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-01-42-A
	Date:	17 July 2008
	Original:	English

IN THE APPEALS CHAMBER

Before: **Judge Andrésia Vaz, Presiding**
Judge Mohamed Shahabuddeen
Judge Mehmet Güney
Judge Theodor Meron
Judge O-Gon Kwon

Registrar: **Mr. Hans Holthuis**

Judgement of: **17 July 2008**

PROSECUTOR

v.

PAVLE STRUGAR

PUBLIC

JUDGEMENT

The Office of the Prosecutor:

Ms. Helen Brady
Ms. Michelle Jarvis
Mr. Xavier Tracol
Ms. Laurel Baig

Counsel for the Accused:

Mr. Goran Rodić
Mr. Vladimir Petrović

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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 "Tribunal", respectively) is seized of two appeals[1] from the Judgement rendered by Trial Chamber II ("Trial Chamber") on 31 January 2005 in the case of *Prosecutor v. Pavle Strugar*, Case No. IT-01-42-T ("Trial Judgement").

A. BACKGROUND

2 Pavle Strugar ("Strugar") was born on 13 July 1933.[2] He is a retired Lieutenant-General of the then Yugoslav People's Army ("JNA"). On 12 October 1991, he assumed command of the Second Operational Group ("2 OG") and remained its commander until 1992.[3]

3 The events giving rise to this appeal relate to a military campaign led by JNA forces in October, November and December 1991 in and around Dubrovnik (Croatia).[4] The Trial Chamber found that on 6 December 1991, in the course of an attack ordered by Strugar against Sr|, a position held by Croatian forces on the heights above Dubrovnik, the Third Battalion of the 472nd Motorised Brigade ("3/472 mtbr") under the command of Captain Vladimir Kovačević ("Kovačević"), which was directly subordinated to the Ninth Military Naval Sector ("9 VPS") under the command of Admiral Miodrag Joki} ("Joki}"),[5] which was in turn directly subordinated to the 2 OG, shelled the Old Town of

[1] Defence Notice of Appeal, 2 March 2005 ("Defence Notice of Appeal"); Prosecution's Notice of Appeal, 2 March 2005 ("Prosecution Notice of Appeal"); Prosecution Appeal Brief, 17 May 2005 ("Prosecution Appeal Brief"); Defence Appeal Brief, 8 July 2005 ("Defence Appeal Brief").
[2] Defence Motion: Request for Providing Medical Aid in the Republic of Montenegro in Detention Conditions, 14 November 2005, para. 21.
[3] Trial Judgement, paras 24, 380.
[4] The broader municipality of Dubrovnik extends for approximately 120 kilometres along the coast of southern Dalmatia in Croatia and borders with Montenegro to the south and with Bosnia and Herzegovina to the east. The city of Dubrovnik is comprised of the area from Sustjepan to the northwest to Orsula in the southeast, and includes the island of Lokrum situated to the southeast of the Old Town (Trial Judgement, para. 19). The part of Dubrovnik which is known as the Old Town comprises an area of some 13.38 hectares enclosed by medieval city walls, is endowed with an exceptional architectural heritage and was recognized as a World Heritage site by UNESCO in 1979 (Trial Judgement, paras 20-21).
[5] Jokić and Kovačević were initially indicted together with Strugar and Milan Zec: *Prosecutor v. Pavle Strugar, Miodrag Joki}, Milan Zec and Vladimir Kovačević*, Case No. IT-01-42-I, Indictment, 22 February 2001.

Dubrovnik.[6] The Trial Chamber concluded that this shelling was deliberate, was not directed at actual or believed Croatian military positions, and caused extensive and large-scale damage to the Old Town.[7] The Trial Chamber held that the shelling of the Old Town resulted in the death of two persons[8] and caused injuries to two persons, none of them taking active part in hostilities.[9] It found that this shelling constituted an attack against civilians and civilian objects[10] and led to the destruction of property not justified by military necessity as well as the destruction of cultural property.[11]

4 The Prosecution charged Pavle Strugar with individual criminal responsibility under Article 7(1) of the Statute for ordering and aiding and abetting the offences mentioned above as well as with superior responsibility under Article 7(3) of the Statute for the same offences.[12] With respect to individual criminal responsibility under Article 7(1) of the Statute, the Trial Chamber was not satisfied that Strugar had ordered the attack on the Old Town, nor that he was aware of the substantial likelihood that such an attack would occur as a result of his order to attack Srđ.[13] Furthermore, it was not satisfied that Strugar had aided and abetted the attack on the Old Town.[14]

5 With respect to individual criminal responsibility under Article 7(3) of the Statute, the Trial Chamber found that Strugar had *de jure* authority over, as well as effective control of, the JNA forces involved in the shelling of the Old Town.[15] The Trial Chamber did not find that prior to the attack on Srđ, Strugar knew or had reason to know that his forces would shell the Old Town.[16] The

[6] Trial Judgement, paras 23, 113-118.
[7] *Ibid.*, paras 120-145, 176-214.
[8] *Ibid.*, paras 241-259, referring to Count 1 (murder, a violation of the laws or customs of war, under Article 3 of the Statute).
[9] *Ibid.*, paras 262-276, referring to Count 2 (cruel treatment, a violation of the laws or customs of war, under Article 3 of the Statute).
[10] *Ibid.*, paras 284-289, referring to Count 3 (attacks on civilians, a violation of the laws or customs of war, under Article 3 of the Statute) and Count 5 (unlawful attacks on civilian objects, a violation of the laws or customs of war, under Article 3 of the Statute).
[11] *Ibid.*, paras 313-330, referring to Count 4 (devastation not justified by military necessity, a violation of the laws or customs of war, under Article 3 of the Statute) and Count 6 (destruction or wilful damage done to institutions dedicated to religion, charity and education, the arts and sciences, historic monuments and works of art and science, a violation of the laws or customs of war, under Article 3 of the Statute).
[12] *Prosecutor v. Pavle Strugar*, Case No. IT-01-42-PT, Third Amended Indictment, 10 December 2003 ("Indictment").
[13] Trial Judgement, paras 347, 358.
[14] *Ibid.*, para. 356.
[15] *Ibid.*, paras 391, 414.
[16] *Ibid.*, para. 417.

Trial Chamber found however that he was informed around 7:00 a.m. of a protest by the European Community Monitor Mission (ECMM) to the Federal Secretary of National Defence of the Socialist Federal Republic of Yugoslavia (SFRY) of the shelling of the Old Town. It held that this information, in combination with his knowledge of previous incidents in which the Old Town had been shelled in October and November 1991, put him on notice of the clear and strong risk that the artillery under his command would shell the Old Town.[17] The Trial Chamber also found that Strugar did not ensure that he obtained reliable information regarding the shelling of the Old Town, did not take the necessary steps to ensure that it be stopped and did not institute any investigation in respect of it, nor did he take any disciplinary or other adverse measures against his subordinates.[18]

6 The Trial Chamber entered a conviction pursuant to Article 7(3) of the Statute only in respect of Count 3, attacks on civilians, and Count 6, destruction of or wilful damage to cultural property.[19] The Trial Chamber imposed a single sentence of eight years of imprisonment.[20]

B. The Appeal

7 In his Notice of Appeal, Strugar presented 100 errors of fact and law. In his Appeal Brief, Strugar sought to withdraw all alleged errors of fact and law presented in his Notice of Appeal which were not included in the Appeal Brief.[21] The withdrawal of these errors of law was confirmed by the then Pre-Appeal Judge on 6 September 2005.[22]

8 Strugar seeks an acquittal on all charges. Alternatively, he requests that he be given a new trial or that his sentence be significantly reduced. Moreover, under his fifth ground of appeal, Strugar seeks to have his request to terminate the proceedings granted on the grounds that he was, and still is, not fit to stand trial.[23] Since the acceptance of his request could render the remainder of

[17] *Ibid.*, para. 418.
[18] *Ibid.*, para. 446.
[19] *Ibid.*, paras 455, 478.
[20] *Ibid.*, para. 481.
[21] These are errors 1, 2, 13-17, 22-23, 33, 38-39, 41-43, 47-53, 56-63, 65-73, 75-76, 78, 81-82 and 92: Defence Appeal Brief, fn. 3.
[22] Status Conference on Appeal, AT. 22-23.
[23] Defence Appeal Brief, para. 255 referring to *Prosecutor v. Pavle Strugar*, Case No. IT-01-42-T, Defence Motion to Terminate Proceedings, 12 February 2004 (confidential) ("Defence Motion to

his and the Prosecution's appeals moot,[24] the Appeals Chamber will examine this ground of appeal first. The remaining grounds of appeal presented by Strugar include alleged errors of fact; alleged errors of law; alleged errors in establishing Strugar's individual criminal responsibility; and alleged errors in sentencing.[25]

9 The Prosecution sets forth three grounds of appeal against the Trial Judgement: alleged errors of fact and law relating to the scope of Strugar's duty to prevent the unlawful shelling of the Old Town; alleged errors relating to the consideration of cumulative convictions; and alleged sentencing errors.[26] The Prosecution seeks a reversal of the Trial Chamber's finding that Strugar did not have the obligation to prevent the shelling of the Old Town before the commencement of the attack against Srđ and a consequent adjustment in sentencing. The Prosecution further requests the entering of convictions under Counts 4 and 5 of the Indictment, and an increase in Strugar's sentence.

Terminate Proceedings"). The Appeals Chamber understands Strugar to submit that the proceedings should be considered terminated retroactively.

[24] See *Prosecutor v. Pavle Strugar*, Case No. IT-01-42-T, Decision re the Defence Motion to Terminate Proceedings, 26 May 2004 ("Decision of 26 May 2004"), para. 39, in which the Trial Chamber mentioned that the consequences of finding an accused unfit depend on the circumstance of a particular case and may include adjournment, discontinuance or abandonment of the trial; ordering the accused to undergo an appropriate treatment or taking other necessary measures to sufficiently alleviate the impairment; or, in some cases, ensuring legal assistance.

[25] The remaining alleged errors of law presented by Strugar are 3-12, 18-21, 24-32, 34-37, 40, 44-46, 54-55, 64, 74, 77, 79-80, 83-91 and 93-100; see Defence Notice of Appeal and Defence Appeal Brief.

[26] Prosecution Notice of Appeal; Prosecution Appeal Brief.

II. APPELLATE REVIEW

A. Standard for Appellate Review

10 On appeal, the parties must limit their arguments to legal errors that invalidate the decision of the Trial Chamber and to factual errors that result in a miscarriage of justice. These criteria are set forth in Article 25 of the Statute and are well established in the jurisprudence of the *ad hoc* Tribunals.[27] Article 25 of the Statute also states that the Appeals Chamber may affirm, reverse or revise the decisions taken by the Trial Chamber.

11 Any 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 decision. An allegation of an error of law which has no chance of changing the outcome of a decision may be rejected on that ground. However, even if the party's arguments are insufficient to support the contention of an error, the Appeals Chamber may still conclude for other reasons that there is an error of law.[28] It is necessary for any appellant claiming an error of law on the basis of the lack of a reasoned opinion to identify the specific issues, factual findings or arguments which, an appellant submits, the Trial Chamber omitted to address and to explain why this omission invalidated the decision.[29]

12 The Appeals Chamber reviews the Trial Chamber's impugned findings of law to determine whether or not they are correct.[30] Where the Appeals Chamber finds an error of law in the Trial Judgement arising from the application of the wrong legal standard, the Appeals Chamber will articulate the correct legal standard and review the relevant factual findings of the Trial Chamber accordingly.[31] In so doing, the Appeals Chamber not only corrects the legal error, but, when necessary, applies the correct legal standard to the

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[27] *Orić* Appeal Judgement, para. 7; *Had`ihasanovi} and Kubura* Appeal Judgement, para. 7; *Halilović* Appeal Judgement para. 6. For jurisprudence under Article 24 of the Statute of the ICTR, see *Ndindabahizi* Appeal Judgement, paras 8-10; *Ntagerura et al.* Appeal Judgement, paras 11-12; *Gacumbitsi* Appeal Judgement, paras 6-9.
[28] *Orić* Appeal Judgement, para. 8; *Had`ihasanovi} and Kubura* Appeal Judgement, para. 8; *Halilović* Appeal Judgement, para. 7. See also *Ntagerura et al.* Appeal Judgement, para. 11; *Semanza* Appeal Judgement, para. 7.
[29] *Had`ihasanovi} and Kubura* Appeal Judgement, para. 13; *Brđanin* Appeal Judgement, para. 9; *Kvočka et al.* Appeal Judgement, para. 25.
[30] *Orić* Appeal Judgement, para. 9; *Had`ihasanovi} and Kubura* Appeal Judgement, para. 9; *Halilović* Appeal Judgement, para. 8.
[31] *Id.*

evidence contained in the trial record and determines whether it is itself convinced beyond reasonable doubt as to the factual finding challenged by the appellant before the finding is confirmed on appeal.[32]

13 When considering alleged errors of fact, the Appeals Chamber will determine whether no reasonable trier of fact could have reached the verdict of guilt beyond reasonable doubt.[33] The Appeals Chamber bears in mind that, in determining whether or not a Trial Chamber's finding was reasonable, it "will not lightly disturb findings of fact by a Trial Chamber".[34] The Appeals Chamber applies the same standard of reasonableness to alleged errors of fact regardless of whether the finding of fact was based on direct or circumstantial evidence.[35] Furthermore, the Appeals Chamber recalls, as a general principle, the approach adopted in *Kupre{ki} et al.* wherein it was stated that:

> 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.[36]

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.[37]

14 The same standard of reasonableness and the same deference to factual findings applies 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

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[32] *Id.*; see also *Ntagerura et al.* Appeal Judgement, para. 136.
[33] *Had`ihasanovi} and Kubura* Appeal Judgement, para. 10; *Halilović* Appeal Judgement, para. 9; *Staki}* Appeal Judgement, para. 10.
[34] *Had`ihasanovi} and Kubura* Appeal Judgement, para. 11; *Blagojević and Jokić* Appeal Judgement, para. 9; *Limaj et al.* Appeal Judgement, para. 12; *Bagilishema* Appeal Judgement, para. 11; *Musema* Appeal Judgement, para. 18.
[35] *Had`ihasanovi} and Kubura* Appeal Judgement, para. 10; *Limaj et al.* Appeal Judgement, para. 12; *Blagojević and Jokić* Appeal Judgement, para. 226; *Brđanin* Appeal Judgement, para. 13. 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.
[36] *Kupre{ki} et al.* Appeal Judgement, para. 30.
[37] *Orić* Appeal Judgement, paras 10-11; *Had`ihasanovi} and Kubura* Appeal Judgement, para. 10; *Halilović* Appeal Judgement, para. 9; *Simi}* Appeal Judgement, para. 10; *Kvo~ka et al.* Appeal Judgement, para. 18; *Vasiljevi}* Appeal Judgement, para. 8.

of fact could have made the impugned finding.[38] Under Article 25(1)(b) of the Statute, like the accused, the Prosecution must demonstrate "an error of fact that occasioned a miscarriage of justice". Considering that it is the Prosecution that bears the burden at trial of proving the guilt of an accused beyond a reasonable doubt, the significance of an error of fact occasioning a miscarriage of justice is somewhat different for a Prosecution appeal against acquittal than for a defence appeal against conviction. 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.[39]

15 Furthermore, the Appeals Chamber reiterates that it does not review the entire trial record *de novo*; in principle, it only takes 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, if any.[40]

B. Standard for Summary Dismissal

16 The Appeals Chamber recalls that it has an inherent discretion to determine which of the parties' submissions merit a reasoned opinion in writing and that it may dismiss arguments which are evidently unfounded without providing detailed reasoning in writing.[41] Indeed, the Appeals Chamber's mandate cannot be effectively and efficiently carried out without focused contributions by the parties. In order for the Appeals Chamber to assess a party's arguments on appeal, the party is expected to present its case clearly, logically and exhaustively.[42] A party may not merely repeat on appeal arguments that did not succeed at trial, unless the party can demonstrate that the Trial Chamber's rejection of them constituted an error warranting the

[38] *Had`ihasanovi} and Kubura* Appeal Judgement, para. 12; *Halilović* Appeal Judgement, para. 11; *Limaj et al.* Appeal Judgement, para. 13.
[39] *Orić* Appeal Judgement, para. 12; *Had`ihasanovi} and Kubura* Appeal Judgement, para. 12; *Halilović* Appeal Judgement, para. 11.
[40] *Had`ihasanovi} and Kubura* Appeal Judgement, para. 9; *Brđanin* Appeal Judgement, para. 15; *Galić* Appeal Judgement, para. 8; *Bagilishema* Appeal Judgement, para. 11.
[41] See *Orić* Appeal Judgement, para. 13; *Halilović* Appeal Judgement, para. 12; *Brđanin* Appeal Judgement, para. 16; *Gacumbitsi* Appeal Judgement, para. 10; *Kamuhanda* Appeal Judgement, para. 10.
[42] *Orić* Appeal Judgement, para. 14; see also *Kunarac et al.* Appeal Judgement, para. 43.

intervention of the Appeals Chamber.[43] In addition, the Appeals Chamber will dismiss submissions as unfounded without providing detailed reasoning if a party's submissions are obscure, contradictory, vague or suffer from other formal and obvious insufficiencies.[44]

17 When applying these basic principles, the Appeals Chamber in *Brđanin* identified eight categories of deficient submissions on appeal which were liable to be summarily dismissed.[45] The Appeals Chamber in the present case has identified the following six categories as being most pertinent to the arguments of the parties.

1. Challenges to Factual Findings on Which a Conviction Does not Rely

18 An appellant must show on appeal that an alleged error of fact is a conclusion which no reasonable trier of fact could have reached and which occasioned a miscarriage of justice, defined as a "grossly unfair outcome in judicial proceedings, as when a defendant is convicted despite a lack of evidence on an essential element of the crime".[46] It is only these factual errors that will result in the Appeals Chamber overturning a Trial Chamber's decision.[47]

19 As long as the factual findings supporting the conviction and sentence are sound, errors related to other factual conclusions do not have any impact on the Trial Judgement. Accordingly, the Appeals Chamber declines, as a general rule, to discuss those alleged errors which have no impact on the conviction or sentence.[48] Where the Appeals Chamber considers that an appellant is challenging factual findings on which a conviction or sentence does not rely or making submissions that are clearly irrelevant to the Trial

[43] See *Halilović* Appeal Judgement, para. 12; *Blagojević and Jokić* Appeal Judgement, para. 10; *Brđanin* Appeal Judgement, para. 16; *Gacumbitsi* Appeal Judgement, para. 9.
[44] *Orić* Appeal Judgement, para. 14; *Limaj et al.* Appeal Judgement, para. 15; *Blagojević and Jokić* Appeal Judgement, para. 11.
[45] *Brđanin* Appeal Judgement, paras 17-31.
[46] *Ibid.*, para. 19; *Kunarac et al.* Appeal Judgement, para. 39; *Kupre{ki} et al.* Appeal Judgement, para. 29; *Furund`ija* Appeal Judgement, para. 37; *Simi}* Appeal Judgement, para. 10.
[47] *Brđanin* Appeal Judgement, para. 19; *Kordi} and Čerkez* Appeal Judgement, para. 19; *Furundžija* Appeal Judgement, para. 37.
[48] *Brđanin* Appeal Judgement, para. 21.

Chamber's factual findings, it will summarily dismiss that alleged error or argument ("category 1").[49]

2. Arguments That Fail to Identify the Challenged Factual Findings, That Misrepresent the Factual Findings, or That Ignore Other Relevant Factual Findings

20 The Appeals Chamber recalls that an appellant is expected to provide it with precise references to relevant transcript pages or paragraphs of the Trial Judgement to which challenge is being made.[50] Similarly, submissions which either misrepresent the Trial Chamber's factual findings or the evidence on which the Trial Chamber relies, or ignore other relevant factual findings made by the Trial Chamber will not be considered in detail.[51] As a general rule, where an appellant's references to the Trial Judgement are missing, vague or incorrect, the Appeals Chamber will summarily dismiss that alleged error or argument ("category 2").

3. Mere Assertions That the Trial Chamber Failed to Give Sufficient Weight to Evidence or Failed to Interpret Evidence in a Particular Manner

21 Mere assertions that the Trial Chamber failed to give sufficient weight to certain evidence, or should have interpreted evidence in a particular manner are liable to be summarily dismissed.[52] Similarly, where an appellant merely seeks to substitute its own evaluation of the evidence for that of the Trial Chamber[53] or claims that the Trial Chamber could not have inferred a certain conclusion from circumstantial evidence without offering an alternative inference or explaining why no reasonable Trial Chamber could have excluded such an alternative inference, such submissions will be dismissed without detailed reasoning[54] ("category 3").

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[49] *Ibid.*, para. 22.
[50] See Practice Direction on Formal Requirements for Appeals from Judgement (IT/201) of 7 March 2002 ("Practice Direction on Formal Requirements for Appeals from Judgement"), paras 1(c)(iii), 1(c)(iv), 4(b)(ii). See also *Halilović* Appeal Judgement, para. 13; *Blagojević and Jokić* Appeal Judgement, para. 11; *Brđanin* Appeal Judgement, para. 15; *Gacumbitsi* Appeal Judgement, para. 10.
[51] *Brđanin* Appeal Judgement, para. 23.
[52] *Ibid.*, para. 24.
[53] *Kunarac et al.* Appeal Judgement, para. 48. See also *Halilović* Appeal Judgement, para. 12; *Blagojević and Jokić* Appeal Judgement, para. 11; *Brđanin* Appeal Judgement, para. 24.
[54] *Brđanin* Appeal Judgement, para. 25.

4. Mere Assertions Unsupported by Any Evidence

22 Submissions will be dismissed without detailed reasoning where an appellant makes factual claims or presents arguments that the Trial Chamber should have reached a particular conclusion without advancing any evidence in support. Indeed, an appellant is expected to provide the Appeals Chamber with an exact reference to the parts of the trial record invoked in support of its arguments.[55] As a general rule, in instances where this is not done, the Appeals Chamber will summarily dismiss the alleged error or argument ("category 4").

5. Arguments That Challenge a Trial Chamber's Reliance or Failure to Rely on One Piece of Evidence

23 Submissions will be dismissed without detailed reasoning where an appellant merely disputes the Trial Chamber's reliance on one of several pieces of evidence to establish a certain fact, but fails to explain why the convictions should not stand on the basis of the remaining evidence. The Appeals Chamber will also summarily dismiss mere assertions that the Trial Chamber's finding was contrary to the testimony of a specific witness, or that the Trial Chamber should or should not have relied on the testimony of a specific witness, unless the appellant shows that an alleged error of fact occurred that occasioned a miscarriage of justice.[56] Similarly, submissions will be dismissed without detailed reasoning where an appellant merely argues that the testimony of a witness is uncorroborated.[57] Where the Appeals Chamber considers that an appellant makes such assertions without substantiating them, it will summarily dismiss that alleged error or argument ("category 5").

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[55] See Practice Direction on Formal Requirements for Appeals from Judgement (IT/201) of 7 March 2002 ("Practice Direction on Formal Requirements for Appeals from Judgement"), paras 1(c)(iii), 1(c)(iv), 4(b)(ii). See also *Halilović* Appeal Judgement, para. 13; *Blagojević and Jokić* Appeal Judgement, para. 11; *Brđanin* Appeal Judgement, para. 15; *Gacumbitsi* Appeal Judgement, para. 10.

[56] *Brđanin* Appeal Judgement, paras 27-28.

[57] The Appeals Chamber recalls that there is no legal requirement that the testimony of a single witness on a material fact be corroborated before it can be accepted as evidence: *Limaj et al.* Appeal Judgement, para. 203; *Kordi} and ^erkez* Appeal Judgement, para. 274; *Čelebići* Appeal Judgement, para. 506.

6. Mere Assertions that the Trial Chamber Must Have Failed to Consider Relevant Evidence

24 A Trial Chamber does not necessarily have to refer to the testimony of every witness and to every piece of evidence on the record[58] and failure to do so does not necessarily indicate lack of consideration.[59] This holds true "as long as there is no indication that the Trial Chamber completely disregarded any particular piece of evidence".[60] Such disregard is shown "when evidence which is clearly relevant to the findings is not addressed by the Trial Chamber's reasoning".[61] Where the Appeals Chamber finds that an appellant merely asserts that the Trial Chamber failed to consider relevant evidence, without showing that an alleged error of fact occasioned a miscarriage of justice, it will summarily dismiss that alleged error or argument[62] ("category 6").

[58] *Kvo~ka et al.* Appeal Judgement, para. 23.
[59] *Čelebići* Appeal Judgement, para. 481; *Kupre{ki} et al.* Appeal Judgement, para. 458.
[60] *Limaj et al.* Appeal Judgement, para. 86.
[61] *Ibid.*
[62] *Brđanin* Appeal Judgement, para. 24.

III. ALLEGED ERRORS IN THE TRIAL CHAMBER'S ESTABLISHMENT OF STRUGAR'S FITNESS TO STAND TRIAL (STRUGAR'S FIFTH GROUND OF APPEAL)

A. Introduction

25 On 26 May 2004, about six months after the commencement of the trial, the Trial Chamber denied a Defence motion seeking the termination of proceedings on the basis that Strugar was allegedly unfit to stand trial.[63] Strugar requests the Appeals Chamber to reverse the Decision of 26 May 2004, to conclude that he is not able to stand trial and thus to terminate the proceedings.[64] Given the nature of this ground of appeal, the Appeals Chamber will address it immediately, first recalling the relevant procedural background and then proceeding with the analysis of the parties' submissions.

B. Procedural Background

26 The question of Strugar's fitness to stand trial was first raised during the final pre-trial status conference held on 15 December 2003.[65] Counsel for Strugar submitted that Strugar was psychologically not fit to follow the trial proceedings due to his numerous health problems, which included dementia, psycho-organic dysfunction and Parkinson's disease aggravated by other medical conditions.[66] On the same day, Strugar filed a written motion seeking a medical examination under Rule 74 *bis* of the Rules in order, *inter alia*, to establish his ability to stand trial.[67] On 19 December 2003, the Trial Chamber concluded that there was, at that stage, no reason to order a further medical examination of Strugar.[68]

[63] *Prosecutor v. Pavle Strugar*, Case No. IT-01-42-T, Decision re Strugar Motion to Terminate Proceedings, 26 May 2004 ("Decision of 26 May 2004").
[64] Defence Notice of Appeal, paras 110-113.
[65] Trial Judgement, para. 510; T. 193-204, 248-251, 253-254. As a preliminary matter, the Appeals Chamber notes that, while some written submissions and decisions cited below were originally filed as confidential documents, the issue of Strugar's fitness to stand trial was "brought into the public arena" when the Trial Chamber decided to "receive the evidence on all [related] issues in open session" (T. 5505). Moreover, most of those filings, while remaining formally confidential, have been cited in subsequent public filings, including the trial transcripts, the Decision of 26 May 2004, status conferences and the parties' submissions on appeal.
[66] T. 193-194.
[67] *Prosecutor v. Pavle Strugar*, Case No. IT-01-42-T, Pavle Strugar's Request for Medical Examination Pursuant to Rule 74 *bis*, 15 December 2003 (confidential).
[68] *Prosecutor v. Pavle Strugar*, Case No. IT-01-42-T, Decision on the Defence Motion for a Medical Examination of the Accused Pursuant to Rule 74 *bis* of the Rules, 19 December 2003,

27 On 2 February 2004, Strugar filed a report from the medical expert allowed by the Registry of the Tribunal to evaluate his mental state, which concluded that he was not able to stand trial ("Lečić-Toševski Report").[69] The Trial Chamber decided to admit the Lečić-Toševski Report in evidence and to allow time for the Defence to file a formal motion and for the Prosecution to arrange for another medical evaluation.[70] On 12 February 2004, in response to the Trial Chamber's concerns about a certain number of issues raised in the Lečić-Toševski Report, Strugar filed a confidential *addendum* thereto.[71] On the same day, Strugar filed a motion seeking to terminate the proceedings on the basis that the Lečić-Toševski Report had concluded that he was unfit to stand trial.[72]

28 In essence, the Lečić-Toševski Report concluded that (i) Strugar suffered from a number of somatic and psychiatric diseases, including recurrent depression, vascular dementia, residual post-traumatic stress disorder, vertebrobasilar insufficiency, chronic renal failure, *etc.*; (ii) as a result of these overlapping illnesses, Strugar's cognitive abilities had deteriorated in judgement, thinking, general processing of information, as well as in impaired memory, learning, attention and concentration; and therefore (iii) Strugar did not fulfil the requirements for capacity to stand trial, because, although he was able to generally understand the trial and its purpose, he could not participate in it in a highly qualitative way and was unable to testify fully at trial due to his memory deficits.

29 On 17 February 2004, the Trial Chamber ordered an MRI scan of Strugar's brain, including T1-T2 images, with a view to facilitating his

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p. 3.

[69] *Prosecutor v. Pavle Strugar*, Case No. IT-01-42-T, Defence Notice & Confidential Annex, 2 February 2004 (confidential). This document was admitted into evidence by the Trial Chamber's oral decision of 29 April 2004 (T. 5710) as Exhibit D83. On 3 February 2004, Strugar moved for a stay in the proceedings until the matter of his fitness to stand trial was resolved by the Trial Chamber (T. 1688). The Trial Chamber ruled on continuation of the proceedings pending analysis of the Lečić-Toševski Report by the Prosecution and the Trial Chamber itself (T. 1695-1696).

[70] T. 1830, 1833-1836.

[71] *Prosecutor v. Pavle Strugar*, Case No. IT-01-42-T, *Addendum* [to the] Defence Notice & Confidential Annex, 12 February 2004 (confidential). This document was admitted into evidence by the Trial Chamber's oral decision of 29 April 2004 (T. 5710) as Exhibit D84. For the purposes of further discussion, the original Lečić-Toševski Report and its *addendum* are jointly referred to as "Lečić-Toševski Report".

[72] *Prosecutor v. Pavle Strugar*, Case No. IT-01-42-T, Defence Motion to Terminate Proceedings, 12 February 2004 (confidential).

examination by experts retained by the Prosecution given that the Lečić-Toševski Report relied, in part, on an MRI scan performed in 2002.[73]

30 On 22 March 2004, the Prosecution filed the medical report prepared by its experts, Drs. Blum, Folnegović-Smalc and Matthews, in connection with Strugar's ability to (i) understand the charges and the proceedings; (ii) instruct his Counsel; (iii) testify; (iv) enter a plea; and (v) understand the consequences of conviction ("Blum *et al.* Report").[74] The Blum *et al.* Report concluded positively with respect to all the above issues, specifying that Strugar's cognitive impairments were too mild to prevent him from understanding the current proceedings and assisting his defence.[75]

31 Drs. Blum, Lečić-Toševski and Matthews were heard by the Trial Chamber and examined by the parties on 28 and 29 April 2004.[76] In his submissions on the matter, Strugar argued that the Trial Chamber should not rely on the Blum *et al.* Report as it gave an "erroneous and biased interpretation" of his condition and should therefore uphold the conclusions of the Lečić-Toševski Report and terminate the proceedings.[77] In support of these claims, Strugar submitted, *inter alia*, that (i) the Lečić-Toševski Report was professional, all-encompassing and based on all relevant scientific methods;[78] (ii) the Lečić-Toševski Report established that Strugar was not fit to stand trial due to a considerable lack of cognitive abilities;[79] (iii) the Blum *et al.* Report contained

[73] *Prosecutor v. Pavle Strugar*, Case No. IT-01-42-T, Order for a Magnetic Resonance Imaging Scan of the Accused, 17 February 2004 (confidential).
[74] *Prosecutor v. Pavle Strugar*, Case No. IT-01-42-T, Prosecution's Submission of Medical Report, 22 March 2004 (confidential). This document was admitted into evidence by the Trial Chamber's oral decision of 29 April 2004 as Exhibit P185 (T. 5710).
[75] The Blum *et al.* Report concluded that Strugar had mildly decreased memory and occasional word-finding difficulty, as well as some decreased mathematical and visual-spatial skills which, however, did not impact his ability to stand trial at that time (p. 16). According to the Blum *et al.* Report, the MRI performed in 2004 did not show significant changes other than normal aging and did not indicate any major anatomic damage (pp. 16-17). The authors of the said Report neither diagnosed post-traumatic stress disorder nor major depressive disorder (p. 17). They also mentioned that his tearfulness was consistent with the circumstances and that his consideration of suicide as an option in case of a conviction was expressed as a rational alternative (p. 17).
[76] Bennett Blum, T. 5507-5540; Dusica Lečić-Toševski, T. 5627-5676; Daryl Matthews, T. 5677-5711. Also see the parties' written submissions filed pursuant to the Trial Chamber's oral decision of 29 April 2004 (T. 5711): *Prosecutor v. Pavle Strugar*, Case No. IT-01-42-T, Defence Submission: In Compliance with Trial Chamber Order, 4 May 2004 (confidential) ("Strugar Submissions of 4 May 2004"); *Prosecutor v. Pavle Strugar*, Case No. IT-01-42-T, Prosecution's Submissions on the Fitness of the Accused to Stand Trial, 5 May 2004 (confidential) ("Prosecution Submissions of 5 May 2004").
[77] Strugar Submissions of 4 May 2004, paras 37, 39.
[78] *Ibid.*, paras 5, 7.
[79] *Ibid.*, paras 7-9.

"numerous omissions and ambiguities" and was based on an arbitrary selection of "convenient parts of the provided medical documentation";[80] (iv) the quality of the MRI performed in 2004 was so poor that it did not allow for an estimation of the progression of the vascular dementia since 2002;[81] and (v) the findings of the Blum *et al.* Report in relation to Strugar's cognitive abilities to stand trial were deficient.[82] The Prosecution essentially submitted that (i) the threshold test for determining competency applied by the Lečić-Toševski Report was incorrect,[83] and (ii) its three experts were more qualified for this task and used more relevant methods of evaluation.[84]

32 In its Decision of 26 May 2004, the Trial Chamber accepted the opinion reached by the Blum *et al.* Report and considered that Strugar was fit to stand trial.[85] On 17 June 2004, the Trial Chamber denied Strugar's request seeking certification of appeal against its Decision of 26 May 2004.[86]

C. Preliminary Matter – Decision on Certification

33 The main basis for the Decision on Certification was that the resolution of this matter would not materially advance the proceedings because the trial was already well advanced and was expected to conclude fairly quickly.[87] The Trial Chamber also noted that Strugar would not suffer any prejudice from this decision because he could still choose to raise this matter in the framework of an appeal against the Trial Judgement and, if the Appeals Chamber were to grant such ground of appeal, any conviction entered against him would be quashed.[88]

34 The Appeals Chamber is of the opinion that the issue of an accused's fitness to stand trial is of such importance that it may generally be regarded as "an issue that would significantly affect the fair and expeditious conduct of the

[80] *Ibid.*, paras 10-11.
[81] *Ibid.*, paras 16-18, 32.
[82] *Ibid.*, paras 19-24.
[83] Prosecution Submissions of 5 May 2004, paras 5-10, 12-14.
[84] *Ibid.*, paras 11, 15-16.
[85] Decision of 26 May 2004, paras 50, 52.
[86] *Prosecutor v. Pavle Strugar*, Case No. IT-01-42-T, Decision on Defence Motion for Certification, 17 June 2004 ("Decision on Certification").
[87] *Ibid.*, para. 7.
[88] *Ibid.*, para. 8.

proceedings or the outcome of the trial" under Rule 73(B) of the Rules.[89] Absent certain exceptions, such as when an accused's submissions in support of his inability to stand trial are frivolous or manifestly without merit, the immediate resolution by the Appeals Chamber of any question of fitness would appear to be essential in that any decision that an accused is not fit to stand trial would necessarily materially advance the proceedings. Correspondingly, the prejudice to the accused resulting from continuing the trial while he or she is unfit to stand would amount to a miscarriage of justice.[90] In the instant case, this matter would have merited deeper consideration by the Appeals Chamber

[89] The Appeals Chamber notes that in a different case, Trial Chamber III also denied a request for certification against a decision concerning the accused's fitness to stand trial (*Prosecutor v. Jovica Stanišić and Franko Simatović*, Case No. IT-03-69-PT, Decision on Motion Re Fitness to Stand Trial, 10 March 2008 (confidential and *ex parte*) ("*Stanišić* Decision of 10 March 2008")) on the grounds that the Defence in that case did not show that the criteria of Rule 73(B) of the Rules had been met - *Prosecutor v. Jovica Stanišić and Franko Simatović*, Case No. IT-03-69-PT, Decision on Defence Motion Requesting Certification for Leave to Appeal, 16 April 2008, paras 4-6.

[90] *Cf. R. v. Podola* [1959] Cr. App. 3 W.L.R. 718: "If a convicted person appeals against his conviction on the ground that the hearing of the preliminary issue was open to objection for error in law, so that he should never have been tried on the substantive charge at all, we are of opinion that this court has jurisdiction to entertain the appeal. [...] [A] convicted person is entitled to contend [...] that he 'should not have been given in charge to the jury as he was, or have been made the subject of any verdict at all, but should have had the proceedings stopped at the outset.'"

Ngatayi v. R [1980] 147 CLR 1, High Court of Australia, p. 14: "Before any trial on an issue of guilt, the issue of capacity is to be decided by a jury empanelled specially to try that issue of capacity [...] The question of whether Mr Ngatayi was capable of understanding the proceedings was not an issue on the trial of his guilt. It is not satisfactory to excuse the holding of a trial at which this would be the issue because of conclusions based on evidence given at trial in which it was not an issue, Special leave to appeal should be granted. Because the statutory procedure intended for the applicant's protection has not been followed, the appeal should be allowed."

Kesavarajah v. R [1994], 181 CLR 230, High Court of Australia, pp. 246-248: "There is simply no point in embarking on a lengthy trial with all the expense and inconvenience to jurors that it may entail if it is to be interrupted by reason of some manifestation or exacerbation of a debilitating condition which can affect the accused's fitness to be tried. Of course, that is not to exclude from the jury's consideration the question whether the condition is such that difficulties can be accommodated by an adjournment if and when they arise. [...] For our part, although the charge to the jury was almost complete, we do not consider that the appellant's fitness to be tried became an immaterial consideration. [...] Notwithstanding that the trial was drawing to its close, the possibility remained that the appellant might be called upon to participate in the proceedings to protect his own interests. [...] Consequently, at this late stage of the trial, a serious question as to the appellant's fitness to be tried again arose, requiring the determination of a jury. [...] The object of s 393 is to ensure that a trial does not proceed in the case of an accused who is unfit to be tried; in other words, a person who is unfit to be tried should not be subject to trial resulting in the risk of his or her conviction. [...] In the result, the appeal should be allowed, the conviction quashed and a new trial ordered."

Malaysia, High Court of Muar, *Public Prosecutor v. Misbah Bin Saat* [1997] 3 MLJ 495, p. 504: "It should be observed that though s 342(1) of the CPC appears to cover a situation where the question of the accused's unsoundness of mind arises when the trial has already commenced, the inquiry by the court as to the fitness of the accused person ought to be determined forthwith when it comes to the knowledge of the court, and ought not to be postponed until after the close of the prosecution's case. It is the duty of the court either at the commencement of the trial, or at any stage during the course of the trial, when the question of fitness to stand trial is raised, to determine that issue immediately."

if not for the fact that the parties have not raised the issue in the context of their appeals.

D. Arguments of the Parties

35 Strugar submits that the Trial Chamber erred in concluding that he was fit to stand trial. In his submission, the Trial Chamber erred by not assessing his overall health condition as well as by accepting the opinion presented in the Blum *et al.* Report.[91] More specifically, Strugar alleges that the evaluation of his fitness to stand trial performed in the Blum *et al.* Report was erroneous, because it (i) neglected the impact of his somatic diseases;[92] (ii) incorrectly assessed the state of his brain on the basis of an MRI which was not adequately performed and, consequently, did not allow for an evaluation of the degree of his vascular dementia;[93] and (iii) established his fitness to stand trial on the basis of inadequate and incomplete diagnostic methods, which most notably ignored his memory problems.[94] Therefore, he submits that the Trial Chamber erred in fact since its Decision of 26 May 2004 relied on erroneous, incomplete and inaccurate conclusions of the Blum *et al.* Report and erroneously rejected the Lečić-Toševski Report.[95]

36 Moreover, Strugar submits that the Trial Chamber erred in accepting the Blum *et al.* Report's conclusion that Strugar was able to testify before the Tribunal and stresses that this decision has direct repercussions on his basic right to testify, as guaranteed by the Statute and the Rules.[96] Strugar suggests that this conclusion did not include consideration of whether he was able to testify without putting him in a "procedurally and materially inferior situation".[97] He also argues that the Trial Chamber erroneously held that, while he was somewhat impaired in his capacity to testify, this impairment could be

[91] Defence Appeal Brief, paras 246, 254.
[92] *Ibid.*, paras 247-248, 254. Strugar submits in particular that, by failing to evaluate the impact of his somatic diseases on his ability to stand trial, the Blum *et al.* Report offered erroneous conclusions on his overall health condition (Defence Brief in Reply, 1 September 2005 ("Defence Reply Brief"), para. 110).
[93] Defence Appeal Brief, para. 249; Defence Reply Brief, para. 111.
[94] Defence Appeal Brief, paras 250, 254; Defence Reply Brief, para. 112.
[95] Defence Appeal Brief, paras 246, 254; see also Defence Reply Brief, para. 109, where Strugar emphasizes that his claim with respect to errors in the Blum *et al.* Report is relevant to the present appellate proceedings, since, as a result of the Trial Chamber's reliance on its conclusions, these errors became those of the Trial Chamber.
[96] Defence Appeal Brief, para. 253.
[97] *Ibid.*, para. 251.

alleviated by the assistance of his Counsel. On the contrary, he avers that his Counsel cannot assist him in matters such as memory or concentration.[98]

37 In sum, Strugar requests the Appeals Chamber to reverse the Decision of 26 May 2004, to decide on this matter relying on the findings of the Lečić-Toševski Report, which concluded that Strugar was not fit to stand trial,[99] and therefore to grant the "Defence Motion to Terminate Proceedings" of 12 February 2004.[100]

38 The Prosecution responds that the Trial Chamber committed no error of law or fact in establishing Strugar's fitness to stand trial.[101] The Prosecution submits that Strugar fails to show how the Trial Chamber erred in accepting the conclusions of the Blum *et al.* Report and in rejecting those of the Lečić-Toševski Report.[102] The Prosecution observes that the Decision of 26 May 2004 was based on the reports of experts appointed by both parties, whom the Trial Chamber found to be in agreement "on most of the relevant elements".[103] In addition, the Prosecution submits that the key issue before the Appeals Chamber is not whether the conclusions of the Blum *et al.* Report were erroneous, but whether the Trial Chamber erred in accepting them.[104]

39 With respect to the conclusions reached by the Lečić-Toševski Report, the Prosecution argues that the Trial Chamber properly rejected them as they were based on a standard for the assessment of Strugar's fitness for trial (whether he was able to "fully" comprehend the proceedings) which is incorrect and inconsistent with the one used by the Trial Chamber.[105] In addition, the Prosecution argues that the author of the Lečić-Toševski Report has never previously assessed an accused's fitness to stand trial and drew unreasonable inferences from her examination of Strugar.[106]

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[98] *Ibid.*, para. 252.
[99] *Ibid.*, para. 255, citing Lečić-Toševski Report.
[100] Defence Appeal Brief, para. 255.
[101] Prosecution Respondent's Brief, para. 6.5.
[102] *Ibid.*, paras 6.5, 6.18.
[103] *Ibid.*, para. 6.4, citing the Decision of 26 May 2004, para. 49.
[104] Prosecution Respondent's Brief, paras 6.9, 6.16.
[105] *Ibid.*, paras 6.6-6.8.
[106] *Ibid.*, para. 6.7.

E. Discussion

40 Strugar does not expressly contest the legal standard applied by the Trial Chamber with respect to his fitness to stand trial. However, he does submit that the Appeals Chamber should rely on the conclusions drawn in the Lečić-Toševski Report, which, according to paragraph 48 of the Decision of 26 May 2004, was based upon an incorrect test for fitness to stand trial.[107] Moreover, both parties offer extensive arguments related to the methods and thresholds used by their experts to reach conclusions on Strugar's fitness to stand trial. Therefore, the Appeals Chamber will first determine the correctness of the standard applied by the Trial Chamber.

1. Legal Standard to Establish an Accused's Fitness to Stand Trial

(a) Decision of 26 May 2004

41 The Trial Chamber noted that, while there were no statutory provisions regulating the matter of fitness to stand trial, a certain number of capacities required for the effective exercise of procedural rights are implicit in Articles 20 and 21 of the Statute.[108] The Trial Chamber found that the exercise of such rights would "presuppose that an accused has a level of mental and physical capacity"[109] and that such exercise "may be hindered, or even precluded, if an accused's mental or bodily capacities, especially the ability to understand, *i.e.* to comprehend, is [*sic*] affected by mental or somatic disorder".[110] On the basis of this analysis as well as consideration of some examples from other international and national jurisdictions and instruments,[111] the Trial Chamber concluded that "fitness or competence to stand trial is a matter which, although undoubtedly connected with the physical and mental condition of an accused person, is not confined to establishing whether a given disorder is present [...] but rather is better approached by determining whether he is able to exercise effectively his rights in the proceedings against him".[112] Therefore, the Trial Chamber set out a non-exhaustive list of the capacities to be evaluated when assessing an accused's fitness to stand trial:

[107] Defence Appeal Brief, para. 246.
[108] Decision of 26 May 2004, paras 20-21.
[109] *Ibid.*, para. 21.
[110] *Ibid.*, para. 23.
[111] *Ibid.*, paras 30-34.
[112] *Ibid.*, para. 35.

- to plead,
- to understand the nature of the charges,
- to understand the course of the proceedings,
- to understand the details of the evidence,
- to instruct counsel,
- to understand the consequences of the proceedings, and
- to testify.[113]

42 With respect to the scope of such capacities, the Trial Chamber noted that "what is required is a *minimum* standard of overall capacity below which an accused cannot be tried without unfairness or injustice".[114] More specifically, the Trial Chamber held that

> In the context of the Statute of the Tribunal, it may be said that the threshold is met when an accused has those capacities, viewed overall and in a reasonable and commonsense manner, at such a level that it is possible for the accused to participate in the proceedings (in some cases with assistance) and sufficiently exercise the identified rights, *i.e.* to make his or her defence.[115]

The Trial Chamber also emphasized that

> the issue of fitness to stand trial is not determined merely by the diagnosis of the mental and somatic disorder from which the Accused suffers, or by identifying which of those conditions *can* affect the functioning of the Accused's mind. These are but possible steps along the path to the material issue; which is the competence of the Accused, notwithstanding any physical or mental disorders from which he might suffer, to conduct his defence in the sense set out earlier in these reasons.[116]

43 The Trial Chamber further concluded that an accused should bear the burden of proof that he or she is unfit to stand trial and that the standard of such proof should be "merely 'the balance of probabilities'".[117]

(b) Discussion

44 In its analysis on the issue at hand, the Trial Chamber referred to the Report of the Secretary-General of the United Nations and held "that in the absence of express provisions it would be necessary for the Tribunal 'to decide on various personal defences which may relieve a person of individual criminal responsibility, such as minimum age or mental incapacity, drawing upon general principles of law recognized by all nations'".[118] Although this issue is

[113] *Ibid.*, para. 36.
[114] *Ibid.*, para. 37 (emphasis original).
[115] *Ibid.*, para. 37.
[116] *Ibid.*, para. 46 (emphasis original).
[117] *Ibid.*, para. 38.
[118] *Ibid.*, para. 20, referring to Report of the Secretary-General Pursuant to Part 2 of Security Council Resolution 808 (1993), 3 May 1993, para. 58.

one of substantive law and the issue at hand is of a procedural nature, the Appeals Chamber agrees with the approach of the Trial Chamber that "the issue of fitness to stand trial appears to be on a similar footing".[119] Hence, after having considered the relevant jurisprudence of this Tribunal and the ICTR, the Appeals Chamber finds it instructive to briefly review the underlying principles with respect to an accused's fitness to stand trial in other jurisdictions.

(i) Jurisprudence of the Tribunal and the ICTR

45 The Appeals Chamber notes that Strugar was not the first accused before this Tribunal or the ICTR whose fitness to stand trial had been evaluated before or during trial.[120] While in the *Landžo* and *Talić* Decisions, the Trial Chambers did not specify any criteria for such an evaluation (referring only to the relevant expert reports and the accused's behaviour during the proceedings),[121] the *Ngeze* Decision ordered an evaluation of the accused's physical and mental health with respect to the following factors: (i) "his ability to stand trial and his capacity to participate meaningfully in the said trial"; (ii) "his mental capacity to communicate with his Defence Counsel in a comprehensible manner, and his ability to instruct the said Counsel, with regard to his defence"; and (iii) "the prognosis and proposed treatment, if any".[122] The Appeals Chamber further notes that the legal standard of evaluating a person's fitness to stand trial used by the Trial Chamber in this case, as well as its definition of the standard of proof, have since been fully endorsed by other Trial Chambers.[123]

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[119] Decision of 26 May 2004, para. 20.
[120] See, *e.g.*, *Prosecutor v. Momir Talić*, Case No. IT-99-36/1-T, Decision regarding Fitness of the Accused to Stand Trial, 29 April 2003 (confidential) ("*Talić* Decision"); *Prosecutor v. Žejnil Delalić et al.*, Case No. IT-96-21-T, Order on the Prosecution's Request for a Formal Finding of the Trial Chamber that the Accused Landžo Is Fit to Stand Trial, 23 June 1997 ("*Landžo* Decision"); see also *Nahimana et al.* Trial Judgement, para. 52, referring to *Prosecutor v. Ferdinand Nahimana et al.*, Case No. ICTR-99-52-T, [Decision on] Motion by the Defence in Accordance with Rule 74 *bis*, 20 February 2001 (confidential) ("*Ngeze* Decision").
[121] *Landžo* Decision, p. 2.
[122] *Ngeze* Decision, pp. 2-3; see also *Prosecutor v. Ferdinand Nahimana et al.*, Case No. ICTR-99-52-T, Hearing of 20 February 2001, T. 108-110. The Appeals Chamber notes that in that case, the expert concluded that Hassan Ngeze suffered from an incurable "personality defect", but that he was still fit to stand trial (see Hearing of 20 March 2001, T. 79-80 (closed session)).
[123] *Stanišić* Decision of 10 March 2008; *Prosecutor v. Milorad Trbić*, Case No. IT-05-88/1-PT, Order in Regard to the Preparation for Trial, 21 March 2007 (confidential), p. 3; *Prosecutor v. Jovica Stanišić and Franko Simatović*, Case No. IT-03-69-PT, Decision on Stanišić Defence's Motion on the Fitness of the Accused to Stand Trial with Confidential Annexes, 27 April 2006, pp. 3-5; *Prosecutor v. Vladimir Kovačević*, Case No. IT-01-42/2-I, Public Version of the Decision on Accused's Fitness to Enter a Plea and Stand Trial, 12 April 2006, paras 21-29.

(ii) Other International Jurisdictions

46 The Appeals Chamber recalls that the issue of fitness to stand trial arose before the International Military Tribunal ("IMT") in relation to three defendants.[124] The criteria used by the IMT in determination of an accused's capacity to stand trial were the following: (i) whether the accused is sane or insane; (ii) whether the accused is fit to appear before the IMT and present his defence; (iii) whether the accused is able to plead to the indictment; (iv) whether the accused is of sufficient intellect to comprehend the course of the proceedings of the trial so as to make a proper defence, to challenge a witness and to understand the details of the evidence.[125] One of these accused was recognized as unfit to stand trial based on medical evidence according to which he had "lost all capacity for memory, reasoning or understanding of statements made to him" and could not be transferred for trial "without endangering his life".[126] As a result, the trial against Gustav Krupp von Bohlen was postponed with the charges of the indictment being retained upon the docket of the IMT for a subsequent trial if his physical and mental condition so permitted.[127] The International Military Tribunal for the Far East also rendered a decision recognizing one of the accused unfit to stand trial based on the fact that he had not "recovered the intellectual capacity and judgement to make him capable of standing trial and of conducting his defense", had not pleaded to the charges and had been "unable during the proceedings to instruct his counsel effectively".[128]

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[124] *The United States of America, the French Republic, the United Kingdom of Great Britain and Northern Ireland, and the Union of Soviet Socialist Republics against Hermann Wilhelm Göring et al.,* Order of the Tribunal Granting Postponement of Proceedings Against Gustav Krupp Von Bohlen, 15 November 1945, 1 Trial of the Major War Criminals, p. 143 ("*Krupp Von Bohlen* Order"); Order of the Tribunal Regarding a Psychiatric Examination of Defendant Streicher, 17 November 1945, 1 Trial of the Major War Criminals, p. 153 ("*Streicher* Order") and Proceedings, Third Day, 22 November 1945, 2 Trial of the Major War Criminals, p. 156; Order of the Tribunal Rejecting the Motion on Behalf of Defendant Hess and Designating a Commission to Examine Defendant Hess with Reference to his Mental Competence and Capacity to Stand Trial, 24 November 1945, 1 Trial of the Major War Criminals, pp. 166-167 ("*Hess* Order") and Proceedings, Ninth Day, 30 November 1945, 2 Trial of the Major War Criminals, pp. 478-496, Proceedings, Tenth Day, 1 December 1945, 3 Trial of the Major War Criminals, p. 1. See also, Phillip L. Weiner, "Fitness Hearings in War Crimes Cases: From Nuremberg to The Hague", *Boston College International & Comparative Law Review*, Vol. 30 (2007), pp. 190-193.

[125] *Streicher* Order, *Hess* Order.

[126] Medical Certificates Attached to Certificate of Service on Defendant Gustav Krupp Von Bohlen, 6 October 1945, 1 Trial of the Major War Criminals, pp. 119-122, 127.

[127] *Krupp Von Bohlen* Order.

[128] *The United States of America, the Republic of China, the United Kingdom of Great Britain and Northern Ireland, the Union of Soviet Socialist Republics, the Commonwealth of Australia, Canada, the Republic of France, the Kingdom of the Netherlands, New Zeland, India, and the*

47 The Appeals Chamber further notes that the European Court of Human Rights ("ECtHR") has addressed the issues of fitness to stand trial in the framework of the guarantees provided by Article 6 of the European Convention on Human Rights ("ECHR").[129] It has held that effective participation in proceedings presupposes that an accused (i) "has a broad understanding of the nature of the trial process and of what is at stake for him or her, including the significance of any penalty which may be imposed"; (ii) is "able to understand the general thrust of what is said in court"; (iii) is "able to follow what is said by the prosecution witnesses and, if represented, to explain to his own lawyers his version of events, point out any statements with which he disagrees and make them aware of any facts which should be put forward in his defence".[130] The ECtHR has specifically underlined that Article 6 of the ECHR does not require that an accused be "capable of understanding every point of law or evidential detail".[131]

48 While the Statute and Rules of Procedure and Evidence of the International Criminal Court ("ICC") do not define any criteria for determination of fitness to stand trial, Rules 133 and 135 provide for the possibility of medical examination of an accused for the purposes of such determination and, if the accused is found unfit, the adjournment of trial proceedings.[132]

49 The possibility of medical examination for the determination of an accused's physical or mental fitness to stand trial is also provided for in Rule 32 of the Internal Rules of the Extraordinary Chambers in the Courts of Cambodia.[133]

50 Rule 74 *bis* of the Rules of Procedure and Evidence of the Special Court for Sierra Leone ("SCSL")[134] provides for the medical examination of the accused on which basis a chamber may conclude as to his fitness to stand trial

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Commonwealth of the Philippines against Sadao Araki et al., 42 Tokyo Major War Crimes Trial: The Records of the International Military Tribunal for the Far East 19637-19638 (R. John Pritchard ed., 1998).

[129] *S.C. v. the United Kingdom*, no. 60958/00, para. 29, ECHR 2004-IV; *T. v. the United Kingdom* [GC], no. 24724/94, para. 83, 16 December 1999; *V. v. the United Kingdom* [GC], no. 24888/94, para. 90, ECHR 1999-IX; *Stanford v. the United Kingdom*, judgment of 23 February 1994, Series A no. 282-A, para. 26.

[130] *S.C. v. the United Kingdom*, no. 60958/00, para. 29, ECHR 2004-IV.

[131] *Id.*

[132] ICC-ASP/1/3.

[133] Adopted on 12 June 2007.

