A Further Step in the Development of the Joint Criminal Enterprise Doctrine

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1. Introduction

On 3 April 2007 the Appeals Chamber of the International Criminal Tribunal for the former Yugoslavia (the Tribunal) rendered its judgement on the appeals from both parties against the judgement handed down by Trial Chamber II on 1 September 2004 in the case of Prosecutor v. Radoslav Brdanin (Trial Judgement). 2 This commentary does not intend to give a general overview of this case; rather it focuses on the analysis of the Appeals Chamber’s legal findings on the first two grounds of the Prosecutor’s appeal which focused on questions of law related to joint criminal enterprise (JCE) liability. Specifically it discusses the contribution of this judgement to the further development and affirmation of the JCE doctrine in the jurisprudence of the Tribunal and more generally in international criminal law.

This assessment of the Appeals Chamber’s decision is made through a brief introduction of the JCE mode of liability as developed by the Tribunal’s jurisprudence. This commentary then describes the relevant legal issues of the Trial Judgement and the criticisms they attracted. Finally it gives an analysis of the Appeal Judgment.

2. The Joint Criminal Enterprise Mode of Liability

The Statute of the Tribunal (Statute) does not explicitly provide for the joint criminal enterprise doctrine. Article 7(1) and 7(3) of the Statute, which lay down the modes of individual criminal responsibility, do not make any reference to the possibility of an accused individual being held responsible for a crime committed pursuant to participation in a JCE. This form of liability has been entirely developed through the jurisprudence of the Trial Chambers and the Appeals Chamber of the Tribunal.

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2 Brdanin Trial Chamber, (IT-99-36), 1 September 2004.
Specifically, in 1999 the Appeals Chamber in the case of Prosecutor v. Dusko Tadić³ (Tadić) stated that JCE as a form of responsibility existed in international customary law and, although implicitly, it was upheld in the Statute.⁴ The case determined that there are three different forms of JCE which are all characterised by the same actus reus. The actus reus has three elements: 1) a plurality of persons; 2) the existence of a common plan, design or purpose (common plan) that amounts to or involves the commission of a crime provided for in the Statute; and 3) the participation of the accused in the common plan.⁵ The mens rea requirement, on the contrary, differs for each form of JCE. As far as the first category of JCE (JCE I) is concerned, there must be a shared intent, among the co-perpetrators, to commit a certain crime that is provided for in the Statute. The second category of JCE (JCE II) refers to the so called “concentration camp” cases, and is a variant of JCE I, in which the Prosecution must prove that the accused had personal knowledge of the system of ill-treatment (such knowledge can be inferred from the position of authority that he held in that context) along with intent to further the system. Finally, the third category (JCE III) is an extended form of JCE which applies to cases involving a common purpose to commit a crime where one of the perpetrators commits a crime that is not part of the common plan. In this case the accused is also held responsible for this further crime if it is proved that he intended to participate and further the common plan of the group and that under the circumstances of the case it was foreseeable that such a crime would have been committed by the physical perpetrator and notwithstanding that the accused willingly took the risk (dolus eventualis).⁶ In essence these are the main elements of the JCE doctrine as defined by Tadić and subsequently reaffirmed, although with some minor differences, by the Appeals Chamber in, among others, Vasiljević,⁷ Krnojelac⁸ and Ojdanić.⁹

Therefore the jurisprudence of the Tribunal was consistent in considering Tadić as the starting point for the definition of the contours of the JCE doctrine and its application as a form of criminal responsibility. In this context on 1 September 2004 the Trial Chamber II of the Tribunal rendered its sentence on the case of Prosecutor v. Radoslav Brdanin.¹⁰

3. The Trial Judgement

Between 1991 and 1992 Radoslav Brdanin was one of the most prominent political figures in the Autonomous Region of Krajina (ARK), in present-day north-eastern Bosnia. During this time, Brdanin held various positions in the ARK, including serving as the

⁴ Tadić Appeal Judgement, para. 220.
⁵ Tadić Appeal Judgement, para. 227.
⁶ Tadić Appeal Judgement, para. 228.
¹⁰ Brdanin Trial Judgement.
President of the ARK Crisis Staff and later of its successor body, the ARK War Presidency. The accused 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.

