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International
Criminal Tribunal
for the former
Yugoslavia

Tribunal Pénal
International pour
l'ex-Yougoslavie

JUDGEMENT SUMMARY

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APPEALS CHAMBER

The Hague, 3 April 2007

SUMMARY OF APPEALS CHAMBER JUDGEMENT FOR RADOSLAV BRĐANIN

Please find below the summary of the judgement today read out by Judge Moloto:

The operative indictment in this case charged Brđanin with a range of crimes committed between April and December of 1992 in Bosnia Herzegovina, and particularly in the Autonomous Region of Krajina (also known as the "ARK"). During this time, Brđanin held various positions in the ARK, including serving as the President of the ARK Crisis Staff and later of its successor body, the ARK War Presidency.

In its Judgement of 1 September 2004, Trial Chamber II convicted Brđanin pursuant to Article 7(1) of the Statute of the Tribunal for:

- persecution as a crime against humanity (Count 3), incorporating torture as a crime against humanity (Count 6), deportation as a crime against humanity (Count 8), and inhumane acts (forcible transfer) as a crime against humanity (Count 9);
- wilful killing as a grave breach of the Geneva Conventions (Count 5);
- torture as a grave breach of the Geneva Conventions (Count 7);
- wanton destruction of cities, towns or villages, or devastation not justified by military necessity as a violation of the laws or customs of war (Count 11);
- and destruction or wilful damage done to institutions dedicated to religion as a violation of the laws or customs of war (Count 12).

The Trial Chamber found Brđanin not guilty of the crimes of:

- genocide (Count 1);
- complicity in genocide (Count 2);
- extermination as a crime against humanity (Count 4);
- and unlawful and wanton extensive destruction and appropriation of property not justified by military necessity as a grave breach of the Geneva Conventions (Count 10).

Trial Chamber II sentenced Brđanin to a single sentence of 32 years' imprisonment. Both the Prosecution and Brđanin appealed the judgement, and we heard oral arguments regarding these appeals on 7 and 8 December 2006. In these oral arguments and in an earlier written brief, we also heard the views of the Association of Defence Counsel with regard to the issue of joint criminal enterprise ("JCE"), which features prominently in the Prosecution appeal.

I will first briefly address the grounds of appeal put forward by Brđanin and then turn to those put forward by the Prosecution.

In his appeal, Brđanin raised well over one hundred and fifty alleged errors. I shall not discuss all of them. Instead, I shall first discuss the Appeals Chamber's general approach to addressing these alleged errors. I will then discuss the Appeals Chamber's overall

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conclusions with regard to Brđanin's challenges to the Trial Chamber's findings as to the Bosnian Serb political agenda and his own role in its implementation. Lastly, I will discuss certain alleged errors that constitute direct challenges against specific convictions.

To begin with, the Appeals Chamber has chosen to dismiss summarily a high number of the errors alleged by Brđanin. The Appeals Chamber has done so where the alleged errors (1) challenge factual findings on which a conviction does not rely; (2) misrepresent the Trial Chamber's factual findings or ignore other relevant factual findings; (3) constitute mere assertions that the Trial Chamber failed to consider relevant evidence; (4) constitute mere assertions that the Trial Chamber could not have reasonably inferred a particular conclusion from circumstantial evidence; (5) are clearly irrelevant or lend support to the challenged finding; (6) challenge the Trial Chamber's reliance or lack of reliance on one piece of evidence without explaining why the finding should not stand on the basis of the remaining evidence; (7) are contrary to common sense; or (8) relate to factual findings whose relevance is unclear. In practice, through these eight categories I just mentioned, the Appeals Chamber has disposed of dozens of Brđanin's alleged errors in a summary way.

Nonetheless, the Appeals Chamber has dealt in a substantial fashion with the many other alleged errors. Some of these alleged errors go to the Trial Chamber's findings with regard to the Bosnian Serb political agenda and Brđanin's role in its implementation. The Appeals Chamber has not found Brđanin's arguments in this respect convincing so as to warrant reversal of his convictions. In particular, the Appeals Chamber leaves undisturbed the Trial Chamber's conclusions about the following: the nature of the Strategic Plan to create a Serbian entity from which most non-Serbs would be permanently removed; the authority of the ARK Crisis Staff over municipal authorities, including the Prijedor municipality; the relationship between the ARK and other bodies, such as the Bosnian Serb Army, the police, and the paramilitary groups; and the contribution of ARK Crisis Staff decisions to the dismissals, disarmament, and resettlement of the non-Serb population. The Appeals Chamber also leaves undisturbed the Trial Chamber's findings that Brđanin had knowledge of, and made a contribution to, the Strategic Plan and that Brđanin knew that crimes were being committed in furtherance of the Strategic Plan.

