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UNITED
NATIONS

International Tribunal for the Prosecution of Persons Responsible for Serious Violations of International Humanitarian Law Committed in the Territory of the Former Yugoslavia Since 1991	Case:	IT-01-47-AR72
	Date:	16 July 2003
	Original:	English

BEFORE THE APPEALS CHAMBER

Before: Judge Theodor Meron, Presiding
Judge Fausto Pocar
Judge Mohamed Shahabuddeen
Judge David Hunt
Judge Mehmet Güney

Registrar: Mr. Hans Holthuis

Decision of: 16 July 2003

PROSECUTOR

v

Enver HADŽIHASANOVIĆ, Mehmed ALAGIĆ and Amir KUBURA

DECISION ON INTERLOCUTORY APPEAL CHALLENGING JURISDICTION IN RELATION TO COMMAND RESPONSIBILITY

Counsel for the Prosecutor

Mr. Ekkehard Withopf

Counsel for the Defence

Ms. Edina Rešidović and Mr. Stéphane Bourgon for Enver Hadžihasanović
Mr. Fahrudin Ibrišimović and Mr. Rodney Dixon for Amir Kubura

I. PRELIMINARY

1. The Appeals Chamber is seised of an interlocutory appeal filed by Enver Hadžihasanović, Mehmed Alagić, and Amir Kubura ("Appellants"). It recalls that, on 12 November 2002, a Trial Chamber rendered a "Decision on Joint Challenge to Jurisdiction", dismissing a motion challenging jurisdiction in the present case. The motion had been brought by the Appellants. On 27 November 2002, the Appellants jointly filed, before the Appeals Chamber, an "Interlocutory Appeal on Decision on Joint Challenge to Jurisdiction" ("interlocutory appeal") pursuant to Rule 72 (B) (i) of the Rules of Procedure and Evidence of the International Tribunal ("Rules"). The Prosecution filed a response on 9 December 2002,[1] and an addendum on 20 December. The Appellants filed a joint reply on 13 December ("Reply").

2. The Appellant Mehmed Alagić died on 7 March 2003. By its order of 21 March 2003, the Trial Chamber terminated the proceedings against him. However, for convenience, the Appeals Chamber would proceed with the present proceedings in the title under which they were filed.

3. This interlocutory appeal presents two issues. These concern challenges by the Appellants on:

> (1) the responsibility of a superior for the acts of his subordinates in the course of an armed conflict which was not international in character ("internal"); and
>
> (2) the responsibility of a superior for acts which were committed before he became the superior of the persons who committed them.

The Appellants' challenges on these two points will be referred to as the first and second grounds, respectively, of their interlocutory appeal.

4. The interlocutory appeal included another matter. However, in a decision of 21 February 2003, a bench of three appellate Judges declared, under Rule 72 (E) of the

[1] Prosecution's Response to Defence Interlocutory Appeal on Jurisdiction ("Response").

Rules,[2] that the interlocutory appeal is valid insofar as it challenged (1) and (2) above.[3] The decision dismissed the remainder of the interlocutory appeal.

5. As to (1) and (2), the Trial Chamber found (a) 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",[4] and (b) 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."[5]

6. The original indictment included counts under Articles 2 and 3 of the Statute of the International Tribunal ("Statute"). The armed conflict in that indictment was characterised as an international one. However, an amended indictment, of 11 January 2002, pleads only violations of the laws or customs of war, which are punishable under Article 3 of the Statute ("war crimes").[6] Paragraph 11 of the amended indictment alleges:

> At all times relevant to this indictment, an armed conflict existed on the territory of Bosnia and Herzegovina.

7. The amended indictment does not describe the "armed conflict" to which it refers as international or internal. The Prosecution has since stated that it has pleaded the existence of an "unclassified" armed conflict in Bosnia and Herzegovina.[7] The Appeals Chamber takes no position on whether the amended indictment should be treated as pleading only an internal armed conflict; it will proceed on the assumption that it can relate to such a conflict. Further, the amended indictment charges the Appellants with superior responsibility pursuant to Article 7(3) only.

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[2] Rule 72 (E) of the Rules provides that "an appeal brought under paragraph (B) (i) may not be proceeded with if a Appeals Chamber of three Judges of the Appeals Chamber, assigned by the President, decides that the appeal is not capable of satisfying the requirement of paragraph (D), in which case the appeal shall be dismissed." Rule 72(B) (i) allows interlocutory appeals from decisions on preliminary motions challenging jurisdiction as a matter of right. Rule 72(D) defines such a preliminary motion as one "which challenges an indictment on the ground that it does not relate to" heads of jurisdiction defined in Articles 1 through 9 of the Statute.
[3] Decision pursuant to Rule 72(E) as to Validity of Appeal, 21 February 2003 ("Impugned decision").
[4] Impugned decision, para. 179.
[5] *Ibid.*, para. 202.
[6] Decision of 21 February 2003, para. 3.
[7] Response, para. 7.

8. In the interlocutory appeal, the Appellants request an oral hearing.[8] On 12 December 2002, Mr. Ilias Bantekas of the School of Law, University of Westminster, England, filed an application for leave to submit to the Appeals Chamber an *amicus* brief on the issue of the application of Article 7(3) of the Statute to internal armed conflicts. The Appeals Chamber, in view of the extensive submissions filed by the parties before both the Trial Chamber and the Appeals Chamber (18 briefs in total) and the substantial discussion in the impugned decision of the issues now under appeal, does not consider it necessary to hold a hearing on the appeal or to call any *amicus* pursuant to Rule 74 of the Rules.[9]

9. The Appeals Chamber will now consider the two points on which the bench of three appellate Judges has found that the interlocutory appeal is valid. In doing so, it desires to affirm its conception that its decision has to bear a reasoned relationship to those points, that its reasoning has to take account of relevant arguments of the parties, but that it is not obliged to deal *seriatim* with each and every argument raised by either side.

II. COMMAND RESPONSIBILITY IN INTERNAL ARMED CONFLICTS

10. As regards the first point on which the bench of three appellate Judges found that the interlocutory appeal raised a valid issue, the Appellants make many arguments but submit in substance that the Trial Chamber erred in two respects, in that:[10]

a) it wrongly found that there was a basis in customary international law for the applicability of the doctrine of command responsibility in internal armed conflicts at the time material to the indictment; and

b) it failed to respect the principle of legality in reaching its conclusion that it had jurisdiction in the present case.

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[8] Interlocutory Appeal, para. 126.
[9] Rule 74 provides that "a Chamber may, if it considers it desirable for the proper determination of the case, invite or grant leave to a State, organization or person to appear before it and make submissions on any issue specified by the Chamber."
[10] Interlocutory Appeal, para.14, p.4. "Superior responsibility" is interchangeable with "command responsibility", and a commander is certainly a superior in terms of Art. 7(3) of the ICTY Statute.

The Appeals Chamber will consider these issues in the order above-mentioned.

(a) Whether customary international law provides for command responsibility in internal armed conflicts

11. As to this issue, there are two uncontested points of law. The first is the principle that serious violations of international humanitarian law in an internal armed conflict incur individual criminal responsibility under customary international law;[11] the finding of the Appeals Chamber to this effect in the *Tadić* Jurisdiction Decision remains a leading authority.[12] The second point is that, at all times relevant to this case, the doctrine of command responsibility was part of customary international law relating to international armed conflict.[13] Where the parties disagree is on the question whether the doctrine applies, as part of customary international law, in an internal armed conflict.[14]

12. In considering this question, the Appeals Chamber is aware that it is incorrect to assume that, under customary international law, all the rules applicable to an international armed conflict automatically apply to an internal armed conflict. More particularly, it appreciates that to hold that a principle was part of customary international law, it has to be satisfied that State practice recognized the principle on the basis of supporting *opinio juris*. However, it also considers that, where a principle can be shown to have been so established, it is not an objection to the application of the principle to a particular situation to say that the situation is new if it reasonably falls within the application of the principle. Also, in determining whether a principle is part of customary international law and, if so, what are its parameters, the Appeals Chamber may follow in the usual way what the Tribunal has held in its previous decisions.

13. Prohibitions on the doing of certain acts in the course of an internal armed conflict are imposed by Article 3 common to the Geneva Conventions of 1949, which

[11] Interlocutory Appeal, para. 47; Reply, para. 21.
[12] *Prosecutor v. Dusko Tadić*, Case No. IT-94-1-AR72, Decision on the Defence Motion for Interlocutory Appeal on Jurisdiction ("*Tadić* Jurisdiction Decision"), 2 October 1995, Appeals Chamber, para.134.
[13] Impugned decision, paras. 17, 40, and 167.
[14] Decision of 21 February 2003, para. 5.

has long been accepted as having customary status.[15] In the *Tadić* Jurisdiction Decision, the Appeals Chamber found that "customary international law imposes criminal responsibility for serious violations of common Article 3, as supplemented by other general principles and rules on the protection of victims of internal armed conflict, and for breaching certain fundamental principles and rules regarding means and methods of combat in civil strife".[16] Likewise, at all times material to this case, customary international law included the concept of command responsibility in relation to war crimes committed in the course of an international armed conflict.[17] Thus, the concept would have applied to war crimes corresponding to the prohibitions listed in common Article 3 when committed in the course of an international armed conflict. It is difficult to see why the concept would not equally apply to breaches of the same prohibitions when committed in the course of an internal armed conflict.

14. In the view of the Appeals Chamber, the matter rests on the dual principle of responsible command and its corollary command responsibility.[18] The origin and interrelationship of these ideas merit much discussion. Here, however, it is sufficient to note that the principle of responsible command was incorporated by the provision in Article 1 of the Regulations Respecting the Laws and Customs of War on Land annexed to the Fourth Hague Convention of 1907 reading:

> 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 ...

Article 43(1) of the 1977 Additional Protocol I to the Geneva Conventions likewise provided that the "armed forces of a Party to a conflict consist of all organized armed

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[15] See *Corfu Channel, Merits, I.C.J. Reports 1949,* p.22, and *Military and Paramilitary Activities in and against Nicaragua, I.C.J. Reports 1986*, pp. 112 and 114.
[16] *Tadic* Jurisdiction Decision, para. 134.
[17] *Prosecutor v. Delalić et al*, IT-96-21-A, Judgement, 20 February 2001, paras. 222-241 ("*Čelebići* Appeal Judgment"); *Prosecutor v Bagilishema*, ICTR-95-1A-A, Judgement (Reasons), 13 December 2002, paras. 35-37.
[18] For the development of the idea, see the judgment of the Trial Chamber in *Delalić*, IT-96-21-T, of 16 November 1998, paras. 333ff.

forces, groups and units which are under a command responsible to that Party for the conduct of its subordinates, ..."

15. The position is no different as regards internal armed conflicts. Responsible command was an integral notion of the prohibition imposed by Article 3 common to the 1949 Geneva Conventions against the doing of certain things in the course of an internal armed conflict. Referring to the criteria for determining whether there was an "armed conflict not of an international character" within the meaning of that provision, the *ICRC Commentary* spoke, authoritatively, of a revolting party possessing "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.[19] Article 1(1) of Protocol II Additional to the Geneva Conventions likewise spoke of a Contracting Party's "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 ...".

16. Thus, whether Article 3 of the Statute is referring to war crimes committed in the course of international armed conflict or to war crimes committed in the course of internal armed conflict under Article 3 common to the Geneva Conventions, it assumes that there is an organized military force. It is evident that there cannot be an organized military force save on the basis of responsible command. It is also reasonable to hold that it is responsible command which leads to command responsibility. Command responsibility is the most effective method by which international criminal law can enforce responsible command.

17. It is true that, domestically, most States have not legislated for command responsibility to be the counterpart of responsible command in internal conflict. This, however, does not affect the fact that, at the international level, they have accepted that, as a matter of customary international law, relevant aspects of international law

[19] Jean S. Pictet, *Commentary, I Geneva Convention* (Geneva, 1952), p. 49.

(including the concept of command responsibility) govern the conduct of an internal armed conflict, though of course not all aspects of international law apply. The relevant aspects of international law unquestionably regard a military force engaged in an internal armed conflict as organized and therefore as being under responsible command. In the absence of anything to the contrary, it is the task of a court to interpret the underlying State practice and *opinio juris* (relating to the requirement that such a military force be organized) as bearing its normal meaning that military organization implies responsible command and that responsible command in turn implies command responsibility.

18. In short, wherever customary international law recognizes that a war crime can be committed by a member of an organised military force, it also recognizes that a commander can be penally sanctioned if he knew or had reason to know that his subordinate was about to commit a prohibited act or had done so and the commander failed to take the necessary and reasonable measures to prevent such an act or to punish the subordinate. Customary international law recognizes that some war crimes can be committed by a member of an organised military force in the course of an internal armed conflict; it therefore also recognizes that there can be command responsibility in respect of such crimes.

19. The Appellants argue that international law developed to regulate the relations between States on the basis of reciprocity and that command responsibility for acts committed in the course of an internal conflict does not raise any questions of reciprocity.[20] The Appeals Chamber does not consider that the matter depends on notions of reciprocity. In the course of development, States have come to consider that they have a common interest in the observance of certain minimum standards of conduct in certain matters;[21] this includes certain aspects of conduct in an internal armed

[20] Interlocutory Appeal, para. 39.
[21] See *Reservations to the Convention on the Prevention and Punishment of the Crime of Genocide, I.C.J.Reports 1951*, p. 23; and *Military and Paramilitary Activities in and against Nicaragua, I.C.J. Reports 1986*, pp. 112 and 114.

conflict. To that extent, internal armed conflict is now the concern of international law without any question of reciprocity.

20. Thus, the fact that it was in the course of an internal armed conflict that a war crime was about to be committed or was committed is not relevant to the responsibility of the commander; that only goes to the characteristics of the particular crime and not to the responsibility of the commander. The basis of the commander's responsibility lies in his obligations as commander of troops making up an organised military force under his command, and not in the particular theatre in which the act was committed by a member of that military force.

21. As against the foregoing, the Appellants argue that "a clear distinction must also be made between the principle of '*responsible command*' and '*command responsibility*'."[22] They contend that the Trial Chamber confused the two concepts when it concluded that the inclusion of the principle of responsible command in Additional Protocol II connoted command responsibility.[23] The Prosecution responds that "the doctrine of command responsibility is a logical consequence of the imposition of individual criminal responsibility for serious violations of international humanitarian law committed by members of forces acting under a responsible command."[24]

22. The Appeals Chamber recognizes that there is a difference between the concepts of responsible command and command responsibility. The difference is due to the fact that the concept of responsible command looks to the duties comprised in the idea of command, whereas that of command responsibility looks at liability flowing from breach of those duties. But, as the foregoing shows, the elements of command responsibility are derived from the elements of responsible command.

23. The Appeals Chamber recalls the United States Supreme Court's decision in the matter of *Yamashita v. Styer*, which, delivered by Chief Justice Stone, states:

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[22] Interlocutory Appeal, para. 32.
[23] *Ibid.*
[24] Response, para. 43.

