ANNEX A

AUTHORITY 27

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 No.: IT-96-21-A

Date: 20 February 2001

Original: ENGLISH

IN THE APPEALS CHAMBER

Before: **Judge David Hunt, Presiding**
Judge Fouad Riad
Judge Rafael Nieto-Navia
Judge Mohamed Bennouna
Judge Fausto Pocar

Registrar: **Mr Hans Holthuis**

Judgement of: **20 February 2001**

PROSECUTOR

V

Zejnil DELALIC, Zdravko MUCIC (aka "PAVO"), Hazim DELIC and Esad LANDŽO (aka "ZENGA")

("^*ELEBICI* Case")

JUDGEMENT

Counsel for the Accused:
Mr John Ackerman and Ms Edina Rešidovi} for Zejnil Delalic
Mr Tomislav Kuzmanovic and Mr Howard Morrison for Zdravko Mucic
Mr Salih Karabdic and Mr Tom Moran for Hazim Delic
Ms Cynthia Sinatra and Mr Peter Murphy for Esad Landžo

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Mr Upawansa Yapa
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1. *De Facto* Authority as a Basis for a Finding of Superior Responsibility in International Law

186. In his brief, Muci} appeared to contest the issue of whether a *de facto* status is sufficient for the purpose of ascribing criminal responsibility under Article 7(3) of the Statute. It is submitted that *de facto* status must be equivalent to *de jure* status in order for a superior to be held responsible for the acts of subordinates.[238] He submits that a person in a position of *de facto* authority must be shown to wield the same kind of control over subordinates as *de jure* superiors.[239] In the appellant's view, the approach taken by the Trial Chamber that the absence of formal legal authority, in relation to civilian and military structures, does not preclude a finding of superior responsibility, "comes too close to the concept of strict responsibility".[240] Further, Muci} interprets Article 28 of the ICC Statute as limiting the application of the doctrine of command responsibility to "commanders or those effectively acting as commanders".[241] He submits that "the law relating to *de jure/de facto* command responsibility is far from certain" and that the Appeals Chamber should address the issue.[242]

187. The Prosecution argues that Muci} has failed to adduce authorities to support his argument that the Trial Chamber erred in finding Muci} to be a *de facto* superior.[243] In its view, the finding of the *de facto* responsibility does not amount to a form of strict liability, and *de facto* authority does not have to possess certain features of *de jure* authority. It is submitted that Muci} has not identified any legal basis for alleging that the Trial Chamber has erred in holding that the doctrine of command responsibility applies to civilian superiors.

188. The Trial Chamber found:

> [...] a *position of command is indeed a necessary precondition* for the imposition of command responsibility. However, this statement must be qualified by the recognition that the existence of such a position *cannot be determined by reference to formal status alone*. Instead, the factor that determines liability for this type of criminal responsibility is the *actual possession, or non-possession, of powers of control over the actions of subordinates*. Accordingly, formal designation as a commander should not be considered to be a necessary prerequisite for command responsibility to attach, as such responsibility may be imposed by virtue of a person's *de facto*, as well as *de jure*, position as a commander.[244]

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[238] Muci} Brief, Section 3, p 1.
[239] Muci} Brief, Section 3, p 7.
[240] Muci} Brief, Section 3, p 6.
[241] Muci} Brief, Section 3, p 18.
[242] Appeal Transcript, p 252. When replying to the Prosecution, Muci} did not object to the Prosecution's submissions, Appeal Transcript, p 302, that he did not take issue with the Trial Chamber's legal finding that a person can be found liable under Article 7(3) on the basis of *de facto* authority, Appeal Transcript, pp 316-317.
[243] Prosecution Response, section 10.
[244] Trial Judgement, para 370 (emphasis added).

189. It is necessary to consider first the notion of command or superior authority within the meaning of Article 7(3) of the Statute before examining the specific issue of *de facto* authority. Article 87(3) of Additional Protocol I to the 1949 Geneva Conventions provides:

> 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 his 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.[245]

190. The *Blaski}* Judgement, referring to the Trial Judgement and to Additional Protocol I, construed control in terms of the material ability of a commander to punish:

> What counts is his material ability, which instead of issuing orders or taking disciplinary action may entail, for instance, submitting reports to the competent authorities in order for proper measures to be taken.[246]

191. In respect of the meaning of a commander or superior as laid down in Article 7(3) of the Statute, the Appeals Chamber held in *Aleksovski*:

> Article 7(3) provides the legal criteria for command responsibility, thus giving the word "commander" a juridical meaning, in that the provision becomes applicable only where a superior with the required mental element failed to exercise his powers to prevent subordinates from committing offences or to punish them afterwards. This necessarily implies that a superior must have such powers prior to his failure to exercise them. If the facts of a case meet the criteria for the authority of a superior as laid down in Article 7(3), the legal finding would be that an accused is a superior within the meaning of that provision.[247]

192. Under Article 7(3), a commander or superior is thus the one who possesses the power or authority in either a *de jure* or a *de facto* form to prevent a subordinate's crime or to punish the perpetrators of the crime after the crime is committed.

193. The power or authority to prevent or to punish does not solely arise from *de jure* authority conferred through official appointment. In many contemporary conflicts, there may be only *de facto*, self-proclaimed governments and therefore *de facto* armies and paramilitary groups subordinate thereto. Command structure, organised hastily, may well be in disorder and primitive. To enforce the law in these circumstances requires a determination of accountability not only of individual offenders but of their commanders or other superiors who were, based on evidence, in control of them without, however, a formal commission or appointment. A tribunal could find itself powerless to enforce humanitarian law against *de facto* superiors if it only accepted as proof of command authority a formal letter of authority, despite the fact that the

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[245] (Emphasis added).
[246] *Blaški}* Judgement, para 302.
[247] *Aleksovski* Appeal Judgement, para 76.

superiors acted at the relevant time with all the powers that would attach to an officially appointed superior or commander.

194. In relation to Muci}'s responsibility, the Trial Chamber held:

> [...] whereas formal appointment is an important aspect of the exercise of command authority or superior authority, the actual exercise of authority in the absence of a formal appointment is sufficient for the purpose of incurring criminal responsibility. Accordingly, the factor critical to the exercise of command responsibility is the actual possession, or non-possession, of powers of control over the actions of the subordinates.[248]

195. The Trial Chamber, prior to making this statement in relation to the case of Muci}, had already considered the origin and meaning of *de facto* authority with reference to existing practice.[249] Based on an analysis of World War II jurisprudence, the Trial Chamber also concluded that the principle of superior responsibility reflected in Article 7(3) of the Statute encompasses political leaders and other civilian superiors in positions of authority.[250] The Appeals Chamber finds no reason to disagree with the Trial Chamber's analysis of this jurisprudence. The principle that military and other superiors may be held criminally responsible for the acts of their subordinates is well-established in conventional and customary law. The standard of control reflected in Article 87(3) of Additional Protocol I may be considered as customary in nature.[251] In relying upon the wording of Articles 86 and 87 of Additional Protocol I to conclude that "it is clear that the term 'superior' is sufficiently broad to encompass a position of authority based on the existence of *de facto* powers of control", the Trial Chamber properly considered the issue in finding the applicable law.[252]

196. "Command", a term which does not seem to present particular controversy in interpretation, normally means powers that attach to a military superior, whilst the term "control", which has a wider meaning, may encompass powers wielded by civilian leaders. In this respect, the Appeals Chamber does not consider that the rule is controversial that civilian leaders may incur responsibility in relation to acts committed by their subordinates or other persons under their effective control.[253] Effective control has been accepted, including in the jurisprudence of the Tribunal, as a standard for the purposes of determining superior responsibility. The *Bla{ki}* Trial Chamber for instance endorsed the finding of the Trial

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[248] Trial Judgement, para 736.
[249] Trial Judgement, paras 364-378.
[250] Trial Judgement, paras 356-363.
[251] By the end of 1992, 119 States had ratified Additional Protocol I, *International Review of the Red Cross* (1993), No. 293, at p 182.
[252] Trial Judgement, para 371.
[253] Trial Judgement, paras 355-363. *See* also Secretary-General's Report, paras 55-56.

