024 SCSL-2003-13-PT (782-818)

SPECIAL COURT FOR SIERRA LEONE

Case No. 2003-13-PT

Before: Judge Benjamin Itoe
Judge Bankole Thompson
Judge Pierre Boutet

Registrar: Mr. Robin Vincent

Date filed: October 20, 2003

THE PROSECUTOR

against

SANTIGIE BORBOR KANU, also known as 55 also known as FIVE-FIVE also known as SANTIGIE KHANU also known as SANTIGIE KANU also known as S.B. KHANU also known as S.B. KANU also known as SANTIGIE BOBSON KANU also known as BORBOR SANTIGIE KANU

MOTION CHALLENGING THE JURISDICTION OF THE SPECIAL COURT, RAISING SERIOUS ISSUES RELATING TO JURISDICTION ON VARIOUS GROUNDS AND OBJECTIONS BASED ON ABUSE OF PROCESS

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Mr. Geert-Jan Alexander Knoops

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I INTRODUCTION

1. Pursuant to Rule 72(B) and (E) of the Rules of Procedure and Evidence ("**Rules**"), the Defense herewith files the following arguments as to lack of jurisdiction of the Special Court of Sierra Leone, raising serious issues relating to its jurisdiction, and amounting to abuse of process as meant in Rule 72(B)(v) of the Rules.

II DEFECTS AS TO THE INTERNATIONAL LEGAL FOUNDATION OF THE SPECIAL COURT

2. Following the Resolution of the Security Council 1315 of August 14, 2000, the Secretary General of the United Nations and the Government of Sierra Leone entered an Agreement on the Establishment of a Special Court for Sierra Leone dated January 16, 2002 ("**Agreement establishing the Special Court**").

3. Article 1 of the Agreement establishing the Special Court expresses the main goal of this establishment, namely "*to prosecute persons who bear the greatest responsibility for serious violations of international humanitarian law and Sierra Leonean law in the territory of Sierra Leone since 30 November 1996.*"[1]

4. Aside from the fact that the Accused Mr. Kanu, according to the Indictment, held the rank of Sergeant and it therefore at first sight can be questioned whether he falls within the ambit of Article 1 of the Agreement, the Agreement establishing the Special Court, as it is held by the Defense, cannot be considered a valid legal basis to supersede the constitutional principles under Sierra Leonean law.

5. Contrary to the establishment of both the International Tribunals for the former Yugoslavia and for Rwanda, as subsidiary organs under Chapter VII of the United Nations Charter, and the establishment of the International Criminal Court based upon a

[1] See for the emphasis on the element of "*most responsible*", the Report of the UN Secretary General on the Establishment of a Special Court for Sierra Leone.

multilateral agreement, the Agreement establishing the Special Court is merely a bilateral agreement. Accordingly, its validity should be clearly distinguished from the other international instruments as mentioned before. More specifically, a bilateral agreement between an international organization such as the UN and one State as such cannot judicially amount to an international legal instrument which can set aside certain constitutional rights and provisions.

6. Both the Peace Agreement between the Government of Sierra Leone and the Revolutionary United Front of Sierra Leone, signed on July 7, 1999 in Lomé ("**Lomé Peace Agreement**") and the Agreement establishing the Special Court can be qualified as bilateral agreements or treaties. In case of conflicting provisions stemming from international treaties, according to the principles of public international law, the treaty which first entered into force takes precedence over the more recently signed treaty.[2] In this specific situation, the Lomé Peace Agreement was concluded July 7, 1999, whereas the Agreement establishing the Special Court entered into force on January 16, 2002 and is therefore more recent. As a consequence, Article IX of the Lomé Peace Agreement ought to be considered taking precedence over, *inter alia*, Article I of the Agreement Establishing the Special Court.