[134] Adopted on 16 January 2002 (last amended on 19 November 2007).

and, if necessary, whether the proceedings should be adjourned. In an application of this provision, it was first ensured that the accused was fit to enter a plea.[135] To be able to do so, the accused "must fully understand and appreciate the nature and the consequences of the pleas he is entering". In this sense, the accused "must be seen to be sane and lucid and must equally be seen, not only to have pleaded, but also to have fully understood the nature and the consequences of the plea he has taken and on which his trial or subsequent proceedings will be based".[136]

51 Finally, while there are no constitutional or statutory provisions in East Timor that directly address the issue of competence to stand trial, the Dili District Court's Special Panels for Serious Crimes ("SPSC") has established the following criteria for determination of this matter: (i) rational and factual understanding of the charges; (ii) rational and factual understanding of the nature and object of the proceedings and the roles of the participants; (iii) ability to consult with the lawyer and to assist in the preparation of the defence "with a reasonable degree of rational understanding"; (iv) rational and factual understanding of the consequences of a conviction.[137] The *Nahak* Decision specified that "[i]n determining whether or not a particular defendant is competent to stand trial, a court need not determine whether the individual operates at the highest level of functioning"; rather "the test is whether the defendant satisfies certain minimum requirements without which he cannot be considered fit for trial".[138]

(iii) National Jurisdictions

52 In common law jurisdictions, fitness to stand trial generally amounts to the ability to conduct a defence at any stage of the proceedings before a verdict is rendered or to instruct counsel to do so and, in particular, to (i) understand the nature or object of the proceedings; (ii) understand the

[135] *The Prosecutor against Foday Saybana Sankoh a.k.a Popay a.k.a. Papa a.k.a. Pa*, Case No. SCSL-2003-02-I, Order for Further Physiological and Psychiatric Examination, 21 March 2003, p. 1; *The Prosecutor against Foday Saybana Sankoh a.k.a Popay a.k.a. Papa a.k.a. Pa*, Case No. SCSL-2003-02-I, Ruling on the Motion for a Stay of Proceedings Filed by the Applicant, 22 July 2003 ("*Sankoh* Decision of 22 July 2003"), p. 5.
[136] *Sankoh* Decision of 22 July 2003, pp. 5-6, citing *R. vs Lee Kun* 11 C.A.R., p. 293.
[137] SPSC, *Deputy General Prosecutor for Serious Crimes v. Joseph Nahak*, Case No. 01A/2004, Findings and Order on Defendant Nahak's Competence to Stand Trial, 1 March 2005 ("*Nahak* Decision"), paras 54-56, 135.
[138] *Ibid.*, para. 121.

possible consequences of the proceedings; and/or (iii) communicate with counsel.[139] What is required by the test for fitness to stand trial in these jurisdictions is a "limited cognitive capacity" to understand the trial process and to communicate with counsel, and not a capacity to exercise "analytical reasoning".[140] Some of these jurisdictions explicitly recognize that insanity or amnesia alone is not enough to conclude that a person is unfit to stand trial.[141] Furthermore, the mere fact that an accused may not be capable of acting in his

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[139] See, *e.g.*, in Australia: *R. v. Presser* [1958] VR 45, p. 48 referring *inter alia* to the ability to understand the charges and the nature of the proceedings, to plead, to follow the course of proceedings, to understand the substantial effect of evidence and to instruct the counsel (approved by the High Court of Australia in *Ngatayi* [1980] 147 CLR 1 and the decision of the Full Court in Khallouf [1981] VR 360); *R. v. Masin* [1970] VR 379, p. 384; *R. v. Bradley (No 2)* [1986] 85 FLR 111, pp. 114-115; *R. v. Allen* [1993] WL 1470490 (VCCA), 66 A Crim R 376; *Kesavarajah v. R* [1994]., 181 CLR 230, High Court of Australia, p. 245.
In Canada: *R. v. Whittle*, [1994] 2 S.C.R. 914; *Steele c. R., Cour d'appel du Québec,* No. 500-10-0004418-853, 12 February 1991, p. 61-62; *R. v. Demontigny*, unreported, Que. S.C., 5000-01-003023-907, 26 September 1990, pp. 3-5 : « *Que veut dire l'expression 'conduire sa défense' ? Bien, cela veut dire, (le bon sens le suggère), savoir qui on est, où on est dans l'espace et dans le temps. Il faut savoir quelle est la nature et la gravité de l'accusation. Il faut savoir ce qu'est un procès, pas nécessairement avec toute la science ou les connaissances que les spécialistes comme les avocats et les juges peuvent avoir, mais il faut savoir ce qu'est un procès. Il faut savoir qu'est-ce que c'est qu'un juge ; qu'est-ce que c'est qu'un jury ; que sont les avocats ; quel est le rôle de l'avocat de la poursuite ; quel est le rôle de l'avocat de la défense. Il faut pouvoir décider de la conséquence de plaider coupable ou non coupable, parce que le procès commence par cela [...] Donc il faut pouvoir à la fois recevoir des conseils de son avocat, lui en demander au besoin, lui donner des instructions et faire des choix en appréciant les conséquences. Il faut bien entendu pouvoir donner un compte rendu fidèle, exact de ce qui s'est passé [...] Mais que ce soit la vérité ou un mensonge, il faut qu'il soit capable de l'exprimer à son avocat pour que l'avocat comprenne. En somme, il faut pouvoir établir un lien de travail efficace entre lui-même et son avocat, un lien dont la confiance, bien sûr, qu'elle soit totale ou limitée, peu importe, ne doit pas être exclue, le bon sens du moins le suggère. En somme, il faut pouvoir fonctionner pour conduire sa défense seul ou avec l'aide d'un avocat. ».* See also Criminal Code, R.S.C., 1985, c. C-46, ss. 2 [ad. 1991, c. 43, s. 1], 672.23 [ad. 1991, c. 43, s. 4].
In India: *Kunnath v. the State* [1993] 1 Weekly Law Reports 1315: "[T]he defendant, by reason of his presence, should be able to understand the proceedings and decide what witnesses he wishes to call, whether or not to give evidence and if so, upon what matters relevant to the case against him"; also see Article 328(1) of the Indian Code of Criminal Procedure, 1973: "When a Magistrate holding an inquiry has reason to believe that the person against whom the inquiry is being held is of unsound mind and consequently incapable of making his defence, the Magistrate shall inquire into the fact of such unsoundness of mind".
In Malaysia: High Court of Muar, *Public Prosecutor v. Misbah Bin Saat* [1997] 3 MLJ 495, pp. 505-506.
In the United Kingdom, *Rex v. Pritchard* [1836] 7 C & P 303 confirmed in *R. v. Podola* [1959] 3 W.L.R. 718, *R. v. Robertson* [1968] 52 Cr App R 690 and *R. v. John M* [2003] EWCA Crim 3452 establishing the test as to whether an accused is of sufficient intellect to comprehend the course of the trial proceedings so as to make a proper defence, to instruct his counsel, to plead to the indictment, to challenge jurors, to understand the details of evidence, and to give evidence; see also Statements of the Secretary of State for the Home Department Regarding his Decision to End Proceedings against Augusto Pinochet: "Among the criteria that I took into account were whether the senator would be in a position to follow the proceedings, to give intelligible instructions to those representing him and to give a coherent statement of his case, and of recollection." (Hansard 12 January 2000 col 281).
In the United States of America: *Dusky v. United States*, 362 U.S. 402, 402-403 (1960); *Feguer v. United States*, 302 F.2d 214, 236 (8th Cir.); *People v. Swallow*, 301 N.Y.S.2d 798, 802-804

best interests during his trial is not sufficient to warrant a finding that he or she is unfit to stand trial.[142] In any case, the evaluation is always conducted according to the circumstances of each individual case.[143]

53 Civil law jurisdictions generally have similar criteria for determination of fitness to stand trial. In certain countries, they include, *inter alia*, an accused's capacity to follow the proceedings and to declare himself in an articulate manner and to reasonably pursue his rights;[144] his ability to reasonably pursue

(N.Y.App.Div.1969); *Drope v. Missouri*, 420 U.S. 162 (1975), pp. 171-173; Missouri Institute of Mental Health Policy Brief, June 2003, p. 2: "A defensible CST [competency to stand trial] evaluation should address the following issues using direct quotations from the defendant whenever possible: 1. The defendant's ability to understand the charges, including: the legal and practical meaning of these charges; the implications of his/her current legal situation; the roles and functions of the courtroom personnel; and the ability to differentiate between various pleas and verdicts. 2. The defendant's ability to assist in his/her defense, which includes: describing his/her behavior and whereabouts at the time of the alleged crime(s); effectively interacting with defense counsel; and behaving in an appropriate manner in the courtroom."

[140] *R. v. Whittle*, [1994] 2 S.C.R. 914, p. 917: "The 'operating mind test' required that the accused possesses a limited degree of cognitive ability to understand what he was saying and to comprehend that the evidence may be used in proceedings against the accused, but no inquiry was necessary as to whether the accused was capable of making a good or wise choice, or one that was in his interest."; *R. v. Taylor* [1992], 77 C.C.C. (3d) 551, p. 567: "The 'limited cognitive capacity' test strikes an effective balance between the objectives of the fitness rules and the constitutional right of the accused to choose his own defence and to have a trial within a reasonable time."

[141] *E.g.*, *Steele c. R. Cour d'appel du Québec,* No. 500-10-0004418-853, 12 February 1991, p. 59; *United States v. Mota and Flores*, 598 F.2d 995, 998 (5th Cir.) ; *United States v. Swanson*, 572 F.2d 523, 526 (5th Cir.); *Feguer v. United States*, 302 F.2d 214, 236 (8th Cir.); *R. v. Podola* [1959] 3 W.L.R. 718: "Even if the loss of memory had been a genuine loss of memory, that did not of itself render the appellant insane so that he could not be tried on the indictment."; Section 8(2) of the Criminal Justice (Mental Impairment) Act 1999 (Tas).

[142] *R. v. Robertson* (1968), 52 Cr. App. R. 690; *R. v. Berry* (1977), 66 Cr. App. R., 156; *R. v. Taylor* [1992], 77 C.C.C. (3d) 551, p. 553: "The inquiry is whether the accused can recount to counsel the necessary facts relating to the offence in such a way that counsel can then properly present a defence. It is not necessary that the accused be able to act in his own best interests and the court should not therefore adopt a higher threshold 'analytical capacity' test for determining fitness."

[143] *E.g.*, *United States v. Mota and Flores*, 598 F.2d 995, 998 (5th Cir.); *Demosthenes v. Ball*, 110 S. Ct. 2223, 2225 (1990); *Maggio v. Fulford*, 462 U.S. 111, 117 (1983); *People v. Swallow*, 301 N.Y.S.2d 798, 802-804 (N.Y.App.Div.1969).

[144] Austrian Supreme Court, Decision No. 13Os45/77 (13Os46/77, 13Os52/77), 22 April 1977, *EvBl* 1977/254, p. 610.
In Japan: Supreme Court Decision 1991(A)No.1048, 28 February 1995, Keishu Vol.49, No.2, 481, p. 484: "[…] the 'state of non-compos mentis' […] means the lack of competency to stand trial, in other words, the inability to distinguish important interests of the criminal defendant and conduct a reasonable defense accordingly" (http://www.courts.go.jp/english/judgments/text/1995.02.28-1991-A-No.1048.html) as confirmed by Supreme Court Judgement 1996(A)No.204, 12 March 1998, Keishu Vol. 52, No.2, 17 ("Japanese Supreme Court Judgement 1996(A)No.204"), pp. 23-24; Decision of Tokyo High Court, 27 March 2006, *Hanrei Taimuzu* Journal,Vol. 1232, 141, p. 176, affirmed by Supreme Court Decision, 15 September 2006, *Hanrei Taimuzu* Journal,Vol. 1232, 138, p. 138.
In Korea: Section 1 and Section 2 of Article 306 of the Code of Criminal Procedure of the Republic of Korea provide that, if the accused is in unsound mind or unable to appear in court because of sickness, the trial shall be suspended, while such state continues. The Supreme Court interpreted the fitness to stand trial of an accused provided in the above Article to mean the ability to understand important matters and exercise his or her right to defend to a

his interests at trial, to make a responsible decision on important issues concerning his defence, to make or receive procedural declarations or otherwise reasonably exercise his personal procedural rights.[145] In other countries, the specific criteria are less elaborated and fitness to stand trial is often linked to the accused's capacity to control his actions.[146] In the framework of this analysis, it is worth noting that the Supreme Court of Chile found Augusto Pinochet to have been unfit to stand trial, having considered that his mental condition impeded him from defending himself.[147]

54 Finally, these concepts are not unknown to the criminal procedure in the countries of the former Yugoslavia. Thus, an accused who is suspected to be incapable of participating in the proceedings due to a mental disturbance is subject to a psychiatric examination, and if he is found to be unable to take part in the procedure, the trial may be adjourned.[148] The War Crimes Chamber

substantial extent thereupon (Judgement of 8 March 1983, Official Gazette 703, p. 680).
In The Netherlands: Article 16 of the Code of Criminal Procedure.

[145] In Germany: German Federal Constitutional Court (*Bundesverfassungsgericht*), NJW 1995, pp. 1951-1952; German Federal Supreme Court (*Bundesgerichtshof*), MDR 1958, p. 141, stressing *inter alia* that the only important issue with respect to fitness to stand trial in criminal proceedings is that at the time of the trial proceedings the accused is in such a state of mental clarity and freedom that it is possible to discuss criminal legal issues with him. In this respect, the accused has to be able to explain to others what he wants to present, and he has to be able to comprehend what others explain, which means that criminal proceedings can be conducted even against an insane accused, provided that the form of insanity allows for a reasonable defence (*id.*).

[146] In Belgium, a number of decisions rendered by the *Cour de cassation* refer to "*un état grave de déséquilibre mental ou de débilité mentale" rendant l'accusé "incapable du contrôle de ses actions"* at the time of the verdict (see *e.g. Arrêt* of 6 January 2004, *Nº de rôle P030777N*, unpublished*; Arrêt* of 17 October 1995, *Nº de rôle P95101N*, *Pasicrisie belge* 1995 (I, p. 922)*; Arrêt* of 20 February 1992, *Nº de rôle 9423*, *Pasicrisie belge* 1992 (0000I, p. 547).
In the Russian Federation: Supreme Court of the Russian Federation, Decision on Cassation No. 35-007-25, 24 May 2007, finding that an accused who was suffering from a temporal psychiatric disorder in the form of medium degree depression episode and, due to his mental condition, could not realize the nature of his actions or their danger to the public, could not control them and required imposed medical treatment. These findings were made by the Supreme Court with reference to Article 81, para. 1 of the Criminal Code of the Russian Federation and Article 443, para. 1 of the Code of the Criminal Procedure providing for the procedure applicable to persons suffering from a mental disorder following the commission of the crime which rendered impossible imposing and serving a sentence. Another Supreme Court decision confirmed a ruling finding an accused fit to stand trial due to the fact that he had never suffered from a mental disorder and, although he showed some slight mental retardation, was at the time of his trial mentally fit to stand trial and be held responsible for his acts (Decision on Cassation No. 64-006-47, 28 February 2007; see also Decision on Cassation No. 44-006-86, 11 September 2006).

[147] *Corto Suprema*, *resolución* 9449, *recurso* 2986/2001, 1 July 2002 (Ruling of the Supreme Court of Chile, Definitive Dismissal of Proceedings against Augusto Pinochet Ugarte, (translation by *Memoria y Justicia* available at www.memoriayjusticia.cl/english/en_docs-dismissal.html)). The Supreme Court based its finding on a standard (para. 31) which appears to be slightly higher than the one retained by the Trial Chamber in the present case, although not as high as used by the Lečić-Toševski Report.

[148] See *e.g.*, Code of Criminal Procedure of Bosnia and Herzegovina, Articles 110, 207 and 388; Criminal Procedure Act of Croatia, Article 456(1); Code of Criminal Procedure of the Republic of

of the District Court in Belgrade has recently rejected the indictment against Kovačević referred to this jurisdiction by the Tribunal under Rule 11 *bis* of the Rules, on the basis that his mental disorder rendered him incapable of participating in the criminal procedure, *i.e.* of understanding the indictment, pleading about his guilt, presenting his case, carefully following the course of the hearing, suggesting evidence, examining witnesses, cooperating with his counsel and actively participating in the proceedings using all the rights he has as the accused.[149]

(iv) Conclusion

55 In light of the discussion above, the Appeals Chamber is satisfied that, in assessing Strugar's fitness to stand trial, the Trial Chamber correctly identified the non-exhaustive list of rights which are essential for determination of an accused's fitness to stand trial.[150] The Appeals Chamber is further satisfied that, on this basis, the Trial Chamber applied the correct legal standard. This is not changed by the Trial Chamber's reference to a "minimum standard of overall capacity"[151] which the Appeals Chamber finds is not the best way of enumerating the correct standard. As noted above, the applicable standard is that of meaningful participation which allows the accused to exercise his fair trial rights to such a degree that he is able to participate effectively in his trial, and has an understanding of the essentials of the proceedings.[152] In this

Montenegro, Article 133; Criminal Procedure Act of the Republic of Serbia, Article 349(1).

[149] Republic of Serbia, District Court in Belgrade, War Crimes Chamber, Case No. K.V.br.3/07, Decision of 5 December 2007. The Appeals Chamber notes that no appeal was filed against the said decision. While some criteria used by the War Crimes Chamber of the District Court in Belgrade appear to be slightly more demanding than those established by the Trial Chamber in the present case, the Appeals Chamber is of the view that the overall approach generally supports the Trial Chamber's conclusions on the matter.

[150] See *supra*, para. 41.

[151] Decision of 26 May 2004, para. 37.

[152] See *Stanišić* Decision of 10 March 2008, para. 60. *Cf.* also, see also Hansard 2 March 2000 col 665-667; *R. v. Secretary of State for the Home Department, ex parte The Kingdom of Belgium; R. v. Secretary of State for the Home Department, ex parte Amnesty International Limited and others,* Queen's Bench Division, CO/236/2000, CO/238/2000, 15 February 2000, *2000 WL 461 (QBD) ("Pinochet* Decision of 15 February 2000*")*, para. 20: "In referring to Senator Pinochet's fitness to stand trial, the Secretary of State is referring to his *capacity to participate meaningfully in a trial*. The Home Secretary has proceeded on the footing that the decisive criteria are the quality of his memory, his ability to process verbal information and to follow the proceedings, his ability to understand the content and implications of questions put to him, his ability to express himself coherently and comprehensibly, and his ability to instruct his legal representatives" (emphasis added); *Dusky v. United States*, 362 U.S. 402 (1960),pp. 402-403: "the 'test must be whether he has sufficient present ability to consult with his lawyer with a reasonable degree of rational understanding – and whether he has a rational as well as factual understanding of the proceedings against him'"; *R. v. Presser* [1958] VR 45, p. 48: "[…] [the accused] need not, of course, understand the purpose of all the various court formalities";

regard, the Trial Chamber applied the standard correctly, as evidenced by its conclusion that an accused's fitness to stand trial should turn on whether his capacities, "viewed overall and in a reasonable and commonsense manner, at such a level that it is possible for [him or her] to participate in the proceedings (in some cases with assistance) and sufficiently exercise the identified rights".[153]

56 Finally, the Appeals Chamber notes its agreement with the Trial Chamber's finding that an accused claiming to be unfit to stand trial bears the burden of so proving by a preponderance of the evidence.[154] In this regard, the Appeals Chamber notes that this approach is consistent with the one used in common law jurisdictions where the burden of proof generally lies on the party which alleges the accused's unfitness to stand trial and is considered to be discharged if this party can show its claim on the balance of probabilities.[155]

2. Application of the Legal Standard to the Facts of the Case

57 As a preliminary matter, the Appeals Chamber notes that most of Strugar's arguments on appeal are reiterations of the above arguments which he made at trial.[156] Therefore, the Appeals Chamber will limit its analysis to the question of whether Strugar has demonstrated that the Trial Chamber's rejection of these arguments constituted an error warranting the intervention of the Appeals Chamber.[157]

"[h]e need not, of course, be conversant with court procedure and he need not have the mental capacity to make an able defence [...] The question is whether "the accused, because of mental defect, fails to come up to certain minimum standards which he needs to equal before he can be tried without unfairness or injustice to him". See also *supra*, paras 47, 52 (fn. 140) and *infra*, para. 60.

[153] See *supra*, paras 41-42.

[154] Decision of 26 May 2004, para. 38; see *supra*, para. 43.

[155] *R. v. Podola* [1959] 3 W.L.R. 718.
The Appeals Chamber also takes note of the aforementioned *Nahak* Decision in which the SPSC determined that the preponderance standard governs determinations of an accused's fitness to stand trial (*Nahak* Decision, paras 57-59 referring to the Decision of 26 May 2004, para. 38: "[...] competence to stand trial is not an element of the offence with which the Defendant is charged" and, consequently, "it is not required that a defendant's competence be proved by 'a higher standard as is required of the prosecutor when proving guilt in criminal cases'"; and paras 59-60, 67, 152 referring to the requirement that "proof that it is more probable than not [...] has been demonstrated."). The Appeals Chamber finally notes that the SPSC declined to define who bears the burden of proof and decided to evaluate the evidence on the matter "without depending on any 'onus of proof' that might otherwise be imposed on the Defendant." (*ibid.*, paras 61-67).

[156] See *supra,* paras 26-27, 31, 35-37.

[157] See *e.g.*, *Halilović* Appeal Judgment, para. 12; *Blagojević and Jokić* Appeal Judgement, para. 10; *Brđanin* Appeal Judgement, para. 16.

58 Considering that it is for the Trial Chamber to accept or reject, in whole or in part, the contribution of an expert witness, the Appeals Chamber concludes that a Trial Chamber's decision with respect to evaluation of evidence received pursuant to Rule 94 *bis* of the Rules is a discretionary one.[158] When assessing an expert report, a Trial Chamber generally evaluates whether it contains sufficient information as to the sources used in support of its conclusions and whether those conclusions were drawn independently and impartially.[159] The question before the Appeals Chamber is "whether the Trial Chamber has correctly exercised its discretion in reaching that decision",[160] that is, whether it has committed a "discernible error" resulting in prejudice to a party.[161] The Appeals Chamber will overturn a Trial Chamber's exercise of its discretion only if it finds that it was "(1) based on an incorrect interpretation of governing law; (2) based on a patently incorrect conclusion of fact; or (3) so unfair or unreasonable as to constitute an abuse of the Trial Chamber's discretion".[162]

59 In this instance, the Trial Chamber emphasized that it was fully satisfied with the quality and thoroughness of both the Blum *et al.* and the Lečić-Toševski Reports.[163] It carefully outlined the conclusions of both reports

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[158] See *Stakić* Appeal Judgement, para. 164; *Semanza* Appeal Judgement, para. 304; see also *The Prosecutor v. Sylvester Gacumbitsi,* Case No. ICTR-2001-64-T, Decision on Expert Witnesses for the Defence - Rules 54, 73, 89 and 94 *bis* of the Rules of Procedure and Evidence, 11 November 2003, para. 8.

[159] *Nahimana et al.* Appeal Judgement, paras 198-199; see also *Prosecutor v. Dragomir Milošević*, Case No IT-98-29/1-T, Decision on Admission of Expert Report of Robert Donia, 15 February 2007, paras 8-9; *Prosecutor v. Milan Martić*, Case No IT-95-11-T, Decision on Defence's Submission of the Expert Report of Professor Smilja Avramov pursuant to Rule 94 *bis*, 9 November 2006, paras 9-10; *Prosecutor v. Radoslav Brđanin*, Case No IT-99-36-T, Decision on Prosecution's Submission of Statement of Expert Witness Ewan Brown, 3 June 2003, p. 4.

[160] *Prosecutor v. Milan Marti}*, Case No. IT-95-11-AR73.2, Decision on Appeal Against the Trial Chamber's Decision on the Evidence of Witness Milan Babi}, 14 September 2006 ("*Martić* Decision of 14 September 2006"), para. 7.

[161] *Prosecutor v. Milan Milutinovi} et al.*, Case No. IT-05-87-AR108*bis*.2, Decision on Request of the United States of America for Review, 12 May 2006 (*Milutinović* Decision of 12 May 2006"), para. 6. See also *Marti}* Decision of 14 September 2006, para. 7.

[162] *Slobodan Milo{evi} v. Prosecutor*, Case No. IT-02-54-AR73.7, Decision on Interlocutory Appeal of the Trial Chamber's Decision on the Assignment of Defence Counsel, 1 November 2004 ("*Milošević* Decision of 1 November 2004"), para. 10; *Milutinovi}* Decision of 12 May 2006, para. 6: "The Appeals Chamber will also consider whether the Trial Chamber 'has given weight to extraneous or irrelevant considerations or that it has failed to give weight or sufficient weight to relevant considerations Ғ…ğ in reaching its discretionary decision." See also *Prosecutor v. Slobodan Milo{evi}*, Case No. IT-99-37-AR73, IT-01-50-AR73, IT-01-51-AR73, Reasons for Decision on Prosecution Interlocutory Appeal from Refusal to Order Joinder, 18 April 2002, paras 4-5.

[163] Decision of 26 May 2004, para. 40.

analyzing their differences and points of agreement.[164] It then concluded that the material issue was Strugar's relevant capacities at the time of trial and not merely medical diagnoses of his mental or somatic disorders.[165] The Trial Chamber found that, while the Lečić-Toševski Report was very detailed on various diagnoses and their potential impact on Strugar's state of health and mind, the said report was seriously lacking in reasoning as to how these diagnoses actually affected Strugar's capacities pertinent to his fitness to stand trial. By "marked contrast", the Blum *et al.* Report was, in the Trial Chamber's view, "consciously concentrated on evaluating the relevant capacities of the Accused".[166] It also concluded that the Lečić-Toševski Report erroneously set "too high a standard of comprehension for the purpose of assessing fitness to stand trial".[167] The Trial Chamber therefore found the approach used by the Blum *et al.* Report to be more persuasive for the purposes in question.[168] In addition to finding that the conclusions of the Blum *et al.* Report were reliable and correct, the Trial Chamber also noted that it had itself had the opportunity to observe Strugar's behaviour in court throughout nearly five months and found that there was no reason to hesitate in accepting the opinion that he was fit to stand trial.[169] The Appeals Chamber is accordingly not satisfied that Strugar has shown that the Trial Chamber abused its discretionary power in reaching any of the above conclusions.

60 Considering the Appeals Chamber's above findings confirming that the Trial Chamber used the correct legal standard for evaluating Strugar's fitness to stand trial,[170] Strugar's suggestion that the Appeals Chamber base its decision on the Lečić-Toševski Report cannot succeed as the said report was based upon an incorrect standard. In particular, the Trial Chamber was correct in rejecting the approach according to which an accused "should have capacity to fully comprehend the course of the proceedings in the trial, so as to make a proper defense, and to comprehend details of the evidence".[171] The Appeals

[164] *Ibid.*, paras 41-45.
[165] *Ibid.*, para. 46.
[166] *Ibid.*, para. 47.
[167] *Ibid.*, para. 48.
[168] *Ibid.*, para. 47.
[169] *Ibid.*, para. 51.
[170] See *supra*, para. 55.
[171] Decision of 26 May 2004, para 48, citing Lečić-Toševski Report, p. 14, as well as the relevant passage of the New Oxford Textbook of Psychiatry referred to therein, which in reality reads as follows: "In its traditional formulation the test of unfitness to plead is whether the defendant is of sufficient intellect to comprehend the course of the proceedings in the trial, so as to make a

Chamber emphasizes that fitness to stand trial should be distinguished from fitness to represent oneself.[172] An accused represented by counsel cannot be expected to have the same understanding of the material related to his case as a qualified and experienced lawyer.[173] Even persons in good physical and mental health, but without advanced legal education and relevant skills, require considerable legal assistance, especially in cases of such complex legal and factual nature as those brought before the Tribunal. The Appeals Chamber therefore agrees with the Trial Chamber that what is required from an accused to be deemed fit to stand trial is a standard of overall capacity allowing for a meaningful participation in the trial, provided that he or she is duly represented by Counsel.[174]

61 With respect to Strugar's allegations that the Trial Chamber failed to assess his overall health condition,[175] the Appeals Chamber notes that, as described above, the Trial Chamber thoroughly examined all the diagnoses rendered by both the Blum *et al.* and the Lečić-Toševski Reports.[176] However,

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proper defence, to know that he might challenge jurors, and to comprehend detail of the evidence".

[172] *Cf. Prosecutor v. Slobodan Milošević*, Case No. IT-02-54-T, Order Concerning Further Medical Report, 11 November 2005 (confidential), p. 2: "[A]ny further report should […] distinguish between the degree of fitness necessary to attend courts as an Accused person, and that required to additionally conduct one's own case." See also, *Milošević* Decision of 1 November 2004, para 14: "How should the Tribunal treat a defendant whose health, while good enough to engage in the ordinary and non-strenuous activities of everyday life, is not sufficiently robust to withstand all the rigors of trial work – the late nights, the stressful cross-examinations, the courtroom confrontations – unless the hearing schedule is reduced to one day a week, or even one day a month? Must the Trial Chamber be forced to choose between setting that defendant free and allowing the case to grind to an effective halt? In the Appeals Chamber's view, to ask that question is to answer it." (footnotes omitted).

[173] See *supra*, para. 52 (fn. 140).

[174] See *supra,* para. 55. *Cf. S.C. v. the United Kingdom*, no. 60958/00, para. 29, ECHR 2004-IV: "Given the sophistication of modern legal systems, many adults of normal intelligence are unable fully to comprehend all the intricacies and exchanges which take place in the courtroom." The representation by skilled and experience lawyers can however be found insufficient to guarantee effective participation of an accused in the proceedings against him where he or she is incapable to cooperate with his or her lawyers for the purposes of his or her defence due to, for example, his or her immaturity and/or disturbed emotional state (*T. v. the United Kingdom* [GC], no. 24724/94, para. 83, 16 December 1999; *V. v. the United Kingdom* [GC], no. 24888/94, para. 90, ECHR 1999-IX); German Federal Constitutional Court holding that the impact of psychological or physical shortcomings on the actual exercise of the accused's procedural rights can be sufficiently compensated by counsel support (NJW 1995, p. 1952); Japanese Supreme Court holding that even if the relevant abilities of the accused are considerably limited he may not be considered to lack them if he enjoys the appropriate assistance of his counsel and/or interpreters who play the role of his guardians (Japanese Supreme Court Judgement 1996(A)No.204, pp. 23-24).

[175] Defence Appeal Brief, paras 246-248, 254; Defence Reply Brief, para. 110.

[176] In particular, the Trial Chamber found itself persuaded that (i) Strugar's depression and post-traumatic stress disorder alleged by the Lečić-Toševski Report "may be experienced as an emotional condition without there being a psychiatric disorder" (Decision of 26 May 2004, para. 42); and (ii) contrary to the conclusions offered by the Lečić-Toševski Report, the degree of

considering that the test for fitness to stand trial is quite different from the definition of a mental or physical disorder,[177] the Appeals Chamber finds that the Trial Chamber correctly emphasized that medical diagnoses alone, no matter how numerous, do not suffice to assess a person's competency to stand trial.[178] It was therefore not obliged to examine each and every alleged or confirmed illness from which Strugar suffered at that time but rather concentrate its analysis, as it did, on conclusions and assessments of the relevant capacities which it defined in the Decision of 26 May 2004.[179]

62 Following the same logic, the Appeals Chamber does not consider it necessary to examine the issues raised with respect to the MRI examination performed in 2004, as the Trial Chamber reasonably found that Strugar possessed all the necessary capacities to stand trial despite the fact that he suffered from vascular dementia.[180] In this respect, the Appeals Chamber notes that the Blum *et al.* Report is, *inter alia*, based on a detailed interview with Strugar during which he appeared not to have any difficulties in relating to the testimonies he had heard in court, to the events relevant to the charges against him or to the names of people he thought to have been involved in

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Strugar's vascular dementia was mild (Decision of 26 May 2004, para. 43; in this respect, the Appeals Chamber also notes that while during her testimony in court Pr. Lečić-Toševski seemed to contest that vascular dementia could be graded at all (T. 5642), her report concludes that the form of Strugar's dementia was "still not in its severe form and can be named as mild, or initial" (Lečić-Toševski Report, p. 12)). Finally, The Trial Chamber also took into account that the said report disagreed on the issue of the impact of the renal disorder on Strugar's capacities relevant to his fitness to stand trial (Decision of 26 May 2004, para. 44).

[177] See *supra*, paras 52, 55; c*f. R. v. Whittle*, [1994] 2 S.C.R. 914; *Wilson v. United States*, 391 F.2d 460 (1968); see also Missouri Institute of Mental Health Policy Brief, June 2003, p. 1: "no psychological symptoms (e.g., sensory hallucinations, dementia, or amnesia) can be considered an automatic bar to competency"; *Steele c. R. Cour d'appel du Québec,* No. 500-10-0004418-853, 12 February 1991, p. 59.

[178] Decision of 26 May 2004, para. 46; See also *Pinochet* Decision of 15 February 2000, paras 20-21 stating with approval that the criteria set by the Home Secretary for determination of Augusto Pinochet's fitness to stand trial were not used in the sense of "general physical debility".

[179] *Cf.* Criminal Procedure Code of Bosnia and Herzegovina, Article 110(3): "Should experts establish that the mental condition of the suspect or accused is disturbed, they shall define the nature, type, degree and duration of the disorder and shall furnish their opinion concerning the *type of influence this mental state has had and still has on the comprehension and actions of the accused.*" (emphasis added).

[180] Defence Appeal Brief, paras 251-253.

those events.[181] Strugar does not show that the Trial Chamber's reliance on the Blum *et al.* Report, in these circumstances, constitutes an abuse of discretion.

63 Therefore, having applied the correct legal standard, the Trial Chamber acted well within its discretion when, on the basis of the totality of evidence before it, it found that Strugar's competence to stand trial was satisfactory. First, it was undisputed by the parties that he understood the nature of the charges brought against him. Second, with respect to his capacity to understand the course of the proceedings and the details of the evidence, it was reasonable to conclude that he did indeed possess such a capacity, notably in light of his explanations and comments received during the preparation of the Blum *et al.* Report.[182] Third, as for Strugar's capacity to testify, it was not unreasonable to conclude that he was able to do so, considering his adequate recollection of the events as expressed to the authors of the Blum *et al.* Report.[183] Fourth, based on interviews and trial materials, the Blum *et al.* Report provided relevant and sound grounds for its conclusions that Strugar appeared to be satisfactorily able to instruct his counsel and it was reasonable for the Trial Chamber to conclude accordingly.[184]

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[181] Blum *et al.* Report, pp. 5-8. The Blum *et al.* Report further concluded that "[O]ccasionally he cannot recall some word, most often someone's name, then he becomes mildly anxious, insisting on remembering the word, which he usually manages after a while. He then goes back to his previous topic and continues elaborating on it. Tenacity and vigilance of attention are normal, and so are his thought processes, both concrete and abstract. [...] There are no delusions, hallucinations, or other abnormal mental phenomena. He does not have difficulty with memory of events or conversation topics from a few hours ago, but he is not able to recall the names of the examiners. There is no apraxia, no agnosia, and no impairment of executive functions." (*ibid.*, pp. 8-9).

[182] *Ibid.*, pp. 10, 13-15 referring, in particular, to the fact that Strugar understood (i) the contents of the Indictment against him and the history of its amendments (ii) the role of the judges, parties and witnesses at trial; (iii) the concept of presumption of innocence; (iv) issues related to super-subordinates responsibility; (v) his status as an accused at trial; (vi) the concept of provisional release; (vii) the concept of plea bargaining; (viii) the process, nature and purpose of examination and cross-examination of witnesses, *etc*. During his interview with the authors of the Blum *et al.* Report, Strugar also summarized his vision of the events relevant to the Indictment and mentioned people he believed responsible for those events (*ibid.*, p. 6). He also explained his impressions of the testimonies given by the Prosecution witnesses at trial – both in general and with specific examples (*ibid.*, pp. 7-8).
Cf. a contrario, S.C. v. the United Kingdom, no. 60958/00, para. 33, ECHR 2004-IV where an accused was, due to his young age and limited intellectual capacity, found to have been unfit to stand trial, notably because he "seem[ed] to have had little comprehension of the role of the jury in the proceedings or of the importance of making a good impression on them. Even more strikingly, he [did] not seem to have grasped the fact that he risked a custodial sentence and, even once sentence had been passed and he had been taken down to the holding cells, he appeared confused and expected to be able to go home with this foster father."

[183] Blum *et al.* Report, pp. 7-8, 16.

[184] *Ibid.*, p. 15.

3. Conclusion

64 In conclusion, the Appeals Chamber finds that the Trial Chamber correctly held that Strugar, while incontestably suffering from a number of somatic and mental illnesses, was fit to stand trial, particularly given that he was not representing himself and benefited from the effective assistance of qualified counsel. In light of the above, Strugar's fifth ground of appeal is dismissed in its entirety.

IV. ALLEGED ERRORS OF FACT (STRUGAR'S FIRST AND THIRD GROUNDS OF APPEAL)

A. Introduction

65 Under his first and third grounds of appeal, Strugar alleges errors of fact in the Trial Chamber's findings on JNA combat operations in the region of Dubrovnik in October and November 1991, the events of 3 and 5 December 1991, the events of 6 December 1991, his failure to prevent the crimes committed by his subordinates and his failure to punish his subordinates for the commission of these crimes. The Appeals Chamber will deal with each of these sub-grounds of appeal in turn.

B. Alleged Errors Regarding JNA Combat Operations in the Region of Dubrovnik in October and November 1991

66 Strugar submits that the Trial Chamber made several erroneous factual findings regarding JNA combat operations in the region of Dubrovnik in October and November 1991, Joki}'s investigation of the combat operations of November 1991 and his knowledge of these combat operations. He argues that these errors led the Trial Chamber to incorrectly find that the mental element necessary to establish his superior responsibility under Article 7(3) of the Statute had been satisfied.[185]

1. Alleged Errors Regarding JNA Combat Operations in October 1991

67 The Trial Chamber held that on 23 October 1991, Strugar issued an 'Order for Further Action' directing the 9 VPS and the 472 mtbr and its subordinate units to undertake military actions against targets in the region of Dubrovnik along the line of Ivanica, Donji Brgat and Dubrava, to which was attached a plan for artillery action, proposed by the Chief of Staff of the 2 OG and approved by Strugar.[186] The Trial Chamber further held that on 23 and 24 October 1991, the 3/472 mtbr and 4/472 mtbr defeated the Croatian forces

[185] Defence Appeal Brief, paras 29, 162, citing Trial Judgement, paras 418, 422.
[186] Trial Judgement, para. 44 (footnotes omitted).

along the road from Trebinje to Dubrovnik.[187] Strugar impugns the Trial Chamber's findings.[188]

68 First, Strugar submits that no reasonable trier of fact could have arrived at the conclusion that he issued an order directing the JNA's 9 VPS and 472 mtbr to undertake military action against targets in the region of Dubrovnik on the basis of the evidence referred to by the Trial Chamber.[189] The Appeals Chamber finds that Strugar omitted to mention that the Trial Chamber also relied on the testimony of Joki}, who testified that Mr. Filipovi} had signed this order on Strugar's behalf.[190] Moreover, the Appeals Chamber finds that it was open to a reasonable trier of fact to find on the basis of Exhibit P121 that Strugar had ordered this attack as the Exhibit clearly indicates that it was issued by the command of the 2 OG and was signed on Strugar's behalf. The Appeals Chamber thus summarily dismisses this sub-ground of appeal under category 2, as including arguments which misrepresent the evidence on which the Trial Chamber relied in its factual findings, and category 3, as including mere assertions that the Trial Chamber should have reached a particular conclusion on the basis of certain evidence.

69 Second, Strugar submits that the plan for artillery action was in fact proposed by the Chief of the Artillery of the 2OG, not by its Chief of Staff, and that nothing in Exhibit P121 indicates that this plan was approved by him (Strugar).[191] The Appeals Chamber observes that Exhibit P121 indicates that it was proposed by the Chief of Artillery of the 2 OG and not by its Chief of Staff as found by the Trial Chamber.[192] The Appeals Chamber holds that Strugar has not, however, demonstrated either that this error affects the Trial Chamber's conclusions or challenges a finding on which his conviction relies. Moreover, in the opinion of the Appeals Chamber, it was in any case open to a reasonable trier of fact to conclude that Strugar approved this plan as it was appended to an order for attack and as Joki} testified that this type of plan would normally be submitted on the directions of the commander of the 2 OG.[193] The Appeals

[187] *Ibid.*, para. 46.
[188] Defence Notice of Appeal, paras 11-12; Defence Appeal Brief, paras 11-13.
[189] Defence Appeal Brief, para. 11.
[190] Joki}, T. 3955, cited in Trial Judgement, para. 44, fn. 88.
[191] Defence Appeal Brief, para. 12.
[192] Trial Judgement, para. 44.
[193] Joki}, T. 3958, cited in Trial Judgement, para. 44, fn. 88.

Chamber summarily dismisses this sub-ground of appeal under category 1, as including challenges to findings on which his conviction does not rely, and category 3, as including mere assertions that the Trial Chamber should have reached a particular conclusion on the basis of certain evidence.

70 Third, Strugar submits that the 3/472 mtbr was stationed six to nine kilometres from the city of Dubrovnik between 24 and 26 October 1991 and did not participate in combat operations.[194] The Appeals Chamber observes that the Trial Chamber considered the evidence on which Strugar relies in his submissions both in its findings on this issue[195] and in its findings on the events of October and November 1991.[196] The Appeals Chamber also notes that the impugned findings do not discuss the role played by military units in the shelling of the Old Town and thus do not contradict the Trial Chamber's other findings on the position and activities of the 3/472 mtbr. The Appeals Chamber summarily dismisses this sub-ground of appeal under category 1, as including arguments which are clearly irrelevant, and category 5, as including a mere assertion that the testimony of certain witnesses is inconsistent with the conclusions of the Trial Chamber.

2. Alleged Errors Regarding JNA Combat Operations in November 1991

71 The Trial Chamber held that between 9 and 12 November 1991 JNA forces positioned south of Dubrovnik shelled the city and its Old Town with artillery and missiles. The Trial Chamber further held that there were no significant Croatian offensive or defensive positions in the Old Town of Dubrovnik after the beginning of November 1991.[197] Strugar impugns the Trial Chamber's findings.[198]

72 Strugar first argues that the Trial Chamber erred in not making findings on the role of the 9 VPS in the shelling of the Old Town in November 1991.[199] The Appeals Chamber finds that Strugar has failed to demonstrate how the

[194] Defence Appeal Brief, paras 13-14.
[195] Trial Judgement, fns 93-94 (citing Joki}, T. 4452-4455).
[196] Trial Judgement, fns 92 (citing Lieutenant Zoran Lemal ("Lemal"), T. 7340), 90 (citing Lieutenant-Colonel Slavoljub Stojanović ("Stojanović"), T. 7795-7797), 131 (citing Captain Jovica Nešić ("Nešić"), T. 8154-8155).
[197] Trial Judgement, paras 61-72.
[198] Defence Notice of Appeal, paras 11-12; Defence Appeal Brief, paras 17-18, 98-103.
[199] *Ibid.*, paras 17-18,

allegations that SFRY navy frigates opened fire, that some shells fell into the sea while other shells fell into the Old Town and that the 9 VPS artillery acted during this period contradict the Trial Chamber's findings or render them erroneous. Moreover, the Appeals Chamber observes that Strugar's reference to the testimony of John Alcock ("Alcock")[200] in support of this second allegation is completely unfounded: Alcock discussed the historical context of the conflict, but did not come close to discussing JNA combat operations in November 1991. The Appeals Chamber summarily dismisses this sub-ground of appeal under category 1, as amounting to a challenge to findings on which his conviction does not rely.

73 In addition, Strugar alleges that the Trial Chamber erred in its findings on Croatian weaponry, both on land[201] and at sea,[202] and defensive positions[203] in and around Dubrovnik in November 1991. In the opinion of the Appeals Chamber, findings on appeal that Croatian forces had warships, heavy weapons and defensive and offensive positions in and around the Old Town of Dubrovnik would be of limited import to Strugar's conviction. These findings would not affect the Trial Chamber's finding that Strugar's troops attacked the Old Town contrary to his preventative orders. Indeed, having regard to the order given by Joki} that JNA troops could only fire on the Old Town in retaliation, the pivotal issue is whether "lethal fire" was coming from the Old Town, not whether there were Croatian forces in and around the Old Town.[204] The Appeals Chamber summarily dismisses these sub-grounds of appeal under category 1, as amounting to challenges to findings on which his conviction does not rely.

74 Finally, Strugar submits that the Trial Chamber erroneously held that no fire emanated from the Old Town in November 1991.[205] In the opinion of the Appeals Chamber, it cannot be excluded that the Trial Chamber considered the evidence to which Strugar refers (and indeed, it did in fact refer to the JNA reports which Strugar cites in his submissions), nor can its decision to rely on the evidence of witnesses to the effect that there was no outgoing fire from the

[200] Alcock, T. 518, 526.
[201] Defence Appeal Brief, paras 99, 103.
[202] *Ibid.*, para. 98.
[203] *Ibid.*, paras 100-101.
[204] Trial Judgement, para. 61.
[205] Defence Appeal Brief, para. 102.

Old Town in November 1991 be deemed unreasonable. The key passage of the Trial Judgement on this subject reads as follows: "No Croatian artillery was positioned in the Old Town of Dubrovnik in November 1991. However, there were JNA reports of shooting incidents from the Old Town walls and turrets in the beginning of November. These reports do not, however, indicate that the Croatian forces were positioned on the Old Town walls and turrets throughout the rest of November. A number of witnesses testified that there was no outgoing fire from the Old Town in November. Individuals armed with light weapons, such as pistols, could be observed moving around the Old Town but there were no set defence positions".[206] The Appeals Chamber summarily dismisses this sub-ground of appeal under category 6, as arguing that the Trial Chamber must have failed to consider relevant evidence.

3. Alleged Errors Regarding Joki}'s Investigation of JNA Combat Operations in November 1991

75 The Trial Chamber held that: (i) Jokić conducted an investigation of the shelling of the Old Town in November 1991; (ii) this investigation concluded that the 3/472 mtbr and possibly the artillery of the 472 mtbr were in a position to shell the Old Town; (iii) Strugar was kept informed of the results of this investigation; and (iv) Joki} requested that the Commander and the Chief of Staff of the 3/472 mtbr be relieved of duty.[207] Strugar impugns the Trial Chamber's findings.[208]

(a) Arguments of the Parties

76 Strugar first submits that the Trial Chamber applied a selective approach in its evaluation of Jokić's testimony.[209] He secondly argues that Joki}'s testimony is not supported by other written or oral evidence.[210] He thirdly

[206] Trial Judgement, para. 72 (footnotes omitted).
[207] *Ibid.*, paras 346, 415, 421-422.
[208] Defence Notice of Appeal, paras 11-12, 33, 95, 98-99; Defence Appeal Brief, paras 20-28, 164.
[209] *Ibid.*, para. 164.
[210] Defence Appeal Brief, paras 24, 28, citing Trial Judgement, paras 346, 415, 421, 422. In particular, he avers that Jokić's claim that he undertook an enquiry into the events of November 1991 and that he (Strugar) learnt of its results through members of his staff is uncorroborated and that no report of the 9 VPS sent to the 2 OG or the Federal Defence Ministry in November 1991 contains information on the shelling of the Old Town by the JNA.

argues that Jokić's testimony is contradictory in several respects.[211] He fourthly argues that Joki}'s testimony is contradicted by other evidence.[212] He finally argues that Jokić had a personal interest in minimizing his own role in these events and shifting blame to others.[213]

77 The Prosecution responds that Strugar fails to show that the Trial Chamber's decision to accept the parts of Joki}'s testimony related to his investigation on the events of November 1991 is unreasonable.[214] It secondly avers that Strugar's submissions regarding Joki}'s testimony fail to demonstrate any error. First, not only is corroboration not a legal requirement for the admissibility of evidence,[215] but there is, in any case, significant evidence supporting Joki}'s interpretation of the events.[216] Second, Strugar's argument that Joki}'s testimony is contradicted by other evidence was considered by the Trial Chamber and therefore fails to satisfy the standard of review on appeal.[217] The Prosecution also submits that Strugar misconstrues

[211] According to Strugar, Jokić stated that he was not aware of civilian casualties and damage caused by the shelling in October and November 1991 (Defence Appeal Brief, paras 164-165, citing Jokić, T. 3999). As the Commander of the 9 VPS, Jokić was the immediate superior of the commanders of the 472 mtbr and of the 3/472 mtbr and was authorized to take measures against his subordinates. The fact that Jokić requested that the 3/472 mtbr be retained within the 9 VPS under his direct command contradicts his testimony that he himself had proposed the 472 mtbr be withdrawn from around Dubrovnik in light of the danger it posed to the Old Town. Also, the fact that Jokić retained authority over the 3/472 mtbr contradicts his testimony that he found out in the November 1991 investigation that the 3/472 mtbr was connected to the shelling of the Old Town during that month (Defence Appeal Brief, paras 25-28, citing Trial Judgement, paras 346, 415, 421, 422).

[212] According to Strugar, the fact that a request for "ZIS cannons" to be given to the 472 mtbr was not approved and was given to the 3/472 mtbr instead contradicts Joki}'s claim that the 3/472 mtbr had participated in the shelling of the Old Town as Joki} would not have provided additional armaments to that unit were this claim truthful (Defence Appeal Brief, para. 27, citing Exhibit D106, "Request for Delay of Deadline and Resubordination of Units issued by the command of the 9th VPS"). The fact that the 3/472 mtbr, while carrying out combat operations between 9 and 12 November 1991, was supported by artillery and mortar fire of other 9 VPS units disproves Jokić's testimony about the 3/472 mtbr's role in the November shelling of the Old Town (Defence Appeal Brief, paras 21-23, citing Exhibit D57, "Order for Attack"; Exhibit D58, "Regular combat report 10.11.01 to the command of the 2nd Brigade from Chief of Staff Milan Zec"; Exhibit P126, "Combat Order issued by the command of the 9th VPS"; and Exhibit P118, "Order of the command of the 9th VPS"). The fact that Kovačević's promotion was proposed by the 9 VPS contradicts Jokić's claim that he was investigating the events of November 1991 and that he had recommended that Kovačević be relieved of duty (Defence Appeal Brief, para. 130, citing Exhibit D100, "Recommendations for Stimulation Measures from Milan Zec to the Command of the 9 VPS").

[213] Defence Appeal Brief, para. 20.

[214] Prosecution Respondent's Brief, para. 4.36, citing *Kupre{ki} et al.* Appeal Judgement, para. 333.

[215] Prosecution Respondent's Brief, para. 2.15, citing, *inter alia*, *Čelebi}i* Appeal Judgement, para. 506.

[216] Prosecution Respondent's Brief, para. 2.15, citing Exhibit P130, "Letter of the International Monitoring Mission dated 11 November 1991" and Exhibit P131, "Letter of the Federal Secretariat for National Defense".

[217] Prosecution Respondent's Brief, para. 2.17.

the evidence and suggests contradictions where none exist.[218] Third, the Prosecution avers that Strugar's argument regarding Joki}'s lack of credibility is speculative in light of the fact that Joki} accepted responsibility and would gain no advantage by giving false testimony.[219]

(b) Discussion

78 With respect to the first and second errors alleged by Strugar, the Appeals Chamber recalls that a reasonable trier of fact may accept some, but reject other, parts of a witness' testimony[220] and that there is no legal requirement that the testimony of a single witness on a material fact be corroborated before it can be accepted as evidence.[221] The Appeals Chamber finds that Strugar has failed to demonstrate that it was unreasonable for the Trial Chamber to accept Joki}'s testimony on the events of November 1991. Indeed, a review of Joki}'s testimony on this matter shows that this finding of the Trial Chamber was reasonable as his evidence was detailed, realistic and measured. In particular, he testified that he did not personally witness the shelling of the Old Town[222] and that his request for two officers to be replaced was left unresolved as "General Strugar did not have any competent officers to offer as replacements" and thus told him "that he would send an officer who was the commander of an armoured unit, but that he would only send this officer later".[223]

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[218] *Ibid.*, para. 2.18. It argues as follows: (i) notwithstanding the absence of a written order, a reasonable trier of fact could conclude that Joki} conducted an investigation; (ii) the evidence relied upon by the Trial Chamber clearly places the 472 mtbr and the 3/472 mtbr within firing range of the Old Town and also indicates that the 3/472 mtbr participated in the attack against Sr| (Prosecution Respondent's Brief, para. 2.18, citing Exhibit P124, "Working Map of the Staff of the 2 OG depicting the Disposition of JNA Forces for 14 November 1991"; Exhibit P118, "Order of the 9 VPS of 11 November 1991"; Exhibit D57, "Order for Attack", cited in Trial Judgement, para. 59, fn. 130); (iii) a reasonable trier of fact could accept Joki}'s testimony that he requested the removal of subordinate commanders; (iv) it was reasonable for the Trial Chamber to accept Joki}'s testimony that Strugar personally made the ultimate decisions on how his units were organised in light of the related evidence in support of this testimony (Prosecution Respondent's Brief, para. 2.18, citing Joki}, T. 3848, 3909-3910, 4495; Trial Judgement, para. 397, fn. 1154; Exhibit P101, "Combat Order No. 6 of the command of the 9th VPS, dated 20 November 1991"; Exhibit D43, "Order to the Command of: 9th VPS and 472 motorized brigade from General Strugar, dated 25 October 1991"); and (v) the fact that Joki} allegedly provided the 3/472 mtbr with additional armaments does not demonstrate that it could not otherwise have participated in the shelling of the Old Town (Prosecution Respondent's Brief, para. 2.18).
[219] *Ibid.*, para. 2.16, citing Joki}, T. 4009, 4340, 5004.
[220] *Kupre{ki} et al.* Appeal Judgement, para. 333.
[221] *Kordi} and ^erkez* Appeal Judgement, para. 274; *Čelebići* Appeal Judgement, para. 506.
[222] Joki}, T. 3998.
[223] *Ibid.*, T. 4000.

79 With respect to the third error alleged by Strugar, the Appeals Chamber finds that he has merely asserted that Joki}'s testimony is contradictory and has not shown how the Trial Chamber erred in finding otherwise. Strugar's allegation that Jokić retained authority over the 3/472 mtbr does not necessarily contradict the latter's testimony: it was reasonable for the Trial Chamber to accept Joki}'s testimony that Strugar personally made the ultimate decisions on how his units were organised in light of related evidence on this point.[224] As for Joki}'s testimony that he was not aware of civilian casualties or damage to civilian objects,[225] Strugar has failed to show how this challenges the Trial Chamber's factual finding that "Joki} conducted an investigation and concluded that the 3/472 mtbr and possibly the artillery of the 472 mtbr were in a position to shell the Old Town".[226]

80 With respect to the fourth error alleged by Strugar, the Appeals Chamber finds that he has merely asserted that the Trial Chamber's findings and the portions of Joki}'s testimony upon which they rely are contradicted by other evidence. In any case, his allegation that the 3/472 mtbr may have been provided with additional armaments does not necessarily contradict Joki}'s testimony,[227] nor does it, most importantly, demonstrate that the 3/472 mtbr could not have participated in the shelling of the Old Town in November 1991. Likewise, Strugar's allegation that, while carrying out combat operations between 9 and 12 November 1991, the 3/472 mtbr was supported by artillery and mortar fire from other 9 VPS units does not necessarily contradict Jokić's testimony regarding the 3/472 mtbr's role in the November shelling of the Old Town, nor does it necessarily affect his credibility. Indeed, the Trial Chamber merely found that "Joki} conducted an investigation and concluded that the 3/472 mtbr and possibly the artillery of the 472 mtbr were in a position to shell the Old Town".[228] Moreover, these allegations misrepresent and ignore the evidence upon which the Trial Chamber relied in its factual findings. In particular, the Trial Chamber reasonably inferred from the evidence that the

[224] Trial Judgement, para. 397, fn. 1154, citing Joki}, T. 3848; Exhibit P101, "Combat Order No. 6 of the command of the 9th VPS, dated 20 November 1991"; and Exhibit D43, "Order to the Command of: 9th VPS and 472 motorized brigade from General Strugar, dated 25 October 1991".
[225] Joki}, T. 3999.
[226] Trial Judgement, fn. 1037. See also *ibid.*, fns 199, 1216, 1222.
[227] See, *e.g.*, Joki}, T. 8594.
[228] Trial Judgement, paras 346, 415, 421-422.

472 mtbr and the 3/472 mtbr were within firing range of the Old Town and that the 3/472 mtbr participated in the attack against Sr|.[229]

81 As to Strugar's argument regarding Kovačević's promotion, the Appeals Chamber observes that the Trial Chamber specifically noted that Joki}'s request was not approved and that "Ftğhere is nothing in the evidence to suggest that the shelling of the Old Town in November 1991 and the consequent damage was ever investigated by the command of the 2 OG, and that disciplinary action of any type was taken against those responsible".[230] The Appeals Chamber is of the view that it was open to a reasonable trier of fact to accept that Joki} had recommended that Kovačević be relieved of duty despite the fact that Kovačević was later promoted in December 1991.[231]

82 With respect to the fifth error alleged by Strugar, the Appeals Chamber finds that he has merely argued that the Trial Chamber should have interpreted the testimony of Joki} in a particular manner by disbelieving him, without demonstrating any error.

83 Accordingly, this sub-ground of appeal is dismissed.

4. Alleged Errors Regarding Strugar's Knowledge of the Shelling of the Old Town in October and November 1991

84 Strugar impugns the Trial Chamber's finding that he had knowledge of the shelling of the Old Town in October and November 1991.[232]

(a) Arguments of the Parties

85 Strugar submits that the Trial Chamber's finding is unsupported by any evidence.[233] Strugar thus avers the following: the "Protest from Head of ECMM Regional Centre in Split to General Strugar, dated 9 November 1991"[234] does not mention the shelling of the Old Town; the "Message from ECMM to JNA HQ

[229] *Ibid.*, para. 59, fns 139-142, citing Exhibit P118, "Order of the 9 VPS of 11 November 1991".
[230] Trial Judgement, fn. 1216.
[231] Similarly, in relation to Joki}'s response to the events of 6 December 1991, the Trial Chamber found that "there is no satisfactory explanation why no disciplinary or other action was taken by FJoki}ğ against Captain Kova~evi}" (*ibid.*, para. 437).
[232] Defence Notice of Appeal, paras 33, 95, 98-99; Defence Appeal Brief, paras 157, 162, referring to Trial Judgement, para. 422.
[233] Defence Appeal Brief, paras 157, 162.
[234] Tab 10 of Exhibit P61.

in Split, dated 9 November 1991"[235] only mentions combat activity around Hotel Argentina, which is situated at a significant distance from the Old Town; the "Protest from Head of ECMM Regional Centre in Split to General Mladeni}, dated 10 November 1991"[236] and the "Message from ECMM to Strugar, Joki}, and Latica, dated 10 November 1991"[237] do not mention the Old Town; and the "Message from ECMM to General Kadijevi}, dated 10 November 1991"[238] only refers to shelling around the walls of the Old Town.[239]

86 The Prosecution responds that Strugar's challenge fails to allege that the Trial Chamber acted unreasonably in considering the evidence as a whole and does not specify how this alleged error creates a miscarriage of justice.[240]

(b) Discussion

87 The Appeals Chamber finds that the Trial Chamber's conclusion that Strugar knew of the events of October and November 1991 is reasonable when due regard is paid to the evidence as a whole.[241] Indeed, as held above, the Appeals Chamber is of the view that the Trial Chamber's finding that Joki} conducted an investigation on the shelling of the Old Town in November 1991 and reported back to Strugar was reasonable.[242] Moreover, the Appeals Chamber notes that the Trial Chamber found that Strugar ordered the attacks

[235] Tab 11 of Exhibit P61.
[236] Tab 13 of Exhibit P61.
[237] Tab 14 of Exhibit P61.
[238] Tab 15 of Exhibit P61.
[239] In addition, Strugar argues that this evidence was in any event not sent or otherwise available to him: tabs 10 and 11 of Exhibit P61 were sent to the JNA Navy Chief Staff in Split, tab 13 of Exhibit P61 was sent to General Mladenić, tab 14 of Exhibit P61 was not sent him, and tab 15 of Exhibit P61 was sent to General Kadijević ("Kadijevi}"). Strugar argues that there is no proof that he had watched Exhibit P19 "Transcript of an ITN News Programme on Events in the Old Town from the 9 to 12 November 1991" nor that he was aware of Exhibit P215, "'Federal Army Tightens siege of Dubrovnik,' Article by Marcus Tanner from the 'The Independent' of 25 October 1991." Strugar states that the only information mentioned by the Trial Chamber which was accessible to him is Exhibit P216, "An article of the Belgrade daily *Politika* entitled 'The Old Dubrovnik was not bombarded.'" (Defence Appeal Brief, para. 162; Defence Reply Brief, para. 75).
[240] Prosecution Respondent's Brief, paras 4.32-4.34.
[241] The Appeals Chamber understands the references to Exhibits P19, P215 and P216 in the Trial Judgement as examples of the broad media coverage which the events of October and November 1991 received and not as references to specific media coverage of which Strugar might have been apprised. As for Exhibit P216, to which Strugar refers, its weight is also limited as there is no evidence that Strugar actually had access to this evidence. In terms of the other evidence relied upon by the Trial Chamber, the Appeals Chamber acknowledges that Tabs 10, 11, 13, 14 and 15 of Exhibit P61 merely refer to attacks or shelling in Dubrovnik and do not refer to the Old Town as such, although Tab 15 does refer to shelling around the walls of the Old Town, and that the aforementioned evidence only pertains to the events of November 1991.
[242] See *supra*, paras 78-83.

in October and November 1991 and participated in the ceasefire negotiations during and following these combat operations.[243]

88 Accordingly, this sub-ground of appeal is dismissed.

C. Alleged Errors Regarding the Events of 3 and 5 December 1991

89 Strugar impugns the Trial Chamber's conclusions on the events of 3 and 5 December 1991 relating to negotiations with Croatian ministers and the planning and ordering of the attack against Sr|. In particular, Strugar alleges errors in the Trial Chamber's findings on his role in conducting negotiations with Croatian ministers, the content of the order to attack Sr|, Joki}'s role in these events, ECMM monitor Colm Doyle's ("Doyle") testimony, the military realities of the JNA, Colonel Svičević's ("Svičević") testimony, and Lieutenant-Colonel Jovanović's ("Jovanovi}") testimony.

