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THE INTERNATIONAL CRIMINAL TRIBUNAL
FOR THE FORMER YUGOSLAVIA

CASE No. IT-99-37-AR72

IN THE APPEALS CHAMBER

Before: The Appeals Chamber

Registrar: Mr. Hans Holthuis

Date Filed: 28 February 2003

THE PROSECUTOR

v.

MILAN MILUTINOVIC

NIKOLA SAINOVIC

DRAGOLJUB OJDANIC

GENERAL OJDANIC'S APPEAL FROM DENIAL OF PRELIMINARY MOTION TO DISMISS FOR LACK OF JURISDICTION: JOINT CRIMINAL ENTERPRISE

The Office of the Prosecutor:

Mr. Geoffrey Nice

Ms. Cristina Romano

Mr. Milbert Shinn

Counsel for Milan Milutinovic:

Mr. John Livingston

Mr. Radoje Stefanovic

Mr. Miladin Papic

Counsel for General Ojdanic:

Mr. Tomislav Visnjic

Mr. Peter Robinson

Mr. Vojislav Selezan

Counsel for Nikola Sainovic:

Mr. Toma Fila

Mr. Vladimir Petrovic

Mr. Zoran Jovanovic

TABLE OF CONTENTS

Preliminary Matters

1. General Dragoljub Ojdanic hereby appeals from the denial of his Preliminary Motion to Dismiss for Lack of Jurisdiction: Joint Criminal Enterprise by Trial Chamber III on 13 February 2003.

2. This appeal is filed pursuant to Rule 72(B)(i) as an appeal of right. The Trial Chamber expressly found 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.'"[1]

3. The Preliminary Motion to Dismiss for Lack of Jurisdiction: Joint Criminal Enterprise was filed on 29 November 2002. The Prosecution filed its response on 13 December 2002. General Ojdanic filed a reply on 6 January 2003. Those are the relevant documents in the proceedings before the Trial Chamber. No oral hearing was held on the motion.[2]

4. The Trial Chamber held 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," citing the *Tadic*, *Furundzija,* and *Celebici* decisions.

5. It further held that "the Trial Chamber does not accept the Defence argument that the application of joint criminal enterprise by the Tribunal infringes the *nullum crimen sine lege* principle, because the Appeals Chamber has found that the basis for this 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 World War II prosecutions."[3]

6. The Trial Chamber also ruled that since joint criminal enterprise liability was only one form of liability alleged in the indictment, it did not warrant the remedy of complete dismissal in any event.[4]

7. The grounds of appeal are set forth in the Table of Contents on page 2.

8. The standard of review for these questions of law is *de novo*.[5]

Introduction

9. This is a frontal attack on the beast known as "joint criminal enterprise." From a seed planted in dicta in the *Tadic* appeal[6], joint criminal enterprise has become a monster theory of liability which now dominates the practice of this Tribunal.[7] No head-on challenge to this theory of liability has heretofore been raised, and the Appeals Chamber has not yet had the opportunity to rule on such a challenge. This is that opportunity.

10. Under the heading "Individual Criminal Responsibility", the Third Amended Indictment in General Ojdanic's case alleges as follows:

> "16. Each of the accused is individually responsible for the crimes alleged against him in this indictment under Articles 3,5, and 7(1) of the Statute of the Tribunal. The accused planned, instigated, ordered, committed, or otherwise aided and abetted in the planning, preparation, or execution of these crimes. By using the word 'committed' in this indictment, the Prosecutor does not intend to suggest that any of the accused physically perpetrated any of the crimes charged, personally. 'Committing' in this indictment refers to participa-tion in a joint criminal enterprise as a co-perpetrator. The purpose of this joint criminal enterprise was, *inter alia*, the expulsion of a substantial portion of the Kosovo Albanian population from the territory of the province of Kosovo in an

effort to ensure continued Serbian control over the province. To fulfil this criminal purpose, each of the accused, acting individually or in concert with each other and with others known and unknown, significantly contributed to the joint criminal enterprise using the *de jure* and *de facto* powers available to him.

