

**THE INTERNATIONAL CRIMINAL TRIBUNAL  
FOR THE FORMER YUGOSLAVIA**

IN TRIAL CHAMBER III

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

Acting Registrar: Mr. John Hocking

Date Filed: 30 March 2009

THE PROSECUTOR

v.

RADOVAN KARADŽIĆ

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

*Public*

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PRELIMINARY MOTION ON LACK OF JURISDICTION:  
SUPERIOR RESPONSIBILITY

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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') charges Dr. Karadžić with criminal responsibility for genocide, crimes against humanity and violations of the laws and customs of war. Of relevance to this Motion is paragraph 35 of the Indictment:

"Radovan Karadžić failed to take the necessary and reasonable measures to prevent the commission of crimes by members of the Bosnian Serb Forces and/or Bosnian Serb Political and Governmental Organs and/or to punish the perpetrators thereof. The term "committed, as used in the context of Article 7(3) of the Statute, includes all modes of liability covered by Article 7(1) and 7(3) of the Statute (...)"

Including article 7(3) under 'committing' in Article 7(3) essentially creates 'superior responsibility through superior responsibility' or 'multiple superior responsibility'.

2. In this Motion, Dr. Karadžić argues that reference in the Indictment to 'multiple superior responsibility' goes beyond the concept of superior responsibility in Article 7(3) of the Statute. It is *ultra vires* the jurisdiction of the ICTY and it violates fundamental principles of criminal law. In particular, Dr. Karadžić argues that:

1. In line with existing case law and statutory law the concept of superior responsibility at the ICTY is a mode of liability, a way of participating in subordinates' crimes. Through the concept of superior responsibility superiors are *punished* for the crimes of their subordinates. The nature of superior responsibility as mode of liability is further confirmed by the close link that is required in ICTY case law between the superior and the subordinate through 'effective control' and 'knowledge'.
2. Superior responsibility under Article 7(3) of the Statute is not necessarily triggered by a superior's direct subordinate. It can result from crimes committed by a subordinate further down the chain of command provided he is under 'effective control' of the superior who knew or had reason to know of the crimes (and who

failed to prevent or punish the crimes). This means that proof is required of a link with the subordinate who is the actual perpetrator and not the direct subordinate who, in the Prosecution's scenario of 'multiple superior responsibility', is the superior who failed to prevent or punish that crime.

3. Under Article 7(3) of the Statute, a superior can only be held liable and punished for crimes in which his subordinate actively participated or crimes that were actually committed by a subordinate. These limits on superior responsibility stem from fundamental criminal law principles, such as the principle of personal culpability and the legality principle (*nullum crimen sine lege*). Both principles require circumscribing liability as much as possible.
4. In so far as the Prosecution attempts to 'reconceptualize' superior responsibility at the ICTY, it is submitted that this violates the principle of legality. In arguing that 'multiple superior responsibility' is part of the ICTY Statute the Prosecution should provide evidence that such a rule existed in customary international law at the time of the (alleged) offences.

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

### Superior responsibility at the ICTY : mode of liability requiring a close link

4. The Tribunal's legislative history, in particular the Final Report of the Commission of Experts, confirms that superior responsibility is a mode of liability that generates liability for subordinate crimes.<sup>1</sup> The 'proximity' that such liability requires between superiors and subordinates is reflected in the text of Article 7(3) of the Statute, which is based on Article 86

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<sup>1</sup>. Final Report of the Commission of Experts Established Pursuant to Security Council Resolution 780 (1992), UN Doc S/1994/674, 27 may 1994.

of the Additional Protocol I and formulates superior responsibility as an extension of subordinate liability.

