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UNITED
NATIONS

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

Case No.: IT-99-37-AR72

Date: 21 May 2003

Original: English

IN THE APPEALS CHAMBER

Before: **Judge Mohamed Shahabuddeen, Presiding**
Judge Fausto Pocar
Judge Claude Jorda
Judge David Hunt
Judge Asoka de Zoysa Gunawardana

Registrar: **Mr Hans Holthuis**

Decision of: **21 May 2003**

PROSECUTOR

v

MILAN MILUTINOVIĆ, NIKOLA ŠAINOVIĆ & DRAGOLJUB OJDANIĆ

DECISION ON DRAGOLJUB OJDANIĆ'S MOTION CHALLENGING JURISDICTION – *JOINT CRIMINAL ENTERPRISE*

Counsel for the Prosecutor
Mr Norman Farrell

Counsel for Dragoljub Ojdanić
Mr Tomislav Višnjić, Mr Vojislav Seležan and Mr Peter Robinson

participation in a joint criminal enterprise as a co-perpetrator".[59] Leaving aside the appropriateness of the use of the expression "co-perpetration" in such a context, it would seem therefore that the Prosecution charges co-perpetration in a joint criminal enterprise as a form of "commission" pursuant to Article 7(1) of the Statute, rather than as a form of accomplice liability. The Prosecution's approach is correct to the extent that, insofar as a participant shares the purpose of the joint criminal enterprise (as he or she must do) as opposed to merely knowing about it, he or she cannot be regarded as a mere aider and abettor to the crime which is contemplated. The Appeals Chamber therefore regards joint criminal enterprise as a form of "commission" pursuant to Article 7(1) of the Statute.

21. The Defence suggests that the *Tadić* interpretation of Article 7(1) means that all modes of liability not specifically excluded by the Statute are included therein.[60] It is not necessary to deal with so wide an argument. The Appeals Chamber was satisfied then, and is still satisfied now, that the Statute provides, albeit not explicitly, for joint criminal enterprise as a form of criminal liability and that its elements are based on customary law. In order to come within the Tribunal's jurisdiction *ratione personae*, any form of liability must satisfy three pre-conditions: (i) it must be provided for in the Statute, explicitly or implicitly; (ii) it must have existed under customary international law at the relevant time; (iii) the law providing for that form of liability must have been sufficiently accessible at the relevant time to anyone who acted in such a way; and (iv) such person must have been able to foresee that he could be held criminally liable for his actions if apprehended.

22. The analogy made by the Defence between the present situation and the rejection by the International Military Tribunal ("IMT") in Nuremberg of the common plan or conspiracy doctrine in relation to war crimes and crimes against humanity is indeed relevant to this case, although not for the reason suggested by the Defence.[61] The IMT noted that the indictment charged not only conspiracy to commit aggressive war, but also to commit war crimes and crimes against humanity.[62] The IMT pointed out that the Charter did not define as a separate crime any conspiracy except the one to commit acts of aggressive war and it therefore disregarded the charges in Count One of the indictment that the defendants had conspired to commit war crimes and crimes against humanity.[63] As pointed out above, the same logic applies in the context of this Tribunal. One Trial Chamber,

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[59] Indictment, par 16.
[60] Ojdanić's Appeal, par 39. This, the Defence said, "flies in the face of rules of statutory interpretation and the cautious approach to interpretation of liability for crimes set forth in the Report of the Secretary General" (ibid).
[61] Ojdanić's Appeal, pars 24-25
[62] *Trial of the Major War Criminals before the International Military Tribunal*, Nuremberg, 14 November 1945 – 1 October 1946, Vol 1, p 226 ("IMT Judgment").
[63] Ibid.

Statute, the application of which would not infringe the above-mentioned principle.[89] The Prosecution points out that other Chambers of the International Tribunal, including the Appeals Chamber, have applied this doctrine in relation to events which took place years before Ojdanić's conduct as described in the indictment.[90]

36. First, concerning the terminological matter raised by the Defence, the phrases "common purpose" doctrine on the one hand, and "joint criminal enterprise" on the other, have been used interchangeably and they refer to one and the same thing. The latter term – joint criminal enterprise – is preferred, but it refers to the same form of liability as that known as the common purpose doctrine or liability.

