UNITED NATIONS

	International Tribunal for the Prosecution of Persons Responsible for Serious Violations of International Humanitarian Law Committed in the Territory of Former Yugoslavia since 1991	Case No.	IT-01-47-T
		Date:	27 September 2004
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IN THE TRIAL CHAMBER

Before: **Judge Jean-Claude Antonetti**
Judge Vonimbolana Rasoazanany
Judge Bert Swart

Registrar: **Mr Hans Holthuis**

Decision: **27 September 2004**

THE PROSECUTOR

v.

ENVER HADŽIHASANOVIĆ
AMIR KUBURA

DECISION ON MOTIONS FOR ACQUITTAL PURSUANT TO RULE 98 *BIS* OF THE RULES OF PROCEDURE AND EVIDENCE

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I. INTRODUCTION

1. Trial Chamber II ("Chamber") of the International Tribunal for the Prosecution of Persons Responsible for Serious Violations of International Humanitarian Law Committed in the Territory of the Former Yugoslavia since 1991 ("Tribunal") is seised of the Motion for Acquittal of Enver Hadžihasanović ("Motion of the Accused Hadžihasanović") filed by counsel for Enver Hadžihasanović ("Defence for the Accused Hadžihasanović") on 11 August 2004 and the Defence Motion on Behalf of Amir Kubura for Judgement of Acquittal Pursuant to Rule 98 *bis* of the Rules of Procedure and Evidence ("Motion of the Accused Kubura") by counsel for Amir Kubura ("Defence for the Accused Kubura") on 11 August 2004.[1]

2. In the Third Amended Indictment ("Indictment") filed on 26 September 2003, the Office of the Prosecutor ("Prosecution") alleges that certain acts and omissions occurred between January 1993 and 16 March 1994 in the territory of Bosnia and Herzegovina, which was the theatre of an armed conflict. In particular, in April 1993 and early summer 1993, ABiH 3rd Corps ("Corps") units allegedly committed crimes after a series of heavy attacks against the HVO including, but not limited to, the municipalities of Bugojno, Busovača, Kakanj, Maglaj, Novi Travnik, Travnik, Vareš, Vitez, Zavidovići, Zenica and Žepče. The Indictment also alleges events in Dusina in the municipality of Zenica in January 1993 and destruction and plunder in the municipalities of Zenica, Travnik and Vareš from January to November 1993.

3. The Indictment alleges that the Accused Hadžihasanović was Commander of the 3rd Corps from 14 November 1992 to 1 November 1993, when he was promoted to Chief of the Supreme Command Staff of the ABiH. In December 1993, he was promoted to the rank of Brigadier General and, as such, became a member of the Joint Command of the Army of the Federation of Bosnia and Herzegovina.[2] The acts ascribed to the Accused Hadžihasanović in the Indictment cover the period January to October 1993.

4. According to the Indictment, the Accused Kubura became the ABiH 3rd Corps 7th Muslim Mountain Brigade ("7th MMB") Chief of Staff on 1 January 1993.[3] From 1 April 1993 to 20 July 1993, Amir Kubura allegedly acted as the substitute for Asim Koričić, 7th MMB Commander in his absence. On 21 July 1993, he was appointed Commander of the 7th MMB before being named as

[1] The Accused Enver Hadžihasanović and Amir Kubura will hereafter be referred to as follows: "Accused Hadžihasanović" and "Accused Kubura", and jointly "Accused".
[2] Joint Prosecution-Defence Statement Agreement of Facts, 3 December 2003 ("Joint Statement of Agreed Facts"), Annex A, p. 3.
[3] Joint Statement of Agreed Facts, Annex A, p. 4.

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the ABiH 1st Corps 1st Muslim Mountain Brigade Commander on 16 March 1994. The acts ascribed to the Accused Kubura in the Indictment cover the period April 1993 to January 1994.[4]

5. The two Accused are being prosecuted on the basis of their criminal command responsibility pursuant to Article 7(3) of the Statute of the Tribunal ("Statute"). The Indictment alleges that the Accused Hadžihasanović is responsible for crimes committed by his subordinates. Those crimes are set out in seven counts in the Indictment and relate to the violations of the laws or customs of war (murder, cruel treatment, wanton destruction of cities, towns or villages not justified by military necessity, plunder of public or private property, destruction or wilful damage of institutions dedicated to religion) as set out in Article 3 of the Statute. The Indictment alleges also that the Accused Kubura incurs criminal responsibility for crimes committed by his subordinates. Those crimes are set out in six counts in the Indictment and relate also to the violations of the laws or customs of war (murder, cruel treatment, wanton destruction of cities, towns or villages not justified by military necessity, plunder of public or private property) as set out in Article 3 of the Statute.

6. At the close of the Prosecution case, counsel for the two Accused filed the aforementioned motions in the specified time requesting the acquittal of the Accused Hadžihasanović and Kubura on all the counts in the Indictment, pursuant to Rule 98 *bis* of the Rules of Procedure and Evidence ("Rules").[5]

7. On 1 September 2004, in response to those motions, the Prosecution filed its confidential Prosecution Response to Defence Motions for Acquittal Pursuant to Rule 98 *bis*[6] ("Response"), in which it requested the Chamber to reject the motions of the Accused Hadžihasanović and the Accused Kubura.

8. On 6 September, Defence for the Accused Hadžihasanović filed a confidential Reply of Enver Hadžihasanović to Prosecution's Response to Defence Motions for Acquittal Pursuant to Rule 98 *bis* (Reply of Enver Hadžihasanović) in reply to the Response.[7] That same day, Defence for the Accused Kubura also filed a Confidential Reply by Defence for Amir Kubura to the Prosecution Response to the Requests for Acquittal by the Defence Pursuant to Rule 98 *bis* of the Rules of Procedure and Evidence ("Reply of the Accused Kubura") in reply to the Response.[8]

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[4] Indictment, para. 41.
[5] See para. 146 of the Motion of the Accused Hadžihasanović and para. 68 of the Motion of the Accused Kubura.
[6] A redacted public version of the Prosecution Response was presented on 2 September 2004.
[7] On 2 September 2004, Defence for Enver Hadžihasanović filed a Motion for Leave to Exceed Page Limit to File a Reply in which it requested the Chamber to grant it leave to file a reply of between 10 and 20 pages. The Prosecution indicated orally to the Chamber that it was not intending to respond to the motion. In a decision dated 6 September 2004, the Chamber dismissed the Motion of the Defence for Enver Hadžihasanović of 2 September 2004.
[8] The Chamber is rendering a public decision which makes no reference to any confidentiality element.

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II. APPLICABLE STANDARD UNDER RULE 98 *BIS* OF THE RULES

A. Submissions of the parties

9. With regard to the applicable criterion pursuant to Rule 98 *bis* of the Rules, the Defence for the Accused Hadžihasanović states that the requests set out in the Motion must be rejected only if the evidence could lead to a guilty verdict beyond reasonable doubt.[9] The Defence for Enver Hadžihasanović holds that when assessing evidence in accordance with Rule 98 *bis* of the Rules, the Chamber need not assess the probative value or the credibility of the evidence and adds that the Prosecution evidence should be assessed as a whole without selecting some of the evidence and setting some of it aside, such as oral or documentary evidence brought out during cross-examination conducted by the Defence for the Accused Hadžihasanović.[10] When the evidence from one or several essential elements of a charge relies on circumstantial evidence, the Defence for the Accused Hadžihasanović submits that "the Chamber must determine whether, by assuming the circumstantial evidence to be established, it would be reasonable to make the requisite inference in order to establish the Accused's guilt".[11]

10. The Defence for the Accused Kubura states that the criterion applicable to requests for acquittal is whether the Prosecution has introduced sufficient evidence, if any, for each element of Article 7(3) of the Statute upon which the Trial Chamber could convict Mr Kubura under this Article.[12] Unless such evidence has been adduced, the Defence maintains that the Chamber is obliged to acquit the Accused Kubura on charges where the evidence adduced is insufficient, i.e. non-existent or incapable, even when taken at its highest, of persuading the Chamber to commit the Accused [Kubura].[13]

11. The Prosecution responds that the issue at this stage of the trial is not whether the Chamber would convict the two Accused on the basis of the evidence adduced thus far, but rather whether a reasonable trier of fact could be satisfied beyond reasonable doubt that the evidence adduced, if it is found credible, could sustain a finding of guilt.[14] It adds that in a case which introduces circumstantial evidence, the Trial Chamber must disregard inferences consistent with the innocence of the Accused.[15] The Prosecution submits that the appropriate approach when applying Rule 98 *bis*

[9] Motion of the Accused Hadžihasanović, para. 18.
[10] Motion of the Accused Hadžihasanović, paras. 19-22.
[11] Motion of the Accused Hadžihasanović, para. 24 (emphasis omitted).
[12] Annex A to the Motion of the Accused Kubura, para. 5 (emphasis omitted).
[13] Annex A to the Motion of the Accused Kubura, para. 6 (emphasis omitted).
[14] Response, para. 4.
[15] Response, para. 5.

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of the to Rules a case in which a large number of underlying incidents are alleged is not to enter judgements of acquittal in respect of each incident, but rather to enter findings as to each count.[16]

B. Discussion

12. Pursuant to Rule 98 *bis*(B) of the Rules, the Trial Chamber is to order an entry of judgement of acquittal on a charge "if it finds that the evidence is insufficient to sustain a conviction on that […] charge[s]." This provision reflects the common law concept of "no case to answer". This issue is raised and adjudicated after the close of the Prosecution case, but before the Defence presents its case. It is an issue peculiar to an adversarial system as the defence case is yet to be presented. A decision on a motion pursuant to Rule 98 *bis* involves no evaluation of the guilt of the accused in light of all the evidence already adduced, nor any evaluation of the respective credit of witnesses, or of the strengths and weaknesses of contradictory or diverging evidence, whether oral or documentary, which is then before the Chamber.[17]

13. As stated by the Appeals Chamber in the case *The Prosecutor v. Jelisić*:[18]

> The capacity of the prosecution evidence (if accepted) to sustain a conviction beyond reasonable doubt by a reasonable trier of fact is the key concept; thus the test is not whether the trier would in fact arrive at a conviction beyond reasonable doubt on the prosecution evidence (if accepted) but *whether it could*. At the close of the case for the prosecution, the Chamber may find that the prosecution evidence is sufficient to sustain a conviction beyond reasonable doubt and yet, even if no defence evidence is subsequently adduced, proceed to acquit at the end of the trial, if in its own view of the evidence, the prosecution has not in fact proved guilt beyond reasonable doubt".[19]

The issue is often stated as not being whether, on the evidence as it stands, the accused *should* be convicted but whether the accused *could* be convicted.[20]

14. Although the concept underlying Rule 98 *bis* of the Rules derives from the common law system, the Rule must be interpreted and applied in its own context and on the basis of the Statute and the Rules. Differences may arise between its application at the Tribunal and in common law systems.[21]

15. The case-law of the Tribunal establishes that when a request is made pursuant to Rule 98 *bis* of the Rules, the issue is not whether *the* Trial Chamber would be persuaded beyond reasonable

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[16] Response, para. 6.
[17] *The Prosecutor v. Pavle Strugar*, Case no. IT-01-42-T, Decision on Defence Motion Requesting Judgement of Acquittal Pursuant to Rule 98 *bis*, 21 June 2004 ("Strugar Decision"), para. 10.
[18] *The Prosecutor v. Goran Jelisić*, Case no. IT-95-10-A, Appeals Judgement, 5 July 2001 ("*Jelisić* Appeals Judgement"), para. 37.
[19] See also *The Prosecutor v. Zejnil Delalić et al. (Čelebići)*, Case no. IT-96-21-A, Appeals Judgement, 20 February 2001 ("*Čelebići* Appeals Judgement"), para. 434 (emphasis added).
[20] *Strugar* Decision, para. 11.
[21] *The Prosecutor v. Dario Kordić and Mario Čerkez*, Case no. IT-95-14/1-T, Decision on Defence Motions for Judgement of Acquittal, 6 April 2000, para. 9.

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doubt to convict after fully evaluating the evidence then before it, but rather, and quite differently, whether it would be properly open to *a* Trial Chamber, taking the evidence at its highest for the Prosecution, to be persuaded beyond reasonable doubt to convict the accused.[22]

16. The only evidence presented by the Prosecution sometimes has so little credibility that no Trial Chamber could give it credence. In such a case, of course, the evidence in question cannot sustain a guilty finding and the request submitted pursuant to Rule 98 *bis* should be granted. The Appeals Chamber accepted this possibility in the *Jelisić* Appeals Judgement when it observed that in assessing such a request, "the Trial Chamber was required to assume that the prosecution's evidence was entitled to credence *unless incapable of belief*".[23] The Appeals Chamber added that a request made under Rule 98 *bis* of the Rules should be granted only if the Trial Chamber "was entitled to conclude that no reasonable trier of fact could find the evidence sufficient to sustain a conviction, beyond reasonable doubt".[24]

17. It follows that a decision by this Trial Chamber that there is sufficient evidence to sustain a conviction of the accused on one of the charges is, in no sense, an indication of the view of the Chamber as to the guilt of the Accused on that charge. That is not the issue at this point. A dismissal of a request for acquittal merely shows that the Chamber considers that there is in the case *some prosecution evidence* which, taken at its highest, could satisfy *a* Trial Chamber *i.e.* is capable of persuading *a* Trial Chamber of the guilt of the Accused of the charge being considered. If there is no evidence of an offence charged, or if, in what is likely to be a somewhat unusual case, the only relevant evidence when viewed as a whole is so incapable of belief that it could not properly support a conviction, even when taken at its highest for the Prosecution, a Rule 98 *bis* motion for an acquittal will succeed.[25]

18. The Chamber did not consider evidence which might be favourable to the Accused. It is at the conclusion of the proceedings, and not at this mid-point, that the Chamber will determine the extent to which any evidence is favourable to the Respondent and make a ruling on the overall effect of such evidence in light of the other evidence in the case.[26]

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[22] *Strugar* Decision, para. 16.
[23] *Jelisić* Appeals Judgement, para. 55 (emphasis added).
[24] *Jelisić* Appeals Judgement, para. 56.
[25] *Strugar* Decision, para. 18.
[26] See *The Prosecutor v. Radoslav Brdjanin*, (Concerning Allegations Against Milka Maglov), Case no. IT-99-36-R77, Decision on Motion for Acquittal Pursuant to Rule 98 *bis* of the Rules, 19 March 2004, para. 9(a), (b) and (c) and the references in footnotes 11-13. See in particular *The Prosecutor v. Radoslav Brdjanin*, Case no. IT-99-36-T, Decision on Motion for Acquittal Pursuant to Rule 98 *bis* of the Rules, 28 November 2003, para. 62: "There is in fact other evidence that argues in favour of the Accused which the Trial Chamber is fully aware of but which for the purposes of the current exercise, i.e. meeting the 98 *bis* standard, cannot have any consequences. It will of course be given all due weight when

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19. In making a decision at this stage in the proceedings, the Chamber will determine whether evidence exists for each of the constituent elements of the offences challenged which, when taken at its highest, could sustain the guilt of the Accused beyond reasonable doubt, as set out above. However, for the purposes of brevity and greater convenience, the Chamber will often use another more succinct formulation by indicating that there is "sufficient evidence".

