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ANNEX A

AUTHORITY 25

**UNITED
NATIONS**

International Tribunal for the
Prosecution of Persons
Responsible for Serious Violations of
International Humanitarian Law
Committed in the Territory of the
Former Yugoslavia since 1991

Case No. IT-99-36-A
Date: 3 April 2007
Original: English

IN THE APPEALS CHAMBER

Before: Judge Theodor Meron, Presiding
Judge Mohamed Shahabuddeen
Judge Mehmet Güney
Judge Andrésia Vaz
Judge Christine Van Den Wyngaert

Registrar: Mr. Hans Holthuis

Judgement of: 3 April 2007

PROSECUTOR

v.

RADOSLAV BRĐANIN

JUDGEMENT

The Office of the Prosecutor:

Mr. Peter Kremer
Ms. Helen Brady
Ms. Kristina Carey
Ms. Katharina Margetts

Counsel for the Accused:

Mr. John Ackerman

Chamber decided not to disturb the Trial Chamber's findings regarding the existence of a JCE. It even used the expression "genocidal enterprise".⁸⁸⁵

409. In *Stakić*, the Appeals Chamber, relying on the Trial Chamber's findings, treated a JCE operating in the municipality of Prijedor in 1992 as composed only of the leaders of political bodies, the military and the police.⁸⁸⁶ Its common purpose was however clearly carried out by a larger number of individuals, including Bosnian Serb police, military, and paramilitary forces.⁸⁸⁷ It is particularly noteworthy that *Stakić* was convicted of certain crimes (murder and extermination) committed by non-members under the third (also "extended") form of joint criminal enterprise.⁸⁸⁸ This is precedent not to be lightly dismissed by the Appeals Chamber.

(c) Conclusion

410. In light of the above discussion of relevant jurisprudence, persuasive as to the ascertainment of the contours of joint criminal enterprise liability in customary international law, the Appeals Chamber is of the view that what matters in a first category JCE is not whether the person who carried out the *actus reus* of a particular crime is a member of the JCE, but whether the crime in question forms part of the common purpose.⁸⁸⁹ In cases where the principal perpetrator of a particular crime is not a member of the JCE, this essential requirement may be inferred from various circumstances, including the fact that the accused or any other member of the JCE closely cooperated with the principal perpetrator in order to further the common criminal purpose. In this respect, when a member of the JCE uses a person outside the JCE to carry out the *actus reus* of a crime, the fact that the person in question knows of the existence of the JCE – without it being established that he or she shares the *mens rea* necessary to become a member of the JCE – may be a factor to be taken into account when determining whether the crime forms part of the common criminal purpose. However, this is not a *sine qua non* for imputing liability for the crime to that member of the JCE.

⁸⁸⁵ *Krstić* Appeal Judgement, paras 134, 143-144. Moreover, the Appeals Chamber recalls that, in the *Kvočka et al.* Appeal Judgement, while Zoran Žigić was found not to be "responsible as a participant in this joint criminal enterprise" (para. 599), the Appeals Chamber confirmed the conviction of Miroslav Kvočka under JCE for crimes physically perpetrated by, among others, Žigić (e.g. the murder of Be}ir Medunjanin, paras 277, 487). This lends further support to the contention of the Prosecution that, under the Tribunal's law, a member of a joint criminal enterprise can be found responsible for crimes perpetrated by a non-member.

⁸⁸⁶ *Stakić* Appeal Judgement, paras 68-70.

⁸⁸⁷ *Stakić* Appeal Judgement, paras 75, 81, 84, 95-96.

⁸⁸⁸ *Stakić* Appeal Judgement, para. 98.

⁸⁸⁹ See *infra*, paras 418-419.

411. When the accused, or any other member of the JCE, in order to further the common criminal purpose, uses persons who, in addition to (or instead of) carrying out the *actus reus* of the crimes forming part of the common purpose, commit crimes going beyond that purpose, the accused may be found responsible for such crimes provided that he participated in the common criminal purpose with the requisite intent and that, in the circumstances of the case, (i) it was foreseeable that such a crime might be perpetrated by one or more of the persons used by him (or by any other member of the JCE) in order to carry out the *actus reus* of the crimes forming part of the common purpose; and (ii) the accused willingly took that risk – that is the accused, with the awareness that such a crime was a possible consequence of the implementation of that enterprise, decided to participate in that enterprise.