> The question is whether the law of war imposes 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....
>
> It is evident that the conduct of military operations by troops whose excesses are unrestrained by the orders or efforts of the commander would almost certainly result in violations which it is the purpose of the law of war to prevent....*Hence the law of war presupposes that its violation is to be avoided through the control of the operations of war by commanders who are to some extent responsible for their subordinates.*
>
> This is recognized by the Annex to the Fourth Hague Convention of 1907, respecting the laws and customs of war on land...Similarly Article 19 of the Tenth Hague Convention...provides that commanders in chief of the belligerent vessels "must see that the above Articles are properly carried out"...And Article 26 of the Geneva Red Cross Convention of 1929...for the amelioration of the condition of the wounded and sick in armies in the field, makes it "the duty of the commander-in-chief of the belligerent armies to provide for the details of execution of the foregoing Articles, [of the convention] as well as for the unforeseen cases."[25]

The court then concluded that these provisions imposed on a commander an affirmative duty to take appropriate measures to protect prisoners of war and the civilian population, and that the duty of a commander "has heretofore been recognized, and its breach penalized by our own military tribunals".[26] Thus, the duties comprised in responsible command are generally enforced through command responsibility. The latter flows from the former.

[25] 327 U.S. 1, 14-15 (1946).
[26] *Ibid.*, s. 16.

24. This view is consistent with Article 7(3) of the Statute in its application to Article 3 thereof. Article 7(3) provides:

> The fact that any of the acts referred to in Article 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.[27]

The Appellants accept that a "plain reading of Article 7(3) *may* lead to the inference that it could apply in internal conflict, since it appears to cover all violations in the Statute, some of which may be committed in internal conflict."[28] That is right; the provision *does* cover violations in internal armed conflict. The effect of the Appellant's submissions is that, to the extent that it does so, the provision is *ultra vires;* in their view, "internationality is required."[29]

25. For the reasons given, the Appeals Chamber does not consider that Article 7(3) is *ultra vires* to the extent that it applies to internal armed conflicts. It will merely emphasise that, if the doctrine of command responsibility is inapplicable to the case of an internal armed conflict, Article 7(3) of the Statute, which clearly assumes such a hypothesis, is *pro tanto* defeated.

26. The applicability of command responsibility to internal armed conflict is not disputed in the cases of the tribunals established for Rwanda, Sierra Leone and East Timor. It is said that these tribunals were established after the ICTY. However, in the view of the Appeals Chamber, the establishment of these bodies was consistent with the proposition that customary international law previously included the principle that command responsibility applied in respect of an internal armed conflict.

27. Taken as a whole, the Appeals Chamber agrees with the survey and analysis made by the Trial Chamber of various sources (including decided cases) concerning the

[27] Article 6(3) of the Statute of the International Tribunal for Rwanda ("ICTR") reproduces this wording.
[28] Interlocutory Appeal, para. 95.

development of State practice and *opinio juris* on the question whether command responsibility forms part of customary international law in relation to war crimes committed in the course of an internal armed conflict, and rejects the submissions of the Appellants on these points. The Appeals Chamber will not therefore enter into such matters. It will diverge from this position only for the purpose of dealing with one argument.

28. The Appellants have placed reliance on the fact that the doctrine of command responsibility was referred to in Articles 86 and 87 of the 1977 Protocol I Additional to the Geneva Conventions of 1949[30] but was not referred to in Protocol II. The former being directed to international armed conflicts while the latter is directed to internal armed conflicts, the Appellants contend that the difference tends to support the view that State practice regarded command responsibility as part of customary international law relating to international armed conflicts and did not regard command responsibility as part of customary international law relating to internal armed conflicts.

29. The Appeals Chamber affirms the view of the Trial Chamber that command responsibility was part of customary international law relating to international armed conflicts before the adoption of Protocol I. Therefore, as the Trial Chamber considered, Articles 86 and 87 of Protocol I were in this respect only declaring the existing position, and not constituting it. In like manner, the non-reference in Protocol II to command responsibility in relation to internal armed conflicts did not necessarily affect the question whether command responsibility previously existed as part of customary international law relating to internal armed conflicts. The Appeals Chamber considers that, at the time relevant to this indictment, it was, and that this conclusion is not overthrown by the play of factors responsible for the silence which, for any of a number of reasons, sometimes occurs over the codification of an accepted point in the drafting of an international instrument.

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[29] *Ibid.*, para. 48.
[30] *Protocol additional to the Geneva Conventions of 12 August 1949, and relating to the Protection of Victims of International Armed Conflicts* ("Additional Protocol I"), 1125 UN Treaty Series, pp. 3-608.

30. Were it otherwise, the Appeals Chamber would have to uphold that, "as argued by the Defence, it is not a crime for a commander in an internal conflict to fail to prevent or punish the killings committed by his subordinates,"[31] *i.e.*, even if the commander knows or has reason to know of the killings. The Appeals Chamber does not consider that it is required to sustain so improbable a view in contemporary international law; more particularly, it finds that such a view is not consistent with its reasoning in the *Tadić* Jurisdiction Decision[32] and in the *Čelebići* Appeal Judgment,[33] or with the reasoning of the Trial Chamber in *Aleksovski.*[34]

31. In the opinion of the Appeals Chamber, the Trial Chamber was correct in holding, after a thorough examination of the matter, that command responsibility was at all times material to this case a part of customary international law in its application to war crimes committed in the course of an internal armed conflict.

(b) The principle of legality

32. As to this issue, the Appellants contend that, if command responsibility for war crimes committed in the course of an internal armed conflict was not part of customary international law at the time when the acts were allegedly done by the Appellants, the principle of legality was necessarily breached.[35] It being clear from the Secretary-General's Report that the Statute was restricted to customary international law, it would follow that the Appellants were indicted for something that was not a crime under customary international law at the time when the relevant acts were allegedly committed.

33. It does not appear to the Appeals Chamber that this argument can stand if it is held, as the Appeals Chamber holds, that at all material times it was part of customary international law that there could be command responsibility in respect of war crimes

[31] Interlocutory Appeal on Decision on Joint Challenge to Jurisdiction, 27 November 2002, para. 20(a).
[32] Decision, 2 October 1995, para.77.
[33] *Čelebići* Appeal Judgment, paras. 116-181.
[34] *Prosecutor v. Aleksovski*, Case No. IT-95-14/1-T, Trial Judgment, 25 June 1999, para. 228.
[35] Interlocutory Appeal, para, 14.

committed in the course of an internal armed conflict. The argument assumes that such responsibility did not form part of customary international law at the material times. If the assumption goes, so does the argument which is based on it.

34. The Appellants argued before the Trial Chamber, and they seem to have retained the argument before the Appeals Chamber[36], that the principle of legality requires that the crime charged be set out in a law that is accessible and that it be foreseeable that the conduct in question may be criminally sanctioned at the time when the crime was allegedly committed. The Appeals Chamber agrees with the answers given by the Trial Chamber. As to foreseeability, the conduct in question is the concrete conduct of the accused; he must be able to appreciate that the conduct is criminal in the sense generally understood, without reference to any specific provision. As to accessibility, in the case of an international tribunal such as this, accessibility does not exclude reliance being placed on a law which is based on custom.[37] The *Tadić* Jurisdiction Decision shows that individual criminal responsibility can attach to a breach of a customary prohibition of certain conduct.[38]

35. The Appellants further argue that the principle of legality requires the existence of a conventional as well as a customary basis for an incrimination.[39] The Appeals Chamber also agrees with the Trial Chamber's rejection of this argument. The obligation of the Tribunal to rely on customary international law excludes any necessity to cite conventional law where customary international law is relied on.[40] Contrary to the arguments of the Appellants, there is nothing in the Secretary-General's Report, to which the Statute of the Tribunal was attached in draft, which requires both a customary basis and a conventional one for an incrimination.

36. Lastly, the Appellants argue that the Trial Chamber confused responsibility under Article 7(1) of the Statute with responsibility under Article 7(3).[41] In the opinion

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[36] Interlocutory Appeal, para. 15.
[37] See "Decision on Dragoljub Ojdanić's Motion Challenging Jurisdiction-Joint Criminal Enterprise", *Prosecutor v. Milan Milutinović et al*, IT-99-37-AR72, 21 May 2003, paras. 37-39 ("Ojdanić Decision").
[38] *Tadić* Jurisdiction Decision, para. 134.
[39] Interlocutory Appeal, para. 16.
[40] See Ojdanić Decision, paras. 9-10.
[41] Interlocutory Appeal, paras. 28-31.

of the Appeals Chamber, there is no basis for such a contention: the Trial Chamber was clear about the difference.

III. COMMAND RESPONSIBILITY FOR CRIMES COMMITTED BEFORE THE SUPERIOR-SUBORDINATE RELATIONSHIP EXISTS

37. The Appeals Chamber will now consider the second point on which the interlocutory appeal has been found to be valid by the bench of three appellate Judges, namely, the responsibility of a superior for acts which were committed before he became the superior of the persons who committed them.

38. The amended indictment alleges that Amir Kubura took up his position as acting commander of the Bosnian Army, 3rd Corps, 7th Muslim Mountain Brigade on 1 April 1993. Paragraph 58 charges him with being "criminally responsible in relation to those crimes that were committed by troops of the ABiH 3rd Corps 7th Muslim Mountain Brigade prior to his assignment on 1 April 1993 (...) Amir Kubura knew or had reason to know about these crimes. After he assumed command, he was under the duty to punish the perpetrators."[42] In effect, he is charged with command responsibility in connection with offences committed or started more than two months before he became the commander of the troops on 1 April 1993.[43]

39. Under count 1, he is charged with command responsibility for, among other events, the Dusina killings in the Zenica Municipality on 26 January 1993.[44] On count 4, he is charged with command responsibility in connection with cruel treatment of prisoners by his subordinates at the Zenica Music School between about 26 January 1993 to at least January 1994. Counts 5 and 6 charge him with command responsibility in connection with wanton destruction and plunder of property allegedly committed at, among others, Dusina in January 1993. With the exception of count 4, the rest of the charges concern events that started and ended before Kubura became the commander of

[42] Amended Indictment, para. 58.
[43] *Ibid.*
[44] *Ibid.*, para. 59.

the troops allegedly involved in those events. Count 4 includes a period of time commencing before but continuing after Kubura became the commander.

40. So, the issue is whether command responsibility extends to acts committed by subordinates prior to the assumption of command by the commander.

41. The Appellants argue that, as a matter of principle, there is no basis in conventional or customary law for holding a commander criminally responsible for the acts of persons who were not his subordinates when they committed the acts.[45] In their submission, the express terms of Article 7(3) of the Statute require that an accused be the superior when the subordinate commits the offence.[46] They submit that a finding to the contrary of what the practice shows would have far-reaching consequences, in that any superior who had effective control over the perpetrators months or years after the offences were committed could be held criminally liable for not punishing the perpetrators.[47] The proper person to be prosecuted is the commander who had effective control over the perpetrator at the time the offences were committed, and who failed to prevent or to punish the crimes.[48]

42. The appellant Kubura also argues, first, that, if the liability of superiors for acts of perpetrators who subsequently become their subordinates had been envisaged, the Statute would have specifically provided for such liability in Article 7(3).[49] Secondly, Article 86 (2) of Additional Protocol I (as well as the Commentary of the International Committee of the Red Cross on that provision) does not provide for liability for offences committed before command was assumed; emphasis is placed on the coincidence of the

[45] See the Written Submission of Amir Kubura on Defence Challenges to Jurisdiction, 10 May 2002 ("Kubura's Submission"), paras. 30-47; Reply, para. 32. See also Response of Amir Kubura to Prosecution's Brief on Defence Challenges to Jurisdiction of 10 May 2002, paras. 8-11; Joint Challenge to Jurisdiction arising from the Amended Indictment Written Submissions of Enver Hadžihasanović, 10 May 2002, paras. 86-89.
[46] Joint Challenge to Jurisdiction Arising from the Amended Indictment, para. 13; Reply of Amir Kubura to Prosecution's Response to Defence Written Submissions on Challenges to Jurisdiction, 31 May 2002, paras. 18-22.
[47] Kubura's Submission, para. 48. See also the Joint Challenge to Jurisdiction Arising from the Amended Indictment, para. 15, and Reply of Amir Kubura to Prosecution's Response to Defence Written Submissions on Challenges to Jurisdiction, para. 28.
[48] Hadžihasanović Response, 24 May 2002, para.48. See also Joint Challenge to Jurisdiction Arising from the Amended Indictment, para.15; Reply of Amir Kubura to Prosecution's Response to Defence Written Submissions on Challenges to Jurisdiction, para.28.
[49] Kubura's Submission, para. 30.

superior-subordinate relationship and the commission of the offences.[50] Thirdly, the case law of the International Tribunal, as embodied in the *Čelebići* Trial and Appeal Judgements as well as in the *Kordić* Trial Judgement, supports the contention that the superior-subordinate relationship must exist at the time of the offence.[51] Fourthly, Article 28 (a) of the Rome Statute of the International Criminal Court limits the responsibility of superiors to the time when the offences were committed.[52] Lastly, there are no provisions in national legislation or military codes that hold a superior in internal armed conflicts criminally responsible for offences committed by persons who subsequently came under the superior's command.[53]

43. In its brief filed before the Trial Chamber, the Prosecution cites the *Kordić* Trial Judgement, which states:

> 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.[54]

The Prosecution later submits that "the material fact for determination is therefore not *who* was in command at the time of the crime, but *when* a commander became aware of the crime, yet failed to take the 'reasonable and necessary measures' to punish the violation".[55] Further, "the Prosecution case is that the troops commanded by Alagi [*sic*]

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[50] *Ibid.*, paras. 33 and 34.
[51] *Ibid.*, paras. 36 and 37.
[52] *Ibid.*, para. 38. Article 28(A) of the Rome Statute, of 12 July 1998 and corrected as of 10 November 1998 and 12 July 1999, reads: "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...*" (emphasis added).
[53] Kubura's Submission, para. 47.
[54] *Prosecutor v. Dario Kordić and Mario Cerkez*, Case No. IT-95-14/2-T, 26 February 2001, para. 446, cited in the Prosecution's Brief regarding Issues in the "Joint Challenge to Jurisdiction Arising from the Amended Indictment", 10 May 2002, para. 62.
[55] Prosecution's Response to Defence Written Submissions on Joint Challenge to Jurisdiction Arising from the Amended Indictment, 24 May 2002, para. 17.

from April 1993 had a history of unpunished criminality".[56] The cruel treatment alleged in counts 3 and 4 of the amended indictment started before but continued after the appellant Kubura assumed command.[57] The Prosecution also submits that "the lack of a known precedent for a finding of guilt for failing to punish subordinates for offences committed before assuming command cannot prevent charging an accused in this manner".[58]

44. In considering the issue of whether command responsibility exists in relation to crimes committed by a subordinate prior to an accused's assumption of command over that subordinate, the Appeals Chamber observes that it has always been the approach of this Tribunal not to rely merely on a construction of the Statute to establish the applicable law on criminal responsibility, but to ascertain the state of customary law in force at the time the crimes were committed.[59]

45. In this particular case, no practice can be found, nor is there any evidence of *opinio juris* that would sustain the proposition that a commander can be held responsible for crimes committed by a subordinate prior to the commander's assumption of command over that subordinate.