A National Laws: Exhaustive Enumeration and Absence of Direct Effect

8. The following five arguments are supportive for this observation. In the **first** place, Chapter XII of the Constitution of Sierra Leone of 1991 ("**Constitution**"), mentions in Article 1 that the laws of Sierra Leone shall comprise of the Constitution, national laws, orders, rules, regulations, or other statutory instruments made by any person or pursuant to a power conferred in that behalf by the Constitution or any other law, the existing law and common law. This definition exhaustively enumerates the sources of national law without mentioning international law as such, more specifically bilateral agreements to be entered into between the Government of Sierra Leone and an international organization such as the UN. Furthermore, the Articles 2 – 7 of Chapter XII

[2] See Ian Brownlie, *Principles of Public International Law*, Clarendon Press 1990.

of the Constitution likewise abstain from including these agreements as part of the laws of Sierra Leone. Therefore, such bilateral agreements which advance to vest a special forum of jurisdiction, which is the case with respect to the Agreement establishing the Special Court, fail to have, without further national legislative measures, direct effect within the domestic legal system of Sierra Leone.

9. Reference is made to Chapter XIII of the Constitution, defining the term "law" as including "*a. any instrument having the force of law made in exercise of a power conferred by law; b. customary law and any other unwritten rules [of] law.*" Again, no mention is made of the phenomenon of direct effect of international treaties within the domestic legal sphere of Sierra Leone.

B Sovereignty

10. **Second**, Article 5(2)(a) of Chapter XII of the Constitution explicitly declares that "*sovereignty belongs to the people of Sierra Leone from whom Government through this Constitution derives all its power, authority and legitimacy.*" This provision expresses respect for the sovereign rights of the people of Sierra Leone. Notably, this provision is implemented in the Constitutional Chapter on the Fundamental Principles of State Policy, so that the entering of a bilateral agreement which established the Special Court, may be deemed to be unconstitutional as it infringes the mentioned sovereign rights of the people of Sierra Leone. In this context, reference is made to Article 4 of Chapter II of the Constitution which imposes "*all organs of the Government and all authorities and persons exercising legislative, executive or judicial powers (...) to observe and apply the provisions of this Chapter.*" This provision therefore amounts to a mandatory fundamental principle of State policy which, in combination with Article 5(2)(a) of this Constitutional Chapter, does not empower the Government of Sierra Leone to exercise its legislative and judicial powers, while violating the sovereign rights of the people of Sierra Leone, among which the primary right to be tried by the national judiciary. Reference is made to Article 172(3) of Chapter XIII of the Constitution, mentioning under (a) that "*any power to make laws conferred by this Constitution includes power to*

make laws having extraterritorial operation."[3] This provision only mentions "*extraterritorial operation*" and therefore not "*extra-jurisdictional operation.*" The strict provisions of this constitutional Chapter reaffirm therefore that the Constitution prohibits enacting laws with jurisdictional clauses which are as such not embedded in the Sierra Leonean system (see below under section C).

C Locus Standi of National Courts

11. In the **third** place, close reading of the Constitution, especially its composition, learns that the people of Sierra Leone can in principle only be tried by their national courts. Article 120(2) of Chapter VII, Part I of the Constitution mentions that "*the judiciary shall have jurisdiction in all matters civil and criminal (...).*"[4] The term judiciary in this provision clearly focuses on the domestic judiciary of Sierra Leone, which interpretation also follows from Article 120(1) of the Constitution which refers to "*the judicial power of Sierra Leone (...).*"

12. The Defense points to Article 171(15) of the Constitution, providing that "*this Constitution shall be the supreme law of Sierra Leone and any other law found to be inconsistent with any provision of this Constitution shall, to the extent of the inconsistency, be void and of no effect.*" This utterly clear provision supports the proposition that not only the Agreement establishing the Special Court cannot supersede the Constitution as the "*supreme law*" of the land (see section A above), but also that such agreements have no effect when violating a domestic system which is meant to have an exclusive nature such as the case with respect to Sierra Leone.

D (Military) Court Martials: Exclusive Jurisdiction

13. In the **fourth** place, the Defense holds that the establishment of the Special Court for Sierra Leone by means of the agreement between the UN and the Government of

[3] Emphasis added.
[4] Emphasis added.