I now turn to Brđanin's challenges as they relate to specific crimes. I will begin by discussing matters on which the Appeals Chamber reverses the Trial Chamber. There are two such matters.

The first matter relates to Brđanin's conviction for torture in the camps and detention facilities. Brđanin claims that the Trial Chamber erred in finding that he aided and abetted these tortures. The Appeals Chamber agrees that there is insufficient evidence for a reasonable trier of fact to find that Brđanin's conduct had a substantial effect on the commission of torture. The Trial Chamber inferred that Brđanin's failure to intervene to prevent torture in the camps and detention facilities, together with his public attitude, had the effect of encouraging personnel in camps and detention facilities to commit torture. The Trial Chamber reached this conclusion, however, without any evidence that such personnel were even aware of Brđanin's public attitude towards the camps and facilities. The Appeals Chamber accordingly reverses Brđanin's convictions for torture in camps and detention facilities. In particular, the Appeals Chamber overturns Brđanin's conviction for aiding and abetting members of the Bosnian Serb forces in the commission of the following crimes: the torture of a number of Bosnian Muslim civilians in the Kozila camp in early July 1992; the torture of a number of Bosnian Muslim women in the Keraterm camp in July 1992; the torture of a number of Bosnian Muslim women in the Trnopolje camp between May and October 1992; the torture of a number of Bosnian Muslim women in the Omarska camp in June 1992; the torture of a number of Bosnian Muslim men in the SUP building in Teslić; and the torture of a number of Bosnian Muslim and Bosnian Croat civilians in the community building in Pribinić in June 1992.

For the reasons mentioned in the Judgement, the Appeals Chamber does not address whether Brđanin could instead be liable for these acts of torture via a theory of omission proper.

The reversal of this conviction also has a limited effect on part of Brđanin's conviction for persecution.

The Appeals Chamber also, *proprio motu*, reverses the Trial Chamber in another respect. It reverses the conviction entered by the Trial Chamber for wanton destruction of cities, towns or villages, or devastation not justified by military necessity to the extent that this conviction relates to the municipality of Bosanska Krupa. For the other municipalities, however, the Appeals Chamber concludes that the Trial Chamber did not err in finding Brđanin responsible beyond reasonable doubt for aiding and abetting the crimes of (1) wanton destruction of cities, towns, and villages or devastation not justified by military necessity; and (2) destruction or wilful damage done to religious institutions.

I now turn to other challenges raised by Brđanin to his convictions for specific crimes.

Brđanin raises numerous other challenges in relation to his conviction for torture. He claims that the Trial Chamber erred as a matter of law in finding that "severe pain or suffering" is the level required for a finding of torture. The Appeals Chamber rejects this argument and affirms that "severe pain or suffering" is the appropriate level required under customary international law for a finding of torture. Whether this level is met is a fact-specific inquiry to be carried out by a trier of fact. In particular, the Appeals Chamber rejects Brđanin's suggestion that a recent - and subsequently withdrawn - memorandum of the United States Department of Justice has modified such standard under international law. Not only has the memorandum been withdrawn, but in any event the position of only one state could not change customary international law.

Brđanin also claims that certain acts of torture - namely, rapes and sexual assaults - were individual domestic crimes rather than crimes committed in the context of an armed conflict or as part of a widespread and systematic attack. The Appeals Chamber rejects this argument, as the facts of this case clearly support the Trial Chamber's findings otherwise. The Trial Chamber did not reach an unreasonable conclusion when it determined that crimes committed by combatants and by members of forces accompanying them while searching for weapons during an armed conflict, and taking advantage of their position, are crimes committed in the context of an armed conflict. The Trial Chamber also reasonably concluded from the evidence that these crimes occurred as a part of a widespread or systematic attack against the civilian population.

Brđanin raises certain other challenges with regard to his conviction for aiding and abetting acts of torture committed during attacks on towns, villages, and neighborhoods. The Appeals Chamber rejects these challenges. In particular, it leaves undisturbed the Trial Chamber's conclusion that ARK Crisis Staff decisions - including those on disarmament - had a substantial effect on these attacks.

With regard to his conviction for wilful killing, Brđanin argues that this conviction must be overturned because, among other things, the Trial Chamber failed to show that the forces that committed these killings were Serb forces from Bosnia as opposed to, for example, groups from Serbia. In light of the clear definition given to the expression "Bosnian Serb forces" in the Indictment, at trial, and in the Trial Judgement, the Appeals Chamber rejects this argument.

