

**UNITED  
NATIONS**

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

Case No. IT-95-9-T  
Date: 17 October 2003  
Original: English

**IN TRIAL CHAMBER II**

**Before:** Judge Florence Ndepele Mwachande Mumba, Presiding  
Judge Sharon A. Williams  
Judge Per-Johan Lindholm

**Registrar:** Mr. Hans Holthuis

**Judgement:** 17 October 2003

**PROSECUTOR**

v.

**BLAGOJE SIMIĆ  
MIROSLAV TADIĆ  
SIMO ZARIĆ**

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**SEPARATE AND PARTLY DISSENTING OPINION OF JUDGE  
PER-JOHAN LINDHOLM**

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**The Office of the Prosecutor:**

Mr. Gramsci Di Fazio  
Mr. Philip Weiner  
Mr. David Re

**Counsel for the Accused:**

Mr. Igor Pantelić and Mr. Srdjan Vuković for Blagoje Simić  
Mr. Novak Lukić and Mr. Dragan Krgović for Miroslav Tadić  
Mr. Borislav Pisarević and Mr. Aleksandar Lazarević for Simo Zarić

## I. JOINT CRIMINAL ENTERPRISE

1. The Prosecution pleaded on 27 September 2002 that “the Prosecution case is one of a common purpose or joint criminal enterprise to persecute non-Serbs.”<sup>2349</sup> Likewise, the Prosecution stated in its Final Brief that “the Accused are jointly charged with participating in a common purpose to persecute non-Serbs in Bosanski Šamac, Odžak and elsewhere in Bosnia and Herzegovina [...]”,<sup>2350</sup> and in their Closing Arguments that “the words ‘acting in concert together’ [...] simply [mean] complicity in a joint criminal enterprise [...] to persecute”.<sup>2351</sup> The pleading was accepted as based on the so-called basic form of joint criminal enterprise.<sup>2352</sup> The majority of the Trial Chamber (“Majority”) states that certain persons, including, *inter alia*, Blagoje Simić and the 17<sup>th</sup> Tactical Group of the JNA, were participants in a joint criminal enterprise responsible for executing the common plan to persecute non-Serb civilians in Bosanski Šamac Municipality.<sup>2353</sup> The common plan is inferred from all the circumstances.<sup>2354</sup>

2. I dissociate myself from the concept or doctrine of joint criminal enterprise in this case as well as generally. The so-called basic form of joint criminal enterprise does not, in my opinion, have any substance of its own. It is nothing more than a new label affixed to a since long well-known concept or doctrine in most jurisdictions as well as in international criminal law, namely co-perpetration. What the basic form of a joint criminal enterprise comprises is very clearly exemplified by Judge David Hunt in his Separate Opinion in *Milutinović, Šainović and Ojdanić*.<sup>2355</sup> The reasoning in the *Kupreškić* Trial Judgement is also illustrative.<sup>2356</sup> The acts of – and the furtherance of the crime by – the co-perpetrators may of course differ in various ways.<sup>2357</sup> If something else than participation as co-perpetrator is intended to be covered by the concept of joint criminal enterprise, there seems to arise a conflict between the concept and the word “committed” in Article 7(1) of the Statute. Finally, also the *Stakić* Trial Judgement limited itself to the clear wording of the Statute when interpreting “committing” in the form of co-perpetration. *Stakić* requires that co-perpetrators “can only realise 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

<sup>2349</sup> Confidential Prosecutor’s Response to the Motion of the Accused Blagoje Simić, Miroslav Tadić, and Simo Zarić for Judgement of Acquittal, 27 September 2002, para. 12.

<sup>2350</sup> Prosecution Final Brief, para. 7.

<sup>2351</sup> Prosecution Closing Arguments, T. 20290.

<sup>2352</sup> *Supra*, para. 155.

<sup>2353</sup> *Supra*, para. 984.

<sup>2354</sup> *Supra*, para. 987.

<sup>2355</sup> *Prosecutor v. Milutinović, Šainović and Ojdanić*, IT-99-37-AR72, Separate Opinion of Judge David Hunt on Challenge by Ojdanić to Jurisdiction *Joint Criminal Enterprise*, 21 May 2003, (“Separate Opinion in *Ojdanić*”), para. 13.

<sup>2356</sup> *Prosecutor v. Kupreškić et al.*, IT-95-16-T, Judgement, 14 January 2000, paras 772, 782.

<sup>2357</sup> Judge Hunt, Separate Opinion in *Ojdanić*, para. 13.

extent he is in control of the act.”<sup>2358</sup> The *Stakić* Trial Judgement can, based on the doctrine of “power over the act” (“Tatherrschaft”), be read as distancing itself from the concept of joint criminal enterprise.<sup>2359</sup>

3. The so-called extended form of joint criminal enterprise is also in a clear manner exemplified in the Separate Opinion in *Ojdanić* by Judge Hunt.<sup>2360</sup> This form of joint criminal enterprise contains neither anything new. It defines the kind of *mens rea* regarded as sufficient to hold co-perpetrator A liable for a crime committed by co-perpetrator B going beyond their common plan. The *mens rea* according to the extended form of joint criminal enterprise is known in Civil Law countries as *dolus eventualis* and in several Common Law countries as (*advertent*) *recklessness*. Whether especially the latter form of *mens rea* was foreseen in the Statute and laid down in customary international law, as stated in the *Tadić* Appeal Judgement,<sup>2361</sup> is a question I leave aside.

