ECtHR, Milanković v. Croatia

On 20 January 2022, the European Court of Human Rights (ECtHR) rendered a decision declaring command responsibility to be part of customary international humanitarian law, applicable both to international and non-international armed conflicts. In the case, the applicant had been convicted in Croatia for war crimes committed between 1991 and 1992 in the regions of Sisak and Banovina. After being convicted at national level, the applicant made a complaint to the ECtHR, arguing that Croatia violated his rights under art. 7 (No punishment without law) of the ECHR. Particularly, he questioned the domestic decision, arguing that as the conflict in the region had not yet escalated to an international level, command responsibility would not be applicable to his conduct, since it was not applicable to non-international armed conflicts and did not form part of customary international humanitarian law.

Acknowledgments

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A. ECHR, MILANKOVIĆ V. CROATIA

[European Court of Human Rights, First Section, Milanković v. Croatia, application no. 33351/20, judgment. 20 January 2022; available at: https://hudoc.echr.coe.int/fre#{%22itemid%22:[%22001-215180%22]}]

INTRODUCTION

1. The case concerns the applicant's conviction, on the basis of his command responsibility, for war crimes against the Serbian civilian population and a prisoner of war, perpetrated in the territory of Croatia in the

period between mid-August 1991 and mid-June 1992.

THE FACTS

[…]

5. On 25 June 1991 Croatia declared independence but was requested by the European Economic Community to postpone implementation of the declaration for three months from 7 July 1991. Therefore, the full implementation of the declaration only came into effect on 8 October 1991, after the three-month moratorium, when Croatia definitively severed all ties with the Socialist Federal Republic of Yugoslavia.

63. On 15 January 1992 Croatia was internationally recognised as an independent State […].

7. In June 2011 a comprehensive investigation was opened into the killings and other criminal offences committed against individuals of Serb ethnicity in the Sisak and Banovina area in the period between mid-August 1991 and mid-June 1992. In that period the applicant was the deputy head of the Sisak-Moslavina Police Department and in the period between 18 July and 1 October 1991 also the commander of all police forces in the broader area of Sisak and Banovina.

8. On the basis of the evidence obtained during the investigation, on 16 December 2011 the Osijek County State Attorney's Office […] indicted the applicant before the Osijek County Court […]. He was accused of having, in the period between 18 August 1991 and 20 June 1992, personally ill-treated civilians, ordered attacks against them, ordered their illegal arrests and detentions, and of having failed to prevent a number of illegal arrests and detentions, the ill-treatment and killings of civilians and the ill-treatment and killing of a prisoner of war perpetrated by the police units under his command.

9. The indictment was modified during the trial, on 26 November 2013. Specifically, the State Attorney's Office eventually charged the applicant with twenty-two counts of war crimes against the civilian population, eighteen of which had been committed before 8 October 1991 (see paragraph 2 above), and one count against a prisoner of war which had also been committed before that date.

[…]

13. Since Article 120 § 1 and Article 122 of the Basic Criminal Code were referencing (blanket) provisions referring to the rules of international law (ibid.), the State Attorney's Office also relied on "universally recognised rules of customary international law of war and [of customary international] humanitarian law relative to ... the responsibility of commanders for the acts of their subordinates in times of armed conflict".

14. The State Attorney's Office also referred to certain specific provisions of the two Geneva Conventions of 12 August 1949 and their Protocols of 8 June 1977, namely:

– Article 3 § 1 (a) and (c) and Article 13 of the Geneva Convention relative to the Treatment of Prisoners of War (“the Third Geneva Convention”);

– Article 3 § 1 (a) and (c) and Articles 13, 27, 31 and 32 of the Geneva Convention relative to the Protection of Civilian Persons in Time of War (“the Fourth Geneva Convention”);

– Articles 75, 86 and 87 of the Protocol Additional to the Geneva Conventions of 12 August 1949, and relating to the Protection of Victims of International Armed Conflicts (“the First Protocol”, see paragraph 20 below);

– Article 4 §§ 1 and 2 (a) and Article 13 of the Protocol Additional to the Geneva Conventions of 12 August 1949, and relating to the Protection of Victims of Non-International Armed Conflicts (“the Second Protocol”).