20. It is worth noting the extent and frequency to which Rule 98 *bis* has come to be relied on in proceedings before the Tribunal, and the prevailing tendency for Rule 98 *bis* motions to involve much delay, lengthy submissions, and therefore an extensive analysis of evidentiary issues in decisions. This is in contrast to the position typically found in common law jurisdictions from which the procedure is derived. While Rule 98 *bis* is a safeguard, the object and proper operation of the Rule should not be lost sight of. Its essential function is to bring an end to only those proceedings in respect of a charge for which there is no evidence on which a Chamber could convict, rather than to terminate prematurely cases where the evidence is weak.[27]

III. ISSUES RAISED IN MOTIONS FOR ACQUITTAL

A. Preliminary questions of law

1. Conditions for applicability of Article 3 of the Statute

21. The Indictment contains counts defined in Article 3 of the Statute (Count 5 under Article 3(b): wanton destruction of cities, towns or villages, not justified by military necessity, Count 6 under Article 3(e): plunder of public or private property and Count 7 under Article 3(d): destruction or wilful damage of institutions dedicated to religion) and counts also are based on Article 3 of the Statute and are recognised under common Article 3 of the Geneva Conventions of 1949 (Counts 1 and 3: murder, and Counts 2 and 4: cruel treatment).

22. The Chamber notes that in October 1995, the Appeals Chamber found in its *Tadić* Decision on Jurisdiction[28] that the Tribunal has power to judge offences set out in common Article 3 of the Geneva Conventions of 1949 since that Article falls within the scope of Article 3 of the Statute.

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the Trial Chamber comes to its final decision, when it will also be in a position to assess all the evidence currently available in the light of the evidence that may be brought forward by the Defence."

[27] *Strugar* Decision, para. 20.

[28] *The Prosecutor v. Duško Tadić*, Case no. IT-94-1-AR72, Decision on the Defence Motion for Interlocutory Appeal on Jurisdiction, 2 October 1995 ("*Tadić* Decision on Jurisdiction"). In its Judgement in the *Aleksovski* case, the Appeals Chamber determined that its case-law was binding on Trial Chambers, para. 113.

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23. With regard to Counts 1 to 4, common Article 3 of the Geneva Conventions applies to situation of non-international armed conflicts. The case-law of the Tribunal found that the provisions of Article 3 of the Statute are applicable also in the context of an international or non-international armed conflict.[29] The Chamber therefore did not consider the nature of the armed conflict in central Bosnia in 1993.

24. Two preliminary conditions must first be satisfied in order for Article 3 of the Statute to apply: the existence of an armed conflict (internal or international) and a clear nexus between the facts of the case and the conflict.[30] The parties did not present detailed arguments on the issue which does not appear to be in dispute.[31]

25. In the *Tadić* Decision on Jurisdiction, the Appeals Chamber considered that an "armed conflict exists whenever there is a resort to armed force between States or protracted armed violence between governmental authorities and organised armed groups or between such groups within a State".[32] It is sufficient to determine that there was an armed conflict in a zone which encompassed the relevant municipality.[33] International humanitarian law applies from the initiation of such armed conflicts and extends beyond the cessation of hostilities until a general conclusion of peace is reached; or, in the case of internal conflicts, a peaceful settlement is achieved.[34]

26. With regard to the requisite clear or manifest nexus, the Appeals Chamber in the *Tadić* case stated that "even if substantial clashes were not occurring in the Prijedor region at the time and place the crimes were allegedly committed […] international humanitarian law applies. It is sufficient that the alleged crimes were closely related to the hostilities occurring in other parts of the territories controlled by the parties to the conflict."[35] The *Kunarac* Appeals Judgement stated that it is sufficient to establish that "the perpetrator acted in furtherance of or under the guise of the armed conflict".[36] The Appeals Chamber stated that the indicia made it possible to establish the "nexus".[37]

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[29] *Tadić* Decision on Jurisdiction, para. 102 and *Čelibići* Appeals Judgement, para. 150.
[30] *Tadić Decision on Jurisdiction, paras. 67-70*; Prosecution's Submissions Concerning Armed Conflict and Elements of Crimes, 2 July 2004 ("Prosecution's Submissions Concerning Armed Conflict and Elements of Crimes"), paras. 3-8; the Defence refers to the *Tadić* Decision on Jurisdiction, Annex A to the Motion of the Accused Hadžihasanović, para. 56.
[31] In its Motion, the Defence for the Accused Hadžihasanović, and by reference the Defence for the Accused Kubura, challenge the admissibility of Counts 5, 6 and 7 by alleging the non-international nature of the armed conflict. This issue is addressed in the section of the Decision relating to Counts 5, 6 and 7.s
[32] *Tadić* Decision on Jurisdiction, paras. 67-70.
[33] See also *The Prosecutor v. Zejnil Delalić et al. (Čelebići)*, Case no. IT-96-21-T, Judgement, 16 November 1998 ("*Čelebići*" Judgement), para. 185.
[34] *Tadić* Decision on Jurisdiction, para. 70.
[35] *Tadić* Decision on Jurisdiction, para. 70, reaffirmed by the Appeals Chamber in *The Prosecutor v. Dragoljub Kunarac et al.*, Case no. IT-96-23&23/1, Appeals Judgement, 12 June 2002 ("*Kunarac* Appeals Judgement"), para. 57.
[36] *Kunarac* Appeals Judgement, para. 58.
[37] *Kunarac* Appeals Judgement, para. 59.

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27. Moreover, with regard to common Article 3 of the Geneva Conventions, it must be established that the victims of the crime did not participate directly in the armed conflict[38] as set out in the introduction to common Article 3 which refers to "persons taking no active part in the hostilities, including members of armed forces who have laid down their arms and those placed 'hors de combat' by sickness, wounds, detention, or any other cause".[39]

2. Factual findings on the nexus between the hostilities and the existence of an armed conflict

28. The Chamber considers that there is sufficient evidence to allow a Trial Chamber to find that in the period relevant to the Indictment, an armed conflict between the HVO and the ABiH existed in the municipalities in question in this case.

29. The Chamber would first note that, at the request of the Defence, it took judicial notice of certain events established in the *Aleksovski* case relating to the existence of an armed conflict between the ABiH and the HVO in the Lašva valley:

> Towards the end of January 1993, there was an outbreak of open hostilities between the HVO and BH army and Bosnian Muslim men were rounded up by the HVO in the town of Busovača, as well as in surrounding villages, around 24 January 1993. Approximately four hundred of these men were taken to be detained at the nearby detention facility at Kaonik for about two weeks.[40]

30. The Chamber observes that the clash between the ABiH and the HVO in Maline on 8 June 1993 was amongst the facts agreed by the parties.[41] The orders to stop firing issued by the headquarters of the two armies and the chief political representatives of the two parties to the conflict indicate therefore that the two armies were involved in an armed conflict when those agreements were drawn up.[42] The Chamber notes that in their testimony many witnesses refer to the "conflict", "hostilities" or "war" between the HVO and the ABiH.[43] The presence of members of international organisations attempting to enforce and reach ceasefire agreements is an additional

[38] On the crime of murder, see *The Prosecutor v. Milomir Stakić*, Case no. IT-97-24-T, Judgement, 31 July 2003 ("*Stakić* Judgement"), para. 581; on the crime of cruel treatment see *Čelebići* Appeals Judgement, para. 424; *The Prosecutor v. Tihomir Blaškić*, Case no. IT-95-14-A, Appeals Judgement, 29 July 2004 ("*Blaškić* Appeals Judgement"), para. 595. Annex A to the Motion of the Accused Hadžihasanović, para. 53: the Defence for the Accused Hadžihasanović maintains that it must be established that the victims were either individuals who did not take part in the fighting or members of armed forces who surrendered or were placed 'hors de combat'.

[39] The application of this criteria to the facts of the case in hand is considered in each section relating to the facts.

[40] Final Decision on Judicial Notice of Adjudicated Facts, 20 April 2004, p. 6, referring to the case *The Prosecutor v. Zlatko Aleksovski*, Case no. IT-95-14/1, Judgement, 25 June 1999, para. 23. However, Witness ZP testified that the armed conflict began in June 1992 in Bosnia and Herzegovina, T.8784.

[41] Joint Prosecution-Defence Statement Agreement of Facts, Annex C.

[42] Joint Prosecution-Defence Statement Agreement of Facts, Annex A, attests to such agreements: "The ABiH and the HVO signed a United Nations brokered cease-fire on 30 January 1993"; "On 18 April, Alija Izetbegović and HZ-HB leader Mate Boban signed an agreement in Zagreb ordering an immediate end to fighting between the ABiH and HVO"; see also P 127 and Annex B.7 of the Joint Prosecution-Defence Statement Agreement of Facts.

[43] See in particular the testimony of Ivo Mršo; Zdravko Žulj; Ivan Tvrtković; Dragan Radić; Witness ZN; Franjo Križanac; Bryan Watters; Nenad Boglejić; Ranko Popović and Hakan Birger.

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factor which makes it possible to conclude that there was an armed conflict in the municipalities relevant to the Indictment at the material time.[44]

31. Furthermore, the Chamber would underscore that in one of his submissions one of the Accused also referred to the existence of an armed conflict in the Lašva Valley between 1992 and 1993.[45]

32. Consequently, a Trial Chamber could conclude that there was an armed conflict between the HVO and the ABiH in the period relevant to the Indictment.

33. With regard to the requisite nexus between the facts of the case and the conflict, the Chamber holds that there is sufficient evidence to make it possible to conclude that such a nexus existed, particularly in view of the evidence that many people were detained following an attack or after searches by the ABiH for people who had weapons or radios or on any other ground.[46]

B. Crimes against persons – violations of the laws or customs of war

1. Count 1: Murders in Dusina, Miletići and Maline

(a) Applicable law

(i) Submissions of the parties

34. The Defence for the Accused Hadžihasanović submits that the essential elements of Count 1 are constituted by evidence of the unlawful acts or omissions resulting in the deaths of victims, as alleged in paragraph 39 of the Indictment. These acts would have to have been committed intentionally.[47] The Defence for the Accused Hadžihasanović argues that the identity of the alleged perpetrators of the acts must be established in sufficient detail to make it possible to assess the criteria set out in Article 7(3) of the Statute, in particular the superior-subordinate relationship and the necessary and reasonable measures to prevent or punish those acts.[48] Moreover, it maintains that the applicable *mens rea* is the 'intention to kill' and that this definition entails both the notions of

[44] See the testimony of Bryan Watters and Vaughan Kent-Payne.
[45] See the Pre-Trial Brief of the Defence for Amir Kubura pursuant to Rule 65 *ter* of the Rules, 3 November 2003 ("Pre-Trial Brief of Kubura"), para. 13:

> However, he was not a 'desk' officer – he was most often away from his headquarters in the town of Zenica, and involved in heavy combat both with the VRS and HVO forces in parts of central Bosnia and other areas during the course of 1992 and 1993. (*emphasis added*)

[46] See in particular the testimony of Ivanka Tavić, Zrinko Alvir, Nenad Bogeljić, Ranko Popović, Dalibor Adžaip, Ivan Josipović and Vinko Tadić.
[47] Annex A to the Motion of the Accused Hadžihasanović, para. 53.
[48] Annex A to the Motion of the Accused Hadžihasanović, para. 54.

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dolus directus and of *dolus eventualis*.[49] The Defence for the Accused Kubura did not present any arguments on this point.[50]

35. The Prosecution argues that the constituent elements of murder are that: 1) the victim is dead, 2) the death resulted from an unlawful act or omission of the accused or a subordinate, 3) at the time of the murder the accused or a subordinate "had the intention to kill or inflict grievous bodily harm on the deceased having known that such bodily harm is likely to cause the victim's death, and is reckless as to whether or not death ensues".[51] With regard to the identity of the alleged perpetrators of the crimes, the Prosecution responds to the Defence submission that the Accused Hadžihasanović had the duty to determine the identity of the perpetrators of crimes committed in his area of responsibility, and asserts that a failure to identify them is not fatal to the Prosecution's case that the Accused exercised effective control over such persons.[52]

36. The Prosecution submits that "though [the *mens rea* for murder] includes the specific intent to kill, it also includes knowledge (i.e. awareness of a certainty that death will occur) as well as deliberately committing an act in the reasonable knowledge that it would possibly or likely result in death".[53] The Prosecution also asserts that the term "intent" in the definition for murder in this Tribunal does not require a conscious object.[54] After recalling the concept of "intent" in civil and common law, it concludes that the *mens rea* for murder is established "if it is virtually certain that death will occur as a consequence of the defendant's behaviour".[55]

(ii) Discussion

37. The Chamber considers that the definition of murder as a violation of the laws or customs of war under Article 3 of the Statute is widely established in the case-law of the Tribunal. The definition of murder requires that the death of the victim be the result of an act or an omission of the Accused whose intent was to kill or to cause seriously bodily harm to the victim in the reasonable knowledge that it would likely result in death.[56] With regard to the requisite *mens rea* under common Article 3 of the Geneva Conventions, the Trial Chamber in the *Stakić* case stated that:

> "both a *dolus directus* and a *dolus eventualis* are sufficient to establish the crime of murder under Article 3. […] The technical definition of *dolus eventualis* is the following: if the actor engages in life-endangering behaviour, his killing becomes intentional if he "reconciles himself" or "makes

[49] Annex A to the Motion of the Accused Hadžihasanović, para. 55.
[50] Motion of the Accused Kubura, para. 67.
[51] Prosecution's Submissions Concerning Armed Conflict and Elements of Crimes, para. 9.
[52] Response, paras. 29 and 30.
[53] Prosecution's Submissions Concerning Armed Conflict and Elements of Crimes, para. 11.
[54] Prosecution's Submissions Concerning Armed Conflict and Elements of Crimes, para. 11.
[55] Prosecution's Submissions Concerning Armed Conflict and Elements of Crimes, para. 15.
[56] See *Stakić* Judgement, para. 584 (citing other cases).

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peace" with the likelihood of death. Thus, if the killing is committed with "manifest indifference of the value of human life", even conduct of minimal risk can qualify as intentional homicide".[57]

The Chamber agrees with this.

