THE INTERNATIONAL CRIMINAL TRIBUNAL
FOR THE FORMER YUGOSLAVIA

CASE No. IT-05-87-PT

IN THE TRIAL CHAMBER

Before: Judge Patrick Robinson, Presiding
Judge O-Gon Kwon
Judge Iain Bonomy

Registrar: Mr. Hans Holthuis

Date Filed: 7 October 2005

THE PROSECUTOR

v.

MILAN MILUTINOVIC
NIKOLA SAINOVIC
DRAGOLJUB OJDANIC
NEBOJSA PAVKOVIC
VLADIMIR LAZAREVIC
VLASTIMIR DJORDEVIC
SRETEN LUKIC

GENERAL OJDANIC'S PRELIMINARY MOTION CHALLENGING JURISDICTION: INDIRECT CO-PERPETRATION

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Mr. Toma Fila and Mr. Vladimir Petrovic for Nikola Sainovic
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"Indirect co-perpetration" Does Not Exist as a Form of Liability in the Statute or in Customary International Law

1. General Dragoljub Ojdanic respectfully moves, pursuant to Rule 72(A)(i), to dismiss from the Amended Joinder Indictment the form of liability of "indirect co-perpetration". General Ojdanic contends that no such form of liability exists in the Statute or in customary international criminal law and therefore the charge does not relate to Article 7 of the Statute of the Tribunal..

The Indictment

2. The Amended Joinder Indictment contains the following relevant provisions:

> "22. In the alternative, the accused are also charged as indirect co-perpetrators, based upon their joint control over the criminal conduct of forces of the FRY and Serbia. The accused had the *mens rea* for the specific crimes charged in this indictment, acted with the mutual awareness of the substantial likelihood that crimes would occur as a direct consequence of the pursuit of the common goal, and were aware of the importance of their own roles.
>
> 34. Each of the accused participated in the joint criminal enterprise in the ways set out (for each accused) in the paragraphs below. Alternatively, each of the accused contributed, as a co-perpetrator based on joint control, to the common goal in the ways set out in those paragraphs…"[1]

3. At the Rule 65 *ter* conference after filing of the Amended Joinder Indictment, the prosecution explained that the allegation of indirect co-perpetration was an alternative formulation of the term "committed" in Article 7(1), inserted in the indictment "to confirm with the emerging jurisprudence in the *Stakic* case."[2]

The *Stakic* Judgement

4. In a previous decision in General Ojdanic's case, the Appeals Chamber held that participation in a joint criminal enterprise was a form of liability within the meaning of term "committed" in Article 7(1) of the ICTY statute.[3]

5. In *Stakic,* the Trial Chamber decided not to apply the concept of joint criminal enterprise as a form of the term "committed" in Article 7(1) "to avoid the misleading

[1] See also para. 18 of the Amended Joinder Indictment which includes indirect co-perpetration within the definition of the term "committed".
[2] Transcript of Rule 65 ter conference at pages 24-25 (23 August 2005)
[3] *Prosecutor v Milutinovic et al*, No. IT-99-37-AR72, *Decision on Ojdanic's Motion Challenging Jurisdiction: Joint Criminal Enterprise* (21 May 2003) at para. 20

impression that a new crime not foreseen in the Statute of this Tribunal has been introduced through the backdoor."[4]

6. Instead, it applied what it labeled as an alternative form of the term "committed"—a doctrine of "co-perpetration".[5] It explained the doctrine as follows:

> "For co-perpetration it suffices that there was an explicit agreement or silent consent to reach a common goal by coordinated co-operation and joint control over the criminal conduct. For this kind of co-perpetration it is typical, but not mandatory, that one perpetrator possesses skills or authority which the other perpetrator does not. These can be described as shared acts which when brought together achieve the shared goal based on the same degree of control over the execution of the common acts."[6]