15. The applicant responded to the charges and maintained, inter alia, the following arguments throughout the proceedings:

– the Basic Criminal Code had not contained the concept of command responsibility, and the referencing (blanket) provisions in its Articles 120 and 122 could not be interpreted in the light of Articles 86 and 87 of the First Protocol to the Geneva Conventions […] because that Protocol applied only to international armed conflicts, it being understood that Croatia’s declaration of independence had come into effect on 8 October 1991, that the country had not been internationally recognised until 15 January 1992 […] and that the Second Protocol applicable to non-international armed conflicts did not provide for command responsibility […];

– the concept of command responsibility could not be applied to him because at the time when the offences had been committed (*tempore criminis*) he had been the deputy head of the local police department and not a member of the military […];

[…]

16. In a judgment of 9 December 2013, the Osijek County Court found the applicant guilty as charged and sentenced him to eight years’ imprisonment.

17. As regards the eighteen war crimes the applicant had been accused of having committed by omission […]), the court convicted him on the basis of Article 120 § 1 and Article 122 of the Basic Criminal Code and on the relevant provisions of the Third and Fourth Geneva Conventions and the Additional Protocols […], taken in conjunction with Article 28 § 2 of the Basic Criminal Code and Articles 86 and 87 of the First Protocol to the Geneva Conventions […].

18. Specifically, on the basis of the evidence taken, the court found that the applicant had had formal and actual command authority over the police units which had committed the eighteen war crimes in question,

and that he had known or had been aware of those crimes. […]. Lastly, the court held that the applicant, who was a military-academy-educated officer, had known very well that his conduct had been prohibited and in breach of the Geneva Conventions and the Protocols thereto.

19. The applicant appealed, complaining of a number of substantive and procedural errors […].

20. In a judgment of 10 June 2014, the Supreme Court […] upheld the applicant's conviction and increased his sentence to ten years' imprisonment.

21. In reply to the applicant's argument that he had been convicted of the war crimes in question on the basis of command responsibility even though the direct perpetrators had not been identified […], the Supreme Court held that all the evidence taken together unequivocally pointed to the conclusion that the perpetrators of those war crimes had been members of the police units under the applicant's formal and actual command.

22. The Supreme Court did not address the applicant's argument […] that *tempore criminis* the war in Croatia had not had an international character […].

23. The applicant subsequently, on 24 July 2014, lodged a constitutional complaint against the Supreme Court's judgment. […].

24. In a decision of 10 March 2020, the Constitutional Court […] held that the war in Croatia had not had an international character before 8 October 1991 […]. Consequently, Articles 86 and 87 of the First Protocol to the Geneva Conventions […] could not serve as the legal basis for the applicant's conviction for the war crimes which had been committed before that date and for which he had been found guilty on the basis of his command responsibility […].

25. However, the Constitutional Court held that at the time of the commission of those offences the command responsibility for war crimes in non-international armed conflicts had already become a rule of customary international law. In that regard the Constitutional Court referred to *Hadžihasanović and Others* case […] and other judgments of the International Criminal Tribunal for the former Yugoslavia (*Delalić and others*, no. IT-96-21-T of 16 November 1998, §§ 333-343, and *Duško Tadić*, no. IT-94-1-T of 7 May 1997) and judgments of the International Criminal Tribunal for Rwanda (*Akayesu*, no. ICTR-96-4-T of 2 September 1998, §§ 612-613).

[…].

RELEVANT LEGAL FRAMEWORK AND PRACTICE

I. DOMESTIC LAW

27. The relevant provisions of the Basic Criminal Code of Croatia […], which was in force from 1 July 1977 until 31 December 1997, provided as follows:

Article 28 Manner of committing a criminal offence

“1. A criminal offence may be committed by an act or omission.

