UNITED NATIONS

	International Tribunal for the Prosecution of Persons Responsible for Serious Violations of International Humanitarian Law Committed in the Territory of the Former Yugoslavia since 1991	Case No.	IT-01-47-A
		Date:	22 April 2008
		Original:	English

IN THE APPEALS CHAMBER

Before: **Judge Fausto Pocar, Presiding**
Judge Mohamed Shahabuddeen
Judge Mehmet Güney
Judge Liu Daqun
Judge Theodor Meron

Registrar: **Mr. Hans Holthuis**

Judgement of: **22 April 2008**

PROSECUTOR

v.

ENVER HADŽIHASANOVIĆ
AMIR KUBURA

PUBLIC

JUDGEMENT

The Office of the Prosecutor:

Mr. Peter Kremer
Ms. Shelagh McCall
Mr. Marwan Dalal
Mr. Xavier Tracol
Ms. Barbara Goy
Mr. Steffen Wirth
Ms. Katharina Margetts
Mr. Matteo Costi

Counsel for the Defence:

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

I. INTRODUCTION

1. The Appeals 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 ("Appeals Chamber" and "International Tribunal", respectively) is seised of three appeals[1] from the Judgement rendered by Trial Chamber II ("Trial Chamber") on 15 March 2006, in the case of *Prosecutor v. Enver Hadžihasanović and Amir Kubura*, Case No. IT-01-47-T ("Trial Judgement").

2. The Appellant Enver Hadžihasanović ("Hadžihasanović") was born on 7 July 1950 in Zvornik, Zvornik municipality, Bosnia and Herzegovina. He is a former officer in the Yugoslav People's Army ("JNA") who, after graduating from the Belgrade Land Forces Military Academy in 1973, was assigned to JNA posts in Tuzla and Sarajevo.[2] In 1988, he was appointed Chief of Staff of the 49th Motorised Brigade and was appointed its commander in late 1989. While in that position, Hadžihasanović achieved the rank of Lieutenant Colonel.[3] After leaving the JNA, Hadžihasanović joined the Territorial Defence of Bosnia and Herzegovina in early April 1992 and was subsequently appointed Chief of Staff of the 1st Corps of the Army of Bosnia and Herzegovina ("ABiH") on 1 September 1992.[4] He was appointed Commander of the 3rd Corps by Sefer Halilović in mid-November 1992, a post he held until 1 November 1993, when he was promoted to Chief of the ABiH Supreme Main Command Staff.[5] He was replaced in this post by Mehmed Alagić.[6] In December 1993, Hadžihasanović was promoted to the rank of Brigadier General and became a member of the Joint Command of the Army of the Federation of Bosnia and Herzegovina.[7]

3. The Appellant Amir Kubura ("Kubura") was born on 4 March 1964 in Kakanj, Bosnia and Herzegovina.[8] He is a former professional officer of the JNA who, after completing training at the Academy for Ground Forces, served for five years as a JNA officer in Đakovica in the province of Kosovo. In 1992, he left the JNA, holding the rank of Captain,[9] and joined the newly created ABiH as the Deputy Commander of a detachment in Kakanj. Later, he was appointed Commander of an ABiH mountain battalion in the same area. On 11 December 1992, Kubura was assigned to the ABiH 3rd Corps 7th Muslim Mountain Brigade ("7th Brigade") and posted as Assistant Chief of Staff

[1] Kubura Notice of Appeal, 13 April 2006; Hadžihasanović Notice of Appeal, 18 April 2006; Prosecution Notice of Appeal, 18 April 2006.
[2] Trial Judgement, para. 1.
[3] Trial Judgement, para. 1.
[4] Trial Judgement, para. 2.
[5] Trial Judgement, para. 2.
[6] Trial Judgement, para. 2.
[7] Trial Judgement, para. 3.
[8] Trial Judgement, para. 4.
[9] Trial Judgement, para. 4.

for Operations and Instruction Matters. On 12 March 1993, Sefer Halilović ordered that Kubura be appointed Chief of Staff and Deputy Commander of the 7th Brigade.[10] On 16 March 1994, Kubura, then a colonel, was appointed Commander of the ABiH 1st Corps 1st Muslim Mountain Brigade. On 16 December 1995, he was appointed Commander of the ABiH 4th Corps 443rd Brigade. In June 1999, he became a member of the Command Staff of the ABiH 1st Corps.[11]

4. Hadžihasanović and Kubura were tried on the basis of the Third Amended Indictment of 26 September 2003 ("Indictment"). On 15 March 2006, the Trial Chamber found Hadžihasanović guilty, pursuant to Articles 3 and 7(3) of the Statute, for having failed to prevent or punish the offences of murder committed by his subordinates in Bugojno and at the Orašac Camp (Count 3); and cruel treatment committed by his subordinates at the Zenica Music School, at the Orašac Camp and at various detention centres in Bugojno (Count 4). The Trial Chamber acquitted Hadžihasanović on all other counts of the Indictment.[12] The Trial Chamber sentenced Hadžihasanović to a single term of five years of imprisonment.[13] Hadžihasanović has appealed the Trial Judgement, seeking the reversal of the convictions against him.[14] The Prosecution has not appealed Hadžihasanović's acquittals but has appealed the sentence imposed on Hadžihasanović.[15]

5. On 15 March 2006, the Trial Chamber found Kubura guilty, pursuant to Articles 3 and 7(3) of the Statute, for having failed to prevent or punish plundering committed by his subordinates in the villages in the Ovnak area and in the village of Vareš (Count 6). The Trial Chamber acquitted Kubura on all other counts of the Indictment.[16] Kubura was sentenced to a single term of imprisonment of two years and six months.[17] Kubura has appealed his conviction and sentence.[18] The Prosecution has appealed Kubura's acquittal under Count 5, regarding wanton destruction in the town of Vareš in November 1993, and the sentence imposed against him.

6. The Appeals Chamber heard oral submissions of the Parties regarding these appeals on 4 and 5 December 2007. Having considered their written and oral submissions, the Appeals Chamber hereby renders its Judgement.

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[10] Trial Judgement, para. 5.
[11] Trial Judgement, para. 6.
[12] Trial Judgement, Disposition.
[13] Trial Judgement, para. 2085.
[14] Hadžihasanović Notice of Appeal, 13 April 2006; Hadžihasanović Appeal Brief (Confidential), 5 February 2007 (Public Redacted Version filed on 18 May 2007).
[15] Prosecution Notice of Appeal, 18 April 2006; Prosecution Appeal Brief, 3 July 2006.
[16] Trial Judgement, Disposition.
[17] Trial Judgement, para. 2093.
[18] Kubura Notice of Appeal, 13 April 2006; Kubura Appeal Brief, 22 January 2007.

II. STANDARD OF APPELLATE REVIEW

7. On appeal, the Parties must limit their arguments to legal errors that invalidate the judgement of the Trial Chamber and to factual errors that result in a miscarriage of justice within the scope of Article 25 of the Statute. These criteria are well established by the Appeals Chambers of both the International Tribunal[19] and the International Criminal Tribunal for Rwanda ("ICTR").[20] In exceptional circumstances, the Appeals Chamber will also hear appeals where a party has raised a legal issue that would not lead to invalidation of the judgement, but is nevertheless of general significance to the International Tribunal's jurisprudence.[21]

8. A party alleging an error of law must identify the alleged error, present arguments in support of its claim and explain how the error invalidates the judgement. An allegation of an error of law which has no chance of changing the outcome of a judgement may be rejected on that ground.[22] Even if the party's arguments are insufficient to support the contention of an error, however, the Appeals Chamber may conclude for other reasons that there is an error of law.[23]

9. The Appeals Chamber reviews the Trial Chamber's findings of law to determine whether or not they are correct.[24] Where the Appeals Chamber finds an error of law in the Trial Judgement arising from the application of the wrong legal standard by the Trial Chamber, the Appeals Chamber will articulate the correct legal standard and review the relevant factual findings of the

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[19] *Halilović* Appeal Judgement, para. 6; *Limaj et al.* Appeal Judgement, para. 8; *Blagojević and Jokić* Appeal Judgement, para. 6; *Brđanin* Appeal Judgement, para. 8; *Galić* Appeal Judgement, para. 6; *Stakić* Appeal Judgement, para. 7; *Kvočka et al.* Appeal Judgement, para. 14; *Vasiljević* Appeal Judgement, paras 4-12; *Kunarac et al.* Appeal Judgement, paras 35-48; *Kupreškić et al.* Appeal Judgement, para. 29; *Čelebići* Appeal Judgement, paras 434-435; *Furundžija* Appeal Judgement, paras 34-40; *Tadić* Appeal Judgement, para. 64.

[20] *Seromba* Appeal Judgement, para. 9; *Nahimana et al.* Appeal Judgement, para. 11; *Muhimana* Appeal Judgement, para. 6; *Kajelijeli* Appeal Judgement, para. 5; *Semanza* Appeal Judgement, para. 7; *Musema* Appeal Judgement, para. 15; *Akayesu* Appeal Judgement, para. 178; *Kayishema and Ruzindana* Appeal Judgement, paras 177, 320. Under the Statute of the ICTR, the relevant provision is Article 24.

[21] *Halilović* Appeal Judgement, para. 6; *Limaj et al.* Appeal Judgement, para. 8; *Blagojević and Jokić* Appeal Judgement, para. 6; *Brđanin* Appeal Judgement, para. 8; *Galić* Appeal Judgement, para. 6; *Stakić* Appeal Judgement, para. 7; *Kupreškić et al.* Appeal Judgement, para. 22; *Tadić* Appeal Judgement, para. 247. *See* also *Nahimana et al.* Appeal Judgement, para. 12.

[22] *Halilović* Appeal Judgement, para. 7; *Limaj et al.* Appeal Judgement, para. 9; *Blagojević and Jokić* Appeal Judgement, para. 7; *Brđanin* Appeal Judgement, para. 9; *Galić* Appeal Judgement, para. 7; *Stakić* Appeal Judgement, para. 8; *Kvočka et al.* Appeal Judgement para. 16, citing *Krnojelac* Appeal Judgement, para. 10.

[23] *Halilović* Appeal Judgement, para. 7; *Limaj et al.* Appeal Judgement, para. 9; *Blagojević and Jokić* Appeal Judgement, para. 7; *Brđanin* Appeal Judgement, para. 9; *Galić* Appeal Judgement, para. 7; *Stakić* Appeal Judgement, para. 8; *Kvočka et al.* Appeal Judgement, para. 16; *Kordić and Čerkez* Appeal Judgement, para. 16; *Vasiljević* Appeal Judgement, para. 6; *Kupreškić et al.* Appeal Judgement, para. 26. *See* also *Seromba* Appeal Judgement, para. 10; *Nahimana et al.* Appeal Judgement, para. 12; *Muhimana* Appeal Judgement, para. 7; *Gacumbitsi* Appeal Judgement, para. 7; *Ntagerura et al.* Appeal Judgement, para. 11; *Semanza* Appeal Judgement, para. 7; *Kambanda* Appeal Judgement, para. 98.

[24] *Halilović* Appeal Judgement, para. 8; *Limaj et al.* Appeal Judgement, para. 10; *Blagojević and Jokić* Appeal Judgement, para. 8; *Brđanin* Appeal Judgement, para. 10; *Galić* Appeal Judgement, para. 8; *Stakić* Appeal Judgement, para. 9; *Krnojelac* Appeal Judgement, para. 10.

Trial Chamber accordingly.[25] In so doing, the Appeals Chamber not only corrects the legal error, but applies the correct legal standard to the evidence contained in the trial record, where necessary, and determines whether it is itself convinced beyond reasonable doubt as to the factual finding challenged by the appellant before that finding is confirmed on appeal.[26] The Appeals Chamber will not review the entire trial record *de novo*. Rather, it will in principle only take into account evidence referred to by the Trial Chamber in the body of the judgement or in a related footnote, evidence contained in the trial record and referred to by the parties, and additional evidence admitted on appeal.[27]

10. When considering alleged errors of fact, the Appeals Chamber will apply a standard of reasonableness. Only an error of fact which has occasioned a miscarriage of justice will cause the Appeals Chamber to overturn a decision by the Trial Chamber.[28] In reviewing the findings of the Trial Chamber, the Appeals Chamber will only substitute its own findings for that of the Trial Chamber when no reasonable trier of fact could have reached the original decision.[29] The Appeals Chamber applies the same reasonableness standard to alleged errors of fact regardless of whether the finding of fact was based on direct or circumstantial evidence.[30]

11. In determining whether or not a Trial Chamber's finding was one that no reasonable trier of fact could have reached, the Appeals Chamber "will not lightly disturb findings of fact by a Trial

[25] *Halilović* Appeal Judgement, para. 8; *Limaj et al.* Appeal Judgement, para. 10; *Blagojević and Jokić* Appeal Judgement, para. 8; *Brđanin* Appeal Judgement, para. 10; *Galić* Appeal Judgement, para. 8; *Stakić* Appeal Judgement, para. 9; *Kvočka et al.* Appeal Judgement, para. 17; *Kordić and Čerkez* Appeal Judgement, para. 17; *Blaškić* Appeal Judgement, para. 15. *See* also *Nahimana et al.*, Appeal Judgement, para. 13.

[26] *Halilović* Appeal Judgement, para. 8; *Limaj et al.* Appeal Judgement, para. 10; *Blagojević and Jokić* Appeal Judgement, para. 8; *Brđanin* Appeal Judgement, para. 10; *Galić* Appeal Judgement, para. 8; *Stakić* Appeal Judgement, para. 9; *Kvočka et al.* Appeal Judgement, para. 17; *Kordić and Čerkez* Appeal Judgement, para. 17; *Blaškić* Appeal Judgement, para. 15. *See* also *Nahimana et al.*, Appeal Judgement, para. 13.

[27] *Brđanin* Appeal Judgement, para. 15; *Galić* Appeal Judgement, para. 8; *Stakić* Appeal Judgement, para. 9; *Blaškić* Appeal Judgement, para. 13; *Kordić and Čerkez* Appeal Judgement, para. 21, fn. 12.

[28] *Halilović* Appeal Judgement, para. 9; *Simić* Appeal Judgement, para. 10; *Kvočka et al.* Appeal Judgement, para. 18; *Vasiljević* Appeal Judgement, para. 8. *See* also *Seromba* Appeal Judgement, para. 11 ; *Muhimana* Appeal Judgement, para. 6; *Kamuhanda* Appeal Judgement, para. 6; *Kajelijeli* Appeal Judgement, para. 5.

[29] *Halilović* Appeal Judgement, para. 9; *Limaj et al.* Appeal Judgement, para. 12; *Blagojević and Jokić* Appeal Judgement, para. 9; *Brđanin* Appeal Judgement, para. 13; *Galić* Appeal Judgement, para. 9; *Stakić* Appeal Judgement, para. 10; *Kvočka et al.* Appeal Judgement, para. 18; *Kordić and Čerkez* Appeal Judgement, para. 18; *Blaškić* Appeal Judgement, para. 16; *Čelebići* Appeal Judgement, para. 435; *Furundžija* Appeal Judgement, para. 37; *Aleksovski* Appeal Judgement, para. 63; *Tadić* Appeal Judgement, para. 64. *See* also *Seromba* Appeal Judgement, para. 11 ; *Nahimana et al.*, Appeal Judgement, para. 14.

[30] *Limaj et al.* Appeal Judgement, para. 12; *Blagojević and Jokić* Appeal Judgement, para. 226; *Brđanin* Appeal Judgement, para. 13; *Galić* Appeal Judgement, para. 9; *Stakić* Appeal Judgement, para. 220; *Čelebići* Appeal Judgement, para. 458. Similarly, the type of evidence, direct or circumstantial, is irrelevant to the standard of proof at trial, where the accused may only be found guilty of a crime if the Prosecution has proved each element of that crime and the relevant mode of liability beyond a reasonable doubt. *See Stakić* Appeal Judgement, para. 219; *Čelebići* Appeal Judgement, para. 458.

Chamber".[31] The Appeals Chamber recalls, as a general principle, the approach adopted by the Appeals Chamber in the *Kupreškić et al.* case, according to which:

> Pursuant to the jurisprudence of the Tribunal, the task of hearing, assessing and weighing the evidence presented at trial is left primarily to the Trial Chamber. Thus, the Appeals Chamber must give a margin of deference to a finding of fact reached by a Trial Chamber. Only where the evidence relied on by the Trial Chamber could not have been accepted by any reasonable tribunal of fact or where the evaluation of the evidence is "wholly erroneous" may the Appeals Chamber substitute its own finding for that of the Trial Chamber.[32]

12. The same standard of reasonableness and the same deference to factual findings of the Trial Chamber apply when the Prosecution appeals against an acquittal. Thus, when considering an appeal by the Prosecution, the Appeals Chamber will only hold that an error of fact was committed when it determines that no reasonable trier of fact could have made the impugned finding.[33] However, since the Prosecution must establish the guilt of the accused at trial, the significance of an error of fact occasioning a miscarriage of justice takes on a specific character when alleged by the Prosecution.[34] An accused must show that the Trial Chamber's factual errors create a reasonable doubt as to his guilt. The Prosecution must show that, when account is taken of the errors of fact committed by the Trial Chamber, all reasonable doubt of the accused's guilt has been eliminated.[35]

13. Pursuant to Article 23(2) of the Statute and Rule 98*ter*(C) of the Rules, Trial Chambers have an obligation to set out a reasoned opinion in writing.[36] This right is one of the elements of the fair trial requirement embodied in Articles 20 and 21 of the Statute. In the *Furundzija* Appeal Judgement, the Appeals Chamber held that Article 23 of the Statute treats the right of an accused to a reasoned opinion as one of the elements of the fair trial requirement embodied in Articles 20 and 21 of the Statute.[37] With regard to legal findings, this obligation does not require a Trial

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[31] *Halilović* Appeal Judgement, para. 10; *Limaj et al.* Appeal Judgement, para. 12; *Blagojević and Jokić* Appeal Judgement, para. 9; *Galić* Appeal Judgement, para. 9; *Stakić* Appeal Judgement, para. 10; *Kvočka et al.* Appeal Judgement, para. 19; *Krnojelac* Appeal Judgement, para. 11; *Furundžija* Appeal Judgement, para. 37; *Aleksovski* Appeal Judgement, para. 63; *Tadić* Appeal Judgement, para. 64. *See* also *Seromba* Appeal Judgement, para. 11; *Nahimana et al.*, Appeal Judgement, para. 14; *Muhimana* Appeal Judgement, para. 8; *Kamuhanda* Appeal Judgement, para. 7; *Kajelijeli* Appeal Judgement, para. 5; *Ntakirutimana* Appeal Judgement, para. 12; *Musema* Appeal Judgement, para. 18.

[32] *Kupreškić et al.* Appeal Judgement, para. 30. *See also Halilović* Appeal Judgement, para. 10; *Limaj et al.* Appeal Judgement, para. 12; *Blagojević and Jokić* Appeal Judgement, para. 9; *Brđanin* Appeal Judgement, para. 14; *Galić* Appeal Judgement, para. 9; *Stakić* Appeal Judgement, para. 10; *Kvočka et al.* Appeal Judgement, para. 19; *Kordić and Čerkez* Appeal Judgement, para. 19, fn. 11; *Blaškić* Appeal Judgement, paras 17-18.

[33] *Limaj et al.* Appeal Judgement, para. 13; *Blagovević and Jokić* Appeal Judgement, para. 9; *Brđanin* Appeal Judgement, para. 14. *See* also *Seromba* Appeal Judgement, para. 11; *Bagilishema* Appeal Judgement, para 13.

[34] *Halilović* Appeal Judgement, para. 11; *Limaj et al.* Appeal Judgement, para. 13; *Krnojelac* Appeal Judgement, para. 14.

[35] *Seromba* Appeal Judgement, para. 11; *Rutaganda* Appeal Judgement, para. 24; *Bagilishema* Appeal Judgement, paras 13-14. *See* also *Halilović* Appeal Judgement, para. 11; *Limaj et al.* Appeal Judgement, para. 13; *Blagojević and Jokić* Appeal Judgement, para. 9; *Brđanin* Appeal Judgement, para. 14.

[36] *Naletilić and Martinović* Appeal Judgement, para. 603; *Kvočka et al.* Appeal Judgement, para. 23; *Kunarac et al.* Appeal Judgement, para. 41; *Furundžija* Appeal Judgement, para. 69.

[37] *Furundžija* Appeal Judgement, para. 69. *See* also *Naletilić and Martinović* Appeal Judgement, para. 603; *Kunarac et al.* Appeal Judgement, para. 41.

Chamber to discuss at length all of the case-law of the International Tribunal on a given legal issue but only to identify the precedents upon which its findings are based. With regard to factual findings, a Trial Chamber is required only to make findings on those facts which are essential to the determination of guilt on a particular count. It is not necessary to refer to the testimony of every witness or every piece of evidence on the trial record.[38] In short, a Trial Chamber should limit itself to indicating in a clear and articulate, yet concise manner, which, among the wealth of jurisprudence available on a given issue and the myriad of facts that emerged at trial, are the legal and factual findings on the basis of which it reached the decision either to convict or acquit an individual. A reasoned opinion consistent with the guidelines provided here allows for a useful exercise of the right of appeal by the Parties and enables the Appeals Chamber to understand and review the Trial Chamber's findings as well as its evaluation of the evidence.[39] While the Appeals Chamber appreciates the care with which the Trial Chamber has expressed itself in the Trial Judgement, the Appeals Chamber is constrained to observe that the Trial Chamber might have been more sparing in its efforts in this respect.

14. On appeal, a party may not merely repeat arguments that did not succeed at trial, unless the party can demonstrate that the Trial Chamber's rejection of them constituted such an error as to warrant the intervention of the Appeals Chamber.[40] Arguments of a party which do not have the potential to cause the impugned judgement to be reversed or revised may be immediately dismissed by the Appeals Chamber and need not be considered on the merits.[41]

15. In order for the Appeals Chamber to assess a party's arguments on appeal, the appealing party is expected to provide precise references to relevant transcript pages or paragraphs in the Trial Judgement to which the challenges are being made.[42] Further, "the Appeals Chamber cannot be

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[38] *Kvocka et al.* Appeal Judgement, para. 23; *Kordić and Čerkez* Appeal Judgement, para. 382; *Kupreškić et al.* Appeal Judgement, para. 39; *Čelebići* Appeal Judgement, para. 498.
[39] *Kunarac et al.* Appeal Judgement, para. 41.
[40] *Halilović* Appeal Judgement, para. 12; *Limaj et al.* Appeal Judgement, para. 14; *Blagojević and Jokić* Appeal Judgement, para. 10; *Brđanin* Appeal Judgement, para. 16; *Galić* Appeal Judgement, para. 10; *Stakić* Appeal Judgement, para. 11; *Blaškić* Appeal Judgement, para. 13. *See* also *Seromba* Appeal Judgement, para. 12; *Muhimana* Appeal Judgement, para. 9; *Gacumbitsi* Appeal Judgement, para. 9; *Kajelijeli* Appeal Judgement, para. 6, citing *Niyitegeka* Appeal Judgement, para. 9; *Rutaganda* Appeal Judgement, para. 18.
[41] *Halilović* Appeal Judgement, para. 12; *Limaj et al.* Appeal Judgement, para. 14; *Blagojević and Jokić* Appeal Judgement, para. 10; *Brđanin* Appeal Judgement, para. 16; *Galić* Appeal Judgement, para. 10; *Stakić* Appeal Judgement, para. 11. *See* also *Seromba* Appeal Judgement, para. 12; *Nahimana et al.* Appeal Judgement, para. 16; *Muhimana* Appeal Judgement, para. 9; *Gacumbitsi* Appeal Judgement, para. 9; *Ntagerura et al.* Appeal Judgement, para. 13; *Kajelijeli* Appeal Judgement, para. 6, citing *Blaškić* Appeal Judgement, para. 13; *Niyitegeka* Appeal Judgement, para. 9; *Rutaganda* Appeal Judgement, para. 18.
[42] *Halilović* Appeal Judgement, para. 13; *Limaj et al.* Appeal Judgement, para. 15; *Blagojević and Jokić* Appeal Judgement, para. 11; *Brđanin* Appeal Judgement, para. 15; *Galić* Appeal Judgement, para. 11; *Stakić* Appeal Judgement, para. 12; *Blaškić* Appeal Judgement, para. 13; *Vasiljević* Appeal Judgement, para. 11; Practice Direction on Appeals Requirements, para. 4(b). *See* also *Seromba* Appeal Judgement, para. 13; *Nahimana et al.* Appeal Judgement, para. 16; *Muhimana* Appeal Judgement, para. 10; *Kajelijeli* Appeal Judgement, para. 7; *Niyitegeka* Appeal Judgement, para. 10; *Rutaganda* Appeal Judgement, para. 19; *Kayishema and Ruzindana* Appeal Judgement, para. 137.

expected to consider a party's submissions in detail if they are obscure, contradictory, vague or suffer from other formal and obvious insufficiencies".[43]

16. It should be recalled that the Appeals Chamber has inherent discretion in selecting which submissions merit a detailed reasoned opinion in writing and may dismiss arguments which are evidently unfounded without providing detailed reasoning.[44]

[43] *Halilović* Appeal Judgement, para. 13; *Limaj et al.* Appeal Judgement, para. 15; *Blagojević and Jokić* Appeal Judgement, para. 11; *Galić* Appeal Judgement, para. 11; *Stakić* Appeal Judgement, para. 12; *Vasiljević* Appeal Judgement, para. 12; *Kunarac et al.* Appeal Judgement, paras 43, 48. *See* also *Seromba* Appeal Judgement, para. 13; *Nahimana et al.* Appeal Judgement, para. 16; *Muhimana* Appeal Judgement, para. 10; *Gacumbitsi* Appeal Judgement, para. 10; *Ntagerura et al*. Appeal Judgement, para. 13; *Kajelijeli* Appeal Judgement, para. 7; *Niyitegeka* Appeal Judgement, para. 10.

[44] *Halilović* Appeal Judgement, para. 12; *Limaj et al.* Appeal Judgement, para. 16; *Galić* Appeal Judgement, para. 12; *Brđanin* Appeal Judgement, para. 16; *Stakić* Appeal Judgement, paras 11,13; *Vasiljević* Appeal Judgement, para. 12; *Kunarac et al.* Appeal Judgement, paras 47-48. *See* also *Seromba* Appeal Judgement, para. 13; *Nahimana et al.* Appeal Judgement, para. 17; *Muhimana* Appeal Judgement, para. 10; *Gacumbitsi* Appeal Judgement, paras 9-10; *Ntagerura et al.* Appeal Judgement, paras 13-14; *Kajelijeli* Appeal Judgement, paras 6, 8; *Niyitegeka* Appeal Judgement, para. 11; *Rutaganda* Appeal Judgement, para. 19.

III. ARTICLE 7(3) OF THE STATUTE: APPLICABLE LAW

17. The Parties to this appeal all challenge the law applied by the Trial Chamber when assessing Hadžihasanović and Kubura's individual criminal responsibility as a superior for the crimes charged. For this reason, the Appeals Chamber deems it necessary to examine collectively all the legal errors they raised on this matter and to recall the correct legal standard under Article 7(3) of the Statute.

A. Whether *de jure* power over subordinates creates a presumption of effective control

18. Hadžihasanović alleges that the Trial Chamber erred by holding that the possession of *de jure* power over his subordinates creates a presumption of effective control over them.[45] In particular, he contests the Trial Chamber's finding that the Appeals Chamber in *Čelebići* undertook its analysis on command responsibility with the presumption that "the official position of commander comes with effective control".[46] He recognises the Appeals Chamber's finding in *Čelebići* that "a court may presume that possession of [*de jure*] power *prima facie* results in effective control unless proof to the contrary is produced",[47] but argues that the Appeals Chamber did not acknowledge the existence of a legal presumption or imply that the Prosecution need not prove effective control once *de jure* power has been established. According to him, such a presumption would amount to "a reversal of the burden of proof by putting the onus on the Defence to produce evidence to rebut the presumption".[48] In conclusion, Hadžihasanović affirms that "[t]he showing of effective control is required in cases involving both *de jure* and *de facto* superiors".[49]

19. The Prosecution responds that the Appeals Chamber in *Čelebići* did not require a showing of effective control in cases involving *de jure* superiors and argues that "a court may presume that possession of such power *prima facie* results in effective control".[50] It maintains that this presumption does not constitute a reversal of the burden of proof but rather "regulates the inferences that can be drawn from proof of *de jure* command".[51] The Prosecution concludes that "Hadžihasanović offered no proof to rebut the presumption".[52]

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[45] Hadžihasanović Appeal Brief, para. 270.
[46] Hadžihasanović Appeal Brief, para. 269, citing Trial Judgement, para. 79.
[47] Hadžihasanović Appeal Brief, para. 271, citing *Čelebići* Appeal Judgement, para. 197.
[48] Hadžihasanović Appeal Brief, paras 272-273.
[49] Hadžihasanović Appeal Brief, para. 275, citing *Čelebići* Appeal Judgement, para. 196. *See* also Hadžihasanović Reply Brief, para. 77.
[50] Prosecution Response Brief, para. 213, citing *Čelebići* Appeal Judgement, para. 197.
[51] Prosecution Response Brief, para. 215.
[52] Prosecution Response Brief, para. 218.

20. In *Čelebići*, the Appeals Chamber underscored that effective control is the ultimate standard and that a showing of effective control is required in cases involving both *de jure* and *de facto* superiors.[53] The Appeals Chamber further noted:

> In determining questions of responsibility it is necessary to look to effective exercise of power or control and not to formal titles. […] In general, the possession of *de jure* power in itself may not suffice for the finding of command responsibility if it does not manifest in effective control, although a court may presume that possession of such power *prima facie* results in effective control unless proof to the contrary is produced.[54]

21. Even when a superior is found to have *de jure* authority over his subordinates, the Prosecution still has to prove beyond reasonable doubt that this superior exercised effective control over his subordinates, unless the accused does not challenge having exercised such control.[55] By holding that "a court may presume that possession of [*de jure*] power *prima facie* results in effective control",[56] the Appeals Chamber in *Čelebići* did not reverse the burden of proof. It simply acknowledged that the possession of *de jure* authority constitutes *prima facie* a reasonable basis for assuming that an accused has effective control over his subordinates. Thus, the burden of proving beyond reasonable doubt that the accused had effective control over his subordinates ultimately rests with the Prosecution.

22. The Appeals Chamber will examine, under Hadžihasanović's fifth ground of appeal regarding the Trial Chamber's analysis of his superior-subordinate relationship with the *El Mujahedin* detachment as of 13 August 1993, whether the Trial Chamber applied the correct legal standard.

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[53] *Čelebići* Appeal Judgement, para. 196. *See* also para. 256 ("[t]he concept of effective *control* over a subordinate – in the sense of a material ability to prevent or punish criminal conduct, however that control is exercised – is the threshold to be reached in establishing a superior-subordinate relationship for the purpose of Article 7(3) of the Statute"); para. 266 ("[C]ustomary law has specified a standard of effective control"); *Halilović* Appeal Judgement, para. 59.

[54] *Čelebići* Appeal Judgement, para. 197.

[55] Depending on the circumstances of the case, a finding that an accused had *de jure* authority will not necessarily lead to the conclusion that he had effective control over his subordinates. In *Blagojević*, for example, the Trial Chamber found that Vidoje Blagojević was in command and control of all units of the Brutanac Brigade. This conclusion reflected its assessment of his *de jure* authority over all the members of the brigade, including Momir Nikolić (*Blagojević and Jokić* Trial Judgement, para. 419). The Trial Chamber however concluded that, in light of the actual facts on the ground, Vidoje Blagojević lacked effective control over Momir Nikolić (*Blagojević and Jokić* Trial Judgement, para. 795). The Appeals Chamber in *Blagojević* found that it did not consider the conclusions regarding the scope of Vidoje Blagojević's authority irreconcilable with the finding that he did not exercise effective control over Momir Nikolić (*Blagojević* Appeal Judgement, para. 302). *See* also *Halilović* Appeal Judgement, para. 85 (the Appeals Chamber held that "*de jure* power is not synonymous with effective control" and that "the former may not in itself amount to the latter").

[56] *Čelebići* Appeal Judgement, para. 197.

B. The "had reason to know" standard and the superior's duty to prevent the recurrence of similar acts

1. Arguments of the Parties

23. Hadžihasanović submits that the standard used by the Trial Chamber – that the accused had reason to know because there was a reasonable risk that the unlawful acts could happen again – is inconsistent with "the command responsibility *mens rea* recognised in the jurisprudence of the International Tribunal".[57] He submits that, because of its erroneous interpretation of both the command responsibility *mens rea* "knew or had reason to know" and the "failure to prevent" component of Article 7(3) of the Statute, the Trial Chamber applied a form of individual criminal responsibility which is not provided for under Article 7(3) of the Statute, namely superior responsibility for having created "a situation conducive to the repetition of similar criminal acts".[58]

24. Kubura argues that the Trial Chamber erred in finding that, by failing to punish his subordinates' acts of plunder in the Ovnak area in June 1993, he "encouraged the subsequent commission of such acts", and thus had reason to know of their acts of plunder in Vareš in November 1993.[59] He stresses that, according to the Trial Chamber's own finding, he only knew that his subordinates "were likely to repeat such acts"[60] and that, under Article 7(3) of the Statute, the Prosecution is required to prove that the superior had reason to know of the "actual offence alleged"[61] or the "relevant crimes".[62] He adds that "knowledge of the offences charged cannot be presumed" and that the Prosecution "must prove the superior's knowledge of the crimes charged by reference to the information in fact available to the superior about these crimes".[63]

25. The Prosecution argues that the Trial Chamber did not err by finding that under the "had reason to know" standard, it is sufficient to establish that a superior has "reason to know that there was a real and reasonable risk that […] unlawful acts would be repeated in the future".[64] It argues

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[57] Hadžihasanović Appeal Brief, para. 245. *See* also AT. 132-133.
[58] Hadžihasanović Appeal Brief, paras 256 and 258.
[59] Kubura Appeal Brief, para. 33, citing Trial Judgement, para. 1982.
[60] Kubura Appeal Brief, para. 34, citing Trial Judgement para. 1982.
[61] Kubura Appeal Brief, para. 34. Kubura further submits that "whether he knew or had reason to know of any unlawful acts in Vareš in November 1993 is a matter to be established beyond reasonable doubt for the specific events that occurred in Vareš, given the particular circumstances of these events" (Kubura Appeal Brief, para. 34).
[62] Kubura Appeal Brief, para. 35, citing *Kordić and Čerkež* Trial Judgement, para. 427; *Blaškić* Appeal Judgement, paras 62-64.
[63] Kubura Appeal Brief, para. 35.
[64] Prosecution Response Brief, para. 152, citing Trial Judgement, para. 1779. *See* also Prosecution Response Brief, para. 153, citing Trial Judgement, para. 133. The Prosecution develops arguments pertaining to the "had reason to know" standard primarily in response to Hadžihasanović's third ground of appeal. It also makes vague references to the "had reason to know" standard in response to Hadžihasanović's fifth ground of appeal and to Kubura's second ground of appeal. With regard to Hadžihasanović's fifth ground of appeal, the Prosecution argues that Hadžihasanović had reason to know "because he knew of [his subordinates'] criminal propensity" (Prosecution Response Brief, para. 268) and that

that the Trial Chamber's "'real and reasonable risk' formulation is consistent with the risk language used by the Appeals Chamber [in *Čelebići* and *Krnojelac*] and the references to 'possible' crimes or to crimes that 'might' occur"[65] and that it is sufficient to prove that a superior is put on notice of a "risky situation which requires him to prevent the commission of crimes" in order to establish his knowledge under Article 7(3) of the Statute.[66]

2. Discussion

26. The Trial Chamber held that a superior's failure to punish crimes of which he has knowledge "makes it possible to foresee a recurrence of unlawful acts"[67] and that, accordingly, "by failing to punish crimes of which he has knowledge, the superior has reason to know that there is a real and reasonable risk that the unlawful acts will be committed again"[68] or "might recur".[69]

27. Pursuant to Article 7(3) of the Statute, the knowledge required to trigger a superior's duty to prevent is established when the superior "knew or had reason to know that [his] subordinate was about to commit [crimes]". The Trial Chamber in *Čelebići* interpreted this requirement in light of the language used in Article 86(2) of Additional Protocol I[70] and held that, under the "had reason to know" standard, it is required to establish that the superior had "information of a nature, which at the least, would put him on notice of the risk of […] offences by indicating the need for additional investigation in order to ascertain whether such crimes were committed or were about to be committed by his subordinates".[71] As a clarification, the Trial Chamber added that "[i]t is sufficient that the superior was put on further inquiry by the information, or, in other words, that it indicated

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the mujahedin's notorious reputation was "sufficient information […] to put him on notice of the *risk* of offences" (Prosecution Response Brief, para. 281, citing *Čelebići* Appeal Judgement, para. 223). With regard to Kubura's second ground of appeal, the Prosecution submits that "Kubura's knowledge of the plunder committed by members of the 7th Brigade in the Ovnak region in June 1993 and his failure to punish the perpetrators, meant that he could not ignore the risk that the members of the 7th Brigade were likely to repeat such acts" (Prosecution Response Brief, para. 346). The Prosecution also makes references to the "had reason to know" standard in its Appeal Brief (*see* Prosecution Appeal Brief, para. 3.17).

[65] Prosecution Response Brief, para. 156. *See* also para. 152, citing Trial Judgement, paras 1779 and 1784.

[66] Prosecution Response Brief, para. 154.

[67] Trial Judgement, para. 166. *See* also para. 164 ("The failure to intervene results in the foreseeable consequence of such conduct being repeated").

[68] Trial Judgement, para. 166.

[69] Trial Judgement, para. 133.

[70] Article 86(2) of Additional Protocol I provides: "The fact that a breach of the Conventions or of this Protocol was committed by a subordinate does not absolve his superiors from penal or disciplinary responsibility, as the case may be, if they knew, or had information which should have enabled them to conclude in the circumstances at the time, that he was committing or was going to commit such a breach and if they did not take all feasible measures within their power to prevent or repress the breach".

[71] *Čelebići* Trial Judgement, para. 383 (establishing that a superior "had reason to know" of some crimes is tantamount to establishing that he had an "implicit" or "constructive" knowledge of such crimes).

the need for additional investigation in order to ascertain whether offences were being committed or about to be committed by his subordinates".[72]

28. The Appeals Chamber in *Čelebići* endorsed this interpretation[73] and held that the rationale behind the standard set forth in Article 86(2) of Additional Protocol I is plain: "failure to conclude, or conduct additional inquiry, in spite of alarming information constitutes knowledge of subordinate offences".[74] It noted that this information may be general in nature[75] and does not need to contain specific details on the unlawful acts which have been or are about to be committed.[76] It follows that, in order to demonstrate that a superior had the *mens rea* required under Article 7(3) of the Statute, it must be established whether, in the circumstances of the case,[77] he possessed information sufficiently alarming to justify further inquiry.

29. In *Krnojelac*, the Trial Chamber found that "[t]he fact that the Accused witnessed the beating of [a detainee, inflicted by one of his subordinates], ostensibly for the prohibited purpose of *punishing* him for his failed escape, is not sufficient, in itself, to conclude that the Accused knew or […] had reason to know that, other than in that particular instance, beatings were inflicted for any of the prohibited purposes".[78] The Appeals Chamber rejected this finding and held that "while this fact is indeed insufficient, in itself, to conclude that Krnojelac *knew* that acts of torture were being inflicted on the detainees, as indicated by the Trial Chamber, it may nevertheless constitute sufficiently alarming information such as to alert him to the risk of other acts of torture being committed, meaning that Krnojelac *had reason to know* that his subordinates were committing or

[72] *Čelebići* Trial Judgement, para. 393.
[73] *Čelebići* Appeal Judgement, para. 241, citing *Čelebići* Trial Judgement, para. 393.
[74] *Čelebići* Appeal Judgement, para. 232. At paragraph 233, the Appeals Chamber further found that, under Article 86 of Additional Protocol I, it is sufficient that the superior had in his possession "information, which, if at hand, would oblige [him] to obtain *more* information (*i.e.* conduct further inquiry)."
[75] *Čelebići* Appeal Judgement, para. 238. The Appeals Chamber held that "[a] showing that a superior had some general information in his possession, which would put him on notice of possible unlawful acts by his subordinates, would be sufficient to prove that he 'had reason to know'". As an example of general information that may be available to a superior, the Appeals Chamber referred to the tactical situation, the level of training and instruction of the subordinates, and their character traits. The ICRC Commentary to Article 86 of Additional Protocol I indeed provides that "such information available to a superior may enable him to conclude either that breaches have been committed or that they are going to be committed".
[76] *Čelebići* Appeal Judgement, para. 238; *Krnojelac* Appeal Judgement, para. 155.
[77] The Appeals Chamber in *Čelebići* held that "an assessment of the mental element required by Article 7(3) of the Statute should be conducted in the specific circumstances of each case, taking into account the specific situation of the superior concerned at the time in question." (*Čelebići* Appeal Judgement, para. 239). *See* also the ILC comment on Article 6 of the ILC Draft Code of Crimes against the Peace and Security of Mankind: "Article 6 provides two criteria for determining whether a superior is to be held criminally responsible for the wrongful conduct of a subordinate. First, a superior must have known or had reason to know *in the circumstances at the time* that a subordinate was committing or was going to commit a crime. This criterion indicates that a superior may have the *mens rea* required to incur criminal responsibility in two different situations. In the first situation, a superior has actual knowledge that his subordinate is committing or is about to commit a crime […].In the second situation, he has *sufficient relevant information to enable him to conclude under the circumstances at the time* that his subordinates are committing or are about to commit a crime" (ILC Report, pp 37-38, quoted in *Čelebići* Appeal Judgement, para. 234).
[78] *See Krnojelac* Appeal Judgement, para. 169, quoting *Krnojelac* Trial Judgement, para. 313.

were about to commit acts of torture".[79] The Appeals Chamber also reiterated that "an assessment of the mental element required by Article 7(3) of the Statute should, in any event, be conducted in the specific circumstances of each case, taking into account the specific situation of the superior concerned at the time in question".[80]

30. While a superior's knowledge of and failure to punish his subordinates' past offences is insufficient, in itself, to conclude that the superior knew that similar future offences would be committed by the same group of subordinates, this may, depending on the circumstances of the case, nevertheless constitute sufficiently alarming information to justify further inquiry.[81] In making such an assessment, a Trial Chamber may take into account the failure by a superior to punish the crime in question. Such failure is indeed relevant to the determination of whether, in the circumstances of a case, a superior possessed information that was sufficiently alarming to put him on notice of the risk that similar crimes might subsequently be carried out by subordinates and justify further inquiry. In this regard, the Appeals Chamber stresses that a superior's failure to punish a crime of which he has actual knowledge is likely to be understood by his subordinates at least as acceptance, if not encouragement, of such conduct with the effect of increasing the risk of new crimes being committed.

31. In the present case, the Trial Chamber, when it reviewed the Appeals Chamber's application of the "had reason to know" standard in the *Krnojelac* case, found that "[o]ver and beyond the conclusions of the Appeals Chamber, the Chamber is of the opinion that by failing to take measures to punish crimes of which he has knowledge, the superior has reason to know that there is a real and reasonable risk those unlawful acts might recur".[82] It further found that "by failing to punish, the

[79] *Krnojelac* Appeal Judgement, para. 169.
[80] *Krnojelac* Appeal Judgement, para. 156, citing *Čelebići* Appeal Judgement, para. 239. In *Krnojelac*, the Appeals Chamber reviewed the facts accepted by the Trial Chamber in that case and found that Milorad Krnojelac had knowledge of the fact that the detainees were held at the KP Dom because they were Muslim (*Krnojelac* Appeal Judgement, para. 167) and that they were being mistreated (*Krnojelac* Appeal Judgement, paras. 163 and 166). The Appeals Chamber further noted that the interrogations conducted at the detention centre were frequent and were conducted by the guards over whom Milorad Krnojelac had jurisdiction (*Krnojelac* Appeal Judgement, para. 168). In this context, the fact that Milorad Krnojelac witnessed acts of torture being inflicted upon Ekrem Zeković by his subordinates constituted information *sufficiently alarming to justify further inquiry* (*Krnojelac* Appeal Judgement, para. 171). As a result, Milorad Krnojelac was found guilty pursuant to Article 7(3) of the Statute for having failed to take the necessary and reasonable measures to prevent the acts of torture committed subsequent to those inflicted upon Ekrem Zeković and for having failed to investigate the acts of torture committed prior to those inflicted on Ekrem Zeković and, if need be, punish the perpetrators (*Krnojelac* Appeal Judgement, para. 172).
[81] *Krnojelac* Appeal Judgement, para. 169.
[82] Trial Judgement, para. 133. The Trial Chamber's reliance on these findings appears to be misplaced. Indeed, the Appeals Chamber did not rely on Milorad Krnojelac's failure to punish the acts of torture committed by his subordinate against Ekrem Zeković when determining whether he had reason to know that his subordinates had committed or might commit crimes of torture other than those related to Ekrem Zeković. However, it seems likely that this may be due to the particular context of that case, in which Milorad Krnojelac was not charged with criminal responsibility for the torture inflicted upon Ekrem Zeković, rather that for any legal reasons.

superior (Krnojelac) did not prevent subsequent criminal acts".[83] Those findings could be read as implying that a superior's failure to punish a crime of which he has knowledge *automatically* constitutes sufficiently alarming information under the "had reason to know" standard, irrespective of the circumstances of the case. Such reading would amount to an error of law. However, the Trial Chamber also found that "from the moment a certain amount of information was available to Krnojelac which, taken as a whole, was sufficiently alarming and such as to alert him to the risk of murders being committed inside the prison, he had an obligation to intervene and at the least should have carried out an investigation".[84] It also referred to the "had reason to know" standard as requiring an assessment of whether a superior had sufficiently alarming information which would have alerted him to the risk that crimes might be committed by his subordinates.[85] This demonstrates that the Trial Chamber correctly understood that standard as requiring an assessment, in the circumstances of each case, of whether a superior had sufficiently alarming information to put him on notice that crimes might be committed. Under the various grounds of appeal below, the Appeals Chamber will determine whether the Trial Chamber correctly applied the "had reason to know" standard.

C. The scope of a superior's duty to punish

32. Under its fourth ground of appeal, the Prosecution argues that the Trial Chamber erred in law by concluding that the use of disciplinary measures is sufficient to discharge a superior of his duty to punish crimes under Article 7(3) of the Statute.[86] It concedes that this error did not have any impact on the verdict and consequently only appeals this issue as "significant to the Tribunal's jurisprudence".[87] Hadžihasanović responds that this ground of appeal is "misconceived" and "of no assistance in applying the command responsibility doctrine before the International Tribunal".[88] In his view, the issue raised by the Prosecution is "an issue [of] semantics which is irrelevant when the time comes for the trier of fact to determine whether a commander indeed took the necessary and reasonable measures to prevent crimes committed by subordinates or to punish them if they did".[89]

[83] Trial Judgement, para. 156, citing *Krnojelac* Appeal Judgement, para. 172. *See* also para. 166: "by failing to punish crimes of which he has knowledge, the superior has reason to know that there is a real and reasonable risk that the unlawful acts will be committed again".
[84] Trial Judgement, para. 135, citing *Krnojelac* Appeal Judgement, paras 178-179.
[85] Trial Judgement, para. 132.
[86] Prosecution Notice of Appeal, para. 16, citing Trial Judgement, paras 893, 899, 2056-2058; Prosecution Appeal Brief, para. 5.1, citing Trial Judgement, paras 2056-2058. *See* also AT. 77-78; 84-87.
[87] Prosecution Appeal Brief, para. 1.5. *See* also para. 5.33.
[88] Hadžihasanović Response Brief, para. 132.
[89] Hadžihasanović Response Brief, para. 134.

33. As the Appeals Chamber previously held, "what constitutes [necessary and reasonable] measures is not a matter of substantive law but of evidence";[90] the assessment of whether a superior fulfilled his duty to prevent or punish under Article 7(3) of the Statute has to be made on a case-by-case basis, so as to take into account the "circumstances surrounding each particular situation".[91] Under Article 86 of Additional Protocol I, for example, superiors have a duty to take "all feasible measures within their power" to prevent or punish a breach of the laws of war and, under Article 87 of Additional Protocol I, such "feasible measures" may take the form of both "disciplinary or penal" measures.[92] It cannot be excluded that, in the circumstances of a case, the use of disciplinary measures will be sufficient to discharge a superior of his duty to punish crimes under Article 7(3) of the Statute. In other words, whether the measures taken were solely of a disciplinary nature, criminal, or a combination of both, cannot in itself be determinative of whether a superior discharged his duty to prevent or punish under Article 7(3) of the Statute. The Prosecution's argument is dismissed.

D. The causal link between a commander's failure to act and his subordinates' crimes

34. Hadžihasanović argues that the Trial Chamber erred in finding that there is an implicit and therefore presumed link between the commander's failure to act in order to prevent the commission of an offence and the commission of that offence by his subordinates.[93] According to him, the aim of the Trial Chamber was "to ensure that the burden – to prove beyond a reasonable doubt the feasibility of the measures which [he] *should have used* [against the *El Mujahedin* detachment to secure the release of the abducted civilians] – would rest on the Accused and not on the Prosecution",[94] which is contrary to the presumption of innocence.[95] Hadžihasanović adds that this error "invalidates the Judgement" because the Trial Chamber's "subsequent analysis of [his] material ability […] to use force against the *El Mujahed[in]* detachment was conducted on the basis of this presumption".[96]

35. In response, the Prosecution recalls that the Appeals Chamber in *Blaškić* confirmed that "causation is not an essential element of Article 7(3) [of the Statute]",[97] although the principle of

[90] *Blaškić* Appeal Judgement, para. 72. *See* also *Halilović* Appeal Judgement, paras 63-64.
[91] *Blaškić* Appeal Judgement, para. 417.
[92] Article 86 of Additional Protocol I states that superiors are responsible if, *inter alia*, they did not take "all feasible measures within their power to prevent or repress the breach". Article 87 of Additional Protocol I states that superiors have a duty to "initiate such steps as are necessary to prevent such violations […] and, where appropriate, to initiate *disciplinary or penal* action against violators thereof" (emphasis added).
[93] Hadžihasanović Appeal Brief, para. 360, referring to Trial Judgement, paras 1463-1465.
[94] Hadžihasanović Appeal Brief, para. 363, referring to Trial Judgement, para. 1465.
[95] Hadžihasanović Appeal Brief, para. 364.
[96] Hadžihasanović Appeal Brief, para. 365, referring to Trial Judgement, paras 1466-1484.
[97] Prosecution Response Brief, para. 307.

causation assumes a "central place" in criminal law.[98] It then argues that, while the Trial Chamber in this case "did find a causal link" between Hadžihasanović's failure to prevent the crimes and the perpetration of the crimes, the existence of this link was "not necessary to a finding of superior responsibility", and that "Hadžihasanović would have been found guilty even in the absence of such a finding".[99]

36. With regard to the existence of a causal link between a commander's failure to act and his subordinates' crimes, the Trial Chamber found:

> [C]ommand responsibility may be imposed only when there is a relevant and significant nexus between the crime and the responsibility of the superior accused of having failed in his duty to prevent. Such a nexus is implicitly part of the usual conditions which must be met to establish command responsibility.[100]

37. On this basis, the Trial Chamber made the following findings as regards a superior's failure to prevent his subordinates from committing crimes:

> Firstly, a superior who exercises effective control over his subordinates and has reason to know that they are about to commit crimes, but fails to take the necessary and reasonable measures to prevent those crimes, incurs responsibility, both because his omission created or heightened a real and reasonably foreseeable risk that those crimes would be committed, a risk he accepted willingly, and because that risk materialised in the commission of those crimes. In that sense, the superior had substantially played a part in the commission of those crimes. Secondly, it is presumed that there is such a nexus between the superior's omission and those crimes. The Prosecution therefore has no duty to establish evidence of that nexus. Instead, the Accused must disprove it.[101]

38. The Appeals Chamber recalls its finding in *Blaškić* that it was "not persuaded by [the argument] that the existence of causality between a commander's failure to prevent subordinates' crimes and the occurrence of these crimes, is an element of command responsibility that requires proof by the Prosecution in all circumstances of a case".[102]

39. The Appeals Chamber also takes into consideration the following conclusion in *Halilović*:

> [T]he nature of command responsibility itself, as a *sui generis* form of liability, which is distinct from the modes of individual responsibility set out in Article 7(1), does not require a causal link. Command responsibility is responsibility for omission, which is culpable due to the duty imposed by international law upon a commander. If a causal link were required this would change the basis of command responsibility for failure to prevent or punish to the extent that it would practically require involvement on the part of the commander in the crime his subordinates committed, thus altering the very nature of the liability imposed under Article 7(3).[103]

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[98] Prosecution Response Brief, para. 307, referring to *Blaškić* Appeal Judgement, para. 76 (quoting *Čelibići* Trial Judgement, para. 398). *See* also *Brđanin* Trial Judgement, para. 280; *Kordić and Čerkez* Trial Judgement, para. 447; *Mpambara* Trial Judgement, para. 26.
[99] Prosecution Response Brief, para. 308.
[100] Trial Judgement, para. 192.
[101] Trial Judgement, para. 193.
[102] *Blaškić* Appeal Judgement, para. 77.
[103] *Halilović* Trial Judgement, para. 78.