4. In the Amended Indictment in this case the three accused are charged with persecutions “acting in concert together, and with other Serb civilian and military officials”,<sup>2362</sup> and “acting in concert with others”.<sup>2363</sup> Although the expressions are not linguistically identical and differ in meaning, it seems as if the expression “acting in concert together” should be the one agreed upon by the parties.<sup>2364</sup> The Prosecution submits that those words “cover exactly the same things” as the concept of “joint criminal enterprise”.<sup>2365</sup> The Defence argues that joint criminal enterprise cannot be inferred from “acting in concert together”.<sup>2366</sup> The stand taken by the Defence is partly correct, partly wrong. “Acting in concert together” and the basic form of joint criminal enterprise have exactly the same meaning, namely co-perpetration, whereas the extended form of joint criminal enterprise under no conditions can be inferred from the words “acting in concert together”.

<sup>2358</sup> Quoting *Roxin, Claus*, Täterschaft und Tatherrschaft (Perpetration and control over the act), 6<sup>th</sup> ed. Berlin, New York, 1994, p. 278.

<sup>2359</sup> *Prosecutor v. Stakić*, IT-97-24-T, Judgement, 31 July 2003, paras 436-438.

<sup>2360</sup> Judge Hunt, Separate Opinion in *Ojdanić*, para. 13. See *Tadić* Appeal Judgement, para. 228 (“with regard to the third category [the extended form of joint criminal enterprise], what is required is the *intention* to participate in and further the criminal activity or the criminal purpose of a group and to contribute to the joint criminal enterprise or in any event 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, under the circumstances of the case, (i) it was *foreseeable* that such a crime might be perpetrated by one or other members of the group and (ii) the accused willingly took that risk”). See also *Prosecutor v. Brđanin and Talić*, IT-99-36 PT, Decision on Form of Further Amended Indictment and Prosecution Application to Amend, 26 June 2001, para. 30.

<sup>2361</sup> *Tadić* Appeal Judgement, paras 224-229.

<sup>2362</sup> Amended Indictment, para. 11.

<sup>2363</sup> Amended Indictment, para. 13 (Blagoje Simić), para. 14 (Miroslav Tadić), and para. 15 (Simo Zarić).

<sup>2364</sup> *Supra*, paras 150-153.

<sup>2365</sup> T. 20290-91. The submission by the Prosecution (T. 20291) must be a mistake. It makes sense only if understood as referring to the basic form of joint criminal enterprise.

<sup>2366</sup> *Supra*, para. 148.

5. Having said this, I have given the reasons for my dissociation from the concept of “joint criminal enterprise”. The concept or “doctrine” has caused confusion and a waste of time, and is in my opinion of no benefit to the work of the Tribunal or the development of international criminal law.

## II. ABOUT DIFFERENT PLANS

6. The Majority concludes “that participants in the joint criminal enterprise acted in unison to execute a plan that included the forcible takeover of the town of Bosanski Šamac. [...] This common plan was aimed at committing persecution against non-Serbs [...]”<sup>2367</sup> In the following paragraph, the Majority states: “Prior to the takeover, members of the joint criminal enterprise worked together in preparation of the takeover of the town of Bosanski Šamac as part of the common plan of persecution”. A careful reading cannot lead to any other conclusion than that the takeover was planned and carried out with a persecutory intent, to make it possible for the Serbs to persecute the non-Serbs.

7. I fully agree that the takeover of power in Bosanski Šamac was planned and that it was carried out on 17 April 1992 by Serb police and the paramilitaries. However, I cannot agree with the finding by the Majority that the 17<sup>th</sup> Tactical Group of the JNA was involved in the takeover.<sup>2368</sup> On the contrary, the commander Lt. Col. Stevan Nikolić, Captain Radovan Antić and Simo Zarić expressed their surprise when they were informed about the takeover.<sup>2369</sup>

8. Neither can I agree with the Majority that the takeover was planned and implemented with the purpose of persecuting the non-Serb population. It might well be that some of the persons involved in the planning had such evil intentions, but there is no evidence to the effect that there existed a persecutory plan between the three accused or between any two of them or between any of them and any other persons. I view the evidence adduced and connected with the takeover in a different and broader way. Not to repeat what is already found in this judgement I only want to point out the most important relevant facts, and add a few others. The following facts are established:

- Since autumn 1991, there were growing tensions between the ethnic groups all over Bosnia and Herzegovina.
- The ethnic groups were more and more arming themselves.

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<sup>2367</sup> *Supra*, para. 987.

<sup>2368</sup> *Supra*, para. 990.

<sup>2369</sup> Stevan Nikolić, T. 18456-67, T. 18513-14; Radovan Antić, T. 16731; Simo Zarić, T. 19223-24.