The Prosecution did not allege that Brdanin physically perpetrated any of the crimes in question, but alleged that he participated in a “basic form” of JCE (JCE I) whose purpose 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 through 12 of the sixth amended indictment. Alternatively, the individual criminal responsibility of the accused was pleaded pursuant to JCE III, 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. In addition, the accused was charged pursuant to Article 7(1) of the Statute for having planned, instigated, ordered or otherwise aided and abetted in the planning, preparation or execution of these crimes, as well as pursuant to Article 7(3) of the Statute for the crimes committed by his subordinates whilst he was holding positions of superior authority. The Trial proceedings of this case, a large-scale case in nature, commenced on 23 January 2002 and ended on 22 April 2004.

With regard to JCE I and JCE III the findings of the Trial Chamber deviated surprisingly from those in Tadić. In sum, the Trial Chamber found that under JCE I an accused individual can be held responsible if the Prosecution, inter alia, proves beyond reasonable doubt that between the physical perpetrator of the crime and the accused there was “an understanding or an agreement to commit that particular crime”. In relation to the third category of JCE, according to the reasoning of the Judges, an agreement must be proved to exist between the accused and the physical perpetrator to commit a specific crime and it was foreseeable that another crime would have been committed by the physical perpetrator and the accused willingly took that risk. The Trial Chamber implicitly held that the physical perpetrator of the crime must be a member of the JCE in order for the accused to bear responsibility for such a crime via JCE. As discussed below this is an aspect of the JCE doctrine that had never been examined before in the case law of the Tribunal. It is interesting to point out that both the Prosecution and the Defence were explicitly asked by the Bench to express their own views on this issue. They both agreed with the conclusion of the Trial Chamber, accepting that the existence of an understanding or an agreement to commit a particular crime between the Accused and the physical

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11 Ibid., paras. 286-290.
12 Tadić Appeal Judgement, para. 196.
13 Sixth Amended Indictment, para. 27.1.
14 Sixth Amended Indictment, para. 27.2.
15 Sixth Amended Indictment, para. 27.3.
16 Brdanin Trial Judgement, para. 344. See also para. 264.
17 Ibid., para. 344.
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perpetrator had to be proven and therefore, implicitly, that the physical perpetrator had to be a member of the JCE. This was the official position held by the Prosecution during the trial which was then reversed before the Appeals Chamber. Finally, the Trial Chamber noted that the JCE mode of liability was a form of individual criminal responsibility which was not suitable to describe the individual criminal responsibility of the accused due to the broad nature of the case at hand and the fact that the accused was physically removed from the “scene” in which the crimes occurred.

Consequently, the JCE was dismissed by the Trial Chamber as a possible mode of liability in the case and Radoslav Brđanin was found guilty, pursuant to Article 7(1) of the Statute, of persecution as a crime against humanity (incorporating torture, forcible transfer and deportation), wilful killing and torture as grave breaches of the 1949 Geneva Conventions, wanton destruction of cities, towns or villages, or devastation not justified by military necessity and destruction or wilful damage done to institutions dedicated to religion. The accused was found not guilty of the crimes of genocide, extermination and unlawful and wanton extensive destruction and appropriation of property not justified by military necessity.

The peculiarity of the findings of the Trial Chamber in relation to the contours and application of the JCE mode of liability and its departure from the previous jurisprudence of the Tribunal gave rise to diverse reactions and attracted much criticism.

4. Reactions And Criticisms

Subsequent to the Trial Judgement it was argued that the findings in relation to the JCE doctrine had excessively narrowed the JCE, thus depriving it of its strength and its ability to “capture the seriousness of a leader’s responsibility for the violent course of events”. Specifically the requirement of an explicit agreement between the accused and the physical perpetrator seemed to go far beyond what had been previously described by the Appeals Chamber as a common state of mind between the physical perpetrator and the accused. Concerns were also expressed in relation to the Trial Chamber holding that JCE

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18 Ibid., fn. 885 referring to the Prosecution Final Trial Brief, Appendix A, para. 2; Defence Final Trial Brief, pp. 117-118.
19 Ibid., para. 344. See also Decision on Form of Further Amended Indictment and Prosecution Application to Amend, 26 June 2001, para 45.
20 Ibid., paras. 355-356 and 376-377.
21 Ibid., para. 1152.
22 Ibidem.
23 Ibid., para. 1153.
26 Krnojelac Appeal Judgement, para. 84.
was inappropriate for large scale cases in which the accused is removed from the scene where the crimes are materially perpetrated. This in fact would preclude the application of this mode of liability to the high-profile accused who operate behind the scenes but are, in many cases, most responsible for the crimes perpetrated. In other words, if this finding were upheld it would detract from the very essence of the JCE doctrine, namely its ability to connect the most responsible high-profile persons to the commission of the most heinous crimes.

