

**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-95-5/18-PT

Date: 7 April 2009

IN THE TRIAL CHAMBER

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

Acting Registrar: Mr. John Hocking

THE PROSECUTOR

v.

RADOVAN KARADŽIĆ

PUBLIC

**PROSECUTION RESPONSE TO "PRELIMINARY MOTION
ON LACK OF JURISDICTION CONCERNING OMISSION
LIABILITY"**

The Office of the Prosecutor:

Mr. Alan Tieger
Ms. Hildegard Uertz-Retzlaff

The Accused:

Mr. Radovan Karadžić

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

Case No. IT-95-5/18-PT

THE PROSECUTOR

v.

RADOVAN KARADŽIĆ

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**PROSECUTION RESPONSE TO “PRELIMINARY MOTION ON LACK OF
JURISDICTION CONCERNING OMISSION LIABILITY”**

I. OVERVIEW

1. Both the Appeals Chamber and customary international law recognise liability for omission beyond the context of superior responsibility. Karadžić shows no cogent reasons to depart from the Appeals Chamber’s case-law. His “Preliminary Motion on Lack of Jurisdiction concerning Omission Liability” of 25 March 2009 (“Motion”) should be dismissed.

II. THE APPEALS CHAMBER'S CASE-LAW RECOGNISES LIABILITY FOR OMISSION

2. Failure to act where there is a legal duty to act can lead to individual criminal liability under Article 7(1) of the Statute.¹ Several accused have been convicted on the basis of omissions before this Tribunal.²

3. An omission can entail liability under various modes of liability of Article 7(1). First, it is well established that an accused can be convicted for committing a crime by failing to act when under a duty to do so.³ Similarly, an accused's contribution to a joint criminal enterprise can be through acts or omissions.⁴

4. An accused's failure to act can entail liability for aiding and abetting.⁵ Contrary to Karadžić's assertions,⁶ this conclusion is not limited to cases of the approving spectator or of superior responsibility. In *Orić*, the Appeals Chamber explained the circumstances – which go beyond the cases of the approving spectator or of superior responsibility – in which an omission proper can lead to liability for aiding and abetting:

The Appeals Chamber recalls that omission proper may lead to individual criminal responsibility under Article 7(1) of the Statute where there is a legal duty to act. The Appeals Chamber has never set out the requirements for a conviction for omission in detail. However, at a minimum, the offender's conduct would have to meet the basic elements of aiding and abetting. Thus, his omission must be directed to assist, encourage or lend moral support to the perpetration of a crime and have a substantial effect upon the perpetration of the crime (*actus reus*). The aider and abettor must know that his omission assists in the commission of the crime of the principal perpetrator and must be aware of the essential elements of

¹ See *Tadić* AJ, para.188; *Blaškić* AJ, para.663 and fn.1385; *Nahimana* AJ, para.478; *Orić* AJ, para.43.

² See, e.g., *Blaškić* AJ, paras.663-671; *Čelebići* TJ, paras.1123, 1145 (maintained on appeal: *Čelebići* AJ, paras.386-387; *Čelebići* SAJ, para.34); *Krnjelac* TJ, paras.171, 173 (maintained on appeal: *Krnjelac* AJ, paras.43-44, 53); *Mrkšić* TJ, paras.622, 629, 632, 674 (currently on appeal).

³ *Tadić* AJ, para.188; *Blaškić* AJ, para.663 and fn.1385; *Ntagerura* AJ, paras.333-334, 338; *Orić* AJ, para.41.

⁴ *Kvočka* AJ, para.187. See also *Kvočka* TJ, para.309; *Milutinović* TJ, Vol.1, para.103.

⁵ *Orić* AJ, para.43; *Nahimana* AJ, para.482; *Ntagerura* AJ, paras.338, 370; *Krnjelac* AJ, paras.37, 43.

