THE INTERNATIONAL CRIMINAL TRIBUNAL
FOR THE FORMER YUGOSLAVIA

IN TRIAL CHAMBER III

Before: Judge Iain Bonomy, Presiding
Judge Michèle Picard
Judge Christoph Flügge

Registrar: Mr John Hocking, Acting Registrar

Date: 25 March 2009

THE PROSECUTOR

v.

RADOVAN KARADŽIĆ

Case No. IT-95-05/18-PT

Public

PRELIMINARY MOTION ON LACK OF JURISDICTION CONCERNING OMISSION LIABILITY

The Office of the Prosecutor

Mr Alan Tieger
Mr Mark Harmon
Ms. Hildegard Uertz-Retzlaff

The Accused

Dr Radovan Karadžić

I. Introduction

1. The Third Amended Indictment ('Indictment') refers to Dr. Karadžić's responsibility for the alleged crimes through omissions on eleven occasions. Of relevance to this Motion, paragraph 35 refers to his liability for omissions in the context of superior responsibility; paragraph 88 makes a general allegation relating to culpable omissions in the context of crimes against humanity; and, paragraphs 30 and 31 refer generally to his liability for omissions in respect of planning, instigating, ordering and/or aiding and abetting.[1]

2. The Prosecution has not identified the legal basis to establish that in customary (or conventional) international law, an individual may be held criminally responsible for any of the alleged crimes by failing to act. In this Motion, Dr. Karadžić argues that reference in the Indictment to omission as a form of criminal liability, beyond its reference to superior responsibility, is *ultra vires* the jurisdiction of the ICTY. In particular, Dr. Karadžić argues that:

1. The ICTY may not consider any form of responsibility of an accused or crime (as substantive international criminal law) without first establishing its existence and availability in customary international law. There is a lack of *evidence* establishing that liability for omissions has become recognised in customary international law, beyond superior responsibility, as a means of attributing criminal responsibility to an individual in international criminal law;

2. Despite reference in the *ad hoc* Tribunal jurisprudence to the concept of omission in relation to aiding and abetting – and, to a far lesser extent, planning instigating and ordering – all such examples of omission liability contemplated are, properly interpreted, references to positive acts (not omissions).

[1] Other references relating to JCE liability (paragraphs 11, 16, 21 and 26) are the subject of a separate motion.

3. Superior responsibility, as set out in Article 7(3) of the ICTY Statute, is *lex specialis* for omission liability in international criminal law. Therefore, punishing someone for failing to carry out their duty to act must be limited to this recognised form of criminal responsibility, or the *nullum crimen sine lege* principle will be violated.

4. It is for the Prosecution to establish the existence of the forms of liability upon which it intends to rely; it is not for Dr. Karadžić to prove the absence of the existence of such rules.

3. This motion challenges the Indictment on the grounds that the above mentioned forms of liability pleaded by the Prosecution as to criminal responsibility under Article 7 of the ICTY Statute are not open to the Tribunal under international law. Rules 72(A)(i) and (D)(iv) are therefore satisfied.

II. Law and Argument

The Prosecution must show *evidence* of the existence of a rule

4. There are few means by which a rule of substantive international criminal law can be created. For such a rule to be available to the ICTY, it must be identified as a rule derived from one of the recognised sources of international law.[2] In particular, the Secretary-General made it clear in his Report that the ICTY is obliged to apply customary international law as it existed at the time of the alleged acts.[3] Evidence of state practice and *opinio juris* establishing such a rule must therefore be specifically identified.[4] This task is far more onerous than simply asserting the existence of a rule or asserting that the practice exists in some (or even many) States' domestic criminal systems. While a chamber may look to general principles of law, as articulated under Article 38(1)(c) of the ICJ Statute, to assist it in clarifying elements of legal rules that are established in customary international law,[5] it may not rely solely on a survey of the criminal justice systems of several common and civil law States. Such an exercise may

[2] Statute of the ICJ, (1945) 39 *AJIL Supp.* 215, Art. 38(1).
[3] Report, para. 34. Conventional international law is not relevant to the subject-matter of this Motion.
[4] A consistent and relatively uniform practice must be *evidenced* before a Tribunal can assert the existence of a rule of customary international law: see, *North Sea Continental Shelf cases* (1969) 41 ILR 29; J.L. Brierly, *Law of Nations* (6th ed., 1963), 61; Ian Brownlie, *International Law* (7th ed., 2008), 6-7.
[5] E.g., *Furundžija* Trial Judgement, para. 175.