"17. This joint criminal enterprise came into existence no later than October 1998 and continued throughout the time period when the crimes alleged in Counts 1 to 5 of this indictment occurred: beginning on or about 1 January 1999 and continuing until 20 June 1999. A number of individuals participated in this joint criminal enterprise during the entire duration of its existence, or, alternatively, at different times during the duration of its existence, including the accused **Milan MILUTINOVIC, Nikola SAINOVIC, Dragoljub OJDANIC,** and others known and unknown.

"18. The crimes enumerated in Counts 1 to 5 of this indictment were within the object of the joint criminal enterprise. Alternatively, the crimes enumerated in Counts 3 to 5 were natural and foreseeable consequences of the joint criminal enterprise and the accused were aware that such crimes were the likely outcome of the joint criminal

> enterprise. Despite their awareness of the foreseeable consequences, **Milan MILUTINOVIC, Nikola SAINOVIC, Dragoljub OJDANIC** and others known and unknown, knowingly and wilfully participated in the joint criminal enterprise. Each of the accused and other participants in the joint criminal enterprise shared the intent and state of mind required for the commission of each of the crimes charged in counts 1 to 5. On this basis, under Article 7(1) of the Statute, each of the accused and other participants in the joint criminal enterprise bear individual criminal responsibility for the crimes alleged in counts 1 to 5."

11. General Ojdanic contends that there is no jurisdiction under the Tribunal's statute to prosecute a person for being a member of a joint criminal enterprise. Because this is the basis upon which he is charged in the Third Amended Indictment, that indictment must be dismissed.

Argument

I. The Trial Chamber Erred in Concluding that Joint Criminal Enterprise Is a Form of Liability Under Article 7(1)

A. Joint Criminal Enterprise Liability

Is Not Provided for in the Statute

12. This Tribunal is a creature of the United Nations Security Council. Its powers and jurisdiction are limited by the statute enacted by that body.

13. The jurisdiction to punish individuals for crimes on the territory of the former Yugoslavia is set forth in Article 7 of the statute. Article 7 makes no mention of joint criminal enterprise liability. It limits the Tribunal's jurisdiction for individual criminal responsibility in Article 7(1) to those persons who "planned, ordered, committed or otherwise aided and abetted in the planning, preparation, or execution of a crime referred to in articles 2 to 5 of the present Statute."

14. Other international instruments have expressly included collective liability when it intended that such liability be imposed. For example, Article 25(3)(d) of the statute of the International Criminal Court specifically provides that a person shall be criminally responsible for a crime if that person "in any other way (other than aiding and abetting or otherwise assisting in the commission of the crime) contributes to the commission or attempted commission of such a crime by a group of persons acting with a common purpose."

15. The International Convention for the Suppression of Terrorist Bombing, adopted by the United Nations General Assembly just four years after the Tribunal's statute, also specifically provides for "common purpose" liability in language much like that of the International Criminal Court.

16. Article 6 of the Nuremburg Charter provided that “leaders, organizers, instigators, and accomplices participating in the formulation or execution of a Common Plan or Conspiracy

to commit any of the foregoing crimes are responsible for all acts performed by any person in execution of such plan."

17. A plain reading of the words of the ICTY statute indicates that there is no jurisdiction to prosecute General Ojdanic for being a member of a "joint criminal enterprise."

B. Joint Criminal Enterprise Liability Was Not Contemplated as Part of The Preparatory Work of the Statute

18. When the language of a statute is clear, there is no need to resort to an analysis of the events which led to its enactment. General Ojdanic contends that the plain language of Article 7(1) clearly does not include joint criminal enterprise liability. 19. However, resort to the preparatory works demonstrating the history of the enactment of the statute only reaffirms the view that the intent of the Security Council was consciously not to include joint criminal enterprise as a form of liability at the Tribunal.

20. Prior to the enactment of the Tribunal's statute, comments were solicited from member countries of the United Nations. The United States, Canada, France, Italy, and Slovenia all proposed that Article 7(1) include conspiracy as a form of individual liability.[8] Those proposals were rejected.

