knowledge of the nature of the system of ill treatment and intent to further the common design of ill treatment.[19] The prosecution does not have to prove a formal or informal agreement under this second category joint criminal enterprise; rather they must prove that the defendant adhered to a system of repression.[20] Under both first category and second category joint criminal enterprise, all members of the joint criminal enterprise may be found criminally responsible for all crimes committed that fall within the common design.[21]

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[17] Id. See also Danner and Martinez, *supra* note 4, page 24, citing *Tadic* Judgment, ¶ 196. "To be found guilty of the crime of murder through first category joint criminal enterprise, the prosecution must prove that the common plan was to kill the victim, that the defendant voluntarily participated in at least one aspect of this common design, and that the defendant intended to assist in the commission of murder, even if he did not himself perpetrate the killing." [Reproduced in accompanying notebook 3 at tab 26].

[18] *Ojdanic* Decision, *supra* note 15, ¶ 23. [Reproduced in accompanying notebook 2 at tab 14].

[19] *Tadic* Appeals Chamber Judgment, *supra* note 3, ¶ 202 to 203. [Reproduced in accompanying notebook 2 at tab 18].

[20] *The Prosecutor v. Krnojelac*, Case No: IT-97-25-A, ICTY Appeals Chamber ¶ 96, (17 September 2003). [Reproduced in accompanying notebook 1 at tab 12] (hereinafter *Krnojelac* Appeals Chamber Judgment).

### *D. Third Category Joint Criminal Enterprise*

The third category of joint criminal enterprise is the most broad and far-reaching form of liability.[22] The Appeals Chamber held that a defendant could be found guilty of acts that were committed even if those criminal acts fell outside of the agreed upon criminal enterprise, as long as those acts were a "natural and foreseeable cause."[23] The notion of common purpose is applied only where the following requirements concerning *mens rea* are fulfilled: (i) the intention to take part in a joint criminal enterprise and to further, either individually or jointly, the criminal purposes of that enterprise; and (ii) the foreseeability of the possible commission by other members of the group of offenses that do not constitute the object of the criminal purpose.[24] Thus, a defendant who intends to participate in a common design may be found guilty of acts outside that design if such acts are a natural and foreseeable consequence of the effecting of that common purpose.[25]

### *E. Joint Criminal Enterprise Applied in Tadic*

The Appeals Chamber applied the third category of joint criminal enterprise to the *Tadic* case.[26] Therefore, the Appeals Chamber found that Tadic had participated in the common

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[21] Danner and Martinez, *supra* note 4. With the exception of attempt to commit genocide, there is no crime of attempt within the ICTY or ICTR Statutes. [Reproduced in accompanying notebook 3 at tab 26]. See also Rome Statute, Article 25(3)(f). The Rome Statute of the ICC does criminalize attempt. [Reproduced in accompanying notebook 1 at tab 3]

[22] Id at page 25.

[23] *Tadic* Appeals Chamber Judgment, *supra* note 3, ¶ 204. [Reproduced in accompanying notebook 2 at tab 18]

[24] Id, at ¶ 220 to 228.

[25] Id, at ¶ 204. An example of a third category joint criminal enterprise is a common, shared intention on the part of the group to forcibly remove members of one ethnicity from their town, village or region with the consequence that, in the course of doing so, one or more of the victims is shot and killed. While murder may not have been explicitly acknowledged to be part of the common design, it was nevertheless foreseeable that the forcible removal of civilians at gunpoint might well result in the deaths of one or more of these civilians. See also, Danner and Martinez, *supra* note 4, page 25. [Reproduced in accompanying notebook 3 at tab 26].

[26] Danner and Martinez, *supra* note 4, page 25. [Reproduced in accompanying notebook 3 at tab 26].

criminal purpose to rid the Prijedor region of the non Serb population, that the killing of non-Serbs was foreseeable and that Tadic was aware of this risk but still willingly participated in the common plan.[27] Tadic was found guilty of murder of the five men killed in the village of Jaskici on the liability theory of the third category joint criminal enterprise. He was ultimately sentenced to twenty years.[28]

The Appeals Chamber outlined objective, *actus reus*, elements of the joint criminal enterprise means of liability.[29] There must be a plurality of persons and they need not be organized into a formal military, political, or administrative structure.[30] A common plan, design, or purpose must exist between the plurality of persons that amounts to or involves the commission of a crime provided for in the statute. This plan may materialize extemporaneously and be inferred from the fact that a plurality of persons acts in unison to put into effect a joint criminal enterprise.[31] Finally, the Accused must have participated in the common design involving the perpetration of one of the crimes provided for in the statute.[32]

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[27] *Tadic* Appeals Chamber Judgment, *supra* note 3, ¶ 232. [Reproduced in accompanying notebook 2 at tab 18].

[28] *The Prosecutor v. Tadic*, Sentencing Judgment, Case No: IT-94-1-A, ICTY Appeals Chamber ¶ 76 (26 January 2000). [Reproduced in accompanying notebook 2 at tab 19] (hereinafter *Tadic* Sentencing Judgment).

[29] See generally, Danner and Martinez, *supra* note 4, pages 23 – 28. [Reproduced in accompanying notebook 2 at tab 26].

[30] *Tadic* Appeals Chamber Judgment, *supra* note 3, ¶ 227 [Reproduced in accompanying notebook 2 at tab 18].

[31] Id.

[32] Id. This participation need not involve commission of a specific crime under one of the provisions but may take the form of assistance in, or contribution to, the execution of the common plan or purpose. See also, Christopher J. Knezevic, *Joint Criminal Enterprise – What is the Degree of Participation Required for a Conviction?* Case Western Reserve University School of Law International War Crimes Research Lab, (Spring 2004). [Reproduced in accompanying notebook 3 at tab 27]. The Appeals Chamber later summarized the different mens rea requirements for each category of joint criminal enterprise in *Krnojelac*:

> The first category of cases requires the intent to perpetrate a specific crime and this intent be shared by all the co-perpetrators. The second category requires that the accused have personal knowledge of the system of ill-treatment as well as intent to further that system of treatment. The third category requires the intent to participate in and further the criminal activity or the criminal purpose of a group and to contribute to the joint criminal enterprise or to the commission of a crime by the group. In addition, responsibility for a crime other than the one agreed upon in the common plan arises only if,

The Appeals Chamber in *Tadic* was not attempting to create a new form of liability through their articulation of the joint criminal enterprise doctrine. The chamber viewed this form of liability as falling under the definition of 'commission' and within the scope of having 'committed' a crime.[33] This would therefore fall under the ICTY Statute Article 7(1) (and also the ICTR Statute Article 6(1), as the wording of the two statutes is essentially identical). The Accused who commits a crime pursuant to a joint criminal enterprise need only perform acts that in some way are directed to the furthering of that joint criminal enterprise.[34]

The scope of joint criminal enterprise application has the potential to be enormously broad. The policy rational behind the development of joint criminal enterprise seems to be consistent with the purposes of the development of the Ad Hoc Criminal Tribunals themselves – to preserve a record of the atrocities committed, to make the superiors, both civil and military leaders, responsible for the war crimes committed under their command, and to provide a deterrent effect upon future conduct of leaders during war times.[35] Joint criminal enterprise is meant to be a form of individual liability, whether or not the Accused standing trial actually physically perpetrated the crimes.

The policy rationale behind the decisions using joint criminal enterprise is served because, in reality, those who actually physically commit crimes that are considered war crimes and crimes against humanity, are usually only following orders from civilian or military leaders.

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> under the circumstances of the case, it was foreseeable that such a crime might be perpetrated by one of the members of the group and the accused willingly took that risk.

*Krnojelac* Appeals Chamber Judgment, *supra* note 20, ¶ 32. [Reproduced in accompanying notebook 1 at tab 12].

[33] Danner and Martinez, *supra* note 4, pages 25 – 26. [Reproduced in accompanying notebook 3 at tab 26].

[34] Steven Powles, *Criminal Liability by Prosecutorial Ingenuity and Judicial Creativity?* Journal of International Criminal Justice, (June 2004). [Reproduced in accompanying notebook 3 at tab 30].

[35] Michael P. Scharf – Balkan Justice: The Story Behind the First War Crimes Trial since Nuremberg, Carolina Academic Press, (1997) pages 56-73. [Relevant sections reproduced in accompanying notebook 1 at tab 4].