1. Alleged Errors Regarding Strugar's Responsibility for Conducting Negotiations with Croatian Ministers

90 The Trial Chamber held that the Yugoslav authorities accorded Strugar the responsibility of conducting negotiations with Croatian ministers on 3 December 1991 and that he, in turn, delegated this responsibility to Joki} on 4 December 1991.[244] Strugar submits that the Trial Chamber committed an error in making this finding,[245] and furthermore that it used this holding to support a number of other erroneous conclusions.[246]

91 Strugar submits that had he been given the responsibility to negotiate, he would not have been competent to delegate this responsibility to Jokić.[247] The Appeals Chamber summarily dismisses this sub-ground of appeal under category 4, as amounting to assertions which are unsupported by any evidence.

92 In addition, Strugar submits that the evidence demonstrates that Joki} was negotiating on behalf of the Supreme Command of the SFRY forces[248] and

[243] Trial Judgement, paras 44-50, 59-67.
[244] *Ibid.*, para. 80.
[245] Defence Notice of Appeal, para. 13; Defence Appeal Brief, paras 30-32.
[246] *Ibid.*, para. 32, citing Trial Judgement, paras 81, 82, 84, 89, 169, 173.
[247] Defence Appeal Brief, para. 30.
[248] *Ibid.*, paras 30, 32.

that his (Strugar) own role in the negotiations was limited.[249] In the opinion of the Appeals Chamber, Strugar has failed to demonstrate that it was unreasonable for the Trial Chamber to conclude that he was given responsibility for conducting negotiations with the Croatian ministers on the basis of the evidence on which it relied.[250] The Appeals Chamber summarily dismisses these sub-grounds of appeal under category 3, as amounting to mere assertions that the Trial Chamber should have interpreted evidence in a particular manner.

2. Alleged Errors Regarding the Order to Attack Sr|

93 The Trial Chamber found that on 5 December 1991, Strugar ordered the attack against Sr| of 6 December 1991.[251] Strugar submits that the Trial Chamber made erroneous and incomplete findings in its conclusions on the order to attack Sr|.[252]

(a) Arguments of the Parties

94 Strugar submits that the Trial Chamber erroneously considered that detailed plans and preparations were made on 5 December 1991 for the attack against Srđ and that these indicated that he issued the order that day for the attack on Srđ. Strugar asserts that the Trial Chamber erred in failing to consider evidence that before 5 December 1991, the 9 VPS had provided the 3/472 mtbr with mortar and tank shells as well as sniper bullets.[253] Second, Strugar points out that Jokić testified that he did not know that Strugar had ordered the attack in question. He submits that if he gave the order to attack Srđ, it is impossible that Jokić would not have known about it.[254] Third, Strugar states that the Trial Chamber did not clarify why he would have ordered the attack, nor explain the content of such an order, to whom it was addressed and how it was transmitted.[255] Fourth, Strugar submits that the Trial Chamber should have had recourse to orders in which the 9 VPS and the 2 OG scheduled

[249] *Ibid.*, paras 30-31.
[250] Trial Judgement, fns 220-221.
[251] *Ibid.*, para. 167.
[252] Defence Notice of Appeal, paras 33, 35-37, 97, 99; Defence Appeal Brief, paras 62-63, 79, 152-153. See also AT. 94-95.
[253] Defence Appeal Brief, paras 62-63, citing Exhibit D97, "Daily Report on Logistical Support, sent by the 9 VPS to the command of the 2 OG and VPO, dated 4 December 1991".
[254] Defence Appeal Brief, para. 79.
[255] *Ibid.*, para. 63.

active combat actions and ordered the prohibition of shelling the Old Town.[256] Strugar also makes reference to his own order of 18 November 1991, issued after the cessation of combat operations in November and still in force on 6 December 1991, in which he explicitly forbade any fire on the Old Town.[257]

95 The Prosecution responds that there is considerable credible and reliable evidence upon which the Trial Chamber could reasonably conclude that Strugar ordered the attack on Sr|.[258] It also responds that Strugar's submissions do not meet the standard of review on appeal as they merely offer alternative interpretations of the evidence that the Trial Chamber already considered and rejected at trial.[259]

(b) Discussion

96 The Appeals Chamber finds that Strugar has failed to demonstrate that the Trial Chamber's findings were unreasonable. In his first submission, Strugar has merely asserted that the Trial Chamber must have failed to consider evidence that the 9 VPS provided the 3/472 mtbr with mortar and tank shells and sniper bullets on 4 December 1991. It cannot be excluded however that the Trial Chamber considered this evidence, especially as it referred to it in another part of the Trial Judgement.[260] Moreover, the fact that the 3/472 mtbr received provisions and armaments on 4 December 1991 does not in fact disprove that the attack against Sr| was planned on 5 December 1991.

97 The Appeals Chamber finds Strugar's second submission regarding Jokić's lack of knowledge of the order to attack Sr| to be unpersuasive. The Trial Chamber expressed clear reservations regarding Joki}'s testimony on the morning of 6 December 1991, in particular his assertions that he did not know of the order to attack Sr| and that the attack was conducted by Kova~evi}

[256] *Ibid.*, para. 152, citing Exhibit P118, "Order of the 9 VPS, dated 11 November 1991"; Exhibit P119, "Order of the 2 OG, dated 24 October 1991"; Exhibit D47, "Order by Strugar to 9 VPS, dated 18 November 1991".
[257] Defence Appeal Brief, para. 153, citing Exhibit D47 "Order by Strugar to 9 VPS, dated 18 November 1991".
[258] Prosecution Respondent's Brief, para. 2.29, citing Ne{i}, T. 8217-8219; Joki}, T. 3910-3911, 4065-4071, 4085-4088, 4117-4118, 4131-4134, 4422, 4803; General Andrew Pringle ("Pringle"), T. 1564-1565, 1594; Doyle, T. 1715-1716; Exhibit P114, "Directive issued from Colonel-General Blagoje Adzic, dated 12 October 1991"; Exhibit P133, tab 41, "Personal file of Captain 1st Class Vladimir Kova~evi}"; Exhibit P61, tab 36, "Strugar's Message to Minister Rudolf".
[259] Prosecution Respondent's Brief, para. 2.30; AT. 121-125, 128-129.
[260] Trial Judgement, fn. 1172.

acting alone.[261] As a result, Strugar has merely argued that the Trial Chamber should have interpreted evidence in a particular manner.

98 With respect to Strugar's third and fourth submissions, the Appeals Chamber recalls that a Trial Chamber is only required to make findings on those facts which are essential to the determination of guilt and does not necessarily have to refer to the testimony of every witness and to every piece of evidence on the record.[262] The Appeals Chamber finds that Strugar has failed to demonstrate how the Trial Chamber's failure to clarify the exact content of the order to attack Sr| impacts on his conviction or sentence. The exact content of this order does not affect the Trial Chamber's findings that Strugar ordered the attack, had the material ability to prevent and stop the shelling of the Old Town and had the ready means of communicating with his subordinates. Moreover, whether or not this order included an additional preventative order has no bearing on Strugar's criminal liability as he would have had, in any case, notice of the risk that this order had been breached and that the Old Town might be shelled as of 7:00 a.m. on 6 December 1991. In addition, Strugar has ignored other relevant findings by the Trial Chamber which do in fact clarify why he ordered the attack against Sr|[263] and which specifically address the evidence to which Strugar refers in his submissions.[264] In this last respect, Strugar has thus merely asserted that the Trial Chamber should have interpreted Exhibits P118, P119 and D47 in a particular manner.

99 Accordingly, this sub-ground of appeal is dismissed.

3. Alleged Errors Regarding Joki}'s Role in the Events of 5 December 1991

100 The Trial Chamber held as follows: "The issue of whether Admiral Jokić was at the Kupari meeting is not determinative of the Chamber's decision in this trial, although it has relevance to credit. It remains in balance."[265]

[261] *Ibid.*, paras 96, 97, 146, 152-153, 157, 174-175, 425.
[262] *Kvo~ka et al.* Appeal Judgement, para. 23.
[263] See Trial Judgement, paras 164, 166.
[264] *Ibid.*, paras 61 (citing Exhibits P118 and P119), 74 (citing Exhibit D47), 396 (citing Exhibits P119 and D47), 415 (citing Exhibits P118 and P119), 421 (citing Exhibits P118, P119 and D47).
[265] Defence Appeal Brief, para. 35, referring to Trial Judgement, para. 88.

101 Strugar impugns the Trial Chamber's finding,[266] submitting that the Trial Chamber erred in failing to resolve a number of issues regarding Jokić's role in the events of 5 December 1991, most notably his participation in the Kupari meeting during which the attack against Sr| was planned.[267] In the opinion of the Appeals Chamber, Strugar has failed to demonstrate how this challenge would affect a finding on which his conviction relies. Contrary to Strugar's submissions, the issue of Joki}'s presence at the meeting in Kupari has no bearing on Strugar's responsibility as a superior, nor does it impact upon any other finding of fact. The Appeals Chamber observes that the Trial Chamber relied on the testimony of Doyle to find that Strugar had ordered the attack against Sr|[268] while in regard to the Kupari meeting, it merely established that the detailed planning and execution of this order had been left by Strugar to the 9 VPS.[269] The Appeals Chamber notes that the Trial Chamber expressed its reservations concerning the testimony of Jovanovi} that the attack had been proposed by Kova~ević at the meeting and specifically rejected Strugar's theory that the attack had been planned by the 9 VPS without Strugar's knowledge and contrary to his orders.[270] In the Appeals Chamber's opinion, Joki}'s presence or absence at the meeting at Kupari affects none of the above conclusions. In these circumstances, the Appeals Chamber is of the view that the Trial Chamber's decision to leave this issue "in balance" was a reasonable one. The Appeals Chamber summarily dismisses this sub-ground of appeal under category 1, as amounting to challenges to factual findings on which his conviction does not rely.

4. Alleged Errors Regarding Doyle's Testimony

102 The Trial Chamber found that Doyle, an Irish army officer serving as an ECMM monitor with responsibility in Bosnia and Herzegovina, met with Strugar on 6 December 1991.[271] Doyle testified as follows in relation to his conversation with Strugar:

> And the interpreter informed me that the general had been quite angry because Fof what was termed to me as paramilitaries on the territory of

[266] Defence Notice of Appeal, paras 14-15, 19-20; Defence Appeal Brief, paras 33-39.
[267] *Ibid.*, paras 33, 39. See also AT. 96-100.
[268] Trial Judgement, paras 164-169.
[269] *Ibid.*, paras 85-91, 169, 339-340.
[270] *Ibid.*, paras 85-98, in particular paras 89, 98.
[271] *Ibid.*, para. 161.

> Bosnia-Herzegovina had attacked some of his troops, the troops that were under General Strugar's command. This was something he would not tolerate and that he responded by firing on the city of Dubrovnik.[272]

The Trial Chamber found Doyle's evidence to be "very reliable" and understood it

> as an unequivocal admission by the Accused that there had been firing that day on Dubrovnik by troops under his command, which firing occurred on the Accused's deliberate order, his offered explanation being the conduct of opposing forces in Bosnia and Herzegovina.[273]

On the basis of a note made by Doyle in his diary on 6 December to the effect that "12.00 met with Gen Strugar (three star) bad in Dubrovnik", the Trial Chamber held that Dubrovnik was, to Doyle, the compelling point of his conversation with Strugar.[274] The Trial Chamber then sought to interpret the meaning of Strugar's reference to Dubrovnik:

> While the words of the Accused to Colm Doyle can be interpreted as indicating that he ordered his troops to fire on the greater city of Dubrovnik, in the Chamber's view his words are very well capable of being understood as an admission that the attack being made that day by the JNA was on his order. This was, as the Chamber has found, an attack directed at Sr|, but as will be discussed, the order to attack Sr| also contemplated some shelling of the city. This evidence leads the Chamber to conclude that what the Accused was in fact saying to Colm Doyle was that he responded to attacks on his troops in Bosnia and Herzegovina by having his troops attack the obviously advantageous and strategic Croatian "paramilitary" position in Dubrovnik which jeopardised JNA troops in the area, namely Sr|. His reference to the city is also consistent with an awareness that the city was indeed being shelled by his forces during the attack. The Chamber is conscious that this finding as to the meaning of his words is more favourable to the Accused than a more literal understanding.[275]

Strugar submits that the Trial Chamber erred in its assessment and interpretation of Doyle's testimony.[276]

(a) Arguments of the Parties

103 Strugar impugns the Trial Chamber's conclusions regarding Doyle's testimony on five main grounds. First, Strugar argues that from the three words "bad in Dubrovnik",[277] the Trial Chamber reached the following erroneous conclusions: (i) he ordered the attack on Srđ; (ii) this attack involved

[272] Doyle, T. 1716, referred to in Trial Judgement, fn. 525.
[273] *Ibid.*, para. 164.
[274] *Ibid.*
[275] *Ibid.*, para. 167 (footnotes omitted).
[276] Defence Notice of Appeal, paras 35-37; Defence Appeal Brief, paras 40-63. See also AT. 88-94.
[277] Exhibit P46, "Excerpt of the diary of Colm Doyle".

the shelling of the city; (iii) he responded by ordering an attack on the strategic position of paramilitary forces in Croatia because of an attack of paramilitary forces in Bosnia; and (iv) the attack was ordered because Srđ was an ongoing sign of the failure of the JNA's attack of November 1991.[278]

104 Second, Strugar challenges the Trial Chamber's finding that "[t]he preoccupation of the Accused and any indication of actual anger during the meeting is also consistent, however, with the Accused's concern that the attack on Srđ had not gone as anticipated."[279] Strugar submits that the Trial Chamber's conclusions about his mood and intentions are unsupported by the evidence. He contends that he might have been angry and concerned because he was suddenly summoned to see Kadijević and because he was surprised by the events of that morning.[280]

105 Third, Strugar submits that Doyle's testimony does not support the Trial Chamber's conclusions. This testimony, in his view, stands for the following propositions: (i) Doyle maintained that he (Strugar) did not mention which paramilitary formations were concerned;[281] (ii) Doyle did not know which order to open fire was allegedly given by him;[282] (iii) Doyle spoke of opening fire in a general way;[283] and (iv) Doyle did not recall all of the words spoken by him.[284] Strugar moreover argues that the Trial Chamber erroneously interpreted Doyle's testimony when it held that Dubrovnik was "the compelling point" of their conversation, since Croatia was, in Doyle's own admission, of no interest to him due to his position of ECMM monitor for Bosnia and Herzegovina.[285]

106 Fourth, Strugar submits that the Trial Chamber misinterpreted Doyle's testimony in a number of respects. He claims that Doyle's testimony amounts to his assumptions, impressions and perceptions about his mood and the

[278] Defence Appeal Brief, para. 47; AT. 88 *et seq.*
[279] Trial Judgement, para. 168.
[280] Defence Appeal Brief, para. 57.
[281] *Ibid.*, para. 45, citing Exhibit D22, "Correcting Note by Witness Doyle"; AT. 89.
[282] Defence Appeal Brief, para. 45, citing Exhibit D21, "Notes of interview with Colonel Doyle, 30 January 2003", para. 8; AT. 90.
[283] Defence Appeal Brief, para. 45, citing Exhibit D21, "Notes of interview with Colonel Doyle, 30 January 2003", para. 10.
[284] Defence Appeal Brief, para. 45, citing Exhibit D21, "Notes of interview with Colonel Doyle, 30 January 2003", para. 10; Doyle, T. 1785, 1791; see also AT. 90.
[285] Defence Appeal Brief, para. 56.

events of 5 December 1991.[286] Strugar argues that the Trial Chamber erred in interpreting the words "firing of Dubrovnik" as an admission that he had issued an order for an attack on Srđ and in failing to refer to any evidence or provide any reason in support of this interpretation.[287] Strugar further argues that the Trial Chamber erred when it concluded that the paramilitary forces mentioned by Doyle referred to paramilitary units from Croatia.[288] He asserts that these conclusions are "arbitrary"[289] and that there is no evidence supporting the findings on the relevance of Srđ for the JNA and on attacks by Croatian paramilitaries on Strugar's troops.[290]

107 Fifth, Strugar maintains that he did not make any admission to Doyle. He argues that the Trial Chamber's conclusion is unreasonable as it implies that he was concealing from Doyle that he had ordered an attack on a legitimate military target (Srđ), while admitting instead to ordering an attack against a potentially prohibited target (Dubrovnik).[291] Strugar also argues that Doyle's testimony regarding his presumed admission lacks credibility in light of the Trial Chamber's other findings.[292]

108 The Prosecution responds that Doyle's testimony constitutes a clear account of Strugar's admission that he was responsible for the activities of his forces around Dubrovnik.[293] It further suggests that the Trial Chamber correctly interpreted the content of Doyle's conversation with Strugar.[294] It finally argues that Strugar does not identify errors of fact, but merely posits alternative interpretations and questions the Trial Chamber's weighing of evidence.[295]

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[286] Defence Appeal Brief, para. 46, citing Exhibit D21, "Notes of interview with Colonel Doyle, 30 January 2003". paras 7, 8, 10; Doyle, T. 1717.
[287] Defence Appeal Brief, paras 48-49; AT. 89.
[288] *Ibid.*, para. 52; AT. 89.
[289] *Ibid.*, para. 53.
[290] *Ibid.*, paras 51-53, citing Trial Judgement, para. 166.
[291] *Ibid.*, paras 54-55; AT. 89.
[292] Strugar asserts that, according to the Trial Chamber's findings, at the time of his alleged admission he: (i) already knew that the Old Town had been targeted and hit; (ii) had already been ordered to Belgrade by the Ministry of Defence and the Chief of Staff of the JNA; (iii) was aware that Kadijević had ordered an investigation into the events of that day; (iv) had ordered a ceasefire only 45 minutes earlier; (v) was allegedly planning with Jokić to cover up the event and to place the responsibility on Kovačević; and (vi) was concealing the truth about the attack from Kadijević, the FRY Minister of Defence and the Chief of the JNA General Staff (Defence Appeal Brief, paras 58-61; AT. 92-93).
[293] Prosecution Respondent's Brief, paras 2.34-2.35.
[294] *Ibid.*, paras 2.37-2.44; see also AT. 124-126.
[295] Prosecution Respondent's Brief, para. 2.45.

(b) Discussion

109 Strugar challenges the Trial Chamber's interpretation of Doyle's note "bad in Dubrovnik".[296] The Appeals Chamber finds that Strugar has misrepresented the Trial Chamber's findings, in terms of the conclusions he alleges it drew from the note "bad in Dubrovnik" included in Doyle's diary. Indeed, the Trial Chamber merely found that this note "confirms that Dubrovnik was, to Colm Doyle, the compelling point of the conversation"[297] and instead relied on the oral testimony of Doyle to reach its findings.[298] Strugar also challenges the Trial Chamber's conclusions about his mood and intentions.[299] The Appeals Chamber finds that Strugar's arguments in this regard are wholly speculative and unsupported by any evidence on the record and merely posit alternative interpretations of the evidence. As Strugar has not shown that these conclusions were in any way unreasonable, these alleged errors are dismissed.

110 The Appeals Chamber will now consider whether the Trial Chamber's interpretation of Doyle's testimony was reasonable. To begin with, the Appeals Chamber finds that the conclusion that Dubrovnik was, for Doyle, the compelling point of his conversation with Strugar is reasonable in light of the cited note in Doyle's diary.[300]

111 With respect to the Trial Chamber's interpretation of Strugar's admission that "he responded by firing on the city of Dubrovnik" as an admission that he had ordered the attack on Sr|, the Appeals Chamber observes that, contrary to Strugar's submissions, the Trial Chamber did in fact provide reasons in support of this interpretation.[301] Indeed, the Trial Chamber relied on three principal reasons:

> (i) "the greater city of Dubrovnik Ŧ...ğ included the Old Town and also, both geographically and as a matter of ordinary language, Sr| as the dominant topographical feature of the city of Dubrovnik."[302]

[296] Defence Appeal Brief, para. 47.
[297] Trial Judgement, para. 164.
[298] *Ibid.*, paras 164-168.
[299] Defence Appeal Brief, para. 57.
[300] Exhibit P46, "Excerpt of the diary of Colm Doyle".
[301] Trial Judgement, paras 166-167.
[302] *Ibid.*, para. 166.

> (ii) "To the JNA forces, all of whom in the region were under the Accused's command, Sr| was an ongoing sign of the failure of the JNA in November to sweep the Croatian forces from the heights around Dubrovnik. Sr| was therefore the position in Dubrovnik which could most effectively strike a decisive blow to Croatian forces. Its capture would deny them the one position which offered them a clear defensive advantage, while significantly enhancing the effectiveness of the JNA's grip on Dubrovnik. The taking of Sr| might well also have been anticipated to be a significant psychological blow to the people of Dubrovnik such that it could well encourage a more ready acceptance of JNA proposals to resolve the situation Dubrovnik faced."[303]
>
> (iii) "[Strugar's] reference to the city is also consistent with an awareness that the city was indeed being shelled by his forces during the attack."[304]

While it is true that the Trial Chamber did not refer to relevant evidence or factual findings in making the above three statements, its findings in relation to the geographical location of Dubrovnik and Sr|, JNA combat operations in the Autumn of 1991, the planning of the attack against Sr| and the conduct of the attack on 6 December 1991 provide ample support for its reasoning.[305] The Appeals Chamber thus finds that the Trial Chamber's interpretation was reasonable. What is more, since this interpretation is, as the Trial Chamber itself acknowledged,[306] more favourable to Strugar than a more literal understanding, Strugar has failed to show how, even if it were erroneous, it could have occasioned a miscarriage of justice.

112 With respect to the Trial Chamber's interpretation of Strugar's reference to paramilitaries as Croatian paramilitary forces, the Appeals Chamber observes that the Trial Chamber did substantiate its interpretation. The Trial Chamber, relying on the testimony of Joki}, stated that "all Croatian forces were regarded by the JNA as paramilitaries as they were not lawfully constituted as a military force".[307] The Appeals Chamber notes other references throughout the Trial Judgement to the presence of Croatian paramilitary forces in the region of Dubrovnik.[308]

113 As a result of the foregoing, the Appeals Chamber finds that Strugar has not shown that the Trial Chamber's findings were erroneous.

114 Accordingly, this sub-ground of appeal is dismissed.

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[303] *Ibid.*
[304] *Ibid.*, para. 167.
[305] *Ibid.*, paras 20, 22-78, 86, 90, 99-145.
[306] *Ibid.*, para. 167.
[307] *Ibid.*, fn. 542, citing Joki}, T. 4368.
[308] See generally Trial Judgement, paras 20, 22-78; Doyle, T. 1743-1744; Joki}, T. 4613; Svi~evi}, T. 7099.

5. Alleged Errors Regarding the "Military Realities of the JNA"

115 The Trial Chamber explained that Strugar's admission to Doyle that he had given the order to attack Sr| was consistent with the military realities of the JNA, having found that it would have been difficult for the attack to have been launched at the level of the 9 VPS, without the concurrence of the 2 OG, especially in light of the negotiations with the Croatian authorities.[309] Strugar submits that this holding is erroneous and incomplete.[310]

116 Strugar submits that the Trial Chamber failed to provide sufficient reasoning in support of its conclusion, including articulating the "military realities" to which it refers as well as explaining why it chose this scenario over other possible scenarios.[311] The Appeals Chamber observes that the Trial Chamber carefully considered and rejected the alternative scenarios to which Strugar refers in his submissions.[312] Moreover, although the Trial Chamber did not refer to them in the impugned paragraph, it did make detailed findings about the military realities of the JNA elsewhere in the Trial Judgement,[313] including a careful examination of the relationship of subordination which existed between the 9 VPS and the 2 OG.[314] Finally, Strugar's arguments regarding alternative scenarios and military operations are speculative and unsubstantiated by reference to any evidence. The Appeals Chamber summarily dismisses this sub-ground of appeal under category 2, as including arguments which ignore other relevant factual findings made by the Trial Chamber, and category 4, as including mere assertions that are unsupported by any evidence.

6. Alleged Errors Regarding Svičević's Testimony

117 The Trial Chamber found the testimony of Svičević, a staff officer of the 2 OG, unpersuasive.[315] Strugar submits that the Trial Chamber erred in dismissing Svičevi}'s testimony.[316]

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[309] Trial Judgement, para. 167.
[310] Defence Notice of Appeal, paras 35-37; Defence Appeal Brief, paras 64-67.
[311] Defence Appeal Brief, paras 64-67; AT. 95-96, 99-100.
[312] Trial Judgement, paras 85-98, 146, 404.
[313] *Ibid.*, paras 23-24, 393-414.
[314] *Ibid.*, paras 381, 390-391, 393-405.
[315] *Ibid.*, paras 149, 163.
[316] Defence Notice of Appeal, para. 28; Defence Appeal Brief, paras 68-75.

(a) Arguments of the Parties

118 Strugar asserts that Svičević did not testify about what the staff of the 2 OG in general knew about the attack on Sr|, but only about matters within his own knowledge.[317] According to Strugar, this contradicts the Trial Chamber's finding that Svičević was trying to give a different interpretation to his notes in order to protect the staff of the 2 OG.[318] Strugar also points out that Svičević's testimony on the fighting between paramilitary groups and the JNA around Dubrovnik was detailed and realistic and clarified ambiguities in the testimony given by Doyle.[319] He further argues that the Trial Chamber erred in failing to analyse the content of Svičević's notes, an error which in turn led it to reach erroneous conclusions about the meeting.[320] Strugar finally challenges the Trial Chamber's finding that Svičević "would hardly note such an admission [of firing against Dubrovnik] by his General", while at the same time concluding that Strugar would proceed to make such an admission to Doyle.[321]

119 The Prosecution responds that the Trial Chamber's analysis of Svičević's testimony was entirely reasonable. To begin with, the Prosecution points out that only Doyle can speak as to his own understanding of the conversation in question.[322] Moreover, the Prosecution reasons that the credibility and reliability of Svičević's testimony were rightly questioned by the Trial Chamber.[323]

(b) Discussion

120 The Appeals Chamber finds that Strugar has failed to demonstrate that the Trial Chamber's assessment of Svičević's testimony was unreasonable. It was open to a reasonable trier of fact not to accept Svičević's account of Strugar's conversation with Doyle in light of the fact that he claimed to be relying on notes which he admitted were not exhaustive[324] and which he made as the liaison officer of the 2 OG.[325] Most importantly, a number of issues arose

[317] *Ibid.*, para. 68, citing Trial Judgement, para. 149.
[318] Defence Appeal Brief, para. 72.
[319] *Ibid.*, para. 69.
[320] *Ibid.*, paras 71-73, 75.
[321] *Ibid.*, para. 74, citing Trial Judgement, para. 163. See also Defence Reply Brief, para. 34.
[322] Prosecution Respondent's Brief, para. 2.51.
[323] *Ibid.*, paras 2.52-2.55.
[324] Svi~evi}, T. 7236-7237; 7239-7240.
[325] *Ibid.*, T. 7059, 7169-7172.

regarding the credibility and reliability of Svičević's testimony in terms of his approach to taking notes, in particular the order in which they were written and the fact that his notes contained both an account of the meeting as well as his personal observations and views, and in terms of the discrepancies in form and in content between the original version of his notes and the two rewrites of his notes which he provided to the Trial Chamber.[326] Hence, Strugar's submissions fall short of demonstrating any error in the Trial Chamber's analysis.

7. Alleged Error Regarding Jovanović's Testimony

121 The Trial Chamber recorded "an express reservation" regarding Jovanovi}'s evidence that the attack on Sr| was proposed by Kova~evi} at a meeting on 5 December 1991 and then agreed to and planned at that meeting by those present.[327] Strugar submits that the Trial Chamber erred in failing to accept Jovanovi}'s testimony on the meeting in Kupari of 5 December 1991.[328]

122 First, in relation to the Trial Chamber's argument that this proposal was made in the middle of negotiations led by Jokić, Strugar submits that the Trial Chamber accepted that Warship Captain Zec, to whom Kovačević was subordinate, was present.[329] The Appeals Chamber summarily dismisses this sub-ground of appeal under category 1, as amounting to an argument that is clearly irrelevant.

123 Second, in relation to the Trial Chamber's argument that it would be surprising that such an attack be discussed at the suggestion of an ordinary battalion commander, Strugar submits that in daily meetings, commanders of the 9 VPS units reported to their superior command about their units, in accordance with JNA military doctrine.[330] The Appeals Chamber summarily dismisses this sub-ground of appeal under category 4, as amounting to assertions that are unsupported by any evidence on the record.

124 Third, Strugar submits that the Trial Chamber erred in rejecting Jovanović's testimony[331] and written report of 6 December 1991 on the combat

[326] T. 7172, 7179-7190, 7196-7206, 7217-7225, 7234-7241.
[327] Trial Judgement, para. 89. See also *ibid.*, para. 98.
[328] Defence Notice of Appeal, paras 15-17, 19; Defence Appeal Brief, paras 83-90.
[329] Defence Appeal Brief, para. 87.
[330] *Ibid.*, paras 85-86.
[331] *Ibid.*, para. 88.

operations of the 3/5 mtbr,[332] in accepting the evidence of certain witnesses,[333] and in failing to consider the testimony of a number of witnesses.[334] In the opinion of the Appeals Chamber, Strugar's submissions merely posit alternative interpretations of the evidence and fail to reveal any error on the part of the Trial Chamber. Morevoer, the Appeals Chamber observes that the Trial Chamber specifically considered the evidence to which Strugar refers in certain of his submissions in its findings on the planning of the attack against Sr|.[335] The Appeals Chamber summarily dismisses these sub-grounds of appeal under category 3, as including submissions that merely posit alternative interpretations of the evidence, and category 2, as including arguments that misrepresent and ignore the Trial Chamber's factual findings.

D. Alleged Errors Regarding the Events of 6 December 1991

125 Strugar submits that the Trial Chamber committed errors in its findings on the events of 6 December 1991 regarding (i) his telephone conversation with Kadijevi}; (ii) the risk of which he had notice was sufficient to justify further enquiry; (iii) his knowledge of the progress of the attack against Sr| on 6 December 1991; (iv) the testimony of Frigate-Captain Handžijev ("Handžijev"); (v) Jokić's and Neši}'s reports on the events of 6 December 1991; (vi) Croat firing positions or heavy weapons in the Old Town; (vii) expert Witness Viličić's report; (viii) the ownership of damaged buildings in the Old Town; and (ix) the status of Mato Valjalo ("Valjalo").

1. Alleged Errors Regarding Strugar's Telephone Conversation with Kadijević

126 The Trial Chamber held that as of around 7:00 a.m. on 6 December 1991, Strugar had notice of the clear and strong risk that his artillery was shelling the Old Town. It also held that despite such notice, he did not ensure that he obtained reliable information to determine whether his artillery was shelling

[332] *Ibid.*, para. 84.
[333] *Ibid.*, para. 89.
[334] *Ibid.*, para. 90.
[335] Trial Judgement, fns 255 (citing Exhibit D108, "Report signed by Miroslav Jovanović, dated 6 December 1991"), 256 (citing Stojanović, T. 7821; Lemal, T. 7366), and 271 (citing Ne{ić, T. 8167). See also Trial Judgement, paras 88-94 (citing Exhibit D108 and the testimony of Stojanović, Lemal and Ne{ić).

the Old Town.[336] The Trial Chamber concluded the following regarding Strugar's telephone conversation with Kadijevi}:

> In the very early stages of the attack, well before the attacking JNA infantry had actually reached the Sr| feature and the fort, at a time around 0700 hours as the Chamber has found, the Accused was informed by the Federal Secretary of National Defence General Kadijevi} of a protest by the ECMM against the shelling of Dubrovnik. (…) While a protest such as had been made to General Kadijevi} could perhaps have arisen from shelling targeted at such Croatian defensive positions, the description that Dubrovnik was being shelled, the extremely early stage in the attack of the protest (before sunrise), and the circumstance that the seriousness of the situation had been thought by the ECMM to warrant a protest in Belgrade at effectively the highest level, would have put the Accused on notice, in the Chamber's finding, at the least that shelling of Dubrovnik beyond what he had anticipated at that stage by virtue of his order to attack Sr|, was then occurring.[337]

Strugar impugns the Trial Chamber's conclusions.[338]

(a) Arguments of the Parties

127 Strugar impugns the Trial Chamber's findings on three main grounds. To begin with, Strugar submits that the Trial Chamber erred in finding that he learnt from Kadijević's telephone call that the Old Town was being shelled. Strugar submits that the only source for the content of the conversation between himself and Kadijević is Jokić and that the latter did not mention that Kadijević had addressed the shelling of the Old Town.[339] Strugar further argues that Kadijević could not have informed him about the shelling of the Old Town as there was no shelling of the Old Town at the time of their telephone conversation. He avers that the Trial Chamber itself found that the most intensive shelling was between 9:00 and 9:30 a.m. and at about 11:00 a.m., and that the ECMM observers did not record the shelling of the Old Town until at least 7.20 a.m.[340] Strugar finally argues that the Trial Chamber erroneously failed to accept other evidence on the circumstances of his telephone conversation with Kadijević[341] and, in particular, erred in failing to establish why Kadijević was angry when he called him.[342]

[336] Trial Judgement, paras 418, 423-424.
[337] *Ibid.*, para. 418 (footnotes omitted).
[338] Defence Notice of Appeal, paras 96, 99; Defence Appeal Brief, paras 132-133, 136-139, 156.
[339] *Ibid.*, para. 156.
[340] *Ibid.*, paras 132-133, 138, citing Exhibit P61, tab 30, "Logsheet of ECMM Substation Dubrovnik, 6 December 1991".
[341] Defence Appeal Brief, paras 136-137.
[342] According to Strugar, the apparent reason for Kadijević's anger was that the attack against Sr| had taken place at a time when negotiations for a comprehensive truce were underway. Strugar refers to Jokić's testimony that "[Strugar] told me that General Kadijević was furious, that an agreement had been signed for a cease-fire to take place and how, given that, could a

128 The Prosecution responds that the Trial Chamber's finding that Strugar and Kadijević discussed the shelling of the Old Town is reasonable and is supported by the evidence.[343]

(b) Discussion

129 The Appeals Chamber finds that Strugar's first and second arguments misrepresent the Trial Chamber's factual findings. The Trial Chamber did not find that Kadijevi} had mentioned the shelling of the Old Town, but rather that he had mentioned the shelling of Dubrovnik.[344] As such, the Trial Chamber's conclusion that Strugar was on notice of the clear and strong risk that his artillery was shelling the Old Town rests on his knowledge of the shelling of Dubrovnik, taken together with his knowledge regarding the attack on Sr| and previous instances of the shelling of the Old Town.[345] Moreover, while it is true that the Trial Chamber found that the most intense periods of shelling occurred between 9:00 and 9:30 a.m. and at about 11:00 a.m.,[346] it also found that shelling of the Old Town had occurred between 5:50 a.m. and 7:00 a.m.,[347] the period preceding Strugar's telephone conversation with Kadijević. Strugar does not show that these were findings no reasonable trier of fact could make.

130 As to Strugar's third argument, the Appeals Chamber finds that he fails to show how the Trial Chamber erred in not establishing whether and why Kadijević was angry when he called Strugar. The Appeals Chamber recalls that a Trial Chamber is only required to make findings on those facts which are essential to the determination of guilt and does not necessarily have to refer to the testimony of every witness and to every piece of evidence on the record.[348] In addition, the Appeals Chamber notes that the Trial Chamber expressed its reservations regarding the parts of Joki}'s testimony upon which Strugar's

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battalion be launching an attack under those circumstances?" (Jokić, T. 4046). Strugar submits that, since evidence shows that he ordered that the attack be halted at 7:00 a.m., the only reasonable inference which can be drawn in the circumstances is that, during their conversation, Kadijević ordered the suspension of the attack against Srđ (Defence Appeal Brief, para. 139).

[343] Prosecution Respondent's Brief, para. 4.18. See also *ibid.*, paras 4.19-4.20.

[344] Trial Judgement, paras 160, 418.

[345] *Ibid.*, para. 418.

[346] *Ibid.*, para. 107.

[347] *Ibid.*, paras 99-106.

[348] *Kvo~ka et al.* Appeal Judgement, para. 23.

argument relies.[349] As Strugar has not shown that the Trial Chamber erred in so doing,[350] his argument stands to be rejected.

131 Accordingly, this sub-ground of appeal is dismissed.

2. Alleged Errors in Finding That the Risk of Which Strugar Had Notice Was Sufficient to Justify Further Enquiry

132 Strugar impugns the Trial Chamber's conclusion regarding "the clear and strong risk" of the shelling of the Old Town of which he had notice:

> In the Chamber's assessment the risk that this was occurring was so real, and the implications were so serious, that the events concerning General Kadijevi} ought to have sounded alarm bells to the Accused, such that at the least he saw the urgent need for reliable additional information, *i.e.* for investigation, to better assess the situation to determine whether the JNA artillery were in fact shelling Dubrovnik, especially the Old Town, and doing so without justification, *i.e.* so as to constitute criminal conduct.[351]

(a) Arguments of the Parties

133 Strugar attacks the Trial Chamber's conclusion on two principal grounds. Strugar first submits that it is based on the erroneous assumption that he had ordered the attack on Sr| and thus could have concluded that it had gone out of control.[352] According to Strugar, in the period following his conversation with Kadijevi}, he ordered the attack to be stopped and did not have information that this order was not effective and thus did not know that shells were falling on the Old Town.[353] He also maintains that his knowledge throughout 6 December 1991 was conditioned by the amount of information he was receiving from the 9 VPS, and that Jokić led the investigation of the events of that day without informing him of any aspects of this inquiry.[354] Strugar secondly submits that the Trial Chamber's conclusion is in contradiction with the Appeals Chamber's finding in *Blaškić* that "[n]eglect of a duty to acquire such knowledge, however, does not feature in [Article 7(3)] as a separate offence, and a superior is not therefore liable under the provision for such

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[349] Trial Judgement, paras 146, 151-155, 160.
[350] The Appeals Chamber dismissed Strugar's challenges against the former finding: see *supra,* para. 97.
[351] Trial Judgement, para. 418 (footnotes omitted); Defence Notice of Appeal, para. 96; Defence Appeal Brief, paras 132-135.
[352] Defence Appeal Brief, para. 132.
[353] *Ibid.*, para. 133.
[354] *Ibid.*, para. 135.

failures but only for failing to take necessary and reasonable measures to prevent or to punish."[355]

134 The Prosecution responds that the Trial Chamber's findings did not imply a conviction for neglect of duty as a separate offence, but only established that Strugar had failed to take necessary and reasonable measures to prevent or punish.[356]

(b) Discussion

135 With respect to Strugar's first argument, the Appeals Chamber notes that it previously dismissed Strugar's challenges to the Trial Chamber's finding that he ordered the attack against Sr|.[357] As a result, Strugar's argument that the Trial Chamber's findings rest on the erroneous assumption that he had ordered the attack on Sr| stands to be rejected. The Appeals Chamber finds that Strugar's other assertions relating to the amount of information he was receiving from the 9 VPS and Jokić's investigation of the events of that day pertain to Strugar's knowledge after his telephone conversation with Kadijević and as such are of no relevance to the impugned factual finding under consideration.

136 With respect to Strugar's second argument, the Appeals Chamber is of the view that the impugned passage, when read in conjunction with the Trial Chamber's description of the applicable law,[358] clearly pertains to Strugar's knowledge of the crimes committed by his subordinates and does not imply a conviction for his failure to acquire relevant information regarding the commission of these crimes.[359]

137 Accordingly, this sub-ground of appeal is dismissed.

[355] Defence Appeal Brief, para. 134, citing *Blaškić* Appeal Judgement, para. 62.
[356] Prosecution Respondent's Brief, para. 4.14.
[357] See *supra,* paras 93-124.
[358] Trial Judgement, paras 369-370, 416.
[359] See also *Čelebići* Appeal Judgement, para. 226.

3. Alleged Errors in Findings on Strugar's Knowledge of the Progress of the Attack against Sr| on 6 December 1991

138 The Trial Chamber concluded that "it should accept the evidence of Joki} that he and the Accused did speak by telephone about the shelling of Dubrovnik, and especially about the shelling of the Old Town, during the morning of 6 December 1991".[360] The Trial Chamber also held as follows:

> Of course, the objective circumstances suggest that the Accused, at least through his staff, would have been regularly advised by telephone or radio of the progress of the attack. It was an attack of considerable political sensitivity given the location and timing. The Accused had ordered the attack himself. It is quite improbable that he did not receive reports.[361]

Strugar impugns the Trial Chamber's findings.[362]

(a) Arguments of the Parties

139 Strugar alleges two errors in the Trial Chamber's findings. First, he submits that the Trial Chamber erred when it held that Jokić discussed the shelling of the Old Town with him on the morning of 6 December 1991 despite Jokić's testimony to the contrary. Strugar argues that his conversation with Jokić dealt exclusively with the attack on Srđ, not with the shelling of the Old Town.[363] Strugar contends that Jokić did not inform him of the events taking place on the morning of 6 December 1991 and that he (Jokić) had received a protest from the ECMM at 6.12 a.m. Strugar recalls that Jokić testified that he thought that the attack was limited to Srđ and that it was more important "to prevent worse things from happening rather than make telephone calls and lose time, waste time".[364] Strugar argues that the Trial Chamber did not provide reasons why it accepted portions of Jokić's testimony as reliable and rejected other portions.[365] According to Strugar, the Trial Chamber had cause to accept Jokić's testimony that he (Strugar) ordered that the attack be stopped, since Jokić had no reason to invent potentially exculpatory circumstances in Strugar's favour and instead had much to gain in incriminating him, both as a

[360] Trial Judgement, para. 160 (footnotes omitted).
[361] *Ibid.*, para. 423 (footnotes omitted).
[362] Defence Notice of Appeal, paras 33, 97, 99; Defence Appeal Brief, paras 143, 145-146, 149-151, 157-161.
[363] *Ibid.*, paras 143, 145.
[364] *Ibid.*, para. 146, citing Jokić, T. 4047-4048 (emphasis omitted).
[365] Defence Appeal Brief, paras 149-151.

show of cooperation with the Prosecution and as a means of minimizing his own responsibility in view of sentencing proceedings in his own case.[366]

140 Second, Strugar submits that the Trial Chamber erred in finding that "it is quite improbable that he did not receive reports" on the attack on the Old Town in the absence of any evidence in support of this finding.[367] According to Strugar, Jokić received initial information about the shelling of the Old Town at about 8:30 a.m., but did not believe this information and only believed that the Old Town was being shelled after he spoke with Croatian Minister Rudolf ("Rudolf"). As a result, Strugar points out that Jokić did not receive information about the shelling of the Old Town despite the fact that he was in constant contact with the command post of the 9 VPS and the operations officer of the 9 VPS, Captain Kozari}.[368] Strugar asserts that there is no evidence that he had information about what was happening in and around the Old Town. He therefore had no reason to believe that Jokić and the Command of the 9 VPS were hiding crucial information from him. Strugar also maintains that there is no evidence that he could have received different information from the JNA artillery position in Žarkovica or from the Command of the 9 VPS had he attempted to obtain information in an alternative way.[369]

141 The Prosecution responds that while Strugar's submissions do not refer to any evidence, the Trial Chamber's findings regarding the shelling of Dubrovnik are supported by the evidence.[370] It also responds that Strugar fails to establish that the Trial Chamber erred in finding that it had reservations about Joki}'s testimony on the conversation he had with Strugar.[371]

(b) Discussion

142 With respect to the first error alleged by Strugar, the Appeals Chamber notes that Strugar has merely asserted that the Trial Chamber should have

[366] *Ibid.*, para. 150.
[367] *Ibid.*, para. 157.
[368] *Ibid.*, paras 157-159, citing Jokić, T. 4049.
[369] Defence Appeal Brief, paras 160-161.
[370] Prosecution Respondent's Brief, paras 4.12-4.13, citing Zineta Ogresta, T. 3464-3465; Valjalo, T. 2000-2001; Vla{ica, T. 3310-3321; Colin Kaiser, T. 2430-2432; Grbi}, T. 1357-1361; Jovi}, T. 2926, 2932-2935; Witness A, T. 3624-3627; Exhibit P61, tab 30, "Logsheet of ECMM Substation Dubrovnik, 6 December 1991"; Exhibit P162, "Harbour-master log between 5 December and 20 December 1991", pp. 10-11. See also Prosecution Respondent's Brief, para. 4.30.
[371] Prosecution Respondent's Brief, paras 4.21-4.24, 4.26-4.27.

relied on certain parts of Joki}'s testimony and has not shown that it erred in not so doing. It reiterates that is open to a reasonable trier of fact to accept some, but reject other, parts of a witness' testimony.[372] In this respect, the Appeals Chamber finds that Strugar's argument regarding Joki}'s motives for testifying is wholly speculative and that the Trial Chamber's reservations regarding the reliability of certain parts of Joki}'s evidence are reasonable.[373]

143 With respect to the second alleged error, the Appeals Chamber is of the view that Strugar's submission that there is no evidence in support of the Trial Chamber's conclusion that "it is quite improbable that he did not receive reports" on the attack on the Old Town is inaccurate. The Trial Chamber reasonably established that the 2 OG had the fundamental organisational structure to enable it to control combat operations and that it received regular combat reports from the units directly subordinated to it.[374] It also reasonably and extensively assessed the numerous means through which Strugar could have obtained information on the attack against Sr|.[375] The Trial Chamber found, moreover, that it was "apparent from his conversation with Colm Doyle that the Accused was, at that stage of the day, informed of the events at Dubrovnik and apparently preoccupied by then".[376] In the opinion of the Appeals Chamber, this evidence, when coupled with other findings establishing that the attack had been ordered by Strugar and that this was "an attack of considerable political sensitivity", provide ample support for the Trial Chamber's conclusion. As to the evidence on which Strugar relies in his submissions, the Appeals Chamber notes that the Trial Chamber expressed reservations regarding its reliability.[377] As Strugar does not attempt to show that the Trial Chamber erred in so doing, but merely asserts that the Trial Chamber should have relied on this evidence, he fails to show that the Trial Chamber's conclusion was unreasonable.

144 Accordingly, this sub-ground of appeal is dismissed.

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[372] *Kupre{ki} et al.* Appeal Judgement, para. 333.
[373] Trial Judgement, paras 152-154, 423.
[374] *Ibid.*, para. 393.
[375] *Ibid.*, para. 423.
[376] *Id.*
[377] *Ibid.*, paras 152-154, 423.

4. Alleged Error Regarding Handžijev's Testimony

145 The Trial Chamber found that it was unable to accept the evidence of Hand'ijev in relation to the events of 6 December 1991.[378] Strugar submits that the Trial Chamber erred in failing to accept Handžijev's testimony.[379]

146 Strugar first submits that the Trial Chamber erred in concluding that Handžijev was very vague as to the time of a telephone call between Joki} and Rudolf.[380] Strugar moreover submits that the Trial Chamber erred in failing to consider the "Harbour-master log between 5 December and 20 December 1991" (Exhibit P162). Strugar maintains that this evidence confirms that given by Handžijev and is in accordance with other evidence on the events of 6 December 1991.[381] Strugar finally submits that the Trial Chamber failed to note that Jokić had rejected Handžijev's evidence as untrue on the basis that the latter was a bad and inept officer.[382] The Appeals Chamber finds that Strugar has failed to show that the Trial Chamber's assessment of Handžijev's testimony was unreasonable. Strugar's first, third and fourth submissions merely posit an alternative interpretation of the evidence and fail to explain why no reasonable Trial Chamber could have excluded such an alternative. Moreover, contrary to Strugar's second submission, the Trial Chamber did in fact consider the related evidence to which he refers.[383] The Appeals Chamber summarily dismisses these sub-grounds of appeal under category 3, as amounting to arguments that the Trial Chamber should have interpreted evidence in a particular manner. In addition, the Appeals Chamber summarily dismisses the second sub-ground of appeal under category 2 because it misrepresents the Trial Chamber's factual findings.

5. Alleged Errors Regarding Jokić's and Ne{i}'s Reports on Events of 6 December 1991

147 The Trial Chamber held that the reports prepared by Joki} and Neši} on the events of 6 December 1991 contained "contrived and false" entries and

[378] *Ibid.*, para. 148.
[379] Defence Notice of Appeal, paras 27, 29; Defence Appeal Brief, paras 91-93.
[380] Defence Appeal Brief, para. 91.
[381] *Ibid.*, paras 91-92.
[382] *Ibid.*, para. 93.
[383] Trial Judgement, para. 151.

were "deliberately deceptive".[384] Strugar submits that, while the Trial Chamber correctly held that the contents of these reports were untrue, it failed to draw the correct inference from this conclusion and to find that Jokić and the command of the 9 VPS deliberately falsified the facts in the reports in order to cover up their own responsibility.[385]

(a) Arguments of the Parties

148 Strugar submits that, while the Trial Chamber correctly held that the contents of these reports were untrue, it failed to draw the correct inference from this conclusion and to find that Jokić and the command of the 9 VPS deliberately falsified the facts in the reports in order to cover up their own responsibility.[386] According to Strugar, the Trial Chamber should have characterized Jokić's reports from 1991 and his testimony from 2004 as false, as Jokić wanted to incriminate him (Strugar) while minimizing his own responsibility.[387] Strugar also argues that the Trial Chamber erred when it found that the 2 OG publicly advocated the version of events presented in Exhibit P61, tab 35 ("Correspondence of 6 December 1991 from Admiral Jokić to Minister Rudolf") and Exhibit P162 ("The Harbour-master Radio Log between 5 December and 20 December 1991"), as these documents have nothing to do with the 2 OG.[388]

149 The Prosecution responds that the Trial Chamber's conclusions are reasonable in light of the evidence, in particular Joki}'s testimony that he was instructed by Strugar to portray this official version to the media at a press conference.[389]

(b) Discussion

150 The Appeals Chamber finds that Strugar has failed to demonstrate that the Trial Chamber's treatment of Joki}'s and Ne{i}'s reports was unreasonable.

[384] *Ibid.*, para. 96.
[385] Defence Notice of Appeal, paras 18, 34; Defence Appeal Brief, paras 94-97.
[386] The Appeals Chamber notes that Strugar does not dispute the authenticity of these reports: Defence Appeal Brief, para. 95. The Appeals Chamber understands the issue of the authenticity of these reports to be separate from the reliability of its contents.
[387] Defence Appeal Brief, paras 95, 97.
[388] *Ibid.*, para. 96. The Appeals Chamber observes that Strugar erroneously referred to tab 36 of Exhibit P61, rather than tab 35, in paragraph 96 of his submissions.
[389] Prosecution Respondent's Brief, para. 2.76, citing Trial Judgement, para. 97; Joki}, T. 4087.

Indeed, Strugar has merely asserted that the Trial Chamber should have interpreted certain evidence in a particular manner without explaining why no reasonable Trial Chamber could have excluded such an alternative inference. In the opinion of the Appeals Chamber, a reasonable trier of fact could have reached the Trial Chamber's conclusions on the basis of the evidence, particularly the evidence indicating that the JNA was in "damage control mode" following the shelling of the Old Town. [390] This alleged error therefore stands to be rejected.

6. Alleged Errors Regarding Croat Firing Positions or Heavy Weapons in the Old Town on 6 December 1991

151 The Trial Chamber held "that the evidence of Croatian firing positions or heavy weapons within the Old Town on 6 December 1991 is inconsistent, improbable, and not credible".[391] Strugar submits that the Trial Chamber erred in making this finding.[392]

(a) Arguments of the Parties

152 According to Strugar, the Trial Chamber reached the above finding by erroneously rejecting the testimony given by Witnesses Pepić, Drljan and Nesić, who had an excellent view from Žarkovica, a location under JNA control. In other respects, the Trial Chamber accepted their evidence, but in this case it inexplicably preferred the testimony of the Prosecution witnesses who were in shelters or in closed facilities (Witnesses Lucjiana Peko, Ivo Grbić, and Slavko Grubišić), or far from the Old Town (Witness Ivan Negodić).[393]

153 The Prosecution responds that Strugar impermissibly attempts to achieve a *de novo* review of the Trial Chamber's findings and fails to show how the Trial Chamber committed an error of fact.[394]

[390] Trial Judgement, para. 173.
[391] *Ibid.*, para. 193. See also *ibid.*, paras 185-188.
[392] Defence Notice of Appeal, paras 43-45, 48; Defence Appeal Brief, para. 105.
[393] *Ibid.*, para. 105, citing Trial Judgement, paras 185-188.
[394] Prosecution Respondent's Brief, para. 2.94.

(b) Discussion

154 The Appeals Chamber finds that Strugar has merely asserted that the Trial Chamber should have relied on Defence witnesses rather than on those called by the Prosecution. It was open to a reasonable trier of fact to reject the testimony of the Defence witnesses, in particular in light of the findings: that "no one of the Croatian weapons or firing positions allegedly observed in the Old Town on 6 December 1991 was noticed by more than one witness", that none of these weapons or firing positions "was observed by those on Sr| which permitted the best and closest view of the Old Town"[395] and that "the question whether JNA fire on the Old Town was deliberate, or merely a response to defensive Croatian fire or other military positions, could have been thought by Fthe Defence witnessesğ to have a direct impact on the assessment of their performance or their exposure to disciplinary action".[396] The Appeals Chamber finds that Strugar has failed to demonstrate that the Trial Chamber's findings were unreasonable.

155 Accordingly, this sub-ground of appeal is dismissed.

7. Alleged Error Regarding Expert Witness Viličić's Report

156 The Trial Chamber found that it was

> unable to accept the opinions expressed by military expert Janko Vili~i} because there are so many matters on which his report is based which are not established, or which are contradicted by the evidence.[397]

Strugar submits that the Trial Chamber erred in making this finding.[398]

(a) Arguments of the Parties

157 Strugar submits that the Trial Chamber erred in rejecting the report of his expert witness Janko Viličić ("Viličić"), thereby not accepting: (i) the fact that targeting a position less than 500 metres from the Old Town walls could result in mortar shells landing in the Old Town; (ii) the deployment of the potential targets of the JNA units as presented in the report; and (iii) the fact that the

[395] Trial Judgement, para. 191.
[396] *Ibid.*, para. 193.
[397] *Ibid.*, para. 210. See also *ibid.*, paras 208, 211.
[398] Defence Notice of Appeal, paras 52-54, 57; Defence Appeal Brief, paras 106-109.

damage in the Old Town did not arise from deliberate shelling, but because Croatian units endangered the Old Town in deploying their military positions.[399]

158 Strugar specifically submits that Viličić's conclusions about Croatian positions were supported by Ne{ić's testimony regarding actions from the Bogišić Park near the Excelsior Hotel and from the vehicle moving to the north of the Old Town.[400] Strugar also submits that the Trial Chamber erroneously found that Viličić's numbers of fired shells did not accord with its findings on the volume of the damage caused to buildings and structures in the Old Town. Strugar asserts, however, that the Trial Chamber did not establish the individual degree of the damage of each building and structure, so that the number of shells could be correlated to the damage. Strugar further argues that this number of damaged buildings and structures is even smaller than the number mentioned in Viličić's report.[401] Finally, Strugar submits that the Trial Chamber erroneously rejected Viličić's assertion that any position within a range of 500 metres of the Old Town necessarily endangered the town, although even Witness Jožef Poje, another expert witness, stated that in an attempt to "neutralize" a target at a distance of 150 metres, the Old Town would necessarily be hit.[402]

159 The Prosecution responds that the Trial Chamber carefully analyzed the reliability and credibility of this evidence in light of the whole trial record as well as of its site visit to Dubrovnik and that Strugar's arguments are incapable of undermining this analysis.[403]

(b) Discussion

160 The Appeals Chamber finds that Strugar has failed to demonstrate that the Trial Chamber's assessment of Viličić's expert opinion was unreasonable. Strugar has merely asserted that the Trial Chamber should have relied on the opinion of his expert witness and has ignored the Trial Chamber's relevant factual findings and the reasoning supporting these findings. Indeed, the Trial Chamber considered the evidence referred to by Strugar in his submissions in

[399] *Ibid.*, para. 106, citing Trial Judgement, paras 208, 211.
[400] Defence Appeal Brief, para. 107, citing Ne{ić, T. 8174-8177; Exhibit D111, "Map of Dubrovnik marked by Captain Ne{i}".
[401] Defence Appeal Brief, para. 108, citing Trial Judgement, para. 318.
[402] Defence Appeal Brief, para. 109, citing P184.5, "Report Supplement".
[403] Prosecution Respondent's Brief, paras 2.95-2.96, citing Trial Judgement, paras 205-213.

the Trial Judgement.[404] Moreover, the Trial Chamber's numerous factual findings on the extent of damage caused to the Old Town provide ample support for its evaluation of Viličić's expert opinion.[405] Finally, the Trial Chamber provided detailed reasons in support of its rejection of Viličić's assertion that any position within a range of 500 metres of the Old Town necessarily endangered the town and expressly considered the opinion of Prosecution Expert Witness Jožef Poje in doing so.[406] As Strugar has not shown that no reasonable trier of fact could have arrived at this conclusion, this alleged error stands to be rejected.

