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THE INTERNATIONAL CRIMINAL TRIBUNAL
FOR THE FORMER YUGOSLAVIA

CASE NO.: IT-00-39-T

IN THE APPEALS CHAMBERS
Before: Judge Fausto Pocar, President
Judge Mohamed Shahabuddeen
Judge Mehmet Güney
Judge Andrésia Vaz
Judge Theodor Meron, Pre-Appeal Judge

Registrar: Mr. Hans Holthuis

Date filed: April 4, 2008

THE PROSECUTOR

v.

MOMČILO KRAJIŠNIK

BRIEF ON JOINT CRIMINAL ENTERPRISE ON BEHALF OF MOMČILO KRAJIŠNIK

The Office of the Prosecutor

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INTRODUCTION

The Judgement under review adjudicates Krajišnik guilty on a joint criminal enterprise theory alone, going well beyond any precedent in which JCE liability has been recognized. In light of the Statute's text and history, and customary international law, JCE is not a valid theory of liability that can be applied to Krajišnik. Even assuming it is, the Judgement provides no coherent or consistent explanation of JCE doctrine, or of the facts found as to Krajišnik which would permit the conclusion that he engaged in criminal activity. The trial chamber found no specific conduct that could be proved beyond a reasonable doubt against Krajišnik that clearly violated the law as defined by the governing Statute. Indeed the conduct individually attributable to Krajišnik was largely protected speech and political activity. The only basis on which he could be and was convicted was an expansion of the highly questionable concept of JCE. This unjustified stretching of existing law violates basic principles of legality and fair warning, endangering the credibility of this international Tribunal.

I. GROUND ONE: JOINT CRIMINAL ENTERPRISE IS NOT A LEGITIMATE THEORY OF LIABILITY, AND THEREFORE THE TRIBUNAL LACKS AUTHORITY TO ADJUDICATE KRAJIŠNIK GUILTY ON SUCH GROUNDS.

SUB-GROUND I(A). Joint Criminal Liability Has No Statutory Basis.

1. The *Krajišnik* Trial Chamber erred in finding that JCE was the appropriate theory of liability under which to determine Momčilo Krajišnik's ("Krajišnik") guilt.[1]

2. The Statute explicitly states the modes of "Individual criminal responsibility" over which the Tribunal may exercise jurisdiction at 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." There is no statutory description of individual criminal liability through JCE or membership in a JCE.

3. This Statute stands in contrast to the Rome Statute of the International Criminal Courts, which expressly states that individual criminal liability exists if a person intentionally

[1] Judgement, ¶877.

"contributes to the commission [of] … a crime by a group of persons acting with a common purpose" in limited and specified circumstances.[2]

4. None of the five distinct modes of involvement established in Article 7(1) which can expose individuals to criminal liability is JCE. Rather, JCE in practice operates much like a conglomeration, coupled with an expansion, of the five defined modes, allowing prosecutors and judges illegitimately to aggregate the cumulative evidence against an accused to find him guilty of some generalized crime, without proof that the accused did "plan", "instigate", "order", "commit" or otherwise "aid and abet" any specific criminal act.

5. Article 7(3) establishes the culpability of a superior for the actions of a subordinate. Krajišnik was charged, but not convicted, under Article 7(3).[3] The Tribunal cannot circumvent the statutory articulation of subordinate-superior liability and create a different category – JCE – to secure culpability based upon comparable principles when the statutory definition is found inapplicable.

6. JCE liability is thus without any textual basis, but a theory created and developed by ICTY judges, at the urging of ICTY prosecutors, to expand the scope of criminal liability under the Statute. This was improper, since the forms of liability set forth in Article 7(1) are specific and exhaustive. The Statute's drafters did not contemplate that ICTY judges would develop new theories of liability; in the Secretary-General's Report accompanying the draft statute, ICTY judges were expressly invited "to decide on various personal *defences* which may relieve a person of individual criminal responsibility…drawing upon general principles of law recognized by all nations."[4] There was no such invitation to develop new modes of liability.[5]

7. Moreover, the Statute's drafters expressly considered the problem of liability of "heads of State" and other actors, who might be removed from the actual crime, and explicitly addressed it in Articles 7(2) and 7(3) *without* creating any JCE or common plan liability.

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[2] Rome Statute, Art. 25(3)(d).
[3] Indictment, ¶¶10-14; Judgement, ¶¶877, 1126.
[4] UNDOC S/25704, ¶58 (emphasis added).
[5] *See* Steven Powles, *Joint Criminal Enterprise, Criminal Liability by Prosecutorial Ingenuity and Judicial Creativity?*, 2 Intl. Crim. Just.. 606, 613 (2004).

8. The Report of the Secretary-General accompanying the original draft of the Statute expressly stated:

> Virtually all of the written comments received by the Secretary-General have suggested that the statute of the International Tribunal should contain provisions with regard to the individual criminal responsibility of heads of State, government officials and persons acting in an official capacity. These suggestions draw upon the precedents following the Second World War. The State should, therefore, contain provisions which specify that a plea of head of State immunity or that an act was committed in the official capacity of the accused will not constitute a defence, nor will it mitigate punishment.
>
> A person in a position of superior authority should, therefore, be held individually responsible for giving the unlawful order to commit a crime under the present statute. But he should also be held responsible for failure to prevent a crime or to deter the unlawful behavior of his subordinates. This imputed responsibility or criminal negligence is engaged if the person in superior authority knew or had reason to know that his subordinates were about to commit or had committed crimes and yet failed to take the necessary and reasonable steps to prevent or repress the commission of such crimes or to punish those who had committed them.[6]

9. These stated principles, incorporated as Articles 7(2) and 7(3), clearly indicate that the Statute's drafters carefully considered the specific issue of liability for government officials, and their solution was twofold: they eliminated any notion of official immunity, and provided that superiors would be liable for actions *of their subordinates* in certain circumstances.

10. The Tribunal here did not find that Krajišnik held a position of "superior authority" over those who committed the actual crimes, or that Krajišnik had the power to "prevent or repress" the crimes, or to "punish" the actors. Instead, it agreed that it was *not* proven that Krajišnik ever exercised "effective control" over those who committed the crimes, but then decided that such control is not a requirement of JCE liability[7] – illegitimately extending the scope of criminal liability for high-level government officials far beyond that contemplated by the Statute's drafters.

