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 No.: 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**

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# DECISION ON DRAGOLJUB OJDANIĆ'S MOTION CHALLENGING JURISDICTION – *JOINT CRIMINAL ENTERPRISE*

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**Counsel for the Prosecutor**
**Mr Norman Farrell**

**Counsel for Dragoljub Ojdanić**
**Mr Tomislav Višnjić, Mr Vojislav Seležan and Mr Peter Robinson**

## Procedural Background

1. Dragoljub Ojdanić ("Ojdanić") is charged pursuant to the Third Amended Indictment ("indictment")[1] with deportation (count 1[2]), other inhumane acts (count 2[3]), persecutions (counts 3[4]) and murder (count 4[5]). He is charged both as a superior pursuant to Article 7(3) of the Statute and for planning, instigating, ordering, committing and otherwise aiding and abetting in the planning, preparation or execution of those crimes, pursuant to Article 7(1).[6] The indictment alleges that his liability pursuant to Article 7(1) stems, *inter alia*, from his part in a joint criminal enterprise to commit those crimes.[7] The relevant paragraphs of the indictment are 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 participation 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.
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> 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 **Slobodan MILOŠEVIĆ, Milan MILUTINOVIĆ, Nikola ŠAINOVIĆ, Dragoljub OJDANIĆ, Vlajko STOJILJKOVIĆ** and others known and unknown.
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> 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 and others known and unknown were aware that such crimes were the likely outcome of the joint criminal enterprise. Despite their awareness of the foreseeable consequences, **Slobodan MILOŠEVIĆ, Milan MILUTINOVIĆ, Nikola ŠAINOVIĆ, Dragoljub OJDANIĆ, Vlajko STOJILJKOVIĆ** 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.

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1 IT-99-37-I, 5 September 2002.
2 A crime against humanity under Article 5(d) of the Statute.
3 As forcible transfer, a crime against humanity under Article 5(i) of the Statute.
4 A crime against humanity under Article 5(h) of the Statute.
5 A violation of the laws or customs of war under Article 3 of the Statute.
6 Indictment, pars 16-52.
7 Indictment, pars 16-18.

2. On 29 November 2002, Ojdanić filed a preliminary motion before Trial Chamber III to dismiss the indictment for lack of jurisdiction in relation to charges based on his liability as a participant in a joint criminal enterprise.[8] On 13 December 2002,[9] the Prosecution responded to his motion and, on 6 January 2003, Ojdanić replied.[10]

3. On 13 February 2003, Trial Chamber III rendered its decision whereby it dismissed Ojdanić's motion.[11] The Trial Chamber held that the Appeals Chamber had determined that participation in a joint criminal enterprise was a mode of liability which applied to any crime within the Tribunal's jurisdiction *ratione materiae*.[12] It further stated that the Appeals Chamber had defined, in accordance with the *nullum crimen sine lege* principle, the constitutive elements of such a form of liability and it said that the Appeals Chamber had clearly distinguished that form of liability from other forms of liability such as conspiracy and membership of criminal organisation.[13]

4. On 28 February 2003, Ojdanić appealed against that decision.[14] On 10 March 2003,[15] the Prosecution responded and, on 13 March 2003, Ojdanić replied.[16]

5. On 25 March 2003, pursuant to Rules 72(B)(i) and 72(E), a Bench of the Appeals Chamber, which had been assigned by the President to this case,[17] declared that Ojdanić's appeal had been validly filed insofar as it is challenging the jurisdiction of the Tribunal in relation to his individual criminal responsibility for his alleged participation in a joint criminal enterprise charged pursuant to Article 7(1) of the Statute.[18] The Bench held that Article 72(D) of the Statute provides that a motion challenging jurisdiction includes motions challenging an indictment on the ground that it

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[8] General Dragoljub Ojdanić's Preliminary Motion to Dismiss for Lack of Jurisdiction: *Joint Criminal Enterprise*.

[9] Prosecution's Response to "Dragoljub Ojdanić's Preliminary Motion to Dismiss for Lack of Jurisdiction: Joint Criminal Enterprise" of 29 November 2002.

[10] Reply Brief: Preliminary Motion to Dismiss for Lack of Jurisdiction: *Joint Criminal Enterprise*. On 9 January, the Prosecution filed a "Prosecution's Notification in relation to Ojdanić's Reply Briefs to his Preliminary Motions to Dismiss for Lack of Jurisdiction: Kosovo and Joint Criminal Enterprise" pointing out that Ojdanić's Reply had been filed out of time.

[11] Decision on Dragoljub Ojdanić's Preliminary Motion to Dismiss for Lack of Jurisdiction: Joint Criminal Enterprise ("Impugned Decision").

[12] Ibid, p 6. The decisions of the Appeals Chamber to which reference was made by the Trial Chamber are as follows: *Prosecutor v Tadić*, Case No IT-94-1-A, Judgement, 15 July 1999 ("*Tadić* Appeal Judgment"), pars 185 *et seq*; *Prosecutor v Furundžija*, Case No IT-95-17/1-A, Judgement, 21 July 2000, pars 118-120 ("*Furundžija* Appeal Judgment"); *Prosecutor v Delalić et al*, Case IT-96-21-A, Judgement, 20 February 2001, pars 365-366 ("*Delalić* Appeal Judgment").

[13] Impugned Decision, pp 6-7.

[14] General Ojdanić's Appeal from Denial of Preliminary Motion to Dismiss for Lack of Jurisdiction: Joint Criminal Enterprise ("Ojdanić's Appeal").

[15] Prosecution's Response to "General Ojdanić's Appeal from Denial of Preliminary Motion to Dismiss for Lack of Jurisdiction: Joint Criminal Enterprise" ("Prosecution's Response").

[16] Reply Brief: "General Ojdanić's Appeal from Denial of Preliminary Motion to Dismiss for Lack of Jurisdiction: Joint Criminal Enterprise" ("Reply").

[17] Ordonnance du Président Portant Nomination de Juges à un Collège de la Chambre d'Appel, 6 March 2003.

[18] Decision Pursuant to Rule 72(E) as to Validity of Appeal ("Bench Decision").

does not relate to any of the persons indicated in Article 7 or any of the violations indicated in Article 7.

**Prosecution's general observations and standard of review**

6. In its Response, the Prosecution raised a number of issues relating to the standard of review on appeal.[19] The Appeals Chamber does not propose to deal with these issues as they do not need to be discussed in the present case, other than to dismiss one submission made by the Prosecution. The Prosecution claims that, because the Trial Chamber found that the relief sought by the Defence was "inappropriate",[20] the present appeal could be rejected *in limine*.[21] All the Trial Chamber said in its Decision was that, since the indictment pleads several heads of responsibility, the general dismissal of the indictment sought by the Defence on the particular point relating to joint criminal enterprise was inappropriate. The Trial Chamber's finding on that point was limited to the dismissal of the indictment insofar as it related to that particular point.[22] As pointed out by the Bench of this Appeals Chamber, if Ojdanić's submissions are correct, there would be no legal basis upon the facts pleaded in the indictment in relation to a joint criminal enterprise to hold him responsible pursuant to Article 7(1) on that basis.[23] That part of the indictment relating to joint criminal enterprise liability would therefore have to be struck out. The indictment would continue to be valid in relation to other heads of responsibility.

7. Standards of review on appeal have been stated repeatedly by this Chamber and need not be re-iterated here.[24]

**Ojdanić's grounds of appeal**

8. Ojdanić lists a number of complaints, which are essentially a re-iteration of arguments which he put before the Trial Chamber.[25] They may be classified as follows:

- Joint criminal enterprise liability does not come within the International Tribunal's jurisdiction;
- Even if it did, the form of joint criminal enterprise charged in the indictment would go beyond the scope of joint criminal enterprise as set out by the Appeals Chamber in the *Tadić* case;

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[19] Prosecution's Response, pars 5 *et seq*.
[20] Impugned Decision, p 6.
[21] The Prosecution claims that the Appeals Chamber should do so "because the alleged errors of law committed by the Trial Chamber fall outside the scope of Art. 25 of the Statute" (Prosecution's Response, par 6).
[22] See Ojdanić's Appeal, par 6, footnote 4, quoting from the Reply brief before the Trial Chamber at footnote 1.
[23] Decision Pursuant to Rule 72(E) as to Validity of Appeal, p 3.
[24] See, e.g., *Prosecutor v Kunarac et al*, Case IT-96-23 & IT-96-23/1-A, Judgement, 12 June 2002, pars 35 *et seq*, and references quoted therein.
[25] See Ojdanić's Appeal, Table of contents, page 2.

- Finally, if this form of liability were to apply to Ojdanić, it would infringe the principle *nullum crimen sine lege.*

Each point will be addressed in turn, but the Appeals Chamber will first consider the scope of its jurisdiction as far as individual criminal liability is concerned.

## Scope of the jurisdiction *ratione personae* of the International Tribunal

9. In his Report to the Security Council, the Secretary-General of the United Nations proposed that the International Tribunal shall apply, as far as crimes within its jurisdiction are concerned, rules of international humanitarian law which are "beyond any doubt part of customary international law".[26] The fact that an offence is listed in the Statute does not therefore create new law and the Tribunal only has jurisdiction over a listed crime if that crime was recognised as such under customary international law at the time it was allegedly committed.[27] The scope of the Tribunal's jurisdiction *ratione materiae* may therefore be said to be determined both by the Statute, insofar as it sets out the jurisdictional framework of the International Tribunal, and by customary international law, insofar as the Tribunal's power to convict an accused of any crime listed in the Statute depends on its existence *qua* custom at the time this crime was allegedly committed.[28]

10. As far as the jurisdiction *ratione personae* of the Tribunal is concerned, the Secretary-General's Report does not contain any explicit limitation as to the nature of the law which the Tribunal may apply, other than a statement apparently of general application to the effect that "the International Tribunal would have the task of applying existing international humanitarian law".[29] Contrary to the Defence submission on that point,[30] there is no reference in the Report of the Secretary-General limiting the jurisdiction *ratione personae* of the International Tribunal to forms of liability as provided by customary law.[31] However, the principle of legality demands that the Tribunal shall apply the law which was binding upon individuals at the time of the acts charged. And, just as is the case in respect of the Tribunal's jurisdiction *ratione materiae*, that body of law must be reflected in customary international law.

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[26] *Report of the Secretary-General Pursuant to Paragraph 2 of Security Council Resolution 808* (1993), ("Secretary-General's Report"), par 34.

[27] See Secretary-General's Report, par 29.

[28] See, for instance, treatment of "violence to life and person" in the *Vasiljević* Trial Judgment (*Prosecutor v Vasiljević*, Case No. IT98-32-T, Judgment, 29 November 2002, pars 193 *et seq.*). This matter has not been appealed by either party.

[29] Secretary-General's Report, par 29.

[30] Ojdanić's Appeal, pars 26-29. The comment cited by the Defence at par 29 of its Appeal was made by the Secretary-General in relation to the Tribunal's jurisdiction *ratione materiae*, not its jurisdiction *ratione personae*.

[31] See Secretary-General's Report, pars 50-59.

11. What must therefore be established in the present case is whether, at the time the acts were allegedly committed (from "on or about 1 January 1999 [...] until 20 June 1999"[32]), joint criminal enterprise as a form of liability existed under customary international law.

**Does the Statute provide for joint criminal enterprise liability ?**

12. Article 7(1) of the Statute contemplates various forms of individual criminal responsibility which apply to all crimes which are within the Tribunal's jurisdiction. It provides as follows:

> **Article 7**
> **Individual criminal responsibility**
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> 1. A person who planned, instigated, 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, shall be individually responsible for the crime.