21. Conspiracy is "an understanding or arrangement amounting to an agreement between two or more persons that they will commit a crime." This is precisely the basis of liability for joint criminal enterprise.[9]

22. Where they intended joint liability to exist for such an agreement, the members of the Security Council specified it in the statute. Indeed, Article 4 contains its own specific language prohibiting conspiracy to commit genocide. That language would be completely redundant if a joint agreement to commit the crimes in Articles 2 through 5 was already encompassed in Article 7(1).[10]

23. In a book written by some of those who helped draft the Tribunal's statute, it was stated that, "[T]he principles of individual criminal responsibility to be applied by the International Tribunal do not include the controversial notion of collective criminal responsibility based on membership in a criminal organization. The notion of collective responsibility in terms of participation in a criminal conspiracy is reflected in the definition of the crime of genocide contained in Article 4 of the Statute."[11]

24. The experience at the Nuremberg trials with collective responsibility provides the historical precedent for this view. The Nuremberg Charter contained a general provision confirming the responsibility of persons participating in a conspiracy to commit any of the crimes referred to therein. However, the Nuremberg Tribunal concluded that this general provision was not sufficient to create a separate and distinct crime with respect to war crimes or crimes against humanity. It held that conspiracy was only a separate crime as it related to the crime of aggression, the definition of which expressly included conspiracy to commit such crimes.[12]

25. The Security Council adopted a similar approach to the ICTY statute. It expressly enacted conspiracy only as a separate crime for genocide. The failure of the Tribunal statute, which drew from the experience at Nuremburg, to expressly include conspiracy or participation in a joint criminal enterprise in Article 7(1) can only be interpreted as an intention to limit the jurisdiction of this Tribunal to individuals who actually “planned, ordered, committed or otherwise aided and abetted in the planning, preparation, or execution of a crime.”

26. The Report of the Secretary-General on the ICTY Statute provided that "The criminal acts set out in this statute are carried out by natural persons; such persons would be subject to the jurisdiction of the International Tribunal irrespective of memberships in groups."[13]

27. That report further specified that "The Secretary-General believes that all persons who participate in the planning, preparation, or execution of serious violations of international humanitarian law in the former Yugoslavia are individually responsible for such violations."[14] (emphasis added) No reference was made to responsibility of members of a joint criminal

enterprise, despite the fact that important member states of the United Nations had urged that conspiracy be included in the forms of liability enumerated in the Tribunal's statute.

28. The Secretary General's Report also makes clear that Judges of the Tribunal were not to create any new forms of liability.

> "It should be pointed out that, in assigning to the International Tribunal the task of prosecuting persons responsible for serious violations of international humanitarian law, the Security Council would not be creating or purporting to legislate that law. Rather, the International Tribunal would have the task of applying existing international humanitarian law."[15]

29. The Secretary General provided an important rationale for such judicial restraint:

> "In the view of the Secretary-General, the application of the principle of *nullum crimen sine lege* requires that the international tribunal should apply rules of international humanitarian law which are beyond any doubt part of customary law so that the problem of adherence of some but not all States to specific conventions does not arise. This would appear to be particularly important in the context of an international tribunal prosecuting persons responsible for serious violations of international

humanitarian law."[16]

30. Therefore, when looking to the intention of the Security Council when enacting the Tribunal's statute, it must be concluded that had it intended to impose liability for joint criminal enterprise, it would have expressly done so. Having not done so, it is not for the Judges of the Tribunal to write it into Article 7(1).

C. Article 7(1) Must Be Interpreted In Light of the Principle of *In Dubio Pro Reo*

31. The interpretation of Article 7(1) in such a way as to write membership in a joint criminal enterprise into the statute violates the principle of *in dubio pro reo*. This principle of statutory construction has been applied by the Appeals Chamber at the pretrial stage of the *Tadic* case. The Chamber held that "any doubt should be resolved in favour of the Defence in accordance with the principle *in dubio pro reo*."[17]

32. The Trial Chamber in *Delalic* held that:

> "where an equivocal word or ambiguous sentence leaves a reasonable doubt of its meaning which canons of construction fail

> to solve, the benefit of the doubt should be given to the subject and against the legislature which has failed to explain itself. This is why ambiguous criminal statutes are to be construed *contra proferentem*."[18]

33. The requirement that statutes be construed in favor of the accused has also been recognized and applied by the statute for the International Criminal Court. Article 22(2) of that statute provides:

> "The definition of a crime shall be strictly construed and shall not be extended by analogy. In case of ambiguity, the definition shall be interpreted in favour of the person being investigated, prosecuted, or convicted."

