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: 14 April 2009

THE PROSECUTOR

v.

RADOVAN KARADŽIĆ

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

Public

MOTION FOR LEAVE TO REPLY AND REPLY BRIEF: PRELIMINARY MOTION ON LACK OF JURISDICTION CONCERNING OMISSION LIABILITY

The Office of the Prosecutor

Mr Alan Tieger
Ms. Hildegard Uertz-Retzlaff

The Accused

Radovan Karadžić

Introduction

1. Dr. Radovan Karadžić hereby seeks leave to file this reply to the 'Prosecution Response to "Preliminary Motion on Lack of Jurisdiction Concerning Omission Liability"', which was filed on 7 April 2009 ('Response'). He believes that a reply in this instance will assist the Chamber by knowing how Dr. Karadzic rebuts the assertions and authorities relied upon by the prosecution.

2. Simply put, the Prosecution has failed to meet its obligation to establish by evidence (not *obiter*, supposition or vague reference) the existence in customary international law of liability for omissions beyond the superior responsibility doctrine. The following paragraphs briefly address each category of argument in the Response.

Assertion that the Appeals Chamber recognises Omission Liability

3. The Prosecution seeks to persuade the Chamber that ICTY appellate jurisprudence supports the existence of omission liability beyond superior responsibility. It has simply reiterated vague references and unspecific *obiter* that appears in some of the judgements on this issue. The Prosecution has done nothing to answer the specific arguments made by Dr. Karadžić in his Motion about the meaning and content of these jurisprudential comments. Attaching a two-page list of cases in its glossary does not advance an understanding of the content and meaning attributable to comments in these cases.

4. Furthermore, the extracts it has identified and set out in the body of its Response (presumably these are seen as the Prosecution's strongest points of reference for its argument) serve only to reinforce arguments made by Dr. Karadžić in the Motion. Indeed, the *Orić* Appeal Judgement extract chosen by the Prosecution itself acknowledges that the 'Appeals Chamber has never set out the requirements for a conviction for omission in detail'.

5. Neither the *Orić* nor *Blaškić* comments, and certainly not the *Galić* ruling,[1] do anything more than reinforce the fact that, beyond vague comments in *obiter*, liability for omissions beyond superior responsibility has no articulated basis in international criminal law.

[1] These are the judgements extracted for specific discussion by the Prosecution: see, Response, paras. 4-6.

6. The Prosecution identifies nothing in the *ad hoc* Tribunal jurisprudence that establishes the existence of such a form of responsibility and it has not answered the specific arguments raised by Dr. Karadžić in the Motion. The Prosecution's assertion in paragraph 7 (and implied in heading III) of its Response that the appellate case law recognises a precedent that omission liability exists beyond superior responsibility remains an unfounded assertion.

Reference to the War Commission and post-WWII jurisprudence

7. The content of the post-WWI Commission on Responsibility report, directly contrary to the meaning attributed by the Prosecution, reveals that the Commission was referring precisely to superior responsibility and none of the language in that Report can be reasonably construed as 'broad enough to cover omission liability beyond superior responsibility'.[2]

8. Furthermore, the post-WWII cases referred to by the Prosecution do not articulate a cogent basis for determining the existence of omission liability as asserted, for the following reasons:

(a) Contrary to the Prosecution's assertions, the cases cited do not reflect clear cases of omission liability; instead, they variously reflect conduct more properly described as positive acts, something like a form of vicarious liability or they are insufficiently clear as to the conduct giving rise to conviction (or acquittal);

(b) The comments in these cases that might provide for such a possibility are vague or inferential and at no point articulate a clear list of elements supporting evidence of a rule of international law;

(c) Post-WWII cases are just that – they are not primary sources of international law; they are, as stated in Article 38(1) of the International Court of Justice (ICJ) Statute, subsidiary sources. Furthermore, no system of precedent exists in international law and, although the ad hoc Tribunals have claimed for themselves a doctrine of *stare decisis*,[3] decisions of chambers cannot create

[2] Response, para. 9.
[3] For ICTY, see, *Prosecutor v. Delalić, Mucić, Delić and Landžo*, Case No. IT-96-21-A, Judgement, 20 February 2001 ('*Čelebići* Appeal Judgement'), para. 8; *Prosecutor v. Aleksovski*, 'Judgment', IT-95-14-1-

rules of international law but can only serve to interpret existing rules.[4] Therefore, while a judgement of an international tribunal might contain an explanation of a rule that has attained the status of customary international law by articulating the *evidence* upon which this assertion is made, none of the cases cited by the Prosecution, to the extent that they genuinely address the question of omission liability, do this. These cases are, therefore, of no assistance in determining the *actual existence* of a rule of customary international law that an individual may be held criminally responsible for an omission beyond the doctrine of superior responsibility in international criminal law.

