UNITED NATIONS

International Tribunal for the Prosecution of Persons Responsible for Serious Violations of International Humanitarian Law Committed in the Territory of Former Yugoslavia since 1991

Case No. IT-01-47-PT

Date: 12 November 2002

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IN THE TRIAL CHAMBER

Before: **Judge Wolfgang Schomburg, Presiding**
Judge Florence Ndpele Mwachande Mumba
Judge Carmel Agius

Registrar: **Mr. Hans Holthuis**

Decision of: **12 November 2002**

PROSECUTOR

v.

ENVER HADŽIHASANOVIĆ
MEHMED ALAGIĆ
AMIR KUBURA

DECISION ON JOINT CHALLENGE TO JURISDICTION

The Office of the Prosecutor:

Mr. Ekkehard Withopf

Counsel for the Accused:

Ms. Edina Rešidović and Mr. Stéphane Bourgon for Enver Hadžihasanović
Ms. Vasvija Vidović and Mr. John Jones for Mehmed Alagić
Mr. Fahrudin Ibrišimović and Mr. Rodney Dixon for Amir Kubura

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I. INTRODUCTION

1. 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" or "ICTY") is seized of the "Joint Challenge to Jurisdiction Arising from the Amended Indictment," filed on behalf of the three accused ("Accused") by their defence counsel ("Defence") on 21 February 2002 ("Joint Challenge" or "Motion"), in which the Defence raised three jurisdictional objections to the Amended Indictment ("Amended Indictment") filed by the Office of the Prosecutor ("Prosecution") on 11 January 2002. The three objections are: (1) International law at the relevant time did not provide for criminal responsibility of superiors in the context of a non-international armed conflict;[1] (2) Article 7(3) of the Statute of the International Tribunal ("Statute") does not provide for liability of a superior for crimes committed before the existence of a superior-subordinate relationship between the perpetrators and the superior; and (3) Article 7(3) of the Statute does not provide for liability of superiors for failure to prevent or punish the planning and preparation of offences.

2. The Defence submitted that the three issues need to be resolved before trial, as a decision in their favour would result in the dismissal of all charges in the Amended Indictment, and therefore, none of the Accused would have to face a trial.

3. The Prosecution filed its response to the Joint Challenge, "Prosecution's Response to Joint Challenge to Jurisdiction Arising from the Amended Indictment" on 27 February 2002, in which it agreed that "these issues should be resolved before the trial and that a timetable for the filing of detailed submissions is needed."

4. On 25 March 2002, the Trial Chamber issued a Scheduling Order in which it ordered that the parties file concurrently written submissions by 10 May 2002, written responses by 24 May 2002, and written replies by 31 May 2002 on the issues raised in the Joint Challenge. The parties submitted their filings accordingly.[2] The Trial Chamber granted leave to the Defence to file an

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[1] Throughout this Decision, the Trial Chamber uses the terms "non-international armed conflict" and "internal armed conflict" interchangeably. Likewise, the terms "command responsibility" and "superior responsibility" should be read as synonymous. Additionally, unless otherwise stated, whenever a gender-specific pronoun or term is used, it should be read to include the male or female equivalent.

[2] Prosecution's Brief Regarding Issues in the "Joint Challenge to Jurisdiction Arising from the Amended Indictment", 10 May 2002 ("Written Submissions of Prosecution"); Joint Challenge to Jurisdiction Arising from the Amended Indictment Written Submissions of Enver Hadžihasanović, 10 May 2002 ("Written Submissions of Hadžihasanović"); Written Submission of Amir Kubura on Defence Challenges to Jurisdiction, 10 May 2002 ("Written Submissions of Kubura"); Submissions of Mehmed Alagic [sic] on the Challenge to Jurisdiction Based on the Illegality of Applying Article 7(3) to Non-International Armed Conflict," dated 9 May 2002, and filed on 10 May 2002 ("Written Submissions of Alagić"); Prosecution's Response to Defence Written Submissions on Joint Challenge to Jurisdiction Arising from the Amended Indictment, 24 May 2002 ("Prosecution Response"); Enver Hadžihasanović's Response to the

additional reply.[3] Additionally, the Prosecution filed a supplementary authority following a decision taken in another Trial Chamber.[4]

5. The Defence requested an oral hearing be held to assist the Trial Chamber in deciding the issues raised in the Joint Challenge. Due to the extensive pleadings submitted by the parties, the Trial Chamber determined that an oral hearing was unnecessary.[5]

6. The Trial Chamber notes that some of the issues raised in the Joint Challenge were previously raised by the Defence with regard to the initial Indictment of 6 July 2001 ("Initial Indictment").[6] In response to the Defence arguments raised on the Initial Indictment in relation to the status of the doctrine of command responsibility under customary international law for crimes committed in internal armed conflict under Article 3 of the Statute, the Trial Chamber issued a decision in which it held that the issue could be left for determination at trial.[7] It found that since the Initial Indictment included counts under Article 2 and Article 3 of the Statute, no prejudice to the Accused would be incurred if the issue were not determined before trial. Additionally, the Trial Chamber instructed the parties to provide detailed submissions on this issue in their pre-trial briefs.[8]

Prosecution's Brief Regarding Issues in the "Joint Challenge to Jurisdiction Arising from the Amended Indictment", 24 May 2002 ("Hadžihasanović Response"); Response of Mehmed Alagic [sic] on the Challenge to Jurisdiction, 24 May 2002 ("Alagić Response"); Response of Amir Kubura to Prosecution's Brief on Defence Challenges to Jurisdiction of 10 May 2002, dated 23 May 2002, and filed on 24 May 2002 ("Kubura Response"); Prosecution's Reply to Defence Responses to the Prosecution's Brief Concerning Issues Raised in the Joint Challenge to Jurisdiction Arising from the Amended Indictment, 31 May 2002 ("Prosecution Reply"); Enver Hadžihasanović's Reply to the Prosecution's Response to Defence Written Submissions on Joint Challenge to Jurisdiction Arising from the Amended Indictment, 31 May 2002 ("Hadžihasanović Reply"); Reply of Mehmed Alagic [sic] on the Challenge to Jurisdiction, 31 May 2002 ("Alagić Reply"); Reply of Amir Kubura to Prosecution's Response to Defence Written Submissions on Challenge to Jurisdiction, 31 May 2002 ("Kubura Reply"). The Trial Chamber advises that citations to one accused's submissions below should not be read as limiting or excluding arguments made by another accused on the same or a similar issue. See, Written Submissions of Hadžihasanović, para. 3, and Written Submissions of Alagić, para. 4, on the adoption of co-accused arguments.

[3] Additional Joint Defence Reply to Issues Raised by the Prosecution's Reply to the Defence Challenge to Jurisdiction, 17 June 2002 ("Additional Reply").

[4] Supplementary Authority to Prosecution's Reply to Defence Responses to the Prosecution's Brief Concerning Issues Raised in the Joint Challenge to Jurisdiction Arising from the Amended Indictment, filed on 27 June 2002. The Trial Chamber notes that the decision provided by the Prosecution, "Decision on Defence Preliminary Motion Challenging Jurisdiction," *Prosecutor v. Strugar et al.*, Case No. IT-01-42-PT, 7 June 2002, is currently on appeal.

[5] Status Conference, 18 July 2002, Transcript p. 149.

[6] Joint Preliminary Motion Alleging Defects in the Form of the Indictment, 8 October 2001, paras 31-42. See subsequent filings on this motion: Prosecution's Response to the Joint Preliminary Motion Alleging Defects in the Form of the Indictment, 22 October 2001; Reply to Prosecution Response to Preliminary Motion Alleging Defects in the Form of the Indictment, 29 October 2001 (the Reply was filed by counsel for Mehmed Alagić; counsel for the other accused joined that Reply by filing the "Joint Reply to Prosecution Response to Preliminary Motion Alleging Defects in the Form of the Indictment" on 5 November 2001); Request for Leave to File Supplement to Prosecution's Response to the Joint Preliminary Motion Alleging Defects in the Form of the Indictment, 30 October 2001.

[7] Decision on Challenge to Jurisdiction, 7 December 2001, para. 7.

[8] Ibid, para.10: "The parties are to address the following question in their pre-trial briefs. Did international law at the time relevant to the present indictment provide for criminal responsibility of superiors who knew or had reason to know that their subordinates were about to commit violations of international humanitarian law, or had done so, and failed to take the necessary and reasonable measures to prevent such acts or to punish the perpetrators thereof in the context of non-international conflicts?"

Once the Initial Indictment was amended and the Amended Indictment no longer included charges pursuant to Article 2 of the Statute, and following the filing of Joint Challenge, the Trial Chamber agreed that this issue should be addressed before the start of trial, as discussed above.

7. The Trial Chamber takes note of a decision issued by a bench of three judges of the Appeals Chamber in another case.[9] In this decision, the Appeals Chamber dismissed a request for leave to appeal a Trial Chamber decision which dismissed a challenge to jurisdiction in relation to Article 7(3) of the Statute, namely, that the criminal responsibility established by Article 7(3) of the Statute violates the principle *nullum crimen sine lege*, because the doctrine of command responsibility was not a norm of international customary law at the time of the alleged offence. The Appeals Chamber dismissed the challenge to jurisdiction on the ground that "it does not relate to any of the matters set out in 72(D) of the Rules."[10] Rule 72(D) of the Rules defines a motion challenging jurisdiction as referring "*exclusively* to a motion which challenges an indictment on the ground that it does not relate to: (i) any of the persons indicated in Articles 1, 6, 7 and 9 of the Statute; (ii) the territories indicated in Articles 1, 8 and 9 of the Statute; (iii) the period indicated in Articles 1, 8 and 9 of the Statute; (iv) *any of the violations indicated in Articles 2, 3, 4, 5 and 7 of the Statute.*"[11] This Trial Chamber interprets the current Joint Challenge as one that negates jurisdiction under Article 7(3) *ex initio* and submits that the Amended Indictment cannot be based on a violation of Article 7(3) of the Statute (Rule 72(A) and Rule 72(D)(iv)).[12]

8. The Trial Chamber will now address the issues raised in the Joint Challenge and present its finding on each issue.

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[9] *Prosecutor v. Milomir Stakić*, Case No. IT-97-24-AR-72, Decision on Application for Leave to Appeal, 19 February 2002 ("*Stakić* Decision").
[10] *Stakić* Decision, p. 3.
[11] (emphasis added).
[12] See, *Prosecutor v. Momčilo Krajišnik*, Case No. IT-00-39-AR72.2, Decision on Interlocutory Motion Challenging Jurisdiction, 25 May 2001. The Trial Chamber notes that this decision by the Appeals Chamber, which dismissed an appeal challenging the criminal responsibility established by Article 7(3) of the Statute on the grounds that it violated the principle *nullum crimen sine lege* because the doctrine of command responsibility was not an international custom at the time of the alleged offence, was based on the former version of Rule 72, which did not include section D(iv).

II. ISSUE 1: COMMAND RESPONSIBILITY IN NON-INTERNATIONAL ARMED CONFLICTS

9. The first issue to be determined is whether international law at the time of the establishment 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 provided for criminal liability of superiors for omissions in the context of non-international armed conflict in general, thereby allowing for the prosecution of the Accused for their concrete acts allegedly committed between January 1993 and January 1994 under Article 7(3) of the Statute.[13]

10. The Amended Indictment alleges that "[a]t all times relevant to this indictment, an armed conflict existed on the territory of Bosnia and Herzegovina."[14] The events in the Amended Indictment are alleged to have occurred in central Bosnia, with the parties to the conflict being the Army of Bosnia and Herzegovina ("ABiH") and Croatian Defence Council ("HVO"). In the Initial Indictment, the Prosecution had alleged that "at all times relevant to this indictment, a state of international armed conflict and partial occupation existed in Bosnia and Herzegovina."[15]

11. In the Amended Indictment, Enver Hadžihasanović and Mehmed Alagić are charged with seven counts of violations of the laws or customs of war under Article 3 and Article 7(3) of the Statute. Amir Kubura is charged with six counts of violations of the laws or customs of war under Article 3 and Article 7(3) of the Statute. There are no charges in the Amended Indictment pursuant to Article 7(1).

12. Enver Hadžihasanović is alleged to have joined the Territorial Defence of Bosnia and Herzegovina after 8 April 1992. On 14 November 1992, it is alleged that he was made the Commander of the 3rd Corps of the ABiH, a position he retained until he allegedly was promoted to Chief of the Supreme Command Staff of the ABiH. In December 1993, it is alleged that he was promoted to Brigadier General, thereby making him a member of the Joint Command of the Army of the Federation of Bosnia and Herzegovina.[16]

13. Mehmed Alagić is alleged to have joined the 17th Krajina Brigade of the ABiH 3rd Corps on 13 January 1993 as a soldier and was appointed the Commander of the ABiH 3rd Corps Operational

[13] The Defence Joint Challenge 21 February 2002 includes *all* charges under Article 3 as not entailing individual criminal responsibility under Article 7(3) and submits that there is no distinction between charges under common Article 3 of the Geneva Conventions and other Article 3 charges, as made in the 7 December 2001 Decision. See Alagić Reply, para. 24 and Kubura Written Submissions, para. 13.
[14] Amended Indictment, para. 11.
[15] Initial Indictment, para. 46.
[16] Amended Indictment, para. 3.

Group on 8 March 1993. On 1 November 1993, it is further alleged that he was named Commander of the ABiH 3rd Corps.[17]

14. Amir Kubura is alleged to have joined the ABiH in 1992 during its formation as the Deputy Commander of a detachment in Kakanj and was allegedly then assigned as the commander of an ABiH Mountain Battalion in the same area. On 11 December 1992, it is further alleged that he was posted as Assistant Chief of Staff for Operations and Instruction Matters of the ABiH 3rd Corps 7th Muslim Mountain Brigade, and allegedly became the Chief of Staff on 1 January 1993. From 1 April 1993 to 20 July 1993, Amir Kubura is alleged to have acted as the substitute for the Brigade Commander of the ABiH 3rd Corps 7th Muslim Mountain Brigade, and is alleged to have been appointed Commander on 21 July 1993.[18]

A. Arguments of the Parties

1. The Defence

15. The Defence for the three Accused are largely in agreement in the presentation of their arguments. The primary argument is that international law – including both customary and conventional law – did not provide for criminal responsibility of superiors in a non-international armed conflict, as applied under Article 7(3) of the Statute of the International Tribunal, for violations of Article 3 (violations of the laws or customs of war) of the Statute at the time the alleged offences were committed. Therefore, all counts in the Amended Indictment fall outside of the jurisdiction of the International Tribunal, as defined by the Secretary-General and endorsed by the Security Council.

16. The Defence contend that there is no basis in customary or conventional law for the doctrine of command responsibility to be applied in an internal armed conflict,[19] and the application thereof violates the principle of legality. The Defence point out that in the Report of the Secretary-General, it is required that the International Tribunal apply rules of international humanitarian law that are "beyond any doubt" part of customary law.[20]

17. The Defence do not challenge the applicability of the principle of command responsibility in international armed conflicts, citing both a conventional and customary basis for the norm in

[17] Ibid, para. 6.
[18] Ibid, para. 9.
[19] The Defence for Alagić specifically argue that there must be both a conventional and customary basis for any rules of international humanitarian law applied by the International Tribunal. See Written Submission of Alagić, para. 30. See also, Hadžihasanović Reply, para.15, in support of this argument.
[20] Report of the Secretary-General Pursuant to Paragraph 2 of Security Council Resolution 808 (1993) ("Report of the Secretary-General"), 3 May 1993 (S/25704), para. 34.

international armed conflicts.[21] The Defence examined the sources relied upon in the *Čelebići* Trial Chamber Judgement[22] for establishing that command responsibility was part of customary international law. The Defence contend that the *Čelebići* Trial Judgement "firmly based its interpretation" on Additional Protocol I, Articles 86 and 87,[23] applicable to international armed conflicts and which specifically provides for disciplinary or penal action when a commander has failed to prevent or punish his subordinates from committing crimes, whereas Additional Protocol II[24] is silent on the issue.[25]

18. Furthermore, the Defence argue that Additional Protocol I provides for "penal or disciplinary responsibility, as the case may be", whereby the "or" allows for other than criminal sanctions. The Defence contend that the omission of the doctrine of command responsibility from Additional Protocol II is a clear sign that "States never intended Command Responsibility to be applied in internal armed conflicts."[26] This, the Defence assert, is a "reflection of the concerns expressed by many States about expanding the application of international humanitarian law to conflicts involving their internal affairs."[27]

19. The Defence further submit that "the fact that a norm of customary international law is applicable in the context of an international armed conflict does not mean that such a norm is also applicable *ipso facto* in the context of a non-international armed conflict."[28]

20. The Defence find the conventional or treaty sources for the application of the doctrine of command responsibility in situations of internal armed conflict cited by the Prosecution to be "erroneous."[29]

21. The Defence contend that there is no case law from an international judicial organ addressing command responsibility in an internal armed conflict. The Defence find the precedents

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[21] The Defence cite Protocol I Additional to the Geneva Conventions of 12 August 1949 and relating to the Protection of Victims of International Armed Conflicts, 8 June 1977, 1125 U.N.T.S. 3 ("Additional Protocol I"), Articles 86 and 87, and post-World War II prosecutions at Nuremberg and Tokyo, as well as military commissions, as "ample precedent" for the doctrine to be applied in international armed conflicts. Written Submissions of Alagić, para. 65.

[22] *Prosecutor v. Zejnil Delalić, Zravko Mucić, Hazim Delić and Esad Landžo* ("*Čelebići*"), Case No. IT-96-21-T, Judgement, 16 November 1998 ("*Čelebići* Trial Judgement").

[23] Written Submissions of Kubura, para. 7.

[24] Protocol II Additional to the Geneva Conventions of 12 August 1949 and relating to the Protection of Victims of Non-International Armed Conflicts, 8 June 1977, 1125 U.N.T.S. 609 ("Additional Protocol II").

[25] See, e.g. Written Submissions of Kubura, paras 16-18.

[26] Written Submissions of Alagić, para. 49.

[27] Written Submissions of Kubura, para. 18, citing Official Records, vol. V, p. 142, 188 and vol. VI, p. 352.

[28] Written Submissions of Hadžihasanović, para. 46. (emphasis in original).

[29] Hadžihasanović Response, paras 16-19. Specifically, the Defence challenge the applicability of the Truxillo Convention of 1820 (cannot be considered to cover an internal armed conflict and does not impose condition that parties be placed under responsible command); Lieber Code of 1863 (recognises individual criminal responsibility for order or encourage, but does not impose a form of command responsibility); and 1900 Rules on Recognition of Belligerent Status of the Institute of International Law (related to recognition of belligerency).

of the Nuremberg and Tokyo Tribunals and the *Yamashita* case to be "beside the point" since they were concerned with international armed conflicts.[30]

22. Additionally, the Defence find that there is no national precedent where superiors were tried for failing to prevent or punish war crimes in internal armed conflicts.[31] The Defence refute the post-World War II cases referred to by the Prosecution as having "no bearing on the application of the command responsibility doctrine during non-international armed conflicts."[32] The Defence assert that the Prosecution examples relate to international armed conflicts or cases of disciplinary, rather than criminal, sanctions.[33]

23. In assessing whether the doctrine of command responsibility is applicable in internal armed conflicts under customary international law, the Defence conducted a survey of national legislation, military manuals and jurisprudence on the national level to determine whether State practice exists for the application of the doctrine to internal armed conflicts. The Defence conclude that there is little to no evidence in any source of a consistent, extensive and representative State practice to apply the doctrine of command responsibility as applied by the International Tribunal in internal armed conflicts. The Defence do note, however, that many States recognise the duty of commanders to prevent or punish crimes committed by subordinates in the context of an international armed conflict, on the basis of Additional Protocol I.[34]

24. Furthermore, the Defence argue that military commanders could not have been held criminally liable for war crimes under the doctrine of command responsibility under national criminal laws. In 1993, only one country, Belgium, had such a law.[35] States that made changes after Additional Protocol I entered into force recognised the duty of commanders to prevent or punish in international armed conflicts, but few states have the necessary legislation to prosecute commanders for failure to prevent or punish in internal armed conflicts.[36] The Defence assert that when States are enacting legislation for the International Criminal Court ("ICC"), they often must make an

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[30] Written Submissions of Alagić, para. 62.
[31] Hadžihasanović Response, para. 10.
[32] Ibid, para. 27.
[33] Specifically, the Defence find that the cases cited by the Prosecution deal with direct participation of an accused in the commission of the crimes with which he is charged (*Santos*; *Kafr Qassen Case*); occurred during an international armed conflict (*Santos*; *A. Cruz*); relate to aiding and abetting (*A. Cruz*); relate to civil rather than criminal proceedings (US Alien Tort Claims Case *Ford*). See Hadžihasanović Response, paras 27-31. Additionally, the Defence cite the case of Captain Medina tried in the United States for the My Lai massacre, and the Kahan Commission in Israel which took disciplinary measures following the Sabra and Shatilla Palestinian refugee camps massacre in Lebanon. See Written Submissions of Hadžihasanović, para. 66.
[34] See Written Submissions of Hadžihasanović, para. 67, and paras 65-78 generally on State practice.
[35] Written Submissions of Kubura, para. 23; Written Submissions of Hadžihasanović, para. 67 (argues the Belgian law is limited to prosecutions of commanders for failure to punish).
[36] Written Submissions of Hadžihasanović, para. 67.

exception or promulgate new legislation for Article 28 of the ICC Statute,[37] which provides for the responsibility of commanders and other superiors, since the principle did not previously exist in national law.[38]

25. The Defence submit that national laws do not provide for criminal liability of commanders "*as if they had committed the crimes themselves.*"[39] Punishment for dereliction of duty or a similar offence of omission is "beside the point", as they are substantively different than the doctrine of command responsibility under Article 7(3). For Article 7(3) liability, the duty to prevent and punish *and* failure to do so entailing criminal responsibility are required, the Defence contend.[40] Furthermore, the Defence argue that for situations in which the failure to prevent or punish, where such failure or omission is a form of complicity, aiding or abetting, or encouraging the commission of the crime, that act would be reflected in Article 7(1) of the Statute and not in Article 7(3).[41] In response to the Prosecution's submissions, the Defence reply that both the quantity and substance of the submissions are insufficient to find that the doctrine of command responsibility is applicable in internal armed conflicts under customary international law.[42]

26. The Defence argue that the Criminal Code of the Republic of Bosnia and Herzegovina in 1993 did not contain a provision to prosecute for war crimes "purely" on the basis of failing to prevent or punish such crimes. It was criminal to "order" or "commit" violations of international

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[37] Rome Statute of the International Criminal Court adopted at Rome on 17 July 1998, A/Conf.183/9, entered into force on 1 July 2002.

[38] Written Submissions of Hadžihasanović, para. 68 (citing the example of Canada); Written Submissions of Alagić, para. 63.

[39] Written Submissions of Alagić, para. 62. (emphasis in original).

[40] See generally, Written Submissions of Alagić, paras 14-23 and para. 62.

[41] See, e.g., Written Submissions of Alagić, para. 62(vi).

[42] Hadžihasanović Response, paras 35-39. The Defence argue that the 1982 French Code of Military Justice relates to superiors who "organised or tolerated" actions of their subordinates and is applicable in international armed conflicts; the 1931 Federal Penal Code of Mexico attaches criminal liability to those who commit, order or tolerate certain acts outside of the ambit of armed conflict, and it not specifically aimed at commanders or criminal liability for failure to prevent or punish; 1963 Penal Code of Congo is related to imputing all crimes committed in a rebellion to the leaders. See Hadžihasanović Response, paras 36-39. Alagić Response, para. 29, also cites the 2001 Swiss case of *Niyonteze v. Public Prosecutor*, and submits the Swiss Appellate Military Tribunal found that Art. 108(2) of the Swiss Military Penal Code could not be applied to internal armed conflicts.