161 Accordingly, this sub-ground of appeal is dismissed.

8. Alleged Errors Regarding the Ownership of Damaged Buildings

162 The Trial Chamber rejected Strugar's submissions at trial that damage was deliberately inflicted by Croatian "interests" to buildings in the Old Town which were owned or occupied by Serbian "interests".[407]

163 Strugar submits that the Trial Chamber erred in rejecting his claim regarding the ownership of the buildings.[408] The Appeals Chamber observes that the Trial Chamber considered Strugar's arguments and the evidence to which he refers at length in the Trial Judgement.[409] The Appeals Chamber summarily dismisses this sub-ground of appeal under category 3, as amounting to mere assertions that the Trial Chamber should have interpreted evidence in a particular manner.

9. Alleged Errors Regarding the Status of Valjalo and Ivo Vlašica

164 The Trial Chamber found that Valjalo was injured while on his way to work and that there was nothing in the evidence to suggest that, in his capacity as a driver for the Dubrovnik Municipal Crisis Staff, he was taking an active part in the hostilities.[410] It therefore held that Valjalo was the victim of

[404] *Ibid.*, para. 198, citing Ne{i}, T. 8174, 8177.
[405] Trial Judgement, paras 177-179, 208, 316-330, Annex I.
[406] *Ibid.*, paras 208-214.
[407] *Ibid.*, para. 181.
[408] Defence Notice of Appeal, paras 40, 42; Defence Appeal Brief, para. 104.
[409] Trial Judgement, para. 181.
[410] *Ibid.*, para. 274 (footnotes omitted).

cruel treatment as a violation of the laws or customs of war under Article 3 of the Statute.[411] Strugar submits that the Trial Chamber erred in so holding.[412]

(a) Arguments of the Parties

165 Strugar submits that Valjalo was a driver assigned to work for the Dubrovnik Municipal Crisis Staff since 15 September 1991 and that during the attack of 6 December 1991 he was transporting members of the Crisis Staff, municipality officials and officials of the Republic of Croatia to perform war tasks.[413] As such, it is argued that he was taking an active part in hostilities. In this regard, Strugar refers to the Law on the Defence of the Republic of Croatia, which provides that members of the municipal crisis staff perform military tasks in times of war.[414] According to Strugar, Valjalo's participation in the hostilities is also supported by the Decision of the Secretariat for Health-Social Care, Labour, Veteran and Disability Issues by which Valjalo was recognized as having the status of a "disabled veteran".[415] Strugar refers to the categories of individuals covered by the Law on the Welfare of Veterans and Civilians Disabled in War, pursuant to which this Decision was issued[416] and points out that Valjalo was accorded the status of a "disabled veteran" as opposed to the status of "disabled civilian", which is given to civilians injured or wounded during war.[417]

166 Strugar also submits that the Trial Chamber erroneously found that Valjalo left his home in the Old Town on 6 December 1991 and was walking down Stradun – the main street bisecting the Old Town on a west-east axis[418] – on his way to work when he was hit by shrapnel. Strugar argues that Valjalo stated in cross-examination that he spent the night between 5 and

[411] *Ibid.*, paras 260, 276.
[412] Defence Notice of Appeal, paras 62-63; Defence Appeal Brief, paras 81-82.
[413] *Ibid.*, para. 82, citing Exhibit D24, "Certificate delivered by the Dubrovnik-Neretva County Prefect under the Law on the Protection of Military and Civilian War Disabled Persons, dated 13 December 1994." See also AT. 107.
[414] AT. 152.
[415] Defence Appeal Brief, para. 82, citing Exhibit P60, "Decision of the Dubrovnik Secretariat for Health, Social Welfare, Labour, Soldiers and Disability Affairs Recognising Mato Valjalo's Status as a War Invalid of the War, dated 15 December 1993."
[416] Law on the Welfare of Veterans and Civilians Disabled in War, *Narodne Novine* no 33/92, 12 June 1992.
[417] AT. 107-108, referring to Law on the Welfare of Veterans and Civilians Disabled in War, Art. 8. The transcript of the appeals hearing refers to "military war invalid". The Appeals Chamber refers to the official translations of the terms used in the aforementioned law and relevant exhibits, as explained below at para. 180.
[418] Trial Judgement, para. 21.

6 December 1991 on duty in the Crisis Staff and that on the morning of 6 December 1991 he left the Crisis Staff premises to go home.[419]

167 The Prosecution responds that Strugar fails to show any error in the Trial Chamber's holding and merely reiterates arguments made at trial.[420] The Prosecution submits that direct or active participation in hostilities requires a direct causal relationship between the activity and military harm to the enemy and that in the language of the ICRC Commentary, to take a direct part in hostilities means to engage in acts of war which, by their nature or purpose, are likely to cause actual harm to the personnel or *matériel* of the enemy armed forces. It submits moreover that while civilians are often used as part of a war effort, this does not turn them into legitimate military targets.[421]

168 The Prosecution further argues that Valjalo was not a member of the armed forces, but was a civilian working as a driver for the Dubrovnik Crisis Staff and that, in his auxiliary position as a driver, he did not meet the test of taking a direct part in the hostilities.[422] In particular, it avers that Valjalo consistently testified that he was not mobilized during the war[423] and that the Trial Chamber was correct to consider his objective activities at the time of the events, and not the source of his disability pension, as determinative of his status for the purposes of international humanitarian law.[424] The Prosecution also notes that Valjalo did in fact testify that he spent the night of 5 December 1991 and the early morning of 6 December 1991 in his flat. It argues that Strugar fails to take Valjalo's entire testimony into account: while Valjalo apparently confused the early hours of 1 October 1991 with the early hours of 6 December 1991 during his cross-examination, he then realised his mistake and corrected it.[425]

169 The Prosecution thus emphasizes that the evidence presented at trial was considered by the Trial Chamber which found that he was a civilian who

[419] Defence Appeal Brief, para. 81, citing Valjalo, T. 2061.
[420] Responding to one of the questions set out by the Appeals Chamber in its Memorandum of 20 March 2008, the Prosecution also addresses the issue of whether Valjalo could be regarded as a lawful military target under international humanitarian law.
[421] AT. 131.
[422] *Id*.
[423] Prosecution Respondent's Brief, para. 2.61, citing Valjalo, T. 1996.
[424] Prosecution Respondent's Brief, para. 2.56, citing Trial Judgement, para. 274. See AT. 131.
[425] Prosecution Respondent's Brief, paras 2.56-2.60, citing Valjalo, T. 1998-1999, 2001, 2051, 2064, 2079-2080.

was not taking an active part in the hostilities and that a similar finding was reached by the Trial Chamber and was affirmed by the Appeals Chamber in the *Joki}* case.[426]

170 Finally, the Prosecution acknowledges that should Valjalo have been the member of an organised armed group or of the armed forces conducting the hostilities or should he have been a civilian who was directly participating in the hostilities, then he could be legitimately targeted under international humanitarian law.[427]

(b) Discussion

171 Before addressing this sub-ground of appeal, the Appeals Chamber will briefly set out the applicable legal standard regarding the scope of application of the crime of cruel treatment as a violation of Common Article 3 under Article 3 of the Statute.

(i) Applicable Legal Standard

172 In order to prove cruel treatment as a violation of Common Article 3 under Article 3 of the Statute, the Prosecution must prove beyond a reasonable doubt that the victim of the alleged offence was a person taking no active part in the hostilities.[428]

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[426] AT. 130.

[427] AT. 131-132. The Prosecution also notes that the Trial Chamber did not make a determinative finding on the international or non-international character of the armed conflict charged in the Indictment. As such, while in an international armed conflict, a combatant would clearly be a lawful military target, in a non-international armed conflict, the label of "combatant" which carries with it the right to participate in the armed conflict and prisoner of war status would not specifically apply. Nonetheless, the Prosecution submits that it is necessary to distinguish between individuals who are actually conducting hostilities on behalf of a party, *i.e.* members of the armed forces and other organised armed groups, and civilians who are not conducting hostilities. See AT. 130-131.

[428] *Čelebi}i* Appeal Judgement, para. 424; *Tadi}* Trial Judgement, para. 614. The crime of cruel treatment is drawn from Common Article 3, which states in relevant part:

> In the case of armed conflict not of an international character occurring in the territory of one of the High Contracting Parties, each party to the conflict shall be bound to apply, as a minimum, the following provisions:
>
> 1. Persons taking no active part in the hostilities, including members of armed forces who have laid down their arms and those placed *hors de combat* by sickness, wounds, detention, or any other cause, shall in all circumstances be treated humanely [...].
>
> To this end the following acts are and shall remain prohibited at any time and in any place whatsoever with respect to the above-mentioned persons:
>
> (a) violence to life and person, in particular murder of all kinds, mutilation, cruel treatment and torture;

173 In *Kordić and Čerkez*, the Appeals Chamber defined the notion of direct participation in hostilities set out in Article 51(3) of *Additional Protocol I* as encompassing acts of war which by their nature or purpose are likely to cause actual harm to the personnel or equipment of the enemy's armed forces.[429] The Appeals Chamber considers the concepts of "active participation" under Common Article 3 and "direct participation" under *Additional Protocol I* to be synonymous for the present purposes.[430] Nevertheless, as the present case requires that the definition of this concept be addressed in more detail and in different circumstances, which was not necessary in the *Kordić and Čerkez* case,[431] the Appeals Chamber will expand below upon its previous reasoning.

174 The notion of participation in hostilities is of fundamental importance to international humanitarian law and is closely related to the principle of

[429] *Kordi} and ^erkez* Appeal Judgement, para. 51. See also *Gali}* Trial Judgement, para. 48; IACiHR, Third Report on human rights in Colombia, Doc. OEA/Ser.L/V/II.102 Doc. 9 rev. 1, 26 February 1999, para. 53 ("It is generally understood in humanitarian law that the phrase 'direct participation in hostilities' means acts which, by their nature or purpose, are intended to cause actual harm to enemy personnel and material."); *Commentary AP I*, paras 1679 ("Undoubtedly there is room here for some margin of judgment: to restrict this concept to combat and to active military operations would be too narrow, while extending it to the entire war effort would be too broad, as in modern warfare the whole population participates in the war effort to some extent, albeit indirectly. The population cannot on this ground be considered to be combatants, although their possible presence near military objectives (Article 52 -- *General protection of civilian objects*, paragraph 2) does expose them to incidental risk. Ŧ...ğ Direct participation in hostilities implies a direct causal relationship between the activity engaged in and the harm done to the enemy at the time and the place where the activity takes place.") (footnotes omitted); 1942 ("The immunity afforded individual civilians is subject to an overriding condition, namely, on their abstaining from all hostile acts. Hostile acts should be understood to be acts which by their nature and purpose are intended to cause actual harm to the personnel and equipment of the armed forces. Thus a civilian who takes part in armed combat, either individually or as part of a group, thereby becomes a legitimate target, though only for as long as he takes part in hostilities."); 1944 ("In general the immunity afforded civilians is subject to a very stringent condition: that they do not participate directly in hostilities, i.e., that they do not become combatants, on pain of losing their protection. Thus 'direct' participation means acts of war which by their nature or purpose are likely to cause actual harm to the personnel and equipment of the enemy armed forces. It is only during such participation that a civilian loses his immunity and becomes a legitimate target."); *Commentary AP II*, paras 4789 ("If a civilian participates directly in hostilities, it is clear that he will not enjoy any protection against attacks for as long as his participation lasts. Thereafter, as he no longer presents any danger for the adversary, he may not be attacked;"), 4787 ("The term 'direct part in hostilities' is taken from common Article 3, where it was used for the first time. It implies that there is a sufficient causal relationship between the act of participation and its immediate consequences.").

[430] See *Akayesu* Trial Judgement, para. 629. See also Basic Principles for the Protection of Civilian Populations in Armed Conflicts, 9 December 1970, UNGA Resolution 2675 (XXV) (distinguishing between "persons actively taking part in the hostilities and civilian populations"); *Commentary AP I*, p. 632, fn.3 (citing an ICRC list which refers to the following as being excerpted from the list of categories of military objectives: "Non-combatants in the armed forces who obviously take no active or direct part in hostilities.").

[431] In *Kordić and Čerkez*, the emphasis of the discussion was on the combatant status of TO members and not on their direct participation in hostilities: see *Kordić and Čerkez* Appeal Judgement, para. 51.

distinction between combatants and civilians.[432] Pursuant to *Additional Protocol I*, combatants have the right to participate directly in hostilities[433] and civilians enjoy general protection against dangers arising from military operations unless and for such time as they take a direct part in hostilities.[434] As a result, a number of provisions of international humanitarian law conventions refer to the concept of participation in hostilities.[435]

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[432] See, *e.g.*, Resolution XXVIII of the XXth International Conference of the Red Cross and Red Crescent, Vienna (1965) declaring: "That distinction must be made at all times between persons taking part in the hostilities and members of the civilian population, to the effect that the latter be spared as much as possible." This was also affirmed by the UN GA Resolutions Respect for Human Rights in Armed Conflicts, 19 December 1968, UNGA Res. 2444 (XXIII), para. 1(c), and Basic Principles for the Protection of Civilian Populations in Armed Conflicts, 9 December 1970, UNGA Res. 2675 (XXV), para. 2.

[433] *Additional Protocol I*, Article 43(2).

[434] *Ibid.*, Article 51(3).

[435] Common Article 3; *Geneva Convention IV*, Article 15 (providing for the establishment of neutralized zones intended to shelter from the effects of war "civilian persons who take no part in hostilities, and who, while they reside in the zones, perform no work of a military character"); *Additional Protocol I*, Articles 31(4) (providing that "the wounded, sick and shipwrecked disembarked, otherwise than temporarily, from a medical aircraft with the consent of the local authorities in the territory of a neutral or other State not a Party to the conflict shall Ŧ…ğ be detained by that State where so required by the rules of international law applicable in armed conflict, in such a manner that they cannot again take part in the hostilities"), 43(2) (providing that "Ŧmğembers of the armed forces of a Party to a conflict Ŧ…ğ are combatants, that is to say, they have the right to participate directly in hostilities"), 45(1) (affording prisoner-of-war status to a person "who takes part in hostilities and falls into the power of an adverse Party"), 45(3) (providing that any person "who has taken part in hostilities, who is not entitled to prisoner-of-war status and who does not benefit from more favourable treatment in accordance with the Fourth Convention" shall have the right at all times to the protection of Article 75 of the Protocol), 47 (providing that a mercenary is anyone who, *inter alia*, "does, in fact, take a direct part in the hostilities"), 51(3) (providing that civilians shall enjoy the protection afforded by Part IV of the Protocol "unless and for such time as they take a direct part in hostilities"), 67(1)(e) (stating that members of the armed forces and military units assigned to civil defence organizations shall be respected and protected, provided that, *inter alia*, "such personnel do not participate directly in hostilities, and do not commit, or are not used to commit, outside their civil defence tasks, acts harmful to the adverse Party"); 77 (providing that Parties to the conflict "shall take all feasible measures in order that children who have not attained the age of fifteen years do not take a direct part in hostilities"); *Additional Protocol II*, Articles 4 (affording fundamental guarantees to "Ŧağll persons who do not take a direct part or who have ceased to take part in hostilities") and 13(3) (providing that civilians shall enjoy the protection afforded by Part IV of the Protocol "unless and for such time as they take a direct part in hostilities"); *Convention (XI) relative to certain Restrictions with regard to the Exercise of the Right of Capture in Naval War*, The Hague, 18 November 1907, Articles 3 (providing that vessels or boats used for fishing or employed in local trade cease to be exempt from capture "as soon as they take any part whatever in hostilities") and 8 (providing that articles 5 to 7 do not apply to "ships taking part in the hostilities*")*; *Convention on Maritime Neutrality*, 135 L.N.T.S. 187, 20 February 1928, Preamble (defining neutrality as "the juridical situation of states which do not take part in the hostilities") and Article 12(2)(a) (providing that a neutral vessel shall be seized and in general subjected to the same treatment as enemy merchantmen when "taking a direct part in the hostilities"); *International Convention against the Recruitment, Use, Financing and Training of Mercenaries*, UNGA Resolution 44/34, 4 December 1989, Articles 1(1)(b) ("*Mercenaries Convention*") (providing that a mercenary is, *inter alia*, a person who "is motivated to take part in the hostilities essentially by the desire for private gain") and 3(1) (providing that a mercenary "who participates directly in hostilities or in

175 While neither treaty law, nor customary law expressly define the notion of active or direct participation in hostilities beyond what has been stated above, references to this notion in international humanitarian law conventions do provide guidance as to its meaning. Common Article 3 itself provides examples of persons other than civilians taking no active part in the hostilities, namely "members of armed forces who have laid down their arms and those placed *hors de combat* by sickness, wounds, detention, or any other cause". Article 41(2) of *Additional Protocol I* states that a person will be *hors de combat* if he "is in the power of an adverse Party", "clearly expresses an intention to surrender" or "has been rendered unconscious or is otherwise incapacitated by wounds or sickness, and therefore is incapable of defending himself" provided that "he abstains from any *hostile act* and does not attempt to escape".[436] *A contrario*, the notion of active participation in hostilities encompasses armed participation in combat activities.

176 Conduct amounting to direct or active participation in hostilities is not, however, limited to combat activities as such.[437] Indeed, Article 67(1)(e) of *Additional Protocol I* draws a distinction between direct participation in hostilities and the commission of "acts harmful to the adverse party" while Article 3(1) of the *Mercenaries Convention* distinguishes between direct participation in hostilities and participation "in a concerted act of violence".[438] The notion of direct participation in hostilities must therefore refer to something different than involvement in violent or harmful acts against the adverse party.[439] At the same time, direct participation in hostilities cannot be

a concerted act of violence, as the case may be, commits an offence for the purposes of the Convention").

[436] *Additional Protocol I*, Article 41(2) (emphasis added). See also *Halilovi}* Trial Judgement, para. 34 (holding that while membership of the armed forces can be a strong indication that an individual is directly participating in the hostilities, it is not an indicator which in and of itself is sufficient to establish this).

[437] See *Commentary AP 1*, para. 1943 ("It seems that the word 'hostilities' covers not only the time that the civilian actually makes use of a weapon, but also, for example, the time that he is carrying it, as well as situations in which he undertakes hostile acts without using a weapon."). See also *Kupre{ki} et al.* Trial Judgement, para. 523; *Juan Carlos Abella v. Argentina*, Case 11.137, Report Nº 55/97, Inter-Am. C.H.R., OEA/Ser.L/V/II.95 Doc. 7, p. 271, para. 178 (1997).

[438] *Additional Protocol I*, Art. 67(1)(e) (stating that members of the armed forces and military units assigned to civil defence organizations shall be respected and protected, provided that, *inter alia*, "such personnel do not participate directly in hostilities, and do not commit, or are not used to commit, outside their civil defence tasks, acts harmful to the adverse Party"); *Mercenaries Convention*, Art. 3(1) (providing that a mercenary "who participates directly in hostilities or in a concerted act of violence, as the case may be, commits an offence for the purposes of the Convention").

[439] See also *Commentary AP I*, para. 1677 ("The Conference considered that all ambiguity should be removed and that it should be explicitly stated that all members of the armed forces

held to embrace all activities in support of one party's military operations or war effort. This is made clear by Article 15 of Geneva Convention IV, which draws a distinction between taking part in hostilities and performing "work of a military character". Moreover, to hold all activities in support of military operations as amounting to direct participation in hostilities would in practice render the principle of distinction meaningless.[440]

177 The Appeals Chamber also takes note of examples of direct and indirect forms of participation in hostilities included in military manuals, soft law, decisions of international bodies and the commentaries to the Geneva Conventions and the Additional Protocols.[441] Examples of active or direct participation in hostilities include: bearing, using or taking up arms,[442] taking part in military or hostile acts, activities, conduct or operations, armed fighting or combat,[443] participating in attacks against enemy personnel, property or equipment,[444] transmitting military information for the immediate use of a

(with the above-mentioned exceptions) can participate directly in hostilities, i.e., attack and be attacked. The general distinction made in Article 3 of the Hague Regulations, when it provides that armed forces consist of combatants and non-combatants, is therefore no longer used. In fact, in any army there are numerous important categories of soldiers whose foremost or normal task has little to do with firing weapons. These include auxiliary services, administrative services, the military legal service and others. Whether they actually engage in firing weapons is not important. They are entitled to do so, which does not apply to either medical or religious personnel, despite their status as members of the armed forces, or to civilians, as they are not members of the armed forces.").

[440] See also *ibid.*, para. 1945, which underscores the importance of this distinction in the following terms: "There should be a clear distinction between direct participation in hostilities and participation in the war effort. The latter is often required from the population as a whole to various degrees. Without such a distinction the efforts made to reaffirm and develop international humanitarian law could become meaningless. In fact, in modern conflicts, many activities of the nation contribute to the conduct of hostilities, directly or indirectly; even the morale of the population plays a role in this context."

[441] The Appeals Chamber notes that some of these materials date from a period which followed the commission of the crime charged in the Indictment. They are merely cited as examples of acts constituting direct and indirect participation in hostilities, a concept nonetheless formulated before the Indictment period, and not as establishing the elements of customary international law applicable at the time of the commission of the crime.

[442] *Oxford Manual of the Laws of Naval War*, 9 August 1913, Article 64(c); Australia, *Defence Force Manual* (1994), para. 532; Belgium, *Teaching Manual for Soldiers* (undated), p. 14; Ecuador, *Naval Manual* (1989), para. 11.3; US, *Field Manual* (1956), para. 60; US, *Naval Handbook* (1995), para. 11.3; *Report on the Practice of India*, 1997, Chapter 1.2; *Commentary GC IV*, p. 40; *Kupre{ki} et al.* Trial Judgement, para. 523.

[443] Australia, *Defence Force Manual* (1994), para. 532; Sweden, *IHL Manual* (1991), Section 3.2.1.5, p. 43; US, *Field Manual* (1956), para. 60; *Report on the Practice of Iraq*, 1998, Chapter 1.2; *Report on the Practice of Botswana*, 1998, Answers to additional questions on Chapter 1.2; *Report on the Practice of Israel*, 1997, Chapter 1.2; *Report on the Practice of Lebanon*, 1998, Answers to additional questions on Chapter 1.2; *Report on the Practice of Zimbabwe*, 1998, Chapter 1.2; *Commentary AP I*, para. 1943; *Staki}* Trial Judgement, para. 589; *Kupre{ki} et al.* Trial Judgement, para. 523; *Juan Carlos Abella v. Argentina*, Case 11.137, Report Nº 55/97, Inter-Am. C.H.R., OEA/Ser.L/V/II.95 Doc. 7, p. 271, para. 178 (1997).

[444] Ecuador, *Naval Manual* (1989), para. 11.3; Netherlands, *Military Manual* (1993) p. V-5; US, *Air Force Commander's Handbook* (1980), paras 2-8; US, *Naval Handbook* (1995), para. 11.3;

belligerent,[445] transporting weapons in proximity to combat operations,[446] and serving as guards, intelligence agents, lookouts, or observers on behalf of military forces.[447] Examples of indirect participation in hostilities include: participating in activities in support of the war or military effort of one of the parties to the conflict,[448] selling goods to one of the parties to the conflict,[449] expressing sympathy for the cause of one of the parties to the conflict,[450] failing to act to prevent an incursion by one of the parties to the conflict,[451] accompanying and supplying food to one of the parties to the conflict,[452] gathering and transmitting military information, transporting arms and munitions, and providing supplies,[453] and providing specialist advice regarding the selection of military personnel, their training or the correct maintenance of the weapons.[454]

178 On the basis of the foregoing, the Appeals Chamber holds that in order to establish the existence of a violation of Common Article 3 under Article 3 of the Statute, a Trial Chamber must be satisfied beyond a reasonable doubt that the victim of the alleged offence was not participating in acts of war which by their nature or purpose are intended to cause actual harm to the personnel or equipment of the enemy's armed forces. Such an enquiry must be undertaken on a case-by-case basis, having regard to the individual circumstances of the victim at the time of the alleged offence.[455] As the temporal scope of an

US, *Air Force Pamphlet* (1976), para. 5-3(a).
[445] *Hague Rules of Aerial Warfare*, 1923, Article 16.
[446] *United States of America v. Salim Ahmed Hamdan*, U.S. Military Commission, 19 December 2007, p. 6.
[447] Ecuador, *Naval Manual* (1989), para. 11.3; US, *Naval Handbook* (1995), para. 11.3; US, *Air Force Commander's Handbook* (1980), paras 2-8.
[448] IACiHR, Third Report on Human Rights in Colombia, Doc. OEA/Ser.L/V/II.102 Doc. 9 rev. 1, 26 February 1999, para. 56.
[449] *Id.*
[450] UN Sub-Commission on Human Rights, Res. 1985/18, 29 August 1985, para. 3; Res. 1987/18, 2 September 1987, para. 3, Res. 1988/13, 1 September 1988, para. 3; Res. 1989/9, 31 August 1989, para. 3; IACiHR, Third Report on Human Rights in Colombia, Doc. OEA/Ser.L/V/II.102 Doc. 9 rev. 1, 26 February 1999, para. 56.
[451] IACiHR, Third Report on Human Rights in Colombia, Doc. OEA/Ser.L/V/II.102 Doc. 9 rev. 1, 26 February 1999, para. 56.
[452] UN Sub-Commission on Human Rights, Res. 1985/18, 29 August 1985, para. 3; Res. 1987/18, 2 September 1987, para. 3, Res. 1988/13, 1 September 1988, para. 3; Res. 1989/9, 31 August 1989, para. 3.
[453] *Commentary AP I*, para. 3187.
[454] *Ibid.*, para. 1806.
[455] *Tadi}* Trial Judgement, para. 616; *Halilovi}* Trial Judgement, para. 34. See, *e.g.*, in relation to the direct participation in the hostilities of a member of the armed forces, *Commentary GC III*, p. 39: "The discussions at the Conference brought out clearly that it is not necessary for an armed force as a whole to have laid down its arms for its members to be entitled to protection under [Article 3]. The Convention refers to individuals and not to units of troops, and a man who

individual's participation in hostilities can be intermittent and discontinuous, whether a victim was actively participating in the hostilities at the time of the offence depends on the nexus between the victim's activities at the time of the offence and any acts of war which by their nature or purpose are intended to cause actual harm to the personnel or equipment of the adverse party.[456] If a reasonable doubt subsists as to the existence of such a nexus, then a Trial Chamber cannot convict an accused for an offence committed against such a victim under Article 3 of the Statute.[457]

179 When dealing with crimes pursuant to Common Article 3, it may be necessary for a Trial Chamber to be satisfied beyond a reasonable doubt that the alleged offence committed against the victim was not otherwise lawful under international humanitarian law.[458] The need for such an additional enquiry will depend on the applicability of other rules of international humanitarian law, which is assessed on the basis of the scope of application of

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has surrendered individually is entitled to the same humane treatment as he would receive if the whole army to which he belongs had capitulated. The important thing is that the man in question will be taking no further part in the fighting."

[456] *Cf. United States of America v. Salim Ahmed Hamdan*, U.S. Military Commission, 19 December 2007, p. 6: "The Commission also finds that the accused directly participated in those hostilities by driving a vehicle containing two surface-to-air missiles in both temporal and spatial proximity to both ongoing combat operations. Ŧ...ğ Although Kandahar was a short distance away, the accused's past history of delivering munitions to Taliban and al-Qaeda fighters, his possession of a vehicle containing surface to air missiles, and his capture while driving in the direction of a battle already underway, satisfies the requirement of 'direct participation'."

[457] The Appeals Chamber notes that for the purposes of establishing an accused's criminal responsibility, the burden of proof of whether a victim was not taking active part in the hostilities rests with the Prosecution. *Cf. Blaški}* Appeal Judgement, para. 111.

[458] The Appeals Chamber observes that this is in line with the jurisprudence of the *ad hoc* Tribunals in relation to Common Article 3 crimes. In the *Čelebi}i* Appeal Judgement, the Appeals Chamber merely set out a non-exhaustive list of the elements of the crime "cruel treatment" under Article 3 of the Statute for the purpose of comparing it with the crime of torture under Article 2 of the Statute in application of the test on cumulative convictions (*Čelebi}i* Appeal Judgement, para. 424). The Appeals Chamber moreover observes that Trial Chambers have made a finding on the civilian status of victims of Common Article 3 crimes or found that this was not necessary given the facts of the respective case. In the *Tadi}* Trial Judgement, the Trial Chamber found that all of the victims were detained by the accused and as such the issue of whether they were combatants or civilians did not arise because even if they were combatants, they had been placed *hors de combat* by detention (*Tadi}* Trial Judgement, para. 616). In the *Staki}* Trial Judgement, the Trial Chamber found that the victims were *hors de combat* or civilians (*Staki}* Trial Judgement, para. 589). In the *Naletili} and Martinovi}* Trial Judgement, the Trial Chamber found that the victims were all civilians or prisoners of war (*Naletili} and Martinović* Trial Judgement, para. 229). In the *Akayesu* Trial Judgement, the Trial Chamber found that the victims were civilians (*Akayesu* Trial Judgement, para. 175).

these rules[459] as well as the circumstances of the case.[460] Indeed, if the victim of an offence was a combatant[461] or if the injury or death of such a victim was the incidental result of an attack which was proportionate in relation to the anticipated concrete and direct military advantage,[462] his injury or death would not amount to a violation of international humanitarian law even if he was not actively participating in hostilities at the time of the alleged offence.

(ii) Alleged Errors Regarding Valjalo's Direct Participation in the Hostilities

180 As a preliminary matter, the Appeals Chamber notes that at trial Exhibits D24 and P60, discussed below, were entered into evidence in BCS. The Appeal Judgement refers to translations obtained from the Registrar during the current proceedings.[463] The Appeals Chamber also notes that during the Appeals Hearing, Strugar referred to two laws to which he had not made reference

[459] The scope of application of international humanitarian law primarily depends on the nature of the armed conflict, the customary or conventional status of a given rule or set of rules and the status of the victim. In conflicts where Common Article 3 is the only applicable provision, the more elaborate rules regarding civilian and combatant status outlined in the Geneva Conventions and Additional Protocol I would not be applicable. See *Čelebi}i* Appeal Judgement, para. 420; *Tadi}* Jurisdiction Decision, para. 91; *Military and Paramilitary Activities in and Against Nicaragua (Nicaragua v. United States of America)* (Merits), Judgment, ICJ Reports (1986), para. 218.

[460] For instance, if a victim was found to be detained by an adverse party at the time of the alleged offence against him, his status as either a civilian or combatant would no longer be relevant because a detained person cannot, by definition, directly participate in hostilities. Therefore, an attack against such person would automatically be unlawful.

[461] Combatants constitute lawful military objectives unless they are *hors de combat*. On the definition of combatant, see: *Additional Protocol I*, Articles 43, 44, 50(1); *Geneva Convention III*, Article 4; *Kordi} and ^erkez* Appeal Judgement, paras 50-51. On the definition of military objectives, see: *Additional Protocol I*, Article 52; *Kordi} and ^erkez* Appeal Judgement, para. 53. On the definition of *hors de combat*, see: *Additional Protocol I*, Article 41(2). See also *Blaški}* Appeal Judgement, para. 114: "As a result, the specific situation of the victim at the time the crimes are committed may not be determinative of his civilian or non-civilian status. If he is indeed a member of an armed organization, the fact that he is not armed or in combat at the time of the commission of crimes, does not accord him civilian status."

[462] *Additional Protocol I*, Articles 51(5)(b), 57(2)(a)(iii) and 57(2)(b). See *Galić* Trial Judgement, para. 58 (and sources cited therein) and *Galić* Appeal Judgement, paras 191-192.

[463] Exhibit P60, "Decision of the Dubrovnik Secretariat for Health, Social Welfare, Labour, Soldiers and Disability Affairs Recognising Mato Valjalo's Status as a War Invalid of the War, dated 15 December 1993"; Exhibit D24, "Certificate delivered by the Dubrovnik-Neretva County Prefect pursuant to the Law on Disabled Military and Civilian War Veterans Welfare, dated 13 December 1994". On 23 October 2007, the Registrar filed an official translation of Exhibits P60 and D24 pursuant to an Order for Translation issued by the Pre-Appeal Judge on 3 October 2007: Deputy Registrar's Submission Pursuant to Rule 33(B) on Order for Translation, 23 October 2007. This official translation differs from the simultaneous translation of the document undertaken during the trial hearing: T. 2093-2095 (Exhibit P60); T. 2101-2102, 2104 (Exhibit D24).

during the trial and which were not considered by the Trial Chamber in the Trial Judgement: the Law on the Defence of the Republic of Croatia and the Law on the Welfare of Veterans and Civilians Disabled in War. The latter law appears in the text of Exhibit P60 and is discussed in the Appeal Judgement on the basis of the Appeals Chamber's incidental jurisdiction to apply relevant national laws.[464]

181 The Appeals Chamber will now address Strugar's challenges to the Trial Chamber's finding that Valjalo was not actively participating in the hostilities at the time of the offence.

182 At the outset, the Appeals Chamber notes that the evidence indicates that Valjalo was a driver for the Dubrovnik Municipal Crisis Staff and that he drove local and foreign officials in Dubrovnik in this capacity.[465] The Appeals Chamber also notes that Valjalo testified that during the events of December 1991, he drove the President of the Executive Council of Dubrovnik, who also served as the President of the Dubrovnik Municipal Crisis Staff. Valjalo specified that the latter did not wear a military uniform.[466] In addition, Valjalo stated that he was a civilian, wore civilian clothes and was unarmed. He indicated that while he was a reserve in the Croatian army, he was not mobilised during the war.[467]

183 Strugar's principal challenge focuses on Exhibits P60 and D24. Exhibit P60 is a Decision of the Dubrovnik Secretariat for Health, Social Welfare, Labour, Soldiers and Disability Affairs which indicates that Valjalo was granted the status of a "disabled veteran of the Croatian war of defence" pursuant to the Decree on the Welfare of Casualties of the War in Defence of the Republic of Croatia and their Families and the Law on the Welfare of Veterans and Civilians Disabled in War.[468] The Appeals Chamber notes however that during

[464] See *Kupre{ki} et al.* Trial Judgement, para. 539.
[465] Valjalo, T. 1995-1997, 2035; Exhibit P60, "Decision of the Dubrovnik Secretariat for Health, Social Welfare, Labour, Soldiers and Disability Affairs Recognising Mato Valjalo's Status as a War Invalid of the War, dated 15 December 1993"; Exhibit D24, "Certificate delivered by the Dubrovnik-Neretva County Prefect pursuant to the Law on Disabled Military and Civilian War Veterans Welfare, dated 13 December 1994".
[466] Valjalo, T. 2091-2092.
[467] *Ibid.*, T. 1995-1996, 2033, 2062-2063, 2091.
[468] Exhibit P60, "Decision of the Dubrovnik Secretariat for Health, Social Welfare, Labour, Soldiers and Disability Affairs Recognising Mato Valjalo's Status of a Disabled Veteran, dated 15 December 1993," pp. 1-2.

his testimony, Valjalo explained that while members of the Dubrovnik Municipal Crisis Staff were civilians and "didn't fight", they were nonetheless granted the status of a "military war invalid".[469] In the opinion of the Appeals Chamber, having regard to the evidence as a whole, it was open to a reasonable trier of fact to find that Valjalo's status as a disabled veteran did not raise a reasonable doubt as to his non-participation in acts of war which by their nature or purpose were intended to cause actual harm to the personnel or equipment of the JNA forces in the Dubrovnik region at the time he was injured.

184 Exhibit D24, a Certificate of the Dubrovnik-Neretva County Prefect delivered pursuant to the Law on Disabled Military and Civilian War Veterans Welfare, provides as follows: "During the worst attacks on Dubrovnik, Mato VALJALO drove members of the Crisis Staff and officials of the municipality and the Republic of Croatia to their war tasks".[470] The Appeals Chamber observes that the Trial Chamber did not refer to this exhibit in the Trial Judgement. However, the Appeals Chamber finds that there is no reasonable doubt that the required nexus is lacking between Valjalo's activities at the time of the offence (he was injured near his home while on his way to work)[471] and any possible participation of the Dubrovnik Municipal Crisis Staff, municipal officials and officials of the Republic of Croatia in acts of war which by their nature or purpose were intended to cause actual harm to the personnel or equipment of the JNA forces in the Dubrovnik region.

185 In light of the foregoing, the Appeals Chamber finds that a reasonable trier of fact could have concluded beyond a reasonable doubt that at the time of the alleged offence, Valjalo was not actively participating in the hostilities.

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[469] Valjalo, T. 2062-2063, 2091.
[470] Exhibit D24, "Certificate delivered by the Dubrovnik-Neretva County Prefect pursuant to the Law on Disabled Military and Civilian War Veterans Welfare, dated 13 December 1994".
[471] See Trial Judgement, para. 274. The Appeals Chamber observes that in his submissions, Strugar has misrepresented the testimony of Valjalo, who, after an initial mistake, made it clear that he spent the night of 5 December 1991 and the early morning of 6 December 1991 in his flat: Valjalo, T. 1998-1999, 2001, 2051, 2064, 2079-2080. The Appeals Chamber moreover observes that the Trial Chamber's conclusion accords with both Valjalo's testimony and Exhibit D24: Valjalo, T. 2000-2002; Exhibit D24, "Certificate delivered by the Dubrovnik-Neretva County Prefect pursuant to the Law on Disabled Military and Civilian War Veterans Welfare, dated 13 December 1994". Although Exhibit P60 states that Valjalo was injured while performing his duty as a driver for the Dubrovnik Municipal Crisis Staff, the Appeals Chamber finds that it was open to a reasonable trier of fact to find that this referred to the general period of Valjalo's employment for the Dubrovnik Municipal Crisis Staff and not to his specific activities at the time of his injury.

186 Accordingly, this sub-ground of appeal is dismissed.

(iii) Ivo Vlašica's and Valjalo's Civilian Status

187 Given the applicability of other rules of international humanitarian law in this case[472] and the specific circumstances in which the offence was committed,[473] the Appeals Chamber is of the view that the Trial Chamber, having found beyond a reasonable doubt that Vlašica and Valjalo were not actively participating in the hostilities, was required to satisfy itself beyond a reasonable doubt that the alleged offence committed against the victims was not otherwise lawful under international humanitarian law.[474] The Appeals Chamber notes that while the Trial Chamber's other findings obviated the need to enquire as to whether Vlašica's and Valjalo's injuries might have been the result of a proportionate attack,[475] it was necessary for the Trial Chamber to be satisfied beyond a reasonable doubt that neither victim was a combatant. Indeed, despite the fact that Vlašica and Valjalo were found to be not actively participating in the hostilities at the time of the alleged offence, they could

[472] The Trial Chamber found that the armed conflict was either internal or international in character, thus making possible the application of other rules of international humanitarian law: Trial Judgement, para. 216.

[473] Ivo Vlašica ("Vla{ica") and Valjalo were found beyond a reasonable doubt to have been the victims of shelling by the JNA forces. However, these circumstances do not exclude the possibility that they might have been combatants at the time of the shelling.

[474] Although Strugar withdrew his challenge to the Trial Chamber's findings regarding Vlašica, the Appeals Chamber finds it necessary to raise this issue *proprio motu* as this issue, which arises from Strugar's challenges to the Trial Chamber's findings regarding Valjalo, affects the Trial Chamber's findings regarding Vla{ica as well. Moreover, in its Memorandum of 20 March 2008, the Appeals Chamber specifically invited the parties to elaborate on whether Vla{ica and Valjalo had the status of civilians or combatants and, if the latter, whether they could therefore be regarded as lawful military targets under international humanitarian law. In response to this question, Strugar specified that he only challenged the civilian status of Valjalo. The Prosecution submitted that in an international armed conflict a combatant "would clearly be a lawful military target", while the fact that "[c]ivilians are often used as part of a war effort […] does not turn a civilian into a legitimate military target"; however, in the present case, both Valjalo and Vlašica were civilians not taking active part in the hostilities (see AT. 106-108, 152 and 130-132, respectively).

[475] Trial Judgement, para. 214: "In view of the foregoing, the Chamber finds that the shelling of the Old Town on 6 December 1991 was not a JNA response at Croatian firing or other military positions, actual or believed, in the Old Town, nor was it caused by firing errors by the Croatian artillery or by deliberate targeting of the Old Town by Croatian forces. In part the JNA forces did target Croatian firing and other military positions, actual or believed, in Dubrovnik, but none of them were in the Old Town. These Croatian positions were also too distant from the Old Town to put it in danger of unintended incidental fall of JNA shells targeted at those Croatian positions. It is the finding of the Chamber that the cause of the established extensive and large-scale damage to the Old Town was deliberate shelling of the Old Town on 6 December 1991, not only by JNA mortars but also by other JNA weapons such as ZIS and recoilless cannons and Maljutka rockets."

nonetheless constitute lawful military targets under international humanitarian law if they were found to be combatants.

188 The Appeals Chamber observes that although the Trial Chamber did not make an express finding to the effect that Vla{ica and Valjalo were civilians, it nonetheless made the following relevant holdings. With respect to Vla{ica, the Trial Chamber noted that he testified that he worked in his father's grocery store.[476] In addition, Strugar does not challenge Vlašica's civilian status.[477] With respect to Valjalo, the Trial Chamber held that "Fwğith regard to the issue of Mato Valjalo's civilian status, the evidence indicates that he was a driver for the Dubrovnik Municipal Crisis Staff".[478] As such, while it would have been preferable for the Trial Chamber to make more explicit findings on this issue, the Appeals Chamber is satisfied that the Trial Chamber established beyond a reasonable doubt that, in substance, both victims were civilians.

E. Alleged Errors Regarding Strugar's Failure to Prevent

189 Strugar submits that the Trial Chamber erred in its findings on the command structure of the 2 OG,[479] his material ability to prevent,[480] his measures to prevent and stop the shelling of the Old Town[481] and the ceasefire order of 11:15 a.m.[482]

1. Alleged Errors Regarding the Command Structure of the 2 OG

190 The Trial Chamber found that in the period from October to December 1991, the Military Naval District (VPO) had primarily an administrative role with respect to the 9 VPS and had no combat or operational authority over the latter and did not exercise effective control over its units. Instead, the Trial Chamber found that the 9 VPS received its combat assignments from the command of the 2 OG and that the command of the 2 OG retained responsibility for maintaining discipline, and for the promotion and removal of officers.[483]

[476] *Ibid.*, fn. 863.
[477] AT. 106-107.
[478] Trial Judgement, para. 274.
[479] Defence Notice of Appeal, paras 93-94.
[480] *Ibid.*, para. 94.
[481] *Ibid.*, paras 33, 96-97, 99.
[482] *Ibid.*, paras 32, 98, 99.
[483] Trial Judgement, paras 390, 403, 404.

191 Strugar submits that the Trial Chamber erred in its conclusions on the command structure of the 2 OG.[484] The Appeals Chamber finds that Milan Zorc's ("Zorc") evidence that Jokić's order about the lifting of the blockade of Dubrovnik, given on the basis of a VPO order,[485] was not in accordance with standard JNA doctrine does not necessarily render the Trial Chamber's findings unreasonable. Indeed, Zorc testified that the command structure of the 2 OG was complex and that the 9 VPS had received combat assignments from the 2 OG. Zorc further explained that questions posed to him regarding JNA military doctrine had been posed "theoretically".[486] Moreover, the Appeals Chamber observes that the Trial Chamber explicitly found that the evidence indicated that frequent changes of the command of the 2 OG and resubordination of its units had not had "any significant effect in practice on the effectiveness of the Accused's command of, and authority over, the 2 OG in the relevant period"[487] and that "Ftğhe limited authority of the VPO in respect of 9 VPS is not shown to have diminished the effectiveness of the Accused's command of the 2 OG in respect of the events of, and relating to, the attack on 6 December 1991".[488] In doing so, the Trial Chamber explicitly considered Zorc's testimony, his expert report as well as other evidence.[489] Strugar has not shown that the Trial Chamber's assessment of the evidence led to findings no reasonable trier of fact could have made. The Appeals Chamber summarily dismisses this sub-ground of appeal under category 3, as including mere assertions that the Trial Chamber failed to interpret evidence in a particular manner, and category 2, as ignoring other relevant factual findings made by the Trial Chamber.

2. Alleged Errors in Finding That Strugar Had the Material Ability to Prevent

192 Strugar submits that the Trial Chamber erroneously held that he

> as the commander of the 2 OG, had the material ability to prevent the unlawful shelling of the Old Town on 6 December 1991 and to interrupt and stop that shelling at any time during which it continued.[490]

[484] Defence Notice of Appeal, paras 93-94; Defence Appeal Brief, paras 124-125.
[485] Exhibit D105 "Order of the Command of the 9 VPS dated 12 October 1991".
[486] Zorc, T. 6662-6663.
[487] Trial Judgement, para. 401.
[488] *Ibid.*, para. 404.
[489] See *ibid.*, paras 401, 404 (and sources cited therein).
[490] *Ibid.*, para. 405; Defence Notice of Appeal, para. 94; Defence Appeal Brief, paras 126-127.

(a) Arguments of the Parties

193 Strugar argues that the Trial Chamber erroneously held that he had the material ability to prevent the shelling of the Old Town on 6 December 1991 because it incorrectly equated his position in the command structure with the notion of the material ability to prevent. In Strugar's submission, the Trial Chamber concluded that he could have issued the order to prevent the shelling on the basis of the fact that he could issue orders and conduct negotiations. Strugar maintains that the Trial Chamber's conclusion represents an application of the principle of objective responsibility.[491]

194 The Prosecution responds that, while Strugar suggests that the Trial Chamber equated *de jure* authority with the material ability to prevent, the Trial Chamber clearly undertook distinct enquiries, establishing in the first place the existence of a superior-subordinate relationship in terms of command structure and only in the second instance that he had the material ability to prevent.[492] According to the Prosecution, there was more than sufficient evidence before the Trial Chamber to support the conclusion that Strugar had the material ability to prevent the shelling of the Old Town.[493]

(b) Discussion

195 The Appeals Chamber finds that Strugar's submissions misrepresent the Trial Judgement's factual findings. The Trial Chamber thoroughly examined the command structure of the 2 OG and found that Strugar had *de jure* authority over the forces involved in the shelling of the Old Town.[494] The Trial Chamber then established that Strugar had the material ability to prevent the unlawful shelling of the Old Town. In doing so, it relied on evidence that Strugar had the authority to give direct combat orders to the units under his command at first, second and lower levels,[495] to order a unit to cease fire and to prohibit attacks

[491] *Ibid.*, paras 126-127.
[492] Prosecution Respondent's Brief, para. 4.4, citing Trial Judgement, paras 379-391, 393-405.
[493] Prosecution Respondent's Brief, paras 4.5-4.7, citing Joki}, T. 3829-3830, 3835-3836, 3910-3911, 3955-3959; Zorc, T. 6434, 6594; Pringle, T. 1563-1564, 1570; Exhibit P101, "Combat Order from 9 VPS to 472 mtbr, dated 20 November 1991"; Exhibit P114, "Directive by Colonel-General Blagoje Adžić, dated 12 October 1991"; Exhibit P204, "Revised Expert Report of Milan Zorc", pp. 22-23; Exhibit P121, "Order from the 2 OG to the 9 VPS and 472 mtbr, dated 23 October 1991".
[494] Trial Judgement, paras 379-391.
[495] *Ibid.*, para. 395.

on specific targets,[496] and to order re-subordination of units within the structure of the 2 OG.[497] In this context, the Appeals Chamber recalls that in situations involving formal hierarchies or command structures, a superior's capacity to issue orders can amount to a factor indicative of his effective control over subordinates, in the sense of a material ability to prevent or punish criminal conduct.[498] Furthermore, the Trial Chamber considered that Strugar had the authority to represent the JNA in negotiations with the ECMM and the Crisis Staff of Dubrovnik.[499] It also considered at length Strugar's arguments regarding the effectiveness of his control over his subordinates and concluded that Strugar exercised effective control over his subordinates.[500] However, the Trial Chamber did more than that. Each of the findings on the *de jure* authority of Strugar over the forces involved in the shelling of the Old Town was based on examples which illustrated that Strugar's *de jure* authority in the command structure of the 2 OG was materialized in his *de facto* powers.[501] Hence, contrary to Strugar's submission, the Trial Chamber did not equate his position in the command structure with his material ability to prevent the shelling.

196 As a result of the foregoing, the Appeals Chamber finds that Strugar has not shown that the Trial Chamber's findings were erroneous.

197 Accordingly, this sub-ground of appeal is dismissed.

3. Alleged Errors Regarding Strugar's Measures to Prevent and Stop the Shelling of the Old Town

198 Strugar impugns the following finding of the Trial Chamber:

> While the finding of the Chamber is that the Accused did not order that the attack on Sr| be stopped when he spoke to Admiral Joki} around 0700 hours on 6 December 1991, the Chamber would further observe that had he in truth given that order, the effect of what followed is to demonstrate that the Accused failed entirely to take reasonable measures within his material ability and legal authority to ensure that his order was communicated to all JNA units active in the attack, and to ensure that his order was complied with. This failure, alone, would have been sufficient for the Accused to incur liability for the acts of his subordinates pursuant to Article 7(3), even if he had ordered at about 0700 hours that the attack on Sr| be stopped.[502]

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[496] *Ibid.*, para. 396.
[497] *Ibid.*, para. 397.
[498] *Halilovi}* Appeal Judgement, para. 204.
[499] Trial Judgement, para. 398.
[500] *Ibid.*, paras 399-404.
[501] *Id.*

(a) Arguments of the Parties

199 Strugar alleges five errors in the Trial Chamber's holding. First, he submits that the Trial Chamber erroneously held that he did nothing to ensure that those who were planning the attack would receive confirmation of the prohibition to shell the Old Town. Strugar argues that, while the Trial Chamber held that he should have reiterated the order that the Old Town was to be spared "except in the case of lethal fire from the Old Town", there is no evidence as to what orders he gave. However, Strugar avers that there is evidence that the company commanders on Srđ did receive such an order.[503]

200 Second, Strugar submits that the Trial Chamber had no knowledge of the content of the alleged reports on the attack against Sr| received by him on the morning of 6 December 1991. Thus, there is no evidence on the facts that were available to him between 7:00 a.m. and 10:00 a.m., especially as the ceasefire was negotiated directly between Croatian authorities in Dubrovnik and the 9 VPS. Thus, Strugar maintains that he had no obligation to acquire additional information during this period of time.[504]

201 Third, Strugar submits that he undertook all the reasonable measures in light of the information available to him and that the Trial Chamber erred when it found that he should have had doubts as to the execution of his orders. He argues that he did not know until his phone call with Kadijević that Dubrovnik was in possible jeopardy and that, at this point in time, he immediately called Jokić to enquire as to the nature of the attack and the units participating in it. Strugar asserts that Jokić informed him that the commander of the 3/472 mtbr was about to launch an attack on Srđ and that he would look into the matter, stop the attack and order the Chief of Staff to get back to him. Strugar avers that he then ordered that the attack be stopped as well as approved the measures taken by Jokić.[505] Strugar argues that there is no evidence indicating that Joki} provided him with any information regarding the Old Town after their conversation at 7:00 a.m. He asserts that he was only in receipt of the limited

[502] Trial Judgement, para. 434 (footnote omitted); Defence Notice of Appeal, paras 33, 96-97, 99; Defence Appeal Brief, paras 140-141, 145, 147, 154-155, 163, 166-170, 174, 176-181.
[503] Defence Appeal Brief, paras 154-155, citing Stojanović, T. 7833. The Appeals Chamber observes that Strugar erroneously referred to T. 4833 rather than T. 7833 in his submissions.
[504] Defence Appeal Brief, paras 166-168.
[505] *Ibid.*, paras 140-141, 145, 147, 163, citing Jokić, T. 4046, 4052.

information provided to him by Joki} and that he did not have any reason to doubt the veracity of this information.[506]

202 Fourth, Strugar submits that the Trial Chamber erred in finding that, because Jokić had not undertaken effective steps to stop the attack, this meant that no orders had been given to that effect as other conclusions were also possible.[507] Strugar argues that at about 7:00 a.m. Jokić ordered Zec to go to Žarkovica to resolve the situation and that Zec stayed there from about 8:00 a.m. to 3:00 p.m. However, he did not execute the order to stop the attack on Srđ as Kovačević had suffered losses and his units had come under fire from the city of Dubrovnik.[508] Moreover, according to Strugar, there is no evidence supporting the Trial Chamber's conclusion that Zec was acting under his orders.[509]

203 Fifth, Strugar submits that the Trial Chamber erroneously held that he ordered the attack to be stopped after 2:00 p.m. Strugar argues that it is unclear how, if he had allegedly ordered the attack in the first place, the attack could have ended at 2:00 p.m. without an explicit order issued by him to that effect.[510] Rather, Strugar argues that the attack was halted by an order of the Command of the 9 VPS: when the Command gave Kovačević the approval to withdraw at 2.45 p.m., he (Strugar) was already on board a plane heading for Belgrade.[511] Thus, Strugar contends that the Trial Chamber erroneously failed to establish on whose orders the attack was stopped.[512]

204 The Prosecution responds that the Trial Chamber gave a careful account of how it reached the conclusion that Strugar had failed to give a preventative order not to fire on the Old Town.[513] It also responds that the fact that the attack on the wider area of Dubrovnik did not cease until 2:00 or 3:00 p.m. supports the reasonable inference that Strugar did not give an order at 7:00 a.m. to stop the attack.[514] It finally responds that the Trial Chamber did not

[507] Defence Appeal Brief, para. 168.
[508] *Ibid.*, para. 169, citing Jokić, T. 4070.
[509] Defence Appeal Brief, para. 174, citing Trial Judgement, para. 431.
[510] Defence Appeal Brief, paras 176-177, 181.
[511] *Ibid.*, paras 178-179, citing Exhibit D96, "War Diary of 9 VPS, 6 November 1991-16 December 1991", p. 70; Lemal, T. 7375; Stojanović, T. 7832; Trial Judgement, para. 170.
[512] Defence Appeal Brief, para. 180, citing Trial Judgement, para. 428.
[513] Prosecution Respondent's Brief, para. 4.27, citing Trial Judgement, paras 420-421.
[514] Prosecution Respondent's Brief, paras 4.38, 4.40-4.41.

make a finding that he had given an order for the attack to be stopped at 2:00 p.m., as suggested by Strugar.[515]

(b) Discussion

205 With respect to the first error alleged by Strugar, the Appeals Chamber finds that Strugar has merely asserted that the Trial Chamber should have interpreted evidence in a particular manner. The evidence to which Strugar refers was expressly considered by the Trial Chamber,[516] and moreover relates to a previous order and does not as such demonstrate that the impugned finding was unreasonable. In addition, he adduces no evidence which disproves the Trial Chamber's assertion that there is nothing in the evidence to suggest that Strugar gave an order making existing prohibitions on shelling the Old Town expressly clear.[517]

206 With respect to the second error alleged by Strugar, the Appeals Chamber recalls that it previously held that the Trial Chamber's finding that it is "quite improbable" that Strugar did not receive reports regarding the attack on Sr| was reasonable.[518] The Appeals Chamber observes that the Trial Chamber made a number of other relevant findings on the means at Strugar's disposal for acquiring additional information regarding the attack against Sr|.[519] In addition, the Appeals Chamber notes that the Trial Chamber found that the need for Strugar to acquire additional information regarding the situation in Dubrovnik arose from his conversation with Kadijevi} and not from any reports he may have received on the progress of the attack against Sr|.[520] Consequently, the Appeals Chamber finds that Strugar has failed to show how the Trial Chamber erred in not establishing the content of the reports.

207 With respect to the third error alleged by Strugar, the Appeals Chamber emphasizes that the Trial Chamber's findings on the necessary and reasonable measures which Strugar failed to take to prevent the commission of crimes by his subordinates were supported by its factual findings regarding the information which was at his disposal at the relevant time. The Appeals

[515] *Ibid.*, paras 4.42-4.45.
[516] Trial Judgement, fn. 1244.
[517] *Ibid.*, para. 422.
[518] See *supra,* para. 143.
[519] Trial Judgement, paras 152-154, 393, 423. See *supra,* para. 143.
[520] Trial Judgement, paras 418, 422.

Chamber observes that, contrary to Strugar's submissions, the Trial Chamber explicitly found that, prior to his telephone conversation with Kadijević, Strugar was already on notice of a real risk that the JNA artillery might unlawfully shell Dubrovnik and the Old Town.[521] Moreover, the Appeals Chamber finds that Strugar's assertions that he was in receipt of limited information regarding the attack against Sr| and the implementation of his orders are not only spurious,[522] but also irrelevant to the extent that the information of which he had notice justified the need to obtain further reliable information.[523]

208 With respect to the fourth error alleged by Strugar, the Appeals Chamber observes at the outset that the Trial Chamber's finding that Strugar had not issued an order to stop the attack against Sr| relied on two findings other than the one mentioned by Strugar. First, the Trial Chamber expressed reservations regarding the evidence of Joki} on aspects of his conversation with Strugar at around 7:00 a.m.[524] Second, the Trial Chamber found that the attack against Sr| had not ceased following Strugar's alleged order to Joki} and found that this could not be explained either by the fact that Strugar's subordinates had simply disregarded this order, nor by the fact that it may have been too late to stop the attack.[525] In view of these findings and the evidence on which they are based, the Appeals Chamber is of the view that the Trial Chamber's conclusion is a reasonable one.

209 As to Strugar's argument regarding Zec, the Appeals Chamber finds that Strugar has misrepresented the Trial Chamber's factual findings. The Trial Chamber did not find that Zec was acting directly under Strugar, but rather held that he was acting pursuant to his order to attack Sr|[526] and that the possibility that he was acting directly under Strugar did "not appear to be a very likely situation".[527]

210 With respect to the fifth error alleged by Strugar, the Appeals Chamber observes that, contrary to Strugar's submissions, the Trial Chamber did not hold that he ordered the attack to be stopped after 2:00 p.m. Rather, the Trial

[521] *Ibid.*, paras 347, 417, 420.
[522] *Ibid.*, paras 393, 418, 422-423. See *supra,* para. 143.
[523] Trial Judgement, paras 418, 423. See *supra,* paras 135-137.
[524] Trial Judgement, paras 152-154, 425.
[525] *Ibid.*, paras 426-427.
[526] *Ibid.*, para. 431.
[527] *Ibid.*, para. 426.

