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ILLEGAL CONSTRUCTION OF THE JOINT CRIMINAL ENTERPRISE

S u m m a r y

This construction, which is not mentioned by a single word in the Statute of the Hague Tribunal (nor in the Rome Statute of the International Criminal Court), exists only in the specific decisions of the Hague Tribunal, which constitutes its illegal character. The tragedy is even worse if we know, and as the time has proven it, that this construction was used in the Tribunal only against the accused Serbian leaders (political and military). So, the time and individual, i. e. so far adjudicated cases showed that it was created in order to judge (against) the persons of the Serbian nationality who were appointed to the leadership positions in the Republic of Srpska, Republic of Srpska Krajina and Republic of Serbia during the war.

Key words: joint criminal enterprise, Hague Tribunal, legal constructions, legality, illegality.

1. Introductory part

There are many illegal things related to the Hague Tribunal, from its establishment to the numerous decisions brought by this creation. I should remind you that this Tribunal was established by violating the United Nations Charter, since the Security Council left the scope of its competencies prescribed by the aforementioned Charter when it brought the Resolution number 827 of 25th May 1993 (on the basis of which the Hague Tribunal was established and the Statute of the Tribunal adopted). To understand this, I will also remind you of the fact that there was no provision of the United Nations Charter which allowed the Security Council to establish any international institution (especially not the international judicial institution), that would impose legally binding obligations to any country, including the United Nations Members. Neither was the Security Council allocated such right by the Chapter VII of the UN Charter. Namely, Article 39 of the Charter prescribed that the Security Council should determine the existence of threats to world peace, violation of that peace or existence of aggression act. In regard to this, the Security Council should, according to the same provision, provide its recommendations and decide on the measures to be taken in order to maintain or restore the peace. However, the latter *should be done in accordance with Articles 41 and 42* of the UN Charter, which are the Articles that determine two measures to be taken, the first of

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which do not include the use of force, while the second type of measures involves the use of force.

The first type of measures that can be imposed by the Security Council has been prescribed in the Article 41 of the Charter, and they may include *complete or partial interruption of economic relations; complete or partial interruption of rail, sea, air, postal, telegraphic, radio and other means of communication; and the severance of diplomatic relations.* Should the Security Council consider the provided measures would be inadequate or have proved to be inadequate, it is authorized, on the basis of Article 42 of the UN Charter, to take such action by air, sea or land forces as may be necessary to maintain or restore international peace or security. Such action may include *demonstrations, blockade and other operations by air, sea or land forces* of Members of the United Nations.

As we can see, Articles 39, 41 and 42 of the UN Charter do not allocate the right, either individually or in mutual relation (nor do other provisions of the Charter) to the Security Council to establish any institution, especially not the international judicial institution. Why is this such? The answer should be found in one of the principles of the public international law, contained in Article 2, Item 1) of the United Nations Charter, according to which this organization is based on *the principle of the sovereign equality of all its Members.* Thus, the principle of equality of all UN Members provides that all UN Members must participate in decision-making in regard to whether an international institution (including the international judicial institution) will be established. In the UN system this is legally possible only through its General Assembly, consisted of all Members of the United Nations. Unlike the General Assembly, the Security Council is the UN body consisting of 15 members, five of which are permanent (Great Britain, China, Russia, USA and France) and 10 non-permanent Members (at this moment-2016, these are: Angola, Venezuela, Egypt, Japan, Malaysia, New Zealand, Senegal, Spain, Ukraine and Uruguay).

Therefore, when the Resolution number 827 was adopted in 1993, on the basis of which the Hague Tribunal was established, only a few countries Members of the United Nations, and Members of the Security Council at the time, participated in the decision-making on this subject. Thus this organ fell out of the scope of its competencies allocated to it by the UN Charter, which represents one of the serious violations of the UN Charter. The next violation can be seen in the fact that in this way the principle of equality of all Members of the organization contained (as the supreme legal obligation) within the aforementioned Article 2, Item 1) of the UN Charter, was blatantly violated.

Previous arguments show that the roots of the Hague Tribunal are based on illegality and only illegality, which later provided one of the illegalities which is the subject of this paper. What is this about? It is about the illegal construction of the so-called Joint Criminal Enterprise, emerged in the practice of the Hague Tribunal, not mentioned by a single word in the Statute of the Tribunal adopted in an illegal way by the Security Council of the United Nations. It is characteristic for the term of legal construction to be reached through the methods of abstraction and induction. First, the thing that the lower legal terms have in common (essence) is taken from them through the abstraction method, and then this material is used with the induction method to obtain a new (higher) legal term. As an example we can take the legal construction of *legal affairs,* which is obtained in a way to take from numerous contracts, as lower legal terms, what is essential for each of them, and in the end it results in the legal construction called *legal affairs.* However, to come to this or any other legal construction that pleads to be legally binding, requires the process in which only legally authorized creator can take place. In other words, it is not possible, and legally acceptable, to create a legal construction by the subject that is not authorized for this kind of work. Or more precisely, in the field of the internal law of the country legal constructions may be created in the constitutions and laws, after which such constructions can only be applied in the practice

by domestic courts. Unlike the domestic legal system, in the field of international law these constructions may be created by the international agreements, but also through common law. In the latter case, it is not enough to have the court, which refers to the custom, only indicate its existence, but it must prove such statement with examples of *common practice* previously accepted by the significant number of countries. In relation to this the theory of law set the rules long time ago, on the basis of which the (non)existence of specific custom is determined. So, to conclude that the certain custom exists, it is necessary to determine the following:

1) that the custom existed continuously for a long time;
2) that it existed more through the joint agreement than by the use of force;
3) that the custom is in conformity with other customs;
4) that the custom contains certainty (so-called *lex certa*);
5) that it has been accepted as legally binding (so-called *opinio iuris sive necessitatis*);
6) that the custom must be of significant importance;
7) that it has to be *reasonable* custom.