Judgement to this effect.[254] The showing of effective control is required in cases involving both *de jure* and *de facto* superiors. This standard has more recently been reaffirmed in the ICC Statute, Article 28 of which reads in relevant parts:

> In addition to other grounds of criminal responsibility under this Statute for crimes within the jurisdiction of the Court;
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> (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,
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> [...]
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> (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 [...][255]

197. In determining questions of responsibility it is necessary to look to effective exercise of power or control and not to formal titles.[256] This would equally apply in the context of criminal responsibility. In general, the possession of *de jure* power in itself may not suffice for the finding of command responsibility if it does not manifest in effective control, although a court may presume that possession of such power *prima facie* results in effective control unless proof to the contrary is produced. The Appeals Chamber considers that the ability to exercise effective control is necessary for the establishment of *de facto* command or superior responsibility[257] and thus agrees with the Trial Chamber that the absence of formal appointment is not fatal to a finding of criminal responsibility, provided certain conditions are met. Muci}'s argument that *de facto* status must be equivalent to *de jure* status for the purposes of superior responsibility is misplaced. Although the degree of control wielded by a *de jure* or *de facto* superior may take different forms, a *de facto* superior must be found to wield substantially similar powers of control over subordinates to be held criminally responsible for their acts. The Appeals Chamber therefore agrees with the Trial Chamber's conclusion:

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[254] *Bla{ki}* Judgement, paras 300-301 referring to *^elebi}i* Trial Judgement, para 378.

[255] *Tadi}* Appeal Judgement, para 223, which states that the text of the ICC Statute "may be taken to express the legal position *i.e., opinio juris*" of those States that adopted the Statute, at the time it was adopted. Muci}'s reliance on the ICC Statute in support of his arguments is thus not helpful in relation to the determination of the law as it stood at the time of the offences alleged in the Indictment.

[256] In relation to State responsibility see ICJ, *Legal Consequences for States of the Continued Presence of South Africa in Namibia (South West Africa) notwithstanding Security Council Resolution 276 (1970)*, Advisory Opinion, ICJ Reports, 1971, p 16 at para 118.

[257] At the hearing, Muci} referred with approval to the *Aleksovski* Judgement's finding that "[A]nyone, including a civilian may be held responsible, pursuant to Article 7(3) of the Statute, if it is proved that the individual had effective authority over the perpetrators of the crimes. This authority can be inferred from the accused's ability to give them orders and to punish them in the event of violations." Appeal Transcript, p 238, referring to para 70 of the *Aleksovski* Appeal Judgement, quoting para 103 of the *Aleksovski* Judgement.

> While it is, therefore, the Trial Chamber's conclusion that a superior, whether military or civilian, may be held liable under the principle of superior responsibility on the basis of his *de facto* position of authority, the fundamental considerations underlying the imposition of such responsibility must be borne in mind. *The doctrine of command responsibility is ultimately predicated upon the power of the superior to control the acts of his subordinates.* A duty is placed upon the superior to exercise this power so as to prevent and repress the crimes committed by his subordinates, and a failure by him to do so in a diligent manner is sanctioned by the imposition of individual criminal responsibility in accordance with the doctrine. *It follows that there is a threshold at which persons cease to possess the necessary powers of control over the actual perpetrators of offences and, accordingly, cannot properly be considered their "superiors" within the meaning of Article 7(3) of the Statute.* While the Trial Chamber must at all times be alive to the realities of any given situation and be prepared to pierce such veils of formalism that may shield those individuals carrying the greatest responsibility for heinous acts, *great care must be taken lest an injustice be committed in holding individuals responsible for the acts of others in situations where the link of control is absent or too remote*.
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> Accordingly, it is the Trial Chamber's view that, in order for the principle of superior responsibility to be applicable, *it is necessary that the superior have effective control over the persons committing the underlying violations of international humanitarian law, in the sense of having the material ability to prevent and punish the commission of these offences.* With the caveat that such authority can have a *de facto* as well as a *de jure* character, the Trial Chamber accordingly shares the view expressed by the International Law Commission that the doctrine of superior responsibility extends to civilian superiors only to the extent that they exercise a degree of control over their subordinates which is similar to that of military commanders.[258]

198. As long as a superior has effective control over subordinates, to the extent that he can prevent them from committing crimes or punish them after they committed the crimes, he would be held responsible for the commission of the crimes if he failed to exercise such abilities of control.[259]

199. The remainder of Muci}'s ground of appeal concerns the sufficiency of the evidence regarding the existence of his *de facto* authority. This poses a question of fact, which the Appeals Chamber will now consider.

2. The Trial Chamber's Factual Findings

200. At the appeal hearing, Muci} argued that the Trial Chamber's reliance on the evidence cited in the Trial Judgement in support of the finding that he exercised superior authority was unreasonable. He made a number of arguments which were ultimately directed to his central contention that the evidence was insufficient to support a conclusion that he was a *de facto*

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[258] Trial Judgement, paras 377-378 (emphasis added; footnote omitted). In relation to the case of Delali}, the Trial Chamber further held that a *de facto* position of authority may be sufficient for a finding of criminal responsibility, "provided the exercise of *de facto* authority is accompanied by the trappings of the exercise of *de jure* authority. By this, the Trial Chamber means the perpetrator of the underlying offence must be the subordinate of the person of higher rank and under his direct or indirect control." Trial Judgement, para 646. The Appeals Chamber does not understand this as a reference to any need for a formal appointment.

[259] The Appeals Chamber thus agrees with the Prosecution that reliance on *de facto* control to establish superior responsibility does not amount to a form of strict liability.

219. Delić agrees with the Prosecution's position that Articles 86 and 87 of Additional Protocol I reflect customary law as established through the post Second World War cases. A commander has a duty to be informed, but not every failure in this duty gives rise to command responsibility.[302]

220. The issues raised by this ground of appeal of the Prosecution include:

(i) whether in international law, the duty of a superior to control his subordinates includes a duty to be apprised of their action, i.e. a duty to know of their action and whether neglect of such duty will always result in criminal liability;

(ii) whether the standard of "had reason to know" means either the commander had information indicating that subordinates were about to commit or had committed offences or he did not have this information due to dereliction of his duty; and

(iii) whether international law acknowledges any distinction between military and civil leaders in relation to the duty to be informed.

221. The Appeals Chamber takes note of the fact that this ground of appeal is raised by the Prosecution for its general importance to the "jurisprudence of the Tribunal".[303] Considering that this ground concerns an important element of command responsibility, that the Prosecution alleges an error on the part of the Trial Chamber in respect of a finding as to the applicable law,[304] that the parties have made extensive submissions on it, and that it is indeed an issue of general importance to the proceedings before the Tribunal,[305] the Appeals Chamber will consider it by reference to Article 7(3) of the Statute and customary law at the time of the offences alleged in the Indictment.[306]

(i) The Mental Element Articulated by the Statute

222. Article 7(3) of the Statute provides that a superior may incur criminal responsibility for criminal acts of subordinates "if he knew or had reason to know that the subordinate was about to commit such acts or had done so" but fails to prevent such acts or punish those subordinates.