13. This provision contains a list of forms of criminal participation which, all other conditions being met, could entail the criminal responsibility of the accused if he or she were to commit any of the crimes provided for in the Statute in any of the ways contemplated by that article. Article 7(1) does not contain an explicit reference to "joint criminal enterprise". Whether or not that list is exhaustive was not addressed specifically by the Defence. The Defence only claims that that provision does not provide for joint criminal enterprise as a form of criminal liability[33] and that other international instruments, such as the Rome Statute of the International Criminal Court, provided for joint criminal enterprise explicitly when it was intended to be included.[34] Had the drafters intended to include such a form of liability for all crimes within the Tribunal's Statute, the Defence says, the drafters would have done so explicitly.[35]

14. In addition, the Defence claims that this specific form of liability was not contemplated by the drafters of the Tribunal's Statute. The Defence submits that the suggestions made by several member states of the Security Council at the time of the adoption of the Tribunal's Statute that it should include "conspiracy" as a form of criminal liability was rejected.[36] "Conspiracy", the Defence claims, "is precisely the basis of liability for joint criminal enterprise".[37] The Defence says that, where they intended to include "conspiracy" as a form of liability, the drafters did so

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[32] Indictment, par 53.
[33] Ojdanić's Appeal, pars 12-17.
[34] Ibid., par 14-16.
[35] Ojdanić's Appeal, par 30.
[36] Ojdanić's Appeal, par 20.
[37] Ojdanić's Appeal, par 21.

expressly, as for instance in Article 4(3)(b) of the Statute concerning "conspiracy to commit genocide".[38]

15. In response, the Prosecution submits that joint criminal enterprise is provided for both in the Statute and under customary international law.[39] It also says that joint criminal liability is different from both "conspiracy" and membership in a criminal organization and, contrary to both of them, it is a punishable mode of participation in the actual commission of crimes.[40] Conspiracy, the Prosecution says, is a mere agreement or understanding between two or more persons to commit a crime, whilst membership in a criminal organization implies the existence of a stable organizational structure directed at the commission of crimes, irrespective of the actual commission of any such crime.[41] The Prosecution submits further that, individual liability for participation in a joint criminal enterprise arises from "a significant contribution to the execution of a common plan that either entails the commission of a crime, or leads to the commission of a crime, as its natural and foreseeable consequence".[42]

16. As pointed out by the Prosecution, the Appeals Chamber has already had an opportunity to consider this matter in other cases. In the *Tadić* case, the Prosecution had argued on appeal that the Trial Chamber had misdirected itself in the application of the common purpose doctrine.[43] The Prosecution submitted then that the gist of this doctrine is that if a person knowingly participates in a criminal activity with others, he or she will be liable for all illegal acts that are natural and probable consequences of that common purpose.[44] In view of the evidence, the Prosecution claimed that the only conclusion reasonably open to the Trial Chamber was that the killing of the five victims was a natural and probable consequence of the attack on the villages of Sivci and Jaskići in which the accused had taken part.[45]

17. In response, the Defence for the accused Duško Tadić did not challenge the existence of this form of liability or its presence under Article 7(1) of the Statute. It submitted, however, that a conviction on that basis would require the Prosecution to establish that the common purpose in which the Appellant is said to have taken part included killing as opposed to ethnic cleansing by other means.[46] Having considered the matter, the Appeals Chamber came to the conclusion that

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[38] Ojdanić's Appeal, par 22.
[39] Prosecution's Response, pars 36-38. In support of its point, the Prosecution undertook a review of a number of domestic jurisdictions and international cases (see pars 44-45).
[40] Prosecution's Response, pars 14-16.
[41] Prosecution's Response, pars 14-15, 25-26.
[42] Prosecution's Response, par 16.
[43] *Tadić* Appeal Judgment, par 173.
[44] *Tadić* Appeal Judgment, par 175.
[45] Ibid.
[46] *Tadić* Appeal Judgment, par 177.

joint criminal enterprise or the common purpose doctrine, as it called it, was provided for in the Statute as a form of liability and that it existed under customary international law at the relevant time (i.e., 1992).[47] The submission by the Defence in the present case that the Appeals Chamber's statement on that point was *obiter dicta* insofar as it went "far beyond that which was necessary to reinstate Tadić's conviction"[48] is incorrect, as it is every Chamber's duty to ascertain that a crime or a form of liability charged in the indictment is both provided for under the Statute and that it existed at the relevant time under customary international law.[49] In the *Tadić* appeal, as pointed out above, the meaning and scope of joint criminal enterprise under the Statute and under customary law was litigated by the parties and joint criminal enterprise in fact formed the *sole* legal basis upon which the Appeals Chamber convicted Tadić.

17. In the *Čelebići* case, the Appeals Chamber interpreted the Prosecution's submissions as suggesting that the Trial Chamber's findings concerning the actions of Hazim Delić should have led to his being convicted under the doctrine of common criminal purpose or joint criminal enterprise.[50] The Appeals Chamber held that it was not satisfied, in that case, that the elements required by that form of criminal liability had been established by the Prosecution beyond reasonable doubt.[51] Finally, in *Furundžija*, the accused Anto Furundžija claimed in his appeal that in order to sustain his conviction as a co-perpetrator of torture, it should have been proved that there was a "direct connection" between his questioning of the victim and the infliction on her of severe pain or suffering.[52] He also submitted that "[w]hat is missing in this case is any allegation *or* proof that [his participation] in any crime, *i.e.,* intentionally acted *in concert with* Accused B in questioning Witness A", and that there was no such allegation contained in the indictment against him, nor was proof offered at the trial in this regard.[53] The Appeals Chamber said that it had identified in the *Tadić* Appeal Judgment the legal elements of co-perpetration in a joint criminal enterprise, and it referred to the definitions of these elements, in particular to the requirement that there must exist a plan, design or purpose underlying the joint criminal enterprise.[54] The conviction based on the joint criminal enterprise charges stood.

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47 *Tadić* Appeal Judgment, pars 220 and 226.
48 Ojdanić's Appeal, par 37.
49 See *Vasiljević* Trial Judgment, par 198, which provides that "Each Trial Chamber is thus obliged to ensure that the law which it applies to a given criminal offence is indeed customary". See also *Delalić* Appeal Judgment, par 170, where the Appeals Chamber said that the Tribunal has jurisdiction over crimes which were already subject to individual criminal responsibility prior to its establishment.
50 *Delalić* Appeal Judgment, par 365.
51 *Delalić* Appeal Judgment, par 366.
52 *Furundžija* Appeal Judgment, par 115
53 Ibid.
54 *Furundžija* Appeal Judgment, par 119.

18. The appellant in this case has advanced no cogent reason why the Appeals Chamber should come to a different conclusion than the one it reached in the *Tadić* case, namely, that joint criminal enterprise was provided for in the Statute of the Tribunal and that it existed under customary international law at the relevant time. The Defence's first contention is that the Appeals Chamber misinterpreted the drafters' intention as, it claims, they would have referred to joint criminal enterprise explicitly had they intended to include such a form of liability within the Tribunal's jurisdiction. As pointed out above, the Statute of the International Tribunal sets the framework within which the Tribunal may exercise its jurisdiction. A crime or a form of liability which is not provided for in the Statute could not form the basis of a conviction before this Tribunal.[55] The reference to that crime or to that form of liability does not need, however, to be explicit to come within the purview of the Tribunal's jurisdiction.[56] The Statute of the ICTY is not and does not purport to be, unlike for instance the Rome Statute of the International Criminal Court, a meticulously detailed code providing explicitly for every possible scenario and every solution thereto. It sets out in somewhat general terms the jurisdictional framework within which the Tribunal has been mandated to operate.

19. As noted in the *Tadić* Appeal Judgment, the Secretary-General's Report provided that "all persons" who participate in the planning, preparation or execution of serious violations of international humanitarian law contribute to the commission of the violation and are therefore individually responsible.[57] Also, and on its face, the list in Article 7(1) appears to be non-exhaustive in nature as the use of the phrase "*or otherwise* aided and abetted" suggests. But the Appeals Chamber does not need to consider whether, outside those forms of liability expressly mentioned in the Statute, other forms of liability could come within Article 7(1). It is indeed satisfied that joint criminal enterprise comes within the terms of that provision.

20. In the present case, Ojdanić is charged as a co-perpetrator in a joint criminal enterprise the purpose of which 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.[58] The Prosecution pointed out in its indictment against Ojdanić that its use of the word "committed" was not intended to suggest that any of the accused physically perpetrated any of the crimes charged, personally. "Committing", the Prosecution wrote, "refers to

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[55] The defence correctly refers to the example of the crime of piracy (Ojdanić's Appeal, par 43).

[56] The Tribunal has accepted, for instance, that Article 3 of the Statute was a residual clause and that crimes which are not explicitly listed in Article 3 of the Statute could nevertheless form part of the Tribunal's jurisdiction (ref to *Tadić*).

[57] *Tadić* Appeal Judgment, par 190, citing Secretary-General's Report, par 54.

[58] Indictment, par 16.

participation in a joint criminal enterprise as a co-perpetrator".[59] Leaving aside the appropriateness of the use of the expression "co-perpetration" in such a context, it would seem therefore that the Prosecution charges co-perpetration in a joint criminal enterprise as a form of "commission" pursuant to Article 7(1) of the Statute, rather than as a form of accomplice liability. The Prosecution's approach is correct to the extent that, insofar as a participant shares the purpose of the joint criminal enterprise (as he or she must do) as opposed to merely knowing about it, he or she cannot be regarded as a mere aider and abettor to the crime which is contemplated. The Appeals Chamber therefore regards joint criminal enterprise as a form of "commission" pursuant to Article 7(1) of the Statute.

21. The Defence suggests that the *Tadić* interpretation of Article 7(1) means that all modes of liability not specifically excluded by the Statute are included therein.[60] It is not necessary to deal with so wide an argument. The Appeals Chamber was satisfied then, and is still satisfied now, that the Statute provides, albeit not explicitly, for joint criminal enterprise as a form of criminal liability and that its elements are based on customary law. In order to come within the Tribunal's jurisdiction *ratione personae*, any form of liability must satisfy three pre-conditions: (i) it must be provided for in the Statute, explicitly or implicitly; (ii) it must have existed under customary international law at the relevant time; (iii) the law providing for that form of liability must have been sufficiently accessible at the relevant time to anyone who acted in such a way; and (iv) such person must have been able to foresee that he could be held criminally liable for his actions if apprehended.

22. The analogy made by the Defence between the present situation and the rejection by the International Military Tribunal ("IMT") in Nuremberg of the common plan or conspiracy doctrine in relation to war crimes and crimes against humanity is indeed relevant to this case, although not for the reason suggested by the Defence.[61] The IMT noted that the indictment charged not only conspiracy to commit aggressive war, but also to commit war crimes and crimes against humanity.[62] The IMT pointed out that the Charter did not define as a separate crime any conspiracy except the one to commit acts of aggressive war and it therefore disregarded the charges in Count One of the indictment that the defendants had conspired to commit war crimes and crimes against humanity.[63] As pointed out above, the same logic applies in the context of this Tribunal. One Trial Chamber,

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[59] Indictment, par 16.
[60] Ojdanić's Appeal, par 39. This, the Defence said, "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" (ibid).
[61] Ojdanić's Appeal, pars 24-25
[62] *Trial of the Major War Criminals before the International Military Tribunal*, Nuremberg, 14 November 1945 – 1 October 1946, Vol 1, p 226 ("IMT Judgment").
[63] Ibid.

for instance, correctly noted that, if it were not satisfied that a given crime was provided for in its Statute, as the IMT had been in relation to conspiracy to commit war crimes and crimes against humanity, this Tribunal would have no choice but to decline to exercise its jurisdiction over such a crime.[64] Unless it is satisfied that a principle of liability is included in the Statute, the Tribunal would not exercise its jurisdiction on the basis of that principle.

23. The Defence's argument that the drafters' exclusion of "conspiracy" from the Statute is evidence that joint criminal enterprise has also been excluded is likewise misguided. Joint criminal enterprise and "conspiracy" are two different forms of liability. Whilst conspiracy requires a showing that several individuals have agreed to commit a certain crime or set of crimes, a joint criminal enterprise requires, in addition to such a showing, that the parties to that agreement took action in furtherance of that agreement.[65] In other words, while mere agreement is sufficient in the case of conspiracy, the liability of a member of a joint criminal enterprise will depend on the commission of criminal acts in furtherance of that enterprise. Thus, even if it were conceded that conspiracy was excluded from the realm of the Tribunal's Statute, that would have no impact on the presence of joint criminal enterprise as a form of "commission" pursuant to Article 7(1) of the Statute.

24. The Defence also claims that joint criminal enterprise is akin to a form of criminal liability for membership and that it has become a "vehicle for organizational liability", whereby mere membership in a criminal organization would by itself entail the individual criminal responsibility of the accused.[66] Under such a form of liability, Ojdanić is exposed to being held liable for his membership in an organisation some members of which may have committed crimes he should have foreseen, the Defence suggests.[67] The Defence says that this is precisely the form of organizational – as opposed to individual – liability that the Security Council eschewed when adopting the Tribunal's Statute.[68]

25. Joint criminal enterprise is different from membership of a criminal enterprise which was criminalised as a separate criminal offence in Nuremberg and in subsequent trials held under Control Council Law No 10.[69] As pointed out by the *United Nations War Crimes Commission*,

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[64] *Vasiljević* Trial Judgment, par 202. This finding was not appealed by either party.