2. A criminal offence may be committed by omission only when the perpetrator failed to act when under a duty to do so.”

Article 120 § 1 War crime against the civilian population

“Whoever, in violation of the rules of international law, in time of war, armed conflict or occupation, orders ... that the civilian population be killed, tortured or treated inhumanely ... or that great sufferance or [serious] injuries to the body or health be inflicted ... or ... that measures of intimidation and terror be used ... or whoever commits any of the foregoing acts shall be punished by imprisonment of at least five years or of twenty years.”

Article 122 War crime against prisoners of war

“Whoever, in violation of the rules of international law ... orders ... that prisoners of war be killed, tortured or treated inhumanely ... or that great sufferance or [serious] injuries to the body or health be inflicted [on them] ... or whoever commits any of the foregoing acts shall be punished by imprisonment of at least five years or of twenty years.”

28. In a number of judgments, Croatian criminal courts, relying on Article 28 § 2 of the Basic Criminal Code […] and the related concept of guarantor liability (a well-known concept of criminal law in the former Yugoslavia), have taken the view that war crimes are types of offences which can also be committed by omission when a perpetrator is under duty to act but failed to do so. Therefore, the national courts have convicted commanders for war crimes they committed by omission, specifically on the basis of their failure to prevent, supress or report war crimes committed by the units under their command. In such crimes the criminal liability of commanders was based on their guarantor obligation, derived from the relevant rules of international law, to protect the civilian population and prisoners of war from the acts prohibited by international humanitarian law and the law of war, both in the course of international and non-international armed conflict.

[…]

II. INTERNATIONAL LAW

A. First Protocol to the Geneva Conventions

30. The relevant Articles of the Protocol Additional to the Geneva Conventions of 12 August 1949, and relating to the Protection of Victims of International Armed Conflicts, of 8 June 1977, […].

B. Statutes of International Criminal Tribunals

31. The relevant Article of the Statute of the International Criminal Court reads:

Article 28

Responsibility of commanders and other superiors

[…]

32. The relevant Articles of the Statute of the International Criminal Tribunal for the former Yugoslavia (ICTY) […]

33. The relevant part of the Report of the Secretary-General on the establishment of the ICTY […]

[…]

C. Relevant customary international Law

35. The relevant part of the *Customary International Humanitarian Law* study by the International Committee of the Red Cross reads as follows:

Rule 153 Command Responsibility for Failure to Prevent, Repress or Report War Crimes

“Commanders and other superiors are criminally responsible for war crimes committed by their subordinates if they knew, or had reason to know, that the subordinates were about to commit or were committing such crimes and did not take all necessary and reasonable measures in their power to prevent their commission, or if such crimes had been committed, to punish the persons responsible.”

36. The relevant parts of the commentary to that rule read as follows:

Summary

“State practice establishes this rule as a norm of customary international law applicable in both international and non-international armed conflicts.”

International armed conflicts

[…]

Non-international armed conflicts

“Practice with respect to non-international armed conflicts is less extensive and more recent. However, the practice that does exist indicates that it is uncontroversial that this rule also applies to war crimes committed in non-international armed conflicts. In particular, the Statutes of the International Criminal Court, of the International Criminal Tribunals for the former Yugoslavia and for Rwanda and of the Special Court for Sierra Leone and UNTAET Regulation No. 2000/15 for East Timor explicitly provide for this rule in the context of non-international armed conflicts. The fact that this rule would also apply to crimes committed in non-international armed conflicts did not occasion any controversy during the negotiation of the Statute of the International Criminal Court.

In the Hadžihasanović and Others case, the International Criminal Tribunal for the former Yugoslavia held that the doctrine of command responsibility, as a principle of customary international law, also applies with regard to non-international armed conflicts. This rule has also been confirmed in several cases brought before the International Criminal Tribunal for Rwanda.

...