⁶ Motion, paras.10-12. See also paras.2.2, 20.

the crime which was ultimately committed by the principal (*mens rea*).⁷

5. As to the remaining modes of liability of Article 7(1), the Appeals Chamber has found in *Galić* that *ordering* cannot be constituted by an omission but requires a positive action by the person in a position of authority.⁸ However, the Appeals Chamber did not disturb the *Galić* Trial Chamber's finding that *planning* and *instigating* can be performed through culpable omission.⁹

6. Contrary to Karadžić's assertions,¹⁰ liability for omission is not limited to superior liability under Article 7(3). Superior liability is only one species of liability for omission. A superior's failure to act can lead to liability under Article 7(1) or 7(3):

The distinguishing factor between the modes of responsibility expressed in Articles 7(1) and 7(3) of the Statute may be seen, *inter alia*, in the degree of concrete influence of the superior over the crime in which his subordinates participate: if the superior's intentional omission to prevent a crime takes place at a time when the crime has already become more concrete or currently occurs, his responsibility would also fall under Article 7(1) of the Statute.¹¹

Consequently, a causal connection between the accused's omission and the crime can lead to conviction under Article 7(1).¹² By contrast, Article 7(3) liability does not require proof that the omission of the superior contributed to the commission of the crime by his subordinates, and the *mens rea* requirement is different ("knew or had reasons to know").

⁷ *Orić* AJ, para.43 (footnotes omitted).

⁸ *Galić* AJ, para.176.

⁹ *Galić* TJ, paras.168, 170. As to instigating, *see also* *Milutinović* TJ, Vol.1, para.83; *Mrkšić* TJ, para.549; *Limaj* TJ, para.514; *Brđanin* TJ, para.269; *Kordić* TJ, para.387; *Blaškić* TJ, para.280. Motion, paras.2.3, 12, 14-15.

¹¹ *Blaškić* AJ, para.664. Footnote 1386 at the end of this paragraph adds :

A superior who perpetrates a crime by omission pursuant to Article 7(1) of the Statute will, at the same time, fail to prevent this crime. The Appeals Chamber has already considered that, in relation to a particular count, it is not appropriate to convict under both Article 7(1) and Article 7(3) of the Statute (*see supra*, Chapter III (C)). Thus, in such cases, Article 7(1) of the Statute will in general prevail over Article 7(3) of the Statute.

¹² *Blaškić* TJ, para.339 (mentioned at Motion, para.14) refers precisely to this causal link required for instigation pursuant to Article 7(1).

III. THERE ARE NO COGENT REASONS TO DEPART FROM THE ESTABLISHED CASE-LAW

7. Appeals Chamber case-law recognising omission liability reflects World War II precedents and other sources of customary international law. Karadžić fails to show cogent reasons to depart from this case-law. His argument that “[i]t 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”¹³ does not show that the Appeals Chamber precedents were wrongly decided.

A. Liability for omission is part of customary international law

8. Liability for omission has been part of customary international law since well before 1990, as evidenced, *inter alia*, by the report of the commission on the responsibility of the authors of World War I, a number of World War II precedents and the provisions of various treaties with customary international law status.

1. Liability for omission was recognised in the report of the commission on the responsibility of the authors of World War I

9. The report of the “Commission on the responsibility of the authors of the [First World] War and on enforcement of penalties” of 29 March 1919 recommended the prosecution of, among others, all those who knowingly and while they had the power to intervene, abstained from preventing or taking measures to prevent, terminate or repress violations of the laws and customs of war.¹⁴ This language is broad enough to cover omission liability going beyond superior responsibility.

2. Liability for omission was recognised and applied in World War II precedents

10. Contrary to Karadžić’s assertions,¹⁵ a number of World War II precedents recognised liability for omission outside the case of superior responsibility:

¹³ Motion, para.2.4. *See also* paras.5, 21.

¹⁴ Report of the “Commission on the responsibility of the authors of the War and on enforcement of penalties” of 29 March 1919, reproduced in 14 *American Journal of International Law* (1920), pp.95 *et seq.*, at p.121.