Sierra Leone, cannot serve as a legal foundation for the legitimacy of the Special Court and the exercise by this Court of jurisdiction over Sierra Leonean nationals insofar as they were part of the armed forces due to Chapter XI of the Constitution. According to Article 169(3)(e) of Chapter XI of the Constitution, it is provided that the National Defense Council is empowered to endorse regulations for the performance of its functions under the Constitution, and that such regulations "*shall include regulations in respect of (...) the delegation to other persons of powers of commanding officers to try accused persons, and the conditions subject to which such delegation may be made.*"[5] This thus concerns a provision of a mandatory nature and must be seen in connection with the Sierra Leonean system of court martial law within which the jurisdiction of these court martials is exclusive for Sierra Leonean military servicemen, such as the Accused (see below). Reference is made to Chapter XIII of the Constitution which provides in Article 171(1) that the term "Court" "*means any court of law in Sierra Leone including court martial,*" thus emphasizing the exclusivity of also the system of court martial.

14. According to the Indictment in the case of Mr. Kanu, the Accused joined the Sierra Leone Army on November 27, 1990 "*and rose to the rank of Sergeant*".[6] The Accused was part of the armed forces of Sierra Leone until his resignation on March 3, 2000.

15. According to the Indictment, part of the alleged crimes took place while he held a military rank and was officially part of the armed forces of Sierra Leone. As a consequence, the Accused, in view of the constitutional provisions mentioned in para. 10 below, is subjected to the powers of the national commanding officers to try accused persons as envisioned in Article 169(3)(e) of Chapter XI of the Constitution. This jurisdictional clause therefore leaves no room for subjecting Sierra Leonean military personnel to the jurisdiction of an internationalized court, such as the Special Court, which is established based on a bilateral agreement between the Sierra Leonean

[5] Emphasis added.
[6] See para. 2 of the Indictment.

Government and the United Nations, while negating the aforementioned constitutional rights for military servicemen.

16. Finally, the Defense points to Article 171(13) of Chapter XIII of the Constitution saying that "*no provision of this Constitution (...) shall be construed as precluding a Court from exercising jurisdiction in relation to any question whether the person or authority has performed those functions in accordance with this Constitution or any other law.*"[7] The phrase "*those functions*" also relate to military functions within the armed forces of Sierra Leone (see Chapter XI of the Constitution). As noted, the Accused is charged (also) in his capacity as member of the military forces of Sierra Leone, c.q. a soldier (see para. 2 of the Indictment). Accordingly, prosecuting him before this Special Court raises the matter of compliance with said constitutional provision.

E Transfer of Nationals: Unconstitutional Phenomenon Resulting in Lack of Jurisdiction

17. In the **fifth** place, the establishment of the Special Court may be deemed unconstitutional for the following reason. The Constitution does not specifically refer to the eligibility of its nationals as to extradition to foreign courts. Yet, according to Sierra Leonean domestic law, such extradition may be possible presupposed the existence of a bilateral or multilateral extradition treaty. However, Article 17(2)(d) of the Agreement establishing the Special Court merely makes mention of the term "*transfer*", which term is not to be equated with the term extradition.[8] In spite of the fact that Article 17 mentions in its chapeau "*including, but not limited to*", the term transfer, as being a totally different concept of international criminal law, does not automatically entail extradition of an indictee to a special court. Therefore, in interpreting Article 17(2)(d) in such a way that it includes the term extradition, would broaden the scope of the article in an impermissible way.

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[7] Emphasis added.
[8] See G.G.J. Knoops, *Surrendering to International Criminal Courts*, New York: Transnational Publishers 2002.

18. The Defense therefore holds the opinion that, as the Constitution does not allow for transfer of its nationals to a foreign or special court raised pursuant to a bilateral agreement between the Government and the UN, and according to Sierra Leonean law, under circumstances, only extradition of nationals is deemed permissible, while transfer and extradition are clearly different judicial concepts, transfer of a Sierra Leonean national, i.e. the Accused, to the Special Court is deemed to be unconstitutional.