(b) Examination of the motions in respect of Count 1, murders in Dusina, Miletići and Maline[58]

(i) Submissions of the parties

38. The Defence for the Accused Hadžihasanović argues that in view of the evidence tendered, the Chamber could not conclude beyond reasonable doubt that the Accused Hadžihasanović knew or had reason to know that his subordinates had committed the murders in Dusina on 26 January 1993 as alleged in paragraph 39(a) of the Indictment, and that he did not take the necessary and reasonable measures to punish the perpetrators of those violations.[59] With regard to the murders committed in Miletići on 24 April 1993 and in Maline on 8 June 1993, alleged in paragraph 39(b) and (c) of the Indictment, the Defence for the Accused Hadžihasanović submits that the Chamber could not conclude beyond reasonable doubt that there was a superior-subordinate relationship between the Accused and the perpetrators of the crimes, and that he did not take the necessary and reasonable measures to punish the perpetrators of the violations.[60]

39. The Defence for the Accused Kubura argues that there is no evidence, direct or circumstantial, of a superior-subordinate relationship between the Accused Kubura and the perpetrators of the crimes committed in Miletići and Maline.[61] It submits that the perpetrators of the offenses are unknown,[62] that there is no evidence that members of the 7th MMB were present in Miletići or Maline at the time of the facts[63] or that those crimes were committed by subordinates of the Accused Kubura.[64] It further argues that there is no evidence that the Accused Kubura had knowledge of the murders committed in Miletići and Maline.[65]

40. The Prosecution responds that there is evidence establishing that the Accused Hadžihasanović was aware of the crimes committed in Dusina as of 26 January 1993 and that he did not take the necessary or reasonable measures to punish the perpetrators.[66] The Prosecution argues that there is circumstantial evidence establishing that forces under the command of the two Accused

[57] *Stakić* Judgement, para. 587.
[58] The structure of this section throughout the Decision varies in accordance with the structure of the Indictment.
[59] Motion of the Accused Hadžihasanović, paras. 99 and 100.
[60] Motion of the Accused Hadžihasanović, paras. 101, 102, 103 and 104.
[61] Motion of the Accused Kubura, para. 14; Reply of the Accused Kubura, paras. 4 and 8.
[62] Reply of the Accused Kubura, para. 11.
[63] Motion of the Accused Kubura, paras. 14, 17 and 30.
[64] Motion of the Accused Kubura, paras. 14, 22, 28 and 32.
[65] Reply of the Accused Kubura, para. 32.
[66] Response, paras. 25 and 52-57.

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were present in Miletići on 24 April 1993, in particular of the 7th MMB and the 306th MB of the ABiH.[67] It submits that there is evidence demonstrating that the Accused Hadžihasanović knew of the massacre in Miletići and that he did not take the necessary and reasonable measures to punish the perpetrators.[68] The Prosecution responds that the murders in Maline were committed by units of the 7th MMB and the 306th MB, together with Mujahedins.[69] It maintains that there is evidence which establishes that the two Accused had knowledge of the facts and that they did not take the necessary and reasonable measures to punish the perpetrators.[70]

(ii) Discussion[71]

a. Dusina

41. The Chamber notes that there is sufficient evidence of the murders of Vojislav Stanišić, a Serb civilian, Niko Kegelj, Stipo Kegelj, Vinko Kegelj, Pero Ljubičić, Augustin Radoš and Zvonko Rajić, all HVO soldiers, at the end of the attack on Dusina on 26 January 1993.[72] There is also sufficient evidence that the six HVO soldiers and Vojislav Stanišić were taken prisoner and that they had surrendered their weapons before being executed.[73] The Chamber consequently concludes that the evidence is sufficient to allow a Trial Chamber to find that the crime of murder under Count 1 has been proved in respect of the deaths of Vojislav Stanišić, Niko Kegelj, Stipo Kegelj, Vinko Kegelj, Pero Ljubičić, Augustin Radoš and Zvonko Rajić.

42. Moreover, sufficient evidence indicates that the seven victims were killed by forces under the control of the Accused Hadžihasanović,[74] and that the Accused Hadžihasanović knew or had reason to know that his subordinates had committed the murders.[75]

b. Miletići

43. The Chamber notes that there is sufficient evidence of the murders of Franjo Pavlović, Tihomir Pavlović, Vlado Pavlović and Anto Petrović, all HVO soldiers, at the end of the attack on

[67] Response, paras. 58-60.
[68] Response, para. 61.
[69] Response, paras. 62-64.
[70] Response, para. 65.
[71] For all the counts, the discussion of the evidence relating to the measures taken to prevent the crimes or punish the perpetrators thereof is in the section which deals with the elements of Article 7(3) of the Statute at the end of the Decision.
[72] See in particular the testimony of Ivica Kegelj, Franjo Batinić, Dragan Radoš and Željko Cvijanović and P 389.
[73] See in particular the testimony of Ivica Kegelj, Franko Batinić and Dragan Radoš, and P 389.
[74] See in particular the testimony of Ivica Kegelj, Franjo Batinić, Dragan Radoš and Željko Cvijanović and P 389 and P720 and Joint Prosecution-Defence statement agreement of facts, Annex A.
[75] See especially Joint Prosecution-Defence Statement Agreement of Facts, Annex B, numbers 18 and 19.

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Miletići on 24 April 1993.[76] Sufficient evidence exists also to demonstrate that they were taken prisoner and had surrendered their weapons before being executed.[77] The Chamber thus concludes that there is sufficient evidence to allow a Trial Chamber to find that the crime of murder under Count 1 has been proved in respect of the deaths of Franjo Pavlović, Tihomir Pavlović, Vlado Pavlović and Anto Petrović.

44. Furthermore, there is sufficient evidence to indicate that the four victims were killed by forces under the control of the Accused,[78] and that the Accused could have had knowledge of the acts.[79]

c. Maline

45. The Chamber observes that there is sufficient evidence of the murders of Anto Balta, Ivo Balta, Jozo Balta, Luka Balta, Nikica Balta, Bojan Barać, Davor Barać, Goran Bobaš, Niko Bobaš, Slavko Bobaš, Srećo Bobaš, Pero Bobaš-Pupić, Dalibor Janković, Stipo Janković, Slavko Kramar, Anto Matić, Tihomir Peša, Ana Pranješ, Ljubomir Pušelja, Predrag Pušelja, Jakov Tavić, Mijo Tavić, Stipo Tavić and Ivo Volić after the attack on Maline on 8 June 1993.[80] Sufficient evidence exists also that the victims, Croatian civilians and HVO soldiers were taken prisoner and had surrendered their weapons before being executed.[81] Consequently, the Chamber concludes that there is sufficient evidence to allow a Trial Chamber to find that the crime of murder under Count 1 has been proved in respect of the deaths of Anto Balta, Ivo Balta, Jozo Balta, Luka Balta, Nikica Balta, Bojan Barać, Davor Barać, Goran Bobaš, Niko Bobaš, Slavko Bobaš, Srećo Bobaš, Pero Bobaš-Pupić, Dalibor Janković, Stipo Janković, Slavko Kramar, Anto Matić, Tihomir Peša, Ana Pranješ, Ljubomir Pušelja, Predrag Pušelja, Jakov Tavić, Mijo Tavić, Stipo Tavić and Ivo Volić.

46. Furthermore, sufficient evidence demonstrates that the victims were killed by forces under the control of the Accused,[82] and that the Accused could have had knowledge of those acts.[83]

[76] See in particular the testimony of Katica Kovačević, Anda Pavlović, Bozo Pavlović, Andre Kujawinski and P 23-P 27.
[77] See in particular the testimony of Katica Kovačević, Anda Pavlović and P 392.
[78] See in particular the testimony of ZP and P 727, P 598, P610, P 663 and P 556.
[79] See in particular P 593, P 707, P 416 and P 661.
[80] See in particular the testimony of Ivanka Tavić, Witness AH, Zdravko Pranješ and Berislav Marjanović as well as P 929.
[81] See in particular the testimony of Ivanko Tavić, Witness AH, Zdravko Pranješ, Beislav Marjanović and the agreed fact in Annex C of the Joint Prosecution-Defence Statement Agreement of Facts.
[82] See in particular the testimony of Ivanko Tavić, Witness ZK, Zdravko Pranješ, Berislav Marjanović, Witness XB and P 579 and P929.
[83] See in particular P 589, P 171 (also an agreed fact), P 661 and P 460.

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2. Count 2: Cruel treatment in Dusina, Miletići and Maline

(a) Applicable law

(i) Submissions of the parties

47. The Defence for the Accused Hadžihasanović argues that the essential elements of Count 2 are evidence of the unlawful acts or omissions causing great suffering or serious injury as alleged in paragraph 39(c) of the Indictment, that is evidence of the serious injuries inflicted on four persons referred to therein at the end of the attack on Maline on 8 June 1993 by the forces of the 7th MMB and the 306th ABiH Mountain Brigade. These are alleged to have been committed intentionally.[84] The Defence for the Accused Kubura did not present any arguments on this point.[85]

48. The Prosecution recalls the case-law of the Tribunal regarding the offence of cruel treatment. It states that the constituent elements of the offence have been defined as follows: 1) acts or omissions of an accused or a subordinate which have caused serious mental or physical suffering or which constitute a serious attack on human dignity and 2) the acts or omissions were wilful.[86] Moreover, the Prosecution lists examples of specific acts from that case-law which can constitute cruel treatment, in particular burying an individual under inhumane circumstances.[87]

(ii) Discussion

49. The Chamber considers that the crime of cruel treatment, a violation of the laws or customs of war under Article 3 of the Statute, is defined in the case-law of the Tribunal as an intentional act or omission which causes serious mental or physical suffering or which constitutes a serious attack on human dignity.[88] In determining the gravity of an act, all the factual circumstances must be taken into consideration, "including the nature of the act or omission, the context in which it occurs, its duration and/or repetition, the physical, mental and moral effects of the act on the victim and the personal circumstances of the victim, including age, sex and health".[89] "The required *mens rea* is met where the principal offender, at the time of the act or omission, had the intention to inflict serious physical or mental suffering or to commit a serious attack on the human dignity of the victim, or where he knew that his act or omission was likely to cause serious physical or mental suffering or a serious attack upon human dignity and was reckless as to whether such suffering or

[84] Annex A to the Motion of the Accused Hadžihasanović, para. 57.
[85] Motion of the Accused Kubura, para. 67.
[86] Prosecution's Submissions concerning armed conflict and elements of crimes, paras. 16-21.
[87] Submissions concerning armed conflict and elements of crimes, para. 21.
[88] See *Čelebići* Appeals Judgement, para. 424; *Blaškić* Appeals Judgement, para. 595.
[89] *The Prosecutor v. Milorad Krnojelac,* Case no. IT-97-25-T, Judgement, 15 March 2002 ("Krnojelac Judgement"), para. 131.

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attack would result from his act or omission".[90] On the basis of this definition, beating and detention under difficult conditions are likely to constitute cruel treatment if they cause serious mental or physical suffering or constitute a serious attack on human dignity.[91]

(b) Examination of the motions in respect of Count 2, cruel treatment in Dusina, Miletići and Maline

(i) Submissions of the parties

50. The Defence for the Accused Hadžihasanović asserts that the Indictment contains no allegation whatsoever of cruel treatment regarding the events at Dusina and Miletići.[92] The Defence observes that, with regard to the events at Maline, the Indictment refers only to serious injuries sustained by the four individuals referred to therein. It maintains, furthermore, that there is no evidence of a superior-subordinate relationship between the Accused Hadžihasanović and the alleged perpetrators of the crimes or that he failed to take the necessary and reasonable measures to prevent the alleged crimes or punish the perpetrators thereof.[93]

51. The Defence for the Accused Kubura appears to put forward the same arguments as it presented with regard to the killings in Miletići and Maline, notably the lack of evidence establishing a superior-subordinate relationship between the Accused Kubura and the alleged perpetrators of the crimes.[94]

52. The Prosecution responds that Count 2 concerns only the survivors of the Maline and Bikoši massacre.[95] It submits that there is evidence establishing mistreatment in Maline and Bikoši by subordinates of the Accused of which they had knowledge.[96]

(ii) Discussion

a. Dusina and Miletići

53. The Chamber observes that the Prosecution intended only to charge the two Accused on Count 2 of the Indictment with the events 8 June 1993 in Maline. Since the Chamber notes that there is no evidence to support the allegations of cruel treatment committed in Dusina on 26

[90] *Krnojelac* Judgement, para. 132.
[91] *Čelebići* Judgement, paras. 554-558, 1015-1018, 1112-1119.
[92] Motion of the Accused Hadžihasanović, paras. 105 and 106; Reply of the Accused Hadžihasanović, para. 35.
[93] Motion of the Accused Hadžihasanović, para. 107.
[94] See above, para. 39.
[95] Response, footnote 188.
[96] Response, para. 66.

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January 1993 and in Miletići on 24 April 1993, it acquits the Accused Hadžihasanović on this Count in respect of Dusina and Miletići and the Accused Kubura in respect of Miletići.

b. Maline

54. The Chamber notes that there is not sufficient evidence that cruel treatment within the meaning of Article 3 of the Statute occurred in Maline on 8 June 1993. The Indictment alleges that Berislav Marjanović, Zdravko Pranješ, Darko Pušelja and Željko Pušelja were seriously injured after the attack on Maline on 8 June 1993. Berislav Marjanović and Zdravko Pranješ appeared before the Chamber as Prosecution witnesses. During his testimony, Berislav Marjanović stated that his injury "wasn't a serious wound".[97] Zdravko Pranješ testified that he had been hit in the thorax and the leg but that "the wounds were superficial".[98] Witness XB stated that Darko Pušelja had been injured below the heart and Željko Pušelja in the arm.[99] The Prosecution adduced no evidence of the serious nature of the injuries sustained by those persons.

55. Consequently, no reasonable Chamber could conclude beyond reasonable doubt that an intentional act or omission causing serious mental or physical suffering or constituting a serious attack on human dignity was committed by subordinates of the two Accused. The Chamber finds that both Accused must be acquitted on the crime of cruel treatment under Count 2 of the Indictment for the crime committed in Maline.

3. Count 3: Murders in the municipalities of Zenica, Travnik and Bugojno

(a) Applicable law

56. The Chamber refers to the previous discussion on the law in respect of Count 1.[100]

[97] Berislav Marjanović, T. 2736.
[98] Zdravko Pranješ, T. 1383.
[99] Witness XB, T. 1652.
[100] See para. 37.

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(b) Examination of the motions in respect of Count 3, murders in the municipalities of Zenica, Travnik and Bugojno

(i) Village of Orašac (municipality of Travnik)

a. Submissions of the parties

57. In light of the submissions of the Defence for the Accused Hadžihasanović, it appears that it is not contesting the murder by beheading of Dragan Popović in Orašac camp on 20 October 1993. The Defence for the Accused Hadžihasanović does maintain however that, with respect to the evidence tendered, the Chamber could not conclude beyond reasonable doubt that a superior-subordinate relationship existed between the perpetrators of the crime and the Accused Hadžihasanović,[101] that the Accused Hadžihasanović knew or had reason to know that his subordinates had committed the alleged crime or that he failed to take the necessary and reasonable measures to prevent the commission of the crime alleged or punish the perpetrators thereof.[102]

58. The Prosecution responds that Orašac camp was operated from about 15 October 1993 until at least December 1993 by Mujahedins subordinated to the Bosnian Krajina Operations Group ("OG") and the 3rd Corps Command, including the El-Mujahed unit, and that there is sufficient evidence that the Accused Hadžihasanović did not take the necessary and reasonable measures to prevent the commission of the crime or to punish the perpetrators thereof.[103]

b. Discussion

59. The Chamber observes that there is sufficient evidence of the murder by beheading of Dragan Popović, a Serb civilian, on 20 October 1993, in Orašac camp.[104] There is also sufficient evidence that at the time the crime was committed, he was in detention because the victim was not participating actively in the hostilities.[105] The Chamber thus concludes that there is sufficient evidence to allow a Trial Chamber to find that the crime of murder under Count 3 has been proved in respect of the death of Dragan Popović in Orašac camp.