[6] UNDOC S/25704, ¶55–56.
[7] Judgement, ¶1121.

SUB-GROUND I(B). Joint Criminal Enterprise Liability Has No Basis In Customary International Law.

11. The *Krajišnik* Trial Chamber erred in relying on the *Tadić* Appeals Chamber's finding that JCE existed as a theory of liability under customary international law.[8] The *Tadić* Chamber's determination in that regard has recently and exhaustively been shown to be historically erroneous.[9]

12. The *Tadić* Appeals Chamber, which first described a theory of JCE liability, insisted that JCE was based upon customary international law, embodied by the World War II tribunals.[10] It claimed to have examined several relevant precedents, from which it elucidated the theory of JCE, including its three separate forms each with distinct *actus reus* and *mens rea*. However, a review of that precedent reveals that the *Tadić* Chamber took wide latitude in its interpretation, repeatedly – and unsoundly – inferring the bases for liability from isolated statements by the prosecutors, when a clear judicial statement was unavailable. Accordingly, the JCE liability theory devised by the *Tadić* Chamber actually has little basis in customary international law.

13. There is a general scholarly consensus that the *Tadić* Appeals Chamber's reading of the relevant precedents was flawed: "[T]he World War II cases provide almost no support for the most controversial aspects of contemporary [JCE] doctrine."[11] Academic scholars help define customary international law, particularly in areas, as here, with little judicial precedent.

14. Professors Danner of Vanderbilt University and Martinez of Stanford University examined the precedent cases relied upon in *Tadić*, and conclude that:

> They do not support the sprawling form of JCE, particularly the extended form of this kind of liability, currently employed at the ICTY. Instead, the cases discussed in *Tadić* fall into one of two types. The first involves unlawful killings of small groups of Allied POWs, either by German soldiers or by German

[8] Judgement, ¶878.
[9] Jenny S. Martinez & Allison Marston Danner, *Guilty Associations: Joint Criminal Enterprise, Command Responsibility, and the Development of International Criminal Law*, 93 Cal. L. Rev. 75 (2005).
[10] *Tadić* AJ, ¶194 *et seq.*
[11] Martinez, *supra* at 110; *see also* Powles, *supra*.

> soldiers and German townspeople. The second group of cases concerns concentration camps.[12]

15. Because the case summaries relied upon by the *Tadić* Chambers often provided no statement of the legal bases for the convictions, the *Tadić* Chambers simply inferred the grounds for the convictions from isolated statements of the prosecutor and the accompanying guilty verdict.[13] The authors conclude that the World War II cases *Tadić* cited "do not … provide any legal basis for the sweeping JCEs, many of which span several years and extend throughout entire regions and even countries, used in later cases at the ICTY."[14] This description accurately captures the nature of the case against Krajišnik, and reveals that the theory of liability under which he was convicted had no basis in customary international law.

16. Ultimately, they conclude that, while ICTY's interpretation of JCE does not accurately reflect the World War II cases, it does share many of the features of the criminal-organization and conspiracy-based prosecutions undertaken post-World War II.[15] This is significant, since the ICTY Statute expressly *rejects* both those forms of liability for the crimes of which Krajišnik was convicted. The Secretary-General's Report explicitly rejects the idea of holding individuals criminally liable merely through membership in organizations – as was done following World War II[16] – explaining that "[t]he criminal acts set out in this statute are carried out by natural persons; such persons would be subject to the jurisdiction of the International Tribunal irrespective of membership in groups."[17] And liability for conspiracy is provided for in the Statute *only* as to the crime of genocide,[18] of which Krajišnik was found not guilty.[19]

17. The professors also observe that, in developing the theory of JCE, the *Tadić* Appeals Chamber essentially "restate[d]" the facts of Tadić's case, thereby "tipping its hand through this doctrinal exegesis."[20] Thus, *Tadić* did not develop the theory of JCE through a

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[12] Martinez, *supra*, at 110..
[13] *Id*. at 110-11.
[14] *Id*. at 112.
[15] *Id*. at 112 – 20.
[16] *Id*. at 113; *see also* Nuremburg Charter Articles 9, 10.
[17] UNDOC S/25704, ¶51.
[18] Article 4(3)(b).
[19] Judgement, ¶1091-94.
[20] Danner & Martinez, *supra*, at 106.

disinterested examination of applicable precedent, but rather molded those precedents to fit a theory that would permit the conviction *of* Tadić. The Judgement here was marred by similarly backward reasoning.

18. A re-examination of the precedent cited by *Tadić* would reveal that the scope of JCE liability as currently applied by ICTY extends far beyond that which occurred under customary international law, and would also permit the Appeals Chamber to consider the substantial body of scholarly work analyzing and criticizing the ICTY prosecutors' use of JCE.

SUB-GROUND I(C). Locating Joint Criminal Enterprise Liability Within The Statute's Use Of The Term "Committed" Is Unreasonable And Internally Inconsistent.

19. The *Krajišnik* Trial Chamber erred in accepting the argument the Prosecutor presented in the Indictment and then finding that Krajišnik was liable under JCE theory for "committing" crimes.[21] Even if JCE were, arguably, a legitimate mode of liability, it cannot be located under the "committed" prong of Article 7(1), notwithstanding that the *Tadić* court implied, and the *Krnojelac* court later confirmed, that JCE liability is located there.[22]

20. Reading "committed" to include JCE liability renders nugatory the other modes of liability explicitly listed in Article 7(1). In virtually any situation in which the accused was alleged to have "planned", "instigated", or "ordered" one of the included crimes, he would also presumably be guilty under JCE theory. This is borne out here: Krajišnik was charged by the indictment with each of the five modes of liability in Article 7(1),[23] but the Trial Chamber chose to proceed only on the JCE theory.[24]

21. The Indictment alleged that Krajišnik "planned, instigated, ordered, committed" or aided and abetted the charged crimes.[25] It then states that "[b]y using the word 'committed' in this indictment, the Prosecutor does not mean that the accused physically committed any of the

[21] Judgement, ¶¶877, 1078.
[22] *Tadić* AJ, ¶188; *Krnojelac* AJ, ¶73.
[23] Indictment, ¶3.
[24] Judgement, ¶877.
[25] Indictment, ¶3.

crimes charged personally. 'Committed' in this indictment refers to participation in a joint criminal enterprise."[26]

22. The Judgement states that "the Chamber finds JCE to be the most appropriate mode of liability. Therefore, other forms of liability charged in the indictment will not be further considered in this Judgement."[27] Thus, Krajišnik was ultimately convicted on the ground that he "committed" the charged crimes.