412. As the Prosecution recognizes, for it to be possible to hold an accused responsible for the criminal conduct of another person, there must be a link between the accused and the crime as legal basis for the imputation of criminal liability. According to the Prosecution, this link is to be found in the fact that the members of the joint criminal enterprise use the principal perpetrators as “tools” to carry out the crime.⁸⁹⁰

413. Considering the discussion of post-World War II cases and of the Tribunal’s jurisprudence above, the Appeals Chamber finds that, to hold a member of a JCE responsible for crimes committed by non-members of the enterprise, it has to be shown that the crime can be imputed to one member of the joint criminal enterprise, and that this member – when using a principal perpetrator – acted in accordance with the common plan. The existence of this link is a matter to be assessed on a case-by-case basis.⁸⁹¹

414. For the aforementioned reasons, the Appeals Chamber considers that the Trial Chamber erred in stating that, in order to hold the Accused criminally responsible for the crimes charged in the Indictment pursuant to the first category of JCE, the Prosecution must, *inter alia*, establish that the persons who carried out the *actus reus* of the crimes in question were members of a joint criminal enterprise. Therefore, the Appeals Chamber, Judge Shahabuddeen dissenting, grants Ground 1 of the Prosecution’s appeal but emphasizes that, for the reasons set out above, it will not examine the consequences of this finding on the facts of the case.

⁸⁹⁰ Prosecution Appeal Brief, paras 3.40-3.48.

⁸⁹¹ The jurisprudence of the Tribunal traditionally equates a conviction for JCE with the mode of liability of “committing” under Article 7(1). The Appeals Chamber declines at this time to address whether this equating is still appropriate where the accused is convicted via JCE for crimes committed by a principal perpetrator who was not part of the JCE, but was used by a member of the JCE.

3. Additional agreement as a requirement of JCE

415. The post-World War II jurisprudence mentioned above, which has been interpreted as a valid source for the ascertainment of the contours of joint criminal enterprise liability in customary international law, also supports the contention that the imposition of liability upon an accused for his participation to further a common criminal purpose does not require an understanding or an agreement between the accused and the principal perpetrator of the crime to commit that particular crime.⁸⁹² The Appeals Chambers turns now to the Prosecution's further submission that there is no support in the jurisprudence of the Tribunal for the requirement, in addition to the existence of a common plan, that an understanding or agreement must have existed between Brđanin and the principal perpetrators.⁸⁹³

416. In a footnote to the finding at paragraph 262 of the Trial Judgement that "[a] common plan amounting to or involving an understanding or an agreement between two or more persons that they will commit a crime must be proved", the Trial Chamber "interpret[ed] the *Krnjelac* Appeals Judgement (paras 95-97) to requiring [*sic*] an agreement between an accused and the principal offenders for the first and the third category [*sic*] of JCE, while not requiring proof that there was a more or less formal agreement between all the participants in the second category of JCE as long as their involvement in a system of ill-treatment has been established."⁸⁹⁴ The language in *Krnjelac* referred to by the Trial Chamber states that "with regard to the crimes considered within a systemic form of joint criminal enterprise [the second category of JCE], the intent of the participants other than the principal offenders presupposes personal knowledge of the system of ill-treatment (whether proven by express testimony or a matter of reasonable inference from the accused's position of authority) and the intent to further the concerted system of ill-treatment. Using these criteria, *it is less important to prove that there was a more or less formal agreement between all the participants than to prove their involvement in the system.*"⁸⁹⁵ The Appeals Chamber in *Krnjelac* further considered that, by requiring proof of an agreement in relation to each of the crimes committed with a common purpose, when it assessed the intent to participate in a systemic form of joint criminal enterprise, the Trial Chamber went beyond the criterion set by the Appeals Chamber in the *Tadić* case.⁸⁹⁶

⁸⁹² See *supra*, paras 395-404.

⁸⁹³ Prosecution Appeal Brief, paras 4.18 and 4.25.

⁸⁹⁴ Trial Judgement, fn. 691.

⁸⁹⁵ *Krnjelac* Appeal Judgement, para. 96 (emphasis added).