7. The *Stakic* Trial Chamber explained the concept by quoting from a German treatise authored by Claus Roxin:

> "The co-perpetrator can achieve nothing on his own…The plan only works if the accomplice works with the other person. Both perpetrators are thus in the same position….They can only realize their plan insofar as they act together, but each individually can ruin the whole plan if he does not carry out his part. To this extent he is in control of the act….This type of key position of each perpetrator describes precisely the structure of joint control over the act…If two people govern a country together—are joint rulers in the literal sense of the word—the usual consequence is that the acts of each depend on the co-perpetration of the other. The reverse side of this is, inevitably, the fact that by refusing to participate, each person individually can frustrate the action."[7]

8. Although not citing a single case in which this concept of "co-perpetration" has been applied in international criminal law, the *Stakic* Trial Chamber concluded that its definition was "closer to what most legal systems understand as 'committing'".[8]

9. The prosecution has now embraced this concept in the Amended Joinder Indictment, expanded it by creating an even more diluted form—"indirect co-perpetration" and seeking to hold General Ojdanic liable under this novel theory for the crimes of murder, deportation, and forcible transfer.

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[4] *Prosecutor v Stakic*, No. IT-97-24, *Judgement* (31 July 2003) at para. 441
[5] *Stakic* at para. 438
[6] *Stakic* at para. 439
[7] *Stakic* at para. 440
[8] *Stakic* at para. 441

Indirect Co-perpetration is Not Within Article 7(1)

10. General Ojdanic respectfully contends that it is wrong for the judges to continually expand the Statute of the Tribunal as enacted by the United Nations Security Council. The Security Council deliberately included aiding and abetting as a form of liability in Article 7(1), conspiracy to commit genocide in Article 4(3)(b) and complicity in genocide in Article 4(3)(e). These provisions adequately cover the situation where a person acts in concert with others in the commission of a crime. Had the Security Council wanted to establish indirect co-perpetration as a form of liability, it could and would have done so explicitly.

11. In 2003, General Ojdanic challenged the doctrine of "joint criminal enterprise" on the ground that it could be found nowhere in the Statute of the Tribunal. The Appeals Chamber rejected this challenge, and wrote joint criminal enterprise into Article 7(1) of the Statute as a form of the term "committed".[9] The Appeals Chamber's creation and application of "joint criminal enterprise" liability, has been the subject of extensive criticism by legal scholars.[10] The Trial Chamber should not allow the prosecution to plunge the jurisprudence of this Tribunal further into the abyss.

12. General Ojdanic notes that the forms of liability in the Statute have been exhaustively analyzed and applied over the past decade in numerous judgements at the Trial Chamber and Appeals Chamber level. The concept of co-perpetration, while discussed as a status to be considered for punishment purposes[11], has never before been applied as a form of liability that might be used to convict an accused. General Ojdanic contends that it is imprudent for the Tribunal, in the twilight of its existence, to be

[9] *Decision on Dragoljub Ojdanic's Motion Challenging Jurisdiction: Joint Criminal Enterprise* (21 May 2003)

[10] Danner & Martinez, *Guilty Associations: Joint Criminal Enterprise, Command Responsibility and the Development of International Criminal Law*, 93 California Law Review 75, 135 (January 2005)(hereinafter "Danner & Martinez); Danner, *Joint Criminal Enterprise and Contemporary International Criminal Law*, Proceedings of the American Society of International Law (2004) at p. 188; Schabas, *Mens Rea and the International Tribunal for the former Yugoslavia*, 37 New England Law Review 1015, 1032 (2003); Sassoli & Olson, *The Judgement of the ICTY Appeals Chamber on the Merits in the Tadic Case*, 82 INT'L REV RED CROSS 733 (2000) at p. 769; Engvall, *Extended Joint Criminal Enterprise in International Criminal Law*, University of Lund (June 2005); Darcy, *An Effective Measure of Bringing Justice?: The Joint Criminal Enterprise Doctrine of the International Criminal Tribunal for the Former Yugoslavia*, 20 American University International Law Review (2004)

[11] See, for example, *Prosecutor v Krstic*, No. 98-33-A, *Judgement* (19 April 2004) at para. 268; *Prosecutor v Vasiljevic*, No. IT-98-32-A, *Judgement* (25 February 2004) at paras. 181-82.

inventing new forms of liability and applying them retroactively to conduct alleged to have occurred in 1999 or before.