establish a rule of domestic criminal practice; it does not follow that a rule of *international* criminal practice has been established.[6]

5. There is insufficient practice, let alone *opinio juris*, to evidence the existence of an international law rule, beyond the doctrine of superior responsibility, that individual criminal responsibility can be established through an accused's omissions. It is not the responsibility of Dr. Karadžić to prove that such omission liability does not exist as a form of responsibility open to the ICTY. Rather, having raised and argued this point, it is the burden of the Prosecution to show that there is evidence (to the high standard required in the establishment of state practice and *opinio juris*) of the existence of such liability in customary international law.

Post-Second World War material

6. The jurisprudence of the Nuremberg Trial and subsequent trials held under Control Council Law No. 10 are often cited as definitive statements in support of a rule of international criminal law. They are, in fact, mere (and limited) evidentiary sources that may be used to identify a basis for a rule of international criminal law. Having said that, a review of these sources reveals a lack of any foundation for the assertion that liability for omission outside of the doctrine of superior responsibility exists in international criminal law.

7. The Nuremberg Judgement itself is silent on the matter and the Control Council Law No. 10 cases that do address the issue clearly show that the concept is either relevant only to the superior responsibility doctrine or inapplicable to an accused's responsibility outwith that doctrine.[7]

8. In Telford Taylor's *Final Report to the Secretary of the Army on the Nuremberg War Crimes Trials under Control Council Law No. 10*, he refers to consideration in the preparation of the Nuremberg Charter to a statement that 'guilt may be either as principal or accessory' and that 'the taking of a consenting part in the commission of a war crime is also punishable; as for example, is omission of a superior officer to prevent

[6] General principles of law are not derived from the consensual (conscious or unconscious) behaviour of States; rather they are used to fill gaps in international law rules or, otherwise put, to fill a *non liquet* in international law: see, Malcolm Shaw, *International Law* (6th ed., 2008), 98.
[7] See examples in *Trials of War Criminals before the Nuremberg Military Tribunals under Control Council Law No. 10*, 1949-53: *Hostages* case, Vol. 11, 1287-1288; *Ministries* Case, Vol. 14, 443, 872.

war crimes when he knows of, or is on notice as to, their commission or contemplated commission and is in a position to prevent them'. Again, there is no articulation of liability for omissions beyond the doctrine of superior responsibility.

9. At the VIII Conference for the Unification of Penal Law held at Brussels in July 1947, States Parties failed to agree on a definition which included 'omissions' in relation to crimes against humanity, demonstrating that in 1947 there was no settled law on omission liability even in relation to crimes against humanity.[8]

No credible evidence of a form of responsibility known as 'aiding and abetting by omission'

10. Some chambers of the *ad hoc* Tribunals have suggested that the aider and abettor's lending of assistance or support may occur not only by means of positive action, but also through omission.[9] The only examples of aiding and abetting by omission given are: (1) aiding and abetting through inactive presence at the scene of the crime; and (2) aiding and abetting where the accused has a duty to act and fails to do so, irrespective of his presence at or absence from the scene.[10]

11. A proper review of this jurisprudence reveals that the proposition that aiding and abetting by omission is a form of responsibility in international criminal law is inaccurate.[11] The *Blaškić* Trial Judgement was the first to speak explicitly of aiding and abetting by omission, suggesting that for such omission liability to arise it must have had a 'decisive effect' on the commission of the crime.[12] While the *Blaškić* Trial and Appeal Judgements left open the theoretical possibility that circumstances beyond inactive presence at the scene could constitute aiding and abetting by omission,[13] the judgements in which such a form of liability has been loosely asserted simply reiterate

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[8] *Law Reports of Trials of War Criminals, Selected and Prepared by the United Nations War Crimes Commission 1947-49*, Vol.9, pp. 26-27.

[9] See, e.g., *Blaškić* Appeal Judgement, para. 47; *Muvunyi* Trial Judgement and Sentence, para. 470; *Orić* Trial Judgement, para. 283; *Strugar* Trial Judgement, 31 January 2005, para. 349; *Blagojević and Jokić* Trial Judgement, para. 726; *Brđanin* Trial Judgement, para. 271; *Galić* Trial Judgement, para. 168; *Aleksovski* Trial Judgement, para. 88.