[101] Motion of the Accused Hadžihasanović, para. 116.
[102] Motion of the Accused Hadžihasanović, para. 117.
[103] Response, paras. 83-84.
[104] See in particular the testimony of Ivo Fišić and Dalibor Adžaip.
[105] See in particular the testimony of Ivo Fišić and Peter Williams and P 496.

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60. Furthermore, there is sufficient evidence that the perpetrators of the crime were subordinated to the Accused Hadžihasanović at the material time[106] and that the Accused Hadžihasanović could have had knowledge of the murder.[107]

(ii) Municipality of Bugojno

a. Submissions of the parties

61. In light of the submissions of the Defence for the Accused Hadžihasanović, it appears that it is not contesting that the killing by beating to death of Mario Zrno when he was taken from the Convent Building in Bugojno to carry out forced labour and that of Mladen Havranek in Slavonija Furniture Salon on 5 August 1993 were committed. However, the Defence for the Accused Hadžihasanović submits that in view of the evidence tendered, the Chamber could not conclude beyond reasonable doubt that Mario Zrno was murdered by the subordinates of the Accused Hadžihasanović,[108] that the Accused Hadžihasanović knew or had reason to know that his subordinates had killed Mario Zrno and Mladen Havranek or that he did not take the appropriate measures to prevent the commission of the crimes or to punish the perpetrators thereof.[109]

62. The Prosecution responds that the evidence shows that after 18 July 1993 prisoners of war and Croatian civilians were detained by ABiH units subordinated to the Accused Hadžihasanović in various detention facilities in Bugojno, that the Accused Hadžihasanović had knowledge of the crimes committed by his subordinates with regard to Mario Zrno and Mladen Havranek and that he did not take the necessary and reasonable measures to prevent the commission of those crimes or to punish the perpetrators thereof.[110]

b. Discussion

63. The Chamber notes that there is sufficient evidence of the killing by beating to death of Mario Zrno, a HVO soldier, when he was taken from the Convent Building in Bugojno to do forced labour,[111] and Mladen Havranek, a HVO soldier, on 5 August 1993 at the Slavonija Furniture Salon in Bugojno.[112] There is also sufficient evidence that at the time the crimes were committed, the

[106] See in particular the testimony of Ivo Fišić, Dalibor Adžaip, Tomislav Rajić and Peter Williams as well as P 440 and P 492.
[107] See in particular the testimony of Ivo Fišić, Peter Williams, Sir Martin Garrod, as well as P 226, P 705, P 216, P 176, P 177, P 178, and P 179.
[108] Motion of the Accused Hadžihasanović, para. 114.
[109] Response, paras. 112-113 and 115.
[110] Response, paras. 89-91.
[111] See in particular the testimony of Vinko Zrno and Ivo Mršo as well as P 203 and P 756.
[112] See in particular the testimony of Zoran Gvozden, Mijo Marjanović and Witness ZE as well as P 203 and P 71.

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victims were not participating actively in the hostilities because they were in detention.[113] The Chamber thus concludes that there is sufficient evidence to allow a Trial Chamber to find that the crime of murder under Count 3 has been proved in respect of the deaths of Mario Zrno and Mladen Havranek.

64. Furthermore, the Chamber concludes that there is sufficient evidence to indicate that these crimes were committed by forces subordinated to the Accused Hadžihasanović[114] and that the Accused Hadžihasanović could have had knowledge of these killings.[115]

(iii) Municipality of Zenica and the town of Travnik

65. The Chamber observes that the Prosecution acknowledged in its Response that it had been unable to demonstrate that a Croatian detainee was killed by beating in May 1993 in the Former JNA Barracks in Travnik, and that Jozo Maračić was killed by beating on 18 June 1993 in Zenica Music School.[116] Consequently, the Chamber considers that the Accused Hadžihasanović and Kubura should be acquitted on the crime of murder under Count 3 for Zenica Music School and the Accused Hadžihasanović of the crime of murder in respect of the Former JNA Barracks in Travnik.

4. Count 4: Cruel treatment in the municipalities of Zenica, Travnik, Kakanj and Bugojno

(a) Applicable law

66. The Chamber refers to the previous discussion on law with regard to Count 2.[117]

(b) Examination of the motions in respect of cruel treatment in the municipalities of Zenica, Travnik, Kakanj and Bugojno

(i) Municipality of Zenica (Zenica Music School)

a. Submissions of the parties

67. In light of the submissions of the Defence for the Accused Hadžihasanović, it appears that it is not contesting that cruel treatment of individuals or detainees took place in Zenica Music School. However, Defence for the Accused Hadžihasanović submits that, in view of the evidence tendered, the Chamber could not conclude beyond reasonable doubt that the Accused Hadžihasanović omitted

[113] See in particular the testimony of Zoran Gvozden, Mijo Marjanović, Witness ZE, Vinko Zrno, Ivo Mršo as well as P 203.
[114] See in particular the testimony of Vinko Zrno and P 203.
[115] See, particular, the testimony of Rudi Gerritsen and P 473 and P 203.
[116] Response, footnote 189.
[117] See para. 49.

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to take the necessary and reasonable measures to prevent the commission of the crimes or to punish the perpetrators thereof.[118]

68. The Defence for the Accused Kubura does not contest that cruel treatment occurred in Zenica Music School.[119] The Defence for the Accused Kubura does submit, however, that there is no evidence that the Accused Kubura knew or had reason to know that there had been mistreatment in Zenica Music School.[120] The Defence for the Accused Kubura argues specifically that no witness referred to the Accused Kubura with regard to the Music School, that the Music School was not the Command Headquarters of the 7th MMB and that there is no evidence to indicate that the Accused Kubura went to the Music School.[121]

69. The Prosecution responds that there is evidence establishing that the Accused knew or had reason to know that there had been mistreatment in the Music School and that they failed to take the necessary and reasonable measures to prevent the commission of that treatment or to punish the perpetrators thereof.[122]

b. Discussion

70. The Chamber notes that there is sufficient evidence indicating the commission of cruel treatment within the meaning of Article 3 of the Statute at Zenica Music School from 26 January 1993, or around this date until at least January 1994.[123] There is also sufficient evidence that at the time the crimes were committed, the victims were not participating actively in the hostilities because they were in detention.[124] Consequently, the Chamber concludes that there is sufficient evidence to allow a Trial Chamber to find that the crime of cruel treatment under Count 4 has been proved in respect of Zenica Music School.

71. The Chamber also notes that there is sufficient evidence that those crimes were committed by forces subordinated to the Accused Hadžihasanović and Kubura, including members of the 7th MMB.[125] There is also sufficient evidence indicates also that the Accused Hadžihasanović could have had knowledge of the mistreatment inflicted by his subordinates.[126] There is sufficient other

[118] Motion of the Accused Hadžihasanović, para. 118.
[119] Motion of the Accused Kubura, para. 38.
[120] Motion of the Accused Kubura, paras. 14, 38, 41.
[121] Motion of the Accused Kubura, para. 42.
[122] Response, paras. 70-79.
[123] See in particular the testimony of Dragan Radoš, Franjo Batinić, Ivan Tvrtković, Witness XA, Kruno Rajić and Ranko Popović as well as P 398, P 401 and P 402.
[124] See in particular the testimony of Dragan Radoš, Franjo Batinić, Ivan Tvrtković, Witness XA, Kruno Rajić and Ranko Popović as well as P 398, P 401 and P 402.
[125] See in particular the testimony of Witness XA and P 402.
[126] See in particular the testimony of Vlado Adamović as well as P 593, P 213, P 685 and P 264.

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evidence that the Accused Kubura knew or had reason to know that such had been committed by his subordinates.[127]

(ii) Town of Travnik (Former JNA Barracks)

a. Submissions of the parties

72. The submissions of the Defence for the Accused Hadžihasanović make clear that it does not appear to be contesting that cruel treatment occurred in the Former JNA Barracks in Travnik. The Defence for the Accused Hadžihasanović maintains, however, that the lack of evidence makes it impossible for the Chamber to conclude beyond reasonable doubt that the Accused Hadžihasanović knew or had reason to know that his subordinates had inflicted cruel treatment in the Former JNA Barracks in Travnik or that he failed to take the necessary and reasonable measures to prevent the commission of those acts or punish the perpetrators thereof.[128]

73. The Prosecution responds that the evidence demonstrates that the prisoners were beaten regularly in the Former JNA Barracks in Travnik by members of the 17th Krajina Brigade or the brigade's military police, that the Accused Hadžihasanović knew or had reason to know that mistreatment had been committed there by his subordinates and that he did not take the necessary preventative or punitive measures.[129]

b. Discussion

74. The Chamber notes that there is sufficient evidence of cruel treatment within the meaning of Article 3 of the Statute in the Former JNA Barracks in Travnik from approximately May 1993 until 31 October 1993.[130] There is also sufficient evidence that at the time the crimes were committed, the victims were not participating actively in the hostilities because they were in detention.[131] Consequently, the Chamber concludes that there is sufficient evidence to allow a Trial Chamber to find that the crime of cruel treatment under Count 4 has been proved in respect of the town of Travnik.

[127] See in particular the testimony of Kruno Rajić and P 401, P 405.
[128] Motion of the Accused Hadžihasanović, para. 119.
[129] Response, paras. 67-69.
[130] See in particular the testimony of Ivan Josipović, Witness XD and P 399.
[131] See in particular the testimony of Ivan Josipović, Witness XD and P 399.

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75. Furthermore, sufficient evidence indicates that the perpetrators of those crimes were subordinated to the Accused Hadžihasanović at the material time[132] and that the Accused Hadžihasanović could have had knowledge of such acts.[133]

(iii) Mehurići Village (Elementary School and Blacksmith Shop)

a. Submissions of the parties

76. In light of the submissions of the Defence for the Accused Hadžihasanović, it does not appear to be contesting that cruel treatment was inflicted on detainees at Mehurići Elementary School and Mehurići Blacksmith Shop. However, the Defence for the Accused Hadžihasanović does submit that in view of the evidence tendered, the Chamber could not conclude beyond reasonable doubt that cruel treatment was meted out to detainees at Mehurići Elementary School by the subordinates of the Accused Hadžihasanović,[134] that the Accused Hadžihasanović knew or had reason to know that his subordinates had committed those crimes at Mehurići Elementary School and Blacksmith Shop and that he had not taken the necessary and reasonable measures to prevent the commission of such acts or punish the perpetrators thereof.[135]

77. The Prosecution responds that evidence has established that soldiers of the 306th MB and the ABiH army guarded the Elementary School and the Blacksmith Shop, that the Accused Hadžihasanović had reason to know and actual knowledge that his subordinates were inflicting cruel treatment in Mehurići Elementary School and Mehurići Blacksmith Shop and that he, nevertheless, failed to take the appropriate preventative or punitive measures.[136]

b. Discussion

78. The Chamber observes that there is sufficient evidence that cruel treatment within the meaning of Article 3 of the Statute occurred in Mehurići Elementary School between approximately 6 June 1993 and at least 24 June 1993 and in Mehurići Blacksmith Shop between around 6 June 1993 and 13 July 1993 at least.[137] There is also sufficient evidence that at the time the crimes were committed, the victims were not participating actively in the hostilities because they were in detention.[138] The Chamber thus concludes that there is sufficient evidence to allow a Trial Chamber

[132] See in particular the testimony of Ivo Fišić, Ivan Josipović, Dalibor Adžaip as well as P 399 and P 142.
[133] See in particular P 486, P 904, P 208 and P 655.
[134] Motion of the Accused Hadžihasanović, para. 120.
[135] Motion of the Accused Hadžihasanović, paras. 121-123.
[136] Response, paras. 80-82.
[137] See in particular the testimony of Vinko Tadić, Ivanka Tavić, Witness XC, Witness ZF and Witness ZK.
[138] See in particular the testimony of Vinko Tadić, Ivanka Tavić, Witness XC, Witness ZF and Witness ZK.

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to find that the crime of cruel treatment under Count 4 has been proved in respect of Mehurići Elementary School and Blacksmith Shop.

79. Furthermore, there is evidence to indicate that the perpetrators of those crimes were ABiH soldiers, including soldiers of the 306th MB of the 3rd Corps Bosnian Krajina OG, subordinated to the Accused Hadžihasanović at the material time,[139] and that the Accused could have had knowledge of those crimes.[140]

(iv) Orašac village (camp)

a. Submissions of the parties

80. The submissions of the Defence for the Accused Hadžihasanović make clear that it does not appear to be contesting that detainees were mistreated at Orašac Camp from 15 October to 31 October 1993. However, the Defence for the Accused Hadžihasanović submits that in light of the evidence tendered, the Chamber could not conclude beyond reasonable doubt that a superior-subordinate relationship existed between the perpetrators of the crimes alleged and the Accused Hadžihasanović,[141] that the Accused Hadžihasanović knew or had reason to know that his subordinates had committed those crimes or that he had not taken the necessary and reasonable measures to prevent the commission of such acts or to punish the perpetrators thereof.[142]

81. The Prosecution responds that the evidence demonstrates that Orašac Camp was operated from about 15 October 1993 until at least December 1993 by Mujahedins subordinated to the Bosnian Krajina OG and the 3rd Corps, including the El-Mujahed unit, that the Accused knew or had reason to know that mistreatment had been inflicted by his subordinates in Orašac Camp and that he had nevertheless not taken the appropriate preventative or punitive measures.[143]

b. Discussion

82. The Chamber observes that there is sufficient evidence that cruel treatment within the meaning of Article 3 of the Statute occurred in Orašac Camp between about 15 October 1993 and 31 October 1993.[144] There is also sufficient evidence that at the time those crimes were committed,

[139] See in particular the testimony of Vinko Tadić, Ivanka Tavić, Witness XC, Witness ZK and Witness AH.
[140] See in particular the testimony of Witness ZP and P 664, P 666, P 904, P 589.
[141] Motion of the Accused Hadžihasanović, para. 124.
[142] Motion of the Accused Hadžihasanović, para. 125.
[143] Response, paras. 83-84.
[144] See in particular the testimony of Ivo Fišić and Dalibor Adžaip as well as P 394 and P 395.

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the victims were not participating actively in the hostilities because they were in detention.[145] Consequently, the Chamber concludes that there is sufficient evidence to allow a Trial Chamber to find that the crime of cruel treatment under Count 4 has been proved in respect of Orašac Camp.