Treaties with customary law status

9. The Prosecution's argument that certain provisions of treaties that have customary international law status refer to omissions as a basis of liability do not stand as evidence of the existence in customary international law of omission liability beyond superior responsibility. As the Prosecution acknowledges, these provisions are contained in multilateral treaties giving rise to State obligations to behave in certain ways. They do not articulate rules relating to individual responsibility and, at any rate, their articulation of the concept of omission is vague and does not indicate with the required specificity what such a rule might entail.

10. Furthermore, the provisions cited by the Prosecution in support of its argument relate largely to the responsibility of a detaining to provide for the protection of prisoners of war – provisions which clearly relate to the chain of command and are, at any rate, too vague in content to articulate a rule giving rise to criminal responsibility beyond superior responsibility.

ICC Statute

11. The Prosecution seeks to play down the significance of a large number of States negotiating the Rome Statute of the ICC failing to agree on the existence of individual

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A, 24 March 2000 ('*Aleksovski* Appeal Judgement'), paras. 112-113. For ICTR, see, *Prosecutor v. Semanza*, Case No. ICTR-97-20-A, Judgement, 20 May 2005 ('*Semanza* Appeals Judgement'), para. 92.

[4] Art. 59 of the ICJ Statute states: 'The decision of the Court has no binding force except between the parties and in respect of that particular case'. See also, Mohammed Shahabuddeen, *Precedent in the World Court* (1996). The European Court of Human Rights system appears to operate in a similar manner: see, Karen Reid, *A Practitioner's Guide to the European Convention on Human Rights* (1998).

criminal responsibility for omissions beyond superior responsibility. In fact, it is difficult to overstate the importance of this point. The fact is that, as recently as 1998, numerous States found it 'almost impossible to negotiate a solution'[5] to this issue. Indeed, they did find it impossible.

12. The Prosecution confuses the rule-making process in international law and inverts the meaning of this issue. To create custom, a significant number of States must behave in a certain way in relation to a rule of international law (state practice) and must believe they are bound by such rule, clearly identifiable (*opinion juris*). The point Dr. Karadžić made in the Motion was that where a significant number of States could not agree on the existence of omission liability beyond superior responsibility as a rule of international law, this was a powerful statement that such a rule does not exist.

13. The ICC Statute is indeed an instrument of compromise and caution must be exercised in asserting that because a rule appears in the Statute it is necessarily reflective of customary international law. However, where these States could not reach agreement, even compromising as they were, this can be taken as strongly suggesting that no such rule exists.

Reference to the SFRY Code

14. The Prosecution argues that no violation of the *nullem crimen sine lege* principle could be said to occur with respect to omission liability beyond superior responsibility because such a principle was recognised in the SFRY Criminal Code. With respect, the existence or otherwise of a rule in a domestic criminal code, whether it be that of the State in which the accused at the time resided and was a national or of any other State, is entirely irrelevant to the status of that rule in international law.

15. Dr. Karadžić is not being tried under the SFRY Criminal Code or any other domestic criminal law; he is being tried by the ICTY under international law, in a system that is required to apply customary international law at the time of the alleged offences. The Prosecution either misunderstands entirely or mischaracterises the relevant legal regime that applies to the very serious crimes alleged.

[5] Prosecution citing a Working Group Chair, Per Saland, in its Response, para. 14.

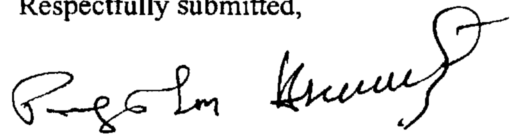
<u>'Contours' argument</u>

16. The Prosecution makes a final argument that, 'even if international law sources do not specifically reflect omission liability for all of the separate modes of liability of Article 7(1) the Statute, the Tribunal will define their contours'.[6] This statement could not be more revealing of the failure of the Prosecution to meet its obligations to prove the existence of a form of responsibility it seeks to rely upon to convict Dr. Karadžić. If the sources of international law do not *specifically* establish a rule, then no rule of international law can be said to exist.

17. No vague reference to 'contours'[7] or 'interpretation' can excuse the Prosecution from its responsibility to establish the existence of such a rule. If it cannot do so, the Motion must be upheld. Dr. Karadžić submits that the Prosecution has indeed failed to do so and therefore seeks the relief requested in his Motion.

Word count: 1,775

Respectfully submitted,



Radovan Karadžić[8]

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[6] Response, para. 16.

[7] This reference to 'contours' has been made in respect of interpreting aspects of the joint criminal enterprise doctrine (see *Prosecutor v. Milutinović et al.*, Case No. IT-05-87-PT, 'Decision on Ojdanić's Motion Challenging Jurisdiction: Indirect Co-Perpetration', 22 March 2006, paras. 23-24). It has some relevance to the identification of the nuance of a particular form of responsibility but not to such a major question as whether the Tribunal has jurisdiction over omission liability beyond the doctrine of superior responsibility.

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