40. Considering that superior responsibility does not require that a causal link be established between a commander's failure to prevent subordinates' crimes and the occurrence of these crimes, there is no duty for an accused to bring evidence demonstrating that such a causal link does not exist. The Appeals Chamber considers that the Trial Chamber erred in law by making such finding.

41. In the present case, the Trial Chamber examined the issue of the causality between a commander's failure to act and his subordinates' crimes when it assessed Hadžihasanović's responsibility in relation to the crimes committed at the Orašac camp in October 1993.[104] It found that "by deciding not to use force against his subordinated troops and by deciding, on the contrary, to adopt a passive attitude towards resolving the ongoing crisis, the Accused Hadžihasanović failed to take the necessary and reasonable measures, in view of the circumstances of the case, in order to prevent the crimes of murder and mistreatment which he had reason to believe [were] about to be committed".[105] This demonstrates that the Trial Chamber first correctly assessed whether the measures taken were "necessary and reasonable". It then turned to examine whether Hadžihasanović "could have prevented the crimes of murder and mistreatment by using force […] against the *El Mujahedin* detachment",[106] though such assessment was not needed.

42. In light of these findings, the Appeals Chamber concludes that the Trial Chamber's error does not have an impact on the Trial Chamber's conclusion with regard to Hadžihasanović's responsibility for these crimes. Hadžihasanović's arguments are dismissed.

[104] The Appeals Chamber notes that this is the only part in the Trial Judgement where the Trial Chamber examined this issue.
[105] Trial Judgement, para. 1461.
[106] Trial Judgement, para. 1462. *See* also paras 1466-1472 (section entitled "Material Ability of the Accused Hadžihasanović to Use Force Against his Subordinates to Prevent Crimes").

IV. FAIRNESS OF THE TRIAL AND EVIDENTIARY ISSUES

43. Hadžihasanović submits that the Trial Chamber committed numerous errors infringing upon his right to a fair trial under Article 21 of the Statute[107] and requests that the Appeals Chamber enter a verdict of acquittal for all counts for which he was found guilty at trial.[108] He specifically argues that: (i) the Trial Chamber committed several errors in relation to its Decision on Motion for Acquittal pursuant to Rule 98*bis* of the Rules of Procedure and Evidence of 27 September 2004 ("Rule 98*bis* Decision");[109] (ii) the Trial Chamber erred in law through its practice of questioning witnesses which would lead a reasonable observer to conclude that the Judges at trial did not appear impartial;[110] (iii) the Trial Chamber erred in law by admitting into evidence ten war diaries and operation logbooks (Exhibits C11-C20) after the Parties had presented their cases;[111] (iv) the Trial Chamber erred in law by admitting into evidence and attaching probative value to the "mujahedin propaganda video" (Exhibit P482);[112] (v) the Trial Chamber erred in law by allowing the Prosecution to present its case on the basis that "an armed conflict existed in the territory of Bosnia and Herzegovina";[113] and (vi) the Trial Chamber erred in law and in fact by denying his request to implement its decision requesting access to the archives of the European Union Monitoring Mission (EUMM) as well as by denying certification of that issue.[114]

44. The Prosecution generally responds that Hadžihasanović failed to demonstrate any error by the Trial Chamber or that the alleged errors caused him prejudice sufficient to invalidate the Trial Judgement.[115] The Prosecution concludes that Hadžihasanović's grounds of appeal related to alleged infringements of his fair trial right should be dismissed in their entirety.[116]

A. Preliminary issue

45. As a preliminary issue, the Appeals Chamber notes that Hadžihasanović refers the Appeals Chamber several times to arguments put forward in his filings at trial, which he seeks to have incorporated into his appeal brief.[117] The Prosecution rejects this way of referring to trial submissions, argues that Hadžihasanović impermissibly attempts to circumvent the word limit, and

[107] Hadžihasanović Notice of Appeal, para. 11.
[108] Hadžihasanović Appeal Brief, para. 177.
[109] Hadžihasanović Appeal Brief, paras 27, 40-45, 50, 68-90, and 184-196.
[110] Hadžihasanović Appeal Brief, paras 91-131.
[111] Hadžihasanović Appeal Brief, paras 132-147.
[112] Hadžihasanović Appeal Brief, paras 148-163. This sub-ground was initially found in Hadžihasanović's sixth ground of appeal; the remainder of the sixth ground of appeal has been withdrawn (*see* Hadžihasanović Appeal Brief, fn. 138).
[113] Hadžihasanović Appeal Brief, paras 164-169.
[114] Hadžihasanović Appeal Brief, paras 170-176.
[115] Prosecution Response Brief, paras 14-15.
[116] Prosecution Response Brief, para. 90.
[117] Hadžihasanović Appeal Brief, paras 69, 94, 153, 168. The Appeals Chamber notes that the accompanying footnotes of Hadžihasanović Appeal Brief, para. 69 (Hadžihasanović Appeal Brief, fns 85-87) do not refer to his filings.

submits that he fails to meet the standard of review on appeal as he does not even attempt to show how the Trial Chamber erred.[118]

46. The Appeals Chamber recalls that appellants have to substantiate their arguments in support of each ground of appeal in their appeal briefs and not by reference to submissions made elsewhere.[119] Additionally, the Appeals Chamber recalls that, "[o]n appeal, a party may not merely repeat arguments that did not succeed at trial, unless the party can demonstrate that the Trial Chamber's rejection of them constituted such an error as to warrant the intervention of the Appeals Chamber".[120] The Appeals Chamber considers that the mere reference to filings at trial is, in general, not an appropriate means of substantiating an assertion of an alleged error on appeal.[121] The Appeals Chamber will accordingly not consider the arguments put forward by Hadžihasanović in his filings at trial and merely referred to on appeal.[122]

B. Issues regarding the Trial Chamber's Rule 98*bis* Decision

47. As part of his first ground of appeal, Hadžihasanović submits that the Trial Chamber erred in law in stating in its Rule 98*bis* Decision that it did not consider evidence favourable to him.[123] In his second ground of appeal, he alleges, *inter alia,* that the Trial Chamber erred in law and in fact in its Rule 98*bis* Decision by not rendering a judgement of acquittal as there was no evidence that he failed to take necessary and reasonable measures to prevent or punish the crimes alleged in Counts 4, 5, 6 and 7 of the Indictment.[124] In his third ground of appeal, he claims, *inter alia*, that the Trial Chamber erred in law and in fact in its Rule 98*bis* Decision by not rendering a judgement of acquittal on Counts 3 and 4 of the Indictment in relation to events in Bugojno.[125]

48. In all three grounds of appeal, Hadžihasanović claims that he was put in the unfair position of having to present a defence even though there was no case to answer and alleges that his fair trial

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[118] Prosecution Response Brief, para. 16.
[119] Practice Direction on Formal Requirements for Appeals from Judgement, paras II.(4)(b) and (c).
[120] *Brđanin* Appeal Judgement, para. 16.
[121] *Nahimana et al.* Appeal Judgement, para. 231.
[122] *See* the Appeals Chamber's finding in the *Naletilić and Martinović* Appeal Judgement regarding Naletilić's challenges against the Trial Chamber's decisions on the admission of evidence: "As to his further general submission incorporating by reference all objections lodged during trial and alleging broadly that the Trial Chamber made erroneous rulings on evidentiary matters, the Appeals Chamber considers that Naletilić does not meet his burden on appeal. He does not even attempt to show how the Trial Chamber erred in admitting the evidence. Therefore the Appeals Chamber need not discuss the merit of these allegations." (*Naletilić and Martinović* Appeal Judgement, para. 403).
[123] Hadžihasanović Notice of Appeal, para. 11(a).
[124] Hadžihasanović Appeal Brief, paras 27, 40-45, 50. Hadžihasanović claims that this sub-ground of his first ground of appeal concerning the Rule 98*bis* Decision is closely linked to his second ground of appeal and, therefore, addresses them jointly in his brief in reply (Hadžihasanović Reply Brief, para. 5).
[125] Hadžihasanović Appeal Brief, paras 184-196.

rights were violated, in particular the presumption of innocence and the right to remain silent.[126] As each of these sub-grounds concern the Trial Chamber's Rule 98*bis* Decision and allege a violation of Hadžihasanović's fair trial rights, the Appeals Chamber will address them within the present section.

1. Rule 98*bis* of the Rules

49. The Appeals Chamber notes that, at the time of the Trial Chamber's Rule 98*bis* Decision, Rule 98*bis* of the Rules read as follows:

> (A) An accused may file a motion for the entry of judgement of acquittal on one or more offences charged in the indictment within seven days after the close of the Prosecutor's case and, in any event, prior to the presentation of evidence by the defence pursuant to Rule 85 (A)(ii).
>
> (B) The Trial Chamber shall order the entry of judgement of acquittal on motion of an accused or *proprio motu* if it finds that the evidence is insufficient to sustain a conviction on that or those charges.[127]

Rule 98*bis* of the Rules has since been amended.[128] The present ground of appeal will proceed on the basis of the wording of Rule 98*bis* in force at the time of the Trial Chamber's decision.

2. Redundancy of legal sufficiency test in an appeal against judgement

50. Hadžihasanović submits that the Trial Chamber defeated the purpose of Rule *98bis* of the Rules by not considering evidence favourable to the Defence.[129] The Prosecution understands Hadžihasanović to argue that, had the Trial Chamber taken into account the exculpatory evidence he adduced during the Prosecution case, the Trial Chamber would have concluded in its Rule 98*bis* Decision that the Prosecution did not provide legally sufficient evidence to sustain a conviction.[130] The Prosecution responds that since Hadžihasanović decided to call a defence case, the question of whether there was legally sufficient evidence to sustain a conviction in the Rule 98*bis* proceedings is redundant. It submits that, in an appeal against a judgement, the appellant has to show that no reasonable trier of fact could have reached the guilty verdict.[131] In his Reply Brief, Hadžihasanović rejects the Prosecution's contention that the issue concerning the Rule 98*bis* Decision is redundant on a substantive appeal when a defence case is called.[132]

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[126] Hadžihasanović Notice of Appeal, paras 11(a), 14, 15(a).
[127] Rules of Procedure and Evidence as amended 28 July 2004.
[128] Rules of Procedure and Evidence as amended 8 December 2004, Rule 98*bis*: "At the close of the Prosecutor's case, the Trial Chamber shall, by oral decision and after hearing the oral submissions of the parties, enter a judgement of acquittal on any count if there is no evidence capable of supporting a conviction."
[129] Hadžihasanović Appeal Brief, para. 71.
[130] Prosecution Response Brief, para. 17.
[131] Prosecution Response Brief, para. 17.
[132] Hadžihasanović Reply Brief, para. 7.

51. The Appeals Chamber agrees that the legal sufficiency test in a decision pursuant to Rule 98*bis* of the Rules – that is, the question of whether a reasonable trier of fact could convict the accused on the Prosecution evidence – is not applicable in an appeal against judgement. Rather, in an appeal against judgement, the test to be applied in determining whether the evidence is factually sufficient to sustain a conviction is whether the conclusion of guilt beyond reasonable doubt is one which no reasonable trier of fact could have reached.[133] Here, however, the issue raised by Hadžihasanović regards the alleged violation of his right to a fair trial resulting from a wrong statement and the application of the legal sufficiency test by the Trial Chamber in its Rule 98*bis* Decision. Insofar as an infringement on his right to a fair trial is concerned, this issue is therefore not redundant on appeal.

52. Regarding Hadžihasanović's second and third grounds of appeal concerning the Rule 98*bis* Decision, which the Prosecution also contends cannot be raised in an appeal against judgement,[134] the Appeals Chamber notes that an appellant is not, as a matter of law, prevented from challenging a finding of the Trial Chamber in a decision pursuant to Rule 98*bis* of the Rules. The Prosecution's reliance to the contrary on the Appeals Chamber's finding in *Čelebići* is misplaced.[135] In *Čelebići*, the Appeals Chamber clarified the applicable test on appeal for alleged errors of fact, for which the legal sufficiency test applied in the Rule 98*bis* Decision is indeed redundant in an appeal against judgement.[136] The allegation at hand, however, is that the Trial Chamber committed an error in its Rule 98*bis* Decision, which as a consequence violated Hadžihasanović's rights to a fair trial.

3. Whether the Trial Chamber erred in law in its Rule 98*bis* Decision by deciding not to consider evidence favourable to Hadžihasanović

53. In its Rule 98*bis* Decision, the Trial Chamber stated that it did not consider evidence favourable to the accused.[137] Hadžihasanović requested certification of the Rule 98*bis* Decision, *inter alia*, on the ground that the Trial Chamber "erred in law by not considering the evidence which could be favourable to the Defence".[138] This part of the request was rejected by the Trial Chamber in its Decision on the Request for Certification to Appeal the Decision rendered pursuant

[133] *Vasiljević* Appeal Judgement, para. 7. *See* also *Stakić* Appeal Judgement, para. 10; *Kvočka et al.* Appeal Judgement, para. 18; *Kordić and Čerkez* Appeal Judgement, para. 18; *Blaskić* Appeal Judgement, para. 16; *Čelebići* Appeal Judgement, para. 435; *Bagilishema* Appeal Judgement, para. 13.
[134] Prosecution Response Brief, paras 94, 128.
[135] Prosecution Response Brief, para. 17.
[136] *Čelebići* Appeal Judgement, para. 435.
[137] Rule 98*bis* Decision, para. 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."
[138] Joint Defence Request for Certification of Trial Chamber's Decision on Enver Hadžihasanović and Amir Kubura's Motions for Acquittal, para. 3(a).

to Rule 98*bis* of the Rules of 26 October 2004 ("Rule 98*bis* Certification Decision").[139] Hadžihasanović submits on appeal that the Trial Chamber erred in its Rule 98*bis* Decision by deciding not to consider evidence favourable to him,[140] while other Trial Chambers have considered the evidence as a whole, referred to "evidence admitted" without limiting it to the evidence proffered by the Prosecution, and considered evidence favourable to the accused.[141] He asserts that, by not considering evidence favourable to him, the Trial Chamber defeated the purpose of Rule 98*bis* of the Rules, which is to determine whether the Prosecution has put forward a case that warrants the defence being called upon to answer.[142] He argues that prior to deciding at trial whether to raise a defence or not, an accused is entitled to have the full case before him at the end of the Prosecution case,[143] which "requires" the Trial Chamber to consider the evidence put forward by the accused during the Prosecution's case for a decision pursuant to Rule 98*bis* of the Rules.[144]

54. The Prosecution responds that the Trial Chamber correctly refused to consider evidence favourable to Hadžihasanović in its Rule 98*bis* Decision.[145] According to the Prosecution, the case-law of the International Tribunal demonstrates that only the Prosecution's evidence has to be taken into account,[146] which is not tested on credibility, reliability or weight, but rather has to be taken at its highest, resolving any doubt in favour of the Prosecution, unless the evidence is incapable of belief.[147] The Prosecution also stresses that, contrary to Hadžihasanović's allegation,[148] the Trial Chamber did consider the testimonies of the Prosecution's witnesses in their totality, including their testimony elicited though cross-examination.[149]

55. The Appeals Chamber considers that the Trial Chamber's finding that it "did not consider evidence which might be favourable to the Accused",[150] if interpreted as implying that it completely ignored the evidence presented by the Defence in its favour during the Prosecution case, would amount to an error of law. For example, where the Defence has cross-examined a witness to good effect or has obtained evidence in an accused's favour during cross-examination, this evidence must be used to assess whether the Prosecution evidence is incapable of belief. In the present case, the

[139] Rule 98*bis* Certification Decision, pp. 3-5.
[140] Hadžihasanović Appeal Brief, para. 68, citing Rule 98*bis* Decision, para. 18.
[141] Hadžihasanović Appeal Brief, para. 74.
[142] Hadžihasanović Appeal Brief, paras 71-72, citing *Prosecutor v. Kordić and Čerkez*, Case No. IT-95-14/2-T, Decision on Defence Motions for Judgements of Acquittal, 6 April 2000, para. 11.
[143] Hadžihasanović Appeal Brief, para. 72.
[144] Hadžihasanović Appeal Brief, para. 72. *See* also Hadžihasanović Reply Brief, para. 15.
[145] Prosecution Response Brief, para. 18.
[146] Prosecution Response Brief, para. 18.
[147] Prosecution Response Brief, para. 19.
[148] Hadžihasanović Appeal Brief, para. 75.
[149] Prosecution Response Brief, para. 20.
[150] Rule 98*bis* Decision, para. 18.

Trial Chamber not only recognised this principle,[151] but also referred in its Rule 98*bis* Decision to the entirety of the testimonies without excluding the cross-examination of the witnesses. Further, the Rule 98*bis* Decision is replete with references to Hadžihasanović's Motion for Acquittal, which in turn is replete with references to evidence adduced by the Defence during the Prosecution case.[152]

56. Accordingly, the Appeals Chamber finds that Hadžihasanović failed to demonstrate that the Trial Chamber erred in law and did not take into account evidence he adduced during the Prosecution case. Hadžihasanović's arguments are dismissed.[153]

4. Alleged lack of evidence in the Rule 98*bis* Decision concerning Hadžihasanović's failure to take necessary and reasonable measures to punish his subordinates

57. Hadžihasanović argues as part of his second ground of appeal that there was no evidence that he failed to take necessary and reasonable measures to punish his subordinates in relation to the crimes alleged in Counts 4, 5, 6 and 7 of the Indictment and hence that the Trial Chamber erred in law and in fact in failing to acquit him of these counts in its Rule 98*bis* Decision.[154] He submits that the sole Prosecution evidence at the end of its case to prove that he failed to take measures to punish the crimes as laid out in Counts 4, 5, 6 and 7 of the Indictment was the evidence given by Witness Hackshaw.[155] Considering that the Trial Chamber concluded in the Trial Judgement that this evidence lacked probative value,[156] Hadžihasanović submits that the Trial Chamber erred in law and in fact when not entering a judgement of acquittal in its Rule 98*bis* Decision.[157] He concludes that, as a result, his right to a fair trial was infringed upon because he was forced to call a defence and respond to charges that the evidence could not support .[158]

58. The Appeals Chamber will address in turn: (i) whether Witness Hackshaw's evidence was the sole evidence on the record at the conclusion of the Prosecution case regarding Hadžihasanović's failure to punish the crimes committed by his subordinates; (ii) whether Witness

[151] Rule 98*bis* Decision, paras 16-17.
[152] Motion for Acquittal of Enver Hadžihasanović ("Hadžihasanović's Motion for Acquittal"), 11 August 2004.
[153] Hadžihasanović also argued that the Trial Chamber erred in denying him certification to appeal the Rule 98*bis* Decision on the ground that the Trial Chamber "erred in law by not considering the evidence which could be favourable to the Defence" (Hadžihasanović Appeal Brief, paras 81-82). Having found in the present section that the Trial Chamber did not err, the issue of denial of certification is moot.
[154] Hadžihasanović Appeal Brief, para. 27, citing Trial Judgement, para. 999.
[155] Hadžihasanović Appeal Brief, para. 27. In his Reply Brief, Hadžihasanović also claims that the Trial Chamber, in its Rule 98*bis* Decision, failed to address "the most important essential element", namely whether he failed to take reasonable and necessary measures to punish his subordinates for the crimes alleged in the Indictment. He claims that the Trial Chamber actually drew its conclusion that there was sufficient evidence of his failure to prevent and punish without assessing any of the related evidence admitted on the record (Hadžihasanović Reply Brief, para. 6(j)).
[156] Trial Judgement, para. 999.
[157] Hadžihasanović Appeal Brief, para. 27.
[158] Hadžihasanović Appeal Brief, para. 50.

Hackshaw's evidence was "inadmissible evidence"; and (iii) whether the Trial Chamber's finding that Witness Hackshaw's conclusions had no probative value should have been drawn immediately following Witness Hackshaw's testimony.

(a) Whether Witness Hackshaw's evidence was the sole evidence on the record at the conclusion of the Prosecution case regarding Hadžihasanović's failure to punish crimes

59. Hadžihasanović claims that the evidence provided by Witness Hackshaw was the "sole evidence" on the record at the conclusion of the Prosecution case regarding his failure to punish the crimes committed by his subordinates.[159] He also asserts that the Prosecution's decision to call Witness Hackshaw as an additional witness showed the absence of other evidence concerning his failure to take such measures.[160] The Prosecution responds that Witness Hackshaw's conclusions were not the sole evidence relating to the failure to take measures to punish upon which the Trial Chamber based its Rule 98*bis* Decision, and submits that the Trial Chamber considered a broad range of Prosecution evidence.[161]

60. The Appeals Chamber notes that the Trial Chamber, in its Rule 98*bis* Decision, held 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".[162]

61. The Appeals Chamber further notes that the Trial Chamber, in its Rule 98*bis* Decision, referred "in particular" to the testimony of two Prosecution witnesses when concluding that sufficient evidence was adduced concerning the failure to prevent or punish the violations committed by subordinates alleged in the Indictment.[163] Hadžihasanović has not demonstrated that this evidence was insufficient for the purpose of Rule 98*bis* of the Rules. He does not make any submissions regarding this evidence in his Appeal Brief and merely claims in his Reply Brief that their testimonies, even taken at their highest, do not contradict the evidence favourable to him.[164] While he points in his Reply Brief to several exhibits adduced by him during the Prosecution case,[165] he does not attempt to demonstrate that this evidence rendered the Prosecution evidence incapable of belief. In any case, in its Rule 98*bis* Decision, the Trial Chamber also considered

[159] Hadžihasanović Appeal Brief, para. 27.
[160] Hadžihasanović Appeal Brief, para. 47. *See* also Hadžihasanović Reply Brief, para. 6(f) and (g).
[161] Prosecution Response Brief, paras 107-109.
[162] Rule 98*bis* Decision, para. 172, referring in the accompanying footnote to the testimony of Sulejman Kapetanović and Vlado Adamović.
[163] Rule 98*bis* Decision, para. 172, fn. 312.
[164] Hadžihasanović Reply Brief, para. 11.
[165] Hadžihasanović Reply Brief, paras 6, 11 and fn. 10.

evidence adduced by Hadžihasanović during the Prosecution case, both pertaining to his failure to punish and his failure to prevent crimes committed by his subordinates.[166]

62. The Appeals Chamber accordingly finds that Hadžihasanović failed to demonstrate that the evidence presented by Witness Hackshaw was the sole Prosecution evidence on the record at the conclusion of the Prosecution's case regarding Hadžihasanović's failure to punish crimes. Hadžihasanović's arguments are dismissed.

(b) Whether Witness Hackshaw's evidence was "inadmissible evidence"

63. The Trial Chamber concluded in the Trial Judgement "with regard to [C]ounts 4, 5, 6 and 7 [of the Indictment] that the conclusions of Witness Hackshaw cannot be admitted as having probative value".[167] Hadžihasanović submits that the issue of probative value is a criterion that goes to the admissibility of the evidence under Rule 89(C) of the Rules and asserts that Witness Hackshaw's conclusions were as a result inadmissible evidence.[168]

64. The Appeals Chamber understands Hadžihasanović's argument to be that, since the Trial Chamber concluded in its Trial Judgement that the evidence provided by Witness Hackshaw lacked probative value, it should not have been admitted at trial in the first place. The Appeals Chamber considers this argument to be based on a mistranslation from the authoritative French text of the Trial Judgement to the English version. The Appeals Chamber acknowledges that the English version of paragraph 999 of the Trial Judgement reads that the evidence "cannot be admitted as having probative value", which uses the wording of Rule 89(C) of the Rules governing the admissibility of evidence. However, the authoritative French version reads: "La Chambre *en* conclut qu'en ce qui concerne les chefs 4, 5, 6 et 7 les conclusions du témoin Hackshaw ne peuvent être *retenues* comme ayant une valeur probante."[169] This indicates that, after considering the methodology used by Witness Hackshaw in his investigation, the Trial Chamber concluded that the evidence cannot be retained as having probative value for those counts. The Trial Chamber did not put into question its decision to admit this evidence. Rather, it held that this evidence could not be given any weight with respect to Counts 4, 5, 6 and 7 of the Indictment even though it was previously admitted at trial. Hadžihasanović's arguments are dismissed.

[166] Rule 98*bis* Decision, paras 168-169, referring to Hadžihasanović's Motion for Acquittal, paras 50, 52-66, 67-79.
[167] Trial Judgement, para. 999.
[168] Hadžihasanović Appeal Brief, para. 37, citing Rule 89(C) of the Rules. *See* also Hadžihasanović Appeal Brief, para. 65.
[169] Emphasis added.

(c) Whether the Trial Chamber's finding that Witness Hackshaw's conclusions had no probative value should have been drawn immediately following his testimony

65. Hadžihasanović argues that the failure of Witness Hackshaw's mission was "manifest", a conclusion which the Trial Chamber should imperatively have drawn immediately following Hackshaw's testimony.[170] Referring to the jurisprudence of the International Tribunal on the law applicable to judgements of acquittal,[171] Hadžihasanović claims that Witness Hackshaw's conclusions were "not legally capable of leading to a conviction due to [their] lack of probative value and inadmissibility [and] so inherently incredible that no reasonable tribunal would accept their truth".[172]

66. The Prosecution submits that Hadžihasanović's claim that the Trial Chamber should have found that his evidence lacked probative value immediately after Witness Hackshaw's testimony mistakenly equates the assessment of evidence in a trial judgement to the test applicable to issuing a judgement under Rule 98*bis* of the Rules, where the applicable standard is whether a reasonable trier of fact could convict on the evidence adduced, taken at its highest.[173]

67. The Appeals Chamber recalls that, in principle, the Trial Chamber was required to take the conclusions of Witness Hackshaw at their highest in its Rule 98*bis* Decision[174] and was thus not called upon in its Rule 98*bis* Decision to clarify the probative value of the investigation conducted by Witness Hackshaw.

68. As to Hadžihasanović's arguments that the failure of Witness Hackshaw's mission was "so manifest" that the Trial Chamber's finding that Witness Hackshaw's conclusions had no probative value should imperatively have been drawn immediately following his testimony,[175] and that the conclusions by Witness Hackshaw were "inherently incredible",[176] the Appeals Chamber notes that the Trial Chamber accorded some weight to the testimony of Witness Hackshaw regarding the

[170] Hadžihasanović Appeal Brief, para. 38. Hadžihasanović also explains that he had submitted in his motion for acquittal that Witness Hackshaw's investigative mission failed to prove the absence of measures taken to punish the crimes alleged in the Indictment (Hadžihasanović Appeal Brief, para. 40, citing Hadžihasanović's Motion for Acquittal, paras 67-79, in which he requested to be acquitted on all counts of the Indictment).
[171] Hadžihasanović Appeal Brief, paras 41-42.
[172] Hadžihasanović Appeal Brief, para. 43 (emphasis omitted).
[173] Prosecution Response Brief, paras 95-98. *See* also Prosecution Response Brief, para. 17.
[174] *Jelisić* Appeal Judgement, para. 55.
[175] Hadžihasanović Appeal Brief, para. 38.
[176] Hadžihasanović Appeal Brief, para. 43.

counts of murder.[177] This demonstrates that the Trial Chamber considered this evidence to be to some extent credible and to have some probative value.[178]

69. The Appeals Chamber finds that Hadžihasanović failed to demonstrate that the failure of Witness Hackshaw's investigation was manifest or that his conclusions were so inherently incredible that the Trial Chamber erred when not rejecting this evidence at the Rule 98*bis* stage as being incapable of belief. Hadžihasanović's arguments are dismissed.

5. Alleged lack of evidence in the Rule 98*bis* Decision concerning events in Bugojno

70. As part of his third ground of appeal, Hadžihasanović submits that the Trial Chamber erred in law and in fact in not acquitting him in the Rule 98*bis* Decision for the murder of Mladen Havranek and the cruel treatment inflicted on prisoners in Bugojno, which led to an infringement of his right to a fair trial.[179] Hadžihasanović explains that the Trial Chamber's conclusion in the Trial Judgement that he had knowledge of these crimes is based solely on Defence evidence, namely three Defence witnesses and one exhibit tendered by the Defence during its case.[180] He claims that "[t]he only conclusion that can be drawn from the sequence of events" is that there was no evidence at the end of the Prosecution's case to demonstrate that he had knowledge of these crimes and that he should have been accordingly acquitted in the Rule 98*bis* Decision.[181]

71. The Trial Chamber relied both on Prosecution and Defence evidence.[182] The Trial Chamber's reliance on evidence that was led during the Defence case does not necessarily establish that the evidence before the Trial Chamber at the conclusion of the Prosecution case was incapable of sustaining a conviction. As acknowledged by Hadžihasanović, the Trial Chamber based its Rule 98*bis* Decision's finding about his knowledge of his subordinates' crimes on several pieces of evidence proffered by the Prosecution.[183] Hadžihasanović merely claims that neither this evidence nor the other evidence on the record at the time of the Rule 98*bis* Decision could have established

[177] Trial Judgement, para. 1000.
[178] The Trial Chamber, however, accorded limited weight to this evidence: "in cases where the Prosecution did not submit any other evidence to meet its burden of proof other than the conclusions of Witness Hackshaw, the [Trial] Chamber finds that the Prosecution has failed to prove its case" (Trial Judgement, para. 1000).
[179] Hadžihasanović Appeal Brief, paras 184, 195-196.
[180] Hadžihasanović Appeal Brief, paras 186, 188, citing Trial Judgement, fns 3893-3898. Hadžihasanović also cites Trial Judgement, para. 1759 (Hadžihasanović Appeal Brief, para. 187; Hadžihasanović Reply Brief, para. 47), which allegedly supports his contention that he did not know about the cruel treatment inflicted to prisoners and the killing of one of them in Bugojno. However, the Appeals Chamber notes that paragraph 1759 of the Trial Judgement is concerned with a different issue.
[181] Hadžihasanović Appeal Brief, para. 188.
[182] *See* Trial Judgement, paras 1747-1755.
[183] Hadžihasanović Appeal Brief, para. 191, citing testimony of Witness Gerritsen, Exhibit P473, Exhibit P203.

the element of knowledge,[184] but does not substantiate his claim. Hadžihasanović's arguments are dismissed.

6. Conclusion

72. For the foregoing reasons, the Appeals Chamber dismisses Hadžihasanović's arguments regarding the Trial Chamber's Rule 98*bis* Decision.

C. Witness Hackshaw's investigation concerning failure to take necessary and reasonable measures to punish the crime of murder

73. Hadžihasanović argues that the Trial Chamber erred in law and in fact in finding that Witness Hackshaw's assertion, according to which "no files concerning murders committed by members of the ABiH [were] opened", was based on an investigation which methodology was found to be sufficiently reliable and therefore had probative value.[185] He claims that the methodology used by Witness Hackshaw for the investigation was not reliable.[186] The Prosecution responds that the Trial Chamber thoroughly analysed the methodology of Witness Hackshaw's mission and differentiated the probative value of its results as regards the counts of murder and other counts.[187] It points to the wide discretion Trial Chambers enjoy in their assessment of evidence and argues that Hadžihasanović failed to show that no reasonable trier of fact could have reached the conclusion that Witness Hackshaw's evidence concerning the murders was reliable.[188] It submits that the Trial Chamber already considered and rejected Hadžihasanović's arguments regarding the short duration of the mission, that not all case files were searched, that files were missing, and that certain official notes or reports were not located.[189]

74. The Appeals Chamber notes that the Trial Chamber addressed the methodology used by the investigation team extensively in its Trial Judgement.[190] The arguments put forward by Hadžihasanović in his Appeal Brief were considered by the Trial Chamber, such as the fact that the mission was conducted in a short period of time,[191] that the investigation team did not search all the case files and realised that files were missing,[192] which was acknowledged by Witness Hackshaw to

[184] Hadžihasanović Appeal Brief, para. 191.
[185] Hadžihasanović Appeal Brief, para. 52, citing Trial Judgement, para. 994, which reads: "Hackshaw's claim that no case files on murders committed by members of the ABiH were opened has probative value since it is based on an investigation whose methodology is sufficiently reliable."
[186] Hadžihasanović Appeal Brief, para. 59.
[187] Prosecution Response Brief, para. 110, citing Trial Judgement, paras 983-1000.
[188] Prosecution Response Brief, paras 111 and 114.
[189] Prosecution Response Brief, para. 112, citing Trial Judgement, paras 984-986.
[190] Trial Judgement, paras 983-1000.
[191] Hadžihasanović Appeal Brief, para. 53. *See* Trial Judgement, para. 984.
[192] Hadžihasanović Appeal Brief, para. 54. *See* Trial Judgement, para. 985. Hadžihasanović also submits that "some registers were missing" (Hadžihasanović Appeal Brief, para. 56) without, however, substantiating his claim.

be a serious flaw in the examination process,[193] and that not all places where criminal records filed by the 3rd Corps could be found were consulted.[194] The Trial Chamber also specifically recognised that the methodology used was "imperfect".[195] It nevertheless came to the conclusion that this methodology was sufficiently reliable and that, therefore, the conclusions of Witness Hackshaw had some probative value.[196] Hadžihasanović failed to demonstrate that the Trial Chamber erred in reaching this conclusion.

75. As to Hadžihasanović's related claim that the methodology of the investigation led by Witness Hackshaw in relation to the crime of murder was no more reliable than the one conducted in relation to Counts 4, 5, 6, and 7 of the Indictment,[197] the Appeals Chamber notes that the Trial Chamber gave specific reasons why it rejected the evidence of Witness Hackshaw regarding Counts 4, 5, 6 and 7 of the Indictment but allocated probative value to this evidence regarding Hadžihasanović's failure to take measures against the murders committed by his subordinates.[198] The Trial Chamber based its distinction on the fact that no searches were made of case files on acts included in Counts 4, 5, 6, and 7, but only on acts of murder and similar crimes.[199] In light of the detailed analysis of the methodology used by the investigation team in the Trial Judgement, the fact that it addressed Hadžihasanović's arguments put forward against this methodology, and the failure by Hadžihasanović to demonstrate that no reasonable trier of fact could have come to the conclusion that the methodology used by the team led by Witness Hackshaw was sufficiently reliable, [200] the Appeals Chamber rejects Hadžihasanović's claim in this respect. The Appeals Chamber also rejects Hadžihasanović's argument that Witness Hackshaw was not qualified to lead an effective investigation through the archives[201] as unsubstantiated.

76. The Appeals Chamber therefore concludes that Hadžihasanović failed to demonstrate that the Trial Chamber erred in finding that Witness Hackshaw's testimony had some probative value and in according it some weight. The Appeals Chamber dismisses Hadžihasanović's arguments regarding Witness Hackshaw's investigation.

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[193] Hadžihasanović Appeal Brief, para. 54. *See* Trial Judgement, para. 985, T. 9691.
[194] Hadžihasanović Appeal Brief, para. 60. *See* Trial Judgement, para. 990 and fn. 2072.
[195] Trial Judgement, para. 992.
[196] Trial Judgement, para. 994.
[197] Hadžihasanović Appeal Brief, para. 63.
[198] Trial Judgement, paras 992-1000.
[199] *See* Trial Judgement, paras 993, 995.
[200] The Appeals Chamber considers that Hadžihasanović's claim that there was no evidence at the end of the Prosecution case that he failed to take measures to punish and that the Trial Chamber should as a result have acquitted him in its Rule 98*bis* Decision (Hadžihasanović Appeal Brief, paras 65-66; Hadžihasanović Reply Brief, paras 12-13), is based on the premise that the Trial Chamber erred in finding that the methodology was reliable. As the Appeals Chamber has found that Hadžihasanović has failed to demonstrate an error in this regard, his arguments are dismissed.
[201] Hadžihasanović Appeal Brief, para. 57. *See* also Prosecution Response Brief, para. 113.

D. Alleged apprehension of bias through the Judges' questioning of witnesses

77. Hadžihasanović submits that the Trial Chamber erred in law in its practice of questioning witnesses, and that such error would lead a reasonable observer to conclude that the Judges at trial did not appear impartial.[202] He therefore requests a new trial for any count for which he remains guilty at the end of this appeal.[203] In particular, he argues that: (i) witnesses were unfairly treated by the Judges;[204] (ii) witnesses were not given time to answer questions;[205] (iii) several statements of the Judges clearly show a pre-conceived opinion on the subject of the testimony or the credibility of the witness,[206] and the Judges, conducting numerous interrogations of witnesses, gave the impression of assisting the Prosecution;[207] and (iv) his right to question the witnesses last does not detract from the appearance of partiality created by the Judges' behaviour.[208] The Prosecution responds that the examples provided by Hadžihasanović are illustrative of the Judges' legitimate function to ask questions, ascertain the truth and clarify contradictions within testimonies or with testimonies of other witnesses.[209]

78. The Judges' obligation to be and remain impartial is laid down in Article 13 of the Statute.[210] The Judges enjoy a presumption of impartiality and there is a high threshold to reach in order to rebut this presumption.[211] Such impartiality is a component of the right to a fair trial as recognised in Article 21 of the Statute.[212] It is settled jurisprudence in the International Tribunal that a Judge should not only be subjectively free from bias, but also that there should be nothing in the surrounding circumstances which objectively gives rise to an appearance of bias.[213] The Appeals

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[202] Hadžihasanović Appeal Brief, para. 91.
[203] Hadžihasanović Appeal Brief, para. 130.
[204] Hadžihasanović Appeal Brief, paras 104-109.
[205] Hadžihasanović Appeal Brief, para. 110.
[206] Hadžihasanović Appeal Brief, paras 111-118.
[207] Hadžihasanović Appeal Brief, paras 119-123.
[208] Hadžihasanović Appeal Brief, paras 124-125. Hadžihasanović also attached, as appendixes B and C, respectively, statements from Witnesses Merdan and Mešić, describing their experience in court (*see* Hadžihasanović Appeal Brief, paras 109 and 118). Considering that Hadžihasanović did not seek admission of these statements as additional evidence under Rule 115 of the Rules, the Appeals Chamber will not take them into account.
[209] Prosecution Response Brief, paras 37-38.
[210] Article 13 of the Statute reads: "The permanent and *ad litem* judges shall be persons of high moral character, impartiality and integrity who possess the qualifications required in their respective countries for appointment to the highest judicial offices". *See Furundžija* Appeal Judgement, para. 177; *Čelebići* Appeal Judgement, para. 655. *See* also *Rutaganda* Appeal Judgement, para. 39.
[211] *Furundžija* Appeal Judgement, para. 197: "[I]n the absence of evidence to the contrary, it must be assumed that the Judges of the International Tribunal 'can disabuse their minds of any irrelevant personal beliefs or predispositions.' It is for the Appellant to adduce sufficient evidence to satisfy the Appeals Chamber that [the Judge in question] was not impartial in his case. There is a high threshold to reach in order to rebut the presumption of impartiality." *See* also *Galić* Appeal Judgement, para. 41; *Čelebići* Appeal Judgement, para. 707; *Nahimana et al.* Appeal Judgement, para. 48; *Rutaganda* Appeal Judgement, para. 42; *Akayesu* Appeal Judgement, para. 91.
[212] *Galić* Appeal Judgement, para. 37; *Furundžija* Appeal Judgement, para. 177. *See* also *Rutaganda* Appeal Judgement, para. 39.
[213] *Galić* Appeal Judgement, para. 38; *Furundžija* Appeal Judgement, para. 189. *See* also *Nahimana et al.* Appeal Judgement, para. 49; *Rutaganda* Appeal Judgement, para. 39; *Akayesu* Appeal Judgement, para. 203.

Chamber recalls that there is an unacceptable appearance of bias if "the circumstances would lead a reasonable observer, properly informed, to reasonably apprehend bias".[214] In the following section, the Appeals Chamber will discuss whether the Trial Judges showed such an appearance of bias.

1. Alleged incorrect treatment of witnesses

79. Hadžihasanović claims that witnesses were incorrectly treated by the Judges and particularly refers to the testimony of Witness Merdan. He claims that a reasonable observer could conclude that the Judges' behaviour as well as their statements and questions gave the impression that they were biased.[215] He argues that: (i) the Judges "immediately opposed" Witness Merdan testifying as one of the first Defence witnesses and expressed their opinion on his credibility;[216] (ii) the Judges addressed him in an "intimidating manner" despite his cooperative attitude;[217] and (iii) he was examined and "literally cross-examined" by the Trial Chamber for more than eight hours.[218] Hadžihasanović invites the Appeals Chamber to watch the video of the testimony of Witness Merdan on 15 and 16 December 2004.[219]

80. The Prosecution responds that: (i) the Judges did not oppose Hadžihasanović's intention to call Witness Merdan as one of the first witnesses but expressed the view that such an important witness should be heard at the end of the Defence case, and the Presiding Judge's comment in this context was not an opinion on Witness Merdan's credibility but showed his concern in view of the testimony's importance;[220] (ii) the allegation that the Judges acted in a biased and intimidating manner is not substantiated and, moreover, the Judges relied extensively on Witness Merdan's testimony, including in Hadžihasanović's favour, which contradicts the allegation of bias;[221] and (iii) the length of Witness Merdan's questioning by the Trial Chamber has to be seen in the context of his overall testimony of 40 hours, including four hours by the Defence after the Judges had questioned him.[222]

(a) Hadžihasanović's request that Witness Merdan testify as one of the first witnesses

81. The Trial Chamber considered that Witness Merdan was a crucial witness, determined that he could best be heard after the other witnesses, and offered the Parties the opportunity to express

[214] *Galić* Appeal Judgement, para. 39; *Furundžija* Appeal Judgement, para. 189. *See* also *Nahimana et al.* Appeal Judgement, paras 49-50; *Rutaganda* Appeal Judgement, para. 39; *Akayesu* Appeal Judgement, para. 203.
[215] Hadžihasanović Appeal Brief, para. 107.
[216] Hadžihasanović Appeal Brief, para. 105.
[217] Hadžihasanović Appeal Brief, para. 106.
[218] Hadžihasanović Appeal Brief, para. 108.
[219] Hadžihasanović Appeal Brief, para. 109.
[220] Prosecution Response Brief, para. 40.
[221] Prosecution Response Brief, para. 41.
[222] Prosecution Response Brief, para. 40.

their views on this issue.[223] The Defence explained that hearing Witness Merdan as one of the first witnesses was a way of enhancing the efficiency of the proceedings and was part of its strategy.[224] The Prosecution proposed to split Witness Merdan's testimony, so that his examination-in-chief would be done at the beginning and his cross-examination at the end of the proceedings,[225] a suggestion initially supported by the Trial Chamber[226] but opposed by the Defence.[227] After deliberation, the Trial Chamber concluded that should Hadžihasanović stand by his position as part of his Defence strategy, the proceedings would have to be adjourned for a week to give the Prosecution and the Trial Chamber the possibility to prepare the cross-examination and questions.[228] The Trial Chamber decided that, in order to avoid wasting time as a result of the adjournment, the Defence's expert witnesses could first be heard, that Witness Merdan could subsequently testify in the last week before the winter recess in December 2004, and that he could be cross-examined in the beginning of January 2005. The Trial Chamber stated that this compromise took into account the positions of the Parties and was in keeping with the Defence strategy and the interest of justice.[229] The Appeals Chamber accordingly finds that the Trial Chamber did not "oppose" Hadžihasanović's decision to call Witness Merdan as one of the first witnesses. Rather, the Trial Chamber took a balanced approach which would not leave a reasonable and properly informed observer to reasonably apprehend bias.

82. Moreover, Hadžihasanović's allegation that the Judges expressed their opinion on the credibility of Witness Merdan is unfounded. It is unclear from Hadžihasanović's submission exactly to which of the Judges' statements he refers.[230] The Prosecution understands Hadžihasanović to refer to a comment of the Presiding Judge in which he mentions the possibility of contradictions by subsequent witnesses.[231] The Appeals Chamber notes that this statement was, however, not concerned with Witness Merdan; the Presiding Judge only explained the rationale behind Rule 90(F)(ii) of the Rules[232] in general.[233] Having also reviewed the remaining portion of the transcripts referred to by Hadžihasanović, the Appeals Chamber finds that a reasonable observer, properly informed, would not be led to reasonably apprehend bias.

[223] T. 10253-10254 (Private Session).
[224] T. 10255-10256 (Private Session).
[225] T. 10257 (Private Session).
[226] T. 10258 (Private Session).
[227] T. 10259-10260 (Private Session).
[228] T. 10284 (Private Session).
[229] T. 10285 (Private Session).
[230] Hadžihasanović Appeal Brief, para. 105 citing T. 10253-10263 and T. 10258 (Private Session).
[231] Prosecution Response Brief, para. 40, citing T. 10258 (Private Session).
[232] Rule 90(F)(ii) reads: "The Trial Chamber shall exercise control over the mode and order of interrogating witnesses and presenting evidence so as to […] avoid needless consumption of time."
[233] T. 10258 (Private Session).

(b) Allegation of intimidation

83. The Appeals Chamber finds that Hadžihasanović's claim that the Judges "behaved towards Witness Merdan in a biased manner" and addressed him in an "intimidating manner"[234] is not substantiated. His contention that, by looking at the testimony of Witness Merdan as a whole, a reasonable observer could conclude that the Judges' statements and questions demonstrate bias,[235] is a generic and unsubstantiated allegation. The Appeals Chamber recalls that an appellant must set forth the arguments in support of his allegation of bias in a precise manner, and that the Appeals Chamber cannot entertain sweeping or abstract allegations that are neither substantiated nor detailed to rebut the presumption of impartiality.[236] Hadžihasanović's arguments are dismissed.

(c) Amount of time Witness Merdan was asked questions by the Trial Chamber

84. Concerning Hadžihasanović's contention that Witness Merdan was "literally cross-examined" by the Trial Chamber for more than eight hours,[237] the Appeals Chamber finds that the amount of time the Judges spent asking him questions does not in and of itself lead a reasonable observer, properly informed, to reasonably apprehend bias. His arguments are dismissed.

(d) Video of the testimony of Witness Merdan of 15 and 16 December 2004

85. Hadžihasanović claims that the apprehension of bias is "evident" from the testimony of Witness Merdan on 15 and 16 December 2004 and invites the Appeals Chamber to watch the video of this testimony.[238] The Appeals Chamber finds that Hadžihasanović does not meet his burden on appeal to demonstrate an error of the Trial Chamber with such a generic contention. This contention is, in any case, not sufficient to rebut the presumption of impartiality which Judges enjoy.[239] An appellant has to set forth the arguments in support of his allegation of bias in a precise manner,[240] and the mere reference to two days of testimony is insufficient in this regard. Hadžihasanović's arguments are dismissed.

[234] Hadžihasanović Appeal Brief, para. 106.
[235] Hadžihasanović Appeal Brief, para. 107.
[236] *Rutaganda* Appeal Judgement, para. 43. *See* also *Akayesu* Appeal Judgement, paras 92 and 100; *Nahimana et al.* Appeal Judgement, para. 48.
[237] Hadžihasanović Appeal Brief, para. 108.
[238] Hadžihasanović Appeal Brief, para. 109.
[239] *Furundžija* Appeal Judgement, para. 197. *See* also *Akayesu* Appeal Judgement, para. 91; *Rutaganda* Appeal Judgement, para. 42; *Nahimana et al.* Appeal Judgement, para. 48.
[240] *Rutaganda* Appeal Judgement, para. 43.

(e) Conclusion

86. For the foregoing reasons, the Appeals Chamber concludes that Hadžihasanović failed to demonstrate that the Trial Chamber's treatment of witnesses would lead a reasonable observer, properly informed, to reasonably apprehend bias. Hadžihasanović's arguments are dismissed.

2. Alleged insufficient time for Witness Merdan to answer Judges' questions

87. Hadžihasanović argues that Witness Merdan complained at trial that he was not given sufficient time to answer questions posed by the Judges.[241] The Prosecution responds that the Presiding Judge, upon this complaint, allowed Witness Merdan to complete his answers.[242]

88. The Appeals Chamber notes that, in the two instances indicated by Hadžihasanović,[243] Witness Merdan was interrupted by the Presiding Judge but then allowed to finish his answers. In particular, when informed by Hadžihasanović that Witness Merdan needed more time to finish his answer, the Presiding Judge told him to take the time he needed to do so.[244] The Appeals Chamber finds that Hadžihasanović failed to demonstrate that a reasonable observer, properly informed, would be led to reasonably apprehend bias on this basis. His arguments are dismissed.

3. Whether the Judges had a pre-conceived opinion on the credibility of witnesses

89. While he acknowledges that Judges are allowed to ask clarifying questions for the discovery of the truth, Hadžihasanović submits that they have to act cautiously and maintain a proper balance between their power to do so and the appearance of impartiality.[245] He argues that several statements of the Judges clearly show a pre-conceived opinion on the subject of the testimony or the credibility of the witnesses.[246] He points to five examples, which he submits would, considered as a whole, lead a reasonable observer to conclude that the Trial Chamber appeared partial:[247] (i) some of the Presiding Judge's remarks to Witness Merdan "literally cross-examining him";[248] (ii) one of the Judges "openly stating" that Witness Merdan was not truthful;[249] (iii) the Presiding Judge's questions to Witness Šiljak;[250] (iv) the Presiding Judge's questions to Witness Jašarević;[251] and

[241] Hadžihasanović Appeal Brief, para. 110.
[242] Prosecution Response Brief, para. 42.
[243] Hadžihasanović Appeal Brief, fns 125-126, citing T. 13620 and T. 13610-13612.
[244] T. 13613: "The Defence would like to give you more time, for you to have more time. Take the time you need to answer".
[245] Hadžihasanović Reply Brief, para. 29.
[246] Hadžihasanović Appeal Brief, para. 111.
[247] Hadžihasanović Reply Brief, para. 30. Hadžihasanović also submits that these examples "are non-exhaustive but nonetheless the most significant" and refers to several other testimonies without providing a reference to the transcript pages or substantiating this allegation (Hadžihasanović Reply Brief, fn. 30).
[248] Hadžihasanović Appeal Brief, para. 112.
[249] Hadžihasanović Appeal Brief, para. 113.
[250] Hadžihasanović Appeal Brief, para. 114.

(v) the Presiding Judge's questions to Witness Mesić, where he "lost his patience and openly told the witness without cause that he was lying".[252]

90. The Prosecution responds that: (i) the Presiding Judge sought to clarify parts of Witness Merdan's testimony, which caused confusion in interpretation, and the Presiding Judge's remarks merely express irritation at this confusion;[253] (ii) the Judge's alleged statement as to Witness Merdan's untruthfulness does not appear in the transcript and his questions were aimed at resolving contradictions between the testimony of Witness Merdan and that of another witness;[254] (iii) regarding Witness Šiljak's testimony, the Prosecution cannot find, in the section of the transcript cited by Hadžihasanović, a particular remark of the Judge that shows an appearance of bias;[255] (iv) the Presiding Judge's statement reminding Witness Jašarević to tell the truth was not inappropriate and has to be seen in the context of confronting the witness with contradictory testimony of another witness;[256] and (v) the Presiding Judge's alleged statement that Witness Mesić was lying does not appear in the transcript.[257]

(a) The Presiding Judge's remarks to Witness Merdan

91. The Appeals Chamber notes that Hadžihasanović referred to two instances where he claims that the Presiding Judge's remarks to Witness Merdan show a pre-conceived opinion on the subject of his testimony and on his credibility.[258] In the first instance, the Presiding Judge asked whether the 3rd Corps was capable of mounting offensive actions. Confusion arose around the difference between "action" and "operation", and offensive and defensive actions, which the Presiding Judge sought to clarify.[259] During the confusion, the Presiding Judge told him not to "toy[] with words".[260] However, after Witness Merdan explained one of the issues, the Presiding Judge also thanked him for his "very exact answer".[261] In the second instance, the Presiding Judge told him that he did not understand why he appeared not to recollect important information surrounding the 3rd Corps.[262]

[251] Hadžihasanović Appeal Brief, para. 115.
[252] Hadžihasanović Appeal Brief, paras 116-117.
[253] Prosecution Response Brief, para. 38.
[254] Prosecution Response Brief, para. 38.
[255] Prosecution Response Brief, para. 43.
[256] Prosecution Response Brief, para. 38.
[257] Prosecution Response Brief, para. 43.
[258] Hadžihasanović Appeal Brief, para. 112, fn. 127. *See* also para. 111.
[259] T. 13593-13597.
[260] T. 13593: "[N]e jouez pas sur les mots".
[261] T. 13597.
[262] T. 13601: "[Judge Antonetti:] Curiously enough, General, anything having to do closely with the 3rd Corps seems to be something you're never aware of. This famous operations log, you don't know anything about it. And another important figure is something that you don't know either. Could you explain this to us. Why don't you know this?"

92. The Appeals Chamber finds that the statements by the Presiding Judge do not indicate a pre-conceived opinion on the subject of the testimony or on the credibility of Witness Merdan. Rather, these statements and the questions posed to him were directed at clarifying issues. Hadžihasanović failed to demonstrate that those statements would lead a reasonable observer, properly informed, to reasonably apprehend bias. His arguments are dismissed.