The Tribunals are attempting to create accountability and guarantee that the perpetrators *most guilty* may be found guilty of crimes within the ICTY's jurisdiction.[36] This principle is reinforced by the fact that the individual accused must have the same criminal intent and objective of the joint criminal enterprise and must participate in some way in the accomplishment of that objective. Judge Antonio Cassese clearly stated the policy rationale behind the use of the joint criminal enterprise as a form of liability:

> The trials 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 aware of what happened.[37]

### *F. Conclusion*

The scope of the doctrine has been expanded greatly since the *Tadic* judgment. There is no minimum contribution or amount of assistance an individual must contribute to a common plan or design to find them part of a joint criminal enterprise, the prosecutors can allege joint criminal enterprises of enormous scope and breadth.[38] Before the Trial Chamber decision in September of 2004 in *The Prosecutor v. Brdjanin*, there would have been no reason why the ICTR prosecutor, for example, could *not* allege that the elimination of the moderate Hutus and

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[36] Alison Marston Danner, *Accountability for War Crime: What Role for National, International, and Hybrid Tribunals?* The American Society for International Law, (March 31-April 3, 2004) [Reproduced in accompanying notebook 2 at tab 25].

[37] Danner and Martinez, *supra* note 4, page 14. Citing Antonio Cassese, *Reflections on International Criminal Justice*, 61 Mod. L.Rev. 1, 6 (1998) [Reproduced in accompanying notebook 3 at tab 26].

[38] *The Prosecutor v. Brdjanin*, Case No: IT-99-36-T, ICTY Trial Chamber Judgment (1 September 2004) ¶ 340 – 356. The Trial Chamber in Brdjanin is objecting to the very broad scope of joint criminal enterprise previously employed by the ICTY. [Reproduced in accompanying notebook 2 at tab 7] (Hereinafter *Brdjanin* Judgment).

Tutsis was the result of a very broad joint criminal enterprise.[39] The prosecutor could allege that each ICTR defendant who intentionally participated in the genocide and who could have foreseen the killings that did in fact occur should be found liable for the murder of the hundreds of thousands of people.

This is still the case, despite the Trial Chamber's recent holding in *Brdjanin* on the subject of joint criminal enterprise. In the subsequent sections of this memorandum are two different arguments. The first argument states the holding of the *Brdjanin* Trial Chamber is limited strictly to the facts and pleadings of the case itself. The second argument states that the Trial Chamber in fact erred in their application of the joint criminal enterprise doctrine to the *Brdjanin* case and did not follow the case law already established in the ICTY. Therefore, the doctrine of joint criminal enterprise is not affected by the judgment from *Brdjanin*.

## III. The Prosecutor v. Brdjanin – Facts

### *A. Charges*

Radoslav Brdjanin was charged with genocide, complicity in genocide, grave breaches of the Geneva Conventions, violations of the laws and customs of war and crimes against humanity, committed in 13 municipalities in the Bosnian Krajina between 1 April 1992 and 31 December 1992. Brdjanin was accused of 12 crimes.[40] Those crimes are genocide (count 1) and complicity to commit genocide,[41] persecutions, a crime against humanity (count 3),[42]

[39] Id. The trial chamber held that the mere espousal of a common plan by the accused and those who physically perpetrated the crime was not sufficient in and of itself to reach the level of a joint criminal enterprise.

[40] *The Prosecutor v. Brdjanin*, Case No: IT-99-36-T, ICTY Trial Chamber, Sixth Amended Indictment, (9 December 2003), ¶ 27.1. [Reproduced in accompanying notebook 1 at tab 8] (Hereinafter *Brdjanin* Indictment).

[41] Press Release for the Judgment in the Case of *The Prosecutor v. Radoslav Brdjanin*, The Hague, (1 September 2004), KR/ P.I.S./888-e. These charges are based upon the fact that the accused participated in a campaign designed to destroy Bosnian Muslims and Bosnian Croats, in whole or in part, as national, ethnical, racial or religious groups,

extermination, a crime against humanity (count 4) and willful killing, a grave breach of the Geneva Conventions of 1949 (count 5),[43] torture, a crime against humanity (count 6) and a grave breach of the Geneva Conventions of 1949 (count 7),[44] deportation, a crime against humanity (count 8) and inhumane acts, a crime against humanity (count 9),[45] unlawful and wanton extensive destruction and appropriation of property not justified by military necessity, a grave breach of the Geneva Conventions of 1949 (count 10), wanton destruction of cities, towns or villages, or devastation not justified by military necessity, a violation of the laws or customs of war (count 11), and destruction or willful damage done to institutions dedicated to religion, a violation of the laws or customs of war (count 12).[46]

### *B. Prosecution's Allegations of Accused's Criminal Responsibility*

The Prosecution did not allege that the accused physically perpetrated any of the crimes listed above but instead alleged that the Accused is individually criminally responsible pursuant to Article 7(1) of the statute[47] for having participated in a joint criminal enterprise. The purpose

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in the municipalities of the ARK. [Reproduced in accompanying notebook 3 at tab 31] (Hereinafter *Brdjanin* Press Release).

[42] Id. This charge is based upon the fact that the accused subjected the Bosnian Muslim and Bosnian Croat populations to killings, torture and mistreatment, for denying them fundamental rights, for deporting or forcibly transferring them as well as destroying, willfully damaging and looting property in predominately Bosnian Muslim and Bosnian Croat populated areas and destroying or willfully damaging Bosnian Muslim and Bosnian Croat religious and cultural buildings.

[43] Id. These charges are based upon the accused's participation in the campaign designed to exterminate members of the Bosnian Muslim and Bosnian Croat populations in the ARK through a significant number of killings in non-Serb areas, camps, and other detention facilities and during deportation or forcible transfer.

[44] Id. These charges are for the accused having inflicted severe pain or suffering on the Bosnian Muslim and Bosnian Croat population through inhuman treatment including sexual assaults, rapes, brutal beatings and other forms of severe maltreatment in various locations.

[45] Id. These charges are based upon the accused having deported or forcibly transferred Bosnian Muslims and Bosnian Croats from the ARK to areas under the control of the legitimate government of Bosnia-Herzegovina and to Croatia.

[46] *Brdjanin* Indictment, *supra* note 40, ¶ 27.1[Reproduced in accompanying notebook 1 at tab 8].

of the joint criminal enterprise was the permanent forcible removal of Bosnian Muslim and Bosnian Croat inhabitants from the territory of the planned Serbian state by the commission of the crimes alleged in Counts 1 to 12. The prosecution also alternatively pleaded that the Accused was individually criminally responsibility pursuant to the extended form of joint criminal enterprise (third category 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 perpetration of the crimes of deportation and forcible transfer.[48]

During the second half of 1991 the Bosnian Serb leadership devised a plan to link Serb populated areas in Bosnia-Herzegovina to gain control over these areas and to create a separate Bosnian-Serb state from which most non-Serbs would be permanently removed. This was known as the Strategic Plan and will be referred to as such in this memorandum.[49] The Bosnian Serb leadership knew that the Strategic Plan could only be implemented by the use of force and fear.[50] Measures were taken to implement the Strategic Plan by the Serbian leaders. Control over the Bosnian Serb military, police and civilian structures was exercised variously by political leaders from the Bosnian Serb Supreme Command and other governmental authorities of the Serbian Bosnian-Herzegovinan. It was impossible to implement a systematic policy of this

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[47] Article 7(1) of the International Criminal Tribunal for the Former Yugoslavia Statute. A person who planned, instigated, ordered, committed or otherwise aided and abetted in the planning, preparation or execution of a crime referred to in articles 2 to 5 of the present Statute, shall be individually responsible for the crime. [Reproduced in accompanying notebook 1 at tab 1].

[48] *Brdjanin* Indictment, *supra* note 40, ¶ 27.3. [Reproduced in accompanying notebook 1 at tab 8].

[49] *Brdjanin* Judgment, *supra* note 38, ¶ 305 to 307. [Reproduced in accompanying notebook 1 in tab 7].

[50] Id, at ¶ 307.

magnitude by mere spontaneous action or by criminal actions conducted by isolated radical groups.[51]

### *C. Positions of Power Held by Accused*

In early 1991, the Autonomous Region of Krajina (ARK) was formed. The Accused became its First Vice President. The ARK was a purely Serbian authority in the region. The ARK was vested with powers of a political nature that belonged to the municipalities, including powers in the area of defense.[52] The Trial Chamber found that the ARK was established as an intermediate level of government by the Serb leadership to coordinate the implementation of the Strategic Plan. The ARK Crisis Staff was formed by the ARK Executive Council in May of 1992.[53] The ARK Crisis Staff was established primarily to ensure the cooperation between the political authorities, the army and the police at the regional level with a view to coordinating the implementation of the Strategic Plan by the different authorities.[54]

The Trial Chamber found that the Accused held key positions of power and was a leading political figure of the ARK and played a significant role in the regional, municipal and republic levels of the Bosnian-Serb leadership.[55] The Trial Chamber was satisfied that the Accused possessed such *de jure* and *de facto* powers that he was one of the most significant and important figures in the ARK.[56] The Accused possessed power by virtue of the political positions that he occupied at the municipal, regional and republican levels. He was also entrusted with political

[51] Id at footnote 310.