⁸⁹⁶ *Krnjelac* Appeal Judgement, para. 97.

417. It is undeniable that proving the existence of such an agreement may be an appropriate way of establishing that a crime formed part of the common purpose, especially with respect to the basic and extended forms of JCE. By stressing that it is less important to prove that there was a more or less formal agreement between all the participants than to prove their involvement in the system, the *Krnjelac* Appeals Chamber was merely referring to the fact that the emphasis in such a form of JCE must be put on the knowledge of the concerted system of ill-treatment and on the intent to further it. This finding cannot be interpreted – as the Trial Chamber appears to have done in the instant case – to mean that the criterion set by the Appeals Chamber in the *Tadić* case requires, in addition to the existence of a common purpose amounting to or involving the commission of a crime provided for in the Statute, an agreement between the accused and the principal perpetrator for the first and third category of JCE.

418. The Appeals Chamber understands that the Trial Chamber's disputed finding was reached out of a concern that it is inappropriate to impose liability on an accused where the link between him or her and those who physically perpetrated the crimes for which he or she is charged is too tenuous. The Appeals Chamber shares this concern. However, the Appeals Chamber does not consider that any form of JCE liability requires an additional understanding or agreement to commit that particular crime between the accused and the principal perpetrator of a crime. What JCE requires in any case is the existence of a common purpose which amounts to, or involves, the commission of a crime. The common purpose need not be previously arranged or formulated; it may materialize extemporaneously.⁸⁹⁷ The Appeals Chamber recalls that, as far as the basic form of JCE is concerned, an essential requirement in order to impute to any accused member of the JCE liability for a crime committed by another person is that the crime in question *forms part of the common criminal purpose*. In cases where the principal perpetrator shares that common criminal purpose of the JCE or, in other words, is a member of the JCE, and commits a crime in furtherance of the JCE, it is superfluous to require an additional agreement between that person and the accused to commit that particular crime. In cases where the person who carried out the *actus reus* of the crime is not a member of the JCE, the key issue remains that of ascertaining whether the crime in question forms part of the common criminal purpose. This is a matter of evidence.

419. For the aforementioned reasons, the Appeals Chamber considers that the Trial Chamber erred in stating that, in order to hold the Accused criminally responsible for the crimes charged in the Indictment pursuant to the first category of JCE, the Prosecution must, *inter alia*, establish that

⁸⁹⁷ *Tadić* Appeal Judgement, para. 227(ii). See also *Vasiljević* Appeal Judgement, para. 100 and *Kvočka et al.* Appeal Judgement, para. 117.

between the person physically committing a crime and the Accused, *there was an understanding or an agreement* to commit that particular crime. Moreover, the Trial Chamber erred when it required that, in order to hold the Accused responsible pursuant to the third category of JCE, the Prosecution must prove that the Accused entered into an agreement with a person to commit a specific crime (in this case, the crimes of deportation and/or forcible transfer) and that this same person personally committed another crime, which was a natural and foreseeable consequence of the execution of the crime agreed upon.

4. The application of JCE doctrine to large-scale cases

420. Finally, the Appeals Chamber turns to the issue of whether JCE liability is a doctrine that applies, or should apply, only to relatively small-scale cases.

421. At the outset, the Appeals Chamber rejects the teleological argument by the Prosecution that the Tribunal should endorse the doctrine of joint criminal enterprise because it would allow the Tribunal “to prosecute and punish those who participate in international crimes as leaders and not only as subordinates.”⁸⁹⁸ Such policy considerations are inapposite as a basis for a theory of individual criminal responsibility.

422. The Appeals Chamber recalls that, in *Tadić*, it explicitly envisaged the possibility of a JCE as large as the one in the present case. When providing an example of a JCE of the third category, where the common purpose is no different from the first category of JCE, it spoke of a “common, shared intention on the part of a group to forcibly remove members of one ethnicity from their town, village or *region*”.⁸⁹⁹ The reference to the ethnic cleansing of a “region” covers exactly cases like the one at hand, which relates to the ARK. Furthermore, among the cases the Appeals Chamber discussed when defining the first category of JCE, it pointed to the *Einsatzgruppen* case, which, given the large mass killings in which the Einsatz units were involved, is based on a common purpose which is far from small.⁹⁰⁰

⁸⁹⁸ Prosecution Appeal Brief, para. 3.34.