83. Furthermore, there is sufficient evidence that the perpetrators of those crimes were subordinated to the Accused Hadžihasanović at the material time[146] and that the Accused Hadžihasanović could have had knowledge of those crimes.[147]

(v) Kakanj Municipality (Motel Sretno)

a. Submissions of the parties

84. In light of the submissions of the Defence for the Accused Hadžihasanović, it does not appear to be contesting that cruel treatment was inflicted on detainees in Motel Sretno in Kakanj. However, the Defence for the Accused Hadžihasanović submits that, in view of the evidence tendered, the Chamber could not conclude beyond reasonable doubt that the Accused Hadžihasanović knew or had reason to know that his subordinates had mistreated detainees at Motel Sretno and that he failed to take the necessary and reasonable measures to prevent the commission of such acts or to punish the perpetrators thereof.[148]

85. The Defence for the Accused Kubura does not contest that cruel treatment was inflicted on detainees in Motel Sretno in Kakanj. However, the Defence for the Accused Kubura submits that there is no evidence the Accused Kubura knew or had reason to know that his subordinates had inflicted cruel treatment on the detainees in Motel Sretno.[149] The Defence for the Accused Kubura submits specifically that the officer who came to Motel Sretno was not identified as a member of the 7th MMB and that there is no evidence that he was in Motel Sretno or the surrounding area at the material time.[150]

86. The Prosecution responds that there is evidence that the Accused Hadžihasanović and Kubura had reason to know and actual knowledge that their subordinates had mistreated detainees at Motel Sretno and that they failed to take the appropriate preventative or punitive measures.[151]

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[145] See in particular the testimony of Ivo Fišić and Dalibor Adžaip as well as P 394 and P 395.
[146] See in particular the testimony of Ivo Fišić, Dalibor Adžaip, Tomislav Rajić and Peter Williams as well as P 440 and P 492.
[147] See in particular the testimony of Ivo Fišić, Peter Williams and Sir Martin Garrod as well as P 226, P 705, P 216, P 176, P 177, P 178 and P 179.
[148] Motion of the Accused Hadžihasanović, paras. 126-127.
[149] Motion of the Accused Kubura, paras. 14, 38, 40.
[150] Motion of the Accused Kubura, paras. 39-40.
[151] Response, paras. 85-88.

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b. Discussion

87. The Chamber observes that there is sufficient evidence that cruel treatment within the meaning of Article 3 of the Statute occurred in Motel Sretno in Kakanj between about 15 May 1993 and at least 21 June 1993.[152] There is also sufficient evidence that, when the crimes were committed, the victims were not participating actively in the hostilities because they were in detention.[153] Consequently, the Chamber concludes that there is sufficient evidence to allow a Trial Chamber to find that the crime of cruel treatment under Count 4 has been proved in respect of Motel Sretno in Kakanj.

88. Furthermore, there is sufficient evidence that members of the 7th MMB subordinated to the Accused Hadžihasanović and the Accused Kubura committed those crimes.[154] There is also sufficient evidence that the Accused Hadžihasanović could have had knowledge of the mistreatment inflicted by his subordinates.[155] There is sufficient other evidence that the Accused knew or had reason to know that such acts were committed by his subordinates.[156]

(vi) Bugojno municipality (Gimnazija School Building, Convent Building, Slavonija Furniture Salon, FC Iskra Stadium, Vojin Paleksić Elementary School, Bank of BH)

a. Submissions of the parties

89. The submissions of the Defence for the Accused Hadžihasanović make clear that it does not appear to be contesting that mistreatment occurred in all the detention facilities listed in paragraph 41(d) with the exception of paragraph 41(df) of the Indictment. However, the Defence for the Accused Hadžihasanović submits that because there is no evidence to support the allegation,[157] the Chamber could not conclude beyond reasonable doubt that mistreatment occurred in the Bank of BH Building in Bugojno, that the Accused Hadžihasanović knew or had reason to know that his subordinates had inflicted mistreatment in the BH Bank building and that, given the absence of evidence, in the other detention facilities in Bugojno, and that he had not taken the necessary and reasonable measures to prevent the commission of those crimes or to punish the perpetrators thereof.[158]

[152] See in particular the testimony of Ranko Popović, Niko Petrović, Marinko Marušić and Nenad Bogeljić.
[153] See in particular the testimony of Ranko Popović, Niko Petrović, Marinko Marušić and Nenad Bogeljić.
[154] See in particular the testimony of Ranko Popović and Nenad Bogeljić.
[155] See in particular P 684.
[156] See in particular the testimony of Nenad Bogeljić.
[157] Motion of the Accused Hadžihasanović, para. 128.
[158] Motion of the Accused Hadžihasanović, paras. 129-131.

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90. The Prosecution responds that the evidence demonstrates that after 18 July 1993, prisoners of war and Croatian civilians were detained by ABiH units subordinated to the Accused Hadžihasanović in various detention facilities in Bugojno, that the Accused Hadžihasanović knew or had reason to know that mistreatment had been inflicted by his subordinates in various facilities in Bugojno and that he nevertheless did not take the appropriate preventative or punitive measures.[159]

b. Discussion

91. The Chamber notes that there is sufficient evidence of cruel treatment within the meaning of Article 3 of the Statute in the periods and in all the detention facilities set out in paragraph 41(d) of the Indictment,[160] including the BH Bank in Bugojno.[161] There is also sufficient evidence that at the time the crimes were committed, the victims were not participating actively in the hostilities because they were in detention.[162] The Chamber thus concludes that there is evidence to allow a Trial Chamber to find that the crime of cruel treatment under Count 4 has been proved in respect of the detention facilities referred to in paragraph 41(d) of the Indictment.

92. Moreover, there is sufficient evidence that the perpetrators of those crimes were subordinated to the Accused Hadžihasanović at the material time[163] and that the Accused Hadžihasanović could have had knowledge of those crimes.[164]

[159] Response, paras. 89-91.
[160] See in particular the testimony of Mijo Marijanović, Witness ZB, Witness ZH, Witness ZR, Ivo Mršo, Zrinko Alvir, Témoin ZC, Tomislav Mikulić as well as P 386 and P 391.
[161] See in particular the testimony of Mijo Marijanović and P 391.
[162] See in particular the testimony of Mijo Marijanović, Witness ZB, Witness ZH, Witness ZR, Ivo Mršo, Zrinko Alvir, Witness ZC, Tomislav Mikulić as well as P 386 and P 391.
[163] See in particular the testimony of Ivo Mršo, Witness ZH and Rudi Gerritsen as well as P 391, P 144, P 272 and P 203.
[164] See P 473, P 203 and P 733.

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C. Crimes directed against property – violations of the laws or customs of war

1. Count 5: Wanton destruction of cities, towns or villages not justified by military necessity in the municipalities of Zenica, Travnik and Vareš

(a) Applicable Law

(i) Submissions of the parties

93. With regard to this Count, the Defence for the Accused Hadžihasanović argues that in addition to quoting "the generic provisions of Article 3 of the Statute",[165] the Prosecution was obliged to identify "the regulation which was contravened […] precisely".[166] According to the Defence for the Accused Hadžihasanović, this is necessary "to allow the Chamber to ensure that the principle of legality, *nullum crimen sine lege*, is respected."[167] In addition, it argues that, in this case, the Prosecution did not provide evidence of the existence of an international armed conflict[168] and that it also failed to show that the offence charged comes under the customary international law applicable to internal or non-international armed conflicts.[169] In the absence of such a demonstration, the Defence for the Accused Hadžihasanović concluded that the Chamber was not competent to consider Count 5.[170] The Defence for the Accused Hadžihasanović also set out in its Motion the constituent elements of wanton destruction.[171]

94. The Prosecution responds that, in the present case, it pleaded the existence of an armed conflict without specifying whether it was international or internal in nature.[172] It submits that the alleged crime set out in Count 5 may be committed in an international or internal armed conflict[173] as both come under customary international law.[174] In the Response, the Prosecution also refers to a prior written submission in which it presented the constituent elements of the crime of wanton destruction.[175]

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[165] Motion of the Accused Hadžihasanović, para. 93.
[166] Motion of the Accused Hadžihasanović, para. 92.
[167] Motion of the Accused Hadžihasanović, para. 92.
[168] Reply of the Accused Hadžihasanović, para. 11.
[169] Reply of the Accused Hadžihasanović, para. 13.
[170] Reply of the Accused Hadžihasanović, para. 14 and Motion of the Accused Hadžihasanović, paras. 96-98. The Defence for the Accused Kubura supported the conclusions of the Defence for the Accused Hadžihasanović on this point. Motion of the Accused Kubura, para. 67.
[171] Annex A to the Motion of the Accused Hadžihasahović, paras. 62-64.
[172] Response, para. 11.
[173] Response, para. 11.
[174] Response, para. 12.
[175] Response, para. 9 and "Prosecution's Submissions Concerning Armed Conflict and Elements of Crime", paras. 24-28.

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(ii) Discussion

95. The Chamber first notes that the Tribunal can only consider an offence that comes under customary international law at the time of its commission.[176] With regard to international armed conflicts, the Chamber notes that the Tribunal's case-law has established the customary character of the crime of wanton destruction of cities, towns or villages not justified by military necessity set out in Article 3(b) of the Statute[177] in the event of a case during the period from 1992 to 1994.[178] The competence of the Chamber to consider a crime committed during an international armed conflict has therefore been established.

96. The crime of wanton destruction of cities, towns or villages not justified by military necessity relates to acts directed against the property of individuals or groups. It has this in common with the crime of plunder of public or private property and the destruction or wilful damage done to institutions dedicated to religion or other purposes, all crimes which come under Article 3 of the Statute, except in respect of undefended dwellings or buildings. Reference should also be made here to the crime of unlawful attack on civilian property which is not explicitly mentioned in Article 3 of the Statute. This crime is practically identical to that of wanton destruction of cities, towns or villages, the more so as the commission of the two crimes may take place immediately following the seizure of a town or village.[179] These four crimes are founded in many international conventions. The case-law of the Tribunal establishes that like wanton destruction during international armed conflict, plunder, wilful damage to specific institutions, and unlawful attacks on civilian property during international armed conflict are crimes of customary international law.[180]

97. The case-law of the Tribunal confirms the fundamental rule of international humanitarian law which requires that the parties to an armed conflict always make a distinction between the civilian population and the combatants and between civilian property and military objectives.

[176] *Blaškić* Appeals Judgement, para. 141.
[177] *Blaškić* Appeals Judgement, para. 145.
[178] *Blaškić* Appeals Judgement, para. 2.
[179] On wanton destruction see: *The Prosecutor v. Dario Kordić and Mario Čerkez*, Case no. IT-95-14/2-T, 26 February 2001 ("*Kordić* Judgement"), paras. 806-807; *The Prosecutor v. Mladen Naletilić and Vinko Martinović*, Case no. IT-98-34-T, Judgement, 31 March 2003 ("*Naletilić* Judgement"), paras. 572, 581, 589; *The Prosecutor v. Radoslav Brdanin*, Case no. IT-99-36-T, Judgement, 1 September 2004, paras. 610, 611, 614, 619, 621, 622, 626, 627, 631, 632, 635. On unlawful attack see: "The Manual of the Law of Armed Conflict", UK Ministry of Defence, Oxford University Press 2004, n. 5.35.2, p. 88.
[180] See *Blaškić* Appeals Judgement, paras. 147-148; *Tadić* Decision on Jurisdiction, para. 98; *The Prosecutor v. Pavle Strugar, Miodrag Jokić and others*, Case no. IT-01-42-AR72, Decision on Interlocutory Appeal, 22 November 2002, para. 10.

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Consequently, the parties to a conflict must direct their operations only against military objectives. The customary nature of this rule has been unequivocally established.[181]

98. Referring now to the law applicable in non-international armed conflicts, the Chamber first observes that Article 4 of Additional Protocol II to the Geneva Conventions of 12 August 1949 on the Protection of Victims of Non-International Armed Conflicts prohibits pillage and that Article 16 prohibits the damaging of places dedicated to religion or other specific purposes. There are however no provisions explicitly and generally prohibiting wanton destruction or unlawful attack on civilian property. In addition, the Commentary of the International Committee of the Red Cross states that Protocol II, unlike Protocol I, "does not protect civilian objects in general".[182] It would nevertheless be premature to conclude that Additional Protocol II is irrelevant for the protection of civilian property against wanton destruction and unlawful attack except for the cases envisaged in Articles 14 to 16. Article 13, paragraph 1, of Protocol II states that the civilian population and individual civilians enjoy general protection against the dangers arising from military operations. The history of the diplomatic negotiations leading to the adoption of Protocol II demonstrates that, at the beginning of the negotiations, inserting a specific provision on the general protection of civilian property had been envisaged. That article was removed in order to simplify the proposed texts. However, the Commentary of the International Committee of the Red Cross on Article 13, states that securing general protection of the civilian population in conformity with this Article is "based on the general principles relating to the protection of the civilian population which apply irrespective of whether the conflict is an international or an internal one". The principle of duplicity and the principle of proportionality are among these principles.[183] These principles imply that attacks against dwellings, schools and other buildings occupied by civilians are prohibited unless the buildings have become legitimate military objectives. The protection of civilian property may therefore be the necessary corollary to the protection of the civilian population in certain cases.[184] The Chamber also notes that the Preamble to Protocol II refers to the Martens Clause, recalling that "in cases not covered by the law in force, the human person remains under the protection of the principles of humanity and the dictates of the public conscience."

99. In resolution 2444 (XXIII) of 19 December 1968 on the respect for human rights in armed conflicts and resolution 2675 (XXV) of 9 December 1970 on the basic principles for the protection

[181] See, for example, Sandoz *et al.* (eds.), Commentary on the Additional Protocols of 8 June 1977 to the Geneva Conventions of 12 August 1949, Official Commentary of the ICRC on Article 48 of the Additional Protocol I to the Geneva Conventions, para. 1863 ("ICRC Commentary").
[182] ICRC Commentary on Article 14, para. 4749, referred to in para. 97 of the Motion of the Accused Hadžihasanović. To this effect see also ICRC Commentary, para. 4772, note 9.
[183] ICRC Commentary, para. 4772.
[184] See Michael Bothe, Karl Josef Partsch, Waldemar A. Solf, "*New Rules for Victims of Armed Conflicts*", The Hague/Boston/London 1982, pp. 670, 676-677.

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of civilian populations in armed conflicts, the United Nations General Assembly affirmed the applicability of the principle of duplicity in all armed conflicts, whether international or non-international.[185] Paragraph 2 of resolution 2675 (XXV) recognises that "[I]n the conduct of military operations during armed conflicts, a distinction must be made at all times between persons actively taking part in the hostilities and the civilian populations." More specifically, paragraph 5 of the said resolution states that "[D]wellings or other installations that are used only by civilian populations should not be the object of military operations."

100. In 1988, the former Yugoslavia adopted rules on the application of international laws of war by the armed forces of the SFRY.[186] Article 7 of these rules explicitly state that the war operations must be directed exclusively against enemy armed forces and other military installations. Articles 4 and 6 of the said rules also state that this principle is applicable in both international and non-international armed conflicts. In the same spirit, Article 142 of the 1990 Penal Code of former Yugoslavia, in terms of its applicability, enumerates war crimes against the civilian population but makes no distinction between international and non-international armed conflicts.[187] These crimes include the seizure and plunder of private property and the widespread destruction of property not justified by military necessity.