[52] Id, ¶ 295.

[53] Id at ¶ 296.

[54] Id ¶ 192.

[55] Id at ¶ 286.

[56] Id at ¶ 291.

power directly by the Bosnian Serb leadership, including Radovan Karadzic.[57] The Accused already enjoyed a great measure of power before the creation of the ARK Crisis Staff. His power was consolidated with his appointment as President of the ARK Crisis Staff and continued and even increased after the ARK Crisis Staff ceased to exist.[58]

Before the creation of the ARK Crisis Staff, the Accused was one of the most powerful politicians in the Celinac municipality and in direct contact with Radovan Karadzic and other Bosnian Serb leaders from whom he received instructions. The Accused's close contact with the top leadership of the SerBiH is also demonstrated by the fact that during meetings of the SerBiH Assembly, he was sitting in the front row among the most senior members of the SDS. The top leadership of the SerBiH granted the Accused a high degree of authority and autonomy in areas of fundamental political importance, which is indicative of the trust the Accused enjoyed at the highest political level.[59]

Once the Accused became President of the ARK Crisis Staff, he became the key figure in the ARK organization. The Accused was the public face of the ARK Crisis Staff, evidenced by the fact that he gave the public speeches, his signature was required for all decision published in the Official Gazette of the ARK, and that he was the person the public recognized as the leader of the ARK Crisis Staff.[60] By virtue of his position as President of the ARK Crisis Staff and particularly as a result of the fact that the Accused was the key figure of the ARK Crisis Staff

[57] Id.

[58] Id at ¶ 293 to 304.

[59] Id at ¶ 293 to 295.

[60] Id at ¶ 297 to 299.

and the driving force behind its decisions, he exercised *de facto* authority over the municipal authorities and the police and had great influence.[61]

### *D. Accused's Role in the Strategic Plan*

The Accused also shared a significant role in the implementation and support of the Strategic Plan with the Bosnian Serb leadership.[62] The Trial Chamber was satisfied of this fact because of the Accused's close relationship with Radoslav Karadzic, and the Accused or other political leaders, the acts and conduct of the Accused, his public speeches and his speeches during Assembly sessions of the ARK and the SerBiH, attended by the Accused as a delegate.[63] Additionally, although the Trial Chamber did not find that the Accused actually designed or the Strategic Plan (Radoslav Karadzic and other leaders were responsible for formulating the Strategic Plan), the Accused, through the power and trust conferred upon him by the Bosnian Serb leadership and through his political positions, made crucial and substantial contribution to the implementation of the Strategic Plan. The Accused, holding authority primarily at the regional level, was an essential link between the leadership at the republican level on the one hand and the ARK municipalities on the other hand.[64]

The Trial Chamber also found that the Accused was a significant and central participant in the implementation of the Strategic Plan throughout the period of the conflict in the former Yugoslavia.[65] The Accused personally made contributions to substantial contribution to the implementation of the Strategic Plan in the ARK. The decisions of the ARK Crisis Staff reflected

[61] Id at ¶ 302.

[62] Id at ¶ 305.

[63] Id at ¶ 306.

[64] Id at ¶ 307 and 308.

[65] Id.

the ideas and strategies which the Accused had been advocating since 1991.[66] By virtue of these decisions and the *de facto* authority and influence exercised by the ARK Crisis Staff, the Accused was able to give effect to his ideas.[67]

The Accused contributed substantially to the implementation of the Strategic Plan through his individual propaganda campaign against the Bosnian Muslims and the Bosnian Croats. The Accused had substantial access to the media, and in fact, was one of the leaders who appeared in the media most often.[68] He used inflammatory and derogatory language, and his public statements had the particular effect of creating fear and hatred between the ethnic groups, inciting the ethnic groups against each other.[69] Finally, in establishing the guilt of the Accused, the Trial Chamber found that the Accused had knowledge that crimes were being committed to execute the Strategic Plan.[70] The Accused toured the "frontlines" of the conflict, reported back to other leaders on the situation, and was briefed by military personnel to gain an understanding of the situation. The Accused spoke publicly about incidents that had occurred.[71]

### *E. Conclusion*

In sum, the Accused, Radoslav Brdjanin had significant power, authority, and control in the region and in the leadership of the ARK Crisis Staff, the group responsible for implementation of the atrocities and crimes against humanity. Although Brdjanin did not actual design the Strategic Plan, he was involved in all levels of espousal, implementation, knowledge,

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[66] Id.

[67] Id at ¶ 315 to 320.

[68] Id at ¶ 323.

[69] Id at ¶ 324 to 325.

[70] Id at ¶ 333.

[71] Id at ¶ 336 to 338.

and control over the region. Brdjanin was one of the most significant and key political figures with power at the times in question.

## IV. Relevant Facts that Limit the Holding of Joint Criminal Enterprise from Prosecutor v. Brdjanin

The Trial Chamber's holding on joint criminal enterprise liability in the *Brdjanin* case should be, alternatively, limited only to the facts of the *Brdjanin* case, and therefore should not serve as a model for future use of the joint criminal enterprise doctrine. This section will outline the relevant parts of the *Brdjanin* case that create the limitation effect upon the Trial Chamber's holding. This section will then explain how those facts create the limiting effect upon the Trial Chamber's holding and further provide a conclusion on the place of the *Brdjanin* judgment in the entirety of case law on joint criminal enterprise.

### *A. The Prosecution's Pleadings in the Indictment*

The most important limitation to the *Brdjanin* joint criminal enterprise decision is the manner in which the Prosecution pleaded, in the indictment, the liability of the Accused through a joint criminal enterprise. Namely, the Prosecution pleaded that the Accused was responsible for the acts charged in the indictment of Counts 1 through 12 through a joint criminal enterprise with "others" generally. The Trial Chamber stated that

> "… in addition to the Accused, "[a] great many individuals participated in this joint criminal enterprise, including […] Momir Talic, other members of the ARK Crisis Staff, the leadership of the SerBiH and the SDS, including Radovan Karadzic, Momcilo Krajisnik and Biljana Plavsic, members of the Assembly of the Autonomous Region of Krajina and the Assembly's Executive Committee, the Serb Crisis Staffs of the ARK municipalities, the army of the Republika Srpska, Bosnian Serb paramilitary forces and others." [72]

[72] *Brdjanin* Indictment, *supra* note 40, at ¶ 27 and 33. The prosecutor does not allege that the accused personally committed any of the alleged crimes. Therefore, in order to hold the Accused criminally responsible for the crimes charged in the Indictment pursuant to the first category of joint criminal enterprise, the Prosecution must establish

The Prosecution did not allege that the Accused physically perpetrated any of the crimes charged in the Indictment.[73] Therefore, in order to hold the Accused criminally responsible for the crimes charged in the Indictment pursuant to the first category of joint criminal enterprise, the Prosecution must establish that between the person physically committing a crime and the Accused, there was an understanding or an agreement to commit that particular crime.[74] In order to hold him responsible pursuant to the third category of joint criminal enterprise, the Prosecution must prove that the Accused entered into an agreement with a person to commit a particular crime (in this case the crimes of deportation and/or forcible transfer) and that this same person physically committed another crime, which was a natural and foreseeable consequence of the execution of the crime agreed upon.[75]

However, the evidence does not show that any of the crimes charged in the Indictment were physically perpetrated by Momir Talic, other members of the ARK Crisis Staff, the leadership of the SerBiH and the SDS (including Radovan Karadzic, Momcilo Krajisnik and Biljana Plavsic), members of the ARK Assembly and the Assembly's Executive Committee and the Serb Crisis Staffs of the ARK municipalities.[76] Because it has not been established that these persons carried out the *actus reus* of any of the crimes charged in the Indictment, the Trial Chamber could not examine the existence of a joint criminal enterprise between the Accused and

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that between the person physically committing a crime and the Accused, there was an understanding or an agreement to commit that particular crime. [Reproduced in accompanying notebook 1 at tab 8].

[73] *Brdjanin* Judgment, *supra* note 38, ¶ 344. [Reproduced in accompanying notebook 1 at tab 7].

[74] Id.

[75] Id.

