

**UNITED
NATIONS**

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

Case No. IT-97-24-T
Date: 31 July 2003
Original: English

IN TRIAL CHAMBER II

Before: Judge Wolfgang Schomburg, Presiding
Judge Volodymyr Vassylenko
Judge Carmen Maria Argibay

Registrar: Mr. Hans Holthuis

Judgement of: 31 July 2003

PROSECUTOR

v.

MILOMIR STAKIĆ

JUDGEMENT

The Office of the Prosecutor:

Ms. Joanna Korner
Mr. Nicholas Koumjian
Ms. Ann Sutherland

Counsel for the Accused:

Mr. Branko Lukić
Mr. John Ostojic

432. The Appeals Chamber in *Tadić* observed that Article 7(1) “covers first and foremost the physical perpetration of a crime by the offender himself, or the culpable omission of an act that was mandated by a rule of criminal law. However, the commission of one of the crimes envisaged in Articles 2, 3, 4 or 5 of the Statute might also occur through participation in the realisation of a common design or purpose.”⁹²⁹ In the *Ojdanić* Decision, the Appeals Chamber held unequivocally that joint criminal enterprise is to be regarded as a form of “commission” pursuant to Article 7(1) of the Statute and not as a form of accomplice liability.⁹³⁰ Since it constitutes a form of “commission” in the sense that, insofar as a participant shares the purpose of the joint criminal enterprise as opposed to merely knowing about it, he cannot be regarded as a mere aider and abettor to the crime contemplated.⁹³¹

433. The Trial Chamber emphasises that joint criminal enterprise can not be viewed as membership in an organisation because this would constitute a new crime not foreseen under the Statute and therefore amount to a flagrant infringement of the principle *nullum crimen sine lege*.⁹³² This must always be borne in mind when working with this definition of the term “commission”.

434. There are three categories of joint criminal enterprise as described by the Prosecution in its arguments.

435. In order to establish individual criminal responsibility pursuant to a joint criminal enterprise, the Prosecution must prove, for all three categories the existence of a common criminal plan between two or more persons in which the accused was a participant.⁹³³ The existence of the agreement or understanding need not be express, but may be inferred from all the circumstances.⁹³⁴ The participation of two or more persons in the commission of a particular crime may itself establish an unspoken understanding or arrangement amounting to an agreement formed between them then and there to commit that particular criminal act.⁹³⁵ A person may participate in a joint criminal enterprise in various ways: (i) by personally committing the agreed crime as a principal offender; (ii) by assisting or encouraging the principal offender in committing the agreed crime as a co-perpetrator who shares the intent of the joint criminal enterprise; (iii) by acting in furtherance of a particular system in which the crime is committed by reason of the accused’s position of authority or function and with knowledge of the nature of that system and intent to further it.⁹³⁶ Provided the

⁹²⁹ *Tadić* Appeal Judgement, para. 188.

⁹³⁰ *Decision on Dragoljub Ojdanić’s Motion Challenging Jurisdiction – Joint Criminal Enterprise*, para. 20.

⁹³¹ *Decision on Dragoljub Ojdanić’s Motion Challenging Jurisdiction – Joint Criminal Enterprise*, para. 20.

⁹³² *Decision on Dragoljub Ojdanić’s Motion Challenging Jurisdiction – Joint Criminal Enterprise*, paras 20 and 31.

⁹³³ *Tadić* Appeal Judgement, para. 227.

⁹³⁴ *Tadić* Appeal Judgement, para. 227; *Krnojelac* Trial Judgement, para. 80.

⁹³⁵ *Vasiljević* Trial Judgement, para. 66; *Krnojelac* Trial Judgement, para. 80.

⁹³⁶ *Vasiljević* Trial Judgement, para. 67; *Krnojelac* Trial Judgement, para. 81.