46. In fact, there are indications that militate against the existence of a customary rule establishing such criminal responsibility. For example, Article 28 of the Rome Statute of the International Criminal Court provides that:

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[56] *Ibid.*, para. 21. For "Alagić" should read "Kubura".
[57] *Ibid.*, para. 22.
[58] *Ibid.*, para. 23.
[59] *See Prosecutor v. Milutinović, Sainović & Ojdanić*, Case No. IT-99-37-AR72, "Decision on Dragolub Ojdanić's Motion Challenging Jurisdiction—Joint Criminal Enterprise," 21 May 2003, para. 9 ("The scope of the Tribunal's jurisdiction *ratione materiae* may therefore said to be determined both by the Statute, insofar as it sets out the jurisdictional framework of the International Tribunal, and by customary international law, insofar as the Tribunal's power to convict an accused of any crime listed in the Statute depends on its existence *qua* custom at the time this crime was allegedly committed."). *See also Čelebići* Appeal Judgment, para. 178.

> (a) 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.[60]

Under the Rome Statute, therefore, command responsibility can only exist if a commander knew or should have known that his subordinates were committing crimes, or were about to do so. This language necessarily excludes criminal liability on the basis of crimes committed by a subordinate prior to an individual's assumption of command over that subordinate.

47. Another example can be found in the Protocol Additional to the Geneva Conventions of 12 August 1949 (Protocol I). Article 86(2) of the Protocol states that "[t]he 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

[60] Emphasis provided. With respect to military relationships not described in para. (a) of Art. 28, the Rome Statute further provides that "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." Emphasis provided.

commit such a breach and if they did not take all feasible measures within their power to prevent or repress the breach." Again, the language of this article envisions a situation in which a breach was in the process of being committed, or was going to be committed; breaches committed before the superior assumed command over the perpetrator are not included within its scope.

48. The International Law Commission, in its Report on the work of its forty-eighth session (6 May–26 July 1996)[61], stated that "[t]he principle of individual criminal responsibility under which a military commander is held responsible for his failure to prevent or repress the unlawful conduct of his subordinates is elaborated in article 86 of Protocol I." Similarly, in the *Čelebići* Appeal Judgment, the Appeals Chamber stated that the "criminal offence based on command responsibility is defined in Article 86(2) only."[62]

49. It should also be mentioned that Article 6 of the Draft Code of Crimes Against the Peace and Security of Mankind, adopted by the International Law Commission at its forty-eighth session, reads as follows:

> 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.[63]

Once again, the emphasis is on the superior-subordinate relationship existing at the time the subordinate was committing or was going to commit a crime. Crimes committed by a subordinate in the past, prior to his superior's assumption of command, are clearly excluded.

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[61] Yearbook of the International Law Commission (1996), Vol. II, Part Two, *Report of the Commission to the General Assembly on the work of its forty-eighth session* (A/51/10), p. 25 ("Yearbook of the ILC").
[62] *Čelebići* Appeal Judgment, para. 237.
[63] Yearbook of the ILC, p. 25 (emphasis provided).

50. Consideration can also be given to the *Kuntze* case[64], before the Nuernberg Military Tribunals. The Appeals Chamber considers that this case also constitutes an indication that would run contrary to the existence of a customary rule establishing command responsibility for crimes committed before a superior's assumption of command over the perpetrator,[65] and that it could certainly not be brought to support the opposite view.

51. Having examined the above authorities, the Appeals Chamber holds that an accused cannot be charged under Article 7(3) of the Statute for crimes committed by a subordinate before the said accused assumed command over that subordinate. The Appeals Chamber is aware that views on this issue may differ. However, the Appeals Chamber holds the view that this Tribunal can impose criminal responsibility only if the crime charged was clearly established under customary law at the time the events in issue occurred.[66] In case of doubt, criminal responsibility cannot be found to exist, thereby preserving full respect for the principle of legality.

52. The Appeals Chamber has carefully considered the thoughtful dissenting opinions of Judges Shahabuddeen and Hunt. Several of the general points Judge Hunt makes at the outset of his dissent about the nature of customary law rules – for example, that customary international law, like the common law, may change over time and that clearly established rules may be applied to new factual situations clearly falling within their

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[64] *In the matter of United States v. Wilhelm List, et al.*, Trials of War Criminals Before the Nuernberg Military Tribunals Under Control Council Law No. 10, Vol. XI, p. 1230 ("*Kuntze* case").

[65] In relation to the alleged mistreatment of Jews and others occurring within the area under Kuntze's command, the military tribunal stated: "The foregoing evidence shows the collection of Jews in concentration camps and the killing of one large group of Jews and gypsies *shortly after the defendant assumed command* in the Southeast by units that were subordinate to him. The record does not show that [Kuntze] ordered the shooting of Jews or their transfer to a collecting camp. The evidence does show that he had notice from the reports that units subordinate to him did carry out the shooting of a large group of Jews and gypsies.... He did have knowledge that troops subordinate to him were collecting and transporting Jews to collecting camps. *Nowhere in the reports is it shown that [Kuntze] acted to stop such unlawful practices. It is quite evident that he acquiesced in their performance when his duty was to intervene to prevent their recurrence.* We think his responsibility for these unlawful acts is amply established by the record." *Kuntze* Case, pp 1279-80 (emphasis provided). While it is clear that this judgment recognizes a responsibility for failing to prevent the recurrence of killings after an accused has assumed command, it contains no reference whatsoever to a responsibility for crimes committed prior to the accused's assumption of command.

[66] *Prosecutor v. Bagilishema*, Case No. ICTR-95-1A-A, Judgement (Reasons), 3 July 2003, para 34.

ambit – are common ground between the Appeals Chamber and the dissenting Judges.[67] It is quite a different matter, however, to stretch an existing customary principle to establish criminal responsibility for conduct falling beyond the established principle. Whether the principle of command responsibility extends to crimes committed prior to the assumption of command is a difficult legal question, and reasonable minds may certainly debate the point. To assert, as the dissenting Judges do, that such a dereliction *clearly* carries individual criminal liability under existing principle seems indefensible. It is trite to observe that in international criminal law, imposition of criminal liability must rest on a positive and solid foundation of a customary law principle. It falls to the distinguished dissenting Judges to show that such a foundation exists; it does not fall to the Appeals Chamber to demonstrate that it does not.

53. It is telling that the dissenting opinions do not mention a single direct and explicit statement in a military manual, or in a commentary to a military manual, or in the case law, or in the abundant literature on command responsibility, suggesting that the customary law principle of command responsibility imposes on a military commander criminal responsibility for crimes committed by his subordinates before he has assumed command. In this respect, the dissents thus give added strength to the Appeals Chamber's view. Though, as the dissents note, some manuals contain language which is broad enough to encompass responsibility for punishing both command and pre-command crimes, there is no textual support confirming direct support for the latter. And, of course, other manuals and other texts, especially Article 86 of Additional Protocol I and the Rome Statute of the ICC, go the other way. For example, the Canadian Defence Ministry's Manual on the Law of Armed Conflict provides that "[s]uperiors are guilty of an offence if they knew, or had information which should have enabled them to conclude, in the circumstances ruling at the time, that the subordinate *was committing or about to commit* a breach of the [the law of armed conflict] and they did not take all feasible measures within their power to prevent or repress the breach." [68] The Manual

[67] *See* Opinion of Hunt, J., dissenting in part, *post*, para. 4.
[68] The Law of Armed Conflict at the Operational and Tactical Level, B-GG-005-027/AF-021, chap. 16, sec. 8, para. 53 (Canada 2001) (emphasis added).

cites and quotes Article 28 of the Rome Statute.[69] The U.S. Commander's Manual on the Law of Naval Operations similarly imposes responsibility on a superior officer who "fail[s] to exercise properly his command authority or fail[s] otherwise to take reasonable measures to discover and correct violations that *may* occur."[70] While the dissenting Judges make much of the need to read Article 86 of Additional Protocol I together with Article 87 of that Protocol, they do not acknowledge that it is Article 86, paragraph 2 – the paragraph embodying the Appeals Chamber's view of the principle of command responsibility – that expressly addresses the individual responsibility of superiors for acts of their subordinates, while Article 87 speaks of the obligations of States parties. The fact that in 1998, the Rome Conference voted for the text embodied in Article 28, though by no means legally conclusive of the matter before us, at least casts a major doubt on the view embraced by the dissenting Judges. (That the Rome Statute embodied a number of compromises among the States parties that drafted and adopted it hardly undermines its significance.[71] The same is true of most major multilateral conventions.)

54. The dissents assert that, for various reasons, the authorities mentioned in the opinion of the Appeals Chamber do not lend support to its conclusions. With all due respect, assuming *arguendo* that the criticisms advanced were correct, absence of authority suggesting that command responsibility does not apply to crimes committed before the assumption of command does not establish the conclusion that such criminal responsibility does exist. The Appeals Chamber would have reached the same conclusion even in the absence of a single text expressly pointing to the correctness of their position.

55. Unable to muster any significant evidence of State practice or *opinio juris* supporting their view, the dissenting Judges rely on a broad interpretation of treaty texts which do not address in terms the question of responsibility for crimes committed before the assumption of command. Their method is flawed. First, it represents a departure from our consistent jurisprudence requiring that criminal liability be grounded not only

[69] *Id.*, paras. 52 and 53.
[70] The Commander's Handbook on the Law of Naval Operations, NWP 1-14M (United States 1995).
[71] *See* Opinion of Hunt, J., dissenting in part, *post*, para. 29.

on statutory language but on firm foundations of customary law. Second, to interpret texts speaking of command responsibility as imposing a duty to punish, after the assumption of command, crimes committed before the assumption of command, is counterintuitive and contrary to the plain meaning of "command" responsibility. Although the duty to prevent and the duty to punish are separable, each is coterminous with the commander's tenure. Third, an expansive reading of criminal texts violates the principle of legality, widely recognized as a peremptory norm of international law, and thus of the human rights of the accused.[72]

56. Aware of these difficulties, the distinguished dissenting Judges seem to suggest that the criminal responsibility of a commander to punish crimes committed before his assumption of command is *ab initio* part and parcel of the customary law principle of command responsibility, and, that the rest is simple application of the law to the facts. But surely this claim of prior existence of such a broader principle of command responsibility is nothing more than a *petitio principii*. Relying on such a proposition, without any support in customary law, does not compensate for the failure of the dissents to carry the burden of demonstrating that such a principle exists in positive international law.

IV. DISPOSITION

57. For the foregoing reasons, the Appeals Chamber unanimously dismisses the appeal insofar as it relates to the first ground of appeal, and allows it, by majority (Judge Shahabuddeen and Judge Hunt dissenting), insofar as it relates to the second ground of appeal.

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

[72] *Cf.* Rome Statute, art. 22, para. 2.

Judge Theodor Meron
Presiding

Judge Shahabuddeen appends a partial dissenting opinion. Judge Hunt appends a separate and partially dissenting opinion.

Dated 16 July 2003,
At The Hague,
The Netherlands.

[Seal of the Tribunal]

PARTIAL DISSENTING OPINION OF JUDGE SHAHABUDDEEN

1. I agree with the decision of the Appeals Chamber that, at the time of the alleged acts of the accused, it was part of customary international law that the principle of command responsibility applied in internal armed conflicts. Regrettably, I am not able to support the decision insofar as it holds that the principle of command responsibility does not apply to a commander in respect of crimes committed by his subordinates before he assumed duty although he knew or had reason to know of the crimes. This opinion seeks to explain my inability.

A. No available cases on the point, one way or another

2. Argument has been made to the effect that there is no known instance in which a commander was regarded as having command responsibility for acts of his subordinates committed before he assumed his command. And that is so. If that was determinative, the appeal would have to be allowed on the point, as it has been on the view taken by the majority. But perhaps the matter can be examined a little.

3. Speaking in *The Hostage Case* of acts committed by the 217th Infantry Division prior to the date on which the Division came under the command of Lieutenant General Kuntze in the course of World War II, United States Military Tribunal V, sitting under Control Council Law No. 10, said that he "is not chargeable with the acts."[1] This remark may be thought to indicate that the mere fact that the crimes were committed before the new commander assumed duty was enough to exclude his being charged with command responsibility, i.e., even if he knew or had reason to know that the crimes were committed and failed to take corrective action. But the strength of the *Kuntze* remark is weakened by the circumstance that, as it seems to me, the accused was charged in the indictment with the equivalent of crimes under article 7(1) of the Statute of the Tribunal relating to matters other than command responsibility.[2]

4. The indictment against Kuntze was indeed wide. For example, count one charged him and others with having -

> unlawfully, wilfully, and knowingly committed war crimes and crimes against humanity, as defined in Article II of Control Council Law No. 10, in that they were principals in,

[1] *"The Hostage Case"*, Case No. 7, *The United States of America v. Wilhelm List et al*, Trials of War Criminals before the Nuernberg Military Tribunals under Control Law No. 10, Vol. XI (Washington, 1951), p. 1275.
[2] Ibid., the indictment, at pp. 765-776.

> accessories to, ordered, abetted, took a consenting part in, were connected with plans and enterprises involving, and were members of organizations or groups connected with, the murder of hundreds of thousands of persons from the civilian populations of Greece, Yugoslavia, and Albania, by troops of the German armed forces under the command and jurisdiction of, responsible to, and acting pursuant to orders issued, executed, and distributed by, the defendants herein. ...[3]

But, wide as were these terms, and notwithstanding the reference to "command and jurisdiction", they appeared to stop short of presenting a charge of command responsibility: they alleged that Kuntze did certain things (which could have occurred by omission or commission), not that he failed to discharge a certain responsibility to control his troops. By contrast, in *Yamashita* the accused was arraigned on a charge for a distinct offence of command responsibility, the text of which read that he "unlawfully disregarded and failed to discharge his duty as commander to control the operations of the members of his command, permitting them to commit brutal atrocities and other high crimes ... ; and he ... thereby violated the law of war." [4]

5. The jurisprudence at the time of the case of Kuntze suggests a certain fluidity: there might be references to the idea of command responsibility, but only in aid of the fact that the proceedings would relate to some other crime involving direct responsibility.[5] Thus, the judgment in Kuntze's case spoke of reports having been made to him and of his having failed to take corrective action;[6] indeed, findings were made on the point. But this was considered only as evidence of his acquiescence or other form of participation in the impugned action.

