

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: 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**

---

**SEPARATE OPINION OF JUDGE DAVID HUNT  
ON CHALLENGE BY OJDANIĆ TO JURISDICTION  
JOINT CRIMINAL ENTERPRISE**

---

**Counsel for the Prosecutor:**

**Mr Norman Farrell**

**Counsel for the Accused Dragoljub Ojdanić:**

**Mr Tomislav Višnjić, Mr Vojislav Seležan & Mr Peter Robinson**

**SEPARATE OPINION OF JUDGE DAVID HUNT  
ON CHALLENGE BY OJDANIĆ TO JURISDICTION  
JOINT CRIMINAL ENTERPRISE**

**The nature of the appeal**

1. Dragoljub Ojdanić ("Ojdanić") has launched what his counsel describe as "a frontal attack on the beast known as 'joint criminal enterprise'".<sup>1</sup> This attack is misplaced, because the nature of the "beast" which Ojdanić attacks has been almost entirely misunderstood by them. That is not to say that some further attention to the way in which a joint criminal enterprise has been defined is unwarranted. However, I am satisfied that an individual criminal responsibility for participation in a joint criminal enterprise to commit a crime clearly existed as part of customary international law at the relevant time, and that the challenge to the jurisdiction of the Tribunal to find such an individual criminal responsibility in relation to crimes within its jurisdiction must fail.

2. The Trial Chamber, from whose decision this interlocutory appeal is brought pursuant to Rule 72(B)(i) of the Rules of Procedure and Evidence ("Rules"), held that the Appeals Chamber had already determined in *Tadić* that participation in a joint criminal enterprise is a mode of individual criminal responsibility within Article 7.1 of the Tribunal's Statute in respect of any crimes within the jurisdiction of the Tribunal,<sup>2</sup> and that the elements and application of such a mode of individual criminal responsibility had been defined by the Appeals Chamber in its judgments in *Tadić*, *Furundžija* and *Čelebići*.<sup>3</sup> Accordingly, it dismissed the challenge to the Tribunal's jurisdiction.<sup>4</sup>

3. Implicit in the first of those rulings is the unstated assumption by the Trial Chamber that the decision of the Appeals Chamber that individual criminal responsibility for participation in a joint criminal enterprise existed in customary international law at the time of the events alleged against *Tadić* was part of its *ratio decidendi*,<sup>5</sup> and thus binding upon the Trial Chamber in

<sup>1</sup> General Ojdanić's Appeal from Denial of Preliminary Motion to Dismiss for Lack of Jurisdiction: Joint Criminal Enterprise, 28 Feb 2003 ("Interlocutory Appeal"), par 9.

<sup>2</sup> Decision on Dragon Ojdanić's Preliminary Motion to Dismiss for Lack of Jurisdiction: Joint Criminal Enterprise, 13 Feb 2003 ("Trial Chamber Decision"), pp 4, 6. The reference is to *Prosecutor v Tadić*, IT-94-1-A, Judgment, 15 July 1999 ("*Tadić* Conviction Appeal Judgment").

<sup>3</sup> *Tadić* Conviction Appeal Judgment, p 6. The further references are to *Prosecutor v Furundžija*, IT-95-17/1-A, Judgment, 21 July 2000 ("*Furundžija* Appeal Judgment") and *Prosecutor v Delalić et al*, IT-96-21-A, Judgment, 20 Feb 2001 ("*Delalić* Conviction Appeal Judgment").

<sup>4</sup> Trial Chamber Decision, p 7.

<sup>5</sup> The concept was described in various ways by the Appeals Chamber in the *Tadić* Conviction Appeal Judgment (see par 5, *infra*), including "common purpose", but the concept has since generally been referred to as joint criminal enterprise (*ibid*).

accordance with the judgment of the Appeals Chamber in *Prosecutor v Aleksovski*.<sup>6</sup> This assumption is challenged by Ojdanić, who asserts that the statements made by the Appeals Chamber in *Tadić* (upon the basis of which the prosecution case has been pleaded in the indictment against him in the present case) were *obiter dicta*.<sup>7</sup> The difference between the two concepts is that the *ratio decidendi* is the statement of legal principle (express or implied) which was necessary for the disposal of the case, whereas an *obiter dictum* is such a statement of legal principle which goes beyond what was necessary for the disposal of the case.<sup>8</sup>

4. This appeal thus raises a number of issues:

- (1) Was the ruling in the *Tadić* Conviction Appeal Judgment that joint criminal enterprise is a mode of individual criminal responsibility within Article 7.1 of the Tribunal's Statute binding on the Trial Chamber?
- (2) If that ruling was not binding –
  - (a) Was that ruling correct?
  - (b) Was the *Tadić* Conviction Appeal Judgment correct in the definition it gave of the elements and application of such a mode of individual criminal responsibility?

