



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 DISMISS FOR LACK OF  
JURISDICTION PORTIONS OF THE AMENDED INDICTMENT ALLEGING  
“FAILURE TO PUNISH” LIABILITY**

**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 Humanitarian Law Committed in the Territory of the Former Yugoslavia since 1991 (“the International Tribunal”), is the “Joint Defence Motion to dismiss for lack of jurisdiction portions of amended indictment alleging ‘failure to punish’ liability” filed by counsel for the two accused, Dario Kordić and Mario Čerkez (together “the Defence”) on 22 January 1999 (“the Motion”), pursuant to Rule 72 of the Rules of Procedure and Evidence of the International Tribunal (“the Rules”), together with the “Prosecutor’s Response to Defence motion to strike portions of the amended indictment alleging ‘failure to punish’ liability”, filed by the Office of the Prosecutor (“Prosecution”) on 5 February 1999.

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

**HEREBY ISSUES ITS WRITTEN DECISION.**

## II. SUBMISSIONS

### A. Arguments of the Defence

1. The Defence seeks to have the words “or to punish the perpetrators thereof” removed from the Amended Indictment filed on 30 September 1998. According to the Defence, the Trial Chamber should decline to hold a commander responsible solely on the ground of failure to punish subordinates guilty of committing crimes against humanity, grave breaches of the Geneva Conventions of 12 August 1949 and violations of the laws and customs of war, particularly in the absence of evidence that the failure to punish resulted in the failure to prevent subsequent violations. Alternatively, the Defence asks the Trial Chamber to set out the role that claims of failure to punish will play during the trial, arguing that, as a matter of fairness, the accused should be advised of the “core legal principles” upon which the Trial Chamber will rely in its consideration of this matter.

2. The Defence argues that in both the civil-law and common-law traditions a person cannot be held criminally liable in the absence of personal guilt, thus a military commander should not be held criminally responsible for atrocities committed by his troops solely on the ground that he failed to punish them. The Defence argues that “failure to punish” can be compared with the now largely defunct offence in the common-law of an “accessory after the fact”, who neither caused the primary crime nor formed the requisite *mens rea* to commit it.

3. The Defence also asserts that criminal responsibility for “failure to punish” has no basis in customary international law, nor is it supported in international conventions. The Defence notes that Protocol Additional to the Geneva Conventions of 12 August 1949, and Relating to the Protection of Victims of International Armed Conflicts (“Additional Protocol I”) was not listed in paragraph 35 of the Report of the Secretary-General<sup>1</sup> as within the competence *ratione materiae* of the International Tribunal. The Defence also asserts that in any event, Article 86 of Additional Protocol I does not provide an independent basis for liability for failure to punish distinct from liability for failure to prevent.

4. Turning to the practice of the International Tribunal, the Defence states that neither Trial

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<sup>1</sup> Report of the Secretary-General pursuant to paragraph 2 of Security Council resolution 808 (1993) and Annex thereto, U.N. Doc. S/25704 (“*Report of the Secretary-General*”) at paragraph 35.

Chamber I in its Decision in *Prosecutor v. Tihomir Blaškić*<sup>2</sup> (“*Blaškić Decision*”), nor Trial Chamber II in its Judgement in *Prosecutor v. Delalić et al.*<sup>3</sup> (“*Čelebići Judgement*”), considered “failure to punish” to be a distinct offence from failure to prevent.

5. Finally, the Defence asserts that a civilian superior should not be held responsible for failing to punish unless it is demonstrated that he exercised disciplinary power equivalent to that of “an effective” military commander. Consequently, if he lacks these powers, he would lack both the legal competence and the ability to impose punishment.

#### B. Arguments of the Prosecution

6. The Prosecution, on the other hand, argues that failure to punish is an offence distinct from failure to prevent. To support this view, the Prosecution relies primarily on the *Blaškić Decision*, the findings of which it interprets in the opposite way to the Defence. The Prosecutor asserts that the Trial Chamber in the *Čelebići Judgement* imposed criminal responsibility responsible both for failure to prevent and for failure to punish. The Prosecution notes that this view is supported in international case law as well as international conventions such as in Articles 86 and 87 of Additional Protocol I. The Prosecutor also notes that Article 21 of the Regulations Concerning the Application of the International Law of War of the armed forces of the Socialist Federal Republic of Yugoslavia incorporated failure to punish as a distinct form of responsibility.

7. As to the Defence request for guidance as to the interpretation of Article 7, paragraph 3, of the Statute, the Prosecution submits that this is a matter to be determined at trial on the merits of the case.

8. The Prosecution also argues that Article 7, paragraph 3, applies to all superiors, including civilians, and that in any event the accused Dario Kordić is also charged as a military superior. According to the Prosecution, civilian superiors do not need to have military-style powers to be held responsible for the acts of their subordinates. Both military and civilians superiors are required to take such steps as are within their power to punish the perpetrators, which may include conducting investigations or initiating disciplinary proceedings.

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<sup>2</sup> Decision on the Defence Motion to Strike Portions of the Amended Indictment Alleging “Failure to Punish” Liability, *Prosecutor v. Blaškić*, IT-95-14-PT, T.Ch. I, 4 Apr. 1997 (“*Blaškić Decision*”).

<sup>3</sup> Judgement, *Prosecutor v. Delalić et al.*, IT-96-21-T, T.Ch. II, 16 Nov. 1998 (“*Čelebići Judgement*”).

### III. DISCUSSION

#### A. Applicable law

9. Article 7, paragraph 3, of the Statute provides as follows:

The fact that any of the acts referred to in articles 2 to 5 of the present Statute was committed by a subordinate does not relieve his superior of criminal responsibility if he knew or had reason to know that the subordinate was about to commit such acts or had done so and the superior failed to take the necessary and reasonable measures to prevent such acts or to punish the perpetrators thereof.