[76] Id at ¶ 345.

these individuals.[77] The *actus reus* of the crimes charged in the Indictment that have been established beyond reasonable doubt were perpetrated by members of the army, the Bosnian Serb police, Serb paramilitary groups, Bosnian Serb armed civilians or unidentified individuals ("Physical Perpetrators").[78]

### *B. Requirement for Specificity in the Pleadings*

During a pre-trial ruling, the Trial Chamber held that if individual criminal responsibility pursuant to the theory of joint criminal enterprise is charged, the indictment must inform the Accused of 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.[79] And herein lies the Prosecution's fatal flaw in the case. The Indictment does not expressly plead a joint criminal enterprise between the Accused and members of the police.[80] The Trial Court held that the terms used in the Indictment by the Prosecution ("others" generally) cannot be summoned to include groups that are not specifically identified. This term ("others") does not meet the requirement of specificity in pleading.[81] Accordingly, the Trial Chamber concluded that the Prosecution did not plead a joint criminal enterprise between the Accused and the police.[82] For the same reason, the Trial Chamber will not examine a joint criminal enterprise between the Accused and Serb armed civilians and unidentified individuals.[83]

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[77] Id.

[78] Id.

[79] Id at ¶ 346. The holding in this case, when analyzed based on the pleadings of the Prosecutor, emphasizes the importance of specificity in pleadings.

[80] Id.

[81] Id.

[82] Id.

The final joint criminal enterprise alleged in the indictment is that between the Accused and members of the Serbian paramilitary forces.[84] However, this alleged joint criminal enterprise also failed to meet the burden required of the prosecution for specificity in pleadings.[85] For the purposes of establishing individual criminal responsibility pursuant to the theory of joint criminal enterprise the Trial Chamber found that it is not sufficient to prove an understanding or an agreement to commit a crime between the Accused and a person in charge or in control of a military or paramilitary unit committing a crime.[86]

### *C. The Prosecution Pleaded Impermissible "Double Joint Criminal Enterprise"*

The Accused can only be held criminally responsible under the mode of liability of joint criminal enterprise if the Prosecution establishes beyond reasonable doubt that the Accused had an understanding or entered into an agreement with those who actually physically committed the particular crime eventually perpetrated or if the crime perpetrated by the relevant physical perpetrators is a natural and foreseeable consequence of the crime agreed upon by the Accused and the relevant physical perpetrators.[87] The Prosecution is, in essence, attempting to allege a "double joint criminal enterprise" wherein the Accused had a joint criminal enterprise with the relevant leaders of the military, police or paramilitary units, and those leaders thereby had a joint

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[83] Id. The Prosecution would have had to either name in the indictment the actual names of those who actually performed the *actus reus* of the crimes, or to allege in the indictment that the Accused had a joint criminal enterprise with the civilian and military leaders known to have had some kind of command responsibility in the crimes.

[84] Id at ¶ 347.

[85] Id at ¶ 346.

[86] Id. During the pre-trial stage of this case, the Trial Chamber ruled that if individual criminal responsibility pursuant to the theory of JCE is charged, the indictment must inform the accused of 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. This holding was based upon a decision from Objections by Momir Talic to the Form of the Amended Indictment, ¶ 21. [Reproduced in accompanying notebook 1 at tab 9]. Quoting from *Prosecutor v. Milorad Krnojelac*, Case No. IT-97-25, Decision on Form of Second Amended Indictment, (11 May 2000), ¶ 16. [Reproduced in accompanying notebook 1 at tab 10].

[87] Id.

criminal enterprise with members or participants in their organization who would have committed the crimes charged in the indictment.

### *D. "Double Joint Criminal Enterprise" Not Within Doctrine and Case Law*

This type of allegation does not fall within the established doctrine and case law of joint criminal enterprise and the alleged joint criminal enterprise actually *is* too broad to apply the doctrine established in the *Tadic* case. The Accused can only be held criminally responsible under the mode of liability of joint criminal enterprise if the Prosecution establishes beyond reasonable doubt that he had an understanding or entered into an agreement with the Relevant Physical Perpetrators to commit the particular crime eventually perpetrated or if the crime perpetrated by the Relevant Physical Perpetrators is a natural and foreseeable consequence of the crime agreed upon by the Accused and the Relevant Physical Perpetrators.[88]

There are other relevant factors that contributed to the holding. For example, there were many people in the region at the time that the ARK Crisis Staff was implementing the Strategic Plan who all shared the requisite mens rea for the crimes committed pursuant to the Strategic Plan.[89] However, mere espousal of the Strategic Plan by the Accused on the one hand and many of the Relevant Physical Perpetrators on the other hand is not equivalent to an arrangement between them to commit a concrete crime.[90] Indeed, the Accused and the Relevant 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

[88] Id.

[89] Id at ¶ 350. For example, the Trial Chamber is satisfied that all individuals espousing the Strategic Plan had the requisite *mens rea* for at least the crimes charged in Count 8 (deportation ) and Count 9 (forcible transfer), *i.e.*, they intended to willfully participate in expulsions or other coercive conduct to forcibly deport one or more person to another State without grounds permitted under international law (deportation) and to force persons to leave their territory without ground permitted under international law (forcible transfer).

[90] Id at ¶ 351.

understanding or entering into any agreement between them to commit a crime. There were other reasonable conclusions to be drawn from the facts presented by the prosecution; for example, that the Accused and the relevant physical perpetrators implemented the Strategic Plan independently of each other without formulating an agreement sufficient to reach that of a joint criminal enterprise.[91]

Because of the impermissible "double joint criminal enterprise" alleged by the Prosecution, there is no actual evidence that links the physical perpetrators of the crimes charged in the indictment and the Accused.[92] The next inquiry is to determine whether an understanding or agreement to that effect between the Accused and the relevant physical perpetrators can be inferred from the fact that they acted in unison to implement the Strategic Plan.[93] In order to draw this inference, it must be the only reasonable inference available from the evidence.[94]

Based on the fact that the Prosecution was unable to allege the specific names of the relevant physical perpetrators of the crimes and therefore was unable to point to the specific facts proving a joint criminal enterprise between the two parties, another reasonable inference that could be drawn would be that the relevant physical perpetrators committed the crimes in question in execution of orders and instructions received from their military or paramilitary superiors who intended to implement the Strategic Plan (and could be members of the joint criminal enterprise with the Accused – indicating the "double joint criminal enterprise" structure again), whereby the Relevant Physical Perpetrators did not enter into an agreement with the Accused to commit

[91] Id .

[92] Id at ¶ 353.

[93] Id.

[94] Id.

these crimes.[95] The Trial Chamber came to this holding despite the fact that both the Accused and the Relevant Physical Perpetrators, all holding the requisite *mens rea* for a particular crime and driven by the same motive to implement the Strategic Plan, furthered the commission of the same crime.[96] This would have occurred, however, without the two parties entering into an agreement between them to commit that crime.[97]

### *E. Conclusion*

Rather than this holding limit the application of joint criminal enterprise to large scale application, this case merely shows the importance of specificity in the indictments. If the Prosecution had been able to allege the names of the relevant physical perpetrators, or alleged in some other way that the Accused and the relevant physical perpetrators had actual contact (rather than just through the "double joint criminal enterprise"), this case would have been successful. Therefore, the Prosecutor at the ICTR will be able to allege a joint criminal enterprise between a government official and the actual killers, provided they are also able to allege specifics in the indictment, as in the names of the physical perpetrators. The holding in this case does not limit the application of a broad scale joint criminal enterprise, which could be proved between a government official and those pursuing the goals of killing the Tutsi.

## V. Analysis of the Application of the Joint Criminal Enterprise Doctrine from the Brdjanin Trial

There are several key elements of the *Prosecutor v. Brdjanin* decision from the first of September, 2004 that limit it's holding of the ICTY judgment on joint criminal enterprise to this

[95] Id at ¶ 354.

[96] Id.

[97] Id.

case only. This section will analyze the case based on the conclusion that the Trial Chamber misapplied the doctrine of joint criminal enterprise.

The scope and purpose of joint criminal enterprise is to convict those people with *de jure* and *de facto* powers who are responsible for war crimes and crimes against humanity but who, however, did not physically commit the crimes.[98]

### *A. No Agreement with the Relevant Physical Perpetrators*

The Trial Chamber recognized that Brdjanin did possess *de jure* and *de facto* powers such that he was one of the most significant political figures in the ARK.[99] Based upon the definition and application of the doctrine of joint criminal enterprise recognized by the Trial Chamber, it would seem clear that the Accused would be found a member of a joint criminal enterprise. However, the Trial Chamber found that, despite the Accused's espousal of a Strategic Plan[100] and that many of the Relevant Physical Perpetrators[101] of the crimes also espoused and acted towards the implementation of the Strategic Plan, the agreement did not reach the level required by the Trial Chamber to find that a joint criminal enterprise existed between the perpetrators and the Accused to commit a crime.[102] Indeed, the Accused and the Relevant 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

[98] See earlier discussion of joint criminal enterprise in Section II of this memorandum.