Interpretation

“This rule has been interpreted in case-law following the Second World War and also in the case-law of the International Criminal Tribunals for the former Yugoslavia and for Rwanda. This includes, but is not limited to, the following points:

(i) Civilian command authority. Not only military personnel but also civilians can be liable for war crimes on the basis of command responsibility. The International Criminal Tribunal for Rwanda, in the Akayesu case in 1998 and in the Kayishema and Ruzindana case in 1999, and the International Criminal Tribunal for the former Yugoslavia, in the Delalić case in 1998, have adopted this principle. It is also contained in the Statute of the International Criminal Court. The Statutes of the International Criminal Tribunals for the former Yugoslavia and for Rwanda and of the Special Court for Sierra Leone refer in general terms to a ‘superior’, as do many military manuals and national legislation.

..."

D. Practice of the International Criminal Tribunal for the former Yugoslavia

37. In its decision on joint challenge to jurisdiction in *Prosecutor v. Hadžihasanović and Others* (IT-01-47, 12 November 2002), the Trial Chamber of the ICTY held that

"the doctrine of command responsibility [was] already in – and [has been] since – 1991 ... applicable in the context of an internal armed conflict under customary international law".

38. That view was upheld on appeal by the ICTY's Appeals Chamber in a decision of 16 July 2003 (decision on interlocutory appeal challenging jurisdiction in relation to command responsibility). The relevant part of that decision reads as follows:

II. COMMAND RESPONSIBILITY IN INTERNAL ARMED CONFLICTS

"[…]

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

11. ... the parties disagree ... on the question whether the doctrine [of command responsibility] applies, as part of customary international law, in an internal armed conflict.

12. In considering this question, the Appeals Chamber ... 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 ...

13. ... 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 ... It is difficult to see why the concept would not equally apply ... 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 ...

15. The position is no different as regards internal armed conflicts ...

...

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

...

20. […] 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. ...

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.

...

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. ... the establishment of these bodies was

consistent with the proposition that customary international law previously included the principle that command responsibility applied in respect of an internal armed conflict.

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

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

[…]

39. The applicability of the concept of command responsibility to non-international armed conflicts was later confirmed in other ICTY's judgments. In particular, in *Prosecutor v. Radoslav Brđanin*, IT-99-36-T, 1 September 2004, § 275, the ICTY held:

"275. The Appeals Chamber has held that "[t]he 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. This applies both in the context of international as well as internal armed conflicts. The jurisprudence of the Tribunal has established the following three-pronged test for criminal liability pursuant to Article 7(3) of the Statute:

1. the existence of a superior-subordinate relationship between the superior (the accused) and the perpetrator of the crime;

2. the accused knew or had reason to know that the crime was about to be or had been committed; and

3. the accused failed to take the necessary and reasonable measures to prevent the crime or punish the perpetrator thereof."

In *Prosecutor v. Pavle Strugar*, IT-01-42-T, 31 January 2005, § 357 the ICTY held:

[…]

40. The applicability of the concept of command responsibility to non-military commanders was confirmed by the ICTY in the so-called *Čelebići* case. In particular, in *Prosecutor v. Delalić, Mucić et al.* IT-96-21-T, 16 November 1998, the Trial Chamber of the ICTY held:

"[…]

a. The Responsibility of Non-Military Superiors

355. ... the Trial Chamber deems it appropriate first to set out its reasoning in relation to the question of the application of the principle enshrined in Article 7(3) to persons in non-military positions of authority.

356. It is apparent from the text of this provision that no express limitation is made restricting the scope of this type of responsibility to military commanders or situations arising under a military command. In contrast, the use of the generic term 'superior' in this provision, together with its juxtaposition to the affirmation of the individual criminal responsibility of 'Head[s] of State or Government' or 'responsible Government official[s]' in Article 7(2), clearly indicates that its applicability extends beyond the responsibility of military commanders to also encompass political leaders and other civilian superiors in positions of authority. This interpretation is supported by the explanation of the vote made by the representative of the United States following the adoption of Security Council resolution 827 on the establishment of the International Tribunal. The understanding of the United States was expressed to be that individual criminal responsibility arises in the case of 'the failure of a superior – whether political or military – to take reasonable steps to prevent or punish such crimes by persons under his or her authority'. This statement was not contested. The same position was adopted by Trial Chamber I in its review of the Indictment pursuant to Rule 61 in Prosecutor v. Milan Martić, where it held that:

'[t]he Tribunal has particularly valid grounds for exercising its jurisdiction over persons who, through their position of political or military authority, are able to order the commission of crimes falling within its

competence ratione materiae or who knowingly refrain from preventing or punishing the perpetrators of such crimes.'