5. With few exceptions described below, the Tribunal has consistently treated superior responsibility as a mode of liability linking superiors to crimes. This appears from the fact that to date, the Tribunal has convicted superiors for the crimes under Articles 2-5 of the Statute committed by their subordinates. That superior responsibility in ICTY case and statutory law is a mode of liability can further be inferred from the rigorous interpretation of the elements<sup>2</sup> that underlie superior responsibility and which guarantee a close link between superiors and subordinates, especially by insisting on ‘effective control’ and ‘knowledge’. This explains the observation by one learned commentator that superior responsibility at the ICTY is only suitable as a liability mode in traditional military-like contexts where there is a clear link of control over subordinates by the superior.<sup>3</sup>

6. ‘Effective control’ is a key element in the doctrine of superior responsibility at the ICTY. Only when a superior exercises effective control can the - *de facto* or *de iure* - commander/superior be held liable for crimes committed by the subordinate. Having ‘effective control’ means having the material ability to prevent subordinate offences or to punish subordinate offenders.<sup>4</sup> The concept of control shapes the relationships of both direct and indirect subordination; it governs relationships beyond rank and formal authority. The essence of ‘control’ as an element of superior responsibility was affirmed in *Hadžihasanović and Kubura* where the Appeals Chamber held that subordinate crimes only generate superior responsibility when it can be established that there was a superior-subordinate relationship governed by effective control at the time of the offence.<sup>5</sup>

7. ‘Knowledge’ (of subordinate crimes) is another important element of superior responsibility that secures a close link between superiors and subordinates. ‘Had reason to know’ in Article 7(3) of the Statute requires proof that there was “information...available to him which would provide notice of crimes committed by his subordinates”.<sup>6</sup> This cognitive standard links the superior to the subordinates who are direct perpetrators of the

<sup>2</sup> (i) superior-subordinate relationship, (ii) knowledge and (iii) failure to prevent or punish. See e.g. *Aleksovski*, Appeals Judgement, para. 72.

<sup>3</sup> See B. Bonafe, Finding a Proper Role for Command Responsibility, (2007) 5 *JCIJ*, 599-618

<sup>4</sup> *Mucic et al*, Appeal Judgement, paras. 256 and 265-266.

<sup>5</sup> *Hadžihasanović and Kubura*, Appeals Chamber Decision on Joint Challenge to Jurisdiction, para 49.

<sup>6</sup> *Mucic et al.*, Trial Judgement, para. 393.

crime. Attempts to loosen such a link by introducing a negligence standard for superior responsibility and a general duty to know, was rejected by the Appeals Chamber in *Mucic et al.*<sup>7</sup>

8. Superior responsibility at the ICTY is a mode of liability. With the elements of ‘effective control’ governing superior-subordinate relationships, and the cognitive standard requiring a certain degree of knowledge of subordinate crimes, superior responsibility at the ICTY presumes a close link between a superior and the subordinate who actually commits the crime. Effective control over the ‘intermediate superior’, who is directly subordinate to the superior, and knowledge of his failure to intervene do not trigger superior responsibility under Article 7(3) of the Statute.

#### Superior responsibility not a separate offence of failure to act in ICTY law

9. It should, however, be noted that despite the extensive body of case law interpreting superior responsibility as a mode of liability for the crimes of subordinates, there have been pronouncements in the Tribunal’s case law that indicate that the concept of superior responsibility should be construed as a separate offence of failure to act/dereliction of duty.<sup>8</sup>

10. These rulings can be understood as attempts to unravel the peculiar and incoherent structure of superior responsibility. Superior responsibility in general is a complex and hybrid concept, it has traits of both a mode of liability and a separate offence of dereliction of duty. It is incoherent to the extent that it may generate liability for intentional crimes as result of a negligent failure to act. In this context we can refer to Article 28 of the ICC Statute, which contains a negligence standard for military superiors. As one commentator said with regard to the latter provision, it is ‘a stunning contradiction between the negligent conduct of the superior and the underlying intent crimes committed by the subordinates’.<sup>9</sup> A way out of this illogical impasse would be to regard superior responsibility as a separate offence, a ‘failure to supervise’.<sup>10</sup>

<sup>7</sup> Appeals Judgement, paras. 226 – 227.

<sup>8</sup> See e.g., *Halilovic*, Trial Judgement, paras 42 ff; *Hadžihasanović and Kubura*, Trial Judgement, para 68.

<sup>9</sup> K. Ambos, ‘Superior Responsibility’ in A. Cassese et al. (eds.) *The Rome Statute of the International Criminal Court : a commentary* (2002), p. 852.

<sup>10</sup> *Ibidem*, p. 871.