6. In the *High Command Case*, it was likewise held that acts of subordinates committed before General Hoth took command could not be charged against him; but the indictment charged him with having "committed crimes ... [in that he] participated in the commission of atrocities and offenses ...".[7] Like Kuntze, Hoth was not charged with a distinct crime corresponding to a charge

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[3] Ibid., pp. 765-766.
[4] *Trial of General Tomoyuki Yamashita*, United Nations War Crimes Commission, *Law Reports of Trials of War Criminals*, Vol. IV, Case No. 21, p. 3; and W.H.Parks, "Command Responsibility for War Crimes", 62 Mil. L. Rev. 1 (1973), p. 23.
[5] See *The High Command Case*, Trials of War Criminals before the Nuernberg Military Tribunals under Control Law No. 10, Vol. XI (Washington, 1951), pp. 462-465 for the indictment, and p. 512 for the concept of command responsibility
[6] *The Hostage Case*, Trials of War Criminals before the Nuernberg Military Tribunals under Control Law No. 10, Vol. XI (Washington, 1951), *supra*, pp. 1278-1281.
[7] See *The High Command Case*, *supra*, pp. 463-465 for counts two and three on which Hoth was convicted (at p. 596), and pp. 584-585 for prior acts of his subordinates in respect of which it was held that he could not be charged.

of command responsibility under article 7(3) of the ICTY Statute; although the judgment referred to elements of the idea of command responsibility,[8] he was charged with other crimes.

7. In my opinion, the cases concerning Kuntze and Hoth cannot be safely relied on as providing authority for the view that a commander can in no circumstances have command responsibility for acts of his subordinates committed before he assumed his command. However, if there is no case in which it was held that command responsibility does not extend to acts committed by subordinates before the commander assumed his command, it has nevertheless to be recognised that there is no case which affirmed the opposite. What then is to be done?

B. The matter has to be determined by interpreting the existing principle of command responsibility and asking whether it applies to the case in hand

8. There being no case on the point one way or another, one is left with the position that command responsibility was part of customary international law, having been established by State practice and *opinio juris*. The principle so established was not a naked one: it would include its implications. What prevents the Tribunal from considering those implications?

9. There is no question of the Tribunal having power to change customary international law, which depends on State practice and *opinio juris*. If State practice and *opinio juris* have thrown up a relevant principle of customary international law, the solution turns on the principle.[9] But that does not bar all forward movement: a principle may need to be interpreted before it is applied. This is illustrated by acceptance by the jurisprudence of the Tribunal that the Tribunal may clarify the elements of a crime.[10] In the process of clarification, the Tribunal has the competence, which any court of law inevitably has, to interpret an established principle of law and to consider whether, as so interpreted, the principle applies to the particular situation before it. This is so because a court called upon to apply a principle proceeds on the basis of a finding, express or implied, that the principle has a certain meaning, however self-evident that meaning may be.[11] In my view, customary international law in turn proceeds on the basis that, whenever a body is established on the international plane to exercise judicial power, that body corresponds to the

[8] *The High Command Case, supra,* pp. 543-544.
[9] The Tribunal is not operating in the formative period of an earlier age in which the obviously developmental character of some decisions might be quickly treated as amounting to State practice and *opinio juris*.
[10] *Aleksovski*, IT-95-14/1-A, of 24 March 2000, paras. 126-127; *Delalić*, IT-96-21-A, of 20 February 2001, para. 173, and *Ojdanić*, IT-99-37-AR72, of 21 May 2003, para. 38.
[11] A clear text may be capable of application without need for interpretation. See *LaGrand Case*, I.C.J., judgment of 21 June 2001, para. 77. But this is only another way of saying that, in such a case, the meaning of the text is self-evident. The clarity of a text does not dispense with the need for a court to give the text a meaning. See *Case Concerning the Arbitral Award of 31 July 1989 (Guinea-Bissau v. Senegal), I.C.J.Reports 1991*, 53 at 136-137, dissenting opinion of Judge Weeramantry. Complications relating to arbitral matters are not considered here.

central idea of a court as known to States generally; it therefore has competence to interpret a principle of law and to determine whether the particular situation before it falls within the principle as so interpreted. The competence is inseparable from the judicial function; it does not invite to open horizons, but, within disciplined limits, it has to be exercised.

10. In sum, the Tribunal has to take it that a principle of customary international law concerning command responsibility has been established by State practice and *opinio juris*. The particular question whether that responsibility extends to acts of a subordinate committed before the commander assumed duty has not fallen to be so far dealt with – at any rate, in any reported instance. That, however, does not mean that such a situation is not capable of being governed by the established principle. If it is capable of being governed by the established principle, that principle must be held to prevail. In acting accordingly, the Appeals Chamber will not be changing customary international law but will be carrying out its true intent by interpreting and applying one of its existing principles.

11. As to relevant principles of interpretation, I understand the appellants to be submitting that the doctrine of command responsibility is not to be interpreted[12] in accordance with the object and purpose principle enjoined by the Vienna Convention on the Law of Treaties 1969. However, since the doctrine is set out in certain texts of a treaty nature, including articles 86 and 87 of Protocol I Additional to the Geneva Conventions, it is admissible to make any necessary interpretation by reference to the object and purpose of the provisions laying down the doctrine. It is to be noticed that the Vienna Convention has been used to construe article 86(2) of the Protocol.[13]

12. Paragraph 120 of the interlocutory appeal[14] pleads that "[u]ncertainty in the law must be interpreted in favour of the accused". As I understand the injunctions of the maxim *in dubio pro reo* and of the associated principle of strict construction in criminal proceedings, those injunctions operate on the result produced by a particular method of interpretation but do not necessarily control the selection of the method. The selection of the method in this case is governed by the rules of interpretation laid down in the Vienna Convention on the Law of Treaties. It is only if the application of the method of interpretation prescribed by the Convention results in a doubt which cannot be resolved by recourse to the provisions of the Convention itself – an unlikely proposition

[12] Interlocutory Appeal on Decision on Joint Challenge to Jurisdiction, paras. 94, 96 and 120.
[13] See *Prosecutor v. Tihomir Blaškić*, IT-95-14-T, of 3 March 2000, para. 327.
[14] Interlocutory Appeal on Decision on Joint Challenge to Jurisdiction.

- that the maxim applies so as to prefer the meaning which is more favourable to the accused.[15] In my view, that is not the position here: there is no residual doubt.

13. I shall also consider a view that, in this field, a court of law may only make an inference by necessary implication. This test is appropriate to consideration of a question as to whether State practice and *opinio juris* have established a certain principle. But, once it is accepted that State practice and *opinio juris* have established a principle, any interpretation of a treaty document which sets out the principle is to be undertaken in conformity with the object and purpose criterion laid down in the Vienna Convention on the Law of Treaties. That is not the same thing as saying that the interpretation has to be made on the basis of necessary implication.

14. Thus approached, there appears to be force in the argument that the responsibilities of a new commander extend to dealing with crimes committed by subordinates before he assumes command if he knows or has reason to know of the crimes. Otherwise, such crimes could fall between two stools. The crimes might have been committed very shortly before the assumption of duty of the new commander - possibly, the day before, when all those in previous command authority disappeared; on the other hand, according to the appellants' view, the new commander is not under an obligation to act, even if he knows that the old commander was thinking of initiating proceedings had he continued in office. That is at odds with the idea of responsible command on which the principle of command responsibility rests and with the associated idea that the power to punish should always be capable of being exercised.

15. These consequences collide with the object and purpose of the relevant provisions of Protocol I. Although, as mentioned in paragraph 16 below, causality does not have to be proved, the object and purpose of the provisions would include the avoidance of future crimes by the subordinates of a new commander arising from seeming encouragement[16] through inaction by him over crimes committed by the same subordinates before he assumed duty but of which he knows or had reason to know. I may add that, if it is said that someone else could act, an answer is that the doctrine of command responsibility could well apply to several persons at the same time.[17]

[15] See *Ojdanić*, IT-99-37-AR72, of 21 May 2003, para. 28.
[16] As to the general principle, see International Committee of the Red Cross, *Commentary on the Additional Protocols of 8 June 1977 to the Geneva Conventions of 12 August 1949* (Geneva, 1987), p. 1015, para. 3548.
[17] The *Prosecutor v. Tihomir Blaškić*, IT-95-14-T, of 3 March 2000, para. 304, and *Prosecutor v. Milorad Krnojelać*, IT-97-25-T, of 15 March 2002, para. 93.

16. The appellants' submission that it is necessary for an accused superior to be in command when the crime is committed by his subordinate presupposes that the superior was in a position to prevent the commission of the crime. The submission assumes that there is need for proof of a causal connection between the commander's failure to exercise his powers and the commission of the particular crime by the subordinate. There is no such requirement, certainly not where the charge is for failure to punish for a crime already committed.[18] In the latter case, there is not, because there cannot be, a causal connection between the commander's failure to exercise his power to punish and the already committed crime.

17. The power to punish depends on whether the commander had effective control.[19] As I understand it, the appellants do not question that. In effect, their argument is about who are the repositories of effective control. The answer cannot be ascertained by merely looking at the nature of effective control; the appellants say that State practice and *opinio juris* will have to be consulted. In their submission, State practice and *opinio juris* show that a new commander is not a repository of effective control in relation to a prior crime committed by his subordinate. For the reasons given and on the approach which I have taken, I disagree with the argument. A new commander can have effective control for the purpose of punishing a crime committed by his subordinate before the new commander assumed his command.

C. <u>On their true interpretation, relevant texts are not at variance with this conclusion; if they are, they do not prevail</u>

18. The Report of the International Law Commission[20] on the work of its forty-eighth session, 6 May-26 July 1996, deals with the draft Code of Crimes Against the Peace and Security of Mankind. As is recalled in paragraph 49 of the decision of the Appeals Chamber, article 6 of the draft Code runs thus:

> 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

[18] *Delalić*, IT-96-21-T, of 16 November 1998, paras. 398-400.
[19] See *Prosecutor v. Delalić*, IT-96-21-A, of 20 February 2001, paras. 196-198, *Prosecutor v. Bagilishema*, ICTR-95-1A-A, of 3 July 2002, para. 50.
[20] There can be argument as to the precise status of the work of the ILC. Views have been expressed in *Furundžija*, IT-95-17/1-T, of 10 December 1998, para. 227, and in *Tadić*, IT-94-1-A, of 15 July 1999, para. 223. *Oppenheim's International Law*, 9th ed., Vol. I, part 1 (London, 1992), p 50, states that "the work of the [International Law] Commission, even where it does not result in a treaty but particularly so if it does, is itself an authoritative influence on the development of the law and a cogent material source of law". Antonio Cassese, *International Law* (Oxford, 2001), p. 292, likewise says that treaties prepared by the International Law Commission "have exercised considerable influence even outside the group of contracting parties". The matter is put on the basis of "influence".

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.

19. Then, there is article 28 of the 1998 Statute of the International Criminal Court, referred to in paragraph 46 of the Appeals Chamber's decision. Paragraph 1 of that article refers to the command responsibility of a military commander where:

(a) 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

(b) 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.

20. These texts may be thought to suggest that a new commander does not have command responsibility in relation to acts done by his subordinates before the commencement of his command: the suggestion may be based on the references to "the circumstances at the time". On the other hand, notice needs to be taken of the words "that the subordinate was committing or was going to commit such a crime" and of the words "were committing or about to commit such crimes" appearing in article 6 of the draft Code and article 28(1)(a) of the Statute of the International Criminal Court, respectively. These words would seem to exclude crimes of subordinates even if committed after the commencement of the commander's command where the commander knew, or should have known, of the commission of the crimes but only after they were committed; that is scarcely consistent with a theory the reasoning of which accepts that a commander has command responsibility at least in relation to acts committed by his subordinates after the commencement of his command. If that situation is omitted from the texts in question, it does not follow that it is not penalised under customary international law; it would remain to be caught by the general principle of command responsibility under customary international law. The point is, as is argued in paragraph 38 below, that the texts in question are not to be taken as exhaustive statements of customary international law on the subject.

21. Weight has of course to be given to the texts as indicative of the state of customary international law as it existed when they were adopted. But, as the texts were adopted subsequent both to the making of the Statute of the Tribunal and to the dates on which the alleged acts of the subordinates in this case were committed, on the question what was the state of customary international law on these occasions they do not seem to speak with the same authority as do the earlier provisions of articles 86 and 87 of the 1977 Additional Protocol I to the Geneva

Conventions 1949. These provisions, which are referred to in part in paragraph 47 of the decision of the Appeals Chamber, read as follows:

> Article 86
>
> 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.[21]
>
> Article 87
>
> 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, to prevent and, where necessary, to suppress and report to competent authorities breaches of the Conventions and of 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 their obligations under the Conventions and this Protocol.
>
> 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.[22]

[21] Emphasis added.
[22] Ibid.

22. Article 86(2) of Protocol I does use the words "in the circumstances at the time". An argument could therefore be made that this excludes the responsibility of a new commander for prior acts of his subordinates. But article 87(3) has also to be considered: it speaks of "subordinates [who] ... have committed a breach ...". These words visualise a larger area of responsibility than that suggested by article 86(2) of Protocol I or the corresponding provisions of article 6 of the draft Code of Crimes Against the Peace and Security of Mankind or article 28 of the Statute of the International Criminal Court.

23. It may be argued that the words last referred to do not necessarily include a reference to "subordinates [who] ... have committed a breach" before the superior/subordinate relationship began; but literally and ordinarily that is not the correct meaning. In choosing the correct meaning of the words, recourse may be had to the object and purpose of the provision, or more particularly to the rule set out in article 31(1) of the Vienna Convention on the Law of Treaties, which says that a "treaty shall be interpreted 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."[23] When that is done, there is not any doubt that a breach is included even if it was committed by a subordinate before the commander assumed his command, provided that the commander knew or had reason to know of the breach.

24. Otherwise, and as previously argued, there could be a gap in the line of responsibilities. The object and purpose of the relevant provisions of Protocol I must be to ensure that there is always someone who will have responsibility for ensuring that the commission of war crimes by a subordinate will not go unpunished. Reports of the commission of the crime might never have reached the previous commander and he might therefore have never been in a position to exercise power to punish the subordinate for it; the reports might only be received by the new commander. Responsible command, from which flows the concept of command responsibility, vests the new commander with power to punish the subordinate for the crime so disclosed.

25. Further, it appears to me that, in settling the general economy of article 86 of Protocol I, that provision has to be read with article 87 as integral parts of the same scheme. It is true that article 87 (like article 86(1)) was directed to States and to Parties to the conflict, but this does not affect the admissibility of using its provisions in interpreting the scope of article 86(2). Article 87 makes States responsible for enforcing certain rules of military conduct against their commanders and therefore constitutes an authoritative guide to the kind of conduct that is prescribed by article 86(2). In my view, the reference in article 87 (3) to "subordinates ... under his control ... [who]

[23] The provision has been used to construe article 86(2) of Protocol I. See *Prosecutor v. Tihomir Blaškić*, IT-95-14-T, of 3 March 2000, para. 327.

have committed a breach ..." comprehends an obligation of a new commander to initiate such steps as are necessary to punish such a subordinate for a breach even if it was committed before the new commander assumed duty, provided of course that the new commander knows or has reason to know of the breach. This view has to be taken into account in determining the scope of article 86 (2).

