



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-PT

Date: 13 February 2003

Original: ENGLISH

IN THE TRIAL CHAMBER

Before: Judge Richard May, Presiding
Judge Patrick Robinson
Judge O-Gon Kwon

Registrar: Mr. Hans Holthuis

Order of: 13 February 2003

PROSECUTOR

v.

**NIKOLA ŠAINOVIĆ
DRAGOLJUB OJDANIĆ**

**DECISION ON DRAGOLJUB OJDANIĆ'S PRELIMINARY MOTION TO
DISMISS FOR LACK OF JURISDICTION: JOINT CRIMINAL ENTERPRISE**

The Office of the Prosecutor

Mr. Geoffrey Nice
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Mr. Milbert Shin

Counsel for Dragoljub Ojdanić

Mr. Tomislav Višnjić
Mr. Vojislav Selžan
Mr. Peter Robinson

Counsel for Nikola Šainović

Mr. Toma Fila
Mr. Zoran Jovanović
Mr. Goran Petrović

THIS TRIAL CHAMBER of the 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 (“International Tribunal”),

BEING SEISED OF “General Dragoljub Ojdanić’s Preliminary Motion to Dismiss for Lack of Jurisdiction: Joint Criminal Enterprise” filed by the Defence for the accused Ojdanić (“Defence”) on 29 November (“Motion”),

NOTING the “Prosecution’s Response to ‘General Dragoljub Ojdanic’s Preliminary Motion to Dismiss for Lack of Jurisdiction: Joint Criminal Enterprise’ of 29 November 2002”, filed on 13 December 2002 (“Response”); the “Reply Brief: Preliminary Motion to Dismiss for Lack of Jurisdiction: *Joint Criminal Enterprise*” filed by the Defence on 6 January 2003 (“Reply Brief”); and, the “Prosecution’s Notification in Relation to Ojdanic’s Reply Briefs to his Preliminary Motions to Dismiss for Lack of Jurisdiction: Kosovo and Joint Criminal Enterprise”, filed on 9 January 2002 (“Prosecution Notification”),

NOTING the submission of the Defence that the Tribunal does not have jurisdiction under Article 7 of the Statute over persons who are alleged to be members of a joint criminal enterprise, a proposition based on several arguments set out, *inter alia*, as follows:

- (a) The language of the Statute makes no mention of joint criminal enterprise and a plain reading of the Statute therefore dictates that there is no jurisdictional basis for prosecuting Ojdanic as being a member of a joint criminal enterprise;
- (b) Joint criminal enterprise is a euphemism for “conspiracy” and there is no provision within Article 7 for a conspiracy to commit crimes under Articles 2-5, the exception being genocide in Article 4. There is no notion of collective criminal responsibility based on membership of a criminal organisation in the ICTY Statute;
- (c) The language of the Statute being clear, there is no need to analyse events leading to its enactment. However, this history, if considered, indicates that conspiracy as a form of criminal liability was expressly rejected by the

drafters. Other international instruments expressly provide for “common purpose” liability and it must be assumed that, had the drafters wanted to impose liability for conspiracy or joint criminal enterprise, they would have done so expressly;

- (d) The principle of *in dubio pro reo*, applied by the Tribunal in previous decisions, dictates that any existing doubt about whether Article 7 encompasses conspiracy or joint criminal enterprise must be interpreted to the advantage of an accused;
- (e) The Nuremberg trials indicate that a general provision in the Nuremberg Statute providing for the responsibility of persons participating in a conspiracy to commit any of the crimes enumerated therein was not sufficient to establish a separate and distinct crime with respect to war crimes or crimes against humanity. Analogy to the ICTY Statute leads to the conclusion that conspiracy is only a separate crime with respect to genocide within the Tribunal’s jurisdiction;
- (f) The *Tadic* Appeals Chamber ruling in which joint criminal enterprise was first identified was wrongly decided, being outside of the Statute and possibly violating the *nullem crimen sine lege* principle. However, whilst the Defence accepts that this Trial Chamber may be bound by the appellate findings, all *Tadic* did was to state that acting with a common purpose might be seen as a form of aiding and abetting. The culpability for an agreement to commit a crime (joint criminal enterprise) was created by Trial Chamber I in the *Kvočka* and *Krstić* cases, which is *ultra vires* the Statute and is not binding on this Trial Chamber.¹ The finding by Trial Chamber I that it is possible to aid and abet a joint criminal enterprise created liability for aiding and abetting an otherwise aider and abettor, and is wrongly decided; and
- (g) The public policy ramifications of this judicial activism (finding joint criminal enterprise implicit in Article 7 of the Statute) are counterproductive,

NOTING that the Defence seeks, as an appropriate remedy, dismissal of the Third Amended Indictment against the accused Ojdanić,

¹ Reference is made to the Trial Chamber II practice set out in the *Brdanin & Talić* and *Krnjelac* cases, finding that joint criminal enterprise liability was not as a principal, encompassed in the term “committed”, but as an accomplice, encompassed in the phrase “otherwise aided and abetted”.