37. Secondly, the principle *nullum crimen sine lege* is, as noted by the International Military Tribunal in Nuremberg, first and foremost, a "principle of justice".[91] It follows from this principle that a criminal conviction can only be based on a norm which existed at the time the acts or omission with which the accused is charged were committed. The Tribunal must further be satisfied that the criminal liability in question was sufficiently foreseeable and that the law providing for such liability must be sufficiently accessible at the relevant time for it to warrant a criminal conviction and sentencing under the head of responsibility selected by the Prosecution.

38. This fundamental principle "does not prevent a court from interpreting and clarifying the elements of a particular crime".[92] Nor does it preclude the progressive development of the law by the court.[93] But it does prevent a court from creating new law or from interpreting existing law beyond the reasonable limits of acceptable clarification. This Tribunal must therefore be satisfied that the crime or the form of liability with which an accused is charged was sufficiently foreseeable and that the law providing for such liability must be sufficiently accessible at the relevant time, taking into account the specificity of international law when making that assessment.

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[89] Prosecution's Response, par 51.
[90] Prosecution's Response, par 52.
[91] IMT Judgment, p 219.
[92] *Aleksovski* Appeal Judgment, pars 126-127; *Delalić* Appeal Judgment, par 173.
[93] See, *inter alia*, *Kokkinakis v Greece*, Judgment, 25 May 1993, Ser A 260-A (1993), pars 36 and 40 (*ECHR*); *EV v Turkey*, Judgment, 7 Feb 2002, par 52; *SW v United Kingdom*, Judgment, 22 Nov 1995, Ser A 335-B (1995), pars 35-36 (*ECHR*). See also *C.R v United Kingdom*, Judgment, 22 Nov 1995, Ser A 335-C (1995), par 34 (*ECHR*): "However clearly drafted a legal provision may be, in any system of law, including criminal law, there is an inevitable element of judicial interpretation. There will always be a need for elucidation of doubtful points and for adaptation to changing circumstances. Indeed, in the United Kingdom, as in the other Convention States, the progressive development of the criminal law through judicial law-making is a well entrenched and necessary part of legal tradition. Article 7 (art. 7) of the Convention cannot be read as outlawing the gradual clarification of the rules of criminal liability through judicial interpretation from case to case, provided that the resultant development is consistent with the essence of the offence and could reasonably be foreseen."

39. The meaning and scope of the concepts of "foreseeability" and "accessibility" of a norm will, as noted by the European Court of Human Rights,[94] depend a great deal on "the content of the instrument in issue, the field it is designed to cover and the number and status of those to whom it is addressed".[95] The specificity of international criminal law in that respect has been eloquently noted by one American Military Tribunal in Nuremberg in the *Justice* case:

> Under written constitutions the *ex post facto* rule condemns statutes which define as criminal, acts committed before the law was passed, but the *ex post facto* rule cannot apply in the international field as it does under constitutional mandate in the domestic field. [...] International law is not the product of statute for the simple reason that there is yet no world authority empowered to enact statutes of universal application. International law is the product of multipartite treaties, conventions, judicial decisions and customs which have received international acceptance or acquiescence. It would be sheer absurdity to suggest that the *ex post facto* rule, as known to constitutional states, could be applied to a treaty, a custom, or a common law decision of an international tribunal, or to the international acquiescence which follows the events. To have attempted to apply the *ex post facto* principle to judicial decisions of common international law would have been to strangle that law at birth.[96]

40. Has Ojdanić had sufficient notice that if, as claimed in the indictment, he took part in the commission of very serious criminal offences as part of a joint criminal enterprise he could be found criminally liable on that basis? This Tribunal does not apply the law of the former Yugoslavia to the definition of the crimes and forms of liability within its jurisdiction. It does, as pointed out above, apply customary international law in relation to its jurisdiction *ratione materiae*. It may, however, have recourse to domestic law for the purpose of establishing that the accused could reasonably have known that the offence in question or the offence committed in the way charged in the indictment was prohibited and punishable. In the present instance, and contrary to the Defence contention,[97] the law of the Federal Republic of Yugoslavia in force at the time did provide for criminal liability for the foreseeable acts of others in terms strikingly similar to those used to define joint criminal enterprise.[98] Article 26 of the Criminal Code of the Socialist Federal Republic of Yugoslavia provides that:

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[94] See references in previous footnote, including, *Kokkinakis v Greece*, Judgment, 25 May 1993, Ser A 260-A (1993), (*ECHR*); *EV v Turkey*, Judgment, 7 Feb 2002; *SW v United Kingdom*, Judgment, 22 Nov 1995, Ser A 335-B (1995) (*ECHR*); *C.R v United Kingdom*, Judgment, 22 Nov 1995, Ser A 335-C (1995).