[65] XV *Law Reports of Trials of War Criminals*, pp 95 and 97. According to the United Nations War Crimes Commission, "the difference between a charge of conspiracy and one of acting in pursuant of a common design is that the first would claim that an agreement to commit offences had been made while the second would allege not only the making of an agreement but the performance of acts pursuant to it." (ibid, pp 97-98).

[66] Ojdanić's Appeal, pars 59-63.

[67] Ojdanić's Appeal, par 65.

[68] Ojdanić's Appeal, par 65.

[69] Article 10 of the Nuremberg Charter provided for this possibility: "In cases where a group or organization is declared criminal by the Tribunal, the competent national authority of any Signatory shall have the right to bring

what was to be punished in relation to the latter was "no mere conspiracy to commit crimes but a knowing and voluntary membership of organisations which did in fact commit crimes, and those on a wide scale".[70] No such offence was included in the Tribunal's Statute. The Secretary-General made it clear that only natural persons (as opposed to juridical entities) were liable under the Tribunal's Statute,[71] and that mere membership in a given criminal organization would not be sufficient to establish individual criminal responsibility:

> The question arises, however, whether a juridical person, such as an association or organization, may be considered criminal as such and thus its members, for that reason alone, be made subject to the jurisdiction of the International Tribunal. The Secretary-General believes that this concept should not be retained in regard to the International Tribunal. 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 membership in groups.[72]

26. Criminal liability pursuant to a joint criminal enterprise is not a liability for mere membership or for conspiring to commit crimes, but a form of liability concerned with the participation in the commission of a crime as part of a joint criminal enterprise, a different matter. The Prosecution in the present case made that point clear when it said that Ojdanić was being charged not for his membership in a joint criminal enterprise but for his part in carrying it out.[73] The indictment talks of his "having significantly contributed" to the execution of the joint criminal enterprise by "using the *de jure* and *de facto* powers available to him".[74]

27. The Defence claims further that, if the Tribunal were to read joint criminal enterprise liability into the Statute, it would thereby be violating the principle *in dubio pro reo*, which provides that, in case of doubt as to the content or meaning of a rule, the interpretation most favourable to the accused should be adopted.[75] Ojdanić contends that the application of that 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".[76] In response, the Prosecution says that this

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individual [sic] to trial for membership therein before national, military or occupation courts. In any such case the criminal nature of the group or organization is considered proved and shall not be questioned." Article 6(1) of the Nuremberg Charter stated that "[t]he Tribunal . . . shall have the power to try and punish persons who, acting in the interest of the European Axis countries, *whether as individuals or as members of organizations*, committed any of the following crimes" (emphasis added). Article II(1)(d) of Control Council Law No 10 provided that "1. Each of the following acts is recognized as a crime: [...] (d) membership in categories of a criminal group or organization declared criminal by the International Military Tribunal".

70 XV *Law Reports of Trials of War Criminals*, pp 98-99.

71 Par 50 of the Secretary-General's Report.

72 Par 51 of the Secretary-General's Report.

73 Prosecution's Response, par 34.

74 Indictment, par 16.

75 Ojdanić's Appeal, par 31.

76 Ojdanić's Appeal, par 34.

principle (*in dubio pro reo*) only applies "where the canons of construction fail to resolve a reasonable doubt in the meaning of a criminal statute".[77]

28. The Appeals Chamber is not satisfied that the present matter mandates the application of this principle of interpretation. The interpretation of Article 7(1) given by the Appeals Chamber in *Tadić*, and the comments made above, simply leave no room for it.[78] Insofar as concerns the question whether joint criminal enterprise is recognised in customary international law, the Appeals Chamber has no doubt that the application of the principle *in dubio pro reo* could help to resolve.

29. Finally, the Defence claims that the Appeals Chamber's finding is, in any case, inconsistent with existing customary law, as existing state practice is too weak to give rise to such a rule.[79] The Appeals Chamber does not propose to revisit its finding in *Tadić* concerning the customary status of this form of liability. It is satisfied that the state practice and *opinio juris* reviewed in that decision was sufficient to permit the conclusion that such a norm existed under customary international law in 1992 when Tadić committed the crimes for which he had been charged and for which he was eventually convicted.

30. In sum, the Defence has failed to show that there are cogent reasons in the interests of justice[80] for the Appeals Chamber to depart from its finding in the *Tadić* case, that joint criminal enterprise was both provided for in the Statute and that it existed under customary international law was in any way unreasonable at the relevant time. This part of the appeal is therefore rejected.

**Meaning and scope of joint criminal enterprise liability charged against Ojdanić**

31. The Defence next submits that the Trial Chamber in this case should not have considered itself to be bound by decisions rendered on this issue by the Appeals Chamber in three successive cases – *Tadić*, *Delalić* and *Furundžija* – as, it claims, these decisions do not provide much guidance on this matter.[81] According to the Defence, the pronouncements in both *Delalić* and *Furundžija* constitute an "unremarkable holding of accomplice liability" which does not support joint criminal enterprise liability by virtue of membership in an organisation with a criminal purpose as alleged in the indictment against him.[82] The Appeals Chamber has already pointed out above that joint criminal enterprise is to be regarded, not as a form of accomplice liability, but as a form of "commission" and that liability stems not, as claimed by the Defence, from mere membership of an

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[77] Prosecution's Response, par 49, citing *Delalić* Trial Judgment, par 413.
[78] Prosecution's Response, par 49.
[79] Ojdanić's Appeal, pars 44-52.
[80] *Delalić* Appeal Judgment, par 26.
[81] Ojdanić's Appeal, par 54.
[82] Ojdanić's Appeal, pars 54-58.

organisation, but from participating in the commission of a crime as part of a criminal enterprise. And, as far as they provided guidance upon matters relevant to the Trial Chamber's decision, the *ratio decidendi* of the Appeals Chamber's judgments was in fact binding upon the Trial Chamber.[83]

32. Even if the Appeals Chamber in this case declines to revisit the *Tadić* decision, the Defence submits, it should hold that the concept of joint criminal enterprise as developed by later Trial Chambers and the Prosecutor in the present case, expands liability beyond the permitted scope of common purpose doctrine and "into the forbidden realm of organizational liability".[84]

33. As pointed out by the Bench of the Appeals Chamber, this indictment alleges that the crimes mentioned above and charged against Ojdanić were within the object of the joint criminal enterprise or, alternatively, that the offences of murder and persecutions were natural and foreseeable consequences of the joint criminal enterprise and that Ojdanić was aware that such crimes were the likely outcome of the joint criminal enterprise.[85] This description of Ojdanić's actions, as alleged in the indictment, falls squarely within the definition of joint criminal enterprise given by the Appeals Chamber in *Tadić*.[86] The Prosecution may not be said to have gone beyond the realm of the *Tadić* decision and the Defence's submission on that point is rejected.

**Does the inclusion of joint criminal liability in the Statute of the International Tribunal infringe the principle *nullum crimen sine lege* ?**

34. Ojdanić finally submits that the doctrine of joint criminal enterprise should not be applied in his case for yet another reason. Applying this doctrine to him, he says, would infringe the principle *nullum crimen sine lege*, insofar as it would mean applying law which was created after the acts for which he is charged.[87] The Defence claims that the common purpose doctrine as laid down in the *Tadić* Judgment was only created on 15 July 1999 – after the acts charged in the indictment – and that the concept of joint criminal enterprise did not enter the Tribunal's jurisprudence until the *Krstić* Trial Judgment.[88]

35. In response, the Prosecution submits that "common purpose" and "joint criminal enterprise" are interchangeable terms which apply to a form of liability recognised under Article 7(1) of the

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[83] *Prosecutor v Aleksovski*, Case No IT-95-14/1-A, Judgement, 24 March 2000, par 113.
[84] Ojdanić's Appeal, par 66.
[85] Bench Decision, page 2.
[86] *Tadić* Appeal Judgment, pars 220, 227-228.
[87] Ojdanić's Appeal, pars 67-70.
[88] Ojdanić's Appeal, par 67.

Statute, the application of which would not infringe the above-mentioned principle.[89] The Prosecution points out that other Chambers of the International Tribunal, including the Appeals Chamber, have applied this doctrine in relation to events which took place years before Ojdanić's conduct as described in the indictment.[90]

36. First, concerning the terminological matter raised by the Defence, the phrases "common purpose" doctrine on the one hand, and "joint criminal enterprise" on the other, have been used interchangeably and they refer to one and the same thing. The latter term – joint criminal enterprise – is preferred, but it refers to the same form of liability as that known as the common purpose doctrine or liability.

37. Secondly, the principle *nullum crimen sine lege* is, as noted by the International Military Tribunal in Nuremberg, first and foremost, a "principle of justice".[91] It follows from this principle that a criminal conviction can only be based on a norm which existed at the time the acts or omission with which the accused is charged were committed. The Tribunal must further be satisfied that the criminal liability in question was sufficiently foreseeable and that the law providing for such liability must be sufficiently accessible at the relevant time for it to warrant a criminal conviction and sentencing under the head of responsibility selected by the Prosecution.

38. This fundamental principle "does not prevent a court from interpreting and clarifying the elements of a particular crime".[92] Nor does it preclude the progressive development of the law by the court.[93] But it does prevent a court from creating new law or from interpreting existing law beyond the reasonable limits of acceptable clarification. This Tribunal must therefore be satisfied that the crime or the form of liability with which an accused is charged was sufficiently foreseeable and that the law providing for such liability must be sufficiently accessible at the relevant time, taking into account the specificity of international law when making that assessment.

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[89] Prosecution's Response, par 51.
[90] Prosecution's Response, par 52.
[91] IMT Judgment, p 219.
[92] *Aleksovski* Appeal Judgment, pars 126-127; *Delalić* Appeal Judgment, par 173.
[93] See, *inter alia, Kokkinakis v Greece*, Judgment, 25 May 1993, Ser A 260-A (1993), pars 36 and 40 (*ECHR*); *EV v Turkey*, Judgment, 7 Feb 2002, par 52; *SW v United Kingdom*, Judgment, 22 Nov 1995, Ser A 335-B (1995), pars 35-36 (*ECHR*). See also *C.R v United Kingdom*, Judgment, 22 Nov 1995, Ser A 335-C (1995), par 34 (*ECHR*): "However clearly drafted a legal provision may be, in any system of law, including criminal law, there is an inevitable element of judicial interpretation. There will always be a need for elucidation of doubtful points and for adaptation to changing circumstances. Indeed, in the United Kingdom, as in the other Convention States, the progressive development of the criminal law through judicial law-making is a well entrenched and necessary part of legal tradition. Article 7 (art. 7) of the Convention cannot be read as outlawing the gradual clarification of the rules of criminal liability through judicial interpretation from case to case, provided that the resultant development is consistent with the essence of the offence and could reasonably be foreseen."

39. The meaning and scope of the concepts of "foreseeability" and "accessibility" of a norm will, as noted by the European Court of Human Rights,[94] depend a great deal on "the content of the instrument in issue, the field it is designed to cover and the number and status of those to whom it is addressed".[95] The specificity of international criminal law in that respect has been eloquently noted by one American Military Tribunal in Nuremberg in the *Justice* case:

> Under written constitutions the *ex post facto* rule condemns statutes which define as criminal, acts committed before the law was passed, but the *ex post facto* rule cannot apply in the international field as it does under constitutional mandate in the domestic field. [...] International law is not the product of statute for the simple reason that there is yet no world authority empowered to enact statutes of universal application. International law is the product of multipartite treaties, conventions, judicial decisions and customs which have received international acceptance or acquiescence. It would be sheer absurdity to suggest that the *ex post facto* rule, as known to constitutional states, could be applied to a treaty, a custom, or a common law decision of an international tribunal, or to the international acquiescence which follows the events. To have attempted to apply the *ex post facto* principle to judicial decisions of common international law would have been to strangle that law at birth.[96]

40. Has Ojdanić had sufficient notice that if, as claimed in the indictment, he took part in the commission of very serious criminal offences as part of a joint criminal enterprise he could be found criminally liable on that basis? This Tribunal does not apply the law of the former Yugoslavia to the definition of the crimes and forms of liability within its jurisdiction. It does, as pointed out above, apply customary international law in relation to its jurisdiction *ratione materiae*. It may, however, have recourse to domestic law for the purpose of establishing that the accused could reasonably have known that the offence in question or the offence committed in the way charged in the indictment was prohibited and punishable. In the present instance, and contrary to the Defence contention,[97] the law of the Federal Republic of Yugoslavia in force at the time did provide for criminal liability for the foreseeable acts of others in terms strikingly similar to those used to define joint criminal enterprise.[98] Article 26 of the Criminal Code of the Socialist Federal Republic of Yugoslavia provides that:

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[94] See references in previous footnote, including, *Kokkinakis v Greece*, Judgment, 25 May 1993, Ser A 260-A (1993), (*ECHR*); *EV v Turkey*, Judgment, 7 Feb 2002; *SW v United Kingdom*, Judgment, 22 Nov 1995, Ser A 335-B (1995) (*ECHR*); *C.R v United Kingdom*, Judgment, 22 Nov 1995, Ser A 335-C (1995).