26. It may be added that, in 1956, the United States Army, which was not alone in this respect, adopted in its Law of Land Warfare a provision making the commander responsible where "troops or other persons subject to his control are about to commit or have committed a war crime and he fails to take the necessary and reasonable steps to insure compliance with the law of war."[24] Possibly, there is material somewhere which shows that this provision excludes command responsibility for prior crimes, but I have not found it. Meanwhile, it appears to me that there is nothing in the provision which excludes the application of the words "have committed a war crime" to war crimes committed before the commander assumed his command if the offender later becomes the subordinate of the commander and the latter knows or has reason to know of the crimes.

D. Article 7(3) of the Statute of the Tribunal

27. The appellants have also made argument on the basis of the wording of article 7(3) of the Statute of the Tribunal, which says:

> 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.

The argument of the appellants is founded on the reference in this provision to 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 ...". They submit that this requires that the accused be the superior when the subordinate commits the offence, and that therefore a new commander is excepted.

[24] United States Army Field Manual 27-10, The Law of Land Warfare (1956), para. 501, cited in W.H.Parks, "Command Responsibility for War Crimes", 62 Mil. L. Rev. 1 (1973), p. 86.

28. I accept the view of the Trial Chamber, as set out in paragraph 198 of its decision, that, on the wording of article 7(3) of the Statute, there are two scenarios. Insofar as the provision refers to a case in which the commander knew or had reason to know that the subordinate was committing or about to commit a crime, the superior/subordinate relationship obviously exists at the time of the commission of the act. However, there is no necessity for such coincidence where the crime has been committed: the provision speaks of a case in which the subordinate "had done" the act – words (including their equivalent) which do not occur in some of the texts previously examined. In such a case, there may but need not be a coincidence of the superior/subordinate relationship with the commission of the act. What, however, has to be simultaneous is the discovery by the commander and the existence of the superior/subordinate relationship.

29. The Trial Chamber's view is supported by the Report of the Secretary-General, to which the Statute of the Tribunal was attached in draft and which was approved by the Security Council. Paragraph 56 of the report, commenting on article 7 of the Statute, said that the "imputed responsibility" of the superior "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". This language suggests that, under article 7(3) of the Statute, the superior/subordinate relationship need exist only at the point of time when the superior knew or had reason to know; it is that combination which triggers command responsibility. This would let in cases in which the subordinate "had committed crimes" even before that relationship began; in other words, the commission of the crime need not be contemporaneous with the existence of the superior/subordinate relationship. It may be noticed that the language is in substance the same in the case of article 6(3) of the Statute of the ICTR, complete with the reference to a subordinate who "was about to commit such acts or had done so ...". The fact that on some matters that Statute comprehends obligations other than those based on customary international law[25] is not relevant in this context.

30. It may be said that the question is not what article 7(3) of the Statute of the Tribunal means on the point but whether it accurately represented customary international law at the time of its adoption. But, in judging this, it is not correct to exclude from consideration the understanding of customary international law as evidenced by the provisions of the Statute; it has to be recalled that the Security Council, in adopting the Statute, has to be taken as effectively speaking on behalf of

[25] See paragraphs 11 and 12 of the Report of the Secretary-General Pursuant to Paragraph 5 of Security Council Resolution 955(1994) S/1995/134 of 13 February 1995, relating to article 4 of the Statute of the ICTR concerning violations of article 3 common to the Geneva Conventions and of Additional Protocol II.

practically all States – and with their consent given through adherence to the Charter of the United Nations.

31. As mentioned in paragraph 9 above, a question is not raised as to the competence of the Tribunal to change customary international law. The question is only what was the state of customary international law at the time when the Security Council adopted the Statute of the Tribunal. On this question, when the position taken by the Security Council (including that of the Secretary-General) is brought into account – as, in my view, it has to be - the Appeals Chamber can have little doubt that the provisions of article 7(3) of the Statute, as construed above, correctly represented customary international law on the point at the time when the Statute was adopted. To hold the opposite is to say that article 7(3) of the Statute was *ultra vires*, at least in part. The provision is clear enough. Beyond the language of argument, it has to be recognised that what is really in issue is the validity of the provision.[26] I am not persuaded that the provision lacked validity.

32. The position of the appellants seems to be influenced by their belief that article 7(3) of the Statute has the effect, as they say, of making the commander "guilty of an offence committed by others even though he neither possessed the applicable *mens rea* nor had any involvement whatsoever in the *actus reus*."[27] No doubt, arguments can be made in support of that reading of the provision, but I prefer to interpret the provision as making the commander guilty for failing in his supervisory capacity to take the necessary corrective action after he knows or has reason to know that his subordinate was about to commit the act or had done so. Reading the provision reasonably, it could not have been designed to make the commander a party to the particular crime committed by his subordinate.

33. In this respect, reference may again be made to paragraph 56 of the Secretary-General's report, mentioned in part in paragraph 29 above. Quoted more fully, that paragraph of the report said:

[26] *For the competence of the Tribunal to consider issues of this kind, see Prosecutor v. Milan Milutinović et al*, IT-99-37-AR72, of 21 May 2003, para. 9.
[27] Interlocutory Appeal, para. 61(c)(i).

> 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.

A careful distinction was drawn between cases in which the commander is criminally responsible as a party to the crime committed by his subordinates on his orders and cases in which the commander is criminally responsible for "failure to prevent a crime or to deter the unlawful behaviour of his subordinates", i.e., command responsibility. Command responsibility imposes criminal responsibility on a commander for failure to take corrective action in respect of a crime committed by another; it does not make the commander a party to the crime committed by that other.[28] The nature of the responsibility is pertinent to its extent.

E. Miscellaneous considerations

34. The tendency of these views is consistent with the meaning of the appellants' resistance to the application of the object and purpose criterion: the appellants seem to recognise that the application of that criterion is not supportive of their claim that a new commander was not intended to have command responsibility in relation to crimes committed by his subordinates before he assumed command but of which he knew or of which he had reason to know.

35. The tendency of these views is also consistent with the appellants' attitude to the *Kordić* statement. That statement reads:

> 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.[29]

[28] See for example *Motifs de l'Arrêt,* in *Prosecutor v. Bagilishema*, Case no ICTR-95-1A-A, 3 July 2002, para. 35.
[29] *Prosecutor v. Dario Kordić and Mario Čerkez*, Case No. IT-95-14/2, of 26 Februrary 2001, para. 446.

The statement was made by a Trial Chamber; also, it was *obiter*, as was conceded by the Prosecutor.[30] But the principle of the statement seems to accord with basic ideas on the subject. The defence of Hadžihasanović seemed to recognise this.

36. Stating the substance of its stand, the defence of Hadžihasanović submitted to the Trial Chamber that "the aim of the command responsibility doctrine is to ensure that commanders will ensure that troops, over which they have effective control, will conduct their operations in accordance with law, thus preventing violations from being committed. Their criminal liability will only arise if they fail to do so and a violation is committed, unless they punish the perpetrators after finding out about their crime."[31] But, as the Trial Chamber noted,[32] the defence of Hadžihasanović then added:

> In this sense, the *obiter* from the *Kordić* Judgement is partly right. A commander cannot turn a blind eye, if he finds out that a violation was committed by a subordinate before he assumed command. If he fails to punish this subordinate, the commander 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.[33]

37. The defence view that such a commander may be individually responsible for "an offence but not pursuant to the doctrine of command responsibility" is without satisfactory explanation of the nature of the offence for which the commander may be individually responsible or the basis on which his responsibility rests if this is not command responsibility. The responsibility is presumably under international criminal law; it is difficult to isolate the specific branch of that law which imposes criminal responsibility if it is not command responsibility. My interpretation of the concession made by the defence of Hadžihasanović is that the concession correctly, if reluctantly, recognises the applicability of command responsibility to the case of a new commander in relation to crimes committed by his subordinates before the commencement of his command, being crimes of which he knows or has reason to know.

38. In the alternative, I hold that the texts relied upon for an interpretation that a commander has no command responsibility in relation to prior acts of his subordinate simply did not advert to the full implications of the principle of customary international law which they sought to codify. A

[30] Prosecution's Response to Defence Interlocutory Appeal on Jurisdiction, 9 December 2002, p. 26, footnote 113.
[31] Enver Hadžihasanović's Response to the Prosecution's Brief, etc., 24 May 2002, para. 48.
[32] Impugned decision, para. 188.
[33] Enver Hadžihasanović's Response to the Prosecution's Brief, etc., 24 May 2002, para. 49.

codification does not necessarily exhaust the principle of customary international law sought to be codified.[34] The fullness of the principle, with its ordinary implications, can continue notwithstanding any narrower scope suggested by the codification.

39. One final matter. Making its central point in remarks of great learning, the majority feels able to say that it "is trite to observe that in international criminal law, imposition of criminal liability must rest on a positive and solid foundation of a customary law principle."[35] The majority is right in describing that observation as trite; it is so trite that nobody has thought of challenging it. Consequently, the object of the observation is not understood. As I have stressed, there is no question of changing customary international law. What the dissenting judges seek to show is that the required foundation in customary international law lies in an existing principle of that same law when that principle is correctly construed.

40. On that question of construction, my approach is that the scope of command responsibility under customary international law can be gathered from the nature of the responsibility under that law, or from a provision setting out that law, including a provision concerning the obligation of States to ensure compliance by commanders with their responsibilities under that law. It should be unnecessary to point out that this does not mean that individual criminal responsibility and State responsibility are the same; that elementary distinction was implied and recognised in paragraph 25 above and does not have to be catechised.

41. The limits set by the moderation practised by traditional judicial discourse may have obscured my arguments. On the other hand, I admire the apparent confidence with which those arguments have been forcefully dismissed by the majority.

F. Conclusion

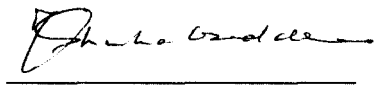
42. A Trial Chamber has power to stay proceedings if it considers that it would be unfair to continue them in the light of any disadvantage suffered by the defence from lapse of time between the commission of the crimes by the subordinate and the time when the new commander assumed his command. In judging that question, the Trial Chamber may take account of the circumstances of the armed conflict and in particular of any rapidity in the turnover of personnel.

43. Subject to this consideration, I am of the view that, under customary international law relating to the doctrine of command responsibility, a commander can be held responsible in

[34] Consider *North Sea Continental Shelf Cases, I.C.J.Reports 1969*, p. 39, para. 63, and *Case Concerning Military and Paramilitary Activities in and against Nicaragua (Nicaragua v. United States of America) (Merits), I.C.J.Reports 1986*, pp. 92-96, paras. 172-179.
[35] Decision of the Appeals Chamber, para. 52.

relation to crimes committed by his subordinates before he assumed command, provided that he knew or had reason to know of the crimes, and that accordingly the decision of the Trial Chamber to this effect was correct. The interlocutory appeal should be dismissed.

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



Mohamed Shahabuddeen

Dated this 16th day of July 2003

At The Hague

The Netherlands

UNITED
NATIONS

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

Case: IT-01-47-AR72

Date: 16 July 2003

Original: English

BEFORE THE APPEALS CHAMBER

Before: Judge Theodor Meron, Presiding
Judge Fausto Pocar
Judge Mohamed Shahabuddeen
Judge David Hunt
Judge Mehmet Güney

Registrar: Mr Hans Holthuis

Decision of: 16 July 2003

PROSECUTOR

v

Enver HADŽIHASANOVIĆ, Mehmed ALAGIĆ and Amir KUBURA

SEPARATE AND PARTIALLY DISSENTING OPINION OF JUDGE DAVID HUNT
COMMAND RESPONSIBILITY APPEAL

Counsel for the Prosecutor

Mr Ekkehard Withopf

Counsel for the Defence

Ms Edina Rešidović and Mr Stéphane Bourgon for Enver Hadžihasanović
Mr Fahrudin Ibrišimović and Mr Rodney Dixon for Amir Kubura

1. Article 7 of the Tribunal's Statute provides, so far as is here relevant:

> **Article 7**
>
> **Individual criminal responsibility**
>
> 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.
>
> [...]
>
> 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.
>
> [...]

The responsibility stated in Article 7(3) is described, colloquially, as either command responsibility or superior responsibility, because it is applicable not only to military commanders but also to political leaders and civilian superiors whose position of authority is based upon the power of effective control, either *de jure* or *de facto*.[1]

2. The Decision of the Appeals Chamber delivered in this interlocutory appeal deals with two issues which the appellants raised by way of a challenge to the jurisdiction of the Tribunal. Each of them related to the concept of command (or superior) responsibility stated in Article 7:

(1) whether this concept of command responsibility applies where the armed conflict in the course of which the superior's subordinates are alleged to have committed such offences was an internal one rather than an international one; and

(2) whether in accordance with the same concept a superior may be criminally responsible where (after assuming command) he knows or has reason to know that those who had become his subordinates had committed crimes before he became their superior.

The Appeals Chamber has unanimously given an affirmative answer to the first of those issues, but a majority of the Appeals Chamber has given a negative answer to the second issue.

The first issue

3. In determining the first of those issues, the Appeals Chamber has reasoned as follows:

(a) There is no contest that, under customary international law –

(i) serious violations of international humanitarian law in an internal armed conflict incur individual criminal responsibility, and

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[1] *Prosecutor v Delalić et al*, IT-96-21-A, Judgment, 20 Feb 2001 ("*Delalić* Appeal Judgment"), pars 195-196; *Prosecutor v Bagilishema*, ITCR-95-1A-A, Judgment (Reasons), 13 Dec 2002 ("*Bagilishema* Appeal Judgment"), par 35.

(ii) command responsibility exists in relation to such serious violations of international humanitarian law in an international armed conflict.[2]

(b) A principle will be held by the Tribunal to be part of customary international law only if it is satisfied that existing State practice accepts that principle as legally binding (*opinio juris*).[3]

(c) A principle so held to have been part of customary international law may however be applied to a new situation where that situation reasonably falls within the application of the principle.[4]

(d) Customary international law assumes that, whether in an internal or an international armed conflict, there is an organized military force. An organized military force can only exist on the basis of responsible command. Responsible command leads to command responsibility, which is the most effective method by which international criminal law can enforce responsible command.[5]

(e) Relevant aspects of international law are accepted, as a matter of customary international law, as governing the conduct of an internal armed conflict. Those relevant aspects unquestionably include an acceptance that a military force engaged in such a conflict is organized and therefore under responsible command. In the absence of anything to the contrary, the underlying State practice and *opinio juris* relating to the requirement that such a military force be organized must be interpreted as bearing its normal meaning, that military organisation implies responsible command and that responsible command in turn implies command responsibility.[6]

(f) Thus, wherever customary international law recognises that a war crime can be committed by a member of an organized military force, it also recognises that a commander is criminally responsible if he knew or had reason to know that the subordinate was about to commit such acts or had done so and if he failed to take the necessary and reasonable measures to prevent such acts or to punish the subordinate.[7]

(g) As customary international law recognises that some war crimes can be committed by a member of an organised military force in the course of an internal armed conflict, it therefore also recognises that there can be command responsibility in relation to those crimes.[8]

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[2] Decision on Interlocutory Appeal Challenging Jurisdiction in Relation to Command Responsibility, 16 July 2003 ("Appeals Chamber Decision"), pars 11, 13.
[3] *Ibid*, par 12.
[4] *Ibid*, par 12.
[5] *Ibid*, par 16.
[6] *Ibid*, par 17.
[7] *Ibid*, par 18.
[8] *Ibid*, par 18.