23. However, Krajišnik's "contributions" to the JCE that the Trial Chamber ultimately deemed proven can by no stretch be depicted as constituting "commission" of the relevant crimes. While dismissing many of the charged contributions as not proven, the Trial Chamber found only that Krajišnik exercised some high level of nondescript, general influence that did not amount to effective control.[28] It expressly stated that Krajišnik's "overall contribution to the JCE was to help establish and perpetuate the SDS party and state structures that were instrumental to the *commission* of the crimes."[29]

24. Thus, the Trial Chamber itself described Krajišnik's actual level of involvement as at least two levels removed from the actual commission of the crimes: Krajišnik merely helped establish and/or perpetuate structures which themselves provided some assistance to those who actually committed crimes.

25. The impropriety of locating JCE liability within Article 7(1)'s use of the term "committed" with regard to high-level actors like Krajišnik has already been implicitly recognized by the Appeal Chamber. In *Brdanin*, the court noted that:

> 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.[30]

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[26] Indictment, ¶3.
[27] Judgement, ¶877.
[28] Judgement, ¶1121.
[29] Judgement, ¶1120 (emphasis added). *But see infra* at ¶39.
[30] *Brdanin* AJ, footnote 891.

26. This scenario applies to *Krajišnik*, where the principal perpetrators of the crime – those who carried out the *actus reus* – were largely low-level soldiers or other unidentified individuals, not identified JCE members.

27. Given how the court incorporated certain crimes into JCE liability, the Trial Chamber essentially held that Krajišnik had "committed" crimes which were (1) not part of his initial objective, (2) not necessary to the objectives of the JCE, and (3) carried out by people with whom he had no contact and over whom he had no control.

SUB-GROUND I(D). Due To The Flaws In JCE's Statutory, Historical And Textual Bases, Krajišnik Lacked Notice That He Faced Potential Criminal Liability.

28. Given these flaws in the statutory, historical, and textual bases of JCE liability, Krajišnik lacked proper notice that he faced potential criminal liability for his actions or failures to act. The acts or omissions underlying Krajišnik's conviction occurred in 1992, but the idea of JCE liability did not arise until the 1999 *Tadić* Appeal. The concept has expanded far beyond its roots in *Tadić*, where it was applied to participants in low-level mob violence, to the present use in prosecuting high-level government officials operating at levels far removed from the actual crimes, whose connections to those crimes are tenuous and vague at best.

29. Thus, imposition of JCE liability conflicts with the Tribunal's own stated adherence to the principle of *nullem crimen sine lege* – that there can be no crime without a previous penal law – emphasized in the Secretary-General's Report:

> In the view of the Secretary-General, the application of the principle *nullum crimen sine lege* requires that the international tribunal should apply rules of international humanitarian law which are *beyond any doubt* part of customary law so that the problem of adherence of some but not all States to specific conventions does not arise. This would appear to be particularly important in the context of an international tribunal prosecuting persons responsible for serious violations of international humanitarian law.[31]

[31] UNDOC S/25704, ¶34 (second emphasis added).

30. Here, JCE was not classified as a crime, nor a theory of criminal liability, in the early 1990s, when the alleged predicates for these crimes occurred. A post hoc determination that, under the facts, JCE is the best mode of liability, inverts the appropriate method of proceeding: first the potential basis of liability must be articulated, then the facts explored, and then judgment rendered. Yesterday's decision in *Haradinaj* suggests a vehicle, in the absence of a statutory basis or established, consistent principles, for result-oriented decision making. Here, where the evidence linking Krajišnik to the imputed offenses was rather weak, the Trial Chamber, with Judge Orie presiding, found JCE the most convenient mode of liability and found Krajišnik guilty, giving a 27-year sentence. In *Haradinaj,* where perhaps the linkage of the crime base to Haradinaj was equally weak (and intimidation and murder of witnesses may have helped), the Trial Chamber, again with Judge Orie presiding, found insufficient evidence of a JCE. Perhaps politics dictated one result in one case, and another elsewhere.

II. GROUND TWO: TRIAL CHAMBER ERRED IN NOT REQUIRING A FINDING THAT KRAJIŠNIK'S CONTRIBUTION TO THE JOINT CRIMINAL ENTERPRISE WAS SUBSTANTIAL

SUB-GROUND II(A). Trial Chamber Misstated Applicable Law When It Held That There Was No Requirement That Krajišnik's Contribution To The Alleged Joint Criminal Enterprise Was Substantial.

31. The *Krajišnik* Trial Chamber erred in determining that there was no requirement that Krajišnik's contribution to the charged JCE be significant or substantial. [32]

32. The Trial Chamber made no finding that Krajišnik's contribution to the alleged JCE was substantial, citing *Kvočka* for the proposition that "[a] contribution of the accused to the JCE need not have been, as a matter of law, either substantial or necessary to the achievement of the JCE's objective."[33] This erroneous statement of law results from a misreading of cited precedent.

[32] Judgement, ¶883.
[33] Judgement, ¶883.

33. The Appeals Chamber in *Kvočka* did state, without citation to authority, that "in general, there is no specific legal requirement that the accused make a substantial contribution to the joint criminal enterprise."[34] However, the court immediately qualified this statement:

> However, there may be specific cases which require, as an exception to the general rule, a substantial contribution of the accused to determine whether he participated in the joint criminal enterprise. In practice, the significance of the accused's contribution will be relevant to demonstrating that the accused shared the intent to pursue the common purpose.[35]

34. Thus, although the *Krajišnik* Trial Chamber cited to *Kvočka* for a universal principle, *Kvočka* explicitly acknowledged that application of the principle was limited.