13. General Ojdanic also notes that the prosecution in the Amended Joinder Indictment has not charged "co-perpetration" as an alternative to the joint criminal enterprise form of liability, as the *Stakic* Trial Chamber applied it, but has charged the accused in this case with "indirect co-perpetration" of a joint criminal enterprise. This bootstrapping of one dubious form of liability onto the back of another stretches Article 7(1) of the Statute to its breaking point.

Customary International Criminal Law

14. Even if this Trial Chamber were to read "co-perpetration" into Article 7(1) of the Statute as an implied subset of the term "committed", as the *Stakic* Trial Chamber has done, there would nevertheless be no jurisdiction to hold General Ojdanic liable for the "indirect co-perpetration" form of liability since it did not exist in customary international criminal law.

15. In order for a form of liability to be applied to an accused at this Tribunal, it must not only exist in the Statute, but must have existed in customary international criminal law. Customary international criminal law consists of *opinio juris* and state practice.[12] The "co-perpetrator" form of liability is unknown in *opinio juris* and is not sufficiently established in the practice of the major legal systems of the world to be considered as part of customary law.

Opinio Juris

16. In the Nuremburg Trial of the Major War Criminals before the International Military Tribunal, the judges declined to make a distinction between perpetrators and accomplices, or principals and aiders and abetters. "Individual responsibility was put under the heading of criminal participation….No distinction in parties to a crime was made, variance in role and degree was expressed in the sentence."[13]

17. The judges "eschewed the most controversial implications of the organizational and conspiracy charges by defining conspiracy narrowly… [and] justified

[12] *Rwamakuba v Prosecutor*, No. ICTR-98-44-AR72.4, *Decision on Interlocutory Appeal Regarding Application of Joint Criminal Enterprise to the Crime of Genocide* (22 October 2004) at para. 14
[13] van Sliedregt, *The Criminal Responsibility of Individuals for Violations of International Humanitarian Law*, TMC Asser Press, The Hague (2003) at pages 27,31.

these limitations by stating that they were in accordance with well settled legal principles, one of the most important of which is that criminal guilt is personal and that mass punishment should be avoided."[14]

18. Similarly, in cases decided under Control Council Law No. 10, such as the *Justice* case,[15] the judges made it plain that "the record is replete with evidence of specific criminal acts, but they are not the crimes charged in the indictment. They constitute evidence of the intentional participation of the defendants and serve as illustrations of the nature and effect of the greater crimes charged in the indictment."[16]

19. Thus the accused were judged on their personal "participation" and not on their relationships with other perpetrators. No distinction between perpetrators and accomplices was even attempted in the *Justice* case.[17] Had the judges in the *Justice* case employed the concept of indirect co-perpetration there would have been no acquittals of members of the notorious SS.

20. Yet there were several acquittals. Altstoetter himself, a department chief in the Ministry of Justice, was found guilty of being a member of the SS, but not guilty of war crimes or crimes against humanity.[18] Judge Cuhorst, the Chief Judge of the Stuttgart Special Court, was described as a "fanatical Nazi and ruthless judge."[19] He was acquitted when it could not be shown that he had personally discriminated against Poles who were tried in his court.[20] Had Altstoetter and Cuhorst been tried under the indirect co-perpetration form of liability, once it was established that they agreed with the overall criminal objectives of Hitler and the SS to discriminate against Jews and Poles, and participated in the Ministry of Justice or Special Courts, they would have been "indirect

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[14] Danner & Martinez at p.120, quoting from Trial of the Major War Criminals before the International Criminal Tribunal, vol I, page 256 (1947).
[15] *United States v Altstoetter et al*, Trials of War Criminals before the Nuremburg Military Tribunals under Control Council Law No. 10, vol III, page 956 (1950).
[16] page 985
[17] "The foregoing documents and facts show without dispute that several of the defendants participated to one degree or another either as a principal, or ordered, or abetted, took a consenting part in, or were connected with the execution or carrying out of the Hitler ['Night and Fog'] scheme or plan." (page 1056); "the person who persuades another to commit murder, the person who furnishes the lethal weapon for the purpose of its commission and the person who pulls the trigger are all principals or accessories to the crime." (page 1063)
[18] page 1171
[19] page 1158
[20] page 1158

co-perpetrators" for all crimes committed by any other persons acting in furtherance of those objectives.