The Trial Chamber notes that in relation to the application of the Swiss Military Penal Code in the case of *Niyonteze v. Public Prosecutor*, which covers offences committed after the time of the Amended Indictment, the Military Appeals Tribunal reversed all convictions for common crimes because of a lack of jurisdiction *ratione personae* over civilians under the Military Penal Code; the Military Cassation Tribunal, in response to the defendant's argument that the allegations could not be considered war crimes absent a close link to the armed conflict, held that in cases of an internal armed conflict, the class of perpetrators included "all individuals lawfully invested with authority and who are expected to further or participate in the war effort because of their capacity as officials or agents of the state, or as persons holding a position of responsibility or as de facto representatives of the government" and that the link between the offences and the armed conflict must not be "vague and undetermined", and that both conditions were met in that case. International Decision: *Niyonteze v. Public Prosecutor*, 27 April 2001, 96 Am. J. Int'l L. 231, 234-35.

humanitarian law during "armed conflict", but the Criminal Code did not, however, have a specific provision on command responsibility, the Defence submit.[43]

27. The Defence further contend that national military manuals do not constitute laws of war, and even if they did provide a source of national practice,[44] they do not have provisions on command responsibility in internal armed conflicts that impute the liability of the subordinate to the superior.[45]

28. Additionally, the Defence cite a "Special Agreement" entered into by the various parties to the conflict in Bosnia and Herzegovina, pursuant to Article 3 common to the Geneva Conventions of 1949[46] ("Common Article 3") including one of 22 May 1992. In that Special Agreement, the parties agreed to apply certain provisions of the Geneva Conventions and Additional Protocol I related to international armed conflicts. The Defence contend that Articles 86 and 87 of Additional Protocol I were not invoked and therefore the parties were not bound by them.[47] The Special Agreement does not have a criminal responsibility provision, "only" a provision calling for "the necessary steps to put an end to the alleged violations or prevent their recurrence and punish those responsible in accordance with the law in force".[48]

29. In response to the Prosecution's arguments that conflict classification is not relevant for determining the applicability of the doctrine of command responsibility under the Statute, the Defence argue that "States have insisted on maintaining a clear difference between international and non-international armed conflicts as well as on ensuring that a marked difference exists in the law applicable in each case."[49] The Defence contend that the distinction was relevant at the time the Statute was adopted, drawing on the treaties and conventions in force at that time, and remains relevant today, as evinced by the manner in which the Statute for the ICC was drafted.[50] This, the Defence conclude, is due to the "express intention of States to maintain sufficient guarantees for the

[43] Written Submissions of Kubura, para. 25, citing Article 154 of the 1992 Bosnian Criminal Code.
[44] Written Submissions of Alagić, para. 53
[45] See generally, Written Submissions of Hadžihasanović, paras 67-77, on military manuals and national legislation.
[46] Geneva Convention (I) for the Amelioration of the Condition of the Wounded and Sick in Armed Forces in the Field, 12 August 1949, 75 U.N.T.S. 31; Geneva Convention (II) for the Amelioration of the Condition of Wounded, Sick and Shipwrecked Members of Armed Forces at Sea, 12 August 1949, 75 U.N.T.S. 85; Geneva Convention (III) Relative to the Treatment of Prisoners of War, 12 August 1949, 75 U.N.T.S. 135; Geneva Convention (IV) Relative to the Protection of Civilian Persons in Time of War, 12 August 1949, 75 U.N.T.S. 287.
[47] Written Submissions of Hadžihasanović, paras 40-41.
[48] See Additional Reply, para.8, and paras 1-11, generally.
[49] Hadžihasanović Response, para. 1.
[50] Written Submissions of Hadžihasanović, para. 64.

proper respect of national sovereignty and the application of the principle of non-interference with internal affairs."[51]

30. In terms of the "characteristics" of the doctrine of command responsibility, the Defence for Alagić argues that two aspects of the doctrine, as applied by the International Tribunal, make it unique, namely that the crime is a separate crime of omission and that the superior is held responsible for the underlying crime committed by the subordinates.[52] In doing so, the Defence seeks to distinguish liability under Article 7(3) from the various forms of – what it characterises as "intentional" – responsibility, and particularly accomplice liability, under Article 7(1) of the Statute. The Defence argues that "other forms" of command responsibility, including a commander being held responsible for (illegal) orders that he has given to his subordinates, a commander breaching his duty and receiving disciplinary rather than criminal sanctions, and a commander's criminal responsibility for failure to control his subordinates, where the commander is held guilty in such a case of a separate crime of dereliction of duty rather than of the underlying crime committed by his subordinates, are fundamentally different from the doctrine of command responsibility as applied by the International Tribunal and thus have "no bearing" on the issue before this Trial Chamber.[53]

31. The Defence further submit that there is no precedent at the International Tribunal on this point, arguing that no Chamber has expressly held that Article 7(3) applies in internal armed conflict.[54] The Defence find that no accused has been convicted "solely" on the basis of Article 7(3) for a non-international armed conflict. In the case of *Aleksovski*, the accused was convicted under Articles 7(1) and 7(3) for Article 3 violations in a case where an international armed conflict was alleged, although not proven at trial. Additionally, the Defence allege that his role was one of direct participation and that he was therefore found responsible "primarily" under Article 7(1).[55] In response to the Prosecution, the Defence comment on additional cases before the International Tribunal. In *Krnojelac*, where the Trial Chamber found the accused guilty of two counts pursuant to

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[51] Hadžihasanović Response, para. 2. The Response of Hadžihasanović concedes that the distinction between international and internal armed conflict has blurred, beginning wit the Spanish Civil War in the 1930s and the advent of international human rights law, but the distinction is still in place, as, it asserts, the *Tadić* Jurisdiction Decision recognises. See *Prosecutor v. Duško Tadić*, Case No. IT-94-1-AR72, Decision on the Defence Motion for Interlocutory Appeal on Jurisdiction, 2 October 1995 ("*Tadić* Jurisdiction Decision").

[52] Written Submissions of Alagić, paras 15-22.

[53] See, e.g., Written Submissions of Alagić, paras 25-26. The submissions of Alagić argue that the complicity of a superior in the crimes of his subordinates, including by omission, would be a "Article 7(1)-type liability" rather than Article 7(3) liability. The Alagić Response further argues that accomplice liability falls under Article 7(1) of the Statute, and not Article 7(3), paras 33-34. The Written Submissions of Hadžihasanović argue that the doctrine of command responsibility is "exceptional" in that a commander can be found guilty of a crime in which he did not participate in any way towards its commission and never intended the offence be committed, para. 16.

[54] Written Submissions of Kubura, para. 15.

[55] Written Submissions of Kubura, para. 15, referring to *Prosecutor v. Zlatko Aleksovski*, Case No. IT-95-14/1-T, Judgement, 25 June 1999 ("*Aleksovski* Trial Judgement").

Article 7(3) in relation to an "internal conflict",[56] the Defence comment that the Trial Chamber "did not address the issue whether 7(3) liability could be imposed in the context of a non-international conflict."[57] The Trial Chamber in *Krstić* found Krstić liable under both Article 7(1) and Article 7(3) in the context of an internal armed conflict. The Defence dismiss this judgement as irrelevant due to the factual context of that case being "long after the times relevant to the present Indictment."[58]

32. Additionally, the Defence submit cases in which Article 7(3) was applied to charges of genocide and crimes against humanity are distinct from this case where the charges are pursuant to Article 3 of the Statute. The Defence argue that the finding in the *Tadić* Jurisdiction Decision that Common Article 3 gives rise to individual criminal responsibility is a different issue than the one before the Trial Chamber. The Appeals Chamber was "entitled" to find that the prohibitions contained in Common Article 3 would be meaningless if they could not be enforced, thereby finding that individual criminal responsibility necessarily attaches to the prohibitions contained therein, the Defence contend; as the enforcement mechanism now clearly exists, it further argues, it is not necessary to extend individual criminal responsibility to the doctrine of command responsibility.[59]

33. The Defence refute the Prosecution argument that command responsibility is a "logical consequence" of the imposition of individual criminal responsibility for violations of international humanitarian law.[60] Further, the Defence refute the Prosecution assertion that command responsibility is the natural outgrowth of "responsible command", arguing that it is impermissible to extend the concept of "responsible command", which did not entail individual criminal responsibility, to "command responsibility". Responsible command does not encompass both duty and liability, as command responsibility does, pursuant to Additional Protocol I, Articles 87 and 86, respectively.[61] The Defence submit that responsible command has an entirely different role in customary international law, namely to serve as a prerequisite for international humanitarian law to apply to an army and serves as the basis for reciprocity with other armies.[62]

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[56] This Trial Chamber notes that the Trial Chamber did not explicitly find that the conflict in *Krnojelac* was an "internal armed conflict", finding that there was an "armed conflict" in the Republic of Bosnia and Herzegovina, a fact to which the parties agreed. See, *Prosecutor v. Milorad Krnojelac,* Case No. IT-97-25-T, Judgment, 15 March 2002 ("*Krnojelac* Trial Judgement").
[57] Hadžihasanović Response, para. 33.
[58] Hadžihasanović Response, para. 32, referring to *Prosecutor v. Radislav Krstić*, Case No. IT-98-33-T, Judgement, 2 August 2001 ("*Krstić* Trial Judgement").
[59] Written Submissions of Alagić, paras 50-52.
[60] Hadžihasanović Response, para. 4.
[61] See, e.g., Hadžihasanović Response, paras 11-15.
[62] Alagić Response, paras 7-8; Hadžihasanović Response, paras 19-21.

34. While the Statute[63] of the International Criminal Tribunal for Rwanda[64] ("ICTR") provides for the application of the doctrine of command responsibility to the internal armed conflict in Rwanda under Article 6(3) of its Statute, the ICTR Statute was adopted after the relevant time period of the Amended Indictment and therefore is not relevant to this issue, the Defence submit.[65] Furthermore, the inclusion of command responsibility in the Statute of the ICTR is no indication of the status of the doctrine in internal armed conflicts under customary international law, as the Report of the Secretary-General on the ICTR states that the subject-matter jurisdiction of the ICTR was not limited to those international instruments which were considered part of customary international law or which customarily entailed individual criminal responsibility.[66] The Defence argue that the Statute cannot be considered a normative source with regard to command responsibility in internal armed conflicts. Additionally, the Defence point out, no one has been convicted solely under Article 6(3) at the ICTR.

35. Finally, the Defence submit that no leading or highly qualified publicists have addressed this question in detail.[67]

36. Having argued that customary international law did not provide for the application of the doctrine of command responsibility in non-international armed conflicts at the time the alleged crimes were committed, the Defence concludes that the principle of legality is violated. The Defence submit that the principle of legality – here *nullum crimen sine lege* – demands that no one shall be guilty of an offence on account of any act or omission which did not constitute a penal offence under international law at the time that the offence was allegedly committed.[68]

37. The Defence draw upon the jurisprudence of the International Tribunal[69] and the Statute for the ICC in detailing the characteristics of the principle of legality, namely the prohibition of the retroactive application of criminal law, the requirement that criminal offences be precisely defined and the prohibition on determining the existence of a criminal offence by analogy.[70] One accused

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[63] Statute for the International Criminal Tribunal for Rwanda, as adopted by the Security Council Resolution 955, 8 November 1994.
[64] International Criminal Tribunal for the Prosecution of Persons Responsible for Genocide and Other Serious Violations of International Humanitarian Law Committed in the Territory of Rwanda and Rwandan Citizens Responsible for Genocide and Other Serious Violations committed in the Territory of Neighbouring States between 1 January and 31 December 1994.
[65] Written Submissions of Alagić, para. 54.
[66] Report of the Secretary-General Pursuant to Paragraph 5 of Security Council Resolution 955 (1994) ("Report of the Secretary-General on the ICTR"), S/1995/134, 13 February 1995, para. 12, as cited in Written Submissions of Alagić, para. 55.
[67] Written Submissions of Kubura, para. 15.
[68] Written Submissions of Hadžihasanović, paras 5-12; Written Submissions of Kubura, paras 4-11.
[69] Written Submissions of Kubura, para. 4, citing *Tadić* Jurisdiction Decision, para. 143 and *Čelebići* Trial Judgement, paras 402-413.
[70] Written Submissions of Hadžihasanović, para. 9, citing ICC Statute, Art. 22.

argued that the prohibition on ambiguity requires that the law must be in written form, which would therefore exclude customary law as a source of incriminatory law.[71]

38. The Defence argue that the first instances where the doctrine of command responsibility in relation to internal armed conflicts was addressed, namely the United Nations International Law Commission ("ILC") Draft Statute for the ICC of 1994 and the 1996 ILC Draft Code on Crimes Against Peace and Security of Mankind, are after the time-period specified in the Amended Indictment and are therefore not reflective of customary law at the time the crimes were alleged to have been committed.[72] Additionally, the Defence argue that the inclusion of command responsibility in the ICC Statute is of no assistance since it was adopted after the time of the alleged crimes.[73]

39. The remedy sought by the Defence is to drop all charges pursuant to Article 3 that rely on Article 7(3) in an internal armed conflict, which would result in a full dismissal of the Amended Indictment against all Accused in this case.

2. The Prosecution

40. The Prosecution argues that the doctrine of command responsibility was part of customary international law before 1994, and at the latest, as of 1 January 1991.[74] The Prosecution cites the application of the doctrine during the "W.W.II war criminal trials", and its subsequent codification in the 1977 Additional Protocol I, the ICTY and ICTR Statutes, and the ICC Statute in 1998 to support this assertion.[75]

41. The Prosecution further contends that under the Report of the Secretary-General, if a basis exists for command responsibility in customary law, it is not required to have an additional conventional source.[76]

42. Individual criminal responsibility exists for serious violations of international humanitarian law for members of forces under "responsible command", the Prosecution asserts. Therefore, the Prosecution contends, the doctrine of command responsibility is a "logical consequence" of the imposition of such individual criminal responsibility. The Prosecution argues that the application of the doctrine of command responsibility is the "logical conclusion" of the *Tadić* Jurisdiction

[71] Written Submissions of Alagić, para. 8.
[72] Written Submissions of Hadžihasanović, paras 59-64.
[73] See, e.g. Written Submissions of Kubura, para. 10.
[74] Written Submissions of Prosecution, para. 4.
[75] Ibid, para. 7.
[76] Prosecution Response, paras 12-15.

Decision, which recognises that customary international law imposes individual criminal responsibility for violations of international humanitarian law in internal armed conflicts.[77]

43. The Prosecution finds the origins of the "concept" of command responsibility in the 19th century for "internal civil wars" in Europe and "America".[78] The Prosecution offers examples from various treaties, codes or conventions to trace the evolution of the concept of "responsible command."[79] The Prosecution cites the Lieber Code of 1863, adopted by the United States during its Civil War, to argue that "a form" of command responsibility was imposed for certain war crimes.[80]

44. The Prosecution asserts that command responsibility cannot exist without responsible command. It traces the link between responsible command and command responsibility to Nuremberg and other post-World War II prosecutions, in finding a basis for individual criminal liability.[81] The Prosecution also cites Additional Protocol II, Art. 1 as indicating "the importance of organized groups being under responsible command."[82] The Prosecution equates responsible command with the "effective control" test in the *Čelebići* Appeal Judgement.[83]

45. The Prosecution further relies on the ICRC Commentary on Article 86 of Additional Protocol I to make the link between "responsible command" and "command responsibility": "The London Agreement of 8 August 1945, which was designed to serve as the basis for the prosecutions instituted after the Second World War, particularly for breaches of the law of armed conflict, does not refer to breaches consisting of omissions. *Nevertheless ... people were convicted for omissions, in particular on the basis of Article 1 of the 1907 Hague Regulations* which provides that members of the armed forces must 'be commanded by a person responsible for his subordinates'."[84]

46. The Prosecution asserts that the International Tribunal case law supports the link between responsible command and command responsibility. In the *Blaškić* Trial Judgement, according to the

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[77] Written Submissions of Prosecution, para. 5.
[78] Ibid, para. 9.
[79] The Prosecution cites the Truxillo Convention of 1820 for the conflict between Spanish armed forces and Colombian rebels, which it asserts was an internal armed conflict; Brussels Protocol of 1874; Regulations to the Hague Conventions of 1899 and 1907, Art. 1. Written Submissions of Prosecution, paras 10-12.
[80] The Prosecution cites Article 71, which, it submits, "made punishable by death the crime of encouraging or ordering the killing of, or infliction of additional wounding on, an already disabled enemy." Written Submissions of Prosecution, para. 11.
[81] Written Submissions of Prosecution, paras 22-25. Specifically, the Prosecution cite the case of *In re Yamashita*, 327 US 1, 14-16 (1946) and *U.S. v. Pohl.*
[82] Ibid, para. 17.
[83] Ibid, para. 31.
[84] Ibid, para. 21 (emphasis in original), citing International Committee of the Red Cross, Commentary on the Additional Protocols of 8 June 1977 to the Geneva Conventions of 12 August 1949 (Yves Sandoz *et al.* eds., 1987) ("Commentary on the Additional Protocols"), para. 3531.

Prosecution, the Trial Chamber "emphasised the importance of Article 43(1) of Additional Protocol I to the doctrine of command responsibility".[85]

47. Conflict classification is not relevant for command responsibility, according to the Prosecution. Command responsibility applies *whenever* international humanitarian law applies, as armed conflicts can be internal and the doctrine is recognised under customary international law. The Prosecution argues that there is a trend in international law showing that the distinction between internal and international armed conflict is lessening. It cites the 1968 Convention on the Non-Applicability of Statutory Limitations to War Crimes and Crimes against Humanity and the 1984 Torture Convention both of which either provide for or "allude" to command responsibility, in support of this assertion.[86] The Prosecution contends that command responsibility is an area of international humanitarian law where conflict classification is "irrelevant."[87]

48. The Prosecution notes that the Statute of the International Tribunal includes a provision on command responsibility and grants this Tribunal jurisdiction over war crimes, crimes against humanity and genocide.[88] The Prosecution finds that the case law of the ICTY supports liability under the doctrine of command responsibility "irrespective of the classification of the conflict."[89] Specifically, the Prosecution cites the case of *Aleksovski*, where the Trial Chamber found the conflict to be non-international and Article 7(3) liability attached, a finding which was not questioned on appeal, and *Kunarac* and *Krnojelac* where, according to the Prosecution, liability was found under Article 7(3) in cases of "armed conflict".[90]

49. While arguing that conflict classification is not relevant, the Prosecution provides examples of the application of the doctrine of command responsibility in internal armed conflicts. The Prosecution contend that national case law exists that applied the doctrine of command responsibility in internal armed conflicts. Specifically, the Prosecution relies on the US-Philippines

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[85] The Prosecution quoted the *Blaškić* Trial Judgement, para. 327: "[It] considers fundamental the provision enshrined in Article 43(1) of Additional Protocol I according to which the armed forces are to be placed "under a command responsible [...] for the conduct of its subordinates"." See *Prosecutor v. Tihomir Blaškić*, Case No. IT-95-14-T, Judgement, 3 March 2000 ("*Blaškić* Trial Judgement").

[86] Written Submissions of Prosecution, paras 45-46.

[87] The Prosecution cites commentators to support their assertion, Written Submissions of the Prosecution, para. 29. These commentators seem to suggest that it is "reasonable" to recognise the duty for superiors to ensure lawful conduct of subordinates in cases of internal armed conflict, as is required in cases of international armed conflict. *See* Morris & Scharf, *The International Criminal Tribunal for Rwanda* (1998), p. 261.

[88] Written Submissions of Prosecution, para. 47.

[89] Ibid, para. 39.

[90] Written Submissions of Prosecution, para. 39. The Trial Chamber notes, however, that the Trial Chamber in the case of *Prosecutor v. Dragoljub Kunarac, Radomir Kovač and Zoran Vuković*, Case No. IT-96-23-T & IT-96-23/1-T, Judgement, 22 February 2001 ("*Kunarac* Trial Judgement"), para. 629, did not find Dragoljub Kunarac guilty for any offences pursuant to Article 7(3). See infra, fn. 250.

"anti-colonial" cases of *Santos* and *Cruz*,[91] and the Israeli case of *Kafr Qassem*.[92] The Prosecution also cites a US Alien Tort Claims Act case in which command responsibility served as the basis for tort liability in El Salvador.[93]

50. The Prosecution contends that various national laws include "command responsibility". Specifically, the Prosecution cites certain military manuals and criminal codes,[94] including post-1993 laws.[95] The Prosecution refute the Defence argument that national laws which use terms such as "tolerate" or "complicity" are reflected solely in Article 7(1) of the Statute rather than Article 7(3), citing the *Čelebići* Trial Judgement's use of laws including the terms "tolerated" and "accomplices" as examples of "state legislative recognition of command responsibility."[96]

51. The Statute of the ICTR, adopted in November 1994, indicates *opinio juris* of the Security Council, the Prosecution submits. Furthermore, there have been numerous convictions under the theory of command responsibility in internal armed conflict for genocide and crimes against humanity at the ICTR, the Prosecution notes.[97]

52. The Prosecution cites the Statutes of the Sierra Leone and East Timor Tribunals, which are applicable to internal armed conflicts and contain specific provisions for command responsibility.[98] The Prosecution argues that these post-1994 developments show that the international community recognised that command responsibility formed part of customary international law predating the temporal jurisdiction of the ICTY Statute in 1991 and that these Statutes are later enactments of a existing prior customary norm. The Prosecution also cites the UN ILC commentary on the 1996 Draft Code of Crimes against the Peace and Security of Mankind in this regard.[99]

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[91] Written Submissions of Prosecution, paras 33-35. *See Santos* G.O. 130, 19 June 1901, Hq. Div. Phil . and *Cruz* G.O. 264, 9 September 1901, Hq. Div. Phil.
[92] Written Submissions of Prosecution, paras 36-37. In the *Kafr Qassem* case, the accused appeared to have participated in the actual commission of the crimes, having given the order to fire at the victims.
[93] Written Submissions of Prosecution, para. 38, citing *Ford v. Garcia*, 289 F.3d 1283 (30 April 2002).
[94] Written Submissions of Prosecution, paras 40-43 (France (superiors charged as accomplices); Congo (crimes committed during a rebellion will be imputed to commander); Mexico (1931)(during non-hostilities, those who order or tolerate murder or inflict suffering will be equally responsible)). The Prosecution also cites the 1991 Torture Victim Protection Act of the United States, which provides a civil remedy for violations of international humanitarian law. See, Written Submissions of Prosecution, para. 44.
[95] Written Submissions of Prosecution, paras 55-57 (Belgium, Sweden and Belarus).
[96] Prosecution Reply, para. 18, citing *Čelebići* Trial Judgement, para. 336.
[97] Written Submissions of Prosecution, paras 47-48.
[98] Written Submissions of Prosecution, paras 49-50; Prosecution Reply, para. 9 (submitting that the Sierra Leone argued unsuccessfully for the jurisdiction of the Special Court to begin in 1991).
[99] Written Submissions of Prosecution, para. 26, citing UN ILC Commentary on Article 6 (responsibility of superiors).

53. In its Reply, the Prosecution cites "Special Agreements" entered into between the parties, which, it argues, indicates that they did not consider conflict classification a bar to applying grave breaches and certain aspects of Additional Protocol I.[100]

54. In the Prosecution's opinion, a finding against the Prosecution will not end the case as conflict classification is "irrelevant" to the Amended Indictment.[101]

B. General Principles

55. In deciding upon the present issue, namely whether international law at the relevant time did or did not provide for criminal responsibility of superiors for omissions as foreseen in Article 7(3), pursuant to the doctrine of command responsibility, in the context of non-international armed conflict, and therefore, whether charges to that effect fall within the jurisdiction 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 Trial Chamber is duty-bound to fully respect the principle of *nullum crimen sine lege* in this broader context. The Trial Chamber observes that the question before it is limited *de facto* to superiors serving in armed forces and who are held responsible in this capacity. The Defence in their submissions rely on this principle and argue that this principle stands in the way of holding the Accused in this case responsible under command responsibility for violations of humanitarian law as the conflict in this case is characterised as an "armed conflict", and not as an international armed conflict.

56. The principle of *nullum crimen sine lege* is a fundamental principle in criminal law and in international human rights law.[102] This principle is enshrined in numerous international conventions including *inter alia*:

- Article 11(2) of the Universal Declaration of Human Rights of 10 December 1948[103];
- Article 7 of the European Convention for the Protection of Human Rights and Fundamental Freedoms ("ECHR") of 4 November 1950; [104]
- Article 15 of the International Covenant on Civil and Political Rights ("ICCPR") of 16 December 1966; [105]

[100] Prosecution Reply, para. 3.
[101] Prosecution Response, para. 10.
[102] Notably, no derogation is permitted from the principle of *nullum crimen sine lege* in times of war or other public emergency in the ECHR, Art. 15.
[103] G.A. Res 217A (III), U.N. Doc. A/811 (1948).
[104] 213 U.N.T.S. 221; European Treaty Series ("ETS") 005.

- Article 9 of the American Convention on Human Rights of 22 November 1969;[106]
- Article 6(2)(c) of Additional Protocol II to the Geneva Conventions of 8 June 1977;[107]
- and Article 10 of the Draft Articles on the Draft Code of Crimes against the Peace and Security of Mankind of 1991.[108]

No doubt the same principle is reflected in nearly all national jurisdictions on a global level. In some jurisdictions, the principle of *nullum crimen sine lege* is even enshrined in the constitution.[109]

57. While the Statute of the International Tribunal does not contain a specific article stating this general principle of law, the Trial Chamber observes that the Secretary-General's Report states that:

> [i]t is axiomatic that the International Tribunal must fully respect internationally recognized standards regarding the rights of the accused at all stages of its proceedings. In the view of the Secretary-General, such internationally recognized standards are, *in particular*, contained in article 14 of the International Covenant on Civil and Political Rights.[110]

Furthermore, the jurisdictional requirement contained in Article 1 indirectly reflects it:

> The International Tribunal shall have the power to prosecute persons responsible for *serious violations of international humanitarian law* [...].