357. This interpretation of the scope of Article 7(3) is in accordance with the customary law doctrine of command responsibility. As observed by the Commission of Experts in its Final Report, while '[m]ost legal cases in which the doctrine of command responsibility has been considered have involved military or paramilitary accused, [p]olitical leaders and public officials have also been held liable under this doctrine in certain circumstances'. Thus, the International Military Tribunal for the Far East (hereafter 'Tokyo Tribunal') relied on this principle in making findings of guilt against a number of civilian political leaders charged with having deliberately and recklessly disregarded their legal duty to take adequate steps to secure the observance of the laws and customs of war and to prevent their breach. ...

...

359. In United States v, Friedrich Flick and others, the six accused, all leading civilian industrialists, were charged with the commission of war crimes and crimes against humanity in that they were said to have been principals in, accessories to, to have ordered, abetted, taken a consenting part in, or to have been connected with plans and enterprises involving the enslavement and deportation to slave labour of civilians from occupied territory, enslavement of concentration camp inmates and the use of prisoners of war in work having a direct relation to war operations. More specifically, it was alleged that the defendants sought and utilised such slave labour programmes by using tens of thousands of slave labourers in the industrial enterprises owned, controlled or influenced by them.

361. Similarly, civilian superiors were found criminally liable for the ill-treatment of forced labourers employed in the German industry in an appellate decision by the Superior Military Government Court of the French Occupation Zone in Germany, in the Roechling case. ...

...

363. Thus, it must be concluded that the applicability of the principle of superior responsibility in Article 7(3) extends not only to military commanders but also to individuals in non-military positions of superior authority."

41. The Appeals Chamber in its judgment in the same case (*Prosecutor v. Delalić, Mucić et al.* IT-96-21-A, 20 February 2021) held:

"195. 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. The Appeals Chamber finds no reason to disagree with the Trial Chamber's analysis of this jurisprudence."

THE LAW

Alleged violation of article 7 of the convention

42. The applicant complained that his convictions for war crimes on the basis of his command responsibility had not had a legal basis in national or international law at the time when they had been committed. […].

[…]

A. Scope of the case

43. The Court notes that even though the applicant mainly complained of his convictions for war crimes committed in the period before the war in Croatia had become an armed conflict of international character […], taken as a whole his arguments […] show that he also complained of his convictions for war crimes committed after that date […].

B. Admissibility

[…]

C. Merits

1. The parties' arguments

[…]

2. The Court's assessment

[…]

51. Having regard to its case-law, the Court considers that its main task in the present case is to examine whether *tempore criminis* […]:

– the applicant's conviction for war crimes had a sufficiently clear legal basis; and

– it was foreseeable for the applicant that his failure to prevent the war crimes committed by the police units under his command would render him criminally liable.

(a) As regards the legal basis for the applicant's conviction and its foreseeability

[…]

54.. In the present case the Court must satisfy itself that the applicant's conviction for war crimes based on his command responsibility as a police commander in an internal armed conflict had sufficiently clear basis in international law at the time when those crimes were committed, that is, having regard to the state of international law in 1991 […].

55. In this regard the Court first reiterates that the Convention cannot be interpreted in a vacuum and should so far as possible be interpreted in harmony with other rules of international law of which it forms part (see, regarding the rules of international humanitarian law, *Hassan v. the United Kingdom* [GC], no. 29750/09, § 77, ECHR 2014).