⁸⁹⁹ *Tadić* Appeal Judgement, para. 204 (emphasis added).

⁹⁰⁰ *Einsatzgruppen* Case, reprinted in *Trials of War Criminals Before the Nuremberg Military Tribunals Under Control Council Law No. 10*, Vol. IV, pp. 427-433. The *Einsatzgruppen* is estimated to have been responsible for the deaths of more than one million people across an area of Europe stretching from Estonia to Crimea. At least with respect to accused Franz Six, this judgement details a clear-cut large-scale case where an extended form of “common purpose” responsibility was applied. The tribunal stated, *inter alia*: “Despite the finding that Vorkommando Moscow formed part of Einsatzgruppe B and despite the finding that Six was aware of the criminal purposes of Einsatzgruppe B, the Tribunal cannot conclude with scientific certitude that Six took an active part in the murder program of that organization. It is evident, however, that Six formed part of an organization engaged in atrocities, offenses, and inhumane acts against civilian populations.” (*Einsatzgruppen* Judgement, p. 526). Even discounting the fact that knowledge was considered enough for criminal liability to attach in cases dealt with under Control Council Law No. 10,

423. This matter was addressed by the ICTR Appeals Chamber in the *Rwamakuba* case. In response to a challenge that the concept of JCE was limited to smaller cases, the ICTR Appeals Chamber stated that “[o]n the contrary, the *Justice* Case shows that liability for participation in a criminal plan is as wide as the plan itself, even if the plan amounts to a ‘nation wide government-organized system of cruelty and injustice.’”⁹⁰¹

424. Thus, the Appeals Chamber finds that the Trial Chamber’s interpretation of *Tadić*, as expressed in paragraph 355 of the Trial Judgement, is incorrect. The Appeals Chamber notes that Brđanin’s arguments do not justify disregarding the views expressed by the ICTR Appeals Chamber on this matter. Contrary to what Brđanin alleges, there is no risk that attaching JCE liability to an individual who is structurally remote from the crime increases the possibility of the individual being made guilty by “mere association”.⁹⁰² This is because responsibility pursuant to JCE does require participation by the accused, which may take the form of assistance in, or contribution to, the execution of the common purpose.⁹⁰³ The Appeals Chamber is also of the view that, whether or not the Trial Chamber is correct in stating that seeking to include structurally remote individuals within the JCE creates difficulties in identifying the agreed criminal object of that enterprise,⁹⁰⁴ this does not as such preclude the application of the JCE theory. The requirement, in such cases, is that the contours of the common criminal purpose have been properly defined in the indictment and are supported by the evidence beyond reasonable doubt. Brđanin’s further argument that the Prosecution is erroneously trying to expand the JCE doctrine beyond the limitations set out under the command responsibility doctrine (as established in U.S. Supreme Court case *Yamashita*)⁹⁰⁵ is unsubstantiated and misplaced.

425. Further, the Appeals Chamber finds misplaced Brđanin’s argument that the jurisprudence of the Tribunal regarding JCE only concerns single municipalities such as Srebrenica, Prijedor, and Bosanski [amac].⁹⁰⁶ It is true that in several cases of the Tribunal, the mode of liability of JCE was applied to relatively small-sized cases. However, that depended, and the decisions in question did not state otherwise, on the size of the cases themselves and not on the existence of a legal requirement that JCE apply only to small-scale cases. In view of the foregoing, the Appeals

there is therefore precedent for conviction of a person who gave his contribution to a large-scale common criminal purpose, accepting the foreseeable consequence that crimes would be committed by others.

⁹⁰¹ *Rwamakuba* Appeal Decision, para. 25.

⁹⁰² Brđanin Response Brief, para. 18.

⁹⁰³ *Vasiljević* Appeal Judgement, para. 100.

⁹⁰⁴ Brđanin Response Brief, para. 22.

⁹⁰⁵ Brđanin Response Brief, paras 37 and 40.

⁹⁰⁶ Brđanin Response Brief, para. 35.

Chamber agrees with the Prosecution that the Trial Chamber erred in concluding that the mode of liability of JCE is not appropriate for cases as large as the one at hand.