21. The same analysis applies to the *RuSHA case*.[21] This was a prosecution of leaders of four organizations responsible for racial crimes against foreigners. These crimes included taking their infants away, forcing them to join the German army, and plundering their property. While the organizations cooperated in various aspects of Hitler's program, the officers of one organization, *Lebensborn*, despite being members of the SS, were acquitted because its organization "did everything within its power to adequately provide for the children…placed in its care."[22]

22. Had the *Lebensborn* defendants been tried under the "indirect co-perpetration" form of liability, once it was established that they agreed with the overall criminal objectives of Hitler and the SS to take away infants from foreigners, they would have been responsible for all crimes committed by other persons in furtherance of those objectives, including those in the other three organizations. By restricting their liability to their own acts, the Tribunal demonstrated that it was not applying the concept of "indirect co-perpetration" in the *RuSHA case*.[23]

23. Therefore, there is no support for the concept of "indirect co-perpetration" as a form of liability in the post-World War II international jurisprudence.

State Practice

24. Article 25 (3) of the Statute of the International Criminal Court provides that:

> "In accordance with this Statute, a person shall be criminally responsible and liable for punishment for a crime within the jurisdiction of the Court if that person:
> (a) Commits such a crime, whether as an individual, jointly with another or through another person, regardless of whether that other person is criminally responsible."

25. This statute, which applies to all crimes committed after July 2002, explicitly provides for joint liability for "commission" of a crime, in addition to liability for aiding

[21] *United States v Ulrich Greifelt et al*, Trials of War Criminals before the Nuremburg Military Tribunals under Control Council Law No. 10, vol V, page 88 (1950)
[22] page 163
[23] See also the acquittals of Brueckner (director of repatriation office who drafted order that was never carried out) Trials of War Criminals before the Nuremburg Military Tribunals under Control Council Law No. 10, vol V, page 147; Meyer-Hetling (chief of planning in Staff Main office not personally connected with crimes) at page 156; Schwerzenberger (chief of finance for Staff Main office) at page 157

and abetting. In his commentary on the statute, Professor Kai Ambos confirms that the ICC Statute goes beyond established state practice at the time, particularly the common law "innocent agent" doctrine, which only allowed for a person to be convicted as a principal if the other person carrying out the crime lacked his own *mens rea*.[24]

26. In her book, *The Criminal Responsibility of Individuals for Violations of International Humanitarian Law*, Elise van Sliedregt comments that "Article 25(3)(a) introduces to the international level a **new** form of perpetration: perpetration by means."[25] (emphasis added)

27. In most legal systems of the world, a person who uses another human as his tool or instrument incurs liability as if he were the physical perpetrator.[26] In common law systems, this has been known as the "innocent agent" doctrine.[27] Some civil law systems, such as Germany, extend this doctrine to physical perpetrators who are not innocent, in that they also have the requisite *mens rea* and capacity to commit the crime.[28] This has become known as liability for being the "perpetrator behind the perpetrator." This doctrine requires that the person "behind" completely dominate the person carrying out the physical act.[29]

28 This is apparently what the *Stakic* Trial Chamber had in mind as a basis for co-perpetration. It noted that "as the leading political figure in Prijedor municipality, he is charged as the perpetrator behind the direct perpetrator/actor and is considered the co-perpetrator of those crimes together with other persons with whom he co-operated in many leading bodies of the Municipality."[30]

29. As noted above, joint commission of a crime with another person possessing the requisite *mens rea* does not make one liable as a perpetrator in the common law legal