35. The *Kvočka* Appeal Chamber declined to find one of the accused guilty expressly because his contribution to the alleged JCE was not substantial – precisely the opposite legal proposition for which the Trial Chamber cites *Kvočka*. The *Kvočka* Appeals Chamber found that:

> [I]n the absence of further evidence of concrete crimes committed by Zigic, no reasonable trier of fact could conclude from the evidence before the Trial Chamber that Zigic participated in a significant way in the functioning of Omarska camp. He cannot be held responsible as a participant in this joint criminal enterprise; his conviction for the crimes committed in this camp "in general" has to be overturned.[36]

36. Thus, the Appeals Chamber has recognized the importance of a substantiality requirement, and it has gained widespread support: Antonio Cassesse, former ICTY President, has noted that several Tribunal chambers have recognized the "indispensable" need for an accused's contribution to be significant, particularly in the context of institutionalized JCEs.[37] International law scholars also strongly support such a requirement, both as an accurate statement of ICTY jurisprudence and as a necessary protection for potential defendants from prosecutorial overreaching, arguing that ICTY "judges should require that prosecutors prove that the defendant has made a substantial contribution to the JCE charged."[38]

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[34] *Kvočka,* AJ, ¶97.
[35] *Kvočka,* AJ, ¶97.
[36] *Kvočka,* AJ, ¶599.
[37] Antonio Cassesse, *The Proper Limits of Individual Responsibility Under the Doctrine of Joint Criminal Enterprise,* 5 J. Int'l Crim. Just. 109, 127-28 (2007).
[38] Martinez, *supra*, at 150.

37. Indeed, the potential for liability in the absence of any limiting requirement of substantiality would strongly conflict with traditional principles of individual criminal responsibility. Under the expansive theory of liability dictated by the *Krajišnik* Trial Chamber, a person who shared the JCE's criminal objectives but whose only contribution was extremely limited – *i.e.*, a legislator voting approval for funding – would be exposed to vast liability despite the lack of any true nexus between his actions and the actual criminal activity. *Tadić* spoke of criminalizing the activity of "all those who in some way made it possible for the perpetrator physically to carry out that criminal act."[39] But such language is overbroad and inconsonant with general principles limiting liability to those who played a direct role in the commission of a crime. Such broad liability would essentially criminalize holding beliefs supportive of the commission of crimes, which, although abhorrent, is universally protected among free nations.

SUB-GROUND II(B). Trial Chamber's Error Was Material Given The Trial Chamber's Determinations With Respect To Which Allegations Of Contribution Were Proved And Not Proved And The Relationship Of "Contribution" To Intent And Shared Purpose

38. The Judgement's summary of Krajišnik's contribution reveals the limited nature of the relatively few allegations that were deemed proven:

> The accused's overall contribution to the JCE was to help establish and perpetuate the SDS party and state structures that were instrumental to the commission of the crimes. He also deployed his political skills both locally and internationally to facilitate the implementation of the JCE's common objective through the crimes envisaged by that objective.[40]

39. Even this bland description of Krajišnik's contribution vastly *overstates* the scope of any such contribution. The Trial Chamber stated that Krajišnik "help[ed] establish" the SDS party,[41] but the Judgement makes clear that Krajišnik, though an early member of SDS, actually played no role in establishing the party.[42]

[39] *Tadić* AJ, ¶192.
[40] Judgement, ¶1120.
[41] Judgement, ¶1120.
[42] Judgement, ¶¶3, 25, 1121.

40. Trial Chamber expressly found that several allegations identifying Krajišnik's alleged participation in the JCE "individually, and through the associations, positions and memberships enumerated [elsewhere in the amended indictment]" were *not proved*. Those included, but were not limited to, "exercising effective control over the Bosnian Serb Political and Governmental Organs and Bosnian Serb Forces which participated in or facilitated the commission of crimes identified in this indictment;" encouraging, assisting or participating in the acquisition of arms or in the distribution of them to Bosnian Serbs to further the objective of the joint criminal enterprise, and "directing or encouraging … subordinates in the Bosnian Serb Political and Governmental Organs and in the Bosnian Serb Forces to direct, assist or request assistance from JNA/VJ forces, Serbian paramilitary units and Bosnian Serb paramilitary and volunteer units in the commission of acts to further the objective of the joint criminal enterprise."[43]

41. These failures of proof are significant, not only as to the substantiality of Krajišnik's contribution, but also on the critical issue of *mens rea*. The *Kvočka* Appeal Chamber expressly stated that the significance of the individual's contribution to the JCE would be "relevant to demonstrating that the accused shared the intent to pursue the common purpose."[44] However, in considering Krajišnik's intent to pursue the common purpose of the JCE, the Trial Chamber failed to consider the substantiality of Krajišnik's contribution, or even its nature, relying instead mainly on "witnesses who testified that they had presented Krajišnik with information about crimes that were being committed," and "sometimes" considering Krajišnik's immediate response to this information.[45] It also considered evidence that it acknowledged was even "less direct," *i.e.*, evidence of general interaction between Krajišnik and other government officials.[46]

42. Additionally, in *Brdanin*, the Appeal Chamber stated that a court "can only find that the accused has the requisite intent if this is the only reasonable inference on the evidence."[47] Krajišnik's isolated statements – for instance, that he wished to change the facts on the

[43] Judgement, ¶1121.
[44] *Kvočka* AJ, ¶97.
[45] Judgement, ¶891.
[46] Judgement, ¶891.
[47] *Brdanin* AJ, ¶429.

ground,[48] and that Serbs and Muslims cannot live together[49] – clearly do not meet this standard, as they reasonably give rise to the inference that he supported the creation of an independent Serbian state by means other than the commission of crimes. Thus, Krajišnik's common intent with the JCE, a necessary element, was not proven.

43. Thus, rather than look to Krajišnik's contributions to the JCE in order to prove his intent to effectuate the alleged common purpose of the JCE, as the *Kvočka* court stated was important, the Trial Chamber instead relied merely on general testimony that Krajišnik was at some level *aware* of some of the crimes being committed.