56. It further notes that the Statute of the ICTY in its Article 7 § 3 refers in general terms to a 'superior' and therefore does not restrict its application only to military commanders […]or make any distinction between international or non-international armed conflict. The Statute applies to serious violations of international humanitarian law committed in the former Yugoslavia since 1 January 1991, the date "clearly intended to convey the notion that no judgement as to the international or internal character of the conflict is being exercised" […]. Moreover, the Statute was intended to reflect the existing international law, namely the rules which were "beyond any doubt part of customary law" at the time […].

57. In *Hadžihasanović and Others* the ICTY held that application of the concept of command responsibility to war crimes committed in an internal armed conflict was already in 1991 a rule of customary international law […]. Likewise, in the *Čelebići (Delalić)* case the ICTY, based on an analysis of World War II-related jurisprudence, held that the principle of superior responsibility reflected in Article 7 §3 of its Statute encompassed also political leaders and other civilian superiors in positions of authority […].

58. This was later confirmed by a number of other ICTY's judgments […] as well as in several cases brought before the International Criminal Tribunal for Rwanda […]. The Court sees no reason to hold otherwise, emphasising that it is not its role to establish authoritatively the state of international law at the time […].

59. However, the Court is sensitive to the applicant's argument that the above legal developments regarding command responsibility in internal armed conflicts […] occurred after the events in the present case took place. On that issue the Court finds particularly relevant the ICTY's view in *Hadžihasanović and Others* that, where a principle can be shown to have been 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 […]. The Court has itself held that Article 7 of the Convention cannot be read as outlawing such gradual clarification of the rules of criminal liability through judicial interpretation from case to case, provided

that the resultant development is consistent with the essence of the offence and could reasonably be foreseen […].

60. It is beyond doubt that the responsibility of commanders for war crimes committed in the course of an international armed conflict was *tempore criminis* an existing rule of international law (see, notably, the First Protocol to the Geneva Conventions […]). The Court agrees with the ICTY's view in *Hadžihasanović and Others* that it is difficult to see why the concept would not equally apply in the course of an internal armed conflict […] and finds that the above interpretation, which prevents impunity of commanders in internal armed conflicts […] is consistent with the essence of the command responsibility […].

61. Furthermore, the Court agrees with the ICTY's conclusion in the *Čelebići* case – which was primarily based on the pre-existing (World War II-related) jurisprudence – that command responsibility does not apply only to military commanders but also to other, non-military, superiors […].

62. As regards foreseeability and accessibility, the Court first reiterates that the scope of the concept of foreseeability depends to a considerable degree on the content of the instrument in issue, the field it is designed to cover and the number and status of those to whom it is addressed […]. It furthermore reaffirms that, in the context of a commanding officer and the laws and customs of war, the concepts of accessibility and foreseeability must be considered together (ibid.).

63.. In this light the Court affirms the ICTY's position in *Hadžihasanović and Others* that, in cases such as the present one, foreseeability means that the accused must be able to appreciate that his conduct is criminal in the sense generally understood, without reference to any specific provision, and that accessibility does not exclude reliance being placed on a law which is based on custom […].

64. Having regard to the flagrant unlawful nature of the war crimes committed by the police units under his command, the Court considers that even the most cursory reflection by the applicant would have indicated that, at the very least, the impugned omissions on his part risked involving command responsibility regardless whether those crimes were committed during international or internal conflict or by a military or non-military (police) commander […].

65. That is especially so in the applicant's case having regard to:

– the fact that he was a police commander, and that persons carrying out a professional activity must proceed with a high degree of caution when pursuing their occupation and can be expected to take special care in assessing the risks that such activity entails […];

[…]

– the fact that Croatia's declaration of independence had been adopted already on 25 June 1991 even

though it came into effect only on 8 October 1991 (see paragraph 2 above).

66. The foregoing considerations are sufficient to enable the Court to conclude that the applicant's conviction for war crimes on the basis of his command responsibility had *tempore criminis* a sufficiently clear legal basis in international law […]and that it was foreseeable for him that his failure to prevent the war crimes committed by the police units under his command would make him criminally liable. It also follows from these considerations that this conclusion applies regardless of whether those crimes were committed before or after the war in Croatia in the early 1990s became an international armed conflict.