34. This principle must be applied to the question of whether Article 7(1) encompasses joint criminal enterprise liability. General Ojdanic contends that application of this principle would result in restricting the statute to the plain meaning of its terms, and requires that the indictment based upon joint criminal enterprise liability be dismissed.

D. The Dicta in the *Tadic* Decision Was Based Upon a Flawed Approach To Interpretation of the ICTY Statute

35. In *Prosecutor v Tadic*, No. IT-94-1-A (15 July 1999), the Prosecutor appealed from the Trial Chamber's acquittal of the accused for killing of five civilians in the village of Jaskici. An armed group of men, including Tadic, had entered the village, separated the men, beaten them, and forcibly removed them to an unknown location. The group fired shots upon entering and leaving the village. After they had left, villagers found the dead bodies of five men, although there was no proof as to who had killed them.[19]

36. The Prosecutor argued that "the gist of the common purpose doctrine is that if a person knowingly participates in criminal activity with others, he or she will be liable for all illegal acts that are natural and probable consequences of that common purpose."[20] The defence did not contest the common purpose doctrine as a form of liability, but argued that the killings were not foreseeable to Tadic.[21] The Appeals Chamber ultimately agreed with the Prosecutor, and held that "the notion of common design as a form of accomplice liability is firmly established in customary international law and in addition is upheld, albeit implicitly, in the Statute of the International Tribunal."[22] Because Tadic actively took part in the attack on Jaskici, including rounding up and severely beating some of the men, he was found guilty of the killings that ensued.[23]

37. However, in deciding the narrow issue of Tadic's liability for acts committed by persons with whom he acted in concert, and therefore aided and abetted, the Appeals Chamber went far beyond that which was necessary to reinstate Tadic's conviction. In dicta, it interpreted the Tribunal's mandate that "all of those who have engaged in serious violations of humanitarian law, whatever the manner in which they may have perpetrated, or participated in the perpetration of these violations, must be brought to justice."

38. The Appeals Chamber went on to conclude that in order to carry out this mandate:

> "…it is fair to conclude that the Statute does not confine
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> itself to providing for jurisdiction over those persons
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> who plan, instigate, order, physically perpetrate a crime,
>
> or otherwise aid and abet in its planning, preparation

> or execution. The Statute does not stop there. It does not exclude those modes of participating in the commission of crimes which occur where several persons having a common purpose embark on criminal activity that is then carried out either jointly or by some members of this plurality of persons."[24]

39. The conclusion that all modes of liability not specifically excluded in the statute of the Tribunal are therefore included 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. Many things are not specifically excluded by the statute—the crime of aggression, organizational liability, and conspiracy. Yet it cannot be seriously contended that, therefore, these crimes and forms of liability are necessarily included in the statute.

40. The Appeals Chamber went on to justify its expansive interpretation of Article 7(1) by pointing out that by their very nature, many international war-related crimes "constitute manifestations of collective criminality: the crimes are often carried out by groups of individuals acting in pursuance of a common criminal design."[25] This was presumably known and appreciated by the Security Council when it rejected the proposed inclusion of conspiracy liability in the ICTY statute by several prominent States, and omitted any liability for common design or joint criminal enterprise.

41. This aspect of the *Tadic* opinion has been criticised by legal commentators. In the book, Nullum Crimen Sine Lege and the Subject Matter Jurisdiction of the International Criminal Court: Genocide, Crimes Against Humanity, War Crimes, Machteld Boot said:

> "The reasoning of the Appeals Chamber actually amounts to collective responsibility, and that raises the question of whether the Tribunal has consequentially exceeded its limits as set by its statutes...It would thus seem that the Appeals Chamber has taken

steps that are beyond the terms of the Statute in this part of the Tadic judgment...[26]

42. Thus, it is respectfully submitted that the Appeals Chamber, in language not essential to the judgement, and therefore, dicta, erred in its approach to construction of the ICTY statute. No matter how many times one reads Article 7(1), one does not find the term "joint criminal enterprise" contained therein.