In commentaries on the draft Statute of this Tribunal, the principle of *nullum crimen sine lege* was discussed in reference to the substantive offences being considered for inclusion in the Statute, and the amount of specificity required in the Statute.[111] The Secretary-General's Report explicitly comments on this issue:

> in assigning to the International Tribunal the task of prosecuting persons responsible for serious violations of international humanitarian law, the Security Council would not be creating or purporting to "legislate" that law. Rather, the International Tribunal would have the task of applying existing international humanitarian law.[112]

Specifically on the principle of *nullum crimen sine lege*, the Secretary-General said in his report:

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[105] 993 U.N.T.S. 171.
[106] 1114 U.N.T.S. 123.
[107] 1977 U.N.J.Y.B. 135.
[108] Draft Articles on the Draft Code of Crimes against the Peace and Security of Mankind (as revised by the International Law Commission through 1991). First Adopted by the U.N. ILC, 4 December 1954, U.N. Doc. A/46/405 (1991), 30 I.L.M. 1554 (1991).
[109] See, e.g., Basic Law (*Grundgesetz*) for the Federal Republic of Germany, which enshrines the principle of *nullum crimen sine lege* in Art. 103 Abs. II GG: "Eine Tat kann nur bestraft werden, wenn die Strafbarkeit gesetzlich bestimmt war, bevor die Tat begangen wurde" ("An act may be punished only if it was defined by a law as a criminal offense before the act was committed."). See also, Constitution of the United States of America, Art. 1, Sect. (9)(3): "No Bill of Attainder or *ex post facto* law shall be passed."
[110] Secretary-General's Report, para. 106. (emphasis added).
[111] See, e.g. S/25504, p.16.
[112] Secretary-General's Report, para. 29.

> the application of the principle *nullum crimen sine lege* requires that the international tribunal should apply rules of international humanitarian law which are beyond any doubt part of customary law so that the problem of adherence of some but not all States to the specific conventions does not arise.[113]

58. Under the jurisprudence of the European Court of Human Rights ("ECtHR"), Article 7 of the ECHR[114] allows for the "gradual clarification" of the rules of criminal liability through judicial interpretation.[115] It is not necessary that the elements of an offence are defined, but rather that general description of the prohibited conduct be provided.[116] In the case of *S.W. v. U.K.*, in relation to the principle of *nullum crimen sine lege*, the European Court of Human Rights held:

> However clearly drafted a legal provision may be, in any system of law, including criminal law, *there is an inevitable element of judicial interpretation.* There will always be a need for elucidation of doubtful points and for adaptation to changing circumstances ... [t]he progressive development of the criminal law through judicial law-making is a *well entrenched and necessary part of legal tradition. Article 7 cannot be read as outlawing the gradual clarification of the rules of criminal liability through judicial interpretation from case to case, provided that the resultant development is consistent with the essence if the offence and could be reasonably foreseen.*[117]

The European Court of Human Rights found that the term "law" in Article 7(1) of the ECHR includes both written and unwritten law, and "implies qualitative requirements, notably those of accessibility and foreseeability."[118]

59. Article 7(2) of the ECHR states that:

> This article shall not prejudice the trial and punishment of any person for any act or omission which, at the time when it was committed, was criminal according to the general principles of law recognised by civilised nations.[119]

60. The Trial Chamber in the *Čelebići* case discussed the principle of *nullum crimen sine lege* in detail. From this analysis, the following observations are particularly relevant:

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[113] Ibid, para. 34.

[114] Article 7(1) of the ECHR provides, in part: "No one shall be held guilty of any criminal offence on account of any act or omission which did not constitute a criminal offence under national or international law at the time it was committed." See also, the Statute for the ICC, Art. 22, which provides: 1. A person shall not be criminally responsible under this Statute unless the conduct in question constitutes, at the time it takes place, a crime within the jurisdiction of the Court. 2. The definition of a crime shall be strictly construed and shall not be extended by analogy. In case of ambiguity, the definition shall be interpreted in favour of the person being investigated, prosecuted or convicted. 3. This article shall not affect the characterization of any conduct as criminal under international law independently of this Statute.

[115] ECtHR, *S.W. v. UK* (1995). The fundamental principles reflected in *S.W. v. UK* has been applied consistently by the European Court. See *Case of Streletz, Kessler and Krenz v. Germany* (2001), para. 49.

[116] ECtHR, *S.W. v. UK* (1995), para. 35, citing *Kokkinakis v. Greece* (1993), para. 52: "an offence must be clearly defined in law ... [and] this requirement is satisfied where the individual can know from the wording of the relevant provision and, if need be, with the assistance of the courts' interpretation of it, what acts and omissions will make him criminally liable." See also, *Handyside v. UK* (1974).

[117] ECtHR, *S.W. v. UK* (1995), para. 36. (emphasis added).

[118] Ibid, para. 35.

[119] According to Harris, O'Boyle and Warbrick, this provision implies that: "[i]f there is no treaty binding upon the parties to a dispute and if no rule of customary international law based upon state practice applies, recourse may be had to 'general principles of law recognised by civilised nations', i.e. by the states members of the international community, to fill the gap." David J. Harris, Michael O'Boyle and Colin Warbrick, Law of the European Convention on Human Rights (London: Butterworths 1995) p. 282.

> 402. The principles *nullum crimen sine lege* and *nulla poena sine lege* are well recognised in the world's major criminal justice systems as being fundamental principles of criminality. Another such fundamental principle is the prohibition against *ex post facto* criminal laws with its derivative rule of non-retroactive application of criminal laws and criminal sanctions. Associated with these principles are the requirement of specificity and the prohibition of ambiguity in criminal legislation. These considerations are the solid pillars on which the principle of legality stands. Without the satisfaction of these principles no criminalisation process can be accomplished and recognised.
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> 403. The above principles of legality exist and are recognised in all the world's major criminal justice systems. It is not certain to what extent they have been admitted as part of international legal practice, separate and apart from the existence of the national legal systems. This is essentially because of the different methods of criminalisation of conduct in national and international criminal justice systems.
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> 404. Whereas the criminalisation process in a national criminal justice system depends upon legislation which dictates the time when conduct is prohibited and the content of such prohibition, the international criminal justice system attains the same objective through treaties or conventions, or after a customary practice of the unilateral enforcement of a prohibition by States.
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> 405. It could be postulated, therefore, that the principles of legality in international criminal law are different from their related national legal systems with respect to their application and standards. They appear to be distinctive, in the *obvious objective of maintaining a balance between the preservation of justice and fairness towards the accused and taking into account the preservation of world order.* To this end, the affected State or States must take into account the following factors, *inter alia*: the nature of international law; the absence of international legislative policies and standards; the *ad hoc* processes of technical drafting; and the basic assumption that international criminal law norms will be embodied into the national criminal law of the various States.
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> [...]
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> 412. It has always been the practice of courts not to fill omissions in legislation when this can be said to have been deliberate. It would seem, however, that where the omission was accidental, it is usual to supply the missing words to give the legislation the meaning intended. *The paramount object in the construction of a criminal provision, or any other statute, is to ascertain the legislative intent. The rule of strict construction is not violated by giving the expression its full meaning or the alternative meaning which is more consonant with the legislative intent and best effectuates such intent.*[120]

61. The Appeals Chamber, in the *Aleksovski* Appeal Judgement, found that the principle of legality requires "that a person may only be found guilty of a crime in respect of acts which constituted a violation of the law at the time of their commission."[121] It further stated that the "principle does not prevent a court, either at the national or international level, from determining an issue through a process of interpretation and clarification as to the elements of a particular crime; nor does it prevent a court from relying on previous decisions which reflect an interpretation as to the meaning to be ascribed to particular ingredients of a crime."[122]

62. This Trial Chamber understands the principle of *nullum crimen sine lege*, a constitutive element of the principle of legality, in relation to the factual criminality of a particular *conduct*. In interpreting the principle of *nullum crimen sine lege*, it is critical to determine whether the

[120] *Čelebići* Trial Judgement, relevant parts from paras 402-412. (emphasis added).
[121] *Aleksovski* Appeal Judgement, para. 126.

underlying conduct at the time of its commission was punishable. The emphasis on conduct, rather than on the specific description of the offence in substantive criminal law, is of primary relevance. This interpretation of the principle is supported by the subsequent declaratory formulation of the principle of *nullum crimen sine lege* in Article 22 of the ICC Statute:

> A person shall not be criminally responsible under this Statute unless *the conduct* in question constitutes, at the time it takes place, a crime within the jurisdiction of the Court.[123]

This interpretation is further supported by the relevant practice between States in the field of extradition. In order to determine whether the requirement of double criminality is fulfilled, the test to be applied is not so much whether a certain conduct is qualified in the respective national jurisdiction in the same way, but whether the conduct in itself is criminalised under those jurisdictions.[124] The Trial Chamber is fully aware of the different contexts in which these two principles are applied. However, the Trial Chamber observes the similarity of the underlying problem and legal guarantee. In order to meet the principle of *nullum crimen sine lege*, it must only be foreseeable and accessible to a possible perpetrator that his concrete conduct was punishable at the time of commission. Whether his conduct was punishable as an act or an omission, or whether the conduct may lead to criminal responsibility, disciplinary responsibility or other sanctions is not of material importance.[125]

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[122] Ibid, para. 127.

[123] ICC Statute, Art. 22(1). (emphasis added).

[124] See, e.g., *Gesetz über die internationale Rechtshilfe in Strafsachen vom 23. Dezember 1982*, § 3 Abs. 2 (German Law on International Cooperation in Criminal Matters of 23 December 1982, Section 3, Para. 2): "Die Auslieferung zur Verfolgung ist nur zulässig, wenn die Tat nach deutschem Recht im Höchstmaß mit Freiheitsstrafe von mindestens einem Jahr bedroht ist oder wenn sie bei sinngemäßer Umstellung des Sachverhalts nach deutschem Recht mit einer solchen Strafe bedroht wäre." ("Extradition for the purpose of prosecution shall be granted only if the act is punishable under German law by a maximum of at least one year of imprisonment or if, *after analogous conversion of the facts*, the act would, under German law, be punishable by such a penalty.") Emphasis added. See Otto Lagodny in Wolfgang Schomburg and Otto Lagodny, *Internationale Rechtshilfe in Strafsachen/International Cooperation in Criminal Matters*, Third Edition (Munich: C. H. Beck, 1998), § 3 Abs. 2, Rdn. 25-29; "Einleitung", Rdn. 64.

[125] While the principle of *nullum crimen sine lege* "appears to have the force of an interpretative presumption in common-law systems", civil law systems generally accord it greater significance. Susan Lamb, "*Nullum crimen, nulla poena sine lege* in International Criminal Law," in Antonio Cassese, Paola Gaeta, John R.W.D. Jones, eds., *The Rome Statute of the International Criminal Court: A Commentary* (Oxford: Oxford University Press, 2002), p. 740. See also M. Cherif Bassiouni, *Crimes Against Humanity in International Criminal Law* (Dordrecht: Martinus Nijhoff Publishers, 1992), p. 91. In Germany, as already mentioned, the principle of *nullum crimen sine lege praevia* is elevated to constitutional rank (Article 103 Abs. II GG). For an authoritative discussion, see Eberhard Schmidt-Aßmann in Theodor Maunz et al., *Grundgesetz: Kommentar* (Munich: C. H. Beck, 1992), Art. 103 Abs. II GG, Rdn. 163-256. For a discussion of the principle of legality in international criminal law, see, for example, Bassiouni, *Crimes Against Humanity in International Criminal Law*, pp. 87-146; and Lamb, "*Nullum crimen, nulla poena sine lege* in International Criminal Law," pp. 733-766. On the principle of legality in American law, see, for example, Paul H. Robinson, *Fundamentals of Criminal Law*, Second Edition (Boston: Little, Brown, 1995), pp. 117-141. On the principle of legality in English law, frequently rendered in terms of "the rule of law," see, for example, Andrew Ashworth, *Principles of Criminal Law*, Third Edition (Oxford: Oxford University Press, 1999), esp. pp. 70-87. On the principle of *nullum crimen sine lege* in German criminal law, see also Claus Roxin, *Strafrecht: Allgemeiner Teil, Band I: Grundlagen, Der Aufbau der Verbrechenslehre*, Third Edition (Munich: C. H. Beck, 1997), § 5 I Rdn. 3; and Hans-Heinrich Jeschek and

63. Apart from the obligation to respect the principle of *nullum crimen sine lege*, the Trial Chamber is bound to interpret the Statute in accordance with Article 31 of the Vienna Convention on the Law of Treaties:

> in good faith, in accordance with the *ordinary meaning of the terms* in their context and in the light of its *object and purpose*. [126]

In order to do so, the Trial Chamber must take into account first the language of the Statute and second the object and purpose of this Statute, as becomes clear from *inter alia* the intention of the drafters of the Statute and of the Security Council. It is for this reason that the Trial Chamber will provide below a detailed overview of the different proposals that formed the basis for the Statute, the report of the Secretary-General, the relevant provisions of the Statute and the discussions in the Security Council at the moment of adoption of the Statute.

64. And as, according to Article 1 of the Statute, the International Tribunal has the power to prosecute persons responsible for serious violations of international humanitarian law, the Trial Chamber must consider as well the principles and purposes of this part of international law. International humanitarian law has, as its primary purpose, to regulate the means and methods of warfare and to protect persons not actively participating in armed conflict from harm. As the Trial Chamber held in *Furundžija* the general principle of respect for human dignity is the basic underpinning and indeed the very *raison d'être* of international humanitarian law and human rights law.[127] While international humanitarian law is largely derived from treaties and conventions, it also consists of a number of principles that have not been explicitly laid down in legal instruments, but are still considered fundamental to this body of law. Of fundamental importance in this respect is the so-called Martens clause, which can be found in numerous conventions in the field of international humanitarian law, ranging from the Hague Regulations to the Additional Protocols to the Geneva Conventions. According to this clause:

> Until a more complete code of the laws of war has been issued, the high contracting Parties deem it expedient to declare that, in cases not included in the Regulations adopted by them, the inhabitants and the belligerents remain under the protection and the rule of the principles of the

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Thomas Weigend, *Lehrbuch des Strafrechts: Allgemeiner Teil*, Fifth Edition (Berlin: Duncker und Humblot, 1996), § 15 IV.

[126] Vienna Convention on the Law of Treaties, 23 May 1969, 1155 U.N.T.S. 331. (emphasis added).

[127] *Prosecutor v. Anto Furundžija*, Case No. IT-95-17/1-T, Judgement, 10 December 1998, para. 183: "The general principle of respect for human dignity is the basic underpinning and indeed the very *raison d'être* of international humanitarian law and human rights law; indeed in modern times it has become of such paramount importance as to permeate the whole body of international law. This principle is intended to shield human beings from outrages upon their personal dignity, whether such outrages are carried out by unlawfully attacking the body or by humiliating and debasing the honour, the self-respect or the mental well being of a person."

> law of nations, as they result form the usages established among civilized peoples, from the laws of humanity, and the dictates of the public conscience.[128]

Although this formulation was first used in the context of a convention applicable to international armed conflicts, this clause has since been considered generally applicable to all types of armed conflicts. As such, it can also be found in the preamble to Additional Protocol II.

65. One of these fundamental principles underlying international humanitarian law is the principle of criminal responsibility for violations of such law. Although such responsibility is not always explicitly laid down in international humanitarian conventional instruments, it has been applied by national and international judicial organs in the course of the last century. Other fundamental principles, as will be discussed below, are the principle of responsible command and the principle of command responsibility. Both principles have sometimes been included in conventional instruments, but not always.

66. Finally, the purpose behind the principle of responsible command and the principle of command responsibility is to promote and ensure the compliance with the rules of international humanitarian law. The commander must act responsibly and provide some kind of organisational structure, has to ensure that subordinates observe the rules of armed conflict, and must prevent violations of such norms or, if they already have taken place, ensure that adequate measures are taken.

C. Developments in Relation to the Principle of Command Responsibility

67. In order to assess the arguments of the parties, the Trial Chamber finds it necessary to describe first the development of the doctrine of command responsibility in a chronological order. It will first focus on the development of the concept prior to the establishment of this Tribunal. Then, the Trial Chamber will describe the place this doctrine has in the Statute of the International Tribunal and in its case law. Respecting the principle of *nulllum crimen sine lege*, the Trial Chamber will draw preliminary findings regarding the status of the principle of command responsibility in internal armed conflicts under customary international law since 1991, and therefore at the time the offences charged in the Amended Indictment were allegedly committed, namely between 1 January 1993 and 31 January 1994, after each section. The Trial Chamber reserves, however, its final decision on this issue pending the discussion below. Additionally, it will briefly examine subsequent developments related to command responsibility, as far as these may be considered relevant to the issue in dispute. The Trial Chamber emphasises that discussion of

[128] This is the text taken from the Hague Regulations, 7th preambular paragraph.

subsequent developments related to command responsibility is not for the purpose of determining the issue before it, but rather for completeness of the discussion.

1. Developments prior to the creation of the International Tribunal

68. The question of where command responsibility may be considered to find its roots is not always answered in the same way. The Prosecution asserts that it finds its origins in the Lieber Code, promulgated by the Union government during the United States Civil War in 1863.[129] The Trial Chamber in the *Čelebići* case refers instead to the Hague Conventions of 1907.[130] Although different terminology is employed, the principles detailed therein foreshadow the current construction of the doctrine of command responsibility. Article 3 of Hague Convention IV of 1907 stipulates:

> A belligerent party which violates the provisions of the said Regulations shall, if the case demands, be liable to pay compensation. It shall be responsible for all acts committed by persons forming part of its armed forces.

Article 1 of the Annex to this Convention ("Hague Regulations") provides that:

> The laws, rights, and duties of war apply not only to armies, but also to militia and volunteer corps fulfilling the following conditions:
>
> 1. To be commanded by a person responsible for his subordinates;
>
> [...]
>
> 4. To conduct their operations in accordance with the laws and customs of war. In countries where militia or volunteer corps constitute the army, or form part of it, they are included under the denomination "army".

Furthermore, Article 43 of the Regulations requires a person in authority

> take all the measures in his power to restore, and ensure, as far as possible, public order and safety[...].

69. During the Preliminary Peace Conference in 1919, the report of the International Commission on the Responsibility of the Authors of War and on Enforcement of Penalties may have been the first explicit expression of individual criminal responsibility for failure to take the

[129] Instruction for the Government of the Armies of the United States in the Filed, Promulgated as General Orders No. 100 (24 April 1963) ("Lieber Code"). Art. 71 provides: "Whoever intentionally inflicts additional wounds on an enemy already wholly disabled, or kills such an enemy or who orders or encourages soldiers to do so, shall suffer death, if duly convicted, whether he belongs to the Army of the United States, or is an enemy captured after having committed his misdeed."

[130] *Čelebići* Trial Judgement, para. 335. See, e.g., William H. Parks, "Command Responsibility for War Crimes," 62 Mil. L. Rev. 1, 11 (1973): "Hague Convention Four, it is submitted, is a manifestation and codification of that which was custom among the signatory nations, giving early recognition to the duties and responsibilities of the commander."

necessary measures to prevent or repress breaches of the law of armed conflict. It recommended that a tribunal be established for the prosecution of all those who

> ordered, or with knowledge thereof and with power to intervene, abstained from preventing or taking measures to prevent, putting an end to or repressing violations of the laws or customs of war.[131]

As is well known, however, this tribunal was never realised and the doctrine of command responsibility for failure to act was not elaborated upon further until the Second World War.[132]

70. The Nuremberg and Tokyo Tribunals and subsequent judicial bodies applied the doctrine of command responsibility in a number of judgements. The Nuremberg Charter contained a provision for criminal responsibility upon which the case law related to command responsibility was based.[133] The Tokyo Tribunal Indictment included a charge under command responsibility:

> The Defendants ... being by virtue of their respective offices responsible for securing the observance of the said Conventions and assurances and the Laws and Customs of War in respect of the armed forces in the countries hereinafter named and in respect of many thousands of prisoners of war and civilians then in the power of Japan ... deliberately and recklessly disregarded their legal duty to take adequate steps to secure the observance and prevent breaches thereof, and thereby violated the laws of war.[134]

In *In re Yamashita*, the Supreme Court of the United States gave an affirmative answer to the question:

> whether the law of war imposed on an army commander a duty to take such appropriate measures as are within his power to control the troops under his command for the prevention of the specified acts which are violations of the law of war ... and whether he may be charged with personal responsibility for his failure to take such measures when violations result.[135]

This answer was largely based on the argument that a commander is duty-bound to exercise responsible command over his troops.[136] The Court found that this responsibility stemmed from a number of statutory provisions, such as Articles 1 and 43 of the Hague Regulations, Article 19 of the Ninth Hague Convention concerning Bombardment by Naval Forces in Time of War, and

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[131] Commission on the Responsibility of the Authors of War and on Enforcement of Penalties – Report Presented to the Preliminary Peace Conference, Versailles, 29 March 1919, as quoted by Burnett, "Command Responsibility and Case Study of the Criminal Responsibility of Israel Military Commanders for the Pogrom at Shatila and Sabra" 107 Mil. L. Rev. 77 (1985).

[132] The Trial Chamber in the *Čelebići* case referred to the national legislation of two countries, France (1944) and China (1946), in which it found the principle of command responsibility was recognised. See *Čelebići* Trial Judgement, paras 336-337.

[133] Article 6 of the Charter of the International Military Tribunal (8 August 1945) states, in part: "Leaders, organizers, instigators and accomplices participating in the formulation or execution of a common plan or conspiracy to commit any of the foregoing crimes are responsible for all acts performed by any persons in execution of such plan."

[134] Tokyo Tribunal Indictment, para. 56.

[135] *In re Yamashita*, 327 US 1, 15 (1946).

[136] See, e.g., William G. Eckhardt, "Command Criminal Responsibility: A Plea for a Workable Standard," 97 Mil. L. Rev. 1, 14 (1982): "Control includes as a minimum a duty to interfere if they [troops] behave improperly. This duty also encompasses a requirement to supervise, a duty to find out what is transpiring. There is no room in the concept of command for a "stick your head in the sand" approach."

Article 26 of the 1929 Geneva Convention for the Amelioration of the Condition of the Wounded and Sick in Armies in the Field.[137]

71. The Supreme Court further stated that the purpose of the laws of war was

> to protect civilian populations and prisoners of war from brutality and [that purpose] would be defeated if the commander of an invading army could with immunity neglect to take reasonable measures for their protection. *Hence the law of war presupposes that its violation is to be avoided through the control of operations of war by commanders who are to some extent responsible for their subordinates.*[138]

The Trial Chamber notes that Tomoyuki Yamashita, formerly General of the Fourteenth Army Group of the Imperial Japanese Army in the Philippine Islands, was convicted by a United States Military Commission in 1945 for unlawfully disregarding and failing to discharge his duty as commander to control the acts of members of his command by permitting them to commit war crimes. General Yamashita was charged with 64 separate allegations for the concrete acts committed by his subordinates, namely:

> (1) Starvation, execution, or massacre without trial and maladministration generally of civilian internees and prisoners of war;
>
> (2) Torture, rape, murder and mass execution of very large numbers of residents of the Philippines, including women and children and members of religious orders, by starvation, beheading, bayoneting, clubbing, hanging, burning alive, and destruction of explosives;
>
> (3) Burning and Demolition without adequate military necessity of large numbers of homes, places of business, places of religious worship, hospitals, public buildings, and educational institutions.

On 7 December 1945, the United States Military Commission found General Yamashita guilty as charged.[139]

72. The United States Military Tribunal at Nuremberg held in *Brandt and others* that:

> [t]he law of war imposes on a military officer in a position of command an affirmative duty to take such steps as are within his power and appropriate to the circumstances to control those under his command for the prevention of acts which are violations of the law of war.[140]

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[137] *In re Yamashita*, 327 US 1, 15-16 (1946). Additionally, the Court cited two internal provisions that recognise the duty of a commanding officer and that breach of such duty is penalised by US military Tribunals. See fn. 3, Gen. Orders No. 221, Hq. Div. of the Philippines, August 17, 1901 and Gen. Orders No. 264, Hq. Div. of the Philippines, September 9, 1901.

[138] *In re Yamashita*, 327 US 1, 15 (1946). (emphasis added).

[139] Trial of General Tomoyuki Yamashita, Case No. 21 (8 November-7 December 1945), *Law Reports of Trials of War Criminals, Vol. IV* (London: His Majesty's Stationary Office for the United Nations War Crimes Commission, 1948), pp. 4, 35.