19. Moreover, this unconstitutional issue is affirmed by the fact that transfer as envisioned in Article 17(2)(d) of the Agreement between the Government and the UN, is conducted in a way which does not respect the principles as set forth in Chapter III of the Constitution, pertaining to the recognition and protection of fundamental human rights and freedoms of the individual. More specifically, it does not comply with Article 17(1)(d) of the Constitution, which states that no person shall be deprived of his personal liberty except as may be done in the event of, *inter alia*, "*the execution of an order of a court made in order to secure the fulfilment of any obligation imposed on him by law*." The words "*by law*" clearly aim at the national laws of Sierra Leone as set forth in the abovementioned paragraphs. Read in combination with Article 18(2) of Chapter III of the Constitution, the phenomenon of transfer of the Accused to the Special Court is deemed to be inconsistent with the Constitution.

20. In **conclusion**, the Defense for this primary reason, based on the five analyzed arguments (each of them separately, or read in combination) holds that the Special Court is not empowered to try the case of the Accused so that the charges should be dismissed.

III LACK OF JURISDICTION DUE TO THE AMNESTY CLAUSE IN THE LOMÉ PEACE AGREEMENT

A Prevalence of Article IX of the Lomé Peace Agreement

22. In the Lomé Peace Agreement, Article IX titled "Pardon and Amnesty" is implemented, which provides in section 2 that after the signing of this Agreement, the

Government of Sierra Leone shall grant absolute and free pardon and reprieve to all combatants and collaborators in respect "*of anything done by them in pursuit of their objectives, up to the time of the signing of the present Agreement*".

23. This provision leaves no doubt as to its judicial and factual scope and clearly embodies also the alleged facts which are set out in the Indictment.

24. Moreover, Article IX(3) of the Lomé Peace Agreement provides that to consolidate the peace and promote the cause of national reconciliation, the Government of Sierra Leone "*shall ensure that no official or judicial action is taken against any member of the RUF/SL, ex-AFRC, ex-SLA or CDF in respect of anything done by them in pursuit of their objectives, as members of those organizations, since March 1991, up to the time of the signing of the present Agreement.*"[9] This provision therefore is of a mandatory nature and reaffirmed by Article 23(9) of the Constitution, saying that "*no person shall be tried for a criminal offence if he shows that he has been pardoned for that offence,*" which situation emerges also here.

B Objections Based on Abuse of Process

25. Without doubt, the latter provision of the Lomé Peace Agreement not only covers the alleged acts delineated in the Indictment against the Accused, but also it raises another serious jurisdictional issue. Article IX(3) of the Lomé Peace Agreement imposes the Government of Sierra Leone with the obligation to take no judicial action whatsoever against any member of the RUF/SL, ex-AFRC, ex-SLA or CDF. This clearly also includes entering a bilateral agreement with an international organization, in order to establish a (Special) Court to try the categories of individuals aimed at in Article IX(3) of the Lomé Peace Agreement. This observation clearly affects the jurisdiction of the Special Court, but also amounts to an objection based on abuse of process, as enshrined in Rule 72(B)(v) of the Rules. In the event a government on the one hand accepts a legal obligation not to take any judicial action whatsoever against any member of the

[9] Emphasis added.

mentioned factions, but on the other hand negates this obligation by subsequently entering a bilateral agreement in order to set up a (Special) Court whereby the (former) members are nonetheless being subjected to said judicial actions, it is tenable that such (governmental) behavior amounts to abuse of process. The latter argument may serve as an additional argument to grant this Motion and to declare that the Special Court bears no jurisdiction with regard to the case of the Accused.

26. Yet, according to the Report of the Secretary General of the UN on the Establishment of a Special Court for Sierra Leone, it is mentioned that there should be no amnesty for international crimes, and that amnesty could only be granted for crimes punishable under domestic legislation.

27. According to the Indictment, Mr. Kanu is charged with several alleged crimes which are equally punishable under Sierra Leonean domestic laws. For instance, unlawful killing (Counts 3 – 5), looting and burning (Count 13), physical violence (Counts 9 – 10), sexual violence (Counts 6 – 8) are all crimes for which Sierra Leonean criminal courts bear jurisdiction, which crimes equally amount to *de facto* breaches of common Article 3 to the Geneva Conventions.