223. The Trial Chamber held that a superior:

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[302] Delić Response, para 212.
[303] Prosecution Reply, para 2.3; Appeal Transcript pp 147-148.
[304] Trial Judgement, para 393.
[305] *See Tadić* Appeal Judgement, paras 247 and 281.
[306] Secretary-General's Report, para 34.

> [...] may possess the *mens rea* for command responsibility where: (1) he had actual knowledge, established through direct or circumstantial evidence, that his subordinates were committing or about to commit crimes referred to under Articles 2 through 5 of the Statute, or (2) where he had in his possession information of a nature, which at the least, would put him on notice of the risk of such offences by indicating the need for additional investigation in order to ascertain whether such crimes were committed or were about to be committed by his subordinates.[307]

224. The Prosecution position is essentially that the reference to "had reason to know" in Article 7(3) of the Statute, refers to two possible situations. First, a superior had information which put him on notice or which suggested to him that subordinates were about to commit or had committed crimes. Secondly, a superior lacked such information as a result of a serious dereliction of his duty to obtain the information within his reasonable access.[308] As acknowledged by the Prosecution, only the second situation is not encompassed by the Trial Chamber's findings.[309] Delali} argues to the effect that the Trial Chamber was correct in its statement of the law in this regard, and that the second situation envisaged by the Prosecution was in effect an argument based on strict liability.[310] Deli} agrees with the Prosecution's assessment of customary law that "the commander has an international duty to be informed", but argues that the Statute was designed by the UN Security Council in such a way that the jurisdiction of the Tribunal was limited to cases where the commander had actual knowledge or such knowledge that it gave him reason to know of subordinate offences, which was a rule inconsistent with customary law laid down in the military trials conducted after the Second World War.[311]

225. The literal meaning of Article 7(3) is not difficult to ascertain. A commander may be held criminally liable in respect of the acts of his subordinates in violation of Articles 2 to 5 of the Statute. Both the subordinates and the commander are individually responsible in relation to the impugned acts. The commander would be tried for failure to act in respect of the offences of his subordinates in the perpetration of which he did not directly participate.

226. Article 7(3) of the Statute is concerned with superior liability arising from failure to act in spite of knowledge. Neglect of a duty to acquire such knowledge, however, does not feature in the provision as a separate offence, and a superior is not therefore liable under the provision for such failures but only for failing to take necessary and reasonable measures to prevent or to punish. The Appeals Chamber takes it that the Prosecution seeks a finding that "reason to

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[307] Trial Judgement, para 383.
[308] Prosecution Brief, para 2.7; Appeal Transcript p 121.
[309] Appeal Transcript, p 121.
[310] Delali} Response, p 157.
[311] Deli} Response, para 215.

know" exists on the part of a commander if the latter is seriously negligent in his duty to obtain the relevant information. The point here should not be that knowledge may be presumed if a person fails in his *duty* to obtain the relevant information of a crime, but that it may be presumed if he had the *means* to obtain the knowledge but deliberately refrained from doing so. The Prosecution's argument that a breach of the duty of a superior to remain constantly informed of his subordinates actions will necessarily result in *criminal* liability comes close to the imposition of criminal liability on a strict or negligence basis. It is however noted that although a commander's failure to remain apprised of his subordinates' action, or to set up a monitoring system may constitute a neglect of duty which results in liability within the military disciplinary framework, it will not necessarily result in criminal liability.

227. As the Tribunal is charged with the application of customary law,[312] the Appeals Chamber will briefly consider the case-law in relation to whether there is a duty in customary law to know of all subordinate activity, breach of which will give rise to criminal responsibility in the context of command or superior responsibility.

(ii) Duty to Know In Customary Law

228. In the *Yamashita* case, the United States Military Commission found that:

> Clearly, assignment to command military troops is accompanied by broad authority and heavy responsibility [...]. It is absurd, however, to consider a commander a murderer or rapist because one of his soldiers commits a murder or a rape. Nevertheless, where murder and rape and vicious, revengeful actions are widespread offences, and there is no effective attempt by a commander to discover and control the criminal acts, such a commander may be held responsible, even criminally liable, for the lawless acts of his troops, depending upon their nature and the circumstances surrounding them.[313]

The Military Commission concluded that proof of widespread offences, and secondly of the failure of the commander to act in spite of the offences, may give rise to liability. The second factor suggests that the commander needs to discover and control. But it is the first factor that is of primary importance, in that it gives the commander a reason or a basis to discover the scope of the offences. In the *Yamashita* case, the fact stood out that the atrocities took place between 9 October 1944 to 3 September 1945, during which General Yamashita was the commander-in-chief of the 14th Army Group including the Military Police.[314] This length of time begs the question as to how the commander and his staff could be ignorant of large-scale atrocities spreading over this long period. The statement of the commission implied that it had

[312] Secretary–General's Report, para 34.
[313] Law Reports of Trials of War Criminals, Vol IV, p 35.
[314] *Ibid*, p 19.

found that the circumstances demonstrated that he had enough notice of the atrocities to require him to proceed to investigate further and control the offences. The fact that widespread offences were committed over a long period of time should have put him on notice that crimes were being or had been committed by his subordinates.

229. On the same case, the United Nations War Crimes Commission commented:

> [...] the crimes which were shown to have been committed by Yamashita's troops were so widespread, both in space and in time, that they could be regarded as providing either prima facie evidence that the accused *knew* of their perpetration, or evidence that he must have failed to fulfil a duty to *discover* the standard of conduct of his troops.[315]

This last sentence deserves attention. However, having considered several cases decided by other military tribunals, it went on to qualify the above statement:

> Short of maintaining that a Commander has a duty to *discover* the state of discipline prevailing among his troops, Courts dealing with cases such as those at present under discussion may in suitable instances have regarded *means of knowledge* as being the same as knowledge itself.[316]

In summary, it pointedly stated that "the law on this point awaits further elucidation and consolidation".[317] Contrary to the Trial Chamber's conclusion, other cases discussed in the Judgement do not show a consistent trend in the decisions that emerged out of the military trials conducted after the Second World War.[318] The citation from the Judgement in the case of *United States v Wilhelm List*[319] ("*Hostage case*") indicates that List failed to acquire "supplementary reports to apprise him of all the pertinent facts".[320] The tribunal in the case found that if a commander of occupied territory "fails to require and obtain *complete* information" he is guilty of a dereliction of his duty.[321] List was found to be charged with notice of the relevant crimes because of reports which had been made to him.[322] Therefore, List had in his possession information that should have prompted him to investigate further the situation under his command. The Trial Chamber also quoted from the *Pohl* case.[323] The phrase quoted is also meant to state a different point than that suggested by the Trial Chamber. In that case, the accused Mummenthey pleaded ignorance of fact in respect of certain aspects of the running

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315 *Ibid*, p 94.
316 *Ibid*, p 94.
317 *Ibid*, p 95.
318 The Trial Chamber held that "the jurisprudence from the period immediately following the Second World War affirmed the existence of a duty of commanders to remain informed about the activities of their subordinates." Trial Judgement, para 388.
319 *United States v Wilhelm List et al*, Vol XI, TWC, 1230.
320 *Ibid*, p 1271, cited in Trial Judgement, para 389.
321 *Ibid* (emphasis added).
322 *United States v Wilhelm List et al*, Vol XI, TWC, at pp 1271-1272.
323 Trial Judgement, para 389.

of his business which employed concentration camp prisoners.[324] Having refuted this plea by invoking evidence showing that the accused knew fully of those aspects, the tribunal stated:

> Mummenthey's assertions that he did not know what was happening in the labor camps and enterprises under his jurisdiction does not exonerate him. It was his duty to know.[325]

That statement, when read in the context of that part of the judgement, means that the accused was under a duty arising from his position as an SS officer and business manager in charge of a war-time enterprise to know what was happening in his business, including the conditions of the labour force who worked in that business. Any suggestion that the tribunal used that statement to express that the accused had a duty under international law to know would be *obiter* in light of the finding that he had knowledge. In the *Roechling* case, which was also referred to by the Trial Chamber, the court concluded that Roechling had a "duty to keep himself informed about the treatment of the deportees."[326] However, it also noted that "Roechling [...] had repeated opportunities during the inspection of his concerns to ascertain the fate meted out to his personnel, since he could not fail to notice the prisoner's uniform on those occasions".[327] This was information which would put him on notice. It is to be noted that the courts which referred to the existence of a "duty to know" at the same time found that the accused were put on notice of subordinates' acts.