5. Conclusion

426. The Appeals Chamber is aware that both Brđanin and the ADC have raised concerns regarding the limits of liability under the joint criminal enterprise doctrine.⁹⁰⁷ However, the Appeals Chamber is of the view that this doctrine as it stands provides sufficient safeguards against overreaching or lapsing into guilt by association.

427. Although *Tadić* and subsequent Trial and Appeal Judgements make it clear that, to be held responsible for a crime committed pursuant to a JCE, the accused need not have performed any part of the *actus reus* of the perpetrated crime,⁹⁰⁸ they also clearly require that the accused have participated in furthering the common purpose at the core of the JCE. The Appeals Chamber considers that not every type of conduct would amount to a significant enough contribution to the crime for this to create criminal liability for the accused regarding the crime in question,⁹⁰⁹ and that the pleading practice of the Prosecution, at least in cases where the Appeals Chamber has had an opportunity to rule on the judgement, has followed this principle.

428. The Appeals Chamber emphasizes that JCE is not an open-ended concept that permits convictions based on guilt by association. On the contrary, a conviction based on the doctrine of JCE can occur only where the Chamber finds all necessary elements satisfied beyond a reasonable doubt. In light of the concerns raised by the ADC about the scope of JCE, the Appeals Chamber briefly reiterates these elements here.

429. To begin with, as explained above, the accused must possess the requisite intent.⁹¹⁰ Moreover, a Chamber can only find that the accused has the requisite intent if this is the only reasonable inference on the evidence.

⁹⁰⁷ Brđanin Response Brief, para. 4; Amicus Brief, paras 49-52.

⁹⁰⁸ *Kvočka et al.* Appeal Judgement, para. 99 (“A participant in a joint criminal enterprise need not physically participate in any element of any crime, so long as the requirements of joint criminal enterprise responsibility are met.”); *Vasiljević* Appeal Judgement, paras 100, 119; *Tadić* Appeal Judgement, paras 196, 227.

⁹⁰⁹ *Tadić* Appeal Judgement, para. 192 (considering that it would be wrong to disregard the role of “all those who in some way made it possible” to commit a crime); *Kvočka* Trial Judgement, para. 311 in light of the discussion in *Kvočka* Appeal Judgement, paras 95-98. See also the language and examples in *Tadić* Appeal Judgement, para. 191 and in *Vasiljević* Appeal Judgement, para. 119. This was also the view expressed in the case *Trial of Feurstein and others*, by the Judge Advocate who stated that, in order to be found responsible, an accused “must be the cog in the wheel of events leading up to the result which in fact occurred.” Proceedings of a War Crimes Trial held at Hamburg, Germany (4-24 August, 1948), judgement of 24 August 1948 (original transcripts in Public Record Office, Kew, Richmond; on file with the Tribunal’s Library), p. 7.

⁹¹⁰ See *supra*, paras 365 and 411.

430. The other requirements for a conviction under the JCE doctrine are no less stringent. A trier of fact must find beyond reasonable doubt that a plurality of persons shared the common criminal purpose; that the accused made a contribution to this common criminal purpose; and that the commonly intended crime (or, for convictions under the third category of JCE, the foreseeable crime) did in fact take place.⁹¹¹ Where the principal perpetrator is not shown to belong to the JCE, the trier of fact must further establish that the crime can be imputed to at least one member of the joint criminal enterprise, and that this member – when using the principal perpetrator – acted in accordance with the common plan. In establishing these elements, the Chamber must, among other things: identify the plurality of persons belonging to the JCE (even if it is not necessary to identify by name each of the persons involved); specify the common criminal purpose in terms of both the criminal goal intended and its scope (for example, the temporal and geographic limits of this goal, and the general identities of the intended victims); make a finding that this criminal purpose is not merely the same, but also common to all of the persons acting together within a joint criminal enterprise;⁹¹² and characterize the contribution of the accused in this common plan. On this last point, the Appeals Chamber observes that, although the contribution need not be necessary or substantial,⁹¹³ it should at least be a significant contribution to the crimes for which the accused is to be found responsible.⁹¹⁴

431. Where all these requirements for JCE liability are met beyond a reasonable doubt, the accused has done far more than merely associate with criminal persons. He has the intent to commit a crime, he has joined with others to achieve this goal, and he has made a significant contribution to the crime's commission. Pursuant to the jurisprudence, which reflects standards enshrined in customary international law when ascertaining the contours of the doctrine of joint criminal enterprise, he is appropriately held liable not only for his own contribution, but also for those actions of his fellow JCE members that further the crime (first category of JCE) or that are foreseeable consequences of the carrying out of this crime, if he has acted with *dolus eventualis* (third category of JCE). It is not decisive whether these fellow JCE members carried out the *actus reus* of the crimes themselves or used principal perpetrators who did not share the common objective.⁹¹⁵

⁹¹¹ See *Tadić* Appeal Judgement, para. 227.

