

**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: 21 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: SUPERIOR
RESPONSIBILITY

The Office of the Prosecutor

Mr Alan Tieger
Ms. Hildegard Uertz-Retzlaff

The Accused

Dr Radovan Karadžić

Pursuant to Rule 126 *bis*, Dr. Radovan Karadžić hereby seeks leave to reply to the Prosecution's Response to Preliminary Motion on Lack of Jurisdiction: Superior Responsibility filed on 9 April 2009 ("Prosecution Response"). He believes that a reply is necessary to refute the arguments raised by the prosecution and will assist the Chamber in its deliberations.

I. Introduction

1. In the Response, the Prosecution raises two issues. First, it asserts that in his Preliminary Motion on Lack of Jurisdiction: Superior Responsibility ("Preliminary Motion")¹ Dr. Karadžić has not raised a proper jurisdictional challenge within the meaning of Rule 72(A)(i).² In this respect, Dr. Karadžić submits that in the Third Amended Indictment ("Indictment") the Prosecution is trying to introduce an entirely *new and unprecedented form* of individual criminal responsibility in international criminal law, i.e. "multiple superior responsibility". Such a concept does not exist under customary international law and thus falls outside the Tribunal's jurisdiction *ratione personae* pursuant to Article 7 of the Statute.

2. Second, the Prosecution contends that the concept of multiple superior responsibility is consistent with Tribunal case-law and the principle of superior responsibility.³ However, the Prosecution has neither referred to ICTY case law underpinning its claim nor established the existence of multiple superior responsibility in customary international law. Dr. Karadžić reiterates that reference in the Indictment to multiple superior responsibility is *ultra vires* the jurisdiction of the ICTY and goes beyond the concept of superior responsibility in Article 7(3) of the Statute.

3. In the following paragraphs each category of arguments in the Prosecution Response is addressed.

¹ Preliminary Motion on Lack of Jurisdiction: Superior Responsibility, 30 March 2009.

² Prosecution Response, paras. 2-5.

³ Prosecution Response, para. 4.

II Jurisdictional Challenge

4. The Prosecution argues that Dr. Karadžić has not challenged jurisdiction within the meaning of Rule 72(A)(i) since he only challenges elements and the application of a mode of responsibility. This, the Prosecution argues, is a matter for trial.⁴ It is submitted that the Prosecution's claim is not supported by the Tribunal's jurisprudence. To the contrary, arguments challenging the "mere" elements of a mode of responsibility were considered to be a valid jurisdictional challenge under Rule 72 in *Hadžihasanović and Kubura* where one of the accused raised a jurisdictional challenge dealing with the superior-subordinate relationship, one of the elements of superior responsibility under Article 7(3). The argument was held to constitute a valid jurisdictional challenge under Rule 72⁵ and the matter was subsequently dealt with by the Appeals Chamber.⁶

5. The Prosecution further contends that Dr. Karadžić only addresses "contours of a form of responsibility" and does not raise any jurisdictional challenge. In support of this claim the Prosecution cites the Trial Chamber Decision in *Perisic*.⁷ The Prosecution correctly states that in *Perisic* a preliminary motion brought by the Accused concerning the interpretation of "committing" under Article 7(3) was rejected by the Trial Chamber. However, the primary reasons for the rejection of the Accused's motion were the lack of reasoning on his part and because the motion raised factual issues to be determined at trial.⁸

6. However, in Dr. Karadzic's case, the concept of multiple superior responsibility proposed in paragraph 35 of the Indictment amounts to a complete new and unprecedented form of responsibility,⁹ which falls outside the jurisdiction of this Tribunal.

7. Multiple superior responsibility opens the door to an unlimited chain of 'omission liability events'. Such a form of superior responsibility is fundamentally different from

⁴ Prosecution Response, para. 2.

⁵ *Hadžihasanović and Kubura*, Decision pursuant to Rule 72(E) as to Validity of Appeal, 21 February 2003, para. 14.

⁶ *Hadžihasanović and Kubura*, Decision on Interlocutory Appeal Challenging Jurisdiction in Relation to Command Responsibility, 16 July 2003.