III. GROUND THREE: JOINT CRIMINAL ENTERPRISE, AS APPLIED TO KRAJIŠNIK, IS AN INCONSISTENT AND INCOHERENT THEORY OF LIABILITY.

SUB-GROUND III(A). The Theory Of Joint Criminal Enterprise Liability Presented In The Indictment And Judgement Is Vague And Unclear.

44. The description of JCE in the indictment is vague, amorphous, and confusing. It is first stated in *geographic* terms: "The JCE encompassed territories within the former Yugoslavia." The indictment then continues, "[w]ithin the Republic of Bosnia and Herzegovina .... the objective of the joint criminal enterprise was the permanent removal by force or other means, of Bosnian Muslim, Bosnian Croat or other non-Serb inhabitants from large areas of Bosnia and Herzegovina…"[50]

45. The charged objective is not itself a crime punishable under the Statute, because it could be achieved in at least three ways: 1) illegally by violating the laws of the tribunal; 2) illegally but without violating those laws (e.g., by making life uncomfortable); or 3) legally (e.g., by positive inducements). This is significant because those in high office always have political goals which could be implemented through legal means, illegal means, or both.

[48] Judgement, ¶998.
[49] Judgement, ¶897.
[50] Indictment, ¶4.

46. The JCE section of the indictment nowhere sets forth any specific means alleged to have been within the contemplation of the JCE, at the JCE's inception or at any later time. The means are identified only generally as "crimes which are punishable under Articles 3, 4 and 5."[51]

47. The Judgement itself does not confront these essential problems. The Trial Chamber did not find a common objective narrower than the stated objective, that was itself a statutory crime, or that could be achieved only through statutory crimes; it did *not* find an "intent to destroy."[52]

48. In fact, the Judgement's critical paragraphs addressing the "common objective" reflect a radical departure from the JCE moorings articulated in *Tadić*, even as described in the Judgement itself.[53] To simplify the analysis, we note that, while the Judgement states that "[t]he question arises whether one or more of these crimes was not part of the common objective of the JCE (JCE form 1) but rather was a natural and foreseeable consequence of the implementation of the … common objective (JCE form 3),"[54] the Judgement *never* returns to or answers that question, and never states that Krajišnik's liability is under form 3 – implying that liability was predicated on form 1.

49. *Tadić* makes clear that JCE liability requires that the *common objective* be the commission of a crime listed in the statute.[55] Yet, Krajišnik's indictment charges no statutory crime as the JCE objective; in fact, the prosecutor appears to have *intentionally* avoided that structure – significant because the *mens rea* required for liability under form 1 is linked to the statutorily criminal objective: the accused must intend that the statutory crime of the JCE's objective be carried out.[56]

[51] Indictment, ¶4.
[52] Judgement, ¶¶867, 869.
[53] *Compare* Judgement, ¶¶878-86, with *id.* ¶¶1089-98.
[54] Judgement, ¶1096.
[55] Judgement, ¶¶878-86.
[56] Judgement, ¶¶879.

50. Here, though, the Judgement describes the common objective as "fluid,"[57] and articulates the means as a vehicle for describing the objective,[58] interjecting evidence that the accused had knowledge of the facts on the ground in defining the common objective and the means used to attain it.[59] Such an amorphous and shifting definition of the JCE, its objectives, and its means has little in common with the requirements for form 1 JCE liability articulated in *Tadić*.

51. Further, the Chamber's decision conflicts with *Tadić*'s express holding as to *actus reus*. It accurately quotes the *Tadić* Appeal Judgement on form 1 liability – "the accused must voluntarily participate in one aspect of the common design (for instance, by inflicting non-fatal violence upon the victim, or by providing material assistance to or facilitating the activities of his co-perpetrators)"[60] – which, with the examples given, shows that the accused must have participated in the crime that is the JCE objective in some direct or material way. However, the Judgement contains no finding that Krajišnik participated in the ways cited as examples, or in any even arguably equivalent manner. Moreover, a review of the specific "contributions" not proven[61] strongly supports the conclusion that the *actus reus* required under *Tadić* was not and could not be proven.

52. The decision under review thus ignores *Tadić's* theoretical underpinnings and disregards the limits *Tadić* articulates on the scope of JCE liability.

53. As scholars have noted, JCE liability has much in common with American notions of *Pinkerton* liability (vicarious liability for foreseeable crimes committed in furtherance of the conspiracy)[62] and enterprise liability, such as that established under "RICO," the Racketeer-Influenced and Corrupt Organizations Act, 18 U.S.Code §§1961-68. This is perhaps unsurprising given the apparent influence of the United States and U.S. prosecutors at the ICTY Office of the Prosecutor. One scholar has noted that:

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[57] Judgement, ¶1098.
[58] Judgement, ¶¶1096-99.
[59] Judgement, ¶1097.
[60] Judgement, ¶879, *quoting Tadić* AJ, ¶196.
[61] Judgement, ¶¶1121(e)-(j).
[62] *Pinkerton v. United States*, 328 U.S. 640 (1946).

> (a) ICTY prosecutors trained in the civil law tradition expressed concern about conspiracy and its surreptitious cognates; and (b) only one ICTY prosecution team, led by Canadian William Fenrick, resisted an over reliance on the doctrine of joint criminal enterprise. "When he retired in 2003, the restraint he had long exercised on others in the Office of the Prosecutor disappeared, and its members began to employ the doctrine more aggressively before the Tribunal."[63]

54. Ironically, the more these cognate doctrines are expanded and used as a basis for criminal liability in international tribunals, the greater the danger that the United States (and other countries) will reject the work of these tribunals, because these elastic doctrines, albeit largely of American provenance, are controversial even in the United States because of their very elasticity.[64]

55. Further, JCE doctrine indiscriminately combines both civil law concepts and common law categories. Cassesse has acknowledged that the confusion resulting from combining analytically distinct concepts "may have contributed to misgivings or misinterpretation."[65]

56. One problem arises because JCE liability can rest on having or espousing an objective which can encompass policy statements or religious or nationalistic goals, if it is known or foreseeable that others will commit crimes listed in Articles 3 to 5 in pursuit of such goals.