Only if the given conditions are met, that is, if there are examples that meet these conditions, a conclusion on the existence of a certain custom in the international law can be made. Still, as there are no such examples, which is why the Hague Tribunal could not have provided them in its judgments, it is obvious that, when it comes to this construction, there was no such common practice accepted by the significant number of countries prior to the establishment of the Hague Tribunal. If we add to this the fact that the construction of the joint criminal enterprise has not existed in any international agreement, or in the Statute of the Hague Tribunal (nor has it been recognized by the later adopted Rome Statute of the International Criminal Court), then the conclusion of its illegality is imposed by itself.

The importance of this construction is that based on it (better to say only based on it) it has been enabled to turn each of the cases against the individually specified persons of the Serbian nationality, and other persons that served in the armed forces of the Republic of Srpska during the past war, into the judgment against the Republic of Srpska before the Hague Tribunal. Then the Court of Bosnia and Herzegovina also adopted the construction, which will be shown through the examples provided below.

Considering the specific subject of this paper, it will be divided into three parts. In the first part I present the most recent example from the judgment against Radovan Karadzic of the Trial Chamber of the Hague Tribunal, while the second part of the paper is dedicated to the examples from the practice of the Court of BiH. The last part of the paper contains the concluding remarks.

2. Practice of the Hague Tribunal

In regard to the case against Dr Radovan Karadzic it is necessary to remind you of the Count 14 of the Third Amended Indictment of the Prosecutor's Office in the Hague (number IT-95-5/18-PT of 27th February 2009) by which Dr Radovan Karadzic was indicted in the following way (my italics):

„14. Radovan Karadzic significantly contributed to achieving *the objective of the permanent removal of Bosnian Muslims and Bosnian Croats from Bosnian Serb-claimed territory through the commission of crimes in one or more of the following ways*:

(a) formulating, promoting, and/or encouraging the development and implementation of SDS and Bosnian Serb governmental policies intended to advance the objective of the joint criminal enterprise, and/or to participate in that;

(b) *participating in the establishment,* supporting and/or *maintaining Bosnian Serb* Political and *Governmental Organs, and of the VRS, the TO, the MUP,* and Bosnian Serb paramilitary forces and volunteer units (hereinafter: Bosnian Serb Forces), *through which the objective of the joint criminal enterprise was implemented…"*

Therefore, Dr Karadzic was charged with participating in the establishment and maintenance of governmental organs, i.e. the Republic of Srpska, and that he used those organs, which means the Republic of Srpska, to achieve the objective of the alleged joint criminal enterprise. This is, whether we admit it or not, the allegation not only against Dr Karadzic but also against the Republic of Srpska. Such allegation was accepted by the Trial Chamber in the present judgment of 24th March 2016, which is proved here by given relevant paragraphs of the judgment. So, the Paragraph 3477 (p. 1311 of the judgment) states that the Trial Chamber found Dr Karadzic to have key role in formulating policies and actively promoting the *creation of the parallel governmental, military, police* and political structures and that, as indicated in the judgment, "*these parallel structures were designed* to support the existence of a separate Bosnian Serb state *and allow for the furtherance of the objective of the general-Overarching* (meaning the top, the highest – my remark) *joint criminal enterprise*", and the alleged plan was aimed at "permanent removal of the Bosnian Muslims and Croats from the BiH territory that Bosnian Serbs sought for themselves" – Paragraph 2627 of the judgment. The original English version of this part of the judgment reads (my italics in the text):

"3477. The Chamber also found that *the Accused was pivotal* in making careful preparations to allow the Bosnian Serbs to respond to any move towards independence by BiH with the creation of its own parallel structures and take-over of power at a municipal level.

The *Accused's involvement in this regard included formulating policies and actively promoting the creation of the parallel governmental, military, police and political structures* that were used to gain or retain control of Bosnian Serb claimed territory. *These parallel structures were designed to* support the existence of a separate Bosnian Serb state and *allow for the furtherance of the objective of the Overarching JCE*."

Then the Paragraph 3507 (p. 1323 of the judgment) states about the governmental organs in the local communities (municipalities) of the Republic of Srpska that *their Crisis Staffs, along with the members of the Territorial Defence, the Ministry of Internal Affairs of the Republic of Srpska and the Republic of Srpska Army, committed crimes to expand the joint plan within the objective of the general-Overarching (meaning the top, the highest) joint criminal enterprise* during the take-over of the government in municipalities. This part of the judgment in its original English version reads (my italics in the text):

"3507. The Chamber found that *the Crisis Staffs*, paramilitaries, *and members of the TO, MUP, and VRS carried out crimes in furtherance of the common plan of the Overarching JCE during the take-over of the Municipalities*."

In this way, the Trial Chamber, in a legally unfounded manner, presented its view in the judgment, according to which the state organs of the Republic of Srpska (the National Assembly, the Government, the Ministry of Internal Affairs and the Army of the Republic of

Srpska) were criminal, considering they were described as "*These parallel structures were designed to ... allow for the furtherance of the objective of the Overarching JCE* ", i.e. that, as parallel structures, they were established to promote *goals of the objective of the general (meaning the top, the highest) joint criminal enterprise,* which is then repeated for the governmental organs (Crisis Staffs) at the local level.