[99] *Brdjanin* Judgment, *supra* note 38, at ¶ 291 [Reproduced in accompanying notebook 1 at tab 7].

[100] Strategic Plan is defined, infra, Section III, page 16 of this memorandum.

[101] Relevant Physical Perpetrators refers to, in the context of this memorandum, those people who actually committed the crimes for which the war criminals discussed in this memorandum are charged. The Relevant Physical Perpetrators are not on trial at the tribunals because the purpose of the tribunals is to prosecute those individuals who are most guilty, by virtue of their positions of power and/or influence.

[102] *Brdjanin* Judgment, *supra* note 38, at ¶ 346. [Reproduced in accompanying notebook 1 at tab 7].

understanding or entering into any agreement between them to commit a crime.[103] The Trial Chamber refused to extend liability through the use of joint criminal enterprise to the Accused because it was not satisfied that the only reasonable conclusion that could be drawn from the Accused's and the physical perpetrators concerted action aimed towards the implementation of the strategic plan is that they all entered into an agreement with the perpetrators to commit the crime.[104]

### *B. Other Possible Alternatives from Facts of the Case (Instead of Finding a Joint Criminal Enterprise)*

The Trial Chamber held that other reasonable inferences could be drawn from the interpretation of the facts. For example, the Accused and the physical perpetrators, all holding the same required mens rea for the crimes committed, furthered the commission of the same crime without entering into an agreement between them to commit that crime. They acted independently of each other to further the same crime, with the same *mens rea*.[105] Additionally, the Trial Chamber found that although joint criminal enterprise is applicable to cases involving ethnic cleansing, it appears that, in providing for the definition of joint criminal enterprise, the Appeals Chamber in Tadic had in mind a somewhat smaller enterprise than the one invoked in the present case.[106] The Trial Chamber supports this interpretation with an analysis of several cases in which the ICTY has applied joint criminal enterprise. The doctrine is mostly applied to enterprises of a smaller scale, limited to a specific military operation and only to members of the

[103] Id at ¶ 351.

[104] Id at ¶ 353.

[105] Id at ¶ 351 and 354.

[106] Id at ¶ 355.

armed forces;[107] a restricted geographical area;[108] a small group of armed men acting jointly to commit a certain crime;[109] or, for the second category of joint criminal enterprise, to one detention camp.[110]

### *C. Conclusion*

Therefore, the Trial Chamber found the fact that acts and conduct of an Accused which facilitated or contributed to the commission of a crime by another person and/or assisted in the formation of that person's criminal intent is not sufficient to establish beyond reasonable doubt that there was an understanding or an agreement between the two to commit that particular crime.[111] An agreement between two persons to commit a crime requires a *mutual* understanding or arrangement with each other to commit a crime.[112] However, a thorough analysis of the use of joint criminal enterprise doctrine in the ICTY and other criminal tribunals does not conform to this view. Rather, the application of joint criminal enterprise liability and the underlying policy rationale behind the development of the doctrine of joint criminal enterprise in the Tadic Appeals Chamber decision would support the opposite conclusion.

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[107] *The Prosecutor v. Krstic*, Case No: IT-98-33-A, Judgment, ICTY Trial Chamber, (19 April 2004). [Reproduced in accompanying notebook 2 at tab 13] (Hereinafter *Krstic* Trial Judgment).

[108] *The Prosecutor v. Simic, et al.*, Case No: IT-95-9, Judgment, ICTY Trial Chamber, (17 October 2003), ¶ 984-985. [Reproduced in accompanying notebook 2 at tab 15] (Hereinafter *Simic* Judgment).

[109] *Tadic* Appeals Chamber Judgment, *supra* note 3, ¶ 232. [Reproduced in accompanying notebook 2 at tab 18]. See also *The Prosecutor v. Vasiljevic*, Case No: IT-98-32-A, ICTY Appeals Chamber Judgment, (25 February 2004), ¶ 88 to 93, 102 to 111. [Reproduced in accompanying notebook 2 at tab 20].

[110] *Brdjanin* Judgment, *supra* note 38, at footnote 890. [Reproduced in accompanying notebook 1 at tab 7]. See also *The Prosecutor v. Krnojelac*, Case No: IT-97-25, ICTY Trial Chamber Judgment, ¶ 84 (15 March 2002). [Reproduced in accompanying notebook 1 at tab 11].

[111] *Brdjanin Judgment*, *supra* note 38, ¶ 340 to 352. [Reproduced in accompanying notebook 1 at tab 7].

[112] Id. ¶ 352.

## VI. Analysis of Joint Criminal Enterprise through Other Cases from the International Criminal Tribunal of the Former Yugoslavia

Alleging in the indictment that the Accused participated in a joint criminal enterprise has become the principal charging preference in ICTY indictments.[113] The following discussion analyzes the use of and interpretation of the doctrine of joint criminal enterprise in the ICTY.

### *A. Stakic*

A case decided by the Tribunal in 2003 applied liability to the defendant through a joint criminal enterprise (although the Trial Chamber used the term "co-perpetration" instead of "joint criminal enterprise").[114] The Trial Chamber found that co-perpetration requires an explicit agreement or silent consent to reach a common goal by coordinated cooperation and joint control over the criminal conduct. For this kind of co-perpetration it is typical, but not mandatory, that one perpetrator possesses skills or authority which the other perpetrator does not. These can be described as shared acts which, when brought together, achieve the shared goal based on the degree of control over the execution of common acts.[115] Also, the Trial Chamber stated that for all three categories of joint criminal enterprise, the Prosecution must prove the existence of a common criminal plan between two or more people in which the Accused was a participant. The

[113] Kelly D. Askin, *Reflections on Some of the Most Significant Achievements of the ICTY*, 37 New Eng. L. Rev. 903, 910-911, (2003). [Reproduced in accompanying notebook 2 at tab 23].

[114] Prosecutor v. Stakic, Case No: IT-97-24-T, Trial Chamber II, (31 July 2003). Stakic was a physician in Prijedor, Bosnia and Herzegovina, and was convicted of extermination as a crime against humanity. The trial chamber used an analysis of joint criminal enterprise, but used the term co-perpetration rather than joint criminal enterprise. But as shown in the original joint criminal enterprise case, Prosecutor v. Tadic, the terms co-perpetration and joint criminal enterprise are interchangeable, although the tribunal officially uses the term joint criminal enterprise at this point. [Reproduced in accompanying notebook 2 at tab 16] (Hereinafter *Stakic* Judgment). See also, Danner and Martinez, *supra* note 4, pages 36 – 37. [Reproduced in accompanying notebook 2 at tab 18].

[115] Id. ¶ 440.

existence of the agreement or understanding need not be express, but may be inferred from all the circumstances.[116]

The Trial Chamber discussed an analysis by Claus Roxin to provide a useful explanation of "co-perpetration."[117] The co-perpetrator can achieve nothing on his own, the plan only 'works' if the accomplice works with the other person. Both perpetrators are thus in the same position. As *Roxin* explains, "they can only realize their plan insofar as they act together, but each individually can ruin the whole plan if he does not carry out his part. To this extent he is in control of the act." *Roxin* goes on to say that this "type of 'key position' of each co-perpetrator describes precisely the structure of joint control over the act."[118]

### *1. Application to The Prosecutor v. Brjdanin*

Applying the definition and interpretation of co-perpetration (i.e. joint criminal enterprise) to the *Brdjanin* case, it would seem that the Trial Chamber misapplied the doctrine. Brdjanin could not achieve the goals of the Strategic Plan if the physical perpetrators did not implement the physical aspects of the crimes. The goals espoused by Brdjanin and those who physically perpetrated the crimes, could not be achieved without the each other. Brdjanin's position of power and authority within the structure of the ARK was such that those who physically perpetrated the crimes would not and could not have had the authority or the impetus to commit the crimes alleged in the indictment against Brdjanin.

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[116] Id, ¶ 435. But see also Richard P. Barrett & Laura E. Little, *Lessons of Yugoslav Rape Trials: A Role for Conspiracy Law in International Tribunals, 88 Min. L. Rev.* 30, 32 (November 2003). They argue that joint criminal enterprise does not require proof of an agreement. [Reproduced in accompanying notebook 2 at tab 24].