NOTING the Prosecution submission that the Motion should be rejected, based, *inter alia*, on the following arguments:

- (a) Article 7(1) of the Statute does not set forth the personal, material, territorial or temporal jurisdiction of the Tribunal, but instead the modes of criminal liability within its jurisdiction. As such, the assertion that participation in a joint criminal enterprise is not covered by Article 7 has no bearing on the jurisdiction of the Tribunal and therefore does not properly constitute an application under Rule 72(A)(i) of the Rules of the Tribunal;
- (b) joint criminal enterprise is not a euphemism for conspiracy, which is an entirely different form of criminal responsibility;
- (c) The remedy sought is inappropriate. Whilst liability for committing is based on a joint criminal enterprise, the Prosecution also charges Ojdanic with having planned, instigated, ordered or otherwise aided and abetted in the commission of crimes;
- (d) joint criminal enterprise is a punishable mode of participation in the commission of any of the crimes within the Tribunal's jurisdiction under Article 7(1) and is distinguishable from the autonomous crime of conspiracy;
- (e) The Appeals Chamber in *Tadic* concluded that joint criminal enterprise was firmly established as a mode of criminal responsibility in both customary international law and in the Tribunal's Statute (and set out the *actus reus* and *mens rea* elements), and expressly distinguished it from liability for aiding and abetting (which has been followed in a number of judgments). Therefore, the Defence argument that joint criminal enterprise under *Tadic* simply encompasses the notion of aiding and abetting is unsupported in the Tribunal case law;²
- (f) The *Tadic*, *Furundzija* and *Celebici* Appeals Judgments, permitting the inclusion of the joint criminal enterprise doctrine within the scope of Article 7 (1) is binding on the Trial Chamber;

² The finding by Trial Chamber I that an accused can aid and abet a joint criminal enterprise is not accepted by Trial Chamber II, which has stated that an aider or abettor aids or abets the crimes carried out by the members of the joint criminal enterprise, not the joint criminal enterprise itself.

- (g) The *travaux préparatoires* are only referred to when the Statute cannot be satisfactorily interpreted in accordance with its purpose and object. The Appeals Chamber in *Tadic* made it clear that joint criminal enterprise is encompassed in Article 7(1) of the Statute and there is no need to look further;
- (h) The purpose behind joint criminal enterprise is stated by the Appeals Chamber as holding responsible individuals participating in the commission of crimes by groups of individuals acting in pursuance of a common criminal design, a purpose supported by the Secretary-General's belief that all persons who participated in the planning, preparation or execution of relevant crimes should be individually responsible for such violations;
- (i) The principle *in dubio pro reo* is only applicable where canons of construction fail to resolve a reasonable doubt in the construction of a criminal statute, which is not the case with respect to joint criminal enterprise and Article 7 (1); and
- (j) Joint criminal enterprise does not entail any form of collective responsibility nor does it allow for the notion of individual criminal responsibility based on membership in a criminal organisation, and Ojdanic is not charged as such,

NOTING the arguments of the Defence set out in its Reply (which, the Trial Chamber notes, was filed without leave being granted pursuant to Rule 126 *bis*), *inter alia*, as follows:

- (a) As the Motion challenges the Third Amended Indictment on the ground that joint criminal enterprise is not encompassed in Article 7, the Motion falls squarely within the definition of a motion challenging jurisdiction under Rule 72 (A)(i). The Defence relies on decisions in the *Hadzihasanovic* and *Strugar* cases in support;
- (b) The form of joint criminal enterprise authorised by the Appeals Chamber in the *Tadic*, *Furundzija* and *Celebici* Judgments does include joint criminal enterprise liability by virtue of membership in an organisation with a criminal purpose, which it is argued is what is alleged in the Third Amended Indictment against Ojdanic;
- (c) There is nothing in the Statute or Secretary-General's Report about collective or organisational responsibility; and

- (d) The Prosecution's reference to two treaties which contain common purpose liability were not in force at the time of the alleged offences and cannot be considered as notice that a particular act is a crime,

CONSIDERING that the Motion amounts to a challenge to jurisdiction under Rule 72 (A)(i) of the Rules, it being a challenge to the indictment on the ground that it does not relate to "any of the violations indicated in Articles 2, 3, 4, 5 and 7 of the Statute",³

CONSIDERING that since the Third Amended Indictment pleads criminal responsibility of the accused for committing crimes based not only on membership of a joint criminal enterprise, but also for having planned, instigated, ordered or otherwise aided and abetted in the offences set out, the relief sought of dismissing the indictment is inappropriate,

CONSIDERING that the Appeals Chamber has determined that participation in a joint criminal enterprise is a mode of liability in respect of any of the crimes within the jurisdiction of the Tribunal under Article 7(1) of the Statute, and defined its elements and application in its Judgments in *Tadic*, *Furundzija* and *Celebici*.⁴

CONSIDERING that the Appeals Chamber jurisprudence clearly distinguishes the form of criminal responsibility encompassed by joint criminal enterprise from both conspiracy (which is an agreement to commit a criminal act, as opposed to an enterprise which includes liability for the actual commission of a criminal offence), and collective criminal responsibility based on membership of a criminal organisation, which is not a form of criminal liability accepted by this Tribunal and is not in fact pleaded in the Third Amended Indictment,

CONSIDERING that the Trial Chamber does not accept the Defence argument that the application of joint criminal enterprise by the Tribunal infringes the *nullem crimen sine lege* principle, because the Appeals Chamber has found that the basis for this

³ Rule 72 (D)(iv) of the Rules.


⁴ See, for example, *Prosecutor v. Tadic*, Judgment, Case No. IT-94-1-A, 15 July 1999 (*Tadic* Appeal Decision), paras. 227-228. In the *Tadic* Appeal Decision, the Appeals Chamber distinguishes between aiding and abetting and acting in pursuance of a common purpose or design (a joint criminal enterprise), para. 229.

form of criminal liability exists in the Statute of the ICTY and that the subjective and objective elements are found in customary international law and based on general international criminal law, national legislation and case law arising out of post-World War II prosecutions,

PURSUANT TO Rule 72 (A)(i) of the Rules of Procedure and Evidence

HEREBY DENIES the Motion.

Done in English and French, the English text being authoritative.



Richard May
Presiding

Dated this thirteenth day of February 2003
At The Hague
The Netherlands

[Seal of the Tribunal]