Still, as there are no proofs that Dr Radovan Karadzic committed any of the crimes (the judgment does not contain proofs that he or any other member of the national leadership of the Republic of Srpska committed, or participated in any way in the performance of the murders or other crimes indicated in the indictment), the Trial Chamber applies the unlawful construction of the joint criminal enterprise. This construction, which has not been mentioned in the Statute of the Hague Tribunal by a single word (nor in the Rome Statute of the International Criminal Court), exists only in the individual decisions of the Hague Tribunal, which constitutes its unlawfulness. The tragedy is even larger since, as time has proved it, the construction was used in the Tribunal only against accused Serbian leaders (political and military). Therefore, the time and specific, adjudicated cases have shown that it has been created to judge the persons of Serbian nationality who held the leading positions in the Republic of Srpska, Republic of Srpska Krajina and Republic of Serbia.

The Trial Chamber in the Paragraph 560 (p. 212 of the judgment) states that this construction is recognized by the jurisprudence of the Tribunal. What does not fit the truth here are the words that the joint criminal enterprise is *recognized* by the jurisprudence of the Hague Tribunal, since it is a construction *created* by the Hague Tribunal. In order to understand this, below I am going to present the essence of the manner in which this construction has been made. Significantly important for this issue is the judgment in the case *The Prosecutor v Dusko Tadic*, in particular the judgment of the Appeals Chamber in this case of 15th July 1999. Thus, the Paragraph 193 of this judgment says how it can be seen:

„193. …. that the international criminal rules on common purpose are substantially rooted in, and to a large extent reflect, the position taken by many States of the world in their national legal systems."

However, when you need to provide examples for this statement, the Appeals Chamber refers to cases with which the Tribunal's construction of the joint criminal enterprise is not related in any way. So, the Paragraph 197 of this judgment (regarding the so-called first category of the criminal enterprise) states:

„197. With regard to this category, reference can be made to the *Georg Otto Sandrock et al* case (also known as the *Almelo Trial*). There a British court found that three Germans who had killed a British prisoner were guilty under the doctrine of „common enterprise". It was clear that they all had had the intention of killing the British soldier, although each of them played different role."

As we can see, we have a case of three officers who participated in the murder of a captured soldier. You simply must ask yourself how related this case is to the alleged joint criminal enterprise which, for example, Dr Radovan Karadzic is charged with. Namely, it is not clear how the case *Almelo* can serve as any foundation for the construction of the joint criminal enterprise, since the Tribunal uses this construction to primarily prove that the establishment of the Republic of Srpska was not that, but the alleged joint criminal enterprise of the Republic of Srpska leadership aimed at expelling Muslims and Croats from the territory of the Republic of Srpska, due to which all the murders, rapes and other unlawful conduct have been considered the alleged consequence of this enterprise. So, it is obvious that one event from the case *Almelo*, in which three soldiers participated in the murder of the captured

enemy soldier, is incoherently (mis)used in order to justify, at all costs, the creation of this unlawful construction.

The Appeals Chamber "reasoning" is made in the same way in the Paragraph 199 of its judgment of 15th July 1999. Here the Chamber refers to the judgment of 24th August 1948 in the case *Ponzano (Trial held in Hamburg for the war crimes committed during the World War II),* or more precisely, to the approach of the legal counsel of the military court in this case, in regard to which it emphasizes:

„199. …To be concerned in the commission of a criminal offence does not only mean that you are the person who in fact inflicted the fatal injury and directly caused death, be it by shooting or by any other violent means; it also means an indirect degree of participation… In other words, he must be the cog in the wheel of events leading up to the result which in fact occurred."

When this "discovery" is applied to the joint criminal enterprise constructed and applied against Serbs accused in the Hague Tribunal, we must wonder how Dr Radovan Karadzic as the President of the Republic of Srpska, participating in its establishment with the rest of the Srpska leadership and members of the National Assembly, Government of the Republic of Srpska and the General Staff of the Army of the Republic of Srpska, could have been some cog in the wheel of a certain event that, for example, occurred after the Republic of Srpska had been created by the will of its people and for the defence of the same people, during which event a local individual (or more of them) raped or killed a person for being of this or that nationality. It is clear, of course, that this state-political organization of one nation does not have, nor can have, or be the reason for this type of criminal activity. Therefore, the previously provided "arguments" cannot be considered reasonable, just like the reference of the Appeals Chamber (Paragraph 200 of its judgment) to the *Einsatzgruppen* case, considering that the Republic of Srpska was established for the defence of its people (in biological and state-legal sense), and not to perform any, much less large-scale killings, based on its establishment.

And when it comes to the so-called third category of this construction, the Appeals Chamber in the case against DuskoTadic refers to the examples from the court practice which could not have been used, by any means, as the foundation for the construction of the joint criminal enterprise. In regard to this the Appeals Chamber referred to the case *Essen West* in which the trial for the murder of three British war prisoners, lynched by a raged German mob in the city of West Essen, took place before the British military court on 13th December 1944. Seven persons were accused (two military officers and five civilians), including the captain Heyer. In regard to his responsibility for killing the prisoners, the Paragraph 207 of the Appeals Chamber judgment reads the following:

„207. Among them there was also the captain Heyer who surrendered the three British airmen to the German soldier who should have escorted them to a *Luftwaffe* unit for interrogation. While the escort with the prisoners were leaving, the captain ordered to the escort not to interfere if the German civilians should molest the prisoners, adding that they should be shot or they would be shot. He gave the order from the stairs of the barracks, out loud, so the gathered people could have heard that and known what would happen. According to the summary of the United Nations Commission for the war crimes, while the prisoners were being taken through one of the main streets of Essen, the crowd around them was becoming bigger and started hitting them and throwing sticks and stones at them. One unidentified German corporal even fired a gun at one of the airmen and wounded him in the head. When they reached the bridge, the airmen were pushed over the fence. One of them died as a result of the fall. The others survived the fall but they were killed by the shots fired from the bridge and the crowd who kicked them to death."