[...]

Discussion

I. Legal framework and applicable law

1. *(Paras 5 - 25)*

1. How do you classify the situation in Croatia before 15 January 1992? And after? Who are the parties involved? (GCI – IV, PI, PII)
2. Does the recognition of Croatia as a State matter for your answer? Does it affect the applicability of IHL? If so, why or why not?

2. *(Para. 15)* Why does the applicant insist on the non-international character of the conflict before 1992? If command responsibility was not applicable at that time, could the applicant still be convicted by the national courts? Would that violate the principle of legality? Is the principle of legality foreseen by IHL?

3. Is the European Court of Human Rights competent to assess questions deriving from IHL? Why or why not? (*See* Hassan v UK, ECHR)

II. Classification of persons and attribution

4. (Paras 7, 15, 18)

1. How does IHL define State armed forces? Are law enforcement troops considered as such? In IAC's? In NIAC's? (GC III, Art. 4; PI, Art. 43(1)-(3); CIHL, Rule 4)
2. Does the belonging of the applicant to armed forces or to law enforcement forces affect the applicability of IHL? Would the applicant be considered a member of the State armed forces? If not, what would he be? Is IHL applicable only to armed forces or are civilians equally bound by it during armed conflict?

5. *(Para. 8)*

1. As the Deputy Head of the local police forces, what were the applicant's obligations towards the persons deprived of their liberty under his supervision? (GCI-IV, Common Art. 3; GCIII, Art. 12, 13, 14, 15, 16;

GCIV, Art. 27, 29, Art. 32, 37; PI, Art. 75; PII, Arts. 4, 5; CIHL, Rules 87-105).

2. Were those obligations applicable to all persons deprived of their liberty? Assuming there were detainees arrested for common crimes, such as burglars, would IHL apply to them? If not, would the persons deprived of their liberty be protected by another legal regime? (Art. 9, ICCPR; Art. 5, ECHR; Art. 7, American Convention; Art. 6, African Charter)

III. Customary international law and command responsibility

6. What is the difference between grave breaches and war crimes? Are they applicable both in NIACs and IACs? Is Croatia under obligation to prosecute both under domestic law? (GCI, Art. 50; GCII, Art. 51; GCIII, Art. 130; GCIV, Art. 147; PI, Art. 85; CIHL, Rule 156)

7. *(Paras 16 – 25, Para. 61)*

1. What is command responsibility? Is it applied only to commanders of armed forces? Equally to civilians? What are the arguments brought by the parties concerning the applicant's alleged command over his subordinates? What is the Court's argument? (PI Arts. 86 - 87; CIHL, Rule 153; Rome Statute, Art. 28)
2. Does the command responsibility as set out by Croatia's court correspond to the command responsibility stated by IHL? By the ICC Statute? Does it go further? Does IHL foresee the commission of crimes by omission? (PI, Art. 86(2); CIHL, Rule 153; Rome Statute, Art. 28)

8. *(Paras 27 - 28)*

1. Is Croatia's law in accordance with the principle of legality? Does IHL contain any specific rules concerning the application of this principle? Could a broader answer be found in other branches of law? Is it sufficiently precise and foreseeable? (CIHL, Rule 101)
2. Does IHL prescribe judicial guarantees and guarantees of treatment for the benefit of suspected perpetrators of grave breaches? (GCI, Arts 49-50; GCII, Art. 51; GCIII, Arts. 49, 105, 129-130; GCIV, Art. 146-147; PI, Art. 87; CIHL, Rules 100-103)

9. *(Paras 25, 37 – 41, 59 - 60)*

1. How is Customary International Humanitarian Law formed? What is its importance for IHL?
2. What are the arguments brought by the Constitutional Court and by the ECtHR to determine that command responsibility is part of customary law? What is the importance of the case-law of International Tribunals for the emergence of customary law?