[140] *United States v. Karl Brandt and others* ("*Medical Case*"), vol. II, Trials of War Criminals before the Nuremberg Military Tribunals under Control Council Law No. 10, 186, 212. While the doctrine of command responsibility was first applied in an international context by the Tokyo and Nuremberg Tribunals, it did not originate with the Tribunals, see William H. Parks, "Command Responsibility for War Crimes," 62 Mil. L. Rev. 1, 77 (1973): "While the custom – an imposition of responsibility upon a commander for illegal acts of his subordinates – existed prior to World War II, it

And in *Wilhelm List and others*, the Tribunal held that:

> [a] corps commander must be held responsible for the acts of his subordinate commanders in carrying out his orders and for acts which the corps commander knew or ought to have known about.[141]

73. Notwithstanding the fact that in the criminal cases just described a number of persons had been held criminally responsible on the basis of the principle of command responsibility, no reference to this principle was included in the Geneva Conventions adopted in 1949. The Geneva Conventions do, however, include a number of penal provisions. For example, Article 146 of the Fourth Geneva Convention establishes an obligation for States to enact legislation necessary to provide effective penal sanctions for the commission of any of the grave breaches of the Convention.[142] Article 147 further elaborates on these grave breaches. The Commentary to this Convention notes that several cases were tried in the Allied courts involving "responsibility which might be incurred by persons who do not intervene to prevent or to put an end to a breach of the Conventions" and concludes that "[i]n view of the Convention's silence on this point, it will have to be determined under municipal law either by the enactment of special provisions or by the application of the general clauses which may occur in the penal codes."[143] All that can be concluded from these provisions in the Conventions and the commentaries thereto is that only some of the violations of the Geneva Conventions amounted to grave breaches and that only in relation to such grave breaches, were States *obliged* to enact appropriate legislation in order to provide for penal sanctions for persons committing or ordering the commission of such breaches. The Conventions as such left it entirely to the discretion of States to provide for penal sanctions for other violations of the Conventions and to provide for penal sanctions for the principle of command responsibility in relation to the grave breaches or any other violations of the Conventions. This conclusion, as will be seen below, may impact on the interpretation and relevance of Additional Protocol II for the legal question with which this Chamber is confronted.

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was the action of commanders and national leaders during that conflict which so shocked the conscience of the world as to demand a strict accounting for the commencement and conduct of those hostilities. [...] The law of war, and as part thereof the law of command responsibility, witnessed great progression through definition and delineation, perhaps reaching a high water mark as international jurists concentrated their efforts on the subject."

[141] *United States v. Wilhelm List and others* ("*Hostage Case*") vol. XI, 1230, 1303. For other cases, see, e.g., U.S. *v. Wilhelm von Leeb et al.* ("*High Command Case*"), TWC vol. X and XI; *Tokyo War Crimes Trial*, Judgement, vol. 20; *US v. Toyoda*; *US v. Milch*, LRTWC, vol. VII; *US v. Pohl et al.*, TWC, Case No. 4, vol. V; *Roechling et al. Case*, (French zone) TWC, vol. XIV, Appendix B p. 1061 (see p. 1106). See for an overview of such cases the *Čelebići* Trial Judgement, paras 338-39. The present Trial Chamber would fully concur with the analysis presented in that judgement and considers it superfluous to quote again the case law presented there.

[142] Article 146, in part: "The High Contracting Parties undertake to enact any legislation necessary to provide effective penal sanctions for persons *committing or ordering to be committed*, any of the grave breaches of the present Convention [...] Each High Contracting Party shall take measures necessary for the suppression of all acts contrary to the provisions of the present Convention other than the grave breaches defined in the following Article. [...]"

[143] Jean Pictet (ed.) – Commentary: IV Geneva Convention Relative to the Protection of Civilian Persons in Time of War (1958) – 1994 reprint edition ("ICRC Commentary on Fourth Geneva Convention"), p. 592.

74. The "Affirmation of the Principles of International Law Recognised by the Charter of Nuremberg" ("Affirmation") adopted by the General Assembly in 1946, affirmed the principles of international law recognised by the Charter "and the judgement of the Tribunal".[144] This can be read as recognising the doctrine of command responsibility as a form of individual criminal responsibility to be a principle of international law. As the Affirmation called for the "progressive development of international law and its codification", the newly-established ILC set out the "Principles of International Law Recognised in the Charter of the Nuremberg Tribunal and in the Judgement of the Tribunal" in 1950.[145]

75. The ILC began work on the Draft Code of Offences against the Peace and Security of Mankind ("Draft Code of Offences") in 1950, pursuant to a request for such a document by the General Assembly. In 1950, the ILC recommended that the principle of superior responsibility be included in the Draft Code of Offences. In doing so, it first looked at the responsibility of a State under international law and found that persons vested with public authority – both military and civilian – would be the "parallel" to the State: "As a State is internationally responsible for unlawful acts and omissions of its organs, so would its organs be *criminally responsible* for the same acts and omissions."[146] It then surveyed national laws finding numerous sources for holding superiors responsible for tolerating commission of crimes by their subordinates,[147] and cited both the Tokyo Tribunal and cases from military tribunals established after the Second World War as precedent for the principle of superior responsibility.[148] The ILC recommended that "in view of the above practice" the following principle be adopted in the Draft:

> Any person in an official position, whether civil or military, who fails to take the appropriate measures in his power and within his jurisdiction, in order to prevent or repress punishable acts under the draft code shall be responsible therefor under international law and liable to punishment.[149]

The "acts under the draft code" included genocide, which can be committed in the absence of an armed conflict, and "violations of the laws or customs of war", as to which the ILC commented "in our view *any* violation of the laws and customs of war should be considered as a crime under

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[144] U.N. G.A. Res. 95, 1st Sess., 1144, U.N. Doc. A/236, 11 December 1946.
[145] Principles of International Law Recognised in the Charter of the Nuremberg Tribunal and in the Judgement of the Tribunal, Adopted by the ILC, U.N. Doc. A/1316, 2 Y.B.I.L.C. 374, 2 August 1950. See generally, Principle 1, Principle III and Principle VII.
[146] Report by J. Spiropoulous, Special Rapp., A/CN.4/25, 26 April 1950, para. 88. (emphasis added).
[147] Report by J. Spiropoulous, Special Rapp., A/CN.4/25, 26 April 1950, paras 88b-93, citing French, Chinese, Dutch, and Greek laws, and the Luxembourg Law on suppression of war crimes. The Trial Chamber notes that some of these laws refer to "accomplices" which the *Čelebici* Trial Chamber appears to have equated with, or seen as, a form of command responsibility. *Čelebici* Trial Judgement, paras 336-337.
[148] Ibid, paras 94-99. The Australian War Crimes Act of 1945 provided that "war crimes" included a violation of the laws and usages of war "*committed in any place whatsoever, whether within or beyond Australia during any war.*" para. 75. (emphasis added).
[149] Ibid, para. 100.

international law",[150] which thus, would include those committed in an international or internal armed conflict.

76. The 1954 Draft Code of Offences only included four Articles.[151] While it included a provision for individual criminal responsibility (Article 1), it did not include a provision on superior responsibility.

77. Since the early 1950's developments in the field of international humanitarian law were rather limited, both on the international and national levels. This applies equally to developments relating to the doctrine of command responsibility. No international judicial organ had applied this doctrine, until the International Tribunal was established. On the national level, however, some military manuals were adopted or amended which included provisions for command responsibility.

78. In a number of national military manuals, reference is made to the principle that a superior is responsible for violations of the laws of war committed by his subordinates. Significantly, the manual of the Yugoslav People's Army ("JNA") in the Socialist Federal Republic of Yugoslavia ("SRFY"), contained the following provision:

> The commander is personally responsible for violations of the law of war if he knew or could have known that his subordinate units or individuals are preparing to violate the law, and he does not take measures to prevent violations of the law of war. The commander who knows that the violations of the law of war took place and did not charge those responsible for the violations is personally responsible. In case he is not authorised to charge them, and he did not report them to the authorised military commander, *he would also be personally responsible.*
>
> A military commander is responsible as a participant or instigator if, by not taking measures against subordinates who violate the law of war, he allows his subordinate units to continue to commit attacks.[152]

79. The United States Army Field Manual on the Law of Warfare of 1956 (with amendments in 1976) states in paragraph 501, entitled "Responsibility for Acts of Subordinates":

> In some cases, military commanders may be responsible for war crimes committed by subordinate members of the armed forces, or other persons subject to their control. Thus, for instance, when troops commit massacres and atrocities against the civilian population of occupied territory or against prisoners of war, the responsibility may rest not only with the actual perpetrators but also with the commander. Such a responsibility arises directly when the acts in question have been committed in pursuance of an order of the commander concerned. The commander is also responsible if he has actual knowledge, or should have knowledge, through reports received by him or through other means, that troops or other persons subject to his control are about to commit

[150] Ibid, paras 57-82, with cites from para. 68.
[151] Report of the ILC covering the work of its sixth session, 3 June-28 July 1954, U.N. Doc. A/2693, 2 Y.B.I.L.C. 140, 151 (1954).
[152] SRFY Federal Secretariat for National Defence, Regulations Concerning the Application of International Law to the Armed Forces of SFRY (1988), Art. 21, reprinted in Bassiouni, The Law of the ICTY, p. 661. (emphasis added). The Trial Chamber notes that Article 6 of the Regulations ("International law of war and the sources upon which this instruction is based") refers to "armed conflict". See also, Criminal Code of SFRY, Art. 22 (complicity): "If several persons jointly commit a criminal act by participating in the act of commission or in some other way, each of them shall be punished as prescribed for the act."

> or have committed a war crime and he fails to take the necessary and reasonable steps to insure compliance with the law of war or to punish violators thereof.

Furthermore, paragraph 507 of this Manual, entitled "Universality of Jurisdiction", provides, in part:

> [...]
>
> b. Persons Charged With War Crimes. The United States normally punishes war crimes as such only if they are committed by enemy nationals or by persons serving the interests of the enemy State. Violations of the law of war committed by persons subject to the military law of the United States will usually constitute violations of the Uniform Code of Military Justice and, if so, will be prosecuted under that Code. Violations of the law of war committed within the United States by other persons will usually constitute violations of federal or state criminal law and preferably will be prosecuted under such law (...). Commanding officers of United States troops must insure that war crimes committed by members of their forces against enemy personnel are promptly and adequately punished.

80. The British Manual of Military Law of 1958, in its paragraph 631, reproduces the text of paragraph 501 of the US Army Field Manual on the Law of Warfare of 1956 quoted above, save for the last line.

81. In Germany, the Humanitarian Law in Armed Conflicts Manual, edited by the Federal Ministry of Defence, states in paragraph 138:

> The superior has to ensure that his subordinates are aware of their duties and rights under international law. He is obliged to prevent and, where necessary, to suppress or to report to competent authorities breaches of international law (Article 87 Additional Protocol I). He is supported in these tasks by the Legal Adviser (Article 82 Additional Protocol I).[153]

82. Although these manuals will normally have been elaborated in order to regulate the functioning of the army in the context of an international armed conflict, the US Army Field Manual of 1956 explicitly provides that:

> [t]he customary law of war becomes applicable to civil war upon recognition of the rebels as belligerents[154]

83. On the international level, a number of conventional developments are relevant to this issue. In this context, the Trial Chamber refers first to Article 2 of the Convention on the Non-Applicability of Statutory Limitations to War Crimes and Crimes Against Humanity[155] according to

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[153] Manual of Humanitarian Law in Armed Conflicts, Federal Ministry of Defence of the Federal Republic of Germany, VR II 3, August 1992. For a commentary on this article, see Christopher Greenwood, "Geschichtliche Entwicklung und Rechtsgrundlagen," in Dieter Fleck ed., *Handbuch des humanitären Völkerrechts in bewaffneten Konflikten* (Munich: C. H. Beck, 1994), p. 29 or Christopher Greenwood, "Historical Development and Legal Basis," in Dieter Fleck, ed., *The Handbook of Humanitarian Law in Armed Conflicts* (Oxford: Oxford University Press, 1995), p. 35.

[154] Paragraph 11a of the Manual of 1956. Further in this context, reference can be made to paragraph 499 of this Manual that states that "every violation of the law of war is a war crime". The British Military Manual of 1958 provides in paragraph 624, that "war crimes include all violations of the law of war".

[155] Convention on the Non-Applicability of Statutory Limitations to War Crimes and Crimes Against Humanity, G.A. res. 2391 (XXIII), Annex, 23 U.N. GAOR Supp. (No. 18) at 40, U.N. Doc. A/7218 (1968) (entered into force 11 November 1970; the former Yugoslavia ratified the Convention on 9 June 1970). Article 2 states: "If any of the crimes

which criminal responsibility also exists for those who "tolerate" the commission of war crimes and crimes against humanity.[156]

84. Discussions started in the course of the 1970s on the need to develop Additional Protocols to the Geneva Conventions. In those discussions, significantly, at first no provision was suggested relating to the duty of commanders.[157] However, in the end the principle of command responsibility was codified, only in Additional Protocol I. Article 86 and 87 of Additional Protocol I state:

> Article 86: Failure to Act
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> 1. The High Contracting Parties and the Parties to the conflict shall repress grave breaches, and take measures necessary to suppress all other breaches, of the Conventions or of this Protocol which result from a failure to act when under a duty to do so.
>
> 2. The fact that a breach of the Conventions or of this Protocol was committed by a subordinate does not absolve his superiors from penal or disciplinary responsibility, as the case may be, if they knew, or had information which should have enabled them to conclude in the circumstances at the time, that he was committing or was going to commit such a breach and if they did not take all feasible measures within their power to prevent or repress the breach.
>
> Article 87: Duty of Commanders
>
> 1. The High Contracting Parties and the Parties to the conflict shall require military commanders, with respect to members of the armed forces under their command and other persons under their control, and prevent and, where necessary, to suppress and report to competent authorities breaches of the Conventions and this Protocol.
>
> 2. In order to prevent and suppress breaches, High Contracting Parties and Parties to the conflict shall require that, commensurate with their level of responsibility, commanders ensure that members of the armed forces under their command are aware of the obligations under the Conventions and this Protocol.

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mentioned in Article 1 [war crimes and crimes against humanity, including apartheid and genocide] is committed, the provisions of this Convention shall apply to representatives if the State authority and private individuals who, as principals or accomplices, participate in or who directly incite others to the commission of any of those crimes, or who conspire to commit them, irrespective of the degree of completion, and *to representatives of the State authority who tolerate their commission.*" Article 3 places an obligation on State Parties to "undertake to adopt all necessary measures, legislative or otherwise, with a view to making possible the extradition" of persons referred to in Article 2.

[156] See Commentary on the Additional Protocols, para. 3526 (on Art. 86): "It is not for the first time that international treaty law provides for criminal responsibility of those who have failed in their duty to act. In this context, we would refer to the Convention on the Non-Applicability of Statutory Limitations to War Crimes and Crimes Against Humanity [...]."

[157] Commentary on the Additional Protocols, para. 3551. Article 87 was first introduced in May 1976 by the United States, in the middle of the Third Session of the Diplomatic Conference. CDDH/I/SR.50, para. 64. In explaining the reason behind the new article, the delegate from the United States explained: "By and large, implementation of Protocol I and of the Geneva Conventions depended on commanders. Without their conscientious supervision, general legal requirements were unlikely to be effective." The article was "designed to provide commanders with clear notice of their responsibilities both in the prevention and repression of breaches during the actual conduct of military operations and in the prevention and repression of breaches through the establishment of the appropriate training measures required at all times." Finally, the reference to "commanders" was "intended to refer to all those persons who had command responsibility, from commanders at the highest level to leaders with only a few men under their command." CDDH/I/SR.50, paras 68-70. Notably, the delegate from Italy said, in expressing his country's support for the new article that it would "strengthen and improve not only the system for the repression of grave breaches, established by the Geneva Conventions of 1949 and Protocol I, *but also the system for the repression of simple breaches.*" CDDH/I/SR.51, para. 5. (emphasis added).

> 3. The High Contracting Parties and Parties to the conflict shall require 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.

85. According to the Commentary on the Additional Protocols, with regard to Article 86, "[t]he importance of this provision cannot be doubted."[158] At the same time however, the Commentary made it clear that the principle as such was by no means new:

> The recognition of the responsibility of superiors who, without any excuse, fail to prevent their subordinates from committing breaches of the law of armed conflict is therefore by no means new in treaty law. However, this principle was not specifically governed by provisions imposing penal sanctions.[159]

Quite to the contrary, the Commentary observes that the notion of a breach of international law consisting of an omission is "uncontested" and follows from State practice, case law and legal literature.[160] The Commentary found the basis for the post-Second World War convictions to rest "only on national legislation, either on explicit provisions, or on the application of general principles found in criminal codes."[161] Also in the course of the negotiations at the Diplomatic Conference, a number of delegations commented that the provisions of what was finally included in Article 87 were already found in the military codes of all countries.[162] The Canadian delegate questioned whether an article on "failure to act" was necessary, as the existing law on this subject was clear: "In the Canadian military code, for instance, direct responsibility rested with any superior, whatever his rank."[163] Similarly, the delegate from the Philippines questioned whether the "duty of commanders" article was necessary as "in any military organization, a commander was under an obligation to prevent his men from committing acts of a criminal nature, otherwise he could be charged with criminal negligence."[164] Notably, the delegate from Yugoslavia had a similar comment on this article, stating that it "consisted of provisions which were already in the military codes of all countries" but that his country had voted for it "in view of the interest expressed in the item by some delegations."[165]

86. Thus, the inclusion of Article 87 was not intended to create new law nor to fill a gap in existing law, but rather to merely "ensur[e] that they [provisions related to duties of commanders]

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[158] Commentary on the Additional Protocols, para. 3529.
[159] Ibid, para. 3540.
[160] Ibid, para. 3529.
[161] Ibid, para. 3525.
[162] Ibid, para. 3562.
[163] CDDH/I/SR.50, para. 47.
[164] CDDH/I/SR.51, para. 9.
[165] CDDH/I/SR.71, para. 2.

are explicitly applicable with respect to the provisions of the Conventions and the Protocol."[166] Article 87 is intended to apply to "all persons who had command responsibility" and "[t]here is no member of the armed forces exercising command who is not obliged to ensure the proper application of the Conventions and the Protocol."[167]

87. As observed by both parties, Additional Protocol II, applicable to armed conflicts of a non-international character, does not include provisions similar to Articles 86 and 87 of Additional Protocol I. However, this Protocol does touch upon the position of a commander, albeit in a more general way than in Additional Protocol I. Article 1 of Additional Protocol II makes explicit reference to the concept of responsible command, a concept which was also included in various previous instruments, as described above:

> This Protocol (...) shall apply to all armed conflicts which are not covered by Article 1 of the Protocol Additional to the Geneva Conventions of 12 August 1949, and relating to the Protection of Victims of International Armed Conflicts (Protocol I) and which take place in the territory of a High Contracting Party between its armed forces and dissident armed forces or other organized armed groups which, *under responsible command*, exercise such control over a part of its territory as to enable them to carry out sustained and concerted military operations and to implement this Protocol.[168]

The Commentary on this point states:

> [t]he existence of a responsible command implies some degree of organization of the insurgent armed group or dissident armed forces, but this does not necessarily mean that there is a hierarchical system of military organization similar to that of regular armed forces. *It means an organization capable, on the one hand, of planning and carrying out sustained and concerted military operations,* and on the other, *of imposing discipline in the name of a de facto authority.*[169]

88. Furthermore, the Trial Chamber refers to the "penal prosecutions" provisions, laid down in Article 6 of Additional Protocol II. The aim of this provision was primarily to provide guarantees that if a person was charged with violations of international humanitarian law in internal armed conflicts, he or she would receive a fair trial.[170] While it does not – and was not intended to – clarify or supplement the basis for individual criminal responsibility, it affirms that the drafters of Additional Protocol II envisioned that prosecutions could be held for those who committed violations of international humanitarian law in internal armed conflicts.

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[166] Commentary on the Additional Protocols, para. 3562: "The object of these texts is to ensure that military commanders at every level exercise the power vested in them, both with regard to the provitions [sic] of the Conventions and Protocol, and with regard to other rules of the army to which they belong. Such powers exist in all armies."
[167] Commentary on the Additional Protocols, para. 3553.
[168] Article 1, paragraph 1 of Additional Protocol II. (emphasis added).
[169] Commentary on the Additional Protocols, para. 4463. (emphasis added).
[170] Art. 6 of Additional Protocol II is largely based on Art. 14 of the ICCPR and is comparable to Art. 75 of Additional Protocol I.

89. Beginning in 1980, the ILC started working again on the Draft Code of Offences, following renewed interest by the General Assembly in preparing a code of crimes. In 1986, the ILC produced updated "Draft Articles".[171] This draft included a specific provision on superior responsibility included in the "General Principles" section of the draft. Article 9, entitled "responsibility of the superior", read:

> The fact that an offence was committed by a subordinate does not relieve his superiors of their criminal responsibility, if they knew or possessed information enabling them to conclude, in the circumstances then existing, that the subordinate was committing or was going to commit such an offence and if they did not take all the practically feasible measures in their power to prevent or suppress the offence.[172]

The commentary on this article states that the

> Commission may also leave the hypothesis in question to be covered by the general theory of complicity. It should be remembered, however, that these are offences committed within the framework of a hierarchy, which therefore almost always involve the power of command. It may therefore be useful to provide a separate basis and an independent written source to cover the responsibility of the leader.[173]

The offences listed under the title "Offences against the Peace and Security of Mankind", included crimes against peace, crimes against humanity, including genocide, and war crimes. Notably, the term "war crimes" applies to serious violations of the laws or customs of war in both international and non-international armed conflicts.

90. The new ILC draft re-ordered the articles, moving "responsibility of the superior" to Article 10 in 1987.[174] In its commentary on this article, the ILC refers to superior responsibility as "a specific case of the theory of complicity."[175] It describes the "complicity" as either:

> the consequence of an order given by an individual who has the authority to give commands, or a deliberate omission on the part of such an individual in an instance where he had the power to prevent the offence. It can also result from negligence, since in principle all military leaders must keep themselves informed of the situation of the units under their command and of the acts committed or planned by them.[176]

The *Yamashita* and *Hostage* cases are cited in support of recognition of the duty imposed on commanders and the subsequent criminal responsibility imposed on superiors who fail to prevent the commission of crimes by their subordinates. The commentary finds that there is one difficulty that arises from this provision, and notably it is "not a substantive problem, but rather a

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[171] Fourth report on the draft Code of Offences against the Peace and Security of Mankind, by Mr. Doudou Thiam, Special Rapporteur, A/CN.4/398, 11 March 1986, Part V, para. 260.
[172] Ibid.
[173] Fourth report on the draft Code of Offences against the Peace and Security of Mankind, by Mr. Doudou Thiam, Special Rapporteur, A/CN.4/398, 11 March 1986, Part V, para. 260, p. 83.
[174] Fifth report on the draft Code of Offences against the Peace and Security of Mankind, by Mr. Doudou Thiam, Special Rapporteur, A/CN.4/404, 17 March 1987, Part V.
[175] Ibid, Art. 10, Commentary (1).
[176] Ibid.

methodological one."[177] The question was whether to include this specific article or whether "the general theory of complicity should be allowed to cover cases falling within this category."[178] In noting that Additional Protocol I devoted two articles to this subject, and that there are "consistent judicial decision and treaty provisions on the subject," as well as the fact that the offences in the draft are "committed in the context of a hierarchy",[179] the ILC opted to maintain a separate article on superior responsibility.

91. In 1988, the ILC presented a slightly altered version of Article 10.[180] It reads:

> Responsibility of the superior:
>
> The fact that a crime against the peace and security of mankind was committed by a subordinate does not relieve his superiors of criminal responsibility, if they knew or had information enabling them to conclude, in the circumstances at the time, that the subordinate was committing or was going to commit such a crime and if they did not take all feasible measures within their power to prevent or repress the crime.

92. This is the same wording as that adopted by the ILC in the 1991 Draft Code of Crimes in Article 12, in the section of the document entitled "General Principles".[181] The commentary on this article stated that the principle of the responsibility of the superior for crimes committed by his subordinates has origins in both international judicial decisions and post-World War II international criminal law, citing Additional Protocol I as an example. The commentary elaborates on the elements of the principle, finding that the superior incurs criminal responsibility "even if he has not examined the information sufficiently or, having examined it, has not drawn the obvious conclusions."[182] The Trial Chamber notes that the crimes included in the 1991 Draft Code of Crimes are quite far-reaching including international terrorism, illicit traffic in narcotic drugs, and wilful and severe damage to the environment, as well as genocide and "exceptionally serious war crimes" committed in an armed conflict.

93. Based on the foregoing, the Trial Chamber makes the following preliminary findings with regard to the doctrine of command responsibility prior to the time when the jurisdiction of the International Tribunal takes effect:

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[177] Ibid, Art. 10, Commentary (4).
[178] Ibid.
[179] Ibid, Art. 10, Commentary (6).
[180] Report of the International Law Commission on the work of its fortieth session (9 May-29 July 1988), A/43/10 ("Report on the 40th Session"), p. 70-71.
[181] Draft Articles on the Draft Code of Crimes against the Peace and Security of Mankind (as revised by the International Law Commission through 1991). First Adopted by the U.N. ILC, 4 December 1954, U.N. Doc. A/46/405 (1991), 30 I.L.M. 1554 (1991).
[182] Report on the 40th Session, p. 71, Art. 10, Commentary (4). The Commission also commented on the "feasible measures" aspect of the article, suggesting that "for the superior to incur responsibility, he must have had the legal competence to take measures to prevent or repress the crime and the material possibility to take such measures." Report on the 40th Session, p. 71, Art. 10, Commentary (5).