E. The Dicta in *Tadic* Was Not A Faithful Application of Customary International Law

43. Where the ICTY statute does not provide for liability, this hole cannot be filled by resort to customary international law. For example, piracy is prohibited by customary international law, yet no one would suggest that it therefore is included within the crimes which can be prosecuted under the ICTY statute.

44. In justifying its creation of collective liability, the Appeals Chamber in its dicta in *Tadic*, analyzed cases of international law to demonstrate that there was precedent for imposing liability upon an individual for the acts of another with whom he shared a common purpose. These authorities, upon analysis, are too weak to comply with the Secretary-General's mandate that the Tribunal only apply rules of "international humanitarian law which are beyond any doubt part of customary law."[27]

45. The Appeals Chamber relied upon an obscure British military court case in which no written judgement was rendered. In the *Essen Lynching* case, a Prosecutor had urged that a German Captain Heyer be convicted of murder based upon his statement to a crowd of angry bystanders, that his officers should not interfere if members of the crowd attacked their British prisoners. The *Tadic* court simply "assumed that the court accepted the Prosecution arguments

as to the criminal liability of Heyer."[28] This is a slim reed upon which to base a conclusion that collective liability is beyond any doubt part of

customary law.

46. The second authority relied upon by the Appeals Chamber was an equally obscure military court case from the United States. In the *Borkum Island* case, members of a mob beat and killed seven crew members of an airplane which had been shot down. Again, there was no written judgement in the case. The *Tadic* court simply "assumed that the court upheld the common design doctrine", although some defendants were found not guilty of the murder.[29]

47. Finally, the Appeals Chamber in *Tadic* relied upon Italian cases in the post-World War II years. It noted that:

> "In these cases, courts indisputably applied the notion that a person may be held criminally responsible for a crime committed by another member of the group and not envisaged in the criminal plan."[30]

48. However, these cases were based upon a specific section of the Italian Penal Code of 1931, not on any notions of international law.[31] The Appeals Chamber was forced to admit that it could not rely on national law to discern any uniform precedent concerning common purpose liability.[32]

49. In addition, the cases relied upon by the Appeals Chamber were not decisions of international tribunals. In M. Cherif Bassiouni, Crimes Against Humanity in International Law (1992 ed.) it is stated that such cases by occupying powers "have no subsequent validity in international law."[33]

50. That was the sum total of authorities relied upon by the Appeals Chamber in *Tadic* to conclude that "the notion of common design as a form of accomplice liability is firmly

established in customary international law."[34] This conclusion was described as "farfetched" by one scholar.[35]

51. The Appeals Chamber's analysis of national law fared no better. It was forced to concede that "it is not the case" that the major countries of the world adopt the same notion of common purpose.[36] It conspicuously omitted any reference to the law of the former Yugoslavia, which, like Germany, Netherlands, Switzerland, and other countries, does not impose liability upon an accused for acts of another outside of a joint plan, regardless of the foreseeability of those acts, and only imposes any collective liability by an express statute.[37]

52. In an article entitled "The Judgment of the ICTY Appeals Chamber on the Merits in the Tadic Case," published in the International Review of the Red Cross in 2000, the Registrar at the Supreme Court of Switzerland, Marco Sassoli, and ICRC delegate Laura M. Olson found that the common purpose doctrine set forth in *Tadic* was "based upon a disputable comparative analysis and on a mysterious theory of sources, and may therefore be questioned under the principle of *nullum crimen sine lege*."[38]

53. The Appeals Chamber is respectfully requested to reconsider the broad pronouncements of collective liability made in the *Tadic* opinion, and analyze the notion of joint criminal enterprise in a manner more faithful to the ICTY statute.

F. Appeals Chamber Cases Since *Tadic* Provide No Precedent for Joint Criminal Enterprise Liability

54. The Trial Chamber in this case found itself bound by the Appeals Chamber decision in *Tadic*, as well as the decisions in *Furundzija* and *Delalic*.[39] In fact, the latter decisions do not provide much guidance on the issue.