In this case there is *a direct contact* between a German captain and his soldiers, to whom he personally issued orders. So between this event and the so-called third category of the joint criminal enterprise there is no any meaningful relation. This is due to the fact that in case of this category the accused person is charged with a criminal offense (e.g. a murder) performed by a third party (often unidentified) *whom the accused is not related to in any way (as is the relation between the German captain from the previous example and his soldiers),* but the accused is charged with this offense since it was considered to be the alleged natural and foreseeable consequence for him. Applied to the case of Dr Radovan Karadzic, or the case of Vojislav Brdjanin whose case will be presented below, they are charged with the murders committed by individuals of whom existence they were not aware at all and which were far from the place of murders for dozens or hundreds of kilometers at the time of their execution. Such accusations are imputed to them for, first, setting up the thesis that Dr Karadzic (or Brdjanin) designed the alleged joint criminal enterprise of establishing the Republic of Srpska which supposedly was aimed at expelling Muslims from the certain area (the so-called first category of this construction), and then they are imputed to be responsible for a murder committed by an individual whom they do not even know, since that murder is considered a natural and foreseeable consequence of their activity of establishing the Republic of Srpska (which is the essence of the third category of the joint criminal enterprise). This essence, it is obvious, do not correspond to the *Essen West* case, in regard to which it must be said again that the establishment of the Republic of Srpska as a form of the state-political organization and defence of one nation does not have, nor can have or be the reason for such criminal acts.

In addition to this, there is one more, very simple, reason for which the arguments of the Appeals Chamber in the judgment against Dusko Tadic are meaningless, and based on which the Chamber tried to show that the construction of the joint criminal enterprise existed before the establishment of the Tribunal. In fact, none of the cases to which the Chamber referred contains the notions, terms or classification as designed by the Tribunal in order to establish this unlawful construction. Such constructions cannot be found in the Statute of the Hague Tribunal either, nor in the Rome Statute of the International Criminal Court, or other international treaties. As a result, the arguments (mis)used by the Appeals Chamber in Paragraphs 221 and 222 of its judgment against Dusko Tadic of 15th July 1999 should be rejected.

Therefore, the only correct conclusion is that the construction of the joint criminal enterprise was designed in an unlawful way, by the arbitrary power of the prosecutor and judges of the Hague Tribunal, in which way its three forms were also created.

According to the first, basic form this construction would include the situations in which all participants, acting towards the same goal, have the same intention of achieving this goal. The second form belongs to the organized systems of ill-treatment (for example, in jails). Reasons I previously presented indicate, individually and in mutual relation, that Dr Karadzic cannot be held responsible for any of the two mentioned forms of this construction. To explain it further, I will use the example from the judgment of the Appeals Chamber in the case against Radoslav Brdjanin (the Appeals Chamber judgment of 3rd April 2007) after which I will relate it to the indictment and judgment against Dr Radovan Karadzic. So, the judgment of the Appeals Chamber against Radoslav Brdjanin indicates the following (my italics):

"430. The other requirements for a conviction under the JCE doctrine are no less stringent. A trier of fact must find beyond reasonable doubt that a plurality of persons shared the common criminal purpose; that the accused made a contribution to this common criminal purpose; and that the commonly intended crime (or, for convictions under the third category of JCE, the foreseeable crime) did in fact take place. *Where the principal perpetrator is not shown to belong to the JCE, the trier of*

fact must further establish that the crime can be imputed to at least one member of the joint criminal enterprise, and that this member – when using the principal perpetrator – acted in accordance with the common plan. In establishing these elements, the Chamber must, among other things: identify the plurality of persons belonging to the JCE (even if it is not necessary to identify by name each of the persons involved); *specify the common criminal purpose* in terms of both the criminal goal intended and its scope (for example, the temporal and geographic limits of this goal, *and the general identities of the intended victims*); *make a finding that this criminal purpose is not merely the same, but also common to all of the persons acting together within a joint criminal enterprise;* and characterize the contribution of the accused in this common plan. On this last point, *the Appeals Chamber observes that, although the contribution need not be necessary or substantial, it should at least be a significant contribution to the crimes,* for which the accused is to be found responsible.

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

The quoted part of the judgment represents the attitude of the Hague Tribunal not only in the case against Radoslav Brdjanin, but also in other cases against the accused Serbs. The above quote contains numerous arbitrary undermining the legal certainty as one of the fundamental values of every legal system. Namely, the Appeals Chamber says that unless proved that the *main perpetrator* (e.g. local criminal who murdered or raped a person of other nationality during the war) was part of the joint criminal enterprise, the court must further determine that the crime can be *assigned to* at least one *member* of the joint criminal enterprise and that this participant, using the main perpetrator, acted in accordance with the common plan. According to the Tribunal, in such case the accused (this time Dr Karadzic) will be held responsible for a crime committed by the main perpetrator although he was not part of the joint criminal enterprise, if the crime of the *main perpetrator* instead to the accused may be assigned to *any other member (participant)* of the criminal enterprise. This is enough for the Tribunal, regardless of the fact that the other member of the alleged criminal enterprise before the commission of the crime, for example, had no contact with the accused (Dr Karadzic) based on which the accused could have known that the crime was about to be committed. To assign the committed crime to the accused in this case it is enough to have the accused and the other person (*participant*) be the members of the joint criminal enterprise, which is the unacceptable arbitrariness. This enterprise, as it follows from the aforementioend judgment, must have *defined joint criminal objective.* This objective was primarily defined by the Prosecutor's Office in its indictments, as the objective of permanent removal of specific population from certain territory, after which this was simply taken over by the Trial Chambers in their judgments. In the practice of the Tribunal it meant that the political leadership of the Serbian people, altough democratically elected and legitimate, did not establish the Republic of Srpska with its decisions on the establishment, but such decisions (in the opinion of the Tribunal) represented joint criminal enterprise whose allegedly precisely defined objective was to permanently remove Muslims and Croats from the territory of the Republic of Srpska.