(i) the doctrine has its roots in *inter alia* the principle of "responsible command" and fundamental tenets of military law;

(ii) the doctrine has been applied in a manner whereby commanders or superiors have incurred individual criminal responsibility based on their failure to carry out their duty to either prevent their subordinates from committing violations of international law or for punishing them thereafter;

(iii) the doctrine has been recognised as forming part of customary international law and a general principle of international criminal law;

(iv) the primary purpose of the doctrine is to ensure compliance with the laws and customs or war and international humanitarian law generally;

(v) the doctrine has been recognised as applying to offences committed either within or in the absence of an armed conflict; and

(vi) the doctrine has been recognised as applying to offences committed either in an international or an internal armed conflict.

With regard to points (v) and (vi), the Trial Chamber takes note of the fact that neither finding has been explicitly codified in an international agreement or treaty, with the exception of Additional Protocol I in relation to international armed conflicts, and that neither finding has been ruled on explicitly by an international judicial body, again with the exception of instances of international armed conflicts.

2. The creation of the International Tribunal

94. Article 1 of the Statute lays down the competence of the International Tribunal

> [t]o prosecute persons responsible for serious violations of international humanitarian law committed in the territory of the former Yugoslavia since 1991 in accordance with the provisions of the present Statute.

95. Individual criminal responsibility is defined in Article 7 of the Statute, which states, in part:

> 1. A person who planned, instigated, ordered, committed or otherwise aided and abetted in the planning, preparation or execution of a crime referred to in articles 2 to 5 of the present Statute, shall be individually responsible for the crime.
>
> 2. The official position of any accused person, whether as Head of State or Government or as a responsible Government official, shall not relieve such person of criminal responsibility nor mitigate punishment.
>
> 3. 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.
>
> [...]

96. The Trial Chamber conducted a survey of official reports and preparatory documents for the Statute to assist it in interpreting the provisions contained therein, and specifically the intended scope of individual criminal responsibility and the doctrine of command responsibility.

97. The Security Council has adopted over forty resolutions on the conflict in the former Yugoslavia. In a number of them, the violations of international humanitarian law formed the major issue. Many of these resolutions have been adopted under Chapter VII of the Charter of the United Nations. In resolution 764 (13 July 1992), the Security Council reaffirmed that all parties are bound to comply with the obligations under international humanitarian law, and that:

> [p]ersons who commit or order the commission of grave breaches of the Conventions are individually responsible in respect of such breaches [...].

In resolution 771 (13 Aug. 1992), the Security Council dealt specifically with continuing reports of widespread violations of international humanitarian law occurring within the territory of the former Yugoslavia and "especially in Bosnia and Herzegovina", strongly condemned "any violations of international humanitarian law" and demanded that "all parties and others concerned in the former Yugoslavia, and all military forces in Bosnia and Herzegovina" shall "immediately cease and desist from *all* breaches of international humanitarian law".[183] In resolution 780, on 6 October 1992, the Security Council called for the creation of a Commission of Experts to examine and analyse information regarding violations of humanitarian law, including grave breaches of the Geneva Conventions, committed in the territory of the former Yugoslavia. On 16 November 1992, the Council adopted resolution 787, in which it condemned all violations of international humanitarian law and

> reaffirms that those who commit or order the commission of such acts will be held individually responsible in respect of such acts [...].

Also in a number of subsequent resolutions, reference was made to violations of international humanitarian law. Reference was sometimes also made to the practice of ethnic cleansing or the denial or the obstruction of access of civilians to humanitarian aid and services such as medical assistance and basic utilities.[184] The Interim Report of the Commission of Experts stated that the

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[183] (emphasis added).
[184] See *inter alia* resolution 819 of 16 April 1993, resolution 824 of 6 May 1993, resolution 844 of 18 June 1993 and resolution 859 of 24 August 1993.

establishment of an *ad hoc* international tribunal in relation to events in the territory of the former Yugoslavia "would be consistent with the direction of its work".[185]

98. In resolution 808 of 22 February 1993, the Security Council decided that an international tribunal shall be established for the prosecution of persons responsible for serious violations of international humanitarian law. The Security Council cited the reports of "widespread violations of international humanitarian law occurring within the territory of the former Yugoslavia" and found that the situation constituted a threat to international peace and security. It further expressed its determination to put an end "to such crimes and to take effective measures to bring to justice the persons who are responsible for them."[186]

99. When subjecting these resolutions to a closer scrutiny, a number of relevant aspects become apparent. First, the Council does at no point in time express itself on the character of the armed conflict. It almost always refers to "violations of international humanitarian law" without further specifying which norms are meant. In some instances, reference is made to the grave breaches, but there, like in resolution 780, the phrase used is "violations of humanitarian law, including grave breaches". From the use of these various formula, the Trial Chamber concludes that the Security Council has deliberately not expressed itself on the character of the armed conflict and also deliberately left open the possibility of the application of norms relating to internal armed conflicts. This finding is consistent with that of the Appeals Chamber in the *Tadić* Appeals Decision on Jurisdiction:

> On the basis of the foregoing, we conclude that the conflicts in the former Yugoslavia have both internal and international aspects, that the members of the Security Council had both aspects of the conflicts in mind when they adopted the Statute of the International Tribunal, and that they intended to empower the International Tribunal to adjudicate violations of humanitarian law that occurred in either context. To the extent possible under existing international law, the Statute should therefore be construed to give effect to that purpose.[187]

The Trial Chamber notes that the Security Council often cited specifically the armed conflict in Bosnia and Herzegovina, and there again did not seek to limit the reach of international

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[185] "Letter Dated 9 February 1993 from the Secretary-General Addressed to the President of the Security Council" Annex, Interim Report of the Commission of Experts Established pursuant to Security Council Resolution 780 (1992) ("Interim Report"), U.N. Doc. S/25274, 10 February 1993, para. 74.

[186] See also, General Assembly resolution 46/242 of 25 August 1992, which condemned the widespread violations of international humanitarian law occurring within the territory of the former Yugoslavia and "especially in Bosnia and Herzegovina and resolution 47/121of the General Assembly of 18 December 1992, in which the Assembly urged the Security Council "to consider recommending the establishment of an *ad hoc* international war crimes tribunal to try and punish those who have committed war crimes in the Republic of Bosnia and Herzegovina [...]". See also, Security Council resolution 820 of 17 April 1993, in which the Council reaffirmed its decision that an international tribunal shall be established for the prosecution of persons responsible for serious violations of international humanitarian law committed in the territory of the former Yugoslavia since 1991, and all violations of international humanitarian law and that "all those who commit or have committed or ordered or have ordered the commission of such acts will be held individually responsible in respect of such acts".

[187] *Tadić* Jurisdiction Decision, para. 77.

humanitarian law *vis-à-vis* individual responsibility in the event that the armed conflict could be termed an "internal armed conflict" within Bosnia and Herzegovina.

100. Second, the choice of words in the various resolutions was always such that it expressed its intention "to bring to justice the persons responsible" for violations of international humanitarian law. No distinction was made between those who commit violations in an internal armed conflict and those who commit violations in an international armed conflict. Furthermore, no distinction was made between the various theories of individual criminal responsibility. In a number of instances the Council made explicit reference to "those who commit or order" such crimes, but these formulations were a further elaboration of the idea that all persons who violated international humanitarian law were to be held responsible for such acts, whether omissions or commissions.

101. Finally, the Trial Chamber observes that most of the relevant resolutions were adopted under Chapter VII of the Charter of the United Nations, and thereby became binding on all parties and all persons involved in the conflict. In other words, each and every person involved in the conflict, whether in a superior or subordinate position and whether involved in a conflict of an international or internal nature, was bound to observe the resolutions of the Security Council.

102. A similar approach can be found in the report of the Commission of Experts. In a letter from the Secretary-General to the President of the Security Council of 9 February 1993, the Secretary-General annexed the "Interim Report of the Commission of Experts Established Pursuant to Security Council Resolution 780 (1992)".[188] The Commission of Experts listed the international agreements and laws relevant to the conflict in the former Yugoslavia. The Commission declined, however, to make a finding of the nature of the conflict and opined that the law applicable to international armed conflicts should apply in its entirety to the situation in the former Yugoslavia. It stated in this respect:

> The Commission is of the opinion, however, that the character and complexity of the armed conflicts concerned, combined with the web of agreements on humanitarian issues the parties have concluded among themselves, justify an approach whereby it applies the law applicable in international armed conflicts to the entirety of the armed conflicts in the territory of the former Yugoslavia.[189]

103. The Trial Chamber notes that in the "Special Agreement" entered into between the parties to the conflict in Bosnia and Herzegovina on 22 May 1992, under the auspices of the International Committee of the Red Cross, the parties "reiterat[e] their commitment to respect and *ensure respect for the rules of International Humanitarian law*." The Trial Chamber further notes that each party, *inter alia*,

> undertakes, when it is informed, in particular by the ICRC, of any allegation of violations of international humanitarian law, to open an enquiry promptly and pursue it conscientiously, and to take the necessary steps to put an end to the alleged violations or prevent their recurrence *and to punish those responsible in accordance with the law in force.*[190]

104. The Commission of Experts also addressed the issue of command responsibility in its Report:

> Superiors are moreover individually responsible for a war crime or a crime against humanity committed by a subordinate if they knew, or had information which should have enabled them to conclude, in the circumstances at the time, that the subordinate was committing or was going to commit such an act and they did not take all feasible measures within their power to prevent or repress the act.[191]

On military commanders, the Commission of Experts observed:

> Military commanders are under a special obligation, with respect to members of armed forces under their command or other persons under their control, to prevent, and where necessary, to suppress such acts and to report them to competent authorities.[192]

On the issue of the object and purpose of the doctrine of command responsibility, it observed in its Final Report:

> The doctrine of command responsibility is directed primarily at military commanders because such persons have a personal obligation to ensure the maintenance of discipline among troops under their command. Most legal cases in which the doctrine of command responsibility has been considered have involved military or paramilitary accused. Political leaders and political officials have also been held liable under the doctrine in certain circumstances.[193]

Thus, it is clear that the Commission of Experts considered that the doctrine of command responsibility should be applicable to any war crime or crime against humanity committed in the former Yugoslavia.

105. After the Security Council had taken the decision that an international tribunal should be established, a number of States submitted draft proposals to the Secretary-General of the United Nations, in preparation of the draft Statute for the Tribunal. In a number of these proposals, specific comments were made on the doctrine of command responsibility, supporting not only the inclusion of this doctrine in the Statute but also a broad application. The Trial Chamber observes that such official pronouncements of States may serve as a guide to the status of customary rules or general principles of law.

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[188] Interim Report.
[189] Ibid, para. 45.
[190] (emphasis added).
[191] Interim Report, para. 52.
[192] Ibid, para. 53.
[193] Final Report of 27 May 1994, UN Doc. S/1994/674, para. 57.

106. The Government of Italy submitted a draft statute for the International Tribunal and comments.[194] The draft statute included a provision for superior responsibility under the title "Principles of criminal liability" which stated:

> [t]he fact that one of the crimes referred to in article 4[195] is committed by a subordinate does not exclude the hierarchical superiors from criminal liability, if they knew, or were in possession of information which would have enabled them to conclude, in the circumstances of the moment, that the subordinate was committing, or was about to commit, the crime or if they had failed to take every possible measure to prevent its commission.[196]

107. The Government of the United States of America issued a letter to the Secretary-General, which contained a draft "charter" for the International Tribunal. In its introduction to the draft, the United States maintains that the "Tribunal should apply substantive and procedural law that is internationally accepted."[197] The United States includes the doctrine of command responsibility in its draft charter, which evinces the belief on the part of the United States that command responsibility is "internationally accepted." In its draft, Article 11 states that "[t]here shall be individual responsibility for the violations set forth in article 10."[198] Article 11 (b) reads:

> An accused person with military or political authority or responsibility is individually responsible if violations described in article 10 were committed in pursuance of his or her order, directive or policy. An accused person is *also individually responsible* if he or she had actual knowledge, or had reason to know, through reports to the accused person or through other means, that troops or other persons subject to his or her control were about to commit or had committed such violations, and the accused person failed to take necessary and reasonable steps to prevent such violations or to punish those committing such violations.[199]

108. The Government of Canada issued a letter with comments on the draft statute in response to Security Council Resolution 808 on 13 April 1993 to the Secretary-General. Canada stated that it is "essential" that the principles of *nullum crimen sine lege* and *nulla poena sine lege* be applied. Canada stated that "the conduct prohibited and the required accompanying mental state should be expressly stated."[200] Regarding the inclusion of the doctrine of command responsibility,

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[194] Letter dated 16 February 1993 from the Permanent Representative of Italy to the United Nations addressed to the Secretary-General, S/25300, 17 February 1993.
[195] Article 4 referred to the following crimes: (a) war crimes, such as violations of the Geneva Conventions and of the Additional Protocols, "as well as any other war crime as defined by international customary law or by international treaties"; (b) crimes of genocide; (c) crimes against humanity consisting of systematic or repeated violations of human rights; and (d) acts of torture.
[196] Letter of Italy, Art. 5(3).
[197] Letter of 5 April 1993 from the Permanent Representative of the United States of America to the United Nations Secretary-General, S/25575, 12 April 1993, p. 2.
[198] Article 10 referred to the following crimes: (a) Violations of the laws or customs of war, including the regulations annexed to the Hague Convention IV of 1907 and grave breaches of the Geneva Conventions of 12 August 1949. For this purpose, the conflict in the former Yugoslavia on or after 25 June 1991 shall be deemed to be of an international character; (b)(i) Acts of murder, torture, extrajudicial and summary execution, illegal detention and rape that are part of a campaign or attack against any civilian population in the former Yugoslavia on national, racial, ethnic or religious grounds; (ii) Acts that violate the Convention on the Prevention and Punishment of the Crime of Genocide.
[199] Letter of 5 April 1993, S/25575, p. 7.
[200] Letter dated 13 April 1993 from the Permanent Representative of Canada to the United Nations Secretary-General, S/25594, 14 April 1993, paras 7-8.

> Canada supports the position that the principles governing criminal liability which hold superiors accountable for the crimes of their subordinates.[201]

While the letter does not comment on the scope of this principle, Canada's interpretation of "serious violations of international humanitarian law" is helpful. It found the jurisdiction to include violations of the laws or customs of war, "including" grave breaches of the Geneva Conventions and Additional Protocol I, crimes against humanity under customary or conventional law, and acts which violate the Genocide Convention and the Convention against Torture.[202]

109. Finally, the Government of the Netherlands also submitted "observations" on the establishment of international ad hoc tribunal to the Secretary-General. It suggested the inclusion of a provision in the Statute according to which persons should be prosecuted for

> [t]he fact of having ordered, authorised or permitted the commission of war crimes and/or crimes against humanity and the fact of being in a position to influence the general standard of behaviour and having culpably neglected to take action against crimes of that kind. This is the case if the persons concerned should have known of the relevant acts, and could have prevented, terminated, or repressed the commission of those acts, and were duty-bound thereto but failed to do so.[203]

The Netherlands addressed the responsibility of the government *vis-à-vis* crimes against humanity and the commission of offences:

> [a]s part of the deliberate, systematic persecution of a particular group of people and/or are designed systematically to deprive that group of people of their rights, *and if the government, which under national law is bound to prevent and suppress such crimes, tolerates or even assists the commission of such crimes against that group of people.* Acts of this kind undermine the norms and principles of the international community. *In such cases, therefore, the international community has the right to deal with these offences and to undertake to prosecute and try those who commit them.*[204]

The Trial Chamber interprets these observations by the Netherlands as a support for the prosecution of all government officials or persons in positions of authority who failed to prevent or suppress violations of international humanitarian law. The Trial Chamber further notes that in the observations, no distinction is made between internal or international armed conflicts.[205]

110. Next, the Trial Chamber considers that the Report of the Secretary-General on the draft Statute of the International Tribunal as providing guidance for the interpretation of the Statute. In his Report, the Secretary-General recalls many of the Security Council resolutions related to the

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[201] Ibid, para. 12.
[202] Ibid, para. 9.
[203] Letter dated 4 May 1993 from the Permanent Representative of the Netherlands to the United Nations Secretary-General, S/25716, 4 May 1993, p. 4.
[204] Letter of the Netherlands, S/25716, p. 4. (emphasis added).
[205] In addition, see *e.g.* the suggestions contained in the letter of the Permanent Representative of Russia in which no specific provision on command responsibility is included. Included, however, is a provision stating that ones official position cannot be used as a defence to prosecution. Letter dated 5 April 1993 from the Permanent Representative of the Russian Federation to the United Nations addressed to the Secretary-General, S/25537, 6 April 1993, Art. 14.

object and purpose of the International Tribunal, and particularly reaffirms that "those who commit or have committed or order or have ordered the commission of acts will be held individually responsible in respect of such acts."[206]

111. In terms of the substance of the Statute, the Secretary-General confirms that:

> [t]he formulations are based upon provisions found in existing international instruments, particularly with regard to competence *ratione materiae* of the International Tribunal.[207]

112. As to the temporal jurisdiction of the International Tribunal, the Statute deliberately reflects the date of 1 January 1991. According to the Secretary-General, this date was chosen as it

> is a neutral date which is not tied to any specific event and is clearly intended to convey the notion that no judgement as to the international or internal character of the conflict is being exercised.[208]

As the *Tadić* Appeals Chamber recounts, the Security Council was aware of – and drafted the Statute to reflect – the mixed character of the conflicts in the former Yugoslavia.[209]

113. On the issue of individual criminal responsibility, the Secretary-General observes that practically all suggestions submitted by States on the Statute include a comment on the need to provide for criminal responsibility for heads of State, government officials and persons acting in an official capacity. He states his belief that "all" persons who participate in the planning, preparation or execution of serious violations of international humanitarian law in the former Yugoslavia "contribute to the commission of the violation and are, therefore, individually responsible."[210]

114. The Report of the Secretary-General states the importance of imputing individual criminal responsibility on superiors:

> 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. 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 those who had committed them.*[211]

At no point in his report does the Secretary-General elude to the possible relevance of conflict classification for the scope of individual criminal responsibility laid down in the Statute.

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[206] Report of the Secretary-General, para. 11.
[207] Ibid para. 17.
[208] Ibid, para. 62.
[209] *Tadić* Appeals Decision on Jurisdiction, paras 73-74.
[210] Report of the Secretary-General, paras 55 and 54.
[211] Ibid, para. 56. (emphasis added).

115. The Statute of the International Tribunal was adopted unanimously by the Security Council on 25 May 1993, as Security Council Resolution 827 (1993).[212] In this resolution, the Council expressed its

> [g]rave alarm at continuing reports of widespread and flagrant violations of international humanitarian law occurring within the territory of the former Yugoslavia, and especially in the Republic of Bosnia and Herzegovina [...].

The Security Council stated its determination

> [t]o put an end to such crimes and to take effective measures to bring to justice the persons who are responsible for them.

The Trial Chamber observes that the formulation chosen - "to bring to justice the persons responsible" – in the resolution by which the Statute of this Tribunal was adopted, does not put any limitations on the individual criminal liability of persons depending on the nature of the conflict.

116. Upon the adoption of the Statute, a number of States commented upon the substance of the text of the Statute. The representative of the United States, for example, commented:

> The crimes being committed, even as we meet today, are not just isolated acts of drunken militiamen, but often are the systematic and orchestrated crimes of Government officials, military commanders, and disciplined artillerymen and foot soldiers. *The men and women behind these crimes are individually responsible for the crimes of those they purport to control; the fact that their power is often self-proclaimed does not lessen their culpability.*[213]

The United States also commented on its understanding of Article 7 of the Statute:

> With respect to paragraph 1 of Article 7, it is our understanding that individual liability arises in the case of a conspiracy to commit a crime referred to in Articles 2 through 5, *or the failure of a superior – whether political or military – to take reasonable steps to prevent or punish such crimes by persons under his or her authority.*[214]

The Trial Chamber concludes that the United States did not consider that the principle of command responsibility should be limited to situations of international armed conflict. Quite to the contrary, the reference in the first quotation here to the "men and women behind these crimes" with power which "is often self-proclaimed" would rather justify the conclusion that command responsibility should certainly also apply to superiors in the context of an internal armed conflict.

117. During the same meeting, the representative from the United Kingdom stated that:

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[212] Provisional Verbatim Record of the Three Thousand Two Hundred and Seventeenth Meeting, 25 May 1993, S/PV.3217, p. 6.
[213] Ibid, p. 13. (emphasis added).
[214] Ibid, p. 16. (emphasis added).

> [i]t is essential that those who commit such acts be in no doubt that they will be held individually responsible. It is essential that these atrocities be investigated and the perpetrators called to account, *whoever and wherever they may be*.[215]

Furthermore,

> [t]he Statute does not, of course, create new law, but reflects existing international law in this field... The establishment of the Tribunal sends a clear message to all in the former Yugoslavia that they must stop immediately violations of international humanitarian law or face the consequences.[216]

118. Finally, the representative from Hungary stated that:

> [w]e also note the importance of the fact that the jurisdiction of the Tribunal covers the whole range of international humanitarian law and the entire duration of the conflict throughout the territory of former Yugoslavia. The Statute of the Tribunal allows the prosecutions of all persons – not communities – charged with crimes where the crime was committed in the territory of former Yugoslavia and without regard to their ethnic affiliation. We note also that the official status of the individual brought to court, whatever it might be, does not immunize him from his criminal liability.[217]

119. On the basis of the drafting history of the Statute of this Tribunal, the Trial Chamber observes that the intention of the drafters was to establish a system by which "all" persons responsible for violations of international humanitarian law could be held responsible. The Security Council resolutions on the conflict in the former Yugoslavia, the suggestions by various States, the report of the Secretary-General and the discussion in the Security Council during the adoption of the Statute all clearly point in that direction. From these sources, one can not conclude that individual criminal responsibility for superiors would not apply if the armed conflict might be considered of a non-international character. As noted above, the report of the Secretary-General does mention at times the character of the armed conflict as a relevant factor, but those observations relate to the jurisdictional requirements for the substantive crimes in the Statute, not to the different theories of individual criminal responsibility.[218]

120. This observation is furthermore supported by a textual analysis of Article 7(3) of the Statute. The text of this paragraph refers to *any* of the acts referred to in Articles 2 to 5. Only Article 2, according to the case law of this Tribunal, is limited to cases of international armed conflicts. The crimes listed in Article 3, violations of the laws or customs of war, and Article 5, crimes against humanity, are applicable in either internal or international armed conflicts. Genocide (Article 4) does not require any nexus with an armed conflict.

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[215] Ibid, p. 17-18. (emphasis added).
[216] Ibid, p.19.
[217] S/PV.3217, p. 20-21.
[218] Report of the Secretary-General, paras 37, 47 and 53-54.

3. Jurisprudence of the International Tribunal

121. The Trial Chamber will now conduct an overview of the jurisprudence to assess how the International Tribunal has interpreted and applied Article 7(3) to the cases before it. There have been a number of cases where individual criminal responsibility pursuant to Article 7(3) of the Statute has been established. In these cases, the elements of the doctrine and the status of the accused as a military versus civilian commander have been the focus of much discussion. The nature of the conflict *vis-à-vis* command responsibility has *never* been discussed, challenged or commented upon by the Prosecution, Defence, Trial Chamber or Appeals Chamber.

122. The first case before the International Tribunal to find individual criminal responsibility pursuant to Article 7(3) was *Čelebići*. In this case, one accused, Zdravko Mucić, was found to be commander of a prison-camp during an international armed conflict. The Trial Chamber found him guilty under both Article 7(1) and Article 7(3), with his position under Article 7(3) being that of a non-military superior, for violations contained in Article 2 (grave breaches) and Article 3 (violations of the laws or customs of war).