101. In the early 1990s the United Nations Security Council abstained from characterising armed conflicts as international or non-international on several occasions when it requested that the parties to the conflict in the former Yugoslavia respect international humanitarian law.[188] For example, in resolution 771 (1992), the Security Council condemned the frequent and multiple violations of international humanitarian law within the territory of the former Yugoslavia among which were the wanton devastation and destruction of property.[189]

102. The International Committee of the Red Cross took a position on the applicability of international humanitarian law in a non-international armed conflict by asking the parties to the armed conflict in Angola to respect this body of law in 1994.[190] The International Committee of the Red Cross noted that international humanitarian law forbids the parties to attack civilian property and to carry out attacks which might cause excessive damage to that property.

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[185] On this point see *Tadić* Decision on Jurisdiction, paras. 110 and 111.
[186] See original text and English translation in M. Cherif Bassiouni & Peter Manikas, "*The Law of the International Criminal Tribunal for the Former Yugoslavia*", Transnational Publishers 1996, p. 648-651.
[187] P. 342.
[188] See on this point *Tadić* Decision on Jurisdiction, para. 74.
[189] Resolution 1019 (1995) provides another example of the deliberate burning of houses.
[190] *Memorandum on respect for international humanitarian law in Angola*, 8 June 1994, addressed to the Government of Angola and UNITA.

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103. The texts of the United Nations General Assembly resolutions and of the other documents referred to in paragraphs 99 to 101 seem to show that the principles proclaimed by the General Assembly were already constituted rules of customary law at that time. In fact, these principles are often considered as declaratory of customary law[191] or as evidence of customary rules.[192]

104. The Chamber finally notes that, in its advisory opinion on the *Legality of the Threat or Use of Nuclear Weapons* of 8 July 1996, the International Court of Justice confirms the existence of cardinal principles in the texts constituting the fabric of humanitarian law, the first of which in respect of the distinction between combatants and non-combatants, seeks to protect the civilian population and civilian property.[193] The opinion demonstrates that these principles are applicable to both international and non-international armed conflicts.[194] The opinion of the International Court of Justice confirms the conclusion that the prohibition of wanton destruction of cities, towns or villages not justified by military necessity comes under international customary law. The Chamber therefore concludes that the wanton destruction of cities, towns or villages during a non-international armed conflict was prohibited by international customary law throughout the period relevant to the Indictment.[195]

105. The question that finally arises is whether the prohibition of wanton destruction of cities, towns or villages could entail the individual criminal responsibility of a person in the period relevant to the Indictment in the context of a non-international armed conflict. In view of the general observations of the Appeals Chamber on the subject,[196] this Chamber concludes that the response must be affirmative.

106. On the basis of what has been set out above, the Chamber concludes that it is competent to consider the offence of wanton destruction of cities, towns or villages not justified by military necessity pursuant to Article 3(b) of the Statute in the event of international or non-international armed conflicts.

107. The Tribunal's case-law establishes that the constituent elements of the crime of wanton destruction not justified by military necessity within the framework of an international armed conflict exist when: i) the destruction of property occurs on a large scale, ii) the destruction is not

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[191] *Tadić* Decision on Jurisdiction, para. 112.
[192] See "The Manual of the Law of Armed Conflict", UK Ministry of Defence, Oxford University Press 2004, p. 391.
[193] See Advisory Opinion on the *Legality on the Threat or Use of Nuclear Weapons*, International Court of Justice, 8 July 1996 ("Advisory Opinion of the ICJ on the Legality of Nuclear Weapons"), para. 78.
[194] Advisory Opinion of the ICJ on the Legality of Nuclear Weapons, paras 74, 75 and 89. Similarly see *The Prosecutor v. Zoran Kupreškić et al.,* Case no. IT-95-16-T, Judgement, 14 January 2000, paras. 521-522.
[195] The Appeals Chamber seems to be in agreement when it states that the rules that come under customary law on internal conflicts cover "such areas as protection of civilians [. . .], in particular cultural property". *Tadić* Decision on Jurisdiction, para. 127. See also *Strugar* Decision, para. 27.

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justified by military necessity, and iii) the perpetrator acted with the intent to destroy the property in question or in reckless disregard of the likelihood of its destruction.[197] At this stage of the trial, the Chamber provisionally subscribes to the stated definition of this crime in both an international and non-international armed conflict.

(b) Examination of the motions in respect of Count 5: wanton destruction of cities, towns or villages, not justified by military necessity in the municipalities of Zenica, Travnik, and Vareš

(i) Submissions of the parties

108. With regard to all the evidence in the record, the Defence for the Accused Hadžihasanović submits that the Chamber could not conclude beyond all reasonable doubt that dwellings, buildings and civilian personal property were destroyed on a large scale in Miletići, Guča Gora, Maline, Čukle, Šušanj, Ovnak, Brajkovići and Grahovčići in the period relevant to the Indictment.[198] It also submits that even if there was such destruction, the Chamber could not conclude that it was unlawful, wanton or not justified by military necessity.[199]

109. The Defence for the Accused Hadžihasanović submits that there is no evidence that widespread wanton destruction occurred in Miletići, Maline, Šušanj/Ovnak/Grahovčići and Vareš during the period relevant to the Indictment.[200]

110. The Prosecution responds that the evidence indicates that acts of wanton destruction occurred on a widespread scale in Guča Gora, Maline, Čukle, Šušanj/Ovnak/Brajkovići/Grahovčići, and Vareš during the period relevant to the Indictment.[201]

(ii) Discussion

a. Dusina

111. The Chamber notes that the Prosecution withdrew the charge on Dusina set out in Count 5.[202] Consequently, the Chamber takes note of the Prosecution's withdrawal of the alleged crime in Dusina set out in this Count.

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[196] *Tadić* Decision on Jurisdiction, paras. 128-136.
[197] *Kordić* Judgement, para. 346. See also *Naletilić* Judgement, para. 579, and *Stakić* Judgement, para. 761.
[198] Motion of the Accused Hadžihasanović, paras. 133-134.
[199] Motion of the Accused Hadžihasanović, paras. 135.
[200] Motion of the Accused Kubura, paras. 14, 47- 51 and 53.
[201] Response, paras. 95, 98, 100-101 and 105.

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b. Miletići

112. The Chamber notes that there is no evidence that wanton destruction of cities, towns or villages not justified by military necessity occurred in Miletići in April 1993 within the meaning of Article 3(b) of the Statute.

Consequently, the Chamber concludes that both of the Accused must be acquitted of the crime of wanton destruction in Miletići set out in Count 5.

c. Guča Gora

113. Sufficient evidence has been adduced to indicate that acts of wanton destruction not justified by military necessity occurred in Guča Gora after an ABiH attack in June 1993.[203] Consequently, the Chamber concludes that there is sufficient evidence to allow a Trial Chamber to find that the crime of wanton destruction in Guča Gora set out in Count 5 has been proved.

114. In addition, sufficient evidence has been adduced to indicate that the Accused Hadžihasanović could have had knowledge of such acts of wanton destruction by ABiH troops.[204]

d. Maline

115. Sufficient evidence has been adduced to indicate that acts of wanton destruction not justified by military necessity occurred in Maline after an ABiH attack in June 1993.[205] Consequently, the Chamber concludes that there is sufficient evidence to allow a Trial Chamber to find that the crime of wanton destruction in Maline set out in Count 5 has been proved. In addition, the Chamber notes that the Prosecution has adduced sufficient evidence to establish the presence of the 7th MMB in Maline.[206]

116. In addition, sufficient evidence has also been adduced to indicate that both Accused could have had knowledge of such acts of wanton destruction in the area of Maline by ABiH troops.[207]

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[202] See T. 4005 and para. 135 in "Submission of the Prosecution's Pre-Trial Brief Pursuant to Rule 65 *ter*(E)" of 10 October 2003 ("Prosecution Pre-Trial Brief").
[203] See in particular the testimony of Dragan Radić and Witness ZJ.
[204] See in particular P 158 and P 589.
[205] See in particular the testimony of Ivanka Tavić as well as P 397.
[206] See para. 46.
[207] See in particular P 158 and P 589.

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e. Čukle

117. Sufficient evidence has been adduced to indicate that acts of wanton destruction not justified by military necessity occurred in Čukle after an ABiH attack in June 1993.[208] Consequently, the Chamber concludes that there is sufficient evidence to allow a Trial Chamber to find that the crime of wanton destruction in Čukle set out in Count 5 has been proved.

118. Moreover, sufficient evidence has also been adduced to indicate that the Accused Hadžihasanović could have had knowledge of such acts of wanton destruction in the area of Čukle.[209]

f. Šušanj/Ovnak/Brajković/Grahovčići

119. Sufficient evidence has been adduced to indicate that acts of wanton destruction not justified by military necessity occurred in Šušanj/Ovnak/Brajković/Grahovčići during an attack by the ABiH in June 1993.[210] In particular, sufficient evidence has been adduced to indicate the presence of the 7th MMB in Šušanj/Ovnak/Brajković/Grahovčići in June 1993.[211] Consequently, the Chamber finds that there is sufficient evidence to allow a Trial Chamber to conclude that the crime of wanton destruction in Šušanj/Ovnak/Brajković/Grahovčići set out in Count 5 has been proved.

120. In addition, sufficient evidence has been adduced to indicate that the Accused Hadžihasanović could have had knowledge of such acts of wanton destruction in Šušanj/Ovnak/Brajković/Grahovčići by ABiH soldiers.[212] Sufficient other evidence also indicates that the Accused Kubura could have had knowledge of the commission of such acts.[213]

g. Vareš

121. Sufficient evidence has been adduced to indicate that after an attack by the ABiH with the participation of the 7th MMB in November 1993, acts of wanton destruction not justified by military necessity were committed in Vareš.[214] Consequently, the Chamber finds that there is sufficient evidence to allow a Trial Chamber to conclude that the crime of wanton destruction in Vareš set out in Count 5 has been proved.

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[208] See in particular the testimony of Witness ZD, Žarko Jandrić as well as P 384 and P 385.
[209] See in particular P 158 and P 589.
[210] See in particular the testimony of Ivo Vuleta, Franjo Križanac, Mijo Marković, Žarko Jandrić, and Witness ZD, as well as P 277 and P 589.
[211] See in particular the testimony of Witness ZA as well as P 426.
[212] See in particular P 426 and P 427.
[213] See in particular P 426 and P 427.
[214] See in particular the testimony of Sir Martin Garrod as well as P 448, P 457 and P 676.

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122. In addition, sufficient evidence has been adduced to indicate that the Accused Kubura could have had knowledge of such wanton destruction.[215]

2. Count 6: plunder of public or private property in the municipalities of Zenica, Travnik and Vareš

(a) Applicable Law

(i) Submissions of the parties

123. On the question of the law applicable to this Count, the parties made identical submissions on the Chamber's competence to consider this Count as those listed under Count 5.[216] Consequently, these submissions will not be repeated here.[217]

(ii) Discussion

124. As stated earlier, the Tribunal can try only offences that come under international customary law at the time of their commission.[218] In respect of international armed conflicts, the Chamber notes that the Tribunal's case-law has demonstrated the customary character of the crime of plunder of public or private property set out in Article 3(e) of the Statute[219] within the framework of cases in the period from 1992 to 1994.[220] The competence of the Chamber to try the crime of plunder in international armed conflicts is therefore established.

125. With respect to non-international armed conflicts, the Appeals Chamber has established the general principle that "It cannot be denied that customary rules have developed to govern internal strife. These rules [. . .] cover such areas as [the] protection of civilian objects".[221] The Appeals Chamber recently dealt more specifically with the question of plunder in a case containing offences committed prior to those covered by the present Indictment.[222] It explained that the act of plunder contravenes several norms of international humanitarian law including those applicable to non-international conflicts under Additional Protocol II to the Geneva Conventions of 12 August 1949

[215] See in particular P 448, P 457 and P 676.
[216] See paras. 92-93.
[217] As for Count 5, the Defence for the Accused Hadžihasanović also submits in its Motion the constituent elements of the crime of plunder of public or private property. Annex A to the Motion of the Accused Hadžihasanović, paras. 65-67. In its Response, the Prosecution also refers to a prior written submission where it presented the constituent elements of the crime of plunder. Response, para. 9 and "Prosecution's Submissions Concerning Armed Conflict and Elements of Crime" of 2 July 2004, paras. 29-35.
[218] See para. 94.
[219] See *Blaškić* Appeals Judgement, paras. 147-148, and *Čelebići* Judgement, paras. 587-590.
[220] See *Blaškić* Appeals Judgement, para. 2, and *Čelebići* Judgement, para. 3.
[221] *Tadić* Decision on Jurisdiction, para. 127.
[222] Compare *Blaškić* Appeals Judgement, para. 2, with para. 7 of the Indictment.

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and that such norms come under international customary law.[223] Referring to non-international conflicts, on the basis of this case-law, the Chamber concludes that the offence of plunder of public or private property came under international customary law at the time the facts alleged in the Indictment occurred. The Chamber is therefore competent to consider Count 5 in non-international conflicts.

126. It remains to be determined whether the prohibition of plunder of public or private property could entail the individual criminal responsibility of a person within the framework of a non-international armed conflict throughout the period relevant to the Indictment. In view of the Appeals Chamber's general observations on this subject,[224] this Chamber concludes that the response must be affirmative.

127. On the basis of the above, the Chamber concludes that it is competent to consider the offence of plunder of public or private property set out in Article 3(e) of the Statute within the framework of an international or non-international armed conflict.

128. Finally, according to the Tribunal's case-law, the crime of plunder in the context of international armed conflict covers "all forms of unlawful appropriation of property in armed conflict for which individual criminal responsibility attaches under international law, including those acts traditionally described as 'pillage'".[225] This crime "extends both to acts of looting committed by individual soldiers for their private gain, and to the organized seizure of property undertaken within the framework of a systematic economic exploitation of occupied territory",[226] and requires that "any property taken [. . . has to be] of sufficient monetary value for its unlawful appropriation to involve grave consequences for the victims".[227] At this stage of the trial, the Chamber provisionally subscribes to this definition of the crime in the event of both an international or non-international armed conflict.

[223] *Blaškić* Appeals Judgement, paras. 147-148.
[224] *Tadić* Decision on Jurisdiction, paras. 128-136.
[225] *Čelebići* Judgement, para. 591. See also *The Prosecutor v. Goran Jelisić*, Case no. IT-95-10-T, Judgement, 14 December 1999, para. 48; *The Prosecutor v. Tihomir Blaškić*, Case no. IT-95-14-T, Judgement, 3 March 2000, para. 184 and *Kordić* Judgement, paras. 351-353.