[95] *Groppera Radio AG and Others v Switzerland*, Judgment, 28 Mar 1990, Ser A 173, par 68.

[96] See, eg, Trials of War Criminals Before The Nuremberg Military Tribunals Under Control Council Law No 10, Vol III ("*Justice* case"), pp 974-975.

[97] Ojdanić's Appeal, par 69.

[98] Articles 253 of the Criminal Code of the Socialist Federal Republic of Yugoslavia and Articles 226 of the Criminal Law of the Republic of Serbia to which the Defence refers are irrelevant insofar as they related, not to a form of joint criminal enterprise, but to a form of liability akin to "conspiracy" which, as pointed above, is a different form of liability. As to Article 254 of the Criminal Code of the Socialist Federal Republic of Yugoslavia and Article 227 of the Criminal Law of the Republic of Serbia, they are likewise irrelevant to the extent that they deal with the

> Anybody creating or making use of an organisation, gang, cabal, group or any other association for the purpose of committing criminal acts is criminally responsible for all criminal acts resulting from the criminal design of these associations and shall be punished as if he himself has committed them, irrespective of whether and in what manner he himself directly participated in the commission of any of those acts.[99]

41. Although domestic law (in particular the law of the country of the accused) may provide some notice to the effect that a given act is regarded as criminal under international law, it may not necessarily provide sufficient notice of that fact. Customary law is not always represented by written law and its accessibility may not be as straightforward as would be the case had there been an international criminal code. But rules of customary law may provide sufficient guidance as to the standard the violation of which could entail criminal liability.[100] In the present case, and even if such a domestic provision had not existed, there is a long and consistent stream of judicial decisions, international instruments and domestic legislation[101] which would have permitted any individual to regulate his conduct accordingly and would have given him reasonable notice that, if infringed, that standard could entail his criminal responsibility.[102]

42. Also, due to the lack of any written norms or standards, war crimes courts have often relied upon the atrocious nature of the crimes charged to conclude that the perpetrator of such an act must have known that he was committing a crime. In the *Tadić* Judgment, for instance, the Appeals Chamber noted "the moral gravity" of secondary participants in a joint criminal enterprise to commit serious violations of humanitarian law to justify the criminalisation of their actions.[103] Although the immorality or appalling character of an act is not a sufficient factor to warrant its criminalisation under customary international law, it may in fact play a role in that respect, insofar as it may refute any claim by the Defence that it did not know of the criminal nature of the acts.[104]

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setting up or membership in a criminal organisation or criminal agreement, regardless of the commission of any crime in pursuance to that organisation. See, Zoran Stojanović, Komentar Krivičnog Zakona Savezne Republike Jugoslavije, Belgrade 1997, pp 269-270 and Nikola Srzentić and Ljubiša Lazarević, Komentar Krivičnog Zakona Savezne Republike Jugoslavije, Belgrade 1995, pp 806-812

[99] In 1992, the name of the Criminal Code of the Socialist Federal Republic of Yugoslavia was changed to "Criminal Code of the Federal Republic of Yugoslavia" (Official Gazette of the FRY No 35/92). For a commentary to that provision, see Zoran Stojanović, Komentar Krivičnog Zakona Savezne Republike Jugoslavije, Belgrade 1997, p 52.

[100] See *X Ltd and Y v United Kingdom*, D and R 28 (1982), Appl 8710/79, pp 77, 80-81.

[101] Contrary to the Defence submission on that point, the Appeals Chamber has not relied upon domestic legislation and domestic case law to identify custom (Ojdanić's Appeal, par 51). The Appeals Chamber referred to those "only [...] to show that the notion of common purpose upheld in international criminal law has an underpinning in many national systems" (*Tadić* Appeal Judgment, par 225). It added that "[i]n the area under discussion, domestic law does not originate from the implementation of international law but, rather, to a large extent runs parallel to, and precedes, international regulation" (ibid).

[102] See *Tadić* Appeal Judgment, pars 195 *et seq.*

[103] *Tadić* Appeal Judgment, par 191.

[104] In the *Delalić* case, the Appeals Chamber referred to the ICCPR to state that certain acts could be regarded as "criminal according to the general principles of law recognized by the community of nations" (*Delalić* Appeals

43. Article 26 of the Criminal Law of the Federal Republic of Yugoslavia, coupled with the extensive state practice noted in *Tadić*, the many domestic jurisdictions which provide for such a form of liability under various names and which forms of liability run parallel to custom,[105] and the egregious nature of the crimes charged would have provided notice to anyone that the acts committed by the accused in 1999 would have engaged criminal responsibility on the basis of participation in a joint criminal enterprise.

44. In sum, the Appeals Chamber does not view the concept of joint criminal enterprise as a separate offence in itself, but only as a mode of committing one of the offences prescribed by articles 2 to 5 of the Statute. This part of Ojdanić's appeal is therefore dismissed.

**Disposition**

45. The Appeals Chamber therefore dismisses the appeal.

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

Mohamed Shahabuddeen
Presiding

Done this 21st day of May 2003,
At The Hague,
The Netherlands.

Judge Shahabuddeen appends a separate opinion to this decision.
Judge Hunt appends a separate opinion to this decision.

**[Seal of the Tribunal]**

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Chamber Judgment, par 173). The IMT used a similar formulation when addressing the criminalisation of aggressive war: "the attacker must know that he is doing wrong" (IMT Judgment, p 219)

[105] *Tadić* Appeal Judgment, par 225. See also Prosecution's Response, pars 22-24 and 45. In its Reply, the Defence stated its view that the Prosecution did "a wonderfyul job of cataloging the numerous national systems which have some or all of her three forms of collective liability" (Reply, par 14).

# SEPARATE OPINION OF JUDGE SHAHABUDDEEN

1. I agree with today's decision. On the central point, it unanimously and correctly follows this Chamber's previous ruling in *Tadić*[1] that joint criminal enterprise is part of customary international law. But, as with most if not all the cases decided by the Tribunal, the reasoning in that case (on which I sat)[2] can bear improvement. With valuable assistance deriving from a reading of the draft of Judge Hunt's separate opinion, I refer below to three points relating to possible areas of improvement.

2. The first point concerns a question whether *Tadić* used too many terms to refer to the concept of "joint criminal enterprise". The second point concerns a question whether the Appeals Chamber, in that case, is to be understood as describing a participant in a joint criminal enterprise as one who merely aids and abets. The third point concerns a question whether the holding of the Appeals Chamber in *Tadić* that joint criminal enterprise exists in customary international law was *obiter*.

## A. Multiplicity of terms

3. As to the first point, it is the case that many terms were used in the *Tadić* judgment. The term "joint criminal enterprise" was one of these terms,[3] but other terms also appeared. They have been brought together in paragraph 24 of a Trial Chamber's decision in *Brđanin and Talić*.[4] They do look curious when put in one place.

4. However, there seems to be some flexibility even within the greater coherence of a single national system. In the Court of Criminal Appeal of England and Wales, reference was made in the same case, at the same page, to "joint enterprise" and to "common enterprise".[5] In a Privy Council case, inclusive of a number of authorities which it cited, references were made to "joint enterprise", "common unlawful enterprise", "common enterprise", "planned enterprise", "common plan", and "common purpose".[6] A common law work of authority uses a subheading, "Joint enterprise/common design".[7] Leading common law authors speak of "common purpose".[8] That

[1] IT-94-1-A, of 15 July 1999.
[2] The bench comprised Judges Shahabuddeen, presiding, Cassese, Wang Tieya, Nieto-Navia and Mumba.
[3] IT-94-1-A, of 15 July 1999, para. 220.
[4] IT-99-36-PT, of 26 June 2001.
[5] *R. v. Anderson* [1966] 2 Q.B. 110 at 118; the catchwords of the report also spoke of "common design".
[6] *Chan Wing-Siu v. R.* (1985) 80 Cr. App. Rep. 117.
[7] *Archbold, Criminal Pleading, Evidence and Practice 2000* (London, 2003), paras. 18-15.

expression seems to be also acceptable in Canada[9] and South Africa.[10] In Australia, it appears that one may speak of "the doctrine of common purpose – or as it is called, joint venture, common venture, common enterprise, etc".[11]

5. In the context of the judgment in *Tadić*, which was tracing the evolution of the doctrine in customary international law, the terms used were understandable and caused no substantial difficulty, or none that was really unmanageable. Judge Cassese, who also sat on the bench which decided that case, has since written of "participation in a common purpose or design".[12] I do not think that he was required to use another term.

## B. Whether the Appeals Chamber meant that a participant in a joint criminal enterprise is a mere aider and abettor

6. The second point relates to a holding in paragraph 220 of the judgment in *Tadić* "that the notion of common design as a form of accomplice liability is firmly established in customary international law ...". In saying that, was the Appeals Chamber saying that a participant in a joint criminal enterprise was one who merely aids and abets?

7. It is not appropriate to describe a participant in a joint criminal enterprise as one who merely aids and abets. But it is not believed that the intention to make such a description can be ascribed to the Appeals Chamber. It would seem that what was meant was that the participants in a joint criminal enterprise were themselves accomplices – accomplices of each other - and that they therefore engaged "a form of accomplice liability". Is there something in law which excludes this meaning? More particularly, does the law prevent principals in the commission of a crime from being treated as accomplices of one another?

8. There is a question whether the definition of "accomplice" includes accessories after the fact, but that is not material in this case. *Black's Law Dictionary*, 7th edition, at page 16, defines "accomplice" this way: "A person who is in any way concerned with another in the commission of

[8] Sir John Smith and Brian Hogan, *Criminal Law* (London, 1996), pp. 148-149.
[9] Don Stuart, *Canadian Criminal Law, A Treatise*, 3rd ed. (Toronto, 1995), pp. 561-2.
[10] C.R.Snyman, *Criminal Law, 3rd ed. (Durban, 1995)*, pp. 249ff.
[11] Peter Gillies, *Criminal Law*, 4th ed. (New South Wales, 1997), p. 174. See also the references to "common purpose" in *Johns v. R.* [1980] 28 ALR 155 at 173.
[12] Antonio Cassese, *International Criminal Law* (Oxford, 2003), p. 181.

a crime, whether as a principal in the first or second degree or as an accessory." At page 925, that work adds that "accomplice liability" is defined as "[c]riminal responsibility of one who acts with another before, during, or after a crime."

9. An aider and abettor may be spoken of as an accomplice of the principal; but that does not exhaust the possibilities. Take a case in which there are no aiders and abettors but only principals. Each principal may be said to be "concerned with another in the commission of a crime" or to be "one who acts with another ... during ... a crime" within the meaning of *Black's* definition of "accomplice", and thus an accomplice of his fellow principals.

10. At any rate, there does not seem to be anything in the general law of evidence in criminal matters which would restrict "accomplice" to aiders and abettors and much that would extend it to include principals in the commission of a crime. In *Davies v. Director of Public Prosecutions,*[13] Lord Simonds, in his speech before the House of Lords, said that the term "accomplice" included the following persons if called as prosecution witnesses: " ... persons who are participes criminis in respect of the actual crime charged, whether as principals or accessories before or after the fact (in felonies) or persons committing, procuring or aiding and abetting (in the case of misdemeanours). This", he added, "is surely the natural and primary meaning of the term 'accomplice.'" The distinction between felonies and misdemeanours in England has since been abolished, but this does not affect the fact that a principal can be an accomplice of another principal.

11. It remains to apply this conclusion to the language used by the Appeals Chamber in paragraph 220 of its judgment in *Tadić.* In that paragraph the Appeals Chamber was, as a matter of fact, not talking of a mere aider and abettor. It had in contemplation only those who participated in the joint criminal enterprise. It fell to be understood as saying that each participant in the joint criminal enterprise would be an accomplice of the other participants and, accordingly, would engage *"a form of accomplice liability".*[14]

[13] [1954] A.C.378, H.L.