123. Before deciding upon this issue, however, the Trial Chamber undertook extensive research into the origins and application of the doctrine of command responsibility. As to the status of this doctrine, it entered into an analysis of various precedents, including the Hague Conventions, and post-World War I developments and post-World War II cases. In addition it made reference to Articles 86 and 87 of Additional Protocol I and to various military manuals. On the basis of this analysis, the Trial Chamber held:

> That military commanders *and other persons occupying positions of superior authority* may be held criminally responsible for the unlawful conduct of their subordinates is a well-established norm of customary and conventional international law.[219]

The Appeals Chamber upheld this finding and affirmed that the principle is "well-established in conventional and customary law."[220]

124. The Trial Chamber in *Čelebići* observed that the doctrine of command responsibility had not been applied by any international judicial organ since the post-World War II cases. It found, however, that the lack of application of the doctrine did not impinge upon its firm standing as a norm of customary international law: "there can be no doubt that the concept of the individual

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[219] *Čelebići* Trial Judgement, para. 333. (emphasis added).
[220] *Prosecutor v. Zejnil Delalić, Zravko Mucić, Hazim Delić and Esad Landžo* ("*Čelebići*"), Case No. IT-96-21-A, Judgement, 20 February 2001 ("*Čelebići* Appeal Judgement"), para. 195.

criminal responsibility of superiors for failure to act is today firmly placed within the corpus of international humanitarian law."[221]

125. On the rationale behind the doctrine, the Trial Chamber found that "criminal responsibility for omissions is incurred *only where there exists a legal obligation to act.*"[222] The Trial Chamber cited Additional Protocol I as one of its sources for determining that the doctrine of command responsibility is "a well-established norm of customary and conventional international law". But it also used Additional Protocol I as an *example* of international law imposing an "affirmative duty on superiors to prevent persons under their control from committing violations of international humanitarian law".[223] The Trial Chamber further found that "it is ultimately this duty that provides the basis for, and defines the contours of, the imputed criminal responsibility under Article 7(3) of the Statute."[224]

126. In terms of the constituent elements of command responsibility, the Trial Chamber found the following to be the "essential elements" of command responsibility for failure to act:

(a) the existence of a superior-subordinate relationship;

(b) the superior knew or had reason to know that the criminal act was about to be or had been committed; and

(c) the superior failed to take the necessary and reasonable measures to prevent the criminal act or punish the perpetrator thereof.[225]

127. In relation to the first element, the Trial Chamber held that:

> It is important to emphasise that at the very root of the concept of command responsibility, with the exercise of corresponding authority, is the existence of a superior-subordinate relationship.[226]

As to this relationship and in assessing the term "command" the Trial Chamber found that "formal status alone" is not the only factor to look at, but rather, "the actual possession, or non-possession, of powers of control over the actions of subordinates."[227] The Trial Chamber defined "effective control" over subordinates as "having the material ability to prevent and punish the commission of these offences."[228] On this issue, the Trial Chamber further held that:

> [p]ersons effectively in command of such more informal structures, with power to prevent and punish the crimes of persons who are in fact under their control, may under certain circumstances be held responsible for their failure to do so. Thus the Trial Chamber accepts the Prosecution's proposition that individuals in positions of authority, whether civilian or within military structures,

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[221] *Čelebići* Trial Judgement, para. 340.
[222] Ibid para. 334, citing the ILC Draft Code of 1996. (emphasis added).
[223] Ibid, para. 334.
[224] Ibid, para. 334.
[225] Ibid, para. 346.
[226] *Čelebići* Trial Judgement, para. 734.
[227] Ibid, para. 370.
[228] Ibid, para. 378.

> may incur criminal responsibility under the doctrine of command responsibility on the basis of their *de facto* as well as *de jure* positions as superiors. The mere absence of formal legal authority to control the actions of subordinates should therefore not be understood to preclude the imposition of such responsibility.[229]

The Appeals Chamber upheld the findings of the Trial Chamber in relation to *de facto* authority as the basis for command or superior authority, finding that a commander or superior is

> [t]hus the one who possesses the power or authority in either a *de jure* or a *de facto* form to prevent a subordinate's crime or to punish the perpetrators of the crime after it is committed.[230]

It also upheld the finding that "political leaders and other civilian superiors in positions of authority" are covered by the term "superior".[231]

128. As to the second element, the "had reason to know" standard, the Appeals Chamber held that this was not imposing a "general duty to know" on superiors, but rather that:

> [a] superior will be criminally responsible through the principles of superior responsibility only if information was available to him which would have put him on notice of offences committed by subordinates.[232]

This, in the view of the Appeals Chamber, is consistent with the customary law standard of *mens rea* as existing at the time of the offences, i.e. 1992.

129. In relation to the third element, the "duty" arising from the command position, the Trial Chamber found that the

> legal duty which rests upon *all* individuals in positions of superior authority requires them to take all necessary and reasonable measures to prevent the commission of offences by their subordinates or, if such crimes have been committed, to punish the perpetrators thereof.[233]

Furthermore, it held that:

> a superior may only be held criminally responsible for failing to take such measures that are within his powers.[234]

What those measures are in any particular case would depend on the facts and circumstances surrounding that commander or superior. Also here, the Appeals Chamber followed this approach, and added:

> As long as a superior has effective control over subordinates, to the extent that he can prevent them from committing crimes or punish them after they committed the crimes, he would be held responsible for the commission of the crimes if he failed to exercise such abilities of control.[235]

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[229] Ibid, paras 354.
[230] *Čelebići* Appeal Judgement, para. 192.
[231] Ibid, para. 195.
[232] Ibid, para. 241.
[233] *Čelebići* Trial Judgement, para. 394. (emphasis added).
[234] Ibid, para. 395.

130. There is nothing on the face of the elements that would suggest that command responsibility is limited to a specific type of armed conflict or that it has any jurisdictional pre-requisites. The manner in which these elements have been applied would rather indicate that the nature of the conflict – or even the existence of an armed conflict – is not a relevant factor. This conclusion could be drawn on the one hand from the fact that the elements described are considered applicable not only to military but also to civilian superiors. The conclusion could further be drawn from the way references are made to situations defined as "armed conflicts". This Trial Chamber refers to the observation of the Appeals Chamber in *Čelebići* that:

> In many contemporary conflicts, there may be only *de facto*, self-proclaimed governments and therefore *de facto* armies and paramilitary groups subordinate thereto. Command structure, organised hastily, may well be in disorder and primitive. To enforce the law in these circumstances requires a determination of accountability not only of individual offenders but of their commanders or other superiors who were, based on evidence, in control of them without, however, a formal commission or appointment. A tribunal could find itself powerless to enforce humanitarian law against *de facto* superiors if it only accepted as proof of command authority a formal letter of authority, despite the fact that the superiors acted at the relevant time with all the powers that would attach to an officially appointed superior or commander.[236]

The Appeals Chamber thus found that the principle of command responsibility could be applicable to *de facto* armies and paramilitary groups, a finding which would strongly suggest applicability of the principle of command responsibility in non-international armed conflicts.

131. The second case before the International Tribunal relating to the interpretation and application of Article 7(3), the *Aleksovski* case, dealt with the case of a prison warden who was considered responsible under both Article 7(1) and Article 7(3) for a number of serious crimes committed in the prison institution. The Trial Chamber was confronted with the interpretation of the term "superior" in Article 7(3). It held that superior responsibility is "not reserved for official authorities" and that "[a]ny person acting *de facto* as a superior may be held responsible under Article 7(3)."[237] The Trial Chamber further found that the "decisive criterion" for determining who is a superior under customary international law is not simply formal legal status "but also his ability, as demonstrated by his duties and competence, to exercise control."[238]

132. The Trial Chamber also found that liability under Article 7(3) should not be seen as responsibility for the act of another person, but rather, "derives directly from the failure of the person against whom the complaint is directed to honour an obligation."[239] The obligation to act is prompted by the fact that the person is a superior to the perpetrator *and* "knew or had reason to

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[235] *Čelebići* Appeal Judgement, para. 198.
[236] Ibid, para. 193.
[237] Ibid, para. 76. (emphasis added).
[238] Ibid, para. 76.
[239] Ibid, para. 72.

know that a crime was about to be committed or had been committed".[240] The Trial Chamber found that "[h]ierarchical power constitutes the very foundation of responsibility" under Article 7(3).[241]

133. The Trial Chamber had to pronounce on the character of the armed conflict between Bosnian Croats and Bosnian Muslims in *Aleksovski*. The Trial Chamber concluded that the conflict was not of an international character. Nonetheless, the Chamber concluded that the acts of the accused

> constitutes an outrage upon personal dignity and, in particular, degrading or humiliating treatment within the meaning of Common Article 3 of the [Geneva] Conventions and therefore constitutes a violation of the laws or customs of war within the meaning of Article 3 of the Statute for which the accused must be held responsible under Articles 7(1) and 7(3) of the Tribunal's Statute.[242]

The Trial Chamber therefore did not find any legal impediment in applying Article 7(3) to a non-international armed conflict for violations pursuant to Article 3 of the Statute.

134. The accused appealed against the application of Article 7(3) to the facts in the case, and as such, the appeal was factual in nature. In affirming the Trial Chamber's finding, the Appeals Chamber held that it did not matter whether the accused was a civilian or military superior, but rather that "he had the powers to prevent or to punish in terms of Article 7(3)."[243]

135. The Prosecution appealed against the characterisation of the armed conflict as a non-international one. The Appeals Chamber found that the Trial Chamber had applied the wrong test in relation to Article 2 charges, and found the conflict to be international. None of the parties appealed against the application by the Trial Chamber of Article 7(3) to a non-international armed conflict.

136. In the case of *Blaškić*, the Trial Chamber found the accused, a military commander, guilty for Article 2 and Article 3 violations under both 7(1) and 7(3) in the context of an international armed conflict. The Trial Chamber relied upon, and elaborated on, the elements of command responsibility as defined in *Čelebići*. For the purposes of the present decision, two aspects of this case warrant mention. Firstly, the Trial Chamber in this case further reflected on the position of the superior and the responsibilities arising from that position. In this context, it held that:

> [a] commander may incur criminal responsibility for crimes committed by persons who are not formally his (direct) subordinates, insofar as he exercises effective control over them.[244]

It added to this that:

> [a] commander need not have any legal authority to prevent or punish acts of his subordinates[245]

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[240] Ibid, para. 72.
[241] *Aleksovski* Trial Judgement, para. 78.
[242] Ibid, para. 228.
[243] *Prosecutor v. Zlatko Aleksovski*, Case No. IT-95-14/1-A, Judgement, 24 March 2000, ("*Aleksovski* Appeal Judgement"), para. 76.
[244] *Blaškić* Trial Judgement, para. 301.

and that the superior

> has the material ability to prevent or punish crimes committed by others [...].[246]

137. The Trial Chamber also elaborated on the mental element of command responsibility, i.e. the requirement that the commander knew or had reason to know that the criminal act was about to be or had been committed. In this context, the Trial Chamber researched the origins of command responsibility in customary international law, including that of "responsible command", and its codification in Additional Protocol I. The Chamber held here:

> The Trial Chamber will interpret Article 86(2) in accordance with Article 31 of the Vienna Convention, that is, "in good faith in accordance with the ordinary meaning to be given to the terms of the treaty in their context and in the light of its object and purpose". *In this respect, the Trial Chamber considers fundamental the provision enshrined in Article 43(1) of Additional Protocol I according to which the armed forces are to be placed "under a command responsible [...] for the conduct of its subordinates.*[247]

138. In the case of *Kordić and Čerkez*, the Trial Chamber found Mario Čerkez, a Brigade commander, guilty under Articles 7(1) and 7(3) for Article 2, Article 3 and Article 5 charges, in the context of an international armed conflict. In its analysis of Article 7(3), the Trial Chamber in this case relied on the Appeals Judgement in *Čelebići*. The Trial Chamber concurred that command responsibility does not only depend on *de jure* authority but also *de facto* authority:

> Actual authority however will not be determined by looking at formal positions only. Whether *de jure* or *de facto*, military or civilian, the existence of a position of authority *will have to be based upon an assessment of the reality of the authority of the accused* [...] A formal position of authority may be determined by reference to official appointment or formal grant of authority.[248]

139. In *Krstić*, in the context of an "armed conflict" in Bosnia, the Trial Chamber found that the elements for Article 7(3) were met for General Krstić. Due to the fact that the responsibility under Article 7(1) already expressed the crime and the criminal behaviour manifested by the alleged perpetrator's conduct exhaustively, it entered a conviction only under Article 7(1) for violations of Articles 3, 4 and 5[249], consuming the Article 7(3) liability. However, before coming to this final

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[245] Ibid, para. 302.
[246] Ibid, para. 335.
[247] Ibid, para. 327, citing 1907 Hague Regulations, Art.1, and Geneva Convention III, Art. 4(a)(2), in the footnote. (empahsis added).
[248] *Prosecutor v. Dario Kordić and Mario Čerkez*, Case No. IT-95-14/2-T, Judgement, 26 February 2001 ("*Kordić* Trial Judgement"), para. 418-19. (emphasis added).
[249] *Krstić* Trial Judgement, para. 605: "The facts pertaining to the commission of a crime may establish that the requirements for criminal responsibility under both Article 7(1) and Article 7(3) are met. However, the Trial Chamber adheres to the belief that where a commander participates in the commission of a crime *through his subordinates*, by "planning", "instigating" or "ordering" the commission of a crime, any responsibility under Article 7(3) is subsumed under Article 7(1). The same applies to the commander who incurs criminal responsibility under the joint criminal enterprise doctrine through the physical acts of his subordinates." See para. 652. (emphasis in original).

result, the Trial Chamber did a straight-forward application of the facts to the elements of command responsibility, as well, and found that they were satisfied.

140. In three cases before the International Tribunal, Trial Chambers examined the liability of non-military accused in the context of an "armed conflict" in Bosnia and Herzegovina for violations of Articles 3 and 5 pursuant to Articles 7(1) and 7(3).[250] For purposes of the present decision, it is of importance to take into account that the Trial Chambers in these three cases did not elaborate on the character of the "armed conflict". The fact that no explicit determination had to be made that the conflict was international or not in these cases did not lead to any discussion as to the possible impact on the criminal responsibility of the accused under either Article 7(1) or Article 7(3). It appears, however, that the character of the conflict was not considered as any obstacle to the application of Article 7(3) by these Trial Chambers.

141. Based on the foregoing overview of the jurisprudence of the International Tribunal, this Trial Chamber concludes that in order to apply the principle of command responsibility as a basis for individual criminal responsibility for crimes contained in the Statute, a Trial Chamber must satisfy itself of certain criteria related to the superior-subordinate relationship, the duty that arises from that relationship to prevent or punish offences of a subordinate, and that a superior knew or had reason to know about the acts of his subordinate in relation to the commission of offences. For the purposes of the question before this Trial Chamber, namely whether the application of the

[250] In the *Kunarac* case, the Trial Chamber had to determine whether one of the accused was in a position of "effective control" over soldiers who committed the offences charged in the Indictment "at the time they committed the offences". As the Trial Chamber found that he was not in effective control at the relevant time, he was not found liable under Article 7(3). *Kunarac* Trial Judgement, para. 628. In the *Kvočka* case, four of the accused were charged for violations of Article 3 and 5 of the Statute under both forms of criminal responsibility laid down in Article 7(1) and 7(3). *Prosecutor v. Miroslav Kvočka, Milojica Kos, Mlado Radić, Zoran Zigić and Dragoljub Prcać,* Case No. IT-98-30/1-T, Judgement, 2 November 2001 ("*Kvočka* Trial Judgement"). The Trial Chamber held that none of the accused could be held responsible under Article 7(3), based entirely on a factual assessment of whether the accused exercised effective control over the persons who had committed crimes. The Trial Chamber notes that with regard to the liability of one accused, Mlado Radić, while the Trial Chamber found that it was "not entirely clear" whether that accused exercised effective control over the perpetrators of the crimes, it "declined" to find Radić incurred superior responsibility, particularly as he had been found to have participated in a joint criminal enterprise: "there is some doubt as to whether, within the context of a joint criminal enterprise, a co-perpetrator or aider or abettor who is held responsible for the totality of crimes committed during his tenure on the basis of a criminal enterprise theory can be found separately responsible for part of those crimes on an Article 7(3) superior responsibility theory." *Kvočka* Trial Judgement, para. 570. Finally, in *Krnojelac*, a non-military warden of a detention centre was found guilty for violations of Article 3 and Article 5 under Article 7(1) and 7(3), in the context of "an armed conflict in Bosnia and Herzegovina", during the period April 1992 to August 1993. The Trial Chamber applied the facts to the elements as elaborated in *Čelebići*, finding that the elements of 7(3) individual criminal responsibility "have been firmly established by the jurisprudence of the Tribunal." *Krnojelac* Trial Judgement, para. 92. For certain counts, the Trial Chamber found that sufficient evidence had been adduced to satisfy the elements under both Article 7(1) and 7(3). In particular, it held that the accused had "failed in his duty as warden to take the necessary and reasonable measures to prevent such acts or to punish the principal offenders". *Krnojelac* Trial Judgement, para. 318. The Trial Chamber found, however, that "it is inappropriate to convict under both heads of responsibility for the same count based on the same acts." *Krnojelac* Trial Judgement, para. 173. It exercised its discretion to determine which "head" of individual criminal responsibility more accurately reflected the culpability of the accused, and thus convicted under either Article 7(1) or 7(3) for each count. *Krnojelac* Trial Judgement, see paras 173, 316 and 493-98 When it convicted the accused under Article 7(1), it took his position as a superior into account as an aggravating factor. *Krnojelac* Trial Judgement, para. 173.

doctrine of command responsibility to Article 3 violations in the context of a non-international armed conflict falls within the jurisdiction 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, it does not find in its jurisprudence any impediment, but rather a confirmation for the existing jurisdiction of this Tribunal.

4. Developments since the adoption of the Statute of the International Tribunal

142. In a number of instruments adopted after the establishment of the International Tribunal by the Security Council in 1993, the doctrine of command responsibility has been included. The Trial Chamber observes that in each of these instruments, no distinction has been made as to the relevance of the doctrine to international armed conflicts and non-international armed conflicts.

143. In referencing these developments, the Trial Chamber is cognisant of the fact that subsequent developments cannot be used to determine whether the principle of command responsibility was, under customary international law, applicable to internal armed conflicts at the time the alleged offences were committed; it mentions these developments rather to illustrate that core elements of the principle have been subsequently codified in largely the same manner as in the Statute and jurisprudence of the International Tribunal.

144. The first instrument of relevance is the Statute of the International Criminal Tribunal for the Prosecution of Persons Responsible for Genocide and Other Serious Violations of International Humanitarian Law Committed in the Territory of Rwanda and Rwandan Citizens Responsible for Genocide and Other Serious Violations committed in the Territory of Neighbouring States between 1 January and 31 December 1994 ("ICTR"), adopted by the Security Council on 8 November 1994. This Statute contains a provision, Article 6, for individual criminal responsibility nearly identical to that of Article 7 of the ICTY Statute.[251]

145. The Trial Chamber has studied the Report of the Secretary-General on the Statute of the ICTR.[252] The ICTR was established to prosecute crimes committed within the territory of Rwanda and in the circumstances of a non-international armed conflict. The Statute of the ICTR is

[251] Article 6(3) of the ICTR Statute provides: The fact that any of the acts referred to in Articles 2 to 4 of the present Statute was committed by a subordinate does not relieve his or her superior of criminal responsibility if he or she 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.
[252] Report of the Secretary-General on the ICTR.

described as "an adaptation" of the Statute of the ICTY.[253] As the Defence also observes, this report makes it clear that:

> [t]he Secretary-General has elected to take a more expansive approach to the choice of the applicable law than the one underlying the statute of the Yugoslav Tribunal and included within the subject-matter jurisdiction of the Rwanda Tribunal international instruments regardless of whether they were considered part of customary international law or whether they have customarily entailed individual criminal responsibility of the perpetrator of the crime.[254]

The Trial Chamber notes that this comment is related to the scope of the subject matter jurisdiction of this Tribunal and more specifically to the fact that, because violations had taken place in an internal armed conflict, norms applicable to such conflicts were to be applied by the ICTR, i.e. violations of Common Article 3 "as more fully elaborated in Article 4 of the Additional Protocol II."[255] The issue of whether criminal liability under the doctrine of command responsibility attached to such crimes under customary international law was not the subject of this comment by the Secretary-General.

146. The ICTR has discussed the interpretation and application of Article 6(3) in a number of cases.[256] In this case law it was not questioned, and rather, it has been confirmed, that the principle of command responsibility applies to the situation in Rwanda. This principle has therefore been applied to substantive norms applicable during an internal armed conflict and to the crime of genocide. Numerous convictions pursuant to both guilty pleas and judgements on the merits have been returned pursuant to Article 6(3).[257] Discussions on Article 6(3) traced the origins of the doctrine of command responsibility to the same sources cited by ICTY Trial and Appeals Chambers.[258] The Appeals Chamber has upheld each conviction,[259] and in the case of *Kayishema*, the Appeals Chamber discussed Article 6(3) in detail.[260] The Appeals Chamber relied on the Appeal

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[253] Ibid, para. 9.
[254] Ibid, para. 12.
[255] Ibid, para. 11.
[256] See, e.g., *Prosecutor v. Jean-Paul Akayesu*, Case No. ICTR-96-4-T, Judgement, 2 September 1998, (*Akayesu* Trial Judgement"); *Prosecutor v. Clément Kayishema and Obed Ruzindana*, Case No. ICTR-95-1-T, Judgement, 21 May 1999 ("*Kayishema* Trial Judgement"); *Prosecutor v. Alfred Musema*, Case No. ICTR-96-13-T, Judgement and Sentence, 27 January 2000, ("*Musema* Trial Judgement");
[257] See, e.g., *Kayishema and Ruzindana* Trial Judgement, paras 210-222 and 513 (the "inherent purpose of Article 6(3) is to ensure that a morally culpable individual is held responsible for those heinous acts committed under his command", para. 516); *Prosecutor v. Jean Kambanda*, Case No. ICTR-97-23-S, Judgement and Sentence, 4 September 1998; *Prosecutor v. Omar Serushago*, Case No. ICTR-98-39-S, Sentence, 5 February 1999; *Musema* Trial Judgement. There has also been one acquittal, based on the factual findings of the Trial Chamber which was upheld on Appeal, *Prosecutor v. Ignace Bagilishema,* Case No. ICTR-95-1A-T, Judgement, 7 June 2001. The acquittal was upheld by the ICTR Appeals Chamber at an oral hearing in Arusha on 3 July 2002. Moreover, in one case, the Trial Chamber declined to find liability pursuant to Article 6(3) due to vagueness in the Indictment. *Akayesu* Trial Judgement, para. 691.
[258] See, e.g., *Akayesu* Trial Judgement, para. 471; *Kayishema* Trial Judgement, paras 215, 220 and 492; *Musema* Trial Judgement, paras 128-148.
[259] See, e.g., *Alfred Musema c/ Le Procureur,* Affaire N°: ICTR-96-13-A, Arret, 16 November 2001; *Jean Kambanda v. The Prosecutor*, Case No. ICTR-97-23-A, Judgement, 19 October 2000.
[260] *Prosecutor v. Clément Kayishema and Obed Ruzindana*, Case No. ICTR-95-1-A, Judgement (Reasons), 1 June 2001 ("*Kayishema* Appeal Judgement"), paras 280-304.

Judgement in *Čelebići*, endorsing its findings with regards to the liability of *de facto* commanders and similarly focused on "effective control" as the key element for command/superior responsibility. Notably, "effective control" was established, in part, by the domestic legislation of Rwanda which established the governmental hierarchy.[261] From this case law it is obvious that, as far as the scope of the principle was challenged, it was done so in order to determine whether the principle should apply to persons in a civilian capacity. The ICTR answered this question in the affirmative.[262]

147. The second instrument of relevance is the Draft Code of Crimes against the Peace and Security of Mankind, adopted by the ILC upon second reading in 1996.[263] Article 6 of the Draft Code refers to the responsibility of the superior and reads:

> The fact that a crime against the peace and security of mankind was committed by a subordinate does not relieve his superiors of criminal responsibility, if they knew or had reason to know, in the circumstances at the time, that the subordinate was committing or was going to commit such a crime and if they did not take all necessary measures within their power to prevent or repress the crime.

The Trial Chamber observes that, although the text differs slightly from the draft provision on the responsibility of the superior, contained in the 1991 Draft Code,[264] in substance the provision describes the same principle.[265] The ILC Commentary on Article 6 states:

> Military commanders are responsible for the conduct of members of the armed forces under their command and other persons under their control. This principle of command responsibility was recognised in the 1907 Hague Convention and reaffirmed in subsequent legal instruments. It requires that members of the armed forces be placed under the command of a superior who is

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[261] *Kayishema* Appeal Judgement, para. 299, citing *Kayishema* Trial Judgement, para. 481.

[262] It may be observed that the ICTR Trial Chambers have tended to apply command responsibility somewhat differently than at the ICTY. The existence of a superior-subordinate relationship is the key feature for finding individual criminal responsibility under Article 7(3) of the ICTY Statute or Article 6(3) of the ICTR Statute. At the ICTY, the actions of a commander or superior, when relating to "ordering" or "aiding or abetting" are considered to come under Article 7(1) of this Statute, as seen in *Krstić* and *Krnojelac* cited above. The ICTR Trial Chambers, however, have found that such orders or forms of participation served as the basis for satisfying the mental element of command responsibility ("knew or had reason to know") since the accused was himself participating or present. These convictions under Article 6(3) have been upheld on appeal (*Musema* and *Kayishema*). While this somewhat different of application of the doctrine does not directly touch the issue before the present Trial Chamber, it may help to address some of the Defence concerns about military manuals or national legislation using terms that could arguably also fit under 7(1) (i.e. "tolerated" or "encouraged").