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(b) Examination of the motions in respect of Count 6: plunder of public or private property in the municipalities of Zenica, Travnik and Vareš

(i) Submissions of the parties

129. The Defence for the Accused Hadžihasanović submits that in view of the evidence tendered, the Chamber could not conclude beyond all reasonable doubt that the plunder in Guča Gora, Miletići, Maline, Čukle and Šušanj/Ovnak/Brajkovići/Grahovčići in the period relevant to the Indictment was unlawful or not justified by military necessity, or that the Accused Hadžihasanović did not take the appropriate measures to prevent or to punish such acts.[228] With regard specifically to Miletići and Guča Gora, it adds that the Chamber could not conclude that a superior-subordinate relationship existed between the perpetrators of the plunder and the Accused Hadžihasanović.[229]

130. The Defence for the Accused Kubura submits that there is no evidence of the presence of the 7th MMB in Miletići and Maline.[230] It further argues that there is no evidence that the plunder in Vareš and Šušanj/Ovnak/Brajkovići/Grahovčići was committed specifically by the members of the 7th MMB.[231] The Defence for the Accused Kubura submits that the acts of plunder committed in Vareš were not on a sufficiently large scale to constitute a serious breach of international law.[232]

131. The Prosecution responds that evidence shows that acts of plunder occurred on a large scale in Miletići, Guča Gora, Maline, Čukle, Šušanj/Ovnak/Brajkovići/Grahovčići, and Vareš in the period relevant to the Indictment.[233]

(ii) Discussion

a. Dusina

132. The Chamber notes that the Prosecution does not intend to proceed with the allegations on Dusina set out in Count 6.[234] Consequently, the Chamber takes note of the Prosecution's withdrawal of the allegations in Dusina set out in this Count.

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[226] *Čelebići* Judgement, para. 590.
[227] *Čelebići* Judgement, para. 1154.
[228] Motion of the Accused Hadžihasanović, paras. 137-138.
[229] Motion of the Accused Hadžihasanović, para. 139.
[230] Motion of the Accused Kubura, paras. 14 and 46.
[231] Motion of the Accused Kubura, paras. 47, 54-55 and 57-65.
[232] Motion of the Accused Kubura, para. 56.
[233] Response, paras. 92, 95, 98, 100-101 and 104.
[234] See T. 4005 and Prosecution Pre-Trial Brief, para. 135.

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b. Miletići

133. There is sufficient evidence that public or private property was looted in Miletići after an ABiH attack in April 1993.[235] Consequently, the Chamber finds that there is sufficient evidence to allow a Trial Chamber to conclude that the crime of plunder of public or private property in Miletići set out in Count 6 has been proved.

134. In addition, there is sufficient evidence that the Accused Hadžihasanović and Kubura could have had knowledge of the plunder.[236] The Chamber also notes that the Prosecution has submitted sufficient evidence to establish the presence of the 7th MMB in Miletići.[237]

c. Guča Gora

135. There is sufficient evidence that acts of plunder of public or private property occurred in Guča Gora after an ABiH attack in June 1993.[238] Consequently, the Chamber concludes that there is sufficient evidence to allow a Trial Chamber to find that the crime of plunder of public or private property in Guča Gora set out in Count 6 has been proved.

136. In addition, there is sufficient evidence to indicate that the Accused Hadžihasanović could have had knowledge that such acts of plunder.[239]

d. Maline

137. There is sufficient evidence to indicate that acts of plunder of public or private property occurred in Maline after an ABiH attack in June 1993.[240] Consequently, the Chamber concludes that there is sufficient evidence to allow a Trial Chamber to find that the crime of plunder of public or private property in Maline set out in Count 6 has been proved. The Chamber also notes that the Prosecution has submitted sufficient evidence to establish the presence of the 7th MMB in Maline.[241]

[235] See in particular P 396.
[236] See in particular P 283.
[237] See para. 44.
[238] See in particular the testimony of Dragan Radić and Witness ZJ.
[239] See in particular P 158 and P 589.
[240] See in particular the testimony of Ivanka Tavić, Dragan Radić, Witness ZF and Witness ZI, as well as P 387 and P 397.
[241] See para. 46.

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138. In addition, there is sufficient other evidence that both Accused could have had knowledge that of acts of plunder in the area of Maline.[242]

e. Čukle

139. There is sufficient evidence that acts of plunder of public or private property occurred in Čukle after an ABiH attack in June 1993.[243] Consequently, the Chamber concludes that there is sufficient evidence to allow a Trial Chamber to find that the crime of plunder of public or private property in Čukle set out in Count 6 has been proved.

140. In addition, there is sufficient evidence that the Accused Hadžihasanović could have had knowledge of such acts of plunder by ABiH in the area of Čukle.[244]

f. Šušanj/Ovnak/Brajkovići/Grahovčići

141. There is sufficient evidence that acts of plunder of public or private property occurred in Šušanj/Ovnak/Brajkovići/Grahovčići after an ABiH attack in June 1993.[245] There is in particular sufficient evidence to indicate the presence of the 7th MMB in Šušanj/Ovnak/Brajkovići/Grahovčići in June 1993.[246] Consequently, the Chamber concludes that there is sufficient evidence to allow a Trial Chamber to find that the crime of plunder of public or private property in Šušanj/Ovnak/Brajkovići/Grahovčići set out in Count 6 has been proved.

142. In addition, there is sufficient evidence that both Accused Hadžihasanović and Kubura could have had knowledge of such acts of plunder by ABiH soldiers in the Šušanj/Ovnak/Brajkovići/Grahovčići area.[247]

g. Vareš

143. There is sufficient evidence that acts of plunder of public or private property occurred in Vareš after an ABiH attack with the participation of the 7th MMB in November 1993.[248] Consequently, the Chamber concludes that there is sufficient evidence to allow a Trial Chamber to

[242] See in particular P 158, P 188, P 426, P 427, P 589 and P 898.
[243] See in particular the testimony of Witness ZA, Witness ZD and Ivo Kolenda, as well as P 384.
[244] See in particular P 158 and P 589.
[245] See in particular the testimony of Witness ZA and Mijo Marković as well as P 277 and P 424.
[246] See in particular the testimony of Witness ZA, Mijo Marković and Ivo Vuleta.
[247] See in particular P 420, P 424, P 426, P 427 and P 589.
[248] See in particular the testimony of Ulf Henricssion as well as P 445, P 447 and P 450.

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find that the crime of plunder of public or private property in Vareš set out in Count 6 has been proved.

144. In addition, there is sufficient evidence to indicate that the Accused Kubura could have had knowledge of such plunder.[249]

3. Count 7: Destruction or wilful damage of institutions dedicated to religion in the municipality of Travnik

(a) Applicable Law

(i) Submissions of the parties

145. With regard to the questions of law applicable to this Count, the parties made submissions on the competence of the Chamber to consider this Count identical to those submitted on Counts 5 and 6.[250] These submissions will therefore not be repeated here.[251]

(ii) Discussion

146. As has already been stated, the Tribunal can consider only offences that come under international customary law at the time they are committed.[252] In his Report to the Security Council on the establishment of the Tribunal, the Secretary-General points out that Article 3 of the Statute was drafted on the basis of the rules of customary law stemming from the 1907 Hague Convention (IV) and the Regulations annexed thereto which were interpreted and applied by the Nürnberg Tribunal.[253] It is to be noted that the 1907 Hague Convention (IV) and the Regulations annexed thereto apply to international armed conflicts[254] and that Article 3, including Article 3(d), derives from customary rules applicable to such conflicts. The Chamber also notes that other Chambers, within the framework of cases dealing with the facts in the period from 1992 to 1994, have acknowledged that they are competent to consider this offence within the framework of international armed conflicts.[255] Consequently, the Chamber concludes that it is competent to consider the offence of destruction or wilful damage of institutions dedicated to religion, set out in

[249] See in particular P 446 and P 447.
[250] See paras. 92-93 and 122.
[251] As for Counts 5 and 6, the Defence for the Accused Hadžihasanović also submits in its Motion the constituent elements of the crime of destruction or wilful damage of institutions dedicated to religion. Annex A to the Motion of the Accused Hadžihasanović, paras. 68-70. In its Response the Prosecution too refers to a prior written submission in which it presented the constituent elements of destruction and wilful damage to institutions dedicated to religion. Response, para. 9 and "Prosecution's Submissions Concerning Armed Conflict and Elements of Crime" of 2 July 2004, paras. 29-35.
[252] See para. 94.
[253] Report of the Secretary-General Pursuant to Paragraph 2 of Security Council resolution 808 (1993), paras. 41-44.
[254] See for example *Tadić* Decision on Jurisdiction, para. 89.
[255] *Kordić* Judgement, paras. 358-362 and *Blaškić* Judgement, para. 185.

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Article 3(d) of the Statute, in respect of acts committed within the framework of international armed conflicts.

147. With regard to non-international armed conflicts, a decision of the Appeals Chamber set out as a principle that one cannot deny that customary rules emerged in order to regulate internal conflicts, and that these rules cover domains such as the protection of private property "in particular cultural property".[256] This Decision also refers to Article 19 of the Hague Convention of 14 May 1954 on the protection of cultural property in the event of an armed conflict, which stipulates that in "the event of an armed conflict not of an international character [. . .] each party to the conflict shall be bound to apply, as a minimum, the provisions of the [. . .] Convention which relate to respect for cultural property."[257] The Appeals Chamber explained as part of a discussion of the law applicable to the conflicts in former Yugoslavia, that Article 19 came under customary law regulating non-international armed conflicts[258] and that "customary international law imposes criminal liability for [. . .] breaching certain fundamental principles and rules regarding means and methods of combat in civil strife."[259] In view of case-law, the Chamber concludes that in the event of a non-international conflict the offence of destruction or willful damage of institutions dedicated to religion comes under international customary law at the time of the facts alleged in the Indictment.

148. The question arises as to whether the prohibition of destruction or wilful damage of institutions dedicated to religion can entail the individual criminal responsibility of a person during the period relevant to the Indictment within the framework of a non-international conflict. In view of the general observations of the Appeals Chamber on this subject,[260] this Chamber concludes that the response must be affirmative.

149. On the basis of the above, the Chamber concludes that it is competent to consider the offence of destruction or wilful damage of institutions dedicated to religion set out in Article 3(d) of the Statute within the framework of an international or non-international armed conflict.

150. Finally, the Trial Chamber in the *Kordić* case stated that the crime of destruction or wilful damage of institutions dedicated to religion is constituted when the act "is committed wilfully and the accused intends by his acts to cause the destruction or damage of institutions dedicated to

[256] *Tadić* Decision on Jurisdiction, para. 127.
[257] Article 19 of the Hague Convention of 14 May 1954 on the protection of cultural property in the event of an armed conflict. With regard to cultural property, this Convention offers the following definition: "movable or immovable property of great importance to the cultural heritage of every people, such as [religious monuments. . .". Article 1 of the Hague Convention of 14 May 1954 on the protection of cultural property in the event of an armed conflict.
[258] *Tadić* Decision on Jurisdiction, para. 98.
[259] *Tadić* Decision on Jurisdiction, para. 134
[260] *Tadić* Decision on Jurisdiction, para. 128-136.

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religion [. . .] and [which are] not used for a military purpose".[261] At this stage of the trial the Chamber provisionally subscribes to that definition of this crime in the event of both an international or non-international armed conflict.

(b) Examination of the motions in respect of Count 7: destruction or wilful damage of institutions dedicated to religion in the municipality of Travnik

(i) Submissions of the parties

151. The Defence for the Accused Hadžihasanović first submits that there is no evidence on the destruction of buildings dedicated to religion in Guča Gora and Travnik.[262] It adds that in view of the evidence tendered, the Chamber could not conclude beyond reasonable doubt that a superior-subordinate relationship existed between the Accused Hadžihasanović and the perpetrators of the damage to the religious buildings in Guča Gora and Travnik, or that the accused Hadžihasanović failed to take the appropriate measures to prevent or punish such acts.[263] It submits that the damage to "Travnik Church does not surpass the minimum requisite level to constitute a war crime in the meaning of the Statute and [International Humanitarian Law.]"[264]

152. The Prosecution responds that there is evidence that establishes that religious buildings in the zones under ABiH control in Guča Gora and Travnik were damaged throughout the Indictment period.[265]

(ii) Discussion

a. Guča Gora

153. Sufficient evidence has been adduced that the buildings dedicated to religion in Guča Gora in the zone under ABiH control were damaged in June 1993.[266] Consequently, the Chamber concludes that there is sufficient evidence to allow a Trial Chamber to find that the crime of destruction or wilful damage to institutions dedicated to religion in Guča Gora set out in Count 7 has been proved.

[261] *Kordić* Judgement, para. 361.
[262] Motion of the Accused Hadžihasanović, para. 141.
[263] Motion of the Accused Hadžihasanović, paras. 141 and 142.
[264] Motion of the Accused Hadžihasanović, para. 142.
[265] Response, paras. 96 and 109.
[266] See in particular the testimony of Jasenko Eminović and Hendrik Morsink as well as P 164.

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154. In addition, there is sufficient evidence that the Accused Hadžihasanović could have had knowledge of such acts of damage.[267]

b. Travnik

155. There is sufficient evidence that the church in the town of Travnik in the zone under ABiH control was damaged in June 1993.[268] Consequently, the Chamber concludes that there is sufficient evidence to allow a Trial Chamber to find that the crime of destruction or wilful damage to institutions dedicated to religion in the town of Travnik set out in Count 7 has been proved.

156. In addition, there is sufficient evidence that the Accused Hadžihasanović could have had knowledge of such acts of damage.[269]

D. Criminal responsibility of the Accused under Article 7(3) of Statute

1. Applicable law

(a) Submissions of the parties

157. The Defence for the Accused Hadžihasanović first submits that the constituent elements of Article 7(3) of the Statute are: a) that a violation as determined by the Statute has been committed, b) evidence that a superior-subordinate relationship existed between the Accused and the perpetrators of that violation, c) evidence that the Accused knew or had reason to know that his subordinates were about to commit such a violation, and d) evidence that the Accused failed to take the necessary and reasonable measures to prevent his subordinates from committing such a violation or to punish the perpetrators thereof.[270] It submits that there is a superior-subordinate relationship if the commander has effective control over the perpetrator at the time the alleged violation was committed. That effective control can be *de jure* or *de facto* and is defined as "the material ability [of the commander] to prevent the alleged perpetrator from committing the violation or to punish him". The Defence also recalls that the possibility of preventing or punishing may take different forms and is more a matter of facts than of law.[271] Furthermore, the Defence for the Accused Hadžihasanović provides specific examples of the exercise of such control[272] and submits

[267] See in particular the testimony of Hendrik Morsink as well as P 164.
[268] See in particular the testimony of Mirko Ivkić as well as P 388.
[269] See in particular the testimony of Mirko Ivkić as well as P 159.
[270] Annex A to the Motion of the Accused Hadžihasanović, para. 4.
[271] Annex A to the Motion of the Accused Hadžihasanović, paras. 7-15.
[272] Annex A to the Motion of the Accused Hadžihasanović, para. 16.