The above mentioned attitudes are applied, as indicated, in all cases of the Hague Tribunal against the accused Serbs. This is how it is done by the Trial Chamber in the case against Dr Radovan Karadzic. First, Paragraph 560 of the judgment indicates three categories

of the so-called joint criminal enterprise. The first category, as explained by the Trial Chamber, encompasses the situations in which all participants, acting pursuant to a common (criminal) purpose, posses the same criminal intention to effectuate that purpose. The second category, as the Trial Chamber further presented, pertains to the organized systems of ill-treatment, while the third, extended form, implies the liability of the participants of the joint criminal enterprise for the crime that overcomes the framework of the joint criminal purpose, but which is *the natural and foreseeable consequence* of achieving the common purpose.

However, in saying this, the Trial Chamber did not indicate, nor could have indicated, a single international treaty (convention) that prescribed something similar. It also did not provide, nor could have provided, the existence of any custom that would confirm the given "reasoning", which is not surprising since such custom (or the international treaty) does not exist at all. As there is no existence of the above mentioned, the Trial Chamber refers only to the decisions made in the previous cases of the Tribunal, starting with the decision in the case against *Dusko Tadic,* followed by the cases against *Brdjanin, Kvocka* and *Vasiljevic.*

Then Paragraph 563 of the judgment states that each of the three categories of the joint criminal enterprise requires the existence of the common criminal plan (purpose), provided that the Hague Tribunal reserved to itself the right to (first through its Prosecution, and then through its Court Councils) determine what the common criminal purpose in each case was, in terms of its objective and scope (timely and spatial).

After such preparatory works, the Trial Chamber make some space to use the Paragraph 2627 of the judgment and state that Dr Karadzic participated in the alleged overarching joint criminal enterprise aimed at permanent removal of Muslims and Croats from the territory of BiH that Serbs wanted for themselves. Paragraph 3447 of the judgment reads:

„...the Chamber finds beyond reasonable doubt that between October 1991 and 30th November 1995 there existed a common (criminal) plan to permanently remove Bosnian Muslims and Bosnian Croats from Bosnian Serb claimed territory, through the commission of individual crimes.."

Paragraph 3452 of the judgment states the following:

„...the Chamber finds that together with the Accused, Momcilo Krajisnik, Nikola Koljevic and Biljana Plavsic shared the intent to effect the common plan to permanently remove Bosnian Muslims and Bosnian Croats from Bosnian Serb claimed territory, and through their positions in the Bosnian Serb leadership and involvement throughout the Municipalities, they contributed to the execution of the common plan from October 1991 to 30th November 1995."

It is true that the Paragraph 3466 indicates that the alleged overarching joint criminal enterprise did not involve the commission of murders and similar crimes, but after that, based on the so-called third category of the joint criminal enterprise, Dr Karadzic was found guilty of those crimes as well, with the "reasoning" that for him they were natural and foreseeable consequence of the overarching joint criminal enterprise. To say it in simple words, the Trial Chamber found Dr Karadzic guilty of each individual murder or ill-treatment case provided by the indictment, because they (as seen by the Chamber, and supported by the unlawful construction of the joint criminal enterprise) were natural and foreseeable consequence for him.

How arbitrary this was, is the best confirmed by the practice of the Tribunal in accordance to which everything done, due to the worst human impulses (e.g. hatred, revenge, greed) after that (after the establishment of the Republic of Srpska) by the local criminals in

the territory of the Republic of Srpska (through murdering, physical harming, raping or otherwise) represented a part of the alleged joint criminal enterprise, for which Dr Karadzic is held to be responsible and due to which the organs of the Republic of Srpska (the National Assembly, the Government, the Ministry of Internal Affairs and the Army of the Republic of Srpska) are allegedly criminal, considering that they were characterized in the judgment as parallel structures established to promote *the objectives of the overarching (meaning top, the highest) joint criminal enterprise,* after which the same is repeated with the governmental organs (Crisis staffs) at the local level.

In the case of the indictment against Dr Radovan Karadzic it means that, according to the Tribunal, he is to be held responsible for murdering or raping each civilian in every of the municipalities listed in the indictment just because prior to that, Count 14 of the indictment, stated that Dr Karadzic through participating in the establishment of political and state organs of the Republic of Srpska allegedly *significantly contributed to achieving the goal of permanent removal of the Muslims and Croats from the territory of the Republic of Srpska by committing criminal offenses.* In other words, the participation of Dr Radovan Karadzic, and that includes participation of other members of the state leadership, in the establishment of the Republic of Srpska, does not represent that, but the alleged joint criminal enterprise with the specified purpose whose achievement implied the commitment of each of individual crimes listed in the indictment. This is such an example of the arbitrariness expressed primarily by the Prosecutor's Office, and then by the Trial Chambers, due to which each of them should be held responsible for the abuse of their official positions, since there is no single word about any of this in the Statute of the Hague Tribunal or the international customary law.