55. In *Prosecutor v Furundzija*, No. IT-95-17/1-A (21 July 2000), a witness was tortured by another man during the interrogation by the accused. The Prosecutor contended that the

accused was liable as a co-perpetrator because they acted in concert, and that no pre-existing plan or agreement to torture was required.[40] The defence did not contest the principle of common purpose enumerated in Article 25 of the Rome Statute, but argued the insufficiency of the proof.[41] The Appeals Chamber held that "where the act of one accused contributes to the purpose of the other and both acted simultaneously in the same place, and within full view of each other, over a prolonged period of time, the argument that there was no common purpose is plainly unsustainable."[42]

56. This is an unremarkable holding of accomplice liability for a contemporaneous criminal act, and does not authorize or sustain the "joint criminal enterprise" liability charged in the Third Amended Indictment against General Ojdanic.

57. Likewise, in *Prosecutor v Delalic*, No. IT-96-21-A (20 February 2001), the Prosecutor raised the common purpose doctrine in her appeal of the acquittal of the accused Delic on a charge of unlawful confinement of civilians at Celebici camp. The Appeals Chamber refused to "accept the circumstance alone of holding a position as a guard somewhere within a camp in which civilians are unlawfully detained suffices to render that guard responsible for the crime of unlawful confinement of civilians."[43]

58. Therefore, *Delalic* is not authority for the creation of "joint criminal enterprise" liability by virtue of membership in an organization with a criminal purpose—the theory of liability charged against General Ojdanic in the Third Amended Indictment.

G. The Trial Chamber Decisions Transformed the *Tadic* Dicta Into a Vehicle for Organizational Liability

59. The danger of the sweeping language in the dicta of *Tadic* has been brought home by the fact that it gave birth to the concept of "joint criminal enterprise" in the Trial Chambers. Even if one accepts the validity of the common purpose doctrine set forth in the *Tadic* dicta, the doctrine has been transformed into organizational liability by recent Trial Chamber decisions and

by the indictment in General Ojdanic's case. It is one thing to be liable as one of five men terrorizing a small village, but quite another to be an official in an organization of more than 100,000 men, many layers of command and hundreds of kilometers away from the events, and be held responsible for crimes committed over a period of six months, throughout a territory.

60. This is contrary to the dictates of the U.N. Secretary-General, who stated:

> "The criminal acts set out in this statute are carried out by natural persons; such persons would be subject to the jurisdiction of the International Tribunal irrespective of their membership in groups."[44]

61. Trial Chamber I first expanded the "common purpose doctrine" into "joint criminal enterprise" liability in its decisions in the ***Krstic*** and *Kvocka* cases, finding liability of a member of a joint criminal enterprise as a principal under Article 7(1).[45] In both cases the "joint criminal enterprise" theory of liability was not pled in the indictment, but only relied upon by the Trial Chamber after the trial in its judgements.[46] In the *Brdjanin & Talic* and *Krnojelac* cases, Trial Chamber II disagreed with the approach of Trial Chamber I, finding that joint criminal enterprise liability was not as a principal, but as an accomplice.[47]

62. Under these decisions, it is possible to have criminal liability under the most absurd scenarios. An accountant in the Ministry of Interior can be liable for murder by processing the payroll of MUP officers who she knows are putting civilians on trains for deportation.[48] No member of any organization involved in the war would be free from liability for murder, since killings are a foreseeable consequence of virtually all conflict-related activity.

63. In addition to the judicial chaos that has resulted from the effort to write joint criminal enterprise liability into the statute of the Tribunal, the public policy ramifications of this judicial activism are counterproductive. Sassoli and Olson pointed out the dangers of creating such liability:

> "Indeed, the very basis of international criminal law and its civilizing contribution to the enforcement of international law is that criminal responsibility is individual...It makes clear that the horrific crimes witnessed by our century were not collectively committed by 'the Serbs', 'the Germans', 'the Croats', or 'the Hutus', but by criminal individuals... It is therefore in our opinion crucial that certain concepts in international criminal law, such as the common purpose doctrine, should not lead to a re-collectivation of responsibility...In our view, this should not, however, lead to criminal responsibility based on simple membership of the group and knowledge of the policy of that group. Such a concept would in fact water down the criminal responsibility of the actual perpetrators and their leaders and create a net of solidarity around them. This in turn would not increase protection for the victims, nor would it facilitate the actual implementation of international criminal justice."