57. A seminal American case, *United States v. Spock*, 416 F.2d 165 (1st Cir. 1969), speaks to these issues. Dr. Benjamin Spock, a well-known author, pediatrician, and peace activist, and others signed a "call to resist" the war in Vietnam. The means contemplated by some who made the "call" encompassed legal and illegal activity. An appellate issue was whether the individual defendants personally agreed to employ the illegal means contemplated by the agreement, for their convictions required that proof. *Tadić* requires such proof; the Judgement does not. Quoting the United States Supreme Court, *Spock* anticipated these dangers:

> criminal intent … must be judged *strictissimi juris*, for otherwise there is a danger that one in sympathy with the legitimate aims of such an organization, but not specifically intending to accomplish them by resort to violence, might be

[63] Jens Meierhenrich, *Conspiracy in International Law*, 2 Annu. Rev. Law Soc. Sci. 341, 352 (2006) (citation omitted).
[64] See, *e.g.*, M. Noferi, *Towards Attenuation: A "New" Due Process Limit on Pinkerton Conspiracy Liability*," 33 Am. J. Crim. L. 91 (2006).
[65] Cassesse, *supra*, at 115.

> punished for his adherence to lawful and constitutionally protected purposes, because of other and unprotected purposes which he does not necessarily share. [66]

58. Even assuming that evidence here demonstrated extensive rhetoric for the "separation" of Bosnian Serbs from Muslims and Croats and repeated Serbian assertions that an historic Serb territory existed, and assuming that Krajišnik shared those views and objectives, there remains a large gap between the stated objective and a finding of culpability for statutory crimes. What is necessary to bridge that gap is unclear from both the indictment and the Judgement. Even the most damaging evidence – that Krajišnik's objective was for Sarajevo to become a unified Serbian city and the articulation that Muslims will have to look elsewhere, and the assumption that this would not occur peacefully – is insufficient for criminal liability.

59. The Judgement was arrived at in backwards fashion. The actors who were ultimately deemed linked to the JCE were articulated generally at the end of the Judgement,[67] not because there was evidence presented to establish that they contributed to, and shared a common objective with, the JCE, but only because they committed or were closer to the commission of criminal acts and therefore had to be linked to the JCE to establish Krajišnik's culpability.

60. An additional problem with the theory of JCE liability is that parties may share a common objective without any contact, planning, or even knowledge of the common objective. This open-ended approach suggests that JCE charges would apply to anyone who supports a nationalistic objective, or religious or political movement, or foreign policy objective wherein armed clashes or war subsequently occurs, wherein some participants act criminally. Sadly, history strongly supports the assumption that it is foreseeable that atrocities such as those listed in Article 5 may occur during armed conflicts. Under such an expansive view of JCE, virtually every political, nationalist, or religious leader in an international "hot spot" is vulnerable to prosecution and conviction.

61. The *Tadić* tribunal recognized the problem posed by independent groups sharing common objectives, or actions of different groups advancing common goals. The requirement

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[66] 416 F.2d 165, 172-73, *quoting Noto v. United States*, 367 U.S. 290 (1961)
[67] Judgement, ¶¶1087-88.

that members act together and in concert to effectuate the common goal was indispensable in *Tadić*, where the accused was himself directly involved in mob violence, but omitted from any serious analysis by the Trial Chamber in *Krajišnik*.

62. Cassesse has emphasized that JCE liability should not apply where no common plan existed between the actual perpetrators and those who participated in the common plan, praising the *Brdanin* Trial Judgement for reaching this result:

> The Chamber, therefore, dismissed the applicability of the notion of JCE to the crimes at issue. Although the Chamber did not provide detailed reasons for its conclusion, it would seem to be correct. To extend criminal liability to instances where there was no agreement or common plan between the perpetrators and those who participated in the common plan would seem to excessively broaden the notion, which is always premised on the *sharing of a criminal intent by all* those who take part in the common enterprise (and this premise is the *sine qua non* condition for the possible additional liability arising in the third category of JCE, where the 'primary offender' commits a further crime, not envisaged in the common plan).[68]

63. Cassesse further agreed with *Brdanin* that members of the Serbian army, police, and paramilitary could not properly be viewed as members of the JCE:

> The Chamber noted that for both categories of JCE to materialize it was required to prove not only the existence of a common criminal plan, but also that the crimes had been perpetrated by one or more participants in such common plan. However, in the case at issue the crimes had been committed by members of the army, police and paramilitary groups that had not participated in the criminal plan or enterprise.[69]

To subvert this requirement of shared common intent, the *Krajišnik* court improperly and summarily concluded that many of the principal perpetrators were in fact members of the JCE.

64. The post hoc inclusion in the Judgement of the diverse list of perpetrators of the crimes as members of the charged JCE is no substitute for their inclusion in the indictment and the need for specific and individualized evidence to support their involvement in the JCE. Additionally, the Judgement does not discuss the level of evidence necessary to demonstrate that a perpetrator was acting pursuant to the direction of the accused or had any nexus or link to

[68] Cassesse, *supra*, at 125-26.
[69] Cassesse, *supra*, at 125.

the accused except that the acts advanced the objective of the JCE, and thus disregarded the obvious question of whether the principal perpetrators were pursuing their own agendas.

SUB-GROUND III(B). This Lack Of Cohesiveness And Clarity Of The Theory Of Joint Criminal Enterprise Liability Is Reflected In The Judgement, Which Is Internally Inconsistent.

65. The *Krajišnik* Trial Chamber erred determining that Krajišnik's liability began at the beginning of April, 1992,[70] contradicting its own reasoning as to the mechanics of JCE liability.[71]

66. The Judgement's application of JCE liability theory is self-contradictory. Specifically, the fundamental determination concerning when Krajišnik's criminal responsibility first arose is utterly inconsistent with the theory of liability adopted, demonstrating that the Chamber's ultimate findings on this issue were result-driven; the verdict does not follow from an application of legal principles to the facts proven at trial.