11. At the ICTY there is no need to conceptualize superior responsibility as a separate offence since negligence is not accepted as the proper fault degree for superior responsibility. That is why superior responsibility at the ICTY is not interpreted as a separate offence of negligent failure to act. This was already determined by the Appeals Chamber in *Mucic et al.*<sup>11</sup> This ruling, coupled with the fact that superiors are punished for the crimes committed by subordinates means that superior responsibility in ICTY law is not a separate offence but a mode of liability. In so far as the indictment alleges that Dr. Karadžić is liable for failing to act, such liability could only be construed on the basis of superior responsibility as mode of liability, thus requiring proof of a close link with subordinate acts.

#### The concept of 'subordinate' in Article 7(3) of the Statute

12. The Prosecution includes article 7(3) under 'committing' in Article 7(3), thus creating the concept of 'multiple superior responsibility'. This means that the accused can be held criminally responsible for war crimes, crimes against humanity or genocide for his *failure* to prevent or punish his subordinate who equally *failed* to prevent or punish crimes committed by his subordinate (i.e. the accused's subordinate's subordinate). Theoretically, this could go on indefinitely. Dr. Karadžić argues that this construction of 'multiple superior responsibility' goes beyond the limit of superior responsibility as applied and developed in the law of this Tribunal.

13. The effect of 'multiple superior responsibility' is that elements that govern superior responsibility – 'effective control' and 'knowledge' – would be applied to the subordinate/superior who fails to intervene (subordinate 1) rather than the subordinate who actually commits the crimes (subordinate 2, 3 or 4 down the chain of command). If the object of creating 'multiple superior responsibility' is to generate liability for those subordinates who are not, or at least not formally, directly subordinate to the superior, liability could be based on the existing concept of superior responsibility. Taking as point of departure the concept of 'effective control', which shapes superior-subordinate relationships beyond rank and formal authority, it should be established that the subordinate who actually commits the crime(s) (subordinate 2,3 or 4) qualifies as 'subordinate' under Article 7(3) and, therefore, triggers superior responsibility of the superior who knew or had reason to know of the crimes

<sup>11</sup> *Mucic et al*, Appeal Judgement, , para. 226

he perpetrated. It is submitted that this form of superior responsibility differs fundamentally from 'multiple superior responsibility' because it requires a link with the actual perpetrator and not with the subordinate who is also the superior who failed to intervene (subordinate 1). Interpreted as such indirect subordination *could* generate liability under Article 7(3) of the ICTY Statute. The key to this interpretation lies, however, in the interpretation of the concept of 'subordinate' and not in the concept of 'committing'.

#### Omission liability and superior responsibility

14. If the term "committed" in Article 7(3) is construed in the manner proposed in the Third Amended Indictment, it could lead to illogical situations. How can a superior (superior 1) possibly envisage and prevent a subordinate-superior's (superior 2) failure to prevent unlawful conduct when the latter did not know of these crimes (but had reason to know)? Criminal law principles would argue against such a construction of superior responsibility. Culpability by omission, especially 'commission by omission', is generally regarded with caution because, contrary to positive acts, an omission is more difficult to determine (and limit).<sup>12</sup> It is more difficult to circumscribe and define what *should have been done* than what actually was done or happened. If this is already the case with a simple, 'singular' omission all the more so with multiple forms of omission. Superior responsibility should not be based on some vague notion of what should have been done. This would generate criminal responsibility by speculation.

15. Superior responsibility at the ICTY is a mode of liability governed by criminal law principles such as personal culpability and the principle of legality. With reference to the 'Preliminary motion on lack of jurisdiction concerning omission liability', it is submitted that under Article 7(3) of the Statute a superior cannot be held liable and punished for crimes in which his subordinate participated by way of an omission.

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<sup>12</sup> Take for instance the French position with regard to 'commission by omission', which is rejected by French courts and commentators. Endorsing the legality principle, French courts maintain that, in principle, there is no liability for commission by omission. J. Pradel, *Droit Pénal Comparé*, Paris (1995), p. 236.