Chamber found that by 3:00 p.m., the JNA infantry had completed their withdrawal from Sr| and that the attack against Sr| "was only abandoned when it became inevitable that the attack could not succeed".[528] In addition, the Appeals Chamber notes that in its earlier findings on the events of 6 December 1991, the Trial Chamber referred to evidence on the trial record supporting the latter finding[529] and that Strugar cited the same evidence in support of his submissions. The Appeals Chamber is of the view that Strugar has failed to demonstrate that it was unreasonable for the Trial Chamber not to have established on whose orders the attack was stopped. The Appeals Chamber recalls that a Trial Chamber is not obliged to make a finding on each and every issue.[530] In the opinion of the Appeals Chamber, the Trial Chamber's failure to find that the attack against Sr| did not cease pursuant to an order by Strugar or ceased pursuant to an order by the Command of the 9 VPS does not in and of itself disprove the Trial Chamber's other factual findings regarding Strugar's order to attack Sr| and his effective control over the troops involved in the shelling of the Old Town.

211 Accordingly, this sub-ground of appeal is dismissed.

4. Alleged Errors in Findings on the Ceasefire Order of 11:15 a.m.

212 The Trial Chamber held that Rudolf and Joki} discussed the possibility of a ceasefire taking effect at 11:15 a.m. and that Strugar approved of this ceasefire and left it to Joki} to convey the order.[531] It furthermore held that while Strugar had ordered a ceasefire, he had not ordered the cessation of the attack against Sr|.[532] It concluded that the ceasefire failed because Strugar had not taken all necessary measures to ensure that all the units received his order.[533] Strugar impugns the Trial Chamber's holdings.[534]

[528] *Ibid.*, paras 431-432.
[529] *Ibid.*, paras 139-141.
[530] *Kvo~ka et al.* Appeal Judgement, para. 23.
[531] Trial Judgement, para. 156.
[532] *Ibid.*, para. 157.
[533] *Ibid.*, para. 429.
[534] Defence Notice of Appeal, paras 32, 98, 99; Defence Appeal Brief, paras 172-173, 182-189.

(a) Arguments of the Parties

213 Strugar first submits that it is impossible that Rudolf and Jokić agreed on a ceasefire which did not cover the attack on Srđ when the attack against Srđ was the main cause of the events of that day.[535] Second, Strugar submits that the Trial Chamber erroneously held that the order did not reach all the active mortar batteries: he argues that there was only one battalion on the ground, comprising four companies, and that the transmission of the order to Kovačević signified that it had been transmitted to all of the mortar batteries.[536] Third, Strugar submits that Jokić's decision to establish a ceasefire at 11:00 a.m. was sabotaged by high-ranking officials of his staff, Kovačević and Zec, and that, as a result, his own orders were also sabotaged.[537] Fourth, Strugar submits that the findings in paragraphs 156 and 429 of the Trial Judgement are contradictory.[538]

214 Alternatively to the preceding line of submissions, Strugar submits that he did not in fact order the ceasefire of 11:15 a.m. He argues that Jokić testified that the ceasefire was the result of negotiations he (Joki}) undertook with Rudolf and that he did not mention any related order issued by him in connection with these negotiations. With respect to the radiogram which the Trial Chamber found was sent in Strugar's name and by his command at the 2 OG to Rudolf, which included the statement indicating that he ordered a ceasefire,[539] he maintains that it was not issued by him or his Command, but was rather sent from the "VPS Boka" to the Dubrovnik Crisis Staff.[540] He finally contends that according to Rudolf, he sent the radiogram at about 4:30 p.m. on 6 December 1991 while he was in Belgrade.[541]

215 The Prosecution responds that Strugar fails to demonstrate that a reasonable trier of fact could not have reached the conclusions that a cessation

[535] *Ibid.*, paras 183-185.
[536] *Ibid.*, para. 182, citing Exhibit D96, "War Diary of 9 VPS, 6 November 1991-16 December 1991".
[537] Defence Appeal Brief, paras 172-173, citing Jokić, T. 4099-4100.
[538] Defence Appeal Brief, para. 186.
[539] Trial Judgement, para. 156, citing P23, "Letter from Colonel Pavle Strugar to Minister Rudolf, 6 December 1991"; Minister Rudolf, T. 5603-5604.
[540] Defence Appeal Brief, paras 187-189, citing Exhibit P23, "Letter from Colonel Pavle Strugar to Minister Rudolf, 6 December 1991".
[541] Defence Appeal Brief, para. 188.

of the attack against Sr| was never ordered and that military units did not receive the ceasefire order.[542]

(b) Discussion

216 With respect to the first error alleged by Strugar, the Appeals Chamber finds that he has misrepresented the Trial Chamber's factual findings. Contrary to Strugar's submissions, the Trial Chamber did not in fact hold that Rudolf and Joki} agreed on a ceasefire which did not cover the attack against Sr|. Rather, the Trial Chamber held that while a ceasefire was agreed upon by Rudolf and Joki}, the implementation of this ceasefire was incomplete as no cessation of the attack against Sr| has been ordered.[543] In the opinion of the Appeals Chamber, Strugar has not shown that this finding was in any way unreasonable. As to Strugar's submission that an order to stop the attack against Sr| had been issued prior to the cease-fire, the Appeals Chamber notes that the Trial Chamber expressed reasonable reservations regarding the reliability of the evidence upon which he relies.[544] In addition, the Appeals Chamber observes that the Trial Chamber chose to rely on other evidence which establishes that no order to stop the attack against Sr| was received by the attacking infantry units or the 3/5 mtbr.[545] As Strugar has failed to show that the Trial Chamber erred in so doing, this alleged error stands to be rejected.

217 With respect to the second and third errors alleged by Strugar, the Appeals Chamber finds that Strugar has merely asserted that the Trial Chamber should have relied on Exhibit D96[546] and the testimony of Joki} without showing how the Trial Chamber erred in not so doing. In terms of the former, the Appeals Chamber notes that the Trial Chamber expressed reservations regarding the reliability of certain entries in Exhibit D96.[547] In terms of the latter, the Appeals Chamber observes that the Trial Chamber

[542] Prosecution Respondent's Brief, paras 4.47-4.51, citing Trial Judgement, paras 96, 156, 427 (fn. 144 Ŧ*sic*ğ).
[543] Trial Judgement, para. 156.
[544] *Ibid.*, paras 146, 151-155, 160 (regarding Joki}'s testimony), 96 (finding that other entries in Exhibit D96 regarding Kovačevi} were "contrived and false"). The Appeals Chamber dismissed Strugar's challenges against the former finding: see *supra,* para. 97.
[545] Trial Judgement, fns 1242, 1244.
[546] "War Diary OC 9. VPS-IKM".
[547] Trial Judgement, para. 96 (finding that other entries in Exhibit D96 regarding Kovačevi} were "contrived and false").

previously excluded the possibility that Kovačevi} and Zec might have acted without orders or contrary to orders.[548] In light of these findings, it would be open to a reasonable trier of fact to find it equally unlikely that Kovačevi} and Zec would have sabotaged the ceasefire order of 6 December 1991. Moreover, in the opinion of the Appeals Chamber, it was open to a reasonable trier of fact to conclude on the basis of the evidence that the ceasefire order to stop the attack against Sr| was not effectively communicated to the attacking infantry units or the 3/5 mtbr.[549]

218 With respect to the fourth error alleged by Strugar, the Appeals Chamber finds that Strugar has ignored the Trial Chamber's other relevant factual findings, most notably those regarding the command structure of the 2 OG[550] and Strugar's ready and immediate means for obtaining information regarding the progress of the attack against Sr|,[551] which clearly show that paragraphs 156 and 429 of the Trial Judgement are not contradictory. In this respect, it was open to a reasonable trier of fact to hold that notwithstanding the fact that Strugar ordered Joki} to convey the ceasefire order, the former, as the commander of the forces involved in the attack, remained responsible for ensuring that the order was conveyed to all units.

219 With respect to the fifth error alleged by Strugar, the Appeals Chamber finds that Strugar has merely asserted that the Trial Chamber should have interpreted the testimony of Joki} and Exhibit P23 in a particular manner. As Strugar fails to show that no reasonable trier of fact could have arrived at the impugned finding, this alleged error stands to be rejected. In light of the foregoing, this sub-ground of appeal is dismissed.

F. Alleged Errors Regarding Strugar's Failure to Punish

220 Strugar alleges errors in the Trial Chamber's findings regarding his material ability to punish,[552] his failure to take measures for the events of

[548] *Ibid.*, paras 89, 97-98, 175 (in relation to Kovačevi}), 426 (in relation to Zec).
[549] See *ibid.*, paras 107-110, 156-157, 428 (fns 1242, 1244).
[550] *Ibid.*, paras 23-24, 381, 390-391, 393-414.
[551] *Ibid.*, para. 423.
[552] Defence Notice of Appeal, para. 95.

6 December 1991[553] and the promotions and decorations awarded for the events of 6 December 1991.[554]

1. Alleged Error in Finding That Strugar Had the Material Ability to Punish

221 The Trial Chamber held that

> following the attack of 6 December 1991 the Accused had the legal authority and the material ability to initiate an effective investigation and to initiate or take administrative and disciplinary action against the officers responsible for the shelling of the Old Town.[555]

222 Strugar impugns this finding on the basis that while the Trial Chamber noted that the commander of the 2 OG could have recommended the removal of an officer, this is not the same as the right to relieve a commander from duty.[556] The Appeals Chamber observes that the Trial Chamber established Strugar's material ability to punish on a number of elements and by reference to a significant amount of evidence.[557] The Appeals Chamber summarily dismisses this sub-ground of appeal under category 4, as including mere assertions unsupported by any evidence, and category 2, as ignoring the Trial Chamber's other relevant factual findings.

2. Alleged Errors Regarding Strugar's Failure to Take Measures for the Events of 6 December 1991

(a) Arguments of the Parties

223 Strugar impugns the Trial Chamber's finding that he failed to initiate an investigation and take action and undertake punitive measures against the perpetrators of the shelling of the Old Town.[558]

224 Strugar submits that the Trial Chamber erred in its findings on Joki}'s investigation of the shelling of the Old Town. He alleges three specific errors. He firstly argues that the Trial Chamber erred in its interpretation of Kadijević's role in the initiation of this investigation. According to Strugar, Jokić informed

[553] Trial Judgement, paras 435-445; Defence Notice of Appeal, paras 26, 38-39, 100-101; Defence Appeal Brief, paras 129, 194-216.
[554] Defence Notice of Appeal, paras 95, 100; Defence Appeal Brief, paras 130-131, 217-218.
[555] Trial Judgement, para. 414.
[556] Defence Notice of Appeal, para. 95; Defence Appeal Brief, para. 129.
[557] See Trial Judgement, paras 406-413.
[558] *Ibid.*, paras 435-445; Defence Notice of Appeal, paras 26, 38-39, 100-101; Defence Appeal Brief, paras 129, 194-216.

Rudolf at 11:45 a.m. that Kadijević had ordered an investigation.[559] Rudolf, in turn, informed Strugar that Kadijević had ordered an investigation, and that he was certain that it would be fair and that he would be informed of its results.[560] In addition, at a meeting on 6 December 1991, Kadijević told five ambassadors from Western countries that he would immediately start an investigation and that every person responsible for violating the ceasefire would be punished.[561]

225 Strugar secondly argues that the Trial Chamber failed to consider all of the measures taken by Jokić in accordance with Kadijević's order. In particular, the Trial Chamber failed to mention the following measures: (i) Jokić took statements from the company commanders who had taken part in the attack, in particular from those who were in a position to attack the Old Town, such as Nešić, commander of an anti-armour detachment from Žarkovica, and Captain Jeremić ("Jeremić"), commander of the 120 mm mortar battery; (ii) Jokić also called Kovačević for explanations and the two met with Nešić and Jeremić on 8 December 1991 so that the three lower officers could provide explanations for the shelling of 6 December 1991; (iii) the commander of the 3/5 mtbr, Jovanović, was asked to give a statement on the events of 6 December 1991; and (iv) Jovanović gave his statement at the Command of the 9 VPS already at 14:00 p.m. on 6 December 1991.[562] In addition, Strugar avers that Jokić formed a commission composed of higher officers of the 9 VPS and sent them to Dubrovnik to establish the damages caused.[563]

226 Strugar also submits that he was excluded from the process of investigating the events of 6 December 1991 because the JNA Supreme Command had ordered Jokić to conduct an investigation and report on its results. Strugar argues that he could not therefore have had the material

[559] *Ibid.*, para. 195, citing Exhibit P162, "Harbour-master log between 5 December and 20 December 1991", p. 14 (probably referring to p. 18); Exhibit P136, "Message for the Crisis Staff of Dubrovnik and Minister Rudolph by Admiral Joki}, dated 6 December 1991".
[560] Defence Appeal Brief, para. 196, citing Rudolf, T. 5784; Exhibit P61, tab 33, "Message from Minister Rudolf to General Strugar".
[561] Defence Appeal Brief, para. 197, citing Ambassador Fietelaars ("Fietelaars"), T. 4194; Exhibit P143, "Report on the Démarche made by General Kadijević with the Chiefs of Mission of the Five Western Security Council Members". See also AT. 101-102.
[562] Defence Appeal Brief, para. 200, citing Nešić, T. 8188; Jovanović, T. 8089; Exhibit D113, "Report by Jovica Nešić to Milan Zec on the use of projectiles on 6 December 1991, dated 8 December 1991"; Exhibit D108, "Report by Miroslav Jovanović to 9 VPS on combat activities of the Command of 3/5th Naval Motorized Brigade on December 1991, no date".
[563] Defence Appeal Brief, para. 202, citing Exhibit P61, tab 39, "Commission Report on Damages in the Old Parts of Dubrovnik, dated 9 December 1991"; P145, "Video of Damages to Historical Sites in Dubrovnik". See also AT. 102-104.

ability to punish the perpetrators, a prerequisite for having failed to punish them.[564] His argument rests on two main submissions. Strugar submits that there is no evidence to prove that he was ordered to take part in the investigation. He argues that the Trial Chamber erroneously held that the order issued by Kadijević to Jokić was of no significance to him as he should have conducted his own investigation. According to Strugar, the effect of the order given by the JNA Supreme Command to Jokić made it impossible for him to conduct a parallel investigation of his own.[565] In this regard, Strugar avers moreover that the Trial Chamber erred when it called Jokić's report "no more than a convenient administrative method of dealing with one issue".[566] Strugar submits that a report on an event that caused five ambassadors to seek an audience with Kadijević and required that a general and an admiral be recalled to report in Belgrade on the same day does not constitute a convenient administrative method.[567] Strugar takes issue with the Trial Chamber's finding that the "report was merely to inform the Federal Secretariat of the action that had been taken by him as a commander of the 9 VPS".[568] He asserts that reporting to the superior command on the execution of an assigned task is a fundamental principle of all command activities.[569]

227 In addition, Strugar maintains that the Trial Chamber erroneously found that he should have conducted an investigation and concluded that he participated "at the very least by acquiescence" in Jokić's sham investigation and sham disciplinary action.[570] Strugar argues that he was never informed about the content of Jokić's report and that the JNA Supreme Command had accepted the report on the investigation. Indeed, on the basis of Jokić's report, Admiral Brovet informed the ambassadors of the United States, Russia and the Netherlands on 12 December 1991 that those responsible for the shelling of the Old Town were under criminal investigation and had been relieved of their command.[571]

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[564] Defence Appeal Brief, paras 194, 198, 201, 207.
[565] *Ibid.*, paras 206, 208, 210, 214, 216; AT. 104-106. See also AT. 113-116, 118-121, 154-161.
[566] Trial Judgement, para. 443.
[567] Defence Appeal Brief, para. 203.
[568] Trial Judgement, para. 443.
[569] Defence Appeal Brief, para. 205.
[570] *Ibid.*, paras 209, 213, citing Trial Judgement, paras 436, 439.
[571] Defence Appeal Brief, paras 211-212, referring to Fietelaars, T. 4195-4196, 4308-4309; Exhibit P144, "Report on the Démarche made by the joint US-USSR-EC with Brovet, Milo{evi} and Tujdman".

228 The Prosecution responds that Strugar simply reiterates submissions already made at trial and thus falls short of meeting his burden on appeal. It submits that Strugar, by offering alternative readings of the evidence, does not establish that no reasonable trier of fact could have reached these conclusions. It asserts that the Trial Chamber provided an extensive, well-referenced discussion in support of its conclusions, which took into consideration the evidence relied upon by Strugar in his appeal submissions.[572]

229 The Prosecution also responds that the fact that Kadijevi} ordered Joki} to conduct an investigation into the matter does not release Strugar from his responsibility to identify and punish the perpetrators of the shelling of the Old Town. It submits that as Joki}'s superior, Strugar had to ensure that the investigation was properly carried out and that the perpetrators were punished.[573] It argues that the fact that Kadijević delegated the duty to draft a report to Jokić does not mean that Strugar should have shied away from his own duty to punish, as every responsible commander must make sure that crimes are correctly investigated.[574]

(b) Discussion

230 The Appeals Chamber will first consider Strugar's challenges to the Trial Chamber's findings on the nature and results of Joki}'s investigation. With respect to the alleged error regarding Kadijević's role in the initiation of this investigation, the Appeals Chamber notes that Strugar refers to communications sent by Rudolf, Joki} or Kadijević to Croatian or other international authorities[575] as well as to a message sent by Rudolf to Strugar himself.[576] The Appeals Chamber notes that in its findings on the measures taken following the shelling of the Old Town, the Trial Chamber specifically considered the most relevant pieces of evidence cited by Strugar in his submissions.[577] The Trial Chamber ultimately considered that assurances were

[572] Prosecution Respondent's Brief, paras 4.56-4.61, 4.63, citing Trial Judgement, paras 88, 96, 128, 140, 143, 145, 151, 172-175, 177, 189, 209, 287, 400, 435-445, fns 252, 255, 276-277, 304, 378, 430, 441, 443, 447, 456, 495, 564-565, 624, 631-632, 645, 652, 679-680, 683, 724-725, 727, 924-925, 1163, 1244, 1260, 1262.
[573] Prosecution Respondent's Brief, para. 4.62.
[574] AT. 134-135, 138-141, 162-168.
[575] See *supra,* fn. 561.
[576] See *supra,* fn. 560.
[577] See Trial Judgement, paras 158, 174, 436 (citing Exhibit P61, tab 33) and 151 (citing Exhibits P136 and P162).

given to international authorities as part of "a damage control exercise by the JNA as a consequence of the adverse international reaction to the shelling".[578] The Appeals Chamber finds that it was open to a reasonable trier of fact to reach this conclusion, given the evidence surrounding the circumstances in which the investigation was initiated and the results and outcome of the investigation.[579] As for the message sent by Rudolf to Strugar, the Appeals Chamber notes that the Trial Chamber found that Rudolf was informed by Joki} that Kadijević had ordered an investigation, although it also found that it was in fact the former who had suggested to the latter that he lead an investigation.[580] On the basis of the evidence regarding Rudolf's limited involvement in the investigation[581] and other evidence regarding its initiation,[582] it was open to a reasonable trier of fact to conclude that Rudolf's message to Strugar was of limited weight.[583] In the opinion of the Appeals Chamber, Strugar has failed to show that the Trial Chamber erred in finding that Joki} had proposed that he carry out an investigation of the shelling of the Old Town and that Kadijević had implicitly accepted this suggestion.

231 With respect to the alleged error regarding the nature of Joki}'s investigation, the Appeals Chamber notes at the outset that the Trial Chamber specifically referred to the evidence on which Strugar relies in his submissions

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[578] *Ibid.*, para. 435.
[579] See, in particular, *ibid.*, paras 170-174, 435-436.
[580] Trial Judgement, paras 158, 172-173.
[581] See, in particular, the Trial Chamber's finding that the JNA provided Rudolf with an explanation that "Captain Kova~evi} acting alone and on the spur of the moment on the morning of 6 December 1991, without authority and contrary to orders", had been responsible for the shelling of the Old Town: *ibid.*, para. 175.
[582] See *ibid.*, paras 158, 170-174, 435-436.
[583] See *ibid.*, para. 158:

> It is also the case that Admiral Joki} told Minister Rudolf that General Kadijevi} had ordered an investigation. The Chamber did weigh, but rejected, whether this affords confirmation of a direct conversation between Admiral Joki} and General Kadijevi}. In particular neither the timing nor the subject (an investigation) fits readily with the evidence of Frigate-Captain Hand`ijev of the conversation he claimed to have overheard. Neither does Admiral Joki} suggest an investigation was intended in his 0700 hours conversation with the Accused. That being so, the mention of an investigation strengthens the possibility that this had been discussed by Admiral Joki} and the Accused after the Accused had spoken further to General Kadijevi} during the morning, following his initial conversation with Admiral Joki}. That remains, however, an issue that cannot be conclusively determined by the Chamber given the state of the evidence. Another clear possibility is that the suggestion of an investigation was an initiative of Admiral Joki} as a means of appeasing Minister Rudolf, although attributed to General Kadijevi}, an initiative which Admiral Joki} followed up that same afternoon when he made the same suggestion to General Kadijevi} in Belgrade. As will be seen, this suggestion was accepted that afternoon by General Kadijevi}. (footnote omitted).

on this issue[584] in its findings as well as in other parts of the Trial Judgement.[585] As such, Strugar's submission that the Trial Chamber failed to consider this evidence stands to be rejected. The Appeals Chamber notes that the Trial Chamber found that:

- "the JNA deliberately put in place false records to indicate that the attack was undertaken spontaneously by Captain Kova~evi} by virtue of Croatian 'provocations' during the night of 5-6 December 1991" and that this "position was in fact taken by the JNA, including the command of the 2 OG, publicly and when dealing with Croatian representatives after the attack";[586]

- Joki}'s report to the SFRY Secretariat on his on-going investigation was "quite out of keeping with the facts as revealed by the evidence in this case, so as to put the conduct of the JNA forces in a more favourable light";[587]

- the report produced by a Commission of three 9 VPS officers on damage to the Old Town and endorsed by Joki} "sought to minimise the nature and extent of the damage and deflect responsibility for its cause from the JNA";[588]

- no disciplinary action was taken against any officers of the 9 VPS or 2 OG, save for Jovanovi}, who was relieved from his temporary command of the 3/5 mtbr, despite the fact that this unit was not in a position to shell the Old Town on 6 December 1991;[589]

- only a limited number of reports and statements were obtained after 6 December 1991, which supported the view that Kova~evi} of the 3/472 mtbr had "acted alone and contrary to orders in carrying out the attack on Sr|" and in which the "extent of the shelling and the damage it caused, especially to the Old Town, were significantly downplayed".[590]

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[584] *Ibid.*, para. 174, fn. 1260 (citing Joki}, T. 4094-4095; Jovanovi}, T. 8087-8088; Ne{i}, T. 8187); fns 566, 576 (citing Exhibit P61, tab 39); fn. 567 (citing Exhibit P145).
[585] Trial Judgement, fns 378 (citing Nešić, T. 8188), 378, 624, 631- 632, 652, 724-725, 727 (citing Exhibit D113); fns 255, 304, 441, 443, 447, 456, 924, 925, 1260 (citing Exhibit D108), 1162 (citing Exhibit P61, tab 39), 578, 735, 971, 1347, 1349-1350, 1352-1353, 1355, 1359-1360, 1362, 1365, 1370, 1375, 1378, 1384, 1400, 1406 (citing Exhibit P145).
[586] Trial Judgement, paras 97-98.
[587] *Ibid.*, para. 174. See also *ibid.*, para. 96.
[588] *Ibid.*, para. 174.
[589] *Ibid.*, paras 174, 436.
[590] *Ibid.*, para. 436.

232 Moreover, the Appeals Chamber recalls that the Trial Chamber established that following the shelling of the Old Town, the JNA was in "damage control mode"[591] and furthermore noted that Joki} testified that at a meeting between Strugar, Kadijevi}, and himself, "he felt that he was being portrayed as the main perpetrator" of the shelling.[592] In the opinion of the Appeals Chamber, taking also into consideration that "only a few written statements and reports were obtained in the day or two after 6 December 1991",[593] it was open to a reasonable trier of fact to conclude, on the basis of the whole of the evidence, that the investigation undertaken by Joki} was a "sham".[594]

233 The Appeals Chamber will now address Strugar's challenges to the Trial Chamber's findings regarding the impossibility for him to conduct a parallel investigation and his participation in, and knowledge of, Joki}'s investigation.

234 The Appeals Chamber notes that the Trial Chamber explicitly considered and rejected Strugar's submissions to the effect that the order given by the JNA Supreme Command to Jokić had excluded him from the investigation of the events of 6 December 1991 and had made it impossible for him to conduct a parallel investigation of his own.[595] In this regard, the Appeals Chamber recalls that the Trial Chamber found that:

- in a meeting in Belgrade on 6 December 1991, Kadijevi} accepted Joki}'s suggestion that the latter investigate the shelling of the Old Town;[596]

- there was no explicit order from Kadijevi} to Joki} to conduct an investigation into the shelling of the Old Town, "although an acceptance that he should do so was implicit";[597]

- "the nature of Admiral Joki}'s reporting was NOT to provide General Kadijevi} with information and/or recommendation for action and decision by General Kadijevi} in respect of the events of 6 December 1991 and consequent disciplinary action", but served rather to inform the Federal Secretariat of what

[591] *Ibid.*, para. 173.
[592] *Ibid.*, para. 171.
[593] *Ibid.*, para. 436.
[594] *Ibid.*, paras 174, 436.
[595] *Ibid.*, paras 438-445.
[596] *Ibid.*, paras 172-173. The Appeals Chamber notes that it previously upheld this finding: see *supra,* para. 230.
[597] Trial Judgement, para. 172.

had occurred and what actions and decision he had taken as Commander of the 9 VPS;[598]

- during the meeting in Belgrade, Kadijevi} was equally critical of both Strugar and Joki};[599]

- Strugar was present throughout the meeting and did not object to, nor resist in any way, Joki}'s proposal that he should investigate or Kadijevi}'s "apparent acceptance" of that proposal;[600]

- Strugar "effectively" knew that Joki}'s investigation was meant "to smooth over the events of 6 December 1991 as best he could with both the Croatian and ECMM interests, while providing a basis on which it could be maintained by the JNA that it had taken appropriate measures";[601]

- Strugar's direct role in the launching of the attack against Sr| and on-going sympathy with the military objectives of this attack as well as the critical view taken by Kadijevi} "provided clear reasons why ŦStrugarğ would not be minded to have the events of 6 December fully investigated, or to take disciplinary or other adverse action himself against those who directly participated";[602]

- "Ŧtğhere is no suggestion in the evidence that at any time ŦStrugarğ proposed or tried to investigate or to take any action against any subordinate for the shelling of the Old Town, or that he was prevented from doing so by General Kadijevi} or any other authority";[603]

- "Ŧwğithin a week or so of 6 December 1991, effect was given to a proposal commenced in November, and which necessarily had the endorsement of the Accused as Commander of the 2 OG, for the promotion of Captain Kova~evi} who led the actual attack on 6 December 1991";[604]

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[598] *Ibid.*, para. 443.
[599] *Ibid.*, para. 440.
[600] *Ibid.*, para. 440.
[601] *Ibid.*, para. 442. See also *ibid.*, paras 173-174, 435-436.
[602] *Ibid.*, para. 441.
[603] *Ibid.*, para. 440.
[604] *Ibid.*, para. 441. The Appeals Chamber notes that it summarily dismisses Strugar's challenges to this finding: see *infra*, paras 241-244.

- “on the occasion of a visit to 3/472 mtbr by General Pani}, the JNA Deputy Chief of General Staff, when both Ŧ̆Strugarğ and Admiral Joki} were present, Ŧ̆Strugarğ invited Captain Kova~evi} to nominate outstanding participants in the events of 6 December 1991”.[605]

235 In addition, the Appeals Chamber notes the following passages from Joki}’s testimony, which the Trial Chamber found credible in relation to the initiation of the investigation and the damage control exercise conducted by the JNA:[606]

> Q. On the return from Podgorica, did you discuss with General Strugar the measures to be taken in relation to the shelling?
>
> A. Yes, I did. From Podgorica, we went to Trebinje, to his command post. And then from Trebinje to Kupari, to my command post. As we travelled, we talked, especially at his command post in Trebinje, about the further steps that were to be taken. *It was accepted that the official version of the events of the 6th of December, which was composed at the command of the 2nd Operational Group on the basis of information provided by Captain Kovacevic, which was given by his officers, that this official version of the event should be sent to Belgrade to the General Staff, and that I should stand by that story, that version, at the press conference on the following day.* And that press conference was held in Kupari. Likewise, I suggested, and General Strugar agreed, that on the following day, I sign the peace agreement, initial the peace agreement, or rather the cease-fire, and that I send my team of officers to Dubrovnik to assess the damage in the Old Town.
>
> Q. Who accepted? It was accepted. What did you mean by “accepted”? Who accepted it? Who gave the instructions to adopt a certain version of the facts?
>
> A. *General Strugar instructed me as to what we should accept, what we should do. It was this official version of the events that took place on the 6th of December.* That is to say, that I should stand by that at the press conference.[607] Ŧ̆…ğ
>
> Q. Was there a commission of investigation that you ordered to be put into action to conduct an assessment of damage to the Old Town?
>
> A. Yes. *As for the damage, yes, I did propose this, and General Strugar accepted it,* and Minister Rudolf did, too, that a team of officers should be sent from my command who would tour the Old Town and assess the extent of the damage.[608] […]
>
> Q. You began to explain my question about the climate of denial. Would you please continue with what you were going to say.
>
> A. This is what I meant to say: This denial or shifting the guilt to the other side, it did exist then. And I think that this was another example of hushing things up or hushing the guilt of JNA units up. My opinion was then, and today I think, that evident facts cannot be hushed up and that professionalism of the units of the

[605] Trial Judgement, para. 441. The Appeals Chamber notes that it summarily dismisses Strugar’s challenges to this finding: see *infra*, paras 241-244.
[606] See Trial Judgement, paras 171-174, 435-436.
[607] Joki}, T. 4086-4087 (emphasis added).
[608] *Ibid.*, T. 4109.

Yugoslav People's Army cannot be proven by shifting the blame to the other side. *Had an investigation been ordered and carried out then, a true investigation regarding the shelling of Dubrovnik, I think that the JNA would have gained far more in terms of its reputation and dignity, rather than that mountain of orders stating that we should not target the Old Town, that we should be disciplined, that all sorts of measures should be taken***.** And in practice, these orders were not observed. I think that that is the truth of the matter.

Q. "Not observed" by whom, Admiral? These orders were not observed by whom?

A. Specifically in this case, the commander of the 3rd Battalion. But also certain officers who gave support or protection to such an arbitrary and grave offence.

Q. *And was this non-observance tolerated by all levels of command above?*

A. *Yes, I think so.*[609] Ŧ…ğ

Q. What was the reason in your view that a thorough, complete investigation was not conducted by you? Why did you not complete a thorough investigation?

A. *First of all, this unit, the 3rd Battalion, was temporarily resubordinated to me. It was not within my establishment. It was within the establishment of the 472nd Brigade, which was subordinated to the 2nd Operational Group. So for an investigation that I would carry out with my authorities, I would have to receive orders from the commander of the 2nd Operational Group.*

Q. Did such orders come through? Did you receive such orders for an investigation?

A. No. No. *A thorough and real investigation regarding this case was not wanted.*

Q. By whom?

A. *I think everybody from the General Staff—let me start from there, and the commander of the operational group, and at my level, my level, including me.* But I personally wanted even then, and I did do what I was in a position to do. *However, when General Panic came and when orders were issued that there should be decorations and commendations for persons participating in this event, that was something that came as total discouragement to me.* And officially, I could not do anything any more.[610]

236 In view of the Trial Chamber's findings, the Appeals Chamber dismisses Strugar's argument that there is no evidence to prove that he was ordered to take part in the investigation. Indeed, the Trial Chamber found that Strugar knew that Joki}'s investigation was a sham undertaken as part of a damage control exercise by the JNA and that Joki}'s task was merely to report to the Federal Secretariat on the measures he had taken as part of this investigation. As such, Strugar need not have been ordered to take part in the investigation for him to be liable for failure to punish as his material and legal authority to investigate and punish remained intact.

[609] *Ibid.*, T. 4115-4116 (emphasis added).
[610] *Ibid.*, T. 4116-4117 (emphasis added).

237 As for Strugar's references to communications with international authorities and the representations made to them, the Appeals Chamber reiterates that it was open to a reasonable trier of fact to consider on the basis of the whole of the evidence that these were part of "a damage control exercise by the JNA as a consequence of the adverse international reaction to the shelling".[611] Consequently, Strugar's argument that these communications prove that Joki}'s investigation was a serious undertaking ordered by the SFRY Secretariat stands to be rejected.

238 With respect to Strugar's other submissions regarding his exclusion from the process of investigation, the impossibility for him to conduct a parallel investigation and his lack of knowledge of the results of Joki}'s investigation, the Appeals Chamber finds that Strugar has merely asserted that the Trial Chamber should have drawn a particular conclusion on the basis of the evidence without explaining why the Trial Chamber's conclusion was unreasonable. In this regard, the Appeals Chamber finds that it was open to a reasonable trier of fact to conclude, on the basis of the whole of the evidence, including most notably the evidence relating to the meeting in Belgrade and the actions undertaken subsequent to this meeting, that Strugar had not been excluded from the process of investigation, but had rather been "at the least, prepared to accept a situation in which he would not become directly involved, leaving all effective investigation, action and decisions concerning disciplinary of other adverse action to his immediate subordinate, Admiral Joki}, whose task effectively was known to ŦStrugarğ to be to smooth over the events of 6 December 1991 as best he could with both the Croatian and ECMM interests, while providing a basis on which it could be maintained by the JNA that it had taken appropriate measures".[612] The Appeals Chamber also finds that it was reasonable for the Trial Chamber to conclude that Strugar "was, at the very least by acquiescence, a participant in the arrangement by which Admiral Joki} undertook his sham investigation and sham disciplinary action, and reported to the First Secretariat in a way which deflected responsibility for the damage to the Old Town from the JNA".[613]

[611] Trial Judgement, para. 435.
[612] *Ibid.*, para. 442.
[613] *Ibid.*, para. 439.

239 Accordingly, this sub-ground of appeal is dismissed, Judge Meron and Judge Kwon dissenting.

3. Alleged Errors Regarding Promotions and Decorations for the Events of 6 December 1991

240 The Trial Chamber held as follows:

> Within a week or so of 6 December 1991, effect was given to a proposal commenced in November, and which necessarily had the endorsement of the Accused as Commander of the 2 OG, for the promotion of Captain Kova~evi} who led the actual attack on 6 December 1991. This promotion occurred in mid-December, despite his critical role in the events of 6 December 1991. There is no suggestion in the evidence of any attempt by the Accused to stop the promotion. Further, while there is some dispute as to whether it occurred in mid-December 1991 or March 1992, or indeed at all, it is also the case, in the Chamber's finding, that on the occasion of a visit to 3/472 mtbr by General Pani}, the JNA Deputy Chief of General Staff, when both the Accused and Admiral Joki} were present, the Accused invited Captain Kova~evi} to nominate outstanding participants in the events of 6 December 1991.[614]

Strugar impugns this holding.[615]

241 Strugar first maintains that he was not directly implicated in the decision relating to Kovačević's extraordinary promotion eight days after the shelling of the Old Town on 6 December 1991.[616] The Appeals Chamber observes that the Trial Chamber did not find that he was directly implicated in the decision relating to Kovačević's extraordinary promotion eight days after the shelling of the Old Town on 6 December 1991. Instead, the Trial Chamber found that Strugar had failed to exercise his power to oppose a proposal for the promotion of Kovačević commenced by the 9 VPS in November 1991.[617] The Appeals Chamber summarily dismisses this sub-ground of appeal under category 2, as misrepresenting the Trial Chamber's factual findings.

242 Strugar secondly avers that the Trial Chamber itself expressed doubts as to whether General Panić's ("Pani}") visit mentioned by the Trial Chamber occurred in mid-December 1991, March 1992 or not at all.[618] The Appeals Chamber observes that while the Trial Chamber did note a divergence in the evidence relating to Pani}'s visit, the Trial Chamber clearly found that the visit

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[614] *Ibid.*, para. 441 (footnotes omitted). See also *ibid.*, paras 412-413.
[615] Defence Notice of Appeal, paras 95, 100; Defence Appeal Brief, paras 130-131, 217-218.
[616] *Ibid.*, paras 130-131.
[617] Trial Judgement, paras 413, 441.
[618] Defence Appeal Brief, paras 130-131, 217.

had in fact taken place.[619] The Appeals Chamber summarily dismisses this sub-ground of appeal under category 2, as misrepresenting the Trial Chamber's factual findings.

243 Strugar thirdly maintains that Nešić, Lemal and Lieutenant Pesić ("Pesić") testified that no one was promoted or decorated in connection with the events of 6 December 1991 and that no visit by Pani} ever occurred.[620] The Appeals Chamber summarily dismisses this sub-ground of appeal under category 5, as amounting to a mere assertion that the testimony of certain witnesses is inconsistent with the conclusions of the Trial Chamber.

244 Strugar finally submits that Jokić's testimony regarding Panić's alleged visit was an attempt to minimize his own criminal responsibility.[621] The Appeals Chamber summarily dismisses this sub-ground of appeal under category 3, as constituting a mere assertion that the Trial Chamber should have interpreted evidence in a particular manner.

G. Conclusion

245 In light of the foregoing, the Appeals Chamber dismisses Strugar's first and third grounds of appeal in their entirety.

[619] Trial Judgement, para. 441.
[620] Defence Appeal Brief, para. 217, citing Nešić, T. 8192; Pesić, T. 7917-7918; Lemal, T. 7381.
[621] Defence Appeal Brief, para. 218.

V. ALLEGED ERRORS OF LAW (STRUGAR'S SECOND GROUND OF APPEAL)

A. Alleged Errors Regarding the Superior-Subordinate Relationship

246 Strugar submits that the Trial Chamber erroneously concluded that the legal requirement of a superior-subordinate relationship was established on the facts of this case.[622]

1. Arguments of the Parties

247 Strugar submits that the Trial Chamber erred in establishing that he had the material ability to prevent on the basis that he could issue orders to subordinate units and could engage in negotiations with the opposing party. According to Strugar, as these two elements are attributable to every officer in a given military organisation, anyone in a given chain of command could be held responsible on this basis.[623]

248 Strugar also submits that the Trial Chamber erred in establishing that he had the material ability to punish on the basis that he could have undertaken measures, which any senior military officer could have carried out. Strugar argues that this would also result in the standard of effective control being fulfilled with respect to any superior within a given chain of subordination.[624]

249 Strugar avers that the superior-subordinate relationship as defined by the Trial Chamber would lead to objective responsibility of military commanding officers at each level for offences perpetrated by subordinates at any level of subordination.[625] Furthermore, he argues that the standard of responsibility employed by the Trial Chamber for high-ranking military commanders would be appropriate in order to establish criminal responsibility pursuant to the third form of joint criminal enterprise of which he has not been accused.[626]

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[622] Defence Notice of Appeal, paras 89-90 referring to Trial Judgement, paras 379-414. The Appeals Chamber notes that these alleged errors appear under the heading "Third Ground of Appeal" in this notice, but under the "Second Ground of Appeal" in the Defence Appeal Brief. This confusion is however not determinative of the substance of Strugar's arguments.
[623] Defence Appeal Brief, paras 110, 112-113; Defence Reply Brief, paras 46-50
[624] Defence Reply Brief, paras 51-52.
[625] Defence Appeal Brief, paras 113, 117; Defence Reply Brief, para. 52.
[626] Defence Appeal Brief, para. 118.

250 The Prosecution responds that the Trial Chamber applied the correct legal standard for establishing the existence of a superior-subordinate relationship pursuant to Article 7(3) of the Statute.[627]

251 Strugar replies that the Trial Chamber erred in determining the standard of responsibility of the superior, as the elements upon which the Trial Chamber found that effective control existed "are attributable to every officer in a given military organization".[628]

2. Discussion

252 Although this sub-ground of appeal is presented as relating to an alleged error of law, the Appeals Chamber is of the view that it is more accurately characterized as a mixed error of law and fact. Hence, the Appeals Chamber will determine whether the conclusion reached by the Trial Chamber was one which no reasonable trier of fact could have reached. However, before doing so, the Appeals Chamber will clarify the legal standard employed by the Trial Chamber in the Trial Judgement.

253 The Appeals Chamber recalls that a superior's authority to issue orders does not *automatically* establish that a superior had effective control over his subordinates, but is one of the indicators to be taken into account when establishing the effective control.[629] As the Appeals Chamber held in *Halilovi}*, in relation to such capacity, "the orders in question will rather have to be carefully assessed in light of the rest of the evidence in order to ascertain the degree of control over the perpetrators".[630] For instance, in *Bla{ki}*, the Appeals Chamber found that "the issuing of humanitarian orders does not by itself establish that the Appellant had effective control over the troops that received the orders".[631]

254 Indeed, as held by the Appeals Chamber in *Blaškić*, "the indicators of effective control are more a matter of evidence than of substantive law, and those indicators are limited to showing that the accused had the power to prevent, punish, or initiate measures leading to proceedings against the

[627] Prosecution Respondent's Brief, paras 3.6, 3.9-3.17
[628] Defence Reply Brief, para. 46.
[629] *Cf. Halilović* Appeal Judgement, paras 68, 70, 139.
[630] *Ibid.*, para. 204.
[631] *Bla{ki}* Appeal Judgement, para. 485.

alleged perpetrators where appropriate".[632] Therefore, whether a given form of authority possessed by a superior amounts to an indicator of effective control depends on the circumstances of the case.[633] For example, with respect to the capacity to issue orders, the nature of the orders which the superior has the capacity to issue, the nature of his capacity to do so as well as whether or not his orders are actually followed would be relevant to the assessment of whether a superior had the material ability to prevent or punish.

(a) Ability to Prevent

255 The Appeals Chamber observes that in establishing that Strugar had the material ability to prevent the unlawful shelling of the Old Town, the Trial Chamber did not merely rely on findings that he could give orders and participate in negotiations. Rather, the Trial Chamber held that as the commander of the 2 OG, Strugar had, and indeed exercised, the authority to give direct combat orders not only to the units under his immediate or first level command, but also to units under his command at a second or further lower level.[634] The Trial Chamber further held that Strugar exercised his authority to give direct combat orders, including his authority to order a unit to cease fire and his authority to prohibit attacks on particular targets.[635] What is more, the Trial Chamber held that he had the authority to order re-subordination of units within the structure of the 2 OG[636] and that the command of the 2 OG retained responsibility for maintaining discipline and for the promotion and removal of officers.[637] Finally, the Trial Chamber was convinced that Strugar's authority to represent the JNA in negotiations with the ECMM and the Crisis Staff of Dubrovnik further illustrated the nature and extent of his material ability to prevent an attack on Dubrovnik by the JNA forces deployed in the region.[638]

256 The Appeals Chamber recalls that whether a superior's orders are in fact followed can be indicative of a superior's effective control over his

[632] *Ibid.*, para. 69. See also *Had`ihasanovi} and Kubura* Appeal Judgement, para. 199.
[633] *Cf. Halilović* Appeal Judgement, paras 191-192; *Had`ihasanovi} and Kubura* Appeal Judgement, paras 199-201.
[634] Trial Judgement, para. 395.
[635] *Ibid.*, para. 396.
[636] *Ibid.*, para. 397.
[637] *Ibid.*, para. 404.
[638] *Ibid.*, para. 398.

subordinates.[639] In this regard, the Appeals Chamber notes that in addition to finding that Strugar had the authority to issue orders, the Trial Chamber also established that Strugar's orders were actually followed.[640]

257 The Appeals Chamber notes however that in other parts of the Trial Judgement, the Trial Chamber found that Strugar had issued a number of orders prohibiting the shelling of Dubrovnik or the Old Town and that these orders had not been complied with by his subordinates in November 1991.[641] In addition, the Trial Chamber noted that it had "Ŧheard evidence that in the period October to December 1991 there were problems with discipline in the units of the 2 OG, in particular, incidents of unauthorised opening of fire, refusal to carry out orders, looting, arson and drinking".[642] Although evidence of prior instances of indiscipline and of non-compliance with orders would be clearly relevant to an assessment of whether Strugar had effective control over his subordinates, this evidence was not explicitly considered by the Trial Chamber in its findings on Strugar's effective control over his subordinates. While Strugar does not raise this issue in his appeal, the Appeals Chamber deems it appropriate to consider it *proprio motu*.

258 After having carefully considered the Trial Chamber's findings and the evidence on which they rely, the Appeals Chamber finds that a reasonable trier of fact could have found that Strugar had the material ability to prevent the commission of crimes by his subordinates, notwithstanding the disciplinary issues in the 3/472 mtbr and the prior instances of non-compliance with his orders. Although the Trial Chamber did not make an explicit finding to this effect, it is apparent that the Trial Chamber considered this evidence as being related to Strugar's on-going failure to comply with his responsibilities as a military commander. The Trial Chamber thus held as follows:

> The extent of the Accused's existing knowledge of the October and November shelling of the Old Town, of the disciplinary problems of the 3/472 mtbr and of its apparent role, at least as revealed by Admiral Joki}'s November investigation, in the November shelling of Dubrovnik, especially the Old Town, and of his failure to clarify the intention of his order to attack Srđ in regard to the shelling of Dubrovnik or the Old Town are each very relevant. In combination they give rise, in the Chamber's finding to a strong need to make very expressly clear, by an immediate and direct order to those commanding

[639] See *Halilovi}* Appeal Judgement, para. 207.
[640] Trial Judgement, paras 399-404.
[641] *Ibid.*, paras 61, 62, 421.
[642] *Ibid.*, fn. 1221.

> and leading the attacking forces, especially the artillery, the special status of the Old Town and the existing prohibitions on shelling it, and of the limitations or prohibition, if any, on shelling the Old Town intended by the Accused on 6 December 1991.[643]

Given the Trial Chamber's other findings regarding Strugar's apparent sympathy with the military objectives of the attack against Sr|[644] and his role in ordering this attack in October, November and December 1991,[645] as well as its findings regarding his ability to issue orders and take disciplinary measures,[646] the Appeals Chamber understands the Trial Judgement as having established that Strugar effectively chose not to act with respect to the non-compliance with his previous orders regarding the shelling of the Old Town. In particular, the Appeals Chamber notes that the Trial Chamber cited the following evidence of Joki} regarding the lack of disciplinary measures taken against the perpetrators of the shelling of the Old Town that his request for two officers to be replaced was left unresolved as "General Strugar did not have any competent officers to offer as replacements" and thus told him "that he would send an officer who was the commander of an armoured unit, but that he would only send this officer later".[647]

259 Having due regard to the nature of the orders which Strugar had the capacity to issue, the nature of the negotiations in which he had the authority to represent the JNA, the nature of his position as the commander of the 2 OG, and the fact that, where it was important to him, his orders were actually followed, the Appeals Chamber finds that the Trial Chamber reasonably found that Strugar had the material ability to prevent the unlawful shelling of the Old Town.

(b) Ability to Punish

260 As to Strugar's material ability to punish the perpetrators of this shelling, the Trial Chamber relied upon a variety of findings when it found that he "had the legal authority and the material ability to initiate" effective action against the officers responsible for the shelling of the Old Town.[648] The Trial Chamber

[643] *Ibid.*, para. 422 (footnotes omitted).
[644] *Ibid.*, para. 441.
[645] *Ibid.*, paras 44-50, 164-167.
[646] *Ibid.*, paras 379-414.
[647] Joki}, T. 4000.
[648] The Appeals Chamber notes that Strugar only challenges one of the Trial Chamber's findings in his appeal and that this challenge has been summarily dismissed. See *supra*, para. 222.

found that as the commander of the 2 OG, Strugar's authority included authority to issue orders and instructions relating to discipline to the units of the 2 OG, including the 9 VPS. In doing so, it referred to a number of orders which illustrated the role of the command structure of the 2 OG with respect to disciplinary matters.[649] The Trial Chamber also found that Strugar had the authority to apply all disciplinary measures prescribed by law, to effect the removal of an officer during combat operations through transfer and appointment to other duties as a personnel change, to recommend the removal of an officer, to approve extraordinary promotions and to oppose regular promotions.[650] Finally, the Trial Chamber found that he had the authority to seek an increase of the number of military police.[651]

261 In addition, the Appeals Chamber observes that the Trial Chamber addressed at length Strugar's arguments at trial that at the material time military courts in the region were not functioning. The Trial Chamber found that the unavailability of a military court did not exonerate a commander from his duty to ensure that information about an offence was communicated to the judicial authorities; nor did it find that there was a complete breakdown in the military court system. Moreover, the Trial Chamber referred to evidence of criminal proceedings initiated against soldiers from the 2 OG in relation to other circumstances.[652]

262 Taking into consideration the nature of the orders which Strugar had the authority to give, the nature of his position, and the fact that the military court system was still functioning at the relevant time, the Appeals Chamber finds that the Trial Chamber reasonably found that Strugar had the material ability to punish. Hence, the Trial Chamber reasonably applied the standard for the superior-subordinate relationship to the facts in the case. Consequently, his arguments regarding objective responsibility and the third category of joint criminal enterprise stand to be rejected.

263 Accordingly, this sub-ground of appeal is dismissed.

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[649] Trial Judgement, para. 406.
[650] *Ibid.*, paras 408-413.
[651] *Ibid.*, paras 407-408.
[652] *Ibid.*, paras 409-410.

B. Alleged Error in Characterization of the *Mens Rea* of the Criminal Offence

264 The Trial Chamber held that the required form of *mens rea* for attacks on civilians (Count 3) and destruction or wilful damage to cultural property (Count 6) is "direct intent", that is, respectively, "intent of making the civilian population or individual civilians, or civilian objects, the object of the attack"[653] and "direct intent to damage or destroy the property in question".[654] The Trial Chamber further found that, in the circumstances of the case, it did not need to consider whether "indirect intent" may have been sufficient for the crimes in question. Strugar submits that the Trial Chamber erred in finding that the *mens rea* element of direct intent was met in relation to these two counts.[655]

265 The Appeals Chamber notes that the Defence Notice of Appeal alleges that the Trial Chamber erred in its findings in relation to both the *actus reus* and the *mens rea* for the crime of attack on civilians or civilian objects.[656] As for the crime of destruction and wilful damage to cultural property, the Defence Notice of Appeal refers generally to errors in establishing the elements of the offence.[657] However, the Defence Appeal Brief only elaborates on alleged errors with respect to the *mens rea* of both crimes.[658] In these circumstances, the Appeals Chamber understands Strugar to have abandoned the allegations concerning the *actus reus* elements of this crime.[659]

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[653] *Ibid.*, para. 283.
[654] *Ibid.*, para. 311.
[655] Defence Notice of Appeal, paras 83, 86.
[656] *Ibid.*, para. 83. With respect to the *actus reus* requirement, the Trial Chamber concluded that "the crime of attacks on civilians or civilian objects, as a crime falling within the scope of Article 3 of the Statute, is, […] an attack directed against a civilian population or individual civilians, or civilian objects, causing death and/or serious injury within the civilian population, or damage to the civilian objects." (Trial Judgement, para. 283).
[657] Defence Notice of Appeal, para. 86. With respect to elements of the *actus reus* requirement, the Trial Chamber concluded that (i) there must be actual damage or destruction occurring as a result of an act directed against the property which constitutes the cultural or spiritual heritage of peoples; (ii) the protection accorded to cultural property is lost where such property is used for military purposes at the time of the acts of hostility against it, but may not be lost simply because of military activities or military installations in the immediate vicinity of the cultural property (Trial Judgement, paras 308, 310, 312).
[658] Defence Appeal Brief, paras 119-123.
[659] The Appeals Chamber recalls that an appellant's brief should contain all the arguments and authorities in support of the grounds outlined in the notice of appeal (Rule 111 of the Rules; Practice Direction on Formal Requirements for Appeals from Judgements, para. 4). *Cf., a contrario, Halilović* Appeal Judgement, para. 25.

1. Arguments of the Parties

266 Strugar submits that the Trial Chamber correctly found that the *mens rea* element for the crimes charged under Counts 3 and 6 requires direct intent.[660] However, he contests the Trial Chamber's "legal assessment" of the established facts.[661] In particular, Strugar refers to paragraph 139 of the Trial Judgement which, in relevant part, reads as follows:

> The truth seems to be, in the finding of the Chamber, that there was inadequate direction of the fire of the JNA mortars and other weapons against Croatian military targets. Instead, they fired extensively and without disciplined direction and targeting correction, at Dubrovnik, including the Old Town.[662]

Strugar argues that these facts, and in particular the inadequate direction of fire (unlike deliberate targeting), do not meet the required standard of direct intent. Rather, inadequate direction of fire would appear to amount to gross negligence or, alternatively, to arguments for "indirect intent".[663]

267 In response, the Prosecution first argues that although the Trial Chamber endorsed direct intent as sufficient for both crimes charged under Counts 3 and 6, it left open the possibility that a standard of *mens rea* lower than direct intent may also have been appropriate for both crimes in question.[664] Second, the Prosecution submits that, in any event, the Trial Chamber's key findings demonstrate that it found that the perpetrators of unlawful shelling had "direct intent".[665]

268 In reply, Strugar contests the Prosecution's interpretation of the Trial Chamber's legal finding on the *mens rea* element and claims that the Trial Chamber did not conclude that indirect intent was a sufficient level of intent for the crimes in question.[666] Strugar further argues that the finding in paragraph 139 of the Trial Judgement allegedly establishing the indirect intent of the

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[660] Defence Appeal Brief, para. 123; AT. 212 with reference to *ibid.*, para. 71.
[661] *Ibid.*, para. 123.
[662] *Ibid.*, para. 120, citing Trial Judgement, para. 139.
[663] Defence Appeal Brief, para. 122.
[664] Prosecution Respondent's Brief, paras 3.33-3.35, citing Trial Judgement, paras 283, 311; see also Prosecution's Addendum, paras 33-34 referring to *Galić* Appeal Judgement, para. 140, *Hadžihasanović and Kubura* Trial Judgement, para. 59, and *Krajišnik* Trial Judgement, para. 782. At the Appeals Hearing, the Prosecution clarified that, in its submission, indirect intent is sufficient for establishing the *mens rea* of the relevant crimes (AT. 137).
[665] Prosecution Respondent's Brief, paras 3.39-3.41, citing Trial Judgement, paras 179, 181, 195, 214, 288, 329.
[666] Defence Reply Brief, para. 53.

perpetrators appears in the only section of the Trial Judgement which clearly determines the precise activities of the JNA on 6 December 1991. He thus submits that the factual findings cited by the Prosecution do not correspond to the facts established in paragraph 139 and that the conclusion on the JNA intentionally targeting civilians and civilian objects contradicts those facts.[667]

2. Discussion

269 At the outset, the Appeals Chamber notes that, although Strugar qualifies the relevant alleged errors of the Trial Chamber as errors of law, it understands him to challenge both the Trial Chamber's legal and factual conclusions with respect to defining the *mens rea* requirement of the crimes in question and its application to the conduct of JNA forces in the region of Dubrovnik on 6 December 1991.[668] Hence, the Appeals Chamber will first examine the applicable law and then determine whether the factual conclusion reached by the Trial Chamber was one which no reasonable trier of fact could have reached.

(a) Attacks on Civilians (Count 3)

270 The Appeals Chamber has previously ruled that the perpetrator of the crime of attack on civilians must undertake the attack "wilfully" and that the latter incorporates "wrongful intent, or recklessness, [but] not 'mere negligence'".[669] In other words, the *mens rea* requirement is met if it has been shown that the acts of violence which constitute this crime were wilfully directed against civilians, that is, either deliberately against them or through recklessness.[670] The Appeals Chamber considers that this definition

[667] *Ibid.*, paras 54-55.
[668] The Appeals Chamber notes that the Trial Chamber made legal and factual findings with respect to Count 3 (attacks on civilians) and Count 5 (attacks on civilian objects) simultaneously (Trial Judgement, paras 277 *et seq.*). Strugar has not presented any argument concerning the Trial Chamber's findings in relation the *mens rea* element of the crime of attack on civilian objects, given that, in light of its conlusion on cumulation, the Trial Chamber did not enter a conviction under Count 5. Both parties clarified that, in their views, the *mens rea* requirement of the crime of attack on civilians and the crime of attack on civilian objects are identical (AT. 137; AT. 212).
[669] *Galić* Appeal Judgement, para. 140, citing *Galić* Trial Judgement, para. 54.
[670] *Cf. Commentary AP I*, para. 3474 which defines the term "wilfully" in the following way: "the accused must have acted consciously and with intent, i.e., with his mind on the act and its consequences, and willing them ('criminal intent' or 'malice aforethought'); this encompasses the concepts of 'wrongful intent' or 'recklessness', *viz.*, the attitude of an agent who, without being certain of a particular result, accepts the possibility of it happening; on the other hand, ordinary negligence or lack of foresight is not covered, i.e., when a man acts without having his

encompasses both the notions of "direct intent" and "indirect intent" mentioned by the Trial Chamber, and referred to by Strugar, as the *mens rea* element of an attack against civilians.

271 As specified by the Trial Chamber in the *Galić* case,

> For the *mens rea* recognized by Additional Protocol I to be proven, the Prosecution must show that the perpetrator was aware or should have been aware of the civilian status of the persons attacked. In case of doubt as to the status of a person, that person shall be considered to be a civilian. However, in such cases, the Prosecution must show that in the given circumstances a reasonable person could not have believed that the individual he or she attacked was a combatant.[671]

The intent to target civilians can be proved through inferences from direct or circumstantial evidence.[672] There is no requirement of the intent to attack *particular* civilians; rather it is prohibited to make the civilian population as such, as well as individual civilians, the object of an attack.[673] The determination of whether civilians were targeted is a case-by-case analysis, based on a variety of factors, including the means and method used in the course of the attack, the distance between the victims and the source of fire, the ongoing combat activity at the time and location of the incident, the presence of military activities or facilities in the vicinity of the incident, the status of the victims as well as their appearance, and the nature of the crimes committed in the course of the attack.[674]

272 In the present case, the Trial Chamber found that the cause of the extensive and large-scale damage to the Old Town of Dubrovnik was the *deliberate* shelling of the Old Town on 6 December 1991, not only by JNA mortars, but also by other JNA weapons such as ZIS and recoilless cannons and Maljutka rockets.[675] The Trial Chamber further concluded that the intent of the perpetrators of this attack was "to target civilians and civilian objects in the Old Town".[676] The Appeals Chamber is of the view that Strugar has failed to

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mind on the act or its consequences."
[671] *Galić* Trial Judgement, para. 55; see also *Kordić and Čerkez* Appeal Judgement, para. 48; *Blaškić* Appeal Judgement, para. 111.
[672] *Galić* Appeal Judgement, fn. 707.
[673] *Ibid.*, fn. 709, citing *Additional Protocol I*, Article 52 (2).
[674] *Galić* Appeal Judgement, para. 132, citing *Kunarac et al.* Appeal Judgement, para. 91; *Blaškić* Appeal Judgement, para. 106; *Galić* Appeal Judgement, para. 133. *Cf. Kordić and Čerkez* Appeal Judgement, para. 438.
[675] Trial Judgement, para. 214.
[676] *Ibid.*, para. 288.

demonstrate that no reasonable trier of fact could have reached such conclusions.