[263] Draft Code of Crimes Against the Peace and Security of Mankind, ILC (1996) (A/48/10).

[264] See supra, para. 92. The differences between the two texts relate first to the formulation "if they knew or had information enabling them to conclude" which in 1996 is replaced by the formulation "if they knew or had reason to know". The second difference lies in the fact that the 1991 Draft Code referred to the fact that the superior should take "all feasible measures", whereas the 1996 Draft Code uses the formula "all necessary measures".

[265] In 1994, comments from the Special Rapporteur and a few countries were included on Article 12 on superior responsibility. The Special Rapporteur found that Article 12 established "a presumption of responsibility" on the part of superiors for crimes committed by their subordinates. This presumption of responsibility is due to "negligence, failure to supervise or tacit consent." Twelfth report on the draft Code of Offences against the Peace and Security of Mankind, by Mr. Doudou Thiam, Special Rapporteur, A/CN.4/460, 15 April 1994, para. 127.

See also, *Čelebići* Trial Judgement, para. 342: "The validity of the principle of superior responsibility for failure to act was further *reaffirmed* in the ILC's 1996 Draft Code of Crimes Against the Peace and Security of Mankind, which contains a formulation of the doctrine very similar to that found in Article 7(3)." (emphasis added).

> responsible for their conduct. A military commander may be held criminally liable for the unlawful conduct of his subordinates if he contributes directly or indirectly to their commission of a crime.

The Commentary on the ILC 1996 Draft Code found the principle of command responsibility to be recognised in the 1907 Hague Convention and "reaffirmed" in subsequent instruments *including* Additional Protocol II, Art. 1.[266] Thus, the ILC provided a conventional basis – and significantly, a pre-1992 basis – for the principle of command responsibility in non-international armed conflicts.

148. The third instrument of relevance is the Rome Statute of the International Criminal Court ("ICC"). In the Statute of the ICC, the doctrine of command responsibility is enshrined in Article 28. Notably, this Article applies to all crimes within the jurisdiction of the ICC, including crimes committed in an internal armed conflict, as well as crimes committed in the absence of an armed conflict. The Trial Chamber observes that the discussions on the drafting of this provision focused almost entirely on the question as to whether the principle should equally apply to military and non-military superiors. During the debates on the draft Statute at least already in 1996, it was clear that a very large majority of States favoured the extension of the principle to include civilian superiors as well. The primary reason behind this approach was the desire to codify an effective principle of command responsibility, not only applicable to the more traditional military commander in regular armed forces, but also to commanders of *de facto* forces and to civilian superiors. After this issue was resolved, the discussions focused primarily on the degree of control and the degree of knowledge required from the superior.[267]

149. The Statute, in force since 1 July 2002, provides for two different standards. Article 28 (a) determines the position of the "military commander or person effectively acting as a military commander", while Article 28 (b) contains the provision relating to the non-military commander.[268]

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[266] ILC Commentary para.1 and fn. 44. Additionally, the ILC cited Additional Protocol I, Art. 43.

[267] Per Saland, International Criminal Law Principles, in Roy Lee (ed), *The Making of the Rome Statute: Issues, Negotiations, Results*, Kluwer 1999, 189 et seq, especially 202-204.

[268] Article 28(a) provides: A military commander or person effectively acting as a military commander shall be criminally responsible for crimes within the jurisdiction of the Court committed by forces under his or her effective command and control, or effective authority and control as the case may be, as a result of his or her failure to exercise control properly over such forces, where: (i) That military commander or person either knew or, owing to the circumstances at the time, should have known that the forces were committing or about to commit such crimes; and (ii) That military commander or person failed to take all necessary and reasonable measures within his or her power to prevent or repress their commission or to submit the matter to the competent authorities for investigation and prosecution. Article 28(b) provides: With respect to superior and subordinate relationships not described in paragraph (a), a superior shall be criminally responsible for crimes within the jurisdiction of the Court committed by subordinates under his or her effective authority and control, as a result of his or her failure to exercise control properly over such subordinates, where: (i) The superior either knew, or consciously disregarded information which clearly indicated, that the subordinates were committing or about to commit such crimes; (ii) The crimes concerned activities that were within the effective responsibility and control of the superior; and (iii) The superior failed to take all necessary and reasonable measures within his or her power to prevent or repress their commission or to submit the matter to the competent authorities for investigation and prosecution. The Trial Chamber notes that the difference between the two provisions lies primarily in the description of the superior-subordinate relationship and the level of knowledge required by the superior over the acts of the subordinates.

The Trial Chamber observes that the language of both provisions contain some differences, but largely contain the same elements for finding responsibility for a superior for the crimes committed by persons subordinated to them. These elements, in turn, largely reflect and confirm the concept of command responsibility as applied by this Tribunal.[269]

D. Discussion

150. With these general principles outlined above in mind, the Trial Chamber will now examine, the status and application of the principle of command responsibility under international law. This examination has to focus on the period prior to the jurisdiction 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 and thereby on the question of jurisdiction for the crimes alleged in the Amended Indictment before it, namely the crimes allegedly committed from January 1993 onwards. The Trial Chamber further examines the establishment of the Statute and the case law developed on its basis.

151. The Trial Chamber's assessment is the following. Based *inter alia* on the provisions relating to responsible command laid down in the various instruments adopted during the Second Hague Peace Conference in 1907, the first attempt to organise trials against commanders on the basis of command responsibility was made after the First World War. After the Second World War, such attempts, still largely based on the same or similar provisions, proved to be more successful. As described above, various persons were held criminally responsible for the acts of their subordinates when they, as commanders, knew or had reason to know that crimes were committed or were about to be committed by subordinates and failed to take appropriate measures that they were duty-bound to take. As the conflicts in relation to which the various international judicial bodies had been established were of an international character, obviously the principle of command responsibility was only used against persons who had acted in such international armed conflicts.

152. The Trial Chamber rejects the argument of the Defence that the precedents of Nuremberg and Tokyo and the *Yamashita* case are "beside the point" because these cases were related to international armed conflicts only. The Trial Chamber is not prepared to follow this argument. In agreement with the Defence that such case law can not automatically be applied in the context of armed conflicts not of an international character, this Trial Chamber is convinced that this case law is of relevance as far as it reflects developments in the elaboration of the principle of responsible command and the principle of command responsibility, and the elaboration of a relationship between these two. These aspects are of general importance. No firm conclusions on the

[269] See supra, para. 126.

applicability or non-applicability of these principles to non-international armed conflicts can be drawn from this case law alone. The elements elaborated on in the case law focused on the duty of commanders, the relationship to the subordinates, and the commanders failure to prevent or punish – none of which include expressly or implicitly any kind of jurisdictional requirement, let alone relevance to the nature of the conflict – and thus, to apply the doctrine developed in relation to international armed conflict to an internal conflict does not disrupt in any way the integrity of the *maxime* of command responsibility.

153. The Geneva Conventions of 1949 did not include a provision on command responsibility. These Conventions were, with the exception of common Article 3, applicable to armed conflicts of an international character. The issue was largely left to national law; the Geneva Conventions did not oblige States Parties to establish such a principle under national law.

154. As discussed above, the various proposals by the ILC for the Draft Code of Offences in the early 1950s included a provision for "responsibility of the superior" that was applicable to offences committed beyond the context of an international armed conflict.[270] While the provision was not included in the 1954 Draft Code of Offences, this was due not to a rejection of the principle as a general principle of criminal law, but rather to the production of an abbreviated Draft, pending a resolution on the crime of aggression.

155. From the 1950s until the 1970s, developments in the field of international humanitarian law were rather scarce. No major new instruments were developed. The discussions on the Draft Code of Crimes against the Peace and Security of Mankind and on the establishment of a permanent international criminal court had come to a stand-still. No new international or national judicial decisions on this issue were taken.[271] An important factor responsible for this situation was the Cold War between East and West.

156. However, it would be misleading to draw conclusions from such a near stand-still situation on the international level. The most important development during this period was the adoption of a number of national military manuals, which, as described above, did regularly include provisions relating to the responsibilities of the superior, and often, the ensuing criminal responsibility for failure to execute these responsibilities vis-à-vis a subordinate. It does not matter whether the punishability of the conduct of a superior was based on specific norms related to an omission in his specific capacity. The omission to prevent or punish and thereby the omission to obey the

[270] See supra, paras 75-76 and 89-92.
[271] *Čelebići* Trial Judgement, para. 340.

obligations laid down in the aforementioned manuals was always regarded as a secondary form of participation if not even as (co) perpetratorship by omission.

157. In 1977, the two Additional Protocols to the Geneva Conventions were adopted. As described, Additional Protocol I includes two provisions, Articles 86 and 87, relevant to the principle of command responsibility. Although this was the first time that a convention was to include an explicit reference to this principle, the Commentary to these provisions enlightens that the principle as such was by no means new and constitutive, but rather the declaration of customary international law only. Additional Protocol II did not include such a provision. It did, however, include a reference to the principle of responsible command.

158. The Defence attach great importance to this difference between the two Additional Protocols, as described above. The Trial Chamber does not agree with this argument. A clear difference between the two Additional Protocols in this respect exist can not be ignored. It would, however, be misleading to jump too easily to conclusions and *a contrario* reasonings as to the relevance of the principle of command responsibility for international and non-international armed conflicts. A more careful analysis of the differences between the two instruments needs to be undertaken and a number of factors need to be addressed.

159. First, the Trial Chamber observes that the structure and substance of the two Protocols are fundamentally different. As the Commentary to Additional Protocol II makes clear "[i]t was apparently felt that the regulation of non-international armed conflicts was too recent a matter for State practice to have sufficiently developed in this field."[272] In other words, where the Geneva Conventions and Additional Protocol I can be considered a reflection of a long development of humanitarian norms in relation to international armed conflicts, States were generally reluctant to lay down or develop such norms in relation to internal armed conflicts. Fear of possible international attention for what was largely considered internal matters and fear of international recognition of armed groups which were preferred by States themselves to be considered "rebels" or "terrorists" added to a reluctance to reflect norms applicable to internal armed conflicts in a legally binding instrument. Consequently, the elaboration of Additional Protocol II would, by definition, lead to a much less developed and detailed set of norms than those included in Additional Protocol I. Illustrative of this fear is the inclusion in Additional Protocol II of Article 3, which reads:

> 1. Nothing in this Protocol shall be invoked for the purpose of affecting the sovereignty of a State or the responsibility of the government, by all legitimate means, to maintain or re-establish law and order in the State or to defend the national unity and territorial integrity of the State.

[272] Commentary on the Additional Protocols, para. 4435.

> 2. Nothing in this Protocol shall be invoked as a justification for intervening, directly, or indirectly, for any reason whatever, in the armed conflict or in the internal or external affairs of the High Contracting Party in the territory of which that conflict occurs.[273]

160. Second, the Trial Chamber observes, one should take into account the character of this Protocol, as is explained in the Commentary to it. It is stated that this Protocol constitutes "a body of *minimum* rules developed and accepted by the international community as a whole."[274] In this context, one should note the last preambular paragraph of Additional Protocol II, which is based on the Martens clause, discussed already above. According to this paragraph

> [i]n cases not covered by the law in force, the human person remains under the protection of the principles of humanity and the dictates of the public conscience.

The Commentary on the Additional Protocols on this provision states:

> If a case is "not covered by the law in force", whether this is because of a gap in the law or because the parties do not consider themselves to be bound by common Article 3, or are not bound by Protocol II, *this does not mean that anything is permitted.* "The human person remains under the protection of the principles of humanity and the dictates of the public conscience": this clarification prevents an *a contrario* interpretation.[275]

The Commentary then goes on by stating that

> [e]ven though customary practices are traditionally only recognized as playing a role in international relations, the existence of customary norms in internal armed conflicts should not be totally denied.[276]

The Commentary then uses the example of the Lieber Code, which itself drew on the existing principles of the laws of war, and then was used as model for the 1899 and 1907 Hague Conventions.[277]

161. Third, the fact that the principle reflected in Articles 86 and 87 of Additional Protocol I is not expressly applicable to internal armed conflicts as such does not mean that commanders in cases of internal armed conflict are not under a duty to oversee and control their subordinates. This is a fundamental tenet of military law.[278] As the ICRC Commentary on Common Article 3 states, when

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[273] The fact that such a fear still exists today may be inferred from the fact that in Article 8 of the ICC Statute, because of the inclusion of norms applicable to internal armed conflicts, paragraph 3, based on Article 3(1) of Additional Protocol II, was included and reads: "Nothing in paragraphs 2(c) and (e) shall affect the responsibility of a Government to maintain or re-establish law and order in the State or to defend the unity and territorial integrity of the State, by all legitimate means."

[274] Commentary on the Additional Protocols, para. 4418. (emphasis added).

[275] Ibid, para. 4434. (emphasis added). This provision is also included in Additional Protocol I, Art. 1, para. 2, the Commentary to which states: "despite the considerable increase in the number of subjects covered by the law of armed conflicts, and despite the detail of its codification, it is not possible for any codification to be complete at any given moment". Commentary on the Additional Protocols, para. 55.

[276] Commentary on the Additional Protocols, para. 4435.

[277] Ibid.

[278] See, generally, Int'l Rev. of the Red Cross, No. 202, "The Law of War and the Armed Forces," F. de Mulinen, February 1978, pp. 20-45; William H. Parks, "Command Responsibility for War Crimes," 62 Mil. L. Rev. 1, 77: "Acceptance of command clearly imposes upon the commander a duty to supervise and control the conduct of his

discussing the criteria for an "armed conflict" (to distinguish an armed conflict from acts of banditry or an "unorganized and short-lived insurrection"), the Party in revolt against the *de jure* government "possesses an organized military force, an authority responsible for its acts, acting within a determinate territory and having the means of respecting and ensuring respect for the Convention."[279] In Additional Protocol II itself, as already discussed, explicit reference to responsible command is made in Article 1. As the Commentary states, responsible command means an organisation that is both capable of planning and carrying out sustained and concerted military operations, *and* imposing discipline in the name of the *de facto* force or government. [280]

162. Finally, the Trial Chamber would like to briefly refer to the "penal prosecutions" provisions, laid down in Article 6 of Additional Protocol II. The primary aim of this provision is to provide guarantees that a person who is charged with violations of international humanitarian law in internal armed conflicts will receive a fair trial and not be sentenced without such a fair trial.[281] It is clear therefore that this section was not drafted for the purpose of clarifying or supplementing the basis for individual criminal responsibility.[282] The omission of such a provision from Additional Protocol II did not, however, in any way question the existence of such individual criminal responsibility under international law. As the ICRC Commentary states "[j]ust like common Article 3, Protocol II leaves intact the right of the established authorities to prosecute, try and convict members of the armed forces and civilians who may have committed an offence related to the armed conflict".[283]

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subordinates in accordance with existing principles of the law of war."; Leslie C. Green, "War Crimes, Crimes Against Humanity and Command Responsibility," in Essays on the Modern Law of War, p. 283 (1999); William G. Eckhardt, "Command Criminal Responsibility: A Plea for a Workable Standard," 97 Mil. L. Rev. 1, 8 (1982): "There are four distinguishing characteristics of a combatant: (1) commanded by a person responsible for his subordinates; (2) has a fixed distinctive sign (be uniformed); (3) carry arms openly; and (4) conduct operations in accordance with the laws and customs of war. A responsible commander heads that list."

The Trial Chamber notes that the issue of command responsibility in an internal armed conflict has not been extensively discussed in any of the works of highly qualified publicists on this subject. See, however, the ICRC "Fact Sheet" on "National Enforcement of International Humanitarian Law: Command responsibility and omission" states, with regard to non-international armed conflicts: "International criminal law recognizes the principle of command responsibility also for acts committed during a non-international armed conflict. For instance, the Statutes of the *ad hoc* tribunals for the former Yugoslavia and Rwanda *expressly affirm* command responsibility, inter alia through omission, for crimes committed by the commander's subordinates." Ref. LG 1999-004c-ENG, p. 2. (emphasis added).
See also, 10 U.S.C.A §162(a) (Combatant commands: assigned forces; chain of command); 10 U.S.C.A. § 164, (Commanders of combatant commands: assignment; powers and duties).

[279] ICRC Commentary to Fourth Geneva Convention, p. 35. Additionally, the Commentary states that "the legal Government is obliged to have recourse to the regular military forces against insurgents organized as military and in possession of a part of the national territory."

[280] Commentary on the Additional Protocols, para. 4463. (emphasis added).

[281] Art. 6 of Additional Protocol II is largely based on Art. 14 of the ICCPR (1966) and is comparable to Art. 75 of Additional Protocol I.

[282] Commentary on the Additional Protocols, para. 4597-4618. Article 6(2)(b) which provides "no one shall be convicted of an offence except on the basis of individual penal responsibility" was drafted for the purposes of prohibiting collective penal responsibility for acts committed by members of a group, rather than to fully elaborate on the concept of individual criminal responsibility. Commentary on the Additional Protocols, para. 4603.

[283] Commentary on the Additional Protocols, para. 4597.

163. The Trial Chamber therefore observes that, in relation to the norms laid down in Additional Protocol I and Additional Protocol II, in general the norms reflected in the former are much more elaborate and precise than in the latter. This applies also for the issue at hand, the criminal responsibility of a superior for a failure to act when under a duty to do so. Articles 86 and 87 of Additional Protocol I explicitly prescribe individual criminal responsibility for those who have a duty to act and fail to act. Additional Protocol II in this respect is only reluctant to create a similar obligation upon States to "take measures necessary to suppress all other breaches, of the Conventions or of this Protocol which result from a failure to act when under a duty to do so."[284] However, the fact that Additional Protocol II does place a duty of responsible command upon a superior confirms that a sound basis for such measures already exists under international law.

164. As the Commentary observes, the negotiations on this Protocol sought to balance the "inviolability of the national sovereignty of States" with ensuring that the very object and purpose of international humanitarian law, namely the protection of victims of armed conflict, was achieved.[285] The balance found at that time was to create a number of mandatory minimum norms applicable in internal armed conflicts. Again, the Protocol also included a reference to the Martens clause in its preamble. The Protocol did not expressly provide for the principle of command responsibility, but did include the principle of responsible command. The latter principle has in the past served as a basis for international judicial organs to hold commanders criminally responsible for the crimes of the subordinates due to their omissions where they had a duty to act and failed to act, as discussed above. Nothing in this Protocol or the Commentary would induce the Trial Chamber to come to an opposite conclusion as the ones drawn and applied by previous international judicial organs and the jurisprudence of this Tribunal.

165. The Defence furthermore refer to the fact that there is practically no national legislation or military manual touching upon command responsibility in the context of internal armed conflicts. The Trial Chamber would agree with this factual observation. But what conclusion can be drawn from this? The specific context of the character of internal armed conflicts needs to be taken into account. The reluctance or fear of States to elaborate specific norms relating to internal armed conflicts on the international level has equally led States not to legislate easily on this issue in their own national legal systems, but rather, limit themselves to criminal law provisions in general or provisions specifically dealing with criminal organisations, treason, terrorism or the like. In the view of this Chamber, however, the principle of *nullum crimen sine lege* is satisfied if the underlying criminal conduct as such was punishable, regardless of how the concrete charges in a

[284] Additional Protocol I, Art. 86(1).
[285] Commentary on the Additional Protocols, para. 4436. See also, para. 4437

specific law would have been formulated. The International Tribunal is in a different position than States and can apply all principles of international criminal law to achieve the purposes of international humanitarian law.

166. The Trial Chamber observes that all ILC drafts since 1950 which included command responsibility did not limit the scope of its application to international armed conflicts. Rather, it expressed its clear intention that the principle of command responsibility apply to all crimes committed during both internal and international armed conflicts, as well as in the absence of an armed conflict.

167. It is not always easy to identify precisely at what point in time a norm forms part of customary international law or whether it is still in a process of development. This Trial Chamber concludes, however, that in relation to the question before it, certainly by and since 1991 command responsibility as a theory of individual criminal responsibility clearly formed part of customary international law. Answering in the affirmative the specific question raised in this challenge to jurisdiction, namely whether the principle of command responsibility formed part of customary international law in relation to violations under Article 3 in the context of internal armed conflicts, does not in any way attack or challenge the integrity of the principle of *nullum crimen sine lege* related to the doctrine of command responsibility, including its elements, object and purpose, and acceptance as a general principle of international criminal law and a part of customary international law.

168. Taking into account the status of the principles of responsible command and command responsibility under international law, it needs now to be examined what the drafters of the Statute had in mind when establishing the jurisdiction of the International Tribunal and what interpretation and application has been provided by the International Tribunal since to these principles.

169. Any interpretation of the object and purpose of the Statute should of course start with an examination of the language of the Statute. As the Trial Chamber in the *Čelebići* case held,

> [t]he cornerstone of the theory and practice of statutory interpretation is to ensure the accurate interpretation of the words used in the statute as the intention of the legislation in question.[286]

Article 1 sets out the competence of the International Tribunal and states that the International Tribunal shall have the power to prosecute persons responsible for serious violations of international humanitarian law in the territory of the former Yugoslavia since 1991 in accordance

[286] *Čelebići* Trial Judgement, para. 160.

with the provisions of the present Statute. No limitation as to the character of the conflict in the context of which crimes may have been committed are included.

170. Article 7(3) of the Statute reflects the principle of command responsibility and starts with the phrase that "[t]he fact that *any* of the acts referred to in articles 2 to 5 of the present Statute was committed [...]." Article 3 and Article 5 refer to offences which can occur in either an internal or an international armed conflict. Article 4 refers to genocide, which can occur in the absence of an armed conflict. A plain-language reading of the relevant provisions of the Statute would consequently lead to the conclusion that any superior can be held individually criminally responsible under the doctrine of command responsibility in relation to any type of armed conflict.

171. This interpretation is supported by the report of the Secretary-General and the discussions that took place within the Security Council when it adopted the Statute. It was made abundantly clear that the Security Council was to fully respect the principle of *nullum crimen sine lege* and to include only such norms that formed part of customary international law. In this respect the Trial Chamber again refers to the report of the Secretary-General that states in paragraph 34 that the Tribunal "should apply rules of international humanitarian law which are beyond any doubt part of customary law." The inclusion of Article 7, paragraph 3, should be read as a reflection of the reasonable and well-supported views of the Security Council and the Secretary-General that this norm formed part of customary international law at the time covered by the mandate of the International Tribunal.[287]

172. As to the scope of the various provisions included in the Statute, the discussion on the establishment of the International Tribunal above,[288] make it clear that *all* persons considered responsible for the violations of international humanitarian law should be held criminally responsible. Furthermore, the temporal jurisdiction of the International Tribunal was defined as such that it encompasses all such violations, regardless of the character of the conflict in which they might have occurred. The Trial Chamber observes that when the Security Council believed it necessary to comment on the classification of the conflict in relationship to specific provisions in the Statute, it did so, as is the case with crimes against humanity.[289] In relation to the doctrine of command responsibility the Council decided not to require any limitation. Rather, the Security

[287] In expanding on the purpose of the International Tribunal, the delegate from Venezuela stated that "[i]t is being established in an attempt to bring to trial and punish anyone who proves to be guilty of the horrible crimes that have been committed in the former Yugoslavia". S/PV.3217, p. 8. The representative from Morocco stated: "We are convinced that the International Tribunal will promote the justice to which we all aspire and will strengthen the rule of law in international relations. The tribunal must seek to punish serious violations of humanitarian law in the broadest sense as crimes against international peace and security." S/PV.3217, p. 13.

[288] See supra, paras 96-120.

[289] As was pointed out in the *Tadić* Jurisdiction Decision, the inclusion of the reference to international or internal armed conflict was to "reintroduce" the nexus between crimes against humanity and armed conflict. See para. 78.

Council evinced its intention that command responsibility be applicable to "any" of the acts referred to in the subject-matter of the International Tribunal.