¹⁵ Motion, paras.6, 8, 19-20.

- In the *Synagogue Fire Case*, the German Supreme Court in the British Occupied Zone found that an accused, who was entrusted with escorting a prisoner to a police station, had a legal obligation to prevent harm being inflicted on the individual in his custody. The court held that the accused's failure to prevent a crowd mistreating the prisoner could lead to conviction for a crime against humanity.¹⁶
- In the *Essen Lynching Case*, a British Military Court convicted a German soldier for not interfering with a crowd which murdered prisoners in his custody. The soldier's failure to fulfil his legal duty to protect the prisoners resulted in a conviction for a war crime.¹⁷
- In the *High Command* case, a U.S. Military Court established under Control Council Law No.10 found that a commander of occupied territory had the duty to protect prisoners of war and civilians in his area, even when the crimes were committed by individuals who were not his subordinates. The court emphasised that "inaction with knowledge that others within his area are violating this duty which he owes, constitute[s] criminality."¹⁸ Karl von Roques was held liable for his failure to prevent crimes committed not just by troops under his command but also by other "agencies within his area."¹⁹
- In the *Fire Brigade Case*, the German Supreme Court in the British Occupied Zone found that the head of the local auxiliary fire brigade had a general duty to take all the necessary measures to prevent the destruction of property by fire. Although the accused was acquitted, because he had no

¹⁶ *Synagogue Fire Case* (1949), *Entscheidungen des Obersten Gerichtshofs für die Britische Zone, in Strafsachen*, vol.2 (1949), pp.11-17, at pp.14-15.

¹⁷ *Trial of Erich Heyer and Six Others* ("*Essen Lynching Case*") (1945), *Law Reports of the Trials of War Criminals*, vol.1, pp.88-92.

¹⁸ *United States v. Wilhelm von Leeb et al.* ("*High Command Case*") (1947), *Trials of War Criminals before the Nuernberg Military Tribunals under Control Council Law No.10, Vol.XI*, pp.631-632 (citation at p.632).

¹⁹ *High Command Case*, p.632. In particular, the court found the defendant guilty for his failure to prevent the criminal actions of "the units under him and agencies in his area" in implementing the "Commissar Order" (p.632) and the "Barbarossa Jurisdiction Order" (p.647), and the murders and ill-treatments of prisoners of war, civilians and "partisans" in his area (pp.639-648).

ability to act in the specific circumstances, the case nevertheless confirms that omissions can form the basis of criminal responsibility.²⁰

- In the *Velpke Children's Home Case*, a British Military Court convicted a number of persons for their failure to fulfil their duty to care for infant children that had been forcibly separated from their mothers.²¹

3. Liability for omission is recognised by treaties with customary law status

11. The provisions of various treaties with customary law status show the acceptance of liability for omission in customary international law. While these provisions are first addressed to States, "they have resulted in the recognition of a general principle of criminal liability for omission."²²

12. The Geneva Conventions and the Additional Protocols not only provide that certain omissions constitute grave breaches,²³ but also specify positive duties to act in various circumstances,²⁴ the breach of which may constitute war crimes. In this connection, Article 86(1) of Additional Protocol I states that:

The High Contracting Parties and the Parties to the conflict shall repress grave breaches, and take measures necessary to suppress all other breaches, of the Conventions or of this Protocol which result from a failure to act when under a duty to do so.

²⁰ *Fire Brigade Case* (1949), *Entscheidungen des Obersten Gerichtshof für die Britische Zone in Strafsachen*, vol.1 (1949), pp.316-320, at pp.316-317.

²¹ *Trial of Heinrich Gerike and seven others* ("*Velpke Children's Home Case*") (1946), *Law Reports of the Trials of War Criminals*, vol.7, pp.76-81.

²² *Blaskić* AJ, fn.1385, referring to A. Cassese, *International Criminal Law*, Oxford, 2003, p.201.