67. The Judgement acknowledges that not all of the crimes with which Krajišnik was charged, and ultimately convicted of, were components of the JCE's initial criminal objective, but Krajišnik was convicted of crimes such as murder through their incorporation into the JCE:

> The Chamber finds that, whereas in the early stages of the Bosnian-Serb campaign the common objective of the JCE was discriminatory deportation and forced transfer, soon thereafter it became clear to the members of the JCE, including [Krajišnik], that the implementation of the common objective involved, as a matter of fact, the commission of an expanded set of crimes. These crimes came to redefine the criminal means of the JCE's common objective during the course of the indictment period. In accordance with the reasoning set out earlier in this section, acceptance of this greater range of criminal means, coupled with persistence in implementation, signalled an intention to pursue the common objective through those new means.[72]

This novel analysis – without citation – is erroneous and a dangerous precedent.

[70] Judgement, ¶1124.
[71] Judgement, ¶¶1098, 1118.
[72] Judgement, ¶1118.

68. Thus, under Trial Chamber's logic, while an initial murder committed by a member of the JCE or a non-member procured by a member would not properly be attributable to JCE members, once such members were informed of the murder and continued in their common objective without attempting to prevent such recurrence, the crime of murder would be incorporated into the criminal means of the JCE and would give rise to future JCE form 1 liability.

69. Yet, the Prosecution took the position, and the Chamber agreed, that Krajišnik's criminal responsibility began with the *first killings* for which evidence was presented – "the attack and crimes committed in Bijeljina municipality in the beginning of April 1992."[73]

70. However, if the basis of Krajišnik's liability for such crimes, which were not original objectives of the JCE, is that he later received reports concerning the crimes and persisted in his actions *after receiving such reports*, then there is no basis for imposing criminal responsibility on him for deaths that occurred in Bijeljina in early April – the beginning of the period, under the Chamber's own analysis, when he could have received reports of criminal activity.

71. This argument does not simply invalidate a small part of the Count 5 conviction for murder as a crime against humanity. It demonstrates the Prosecutor's overreaching and the Chamber's fundamental failure to state and apply principles coherently and consistently to the facts found. It reflects the Judgement's deficiency because, even assuming the JCE theory to be valid, it must be applied to ascertain whether the accused bears criminal responsibility for specific crimes, not with a broad brush to impose criminal liability for all bad acts.

72. The lack of clarity and cohesiveness is demonstrated further by the Chamber's determination as to the crime of deportation. It found that, unlike murder, deportation was among the "original crimes" contemplated by the JCE's common objective as of late March

[73] Judgement, ¶¶300, 1123, 1124.

1992.[74] The Judgement also makes reference to deportations having occurred from a number of listed municipalities.[75]

73. It does not, however, link those municipality crimes to the JCE, or to members of the JCE, let alone to Krajišnik. In Part 6 of the Judgement, which discusses the "Accused's responsibility," the Chamber finds that the crime of deportation was a necessary means of implementing the common objective.[76] In the same paragraph the Chamber writes:

> [I]n July 1992, … 9,000 Muslims and Croats were forced to cross into Croatia. The Main Staff was informed by the 1st Krajina Corps in December 1992 of a convoy of buses transporting 1,008 detainees from Manjača camp to Croatia. At around the same time, the 1st Krajina Corps informed the main staff of another 1,001 detainees from Manjača being moved out of the Bosnian-Serb Republic.

However, the section on municipality crimes dealing with Manjača, in Banja Luka municipality, does not contain any findings as to the movement of either 1,008 or 1,001 detainees from Manjača at or around December 1992 or, indeed, at any other time. Thus, these do not appear to have been among the municipality crimes the Chamber found. Moreover, the 9,000 persons referred to who crossed into Croatia, according to other parts of the Judgement, were moved not by JCE members or persons they procured, but rather under the supervision of the UNHCR.[77]

74. Thus, it is contradictory and incoherent for the Chamber to have determined that deportation was one of the original criminal means contemplated by the JCE, but to find Krajišnik responsible for deportations based on movements of particular groups of persons to whom the "municipality crimes" section of the Judgement makes no reference at all, or movements under the auspices of UNHCR. Given that "deportation" is one of the two "original crimes" found to have been within the objectives of the JCE, the Chamber's treatment of Krajišnik's responsibility for deportation illuminates larger problems with the Judgement and the JCE theory upon which it rests.

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[74] Judgement, ¶1097.
[75] Judgement, ¶¶728, 731.
[76] Judgement, ¶1097.
[77] Judgement, ¶417.

SUB-GROUND III(C). The Prosecution's Own Presentation Reveals The Incoherence Of Joint Criminal Enterprise.

75. The prosecution's contention that the Chamber applied the correct JCE law is only five paragraphs, but illuminates fundamental problems with JCE liability.[78] At ¶31, the prosecution treats a JCE as an entity, an object, a "thing." Attempting to define this thing, the prosecution says it exists when two or more persons participate in the realization of a common criminal objective and that it is the "common objective that *begins to transform* a plurality of persons into a group or enterprise."[79] But this begs many of the basic questions addressed above: for example, when do people become a group and what does an individual need to know, intend, or do to become liable for crimes committed by other group members.

76. Significantly, nowhere in that or the later paragraphs does the prosecution indicate what an individual's *mens rea* – his knowledge or intent – must be vis-à-vis the "common objective,"[80] vis-à-vis the group, or vis-à-vis the acts or crimes which may in the future be committed, by others, "pursuant to the common objective." The prosecution merely states that the accused must be "sufficiently connected and concerned with persons who committed crimes pursuant to the common objective in various capacities, or who procured others to do so."[81] Surely, "connected and concerned with" hardly answers the question of what the defendant must do, let alone with what state of mind.

77. The prosecution elides these questions when it asserts that Krajišnik's fundamental argument that his actions cannot be classified as any crime under the Statute is "irrelevant to his liability under JCE."[82] It is not only relevant; it is the heart of the matter. Krajišnik cannot be punished unless, by his actions, he is responsible for one or more of the crimes listed in the Statute. Krajišnik has been found guilty of murder, deportation, and other crimes against

[78] Prosecution Brief, ¶¶31-35.
[79] Prosecution Brief, ¶31 (emphasis added).
[80] Prosecution Brief, ¶31-35.
[81] Prosecution Brief, ¶32.
[82] Prosecution Brief, ¶35.

humanity. Indeed, it is only if "commission" includes JCE liability that there is even arguably a basis for his conviction under the Judgement.