[10] *Aleksovski*, *Galić*, *Muvunyi* cases.

[11] For a detailed analysis of this issue, Gideon Boas, James L. Bischoff, and Natalie L. Reid, *Forms of Responsibility in International Criminal Law* (2007), 4.3.1.1.3.

[12] *Blaškić* Trial Judgement, para. 284.

[13] *Blaškić* Appeal Judgement, para. 47; repeated in *Ntagerura, Bagambiki and Imanishimwe* Appeal Judgement, paras. 370, 377. See also, *Mrkšić et al.* Trial Judgement, paras. 553–554.

that aiding and abetting can be effected by omission without explaining how this could occur.[14] Indeed, close examination of the case law reveals that, in the cases in which a chamber has found the requisite 'significant encouraging effect',[15] the aider and abettor had in fact intentionally made himself available at the scene, or intentionally stayed on the scene if already there, for the express purpose of showing solidarity with the physical perpetrators or approval of their actions.[16] These circumstances reveal that the accused were in fact *actively* aiding and abetting the crimes, even though they may not have taken any overt action or said anything once at the scene.

12. The only other circumstance in which aiding and abetting by omission might be said to arise is where a superior with a duty to act fails to take action[17] – precisely the basis for the form of omission liability known as superior responsibility. Indeed, the Trial Chamber in the *Strugar* case ostensibly supported this view of the case law and determined that Strugar's own failure to take more effective measures was more properly regarded in the context of superior responsibility under Article 7(3) of the ICTY Statute.[18]

No evidence of omission liability for planning, instigating and ordering a crime

13. Reference to these forms of responsibility by the ICTY suggests that, while the accused may design, prompt, or instruct certain conduct with the awareness of the substantial likelihood that a crime will be committed in carrying out that conduct, the accused's conduct properly characterised cannot be effected through an omission.[19]

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[14] See, *Milutinović et al.* Trial Judgement, para. 90 (but see note 18 below); *Aleksovski* Trial Judgement, para. 88; *Rutaganira* Trial Judgement, paras. 74, 81, 84, 91, 99–100;

[15] *Ndindabahizi* Trial Judgement, para. 457; *Strugar* Trial Judgement, para. 349; *Simić et al.* Trial Judgement, para. 165; *Vasiljević* Trial Judgement, para. 70; *Krnojelac* Trial Judgement, para. 88; *Kvočka et al.* Trial Judgement, para. 257; *Kunarac et al.* Trial Judgement, para. 393; *Muvunyi* Trial Judgement, para. 472; *Mpambara* Trial Judgement, para. 22; see also, *Bisengimana* Trial Judgement.

[16] *Strugar* Trial Judgement, para. 349.

[17] *Galić*, *Simić*, and *Rutaganira* Trial Judgements. The Trial Chamber in *Milutinović et al.* appeared to suggest that Ojdanić was guilty of aiding and abetting through acts and omission – however, the omissions appear to relate to a failure to prevent or punish and, beyond the assertion, it points to no evidence to suggest that aiding and abetting by omission has a foundation in international law (paras. 620-631).

[18] *Strugar* Trial Judgement, para. 355.

[19] *Galić* Trial Judgement, para. 168; Gideon Boas, James L. Bischoff, and Natalie L. Reid, *Forms of Responsibility in International Criminal Law* (2007), chapter 5.

14. The only attempt in the case law to suggest such a possibility concretely was the *Blaškić* Trial Judgement. As an example of an omission amounting to instigation, the Chamber quoted from the Regulations Concerning the Application of International Law to the Armed Forces of the Socialist Federal Republic of Yugoslavia: 'A military commander is responsible as ... an instigator if, by not taking measures against subordinates who violate the law of war, he allows his subordinate units to continue to commit the acts.'[20] The Trial Chamber sought to qualify this passage with the caveat that, under the ICTY Statute, liability for instigation in such a scenario could only ensue if the Prosecution proves that 'the subordinates would not have committed the subsequent crimes if the commander had not failed to punish the earlier ones'[21] – a clear reference to superior responsibility.