The Trial Chamber’s implicit finding that the physical perpetrator must be a member of the JCE was also discussed by Judge Iain Bonomy in Milutinović et al (Trial Chamber III). Judge Bonomy noted that this matter had never been specifically addressed in the jurisprudence of the Tribunal but rather merely assumed until the Brđanin Trial Judgement. However, the line taken by the Trial Chamber in Brđanin, was contrasted by the approach of the Trial Chamber in Krstić in which no reference was made to the membership of the physical perpetrator in the JCE. Judge Bonomy also underlined that Tadić “did not take any unambiguous position” on whether the physical perpetrators must be members of the JCE. Therefore he concluded that, also after the Brđanin Trial Judgement, it was consistent with the jurisprudence of the Tribunal for a participant in a JCE to be held liable for crimes committed by a third person who acted as an instrument of the JCE without being a member of it. Certainly there was no binding decision of the Appeals Chamber preventing a Trial Chamber from ruling in that direction. Judge Bonomy’s separate opinion seems to anticipate the Appeal Judgement in relation to its legal findings on the JCE doctrine and also reveals that the discord among the Judges of the Tribunal regarding the position taken by the Trial Chamber in Brđanin.

5. The Appeal Judgement

The Trial Judgement was appealed by both parties. On 7 and 8 December 2006 the oral arguments of the parties were heard by the Appeals Chamber. The Prosecution presented five grounds of appeal. The fifth ground was subsequently withdrawn. The first two grounds focused on questions of law related to the JCE doctrine. Specifically, in the first ground the Prosecution challenged the Trial Chamber’s (implicit) finding that the physical perpetrator of the crime must also be a member of the JCE in order to hold a defendant responsible through JCE for this crime. In the second ground of the Prosecution’s appeal the Trial Judgement was challenged in relation to two legal findings, namely that there must be an agreement or understanding between the accused and the principal perpetrator, and that the JCE doctrine is applicable only to enterprises smaller than the one alleged in Brđanin.

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28 Separate Opinion of Judge Iain Bonomy, Milutinović et al., Decision on Ojdanić’s Motion Challenging Jurisdiction: Indirect co-perpetration, 22 March 2006.  
29 Ibid., Indirect co-perpetration, paras. 5-13.
Before addressing the Appeal Judgement’s holdings it is interesting to underline the approach followed by the Appeals Chamber in dealing with these delicate matters. The Appeals Chamber immediately appreciated the importance of the legal issues at stake and expressly stated so when, on 5 May 2005, it rendered its decision in a motion filed by Brđanin seeking the dismissal of the Prosecutor’s first ground of appeal (Motion to Dismiss). Specifically the Appeals Chamber held that, although not explicitly provided for in the Statute, it is among the Appeals Chamber’s functions to consider legal issues (as long as they have a “nexus” with the case at hand) which may be of considerable significance to the jurisprudence of the Tribunal.

Whether the person who commits the actus reus must be a member of the JCE, as the Presiding Judge Theodor Meron noted, is a legal issue which had never previously been directly addressed by the Appeals Chamber. Consequently it is, as the Appeals Chamber held, “of considerable significance to the Tribunal’s jurisprudence as it affects every case employing a JCE theory”. The Appeals Chamber held that such determinations are not “impermissible advisory opinions”, as argued by Brđanin, but they are a useful tool to further the jurisprudence of the Tribunal and to contribute to the development of international criminal law. The Judges found that although it was “unfortunate” that the Prosecution had reversed its own position, this circumstance did not affect the Appellant as the Prosecution did not seek an alteration of the Judgement. From the foregoing considerations it is evident that the Appeals Chamber clearly captured the need for an explicit holding on this legal issue in order to set the correct legal standard.