IV. KRAJIŠNIK'S INCORPORATES CERTAIN AMICUS' ARGUMENTS, AND REJECTS OTHERS.

78. Krajišnik, through counsel, and in compliance with the decision of this Chamber dated 28 February 2008, incorporates the following arguments of amicus curiae:

> (a) paragraphs 139-40, which argue that the Chamber specified a non-exhaustive list of rank and file members of the JCE, and that the Judgement was defective for premising Krajišnik's conviction on acts and conduct of individuals not identified in the Judgement, and without demonstrating a common shared plan between Krajišnik and these persons.
>
> (b), (c) paragraphs 141-44, which argue that the Chamber failed to find the commencement and conclusion dates for the JCE. These paragraphs also note the deficiency in the Judgement in not making findings as to necessary shared intent to commit adjudicated substantive crimes.
>
> (d) paragraphs 145-58, which argue against the Chamber's determination of the existence of a common plan. Krajišnik rejects the argument that there is a "correct concept of JCE." Krajišnik adopts the argument that the Trial Chamber's "fluid" concept used is inconsistent and more expansive than the concept of JCE used in the *Brdanin* Judgement but rejects the conclusion in paragraph 158 that "JCE liability is a mode of liability which applies to the commission of specific crimes;"
>
> (e) rejects the arguments in paragraphs 159-66, which suggests that proof of JCE (1) does not involve a departure from the principles required to establish the *mens rea* for the crime charged. Krajišnik accepts the arguments that Krajišnik's *mens rea* must be established to support the convictions herein and that there was a deficiency in failing to articulate sufficient evidence to establish Krajišnik's personal *mens reas* to commit Counts 3-8;
>
> (f) paragraphs 167-72, which argue lack of proof beyond a reasonable doubtof Krajišnik's participation in the implementation of the JCE. Krajišnik rejects amicus' implicit acknowledgement that JCE, if properly proven, is appropriate to establish individual criminal responsibility;
>
> (g) paragraphs 173-83, which argue a failure to find that the principal perpetrators were used as tools by a member of the JCE and that the Judgement is inconsistent with and an expansion of the concepts of JCE articulated in the *Brdanin* appeal decision. Krajišnik rejects amicus' implicit concession that such proof would be

sufficient to establish Krajišnik's individual criminal responsibility and that the *Brdanin* Appeal Chamber decision, although much narrower on JCE liability than the instant decision, is correct in concluding that JCE liability can support individual criminal liability;

(h) paragraphs 184-87, which argue the deficiencies in the pleading of JCE. Krajišnik rejects the implicit concession that, if JCE were pled as described in the

V. REQUEST FOR OPPORTUNITY TO ADDRESS JCE ISSUES THAT ARISE IN CONNECTION WITH KRAJIŠNIK'S RULE 115 MOTION AND TO ADDRESS THE HARADINAJ DECISION.

79. The new evidence Krajišnik seeks to present may be relevant to these JCE issues. Counsel respectfully requests an opportunity to address these matters in a further submission. Additionally, counsel requests an opportunity to review thoroughly yesterday's lengthy decision in *Haradinaj*, and to submit additional information premised on that decision.

V. CONCLUSION.

1. For the foregoing reasons, Krajišnik's conviction should be vacated.

Dated this 4th day of April, 2008.

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Word Count: 7,996

Krajišnik's Glossary

Pleadings, Order, Decisions etc., from Prosecutor v. Momčilo Krajišnik, Case No. IT-00-39-A

Abbreviation used in Krajišnik Response	Full Citation
Indictment	*Prosecutor v. Momčilo Krajišnik & Biljana Plavšić*, Case No. IT-00-39&40-PT, Amended Consolidated Indictment, 7 March 2002 (Public)
Judgement	*Prosecutor* v. *Momčilo Krajišnik*, Case No. IT-00-39-T, T.Ch., Judgement, 27 September 2006
Prosecution's Brief	*Prosecutor* v. *Momčilo Krajišnik*, Case No. IT-00-39-T, Prosecution's Brief, 18 March 2008

Other ICTY Authorities

Abbreviation used in Krajišnik Response	Full Citation
Brđanin AJ	*Prosecutor* v. *Radoslav Brđanin*, Case No. IT-99-36-T, T.Ch., Judgement, 1 September 2004
Brđanin AJ	*Prosecutor* v. *Radoslav Brđanin*, Case No. IT-99-36-A, App.Ch., Judgement, 3 April 2007
Krnojelac AJ	*Prosecutor* v. *Milorad Krnojelac*, Case No. IT-97-25-A, App.Ch., Judgement, 17 September 2003
Kvočka AJ	*Prosecutor* v. *Miroslav Kvočka, Milojica Kos, Mlado Radić, Zoran Žigić and Dragoljub Prcać*, Case No. IT-98-30/1-A, App.Ch., Judgement, 28 February 2005
Tadić TJ	*Prosecutor* v. *Duško Tadić a/k/a "Dule"*, Case No. IT-94-1-T, T.Ch., Opinion and Judgement, 7 May 1997

Other United Nations Authorities

Abbreviation used in Krajišnik Response	**Full Citation**
UNDOC S/25704	The Secretary-General, Report of the Secretary-General pursuant to ¶ 2 of Security Counsel Resolution 808 (1993), U.N. Doc. S/25704 (May 3, 1993)
Nuremberg Charter	Charter of the International Military Tribunal for the Prosecution and Punishment of the German Major War Criminals, Berlin (October 6, 1945)
UNHCR	United Nations High Commissioner for Refugees
Statute	Statute of the International Criminal Tribunal for the former Yugoslavia established by Security Council Resolution 827 (1993)
Rome Statute	Rome Statute of the International Criminal Court, U.N. Doc. A/CONF.183/9, 17 July 1998.

Other Abbreviations

Abbreviation used in Krajišnik Response	**Full Citation**
T.	Trial Transcript