(b) Allegation that a Judge openly stated that Witness Merdan was not truthful

93. Hadžihasanović claims that one of the Judges, while asking questions on the events in Orašac, openly stated that Witness Merdan was not truthful.[263] The Appeals Chamber notes that Witness Merdan was confronted by the Judge with a document and testimony of another witness which, in the view of the Judge, appeared to contradict Witness Merdan's testimony.[264] In light of the fact that this part of Witness Merdan's testimony was an element of significant importance for the Trial Chamber,[265] it is understandable that the Judge sought to clarify the contradictory statements by Witness Merdan and the other witness. The Appeals Chamber recalls that Judges have a wide discretion to contribute to the discovery of the truth, including the power to confront one witness with the testimony of another.[266] The Appeals Chamber also notes that, contrary to Hadžihasanović's contention, the Judge did not state that Witness Merdan was not truthful, he only sought to clarify the differences among various testimonies.[267] The Appeals Chamber concludes that Hadžihasanović failed to demonstrate that the questions and statements by the Judge would lead a reasonable observer, properly informed, to reasonably apprehend bias. His arguments are dismissed.

[263] Hadžihasanović Appeal Brief, para. 113.
[264] *See* T. 13673-13675: "[Judge Swart:] May we not assume that you were aware of the kidnappings of a number of Croats in Travnik in October, or weren't you? A. No, Your Honour, I wasn't aware of that. […] [Judge Swart:] I can imagine you're not aware any more of that meeting, but it is difficult for me to accept that he [i.e., Witness Duncan] is not telling the truth or that he is not representing correctly what happened. A. No, Your Honour. I can claim with full responsibility that Duncan Alistair never told me that some Croats had been kidnapped in Travnik. […] [Judge Swart:] So there is a written document who says something about your meeting, and [Witness] Duncan himself also testified to the same effect. A. Your Honour, I can claim with full responsibility before this Trial Chamber that Colonel Alistair Duncan never informed me of some Croats having been kidnapped in Travnik. Similarly, Your Honours, I claim with full responsibility that I signed an order, or perhaps even two orders, on behalf of the 3rd Corps commander according to which the *El mujahedin* detachment was to be resubordinated to the *Bosanska Krajina* OG, which was led by the late General Alagic. So if I said that Colonel Alistair Duncan probably paraphrased what I said, but I would like to emphasise the fact that Colonel Alistair Duncan never told me that Croats had been kidnapped in Travnik."
[265] The Trial Chamber noted the contradictory interpretations of Witnesses Merdan and Duncan (Trial Judgement, paras 1413-1416) and found that Witness Merdan was aware, by 20 October 1993 at the latest, of the abduction of the second group of Serbian and Croatian civilians (Trial Judgement, para. 1422).
[266] *Rutaganda* Appeal Judgement, paras 62-63.
[267] T. 13673-13676.

(c) Witness Šiljak

94. Hadžihasanović also takes issue with the Presiding Judge's questions to Witness Šiljak. The Appeals Chamber, however, notes that the transcript page cited by Hadžihasanović, first, does not identify the Presiding Judge but Judge Swart as asking questions and, second, does not indicate that the Judge asked any question that would demonstrate an appearance of bias.[268] Hadžihasanović's argument is dismissed.

(d) Witness Jašarević

95. Concerning Hadžihasanović's reference to the comment made by the Presiding Judge when questioning Witness Jašarević,[269] the Appeals Chamber considers that the Judge was merely putting him on notice that his testimony appeared to contradict a version of events recounted by another witness.[270] The Presiding Judge then reminded Witness Jašarević that he took the solemn declaration to speak the truth.[271] The Appeals Chamber notes that, under the Rules of the International Tribunal, "[a] Chamber, *proprio motu* or at the request of a party, may warn a witness of the duty to tell the truth and the consequences that may result from a failure to do so".[272] The Appeals Chamber considers that such a reminder is particularly appropriate when Judges are confronted with two contradictory statements of events. The mere fact that the Presiding Judge reminded Witness Jašarević in this context that he was under the obligation to speak the truth would not lead a reasonable observer, properly informed, to reasonably apprehend bias. Hadžihasanović's arguments are dismissed.

[268] Hadžihasanović only states that, under the section of his Appeal Brief dealing with "Judges statements/questions showing pre-conceived opinions on credibility of witnesses", that "[a]nother example is when the Presiding Judge addressed Witness Šiljak on 26 October 2004" (Hadžihasanović Appeal Brief, para. 114, citing T. 10667). The two questions posed by Judge Swart to Witness Šiljak on transcript page T. 10667 read: "And the mujahedin or the individuals that came from them and later joined your brigades, did they have a sort of influence on the behaviour of your soldiers in the sense that your soldiers also began to grow beards or that kind of thing, to become more Muslim in appearance? […] My final question, but I think you may already have answered it. There is a possibility, given these two documents, that mujahedin sort of conducted their own war at the same time as you had your war. Was there any form in such a situation, if they existed, of coordination, or was there any military advantage in their -- in what they did for your troops?"

[269] Hadžihasanović Appeal Brief, para. 115, citing T. 11594.

[270] T. 11594: "[Judge Antonetti:] We have a witness who appears to have given us a different version, a contradictory version. He said that they had been taken to another building and that that is where they met Red Cross representatives. What could you say about this slight contradiction? To refresh your memory, I will quote what this person said very rapidly. A certain number of soldiers from the civilian police came with a list containing the names of various persons. All those on the list had to leave the sports hall and were taken to another building close by. There were other Croats there, including women. I'd like to be clear about this. The Red Cross representatives, did they see people in the school or outside the school? You're telling us that you were present. So please, clarify this for us".

[271] T. 11594: "[Judge Antonetti:] And I'd like to remind you that you have taken the solemn declaration and said that you will speak the truth".

[272] Rule 91(A) of the Rules.

(e) Witness Mesić

96. Hadžihasanović claims that, when questioning Witness Mesić, the Presiding Judge "lost his patience and openly told the witness without cause that he was lying".[273] The Appeals Chamber has reviewed the transcript pages referred to by Hadžihasanović and did not find a statement by the Presiding Judge that Witness Mesić was lying.[274] The Presiding Judge sought to clarify an event for which two opposing testimonies existed.[275] He explained that another witness gave a contrary description of the events and asked Witness Mesić whether he was "quite sure" of what he had told the Judges under solemn oath.[276] Witness Mesić reaffirmed his version of the events[277] and the Presiding Judge reminded him that he was testifying under oath.[278] The Appeals Chamber finds that the fact that the Presiding Judge, in the context of two conflicting testimonies, reminded Witness Mesić that he was under oath would not lead a reasonable observer, properly informed, to reasonably apprehend bias. Hadžihasanović's arguments are dismissed.

(f) Conclusion

97. The Appeals Chamber concludes that Hadžihasanović failed to demonstrate that the Judges had a pre-conceived opinion on the subject of the testimony or the credibility of the witnesses. The five examples he provides would not lead a reasonable observer, properly informed, to reasonably apprehend bias. This sub-ground of appeal is dismissed in its entirety.

4. Allegation that the Judges gave the impression of assisting the Prosecution

98. Hadžihasanović submits that the Judges, when conducting numerous interrogations of witnesses, gave the impression of investigating and assisting the Prosecution.[279] He claims that the "apparent" purpose of this extensive questioning was to deprive the witnesses' testimonies of their probative value, and specifically refers to the questioning of Witness Baggesen.[280] He submits that Witness Baggesen stated during his testimony that he visited a specific building without seeing

[273] Hadžihasanović Appeal Brief, paras 116-117.
[274] Hadžihasanović Appeal Brief, fn. 131, citing T. 12889-12905.
[275] Witness Križanac testified that, in his car, he was escorted by a soldier (T. 1102, 1104), whereas Witness Mesić said that there was no soldier with Witness Križanac in the vehicle (T. 12899, *see* also T. 12903).
[276] T. 12897-12898: "[Judge Antonetti:] The persons you brought with you described the facts differently, and the Defence referred to that. They did not mention your name. We have the testimony about what actually happened, and it does not correspond to what you said. Are you quite sure of what you told us under the solemn oath, that is that you brought those people back in the car, that there were no military men, that you stopped to take a cup of coffee. Are you quite sure of that?"
[277] T. 12901.
[278] T. 12902: "[Judge Antonetti:] All right. So you don't understand why they said there were soldiers whereas according to you there were none. We're going to take note of what you've just said under oath, under the solemn declaration."
[279] Hadžihasanović Appeal Brief, paras 119-120. *See* also Hadžihasanović Reply Brief, para. 32.
[280] Hadžihasanović Appeal Brief, para. 121.

anyone detained there and claims that the Judges "vainly tried to contradict him on this issue because his testimony did not fit their own pre-conceived idea".[281] Hadžihasanović additionally contends that the Judges, when questioning expert Witness Reinhardt, addressed issues that were neither included in his expert report nor raised by the Parties during examination and cross-examination, such as the treatment of prisoners and the responsibility of a commander towards prisoners.[282] Hadžihasanović also claims that he could not adequately re-examine Witness Reinhardt on these issues due to the fact that he had insufficient time.[283]

99. The Prosecution responds that the Judges' questions to Witness Baggesen were posed to clarify a specific issue. It claims that Witness Baggesen first stated that he had visited the entire building without seeing any detainees but later acknowledged that he might not have seen the basement of this building.[284] The Prosecution additionally argues that other witnesses testified that people were detained in this basement.[285] With regard to Witness Reinhardt, the Prosecution claims that Judges are allowed to ask questions beyond issues raised in examination and cross-examination, and that the issue of the responsibility of a commander towards prisoners was mentioned in the expert report and thus fell within Witness Reinhardt's expertise.[286] Regarding questions pertaining to the treatment of prisoners, the Prosecution acknowledges that while this issue was not in Witness Reinhardt's report, one Judge's "unfortunate misapprehension" does not however show bias and, in any case, the confusion was later rectified by another Judge, who stated that the treatment of prisoners was not part of the report and thus would not be discussed.[287]

(a) Witness Baggesen

100. The Appeals Chamber notes that many witnesses testified that prisoners were held in the basement of the Zenica Music School.[288] Witness Baggesen testified that during his visit he did not see anyone detained in the Zenica Music School.[289] After being shown a photo of the basement, Witness Baggesen could not remember whether he had seen it.[290] The Appeals Chamber considers that, in this context, the Judge's questions were appropriate to clarify whether Witness Baggesen had in fact visited the basement of the Zenica Music School. In addition, the Appeals Chamber

[281] Hadžihasanović Appeal Brief, para. 121.
[282] Hadžihasanović Appeal Brief, para. 122.
[283] Hadžihasanović Appeal Brief, para. 123.
[284] Prosecution Response Brief, para. 38.
[285] Prosecution Response Brief, para. 38.
[286] Prosecution Response Brief, para. 39.
[287] Prosecution Response Brief, para. 39.
[288] *See* Trial Judgement, paras 1173-1200, in particular para. 1190, fn. 2629.
[289] T. 7036.
[290] T. 7037.

notes that the Trial Chamber indeed accepted in its Trial Judgement that, during the time of Witness Baggesen's visit, no detainees were held in the basement.[291]

101. The Appeals Chamber finds that, in the context of conflicting testimonies, the clarification sought by the Judge from Witness Baggesen as to whether he had in fact visited the basement of the Zenica Music School would not lead a reasonable and properly informed observer to conclude that the Judge gave the impression that he assisted the Prosecution or attempted to deprive the witness's testimony of its probative value. Hadžihasanović's arguments are dismissed.

(b) Witness Reinhardt

102. The Appeals Chamber notes that, pursuant to Rule 85(B) of the Rules, "a Judge may at any stage put *any* question to the witness".[292] Judges may ask any questions that they deem necessary for the clarification of testimonies or for the discovery of the truth.[293] They are therefore allowed to ask questions beyond the issues raised by the Parties. Similarly, Judges are not prohibited from asking questions to an expert witness on issues that are not covered by his or her report. In the present case, Hadžihasanović claims that the questions put to Witness Reinhardt by the Judges concerning the treatment of prisoners and the responsibility of a commander towards prisoners went beyond the content of his report and hence showed bias on the part of the Judges.[294] Witness Reinhardt was indeed asked whether Hadžihasanović knew of mistreatments being inflicted.[295] The question thus went beyond the scope of his report, insofar as he did not know of specific instances of mistreatment.[296] However, Hadžihasanović does not demonstrate that the questions asked would lead a reasonable and properly informed observer to apprehend bias or that he suffered any prejudice. Regarding the responsibility of a commander towards prisoners, the questions at issue, albeit beyond the scope of Witness Reinhardt's report, were asked in order to gather his view as a commander and only pertained to the responsibilities of commanders in general.[297] Again, Hadžihasanović does not demonstrate that the questions put to him would lead a reasonable and properly informed observer to apprehend bias or that he suffered any prejudice. Further,

[291] Trial Judgement, para. 1190.
[292] Emphasis added.
[293] *Rutaganda* Appeal Judgement, para. 111.
[294] Hadžihasanović Appeal Brief, para. 122.
[295] T. 6887.
[296] Witness Reinhardt answered in a general manner that, based on the fact that Hadžihasanović issued orders to treat the civilian population according to international law, he would conclude that Hadžihasanović knew that it was not always the case, but that his answer was only based on general orders issued by Hadžihasanović, and that he could not testify to a specific case involving mistreatment of prisoners. *See* T. 6887, T. 6889-6890.
[297] T. 6890: "Well, since you did not write explicitly about that matter, I'm not going to ask you questions on the basis of the least facts or the documents of the case, but I'm interested in your opinion as a commander with regard to the treatment of prisoners in general, and I hope you are able to tell me a few things about the responsibilities of commanders in general, in the abstract, so to say."

Hadžihasanović did not object to any of these Judges' questions nor did he raise objections about their content while further cross-examining Witness Reinhardt.

103. Regarding Hadžihasanović's unsubstantiated claim that he could not adequately re-examine Witness Reinhardt on these issues due to the fact that he had insufficient time,[298] the Appeals Chamber notes that the time allocated to the Parties is within the discretion of the Trial Chamber. An appellant has to demonstrate that the Trial Chamber ventured outside its discretionary framework when it allocated time to re-examine a witness after the questions of the Trial Chamber, which Hadžihasanović failed to do. The Appeals Chamber dismisses his argument as unsubstantiated.

(c) Conclusion

104. The Appeals Chamber finds that Hadžihasanović failed to demonstrate that the Judges gave the impression of investigating on behalf of or assisting the Prosecution. The questions asked by the Judges to Witnesses Reinhardt and Baggesen would not lead a reasonable observer, properly informed, to reasonably apprehend bias. Hadžihasanović's arguments are dismissed.

5. Whether there still remains an appearance of partiality, even if Hadžihasanović had the right to question the witnesses last

105. Hadžihasanović submits that the Trial Chamber decided that he did not suffer any prejudice because he could always ask questions after the Judges did.[299] He claims in that respect that, even if he was allowed to question the witnesses last, this could not restore the imbalance created by the Judges' interventions and the questioning would thus still appear to be partial to a reasonable observer. He argues that Judges have a different role than that of the Parties, and that witnesses perceive the questions asked by the Judges differently than the ones asked by the Parties.[300] The Prosecution responds that Hadžihasanović's argument is unsubstantiated. It argues that the Trial Chamber's invitation to the Parties to re-examine the witnesses after the Judges' questioning was in accordance with the jurisprudence of the International Tribunal.[301]

106. The Appeals Chamber finds that Hadžihasanović failed to demonstrate that the Trial Chamber's questioning of the witnesses would lead a reasonable observer, properly informed, to conclude that the Judges were biased. His argument that there remains an appearance of partiality, even if he had the right to question the witnesses last, is therefore dismissed.

[298] Hadžihasanović Appeal Brief, para. 123.
[299] Hadžihasanović Appeal Brief, para. 124.
[300] Hadžihasanović Appeal Brief, para. 125.
[301] Prosecution Response Brief, para. 44.

107. For the foregoing reasons, the Appeals Chamber dismisses Hadžihasanović's arguments regarding the Judges' alleged partiality.

E. Evidence admitted after the presentation of the Defence case: Exhibits C11-C20

1. Arguments of the Parties

108. Hadžihasanović submits that the Trial Chamber erred in law by ordering ten war diaries and operation logbooks (Exhibits C11-C20) to be admitted in full after the presentation of the Defence case.[302] He suggests as an appropriate remedy that the Appeals Chamber strike any reference to these documents from the Trial Judgement and assess the remaining evidence *de novo* for Counts 3 and 4 of the Indictment in relation to the events in Orašac. He requests, however, that, "in the unique circumstances of this case", the Appeals Chamber reverses the convictions for these counts.[303]

109. Specifically, Hadžihasanović submits that several entries of the war diaries and operations logbooks were admitted during the trial, but that the entire war diaries and logbooks were only admitted as Trial Chamber exhibits after the presentation of the Parties' cases.[304] He claims that the Trial Chamber referred to these exhibits 69 times against him in its Trial Judgement and "very often as the sole source to establish a fact or draw an inference".[305] He argues that since the exhibits were not before the Trial Chamber at trial, he had no opportunity to challenge or rebut this evidence,[306] but was nonetheless convicted on this basis.[307] He also claims that he was not put on notice during the presentation of his case that he would have to address these exhibits.[308] In addition, Hadžihasanović argues that the Trial Chamber used the 3rd Corps war diary and operations logbooks against him, although these documents were not available for the period after 28 July 1993 and the information therein was thus not accessible to him at the Corps level.[309]

[302] Hadžihasanović Appeal Brief, paras 132, 136.
[303] Hadžihasanović Appeal Brief, para. 147.
[304] Hadžihasanović Appeal Brief, paras 133-135.
[305] Hadžihasanović Appeal Brief, para. 139. *See* also Hadžihasanović Reply Brief, para. 36.
[306] Hadžihasanović Appeal Brief, para. 140.
[307] Hadžihasanović Appeal Brief, para. 144.
[308] Hadžihasanović Appeal Brief, para. 141. Hadžihasanović also submits that several witnesses testified on events depicted in the war diaries and operations logbooks but the Trial Chamber did not question these witnesses with a view to: "(a) admitting the documents; (b) obtaining clarification or precision regarding the exhibits; or (c) putting [him] on notice that it intended to consider material not admitted on the record" (Hadžihasanović Appeal Brief, para. 146). Further, he argues that he could reasonably assume that since the Trial Chamber during trial admitted only selected parts of Exhibits C11-C20 into evidence, that the other entries would not be used to draw adverse inferences against him (Hadžihasanović Reply Brief, para. 37).
[309] Hadžihasanović Appeal Brief, para. 145.

110. The Prosecution responds that the Trial Chamber was entitled under the Rules to admit Exhibits C11-C20 at the end of the proceedings.[310] In addition, the Prosecution argues that: (i) the documents were admitted merely as a "housekeeping matter" and Hadžihasanović himself relied on some of the documents to support his case;[311] (ii) the admission of exhibits C11-C20 did not cause Hadžihasanović any prejudice;[312] and (iii) Hadžihasanović was on notice of the issues covered by Exhibits C11-C20.[313] As to Hadžihasanović's argument that the 3rd Corps war diary and operations logbooks were not available for the period after 28 July 1993, the Prosecution submits that this argument is unclear since the Trial Judgement only refers to this exhibit for events before 28 July 1993, each time indicating the time period concerned.[314]

2. Discussion

111. For the sake of clarity, the Appeals Chamber deems it necessary to restate the relevant procedural history concerning the admission into evidence of the war diaries and operations logbooks. On 10 March 2004, the Prosecution provided the Trial Chamber, upon its request,[315] with a list of exhibits which the Prosecution sought to admit into evidence, including a number of entries of several war diaries and logbooks.[316] At the hearing of 27 April 2004, Hadžihasanović contested the admission of the proposed entries of the war diaries and operations logbooks.[317] He insisted that "[t]hese operational logs […] must be presented in their entirety" and argued that presenting just one entry would not be reliable if the rest of the log was not presented.[318] With respect to the war diaries, he similarly argued that "incomplete entries or choosing one page and not the rest of the diary […] greatly diminishes the reliability of the evidence being presented".[319] In its oral ruling of 17 May 2004, the Trial Chamber requested the Prosecution to provide a full translation of these documents.[320] On 16 July 2004, the Trial Chamber decided to admit the entries sought by the Prosecution,[321] but it did not admit all war diaries and operations logbooks. In the same decision,

[310] Prosecution Response Brief, paras 59-61, citing Rule 89(C), Rule 98 and Rule 85(A)(iii) of the Rules.
[311] Prosecution Response Brief, paras 47-48.
[312] Prosecution Response Brief, paras 49-52.
[313] Prosecution Response Brief, paras 53-57.
[314] Prosecution Response Brief, para. 58.
[315] T. 3338-3339.
[316] Prosecution's Consolidated Exhibit List and Motion to Amend its List of Exhibits, 10 March 2004.
[317] *See* also Joint Defence Response to Prosecution's Consolidated Exhibit List and Motion to Amend its List of Exhibits, 29 March 2004.
[318] T. 6220.
[319] T. 6222.
[320] T. 7476. The translation was provided in July 2004 (*see* Prosecution Response Brief, para. 47 and T. 9998). Hadžihasanović does not contest that he received the translation.
[321] Confidential Decision on the Admissibility of Certain Challenged Documents and Documents for Identification, 16 July 2004 ("Confidential Decision on Admissibility of Evidence").

the Trial Chamber held that the war diaries and operations logbooks presented sufficient indicia of reliability, relevance and probative value.[322]

112. On 22 June 2005, after the presentation of the Defence case, the Trial Chamber ordered that the ten war diaries and operations logbooks be admitted in full as Trial Chamber exhibits (Exhibits C11-C20), except for the Prosecution exhibits which had already been admitted in the proceedings.[323] It held that "the admission of the [ten war diaries and operations logbooks] in full will contribute to the ascertainment of the truth" and "could assist in clarifying previously admitted exhibits and in following the sequence of events in 1993".[324] After Hadžihasanović filed a motion to obtain an extension of time to file his Final Trial Brief on 27 June 2005, on the ground that he needed more time to integrate the war diaries and operations logbooks into his final trial submissions, the Trial Chamber issued an order partially granting this motion.[325]

113. As a preliminary issue, the Appeals Chamber notes that, according to the English version of the Trial Chamber's decision to admit the war diaries and the operations logbooks, the Trial Chamber considered the following: "during the hearing of 27 April 2004 the Defence submitted that the [ten war diaries and operations logbooks] should be admitted in full since quoting extracts diminishes their reliability".[326] However, the French version of this decision, which is authoritative, does not say that Hadžihasanović submitted that these documents should be "admitted" but that they should have been "presented" ("présentés") in full,[327] which is in accordance with his request during the hearing.[328] Hadžihasanović's argument was therefore that the Prosecution should not seek admission of excerpts of the war diaries and operation logbooks but of the entire documents, because only then could their reliability be properly assessed. Hence, the English version of the Trial Chamber's decision is not to be understood to the effect that Hadžihasanović himself sought to have the war diaries and operations logbooks admitted in full.

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[322] Confidential Decision on Admissibility of Evidence, para. 63. *See* also Order on Admission of Chamber Exhibits, 22 June 2005, p. 2.
[323] Order on Admission of Chamber Exhibits, 22 June 2005.
[324] Order on Admission of Chamber Exhibits, 22 June 2005, p. 3.
[325] Order Amending the Scheduling Order further to the Motion by the Defence for Enver Hadžihasanović to obtain an Extension of Time to file his Final Trial Brief, 29 June 2005.
[326] Order on Admission of Chamber Exhibits, 22 June 2005, p. 2.
[327] *See* French version of Order on Admission of Chamber Exhibits, 22 June 2005 (Ordonnance portant admission de pièces de la Chambre) : "ATTENDU que la Défense, lors de l'audience de 27 avril 2004, a évoqué que les Journaux de guerre doivent être présentés dans leur entièreté, et que des entrées incomplètes diminuent la fiabilité des journaux de guerre".
[328] T. 6220: "[Counsel for Hadžihasanović:] These operational logs, Mr. President, in our opinion must be presented in their entirety. If the Prosecution wants to tender a log, just presenting part of the log or a day from the log can't be reliable if we don't have the rest of the log." T. 6222: "[Counsel for Hadžihasanović:] And once more, with regard to a war diary, incomplete entries or choosing one page and not the rest of the diary in our opinion greatly diminishes the reliability of the evidence being presented".

114. The Appeals Chamber notes that Trial Chambers are entitled to admit any relevant evidence which they deem to have probative value.[329] Hadžihasanović does not deny that Exhibits C11-C20 have probative value. Rather, he argues that the Trial Chamber erred in admitting Exhibits C11-C20 under Rule 98 of the Rules.[330] Indeed, the plain language of Rule 98 of the Rules suggests that this Rule is not pertinent in the present case since the Trial Chamber did not order the Parties to produce additional evidence but rather admitted evidence already in the Prosecution's possession. In any case, the Appeals Chamber considers that Hadžihasanović's claim under this sub-ground of appeal does not relate to whether the Trial Chamber was allowed to admit these exhibits into evidence but to the point in time at which it did so.[331]

115. According to Hadžihasanović, a Trial Chamber may not admit exhibits into evidence after the presentation of the Defence case. The Appeals Chamber rejects this general contention and notes that, under Rule 85(A)(v) of the Rules, a Trial Chamber may, *for example*, order the production of additional evidence pursuant to Rule 98 of the Rules after the presentation of the Parties' cases and may then admit those additional exhibits into evidence. The Appeals Chamber considers that there is nothing in the Rules that would, in principle, prohibit a Trial Chamber from admitting evidence after the Defence case as long as it is relevant and the Trial Chamber deems it to have probative value.

116. Though Trial Chambers have broad discretion in assessing the admissibility of evidence under Rule 89(C) of the Rules, the accused's right to a fair trial limits this discretion. These limits are recognised in the Rules, according to which Trial Chambers "shall apply rules of evidence which will best favour a fair determination of the matter before it and are consonant with the spirit of the Statute and the general principles of law",[332] and "may exclude evidence if its probative value is substantially outweighed by the need to ensure a fair trial".[333]

117. Hadžihasanović asserts that the admission of all war diaries and operations logbooks infringed his rights to have the necessary time and facilities to prepare his defence and have knowledge of the case he had to meet.[334] The Trial Chamber decided to admit the war diaries only in part, even though they were available in their entirety, whereas Hadžihasanović insisted that doing so would affect their reliability.[335] Contrary to the Trial Chamber's finding in its order

[329] Rule 89(C) of the Rules.
[330] Hadžihasanović Reply Brief, para. 35.
[331] *See* Hadžihasanović Reply Brief, para. 35, where he argues that a Trial Chamber can only act *proprio motu* to call witnesses and can only request the Parties to provide additional evidence "during the case for the Prosecution or the Defence or during rebuttal, at which time the parties would have an opportunity to challenge such evidence".
[332] Rule 89(B) of the Rules.
[333] Rule 89(D) of the Rules.
[334] Hadžihasanović Appeal Brief, para. 142.
[335] *See supra* para. 111.

postponing the filing of the Parties' final trial briefs, and in light of its earlier Confidential Decision on Admissibility of Evidence ordering admission of only part of the diaries, the fact that all diaries were disclosed to Hadžihasanović at the pre-trial stage does not necessarily mean that Hadžihasanović "had adequate time during both the Prosecution and the Defence cases to develop its strategy in light of the documents taken from the War diaries".[336] In fact, a better practice would have been to admit the war diaries in their entirety during the Prosecution case or at least before the closure of the Defence case, so as to give as much time as possible to the Parties to develop their strategy.

118. That being said, Hadžihasanović did not object to the admission of the war diaries, but rather requested additional time to file his final trial brief so as to allow him to harmonize his written arguments with the content of the war diaries and to ascertain whether the fact that he did not have the opportunity to challenge their content during the trial caused him prejudice and hence whether "additional measures" would be required.[337] Hadžihasanović not only failed to object to the admission of the war diaries, but also did not petition for such "additional measures".[338] Regardless, Hadžihasanović failed to demonstrate that his rights to have the necessary time and facilities to prepare his defence and to acquire knowledge of the case were infringed upon by the Trial Chamber's decision to admit Exhibits C11-C20 into evidence.

119. For the foregoing reasons, the Appeals Chamber dismisses Hadžihasanović's arguments regarding Exhibits C11-C20.

F. Admission of Exhibit P482 and its probative value

120. Hadžihasanović challenges the Trial Chamber's finding that Exhibit P482 (the "mujahedin propaganda video") contained sufficient indicia of relevance and probative value and its admission was not prohibited by Rule 89(D) of the Rules.[339] He submits that the Trial Chamber erred in law by admitting Exhibit P482 into evidence whereas it was entirely unreliable.[340] Alternatively, he

[336] Order Amending the Scheduling Order further to the Motion by the Defence for Enver Hadžihasanović to obtain an Extension of Time to file his Final Trial Brief, 29 June 2005, p. 3.
[337] Defence Motion to Obtain an Extension of Time for Enver Hadžihasanovićto file his Final Trial Brief, 27 June 2005, para. 13. Hadžihasanović's motion was granted on 29 June 2005 (Order Amending the Scheduling Order further to the Motion by the Defence for Enver Hadžihasanović to obtain an Extension of Time to file his Final Trial Brief, 29 June 2005).
[338] As a general principle, an appellant "cannot remain silent on [a] matter only to return on appeal to seek a trial *de novo*" (*Galić* Appeal Judgement, para. 56; *see* also *Blaskić* Appeal Judgement, para. 333; *Čelebići* Appeal Judgement, para. 640; *Furundžija* Appeal Judgement, para. 174; *Tadić* Appeal Judgement, para. 55; *Kambanda* Appeal Judgement, para. 25; *Akayesu* Appeal Judgement, para. 361).
[339] Hadžihasanović Appeal Brief, para. 154.
[340] Hadžihasanović Appeal Brief, para. 148. Hadžihasanović specifically submits that: (i) its authenticity is questionable; (ii) its source, purpose and authorship were not determined, nor the link between the video's narration and the events, or the narrator's identity; (iii) "propaganda videos" are in themselves questionable in terms of reliability and

submits that the Trial Chamber erred in fact and in law by attaching weight to an exhibit which had no probative value.[341] He claims that the Trial Chamber drew negative inferences against him based on this exhibit.[342] Because the Appeals Chamber does not ultimately need to resolve the question whether Hadžihasanović had *de jure* authority over the *El Mujahedin* detachment,[343] and because Hadžihasanović is acquitted of the only count to which Exhibit P482 pertains,[344] the Appeals Chamber declines to adjudicate what has become a hypothetical question.

G. Armed conflict in the territory of Bosnia and Herzegovina

121. Hadžihasanović submits that the Trial Chamber erred in law by allowing the Prosecution to present its case on the basis that "an armed conflict existed in the territory of Bosnia and Herzegovina".[345] He submits that the Trial Chamber found that the crimes were committed in a non-international armed conflict but referred in its Trial Judgement systematically to provisions of the laws of war solely applicable to international armed conflict.[346] He argues that the fact that the applicable laws are not the same placed him in the unfair position of not knowing which body of international humanitarian law applied to the charges against him and that this caused an infringement of his right to be informed promptly and in detail of the charges laid against him as required by Article 21(4)(a) of the Statute.[347]

122. The Prosecution responds that the alleged error did not cause Hadžihasanović any prejudice because he acknowledged at trial that the nature of the conflict was irrelevant to Counts 1 to 4 of the Indictment and because, as a result, the alleged violation only relates to Counts 5 to 7 of the Indictment for which he was acquitted by the Trial Chamber.[348] In addition, the Prosecution submits that Hadžihasanović was not prejudiced by the lack of specification of the nature of the armed conflict because the Trial Chamber found no difference in the law relating to Counts 5 to 7 of the Indictment and hence that the nature of the conflict was irrelevant in this case.[349]

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its reliability was put into question by the Prosecution's military expert; and (iv) no witness was called to testify about its reliability and authenticity (Hadžihasanović Appeal Brief, para. 159). *See* also Hadžihasanović Reply Brief, para. 40.

[341] Hadžihasanović Appeal Brief, para. 148.

[342] Hadžihasanović Appeal Brief, paras 161-162. *See* also Hadžihasanović Reply Brief, paras 40-41. Hadžihasanović also contends that the Trial Chamber drew inferences against him based on this exhibit in conjunction with other exhibits such as C11-C20 but fails to refer to specific parts of the Trial Judgement where the Trial Chamber did so (Hadžihasanović Appeal Brief, para. 162). The Appeals Chamber will accordingly not address this argument as unsubstantiated.

[343] *See infra* para. 189.

[344] *See infra* Section V(C): "Murder and Cruel Treatment in Orašac in October 1993".

[345] Hadžihasanović Appeal Brief, para. 164.

[346] Hadžihasanović Appeal Brief, para. 165.

[347] Hadžihasanović Appeal Brief, para. 167.

[348] Prosecution Response Brief, paras 73-74.

[349] Prosecution Response Brief, paras 77-78. The Prosecution also notes that the jurisprudence of the International Tribunal confirms that the elements of the crimes in question are the same irrespective of the nature of the armed conflict (Prosecution Response Brief, para. 79, referring to Prosecution Response Brief, Annex B).

123. The Appeals Chamber notes that Hadžihasanović admitted at trial that the nature of the armed conflict was irrelevant to Counts 1 to 4 of the Indictment.[350] With regard to Counts 5 to 7 of the Indictment, the Appeals Chamber notes that Hadžihasanović previously argued in his Motion for Acquittal of 11 August 2004 that the Prosecution failed to plead the nature of the armed conflict. The Appeals Chamber found that it was clear, prior to the commencement of the trial, that the Prosecution would proceed on the basis that Article 3 of the Statute, on which Counts 5 to 7 relied, applied to both international and non-international armed conflicts, and that Hadžihasanović decided not to bring a pre-trial motion pursuant to Rule 72 of the Rules challenging the Prosecution's pleading.[351] Further, the Appeals Chamber notes that Hadžihasanović was acquitted of Counts 5 to 7 of the Indictment and that, as a result, Hadžihasanović suffered no prejudice. For the foregoing reasons, the Appeals Chamber dismisses Hadžihasanović's arguments regarding the nature of the armed conflict in Bosnia and Herzegovina.

H. Access to the EUMM archives

1. Arguments of the Parties

124. Hadžihasanović submits that the Trial Chamber erred in law and in fact in its Decision on Defence Access to EUMM Archives dated 12 September 2003 ("Decision on Defence Access to EUMM Archives") by denying his application of 14 August 2003, in which he sought the implementation of the Trial Chamber's request that the European Union Monitoring Mission ("EUMM") grant him access to its full archives ("Request for Access to EUMM Archives").[352] He also claims that the Trial Chamber erred in its refusal to grant certification of the issue in its Decision on Joint Defence Application for Certification of Decision on Access to EUMM Archives dated 25 September 2003.[353]

125. Hadžihasanović explains that the Trial Chamber first requested the EUMM to provide him access to the full archives in its confidential Request for Access to EUMM Archives rendered pursuant to Rule 54*bis* of the Rules,[354] but later "refused to further address the issue with the EUMM".[355] He claims that, instead of implementing this initial decision, the Trial Chamber adjudicated "*de novo* the need for the Defence to have access to these documents" and denied such need in its Decision on Defence Access to EUMM Archives.[356] Hadžihasanović admits that he

[350] Hadžihasanović's Motion for Acquittal, para. 90.
[351] Decision on Joint Defence Interlocutory Appeal of Trial Chamber Decision on Rule 98*bis* Motions for Acquittal, 11 March 2005, paras 10-11.
[352] Hadžihasanović Appeal Brief, para. 170.
[353] Hadžihasanović Appeal Brief, para. 173.
[354] Hadžihasanović Appeal Brief, para. 171.
[355] Hadžihasanović Appeal Brief, para. 172.
[356] Hadžihasanović Appeal Brief, para. 172.

obtained "partial access" to the EUMM archives by virtue of the Trial Chamber's subsequent order of 15 December 2003, but argues that it happened "well after the beginning of the trial", which had "serious repercussions" on his ability to prepare for trial and present the case.[357] In particular, he claims that his ability "to effectively challenge" the Prosecution evidence was "seriously affected".[358]

126. The Prosecution responds that Hadžihasanović has failed to demonstrate any error in the Trial Chamber's decisions concerning his access to the EUMM archives in light of the discretionary power of the Trial Chamber under Rules 54 and 54*bis* of the Rules.[359] It further argues that Hadžihasanović has not substantiated the claim that, being granted the access "well after [the] beginning of trial", he suffered serious repercussions in his preparation for trial since he failed to identify "a single instance where his ability to prepare his defence was limited".[360] Instead, the Prosecution argues that Hadžihasanović "suffered no prejudice" since he obtained access to the EUMM materials before the first relevant witness testified.[361] The Prosecution further refers to the transcripts of the Trial Chamber's sessions to point out that the witnesses testifying about the EUMM materials were delayed until after Hadžihasanović had sufficient time to review the relevant EUMM materials and thus be enabled to prepare properly for cross-examination.[362]

127. In relation to the Decision on Defence Access to EUMM Archives, Hadžihasanović contends that no official request was made by the EUMM to have the initial Request of 28 March 2003 set aside pursuant to Rule 54*bis*(E) of the Rules.[363] Hence, he argues, nothing in the Statute and the Rules allowed the Trial Chamber to ignore its previous decision and to issue a new one "directly and significantly affecting" his rights.[364] In turn, the Prosecution explains that the Decision on Defence Access revoking the initial Request by the Trial Chamber having granted access to the EUMM archives was justified under Rule 54*bis*(E) of the Rules, specifically on the basis of the "security concerns of EUMM".[365] In support, the Prosecution refers to the letter by EUMM of 9 May 2003 addressed to the Trial Chamber in response to its initial Request for Access to EUMM Archives dated 28 March 2003, whereby the EUMM reserved its right under Rule 54*bis*(E) of the Rules to provide material to Hadžihasanović only "on a voluntary basis".[366] In justifying "a modified approach" of the Trial Chamber, the Prosecution highlights the fact that Hadžihasanović

[357] Hadžihasanović Appeal Brief, paras 173, 175. *See* also Hadžihasanović Reply Brief, para. 43.
[358] Hadžihasanović Notice of Appeal, para. 11(e).
[359] Prosecution Response Brief, paras 80, 84, 86.
[360] Prosecution Response Brief, para. 82, citing *Galić* Appeal Judgement, para. 7.
[361] Prosecution Response Brief, para. 80. *See* also para. 83.
[362] Prosecution Response Brief, paras 82, 83; fns 187, 188.
[363] Hadžihasanović Appeal Brief, para. 172.
[364] Hadžihasanović Reply Brief, para. 43.
[365] Prosecution Response Brief, para. 85.
[366] Prosecution Response Brief, para. 81.

continuously received the EUMM material under Rules 66 and 68 of the Rules.[367] To the same effect, the Prosecution recalls its meeting with the EUMM on 24 July 2003 "to discuss all concerns"[368] and achieve "a practical solution".[369]

128. The Prosecution also submits that Hadžihasanović failed to demonstrate any error in the Trial Chamber's Decision on Joint Defence Application not to certify the appeal.[370] It clarifies that certification was denied under Rule 73(B) of the Rules due to the "very general" nature of Hadžihasanović's request and in light of a "clear willingness" of the EUMM to provide Hadžihasanović with the "identifiable and relevant material".[371] The Prosecution further recalls the guidance provided by the Trial Chamber in its Decision on Joint Defence Application as to how to seek access from the EUMM and the respective failure of Hadžihasanović to show any attempt to obtain access.[372]

2. Discussion

129. The Appeals Chamber considers that Hadžihasanović has failed to clearly identify an error of the Trial Chamber in its Decision on Defence Access to EUMM Archives or in the decision denying certification of that issue. He merely claims in his submissions that the Trial Chamber erred without demonstrating how.

130. Further, the Appeals Chamber recalls that "[w]here a party alleges on appeal that the right to a fair trial has been infringed, it must prove that the violation caused such prejudice to it as to amount to an error of law invalidating the judgement".[373] Thus, the element of prejudice forms an essential aspect of proof required of an appellant in relation to the appeal alleging a violation of his fair trial rights. In this respect, Hadžihasanović claims that obtaining "partial access" to the EUMM archives "well after the beginning of the trial", resulting from the allegedly erroneous decisions of the Trial Chamber, had "serious repercussions" on his ability to prepare for trial and thus infringed his right to a fair trial.[374] He also claims that the alleged error "seriously affected" his ability to "effectively challenge the evidence led by the Prosecution during the presentation of its case".[375] In reply, he emphasises that his prejudice lies in the "endless difficulties" to gain access to the EUMM

[367] Prosecution Response Brief, para. 85.
[368] Prosecution Response Brief, para. 81.
[369] Prosecution Response Brief, para. 85.
[370] Prosecution Response Brief, para. 87.
[371] Prosecution Response Brief, para. 87. *See* also para. 85.
[372] Prosecution Response Brief, para. 87.
[373] *Galić* Appeal Judgement, para. 21; *Kordić and Čerkez* Appeal Judgement, para. 119.
[374] Hadžihasanović Appeal Brief, para. 175.
[375] Hadžihasanović Notice of Appeal, para. 11(e).

archives and in the fact that it was granted at a time during trial when he had "no resources to properly analyze and draw benefit from these archives".[376]

131. The Appeals Chamber considers that it does not suffice in the present case that Hadžihasanović claims in such general terms that he suffered prejudice. Hadžihasanović must show that the allegedly erroneous use by the Trial Chamber of its discretion under the Rules caused him such prejudice that it invalidates the Trial Judgement, demonstrating in specific terms how the alleged error infringed upon his right to a fair trial. However, Hadžihasanović merely claims that his ability to challenge evidence tendered by the Prosecution was "seriously affected" and that the allegedly late access had "serious repercussions", without providing the Appeals Chamber with any further explanation on those repercussions or difficulties.

132. The Appeals Chamber has further consulted the record of the trial proceedings and considers that it demonstrates a clear determination of the Trial Chamber to accommodate the needs and interests of Hadžihasanović by allowing for all possible rearrangements in the course of the trial to ensure a fair trial to him. In particular, the Appeals Chamber notes that, after Hadžihasanović complained that he required sufficient time to review the relevant documents,[377] the Presiding Judge agreed that a proper review of these documents would take time.[378] The Appeals Chamber also takes note of the decisions of the Trial Chamber on the written and oral requests of Hadžihasanović regarding the delay of specific witness testimonies in connection to material from the EUMM archives until after he had the opportunity to review the material needed for an effective conduct of his cross-examination. One of the first significant postponements of the testimony of a Prosecution witness was based on Hadžihasanović's request to be granted additional time in order to be able to review the lists he had recently received from the Prosecution.[379] The transcripts of subsequent sessions similarly show that the Trial Chamber accommodated Hadžihasanović's concerns by rescheduling the relevant witness testimonies to later available dates.[380] For example, regarding the cross-examination of Witness Chambers, Hadžihasanović requested "a couple of days" and stated

[376] Hadžihasanović Reply Brief, para. 43.
[377] T. 5717-5719.
[378] T. 5720.
[379] This was the result of the compromise solution proposed by the Prosecution and subsequently approved by the Trial Chamber (T. 5576-5578 (Private Session)). The examination-in-chief of the witness was conducted on 6-7 April 2004 as originally scheduled, while cross-examination was postponed to a "subsequent date" actually taking place on 28 May 2004 (T. 5649-5664; 5668-5695; 8239-8315). The postponement was to enable Hadžihasanović to identify the missing EUMM documents, in relation to which the Prosecution would appeal to the European Union for getting the restrictions pursuant to Rule 70 of the Rules lifted.
[380] On 19 April 2004, Hadžihasanović requested that three witnesses, scheduled on 22 and 23 April 2004, testify at a later stage in order to give him additional days to consult the relevant EUMM documents and prepare for cross-examination (T. 5717-5719). As a result, the Presiding Judge invited the Prosecution to explore the possibilities of rescheduling the witnesses to accommodate Hadžihasanović (T. 5726). *See* also Joint Defence Urgent Motion to Postpone the Testimony of an ECMM Witness, 13 April 2004, in which Hadžihasanović asked for postponement of the

that he "will be ready as of Monday".[381] The cross-examination indeed started on the requested date.[382] The Trial Chamber at all times concurred with Hadžihasanović that giving him adequate time to review the EUMM material for cross-examining the relevant witnesses was indeed crucial in respecting his fair trial rights.[383]

133. The Appeals Chamber further notes that, in the course of the trial, most of the witnesses' testimonies, whose delay had been requested by Hadžihasanović based on the need for additional time, were postponed for a considerable period.[384] All of the above refutes Hadžihasanović's claim that his ability to effectively challenge the Prosecution's evidence during the trial was seriously affected and caused him prejudice.

134. For the foregoing reasons, the Appeals Chamber dismisses Hadžihasanović's arguments regarding his access to the EUMM archives.

testimony of Witness Rolf Weckesser, scheduled on Monday, 19 April 2004. The examination-in-chief and cross-examination of Witness Rolf Weckesser took place on 12 May 2004 (T. 7200-7246).

[381] T. 5724.

[382] T. 6080.

[383] T. 4755, 4758. *See* also Decision on Defence Motion for Access to EUMM Archives, 15 December 2003, p. 3, in which the Trial Chamber explicitly stated that Hadžihasanović's access to the relevant portions of the EUMM archives was "necessary to guarantee a fair trial".

[384] Torbjorn Junhov, whose testimony was originally scheduled on 23 April 2004, was ultimately examined on 1 June 2004 (T. 8352-8433). The testimony of Witness Rolf Weckesser was initially planned for 19 April 2004; as a result of Hadžihasanović's request for postponement dated 13 April 2004, examination finally took place on 12 May 2004 (T. 7200-7246). The testimony of Witness Dieter Schellschmidt, scheduled on 2 April 2004, was similarly delayed to 24 May 2004 (T. 5240, 7896-7963).

V. HADŽIHASANOVIĆ'S INDIVIDUAL CRIMINAL RESPONSIBILITY AS A SUPERIOR

A. Murder and Cruel Treatment in Bugojno as of August 1993

135. Hadžihasanović argues under his third ground of appeal that the Trial Chamber erred in law and in fact by finding that he failed to take the adequate measures required to punish those responsible for the murder of Mladen Havranek and the cruel treatment of six prisoners at the *Slavonija* Furniture Salon on 5 August 1993, as well as to prevent similar crimes in the other facilities in Bugojno.[385] He contends that the Trial Chamber's errors of law and fact occasioned a miscarriage of justice and invalidated the Trial Judgement.[386] Specifically, he challenges the Trial Chamber's findings regarding: (i) the measures taken to punish the perpetrators of the crimes committed on 5 August 1993 at the *Slavonija* Furniture Salon; (ii) his prior knowledge of the crimes committed in the Bugojno detention facilities as of 18 August 1993; and (iii) the measures taken to prevent similar crimes in the Bugojno detention facilities as of 18 August 1993.[387] The Appeals Chamber will address these arguments in turn.[388]

1. Measures taken to punish the perpetrators of the crimes committed on 5 August 1993 at the *Slavonija* Furniture Salon

136. Hadžihasanović contends that, given the evidence on the record, no reasonable trier of fact could have concluded that the measures taken by the superiors of the 307th Brigade against the

[385] Hadžihasanović Notice of Appeal, para. 15, citing Trial Judgement, paras 1777-1778.
[386] Hadžihasanović Notice of Appeal, para. 15(a)-(h).
[387] Hadžihasanović Appeal Brief, paras 197-265. Hadžihasanović's remaining arguments under his third ground of appeal, regarding alleged errors in the Disposition of the Trial Judgement and the Trial Chamber's Rule 98*bis* Decision, are examined below under Section VII(B)(1) ("Alleged errors in the Disposition of the Trial Judgement") and above under Section IV(B)(6) ("Alleged absence of evidence in the Trial Chamber's Rule 98*bis* Decision with respect to events in Bugojno in relation to Counts 3 and 4 of the Indictment"), respectively.
[388] The Appeals Chamber notes that, on 26 November 2007, Hadžihasanović filed an Expedited Appellant Motion Seeking Admission in the Record on Appeal of Certain Official Translations and Request for Additional Time During the Appeal Oral Hearing ("Hadžihasanović 26 November 2007 Motion"), seeking, *inter alia*, admission in the record on appeal of official translations of segments of the Trial Transcript (Witness Edib Zlotrg, T. 14987, lines 25-25; Witness Fehim Muratović, T. 15039, lines 1-9 and 21-24) (the "Official Translations"). Hadžihasanović argued that the Official Translations, which were in the possession of the Trial Chamber but were not provided to the Parties prior to the rendering of the Trial Judgement, differed from the Trial Transcript (in both its French and English form) in ways which caused him prejudice. Hadžihasanović sought admission of the Official Translations in the record on appeal and requested that the Appeals Chamber assess and review the determination of his responsibility by the Trial Chamber for Counts 3 and 4 on their basis. The Appeals Chamber, in its Decision on Hadžihasanović's Expedited Appellant Motion Seeking Admission in the Record on Appeal of Certain Official Translations and Request for Additional Time During the Appeal Oral Hearing, filed 30 November 2007, ordered that the Official Translations be made available to the Parties and that they form part of the record on appeal. All citations herein are thus to the English Trial Transcript, as modified by the Official Translations. The two internal memoranda from the Conference and Language Services Section of the International Tribunal ("CLSS") dated 30 November 2007, which were appended to the Urgent Appellant Motion Seeking Admission in the Record on Appeal of Further Official Translations Obtained from CLSS, filed on 3 December 2007 and withdrawn on 5 December 2007, were also admitted into the record on appeal and thus taken into account by the Appeals Chamber.

perpetrators of the 5 August 1993 *Slavonija* Furniture Salon crimes were disciplinary in nature and inadequate in the circumstances.[389]

(a) The extent of the measures taken to punish the perpetrators of the 5 August 1993 *Slavonija* Furniture Salon crimes

137. Hadžihasanović argues that the Trial Chamber erred in concluding that the measures taken to punish those responsible for the murder of Mladen Havranek and the cruel treatment of the six prisoners at the *Slavonija* Furniture Salon on 5 August 1993 were solely disciplinary, rather than criminal, in nature.[390] Specifically, he notes that: (i) the report of Fehim Muratović dated 18 August 1993 states that the "soldiers were taken into custody and proceedings were instituted against them";[391] (ii) Fehim Muratović testified that the "individuals" were "arrested or imprisoned", that "legal proceedings against them" were instituted, and that "appropriate legal measures were taken against the persons who had done this […] against the members of the HVO […] [at] the [F]urniture [S]alon";[392] (iii) Witness Edib Zlotrg testified that "proceedings had been instituted against them";[393] and that "a criminal report had been filed" by members of the 307th Brigade against them;[394] (iv) Witness HF testified that proceedings were initiated against them;[395] (v) a report of 20 August 1993 from the chief of the civilian police in Bugojno regarding alleged war crimes committed against Croats includes a list which mentions, amongst others, the name of

[389] Hadžihasanović Appeal Brief, para. 198. *See* also Hadžihasanović Appeal Brief, paras 209, 216; AT. 113-117, 184-185.
[390] Hadžihasanović Appeal Brief, paras 197-198, citing Trial Judgement, para. 1776. *See* also AT. 113-117; Hadžihasanović Reply Brief, para. 56.
[391] Hadžihasanović Appeal Brief, para. 199, quoting Exhibit DH1392 (Report compiled by Fehim Muratović and Edib Zlotrg, dated 18 August 1993).
[392] Hadžihasanović Appeal Brief, paras 200-201, citing Witness Fehim Muratović, T. 14963-14964, T. 15038-15039.
[393] Hadžihasanović Appeal Brief, para. 205, citing Witness Edib Zlotrg, T. 14999. *See* also para. 202, citing Witness Edib Zlotrg, T. 14987-14988; para. 204, citing Witness Edib Zlotrg, T. 14991-14992; para. 206, citing Witness Edib Zlotrg, T. 15013-15014.
[394] AT. 115, citing Witness Edib Zlotrg, T. 14987. *See* also Hadžihasanović 26 November 2007 Motion, Annex A, p. 2; Hadžihasanović Appeal Brief, para. 203, citing Appendix E to Hadžihasanović Appeal Brief. The Appeals Chamber notes that the Prosecution, in its Response to Expedited Appellant Motion Seeking Admission in the Record on Appeal of Certain Official Translations and Request for Additional Time During the Appeal Oral Hearing, filed 28 November 2007 ("Prosecution Response to Hadžihasanović 26 November 2007 Motion"), contests the official English translation insofar as it believes this portion of Witness Edib Zlotrg's testimony should read "a criminal report *is being* filed" (emphasis added) and also notes a discrepancy between the English and French versions of the cross-examination of Witness Edib Zlotrg on this point, namely that the English version of the transcript reads "he identified the perpetrators of this crime and proceedings had been instituted against them and *a criminal report was going to be filed* against them on the basis of the seriousness of the crime" (T. 14999), while the French version reads "Il y a identifié les individus qui ont été les auteurs de cette infraction et *des poursuites ont été engagées* à leur encontre afin de déterminer le niveau de leur responsabilité, ou culpabilité pour agir en conséquence." (T. 14999-15000) (emphases added). *See* Prosecution Response to Hadžihasanović 26 November 2007 Motion, paras 5-6. The Appeals Chamber notes that, pursuant to the second CLSS memorandum dated 30 November 2007, which was appended to the Urgent Appellant Motion Seeking Admission in the Record on Appeal of Further Official Translations Obtained from CLSS, filed on 3 December 2007 and withdrawn on 5 December 2007, the correct English translation of Witness Edib Zlotrg's testimony at T. 14999 reads "he identified the perpetrators of this offence and proceedings were instituted against them to establish the degree of responsibility and based on the degree a criminal report was going to be filed".
[395] Hadžihasanović Appeal Brief, para. 207, citing Witness HF, T. 17196-17197 (Closed Session).