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[24] Professor Kai Ambos in Triffterer, *Commentary on the Rome Statute of the International Criminal Court*, Nomos Verlagsgesellschaft (Baden Baden 1999) at pp. 479-80

[25] van Sliedregt, The Criminal Responsibility of Individuals for Violations of International Humanitarian Law, TMC Asser Press, The Hague (2003) at p. 70

[26] Gillies, *The Law of Criminal Complicity*, Law Book Co. Ltd. (Sydney 1980) at pp. 138-39; Kadish, *Complicity, Cause and Blame: A Study in the Interpretation of Doctrine*, 73 California Law Review 323 (1985)

[27] Model Penal Code sec. 2.06(2)(a); Black's Law Dictionary recognizes the indirect perpetrator as the one who "rather than using his own hands, uses the hands of an innocent agent to commit a crime."

[28] However, these jurisdictions limit responsibility to only those crimes which were actually intended. *Tadic* at para. 224

[29] van Sliedregt, The Criminal Responsibility of Individuals for Violations of International Humanitarian Law, TMC Asser Press, The Hague (2003) at p. 70

[30] *Stakic* at para. 741

systems of the world. Likewise, liability for unintended, but foreseeable crimes does not exist in many civil law systems of the world. The hybrid of "indirect co-perpetration" alleged in the Amended Joinder Indictment picks the most favorable aspects of each system for the prosecution, but is not established as customary international criminal law in the state practice of the major legal systems of the world.

30. The "indirect co-perpetrator" form of liability advanced by the prosecution also goes against the trend in national systems to avoid such artificial distinctions. Justice Joachim Vogel of Stuttgart, in a recent article, wrote:

> "In the first Tadic decision, the prosecution at the I.C.T.Y. cites 'the modern trend to move away from very technical definitions about the degree of responsibility, and instead move us to focus on whether the action in any way incurred criminal liability … The relative degree of responsibility is a matter for sentencing' Indeed, it is the very idea of 'monistic' models (in German legal terminology: '*Einheitstätersysteme*' – that we should not ask whether a person is liable as main perpetrator (author, primary party) or accomplice (instigator, aider and abettor, secondary party) but weigh the degree of participation in the sentencing process.
>
> In contrast, it is still the majority of the criminal law systems in the world which make a legal distinction between primary and secondary liability – which may be called a 'responsibility orientated' model. However, a closer look reveals that these systems are indeed moving towards a 'sentencing orientated' model. In many legal systems, there is no difference between the penalties provided for main perpetrators on the one hand and secondary parties on the other hand…
>
> Indeed, the practical value of the distinction between primary and secondary parties may well be doubted. Often—and setting symbolic reasons aside, nothing will depend on whether the accused is instigator or accomplice by encouraging. On the other hand, a complex system of criminal responsibility will lock up legal resources. In Germany, books and articles have been written about whether heads of organizations responsible for offenses are indirect perpetrators…co-perpetrators…or instigators…, a question of hardly any practical importance because the same penalties apply. There is a clear and present danger

that real and really important questions are neglected."[31]

31. Therefore, because the form of liability of "indirect co-perpetration" cannot be said to be an established principle in state practice by the major legal systems of the world, and cannot be said to be a principle rooted in international *opinion juris*, the prosecution's attempt to apply it to General Ojdanic's conduct in 1999 violates the principle of *nullum crimen sine lege*.

Conclusion

32. Because the "indirect co-perpetration" form of liability charged in the Amended Joinder Indictment neither exists in the Statute nor in customary international law, there is no jurisdiction to prosecute General Ojdanic under this form of liability. The Trial Chamber should order paragraph 22 and the second sentence of paragraph 34 stricken from the Amended Joinder Indictment and dismiss the charges of "indirect co-perpetrator" liability.

Respectfully submitted,

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[31] Vogel, *How to Determine Individual Criminal Responsibility in Systemic Context: Twelve Models*, Societe Internationale de Defense Sociale at www.defensesociale.org/revista2002