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that "if a commander can prevent the alleged perpetrator from committing a violation only by the use of force, the commander does not exercise effective control over the latter or his unit".[273] It also asserts that "the identity of the alleged perpetrator is a very important matter when establishing if a superior-subordinate relationship existed between the perpetrator and the commander".[274]

158. The Defence for the Accused Hadžihasanović submits that the requisite knowledge as set in Article 7(3) of the Statute contains two distinct concepts, "knowing" – that is actual knowledge established by direct or circumstantial evidence – and "had reason to know" which requires evidence that (1) the commander had elements of information, and (2) that such information was sufficient to require that he take supplementary measures to obtain further information".[275] The Defence for the Accused Hadžihasanović points out, in particular, that the concept "had reason to know" differs from the concept "should have known" since the latter does not require evidence that the commander had elements of information.[276] The Defence for the Accused Hadžihasanović submits that the commander's knowledge must refer either to the fact that "the alleged perpetrator, a subordinate over whom he exercised effective control, was about to commit a crime" or that "the alleged perpetrator, […] had committed a crime". It asserts, however, that Article 7(3) does not require that commander have knowledge of the possibility of the commission of a crime by his subordinates.[277]

159. The Defence maintains that the main element of the trial is the demonstration that the Accused Hadžihasanović failed to take the necessary and reasonable measures within the meaning of Article 7(3) of the Statute.[278] It notes in particular that those measures must be assessed in accordance with the commander's position and rank and that Article 7(3) does not oblige the commander to achieve results.[279] The Defence for the Accused Hadžihasanović also asserts that Article 7(3) of the Statute does not include measures to "prevent" violations from being committed since the commander, at that time, does not satisfy the criterion according to which he 'knew or had reason to know' that a subordinate was about to or had committed a violation. It considers that a failure to respect his obligations to take preventative measures would instead be a violation under Article 7(1) of the Statute.[280] It refers to the test used the *Yamashita* case and infers that in order to assess the responsibility of a commander accused solely under Article 7(3) of the Statute, it is

[273] Annex A to the Motion of the Accused Hadžihasanović, para. 17.
[274] Annex A to the Motion of the Accused Hadžihasanović, para. 18.
[275] Annex A to the Motion of the Accused Hadžihasanović, paras. 19-23.
[276] Annex A to the Motion of the Accused Hadžihasanović, para. 24.
[277] Annex A to the Motion of the Accused Hadžihasanović, paras. 25 and 26.
[278] Motion of the Accused Hadžihasanović, para. 35.
[279] Annex A to the Motion of the Accused Hadžihasanović, paras. 35, 37 and 32; see paras. 31-47 for the entire line of reasoning.
[280] Annex A to the Motion of the Accused Hadžihasanović, paras. 42 and 43.

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necessary to consider "the number and type of violations committed at the time […], all the measures taken by a commander to avert [...] or prevent the commission of violations, or to make sure that the alleged perpetrators are treated pursuant to the laws and rules in force […]; and […] the relationship between the violations at the time and the measures taken as compared to the test elaborated in the *Yamashita* case [...]".[281]

160. The Defence for the Accused Kubura also recalls the same four constituent elements of Article 7(3) of the Statute.[282]

161. In its Pre-Trial Brief, the Prosecution addressed the constituent elements of Article 7(3) of the Statute in detail.[283] Taking into consideration the Appeals Judgement of 29 July 2004 in the *Blaškić* case, it provided additional clarification in its Response, particularly concerning the concept of effective control, the *mens rea* "had reason to know" and the legal aspect of "failure to punish".[284] With respect to evidence of failure to act, more particularly evidence of failure to prevent or punish, within the meaning of Article 7(3) of the Statute, the Prosecution argues that the evidence may be direct or circumstantial. In the latter case, it submits that "the Prosecution must present sufficient evidence to demonstrate *prima facie* that the Accused has failed in his duty to act. One this *prima facie* showing has been made at the Rule 98 *bis* stage, the Defence has a case to answer with respect to this issue".[285] It maintains that this "situation is analogous to the shifting of an *evidentiary* burden".[286] In this respect, the Prosecution relies on a distinction between the legal burden of proof and the evidentiary burden of proof and maintains that the latter may be shifted to the Accused "where [the burden of proof] relates to something likely to be within the Accused's knowledge or to which he has ready access".[287]

162. In its Reply, the Defence for the Accused Hadžihasanović responds, *inter alia*, to the Prosecution's arguments regarding the proof of failure to act and the shift in the burden of proof. It asserts that obliging the Accused to demonstrate in the Defence case the steps taken to satisfy his duty to act is a reversal of the burden of proof.[288] It also asserts that the Accused bears no burden of proof.[289]

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[281] Annex A to the Motion of the Accused Hadžihasanović, paras. 48 and 49.
[282] Motion of the Accused Kubura, para. 3.
[283] Prosecution Pre-Trial Brief, paras. 11-16.
[284] Response, paras. 7 and 8.
[285] Response, para. 16.
[286] Response, footnote 27.
[287] Response, footnote 27.
[288] Reply of the Accused Hadžihasanović, para. 3 (emphasis in the original).
[289] Reply of the Accused Hadžihasanović, para. 6.

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(b) Discussion

163. The Chamber considers that the constituent elements of criminal responsibility within the meaning of Article 7(3) of the Statute are well established in the Tribunal's case-law: i) a superior-subordinate relationship between the Accused and the alleged perpetrator or perpetrators of crimes falling within the jurisprudence of the Tribunal; ii) the fact that the Accused knew or had reason to know that the perpetrator was about to commit the criminal act or had already done so (knowledge); and iii) the fact that the Accused did not take the necessary and reasonable measures to prevent the criminal act from being committed or to punish the perpetrators thereof.[290]

164. The decisive criterion for establishing the superior-subordinate link is "effective control" of the superior over his subordinates, in other words, the material capacity to prevent or punish the acts.[291] The criterion of "effective control" applies to both *de jure* and *de facto* superiors.[292] According to the Appeals Chamber in the *Čelebići* case, effective control can be exercised only when the superior has a higher rank than the alleged perpetrator of the crimes. In this respect, it referred to "the necessity to prove that the perpetrator was the 'subordinate' of the accused".[293] The Appeals Chamber in the *Blaškić* case found that effective control is more a matter of evidence than of law and that "those indicators [of effective control] are limited to showing that the accused had the power to prevent, punish, or initiate measures leading to proceedings against the alleged perpetrators where appropriate".[294]

165. With regard to the knowledge of the superior, the principle of command responsibility does not establish a strict form of liability for a superior who did not prevent his subordinates from committing crimes or did not punish the perpetrators of those crimes.[295] Consequently, a superior could not be held criminally responsible for not making sure that he was informed of the acts of his subordinates.[296] However, the case-law of the Tribunal states that *mens rea* "had reason to know" is established if the superior had specific information alerting him to offences committed by his subordinates.[297] As an example, it held that *mens rea* was established "[when] a military commander […] 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".[298]

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[290] *Čelebići* Appeals Judgement, paras. 186-198, 266.
[291] *Čelebići* Appeals Judgement, paras. 196, 197, 256; *Blaškić* Appeals Judgement, para. 67.
[292] *Čelebići* Appeals Judgement, para. 197.
[293] *Čelebići* Appeals Judgement, para. 303.
[294] *Blaškić* Appeals Judgement, para. 69.
[295] *Čelebići* Judgement, para. 383, confirmed by the Appeals Chamber in the *Čelebići* Appeals Judgement, para. 239.
[296] *Čelebići* Appeals Judgement, paras. 226, 230; *Blaškić* Appeals Judgement, paras. 62 and 63.
[297] *Čelebići* Appeals Judgement, para. 241.
[298] *Čelebići* Appeals Judgement, para. 238.

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166. The superior's material capacity to prevent or punish must be taken as a basis when determining the necessary and reasonable measures under Article 7(3) of the Statute.[299] Once again, this is more a matter of fact than of law.[300] With respect to the scope of the obligation to prevent crimes committed by his subordinates, the Trial Chamber in the *Kordić* and *Čerkez* case held that "the duty to prevent should be understood as resting on a superior at any stage before the commission of a subordinate crime if he acquires knowledge that such a crime is being prepared or planned, or when he has reasonable grounds to suspect subordinate crimes".[301]

167. With regard to proof of failure to act, the Chamber draws attention to the fundamental principle of the Tribunal's case-law that an accused shall be presumed innocent until proved guilty as set out in the Statute.[302] This means that the burden of proof lies with the Prosecution which must demonstrate beyond reasonable doubt that the Accused failed in his obligations under Article 7(3) of the Statute. Nevertheless, in the case in point, the Chamber is not obliged to rule on how the Prosecution fulfilled this duty but rather on whether in view of the standard applicable according to Rule 98 *bis* of the Rules there is sufficient evidence of a "*a case to answer*", in other words, sufficient evidence to require the Defence to respond. This question of fact will be examined below.

2. Examination of the motions in respect of command responsibility pursuant to Article 7(3) of the Statute

(a) Submissions of the parties

168. The parties' submissions on the evidence in respect of subordination and the alleged knowledge which the Accused had about the offences committed by their subordinates and the Chamber's position on these issues have been presented in the sections dealing with Counts 1 to 7. Furthermore, the parties submitted arguments to the Chamber regarding the Accused's alleged control over the Mujahedin fighters who are presumed guilty of having committed certain crimes set out in the Indictment.[303] Those arguments relate particularly to the Mujahedins' incorporation into the 3rd Corps and the 7th MMB. Since the Chamber has already found that sufficient evidence has been adduced on each incident alleged to establish a superior-subordinate relationship between the Accused and the alleged perpetrators of the crimes, as discussed in the sections dealing with Counts 1 to 7, the Chamber considers that there is no need for a general discussion of the question of the Mujahedins' subordination to the 3rd Corps command at this stage.

[299] *Čelebići* Judgement, para. 335; *Blaškić* Appeals Judgement, para. 72.
[300] *Blaškić* Appeals Judgement, para. 72.
[301] *Kordić* Judgement, para. 445.
[302] Article 21(3) of the Statute.
[303] Response, paras. 32-51; Reply of the Accused Hadžihasanović, paras. 19-31 ; Reply of the Accused Kubura, paras. 33-39.

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169. With regard to the necessary and reasonable measures within the meaning of Article 7(3) of the Statute, the Defence for the Accused Hadžihasanović submits that the evidence admitted into the record demonstrates that the Accused was a responsible commander.[304] It submits that the Accused Hadžihasanović took an increasing number of measures, particularly to ensure that his subordinates knew and respected the law, including international humanitarian law, to enforce discipline within the 3rd Corps, to implement a reporting system and to improve the exchange of information, to establish a legal service and a system of military justice within the 3rd Corps command, to organise inspections of the units of the 3rd Corps, to ensure the protection of persons *hors de combat* of civilians and property, to investigate allegations of violations, to instigate disciplinary and criminal proceedings against members of the 3rd Corps suspected of having committed violations, to ensure co-operation between the 3rd Corps and its subordinate units and the civilian authorities and in order to guarantee security and carry out investigations, to ensure the co-operation of the 3rd Corps with all the international organisations in Central Bosnia and to promote the peaceful resolution of the conflict.[305] However, the main argument of the Defence for the Accused Hadžihasanović is the lack of evidence that the Accused Hadžihasanović failed in his obligations under Article 7(3) of the Statute.[306] It submits that, given the judicial process available to the Accused to take measures to prevent or punish the violations allegedly committed by his subordinates, and in view of the many complaints filed with those authorities and the way in which the Prosecution carried out its investigations in Central Bosnia, it would be impossible to conclude beyond reasonable doubt that the Accused did not take any measures with regard to the violations alleged in the Indictment.[307]

170. The Defence for the Accused Kubura did not make any factual submissions regarding the necessary and reasonable measures within the meaning of Article 7(3) of the Statute.

171. With regard to the necessary and reasonable measures, the Prosecution submits that it conducted an investigation into the files found in the offices of the Public Prosecutor in Zenica and Travnik but that none of the files related to the crimes or violations alleged in the Indictment.[308] Furthermore, it submits that the cases brought before the District Military Courts by the 3rd Corps involved only crimes committed on the front line or reports of murders or accidental killings.[309] It notes that the witness Kapetanović did not recall a single case being referred from the 3rd Corps for

[304] Motion of the Accused Hadžihasanović, para. 50.
[305] Motion of the Accused Hadžihasanović, paras. 52-66.
[306] Motion of the Accused Hadžihasanović, para. 67.
[307] Motion of the Accused Hadžihasanović, paras. 67-79.
[308] Response, paras. 23-26.
[309] Response, para. 21.

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prosecution involving Bosnian Croat victims with ABiH perpetrators.[310] The Prosecution maintains that all the investigations of measures taken demonstrated that the 3rd Corps did not report any case concerning the serious violations alleged in the Indictment to the relevant courts.[311]

(b) Discussion

172. The Chamber observes that, in view of the stage of the proceedings and the applicable standard pursuant to Rule 98 *bis* of the Rules, sufficient evidence has been adduced of the failure of the two Accused to respect their obligation to prevent or punish the violations committed by subordinates alleged in the Indictment.[312] The Chamber thus concludes that there is sufficient evidence to allow a Trial Chamber to find that the Accused failed in their obligation under Article 7(3) of the Statute.

E. Conclusion

173. The Chamber concludes that the Prosecution has adduced sufficient evidence to satisfy the requirement of Rule 98 *bis* of the Rules for all the counts against the Accused except, as indicated above, in respect of certain allegations.

[310] Response, para. 21.
[311] Response, para. 26.
[312] See in particular the testimony of Sulejman Kapetanović and Vlado Adamović.

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IV. DISPOSITION

For the foregoing reasons,

TRIAL CHAMBER II :

PURSUANT TO Rule 98 *bis* of the Rules,

ACQUITS the Accused Hadžihasanović on the part of Count 2 of the Indictment concerning cruel treatment in Dusina on 26 January 1993 in respect of his individual criminal responsibility under Article 7(3) of the Statute,

ACQUITS the Accused Hadžihasanović and Kubura on the part of Count 2 of the Indictment concerning cruel treatment in Miletići on 24 April 1993 in respect of their individual criminal responsibility under Article 7(3) of the Statute,

ACQUITS the Accused Hadžihasanović and Kubura on the part of Count 2 of the Indictment concerning cruel treatment in Maline on 8 June 1993 in respect of their individual criminal responsibility under Article 7(3) of the Statute,

ACQUITS the Accused Hadžihasanović and Kubura on the part of Count 3 of the Indictment concerning the killing of Jozo Maračić at Zenica Music School on 18 June 1993 in respect of their individual criminal responsibility under Article 7(3) of the Statute,

ACQUITS the Accused Hadžihasanović on the part of Count 3 of the Indictment concerning the killing of a Croatian detainee in the Former JNA Barracks in Travnik in May 1993 in respect of his individual criminal responsibility under Article 7(3) of the Statute,

ACQUITS the Accused Hadžihasanović and Kubura on the part of Count 5 of the Indictment concerning the wanton destruction of towns and villages unjustified by military necessity in April 1993 in respect of their individual criminal responsibility under Article 7(3) of the Statute,

TAKES NOTE of the Prosecution's withdrawal of the part of Count 5 of the Indictment concerning the wanton destruction of towns and villages unjustified by military necessity in Dusina in January 1993 in respect of the individual criminal responsibility of the Accused Hadžihasanović under Article 7(3) of the Statute,

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TAKES NOTE of the Prosecution's withdrawal of the part of Count 6 of the Indictment concerning pillage in Dusina in January 1993 in respect of the individual criminal responsibility of the Accused Hadžihasanović under Article 7(3) of the Statute,

REJECTS the remainder of the motions for acquittal.

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

_____
Judge Jean-Claude Antonetti
Presiding Judge of the Chamber

Done this twenty-seventh day of September 2004
At The Hague
The Netherlands

[Seal of the Tribunal]

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