[117] Id, at ¶ 440, citing Claus Roxin,, Täterschaft und Tatherrschaft (Perpetration and control over the act), 6th Edition, Berlin, New York, 1994, p. 278. Claus Roxin was a Professor of criminal law, law of criminal procedure and general legal doctrine at University of Munich and since 1974 acting director of the institute for the entire criminologies. The Trial Chamber relied on Roxin in their analysis of the word "committing" in the statute.

[118] Id.

This type of joint criminal enterprise is not too broad, as alleged by the Trial Chambers in the September 2004 judgment, to conform to the idea of joint criminal enterprise as elucidated in the *Tadic* Appeals Chamber decision. As noted in the *Tadic* Appeals Chamber decision, all persons who participate in the planning, preparation or execution of serious violations of international humanitarian law contribute to the commission of the violation and are therefore individually responsible.[119] Many joint criminal enterprises are described in very broad terms in the prosecution's indictments.[120] For example, in the indictment of Milan Martic, the Prosecution alleged that he was a participant in a joint criminal enterprise, the purpose of which was forcible removal of a majority of the Croat, Muslim, and other non-Serb population from approximately one-third of the territory of the Republic of Croatia, Bosnia, and Herzegovina.[121] The prosecution has been allowed to move forward with their trials using the broad application of joint criminal enterprise, as in *Stakic*. The Prosecution alleged in their indictment against *Stakic* that the Accused was a participant in a joint criminal enterprise, the purpose of which was the permanent forcible removal of Bosnian Muslims and Bosnian Croats from the territory of the planned Serbian State.[122] This indicates, therefore, that the ICTY does not have an objection to allegations of joint criminal enterprises of great breadth.[123]

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[119] *Tadic* Appeals Judgement, para. 190, quoting paragraph 54 of the Secretary-General's Report. [Reproduced in accompanying notebook 2 at tab 18].

[120] See *The Prosecutor v. Stakic*, Case No: IT-97-24, Fourth Amended Indictment, (10 April 2002), ¶ 26 [Reproduced in accompanying notebook 2 at tab 17]; *The Prosecutor v. Brdjanin & Talic*, Case No: IT-99-36/1, ICTY Trial Chamber, Decision on Objections by Momir Talic to the Form of the Amended Indictment, (20 February 2001), ¶ 27.1 [Reproduced in accompanying notebook 1 at tab 9]; *Ojdanic* Decision, *supra* note 15, ¶ 1, 6 [Reproduced in accompanying notebook 2 at tab 12].

[121] Danner and Martinez, *supra* note 4, page 50. [Reproduced in accompanying notebook 2 at tab 18].

[122] *Stakic* Fourth Amended Indictment, *supra* note 120, ¶ 26. [Reproduced in accompanying notebook 2 at tab 17]. See also, Danner and Martinez, page 50. [Reproduced in accompanying notebook 3 at tab 26].

[123] Danner and Martinez, page 50 [Reproduced in accompanying notebook 3 at tab 26].

### *2. Comparison of Stakic and Brdjanin: Brdjanin Should be Found Guilty Through a Joint Criminal Enterprise*

Based on the indictments cited and the ICTY holdings on joint criminal enterprise in those holdings, it is clear that the Trial Chamber in the *Brdjanin* case deviated substantially from the established case law on joint criminal enterprise. Based on *Stakic,* the Trial Chamber in *Brdjanin* should have reached the opposite holding. Both Stakic and Brdjanin were civilian leaders, and not military leaders, indicating that the ICTY is willing to use joint criminal enterprise to convict defendants whether or not they had a position of military power. It is clear that there was an agreement to further the Strategic Plan between the Accused and those who physically perpetrated the crimes. The agreement does not have to be expressed, but can be implied from the circumstances.[124]

Each participant in the alleged joint criminal enterprise could not achieve their goals without the help and assistance of the other.[125] The Relevant Physical Perpetrators of the crimes, who committed the crimes specifically to further the goals of the Strategic Plan, would not have had the organization and means required to perpetrate the specific acts that would have furthered the Strategic Plan. Brdjanin himself was a key member of the ARK Crisis Staff, the group responsible for the formulation and implementation of the Strategic Plan. Brdjanin and his associates formulated the Strategic Plan (i.e. rid the area of non-Serbs) and then enlisted subordinates to help them achieve this goal. This amounts to a joint criminal enterprise, albeit an enterprise perhaps a bit more broad-scale than the Trial Chamber felt comfortable with.

[124] *Stakic* Judgment, *supra* note 114, ¶ 435. [Reproduced in accompanying notebook 2 at tab 16].

[125] Id.

However, this alone is not a sufficient reason to prevent liability of an Accused where the definition and requirements for the doctrine are so clearly met.

### *B. Ojdanic*

In the May 2003 Appeals Chamber decision in *Ojdanic* on a motion challenging the jurisdiction of the tribunal over joint criminal enterprise, the Appeals Chamber reaffirmed the Tadic decision on joint criminal enterprise.[126] The Accused was charged as a co-perpetrator in a joint criminal enterprise. The purpose of this enterprise was to expel a substantial portion of the Kosovo Albanian population from the territory of the province of Kosovo in an effort to ensure continued Serbian control over the province.[127] The Prosecution pointed out in its indictment against Ojdanic that its use of the word "committed" was not intended to suggest that any of those accused personally physically perpetrated the crimes charged, but rather the use of the word "committing" means that the Accused participated in a joint criminal enterprise as a co-perpetrator.[128]

The participant must share the purpose of the joint criminal enterprise. The person who merely knows about the joint criminal enterprise he or she will only be regarded as a mere aider and abettor to the crime which is contemplated. Thus, the Appeals Chamber views participation in a joint criminal enterprise as a form of "commission" by which the Accused is actually responsible for the execution of the crimes charged under Article 7(1) of the Statute.[129] The Appeals Chamber in Ojdanic pointed out that joint criminal enterprise is different than conspiracy. Clarifying, they stated:

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[126] *Ojdanic* Decision, *supra* note 15, ¶ 16. [Reproduced in accompanying notebook 2 at tab 14]. See also, Knezevic, pages 24 – 27. [Reproduced in accompanying notebook 3 at tab 27].

[127] Id at ¶ 20.

[128] Id.

[129] Id.

> Whilst conspiracy requires a showing that several individuals have agreed to commit a certain crime or set of crimes, a joint criminal enterprise requires, in addition to such a showing, that the parties to the agreement took action in furtherance of that agreement. In other words, while mere agreement is sufficient in the case of conspiracy, the liability of a member of a joint criminal enterprise will depend on the commission of criminal acts in furtherance of that enterprise. Thus even if it were conceded that conspiracy was excluded from the realm of the Tribunal's statute, that would have no impact on the presence of joint criminal enterprise as a form of "commission" pursuant to Article 7(1) of the Statute.[130]

This decision is also indicative of the fact that the Trial Chamber is not opposed to using the doctrine of joint criminal enterprise in situations of great breadth.[131]

Defendants have alleged that joint criminal enterprise is simply a vehicle for organizational liability.[132] However, the ICTY has denied this charge.[133] The Appeals Chamber has held that "criminal liability pursuant to a joint criminal enterprise is not liability for mere membership or for conspiring to commit crimes, but a form of liability concerned with the participation in the commission of a crime as part of a joint criminal enterprise", which is a different matter.[134]

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[130] Id at ¶ 23

[131] Danner and Martinez, *supra* note 4, pages 48-50. [Reproduced in accompanying notebook 3 at tab 26].

[132] Id, pages 36 – 37. For example, in *Ojdanic's* Motion Challenging Jurisdiction, ¶ 26, the Appeals Chamber held that "criminal liability pursuant to a joint criminal enterprise is not liability for mere membership or for conspiring to commit crimes. Rather, it is a form of liability concerned with the participation in the commission of a crime as part of a joint criminal enterprise, a different matter."

[133] Id.

[134] *Ojdanic* Decision, *supra* note 15 ¶ 26, (21 May 2003). [Reproduced in accompanying notebook 2 at tab 14]. See also, *Stakic* Judgment, *supra* note 114, ¶ 435, 31 July 2003. [Reproduced in accompanying notebook 2 at tab 16]. The Trial Chamber in *Stakic* has asserted, similarly, that joint criminal enterprise cannot be viewed as membership in an organization because this would constitute a new crime not foreseen under the Statute and therefore would amount to a flagrant infringement of the principile nullum crimen sine lege. See also, Danner and Martinez, *supra* note 4, page 36. [Reproduced in accompanying notebook 3 at tab 26].