Principle of legality and ‘reconceptualizing’ superior responsibility

16. The term “committed” within Article 7(3) has been discussed by the Tribunal in several instances and it has never been construed to encompass also superior responsibility.<sup>13</sup> The Appeals Chamber in *Orić* refused to address the question of whether superior responsibility can be based on superior responsibility.<sup>14</sup>

17. The Prosecution, by including article 7(3) under ‘committing’ in Article 7(3), attempts to reconceptualise the concept of superior responsibility at the ICTY. Such reconceptualization would violate the principle of legality (*nullem crimen sine lege*) when endorsed by the Trial Chamber.<sup>15</sup> ‘Multiple superior responsibility’ does not comport with existing ICTY case law on superior responsibility, which is modelled ‘on and reflects customary international law existing at the time of the offences.

18. There is insufficient practice, let alone *opinio juris*, to evidence the existence of an international law rule, that individual criminal responsibility can be established through a multiplied concept of superior responsibility. It is not the responsibility of Dr. Karadžić to prove that ‘multiple superior responsibility’ 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 (in the form of state practice and *opinio juris*) of the existence of such liability in customary international law

19. At the ICTY and the ICTR, the facts dictate how criminal liability is conceptualized. Unlike the ICC, the *ad hoc* Tribunals cannot rely on a pre-existing conceptual framework laid down in a statute that can be applied to the facts of an individual case before it. This is not necessarily a bad thing. It is inherent in judicial lawmaking, which is what the *ad hoc* Tribunals do and *have* to do because of the rudimentary structure of their Statutes. On the other hand, it is a hazardous business when there is no rule of binding precedent or *stare*

<sup>13</sup> See also G. Boas, J.L.Bischoff, and N.L.Reid, *Forms of Responsibility in International Criminal Law* (2007), p. 248 where the authors express their firm belief that “committed” under Article 7(3) does not include ‘failure to prevent or punish’.

<sup>14</sup> *Orić*, Appeals Judgement, para.39; The same interpretation was repeated in *Boskoski and Tarculoski*, Trial Judgement, para. 404 and in *Delic*, Trial Judgement, para. 56.

<sup>15</sup> Based on standards derived from theories on casuistry and precedent the substantial changing of a liability concept such as superior responsibility would qualify as ‘bad casuistry’ see A.R. Jonsen and S. Toulmin, *The Abuse of Casuistry. A history of moral reasoning*, Berkeley/Los Angeles/London, University of California Press 1988).



*decisis* and at the same time, frequent reliance on fluid rules of customary international law. It is thus important to recall the principled approach of the Appeals Chamber in *Hadžihasanović and Kubura* with regard to another attempt by the Prosecution to ‘progressively develop the law’ with regard to superior responsibility (superior responsibility for ‘past crimes’):

“[t]his Tribunal can impose criminal responsibility only if the crime charged was clearly established under customary law at the time the events in issue occurred. In case of doubt, criminal responsibility cannot be found to exist, thereby preserving full respect for the principle of legality”.<sup>16</sup>

And:

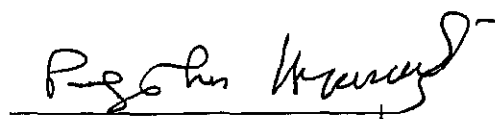
“It is trite to observe that in international criminal law, imposition of criminal liability must rest on a positive and solid foundation of a customary law principle.”<sup>17</sup>

### III. Relief requested

20. By this Motion, Dr. Karadžić requests the Trial Chamber to strike the second reference to Article 7(3) in paragraph 35 of the indictment because it does not relate to a form of liability under Article 7 over which the Tribunal has jurisdiction.

Word count: 2897

Respectfully submitted,



Radovan Karadžić<sup>18</sup>

<sup>16</sup> *Prosecutor v. Hadžihasanović and Kubura*, Decision on Joint Challenge to Jurisdiction, IT-01-47-AR72, 16 July 2003, para 51

<sup>17</sup> *Ibidem*, para 52.

<sup>18</sup> The contribution of Prof. Dr. Elies van Sliedregt, Professor of International Criminal Law at VU University Amsterdam and Barbora Holá researcher at VU University Amsterdam, to the research and drafting of this motion is gratefully acknowledged.