(h) As the existence of this customary international law predated the events pleaded against the appellants, there is no breach of the principle of legality – that a person may only be found guilty of a crime where the acts alleged against him constituted a crime at the time of their commission (*nullum crimen sine lege*).[9]

4. I agree completely with that conclusion and with the reasoning which led to it. It is important, in my view, to emphasise that the application of an existing principle accepted as customary international law to a new situation where that situation reasonably falls within its application is hardly a novel proposition. Reference was made to such a process in the Memorandum of Proposals for the Prosecution and Punishment of Certain War Criminals and Other Offenders at the London Conference, presented on behalf of the United States to the Foreign Ministers of the Allied Powers and to their representatives at San Francisco, on 30 April 1945:[10]

> The application of this law may be novel because the scope of the Nazi activity has been broad and ruthless without precedent. The basic principles to be applied, however, are not novel and all that is needed is a wise application of those principles on a sufficiently comprehensive scale to meet the situation. International law must develop to meet the needs of the times just as the common law has grown, not by enunciating new principles but by adapting old ones.

Such a process of reasoning was applied in the judgments delivered in at least two trials which subsequently took place in Nuremberg. In the *Justice* case,[11] the Tribunal said:[12]

> International law is not the product of statute. Its content is not static. The absence from the world of any governmental body authorized to enact substantive rules of international law has not prevented the progressive development of that law. After the manner of the English common law it has grown to meet the exigencies of changing conditions.

In the *Krupp* trial,[13] the defendants raised a defence of necessity, claiming that, in order to meet the production quotas imposed upon them as industrialists by the authorities, it was necessary to employ prisoners of war, forced labour and concentration camp inmates. The Tribunal accepted the availability of such a defence where it is shown that the acts charged were done "to avoid an evil both serious and irreparable", there "was no other adequate means of escape" and the remedy was "not disproportioned to the evil",[14] and that it could apply if the existence of a tyrannical and oppressive régime is assumed. The Tribunal, however, denied its application to

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[9] *Ibid*, pars 34-35.

[10] Re-printed in the Report of Robert H Jackson, United States Representative to the International Conference on Military Trials, London 1945, 28 at 37.

[11] Trials of War Criminals before the Nuremberg Military Tribunal under Control Council Law No XIV, *United States v Alstötter et al* case, Vol III, 954.

[12] The passage appears in two places, at 966 and at 974-975.

[13] Law Reports of Trials of War Criminals (United Nations War Crimes Commission, 1949), *United States v Alfred Krupp et al*, Vol X, 69.

[14] At 147. The statement of the law was taken from *Wharton's Criminal Law*, Vol I, Section 126, at 177.

the facts of that case because the defendants were not acting under compulsion or coercion but with an "ardent desire to employ forced labour".[15] In accepting the availability of such a defence, the Tribunal expressly recognised that it was applying an existing principle of law to a new situation when it said:[16]

> As the prosecution says, most of the cases where this defence has been under consideration involved such situations as two shipwrecked persons endeavouring to support themselves on a floating object large enough to support only one; the throwing of passengers out of an overloaded lifeboat; or the participation in crime under the immediate and present threat of death or great bodily harm. So far as we have been able to ascertain with the limited facilities at hand, the application to a factual situation such as that presented in the Nuremberg Trials of industrialists is novel.

Subsequently, the Supreme Court of Israel also remarked that customary international law is "never static but is found to be in a process of constant growth".[17]

5. There is nothing further I wish to add to my complete agreement with the conclusion stated in the Appeals Chamber Decision on this first issue, and with the reasoning which led to it.

The second issue

6. In determining that a superior can *not* be criminally responsible where (after assuming command) he knows or has reason to know that those who had become his subordinates had committed crimes before he became their superior, the majority of the Appeals Chamber has reasoned as follows:

(a) No State practice exists concerning the existence of command responsibility in such a situation, nor any *opinio juris*, and thus no customary international law in force at the time when the crimes were committed.[18]

(b) In fact, there are indications which militate against the existence of a customary rule establishing such a criminal responsibility, and a number of examples are given.[19]

(c) The Tribunal can impose criminal responsibility only if the crime charged was clearly established at the time when the events in issue occurred. In case of doubt, criminal responsibility cannot be found to exist, thereby preserving full respect for the principle of legality.[20]

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[15] At 149.
[16] At 147.
[17] *Attorney-General v Adolf Eichmann* (1962) 36 International Legal Reports 277, at 290. The English translation of the original in Hebrew was prepared in the Ministry of Justice of Israel.
[18] Appeals Chamber Decision, pars 44-45.
[19] *Ibid*, pars 46-50.
[20] *Ibid*, par 51.

7. I do not agree either with the majority conclusion or with the first two steps of the reasoning which led to it.

(a) No customary international law

8. My approach to this issue commences at the same point accepted by the Appeals Chamber unanimously in relation to the first issue. Customary international law recognises that a commander is criminally responsible if he knew or had reason to know that the subordinate was about to commit acts amounting to a war crime or had done so and if he failed to take the necessary and reasonable measures to prevent such acts or to punish the subordinate.[21] That principle may be applied to whatever situation reasonably falls within the application of the principle.[22] In my opinion, the situation of a superior who (after assuming command) knows or has reason to know that a person who has become his subordinate had committed a crime before he became that person's superior falls reasonably within that principle.

9. That principle cannot be limited artificially to the situation in which the superior-subordinate relationship existed at the time when the subordinate was committing or about to commit the acts amounting to a war crime, or at any time other than the time when the superior knows or has reason to know that the subordinate had committed the acts amounting to a war crime. One reason for this is that the criminal responsibility of the superior is not a direct responsibility for the acts of the subordinate. It is a responsibility for his own acts (or, rather, omissions) in failing to prevent or to punish the subordinate when he knew or had reason to know that he was about to commit acts amounting to a war crime or had done so.[23]

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[21] Appeals Chamber Decision, par 18; encapsulated in par 3(f), *supra*.

[22] *Ibid*, par 12; encapsulated in par 3(c), *supra*.

[23] The point was clearly made in the judgment of the US Supreme Court in the *Yamashita* case, Law Reports of Trials of War Criminals, Vol IV, 1 at 43-44: "[...] it is urged that the charge does not allege that petitioner has either committed or directed the commission of such acts, and consequently that no violation is charged against him. But this overlooks the fact that the gist of the charge is an unlawful breach of duty by petitioner as an army commander to control the operations of the members of his command by 'permitting them to commit' the extensive and widespread atrocities specified." The distinction has been accepted in the jurisprudence of this Tribunal. It has been held that no causal link needs to be established between the act of the subordinate and the failure of the superior to prevent or punish in order to establish superior responsibility: *Prosecutor v Delalić et al*, IT-96-21-T, Judgment, 16 Nov 1998, par 400 (the issue was not raised on appeal, although the Appeals Chamber did state that superior responsibility is *not* a vicarious responsibility doctrine: *Delalić* Appeal Judgment, par 239); *Prosecutor v Kordić & Čerkez*, IT-95-14/2-T, Judgment, 26 Feb 2001 ("*Kordić* Judgment"), par 447. In the *Bagilishema* Appeal Judgment, the Appeals Chamber described superior responsibility solely in terms of a breach of duty (at par 35): "References to 'negligence' in the context of superior responsibility are likely to lead to confusion of thought, as the Judgment of the Trial Chamber in the present case illustrates. The law imposes upon a superior a duty to prevent crimes which he knows or has reason to know were about to be committed, and to punish crimes which he knows or has reason to know had been committed, by subordinates over whom he has effective control. A military commander, or a civilian superior, may therefore be held responsible if he fails to discharge his duties as a superior either by deliberately failing to perform them or by culpably or wilfully disregarding them." The separation between the responsibility of the superior for his own omission to act and the responsibility of the superior for the

[footnote continued on next page]

10. The majority does not explain why the principle of command responsibility which has been accepted as customary international law cannot be applied to such a situation. The majority has instead looked first for the existence of State practice in relation to the very circumscribed factual situation to which the principle is sought to be applied, rather than whether that particular factual situation reasonably fell within the principle. This is a completely different approach to that unanimously adopted in relation to the first issue. The approach unanimously adopted in relation to whether command responsibility exists in an internal armed conflict necessarily ignored the existence of State practice in relation to that particular factual situation. The customary international law which supported the existence of the principle also supports the application of that principle in that situation.

11. The majority asserts that no State practice can be found supporting the criminal responsibility of a superior who fails to punish a subordinate for acts committed before the superior-subordinate relationship existed of which the superior knows or has reason to know only that the acts had already been committed.[24] (It will be convenient to refer to this situation as the "factual situation in question in this appeal".)

12. I understand the reference here to be to the absence of any reference to the factual situation in question in this appeal in military manuals and the like. However, it is not suggested by the majority that such sources of State practice *exclude* a criminal responsibility in such a situation. Military manuals are usually expressed in fairly general terms which would certainly include such a situation. Let me give two examples:

(i) "The Law of War on Land being Part III of the Manual of Military Law" (UK, 1958), beside the heading "Responsibility of commanders for war crimes committed by subordinates", provides:

> 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 example, when troops commit, or assist in the commission of, massacres and atrocities against the civilian inhabitants of occupied territory, or against prisoners of war, the responsibility may rest not only with the actual perpetrators but also with the commander. Such 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

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subordinate's acts themselves has been noted in the literature. A comment upon the equivalent provision in Article 28 of the Rome Statute is in the following terms: "Superior responsibility establishes liability for *omission*. The superior is punished because of the failure to supervise the subordinates and to prevent or repress their commission of atrocities. This kind of liability – for omission – is unique in international criminal law. [...] Article 28 can be characterised as a genuine offence or separate crime of omission [...], since it makes the superior liable only for a failure of proper supervision and control of his or her subordinates but not, at least not 'directly', for crimes they commit.": The Rome Statute of the International Criminal Court: A Commentary (Cassese *et al*, eds), Vol 1, Chap 21 ("Superior Responsibility"), Kai Ambos, at 850-851.

[24] Appeals Chamber Decision, par 45.

> received by him or through other means, that troops or other persons subject to his control are about to commit or have committed a war crime and if he fails to use the means at his disposal to ensure compliance with the law of war.

The reference there to "troops or other persons subject to his control" is, I suggest, equally applicable to troops "subject to his control" at the time when he knew or had reason to know that they had committed crimes as it is to troops "subject to his control" at the time when they were committed. The notes to this text include this statement:

> However, it is probable that the responsibility of the commander goes beyond the duty as formulated above. He is also responsible if he fails, negligently or deliberately, to ensure by all the means at his disposal that the guilty are brought to trial, deprived of their command and ordered out the theatre of war, as may be appropriate.[25]

(ii) "The Law of Land Warfare" (US, 1956 revised 1976), under the heading "501. Responsibility for Acts of Subordinates", is in almost identical terms, but for the sake of accuracy I will quote the whole provision:

> 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 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.

In neither case would a commander in the factual situation in question in this appeal believe that he must (or even could) say: "Yes, I know that these men who are now my subordinates committed an atrocious massacre the week before I assumed command – but, as I was not then their superior (or, in a position to prevent them from committing these offences), I am under no duty to punish them". I suggest that the reason why military manuals have not expressly referred to the factual situation in question in this appeal is that the duty to punish in that situation is so obvious that no-one has ever seen the need to refer to it expressly.

13. In my opinion, the absence of State practice supporting the criminal responsibility of the superior in the factual situation in question in this appeal is irrelevant where that situation falls reasonably within the principle which has been accepted as customary international law.

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[25] See also ICRC Commentary on the Additional Protocols (Geneva, 1987, par 3562, page 1023): "[A]ll this does not prevent commanders from trying to identify any possible gaps in the law of armed conflict or to put forward consistent interpretations on points which have not been clearly regulated."

(b) Indications against the existence of a customary rule

14. A number of examples are given by the majority which, it asserts, militate against the existence of such a customary rule. They are given in no apparent order, but I propose to deal with them in chronological order. Such examples may possibly also be relevant to the issue as to whether the particular factual situation in question in this appeal reasonably falls within the principle of command responsibility.

15. **(i) The *Kuntze* case**[26] The majority points to a passage in the judgment of the Nuremberg Military Tribunal under Control Council Law 10 ("Control Council 10 Tribunal") which states:[27]

> The foregoing evidence shows the collection of Jews in concentration camps and the killing of one large group of Jews and gypsies shortly after the defendant assumed command in the Southeast by units that were subordinate to him. The record does not show that the defendant Kuntze ordered the shooting of the Jews or their transfer to a collecting camp. The evidence does show that he had notice from the reports that units subordinate to him did carry out the shooting of a large group of Jews and gypsies as hereinbefore mentioned. He did have knowledge that troops subordinate to him were collecting and transporting Jews to collecting camps. Nowhere in the reports is it shown that the defendant Kuntze acted to stop such unlawful practices. It is quite evident that he acquiesced in their performance when his duty was to intervene to prevent their recurrence. We think his responsibility for these unlawful acts is amply established by the record.

To this passage, the majority adds the comment:[28]

> Whilst it is clear that this judgment recognises a responsibility for failing to prevent the recurrence of killings after an accused has assumed command, it contains no reference whatsoever to a responsibility for crimes committed prior to the accused's assumption of command.

The majority states in the text of the Appeals Chamber Decision that it "considers that this case also constitutes an indication that would run contrary to the existence of a customary rule establishing command responsibility for crimes committed before a superior's assumption of command over a perpetrator, and that it could certainly not be brought to support the opposite view".[29]

16. As the majority appears to concede, this passage says nothing which could suggest that a superior does *not* have any criminal responsibility for failing to punish a subordinate for acts committed before the superior-subordinate relationship existed of which the superior knows or has reason to know only that the acts had already been committed. The "indication" that he

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[26] The case of Lieutenant General Walter Kuntze is to be found in the judgment of Military Tribunal V in Case 7, *United States v Wilhelm List et al ("The Hostage Case")*, 19 Feb 1948, reported in Trials of War Criminals Before the Nuremberg Military Tribunals Under Control Council Law No 10, Vol XI, 1230 ("Judgment").

[27] Judgment, at 1279-1280.

[28] Appeals Chamber Decision, footnote 65.

[29] Appeals Chamber Decision, par 50.

does not have such criminal responsibility which is perceived by the majority from this passage rests solely upon the absence in it of any reference "whatsoever" to such a responsibility. Such a line of reasoning could be valid only if the issues in the *Kuntze* case were such that the Control Council 10 Tribunal would be expected to have dealt in this passage with the wider issue (if, for example, Kuntze had been charged with such a form of criminal liability) – and, even then, mere silence would necessarily be an uncertain foundation for any inference that the Control Council 10 Tribunal would have dealt with that wider issue in the manner for which the majority contends.