Since there has always been, and always will be, individuals prone to crime commitment (such as murders, rapes and similar, aimed against the people of other nationality), but who may not be related to the governmental bodies in any way, the Tribunal arbitrarily designed for such cases the so-called third form of the joint criminal enterprise. This type refers to the indirect executors of the crimes who do not belong to the alleged joint criminal enterprise and who commit murders, rapes and other crimes against specific population. According to the practice of the Tribunal even then there is a responsibility of other participants of the alleged joint criminal enterprise. The only condition is that the murder or some other crime *for them represented a natural and foreseeable consequence of effectuating their common purpose,* and whether something was foreseeable or not will, of course, be decided by the Hague Tribunal.

It is understood that in all cases against the Serbs accused in the Tribunal, including the case against Dr Radovan Karadzic, a single crime for them always represented a natural and foreseeable consequence, since that is simply the opinion of the Prosecutor's Office and the Trial Chambers. The first thing that is immediately noticeable is the legal uncertainty of such a construction, because there are no, nor can there be, reliable marks on the basis of which it could be possible to predict in advance if something is a natural and foreseeable consequence of someone's behaviour (to predict, for example, that in one of the municipalities a local criminal would kill or rape someone just because that person is of different nationality). However, something like that has been created in the jurisprudence of the Tribunal and the decision regarding it depends only on the assessment, or better to say the will of the judges. It is not hard to conclude, which has been proved by the Tribunal practice so far, that the third form of liability was applied exclusively in the cases of the accused Serbian officials (case of the first-instance judgment of the Hague Tribunal against Srdjan Praljak and other accused persons of Croatian nationality is an *exception* that only confirms this rule).

So, the same happened in the case of the judgment against Dr Radovan Karadzic. In that case, to say it in plain language, he was, in an illegally groundless manner, found to be

guilty of all the cases of the criminal individuals and groups on the Serbian side who, under the influence of the hurricanes of tethered and compressed hatreds, committed murders, rapes and other misdeeds against the Muslims and Croats during the war. "The reason" for such a conviction of Dr Karadzic, in the opinion of the Trial Chamber (Paragraph 3521 of the judgment), is that the mentioned misdeeds according to the judges were *foreseeable (???)* for Dr Karadzic. However, the judgment does not provide any valid explanation regarding how Dr Karadzic could have foreseen what some local criminal would do, which is not surprising since the irrational constructions (such as the construction of the joint criminal enterprise) cannot be explained. It is obvious that this is not only legally groundless, but highly irrational and arbitrary construction.

What kind of absurd we are here talking about, is probably the best confirmed by what has recently happened in the practice of the Supreme Court of the United Kingdom. Namely, the third form of the construction of the joint criminal enterprise as a form of liability of the so-called secondary participants in the crimes was expanded (by court practice rather than the law) in 1984 by the decision of the British Council of State. The form existed until 18th February 2016, when it was put out of force by the decision of the Supreme Court of the United Kingdom in the case *Ruddock v The Queen* (the decision is available at *https://www.supremecourt.uk/cases/docs/uksc-2015-0015-judgment.pdf*). In this decision the Supreme Court determined that (for all the past decades) the decision brought in 1984 which introduced the mentioned form of a joint criminal enterprise was wrong. Practically it means that the criminal law regarding this issue is returned to where it should be, i.e. to the requirement that, in cases like this, for the liability of accomplices the same subjective element must be sought as for the main perpetrator. More simply put, and applied to the example of a murder we mentioned previously, accomplices cannot be found guilty of a murder committed by another person unless that act was encompassed by the accomplices' premeditation.

Therefore, this is the essence of this abitrary construction that makes the basis of every count of the indictment against Dr Radovan Karadzic. It was used, as proved previously, to sentence not only him but the Republic of Srpska as well.

This construction was used by the Tribunal in the part of the judgment against Dr Radovan Karadzic which condemned him for taking UNPROFOR members as hostages, during NATO bombing of the Republic of Srpska *in May 1995.* The Trial Chamber did this, although it was an act of extreme necessity, in which case there is no criminal act. Namely, Paragraph 5856 of the Trial Chamber judgment states that NATO was authorized by the United Nations to perform bombing, and the foundation for this act was found in the Resolution of the Security Council number 836 *of 4th June 1993.* Still, what the Chamber missed to say is that the Resolution (Item 10) indicated that this act can be done '*under the authority of the Security Council'*. I point this out because the quoted words mean (in language and teleological sense) that the bombing performed in 1995 should have been preceeded by the corresponding (specific) decision of the Security Council, and such decision is missing, which is why the Tribunal could not have provided the same in the judgment against Dr Karadzic. For those reasons NATO bombing in 1995 was unlawful, and this was the way how NATO alliance put itself onto one of the warring sides (Muslim side). The aforementioned is of importance, since everything performed after that by the appropriate organs of the Republic of Srpska is not reprisal, as it was legally incorrectly subsumed by the Tribunal in this judgment (see Paragraphs 5948-5950). Instead, it is an act of extreme necessity that excludes the violation of law or customs of war, which is the incrimination used by the Trial Chamber to explain the taking of the UNPROFOR members by the Army of the Republic of Srpska. The extreme necessity exists when the offense is done by the perpetrator so that he could protect his goods from the immediate unprovoked danger that otherwise

could not be eliminated, whereby the committed offense is not larger than the danger threatening. Transferred to the questioned case, the event in which NATO performs the unlawful bombing of the Republic of Srpska and thus openly joins one of the warring sides, and then when the Army of the Republic of Srpska because of this (and only because of this, which emerges from the judgment against Dr Radovan Karadzic) takes the UNPROFOR members as hostages, then such action is to be considered the *extreme necessity*, and not the alleged joint criminal enterprise to "*compel* NATO to cease its air strikes against Bosnian Serb military targets", as it was unfoundedly and maliciously concluded in the Paragraph 5951 of the Trial Chamber judgment.