Mladen Havranek with the handwritten note "criminal arrested" ("20 August 1993 report");[396] and (vi) the Trial Chamber concluded that "neither the [Fehim Muratović] report of 18 August 1993 nor Witness HF make explicit what kind of disciplinary or criminal action was taken against the perpetrators".[397] Hadžihasanović concludes that, on the basis of this evidence, no reasonable trier of fact could have found that "the measures, taken against the alleged perpetrators […] by the superiors of the 307th Brigade, were of a disciplinary nature".[398]

138. Further, at the Appeal Hearing, Hadžihasanović developed the argument that, after 5 August 1993 but no later than 18 August 1993, a criminal report had been filed by the 307th Brigade regarding the 5 August 1993 crimes at the *Slavonija* Furniture Salon with the municipal public prosecutor in Bugojno.[399] In this regard, Hadžihasanović relies on: (i) the testimony of Witness Sead Zerić, the Travnik District Military Prosecutor from December 1992 to February 1996, who testified that municipal public prosecutors had an obligation to pass on criminal reports they received regarding army personnel to the military prosecutor's office when these dealt with crimes outside their jurisdiction;[400] (ii) the evidence of criminal reports filed by the 3rd Corps Military Police with the District Military Prosecutor Offices while Hadžihasanović was in command which, he argues, demonstrates the 3rd Corps' policy of punishing its troops for their criminal activity;[401] (iii) the testimony of Witness Edib Zlotrg that "a criminal report had been filed" by the 307th Brigade against those responsible for the murder and cruel treatment at the *Slavonija* Furniture Salon on 5 August 1993;[402] and (iv) the 20 August 1993 report, which annex refers to the murder of Mladen Havranek and which relates to a meeting attended by the Bugojno municipal public prosecutor and European Community observers where alleged war crimes committed against Croats were discussed.[403]

139. In particular, Hadžihasanović submits that the presence of the Bugojno municipal public prosecutor at the meeting referenced in the 20 August 1993 report establishes that the Bugojno municipal public prosecutor had been alerted to the murder of Mladen Havranek by the 307th

[396] Hadžihasanović Appeal Brief, para. 208, citing Exhibit P203 (Senad Dautović report dated 20 August 1993).
[397] Hadžihasanović Appeal Brief, para. 210, quoting Trial Judgement, para. 1767.
[398] Hadžihasanović Appeal Brief, para. 198, citing Trial Judgement, para. 1776. *See* also Hadžihasanović Appeal Brief, paras 209, 216.
[399] AT. 115-117, 184-185.
[400] AT. 112-113, citing Witness Sead Zerić, T. 5594. *See* also AT. 185.
[401] AT. 114. *See* also AT. 90-92.
[402] *See* Hadžihasanović 26 November 2007 Motion, Annex A, p. 2, citing Official English Translation of Witness Edib Zlotrg, T. 14987. *See* also fn. 394 *supra*.
[403] AT. 115-117. *See* also Hadžihasanović Appeal Brief, para. 208, citing Exhibit P203 (Senad Dautović report dated 20 August 1993).

Brigade's filing of a criminal report and that it was thus his duty to either act upon that criminal report or pass it along to the Travnik District Military Prosecutor.[404]

140. The Prosecution responds that the Trial Chamber correctly concluded that the measures handed out as punishment for the crimes committed on 5 August 1993 at the *Slavonija* Furniture Salon were disciplinary in nature and therefore inadequate.[405] It submits that Hadžihasanović "quotes selectively" from the testimony of Witnesses Fehim Muratović, Edib Zlotrg and HF, and that "[t]he evidence cited does not establish that the perpetrators were brought before a military criminal tribunal".[406] It contests that Witness Edib Zlotrg's testimony regarding the criminal nature of the measures taken is sufficient to show that it was unreasonable for the Trial Chamber to conclude that they were disciplinary in nature.[407] The Prosecution recalls that the Trial Chamber noted Witness Edib Zlotrg's testimony but found that the testimony of Witness Fehim Muratović established that the perpetrators were brought before the military disciplinary organ in Bugojno and that his testimony was corroborated by that of Witnesses Sead Zerić, Peter Hackshaw and Zrinko Alvir.[408] It also submits that the Trial Chamber noted that "in its Final Brief, the Defence for the Accused Hadžihasanović indicated that the measures taken after the alleged incidents were disciplinary in nature"[409] and argues that "Hadžihasanović now asserts the opposite position, without explanation".[410]

141. Further, with respect to Hadžihasanović's claims that the 20 August 1993 report evidences that a criminal report was filed by the 307th Brigade and that the Bugojno municipal public prosecutor was seized of the 5 August 1993 *Slavonija* Furniture Salon crimes, the Prosecution contends that the municipal public prosecutor would not have been competent to handle such a matter and "would have to refer the matter to the military prosecutor, who gave clear evidence that he had never received such a report".[411] The Prosecution submits that "the Trial Chamber's conclusion that no [criminal] report was filed is a reasonable conclusion".[412]

142. As a preliminary matter, the Appeals Chamber notes that the Trial Judgment and the Parties' arguments on appeal place undue emphasis on the nature of the measures taken. The Appeals Chamber recalls that the relevant inquiry is whether a reasonable trier of fact could conclude that Hadžihasanović took measures to punish the perpetrators which were "necessary and reasonable" in

[404] AT. 115-117.
[405] Prosecution Response Brief, para. 133, citing Trial Judgement, paras 1763-1785.
[406] Prosecution Response Brief, para. 135.
[407] AT. 151-154.
[408] Prosecution Response Brief, paras 141-144, citing Trial Judgement, paras 1763-1780. *See* also AT. 151.
[409] Prosecution Response Brief, para. 138, quoting Trial Judgement, para. 1776.
[410] Prosecution Response Brief, para. 138.
[411] AT. 154.

the circumstances of the case,[413] not whether those measures were of a disciplinary or criminal nature.

143. The Appeals Chamber recognises that, contrary to the Prosecution's assertion,[414] Hadžihasanović disputed in his Final Trial Brief that the measures taken to punish the perpetrators of the crimes at the *Slavonija* Furniture Salon on 5 August 1993 were disciplinary in nature.[415] The Appeals Chamber notes that the Trial Chamber reviewed the evidence before it and concluded that the "3rd Corps initiated no investigation or criminal proceedings against the perpetrators" of the crimes at the *Slavonija* Furniture Salon.[416] The Trial Chamber first examined Witness Muratović's report of 18 August 1993 and Witness HF's testimony and found that it could not be inferred from this evidence whether disciplinary or criminal action was taken against the perpetrators.[417] Indeed, the 18 August 1993 report stated that the "soldiers [had been] taken into custody" and that "proceedings [had been] instituted against them",[418] while Witness HF testified only that he had been informed that "legal proceedings" had been instituted.[419] The Trial Chamber then noted that Witness Edib Zlotrg's testimony "seems to indicate that the action taken against the perpetrators was criminal in nature"[420] but, after weighing this testimony against that of other witnesses – namely that of Witnesses Fehim Muratović, Sead Zerić, Peter Hackshaw and Zrinko Alvir – concluded that "the 307th Brigade took disciplinary measures", rather than criminal ones, against the perpetrators of the cruel treatment of the six prisoners and the murder of Mladen Havranek.[421]

144. Specifically, the Trial Chamber found that, in his testimony, Witness Fehim Muratović specified that the perpetrators "were brought before the military disciplinary organ in Bugojno and were punished".[422] As corroboration, the Trial Chamber noted that Witness Sead Zerić, the Travnik District Military Prosecutor from December 1992 to February 1996, stated that he never received a

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[412] AT. 154.
[413] *Blaškić* Appeal Judgement, para. 417. *See* also *supra* para. 33.
[414] Prosecution Response Brief, para. 138.
[415] The Appeals Chamber notes that the Hadžihasanović Final Trial Brief footnote – relied on by the Trial Chamber at paragraph 1776 of the Trial Judgement – references Witness Fehim Muratović's testimony that the perpetrators were brought before the military disciplinary organ in Bugojno, but does not indicate that Hadžihasanović adopted that testimony as to the nature of the measures imposed. Indeed, paragraph 1042 of the Hadžihasanović Final Trial Brief otherwise states that "criminal proceedings" were instituted against the perpetrators.
[416] Trial Judgement, para. 1776.
[417] Trial Judgement, paras 1765-1767.
[418] Trial Judgement, para. 1765, quoting Exhibit DH1392 (Report compiled by Fehim Muratović and Edib Zlotrg, dated 18 August 1993).
[419] Witness HF, T. 17196 (Closed Session). *See* Trial Judgement, para. 1766.
[420] Trial Judgement, para. 1768, citing Witness Edib Zlotrg, T. 14987. The Appeals Chamber notes that this Trial Chamber reference to the testimony of Witness Edib Zlotrg was based on the Trial Transcript rather than the Official Translation of this portion of the witness's testimony, which makes clear that he was indeed referring to the filing of a criminal report. The Trial Chamber's use of the qualitative term "seems" at paragraph 1768 of the Trial Judgement therefore appears inappropriate.
[421] Trial Judgement, para. 1776. *See* also Trial Judgement, paras 1769-1775.
[422] Trial Judgement, para. 1769, citing Witness Fehim Muratović, T. 15039-15040.

criminal complaint alleging that ABiH soldiers killed or mistreated prisoners of war or civilian detainees in his zone of responsibility, including Bugojno.[423] Moreover, Witness Peter Hackshaw, the Prosecution's investigator, testified that he consulted the Travnik District Military Prosecutor's Office's registers but failed to find the name of any victim named in the Indictment.[424] Finally, Witness Zrinko Alvir, who was also beaten on the same evening as Mladen Havranek, testified that he made a statement against two of the perpetrators to the police authorities in Bugojno in November 1994 but that he was not heard as a witness in criminal proceedings against them until 2004.[425]

145. The Appeals Chamber concurs with the Trial Chamber that the testimony of Witnesses Fehim Muratović, Sead Zerić, Peter Hackshaw and Zrinko Alvir provide a sufficient basis to conclude that the perpetrators of the 5 August 1993 *Slavonija* Furniture Salon crimes were held responsible for breaches of military discipline by the military disciplinary organ in Bugojno and that no criminal report was filed with the District Military Prosecutor's Office regarding the matter.

146. The Appeals Chamber further finds, however, that the 20 August 1993 report raises a reasonable doubt as to whether the 307th Brigade filed with the Bugojno municipal prosecutor a criminal report regarding the 5 August 1993 *Slavonija* Furniture Salon crimes. Indeed, the 20 August 1993 report establishes that the Bugojno municipal public prosecutor met with European Community observers to discuss alleged war crimes committed against Croats, including the murder of Mladen Havranek.[426] The 20 August 1993 report does not indicate whether the 307th Brigade's filing of a criminal report alerted the Bugojno municipal public prosecutor to the murder of Mladen Havranek. Nevertheless, the Appeals Chamber finds that the Trial Chamber erred in not taking into account the 20 August 1993 report as evidence creating a reasonable doubt as to whether the 3rd Corps initiated an investigation or criminal proceedings against the perpetrators of the murder and cruel treatment.

147. The Appeals Chamber notes that the testimonial evidence cited above, which confirmed that no criminal report was filed with the Travnik District Military Prosecutor, is not relevant to the issue of whether a report was filed with the Bugojno municipal public prosecutor. The Appeals Chamber recalls that the testimony of Witnesses Sead Zerić and Peter Hackshaw dealt with the absence of criminal reports filed with the District Military Prosecutor, and that the testimony of Witnesses Fehim Muratović and Zrinko Alvir do not specifically address, nor refute,

[423] Trial Judgement, para. 1773, citing Witness Sead Zerić, T. 5525.
[424] Trial Judgement, para. 1774, citing Witness Peter Hackshaw, T. 9692-9693.
[425] Trial Judgement, para. 1775, citing Witness Zrinko Alvir, T. 2644-2645.
[426] Exhibit P203 (Senad Dautović report dated 20 August 1993). The Appeals Chamber notes that this report was sent, *inter alia*, to the 307th Brigade.

Hadžihasanović's claim that a criminal report was filed with the Bugojno municipal public prosecutor. Finally, though the annex to the 20 August 1993 report refers only to the murder of Mladen Havranek, and not to the cruel treatment of the six prisoners, the Appeals Chamber finds that the report raises a reasonable doubt as to whether the entire matter, including the cruel treatment, was referred to the Bugojno municipal public prosecutor by the 307th Brigade.

148. In light of the foregoing, the Appeals Chamber concurs with the Trial Chamber's finding that the perpetrators of the 5 August 1993 *Slavonija* Furniture Salon crimes were held responsible for breaches of military discipline by the military disciplinary organ in Bugojno and that no criminal report was filed with the Travnik District Military Prosecutor's Office regarding the matter. The Appeals Chamber finds, however, that, based on the evidence, no reasonable trier of fact could have found beyond reasonable doubt that the 3rd Corps failed to initiate criminal proceedings by filing a report with the Bugojno municipal public prosecutor.

(b) Whether the measures taken by Hadžihasanović were necessary and reasonable

149. Hadžihasanović submits that he took measures which were necessary and reasonable in the circumstances ruling at the time.[427] He submits that the perpetrators had been identified, arrested, imprisoned and legal proceedings instituted against them.[428] He maintains that "considering the absence of any information allowing him to conclude that there were additional problems in Bugojno"[429] and the fact that, "as a result of the system he put in place",[430] it had been reported to him that the incident was dealt with according to the law, "it was reasonable for [him] to be satisfied [with] the outcome".[431] Further, with respect to the 307th Brigade's filing of a criminal report with the Bugojno municipal public prosecutor, Hadžihasanović submits that it was the latter's duty to either act upon that criminal report or pass it along to the Travnik District Military Prosecutor if the matter was outside his jurisdiction.[432]

150. The Prosecution responds that the Trial Chamber did consider "the arrest, report and disciplinary measures"[433] and reasonably found that "the summary discipline imposed without a military criminal prosecution was not sufficient punishment".[434] The Prosecution also notes that the

[427] Hadžihasanović Appeal Brief, para. 231.
[428] Hadžihasanović Appeal Brief, para. 222.
[429] Hadžihasanović Appeal Brief, para. 231.
[430] Hadžihasanović Appeal Brief, para. 230.
[431] Hadžihasanović Appeal Brief, para. 231. *See* also AT. 117-122.
[432] AT. 115-117.
[433] Prosecution Response Brief, para. 147.
[434] Prosecution Response Brief, para. 148, citing Trial Judgement, paras 1763-1785. *See* also Prosecution Response Brief, para. 151.

Trial Chamber considered that summary disciplinary measures are sufficient to punish plunder, but insufficient to punish murder and cruel treatment.[435]

151. The Appeals Chamber recalls that the assessment of whether a superior fulfilled his duty to prevent or punish has to be made on a case-by-case basis, so as to take into account the "circumstances surrounding each particular situation".[436] As the Appeals Chamber previously held, "what constitutes necessary and reasonable measures is not a matter of substantive law but of evidence".[437]

152. In the present case, the Appeals Chamber recalls that it concurs with the Trial Chamber's finding that the perpetrators of the 5 August 1993 *Slavonija* Furniture Salon crimes were brought before the military disciplinary organ in Bugojno. The Appeals Chamber agrees that, given the gravity of the offences for which the perpetrators were being punished – murder and cruel treatment – Hadžihasanović "could not consider as acceptable punishment the disciplinary sanction of a period of detention not exceeding 60 days".[438] Indeed, while immediate and visible measures such as disciplinary detention were necessary, the disciplinary sanction of a period of detention not exceeding 60 days – the maximum allowed under the Rules on Military Discipline –[439] would have been insufficient in the present circumstances.

153. The Appeals Chamber further recalls, however, that the Trial Chamber erred in concluding that no investigation or criminal proceedings were otherwise initiated against the perpetrators. As noted above, the 20 August 1993 report raises a reasonable doubt as to whether a criminal report was filed by the 307th Brigade with the Bugojno municipal public prosecutor regarding the 5 August 1993 *Slavonija* Furniture Salon crimes. The Appeals Chamber notes that there would have been no inconsistency in imposing both disciplinary measures against the perpetrators and reporting the matter in question to the prosecutorial authorities.[440]

154. The Appeals Chamber recalls that a superior need not dispense punishment personally and may discharge his duty to punish by reporting the matter to the competent authorities.[441] Here, the

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[435] Prosecution Response Brief, para. 150, citing Trial Judgement, paras 893, 899, 2056-2058 (for plunder) and paras 1776-1777 (for murder and cruel treatment).
[436] *Blaškić* Appeal Judgement, para. 417. *See* also *supra* para. 33.
[437] *Blaškić* Appeal Judgement, para. 72; *Halilović* Appeal Judgement, paras 63-64. *See* also *supra* para. 33.
[438] Trial Judgement, para. 1777.
[439] *See* Exhibit P325 ("Rules on Military Discipline, *Official Gazette of the RBiH*, no. 12 dated 13 August 1992"), Article 13. The Appeals Chamber recalls that, in response to a question posed to the Parties, Hadžihasanović and the Prosecution agreed that neither military disciplinary courts nor superiors exercising disciplinary powers could impose a sanction in excess of 60 days of imprisonment (AT. 109-110, 149-150).
[440] *See* Exhibit P325 (Rules on Military Discipline, *Official Gazette of the RBiH*, no. 12 dated 13 August 1992), Article 6 (which states that the accountability of a member of the military for a criminal offence does not exclude accountability for the same offence as a breach of military discipline).
[441] *See Blaskić* Trial Judgement, para. 335, cited with approval by the *Blaskić* Appeal Judgement, para. 72.

Appeals Chamber finds that the reporting of the 5 August 1993 *Slavonija* Furniture Salon crimes to the Bugojno municipal public prosecutor, in conjunction with the disciplinary sanctions imposed by the military disciplinary organ in Bugojno, constituted necessary and reasonable measures to punish the perpetrators. The Appeals Chamber recognises that the District Military Prosecutor's Office, rather than that of the municipal public prosecutor, would have likely been a more appropriate forum for the filing of a criminal report,[442] but finds that Hadžihasanović's responsibility should not turn on the Bugojno municipal public prosecutor's possible failure to initiate criminal proceedings or to refer the matter to the District Military Prosecutor.[443] The Appeals Chamber notes that Witness Sead Zerić, the former Travnik District Military Prosecutor, testified that municipal public prosecutors had an obligation to pass on criminal reports they received regarding army personnel to the military prosecutor's office when these dealt with crimes outside their jurisdiction.[444]

155. In light of the foregoing, the Appeals Chamber finds that no reasonable trier of fact could have concluded, given the evidence, that the measures taken to punish the perpetrators of the crimes at the *Slavonija* Furniture Salon on 5 August 1993 were inadequate in the circumstances of the case. Accordingly, the Appeals Chamber reverses Hadžihasanović's convictions for having failed to take the adequate measures required to punish those responsible for the murder of Mladen Havranek and the cruel treatment of six prisoners at the *Slavonija* Furniture Salon on 5 August 1993.

2. Hadžihasanović's knowledge of the acts of mistreatment committed as of 18 August 1993 in the Bugojno Detention Facilities

156. Hadžihasanović contends that the Trial Chamber erred in law and fact in finding that he had reason to know of the acts of mistreatment committed as of 18 August 1993 in the Bugojno Detention Facilities.[445] He argues that the Trial Chamber applied a "wrong interpretation of the command responsibility *mens rea*".[446] He submits that the standard used by the Trial Chamber, namely whether the accused had reason to know that there was "a risk that the unlawful acts could

[442] The district military courts, including the Travnik District Military Court, operated independently of the ABiH and were established primarily to try criminal offences committed by military personnel (Trial Judgement, paras 907-938) while the civilian court system, including the office of the municipal public prosecutor, had jurisdiction to try criminal offences committed by civilians and, in some limited cases, members of the military (Trial Judgement, paras 953-957).
[443] *See Čelebići* Trial Judgement, para. 395 (stating that a superior may only be held criminally responsible for failing to take such measures that are within his powers). *See* also *Blaškić* Appeal Judgement, para. 417.
[444] Witness Sead Zerić, T. 5594.
[445] Hadžihasanović Appeal Brief, para. 234. The Appeals Chamber notes that the Trial Chamber found that the elements of cruel treatment were established for the following Bugojno detention facilities administered and controlled by the 307th Brigade: the Gimnazija School Building from 18 July 1993 to 8 October 1993 (Trial Judgement, para. 1674); the *Iskra FC* Stadium from August 1993 to 31 October 1993 (Trial Judgement, para. 1718); the *Vojin Paleksić* Elementary School from late July 1993 to late August 1993 (Trial Judgement, para. 1691); and the *Slavonija* Furniture Salon from 24 July 1993 to 23 August 1993 (Trial Judgement, para. 1615) (collectively, "Bugojno Detention Facilities").
[446] Hadžihasanović Appeal Brief, para. 242, citing Trial Judgement, para. 1779.

happen again", is inconsistent with "the command responsibility *mens rea* recognized in the jurisprudence of the International Tribunal".[447]

157. Further, Hadžihasanović contends that "no reasonable trier of fact could conclude that [he] had reason to know that [his] subordinates were committing or about to commit further mistreatment at the Furniture Salon".[448] He argues that this conclusion "contradicts [the Trial Chamber's] own findings that the information in [his] possession on 18 August 1993 shed light on a serious incident which took place on one occasion on 5 August 1993 – not on a practice of repeated beatings – and that this was not enough to allow [him] to believe that these criminal acts were preceded or followed by others of the same nature".[449] He adds that "[t]o extend this finding to other detention facilities is even more illogical", as he "did not have knowledge of the number and location of the other detention facilities".[450]

158. The Prosecution responds that the Trial Chamber did not err by finding that, under the "had reason to know" standard, it is sufficient to establish that a superior has reason to know of a real and reasonable risk that unlawful acts would be repeated in the future.[451] It claims that the Trial Chamber found that "the summary discipline imposed without a military criminal prosecution was not sufficient punishment" and that "the clear message of insufficient punishment was impunity, which encouraged additional crimes against prisoners".[452] The Prosecution argues that "Hadžihasanović fails to take into consideration that the Chamber distinguished between awareness only of the 5 August incident, which it did not consider sufficient to trigger 'had reason to know', and the situation where the awareness is coupled with failure to punish".[453] It claims that there is "substantial case law holding that failure to punish crimes is often also a failure to prevent their recurrence".[454] Thus, given that Hadžihasanović knew of and failed to punish the 5 August 1993 incident, "[i]t was reasonable for the Trial Chamber to conclude that [he] was aware of a real and reasonable risk of future cruel treatment in Bugojno".[455]

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[447] Hadžihasanović Appeal Brief, para. 245. The Appeals Chamber notes that Hadžihasanović's arguments, along with those of the other Parties on the legal issue of "had reason to know" and the superior's duty to prevent the recurrence of similar acts, have been discussed in greater detail in the section dealing with the law applicable to Article 7(3) of the Statute (Section III(B): "The 'had reason to know' standard and the superior's duty to prevent the recurrence of similar acts").
[448] Hadžihasanović Appeal Brief, para. 249. *See* also AT. 124-126.
[449] Hadžihasanović Appeal Brief, para. 250.
[450] Hadžihasanović Appeal Brief, para. 252.
[451] Prosecution Response Brief, para. 152, citing Trial Judgement, paras 1779, 1784. *See* also Prosecution Response Brief, para. 153, citing Trial Judgement, paras 95, 133.
[452] Prosecution Response Brief, para. 148, citing Trial Judgement, paras 1763-1785.
[453] Prosecution Response Brief, para. 166, citing Trial Judgement, para. 1760.
[454] Prosecution Response Brief, para. 166.
[455] Prosecution Response Brief, para. 172. *See* also AT. 155-156.

159. Finally, the Prosecution asserts that it was reasonable for the Trial Chamber to find that Hadžihasanović had reason to know of future crimes in the detention facilities other than the *Slavonija* Furniture Salon.[456] It maintains that Hadžihasanović had knowledge of the number and locations of the other detention facilities, as he "ordered the commands of the OG *Zapad* and the 307th Brigade to authorise the visit by a delegation of the ICRC to the *Iskra* FC Stadium".[457] The Prosecution adds that Hadžihasanović also "had reason to know based on the geographic proximity of the detention centres in Bugojno and the fact that they were administered and controlled by the same 307th Brigade leader".[458]

160. The Appeals Chamber recalls that the Trial Chamber first examined Hadžihasanović's knowledge of the cruel treatment of six prisoners and the murder of Mladen Havranek, as well as his knowledge of the other crimes committed in the various Bugojno Detention Facilities prior to 18 August 1993.[459] It concluded that: (i) Hadžihasanović knew, as of 18 August 1993, that two 307th Brigade soldiers had beaten six prisoners of war on 5 August 1993 and that one of them had died as a result of the beating;[460] and (ii) Hadžihasanović did not have reason to know that his subordinates had committed other acts of mistreatment at the *Slavonija* Furniture Salon or at other detention locations controlled by the 307th Brigade in Bugojno, prior to 18 August 1993.[461]

161. The Trial Chamber then addressed, as part of its examination of the punitive measures taken in relation to the crimes committed on 5 August 1993, whether Hadžihasanović had reason to know, as of 18 August 1993, of mistreatment in the Bugojno Detention Facilities controlled by the 307th Brigade.[462] The Trial Chamber found:

> In this case, by failing to punish appropriately the members of the 307th Brigade who committed the crimes of mistreatment and murder at the Furniture Salon, the Accused Hadžihasanović created a situation which encouraged the repeated commission of similar criminal acts, not only at the Furniture Salon but also in all of the other detention locations controlled by the members of the 307th Brigade, as of 18 August 1993. By failing to take the appropriate measures with respect to the crimes of which he had knowledge, the Accused Hadžihasanović had reason to know that there was a real and reasonable risk that those unlawful acts would be repeated in the future, especially since the detention centres set up in Bugojno were established in geographic proximity to one another and were administered and controlled by the same 307th Brigade leaders. The Chamber considers that the absence or inadequacy of punitive measures against the guards in one detention centre in Bugojno necessarily had an impact on the other guards operating in different detention facilities in Bugojno.[463]

[456] Prosecution Response Brief, para. 173.
[457] Prosecution Response Brief, para. 173, citing Trial Judgement, para. 1166.
[458] Prosecution Response Brief, para. 173, citing Trial Judgement, para. 1779.
[459] Trial Judgement, paras 1747-1762 (section entitled "Knowledge of the Accused Hadžihasanović").
[460] Trial Judgement, para. 1755.
[461] Trial Judgement, para. 1760.
[462] Trial Judgement, paras 1763-1780 (section entitled "Measures Taken").
[463] Trial Judgement, para. 1779 (footnotes omitted).

162. The Appeals Chamber notes that the Trial Chamber's finding that Hadžihasanović had reason to know of the acts of mistreatment committed in the Bugojno Detention Facilities as of 18 August 1993 is predominantly based on its finding that Hadžihasanović failed to take adequate measures to punish the perpetrators of the 5 August 1993 crimes. The Appeals Chamber has found this latter Trial Chamber's finding to have been in error and has acquitted Hadžihasanović of having failed to take the adequate measures required to punish those responsible for the murder of Mladen Havranek and the cruel treatment of six prisoners at the *Slavonija* Furniture Salon on 5 August 1993.

163. The Appeals Chamber finds that none of the Trial Chamber's remaining findings, whether taken individually or collectively, sufficiently supports its conclusion that Hadžihasanović had reason to know of the acts of cruel treatment in the Bugojno Detention Facilities as of 18 August 1993. Hadžihasanović's knowledge of the 5 August 1993 crimes does not establish that he had reason to know of similar future crimes in Bugojno as of 18 August 1993, particularly given the Appeals Chamber's finding that he took adequate measures to punish the perpetrators once he was informed of these earlier crimes. Similarly, the Trial Chamber's findings that the Bugojno Detention Facilities were established in geographic proximity to one another and that they were administered and controlled by the same 307th Brigade leaders[464] are insufficient to demonstrate Hadžihasanović's knowledge. The Appeals Chamber finds that no reasonable trier of fact could have concluded, given the evidence, that Hadžihasanović possessed the requisite knowledge under Article 7(3) of the Statute, which would trigger his responsibility to prevent or punish the acts of mistreatment committed in the Bugojno Detention Facilities as of 18 August 1993.

164. Accordingly, the Appeals Chamber reverses Hadžihasanović's convictions for having failed to take adequate measures to prevent or punish cruel treatment in the Bugojno Detention Facilities as of 18 August 1993.[465]

B. Cruel Treatment at the Zenica Music School from May to September 1993

165. Hadžihasanović argues under his fourth ground of appeal that the Trial Chamber erred in law and in fact by finding that, with respect to the infliction of physical violence at the Zenica Music School, he "failed in his duty as a superior to take the reasonable measures necessary to punish the perpetrators and prevent such acts".[466] Specifically, he contends that the Trial Chamber

[464] Trial Judgement, para. 1779.
[465] Hadžihasanović's arguments regarding the adequacy of the measures taken to prevent the acts of cruel treatment in the Bugojno Detention Facilities as of 18 August 1993 (Hadžihasanović Appeal Brief, paras 197-265) are thereby rendered moot.
[466] Hadžihasanović Appeal Brief, para. 411, quoting Trial Judgement, para. 1240. *See* also AT. 146.

erred in fact in its appreciation of the evidence[467] and in assessing what measures were necessary and reasonable under the circumstances at the time.[468]

1. Whether the Trial Chamber erred in its appreciation of the evidence

166. Hadžihasanović argues that the Trial Chamber failed to properly consider and attach probative value to: (i) evidence provided by Witnesses Džemal Merdan and HF that measures were taken by the 3rd Corps to investigate allegations of mistreatment at the Zenica Music School; and (ii) evidence related to the concealment of prisoners held at the Zenica Music School.[469]

(a) Evidence provided by Witnesses Džemal Merdan and HF

167. Hadžihasanović challenges the Trial Chamber's decision to question the exactitude of the statements made by Witness Džemal Merdan – Hadžihasanović's Deputy-Commander – and Witness HF – a senior officer of the 3rd Corps Command – as regards their respective visits to the Zenica Music School.[470] He submits that, had the Trial Chamber properly appreciated the evidence proffered by Witnesses Džemal Merdan and HF, it could not have concluded that "no investigative measures were undertaken which would have allowed to identify the perpetrators of the cruel treatment at the Music-School".[471]

168. The Prosecution responds that the Trial Chamber "expressly referred"[472] to the evidence proffered by Witnesses Džemal Merdan and HF in the Trial Judgement and "made a reasoned decision to give their testimonies limited weight".[473] It submits that the Trial Chamber assessed the testimony of Witnesses Merdan and HF against the testimony of many former detainees held at the Zenica Music School between 18 April 1993 and 20 August 1993 but decided to give more weight to the latter.[474]

169. The Appeals Chamber notes that the Trial Chamber considered the testimony of Witnesses Džemal Merdan and HF but, after reviewing the totality of the evidence before it, decided to accord

[467] Hadžihasanović Appeal Brief, paras 420-453.
[468] Hadžihasanović Appeal Brief, paras 454-478. Hadžihasanović also argued under his fourth ground of appeal that the Trial Chamber committed an error in the Disposition of the Trial Judgement by finding him guilty for failing to take necessary and reasonable measures to prevent or punish cruel treatment at the Zenica Music School "from around 26 January 1993 to 31 October 1993" (Hadžihasanović Appeal Brief, para. 417) His arguments are examined below under Section VII(B)(1) ("Alleged errors in the Disposition of the Trial Judgement").
[469] Hadžihasanović Appeal Brief, para. 413.
[470] Hadžihasanović Appeal Brief, para. 440, quoting Trial Judgement, para. 1220. *See* also Hadžihasanović Appeal Brief, para. 435; AT. 146-147.
[471] Hadžihasanović Appeal Brief, para. 434. *See* also Hadžihasanović Appeal Brief, para. 438.
[472] Prosecution Response Brief, para. 182, citing Prosecution Response Brief, Appendix E (Table of Submissions Considered by the Trial Chamber). *See* also Prosecution Response Brief, para. 186, citing Trial Judgement, paras 1233, 1235.
[473] Prosecution Response Brief, para. 183, citing Trial Judgement, para. 1236. *See* also AT. 181-182.

greater weight to the testimony of other witnesses.[475] The Trial Chamber found that, based on the "many accounts by former prisoners at the Music School", the Zenica Music School's basement "consistently housed a number between about ten and around thirty detainees [from 18 April 1993 until 20 August 1993]".[476] The Trial Chamber concluded that "on the assumption that [Witnesses Merdan and HF] visited the Music School, it is surprising, to say the least, that they never saw detainees at the Zenica Music School".[477] The Appeals Chamber notes that it is within the discretion of the Trial Chamber to weigh different witnesses's evidence at trial and recalls that a party's assertion that the Trial Chamber should have preferred the testimony of certain witnesses over others is, without more, "no argument at all".[478]

170. Moreover, the Appeals Chamber considers that Hadžihasanović's arguments regarding the import of the testimony of Witnesses Džemal Merdan and HF ignores the additional finding by the Trial Chamber that Hadžihasanović received "alarming" information from sources other than these two witnesses, which established the need for further inquiry based on allegations of mistreatment.[479] Specifically, the Trial Chamber found that Hadžihasanović was also informed by "the ECMM, the HVO [and] Judge Vlado Adamović […] that his subordinates were committing mistreatment at the Music School".[480] Thus, the Trial Chamber's finding that an investigation of the allegations of cruel treatment would have enabled Hadžihasanović to identify the persons responsible for the violence does not turn solely on the truthfulness of Witnesses Džemal Merdan and HF. The Appeals Chamber finds that Hadžihasanović improperly ignores this relevant factual finding in his submissions on appeal while maintaining that the Trial Chamber otherwise erred in its appreciation of the evidence.[481]

171. The Appeals Chamber accordingly dismisses Hadžihasanović's arguments regarding the Trial Chamber's alleged failure to properly consider evidence provided by Witnesses Džemal Merdan and HF.

(b) Evidence related to the concealment of prisoners held at the Zenica Music School

172. Hadžihasanović submits that the Trial Chamber failed to properly consider evidence that "the arrest, detention and alleged mistreatment of detainees at the Music School was concealed

[474] Prosecution Response Brief, para. 185, citing Trial Judgement, para. 1190, fn. 2629, and para. 1238.
[475] Trial Judgement, para. 1220.
[476] Trial Judgement, paras 1190 and 1220.
[477] Trial Judgement, para. 1220.
[478] *Galić* Appeal Judgement, para. 300.
[479] Trial Judgement, para. 1236.
[480] Trial Judgement, para. 1230.
[481] *Brđanin* Appeal Judgement, para. 23.

from [him], the 3rd Corps and the international organizations by some members of the 7[th] Brigade".[482] Hadžihasanović contends that the evidence before the Trial Chamber established "a practice to conceal prisoners from the 3rd Corps and international organizations"[483] and that consequently no reasonable trier of fact could have concluded that the testimony of Witnesses Džemal Merdan and HF was not truthful and that no measures to investigate the allegations of mistreatment were taken.[484]

173. The Appeals Chamber notes that the Trial Chamber took into account the attempted concealment of mistreatment at the Zenica Music School upon which Hadžihasanović relies. The Trial Chamber noted that there was "an intention on the part of the soldiers present at the School to conceal the mistreatment inflicted on the detainees", but concluded "that this has no bearing on the criminal responsibility of the Accused Hadžihasanović".[485] Indeed, the Trial Chamber found that Hadžihasanović had received information that his subordinates were committing mistreatment at the Zenica Music School from "sources outside the 7th Brigade", such that any attempted concealment by members of the 7th Brigade was rendered secondary.[486] The Appeals Chamber reiterates that Hadžihasanović may not ignore relevant factual findings made by the Trial Chamber in his submissions on appeal.[487]

174. Accordingly, the Appeals Chamber dismisses Hadžihasanović's arguments regarding the Trial Chamber's alleged failure to properly consider evidence of concealment at the Zenica Music School.

2. Whether the Trial Chamber erred in assessing whether the measures taken by Hadžihasanović were necessary and reasonable

175. Hadžihasanović submits that the measures he took with respect to the Zenica Music School were necessary and reasonable in the prevailing circumstances.[488] He argues that the Trial Chamber failed to properly consider the circumstances ruling at the time, including that: (i) whatever knowledge he possessed was based either on unfounded rumours or limited to unconfirmed allegations; and (ii) he took a significant number of measures to ensure that prisoners at the Zenica Music School were properly treated.[489]

[482] Hadžihasanović Appeal Brief, para. 441. *See* also Hadžihasanović Reply Brief, para. 110; AT. 147.
[483] Hadžihasanović Appeal Brief, para. 452.
[484] Hadžihasanović Appeal Brief, para. 453.
[485] Trial Judgement, para. 1230.
[486] Trial Judgement, para. 1230.
[487] *Brdanin* Appeal Judgement, para. 23.
[488] Hadžihasanović Appeal Brief, paras 454-455.
[489] Hadžihasanović Appeal Brief, para. 457. *See* also Hadžihasanović Appeal Brief, para. 479; AT. 147.

(a) The basis of Hadžihasanović's knowledge

176. Hadžihasanović contends that the Trial Chamber did not properly appreciate that his knowledge in relation to cruel treatment at the Zenica Music School was limited to "rumours" and "allegations which were not confirmed".[490] Hadžihasanović cites the testimony of Witnesses Judge Vlado Adamović,[491] Ramiz Džaferović,[492] Hamdija Kulović,[493] Halil Brzina,[494] Hilmo Ahmetović[495] and Zaim Kablar[496] as evidence that "in Zenica, rumours circulated about [the] Music-School which were totally unfounded and in fact nothing more than propaganda".[497]

177. Notwithstanding the rumours in Zenica, Hadžihasanović contends that the only information he received with respect to the allegations of mistreatment at the Zenica Music School was limited to that which was reported to him by Witnesses Merdan, HF and Adamović.[498] He submits that "a corps commander would be expected to trust his subordinate brigade commanders for […] informing him of any related problems affecting [the detention facility]".[499] Consequently, he asserts that he had no reason to doubt the information reported to him that the allegations of mistreatment of detainees were unfounded.[500]

178. The Prosecution responds that Hadžihasanović "repeats his submissions at trial and fails to demonstrate an error of law or fact requiring intervention by the Appeals Chamber".[501] The Prosecution stresses that the Trial Chamber dealt with his arguments before rejecting them[502] and contends that, in any event, the Trial Chamber's finding that Hadžihasanović had reason to know of the mistreatment of detainees at the Zenica Music School is "amply supported by the evidence".[503]

179. The Appeals Chamber notes that the Trial Chamber considered Hadžihasanović's current arguments in the Trial Judgement but nonetheless concluded that he had sufficient knowledge of the acts of mistreatment committed by his subordinates at the Zenica Music School under Article 7(3)

[490] Hadžihasanović Appeal Brief, para. 457.
[491] Hadžihasanović Appeal Brief, para. 460, quoting Witness Judge Vlado Adamović, T. 9596, T. 9582-9583.
[492] Hadžihasanović Appeal Brief, para. 461, quoting Witness Ramiz Džaferović, T. 14231-14232, T. 14294; citing Witness Ramiz Džaferović, T. 14235, T. 14273. *See* also Hadžihasanović Appeal Brief, para. 462, citing Witness Ramiz Džaferović, T. 14273.
[493] Hadžihasanović Appeal Brief, para. 462, citing Witness Hamdija Kulović, T. 14291-14296.
[494] Hadžihasanović Appeal Brief, para. 463, citing Halil Brzina, Exhibit DK62, Rule 92 statement, 200179963, para. 23.
[495] Hadžihasanović Appeal Brief, para. 464, citing Witness Hilmo Ahmetović, T. 16217-16218.
[496] Hadžihasanović Appeal Brief, para. 465, citing Witness Zaim Kablar, T. 14620-14621.
[497] Hadžihasanović Appeal Brief, para. 459.
[498] Hadžihasanović Appeal Brief, para. 470.
[499] Hadžihasanović Appeal Brief, para. 468, quoting DH2088 (Military Expert Opinion of Retired General Vahid Karavelić dated February 2005), para. 767 (emphasis omitted).
[500] Hadžihasanović Appeal Brief, paras 470-471.
[501] Prosecution Response Brief, para. 191, comparing Hadžihasanović Appeal Brief, paras 466-471 with Hadžihasanović Final Brief, paras 885-959.
[502] Prosecution Response Brief, para. 191, citing Trial Judgement, paras 1218-1219, 1223, 1230.
[503] Prosecution Response Brief, para. 195. *See* also AT. 179.

of the Statute.[504] First, the Trial Judgement explicitly stated that it did not base its finding regarding Hadžihasanović's knowledge on rumours of mistreatment at the Zenica Music School.[505] Second, the Trial Chamber found that Hadžihasanović received information regarding allegations of mistreatment at the Zenica Music School from sources other than Witnesses Džemal Merdan, HF and Judge Vlado Adamović.[506] Third, the Trial Chamber found that the information Hadžihasanović received from Witness Judge Vlado Adamović was sufficient to put him on notice of a real and reasonable risk about mistreatment by his subordinates at the Music School and "should have prompted an additional investigation".[507]

180. The Appeals Chamber recalls that, on appeal, a party may not merely repeat arguments that did not succeed at trial, unless the party can demonstrate that the Trial Chamber's rejection of them constituted such an error as to warrant the intervention of the Appeals Chamber.[508] Here, Hadžihasanović improperly offers only the bare assertion that the Trial Chamber erred in its appreciation of the evidence and fails to explain why no reasonable trier of fact could reach the same conclusion as the Trial Chamber.[509] Hadžihasanović's arguments are dismissed.

(b) Whether the measures taken by Hadžihasanović were necessary and reasonable

181. Hadžihasanović contends that the Trial Chamber's findings are "replete with examples" of measures taken by him "to fulfil his duties and responsibilities pursuant to [International Humanitarian Law]".[510] Hadžihasanović highlights the Trial Chamber's finding that he "sought to lay down disciplinary rules within the 3rd Corps designed to prevent and punish the unlawful actions of his subordinates".[511] He further argues that the Trial Chamber erred by not appreciating the evidence in light of his "character" and "the manner in which he exercised his command",[512] and submits that both of these factors demonstrate "that he is not the type of commander who would fail to take necessary and reasonable measures in this situation".[513]

182. The Prosecution responds that Hadžihasanović "failed to deploy genuine efforts to open an appropriate investigation on accusations of cruel treatment".[514] It argues that, although

[504] Trial Judgement, paras 1223, 1230.
[505] Trial Judgement, para. 1223 (concluding that these rumours "[do] not suffice to constitute the *mens rea* of command responsibility within the meaning of Article 7(3) of the Statute").
[506] Trial Judgement, paras 1218, 1230 (noting that Hadžihasanović was informed by, *inter alia*, the ECMM and the HVO that his subordinates were committing mistreatment at the Music School).
[507] Trial Judgement, para. 1223.
[508] *Brdanin* Appeal Judgement, para. 16.
[509] *Brdanin* Appeal Judgement, para. 24.
[510] Hadžihasanović Appeal Brief, para. 473. *See* also Hadžihasanović Reply Brief, para. 110.
[511] Hadžihasanović Appeal Brief, para. 474, quoting Trial Judgment, para. 1234.
[512] Hadžihasanović Appeal Brief, para. 476. *See* also Hadžihasanović Appeal Brief, paras 475, 477.
[513] Hadžihasanović Appeal Brief, para. 479.
[514] Prosecution Response Brief, para. 204, citing Trial Judgement, para. 1240. *See* also AT. 182-183.

Hadžihasanović had reason to know of mistreatment committed by his subordinates in the Zenica Music School since 8 May 1993, no criminal complaint was initiated by any member of the 7th Brigade or the 3rd Corps as of that date forward.[515] In its view, the measures taken by Hadžihasanović were "not appropriate in light of the alarming information he received".[516] Last, the Prosecution submits that Hadžihasanović's submissions on his character and the manner in which he exercised his command are irrelevant.[517]

183. The Appeals Chamber recalls that the Trial Chamber found that, "as of 8 May 1993, [Hadžihasanović] had reason to know that his subordinates were committing mistreatment at the Zenica Music School" and therefore "was under a duty to take the necessary and reasonable measures to stop the violence, punish the perpetrators and prevent further mistreatment".[518] The Trial Chamber considered Hadžihasanović's arguments that he had taken preventive measures to ensure that civilians and prisoners of war were treated in accordance with international humanitarian law,[519] that he took steps to investigate allegations of mistreatment by asking Nesib Talić – the 7th Brigade's Assistant Commander for Military Security – to investigate these reports, and that Witnesses HF and Džemal Merdan inspected the Zenica Music School on several occasions.[520] The Trial Chamber nevertheless concluded that Hadžihasanović "did not make genuine efforts to initiate an appropriate investigation into the allegations of cruel treatment whereas such an investigation would have enabled him to discover the identity of the persons responsible for the violence".[521]

184. Specifically, the Trial Chamber found that Hadžihasanović "could not in any event be satisfied with Nesib Talić's investigation alone" given the "alarming" information he had received from various outside sources regarding the Zenica Music School.[522] The Trial Chamber also "question[ed] the exactitude of the statements made by Džemal Merdan and witness HF" to the effect that they had taken necessary and reasonable measures to verify the allegations of mistreatment by visiting the School.[523] The Appeals Chamber recalls that the Trial Chamber found that no "criminal complaints relating to violence suffered at the Music School were lodged at the initiative of the 7th Brigade or the 3rd Corps".[524] Further, the Appeals Chamber notes that Hadžihasanović's argument that his character and the manner in which he exercised his command

[515] Prosecution Response Brief, para. 204, citing Trial Judgement, paras 1238, 1239.
[516] Prosecution Response Brief, para. 205, citing Trial Judgement, paras 1234, 1236.
[517] Prosecution Response Brief, para. 205.
[518] Trial Judgement, para. 1231.
[519] Trial Judgement, para. 1233, citing Hadžihasanović Final Brief, paras 882-884.
[520] Trial Judgement, para. 1233, citing Hadžihasanović Final Brief, paras 895-912.
[521] Trial Judgement, para. 1240.
[522] Trial Judgement, para. 1236.
[523] Trial Judgement, para. 1220. *See* also para. 1236.

demonstrate that he is not the type of commander who would fail to take necessary and reasonable measures in the situation[525] is belied by the Trial Chamber's finding that Hadžihasanović in fact failed to take such measures.[526]

185. Thus, the Appeals Chamber finds that Hadžihasanović failed to demonstrate that no reasonable trier of fact could have concluded that, given the evidence, he failed to take necessary and reasonable measures in the circumstances of the case to punish the perpetrators of the cruel treatment at the Zenica Music School and prevent further mistreatment.

186. In light of the foregoing, the Appeals Chamber dismisses, in part, Hadžihasanović's fourth ground of appeal.[527]

C. Murder and Cruel Treatment in Orašac in October 1993

187. Hadžihasanović submits under his fifth ground of appeal that the Trial Chamber erred in law and in fact by finding that he failed to take necessary and reasonable measures to prevent the murder of Dragan Popović and the cruel treatment committed by the *El Mujahedin* detachment in the Orašac Camp against the five civilians abducted on 19 October 1993.[528] Claiming that these errors occasioned a miscarriage of justice,[529] Hadžihasanović requests that the convictions entered against him under Counts 3 and 4 of the Indictment be reversed and that a verdict of acquittal be entered.

188. In particular, Hadžihasanović argues that he could not incur responsibility for the murder of Dragan Popović and the cruel treatment of the civilians because there was no superior-subordinate relationship between the 3rd Corps and the members of the *El Mujahedin* detachment between 13 August and 1 November 1993, when he left his position as commander of the 3rd Corps.[530] He submits that the Trial Chamber erred in: (i) finding that he had *de jure* authority over the members of the *El Mujahedin* detachment;[531] (ii) applying a presumption of effective control based on his *de*

[524] Trial Judgement, para. 1239.
[525] Hadžihasanović Appeal Brief, paras 475-479.
[526] Trial Judgement, paras 1236, 1240.
[527] For Hadžihasanović's argument concerning the Disposition of the Trial Judgement, *see* below under Section VII(B)(1) ("Alleged errors in the Disposition of the Trial Judgement").
[528] Hadžihasanović Notice of Appeal, para. 19, citing Trial Judgement, para. 1486. The Appeals Chamber notes that, even though Hadžihasanović refers to "cruel treatment for the period from 15 to 31 October 1993", the impugned paragraph of the Trial Judgement refers to "cruel treatment committed between 19 and 31 October 1993".
[529] Hadžihasanović Notice of Appeal, para. 19.
[530] Hadžihasanović Appeal Brief, paras 268-347. The Appeals Chamber notes that Mehmed Alagić succeeded Hadžihasanović on 1 November 1993 (Trial Judgement, para. 330).
[531] Hadžihasanović Appeal Brief, paras 297-318; AT. 131; AT. 141.

jure authority over the *El Mujahedin* detachment;[532] and (iii) finding that he exercised effective control over the *El Mujahedin* detachment.[533]

189. The ultimate question under this ground of appeal is whether Hadžihasanović exercised effective control over the *El Mujahedin* detachment. Since *de jure* authority is only one factor that helps to establish effective control, and because the present question is resolvable on the basis of effective control alone, the Appeals Chamber declines to address whether Hadžihasanović had *de jure* authority over the *El Mujahedin* detachment.

1. Whether the Trial Chamber applied a presumption of effective control based on Hadžihasanović's *de jure* authority over the *El Mujahedin* detachment

190. The Appeals Chamber recalls that a showing of effective control is required in cases involving both *de jure* and *de facto* superiors and that the burden of proving beyond reasonable doubt that the accused had effective control over his subordinates ultimately rests with the Prosecution.[534] In this section, the Appeals Chamber will examine the Trial Chamber's assessment of the superior-subordinate relationship between Hadžihasanović and the members of the *El Mujahedin* detachment as of 13 August 1993 to determine whether the Trial Chamber applied a presumption of effective control based on its finding of Hadžihasanović's *de jure* authority over the detachment and, in doing so, committed an error of law.

191. The Trial Chamber began its analysis of Hadžihasanović's effective control over the *El Mujahedin* detachment as of 13 August 1993 by stating that, given its finding that he had *de jure* authority, what needed to be established was whether the evidence before it was capable of reversing the presumption that Hadžihasanović had effective control over the *El Mujahedin* detachment.[535] This statement, without more, would amount to an error of law, in that it appears to require Hadžihasanović to reverse the burden of proof.[536]

192. The Appeals Chamber notes, however, that the Trial Chamber also examined whether the evidence presented at trial established the existence, between Hadžihasanović and the *El Mujahedin* detachment, of certain indicators of effective control. The Trial Chamber recalled that "several indicia have been developed to determine the existence of a commander's effective control over his

[532] Hadžihasanović Appeal Brief, para. 270.
[533] Hadžihasanović Appeal Brief, paras 319-347; AT. 131, 142.
[534] *See supra* paras 20-21.
[535] Trial Judgement, para. 846 ("What must be established is whether the presumption noted in the [*Čelebići*] Appeal Judgement has been reversed in this case by the evidence"). *See* also para. 86 ("[B]y virtue of his official position, it is assumed that a commander exercises effective control").
[536] *See supra* Section III(A): "Whether *de jure* power over subordinates creates a presumption of effective control".

forces"[537] and found that, in the present case, the Prosecution provided evidence which satisfied three indicia of effective control: (i) the power to give orders and have them executed; (ii) the conduct of combat operations involving the forces in question; and (iii) the absence of any other authority over the forces in question.[538]

193. In light of the foregoing, the Appeals Chamber finds that the Trial Chamber's conclusion that Hadžihasanović had effective control over the *El Mujahedin* detachment was not based on a reversal of the burden of proof. Rather, the Trial Chamber ultimately placed on the Prosecution the burden of proving beyond reasonable doubt that Hadžihasanović had effective control over the *El Mujahedin* detachment. Hadžihasanović's arguments are dismissed.