Turning now to the Appeal Judgement, the Appeals Chamber was satisfied that the Trial Chamber viewed the required agreement between the accused and the physical perpetrator as equivalent to a common plan on the basis of JCE. Consequently any physical perpetrator who had entered such an agreement was also a member of a JCE. Although inferred, this conclusion is nonetheless correct. The Trial Chamber, in fact, had made clear its view of the matter in a precedent decision in which it employed a more explicit terminology and argued, in relation to JCE III, that proof of an agreement or an understanding is essential to hold that the Accused was a member of the JCE together with the person who committed the further crime. This decision was the only source the Trial

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30 Brđanin, Appeals Chamber (IT-Decision on Motion to Dismiss Ground 1 of the Prosecutor’s Appeal, 5 May 2005.
31 Ibid., Separate Opinion of Judge Theodor Meron appended to the Appeal Judgement, para. 2.
32 Ibid., Decision on Motion to Dismiss Ground 1 of the Prosecutor’s Appeal, p.2.
33 Ibid., Decision on Motion to Dismiss Ground 1 of the Prosecutor’s Appeal, p.2.
34 As noted by the Appeals Chamber the Prosecution ordinarily cannot change its position on Appeal, but this principle finds no application when it brings no prejudice to the other party which, like in the present case, does not even have contest the issue. See: Ibid., Decision on Motion to Dismiss Ground 1 of the Prosecutor’s Appeal, p. 3.
36 Brđanin, Trial Chamber Decision on Form of Further Amended Indictment and Prosecution Application to Amend, 26 June 2001, para 44.
Chamber relied upon in its “rather significant departure” from the definition of “common plan” given in Tadić.  

Their analysis of post-World War II case law and of the Tribunal’s jurisprudence led the Appeals Chamber to conclude that what matters in JCE I and III is not the membership of the physical perpetrator in the JCE, as erroneously stated by the Trial Chamber, but whether the crime perpetrated “forms part of the common purpose”. If the crime committed falls within the common plan agreed upon in the JCE then it is not essential to prove that the person who committed the actus reus was a member of the JCE. Further to this, the crime committed must be shown to be imputable to a member of the JCE who acted in accordance to the common criminal plan using a third person as physical perpetrator and the existence of this link has to be assessed on a case by case basis.  

Addressing the second ground of the Prosecution’s appeal, the Appeals Chamber stated that the conclusion that an express agreement between the accused and the physical perpetrator must be proved by the Prosecution was reached through a misinterpretation of the Krnojelac Appeal Judgement. Specifically in Krnojelac it was underlined that in JCE II the key element of the mens rea is the knowledge by the accused of the system of ill-treatment and intent to further it rather than the existence of a more or less formal agreement between all the participants. The Trial Chamber erroneously interpreted it as meaning that the legal standard set by Tadić requires an agreement between the physical perpetrator and the accused for JCE I and III. The Appeals Chamber namely concluded that, although it shared the concern that led the Trial Chamber to reach that finding, i.e., that an accused might be held responsible for a crime even when there is too tenuous a link between him and the person who perpetrated the actus reus, nonetheless it did not “consider that any form of JCE liability requires an additional understanding or agreement between the accused and the principal perpetrator to commit that particular crime.”  

Finally deciding the second part of the second ground of the Prosecution’s appeal, the Appeals Chamber recalled Tadić in which it explicitly provided an example of a large scale case falling within the third form of JCE. It also recalled that this matter had been already dealt with by the ICTR Appeals Chamber which stated that “liability for participation in a criminal plan is as wide as the plan itself, even if the plan amounts to a ‘nation wide

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37 **Brdanin Appeal Judgement**, para. 390.
38 Ibid., para. 410-411. Judge Shahabuddeen dissented. See Partly dissenting opinion of Judge Shahabuddeen appended to the Appeal Judgement.
39 Ibid., para. 413.
40 **Krnojelac Appeal Judgement**. paras 95-97.
41 **Brdanin Appeal Judgement**, para. 417. The view of the Trial Chamber is explicit in fn. 691 od the Trial Judgement which read: “The Trial Chamber interprets the **Krnojelac Appeal Judgement** (paras 95-97) to requiring an agreement between an accused and the principal offenders for the first and the third category 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.”.
42 **Brdanin Appeal Judgement**, para. 418.
43 **Rwamakuba Appeal Decision**, para. 25.
government organised system of cruelty and injustice." \(^{44}\) In light of the foregoing considerations, the Appeals Chamber granted the first two grounds of the Prosecution’s appeal. This, as explained above, had no impact on the conviction of Brđanin which was reduced to 30 years as a consequence of the reversal of his convictions under Counts 3, 7 and 11 pursuant to his appeal. Generally in the jurisprudence of the Tribunal, to hold an accused responsible via JCE equates to a conviction for crimes committed under article 7(1). In the Trial Judgement Radoslav Brđanin was found guilty under article 7(1) of the Statute for “instigating”, “aiding” and “abetting” but not for “committing” the crimes, due to the Trial Chamber’s dismissal of the JCE doctrine.

