

IT-95-14/2-PT
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UNITED
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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-95-14/2-PT
Date: 2 March 1999
Original: English

IN THE TRIAL CHAMBER

Before: Judge Richard May, Presiding
Judge Mohamed Bennouna
Judge Patrick Robinson

Registrar: Mrs. Dorothee de Sampayo Garrido-Nijgh

Decision of: 2 March 1999

PROSECUTOR

v.

**DARIO KORDIĆ
MARIO ČERKEZ**

**DECISION ON THE JOINT DEFENCE MOTION TO STRIKE PARAGRAPHS 20 AND 22
AND ALL REFERENCES TO ARTICLE 7(3) AS PROVIDING A SEPARATE OR AN
ALTERNATIVE BASIS FOR IMPUTING CRIMINAL RESPONSIBILITY**

The Office of the Prosecutor
Mr. Geoffrey Nice
Mr. Rodney Dixon

Counsel for the accused
Mr. Mitko Naumovski, Mr. Leo Andreis, Mr. David F. Geneson, Mr. Turner T. Smith, Jr.,
and Ms. Ksenija Turković, for Dario Kordić

Mr. Božidar Kovačić, for Mario Čerkez

I. INTRODUCTION

Pending before this Trial Chamber of the International Tribunal for the Prosecution of Persons Responsible for Serious Violations of International Law Committed in the Territory of the Former Yugoslavia since 1991 ("International Tribunal") is the motion, "Joint Defense Motion to Strike Paragraphs 20 and 22 and All References to Article 7(3) as Providing a Separate or an Alternative Basis for Imputing Criminal Responsibility" ("the Motion") filed by counsel for the two accused, Dario Kordić and Mario Čerkez (together "the Defence") on 22 January 1999, together with the "Prosecutor's Response to Joint Defence Motion to Strike Paragraphs 20 and 22 and All References to Article 7(3) as Providing a Separate or an Alternative Basis for Imputing Criminal Responsibility" filed by the Office of the Prosecutor ("Prosecution") on 5 February 1999.

THE TRIAL CHAMBER, HAVING CONSIDERED the written submissions and oral arguments of the parties heard on 16 February 1999,

HEREBY ISSUES ITS WRITTEN DECISION.

II. DISCUSSION

A. Arguments of the Parties

1. This Motion rests on the Defence submission that Article 7, paragraph 3, of the Statute of the International Tribunal (“Statute”) does not itself provide an independent basis for imposing “imputed” or “command” criminal liability. Instead, the Defence contends that any individual criminal liability of the accused must be predicated on Article 7, paragraph 1. The Defence argues that the language and overall structure of Article 7, in particular paragraphs 2, 3 and 4, which utilise language to the effect that an accused person is not relieved of criminal responsibility in certain circumstances, support this interpretation. The Defence submits that further support for this interpretation comes from a reading of Article 28(2) of the Rome Statute of the International Criminal Court (“ICC Statute”) which provides for command responsibility in the following provision: “a superior shall be responsible for crimes within the jurisdiction of the Court committed by subordinates under his or her effective control...”.

2. The Defence further contends that, even if Article 7, paragraph 3, could be construed as providing for “imputed” or “command” responsibility, the Prosecution should not be allowed to plead liability under Article 7, paragraph 1, and Article 7, paragraph 3, in the alternative with respect to a single offence. The Defence argues that to allow the Prosecutor to proceed in such a manner would deprive the accused of their fundamental right to be informed with specificity of the “nature and cause” of the charges against them.

3. The Prosecutor rebuts the Defence submission, arguing that the doctrine of superior responsibility, as enshrined in Article 7, paragraph 3, of the Statute, is a distinct form of criminal liability that is well-established under international humanitarian law. The Prosecution further argues that the jurisprudence of the International Tribunal demonstrates that Article 7, paragraph 1, and paragraph 3, may be pleaded either in the alternative or cumulatively.

B. Analysis

4. The Trial Chamber finds that the doctrine of command responsibility as a distinct form of criminal liability is well-established under international humanitarian law. Indeed, the recent Judgement rendered by Trial Chamber II of the International Tribunal in *Prosecutor v. Delalić et al.*, (“*Čelebići Judgement*”) re-affirmed the legal principle of command responsibility as a separate and individual form of criminal liability, concluding that “the principle of individual criminal

responsibility of superiors for failure to prevent or repress the crimes committed by subordinates forms part of customary international law.”¹

5. The Trial Chamber acknowledges that, when contrasted with Article 28(2) of the ICC Statute, the language and overall structure of Article 7 may appear to provide a less robust basis for imposing command responsibility as an independent ground for criminal responsibility arising under Article 7, paragraph 3. However, the construction that Article 7, paragraph 3, provides for a form of criminal liability that is separate and distinct from Article 7, paragraph 1, is supported by the following paragraph of the Report of the Secretary-General pursuant to paragraph 2 of the Security Council resolution 808:

A person in a position of superior authority should, therefore, be held individually responsible for giving the unlawful order to commit a crime under the present statute. But he should also be held responsible for failure to prevent a crime or to deter the unlawful behaviour of his subordinates.²

This comment, from an important part of the legislative history of the Statute of the International Tribunal, shows, in the second sentence, that the intention of the drafters was to establish command responsibility as a separate form of criminal liability.

6. As to the contention by the Defence that even if Article 7, paragraph 3, provides for command responsibility, it cannot be pleaded in the alternative to a charge under Article 7, paragraph 1, the Trial Chamber notes that the jurisprudence of both the International Tribunal and the International Criminal Tribunal for Rwanda permits an accused to be charged either alternatively or cumulatively under Article 7, paragraph 1, and paragraph 3. For example, in the *Čelebići Judgement*, the Trial Chamber held that “an accused may be charged for the commission of an offence in his individual and personal capacity as one of the actual perpetrators of the offence in accordance with Article 7(1) of the Statute, and/or in his capacity as a superior authority with respect to the commission of the offence in accordance with Article 7(3).”³ In the Amended Indictment, the accused is charged in the alternative in respect of Article 7, paragraph 1, and Article 7, paragraph 3, and it will be left to the Trial Chamber to determine on the basis of the evidence presented at trial whether the charges are substantiated.

¹ Judgement, *Prosecutor v. Delalić et al.*, Case No. IT-95-21-T, T. Ch. II, 16 Nov. 1998, (“*Čelebići Judgement*”), para. 343.

² Report of the Secretary-General submitted pursuant to paragraph 2 of Security Council Resolution 808 (1993), and Annex thereto, U.N. Doc. S/25704, para. 56.

³ *Čelebići Judgement*, *supra* n. 3, para. 1221.

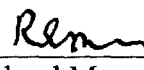
III. DISPOSITION

For the foregoing reasons

PURSUANT TO Rule 72 of the Rules of Procedure and Evidence of the International Tribunal,

THE TRIAL CHAMBER DISMISSES the Joint Defense Motion to Strike Paragraphs 20 and 22 and All References to Article 7(3) as Providing a Separate or an Alternative Basis for Imputing Criminal Responsibility.

Done in both English and French, the English text being authoritative.



Richard May
Presiding

Dated this second day of March 1999
At The Hague
The Netherlands

[Seal of the Tribunal]