⁷ Prosecution Response, paras. 3-4.

⁸ *Perisic*, Decision on Preliminary Motions, 29 August 2005, para. 31.

⁹ Preliminary Motion, paras. 12-13.

superior responsibility as it has been developed in the Tribunal's case law. It has no basis in customary international law (see below) and as a result raises a proper jurisdictional challenge pursuant to Rule 72(A)(i).

III Multiple Superior Responsibility is not part of Article 7(3) of the Statute

8. The Trial Chamber should reject the merits of the Prosecution's response which claims that multiple superior responsibility as proposed in paragraph 35 of the Indictment is consistent with Tribunal case-law and the customary law doctrine of superior responsibility.

A. Tribunal case-law does not confirm that Article 7(3) covers subordinate criminality based on superior responsibility as omission liability.

9. The Prosecution argues that it is by now accepted in the Tribunal's case law that "committed" in Article 7(3) is not limited to physical commission of crimes of subordinates. It repeats the Trial Chamber's ruling in *Boškoski* that "commit" in Article 7(3) refers to "any of the criminal conduct by a subordinate perpetrated through any of the modes of liability that are provided for under the Statute".¹⁰ Furthermore, the Prosecution endorses the purposive approach the *Boškoski* Trial Chamber adopts in interpreting "commit" broadly.¹¹

10. We respectfully submit that the Prosecution's reasoning on this point is misleading. The question before the Trial Chamber in *Boškoski* was whether "[s]uperior responsibility can be attributed under 7(3) of the Statute for crimes committed by a subordinate, by act or omission, through any of the modes of liability provided for *under Article 7(1) of the Statute*".¹² Thus, the *Boškoski* ruling refers solely to "committing" as encapsulating modes of liability under Article 7(1) of the Statute (including omission liability). Indeed, Boškoski was charged under 7(3) for crimes of regular and reserve police; for the commission of crimes and for omission by way of *aiding and abetting* crimes.¹³

11. In the Motion, superior responsibility is referred to and regarded as a mode of liability to contrast it with superior responsibility as a separate offence and to emphasize the link with

¹⁰ Prosecution Response, para. 10, referring to paras 22 and 46 of *Boškoski* Indictment TD.

¹¹ Prosecution Response, paras. 11-14, referring to paras 24 and 26 of the *Boškoski* Indictment TD.

¹² *Boškoski* Indictment TD, para. 19 (emphasis added). See also para 18.

¹³ See *Boškoski*, Judgement, para 3 (emphasis added).

subordinate criminality; hence the strict interpretation of effective control and knowledge. Treating it as such does *not* mean that superior responsibility is on a par with modes of liability under Article 7(1) of the Statute. In that sense, superior responsibility is treated as a *sui generis* mode of liability, as has been done in scholarly literature.¹⁴

B. Principles of statutory interpretation do not confirm that Article 7(3) covers subordinate criminality based on superior responsibility as omission liability

12. The Prosecution's endorsement in paragraphs 11-14 of the Response of the *Boškoski* Trial Chamber interpretation of "committing" under Article 7(3) does not justify including 7(3) liability under "committing". None of the sources the *Boškoski* Trial Chamber relies upon, nor the Decision itself, contain even a hint of regarding "committing" as encompassing 7(3) liability. In fact, the *Boškoski* Trial Decision, by distinguishing between omission liability under 7(1) and omission liability *per se*, i.e. 7(3) liability¹⁵, suggests that it did not consider the possibility of multiple superior responsibility as a (third) type of omission liability under the ICTY Statute. Admittedly, there is no explicit rejection or acknowledgement of multiple superior responsibility in the Decision, yet it is submitted that read in context and bearing in mind the facts of the case, it is clear that the *Boskoški* Trial Chamber did not consider "committing" in 7(3) to constitute/extend to multiple superior responsibility.

C. The customary law doctrine of superior responsibility does not "reasonably encompass"¹⁶ responsibility for subordinate criminality based on superior responsibility as omission liability

13. In support of its claim that the doctrine of superior responsibility "reasonably encompasses" multiple superior responsibility, the Prosecution refers to Additional Protocol I and State military manuals and scholarly literature.