²³ *E.g.*, Articles 13 ("Any unlawful act or omission by the Detaining Power causing death or seriously endangering the health of a prisoner of war in its custody is prohibited, and will be regarded as a serious breach of the present Convention") and 130 ("wilfully depriving a prisoner of war of the rights of fair and regular trial" constitutes a grave breach) GC III; Article 11(4) AP I ("Any wilful act or omission which seriously endangers the physical or mental health or integrity of any person who is in the power of a Party other than the one on which he depends and which either violates any of the prohibitions in paragraphs 1 and 2 or fails to comply with the requirements of paragraph 3 shall be a grave breach of this Protocol"). Article 5(2)(e) AP II also provides that the physical or mental health and integrity of persons whose liberty has been restricted shall not be endangered by any unjustified act or omission.

²⁴ For instance, Common Article 1 of the Geneva Conventions; Articles 10, 12, 15-17, 30 GC I; Articles 10, 12, 19-20; Articles 10, 13, 15, 29, 60, 69-77, 118, 121-122 GC III; Articles 11, 55-56 GC IV; Articles 36, 41(3), 44(3), 48 and 52, 35 and 55, 57-58, 69-70, 76-77, 80, 82-83 AP I.

B. It is irrelevant that the ICC Statute does not expressly recognise liability for omissions

13. Contrary to Karadžić's assertion,²⁵ it is irrelevant that the ICC Statute does not explicitly recognise liability for omission. First, as recognised by Karadžić, the Rome Statute was the result of compromises, and may not in all respects accurately reflect customary international law.

14. Second, the drafters of the ICC Statute left the issue of omission liability for the Court to determine. As explained by Per Saland, chairman of the working group that drafted the general principles at the Rome Conference:

Lengthy discussion in Rome showed that [...] it would be almost impossible to negotiate a solution [regarding the problem of criminal responsibility for omission] acceptable to all. I therefore made the suggestion of not having a general provision on omission at all. This was after all the situation in some legal systems [...] which does not prevent courts from construing criminal responsibility for omission under certain circumstances [...] As a result, the issue of omission will be left to the Court's case law.²⁶

15. Third, the case-law of the ICC now accepts liability for omission.²⁷

C. No violation of the *nullum crimen sine lege* principle

16. Not only was liability for omission well established in customary international law before 1990, it was recognised in Article 30 of the SFRY Criminal Code,²⁸ a provision incorporated in the laws and applied in BiH and Republika Srpska during the Indictment period.²⁹ Thus, contrary to Karadžić's assertion,³⁰ no violation of the *nullum crimen sine lege* principle can arise in finding liability for omission beyond

²⁵ Motion, para.18.

²⁶ Per Saland, "International Criminal Law Principles", Chap.7 in Roy S. Lee (ed.), *The International Criminal Court, The Making of the Rome Statute* (1999), pp.189-216, at pp.212-213.

²⁷ *Lubanga* Decision, paras.152, 351-352; *Katanga* Decision, paras.227, 287, 310, 315, 357, 368-369, 529.

²⁸ SFRY Criminal Code, Article 30:

(1) A criminal act may be committed by a positive act or by an omission.

(2) A criminal act is committed by omission if the offender abstained from performing an act which he was obligated to perform.

²⁹ Liability for omission is also recognised in Article 21 of the BiH Criminal Code of 2003.

³⁰ Motion, paras.2.3, 19-20.

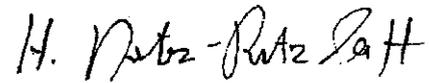
superior responsibility under the ICTY Statute.³¹ Even if international law sources do not specifically reflect omission liability for all of the separate modes of liability of Article 7(1) of the Statute,³² the Tribunal will define their contours:

The Statute, a brief document, uses concepts without embroidery. It prescribes modes of liability but has not furnished details that may be required to decide whether those modes of liability have been satisfied in a particular case. It is easy to see that details may be required in deciding whether an accused has been engaged in planning, instigating, ordering or committing a prescribed crime, or aiding and abetting in the planning, preparation or execution of it – modes of liability prescribed by Article 7(1) of the Statute. The Statute is to be taken as authorising the Tribunal to interpret these modes of liability and to say what concrete actions will constitute them.³³

IV. CONCLUSION

17. The Appeals Chamber has correctly concluded that an accused can incur liability for a failure to act when under a duty to do so. The Trial Chamber should dismiss Karadžić's Motion.

