



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-02-54-T
Date: 31 May 2005
Original: English

IN THE TRIAL CHAMBER

Before: Judge Patrick Robinson, Presiding
Judge O-Gon Kwon
Judge Iain Bonomy

Registrar: Mr. Hans Holthuis

Decision of: 31 May 2005

PROSECUTOR

v.

SLOBODAN MILOŠEVIĆ

**PRELIMINARY ORDER ON
AMICUS CURIAE OBSERVATIONS *PROPRIO MOTU* ON THE DESIRABILITY OF
SUBMISSIONS ON THE ALTERNATIVE BASES OF
INDIVIDUAL CRIMINAL RESPONSIBILITY ALLEGED IN THE CASE
AND ON THE ISSUE OF TRIALS *IN ABSENTIA***

The Office of the Prosecutor

Ms. Carla Del Ponte
Mr. Geoffrey Nice

The Accused

Mr. Slobodan Milošević

Court Assigned Counsel

Mr. Steven Kay, QC
Ms. Gillian Higgins

Amicus Curiae

Prof. Timothy L.H. McCormack

Case No. IT-02-54-T

31 May 2005

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 (“International Tribunal”),

BEING SEISED OF “*Amicus Curiae* Observations *Proprio Motu* on the Desirability of Submissions on the Alternative Bases of Individual Criminal Responsibility Alleged in the Case and on the Issue of Trials *in Absentia*”, filed on 25 April 2005 (“Observations”), in which the *Amicus Curiae*, Professor McCormack, requests permission to make written submissions on the following specific legal issues related to the Accused’s alleged individual criminal responsibility:

- (1) The legal test to be applied for criminal responsibility under Article 7(1) of the Statute in respect of joint criminal responsibility; and
- (2) The legal test to be applied for superior criminal responsibility under Article 7(3) of the Statute in respect of the application of that form of responsibility for a civilian commander as a head of State (or analogous position),

and to make submissions on the international and comparative law jurisprudence related to trials *in absentia*,

NOTING the Trial Chamber’s “Order Appointing *Amicus Curiae*”, issued on 22 November 2002, designating Professor McCormack as an *Amicus Curiae* for the purposes of (1) making written submissions on and appearing before the Trial Chamber to address questions of international law when requested, and (2) drawing to the Trial Chamber’s attention to relevant issues of international law,

NOTING the submission set forth in the Observations that, although there is Tribunal jurisprudence at the trial and appellate levels with respect to the issues related to criminal responsibility:

- (1) in respect of the alleged criminal responsibility of the Accused as a participant in a joint criminal enterprise, there is a need to supplement the existing jurisprudence with a more systematic and comprehensive analysis of the post-World War II jurisprudence and a review of domestic national criminal law approaches (not

previously dealt with in any detail in the Tribunal jurisprudence) to joint criminal enterprise as a basis for criminal responsibility; and

- (2) in respect of the alleged criminal responsibility of the Accused as a civilian commander under Article 7(3) of the Statute, there is a need to research prior international and domestic jurisprudence, including comments offered *obiter dicta* or analogies that could be usefully drawn, with respect to adjudicative determination of the criminal responsibility for the first time of a head of State,¹

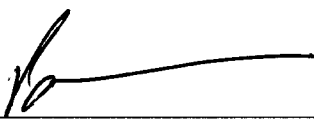
NOTING that, in the Trial Chamber “Order on *Amici Curiae* Observations on Relevant Issues of International Law” of 26 October 2004, it stated that it did not consider it appropriate, at that time, to order an *amicus* brief on these issues, but that the *Amicus Curiae* submits this decision was based on the particular circumstances that prevailed at the time, which have now changed,

CONSIDERING that it is appropriate for the Trial Chamber to seek the views of the parties on the appropriateness and content of the Observations relating to criminal responsibility before determining the matter,

PURSUANT TO Rules 74 and 54 of the Rules of Procedure and Evidence of the International Tribunal

HEREBY ORDERS that the Prosecution, Accused and Assigned Counsel may, within seven days, make submissions on the appropriateness and content of the Observations relating to criminal responsibility.

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



Judge Robinson
Presiding

Dated this thirty-first day of May 2005
At The Hague
The Netherlands

[Seal of the Tribunal]

¹ The *Amicus*, in his Observations, notes that with respect to the cases of *Kambanda* before the ICTR and *Plavšić* before the ICTY, guilty pleas were entered and no trial ensued.
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