¹⁴ V. Nehrlich, Superior Responsibility under Article 28 ICC Statute. For what exactly is the Superior Held Responsible?", 5 *Journal of International Criminal Justice* (2007), p. 665-682; E. van Sliedregt, *The Criminal Responsibility of Individuals for Violations of International Criminal Law*, The Hague/Cambridge, 2003, p. 217-220.

¹⁵ *Boškoski*, Indictment TD, para 29.

¹⁶ Prosecution Response, para 15.

1. Protocol I

14. As to Additional Protocol I (AP I), it is clear that those who drafted Articles 86 and 87, had in mind the standard situation of subordinate criminality: liability for failing to prevent or punish those *perpetrating* crimes. This can be deduced from the Commentary to Article 86 of the First Additional Protocol to the 1949 Geneva Conventions, with regard to the qualification of ‘superior’:

This is not a purely theoretical concept covering any superior in a line of command, but we are concerned only with the superior who has a personal responsibility with regard to the *perpetrator* of the *acts* concerned because the latter, being his subordinate, is under his control.¹⁷

It is not clear how Article 86 AP I can support the interpretation of 7(3) to include multiple superior responsibility when it is premised on the standard situation of superior responsibility where the superior is liable for subordinates who perpetrate crimes, not for subordinates who fail to prevent or punish crimes. Read against the background of the Commentary to these provisions and bearing in mind how these provisions have been interpreted in ICTY case law (in particular *Mucic et al.*)¹⁸, Article 86(2) API may not be regarded as “logically encompass[sing] liability for subordinates who have themselves violated the superior responsibility doctrine”.¹⁹

2. Other sources

15. The same goes for State military manuals and scholarly literature²⁰. The Prosecution refers to broad terms in military manuals, such as “illegal *acts*”, “unlawful behavior” and “criminal conduct” to argue that these sources confirm that superiors are required to address all forms of unlawful subordinate conduct. Indeed, on paper these terms - apart from “acts”²¹ - may be viewed as sufficiently broad to encompass (subordinate) criminality by omission. Yet no evidence has been put forward that it actually does, neither with regard to 7(1) omission

¹⁷ Commentary to Additional Protocol I, para. 3544, available at www.icrc.org/ihl.nsf/COM/470-750112?OpenDocument (emphasis added).

¹⁸ *Mucic et al.*, Appeals Judgement, paras. 215 – 241.

¹⁹ Prosecution Response, para. 17.

²⁰ The Boas et al. book cited in footnote 13 of the Preliminary Motion argues in favour of superior responsibility for subordinate omission criminality. However, this does not render the book invalid as a source to rely upon for the particular argument at stake, namely that “committed” “[w]ithin Article 7(3)...has never been construed to encompass also superior responsibility”. See Preliminary Motion, para. 16.

²¹ Unless a ‘commission by omission’ reasoning is acceptable under that jurisdiction. See also Preliminary Motion, footnote 12.

liability nor with omission liability *per se*, i.e. 7(3) liability. No practice/case-law is cited that interprets these terms. The Prosecution argument on this point rather reinforces the non-existence of a clear statement as to the possibility of a superior being held responsible for the failure of his subordinate as a superior to prevent or punish crimes committed by the subordinate's subordinates. This is no surprise, it is the inevitable remoteness of this cascading line of responsibility that renders such a proposition inherently dangerous and prejudicial.

16. Since there is no clear statement in neither conventional nor customary international law supporting multiple superior responsibility, it may be for the good reason that it is not an appropriate construction of individual criminal responsibility. At any rate it is *not* articulated, the burden is on the Prosecution to show its existence by concrete reference to *evidence* and it cannot do so.

D. Dr. Karadžić' argument does have merit

17. The Prosecution argues that the argument set out in the Preliminary Motion lacks merit because it ignores ICTY case-law that confirms that a superior's criminal responsibility encompasses both acts and omissions.²² However, the Motion is not based (solely) on ICTY case-law but on criminal law principles such as *nullum crimen sine lege* and the principle of personal culpability.²³ With all due respect, ICTY case-law does not necessarily coincide with such principles.