230. Further, the Field Manual of the US Department of Army 1956 (No. 27-10, Law of Land Warfare) provides:

> The commander is...responsible, if he had actual knowledge, or *should have had 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 use the means at his disposal to insure compliance with the law of war.[328]

The italicised clause is clear that the commander should be presumed to have had knowledge if he had reports or other means of communication; in other words, he *had already information* as contained in reports or through other means, which put him on notice. On the basis of this analysis, the Appeals Chamber must conclude, in the same way as did the United Nations War Crimes Commission,[329] that the then customary law did not impose in the criminal context a general duty to know upon commanders or superiors, breach of which would be sufficient to render him responsible for subordinates' crimes.

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[324] *United States v Oswald Pohl et al.*, TWC, Vol. V, p 1055.
[325] *Ibid.*
[326] TWC, Vol XIV, Appendix B, p 1136.
[327] TWC, Vol XIV, Appendix B, p 1136-37.
[328] Emphasis added.
[329] Law Reports of Trials of War Criminals, Vol IV, p 94.

231. The anticipated elucidation and consolidation of the law on the question as to whether there was a duty under customary law for the commander to obtain the necessary information came with Additional Protocol I. Article 86(2) of the protocol provides:

> 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.[330]

232. The phrase, "had reason to know", is not as clear in meaning as that of "had information enabling them to conclude", although it may be taken as effectively having a similar meaning. The latter standard is more explicit, and its rationale is plain: failure to conclude, or conduct additional inquiry, in spite of alarming information constitutes knowledge of subordinate offences. Failure to act when required to act with such knowledge is the basis for attributing liability in this category of case.

233. The phrase "had information", as used in Article 86(2) of Additional Protocol I, presents little difficulty for interpretation. It means that, at the critical time, the commander had in his possession such information that should have put him on notice of the fact that an unlawful act was being, or about to be, committed by a subordinate. As observed by the Trial Chamber, the apparent discrepancy between the French version, which reads "*des informations leur permettant de conclure*" (literally: information enabling them to conclude), and the English version of Article 86(2) does not undermine this interpretation.[331] This is a reference to information, which, if at hand, would oblige the commander to obtain *more* information (i.e. conduct further inquiry), and he therefore "had reason to know".

234. As noted by the Trial Chamber, the formulation of the principle of superior responsibility in the ILC Draft Code is very similar to that in Article 7(3) of the Statute.[332] Further, as the ILC comments on the draft articles drew from existing practice, they deserve close attention.[333] The ILC comments on the *mens rea* for command responsibility run as follows:

> Article 6 provides two criteria for determining whether a superior is to be held criminally responsible for the wrongful conduct of a subordinate. First, a superior must have known or

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[330] Emphasis added.

[331] Trial Judgement, para 392. The two commentaries on Additional Protocol I appear to agree that the French text, which is broader, should be preferred. *See* Commentary on the Two 1977 Protocols Additional to the Geneva Conventions of 1949, Michael Bothe, Karl Joseph Partsch, Waldemar A Solf, (Martinus Nijhoff: The Hague 1982), pp 525-526; ICRC Commentary para 3545.

[332] Trial Judgement, para 342.

[333] ILC Report, pp 34 ff.

> had reason to know *in the circumstances at the time* that a subordinate was committing or was going to commit a crime. This criterion indicates that a superior may have the *mens rea* required to incur criminal responsibility in two different situations. In the first situation, a superior has actual knowledge that his subordinate is committing or is about to commit a crime...In the second situation, he has *sufficient relevant information to enable him to conclude under the circumstances at the time* that his subordinates are committing or are about to commit a crime.[334]

The ILC further explains that "[t]he phrase 'had reason to know' is taken from the statutes of the ad hoc tribunals and should be understood as having the same meaning as the phrase 'had information enabling them to conclude' which is used in the Additional Protocol I. The Commission decided to use the former phrase to ensure an objective rather than a subjective interpretation of this element of the first criterion."[335]

235. The consistency in the language used by Article 86(2) of Additional Protocol I, and the ILC Report and the attendant commentary, is evidence of a consensus as to the standard of the *mens rea* of command responsibility. If "had reason to know" is interpreted to mean that a commander has a duty to inquire further, on the basis of information of a general nature he has in hand, there is no material difference between the standard of Article 86(2) of Additional Protocol I and the standard of "should have known" as upheld by certain cases decided after the Second World War.[336]

236. After surveying customary law and especially the drafting history of Article 86 of Additional Protocol I,[337] the Trial Chamber concluded that:

> An interpretation of the terms of this provision [Article 86 of Additional Protocol I] in accordance with their ordinary meaning thus leads to the conclusion, confirmed by the *travaux préparatoires*, that a superior can be held criminally responsible only if some specific information was in fact available to him which would provide notice of offences committed by his subordinates. This information need not be such that it by itself was sufficient to compel the conclusion of the existence of such crimes. It is sufficient that the superior was put on further inquiry by the information, or, in other words, that it indicated the need for additional investigation in order to ascertain whether offences were being committed or about to be committed by his subordinates. This standard, which must be considered to reflect the position of customary law at the time of the offences alleged in the Indictment, is accordingly controlling for the construction of the *mens rea* standard established in Article 7(3). The Trial Chamber thus makes no finding as to the present content of customary law on this point.[338]

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[334] *Ibid*, pp 37-38 (emphasis added).

[335] *Ibid*, p 38. Article 28(a) of the ICC Statute provides for the responsibility of a military commander or a person effectively acting as a military commander. To establish the responsibility, proof is required that the 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".

[336] Trial Judgement, para 389, where the trial of Admiral Toyoda was cited. Also, the *Tokyo Trial* Judgement, International Military Tribunal for the Far East (29 April 1946-12 November 1948), Vol.1, p 30, cited in the Prosecution Brief, para 2.9.

[337] The Trial Chamber, in particular, correctly observed to the effect that an overly broad "should have known" standard was rejected at the conference which adopted Additional Protocol I. Trial Judgement, para 391.

[338] *Ibid*, para 393.

237. The Prosecution contends that the Trial Chamber relied improperly upon reference to the object and purpose of Additional Protocol I.[339] The ordinary meaning of the language of Article 86(2) regarding the knowledge element of command responsibility is clear. Though adding little to the interpretation of the language of the provision, the context of the provision as provided by Additional Protocol I simply confirms an interpretation based on the natural meaning of its provisions. Article 87 requires parties to a conflict to impose certain duties on commanders, including the duty in Article 87(3) to "initiate disciplinary or penal action" against subordinates or other persons under their control who have committed a breach of the Geneva Conventions or of the Protocol. That duty is limited by the terms of Article 87(3) to circumstances where the commander "is aware" that his subordinates are going to commit or have committed such breaches. Article 87 therefore interprets Article 86(2) as far as the duties of the commander or superior are concerned, but the criminal offence based on command responsibility is defined in Article 86(2) only.