But, before dealing with these issues, it is necessary to identify what it was that the Appeals Chamber stated in the *Tadić* Conviction Appeal Judgment.

#### **What did *Tadić* state?**

5. The issues which the Appeals Chamber determined in the *Tadić* Conviction Appeal Judgment were (i) whether the acts of one person can give rise to the criminal responsibility of another person where both persons participate in the execution of "a common criminal plan", and (ii) the state of mind which must be established in such a case in relation to the person who does not physically execute (or carry out) the crime charged.<sup>9</sup> The first issue was subsequently re-stated as being whether criminal responsibility for participation in a "common criminal purpose" fell within the ambit of individual responsibility in Article 7.1 of the Tribunal's Statute.<sup>10</sup> The Appeals Chamber labelled this concept variously, and apparently interchangeably, as a common

<sup>6</sup> IT-95-14/1-A, Judgment, 24 Mar 2000 ("*Aleksovski* Appeal Judgment"), par 113.

<sup>7</sup> Interlocutory Appeal, par 37.

<sup>8</sup> *The Oxford Companion to Law*, 1980, Entry "Ratio Decidendi", which is based upon the text of CK Allen, *Law in the Making*.

<sup>9</sup> *Tadić* Conviction Appeal Judgment, par 185.

<sup>10</sup> *Ibid*, par 187.

criminal plan,<sup>11</sup> a common criminal purpose,<sup>12</sup> a common design or purpose,<sup>13</sup> a common criminal design,<sup>14</sup> a common purpose,<sup>15</sup> a common design,<sup>16</sup> and a common concerted design.<sup>17</sup> The common purpose is also described, more generally, as being part of a criminal enterprise,<sup>18</sup> a common enterprise,<sup>19</sup> and a joint criminal enterprise.<sup>20</sup> Following the first detailed consideration of the *Tadić* Conviction Appeal Judgment within the Tribunal (in which a preference for the term "joint criminal enterprise" was expressed),<sup>21</sup> the concept has generally been referred to as a joint criminal enterprise, and this is the term which has been adopted by the prosecution in the present indictment and in many other indictments.

6. The Appeals Chamber held that the notion of a joint criminal enterprise "as a form of accomplice liability" was firmly established in customary international law, and that it was available ("albeit implicitly") under the Tribunal's Statute.<sup>22</sup> The Appeals Chamber identified three "distinct categories of collective criminality" as being encompassed within the concept of joint criminal enterprise,<sup>23</sup> although it subsequently suggested that the second category was in many respects similar to the first,<sup>24</sup> and that it was really a variant of the first category.<sup>25</sup> The three categories were as follows:

*Category 1:*<sup>26</sup> All of the participants in the joint criminal enterprise,<sup>27</sup> acting pursuant to a common design, possessed the same criminal intention. The example is given of a plan formulated by the participants in the joint criminal enterprise to kill where, although each of the participants in the plan may carry out a different role, each of them has the intent to kill.<sup>28</sup>

<sup>11</sup> *Ibid.*, par 185.

<sup>12</sup> *Ibid.*, par 187.

<sup>13</sup> *Ibid.*, par 188.

<sup>14</sup> *Ibid.*, pars 191, 193.

<sup>15</sup> *Ibid.*, pars 193, 195, 204, 225.

<sup>16</sup> *Ibid.*, pars 196, 202, 203, 204.

<sup>17</sup> *Ibid.*, par 203.

<sup>18</sup> *Ibid.*, par 199.

<sup>19</sup> *Ibid.*, par 204.

<sup>20</sup> *Ibid.*, par 220.

<sup>21</sup> *Prosecutor v Brđanin & Talić*, IT-99-36-PT, Decision on Form of Further Amended Indictment and Prosecution Application to Amend, 26 June 2001 ("*Brđanin & Talić* Decision"), par 24. The Appeals Chamber appears to have expressed a similar preference, in its decision in the present case (par 36).

<sup>22</sup> *Tadić* Conviction Appeal Judgment, par 220.

<sup>23</sup> *Ibid.*, par 195.

<sup>24</sup> *Ibid.*, par 202.

<sup>25</sup> *Ibid.*, par 203.

<sup>26</sup> *Ibid.*, par 196.

<sup>27</sup> The *Tadić* Conviction Appeal Judgment (at par 196) describes them all as "co-defendants", but the issue is the same where only some of the participants have been charged and are standing trial. The category does not depend upon just who has been charged.

<sup>28</sup> The Judgment speaks here (also at par 196) of co-perpetrators, but this is an issue to which I must return.