3. Practice of the Court of Bosnia and Herzegovina

Created in this way, the construction of the joint criminal enterprise is then used in the practice of the Court of BiH, as shown by the examples below. Thus, in the judgment number X-KR-08/549-2 of 10th September 2009, adopted on the basis of the plea agreement, the Court of BiH, by accepting the construction of participation in the joint criminal enterprise that the accused is charged with by the Prosecutor, says the following (my italics):

„In the period between late April 1992 and late September of the same year, as part of a widespread systematic attack of the army and police of the Serb Republic of BiH, and then of the Republic of Srpska, against the Bosniak and Croat population of the Prijedor Municipality, with knowledge of such an attack, as a reserve police officer, knowingly participated in *a joint criminal enterprise of civilian and military authorities of Prijedor Municipality, with a view of persecuting and committing crimes against Bosniaks and Croats, sharing the same goal with the civilian and military authorities of Prijedor Municipality, and with the military and civil structures of the Serb Republic of BiH and then of the Republic of Srpska,* the goal implying the discriminatory persecution of Bosniaks and Croats on political, national, ethnic and religious grounds from the territory controlled by the military and police of the Serb Republic of BiH and then of the Republic of Srpska…".

What is important in the quoted part of the judgment is the fact that the Court of BiH is trying to say that the acts committed by the accused are part, or consequence of the alleged joint criminal enterprise of the civilian and military authorities of Prijedor Municipality, which should logically be *premisa minor*, since it is a result of *premise* maior, which states that, in accordance with the indictment and this judgment of the Court of BiH, "the military and civilian structures of the Serb Republic of BiH, and then of the Republic of Srpska, had the same goal". However, the reasoning of the judgment does not provide any legally valid reasons and evidence for this.

The Court of BiH acts in the similar way in the judgment number X-KR-10/928 of 19th July 2010. This is also the judgment adopted on the basis of the plea agreement, and its pronouncement indicates (my italics) that:

„…the members of the Army of the Republic of Srpska and the Ministry of Internal Affairs of the Republic of Srpska undertook a widespread and systematic attack against the Bosniak civilians from the UN protected area of Srebrenica, *the attack which was in compliance with the state or organizational policy and aimed at implementing this policy…*".

The important thing in this case is the fact that the reasoning of this judgment, in regard to the quoted part of its pronouncement, does not contain any word about the given claims. The Court, in fact, did not present any reason or evidence on which such allegations might be based.

Previously discussed examples must be observed in relation to another unlawful practice developed in the Court of BiH, related to the incrimination of the crime against humanity. Namely, in the work of that Court we can notice a long practice of unconstitutional retroactive implementation of the mentioned incrimination on the events that happened in the past war in BiH, despite the fact that crimes against humanity had not been prescribed as criminal offense by the domestic legislation until 2003, when the High Representative imposed the Criminal Code of BiH and thus prescribed the mentioned criminal offense. However, in spite of the unconstitutionality of such a practice, it is used by the Prosecutor's Office of BiH and the Court of BiH in the proceedings against the former members of the Ministry of Internal Affairs and the Army of the Republic of Srpska. The reason for this is to be found in the fact that only by using this incrimination it can be stated that a certain act (e.g. murder or beating) was committed within the alleged *wide and systematic attack of the police and the Army of the Republic of Srpska against the Muslim population*, regardless of the fact that in this specific case the evidence does not confirm the existence of such attack. And such attack is easy to be incorporated into the indictments and judgments since it can be assigned to a state or some other organization which is, at that time, exercising the authority in a specific territory. So, when such formulations are used, it means that for them the Republic of Srpska is to be accused. Thus, all the trials and numerous judgments of the Court of BiH are turned into, not the trial against individual persons, but into the trial against the Republic of Srpska which, to make things even worse, is not allowed in these proceedings to deny through its representatives, the groundless allegations given in the indictments of the Prosecutor's Office of BiH.

4. Concluding remarks

I believe that all previously mentioned examples (which are not the only ones) showed in which way the judgments of the aforementioned institutions represented not only judgments against the accused persons, but also against the Serbian people and the Republic of Srpska, which is the evidence of its political nature. Namely, having in mind everything stated in the previous parts, the goal of those judgments is to perform a specific stigmatization of the Republic of Srpska and the Serbian people. This is done when a legitimate aspiration of a constituent people to establish the Republic of Srpska and thus organize itself in the state and political sense, forced on by the other two peoples, is proclaimed the alleged joint criminal enterprise in this and many other judgments of the Hague Tribunal and the Court of BiH, that is the widespread and systematic attack of the Police and Army of the Republic of Srpska against the Muslims.