273 Indeed, on the basis of the totality of the evidence before it, the Trial Chamber was convinced that the damage inflicted to the Old Town of Dubrovnik on 6 December 1991 was caused by JNA shelling which lasted over ten and a half hours.[677] Among other factors, the Trial Chamber took into account the fact that the Croatian mortar attack against Lieutenant Pesić's unit near Srđ originated in the area of Lapad, well to the northwest of the Old Town.[678] Furthermore, based on the positioning of the weapons on the Žarkovica plateau, the Trial Chamber concluded that JNA recoilless cannons and the Maljutka rockets could target both Srđ and the nearer residential areas of Dubrovnik, including the Old Town.[679] Although the Trial Chamber did find that there had been an attempt at countering fire by Croatian forces in Dubrovnik, it pointed out that only three or four shells landed near Žarkovica (none hitting the JNA position), while further Croatian fire was concentrated on Srđ.[680] The Trial Chamber then observed that, while the task of the anti-armour company on Žarkovica was to secure JNA positions on Srđ, its targets included and reached parts of the Old Town.[681] With respect to the use of Maljutka rockets, the Trial Chamber found that, while there was no evidence of any specific targets in Dubrovnik for this weapon, there was sound evidence that rockets were indiscriminately fired from Žarkovica on the Old Town.[682]

274 Furthermore, the Trial Chamber accepted Witness B's evidence describing "indiscriminate firing, with soldiers often firing at will at targets of their choosing in Dubrovnik, including the Old Town".[683] He further "testified that no targets were identified that day, that the officers on Žarkovica never ordered that Maljutkas should not be fired on the Old Town" and "that even those who were not trained in handling a Maljutka were encouraged to participate in the firing".[684] Strugar does not allege under this ground of appeal

[677] *Ibid.*, para. 181, with reference to paras 100, 103, 139.
[678] *Ibid.*, paras 124, 176, 181.
[679] *Ibid.*, para. 127. The Trial Chamber also found that the recoilless cannons had the range to target both the Old Town of Dubrovnik and Srđ (*ibid.*, para. 130).
[680] *Ibid.*, para. 128.
[681] *Ibid.*, paras 129-131.
[682] *Ibid.*, paras 132-134.
[683] *Ibid.*, para. 134. See also *ibid.*, paras 139, 213-214.
[684] *Ibid.*, para. 134 (footnotes omitted).

that any of the above-mentioned factual findings of the Trial Chamber is erroneous.[685]

275 Based on the detailed analysis of the evidence before it, the Trial Chamber explicitly rejected the Defence suggestion that the attack was made in response to Croatian firing.[686] On the contrary, the Trial Chamber was left with no doubt that "no military firing points or other objectives, real or believed, in the Old Town were targeted by the JNA".[687] The Appeals Chamber, moreover, has held on various occasions that the absolute prohibition against attacking civilians "may not be derogated from because of military necessity".[688] Furthermore, the Appeals Chamber recalls that, depending on the circumstances of the case, the indiscriminate character of an attack can be indicative of the fact that the attack was indeed directed against the civilian population.[689]

276 The Trial Chamber's finding at paragraph 139 of the Trial Judgement, which Strugar asserts to be a finding of indirect intent, in fact addresses a different issue. The Trial Chamber found that the fire of JNA mortars and other weapons did not properly target Croatian military forces: "[i]nstead, they fired extensively and without disciplined direction and targeting correction, at Dubrovnik, including the Old Town".[690] In such circumstances, given, in particular, the lack of military targets within the Old Town, as well as the events of the previous weeks, it was impossible not to know that civilians

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[685] The Appeals Chamber notes that some indirectly related challenges are raised by Strugar in the framework of his third ground of appeal. However, in light of the suggested dismissals of these challenges below, they have no impact on the present discussion.
[686] Trial Judgement, paras 195, 211, 214.
[687] *Ibid.*, para. 288, referring to factual conclusions in paras 193-194.
[688] *Galić* Appeal Judgement, para. 130 citing *Blaškić* Appeal Judgement, para. 109, and *Kordić and Čerkez* Appeal Judgement, para. 54. In this sense, the fighting on both sides affects the determination of what is an unlawful attack and what is acceptable collateral damage, but not the prohibition itself (*Galić* Appeal Judgement, fn. 704). It has also been held that even the presence of individual combatants within the population attacked does not necessarily change the legal qualification of this population as civilian in nature (*Galić* Appeal Judgement, para. 136).
[689] *Galić* Appeal Judgement, para. 132 and fn. 706. In that case, the Appeals Chamber upheld the Trial Chamber's finding that attacks which employ certain means of combat which cannot discriminate between civilians and civilian objects and military objectives were "tantamount to direct targeting of civilians" (*Galić* Trial Judgement, fn. 101). See also *Galić* Appeal Judgement, fn. 706: "Attacking anything that moves in a residential building, before determining whether the mover is a civilian or a combatant, is a paradigmatic example of not differentiating between targets."
[690] Trial Judgement, para. 139.

would be unlawfully hit.[691] Therefore, while it may be true that the shelling was not aimed at specific targets within the civilian area, it was reasonable to conclude – as the Trial Chamber did in paragraph 214 of the Trial Judgement – that the perpetrators did deliberately shell civilians.[692] In fact, the evidence before the Trial Chamber suggested that the perpetrators fired their weapons conscious as to their acts and consequences and willing them to happen.[693] It was, therefore, unnecessary for the Trial Chamber to explore other options as to the *mens rea* of the crime in question.

(b) Destruction or Wilful Damage of Cultural Property (Count 6)

277 The crime of destruction or wilful damage of cultural property under Article 3(d) of the Statute is *lex specialis* with respect to the offence of unlawful attacks on civilian objects.[694] The *mens rea* requirement of this crime is therefore also met if the acts of destruction or damage were wilfully (*i.e.* either deliberately or through recklessness) directed against such "cultural property".[695]

278 The Trial Chamber held that "a perpetrator must act with a direct intent to damage or destroy the property in question" and that the issue as to whether "indirect intent" could also be sufficient for this crime did not arise in the circumstances of the case.

279 On the basis of the fact that the entire Old Town of Dubrovnik was added to the World Heritage List in 1979, the Trial Chamber concluded that each structure or building in the Old Town fell within the scope of Article 3(d) of the Statute. The Trial Chamber also noted that the protective UNESCO emblems were visible from the JNA positions on Žarkovica and elsewhere.[696] Strugar does not allege that any of these findings are erroneous. Hence, the Trial Chamber reasonably concluded that the direct perpetrators of the crime were aware of

[691] *Cf. Blaškić* Trial Judgement, para. 180.
[692] Trial Judgement, para. 214; *cf. Galić* Appeal Judgement, paras 334-335; *Kordić and Čerkez* Appeal Judgement, para. 419.
[693] See Trial Judgement, paras 182-214.
[694] *Kordić and Čerkez* Appeal Judgement, paras 89-91; *Kordić and Čerkez* Trial Judgement, para. 361.
[695] See *Hadžihasanović and Kubura* Trial Judgement, para. 59; *Krajišnik* Trial Judgement, para. 782; *Naletilić and Martinović* Trial Judgement, paras 603-605, citing *Kordić and Čerkez* Trial Judgement, para. 358 and *Blaškić* Trial Judgement, para. 185.
[696] Trial Judgement, para. 329.

the protected status of the cultural property in the Old Town and that the attack on this cultural property was deliberate and not justified by any military necessity.[697] Consequently, his submission that the Trial Chamber's findings on the *mens rea* of the direct perpetrators of the crime do not meet the standard of direct intent must fail.

280 In light of the foregoing, Strugar's challenges with respect to the Trial Chamber's findings on the required form of *mens rea* for the crimes of attacks on civilians and destruction or wilful damage to cultural property are dismissed in their entirety.

281 Accordingly, this sub-ground of appeal is dismissed.

C. Conclusion

282 For the foregoing reasons, the Appeals Chamber dismisses Strugar's second ground of appeal in its entirety.

[697] *Ibid.*, para. 329.

VI. ALLEGED ERROR OF LAW REGARDING THE SCOPE OF STRUGAR'S DUTY TO PREVENT (PROSECUTION'S FIRST GROUND OF APPEAL)

A. Introduction

283 The Trial Chamber found that Strugar's criminal responsibility pursuant to Article 7(3) of the Statute arose at around 7:00 a.m. on 6 December 1991.[698] In a preceding finding, the Trial Chamber found that Strugar's criminal responsibility had not arisen prior to the commencement of the attack on Sr| in the early morning of 6 December 1991. In this respect, it held as follows:

> In the Chamber's assessment of what was known to the Accused at or before the commencement of the attack on Sr|, there has been shown to be a real and obvious prospect, a clear possibility, that in the heat and emotion of the attack on Sr|, the artillery under his command might well get out of hand once again and commit offences of the type charged. It has not been established, however, that the Accused had reason to know that this would occur. This is not shown to be a case, for example, where the Accused had information that before the attack his forces planned or intended to shell the Old Town unlawfully, or the like. It is not apparent that additional investigation before the attack could have put the Accused in any better position. Hence, the factual circumstances known to the Accused at the time are such that the issue of "reason to know" calls for a finely balanced assessment by the Chamber. In the final analysis, and giving due weight to the standard of proof required, the Chamber is not persuaded that it has been established that the Accused had reasonable grounds to suspect, before the attack on Sr|, that his forces were about to commit offences such as those charged. Rather, he knew only of a risk of them getting out of hand and offending in this way, a risk that was not slight or remote, but nevertheless, in the Chamber's assessment, is not shown to have been so strong as to give rise, in the circumstances, to knowledge that his forces were about to commit an offence, as that notion is understood in the jurisprudence. It has not been established, therefore, that, before the commencement of the attack on Sr|, the Accused knew or had reason to know that during the attack his forces would shell the Old Town in a manner constituting an offence.[699]

284 The Prosecution submits that the Trial Chamber erred in law when it held that Strugar did not "know or have reason to know" that his subordinates were about to commit an offence prior to the attack against Sr|.[700] Alternatively, it submits that even if the Trial Chamber's interpretation of the law is correct, the Trial Chamber nonetheless erred in fact in finding that it had not been

[698] The Trial Chamber found that, as a result of his being informed by Kadijević around 7:00 a.m. of a protest by the ECMM of the shelling of the Old Town as well as due to his knowledge regarding the attack on Sr| as well as previous incidents in which the Old Town had been shelled in October and November 1991, Strugar had notice of the clear and strong risk that the forces under his command would repeat their previous conduct and shell the Old Town: Trial Judgement, para. 418.
[699] *Ibid.*, para. 417.
[700] Prosecution Notice of Appeal, paras 4-5.

established that, even prior to the attack against Sr|, Strugar had reasonable grounds to suspect that his forces were about to commit an offence.[701]

B. Arguments of the Parties

285 The Prosecution's principal ground of appeal centres on the object of the *mens rea* under Article 7(3) of the Statute, namely what the superior must know or have reason to know so that his duty to prevent is engaged.[702] The Prosecution submits that the Trial Chamber correctly assessed the risk of which Strugar had notice, but failed to draw the correct legal consequences from its assessment.[703] The Prosecution alleges that the Trial Chamber committed three errors in its treatment of the object of the *mens rea*.

286 First, the Prosecution submits that in holding that Strugar was not on notice that the unlawful shelling of the Old Town "would" occur, the Trial Chamber erred in importing a requirement into Article 7(3) that a superior must know or have reason to know that the imminent commission of the crimes is certain before he or she is legally obliged to take any steps to prevent the occurrence of those crimes.[704] In this respect, the Prosecution argues that Article 7(3) of the Statute does not require notice of the certainty of the commission, or imminent commission, of crimes. The Prosecution argues that the Appeal Judgement in *Krnojelac* stands for the proposition that a superior who is on notice of a risk that crimes will be committed in the future has a duty to intervene against the risk of future crimes and not merely a duty to ascertain whether future crimes will definitely be committed.[705] In addition, the Prosecution avers that the threshold necessary to trigger the superior's duty to investigate is generally phrased in broad terms.[706] Finally, the Prosecution argues that its position is supported by authorities establishing that notice of prior commission of crimes is, *per se*, notice of an unacceptable risk of similar future crimes[707] as well as that a superior has an obligation to refrain from

[701] *Ibid.*, para. 6.
[702] Prosecution Appeal Brief, paras 2.14-2.15.
[703] AT. 220.
[704] Prosecution Appeal Brief, paras 2.16-2.17, citing Trial Judgement, para. 417.
[705] Prosecution Appeal Brief, paras 2.26-2.28, citing *Krnojelac* Appeal Judgement, paras 155, 166, 169-180. See also AT. 180.
[706] Prosecution Appeal Brief, paras 2.31-2.32, citing *^elebi}i* Appeal Judgement, para. 238; *Kvo~ka et al.* Trial Judgement, paras 317-318; *Commentary AP I*, para. 3545.
[707] Prosecution Appeal Brief, paras 2.50-2.62, citing *Trial of Major Karl Rauer and Six Others*, British Military Court, Wuppertal, Germany, 18 February 1946, U.N. War Crimes Commission,

using troops with a known criminal propensity[708] and to prevent the recurrence of crimes.[709]

287 Furthermore, the Prosecution submits that a requirement of notice that crimes will certainly be committed would render the superior's obligation to prevent crimes virtually meaningless, as most scenarios do not involve a superior who is able to ascertain in advance, even with a thorough investigation, that the future commission of crimes by his subordinates is certain. Moreover, relieving a superior from taking necessary and reasonable measures to control an obviously risky situation in order to prevent crimes would run counter to the very essence of the doctrine of superior responsibility, which is grounded in the notion of responsible command.[710]

288 Second, the Prosecution submits that in holding that Strugar did not have information that his forces planned or intended to shell the Old Town and that additional investigation on his part could not have put him in a better position, the Trial Chamber erred in defining the object of the *mens rea* as knowledge that a specific crime (particularised by factors such as place, time or

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Law Reports of Trials of War Criminals, IV, p. 113-115; Röling and Rüter (eds), The International Military Tribunal for the Far East, *The Tokyo Judgement* 29 April 1946-12 November 1948, (1977), Volume I, p. 31 ("If crimes are committed against prisoners under their control, of the likely occurrence of which they had, or should have had knowledge, in advance, they are responsible for those crimes. If, for example, it may be shown that within the units under his command conventional war crimes have been committed of which he knew or should have known, a commander who takes no adequate steps to prevent the occurrence of such crimes in the future will be responsible for such future crimes."); Kimura (*ibid.*, p. 452), Tojo (*ibid.*, p. 462), Koiso (*ibid.*, p. 453), and Matsui (*ibid.*, p. 454); *Trial of Wilhem List and Others*, United States Military Tribunal (1948), U.N. War Crimes Commission, Law reports of the Trials of War Criminals, Vol. IV, 34, p. 71; *Had`ihasanovi}* Appeal Decision on Jurisdiction, fn. 65 (finding that the *Kuntze* case "recognizes a responsibility for failing to prevent the recurrence of killings after an accused has assumed command"); *Krnojelac* Appeal Judgement, para. 172.

[708] Prosecution Appeal Brief, paras 2.58-2.63, citing *Blaškić* Appeal Judgement, paras 476, 480 (implying that superior responsibility may have attached if *Blaškić* had known of the criminal propensity of units under his command); Final Report of the Commission of Experts Established Pursuant to Security Council Resolution 780 (1992), U.N. Doc. S/1994/674 (27 May 1994), para. 59.

[709] Prosecution Appeal Brief, para. 2.64, citing military manuals (Croatia, Commander's Manual, para. 20; France, LOAC Summary Note, para. 5.1; Hungary, Military Manual, p. 40; Togo, Military Manual, p. 15; Italy, Law of Armed Conflict Elementary Rules Manual, para. 20; Madagascar, Military Manual, para. 20; Russia, Military Manual, para. 14(b); Spain, LOAC Manual, paras 10.8.c., 11.4.b, Benin, Military Manual, p. 15; US Final report to Congress on the Gulf War, pp. 633-634; SFRY Military Manual, para. 21(2); Israel, Final report of the Commission of Inquiry into the Events at the Refugee Camps in Beirut (February 7, 1983), p. 8; Canada, Court Martial Appeal Court, Boland Case, *Judgement*, 16 May 1995, cited in ICRC Customary International Law Study, p. 3752, para. 650.

[710] Prosecution Appeal Brief, paras 2.33-2.35, 2.38, citing *Had`ihasanovi}* Appeal Decision on Jurisdiction, para. 16; *Krnojelac* Appeal Judgement, para. 171; *Commentary AP I*, para. 3550; *Trial of General Yamashita*, US Military Commission (Manila), 7 December 1945, Law reports of Trial of War Criminals, Volume IV, UN War Crimes Commission, HMSO, London, 1948, p. 15.

perpetrator) is planned; in doing so, the Trial Chamber effectively limited a superior's duty to prevent crimes to situations where a prior investigation is capable of leading to the conclusion that crimes will definitely be committed.[711] Indeed, the Prosecution argues that the case-law of the Appeals Chamber demonstrates that Article 7(3) of the Statute does not require notice of specific details of crimes committed or about to be committed.[712]

289 Third, the Prosecution submits that the Trial Chamber erred in referring to the "substantial likelihood" standard in its discussion of superior responsibility, thus importing into Article 7(3) of the Statute the standard applicable to Article 7(1) of the Statute.[713] The Prosecution argues that the standard applied by the Trial Chamber results in a *mens rea* requirement that is more restrictive than the one which applies for ordering under Article 7(1) of the Statute – where knowledge of the "substantial likelihood" that crimes will be committed in the execution of an order is sufficient.[714] As the Appeals Chamber has held that an accused should refrain from issuing an order when he is aware of the substantial likelihood that crimes will be committed in execution of this order, it would be inconsistent to hold that, for the purposes of Article 7(3) of the Statute, a superior in a similar situation had no legal duty to take any preventative measures at all.[715]

290 The Prosecution submits that the Trial Chamber's errors had an impact on the disposition in this case and should be corrected by the Appeals Chamber. The Prosecution submits that there can be no doubt that prior to the commencement of the attack on Sr|, Strugar was on notice of an unacceptable risk of the Old Town being unlawfully shelled. It argues that Strugar's knowledge of the prior unlawful shelling of the Old Town in October and November 1991 triggered his duty to intervene to prevent future crimes. This duty was heightened as soon as he made the decision to order the attack on Sr| using units which he had been informed were implicated in the prior

[711] Prosecution Appeal Brief, paras 2.18-2.19, citing Trial Judgement, para. 417. See also AT. 174-176.
[712] Prosecution Appeal Brief, paras 2.22-2.23, citing *^elebi}i* Appeal Judgement, para. 238; *Krnojelac* Appeal Judgement, para. 155; *Bagilishema* Appeal Judgement, para. 42. See also AT. 176-180, citing *Krnojelac* Appeal Judgement, para. 169; *Had`ihasanovi} and Kubura* Appeal Judgement, paras 30-31, 267.
[713] Prosecution Appeal Brief, paras 2.44-2.48, citing Trial Judgement, para. 420; *Blaškić* Appeal Judgement, para. 42.
[714] Prosecution Appeal Brief, para. 2.38, 2.40, citing *Blaškić* Appeal Judgement, para. 42.
[715] Prosecution Appeal Brief, para. 2.41.

unlawful acts.[716] The Prosecution avers that, by doing nothing, Strugar unquestionably acted in a manner that violated his obligations as a superior.[717] In particular, it argues that it would have been reasonable and necessary for Strugar to have given a timely and specific preventative order making it clear that he forbade the unlawful shelling of the Old Town during the course of the 6 December 1991 attack,[718] to have limited the access to artillery of units involved in previous shelling of the Old Town,[719] and to have accepted Joki}'s proposals to refrain from using Kova~evi} and the 3/472 mtbr in the attack of 6 December 1991, or, at the very least, to have Kova~evi} sufficiently monitored during the attack.[720] The Prosecution contends that the appropriateness of taking preventative steps is highlighted by Joki}'s own efforts to stop the attack and have Kova~evi} removed from duty.[721] It finally maintains that Strugar, as Commander of the 2 OG, had the material ability to take these preventative measures.[722]

291 In addition, the Prosecution argues that the Trial Chamber's failure to extend Strugar's liability under Article 7(3) of the Statute back in time to 12:00 a.m. on 6 December 1991 (in accordance with the time-frame of the Indictment) constitutes a failure to recognize Strugar's key legal obligation under the circumstances, namely that a superior had to take all necessary and reasonable measures within his power to prevent the situation from getting out of control and escalating to a point where crimes occurred.[723] The Prosecution explains that the difference between finding Strugar liable from 12:00 a.m. and finding him liable only from the commencement of the attack is the difference between, on the one hand, Strugar acting responsibly as a commander to prevent the shelling from starting and, on the other hand, belatedly intervening once the shelling was already in full swing in a bid to halt the crimes.[724]

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[716] *Ibid.*, paras 2.8-2.11, 2.68-2.69, citing Trial Judgement, paras 50, 97, 126, 167, 346, 414-418, 420-422, fn. 1221. See also AT. 172-174.
[717] Prosecution Appeal Brief, paras 2.78-2.79, citing Trial Judgement, para. 421.
[718] Prosecution Appeal Brief, paras 2.80-2.82, citing Trial Judgement, paras 421-422. See also AT. 180-181.
[719] Prosecution Appeal Brief, paras 2.83-2.84, citing Prosecution Closing Brief, paras 14, 18; Joki}, T. 3935, 3981, 5006; Fietelaars, T. 4190-4191.
[720] Prosecution Appeal Brief, paras 2.83-2.84, citing Prosecution Closing Brief, para. 285; Joki}, T. 3830, 3837-3838, 3906-3907, 3909, 4002, 4065-4067, 4069-4070, 4094, 4496; Trial Judgement, fn. 1216;
[721] Prosecution Appeal Brief, para. 2.89, citing Joki}, T. 4065-4067, 4069-4070.
[722] Prosecution Appeal Brief, para. 2.91, citing Trial Judgement, para. 414.
[723] Prosecution Appeal Brief, para. 2.95.
[724] *Ibid.*, para. 2.96. See also AT. 169-171.

292 The Prosecution alternatively submits that, should the Appeals Chamber find that the object of the *mens rea* standard under Article 7(3) of the Statute requires notice of a substantial likelihood of the commission of future crimes, this requisite standard was met on the facts of this case and, therefore, the Trial Chamber erred in not reaching this finding.[725]

293 Strugar responds[726] that the Appeals Chamber should dismiss the assertions contained in the Prosecution's first ground of appeal as groundless and confirm the contested part of the Judgement.[727] He argues that the Prosecution makes erroneous submissions regarding the time the attack on the Old Town began and that, according to the evidence submitted during the trial, he first learnt of the events of 6 December 1991 during his telephone conversation with Kadijevi} at 7:00 a.m.[728] Moreover, he submits that the Prosecution relied on the testimony of Joki} who, in an attempt to minimize his own role in the events, made a number of false allegations. He avers that Joki} did not inform him that the 3/472 mtbr was involved in the shelling of the town in November 1991, did not carry out any kind of investigation into this matter, and did not request that the Commander of the Staff of the 472 mtbr and Kova~evi} be relieved of duty.[729] Third, he asserts that the 3/472 mtbr was not involved in the shelling of the Old Town in November 1991.[730]

294 Strugar further responds that the Prosecution misinterprets the Trial Chamber's findings on his criminal responsibility under Article 7(3) of the Statute. First, he submits that the Trial Chamber carefully assessed whether he was on notice of a real and obvious risk of crimes and did not seek to establish whether he had notice of the certainty of crimes. He moreover observes that, in the assessment of the risk of shelling of the Old Town, the Trial Chamber took into account all relevant factors. He argues that, in light of this

[725] Prosecution Appeal Brief, paras 2.70-2.74.
[726] The Appeals Chamber notes that Strugar's argument that this ground of appeal rests on the Trial Chamber's erroneous conclusion that he ordered the attack on Srđ (Defence Appeal Brief, paras 33-77; Defence Respondent's Brief, paras 12-15; AT. 199) has already been rejected: see *supra*, paras 93-124.
[727] Defence Respondent's Brief, para. 16.
[728] *Ibid.*, paras 18-19, citing Trial Judgement, para. 422.
[729] Defence Respondent's Brief, paras 20, 24-28, citing Trial Judgement, paras 152-153; Joki}, T. 3833, 3848, 3999; Exhibit D43; Exhibit P101; Exhibit P119; Exhibit D43; Zorc, T. 6656-6658, 6660-6661, 6611, 6512-6613.
[730] Defence Respondent's Brief, paras 21-23, citing Exhibit D57; Exhibit D58; Exhibit P126; Exhibit P118; Exhibit P19.1, p. 2.

assessment, the Trial Chamber reasonably concluded that the risk which was known to him before 7:00 a.m. on 6 December 1991 was not so strong as to engage his responsibility as a superior.[731] Second, Strugar submits that the Trial Chamber, with its use of the term "substantial likelihood", cannot have introduced the standard applicable to Article 7(1) of the Statute as it took into consideration a series of risk-related elements not required by that standard.[732] Third, Strugar maintains that the Prosecution's argument that notice of the prior commission of crimes constitutes notice of an unacceptable risk of similar future crimes implies an automatic imposition of criminal liability and is not supported by the Tribunal's jurisprudence.[733] According to Strugar, the Appeals Chamber in *Krnojelac* held that a Trial Chamber has to assess a series of circumstances relating to an offence in order to be able to conclude that the superior knows or has reason to know.[734] He claims that the Trial Chamber adopted this approach in the Trial Judgement.[735] Fourth, Strugar contends that it has not been established that crimes were in fact committed in October and November 1991 and moreover that these alleged crimes have the same elements as the crimes committed on 6 December 1991, nor has it been established that the same units and individuals were involved in both incidents. In this regard, Strugar cites the statement of the Appeals Chamber in *Krnojelac* 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".[736]

295 Finally, Strugar attacks Joki}'s credibility. In particular, he maintains that Joki} never tried to stop the attack against Sr| and never found Kova~evi} responsible for the events of 6 December 1991.[737]

296 The Prosecution replies that the Appeal Judgement in *Krnojelac* does not stand for the proposition that the superior must know of the specific details of

[731] Defence Respondent's Brief, paras 29-38, citing Trial Judgement, paras 347, 367-370, 414-418, 420-422. See also AT. 199-201.
[732] Defence Respondent's Brief, para. 39.
[733] *Ibid.*, paras 40-42, citing *Krnojelac* Appeal Judgement, 17 September 2003, para. 155; *Krnojelac* Trial Judgement, para. 94. See also AT. 201-202.
[734] Defence Respondent's Brief, paras 45-46, citing *Krnojelac* Appeal Judgement, para. 171.
[735] Defence Respondent's Brief, para. 47.
[736] *Ibid.*, para. 44, citing *Krnojelac* Appeal Judgement, para. 156.
[737] Defence Reply Brief, paras 49-55, citing Joki}, T. 4064, 4101, 4108, 4904; Jovanovi}, T. 7026-7031; Colonel Gojko Djura{i}, T. 6977-6978; Exhibit D96, p. 70; Pepi}, T. 7483-7484.

crimes which have been or are about to be committed. It is enough for him to know of the type or category of criminal conduct. It argues in this respect that Strugar was on notice of previous unlawful attacks against the Old Town, attacks falling within the same category as those which re-occurred on 6 December 1991.[738] The Prosecution further replies that Strugar fails to demonstrate that the Trial Chamber erred in finding that he ordered the attack of 6 December 1991 or in relying on the testimony of Joki} and refers to its Respondent's Brief to Strugar's grounds of appeal relating to these two matters.[739] It also avers that, in any case, its ground of appeal is not dependent on the Trial Chamber's finding that Strugar ordered the attack of 6 December 1991: while this order heightened the risk that the shelling of Dubrovnik would occur, Strugar's knowledge of and failure to punish past crimes triggered his duty to prevent crimes at an earlier time.[740]

C. Discussion

297 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 *^elebi}i* interpreted this requirement in light of the language used in Article 86(2) of Additional Protocol I[741] 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".[742] 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 the need for additional investigation in order to

[738] Prosecution Reply Brief, paras 1.6-1.7.
[739] *Ibid.*, paras 1.11-1.115. See also AT. 217-219.
[740] AT. 216-217, referring to *Had`ihasanovi} and Kubura* Appeal Judgement; *Naletili} and Martinović* Appeal Judgement, paras 386-387. See also AT. 129.
[741] 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."
[742] *^elebi}i* 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).

ascertain whether offences were being committed or about to be committed by his subordinates".[743]

298 The Appeals Chamber in *^elebi}i* endorsed this interpretation[744] 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".[745] It noted that this information may be general in nature[746] and does not need to contain specific details on the unlawful acts which have been or are about to be committed.[747] 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,[748] he possessed information sufficiently alarming to justify further inquiry.[749]

299 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

[743] *Ibid.*, para. 393. See also *Had`ihasanovi} and Kubura* Appeal Judgement, para. 27.
[744] *^elebi}i* Appeal Judgement, para. 241, citing *^elebi}i* Trial Judgement, para. 393.
[745] *^elebi}i* 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)."
[746] *Ibid.*, 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 "Ŧsğuch information available to a superior may enable him to conclude either that breaches have been committed or that they are going to be committed"(*Commentary AP I*, para. 3545).
[747] *^elebi}i* Appeal Judgement, para. 238; *Krnojelac* Appeal Judgement, para. 155.
[748] The Appeals Chamber in *^elebi}i* 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." (*^elebi}i* 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 *^elebi}i* Appeal Judgement, para. 234).
[749] See *Had`ihasanovi} and Kubura* Appeal Judgement, para. 28.

know that, other than in that particular instance, beatings were inflicted for any of the prohibited purposes".[750] 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 were about to commit acts of torture".[751] 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".[752]

300 In *Had'ihasanovi} and Kubura*, the Trial Chamber found 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".[753] The Appeals Chamber in that case found that the Trial Chamber had erred in making this finding as it implied "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 Vare{".[754] The Appeals Chamber thus applied the correct legal standard to the evidence on the trial record: "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

[750] See *Krnojelac* Appeal Judgement, para. 169, quoting *Krnojelac* Trial Judgement, para. 313.
[751] *Krnojelac* Appeal Judgement, para. 169.
[752] *Ibid.*, para. 156, citing *^elebi}i* 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 (*ibid.*, paras 163, 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 (*ibid.*, para. 168). In this context, the fact that Milorad Krnojelac witnessed acts of torture being inflicted upon Ekrem Zekovi} by his subordinates constituted information *sufficiently alarming to justify further inquiry* (*ibid.*, 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 Zekovi} and for having failed to investigate the acts of torture committed prior to those inflicted on Ekrem Zekovi} and, if need be, punish the perpetrators (*ibid.*, para. 172). See also *Had`ihasanovi} and Kubura* Appeal Judgement, paras 29, 265-269.
[753] *Had`ihasanovi} and Kubura* Trial Judgement, para. 1982 (footnotes omitted).
[754] *Had`ihasanovi} and Kubura* Appeal Judgement, para. 265.

Vare{, 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."[755]

301 As such, 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 under the 'had reason to know' standard.[756] 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.[757]

302 In the present case, the Appeals Chamber observes that the Trial Chamber recalled the approach taken in the *^elebi}i* Trial Judgement and upheld in the related Appeal Judgement, according to which "a superior will be criminally responsible by virtue of the principles of superior responsibility only if information was available to him which would have put him on notice of offences committed by subordinates, or about to be committed".[758] The Trial Chamber also recalled "that even general information in [the superior's] possession, which would put him on notice of *possible* unlawful acts by his subordinates would be sufficient".[759] However, the Appeals Chamber also notes that the Trial Chamber referred to the standard as requiring that a superior be "in possession of sufficient information to be on notice of the *likelihood* of

[755] *Ibid.*, para. 269.
[756] *Krnojelac* Appeal Judgement, para. 169; *Had`ihasanovi} and Kubura* Appeal Judgement, para. 30.
[757] *Had`ihasanovi} and Kubura* Appeal Judgement, para. 30.
[758] Trial Judgement, paras 369-370 (footnote omitted).
[759] *Ibid.*, para. 370 (emphasis added), citing *Čelebići* Appeal Judgement, para. 238.

illegal acts by his subordinates".[760] Consequently, the Appeals Chamber cannot conclude with certainty that the Trial Chamber properly interpreted the standard of "had reason to know" as requiring an assessment, in the circumstances of the case, of whether a superior possessed information that was sufficiently alarming to put him on notice of the risk that crimes might subsequently be carried out by subordinates and justify further inquiry.[761] The Appeals Chamber must therefore determine whether the Trial Chamber erred in law by applying an incorrect legal standard in its findings on Strugar's criminal responsibility as a superior.[762]

303 The Appeals Chamber observes that the Trial Chamber found that prior to the commencement of the attack against Sr|, Strugar had reason to know of the risk that the forces under his command might repeat their previous conduct and unlawfully shell the Old Town.[763] The Trial Chamber characterised this risk as "a real and obvious prospect", "a clear possibility", "a risk that was not slight or remote", and a "real risk".[764] The Appeals Chamber moreover notes that the Trial Chamber found that the *mens rea* element of Article 7(3) of the Statute was not met before the commencement of the attack against Sr| because it found that it had not been established that Strugar "had reason to know that Ŧunlawful shellingğ *would* occur",[765] that the risk of such shelling was shown "to have been so strong as to give rise, in the circumstances, to *knowledge* that his forces were about to commit an offence"[766] or that "there was a *substantial likelihood* of the artillery" unlawfully shelling the Old Town.[767] In addition, the Trial Chamber held that it was "not apparent that additional investigation before the attack could have put the Accused in any better position".[768] The Appeals Chamber finally notes that the Trial Chamber found that Strugar's notice, after the commencement of the attack against Sr|, of a

[760] Trial Judgement, para. 370, citing *Kordi} and Čerkez* Trial Judgement, para. 437 (emphasis added; footnote omitted). The Trial Chamber stated that it "approach[ed] its decision on the basis of this jurisprudence" (Trial Judgement, para. 371).
[761] See *Krnojelac* Appeal Judgement, para. 155; *Had`ihasanovi} and Kubura* Appeal Judgement, para. 30.
[762] Trial Judgement, paras 415-419.
[763] *Ibid.*, paras 347, 416-417, 420.
[764] *Ibid.*, paras 347, 416-417, 420.
[765] *Ibid.*, para. 417 (emphasis original).
[766] *Ibid.*, para. 417 (emphasis added).
[767] *Ibid.*, para. 420 (emphasis added).
[768] *Ibid.*, para. 417.

"clear and strong risk"[769] or a "clear likelihood"[770] that his forces were repeating its previous conduct and unlawfully shelling the Old Town did however meet the *mens rea* requirement under Article 7(3).

304 Taking into consideration the relevant factual findings of the Trial Chamber, the Appeals Chamber finds that the Trial Chamber committed an error of law by not applying the correct legal standard regarding the *mens rea* element under Article 7(3) of the Statute. The Trial Chamber erred in finding that Strugar's knowledge of the risk that his forces might unlawfully shell the Old Town was not sufficient to meet the *mens rea* element under Article 7(3) and that only knowledge of the "substantial likelihood" or the "clear and strong risk" that his forces would do so fulfilled this requirement. In so finding, the Trial Chamber erroneously read into the *mens rea* element of Article 7(3) the requirement that the superior be on notice of a strong risk that his subordinates would commit offences. In this respect, the Appeals Chamber recalls that under the correct legal standard, sufficiently alarming information putting a superior on notice of the risk that crimes might subsequently be carried out by his subordinates and justifying further inquiry is sufficient to hold a superior liable under Article 7(3) of the Statute.[771]

305 Having found that the Trial Chamber erred in law, the Appeals Chamber must apply the correct legal standard to the facts as found by the Trial Chamber and determine whether it is itself convinced beyond reasonable doubt that Strugar possessed, prior to the commencement of the attack against Sr|, sufficiently alarming information to meet the "had reason to know" standard under Article 7(3) of the Statute.[772] The Appeals Chamber recalls that the Trial Chamber established the following facts in relation to Strugar's knowledge prior to the commencement of the attack against Sr|:

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[769] *Ibid.*, para. 418.
[770] *Ibid.*, para. 422.
[771] See *supra*, paras 297-301.
[772] The Appeals Chamber recalls that it has dismissed Strugar's challenges to these factual findings: see *supra*, paras 65-245 and notes that the Prosecution has not challenged the Trial Chamber's factual findings, but rather its application of the legal standard to these factual findings. Therefore, it is sufficient for the Appeals Chamber to apply the correct legal standard to the facts as found by the Trial Chamber, as opposed to applying it to the evidence on the trial record. See *Staki}* Appeal Judgement, para. 63. See also, in relation to an application of the correct legal standard to the evidence on the trial record, *Nahimana et al.* Appeal Judgement, paras 736, 770; *Bla{ki}* Appeal Judgement, para. 24.

- Strugar ordered the attack against Sr|[773] and knew that the attack against Sr| necessarily contemplated some shelling of the wider city of Dubrovnik;[774]

- Strugar knew that in the course of previous JNA military action in October and November 1991 seeking to capture further territory in the vicinity of Dubrovnik, including Sr| in November, there was unauthorised shelling of the Old Town;[775]

- Strugar knew that the forces in the attack on 6 December 1991 included the forces involved in the November shelling of the Old Town, and that the unit directly located around Sr| on 6 December was the 3/472 mtbr which, under the same commander, had been identified as a likely participant in the November shelling;[776]

- Strugar knew that the 3/472 mtbr, and the 3/5 mtbr located to the immediate north of the 3/472 mtbr, were each equipped with substantial artillery capacity on 6 December 1991, as they had been in November 1991;[777]

- Strugar knew that existing orders precluding shelling of the Old Town in October and November 1991 had not proved effective as a means of preventing his troops from shelling the Old Town on these two occasions;[778]

- Strugar knew that no adverse action had been taken against the perpetrators of previous acts of shelling the Old Town and thus that there were no examples of adverse disciplinary or other consequences for those who breached existing preventative orders or international law.[779]

306 In light of the Trial Chamber's factual findings regarding Strugar's knowledge prior to the attack against Sr|, the Appeals Chamber is satisfied beyond a reasonable doubt that Strugar had notice of sufficiently alarming information such that he was alerted of the risk that similar acts of unlawful

[773] Trial Judgement, para. 167.
[774] *Ibid.*, paras 129, 167, 342-343, 347, 415, 418.
[775] *Ibid.*, paras 346, 415, fns 1037, 1199-1201.
[776] *Ibid.*, paras 346, 415, fns 1037, 1199-1201.
[777] *Ibid.*, para. 415, fn. 1202.
[778] *Ibid.*, paras 61, 62, 415 (fn. 1203), 421 (fn. 1221).
[779] *Ibid.*, para. 415, fn. 1204.

shelling of the Old Town might be committed by his subordinates as well as of the need to undertake further enquiries with respect to this risk.

307 In the opinion of the Appeals Chamber, the only reasonable conclusion available on the facts as found by the Trial Chamber was that Strugar, despite being alerted of a risk justifying further enquiries, failed to undertake such enquiries to assess whether his subordinates properly understood and were inclined to obey the order to attack Sr| and existing preventative orders precluding the shelling of the Old Town.[780]

308 Consequently, the Appeals Chamber is satisfied beyond a reasonable doubt that as of 12:00 a.m. on 6 December 1991, Strugar possessed sufficiently alarming information to meet the "had reason to know" standard under Article 7(3) of the Statute.

D. Conclusion

309 In light of the foregoing, the Appeals Chamber allows this ground of appeal and will determine the impact of this finding, if any, on Strugar's sentence in the section on sentencing below.

310 As a result of the Appeals Chamber's findings on the applicable legal standard, it is not necessary to consider the Prosecution's alternative ground of appeal.

[780] The Appeals Chamber observes that the Trial Chamber stated something akin to this, though it found that Strugar's liability was not engaged at this point in time. See *ibid.*, para. 420: "the known risk was sufficiently real and the consequences of further undisciplined and illegal shelling were so potentially serious, that a cautious commander may well have thought it desirable to make it explicitly clear that the order to attack Srđ did not include authority to the supporting artillery to shell, at the least, the Old Town." See also *ibid.*, para. 421: "A new express order prohibiting the shelling of the Old Town (had that been intended by the Accused) given at the time of his order to attack Srđ, would both have served to remind his forces of the existing prohibition, and to reinforce it. Further, and importantly, it would have made it clear to those planning and commanding the attack, and those leading the various units (had it been intended by the Accused) that the order to attack Srđ was not an order which authorised shelling of the Old Town. […] It remains relevant, however, that nothing had been done by the Accused before the attack on Srđ commenced to ensure that those planning, commanding and leading the attack, and especially those commanding and leading the supporting artillery, were reminded of the restraints on the shelling of the Old Town, or to reinforce existing prohibition orders."

VII. ALLEGED ERROR IN THE APPLICATION OF THE LAW ON CUMULATIVE CONVICTIONS (PROSECUTION'S SECOND GROUND OF APPEAL)

A. Introduction

311 The Trial Chamber held as follows in relation to the issue of cumulative convictions:

> The question of cumulative convictions arises where more than one charge arises out of what is essentially the same criminal conduct. In this case the artillery attack against the Old Town by the JNA on 6 December 1991 underlies all the offences charged in the Indictment. The Appeals Chamber has held that it is only permissible to enter cumulative convictions under different statutory provisions to punish the same criminal conduct if "each statutory provision involved has a materially distinct element not contained in the other". Where, in relation to two offences, this test is not met, the Chamber should enter a conviction on the more specific provision.[781]

312 When it came to apply the law on cumulation ("*Čelebići* test") with respect to the offences of murder (Count 1), cruel treatment (Count 2) and attacks on civilians (Count 3), on the one hand, and to the offences of devastation not justified by military necessity (Count 4), unlawful attacks on civilian objects (Count 5), and destruction of, or wilful damage to, cultural property (Count 6), the Trial Chamber held that, in the circumstances of the case, the criminal conduct in respect to the first three counts was fully and most appropriately reflected in Count 3,[782] while the criminal conduct of the three latter counts was fully and most appropriately reflected in Count 6.[783]

313 The Prosecution submits that the Trial Chamber erred in law in its application of the test on cumulative convictions to devastation not justified by military necessity (Count 4), unlawful attacks on civilian objects (Count 5) and destruction of, or wilful damage to, cultural property (Count 6). It argues that, had the Trial Chamber applied the test correctly, it would have entered convictions for all three Counts and not only for Count 6 of the Indictment.[784]

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[781] Trial Judgement, para. 447.
[782] *Ibid.*, paras 449-451.
[783] *Ibid.*, paras 452-454. Count 6 actually reads "destruction or wilful damage done to institutions dedicated to religion, charity and education, the arts and sciences, historic monuments and works of art and science", but is here indicated simply as "destruction to, or wilful damage of, cultural property.
[784] Prosecution Appeal Brief, paras 3.1-3.3.

B. Arguments of the Parties

314 The Prosecution argues that the crimes charged under Counts 4 (devastation not justified by military necessity), 5 (unlawful attacks on civilian objects) and 6 (destruction to, or wilful damage of, cultural property) each comprise at least one materially distinct element not contained in the other and thus meet the test on cumulative convictions set out by the Appeals Chamber in the *Čelebići* case.[785]

315 The Prosecution first submits that the crime of unlawful attacks on civilian objects requires proof of an attack – an element not required by the crimes charged under Counts 4 and 6.[786] Second, the destruction of, or wilful damage to, cultural property necessitates proof of destruction of, or wilful damage directed against, property constituting the cultural or spiritual heritage of peoples – an element not required by unlawful attacks on civilian objects and devastation not justified by military necessity.[787] Third, the crime of devastation not justified by military necessity is the only one amongst these three crimes to require proof that the destruction of, or wilful damage to, property was not justified by military necessity and that it occurred on a large scale.[788]

316 Although it agrees with the statement of the law by the Trial Chamber, the Prosecution submits that the Trial Chamber erred in applying this law to the facts and, in particular, in expressing the view that, in light of the particular circumstances in which these offences were committed, the interests of justice and the purposes of punishment, a conviction should not be entered in respect of devastation not justified by military necessity and unlawful attacks on civilian objects. These crimes, in the view of the Trial Chamber, did not really add any material element to the crime of destruction of, or wilful damage to, cultural property.[789] The Prosecution submits that the Trial Chamber implicitly asserted, when referring to the notion of "interests of justice", that the

[785] *Ibid.*, para. 3.11.
[786] *Ibid.*, para. 3.16.
[787] *Ibid.*, para. 3.17, quoting *Kordi} and Čerkez* Trial Judgement, para. 453.
[788] Prosecution Appeal Brief, para. 3.18. Even assuming that destruction during unlawful attacks against civilian objects must occur on a large scale, as the Trial Chamber held (Trial Judgement, para. 280), "non-justification by military necessity remains a materially distinct element between devastation not justified by military necessity and the two other crimes at stake" (*ibid.*, para. 3.19).
[789] *Ibid.*, paras 3.21-3.22, citing Trial Judgement, paras 451, 454.

application of the *Čelebići* test is discretionary, while, in its view, Trial Chambers must enter cumulative convictions where the test is met.[790] The Prosecution further submits that the Appeals Chamber should not grant Trial Chambers discretion in application of the test on cumulative convictions as this would lead to unfairness and the unequal treatment of accused before the Tribunal.[791] Finally, the Prosecution argues that the Trial Chamber, by referring in the Trial Judgement to the "purposes of punishment", erred by confusing the legal test on cumulative convictions with the issue of punishment, which only comes into play at a later stage.[792]

317 Strugar responds that the Trial Chamber's decision with regard to cumulative convictions is perfectly consistent with the Tribunal's jurisprudence.[793] Strugar argues that the central issue to be addressed is whether "proof of the fact of the attack", with respect to Counts 5 and 6 of the Indictment, and "proof of the fact of the existence or absence of military necessity", with respect to Counts 4 and 6 of the Indictment, is required.[794]

318 First, Strugar submits that the offences charged under Counts 5 and 6 of the Indictment both contain an "object against which the act was committed" and a "manner in which the act was committed".[795] In this sense, Strugar submits that both offences are committed against civilian objects, because "any cultural or spiritual heritage is without a doubt civilian in character",[796] as well as in the same manner, because an "act causing a damage as the manner of the commission of the crime, certainly can and must imply an attack as a specific conduct through which the crime is committed".[797] Therefore, Strugar contends that the Trial Chamber was wrong in stating that the offence of attack on civilian objects requires an element not contained in the two other offences at stake.[798] Strugar further submits that the *mens rea* requirement for Counts 5

[790] Prosecution Appeal Brief, paras 3.24-3.26.
[791] *Ibid.*, para. 3.27.
[792] *Ibid.*, para. 3.28.
[793] Defence Response Brief, para. 59.
[794] *Ibid.*, para. 64 (emphasis omitted).
[795] *Ibid.*, para. 67.
[796] *Ibid.*, para. 67.
[797] *Ibid.*, para. 69.
[798] *Ibid.*, para. 70. However, Strugar specifies that he is not appealing this finding as the Trial Chamber only entered a conviction under Count 3 given the "particular circumstances in which these offences were committed" (Trial Judgement, para. 455).

and 6 is the same.[799] Thus, he argues that the test on cumulative conviction is fully met with respect to these Counts.[800]

319 Strugar then turns to the relationship between Counts 4 and 6 of the Indictment. In his view, both offences require proof of the same elements in terms of the damage or destruction and the *mens rea*.[801] With regard to the references to "military necessity" in Count 4 and "military purposes" in Count 6, Strugar refers to the definition of military necessity set out in Article 52 of Additional Protocol I to the Geneva Conventions and also envisaged by Article 4 of the 1954 Hague Convention.[802] Strugar argues that in both offences, the element of military necessity is required.[803] The cited elements of the two offences would therefore not be materially distinct from one another.[804]

320 Alternatively, Strugar contends that the Appeals Chamber should uphold the findings with regard to Counts 4 and 5 on the basis that these two offences do not add any materially distinct elements in the circumstances of this case.[805] Addressing the Prosecution's contention relating to the Trial Chamber's exercise of discretion and its use of the phrase "interests of justice", Strugar argues that the test on cumulative convictions was correctly applied and that "no discretion was asserted".[806] Moreover, Strugar submits that the phrase "interests of justice" is implicitly contained in the *Čelebići* test on cumulative convictions and that the principles underlying this concept motivate the application of the test. According to Strugar, this is the "exclusive context in which the Trial Chamber uses the phrase 'the interests of justice'".[807]

C. Discussion

321 The jurisprudence of the Tribunal on the issue of cumulative convictions is well-established. The *Čelebići* test, which is to be applied in determining whether cumulative convictions are permissible, states that:

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[799] Defence Response Brief, para. 71.
[800] *Ibid.*, para. 72.
[801] *Ibid.*, paras 77-78.
[802] *Ibid.*, paras 80-81.
[803] *Ibid.*, para. 83.
[804] *Ibid.*, para. 86. Again, Strugar specifies that, given the conclusion reached by the Trial Chamber in paragraph 455 of the Trial Judgement, he is not appealing this finding.
[805] *Ibid.*, para. 87.
[806] *Ibid.*, para. 89.
[807] *Ibid.*, para. 90.

> Having considered the different approaches expressed on this issue both within this Tribunal and other jurisdictions, this Appeals Chamber holds that reasons of fairness to the accused and the consideration that only distinct crimes may justify multiple convictions, lead to the conclusion that multiple criminal convictions entered under different statutory provisions but based on the same conduct are permissible only if each statutory provision involved has a materially distinct element not contained in the other. An element is materially distinct from another if it requires proof of a fact not required by the other.
>
> Where this test is not met, the Chamber must decide in relation to which offence it will enter a conviction. This should be done on the basis of the principle that the conviction under the more specific provision should be upheld. Thus, if a set of facts is regulated by two provisions, one of which contains an additional materially distinct element, then a conviction should be entered only under that provision.[808]

322 Whether the same conduct violates two or more distinct statutory provisions is a question of law.[809] Thus, "the *Čelebići* test focuses on the legal elements of each crime that may be the subject of a cumulative conviction rather than on the underlying conduct of the accused".[810]

1. The Trial Chamber's Use of Discretion in Applying the Cumulative Convictions Test

323 The Appeals Chamber notes that the test applicable to cumulative convictions was correctly set out by the Trial Chamber.[811] However, after finding that the offences at stake each "theoretically" contained materially distinct elements from each other,[812] the Trial Chamber determined that "Counts 4 and 5 really add no materially distinct element, *given the particular circumstances* in which these offences were committed."[813] Therefore, the Trial Chamber ruled that the "interests of justice and the purposes of punishment" would be better served by entering a conviction only in respect of Count 6.[814]

324 The Appeals Chamber finds that by subjecting the application of the *Čelebići* test to the "particular circumstances" of the case, the Trial Chamber exercised discretion and that such exercise of discretion constitutes an error of law. As the Appeals Chamber stated in the *Staki}* Appeal Judgement,

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[808] *Čelebići* Appeal Judgement, paras 412-413.
[809] *Kunarac et al.* Appeal Judgement, para. 174. See also *Staki}* Appeal Judgement, para. 356; *Kordi} and Čerkez* Appeal Judgement, para. 1032.
[810] *Staki}* Appeal Judgement, para. 356.
[811] Trial Judgement, para. 447.
[812] *Ibid.*, para. 452.
[813] *Ibid.*, para. 454 (emphasis added).
[814] *Ibid.*, para. 454.

> [w]hen the evidence supports convictions under multiple counts for the same underlying acts, the test as set forth in *Čelebići* and *Kordić* does not permit the Trial Chamber discretion to enter one or more of the appropriate convictions, unless the two crimes do not possess materially distinct elements.[815]

325 The Appeals Chamber will therefore proceed to analyse whether this error invalidates the decision, through an application of the test on cumulative convictions to the crimes charged under Counts 4, 5 and 6.

2. The Trial Chamber's Application of the Cumulative Convictions Test

326 The Trial Chamber defined the crime of devastation not justified by military necessity (Count 4) as follows: (a) destruction or damage of property on a large scale; (b) the destruction or damage was not justified by military necessity; and (c) the perpetrator acted with the intent to destroy or damage the property or in the knowledge that such destruction or damage was a probable consequence of his acts.[816] The Trial Chamber further determined that the elements of the crime of unlawful attacks on civilian objects (Count 5) were: (a) an attack directed against civilian objects; (b) causing damage to the civilian objects; and (c) conducted with the intent of making the civilian objects the object of the attack.[817] Finally, regarding the crime of destruction of, or wilful damage to cultural property (Count 6), the Trial Chamber ruled that an act fulfils the elements of this crime if (a) it has caused damage or destruction to property which constitutes the cultural or spiritual heritage of peoples; (b) the damaged or destroyed property was not used for military purposes at the time when the acts of hostility directed against these objects took place; and (c) the act was carried out with the intent to damage or destroy the property in question.[818] The Appeals Chamber notes that the Trial Chamber's definitions of the elements of the crimes are not contested by either of the Parties.[819]

327 Addressing the question of whether the elements of the three crimes are materially distinct from one another, the Trial Chamber stated that

> [t]he offence of attacks on civilian objects requires proof of an attack, which is not required by any element of either the offence of devastation not justified by military necessity or the offence of destruction of or wilful damage to

[815] *Staki}* Appeal Judgement, para. 358.
[816] Trial Judgement, para. 297.
[817] *Ibid.*, para. 283.
[818] *Ibid.*, para. 312.
[819] Prosecution Appeal Brief, paras 3.12-3.15; Defence Response Brief, para. 65.

> cultural property. The offence of destruction of or wilful damage to cultural property requires proof of destruction or wilful damage directed against property which constitutes the cultural or spiritual heritage of peoples, which is not required by any element of the offence of attacks on civilian objects or the offence of devastation not justified by military necessity. The offence of devastation not justified by military necessity requires proof that the destruction or damage of property (a) occurred on a large scale and that (b) was not justified by military necessity. What is required by one offence, but not required by the other offence, renders them distinct in a material fashion.[820]

328 The Appeals Chamber holds that the Trial Chamber's application of the *^elebi}i* test is correct. First, the Appeals Chamber finds that the definition of the crime of unlawful attacks on civilian objects (Count 5) contains a materially distinct element not present in either the crime of devastation not justified by military necessity (Count 4) or the crime of destruction of, or wilful damage to cultural property (Count 6): the requirement of proof of an attack directed against civilian objects.[821] Although the commission of the latter two crimes may, as suggested by Strugar, imply an attack, this is not a legal element of either crime, which is the proper focus of the *Čelebići* test on cumulation.[822] Therefore, the Trial Chamber rightly concluded that Count 5 contains a materially distinct element not present in the two other Counts.

329 Second, the Appeals Chamber agrees with the Trial Judgement that Count 6 is the only one to contain the element that the damage or destruction must have been carried out against property which constitutes the cultural or spiritual heritage of peoples. In this regard, the Trial Chamber followed the approach taken in previous cases, that

> [t]he offence of destruction or wilful damage to institutions dedicated to religion overlaps to a certain extent with the offence of unlawful attacks on

[820] Trial Judgement, para. 453.
[821] The Appeals Chamber notes that the three crimes at stake in the present instance were found to have been permissibly cumulative by the Trial Chamber in *Kordi} and ^erkez*. However, in that case, the Trial Chamber declined to discuss the materially distinct character of these crimes, merely stating, in paragraph 826, that "[t]he issue of improper cumulative conviction does not arise in relation to the remaining Counts […]." This issue was not subject to an appeal by the Parties. Similarly, in the *Joki}* Sentencing Judgement, when addressing Joki}'s guilty plea to these crimes, among others, the Trial Chamber merely stated that it had "taken into consideration the fact that some of the crimes to which [Joki}] pleaded guilty contain identical legal elements, proof of which depends on the same set of facts, and were committed as part of one and the same attack on the Old Town of Dubrovnik." See *Joki}* Sentencing Judgement, para. 54. The Trial Chamber did not specify which of the crimes at stake contained identical legal elements and the issue was not appealed by the Parties. It is therefore the first time that the Appeals Chamber is requested to concretely examine the issue of cumulative convictions with regard to these three specific crimes.
[822] *Staki}* Appeal Judgement, para. 356.

> civilian objects except that the object of the offence of destruction or wilful damage to institutions dedicated to religion is more specific.[823]

Whereas cultural property is certainly civilian in nature,[824] not every civilian object can qualify as cultural property. Therefore, the Trial Chamber rightly concluded that Count 6 contains a materially distinct element not present in the two other Counts.

330 Third, the Trial Chamber stated that the non-justification by military necessity is only an element of the crime of devastation not justified by military necessity (Count 4). The Appeals Chamber agrees that, in line with previous jurisprudence,[825] the element of the non-justification by military necessity present in the crime of devastation not justified by military necessity (Count 4) is indeed not present in the crime of attack against civilian objects (Count 5). The Appeals Chamber also agrees that military necessity is not an element of the crime of destruction of, or damage to cultural property (Count 6). While the latter's requirement that the cultural property must not have been used for military purposes may be an element indicating that an object does not make an effective contribution to military action in the sense of Article 52(2) of *Additional Protocol I*, it does not cover the other aspect of military necessity, namely the definite military advantage that must be offered by the destruction of a military objective. Therefore, the Trial Chamber rightly concluded that military necessity was a materially distinct element distinguishing Count 4 from Counts 5 and 6.

331 Finally, the Appeals Chamber agrees with the Trial Chamber's finding that Count 4 was the only one requiring proof that the devastation must have occurred on a large scale.

332 In light of the above, the Appeals Chamber finds that the Trial Chamber correctly concluded that the offences charged under Counts 4, 5 and 6 each contain materially distinct elements from one another, but erred in failing to enter cumulative convictions for Counts 4, 5 and 6 of the Indictment against

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[823] *Br|anin* Trial Judgement, para. 596, referring to *Kordi} and ^erkez* Trial Judgement, para. 361. See also *Joki}* Sentencing Judgement, para. 50, citing *Commentary AP I*, para. 2067 (stating that the protection granted to cultural property "is additional to the immunity attached to civilian objects").
[824] See, in relation to educational institutions, *Kordi} and ^erkez* Trial Judgement, para. 361.
[825] See *Blaški}* Appeal Judgement, para. 109; *Kordi} and ^erkez* Corrigendum to Judgement of 17 December 2004, para. 54.

Strugar. The Appeals Chamber revises the Trial Judgement accordingly and enters a conviction under Counts 4 and 5 respectively.