#### B. Analysis

10. The relevant paragraphs of the Amended Indictment (paragraphs 20, 22) from which the Defence seeks to have struck the words “or to punish the perpetrators thereof” are identical and read as follows:

A superior is criminally responsible for the acts of his subordinates if the superior knew or had reason to know that his subordinate was about to commit such acts or had done so and the superior failed to take necessary and reasonable measures to prevent further such acts or to punish his subordinate. As to each charge in the indictment, [Dario Kordić or Mario Čerkez], in addition to being individually responsible, knew or had reason to know, and it was foreseeable, that persons subordinate to him were about to commit various crimes, persecutions and illegal acts, or had done so, and failed to take necessary and reasonable measures to prevent such crimes, persecutions and acts or punish the perpetrators thereof.

11. This language replicates the wording of Article 7, paragraph 3, of the Statute, which is discussed in the Report of the Secretary-General at paragraph 56:

This imputed responsibility or criminal negligence is engaged if the person in superior authority knew or had reason to know that his subordinates were about to commit or had committed crimes and yet failed to take the necessary and reasonable steps to prevent or repress the commission of such crimes or to punish the perpetrators thereof.<sup>4</sup>

12. Dealing first with the argument that responsibility for failure to punish has no basis in customary international law, the Trial Chamber notes that, in the *Čelebići Judgement*<sup>5</sup>, that Trial Chamber found that the principle of individual criminal responsibility of superiors for failure to

<sup>4</sup> *Report of the Secretary-General, supra n. 1.*

<sup>5</sup> *Čelebići Judgement, supra n. 3, para. 343.*

prevent or repress the crimes committed by subordinates can be considered a part of customary international law<sup>6</sup>. The same conclusion has also been reached by another Trial Chamber in the *Blaškić Decision*<sup>7</sup>.

13. Turning next to the argument that there is no independent basis for liability for failure to punish distinct from liability for failure to prevent crimes committed by subordinates, Article 86 of Additional Protocol I is entitled “Failure to Act” and imposes “penal or disciplinary responsibility” on superiors who

knew, or had information which should have enabled them to conclude in the circumstances at the time, that [a subordinate] was committing or was going to commit such a breach [of the Conventions or of this Protocol] and if they did not take all feasible measures within their powers to prevent or repress the breach. (Emphasis added.)

Article 87, entitled “Duty of Commanders”, provides that

the High Contracting Parties and the Parties to the conflict shall require that any commander who is aware that subordinates or other persons under his control are going to commit or have committed a breach of the Conventions or of this Protocol, to initiate such steps as are necessary to prevent such violations of the Conventions or this Protocol, and, where appropriate, to initiate disciplinary or penal action against violators thereof. (Emphasis added.)

As noted in the *Blaškić Decision*, both the Republic of Croatia and Bosnia and Herzegovina are bound by Additional Protocol I as successor States of the Socialist Federal Republic of Yugoslavia, which had ratified the Protocol on 11 June 1979.

14. The Trial Chamber further notes that Article 7, paragraph 3, of the Statute has been reaffirmed, *inter alia*, by Article 6 of the Draft Code of Crimes Against Peace and Security of Mankind<sup>8</sup>. As noted by the International Law Commission, in its Commentary:

Article 6 provides two criteria for determining whether a superior is to be held criminally responsible for the wrongful conduct of a subordinate. First, a superior must have known or had reason to know in the circumstances at the time that a subordinate was committing or was going to commit a crime. This criterion indicates that a superior may have the *mens rea* required to incur criminal responsibility in two different situations . . . The second criterion requires that a superior failed to take all necessary measures within his power to prevent or

<sup>6</sup> *Čelebići Judgement*, *supra* n. 3. See also *United States v. Tojo*, Tokyo War Crimes Trials, Vol. XX, p. 49845-49846: “He [Tojo] took no adequate steps to punish offenders (who ill-treated prisoners and internees) and to prevent the commission of similar offences in the future”; *United States v. Wilhelm List and others*, Trials of War Criminals, Vol. XI, p.1272: “His [Field Marshall Wilhelm List] failure to terminate these unlawful killings and to take adequate steps to prevent their recurrence constitutes a serious breach of duty and imposes criminal responsibility”.

<sup>7</sup> *Blaškić Decision*, *supra* n. 2.

<sup>8</sup> *Report of the International Law Commission on the Work of its Forty-eighth Session*, (1996), G.A.O.R., 51<sup>st</sup> sess., Supp. No.10, U.N. Doc. A/51/10, pp.37-38.

repress the criminal conduct of his subordinate. This second criterion is based on the duty of a superior to command and to exercise control over his subordinates. A superior incurs criminal responsibility only if he could have taken the necessary measures to prevent or to repress the unlawful conduct of his subordinates and he fails to do so.

15. As to the alternative request that the Trial Chamber set out the role that claims of failure to punish will play in the trial, the Trial Chamber notes that it is for the parties to decide how to present the case and declines to rule further on this point.

16. Finally, when considering the degree of control required, the Trial Chamber notes that in the *Čelebići Judgement* it was found that the non-exclusive language of Article 7, paragraph 3, permitted charges to be brought against both military and civilian superiors and that: "It is necessary that the superior have effective control over the person committing the underlying violations of international humanitarian law, in the sense that they have the material ability to prevent and punish the commission of the offences"<sup>9</sup>. This matter involves mixed questions of fact and law which should be dealt with during trial.

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<sup>9</sup> *Čelebići Judgement*, *supra* n. 3, at para. 378.

**IV. 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 Motion.

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



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Richard May  
Presiding

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

[Seal of the Tribunal]