Word Count: 2657



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Dated this 7th day of April 2009
At The Hague, The Netherlands

³¹ See, e.g. *Ojdanić* JCE AD, para.40 (stating that it is relevant to consider domestic law from the former Yugoslavia to determine whether “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.”)

³² *Contrast* Motion, para.17.

³³ *Krajišnik* AJ, Separate Opinion of Judge Shahabudeen, para.13.

Prosecution's Glossary

ICTY authorities

Abbreviation used in Response	Full citation
<i>Blaškić</i> AJ	<i>Prosecutor v. Tihomir Blaškić</i> , Case No. IT-95-14-A, App.Ch., Judgement, 29 July 2004
<i>Blaškić</i> TJ	<i>Prosecutor v. Tihomir Blaškić</i> , Case No. IT-95-14-T, T.Ch., Judgement, 3 March 2000
<i>Brđanin</i> TJ	<i>Prosecutor v Radoslav Brđanin</i> , Case No. IT-99-36-T, T.Ch., Judgement, 1 September 2004
<i>Čelebići</i> AJ	<i>Prosecutor v. Zejnil Delalić, Zdravko Mucić, a.k.a. "Pavo", Hazim Delić & Esad Landžo, a.k.a. "Zenga"</i> , Case No. IT-96-21-A, App.Ch., Judgement, 20 February 2001
<i>Čelebići</i> SAJ	<i>Prosecutor v. Zejnil Delalić, Zdravko Mucić, a.k.a. "Pavo", Hazim Delić & Esad Landžo, a.k.a. "Zenga"</i> , Case No. IT-96-21-A, App.Ch., Judgement on Sentence Appeal, 8 April 2003
<i>Čelebići</i> TJ	<i>Prosecutor v. Zejnil Delalić, Zdravko Mucić, a.k.a. "Pavo", Hazim Delić & Esad Landžo, a.k.a. "Zenga"</i> , Case No. IT-96-21-T, T.Ch., Judgement, 16 November 1998
<i>Galić</i> AJ	<i>Prosecutor v. Stanislav Galić</i> , Case No. IT-98-29-A, App.Ch., Judgement, 30 November 2006
<i>Galić</i> TJ	<i>Prosecutor v. Stanislav Galić</i> , Case No. IT-98-29-T, T.Ch., Judgement, 5 December 2003
<i>Kordić</i> TJ	<i>Prosecutor v. Dario Kordić & Mario Čerkez</i> , Case No. IT-95-14/2-T, T.Ch., Judgement, 26 February 2001
<i>Krajišnik</i> AJ	<i>Prosecutor v. Momčilo Krajišnik</i> , Case No. IT-00-39-A, App.Ch., Judgement, 17 March 2009
<i>Krnojelac</i> AJ	<i>Prosecutor v. Milorad Krnojelac</i> , Case No. IT-97-25-A, App.Ch., Judgement, 17 September 2003
<i>Krnojelac</i> TJ	<i>Prosecutor v. Milorad Krnojelac</i> , Case No. IT-97-25-T, T.Ch., Judgement, 15 March 2002
<i>Kvočka</i> AJ	<i>Prosecutor v. Miroslav Kvočka, Milojica Kos, Mlado Radić, Zoran Žigić & Dragoljub Prcać</i> , Case No. IT-98-30/1-A, App.Ch., Judgement, 28 February 2005