D. Conclusion

333 In light of the foregoing, the Appeals Chamber allows the Prosecution's second ground of appeal and will determine the impact of this finding, if any, on Strugar's sentence in the section on sentencing.[826]

[826] Although the Prosecution requests the Appeals Chamber to overturn the Trial Chamber's findings on cumulative convictions, to revise the Trial Judgement and to enter convictions under Counts 4 and 5, the Prosecution does not request the Appeals Chamber to revise the sentence as the cumulative convictions are based on the same criminal conduct undertaken by Strugar. See Prosecution Appeal Brief, para. 3.32.

VIII. SENTENCING

A. Alleged Sentencing Errors (Strugar's Fourth Ground of Appeal and Prosecution's Third Ground of Appeal)

1. Introduction

334 The Trial Chamber sentenced Strugar to eight years of imprisonment.[827] Both parties are appealing against the sentence. Strugar seeks a reduction in his sentence. He submits that the Trial Chamber erred in its comparison of his and Joki}'s sentences, in failing to give adequate weight to his statement of apology and in failing to take into account or to give due weight to certain other mitigating circumstances.[828] Conversely, the Prosecution seeks an increase in Strugar's sentence, from eight years to ten to twelve years.[829] It also submits that the Trial Chamber erred in its comparison of Strugar and Joki}'s sentences and in considering that Strugar's statement of apology was a mitigating circumstance.[830] As the appeals of the parties on sentencing are related to one another, the Appeals Chamber will consider them simultaneously.

2. Standard for Appellate Review on Sentencing

335 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 obliging 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.[831]

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[827] Trial Judgement, para. 481.
[828] Defence Notice of Appeal, paras 104-108.
[829] AT. 195.
[830] Prosecution Notice of Appeal, paras 15-19.
[831] *Had`ihasanovi} and Kubura* Appeal Judgement, para. 301; *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.

336 Trial Chambers are vested with a 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.[832] 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 follow the applicable law.[833] It is for the appellant to demonstrate how the Trial Chamber ventured outside its discretionary framework in imposing the sentence.[834]

337 To show that the Trial Chamber committed a discernible error in exercising its discretion, an appellant has to 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.[835]

3. Alleged Errors Regarding the Comparison of Strugar's and Joki}'s Sentences

(a) Introduction

338 In determining the sentence to be imposed on Strugar, the Trial Chamber discussed the *Joki}* case:[836]

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[832] *Had`ihasanovi} and Kubura* Appeal Judgement, para. 302; *Limaj et al.* Appeal Judgement, para. 127; *Zelenović* Judgement on Sentencing Appeal, para. 11; *Blagojevi} and Joki}* Appeal Judgement, para. 137; *Čelebići* Appeal Judgement, para. 717. See also *Nahimana et al.* Appeal Judgement, para. 1037; *Ndindabahizi* Appeal Judgement, para. 132.

[833] *Had`ihasanovi} and Kubura* Appeal Judgement, para. 302; *Limaj et al.* Appeal Judgement, para. 127; *Zelenović* Judgement on Sentencing Appeal, para. 11; *Blagojevi} and Joki}* 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.

[834] *Had`ihasanovi} and Kubura* Appeal Judgement, para. 302; *Limaj et al.* Appeal Judgement, para. 127; *Zelenović* Judgement on Sentencing Appeal, para. 11; *Blagojevi} and Joki}* Appeal Judgement, para. 137; *Čelebići* Appeal Judgement, para. 725. See also *Ndindabahizi* Appeal Judgement, para. 132.

[835] *Had`ihasanovi} and Kubura* Appeal Judgement, para. 303; *Limaj et al.* Appeal Judgement, para. 128; *Zelenović* Judgement on Sentencing Appeal, para. 11; *Brđanin* Appeal Judgement, para. 500; *Babi}* Judgement on Sentencing Appeal, para. 44.

[836] On appeal, Admiral Jokić's sentence of seven years' imprisonment was affirmed, however only the conviction under Article 7(1) of the Statute was maintained. See *Joki}* Sentencing Judgement, 18 March 2004; *Joki}* Judgement on Sentencing Appeal, 30 August 2005. The Appeals Chamber notes that the arguments of the parties on this sub-ground of appeal were submitted before the *Joki}* Judgement on Sentencing Appeal was issued.

> The Chamber further notes that Admiral Joki} pleaded guilty to the same charges as the Accused, and acknowledged his responsibility for having aided and abetted the unlawful shelling of the Old Town (Article 7(1) of the Statute) as well as his responsibility as commander of the 9 VPS (Article 7(3) of the Statute) for his failure to prevent such shelling or punish the perpetrators thereof. On this basis, Admiral Joki} was sentenced to seven years imprisonment. There is no doubt that the Accused's position as a commander at a very high level in the JNA command structure, reporting directly to the Federal Secretariat of Defence, serves to emphasize the seriousness of his failure to prevent the shelling and to punish the perpetrators, i.e. his failure to exercise his authority in accordance with the laws of war. Nevertheless, when it comes to determining an appropriate sentence for the Accused, the Chamber also keeps in mind that Admiral Joki}, as the Accused's immediate subordinate, had direct command and responsibility over the forces involved in the unlawful shelling of the Old Town. While the Accused's responsibility for his failure to act as the superior commander of the forces involved is clearly established by the evidence, it remains the case that he was more remotely responsible than Admiral Joki}. Further, the Accused is convicted only pursuant to Article 7(3) of the Statute. It is the case, however, that Admiral Joki} entered a guilty plea.[837]

Both parties impugn the Trial Chamber's reasoning.[838]

(b) Arguments of the Parties

(i) Strugar's Appeal

339 Strugar submits that his sentence is inappropriate in light of the sentence of seven years imposed on Jokić. Strugar argues that: (i) Jokić's criminal responsibility was more direct than his;[839] (ii) Jokić was convicted pursuant to Article 7(1) of the Statute for six criminal offences; and (iii) the offences for which Jokić was convicted comprised a larger number of victims and a larger volume of damage than those for which he was convicted. Strugar submits that, taking into account the number and gravity of their respective offences and the number and character of their respective mitigating circumstances,[840] a lighter sentence should have been imposed on him.[841]

340 The Prosecution responds that the sentence should be increased to reflect the significant differences between the two cases.[842] The Prosecution

[837] Trial Judgement, para. 464 (footnotes omitted).
[838] Defence Notice of Appeal, para. 105; Prosecution Notice of Appeal, para. 16.
[839] In this regard, Strugar refers to arguments developed in his first, second and third grounds of appeal as well as the Trial Chamber's finding that Strugar "was more remotely responsible than Admiral Joki}." See Trial Judgement, para. 464.
[840] Strugar refers to arguments developed in the Defence Respondent's Brief, paras 93, 150.
[841] Defence Appeal Brief, para. 221.
[842] Prosecution Respondent's Brief, para. 5.1, relying on the arguments advanced in the Prosecution Appeal Brief.

moreover submits that Strugar, in comparing the overall gravity of these two sentences, ignores the impact of mitigating circumstances.[843]

(ii) The Prosecution's Appeal

341 The Prosecution impugns the Trial Chamber's comparison of the cases of Strugar and Joki} on two main grounds. In the first instance, the Prosecution submits that the Trial Chamber erred in considering Strugar's crimes less grave because his position was more remote than Jokić's – the former being one level up with respect to the latter in the chain of command.[844] It argues that the Trial Chamber erred in law in finding that lower sentences should be applied to an accused in a position of authority. Alternatively, it argues that the Trial Chamber erred in fact in finding that Joki} had a higher degree of effective control over the troops involved in the unlawful shelling of the Old Town than did Strugar.[845]

342 With respect to the alleged error of law, the Prosecution submits that both international law and domestic law impose more severe sentences on accused persons who hold a senior position of authority within a civilian or military command structure.[846] In this regard, the Prosecution argues that while Jokić and Strugar were of equal formal rank, Strugar was temporarily Jokić's commander, had command authority over him and was thus the most senior military commander in the area where and when the crimes were committed.[847] It submits therefore that Strugar's higher position in the chain of command increases his criminal responsibility and calls for a higher sentence.[848]

343 With respect to the alleged error of fact, the Prosecution submits that Strugar had a greater degree of effective control demonstrated both by his greater ability to control his troops and by his greater material ability to prevent and punish the crimes. In terms of the former, the Prosecution highlights that the Trial Chamber found that Strugar had ordered the military attack against Sr| and that he had retained the authority and ability to give

[843] *Ibid.*, paras 5.4-5.26.
[844] Prosecution Notice of Appeal, para. 16; Prosecution Appeal Brief, para. 4.2.
[845] Prosecution Appeal Brief, para. 4.3.
[846] Prosecution Appeal Brief, paras 4.9-4.13 (with further references). Prosecution's Addendum, paras 22-26 (with further references).
[847] Prosecution Appeal Brief, para. 4.6, citing Trial Judgement, para. 337.
[848] Prosecution Appeal Brief, para. 4.14.

orders to the units involved in this attack.[849] While it acknowledges that Joki} was physically closer to @arkovica on 6 December 1991 and was the immediate superior commander of the battalion stationed there, it argues that this did not limit or affect Strugar's capacity to control the situation.[850] In terms of the latter, the Prosecution argues that Strugar had more authority to make staff changes than Joki} prior to the commission of the crimes, that Strugar – and not Joki} – was notified of the shelling on 6 December 1991 and was therefore in a better position than Joki} to investigate further, and that Strugar was in a position of superior command when Joki} investigated the crimes after their commission.[851]

344 In the second instance, the Prosecution submits that the Trial Chamber erred in failing to take into account two significant differences in terms of the mitigating circumstances applicable to the cases of Strugar and Jokić which should have resulted in greater divergence between their sentences.[852] First, the Prosecution argues that the Trial Chamber failed to take Jokić's substantial cooperation with the Prosecution into account as a mitigating factor. It points out that the Trial Chamber in *Joki}* expressly referred to Joki}'s cooperation with the Prosecution as a mitigating factor "of exceptional importance".[853] It avers that the Trial Chamber committed a discernible error by failing to place particular emphasis on the fact that Joki}'s sentence was mitigated by his cooperation with the Prosecution while Strugar's could not be so mitigated.[854] Second, the Prosecution argues that the Trial Chamber failed to recognise that Strugar's statement should have been given much less weight than Jokić's statement of remorse. It avers that Jokić's expression of remorse is qualitatively different from Strugar's statement as the former was expressed immediately after the events, concentrates on regret of civilian loss of life and damage to civilian property and was accompanied by concrete indicia of personal regret – a guilty plea and substantial cooperation with the Prosecution.[855]

[849] *Ibid.*, para. 4.19, citing Trial Judgement, paras 394-396, 405, 414, 423-424, 433, 439, 441-443.
[850] Prosecution Appeal Brief, paras 4.20-4.23.
[851] *Ibid.*, paras 4.24-4.25. See also AT. 186-189.
[852] Prosecution Notice of Appeal, para. 18.
[853] Prosecution Appeal Brief, para. 4.63, citing *Joki}* Sentencing Judgement, para. 114.
[854] Prosecution Appeal Brief, paras 4.64-4.66. See also AT. 189.
[855] Prosecution Appeal Brief, paras 4.67-4.74.

345 With respect to the Prosecution's submission regarding the gravity of the crimes, Strugar first responds that it is unthinkable to consider the position of the person in the chain of command as the only difference between two given situations for the purposes of sentencing. Rather, the concrete circumstances of each particular case, including the gravity of the criminal offence and the gravity of the totality of the conduct of the accused, must be reflected in the sentence.[856] In this regard, Strugar avers that the Prosecution's argument that he and Joki} were found guilty of the same crimes is a gross misinterpretation of the facts.[857] Strugar secondly responds that the *^elebi}i* Appeal Judgement stands for the proposition that the responsibility of the superior for the same offence may be of lesser gravity than the responsibility of the subordinate.[858] Strugar thirdly responds that the concept of effective control is not expressed in degrees and has no connection with the gravity of the sentence.[859] He adds that the evidence does not establish that he could directly issue orders to the lower subordinated units in the chain of command.[860] Rather, he argues that it establishes that the order to attack Sr| was issued through and executed by Joki}, who remained the immediate commander of the units involved in this attack.[861] He also avers that his ability to punish was restrained by the fact that Joki} was appointed by the SFRY to investigate the events of 6 December 1991.[862]

346 With respect to the Prosecution's submission regarding other differences between his and Joki}'s sentences, Strugar firstly responds that Joki}'s cooperation with the Prosecution only served to minimize the severity of his own sentence and that his testimony, as acknowledged by the Trial Chamber, was less than completely truthful.[863] He secondly responds that Joki}'s

[856] *Ibid.*, paras 99-100, 106-108, citing *Musema* Appeal Judgement, para. 382. See also AT. 202-203, 211-212.
[857] Defence Respondent's Brief, paras 100-105, 110, citing *Prosecutor v. Miodrag Joki}*, Case No. IT-01-42-PT, Plea Agreement between Miodrag Joki} and the Office of the Prosecutor, 27 August 2003 (confidential, *ex parte*, under seal) ("Joki}'s Plea Agreement"), paras 2, 14; *Prosecutor v. Miodrag Joki}*, IT-01-42, Second Amended Indictment, 26 August 2003, confirmed on 27 August 2003, paras 14, 19, Schedule II; *Joki}* Sentencing Judgement, para. 27; Trial Judgement, para. 318, Annex I. See also AT. 204-206.
[858] Defence Respondent's Brief, paras 110-111, citing *Čelebići* Appeal Judgement, para. 735.
[859] Defence Respondent's Brief, para. 113.
[860] *Ibid.*, paras 114-118.
[861] *Ibid.*, paras 119-125.
[862] *Ibid.*, para. 126.
[863] *Ibid.*, paras 140-144. See also AT. 206-211.

statement is not qualitatively different from his own as they both express regret for human casualties of the conflict and damages caused.[864]

347 In its Reply, the Prosecution submits that there is no difference between how the Trial Chamber in the present case and how the Trial Chamber in the *Joki}* case conceived of Joki}'s role in, and responsibility for, the shelling of Dubrovnik. As such, the comparison of the sentences in these two cases is appropriate because the Trial Chamber took the view of Joki}'s responsibility as found by the Joki} Trial Chamber and as affirmed by the Appeals Chamber.[865] In addition, the Prosecution avers that it was permissible for Strugar to issue orders directly to units in lower levels of subordination and that the mechanics of how orders were conveyed to troops does not affect whether these troops were under his command and that the fact that Joki} may have been tasked by the SFRY to institute an investigation does not relieve Strugar of his responsibility to punish, as he was Joki}'s and the troops' commander.[866] Finally, the Prosecution asserts that the Trial Chamber was aware of the value of Jokić's cooperation with the Prosecution and indeed relied on it in convicting Strugar.[867]

(c) Discussion

348 The Appeals Chamber has held that sentences of like individuals in like cases should be comparable.[868] While similar cases do not provide a legally binding tariff of sentences, they can be of assistance in sentencing if they involve the commission of the same offences in substantially similar circumstances.[869] The relevance of previous sentences is however often limited as a number of elements, relating, *inter alia*, to the number, type and gravity of the crimes committed, the personal circumstances of the convicted person and the presence of mitigating and aggravating circumstances, dictate different results in different cases such that it is frequently impossible to transpose the sentence in one case *mutatis mutandis* to another.[870] This follows from the principle that the determination of the sentence involves the individualisation

[864] Defence Respondent's Brief, paras 131-138, citing Strugar, T. 8807-8808.
[865] AT. 214-215.
[866] Prosecution Reply Brief, paras 3.13-3.14.
[867] *Ibid.*, para. 3.32.
[868] *Kvočka et al.* Appeal Judgement, para. 681.
[869] *Furundžija* Appeal Judgement, para. 250. See also *Čelebići* Appeal Judgement, paras 721, 756-757; *Jelisić* Appeal Judgement, paras 96, 101; *Kvočka et al.* Appeal Judgement, para. 681.

of the sentence so as to appropriately reflect the particular facts of the case and the circumstances of the convicted person.[871]

349 As a result, previous sentencing practice is but one factor among a host of others which must be taken into account when determining the sentence.[872] Nonetheless, as held by the Appeals Chamber in *Jelisić*, a disparity between an impugned sentence and another sentence rendered in a like case can constitute an error if the former is out of reasonable proportion with the latter. This disparity is not in itself erroneous, but rather gives rise to an inference that the Trial Chamber must have failed to exercise its discretion properly in applying the law on sentencing:

> The Appeals Chamber agrees that a sentence should not be capricious or excessive, and that, in principle, it may be thought to be capricious or excessive if it is out of reasonable proportion with a line of sentences passed in similar circumstances for the same offences. Where there is such disparity, the Appeals Chamber may infer that there was disregard of the standard criteria by which sentence should be assessed, as prescribed by the Statute and set out in the Rules. But it is difficult and unhelpful to lay down a hard and fast rule on the point; there are a number of variable factors to be considered in each case.[873]

350 With respect to Strugar's and the Prosecution's arguments that the Trial Chamber erred in its overall comparison of the *Strugar* and *Joki}* cases, the Appeals Chamber observes that the Trial Chamber merely "noted" and "kept in mind" certain aspects of the *Joki}* case and sentence and did so only in its discussion on the gravity of the offence.[874] The Appeals Chamber thus emphasizes that, in accordance with the established jurisprudence cited above, the Trial Chamber's comparison of the cases of Strugar and Joki} was but one factor which it considered in its determination of the sentence.

351 The Appeals Chamber finds that the limited extent of the Trial Chamber's reliance on the sentence passed in *Joki}* was reasonable. Indeed, in the view of

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[870] *Kvo~ka et al.* Appeal Judgement, para. 681. See also *^elebi}i* Appeal Judgement, paras 719, 721; *Furund'ija* Appeal Judgement, para. 250; *Limaj et al.* Appeal Judgement, para. 135, *Blagojević and Jokić* Appeal Judgement, para. 333, *Momir Nikolić* Judgement on Sentencing Appeal, para. 38, *Musema* Appeal Judgement, para. 387.

[871] *Čelebići* Appeal Judgement, paras 717, 821; *Dragan Nikolić* Judgement on Sentencing Appeal, para. 19; *Babić* Judgement on Sentencing Appeal, para. 32; *Naletilić and Martinović* Appeal Judgement, para. 615; *Simić* Appeal
Judgement, para. 238; *Bralo* Judgement on Sentencing Appeal, para. 33; *Jelisi}* Appeal Judgement, para. 101.

[872] *Krsti}* Appeal Judgement, para. 248.

[873] *Jelisić* Appeal Judgement, para. 96.

[874] Trial Judgement, para. 464.

the Appeals Chamber, Joki}'s case differs in significant ways from that of Strugar. In particular, the Appeals Chamber notes that Joki} was the direct commander of the forces involved in the shelling of the Old Town, was convicted pursuant to Article 7(1) of the Statute for six criminal offences, pleaded guilty to the charges brought against him, was found to have expressed remorse and accepted responsibility and substantially cooperated with the Prosecution.[875] While a comparison of these two cases may prove instructive in the context of a discussion of the gravity of the offence, the Appeals Chamber finds that in light of the preceding significant differences between these two cases, the parties' arguments regarding the overall comparison between the sentences in these two cases stand to be rejected.

352 Moreover, having regard to the fact that the Trial Chamber was not comparing these two cases on a general basis, but merely with regard to the gravity of the offences, the Appeals Chamber finds that it was not unreasonable for the Trial Chamber not to discuss other differences between these two cases. The Appeals Chamber notes that the Trial Chamber concluded that significant differences existed relating to the gravity of the crimes, mainly the type and number of crimes and the nature of the participation in the crimes.[876] In this context, Jokić's cooperation with the Prosecution, his expression of remorse or any other factor were not "relevant considerations" to which the Trial Chamber was obliged to give weight.[877]

353 The Appeals Chamber will now consider the Prosecution's submission that the Trial Chamber erred in holding that Strugar "was more remotely responsible than Admiral Joki}".[878] With respect to the error of law alleged by the Prosecution, the Appeals Chamber notes that in the jurisprudence of the Tribunal, it is open to a Trial Chamber to consider a convicted person's position of authority in its assessment of the gravity of the crime.[879] The Trial Chamber did indeed do so, having held that

[875] See generally Joki}'s Plea Agreement; *Joki}* Judgement on Sentencing Appeal.
[876] The Appeals Chamber understands the Trial Chamber's reference to Jokić's guilty plea as merely providing further context for differences between his and Strugar's case.
[877] See *supra*, para. 337.
[878] Trial Judgement, para. 464.
[879] *Naletili} and Martinović* Appeal Judgement, paras 609-613, 625-626; *Musema* Appeal Judgement, paras 382-383.

> Ftğhere is no doubt that the Accused's position as a commander at a very high level in the JNA command structure, reporting directly to the Federal Secretariat of Defence, serves to emphasize the seriousness of his failure to prevent the shelling and to punish the perpetrators, *i.e.* his failure to exercise his authority in accordance with the laws of war.[880]

The Trial Chamber added as follows:

> Nevertheless, when it comes to determining an appropriate sentence for the Accused, the Chamber also keeps in mind that Admiral Joki}, as the Accused's immediate subordinate, had direct command and responsibility over the forces involved in the unlawful shelling of the Old Town. While the Accused's responsibility for his failure to act as the superior commander of the forces involved is clearly established by the evidence, it remains the case that he was more remotely responsible than Admiral Joki}.[881]

354 Contrary to the Prosecution's submissions, the Appeals Chamber does not understand this second excerpt as implying or suggesting that less severe sentences should be imposed upon convicted persons in positions of authority. The Trial Chamber merely highlighted its prior factual finding that Joki} was Strugar's immediate subordinate and was the direct commander of the forces involved in the shelling of the Old Town. This factor, along with Strugar's superior responsibility, was relevant to an assessment of the gravity of the offence. In the opinion of the Appeals Chamber, it was open to a reasonable trier of fact to simultaneously consider the various aspects of the form and degree of Strugar's participation in the crime, namely his "position as a commander at a very high level in the JNA command structure" as well as the remoteness of his responsibility when compared to that of Joki}.

355 In addition, to the extent that the Prosecution's argument rests on the claim that the sentence in this case is erroneously out of proportion to the sentence rendered in *Joki}*, it stands to be rejected in light of the material differences noted above between these two cases.

356 With respect to the error of fact alternatively alleged by the Prosecution, the Appeals Chamber reiterates its view that the Trial Chamber's statement regarding the remoteness of Strugar's responsibility was merely referring to the fact that Joki} had direct command and responsibility over the forces involved in the unlawful shelling of the Old Town. This statement clearly flows from the relevant factual findings of the Trial Judgement,[882] which the

[880] Trial Judgement, para. 464.
[881] *Id.*
[882] *Ibid.*, paras 24, 61, 91, 137, 146, 154, 156, 173, 385, 394, 426, 435-436.

Prosecution has not impugned. In addition, this statement does not, as alleged by the Prosecution, contradict any other relevant finding or conclusion in the Trial Judgement and does not affect or limit Strugar's responsibility as a superior.

357 For the foregoing reasons, the Appeals Chamber finds that the parties have failed to show any discernible error in the Trial Chamber's limited references to the *Joki}* case. These two sub-grounds of appeal are therefore dismissed.

4. Alleged Errors Regarding Strugar's Post-Trial Statement

(a) Introduction

358 After the closing arguments of the parties, Strugar asked to be allowed to make an unsworn statement to the Trial Chamber and stated in particular:

> I am genuinely sorry for all human casualties and for all the damage caused. I am genuinely sorry for all the victims, for all the people who were killed in Dubrovnik, as well as for all those young soldiers who were killed on Sr| as well as in other areas and positions. I am sorry that I was unable to do anything to stop and prevent all that suffering.[883]

The Trial Chamber held that it "accepts the sincerity of this statement although it takes a different position from the Accused with respect to the last sentence".[884] Both parties impugn the Trial Chamber's reasoning.[885]

(b) Arguments of the Parties

(i) Strugar's Appeal

359 Strugar submits that the Trial Chamber erred in failing to give adequate weight to his expression of regret before the Trial Chamber, by taking a different position with respect to the last sentence of his statement.[886] Strugar argues that this runs afoul of the Appeals Chamber's holding in *Vasiljevi}* that the sincere expression of regret may constitute a mitigating circumstance, even in the absence of any admission of participation in a crime.[887]

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[883] Strugar, T. 8808.
[884] Trial Judgement, para. 471.
[885] Defence Notice of Appeal, para. 107; Prosecution Notice of Appeal, para. 17.
[886] Defence Appeal Brief, para. 229. See also AT. 108.
[887] *Vasiljević* Appeal Judgement, para. 177.

360 The Prosecution responds that Strugar misinterprets the Trial Judgement, which did in fact credit this statement as sincere. In addition, since the statement contained a sentence denying responsibility, Strugar fails to show how the Trial Chamber could have given the statement a more favourable assessment.[888]

(ii) The Prosecution's Appeal

361 The Prosecution submits that the Trial Chamber erred in law in concluding that Strugar's statement expressed sincere remorse sufficient to be qualified as a mitigating factor. First, the Prosecution argues that the Trial Chamber accepted the statement as sincere despite its conclusions that Strugar's denial of responsibility was disproved by the factual findings in the Trial Judgement and that Strugar's apology immediately after the incident was insincere.[889]

362 Second, the Prosecution submits that a statement of apology may only be a mitigating factor if it includes a statement of remorse for wrongdoing that is related to a recognized sentencing purpose, such as deterrence, rehabilitation or prevention.[890] According to the Prosecution, Strugar's statement cannot serve to reduce his sentence as it fails to admit any wrongdoing and any responsibility and thus bears no relation to any sentencing purpose.[891] Indeed, Strugar, by expressing general regret for the effects of the war and claiming to have behaved "honourably", indicated that he did not believe that there was anything wrong with the conduct of the war and that he did not do anything wrong.[892] The Prosecution avers that the Trial Chamber misconstrued Strugar's generalised concern for the negative effects of the war as satisfying the legal definition of remorse as a mitigating factor and that for the Trial Chamber to have done so, it must have given an extremely broad interpretation to the Appeals Chamber's holding in *Vasiljevi}* such that all

[888] Prosecution Respondent's Brief, para. 5.9.
[889] Prosecution Appeal Brief, paras 4.29-4.30, citing Trial Judgement paras 470-471.
[890] Prosecution Appeal Brief, paras 4.32-4.42, citing *Kvo~ka et al.* Appeal Judgement, para. 715; *Blaškić* Appeal Judgement, paras 678, 696, 705; *Serushago* Sentencing Appeal Judgement, para. 39; *Gali}* Trial Judgement, para. 759; *Blaškić* Trial Judgement, para. 771; *Kordi} and ^erkez*, Appeal Judgement, para. 1073; *Krsti}* Appeal Judgement, para. 713.
[891] Prosecution Appeal Brief, paras 4.31, 4.55.
[892] Prosecution Appeal Brief, paras 4.56-4.57.

statements of apology – even those that deny any wrongdoing and responsibility – would qualify as expressions of remorse.[893]

363 Strugar responds that the Trial Chamber did not in fact grant any weight to the statement, as the Trial Chamber did not explicitly note whether it accepted this statement as a mitigating circumstance and what weight it gave to it.[894] He recalls, moreover, the Appeals Chamber's holding in *Vasiljevi}* that the sincere expression of regret may constitute a mitigating circumstance, even in the absence of any admission of participation in a crime.[895]

364 In its Reply, the Prosecution asserts that the fact that no weight is given to the remorse is not supported by the Trial Judgement as the Trial Chamber expressly stated that a "sincere expression of regret may constitute a mitigating circumstance" and "acceptŁFedğ the sincerity of the statement".[896] This position is supported by the Appeals Chamber's jurisprudence that the

> weight to be attached to such circumstance lies in the discretion of the Trial Chamber which is under no obligation to set out in detail each and every factor relied upon.[897]

(c) Discussion

365 In order to be a factor in mitigation, the remorse expressed by an accused must be genuine and sincere.[898] The Appeals Chamber recalls that it has previously held that an accused can express sincere regrets without admitting his participation in a crime.[899] In such circumstances, remorse nonetheless requires acceptance of some measure of moral blameworthiness for personal wrongdoing, falling short of the admission of criminal responsibility or guilt. This follows from the ordinary meaning of the term remorse[900] as well

[893] *Ibid.*, paras 4.32, 4.43. See also AT. 190-193.
[894] Defence Respondent's Brief, paras 128, 130. See also AT. 207-208.
[895] Defence Respondent's Brief, paras 131-132, citing *Vasiljević* Appeal Judgement, para. 177. See also AT. 208.
[896] Prosecution Reply Brief, para 3.17, citing Trial Judgement, paras 470-471.
[897] Prosecution Reply Brief, para. 3.17, citing *Kupre{ki} et al.* Appeal Judgement, para. 430; *Bla{kić* Appeal Judgement, para. 696.
[898] See *Joki}* Judgement on Sentencing Appeal, para. 89 (and sources cited therein).
[899] *Vasiljević* Appeal Judgement, para. 177.
[900] The Oxford English Dictionary defines remorse as "a feeling of compunction, or of deep regret and repentance, for a sin or wrong committed."

as the approach taken in the few cases where expressions of remorse made by accused who maintained their innocence have been accepted in mitigation.[901]

366 However, beyond such expressions of remorse, an accused might also express sympathy, compassion or sorrow for the victims of the crimes with which he is charged. Although this does not amount to remorse as such, it may nonetheless be considered as a mitigating factor. The Appeals Chamber notes that such expressions of sympathy or compassion have been accepted as mitigating circumstances by Trial Chambers of both the ICTR and this Tribunal.[902]

367 The Appeals Chamber understands the Trial Chamber to have accepted Strugar's statement as an expression of sorrow for the victims and not as an expression of remorse. Indeed, the Trial Chamber merely considered Strugar's statement to be sincere and specifically noted its disagreement with the

[901] *Blaški}* Appeal Judgement, para. 705 (finding that "the integrity of the Trial Chamber's conclusion that the Appellant has demonstrated remorse is in fact unchallenged by the contradiction putatively identified by the Trial Chamber."); *Blaški}* Trial Judgement, para. 775 ("The Trial Chamber points out that, from the very first day of his testimony, Tihomir Blaškić expressed profound regret and avowed that he had done his best to improve the situation although this proved insufficient."); *Kunarac et al.* Trial Judgement, para. 869 ("his statement that he felt guilty about the fact that FWS-75 was gang-raped while he was raping D.B. in an adjoining room may be interpreted as a statement of remorse, and is considered in mitigation."); *^elebi}i* Trial Judgement, para. 1279 ("The Trial Chamber does not consider Mr. Landžo's belated partial admissions of guilt, or any expressions of remorse, to significantly mitigate, in the circumstances, the crimes committed by him. Ŧ…ğ Mr. Landžo did address a written statement to the Trial Chamber after the end of his trial, stating that he was sorry for his conduct in the Čelebići prison-camp and that he wished to express his regrets to his victims and their families. Such expression of remorse would have been more appropriately made in open court, with these victims and witnesses present, and thus this ostensible, belated contrition seems to merely have been an attempt to seek concession in the matter of sentence.").

[902] *Br|anin* Trial Judgement, para. 1139 ("throughout the trial there were a few instances when, through Defence counsel, he told witnesses that he felt sorry for what they had suffered. The Trial Chamber has no reason to doubt the sincerity of the Accused in offering his regret, and will take these instances into consideration as a mitigating factor for the purpose of sentencing the Accused."); *Ori}* Trial Judgement, para. 752 ("throughout the trial, there were a few instances when Defence counsel on his behalf expressed compassion to witnesses for their loss and suffering. The Trial Chamber does not doubt the sincerity of the Accused in expressing empathy with the victims for their loss and suffering, and has taken this sincerity into consideration as a mitigating factor."); *Staki}* Trial Judgement, para. 922 ("The Trial Chamber considers as a mitigating factor Dr. Staki}'s behaviour towards certain witnesses. For example, on 27 June 2002, he directed his counsel not to cross-examine Nermin Karagić 'because of the suffering of this witness and his pretty bad mental state.'"); *Akayesu* Trial Judgement, para. 45 ("Akayesu expressed sympathy for the many victims of the genocide and of the war and he identified with the survival of the events of 1994."); Musema Trial Judgement, para. 1005 ("The Chamber, amongst the mitigating circumstances, takes into consideration that Musema admitted the genocide against the Tutsi people in Rwanda in 1994, expressed his distress about the deaths of so many innocent people, and paid tribute to all victims of the tragic events in Rwanda."); *Musema* Appeal Judgement, para. 396 (accepting the Trial Chamber's findings on mitigating circumstances).

position taken by Strugar in the last sentence of his statement.[903] The Appeals Chamber is of the view that this was a reasonable conclusion as it would not be open to a reasonable trier of fact to accept Strugar's statement as constituting a sincere expression of remorse in light of his failure to acknowledge any form or measure of moral blameworthiness for personal wrongdoing. In view of this, Strugar's and the Prosecution's sub-grounds of appeal are dismissed.

5. Alleged Errors Regarding Mitigating Circumstances

(a) Introduction

368 Strugar submits that the Trial Chamber failed to take into account or give adequate consideration to certain mitigating circumstances.[904]

(b) Arguments of the Parties

369 First, Strugar argues that the Trial Chamber erred in not accepting his expression of regret in a letter written to Croatian Minister Davorin Rudolf on 7 December 1991 as a sincere demonstration of remorse.[905] He recalls that the Trial Chamber arrived at this decision in light of "the ongoing negotiations with the Croatian representatives, the role of the Accused in the attack on Srđ, and his failure to investigate and punish the perpetrators of the crime".[906]

370 With respect to the on-going negotiations, Strugar submits that the Trial Chamber did not explain their significance for the assessment of the sincerity of his regret. In this regard, Strugar notes first that Jokić was held to be in charge of these negotiations but that, in his case, the Trial Chamber did accept the sincerity of the regret which he (Joki}) expressed in a radiogram to Rudolf on 6 December 1991.[907] Strugar furthermore argues that the immediacy of his expression of remorse on 7 December 1991 is an authentic indicator of its sincerity.[908] With respect to his role in the attack on Srđ, Strugar submits that it cannot serve as a basis for not accepting the sincerity of his expression of remorse. According to Strugar, as the Trial Chamber itself held that his order to

[903] Trial Judgement, para. 471.
[904] Defence Notice of Appeal, para. 107.
[905] Defence Appeal Brief, para. 223.
[906] Trial Judgement, para. 470.
[907] Defence Appeal Brief, para. 224, citing *Joki}* Sentencing Judgement, para. 89.
[908] Defence Appeal Brief, para. 225.

attack Srđ did not encompass an attack on the Old Town, his apologies for something that had gone beyond his orders would be logical.[909] With respect to his failure to prevent and punish, Strugar also submits that it cannot serve as a basis for not accepting the sincerity of his expression of remorse. He further submits that if this were correct, expressions of remorse could never be accepted in cases of convictions pursuant to Article 7(3) of the Statute[910] or could only be accepted if expressed at a time when an accused could no longer punish his subordinates.[911] Strugar finally adds that the Trial Chamber failed to assign due weight to the expressions of regret conveyed by his Counsel on his behalf. He argues that the Trial Chamber should have followed the approach adopted in the *Brđanin* Trial Judgement.[912]

371 Second, Strugar argues that the Trial Chamber erred in failing to accept the indirect nature of his participation in the events, clearly established in certain portions of the Trial Judgement,[913] as a mitigating circumstance.[914]

372 Third, Strugar asserts that the Trial Chamber gave insufficient weight to his personal and family circumstances, his good character and his voluntary surrender.[915]

373 Fourth, Strugar argues that the Trial Chamber erred in failing to consider his poor health as a separate mitigating circumstance as well as in failing to accord it due weight. In this regard, Strugar refers to evidence of Prosecution and Defence witnesses to the effect that he suffers from a number of serious diseases and medical conditions.[916]

374 Fifth, Strugar argues that the Trial Chamber erred in failing to consider his age as a separate mitigating circumstance. Strugar states that he does not have hope of a worthwhile life upon release, that he is practically sentenced to

[909] *Ibid.*, para. 226. See also AT. 108.
[910] Defence Appeal Brief, paras 227, 229.
[911] Defence Reply Brief, para. 101.
[912] Defence Appeal Brief, para. 228; Defence Reply Brief, para. 102, citing *Brđanin* Trial Judgement, para. 1139.
[913] Defence Reply Brief, para. 103, citing Trial Judgement, paras 433, 442-445.
[914] Defence Appeal Brief, para. 230.
[915] *Ibid.*, para. 231. See also AT. 108-109.
[916] Defence Appeal Brief, paras 233-236, citing Exhibit D118, "Medical Report by Doctor Čedo Vuković, June 2004"; Exhibit D119, "Medical Report by Doctor Sava Mičić, June 2004"; Exhibit P83, "Medical Report by Dr. Dušica Lečić-Toševski, January 2004"; Exhibit P185, "Prosecution's Submission of Medical Report by Drs Bennett Blum, Vera Folnegović-Šmalc and Daryl Mathews, March 2004"; Dr. Blum, T. 5520. See also AT. 109-111.

life imprisonment due to the fact that he would be leaving prison at the age of almost 79, and that his age and his health problems will expose him to inappropriate pains and suffering during his stay in prison.[917]

375 In conclusion, Strugar maintains that his case is an exceptional one, such that age and health considerations should be considered as mitigating circumstances of great weight.[918] He submits that the seriousness of the crime for which he was convicted is incomparable with the weight of the crimes for which other persons of similar age have been found guilty, providing the example of Biljana Plavšić.[919]

376 The Prosecution responds that Strugar fails to demonstrate that the Trial Chamber did not assign appropriate credence to all relevant mitigating circumstances.[920] In this regard, it recalls that the Appeals Chamber has held that

> Fpğroof of mitigating circumstances does not automatically entitle the Appellant to a 'credit' in the determination of the sentence; rather, it simply requires the Trial Chamber to consider such mitigating circumstances in its final determination.[921]

(c) Discussion

377 Strugar submits that the Trial Chamber erred in not accepting his expression of regret in a letter written to Rudolf on 7 December 1991 as a sincere demonstration of remorse. The Appeals Chamber observes that the Trial Chamber found that it was unable to accept that this letter was a sincere expression of remorse in light of the circumstances at the time, "in particular the ongoing negotiations with the Croatian representatives, the role of the Accused in the attack on Sr|, and his failure to investigate and punish the perpetrators of the crimes".[922]

378 The Appeals Chamber finds that it was open to a reasonable trier of fact to conclude that the ongoing negotiations with the Croatian representatives and Strugar's subsequent failure to investigate and punish the perpetrators of

[917] Defence Appeal Brief, paras 238-240, citing *Plavšić* Sentencing Judgement, paras 104-105; Defence Reply Brief, para. 106. See also AT. 110-112.
[918] Defence Appeal Brief, para. 241.
[919] Defence Reply Brief, paras 104-106.
[920] Prosecution Respondent's Brief, paras 5.2, 5.5-5.8, 5.10-5.25.
[921] *Niyitegeka* Appeal Judgement, para. 267.
[922] Trial Judgement, para. 470.

the crimes put in doubt the sincerity of Strugar's expression of remorse. Indeed, Strugar's letter of 7 December 1991 could clearly influence, and be influenced by, on-going negotiations. In this respect, whether or not the Trial Chamber in *Joki}* accepted the sincerity of the latter's expression of regret in a radiogram sent to Rudolf on 6 December 1991 in similar circumstances has no bearing on the reasonableness of the Trial Chamber's findings in this case.[923] In addition, Strugar's failure to conduct an adequate investigation and to punish the perpetrators at the time when the letter was sent is a relevant factor in considering the sincerity of his expression of remorse. Contrary to Strugar's submissions, this does not exclude in the current circumstances the possibility that regret expressed at a later stage could have been found to be sincere.

379 The Appeals Chamber is of the view that the Trial Chamber erred in finding that Strugar's role in the attack on Srđ could serve as a basis for not accepting the sincerity of his expression of remorse. Were it otherwise, an accused's prior criminal conduct would always cast doubt on the sincerity of his subsequent expressions of remorse.[924] However, the impact of this error is insignificant as the Appeals Chamber finds that it was reasonable for the Trial Chamber not to accept the sincerity of Strugar's expression of remorse on the basis of the other two factors which it cited. Accordingly, this part of Strugar's sub-ground of appeal is dismissed.

380 Strugar also submits that the Trial Chamber failed to assign due weight to the expressions of regret conveyed by his Counsel on his behalf. Having considered the expressions of regret to which Strugar refers,[925] the Appeals Chamber is satisfied that the Trial Chamber did not err in the exercise of its discretion. The Appeals Chamber notes that the two statements made by Counsel for Strugar amount to expressions of sorrow, not remorse.[926] In addition, it observes that one of the two statements was made on behalf of the Defence team only. As such, it fell within the Trial Chamber's discretion to give little to no weight to these two statements, especially as it had also noted the sincerity of Strugar's own expression of sorrow. As a result, the Appeals Chamber dismisses this part of Strugar's sub-ground of appeal.

[923] Defence Appeal Brief, para. 224, citing *Joki}* Sentencing Judgement, para. 89.
[924] *Cf. Blaški}* Appeal Judgement, para. 705.
[925] T. 1447, T. 2020.
[926] See *supra*, para. 365.

381 Strugar submits that the Trial Chamber erred in failing to accept the indirect nature of his participation in the events as a mitigating circumstance. The Appeals Chamber recalls that the indirect nature of a convicted person's participation in the crimes can indeed be accepted as a mitigating circumstance.[927] In cases involving superior responsibility, while proof of active participation by a superior in the criminal acts of his subordinates may constitute an aggravating circumstance,[928] absence of such participation on the part of a superior is not a mitigating circumstance. Indeed, failure to prevent or punish subordinate crimes is the relevant culpable conduct and lack of active or direct participation in the crimes does not therefore reduce that culpability as a mitigating circumstance.[929] Rather, as was done by the Trial Chamber,[930] superior responsibility should be considered in the assessment of the gravity of the crimes.[931]

382 Strugar asserts that the Trial Chamber gave insufficient weight to his personal and family circumstances, his good character, his voluntary surrender, his poor health and his age as mitigating circumstances. The Appeals Chamber observes that the Trial Chamber referred to Strugar's submissions on this point[932] and expressly took into account these factors in its consideration of the mitigating circumstances pertaining to his case.[933] The Appeals Chamber finds that Strugar has shown neither that the Trial Chamber failed to consider all the evidence before it concerning his personal circumstances, nor that it abused its discretion in weighing mitigating circumstances. This alleged error is therefore dismissed.

383 Accordingly, this sub-ground of appeal is dismissed.

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[927] *Krstić* Appeal Judgement, para. 273.
[928] *Aleksovski* Appeal Judgement, para. 183; *^elebi}i* Appeal Judgement, para. 736.
[929] *Ibid.*, para. 737.
[930] Trial Judgement, paras 459, 462-463.
[931] *Kupre{ki} et al.* Trial Judgement, para. 852, cited in *Aleksovski* Appeal Judgement, para. 182.
[932] Trial Judgement, para. 467.
[933] *Ibid.*, paras 468-469, 472.

6. Conclusion

384 For the foregoing reasons, the Appeals Chamber dismisses Strugar's fourth ground of appeal and the Prosecution's third ground of appeal in their entirety.

B. Impact of the Appeals Chamber's Findings on the Sentence

1. Error of Law Regarding Prosecution's First Ground of Appeal

385 With respect to the Prosecution's first ground of appeal, the Appeals Chamber found above that the Trial Chamber committed an error of law in failing to find that Strugar, as of 12:00 a.m. on 6 December 1991, possessed sufficiently alarming information to meet the "had reason to know" standard under Article 7(3) of the Statute.[934] Instead, the Trial Chamber held that Strugar did not possess such information before around 7:00 a.m. on 6 December 1991.

386 The Appeals Chamber recalls its recent finding in *Hadžihasanović and Kubura* 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.[935]

387 In relation to the seriousness of Strugar's own conduct in failing to prevent the underlying crimes, the Appeals Chamber finds that without the above-mentioned legal error, the Trial Chamber would have found Strugar responsible for failing to prevent the unlawful shelling of the Old Town before it had ever begun as opposed to finding that he was responsible for failing to stop the shelling once it had already begun. However, in relation to the underlying crimes committed by Strugar's subordinates, the Appeals Chamber

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[934] See *supra*, para. 308.

[935] *Čelebi}i* 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)).

notes that the Trial Chamber apparently conflated the damage done to the Stradun both before and after 7:00 a.m.[936] The Appeals Chamber finds *proprio motu* that the Trial Chamber erred in that respect, as it failed to distinguish between damage caused before and after 7:00 a.m. – the time where it found Strugar's superior responsibility to have been engaged. Although the Appeals Chamber has extended Strugar's liability to 12:00 a.m., the Appeals Chamber notes that the Trial Chamber took cognizance of the damage caused during this additional time period (*i.e.*, 12:00 a.m. to 7:00 a.m.). The Appeals Chamber thus finds that the sentence imposed by the Trial Chamber already reflects the entirety of the damage caused to the Old Town on 6 December 1991. Consequently, the Appeals Chamber is of the view that while the Trial Chamber's legal error affects the conduct for which Strugar is being convicted, it does not have an impact upon his sentence.

2. Error of Law Regarding the Prosecution's Second Ground of Appeal

388 With respect to the Prosecution's second ground of appeal, the Appeals Chamber recalls that although the Prosecution requests that the Appeals Chamber overturn the Trial Chamber's findings on cumulative convictions, revise the Trial Judgement and enter convictions under Counts 4 and 5, it does not request that the Appeals Chamber revise the sentence as the cumulative convictions are based on the same criminal conduct.[937] The Appeals Chamber agrees with the Prosecution that the cumulative convictions are based on the same criminal conduct and do not add to the gravity of Strugar's criminal conduct. In this context, the Appeals Chamber recalls its finding in *Galić* that the sentence has to adequately reflect the level of gravity of the criminal conduct and the perpetrator's degree of participation.[938] Since both elements are not affected by the Trial Chamber's error, the Appeals Chamber finds that allowing the Prosecution's second ground of appeal does not have any impact on Strugar's sentence.

[936] Trial Judgement, paras 101, 109; *ibid.*, Annex 1, no. J3, with reference to *inter alia* Witness A, T. 3705.
[937] Prosecution Appeal Brief, para. 3.32.
[938] *Galić* Appeal Judgement, para. 455.

C. Consideration of Strugar's Post-Trial Health as a Mitigating Circumstance on Appeal

1. Arguments of the Parties

389 At the Appeals Hearing, Strugar submitted that the state of his health had deteriorated since the Trial Judgement had been delivered and that evidence of his poor health should be considered in mitigation of his sentence on appeal.[939]

390 The Prosecution responded that if the Appeals Chamber imposes a new sentence as a result of its findings on the merits of the Appeals, it should indeed consider evidence that Strugar's health has significantly worsened since trial.[940]

2. Discussion

391 The Appeals Chamber recalls its previous finding in *Jelisić* that it "will not substitute its sentence for that of a Trial Chamber unless the Trial Chamber [...] has failed to follow applicable law".[941] In the case at hand, the Trial Chamber committed such an error with respect to the scope of Strugar's criminal liability from 12:00 a.m. to 7:00 a.m. on 6 December 1991. Although this legal error has not been found to have had an impact on the sentence, the criminal conduct for which the Trial Chamber convicted Strugar has changed, as it now also comprises his failure to prevent the unlawful shelling of the Old Town before it had ever begun. As such, taking into consideration this legal error of the Trial Chamber, the Appeals Chamber considers that it is resentencing Strugar for his failure to prevent and punish the unlawful shelling of the Old Town on 6 December 1991 and that it thus has the mandate to revise the sentence without remitting it to the Trial Chamber.[942]

392 With respect to the evidence relating to the deterioration of Strugar's health since the Trial Judgement, the Appeals Chamber admits the relevant material

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[939] AT. 109-111, 116-117.
[940] AT. 194-195, referring to *^elebi}i* Judgement on Sentence Appeal, paras 11-15.
[941] *Jelisić* Appeal Judgement, para. 99.
[942] See *Vasiljević* Appeal Judgement, para. 181 (with further references). The Appeals Chamber notes that neither party submits that the matter be be remitted to a Trial Chamber.

before it[943] in evidence pursuant to Rules 89 and 98 of the Rules. Having considered this evidence the Appeals Chamber accepts that Strugar's health has deteriorated since the rendering of the Trial Judgement and will take this into account as a mitigating circumstance in its revision of the sentence imposed on him.

393 In light of the above, the Appeals Chamber imposes on Strugar a single sentence of seven and a half years of imprisonment subject to credit for time spent in detention so far.

[943] Medical Report prepared by Dr. Falke as per the then Pre-Appeal Judge and submitted to the Appeals Chamber by the Deputy Registrar, 7 July 2005; Medical Report submitted to the Appeals Chamber by the Deputy-Regitrar, 17 August 2005; Confidential Annex to Defence Notice, 11 September 2006; *Prosecutor v. Pavle Strugar,* Case No. IT-01-42-Misc.1, Confidential Annexes to Defence Request for Providing Medical Aid, 10 May 2007; Annex to Defence Notice Relevant to Appeals Chamber's Public "Order to the Defence of Pavle Strugar for Filing of Medical Report", 27 June 2008 (confidential).

IX. 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 hearing on 23 April 2008;

SITTING in open session;

DISMISSES all grounds of appeal submitted by Strugar, Judges Meron and Kwon dissenting with regard to the third ground of appeal concerning the failure to take measures for the events of 6 December 1991;

ALLOWS the Prosecution's first ground of appeal regarding the scope of Strugar's duty to prevent the shelling of the Old Town;

ALLOWS the Prosecution's second ground of appeal and **ENTERS** convictions under Counts 4 (devastation not justified by military necessity, a violation of the laws or customs of war, under Article 3 of the Statute) and 5 (unlawful attacks on civilian objects, a violation of the laws or customs of war, under Article 3 of the Statute) pursuant to Article 7(3) of the Statute;

DISMISSES the Prosecution's third ground of appeal;

REPLACES the sentence of eight years of imprisonment imposed by the Trial Chamber by a sentence of seven and a half years, subject to credit being given under Rule 101(C) of the Rules for the period already spent in detention;

ORDERS that, in accordance with Rules 103(C) and Rule 107 of the Rules, Strugar is to remain in the custody of the Tribunal pending the finalisation of arrangements for his transfer to the State in which his sentence will be served.

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

Andrésia Vaz	Mohamed Shahabuddeen	Mehmet Güney
Presiding Judge		Judge
Judge		

Theodor Meron	O-Gon Kwon
Judge	Judge

Judge Shahabuddeen appends a separate opinion.

Judges Meron and Kwon append a joint dissenting opinion.

Dated this seventeenth day of July 2008,

At The Hague, The Netherlands

[**Seal of the Tribunal**]

X. SEPARATE OPINION OF JUDGE SHAHABUDDEEN

A. Introduction

1. This matter is illustrative of certain evidential problems which trouble the hearing of cases that occur during armed conflict. Whatever the difficulties, the usual standards of a fair trial must of course be observed. But the requirements need not be exaggerated: they are, as they stand, supple enough to take account of conditions of armed conflict without reliance being placed on mere suspicion.

2. I agree with the Appeals Chamber that the appellant, a commander, had sufficiently alarming information to enable him to anticipate the crimes of his subordinates and to be under a duty to prevent them from committing those crimes as from the very beginning of the crimes; in the circumstances of the case, the law did not require the Trial Chamber to enter a conviction only as from the time when the appellant acquired knowledge that the commission of the crimes was actually in progress.[944] However, the Trial Chamber did get the law right in so far as it convicted the appellant of failing to punish his subordinates for the crimes. The Appeals Chamber, by majority, is in turn upholding that conviction.[945] I write in support of its judgement.

3. The power of a commander to punish may be displaced by a decision of a higher command to exercise that power, including a power to make any necessary investigation. In the present case, a higher command did institute an investigation, but the prosecution says that it was not a true investigation: it was a sham in which the appellant was complicit. It therefore did not count; it left the case to be determined as if there was no such investigation, that is to say, on the basis that the power to punish rested with the appellant. The Trial Chamber upheld the case for the prosecution both on the investigation being a sham and on the appellant being complicit in it. The appellant challenged both grounds. I shall deal with both aspects.

[944] Appeals Judgement, para. 304.
[945] *Ibid.*, para. 245.

4. The case concerns the city of Dubrovnik. Dubrovnik includes the Old Town, a picturesque medieval site.[946] In 1979, the Old Town was recognised by UNESCO as a World Heritage site.[947] In 1991, it comprised some 7,000 to 8,000 inhabitants.[948] Between October and December 1991, the city of Dubrovnik, including the Old Town, was shelled by the Yugoslav People's Army (JNA) on a number of occasions.[949] These shellings occurred in spite of orders issued by the JNA during this same time prohibiting attacks on Dubrovnik.[950] This case relates to the last round of shellings on 6 December 1991.

5. Dubrovnik is near to Sr|. On 5 December 1991, the appellant ordered troops under his command to attack Sr|.[951] He had sufficiently alarming knowledge from previous occasions that the likelihood was that they would also attack neighbouring Dubrovnik. On the following day – 6 December 1991 – they did attack Dubrovnik, including the Old Town. The JNA's order not to attack Dubrovnik still stood.[952] Thereupon, it was the appellant's duty to punish his subordinates who were responsible.

6. The appellant did not perform that duty. He says that his own responsibility to punish was displaced by an investigation instituted by the high command. An investigation did result from a meeting, held in Belgrade, by the high command, represented by General Kadijević, the Federal Secretary for National Defence or Minister of Defence.[953] The appellant and his deputy, Admiral Jokić, were present during the meeting. Admiral Jokić suggested an investigation, and he assumed responsibility for it. The Trial Chamber found that the investigation was always intended, to the knowledge of the appellant as a participant in it, to be a sham; its purpose was to placate the concerns of the international community (concerns of Croatia and of the European Community Monitoring Mission (ECMM)), which had been aroused by the damage done to the Old Town.

[946] Trial Judgement, paras 19-21.
[947] *Ibid.,* para. 21.
[948] *Ibid.,* para. 21.
[949] *Ibid.,* paras 40-145.
[950] See, *e.g.*, *Ibid.*, paras 52, 54, 61.
[951] *Ibid.*, para. 342.
[952] See, *e.g.*, *ibid.*, paras 52, 54, 61.
[953] *Ibid.*, para. 14, footnote 14.

7. For an investigation instituted by a higher command to displace the duty of a commander to investigate with a view to punishing, it seems to me that the investigation instituted by that higher command must be a true one designed to permit the power to punish to be rationally exercised, and not simply one designed to accomplish other purposes such as shielding the truth from disclosure, including the possible liability of the commander. So, one comes to the two questions presented above, namely, whether the investigation was a sham, and, if so, whether the appellant knew that it was a sham.

B. The Facts

8. As to General Kadijević (who was not charged), no direct evidence was available to prove an intention to set up a sham investigation; in the nature of things, that was to be expected. The general's intention had to be ascertained from the surrounding facts. These included the circumstance that the shelling began from around 0550 hours on 6 December 1991[954] and ended at around 1630 hours that afternoon.[955] Protesting at the shelling, representatives of interested states telephoned the general early in the morning of 6 December 1991, before 7 am. Nevertheless, the shelling continued for many hours thereafter.[956] The Trial Chamber found that in 'fact the shelling of the Old Town and the wider Dubrovnik continued despite the protest to General Kadijević in Belgrade and other protests from Dubrovnik'.[957] The speed of military communications grounds the inference that the general knew of the continued shelling.

9. General Kadijević was indeed angry that the attack had come after a ceasefire agreement had been reached;[958] he accused both the appellant and his deputy, Admiral Jokić, of not having acted wisely.[959] But he could be angry with them for what they had unwisely done, without wanting the truth of what they had done to be revealed. Is there any evidence of this? Yes, provided one is not looking for minutiae. As has been noticed, the shelling continued for

[954] *Ibid.*, para. 99.
[955] *Ibid.*, para. 110.
[956] *Ibid.,* paras 99, 110.
[957] *Ibid.*, para. 432.
[958] *Ibid.,* para.146.
[959] *Ibid.*, para. 171.

many hours after General Kadijević had received protests from representatives of the international community.[960] The evidence before the Trial Chamber was enough to enable it to find that the only purpose of the investigation was to abate international interest in the matter; this was why the Trial Chamber said 'that the JNA was in what is colloquially described as "damage control mode"'.[961]

10. As to Admiral Jokić, it has to be borne in mind that he was the appellant's deputy. Indeed, the whole idea of an investigation came from the admiral. As has been seen, he was criticised, together with the appellant, by General Kadijević for not having acted wisely; so he had an interest in the outcome of the investigation. To take advantage of his offer to conduct the investigation did not guarantee its objectivity. More than that: as will be seen, he deliberately distorted the truth. It is not surprising that the Trial Chamber found as follows:

> What followed, in the finding of the Chamber, evidences the tenor and the effect of the understanding or instructions Admiral Jokić took from the Belgrade meeting. His immediate actions were to give unqualified assurances, citing the authority of General Kadijević, of a thorough investigation and action to deal with the perpetrators, to Minister Rudolf [of Croatia[962]], the Dubrovnik Crisis Committee and the ECMM. He called for reports from a few of his senior staff, reports which were not conveyed to anyone else. He dispatched officers to 'improve' the morale of the units involved in the attack who by the end of the day considered they had suffered defeat, and also to seek to determine from these units what had occurred. Their reports, if any, were not conveyed to anyone else. He removed one acting battalion commander from his post, Lieutenant-Colonel Jovanović of the 3/5 mtbr, but returned him immediately to his normal duties without any adverse disciplinary or other action. He then reported to the Federal Secretariat briefly on these matters, and generally on the action of 6 December 1991, in a way which was quite out of keeping with the facts as revealed by the evidence in this case, so as to put the conduct of the JNA forces in a more favourable light. His report included an assurance that 'final and all encompassing' measures would follow. There never were any. The next day, a 'Commission' of three 9 VPS officers visited the Old Town to report on the damage. Admiral Jokić endorsed their report, which sought to minimise the nature and extent of the damage and deflect responsibility for its cause from the JNA, when even a cursory viewing of the accompanying film would have disclosed its inadequacy. He took no other disciplinary or administrative action to better determine the truth of what occurred or to deal with those responsible. A glaring indication of the sham which, in the finding of the Chamber, this investigation and these measures were, is provided by the fact that the 120 mm mortar battery of the 3/5 mtbr was not within range of the Old Town. They were the only artillery weapons under the command of Lieutenant-Colonel Jovanović, who was the ONLY officer who was removed by Admiral Jokić from his command. This was a temporary command, which Lieutenant-Colonel Jovanović held for only one day. This battery could not have caused damage to the Old Town on 6 December

[960] *Ibid.*, paras 99 and 432.
[961] *Ibid.*, para. 173.
[962] He was Minister of Maritime Affairs for the Croatian Government. See *Ibid.*, para. 75.