12. In short, the reference to "accomplice" in paragraph 220 of the judgment of the Appeals Chamber in *Tadić* was restricted to participants in a joint criminal enterprise; it did not include mere aiders and abettors, and so the Appeals Chamber was not saying that participants in a joint criminal enterprise were mere aiders and abettors. If it were saying that, its statement would be in contradiction with what it said in paragraph 229, for there it proceeded expressly to mark the distinction between the two categories, stating that it would "distinguish between acting in pursuance of a common purpose or design to commit a crime, and aiding and abetting," and giving specific grounds for the distinction.

13. So too in the case of paragraph 192 of the judgment, in which the Appeals Chamber said that, "depending upon the circumstances, to hold [co-perpetrators] liable only as aiders and abettors might understate the degree of their criminal responsibility". Whether this should mean that aiders and abettors were necessarily to be punished at a lower level than co-perpetrators need not detain inquiry.[15] The important thing is that the statement evidenced a clear distinction being drawn by the Appeals Chamber between co-perpetrators and aiders and abettors and *a fortiori* between perpetrators and aiders and abettors.

14. The Appeals Chamber could contradict itself, but it might be presumed to intend not to do so. The explicit stand taken in paragraphs 192 and 229 was consistent with the position taken in paragraph 220 when this is construed as suggested above. It seems to me that there was no inconsistency between these paragraphs.

## C. Whether *Tadić* is *obiter*

15. The third point concerns the fact that Tadić only questioned the application to his case of the doctrine of joint criminal enterprise and so may be taken to have conceded its existence in customary international law.[16] The question is whether the apparent concession rendered *obiter* the ruling of the Appeals Chamber that the doctrine formed part of customary international law, with the result that it was not obligatory on a Trial Chamber to follow the ruling.

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[14] Emphasis added.

[15] If the statement meant that the Statute itself prescribed that aiders and abettors had to be punished at a lower level than principals, the statement was *obiter*. On that point, there had been no argument and no separate inquiry and finding by the Appeals Chamber. See, further, below on *obiter*.

[16] IT-94-1-A, paras 176-177.

16. There are cases in which a concession by a party of a point was regarded as, by itself, sufficient to make a pronouncement by the court on the point an *obiter dictum,* even if it would otherwise have been *ratio decidendi.* But there can be other views; mine is as follows.

17. It has been put in various ways, but the *ratio decidendi* of a case is generally considered to be "the reason why it was decided as it was."[17] The reason why a case was decided as it was does not logically depend on whether or not its underlying proposition was conceded or whether there was absence of argument on it. The proposition may be *ratio decidendi* despite absence of argument or a concession; these things do not automatically cause a holding to be an *obiter dictum* when it would otherwise have been *ratio decidendi.* What is *ratio decidendi* remains *ratio decidendi.*

18. However, it is useful to distinguish between *ratio decidendi* and the authority it exerts over the way other cases are decided. Though a holding is *ratio decidendi*, it may well have no more authority than an *obiter dictum*, but this result comes about by way of an *exception* to the authority normally exerted by *ratio decidendi.*[18]

19. The justification for an exception to the authority normally exerted by *ratio decidendi* is not simply the absence of argument or the making of a concession. As the cases suggest,[19] the justification is that, although the proposition in question was *ratio decidendi*, it was merely assumed by the court to be correct in the absence of argument or because of the making of a concession, and was not the result of the court's own deliberate inquiry and considered finding. Two cases illustrate this.

20. In *Baker v. The Queen,* where the question before the Privy Council concerned the force of its previous holding, the Board said that the circumstances in which that holding was made "gave rise to a very strong inference, not that the Board had acted per incuriam but that it had merely accepted as correct for the purpose of disposing of the particular case a proposition which counsel in the case either had agreed or under the practice of the Judicial Committee were not in a position to dispute."[20]

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[17] *Ashville Investments Ltd. v. Elmer Contractors Ltd* [1989] Q.B. 488 at 494.
[18] See *Baker v. The Queen* [1975] A.C. 774 at 788, and *In* re *Hetherington Decd.* (1990) Ch. 1 at 10.
[19] Ibid.
[20] [1975] 3 All ER 55 at 64.

21. *In* re *Hetherington, Dec'd*, was a case in which the judge said that "the authorities ... clearly establish that even where a decision of a point of law in a particular sense was essential to an earlier decision of a superior court, but that superior court merely assumed the correctness of the law on a particular issue, a judge in a later case is not bound to hold that the law is decided in that sense."[21]

22. Thus, if the holding was "essential" to the decision, it was clearly *ratio decidendi* and retained that quality. But, though *ratio decidendi*, its precedential value was diminished by the fact that the correctness of the holding was assumed in circumstances in which there was a concession or in which there was an absence of argument. However, the making of a concession or the absence of argument does not necessarily show that the court's finding in favour of a proposition resulted from an assumption that the proposition was correct.

23. The Appeals Chamber may occasionally act on the basis of a concession of law. But it may also take the view that, concession or no concession, it would satisfy itself of the true state of the law before proceeding to apply it. The principle *jura curia novit*, which is of municipal origin[22] but also applies to international adjudication, gives the Appeals Chamber that competence, if indeed it does not require the Appeals Chamber to apprise itself of the law. So, even if there is a concession, that does not disable the Appeals Chamber from inquiring into the law. Where the Appeals Chamber does so, the proposition announced in the resulting holding is not assumed: it has emerged from the analysis and finding independently made by the Chamber.

24. In sum, where, as in this case, the proposition in question was in no sense assumed but, on the contrary, resulted from careful and exhaustive examination by the court of material relevant to a manifestly important point bearing on its jurisdiction,[23] the conclusion of the court cannot be relegated to the ranks of *obiter dicta* on the mere ground that the proposition was conceded by the party concerned; it is *ratio decidendi* and exerts the force normally flowing from this.

25. Moreover, it is helpful to bear in mind what Cairns, J., said in *W.B. Anderson and Sons Ltd. v. Rhodes (Liverpool) Ltd.*[24] The question was what authority should a lower court give to a pronouncement by the highest court in the system, which went beyond what was really necessary for the decision of the issue which was actually involved. The judge said:

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[21] [1990] Ch. 1, per Sir Nicholas Browne-Wilkinson, V.C.
[22] Bin Cheng, *General Principles of Law as Applied by International Courts and Tribunals* (London, 1953), p. 299.
[23] For the duty of the court to satisfy itself that it has jurisdiction, whether or not the point has been argued, see, by analogy, Judge Basdevant's dissenting opinion in *Certain Norwegian Loans, I.C.J.Reports* 1957, p.9 at p.74.
[24] [1967] 2 All E.R. 850 at 857.

> Under the law as it was understood to be before *Hedley Byrne & Co Ltd v Heller & Partners Ltd* was decided in the House of Lords, there could be no liability for negligent misrepresentation unless there was a contractual duty of care. The actual decision in the *Hedley Byrne* case was that the plaintiffs could not succeed because the representations made to them were expressly made without responsibility, but all the law lords agreed that in some circumstances there could be a liability in tort for negligent misrepresentation. An academic lawyer might be prepared to contend that the opinions expressed by their lordships about liability for negligent misrepresentation were obiter, and that *Candler v Crane, Christmas & Co* is still a binding decision. In any[25] judgment that would be an unrealistic view to take. When five members of the House of Lords have all said, *after close examination of the authorities*,[26] that a certain type of tort exists, I think that a judge of first instance should proceed on the basis that it does exist without pausing to embark on an investigation of whether what was said was necessary to the ultimate decision.

26. These remarks, as I understand them, show that, even if a holding went beyond what was really necessary for the decision of the issue which was actually involved and was therefore *obiter*, it has to be fully regarded by lower courts if it represented the considered views of the highest court in the system. The remarks assume greater force when it is borne in mind that the Tribunal is not in the position of a domestic court operating with a largely settled corpus of law; its juristic mission is more exploratory than is that of a normal domestic court.

## D. Conclusion

27. On the central point, *Tadić* was of course right: joint criminal enterprise is recognised in customary international law. Nevertheless, the development of most, if not all, of the case-law of the Tribunal can benefit from further consideration, whether of that point or of others. And so, for myself, I have given attention to three points on which it might be thought that improvements could be made to the reasoning in *Tadić*.

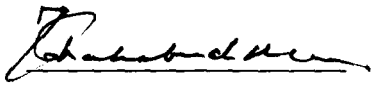
28. As to the first point, the *Tadić* judgment could have used fewer terms to refer to joint criminal enterprise. However, the variety of language employed was understandable and causes no substantial difficulty, or none that is really unmanageable. As to the second point, it is not

[25] The word "any" is given as "my" in the excellent work of Rupert Cross and J.W.Harris, *Precedent in English Law*, 4th ed. (Oxford, 1991), p. 80. The latter sounds better, but I am not sure which is textually correct.

appropriate to describe a participant in a joint criminal enterprise as one who merely aids and abets, but the Appeals Chamber in *Tadić* did not say so. As to the third point, the ruling of the Appeals Chamber in *Tadić* was not *obiter*; it was *ratio decidendi* and carried the authority normally associated with that concept.

29. Thus, on all three points, I am content with the judgment rendered in *Tadić*.

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



Mohamed Shahabuddeen

Dated this 21 May 2003
At The Hague
The Netherlands

[26] Emphasis added.

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*

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Mr Norman Farrell

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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'".[1] 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,[2] 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*.[3] Accordingly, it dismissed the challenge to the Tribunal's jurisdiction.[4]

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*,[5] and thus binding upon the Trial Chamber in

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1 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.

2 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").

3 *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").

4 Trial Chamber Decision, p 7.

5 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*.[6] 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*.[7] 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.[8]

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.[9] 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.[10] The Appeals Chamber labelled this concept variously, and apparently interchangeably, as a common

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[6] IT-95-14/1-A, Judgment, 24 Mar 2000 ("*Aleksovski* Appeal Judgment"), par 113.
[7] Interlocutory Appeal, par 37.
[8] *The Oxford Companion to Law*, 1980, Entry "Ratio Decidendi", which is based upon the text of CK Allen, *Law in the Making*.
[9] *Tadić* Conviction Appeal Judgment, par 185.
[10] *Ibid*, par 187.

criminal plan,[11] a common criminal purpose,[12] a common design or purpose,[13] a common criminal design,[14] a common purpose,[15] a common design,[16] and a common concerted design.[17] The common purpose is also described, more generally, as being part of a criminal enterprise,[18] a common enterprise,[19] and a joint criminal enterprise.[20] 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),[21] 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.[22] The Appeals Chamber identified three "distinct categories of collective criminality" as being encompassed within the concept of joint criminal enterprise,[23] although it subsequently suggested that the second category was in many respects similar to the first,[24] and that it was really a variant of the first category.[25] The three categories were as follows:

> *Category 1*:[26] All of the participants in the joint criminal enterprise,[27] 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.[28]

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[11] *Ibid*, par 185.
[12] *Ibid*, par 187.
[13] *Ibid*, par 188.
[14] *Ibid*, pars 191, 193.
[15] *Ibid*, pars 193, 195, 204, 225.
[16] *Ibid*, pars 196, 202, 203, 204.
[17] *Ibid*, par 203.
[18] *Ibid*, par 199.
[19] *Ibid*, par 204.
[20] *Ibid*, par 220.
[21] *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).
[22] *Tadić* Conviction Appeal Judgment, par 220.
[23] *Ibid*, par 195.
[24] *Ibid*, par 202
[25] *Ibid*, par 203.
[26] *Ibid*, par 196.
[27] 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.
[28] The Judgment speaks here (also at par 196) of co-perpetrators, but this is an issue to which I must return.

*Category 2*:[29] All of the participants in the joint criminal enterprise were members of military or administrative groups acting pursuant to a concerted plan, where the person charged held a position of authority within the hierarchy; although he did not physically execute any of the crimes charged, he actively participated in enforcing the plan by aiding and abetting the other participants in the joint criminal enterprise who did execute them. The example is given of a concentration camp, in which the prisoners are killed or otherwise mistreated pursuant to the joint criminal enterprise.

*Category 3*:[30] All of the participants were parties to a common design to pursue one course of conduct, where one of the persons carrying out the agreed object of that design also commits a crime which, whilst outside the "common design", was nevertheless a natural and foreseeable consequence of executing "that common purpose".[31] The example is given of a common (shared) intention on the part of a group to remove forcibly members of one ethnicity from their town, village or region (labelled "ethnic cleansing"), with the consequence that, in the course of doing so, one or more of the victims is shot and killed.