238. Contrary to the Prosecution's submission, the Trial Chamber did not hold that a superior needs to have information on subordinate offences in his actual possession for the purpose of ascribing criminal liability under the principle of command responsibility. A showing that a superior had some general information in his possession, which would put him on notice of possible unlawful acts by his subordinates would be sufficient to prove that he "had reason to know". The ICRC Commentary (Additional Protocol I) refers to "reports addressed to (the superior), [...] the tactical situation, the level of training and instruction of subordinate officers and their troops, and their character traits" as potentially constituting the information referred to in Article 86(2) of Additional Protocol I.[340] As to the form of the information available to him, it may be written or oral, and does not need to have the form of specific reports submitted pursuant to a monitoring system. This information does not need to provide specific information about unlawful acts committed or about to be committed. For instance, a military commander who has received information that some of the soldiers under his command have a violent or unstable character, or have been drinking prior to being sent on a mission, may be considered as having the required knowledge.

239. Finally, the relevant information only needs to have been provided or available to the superior, or in the Trial Chamber's words, "in the possession of". It is not required that he actually acquainted himself with the information. In the Appeals Chamber's view, an

[339] *See* Prosecution argument in Prosecution Brief, paras 2.15-2.19. Reference is made to Article 31 of the Vienna Convention on the Law of Treaties of 1969.
[340] ICRC Commentary (Additional Protocol I), para 3545.

assessment of the mental element required by Article 7(3) of the Statute should be conducted in the specific circumstances of each case, taking into account the specific situation of the superior concerned at the time in question. Thus, as correctly held by the Trial Chamber,[341] as the element of knowledge has to be proved in this type of cases, command responsibility is not a form of strict liability. A superior may only be held liable for the acts of his subordinates if it is shown that he "knew or had reason to know" about them. The Appeals Chamber would not describe superior responsibility as a vicarious liability doctrine, insofar as vicarious liability may suggest a form of *strict* imputed liability.

(iii) Civilian Superiors

240. The Prosecution submits that civilian superiors are under the same duty to know as military commanders.[342] If, as found by the Appeals Chamber, there is no such "duty" to know in customary law as far as military commanders are concerned, this submission lacks the necessary premise. Civilian superiors undoubtedly bear responsibility for subordinate offences under certain conditions, but whether their responsibility contains identical elements to that of military commanders is not clear in customary law. As the Trial Chamber made a factual determination that Delali} was not in a position of superior authority over the ^elebi}i camp in any capacity, there is no need for the Appeals Chamber to resolve this question.

(iv) Conclusion

241. For the foregoing reasons, this ground of appeal is dismissed. The Appeals Chamber upholds the interpretation given by the Trial Chamber to the standard "had reason to know", that is, a superior will be criminally responsible through the principles of superior responsibility only if information was available to him which would have put him on notice of offences committed by subordinates.[343] This is consistent with the customary law standard of *mens rea* as existing at the time of the offences charged in the Indictment.

2. Whether Delali} Exercised Superior Responsibility

242. The Prosecution's second ground of appeal alleges an error of law in the Trial Chamber's interpretation of the nature of the superior-subordinate relationship which must be established to prove liability under Article 7(3) of the Statute. The Prosecution contends that the Trial Chamber wrongly "held that the doctrine of superior responsibility requires the

[341] Trial Judgement, para 383.
[342] Prosecution Brief, para 2.11.

247. The Prosecution's argument relating to the Trial Chamber's findings as to the nature of the superior-subordinate relationship is considered first before turning to the second argument relating to the exclusion of evidence which was sought to be admitted as rebuttal or fresh evidence.

(i) The Superior-Subordinate Relationship in the Doctrine of Command Responsibility

248. The Prosecution interprets the Trial Chamber to have held that, in cases involving command or superior responsibility, the perpetrator must be "part of a subordinate unit in a direct chain of command under the superior" for the superior to be held responsible.[361] The Prosecution submissions do not refer to any specific express statement of the Trial Chamber to this effect but appear to consider that this was the overall effect of the Trial Chamber's findings. The Prosecution first refers to, and apparently accepts, the finding of the Trial Chamber that:

> [...] in order for the principle of superior responsibility to be applicable, it is necessary that the superior have effective control over the persons committing the underlying violations of international humanitarian law, in the sense of having the material ability to prevent and punish the commission of these offences [...] such authority can have a *de facto* or *de jure* character.[362]

249. The Prosecution then refers to certain subsequent conclusions of the Trial Chamber which it apparently regards as supporting its interpretation that the Trial Chamber held that the doctrine of superior responsibility requires the perpetrator to be part of a subordinate unit in a direct chain of command under the superior. First, the Prosecution refers to the Trial Chamber's statement that, in the case of the exercise of *de facto* authority, it must be

> [...] accompanied by the trappings of the exercise of *de jure* authority. By this, the Trial Chamber means that the perpetrator of the underlying offence must be the subordinate of the person of higher rank *and under his direct or indirect control*.[363]

The section of the judgement cited and relied upon in the Prosecution Brief, however, omits the italicised portion of the passage. This qualification expressly conveys the Trial Chamber's view that the relationship of subordination required by the doctrine of command responsibility may be direct *or indirect*.

250. The Trial Chamber also referred to the ICRC Commentary (Additional Protocols), where it is stated that the superior-subordinate relationship should be seen "in terms of a

[361] Prosecution Brief, para 3.6.
[362] Trial Judgement, para 378, cited in Prosecution Brief at para 3.2.
[363] Trial Judgement, para 646, cited in Prosecution Brief at para 3.3.

hierarchy encompassing the concept of control".[364] Noting that Article 87 of Additional Protocol I establishes that the duty of a military commander to prevent violations of the Geneva Conventions extends not only to his subordinates but also to "other persons under his control", the Trial Chamber stated that:

> This type of superior-subordinate relationship is described in the Commentary to the Additional Protocols by reference to the concept of "indirect subordination", in contrast to the link of "direct subordination" which is said to relate the tactical commander to his troops.[365]

251. Two points are clear from the Trial Chamber's consideration of the issue. First, the Trial Chamber found that a *de facto* position of authority suffices for the purpose of ascribing command responsibility. Secondly, it found that the superior-subordinate relationship is based on the notion of control within a hierarchy and that this control can be exercised in a direct or indirect manner, with the result that the superior-subordinate relationship itself may be both direct and indirect. Neither these findings, nor anything else expressed within the Trial Judgement, demonstrates that the Trial Chamber considered that, for the necessary superior-subordinate relationship to exist, the perpetrator must be in a *direct* chain of command under the superior.

252. Examining the actual findings of the Trial Chamber on the issue, it is therefore far from apparent that it found that the doctrine of superior responsibility requires the perpetrator to be part of a subordinate unit in a *direct* chain of command under the superior; nor is such a result a necessary implication of its findings. This seems to have been implicitly recognised by the Prosecution in its oral submissions on this ground of appeal at the hearing.[366] The Appeals Chamber regards the Trial Chamber as having recognised the possibility of both indirect as well as direct relationships subordination and agrees that this may be the case, with the proviso that effective control must always be established.