> 1991. Admiral Jokić took no disciplinary action against anyone else. The evidence discloses no action by the Accused to investigate or discipline anyone in respect of the shelling of the Old Town or the events of 6 December 1991. In short no one has been disciplined or suffered adverse action for the shelling of the Old Town, on 6 December 1991. In fact, some 8 days after 6 December 1991 Captain Kovačević, who commanded the attack, was promoted.[963]

11. Thus, investigating reports were pigeonholed; damage was patently minimised; the conduct of the JNA was made to appear in a more favourable light than was merited; responsibility was sought to be deflected. This is consistent with the later fact that just 'some 8 days after 6 December 1991 Captain Kovačević, who commanded the attack, was promoted'.[964] The admiral's promise of 'final and all encompassing' measures was intended to placate external concerns of the international community; internally, the assurance never bore fruit, because it was never intended to bear any. The admiral's actions conformed to a strategy of 'damage control'.

12. As to the appellant, he himself had no interest – certainly no genuine interest – in opening a proper investigation:[965] he knew that such an investigation would in all probability report against him. The Trial Chamber had before it evidence of his presence throughout the meeting which decided on the investigation and his subsequent relation to the investigation.[966] As has been mentioned, Captain Kovačević, who commanded the attack on the Old Town within the appellant's sphere of responsibility, was promoted within days of the event.[967] The Trial Chamber also found that, on a visit by the JNA Deputy Chief of Staff, 'when both the Accused and Admiral Jokić were present, the Accused invited Captain Kovačević to nominate outstanding participants in the events of 6 December 1991'.[968] So, far from expressing concern, the appellant thereby indicated approval of what had been done. It is not possible to support a view that what the appellant did was to express appreciation of the military gallantry displayed without also approving the forbidden operation during which that gallantry was displayed. The facts could reasonably be interpreted as indicating that the appellant was out of sympathy with anything that was critical of the attack on the Old Town. The Trial Chamber's findings were in

[963] *Ibid.,* para. 174 (footnotes in the original omitted).
[964] *Ibid*.
[965] *Ibid.*, para. 441.
[966] *Ibid.*, paras 435-445.
[967] *Ibid.*, para. 441.
[968] *Ibid*.

keeping with that interpretation; it is not for the Appeals Chamber to prefer a different reading of the material.

13. In addition, Admiral Jokić testified to a conversation which he had with the appellant on leaving the meeting in Belgrade on 6 December 1991. He said that, '[a]s we travelled, we talked … about the further steps to be taken. It was accepted that the official version of the events of the 6th of December, which was composed at the command of the 2nd Operational Group on the basis of the information provided by Captain Kovačević, which was given by his officers, that this official version of the event should be sent to Belgrade to the General Staff, and that I should stand by that story, that version, at the press conference on the following day'. When questioned further, Admiral Jokić confirmed that 'General Strugar instructed me as to what we should accept, what we should do. It was this official version of the events that took place on the 6th of December. That is to say, that I should stand by that at the press conference'.[969]

14. The cross-examination of the witness on the point did not challenge his version of the conversation,[970] being addressed to the timing of the conversation.[971] The substance of the conversation was not put in issue; it was part of the general material which the Trial Chamber had to consider and must be taken to have considered though not specifically referred to in its judgement. Not all the evidence can be cited in the judgement: only a very small part of it can, as familiarity with the voluminous nature of the proceedings of the Tribunal will easily attest. The evidence of the conversation confirms that the appellant sought to contrive an official version of the events which differed from the truth. That version ultimately derived from Captain Kovačević. The appellant identified with Captain Kovačević – the doer of the deed.

15. I have examined the admissibility of the evidence of the conversation because I do not see any reference to it in the Trial Chamber's judgement. The most I see is a statement in paragraph 437 of the judgement reading: 'The Admiral in effect says that he could not find any satisfactory evidence to

[969] Transcript of the Trial Chamber, 4086-4087.
[970] *Ibid.*, 4689.
[971] *Ibid.*, 4650-4690.

enable him to do anything more. That is surprising indeed'. That may be thought capable of showing that the Trial Chamber placed no reliance on the evidence of the conversation. Does it show that? The surprise of the Trial Chamber was at the witness's claim that the evidence did not enable him 'to do anything more'. The Trial Chamber's surprise was not in any way directed to the evidence of the conversation between the witness and the appellant; the witness's credibility was not attacked on that point. So the evidence of the conversation stood. It showed beyond reasonable doubt that the investigation was a sham and that the appellant was complicit in the sham. Consistent with the view that the Trial Chamber accepted the credibility of the witness's testimony is the fact that its ultimate findings accorded with that testimony.

16. Accordingly, the Trial Chamber found 'that the Accused was, at the very least by acquiescence, a participant in the arrangement by which Admiral Jokić undertook his sham investigation and sham disciplinary action'.[972] That was a reasonable inference to draw from all the facts. It accorded naturally with the relations between the appellant and the admiral, of which the Trial Chamber wrote:

> [T]he Chamber finds, [the Accused] was, at the least prepared to accept a situation in which he would not become directly involved, leaving all effective investigation, action and decisions concerning disciplinary of other adverse action to his immediate subordinate, Admiral Jokić, whose task effectively was known to the Accused to be to smooth over the events of 6 December 1991 as best he could with both the Croatian and ECMM interests, while providing a basis on which it could be maintained by the JNA that it had taken appropriate measures.[973]

That was a finding that Admiral Jokić – the appellant's deputy – was carrying out a sham investigation to the knowledge and with the approval of the appellant.[974] The finding was not one which no reasonable trier of fact could have made in the circumstances taken as a whole. The Appeals Chamber cannot upset it.

C. The Law

i. Direct evidence not required to prove the appellant's knowledge of the sham

[972] Trial Judgement, para. 439.
[973] *Ibid.*, para. 442.
[974] *Ibid.*, paras 435 and 436

17. It would of course be better if the appellant's knowledge of the 'sham' was proved by direct evidence. But, in the nature of the case, direct evidence was not available. Circumstantial evidence could be resorted to, but the use of that kind of evidence has limits. What the case involves therefore is a revisiting of the tired issue as to the extent to which reliance may be placed on circumstantial evidence.

18. Some help is to be had from cases of racial discrimination. Whether there is racial discrimination is a question of fact. But it may be possible to prove that fact in the absence of direct evidence of it. In this respect, it was pointed out that it 'is not often that there is direct evidence of racial discrimination',[975] and so 'the affirmative evidence of discrimination will normally consist of inferences to be drawn from the primary facts'.[976] As it was said in a work of authority, 'it is rarely possible to prove more than discrimination and difference of race; if this is done, then in the absence of any credible explanation, it is permissible to infer that the discrimination was made upon racial grounds'.[977] The fact of discrimination and the fact of racial differences left out the key question – also a question of fact – as to whether such discrimination, as there was, was indeed racial discrimination. The court held that that key question of fact could be proved by inference from the established fact that there was discrimination and from the established fact that there were racial differences.

19. Though the leading principles are trite, it may be noted that 'circumstantial evidence' has been defined as '[e]vidence of some collateral fact, from which the existence or non-existence of some fact in question may be inferred as a probable consequence',[978] and that 'inference' bears this meaning:

> A logical and reasonable conclusion of a fact not presented by direct evidence but which, by process of logic and reason, a trier of fact may conclude exists from the established facts. … Inferences are deductions or conclusions which with reason and common sense lead the jury to draw from facts which have been established by the evidence in the case.[979]

[975] *North West Thames Regional Health Authority* [1988] I.C.R. 813 at 822, May LJ.
[976] *Khanna v. Ministry of Defence* [1981] I.C.R. 653, 658-659, *per* Browne-Wilkinson J.
[977] Colin Tapper, *Cross and Tapper on Evidence*, 11th edition (Oxford, 2007), p. 43.
[978] *Black's Law Dictionary*, eighth ed. (Minnesota, 2004), p. 595.
[979] *Black's Law Dictionary with Pronunciations*., sixth ed. (Minnesota, 1990), p. 778.

20. Hence, the circumstance that a proposition of fact is new, or that there is no 'direct evidence' of it, is not necessarily an objection to its admission in evidence. The question is whether the inference which has led to the proposition is reasonable. This depends on 'common sense'. 'Common sense' will lead a jury to say that, in this case, a reasonable assessment of the evidence showed that the investigation was not a real investigation and that the appellant knew that it was not.

21. The error attributed by the appellant to the Trial Chamber seems to be that it acted in the absence of direct evidence of the appellant's knowledge of the sham. In my view, in the absence of direct evidence of the appellant's knowledge of the sham, the Trial Chamber was entitled to rely on circumstantial evidence to hold that, as a matter of fact, the investigation was not intended to be genuine and that the appellant knew that it was not.

ii. No violation of the rule that a trial court must acquit unless the facts are not only consistent with guilt but are also inconsistent with any other rational explanation

22. To compensate for any shortcomings which may be thought to exist in the use of circumstantial evidence, a supporting rule is that, in cases which rely upon such evidence, the court must acquit unless the facts are not only consistent with guilt but are also inconsistent with any other rational explanation.

23. The argument underlying that supporting rule is of limited thrust. The principle sought to be invoked by the argument is not independent of the principle that guilt must be proved beyond reasonable doubt, but is a consequence of the latter: if there is a rational explanation, it follows that guilt has not been proved beyond reasonable doubt.[980] The test is not merely whether guilt is consistent with the facts, but whether guilt is proved by the facts beyond reasonable doubt. The rule about there being a rational explanation is a suitable way (particularly but not only if there is a jury) of applying the general rule about reasonable doubt in some cases of

[980] *McGreevy v. DPP* [1973] 1 W.L.R. 276, HL. There are variations in other jurisdictions. See, for example, *Barca v. The Queen*, [1975] 113 CLR. 82, 104-105, *De Gruchy v. The Queen*, [2002] 211 CLR 85, para. 47, and *R v. Chapman (No 2)*, [2002] 83 S.A.S.R. 286, 291.

circumstantial evidence,[981] and it has been so employed by the Tribunal. But it does not introduce an additional or more stringent rule: it is really a corollary of the rule that guilt must be proved beyond reasonable doubt.

24. In any case, it is to be noticed that what the Trial Chamber said was that 'the Chamber has been careful to consider whether an inference reasonably open on [the evidence] was inconsistent with the guilt of the Accused'.[982] On the facts of the case as found by the Trial Chamber, there was no rational explanation other than guilt.

iii. The evidence was capable of supporting the Trial Chamber's finding that the appellant knew that the investigation was a sham

25. There is no basis on which the Trial Chamber's finding could be faulted by the Appeals Chamber, unless it be that the Appeals Chamber considers that the evidence was not capable of supporting the Trial Chamber's conclusion. But there is a caution to be observed in using that kind of argument. Such an argument can slide into non-compliance with the duty of an appellate court to defer to the trial court's assessment of the facts. There can be criticism that, instead of incurring the risk of being seen to be failing to defer to the Trial Chamber's assessment of the facts, the Appeals Chamber may hold that there is simply no evidence capable of supporting the Trial Chamber's assessment.

26. In any case, it cannot be said that there was no evidence capable of supporting the conclusion of the Trial Chamber. The Trial Chamber's conclusion was not speculative; it was based on inferences from a number of facts. In the nature of the case, these facts were not detailed, but they nevertheless sufficiently appeared. As has been argued, the fact that some leap in the proof was required was not necessarily objectionable. There might be a gap in direct proof, but legitimate inferences from circumstantial evidence could make up for it.

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[981] See *Knight v. The Queen*, [1992] 175 CLR 495, at 502, in which Mason CJ, Dawson and Toohey JJ considered the rule that the jury had to be directed that they should only find by inference an element of the crime charged if there were no other inference or inferences which were favourable to the appellant, and remarked that the rule 'is a direction which is no more than an amplification of the rule that the prosecution must prove its case beyond reasonable doubt and the question to which it draws attention – that arising from the existence of competing hypotheses or inferences – may occur in a limited way in a case which is otherwise one of direct rather than circumstantial evidence'.

[982] Trial Judgement, para. 5.

iv. Appellate deference to Trial Chamber's findings of fact

27. It is possible, theoretically, that another trier of fact will not conclude that the investigation was a sham and that the appellant knew that it was a sham. But the question is not whether the Appeals Chamber agrees with such a finding by another trier of fact. The question is a different one: can the Appeals Chamber say that the finding made by this Trial Chamber – the Trial Chamber having heard all the evidence and indeed having lived with it for some 14 months – was one which no reasonable Trial Chamber could[983] have made?

28. Barring a material error of reasoning (and I see none), how the Trial Chamber assessed the evidence was a matter for the Trial Chamber. As it was said by Brierly, 'different minds, equally competent may and often do arrive at different and equally reasonable results'.[984] Similarly, Lord Hailsham remarked that '[t]wo reasonable [persons] can perfectly reasonably come to opposite conclusions on the same set of facts without forfeiting their title to be regarded as reasonable ... Not every reasonable exercise of judgment is right, and not every mistaken exercise of judgment is unreasonable'.[985]

29. I think the Appeals Chamber is right to abide by the Trial Chamber's findings.

D. Singleness of Command

30. The appellant is right in contending that, if there were to be two investigations – one by the appellant, the other by the high command – the two investigations would conflict with the ruling concept of 'singleness of command'. The argument gives a reason for, but is materially the same as, the appellant's basic contention that, if a higher command institutes an investigation through an officer other than the commander, that circumstance operates to displace the commander's normal duty to investigate – an argument considered above. Like that argument, it also turns on the character

[983] In *Hadžihasanović*, IT-01-47-A, 22 April 2008, para. 11, the Appeals Chamber recently restated the established principle that 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 Chamber"'.
[984] Sir Hersch Lauterpacht and C.H.M.Waldock (eds.), *The Basis of Obligation in International Law and Other Papers by the Late James Leslie Brierly, 1958, p. 98. And see Tadić*, IT-94-1-A, 15 July 1999, para. 64.
[985] *In re W. (An Infant),* [1971] AC 682, HL, p. 700, per Lord Hailsham.

of the investigation. The responsibility of the appellant to punish was not displaced by any kind of investigation; it was displaced only by an investigation directed to the question of punishment. The Trial Chamber's conclusion, which in my view is unassailable, is that the Jokić investigation was not of this kind.

31. In this respect, the Trial Chamber explicitly said:

> The Chamber is not persuaded in these circumstances that it is revealed that the Accused was, or thought himself to be, excluded from acting, or that he was ordered not to take action in respect of the events of 6 December 1991. Rather, the evidence persuades the Chamber that the Accused was, at the very least by acquiescence, a participant in the arrangement by which Admiral Jokić undertook his sham investigation and sham disciplinary action, and reported to the First Secretariat in a way which deflected responsibility for the damage to the Old Town from the JNA.[986]

The circumstantial evidence was enough to support the Trial Chamber's finding that the appellant did not think that he was 'excluded from acting, or that he was ordered not to take action in respect of the events of 6 December 1991'. The fact that the appellant did not think that he was excluded from acting meant that he himself did not understand that the organisers of the investigation intended to exclude him from acting: he knew that their intention was not to interfere with the usual incidents of his command.

E. Burden of Proof

32. Finally, I am not persuaded that the Trial Chamber reversed the burden of proof as to whether the appellant sought to investigate or to act against any subordinate. In paragraph 440 of the Trial Judgement, the Trial Chamber noted that '[t]here is no suggestion in the evidence that at any time [the appellant] proposed or tried to investigate or to take any action …'. That might be argued to mean that the Trial Chamber thought that the burden was on the appellant to prove that he did not act. But it is useful to recall that the appellant's defence at trial was not that he had acted, but that any failure on his part to act was due to the investigation being conducted by Jokić. It was only fleshing out the appellant's case to make the observation which the Trial Chamber made to the effect that there was no evidence that the appellant took any action; that proposition was not alien to the strategy of the defence. The prosecution must of course prove all the elements of its case and discharge its

[986] Trial Judgement, para. 439.

burden of proof; but that does not preclude the court from making pertinent observations on the evidence in the light of the strategy of the defence – which may well press only some issues, while not agitating others. This no doubt was why the appellant did not make any argument on the particular point.

F. Conclusion

33. Circumstantial evidence cannot accomplish the impossible; but the approach to its use should be a realistic one, without being speculative. In a case of this kind, the Appeals Chamber ought to be slow to interfere with the way in which the Trial Chamber had recourse to such evidence to find that there was a sham and that the appellant knew of it. That another trier of fact may not draw the same inference is irrelevant. The inference *could* be drawn by a reasonable trier of fact. That is the test; where it is satisfied, as here, it excludes interference by the Appeals Chamber. I respectfully support its judgement.

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

_____

Mohamed Shahabuddeen

Dated this seventeenth day of July 2008,
At The Hague, The Netherlands.

[**Seal of the Tribunal**]

XI. JOINT DISSENTING OPINION OF JUDGE MERON AND JUDGE KWON

1. We respectfully dissent from the majority regarding its finding as to Strugar's responsibility for the events of 6 December 1991 under Article 7(3) of the Statute. We cannot agree with the majority's decision to uphold the Trial Chamber's finding that Strugar did not fulfil his duty to take measures to punish those responsible for the unlawful shelling of the Old Town on 6 December 1991.

2. The Trial Chamber found that Joki} proposed that he carry out an investigation of the shelling of the Old Town and that Kadijević implicitly accepted this suggestion, and that the former reported back to the latter on the results of the investigation and the disciplinary measures to follow.[987] We note that the Trial Chamber also found that Strugar, "as Admiral Joki}'s immediate superior, remained undisturbed and unrestrained in his power and authority to require more to be done by the Admiral, or to act directly himself, had he so chosen."[988]

A. Singleness of Command

3. We are of the opinion that Kadijevi}'s order, albeit an implicit one, that Joki} should investigate the events of 6 December 1991 prevented Strugar in both a *de jure* and *de facto* sense from conducting his own parallel investigation. We note in this regard that the oral submissions made by the Prosecution on Appeal that an officer retains his obligation to investigate even where that officer's superior has ordered that officer's subordinate to conduct a legitimate investigation[989] is unacceptable.

4. The principle of singleness of command, adopted as one of the basic principles of command and control within the JNA[990] creates a single, direct

[987] Trial Judgement, paras 173-174.
[988] Trial Judgement, para. 443.
[989] Appeals Hearing, T. 138: "… the position of the Prosecution is that the commander of an army has always, subject to the idea that there is command responsibility, always has the obligation to punish if he is informed or is aware of the crimes that have been committed. The fact that an investigation is ordered by a superior to a subordinate of the commander in question does not relieve the superior (*sic*) of the obligation. That is the principle at hand."
[990] Exhibit P194, "The Law on All People's defence of the JNA", Exhibit P193, "Command and Control of the Armed Forces", Exhibit P204, "Revised Expert Report of Milan Zorc".

channel through which orders will be formulated, received and carried out.[991] It follows that where an officer's competent superior orders an investigation, any attempt by that officer to interfere with or undermine the order by carrying out a parallel investigation would not be tolerated. The fact that Strugar might have become the subject of an investigation actually strengthens the notion that he should not have interfered with any investigation ordered by his superior. Under such circumstances, it would have been especially inappropriate for Strugar to have become involved. Given the singleness of command doctrine, we do not consider it necessary and reasonable in this case to say that Strugar was obliged to conduct an investigation parallel to the one ordered by the JNA Supreme Command, i.e., Kadijevi}.

5. In order to find Strugar guilty under Article 7(3) for failure to punish his subordinates for the unlawful shelling of Old Town, despite Kadijevi}'s order, it must be established that the following situation exists, which the prosecution must prove beyond a reasonable doubt:

(i) the investigation ordered by Kadijevi} was a sham;

(ii) Strugar knew that the investigation was a sham; and

(iii) Strugar was complicit, with Kadijevi} and Joki}, in conducting a sham investigation.

B. The Burden of Proof

6. The Trial Chamber states:

> "In the Chamber's finding, the facts do not provide a foundation for these submissions. *What is submitted is not the legal effect of what occurred, nor, in the Chamber's finding, is there the factual basis in the evidence for any suggestion that the Accused believed this to be the case in 1991. The Chamber is not persuaded in these circumstances that it is revealed that the Accused was, or thought himself to be, excluded from acting, or that he was ordered not to take action in respect of the events of 6 December 1991.* Rather, the evidence persuades the Chamber that the Accused was, at the very least by acquiescence, a participant in the arrangement by which Admiral Joki} undertook his sham investigation and sham disciplinary action, and reported to the First Secretariat in a way which deflected responsibility for the damage to the Old Town from the JNA.
>
> The Accused was present throughout the meeting in Belgrade with General Kadijevi}. It is the evidence that the General was equally critical of both the Accused and Admiral Joki}. *It is not suggested by the evidence that the Accused objected or resisted in any way at the meeting, or later, to the*

[991] Exhibit P204, "Revised Expert Report of Milan Zorc", p. 4.

> *proposal of Admiral Joki} that he should investigate, or to General Kadijevi}'s apparent acceptance of that. There is no suggestion in the evidence that at any time he proposed or tried to investigate or to take any action against any subordinate for the shelling of the Old Town, or that he was prevented from doing so by General Kadijevi} or any other authority*."[992]

7. The Trial Chamber has chosen to focus on the absence of proof that Kadijevi}'s order for Joki} to investigate effectively prevented Strugar from conducting a parallel investigation. We consider this to be an inappropriate reversal of the burden of proof. The burden of proof rests squarely with the Prosecution to prove Strugar's guilt beyond a reasonable doubt. As noted above, in order to prove Strugar's guilt, the prosecution must show that Strugar was both aware of the sham nature of the investigation ordered by Kadijevi} and part of the conspiracy with Kadijevi} and Joki} to conduct the sham investigation. We consider that the Trial Chamber erred by focusing on the absence of evidence that Strugar was prevented from conducting a parallel investigation, as this constitutes a reversal of the burden of proof.

C. The Finding of the Trial Chamber Is Insufficient to Prove That Strugar Knew That the Investigation Was a Sham

8. Assuming that the investigation conducted by Jokić was a sham, the Prosecution still had the burden of proving both Strugar's knowledge of the sham and his complicity in it. We turn first to the question of knowledge.

9. We note the Trial Chamber's finding that Strugar was:

> "prepared to accept a situation in which he would not become directly involved, leaving all effective investigation, action and decisions concerning disciplinary or other adverse action to his immediate subordinate, Admiral Joki}, whose task effectively was known to ŦStrugarğ to be to smooth over the events of 6 December 1991 as best he could with both the Croatian and ECMM interests, while providing a basis on which it could be maintained by the JNA that it had taken appropriate measures."[993]

10. This finding does not go far enough to prove Strugar's guilt, as it makes no mention of Strugar's knowledge that Kadijevi} ordered Joki} to conduct a sham investigation.

11. The finding of the Trial Chamber that Strugar "effectively" knew that Joki}'s investigation was meant "to smooth over the events of 6 December

[992] Trial Judgement, paras 439-440 (footnotes omitted, emphasis added).
[993] Trial Judgement, para. 442. We note that this paragraph of the Trial Judgement is not referenced.

1991 as best he could" and to "provide a basis on which it could be maintained by the JNA that it had taken appropriate measures"[994] does not, in our opinion, equate to knowledge that the investigation was intended to be a public relations exercise through which no disciplinary action would be taken. Indeed, a totally legitimate investigation could just as easily smooth things over for the JNA in the eyes of the international community.

D. There Is No Evidence to Prove That Strugar Knew That the Investigation Was a Sham

12. The majority notes a number of the Trial Chamber's findings which, in their opinion, support the conclusion of the Trial Chamber.[995] What we consider to be missing from the Trial Chamber's judgement is a finding that Strugar was aware that the investigation, which Kadijevi} ordered Joki} to undertake, was a sham. Indeed, we are of the opinion that there was no evidence before the Trial Chamber to support such a finding beyond reasonable doubt.[996]

13. We note that the majority, when reaching its conclusion, cites directly from a portion of Joki}'s testimony in which Joki} states, *inter alia*, that he and Strugar discussed the "official version of events" regarding 6 December 1991.[997] However, we note that the Trial Chamber was very careful to select the parts of Joki}'s testimony on which it relied, and cast serious doubt on the credibility of a number of other aspects of Jokic's testimony.[998] The Trial Chamber did not use the above portion of Joki}'s testimony. Furthermore, the Trial Chamber went on to describe this part of Joki}'s testimony as "surprising indeed".[999] For this reason, we do not consider this portion of Joki}'s testimony to be appropriate evidence for the Appeals Chamber to rely upon.

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[994] Trial Judgement, para. 442.
[995] Trial Judgement, paras 172-173, 440-443, quoted *supra* paras 231 and 234.
[996] Further, we find no evidence in the Trial Chamber's judgement that Strugar was made aware of Joki}'s report detailing the damage done to the Old Town of Dubrovnik. In order to oblige Strugar to conduct his own investigation parallel to Joki}'s, he must have been alerted to the extent of the damage done to the Old Town.
[997] T. 4116-4117, quoted by the majority at para. 235.
[998] Trial Judgement, paras 146, 152-154, 160, 423 and 425.
[999] Trial Judgement, para. 437.

E. Strugar's Complicity in the Sham Investigation

14. Furthermore, we also note that there is a paucity of evidence indicating that Strugar was complicit in the sham investigation.

15. The most that the Trial Chamber said about this issue is:

> "The Accused was present throughout the meeting in Belgrade with General Kadijević. It is the evidence that the General was equally critical of both the Accused and Admiral Joki}. It is not suggested by the evidence that the Accused objected or resisted in any way at the meeting, or later, to the proposal of Admiral Jokić that he should investigate, or to General Kadijević's apparent acceptance of that."[1000]

16. Strugar's mere presence at the meeting in Belgrade does not establish any complicity on his part because there is no evidence that Strugar believed the meeting to be other than in good faith. To the extent that Strugar believed that Kadijević (a) had insisted on a thorough investigation and (b) designated Jokić to undertake the investigation, the fact that the three individuals met together in Belgrade bears no indicia of a conspiracy.

17. Furthermore, any information that Strugar might have acquired after the meeting regarding the sham nature of the investigation likewise would be incapable of establishing Strugar's complicity. As elucidated above, the principle of singleness of command means that once Strugar reasonably believed that Kadijević had designated Jokić to conduct the investigation, Strugar lacked the material ability to intervene.

18. We note the majority's reliance on the Trial Chamber's finding that Strugar "invited Captain Kova~evi} to nominate outstanding participants in the events of 6 December 1991".[1001] We do not consider this to be evidence of Strugar's complicity in the sham investigation. Strugar's interest in recognising exemplary conduct on 6 December 1991 does not equate to evidence that he was also intent on allowing impunity for illegal conduct.

19. For the foregoing reasons, the Trial Chamber failed to establish that Strugar's actions or inactions constituted "acquiescence"[1002] (*i.e.*, complicity) in the sham investigation.

[1000] Trial Judgement, para. 440 (footnotes omitted).
[1001] *Supra,* para. 234, quoting Trial Judgement, para. 441.
[1002] *See* Trial Judgement, para. 439.

F. Conclusion

20. In our opinion, the evidence marshalled by the Trial Chamber fails to establish that Strugar had knowledge of the sham nature of the investigation ordered by Kadijević or, in the alternative, that Strugar was complicit in the sham investigation. Consequently, we maintain that no reasonable trier of fact could have concluded beyond reasonable doubt that Strugar had failed in his duty to punish his subordinates for the crimes committed by them.

21. Accordingly, we would grant Strugar's sub-ground of appeal and reverse his conviction for failure to punish the perpetrators of the unlawful shelling of the Old Town.[1003]

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

Theodor Meron
Judge

O-Gon Kwon
Judge

Dated this seventeenth day of July 2008,

At The Hague, The Netherlands

[**Seal of the Tribunal**]

[1003] Trial Judgement, para. 446.

XII. ANNEX A – PROCEDURAL HISTORY

A. Trial Proceedings

1. An initial indictment against Strugar and three other accused was confirmed on 27 February 2001.[1004] The Appellant surrendered voluntarily to the custody of the Tribunal on 4 October 2001 and was transferred to the United Nations Detention Unit in The Hague on 21 October 2001. At his initial appearance on 25 October 2001 he pleaded not guilty to all counts in the initial indictment. The initial indictment was twice amended[1005] and culminated in the Third Amended Indictment filed on 10 December 2003 ("Indictment").[1006]

2. The trial proceedings against Strugar began on 16 December 2003 before a bench of Trial Chamber II, composed of Judge Kevin Parker, presiding, Judge Krister Thelin and Judge Christine Van Den Wyngaert. The Chamber sat for 100 trial days. The Prosecution called a total of 19 *viva voce* witnesses, among them three experts, and tendered two witness statements into evidence pursuant to Rule 92 *bis* (C) of the Rules. The Defence also called 19 *viva voce* witnesses, among them two experts. The Trial Chamber admitted 292 Prosecution exhibits and 119 Defence exhibits. The Final Trial Briefs were filed on 30 August 2004 by the Prosecution and on 3 September 2004 by the Defence. Closing arguments were heard on 8 and 9 September 2004.

3. The Trial Judgement was rendered on 31 January 2005. The Trial Chamber found Strugar guilty pursuant to Article 7(3) of the Statute of Count 3 (attacks on civilians) and of Count 6 (destruction or wilful damage done to institutions dedicated to religion, charity and education, the arts and sciences, historic monuments and works of art and science), both constituting violations

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[1004] *Prosecutor v. Pavle Strugar, Miodrag Jokić, Milan Zec and Vladimir Kovačević*, Case No. IT-01-42-I, Order on Review of the Indictment pursuant to Article 19 of the Statute and Order for Limited Disclosure, 27 February 2001. The initial indictment included charges against Jokić, Zec and Kovačević. The charges against Zec were withdrawn on 26 July 2002 (*Prosecutor v. Milan Zec*, Case No. IT-01-42-I, Order Authorising the Withdrawal of the Charges against Milan Zec without Prejudice, 26 July 2002) while the proceedings against Jokić were separated on 17 September 2003 (*Prosecutor v. Pavle Strugar*, Case No. IT-01-42-PT, Order for Separation, 17 September 2003) and those against Kovačević were separated on 26 November 2003 (*Prosecutor v. Pavle Strugar and Vladimir Kovačević*, Case No. IT-01-42-PT, Decision on the Prosecutor's Motion for Separate Trial and Order to Schedule a Pre-Trial Conference and the Start of the Trial against Pavle Strugar, 26 November 2003).

[1005] The initial indictment was first amended on 26 July 2002 and further amended on 31 March 2003.

[1006] Third Amended Indictment, 10 December 2003.

of the laws or customs of war, under Article 3 of the Statute.[1007] The Trial Chamber imposed a single sentence of eight years' imprisonment.[1008]

B. Appeal Proceedings

1. Notices of Appeal

4. On 18 February 2005, Strugar filed a request for extension of time in which to file his Notice of Appeal pursuant to Rule 108 of the Rules in order for him to receive the translation of the Trial Judgement in his own language.[1009] On 1 March 2005, the then Pre-Appeal Judge denied his request and directed the Registrar to inform the Appeals Chamber about the day on which the translation of the Trial Judgement would be served on the Accused in his language.[1010]

5. On 2 March 2005, in accordance with Article 25 of the Statute and Rule 108 of the Rules, Strugar filed his Notice of Appeal against the Trial Judgement.[1011] The Prosecution filed its Notice of Appeal on the same day.[1012]

2. Initial Composition of the Appeals Chamber

6. On 28 February 2005, Judge Fausto Pocar, at the time Acting President of the Tribunal, designated the following Judges to form the Appeals Chamber's Bench hearing the case: Judge Fausto Pocar, Judge Theodor Meron, Judge Florence Mumba, Judge Mehmet Güney and Judge Wolfgang Schomburg. Judge Wolfgang Schomburg was designated to serve as Pre-Appeal Judge.[1013] On 18 November 2005, Judge Andrésia Vaz was assigned to the Bench to replace Judge Florence Mumba.[1014]

[1007] Trial Judgement, para. 478.
[1008] *Ibid.*, para. 481.
[1009] Defence Request for Variation of Time Limit to File Notice of Appeal, 18 February 2005.
[1010] Decision on Request for Extension of Time, 1 March 2005.
[1011] Defence Notice of Appeal, 2 March 2005.
[1012] Prosecution's Notice of Appeal, 2 March 2005.
[1013] Order Assigning Judges to a Case Before the Appeals Chamber and Appointing a Pre-Appeal Judge, 28 February 2005.
[1014] Order Replacing a Judge in a Case Before the Appeals Chamber, 18 November 2005.

3. Appeal Briefs

(a) Prosecution's Appeal

7. On 31 May 2005, Strugar requested an extension of time for the filing of his Respondent's Brief which was due on 27 June 2005.[1015] The Prosecution opposed this request.[1016] The Appeals Chamber dismissed it on 13 June 2005 considering, among other things, that the translation of the Trial Judgement in Strugar's language was filed on 13 June 2005.[1017] Following the dismissal of his request, Strugar filed his Respondent's Brief on 27 June 2005.[1018]

8. On 12 July 2005 the Prosecution filed its Reply Brief.[1019]

(b) Strugar's Appeal

9. On 25 April 2005, Strugar filed a request for an extension of time to file his Appeal Brief on 20 July 2005, or 60 days after the filing of the translation of the Trial Judgement in his language.[1020] The Prosecution did not object to Strugar being afforded a reasonable period of time following the receipt of the translation of the Trial Judgement to file his Appeal Brief. It submitted, however, that Strugar had failed to demonstrate that the extension of time by 60 days was justified in the circumstances of this case.[1021] On 9 May 2005, the Appeals Chamber granted Strugar's request in part and ordered him to file his Appeal Brief not later than 25 days after the filing of the translation of the Trial Judgement in his language.[1022] Strugar filed his Appeal Brief on 8 July 2005.[1023]

[1015] Defence Request for Variation of Time Limit to File Response to Prosecution's Appeal Brief, 31 May 2005.
[1016] Prosecution Response to Defence Request for Variation of Time Limit to File Response to Prosecution's Appeal Brief, 2 June 2005.
[1017] Decision on Defence Request for Variation of Time Limit to File Response to Prosecution's Appeal Brief, 13 June 2005.
[1018] Defence Response Brief, 27 June 2005 (filed confidentially and rendered public by oral order following the Status Conference of 30 June 2005).
[1019] Prosecution Brief in Reply, 12 July 2005.
[1020] Defence Request for Variation of Time Limit to File Appellants Brief, 25 April 2005.
[1021] Prosecution Response to Defence Request for Variation of Time Limit to File Appellant's Brief, 27 April 2005.
[1022] Decision on Defence Request for Extension of Time, 9 May 2005.
[1023] Defence Appeal Brief, 8 July 2005. In his Appeal Brief, Strugar sought to withdraw all alleged errors of fact and law presented in his Notice of Appeal not presented in his Appeal Brief (Appeal Brief, fn. 3). The withdrawal of these errors was confirmed by the Pre-Appeal Judge during the Status Conference of 6 September 2006 (T.22-23).

10. On 17 August 2005, the Prosecution filed its Respondent's Brief.[1024] On 1 September 2005, Strugar filed his Reply Brief.[1025]

4. Strugar's Requests for the Provision of Medical Aid and Provisional Release

11. On 14 November 2005, Strugar filed a request for provisional release to enable him to undergo surgery for a total hip prosthesis implantation in the Republic of Montenegro.[1026] The Prosecution did not oppose Strugar's request.[1027] On 23 November 2005, Strugar replied to the Prosecution's Response and submitted that the duration of his medical treatment should be credited as time spent in custody, regardless of where the treatment was to be performed.[1028] On 28 November 2005, the Prosecution sought leave to file a further response to Strugar's request. The Prosecution underlined its position in favour of the provisional release, emphasising however that convicted persons are not considered to be serving their sentence while on provisional release.[1029] On 30 November 2005, Strugar responded to the Prosecution's further response.[1030] On 8 December 2005, the Appeals Chamber denied Strugar's request for provisional release under detention conditions, having found that Strugar had not demonstrated that the medical aid of which he was in need could not be adequately provided to him in health institutions in The Netherlands.[1031]

12. On 12 December 2005, Strugar filed a further motion for provisional release for medical aid without asking that the time spent on provisional release be credited as time spent in custody.[1032] The Prosecution did not oppose this request in light of the special humanitarian aspects pertaining to

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[1024] Prosecution Brief in Response, 17 August 2005.
[1025] Defence Brief in Reply, 1 September 2005.
[1026] Request for Providing Medical Aid in the Republic of Montenegro in Detention Conditions, 14 November 2005 ("First Motion").
[1027] Prosecution Response to Defence Motion for Provisional Release, 21 November 2005.
[1028] Defence Reply: Prosecution Response to Defence Motion for Provisional Release, 23 November 2005.
[1029] Prosecution Request to File a Further Response and the Further Response, 28 November 2005 (confidential). The public redacted version of the request was filed on 29 November 2005.
[1030] Defence Further Reply to Prosecution Request to File a Further Response and Further Response, 30 November 2005.
[1031] Decision on "Defence Motion: Request for Providing Medical Aid in the Republic of Montenegro in Detention Conditions", 8 December 2005.
[1032] Defence Request for Provisional Release for Providing Medical Aid in the Republic of Montenegro, 12 December 2005.

Strugar's medical condition.[1033] On 16 December 2005, the Appeals Chamber granted Strugar provisional release for a period of no longer than four months.[1034]

5. Withdrawal of the Appeals

13. In three meetings pursuant to Rules *65 ter* (I) and 107 of the Rules as well as during the status conferences on 12 December 2005 and 31 August 2006, the then Pre-Appeal Judge, Counsel for Strugar and the Prosecution discussed issues related to Strugar's health, the possibility of serving his sentence in Montenegro, and the issue of whether the parties might withdraw their appeals.[1035] On 15 September 2006, both parties filed withdrawals of their appeals,[1036] noting *inter alia* the "humanitarian circumstances" in relation to Strugar's age and health.[1037] On 20 September 2006, the Appeals Chamber accepted the withdrawal of the appeals and declared the appellate proceedings closed.[1038]

6. Request for Early Release

14. On 26 March 2007, Strugar requested the President of the Tribunal ("President") to grant him early release.[1039] The President denied the request on 26 June 2007.[1040]

[1033] Prosecution Response to Defence Request for Provisional Release for Providing Aid in the Republic of Montenegro, 13 December 2005.
[1034] Decision on "Defence Motion: Defence Request for Provisional Release for Providing Medical Aid in the Republic of Montenegro", 16 December 2005. On 12 January 2006, the Appeals Chamber filed the Corrigendum to "Decision on 'Defence Motion: Defence Request for Provisional Release for Providing Medical Aid in the Republic of Montenegro'".
[1035] The meetings pursuant to Rules 65*ter*(I) and 107 of the Rules took place on 11 October 2005, 30 March 2006 and 11 May 2006. For a more detailed overview of the events leading to the withdrawal of the parties' appeals, see Decision on Strugar's Request to Reopen Appeal Proceedings, 7 June 2007.
[1036] Defence Notice of Withdrawing Appeal, 15 September 2006 ("Defence Withdrawal"); Withdrawal of Prosecution's Appeal against the Judgement of Trial Chamber II dated 31 January 2005, 15 September 2006 ("Prosecution Withdrawal").
[1037] Defence Withdrawal, paras 9, 12; Prosecution Withdrawal, para. 2.
[1038] Final Decision on "Defence Motion of Withdrawing Appeal" and "Withdrawal of Prosecution's Appeal against the Judgement of Trial Chamber II dated 31 January 2005", 20 September 2005 ("Decision Accepting Withdrawals").
[1039] Defence Request Seeking Early Release, 26 March 2007. See also Confidential Defence Submission, 10 May 2007 (confidential), and Prosecution Notice Concerning Defence Submission to the President, Dated 10 May 2007, 17 May 2007 (confidential).
[1040] Decision of the President on Pavle Strugar's Request for Early Release, 26 June 2007 (confidential).

7. Reopening of the Appeals

15. On 15 March 2007, Counsel for Strugar received a letter from the Registry stating that Strugar could not serve his sentence in Montenegro.[1041] Subsequently, Strugar submitted that his withdrawal was not an informed one as he did not know of the existing legal impediment that prevented him from serving the remainder of his sentence in Montenegro. Strugar thus sought the revocation of the Decision Accepting Withdrawals.[1042]

16. Pending the Appeals Chamber's decision on his request for reopening of the appeals, Strugar filed a series of requests for providing medical aid and postponement of the decision on reopening.[1043] Considering that, at that stage, there was no live appeal in this case, the Appeals Chamber denied the requests for medical aid on the grounds of lack of jurisdiction and the request for postponement on the merits, without prejudice to Strugar's right to file a motion for provisional release should the Appeals Chamber reopen the appeals.[1044]

17. On 7 June 2007, the Appeals Chamber granted, by majority, Judge Schomburg dissenting, Strugar's request for reopening of the proceedings. The Appeals Chamber found that the withdrawal of Strugar's appeal had not been informed, holding that the withdrawal of his appeal was based upon a misunderstanding of the options legally available in his situation. As a result, the Appeals Chamber reconsidered its Decision Accepting Withdrawals and reopened the appeals of both parties in order to avoid a miscarriage of justice.[1045]

8. New Composition of the Appeals Chamber

18. On 30 March 2007, the President assigned the following Judges to the present case, noting that Strugar had filed his request seeking the reopening of

[1041] Letter from Hans Holthuis, Registrar, to Goran Radić, Counsel for Strugar, 15 March 2007 ("Letter of 15 March 2007") (provided as Annex 8 to the Defence Request).
[1042] Defence Request Seeking the Re-Opening of Appeal Proceedings Before the Appeals Chamber, 26 March 2007 (confidential).
[1043] Defence Request for Providing Medical Aid, 10 May 2007 (confidential); Defence Request Seeking the Postponement of the Decision to the "Confidential Defence Request Seeking the Re-Opening of Appeal Proceedings before the Appeals Chamber", 10 May 2007 (confidential), Confidential Addendum, 14 May 2007.
[1044] Decision on Strugar's Requests Filed 10 May 2007, 23 May 2007 (confidential).
[1045] Decision on Strugar's Request to Reopen Appeal Proceedings, 7 June 2007, paras 29-31.

the appeal proceedings: Judge Mohamed Shahabuddeen, Judge Mehmet Güney, Judge Andrésia Vaz, Judge Theodor Meron and Judge Wolfgang Schomburg.[1046] Following the Appeals Chamber's decision on the reopening of Strugar's appeal and the Prosecution's appeal against the Trial Judgement on 7 June 2007,[1047] the President ordered that the same bench should hear the appeals of the parties.[1048] Following the election of Judge Andrésia Vaz as Presiding Judge in this case pursuant to Rule 22(B) of the Rules, she appointed herself as Pre-Appeal Judge.[1049] Finally, pursuant to the President's Order of 21 February 2008, Judge Wolfgang Schomburg was replaced by Judge O-Gon Kwon.[1050]

9. Additional Submissions by the Parties

19. On 23 August 2007, the Appeals Chamber *proprio motu* invited the parties to update by means of *addenda* their submissions on the merits of their appeals in light of the jurisprudence of the Tribunal, which has developed since the Decision Accepting Withdrawals, no later than 7 September 2007.[1051] Strugar requested an extension of time for the filing of such *addendum*.[1052] The Prosecution did not oppose this request.[1053] On 31 August 2007, the Pre-Appeal Judge granted the extension of time and ordered the parties to file their *addenda* no later than 30 September 2007.[1054] The Prosecution filed such an *addendum* on 1 October 2007.[1055] On 3 October 2007,[1056] the Pre-Appeal Judge dismissed Strugar's request for a further extension of time for the filing of the *addendum*, if any.[1057]

[1046] Order Assigning Judges to a Case Before the Appeals Chamber, 30 March 2007.
[1047] Decision on Strugar's Request to Reopen Appeal Proceedings, 7 June 2007.
[1048] Order Assigning Judges to a Case Before the Appeals Chamber, 5 July 2007.
[1049] Order Appointing the Pre-Appeal Judge, 13 July 2007.
[1050] Order Replacing a Judge in a Case Before the Appeals Chamber, 21 February 2008.
[1051] Order Regarding Briefings on Appeal, 23 August 2007, p. 2.
[1052] Defence Request Seeking Extension of Time in Respect to Complying with the Appeal Chamber's "Order Regarding Briefings in Appeal, 29 August 2007.
[1053] Prosecution Response to Motion for Extension of Time, 29 August 2007.
[1054] Decision on "Defence Request Seeking Extension of Time in Respect to Complying with the Appeal Chamber's 'Order Regarding Briefings in Appeal'", 31 August 2007.
[1055] Prosecution's Addendum on Recent Case-Law pursuant to Order of 23 August 2007, 1 October 2007.
[1056] Decision on "Second Defence Request Seeking Extension of Time in Respect to Complying with the Appeal Chamber's 'Order Regarding Briefing on Appeal'", 3 October 2007.
[1057] Defence Second Request Seeking Extension of Time in Respect to Complying with the Appeal Chamber's 'Order Regarding Briefings on Appeal'", 1 October 2008.

10. Status Conferences

20. Prior to the withdrawal of the appeals, Status Conferences in accordance with Rule 65 *bis* of the Rules were held on 30 June 2005, 6 September 2005, 12 December 2005 and 31 August 2006. Following the reopening of the Appeals, Status Conferences in accordance with Rule 65 *bis* of the Rules were held on 1 October 2007 and 1 February 2008.

11. Appeals Hearing

21. Pursuant to the Appeals Chamber's Order of 29 January 2008,[1058] the oral arguments of the parties were heard on 23 April 2008.

12. Provisional Release after Reopening of the Appeals

22. On 2 April 2008, the Appeals Chamber dismissed Strugar's request for provisional release[1059] on the ground that he had not shown the existence of special circumstances within the meaning of Rule 65(I)(iii) of the Rules.[1060] On 15 April 2008, the Appeals Chamber granted in part Strugar's renewed request for provisional release,[1061] as it was satisfied that "acute justification for the purposes of determining whether the special circumstances envisaged by Rule 65(I)(iii) of the Rules" existed and that all the other requirements of Rule 65(I) were met.[1062] Strugar was on provisional release between 17 and 21 April 2008.[1063]

[1058] Scheduling Order for Appeals Hearing, 29 January 2008.
[1059] Defence Request Seeking Provisional Release on the Grounds of Compassion with Confidential Annexes, 18 March 2008 (confidential).
[1060] Decision on Defence Request Seeking Provisional Release on the Grounds of Compassion, 2 April 2008 (public redacted version).
[1061] Renewed Defence Request Seeking Provisional Release on the Grounds of Compassion with Confidential Annexes, 9 April 2008 (confidential).
[1062] Decision on the Renewed Defence Request Seeking Provisional Release on Compassionate Grounds, 15 April 2008 (public redacted version).
[1063] Report of the Embassy of the Republic of Serbia, 6 May 2008 (confidential).

XIII. ANNEX B – GLOSSARY OF TERMS

A. Jurisprudence

1. International Tribunal

ALEKSOVSKI Zlatko

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

BABIĆ Milan

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

BLAGOJEVI] Vidoje and JOKI] Dragan

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

BLA[KI] Tihomir

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 Radoslav

Prosecutor v. Radoslav Brđanin, Case No IT-99-36-T, Decision on Prosecution's Submission of Statement of Expert Witness Ewan Brown, 3 June 2003

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. Žejnil Delalić et al., Case No. IT-96-21-T, Order on the Prosecution's Request for a Formal Finding of the Trial Chamber that the Accused Landžo Is Fit to Stand Trial, 23 June 1997 ("*Landžo* Decision")

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")

Prosecutor v. Zdravko Mucić, Hazim Delić and Esad Landžo, Case No. IT-96-21-A*bis*, Judgement on Sentence Appeal, 8 April 2003 ("*Čelebići* Judgement on Sentence Appeal")

FURUNDŽIJA Anto

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

GALIĆ Stanislav

Prosecutor v. Stanislav Galić, Case No. IT-98-29-T, Judgement and Opinion, 5 December 2003 ("*Galić* Trial Judgement")

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

HADŽIHASANOVI] Enver and KUBURA Amir

Prosecutor v. Enver Hadžihasanovi}, Mehmed Alagi} and Amir Kubura, Case No. IT-01-47-AR72, Decision on Interlocutory Appeal Challenging Jurisdiction in relation to Command Responsibility, 16 July 2003 ("*Hadžihasanovi}* Appeal Decision on Jurisdiction")

Prosecutor v. Enver Hadžihasanovi} and Amir Kubura, Case No. IT-01-47-T, Judgement, 15 March 2006 ("*Hadžihasanovi} and Kubura* Trial Judgement")

Prosecutor v. Enver Hadžihasanovi} and Amir Kubura, Case No. IT-01-47-A, Judgement, 22 April 2008 ("*Hadžihasanovi} and Kubura* Appeal Judgement")

HALILOVI] Sefer

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

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

JELISIĆ Goran

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

JOKIĆ Miodrag

Prosecutor v. Miodrag Jokić, Case No. IT-01-42/1-S, Sentencing Judgement, 18 March 2004 ("*Jokić* Sentencing Judgement")

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

KORDIĆ Dario and ČERKEZ Mario

Prosecutor v. Dario Kordić and Mario Čerkez, Case No. IT-95-14/2-T, Judgement, 26 February 2001 ("*Kordić and Čerkez* Trial Judgement")

Prosecutor v. Dario Kordić and Mario Čerkez, Case No. IT-95-14/2-A, Judgement, 17 December 2004 ("*Kordić and Čerkez* Appeal Judgement")

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

KOVAĆEVIĆ Vladimir

Prosecutor v. Vladimir Kovačević, Case No. IT-01-42/2-I, Public Version of the Decision on Accused's Fitness to Enter a Plea and Stand Trial, 12 April 2006

KRAJIŠNIK Momčilo

Prosecutor v. Momčilo Krajišnik, Case No. IT-00-39-T, Judgement, 27 September 2006 ("*Krajišnik* Trial Judgement")

KRNOJELAC Milorad

Prosecutor v. Milorad Krnojelac, Case No. IT-97-25-T, Judgment, 15 March 2002 ("*Krnojelac* Trial Judgement")

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

KRSTI] Radislav

Prosecutor v. Radislav Krstić, Case No. IT-98-33-A, Judgement, 19 April 2004 ("*Krstić* Appeal Judgement")

KUNARAC et al.

Prosecutor v. Dragoljub Kunarac, Radomir Kovač and Zoran Vuković, Case No. IT-96-23 & IT-96-23/1-T, Judgement, 22 February 2001 ("*Kunarac et al.* Trial Judgement")

Prosecutor v. Dragoljub Kunarac, Radomir Kovač and Zoran Vuković, Case No. IT-96-23 & IT-96-23/1-A, Judgement, 12 June 2002 ("*Kunarac et al.* Appeal Judgement")

KUPREŠKIĆ et al.

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

KVOČKA et al.

Prosecutor v. Miroslav Kvočka, Milojica Kos, Mlado Radić, Zoran Žigić and Dragoljub Prcać, Case No. IT-98-30/1-T, Judgement, 2 November 2001 ("*Kvočka et al.* Trial Judgement")

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

LIMAJ et al.

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

MARTIĆ Milan

Prosecutor v. Milan Marti}, Case No. IT-95-11-AR73.2, Decision on Appeal Against the Trial Chamber's Decision on the Evidence of Witness Milan Babi}, 14 September 2006

Prosecutor v. Milan Martić, Case No IT-95-11-T, Decision on Defence's Submission of the Expert Report of Professor Smilja Avramov pursuant to Rule 94 *bis*, 9 November 2006

MILOŠEVĆ Dragomir

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Kesavarajah v. R [1994], 181 CLR 230, High Court of Australia

R. v. Allen [1993] WL 1470490 (VCCA), 66 A Crim R 376

R. v. Bradley (No 2) [1986] 85 FLR 111

R. v. Masin [1970] VR 379

R. v. Presser [1958] VR 45

(b) Austria

Supreme Court, Decision No. 13Os45/77 (13Os46/77, 13Os52/77), 22 April 1977, *EvBl* 1977/254

(c) Belgium

Arrêt of 20 February 1992, *Nº de rôle 9423*, *Pasicrisie belge* 1992(0000I)

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(e) Canada

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(f) Germany

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(g) India

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(h) Japan

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(i) Korea

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(k) Russian Federation

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(l) Serbia

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(m) United Kingdom

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(n) United States of America

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Drope v. Missouri, 420 U.S. 162 (1975)

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Wilson v. United States, 391 F.2d 460 (1968)

8. Other Documents

(a) United Nations Documents

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UNGA Resolution 2675 (XXV), Basic Principles for the Protection of Civilian Populations in Armed Conflicts, 9 December 1970

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(b) International Treaties

Convention Relative to certain Restrictions with regards to the Exercise of the Right of Capture in Naval War, 18 October 1907

Convention on Maritime Neutrality, 135 L.N.T.S. 187, 20 February 1928

9. Doctrine

Phillip L. Weiner, "Fitness Hearings in War Crimes Cases: From Nuremberg to The Hague", *Boston College International & Comparative Law Review*, Vol. 30 (2007)

B. List of Designated Terms and Abbreviations

2 OG	Second Operational Group
3/472 mtbr	Third Battalion of the 472nd Motorised Brigade
3/5 mtbr	Third Battalion of the 5th Motorised Brigade
107 OAG	107th Coastal Artillery Group
9 VPS	Ninth Military Naval Sector
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), Geneva, 8 June 1977
Additional Protocol II	Protocol Additional to the Geneva Conventions of 12 August 1949, and Relating to the Protection of Victims of Non-International Armed Conflicts (Protocol II), Geneva, 8 June 1977
Appeals Hearing	Public hearing of the Appeals held on 23 April 2008
AT.	Transcript of the Appeals Hearing
BCS	Bosnian Croatian Serbian language
Blum *et al.* Report	Exhibit P185: *Prosecutor v. Pavle Strugar,* Case No. IT-01-42-T, Prosecution's Submission of Medical Report, 22 March 2004 (confidential)
Čelebići test	Law applicable on cumulative convictions

Commentary AP	See ICRC Commentary
Commentary GC III/IV	Commentary to Geneva Convention III/IV, Geneva (1960/1958)
Common Article 3	Article 3 of Geneva Conventions
Croatia	Republic of Croatia
Defence	Counsel for the Accused
Defence Appeal Brief	*Prosecutor v. Pavle Strugar*, Case No. IT-01-42-A, Defence Appeal Brief, 8 June 2005
Defence Notice of Appeal	*Prosecutor v. Pavle Strugar*, Case No. IT-01-42-A, Defence Notice of Appeal, 2 March 2005
Defence Respondent's Brief	*Prosecutor v. Pavle Strugar*, Case No. IT-01-42-A, Defence Response Brief, 27 June 2005
Defence Reply Brief	*Prosecutor v. Pavle Strugar*, Case No. IT-01-42-A, Defence Brief in Reply, 1 September 2005
Decision of 26 May 2004	*Prosecutor v. Pavle Strugar,* Case No. IT-01-42-T, Decision re Strugar Motion to Terminate Proceedings, 26 May 2004
ECMM	European Community Monitor Mission
ECHR	European Convention on Human Rights of 4 November 1950
ECtHR	European Court of Human Rights
Geneva Convention I	Geneva Convention I for the Amelioration of the Condition of the Wounded and Sick in Armed Forces in the Field of 12 August 1949
Geneva Convention II	Geneva Convention II for the Amelioration of the Condition of Wounded, Sick and Shipwrecked Members of Armed Forces at Sea of 12 August 1949
Geneva Convention III	Geneva Convention III Relative to the Treatment of Prisoners of War of 12 August 1949
Geneva Convention IV	Geneva Convention IV Relative to the Protection of Civilian Person in Time of War of 12 August 1949

Geneva Conventions	Geneva Conventions I to IV of 12 August 1949
Hague Convention of 1954	Convention for the Protection of Cultural Property in the Event of Armed Conflict, The Hague, 14 May 1954
Hague Regulations	Regulations Respecting the Laws and Customs of War on Land annexed to Hague Convention IV of 18 October 1907
HQ	Headquarters
IACHR	Inter-American Commission on Human Rights
ICC	International Criminal Court
ICRC	International Committee of the Red Cross
ICRC Commentary	Commentary on the Additional Protocols of 8 June 1977 to the Geneva Conventions of 12 August 1949, International Committee of the Red Cross, Geneva, 1987
ICRC Customary International Law Study	*Jean-Marie Henckaerts & Louise Doswald-Beck*, eds., Customary International Humanitarian Law (Cambridge: Cambridge University Press, 2005)
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
ILC	International Law Commission
IMT	International Military Tribunal
Indictment	*Prosecutor v. Pavle Strugar*, Case No. IT-01-42-PT, Third Amended Indictment, 10 December 2003
JNA	Yugoslav Peoples' Army (Army of the Socialist Federal Republic of Yugoslavia)

Lečić-Toševski Report	Exhibit D83: *Prosecutor v. Pavle Strugar*, Case No. IT-01-42-T, Defence Notice & Confidential Annex, 2 February 2004 (confidential); Exhibit D84: *Prosecutor v. Pavle Strugar*, Case No. IT-01-42-T, *Addendum* [to the] Defence Notice & Confidential Annex, 12 February 2004 (confidential)
MRI	Magnetic resonance imaging
Prosecution	Office of the Prosecutor
Prosecution Appeal Brief	*Prosecutor v. Pavle Strugar*, Case No. IT-01-42-A, Prosecution Appeal Brief, 17 May 2005
Prosecution Notice of Appeal	*Prosecutor v. Pavle Strugar*, Case No. IT-01-42-A, Prosecution's Notice of Appeal, 2 March 2005
Prosecution Respondent's Brief	*Prosecutor v. Pavle Strugar*, Case No. IT-01-42-A, Prosecution Brief in Response, 17 August 2005
Prosecution Reply Brief	*Prosecutor v. Pavle Strugar*, Case No. IT-01-42-A, Prosecution Brief in Reply, 12 July 2005
Prosecution's Addendum	*Prosecutor v. Pavle Strugar*, Case No. IT-01-42-A, Prosecution's Addendum on Recent Case-Law Pursuant to Order of 23 August 2007, 1 October 2007
Rules	Rules of Procedure and Evidence of the Tribunal
Statute	Statute of the International Criminal Tribunal for the former Yugoslavia established by Security Council Resolution 827
SFRY	Socialist Federal Republic of Yugoslavia
T.	Transcript of hearing in the present case.
UN	United Nations
UNESCO	United Nations Educational, Scientific and Cultural Organisation
VPO	Military Naval District

VPS Military Naval Sector