7. It is clear from the *Tadić* Conviction Appeal Judgment that, in relation to both the first and the second categories, the prosecution must demonstrate that all of the persons charged and all of the persons who physically executed the crime charged had a common state of mind – that the crime charged should be carried out (or executed), and the state of mind required for that crime. This *is* an appropriate use of the phrase "common purpose",[32] and it is reflected in various other phrases used in that Judgment, such as "acting in pursuance of a common criminal design".[33] Insofar as the *first* category is concerned, this is stated expressly:[34]

> [...] all co-defendants, acting pursuant to a common design, possess the same criminal intention [...].

The example is given of a plan to kill in effecting this common design, and it is said that, even though the various participants in that plan may be carrying out different roles within that plan, it must be shown that "all possess the intent to kill". The passage concludes:

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[29] *Tadić* Conviction Appeal Judgment, par 202.
[30] *Ibid,* par 204.
[31] The Judgment's use of the word "perpetrator" (at par 196) is a reference to a person who physically perpetrates the crime falling within the agreed object of the common design, or joint criminal enterprise.
[32] *Tadić* Conviction Appeal Judgment, par 190.
[33] *Ibid,* pars 191, 193.
[34] *Ibid,* par 196.

> [The] accused, even if not personally effecting the killing, must nevertheless intend this result.

8. Insofar as the *second* category is concerned, the position is stated a little more discursively, but nevertheless to the same effect. After referring to the joint criminal enterprise as being one "to kill or mistreat prisoners",[35] and as "a system of repression",[36] the *Tadić* Conviction Appeal Judgment states:[37]

> The *mens rea* element comprised: (i) knowledge of the nature of the system and (ii) the intent to further the common concerted design to ill-treat inmates.

As that Judgment suggests, the second category does not differ substantially from the first. The position of the accused in the second category is exactly the same as the accused in the first category. Both carry out a role within the joint criminal enterprise to effect the object of that enterprise which is different to the role played by the person who physically executes the crime charged. The role of the accused in the second category is enforcing the plan by assisting the person who physically executes the crime charged.[38] Both of them must intend that the crime charged is to take place. To accept anything less as sufficient would deny the existence of a "common purpose".[39] The first and second categories have together been described elsewhere as the *basic* form of joint criminal enterprise, and the third category as an *extended* form of joint criminal enterprise.[40]

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[35] *Ibid*, par 202.
[36] *Ibid*, par 203.
[37] *Ibid*, par 203.
[38] *Ibid*, par 202.
[39] The relevant state of mind for the accused, as an element of the prosecution case, must be established beyond reasonable doubt. It may be inferred from the circumstances of his participation by way of assistance: if the accused, with knowledge of the nature of the system, assisted the person who physically executes the crime charged in a sufficiently substantial way, then his intent to further the common concerted design may be inferred if that is the only reasonable inference which is available. Care should, however, be exercised that the step of drawing the inference beyond reasonable doubt as to this state of mind on the part of the accused is not ignored. There are some statements in the cases which appear, at least on their face, to jump straight from knowledge plus substantial assistance to guilt, without first drawing the necessary inference beyond reasonable doubt as to intent of the accused. Without determining here whether or not such statements should be accepted at face value, it is sufficient for reference to be made to statements made by the Trial Chamber in *Prosecutor v Kvočka et al*, IT-98-30/1-T, Judgment, 2 Nov 2001, at pars 273, 306, 309-310, 312. The test is more accurately stated in the third sentence of par 284 of that judgment, provided that it is understood that, for the inference to be drawn beyond reasonable doubt, it must be the only reasonable inference available: *Delalić* Conviction Appeal Judgment, par 458.
[40] *Brđanin & Talić* Decision, par 27.

9. Insofar as the *third* category (the extended form of joint criminal enterprise) is concerned, the Appeals Chamber identified the relevant state of mind in various ways. The first statement was in these terms:[41]

> Criminal responsibility may be imputed to all participants within the common enterprise where the risk of death occurring was both [*sic*] a predictable consequence of the execution of the common design and the accused was either reckless or indifferent to that risk.

The next passage summarises the relevant state of mind in these terms:[42]

> What is required is a state of mind in which a person, although he did not intend to bring about a certain result, was aware that the actions of the group were most likely to lead to that result but nevertheless willingly took that risk. In other words, the so-called *dolus eventualis* is required (also called "advertent recklessness" in some national legal systems).

The third passage summarises the relevant state of mind in these terms:[43]

> [...] responsibility for a crime other than the one agreed upon in the common plan arises only if, under the circumstances of the case, (i) it was *foreseeable* that such a crime might be perpetrated by one or other members of the group and (ii) the accused *willingly took that risk.*

10. It is unfortunate that expressions conveying different shades of meaning have been used in these three formulations, apparently interchangeably, in relation to the very category which the Appeals Chamber was applying in that appeal. So far as the *subjective* state of mind is concerned, there is a clear distinction between a perception that an event is possible and a perception that the event is likely (a synonym for probable). The latter places a greater burden on the prosecution than the former. The word "risk" is an equivocal one, taking its meaning from its context. In the first of these three formulations stated ("the risk of death occurring"), it would seem that it is used in the sense of a possibility. In the second formulation, "most likely" means at least probable (if not more), but its stated equivalence to the civil law notion of *dolus eventualis* would seem to reduce it once more to a possibility.[44] The word "might" in the third formulation indicates again a possibility. In many common law national jurisdictions, where the crime charged goes beyond what was agreed in the joint criminal enterprise, the prosecution must establish that the participant who did not himself carry out that crime nevertheless

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[41] *Tadić* Conviction Appeal Judgment, par 204.

[42] *Ibid*, par 220.

[43] *Ibid*, par 228. The emphasis appears in the Judgment.

[44] *Dolus eventualis* is a subtle civil law concept with a wide application in relation to the state of mind required for different crimes. It requires an advertence to the possibility that a particular consequence will follow, and acting with either indifference or being reconciled to that possibility (in the sense of being prepared to take that risk). The extent to which the possibility must be perceived differs according to the particular country in which the civil law is adopted, but the highest would appear to be that there must be a "concrete" basis for supposing that the particular consequence will follow.

participated in that enterprise with the contemplation of the crime charged as a *possible* incident in the execution of that enterprise.[45] This is very similar to the civil law notion of *dolus eventualis* or advertent recklessness. So far as the *objective* element to be proved is concerned, the words "predictable" in the first formulation and "foreseeable" in the third formulation are truly interchangeable in this context.

11. The *Tadić* Conviction Appeal Judgment has accordingly been interpreted, in the case of a participant in the joint criminal enterprise who is charged with a crime carried out by another participant which goes beyond the agreed object of that enterprise, as requiring the prosecution to establish:[46]

(i) that the crime charged was a natural and foreseeable consequence of the execution of that enterprise, and

(ii) that the accused was aware that such a crime was a possible consequence of the execution of that enterprise, and that, with that awareness, he participated in that enterprise.

The first is an *objective* element of the crime, and does not depend upon the state of mind on the part of the accused. The second is the *subjective* state of mind on the part of the accused which the prosecution must establish. None of the various formulations in *Tadić* Conviction Appeal Judgment requires the prosecution in such a case to establish that the accused intended such further crime to be carried out, or that he shared with that other participant the state of mind required for that further crime.

12. The state of mind of the accused to be established by the prosecution accordingly differs according to whether the crime charged:

(a) was *within* the object of the joint criminal enterprise, or

(b) went *beyond* the object of that enterprise, but was nevertheless a natural and foreseeable consequence of that enterprise.

If the crime charged fell *within* the object of the joint criminal enterprise, the prosecution must establish that the accused shared with the person who physically executed the crime the state of mind required for that crime. If the crime charged went *beyond* the object of the joint criminal enterprise, the prosecution needs to establish only that the accused was aware that the further crime was a possible consequence in the execution of that enterprise and that, with that awareness, he participated in that enterprise.

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[45] *Johns v The Queen* (1980) 143 CLR 108, at 111-113, 116, 130-131; *Chan Wing-Siu v The Queen* [1985] AC 168, at 175, 178.

[46] *Brđanin & Talić* Decision, par 30.

13. A familiar example of a joint criminal enterprise, which incorporates both the basic and the extended forms of the enterprise, will illustrate these differences more clearly.

- Three men (A, B and C) reach an understanding or arrangement amounting to an agreement between them that they will rob a bank, and that they will carry with them a loaded weapon for the purposes of persuading the bank teller to hand over the money and of frightening off anyone who attempts to prevent the armed robbery from taking place. The agreement is that A is to carry the weapon and to demand the money from the teller, B is to stand at the doorway to the bank to keep watch, and C is to drive the getaway vehicle and to remain with the vehicle whilst the other two go inside the bank. The basic form of the joint criminal enterprise is therefore one to commit an armed robbery.
- During the course of the armed robbery, A produces the weapon and demands that the bank teller hand over the money. As the teller does so, A observes him also pressing a button, which A thinks would alert the police that a robbery is taking place. A panics and fires his weapon, wounding the bank teller. In such a situation, in order to establish that all three men (A, B and C) were guilty of the armed robbery (the basic form of the joint criminal enterprise), the prosecution would have to prove that all three men intended the armed robbery to take place and that they shared the relevant state of mind required for the crime of armed robbery. If B and C are shown to have shared that state of mind with A, they are guilty with him of the armed robbery, even though they did not physically execute the crime themselves.
- The wounding of the teller, however, was not within the object of the basic joint criminal enterprise to which B and C had agreed. In order to establish that not only A but also B and C were responsible for the wounding of the teller (the extended form of the joint criminal enterprise), the prosecution would have to prove that such a wounding was a natural and foreseeable consequence of carrying a loaded weapon during an armed robbery, that each of B and C was aware that the wounding of someone was a possible consequence in the execution of the armed robbery he had agreed to, and that, with that awareness, he participated in that armed robbery. The prosecution would *not* have to establish that B and C intended that anyone would be wounded or that they shared with A the relevant state of mind required for the further crime of wounding.

### *(1) Was the ruling that joint criminal enterprise is a mode of individual criminal responsibility within Article 7.1 binding on the Trial Chamber?*

14. Ojdanić has pointed out (as is the fact) that, in his conviction appeal, Tadić did not challenge the existence of individual criminal responsibility for participation in a joint criminal

enterprise in customary international law, but merely the application of such a form of responsibility to the findings which had been made by the Trial Chamber.[47] The facts found by the Trial Chamber were that Tadić had actively taken part in an attack upon a village in which a number of men were killed, by rounding up some of the men and severely beating them.[48] The Appeals Chamber held that the only possible inference from those facts was that Tadić had the intention to further the criminal purpose to rid the Prijedor region of the non-Serb population, by committing inhumane acts against them.[49] The Appeals Chamber also held that the fact that non-Serbs might be killed in effecting this common aim was, in the circumstances of the case, foreseeable,[50] that Tadić was beyond doubt aware that killings had accompanied the commission of those inhumane acts,[51] and that he was aware that the actions of the group of which he was a member were likely to lead to such killings but he nevertheless willingly took that risk.[52] The Appeals Chamber therefore concluded that Tadić had "participated" in the killings, and that he should be found criminally responsible for those killings under Article 7.1.[53]

15. As the existence of an individual criminal responsibility for participating in a joint criminal enterprise to commit a crime specified in the Tribunal's Statute was conceded by Tadić, the ruling that such an individual criminal responsibility existed in customary international law was not necessary for the disposal of that appeal, no matter how logical it may have been to consider the place of joint criminal enterprise in customary international law and what its elements were in order to determine whether it applied in the circumstances of that case. The ruling was therefore, strictly, an *obiter dictum* which was not binding upon the Trial Chamber in the present case, however persuasive it clearly would have been.[54]

### *(2)(a) Was the ruling correct?*

16. This issue contains within it two separate issues:

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[47] *Tadić* Conviction Appeal Judgment, par 177.
[48] *Ibid*, par 232.
[49] *Ibid*, par 232.
[50] *Ibid*, par 232.
[51] *Ibid*, par 231.
[52] *Ibid*, par 232.
[53] *Ibid*, par 233.
[54] I do not, however, accept the argument put by Ojdanić (Interlocutory Appeal, par 37) that, as the facts established that Tadić had aided and abetted those who killed the men, the Appeals Chamber "went far beyond that which was necessary to reinstate Tadić's conviction". Such an argument wrongly assumes that the extent of the responsibility of a person who aids and abets the commission of a crime is the same as one who participates in a joint criminal enterprise to commit that crime. The distinction is made clear in par 29, *infra*.