64. General Ojdanic contends that the decisions of the Trial Chambers demonstrate that the judicial creation of a form of liability not set forth in the statute was both beyond the jurisdiction of this Tribunal and unwise. The Third Amended Indictment in his case contains the following language:

> "The crimes enumerated in Counts 1 to 5 of this indictment were within the object of the joint criminal enterprise. Alternatively,

the crimes enumerated in Counts 3 to 5 were natural and foreseeable consequences of the joint criminal enterprise and the accused were aware that such crimes were the likely outcome of the joint criminal enterprise."

65. This charge exposes General Ojdanic to liability for being a member of an organization, other members of which are alleged to have committed crimes that he should have foreseen. This is precisely the form of organizational, rather than individual, liability that the Security Council eschewed when adopting the ICTY statute.

66. Therefore, even if the Appeals Chamber declines to revisit the broad dicta in *Tadic*, it should hold that the concept of "joint criminal enterprise", as developed in the Trial Chambers and by the Prosecutor in General Ojdanic's indictment, expands liability beyond the common purpose doctrine and into the forbidden realm of organizational liability.

II. The Trial Chamber Erred in Concluding That Application of Joint Criminal Enterprise Liability to General Ojdanic Does Not Violate The Principle of *Nullum Crimen Sine Lege*

67. General Ojdanic also contends that the creation of joint criminal enterprise liability, even if adopted by this Trial Chamber, should not be applied in his case. *Tadic's* common purpose form of liability was only created on 15 July 1999, and the concept of "joint criminal enterprise" as a form of liability did not enter the Tribunal's jurisprudence until the *Krstic* decision in August, 2001. The Third Amended Indictment against General Ojdanic encompasses conduct which ended on 20 June 1999, before either decision was handed down.

68. If the Appeals and Trial Chambers, with its collective wisdom and staff, have had to rely on obscure, unpublished World War II cases, and inconsistent national practice, and still

been unable to decipher the source and limits of joint criminal enterprise liability, not contained on the face of the Statute, how can one expect General Ojdanic, holed up in his underground bunker in Belgrade while NATO bombs rained down, to be on notice that such conduct contravened the Tribunal's statute?

69. This is particularly true in light of the fact that the law in the former Yugoslavia did not impose liability for the foreseeable acts of others[49], which is the basis of the "joint criminal enterprise" allegations in the Third Amended Indictment.

70. Therefore, even if his first ground of appeal is rejected, General Ojdanic respectfully submits that the Third Amended Indictment should be dismissed, or the joint criminal enterprise allegations stricken, based upon the principle of *nullem crimen sine lege*.

Conclusion

71. General Ojdanic respectfully contends that the Third Amended Indictment charges him with conduct, being a member of a joint criminal enterprise, which is not within the jurisdiction of this Tribunal. He further contends that the application of liability under this theory to his case violates the principle of *nullum crimen sine lege*. For those reasons, he respectfully requests that Trial Chamber decision be reversed and the Third Amended Indictment be dismissed.

Respectfully submitted,

TOMISLAV VISNJIC

VOJISLAV SELEZAN

PETER ROBINSON

Counsel for General Ojdanic

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[1] Decision, at page 6, first full paragraph

[2] This information is being provided pursuant to the "Practice Direction on Procedure for Filing of Written Submissions in Appeal Proceedings Before the International Tribunal," (7 March 2002)

[3] Decision at pages 6-7.

[4] Decision, at page 6. The defence had noted that "General Ojdanic will accept whatever remedy the Trial Chamber deems appropriate if it holds that joint criminal enterprise liability is not within Article 7(1). However, he notes that this is the primary theory relied upon by the Prosecutor and that there is no evidence whatsoever in the supporting material that General Ojdanic planned, instigated, ordered, or committed the offenses charged in the indictment." (Reply Brief at fn.1) General Ojdanic maintains the same position on appeal.