17. It is clear from the Judgment of the Control Council 10 Tribunal that Kuntze was not charged with such a form of criminal liability. Kuntze was charged, in common with all the other defendants, with being a principal in or an accessory to the murder of large numbers of persons from the civilian populations of (*inter alia*) Yugoslavia by troops of the German armed forces under his command and jurisdiction and responsible to him, *who were acting pursuant to orders issued, executed and distributed by him*, and with ordering, abetting, taking a consenting part in, being connected with plans and enterprises involving and was a member of organisations or groups connected with such murders by such troops *who were acting pursuant to orders issued, executed and distributed by him.*[30] As none of the killings which had taken place before Kuntze had assumed command could have been committed by troops *who were acting pursuant to orders issued, executed and distributed by him*, there is no basis in that indictment for convicting him upon the basis of command responsibility for those crimes.

18. There is nothing in the passage quoted by the majority which suggests that it was either necessary or appropriate for the Control Council 10 Tribunal to have dealt with the wider issue. The facts upon which the Control Council 10 Tribunal relied for the summary given in this passage show that, on 24 October 1941, Kuntze was appointed as Deputy Armed Forces Commander Southeast and commander in chief of the 12th Army, on a temporary basis during the illness of Field Marshall List.[31] He assumed such command on 27 October.[32] The collection and the killing of the Jews to which the summary refers appears to have commenced on 29 October,[33] although the details given in the Judgment appear to refer mainly to reprisal killings, a different issue. The passage upon which the majority relies, however, says expressly that the collection and killing occurred "shortly after the defendant assumed command in the Southeast by units which were subordinate to him". Kuntze, as this passage points out,

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[30] Judgment, 765-766. The emphasis both here and in the next sentence is mine.
[31] Judgment, 1274.
[32] *Ibid*, 1276.
[33] *Ibid*, 1277.

received reports that those units had carried out the shooting of a large group of Jews and gypsies. There is no question, therefore, that the superior-subordinate relationship existed at the time when the collection and killing occurred. He was found to be criminally responsible for those acts because he failed to perform his duty to prevent their recurrence, and thus had acquiesced in those acts.[34]

19. Why, then, would the Control Council 10 Tribunal have been expected to deal *in this passage* with the wider issue of the criminal responsibility of Kuntze for crimes committed by his subordinates before he assumed command? The majority does not in the Appeals Chamber Decision suggest any reason, and I can see none. The facts found by the Control Council 10 Tribunal elsewhere in the Judgment (when dealing with the reprisal killings) *could* have given rise to this wider issue – but only if the facts had fallen within the charges laid, which they clearly did not.[35] The absence of any discussion of this wider issue – either in this passage or in the Judgment generally – provides no support for the majority's conclusion that this passage contains an indication which runs contrary to the existence of a command responsibility for crimes committed before a superior's assumption of command over the perpetrator. I do not accept that the *Kuntze* case has any bearing upon the issues in this appeal.

20. **(ii) Article 86(2) of Additional Protocol I to the Geneva Conventions** The majority points to the following provision in Article 86(2):

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[34] Judgment, 1280. This statement has been regarded as one of the early developments of a superior responsibility such as customary international law now accepts, but it is important to keep in mind that – unlike in the *Yamashita* case (see footnote 23, *supra*) where responsibility was based upon "permitting [the subordinates] to commit" the crimes – some courts had not at that stage perceived the separation which is now seen under customary law between the responsibility of the superior for his own failure to perform his duties to prevent and to punish and his responsibility for the subordinate's acts themselves (see par 9 and footnote 23, *supra*).

[35] The Tribunal found that the month of October 1941 exceeded all previous monthly records for the killing of innocent members of the population in reprisal for the criminal acts of unknown persons (Judgment, 1276). Kuntze had assumed command on 27 October. The Tribunal said that it seemed highly improbable that Kuntze could have stepped into the command in the Southeast in the midst of these actions and their reporting "without gaining knowledge and approval" (Judgment, 1276-1277). The Tribunal found that Kuntze received a report covering the whole period of the Yugoslav resistance movement up to and including 5 December 1941 (Judgment, 1277 – there is an obvious typographical error of 1841 for 1941). This report would necessarily have included killings before the superior-subordinate relationship commenced committed by persons who had since become the subordinates of Kuntze.

These findings may be contrasted with those concerning the reprisal killings which took place after Kuntze assumed command, a different issue to the collection and killing of the Jews. Daily reports to Kuntze revealed that thousands of people had been shot pursuant to *orders which Kuntze had either issued or distributed* (Judgment, 1277 – the emphasis is mine). Although he was advised of all these killings, Kuntze not only failed to take steps to prevent their recurrence but he urged more severe action upon his subordinate commanders, and he gave orders and directives for the reprisal actions (including killing) which were not grounded on judicial findings (Judgment, 1278). These orders and directives constituted violations of international law which were punishable as crimes. The orders he had issued and his subsequent failure to take steps to end these unlawful killings after they had been reported to him were held to make him criminally responsible (Judgment, 1278-1279).

> 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 enable 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.

The majority says that "the language of this article envisions a situation in which a breach was in the process of being committed, or was going to be committed; breaches committed before the superior assumed command over the perpetrator are not included within its scope".[36]

21. Article 86(2), a source of customary international law supporting the command responsibility provided in Article 7(3) of the Tribunal's Statute,[37] is unhappily worded when it is compared with Article 87(3) of Additional Protocol I, which is in the following terms:

> The High Contracting Parties and Parties to the conflict shall require any commander who is aware that subordinates and 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.

There are two significant differences between these two provisions:

(i) Article 86(2) speaks only of a duty "to prevent or repress the breach". It makes no express reference to a duty to punish, an omission which required an explanation in the ICRC Commentary on the Additional Protocols, in these terms:[38]

> The term 'suppress' [...] should be understood in a broad sense: literally of course this means putting an end to such conduct; depending on its gravity and the circumstances, such conduct can and should lead to administrative, disciplinary or even penal sanctions – in accordance with the general principle that every punishment should be proportional to the severity of the breach."

On the other hand, Article 87(3) speaks expressly of a duty "to initiate disciplinary or penal action", although only where the superior "is aware" that his subordinates are going to commit or have committed such breaches.

(ii) Article 86(2) speaks of the commander's knowledge or reason to know of the breach being gained prior to or at the time of that breach. On the other hand, Article 87(3) refers expressly to the duty to punish where the superior's knowledge or reason to know was gained only after the breach took place. As the majority has conceded, customary international law imposes a *duty to punish* even when the commander's knowledge or reason to know of the breach has been gained only after the breach has taken place.[39]

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[36] Appeals Chamber Decision, par 47.
[37] *Delalić* Appeal Judgment, par 237.
[38] Geneva, 1987, par 3402, page 975.
[39] Appeals Chamber Decision, par 18; encapsulated in par 3(f), *supra*.

In these circumstances, the temporal restriction which the majority imposes upon the superior's responsibility based upon the omission from Article 87 of any reference to the commander's knowledge or reason to know gained only after the breach took place appears to rest upon a very uncertain foundation. Treaties are, of course, notorious for producing ambiguities of this type, hence the need for recourse in many cases in the Tribunal to the principles of interpretation stated in the Vienna Convention on the Law of Treaties. I refer to some of these cases in the next paragraph.

22. Article 31(1) of the Vienna Convention provides that "[a] treaty shall be interpreted 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". The object and purpose of Additional Protocol I is, according to its Preamble, to "reaffirm and develop the provisions protecting the victims of armed conflicts and to supplement measures intended to reinforce their application", which accords neatly with the object and purpose of international humanitarian law generally:

> The aim of international humanitarian law is to protect the human being and to safeguard the dignity of man in the extreme situation of war The provisions of international humanitarian law have always been tailored to fit human requirements. They are bound to an ideal: the protection of man from the consequences of brute force.[40]

Such an approach has been adopted by the Appeals Chamber previously.[41] The interpretation placed on Article 86(2) by the majority in this case has certainly not been so tailored. It will leave a gaping hole in the protection which international humanitarian law seeks to provide for the victims of the crimes committed contrary to that law. Where the prosecution is unable to identify, to find or to apprehend the relevant subordinates in order to prosecute them (a common event), there can be no prosecution if the superior has left his command before he knows or has reason to know of their commission, because he cannot be prosecuted even though the superior-subordinate relationship existed at the appropriate time; similarly, the superior who takes over his command, even though he may quickly know or have reason to know that the crimes have

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[40] Hans-Peter Gasser, International Humanitarian Law - An Introduction, Haupt, 1993, at 16.

[41] Appeals Chamber decisions adopting this approach in humanitarian law cases include: *Prosecutor v Tadić*, IT-94-1-A, Judgment, 15 July 1999 ("*Tadić* Conviction Appeal Judgment"), in relation to Article 2 of the Tribunal's Statute (par 166), Article 5 (pars 282-285) and Article 7(1) (pars 190-191); *Prosecutor v Aleksovski*, IT-95-14/1-A, Judgment, 24 Mar 2000 ("*Aleksovski* Conviction Appeal"), in relation to Article 2 (par 152); *Delalić* Appeal Judgment, also in relation to Article 2 (pars 67-70, 81). Appeals Chamber decisions adopting this approach in relation to other issues include: *Aleksovski* Conviction Appeal, in relation to the doctrine of judicial precedent (par 98); *Prosecutor v Milošević*, IT-01-51-AR73, Reasons for Decision on Prosecution Interlocutory Appeal from Refusal to Order Joinder, 18 Apr 2002, in relation to the resolution of discrepancies between the English and French versions of the Rules of Procedure and Evidence (par 16). See also *Prosecutor v Furundžija*, IT-95-17/1-T, Judgment, 10 Dec 1998 ("*Furundžija* Judgment"), in relation to the forms of liability in Article 7(1) (par 254).

been committed and yet fail to punish, cannot be prosecuted for that failure according to the majority view.

23. Another consequence of the interpretation of the majority is that the anchoring of the duty to punish in the existence of the superior-subordinate relationship at the time when the subordinate was committing or was about to commit such acts necessarily melds the duty to prevent and the duty to punish into the one duty. This is at odds with the jurisprudence of this Tribunal, in which the duty to prevent has been treated as quite separate from the duty to punish. That jurisprudence proceeds upon the basis that, if the superior had reason to know in time to prevent, he commits an offence by failing to take steps to prevent, and he cannot make good that failure by subsequently punishing his subordinates who committed the offences. That was held by, for example, the Trial Chamber in the *Blaškić* Judgment,[42] and the Trial Chamber in the *Kordić* Judgment.[43] The duty to punish, it was said, arises after the crime has been committed (that is, I would think, because the superior had been given reason to know only after that commission). In the second of those cases,[44] the Trial Chamber (of which two members had also been members of the International Law Commission responsible for the Draft Code upon which the majority also relies) said:[45]

> Persons who assume command after the commission [of the crime] are under the same duty to punish.

The two duties are, moreover, usually identified by the Appeals Chamber as alternatives.[46] The majority has not challenged this jurisprudence.

24. All of these considerations lead me to the conclusion that the interpretation placed by the majority upon Article 86(2) of Additional Protocol I does not accord with its object and purpose, and it is inconsistent with the existing jurisprudence of the Tribunal. I do not accept that the provisions of Article 86(2) militate against the application of the principle of command responsibility to the particular factual situation in question in this appeal.

25. **(iii) Report of the International Law Commission (1996) and its Draft Code**[47] The majority points out that the International Law Commission referred to Article 86(2) of Additional Protocol I as elaborating the principle of command responsibility,[48] and it also draws

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[42] *Prosecutor v Blaškić*, IT-95-14-T, Judgment, 3 Mar 2000, par 336.
[43] *Kordić* Judgment, pars 444-446.
[44] At par 446.
[45] Also at par 446.
[46] See *Aleksovski* Conviction Appeal, pars 72, 76; *Delalić* Appeal Judgment, at pars 192, 193, 198.
[47] Yearbook of the International Law Commission (1996), Vol II, Part Two, Report of the Commission to the General Assembly on the work of its forty-eighth session (A/51/10) ("Report").
[48] Appeals Chamber Decision, par 48, referring to p 25 of the Report.

attention to Article 6 of the Draft Code of Crimes against the Peace and Security of Mankind which the Commission had put forward. Article 6 is in these terms (the emphasis has been added by the majority):

> Article 6
>
> 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 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 majority comments that "[o]nce again, the emphasis is on the superior-subordinate relationship existing at the time the subordinate was committing or was going to commit a crime. Crimes committed by a subordinate in the past, prior to his superior's assumption of command, are clearly excluded".[49]

26. The first point to be made in relation to this comment is that an ILC draft does not constitute State practice for the purpose of identifying customary law.[50] The second point is that this draft code (which is the first, in a long line of such drafts, to deal expressly with the principle of command responsibility) has never been put into effect. The third point is that, as Article 6 of the draft is based upon Article 86(2) of Additional Protocol I, my comments relating to the majority's interpretation of that Article must apply equally to the majority's interpretation of Article 6 of the draft. My comment that the interpretation placed by the majority upon Article 86(2) does not accord with its object and purpose gains strength from the *Kordić* Judgment (referred to in par 23, *supra*), which suggests that such an interpretation was apparently not intended by the ILC when incorporating the provisions of Article 86(2) in Article 6.[51]

27. The last point to be made in relation to the majority's comment concerns the emphasis placed by it upon the phrases "in the circumstances of the time" and "was committing or was going to commit such a crime". The text of Article 6 of the Draft Code is said by the ILC's Commentary to have been based upon three instruments – the Statutes of the two *ad hoc*

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[49] *Ibid*, par 49.

[50] Its members are elected *in their individual capacity* and not as representatives of their Governments: see the website of the International Law Commission (created by the Codification Division of the Office of Legal Affairs in the United Nations – http://www.un.org/law/ilc/membefra.htm), under "Election". A distinction between such a draft code and customary international law was drawn in, for example, *Prosecutor v Kupreškić et al*, IT-95-16-T, Judgment, 14 Jan 2000 ("*Kupreškić* Trial Judgment"), par 591.

[51] This is because both Judge Bennouna and Judge Robinson, who were members of the International Law Commission in 1996, joined in the statement made in the *Kordić* Judgment already quoted (in par 23, *supra*): "Persons who assume command after the commission [of the crime] are under the same duty to punish."

Tribunals and Additional Protocol I.[52] The phrase "in the circumstances of the time" does not appear in either of the Statutes, but it does in Article 86 of the Additional Protocol (which I have quoted above).[53] The ICRC Commentary on the Additional Protocols makes it very clear that the reference in Article 86 to knowledge "in the circumstances at the time" was intended to apply only to the circumstance in which the superior has to exercise his duty to prevent the commission of crimes by his subordinates:[54]

> Every case must be assessed in the light of the situation of the superior concerned at the time in question, in particular distinguishing the time 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.