(i) Did such an individual criminal responsibility for participation in a joint criminal enterprise to commit a crime exist in customary international law at the relevant time (the period "since 1991")?[55]

(ii) Is such an individual criminal responsibility contemplated by Article 7.1 of the Tribunal's Statute?

### *(i) Customary international law*

17. In my opinion, the affirmative ruling by the Appeals Chamber that such a responsibility did exist as customary international law at that time was correct. The *Tadić* Conviction Appeal Judgment reviewed a large number of decisions of military or other tribunals in the trials of persons charged with violations of international humanitarian law committed during World War II.[56] Most of the cases reviewed were tried in accordance with the domestic law of the country which established the particular tribunal. In general, those in which the concept of joint criminal enterprise was recognised were decided in accordance with common law principles. Most of those which were decided in accordance with civil law principles recognised a similar but not identical concept of co-perpetration. Other cases still were decided under Control Council Law No 10, but these were concerned mainly with the specific crime of membership of a criminal group or organisation declared to be criminal by the International Military Tribunal,[57] an offence which was entirely distinct from a crime committed by way of participation in a joint criminal enterprise, a distinction to which I will refer again later.

18. Ojdanić has argued that, as these decisions were of the tribunals of occupying powers and not of international tribunals, they "have no subsequent validity in international law".[58] He ascribes the words quoted to M Cherif Bassiouni,[59] but they were in fact used by Bassiouni (with the addition of the word "criminal" following "international") not to deny the validity of the decisions of the tribunals of occupying powers as international law, but to deny the validity as such law of the specific crime of membership of a criminal organisation referred to in the

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[55] Tribunal's Statute, Article 1.
[56] *Tadić* Conviction Appeal Judgment, pars 197-220
[57] Charter of the International Military Tribunal, II. Jurisdiction and General Principles, Articles 9-10; Control Council Law No 10, Article II(1)(d).
[58] Interlocutory Appeal, par 49.
[59] *Crimes Against Humanity in International Law* (1992), "Elements of Criminal Responsibility", p 356.

preceding paragraph of this Opinion.[60] It is unnecessary to follow the same path through the decisions reviewed in the *Tadić* Conviction Appeal Judgment as was followed in that Judgment. It is clear that, notwithstanding the domestic origin of the laws applied in many trials of persons charged with war crimes at that time, the law which was applied must now be regarded as having been accepted as part of customary international law.

### *(ii) Article 7.1*

19. Article 7.1 of the Statute ("Individual criminal responsibility") provides that:

> A person who planned, instigated, 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, shall be individually responsible for the crime.

Ojdanić disputes the ruling by the Appeals Chamber in the *Tadić* Conviction Appeal Judgment that this provision contemplated an individual criminal responsibility for participation in a joint criminal enterprise to commit a crime within the Tribunal's jurisdiction. His argument is three-fold:

(a) where such a responsibility is intended to be included in an instrument, it is expressly stated;

(b) an attempt to include such a responsibility in the Tribunal's Statute was rejected by the United Nations; and

(c) academic opinion denies that it was intended to be included.

20. As to (a), Ojdanić refers to:

(i) the Charter of the International Military Tribunal, which provided:[61]

> Leaders, organisers, 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 such persons in execution of such plan.

(ii) the Rome Statute of the International Criminal Court, which provides for a criminal responsibility for contributing to the commission of a crime "by a group of persons acting with a common purpose";[62] and

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[60] Bassiouni also said (*op cit*, at pp 355-356) that decisions of the Control Council No 10 tribunals in relation to these criminal organisations "do not constitute a valid international legal precedent, except for its affirmations of certain 'general principles'", whatever such an exception may mean. I agree with his view that that crime forms no part of customary international law. The *Tadić* Conviction Appeal Judgment did not, of course, refer to the decisions of the tribunals of the occupying forces as precedents – but only as relevant instances of State practice for the purposes of identifying a norm of customary international law.

[61] Article 6.

[62] Article 25(3)(d).

(iii) the International Convention for the Suppression of Terrorist Bombing, which also provides for a criminal responsibility for contributing to the commission of a crime by such persons.[63]

21. It is a misconception to argue that, because these three instruments included an express reference to an individual criminal responsibility for participation in a joint criminal enterprise, the Tribunal's Statute would also have referred expressly to such a criminal responsibility if it had been intended that it would fall within the Tribunal's jurisdiction. If, for example, the Tribunal's Statute itself had included a particular mode of individual criminal responsibility in relation to all but one of the crimes which it invested the Tribunal with jurisdiction to try, it may be difficult to explain away the absence of such a criminal responsibility in relation to the remaining crime as otherwise than an intentional exclusion of such a mode of responsibility. Where, however, all but one of four different instruments, drafted in four entirely different sets of circumstances, provide for a particular mode of individual criminal responsibility but the remaining instrument does not do so, the omission of an express reference to such a mode of responsibility in that fourth instrument cannot, by itself, fairly be regarded as an intentional exclusion of that mode of responsibility.

22. As to (b), Ojdanić relies upon the absence from the Tribunal's Statute (except in relation to genocide, in Article 4) of any reference to participation of *conspiracy* as a mode of individual criminal responsibility, despite the submissions by a number of countries that such a mode of responsibility should be included.[64] Ojdanić defines conspiracy as:

> [...] an understanding or arrangement amounting to an agreement between two or more persons that they will commit a crime,

and states "This is precisely the basis of liability for joint criminal enterprise".[65] The absence of conspiracy as a mode of individual criminal responsibility is said to reaffirm the view that the Security Council consciously intended to exclude joint criminal enterprise as a mode of individual criminal responsibility.[66]

23. This argument is entirely fallacious. Conspiracy is not a mode of individual criminal responsibility for the commission of a crime. Conspiracy is itself a crime (of an inchoate nature)

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[63] Article 2(3)(c).
[64] Reliance is placed upon the submissions of the United States, Canada, Italy and Slovenia, as described by Morris & Scharf, *An Insider's Guide to the International Criminal Tribunal for the former Yugoslavia*, pp 384-387 (1995).
[65] Interlocutory Appeal, par 21.
[66] *Ibid*, par 19.

which is complete once the agreement between the conspirators has been reached. No step needs to have been taken in furtherance of that agreement before the crime of conspiracy has been committed. On the other hand, joint criminal enterprise is available as one mode of individual criminal responsibility by which a crime may be committed, but only where the agreed (or contemplated) crime has in fact been committed. The absence of *conspiracy* from the Statute (other than in relation to the crime of genocide) is irrelevant to the issues raised in this appeal.

24. As to (c), Ojdanić relies upon the suggestion by two authors, said to have been "involved in the creation of the International Tribunal",[67] that –

> [...] the principles of individual criminal responsibility to be applied by the International Tribunal do not include the controversial notion of collective responsibility based upon membership in a criminal organisation.
>
> 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.[68]

Ojdanić interprets this passage as supporting the exclusion of joint criminal enterprise from Article 7.1 because it is equivalent to a "collective responsibility based upon membership in a criminal organisation".[69] Neither the first nor the third of the categories of joint criminal enterprise as defined by the *Tadić* Conviction Appeal Judgment could be equated to the specific crime of membership of a criminal group or organisation declared to be criminal by the International Military Tribunal to which reference has already been made.[70] The cases which are said to support the second category may perhaps be ambivalent, an issue to which I return later, but nothing said in that judgment equates the second category to that specific crime either. And, to repeat what I said earlier,[71] that specific crime is entirely distinct from a crime committed by way of participation in a joint criminal enterprise.

25. I reject all three arguments put by Ojdanić for disputing the ruling by the Appeals Chamber in the *Tadić* Conviction Appeal Judgment that Article 7.1 of the Tribunal's Statute contemplates an individual criminal responsibility for participation in a joint criminal enterprise to commit a crime within the Tribunal's jurisdiction. The fact remains, however, that the Article does not expressly refer to such a mode of individual criminal responsibility. The issue now to be determined is whether it nevertheless falls within the words of that Article.

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[67] Morris & Scharf (*op cit*), Preface, p xiv.
[68] *Ibid*, p 95.
[69] Interlocutory Appeal, par 25.
[70] Paragraph 17, *supra*.
[71] *Ibid*.

26. The Report of the UN Secretary-General proposing the Statute for an international criminal tribunal for the former Yugoslavia stated the Secretary-General's belief that –

> [...] all persons who participate in the planning, preparation or execution of serious violations of international humanitarian law in the former Yugoslavia contribute to the commission of the violation and are, therefore, individually responsible.[72]

This is a valid aid to the interpretation of Article 7.1 of the Statute, and of the width to be given to the phrase "[a] person who planned, instigated, ordered, committed or otherwise aided and abetted in the planning, preparation or execution of a crime" in that Article. In my view, the verb "commit" is sufficiently protean in nature as to include participation in a joint criminal enterprise to commit the crime.[73] Such an approach does *not* amount to an argument that "all modes of liability not specifically excluded in the [Statute] of the Tribunal are therefore included", as Ojdanić has submitted.[74] It is merely the application of a clear statement of intention by those who drafted the Statute that "all" persons who participated in the commission of a crime are individually responsible for the commission of that crime, without argument as to any technicalities concerning the way such a participation should be described. Notwithstanding the unsubstantiated assertion by Ojdanić that the application of the *contra preferentem* or *in dubio pro reo* principle would exclude the availability of an individual criminal responsibility for participation in a joint criminal enterprise,[75] there is no ambiguity involved in Article 7.1 of the Statute which would require the application of such a principle.

27. I am satisfied that individual criminal responsibility for participation in a joint criminal enterprise to commit a crime within the Tribunal's jurisdiction is included within Article 7.1 of the Tribunal's Statute.

***(2)(b) Was the Tadić Conviction Appeal Judgment correct in the definition it gave of the elements and application of a joint criminal enterprise as a mode of individual criminal responsibility?***

28. It is obvious from what I have already written that I do have difficulties with some of the statements made by the Appeals Chamber in the *Tadić* Conviction Appeal Judgment upon this issue. If, however, the elements and application of a joint criminal enterprise are interpreted in

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[72] Report of the Secretary-General Pursuant to Paragraph 2 of Security Council Resolution 808 (1993), 3 May 1993, par 54.

[73] This may have been what was intended in the *Tadić* Conviction Appeal Judgment by the perhaps cryptic statement, at par 188, that Article 7.1 of the Statute:

> "[...] covers first and foremost the physical perpetration of a crime by the offender himself, or 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."

[74] Interlocutory Appeal, par 39.

[75] *Ibid*, pars 31-34.

the way I have stated in this Opinion,[76] many of the difficulties I have are removed. Some difficulties nevertheless remain.

29. One difficulty I still have is with the description of "a form of accomplice liability" given by the *Tadić* Conviction Appeal Judgment to the individual criminal responsibility which arises from the participation of an accused in a joint criminal enterprise to carry out a crime specified in the Tribunal's Statute.[77] "Accomplice" is a term of uncertain reference. It means one who is associated with another in the commission of a crime, but his association may be either as a principal or as one who aids and abets the principal. The *Tadić* Conviction Appeal Judgment does not identify which of these two meanings it intended to convey by the description it gave, and accordingly the description may be productive of confusion.[78] In my opinion, it is not appropriate to describe a participant in a joint criminal enterprise as one who merely aids and abets, even though such a description may well bring a joint criminal enterprise easily within the terms of Article 7.1 of the Statute ("[a] person who [...] otherwise aided and abetted in the [...] execution of a crime referred to in articles 2 to 5 of the present Statute").[79] It would not be appropriate because, as the *Tadić* Conviction Appeal Judgment itself acknowledges, such a participant must be distinguished from one who merely aids and abets.[80] The main distinction between the two relates to the state of mind which must be established. The participant in the basic form of joint criminal enterprise must share with the person who physically carried out the crime the state of mind required for that crime; the person who merely aids and abets must be aware of the essential elements of the crime committed, including the state of mind of the person who physically carried it out, but he need not share that state of mind.[81]

30. Another difficulty which remains is the existence, as a separate category of joint criminal enterprise, of the second category formulated in the *Tadić* Conviction Appeal Judgment, in which all of the participants are members of military or administrative groups acting pursuant to

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[76] Paragraphs 5-13, *supra*.

[77] *Tadić* Conviction Appeal Judgment, par 220.