Brđanin also raises certain challenges to his conviction for persecution. The Trial Chamber had found that Brđanin aided and abetted the crime of persecution with respect to the following acts: wilful killing; torture; destruction of property and religious buildings; deportation and forcible transfer; physical violence; rapes; sexual assault; constant humiliation and degradation; denial of the right to freedom of movement; and denial of the right to proper judicial process. The Trial Chamber had also found that Brđanin instigated the crime of persecution with respect to deportation and forcible transfer and ordered the crime of persecution with respect to the denial of the right of employment. The Appeals Chamber dismisses Brđanin's argument that, as a matter of law, certain types of conduct (that is: acts of physical violence; the denial of the right not to be denied employment; and

the denial of the rights of freedom of movement and proper judicial process) fall outside the jurisdiction of the Tribunal. In this regard, the Appeals Chamber recalls that acts underlying persecutions under Article 5(h) of the Statute need not necessarily be considered a crime in international law; rather, they must be of equal gravity to the crimes listed in Article 5 of the Statute, whether considered in isolation or in conjunction with other acts charged. The Appeals Chamber also finds that Brđanin has failed to show why no reasonable trier of fact could have reached the conclusion, beyond reasonable doubt, that Bosnian Muslims and Croats in the ARK were denied the right to proper judicial access on discriminatory grounds.

Brđanin also challenges the Trial Chamber's finding that he was responsible for aiding and abetting and instigating the crimes against humanity of deportation, and forcible transfer in light of the decisions on so-called [and I quote] "voluntary resettlement" [end of quote] issued by the ARK authorities. Seen in the context of the events established beyond reasonable doubt by the evidence, the Appeals Chamber considers that Brđanin has not shown how the Trial Chamber erred in finding that the Decisions on voluntary resettlement and on disarmament prompted the authorities who implemented them to commit the crimes of deportation and forcible transfer.

I turn now to the grounds of appeal put forward by the Prosecution. The Prosecution initially put forth five grounds of appeal. One of them was subsequently withdrawn and is therefore disregarded in the Judgement.

Of the remaining four grounds, the first two involve questions of law relating to the doctrine of joint criminal enterprise, also known as JCE. In Ground 1 of its Appeal, the Prosecution challenged the Trial Chamber's implicit finding that the principal perpetrators of a crime - that is, the individuals who actually carry out the *actus reus* of the crime - must be members of the JCE for any convictions via JCE to attach with regard to those crimes. In Ground 2 of its Appeal, the Prosecution challenges two legal holdings of the Trial Chamber: first, the holding that there must be an agreement or understanding between the accused and the principal perpetrator for the accused to be convicted via JCE; and, second, that JCE is applicable only to enterprises smaller than the one alleged in this case.

After consideration of post-World-War-II jurisprudence and the Tribunal's own jurisprudence, the Appeals Chamber grants Grounds 1 and 2 of the Prosecution's Appeal.

Briefly, as to Ground 1, the Appeals Chamber finds that a member of a JCE can be held responsible for crimes committed by non-members of the enterprise, provided that the crime can be imputed to one member of the joint criminal enterprise and that this member, when using the non-member principal perpetrator, acted in accordance with the common plan.

As to Ground 2, the Appeals Chamber finds that the Trial Chamber erred in holding that the Prosecution must prove that the accused had a specific agreement with the principal perpetrator to commit a particular crime. Such a showing of a specific agreement is unnecessary in view of the common plan necessarily shared by all JCE members. Nonetheless, the Prosecution must of course prove other elements, including the fact that the accused shared the common criminal purpose and that the crime in question forms part of that common criminal purpose. Also with regard to Ground 2, the Appeals Chamber finds that the Trial Chamber erred in finding that the doctrine of JCE applies only to relatively small-scale cases. Prior cases provide clear authority for JCEs on scales much larger than one municipality.

The Appeals Chamber thus grants Grounds 1 and 2 of the Prosecution's appeal with regard to the questions of law presented therein.

A further question is how this should affect the convictions in the case at hand. In this case, the Prosecution submitted that it would be unfair to enter convictions for JCE against Brđanin based on the Prosecution prevailing with regard to Ground 1 of its appeal. This is because, at trial, the parties shared an understanding that the principal perpetrators must

belong to the JCE for Brđanin to be convicted via JCE. In light of this understanding *inter partes*, it would be unfair to enter new convictions against Brđanin on this basis, as he could reasonably have thought at trial that he could defeat the Prosecution's case by showing that the principal perpetrators were not JCE members. Thus, he might have foregone other lines of defence on this assumption.