The Appeals Chamber declined to address whether an accused convicted through JCE for crimes committed by a non-member of the JCE can be considered to have committed such crimes. \(^{45}\) Nonetheless, this issue was addressed by the Presiding Judge Theodor Meron, in his separate opinion appended to the Judgement. He recalled that the Appeals Chamber decided not to dismiss the first ground of the Prosecutor’s Appeal \(^{46}\)“for the sole purpose of clarifying the law” and therefore he considered it appropriate to share his own view on this matter. Judge Meron suggested that when a member of a JCE uses a non-member to commit a crime which is part of the common purpose, the other members of the JCE should be held responsible for the same mode of liability that attached to this JCE member. \(^{47}\) In other words, if a JCE member orders a non-member to carry out a crime then the other JCE members would be responsible via JCE under article 7(1) of the Statute for “ordering” and not for “committing”.

Judge Meron’s approach seems to be reasonable and allows for the careful calibration of the responsibility attached to the other JCE members. Now that it is clear that the JCE doctrine does not require the physical perpetrator of a crime to belong to the JCE as a member, future cases will tell us if this approach will be adopted by the Trial Chambers of the Tribunal.

6. Final Remarks

The following conclusions can be drawn about the Brđanin Appeal Judgement’s impact on the JCE mode of liability. As mentioned, the JCE mode of liability has been developed through the jurisprudence of the Tribunal. Therefore it is understandable that, although quite well settled and affirmed, it still has some gaps which need to be filled as the jurisprudence develops. The Trial Chamber holding that the physical perpetrator of a crime must also be proved to be a member of the JCE does not explicitly contradict a precedent ruling of the Appeals Chamber. On the contrary here was an unanswered question whose response was assumed rather then explicitly discussed in previous cases.

\(^{44}\)Brđanin Appeal Judgement, para. 423.
\(^{45}\)Ibid., fn. 891.
\(^{46}\)Ibid., Decision on Motion to Dismiss Ground 1 of the Prosecutor’s Appeal.
\(^{47}\)Separate Opinion of Judge Meron appended to the Appeal Judgement, paras. 5-6.
This legal issue, which is relevant to the JCE doctrine, had not been addressed directly by either the Appeals Chamber or by a Trial Chamber. Brdanin was the first case in which a Trial Chamber dealt with the matter and reached a conclusion, finding fertile ground in the chasm left by prior case law on this very significant legal issue. The Appeals Chamber’s approach and its discussion of the relevant questions of law are enlightening examples of the correct functioning of the dynamic through which a complex mode of liability such as JCE is developed. It is natural that different interpretations may arise where there is no explicit and clear jurisprudence on a specific matter.

The Appeals Chamber, through its judgement, contributed to the further evolution of the JCE doctrine as it shed light on an aspect of doctrine which was mantled by the ambiguity of previous case law. The Judges demonstrated an acute awareness of the most common criticism levelled at the JCE doctrine, namely that, especially in its third form, it overreaches, stretching to the point that it melts into guilt by mere association. This concern informed the basis of the Trial Chamber’s findings. The Appeals Chamber felt it necessary to reiterate the elements which have to be proved beyond reasonable doubt in order to convict an accused on the basis of JCE, including proof of the actual contribution of the accused to the JCE.48

In this author’s opinion, the findings of the Appeals Chamber in relation to the first and the second grounds of the Prosecution’s Appeal are correct. To uphold the opposite conclusions of the Trial Chamber and confer upon them the status of legal standard would have led to very unsound results. It would have limited the employment of the JCE mode of liability to small cases in which the physical perpetrator was a member of the JCE through an explicit agreement concluded with the accused who could not be removed from the commission of the crime. This would not reflect the way in which modern conflicts develop and international crimes occur and it would spare the most responsible persons from being called to answer for their actions. On one hand the Appeals Chamber presents the track on which the JCE mode of liability should proceed and on the other hand – borrowing the words of Judge Van Den Wijngaert49 – it shows that JCE is not an open formula that allows convictions based on guilt by mere association.

Consequently, the Appeal Judgement should be welcomed. It has contributed to the further identification and explanation of the JCE mode of liability and prevented the erosion of its essence and the loss of its effectiveness.

48 Ibid., paras. 428-432.
49 Declaration of Judge Van Den Wijngaert appended to the Appeal Judgement, para. 4.