173. The Trial Chamber therefore concludes that the Security Council, acting under Chapter VII of the Charter of the United Nations, was clearly focused on establishing a Tribunal to address all serious violations of international humanitarian law recognised under customary international law, with the purpose of assisting to restore peace and security in the former Yugoslavia by all available tools of criminal law. The International Tribunal should be able to prosecute any person for any violation of international humanitarian law, regardless of the character of the conflict in which the particular violation took place and regardless of the status of the accused as a military or non-military or as a superior or subordinate. A last quotation from the Appeals Chamber in the *Tadić* Jurisdiction Decision may suffice here. When confronted with the question as to whether, apart from Article 2 on the grave breaches, other provisions relating to the subject matter jurisdiction of the Tribunal should also be interpreted as requiring a nexus to an international armed conflict, the Appeals Chamber stated:

> [i]t would however defeat the Security Council's purpose to read a similar international armed conflict requirement into the remaining jurisdictional provisions of the Statute. Contrary to the drafters' apparent indifference to the nature of the underlying conflicts, *such an interpretation would authorize the International Tribunal to prosecute and punish certain conduct in an international armed conflict, while turning a blind eye to the very same conduct in an internal armed conflict.* [...] However, it would have been illogical for the drafters of the Statute to confer on the International Tribunal the competence to adjudicate the very conduct about which they were concerned, only in the event that the context was an international conflict, when they knew that the conflicts at issue in the former Yugoslavia could have been classified, at varying times and places, as internal, international, or both.[290]

174. Recalling that the doctrine of command responsibility clearly formed part of customary international law at the period of time covered by the mandate of the International Tribunal, the Trial Chamber will now examine the elements that must be satisfied in order to make this form of individual criminal responsibility operative. The elements that must be satisfied by a Trial Chamber at trial are: the existence of a superior-subordinate relationship; the superior knew of had reason to know that the criminal act was about to be or had been committed; the superior failed to take the necessary and reasonable measures to prevent the criminal act or to punish the perpetrator thereof. In doing so, the Trial Chamber emphasises that the purpose of command responsibility is to ensure that persons vested with *responsibility over others* fulfil their *duty* to ensure that their subordinates do not commit criminal acts. The absence of an express limitation – or an additional element or jurisdictional requirement – in the language of Article 7(3) was deemed as evidence that under customary law the doctrine of command responsibility could be applied to non-military superiors. Likewise, this Trial Chamber observes, the absence of any express limitation, or conversely, any

requirement of an international armed conflict – or even armed conflict – on the applicability of the doctrine of command responsibility would indicate that the doctrine applies regardless of the nature of the conflict. Where the Statute on occasion has included certain jurisdictional requirements in relation to the definition of the crimes, no such requirements have been included in relation to the principle of command responsibility.

175. As noted above, whether the application of this provision should depend on the character of the armed conflict was not in discussion in *Čelebići*. The following quotation from this case is significant to this discussion:

> The requirement of the existence of a "superior-subordinate" relationship which, in the words of the Commentary to Additional Protocol I, should be seen "in terms of a hierarchy encompassing the concept of control", is particularly problematic in situations such as that of the former Yugoslavia during the period relevant to the present case – situations where previously existing formal structures have broken down and where, during an interim period, the new, possibly improvised, control and command structures, may be ambiguous and ill-defined. It is the Trial Chamber's conclusion [...] [that] persons effectively in command of such more informal structures, with power to prevent and punish the crimes of persons who are in fact under their control, may under certain circumstances be held responsible for their failure to do so. [291]

The Trial Chamber finds that from this quotation it becomes obvious that the application of this provision to non-international armed conflicts was presumed. If the Trial Chamber would have considered the principle of command responsibility only applicable to international armed conflict, the reference to the breaking down of structures would have made no sense.

176. This wide approach taken by the Trial Chamber in *Čelebići*, and supported by the Appeals Chamber, has been followed in other cases as well. As the overview of the case law above has clearly shown, in a number of cases accused have been held criminally responsible under Article 7(3) in the context of an "armed conflict" for violations of the laws and customs of war, where such violations were based on norms developed in the context of non-international armed conflicts, in particular common Article 3. The Trial Chamber for that reason is unable to agree with the statement of the Defence that there is no precedent in the ICTY case law making Article 7(3) applicable to internal armed conflict.

177. The overview of developments that have taken place after the establishment of the Tribunal confirm the direction that has been taken by the International Tribunal in the interpretation and application of Article 7(3). The ICTR has followed the approach according to which persons were held individually criminally responsible, as a superior, for violations of humanitarian law, notwithstanding the fact that the crimes were committed in an internal armed conflict. In general,

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[290] *Tadić* Jurisdiction Decision, para. 78. (emphasis added).

the Trial Chamber would agree with the Defence that one should be extremely careful to make use of subsequent developments in order to determine the status and content of a norm at a moment prior to such developments. In the present case, however, the Trial Chamber considers the practice of the ICTR relevant in that both the inclusion of command responsibility in Article 6(3) of the ICTR Statute and the case law of the ICTR reconfirm the interpretation followed by this Tribunal. Similar conclusions can be drawn from Article 6 of the Draft Code of Crimes against the Peace and Security of Mankind and Article 28 of the ICC Statute. In the view of the Trial Chamber these instruments, elaborated in 1996 and 1998, have to be considered as confirming the interpretation of the principle of command responsibility, as applied by this Tribunal.

178. As already indicated above, the Trial Chamber in the *Čelebići* case held in relation to the principle of legality that this principle in international criminal law has the

> obvious objective of maintaining a balance between the preservation of justice and fairness towards the accused and taking into account the preservation of world order.[292]

In the present case, the Trial Chamber observes that such a balance is clearly found by interpreting Article 7(3) in the way it has already been done by this Tribunal in a number of earlier cases. This means that the Accused are subject to the jurisdiction of this Tribunal. They may be held criminally responsible for the allegations contained in the Amended Indictment under the principle of command responsibility if it can be proved that they, in the context of an armed conflict, were superiors who knew or had reason to know that subordinates, over whom they had effective control, were about to or had committed criminal acts falling under the jurisdiction of this Tribunal and they failed to take the necessary and reasonable measures to prevent such acts or punish the perpetrators thereof. That is a question for the Trial Chamber that ultimately hears this case to ask and answer; this Trial Chamber finds that it is within the jurisdiction of the International Tribunal, and therefore possible for a subsequent Trial Chamber to consider the question on the merits.

E. Conclusion

179. For the foregoing reasons, the Trial Chamber finds that the doctrine of command responsibility already in – and since - 1991 was applicable in the context of an internal armed conflict under customary international law. Article 7(3) constitutes a declaration of existing law under customary international law and does not constitute new law. Therefore, there was no obstacle to vesting jurisdiction also over this doctrine regardless of the character of the armed conflict to the International Tribunal for the Prosecution of Persons Responsible for Serious

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[291] *Čelebići* Trial Judgement, para. 354.
[292] Ibid, para. 405.

Violations of International Humanitarian Law Committed in the Territory of the Former Yugoslavia since 1991. Accordingly, the Trial Chamber comes to the conclusion that the offences alleged in the Amended Indictment fall within the jurisdiction of this Tribunal. As a result, this part of the motion fails.

III. ISSUE 2: COMMAND RESPONSIBILITY FOR CRIMES COMMITTED BEFORE SUPERIOR-SUBORDINATE RELATIONSHIP EXISTS

180. The Amended Indictment alleges that Amir Kubura took up his position on 1 April 1993. Counts 1, 2, 5 and 6 all reference crimes that were alleged to have been committed in January 1993.[293] Paragraph 58 of the Amended Indictment states that Kubura is responsible under the doctrine of command responsibility because "after he assumed command, he was under a duty to punish the perpetrators."

A. Arguments of the Parties

1. The Defence

181. The Defence contend that there is no basis in customary or conventional law for holding a superior liable for a crime like murder that was allegedly committed by subordinates before the accused Kubura became commander.[294]

182. The Defence argue that the express terms of Article 7(3) require that an accused be the superior when the subordinate commits the offence, citing the words "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". The Defence further contend that Article 7(3) "does not permit superiors to be held responsible for perpetrators who "*subsequently*" become their subordinates" and that if such liability were envisioned, it would be specifically provided for in the Article.[295] If there is any question as to the interpretation of a provision in the Statute or Rules, the Defence submit, it must be interpreted in the light most favourable to the accused.[296]

183. The Defence submit that the provisions of Additional Protocol I do not provide for liability for offences committed before command was assumed.[297] The Defence contend that a plain-language reading of Article 86(2) leads to this conclusion. Additionally, it submits, the Commentary on the Additional Protocols emphasises co-incidence of the superior-subordinate relationship and the commission of the offence, thereby illustrating that the doctrine is only

[293] Amended Indictment, para. 59(a).
[294] Written Submissions of Kubura, para. 29.
[295] Ibid, para. 30. (emphasis in original).
[296] Ibid, para. 31.
[297] Ibid, para. 33. The Defence further argue that Article 1 of the Regulations annexed to the 1907 Hague Convention, which it cites as the origin of the doctrine of command responsibility, also indicated co-incidence of the superior-subordinate relationship for responsible command ("commanded by a person responsible for his subordinates"). See Written Submissions of Hadžihasanović, para. 86.

concerned with the superior who had personal responsibility for the perpetrator at the time of the commission of the offence, as the perpetrator was under his control.[298]

184. The Defence submit that the jurisprudence of the International Tribunal supports its position. Specifically, the Defence cite the *Čelebići* Trial Judgement, which interpreted Article 86 of Additional Protocol I to mean that a

> superior can be held criminally responsible only if some specific information was in fact available to him which would provide notice of offences committed by his subordinates. ... It is sufficient that the superior was put on further inquiry by the information, or, in other words, that it indicated the need for additional investigation in order to ascertain whether offences *were being committed* or *about to be committed* by his subordinates.[299]

185. The Defence argue that Article 7(3) may apply when the superior learns after the event of the offence, but that the superior-subordinate relationship must exist at the time of the offence. Citing the *Čelebići* Trial Judgement, the Defence focus on the concept of "effective control", which, in its opinion, must exist at the time the offences were committed:

> it is the Trial Chamber's view that, in order for the principle of superior responsibility to be applicable, it is necessary that the superior have effective control over the persons committing the underlying violations of international humanitarian law, in the sense of having the material ability to prevent and punish the commission of the offences.[300]

The Defence characterise the material issue for command responsibility as the "existence of a superior to subordinate relationship between commander and perpetrator at the time the offence was committed" and not the existence of that relationship *when* the commander became aware of the alleged commission of the offences.[301] The Defence describe the aim of command responsibility to ensure that commanders will guarantee that troops over whom they have effective control will conduct operations in accordance with the law, thereby *preventing* crimes from being committed, and argue that this aim is achieved by holding those commanders who are in a position to prevent the commission of crimes liable.[302]

186. The Defence further submit that there is no reported case before either an international or national tribunal in which a superior has been found guilty for offences committed by subordinates before he took command, in any type of armed conflict, citing the post World War II cases as examples of the co-incidence of the superior-subordinate relationship.[303] The Defence specifically cite the *High Command Case*, which it argues illustrates that the court made "a clear distinction

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[298] Written Submissions of Kubura, para. 34, citing para. 3544 of the Commentary on the Additional Protocols: "we are only concerned 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."
[299] Written Submissions of Kubura, para. 35, citing *Čelebići* Trial Judgement, para. 393. (emphasis added by Defence).
[300] Written Submissions of Hadžihasanović, citing *Čelebići* Trial Judgement, para. 378.
[301] Kubura Response, para. 9. See also, Kubura Reply, para. 22; Hadžihasanović Response, para. 48.
[302] Hadžihasanović Response, para. 48.

between each period of command" and assessed liability based on the specific command responsibilities during each separate time period.[304] The Defence find that the factors relied upon in the *High Command Case*, including that the accused was actually commander of the perpetrators and that the events occurred over a "wide period of time", supported the conclusion in that case that he "approved" the offences. In contrast, the Defence argue that Kubura is charged with failing to punish particular violations, namely "an isolated incident in Dusina," which occurred months before he assumed command.[305]

187. While the Defence do not rely upon the 1998 ICC Statute as a source for determining customary international law in 1992, they submit that the ICC Statute does "not alter" the scope of the doctrine, which it argues is limited in the ICC Statute to the time when the offences were committed ("circumstances at the time") and not to past crimes ("were committing or about to commit such crimes").[306]

188. The Defence for Hadžihasanović concede that the Trial Chamber in *Kordić* was "partly right" in stating that a commander cannot turn a blind eye to crimes committed by a subordinate before he assumed command.[307] The Defence submit that if the commander fails to punish this subordinate he may be individually responsible for "an" offence, but not pursuant to the doctrine of command responsibility, as he had no responsibility towards the perpetrator when the offence was committed.[308]

189. Additionally, the Defence argue that there are no provisions in national legislation or military codes that hold a superior in non-international armed conflicts criminally responsible for offences committed by persons who subsequently came under a superior's command.[309]

190. Finally, the Defence argue, as a matter of policy, that there would be "no limits" on prosecutions that could be "launched" against subsequent commanders if any subsequent superior who had effective control over the perpetrator of an offence could be criminally liable under international law.[310] The Defence argue that the proper person to prosecute is the commander who had effective control over the perpetrator at the time the offences were committed and failed to

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[303] Written Submissions of Kubura, para. 39-42.
[304] Ibid, paras 41-45.
[305] Ibid, para. 45.
[306] Ibid, para. 38.
[307] As the Defence highlight when it characterises this statement as "*obiter*", the *Kordić* case did not deal with the scenario of a subsequent commander.
[308] Hadžihasanović Response, para. 49.
[309] Written Submissions of Kubura, para. 47.
[310] Ibid, paras 48-49.

either prevent or punish those offences.[311] The Defence further point out that command is generally not vested in one person, and if the immediate commander is no longer available for prosecution after failing to prevent or punish a superior, then a person higher in the chain of command could be held liable.[312]

2. The Prosecution

191. The Prosecution argues that a commander who takes command after the commission of a crime and subsequently knew or had reason that such crimes were committed and fails to punish the subordinate can be held individually criminally liable.[313] The Prosecution submits that the key issue is not who the commander is at the time of the commission of the offences, but rather, who the commander is when sufficient notice of the offences having been committed is communicated, and whether that commander fails in his duty to punish the subordinate-perpetrator.[314]

192. The Prosecution relies on jurisprudence of the International Tribunal to support its argument. The Trial Chamber in *Kordić* stated:

> The duty to punish naturally arises after a crime has been committed. Persons who assume command after the commission are under the same duty to punish. This duty includes at least an obligation to investigate the crimes to establish the facts and to report them to the competent authorities, if the superior does not have the power to sanction himself.[315]

The Prosecution argues that confining command responsibility to the "temporal commander" would relieve subsequent commanders of any responsibility to punish "irrespective of when the crime was committed or reported."[316]

193. The Prosecution argues that the material issue for command responsibility is the existence of a superior-subordinate relationship *when* the commander became aware of the crimes allegedly committed by subordinates and failed to take reasonable and necessary measures to punish.[317] Additionally, the Prosecution submits that criminal liability is incurred when a commander either fails to prevent a crime *or* punish a crime; the Prosecution do not find that the duty to punish is dependent on a prior failure to punish.[318]

194. The Prosecution argues that if the Defence position prevails, the result could be a failure to punish any commander. The Prosecution submits that if a commander is replaced after the

[311] Hadžihasanović Response, para. 48.
[312] Kubura Response, para. 12; Kubura Reply, para. 20.
[313] Written Submissions of Prosecution, para. 60.
[314] Prosecution's Response, para. 17.
[315] *Kordić* Trial Judgement, para. 446.
[316] Written Submissions of Prosecution, para. 62.
[317] Ibid, para. 63.

commission of offences and with the perpetrators not being punished, then no one could be held accountable for failure to punish and Article 7(3) would be rendered meaningless.[319]

195. In response to the Defence argument that there would be no end to prosecutions of subsequent commanders, the Prosecution submits that a prosecutor would exercise his or her discretion to prosecute a subsequent commander, making the determination after looking at factors including the time elapsed between the alleged commission of the offences and the appointment of a new commander. Additionally, a prosecutor may look at whether subordinates have a history of unpunished criminality that continues into the new command, although the Prosecution submissions are not clear whether it would be necessary for the criminality to continue or the lack of punishment to continue into the new command. The Prosecution submits that this case is an example of unpunished and ongoing crimes for which a subsequent commander, namely Kubura, should be held criminally liable under the doctrine of command responsibility.[320]

196. The Prosecution submits that whether Kubura lacked the material ability to punish perpetrators in April 1992 for crimes committed in January 1992 is a factual issue to be determined at trial.[321]

B. Discussion

197. As discussed above, the purpose of the doctrine of command responsibility is to require commanders to fulfil their duty to ensure that their subordinates comply with the principles of international humanitarian law by holding commanders individually criminally responsible for crimes committed by their subordinates when the commander knew or had reason to know that the subordinate was about to commit an offence, or had done so, and the commander failed to take the necessary and reasonable measures to prevent the commission of an offence or failed to punish the perpetrators thereof.

198. Article 7(3) of the Statute posits two scenarios for the attachment of individual criminal liability to a superior: (a) if he knew or had reason to know that a subordinate was about to commit such acts [those referred to in articles 2 to 5 of the Statute] and the superior failed to take the necessary and reasonable measures to prevent such acts *or* (b) if he knew or had reason to know that a subordinate was had committed such acts [those referred to in articles 2 to 5 of the Statute] and failed to punish the perpetrators thereof. Thus, the Trial Chamber finds Article 7(3) to mean

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[318] Prosecution Reply, para. 20.
[319] Prosecution Response, paras 18-19.
[320] Ibid, paras 21- 22.

that (a) when a superior knew of had reason to know that a subordinate was about to commit such acts as those in Article 2 to 5 of the Statute AND the superior failed to take the necessary and reasonable measures to prevent such acts, the commander is individually criminal liable; OR (b) when a superior knew of had reason to know that a subordinate had committed such acts as those in Article 2 to 5 of the Statute AND the superior failed to take the necessary and reasonable measures to punish the perpetrators thereof, the commander is individually criminal liable.

199. In the Final Report of the Commission of Experts,[322] the Commission comments on the requisite mental state for a commander to be held criminally liable. "It is the view of the Commission that the mental element necessary when the commander has not given the offending order is (a) actual knowledge, (b) such serious personal dereliction on the part of the commander as to constitute wilful and wanton disregard of the possible consequences, or (c) an imputation of constructive knowledge, that is, despite pleas to the contrary, the commander, under the facts and circumstances of the particular case, must have known of the offences charged and acquiesced therein." The Commission then provided a list of indicia to consider whether a commander "must have known" about the acts of his subordinates. This list includes: (a) number of illegal acts; (b) type of illegal acts; (c) scope of illegal acts; (d) the time during which the illegal acts occurred; (e) number and type of troops involved; (f) logistics involved, if any; (g) geographical location of the acts: (h) widespread occurrence of the acts; (i) tactical tempo of operations; (j) *modus operandi* of similar illegal acts; (k) officers and staff involved; and (l) location of the commander *at the time*.[323]

200. The Trial Chamber finds that the object and purpose of the doctrine of command responsibility under international criminal law is satisfied by holding subsequent commanders who meet the elements of command responsibility liable for the crimes of their subordinates. The Trial Chamber, however, deems the length of time between the actual commission of the crimes and the time that the superior assumed command over the subordinate in question as a factor to be examined in assessing whether the elements have been satisfied at trial.

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[321] Ibid, para. 17.
[322] S/1994/674, para. 58.
[323] S/1994/674, para. 58. See, also, *Aleksovski* Trial Judgment, para. 80: "The weight to be given to that indicium however depends *inter alia* on the geographical and temporal circumstances. This means that the more physically distant the commission of the acts was, the more difficult it will be, in the absence of other indicia, to establish that the superior had knowledge of them. Conversely, the commission of a crime in the immediate proximity of the place where the superior ordinarily carried out his duties would suffice to establish a significant indicium that he had knowledge of the crime, *a fortiori* if the crimes were repeatedly committed." On the issue of "responsibility of superiors" in Article 86 of Additional Protocol I, the Commentary on the Additional Protocols states that "[e]very case must be assessed in the light of the situation of the superior concerned at the time in question, in particular distinguishing the time that the information was available and the time at which the breach was committed, also taking into account other circumstances which claimed his attention at that point, etc." Commentary on the Additional Protocols, para. 3545.

201. Whether the elements for command responsibility can be met in this case is an issue to be determined at trial. While Kubura, according to the Amended Indictment, was not the superior at the time the crimes in the named counts were alleged to have been committed, it is only when the Trial Chamber hears the evidence related to Kubura's ability to exercise effective control over the alleged subordinates who allegedly committed the crime that it will be able to determine if he had the material ability to punish them for crimes committed approximately three months prior to his taking over command, as the Amended Indictment charges. Additionally, when Kubura was in a position to "know or had reason to know" information regarding the alleged commission of the offences is a factual issue to be determined at trial. That information is necessary to determine what impact the time difference between the actual commission of the crimes and his being in a position to exercise effective control over these subordinates may have on finding him liable under the principle of command responsibility.

C. Conclusion

202. The Trial Chamber finds that in principle a commander can be liable under the doctrine of command responsibility for crimes committed prior to the moment that the commander assumed command. The Trial Chamber finds, however, that the question of whether the principle may also apply to the present case depends on whether the elements of command responsibility are met, which is a factual issue to be determined at trial. Accordingly, the Trial Chamber also denies this part of the Defence motion.

IV. ISSUE 3: LIABILITY OF SUPERIORS FOR FAILURE TO PREVENT OR PUNISH *PLANNING AND PREPARATION* OF OFFENCES

203. Paragraphs 61 and 66 of the Amended Indictment state, in relation to the three accused, that they "knew of had reason to know that the following ABiH forces under their command and control *were about to plan, prepare or* execute" certain acts.

A. Arguments of the Parties

1. The Defence

204. The Defence argue that Article 7(3) of the Statute does not impose liability on a superior for failing to prevent or punish the *planning* or *preparation* of an offence but only the *commission* of the offence.[324] The Defence submit that in "many" of the cases before the International Tribunal, unless the violation was actually committed, no liability was found under Article 7(3).[325] It recognises that the duty to prevent necessarily exists before the commission of an offence, but that liability of a superior only arises if the offence was actually committed. To allow for liability when no crime was committed would amount to a form of "attempt", and attempt is not included in the Statute.[326]

205. The Defence further contend that liability for planning or preparing an offence, as well as for instigating and aiding and abetting an offence, can only be charged under Article 7(1) of the Statute. Therefore, it contends, paragraphs 61 and 66 in their present form are *ultra vires*.[327]

206. The Defence request that the Prosecution be ordered to remove the references to "planning" and "preparation" from the Amended Indictment.[328]

2. The Prosecution

207. The Prosecution submits that under the jurisprudence of the International Tribunal, "planning" and "preparation" can be included in the Amended Indictment.[329] The Prosecution

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[324] Joint Challenge, para. 17; Written Submissions of Hadžihasanović, para. 90-91; Written Submissions of Kubura, para. 50.
[325] Written Submissions of Hadžihasanović, para. 91, citing *Blaškić* Trial Judgement and *Kordić* Trial Judgement; Kubura Response, paras 14-16.
[326] Hadžihasanović Response, para. 50; Kubura Response, para. 16.
[327] Written Submissions of Hadžihasanović, para. 92; Written Submissions of Kubura, para. 51.
[328] Written Submissions of Hadžihasanović, para. 93; Written Submissions of Kubura, para. 51.
[329] Written Submissions of Prosecution, para. 65, citing *Kordić* Trial Judgement, para. 445: "The duty to prevent should be understood as resting on a superior at any stage before the commission of a subordinate crime if he acquires knowledge that such a crime is being prepared or planned, or when he has reasonable grounds to suspect subordinate crimes".

disagrees with the Defence proposition that paragraphs 61 and 66 reflect liability under 7(1).[330] Further, the Prosecution states that it is not seeking to introduce liability for attempt in these paragraphs.[331]

208. The Prosecution further contends that knowledge of the "planning and preparation" of criminal acts provides the basis for liability to prevent an offence. It describes the inclusion of "planning and preparation" for the purpose of providing a possible ingredient of the superior's knowledge.[332]

B. Discussion

209. The Trial Chamber does not find that through the words "planning" and "preparation" the Prosecution is seeking to attach any liability for attempted crimes by subordinates. Article 7(3) is clear in its wording and intent: "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." Criminal liability under the Statute cannot attach because subordinates "were about to plan, prepare" crimes within the jurisdiction of the Statute.

210. Evidence of acts of planning or preparation may be relevant for a Trial Chamber to make its finding of whether a superior "knew or should have known" that a subordinate was "about to commit such acts" and "failed to prevent such acts". The Trial Chamber finds that the inclusion of the words "were about to", "plan", and "prepare" before "execute" in paragraphs 61 and 66 of the Amended Indictment are related to the superior's knowledge that subordinates were allegedly "about to commit such acts" and therefore falls within the scope of Article 7(3) of the Statute.

C. Conclusion

211. Accordingly, the Trial Chamber denies the request that the Prosecution be ordered to rephrase paragraphs 61 and 66.

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[330] Written Submissions of Prosecution, para. 66.
[331] Prosecution Reply, para. 22.
[332] Written Submissions of Prosecution, para. 66.

V. DISPOSITION

For the foregoing reasons, the Trial Chamber, pursuant to Rule 72 of the Rules:

DISMISSES the Motion in full.

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

Dated this twelfth day of November 2002,
At The Hague
The Netherlands

Wolfgang Schomburg
Presiding Judge

[Seal of the Tribunal]