2. Whether Hadžihasanović had effective control over the *El Mujahedin* detachment

194. Hadžihasanović raises various arguments in order to show that no reasonable trier of fact could have found that the indicia of effective control referred to by the Trial Chamber were satisfied in the present case, or that he had the material ability to prevent or punish crimes committed by members of the *El Mujahedin* detachment.[539] He argues that, in its assessment of the evidence, the Trial Chamber drew incorrect inferences, placed excessive weight on certain pieces of evidence which had little or no probative value, and failed to properly consider evidence of "high probative value".[540]

195. The Prosecution responds that Hadžihasanović failed to show that the Trial Chamber's conclusion that he had effective control over the *El Mujahedin* detachment was unreasonable.[541] It underscores that the 3rd Corps "benefited militarily from the *El Mujahedin* detachment",[542] that there was a "significant difference" between the periods before and after the creation of the *El Mujahedin* detachment,[543] and that the *El Mujahedin* detachment carried out orders from the 3rd Corps command after its formation.[544] According to the Prosecution, effective control does not require "complete control" over every aspect of the subordinates' conduct.[545] It argues that, "[o]nce

[537] Trial Judgement, para. 851, referring to paras 82-84.
[538] Trial Judgement, para. 851.
[539] Hadžihasanović Appeal Brief, paras 319-347; *See* also AT. 134 ("[H]ad the Trial Chamber correctly analysed all the evidence on the record, then it would come to the conclusion that there was no material ability to prevent or punish").
[540] Hadžihasanović Appeal Brief, para. 321. *See* also AT. 142 ("[A] large amount of evidence which […] has high probative value was not attributed any weight"; "[T]he Trial Chamber […] incorrectly attributed weight to unreliable evidence for the period after 13 August 1993").
[541] Prosecution Response Brief, para. 241.
[542] Prosecution Response Brief, para. 245, citing Trial Judgement, para. 850.
[543] Prosecution Response Brief, paras 244-245.
[544] Prosecution Response Brief, para. 247, citing Trial Judgement, paras 847-849.
[545] Prosecution Response Brief, para. 261, citing *Kordić and Čerkez* Trial Judgement, para. 421 (regarding the ability to give orders), and *Strugar* Trial Judgement, para. 394 (regarding the conduct of combat operations involving the subordinates).

a stable basis of control is established, effective control will not be affected if, in a specific situation, a superior has no necessary and reasonable measure at his disposal to prevent improper conduct".[546]

196. The Appeals Chamber recalls the Trial Chamber's findings that the *El Mujahedin* detachment was officially created on 13 August 1993 and that Hadžihasanović had *de jure* authority over the detachment as of that date.[547] The Trial Chamber also found that, as of that date, Hadžihasanović exercised effective control over the *El Mujahedin* detachment.[548] This conclusion, in turn, prompted the Trial Chamber to examine whether Hadžihasanović had knowledge or reason to know of the crimes that members of the *El Mujahedin* detachment were about to commit in the Orašac Camp[549] and whether he fulfilled his duty as a superior to prevent such crimes.[550] The Trial Chamber found that he failed in his duty in that he did not use force to rescue the civilians abducted by the *El Mujahedin* detachment, despite having the material ability to do so.[551]

197. The Trial Chamber found that Hadžihasanović exercised effective control over the *El Mujahedin* detachment on the basis that the evidence before it showed that three types of indicia of effective control were satisfied, namely: (i) the power to give orders to the *El Mujahedin* detachment and have them executed; (ii) the conduct of combat operations involving the *El Mujahedin* detachment; and (iii) the absence of any other authority over the *El Mujahedin* detachment.[552] The Trial Chamber also took into account the fact that criminal proceedings were initiated in autumn 1993 in a Travnik court against a member of the *El Mujahedin* detachment.[553] The Appeals Chamber will examine each of these bases in turn to determine whether they support the Trial Chamber's conclusion that effective control existed.

(a) The power to give orders to the *El Mujahedin* detachment and have them executed

198. Hadžihasanović submits that no evidence demonstrates that orders were carried out by the *El Mujahedin* detachment after 13 August 1993.[554] In particular, he stresses that the *El Mujahedin* detachment never received any orders for engagement between 13 August 1993 and November 1993.[555] He points to the existence of some exhibits showing that the members of the *El Mujahedin*

[546] Prosecution Response Brief, para. 261.
[547] Trial Judgement, para. 843.
[548] Trial Judgement, para. 853.
[549] Trial Judgement, para. 1408.
[550] Trial Judgement, para. 1436.
[551] Trial Judgement, para. 1477.
[552] Trial Judgement, para. 851.
[553] Trial Judgement, paras 852 and 1404.
[554] Hadžihasanović Appeal Brief, paras 325-326.
[555] Hadžihasanović Appeal Brief, paras 310 and 326.

detachment reserved the right to decide for themselves whether to join combat operations.[556] The Prosecution responds that the 3rd Corps issued orders to the *El Mujahedin* detachment after its formation,[557] and that two or three of them were carried out by the *El Mujahedin* detachment.[558]

199. The Appeals Chamber recognises that the power to give orders and have them executed can serve as an indicium of effective control.[559] The Trial Chamber took certain orders of re-subordination into account, though to varying degrees, as indicia of effective control. Specifically, the Trial Chamber indicated that three re-subordination orders were sent to the *El Muja*hedin detachment by the 3rd Corps: an order from Hadžihasanović, dated 28 August 1993, addressed to the OG *Bosanska Krajina*, the 306th Brigade and the *El Mujahedin* detachment, to "re-subordinate the detachment to the 306th Brigade in order to effectively coordinate combat operations" ("28 August Order");[560] an order from Džermal Merdan (3rd Corps Deputy Commander), on behalf of Hadžihasanović, dated 6 September 1993, addressed to the OG *Bosanska Krajina* and the *El Mujahedin* detachment, to re-subordinate this detachment to the OG *Bosanska Krajina* for forthcoming combat activities ("6 September Order");[561] and an order dated 4 December 1993, addressed by the then 3rd Corps Commander Mehmed Alagić to the OG *Bosanska Krajina* and the *El Mujahedin* detachment, to re-subordinate this detachment to the OG *Bosanska Krajina* ("4 December Order").[562] The Trial Chamber found that the 28 August Order was never carried out because the *El Mujahedin* detachment refused to obey it,[563] and that the 4 December Order, though carried out, was issued a month after Hadžihasanović had left his position as 3rd Corps Commander.[564] These orders are of limited value to the determination of Hadžihasanović's responsibility as a superior for crimes he failed to prevent in October 1993.

200. By issuing the 6 September Order, the 3rd Corps sought to re-subordinate the *El Mujahedin* detachment to the OG *Bosanska Krajina*. The Trial Chamber found that this order had been carried out and that the *El Mujahedin* detachment "took part in several combat operations along with other units in the [OG *Bosanska Krajina*]".[565] In the Appeals Chamber's view, the 6 September Order alone is not sufficient for a showing that the relationship between the 3rd Corps and the *El Mujahedin* detachment was one of effective control rather than one of mere cooperation, as it was

[556] Hadžihasanović Appeal Brief, para. 328.
[557] Prosecution Response Brief, para. 245, citing Trial Judgement, paras 824-828, 830, 841, 847-849.
[558] Prosecution Response Brief, para. 247, citing Trial Judgement, paras 847-849.
[559] *Blaškić* Appeal Judgement, para. 69.
[560] Trial Judgement, para. 824, citing Exhibit P792/DH165.7.
[561] Trial Judgement, para. 825, citing Exhibit P440.
[562] Trial Judgement, para. 830, citing Exhibit P451.
[563] Trial Judgement, para. 824.
[564] Trial Judgement, para. 330.
[565] Trial Judgement, para. 848.

prior to 13 August 1993.[566] The 6 September Order was an attempt on the part of the 3rd Corps to exercise control over the *El Mujahedin* detachment, not its realisation. Thus, none of the re-subordination orders, either individually or collectively, is sufficient to establish the existence of effective control.

201. The Appeals Chamber notes however that the Trial Chamber did not limit its conclusion to the orders discussed in the above-paragraphs, but also examined the conduct of combat operations involving the *El Mujahedin* detachment, whether under the auspices of the OG *Bosanska Krajina* or other 3rd Corps forces. The Appeals Chamber will examine whether the existence of effective control can be established on any of the other bases relied upon by the Trial Chamber for its conclusion.

(b) The conduct of combat operations involving the *El Mujahedin* detachment

202. Hadžihasanović argues that the documents referred to by the Trial Chamber in its analysis of the conduct of combat operations involving the *El Mujahedin* detachment could not allow a reasonable trier of fact to conclude that, as of 13 August 1993, he exercised effective control over its members.[567] In particular, he contends that no entries in the operations logbooks allowed the Trial Chamber to draw the inference that the 3rd Corps exercised effective control over the members of the *El Mujahedin* detachment as of that date.[568] He recalls that the Trial Chamber considered the 3rd Corps' annoyance with the *El Mujahedin* detachment's behaviour during and after the combat operations.[569] The Prosecution responds that the members of the *El Mujahedin* detachment fought within the framework established by the command of the OG *Bosanska Krajina* in September and October 1993,[570] and that the war diaries for the period between 13 August and 1 November 1993 contained references to losses sustained by the *El Mujahedin* detachment.[571]

203. At the outset, the Appeals Chamber points out that, if taken literally, there is little basis in the jurisprudence of this International Tribunal for considering what the Trial Chamber termed as

[566] Trial Judgement, para. 795: "frequent cooperation in itself [did] not allow the conclusion that the mujahedin were subordinated to the 3rd Corps […] and were under [its] effective control".
[567] Hadžihasanović Appeal Brief, para. 326.
[568] Hadžihasanović Appeal Brief, para. 324.
[569] Hadžihasanović Appeal Brief, para. 329.
[570] Prosecution Response Brief, para. 218, citing Trial Judgement, para. 848. *See* also Prosecution Response Brief, para. 263 (the Prosecution argues that "[b]efore, during and after the events in Orašac [the members of the *El Mujahedin* detachment] fought with the OGBK"); AT. 166 ("From [6th September 1993], the *El Mujahedin* detachment participated in continuous combat operations as part of the OG [*Bosanska Krajina*] until October 31").
[571] AT. 178 ("[T]here are reports in the war diaries referring to the *El-Mujahedin* detachment losses, which wasn't the case prior to August 1993"). *See* also Prosecution Response Brief, para. 246, quoting Trial Judgement, para. 795 (the Prosecution argues that the period before 13 August 1993 and the period after this date are distinguishable since, as the Trial Chamber noted, there was a "total absence of references to the mujahedin's military activity in the war diaries and

the "conduct of combat operations involving the forces in question"[572] as an indicium of effective control.[573] A reading of the relevant sections of the Trial Judgement suggests that what the Trial Chamber sought to demonstrate by defining this criterion was the degree of subordination of the *El Mujahedin* detachment to the OG *Bosanska Krajina* during combat operations.[574] Accordingly, the Appeals Chamber will discuss the Trial Chamber's findings within this latter context.

204. The Trial Chamber found that, during the combat operations of September and October 1993, there were "no indications that the detachment fought outside the framework established by the [OG *Bosanska Krajina*] commanders" or "conduct[ed] independent operations on its own initiative".[575] The Trial Chamber concluded that the *El Mujahedin* detachment fought during this period "under the command of the OG *Bosanska Krajina*".[576] This was based on a number of findings, the most significant of which are recalled below.

205. The Trial Chamber found that the *El Mujahedin* detachment took part in combat operations in the zone of responsibility of the OG *Bosanska Krajina* between 5 and 7 September 1993 and that, on 5 September 1993, the 306th Brigade led a coordinated attack with the 27th Brigade, the 325th Brigade and the *El Mujahedin* detachment.[577] On 7 September 1993, when the 325th Brigade experienced difficulties in fighting in the Grbavica sector and sought the help of the *El Mujahedin* detachment to repel an HVO attack, the OG *Bosanska Krajina* responded favourably and organised the means to assist them, including the deployment of the *El Mujahedin* detachment to fight alongside the 325th Brigade.[578]

206. Further, the Trial Chamber found that, around 18 September 1993, the *El Mujahedin* detachment also took part in combat operations in the Krušica sector, in the vicinity of Vareš. The Trial Chamber found that Mehmed Alagić "ordered the mujahedin to fight in the combat operations alongside the 17th Brigade".[579] The Trial Chamber noted, however, that during these operations,

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operations books, which is quite different from the situation after the formation of the *El Mujahedin* detachment in August 1993").

[572] Trial Judgement, paras 83, 851.

[573] *See Blaškić* Appeal Judgement, para. 69 ("[the 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"). In a footnote appended to justify this criterion, the Trial Chamber referred to paragraph 398 of the *Strugar* Trial Judgement. Upon review of that judgement, the Appeals Chamber considers that the Trial Chamber in the *Strugar* case did not devise a new indicator of effective control, but simply analysed the effect of certain orders in the context of combat operations.

[574] *See* Trial Judgement, paras 825-827, 848, 851-852.

[575] Trial Judgement, para. 848.

[576] Trial Judgement, para. 848.

[577] Trial Judgement, para. 826.

[578] Trial Judgement, para. 826.

[579] Trial Judgement, para. 827, relying on Witness Čuskić's testimony. The Trial Chamber stressed that "[t]he transcript [was] not clear as to whom this order was given" (Trial Judgement, para. 827, fn. 1681).

"the ABiH sustained heavy losses because of the mujahedin's combat methods".[580] Witness Čuškić testified to the behaviour of the members of the *El Mujahedin* detachment during these operations as follows:

> [R]egardless of the plan of operation, the issued order, and everything else, because we had done our best to prepare it properly, during the operation itself, they acted independently, and this caused considerable losses in my own unit. That day, I think I had 78 wounded and 16 dead, which had never happened to me as a brigade commander up until then, nor after that. [581]

207. On 9 October 1993, the commander of the OG *Zapad* sent a letter to Hadžihasanović. In this letter, the commander of the OG *Zapad* sought permission to use part of the *El Mujahedin* detachment in combat operations because the representatives of the detachment had informed him that "they were ready to take part in combat but that they believed this required an order from the 3rd Corps".[582] The next day, Hadžihasanović seemingly denied that request. He replied that "the [*El Mujahedin*] detachment was still attached to OG *Bosanska Krajina* and engaged in combat operations in the Lašva valley".[583] While the Trial Chamber did not indicate whether the detachment ultimately fought with the OG *Zapad*, it nevertheless took into account Hadžihasanović's reply to underscore that the *El Mujahedin* detachment did not believe it could conduct combat operations on its own initiative.[584]

208. Lastly, the Trial Chamber found that the war diaries and the operational logbook of the OG *Bosanska Krajina* mentioned that the *El Mujahedin* detachment participated in combat operations with the 308th Brigade in the Novi Travnik – Gornji Vakuf region – on 24 October 1993. The result of the combat was 4 dead and 17 wounded for the 308th brigade and 3 dead and 8 wounded for the *El Mujahedin* detachment.[585]

209. These findings confirm that the *El Mujahedin* detachment took part in several combat operations in September and October 1993 and that this occurred within the framework established by the OG *Bosanska Krajina* and the 3rd Corps. This, however, does not in itself necessarily provide sufficient support for the conclusion that Hadžihasanović had effective control over the *El Mujahedin* detachment in the sense of having the material ability to prevent or punish its members should they commit crimes.[586] Further, several findings of the Trial Chamber demonstrate that the *El Mujahedin* detachment maintained on various issues a significant degree of

[580] Trial Judgement, para. 827.
[581] Witness Čuškić, T. 12151.
[582] Trial Judgement, para. 828.
[583] Trial Judgement, para. 828.
[584] Trial Judgement, para. 828.
[585] Trial Judgement, para. 829.
[586] *See Čelebići* Appeal Judgement, para. 256.

independence from the units it fought alongside. This belies the Trial Chamber's conclusion that the *El Mujahedin* detachment was under the effective control of the 3rd Corps.

210. The Appeals Chamber notes that the *El Mujahedin* detachment took part in combat operations alongside 3rd Corps formations, including the OG *Bosanska Krajina*, as of the second half of 1992.[587] The Appeals Chamber stresses that, with respect to the period before 13 August 1993, the Trial Chamber found that the relationship between the *El Mujahedin* detachment and the 3rd Corps was one of cooperation, not effective control. The Trial Chamber found that "frequent cooperation in itself [did] not allow the conclusion that the mujahedin were subordinated to the 3rd Corps […] and were under [its] effective control".[588] Neither the 6 September Order nor the conduct of combat operations demonstrate that the relationship between the 3rd Corps and the mujahedin, later officially renamed the *El Mujahedin* detachment, evolved from cooperation to effective control.

211. In addition to these considerations, the Trial Chamber made several findings regarding the *El Mujahedin* detachment's combat conditions and methods.[589] The Trial Chamber found, for example, that "the detachment members were anxious to maintain their independence and reserved the right to decide whether they would take part in combat operations".[590] Members of the detachment "demanded special missions"[591] and "groups of negotiators had to be used to determine if they would take part in combat".[592] The Trial Chamber further found that "[t]his vow of independence had significant repercussions on how the *El Mujahedin* detachment took part in

[587] *See* Trial Judgement, para. 537 (the *El Mujahedin* detachment expressed their readiness to conduct combat operations in the zone of responsibility of the 333rd Brigade). *See* also Trial Judgement, para. 530 (T. 17233, Closed Session). The *El Mujahedin* detachment took part in combat operations alongside the 7th and the 17th units during the combat operations in April 1993 on Mt Zmajevac, south of Zenica (Trial Judgement, para. 532); in the Bijelo Bučje and Mravinjac sectors in June 1993 (Trial Judgement, paras 534-535); and at Kaćuni south-east of Busovača in July 1993 (Trial Judgement, para. 537).
[588] Trial Judgement, para. 795.
[589] Trial Judgement, para. 849. *See* Prosecution Response Brief, paras 255-256.
[590] Trial Judgement, para. 833, citing Witness Kulenović, T. 13921. Witness Kulenović testified as follows: "No such formation was placed under the command of the *Bosanska Krajina* OG or became a part of this OG […]. They never wanted to be placed under our command. […] It seems that they didn't want to allow anybody to be above them, and even if they accepted to participate in combat together with our unit, they wanted to have a special mission, a special task, and they could never be taken to task by the superior command" (Witness Kulenović, T. 13921).
[591] Trial Judgement, para. 849.
[592] Trial Judgement, para. 833, citing Witness Čuškić, T.12087, 12130-12131. Witness Čuškić testified as follows: "[W]henever a commander issued an order, for example, to me, I […] just carried it out. But […] when this unit was formed, you always had to use negotiation teams to see if they would participate in actions or not […] (Witness Čuškić, T. 12087); "[A]fter its formation, in order to use the *El Mujahedin* detachment, or part of it, some delegations had to ensure that they would accept this. […] So it wasn't as if they were units of any other kind. It's not as if the commander could issue an order and be sure that commanders of subordinate units would take all the measures necessary to carry out the task as well as possible" (Witness Čuškić, T. 12131); "Generally you could give them an order, but if they did not agree to carry it, nothing came out of it. So they carried out only those orders which, on the basis of some signs of theirs or prayers or whatever, they agreed to carry out" (Witness Čuškić, T. 12149).

combat"[593] and was reminiscent of the way the mujahedin took part in combat before the formation of the *El Mujahedin* detachment.[594] In addition, the Trial Chamber noted that "[c]ontact and communication with its members were difficult",[595] that "there was no information on the identity of the detachment members [or] other aspects of its operations",[596] and that the *El Mujahedin* detachment "sometimes left the battlefield without submitting reports on the outcome of combat".[597] The Appeals Chamber also notes that the *El Mujahedin* detachment was not stationed within the premises of the 3rd Corps or that of the OG *Bosanska Krajina*, but was stationed on its own in a separate camp.[598] The Trial Chamber concluded that "the detachment held an exceptional position within the 3rd Corps" but that this did not prevent "the 3rd Corps and its units from using the detachment in combat and benefiting militarily from its existence".[599]

212. Finally, the independence of the *El Mujahedin* detachment in respect of the 3rd Corps is reflected by the detachment's abduction of civilians, a practice that was conducted in reckless disregard of the directives of the 3rd Corps, which sought to prevent and stop these abductions.[600] As the Trial Chamber did not discuss these abductions in its section dedicated to effective control, the Appeals Chamber will first discuss the other considerations developed by the Trial Chamber with regard to whether Hadžihasanović had effective control. It will then discuss the significant relevance of that practice and the surrounding circumstances as an indicator of the independence of the *El Mujahedin* detachment in respect of the 3rd Corps.

213. In its concluding remarks on the issue of Hadžihasanović's effective control, the Trial Chamber stated the following:

> It must be noted, however, that this exceptional position was in fact accepted by the 3rd Corps, insofar as it did not in effect prevent the 3rd Corps and its units from using the detachment in combat and benefiting militarily from its existence. It should also be noted that nothing forced the 3rd Corps commanders to use the detachment in combat. In so doing, they accepted all the consequences of their decisions and inevitably assumed full responsibility for them.[601]

The Appeals Chamber does not dispute that the 3rd Corps may have benefited from the *El Mujahedin* detachment, and that a circumstance of this kind may entail some form of responsibility,

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[593] Trial Judgement, para. 833.
[594] Trial Judgement, para. 834.
[595] Trial Judgement, para. 849. *See* also Trial Judgement, para. 833.
[596] Trial Judgement, para. 849. *See* also Trial Judgement, para. 833.
[597] Trial Judgement, para. 849. *See* also Trial Judgement, para. 833, referring to Witness Kulenović, T. 13920. Witness Kulenović testified as follows: "The superior command could never be aware of what was done in combat, whether the mission had been accomplished or not. In my view, whatever happened during combat, they would just leave without reporting to anybody on what had been accomplished in terms of their original mission" (Witness Kulenović, T. 13921).
[598] Trial Judgement, para. 1467.
[599] Trial Judgement, para. 850.
[600] *See infra* paras 222-230.
[601] Trial Judgement, para. 850.

if the particulars of such responsibility are adequately pleaded in an Indictment.[602] The Appeals Chamber nevertheless questions the relevance of that consideration for demonstrating the existence of Hadžihasanović's effective control over the *El Mujahedin* detachment. The Appeals Chamber clarifies, however, given that the expression "full responsibility" adopted by the Trial Chamber may be somewhat misleading, that the responsibility of a superior under Article 7(3) of the Statute is only triggered by a superior's failure to prevent and punish the crimes of his subordinates of which he has the requisite knowledge. Thus, even if Hadžihasanović benefited militarily from the *El Mujahedin* detachment, his responsibility as a superior under Article 7(3) of the Statute would be, eventually, triggered only upon a showing that the members of the *El Mujahedin* detachment were his subordinates. As the Trial Chamber made its remark in the context of its discussion on effective control, it presumably used the remark as an argument to justify attributing Hadžihasanović with effective control. This argument, however, does not provide support for the existence of effective control.

214. Thus, while these Trial Chamber's findings indicate that the 3rd Corps cooperated with the *El Mujahedin* detachment, they are insufficient to establish the existence of effective control. The Appeals Chamber will examine whether any of the Trial Chamber's additional findings provide a proper basis for its conclusion that Hadžihasanović exercised effective control over the *El Mujahedin* detachment.

(c) The absence of any other authority over the *El Mujahedin* detachment

215. The Trial Chamber concluded that there was no authority over the *El Mujahedin* detachment other than the authority of the 3rd Corps.[603] According to Hadžihasanović, the *El Mujahedin* detachment was not under the command of the 3rd Corps, but under the command of some "mujahedin leaders".[604] He affirms that the *El Mujahedin* detachment refused to be placed under the command and control of the 3rd Corps and wanted to be assigned tasks from another authority.[605]

216. Some of the Trial Chamber's findings suggest that the *El Mujahedin* detachment was more under the influence of Muslim clerics, than under that of the 3rd Corps.[606] The Trial Chamber noted that, in June 1993, Hadžihasanović informed Rasim Delić and Sefer Halilović that the mujahedin

[602] Trial Judgement, para. 1483.
[603] Trial Judgement, para. 851.
[604] Hadžihasanović Appeal Brief, paras 327 and 340, referring to Exhibits DH1515 and DH271.
[605] Hadžihasanović Appeal Brief, para. 310.
[606] Trial Judgement, para. 610 ("Fikret Čuškić was only able to obtain [the release of his soldier] by sending a message through the Mufti of Travnik, Nusret Efendija Avdibegović"); para. 1444 ("Kazimir Pobrić's release was due to the influence brought to bear on the Mujahedin by the circle of Muslim clerics and naturalized Bosnian Muslims"); para. 552 (the Trial Chamber took note that, according to Hadžihasanović, "it was a well-known fact that these persons had the support of certain state organs and high-ranking clergymen").

"had the support of certain state organs and high-ranking clergymen".[607] On two occasions, at the end of October 1993, the circle of Muslim clerics was able to exercise influence over the members of the detachment while the OG *Bosanska Krajina* was unable to have its orders carried out.[608] Despite these findings, the Trial Chamber nevertheless concluded that the *El Mujahedin* detachment was subject to no other authority.[609]

217. Assuming that the Trial Chamber's conclusion that there was no other authority over the *El Mujahedin* detachment is correct, the Appeals Chamber disputes the relevance of the criterion identified by the Trial Chamber as an indicator of the existence of effective control. Hadžihasanović's effective control cannot be established by process of elimination. The absence of any other authority over the *El Mujahedin* detachment in no way implies that Hadžihasanović exercised effective control in this case.

(d) The prosecution of a member of the *El Mujahedin* detachment

218. In its analysis of whether Hadžihasanović exercised effective control over the members of the *El Mujahedin* detachment, the Trial Chamber took into consideration the testimony of Witness Šiljak that a member of the *El Mujahedin* detachment was "prosecuted by the Travnik District Military Court and sentenced for having run the witness' wife out of the village of Kljaci in the fall of 1993 because she was the offspring of a mixed marriage".[610] Hadžihasanović argues that the Trial Chamber erred in inferring from this witness' testimony that the case was brought before the Travnik District Military Court and submits that the alleged perpetrator was tried before the municipal court in Travnik.[611] The Prosecution concedes that the Trial Chamber erred in finding that the alleged perpetrator was prosecuted before a military court, but maintains that this error had no impact on the Trial Chamber's ultimate findings.[612]

219. Witness Šiljak testified that the alleged perpetrator "had to appear before the court in Travnik" without specifying which court it was.[613] Even if it were true that the said individual had

[607] Trial Judgement, para. 552.
[608] Trial Judgement, para. 1444 (the Trial Chamber found that "the release of Kazimir Pobrić on 22 or 23 October 1993 was most probably not attributable to the order transmitted on 20 October 1993 by the OG *Bosanska Krajina* Command" but "was due to the influence brought to bear on the mujahedin by the circle of Muslim clerics and naturalised Bosnian Muslims"); paras 610 and 1452 (the Trial Chamber found that the "mujahedin did not release the soldier in spite of Alagić's order" and that the 17th Brigade was "only able to obtain his release by sending a message through the Mufti of Travnik").
[609] Trial Judgement, para. 851.
[610] Trial Judgement, para. 821. *See* also para. 852.
[611] Hadžihasanović Appeal Brief, paras 344-345; AT. 143 ("[M]embers of the Mujahedin were in fact tried by the municipal court in Travnik and not, as the Trial Chamber held, by the district military court").
[612] Prosecution Response Brief, para. 257.
[613] Witness Šiljak, T. 10645.

been brought before the Travnik District Military Court,[614] there is no indication in the Trial Judgement as to what role Hadžihasanović would have had in bringing about the initiation of proceedings against that perpetrator. Nor does Witness Šiljak's testimony demonstrate that the perpetrator was prosecuted following measures taken or initiated by the 3rd Corps. The Appeals Chamber stresses that the perpetrator was an identified local Muslim and that both the civilian police and the witness himself may have filed the complaint against him.[615]

220. In its analysis concerning the above witness, the Trial Chamber also took into consideration the fact that Witness Merdan accepted, "at least in principle", that a member of the *El Mujahedin* detachment would be treated the same way as any other member of the 3rd Corps if he was found to have committed a crime.[616] This statement, however, does not show that, in practice, the 3rd Corps had the material ability to punish members of the detachment should they commit crimes, but only that they would possibly do so.

221. The Appeals Chamber concludes that these testimonies do not support the Trial Chamber's conclusion that Hadžihasanović had effective control over the *El Mujahedin* detachment.

(e) The abduction of civilians by the *El Mujahedin* detachment and the non-use of force by the 3rd Corps to rescue them

222. Hadžihasanović submits that, given that the only way for the 3rd Corps to obtain the release of the five civilians who had been abducted by members of the *El Mujahedin* detachment on 19 October 1993 was to use force against the detachment, he could not be found to have had effective control over it. According to Hadžihasanović, a commander who has no other option but to attack a group, with a view to preventing its members from committing a crime, cannot exercise effective control over that group.[617] Hadžihasanović further contends that no reasonable trier of fact, having properly assessed the evidence admitted in this case, could conclude that launching an attack against the *El Mujahedin* detachment in the circumstances ruling at the time, constituted a necessary and reasonable measure.[618] He alleges that the Trial Chamber failed to take into consideration the fact that nobody within the 3rd Corps knew, prior to 6 November 1993, that the Croatian and

[614] The Appeals Chamber finds that, while the section of the Trial Judgement on the civilian courts that operated in Central Bosnia throughout the war does not contain any indications as to whether a municipal court existed in Travnik in 1993 (Trial Judgement, paras 953-957), there could have been a court other than the Travnik District Military Court in Travnik at that time.
[615] Criminal reports or complaints submitted to district military prosecutors could come from the Civilian Police or civilians (Trial Judgement, paras 921-922). With regard to municipal courts, the Trial Chamber found that "[p]rosecutorial procedure was identical to that of the district military courts" and stressed, nevertheless, that "a civilian court prosecutor could take on a case only after a complaint had been filed by the civilian police or the CSB (Security Services Centre)" (Trial Judgement, para. 956).
[616] Trial Judgement, para. 852.
[617] Hadžihasanović Appeal Brief, para. 285, *See* also Hadžihasanović Reply Brief, para. 80; AT. 134-135.

Serbian civilians had been brought to the mujahedin camp in Orašac.[619] Finally, Hadžihasanović alleges that the Trial Chamber failed to appreciate: (i) the complexity of planning a military attack against the *El Mujahedin* detachment;[620] (ii) the impact of this attack on the accomplishment of his mission;[621] (iii) the fact that such an attack would likely cause collateral damage;[622] and (iv) the fact that the 3rd Corps lacked the time to launch such an attack.[623]

223. The Prosecution responds that effective control does not disappear every time a superior experiences difficulty in enforcing an order,[624] and affirms that, once a stable basis of control is established, effective control will not be affected if, in a specific situation, a superior has no necessary and reasonable measure at his disposal to prevent improper conduct.[625] The Prosecution submits that the Trial Chamber did address the impact of a possible attack when discussing the risk that a third front would be opened.[626] It also underscores that because members of the *El Mujahedin* detachment were notoriously dangerous, there was an urgency brought to the duty to take reasonable measures.[627]

224. The Trial Chamber made the following findings regarding the *El Mujahedin* detachment's abduction of civilians. On 15 October 1993, members of the *El Mujahedin* detachment abducted six Croatian civilians, though the detachment had been explicitly warned against such action by Mehmed Alagić, Hadžihasanović's deputy.[628] On 15 or 16 October 1993, the OG *Bosanska Krajina* Command threatened to attack the *El Mujahedin* detachment should they refuse to release the civilians who were still being kept hostage.[629] The Trial Chamber noted that these first threats to use force against the *El Mujahedin* detachment did not have the expected deterrent effect.[630] On the contrary, the *El Mujahedin* detachment responded by abducting five more civilians on 19 October 1993.[631] On 20 October 1993, a member of the OG *Bosanska Krajina* command handed

[618] Hadžihasanović Appeal Brief, para. 407.
[619] Hadžihasanović Appeal Brief, para. 391, citing Trial Judgement, para. 1466.
[620] Hadžihasanović Appeal Brief, para. 390, citing Witness HD, T. 15489-15495, T. 15504-15509 (Closed Session); Witness Muratović, T. 15075-15076.
[621] Hadžihasanović Appeal Brief, paras 396-398, citing Witness Merdan, T. 13353-13354, T. 13358-13359, T. 13543-13546, T. 13777-13782. Hadžihasanović affirms that launching such an attack "would open a *permanent* third front against an unpredictable third enemy" (Hadžihasanović Appeal Brief, para. 397).
[622] Hadžihasanović Appeal Brief, paras 399-400.
[623] Hadžihasanović Appeal Brief, para. 390.
[624] Prosecution Response Brief, para. 261, citing *Gacumbitsi* Appeal Judgement, para. 182; *Čelibići* Appeal Judgement, para. 256. *See* also Prosecution Response Brief, para. 284 (the Prosecution argues that "[Hadžihasanović's] overall superior-subordinate relationship was unaffected by difficulties in controlling members of the *El Mujahedin* detachment").
[625] Prosecution Response Brief, para. 261.
[626] Prosecution Response Brief, para. 301.
[627] Prosecution Response Brief, para. 305.
[628] Trial Judgement, para. 1364. Regarding the Abu Džafer's threats, *see* para. 1361.
[629] Trial Judgement, para. 1369.
[630] Trial Judgement, paras 1454-1455, 1458.
[631] Trial Judgement, paras 1454, 1456, 1458.

out a list of persons abducted by the *El Mujahedin* detachment to representatives of the ICRC, the ECMM and the UNHCR.[632] That same day, Mehmed Alagić ordered the *El Mujahedin* detachment to release the prisoners who had been abducted the previous day,[633] and communicated with the circle of Muslim clerics and naturalised Bosnian Muslims with a view to influencing the mujahedin.[634] A member of the OG *Bosanska Krajina* went to the mujahedin camp in Poljanice, where he met Abu Haris, the head of the *El Mujahedin* detachment. He transmitted Mehmed Alagić's order to release the prisoners immediately.[635] On 21 October 1993, however, Dragan Popović, one of the five hostages kidnapped on 19 October 1993, was killed.[636] Another hostage, Kazimir Pobrić, was released on 22 or 23 October 1993.[637] Between 20 and 29 October 1993, a representative of the ICRC tried, with the assistance of an officer from the OG *Bosanska Krajina* Command, to pay a visit to the abducted civilians. The mujahedin refused to let them enter their camp.[638] Finally, on 29 October 1993, Mehmed Alagić threatened for a second time to attack the detachment if the prisoners were not released.[639] The last hostage was released on 7 December 1993.[640]

225. Furthermore, the Appeals Chamber notes that the 3rd Corps was unable to obtain the release of one of its soldiers who was abducted by members of the *El Mujahedin* detachment on 23 October 1993. Emir Kuduzović, a 17th Brigade soldier, was detained for several days and mistreated at the Poljanice Camp by members of the detachment because he had consumed alcohol.[641] The Trial Chamber found that the "mujahedin did not release the soldier in spite of Alagić's order"[642] and that the 17th Brigade was "only able to obtain his release by sending a message through the Mufti of Travnik."[643] The message indicated that the 17th Brigade would attack the camp if the mujahedin did not release the soldier.[644]

226. The Trial Chamber dealt with these events with a view to determining whether Hadžihasanović had taken necessary and reasonable measures as a superior to prevent or punish crimes committed by the *El Mujahedin* detachment on the premise that Hadžihasanović had effective control over the detachment. In the Appeals Chamber's view, these events confirm that

[632] Trial Judgement, para. 1375.
[633] On 20 October 1993, Džermal Merdan had ordered Mehmed Alagić to resolve the issue of the abductions in Travnik (Trial Judgement, paras 1438 and 1413-1422).
[634] Trial Judgement, para. 1381.
[635] Trial Judgement, para. 1377.
[636] Trial Judgement, para. 1378.
[637] Trial Judgement, para. 1381.
[638] Trial Judgement, para. 1384.
[639] Trial Judgement, para. 1383.
[640] Trial Judgement, paras 1386-1387.
[641] Trial Judgement, para. 1452. *See* also para. 610.
[642] Trial Judgement, para. 1452.
[643] Trial Judgement, para. 610. *See* also para. 1452.

Hadžihasanović did not have effective control over the *El Mujahedin* detachment. They demonstrate that there were areas, in addition to the examples already provided in paragraph 224 above, in which the *El Mujahedin*'s detachment acted independently from the 3rd Corps.

227. The *El Mujahedin* detachment was never requested by the 3rd Corps to capture hostages, nor did it receive any approval for doing so. Quite to the contrary, its behaviour was in reckless disregard of the 3rd Corps' requests that it abstain from these abductions. It did not comply with Mehmed Alagić's order to release them,[645] or release them when threatened with the use of force.[646] The independence of the *El Mujahedin* detachment from the 3rd Corps, as opposed to its subordination to it, is further confirmed by other circumstances. The 3rd Corps had to engage in negotiations for the release of the hostages with some members of the detachment while at the same time putting pressure on them with the support of certain international organisations, as well as Muslim clerics and naturalised Bosnian Muslims.[647] Had the members of the *El Mujahedin* detachment been subordinated to the 3rd Corps, no negotiations or external pressure would have been needed. The 3rd Corps' orders to release the hostages would have been complied with. Another circumstance showing the independence of the *El Mujahedin* detachment from the 3rd Corps is the Trial Chamber's finding that the only means available to the 3rd Corps to obtain the release of the hostages was to use direct force against the *El Mujahedin* detachment.

228. The Appeals Chamber agrees with the Trial Chamber that the fact that a superior is compelled to use force to control some of his subordinates does not automatically lead to the conclusion that this superior does not exercise effective control over them.[648] The Appeals Chamber concurs with the Trial Chamber's finding that this issue must be evaluated on a case-by-case basis.[649] Further, there might be situations in which a superior has to use force against subordinates acting in violation of international humanitarian law. A superior may have no other alternative but to use force to prevent or punish the commission of crimes by subordinates. This kind of use of force is legal under international humanitarian law insofar as it complies with the principles of proportionality and precaution and may even demonstrate that a superior has the material ability to

[644] Trial Judgement, para. 610. *See* also para. 1452.
[645] Trial Judgement, para. 1452.
[646] Trial Judgement, paras 1377, 1383.
[647] *See supra* para. 224.
[648] Trial Judgement, para. 86.
[649] In the Appeals Chamber's view, the fact that Vahid Karavelić, Commander of the 1st Corps from July 1993 to August 1995, had to attack some of his subordinates at the end of 1993 demonstrates that, in exceptional circumstances, a superior may have to use military assets against his subordinates. *See* Witness Karavelić, T. 17620-17621 and T. 17877-17885; Hadžihasanović Appeal Brief, para. 385; AT. 189 ("General Karavelić is the officer who defended Sarajevo against the worst possible blockage in years. […] [H]e had to attack […] subordinates who […] suddenly became out of control. […] He went to see the President of Bosnia and he said […] 'I need to attack these people, but I'm not going to do it unless I get the proper authority', and the President […] gave [him] the authority after doing the proper political analysis").

prevent and punish the commission of crimes. The issue in the present case, however, is whether those modalities in which force should have been used, in the Trial Chamber's view, to rescue the hostages, confirm the absence of Hadžihasanović's effective control over the *El Mujahedin* detachment.

229. The military operation that the Trial Chamber expected the 3rd Corps to launch in order to rescue the hostages was not simply a type of police operation over a few recalcitrant subordinates. Rather, it would have amounted to a full-fledged armed attack against the camp where the *El Mujahedin* detachment was based.[650] According to the Trial Chamber, this operation "was intended only to secure the release of a few civilians who had been abducted and not to disarm all the mujahedin".[651] Given the reckless behaviour of the *El Mujahedin* detachment and the fact that its members were armed with automatic rifles and rocket launchers,[652] it is likely that the 3rd Corps would have encountered resistance. This military operation could have caused significant casualties on all sides, including to the hostages themselves. In light of these considerations, the military operation that the Trial Chamber expected the 3rd Corps to undertake would, in the Appeals Chamber's view, be comparable to that necessary to obtain the release of hostages from an enemy force rather than a force under its effective control.

230. Regardless of whether the use of force was materially feasible or advisable to save the lives of the hostages, the above scenario reveals a situation in which the relationship between the *El Mujahedin* detachment and the 3rd Corps was not one of subordination. It was quite close to overt hostility since the only way to control the *El Mujahedin* detachment was to attack them as if they were a distinct enemy force. This scenario is at odds with the premise of the Trial Chamber that the *El Mujahedin* detachment was subordinated to the 3rd Corps. This conclusion further confirms that Hadžihasanović did not have effective control over the *El Mujahedin* detachment.

(f) Conclusion

231. In order to demonstrate that Hadžihasanović had effective control over the members of the *El Mujahedin* detachment, the Prosecution was required to prove beyond reasonable doubt that Hadžihasanović had the material ability to prevent or punish the criminal conduct of its members.[653] Such material ability is a minimum requirement for the recognition of a superior-subordinate relationship for the purposes of Article 7(3) of the Statute.[654] The Appeals Chamber, taking into account the submissions of the Parties, reviewed all of the relevant findings of the Trial Chamber

[650] Trial Judgement, paras 1466-1472.
[651] Trial Judgement, para. 1471.
[652] Trial Judgement, para. 1469.
[653] *See Čelebići* Appeal Judgement, para. 256.

and examined their significance in terms of effective control, both in isolation and collectively. In light of the foregoing, the Appeals Chamber finds that no reasonable trier of fact could have concluded that it was established beyond reasonable doubt that Hadžihasanović had effective control over the *El Mujahedin* detachment between 13 August and 1 November 1993.

232. As a result, the Appeals Chamber reverses Hadžihasanović's convictions for having failed to prevent the crimes of cruel treatment committed between 19 and 31 October 1993 and the murder of Dragan Popović.

[654] *Čelebići* Appeal Judgement, para. 303; *Halilović* Appeal Judgement para. 59.

VI. KUBURA'S INDIVIDUAL CRIMINAL RESPONSIBILITY AS A SUPERIOR

A. Plunder in the Ovnak area in June 1993

233. Kubura submits under his first ground of appeal that the Trial Chamber erred in law and fact in convicting him under Count 6 of the Indictment for failing to take necessary and reasonable measures to punish the acts of plunder committed in June 1993 in the villages of Šušanj, Ovnak, Brajkovići and Grahovčići (collectively, the "Ovnak area").[655] He argues that the Trial Chamber erred in finding that the 7th Brigade was involved in the plunder committed in the Ovnak area and/or that he knew of his subordinates' involvement in these acts.[656] As a result, he requests that the Appeals Chamber acquit him of Count 6 of the Indictment.[657]

1. The 7th Brigade's involvement

234. Kubura argues that the Trial Chamber erred in concluding that it had been established beyond reasonable doubt that his subordinates in the 7th Brigade committed plunder in the Ovnak area and claims that he should have accordingly been acquitted of this charge.[658] In particular, Kubura alleges that "the evidence referenced by the Trial Chamber on the involvement of the 7th Brigade in plunder in the Ovnak area and the Trial Chamber's findings are contradictory".[659]

235. In support of this allegation, Kubura offers the following examples: (i) the Trial Chamber's findings that the 7th Brigade units "did not enter the villages of Brajkovići, Grahovčići and Šušanj" and "left the Ovnak sector on 9 June 1993"[660] contradict the finding that plunder in these villages was committed by members of the 7th Brigade and that plundered goods were taken by members of the 7th Brigade to the church in Brajkovići on 9 June 1993;[661] (ii) the testimonies of witnesses listed in paragraphs 1936-1938 of the Trial Judgement, which refer to incidents committed after 9 June 1993, contradict the Trial Chamber's finding that the 7th Brigade had left the area by then;[662] (iii) the report from the Zenica *OpŠO* dated 20 June 1993, relied upon by the Trial Chamber for the conclusion that the 7th Brigade was involved in the plunder, "does not refer to members of the

[655] Kubura Appeal Brief, para. 5.
[656] Kubura Appeal Brief, para. 5.
[657] Kubura Appeal Brief, para. 60. *See* also AT. 34-35.
[658] Kubura Appeal Brief, para. 25.
[659] Kubura Appeal Brief, para. 17.
[660] Kubura Appeal Brief, para. 18, citing Trial Judgement, para. 1931.
[661] Kubura Appeal Brief, para. 19, citing Trial Judgement, para. 1935.
[662] Kubura Appeal Brief, para. 19.

military police of the 7th Brigade being involved in plunder";[663] (iv) the Trial Chamber noted the testimonies of Defence witnesses – involved in the military operations – to the effect that members of the 7th Brigade had not been involved in plunder, "without finding them unreliable";[664] and (v) the Trial Chamber accepted that civilians also committed acts of plunder.[665] According to him, "[t]he undisputed evidence was that units of the 7th Brigade withdrew from the area on 8 June 1993"[666] and that they were "immediately transported by bus to Kakanj",[667] where they arrived "on the afternoon of 9 June 1993".[668]

236. The Prosecution responds that various ABiH documents and witness testimony support the Trial Chamber's finding that "[t]he plunder in the villages of Šušanj, Ovnak, Brajkovići and Grahovčići in June 1993 was committed in particular by members of the military police subordinated to the 7th Brigade".[669] It asserts that Kubura misread the Trial Chamber's findings in question and further argues that the majority of the evidence supports "the distinction between activities on 8 June [1993] and the plunder that ensued the following day before the 7th Brigade was re-deployed to Kakanj".[670] It contends that while the Trial Chamber found that the 7th Brigade did not enter the villages during combat operations on 8 June 1993, the military police did so the following day when they plundered property.[671] The Prosecution concludes, therefore, that the Trial Chamber's findings are not inconsistent.[672] It adds that "the testimony of witnesses who described the plunder of the Ovnak region comports with the [Trial] Chamber's conclusion that [plunder was committed] by members of the 7th Brigade on 9 June 1993".[673]

237. The Appeals Chamber notes that the Trial Chamber examined Kubura's claim that members of the 7th Brigade could not have been responsible for the plunder because they had already left the Ovnak area on 8 June 1993[674] but, following its review of the evidence, concluded otherwise.[675] While, as Kubura argues, the Trial Chamber indeed found that members of the 7th Brigade did not

[663] Kubura Appeal Brief, para. 22, citing Trial Judgement, para. 1943; Exhibit P898 (Zenica *OpŠO* report dated 20 June 1993).
[664] Kubura Appeal Brief, para. 23, citing Trial Judgement, para. 1934.
[665] Kubura Appeal Brief, para. 24, citing Trial Judgement, para. 1943.
[666] Kubura Appeal Brief, para. 20.
[667] Kubura Appeal Brief, para. 21.
[668] Kubura Appeal Brief, para. 21.
[669] Prosecution Response Brief, para. 323, quoting Trial Judgement, para. 1952.
[670] Prosecution Response Brief, para. 329, citing Witnesses Safet Junuzović, T. 18517, Kasim Alajbegović, T. 18701, BA, T. 794, Kasim Podžić, T. 18646, T. 18599-18600, T. 18616-18617, Elvedin Omić, T. 18628.
[671] Prosecution Response Brief, para. 329, citing Trial Judgement, paras 1931-1932.
[672] Prosecution Response Brief, para. 329.
[673] Prosecution Response Brief, para. 330, citing Trial Judgement, paras 1934-1935. *See* also Prosecution Response Brief, fn. 684, citing Trial Judgement, para. 1936.
[674] Trial Judgement, para. 1930, citing Kubura Defence Final Brief, paras 173-175.
[675] Trial Judgement, paras 1943, 1962.

enter the villages of Brajkovići, Grahovčići and Šušanj and left the sector on 9 June 1993,[676] it also found that, following the end of combat operations, members of the 7th Brigade's military police units entered[677] and systematically plundered the Ovnak area as of 9 June 1993 prior to their departure.[678] The Trial Chamber's findings were based on testimony provided by witnesses who observed members of the 7th Brigade military police requisitioning property from civilians in the Ovnak area on 9 June 1993[679] as well as evidence corroborating the 7th Brigade military police's involvement in the plunder.[680] The Trial Chamber also noted the testimony of witnesses, including those listed in paragraphs 1936-1938 of the Trial Judgement, who observed the aftermath of the plunder and/or witnessed others continuing to plunder the Ovnak area after the 7th Brigade's departure.[681] Kubura fails to offer any new argument on appeal to substantiate his claim that his subordinates in the 7th Brigade could not have been involved in the plunder because they had already left the Ovnak area on 8 June 1993.[682] The Appeals Chamber stresses that a party may not merely repeat arguments on appeal that did not succeed at trial, unless the party can demonstrate that the Trial Chamber's rejection of them constitutes such an error as to warrant the intervention of the Appeals Chamber.[683]

238. Concerning Kubura's further arguments, the Appeals Chamber observes that, though the Zenica *OpŠO* report dated 20 June 1993[684] does not explicitly refer to the 7th Brigade as such, it does refer to the "Muslim Armed Forces" ("MOS") or "Muslim forces", terms which the Trial Chamber had found were used to refer to the 7th Brigade.[685] Moreover, the 7th Brigade's involvement in the plunder is supported by the Zenica *OpŠO* report dated 11 June 2003.[686] The Trial Chamber noted that, according to the 11 June 2003 report, the 7th Brigade was responsible for matters related to war booty in the Ovnak area at the time but that seised property was not being officially registered in the facilities controlled by the 7th Brigade.[687] Furthermore, the Trial Chamber noted the testimonies of Defence witnesses to the effect that members of the 7th Brigade had not

[676] Trial Judgement, para. 1931.
[677] Trial Judgement, para. 1932.
[678] Trial Judgement, paras 1942-1943.
[679] Trial Judgement, para. 1943, citing Witness ZA, T. 2332 (Private Session); Witness BA, T. 795-796.
[680] Trial Judgement, para. 1940, citing Exhibits P424 (Zenica *OpŠO* report dated 11 June 1993), P898 (Zenica *OpŠO* report dated 20 June 1993); Trial Judgement, para. 1943, citing Exhibit P898 (Zenica *OpŠO* report dated 20 June 1993).
[681] *See* Trial Judgement, para. 1936, citing Witnesses Franjo Križanac, T. 1108, Mijo Marković, T. 2365-2366; Trial Judgement, para. 1937, citing Witnesses Jozo Marković, T. 4422-4424, ZA, T. 2330-2332 (Private Session).
[682] Compare Kubura Final Trial Brief, paras 168-186, with Kubura Appeal Brief, paras 17-20.
[683] *Brđanin* Appeal Judgement, para. 16.
[684] Exhibit P898 (Zenica *OpŠO* report dated 20 June 1993).
[685] Trial Judgement, para. 410, citing Exhibit P543 (HVO assistant commander for security of the central Bosnia operations zone report dated 15 April 1993); noting the activities of "members of the 7th Muslim Brigade, *i.e.* the MOS".
[686] Exhibit P424 (Zenica *OpŠO* report dated 11 June 1993).
[687] Trial Judgement, para. 1940, citing Exhibit P424 (Zenica *OpŠO* report dated 11 June 1993).

been involved in plunder[688] but, based on the totality of the evidence presented, acted within the scope of its discretion in concluding otherwise. Finally, the Trial Chamber's finding that civilians also engaged in plunder[689] is not incompatible with the disputed finding and does not relieve Kubura of his responsibility for the plunder committed by his own subordinates.

239. Thus, as regards the 7th Brigade's involvement, the Appeals Chamber finds that Kubura failed to establish that, given the evidence, no reasonable trier of fact could have concluded that members of the 7th Brigade committed plunder in the Ovnak area in June 1993. His arguments are dismissed.