[5] *Prosecutor v Brdjanin & Talic*, No. IT-99-36-AR73.9 (11 December 2002) [appeal of Jonathan Randal]

[6] *Prosecutor v Tadic*, No. IT-94-1-A (15 July 1999)

[7] See indictments in *Prosecutor v Seselj*, No. IT-03-67; *Prosecutor v Meakic et al*, No. IT 02-65; *Prosecutor v Borovcanin*, No. IT-02-64; *Prosecutor v Nikolic*, No. IT-02-63;

Prosecutor v Blagojevic et al, No. IT 02-60; *Prosecutor v Beara*, No. IT-02-58; *Prosecutor v Popovic*, No. IT 02-57; *Prosecutor v Milosevic*, No. IT-02-54; *Prosecutor v Krajisnik & Plavsic*, No. IT-00-39 &40; *Prosecutor v Brdjanin & Talic*, No. IT-99-36; *Prosecutor v Stakic* No. IT-97-24; and *Prosecutor v Martic*, No. IT-95-11.

[8] See Morris & Scharf, An Insider's Guide to the International Criminal Tribunal for the former Yugoslavia, Transnational Publishers, New York, 1995 at pages 384-87.

[9] Prosecutor v Krnolejac, No. IT-97-25-T (15 March 2002) at para. 80.

[10] Genocide is not charged as one of the crimes in this case.

[11] Morris & Scharf, An Insider's Guide to the International Criminal Tribunal for the former Yugoslavia, Transnational Publishers, New York, 1995 at page 95.

[12] Morris & Scharf, An Insider's Guide to the International Criminal Tribunal for the former Yugoslavia, Transnational Publishers, New York, 1995 at pages 6, 95-96, fn. 299, quoting from Nuremberg Judgment at 56.

[13] Report of Secretary-General on ICTY Statute at para. 51.

[14] Report of Secretary-General on ICTY Statute at para. 54.

[15] Report of Secretary-General on ICTY Statute at para. 29

[16] Report of Secretary-General on ICTY Statute at para 34

[17] *Prosecutor v Tadic*, No. IT-94-1-A (15 October 1998) at para. 73.

[18] *Prosecutor v Delalic*, No. IT-96-21-T (16 November 1998) at para. 413.

[19] Paras. 180-81,232

[20] Para. 175

[21] Para 177

[22] Para. 220

[23] Para. 232

[24] Para 190

[25] Para. 191

[26] See page 288, 302 (Intersentia Publishers, Antwerp, 2001)

[27] Report of Secretary-General at para 34

[28] *Tadic*, at para. 208

[29] *Tadic*, at para. 212

[30] *Tadic*, at para. 218

[31] Sassoli & Olson, "The Judgment of the ICTY Appeals Chamber on the Merits in the Tadic Case," 839 International Review of the Red Cross 733 (2000)

[32] See para. 51, below

[33] Page 356

[34] *Tadic*, at para. 220

[35] Boot, , Nullum Crimen Sine Lege and the Subject Matter Jurisdiction of the International Criminal Court: Genocide, Crimes Against Humanity, War Crimes, Intersentia Publishers, Antwerp, 2001, at page 293.

[36] *Tadic*, at para. 225

[37] Articles 253-54, Criminal Law of the Federal Republic of Yugoslavia; Articles 226-27, Criminal Law of the Republic of Serbia

[38] Sassoli & Olson, "The Judgment of the ICTY Appeals Chamber on the Merits in the Tadic Case," 839 International Review of the Red Cross 733 (2000)

[39] Decision at page 6

[40] Para. 116

[41] Para. 117

[42] Para. 120

[43] Para 364

[44] Report of Secretary-General, at para. 51

[45] *Prosecutor v Krstic*, No. IT-98-33-T (2 August 2001) at para. 601; *Prosecutor v Kvocka et al*, No. IT-98-30/1-T (2 November 2001) at para. 284.

[46] *Krstic*, at para. 481, *Kvocka* at para. 246

[47] *Prosecutor v Brdjanin & Talic*, No. IT-99-36-PT (28 March 2001) at para. 43; *Prosecutor v Krnolejac*, No. IT-97-25-T (15 March 2002) at para. 73.

[48] See child pornography analogy in *Kvocka*, at para. 285

[49] Articles 253-54, Criminal Law of the Federal Republic of Yugoslavia; Articles 226-27, Criminal Law of the Republic of Serbia