⁹¹² *Stakić* Appeal Judgement, para. 69.

⁹¹³ *Kvočka et al.* Appeal Judgement, paras 97-98.

⁹¹⁴ See *supra*, para. 427. Moreover, “[i]n practice, the significance of the accused’s contribution will be relevant to demonstrating that the accused shared the intent to pursue the common purpose.” *Kvočka et al.* Appeal Judgement, para. 97.

⁹¹⁵ See *supra*, paras 410-414.

432. The Appeals Chamber recognizes that, in practice, this approach may lead to some disparities, in that it offers no formal distinction between JCE members who make overwhelmingly large contributions and JCE members whose contributions, though significant, are not as great. However, the Appeals Chamber recalls that any such disparity is adequately dealt with at the sentencing stage.

E. Impact of the Appeals Chamber's Findings

1. Introduction

433. The Prosecution states that, since it is not challenging the Trial Chamber's finding that it did not plead a JCE between Brđanin and the police, armed Serb civilians, and unidentified individuals, Ground 2 has no effect on Brđanin's convictions for aiding and abetting the crimes committed by those perpetrators.⁹¹⁶ Rather, the Prosecution submits that this ground of appeal – if granted – will only concern the JCE between Brđanin and the members of the army and Serb paramilitary forces who carried out crimes, and whom the Trial Chamber identified as "Relevant Physical Perpetrators".⁹¹⁷

434. The Prosecution maintains that, had the Trial Chamber correctly applied the doctrine of JCE, Brđanin would have been held guilty as a co-perpetrator, via the first category of JCE, for the crimes of deportation, forcible transfer, and persecution (Counts 8, 9 and 3 respectively) committed by the Relevant Physical Perpetrators.⁹¹⁸ Additionally, Brđanin would have been found guilty as a co-perpetrator, via the third category of JCE, for other acts of persecution (Count 3), namely: wilful killing (Count 5), torture (Count 7), wanton destruction (Count 11), and destruction of religious institutions (Count 12), all of which were committed by the Relevant Physical Perpetrators.⁹¹⁹

2. Arguments of the parties

435. In its Order to the Prosecution of 27 October 2006, the Appeals Chamber asked the Prosecution for a written response to the following question:

If the Prosecution's Second Ground of Appeal was to be granted and Brđanin's responsibility was then to be analysed pursuant to JCE, would the elements of JCE be fulfilled, taking into account the agreement *inter partes* at trial and based on the trial record? If so, and referring to the findings of the Trial Chamber in the Judgement as well as trial record, how would the elements of JCE be

⁹¹⁶ Prosecution Appeal Brief, para. 4.42.

⁹¹⁷ Prosecution Appeal Brief, para. 4.42, referring to Trial Judgement, para. 347; Prosecution's Response to Appeal Chamber's Questions on JCE, 13 November 2006 ("Prosecution Response on JCE"), para. 2.

⁹¹⁸ Prosecution Appeal Brief, para. 4.43; Prosecution Response on JCE, paras 28-30.

⁹¹⁹ Prosecution Appeal Brief, para. 4.43; Prosecution Response on JCE, paras 31-37.

Done in English and French, the English text being authoritative.

Judge Theodor Meron
Presiding

Judge Mohamed Shahabuddeen

Judge Mehmet Güney

Judge Andréia Vaz

Judge Christine Van Den Wyngaert

Judge Van Den Wyngaert appends a declaration.

Judge Theodor Meron appends a separate opinion.

Judge Mohamed Shahabuddeen appends a partly dissenting opinion.

Dated this 3rd day of April 2007

At The Hague,

The Netherlands

[Seal of the Tribunal]