2. Kubura's knowledge[690]

240. Kubura argues that the Trial Chamber erred by inferring from the testimony of only one witness, Witness BA, that he knew of the plunder committed in the Ovnak area on 9 June 1993.[691] While he does not challenge that Witness BA testified that plundered property was distributed among the members of the 7th Brigade, Kubura takes issue with the Trial Chamber's finding that this testimony showed that a decision from the command was required for such distribution, and that such a decision implied that he knew of the plundered property.[692] To the contrary, he claims that the alleged distribution of plundered property "could have been decided upon and implemented by various other members of the 7th Brigade, without [his] knowledge".[693] He emphasises that it was not even established that he was present at the Bilimište Headquarters at that time.[694] He adds that Witness BA did not mention him in his testimony[695] and that, according to his testimony, Witness BA "did not know by whom and how any distribution [of the plundered property] was performed".[696]

241. Kubura further states that a superior's knowledge must be proven "by reference to the information in fact available to the superior"[697] and "cannot be 'presumed'".[698] In this instance, he affirms that the Trial Chamber's inferences drawn from Witness BA's testimony had not been

[688] Trial Judgement, para. 1934.
[689] Trial Judgement, para. 1943.
[690] The Prosecution alleged in its Response Brief that Kubura did not challenge that he knew of his subordinates' acts of plunder in the Ovnak area at trial and accordingly argued that Kubura waived his right to appeal this issue (Prosecution Response Brief, paras 313-315). However, on 26 November 2007, it withdrew this argument (Notice of Withdrawal of Arguments in Prosecution Response Brief to Grounds of Appeal of Kubura, 26 November 2007).
[691] Kubura Appeal Brief, paras 7, 11. *See* also Kubura Reply Brief, para. 8; AT. 36.
[692] Kubura Appeal Brief, para. 7, citing Trial Judgement, para. 1957.
[693] Kubura Appeal Brief, para. 11.
[694] Kubura Appeal Brief, para. 8, citing Trial Judgement, para. 1956. *See* also AT. 37.
[695] Kubura Appeal Brief, para. 11.
[696] Kubura Appeal Brief, para. 9, citing Witness BA, T. 808-809. *See* also AT. 36.
[697] Kubura Appeal Brief, para. 12, citing *Čelebići* Appeal Judgement, paras 238-239, 241; *Blaškić* Appeal Judgement, paras 62-64.

established beyond reasonable doubt, as "other reasonable inferences were open to the Trial Chamber that were inconsistent with guilt".[699] Therefore, he concludes that Witness BA's testimony was not sufficient to prove Kubura's knowledge of the plunder committed in the Ovnak area in June 1993 beyond reasonable doubt.[700]

242. The Prosecution argues that "considerable evidence" presented at trial established that Kubura knew of the plunder committed by members of the 7th Brigade.[701] Accordingly, the Prosecution submits that the Trial Chamber did not base its conclusion solely on Witness BA's testimony[702] and contends that: (i) "[a] series of orders sent to Kubura immediately following the Ovnak operation indicated that members of the 3rd Corps were 'pillaging' and 'looting' Ovnak";[703] (ii) "Kubura transmitted the very contents of these orders to his subordinates, thereby confirming that he was aware of the likelihood that [these] allegations of pillage and looting […] related to troops under his command";[704] and (iii) Kubura issued a response to the 3rd Corps Command denying that the 7th Brigade was responsible for the acts of pillage and looting, thereby showing that "he recognised that his superiors considered his troops responsible".[705] Further, the Prosecution argues that "Kubura knew of the plunder based on the re-distribution of plundered property".[706] Finally, the Prosecution contends that "[t]he storage of plundered property directly in front of Kubura's headquarters supports that Kubura knew of his subordinates' plunder of Ovnak".[707] It affirms that "[p]roximity of a commander to his subordinates' crimes is an important factor in determining whether a commander knew about the acts of his subordinates".[708]

243. Kubura disputes the Trial Chamber's reliance on Witness BA's testimony[709] but ignores the additional evidence considered by the Trial Chamber and its resulting findings. Indeed, the Trial Chamber's conclusion was not "based purely on the testimony of one witness, Witness BA".[710] The

[698] Kubura Appeal Brief, para. 12, quoting *Čelebići* Trial Judgement, para. 386.
[699] Kubura Appeal Brief, para. 11. *See* also Kubura Appeal Brief, para. 6.
[700] Kubura Appeal Brief, para. 14. *See* also Kubura Reply Brief, para. 9; AT. 37. Kubura also argues that Witness BA's credibility was not discussed by the Trial Chamber and that "it is evident from examining his testimony as a whole that he was a witness whose reliability was placed in issue" (Kubura Appeal Brief, para. 13). He however only refers to page 815 of this witness' testimony, without explaining how this part of the testimony affects the witness' credibility. This argument is accordingly dismissed.
[701] Prosecution Response Brief, para. 316. *See* also AT. 49-50.
[702] Prosecution Response Brief, para. 316.
[703] Prosecution Response Brief, para. 317, citing Exhibits P186 (Hadžihasanović order dated 10 June 1993), DH65 (Hadžihasanović order dated 19 June 1993).
[704] Prosecution Response Brief, para. 317, citing Exhibit P427 (7th Brigade Commander order dated 20 June 1993).
[705] Prosecution Response Brief, para. 318, citing Exhibit P426 (7th Brigade Commander report dated 20 June 1993).
[706] Prosecution Response Brief, para. 319.
[707] Prosecution Response Brief, para. 321.
[708] Prosecution Response Brief, para. 321, citing *Aleksovski* Trial Judgement, para. 80; *Naletitlić and Martinović* Trial Judgement, para. 72; *Bagilishema* Trial Judgement, para. 925.
[709] Kubura Appeal Brief, paras 7, 11. *See* also Kubura Reply Brief, para. 8.
[710] Kubura Appeal Brief, para. 7.

Trial Chamber also found that Kubura himself ensured[711] that the 7th Brigade had the "framework of an organised army having a standardised procedure for war booty"[712] and that he had established collection points and commissions for war booty in advance of the plundering in the Ovnak area.[713] Moreover, the Trial Chamber noted that Kubura received orders alerting him to plunder in the Ovnak area generally, which Kubura acknowledged and to which he responded.[714] The Trial Chamber found that Hadžihasanović issued an order on 10 June 1993 to all his subordinate units, which included the 7th Brigade, in which he condemned the occurrence of unlawful behaviour by members of the 3rd Corps and ordered, *inter alia*, a stop to all acts of plunder.[715] Following an order from the 3rd Corps Command dated 19 June 1993,[716] the 7th Brigade Commander also issued an order to his subordinates, dated 20 June 1993, noting that incidents of plunder had taken place and prohibiting their further commission.[717] While these orders do not explicitly designate members of the 7th Brigade as taking part in the plunder, the conclusion that they were involved is a reasonable one given the timing of the orders and the 7th Brigade's role in the Ovnak area operations in June 1993. Thus, Kubura's knowledge of the plunder can be established irrespective of the Trial Chamber's finding that Kubura had given his consent to the distribution of the plundered property amongst his subordinates.

244. In addition, the Trial Chamber found that Kubura issued a report on 20 June 1993 to the 3rd Corps Command acknowledging that a standardised procedure for war booty had been implemented by the 7th Brigade, and in which he denied that his subordinates had taken part in acts of plunder.[718] The Trial Chamber took note of Kubura's official denial but nonetheless concluded that Kubura had knowledge of his subordinates' acts of plunder.

245. Finally, the Appeals Chamber notes that Kubura's argument that he was not present at the Bilimište Headquarters at the time the plundered property was distributed[719] fails to detract from the Trial Chamber's conclusion. The Trial Chamber found that Kubura's knowledge of the plunder committed by his subordinates could be established based on the evidence presented even though his presence at the Bilimište Headquarters "cannot be established beyond a reasonable doubt".[720]

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[711] Trial Judgement, para. 1939, citing Exhibit P420 (Order for attack dated 5 June 1993).
[712] Trial Judgement, para. 1960.
[713] Trial Judgement, para. 1939.
[714] Trial Judgement, para. 1959, citing Exhibits P427 (7th Brigade Commander order dated 20 June 1993), P426 (7th Brigade Commander report dated 20 June 1993).
[715] Trial Judgement, para. 1949, citing Exhibit P186 (Hadžihasanović order dated 10 June 1993).
[716] Exhibit DH65 (Hadžihasanović order dated 19 June 1993).
[717] Trial Judgement, para. 1959, citing Exhibit P427 (7th Brigade Commander order dated 20 June 1993).
[718] Trial Judgement, paras 1939, 1945, 1960, citing Exhibit P426 (7th Brigade Commander report dated 20 June 1993).
[719] Kubura Appeal Brief, para. 8, citing Trial Judgement, para. 1956.
[720] Trial Judgement, para. 1956.

246. The Appeals Chamber finds that Kubura failed to demonstrate that, given the evidence, no reasonable trier of fact could have concluded that he had knowledge of plunder by his subordinates in the Ovnak area in June 1993.

247. In light of the foregoing reasons, the Appeals Chamber dismisses Kubura's first ground of appeal.

B. Plunder in Vareš in November 1993

248. Kubura submits under his second ground of appeal that the Trial Chamber erred in law and in fact in convicting him under Count 6 of the Indictment for failing to take necessary and reasonable measures to prevent or punish the plunder which took place in Vareš in November 1993.[721] He argues that the Trial Chamber erred in finding that the 7th Brigade was involved in the commission of acts of plunder in Vareš in November 1993 and/or that he knew or had reason to know of these acts.[722] As a result, he requests the Appeals Chamber to acquit him of Count 6 of the Indictment.[723]

1. The 7th Brigade's involvement

249. Kubura argues that the Trial Chamber erred in finding that it was established beyond reasonable doubt that his subordinates in the 7th Brigade committed plunder in Vareš in November 1993.[724] In support of this argument, Kubura: (i) claims that none of the documents relied upon by the Trial Chamber in reaching the finding in question state that the 7th Brigade was involved in any looting in Vareš;[725] (ii) points to the Trial Chamber's finding that the units of the 7th Brigade left the town of Vareš on 4 November 1993;[726] and (iii) submits that the 4 November 1993 Report from the Operational Group East, which states that everything was being looted the day the 7th Brigade entered Vareš, was not supported by any of the witness testimony.[727] In that respect, Kubura first notes that the Trial Chamber heard evidence from commanders and members of the 7th Brigade who were present in Vareš on 4 November 1993, confirming that members of the 7th Brigade had not been involved in looting other than taking some food as they were very hungry.[728] Second, he argues that the testimony of Hakan Birger and Ulf Henricsson do not support the Trial Chamber's

[721] Kubura Appeal Brief, para. 27.
[722] Kubura Appeal Brief, para. 27.
[723] Kubura Appeal Brief, para. 60.
[724] Kubura Appeal Brief, para. 45.
[725] Kubura Appeal Brief, para. 38.
[726] Kubura Appeal Brief, para. 38, citing Trial Judgement, para. 1980.
[727] Kubura Appeal Brief, para. 39, citing Exhibit P676 (Extraordinary report to command of the ABiH 6th Corps, Command of the ABiH 3rd Corps, OG 'Lasva', TG Dabravine and 2nd Corps, dated 4 November 1993).
[728] Kubura Appeal Brief, para. 44, citing Trial Judgement, para. 1967.

finding in question,[729] because Hakan Birger did not mention the 7th Brigade in the pages of his testimony referred to by the Trial Chamber[730] and Ulf Henricsson did not provide any clear basis for his conclusion that the plunder was committed by 7th Brigade soldiers.[731]

250. The Prosecution responds that "[e]xtensive evidence derived from ABiH reports and the testimony of international observers present in Vareš" support the finding that the plunder committed in this town was committed by soldiers of the 7th Brigade 2nd and 3rd Battalions.[732] It argues that: (i) an interim report from the Operations Group East Command dated 4 November 1993 indicates that "the 7th Brigade soldiers stole and plundered everything they found" when they entered Vareš;[733] (ii) a combat report from the 6th Corps Command dated 10 November 1993 identifies looting in Vareš within a passage that addresses the conduct of the 7th Brigade;[734] (iii) the sequence of ABiH documents cited by the Trial Chamber to establish Kubura's knowledge leaves no doubt that the members of the 7th Brigade plundered Vareš on 4 November 1993;[735] (iv) Ulf Henricsson's conclusion that the 7th Brigade looted the town of Vareš was based on the fact that the commander of the troops present in the town told him that they were from the 7th Brigade;[736] and (v) Witness Hakan Birger testified that it was very clear that the soldiers committing plunder in the town of Vareš were from "the 7th Muslim Brigade".[737] The Prosecution adds that the Trial Chamber "carefully considered evidence from commanders and members of the 7th Brigade who claimed that the 7th Brigade had not been involved in looting other than taking food" but that it "preferred the evidence of both the ABiH reports and the testimony of international observers".[738] It recalls that the Trial Chamber was "uniquely placed to evaluate the

[729] Kubura Appeal Brief, para. 41.
[730] Kubura Appeal Brief, para. 42, citing Trial Judgement, fn. 4850.
[731] Kubura Appeal Brief, para. 43, citing Trial Judgement, fn. 4648.
[732] Prosecution Response Brief, para. 352, citing Exhibits P445 (Extraordinary combat report from the 6th Corps, command of the ISTOK/East/OG/Operations Group dated 4 November 1993), P676 (Extraordinary report to command of the ABiH 6th Corps, Command of the ABiH 3rd Corps, OG 'Lasva', TG Dabravine and 2nd Corps, dated 4 November 1993); P449 (Report according to Document Str. Conf No. 02/1229-1 of 8 November 1993, Operations Centre RBH Armed Forces Supreme Command Staff, dated 13 November 1993); Witnesses Hakan Birger, T. 5387-5388, Ulf Henricsson, T. 7670.
[733] Prosecution Response Brief, para. 355, citing Trial Judgement, para. 1968; Exhibit P445 (Extraordinary combat report from the 6th Corps, command of the ISTOK/East/OG/Operations Group dated 4 November 1993).
[734] Prosecution Response Brief, para. 356, citing Trial Judgement, para. 1968; Exhibit P448 (Analysis of the execution of tasks involved in Operation Vareš, including chronology of events, dated 10 November 1993).
[735] Prosecution Response Brief, para. 357, citing Trial Judgement, paras 1985-1986; Exhibits P676 (Extraordinary report to command of the ABiH 6th Corps, Command of the ABiH 3rd Corps, OG 'Lasva', TG Dabravine and 2nd Corps, dated 4 November 1993), P446 (Information from the Command of the ABiH 3rd Corps regarding prevention of chaos and plunder in Vareš, dated 4 November 1993), P675 (Order from Abdulah Ahmić, ABiH 6th Corps Operational Group *Istok* (East) Commander, dated 4 November 1993), P468 (ABiH 3rd Corps, 7th Brigade, 2nd Battalion Combat Report, dated 11 November 1993).
[736] Prosecution Response Brief, para. 359, citing Trial Judgement, para. 1972; Witness Ulf Henricsson, T. 7669.
[737] Prosecution Response Brief, para. 360, citing Witness Harkan Birger, T. 5385, T. 5388, T. 5423.
[738] Prosecution Response Brief, para. 361, citing Trial Judgement, paras 1967, 1978.

credibility of these competing witnesses" and contends that Kubura does not show how this evaluation was unreasonable.[739]

251. The Appeals Chamber notes that, contrary to Kubura's claim, documents relied upon by the Trial Chamber in reaching the finding that his subordinates engaged in plunder in Vareš do specifically refer to the 7th Brigade's involvement in this crime. Kubura fails to address the Trial Chamber's references to the report from the OG *Istok* Commander dated 4 November 1993, which clearly indicates the 7th Brigade's involvement in the plunder.[740] Kubura may not simply ignore relevant factual findings made by the Trial Chamber in his submissions.[741]

252. The Trial Chamber also noted a series of additional orders and reports which indicated that members of the 7th Brigade were involved in acts of plunder in Vareš.[742] Kubura's attempts to simply re-characterise the contents of three of these orders and reports[743] are improper.[744] The Trial Chamber was well within the bounds of its discretion in considering these orders and reports and noted at the outset that documents such as these would be accorded a "certain weight" where they "were part of a series of orders or reports which formed part of a set of related documents whose content there was no reason to question".[745]

253. In addition, the Trial Chamber found that the orders and reports indicating that Kubura's subordinates engaged in acts of plunder were corroborated by testimony from international observers present in Vareš on 4 November 1993.[746] The Appeals Chamber notes that though the references to Witness Hakan Birger's transcript in paragraph 1978 of the Trial Judgement are not to

[739] Prosecution Response Brief, para. 361, citing Kubura Appeal Brief, para. 44.
[740] Trial Judgement, paras 1968, 1975, 1978, citing Exhibit P445 (Extraordinary combat report from the 6th Corps, command of the ISTOK/East/OG/Operations Group dated 4 November 1993).
[741] *Brdanin* Appeal Judgement, para. 23.
[742] Trial Judgement, para. 1978, citing Exhibit P676 (Extraordinary report to command of the ABiH 6th Corps, Command of the ABiH 3rd Corps, OG 'Lasva', TG Dabravine and 2nd Corps, dated 4 November 1993"). *See* also Trial Judgement, para. 1986, citing Exhibits P446 (Information from the Command of the ABiH 3rd Corps regarding prevention of chaos and plunder in Vareš, dated 4 November 1993), P675 (Order from Abdulah Ahmić, ABiH 6th Corps Operational Group *Istok* (East) Commander, dated 4 November 1993), P468 (ABiH 3rd Corps, 7th Brigade, 2nd Battalion Combat Report, dated 11 November 1993).
[743] Kubura Appeal Brief, paras 32, 38, citing Exhibits P675 (Order from Abdulah Ahmić, ABiH 6th Corps Operational Group *Istok* (East) Commander, dated 4 November 1993), P446 (Information from the Command of the ABiH 3rd Corps regarding prevention of chaos and plunder in Vareš, dated 4 November 1993), P448 (Analysis of the execution of tasks involved in Operation Vareš, including chronology of events, dated 10 November 1993). The Appeals Chamber notes that even though Kubura's Appeal Brief refers to Exhibit P448, the correct reference is to Exhibit P468 (ABiH 3rd Corps, 7th Brigade, 2nd Battalion Combat Report, dated 11 November 1993). The submissions in paragraph 32 of Kubura Appeal Brief and the citation in question concern Exhibit P468, p. 2. Moreover, Exhibit P448 is not a report from the "2nd Battalion of the 7th Brigade" as submitted by Kubura, but rather the "Analysis of the execution of tasks involved in Operation Vareš, including chronology of events, dated 10 November 1993".
[744] *Brdanin* Appeal Judgement, para. 24.
[745] Trial Judgement, para. 298.
[746] Trial Judgement, paras 1969-1972, 1975, 1978, citing Witnesses Hakan Birger, T. 5384-5392, T. 5420-5425, Ulf Henricsson, T. 7669-7670.

pages where he identifies the plunderers as members of the 7th Brigade,[747] the relevant testimony is contained in the transcript pages immediately surrounding those cited by the Trial Chamber and was cited at paragraph 1969 of the Trial Judgement.[748] Further, Kubura does not provide any basis for challenging the Trial Chamber's reliance on the testimony of Ulf Henricsson.[749] Kubura's assertion that the Trial Chamber should have preferred the testimony of other witnesses[750] is, without more, "no argument at all".[751] Finally, Kubura fails to explain the "significan[ce]"[752] of the Trial Chamber's finding that units of the 7th Brigade left the town of Vareš on 4 November 1993[753] given that it also found that they first plundered the town that day.[754]

254. Thus, the Appeals Chamber finds that Kubura failed to demonstrate that, given the evidence, no reasonable trier of fact could have concluded that members of the 7th Brigade committed plunder in Vareš in November 1993. His arguments are dismissed.

2. Kubura's knowledge[755]

(a) Arguments of the Parties

255. Kubura contests the Trial Chamber's finding that "owing to his knowledge of the plunder committed by his subordinates in June 1993 [in the Ovnak area] and his failure to take punitive measures, [he] could not [ignore] that the members of the 7th Brigade were likely to repeat such acts".[756] He also challenges that his failure to punish the perpetrators of these acts "encouraged the subsequent commission of such acts".[757] According to Kubura, this finding does not establish that he knew or had reason to know about the plunder which occurred in Vareš five months later,[758] as the Prosecution was required to prove that he knew or had reason to know about the "actual

[747] Trial Judgement, para. 1978, citing Witness Hakan Birger, T. 5385-5386, 5389, 5422.
[748] Trial Judgement, para. 1969, citing Witness Hakan Birger, T. 5388.
[749] Trial Judgement, para. 1978, citing Witness Ulf Henricsson, T. 7670.
[750] Kubura Appeal Brief, para. 44.
[751] *Galić* Appeal Judgement, para. 300.
[752] Kubura Appeal Brief, para. 38.
[753] Trial Judgement, para. 1980.
[754] Trial Judgement, para. 1978.
[755] The Prosecution alleged in its Response Brief that Kubura did not challenge that he knew of his subordinates' acts of plunder in the Ovnak area at Trial and accordingly argued that Kubura waived his right to appeal this issue (Prosecution Response Brief, paras 338-340). However, on 26 November 2007, it withdrew this argument (Notice of Withdrawal of Arguments in Prosecution Response Brief to Grounds of Appeal of Kubura, 26 November 2007).
[756] Kubura Appeal Brief, para. 33, quoting Trial Judgement, para. 1982. Due to a translation error, this paragraph of the Trial Judgement has been corrected. The French authoritative version reads: "La Chambre estime, par conséquent, que l'Accusé Kubura, du fait de la connaissance de celui-ci des actes de pillage commis par ses subordonnées en juin 1993 et du fait de l'absence de mesures punitives, ne pouvait ignorer que les membres de la 7e Brigade étaient susceptibles de commettre à nouveau de tels actes" (emphasis added, footnotes omitted).
[757] Kubura Appeal Brief, para. 33, quoting Trial Judgement, para. 1982.
[758] Kubura Appeal Brief, para. 33. *See* also Kubura Notice of Appeal, para. 7: "In particular, the Trial Chamber erred in finding that [he] failed to *prevent* the plundering in Vareš in November 1993 on account of failing to *punish* plundering in the [Ovnak area] in June 1993."

offence[s] alleged", namely the acts of plunder committed in Vareš in November 1993.[759] In other words, Kubura contends that the Prosecution was required to prove "an awareness that the 'relevant crimes' were committed or were about to be committed", or that he "had reason to know about the commission of the relevant crimes",[760] by reference to the information in fact available to him regarding these crimes.[761]

256. Furthermore, Kubura claims that the Trial Chamber's finding that he knew or had reason to know of the acts of plunder committed in Vareš in November 1993 is "based on only three documents",[762] namely the 4 November 1993 Order from Operational Group East,[763] the 7th Brigade 2nd Battalion 11 November 1993 Report,[764] and the 3rd Corps Command 4 November 1993 Report.[765] He alleges that "these three documents […] taken on their own and together do not prove beyond reasonable doubt that [he] knew or had reason to know of the commission of any plunder by his subordinates".[766] In particular, Kubura contends that: (i) none of these documents state that members of the 7th Brigade had committed any unlawful acts of plunder;[767] (ii) there is nothing on the face of the 4 November 1993 Order from the Operational Group East which establishes that it was sent to and received by the command of the 7th Brigade, or Kubura;[768] (iii) the 4 November 1993 Order from Operational Group East does not state that the 7th Brigade removed items from the town;[769] (iv) although the 3rd Corps Command 4 November 1993 Report notes that the brigades were ordered to use the military police units to prevent chaos in Vareš, there is no evidence that any report was made to Kubura that his subordinates were involved in looting;[770] (v) there is no evidence to prove that Kubura received the 7th Brigade 2nd Battalion 11 November 1993 Report;[771]

[759] Kubura Appeal Brief, para. 34. *See* also AT. 46-47.
[760] Kubura Appeal Brief, para. 35, citing *Kordić and Čerkež* Trial Judgement, para. 427; *Blaškić* Appeal Judgement, paras 62-64.
[761] Kubura Appeal Brief, para. 35, citing *Čelebići* Appeal Judgement, paras 238-239, 241; *Blaškić* Appeal Judgement, paras 62-64.
[762] Kubura Appeal Brief, para. 29, citing Trial Judgement, para. 1986. *See* also Kubura Reply Brief, para. 11.
[763] Exhibit P675 (Order from Abdulah Ahmić, ABiH 6th Corps Operational Group *Istok* (East) Commander, dated 4 November 1993).
[764] Exhibit P468 (ABiH 3rd Corps, 7th Brigade, 2nd Battalion Combat Report, dated 11 November 1993).
[765] Exhibit P446 (Information from the Command of the ABiH 3rd Corps regarding prevention of chaos and plunder in Vareš, dated 4 November 1993).
[766] Kubura Appeal Brief, para. 32. *See* also Kubura Reply Brief, para. 12; AT. 39-41.
[767] Kubura Appeal Brief, para. 32.
[768] Kubura Appeal Brief, para. 32, citing Exhibit P675 (Order from Abdulah Ahmić, ABiH 6th Corps Operational Group *Istok* (East) Commander, dated 4 November 1993).
[769] Kubura Appeal Brief, para. 32, citing Exhibit P675 (Order from Abdulah Ahmić, ABiH 6th Corps Operational Group *Istok* (East) Commander, dated 4 November 1993).
[770] Kubura Appeal Brief, para. 32, citing Exhibit P446 (Information from the Command of the ABiH 3rd Corps regarding prevention of chaos and plunder in Vareš, dated 4 November 1993).
[771] Kubura Appeal Brief, para. 32.

and (vi) the 7th Brigade 2nd Battalion 11 November 1993 Report mentions that, on 4 November 1993, "looting and theft of property was prevented very efficiently".[772]

257. The Prosecution responds that "Kubura's knowledge of the plunder […] committed by members of the 7th Brigade in Ovnak [area in June 1993] was a relevant factor in determining that he knew of their subsequent plunder in Vareš".[773] It claims, more precisely, that Kubura's knowledge of these acts and his failure to punish the perpetrators "meant that he could not ignore the risk that the members of the 7th Brigade were likely to repeat such acts".[774] Relying on the International Tribunal's case-law, it contends that "previous knowledge of similar acts committed by subordinates is a basis for concluding that a superior knew or had reason to know of repeated offending".[775]

258. Furthermore, the Prosecution argues that "[a] series of orders issued by members of the ABiH supported the conclusion that Kubura knew of the plunder committed by his subordinates in Vareš".[776] It argues that: (i) the 3rd Corps' orders to the brigades to use the military police to prevent property from being plundered, referred to in the 3rd Corps Command 4 November 1993 Report issued by Hadžihasanović, "were sent to Kubura", as "the 7th Brigade was the only brigade subordinated to the 3rd Corps present in Vareš on 4 November 1993";[777] (ii) the instruction in the 4 November 1993 Order from Operational Group East directing the subordinate forces to "[c]ease all unauthorised acts in the town of Vareš and withdraw the army from the town" was addressed to the "Commander of the 7th Muslim Mountain Brigade";[778] (iii) Kubura's order on 5 November 1993 directing his subordinates to withdraw from the town in order to safeguard the "security of property of all citizens as well as legal entities in the territory" confirms that he received the 4 November 1993 Order from Operational Group East and that he contemplated that it addressed acts of plunder carried out by soldiers under his command;[779] and (iv) Kubura's order of 7 November 1993 to distribute the illegally appropriated property among members of the 7th Brigade confirms his knowledge of the plunder in Vareš.[780] Finally, the Prosecution affirms that "a

[772] Kubura Appeal Brief, para. 32.
[773] Prosecution Response Brief, para. 346.
[774] Prosecution Response Brief, para. 346, citing Trial Judgement, para. 1982. *See* also AT. 55-56.
[775] Prosecution Response Brief, para. 348, citing *Čelebići* Appeal Judgement, para. 328; *Krnojelac* Appeal Judgement, para. 155.
[776] Prosecution Response Brief, para. 341, citing Trial Judgement, para. 1986. *See* also AT. 56-58.
[777] Prosecution Response Brief, para. 343, citing Trial Judgement, para. 1986 and the orders referenced in Exhibit P446 (Information from the Command of the ABiH 3rd Corps regarding prevention of chaos and plunder in Vareš, dated 4 November 1993).
[778] Prosecution Response Brief, para. 344, citing Trial Judgement, para. 1986; Exhibit P675 (Order from Abdulah Ahmić, ABiH 6th Corps Operational Group *Istok* (East) Commander, dated 4 November 1993).
[779] Prosecution Response Brief, para. 345, quoting Exhibit P478 (ABiH 3rd Corps 7th Muslim Mountain Brigade Order, dated 5 November 1993).
[780] AT. 58, citing Trial Judgement para. 1993 and Exhibit P447 (Kubura Order dated 7 November 1993).

commander's proximity to his subordinates' crimes is certainly an important factor in determining whether the commander knew about his subordinates' acts".[781] In this instance, it alleges that the fact that Kubura was in Vareš Majdan when the plunder occurred in Vareš, a place which is a kilometre away from Vareš, supports that he knew or had reason to know of these crimes.[782]

(b) Discussion

259. The Appeals Chamber recalls that the Trial Chamber found that Kubura "failed in his duty to take both preventive measures to avert the plunder [in Vareš in November 1993] and punitive measures to punish the perpetrators of these crimes".[783] As the Appeals Chamber previously recognised in this case, "the duty to prevent and the duty to punish are separable".[784] The failure to punish and the failure to prevent involve different crimes committed at different times: the failure to punish concerns past crimes committed by subordinates, whereas the failure to prevent concerns future crimes of subordinates.[785] In other words, they represent two distinct legal obligations, the failure of either one of which entails responsibility under Article 7(3) of the Statute.

260. The failure to prevent and the failure to punish are not only legally distinct, but are factually distinct in terms of the type of knowledge that is involved for each basis of superior responsibility.[786] The duty to prevent arises for a superior from the moment he knows or has reason to know that a crime is about to be committed, while the duty to punish only arises after the commission of the crime. Thus, knowledge which is relevant to a superior's duty to punish may or may not be relevant to his duty to prevent depending on when the superior acquired actual knowledge or had reason to know about it. The Parties' arguments regarding Kubura's knowledge of his subordinates' acts of plunder in Vareš in November 1993, particularly as they relate to his past failure to punish his subordinates' acts of plunder in the Ovnak area, are best examined by distinguishing between findings which concern knowledge giving rise to: (i) Kubura's duty to prevent and; (ii) his duty to punish his subordinates' acts of plunder. Accordingly, while the Trial Chamber did not distinguish between these two sets of findings, the Appeals Chamber will conduct its review based on this distinction.

[781] Prosecution Response Brief, para. 350, citing *Aleksovski* Trial Judgement, para. 80; *Naletilić and Martinović* Trial Judgement, para. 72; *Bagilishema* Trial Judgement, para. 925.
[782] Prosecution Response Brief, para. 350, citing Trial Judgement, para. 1983; Witness Elvir Mušija, T. 18774.
[783] Trial Judgement, p. 591-592, section (iv)(2).
[784] *Prosecutor v. Enver Hadžihasanović, Mehmed Alagić and Amir Kubura*, Case No. IT-01-47-AR72, Decision on Interlocutory Appeal Challenging Jurisdiction in Relation to Command Responsibility, 16 July 2003, para. 55.
[785] *Blaškić* Appeal Judgement, para. 83.
[786] *See Prosecutor v. Sefer Halilović*, Case No. IT 01-48-PT, Trial Chamber Decision on Prosecutor's Motion Seeking Leave to Amend the Indictment, 17 December 2004, para. 32.

(i) Kubura's knowledge giving rise to a duty to prevent

261. The Trial Chamber's explicit finding that Kubura failed in his duty to prevent his subordinates' acts of plunder in Vareš in November 1993[787] implies a finding that he had knowledge sufficient to trigger that duty. The Appeals Chamber recalls that pursuant to Article 7(3) of the Statute, the knowledge required to trigger a superior's duty to prevent is established when the superior "knew or had reason to know that [his] subordinate was about to commit [crimes]".[788] A superior will be deemed to have had reason to know when, given the circumstances of the case, he possessed information sufficiently alarming to justify further inquiry.[789] The Appeals Chamber recalls that while a superior's knowledge of and failure to punish his subordinates' past offences is insufficient, in itself, to conclude that the superior knew that similar future offences would be committed by the same group of subordinates, it may, depending on the circumstances of the case, nevertheless constitute sufficiently alarming information to justify further inquiry.[790]

262. The Appeals Chamber notes that the Trial Chamber's analysis of whether Kubura had reason to know of his subordinates' acts of plunder in Vareš focuses on his knowledge of and failure to punish his subordinates' acts of plunder in the Ovnak area some five months earlier. Indeed, the Trial Chamber stated:

> The Chamber would first recall that the Accused Kubura knew that his subordinates had already committed acts of plunder before November 1993. It considers that the evidence has proved that members of the 7th Brigade plundered in the Ovnak sector in June 1993 and that the Accused Kubura had knowledge of these crimes as of that time. In addition, the Chamber finds that the Accused Kubura failed to take punitive measures against the perpetrators of these acts and the absence of such measures against the plunder committed in June 1993 encouraged the subsequent commission of such acts. The Chamber therefore considers that the Accused Kubura, owing to his knowledge of the plunder committed by his subordinates in June 1993 and his failure to take punitive measures, could not [ignore] that the members of the 7th Brigade were likely to repeat such acts.[791]

263. Further, the Trial Chamber considered the following:

> Even if the Accused Kubura took measures *a posteriori* to put an end to the plunder in Vareš by withdrawing his troops from the town, the Chamber considers that by not taking punitive measures against those plundering in June 1993, the Accused Kubura failed in his duty to prevent such acts in Vareš in November 1993.[792]

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[787] Trial Judgement, page 591, section (iv)(2).
[788] Article 7(3) of the Statute.
[789] *See supra* para. 28.
[790] *See supra* para. 28.
[791] Trial Judgement, para. 1982 (footnotes omitted). Due to a translation error, this paragraph of the Trial Judgement has been corrected. The French authoritative version reads: "La Chambre estime, par conséquent, que l'Accusé Kubura, du fait de la connaissance de celui-ci des actes de pillage commis par ses subordonnées en juin 1993 et du fait de l'absence de mesures punitives, ne pouvait *ignorer* que les membres de la 7e Brigade étaient susceptibles de commettre à nouveau de tels actes" (emphasis added).
[792] Trial Judgement, para. 1991. The Appeals Chamber notes that that this finding was made by the Trial Chamber in its discussion of whether Kubura took sufficient measures to satisfy his duty to prevent, not in its discussion of whether

264. The Appeals Chamber notes that portions of the Trial Judgement demonstrate that the Trial Chamber considered factors other than Kubura's past failure to punish his subordinates in determining whether he had reason to know of their acts of plunder in Vareš on 4 November 1993. First, the Trial Chamber noted Kubura's presence "in the Vareš sector from 3 to 5 November 1993"[793] as a possible indicium of his knowledge, though it found that his "presence […] in Vareš is not in itself sufficient to establish his knowledge beyond a reasonable doubt".[794] Second, the Trial Chamber noted that the combat report from the 6th Corps OG Istok Command dated 4 November 1993 described the plunder as it was being committed by members of the 7th Brigade unit, though it also found the report insufficient to establish Kubura's knowledge given that it could not confirm he had ever received it.[795] Third, the Trial Chamber found that Kubura received orders alerting him to the acts of plunder whilst they were ongoing and holding him responsible for putting an end to them.[796] The Appeals Chamber recalls that the Trial Chamber considered the duty to suppress to be part and parcel of a superior's duty to prevent,[797] such that knowledge acquired by Kubura while his subordinates had begun and were still engaged in committing the acts of plunder in Vareš would be relevant to his duty to prevent those crimes.[798]

265. Notwithstanding the foregoing, the Trial Judgement suffers, at the very least, from a lack of clarity as to whether and, if so, how the Trial Chamber took into account the circumstances of the case in determining that Kubura had reason to know sufficient to trigger a duty to prevent his subordinates' acts of plunder in Vareš. The Appeals Chamber deems it of significant import that the Trial Chamber found that irrespective of the measures taken by Kubura to stop the acts of plunder in Vareš once he had knowledge of them, Kubura remained responsible for failing to prevent these acts in the first place based *exclusively* on his past failure to punish similar acts in the Ovnak

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Kubura had sufficient knowledge to trigger his duty to prevent. Nevertheless, the Appeals Chamber finds that the finding reflects the Trial Chamber's general approach to the matter, namely that it considered that Kubura's knowledge of and past failure to punish his subordinates' acts of plunder in the Ovnak area automatically entailed that he had reason to know of their future acts of plunder in Vareš.

[793] Trial Judgement, para. 1983.

[794] Trial Judgement, para. 1984.

[795] Trial Judgement, para. 1985, citing Exhibit P676 (Extraordinary report to command of the ABiH 6th Corps, Command of the ABiH 3rd Corps, OG Lasva', TG Dabravine and 2nd Corps, dated 4 November 1993).

[796] Trial Judgement, para. 1986: "[O]n 4 November 1993, the 6th Corps OG *Istok* Command issued an order recalling that all unlawful activity in Vareš was to stop and that measures to halt the removal of property from the town were to be undertaken. The order noted specifically that the 7th Brigade Commander was responsible for the execution of the order. That same day, 4 November 1993, the 3rd Corps Command informed the OG *Istok* that orders had been sent to the brigades for them to use the military police to prevent property from being plundered. Since the 7th Brigade was the only brigade subordinated to the 3rd Corps that was present in Vareš on 4 November 1993, the Chamber considers that the 3rd Corps orders mentioned above must have been sent to the 7th Brigade" (footnotes omitted).

[797] Trial Judgement, para. 127: "The duty to suppress should be considered part of the superior's duty to prevent, as its aim is to prevent further unlawful acts".

[798] *See Limaj* Trial Judgement, para. 527: "The duty to prevent arises from the time a superior acquires knowledge, or has reasons to know that a crime is being or is about to be committed, while the duty to punish arises after the superior acquires knowledge of the commission of the crime".

area.[799] Such a conclusion implies that the Trial Chamber considered Kubura's knowledge of and past failure to punish his subordinates' acts of plunder in the Ovnak area as automatically entailing that he had reason to know of their future acts of plunder in Vareš. Therefore, the Appeals Chamber finds that this constitutes an error of law.

266. Consequently, in accordance with the standard of review,[800] the Appeals Chamber will apply the correct legal standard to the evidence contained in the trial record, where necessary, and determine whether it is itself convinced beyond reasonable doubt that, given the circumstances of the case, Kubura had reason to know sufficient to trigger a duty to prevent his subordinates' acts of plunder in Vareš.[801]

267. The Appeals Chamber recognises that Kubura's knowledge of and failure to punish his subordinates' past acts of plunder was likely to be understood by his subordinates at least as acceptance, if not encouragement of such conduct, such that it increased the risk that further acts of plunder, such as those in Vareš, would be committed again. The Appeals Chamber notes however, that the acts of plunder committed by Kubura's subordinates in the Ovnak area on 9 June 1993 and in Vareš on 4 November 1993 were separated by some five months and some 40 kilometres. While the plunder was widespread on the two occasions it occurred, Kubura's subordinates were not found to have engaged in plunder on a frequent basis while under his command.[802] The Appeals Chamber recalls that the Trial Chamber did not find that Kubura had any other knowledge – be it actual or imputed – regarding his subordinates' acts of plunder in Vareš prior to their commission, other than the knowledge it inferred from his past failure to punish.

268. Moreover, the Appeals Chamber notes that the instant circumstances differ from those of the *Krnojelac* Appeal Judgement.[803] The Appeals Chamber recalls that Krnojelac was found to have reason to know that his subordinates were committing or about to commit crimes given that he had witnessed the beating of a detainee, knew of the fact that the detainees were held at the detention centre because they were Muslim,[804] that they were being mistreated,[805] and that the interrogations conducted at the detention centre were frequent and were conducted by guards over whom he had

[799] Trial Judgement, para. 1991.
[800] *See supra* para. 9.
[801] *See Brđanin* Appeal Judgement, para. 10; *Blaškić* Appeal Judgement, para. 15; *Ntagerura et al.* Appeal Judgement, para. 136.
[802] The Appeals Chamber notes that in response to a question posed to the Parties at the Appeal Hearing, the Prosecution failed to establish any instances of plunder between June and November 1993 for which Kubura could be held responsible under Article 7(3). AT. 50-54; 60-64.
[803] *See supra* para. 29.
[804] *Krnojelac* Appeal Judgement, para. 167.
[805] *Krnojelac* Appeal Judgement, paras 163, 166.

jurisdiction.[806] Here, the circumstances leading up to Kubura's subordinates' acts of plunder in Vareš do not present such a comparable confluence of factors.

269. However, with respect to Kubura's knowledge of his subordinates' acts of plunder whilst they were ongoing, the Appeals Chamber recalls that Kubura received orders on 4 November 1993 alerting him to the ongoing acts of plunder in Vareš and holding him responsible for stopping them. Indeed, the Trial Chamber found that Kubura received orders from the 3rd Corps Command directing him to use military police to prevent property from being plundered in Vareš,[807] as well as instructions from the Operational Group East to "[c]ease all unauthorised acts", "stop anything being removed" and withdraw his troops from the town.[808] While Kubura's knowledge of his subordinates' past plunder in Ovnak and his failure to punish them did not, in itself, amount to actual knowledge of the acts of plunder in Vareš, the Appeals Chamber concurs with the Trial Chamber that the orders he received on 4 November 1993 constituted, at the very least, sufficiently alarming information justifying further inquiry.

270. In light of the foregoing, the Appeals Chamber finds that Kubura possessed knowledge sufficient to trigger a duty to prevent his subordinates from committing further plunder in Vareš as of his receipt of the orders alerting him to the ongoing plunder.

271. Given the finding articulated above, the Appeals Chamber turns to examine whether Kubura satisfied his duty to prevent his subordinates from committing further acts of plunder in Vareš. The Appeals Chamber recalls the Trial Chamber's finding that Kubura had taken "certain measures to end the plunder in Vareš on 4 November 1993".[809] Specifically, the Trial Chamber found that "following the order of 4 November 1993 from the OG *Istok* Command, the Accused Kubura withdrew his troops from Vareš the very same day"[810] and then "forbade the members of the 7th Brigade from entering or staying in Vareš" on 5 November 1993.[811] The Trial Chamber "consider[ed], however, that even though the Accused Kubura put a stop to the plunder once it had started so it would not be repeated, he nonetheless did not take sufficient measures to prevent the initial plunder from taking place".[812]

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[806] *Krnojelac* Appeal Judgement, para. 168.
[807] Trial Judgement, para. 1986, citing the orders referenced in Exhibit P446 (Information from the Command of the ABiH 3rd Corps regarding prevention of chaos and plunder in Vareš, dated 4 November 1993).
[808] Trial Judgement, para. 1986, citing Exhibit P675 (Order from Abdulah Ahmić, ABiH 6th Corps Operational Group *Istok* (East) Commander, dated 4 November 1993).
[809] Trial Judgement, para. 1989.
[810] Trial Judgement, para. 1989 (footnotes omitted).
[811] Trial Judgement, para. 1989. The Appeals Chamber notes that in response to a question posed to the Parties at the Appeal Hearing, the Prosecution recognised that, following Kubura's receipt of orders alerting him to the plunder, he ordered the removal of his troops from Vareš by 15:00 hours on 4 November 1993 (AT. 54).
[812] Trial Judgement, para. 1989.

272. The Appeals Chamber notes that the Trial Chamber's conclusion implies that, were it not for its finding that Kubura had reason to know of the acts of plunder in Vareš based on his past failure to punish his subordinates for the acts in the Ovnak area, the Trial Chamber would have found that Kubura had taken sufficient measures in accordance with his duty to stop the plunder on 4 November 1993. Given the Appeals Chamber's finding that Kubura only had knowledge sufficient to trigger a duty to prevent his subordinates from committing further acts of plunder in Vareš as of when he received the orders alerting him to the ongoing acts of plunder, the Appeals Chamber finds that Kubura took necessary and reasonable measures, given the circumstances of the case, to prevent the plunder by "put[ting] a stop to the plunder once it had started so it would not be repeated".[813]

(ii) Kubura's knowledge giving rise to a duty to punish

273. The Appeals Chamber recalls that the Trial Chamber also determined that Kubura had knowledge sufficient to trigger a duty to punish his subordinates for their acts of plunder in Vareš.[814] As previously noted, Kubura contests the Trial Chamber's finding regarding this knowledge and argues, more specifically, that the 4 November 1993 Order from Operational Group East,[815] the 7th Brigade 2nd Battalion 11 November 1993 Report,[816] and the 3rd Corps Command 4 November 1993 Report,[817] which he posits are the sole basis for the Trial Chamber's finding,[818] do not prove beyond reasonable doubt that he knew or had reason to know of the plunder by his subordinates.[819] The Prosecution argues that, in addition to Kubura's past failure to punish his subordinates and his proximity to Vareš, "[a] series of orders issued by members of the ABiH supported the conclusion that Kubura knew of the plunder committed by his subordinates in Vareš".[820]

274. The Appeals Chamber found that Kubura had knowledge of his subordinates' acts of plunder in Vareš sufficient to give rise to a duty to prevent these acts under Article 7(3) of the Statute. The Appeals Chamber considers that this knowledge is also sufficient to trigger Kubura's duty to punish his subordinates for their acts of plunder in Vareš.

[813] Trial Judgement, para. 1989. *See* also para. 1991.
[814] The Trial Chamber found that Kubura had "knowledge about the plunder committed by his subordinates in Vareš", without specifying whether he "knew" or "had reason to know", or both, of the plunder (Trial Judgement, para. 1986).
[815] Exhibit P675 (Order from Abdulah Ahmić, ABiH 6th Corps Operational Group *Istok* (East) Commander, dated 4 November 1993).
[816] Exhibit P468 (ABiH 3rd Corps, 7th Brigade, 2nd Battalion Combat Report, dated 11 November 1993).
[817] Exhibit P446 (Information from the Command of the ABiH 3rd Corps regarding prevention of chaos and plunder in Vareš, dated 4 November 1993).
[818] Kubura Appeal Brief, para. 29.
[819] Kubura Appeal Brief, para. 32. *See* also Kubura Reply Brief, para. 12.
[820] Prosecution Response Brief, para. 341, citing Trial Judgement, para. 1986.

275. In any event, Kubura's challenge to the three orders and reports,[821] which he claims underlie the Trial Chamber's finding that he had knowledge of his subordinates' acts of plunder in Vareš,[822] fails to properly acknowledge that the Trial Chamber considered them, not in isolation one from the other, but as a sequence of interrelated correspondence. As described by the Trial Chamber:

> [O]n 4 November 1993, the 6th Corps OG *Istok* Command issued an order recalling that all unlawful activity in Vareš was to stop and that measures to halt the removal of property from the town were to be undertaken. The order noted specifically that the 7th Brigade Commander was responsible for the execution of the order. That same day, 4 November 1993, the 3rd Corps Command informed the OG *Istok* that orders had been sent to the brigades for them to use the military police to prevent property from being plundered. Since the 7th Brigade was the only brigade subordinated to the 3rd Corps that was present in Vareš on 4 November 1993, the Chamber considers that the 3rd Corps orders mentioned above must have been sent to the 7th Brigade. Furthermore, the 7th Brigade 2nd Battalion informed the 7th Brigade Command on 11 November 1993 that the collection of war booty, consisting primarily of food, had been carried out in an organised manner. The Chamber thus finds that the orders issued by the OG *Istok* and by the 3rd Corps Command, as well as the 7th Brigade 2nd Battalion report, establish the Accused Kubura's knowledge about the plunder committed by his subordinates in Vareš.[823]

276. Contrary to Kubura's claims, these reports and orders make clear that acts of plunder were being committed in Vareš on 4 November 1993 and that Kubura, as the 7th Brigade's Commander, was being held responsible for such acts. Here, the Trial Chamber found that alarming information was communicated to Kubura on 4 November 1993 and that Kubura received a report on 11 November 1993 from the 7th Brigade 2nd Battalion informing him of the 7th Brigade's collection of war booty in Vareš.[824] Though the 11 November 1993 report notes, as Kubura points out, that "looting and theft of property was prevented very efficiently",[825] the Trial Chamber nevertheless concluded that the 7th Brigade engaged in acts of plunder[826] and that the series of reports and orders from the ABiH served to "establish the Accused Kubura's knowledge about the plunder committed by his subordinates in Vareš".[827] The Appeals Chamber recalls that a superior's knowledge can be established through either direct or circumstantial evidence that his subordinates had committed crimes within the jurisdiction of the International Tribunal.[828]

277. Moreover, the Trial Chamber also found that Kubura issued an order dated 7 November 1993 in which he granted leave to the soldiers who took part in the operations in Vareš

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[821] Kubura Appeal Brief, paras 29, 32, citing Exhibits P675 (Order from Abdulah Ahmić, ABiH 6th Corps Operational Group *Istok* (East) Commander, dated 4 November 1993), P446 (Information from the Command of the ABiH 3rd Corps regarding prevention of chaos and plunder in Vareš, dated 4 November 1993), P448 (Analysis of the execution of tasks involved in Operation Vareš, including chronology of events, dated 10 November 1993). *See* also *supra* footnote 743.
[822] Trial Judgement, para. 1986.
[823] Trial Judgement, para. 1986 (footnotes omitted).
[824] Trial Judgement, para. 1986, citing Exhibit P468 (ABiH 3rd Corps, 7th Brigade, 2nd Battalion Combat Report, dated 11 November 1993).
[825] *See* Kubura Appeal Brief, para. 32.
[826] Trial Judgement, para. 1978.
[827] Trial Judgement, para. 1986.
[828] *Galić* Appeal Judgement, paras 171, 182; *Čelebići* Trial Judgement, paras 383, 386.

and ordered that the seized property be distributed among members of the 7th Brigade.[829] The Appeals Chamber concurs with the Trial Chamber's finding that such a "distribution of illegally appropriated property" reveals the lack of punitive measures taken by Kubura and notes that it serves to confirm his knowledge of his subordinates' acts of plunder.[830]

278. Finally, the Appeals Chamber reiterates that Kubura's past failure to punish his subordinates' acts of plunder in the Ovnak area increased the risk that further acts of plunder would be committed again and supports the finding that he had the requisite knowledge under Article 7(3) of the Statute of his subordinates' acts of plunder in Vareš given the additional alarming information at his disposal.

279. Thus, the Appeals Chamber finds that Kubura failed to demonstrate that, given the evidence, no reasonable trier of fact could have concluded that he had knowledge of plunder by his subordinates in Vareš sufficient to trigger a duty to punish them for this crime.

280. In light of the foregoing, the Appeals Chamber dismisses in part Kubura's second ground of appeal.

C. Wanton destruction in Vareš in November 1993

281. The Prosecution submits in its second ground of appeal that Kubura should have been convicted under Article 7(3) of the Statute for the acts of wanton destruction committed in Vareš on 4 November 1993 under Count 5 of the Indictment.[831] It affirms that Kubura knew or had reason to know that his subordinates committed acts of wanton destruction in Vareš in November 1993 and failed to take necessary and reasonable measures to punish them for committing such acts.[832] Kubura responds that the Trial Chamber did not err, either in law or in fact, in its assessment of whether he possessed the required knowledge under Article 7(3) of the Statute.[833]

1. Whether the Trial Chamber erred in law by limiting its inquiry to Kubura's actual knowledge

282. The Prosecution contends that the Trial Chamber erred in law by limiting its inquiry to Kubura's actual knowledge of the acts of wanton destruction committed in Vareš on 4 November 1993.[834] It submits that, by requiring that Kubura's knowledge of these acts be

[829] Trial Judgement, para. 1993, citing Exhibit P447 (Kubura Order dated 7 November 1993).
[830] Trial Judgement, para. 1993.
[831] Prosecution Appeal Brief, para. 3.42; AT. 76.
[832] Prosecution Appeal Brief, para. 3.41.
[833] Kubura Response Brief, para. 9. *See* also AT. 96-97. According to Kubura, the Prosecution has not demonstrated that no reasonable trier of fact could have reached the same conclusion as the Trial Chamber on the evidence presented at trial (Kubura Response Brief, para. 23).
[834] Prosecution Appeal Brief, paras 3.3 and 3.40.

established "with certainty",[835] the Trial Chamber created an additional requirement for the application of Article 7(3) of the Statute.[836] This additional requirement is, according to the Prosecution, contrary to the Appeals Chamber jurisprudence according to which a superior need only have sufficiently alarming information to put him on notice of the risk that a crime has been or is being committed.[837] Lastly, the Prosecution contends that, by requiring that Kubura's knowledge be established "with certainty", the Trial Chamber ignored that knowledge may be established through direct or circumstantial evidence, which allows for an inference that the superior "must have known" of his subordinates' criminal acts.[838]

283. Kubura responds that the Trial Chamber's conclusion that the Prosecution had failed to prove that he "knew or had reason to know" that his subordinates were about to commit or had committed acts of wanton destruction in Vareš in November 1993 indicates that the Trial Chamber did not limit its inquiry to his actual knowledge of these acts.[839] He also argues that, by requiring that his knowledge of the acts of wanton destruction be established "with certainty", the Trial Chamber did not mean anything more than requiring that his knowledge of such acts – *i.e.* his actual knowledge or reason to know – be established beyond reasonable doubt.[840]

284. At the outset, the Appeals Chamber observes that the words "with certainty" appear only at the very end of paragraph 1852 of the Trial Judgement, which relates to the notice of wanton destruction in Vareš that Kubura may have received from orders issued by the 3rd Corps Command. These words do not appear anywhere else in the section.

285. The Appeals Chamber further notes the Trial Chamber's general findings with respect to proof by inference, in particular that:

> […] in cases where several inferences may be made on the basis of the same evidence and are equally plausible, the Chamber considered that it could not hold the most prejudicial evidence against the Accused, except in cases where the inference most favourable to the Accused cannot be upheld in view of the facts of the case.[841]

286. The Appeals Chamber notes that this standard is in accordance with the general principles established in its jurisprudence with respect to circumstantial evidence, namely that:

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[835] Prosecution Appeal Brief, para. 3.7, referring to Trial Judgement, para. 1852.
[836] Prosecution Appeal Brief, para. 3.12.
[837] Prosecution Appeal Brief, para. 3.13.
[838] Prosecution Appeal Brief, para. 3.33, citing *Kordić and Čerkez* Trial Judgement, para. 427.
[839] Kubura Response Brief, para. 9, citing Trial Judgement, para. 1853. *See* also AT. 96 ("The Trial Chamber quite clearly stated […] that it did not find that the Prosecution had proved that [Kubura] knew or had reason to know of destruction. It did not limit its findings to […] actual knowledge"; "[I]n taking into consideration the various orders and reports that the Prosecution have referred to, it is evident that [the Trial Chamber was] looking not only at actual knowledge and direct knowledge but also all of the surrounding circumstances to determine whether any inference could be drawn from that evidence which could suggest that there were reasons to know of the destruction").