Those considerations are wholly inapplicable to the situation in which a superior (even one who was the superior at the time the breach was committed) came to know or had reason to know subsequently that his subordinates had already committed the crime. My view is confirmed by the fact that Article 87(3) – which deals expressly (although in a limited way) with the duty of a superior to punish subordinates where he becomes aware that they have already committed a crime[55] – contains no reference to "the circumstances at the time" when he became aware.

28. Once again, therefore, I do not accept the interpretation placed by the majority upon either the ILC Report or its Draft Code, and I do not accept that either militates against the application of the principle of command responsibility to the particular factual situation in question in this appeal.

29. **(iv) Rome Statute of the International Criminal Court** The majority refers to Article 28 of that Statute ("Responsibility of commanders and other superiors"), which provides:

> In addition to other grounds of criminal responsibility under this Statute for crimes within the jurisdiction of the Court:
>
> (a) 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:

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[52] Report, pp 25-26, par (4).

[53] Paragraph 20, *supra*.

[54] ICRC Commentary, par 3545, p 1014. Unfortunately, the reference in the footnote to this passage from the Commentary, to the proceedings of the Diplomatic Conference on the Reaffirmation and Development of International Humanitarian Law Applicable in Armed Conflicts, at pp 131-132, is a reference to the discussion of the responsibility of the subordinate who acts on the order of a superior (Article 7(4) of the Statute), rather than the responsibility of the superior (Article 7(3) of the Statute). [Article 7(4) provides: The fact that an accused person acted pursuant to an order of a Government or of a superior shall not relieve him of criminal responsibility, but may be considered in mitigation of punishment if the International Tribunal determines that justice so requires."]

[55] The terms of Article 87(3) of Additional Protocol I are set out in par 21 of the text, *supra*.

> (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.
>
> (b) 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 majority says that the language of this Statute "necessarily excludes criminal liability on the basis of crimes committed by a subordinate prior to an individual's assumption of command over that subordinate".[56]

30. The status to be afforded to the Rome Statute has so far been considered by this Tribunal only prior to the Statute coming into force, Nevertheless, the Tribunal has given it significant legal value as an authoritative expression of the legal views of a great number of States at the time when the Statute was adopted (in July 1998).[57] In the present case, the relevant period is from January 1993 to January 1994, not July 1998, and the principle of legality, for which the majority preserves full respect,[58] requires some care to be taken of many provisions in the Rome Statute – even though it was only four years later – which were the result of months of negotiation and compromise. Attention has already been drawn by the Tribunal to the obvious fact that, whereas many of the Statute's provisions may be taken as reflecting customary international law at the time it was adopted, it also creates new law or modifies existing law.[59]

31. Article 28 was previously Article 25 in the draft Statute being considered at the United Nations Diplomatic Conference of Plenipotentiaries on the Establishment of an International Criminal Court (usually described as the Rome Conference) in 1998. So far as the reliance of the majority upon the terms of Article 28 in the Statute is concerned, Article 25 in the draft

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[56] Appeals Chamber Decision, par 46.
[57] *Furundžija* Judgment, par 227; *Tadić* Conviction Appeal Judgment, par 223.
[58] Appeals Chamber Decision, par 51.
[59] *Furundžija* Judgment, par 227.

Statute was in identical terms. The report of the Working Group on General Principles of Criminal Law considered at the Rome Conference, stated in relation to that Article 25:[60]

> The Working Group draws the attention of the Drafting Committee to the fact that the text of this article was the subject of extensive negotiations and represents quite delicate compromises.

That this is so is patent, in my view, from the vast differences between the provisions relating to military commanders and those relating to other superiors, and between those provisions and existing instruments such as the Statutes of the *ad hoc* Tribunals.

32. In these circumstances, the terms of Article 28 of the Rome Statute are of very limited value in determining the customary international law at the time relevant to these proceedings. Having said that, however, it is obvious that the references in each of those sets of provisions to "were committing or about to commit such crimes", which the majority has emphasised, were founded on Article 86(2) of Additional Protocol I. Again, therefore, my comments relating to the majority's interpretation of that Article must apply equally to the majority's interpretation of Article 28 of the Rome Statute.

33. For all the reason already given, I do not accept that Article 28 militates against the application of the principle of command responsibility to the particular factual situation in question in this appeal.

34. It follows that I reject all of the arguments of the majority.

Disposition

35. I would accordingly dismiss the appeal in relation to both issues.

Addendum

36. I have read with interest the material added by the majority to the Appeals Chamber Decision to meet what has been stated in the two opinions which dissent in relation to the second issue determined in this appeal.[61] That material raises a number of new issues. What the majority still does not do is give any direct explanation for the completely different approach which it adopted in relation to the second issue from the approach which was

[60] A/Conf.183/C.1/WGGP/L.4/Add.1, 29 June 1998, at 3.
[61] Appeals Chamber Decision, pars 52-56.

unanimously adopted in relation to the first issue.[62] There is nothing in the material added by the majority which justifies the different approach taken by the majority.

37. An issue between the majority and myself appears to be whether the very circumscribed factual situation with which the second issue is concerned falls within the application of the principle of command responsibility which has been accepted as customary international law.[63] The majority says that my assertion that this situation "*clearly* carries individual criminal responsibility under existing principle seems indefensible".[64] The emphasis on "clearly" appears in the material added by the majority. That is *not* what I have said. What I have said is fully consistent with what the Appeals Chamber has said, unanimously, in that Decision:[65]

> More particularly, [the Appeals Chamber] appreciates that to hold that a principle was part of customary international law, it has to be satisfied that State practice recognised the principle on the basis of supporting *opinio juris*. However, it also considers that, where a principle can be shown to have been so established, it is not an objection to the application of the principle to a particular situation to say that the situation is new if it ***reasonably*** falls within the application of the principle.[66]

After stating the principle of command responsibility, I have stated my conclusion in these words:[67]

> In my opinion, the situation of a superior who (after assuming command) knows or has reason to know that a person who has become his subordinate had committed a crime before he became that person's superior falls ***reasonably*** within that principle.

I stand by that statement, for the reasons I gave.[68]

38. Somehow, and without explanation, the majority has moved (within the space of forty paragraphs) from a requirement that the particular factual situation falls "reasonably" within the principle to one that it "clearly" falls within that principle. I have not moved with the majority. There is a very real distinction between the two requirements. The majority appears to have confused the statement of reasonableness which was unanimously adopted earlier in the Appeals Chamber Decision with the principle of legality stated later by the majority as

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[62] The majority has insisted in relation to the second issue that it is necessary to establish the existence of customary international law in relation to the application of the principle of command responsibility to the very circumscribed factual situation, yet it has not insisted in relation to the first issue that it is necessary to establish such customary international law in relation to the application of that principle to an internal (rather than an international) armed conflict.

[63] Appeals Chamber Decision, pars 52, 56.

[64] Appeals Chamber Decision, par 52.

[65] *Ibid*, par 12. I have added the emphasis in this quotation and in the quotation which follows.

[66] That statement has been encapsulated by me in this present opinion in these words: "A principle so held to have been part of customary international law may however be applied to a new situation where that situation ***reasonably*** falls within the application of the principle." (Again, I have added the emphasis.)

[67] Paragraph 8, *supra*. See also par 13.

[68] Paragraphs 9-12, *supra*.

requiring the crime charged to be "clearly" established under customary international law at the time the events in issue occurred.[69]

39. The statement by the majority, that "[it] falls to the distinguished dissenting judges to show that [a positive and solid foundation of a customary law principle] exists; it does not fall to us to demonstrate that it does not",[70] is tenable only if it be accepted that, on my part, I have failed to demonstrate that such a principle of customary law exists. The argument which I put – and which appears to have been misunderstood by the majority – is that the relevant principle of customary international law in relation to the second issue is that which was accepted unanimously by the Appeals Chamber in this appeal, that a commander is criminally responsible if he knew or had reason to know that the subordinate was about to commit acts amounting to a crime within the meaning of the Tribunal's Statute or had done so and if he failed to take the necessary and reasonable measures to prevent such acts or to punish the subordinate.[71] My response to the legality argument was that the customary international law which supports the existence of the principle also supports the application of that principle in the situations which reasonably fall within it,[72] and I will not repeat what I said earlier in relation to that.

40. The material added by the majority now makes clear what was perhaps implicit before, that it is (in the view of the majority) necessary, before a principle accepted in customary international law can be applied to any particular circumscribed factual situation, to demonstrate that custom already exists supporting its application to that situation. Surely it is the purpose of the relevant principle of customary international law which dictates the scope of its application, not the facts of the situation to which the principle is sought to be applied. And, if that scope or purpose is not sufficiently rigorous or precise, it may be defined by reference to the "principles of humanity" and "dictates of public conscience" as provided for in the *Martens* Clause.[73] If the view of the majority is correct, no principle of customary international law could ever be applied to a new situation, simply because it *is* a new situation.

41. An illustration of the application of a principle of customary international law to a particular circumscribed factual situation is to be found in the *Shimoda* case, which discussed

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[69] Appeals Chamber Decision, par 51. The same confusion between the two concepts appears earlier in par 52 of the Appeals Chamber Decision, claiming that it is common ground between the majority and the minority that "clearly established rules may be applied to new factual situations ***clearly*** falling within their ambit" (I have added the emhasis), which statement is again incorrectly ascribed to me in footnote 67 of that decision.

[70] Appeals Chamber Decision, par 52.

[71] Paragraph 8, *supra*, relying upon par 12 of the Appeals Chamber Decision.

[72] See par 10, *supra*.

[73] *Kupreškić* Trial Judgment, par 525.

the legality in international law of the act of the United States of America in dropping atomic bombs on Hiroshima and Nagasaki in 1945.[74] I do not refer to this case for the purpose of upholding its conclusion,[75] but for the line of reasoning adopted in that case which demonstrates the error in the view of the majority in relation to the application of an accepted principle of international criminal law to a particular circumscribed factual situation.[76] The plaintiffs, who had been injured in the bombing, sought damages from the State of Japan for having waived (in the Treaty of Peace with Japan, 1951) the claims of its citizens under (*inter alia*) international law against the United States for what was claimed to be its illegal act under the rules of positive international law (taking both treaty law and customary law into consideration) in force in 1945.[77] The Japanese Government argued that, as none of the many declarations, conventions and treaties prohibiting the use of nominated types of weapons which constituted the relevant customary international law included provisions directly touching upon the use of an atomic bomb (which had never been used previously in a war), its use was not expressly regulated by positive international law.[78]

42. The Court, although denying relief on other grounds, rejected this argument and held that the "indiscriminate bombardment of undefended cities" with atomic bombs was an illegal act of hostilities according to the rules of international law.[79] In the course of its reasoning, the Court said:[80]

> It can naturally be assumed that the use of a new weapon is legal as long as international law does not prohibit it. However, the prohibition in this context is to be understood to include not only the case where there is an express rule of direct prohibition, but also the case where the prohibition can be implied *de plano* from the interpretation and application by analogy of existing rules of international law (customary international law and treaties). Further, the prohibition must be understood also to include the case where, in the light of principles of international law, the use of a new weapon is deemed to be contrary to these principles, for there is no reason why

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[74] *Shimoda et al* ("The *Shimoda* case"), Japan, Tokyo District Court, judgment of 7 December 1963, reported in L Friedmann, *The Law of War*, Vol II, 1688-1702 ("Friedman, Law of War"), 1688. On line (in English): www.icrc.org/ihl-nat.nsf.

[75] cf Illegality of the Use by a State of Nuclear Weapons in Armed Conflict, Advisory Opinion, 8 July 1996 ("*Legality of Nuclear Weapons* case"), ICJ Reports 1996, 66.

[76] The International Court of Justice, in the *Legality of Nuclear Weapons* case, similarly reasoned that the legality of the threat or use of nuclear weapons was to be assessed according to "the most directly relevant applicable law governing the question", namely, that relating to the use of force enshrined in the United Nations Charter, the laws of war concerned with the conduct of hostilities and various treaties dealing specifically with nuclear weapons, although none of these bodies of law dealt specifically with the issue under consideration (par 34). The International Court of Justice recognised that the principles and rules of humanitarian law had evolved prior to the invention of nuclear weapons, but that there could be no doubt that the established principles and rules of humanitarian law applied to them; any conclusion that they did not apply "would be incompatible with the intrinsically humanitarian character of the legal principles in question which permeates the entire law of armed conflict and applies to all forms of warfare and to all kinds of weapons, those of the past, those of the present and those of the future" (pars 85-86).

[77] This statement of the pleadings is taken from the headnote: Friedman, Law of War, 1688.

[78] *Ibid*, 1690.

[79] *Ibid*, 1693.

[80] *Ibid*, 1690.

> the interpretation of rules of international law should be limited to literal interpretation, any more than the interpretation of municipal law.
>
> [...] Any weapon the use of which is contrary to the customs of civilised countries and to the principles of international law should *ipso facto* be deemed to be prohibited even if there is no express provision in the law; the new weapon may be used as a legal means of hostilities only if it is not contrary to the principles of international law.

The court concluded: "Thus, for a weapon to be legal it is not enough that it is a new weapon; and a new weapon must naturally be subjected to the examination of positive international law".[81]

43. The last of the new issues raised by the majority concerns Articles 86(2) and 87(3) of Additional Protocol I. The majority has sought to address my argument that its reliance upon Article 86(2) for the temporal restriction which the majority imposes was, by reason of the provisions of Article 87(3), a very uncertain foundation for such a restriction.[82] It points out that I have failed to acknowledge that it is Article 86(2) which expressly addresses the individual responsibility of superiors for acts of their subordinates, whilst Article 87(2) speaks of the obligations of States parties.[83] The majority cites no authority for the distinction which it draws between the two Articles. Both are regarded in law as binding only the High Contracting Parties. Each of them obliges those Parties to implement, pursuant to their treaty obligations, certain standards in their domestic laws, including duties upon commanders as provided in each of them. Although it is generally held that some provisions of the Additional Protocols have been accepted in customary international law as binding on individuals, it is unnecessary in the present case to resolve which ones have been so accepted. I referred to the contents of the two Articles not for the purpose of saying that one or the other or both were or were not accepted as so binding on individuals but (as I believe it is clear from what I said) only for the purpose of demonstrating the context in which Article 86(2) is to be found and the inadequacy of the majority's interpretation of that Article. I was encouraged to do so by the ICRC Commentary to Article 86(2), which says that Article 86(2) "should be read in conjunction with [...] Article 87 (*Duty of commanders*)".[84]

44. My opinion that the appeal should be dismissed in relation to both issues remains unchanged.

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[81] *Ibid*, 1690. See also a similar line of reasoning in *KHW v Germany*, Application No 00037201/97, 22 Mar 2001, par 45 (ECourtHR).
[82] Paragraph 21, *supra*.
[83] Appeals Chamber Decision, par 53.
[84] ICRC Commentary, par 3541, p 1011.

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

Dated this 16th day of July 2003,
At The Hague,
The Netherlands.

Judge David Hunt

[Seal of the Tribunal]