15. While subsequent trial chambers of both *ad hoc* Tribunals have repeated the proposition that instigation may occur by omission, it is apparent from a review of these cases that the Chambers have confined themselves to a broad theoretical statement without exploring further whether it is founded in international law. Furthermore, it is submitted that such circumstances are in fact more permissibly described as superior responsibility.

16. The ICTY Appeals Chamber in the *Galić* case has gone further in respect of ordering by holding that liability for ordering cannot ensue on the basis of an omission. The Chamber stated that it could not 'conceive of a situation in which an order would be given by an omission, in the absence of a prior positive act' and concluded that 'the omission of an act cannot equate to the mode of liability of ordering under Article 7(1) of the Statute.'[22]

17. Once again, no evidence has been articulated for the assertion that an accused can be held liable for an omission in respect of planning, instigating, and ordering. Not only has the foundation for this proposition in international law never been articulated, no

[20] *Blaškić* Trial Judgement, para. 338.
[21] *Blaškić* Trial Judgement, para. 339.
[22] *Galić* Appeal Judgement, para. 176: '[i]t would thus be erroneous to speak of "ordering by omission"' (para. 177 n. 508).

chamber has ever relied upon this as a basis for liability and, in the case of ordering, the Appeals Chamber has explicitly rejected it.

No omission liability under the ICC Statute

18. The ICC Statute is often cited as a foundation for asserting the development of a rule of customary international criminal law. This is not always appropriate given that the process of compromise that gave rise to certain provisions might not accurately reflect the views of States. Even so, an early draft of Article 28 by the Preparatory Committee, dealing with individual criminal responsibility, expressly contemplated liability for omission.[23] States Parties in negotiating this provision could not reach any agreement on a rule expressing the existence of omission liability for any form responsibility excepting superior responsibility. The article contemplating omission liability was deleted, 'because it was not possible to reach consensus on the definition of an omission'.[24] This shows that, as recently as 1998, States were unable to agree on the existence of a form of omission liability beyond superior responsibility.

Article 7(3) as the *lex specialis* for omission liability in international criminal law

19. The only form of omission responsibility that can properly be said to exist in customary international law is that of superior responsibility. The doctrine of superior responsibility is well established as a form of responsibility recognised in international criminal law.[25] An accused convicted pursuant to the doctrine of superior responsibility is not held liable for the substantive crime of a subordinate, but rather for failing to honour a legal obligation to take action to promote and ensure law-abiding behaviour among subordinates.[26]

20. The finding of criminal responsibility for failing to act requires the establishment of an *existent* legal duty to act and an attendant failure to do so. As argued above, where the ICTY jurisprudence has sought to identify circumstances beyond superior responsibility in which omission liability exists in international criminal law, it has

[23] Draft reproduced in M Cherif Bassiouni, *The Legislative History of the International Criminal Court: An Article-by-Article Evolution of the Statute* (2005), Vol. 2, 195.
[24] Otto Triffterer, *Commentary on the Rome Statute of the International Criminal Court – Observers' Notes, Article by Article* (2nd ed., 2008), 770.
[25] See, Gideon Boas, James L. Bischoff, and Natalie L. Reid, *Forms of Responsibility in International Criminal Law* (2007), chapter 3.
[26] *Krnojelac* Appeal Judgement, para. 171; *Čelebići* Appeal Judgement'), para. 239.

rather identified positive acts that form part of the objective elements of the form of responsibility. Further, none of the jurisprudence or other sources considered has provided evidence to support the existence of omission liability as a form of responsibility in international criminal law outside of the superior responsibility doctrine.

21. It is now incumbent upon the Prosecution to identify evidence of the positive existence of such a form of liability.

III. Relief requested

22. By this Motion, Dr. Karadžić requests the Chamber to instruct the Prosecution to delete references in the Indictment to alleged criminal responsibility for omissions from paragraphs 30, 31 and 88, and to further instruct the Prosecution that it may not seek to lead evidence on or argue Dr. Karadžić's responsibility for failing to act except to the extent that he is alleged to be criminally liable as a superior under Article 7(3) of the ICTY Statute.

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Respectfully submitted,

Radovan Karadžić[27]

[27] The contribution of Dr. Gideon Boas, Senior Lecturer at Monash University (Australia), to the research and drafting of this Motion is gratefully acknowledged.