> A circumstantial case consists of evidence of a number of different circumstances which, taken in combination, point to the guilt of the accused person because they would usually exist in combination only because the accused did what is alleged against him […]. Such a conclusion must be established beyond reasonable doubt. It is not sufficient that it is a reasonable conclusion available from that evidence. It must be the *only* reasonable conclusion available. If there is another conclusion which is also reasonably open from that evidence, and which is consistent with the innocence of the accused, he must be acquitted.[842]

287. The Appeals Chamber further observes that, in the three paragraphs relating to Kubura's knowledge of the acts of wanton destruction in Vareš,[843] the Trial Chamber considered drawing inferences from established facts: for instance, the inference that Kubura could not see the destruction from the route he took on 5 November 1993[844] or the inference that the 7th Brigade must have received the order referred to in the report dated 4 November 1993 from the 3rd Corps Command to the OG *Istok* in which the 3rd Corps Command ordered the brigades to use the military police forces to prevent chaos and the destruction of property in Vareš.[845] Even though the Trial Chamber did not admit as reasonably grounded all the inferences it considered, the mere fact that these inferences were considered demonstrates that the Trial Chamber did not exclude that Kubura's knowledge could be established by way of circumstantial evidence and thus belies the argument that the Trial Chamber applied a "with certainty" standard of proof. Indeed, the Trial Chamber inferred that the 7th Brigade "must have received" the 3rd Corp Command order given that the 7th Brigade was subordinated to the 3rd Corps and was present in Vareš.

288. Moreover, as to the question of whether the Trial Chamber erred in law by limiting its inquiry to Kubura's actual knowledge of the acts of wanton destruction committed in Vareš in November 1993, the Appeals Chamber notes that the section of the Trial Judgement related to Kubura's knowledge of these acts is entitled "Knowledge of Amir Kubura" and is indeed devoid of any references to the issue of whether Kubura had reason to know of these acts.[846] It is the view of the Appeals Chamber, however, that the absence of such references cannot be conclusive in demonstrating that the Trial Chamber omitted to consider whether Kubura had reason to know about these acts. The Trial Chamber concluded that "the Prosecution had failed to prove that […] Kubura knew *or had reason to know* that his subordinates were about to commit or had committed acts of destruction in Vareš in November 1993".[847] This indicates that the Trial Chamber did not

[840] Kubura Response Brief, para. 6, citing Trial Judgement, para. 1853.
[841] Trial Judgement, para. 311.
[842] *Čelebići* Appeal Judgement, para. 458; *see* also *Galić* Appeal Judgement, para. 218; *Kordić and Čerkez* Appeal Judgement, para. 289.
[843] Trial Judgement, paras 1850-1852.
[844] Trial Judgement, para. 1850.
[845] Trial Judgement, para. 1852.
[846] Trial Judgement, paras 1850-1852.
[847] Trial Judgement, para. 1853 (emphasis added).

limit its inquiry to Kubura's actual knowledge but also implicitly examined whether he had reason to know of these acts.

289. Therefore, the Appeals Chamber finds that the Prosecution failed to demonstrate that the Trial Chamber applied an erroneous standard of proof and limited its inquiry to Kubura's actual knowledge of wanton destruction in Vareš on 4 November 1993. The Prosecution's arguments are dismissed.

2. Whether there was insufficient evidence to prove that Kubura knew or had reason to know of wanton destruction in Vareš on 4 November 1993

290. The Prosecution argues that the Trial Chamber erred in fact by finding that there was insufficient evidence to prove that Kubura knew or had reason to know of the acts of wanton destruction committed in Vareš in November 1993.[848] It challenges the Trial Chamber's conclusion that Kubura's knowledge of the acts of destruction committed by his subordinates in Vareš on 4 November 1993 was not established beyond reasonable doubt. The Prosecution relies on three findings made by the Trial Chamber, namely that: (i) Kubura "must have received" orders from the 3rd Corps on 4 November 1993 requiring the prevention of chaos and destruction of property;[849] and (ii) Kubura was aware of his troops' acts of plunder in Vareš.[850] It submits that these factual findings should have led the Trial Chamber to the conclusion that Kubura knew or had reason to know of the acts of wanton destruction committed by his troops in Vareš.[851]

291. Kubura responds that the Prosecution fails to demonstrate that no reasonable trier of fact could have reached the Trial Chamber's conclusion on the evidence presented at trial.[852] In particular, he argues that the reports and orders dated 4 November 1993 from the 6th Corps OG *Istok* Command and the 3rd Corps Command were not sufficient to establish beyond reasonable doubt that he possessed the required knowledge under Article 7(3) of the Statute.[853] He further

[848] Prosecution Appeal Brief, paras 3.4, 3.41; AT. 74-75. *See* also Prosecution Appeal Brief, paras 3.7-3.8; Prosecution Reply Brief, paras 3.1, 3.5.
[849] Prosecution Appeal Brief, para. 3.30, referring to Trial Judgement, para. 1852 and Exhibit P446 (Information from the Command of the ABiH 3rd Corps regarding prevention of chaos and plunder in Vareš, dated 4 November 1993). *See* also Prosecution Appeal Brief, paras 3.9-3.11; AT. 73, 75-76. The Prosecution also contends that, because it focused on actual knowledge and failed to address whether Kubura had reason to know of the acts of wanton destruction committed by his subordinates, the Trial Chamber ignored its factual findings regarding Kubura's presence in and physical proximity to Vareš (Prosecution Appeal Brief, para. 3.29; Prosecution Reply Brief, para. 3.17). Having found in the previous section that the Trial Chamber did not limit its inquiry to Kubura's actual knowledge, the Appeals Chamber need not address this argument. In any event, the Trial Chamber found that it was not established that "Kubura could see the destruction from the route he took on 5 November 1993" (Trial Judgement, para. 1850).
[850] Prosecution Appeal Brief, para. 3.30, referring to Trial Judgement, para. 1851. *See* also Prosecution Appeal Brief, paras 3.15-3.24; AT. 72-73, 75.
[851] Prosecution Appeal Brief, para. 3.34.
[852] Kubura Response Brief, para. 23.
[853] Kubura Response Brief, paras 10-11, referring to Exhibit P676 (Combat report of the 6th Corps OG *Istok* Command, dated 4 November 1993), Exhibit P675 (Order from the 6th Corps OG *Istok* Commander, dated 4 November 1993), and

points out that his presence in Vareš was not sufficient to establish his knowledge of the acts of wanton destruction.[854]

292. The Trial Chamber found that Kubura's subordinates committed wanton destruction in Vareš on 4 November 1993[855] but that it was not proven beyond reasonable doubt that he knew or had reason to know of this crime.[856] For the reasons set forth below, the Appeals Chamber finds that the Prosecution has failed to establish that the Trial Chamber erred in so finding.

293. First, as to whether Kubura received information concerning the destruction of property in Vareš, the Trial Chamber found, as correctly remarked by the Prosecution, that the OG *Istok* issued a combat report to the 3rd Corps Command on 4 November 1993 noting the chaotic situation in Vareš. In this report, the OG *Istok* requested that the 3rd Corps Command send police military units to the town of Vareš.[857] In response, the 3rd Corps Command issued a combat report stating that it had issued orders that brigades use military police forces to prevent chaos and the destruction of property in Vareš.[858] The Trial Chamber found that the 7th Brigade neither received the 4 November 1993 OG *Istok* combat report to the 3rd Corps Command nor the 3rd Corps Command's combat report in response.[859] Yet, from the content of the latter of these combat reports (3rd Corps Command combat report), it inferred that the 7th Brigade "must have received" orders to use military police forces to prevent chaos and the destruction of property in Vareš given that the 7th Brigade was subordinated to the 3rd Corps Command and present in Vareš.[860] This 3rd Corps Command combat report, however, failed to make explicit the identity of the perpetrators of the acts of wanton destruction in Vareš. The Appeals Chamber notes that other brigades were also present in Vareš on 4 November 1993.[861]

294. Notably, the Trial Chamber also found that the OG *Istok* issued a separate order on 4 November 1993, specifically directed to the 7th Brigade Commander,[862] which "explicitly refers

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Exhibit P446 (Information from the Command of the ABiH 3rd Corps regarding prevention of chaos and plunder in Vareš, dated 4 November 1993). *See* also AT. 99.

[854] Kubura Response Brief, paras 20-21.

[855] Trial Judgement, paras 1844-1846.

[856] Trial Judgement, para. 1853.

[857] Trial Judgement, para. 1852, citing Exhibit P676 (Extraordinary report to command of the ABiH 6th Corps, Command of the ABiH 3rd Corps, OG 'Lasva', TG Dabravine and 2nd Corps, dated 4 November 1993).

[858] Trial Judgement, para. 1852, citing Exhibit P446 (Information from the Command of the ABiH 3rd Corps regarding prevention of chaos and plunder in Vareš, dated 4 November 1993).

[859] Trial Judgement, para. 1852, citing Exhibits P676 (Extraordinary report to command of the ABiH 6th Corps, Command of the ABiH 3rd Corps, OG 'Lasva', TG Dabravine and 2nd Corps, dated 4 November 1993) and P446 (Information from the Command of the ABiH 3rd Corps regarding prevention of chaos and plunder in Vareš, dated 4 November 1993).

[860] Trial Judgement, para. 1852.

[861] Trial Judgement, paras 1836, 1839.

[862] Trial Judgement, para. 1851, citing Exhibit P675 (Order from Abdulah Ahmić, ABiH 6th Corps Operational Group *Istok* (East) Commander, dated 4 November 1993).

to activities of plunder and the need to prevent them [but] does not mention acts of destruction".[863] The Appeals Chamber concurs with the Trial Chamber that, given the evidence taken as a whole, the inference that the 7th Brigade "must have received" orders from the 3rd Corps Command on 4 November 1993 does not establish, by itself, Kubura's knowledge of his subordinates' acts of wanton destruction.

295. Second, the Appeals Chamber considers that Kubura's knowledge of the acts of wanton destruction cannot automatically be inferred from his awareness of the plunder in Vareš on 4 November 1993. Indeed, the Trial Chamber's finding regarding Kubura's knowledge of the plunder in Vareš on 4 November 1993 rests on a much broader evidentiary basis. The Trial Chamber reached this conclusion on the basis of the aforementioned 4 November 1993 Order from the OG *Istok*, which specifically referred to acts of plunder but not of wanton destruction being committed in Vareš.[864] The Trial Chamber also relied on a 7th Brigade 2nd Battalion 11 November 1993 Report, which noted the 7th Brigade's collection of war booty in Vareš but did not mention acts of wanton destruction.[865] Furthermore, the Trial Chamber relied on Kubura's knowledge of and failure to punish his subordinates' past acts of plunder.[866] The Trial Chamber made no such findings with respect to any past acts of wanton destruction by Kubura's subordinates. Thus, while there was a sufficient evidentiary basis for the Trial Chamber to conclude that Kubura had knowledge of the acts of plunder in Vareš, it was reasonable for it to conclude that his knowledge as regards the acts of wanton destruction was not established beyond reasonable doubt.

296. In light of the foregoing, the Appeals Chamber finds that the Prosecution failed to establish that no reasonable trier of fact could have concluded, on the basis of all the admitted evidence, that Kubura's knowledge of wanton destruction in Vareš on 4 November 1993 was not established beyond reasonable doubt. The Prosecution's second ground of appeal is dismissed and Kubura's acquittal under Count 5 of the Indictment is confirmed.

[863] Trial Judgement, para. 1851.
[864] Trial Judgement, para. 1986, citing Exhibit P675 (Order from Abdulah Ahmić, ABiH 6th Corps Operational Group *Istok* (East) Commander, dated 4 November 1993).
[865] Trial Judgement, para. 1986, citing Exhibit P468 (ABiH 3rd Corps, 7th Brigade, 2nd Battalion Combat Report, dated 11 November 1993).
[866] Trial Judgement, para. 1982. *See* also Section VI(B): "Plunder in Vareš in November 1993".

VII. APPEALS AGAINST SENTENCE

297. The Appeals Chamber reversed Hadžihasanović's convictions for having failed to punish those responsible for the murder of Mladen Havranek (Count 3) and the cruel treatment of six prisoners at the *Slavonija* Furniture Salon on 5 August 1993 (Count 4), as well as for failing to prevent or punish the cruel treatment in the Bugojno Detention Facilities as of 18 August 1993 (Count 4).[867] The Appeals Chamber also reversed Hadžihasanović's convictions for having failed to prevent the murder of Dragan Popović (Count 3) and the cruel treatment committed by members of the *El Mujahedin* detachment at the Orašac Camp (Count 4).[868] The Appeals Chamber upheld Hadžihasanović's conviction as a superior under Article 7(3) of the Statute for failing to prevent or punish the cruel treatment at the Zenica Music School (Count 4).[869]

298. Further, the Appeals Chamber found that Kubura took necessary and reasonable measures to prevent, though not to punish, his subordinates' acts of plunder in Vareš.[870] The Appeals Chamber also upheld Kubura's convictions as a superior under Article 7(3) of the Statute of two incidents of plunder as violations of the laws or customs of war (Count 6).[871]

299. The Appeals Chamber recalls that the Trial Chamber sentenced Hadžihasanović to a single term of five years' imprisonment[872] and sentenced Kubura to a single term of 30 months' imprisonment.[873] Hadžihasanović does not specifically appeal his sentence but alleges that the Trial Chamber erred in that the Disposition of the Trial Judgement does not adequately reflect some of the findings in the Trial Judgement,[874] Kubura appeals his sentence as "manifestly excessive",[875] and the Prosecution appeals both Hadžihasanović and Kubura's sentences as "manifestly inadequate".[876]

[867] *See supra* Section V(A): "Murder and Cruel Treatment in Bugojno as of August 1993".
[868] *See supra* Section V(C): "Murder and Cruel Treatment in Orašac in October 1993".
[869] *See supra* Section V(B): "Cruel Treatment at the Zenica Music School from May to September 1993".
[870] *See supra* Section VI(B): "Plunder in Vareš in November 1993".
[871] *See* Trial Judgement, p. 627. As previously noted, the Appeals Chamber reversed the Trial Chamber finding that Kubura had failed to take necessary and reasonable measures to prevent his subordinates' acts of plunder in Vareš but concurred that Kubura had failed to punish his subordinates for those acts. Given that the duty to prevent and the duty to punish represent two distinct legal obligations, the failure of either one of which entails responsibility under Article 7(3) of the Statute, Kubura's superior responsibility conviction for the plunder in Vareš is maintained.
[872] Trial Judgement, paras 2078-2086.
[873] Trial Judgement, paras 2087-2094.
[874] Hadžihasanović Appeal Brief, paras 178, 416.
[875] Kubura Appeal Brief, para. 50.
[876] Prosecution Appeal Brief, paras 2.1, 4.1.

300. The Appeals Chamber will examine the Parties' arguments prior to discussing any adjustments in Hadžihasanović or Kubura's sentences in light of its findings, and in accordance with the requirements of the Statute and the Rules.[877]

A. Standard of review in sentencing

301. The relevant provisions on sentencing are Articles 23 and 24 of the Statute and Rules 100 to 106 of the Rules. Both Article 24 of the Statute and Rule 101 of the Rules contain general guidelines for a Trial Chamber requiring it to take into account the following factors in sentencing: the gravity of the offence or totality of the culpable conduct; the individual circumstances of the convicted person; the general practice regarding prison sentences in the courts of the former Yugoslavia; and aggravating and mitigating circumstances.[878]

302. Appeals against sentence, as appeals from a trial judgement, are appeals *stricto sensu*;[879] they are of a corrective nature and are not trials *de novo*.[880] Trial Chambers are vested with broad discretion in determining an appropriate sentence, due to their obligation to individualise the penalties to fit the circumstances of the accused and the gravity of the crime.[881] This discretion includes determining the weight given to mitigating or aggravating circumstances.[882] The conclusion as to whether a fact amounts to a mitigating circumstance will be reached "on a balance of probabilities".[883] As a general rule, the Appeals Chamber will not revise a sentence unless the Trial Chamber has committed a "discernible error" in exercising its discretion or has failed to

[877] *See Blagojević and Jokić* Appeal Judgement, para. 142.
[878] *Limaj et al.* Appeal Judgement, para. 126; *Zelenović* Judgement on Sentencing Appeal, para. 9; *Bralo* Judgement on Sentencing Appeal, para. 7; *Čelebići* Appeal Judgement, paras 429, 716. In addition, Trial Chambers are obliged to take into account the extent to which any penalty imposed by a court of any State on the convicted person for the same act has already been served, as referred to in Article 10(3) of the Statute and in Rule 101(B)(iv) of the Rules.
[879] *Limaj et al.* Appeal Judgement, para. 127; *Zelenović* Judgement on Sentencing Appeal, para. 10; *Bralo* Judgement on Sentencing Appeal, para. 8; *Mucić et al.* Judgement on Sentencing Appeal, para. 11.
[880] *Limaj et al.* Appeal Judgement, para. 127; *Zelenović* Judgement on Sentencing Appeal, para. 10; *Bralo* Judgement on Sentencing Appeal, para. 8; *Čelebići* Appeal Judgement, para. 724. *See* also *Ndindabahizi* Appeal Judgement, para. 132.
[881] *Limaj et al.* Appeal Judgement, para. 127; *Zelenović* Judgement on Sentencing Appeal, para. 11; *Blagojević and Jokić* Appeal Judgement, para. 137; *Čelebići* Appeal Judgement, para. 717. *See* also *Nahimana et al.* Appeal Judgement, para. 1037; *Ndindabahizi* Appeal Judgement, para. 132.
[882] *Zelenović* Judgement on Sentencing Appeal, para. 11; *Brđanin* Appeal Judgement, para. 500.
[883] *Zelenović* Judgement on Sentencing Appeal, para. 11; *Bralo* Judgement on Sentencing Appeal, para. 8; *Babić* Judgement on Sentencing Appeal, para. 43; *Blaškić* Appeal Judgement, para. 697. *See also Čelebići* Appeal Judgement, para. 590.

follow the applicable law.[884] It is for the appellants to demonstrate how the Trial Chamber ventured outside its discretionary framework in imposing the sentence.[885]

303. To show that the Trial Chamber committed a discernible error in exercising its discretion, appellants must demonstrate that the Trial Chamber gave weight to extraneous or irrelevant considerations, failed to give weight or sufficient weight to relevant considerations, made a clear error as to the facts upon which it exercised its discretion, or that the Trial Chamber's decision was so unreasonable or plainly unjust that the Appeals Chamber is able to infer that the Trial Chamber must have failed to exercise its discretion properly.[886]

B. Hadžihasanović's sentence

304. Hadžihasanović submits in his fourth ground of appeal that the Trial Chamber committed several errors in the Disposition of the Trial Judgement.[887] The Prosecution argues in its first ground of appeal that the Trial Chamber abused its discretion by imposing a "manifestly inadequate" sentence of five years' imprisonment on Hadžihasanović.[888] These claims are addressed in turn below.[889]

1. Alleged errors in the Disposition of the Trial Judgement

305. Hadžihasanović argues under his fourth ground of appeal that the Trial Chamber committed an error in the Disposition of the Trial Judgement by finding him guilty for failing to take necessary and reasonable measures to prevent or punish cruel treatment at the Zenica Music School "from

[884] *Limaj et al.* Appeal Judgement, para. 127; *Zelenović* Judgement on Sentencing Appeal, para. 11; *Blagojević and Jokić* Appeal Judgement, para. 137; *Tadić* Judgement in Sentencing Appeals, para. 22. *See* also *Nahimana et al.* Appeal Judgement, para. 1037; *Ndindabahizi* Appeal Judgement, para. 132.
[885] *Limaj et al.* Appeal Judgement, para. 127; *Zelenović* Judgement on Sentencing Appeal, para. 11; *Blagojević and Jokić* Appeal Judgement, para. 137; *Čelebići* Appeal Judgement, para. 725. *See* also *Ndindabahizi* Appeal Judgement, para. 132.
[886] *Limaj et al.* Appeal Judgement, para. 128; *Zelenović* Judgement on Sentencing Appeal, para. 11; *Brdanin* Appeal Judgement, para. 500; *Babić* Judgement on Sentencing Appeal, para. 44.
[887] Hadžihasanović Appeal Brief, paras 416-419. Hadžihasanović's arguments concerning the errors in the Disposition of the Trial Judgement are not explicitly pleaded in his Notice of Appeal. However, such errors touch upon Hadžihasanović's conviction and could, as he contends, have an impact on his sentence. Further, the Prosecution did not object to Hadžihasanović's arguments and in fact agrees, in part, that the language in the Disposition of the Trial Judgement is inconsistent with the findings made regarding Hadžihasanović's individual criminal responsibility (Prosecution Response Brief, paras 118, 179). Where an Appellant fails to properly raise an argument and the Prosecution fails to object, the Appeals Chamber possesses the discretion to consider it in order to ensure the fairness of the proceedings. The Appeals Chamber accordingly decided to address Hadžihasanović's arguments. *See Simba* Appeal Judgement, para. 12.
[888] Prosecution Appeal Brief, paras 1.3, 2.1.
[889] Hadžihasanović also argued under his third ground of appeal that the Trial Chamber committed similar errors in the Disposition of the Trial Judgement regarding his convictions under Article 7(3) of the Statute for the crimes committed by his subordinates in the Bugojno Detention Facilities (Hadžihasanović Appeal Brief, paras 179-182). The Appeals Chamber finds that it need not address these arguments given that it has reversed Hadžihasanović's convictions for these crimes (*see supra* Section V(A): "Murder and Cruel Treatment in Bugojno as of August 1993").

around 26 January 1993 to 31 October 1993".[890] He points out that the Trial Chamber found that the elements of cruel treatment were established for the periods from "26 January 1993 to 20 August 1993 or 20 September 1993", with regard to serious physical and psychological abuse.[891] He further notes that the Trial Chamber found that he had "reason to know as of 8 May 1993 that his subordinates were committing cruel treatment" and "failed in his duty as a superior to take the reasonable measures necessary to punish the perpetrators and prevent such acts".[892] He affirms, therefore, that the "Disposition is erroneous and must be adjusted to reflect the shorter period of 8 May 1993 to 20 September 1993 (a minimum of 102 days less)".[893]

306. Hadžihasanović contends that his sentence must be adjusted downward given that "it is reasonable to assume that the sentence imposed was decided on the basis of the Disposition".[894]

307. The Prosecution agrees, in part, that the language in the Disposition of the Trial Judgement is inconsistent with the findings made regarding Hadžihasanović's individual criminal responsibility.[895] It concurs with Hadžihasanović that the Disposition of the Trial Judgement concerning the crimes committed at the Zenica Music School should be corrected to reflect that he was found guilty for "failure to both prevent and punish the crimes committed from 8 May 1993 to 20 August 1993 or 20 September 1993" but recalls that the Trial Chamber also properly convicted him for "failure to punish the crimes committed from 26 January 1993 to 8 May 1993".[896]

308. The Prosecution disagrees, however, with Hadžihasanović's argument that his sentence was determined on the basis of the Disposition of the Trial Judgement. It recalls that it has appealed his sentence, which in its view "remains low",[897] and considers that even if the Disposition of the Trial Judgement was corrected, thus resulting in a reduced time period of responsibility, such a change would have "little or no effect on the sentence".[898]

309. The Appeals Chamber finds that the Disposition of the Trial Judgement was in some respects incorrect and that it should be rendered consistent with the Trial Chamber's findings. Thus, the relevant portion of the Disposition of the Trial Judgement should be corrected to reflect

[890] Hadžihasanović Appeal Brief, para. 417, quoting Trial Judgement, p. 622 (Count 4, bullet point 1).
[891] Hadžihasanović Appeal Brief, para. 417, quoting Trial Judgement, para. 1200.
[892] Hadžihasanović Appeal Brief, para. 417, quoting Trial Judgement, para. 1240.
[893] Hadžihasanović Appeal Brief, para. 418.
[894] Hadžihasanović Appeal Brief, paras 183, 419. *See* also Hadžihasanović Reply Brief, para. 107.
[895] Prosecution Response Brief, para. 179.
[896] Prosecution Response Brief, para. 179, citing Trial Judgement, paras 1240, 1251. At the Appeal Hearing, the Prosecution also noted that the Disposition of the Trial Judgement regarding Hadžihasanović's responsibility for the murder and cruel treatment in Orašac erroneously refers to the period from 15 to 31 October 1993, rather than from 19 to 31 October 1993 (AT. 157). The Appeals Chamber has noted the discrepancy but, having reversed Hadžihasanović's convictions for those events (*see supra* Section V(C): "Murder and Cruel Treatment in Orašac in October 1993"), need not correct the Disposition of the Trial Judgement.
[897] Prosecution Response Brief, para. 122.

Hadžihasanović's individual criminal responsibility as a superior for the following: failure to prevent or punish cruel treatment at the Zenica Music School from 8 May 1993 to 20 August 1993 or 20 September 1993, in addition to failure to punish cruel treatment at the Zenica Music School from 26 January 1993 to 8 May 1993.[899]

310. As regards the impact of this shorter period of responsibility on Hadžihasanović's sentence, the Appeals Chamber first recalls that the Trial Chamber, in its sentencing determination, correctly determined that the cruel treatment at the Zenica Music School took place over approximately seven months and not nine months as erroneously indicated in the Disposition of the Trial Judgement.[900] The Appeals Chamber further notes that the Trial Chamber's finding regarding the large number of victims involved in the detention facilities in Zenica, which was considered an aggravating circumstance, remains valid for the relevant period.[901] Thus, these factors remain unaffected by the above correction to the Disposition of the Trial Judgement.

2. Whether Hadžihasanović's sentence is manifestly inadequate

311. The Prosecution argues under its first ground of appeal that the Trial Chamber erred by imposing a "manifestly inadequate" sentence of five years' imprisonment on Hadžihasanović.[902] It argues that the Trial Chamber: (i) failed to reflect the gravity of the crimes committed by Hadžihasanović's subordinates and the degree and form of his responsibility under Article 7(3) of the Statute;[903] (ii) erred in its assessment of Hadžihasanović's "good character" as a mitigating circumstance;[904] (iii) erred in taking into account Hadžihasanović's "lack of theoretical and practical training" as a mitigating circumstance;[905] and (iv) failed to properly consider the sentencing practices of the former Yugoslavia.[906] It requests that his sentence be increased.[907]

(a) Gravity of the underlying crimes and of Hadžihasanović's conduct

(i) Preliminary issue

312. The Prosecution asserts that the gravity of both the underlying crimes and the superior's own conduct must be considered when determining the appropriate sentence for convictions under Article 7(3) of the Statute and relies on the Appeals Chamber's finding that "the seriousness of a

[898] Prosecution Response Brief, para. 124.
[899] Trial Judgement, p. 622, Disposition, Count 4, bullet point 1. *See* also Trial Judgement, paras 1200, 1240, 1251.
[900] Trial Judgement, para. 2082.
[901] Trial Judgement, para. 2083.
[902] Prosecution Appeal Brief, paras 1.3, 2.1. *See* also AT. 69.
[903] Prosecution Appeal Brief, paras 2.1-2.2. *See* also AT. 68.
[904] Prosecution Appeal Brief, paras 2.21-2.35. *See* also AT. 68-69.
[905] Prosecution Appeal Brief, para. 2.27. *See* also AT. 69.
[906] Prosecution Appeal Brief, para. 2.11.

superior's conduct in failing to prevent or punish crimes must be measured to some degree by the nature of the crimes to which this failure relates".[908] Hadžihasanović responds that while it is necessary to consider to "some degree" the seriousness and nature of the underlying crimes, the main consideration for convictions under Article 7(3) of the Statute is "the form and degree of participation of the Accused".[909] In support of this assertion, he argues that "a person accused *solely* pursuant to Article 7(3) will not be convicted for the actual crime committed by his subordinates but in essence for failing in his duty to prevent or punish".[910]

313. The Appeals Chamber reiterates that, when assessing the gravity of a crime in the context of a conviction under Article 7(3) of the Statute, two matters must be taken into account:

> (1) the gravity of the underlying crime committed by the convicted person's subordinate; *and*
> (2) the gravity of the convicted person's own conduct in failing to prevent or punish the underlying crimes.[911]

Thus, in the context of a conviction under Article 7(3) of the Statute, the gravity of a subordinate's crime remains, contrary to Hadžihasanović's assertion, an "essential consideration" in assessing the gravity of the superior's own conduct at sentencing.[912]

(ii) Gravity of the underlying crimes

314. The Prosecution asserts that the Trial Chamber erred by failing to consider or provide a reasoned opinion concerning the gravity of the underlying crimes in sentencing Hadžihasanović.[913] First, it contends that, while the Trial Chamber considered the heinous character of the murder by decapitation of Dragan Popović as an aggravating factor, it failed to consider the nature and number of the other incidents – the murder of Mladen Havranek and the six instances of cruel treatment – when assessing gravity at sentencing.[914] Second, the Prosecution asserts that the Trial Chamber also "failed to consider or to refer to the particularly odious circumstances"[915] of the cruel treatment

[907] Prosecution Appeal Brief, para. 2.35. *See* also AT. 67.
[908] Prosecution Appeal Brief, para. 2.4, quoting *Čelebići* Appeal Judgement, para. 732. *See* also AT. 69-70.
[909] Hadžihasanović Response Brief, para. 69.
[910] Hadžihasanović Response Brief, para. 69, citing *Čelebići* Appeal Judgement, para. 741. *See* also AT. 92.
[911] *Čelebići* Appeal Judgement, para. 732 (emphasis added). *See* also para. 741 ("a consideration of the gravity of offences committed under Article 7(3) of the Statute involves, *in addition to* a consideration of the gravity of the conduct of the superior, a consideration of the seriousness of the underlying crimes" (emphasis added).
[912] *Čelebići* Appeal Judgement, para. 741.
[913] Prosecution Appeal Brief, para. 2.7. *See* also Prosecution Reply Brief, paras 2.19-2.20.
[914] Prosecution Appeal Brief, para. 2.10. The Appeals Chamber recalls that it has reversed Hadžihasanović's convictions regarding the crimes committed in the Bugojno Detention Facilities (*see supra* Section V(A)) and the Orašac Camp (*see supra* Section V(C)). Nonetheless, the Appeals Chamber notes that the Prosecution's arguments regarding the gravity of the underlying offences continue to apply to Hadžihasanović's remaining conviction for the crimes at the Zenica Music School and that the Trial Chamber's analysis of crimes at sentencing, including of those for which Hadžihasanović has now been acquitted, sheds light on its understanding of the need to take into account the gravity of the underlying crimes.
[915] Prosecution Appeal Brief, para. 2.12. *See* also AT. 67-68.

committed by Hadžihasanović's subordinates and also failed to consider the impact of such crimes on the victims in its sentencing considerations.[916]

315. Hadžihasanović responds that the Trial Chamber did consider and provide a reasoned opinion regarding the inherent gravity of his criminal conduct.[917] He argues that the Trial Chamber "did consider the type and number of incidents for which [he] was found guilty, the manner in which they were committed as well as their consequences".[918]

316. The Appeals Chamber notes that the Trial Chamber was aware of its obligation under Article 24(2) of the Statute to take into account the gravity of the crime in its sentencing determination.[919] Further, the Trial Judgement is replete with descriptions and related findings going to the gravity of the underlying crimes, including the type of offences, number of incidents, particular circumstances of the cruel treatments and their impact on the victims.[920]

317. Moreover, the Appeals Chamber finds that the Trial Chamber, within its discussion of the aggravating circumstances, considered factors going to the gravity of the underlying crimes in rendering Hadžihasanović's sentence. The Trial Chamber found that the heinous character of the murder by decapitation of Dragan Popović,[921] the time span over which the cruel treatment at the Zenica Music School and in Bugojno took place,[922] and the number of victims at the detention centres[923] were all aggravating circumstances. The Appeals Chamber recalls that though gravity of the crime and aggravating circumstances are two distinct concepts,[924] Trial Chambers have some discretion as to the rubric under which they treat particular factors.[925] Here, the Trial Chamber's focus on the underlying crimes within the context of its aggravating circumstances discussion, in conjunction with its detailed description of them in the body of the Trial Judgement and its awareness of the need to take the gravity of the crime into account at sentencing, indicate that the gravity of the underlying crimes was properly considered at sentencing.

318. Thus, the Appeals Chamber finds that the Prosecution failed to demonstrate that the Trial Chamber either failed to consider the gravity of the underlying crimes or failed to provide a

[916] Prosecution Appeal Brief, para. 2.8. *See* also Prosecution Appeal Brief, paras 2.13, 2.17.
[917] Hadžihasanović Response Brief, paras 72, 75-76. *See* also Hadžihasanović Response Brief, para. 97; AT. 92.
[918] Hadžihasanović Response Brief, para. 88.
[919] Trial Judgement, para. 2067. *See* also para. 2076.
[920] *See* Trial Judgement, paras 1173-1200 (description of the crimes at the Zenica Music School and its related findings); 1359-1401 (description of the crimes at the Orašac Camp and its related findings); 1596-1727 (description of the crimes in the Bugojno facilities and its related findings).
[921] Trial Judgement, para. 2084.
[922] Trial Judgement, para. 2082.
[923] Trial Judgement, para. 2083.
[924] *Deronjić* Judgement on Sentencing Appeal, para. 106.
[925] *Vasiljević* Appeal Judgement, para. 157.

reasoned opinion as to the gravity of the underlying crimes in rendering Hadžihasanović's sentence. The Prosecution's arguments are dismissed.

(iii) Hadžihasanović's high level of authority

319. The Prosecution asserts that the Trial Chamber failed to properly assess the gravity of Hadžihasanović's conduct in that his high level of authority should have attracted a more severe sentence. Relying on the finding of the ICTR Appeals Chamber in the *Musema* Appeal Judgement that there is "a general principle that sentences should be graduated, that is, that the most senior levels of the command structure should attract the severest sentences",[926] the Prosecution submits that "it is a principle of sentencing that superior command attracts greater criminal responsibility, not less".[927] The Prosecution contends that "a distinction must be made between *position* of authority and *level* of authority".[928] It argues that "[a] high level of authority is not an element of superior responsibility", and as such "may still play a role in sentencing"[929] under Article 7(3) of the Statute.[930] Hadžihasanović submits that a high position of authority (either in the military or political structure) is in itself irrelevant and that it is the abuse of that authority which can lead to a more severe sentence.[931]

320. The Appeals Chamber recalls that a position of authority does not in and of itself attract a harsher sentence.[932] Further, in the context of a conviction under Article 7(3) of the Statute, use of the superior's position of authority as an aggravating circumstance would be inappropriate since it is itself an element of criminal liability.[933] Nor would a high level of authority, to echo the Prosecution's distinction, necessarily attract greater responsibility were it to be considered. Rather, it is the superior's abuse of that level of authority which could be taken into consideration at sentencing.[934] The Prosecution does not, however, plead such an abuse on Hadžihasanović's part. Moreover, the Appeals Chamber recalls that no findings were made indicating Hadžihasanović's direct involvement in the commission of the underlying crimes against the victims.[935]

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[926] *Musema* Appeal Judgement, para. 382.
[927] Prosecution Appeal Brief, para. 2.3.
[928] Prosecution Reply Brief, para. 2.28.
[929] Prosecution Reply Brief, para. 2.29, citing *Galić* Appeal Judgement, para. 412.
[930] Prosecution Reply Brief, para. 2.30.
[931] Hadžihasanović Response Brief, paras 60-65. *See* also AT. 92-93.
[932] *Stakić* Appeal Judgement, para. 411; *Babić* Judgement on Sentencing Appeal, para. 80.
[933] *See Naletilić and Martinović* Appeal Judgement, para. 626; *Miodrag Jokić* Judgement on Sentencing Appeal, para. 30.
[934] *See Galić* Appeal Judgement, para. 412 (discussing the abuse of a high level of authority in the context of the mode of liability of ordering).
[935] *See Aleksovski* Appeal Judgement, para. 183 (where the Appeals Chamber considered that the superior responsibility of the appellant, who was a prison warden, "seriously aggravated [his] offences, [as] [i]nstead of preventing it, he involved himself in violence against those whom he should have been protecting").

321. In any event, the principle of graduation upon which the Prosecution relies is not absolute. Indeed, the ICTR Appeals Chamber in *Musema* qualified its statement that sentences should be graduated by noting that this principle "is, however, always subject to the proviso that the gravity of the offence is the primary consideration for a Trial Chamber in imposing sentence".[936] The Prosecution's contention that Hadžihasanović must receive a harsher sentence based on his high level of authority is not substantiated by the practice of the International Tribunal.

322. Thus, the Appeals Chamber finds that the Prosecution failed to demonstrate that the Trial Chamber erred in not taking into account Hadžihasanović's high level of authority in sentencing him. The Prosecution's arguments are dismissed.

(b) Hadžihasanović's "good character"

323. The Prosecution argues that the Trial Chamber erred in law and fact in taking into account as mitigating circumstances, under Hadžihasanović's "good character", the following factors: (i) his competence and effectiveness;[937] and (ii) his intelligence and good education.[938]

(i) Hadžihasanović's competence and effectiveness

324. The Prosecution submits that professionalism or competence can be either aggravating or mitigating factors, depending on the circumstances of the case, but that those factors here accentuate the "serious failure by Hadžihasanović to act" and thus aggravate his responsibility as a superior.[939] Hadžihasanović responds that the Prosecution's assertion that his competence and effectiveness should be aggravating is "not supported by the evidence".[940] To the contrary, he contends that the Trial Chamber's consideration of these qualities was made in the context of its finding that he had a character which can be rehabilitated "and that he thus merits a reduced sentence".[941]

325. The Appeals Chamber recalls that the factors to be taken into account in aggravation or mitigation of a sentence have not been exhaustively defined by the Statute or the Rules, and that Trial Chambers have considerable discretion in deciding how these factors are applied in a particular case.[942] Whether a specific factor constitutes a mitigating or aggravating circumstance is

[936] *Musema* Appeal Judgement, para. 382.
[937] Prosecution Appeal Brief, para. 2.21. *See* also AT. 69.
[938] Prosecution Appeal Brief, para. 2.21. *See* also AT. 69.
[939] Prosecution Appeal Brief, paras 2.23, 2.24.
[940] Hadžihasanović Response Brief, para. 108.
[941] Hadžihasanović Response Brief, para. 106. *See* also AT. 90.
[942] *Blaškić* Appeal Judgement, para. 685; *Čelebići* Appeal Judgement, para. 780.
[943] *Stakić* Appeal Judgement, para. 416.

therefore largely a case-specific determination to be made by the Trial Chamber.[943] In the present case, the Trial Chamber took into account Hadžihasanović's competence and effectiveness – along with his lack of prior criminal record, his prior good reputation, his intelligence and his good manners – as part of its finding that he "has a character which can be rehabilitated".[944] In addition to Hadžihasanović's potential for rehabilitation,[945] the Trial Chamber also considered as mitigating circumstances Hadžihasanović's voluntary surrender to the Tribunal,[946] his compliance with the conditions of his provisional release,[947] his good conduct at the United Nations Detention Unit and during the hearings,[948] his family situation,[949] and the overall context in which the incriminating acts took place.[950] The Trial Chamber acted within the scope of its discretion in doing so. Further, there is no indication that the Trial Chamber gave undue consideration to Hadžihasanović's competence and effectiveness as it noted that the sentencing principle of rehabilitation was of "relative" importance.[951]

326. Thus, the Appeals Chamber finds that the Prosecution failed to demonstrate that the Trial Chamber erred by taking into account Hadžihasanović's competence and effectiveness as mitigating circumstances. The Prosecution's arguments are dismissed.

(ii) Hadžihasanović's intelligence and good education

327. The Prosecution argues that the Trial Chamber abused its discretion by considering Hadžihasanović's intelligence and good education in mitigation as these factors have previously been rejected as mitigating and are in fact aggravating circumstances.[952] It asserts that "[t]o accept an individual's intelligence and good education as a mitigating circumstance for illegal behaviour or as part of good character is illogical as an intelligent and well-educated person is better positioned to understand the illegality and consequences of his acts, and to recognise his duties and to effectively discharge them."[953] Hadžihasanović responds that the Prosecution's assertion that these factors have been explicitly rejected as mitigating is erroneous.[954] He argues that it was within the

[944] Trial Judgement, para. 2080.
[945] Trial Judgement, para. 2080.
[946] Trial Judgement, para. 2078.
[947] Trial Judgement, para. 2078.
[948] Trial Judgement, para. 2078.
[949] Trial Judgement, para. 2079.
[950] Trial Judgement, para. 2081.
[951] Trial Judgement, para. 2073.
[952] Prosecution Appeal Brief, para. 2.25. *See* also AT. 69.
[953] Prosecution Appeal Brief, para. 2.26. *See* also Prosecution Reply Brief, para. 2.33 (arguing that if intelligence and good education were taken into account as indicative of rehabilitative character, rehabilitation "must not be given undue weight" as a sentencing principle).
[954] Hadžihasanović Response Brief, para. 111.

Trial Chamber's discretion, in the circumstances of the case, to consider his intelligence and good manners as character traits that indicate his ability for successful rehabilitation.[955]

328. The Appeals Chamber recognises that intelligence and good education have been considered to be possible aggravating factors.[956] This does not mean, however, that these factors should *only* be considered aggravating factors. The Appeals Chamber reiterates that whether certain factors going to a convicted person's character constitute mitigating or aggravating factors depends largely on the particular circumstances of each case.[957] The Appeals Chamber previously underlined that "[c]aution is needed when relying as a legal basis on statements made by Trial Chambers in the context of cases and circumstances that are wholly different".[958] In the present case, the Trial Chamber took into account the Prosecution's argument that Hadžihasanović's intelligence and good education should constitute aggravating circumstances[959] but chose to include these factors as part of its findings on his potential for rehabilitation.[960] Further, there is no indication that the Trial Chamber accorded undue weight to these factors, given that it also indicated that it accorded the rehabilitation sentencing principle limited value.[961]

329. Thus, the Appeals Chamber finds that the Prosecution failed to demonstrate that the Trial Chamber erred by taking into account Hadžihasanović's intelligence and good education as mitigating factors. The Prosecutions's arguments are dismissed.

(c) Hadžihasanović's lack of theoretical and practical training as 3rd Corps Commander

330. The Prosecution contends that lack of proper training has previously been accepted as a mitigating factor[962] and acknowledges that Hadžihasanović "might not have had all the formal training required to be a Corps commander".[963] However, it submits that given that Hadžihasanović was an "experienced and competent senior military officer"[964] who had practical experience with superior responsibility and its enforcement as a former military police battalion commander,[965] "this lack of a formal training cannot mitigate the severity of his sentence [because] he was materially capable of exercising control and command at the time of the crimes".[966] The Prosecution contends

[955] Hadžihasanović Response Brief, paras 110-114. *See* also AT. 93.
[956] *Brdanin* Trial Judgement, para. 1114*; Milan Simić* Sentencing Judgement, paras 103-105.
[957] *Babić* Judgement on Sentencing Appeal, para. 49.
[958] *Stakić* Appeal Judgement, para. 416 (as to Milomir Stakić's professional background). *See* also *Babić* Judgement on Sentencing Appeal, para. 49 (as to Milan Babić's good character).
[959] Trial Judgement, para. 2064.
[960] Trial Judgement, para. 2080.
[961] Trial Judgement, paras 2073 and 2080.
[962] Prosecution Appeal Brief, para. 2.28.
[963] Prosecution Appeal Brief, para. 2.28.
[964] Prosecution Appeal Brief, para. 2.28.
[965] Prosecution Appeal Brief, para. 2.32.
[966] Prosecution Appeal Brief, para. 2.28. *See* also Prosecution Reply Brief, paras 2.37-2.38; AT. 69.

that, except for the cruel treatment which took place at the Zenica Music School starting in January 1993, Hadžihasanović had acquired enough experience by the time the other crimes charged occurred because the incidents took place more than six months after he assumed control of the ABiH 3rd Corps.[967] Further, the Prosecution argues that lack of formal training is irrelevant to Hadžihasanović's duties concerning procedures of military discipline because those are "integral to all positions of military command".[968]

331. Hadžihasanović responds that the Trial Chamber did not err by considering his lack of theoretical and practical training in mitigation of his sentence and points to the evidence submitted at trial attesting to his inexperience when he assumed command of the ABiH 3rd Corps.[969]

332. The Appeals Chamber notes that the Prosecution does not dispute the Trial Chamber's finding that Hadžihasanović suffered from a lack of training specific to his new position when he became commander of the 3rd Corps. The Prosecution also agrees that, at least regarding the cruel treatment at the Zenica Music School, Hadžihasanović did not have sufficient time to gain the practical experience necessary for his new position.[970] More importantly, the Prosecution's argument that Hadžihasanović's past experience as a former military police battalion commander should have sufficiently prepared him for the duties of his new position is unavailing given that aspects of superior command may vary according to the level at which they are exercised.[971] Nor is there any indication that the Trial Chamber gave undue weight to Hadžihasanović's lack of proper training. The Trial Chamber's assessment of factors going to Hadžihasanović's character, "in view of the fact that when he assumed command of the 3rd Corps, he had not yet completed the theoretical and practical training required to hold such a post",[972] was within the bounds of the discretion it is accorded in these matters.

333. Thus, the Appeals Chamber finds that the Prosecution failed to demonstrate that the Trial Chamber erred by taking into account Hadžihasanović's lack of theoretical and practical training as a mitigating factor. The Prosecution's arguments are dismissed.

[967] Prosecution Appeal Brief, para. 2.33.
[968] Prosecution Appeal Brief, para. 2.32.
[969] Hadžihasanović Response Brief, paras 115-122. *See* also AT. 93.
[970] Prosecution Appeal Brief, para. 2.33.
[971] *See* ICRC Commentary to Article 87 of Additional Protocol I, p. 1019, note 3554 ("[I]t is self-evident that the obligation applies in the context of the responsibilities as they have devolved over different levels of the hierarchy and that the duties of a non-commissioned officer are not identical to those of a battalion commander, and the duties of the latter are not identical to those of a divisional commander").
[972] Trial Judgement, para. 2080.

(d) Sentencing practices in the former Yugoslavia

334. The Prosecution argues that, according to the sentencing practices in the former Yugoslavia, Hadžihasanović's conduct for failing to prevent and/or punish his subordinates' crimes of murder and cruel treatment would have each attracted a sentence in excess of five years of imprisonment.[973] Hadžihasanović responds that the Prosecution's assertion that his conduct would have attracted a harsher sentence in the former Yugoslavia is incorrect[974] and, in any event, recalls that the Trial Chamber properly stated that "[a]ny references to the general practice [regarding prison sentences in the Former Yugoslavia] are purely indicative and are in no way binding".[975]

335. The Appeals Chamber notes that while the Trial Chamber failed to adequately articulate the applicable sentencing practices of the former Yugoslavia in its sentencing determination,[976] this is not an error capable of affecting the Trial Judgement. Though Articles 142 and 144 of the SFRY Criminal Code both provide for a minimum sentence of five years' imprisonment, these Articles concern liability for ordering or committing war crimes, rather than superior responsibility for failure to prevent and punish these acts. Thus, the SRFY's minimum sentence of five years would have been of limited relevance to the Trial Chamber's own sentencing determinations given the superior responsibility context in the present case. The Appeals Chamber also notes that the SFRY Criminal Code's general sentencing principles permit a sentence lower than the five-year minimum when, as here, mitigating circumstances are found to exist. Finally, the Appeals Chamber recalls that while references to the sentencing practices of the former Yugoslavia must be taken into account,[977] which the Trial Chamber acknowledged in the present case,[978] such practices only provide guidance and are not binding.[979]

336. In light of the foregoing, the Appeals Chamber dismisses the Prosecution's first ground of appeal.

[973] Prosecution Appeal Brief, para. 2.11, citing Article 142 of the SFRY Criminal Code.
[974] Hadžihasanović Response Brief, paras 89-94. *See* also AT. 93-94.
[975] Hadžihasanović Response Brief, para. 89, citing Trial Judgement, para. 2074; *Kupreškić et al.* Trial Judgement, para. 840*; Blaškić* Trial Judgement, para. 759*; Čelebići* Appeal Judgement, paras 813, 820; *Jokić* Judgement on Sentencing Appeal, para. 37; *Strugar* Trial Judgement, para. 473.
[976] *Dragan Nikolić* Judgement on Sentencing Appeal, para. 69 ("It follows that Trial Chambers have to take into account the sentencing practices in the former Yugoslavia and, should they depart from the sentencing limits set in those practices, must give reasons for such departure."), citing *Kunarac* Trial Judgement, para. 829 ("what is required certainly goes beyond merely reciting the relevant criminal code provisions of the former Yugoslavia").
[977] *Dragan Nikolić* Judgement on Sentencing Appeal, para. 69. *See also Tadić* Judgement in Sentencing Appeals, para. 21; *Serushago* Sentencing Appeal Judgement, para. 30.
[978] Trial Judgement, para. 2074.
[979] *Kupreškić et al.* Appeal Judgement, para. 418.

C. Kubura's Sentence

337. Both the Prosecution and Kubura appeal Kubura's sentence under the third ground of their respective appeals.

338. The Prosecution argues that the Trial Chamber erred in the exercise of its discretion by imposing a "manifestly inadequate" sentence of two and a half years of imprisonment against Kubura.[980] In its view, the Trial Chamber: (i) failed to consider the gravity of the crimes of plunder committed by Kubura's subordinates; and (ii) erred in law by considering in mitigation of Kubura's sentence the fact that he promptly followed his superior's order to stop the abuses in Vareš.[981] The Prosecution requests that the sentence be increased.[982]

339. Kubura submits that the Trial Chamber erred in the exercise of its discretion in sentencing him to two and a half years of imprisonment. He argues that, given "the nature of the offences of plunder", the sentence rendered by the Trial Chamber is "manifestly excessive". He also contends that the Trial Chamber erred in respect of its consideration of the gravity of the crime and in respect of the weight given to aggravating features.[983]

340. The Appeals Chamber will examine the substance of both of these appeals, jointly where appropriate.[984]

1. Gravity of the underlying crimes

341. The Prosecution contends in its appeal brief that, while the Trial Chamber considered the seriousness of the crimes of plunder for jurisdictional purposes, it "failed to address the particular gravity of the two plunders for sentencing purposes".[985] It argues that the sentence imposed does not adequately reflect the gravity of the plunder for which Kubura was convicted as a superior.[986] The Prosecution submits that, in Kubura's case, such gravity comprises not only the economic

[980] Prosecution Appeal Brief, para. 4.1. *See* also AT. 70; Prosecution Response Brief, para. 363.
[981] Prosecution Appeal Brief, para. 4.1. *See* also AT. 70-71.
[982] Prosecution Appeal Brief, para. 4.29.
[983] Kubura Appeal Brief, para. 50.
[984] The Appeals Chamber also notes that Kubura argued at paragraph 9 of his Notice of Appeal that his sentence was manifestly excessive "when compared with the sentence imposed in other cases for plunder or similar offences". However, Kubura fails to refer to cases which in his view would bear similarities with his own. Further, the Appeals Chamber emphasises that, as a general principle, comparisons with other cases as an attempt to persuade the Appeals Chamber to either increase or reduce the sentence are of limited assistance: the differences are often more significant than the similarities and the mitigating and aggravating factors dictate different results (*see Babić* Appeal Judgement, para. 33; *Dragan Nikolić* Judgement on Sentencing Appeal, para. 15; *Čelebići* Appeal Judgement, para. 719). Accordingly, the Appeals Chamber will not address this argument.
[985] Prosecution Appeal Brief, para. 4.11. *See* also Prosecution Appeal Brief, para. 46; AT. 71.
[986] Prosecution Appeal Brief, para. 4.3. *See* also AT. 72.

consequences for the victims[987] but also "the repetition of the acts and their overall impact on the civilian population".[988] Further, the Prosecution contends that, under the SFRY Criminal Code, a single incident of plunder would have attracted a minimum sentence of five years of imprisonment and that two instances would have attracted a sentence in excess of five years of imprisonment.[989] Thus, it argues that "the imposition of only half the minimum sentence […] demonstrates a discernible error in the exercise of the Chamber's sentencing discretion".[990]

342. Kubura responds that the Prosecution failed to mention "various aggravating features of [his] conduct"[991] that the Trial Chamber took into account when sentencing him, and submits that the Prosecution has not shown that the sentence rendered was manifestly inadequate.[992] He also contends that plunder, although a serious crime within the jurisdiction of the International Tribunal, is "one of the least serious war crimes within the range of offences"[993] before it and accordingly should attract sentences at the "lowest end of the spectrum".[994] Kubura contends that his sentence was manifestly excessive and must appropriately reflect the seriousness of the crime and be proportional to the conduct involved and the sentences imposed for more serious crimes at the International Tribunal.[995]

343. In sum, the Appeals Chamber notes that both the Prosecution and Kubura agree that the Trial Chamber failed to take into account the gravity of the underlying crimes of plunder in rendering Kubura's sentence.[996] Rather, the disagreement is as to whether a proper consideration of their gravity would have resulted in an upward or downward adjustment of his sentence.