18. As to the argument that the Preliminary Motion fails to recognize that superiors are generally responsible for subordinate criminality based on omission, omission liability under 7(3) of the Statute cannot be put on a par with omission liability under 7(1) of the Statute. In fact, the distinction between 7(1) omission liability and 7(3) liability has long been part of ICTY case-law. In *Blaskic* the Appeals Chamber held that "that the provisions of Article 7(1) and Article 7(3) of the Statute connote distinct categories of criminal responsibility".²⁴ While both forms of criminal responsibility may connote omission liability they remain very different modes of liability.

²² Prosecution Response, para. 21.

²³ Preliminary Motion, paras. 3 and 14-15.

²⁴ *Blaskic*, Appeals Judgement, 29 July 2004, para.91. See also *Kordic & Cerkez*, Appeals Judgement, 16 December 2004, para. 1030.

19. The Prosecution argument in paragraph 24 should be rejected since it would reintroduce, through the backdoor, superior responsibility for crimes committed *before* the superior assumed command. The prosecution argues:

In some circumstances, however, liability under Article 7(3) will only arise in respect of the subordinate who violated his own duties as a commander and not in respect of the subordinate who has physically committed the crime. For example, under current case-law, a superior may not be liable for a subordinate-perpetrator's crime because the crime predated the superior's assumption of command. However, the superior would still be liable for a second subordinate's failure to punish this crime, when such failure occurred or continued after the superior took over. In this scenario, the criminality of the second subordinate would have occurred after the accused assumed command.

As is well-known, this type of 'pre-command liability' was proposed by the Prosecution in *Hadžihasanović and Kubura* and rejected by the Appeals Chamber²⁵ :

Having examined the above authorities, the Appeals Chamber holds that an accused cannot be charged under Article 7(3) of the Statute for crimes committed by a subordinate before the said accused assumed command over that subordinate. The Appeals Chamber is aware that views on this issue may differ. However, the Appeals Chamber holds the view that this Tribunal can impose criminal responsibility only if the crime charged was clearly established under customary law at the time of 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.²⁶

20. The most fundamental and pressing point of the Preliminary Motion, which the Prosecution – unsurprisingly - does not address is the attempt to reconceptualise superior responsibility and to 'progressively develop the law'.²⁷ The Appeals Chamber has ruled with regard to the Prosecution's attempt in *Hadžihasanović and Kubura* to introduce pre-command liability that:

[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

²⁵ *Hadžihasanović and Kubura*, Decision on Interlocutory Appeal Challenging Jurisdiction in Relation to Command Responsibility, 16 July 2003.

²⁶ *Ibidem*, para 51.

²⁷ See Preliminary Motion, paras. 16-20.

responsibility cannot be found to exist, thereby preserving full respect for the principle of legality.²⁸

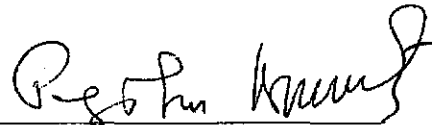
21. In reference to the arguments raised in the Motion, in particular paragraphs 17-19, the Prosecution has not demonstrated that the concept of multiple superior responsibility existed under customary international law at the time of the alleged offences, or indeed at all. It has failed to point to the case of a single accused, either at the ICTY or in any other jurisdiction, who has been convicted of failing to prevent or punish a subordinate's failure to prevent or punish. Accepting this form of liability would violate criminal law principles, most prominently the principle of legality.

IV. Relief requested

22. The second reference to Article 7(3) in paragraph 35 of the indictment should be stricken because it does not relate to a form of liability under Article 7 over which the Tribunal has jurisdiction.

Word count: 2761

Respectfully submitted,



Radovan Karadžić²⁹

²⁸ *Hadžihasanović and Kubura*, Decision on Interlocutory Appeal Challenging Jurisdiction in Relation to Command Responsibility, para 51.

²⁹ 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 reply is gratefully acknowledged.