[78] Considerably earlier in the Judgment, at par 192, the following statement is made:

> "[...] to hold criminally liable as a perpetrator only the person who materially performs the criminal act would disregard the role as co-perpetrators of all those who in some way made it possible for the perpetrator physically to carry out that criminal act. At the same time, depending upon the circumstances, to hold the latter liable only as aiders and abettors might understate the degree of their criminal responsibility."

That statement is consistent with what follows in the text of my Opinion. My concern, however, is the lack of clarity in the text of the *Tadić* Conviction Appeal Judgment at par 220.

[79] In this sense, the second sentence of par 19 of the Appeals Chamber's Decision in the present appeal may contribute to that confusion.

[80] *Tadić* Conviction Appeal Judgment, par 229.

[81] *Aleksovski* Appeal Judgment, par 162.

a concerted plan.[82] Many of the cases considered in that Judgment concerning this second category appear to proceed upon the basis that certain organizations in charge of the concentration camps, such as Die Schutzstaffeln der Nationalsocialistischen Deutschen Arbeiterpartei (the "SS"), were themselves criminal organisations declared to be so by the Nuremburg Tribunal,[83] so that the participation of an accused person in the joint criminal enterprise charged would be inferred merely from his membership of that criminal organization. This has no doubt contributed to the confusion of thought on the part of Ojdanić, who has adopted clearly erroneous criticisms that the *Tadić* Conviction Appeal Judgment has, by recognizing a joint criminal enterprise, adopted a principle of collective responsibility.[84] I am not satisfied that the Appeals Chamber in the *Tadić* Conviction Appeal Judgment demonstrated a sufficiently firm basis for the recognition of these cases as a separate category of joint criminal enterprise.

31. A third difficulty which remains is the use in the *Tadić* Conviction Appeal Judgment of the words "perpetrator" and "co-perpetrator[s]", apparently as terms of art, when dealing with the concept of a joint criminal enterprise. The former is used to describe the person who physically executed the crime charged and the latter to describe those who otherwise participated in the joint criminal enterprise.[85] The use of such terms has not always been consistently followed in subsequent cases,[86] but it appears to result from a distinction which exists in the civil law system whereby a person who merely aids and abets the perpetrator (or the person who physically executes the crime) is subject to a lower maximum sentence. The adoption of the term "co-perpetrator" is apparently intended for that purpose to distinguish the participant in a joint criminal enterprise from one who merely aids and abets. No such distinction exists in relation to sentencing in this Tribunal, and I believe that it is unwise for this Tribunal to attempt to categorise different types of offenders in this way when it is unnecessary to do so for sentencing purposes. The Appeals Chamber has made it clear elsewhere that a convicted person must be punished for the seriousness of the acts which he has done, whatever their categorisation.[87]

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[82] See par 6, *supra*.
[83] Charter of the International Military Tribunal, II. Jurisdiction and General Principles, Articles 9-10.
[84] See, for example, Interlocutory Appeal, pars 41, 44-45, 59, 65.
[85] These uses are most clearly identified in the *Tadić* Conviction Appeal Judgment at pars 186-200, but particularly in par 192.
[86] For example, in *Prosecutor v Krstić*, IT-98-33-T, Judgment, 2 Aug 2001, a distinction was sought to be drawn between an accomplice and a co-perpetrator.
[87] *Aleksovski* Appeal Judgment, par 182; *Delalić* Conviction Appeal Judgment, pars 429-430.

**Other issues raised by Ojdanić**

32. Ojdanić has submitted that neither of the subsequent decisions of the Appeals Chamber in *Furundžija* or *Delalić* provide any assistance or binding propositions of law beyond what was stated in the *Tadić* Conviction Appeal Judgment.[88] I agree with that submission.

33. He has also submitted that, even if "one accepts the validity of the common purpose doctrine set forth in the *Tadić* dicta", that doctrine has been "transformed into organisational liability" by its expansion into a "joint criminal enterprise liability" by subsequent Trial Chamber decisions.[89] This submission ignores the fact that "joint criminal enterprise" is merely the label which has been preferred to the many other labels (including "joint criminal enterprise") which the Appeals Chamber gave to the concept in the *Tadić* Conviction Appeal Judgment.[90] This is but another version of the "collective responsibility" argument which I have already described as erroneous.[91] Apart from providing some examples redolent with hyperbole, support for this argument is sought to be found mainly in an article published in 2000,[92] which includes the following remarkable statement in relation to the *Tadić* Conviction Appeal Judgment:

> 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 upon simple membership of the group and knowledge of the policy of the group.

There is nothing in the *Tadić* Conviction Appeal Judgment which supports the existence of an individual criminal responsibility for participation in a joint criminal enterprise upon the basis stated in the second sentence of that statement.

34. Finally, Ojdanić has submitted that the relevant concept – be it common purpose or joint criminal enterprise – was created only on 15 July 1999 by the *Tadić* Conviction Appeal Judgment, and that its application to the charges against him offends the principle of legality, or *Nullum Crimen Sine Lege*. Upon this issue, I am content to agree with what has been said by the Appeals Chamber in the present appeal.[93]

35. I would dismiss the appeal for all these reasons.

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[88] Interlocutory Appeal, pars 54-58.
[89] *Ibid*, par 59-61.
[90] See par 5, *supra*.
[91] Paragraph 30, *supra*.
[92] The Judgment of the ICTY Appeals Chamber on the Merits in the Tadić Case, *International Review of the Red Cross*, Sassoli & Olson.
[93] Paragraphs 33-44.

**Judicial precedent – an addendum**

36. Judge Shahabuddeen has written a Separate Opinion in which he seeks to respond in relation to some of the issues I have raised concerning what was said in the *Tadić* Conviction Appeal Judgment; on the three issues he has chosen to discuss, he expresses himself as being content with that judgment. I do not propose to say anything further concerning those issues. I must, however, deal with one matter of significance also raised by Judge Shahabuddeen, the issue of judicial precedent. Because that issue is of importance to the general jurisprudence of the Tribunal, and because Judge Shahabuddeen has expressed his view, I feel obliged to express my own view upon that issue.

37. In the *Aleksovski* Conviction Appeal Judgment, when discussing the issue of judicial precedent, the Appeals Chamber said that the ruling which is followed in accordance with judicial precedent is "the legal principle (*ratio decidendi*)" of the previous decision,[94] and that a proper construction of the Tribunal's Statute "requires that the *ratio decidendi* of the [Appeals Chamber's] decisions is binding on Trial Chambers",[95] so as to comply with the intention of the Security Council that the Tribunal applies "a single, unified, coherent and rational corpus of law".[96] The need for coherence was stated as being:[97]

> [...] particularly acute in the context in which the Tribunal operates, where the norms of international humanitarian law and international criminal law are developing, and where, therefore, the need for those appearing before the Tribunal, the accused and the Prosecution, to be certain of the regime in which cases are tried is even more pronounced.

There was no other discussion by the Appeals Chamber of just what is comprehended within the *ratio decidendi* of a previous decision.

38. Judge Shahabuddeen has argued (1) that a distinction should be drawn between (a) the *ratio decidendi* of a decision and (b) the "authority it exerts over the way other cases are decided",[98] and (2) that there is an exception to the authority normally exerted by a *ratio decidendi* where the ruling in question was not the result of the court's own deliberate inquiry and considered finding.[99] Where such a finding is relevant to a manifestly important point bearing on the court's jurisdiction, he says, it cannot be relegated to the ranks of *obiter dicta*, it is *ratio decidendi* and exerts the force normally flowing from this.[100] He draws attention to the fact

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[94] Paragraph 110.
[95] Paragraph 113.
[96] *Ibid.*
[97] *Ibid.*
[98] Separate Opinion of Judge Shahabuddeen, p 5.
[99] *Ibid*, p 6.
[100] *Ibid*, p 7.

that the Tribunal is not in the position of a domestic court operating with a largely settled corpus of law, so that "its juristic mission is more exploratory than is that of a normal domestic court".[101]

39. In my respectful opinion, both this rather fluid concept of what is *ratio* and what is *obiter* and the stated justification for being "more exploratory" are inconsistent with what was said in *Aleksovski*, and both overlook what *must* be regarded as the binding nature of every *ratio decidendi* and what *may* be regarded as the persuasive nature of some *obiter dicta*.

40. Judge Shahabuddeen found helpful a statement concerning the issue made by Mr Justice Cairns sitting at first instance,[102] when his Lordship:

(1) referred to

(a) the decision of the Court of Appeal in *Candler v Crane, Christmas & Co*,[103] which had held that there could be no liability for an honest but negligent misrepresentation unless (to put it broadly) there was a contractual relationship between the parties, and

(b) the subsequent ruling by the House of Lords, in *Hedley Byrne & Co Ltd v Heller & Partners Ltd*,[104] that such a liability *could* arise otherwise, since the law implied a duty of care when a party seeking information from a party possessed of a special skill trusts him to exercise due care, and that party knew or ought to have known that reliance was being placed on his skill and judgment;[105] and

(2) then said that, upon the basis that the House of Lords had also held that, in that particular case, there had been an express disclaimer of responsibility so that no such duty was implied, an academic may suggest that first instance judges would remain bound by the earlier decision of the Court of Appeal in *Candler v Crane, Christmas*.

41. With all due respect to both Mr Justice Cairns and Judge Shahabuddeen, the example chosen is not a good one. In the *Hedley Byrne Case*, the ultimately unsuccessful respondent had argued that the decision in *Candler v Crane, Christmas* denied the claim for negligent misrepresentation, and that that decision was right in principle and in accordance with earlier authorities.[106] Whether that decision was right was the principal issue discussed by their Lordships in the speeches delivered. Lord Reid stated that, if the appellant's argument was

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[101] *Ibid*, p 8.
[102] *WB Anderson and Sons Ltd v Rhodes (Liverpool) Ltd* [1967] 2 All ER 850 at 857.
[103] [1951] 2 KB 164.
[104] [1964] AC 465.
[105] *Ibid*, at 486, 502, 514.
[106] *Ibid*, at 476; see also the speech of Lord Devlin (at 515).

correct, then *Candler v Crane, Christmas* "was wrongly decided".[107] He then discussed the cases which had led to that decision, saying of one (for example) that the decision had been wrong to limit the duty of care to where there was a contract, and that the *ratio* of the leading case upon which that decision had relied (*Le Lievre v Gould*[108]) was "wrong".[109] Lord Morris of Borth-y-Gest stated that:[110]

> My Lords, I consider that it follows and that *it should now be regarded as settled law* that if someone possessed of a special skill undertakes, quite irrespective of contract, to apply that skill for the assistance of another person who relies upon such skill, a duty of care will arise. [...]

His Lordship then identified the "settled law" in the terms already described. Lord Hodson agreed with what had been said by Lord Morris.[111] Lord Pearce, like Lord Reid, stated that the *ratio* in *Le Lievre v Gould* was wrong.[112]

42. With the weight of that opinion, the headnote of the judgment in *Hedley Byrne* published in the authorised law reports correctly described the decision of the Court of Appeal in *Candler v Crane, Christmas* as having been "overruled".[113] No judge sitting at first instance who had even the slightest connection with reality could have understood that he was still bound by that decision of the Court of Appeal. Even if the ruling of the House of Lords could still be regarded as, strictly, *obiter* because of the conclusion that the facts of the *Hedley Byrne Case* did not fall within the principle stated, it would have been *obiter* of the most persuasive kind possible. My own view agrees with the editor of the authorised law reports, that the House of Lords had firmly overruled the decision by the Court of Appeal in *Candler v Crane, Christmas* but, whichever way the *Hedley Byrne* judgment is viewed, it does *not*, with respect, support Judge Shahabuddeen's argument that the binding nature of the *ratio decidendi* of a previous decision depends upon the rather fluid concept which he states.

43. I therefore maintain my understanding that the *ratio decidendi* of a decision 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. The distinction drawn by Judge Shahabuddeen is contrary

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[107] *Ibid*, at p 487.
[108] [1893] 1 QB 491.
[109] [1964] AC 465, at 488-489.
[110] *Ibid*, at 502-503. The emphasis did not appear in the original and has been added by me.
[111] *Ibid*, at 514.
[112] *Ibid*, at 535.
[113] *Ibid*, at 466.

to what was said by the Appeals Chamber in *Aleksovski*, and, if accepted, that distinction would destroy the cohesion which the *Aleksovski* Conviction Appeal Judgment sought to impose.

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

Dated this 21st day of May 2003,
At The Hague,
The Netherlands.

David Hunt

Judge David Hunt

**[Seal of the Tribunal]**