253. However, the argument of the Prosecution goes further than challenging the perceived requirement of *direct* subordination. The key focus of the Prosecution argument appears to be the Trial Chamber's rejection of the Prosecution theory that persons who can exert "substantial influence" over a perpetrator who is not necessarily a subordinate may, by virtue of that influence, be held responsible under the principles of command responsibility.[367] The

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[364] Trial Judgement, para 354, quoting from the ICRC Commentary (Additional Protocols), para 3544.
[365] Trial Judgement, para 371.
[366] The Prosecution submitted that the Trial Chamber "*appeared* to focus on the necessity of a chain of command. It *appeared to focus* on the necessity of that there has to be a command structure..." and referred to "...the Trial Chamber's reliance on the need for a chain of command, and specifically some – *what appears to be* some direct link or direct chain of command ...", Appeal Transcript, pp 152 and 153.
[367] *See* Trial Judgement, para 648.

Prosecution does not argue that *anyone* of influence may be held responsible in the context of superior responsibility, but that a superior encompasses someone who "may exercise a substantial degree of influence over the perpetrator or over the entity to which the perpetrator belongs." [368]

254. The Trial Chamber understood the Prosecution at trial to be seeking "to extend the concept of the exercise of superior authority to persons over whom the accused can exert substantial influence in a given situation, who are clearly not subordinates",[369] which is essentially the approach taken by the Prosecution on appeal. The Trial Chamber also rejected the idea, which it apparently regarded as being implicit in the Prosecution view, that a superior-subordinate relationship could exist in the absence of a subordinate:

> The view of the Prosecution that a person may, in the absence of a subordinate unit through which authority is exercised, incur responsibility for the exercise of a superior authority seems to the Trial Chamber a novel proposition clearly at variance with the principle of command responsibility. The law does not know of a universal superior without a corresponding subordinate. The doctrine of command responsibility is clearly articulated and anchored on the relationship between superior and subordinate, and the responsibility of the commander for actions of members of his troops. It is a species of vicarious responsibility through which military discipline is regulated and ensured. This is why a subordinate unit of the superior or commander is a *sine qua non* for superior responsibility.[370]

The Trial Chamber thus unambiguously required that the perpetrator be subordinated to the superior. While it referred to hierarchy and chain of command, it was clear that it took a wide view of these concepts:

> The requirement of the existence of a "superior-subordinate relationship" which, in the words of the Commentary to Additional Protocol I, should be seen "in terms of a hierarchy encompassing the concept of control", is particularly problematic in situations such as that of the former Yugoslavia during the period relevant to the present case – situations where previously existing formal structures have broken down and where, during an interim period, the new, possibly improvised, control and command structures may be ambiguous and ill-defined. It is the Trial Chamber's conclusion ... that persons effectively in command of such more informal structures, with power to prevent and punish the crimes of persons who are in fact under their control, may under certain circumstances be held responsible for their failure to do so.[371]

The Trial Chamber's references to concepts of subordination, hierarchy and chains of command must be read in this context, which makes it apparent that they need not be established in the sense of formal organisational structures so long as the fundamental requirement of an effective power to control the subordinate, in the sense of preventing or punishing criminal conduct, is satisfied.

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[368] Appeal Transcript, pp 116-118.
[369] Trial Judgement, para 648.
[370] Trial Judgement, para 647, cited in the Prosecution Brief at para 3.4.
[371] Trial Judgement, para 354.

255. It is clear that the Trial Chamber drew a considerable measure of assistance from the ICRC Commentary (Additional Protocols) on Article 86 of Additional Protocol I (which refers to the circumstances in which a superior will be responsible for breaches of the Conventions or the Protocol committed by his subordinate) in finding that actual control of the subordinate is a necessary requirement of the superior-subordinate relationship.[372] The Commentary on Article 86 of Additional Protocol I states that:

> [...] we are concerned only with the superior who has a personal responsibility with regard to the perpetrator of the acts concerned because the latter, *being his subordinate, is under his control*. The direct link which must exist between the superior and the subordinate clearly follows from the duty to act laid down in paragraph 1 [of Article 86]. Furthermore only that superior is normally in the position of having information enabling him to conclude in the circumstances at the time that the subordinate has committed or is going to commit a breach. However it should not be concluded from this that the provision only concerns the commander under whose direct orders the subordinate is placed. The concept of the superior is broader and should be seen in terms of a hierarchy encompassing the concept of control.[373]

The point which the commentary emphasises is the concept of control, which results in a relationship of superior and subordinate.

256. The Appeals Chamber agrees that this supports the Trial Chamber's interpretation of the law on this point. The concept of effective *control* over a subordinate - in the sense of a material ability to prevent or punish criminal conduct, however that control is exercised - is the threshold to be reached in establishing a superior-subordinate relationship for the purpose of Article 7(3) of the Statute.[374]

257. In considering the Prosecution submissions relating to "substantial influence", it can be noted that they are not easily reconcilable with other Prosecution submissions in relation to command responsibility. The Prosecution expressly endorses the requirement that the superior have effective *control* over the perpetrator,[375] but then espouses, apparently as a matter of general application, a theory that in fact "substantial influence" alone may suffice, in that "where a person's powers of influence amount to a *sufficient* degree of authority or control in the circumstances to put that person in a position to take preventative action, a failure to do so

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[372] Trial Judgement, paras 354, 371 and 647, referring to para 3544 of the ICRC Commentary (Additional Protocols). Article 86(2) provides: "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."

[373] ICRC Commentary (Additional Protocols), para 3544.

[374] It has been elsewhere accepted in the jurisprudence of the Tribunal that, where there is no effective control, there is no superior responsibility: *Aleksovski* Trial Judgement, para 108 (HVO soldiers with arms forced their way into the prison without the guards being able to stop them) and para 111 (no finding was made on any existence of control by Aleksovski over the HVO soldiers).

may result in criminal liability."[376] This latter standard appears to envisage a lower threshold of control than an effective control threshold; indeed, it is unclear that in its natural sense the concept of "substantial *influence*" entails any necessary notion of control at all. Indeed, certain of the Prosecution submissions at the appeal hearing suggest that the substantial influence standard it proposes is not intended to pose any different standard than that of control in the sense of the ability to prevent or punish:

> But we would submit that if there is the substantial influence, which we concede is something which has got to be determined essentially on a case-by-case basis, if this superior does have *the material ability to prevent or punish*, he or she should be within the confines of this doctrine of command responsibility as set forth in Article 7(3).[377]

The Appeals Chamber will consider whether substantial influence has ever been recognised as a foundation of superior responsibility in customary law.

258. The Prosecution relied at trial and on appeal on the *Hostage case* in support of its position that the perpetrators of the crimes for which the superior is to be held responsible need not be subordinates, and that substantial influence is a sufficient degree of control.[378] The Appeals Chamber concurs with the view of the Trial Chamber that the *Hostage case* is based on a distinction in international law between the duties of a commander for occupied territory and commanders in general. That case was concerned with a commander in occupied territory. The authority of such a commander is to a large extent territorial, and the duties applying in occupied territory are more onerous and far-reaching than those applying to commanders generally. Article 42 of the Regulations Respecting the Laws and Customs of War on Land, annexed to the Hague Convention (IV) Respecting the Laws and Customs of War on Land 1907, provides:

> Territory is considered occupied when it is actually placed under the authority of the hostile army.
>
> The occupation extends only to the territory where such authority has been established and can be exercised.

Article 43 provides:

> The authority of the legitimate power having in fact passed into the hands of the occupant, the latter shall take all the measures in his power to restore, and ensure, as far as possible, public

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[375] Prosecution Brief para 3.7; Appeal Transcript p 115.
[376] Prosecution Brief, para 3.15 (emphasis added).
[377] Appeal Transcript, p 119.
[378] The *Hostage case*, TWC, Vol. XI, p 1260.

> order and safety, while respecting, unless absolutely prevented, the laws in force in the country.