<i>Kvočka</i> TJ	<i>Prosecutor v. Miroslav Kvočka, Milojica Kos, Mlado Radić, Zoran Žigić & Dragoljub Prcać, Case No. IT-98-30/1-T, T.Ch., Judgement, 2 November 2001</i>
<i>Limaj</i> TJ	<i>Prosecutor v. Fatmir Limaj, Haradin Bala & Isak Musliu, Case No. IT-03-66-T, T.Ch., Judgement, 30 November 2005</i>
<i>Milutinović</i> TJ	<i>Prosecutor v. Milan Milutinović, Nikola Šainović, Dragoljub Ojdanić, Nebojša Pavković, Vladimir Lazarević and Sreten Lukić, Case No.IT-05-87-T, Judgement, 26 February 2009</i>
<i>Mrkšić</i> TJ	<i>Prosecutor v.Mile Mrkšić, Miroslav Radić & Veselin Šljivančanin, Case No. IT-95-13/1-T, T.Ch., Judgement, 27 September 2007</i>
<i>Ojdanić</i> JCE AD	<i>Prosecutor v. Dragoljub Ojdanić et al., Case No. IT-99-37-AR72, App.Ch., Decision on Dragoljub Ojdanić's Motion challenging Jurisdiction-Joint Criminal Enterprise, 21 May 2003</i>
<i>Orić</i> AJ	<i>Prosecutor v. Naser Orić, Case No. IT-03-68-A, App.Ch., Judgement, 3 July 2008</i>
<i>Tadić</i> AJ	<i>Prosecutor v. Duško Tadić a/k/a "Dule", Case No. IT-94-1-A, App.Ch., Judgement, 15 July 1999</i>

ICTR authorities

Abbreviation used in Response	Full citation
<i>Nahimana</i> AJ	<i>Prosecutor v. Ferdinand Nahimana, Jean-Bosco Barayagwiza & Hassan Ngeze, Case No. ICTR-99-52-A, App.Ch., Judgement, 28 November 2007</i>
<i>Ntagerura</i> AJ	<i>Prosecutor v. André Ntagerura, Emmanuel Bagambiki & Samuel Imanishimwe, Case No. ICTR-99-46-A, Judgement and Sentence, 7 July 2006</i>

Decisions of the ICC

Abbreviation used in Response	Full citation
<i>Katanga</i> Decision	<i>The Prosecutor v. Germain Katanga and Mathieu Ngudjolo Chui</i> , Case No. ICC-01/04-01/07, Pre-Trial Chamber, Decision on the confirmation of charges, 30 September 2008
<i>Lubanga</i> Decision	<i>The Prosecutor v. Thomas Lubanga Dyilo</i> , Case No. ICC-01/04-01/06, Pre-Trial Chamber, Decision on the confirmation of charges, 29 January 2007

General Sources

Abbreviation used in Response	Full citation
AP I	Additional Protocol I to the Geneva Conventions of 12 August 1949, and Relating to the Protection of Victims of International Armed Conflicts (Protocol I) of 8 June 1977
AP II	Additional Protocol II to the Geneva Conventions of 12 August 1949, and Relating to the Protection of Victims of Non-International Armed Conflicts (Protocol I) of 8 June 1977
GC I	First Geneva Convention for the Amelioration of the Condition of the Wounded and Sick in Armed Forces in the Field, 12 August 1949
GC II	Second Geneva Convention for the Amelioration of the Conditions of Wounded, Sick and Shipwrecked Members of Armed Forces at Sea, 12 August 1949
GC III	Third Geneva Convention Relative to the Treatment of Prisoners of War, 12 August 1949
GC IV	Fourth Geneva Convention Relative to the Protection of Civilian Persons in Time of War, 12 August 1949

Other Abbreviations

Abbreviation used in Response	Full citation
Art.	Article
fn.	Footnote
fns.	Footnotes
ICC	International Criminal Court
para.	paragraph
paras	paragraphs
p.	page
pp.	pages
SFRY	<i>Former:</i> Socialist Federal Republic of Yugoslavia
Statute	Statute of the International Criminal Tribunal for the Former Yugoslavia established by the Security Council Resolution 827 (1993)