***Comparison of Ojdanic and Brdjanin: Brdjanin Should be Found Guilty Through a Joint Criminal Enterprise***

Applying this explanation of joint criminal enterprise, it appears that Brdjanin should have been found to be a participant in a joint criminal enterprise. Based on Brdjanin's position of power and authority in the ARK, an agreement arose between Brdjanin and those who physically perpetrated the crimes alleged. The physical perpetrators were acting under orders and direction from Brdjanin, to implement the Strategic Plan. Therefore, an agreement had been reached between Brdjanin and the physical perpetrators of the crimes. Additionally, the parties to the agreement between Brdjanin, a superior with significant *de facto* and *de jure* powers in the region, and those people who physically perpetrated the crimes acted to further the goals of the agreement, i.e. the Strategic Plan. Criminal acts were committed in furtherance of the enterprise.

### *C. Krnojelac*

The ICTY Appeals Chamber decision in *Prosecutor v. Krnojelac* illustrated the extent to which the tribunal is willing to take the joint criminal enterprise doctrine. The Appeals Chamber overturned the Trial Chamber's decision that refused to extend joint criminal liability to Krnojelac.[135] The Trial Chamber found that there was insufficient evidence to prove the existence of an agreement between Krnojelac and the other participants to commit a joint criminal enterprise and that Krnojelac shared the same intent as the other participants. The Trial Chamber also found insufficient evidence to support Krnojelac's intent to commit the underlying crimes of persecution, such as murder, torture, inhumane acts, and cruel treatment.[136] However, as discussed further, *supra*, the Appeals Chamber disagreed with this analysis.[137]

[135] *The Prosecutor v. Krnojelac*, Case No: IT-97-25, ICTY Trial Chamber Judgment, 15 March 2003. [Reproduced in accompanying notebook 1 at tab 11] (Hereinafter *Krnojelac* Judgment). See also Knezevic, pages 39 to 46. [Reproduced in accompanying notebook 3 at tab 27].

### *1. Krnojelac Trial Chamber Case*

In the Trial Chamber case, the Prosecution alleged in the Trial Chamber that Krnojelac incurred responsibility for the inhumane and cruel treatment of the detainees as a participant in a joint criminal enterprise. In order to establish liability on this basis, it must be shown that Krnojelac entered into an agreement with the guards of KP Dom and the military authorities to subject the non-Serb detainees to the inhumane conditions and cruel treatment, and that each of the participants, including Krnojelac, shared the same intent of the crime.[138] The Trial Chamber holding found that Krnojelac was not responsible as a participant in the joint criminal enterprise alleged by the prosecution. Krnojelac was not convicted as a participant in a joint criminal enterprise to commit torture, murder, imprisonment and inhumane acts because there was insufficient evidence to prove the existence of an agreement between Krnojelac and the other participants to commit the joint criminal enterprise and to prove that he shared the same intent as the other participants.[139]

The Trial Chamber provided the following definition of a joint criminal enterprise:

> A joint criminal enterprise exists where there is an understanding or arrangement amounting to an agreement between two or more persons that they will commit a crime. The understanding or agreement need not be express, and its existence may be inferred from all the circumstances. It need not have been reached at any time before the crime was committed. The circumstances in which two or more persons are participating together in the commission of a particular crime may themselves establish an unspoken understanding or arrangement formed between them than and there to commit a crime.[140]

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[136] Id.

[137] *The Prosecutor v. Krnojelac* Appeals Chamber Judgment, *supra* note 20. [Reproduced in accompanying notebook 1 at tab 12].

[138] *Krnojelac* Judgment, *supra* note 135, ¶ 170 [reproduced in accompanying notebook 1 at tab 11].

[139] Id ¶ 534-535.

[140] Id at ¶ 80.

The Trial Chamber found that in order to prove that the Accused was responsible for the joint criminal enterprise, the Prosecution must prove that there was an agreement between himself and the other participants to persecute the Muslim and other non-Serb civilian male detainees by way of the underlying crimes found to have been committed. Also, the Prosecution must prove that the principle offenders and the Accused shared the intent required for each underlying crime and the intent to discriminate in their commission.[141]

### *2. Krnojelac Appeals Chamber Judgment*

However, the Appeals Chamber did not agree with the Trial Chamber's analysis of the requirements for a finding of participation in joint criminal enterprise.[142] The Appeals Chamber focused on the fact that the Accused was a warden at KP Dom for 15 months; he knew the non-Serbs were being unlawfully detained because of their ethnicity and the guards and military authorities were responsible for the inhumane conditions and abuses suffered by the detainees.[143] Krnojelac not only encouraged his subordinates to sustain the inhumane conditions but actually furthered the perpetration of those criminal acts by failing to take preventative measures.[144] More important to the *Brdjanin* decision, the Appeals Chamber in Krnojelac established that it was less important to prove that there was a formal agreement between the participants and more important to prove their involvement in the system.[145] The Appeals Chamber held that there was no other reasonable alternative that could be drawn by the trier of fact other than that the

[141] Id at ¶487. See also ¶ 127, 170, 315, 346, and 427 for further allegations of joint criminal enterprise and the other crimes alleged in the indictment. Also, Daryl A. Mundis, *Current Developments at the Ad Hoc International Criminal Tribunals*, Journal of International Criminal Justice, (April 2003), page 7 [Reproduced in accompanying notebook 3 at tab 29].

[142] *Krnojelac* Appeals Chamber Judgment, *supra* note 20. [Reproduced in accompanying notebook 2 at tab 12].

[143] Id at ¶ 110 and 111.

[144] Id at ¶ 113.

[145] Id ¶ 96.

Accused shared the criminal intent of persecution and expulsion.[146] Based on the foregoing, Krnojelac could not have failed to share the intent to use unlawfully detained non-Serb prisoners for forced labor. The Appeals Chamber therefore determined that the Trial Chamber's decision to acquit Krnojelac of the crime of persecution based on forced labor must be reversed and that, pursuant to Article 7(1) of the Statute, Krnojelac must be convicted of persecution based on forced labor as a co-perpetrator of the joint criminal enterprise whose purpose was to persecute the non-Serb detainees by exploiting their forced labor.[147]

### *3. Comparison of Krnojelac Appeals Chamber Decision and Brdjanin: Brdjanin Should be Found Guilty Through a Joint Criminal Enterprise*

Using the Appeals Chamber analysis of joint criminal enterprise, it is clear that the Trial Chamber in *Brdjanin* misinterpreted the application of joint criminal enterprise.[148] The Trial Chamber attempted to limit the application of joint criminal enterprise by finding that the prosecution alleged an enterprise too broad and that mere espousal of the Strategic Plan by both the Accused and the physical perpetrators of the crime was not sufficient to meet the requirements of liability through joint criminal enterprise. However, it is clear that this interpretation is misguided. Following the rules laid out by the Appeals Chamber in *Krnojelac*

[146] Id at ¶ 206. The Appeals Chamber relies specifically on the facts that Krnojelac was aware of the initial decision to use KP Dom detainees to work and was responsible for all the business units and work sites associated with the prison and, as such, played a central role. Moreover, Krnojelac voluntarily accepted the position in full awareness that non-Serb civilians were being illegally detained at the KP Dom because of their ethnicity and he knew that none of the procedures in place for legally detained persons was ever followed at the KP Dom. He exercised final control over the work of detainees in and for the KP Dom. He had regular meetings with the heads of the furniture factory, metal workshop and farm where detainees worked.

[147] Id.

[148] *Brdjanin* Judgment, *supra* note 38. [Reproduced in accompanying notebook 1 at tab 7].

discussed above,[149] the Trial Chamber should find that Brdjanin was a participant of a joint criminal enterprise.

### *D. Blagojevic*

In July 1995, Vidoje Blagojevic was the Commander of the Bratunac Brigade and held the rank of Colonel. It is alleged that by virtue of his position as Commander of the Bratunac Brigade, Colonel Blagojevic participated in the forcible transfer of women and children from the Srebrenica enclave to Kladanj on 12 and 13 July, and that he was responsible for all prisoners captured, detained, or killed within the Bratunac Brigade zone of responsibility, including those prisoners that were subsequently transported, with his knowledge, to the Zvornik Brigade zone for further detention and execution.[150]

The Prosecution alleged that Blagojevic was guilty of the crimes, as charged in the indictment,[151] of forcible transfer and persecutions through a first category joint criminal enterprise. The Prosecution also alleges that certain underlying crimes, namely "opportunistic killings" were "a natural and foreseeable consequence of the unfolding Joint Criminal

[149] *Krnojelac* Appeals Chamber Judgment, *supra* note 20, ¶ 77. [Reproduced in accompanying notebook 1 at tab 12]. See also, *Krnojelac* Judgment, *supra* note 135, ¶ 80. The Trial Chamber in Krnojelac found that a joint criminal enterprise exists where there is an understanding or arrangement amounting to an agreement between two or more persons that they will commit a crime. The understanding or agreement need not be express, and its existence may be inferred from all the circumstances. It need not have been reached at any time before the crime was committed. The circumstances in which two or more persons are participating together in the commission of a particular crime may themselves establish an unspoken understanding or arrangement formed between them than and there to commit a crime. [Reproduced in accompanying notebook 1 at tab 11].