In this context we should observe the fact that in the judgment of the Trial Chamber in the Hague against Dr Radovan Karadzic the organs of the Republic of Srpska are not called the correct names in any line. Instead, the National Assembly of the Republic of Srpska in this judgment is called the Bosnian Serb Assembly (p. 28 of the judgment), and the Government of the Republic of Srpska is called the Bosnian Serb Government (p. 38). Even the Constitution of the Republic of Srpska and the Law on the Army of the Republic of Srpska in this judgment are not called those names, but the Bosnian Serb Constitution, and the Bosnian Serb Law on the Army (see Paragraph 3493 of the judgment). If everything said so far is taken into consideration, it is not hard to conclude that the acts of Tribunal are such in order to say that in its view the period of the existence of the Republic of Srpska from the moment of its establishment in 1992 until the end of the war and the Dayton Agreement in 1995 is actually illegal. This must be brought into relation with the actual decision of the Constitutional Court of BiH (number U-3/13 of 26th November 2015) by which the Republic

of Srpska is being unlawfully imposed another day as its day, despite the fact it was born on 9th January 1992. The Constitutional Court of BiH is doing this through the majority votes (votes of two Bosniak judges and three foreign judges) in a way that it does not judge the existing legal norm, but the history and something not contained by the Law of the Republic of Srpska governing its holidays. In fact, if this Law prescribes that 9th January should be marked as the Republic Day, then this does not, nor can have anything that would violate the Constitution of BiH, because the Republic of Srpska was established on this (not some other) day. Considering this historical fact, there is no court that could judge the history nor state that such historical event has preference to a certain nation (as it is unlawfully concluded by the Constitutional Court in Paragraph 90 of the given decision). Making conclusions in such legally unfounded way, the judges that made this decision by outvoting, conclude unfoundedly (in Paragraph 79 of their majority decision) that this holiday of the Republic of Srpska must also represent all its citizens. In other words, this means that the Republic Day, as seen through the eyes of the judges who brought the decision by outvoting, must be what other nations want it to be, although it is certain that the Bosniaks for this holiday would not accept any other date before the date of signing the Dayton Agreement. Based on this, it could be finally concluded that the Republic of Srpska is an illegal creation in the period from 9th January 1992 to the Dayton Agreement. From this it would only take a step to the next decision of the Constitutional Court of BiH, in accordance to which the Republic of Srpska would have to alter its name, and thus become completely meaningless. Namely, if the majority of judges could have made legally unfounded conclusion (and thus impose its will on the others) that the holiday of the Republic of Srpska must be what other nations want, so not to prefer any nation, then after this the same majority of judges will not be prevented to conclude, in due time (for example, upon the request of Bakir Izetbegovic as a Member of BiH Presidency) that the name of this entity must not be composed of the word "Srpska" since it refers to only one nation, due to which the National Assembly of the Republic of Srpska and the Parliamentary Assembly of BiH would be ordered to amend the relevant provisions of the Republic of Srpska Constitution, and the Constitution of BiH.

In concluding remarks to this paper, I have to emphasize that the judgments which have been the subject to the previous analysis contribute to achieving two goals. First of them, although for other reason, is rightfully observed by Mirjana Vasovic, referring to the regional hatred. Regarding this, she states:

"To an objective observer, namely, it is simply striking to observe that the hatred, especially the one against the Serbian people, is getting stronger for twenty years, instead, as it would be expected and as it is natural, to gradually diminish. Moreover, new reasons are constantly found and "conclusions" made that raise it up (like, for example, in Srebrenica where, once a year, the buried bodies are ritually multiplied). … In fact, the degree of animosity towards the Serbian people in the region reached the point after which we can be absolutely calm. There is no such crime – committed, assigned or intended – that may justify this kind and this level of hatred. Still, if we take a close look, it is not a metaphysical hatred. It has its specific prehistory (historical hatreds never get old), just like it has rather determined, current role and instrumentality. In short, it is used to consolidate the unfinished states, to homogenize the nations with insecure identities and to legitimize the shaken government."

(Mirjana Vasovic: *Regionalna mrznja*, published on 27th August 2015 at http://www.politika.rs/rubrike/Komentari/Regionalna-mrznja.sr.html)

There are two things from the quoted that I will point out on this occasion. First refers to the fact that, unfortunately, the judgments, like the one against Dr Radovan Karadzic, only contribute to deepening the gap between the Serbs and the Muslims, which is a great tragedy

considering their closeness (the same Serbian ethnical origin), rooted in the distant past. The second thing is related to the intent of such judgments, no matter if we admit it or not, to deconsolidate the Republic of Srpska, which is the essence of their political anatomy.

This deconsolidation, according to the ideas of such policy creators, should be achieved in the heads of the local Serbs. Namely, when the individuals start accepting certain views in an uncritical way just because the same are provided by specific institutions, then that will certainly take them to the indoctrination and self-denial, which the Serbian nation is particularly prone to. For such reasons will, therefore, the judgments like this, be used to try to convince the population of the Republic of Srpska to alter its attitude towards its own state, in a way to delegitimize it in the masses, which is the essence of mental desubstantialization of any state. This is an attempt to make easy the work of the numerous forces (in BiH and abroad) that desire to destroy the Republic of Srpska by all means. Of course, this must be observed as part of a more complex scenario of NATO-ization of the Serbian ethnical and national territory, that encompasses not only the territory of the Republic of Srpska, but also Serbia and Montenegro. In this way NATO expands the area of its influence and tightens the loop around the neck of Russia, the breaking of which is actually its long-term and ultimate strategic goal.

In fact, those forces need judgments like the aforementioned to reach their final political goal, i.e. to refer to such judgments and thus obtain the disappearance of the Republic of Srpska in a peaceful manner, although they will not hesitate to use the force at a particular moment to achieve it, especially if they realize that the attempt of its mental desubstantialization is not successful. Therefore, by pointing out the unlawful things and lies presented in this paper, I tried to explain how groundless it is to have the self-denying spirit in our nation or to turn our back on the Republic of Srpska, since it does not deserve it in any way or for any reason.