The Appeals Chamber finds that, in view of this, new convictions can be entered against Brđanin in the specific and peculiar circumstances of this case only if the principal perpetrators were found to be JCE members. The Appeals Chamber concludes that the Trial Chamber did not find that all the principal perpetrators were JCE members. Nor did the Trial Chamber specify *which* principal perpetrators were JCE members. Accordingly, in light of the understanding *inter partes*, the Appeals Chamber enters no new convictions under the JCE doctrine.

I should note that Judge Shahabuddeen takes a different view from the majority in regard to certain aspects of the Prosecution's appeal on JCE, and he has filed a partially dissenting opinion to that effect. I myself have also filed a brief separate opinion outlining my own views with relation to a particular aspect of the Prosecution's appeal. Judge Van Den Wyngaert has appended a declaration on this issue.

In its third ground of appeal, the Prosecution challenges Brđanin's acquittal for aiding and abetting wilful killings in camps and detention facilities and for his acquittal in relation to certain murders committed by the Miće paramilitary group in Teslić municipality. The Appeals Chamber dismisses this ground of Appeal. The Prosecution's argument that Brđanin should be convicted for the killings in the camps and detention facilities relies on the Trial Chamber's reasoning in convicting Brđanin for aiding and abetting torture in the camps and detention facilities. Since the Appeals Chamber has however concluded that the Trial Chamber erred in finding Brđanin responsible for torture in the camps and detention facilities, the Prosecution's arguments here cannot succeed. With regard to Brđanin's acquittal in relation to the murders committed by the Miće paramilitary group, the Appeals Chamber concludes that the Prosecution failed to show that no reasonable fact-finder could have reached a verdict of acquittal.

In Ground 4 of its Appeal, the Prosecution challenges Brđanin's acquittal with regard to the charge of aiding and abetting the crime of extermination. The Appeal Chamber dismisses this Ground, too. The Appeals Chamber does agree with the Prosecution that the Trial Chamber was unreasonable in failing to find that the principal perpetrators at the locations of four specific large-scale killings had the requisite *mens rea* for the crime of extermination. Nonetheless, the Appeals Chamber sees no adequate basis for disturbing the Trial Chamber's finding that Brđanin himself did not know that extermination would be committed in the ARK.

Finally, the parties make no meritorious arguments with regard to sentencing that are independent of their arguments with regard to the convictions and the acquittals. Accordingly, I will not discuss issues specific to sentencing further.

Since the Appeals Chamber has reversed certain convictions, it has reduced the sentence given to Brđanin. However, in light of the relative gravity of the crimes for which Brđanin's convictions have been overturned and that of the crimes for which Brđanin's convictions have been upheld, as well as the relevant aggravating and mitigating circumstances, this reduction has been quite limited.

I will now read the disposition of the Appeals Chamber Judgement. Mr. Brđanin, will you please stand?

For the foregoing reasons, **THE APPEALS CHAMBER**

PURSUANT TO Article 25 of the Statute and Rules 117 and 118 of the Rules

NOTING the respective written submissions of the parties and the arguments they presented at the hearing of 7 and 8 December 2006;

SITTING in open session;

ALLOWS Brđanin's appeal in part, and

REVERSES Brđanin's conviction under Count 3 (persecution as a crime against humanity), insofar as it incorporates torture as a crime against humanity committed in camps and detention facilities (Count 6);

REVERSES Brđanin's conviction under Count 7 (torture as a grave breach of the Geneva Conventions of 1949) with respect to torture committed in camps and detention facilities only;

REVERSES Brđanin's conviction under Count 11 (wanton destruction of cities, towns or villages, or devastation not justified by military necessity as a violation of the laws or customs of war) with respect to the municipality of Bosanska Krupa only;

DISMISSES Brđanin's remaining grounds of appeal;

ALLOWS Ground 1, Judge Shahabuddeen dissenting in part, and Ground 2 of the Prosecution's appeal but, for the reasons given in the Judgement, does not modify Brđanin's convictions in relation thereto;

DISMISSES Grounds 3 and 4 of the Prosecution's appeal;

NOTES that Ground 5 of the Prosecution's appeal was withdrawn;

IMPOSES a new sentence of 30 years of imprisonment, subject to credit being given under Rule 101 (C) of the Rules for the period Brđanin has spent in detention;

ORDERS that, in accordance with Rule 103(C) and Rule 107 of the Rules, Brđanin is to remain in the custody of the Tribunal pending the finalisation of arrangements for his transfer to the State in which his sentence will be served.

Judge Christine Van Den Wyngaert appends a declaration.

Judge Theodor Meron appends a separate opinion.

Judge Mohamed Shahabuddeen appends a partially dissenting opinion.

Mr. Brđanin, you may be seated. Registrar, would you please distribute copies of the judgement to the parties.

Thank you. This concludes the hearing. The Appeals Chamber stands adjourned.

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