This clearly does not apply to commanders in general. It was not then alleged, nor could it now be, that Delali} was a commander in occupied territory, and the Trial Chamber found expressly that he was not.[379]

259. The Prosecution emphasises however that it did not rely on the *Hostage case* alone.[380] At trial, and on appeal, the Prosecution relied on the judgement in the *Muto* case before the International Military Tribunal for the Far East.[381] The Appeals Chamber regards the *Muto* case as providing limited assistance for the present purpose. Considering Muto's liability as Chief-of-Staff to General Yamashita, the Tokyo Tribunal found him to be in a position "to influence policy", and for this reason he was held responsible for atrocities by Japanese troops in the Philippines. It is difficult to ascertain from the judgement in that case whether his conviction on Count 55 for his failure to take adequate steps to ensure the observance of the laws of war reflected his participation in the making of that policy or was linked to his conviction on Count 54 which alleged that he "ordered, authorized and permitted" the commission of conventional war crimes.[382] It is possible that the conviction on Count 54 led to that on Count 55.

260. On the other hand, the Military Tribunal V in *United States v Wilhelm von Leeb et al*, states clearly that:

> In the absence of participation in criminal orders or their execution within a command, a Chief of Staff does not become criminally responsible for criminal acts occurring therein. He has no command authority over subordinate units. All he can do in such cases is call those matters to the attention of his commanding general. Command authority and responsibility for its exercise rest definitively upon his commander.[383]

This suggests that a Chief-of-Staff would be found guilty only if he were involved in the execution of criminal policies by writing them into orders that were subsequently signed and issued by the commanding officer. In that case, he could be *directly* liable for aiding and abetting or another form of participation in the offences that resulted from the orders drafted by him. The Appeals Chamber therefore confines itself to stating that the case-law relied on by the

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379 Trial Judgement, para 649.
380 Prosecution Brief, para 3.20.
381 Trial Judgement, paras 368-369; Appeal Transcript, p 117, Tokyo War Crimes Trial, The International Military Tribunal for the Far East, Judgement, Official Transcript reprinted in R John Pritchard and Sonia Magbanna Zaide (eds.) The Toyko War Crimes Trial, Vol. 20 (1981).
382 J Pritchard et al (eds), *The Tokyo War Crimes Trial* (Garland Publishing Inc, New York and London, 1981) (complete transcripts), vol 20 (Judgement and Annexes), pp 49,772.
383 *United States v Wilhelm von Leeb et al*, TWC, Vol. XI, pp 513-514, quoted in the Trial Judgement, para 367.

Prosecution was not uniform on this point. No force of precedent can be ascribed to a proposition that is interpreted differently by equally competent courts.

261. The Prosecution also relies on the *Hirota* and *Roechling* cases.[384] In the *Hirota* case, the Tokyo Tribunal found that Hirota, the Japanese Foreign Minister at the time of the atrocities committed by Japanese forces during the Rape of Nanking, "was derelict in his duty in not insisting before the Cabinet that immediate action be taken to put an end to the atrocities, failing any other action open to him to bring about the same result."[385] The Trial Chamber found this to be "language indicating powers of persuasion rather than formal authority to order action to be taken".[386]

262. In the *Roechling* case,[387] a number of civilian industrialists were found guilty in respect of the ill-treatment of deportees employed in forced labour, not on the basis that they ordered the treatment but because they "permitted it; and indeed supported it, and in addition, for not having done their utmost to put an end to the abuses".[388] The Trial Chamber referred specifically to the findings in relation to von Gemmingen-Hornberg, who was the president of the Directorate and works manager of the Roechling steel plants. The tribunal at first instance had found that "the high position which he occupied in the corporation, as well as the fact that he was Herman Roechling's son-in-law, gave him certainly sufficient authority to obtain an alleviation in the treatment of these workers", and that this constituted "cause under the circumstances" to find him guilty of inhuman treatment of the workers. The reference to "sufficient authority" was interpreted by the Trial Chamber as indicating "powers of persuasion rather than formal authority", partly because of the tribunal's reference to the fact that the accused was Roechling's son-in-law,[389] and it is upon this interpretation that the Prosecution appears to rely.[390]

263. The Appeals Chamber does not interpret the reference to "sufficient authority" as entailing an acceptance of powers of persuasion or influence alone as being a sufficient basis on

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[384] Appeal Transcript, p 117; Prosecution Brief, para 3.16.

[385] *The Tokyo Judgment*, The International Military Tribunal for the Far East, 29 April 1946-12 November 1948, Vol I, (ed B V A Röling and C F Rüter, 1977, APA University Press, Amsterdam) pp 447-448.

[386] Trial Judgement, para 376.

[387] *The Government Commissioner of the General Tribunal of the Military Government for the French Zone of Occupation in Germany v Directors of the Roechling Enterprises*, XIV Trials of War Criminals Before the Nuremberg Military Tribunals, p 1061("*Roechling* case") at pp 1092-3.

[388] *Roechling* case, judgement on appeal at p 1136.

[389] Trial Judgement, para 376.

[390] The Prosecution does not cite the relevant parts of the judgement on which it relies but refers to the Trial Chamber's references to the case. Prosecution Brief para 3.17. *See* also Appeal Transcript at p 117. The Trial Chamber was, as is apparent from the reference in footnote 404 of the Trial Judgement, referring to the accused von Gemmingen-Hornberg.

which to found command responsibility. The *Roechling* judgement on appeal does not refer to the fact that the accused was Roechling's son-in-law, but it emphasises his senior position as president of the Directorate and his position as works manager, "that is, as the works representative in negotiations with the authorities specially competent to deal with matters relating to labor. His sphere of competence also included contact with the Gestapo in regard to the works police".[391] The judgements suggest that he was found to have powers of control over the conditions of the workers which, although not involving any formal ability to give orders to the works police, exceeded mere powers of persuasion or influence. Thus the Appeals Chamber considers the Trial Chamber's initial characterisation of the case as being "best construed as an example of the imposition of superior responsibility on the basis of *de facto* powers of control possessed by civilian industrial leaders" as being the more accurate one.[392]

264. The Appeals Chamber also considers that the *Pohl* case does not support the proposition of the Prosecution that the substantial influence alone of a superior may suffice for the purpose of command responsibility.[393] The person in question, Karl Mummenthey, an SS officer and a business manager, not only possessed "military power of command" but, more importantly in this case, "control" over the industries where mistreatment of concentration camp labourers occurred.[394] This is apparent even from the passage of the judgement cited by the Prosecution in its Appeal Brief:[395]

> Mummenthey was a definite integral and important figure in the whole concentration camp set-up, and, as an SS officer, *wielded military power of command*. If excesses occurred in the industries *under his control* he was in a position not only to know about them, but to do something.[396]

265. In the context of relevant jurisprudence on the question, it should also be noted that the Prosecution also relies on the fact that a Trial Chamber of the International Criminal Tribunal for Rwanda, in *Prosecutor v Kayishema and Ruzindana*,[397] relied on these World War II authorities, and on the references to them in the judgement of the Trial Chamber in *Celebici*, to

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[391] *Roechling* Case, judgement on appeal, p 1136; *See* also p 1140. The Superior Military Government Court also referred specifically to the fact that the chief of the works police (Werkschutz) was an SS officer called Rassner who was appointed by the accused von Gemmingen-Hornberg: p 1135.
[392] Trial Judgement, para 376.
[393] *United States v Oswald Pohl et al*, TWC, Vol.V, p 958. Relied on in the Prosecution Brief at 3.14 and 3.20.
[394] *Ibid*, pp 1052-1053.
[395] Prosecution Brief, para 3.14, citing the *Pohl* case as referred to in the Trial Judgement, para 374.
[396] *United States v Oswald Pohl et al*, Vol V, TWC, p 958 (emphasis added).
[397] *Prosecution v Kayishema and Ruzindana*, Case No ICTR-95-1-T, Judgement, 21 May 1999.