[150] *Prosecutor v. Blagojevic*, Case No: IT-02-6-T, ICTY Trial Chamber Judgment, (17 January 2005). [Reproduced in accompanying notebook 1 at tab 5] (Hereinafter *Blagojevic* Judgment).

[151] Id, ¶ 5 to 10. The prosecution alleges that common purpose of the joint criminal enterprise was to forcibly transfer the women and children from the Srebrenica enclave to Kladanj, on 12 July and 13 July 1995; and to capture, detain, summarily execute by firing squad, bury, and rebury thousands of Bosnian Muslim men and boys aged 16 to 60 from Srebrenica enclave from 12 July 1995 until and about 19 July 1995. […] The initial plan was to summarily execute more than 1000 Bosnian men and boys, aged 16 to 60, who were separated from the group of Bosnian Muslims in Potocari on 12 and 13 July. On 12 July, this plan was broadened to include the summary execution of over 6000 men and boys, aged 16 to 60, who were captured from the column of Bosnian Muslim men escaping the Srebrenica enclave on 12 July through about 19 July 1995.

Enterprise.[152] The Trial Chamber, however, found that the liability of the Accused was more akin to that of an aider and abettor, rather than a participant pursuant to a joint criminal enterprise. The Trial Chamber outlined the rule used to determine participation in a joint criminal enterprise.

The first element which must be established is that a plurality of persons participated in the joint criminal enterprise.[153] It is alleged that the plurality of persons consisted of members of the VRS and MUP officers.[154] The Trial Chamber finds that there was a plurality of persons who participated in the forcible transfer or women and children from the Srebrenica enclave on 12 and 13 July. Based on the evidence before it in this case, the participants in the joint criminal enterprise were officers of the VRS and members of the MUP and the Accused.

The second element which must be established is the existence of a common plan that amounts to or involves the commission of a crime provided for in the Statute.[155] The Trial Chamber finds that there is evidence of a common plan to commit the crime of forcible transfer.[156]

The third element which must be established is the participation of the Accused in the execution of the common plan.[157] The Trial Chamber finds that there is evidence that the

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[152] Id ¶ 691.
[153] Id ¶ 709.

[154] *The Prosecutor v.Blagojevic,* Amended Joinder Indictment, Case No: IT-02-60-T, ICTY Trial Chamber, (26 May 2003). [Reproduced in accompanying notebook 1 at tab 6] (Hereinafter *Blagojevic* Amended Joinder Indictment). This also includes General Mladic, General Zivanovic, General Krstic, Colonel Beara, Colonel Vujadin Popovic, Colonel Vidoje Blagojevic, Colonel Pandurevic, Major Obrenovic, Major Dragan Jokic, and Captain Momir Nikolic.

[155] *Blagojevic* Judgment, *supra* note 150, ¶ 710. [Reproduced in accompanying notebook 1 at tab 5].

[156] Id.

[157] Id. ¶ 711.

Accused, Vidoje Blagojevic, participated in the forcible transfer.[158] In recalling that forcible transfer is charged as under the first category of joint criminal enterprise, the Trial Chamber must determine whether Blagojevic shared the intent, along with the other participants in the joint criminal enterprise, to commit forcible transfer and whether he voluntarily participated in the enterprise.[159] The Trial Chamber finds that Colonel Blagojevic did not have the requisite intent to commit forcible transfer.

The Trial Chamber reached this conclusion because they found that while the Accused rendered acts to the physical perpetrators of the crimes that assisted in the commission of the crimes of murder, extermination, and persecution, there was insufficient evidence to establish that Colonel Blagojevic had knowledge that these acts assisted in the commission of the crime of murder, in relation to the mass executions.[160] Further, the Trial Chamber found that the Accused had sufficient knowledge that the crimes committed by the physical perpetrators of the crimes amounted to underlying crimes of murder, cruel and inhumane treatment, terrorizing the civilian population and forcible transfer.[161] However, the Accused did not have knowledge that the underlying crimes amounted to the crime of persecution.

***Comparison of Blagojevic and Brdjanin: Brdjanin Should be Found Guilty Through a Joint Criminal Enterprise***

This holding might seem contrary to the argument that the *Brdjanin* Trial Chamber misapplied the law. However, the Trial Chamber judgment in *Blagojevic* is analogous to the argument posited above. The Trial Chamber in *Blagojevic* focused on the fact that the Accused

[158] Id.

[159] Id at ¶ 712.

[160] Id at ¶ 708 to 714.

[161] Id.

did not have the requisite *mens rea* to support the finding of liability through a joint criminal enterprise. However, Blagojevic met all the other conditions of a joint criminal enterprise. In the *Brdjanin* case, the Trial Chamber does not argue that the Accused lacked the mens rea and criminal intent to commit the crimes alleged in the indictment. Rather, the Trial Chamber holds that the Accused, in particular, espoused and assisted the commission of crimes in furtherance of the Strategic Plan. Therefore, according to the holding of *Blagojevic*, Brdjanin should be found guilty of joint criminal enterprise because Brdjanin met the three requirements for finding participation in a joint criminal enterprise: first, that a plurality of persons participated in the joint criminal enterprise; second, the existence of a common plan that amounts to or involves the commission of a crime provided for in the Statute (in Brdjanin's case, that would be the Strategic Plan); and third, the Accused participated in the execution of the common plan.

## VII. Conclusion

There appears to be no reason why the ICTR Prosecutor could not allege that the elimination of moderate Hutus and Tutsis in Rwanda was itself the object of a massive criminal enterprise.[162] At least ICTR indictment has alleged that the Accused was in this type of joint criminal enterprise, in *The Prosecutor v. Zigiranuirazo*.[163] In this indictment it is alleged that the defendant acted in concert with others, participated in the planning, preparation or execution of a common scheme, strategy, plan or campaign to exterminate the Tutsi and the political opposition to the Interim Government. The prosecution could argue that each ICTR defendant who intentionally participated in the genocide and who foresaw the killings that, in fact, occurred

[162] Danner and Martinez, *supra* note 4. [Reproduced in accompanying notebook 3 at tab 26].

[163] The Prosecutor v. Zigiranuirazo, Indictment, ICTR-2001-73-1 ¶ 23, 20 June 2001. [Reproduced in accompanying notebook 2 at tab 21].

should be found liable for the murder the hundreds of thousands of people.[164] Using joint criminal enterprise to prosecute war criminals is one of the most important tools available to prosecutors in the International Criminal Tribunals. Based on the analysis of the holdings and facts in *The Prosecutor v. Brdjanin*, the Ad Hoc Criminal Tribunals are not limited in their application of the doctrine. First, the Trial Chamber misinterpreted and misapplied joint criminal enterprise to the *Brdjanin* case. The allegations that the enterprise alleged by the prosecution is too broad to be considered a joint criminal enterprise does not follow the established case law of the tribunal nor does it follow and comport with the underlying policy rationales that influenced the development of joint criminal enterprise in the first place.

The second, alternative, argument also limits this holding to the *Brdjanin* case only. Therefore, the Trial Chamber's rejection of the doctrine of joint criminal enterprise is limited to the facts of this case only. Because the prosecution did not meet the requirements for specificity in their pleadings, the Trial Chamber was precluded from applying joint criminal enterprise in the manner alleged by the Prosecution. Therefore, the limitation on this aspect of the *Brdjanin* case is due only to lack of specificity in the pleadings, and not because of any change in the application of joint criminal enterprise.[165]

[164] Danner and Martinez, *supra* note 4, page 50. [Reproduced in accompanying notebook 3 at tab 26].
[165] For more extensive discussion of ICTR jurisprudence in relation to joint criminal enterprise, please see Robert Kayinamura's memorandum prepared for the ICTR Spring 2005. His memorandum examines two issues: (1) if an accused can be liable for genocide under category three joint criminal enterprise and (2) if an accused can be prosecuted for war crimes under category three joint criminal enterprise theory.