344. The Appeals Chamber recalls its finding that the Trial Chamber properly took into account the gravity of the underlying crimes in determining Hadžihasanović's sentence,[997] and finds that the Trial Chamber acted similarly in determining Kubura's sentence. Specifically, the Appeals

[987] Prosecution Appeal Brief, para. 4.7, citing Trial Judgement, para. 55.
[988] Prosecution Appeal Brief, para. 4.7, citing *Kordić and Čerkez* Appeal Judgement, para. 83.
[989] Prosecution Appeal Brief, para. 4.12. *See* also AT. 72.
[990] Prosecution Appeal Brief, para. 4.13.
[991] Kubura Response Brief, para. 31, citing Trial Judgement, paras 2091-2092.
[992] Kubura Response Brief, para. 33.
[993] Kubura Response Brief, para. 26. *See* also Kubura Appeal Brief, para. 51; AT. 101.
[994] Kubura Response Brief, para. 27. *See* also Kubura Response Brief, paras 28-29. At the Appeal Hearing, Kubura noted that the Prosecution initially recommended a sentence of ten years of imprisonment for the entire indictment. He argued that, considering that the Trial Chamber found him guilty for only two property-related counts out of the sixteen total counts, imposing a sentence higher than two years and a half would have been disproportionate (AT. 101-102). The Prosecution replied that, "according to Rule 87(C), the Trial Chamber can either impose a sentence in respect of each finding of guilt and say whether it is to be served consecutively or concurrently, or like in this case, impose a single sentence which reflects the totality of the criminal conduct" (AT. 105).
[995] Kubura Appeal Brief, para. 53.
[996] The Appeals Chamber notes that the arguments made by the Prosecution and Kubura under the third ground of their respective appeals regarding the Trial Chamber's failure to take into account the gravity of the underlying offences are similar to those made by the Prosecution under its first ground of appeal with respect to Hadžihasanović's sentence.
[997] *See supra* para. 318.

Chamber finds that: (i) the Trial Chamber was aware of its obligation under Article 24(2) of the Statute to take into account the gravity of the crime in its sentencing determination;[998] (ii) the Trial Judgement is replete with descriptions and related findings going to the gravity of the underlying crimes committed by Kubura's subordinates;[999] and (iii) the Trial Chamber, within its discussion of aggravating circumstances, considered factors going to the gravity of the crime, including that of the underlying crimes.[1000]

345. Thus, the Appeals Chamber finds that the Prosecution and Kubura failed to demonstrate that the Trial Chamber either failed to consider the gravity of the underlying crimes or to provide a reasoned opinion as to the gravity of the underlying crimes in rendering Kubura's sentence.

346. Similarly, for the reasons discussed above at paragraph 335, the Appeals Chamber finds that the Trial Chamber's failure to adequately articulate the applicable sentencing practices of the former-Yugoslavia in its sentencing determination was not an error capable of affecting the Trial Judgement. In short, the relevant Articles of the SFRY Criminal Code would have been of limited relevance to the Trial Chamber's own sentencing determinations given the superior responsibility context in the present case. Further, the SFRY Criminal Code's general sentencing principles permit a sentence lower than the five-year minimum when, as here, mitigating circumstances are found to exist. Finally, references to the sentencing practices of the former Yugoslavia are indicative, rather than binding.

347. Accordingly, the Prosecution's and Kubura's arguments are dismissed.

2. Aggravating circumstances

348. Kubura also argues under his third ground of appeal that the Trial Chamber erred in its assessment of the aggravating circumstances.[1001] Specifically, he contends that the Trial Chamber erred in considering the systematic nature of the plundering as an aggravating circumstance given that the 7th Brigade's framework for dealing with "war booty" was a system designed to prevent looting.[1002] He further argues that the Trial Chamber incorrectly found the plunder to be "systematic" because the looting involved only two areas, each taking place for only about one day,

[998] Trial Judgement, para. 2067.
[999] Trial Judgement, paras 1931-1943 (description of the plunder in the Ovnak area and its related findings), paras 1966-1978 (description of the plunder in Vareš and its related findings).
[1000] The Trial Chamber noted the "repetitive and extensive nature of the plunder" and took into account the "systematic nature of the plunder" as an aggravating circumstance (Trial Judgement, para. 2091).
[1001] Kubura Appeal Brief, para. 55.
[1002] Kubura Appeal Brief, para. 55, citing Exhibit P426 (Report from the Commander of the ABiH 3rd Corps 7th Muslim Brigade dated 20 June 1993); Trial Judgement, para. 2091.

and that the two instances were separated by a period of five months.[1003] Kubura also submits that the systematic nature of the plunder is belied by the Trial Chamber's additional findings that multiple military units and civilians were also involved in the looting,[1004] that in Vareš the soldiers were in a celebratory mood and thus disorganised and spontaneous,[1005] and that the goods appropriated were food for hungry soldiers and, in one case, women's shoes.[1006]

349. The Prosecution responds that the Trial Chamber's consideration of the systematic nature of the plunder of the Ovnak area and Vareš as an aggravating circumstance was reasonable.[1007] It contends that the Trial Chamber determined that the commissions in charge of the collection of "war booty" served as a vehicle for the 7th Brigade's systematic plunder, a conclusion in opposition to Kubura's assertion that the 7th Brigade's framework for dealing with "war booty" was aimed at preventing plunder.[1008] Further, it argues that the fact that the plunders only involved two areas, each took place for one day, and were five months apart, "remains compatible with their systematic nature and does not make the conclusion unreasonable".[1009]

350. The Trial Chamber found that the plunder in the Ovnak area and in Vareš was "systematic [in] nature" and considered this to be an aggravating circumstance.[1010] With respect to the plunder in the Ovnak area, the Trial Chamber found that Kubura himself helped establish collection points and created two commissions – one operating in the combat zone and the other based in the 7th Brigade's headquarters in Bilmište – tasked with organising war booty.[1011] It found that the property plundered during the Ovnak operations "went beyond the scope of legitimate war booty" and that it "did not fit into the category of property having direct military use".[1012]

351. With respect to the plunder in Vareš, the Trial Chamber found that "an official and organised procedure existed to collect certain property, particularly food, which the 7th Brigade considered to be part of the war booty",[1013] but that the property plundered "did not fall within the category of property having direct military use".[1014] The Appeals Chamber recalls that it upheld the

[1003] Kubura Appeal Brief, para. 56.
[1004] Kubura Appeal Brief, para. 57, citing Trial Judgement, paras 1943, 1978.
[1005] Kubura Appeal Brief, para. 57.
[1006] Kubura Appeal Brief, para. 57, citing Trial Judgement, para. 1978, fn. 4650; Witness Hakan Birger, T. 5384-5385.
[1007] Prosecution Response Brief, para. 367, citing Trial Judgement, paras 1942, 1977, 2091-2092.
[1008] Prosecution Response Brief, para. 368, citing Trial Judgement, paras 1939-1941.
[1009] Prosecution Response Brief, para. 369.
[1010] Trial Judgement, para. 2091.
[1011] Trial Judgement, paras 1939, 2091.
[1012] Trial Judgement, para. 1941.
[1013] Trial Judgement, para. 1977.
[1014] Trial Judgement, para. 1976.

Trial Chamber's findings that Kubura had knowledge of his subordinates' acts of plunder in Vareš and the Ovnak area.[1015]

352. The Appeals Chamber finds that Kubura fails to demonstrate how the Trial Chamber ventured outside the scope of its discretion by taking into account the abuse of an organisational framework for war booty as an aggravating circumstance. Moreover, Kubura's arguments mistakenly focus on the geographical and temporal aspects of the plunder[1016] rather than the systematic manner in which it was carried out, which was supported by the Trial Chamber's findings.[1017]

353. Thus, the Appeals Chamber finds that Kubura failed to demonstrate that the Trial Chamber erred in its assessment of the aggravating circumstances. The Appeals Chamber dismisses Kubura's third ground of appeal.

3. Mitigating circumstances

354. The Prosecution argues under its third ground of appeal that the Trial Chamber erred in law by considering and crediting in mitigation of Kubura's sentence the fact that he promptly followed his superior's order to stop the abuses in Vareš resulting in the immediate withdrawal of his troops.[1018]

355. The Appeals Chamber recalls its finding that Kubura took necessary and reasonable measures to prevent, though not to punish, his subordinates' acts of plunder in Vareš.[1019] In particular, the Appeals Chamber found that Kubura had knowledge sufficient to trigger a duty to prevent his subordinates from committing further acts of plunder in Vareš as of when he received orders alerting him to ongoing acts of plunder but that Kubura took necessary and reasonable measures, given the circumstances of the case, to prevent the plunder by "put[ting] a stop to the plunder once it had started so it would not be repeated".[1020] The Appeals Chamber considers that the Prosecution's arguments regarding the Trial Chamber's alleged error in considering and crediting, in mitigation of Kubura's sentence, his actions to stop and further prevent his subordinates' acts of plunder in Vareš are thereby rendered moot. The Appeals Chamber notes however, that any adjustment to Kubura's sentence on the basis that he satisfied his duty to prevent

[1015] *See supra* paras 246, 279.
[1016] *See* Kubura Appeal Brief, para. 56 (arguing that the Trial Chamber incorrectly found the plunder to be "systematic" because the looting involved only two areas, each taking place for only about one day, and that the two instances were separated by a period of five months).
[1017] Trial Judgement, paras 1939-1941, 1976-1977.
[1018] Prosecution Appeal Brief, paras 4.14, 4.18, 4.24-4.28. *See* also AT. 71.
[1019] *See supra* para. 272.
[1020] *See supra* paras 270-272, citing Trial Judgement, para. 1989.

his subordinates' acts of plunder in Vareš will be tempered in light of the Trial Chamber's decision to consider the same underlying actions as a mitigating circumstance.

D. Impact of the Appeals Chamber's findings on the sentences

356. The Appeals Chamber recalls that, pursuant to Rule 87(C) of the Rules regarding imposition of sentences, a Trial Chamber "shall impose a sentence in respect of each finding of guilt and indicate whether such sentences shall be served consecutively or concurrently, unless it decides to exercise its power to impose a single sentence reflecting the totality of the criminal conduct of the accused". In imposing a single sentence of five years' imprisonment upon Hadžihasanović,[1021] the Trial Chamber reflected the totality of his criminal conduct. The Appeals Chamber recalls that it has vacated parts of Hadžihasanović's convictions as a superior pursuant to Article 7(3) of the Statute under Counts 3 and 4 of the Indictment.[1022] The Appeals Chamber further recalls that the Trial Chamber did not err in its assessment of the relevant aggravating and mitigating factors as well as the individual circumstances in determining Hadžihasanović's sentence.

357. In light of the foregoing, the Appeals Chamber concludes that, based on the circumstances of the case, including the seriousness of the crime of which Hadžihasanović was convicted, and the quashing of those convictions outlined above, Hadžihasanović's sentence is reduced to a term of imprisonment of three years and six months of imprisonment.

358. The same reasoning applies to Kubura's sentence. Having vacated his conviction for failure to take necessary and reasonable measures to prevent, though not to punish, his subordinates' acts of plunder in Vareš,[1023] the Appeals Chamber reduces Kubura's sentence to a term of imprisonment of two years.

[1021] Trial Judgement, para. 2085.
[1022] *See supra* Section V(A): "Murder and Cruel Treatment in Bugojno as of August 1993"; Section V(C): "Murder and Cruel Treatment in Orašac in October 1993".
[1023] *See supra* Section VI(B): "Plunder in Vareš in November 1993".

VIII. DISPOSITION

For the foregoing reasons, **THE APPEALS CHAMBER**

PURSUANT TO Article 25 of the Statute and Rules 117 and 118 of the Rules;

NOTING the respective written submissions of the Parties and the arguments they presented at the hearings of 4 and 5 December 2007;

SITTING in open session, unanimously:

ALLOWS Hadžihasanović's appeal, in part, with respect to Ground 3; **REVERSES** his conviction for failing to take the necessary and reasonable measures to punish those responsible for the murder of Mladen Havranek (Count 3 of the Indictment) and the cruel treatment of six prisoners at the *Slavonija* Furniture Salon on 5 August 1993 (Count 4 of the Indictment), as well as his conviction for failing to take the necessary and reasonable measures to prevent or punish the cruel treatment at the *Gimnazija* School Building, the *Slavonija* Furniture Salon, the *Iskra* FC Stadium and the *Vojin Paleksić* Elementary School in Bugojno as of 18 August 1993 (Count 4 of the Indictment);

ALLOWS Hadžihasanovic's appeal, in part, with respect to Ground 4, concerning certain errors in the Disposition of the Trial Judgement with regard to his conviction entered under Count 4 of the Indictment for his failure to prevent or punish the cruel treatment at the Zenica Music School; **SETS ASIDE** the related portion of the Disposition of the Trial Judgement and **REPLACES** it with the following:

> COUNT 4: GUILTY of failure to prevent or punish cruel treatment at the Zenica Music School from 8 May 1993 to 20 August 1993 or 20 September 1993, in addition to failure to punish cruel treatment at the Zenica Music School from 26 January 1993 to 8 May 1993.

ALLOWS Hadžihasanović's appeal, in part, with respect to Ground 5; **REVERSES** his conviction for failing to take the necessary and reasonable measures to prevent the murder of Dragan Popović on 21 October 1993 (Count 3 of the Indictment) and his conviction for failing to take the necessary and reasonable measures to prevent cruel treatment at the Orašac camp from 15 October 1993 to 31 October 1993 (Count 4 of the Indictment);

REDUCES the sentence of five years of imprisonment imposed on Hadžihasanović by the Trial Chamber to a sentence of three years and six months of imprisonment, subject to credit being given under Rule 101(C) of the Rules for the period Hadžihasanović has already spent in detention; and

DISMISSES Hadžihasanović's appeal in all other respects;

ALLOWS Kubura's appeal, in part, with respect to Ground 2; **REVERSES** his conviction for failing to take the necessary and reasonable measures to prevent, though not to punish, plunder in Vareš on 4 November 1993 (Count 6 of the Indictment);

REDUCES the sentence of thirty months of imprisonment imposed on Kubura by the Trial Chamber to a sentence of two years' imprisonment; and

DISMISSES Kubura's appeal in all other respects;

DISMISSES the Prosecution's appeal in its entirety;

ORDERS that this Judgement shall be enforced immediately pursuant to Rule 118 of the Rules.

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

_____	_____	_____
Judge Fausto Pocar Presiding	Judge Mohamed Shahabuddeen	Judge Mehmet Güney
_____		_____
Judge Liu Daqun		Judge Theodor Meron

Dated this 22nd day of April 2008

At The Hague,
The Netherlands

[Seal of the International Tribunal]

IX. PROCEDURAL BACKGROUND

A. History of Trial Proceedings

359. An initial indictment against Enver Hadžihasanović, Amir Kubura and Mehmed Alagić was confirmed by Judge Fouad Riad on 13 July 2001.[1024] This indictment was amended three times further to motions for defects in its form.[1025] Following the death of Mehmed Alagić on 7 March 2003, the Trial Chamber ordered the close of the proceedings against him.[1026] The trial proceeded on the basis of the charges contained in the Third Amended Indictment of 26 September 2003 against Hadžihasanović and Kubura.[1027] Hadžihasanović and Kubura were charged under Article 7(3) of the Statute for failing to prevent or punish certain acts committed by their subordinates which constitute violations of the laws or customs of war.[1028]

360. On 2 and 4 August 2001, respectively, Hadžihasanović and Kubura voluntarily surrendered to the International Tribunal. Their initial appearance before the duty Judge Lal Chand Vohrah took place on 9 August 2001. They both entered pleas of not guilty to all of the charges against them. The trial commenced on 2 December 2003 and concluded on 15 July 2005. In all, 2,949 exhibits were tendered into evidence, 172 witnesses testified before the Trial Chamber, and 33 written statements under Rule 92*bis* of the Rules as well as three stipulations were admitted.[1029]

361. The Trial Judgement was rendered on 15 March 2006. The Trial Chamber, unanimously, found Hadžihasanović guilty, pursuant to Article 7(3) of the Statute, of the following crimes: murder as a violation of the laws or customs of war (Count 3); and cruel treatment as a violation of the laws or customs of war (Count 4). The Trial Chamber acquitted Hadžihasanović on all other counts of the Indictment.[1030] The Trial Chamber sentenced Hadžihasanović to a single term of five years' imprisonment. The Trial Chamber found Kubura guilty, pursuant to Article 7(3) of the

[1024] *Prosecutor v. Enver Hadžihasanović, Mehmed Alagić and Amir Kubura,* Case No. IT-01-47-I, Order on Review of the Indictment (IT-01-47), pursuant to Article 19 of the Statute and Order for Non-disclosure, 13 July 2001.
[1025] *Prosecutor v. Enver Hadžihasanović, Mehmed Alagić and Amir Kubura,* Case No. IT-01-47-PT, Amended Indictment, 11 January 2002; *Prosecutor v. Enver Hadžihasanović, Mehmed Alagić and Amir Kubura,* Case No. IT-01-47-PT, Second Amended Indictment, 15 August 2003; *Prosecutor v. Enver Hadžihasanović, Mehmed Alagić and Amir Kubura,* Case No. IT-01-47-PT, Third Amended Indictment, 26 September 2003.
[1026] *Prosecutor v. Enver Hadžihasanović and Amir Kubura,* Case No. IT-01-47-PT, Order Terminating Proceedings against Mehmed Alagić, 21 March 2003.
[1027] *Prosecutor v. Enver Hadžihasanović, Mehmed Alagić and Amir Kubura,* Case No. IT-01-47-PT, Third Amended Indictment, 26 September 2003.
[1028] *Prosecutor v. Enver Hadžihasanović and Amir Kubura,* Case No. IT-01-47-PT, Third Amended Indictment, 26 September 2003 (Hadžihasanović and Kubura were charged with 7 and 6 counts respectively).
[1029] Trial Judgement, para. 2125.
[1030] Count 1 (murder as a violation of the laws or customs of war); Count 2 (cruel treatment as a violation of the laws or customs of war); Count 5 (wanton destruction of cities, towns or villages not justified by military necessity as a violation of the laws or customs of war); Count 6 (plunder of public or private property as a violation of the laws or customs of war); Count 7 (destruction or wilful damage done to institutions dedicated to religion as a violation of the laws or customs of war).

Statute, of the following crime: plunder of public or private property as a violation of the laws or customs of war (Count 6). The Trial Chamber acquitted Kubura on all other counts of the Indictment.[1031] Kubura was sentenced to a single term of imprisonment of two years and six months.[1032]

B. The Appeal

1. Notices of Appeal

362. The Prosecution filed its Notice of Appeal on 18 April 2006.[1033] Kubura and Hadžihasanović filed their Notices of Appeal, respectively, on 13 and 18 April 2006.[1034]

2. Composition of the Appeals Chamber

363. By order of 26 April 2006, the President of the International Tribunal, Judge Fausto Pocar, designed the following Judges to form the Appeals Chamber in these proceedings: Judge Mohamed Shahabuddeen (Pre-Appeal Judge), Judge Andrésia Vaz, Judge Theodor Meron, Judge Wolfgang Schomburg.[1035]

364. On 27 April 2006, Judge Mehmet Güney was assigned to replace Judge Wolfgang Schomburg.[1036] On 14 February 2007, Judge Pocar assigned Judge Liu Daqun to replace Judge Andrésia Vaz.[1037]

3. Filing of the Appeal Briefs

(a) Hadžihasanović and Kubura's appeals

365. On 8 May 2006, Hadžihasanović filed a motion in which he sought an extension of time for the filing of his Appeal Brief until 45 days after the completion of a translation in B/C/S of certain sections of the Trial Judgement that were of particular importance to his appeal.[1038] The Prosecution

[1031] Counts 1 and 3 (murder as a violation of the laws or customs of war); Counts 2 and 4 (cruel treatment as a violation of the laws or customs of war); Count 5 (wanton destruction of cities, towns or villages, not justified by military necessity as a violation of the laws or customs of war).
[1032] Trial Judgement, Disposition.
[1033] Prosecution Notice of Appeal, 18 April 2006.
[1034] Notice of Appeal From Judgement on Behalf of Amir Kubura Filed Pursuant to Rule 108, 13 April 2006; Notice of Appeal from Judgement on Behalf of Enver Hadžihasanović and Request for Leave to Exceed the Page Limit, 18 April 2006.
[1035] Order Assigning Judges to a Case before the Appeals Chamber and Appointing a Pre-Appeal Judge, 26 April 2006.
[1036] Order Re-assigning a Judge to an Appeal before the Appeals Chamber, 27 April 2006.
[1037] Order Replacing a Judge in a Case before the Appeals Chamber, 14 February 2007.
[1038] Appellant's Motion for Variation of Time Limits Pursuant to Rule 127, 8 May 2006, paras 14-16.

took no position on Hadžihasanović's motion.[1039] On 27 June 2006, the Appeals Chamber granted Hadžihasanović's motion.[1040]

366. On 18 January 2007, Hadžihasanović filed a motion in which he requested an extension of the word limit for his Appeal Brief from 30,000 to 39,000 words. Hadžihasanović submitted that his request was justified by the length of the Trial Judgement, the number of exhibits entered into evidence in this case, the number of grounds of appeal and the need to address numerous exhibits and testimonies, including those not mentioned in the Trial Judgement.[1041] On 22 January 2007, the Pre-Appeal Judge found that the factors raised by Hadžihasanović did not constitute exceptional circumstances that distinguished the case and necessitated an extension of the word limit prescribed in the Practice Direction on the Length of Briefs and Motions ("Practice Direction on Length");[1042] the motion was denied.[1043] On the same day, Hadžihasanović sought to file a 45,000-word Appeal Brief and at the same time requested the Appeals Chamber to reconsider the decision taken on 22 January 2007.[1044] The Registry refused to file the document in view of its non-compliance with the Practice Direction on Length and the Decision of 22 January 2007. It informed Hadžihasanović that he should resubmit his Appeal Brief in accordance with that decision. On 25 January 2007, the Prosecution responded that the request for reconsideration was without merit and should be dismissed; it did not oppose the request for a five-day extension of time for the filing of Hadžihasanović´s Appeal Brief.[1045] On 30 January 2007, the Appeals Chamber denied Hadžihasanović's request for reconsideration but granted Hadžihasanović leave to file his Appeal Brief within five days from that decision, in full compliance with all relevant Rules and Practice Directions.[1046]

367. Hadžihasanović filed his Appeal Brief on 5 February 2007 confidentially, together with annexes amounting to approximately 32,000 pages, four DVDs and two CDs.[1047] On 20 February 2007, the Appeals Chamber rendered a decision which declared null and void the annexes filed by Hadžihasanović on the ground that they did not comply with paragraph C(6) of the

[1039] Prosecution's Response to Appellant Hadžihasanović's Motion for Variation of Time Limits pursuant to Rule 127, 12 May 2006, para. 5.
[1040] Decision on Motions for Extension of Time, Request to Exceed Page Limit and Motion to File a Consolidated Response to Appeal Briefs, 27 June 2006, para. 6.
[1041] Defence Motion on Behalf of Enver Hadžihasanović Seeking Leave to Exceed Words Limit for the Appeal Brief, 18 January 2007, para. 3.
[1042] IT/184/rev. 2, 16 September 2005.
[1043] Decision on Defence Motion on Behalf of Enver Hadžihasanović Seeking Leave to Exceed Words Limit for the Appeal Brief, 22 January 2007.
[1044] Motion on Behalf of Mr. Hadžihasanović for Reconsideration and Extension of Time to File Appeal Brief, 22 January 2007 ("Decision of 22 January 2007"), para. 4.
[1045] Prosecution's Response to Hadžihasanović's Motion for Reconsideration and Extension of time to File Appeal Brief, 25 January 2007.
[1046] Decision on Appellant's Motion for Reconsideration and Extension of Time Limits, 30 January 2006 ("Decision of 30 January 2007").
[1047] Appellant Brief on Behalf of Enver Hadžihasanović (Confidential), 5 February 2007.

Practice Direction on the Length and the Decision of 30 January 2007;[1048] it directed the Registry to remove the annexes from the case file and ordered Hadžihasanović, if he so wished, to re-file annexes to his Appeal Brief within one week of the date of that decision.[1049] Hadžihasanović confidentially re-filed annexes to his Appeal Brief on 27 February 2007.[1050]

368. On 22 May 2006, Kubura requested an English translation of the Trial Judgement in order to prepare his Appeal Brief, and sought an extension of 75 days to file his Appeal Brief upon receipt of this translation.[1051] The Prosecution did not oppose an extension of time but argued that 75 days was excessive as Kubura's Counsel could begin working on the brief before receiving the translation.[1052] On 27 June 2006, the Appeals Chamber decided that an extension of 60 days was appropriate.[1053] The English translation of the Trial Judgement was transmitted to the Parties on 23 November 2006 and the B/C/S translation of the Trial Judgement was transmitted to the Parties on 1 December 2006.[1054] At a Status Conference held on 11 December 2006, the Pre-Appeal Judge granted Hadžihasanović and Kubura further extensions of time for the filing of their Appeal Briefs until 22 January 2007. Kubura filed his Appeal Brief on 22 January 2007.[1055]

369. On 26 May 2006, the Prosecution requested the authorisation to file a consolidated response brief, arguing that Hadžihasanović and Kubura's cases were interconnected.[1056] On 27 June 2006, the Appeals Chamber granted the Prosecution's motion.[1057] On 25 January 2007, the Prosecution requested leave to file its Consolidated Response Brief 40 days from the filing of Hadžihasanović's Appeal Brief.[1058] On 30 January 2007, the Appeals Chamber allowed the Prosecution to file its Consolidated Response Brief within 40 days of the filing date of the latter of the two Appeal Briefs of Hadžihasanović and Kubura.[1059] The Prosecution filed its Consolidated Response Brief on 19 March 2007 confidentially.[1060] On 26 November 2007, the Prosecution filed its "Notice of

[1048] Paragraph C(6) of the Practice direction on Length provides that "an appendix will be of reasonable length, which is normally three times the page limit for that class of motion or brief (for a brief that is limited to 30 pages by the above practice direction, the appendix should be limited to 90 pages), although it is understood that the length of appendices will naturally vary more than the length of briefs".
[1049] Decision on Appeal Brief Annexes, 20 February 2007.
[1050] Appeal Brief Annexes (Confidential), 27 February 2007.
[1051] Motion on Behalf of Mr. Amir Kubura for Extension of Time to File his Appeal Brief, 22 May 2006.
[1052] Prosecution's Response to Appellant Kubura's Motion for Extension of Time to File Appeal Brief and Prosecution's Motion to File a Consolidated Response to Appeal Briefs, 26 May 2006, para. 12.
[1053] Decision on Motions for Extension of Time, Request to Exceed Page Limit and Motion to File a Consolidated Response to Appeal Briefs, 27 June 2006, paras 7-8.
[1054] Transcript of Status Conference, 11 December 2006, pp. 11,12.
[1055] Appeal Brief on Behalf of Amir Kubura, 22 January 2007.
[1056] Prosecution's Response to Appellant Kubura's Motion for Extension of Time to File Appeal Brief and Prosecution's Motion to File a Consolidated Response to Appeal Briefs, 26 May 2006, para. 14.
[1057] Decision on Motions for Extension of Time, Request to Exceed Page Limit and Motion to File a Consolidated Response to Appeal Briefs, 27 June 2006, paras 7-8.
[1058] Prosecution's Response to Hadžihasanović's Motion for Reconsideration and Extension of time to File Appeal Brief, 25 January 2007.
[1059] Decision on Appellant's Motion for Reconsideration and Extension of Time Limits, 30 January 2007, para. 14.
[1060] Prosecution's Response Brief (Confidential), 19 March 2007.

Withdrawal of Arguments in Prosecution Response Brief to Grounds of Appeal of Kubura" whereby it withdrew its arguments in its response to Kubura's first and second grounds of appeal that Kubura had waived his right to appeal the Trial Judgement's finding that he had knowledge of the plunder committed by members of the 7th Brigade.[1061]

370. Hadžihasanović and Kubura filed their Reply Briefs on 3 April 2007.[1062] Hadžihasanović's Reply Brief was filed confidentially.

371. On 4 May 2007, the Pre-Appeal Judge directed Hadžihasanović to file, within two weeks of the order, public versions of his Appeal Brief (including the annexes) and Reply Brief. The order also requested the Prosecution to file a public version of its Response Brief within two weeks of the order.[1063] On 18 May 2007, Hadžihasanović filed a public redacted version of his Appeal Brief and his Reply Brief and the Prosecution filed a public redacted version of its Response Brief.

(b) Prosecution's appeal

372. The Prosecution filed its Appeal Brief on 3 July 2006.[1064] On 21 July 2006, Kubura requested an extension of time to file his Response Brief until 40 days after receiving the English translation of the Trial Judgement.[1065] The Prosecution did not oppose the motion.[1066] On 26 July 2006, the Trial Chamber granted Kubura's motion.[1067] On 10 January 2007, Kubura filed his Response Brief.[1068]

373. On 28 July 2006, Hadžihasanović requested an extension of time to file his Response Brief, until 40 days after receiving the B/C/S translation of the specific pages referred to in his "Motion for Variation of Time Limits Pursuant to Rule 127 of May 2006".[1069] On 1 August 2006, the Prosecution responded that it did not oppose Hadžihasanović's motion; it requested that, in the event that Hadžihasanović's motion be granted, the decision "permit the Prosecution to file a Consolidated Reply Brief within 15 days from the filing of the latter of the two Respondent's Briefs" consistent with the decision granting Kubura's motion for an extension of time to file his

[1061] *See* Prosecution Response Brief, paras 313-315, 338-340.
[1062] Reply on Behalf of Hadžihasanović to the Prosecution's Response Brief (Confidential), 3 April 2007; Reply Brief on Behalf of Amir Kubura, 3 April 2007.
[1063] Order Concerning Confidential Filings, 4 May 2007.
[1064] Prosecution Appeal Brief, 3 July 2006. The related Book of Authorities was filed on 4 July 2006.
[1065] Motion on Behalf of Mr. Amir Kubura for Extension of Time to File Respondent's Brief, 21 July 2006.
[1066] Response to Appellant Kubura's Motion for Extension of Time to File Respondent's Brief, 24 July 2006.
[1067] Decision on Motion for Extension of Time, 26 July 2006.
[1068] Response Brief on Behalf of Mr. Amir Kubura to the Prosecution Appeal Brief of 3 July 2006, 10 January 2007.
[1069] Motion on Behalf of Enver Hadžihasanović Seeking an Extension of Time to File Respondent´s Brief, 28 July 2006, para. 17.

Response Brief.[1070] Hadžihasanović's motion was granted on 8 August 2006 and the Prosecution was permitted to file its Consolidated Reply Brief within 15 days of the filing of the later of the two Response Briefs of Hadžihasanović and Kubura.[1071] On 10 January 2007, Hadžihasanović filed his Response Brief.[1072] The Prosecution filed its Reply Brief on 30 January 2007.[1073]

4. Motions to strike

374. On 10 April 2007, the Prosecution filed a motion in which it requested the Appeals Chamber to strike paragraph 117 and Appendix A of Hadžihasanović's Reply Brief.[1074] It argued that Appendix A contained material from a newspaper article that did not form part of the record on appeal and thus was not properly before the Appeals Chamber, while paragraph 117 impermissibly referred to the documents contained in Appendix A.[1075]

375. Hadžihasanović responded that Appendix A contained information "which [was] credible, relevant and directly related to testimony of [Prosecution Witness Vlado] *Adamović* which [was] part of the trial record" and which "may help the Appeals Chamber in adjudicating the Ground of Appeal concerning Music School".[1076] He therefore requested the Appeals Chamber to deny the motion and consider whether Appendix A would be of assistance in assessing the testimony of Witness Adamović as a whole.[1077]

376. On 3 May 2007, the Appeals Chamber granted the motion and struck Appendix A and paragraph 117 of the Reply Brief.[1078]

5. Early release

377. On 15 March 2006, Kubura filed a request for early release.[1079] On 11 April 2006, the President of the International Tribunal granted Kubura's motion for early release.

[1070] Prosecution's Response to Motion on Behalf of Enver Hadžihasanović Seeking an Extension of Time to File Respondent's Brief, 1 August 2006, para. 5.
[1071] Decision on Motion for Extension of Time, 8 August 2006.
[1072] Response Brief on Behalf of Enver Hadžihasanović, 10 January 2007. The related Book of Authorities was filed on the same day.
[1073] Prosecution Reply Brief, 30 January 2007. The related Book of Authorities was filed on the same day.
[1074] Prosecution's Motion to Strike Annex A of Hadžihasanović's Reply Brief (Confidential), filed 10 April 2007, para. 3.
[1075] Prosecution's Motion to Strike Annex A of Hadžihasanović's Reply Brief (Confidential), filed 10 April 2007, paras 1-2.
[1076] Response on Behalf of Hadžihasanović to Prosecution's Motion to Strike Annex A of Hadžihasanović's Reply Brief, 19 April 2007, para. 3.
[1077] Response on Behalf of Hadžihasanović to Prosecution's Motion to Strike Annex A of Hadžihasanović's Reply Brief, 19 April 2007, para. 5.
[1078] Decision on motion to strike Appendix A and paragraph 117 of Hadžihasanović's Reply Brief, 3 May 2007, para. 6.
[1079] Motion on behalf of Amir Kubura for Early Release, 15 March 2007.

378. On 2 March 2007, Hadžihasanović confidentially filed a request for early release, in support of which he argued that: he always demonstrated exemplary behaviour during his detention on remand at the United Nations Detention Unit, he had served two-thirds of his sentence, the President of the International Tribunal had ordered early release of convicted persons during appeal proceedings in other cases.[1080] On 7 March 2007, the Prosecution responded that Hadžihasanović was not eligible for early release due to his pending appeal and the fact that he had not been sent to a State to serve his sentence; it further contended that although the President had previously awarded early release for convicted persons, a distinguishing feature was that in those cases there was no appeal pending.[1081] On 12 April 2007, the President of the International Tribunal denied Hadžihasanović's request since his conviction and sentence were not final.[1082]

6. Provisional release

379. On 16 April 2007, Hadžihasanović filed, partly confidentially, a motion for provisional release for the remainder of the duration of the appeal proceedings in this case.[1083] Hadžihasanović submitted that special circumstances existed which warranted his provisional release in that, as of 7 April 2007, he had served two-thirds of his sentence, or 1217 of 1826 days.[1084] The Prosecution opposed the motion on the ground that Hadžihasanović had not demonstrated the existence of special circumstances warranting the granting of provisional release.[1085] It submitted that time served is not a special circumstance for the purpose of an application for provisional release. On 20 June 2007, the Appeals Chamber decided that, on the facts of this case, detention amounting to approximately two-thirds of a term of imprisonment was sufficiently substantial to constitute a special circumstance warranting Hadžihasanović's provisional release.[1086] Hence, the Appeals Chamber granted Hadžihasanović's motion and ordered that he be provisionally released pending the hearing of his appeal.[1087] On 14 November 2007, the Appeals Chamber varied the terms of Hadžihasanović's provisional release for the duration of the appeal hearing.[1088] On 15 April 2008, the Appeals Chamber terminated Hadžihasanović's provisional release.[1089]

[1080] Request on behalf of Enver Hadžihasanović for Early Release pursuant to Rules 124 and 125 of the Rules, 2 March 2007.
[1081] Prosecution's Response to Hadžihasanović's Request for Early Release, 7 March 2007.
[1082] Decision of the President on Hadžihasanović's Request for Early Release (Confidential), 12 April 2007.
[1083] Motion on Behalf of Enver Hadžihasanović for Provisional Release, 16 April 2007 (the motion was filed publicly while its enclosures were filed confidentially).
[1084] Motion on Behalf of Enver Hadžihasanović for Provisional Release, 16 April 2007, paras 25, 27.
[1085] The Prosecution's Response to Motion on Behalf of Enver Hadžihasanović for Provisional Release, 20 April 2007, paras 1, 8-13.
[1086] Decision on Motion on Behalf of Enver Hadžihasanović for Provisional Release, 20 June 2007, para. 13.
[1087] Decision on Motion on Behalf of Enver Hadžihasanović for Provisional Release, 20 June 2007, para. 15.
[1088] Order Recalling Enver Hadžihasanović from Provisional Release, 14 November 2007.
[1089] Decision Terminating the Provisional Release of Enver Hadžihasanović, 15 April 2008.

7. Status conferences

380. Status conferences in accordance with Rule 65*bis* of the Rules were held on 1 September 2006, 11 December 2006, and 4 April 2007. In light of the fact that Kubura was granted early release on 11 April 2006, that Hadžihasanović was granted provisional release on 27 June 2006, and in agreement with the Parties, no further status conference was held.

X. GLOSSARY OF TERMS

A. List of Tribunal and Other Decisions

1. International Tribunal

ALEKSOVSKI
Prosecutor v. Zlatko Aleksovski, Case No. IT-95-14/1-A, Judgement, 24 March 2000 ("*Aleksovski* Appeal Judgement").

BABIĆ
Prosecutor v. Milan Babić, Case No. IT-03-72-A, Judgement on Sentencing Appeal, 18 July 2005 ("*Babić* Judgement on Sentencing Appeal").

BLAGOJEVIĆ AND JOKIĆ
Prosecutor v. Vidoje Blagojević and Dragan Jokić, Case No. IT-02-60-T, Judgement, 17 January 2005 ("*Blagojević and Jokić* Trial Judgement").

Prosecutor v. Vidoje Blagojević and Dragan Jokić, Case No. IT-02-60-A, Judgement, 9 May 2007 ("*Blagojević and Jokić* Appeal Judgement").

BLAŠKIĆ
Prosecutor v. Tihomir Blaškić, Case No. IT-95-14-T, Judgement, 3 March 2000 ("*Blaškić* Trial Judgement").

Prosecutor v. Tihomir Blaškić, Case No. IT-95-14-A, Judgement, 29 July 2004 ("*Blaškić* Appeal Judgement").

BRALO
Prosecutor v. Miroslav Bralo, Case No. IT-95-17-A, Judgement on Sentencing Appeal, 2 April 2007 ("*Bralo* Judgement on Sentencing Appeal").

BRĐANIN
Prosecutor v. Radoslav Brđanin, Case No. IT-99-36-T, Judgement, 1 September 2004 ("*Brđanin* Trial Judgement").

Prosecutor v. Radoslav Brđanin, Case No. IT-99-36-A, Judgement, 3 April 2007 ("*Brđanin* Appeal Judgement").

ČELEBIĆI
Prosecutor v. Zejnil Delalić, Zdravko Mucić, a.k.a. "Pavo", Hazim Delić and Esad Landžo, a.k.a. "Zenga", Case No. IT-96-21-T, Judgement, 16 November 1998 ("*Čelebići* Trial Judgement").

Prosecutor v. Zejnil Delalić, Zdravko Mucić, a.k.a. "Pavo", Hazim Delić and Esad Landžo, a.k.a. "Zenga", Case No. IT-96-21-A, Judgement, 20 February 2001 ("*Čelebići* Appeal Judgement").

DERONJIĆ
Prosecutor v. Miroslav Deronjić, Case No. IT-02-61-A, Judgement on Sentencing Appeal, 20 July 2005 ("*Deronjić* Judgement on Sentencing Appeal").

FURUNDŽIJA
Prosecutor v. Anto Furundžija, Case No. IT-95-17/1-A, Judgement, 21 July 2000 ("*Furundžija* Appeal Judgement").

GALIĆ
Prosecutor v. Stanislav Galić, Case No. IT-98-29-A, Judgement, 30 November 2006 ("*Galić* Appeal Judgement").

HADŽIHASANOVIĆ, ALAGIĆ AND KUBURA
Prosecutor v. Enver Hadžihasanović and Amir Kubura, Case No. IT-01-47-T, Decision on Motions for Acquittal pursuant to Rule 98*bis* of the Rules and Procedure and Evidence, 27 September 2004 ("Rule 98*bis* Decision").

Prosecutor v. Enver Hadžihasanović and Amir Kubura, Case No. IT-01-47-T, Decision on the request for Certification to Appeal the Decision rendered pursuant to Rule 98 *bis* of the Rules, 26 October 2004 ("Rule 98*bis* Certification Decision").

Prosecutor v. Enver Hadžihasanović and Amir Kubura, Case No. IT-01-47-T, Confidential Decision on the Admissibility of Certain Challenged Documents and Documents for Identification, 16 July 2004 ("Confidential Decision on Admissibility of Evidence").

HALILOVIĆ
Prosecutor v. Sefer Halilović, Case No. IT-01-48-T, Judgement, 16 November 2005 ("*Halilović* Trial Judgement").

Prosecutor v. Sefer Halilović, Case No. IT-01-48-A, Judgement, 16 October 2007 ("*Halilović* Appeal Judgement").

JELISIĆ
Prosecutor v. Goran Jelisić, Case No. IT-95-10-A, Judgement, 5 July 2001 ("*Jelisić* Appeal Judgement").

JOKIĆ
Prosecutor v. Miodrag Jokić, Case No. IT-01-42/1-A, Judgement on Sentencing Appeal, 30 August 2005 ("*Miodrag Jokić* Judgement on Sentencing Appeal").

KORDIĆ AND ČERKEZ
Prosecutor v. Dario Kordić and Mario Čerkez, Case No. IT-95-14/2-A, Judgement, 17 December 2004 ("*Kordić and Čerkez* Appeal Judgement") as corrected by *Prosecutor v. Dario Kordić and Mario Čerkez*, Case No. IT-95-14/2-A, Corrigendum to Judgement of 17 December 2004, 26 January 2005.

KRNOJELAC
Prosecutor v. Milorad Krnojelac, Case No. IT-97-25-A, Judgement, 17 September 2003 ("*Krnojelac* Appeal Judgement").

KUNARAC, KOVAČ AND VUKOVIĆ
Prosecutor v. Dragoljub Kunarac, Radomir Kovač and Zoran Vuković, Case Nos IT-96-23 and IT-96-23/1-T, Judgement, 22 February 2001 ("*Kunarac et al.* Trial Judgement").

Prosecutor v. Dragoljub Kunarac, Radomir Kovač and Zoran Vuković, Case Nos IT-96-23 and IT-96-23/1-A, Judgement, 12 June 2002 ("*Kunarac et al.* Appeal Judgement").

Z. KUPREŠKIĆ, M. KUPREŠKIĆ, V. KUPREŠKIĆ, JOSIPOVIĆ, PAPIĆ AND ŠANTIĆ
Prosecutor v. Zoran Kupreškić, Mirjan Kupreškić, Vlatko Kupreškić, Drago Josipović, Dragan Papić and Vladimir Šantić, a.k.a. "Vlado", Case No. IT-95-16-T, Judgement, 14 January 2000 ("*Kupreškić et al.* Trial Judgement").

Prosecutor v. Zoran Kupreškić, Mirjan Kupreškić, Vlatko Kupreškić, Drago Josipović and Vladimir Šantić, Case No. IT-95-16-A, Appeal Judgement, 23 October 2001 ("*Kupreškić et al.* Appeal Judgement").

KVOČKA, KOS, RADIĆ, ŽIGIĆ AND PRCAĆ
Prosecutor v. Miroslav Kvočka, Mlado Radić, Zoran Žigić and Dragoljub Prcać, Case No. IT-98-30/1-A, Judgement, 28 February 2005 ("*Kvočka et al.* Appeal Judgement").

LIMAJ, BALA AND MUSLIU
Prosecutor v. Fatmir Limaj, Haradin Bala and Isak Musliu, Case No. IT-03-66-T, Judgement, 30 November 2005 ("*Limaj et al.* Trial Judgement").

Prosecutor v. Fatmir Limaj, Haradin Bala and Isak Musliu, Case No. IT-03-66-A, Judgement, 27 September 2007 ("*Limaj et al.* Appeal Judgement").

MUCIĆ, DELIĆ AND LANDŽO
Prosecutor v. Zdravko Mucić, Hazim Delić and Esad Landžo, Case No. IT-96-21-A*bis*, Judgement on Sentence Appeal, 8 April 2003 ("*Mucić et al.* Judgement on Sentencing Appeal").

NALETILIĆ AND MARTINOVIĆ
Prosecutor v. Mladen Naletilić, aka "Tuta" and Vinko Martinović, aka "Štela", Case No. IT-98-34-A, Judgement, 3 May 2006 ("*Naletilić and Martinović* Appeal Judgement").

D. NIKOLIĆ
Prosecutor v. Dragan Nikolić, Case No. IT-94-2-A, Judgement on Sentencing Appeal, 4 February 2005 ("*Dragan Nikolić* Judgement on Sentencing Appeal").

B. SIMIĆ
Prosecutor v. Blagoje Simić, Case No. IT-95-9-A, Judgement, 28 November 2006 ("*Simić* Appeal Judgement").

M. SIMIĆ
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Prosecutor v. Milomir Stakić, Case No. IT-97-24-A, Judgement, 22 March 2006 ("*Stakić* Appeal Judgement").

STRUGAR
Prosecutor v. Pavle Strugar, Case No. IT-01-42-T, Trial Judgement, 31 January 2005 ("*Strugar* Trial Judgement").

TADIĆ
Prosecutor v. Duško Tadić a/k/a "Dule", Case No. IT-94-1-AR-72, Decision on the Defence Motion for Interlocutory Appeal on Jurisdiction, 2 October 1995 ("*Tadić* Jurisdiction Decision").

Prosecutor v. Duško Tadić, Case No. IT-94-1-A, Judgement, 15 July 1999 ("*Tadić* Appeal Judgement").

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VASILJEVIĆ
Prosecutor v. Mitar Vasiljević, Case No. IT-98-32-A, Judgement, 25 February 2004 ("*Vasiljević* Appeal Judgement").

2. ICTR

AKAYESU
Prosecutor v. Jean-Paul Akayesu, Case No. ICTR-96-4-A, Judgement, 1 June 2001 ("*Akayesu* Appeal Judgement").

GACUMBITSI
Prosecutor v. Sylvestre Gacumbitsi, Case No. ICTR-2001-64-A, Judgement, 7 July 2006 ("*Gacumbitsi* Appeal Judgement").

KAJELIJELI
Prosecutor v. Juvénil Kajelijeli, Case No. ICTR-98-44-A, Judgement and Sentence, 23 May 2005 ("*Kajelijeli* Appeal Judgement").

KAMBANDA
Jean Kambanda v Prosecutor, Case No. ICTR-97-23-A, Judgement, 19 October 2000 ("*Kambanda* Appeal Judgement").

KAYISHEMA AND RUZINDANA
Prosecutor v. Clément Kayishema and Obed Ruzindana, Case No. ICTR-95-1-A, Judgement (Reasons), 1 June 2001 ("*Kayishema and Ruzindana* Appeal Judgement").

MUHIMANA
Mikaeli Muhimana v. The Prosecutor, Case No. ICTR-95-1B-A, Judgement, 25 May 2007 ("*Muhimana* Appeal Judgement").

MUSEMA
Prosecutor v. Alfred Musema, Case No. ICTR-96-13-A, Judgement, 16 November 2001 ("*Musema* Appeal Judgement").

NAHIMANA, BARAYAGWIZA AND NGEZE
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NDINDABAHIZI
Emmanuel Ndindabahizi, Case No. ICTR-01-71-A, Judgement, 16 January 2007 ("*Ndindabahizi* Appeal Judgement").

NIYITEGEKA
Prosecutor v. Eliézer Niyitegeka, Case No. ICTR-96-14-T, Appeal Judgement, 9 July 2004 ("*Niyitegeka* Appeal Judgement").

NTAGERURA, BAGAMBIKI AND IMANISHIMWE
Prosecutor v. André Ntagerura, Emmanuel Bagambiki and Samuel Imanishimwe, Case No. ICTR-99-46-A, Judgement, 7 July 2006 ("*Ntagerura et al.* Appeal Judgement").

RUTAGANDA
Prosecutor v. Georges Anderson Nderubunwe Rutaganda, Case No. ICTR-96-3-A, Judgement, 26 May 2003 ("*Rutaganda* Appeal Judgement").

SIMBA
Aloys Simba v. the Prosecutor, Case No. ICTR-01-76-A, Judgement, 27 November 2007 ("*Simba* Appeal Judgement").

SEMANZA
Laurent Semanza v. Prosecutor, Case No. ICTR-97-20-A, Judgement, 20 May 2005 ("*Semanza* Appeal Judgement").

SEROMBA
The Prosecutor v. Athanase Seromba, Case No. ICTR-2001-66-A, Judgement, 12 March 2008 ("*Seromba* Appeal Judgement").

SERUSHAGO
Prosecutor v. Omar Serushago, Case No. ICTR-98-39-A, Reasons for Judgement, 6 April 2000 ("*Serushago* Sentencing Appeal Judgement").

B. List of Abbreviations, Acronyms and Short References

According to Rule 2(B) of the Rules of Procedure and Evidence, the masculine shall include the feminine and the singular the plural, and vice-versa.

ABiH	Army of Bosnia and Herzegovina
Additional Protocol I	Protocol Additional to the Geneva Conventions of 12 August 1949, and Relating to the Protection of Victims of International Armed Conflicts (Protocol I) of 8 June 1977, 1125 U.N.T.S. 3
a.k.a.	Also known as
AT.	Transcript page from hearings on appeal in the present case. All transcript page numbers referred to are from the unofficial, uncorrected version of the transcript, unless specified otherwise. Minor differences may therefore exist between the pagination therein and that of the final transcripts released to the public. The Appeals Chamber accepts no responsibility for the corrections to or mistakes in these transcripts. In case of doubt the video-tape of a hearing is to be revisited.
B/C/S	[The Bosnian/Serbian/Croatian languages]
BiH	Bosnia and Herzegovina
BritBat	British Battalion of UNPROFOR
CLSS	Conference and Language Services Section of the International Tribunal

D	Designates "Defence" for the purpose of identifying exhibits
ECMM/ EUMM	European Community Monitoring Mission/European Union Monitoring Mission
Hadžihasanović Appeal Brief	Appellant Brief on Behalf of Enver Hadžihasanović (Confidential), filed 5 February 2007, Public redacted version filed 18 May 2007
Hadžihasanović Final Trial Brief	Final Trial Brief on Behalf of Enver Hadžihasanović, 6 July 2005
Hadžihasanović Notice of Appeal	Notice of Appeal From Judgement on Behalf of Enver Hadžihasanović and Request for Leave to Exceed the Page Limit, filed 18 April 2006
Hadžihasanović Response Brief	Response Brief on Behalf of Enver Hadžihasanović, filed 10 January 2007
Hadžihasanović Reply Brief	Reply on Behalf of Enver Hadžihasanović to Prosecution's Response Brief (Confidential), filed 3 April 2007, Public redacted version filed 18 May 2007
Hague Regulations	Regulations Respecting the Laws and Customs of War on Land, annexed to Hague Convention IV
HVO	Croatian Defence Council
ICTR	International Criminal Tribunal for the Prosecution of Persons Responsible for Genocide and Other Serious Violations of International Humanitarian Law Committed in the Territory of Rwanda and Rwandan Citizens Responsible for Genocide and Other Such Violations Committed in the Territory of Neighbouring States Between 1 January 1994 and 31 December 1994
ICRC	International Committee of the Red Cross
Indictment	*Prosecutor v. Enver Hadžihasanović and Amir Kubura*, Case No. IT-01-47-PT, Third Amended Indictment, 26 September 2003
International Tribunal	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
JNA	Yugoslav Peoples' Army (Army of the Socialist Federal Republic of Yugoslavia)
Kubura Notice of Appeal	Notice of Appeal on Behalf of Amir Kubura filed Pursuant to Rule 108, filed 13 April 2006
Kubura Appeal Brief	Appeal Brief on Behalf of Mr. Amir Kubura, filed 22 January 2007
Kubura Response Brief	Response Brief on Behalf of Mr. Amir Kubura to the Prosecution Appeal Brief of 3 July 2006, filed 10 January 2006
Kubura Reply Brief	Reply Brief on Behalf of Mr. Amir Kubura, filed 3 April 2007

Kubura Final Trial Brief	Final Trial Brief on Behalf of Amir Kubura, filed 6 July 2005
OG	Operation(s) Group
P	Designates "Prosecution" for the purpose of identifying exhibits
Prosecution	Office of the Prosecutor
Prosecution Notice of Appeal	Prosecution's Notice of Appeal, filed 18 April 2006
Prosecution Appeal Brief	Prosecution Appeal Brief, filed 3 July 2006.
Prosecution Response Brief	Prosecution's Response Brief (Confidential), filed 19 March 2007, Public redacted version filed 18 May 2007
Prosecution Reply Brief	Prosecution Reply Brief, 30 January 2007
Rules	Rules of Procedure and Evidence of the International Tribunal
7th Brigade	7th Muslim Mountain Brigade
SFRY	Former Socialist Federal Republic of Yugoslavia
SFRY Criminal Code	Criminal Code of the Socialist Republic of Yugoslavia, adopted 28 September 1976 and entered into force on 1 July 1977
Statute	Statute of the International Tribunal for the former Yugoslavia, established by Security Council Resolution 827 (1993)
T.	Transcript page from hearings at trial in the present case. All transcript page numbers referred to are from the unofficial, uncorrected version of the transcript, unless specified otherwise. Minor differences may therefore exist between the pagination therein and that of the final transcripts released to the public. The Appeals Chamber accepts no responsibility for the corrections to or mistakes in these transcripts. In case of doubt the video-tape of a hearing is to be revisited.
UNPROFOR	United Nations Protection Force