find that powers of influence are sufficient to impose superior responsibility.[398] The ICTR Trial Chamber stated:

> [...] having examined the *Hostage* and *High Command* cases the Chamber in *Celebici* concluded that they authoritatively asserted the principle that, "powers of influence not amounting to formal powers of command provide a sufficient basis for the imposition of command responsibility." This Trial Chamber concurs.[399]

No weight can be afforded to this statement of the ICTR Trial Chamber, as it is based on a misstatement of what the Trial Chamber in *Celebici* actually held. The quoted statement was *not* a conclusion of the Trial Chamber, nor its interpretation of the *Hostage* and *High Command* cases, but the ICTR Trial Chamber's interpretation of the decision of the Tokyo Tribunal in the *Muto* case.[400] The Trial Chamber in *Celebici* ultimately regarded any "influence" principle which may have been established by *Muto* case as being outweighed by other authorities which suggested that a position of command in the sense of effective control was necessary.

266. The Appeals Chamber considers, therefore, that customary law has specified a standard of *effective* control, although it does not define precisely the means by which the control must be exercised. It is clear, however, that substantial influence as a means of control in any sense which falls short of the possession of effective control over subordinates, which requires the possession of material abilities to prevent subordinate offences or to punish subordinate offenders, lacks sufficient support in State practice and judicial decisions. Nothing relied on by the Prosecution indicates that there is sufficient evidence of State practice or judicial authority to support a theory that substantial influence as a means of exercising command responsibility has the standing of a rule of customary law, particularly a rule by which criminal liability would be imposed.

267. The Appeals Chamber therefore finds that the Trial Chamber has applied the correct legal test in the case of Delali}. There is, therefore, no basis for any further application of that test to the Trial Chamber's findings, whether by the Appeals Chamber or by a reconstituted Trial Chamber.[401]

268. The Prosecution's argument dealt with here is limited to the submission that it was the Trial Chamber's alleged error of law in the legal test which led it to an erroneous conclusion that Delalic did not exercise superior authority. There was no independent allegation in the

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[398] Prosecution Brief, para 3.18.
[399] *Prosecutor v Kayishema and Ruzindana*, Case No ICTR-95-1-T, Judgement, 21 May 1999, para 220.
[400] Trial Judgement, para 375.
[401] Prosecution Brief, para 3.33; Appeal Transcript pp 158 and 166.

Prosecution Brief that the Trial Chamber made errors of fact in its factual findings which should be overturned by the Appeals Chamber, although certain submissions at the hearing of the appeal suggest that the Prosecution submits that, even under the standard of effective control (which was in fact applied by the Trial Chamber), the Trial Chamber should have found Delalic to have exercised superior authority.[402] However, nothing raised by the Prosecution would support a finding by the Appeals Chamber that the Trial Chamber's findings, and its ultimate conclusion from those facts that Delalic did not exercise the requisite degree of control, was so unreasonable that no reasonable tribunal of fact could have reached them.[403]

(ii) Whether the Trial Chamber erred in excluding rebuttal or fresh evidence

269. As discussed above, the Prosecution submitted "in the alternative" that the Appeals Chamber should grant leave to the Prosecution to present "additional" evidence that was wrongly excluded by the Trial Chamber.[404] The nature of the "alternative" was described as follows:

> The issue is an issue of an error of law. The issue is whether or not the Trial Chamber applied the correct test for the admission of rebuttal or fresh evidence. If they applied the incorrect test and it's an error of law, then the Trial Chamber erred.[405]

270. As noted above, the Appeals Chamber deals with this argument as an independent allegation of an error of law on behalf of the Trial Chamber.

271. At the request of the Trial Chamber during the case of the last of the accused to present his defence, the Prosecution filed a notification of witnesses proposed to testify in rebuttal. It proposed to call four witnesses, one relating to the case against Landžo and the others relating to the case against Delalic, one of whom was a Prosecution investigator being called essentially to tender a number of documents "not previously available to the prosecution".[406] Oral submissions on the proposal were heard by the Trial Chamber on 24 July 1998,[407] and the Trial Chamber ruled that, with the exception of the witness relating to the case against Landžo, the proposed evidence was not rebuttal evidence, but fresh evidence, and that the Prosecution had

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[402] Appeal Transcript, p 164: after referring to various facts found by the Trial Chamber, it was submitted that: "As a result of this specific position and someone who is granted authority by the higher command, it is the Prosecution's position that those facts demonstrate he had *control*."

[403] *Tadic* Appeal Judgement, para 64; *Aleksovski* Appeal Judgement, para 63; *Furundžija* Appeal Judgement, para 37 and *infra* paras 434-436.

[404] Prosecution Brief, para 3.80.

[405] Appeal Transcript, p 168.

[406] Prosecution's Notification of Witnesses Anticipated to Testify in Rebuttal, 22 July 1998, ("Notification"), 5th unnumbered page.

[407] Trial Transcript, pp 14934-14974.

301. The remaining issue as to the applicable law raised by the Prosecution in relation to this ground which has not previously been considered is its contention that the Trial Chamber erred because it required Delić to be part of the chain of command and, more generally, it required the perpetrators of the underlying offences to be his "subordinates" before liability under Article 7(3) could be imposed.

302. It is beyond question that the Trial Chamber considered Article 7(3) to impose a requirement that there be a superior with a corresponding subordinate.[475] The Prosecution itself submits that one of the three requirements under Article 7(3) is that of a superior-subordinate relationship. There is therefore a certain difficulty in comprehending the Prosecution submission that the Trial Chamber erred in law in requiring the perpetrator of the underlying offence to be a subordinate of the person of higher rank.[476] The Trial Chamber clearly did understand the relationship of subordination to encompass indirect and informal relationships, as is apparent from its acceptance of the concepts of civilian superiors and *de* facto authority, to which the Appeals Chamber has referred in its discussion of the issue in relation to the Prosecution's second ground of appeal.

303. The Appeals Chamber understands the necessity to prove that the perpetrator was the "subordinate" of the accused, not to import a requirement of *direct* or *formal* subordination but to mean that the relevant accused is, by virtue of his or her position, senior in some sort of formal or informal hierarchy to the perpetrator. The ability to exercise effective control in the sense of a material power to prevent or punish, which the Appeals Chamber considers to be a minimum requirement for the recognition of the superior-subordinate relationship, will almost invariably not be satisfied unless such a relationship of subordination exists. However, it is possible to imagine scenarios in which one of two persons of equal status or rank – such as two soldiers or two civilian prison guards – could in fact exercise "effective control" over the other at least in the sense of a purely practical ability to prevent the conduct of the other by, for example, force of personality or physical strength. The Appeals Chamber does not consider the doctrine of command responsibility – which developed with an emphasis on persons who, by virtue of the position which they occupy, have authority over others – as having been intended to impose criminal liability on persons for the acts of other persons of completely equal status.[477]

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[475] Trial Judgement, paras 646-647.
[476] Prosecution Brief, para 6.7.
[477] In any event, concepts of accessory criminal liability such as aiding and abetting will potentially apply to persons of moral or personal authority who, by failing to act in such scenarios, have the effect in the

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

Judge David Hunt, Presiding

Judge Fouad Riad

Judge Rafael Nieto-Navia

Judge Mohamed Bennouna

Judge Fausto Pocar

Dated this twentieth day of February 2001
At The Hague
The Netherlands

[Seal of the Tribunal]