[95] *Groppera Radio AG and Others v Switzerland*, Judgment, 28 Mar 1990, Ser A 173, par 68.

[96] See, eg, Trials of War Criminals Before The Nuremberg Military Tribunals Under Control Council Law No 10, Vol III ("*Justice* case"), pp 974-975.

[97] Ojdanić's Appeal, par 69.

[98] Articles 253 of the Criminal Code of the Socialist Federal Republic of Yugoslavia and Articles 226 of the Criminal Law of the Republic of Serbia to which the Defence refers are irrelevant insofar as they related, not to a form of joint criminal enterprise, but to a form of liability akin to "conspiracy" which, as pointed above, is a different form of liability. As to Article 254 of the Criminal Code of the Socialist Federal Republic of Yugoslavia and Article 227 of the Criminal Law of the Republic of Serbia, they are likewise irrelevant to the extent that they deal with the

> Anybody creating or making use of an organisation, gang, cabal, group or any other association for the purpose of committing criminal acts is criminally responsible for all criminal acts resulting from the criminal design of these associations and shall be punished as if he himself has committed them, irrespective of whether and in what manner he himself directly participated in the commission of any of those acts.[99]

41. Although domestic law (in particular the law of the country of the accused) may provide some notice to the effect that a given act is regarded as criminal under international law, it may not necessarily provide sufficient notice of that fact. Customary law is not always represented by written law and its accessibility may not be as straightforward as would be the case had there been an international criminal code. But rules of customary law may provide sufficient guidance as to the standard the violation of which could entail criminal liability.[100] In the present case, and even if such a domestic provision had not existed, there is a long and consistent stream of judicial decisions, international instruments and domestic legislation[101] which would have permitted any individual to regulate his conduct accordingly and would have given him reasonable notice that, if infringed, that standard could entail his criminal responsibility.[102]

42. Also, due to the lack of any written norms or standards, war crimes courts have often relied upon the atrocious nature of the crimes charged to conclude that the perpetrator of such an act must have known that he was committing a crime. In the *Tadić* Judgment, for instance, the Appeals Chamber noted "the moral gravity" of secondary participants in a joint criminal enterprise to commit serious violations of humanitarian law to justify the criminalisation of their actions.[103] Although the immorality or appalling character of an act is not a sufficient factor to warrant its criminalisation under customary international law, it may in fact play a role in that respect, insofar as it may refute any claim by the Defence that it did not know of the criminal nature of the acts.[104]

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setting up or membership in a criminal organisation or criminal agreement, regardless of the commission of any crime in pursuance to that organisation. See, Zoran Stojanović, Komentar Krivičnog Zakona Savezne Republike Jugoslavije, Belgrade 1997, pp 269-270 and Nikola Srzentić and Ljubiša Lazarević, Komentar Krivičnog Zakona Savezne Republike Jugoslavije, Belgrade 1995, pp 806-812

[99] In 1992, the name of the Criminal Code of the Socialist Federal Republic of Yugoslavia was changed to "Criminal Code of the Federal Republic of Yugoslavia" (Official Gazette of the FRY No 35/92). For a commentary to that provision, see Zoran Stojanović, Komentar Krivičnog Zakona Savezne Republike Jugoslavije, Belgrade 1997, p 52.

[100] See *X Ltd and Y v United Kingdom*, D and R 28 (1982), Appl 8710/79, pp 77, 80-81.

[101] Contrary to the Defence submission on that point, the Appeals Chamber has not relied upon domestic legislation and domestic case law to identify custom (Ojdanić's Appeal, par 51). The Appeals Chamber referred to those "only [...] to show that the notion of common purpose upheld in international criminal law has an underpinning in many national systems" (*Tadić* Appeal Judgment, par 225). It added that "[i]n the area under discussion, domestic law does not originate from the implementation of international law but, rather, to a large extent runs parallel to, and precedes, international regulation" (ibid).

[102] See *Tadić* Appeal Judgment, pars 195 *et seq.*

[103] *Tadić* Appeal Judgment, par 191.

[104] In the *Delalić* case, the Appeals Chamber referred to the ICCPR to state that certain acts could be regarded as "criminal according to the general principles of law recognized by the community of nations" (*Delalić* Appeals