28. In **conclusion**, the Special Court lacks jurisdiction for the crimes set forth in the Indictment, insofar as these are punishable under the Sierra Leonean domestic laws.

IV LACK OF JURISDICTION WITH REGARD TO SUPERIOR RESPONSIBILITY PRIOR TO ASSUMING COMMAND

29. In any event, the Defense holds the opinion that the Special Court cannot assume jurisdiction for crimes which allegedly should have been committed prior to assuming command or allegedly taking the position of a superior.

30. The ICTY Appeals Chamber in *Prosecutor* v. *Hadzihasanovic*, in its Interlocutory Decision of July 16, 2003, clearly held that the application of the principle of superior

responsibility to international crimes which have been committed before an accused has assumed command, finds no support in customary international law. In deciding so, the Appeals Chamber referred to, *inter alia*, the absence of the possibility of such application in other international legal instruments, such as, but not limited to, Article 28 of the ICC Statute. It also mentions that an opposite view would infringe the principle of legality.[10]

31. According to the Indictment in the case of the Accused, he allegedly was "*a senior commander of AFRC/RUF forces in Kono district*" between mid-February 1998 – April 30, 1998 and "*one of the three commanders (...) on 6 January 1999.*" However, several charges are related to the crimes which allegedly have taken place before February 1998. See for instance Counts 3 – 5 of the Indictment, paras. 33 and 34 and Count 12, para. 52, Count 13 para. 59.

32. Consequently, the Special Court is not empowered to try the charges launched against the Accused insofar as related to the concept of superior responsibility for crimes allegedly committed before February 1998.

V CONCLUSION

For all these reasons, the Defense respectfully prays that the Special Court, while declaring that it fails to have jurisdiction to try the Accused, dismisses the charges against the Accused (i) in its entirety, or (ii) partly (with respect to Chapter IV above).

Done in Freetown on this 20th day of October 2003.
For the Defense

Geert-Jan Alexander Knoops

[10] Case No. IT-01-47-AR72, paras. 44 – 55. Not yet published.

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

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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 Had`ihasanovi}, Mehmed Alagi}, 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 Alagi} 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.

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

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[6] Decision of 21 February 2003, para. 3.
[7] Response, para. 7.
[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.

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

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.

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[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.

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 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 ...

[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.

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 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,

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

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 (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

[20] Interlocutory Appeal, para. 39.

in certain matters;[21] this includes certain aspects of conduct in an internal armed 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.

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

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:

> 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).

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

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[26] *Ibid.*, s. 16.
[27] Article 6(3) of the Statute of the International Tribunal for Rwanda ("ICTR") reproduces this wording.
[28] Interlocutory Appeal, para. 95.
[29] *Ibid.*, para. 48.

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 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

[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.

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.

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.

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[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.

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 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

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[35] Interlocutory Appeal, para, 14.
[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.

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 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

[41] Interlocutory Appeal, paras. 28-31.
[42] Amended Indictment, para. 58.
[43] *Ibid.*
[44] *Ibid.*, para. 59.

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 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]

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[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.

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 superior-subordinate relationship and the commission of the offences.[50] Thirdly, the case law of the International Tribunal, as embodied in the *^elebi}i* Trial and Appeal Judgements as well as in the *Kordi}* 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 *Kordi}* 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

[49] Kubura's Submission, para. 30.
[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.

> 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*] 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]

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[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.

[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.

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:

> (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]

[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.

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 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:

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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.

> 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.

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

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[63] Yearbook of the ILC, p. 25 (emphasis provided).

[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.

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 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

[66] *Prosecutor v. Bagilishema*, Case No. ICTR-95-1A-A, Judgement (Reasons), 3 July 2003, para 34.
[67] *See* Opinion of Hunt, J., dissenting in part, *post*, para. 4.

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 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

[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).
[69] *Id.*, paras. 52 and 53.
[70] The Commander's Handbook on the Law of Naval Operations, NWP 1-14M (United States 1995).

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 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.

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[71] *See* Opinion of Hunt, J., dissenting in part, *post*, para. 29.
[72] *Cf.* Rome Statute, art. 22, para. 2.

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.

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]